IN THE SUPREME COURT OF FLORIDA

ROBERT L. HENRY,

Appellant,

vs. Case No. SC03-1312

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, ROBERT L. HENRY, was the defendant in the trial court below and will be referred to herein as "Appellant," or “Henry.” Appellee, the State of Florida, was the respondent in the trial court below and will be referred to herein as "the State." Reference to the original record on appeal will be by the symbol "ROA," reference to the supplemental record on direct appeal with be by the symbol “SROA”, reference to the postconviction record will be the symbol “PCR”, reference to the supplemental record containing pleadings in the postconviciton proceedings will be by the symbol “SR-PCR” and reference to the supplemental transcript containing the remainder of the evidentiary hearing will be by the symbol “ST-PCR” followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Robert Henry was convicted of two counts of first-degree murder in the burning deaths of Janet Thermidor and Phyllis Harris. Henry was sentenced to death for both murders. He was also convicted and sentenced to life imprisonment for armed robbery and arson. The relevant facts appear in this Court's opinion and are recounted here as follows:

> Robert Henry appeals his convictions of first-degree murder and the resultant death sentences as well as the two concurrent terms of life imprisonment for armed robbery with a deadly weapon and arson. We have jurisdiction. Art. V, Sec. 3(b)(1), Fla. Const. We affirm the convictions and sentences.
>
> Around 9:30 p.m. on November 1, 1987 fire fighters and police officers responded to a fire at a fabric store in Deerfield Beach. Inside they found two of the store's employees, Phyllis Harris, tied up in the men's restroom, and Janet Thermidor, on the floor of the women's restroom. Each had been hit in the head with a hammer and set on fire. Harris was dead when found. Although suffering from a head wound and burns over more than ninety percent of her body, Thermidor was conscious. After being taken to a local hospital, she told a police officer that Henry, the store's maintenance man, had entered the office, hit her in the head, and stolen the store's money. Henry then left the office, but returned, threw a liquid on her, and set her on fire. Thermidor said she ran to the restroom in an effort to extinguish the fire. She died the following morning.

> Based on Thermidor's statement, the police began looking for Henry and found him shortly before 7:00 a.m. on November 3, at which time they arrested him. Henry initially claimed that three unknown men robbed the store and abducted him, but later made statements incriminating himself. A grand jury indicted Henry for two counts of first-degree murder, armed robbery, and arson. The jury convicted him as charged and recommended the death sentence for each of the murders, which the trial court imposed.
>
> After being arrested, Henry made a total of six oral and taped statements. In the first two he claimed that unknown robbers forced their way into the store and denied any personal involvement. In the other statements he confessed that he acted alone.

Henry v. State, 586 So. 2d 1033, 1035 (Fla. 1991). Following his direct appeal, Henry filed a petition for writ of certiorari in the United States Supreme Court. The Court granted the writ, vacated the judgment and remanded the case in light of Espinosa v. Florida, 505 U.S. 1070 (1992). Henry v. Florida, 505 U.S. 1216 (1992). This Court again affirmed Henry's conviction and sentence in December of 1992 adding the following to the original opinion:

> In Henry v. Florida, 505 U.S. 1216, 112 S.Ct. 3021, 120 L.Ed.2d 893 (1992), the United States Supreme Court vacated the judgment against Henry and remanded for our reconsideration in light of Espinosa v. Florida, --- U.S. ----, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), which declared inadequate our former instruction on the

> heinous, atrocious, or cruel aggravator. Henry, however, requested, and his trial court gave, an expanded instruction defining the terms of and limiting the applicability of this aggravator. Thus, the instruction given to Henry's jury was not unconstitutionally vague, and we reaffirm his death sentences.

Henry v. State, 613 So.2d 429, 434 (Fla. 1993). A second petition for writ of certiorari was denied on January 10, 1994.

Although Henry's motion for post conviction relief was due in January of 1995, he received an extension of time as well as leave to file three amendments. The final motion was filed in October of 1998. Therein Henry raised fifty-one claims for relief. Appellant was granted an evidentiary hearing on the following claims: counsel was ineffective for failing to utilize expert mental health professionals and present mitigation to the jury at the penalty phase; counsel did not make adequate use of Florida Rule of Criminal Procedure 2.216 which authorizes the appointment of confidential experts; and counsel was ineffective for failing to ask defense experts to address mitigating factors of substance abuse and organic brain problems. (PCR 1100). Regarding the claim of ineffective assistance, the trial court limited the focus of the hearing to a determination of the deficiency prong of Strickland v. Washington, 466 U.S. 668 (1984). (PCR 1574-1575, n.3). The evidentiary hearing was

conducted over 4 days; October 18, 2000, and August 6-8, 2001. (PCR 1575-1577). The trial court denied all relief on January 17, 2003. (PCR 1574-1646). A motion for rehearing was denied on June 23, 2003. (PCR 1751). This appeal followed.

SUMMARY OF ARGUMENT

Issue I - After providing a full and fair hearing in which to establish that trial counsel rendered deficient performance, the trial court correctly concluded that counsel conducted a reasonable investigation into potential mitigating evidence.

Issue II - The trial court was correct in summarily denying the remainder of appellant's claims as they were either procedurally barred, legally insufficient as pled or refuted from the record.

Issue III - The trial court denied properly appellant's claim that cumulative error rendered his conviction and sentence unreliable.

ARGUMENT

ISSUE I

FOLLOWING A FULL AND FAIR HEARING, THE TRIAL COURT CONCLUDED PROPERLY THAT HENRY FAILED TO ESTABLISH THAT TRIAL COUNSEL'S PERFORMANCE AT THE PENALTY PHASE WAS DEFICIENT

In his postconviction motion and on appeal, Henry alleged that trial counsel, Bruce Raticoff, did not provide constitutionally adequate representation guaranteed to him under the Sixth Amendment, as outlined in Strickland v. Washington, 466 U.S. 668 (1984). He alleges that a necessary component of any constitutionally adequate investigation is the utilization of qualified mental health experts. Allegedly, Raticoff failed to properly investigate, prepare, and present mitigating evidence regarding appellant's alleged drug abuse. Trial counsel should have employed the services of experts in the fields of psychology, psychiatry, neurology, and neuropharmacology. Moreover, counsel should have; provided "additional materials" to these experts; arrange family member interviews with them; requested the services of an additional confidential mental health expert; tested Henry's clothes and blood for drug residue; tested an empty beer can left at the scene for fingerprints; and hired a "specialist" in the area of

acute and chronic effects of long term drug abuse. **Initial brief at 35-36.**

According to Henry, an adequate investigation would have led to the discovery of evidence relating to his abusive and neglectful childhood; his organic brain damage; his post traumatic stress syndrome; and his substance abuse, both chronic and at the time of the of the crime. Such compelling information would have supported a finding of both statutory and non-statutory mitigation.

Following a bifurcated evidentiary hearing spanning four days of testimony, the trial court rejected appellant's claims finding a complete lack of factual support for the presence of mitigation. The court's specific factual findings included the following:

> Based on the evidence presented, this Court finds that the information Raticoff and the three mental health experts had prior to trial in 1987 and 1988, would not have required further mental health investigation because there were no indicia present of a chronic or acute drug problem or addiction, organic brain damage, an altered state of consciousness, mental retardation or mental illness.

(PCR 1640).

On appeal, Henry challenges the trial court's factual findings and alleges that the court deprived him of a meaningful

opportunity to develop his claim at a full and fair hearing, because the court unfairly limited the focus of the hearing to Strickland's "performance prong". The state asserts that Henry misstates the law and ignores crucial facts developed at the evidentiary hearing. As will be discussed in detail below, the trial court's factual findings are supported by the record and its legal rulings are correct.

"For ineffective assistance of counsel claims raised in postconviction proceedings, the appellate court affords deference to findings of fact based on competent, substantial evidence and independently reviews deficiency and prejudice as mixed questions of law and fact." Freeman v. State, 858 So. 2d 319, 323 (Fla., 2003); Stephens v. State, 748 So. 2d 1028, 1033-1034 (Fla. 1999)(requiring *de novo* review of ineffective assistance of counsel but recognizing and honoring "trial court's superior vantage point in assessing credibility of witnesses and in making findings of fact."); State v. Reichmann, 777 So. 2d 342 (Fla. 2000; Cherry v. State, 781 So. 2d 1040, 1048 (Fla. 2000); Simms v. State, 754 So. 2d 657, 670 (Fla. 2000); Rose v. State, 675 So. 2d 567 (Fla. 1996). "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); "So long as the [trial court's] decisions are supported by competent, substantial evidence, this Court will not substitute its judgment for that of the trial court on questions of fact and, likewise, on the credibility of the witnesses and the weight to be given to the evidence." Sochor v. State, 883 So. 2d 766, 781 (Fla. 2004))quoting Porter v. State, 788 So. 2d 917, 923 (Fla. 2001)(emphasis omitted); Davis v. State, 875 SO. 2d 359, 365 (Fla. 2003)(same). With these principles in mind, appellee asserts that the trial court's factual findings and legal conclusions must be upheld on appeal.

The fatal flaw in appellant's argument is that it is nothing more that a laundry list of what current counsel now thinks Raticoff could have done. Appellant completely ignores the sever limitations he himself placed on counsel and also ignores the fact that there was a complete lack of evidence to support an intoxication defense.

When assessing the constitutional adequacy of an attorney's performance, the law requires the courts to consider the surrounding circumstances such as statements by the defendant; strength and significance of the inculpatory evidence; strength and significance of the exculpatory evidence. The United States Supreme Court as consistently explained:

> In light of these standards, our principal concern in deciding whether Schlaich and Nethercott exercised "reasonable professional judgment," id., at 691, 80 L Ed 2d 674, 104 S Ct 2052, is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background was itself reasonable. Ibid. Cf. Williams v. Taylor, supra, at 415, 146 L Ed 2d 389, 120 S Ct 1495 (O'Connor, J., concurring) (noting counsel's duty to conduct the "requisite, diligent" investigation into his client's background). In assessing counsel's investigation, we must conduct an objective review of their performance, measured for "reasonableness under prevailing professional norms," Strickland, 466 U.S., at 688, 80 L Ed 2d 674, 104 S Ct 2052, which includes a context-dependent consideration of the challenged conduct as seen "from counsel's perspective at the time," id., at 689, 80 L Ed 2d 674, 104 S Ct 2052 ("Every effort [must] be made to eliminate the distorting effects of hindsight").

Wiggins v. Smith, 539 U.S. 510 at 522-523 (2003)(emphasis added). The analysis espoused by appellant completely ignores the presence of any obstacles facing counsel that may have been present and amounts to an analysis comprised of nothing but second guessing and distorted hindsight. Such an analysis is decried by Strickland and more recently, by Wiggins:

> In finding that Schlaich and Nethercott's investigation did not meet Strickland's performance standards, we emphasize that Strickland does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely

> the effort would be to assist the defendant at sentencing. Nor does Strickland require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of Strickland. 466 U.S., at 689, 80 L Ed 2d 674, 104 S Ct 2052. We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." Id., at 690-691, 80 L Ed 2d 674, 104 S Ct 2052. A decision not to investigate thus "must be directly assessed for reasonableness in all the circumstances." Id., at 691, 80 L Ed 2d 674, 104 S Ct 2052.

Wiggins, 539 U.S. at 533. See generally Bush v. State, 505 So. 2d 409, 410 (Fla. 1988) (deferring to trial œounsel's decision not to pursue mental health defense in light of counsel's intimate familiarity with defendant as well as no discernable evidence of mental health problems); Arbelaez v. State, 30 Fla. L. Weekly S65 (Fla. January 27, 2005)(recognizing that utilization of mental health experts is not required in every case, and will depend on the existence of information which would warrant such an investigation). For the reasons explained in greater detail below, trial counsel's decision not to pursue intoxication as mitigation was reasonable.

Defense counsel did investigate and did consider presenting intoxication abuse and mental health issues as mitigation.

However, he was unable to present such mitigation in large part because there was no credible evidence to support it and because Henry insisted on waiving the presentation of all mitigation.

First, the record on direct appeal contains overwhelming evidence of Henry's conviction for premeditated murder. Henry confessed in two separate statements that he alone committed the robbery at Cloth World and that he alone killed his two co-workers by setting them on fire. He also admitted that drugs did not play a role in these murders. (PCR 883, ST-PCR 86, SR-PCR 1217). Moreover, Henry testified at the guilt phase, proclaiming his innocence via an incredible story about being kidnaped by armed masked men who killed his co-workers but miraculously let him go free. At no point during his testimony did he ever tell the jury that his state of mind was in anyway impaired. (ROA 2248-2255). And the jury also heard the dramatic dying declaration of victim Janet Thermidor wherein she stated that Robert was responsible for these crimes. Ms. Thermidor stated that while she was counting the cash at the end of the day, Robert knocked on her office door and called her name. When she answered he entered and hit her with a hammer twice as she turned her back to him, then left with the money. He returned a short time later, poured a liquid on her and set her on fire before leaving. He never spoke a word to her. (ROA 154-

163). The strength of the evidence in support of premeditation was so compelling that this Court sustained the finding of the aggravating factor of "cold, calculated, and premeditated." Henry v. State, 613 So. 2d 429, 433-434 (Fla. 1993).

