IN THE SUPREME COURT OF FLORIDA

ERNEST SUGGS

Appellant,

v. CASE NO. SC03-1330

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR WALTON COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FLORIDA STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Appellant, Ernest Suggs, raises fourteen claims in his appeal of the trial court's denial of his second amended motion to vacate his judgments of conviction and sentence to death. References to petitioner will be to "Suggs" or "Appellant," and references to respondent will be to "the State" or "Appellee."

The record on direct appeal in the instant case will be referenced as (TR) followed by the appropriate volume number and page number. Citations to the record in the instant post-conviction appeal will be referred to as (PCR) followed by the appropriate volume and page number. Citations to the two-volume transcript of the evidentiary hearing held on Suggs' motion for post-conviction relief will be referred to as (PCR EH) followed by the appropriate page number. Citations to the record evidence introduced at the evidentiary hearing will be referred to as (PCR Evd.) followed by the appropriate page number.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Suggs was charged, by indictment, on August 22, 1990, with one count of first degree murder, one count of robbery and one count of kidnapping.[1] The relevant facts concerning the August

[1] Suggs was also charged with possession of a firearm by a convicted felon but that charge was severed from the remaining charges.

6, 1990, murder of Pauline Casey are recited in this Court's opinion on direct appeal:

> . . . Pauline Casey, the victim, worked at the Teddy Bear Bar in Walton County. On the evening of August 6, 1990, the bar was found abandoned, the door to the bar was ajar, cash was missing from the bar, and the victim's car, purse, and keys were found at the bar. The victim was missing. Ray Hamilton, the victim's neighbor, told police that he last saw the victim shooting pool with an unidentified customer when he left the bar earlier that night. Based on Hamilton's description of the customer and the customer's vehicle, police issued a BOLO for the customer. Subsequently, a police officer stopped a vehicle after determining that it matched the BOLO description.
>
> The driver of the vehicle was identified as the appellant, Ernest Suggs. Although he was not then under arrest, Suggs allowed the police to search his vehicle and his home. While searching Suggs' home, the police found, in a bathroom sink, approximately $170 cash in wet bills, consisting of a few twenty-, ten-, and five-dollar bills and fifty-five one-dollar bills.
>
> Meanwhile, police obtained an imprint of the tires on Suggs' vehicle and began looking for similar tire tracks on local dirt roads. Similar tire tracks were found on a dirt road located four to five miles from the Teddy Bear Bar. The tracks turned near a power line, and the victim's body was found about twenty to twenty-five feet from the road. The victim had been stabbed twice in the neck and once in the back; the cause of death was loss of blood caused by these stab wounds. After the victim was found, Suggs was arrested for her murder.
>
> In addition to the cash and tire tracks, police obtained the following evidence connecting Suggs to the murder: one of the three known keys to the bar and a beer glass similar to those used at the bar were found in the bay behind Suggs' home; the victim's palm and fingerprints were found in Suggs' vehicle; and a serologist found a bloodstain on Suggs' shirt that matched the victim's blood. Additionally, after his

arrest, Suggs told two cellmates that he killed the victim.

In his defense, Suggs contended that he was framed and made the following claims: that he had small bills because his parents had paid him in cash for working on their dock; that the money was wet because he fell in the water while working on the dock; that other vehicles have tires similar to the tires on his vehicle; that the tires on his vehicle leave a specific overlap pattern because of the wear on them and that no such overlap pattern was found at the scene; that the underbrush on his vehicle did not match any brush from the area of the crime scene; that no fibers or hairs from the victim were found in his vehicle; that the fingerprints in his vehicle could have been left at any time before the day of the murder; that the enzyme from the blood stain on his shirt matches not only the victim but also 90% of the population; that the shirt from which the blood was taken was not properly stored and that the stain could come from any bodily fluid; that the tests performed on the blood stain produced inconclusive results, including the fact that the stain could have been a mixed stain of saliva and hamburger; that a news conference was held regarding his arrest twenty-four hours before the bay behind his house was searched, which provided ample time for someone to deposit the key and glass there; and that his two cellmates lied, gave inconsistent testimony, and received reduced sentences because of their testimony. Additionally, Suggs contended that both Ray Hamilton and Steve Casey, the victim's husband, could have committed the murder (with Casey having life insurance as a motive), and that those individuals were being pursued as suspects until his arrest, but as soon as he was arrested, police dropped their investigation of those suspects.

The State countered this defense by showing that the dock on which Suggs was purportedly working contained no new wood; that the tire tracks did in fact match Suggs' vehicle; and that the enzyme from the blood did not come from Suggs. Suggs was convicted of first-degree murder, kidnapping, and robbery.

> At the penalty-phase proceeding, one of Suggs' cellmates testified that Suggs told him he murdered the victim because he did not want to leave a witness. Additionally, the State entered into evidence a book entitled Deal the First Deadly Blow, which they had taken from Suggs' house. The State used this evidence to show that Suggs planned how he would kill the victim. The State also introduced evidence that Suggs was convicted of first-degree murder and attempted murder in 1979 and that he was on parole at the time of the murder in this case. Suggs produced evidence showing that he came from a good family; that he was a normal, happy child; and that he was a very hard worker.

Suggs v. State, 644 So.2d 64, 65-67 (Fla. 1994).

After the penalty phase, the jury recommended, by a seven-to-five vote, that Suggs be sentenced to death. The trial court found the State had proven seven aggravating circumstances beyond a reasonable doubt: (1) The capital felony was committed by Suggs while under sentence of imprisonment; (2) Suggs was previously convicted of another capital felony and a felony involving the use or threat of violence to the person; (3) the crime for which Suggs is to be sentenced was committed while he was engaged in the commission of the crime of kidnapping; (4) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest; (5) the capital felony was committed for pecuniary gain; (6) the capital felony was especially heinous, atrocious, or cruel; (7) the capital felony was a homicide and was committed in a cold, calculated, and

premeditated manner without any pretense of moral or legal justification.

The trial judge found one statutory mitigator and two non-statutory mitigators: (1) The capacity of Suggs to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (he had been drinking at the time of the incident); (2) Suggs' family background (he came from a good family); and (3) Suggs' employment background (he was a hard worker). In her sentencing order, the trial judge concluded the aggravating factors outweighed the mitigating factors, followed the jury recommendation, and sentenced Suggs to death.

