IN THE SUPREME COURT OF FLORIDA

DONALD W. DUFOUR,

Appellant,

v. CASE NO. SC03-1326

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, STATE OF FLORIDA

_____

ANSWER BRIEF OF APPELLEE

_____

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STATEMENT OF THE CASE

Trial Court Proceedings:

On May 31, 1984, Dufour was found guilty of first degree murder. (TR2670). The jury voted unanimously for the death penalty on June 15, 1984. (TR2712). On July 3, 1984, the trial court sentenced Dufour to death, finding the following aggravating circumstances: 1) prior conviction for another capital felony, 2) the murder was committed while the Defendant was engaged in the commission of an armed robbery, 3) the murder was committed for the purpose of avoiding or preventing arrest, and 4) the murder was cold, calculated and premeditated. (TR2720-2721). In mitigation, the trial court found as follows:

> The Court finds that none of the statutory mitigating circumstances have been shown to exist.
>
> The Court further finds that all of the factors presented by the Defendant at the sentencing hearing taken together are insufficient as mitigation to outweigh any single one of the aggravating circumstances.... (TR 2721).

Appellate Proceedings

Dufour's judgment and death sentence were affirmed by this Court in Dufour v. State, 495 So. 2d 154 (Fla. 1986). A petition for writ of certiorari to the United States Supreme Court was denied. See Dufour v. Florida, 479 U.S. 1101 (1987).

Post-conviction proceedings

An Amended 3.851 Motion for Postconviction Relief was filed

on October 16, 2001 with a Memorandum of Law in support thereof. (PCR Vol. 10, 749-841). The State filed its Response to Amended 3.850 Motion for Post Conviction Relief on December 13, 2001. (PCR Vol. 10, 842-962).

On March 7, 2002, the Defendant filed a Motion to Interview Jurors-Notice of Intent to Interview Jurors. (PCR Vol. 10, 963-968). The State's Response to Defendant's Motion for Leave of Court to Interview Jurors was filed on March 11, 2002. (PCR Vol. 10, 969-971).

Following the Huff hearing held on March 7, 2002, the trial court issued an Order Granting Evidentiary Hearing, concluding that an evidentiary hearing was necessary regarding the following claims:

> I B (ineffective assistance of counsel for failing to give an opening statement),
> I D (ineffective assistance of counsel for failing to investigate and present evidence that Robert Taylor was present at the crime scene and actually killed the victim),
> I E (ineffective assistance of counsel for failing to ensure that Defendant received competent mental health assistance),
> I F (ineffective assistance of counsel for failing to investigate and present mitigation of Defendant's background),
> I G (ineffective assistance of counsel for failing to investigate and present mitigating evidence of substance abuse and the way it affected Defendant),
> I L (ineffective assistance of counsel for failing to present evidence of Defendant's excellent prison record),
> Claim II (Defendant was deprived of his due process rights to develop mitigation because the court-appointed psychiatrist failed to provide competent mental health assistance as is required by

Ake v. Oklahoma, 470 U.S. 68 (1985)), and

Claim VI (the State committed fundamental error by destroying exculpatory physical evidence while this case was pending on direct appeal), limited to Defendant's evidence of bad faith in the failure to preserve the evidence. (PCR Vol. 10, 972).

On October 18, 2002, the Defendant filed a Motion to Amend 3.851 Motion for Postconviction Relief, as well as the Amended Motion, seeking to add a claim based upon Ring v. Arizona, 122 S.Ct. 2428 (2002). (PCR Vol. 11, 997-1025).

On November 20, 2002, the Defendant also filed a Notice of Intent to pursue rights under Atkins v. Virginia, 122 S.Ct. 2242 (2002), after the State of Florida has promulgated the proper procedures which afford procedural and substantive due process rights as required by the United States and Florida Constitutions. (PCR Vol. 11, 1051-1095).

Following the evidentiary hearing held November 18-21, 2002, written closing arguments were filed by the State on February 6, 2003, (PCR Vol. 11, 1101-1114), and by the Defendant on February 11, 2003 (PCR Vol. 11, 1115-1132). On May 30, 2003, the trial court issued the Order Denying Amended 3.851 Motion for Post Conviction and Amendment to 3.851 Motion for Post Conviction Relief. (PCR Vol. 11, 1133-1152). A Notice of Appeal was filed on July 1, 2003. (PCR Vol. 11, 1153-1154).

STATEMENT OF THE FACTS

Trial

In its opinion affirming Dufour's conviction and death sentence, this Court set forth the salient facts as follows:

> The evidence at trial established the following scenario. State witness Stacey Sigler, appellant's former girlfriend, testified that on the evening of September 4, 1982, the date of the murder, appellant announced his intention to find a homosexual, rob and kill him. He then requested that she drop him off at a nearby bar and await his call. About one hour later, appellant called Sigler and asked her to meet him at his brother's home. Upon her arrival, appellant was going through the trunk of a car she did not recognize, and wearing new jewelry. Both the car and the jewelry belonged to the victim.
>
> Appellant had met the victim in the bar and driven with him to a nearby orange grove. There, appellant robbed the victim and shot him in the head and, from very close range, through the back. Telling Sigler that he had killed a man and left him in an orange grove, he abandoned the victim's car with her help.
>
> According to witness Robert Taylor, a close associate of appellant's, appellant said that he had shot a homosexual from Tennessee in an orange grove with a .25 automatic and taken his car. Taylor, who testified that he had purchased from appellant a piece of the stolen jewelry, helped appellant disassemble a .25 automatic pistol and discard the pieces in a junkyard.
>
> State witness Raymond Ryan, another associate of appellant's, also testified that appellant had told him of the killing, and that appellant had said "anybody hears my voice or sees my face has got to die." Noting appellant's possession of the jewelry, Ryan asked him what he had paid for it. Appellant responded "You couldn't afford it. It cost somebody a life." Ryan further testified that he had seen appellant and Taylor dismantle a .25 caliber pistol.
>
> Henry Miller, the final key state's witness, testified as to information acquired from appellant while an inmate in an isolation cell next to appellant's. In return for immunity from several armed robbery charges, Miller testified that appellant

> had told him of the murder in some detail, and that appellant had attempted to procure through him witness Stacey Sigler's death for $5,000.

See Dufour v. State, 495 So. 2d 154, 156-157 (Fla. 1986).

Postconviction

George Dufour, Defendant's brother

George Dufour, Defendant's older brother, testified that he has been an attorney since 1973. (PCR Vol. 7, 169). There were a total of four brothers in their family. George was the oldest, followed by John, then Gary and the Defendant was the youngest. (PCR Vol. 7, 171).

Their father was a long distance truck driver. (PCR Vol. 7, 170). Their father had polio as a child and limped as a result. (PCR Vol. 7, 172). Then, before the Defendant was born, the father had an accident which crushed his other foot. (PCR Vol. 7, 172). When their mother was pregnant with the Defendant, their father had a second accident which resulted in a steel plate being placed in his head. (PCR Vol. 7, 173).

According to George Dufour, after the last accident, their father lost his trucking license which negatively impacted their financial situation. George Dufour also testified that their father became violent after the plate was put in his head and would drink alcohol. (PCR Vol. 7, 175-176, 199-200). However, their father was also away from home a lot, for four or five days at a time. And, during his absence, the family lived in

peace. (PCR Vol. 7, 200). No abuse in the family ever resulted in medical treatment. (PCR Vol. 7, 200). Moreover, the brunt of the father's anger was usually directed at another brother, John. (PCR Vol. 7, 204).

The family moved a lot. However, George Dufour was unsure of the reason. He stated only that he "guess[ed]" that they could not pay the rent. (PCR Vol. 7, 178).

George Dufour described the Defendant as "...always the sweet one. He was the anchor of the family." (PCR Vol. 7, 181). The Defendant apparently would do anything that anybody asked of him. "He [the Defendant] was the sweetest kid of the whole family." (PCR Vol. 7, 181). George Dufour was not aware of how far the Defendant went in school. (PCR Vol. 7, 181, 191). George left home when the Defendant was eight years old, and was out of his life until the Defendant was around 16 or so. (PCR Vol. 7, 182, 202).

George Dufour first saw the Defendant sniffing glue at age 10 or 12. (PCR Vol. 7, 182-183). However, there was no access to alcohol in their home. (PCR Vol. 7, 183). In fact, George testified that their father would only bring a couple cans of beer into the home at a time. (PCR Vol. 7, 183). While claiming that the Defendant drank when he came to visit him, George Dufour also testified that he did not think that the Defendant used any other controlled substances when he was

living at home. (PCR Vol. 7, 184). George first saw the Defendant smoke marijuana at age 16; but, he might have been closer to 20 than 16. (PCR Vol. 7, 184, 207).

Later, when the Defendant was in his early 20's, George Dufour and he were both living a wild life with lots of sex, drugs and alcohol. (PCR Vol. 7, 185). Their brother, Gary, also used drugs and alcohol. However, their other brother, Johnny, did not use any controlled substances to George's knowledge. (PCR Vol. 7, 186-187).

George Dufour described Defendant as a very social person who had to be the life of the party and the center of attention. George also saw some aggressive behavior from the Defendant when he hung around a certain bad group of people. (PCR Vol. 7, 187).

When George Dufour was at college in Gainesville, the Defendant became homosexually active with some of George's friends. (PCR Vol. 7, 188). The Defendant would also receive financial support from older men at that time as opposed to getting a job. (PCR Vol. 7, 208-209). George was completely unfamiliar with any allegations that the Defendant had been abused sexually as a young child. (PCR Vol. 7, 189-190).

After their mother died and the Defendant was released from Lantana Correctional Institute, the Defendant started to hang out with some strange people, including a devil worshiper who

was later murdered in Tampa. (PCR Vol. 7, 193-194). The Defendant became a different person. He told stories of grave robbing, his voice became raspier and he did drugs. (PCR Vol. 7, 195). According to George, the Defendant was an instigator with respect to activities like grave robbing. (PCR Vol. 7, 212-213). The Defendant was never able to hold a job. (PCR Vol. 7, 196).

Prior to appearing at the evidentiary hearing, George had not seen the Defendant in almost 20 years. Some time in the early 1980's, the Defendant came to George's house and threatened George's roommate. Then, when George saw him, they argued about whether the Defendant was welcome in George's home. The Defendant had a gun and threatened to kill both George and George's roommate. That was the last time George saw the Defendant. (PCR Vol. 7, 217-218). After this encounter, George testified that he absolutely did not want any further involvement with the Defendant. (PCR Vol. 7, 219).

Attorney Raymond Dvorak, Defendant's defense attorney

Attorney Raymond Dvorak represented the Defendant at trial. Prior to that trial, Dvorak had worked on two capital cases as a prosecutor and five capital cases as a defense attorney. He obtained plea agreements in all but one case, and that case resulted in a life recommendation from the jury and a life sentence for the defendant. (PCR Vol. 7, 223-225).

With regard to jury selection in Defendant's case, Dvorak recalled two female jurors (Jurors Frazier and Sullen), one of which he challenged for cause. He also remembered that one of the women was extremely uncomfortable sitting on the murder case, and he felt that she would be a better alternate juror than some of the others. (PCR Vol. 7, 226-227). Dvorak was unsure whether he had remaining peremptory challenges, but thought he should have moved to strike both women based on their statements that they were in favor of the death penalty. (PCR Vol. 7, 227).

Attorney Dvorak's testimony regarding the viability of a voluntary intoxication defense revealed that this defense was considered and rejected. The defense strategy was that the Defendant did not commit the murder, that Robert Taylor killed the victim and was the leader of the gang. (PCR Vol. 7, 228, 258-259). Based upon that theory which was supported by physical evidence and the testimony of other gang members, Dvorak did not think it appropriate to present inconsistent theories to the jury. Also, the Defendant's girlfriend made statements to the police and in deposition that the Defendant was sober just before the murder. (PCR Vol. 7, 229). Further, the defense psychiatrist did not note any substance abuse at the time of the offense. Finally, Attorney Dvorak based his decision not to pursue the voluntary intoxication defense based

upon conversations with the Defendant himself. (PCR Vol. 7, 229).

The defense retained a confidential mental health expert in preparation for Defendant's case. (PCR Vol. 7, 229-230). The expert was retained to examine the Defendant as to competency for trial and competency at the time of the offense. Dvorak also wanted to know everything he could concerning the Defendant's background. (PCR Vol. 7, 230). Dvorak did not have an independent recollection as to whether he asked Dr. Gutman to consider statutory mitigation. (PCR Vol. 7, 231).