In addition to the overwhelming evidence of premeditation presented at trial, testimony developed at the evidentiary hearing demonstrated that trial counsel's strategic decisions not to pursue intoxication as a defense were reasonable. Raticoff testified that he reviewed extensively the work completed by his predecessor counsel, Sid Solomon. Mr. Solomon had already hired an investigator, conducted numerous depositions, and hired mental health expert, Dr. Trudy Block-Garfield.[1] Raticoff spoke at length to Mr. Solomon, Dr. Block-Garfield, Henry's mother, his aunt, and of course, Henry. (ST-PCR 33, 69, 77, PCR 874-875, 878, 880, 884). There were extensive discussions with both Mr. Solomon and Henry regarding the possibility of presenting a voluntary intoxication/insanity defense. (ST-PCR 33-36, 69, 77, 80, PCR 878-479 915). However, Henry refused to allow Raticoff to pursue that line of defense. Henry adamantly denied that substance abuse played any role in

[1] Solomon predicated his need for a confidential expert in part on the notion that he was exploring a defense based on intoxication. Dr. Block-Garfield's evaluation was completed prior to Raticoff' appointment. (ST-PCR 69, 77).

his behavior on the night of the murders. Henry repeatedly denied that his background contained any history of chronic substance abuse. (ST-PCR 34, 41-42, 78-79, 94-95, PCR 878-883, 884, 888, 915, 916, 940). During trial preparation, Henry told three mental health professionals, retained either by Raticoff or his predecessor Sidney Solomon, that he did not have a drug abuse problem and that drugs did not play a part in this crime. He readily admitted to smoking marijuana on a regular basis, but he stated that his experience with other drugs, including crack cocaine, was very limited. (Id.). Raticoff explained:

> RATICOFF: But you see when your client tells you that he is not drug addicted and not using drugs and that's not a viable defense and he will not cooperate in that defense, and after all the doctors who have examined Mr. Henry all indicated that there was no drug addiction, I find that really hard to follow up with a plausible defense at trial.

(ST-PCR 36).

When confronted with depositions of people who could have possibly provided evidence to the contrary, Henry emphatically stated that they were lying and he refused to consider such a defense at either stage of his trial. Counsel further explained:

> I tried to do the best I could. I mean at the point that I obviously discussed it with Mr. Henry there were several witnesses that alluded to not necessarily drug addiction and not necessarily for a defense in this

> case, but certainly for possible mitigation if we got to the penalty phase. Their testimony, and it was vehemently denied there. The other two doctors, Dr. Spencer and Dr. Livingston both reported back to me that he had also vehemently denied use of drugs other that smoking marijuana occasionally. And there was nothing else I could do with that.
>
> That was not Mr. Henry's wishes. That was not the way the Defense was going to go. It was not going to be an intoxication defense. And that was set by my client, not by me.

(ST-PCR 79). Simply, there was no evidence to support an intoxication defense at either stage of trial. Appellant did not present any contrary evidence at the evidentiary hearing.

Raticoff further explained that he could not present penalty phase mitigation of intoxication because that would have been in conflict with his client's own statement at the guilt phase.[2] Any attempt to then present intoxication as a mitigator would have destroyed any credibility he may have had with the jury. Raticoff's decision was reasonable. See Florida v. Nixon, 18 Fla. Weekly Fed. S33 (December 13, 2004)(summarizing in part, "in a capital case, counsel must consider in conjunction both the guilt and penalty phases in determining how

[2] A person's decision to testify is a fundamental right that belongs solely to the defendant and does not fall under the purview of a defense attorney's strategic decision. United State v. Burke, 257 F. 3d 1321, 1323 (11th Cir. 2001); White v. State, 559 So. 2d 1097, 1099 (Fla. same); Morris v. State, 557 So. 2d 27, 29 (Fla. 1990)(same).

best to proceed."); See also Rose v. State, 617 So. 2d 219, 294 (Fla. 1993)(finding defense attorney's decision to present penalty phase evidence that was consistent with guilt phase theme to be reasonable strategy); Jones v, State, 528 So. 2d 1171, 1175 (Fla. 1988)(finding reasonable defense attorney's decision not to present penalty phase evidence that was inconsistent with guilt phase evidence); Cherry, 781 So. 2d at 1050(determining that counsel's decision not to pursue intoxication as mitigation as it conflicted with guilt phase claim of innocence was reasonable); Rivera v. State, 717 So.2d 477, 485 (Fla. 1998)(precluding claim of ineffective assistance of counsel for failing to present voluntary intoxication when defendant preempts such a strategy by maintaining innocence).

As mentioned above, Raticoff reviewed all the information garnered by Mr. Solomon including the report of Dr. Garfield. Raticoff described the report as a character assassination of Henry, and therefore, unusable. It was one of the most devastating reports that he had seen in his twenty-one (21) years of practice. (PCR 920-921). For instance, Block-Garfield found, "[i[t is likely that Robert obtains vindictive gratification by humiliating and dominating others." (SR-PCR 45). "It is likely that he obtains a great deal of satisfaction by derogating and humiliating others. He is generally

contemptuous of sentimentality, social compassion, and common humanistic values." (Id.) "In order to make his cruel behaviors more palatable to others, Robert is likely to concoct plausible explanations and excuses by pretending to be an innocent victim." (Id.) "Robert has little regard for others and lacks warmth, and the ability to relate to others on an intimate level. Women are viewed as legitimate prey for exploitation and are probably often the target of his aggressive attacks. (SR-PCR 46). Dr. Block-Garfield concluded her evaluation with a very poor prognosis for change. (SR-PCR 47). Raticoff further consulted with her in hopes that she could alter her findings. She could not. (ST-PCR 70-73, 75, 78, 80, 89, PCR 876). Consequently Raticoff decided that Block-Garfield was not going to testify at the penalty phase, as it would have been suicidal to allow the jury to hear her findings. That decision was constitutionally sound. See Davis v. Singletary, 199 F.3d 1471, 1478 (11th Cir. 1997)(upholding, as reasonable trial strategy, counsel's decision not to present defendant's mental health history in order to keep from the jury, appellant's pedophillic tendencies); Marek v. Singletary, 62 F.3d 1295, 1300 (11th Cir. 1995)(finding trial counsel's decision not to present mitigation of appellant's childhood because of negative aspects including his homosexuality was reasonable strategy); Van Poyck v.

Singletary, 694 So. 2d 686 (Fla. 1997)(finding trial counsel's decision not to pursue mental health evidence based on negative aspects of doctor's report was reasonable strategy); Peterka v. State, 890 So. 2d 219 (Fla. 2004)(finding counsel's decision not to introduce military record as mitigation reasonable given negative aspects of service)yr record Haliburton v. Singletary, 691 So. 2d 466, 471 (Fla. 1997)(same).

Irrespective of the devastating report of Block-Garfield, Raticoff did not suspend his investigative efforts. In fact, he requested the assistance of additional experts. But, because he had already been afforded a confidential mental health professional pursuant to 2.216, the focus of these new evaluations would have to be on competency/sanity.[3] This was done for three reasons. Raticoff was hoping to obtain a more favorable report that could be used at the penalty phase; he wanted to be sure that Henry was in fact competent to stand trial; and that Henry was competent to waive mitigation. Raticoff testified:

[3] Henry criticizes Raticoff for failing to secure appointment of an additional confidential expert. However, he does not offer any legal basis upon which he would have been entitled to a second expert under 3.216. Rose v. State, 506 So. 2d 467, 471 (Fla. 1st DCA 1987)(explaining Rule 3.216(a),is restrictive, as it entitles a defendant to *one* expert to initially report to the defense only).

> And although I did feel Mr. Henry was competent to stand trial, it was my feeling after Doctor Garfield's report and after the fact that we had really no solid viable defense at that point that I was going to explore that area as far as seeing if any other doctors agreed or disagreed with Dr. [Block Garfield].
>
> And secondly, and I believe more importantly in this case, it indicated that Mr. Henry was competent to stand trial. It showed that as we all asked these questions afterwards, you know, that there was not going to be any question in anybody's mind that when Mr. Henry went to trial, he was competent to stand trial. So based on these two reasons I had these experts appointed.

(ST-PCR 51).

Raticoff further explained:

> Obviously we put on no penalty phase. And Mr. Henry and I did discuss the penalty phase, discussed what could be done, what witnesses could be called, what they could testify to. We discussed Dr. [Block-]Garfield report. We discussed the implications of the entry of that report for whatever little positive might be gotten out of it. So I don't –I never had a question as to his competency. But by the same token because of the gravity of the offense and the fact that he didn't want to testify at the penalty phase, I think that would cause anybody some concern. And agin, I was not a mental health expert. I'm a lawyer. That's why we have these doctors, and that's why we have these appointments of experts. And that's one of the reasons I had these other two experts appointed.

(ST-PCR 84-85).

Pursuant to the request the court appointed Dr. John Spencer and Dr. Patsy Ceros-Livingston. Although not as damaging as Block-Garfield's assessment, neither evaluation was very helpful. In addition to sanity and competency the evaluations also included a personality assessment. (ST-PCR 51-52, 74-75, 84-85, PCR 876, 942-945). Again Henry denied extensive drug use to both doctors. (ST-PCR 34, 36, 78-79). Again, Henry repeated to Dr. Ceros-Livingston that the murders were committed by armed masked men and he was innocent. (SR-PCR 51-54). Neither doctor detected or uncovered any evidence of mental illness, mental retardation, or insanity. (SR-PCR 48-54). To the contrary, Henry was described as an individual of average intelligence, able to think on an abstract level, not exhibiting any apparent cognitive deficits, and having no difficulty with short or long term memory. (SR-PCR 48-54).

Moreover, consistent with the assessment of all the mental health professionals, Raticoff's own observation of his client did not reveal any need to continue to pursue this futile area beyond the efforts detailed above. Raticoff did not observe any behavior that he would consider abnormal, nor did Henry exhibit any motor or physical problems, or blackouts in Raticoff's presence. (PCR 926-927). In fact, Henry had a good memory, total recall, no inconsistent actions, a clear understanding of

whatever was taking place, and did not take words out of context. (PCR 876-877, 926-927).

Additionally Raticoff was never told by Henry or other family members about any head injuries or prior mental health problems.[4] (PCR 876). There was no record of any hospital treatments, mental health treatment/diagnosis, or referral for such intervention indicated in the school or military records. None of Henry's lay witnesses offered anecdotal evidence of any personality problems, abnormalities, or mental health concerns that should have been uncovered by Raticoff and investigated for the purpose of presenting mitigation. The trial court's rejection of appellant's evidence is more than supported by the record. (PCR 1643 n. 58 & 59). Raticoff insisted that had he observed any evidence to suggest mental impairment, as an officer of the court, he would have notified the trial court (PCR 926-927).

[4] In fact, statements of appellant's family clearly dispel any notion that further investigation would have led to any mitigation concerning organic brain damage. For instance, Fronia Johnson, appellant's step-mother with home he lived until the 9th grade stated that "doesn't remember any head injuries" (SR-PCR 1406, 1427); Shirley Johnson, Fronia Johndosn's sister stated, "never heard Henry complain of headaches or blackouts (Sr-PCR 1444, 1466-1467); William Gessor, friend of Henry's from the Marines, stated that he had, "no knowledge of injuries or headaches,")SR-PCR 1554,, 1575); Roxanne Suarez, friend of appellant's in school stated that Henry "never blacked out in front of her". (SR-PCR 1622, 1641).

Henry's actions during the trial also demonstrate that he was not suffering from any brain damage. He remained very aware of and interested in the progress of his case. He was personally consulted about numerous strategic decisions, including waiver to testify at the suppression hearing, waiver of speedy trial, waiver of lesser included offenses, waiver of presentation of penalty phase witnesses. (ROA 471, 2232-2235, 2409, SROA 139-141). Henry personally waived the presentation of witnesses at the guilt phase, other than himself, in order to save "the sandwich" closing argument before the jury. (ROA 2378-2379). Henry was also able to further assist in his defense by testifying on his behalf. (ROA 2233-2247). He was also successful in obtaining new counsel via his pro se motion to remove Sid Solomon. (SROA 101, 109-116).

The state also presented the testimony of Dr. Block-Garfield, a clinical and forensic psychologist.[5] She explained that her evaluation of appellant prior to trial included a psychological and emotional functioning assessment. (ST-PCR 102-103). She was unable to remember if the scope of the evaluation included specific attention to mitigation. (ST-PCR 106, 119). However, Dr. Block-Garfield testified that if any

[5] Without objection Dr. Block-Garfield was offered as an expert in forensic and clinical psychology. (ST-PCR 101).

evidence of mental illness, mental retardation, or organic brain damage was present she would have discussed it with defense counsel, included it in her report, and would have recommended further appropriate testing regardless of the scope of the evaluation. (ST-PCR 107, 121-122, 124-128). Her initial approach to a sanity evaluation would not be much different than her approach to a mitigation evaluation, in that she would request the same type of information/discovery. She would want to see any information that would impact a person's state of mind at the time of the crime. (ST-PCR 106). She does not remember exactly what she had available in this case because the file was lost.

Dr. Block-Garfield saw Henry on four separate occasions which she described as a significant amount of time. (ST-PCR 101, 120). The tests conducted included Rorschach, the Bender Gestault, the Thematic Apperception, the House Tree Person[6] and a clinical interview. (ST-PCR 110-111). Consistent with Ratifcoff's testimony, Dr. Block-Garfield stated that she spoke to both defense attorneys, Sidney Solomon and Raticoff, about her findings. (ST-PCR 110, 119, 127).

[6] These tests would indicate the presence of organic brain damage but not if it were only a mild form of same. (ST-PCR 130).

In her discussions with Henry, he denied the existence of any prior psychiatric treatment. The doctor was aware of Henry's military service, including his disciplinary problems. She knew of his early abusive childhood experiences which she described as "early exposure to parental cruelty and domination", and she was cognizant of his use of marijuana. (ST-PCR 108, 123, SR-PCR 40-47). She also testified that had she found any indication of "organicity", mental illness, or retardation she would have included that in her report and she would have recommended a neuropsychological evaluation. (ST-PCR 128-129).