On direct appeal, Suggs raised eight issues. He alleged: (1) a new trial is warranted because the trial judge erred in permitting a judge to testify on behalf of the State without first conducting a Richardson hearing; (2) the trial judge erred by denying Suggs' motion to suppress the evidence found at his home, claiming his initial detention by police was illegal and the consent form he signed agreeing to allow the law enforcement officers to search his home was improperly obtained; (3) the trial judge erroneously denied his motion for mistrial when the prosecutor, during opening statement, implied Suggs had been in prison before the murder; (4) the prosecutor’s arguments and

tactics deprived Suggs of a fair trial; (5) the evidence was insufficient to support Suggs' conviction for kidnapping because no evidence exists to support the charge he forcibly required the victim to leave the bar; (6) the trial judge erred in denying Suggs' motion to preclude the in-court identification of Suggs by the victims's neighbor, Ray Hamilton; (7) the trial judge erred in admitting into evidence the book entitled "Deal the First Deadly Blow"; (8) the trial judge erred by allowing the jury to consider certain evidence in aggravation and in instructing the jury on certain aggravating factors.[2] Suggs 644 So.2d at 67-70.

On September 1, 1994, this Court rejected Suggs' claims on direct appeal and affirmed his convictions and sentences for the first-degree murder of Pauline Casey, kidnapping, and robbery. Suggs v. State, 644 So.2d 64, 70 (Fla. 1994). Suggs filed a

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[2] Suggs alleged the prosecutor improperly elicited testimony during the penalty phase regarding witness elimination and nonviolent, uncharged offenses that Suggs had either committed or planned to commit, insufficient evidence existed to establish that Suggs set out to kill the victim to eliminate a witness; the jury instruction on heinous, atrocious, or cruel is invalid under Espinosa v. Florida, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992); the murder was not heinous, atrocious, or cruel because the victim had only two knife wounds of any significance and because it is uncertain whether the victim was in any pain or how long she lived after the attack; the murder was not cold, calculated, and premeditated; and the trial court improperly doubled aggravators by finding that Suggs committed the murder "to avoid detection" and "to avoid arrest."

Petition for Writ of Certiorari with the United States Supreme Court. The United States Supreme Court denied review on April 25, 1995, in Suggs v. Florida, 514 U.S. 1083 (1995).

On January 24, 1997, Suggs filed a motion for post-conviction relief raising twelve claims. On February 27, 1998, Suggs filed an amended motion to vacate his convictions and sentence. Suggs raised fifteen claims in his amended motion for post-conviction relief. On August 28, 2001, Suggs filed a second amended motion for post-conviction relief raising seventeen claims.[3]

On January 14, 2002, the trial court held a Huff[4] hearing on Suggs' second amended post-conviction motion. On May 14, 2002,

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[3] Between the time Suggs filed his first amended motion for post-conviction relief and his second amended motion for post-conviction relief, the trial judge (Judge Melvin) retired. Prior to her retirement, Judge Melvin held a Huff hearing on Suggs' first amended motion for post-conviction relief. On March 14, 2000, Judge Melvin issued an order granting Suggs an evidentiary hearing on four of his claims and summarily denying nine others. Two claims she dismissed without prejudice.

Because Judge Melvin retired after the Huff order was issued but before an evidentiary hearing was held on the motion, a successor judge, Judge Lewis Lindsey, was assigned to the case. Shortly thereafter, however, Judge Lindsey granted a motion for his disqualification because he had testified as a witness during Suggs' trial. Additionally, Suggs' collateral counsel moved to withdraw from the case and new collateral counsel was appointed. Newly appointed counsel filed a second amended motion and the court held both a Huff and evidentiary hearing on the second amended motion.

[4] Huff v. State, 622 So.2d 982 (Fla. 1993).

the court summarily denied most of Suggs' claims and denied two others without prejudice to amend the motion to sufficiently plead these claims. The court granted an evidentiary hearing, however, on seven of Suggs' claims.[5] After an evidentiary hearing conducted on January 23-24, 2003, the trial court entered an order on June 11, 2003, denying Suggs' motion for post-conviction relief. This is Suggs' appeal from the denial of that order.

SUMMARY OF THE ARGUMENT

Suggs raises fourteen claims:

1. The trial court properly found Suggs failed to demonstrate the State knowingly presented false or misleading testimony when James Taylor and Wallace (Wally) Byars took the witness stand at Suggs' trial and testified Suggs confessed to the murder of Pauline Casey. Suggs also failed to demonstrate the state withheld exculpatory Brady evidence. Trial counsel testified he received a copy of the allegedly withheld memorandum

[5] Suggs did not seek to amend his Rule 3.850 motion prior to the evidentiary hearing held in January 2003 in order to raise a Ring v. Arizona claim. Instead, he chose to raise a Ring claim for the first time in a petition for writ of habeas corpus now pending in this Court.

from the prosecutor. As the evidence established the State did not withhold the memorandum, Suggs failed to show a Brady violation.

2. The trial court properly found Suggs presented no competent evidence to show that law enforcement placed informants in Suggs' cell in order to deliberately elicit incriminating statements. Accordingly, Suggs failed to show counsel was ineffective for failing to raise a Massiah violation at trial. Suggs also failed to demonstrate counsel was ineffective for failing to insist on a Richardson hearing when the State called an unexpected witness to testify. Trial counsel testified that he knew of the witness before opening statements, had a chance to talk to him informally to learn what he would say on the stand, and was prepared for cross-examination. Counsel was not ineffective for failing to move for a mistrial when two jurors became ill during the medical examiner's testimony. Trial counsel testified he wanted warm human beings on the jury who would be more likely to show Suggs mercy if they got to a penalty phase. Suggs presented no evidence at the evidentiary hearing to demonstrate there was an alternate explanation for the presence of Pauline Casey's finger and palm print in Suggs' car. Suggs failed to show counsel was ineffective for failing to discover evidence that Suggs failed to show existed at the time of the

murder. Suggs failed to present any evidence at the evidentiary hearing that Steve Casey and Ray Hamilton's trial testimony was actually false. Trial counsel cannot be ineffective for failing to uncover nonexistent evidence. It was the trial judge who gave the jury the option for a read back of testimony. Trial counsel cannot be deemed ineffective for candidly informing the court that it was within the judge's discretion to grant the jury's request for a partial read back of trial testimony. Trial counsel was not ineffective for failing to object to the prosecutor's closing arguments at trial. Trial counsel established at an evidentiary hearing they had a reasoned tactical decision not to object to arguments that may have been objectionable. Failure to object to arguably objectionable closing argument is not ineffective if counsel makes a reasonable tactical decision as part of the overall defense strategy. Suggs is not entitled to relief for failure of counsel to insist on a mistrial when the prosecutor implied to the jury that Suggs had been in jail before the murder. Trial counsel asked for a mistrial which was denied. The error was preserved for appeal and decided adversely to Suggs.