Dr. Gutman concluded the Defendant was competent at the time of the offense and for trial purposes. Dr. Gutman could not say that there were any psychiatric reasons behind the killing. He found Defendant had antisocial behavior. Yet, Dr. Gutman did support Dvorak's feeling that the Defendant was easily led by others. (PCR Vol. 7, 232-233). Ultimately, Dvorak felt that calling a defense mental expert would have been devastating to the defense. (PCR Vol. 7, 264). A notation in the file further supported that the defense team made a strategic decision not to call Dr. Gutman. (PCR Vol. 7, 288). After receiving Dr. Gutman's opinion, the defense did not seek a second opinion.

As far as additional background investigation for the penalty phase, the defense spoke to friends and the Defendant's

brother, Gary. He had difficulty with the family, however. (PCR Vol. 7, 234). Dvorak spoke to George Dufour who did not want to get involved. (PCR Vol. 7, 234-235). Another member of the defense team also tried to contact George Dufour and did not succeed. Moreover, the Defendant himself did not want the defense to get his family involved. (PCR Vol. 7, 235). The Defendant consistently instructed Dvorak that he did not want his family involved in the penalty phase. (PCR Vol. 7, 277). The Defendant was not happy when Dvorak got his brother Gary involved. And, George Dufour had nothing to do with Dvorak when he was contacted. (PCR Vol. 7, 278).

Attorney Dvorak did receive school records and Department of Correction records from Defendant's prior incarcerations. (PCR Vol. 7, 236). Notations in the defense file also confirmed that background information was obtained from the Defendant. (PCR Vol. 7, 289).

Dvorak believed that the Defendant had suffered some sort of traumatic sexual experience in his past. While unsure of the source, Dvorak learned that the Defendant had been pimped to homosexuals in his teens by his brother George. However, no one wanted to discuss the matter with Dvorak. (PCR Vol. 7, 237, 279).

The Defendant had done drugs and alcohol from the time he

was very young. However, the defense strategy was to convey to the jury that the Defendant was a normal person who was a follower, not a leader, and who would adapt well in an institutional setting. Toward that end, Dvorak made a strategic decision not to portray the Defendant as a "...drugged out drunken maniac." (PCR Vol. 7, 238-240).

Further, Dvorak admitted that he knew that calling Stacy Ziegler as a witness might open the door to some potentially damaging information about the Defendant. However, Dvorak felt that having a person who testified against the Defendant in the guilt phase argue that he did not deserve the death penalty would have tremendous psychological impact on the jury. (PCR Vol. 7, 240-241).

The Defendant admitted to Dvorak that he killed Zack Miller. According to the Defendant, the initial intent was to rob the victim. Then, when the victim made a sexual advance on the Defendant, the Defendant shot the victim. (PCR Vol. 7, 267-268). However, Dvorak did not fully believe the Defendant. He felt that Robert Taylor was involved, especially where an independent witness had heard arguing at the murder scene at a time after the victim would have been shot. (PCR Vol. 7, 268-269).

Stacy Sigler testified that the Defendant was not

intoxicated on the day of the murder. (PCR Vol. 7, 271). Neither did the Defendant indicate that he was intoxicated or in any way out of his mind or having a break with reality. Further, Dvorak did not believe that defense attorneys were using neuropharmacologists at the time of Defendant's trial. (PCR Vol. 7, 272).

Dr. Jonathan Lipman, neuropharmacologist

Dr. Lipman testified for the defense in postconviction as a forensic neuropharmacologist. (PCR Vol. 7, 296). After reviewing numerous records relating to the Defendant and this case and after meeting with the Defendant, Dr. Lipman concluded that the Defendant had a history of drug and alcohol abuse from an early age. (PCR Vol. 7, 312-314). Dr. Lipman concluded that on the day of the murder the Defendant was in a state of chronic intoxication. (PCR Vol. 7, 328). Based on the amount of drugs and alcohol that Defendant was using, Dr. Lipman felt that he would have to suffer from organic impairment of his brain. (PCR Vol. 7, 330). As a result of this brain impairment, Dr. Lipman testified that Defendant's capacity to conform his conduct to the requirements of law would be impaired. (PCR Vol. 7, 338-339).

Dr. Lipman admitted that the test done by Dr. Zimmerman which allegedly showed that Defendant was brain damaged does not

indicate when that brain damage came about. (PCR Vol. 8, 375). He further admitted that with respect to the actual acts of killing in which the Defendant was involved, Dr. Lipman could only testify in generalizations as to the effects of drug abuse where the specifics of the offenses were in dispute. (PCR Vol. 8, 381-382).

Dr. Sherry Burg Carter, psychologist

Dr. Carter was hired by the defense in postconviction to evaluate whether the Defendant had been sexually abused as a child or adolescent and to see if those experiences impacted his development and misbehavior. (PCR Vol. 8, 418-419). In rendering her opinion, Dr. Carter relied upon interviews with the Defendant, as well as other records and depositions relevant to the case. (PCR Vol. 8, 420).

Defendant told Dr. Carter that he was sexually abused by a male friend of his brother George when the Defendant was a child. (PCR Vol. 8, 422). The Defendant also described physical and mental abuse from his father. (PCR Vol. 8, 423). According to the Defendant, he began abusing alcohol and drugs at a young age. (PCR Vol. 8, 424). The Defendant further described several other sexual episodes occurring before he reached the age of majority, including sex with an adult woman, sex with another woman and a man at the same time, and

homosexual encounters with his brother George's friends. (PCR Vol. 8, 425-426).

Dr. Carter concluded that the Defendant met the statutory mitigator of an extreme mental or emotional disturbance at the time of the incident because of his chronic substance abuse problem. (PCR Vol. 8, 431-432). She further testified that if Defendant had brain damage or there was any evidence to suggest he was substantially impaired at the time of the offense, then he would qualify for the statutory mitigator dealing with his capacity to conform his behavior to the requirements of law. (PCR Vol. 8, 433).

On cross, Dr. Carter admitted she could not say to what extent Defendant's substance abuse influenced him in committing the instant murder. Nor could she say whether his capacity to appreciate the wrongfulness of his conduct was impaired at the point in time when he committed the murder. (PCR Vol. 8, 454).

Dr. Robert Berland, forensic psychologist

Dr. Berland was offered by the defense in postconviction as an expert in forensic psychology. (PCR Vol. 8, 465). Dr. Berland's practice has been almost exclusively for the defense for at least 95% of the time. (PCR Vol. 8, 500). Dr. Berland admitted that in 1984 the routine practice was for the attorney to take the lead in developing mitigation. (PCR Vol. 8, 467).

In evaluating the Defendant, Dr. Berland reviewed DOC records, depositions and affidavits relevant to the case, and appellate opinions from both Mississippi and Florida. He also administered a Minnesota Multiphasic Personality Inventory and interviewed the Defendant. (PCR Vol. 8, 467-468). Dr. Berland concluded the Defendant had a chronic disturbance and antisocial personality disorder. (PCR469). The testing showed indications of delusional paranoid thinking, hallucinations and mood disturbance. (PCR Vol. 8, 470).

Earlier testing done by DOC determined that the Defendant vacillated to a withdrawn self-centered position with rapid and sudden changes in temperament. The Defendant was suspicious and distrustful and reacted to betrayal with devious frightfulness and treachery. (PCR Vol. 8, 472).

An MMPI test done in 1979 resulted in a scale four. This result is either influenced by antisocial thinking or by psychotic disturbance. (PCR Vol. 8, 474-477).

Dr. Berland testified that Defendant's act of huffing toluene as a child could produce brain injury. (PCR Vol. 8, 478-479). Dr. Berland also concluded that the differences in the WAIS test administered by Dr. Merin were consistent with brain injury. (PCR Vol. 8, 481). While the Defendant reported

several accidents which could have resulted in brain injury, Dr. Berland had no information to support that conclusion. (PCR Vol. 8, 482-484).

Dr. Berland received no useful information regarding whether the Defendant was under the affects of drugs or alcohol at the time of the crime. (PCR Vol. 8, 484-485). He did feel there was information which would permit a conclusion that the Defendant was under the influence of an extreme mental or emotional disturbance at the time of the murder. However, Dr. Berland equivocated this conclusion by stating that if the Defendant had been under the influence of drugs or alcohol in conjunction with his mental illness, he "...would likely have been under the influence of extreme mental or emotional disturbance." (PCR Vol. 8, 485-486). With respect to whether the Defendant suffered some substantial impairment in his capacity to conform his conduct to the requirements of law, Dr. Berland stated there was no evidence of such an impairment. Yet, he felt the nature of Defendant's mental illness could create a substantial impairment in his capacity to conform his conduct to the requirements of law. (PCR487). However, Dr. Berland also testified that he had no reason to question Defendant's ability to recognize the wrongfulness of his acts. (PCR Vol. 8, 542).

Both the Defendant and others provided information that the Defendant had an extensive history of using drugs. (PCR Vol. 8, 487-489). The Defendant made poor grades in school. (PCR Vol. 8, 489-490). According to George Dufour, the Defendant had an abusive father and moved a lot. (PCR4 Vol. 8, 90). Some witnesses reported occasions where the Defendant expressed remorse for the killings he committed and had asked a friend to kill him. (PCR Vol. 8, 492-494). However, he also showed very nonremorseful times. (PCR Vol. 8, 542).

While the Defendant exhibited good behavior in prison at one point, later, after a head injury, upon reincarceration, he was a discipline problem. (PCR Vol. 8, 494-495). However, Dr. Berland had no information to substantiate that a head injury occurred. (PCR Vol. 8, 495).

The school records reviewed by Dr. Berland were the same as those introduced at trial by Attorney Dvorak. Among these records, it showed that the Defendant had an I.Q. of 80 in the seventh grade. (PCR Vol. 8, 504). Later, in prison, Defendant obtained his GED. (PCR Vol. 8, 509).

Dr. Berland had no basis to rule out a diagnosis of antisocial personality disorder. (PCR Vol. 8, 516). He admitted Defendant had factors consistent with juvenile conduct disorder and an adult antisocial personality disorder which

would be a lifestyle choice, as opposed to a biological malfunction in the brain. (PCR Vol. 8, 516). Someone, like the Defendant, who was an energized antisocial would be more likely to adopt a high risk lifestyle. (PCR Vol. 8, 540).

Dr. Sidney Merin

At the evidentiary hearing, the State called Dr. Merin to testify as an expert in clinical psychology and neuropsychology. (PCR Vol. 9, 563). Dr. Merin reviewed background information relevant to the Defendant, and interviewed the Defendant. (PCR Vol. 9, 569-570, 573-576). Dr. Merin also administered the Wechsler Intelligence test to the Defendant. (PCR Vol. 9, 576-577). Defendant did extremely well on the portion of testing meant to determine the functioning of his prefrontal lobe activity. (PCR Vol. 9, 598-599).

Ultimately, Dr. Merin concluded that the Defendant knew exactly what he was doing at the time of the murder, particularly with functions associated with the prefrontal lobe. (PCR Vol. 9, 607). The Defendant may have some mild neurocognitive impairment, but not so much as to render him incapable of planning, organizing, and thinking things through as the prefrontal lobe requires. (PCR Vol. 9, 608). Dr. Merin found no delusional symptoms. Rather, the Defendant is guarded and suspicious which is not uncommon for antisocial

personalities. (PCR Vol. 9, 609). According to Dr. Merin, psychosis did not play a role in Defendant's crimes. (PCR Vol. 9, 609). Dr. Merin found no evidence that Defendant was unable to conform his conduct to the requirements of law. He knew what he was doing, and knew it was wrong. (PCR Vol. 9, 610). Further, there was no evidence that the Defendant was substantially impaired by any mental infirmity at the time he committed the murder. (PCR Vol. 9, 610-611).

Dr. Merin's diagnoses of Defendant include a substance abuse disorder by history, mild neurocognitive disorder, although not rendering him incapable of using prefrontal lobe phenomena, a personality disorder with borderline and antisocial features and minimal paranoia features. (PCR Vol. 9, 611). The Defendant did not suffer from brain injury or damage. (PCR Vol. 9, 625). Dr. Merin's conclusions concurred with Dr. Gutman's diagnoses at the time of Defendant's trial. (PCR Vol. 9, 613-614).