The testimony detailed above supports the trial court's factual findings that there was no evidence to support any further investigation into the presence of mitigating evidence. In summary, any penalty phase presentation based on intoxication and organic brain damage was rendered impossible because of the complete lack of any evidence to support it. Raticoff's independent investigation, his interactions with and observation of his own client, Henry's confessions, Henry's statements to three mental health experts, and his guilt phase testimony prevented such a defense. (PCR 921-922). Raticoff conducted a competent investigation and made reasonable, sound strategic decisions based on what he had available. Henry's claim must be

denied. See Defour v. State, 30 Fla. L. Weekly S247 (Fla. April 14, 2005)(rejecting claim that counsel provided deficient performance when he decided not to seek additional mental health experts after obtaining very unfavorable initial report); See also Pietri v. State, 885 So. 2d 245 (Fla. 2004)(finding no deficiency in trial counsel's performance regarding failure to present intoxication evidence at both phases of trial because, "[w]hile Pietri presented several witnesses at the evidentiary hearing who testified concerning his extensive drug use both historically and during the four days immediately preceding the crime, Pietri did not present any competent evidence demonstrating that he was actually intoxicated at the time of the offense."); Rivera; White v. State, 559 So. 2d 1097 (Fla. 1990)(finding counsel not deficient for failing to present voluntary intoxication defense as not supported by the evidence); Miller v. State, 770 So. 2d 1144, 1149 (Fla. 2000)(upholding trial court's rejection of mitigation of lack of intent based on evidence that demonstrated defendant's purposeful actions); see also Cherry, 781 So. 2d at 1050)(upholding conclusion that trial counsel's failure to present mitigating evidence of drug abuse was not predicated upon lack of investigation, but because the evidence at trial did not support the proposed mitigation); Rutherford v. State,

727 So. 2d 216, 222 (Fla. 200)(upholding denial of ineffective claim because defense attorney's discussions with defendant, family and mental health experts did not uncover any mental impairment); Asay v. State, 769 So. 2d 974, 985-986 (Fla. 2000)(finding counsel's decision to forgo mental health mitigation was constitutionally reasonable because initial report was unhelpful).

Second, Raticoff was also precluded from presenting any mitigation because appellant insisted on waiving the presentation of intoxication as a defense at guilt or penalty phase, and he refused to allow Raticoff to present any mitigation whatsoever. Raticoff was prepared to present non-statutory mitigation of Henry's military service as well as testimony from friends and family regarding appellant's childhood trauma and upbringing. Raticoff was aware of all this information, discussed its potential with appellant but Henry refused to allow Raticoff to present it. (ST-PCR 53-57; PCR 895-896, 900-908, 935;ROA 2548-2551, 2556-2560, 2564, 2619-2621). On appeal, this Court found that appellant's waiver was valid. Henry, 613 So. 2d at 433 (finding waiver of mitigation valid as defendant acknowledged that counsel was prepared to present witnesses at penalty phase and trial court was prepared to grant a continuance for that purpose). Counsel cannot now be

faulted for Henry's affirmative actions which precluded the presentation of mitigating evidence. See Cherry, 781 So. 2d at 1050 (rejecting claim of ineffective assistance where defendant's actions constrained counsel's performance because "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions.") (quoting Strickland v. Washington, 466 U.S. 668, 691 (1984)); Sims v. State, 602 So. 2d 1253, 1257 (Fla. 1992) (finding when defendant directs counsel not to collect evidence, counsel is not ineffective in following client's wishes because counsel "has considerable discretion in preparing trial strategy and choosing the means of reaching the client's objectives"); Rutherford v. State, 727 So. 2d at 224-25 (reasoning counsel was not ineffective where he failed to investigate, develop, and present mitigating evidence regarding defendant's harsh childhood and war experiences where counsel had reasonable basis not to present this evidence and where defendant did not cooperate in presenting ceratin mitigation evidence).

Appellant also argues that the trial court's factual findings are not supported by the record because he presented evidence at the hearing which was in conflict with those findings. He characterizes the postconviction testimony of five (5) lay witnesses and a neuropharmacologist as follows, "[t]he

family and friends of Mr. Henry who testified at the evidentiary hearing represent the kind of information about his background which, had it been investigated and developed with appropriate experts, certainly would have put Raticoff on notice that there was a plethora of statutory and non statutory mental health mitigation available." **Initial brief at 28.** The state asserts that the testimony of Raticoff and Block-Garfield clearly supports the trial court findings and must be upheld. See Sochor, 883 So. 2d at 781.

In any event, the testimony presented by appellant below at best supports only a finding that Henry was involved with drugs both before and after his Marine service. There was no evidence presented which established that Henry was under the influence of drugs at the time of these murders or that he has ever exhibited symptoms of mental illness or unusual behavior to warrant further testing for organic brain damage. The trial court rejected completely the testimony of appellant's witnesses, finding it speculative, conflicting, insignificant and completely refuted by the record. (PCR 1640, 1643). The court noted:

> This Court finds that the evidence presented by Capital Collateral Counsel did not demonstrate that Raticoff overlooked any evidence of pertinence regarding Mr. Henry's alleged history of personality disorders, head traumas, organic brain damage and

> intoxication. During the four days of extensive testimony at the evidentiary hearing there was no testimony presented that Mr. Henry was intoxicated at the time of the crime. No one observed Mr. Henry ingesting drugs at the time of the crime; no one testified with any credibility about having observed Mr. Henry ingesting drugs in the days before the crime was committed. The testimony as presented was speculative and conflicting.
>
> This Court finds that the testimony relating to Mr. Henry's general marijuana use did not establish or illustrate that Mr. Henry had developed or had suffered from either chronic or acute drug substance abuse. Other than a later "after the fact" report written several years after trial and a sentencing notation in the DOC medical records by a psychologist, about an R.X. which was not legible, there were no records of hospital, mental health treatment or diagnosis or referrals for intervention indicated in the military or in Mr. Henry's school records which were in existence prior to trial.

(PCR 1642-1643). The court also found:

> Contained in Volumes V and VI [of defense exhibit }are statements/affidavits which were made by Fronia Johnson, Francis Judson, Elizabeth Kyle, Shirley Johnson, William Gessor and Rozanne Suarez. This court notes that Ms. Suarez was to be called as a defense witness, but was apparently not served until July 31, 2001, and was on vacation during the evidentiary hearings. (citations admitted). The statements involved lack of any observations or knowledge about alleged organic brain damage or any problems Mr. Henry may have allegedly had with his head. Mr. Henry's mother did not recall any head injuries (citations to record/evidence omitted) his aunt, Shirley Johnson never heard Mr. Henry complain of

> headaches or blackouts, Mr. Henry never blacked out in front of Roxanne Suarez, and William Gessor had no knowledge of headaches or head injuries suffered by Mr. Henry.

(PCR 1643, f.n. 58). The court further observed:

> ...several people had seen or had been with Mr. Henry on the day of the crimes. These statements are contained in Volumes V and VI. Six people allegedly saw Mr. Henry on the day or the evening of the murders: Lawana Madison, Eddie Simpson, Charles Judson, Eddie McCall, Jean Giordano and Roxanne Campbell. With the exception of Ms. Madison, the other observations of Mr. Henry included, "he was in good frame of mind, "he was normal", "polite", "cool", and he "did not look high." During the week preceding the crimes, Francine Johnson provided a statement to the effect that she was [with] Mr. Henry and he did not do drugs that week.
>
> The State introduced Madison's deposition at the evidentiary hearing. Raticoff deposed Madison on September 26, 1988. In all, Madison made three separate statements. She claimed that on the evening of the crimes, Mr. Henry came to her home after 10:00 p.m. and he stayed with her for several hours having sex and doing drugs. In another statement, she claimed that she left to get more crack. However, when Raticoff confronted Mr. Henry about the statements Madison made, Mr. Henry claimed that Madison was lying and he denied all drug usage. Mr. Henry's trial testimony contradicted Madison's statement. This Court finds that clearly, for that reason alone, Raticoff could not have put her on the stand during the penalty phase.

(PCR 1643-1644 f.n. 59). The trial court's rejection of appellant's evidence is supported by the record.

Fort instance, Joe Henry, the defendant's brother, testified that he saw the defendant smoke marijuana, ingest hashish, THA, alcohol, opium, acid, and hash oil while they were in high school. Joe testified that he and the defendant did such drugs approximately four times. Joe also stated that he and his brother smoked days before the murders. (PCR 577, 583, 588).

Henry's sister, Martha Gilbert, testified that her brother smoked grass and she never saw him do anything else. (PCR 740, 742-744). She stated that she did not see him much after he returned home from the Marines. (PCR 745). Martha denies ever speaking to Raticoff. However, on cross-examination she was impeached with a prior statement wherein she admitted that she did speak to a lawyer. (PCR 752-754,7675). The family never discussed Henry's case. Any information obtained about the trial was gleaned from television. (PCR 761, 772-773).

Carolyn Fort Cason testified that she dated Henry in 1984-1985. She never saw him ingest drugs or consume alcohol. (PCR 721, 728-732). She ended the relationship because she heard that Henry was doing drugs. After their breakup, he eventually admitted his drug use to her. She described Henry as very secretive. (PCR 724-725).

Eddie Simpson, a childhood friend, smoked marijuana with Henry. He has never seen Henry do any other drugs although he has seen him in possession of crack cocaine. (PCR 775-780). Simpson testified that on the day of the day of the murders, he was with Henry for four hours between the hours of noon and 4:00 p.m. (PCR 783).[7]

The final lay witness was Elizabeth Kyle Jackson. She and Henry were in a relationship from 1985-1986. Ms. Jackson never saw Henry do drugs. She ended the relationship because of suspicions that he was involved with another woman. (PCR 785-791). On direct examination, she stated that she never talked to Raticoff at the time of trial. However, on cross-examination, she was impeached with a statement that she had given after the trial where she acknowledged that she was asked to be a character witness for Henry, but she did not think it would help him given all the publicity. (PCR 798, SR-PCR 1494-1519).

Defense witness, neuropharmacologoist, Dr. Lippman opined that appellant was under the influence of drugs at the time of the crime based on the following; (1) Henry's statements to police indicted that he was confused at the time and that he did

[7] Notably absent from this testimony is any evidence that Henry had been ingesting any drugs on that day.

"drugs" every now and then; (2) the PSI made reference to Henry's prior use of drugs; (3) alleged statements from witnesses that Henry used drugs at the time of the crime; (4) deposition of a law enforcement officer that included a description of Henry as a "street person" or "rock monster" at the time of his arrest; (5) deposition of a nurse who saw Henry after his arrest and described him as disorganized and in need of a psychiatric assessment; (6) a Cloth World costumer's description that Henry was "making no sense" on that evening; (7) statements from siblings, friends, and ex-friend girlfriends that Henry had a drug habit; (8) "repeated" drug related infractions in the military, which lead to his other than honorable discharge; and (9) a six volume set of materials complied by appellant. (SR-PCR 2-1700). **Initial brief at 22-28.**

The state asserts that none of this information was significant and certainly did not support the assertion that appellant was intoxicated at the time of crimes. Descriptions of appellant at the time of his arrest[8] and statements about his occasional drug use in the past, simply do not support appellant's claim on appeal.

[8] The fire department was called to the scene of a fire at Cloth World at approximately 9:30 p.m. on November 1, 1987. Appellant was arrested around 7:00 p.m. on November 3, 1987. Henry v. State, 613 So. 2d 429, 430 (Fla. 1993).

Included in the six volume set of materials were the statements from Frances Johnson, Charles Judson, and Lawana Madison.[9] Lippman curiously described the statements as, "confirmed Mr. Henry's drug use and disoriented state of mind at the time of the crimes." **Initial brief at 25.** However, that description is a complete mischaracterization of the statements. For instance, Francine Judson stated that Henry did drugs on occasion, and not every day. (SR-PCR 1389). She saw appellant on November 2, 1987 prior to leaving for work but did not see him again until Tuesday morning around seven a.m. (SR-PCR 1387). At no point did Ms. Judson indicate that appellant was under the influence at any point during that time. In complete contradiction to Lippman's belief that Henry was intoxicated at that time, Judson was told by Henry that he had been at Cloth World when three masked men came into rob the store, he was kidnaped and later released. (SR-PCR 1387-1388).

Charles Judson saw Henry at 10:30- 11:00 p.m. on the night of November 2, 1987. (SR-PCR 1644). Henry was carrying a paper bag rolled up in his hands. Judson had heard that Henry was

[9] Lippman relied on Lawana Madison's statements, to support his belief that Henry was "high" on drugs during the crime. Yet incredibly, Lippman was completely unaware that Henry claimed his total innocence to the jury at trial, which obviously was in complete contradiction to Madison's version of the evenings events.(PCR 697-701).

spending a lot of money that evening buying drugs. (SR-PCR 1656, 1657, 1658).

Lawana Madison gave two statements to police in addition to being deposed by Raticoff. She stated that Henry came to her house on the night of November 2, 1987 and they smoked crack cocaine. Lawanda could not be certain of the time, it was anywhere between eight p.m. to eleven p.m. (SR-PCR 1373, 1376). Madison also gave conflicting statements regarding how much time Henry spent with her that evening. In statements to police, she stated he was with her for only thirty minutes. In her deposition she stated that Henry was there for several hours.[10] Lippman's reliance on these statements in support of his conclusions is suspect. The trial court's rejection of same was proper.[11]

Equally unavailing is Lippman's reliance on appellant's military records. He asserts that Henry was discharged from the military due to drug infractions, however that is a gross

[10] In addition to the internal inconsistencies on her statements, Raticoff could not put Madison on the stand in penalty phase given that her rendition of the events of that evening are in total contradiction to Henry's guilt phase testimony. (PCR 894, 917).

[11] The remainder of the affidavits in support of mitigating evidence of Henry's alleged extensive and chronic drug abuse history (SR-PCR 1360-1790) include statements such as, "heard rumors that Henry did drugs", "Henry smoked crack and grass on occasion", "never saw Henry do drugs." (SR-PCR 1389, 1416, 1434)

mischarcaterization of the records. During his six years in the service, Henry was disciplined numerous times. His separation was based on a pattern of misconduct, which included; (1) nonjudicial punishment on three occasions; (2) one conviction by special martial; (3) stealing a car from another service man; (4) counseling for drug use on two occasions; (5) and ten instances of misconduct and substandard performance. At the time of his discharge, he was listed as a deserter. The trial court correctly rejected Lippman's characterization and found:

> This Court finds Dr. Lippman's testimony incredible as he also mischaracterized Mr. Henry's military records and the reason for the less that honorable discharge as being caused by drugs.

(PCR 1640).

Henry's reliance on the information contained in the six volume set of "materials"[12] discussed above, is of no moment and does not support Henry's claims because the information was either (1) considered and rejected by counsel; (2) irrelevant because it was not in existence at the time of trial; or (3) it simply was not significant.

First, included therein are the reports of the three mental health professionals that were retained by trial counsel;

[12] They were not introduced as substantive evidence, but merely information that was relied upon by Henry's experts.