3. Trial counsel testified he did not want to highlight Suggs' prior incarceration record because Mr. Suggs had already committed one murder and had gone to prison. Trial counsel

believed this prior murder conviction would likely send Suggs to the electric chair when considered along with the brutal murder of Pauline Casey. When an attorney makes a tactical decision not to present mitigating evidence of dubious value after a full investigation, counsel is not ineffective. This Court has already ruled the HAC instruction given to Suggs' jury was not the one struck down in Espinoza v. Florida. Suggs' CCP claim must fail because at the time of Suggs trial, the CCP instruction given was a valid instruction. Trial counsel cannot be deemed ineffective for failing to object to a standard jury instruction that had not been invalidated at the time of the defendant's sentencing or to anticipate changes in the law two years hence. Suggs' claim that trial counsel was ineffective for failing to investigate and present available mental health mitigation is without merit. Prior to trial, Suggs was evaluated by a court appointed mental health expert. After receiving a copy of the report, trial counsel decided not to use it because it would do more harm than good. When counsel pursues mental health mitigation and receives unusable or unfavorable reports, trial counsel is not ineffective for failing to present the expert's findings.

4. Suggs claims newly discovered evidence establishes that William (Alex) Wells confessed to killing Pauline Casey. The

only direct evidence of the alleged Wells' confession was the testimony of George Broxson, an inmate serving life in prison. William Wells testified at the evidentiary hearing he did not confess to George Broxson he murdered Pauline Casey and in fact that he did not kill her. The trial court found Broxson's testimony not to be credible. 5. While Suggs was absent from a pre-trial conference at which counsel agreed three prospective jurors were subject to challenge for cause as matter of law, Suggs was subsequently brought into the conference, fully briefed on the reasons for the excusals, and given an opportunity to discuss the challenges with both the court and his counsel. Suggs has failed to show, or even assert, how he could have made a meaningful contribution to counsel's legal arguments during these preliminary proceedings.

6. Suggs claim that both he and state witness Wally Byars were represented by Assistant Public Defender (APD) Mooneyham at a time Byars claims Suggs made incriminating statements to him is without merit. Mr. Mooneyham did not actually represent Suggs at all, beyond filing two boilerplate pleadings shortly after his arrest. Suggs was actually represented in the initial stages of trial preparation by APD Earl Loveless. Any conflict created by representation of Byars and Suggs by the same Public Defender's Office was cured when one year before trial Suggs hired private

counsel and was represented by those privately retained trial counsel through trial.

7. Suggs improperly raises the same issues in issue seven as he did in other substantive claims in his initial brief.

8. On direct appeal, this Court denied Suggs' challenge to the search of his home. This Court found that Suggs voluntarily agreed to allow officers to search his home and car. Because this claim was raised on direct appeal and decided adversely to Suggs, his claim is procedurally barred. Additionally, any challenge to the warrant's specificity would not have resulted in the suppression of the evidence seized from Suggs' home and car.

9. This claim is procedurally barred. On direct appeal, Suggs challenged the constitutionality of the HAC aggravator based on the United States Supreme Court's ruling in Espinosa v. Florida, 505 U.S. 1079 (1992). This Court ruled the HAC instruction given in Suggs' case was not the invalid instruction at issue in Espinosa. Suggs' claim concerning the CCP instruction and proportionality are likewise procedurally barred. On direct appeal, this Court ruled the evidence was sufficient to support the trial judge's finding that the murder of Pauline Casey was cold, calculated, and premeditated. When this Court unanimously affirmed Suggs' sentence to death, it determined his death sentence was proportional.

10. This claim is procedurally barred. A claim attacking the constitutionality of the Florida Bar Rule of Professional Conduct governing interviews of jurors can and should be raised on direct appeal.

11. This claim is procedurally barred. Constitutional challenges to Florida's death penalty statute on Eighth Amendment grounds can be and should be on direct appeal.

12. This claim is procedurally barred. Constitutional challenges to Florida's death penalty statute can be and should be raised on direct appeal.

13. Because the Governor has not signed a death warrant and Suggs' execution is not presently pending, this claim is not ripe for adjudication.

14. In its order denying Suggs' motion for post-conviction relief, the trial court ruled that "[t]he defendant is entitled to no relief on his cumulative error claim." (PCR. Vol. 1, 346). Accordingly, it is clear the trial judge fully considered, but rejected, Suggs' claim of cumulative error. Likewise, here, Suggs has failed to demonstrate any individual error. Accordingly, any cumulative error claim as to this appeal must fail.

ARGUMENT

I.

WHETHER THE TRIAL COURT ERRED IN DENYING SUGGS' CLAIM HE WAS DEPRIVED OF DUE PROCESS WHEN THE STATE WITHHELD EVIDENCE THAT WAS MATERIAL AND EXCULPATORY AND/OR PRESENTED FALSE OR MISLEADING EVIDENCE AT TRIAL.

Suggs claims the State committed both a Brady violation and a Giglio violation in his case. Suggs claims the State committed a Giglio violation when it presented the false and misleading testimony of Wallace Byars and James Taylor. Suggs claims the State committed a Brady violation when it failed to disclose a typewritten memorandum from prosecutor Adkinson to Medical Examiner Dr. Kielman indicating the prosecutor's concern over the time of death. The court granted an evidentiary hearing as to this claim. **A. The alleged Giglio violation**:

To establish a Giglio violation, it must be shown that: (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material. Guzman v. State, 868 So.2d 498 (Fla. 2003); Ventura v. State, 794 So.2d 553, 562 (Fla. 2001).[6] The defendant bears the burden to

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

establish the first two elements of a Giglio violation. Once a defendant establishes the prosecutor knowingly presented false testimony at trial or fails to correct what the prosecutor later learns is false testimony, the burden shifts to the State to show the false evidence was not material. Guzman v. State, 868 So.2d 498, 506(Fla. 2003). In this case, Suggs failed to demonstrate that Taylor and Byars' trial testimony was false.

At trial, James Taylor testified he was an eighteen time convicted felon and that he and Suggs were incarcerated in the Walton County Jail together sometime in August 1990. Taylor testified Wally Byars was also in the same cell. (TR. XXI 3535).

Taylor told the jury that Suggs told him the murder weapon would not be found because he threw it in a canal when crossing the bridge (TR. XXI 3537). Taylor testified he and Suggs discussed some of the evidence in this case, specifically a key and glass found behind Suggs' parents' home or cabin. Taylor testified that Suggs also told him, in describing the murder, that he had "damn near takened [sic] her head off." (TR. XXI 3539). Taylor told the jury that Suggs told him that if he would have dug a hole, put the body in there and put some lime on it, within ten or twelve days there would have been no body to be found. (TR. XXI 3539).

Taylor testified he had given a statement to law enforcement on August 21, 1990, regarding Suggs' admissions, he had not been promised anything in exchange for making the statement, and had not been cut any deals in exchange for his testimony at trial. While Taylor admitted he had worked as a government informant over the past several years, he denied any knowledge that anyone in law enforcement viewed him as a witness against Suggs. (TR. XXI 3539, 3576). He also testified he did not make any deal with the State in return for his testimony against Suggs and denied receiving special privileges in jail in return for his cooperation. (TR. XXI 3585, 3606). Trial counsel vigorously cross-examined James Taylor about his motive to lie and his prior extensive criminal record. Wally Byars also testified at trial. Byars testified that Suggs told him he had killed Pauline Casey. (TR. XX 3399). Byars related that Suggs told him the reason he killed Pauline Casey was that it was "over a robbery, robbing and – there was another intention there that he was going to rape her." Byars testified Suggs told him that Pauline Casey put up a struggle so he went ahead and killed her. Suggs told Byars that he cut her throat, had stabbed her in the throat and had "damn near cut her head off." (TR. XX 3401). Byars testified that Suggs told him he put a knife to Pauline Casey's

throat and “drug her out of the bar.” (TR. XX 3400). Suggs told Byars he drug Casey’s body off to the side of a dirt road.