According to Dr. Merin, the 1979 MMPI results were consistent with antisocial personality. (PCR Vol. 9, 615). Further, Defendant's background information supported the opinion of antisocial personality. (PCR Vol. 9, 616). The facts of the five murders committed by Dufour were also consistent with antisocial personality disorder. (PCR Vol. 9, 617-618).

Assistant State Attorney Dorothy Sedgwick

Assistant State Attorney Sedgwick was a division chief with the State Attorney's Office when Defendant was arraigned in this case and in another double homicide. Assistant State Attorney Frank Tamen was assigned the instant case, with ASA Sedgwick as second counsel. ASA Sedgwick was to be lead counsel on the double homicide. (PCR Vol. 9, 654-655). The instant case went to trial first. (PCR Vol. 9, 655).

ASA Sedgwick had no memory regarding a stick found at the scene of the instant murder. (PCR Vol. 9, 656). The office policy was to request that all evidence, even if not admitted into trial, be maintained. (PCR Vol. 9, 657).

With regard to the defense use of a mental health expert, ASA Sedgwick would have examined any background material relied upon by said expert to look for derogatory material. Such information could be used for the State's cross-examination of the defense expert or to provide to the State's mental health expert. In Defendant's case, information that he raped a friend's wife or that jewelry was found in Defendant's possession related to another rape and physical evidence related to the double murders would have served that purpose. (PCR Vol. 9, 658-659).

Frank Tamen

Attorney Tamen was a former prosecutor who prosecuted the instant case. (PCR Vol. 9, 690-691). Tamen had no recollection of a stick being considered as evidence of anything in this case. (PCR Vol. 9, 691). He further did not remember ever being contacted by the Sheriff's Office regarding the stick or any other piece of evidence being held by the Sheriff after the trial concluded. (PCR Vol. 9, 691). Had such a call been made to him, Tamen would have told them to maintain the evidence because he left the State Attorney's Office before the direct appeal was final. (PCR Vol. 9, 691-692).

Had the defense called a psychological expert at trial, the State would have been able to open the door to negative information in Defendant's background. Tamen would have brought out information concerning Defendant's criminal background that could not otherwise have come in, such as uncharged crimes and the double homicide which had not yet gone to trial. He could have also explored Defendant's ability to plan his criminal activity. (PCR Vol. 9, 692-696).

Diane Payne

Diane Payne was a former detective with the Orange County Sheriff's Office. (PCR Vol. 9, 709). She was the lead detective on this case and was in charge of the items taken into custody as possible evidence in this case. (PCR Vol. 9, 710).

The stick was destroyed per Payne's authorization. (PCR Vol. 9, 711). However, she had no recollection of the destruction. (PCR Vol. 9, 711). Routinely, she would call the State Attorney's Office to get permission to destroy evidence in homicide cases, but it was possible she did not make the call in this instance. (PCR Vol. 9, 712).

William Vose

At the time of Defendant's trial, Vose was general counsel for the Sheriff's Office. (PCR Vol. 9, 720). In 1984, the Defendant was refusing to eat. Vose was contacted by the jail to try to figure out whether to file a motion to force Defendant to take nourishment. (PCR Vol. 9, 721). Vose then contacted Defendant's brother, George Dufour, and told him that the Defendant was trying to kill himself by not eating. George Dufour responded that as far as he was concerned his brother could die, that the rest of the family was sick of him and he did not want anything to do with it. (PCR Vol. 9, 723-724).

Attorney Jay Cohen

A former prosecutor, Cohen represented Defendant at trial in the penalty phase. (PCR Vol. 9, 727-728, 738). Dr. Gutman's report was negative toward the Defendant, concluding that he was a sociopath. (PCR Vol. 9, 734). As a defense team, they were very concerned about virtually anything Dr. Gutman said in the

report coming out at trial. (PCR Vol. 9, 734). Cohen made a notation in the file that Dr. Gutman indicated they would not want to call him to the stand, that he would hurt their case. After discussing the matter with Attorney Dvorak, their conclusion was clear that they were not going to call Dr. Gutman. (PCR Vol. 9, 735).

SUMMARY OF THE ARGUMENT

Issue I: Appellant's trial counsel failed to render ineffective assistance of counsel in failing to peremptorily strike either Juror Frazier or Juror Sullen. Neither juror expressed a view of the death penalty which would have prevented or substantially impaired their ability to perform as a juror in accordance with the jury instructions or oath.

Neither was defense counsel ineffective for failing to pursue a voluntary intoxication defense. Attorney Dvorak testified that this defense was considered and rejected based upon the testimony of others, including Appellant's girlfriend, and based upon conversations with Appellant himself. Moreover, a voluntary intoxication defense would have been inconsistent with the defense that Appellant was not the murderer. In view of the strategy adopted by defense counsel, the failure to pursue a line of defense which was unsupported by the evidence was not deficient performance on the part of counsel.

Issue II: Defense counsel was not ineffective for failing to call a mental health expert at trial. The expert retained by the defense, Dr. Gutman, concluded that Appellant was antisocial. Therefore, defense counsel concluded that testimony from a mental health expert would have been devastating to the defense. While Appellant now attempts to second guess this

strategic decision, even the postconviction defense expert, Dr. Berland, admitted he could not rule out a diagnosis of antisocial personality disorder. As such, Appellant failed to demonstrate deficient performance resulting from the informed, strategic decision not to employ a mental health expert in the penalty phase.

Secondly, while Appellant claims counsel's investigation into his childhood and family background was deficient, Appellant failed to identify any evidence relating to his childhood which should have been presented. The only witness to testify on this topic in postconviction was Appellant's brother, George Dufour, who was contacted at the time of the original trial and refused to cooperate with the defense. Additionally, the substance of George Dufour's testimony paralleled that of Appellant's other brother, Gary Dufour, who did testify at the penalty phase. Finally, Appellant refused to cooperate with his attorneys with regard to researching his background; thus, Appellant severely hampered their ability to prepare for and present a penalty phase defense.

Neither was counsel ineffective in his investigation Appellant's history of drug and alcohol abuse. Appellant maintains that the trial court ignored case law establishing that evidence of alcoholism and chronic substance abuse is valid

mitigation. However, the trial court properly considered and rejected the claim of ineffective assistance of counsel with respect to investigating substance abuse based upon Appellant's ability to know right from wrong, as well as other factors.

Finally, counsel was not ineffective for failing to put on evidence of Appellant's good prison record as mitigation. Appellant failed to identify what evidence of good behavior existed and failed to question Attorney Dvorak on the topic. Moreover, introduction of Appellant's prison records would have further introduced evidence of another prior conviction and evidence of bad behavior, including disciplinary reports and Appellant's act of planning to escape while in custody during this trial.

Neither was counsel ineffective for making the informed, strategic decision to call Stacey Sigler as a witness during the penalty phase. Attorney Dvorak testified that he decided that having a person who testified against Appellant in the guilt phase argue that he did not deserve the death penalty would have tremendous psychological impact on the jury. Such a strategic decision does not constitute ineffective assistance.

The claim of ineffective assistance based on the failure to object to the Mississippi prosecutor's testimony concerning Appellant's prior murder is also without merit. Trial counsel

did object in detail to the testimony in question. Moreover, this issue was considered by this Court on direct appeal and was rejected.

Further, the claim relating to the failure to object to the prosecutor's closing argument must fail. The challenged comments were fair comment on the evidence and related to the aggravators. Alternatively, the comments were harmless in view of the overwhelming evidence of Appellant's guilt.

No prejudice could result from the failure to object to the avoid arrest aggravator. While this Court struck the aggravator on direct appeal, this Court also upheld the death sentence based upon the remaining three aggravators. As such, no prejudice can be shown.

Finally, no cumulative error has been demonstrated. Each of the claims raised have been shown to be without merit.

Issue III: Appellant's Ake claim is procedurally barred because it should have been raised on direct appeal. Alternatively, the Ake claim is without merit where Appellant merely challenges Dr. Gutman's findings at the time of trial. Appellant cannot demonstrate that the examinations done at trial were so grossly insufficient that they ignored clear indications of either mental retardation or organic brain damage. No expert testified that Appellant is retarded or that he definitively

suffers from any brain damage. And, the postconviction mental health expert, Dr. Berland, agreed with Dr. Gutman's conclusion that Appellant has antisocial personality disorder. Thus, relief was properly denied.

Issue IV: Appellant is not entitled to conduct juror interviews. He failed to identify any possible error so egregious as to vitiate the entire proceedings.

Issue V: Appellant's Caldwell claim is both procedurally barred and substantively without merit.

Issue VI: The trial court properly denied Appellant's claim that the State destroyed exculpatory evidence. Appellant failed to show the State acted in bad faith in the destruction of the stick.

Issue VII: Appellant concedes that his claim based upon Ring v. Arizona is without merit. This Court has consistently rejected the claim. Additionally, Appellant's prior violent felonies exempt this case from any possible application of Ring. Finally, the Ring decision is not retroactive.

Issue VIII: Again, Appellant concedes that his challenges to the jury instructions relating to the aggravators are without merit. These claims have been consistently rejected by this Court.

Issue IX: Appellant's constitutional challenge to the rules

governing juror interviews is not appropriate on postconviction where it does not attack the validity of Appellant's conviction and sentence. Moreover, the rules merely restrict juror interviews to circumstances where an attorney can demonstrate he has reason to believe that grounds for a legal challenge to a verdict may exist. Thus, Appellant is not entitled to relief.

Issue X: Appellant is not entitled to a new trial based upon any allegation of cumulative error. This claim must be rejected where Appellant is not entitled to relief on any of the individual claims discussed herein.

ARGUMENT

JURISDICTION

It appears this Court is without jurisdiction in this case. The Order Denying Amended 3.851 Motion for Post Conviction and Amendment to 3.851 Motion for Post Conviction Relief was entered and filed on May 30, 2003. (PCR Vol. 11, 1133-1152). Appellant did not file his Notice of Appeal until July 1, 2003, thirty-two (32) days after rendition of the final order. (PCR Vol. 11, 1153-1154).

Rules 9.110(b) and 9.140(b)(3), Florida Rules of Appellate Procedure, provide that jurisdiction of the appellate court is invoked by filing two copies of a notice of appeal with the clerk of the lower tribunal within 30 days of rendition of the order. An order is rendered when a signed written order is filed with the clerk of the lower tribunal. It appears the notice of appeal was not timely filed.

STANDARD OF REVIEW

The framework for analyzing ineffective assistance of counsel claims is set forth in Strickland v. Washington, 466 U.S. 668 (1984):

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance

> prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.
>
> Id. at 687. To establish prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. Ineffective assistance of counsel claims present a mixed question of law and fact subject to plenary review based on the Strickland test. See Stephens v. State, 748 So. 2d 1028, 1033 (Fla. 1999). Therefore, this Court must engage in an independent review of the trial court's legal conclusions, while giving deference to the trial court's factual findings.

See Gordon v. State, 863 So. 2d 1215, 1221 (Fla. 2003).

ISSUE I

WHETHER TRIAL COUNSEL WAS INEFFECTIVE DURING THE GUILT PHASE.

A. The lower court properly held that trial counsel was not ineffective in failing to strike Jurors Frazier and Sullen.

Without any supporting authority, Appellant argues that trial counsel was ineffective for failing to strike Jurors Frazier and Sullen based upon their alleged predisposition to impose the death penalty. As noted by the trial court, the record below demonstrates that neither juror expressed a view of the death penalty which would have prevented them from serving as an impartial juror. (PCR Vol. 11, 1136-1137). See Ventura v. State, 794 So. 2d 553, 569 (Fla. 2001), citing Palmes v. State, 425 So. 2d 4, 7 (Fla. 1983) (denying defendant's ineffectiveness claim based on counsel's failure to object to the dismissal of several prospective jurors for cause who expressed views in opposition of the death penalty, holding no substantial deficiency in this regard where the "excusals were not objected to because they were not legally objectionable"); see also Wainwright v. Witt, 469 U.S. 412 (1985) (The standard for determining whether a prospective juror may be excused for cause because of his or her views of the death penalty is whether the prospective juror's views would "prevent or substantially impair the performance of his or her duties as a

juror in accordance with the juror's instructions or oath."); San Martin v. State, 717 So. 2d 462, 468 (Fla. 1998); Kimbrough v. State, 700 So. 2d 634, 638-39 (Fla. 1997). As such, Appellant has failed to establish deficient performance on trial counsel's part or any prejudice which might justify postconviction relief. Thus, the ruling of the trial court on this issue should be affirmed.