Henry's taped statements; a transcript of the suppression hearing; and depositions of Henry's siblings, former girlfriends, and state witnesses. (SR-PCR 2, 40-54, 1198-1792). Raticoff was obviously aware of all this information. (ROA 2548-2549, 2550-2551, 2564). However, none of the information was relevant to Henry's actions at the time of the murders.

Second, contained in Volume I (SR 2, 3-36)and all of Volumes II and III (SR 2, 323-1197) are the trial court's sentencing order, this Court's opinion on direct appeal and Department of Corrections records that were generated after the conviction. Because this information that was not in existence at the time of the crime or trial it is irrelevant. It defies logic to base a challenge to the adequacy of trial counsel's investigation on information that could not have possibly been uncovered by anyone because it did not exist. Cf. Strickland v. Washington, 466 U.S. 668 (1984)(warning that a high level of deference must be paid to counsel's performance and the distortion of hindsight must be limited as the standard is to evaluate performance based on the facts known at the of trial); Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995)(concluding standard is not how current counsel would have proceeded in hindsight).

Third, the materials also include a transcript from Carver Elementary School depicting one semester from 1971, where Henry received "B's" and "C's, and a report card from one semester at Deerfield Beach High School which appears to include Henry's grades in various subjects including "C's", "D's" and "F's." (SR-PCR 37-39). Although it is not clear whether Raticoff ever reviewed these transcripts, what is clear is that these school transcripts did not offer any compelling evidence that would have put any competent lawyer on notice that there was any significant mitigating evidence available that warranted further investigation than what had already been provided in this case. The evidence of poor grades in high school, is not compelling and is not of such a nature that it would have or should have put Raticoff on notice that Henry had organic brain damage or suffered from any particular mental infirmity.[13] This scant documentation would not have warranted further mental health testing beyond the three evaluations that were done or would have warranted further investigation to uncover any evidence of substance abuse. Compare Mason v. State, 489 So.2d 734, 736 (Fla. 1986) (finding defendant entitled to hearing on prejudice prong of Strickland based on proffer of significant evidence of

[13] The state would note that Henry's military records indicate that he was accepted to Broward Community College for the fall semester in August of 1982.

extensive history mental retardation, drug abuse, and psychotic behavior).

In summation, testimony of Henry's friends and relatives, along with the school and military records simply do not provide any evidence to demonstrate that Raticoff should have conducted any further investigation into Henry's drug usage. There simply was no factual basis for Henry's claim. At best, family and friends testified that Henry, on occasion, ingested a variety of drugs. Additionally, Henry's general use of marijuana and crack cocaine did not illustrate that Henry developed a chronic drug abuse history which led to any mental health impairment/organicity.

Because Henry's investigation in preparation for the evidentiary hearing did not uncover any significant or credible information that had been overlooked during Raticoff's investigation, the trial court concluded that Raticoff's performance was not deficient. (ROA 1645). This court must affirm that ruling as it is supported by the record and the case law. See Henry v. State, 862 So. 2d 679, 685 (Fla. 2003)(quoting United States Supreme Court precedent that focus is on reasonableness of what counsel actually did); Patton v. State, 784 So. 2d 380 (Fla. 2000)(precluding reviewing court from considering issue of trial counsel's performance with

heightened perspective of hindsight); Rose, 675 So. 2d at 571 (holding disagreement with trial counsel's choice of strategy does not establish ineffective assistance of counsel); Cherry, 659 So. 2d at 1073 (concluding standard is not how current counsel would have proceeded in hindsight); Rivera, 717 So. 2d at 486;(same); Kimbrough v. State, 886 So. 2d 965 (Fla. 2004)(rejecting claim that counsel failed to provided relevant information to mental health experts given the complete absence of what specific records were critical and overlooked); Jones v. State, 855 So. 2d 611 (Fla. 2003)(upholding denial of claim that counsel was ineffective where witnesses presented by defendant where not credible nor could they offer any information surrounding defendant's behavior at the time of the crime); Heynard v. State, 883 So. 2d 753 (Fla. 2004)(upholding trial court's conclusion that failure to present evidence of chronic drug use was not the result of counsel's deficient performance but because there was no evidence presented at evidentiary hearing to support the fact that it existed); Marshall V. State, 854 So. 2d 1235, 1247-1248 (Fla. 2003)(finding failure to uncover evidence of abuse cannot be attributed to counsel's investigation given that the defendant repeatedly told counsel and mental health experts that he was not abused as a child); see also Occichone v. State, 768 So. 2d 1037, 1048 (Fla.

2000)(finding attorney's decision not to present voluntary intoxication at penalty phase reasonable in light of defendant's statement which clearly demonstrate intent); Johnson v. State, 593 So. 2d 206, 209 (Fla. 1992)(same); Stewart v. State, 801 So. 2d 59, 65 (Fla. 2001)(same); Porter v. State, 26 Fla. L. Weekly S321 (Fla. May 3, 2001)(upholding trial court's finding of no deficient performance as defendant's actions limited availability of evidence); Davis v. State, 875 So. 2d 359(finding that trial counsel did render deficient performance for failure to present intoxication defense where defendant gave two detailed confessions about the crime); Pace v. State, 727 So. 2d 216 (Fla. 2003)(upholding trial court's finding that counsel was not deficient for not pursuing intoxication defense given that retained experts provided unfavorable report and defendant consistently denied that he was affected by at the time of the crimes); Defour (finding counsel's decision not to pursue voluntary intoxication defense reasonable given that evidence did not demonstrate impairment at time of crime and was inconsistent with defendant's theory of innocence).

Henry next asserts that he was denied a full and fair opportunity to develop his claim at the evidentiary hearing. (PCR 1069-1109). The trial court limited the focus of the hearing to a determination of the deficiency prong of

Strickland. (PCR 1574-1575, n.3). The trial court further determined that a hearing on the second prong of Strickland, i.e., prejudice prong, would be granted should Henry establish the Raticoff's investigation was sub-standard because he failedto uncover significant information.[14]

Relying on Wiggins and Williams v. Taylor, 529 U.S. 362 (2000), Henry argues that the court's decision to bifurcate the proceedings was error because the two prongs of Strickland, i.e., deficient performance and prejudice were inextricably linked and could not be separated, "[t]he language of Williams indicates that deficient performance is established not only by what trial counsel did and did not do, but also what counsel could have done." **Initial brief at 6.** Henry derives further support for this notion from State v. Lewis, 838 So. 2d 1102 (Fla. 2002), claiming that mental health testimony in postconviction proceedings, can establish deficient performance. Henry's assertion that the two prongs of Strickland are intertwined and therefore can never be separated is simply not correct.

[14] However, because Henry failed to establish that Raticoff's investigation was constitutionally deficient, there was no need to expend further resources in an attempt to establish prejudice.

First, Lewis and Wiggins are completely distinguishable and are of no moment. In Lewis this Court noted that counsel admittedly spent little time in penalty phase preparation; counsel did not commence any investigation until shortly before the penalty phase was to begin; counsel had minimal conversations with family and friends of Lewis; and counsel never obtained the hospitalization records or foster care information that was available. Lewis, 838 So. 2d at 1109.

And, in Wiggins, trial counsel failed to uncover records from social service agencies which revealed that Wiggins's mother was a chronic alcoholic which resulted in Wiggins being shuttled from different foster homes; he displayed emotional difficulties at those homes; he had frequent and extended absences from school; and he was left home alone without food for several days. Id. 539 U.S. at 525.

In the case at bar, Henry's evidentiary presentation did not contain any significant information remotely similar to the evidence described in Wiggins and Lewis. Moreover, to the extent there "may' have been evidence that Henry was more than an occasional user of drugs, it was appellant who precluded presentation of that evidence. See Power v. State, 886 So. 2d 951, 961 n.6 (Fla. 2004)(distinguishing Wiggins as Wiggins did not preclude his counsel from presenting mitigation as did

Power). Consequently, Wiggins and Lewis do not provide a basis for relief.

Second, Henry was required to demonstrate that Raticoff failed to conduct a through investigation or that he missed certain "red flags," such as repeated hospitalizations for mental problems, or suicide attempts. For example in Arbelaez v. State, 30 Fla. L. Weekly S65 (January 27, 2005)(emphasis added) this Court determined:

> We conclude that counsel did not conduct a reasonable investigation of Arbelaez's mental health status. To the contrary, counsel ignored various red flags indicating that Arbelaez could have significant mental health problems. For instance, counsel clearly knew from the competency and sanity evaluation that Arbelaez had low intelligence and a history of depression. The report of Dr. A.M. Castiello, the psychiatrist who conducted the competency and sanity evaluation in 1990, states that "[c]linically, the defendant is functioning at a low average intellectual capacity." The report recounts Arbelaez's hospitalization at a Colombian mental hospital and his attempted suicides in Colombia. Counsel received confirmation of these facts from family members. For example, in a letter to counsel shortly before the penalty phase, Arbelaez's mother wrote that he "is not normal" and described how, as a youth, Arbelaez "wanted to die," once ingested rat poison, and was repeatedly treated at mental hospitals.

Likewise in Orme v. State, 30 Fla. L. Weekly S127, 130 & n.1 (Fla. February 24, 2005), this Court explained that counsel

provided deficient performance due to his failure to pursue leads based on Orme's documented bipolar diagnosis and corroborating anecdotal evidence from family members. Arbelaez and Orme illustrate that it is possible to make a determination regarding the adequacy or reasonableness of trial counsel's investigative efforts and strategic decisions without having to simultaneously taking into consideration the prejudice prong.

In the case at bar, the crux of the trial court's denial of relief was that there was nothing compelling for counsel to develop. The trial court found that counsel did not ignore any "red flags" which required further exploration and development into potential mental health or drug abuse issues. Therefore it was permissible for the trial court to focus its determination on that aspect of the analysis rather than expend additional resources so that appellant could present new doctors with new diagnosis in an attempt to turn "lemons into lemon aide."[15] The trial court's decision to bifurcate the hearing was

[15] The state is mindful of Rutherford v. State, wherein this Court explained:

> In evaluating the Strickland prongs of deficiency and prejudice, it is important to focus on the nature of the mental mitigation Rutherford now claims should have been presented. This focus is of assistance when determining whether trial counsel's choice was a reasonable and informed strategic decision.

proper. See Strickland, 466 U.S. at 697; "When applying Strickland, we are free to dispose of ineffectiveness claims on either of its two grounds."; Housel v. Head, 238 F.3d 1239 (11th Cir. 2001) (disposing of ineffectiveness claim based solely on finding counsel's performance not deficient); Downs v. State, 740 So.2d 506, 518 n. 19 (Fla. 1999) (finding no need to address prejudice prong where defendant failed to establish deficient performance prong); Cave v. State, 30 Fla. L. Weekly 38 (Fla. January 27, 2005)(recognizing that prejudice prong need not be considered when it was determined that counsel was not deficient as he explained that mental health experts could not provided useful information and defendant continually denied the claim that heroine was a factor in this crime.); Oats v. Singletary, 141 F.3d 1018, 1023 (11th Cir. 1998); Waterhouse v. State, 792 So.2d 1176 (Fla. 2001).

In conclusion, Henry's claim of ineffective assistance of counsel was denied properly after a full and fair hearing. The trial court's factual findings were supported by the record and its legal conclusions were correct.

Id. at 223. However, Henry did not meet the threshold requirement of presenting any significant/credible evidence which would have warranted a continuation of counsel's investigation beyond what had already been conducted.

Appellant next claims that the trial court erred in summarily denying his motions for forensic testing of certain evidence that was taken at the time of his arrest. Specifically, appellant requested permission to have Dr. Lippman test Henry's tee-shirt, shoes, and a Miller Lite can for the presence of metabolites of drugs. This evidence would have allegedly bolstered his claim of intoxication at the time of the offense. **Initial brief at 52**.

The trial court found such testing to be irrelevant for the following reasons:

> This Court agrees with the State's reasoning that the requested forensic testing would not have been relevant. The testing of the clothing and the blood (forensic testing, but not DNA testing) would not account for Mr. Henry's mental state at the time of the crime as the murders occurred around 9:00-9:30 p.m. on November 1, 1987 and Mr. Henry was not arrested until 7:00 p.m. on November 3, 1987. In his motion, Capital counsel conceded that Mr. Henry's blood was not extracted until 12:05 a.m. on November 4, 1987. This Court finds that testing of the physical evidence for the presence of drugs approximately fifty-two hours after the crime occurred would not have been probative of Mr. Henry's mental state at the time of the crime. Moreover, this Court finds that the testing of the empty Miller beer can would not have produced relevant evidence which could have been linked/tied to Mr. Henry because no "discernible finger prints" were discovered on the can. Even if drug trace amounts were found on the can, there was no nexus between the can and Mr. Henry.

(PCR 1712). Appellant's brief does not address how the trial court's conclusion that the evidence would be irrelevant was incorrect. Relief must be denied. See Pietri ("[w]hile Pietri presented several witnesses at the evidentiary hearing who testified concerning his extensive drug use both historically and during the four days immediately preceding the crime, Pietri did not present any competent evidence demonstrating that he was actually intoxicated at the time of the offense.").

Appellant also claims that Henry's waiver of mitigation was not knowing and intelligent because, "Raticoff failed to inform Mr. Henry that the existence of his brain damage, psychiatric illness and cocaine psychosis at the time of the offense constituted compelling mitigation, because, unlike postconviction counsel, he did not investigate them and did not discover them." **Initial brief at 53.** Appellant relies on Lewis, for the proposition that the issue of waiver must be revisited once additional information is uncovered following the direct appeal. The trial court summarily denied this claim finding that it was procedurally barred and refuted from the record. (PCR 1084-1085). Relief was properly denied, as Lewis is distinguishable.