Byars told the jury he had been previously adjudged incompetent to stand trial. (TR. XX 3402). He denied being promised anything for his testimony. Byars also testified he had not received a lesser sentence in exchange for his testimony and his plea of guilty prior to trial on an unrelated case had nothing to do with his testimony against Suggs. (TR. XX 3405, 3450, 3452). Like with Taylor, trial counsel vigorously cross-examined Wally Byars about his motive to lie in order to win special consideration from the State and law enforcement regarding the terms and conditions of his incarceration.

Neither Taylor nor Byars testified at the evidentiary hearing. Likewise, Suggs did not take the witness stand during the evidentiary hearing to deny he made any admissions to Taylor or Byars.

The trial court ruled there was no Giglio violation because the defense presented no evidence to support its allegation that Taylor and Byars fabricated the Defendant’s admission to the murder of Pauline Casey. The court pointed to the fact that while Gerald Shockley, a defense investigator, testified Taylor admitted to him that he and Byars lied about Suggs’ confession to the murder, Taylor refused to testify or even provide a written

statement.[7] Suggs also did not present the testimony of Byars to support his claim.

Accordingly, the trial court ruled Suggs presented no evidence to support his claim that Byars and Taylor's testimony was false or misleading. (PCR Vol I 335-336).[8] Because Suggs failed to establish that Byars and Taylor presented false or misleading testimony at trial, Suggs has failed to demonstrate a Giglio violation.

B. The alleged Brady violation.

To establish a Brady violation, a defendant must show: (1) evidence favorable to the accused, because it is either exculpatory or impeaching; (2) the evidence was suppressed by the

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[7] At the evidentiary hearing, Investigator Shockley testified that Taylor told him that his own trial testimony and that of Byars was perjured. (PCR EH 103). According to Shockley, Taylor told him that while they had testified that Suggs had confessed, Suggs had not confessed to them. (PCR EH 103). Taylor told him that they made the confession up to receive special treatment from the Sheriff's office and that the Sheriff's office provided they information about the details of the murder, not Suggs. (PCR EH 103).

While the defense investigator testified at the evidentiary hearing as to what Taylor told him about the circumstances of his testimony at trial, Shockley has no independent knowledge of the murder itself. While hearsay is admissible at evidentiary hearing, the trial judge is entitled to put no weight on such evidence.

[8] Once the trial judge found that Suggs failed to produce evidence sufficient to demonstrate Byars' and Taylor's testimony was false, it was unnecessary to evaluate the remaining two elements required to establish a Giglio violation.

State, either willfully or inadvertently; and (3) prejudice ensued.[9] The burden is on the defendant to demonstrate the evidence he claims as Brady material satisfies each of these elements. Wright v. State, 857 So.2d 861 (Fla. 2003). The test for prejudice or materiality under Brady is whether, had the evidence been disclosed, there is a reasonable probability of a different result. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceedings. Guzman v. State, 868 So.2d 498 (Fla. 2003); Cardona v. State, 826 So.2d 968, 973 (Fla. 2002).

In his initial brief, Suggs claims the trial judge failed to resolve the discrepancy between the prosecutor's testimony that the memorandum was not something he would have turned over in discovery (PCR EH 118) and that of trial counsel Robert Kimmel's testimony he did receive the document directly from Mr. Adkinson. (PCR EH 228). Any suggestion the trial court failed to resolve the discrepancy is without merit. The trial court ruled the prosecutor's memorandum to Dr. Kielman was, in fact, disclosed to the defense. (PCR Vol. I, 336). In making such a finding, the trial court relied upon the testimony of Suggs' defense counsel, Robert Kimmel, who testified the memo was disclosed to the defense, albeit it not through a formal

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

discovery response. (PCR EH 228). [10] Though the prosecutor testified the memorandum would not have been something he would have turned over in discovery and he did not inform defense counsel about his concerns over Dr. Keilman's opinion about the time of death, the trial judge's conclusion that Mr. Kimmel received a copy of the memorandum clearly resolves any alleged discrepancy between the testimony presented at the evidentiary hearing.

A trial court's finding after evaluating conflicting evidence that Brady material had been disclosed is a factual finding. Way v. State, 760 So.2d 903, 911 (Fla. 2003). As a factual finding, the reviewing court should uphold the finding as long as it is supported by competent, substantial evidence in the record. Id. *See also* Lightbourne v. State, 841 So.2d 431 (Fla. 2003)(holding that this Court defers to the factual findings made by the trial court to the extent they are supported by competent, substantial evidence, but reviews *de novo* the application of those facts to the law).

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[10] In addition to the trial judge's finding that the memorandum was actually disclosed to trial counsel, this memorandum really is not Brady material. This allegedly exculpatory evidence was the medical examiner's opinion regarding the time of death, not the prosecutor's query concerning that opinion. As this opinion was reported in Dr. Keilman's deposition and was therefore known to the defense, any failure to disclose the prosecutor's concerns over the time of death would not be a Brady violation.

The trial court found the evidence had not been suppressed by the prosecution because trial defense counsel testified he received the memorandum directly from the prosecutor. (PCR Vol. 1, 336). The trial court found that because the memorandum had been disclosed to the defense counsel, there was no Brady violation. As this finding of fact is supported by competent substantial evidence, this court should affirm. Way v. State, 760 So.2d 903, 911 (Fla. 2003). Suggs has failed to meet his burden to demonstrate a Brady violation occurred and this court should affirm.

II.

WHETHER THE TRIAL COURT ERRED IN DENYING SUGGS' CLAIM HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS CAPITAL TRIAL.

Suggs contends trial counsel was ineffective during the guilt phase of his trial. Specifically, Suggs complains trial counsel was ineffective in (1) failing to investigate an alleged Massiah violation, (2) failure to assert a Richardson violation when the State called Judge Lewis Lindsey to testify concerning Wally Byars' release from the Walton County Jail, (3) failure to move for a mistrial during the medical examiner's testimony when two jurors became ill, (4) failure to investigate how the victim's finger and palm prints came to be in Suggs' car, (5)

failure to investigate the fabricated testimony of Steve Casey and Ray Hamilton, (6) failure to properly respond to the jury's request to have a read back of the trial testimony of Steve Casey and Ray Hamilton, (7) failure to object to certain prosecution arguments, including the prosecutor's Golden Rule argument, references to the victim as a missing witness, comments on Suggs' right to remain silent, references to the defense attorney's putting up a smoke screen or creating a diversion, and repeated references to the defense experts as "hired guns" and "Monday morning quarterbacks", (8) failure to insist on a mistrial when the prosecutor told the jury that Suggs had been in jail[11], (9) failure to object to Suggs being shackled.