First, Appellant challenges Juror Frazier. The voir dire of Juror Frazier proceeded, in relevant part, as follows:

> THE COURT: Ms. Frazier, I want to talk to you about this topic of the death penalty for a few moments. Do you have any feelings about the issue of capital punishment that you can share with us?
>
> MS. FRAZIER: Not -- I'm not against it really.
>
> **THE COURT: Okay. Do you feel that there would be some cases where it may be appropriate and others where it would not be so?**
>
> **MS. FRAZIER: In some cases, yes.**
>
> THE COURT: Okay. Under Florida law the death penalty is not made mandatory for an offense. The death penalty is the Judge's decision after the law is made following a recommendation of the jury after a trial or a hearing. Do you understand that?
>
> MS. FRAZIER: (Nods affirmatively)
>
> THE COURT: Do you think you could participate in this case?
>
> MS. FRAZIER: Yes.
>
> THE COURT: Excuse me. Both on the trial aspect of the case and for a hearing later if there is a guilty verdict on the penalty phase of the case?
>
> MS. FRAZIER: Yes.
>
> THE COURT: If there is a trial, or at the trial portion of the case the evidence would be presented for your consideration, and the attorneys would present arguments to you. And I would instruct you on the law. After that you would retire with the rest of the jurors and make a decision. If the evidence

established guilt beyond all reasonable doubt then your decision would have to be return a verdict of guilty.

Would you be able to do that?

MS. FRAZIER: Yes.

THE COURT: If the evidence revealed that there was a doubt in this case, and you had a reason for that doubt, then your verdict would not be guilty because your doubt was reasonable. You understand that?

MS. FRAZIER: Yes.

THE COURT: If there was a guilty verdict we would then go to a penalty stage of the case, which would be about two weeks later. We would recess the trial. Then we'd come back, and in about two weeks. At that time the attorneys would be making presentations to the jury. And depending, well, and the jury would be considering what the law refers to as aggravating factors and mitigating factors, or put another way, bad points and good points. And if the bad points outweigh the good points the jury could recommend the death penalty. If the good points outweighed the bad points the jury should recommend life imprisonment.

If you were selected as a juror in this case would you be able to proceed through those or that stage of the case also?

MS. FRAZIER: Yes.

THE COURT: Okay. Mr. Tamen.

MR. TAMEN: Do you have any ideas in your mind as to the kind of cases that might want to make you, might make you want to recommend the death sentence?

MS. FRAZIER: I'll tell you the difference.

MR. TAMEN: Okay.

MS. FRAZIER: Whereas someone has killed another person and they only received 25 years instead of life.

THE COURT: Could you speak up, please.

MS. FRAZIER: Where someone has killed someone, and he only received 25 years instead of life in prison without parole, and where someone has killed a child, I think they should receive a death penalty.

MR. TAMEN: If you found a person guilty of first degree murder the Judge would tell you there are only two choices as far as the sentence. One would be a death sentence. The other one life imprisonment with a mandatory minimum of 25 years. Meaning that he could not be paroled until he's served at least 25

years behind bars, and maybe more. That would be up to the Parole Commission.

Given that knowledge now, are there any other kinds of cases that where you think death would be more appropriate penalty than 25 years to life?

MS. FRAZIER: It's 25 years?

MR. TAMEN: In a penalty phase the Judge will give you some instructions of the kind of factors that under law could justify a death sentence, and other factors that could indicate a death sentence would not be appropriate. Would you be able to follow the law and consider other factors that would warrant a death sentence? Or do you have the feeling that only the murder of a child would justify a death sentence?

MS. FRAZIER: Not only a child really. It all depends on how the person was murdered. If he, you know, the person was beaten or raped or, you know.

MR. TAMEN: Especially violent?

MS. FRAZIER: Um-hum.

MR. TAMEN: Do you think that -- I don't want to go into all the different factors. Do you think there might be some factors that if you heard them might make you think, a well, that could justify a death sentence?

MS. FRAZIER: For the death penalty?

MR. TAMEN: Um-hum.

MS. FRAZIER: I guess it all depends. I don't think anyone should live if they kill somebody else.

MR. TAMEN: Would it be fair to say that you'll be open minded, and you'll listen to the law, and you'll follow the law as far as considering what could justify a death sentence and what should not?

See, the only thing I don't -- I want to make sure that I don't have people sitting on the jury who have already made up their mind as to what kinds of cases would justify death sentences, so that they wouldn't be able to look at this case fresh and listen to the law as it applies to this case, and then make a fresh decision whether --

MS. FRAZIER: (Interposing) If it was an accident I don't believe it should be -- if it was an accident, they had a good reason, and it just went off, and something like that, I don't believe it should be.

MR. TAMEN: What about if it was a deliberate killing? Would it tend to make you more inclined

toward a death sentence?

MS. FRAZIER: Yes.

MR. TAMEN: Okay. During the first phase of the trial where you'll be hearing evidence, the evidence will just be on whether the Defendant is guilty or not guilty. And that will be your job to decide, see, guilty of this crime or not guilty. And the Judge will tell you when you consider that verdict, guilty or not guilty, you're not supposed to consider the possible penalty. Get to that later.

If he's convicted do you think you could set aside any possible thoughts of a death penalty and decide whether he's guilty, first of all?

MS. FRAZIER: First he has to be guilty.

MR. DVORAK: I couldn't hear that answer, ma'am. Could you speak up just a bit, please?

MS. FRAZIER: First he has to be guilty.

MR. TAMEN: Would the thought that he might get the death penalty make you more reluctant to find him guilty than you would be with the same evidence if the death was not a possible sentence?

MS. FRAZIER: If he's guilty, yes, I'm sure I would.

MR. TAMEN: I have no further questions.

THE COURT: Anything else, Mr. Dvorak?

MR. DVORAK: Thank you, Your Honor.

Ms. Frazier, how do you feel, ma'am, when you read the newspaper or hear a news account that someone has been executed in this state or in a different state? What kinds of feelings go through your --

MS. FRAZIER: (Interposing) If I read what has happened and the kind of murder it was then I feel he should get the death penalty.

MR. DVORAK: You made a comment earlier, ma'am, that you don't think a person should live if they have killed another person.

MS. FRAZIER: Okay.

MR. DVORAK: Can you expand on that a little bit?

MS. FRAZIER: I think I was saying if it was the type of murder it was. If it was pre -- if he, you know, a premeditated murder, yes, I think he should get the death penalty. He thought about it. He knew what he was doing. If a person is sort of like retarded and he murdered somebody I don't think he should get a death penalty.

MR. DVORAK: Are you telling us in any -- and part

of the definition -- as an attorney I'm not here to instruct you on the law, but the Judge does that. We're getting into it a little bit. The definition of first degree murder includes an element of premeditation. Are you -- do you understand that?

MS. FRAZIER: Um-hum.

MR. DVORAK: Okay. Are you telling us, ma'am, that in any premeditated murder situation that you would vote for the death penalty regardless of what you heard concerning factors that might be in favor of the individual?

MS. FRAZIER: I would have to listen closely, look at closely what had happened, you know, why did he do it. Because there might have been a reason why he did it.

MR. DVORAK: Going into it, would your inclination be to favor the death penalty in that circumstance?

MS. FRAZIER: After I heard what happened.

MR. DVORAK: Speaking of what happened, obviously, at this point we're talking about the death penalty. We may never get to that phase. You understand that, don't you?

MS. FRAZIER: Um-hum.

MR. DVORAK: We're way ahead of ourselves here because you have heard no evidence yet.

MS. FRAZIER: Um-hum.

MR. DVORAK: All right, ma'am. Thank you.

(TR Vol. II, 248-257).

Thus, as the record reveals, Juror Frazier expressed no view of the death penalty which would prevent her from acting in accordance with the jury instructions and oath. Therefore, Appellant has failed to demonstrate that Juror Frazier was objectionable for cause or otherwise based upon her views of the death penalty. See Wainwright, 469 U.S. 412.

Appellant makes the same challenge to Juror Sullen claiming she also voiced a predisposition to impose death. However, upon

questioning by defense counsel, Juror Sullen specifically stated that she did not believe that every premeditated murder should by punished by death. (TR Vol. III, 414-415). While defense counsel did raise an unsuccessful challenge for cause to Juror Sullen, the trial court properly determined that she stated she could follow the court's instructions and the law. (TR Vol. III, 418).

Based upon these facts, no basis existed for moving to challenge either juror for cause. Despite this, defense counsel did attempt to remove Juror Sullen for cause. However, notably, counsel did not seek to use a peremptory strike on either of the challenged jurors. In fact, the defense used all ten peremptory challenges and an additional two more without moving to strike either Juror Frazier or Sullen. (TR Vol. I, 282-283; Vol. IV, 572-577). The problem posed by a postconviction challenge of this nature was addressed by the Fourth District Court of Appeal in Jenkins v. State, 824 So. 2d 977, 980-983 (Fla. 4th DCA 2002).

In Jenkins, 824 So. 2d 977, 980, the defendant argued his lawyer was incompetent for failing to strike an allegedly biased juror for cause. The defense attorney used only seven of his ten peremptory strikes, and did not challenge the juror for cause. The State argued that, in the context of the entire voir dire, the juror's responses did not indicate any bias; and, the

trial court agreed. See Jenkins, 824 So. 2d at 980.

In affirming the denial of postconviction relief on this claim, the Fourth District Court of Appeal discussed the nature of a postconviction challenge to an attorney's actions during voir dire as follows:

> This case lands at the crossroads of fundamental error and post-conviction relief. Appellant's lawyer neither objected to juror Galbraith, nor sought to excuse him with a peremptory challenge. The issue was therefore not preserved for direct appeal. Nor was it so serious as to amount to fundamental error. Seeking post- conviction relief, appellant argues that his lawyer was incompetent for allowing juror Galbraith to sit.
>
> *****
>
> The requirement of a timely objection to preserve the denial of a cause challenge for appeal serves a number of functions in our legal system. An objection during jury selection promotes judicial economy by allowing the court to remove an unqualified juror before the trial has begun, when other jurors are available for selection. A timely objection alerts the court and the other party to a problem, making possible further questioning to shed light on a potential juror's fitness to serve. A ruling on a juror's qualifications may turn on the way a juror answers a question; a trial judge is best able to evaluate a juror's qualifications when the juror's facial expression and tone of voice are fresh in the judge's mind. Seating a juror who does not pass the Singer test for juror competency creates an error not subject to harmless error analysis. For this reason, it is important for a court to rule on a juror's qualifications before a trial begins.
>
> Finally, requiring the parties to voice challenges to objectionable jurors places the power of the jury selection in the hands of the parties, not the judge. The "methods of jury voir dire are subjective and individualistic." Meeks v. State, 418 So. 2d 987, 988 (Fla. 1982); accord Miller v. Francis, 269 F.3d 609, 620 (6th Cir. 2001) (observing that "few decisions at

trial are as subjective or prone to individual attorney strategy as juror voir dire, where decisions are often made on the basis of intangible factors"). Recognizing that the parties in a trial should have a large say in the choice of jurors, Florida has preserved the right of the parties to individually examine the jurors. See Fla. R. Crim. P. 3.300(b) (stating that "counsel for both the state and defendant shall have the right to examine jurors orally on their voir dire"); Fla. R. Civ. P. 1.431(b) (providing that "the right of the parties to conduct a reasonable examination of each juror orally shall be preserved"). A legal system that routinely used post-conviction relief as a vehicle for second guessing juror qualifications in the absence of a timely objection would encourage trial judges to intervene in the jury selection process and impose their views regarding which jurors satisfied objective standards of fairness.

On direct appeal, to preserve for appellate review a claim that the trial court improperly denied a cause challenge to a juror, a defendant must exhaust his peremptory challenges, request an additional peremptory challenge from the court, and demonstrate that an objectionable juror was seated. See Trotter v. State, 576 So. 2d 691, 693 (Fla. 1990); Cason v. State, 760 So. 2d 283, 284 (Fla. 4th DCA 2000). As the supreme court has explained, a trial judge's erroneous refusal to grant a cause challenge abridges a defendant's right to peremptory challenges by reducing the number of those challenges available him. Florida and most other jurisdictions adhere to the general rule that it is reversible error for a court to force a party to use peremptory challenges on persons who should have been excused for cause, provided the party subsequently exhausts all of his or her peremptory challenges and an additional challenge is sought and denied. Hill, 477 So. 2d at 556.