At trial, the court conducted a very through colloquy with appellant regarding his waiver of mitigation. It is clear from the record that Henry knew he could present mitigation; he knew that counsel was prepared to call five lay witnesses, Shirley Johnson, Sonia Johnson, Martha Brinson, Carolyn Ford, and Elizabeth Kyle;[16] he knew that the court was prepared to grant a continuance to compel their attendance; he knew he could present the report/testimony of his confidential expert Dr. Block-Garfield; and he knew he could take the stand and testify on his own behalf regarding any aspect of his military service. (ROA 2548-2560, 2564, 2619-2621). On direct appeal, Henry challenged the sufficiency of his waiver. Based on the record, this Court found:

> Defense counsel then said that Henry also needed to be present because he had subpoenaed witnesses for the penalty phase in spite of Henry's request that counsel not do so and that Henry had to make a final decision about presenting psychiatric testimony. Counsel also stated that the state had received a copy of the psychiatrist's report. Henry then entered the courtroom and talked with his counsel off the record. Following that, Henry stated on the record that he had told counsel not to subpoena family members, that if they did not appear to testify he did not want them

[16] Henry refused to waive the attorney-client privilege and place on the record the content of the witnesses' testimony. However under oath, he advised the court that he was aware of the nature of their testimony. (ROA 2556-2557).

> brought to court, and that he did not want the psychiatrist to testify even though counsel had advised him that all of these persons should be called to testify on his behalf. The court questioned Henry about waiving the presentation of mitigating evidence. Henry persisted in his desire that no such evidence be introduced and made a formal sworn waiver of his right to present evidence at the penalty proceeding.
>
> Henry now argues that a consent judgment to death is not permitted and that, therefore, the presentation of mitigating evidence cannot be waived. We considered and rejected a similar argument in Hamblen v. State, 527 So.2d 800 (Fla.1988). As in Hamblen, the instant trial court carefully and conscientiously considered this case, as evidenced by the finding of two mitigators in spite of Henry's refusal to allow presentation of more testimony. Thus, we see no error arising from Henry's knowing and voluntary waiver, nor do we agree that defense counsel breached the attorney-client privilege or had a conflict of interest.

Henry, 613 So. 2d at 433. Henry's waiver of mitigation was predicated on a complete understanding of what potential evidence could have been presented. As set forth in great detail above, counsel conducted a through investigation and had extensive discussions with his client about mitigating evidence. The record on appeal as well as the postconviction record illustrate the marked differences between the waiver herein in comparison with the waiver process disapproved of in Lewis and Deaton v. State, 635 So. 2d 4 (Fla. 1993). This is not a case

where counsel did not conduct an investigation for the penalty phase until after the guilt phase was over. This is not a case where counsel failed to uncover mitigating evidence contained in hospitalization records, school records or foster care information as was the situation in Lewis. Id. 838 So. 2d at 1119-1110.

This case is equally dissimilar to Deaton. Therein, trial counsel admitted that he had done "very little" in the way of penalty phase preparation, in fact he admitted, "I started scrambling for something to do about the penalty phase", he stated that at most he only devoted two days to penalty phase investigation after the guilt phase had concluded; counsel did not obtain documents such as hospital records etc., in an effort to discuss the presence of potential mitigation with Deaton; nor did counsel offer an explanation for his failure to do so.

The facts of the instant case are in complete contradiction to those of Deaton and Lewis. In deed, this Court has previously distinguished Deaton from the instant case:

> clearly, the record must support a finding that such a valid waiver was knowingly, voluntarily and intelligently made. *See, e.g., Henry v. State*, 613 So. 2d 429 (Fla. 1992).

Deaton, 635 So. 2d at 8-9. Appellant's evidentiary presentation below did not uncover any significant evidence that would call

into question this Court's earlier finding that Henry's waiver was valid.

Appellant next claims that the trial court erred in denying his request to question trial counsel about his own prior mental health and substance abuse problems that became public in 1996. It is alleged that Raticoff ignored evidence of appellant's substance abuse at the time of the crime because he himself was experiencing a substance abuse problem. Henry further claims that Raticoff's past mental health issues are relevant in these proceedings because, "Raticoff's blinders as to Mr. Henry's substance abuse and intoxication at the time of the offense were largely self-imposed." **Initial brief at 54.** Henry claims that this evidence demonstrates that his waier of mitigation was not knowing and intelligent. The trial court summarily denied this claim, finding it to be procedurally barred as the validity of his waiver was raised and rejected on direct appeal. Moreover allegations of counsel's mental condition are speculative and irrelevant. (PCR 1085). The trial court's ruling was proper.

Raticoff's representation of Henry was either constitutionally adequate or it was not. In other words, if his investigative efforts pass muster, then it would not matter whether trial counsel was suffering from substance abuse at the time he represented appellant. And if Raticoff conducted an

insufficient investigation into Henry's alleged intoxication at the time of the crime, it would not matter why it was inadequate. In other words, the inadequacy of the investigation would neither be exacerbated nor mitigated in any way. Cf. O'Callaghan v. State, 542 So.2d 1324, 1325-26 (Fla. 1989) (affirming summary denial of ineffectiveness claim which was based on counsel undergoing bar disciplinary proceedings because of alcohol problem); Bryan v.. State, 25 Fla. L. Weekly S159, 160 (Fla. February 22, 2000) (finding trial counsel's representation not deficient, thus, counsel's alcoholism was irrelevant to claim of ineffectiveness); Bonin v. Calderon, 59 F.3d 815, 838 (9th Cir. 1995)(upholding court's refusal to hear evidence of counsel's drug use as claim of ineffectiveness of counsel employs an objective standard and, therefore, source of counsel's alleged shortcoming is irrelevant); Berry v. King, 765 So.2d 451, 454 (5th DCA 1985) (same); McDougall v. Dixon, 921 F.2d 518, 535 (4th Cir. 1990) (same).

Moreover, as explained in great detail above, Henry never presented any evidence below that he was intoxicated at the time of the offense. Consequently, Raticoff did not ignore any evidence of intoxication, it simply did not exist. Therefore counsel's alleged problems were irrelevant. Relief was properly denied.

Finally, Henry asserts that the trial court's factual findings are not supported by the record, and that the findings are irrelevant to the inquiry at hand. Henry explains, "[t]he issue here was not so much whether Raticoff chose to put on these witnesses or not, it was whether he followed up on what they had to say." **Initial brief at 58.** In other words, the focus should have been on whether Raticoff knew of the existence of these witnesses which would have prompted him to investigate further, and not on whether they were credible. He further complains that the trial court should have refrained from making similar credibility findings regarding the testimony of the experts as well. Appellant misstates the law.

The parameters of the hearing were simple and straightforward. The pith of Henry's issue was that there was significant evidence available regarding intoxication issues that should have put counsel on notice that further investigation should have been conducted. Pursuant to that allegation, appellant was provided the opportunity to present the specific evidence that was in existence before trial that would have prompted reasonable counsel to further pursue an intoxication defense.

The trial court was then required to assess the credibility of all of the evidence presented in order to render a legal

conclusion regarding the reasonableness of Raticoff's decisions. To suggest that the trial court improperly overstepped its authority by making factual findings is without merit. Arbelaez, supra (reiterating standard that trial courts are required to make credibility findings of witnesses and decide the weight to be given the evidence);Sireci v. State, 587 So.2d 450, 453 (Fla. 1991)("[i]t is the trial court's duty to resolve conflicts in the evidence and that determination should be final if supported by competent, substantial evidence."); Bottoson v. State, 674 So.2d 621, 622 n.2 (Fla. 1996)reasoning that conflicts in the evidence and witnesses credibility should be resolved by the fact finder); Porter (recognizing trial court's duty is to assess credibility and weigh evidence at postconviction hearing); Sochhor (same). The trial court's factual findings and legal conclusions are supported by the record and must be affirmed.

ISSUE II

THE TRIAL COURT'S SUMMARY DENIAL OF THE REMAINDER OF APPELLANT'S CLAIMS WAS PROPER GIVEN THAT THE CLAIMS WERE EITHER PROCEDURALLY BARRED, LEGALLY INSUFFICIENT AS PLED OR REFUTED FROM THE RECORD

Appellant claims that the trial court erred in summarily denying the majority of his claims. A review of the record

below and in conjunction with relevant case law, establishes that the trial court's rulings were correct.

Appellant claims that the trial court erred in denying his challenge to Florida's capital sentencing scheme under Ring v. Arizona, 536 U.S. 584 (2002).[17] The trial court denied relief based on this Court's pronouncements in Bottoson v. Moore, 883 So. 2d 693 (Fla. 2003) and King v. Moore, 831 So. 2d 143 (Fla. 2003). (PCR). The trial court's ruling was correct.

First, Ring does not apply in Florida as this Court has consistently maintained that unlike the sentencing scheme in Arizona, the statutory maximum sentence for first degree murder is death. Mills v. Moore, 786 So. 2d 532 (Fla.2001); Shere v. Moore, 830. 2d 56 (Fla. 2003); G. Porter v. Crosby, 840 So. 2d 981 (Fla. 2003) ("we have repeatedly held that maximum penalty under the statute is death and have rejected the other Apprendi arguments [that aggravators read to be charged in the indictment, submitted to jury and individually found by unanimous jury]).

Second, both this Court as well as the United States Supreme Court have determined that Ring is not to be applied retroactively. Consequently, appellant cannot rely on Ring for

[17] Following the denial of his motion for postconviction relief, appellant filed a successive motion wherein he presented this claim.

relief in postconviction proceedings. Schriro v. Summerlin, 124 S.Ct. 2519 (2004); Johnson v. State, 30 Fla. L. Weekly S297 (Fla. April 28, 2005).[18]

In any event, appellant would not be entitled to relief even if Ring applied in Florida and was subject to retroactive application. In addition to his convictions for first degree murder, Henry was also convicted of arson and robbery, which then formed the basis for the aggravating factor that "the crime was committed in the course of a felony." Henry v. State, 613 So. 2d 429, 432 (Fla. 1992). Consequently there was no Sixth Amendment violation. Relief was properly denied. See Kormondy v. State, 845 So. 2d 41, n. 3 (Fla. 2003)(concluding that simultaneous convictions of felonies which then form basis for aggravating factor is sufficient to satisfy requirements of Ring); Jones v. Crosby, 845 So. 2d 55 (Fla. 2003)(same).

Appellant next claims that the state violated Brady v. Maryland, 373 U.S. 83 (1963) because it failed to disclose the contents of Leroyal Rowell's polygraph examination as well as the conclusions reached by the paleographer. The trial court summarily denied relief because the record conclusively

[18] The trial court, did not have the benefit of either Schriro v. Summerlin, 124 S.Ct. 2519 (2004); Johnson v. State, 30 Fla. L. Weekly S297 (Fla. April 28, 2005) when is denied relief on this issue.

demonstrated that trial counsel was well aware of the polygraph examination and possessed the wherewithal to obtain the results. (PCR 1077). Again the trial court's ruling was correct.

The record unequivocally demonstrates that defense counsel was in possession of Rowell's' polygraph results. The admissibility of Rowell's' polygraph examination was the subject of a state motion in limine. (ROA 2830). There was extended argument regarding the admissibility of same before trial. (ROA 1092-1104). Because appellant's claim is totally rebutted from the record, he was not entitled to relief. See Rivera, 717 So. 2d 477, 483(Fla 1998); Sochor v. State, 883 So. 2d 766 (Fla. 2004).

Nor can Henry establish his claim that the state withheld the polygraph results reached by the paleographer Frank Carbone. Carbone's conclusions were a topic of discussion in the deposition of law enforcement officer, Detective Ganino. Consequently, Henry could have obtained the paleographer's conclusion by simply asking for them. Henry's Brady claim is therefore meritless. See Routly v. State 590 So.2d 397, 399-400 (Fla. 1991)(rejecting claim that state withheld evidence of immunity consideration for state witness when record showed that defense counsel was in possession of that evidence prior to trial and used it to impeach witness at trial); Hunter, 660

So.2d at 250 (Fla. 1995)(rejecting Brady claim where record undisputedly demonstrates that defense counsel had information in his possession).

Appellant also argues that if counsel was aware of the polygraph results he should have presented it to the jury. His failure to do so amounted to ineffective performance. The trial court summarily denied this claim finding that ti was refuted from the record. (PCR 1077). That ruling was correct

Although Henry alleges that polygraph results should be admissible at a capital trial, he has not demonstrated that such is the case. See Delap v. State, 440 So. 2d 1242, 1247 (Fla. 1983); Perry v. State, 395 So. 2d 170, 175 (Fla. 1981). Consequently counsel's performance could not have been deficient given that the results of the tests were inadmissable. See LeCroy v. State, 727 So. 2d 236 (Fla. 1998)(finding counsel's performance not deficient since no legal basis for admission of polygraph results); see also Phillips v. State, 608 So. 2d 778, 182 (Fla. 1992)(rejecting ineffective assistance of counsel claim given that proposed legal strategy is erroneous); Sochor, 883 So. 2d at 787.

Next, even if Rowell's polygraph results were admissible Henry fails to demonstrate how they would have made a difference in the outcome of his trial. The polygraph results

did not exonerate Henry as they were inconclusive. See Mitchell v. State, 595 So. 2d 938, 941 (Fla. 1991)(failing to present expert testimony regarding hair samples not prejudicial since the evidence did not exculpate defendant but merely would have indicated that hair was either consistent with defendant's hair or not).

Furthermore, Rowell ultimately recanted the statement implicating McClendon and Hartgrove in the murders. Consequently, Rowell's credibility would have been seriously undermined. (R 1095-1099). cf. Armstrong v. State, 642 So. 2d 730, 735 (Fla. 1994)(ruling that recanted testimony is inherently unreliable). An inconclusive polygraph report regarding a statement that has since been recanted would not have bolstered Henry's defense theory. Henry already was faced with serious credibility problems of his own. In five separate statements to the police, Henry gave contradictory statements regarding the events of that evening. In at least two of the statements Henry admitted that it was he and he alone who robbed Cloth World and killed Janet Thermidor and Phyllis Harris. In those two statements he also admitted that the other story he gave implicating three unknown assailants was not true. Presenting the recanted testimony of Rowell on top of the contradictory statements already in existence would not have

been helpful. Henry cannot establish the requisite prejudice under Strickland v. Washington, 466 U.S. 668 (1984). See Hill v. State, 24 Fla. Law Weekly S (Fla. March 25, 1999)(finding contradictory statements from third party that a co-defendant was the actual shooter was not Brady material given it's value was limited to that of possible impeachment of the declarant and not exculpatory of the defendant); Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1325 (Fla. 1994)(rejecting newly discovered evidence claim since defendant aware of evidence and it was not material given that it was contradicted by other evidence). Defense counsel was not ineffective for failing to introduce Rowell's inconclusive polygraph results. Cf. Felker v. Thomas, 52 F. 3rd 907, 910-911 (11th Cir. 1995)(finding evidence not material for Brady claim where withheld evidence was in direct contradiction to defendant's own statement and jury would have viewed defendant as liar); United States v. Starrett, 55 F. 3dd 1525, 1556 (11th Cir. 1995)(same).