A. Failing to investigate and raise an alleged Massiah violation.

Suggs claims that law enforcement officials placed two inmates, acting as State agents, in the same cell with Suggs for the express purpose of eliciting incriminating statements against him in violation of Suggs' Sixth Amendment right to counsel. Suggs argues these actions violate the dictates of the Massiah v. United States, 377 U.S. 201 (1964).

[11] Suggs concedes trial counsel asked for a mistrial but alleges he should have insisted after the trial judge denied his motion for a mistrial.

In Massiah, the United States Supreme Court ruled that the Sixth Amendment prohibits law enforcement officers from interrogating a defendant after his or her indictment and in the absence of counsel. Statements "deliberately elicited" from a defendant without a valid waiver, after the right to counsel has attached, are inadmissible at trial. Massiah at 206. This Court, in Rollings v. State, 695 So.2d 278, 291 (Fla. 1997), ruled the State violates a defendant's Sixth Amendment right to counsel only when the State takes some affirmative steps toward obtaining information in derogation of that right. This Court went on to note that using a paid informant under a contingency agreement or intentionally placing an inmate in a certain location for the purpose of eliciting incriminating statements could constitute improper state action directed to obtaining statements of a defendant in the absence of his counsel. Because both Massiah and Rollings require some affirmative steps by law enforcement to deliberately elicit incriminating statements from a represented inmate, use of a “jailhouse snitch” who voluntarily comes forward with a defendant’s inculpatory statements does not violate a defendant’s Sixth Amendment right to counsel.

Suggs supports his claim that Taylor was an agent of the State by pointing to evidence that Taylor was a known informant in another case and had acted as an informant before for FDLE, DEA, U.S. Customs and two neighboring states (Alabama and

Georgia). Suggs also points to the fact Taylor was allegedly booked into jail under an alias and was allowed perks not normally enjoyed by other inmates including a razor blade, cologne, a private metal lock box, necklace, watch, fingernail clippers, a ring, and a voice activated tape recorder.

Suggs supports his claim that Byars was a planted agent of the State by pointing to Byars' trial testimony that he was given a three year sentence to be served in the county jail, rather than at the Department of Corrections, and was sent to Chattahoochee Mental Hospital after informing police about Suggs' statements.

At the evidentiary hearing, trial counsel Kimmel testified he had no evidence that either Byars or Taylor was an agent of the sheriff. (PCR EH 199-200). None of the depositions taken by the defense, including those of Byars and Taylor provided any evidence that Taylor and Byars were planted. (PCR EH 220-223). Mr. Kimmel told the court that if there had been any evidence this was the case, he would have raised the issue. (PCR EH 200). He testified that both Byars and Taylor were throughly cross examined. (PCR EH 200). In Kimmel's opinion, Byars and Taylor did not win the case for the State. Rather, the fingerprint evidence was the key factor in the case. (PCR EH 200).

Gerald Shockley, an investigator for prior collateral counsel, testified at Suggs' evidentiary hearing. (PCR EH 94). Mr. Shockley interviewed Taylor, who was at that time an inmate in Alabama. (PCR EH 102). According to Mr. Shockley, Taylor told him that his own trial testimony and that of Byars was perjured. (PCR EH 103). Taylor told him that while they had testified that Suggs had confessed, Suggs had not confessed to them. (PCR EH 103). Taylor told him they made the confession up to receive special treatment from the Sheriff's office. (PCR EH 103). Taylor reported that the Sheriff's office provided the information about the details of the murder, not Suggs. (PCR EH 103). Taylor refused to make a written statement and did not testify at the evidentiary hearing. (PCR EH 108-111)

George Broxson, an inmate with a life sentence, who was housed in the Walton County jail from 1990 until 1992, testified for the defense in support of the alleged Massiah violation. Broxson told the trial judge that Taylor was afforded special privileges in jail. (PCR EH 44). Broxson testified that Deputy Tim Crenshaw would give Taylor anything Taylor wanted and that Taylor was an informant. (PCR EH 45,48). Broxson also testified that Taylor had items in his possession other inmates did not have and a voice activated tape player to record an unidentified inmate. (PCR EH 49).

Broxson told the court that Byars told him that he was going to testify against Suggs so he would not have to go to prison. (PCR EH 49). Broxson testified Byars was arrested by a Park Ranger or "somebody" but to his knowledge Byars was not prosecuted for that crime. (PCR EH 50).

Mr. Quinn McMillan, the former Sheriff of Walton County at the time of the murder, testified that Byars and Taylor were incarcerated in the Walton County jail. (PCR EH 177-178). It was not a practice of the jail to send informants into cells with other prisoners in order to gather information. (PCR EH 178). Mr. McMillan testified he did not instruct either Byars or Taylor to attempt to get a confession from Suggs. (PCR EH 179).

The trial judge ruled that there was no credible evidence that either Taylor or Byars were agents for the State. Neither Taylor nor Byars testified at the evidentiary hearing. The Court pointed to Mr. McMillan's testimony that Taylor and Byars were not instructed to attempt to obtain a confession from Suggs. (PCR Vol. I 338). As there was no evidence of a Massiah violation, the trial court ruled Suggs had failed to show either deficient performance or prejudice because of trial counsel's failure to raise a Massiah violation with the trial court. Id.

Suggs completely failed to demonstrate a Massiah violation. In accord with this Court's ruling in Rollings, in order to show a violation of Suggs' right to counsel, Suggs must demonstrate law enforcement officials took affirmative steps to deliberately elicit incriminating information from him after his Sixth Amendment right to counsel had attached. While Broxson testified Taylor was an informant and enjoyed special privileges, his testimony established he had no actual knowledge of any intentional placement of Taylor in Suggs' cell so that Taylor could seek to elicit incriminating statements from Suggs.[12] Likewise, he professed no actual knowledge of any arrangement between jail officials and Wally Byars. The former sheriff of Walton county testified at the evidentiary hearing he did not instruct Byars or Taylor to elicit incriminating statements from Suggs nor was it a practice to put informants in a jail cell for that purpose. While Mr. Shockley testified that Taylor told him that he and Byars made up the confession up to receive special treatment from the Sheriff's office, Taylor did not testify at the evidentiary hearing. Accordingly, Shockley's testimony was

[12] In the order denying post-conviction relief, the trial court, in ruling on Suggs' newly discovered evidence claim, found Broxson not to be a credible witness. (PCR Vol I. 342).

entirely hearsay, evidence to which the trial judge was entitled to afford no weight. [13]

Because the trial judge concluded that Suggs failed to present any substantial competent evidence to demonstrate a Massiah violation, the trial court properly determined that counsel was not ineffective for failing to raise the issue at trial. Jones v. State, 845 So.2d 55 (Fla. 2003) (noting that counsel is not ineffective for failing to raise a meritless claim).