To establish reversible error where he exhausted his peremptory challenges, a defendant must then identify a specific juror whom he otherwise would have struck peremptorily and who actually sat on the jury. "The defendant cannot stand by silently while an objectionable juror is seated and then, if the verdict is adverse, obtain a new trial." Trotter, 576 So. 2d at 693.

See Jenkins, 824 So. 2d at 980-981.

In the instant case, Appellant's attorney exhausted his peremptory challenges and used an additional two challenges. And, while he objected to one of the challenged jurors for cause, he did not attempt to strike either of them peremptorily. Neither did defense counsel request additional peremptory challenges as a result of the denial of his cause challenge. In fact, no request for additional peremptories was denied by the trial court. Therefore, Appellant cannot demonstrate reversible error resulting from the fact that Jurors Frazier and Sullen sat on his jury.

The Jenkins court went on to explain the difference between an ineffective assistance of counsel claim for failing to make a cause challenge versus the review of a denial of a cause challenge on direct appeal.

> Typically, on direct appeal, only fundamental errors may be corrected in the absence of a timely objection at trial. Much has been written trying to characterize a fundamental error. Fundamental error has been described as the type of error that "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Rogers v. State, 783 So. 2d 980, 1002 (Fla. 2001); Kilgore v. State, 688 So. 2d 895, 898 (Fla. 1996). "Fundamental error has been defined as one that goes to the essence of a fair and impartial trial, error so fundamentally unfair as to amount to a denial of due process." Scoggins v. State, 691 So. 2d 1185, 1189 (Fla. 4th DCA 1997). A fundamental error so damages "the fairness of the trial that the public's interest

in our system of justice justifies a new trial even when no lawyer took the steps necessary to give a party the right to demand a new trial" on direct appeal. Hagan v. Sun Bank of Mid-Florida, 666 So. 2d 580, 586 (Fla. 2d DCA 1996), disapproved on other grounds by Murphy v. Int'l Robotic Sys., Inc., 766 So. 2d 1010 (Fla. 2000). In more mundane terms, a fundamental error is one where a judicial mind steeped in fairness reviews the facts and reflexively responds, "Outrageous!"

Proceedings under rule 3.850 are not to be used as a second appeal. See Medina v. State, 573 So. 2d 293, 295 (Fla. 1990). A lawyer's competence in failing to make a cause challenge should not be reviewed in a 3.850 proceeding in the same way that a denial of a cause challenge is reviewed on direct appeal. To do so is to undermine the trial process and to nullify the reasons for requiring a timely objection in the first place. Because a defendant must demonstrate prejudice in a 3.850 proceeding, post-conviction relief based on a lawyer's incompetence with regard to the composition of the jury is reserved for a narrow class of cases where prejudice is apparent from the record, where a biased juror actually served on the jury.

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Where a lawyer's incompetence involves the failure to exercise a cause challenge, the proper inquiry is not whether the trial court would have sustained the challenge had it been made at trial. The Singer test is not concerned with actual prejudice to a defendant. Singer's "any reasonable doubt" standard encourages some liberality in granting cause challenges at a time when the cost to the legal system is minimal.

After trial, the Strickland requirement of actual prejudice imposes a more stringent test before a new trial can be ordered for the failure to object to a person's service on a jury. It is whether the lawyer's failure to raise a challenge resulted in a biased juror serving on the jury. See Goeders v. Hundley, 59 F.3d 73, 75 (8th Cir. 1995) (holding that where a claim of ineffective assistance of counsel is grounded in the claim that counsel failed to strike a biased juror, a defendant "must show that the juror was actually biased against him"); Hughes v. United States, 258 F.3d 453, 458 (6th Cir. 2001) (citing

> Goeders). The nature of the juror's bias should be patent from the face of the record. Only where a juror's bias is so clear can a defendant show the necessary prejudice under Strickland, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694; accord Mickens v. Taylor, 535 U.S. 162, 152 L. Ed. 2d 291, 122 S. Ct. 1237, 1240 (2002).
>
> In this context, the search for a biased juror in a 3.850 proceeding is analogous to the search for fundamental error on direct appeal. The seating of a biased juror is the type of problem to which a trial judge must be sensitive, even in the absence of an objection. If an objection to a juror's qualifications can be waived by failing to make a timely objection, the error is not a fundamental one. And if a lawyer's "error" regarding a juror's qualifications is not so serious as to be the equivalent of fundamental error, then post-conviction relief is not appropriate.

See Jenkins, 824 So. 2d at 981-984.

Here, as in Jenkins, where the record failed to demonstrate that a biased juror sat on the jury, Appellant has failed to show that he suffered any prejudice. Thus, no relief is warranted.

B. Defense counsel's strategic decision to not pursue a voluntary intoxication defense fails to constitute ineffective assistance of counsel.

Based upon Appellant's purported substance abuse history, post-conviction counsel suggests that counsel was ineffective for not presenting a voluntary intoxication defense. However, defense counsel testified at the evidentiary hearing that this

defense was considered and rejected.

The defense strategy was that the Appellant did not commit the murder, that Robert Taylor killed the victim and was the leader of the gang. (PCR Vol. 7, 228, 258-259). Based upon that theory which was supported by physical evidence and the testimony of other gang members, Dvorak did not think it appropriate to present inconsistent theories to the jury. Also, Appellant's girlfriend made statements to the police and in deposition that Appellant was sober just before the murder. (PCR Vol. 7, 229). Further, the defense psychiatrist did not note any substance abuse at the time of the offense. Finally, Attorney Dvorak based his decision not to pursue the voluntary intoxication defense based upon conversations with Appellant himself. (PCR Vol. 7, 229). See Davis v. State, 28 Fla. L. Weekly S 835 (Fla. November 20, 2003), citing Stewart v. State, 801 So. 2d 59 (Fla. 2001)(counsel not ineffective for not pursuing a voluntary intoxication defense where conversations with the defendant persuaded him that an involuntary intoxication defense would not be appropriate).

Relying on State v. Williams, 797 So. 2d 1235 (Fla. 2001)(held that counsel not ineffective for failing to pursue voluntary intoxication defense when such defense inconsistent with defendant's theory of the case), the trial court properly

determined that counsel was not ineffective for presenting this defense which was clearly inconsistent with the strategy that Appellant was framed and did not commit the murder. Nevertheless, postconviction counsel now attempts to argue that the voluntary intoxication defense would have negated Appellant's intent to commit the robbery which led to the murder. This argument ignores the fact that no evidence suggested that Appellant was intoxicated at the time of the offense. This claim further ignores the fact that Appellant was responsible for numerous robberies of homosexuals which resulted in at least three other homicides. And, Stacy Sigler testified that Appellant was sober and planned the robbery with specific intent. Under these circumstances, the trial court properly found no ineffective assistance of counsel.

ISSUE II

WHETHER TRIAL COUNSEL WAS INEFFECTIVE DURING THE PENALTY PHASE.

A. Appellant failed to show that counsel was ineffective in failing to investigate and present mitigating evidence.

1. Mental health mitigation.

Appellant complains that counsel failed to conduct a reasonable mental health investigation. Again, the testimony presented at the evidentiary hearing belies this claim. Both defense attorneys testified that they made an informed, strategic decision not to call a mental health expert to testify for the defense. Under these circumstances, Appellant cannot second guess a strategic decision employed by defense counsel. See Griffin v. State, 866 So. 2d 1, 15-16 (Fla. 2003).

The defense retained a confidential mental health expert, Dr. Gutman, in preparation for Appellant's case. (PCR229-230). Dr. Gutman was retained to examine Appellant as to competency for trial and competency at the time of the offense. Attorney Dvorak also wanted to know everything he could concerning Appellant's background. (PCR Vol. 7, 230).

Dr. Gutman concluded Appellant was competent at the time of the offense and for trial purposes. Dr. Gutman could not say that there were any psychiatric reasons behind the killing. He found Appellant had antisocial behavior. Yet, Dr. Gutman did

support Dvorak's feeling that Appellant was easily led by others. (PCR Vol. 7, 232-233). Ultimately, Dvorak felt that calling a defense mental expert would have been devastating to the defense. (PCR Vol. 7, 264). After receiving Dr. Gutman's opinion, the defense did not seek a second opinion.

A former prosecutor, Attorney Cohen also represented Appellant at trial in the penalty phase. (PCR Vol. 9, 727-728, 738). Cohen confirmed that Dr. Gutman's report was negative toward Appellant, concluding that he was a sociopath. (PCR Vol. 9, 734). As a defense team, they were very concerned about virtually anything Dr. Gutman said in the report coming out at trial. (PCR Vol. 9, 734). Cohen made a notation in the file that Dr. Gutman indicated they would not want to call him to the stand, that he would hurt their case. After discussing the matter with Attorney Dvorak, their conclusion was clear that they were not going to call Dr. Gutman. (PCR Vol. 7, 288; Vol. 9, 735).

The testimony from both members of the defense team indicates that a strategic decision was made not to call a mental health expert in penalty phase. While Appellant attempts to blame this decision on a statement from Attorney Dvorak regarding whether negative information about Appellant's background would become available to the State, the direct

testimony of Dvorak and Attorney Cohen contradicts this assertion.

Ignoring the testimony of Attorneys Dvorak and Cohen regarding their decision not to call Dr. Gutman, Appellant attempts to argue that defense counsel was ineffective in failing to seek a second opinion. However, Appellant offers no authority for the proposition that effective representation requires a second opinion when a competent mental health expert provides a valid expert opinion. In fact, while Appellant called Dr. Berland to testify at the evidentiary hearing seemingly in support of this argument, Dr. Berland's testimony proved the point that negative information would have been heard by the jury had the defense presented a mental health expert.

Dr. Berland testified that he could not rule out a diagnosis of antisocial personality disorder for Appellant. (PCR Vol. 8, 516). He admitted Defendant had factors consistent with juvenile conduct disorder and an adult antisocial personality disorder which would be a lifestyle choice, as opposed to a biological malfunction in the brain. (PCR Vol. 8, 516). In fact, Dr. Berland went so far as to say that someone, like the Defendant, who was an energized antisocial would be more likely to adopt a high risk lifestyle. (PCR Vol. 8, 540).

In view of this testimony, Attorneys Dvorak and Cohen made

the correct decision not to call a mental health expert to testify. Where, as here, a strategic decision is employed by defense counsel, Appellant cannot second guess their strategy in postconviction.

> Trial counsel is not deficient where he makes a reasonable strategic decision to not present mental mitigation testimony during the penalty phase because it could open the door to other damaging testimony. See Ferguson v. State, 593 So. 2d 508, 510 (Fla. 1992) (finding counsel's decision to not put on mental health experts to be "reasonable strategy in light of the negative aspects of the expert testimony" where experts had indicated that defendant was malingering, a sociopath, and a very dangerous person); see also State v. Bolender, 503 So. 2d 1247, 1250 (Fla. 1987) (holding that "strategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected"). Accordingly, we affirm the denial of relief on this claim.

See Griffin v. State, 866 So. 2d 1, 15-16. Similarly, Appellant's defense attorneys concluded that any mitigation offered by Dr. Gutman would be outweighed by the potentially damaging information concerning his antisocial personality. As such, Appellant has failed to show any deficient performance with respect to the strategic decision not to employ a mental health expert at penalty phase.

Finally, given that all three psychologists that evaluated Appellant concluded that he was antisocial, Appellant cannot show that a second opinion would have resulted in a more favorable expert opinion for him at the time of trial. The

three mental health experts include Dr. Gutman's opinion at trial, Dr. Berland's opinion at the evidentiary hearing, and the State's expert at the evidentiary hearing, Dr. Merin, who also concluded that Appellant was antisocial. (PCR Vol. 9, 611-614). Consequently, even if defense counsel was required to obtain a second opinion, no prejudice has been shown as a result of the failure to do so.

2. Family and childhood mitigation.

Appellant argues the lower court erred in failing to find that counsel's investigation into Appellant's childhood was deficient. While claiming that defense counsel's investigation was not thorough, Appellant failed to identify any specific deficiencies or specific witnesses or evidence relating to his childhood that should have been discovered.[1] Moreover, at the evidentiary hearing, Appellant presented no testimony, other than that from George Dufour who refused to cooperate with defense counsel at the time of trial, in support of this claim.