Appellant claims his trial counsel failed to provide postconviction counsel with a copy of the trial file. The trial court found the claim to be legally insufficient as pled as Henry did not demonstrate that other avenues to gain information proved to be unsuccessful. (PCR 1075, n.13). That ruling was proper. Henry failed to raise a legally sufficient claim for

relief, regardless of whether Mr. Raicoff is withholding the files, or has lost or destroyed them.

Next Henry claims that his sentencing phase proceedings were unconstitutionally tainted because the jury received an invalid instruction on "the pecuniary gain aggravator." To the extent that both his trial counsel and appellate counsel failed to successfully challenge the instruction, Henry received ineffective assistance of counsel. The trial court summarily denied this issue, finding the claim to be procedurally barred, legally insufficient as pled and without merit. The trial court's ruling was proper.

Appellant's challenge to the aggravator was a single-sentence conclusory statement, without any supporting facts was legally insufficient, and did not warrant further review. See Kennedy v. State, 547 So.2d 912, 913 (Fla. 1989) ("A defendant may not simply file a motion for post-conviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing.").

Second, this claim was procedurally bared as it could have been raised on direct appeal. Atkins v. State, 541 So. 2d 1165, 1166 n. 1 (Fla. 1989). On appeal, Henry challenged the

sufficiency of the evidence relied upon to sustain a finding of this aggravator. This Court rejected that claim finding:

> Contrary to Henry's argument, we also find the aggravating factors to have been established beyond a reasonable doubt. The state proved that Henry committed both robbery and arson, thereby supporting the pecuniary gain and felony murder aggravators. Henry disabled both of the victims, one by tying her up and the other by a blow to the head, and could have effected the robbery without killing them. The victims knew Henry, however, and, even though one survived long enough to identify him, the evidence supports finding that Henry intended to eliminate these witnesses to prevent arrest.

Henry, 613 So. 2d at 433. Given that Henry did not challenge the applicable jury instruction on direct appeal, review in these proceedings is prohibited. See, e.g., Roberts v. Singletary, 626 So.2d 168 (Fla. 1993); Sims v. Singletary, 622 So.2d 980 (Fla. 1993); Mills v. Singletary, 622 So.2d 943 (Fla. 1993); Atkins v. Singletary, 622 So.2d 951 (Fla. 1993); Turner v. Dugger, 614 So.2d 1051, 1081 (Fla. 1992); Windom v. State, 886 So. 2d 915, 929-930 (Fla. 2004).

To the extent this claim was properly before the Court under the guise of ineffective assistance of counsel, Henry was still not entitled to relief. As noted above, this Court unequivocally found that the state proved the pecuniary gain aggravator beyond a reasonable doubt. Henry, 613 So. 2d at 433.

Consequently any error due to the an inadequate jury instruction would be harmless error. See Chandler v. Dugger, 634 So. 2d 1066, 1069 (Fla. 1994) (finding overwhelming evidence to establish aggravating factor rendered harmless any deficiency in instruction). Therefore, even if counsel had successfully preserved the issue for review, Henry could not establish prejudice. Therefore, Henry's claim was without merit and was properly dismissed.

In a related argument, appellant also claims that the jury improperly relied upon and the judge erroneously considered the aggravating factor of "pecuniary gain" when imposing the death sentence. The trial court found this claim to be procedurally barred as it was raised and rejected on direct appeal. (PCR 1084). The trial court's ruling is correct.

On appeal this Court found:

> Contrary to Henry's argument, we also find the aggravating factors to have been established beyond a reasonable doubt. The state proved that Henry committed both robbery and arson, thereby supporting the pecuniary gain and felony murder aggravators.

Henry 613 at 433. Appellant makes no attempt to overcome this procedural bar. Summary denial was proper. Remeta v. Dugger, 622 So.2d 452, 454 (Fla. 1993), citing Medina v. State, 573 So.2d 293, 295 (Fla. 1990). "Proceedings under rule 3.850 are

not to be used as a second appeal." Id.; Rivera v. State, 717 So.2d 477, 480 n.2 (Fla. 1998).

Appellant's next alleges that he was incapable of waiving his rights to an attorney and therefore his confession should have been suppressed. In conclusory fashion, appellant states that the police exploited his mental disabilities. **Initial brief at 73.** Rather than presenting proper argument in his brief, appellant merely references certain pages from his motion for postconviction relief. The state asserts that this issue has been waived for purposes of appeal. See Duest v. Dugger, 555 SO. 2d 849, 851-852 (Fla. 1990)("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.").

As for the merits, the trial court summarily denied this claim, finding that the issue was procedurally barred, as appellant challenged the admissibility of his statements at a motion to suppress and on direct appeal. (PCR 1080). Henry, 613 So. 2d at 431. That ruling was correct. See Demps v. State, 416 So.2d 808, 809 (Fla.1982); Meeks v. State, 382 So.2d 673, 675 (Fla.1980); Adams v. State, 380 So.2d 423, 242 (Fla.1980); Smith v. State, 445 So.2d 323, 325 (Fla. 1983); Muhammad v.

State, 603 So.2d 488, 489 (Fla. 1992); Lopez v. Singletary, 634 So.2d 1054, 1056 (Fla. 1993).

Next appellant claims that counsel was ineffective for conceding admissibility to gruesome photographs. The trial court summarily denied this claim, findings that it had been raised and rejected on direct on direct appeal. (PCR 1080). That ruling was proper. Muhammad.

In rejecting this claim on direct appeal, this Court determined:

> Although the state sought to introduce numerous photographs of the victims and the murder scene, the court carefully limited the admission of photographs to only those relevant to the state witnesses' testimony. The basic test for admissibility of photographs is relevance. Haliburton v. State, 561 So.2d 248 (1990), cert. denied, 501 U.S. 1259, 111 S.Ct. 2910, 115 L.Ed.2d 1073 (1991). The record shows that the probative worth of the photographs admitted in the instant case outweighed any prejudice, and there is no merit to Henry's argument to the contrary.

Henry, 613 So. 2d at 432. It is inappropriate to relitigate the substance of a claim under the guise of ineffective assistance of counsel in an attempt to avoid the bar. See Rivera, (finding claim to be procedurally barred as it is merely using a different argument to raise prior claim); Marajah v. State;684 So. 2d 726, 728 (Fla. 1996)(finding it inappropriate to use

collateral attack to relitigate previous issue) See Medina v. Dugger, 573 So. 2d 293 (Fla. 1990)(recasting claim as one of ineffective assistance of counsel cannot circumvent rule that postconviction proceedings cannot serve as second appeal). Further review is precluded; Harvey v. Dugger, 656 So.2d 1253, 1256 (Fla. 1995)(same); Muhammad; Lopez.

Next appellant claims that the police had no reasonable trustworthy belief that he had committed a crime and therefore he was arrested without probable cause. He alleged below that the state's use of the dying declaration of Janet Thermidor as a basis for his arrest, was improper because the statement was unreliable. The trial court summarily denied this claim finding that it was procedurally barred as a variation of it was raised and rejected on direct appeal. (PCR 1081). The trial court's ruling was correct.

On direct appeal Henry unsuccessfully challenged the reliability and admissibility of Janet Thermidor's dying declaration. Henry, 613 So. 2d at 431. Henry's attempt to again challenge the reliability and therefore admissibility of Ms. Thermidor's statement by recasting the claim is prohibited. See Rivera; Marajah; Medina. Further review is precluded.

Next appellant alleged that trial counsel was ineffective for failing to object to various statements by the prosecutor

and for failing to object to certain penalty phase jury instructions. The comments and instructions precluded the jury from considering mercy at the penalty phase, and diminished their responsibility in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). The trial court summarily denied both claims as they were raised and rejected on direct appeal. (PCR 1082-1084). The trial court's determination was proper.

On direct appeal, Henry unsuccessfully argued that the jury was left with the impression that the law precluded mercy for the defendant as a consideration in mitigation. Henry, 613 So.2d at 434 n.13. Therefore his argument in these proceedings is simply an attempt to argue a different factual basis for the same legal argument raised on appeal and is therefore procedurally barred. Appellant does not even acknowledge the procedural bar, let alone offer an explanation regarding how it would not preclude review here. Summary denial was proper. Quince v. State, 477 So.2d 535, 536; Rivera v. State, 717 So. 2d 477, 480 n.2 (Fla. 1998); Defour v. State, 30 Fla. L. Weekly S247 (Fla. April 14, 2005)(finding challenge to prosecutor's comment s that alleged diminished role of jury to be procedurally barred and without merit). .

Alternatively this claim is without merit. The jury was told that their recommendation was entitled to great weight. (R

2627, 2649-2650). There was no error as that is a correct statement of the law. This Court has repeatedly upheld the constitutionality of the standard jury instructions related to the death penalty statute. See Burns v. State, 699 So. 2d 646, 654 (Fla. 1997)(rejecting claim that Espinosa renders incorrect the standard jury instruction regarding the jury's role in the penalty phase); Turner, 614 So. 2d at 1079(same) Cf. Sims v. Singletary, 622 So. 2d 980,981 (Fla. 1993)(rejecting claim that Espinosa warrants a determination on an otherwise procedurally barred claim). Summary denial is warranted.

Appellant next alleged that trial counsel's ineffectiveness rendered invalid his waiver of mitigation. Specifically, trial counsel's performance was deficient in the following areas: (1) mental health evaluations of appellant and their impact upon issues were not conducted; (2) counsel failed to attack the aggravating factors and in fact conceded the existence of same; (3) counsel failed to argue to the jury that Henry felt remorse.[19] **Initial brief at 78.** The trial court found claims one and two to be either procedurally barred or refuted from the record. (PCR 1084-1087). Those rulings were proper.

[19] Trial counsel's failure to argue to the jury that Henry felt remorse his crimes was not presented below and therefore is procedurally barred. As for the merits, appellant does not explain how counsel could argue remorse when Henry maintained his innocence.

The propriety of appellant's waiver of mitigation was litigated on direct appeal and therefore it is procedurally barred. Henry, 613 So. 2d at 433. Therefore to the extent Henry is yet again attempting to relitigate the propriety of that waiver under the guise of ineffective assistance of counsel, he is procedurally barred. See Medina v. State, 573 So. 2d 293 (Fla. 1990) ("Allegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal."); Harvey, 656 So. 2d at 1256 ("It is also not appropriate to use a different argument to relitigate the same issue.")

As detailed in the preceding issue, Henry was evaluated by three mental health experts, in part to assess his competency to waive mitigation. All three found him to be sane and competent. (ROA 2720-2721, 2808-2809, SROA 119, 147-148, 201-206). Moreover, the record reveals that when discussing the nature of any potential mitigation at the waiver hearing, Henry refused to waive the attorney-client privilege. However, under oath, Henry stated that he was aware of the nature of information that the five witnesses would provide and he clearly did not want to call them. (R 2556-2560, 2564, 2619-2621). Appellant has not made

any claim that would call into question his sworn testimony or the findings of competency.[20]

Equally unavailing is Henry's challenge to counsel's performance regarding the existence of aggravating factors. This Court found that there was sufficient evidence to upheld the existence of all the aggravating factors found by the trial court:

> Contrary to Henry's argument, we also find the aggravating factors to have been established beyond a reasonable doubt. The state proved that Henry committed both robbery and arson, thereby supporting the pecuniary gain and felony murder aggravators. Henry disabled both of the victims, one by tying her up and the other by a blow to the head, and could have effected the robbery without killing them. The victims knew Henry, however, and, even though one survived long enough to identify him, the evidence supports finding that Henry intended to eliminate these witnesses to prevent arrest. Cf. Correll v. State, 523 So.2d 562 (Fla.), cert. denied, 488 U.S. 871, 109 S.Ct. 183, 102 L.Ed.2d 152 (1988); Hooper v. State, 476 So.2d 1253 (Fla.1985), cert. denied, 475 U.S. 1098, 106 S.Ct. 1501, 89 L.Ed.2d 901 (1986). The evidence also supports finding the murders to have been cold, calculated, and premeditated and heinous, atrocious, or cruel.
>
> Henry lured Harris into the restroom and persuaded her to let him tie her up and

[20] Appellant's challenge to the findings of competency cannot be reconciled with appellant's simultaneous challenge that he was unfairly denied access to a law library before trial. (PCR 1093).

> blindfold her under the guise of protecting her from the robbers. After hitting Thermidor in the head and stealing the money, he left, but then returned with a liquid accelerant which he poured on her and lit while she begged him not to. Only after setting Thermidor on fire did he return to Harris and do the same to her. Cf. Way v. State, 496 So.2d 126 (Fla.1986); Hooper. We therefore affirm Henry's two death sentences.

Henry, 613 So. 2d at 433-434. Therefore, relitigation of the claim under the guise of ineffective assistance of counsel is procedurally barred. See Peterka v. State, 890 So. 2d 219, 239 (Fla. 2004)(upholding procedural bar on claim of ineffective assistance of counsel for failing to challenge aggravating factors where sufficiency of factors was raised and rejected on direct appeal); Schwab v. State, 814 So. 2d 402, 413 (Fla. 2002).

Summary denial of this issue is also warranted as it is legally insufficient as pled. Henry fails to allege any factual basis or legal authority in support of his conclusions that counsel failed to present evidence which would have negated the existence of any or all of the aggravating factors. See Engle v. State, 576 So. 2d 698, 700 (Fla. 1992) (ruling that motion is legally insufficient absent factual support for allegations). See also Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989) ("A defendant may not simply file a motion for post-conviction

relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing."); Roberts v. State, 568 So. 2d 1255, 1258 (Fla. 1990) ("The second and third claims are devoid of adequate factual allegations and therefore are insufficient on their face.").