B. *Failure to assert a Richardson violation when the State called Judge Lewis Lindsey to testify concerning Wally Byars' release from the Walton County Jail.*

Suggs claims that counsel was ineffective for waiving a Richardson hearing when an undisclosed witness, Judge Lewis R. Lindsey, was called to testify for the State as to the circumstances of Wally Byars release from jail. In support of

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[13] During his testimony at the evidentiary hearing, Shockley did not testify that Taylor told him that he and Byars had been intentionally placed in Suggs' cell for the purpose of eliciting inculpatory statements from Suggs. He testified only that Taylor told him that they made up Suggs' confessions in order to get special treatment. In a report of interview, introduced at the evidentiary hearing, Shockley wrote that Taylor told him they had been planted in Sugg's cell and told by Sheriff McMillan and others that they needed a confession from Suggs. (PCR Evd. 360). Like Shockley's hearsay testimony at the evidentiary hearing, the trial judge was entitled to afford no weight to this double hearsay.

his claim, Suggs points to the fact that this Court in Suggs v. State, 644 So.2d 64, 67 (Fla. 1994) found no reversible error in the failure of the trial court to conduct a Richardson hearing because trial counsel waived the issue by stating a Richardson hearing would not cure the damage of admitting Judge Lindsey's testimony.

Suggs suggests this Court's finding that counsel waived a Richardson hearing establishes trial counsel was ineffective. Suggs claims that reasonably competent counsel would have vigorously argued the discovery violation and prevented Judge Lindsey from testifying. (IB 32). Suggs is mistaken. Suggs cannot show he was prejudiced by counsel's failure to renew his request for a Richardson hearing because Suggs cannot establish the preparation of his case was prejudiced by the late disclosure nor demonstrate that had such a hearing been conducted, Suggs would have successfully excluded Judge Lindsey's testimony.

At the evidentiary hearing, trial counsel Robert Kimmel testified he was familiar with the requirements of Richardson. Mr. Kimmel testified he knew Judge Lindsey would testify before opening statements commenced, he had a chance to talk to him before he testified, and knew what Judge Lindsey was going to say by the time he took the witness stand. (PCR EH 190). He was prepared for cross-examination. Kimmel told the trial court that

because a defendant has to show actual prejudice to his case by not knowing of the witness ahead of time, he did not believe he would have accomplished anything by insisting on a Richardson hearing. Mr. Kimmel also did not think he could prove the prejudice part of Richardson. (PCR EH 190). Mr. Kimmel told the court that had he insisted on a hearing, the most he would have gotten is a short continuance to take Judge Lindsey's deposition. Taking his deposition, however, would not result in learning anything new because he had already talked to him informally. In his view, pushing for a Richardson hearing would "have done nothing but delay and wouldn't have helped us win at trial." (PCR EH 190-191). In its order, the trial court concluded Suggs failed to establish any prejudice from counsel's failure to raise and preserve a Richardson hearing issue. The court found that trial counsel's testimony at the evidentiary hearing established the defense was prepared for Judge Lindsey's testimony and trial counsel were not prejudiced in their preparation for trial. The court further found a delay in the trial due to the results of a Richardson hearing would not have effected the outcome of the jury trial. (PCR Vol I 318).

When a discovery violation is alleged, the trial court must conduct a Richardson inquiry. The trial judge must first determine whether a willful or inadvertent discovery violation

occurred and if so, determine whether the violation caused prejudice to the defendant in the preparation of his defense. If the court determines there was a discovery violation that caused prejudice to the defendant in the preparation of his defense, the trial court must next, in its discretion, fashion an appropriate remedy. Only when the defense can show prejudice to the preparation of his case is a remedy appropriate. Cooper v. State, 336 So.2d 1133, 1138 (Fla.1976) (ruling that once prejudice is determined, the court may fashion an appropriate remedy).

The failure of a party to timely disclose a witness in discovery is not, in and of itself, a sufficient ground to exclude that witness. Lucas v. State, 376 So.2d 1149, 1151 (Fla.1979). Whether exclusion of the witness is the appropriate remedy depends on the totality of the circumstances, including the factors indicated in Richardson, most importantly, whether the violation has prejudiced the opposition's ability to prepare for trial. Richardson v. State, 246 So.2d 771, 775 (Fla. 1971).

In this case, the record establishes that even had trial counsel renewed his request for a Richardson hearing once the State called Judge Lindsey to the witness stand, he would not have been able to show late disclosure of this witness prejudiced the preparation of Suggs' case. During the evidentiary hearing,

trial counsel testified the defense knew about Judge Lindsey before opening statements and had the opportunity to talk to him before he testified. Trial counsel knew what Judge Lindsey was going to say before he ever took the witness stand and was prepared to cross-examine him. (PCR EH 190-191). Because trial counsel would have had to reveal as much had the court conducted a formal Richardson hearing, he would not have been able to demonstrate prejudice by Judge Lindsey's late disclosure.

Even if the trial judge would have fashioned a remedy out of an abundance of caution, trial counsel testified at the evidentiary hearing that rather than exclude the witness, Judge Melvin would have likely granted the defense a short continuance to depose the witness. According to trial counsel, a delay would have only created the possibility of witness management problems and would not have helped win at trial. According to Mr. Kimmel, winning was exactly what they were trying to do. (PCR EH 190-191). Because Suggs cannot demonstrate any prejudice for trial counsel's failure to insist on a Richardson hearing, this Court should deny this claim.

C. ***Trial counsel's failure to object or move for a mistrial during the medical examiner's testimony.***

During the medical examiner's testimony, jurors Linda Lee and James Lay became ill. Suggs claims that trial counsel was ineffective for failing to object or move for a mistrial. Suggs also suggests that trial counsel should have tried to curtail the presentation of this evidence.[14] The court had both jurors checked out by a nurse and questioned them as to their ability to proceed. Both jurors indicated they were able to proceed. (TR. XX 3388-3392). Neither indicated their illness would preclude them from fairly and impartially deciding the case in accord with the evidence presented at trial and the law upon which the judge instructed them. At the evidentiary hearing, trial counsel was questioned as to the reason he did not seek to replace the ill jurors with available alternates. Trial counsel testified he would rather have warm compassionate human beings on the jury who are repulsed by that kind of violence rather than add jurors who may be so cold blooded that it means nothing to them. Trial counsel told the court that such a juror would not have compassion for Mr. Suggs during the penalty phase (PCR EH 248).