At the evidentiary hearing, Attorney Dvorak testified to his

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[1]As noted in Griffin v. State, 866 So. 2d 1, 9, "merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived," quoting Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990). Thus, in those instances where Appellant did not elaborate on his claims on appeal, this Court should not look to his postconviction motion for explanation.

investigation into Appellant's childhood. The defense spoke to friends and the Defendant's brother, Gary. He had difficulty with the family, however. (PCR Vol. 7, 234). Dvorak specifically spoke to George Dufour who did not want to get involved. (PCR Vol. 7, 234-235). Another member of the defense team also tried to contact George Dufour and did not succeed. Moreover, the Defendant himself did not want the defense to get his family involved. (PCR Vol. 7, 235). The Defendant consistently instructed Dvorak that he did not want his family involved in the penalty phase. (PCR Vol. 7, 277). The Defendant was not happy when Dvorak got his brother Gary involved. And, George Dufour had nothing to do with Dvorak when he was contacted. (PCR Vol. 7, 278).

Attorney Dvorak did receive school records and Department of Correction records from Appellant's prior incarcerations. (PCR Vol. 7, 236). Notations in the defense file also confirmed that background information was obtained from Appellant. (PCR Vol. 7, 289).

Dvorak believed that Appellant had suffered some sort of traumatic sexual experience in his past. While unsure of the source, Dvorak learned that Appellant had been pimped to homosexuals in his teens by his brother George. However, no one wanted to discuss the matter with Dvorak. (PCR Vol. 7, 237,

279).

Attorney Vose's testimony corroborated Dvorak's assertion that George Dufour was not interested in helping Appellant's defense. At the time of Appellant's trial, Vose was general counsel for the Sheriff's Office. (PCR Vol. 9, 720). In 1984, Appellant was refusing to eat. Vose was contacted by the jail to try to figure out whether to file a motion to force Appellant to take nourishment. (PCR Vol. 9, 721). Vose then contacted Defendant's brother, George Dufour, with whom he had attended law school, and told him that Appellant was trying to kill himself by not eating. George Dufour responded that as far as he was concerned his brother could die, that the rest of the family was sick of him and he did not want anything to do with it. (PCR Vol. 9, 723-724).

Consequently, where any alleged deficiency would be directly "...attributable to an uncooperative defendant and unwilling, absent or recalcitrant witnesses...," defense counsel conducted a reasonable background investigation. See Hodges v. State, 28 Fla. L. Weekly S475 (Fla. June 19, 2003). As such, Appellant has failed to demonstrate deficient performance on the part of defense counsel with regard to this claim.

Notably, Appellant neglects to mention that the defense did call Appellant's brother Gary Dufour to testify in the original

penalty phase. Gary testified to much of the same information that George Dufour provided at the evidentiary hearing concerning their family background.

Gary told the jury that their father was a truck driver who did not work steady all the time. Therefore, they moved quite a bit. Their father was also a mean and aggressive alcoholic. The father was irritable and drank a lot and they never had any money. (PCR Vol. 11, 1584). He took out his frustrations on the family, especially on Appellant who was the youngest. Appellant was physically beaten by their father. (PCR Vol. 11, 1585). Appellant did poorly in school as a result of their disruptive family life. (PCR Vol. 11, 1587).

Ultimately, Gary's testimony at the penalty phase virtually mirrored that testimony provided by George Dufour at the evidentiary hearing concerning their family history. Thus, even if George Dufour had been willing to testify at the time of trial, Appellant can demonstrate no prejudice. The jury unanimously recommended death, and the trial court found the following aggravators: 1) prior conviction for another capital felony, 2) the murder was committed while the Defendant was engaged in the commission of an armed robbery, 3) the murder was committed for the purpose of avoiding or preventing arrest, and 4) the murder was cold, calculated and premeditated. (TR2720-

2721). Under these circumstances, it would be highly unlikely that any cumulative testimony from George Dufour regarding Appellant's upbringing would have led to a life recommendation. See Hodges, 28 Fla. L. Weekly S475.

3. Drug and alcohol abuse.

Again, Appellant complains that trial counsel's investigation into his history of drug and alcohol abuse was deficient. However, on appeal, Appellant's argument focuses only on whether the trial court applied the correct rule of law in denying this postconviction claim. According to Appellant, the trial court's ruling ignored case law establishing that evidence of alcoholism and chronic substance abuse is valid mitigation. (IB 50).

In denying this claim, the trial court's Order reads as follows:

> Defendant contends that defense counsel failed to present mitigating evidence of Defendant's chronic substance abuse and its effect on him. At the hearing, Defendant presented the testimony of several expert witnesses. The State points out that the jury was told of Defendant's extensive alcohol and drug history during trial. (R.1588). As the State argues, presenting additional evidence of Defendant's drug and alcohol abuse "does not create any sympathy for him. The use of drugs and alcohol was simply an expression of his problematic personality disorder." Moreover, none of the experts could confirm that his history deprived Defendant of the ability and rationality to plan the robbery and murder in the instant case. Thus, this claim does not warrant relief. (PCR Vol. 11, 1140-1141).

From this language, Appellant concludes that the trial court improperly applied the M'Naughten rule regarding whether a defendant is legally insane rather than properly considering the statutory mitigators related to mental condition.

First, Appellant's argument must fail where the cases he relies upon, Mines v. State, 390 So. 2d 332 (Fla. 1980), and Ferguson v. State, 417 So. 2d 631 (Fla. 1982), deal with error resulting from an improper sentencing order. Here, we are dealing with an order denying postconviction relief which is factually distinguishable from a trial court's decision in an initial sentencing order. Here, the trial court is simply determining whether counsel's performance with respect to presenting Appellant's substance abuse history was deficient, and, if it was deficient, whether such deficiency prejudiced the outcome of the proceedings. At this stage, this Court is not concerned with whether mitigation was properly weighed with the potential aggravators in the same manner as it would on review from an initial sentence imposing death.

This case is further distinguishable from Mines and Ferguson. In Mines and Ferguson, the trial court ignored clear evidence of the defendants' substantial mental conditions at the time of the offenses. See Mines, 390 So. 2d 332, 337; and Ferguson, 417 So. 2d 631, 638. In contrast, no such clear

evidence exists regarding Appellant's mental condition. Moreover, where, as here, the defendant's ability to differentiate between right and wrong and to understand the consequences of his actions is relevant to the establishment of the statutory mitigators dealing with mental state, such a consideration may be used to reject those mitigators. See Ponticelli v. State, 593 So. 2d 483, 490 (Fla. 1991). Analogous to the trial court's rejection of statutory mental mitigation in Ponticelli, the instant trial court rejected this claim of ineffective assistance on the basis of Appellant's ability to know right from wrong, as well as other factors.

The trial court also noted that the jury had heard evidence of Appellant's history of substance abuse. Testimony from Gary Dufour, Stacy Sigler and Raymond Ryan established that Appellant had a serious history of abusing drugs and alcohol which began at a young age. Thus, any additional testimony resulting from Appellant's self serving statements to his own experts would have been cumulative and could not have effected the verdict. Thus, the trial court properly denied this claim.

4. Prison record.

Next, Appellant maintains that trial counsel was ineffective for failing to put on evidence of his good prison record as mitigation. First, it should be noted that trial counsel did

present the testimony of Sister Cathleen Spurlin, who ministered to Appellant while he was in prison, as evidence of Appellant's newfound faith. (TR Vol. 11, 23-30). However, Appellant suggests that his records from his incarceration at Lantana Correctional Institute should have been introduced as mitigation. This claim is without merit.

Initially, Appellant's Initial Brief fails to identify any information from the Lantana records in support of the allegation that he behaved well in prison. In fact, Appellant's Motion for Postconviction Relief filed in the Circuit Court fails to identify any substantive information concerning his behavior at Lantana. (PCR, Vol. 10, 768). Moreover, at the evidentiary hearing, Appellant completely failed to question Attorney Dvorak regarding his time at Lantana. Thus, this Court has no evidence to substantiate a claim that counsel was ineffective for failing to present this information as mitigation. This claim should, therefore, be deemed waived.

What does appear in the record regarding Appellant's time in Lantana comes from the State's Response to the Motion for Postconviction Relief. The State noted that entering evidence of Appellant's incarceration in Lantana would have informed the jury of another prior offense, thus extending Appellant's criminal history even further, which would not otherwise have

been admissible. (PCR Vol. 10, 855). The State attached the Lantana records as exhibits to the Response, and further highlighted that the records actually contain evidence of bad behavior on Appellant's part. Specifically, Appellant was denied gain time as a result of a disciplinary report, was arrested for violating parole while in possession of a deerslayers knife, and lost visiting privileges after improperly receiving money from visitors. (PCR Vol. 10, 855, 879, 883-885).

Appellant also admits that the State possessed evidence that he had behaved criminally while in jail awaiting trial. (IB 55). This admission alone factually contradicts Appellant's claim of good behavior while in prison. This is especially true in view of the fact that Appellant completely failed to question Attorney Dvorak at the evidentiary hearing concerning the substance of any prison records and further fails to argue on appeal what evidence should have been pursued by defense counsel. Thus, the record before this Court is completely devoid of any new evidence to sustain this claim of good behavior. And, in fact, the evidence which is available shows that Appellant was planning escape attempts while in custody at the time of trial. See Dufour, 495 So. 2d at 162. Under these circumstances, no deficient performance on the part of defense

counsel has been shown.

Moreover, even if counsel should have pursued this avenue of nonstatutory mitigation, no prejudice resulted. Any minimal evidence of Appellant's good behavior in prison, when viewed with his escape attempt and other evidence of poor behavior in prison, could not possibly outweigh the statutory aggravators found by the trial court. Therefore, this claim was properly denied.

B. Trial counsel's decision to call Stacey Sigler as a mitigation witness failed to constitute deficient performance where counsel made an informed, strategic decision to call her.

Appellant claims that counsel was ineffective in calling Sigler because it opened the door to some negative testimony about him. However, Attorney Dvorak specifically testified that he considered that possibility. Ultimately, he concluded that having a person who testified against the Defendant in the guilt phase argue that he did not deserve the death penalty would have tremendous psychological impact on the jury. (PCR Vol. 7, 240-241). Dvorak further felt that he could minimize any negative information from Sigler better than he could have dealt with the same evidence from an expert. (PCR Vol. 7, 241). As such, Appellant cannot properly challenge an informed, strategic decision of counsel in the hindsight of postconviction. See e.g., Howell v. State, 2004 Fla. Lexis 661 (Fla. May 6, 2004).

Additionally, much of the information contained in Sigler's testimony, such as Appellant's bad childhood, the fact that his brother was gay, and that he used cocaine and alcohol, came out at trial through the testimony of Gary Dufour. Most notably, this same information was also introduced by Appellant through the testimony of George Dufour at the evidentiary hearing as testimony which should have been admitted in mitigation. Thus, it makes no sense that Appellant would now argue that this information should not have come in at trial through Sigler, but should have come in through George Dufour. Consequently, this claim was properly denied.

C. Counsel was not ineffective for failing to object to improper hearsay testimony.

Appellant raises this claim in reference to the testimony of Thomas Mayfield, the Mississippi prosecutor who prosecuted Appellant for another murder. Mayfield's testimony, in part, summarized the testimony of the pathologist who testified at the Mississippi trial. According to Appellant, trial counsel did not effectively object to this testimony. This claim is baseless.

First and foremost, Attorney Cohen ***did object*** to this testimony. In fact, counsel objected in detail, as follows:

> Q: Could you summarize for us the pathologist's description of how the wounds were inflicted?

> Mr. Cohen: I will object to hearsay. If the pathologist is here, fine, but I have no report. It's total rank hearsay.
>
> Mr. Tamen [the prosecutor]: On discovery, your Honor, he was provided with the transcript of the pathologist's testimony. Hearsay is admissible in a penalty hearing.
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> The Court: The objection is overruled. (TR1561).

Thus, Appellant's claim that counsel should have pointed out that a defendant should be accorded an opportunity to rebut any hearsay is wholly without merit. Counsel did point out that he had no report. And, the State further noted that the defense had been given the exact testimony which was being summarized. Under these circumstances, counsel made every effort to object. No deficiency in performance existed.