In any event the record clearly establishes that defense counsel in spite of Henry's waiver of mitigation, did not concede Henry's "guilt" at the penalty phase. Raticoff challenged the sufficiency of the evidence for "avoid arrest factor" and "cold, calculated and premeditated." (ROA 2581-2587). Raticoff requested and received an expanded jury instruction regarding the "heinous atrocious and cruel" factor. (ROA 2586-87, 2614). He requested and received numerous special instructions regarding the jury's consideration of both the mitigating and aggravating jury instructions. (R 2597, 2600-2619). Since the record conclusively rebutted all appellant's claims, summarily denial was warranted. Teffeteller v. Dugger, 734 So. 2d 1009 (Fla. 1999)(upholding summary denial of claim of ineffective assistance of counsel since motion does not allege facts that are not conclusively rebutted by the record.); Mendyke v State, 592 So. 2d 1076, 1079 (Fla. 1992)(same).

Appellant also argued that the felony-murder aggravator was an automatic aggravator and therefore unconstitutional. The trial court found the claim to be procedurally barred because it was raised and rejected on direct appeal. (PCR 1088). That ruling was correct. Henry 613 So.2d at 434 n.11. See Sims; Mills; Atkins; Turner.

Appellant next challenged the constitutionality of the jury instruction regarding the "avoid arrest" factor. The trial court determined that the use of the aggravator was proper as this Court found there was sufficient evidence to sustain its existence. Henry. Therefore the claim was summarily denied. (PCR 1090). Summary denial was proper. See, e.g., Roberts v. Singletary, 626 So.2d 168 (Fla. 1993); Sims; Mills; Atkins; Turner.

Appellant next alleged that the penalty phase jury instruction impermissibly shifted the burden of proof to him to establish that death was not the appropriate sentence. The trial court found the claim to be procedurally barred as a similar issue was raised and rejected on direct appeal. (PCR 1090). Henry, 613 So.2d at 433 n.13. Appellant's attempt to now claim that counsel was ineffective for failing to object to this instruction is inappropriate. Review is precluded. See Quince; Chandler; see also Harvey.

Appellant also claimed that there was insufficient evidence to sustain the aggravating factor of "cold, calculated, and premeditated." The trial court summarily denied relief finding the claim to be procedurally barred as it was raised and rejected on direct appeal. (PCR 1019). That ruling was proper.

On direct appeal, Henry challenged the sufficiency of the evidence to sustain the "CCP" factor. In rejecting that argument this Court found:

> [t]he evidence also supports finding the murders to have been cold, calculated, and premeditated and heinous, atrocious, or cruel. Henry lured Harris into the restroom and persuaded her to let him tie her up and blindfold her under the guise of protecting her from the robbers. After hitting Thermidor in the head and stealing the money, he left, but then returned with a liquid accelerant which he poured on her and lit while she begged him not to. Only after setting Thermidor on fire did he return to Harris and do the same to her. Cf. Way v. State, 496 So.2d 126 (Fla. 1986); Hooper.

Henry 613 So. 2d at 433-434. Henry's attempt to relitigate that the is procedurally barred. Maharaj.

Next, in a very conclusory fashion, Henry argues that Florida's death penalty statute is unconstitutional. The trial court summarily denied this claim, because this issue was raised and rejected on direct appeal. (PCR 1092). Relitigation in these proceedings was improper. Henry, at 432. Bryan v.

State, 641 So.2d 61, 63 (Fla. 1994) (finding relitigation of the same issue under a different theory is precluded in postconviction proceedings). Walls v. State, 641 So.2d 381 , 384 (Fla. 1994).

Henry next claimed that his jury was improperly allowed to consider robbery as the underlying felony for both the "felony murder" aggravator and the "pecuniary gain" aggravator. This impermissible "doubling"entitled Henry to a new sentencing hearing. The trial court summarily denied relief finding the issue procedurally bared as it was raised and rejected on direct appeal. (PCR 1095). Henry, 613 So. 2d at 433.

On appeal, Henry argued that the trial court erred in refusing to give a doubling instruction. This court upheld the trial court's ruling:

> The trial court, however, carefully considered the requested instructions and rejected only those that did not accurately reflect the law or that were adequately set out in the standard jury instructions. Rejection of these instructions has been upheld in other cases, and we find no error in their rejection here.

Id. Henry's attempt to relitigate this claim is impermissible. Maharaj.

Briefly as to the merits, Henry incorrectly argued that the trial court found both the "pecuniary gain" aggravator and

"committed during the course of a felony", with robbery as the underlying felony. In fact, the trial court relied upon the underlying felony of arson to satisfy the "committed during the course of aggravator." (ROA 2907). Thus, contrary to Henry's assertions, there was no improper doubling nor was the jury improperly instructed. See Teffeteller v. State, 734 So. 2d 1009 (Fla. 1999)(concluding that it is not error to instruct the jurors on the robbery and pecuniary gain factor).

Henry next challenged the constitutionally of the jury instruction applicable to the "prior violent felony" aggravator. The trial court found any challenge to the instruction to be procedurally barred. (PCR 1096). That ruling was correct. See, e.g., Roberts; Sims; Mills; Atkins; Turner.

He also claimed that trial counsel was ineffective for not raising this issue at trial. Summary denial was proper as Henry cannot establish prejudice. (PCR 1096).

Although the trial court did not find that this factor had been proven, the evidence in support of same was overwhelming. (ROA 2906-2910). Henry was convicted of killing two separate victims consequently this aggravator was proven beyond a reasonable doubt. Zeigler v. State, 580 So. 2d 127, 129 (Fla 1991)(finding "prior violent felony" aggravator to be properly applied in cases where there are contemporaneous crimes to

separate victims); Correll v. State, 523 So. 2 562, 567 (Fla. 1988)(same). Consequently, any alleged error or infirmity in the instruction was harmless error. See Chandler. Henry's trial counsel did not render deficient performance on this issue. Teffeteller v. Dugger, 734 So. 2d 1009(Fla. 1999)(rejecting claim of ineffective assistance of counsel for failure to raise unmeritorious claim).

Henry also alleged that the prosecutor's comments and the jury instructions impermissibly precluded the jury from considering mercy or sympathy during its sentencing determination. The trial court found this claim to be both procedurally barred and without merit. (PCR 1100-1101). The trial court's summary denial was correct. See Atkins; Rivera ;Kelly v. State,569 So. 2d 754, 756 (Fla. 199)(holding that trial errors apparent from the face of the record are not cognizable in motion for postconviction relief). . As for the merits, the record refutes appellant's claim. In support of his claim, appellant cites to the following record cites, (ROA 674, 707, 746-7, 814, 835, 945, 2865). **Initial brief at 85.** However these record references do not support his claim. For instance, several are prosecutorial comments about sympathy in relation to the jurors' ability to render a verdict during the guilt phase and not about any sentencing recommendation. (R 674, 814, 945).

Additionally, several of the comments were actually made by defense counsel.

And finally, appellant takes the statements out of context. For instance, defense counsel was reminding the jury that the verdict had to be based on the evidence presented and not on sympathy for anyone person. (ROA 707, 746-7836). Likewise, the jury instruction under attack by Henry herein was a part of the standard instructions given during the guilt phase of the trial. (ROA 2842-2869). Consequently, there is no factual support for appellant's argument. Summary denial was warranted.

Moreover, this Court has repeatedly rejected any argument which attempted to characterize penalty phase instructions as "anti-sympathy" comments. "Florida's death penalty statute, and the instructions and recommendation forms based on it, set out a clear and objective standard for channeling the jury's discretion." Dougan v. State, 595 So. 2d 1, 4 (Fla. 1992)(rejecting argument that sympathy based on a juror's own emotion rather than evidence is a proper consideration in capital sentencing). Review was denied properly.

Henry next argued that he was absent from a critical stage of his trial and the error was exacerbated by defense counsel when counsel violated the attorney-client privilege. The violation occurred when the defense "turned over" to the state,

a confidential psychological report.[21] The trial court summarily denied this claim because it was an issue which was raised and rejected on direct appeal.

On appeal, Henry argued that his waiver of mitigating evidence at the penalty phase was invalid. Therein he argued that his absence from a critical stage of the proceedings at which his counsel improperly waived the attorney-client privilege, rendered any subsequent waiver of mitigation invalid. This Court rejected this argument as follows:

> Before Henry entered the courtroom for the penalty phase, the court informed defense counsel and the prosecutor that he had recently attended a circuit judges' educational program and wanted to talk with them about the penalty instructions. Everyone agreed, however, that the instructions should be discussed in Henry's presence. Defense counsel then said that Henry also needed to be present because he had subpoenaed witnesses for the penalty phase in spite of Henry's request that counsel not do so and that Henry had to make a final decision about presenting psychiatric testimony. Counsel also stated that the state had received a copy of the psychiatrist's report. Henry then entered the courtroom and talked with his counsel off the record. Following that, Henry stated on the record that he had told counsel not to subpoena family members, that if they did not appear to testify he did not want them brought to court, and that he did

[21] Although there is some discussion regarding the psychological report of Dr. Trudy Block, the report does not appear in the record on direct appeal.

> not want the psychiatrist to testify even though counsel had advised him that all of these persons should be called to testify on his behalf. The court questioned Henry about waiving the presentation of mitigating evidence. Henry persisted in his desire that no such evidence be introduced and made a formal sworn waiver of his right to present evidence at the penalty proceeding.
>
> Henry now argues that a consent judgment to death is not permitted and that, therefore, the presentation of mitigating evidence cannot be waived. We considered and rejected a similar argument in Hamblen v. State, 527 So.2d 800 (Fla.1988). As in Hamblen, the instant trial court carefully and conscientiously considered this case, as evidenced by the finding of two mitigators in spite of Henry's refusal to allow presentation of more testimony. Thus, we see no error arising from Henry's knowing and voluntary waiver, nor do we agree that defense counsel breached the attorney-client privilege or had a conflict of interest.

Henry, 613 So. 2d at 433 (emphasis added). Henry's attempt to relitigate these facts under a different argument was properly rejected. Maharaj; Rivera. Relief must be denied.

Appellant also claimed that the trial court erred in failing to sua sponte change venue in the instant case. Furthermore, trial counsel was ineffective for failing to pursue this matter as well. The trial court summarily denied relief finding the claim to be legally insufficient as pled and procedurally barred. (PCR 1102). That ruling was correct.

In his motion Henry alleged that six jurors, "were already familiar with the outrageous and inflammatory media reporting surrounding Mr. Henry's trial." (PCR). **Third amended motion at 183.** Henry neither named the "infected" jurors nor provided any factual support in the record in support of his claim. On appeal, appellant's presentation of the issue is similarly lacking. **Initial brief at 87.** Appellant's conclusory allegation alleging error by the trial court or ineffective representation by trial counsel regarding this issue was legally insufficient and all relief was denied properly. LeCroy; Teffteller v. Dugger, 734 So. 2d 1009 (Fla. 1999). Alternatively, any issue challenging the trial court's failure to *sua sponte* change venue is not cognizable in a motion for postconviction relief. Rivera

Next appellant claimed that trial counsel's failure to investigate and prepare led to the erroneous admission of Janet Thermidor's statements. The trial court summarily denied the claim finding that it was procedurally barred and without merit. (PCR 1103). That ruling was correct.

Henry challenged the admissibility of Mrs. Thermidor's dying declaration at trial and on appeal. Henry, 613 So.2d at 431. Consequently he is not entitled to further review as it is well established that proceedings under Rule 3.850 are not to be

used as a second appeal and it is inappropriate to use a different argument to relitigate the same issue. Medina v. State, 573 So.2d 293 (Fla. 1990); Torres-Arboledas, 636 So. 2d 1321,1323 (Fla. 1994)(remanded for resentencing on other grounds). Moreover, allegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal. Medina 573 So. 2d at 295.

Moreover Henry's claimed that Raticoff was ineffective during litigation of his motion to suppress. Summary denial was proper as the allegations are rebutted by the record. Trial counsel presented vigorous argument to the trial court on the issue; he objected to the statement's admission, and he argued to the jury that the statement was not reliable. (ROA 176-184, 199-205, 2431-2432, 2438-2441). Appellant does not point to any specific error that calls into question the actions of trial counsel. Relief was denied properly.

Henry next alleged that he was impermissibly discouraged from exercising his constitutional right to present evidence by operation of Fla. Rule of Crim.. Pro. 3.250. He further opined that trial counsel was ineffective for failing to make the argument that Henry was coerced into waiving his right to present testimony. Trial counsel's failure to preserved the

issue resulted in a procedural default of the claim on direct appeal. The state asserts that summary denial of this issue is warranted for the following reason.

On direct appeal, Henry presented the identical argument which this Court found to be procedurally barred, "[b]esides failing for not being made before the trial court, this issue has been decided adversely to Henry's position." Henry, 613 So.2d at 423, n.8. This Court further found that since the alleged error could not be considered fundamental, no reason existed to overcome the procedural bar. Id.

As noted above, because counsel did not preserve the issue for appellate review, this Court refused to address the issue. That omission allegedly was deficient performance under Strickland. Henry cannot prevail on this claim because he cannot establish prejudice under Strickland. Because this Court has already determined that review was not warranted because the alleged error did not go to the heart of the case, there can be no finding of prejudice under Strickland. In other words, but for trial counsel's omission/failure to preserve the issue for review, a reasonable probability does not exist that the outcome of the trial would have been different. Consequently Henry cannot meet his burden under the prejudice prong of Strickland. See White v. State, 559 So. 2d 1097, 1099-1100 (Fla.

1990)(rejecting ineffective assistance of counsel claim regarding counsel's failure to preserve issues for appeal in postconviction appeal based on earlier finding by court on direct appeal that unpreserved alleged errors would not constitute fundamental error). Since Henry cannot establish prejudice the claim can be summarily denied. Kennedy, 547 So. 2d at 914. Furthermore, the Florida Supreme Court rejected the issue on the merits as well. Henry, 613 So. 2d at 433 n. 8. Consequently Henry cannot establish that counsel was ineffective. Teffeteller (rejecting claim of ineffective assistance of counsel for failure to raise unmeritorious claim); Cf. Peterka, 890 So. 2d at, 298 (concluding that defendant could not establish prejudice from trial counsel's failure to object to improper cross-examination where the Court held on direct appeal that although not preserved, any error was harmless); Vining v. State, 827 So. 2d 210, 214 (Fla. 2002)(same).