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[14] In making this latter argument, Suggs makes no effort to proffer any basis for trial counsel to exclude autopsy and crime scene photographs introduced at trial. Neither does he identify any particular photographs that were objectionable or explain how counsel was ineffective for failing to file a motion to exclude any particular photograph(s). By failing to present any argument, above making a wholly conclusory allegation, Suggs has waived his issue on appeal.

Trial counsel testified the defense began preparation for this case knowing the brutality of the murder was something they could not avoid. Counsel told the court they knew they needed to meet this reality head on and their strategy was to show that another person was actually responsible for the crime. (PCR EH 246). Trial counsel specifically testified he disagreed with collateral counsel's assertions he should have struck the jurors and brought in alternates instead. (PCR EH 247).

The trial court ruled it was a tactical decision not to challenge the two ill jurors because trial counsel determined he would rather have warm human beings on the jury who would likely also show Suggs' mercy. Accordingly, the court ruled it was not ineffective assistance of counsel when counsel failed to seek to replace the ill jurors with available alternates or ask for a mistrial. (PCR Vol I. 339).

Suggs does not allege the ill jurors were no longer qualified to sit on his jury, the jurors became prejudiced against him as a result of the graphic medical evidence, the alternates were more compassionate, more fair, or more qualified to sit on Suggs' capital murder trial, or the outcome of Suggs' trial would have been different had the two ill jurors been replaced. Further, Suggs points to no legal basis upon which trial counsel could have sought to replace the jurors. Because

Suggs failed to demonstrate the results of his trial would have been different if counsel would have sought to replace the jurors or would requested a mistrial, Suggs' claim must fail. Strickland v. Washington, 466 U.S. 668, 694 (1984) (the test for ineffective assistance of counsel claims is whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different).

D. ***Failure to investigate how the victim's finger and palm prints came to be in Suggs' car***.

Suggs claims trial counsel unreasonably failed to proffer an innocent explanation for the presence of the victim's finger and palm print in his car. Suggs claims the evidence demonstrated that Suggs and the victim were friends and had been together earlier on the day of the murder at a bar called the Hitching Post. Suggs claims that defense counsel failed to call "other witnesses" who could have corroborated that fact. (IB 35). Suggs claims that trial counsel should have questioned John Miller, Curtis Wright, Toby Wright and John Villereal in order to establish the victim and Suggs were friends who had been shooting pool together on the day of the murder. He also cites to the testimony of Ray Hamilton who testified that Pauline mentioned, in his presence, that she was at the Hitching Post at the same

time as Suggs but did not mention anything about going out to his car. (IB 35).

At the evidentiary hearing, Suggs failed to present any evidence that established there may have been an innocent explanation for the presence of Pauline Casey's finger and palm prints in Suggs' car. Even in his initial brief, Suggs does not suggest that any witness would have actually been able to testify they had seen Pauline Casey in Suggs' car the day of the murder or at any other time. At most, Suggs suggests that Pauline Casey and Suggs were acquainted and may have either seen each other or played pool at the Hitching post earlier on the day of the murder.

Though Suggs argues that trial counsel should have presented evidence to establish an innocuous explanation for the presence of Pauline Casey's fingerprints in Suggs' car, Suggs failed to establish the possibility of an alternative explanation at the evidentiary hearing. For instance, though Suggs claims his trial counsel was ineffective for failing to explore and present the link between Pauline Casey and Suggs by questioning certain named witnesses, none of these witnesses testified at the evidentiary hearing. Suggs did not call Ray Hamilton, Ted Valencia, James Casey, John T. Miller, Curtis Wright, Toby Wright, or John Villareal to testify at the evidentiary hearing to establish this

missing link or to show that reasonably competent counsel would have discovered this link through more thorough questioning of these witnesses. Additionally, though Suggs refers to other witnesses who could have testified as to the link between Suggs and Pauline Casey, Suggs fails to identify any of these other potential witnesses, outline the substance of their testimony, or establish they would have been available to testify at trial. Nelson v. State, 29 Fla. L. Weekly S277 (Fla. June 3, 2004).

At the evidentiary hearing, trial counsel testified they had nothing to rebut the fingerprint evidence or any evidence to prove the fingerprints were on the car for any legitimate purpose. (PCR EH 202). The court found that trial counsel, after investigation, determined there was no evidence to support the notion Ms. Casey's fingerprints were in Suggs' car for any legitimate purpose. The court also found that Suggs failed to present any evidence at the evidentiary hearing to establish an alternative explanation for the victim's fingerprints and therefore had not established a facially sufficient claim pursuant to Strickland. (PCR Vol I. 340).

Suggs' failure to present evidence of this innocent explanation for the fingerprint evidence coupled with trial counsel's testimony they could unearth no innocent explanation for this evidence warrant denial of this claim.

E. ***Failure to investigate the fabricated testimony of Steve Casey and Ray Hamilton.***

Suggs alleges that trial counsel was ineffective for failing to adequately investigate and challenge the testimony of Steve Casey and Ray Hamilton. Suggs claims Steve Casey falsely testified at trial that on the day of the murder, he was at home trying to sell his 1969 Chevrolet pick-up truck. Suggs argues Ray Hamilton falsely testified that on August 6, 1990 he was at the Teddy Bear Bar when he received a telephone call from Steve Casey, who told him he had sold the pick-up truck.[15] (TR. XVI 2796). Suggs claims both mens' testimony was false because subsequent investigation "suggests" the truck had been sold before the murder for $300. [16] At the evidentiary hearing, however, Suggs put on no evidence to support his claim that Steve Casey actually sold the truck the day before the murder. Suggs did not call Steve Casey or the alleged buyer of the truck, or present any documentary evidence to show the truck was actually sold on August 5, 1990.

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[15] Ray Hamilton did not testify that Steve Casey told him he had sold the truck the night of the murder. In actuality, Ray Hamilton testified that Steve Casey told him simply that he had sold the truck for $1400. (TR. XVI 2815). Ray Hamilton also testified Pauline Casey told him that Steve told the truck. (TR. XVI 2796, 2815).

[16] In his second amended motion for post-conviction relief Suggs alleges the truck was sold the day before the murder.