Moreover, this Court did consider this claim on direct appeal. The opinion noted that the circumstances of the Mississippi murder came in over objection. See Dufour, 495 So. 2d at 157. And, the opinion goes on to conclude that this argument was meritless. See id., at 163. No relief is warranted.

D. Counsel was not ineffective for failing to object to the prosecutor's penalty phase closing argument.

Appellant argues that the prosecutor's closing misled the jury regarding their requirement to weigh aggravators against the mitigators relevant to Appellant. As a result, Appellant claims counsel was ineffective for failing to object to the

State's closing. On postconviction, the lower court found that the comments were not objectionable. (PCR Vol. 11, 1142). The ruling should be affirmed.

Initially, the challenged comments were not objectionable. The reference to whether a life is worth a piece of jewelry was directly related to the aggravators involving during commission of a robbery and whether the crime was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. The comment also was a fair comment on evidence that Appellant committed the murder solely as part of his plan to rob the victim.

Even if the comments were objectionable, any error would have been harmless in view of the overwhelming evidence of Appellant's guilt. As such, any possible deficiency in counsel's performance would not have impacted the outcome of the proceedings.

E. Counsel was not ineffective for failing to object to the penalty phase instruction regarding whether the crime was committed for the purpose of avoiding a lawful arrest.

Appellant argues the jury was improperly instructed on the avoid arrest aggravator. However, on direct appeal, this Court struck the avoid arrest aggravator, but upheld the death penalty. As noted in the opinion, the court below found three proper aggravators and no mitigating circumstances. As such,

the death penalty was properly imposed. See Dufour, 495 So. 2d at 163-164. Thus, absolutely no prejudice can be shown as a result of the giving of the avoid arrest instruction.

F. No cumulative error occurred with respect to trial court's performance.

As each of Appellant's claims of ineffective assistance have been shown to be without merit, no cumulative error has been demonstrated.

ISSUE III

NO ERROR OCCURRED WITH RESPECT TO THE EXPERT MENTAL HEALTH ASSISTANCE PROVIDED TO APPELLANT AT TRIAL.

Appellant argues that he did not receive competent mental health assistance prior to his trial as is required by Ake v. Oklahoma, 470 U.S. 68 (1985). First, to the extent that Appellant is asserting a true Ake claim, and is not simply reasserting his ineffective assistance of counsel claim, that claim is procedurally barred.[2] See Moore v. State, 820 So. 2d 199, 203, n.4 (Fla. 2002)(affirming summary denial of an Ake claim in a post-conviction motion because Ake claims should be raised on direct appeal and therefore, are procedurally barred in post-conviction litigation). Alternatively, should this Court determine that the procedural bar is inapplicable to this case, the State will address the substantive argument raised by Appellant. Notably, Appellant does not argue that counsel was ineffective with respect to retention of a mental health expert. Rather, Appellant simply challenges Dr. Gutman's findings as compared to the defense experts presented in postconviction.

Thus, despite defense counsels' testimony that they made a strategic decision with regard to mental mitigation, Appellant

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[2]Procedurally barred claims are reviewed de novo. Questions of fact are reviewed by the competent, substantial evidence standard.

now argues that Dr. Gutman provided inadequate mental health assistance. However, a mental health examination is not inadequate simply because a defendant is later able to find experts to testify favorably in his behalf. See Jones v. State, 732 So. 2d 313, 320 (Fla. 1999), citing Correll v. Dugger, 558 So. 2d 422, 426 (Fla. 1990); and State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987). A new sentencing hearing is mandated only where the mental examinations were so grossly insufficient that they ignore clear indications of either mental retardation or organic brain damage. See Sireci, 502 So. 2d 1221, 1224.

With respect to the testimony offered on the issue of Appellant's health, the lower court found as follows:

> Defendant argues that the psychiatric evaluation he received by Dr. Gutman was insufficient because it failed to reveal several mental problems from which Defendant allegedly suffers. The State responds that Defendant received the mental health expert assistance "normally provided in the period of time" when he was prosecuted. At the evidentiary hearing, Dr. Merin indicated that he conducted several hours of extensive neuropsychological testing of Defendant. He also opined that Dr. Gutman's evaluation was characteristic of those done during the relevant time period. Ultimately, Dr. Merin made essentially the same conclusions of Defendant's mental capabilities as Dr. Gutman had prior to Defendant's trial.
>
> Having listened to the testimony of the experts presented by Defendant, the Court acknowledges that some of their opinions of Defendant's mental state differed from those of Dr. Merin and Dr. Gutman. However, expert opinions will rarely be in agreement on all points. This Court concludes that Dr. Gutman's evaluation was adequate and that there is no reasonable probability that the outcome of Defendant's

> trial court have different [sic] had another expert been consulted. (PCR Vol. 11, 1144-1145).

Ake requires that a defendant have access to a "competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." 470 U.S. 68, 83. Appellant was afforded such assistance. While the defense experts who testified at the evidentiary hearing offered some additional diagnoses, none testified that Dr. Gutman's conclusions were in error. In fact, Dr. Berland testified that he had no basis to rule out a diagnosis of antisocial personality disorder. (PCR Vol. 8, 516). He admitted Defendant had factors consistent with juvenile conduct disorder and an adult antisocial personality disorder which would be a lifestyle choice, as opposed to a biological malfunction in the brain. (PCR Vol. 8, 516).

Under these circumstances, no constitutional deficiency was shown in the mental health assistance provided to Appellant at trial, nor has Appellant shown any deficiency on the part of counsel in hiring or providing information to their expert. Dr. Gutman performed all the essential tasks required by Ake, and Appellant has not shown any violation. See Johnson v. State, 769 So. 2d 990, 1005 (Fla. 2000).

No expert testified that Appellant was mentally retarded. In fact, no expert testified that Appellant definitively

suffered any brain damage. Furthermore, the experts disagreed as to the amount, if any, of impairment to Appellant's thought processes. As such, a new sentencing hearing is not mandated where reasonable experts disagree as to whether Appellant has any brain damage. Under such circumstances, it cannot be said that the examinations conducted prior to trial "were so grossly insufficient that they ignore[d] *clear* indications of ... brain damage." See Sireci, 502 So. 2d at 1224 (emphasis added).

Again, even if counsel was deficient, no prejudice resulted. The aggravators outweighed any non-statutory or statutory mental health mitigation. Morever, the evidence presented failed to rise to the level of any statutory mitigator.

Only two statutory mitigators are possibly relevant to the Court's analysis: (1) whether Appellant acted under extreme mental or emotional disturbance at the time of the offense, or (2) whether Appellant had to the capacity to understand the criminality of his conduct or conform his conduct to the requirements of law. Dr. Merin testified that neither of these statutory mitigators applied. (PCR Vol. 9, 610-611).

Even Dr. Berland was equivocal on whether Appellant was under the influence of an extreme mental or emotional disturbance. Dr. Berland admitted he received no useful information regarding whether the Defendant was under the

affects of drugs or alcohol at the time of the crime. (PCR Vol. 8, 484-485). Thus, he gave the equivocal conclusion that if the Defendant had been under the influence of drugs or alcohol in conjunction with his mental illness, he "...would likely have been under the influence of extreme mental or emotional disturbance." (PCR Vol. 8, 485-486). The experts' testimony alone does not require a finding of extreme emotional disturbance. See Provenzano v. State, 497 So. 2d 1177, 1184 (Fla. 1986).

With respect to whether the Defendant suffered some substantial impairment in his capacity to conform his conduct to the requirements of law, Dr. Berland stated there was no evidence of such an impairment. (PCR Vol. 8, 487). Dr. Berland also testified that he had no reason to question Defendant's ability to recognize the wrongfulness of his acts. (PCR Vol. 8, 542).

Dr. Lipman, the defense neuropharmacologist, testified that based on the amount of drugs Defendant was using, organic brain impairment was likely. (PCR Vol. 7, 330). However, this opinion was also equivocal. Dr. Lipman further admitted that he could only testify in generalizations as to the effects of drug abuse where the specifics of the offenses were in dispute. (PCR Vol. 8, 381-382).

Finally, defense psychologist Dr. Carter rendered an opinion on whether Defendant met the statutory mitigator of an extreme mental or emotional disturbance at the time of the incident. However, this opinion can be of little value where Dr. Carter explained that she was retained specifically to determine if Defendant was sexually abused as a child or adolescent and to see if those experiences impacted his development and behavior. (PCR Vol. 8, 418-419). Additionally, Dr. Carter admitted her opinions relating to the statutory mitigators were limited because she could not say to what extent Defendant's substance abuse influenced him in committing the murder nor could she say whether his capacity to appreciate the wrongfulness of his conduct was impaired when he committed the murder. (PCR Vol. 8, 454).

In conclusion, the trial court properly determined that Defendant received competent mental health expert assistance. Thus, no relief is warranted.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT THE OPPORTUNITY TO INTERVIEW THE JURY.

Appellant claims the trial court erred in denying his request to interview the jury relating to several incidents which occurred during trial. In order to be entitled to juror interviews, a party must present "sworn allegations that, if true, would require the court to order a new trial because the alleged error was so fundamental and prejudicial as to vitiate the entire proceedings." See Johnston v. State, 841 So. 2d 349, 357 (Fla. 2002), quoting Johnson v. State, 804 So. 2d 1218, 1225 (Fla. 2001). Appellant has failed to identify any possible error so egregious as to vitiate the entire proceedings. It is entirely speculative to presume that any of the alleged events even affected the jury at all. Moreover, none of these incidents involve any allegation of misconduct on the part of the jury.

The alleged justification for seeking juror interviews revolves mainly around the jurors' perception of events surrounding trial. Appellant argues that the fact he was in shackles during trial, that the victim's sister became emotional on the stand, that witness Raymond Ryan testified that Appellant "liked guys," and that a juror was excused because her husband

received a strange phone call should have led the lower court to permit juror interviews. (IB73-74). This argument fails to provide adequate support for a request to interview the jury.

Juror interviews are not permitted relative to any matter that inheres in the verdict itself and relates to the jury's deliberations. To this end, any jury inquiry is limited to allegations which involve an overt prejudicial act or external influence. See Reaves v. State, 826 So. 2d 932 (Fla. 2002) (citations omitted). Appellant has pointed to no overt prejudicial act. And, arguably, the only possible external influence would be the phone call to the juror. However, this Court dealt with that issue on direct appeal, as follows:

> In his eleventh point on appeal, appellant contends that the trial court erred in denying appellant's motion for mistrial after the jury learned that one juror had received a "strange" phone call and been dismissed. The caller dialed the number, asked if "Mr. Girdner", the juror's husband -- not the juror -- was in, and hung up. Although the phone call could not be linked to the trial in any sense, the trial court, pursuant to defense counsel's urgings, in an "abundance of caution" dismissed the juror from service immediately prior to closing arguments.
>
> Contrary to the court's instruction, the dismissed juror mentioned the phone call to other members of the jury. The court then called the jury in, explained the circumstances surrounding the call and the juror's dismissal, and assured the jury that the call had no connection with the trial and that their phone numbers were not made public. Finally, the court determined that the jurors had no reservations about their further service.
>
> Determinations of whether substantial justice requires a mistrial and related questions involving

> juror conduct are both lodged within the sound discretion of the trial court. Doyle v. State, 460 So.2d 353 (Fla. 1984). In light of the tenuous connection between the trial and the call, the court's instruction to the jury was sufficient to cure any taint which may have resulted from the jurors' knowledge of the call. Clark v. State, 443 So.2d 973 (Fla. 1983), cert. denied, 467 U.S. 1210, 104 S. Ct. 2400, 81 L. Ed. 2d 356 (1984); State v. Tresvant, 359 So.2d 524 (Fla. 3d DCA 1978), cert. denied, 368 So.2d 1375 (1979). We therefore reject appellant's contention.

See Dufour, 495 So. 2d at 162-163. As such, the claim was properly denied.

ISSUE V

WHETHER THE TRIAL COURT MISLED THE JURY REGARDING THEIR RESPONSIBILITY FOR THEIR ROLE IN THE SENTENCING PROCESS.