Next, Henry alleged that trial counsel was ineffective for failing to object to use of evidence concerning the decedents and their families. The trial court summarily denied the issue. (PCR 1104). The court's ruling was correct.

Although trial counsel did not preserve the issue, appellate counsel sought review. However this Court refused to address the issue finding that it was procedurally barred for

failure to raise it at trial. Henry, 613 So. 2d at 432. The Court further found that since the alleged error could not be considered fundamental, no reason existed to overcome the procedural bar. Id.

Although Henry again seeks review of the same issue, he does so under the guise of ineffective assistance of counsel. However Henry cannot prevail on this claim because this Court explicitly found that this claim did not amount to fundamental error, consequently review was precluded. Henry, 613 So. 2d at 432. Because the alleged error did not go to the heart of the case, i.e., it was not fundamental error, Henry cannot establish prejudice under Strickland. In other words, but for trial counsel's omission/failure to preserve the issue for review, a reasonable probability does not exist that the outcome of the trial would have been different. Consequently Henry has failed to meet his burden. See White v. State, 559 So. 2d 1097, 1099-1100 (Fla. 1990)(rejecting ineffective assistance of counsel claim regarding counsel's failure to preserve issues for appeal in postconviction appeal based on earlier finding by court on direct appeal that unpreserved alleged errors would not constitute fundamental error). Since Henry cannot establish prejudice the claim can be summarily denied. Kennedy, 547 So. 2d at 914; Cf. Peterka v. State, (concluding that defendant

could not establish prejudice from trial counsel's failure to object to improper cross-examination where the Court held on direct appeal that although not preserved, any error was harmless); Vining v. State, 827 So. 2d 210, 214 (Fla. 2002) (same).

In any event, the state will briefly address the merits of the claim for the sole purposes of presenting an accurate account of how the statements were made. The prosecutor explained to the jury that both victims always worked at night because they had other jobs during the day. Given that the crimes occurred at night after the store closed, this information was relevant to show that Henry was able to plan this robbery and these murders at a time when there would be no other witnesses around. The state's argument was required in order to establish that the murders were "cold, calculated and premeditated." (ROA 1042).

Henry also complained that the state called as a witness, Debra Cox, the sister of Janet Thermidor. He claimed that she was impermissibly allowed to testify regarding identity of Ms. Thermidor. The record belies this claim. Ms Cox's testimony was elicited solely to identify the clothes Ms. Thermidor was wearing that evening. This was important because a flame

accelerant was found on Ms. Thermidor's clothes and the defense was going to challenge that finding. (ROA 1292-1296).

Next Henry challenged the testimony of paramedic Myles McGrail. He claimed that his testimony recounting the condition of the victim Janet Thermidor was unnecessary. Henry is in error. Because firefighter McGrail was one of the first people on the scene, his description of the crime scene upon his arrival was critical. (ROA 1121-1142). Henry cites to absolutely no authority which precludes a state from presenting such relevant testimony. Cf. Haliburton v. State, 561 So. 2d 248 (Fla. 1990) (finding no abuse of discretion for admission of photographs were test for admissibility is relevance).

Henry also challenged the testimony of Officer Dunesberry. (ROA 1353-1405). Officer Dunnesbury took the statement of Ms. Thermidor, and therefore his description of Thermidor's physical and emotional condition at the hospital was critical in the state's attempt to introduce the hearsay statement at trial. Henry, 613 So. 2d at 431.

Henry next alleged that Raticoff failed to object to the testimony of Mr. Harris, the husband of Phyllis Harris. Henry claims that his identification testimony was irrelevant since the identity of Ms. Harris was established through the testimony of store manager Mr. Balke. Henry misreads the record. Mr.

Harris' testimony which consisted of two pages, was limited to the identification of his wife through her handwriting and the fact that she worked at Cloth World at night. (ROA 1409-1411). In conjunction with that testimony, Mr. Balke also testified that the person he hired was known to him as Phyllis Harris. (ROA 1548). This testimony was relevant because identification of Mrs. Harris after death was not possible. (ROA 1408). Consequently, Henry's reliance on Lewis v. State, 377 So. 2d 640 (Fla. 1979) is misplaced. The law is well settled that identification by a family member is precluded as long as someone else has been able to view the victim after death. Lewis, 377 So. 2d at 642; See also Terzado v. State, 232 So. 2d 231 (Fla. 4th DCA) (finding identification of victim insufficient without evidence that witness had in fact seen victim after death). However, since that was not possible in the instant case, Henry's claim is devoid of merit. Raticoff's performance was not deficient in this regard. Teffeteller (rejecting claim of ineffective assistance of counsel for failure to raise unmeritorious claim).

Henry also challenged the relevancy of the testimony of the store manager Mr. Balke as well as the prosecutor's reference to it in closing argument. Balke testified about the damages caused by the extensive fire at the store. Because Henry was

charged with arson and armed robbery, that testimony was relevant. (R 1538-1606)). Raticoff was not ineffective for failing to make such a frivolous objection. In summation, Henry cannot demonstrate that any of the challenged information was "impermissible victim impact evidence". To the contrary, all the testimony was relevant to establish elements of the crime. Summary denial was proper.

Henry next alleged that trial counsel was ineffective for failing to pursue a voluntary intoxication defense. The trial court summarily denied the claim finding that it was legally insufficient as pled. (PCR 1104). That ruling was correct, Henry did not present any factual support for this defense.[22] See LeCroy; see also Highsmith v. State, 617 So.2d 825 (Fla. 1st DCA 1993).

Henry also alleged that trial counsel was deficient in his failure to object to the admissibility of the testimony of Drs. Dellerson and Podgorny. The doctors testified at a pre-trial hearing on appellant's motion in limine regarding the admissibility of the dying declaration of Janet Thermidor. Henry alleged that their opinions were not based on generally accepted standards within the medical community. This issue

[22] The court also noted that a voluntary intoxication defense would have been counter to Henry's own statements at trial that he did not commit the crimes. (PCR 1104).

must be summarily denied since the identical issue, both factually and legally, was raised and rejected on direct appeal. Therein in an attempt to preclude the admission of Janet Thermidor's dying declaration, Henry attacked the propriety of the state's expert witnesses. This Court rejected Henry's argument in toto. Henry, 613 So. 2d at 431 & n.5. Henry's attempts to relitigate the issue a second time under the guise of ineffective assistance of counsel is precluded. Rivera; Majarah.

Next Henry alleged below and on appeal that, "[t]he testimony by the state's medical and blood splatter witnesses was presented without prerequisite as to the acceptability of their opinions. In fact there is debate over the opinions they offered." **Initial brief at 94.** The issue was summarily denied because it was legally insufficient as pled. (PCR 1104-1105). That ruling was correct. See LeCroy; see also Highsmith v. State, 617 So.2d 825 (Fla. 1st DCA 1993); Teffeteller(finding summary denial of ineffective assistance claim to be proper given that defendant does not specify nature of deficient performance or how he was prejudiced by same).

Henry also claimed that he was improperly denied an evidentiary hearing regarding his claim that, "the entire body of forensic testimony presented in the case was tainted by low

standards and sloppy work which was endemic in the Broward Sheriff's Office Forensics laboratory at the time of Mr. Henry's arrest." **Initial brief at 95.** The trial court properly denied the claim because the pleading was legally insufficient as pled. See LeCroy; Cf. O'Callaghan v. State, 542 So.2d 1324, 1325-26 (Fla. 1989) (affirming summary denial of ineffectiveness claim which was based on counsel undergoing bar disciplinary proceedings because of alcohol problem); Teffeteller.

Henry next alleged that the trial court erred in finding the existence of the aggravating factor of "heinous, atrocious, and cruel," because the state did not prove that he intended to torture his victims or that they were conscious during the attack. **Initial brief at 96-97.** The trial court summarily denied this claim finding that it was procedurally barred because it was raised and rejected on direct appeal. (PCR 1106-1107). Relitigation is precluded. See Medina v. State, 573 So. 2d 293, 295 (Fla. 1990)(upholding summary denial of claim since it is nothing more than an attempt to relitigate an issue already raised on direct appeal).

On direct appeal this Court found as follows:

> The evidence also supports finding the murders to have been cold, calculated, and premeditated and heinous, atrocious, or cruel. Henry lured Harris into the restroom and persuaded her to let him tie her up and blindfold her under the guise of protecting

> her from the robbers. After hitting Thermidor in the head and stealing the money, he left, but then returned with a liquid accelerant which he poured on her and lit while she begged him not to. Only after setting Thermidor on fire did he return to Harris and do the same to her. Cf. Way v. State, 496 So.2d 126 (Fla.1986); Hooper. We therefore affirm Henry's two death sentences.

Henry, 613 So. 2d at 433-434. Henry does not present this court with any new evidence or case law that would call into question these findings. Review is precluded. See Rivera.

Henry next claimed that the jury was improperly allowed to consider the "invalid" aggravating factor of "prior violent felony," because the jury was instructed on this factor, however, the trial court did not find that it existed. Consequently, he concluded that the jury's consideration of the factor was improper. He further argues that to the extent that trial counsel did not object to the jury's consideration of this factor, he rendered ineffective assistance of counsel. The trial court summarily denied relief finding that the underlying challenge to Henry's death sentence is procedurally barred as it is an issue which could have been raised on direct appeal. (PCR 1107).

Alternatively, appellant cannot establish that counsel was ineffective because the judge failed to find the existence of

this aggravator. Henry was convicted of killing two separate victims. That evidence was sufficient to establish the "HAC" factor. See Zeigler v. State, 580 So. 2d 127, 129 (Fla 1991)(finding "prior violent felony" aggravator to be properly applied in cases where there are contemporaneous crimes to separate victims); Correll v. State, 523 So. 2 562, 567 (Fla. 1988)(same). Simply because the judge did not consider or mention this factor does not render Henry's death sentence invalid. Stewart v. State, 558 So. 2d 416, 420 (Fla. 1990)(finding no error in trial court's rejection of aggravating factor as trial court is required to instruct jury on all factors to which evidence has been presented); Bowden v. State, 588 So. 2d 225, 231 (Fla 1991) (finding simply because trial court fails to find existence of aggravator does not mean there was insufficient evidence to present consideration of the factor to jury). Henry's trial counsel did not render deficient performance on this issue. Teffeteller v. Dugger, 734 So.2d 1009 (Fla. 1999)(rejecting claim of ineffective assistance of counsel for failure to raise unmeritorious claim). Summary denial was proper.

In his last argument, Henry presents a one sentence argument that he is insane to be executed. **Initial brief at 99.** The trial court found the claim to be legally insufficient as

pled. (PCR 1108). That ruling was proper. See Lecroy (upholding summary denial of claim absent any details of the nature and source of the evidence).

In the alternative, summary denial was still warranted given that Henry fails to allege why this issue was nor raised on direct appeal. Cf. Johnston v. Dugger, 583 So. 2d 657, 660 (Fla. 1991) ("Johnston's claim that he was not competent to stand trial in 1984 is procedurally barred because he did not challenge the competency finding on direct appeal."); Bundy v. State, 538 So. 2d 445, 447 (Fla. 1989)(same).

Summary denial was also warranted based on the fact that the record below conclusively rebuts Henry's naked allegations of insanity. First, pursuant to Fla. Rule Criminal Pro. 3.211, the trial court appointed Dr. Patsy Ceros-Livingston and Dr. John Spencer to evaluate Henry's competency to stand trial as well as his sanity. (ROA 2803, 2808-2809). Upon examination of the defendant, both doctors found Henry to be competent and legally sane at the time of the offense. (SROA 201-206). Summary denial was proper.

ISSUE III

THE TRIAL COURT DENIED PROPERLY APPELLANT'S CLAIM THAT THE ALLEGED CUMULATIVE ERROR REQUIRED A REVERSAL OF HIS CONVICTION

Appellant makes a cursory allegation that the entire process "failed him" due to the number of errors at his trial. The trial court summarily denied the claim finding it procedurally barred. (PCR 1091-1092). That ruling was correct. See Zeigler v. State, 452 So.2d 537, 539 (Fla. 1984) ("In spite of Zeigler's novel, though not convincing, argument that all nineteen points should be viewed as a pattern which could not have been seen until after the trial, we hold that all but two of the points raised either were, or could have been, presented at trial or on direct appeal. Therefore, they are not cognizable under rule 3.850."), sentence vacated on other grounds, 524 So.2d 419 (Fla. 1988); Chandler v. Dugger, 634 So. 2d 1066, 1068 (Fla. 1994)(same); Rivera v. State, 717 So. 2d 477, 480 n.1 (Fla. 1998)(same); Occchicone v. State, 768 So. 2d 1037, 1040 (Fla. 2000); Freeman v. State, 761 So. 2d 1055, 1073, n. 2 (Fla. 2000); Valle v. State, 705 So. 2d 1331 (Fla. 1997); Jackson v. Dugger, 633 So. 2d 1051 (Fla. 1993); Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1323-1324 (Fla. 1994); Melendez v. State, 718 So. 2d 746, 749 (Fla. 1989).

Moreover, none of appellant's claims are meritorious, therefore he is not entitled to relief. See Sochor v. State, 883 So. 2d 766, 789 (Fla. 2004)(holding, "our resolution of the preceding claims leads us to reject Sochor's 'cumulative errors' argument"); Defour v. State, 30 Fla. L. Weekly S247 (April 14, 2005)"Where individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error must fail." Griffin v. State, 866 So. 2d 1, 22 (Fla. 2003); see also Downs v. State, 740 So. 2d 506, 509 n.5 (Fla. 1999). Dufour is not entitled to relief on this claim because the alleged individual errors are without merit and, therefore, the contention of cumulative error is similarly without merit."

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court affirm the trial court's denial of appellant's Third Amended Motion for Postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by U.S. mail, to William Hennis, 101 N.E. 3rd Ave. Suite 400, Ft. Lauderdale, Fl. 33301, this ____ day of June, 2005.

CERTIFICATE OF FONT

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

_____
CELIA A. TERENZIO
Assistant Attorney General