Appellant argues the trial court's comments violated Caldwell v. Mississippi, 472 U.S. 320 (1985), by minimizing the jury's role in the sentencing process. This claim was properly summarily denied as follows:

> First, this issue could have and should have been raised on direct appeal. Brown v. State, 755 So. 2d 616,621 n.7 (Fla. 2000). On direct appeal, the Supreme Court addressed several sentencing issues and Defendant's objections to the sentencing instructions.
>
> Second, the State responds that this claim lacks merit because the Florida Supreme Court has recently held that a claim that the standard jury instructions that refer to the jury as advisory and that refer to the jury's verdict as a recommendation, in violation of Caldwell, is without merit, in light of the United States Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000). See Card v. State, 803 So. 2d 613 (Fla. 2001). This Court agrees. Thus, this claim is summarily denied. (PCR1145-1146).

Notably, this claim is procedurally barred. An allegation arguing a violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985), is an issue which must be raised on direct appeal. This Court has repeatedly rejected claims that defense counsel's failure to properly litigate this issue during the trial and direct appeal amount to ineffective assistance of counsel. See, Johnston v. Dugger, 583 So. 2d 657, at 662-663, n. 2 (Fla. 1991); Gorham v. State, 521 So. 2d 1067,

at 1070 (Fla. 1988); Rose v. State, 617 So. 2d 291, at 297 (Fla. 1993); Mendyk v. State, 592 So. 2d 1076, at 1080-1081 (Fla. 1992); Provenzano v. Dugger, 561 So. 2d 541, at 545 (Fla. 1990). Thus, the trial court accurately determined that this claim is both procedurally barred and substantively without merit. No relief is warranted.

ISSUE VI

WHETHER THE STATE IMPROPERLY DESTROYED PHYSICAL EVIDENCE.

Appellant claims the State destroyed exculpatory evidence consisting of a stick with hair on it. Allegedly, this hair could have shown that someone other than Appellant was at the crime scene and committed the murder instead of Appellant. It appears that DNA testing revealed that the hair on the stick was not Appellant's. (PCR Vol. 10, 788-793). Based on this information, Appellant claims the evidence was exculpatory because it could have proven that a third person, in addition to Appellant and the victim, was present at the murder scene. Specifically, Appellant claims the hair evidence could have proven that Robert Taylor was at the scene. Factually, this claim ignores Appellant's confession to the murder. Moreover, as noted by the lower court, Appellant's supposition that the hair belonged to Robert Taylor is pure speculation. (PCR Vol. 11, 1148).

Legally, this claim also fails. In order to prevail, Appellant was required to show bad faith on the part of the police. See Kelley v. State, 569 So. 2d 754, 755 (Fla. 1990), citing Arizona v. Youngblood, 488 U.S. 51 (1988)(unless defendant shows bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a

denial of due process). Where the testimony at the evidentiary hearing established that the State failed to destroy the hair as an act of bad faith, the trial court properly denied the claim.

Neither prosecutor had any memory of a stick being a part of the evidence in this case. (PCR Vol. 9, 656, 691). While documents showed that the lead detective authorized the destruction of the stick, she had no recollection of the destruction. (PCR710-712). Under these circumstances, Appellant failed to establish bad faith on the part of law enforcement regarding the destruction of the stick.

Nevertheless, Appellant attempts to rely on Guzman v. State, 868 So. 2d 498 (Fla. 2003), to argue that because hair from the stick was tested by the State, the State breached a known duty by destroying the stick. In Guzman, the defendant claimed he was deprived of due process by the State's bad faith destruction of a clump of hair found on the back of the thigh of the victim, Colvin, at the murder scene.

> Guzman assert[ed] that the hair was potentially exculpatory evidence because, if DNA testing showed that the hair was not Guzman's or Colvin's, this would show that someone other than Guzman killed Colvin. Guzman argue[d] that the State's bad faith [was] established by the destruction of evidence without a written request or court order, in violation of the Daytona Beach Police Department's rules and procedures....

868 So. 2d at 509.

Here, Appellant claims that the fact that the State tested the hair found on the stick rendered the evidence exculpatory. In making this argument, Appellant relies on language from the Guzman opinion which noted:

> Evidence that has not been examined or tested by government agents does not have "apparent exculpatory value" and thus cannot form the basis of a claim of bad faith destruction of evidence. See id. at 57 (rejecting a due process claim based on the government's failure to preserve evidence "of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant"); see also King v. State, 808 So. 2d 1237, 1242 (Fla. 2002) (holding that a defendant failed to show bad faith on the part of the State in destroying hair and tissue evidence, in part because the defendant failed to show the police made a "conscious effort to prevent the defense from securing the evidence"); Merck v. State, 664 So. 2d 939, 942 (Fla. 1995) (holding that the defendant failed to show bad faith in a police detective's failure to preserve a pair of pants found at a crime scene, because the detective believed they did not have evidentiary value).

868 So. 2d at 509.

However, the mere fact that the hair was tested does not change the testimony which established that law enforcement did not act in bad faith in destroying the evidence. Again, even with the testing that was done, nothing more can be said other than the hair could have been subjected to further testing with purely speculative results. Nor has any evidence established that the police made a conscious effort to prevent the defense from securing the evidence or that the police had any belief

that the stick had evidentiary value.

Under these circumstances, Appellant, like Guzman, has not shown that the stick would exonerate him or that law enforcement believed that it might. Thus, as in Guzman, the destruction of evidence that, if tested, might have exonerated Appellant is not sufficient under Youngblood to establish a due process violation. Appellant's claim of bad faith destruction of evidence must fail.

See Guzman v. State, 868 So. 2d 498 (Fla. 2003).

ISSUE VII

WHETHER THE FLORIDA DEATH SENTENCING STATUTE VIOLATES RING V. ARIZONA.

Candidly, Appellant concedes that this Court has held this claim has no merit. However, in an abundance of caution, the State will respond briefly to the argument. (The issue is more fully discussed in the State's Response to Petition for Habeas Corpus.)

This Court has repeatedly rejected postconviction challenges to section 921.141 based on Apprendi v. New Jersey, 530 U.S. 466 (2000) and Ring v. Arizona, 122 S.Ct. 2428 (2002). See Zakrzewski v. State, 866 So. 2d 688 (Fla. 2003), citing e.g., Wright v. State, 857 So. 2d 861 (Fla. 2003); Jones v. State, 855 So. 2d 611 (Fla. 2003); Chandler v. State, 848 So. 2d 1031, 1034 n.4 (Fla. 2003).

In addition, Appellant's prior violent felonies exempt this case from the requirement of jury findings on any fact necessary to render a defendant eligible for the death penalty. See Zakrzewski, 866 So. 2d 688, citing Duest v. State, 855 So. 2d 33 (Fla. 2003); see also Doorbal v. State, 837 So. 2d 940, 963 (Fla.) (stating that prior violent felony aggravator based on contemporaneous crimes charged by indictment and on which defendant was found guilty by unanimous jury "clearly satisfies the mandates of the United States and Florida Constitutions"),

cert denied, 156 L. Ed. 2d 663, 123 S. Ct. 2647 (2003).

Finally, even if Ring did apply to Florida's capital sentencing scheme, it is not retroactive under the principles of Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980). Pursuant to Witt, Ring is only entitled to retroactive application if it is a decision of fundamental significance, which so drastically alters the underpinnings of Dufour's death sentence that "obvious injustice" exists. See New v. State, 807 So. 2d 52 (Fla. 2001). In determining whether this standard has been met, this Court must consider three factors: the purpose served by the new case; the extent of reliance on the old law; and the effect on the administration of justice from retroactive application. See Ferguson v. State, 789 So. 2d 306, 311 (Fla. 2001). Application of these factors to Ring, which did not directly or indirectly address Florida law, offers no basis for consideration of Ring in this case. Compare Cannon v. Mullin, 297 F.3d 989 (10th Cir. 2002) (rejecting the claim that Ring is retroactive in federal courts.) But see Windom v. State, 29 Fla. L. Weekly S 191 (Fla. May 6, 2004)(J. Cantero, specially concurring)(Ring does not apply retroactively). Thus, no relief is warranted.

ISSUE VIII

WHETHER THE JURY INSTRUCTIONS RELATING TO THE AGGRAVATORS WERE UNCONSTITUTIONAL.

Again, Appellant concedes these arguments are without merit. However, the State will address them as follows.

A. During the commission of a felony instruction.

Appellant argues that this aggravator unconstitutionally applies to every felony murder. This Court has repeatedly rejected the argument that the murder in the course of a felony aggravator is an unconstitutional automatic aggravator. See Reed v. State, 29 Fla. L. Weekly S156 (Fla. April 15, 2004), citing Blanco v. State, 706 So. 2d 7, 11 (Fla. 1997). Thus, this claim is meritless and properly denied.

B. Cold, calculated and premeditated jury instruction.

Appellant seeks to benefit from the Espinosa[3] decision with respect to the instructions given on the CCP aggravator. However, this Court has held that, absent an objection at trial, this claim is procedurally barred. See Walton v. State, 847 So. 2d 438, 445 (Fla. 2003). As such, where Appellant concedes that counsel failed to object below, this claim was properly summarily denied.

C. Shifting the burden of proof during the penalty phase.

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[3]Espinosa v. Florida, 112 S.Ct. 2926 (1992).

This claim is procedurally barred. Challenges to the propriety of jury instructions must be presented at trial and on direct appeal. This Court has repeatedly rejected this exact claim as barred. Harvey v. Dugger, 656 So. 2d 1253, at 1255-1256 (Fla. 1995); Roberts v. State, 568 So. 2d 1255, at 1257-1258 (Fla. 1990); Engle v. Dugger, 576 So. 2d 696, at 701 (Fla. 1991). The claim is also meritless. Preston v. State, 531 So. 2d 154, 160 (Fla. 1988); Arango v. State, 411 So. 2d 172, 174 (Fla.), cert. denied, 457 U.S. 1140 (1982). No relief is warranted.

D. Cumulative error.

Appellant argues that, cumulatively, the alleged errors in the jury instructions warrant relief. However, each of the claims is wholly without merit. Thus, no error occurred.

ISSUE IX

WHETHER THE RULES PROHIBITING JUROR INTERVIEWS ARE UNCONSTITUTIONAL.

Appellant next argues that the trial court erred in denying relief on his claim relating to the rules governing juror interviews. Appellant maintains that the rules are unconstitutional.

Initially, this claim is not appropriate for postconviction, since it does not attack the validity of the appellant's convictions or sentences. See Foster v. State, 400 So. 2d 1 (Fla. 1981). Even if the claim is considered, however, Appellant has not demonstrated that relief is warranted.

Florida Rule of Professional Conduct 4-3.5(d)(4) does not impose a blanket prohibition on Appellant's right to contact the jurors that deliberated his fate. It only restricts contact to circumstances where an attorney can demonstrate to the trial judge that he has reason to believe that grounds for a legal challenge to the verdict may exist. Even if these restrictions are construed to potentially impinge upon a constitutional right, the rule is valid because it serves vital governmental interests in protecting the finality of a verdict, preserving juror privacy, and promoting full and free debate during the deliberation process.

The United States Supreme Court has held that "long-

recognized and very substantial concerns" justify protecting jury deliberations from the intrusive inquiry which Appellant is seeking to conduct. See Tanner v. United States, 483 U.S. 107, 127, 107 S. Ct. 2739, 97 L. Ed. 2d 90 (1987). Federal courts have consistently upheld the federal restrictions on post-trial juror interviews against constitutional challenges. See United States v. Hooshmand, 931 F.2d 725, 736-737 (11th Cir. 1991); United States v. Griek, 920 F.2d 840, 842-844 (11th Cir. 1991). The reasoning of those cases applies equally well to Florida's rule restricting juror contact when considered in light of Florida's constitutional right of access to the courts, and demonstrates that Appellant is not entitled to relief on this issue.

ISSUE X

WHETHER APPELLANT IS ENTITLED TO A NEW TRIAL BASED ON CUMULATIVE ERROR.

Finally, Appellant asserts that the combined effect of all alleged errors in this case warrants a new trial and/or penalty phase. This cumulative error claim is not an independent claim, but is contingent upon Appellant demonstrating error in at least two of the other claims presented in his brief. For the reasons previously discussed, he has not done so. Thus, the claim must be rejected because none of the allegations demonstrate any error, individually or collectively. No relief is warranted.

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Marie-Louise Samuels Parmer, Assistant CCRC, and Leslie Anne Scalley, Assistant CCRC, Office of the Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, FL 33619-1136, this _____ day of May, 2004.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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