Trial counsel testified at the evidentiary hearing about the extensive investigation into Steve Casey's alibi and the sale of the truck. Mr. Stewart testified they investigated Steve Casey's claim he was home selling a pickup truck on the night his wife was murdered. (PCR EH 140). They worked very hard and "did everything humanly possible" to find out whether the sale occurred on Monday night or not. (PCR EH 140). They did find out that Steve Casey had a life insurance policy on his wife purchased shortly before she died and that before she was even buried, he had called to see how to collect the proceeds. (PCR EH 140).[17] In attempting to learn when Casey actually sold the truck, defense counsel searched public records to see how the

[17] Contrary to counsel's sinister implication that Steve Casey bought a life insurance policy on his wife shortly before her murder, Steve Casey testified the life insurance policy was one administered by the Army. Casey testified that when he called the VA to discuss any burial cost benefits to which he may be entitled as a result of Pauline Casey's death, a gentleman at the VA told him he may be eligible for the proceeds of her Army life insurance policy (Pauline, like Steve had been in the Army). According to Mr. Casey, this information prompted to him to call Fort Rucker to find out whether he was eligible. He ultimately collected these benefits. He testified he did not know of the policy before her death. (TR. XXII 3695). Casey's testimony that the insurance policy he collected upon was indeed Ms. Casey's Serviceman's Group Life Insurance (SGLI)/Veteran's Group Life Insurance (VGLI) benefits was corroborated by the testimony of Ms. Sandra Hall, a leave personnel clerk at Fort Rucker, Alabama. (TR. XXI 3710, 241). However, she also testified she briefed both Steve and Pauline Casey on the grace period after discharge and the cost of converting SGLI insurance to VGLI coverage.

transfer was made, went to Tallahassee,[18] and went to the local courthouse to prove Casey had sold the truck before the murder. (PCR EH 143). Mr. Stewart testified he also had Steve Casey's phone records which established a phone call was made from Steve Casey's home to Casey's mother around 8:50 until 9:30 on the night of the crime. (PCR EH 159-160). [19]

The trial court found that trial counsel testified as to his extensive investigation of the truck. The court ruled counsel's investigation was not deficient and denied Suggs' claim. (PCR Vol I. 340-341).

Suggs presented no evidence at the evidentiary hearing to support his allegation Steve Casey actually sold the truck the day before the murder. Even in his brief, Suggs' claims only that available evidence suggests that Steve Casey sold his truck before the murder. (IB 38). However, Suggs' presented no competent evidence at the evidentiary hearing to support this suggestion. Additionally, Suggs' claim that Ray Hamilton's testimony was false is refuted by looking only to the four

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[18] Mr. Stewart was likely referring to a visit to the Department of Motor Vehicles (DMV) headquartered in Tallahassee.

[19] Mr. Casey testified at trial that he talked to his mother in Evanston, Wyoming immediately before he talked to his wife and to Ray Hamilton at the Teddy Bear Bar. (TR. XXII 3686, 3706).

corners of Suggs' claim. Suggs claims that Ray Hamilton's testimony was false in that he testified he received a phone call from Steve Casey who told him the truck had been sold. Suggs now insists the truck was sold the day before the murder. Yet, Hamilton did not testify at trial that Steve Casey told him the truck was sold the night he talked to him but only that he sold the truck. Thus, based upon the four corners of Suggs' complaint, Hamilton's testimony was unquestionably truthful.

Because Suggs failed to present any testimony or evidence at the evidentiary hearing to establish that evidence available at the time of trial would have demonstrated that Steve Casey and Ray Hamilton's testimony at trial was false, counsel cannot be deemed ineffective.[20]

F. ***Failure to properly respond to the jury's request to have the testimony of Steve Casey and Ray Hamilton be re-read to them.***

Suggs claims trial counsel was ineffective for failing to insist that the testimony of Ray Hamilton and Steve Casey be read back to the jury. The record reflects the jury sent a note to the court which read "Can we have Steve Casey's and Ray Hamilton's court testimony and depositions?" (TR. XXVII 4536). All parties agreed that neither man's deposition was introduced

[20] Suggs does not claim that evidence concerning the sale of the truck constitutes newly discovered evidence.

into evidence. The state objected to a read back of only part of the testimony and asked the court to instruct the jury that they must rely on the testimony heard. (TR. XXVII 4536). Trial counsel, Kimmel, asked the court to grant the request, allow the jury to have the testimony, and explain any delay such an effort would entail. (TR. XXVII 4537-4538). Again the State objected and told the court it believed that a read back of only part of the testimony would be improper. (TR. XXVII 4538).

The trial court asked trial counsel his position on whether the read back was mandatory or discretionary. Trial counsel informed the court, that to be candid, it was discretionary and it would not be error either way. (TR. XXVII 4539). The court went on to explore how long the process would take given the fact that three or four different court reporters had worked on the case through seven days worth of evidence and the notes were located about an hour away in Defuniak Springs. (TR. XXVII 4537, 4540).

After some more discussions regarding how to instruct the jury about the delay involved in granting their request, the judge called the jury back into the court room. She explained the testimony was not available in the form of a transcript but instead were in the form of court reporter's notes. (TR. XXVII 4547). The court went on to explain that it would take about

three hours to get the notes. She explained that the jury would not receive a copy of the transcripts, because they did not exist, but would instead be read the testimony. The court also told the jury the depositions of neither man were admitted into evidence and as such were not available to them. (TR. XXVII 4547). The judge then asked the jury to go back and discuss what they had just heard and give her some feedback. The court also informed the jury the attorneys to do some research on the jury's request. (TR. XXVII 4548).

Shortly thereafter, the jury foreman sent a note asking the court to disregard the request for transcripts. Neither party requested any further communication with the jury on this point. (TR. XXVII 4549). Trial counsel then informed the court that they had found the applicable rule and that while the court's decision was within its discretion, the rule allowed the court to read the testimony to the jury. (TR. XXVII 4549). No further instructions were requested by either party.

Suggs claims that competent counsel would have sought a delay in the trial to retrieve the notes or requested a mistrial. The gravamen of Suggs' argument seems to be that trial counsel should not have candidly informed the court that, pursuant to Rule 3.410, Florida Rules of Criminal Procedure, the court "may"

order the read back. [21] Certainly, Suggs provides no legal support for the notion that a mistrial was appropriate.

At the evidentiary hearing, trial counsel Stewart testified that the defense requested the testimony be read to the jury. Mr. Stewart testified that he recalled a pretty extensive colloquy about it and the trial judge came down on the side of the prosecution. He testified there was some concern on the defense's part about the read back because you never know what a jury is doing or whether it was beneficial to leave it as it was. Mr. Stewart went on to note that if the jury was convinced Steve Casey and Ray Hamilton were lying, as he was, they jury would be on their side. (PCR EH 136-137). Mr. Stewart also testified the jury's request clearly indicated somebody in the jury room thought the defense had made a point. Mr. Stewart explained that because no one knows whether reading it back will help or hurt, they determined at that point to leave the jury where they were with the information they had. Mr. Stewart noted that the State appeared to be unhappy at the jury's request and the defense just hoped that at that point in time, the jury would side with the defense. (PCR EH 159).

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[21] In 1972, the rule was amended to make a read back discretionary. Prior to this amendment, a requested read back was mandatory. Rule 3.410, Fla. R. Crim P. (2002) (committee notes).

Trial counsel Kimmel testified at the evidentiary hearing that the judge decided to leave the matter to the jury. (PCR EH 199). He testified the matter was in the court's discretion under the law, and he did not "make a record by having the judge tell me no three or four times". According to Mr. Kimmel, the judge is the boss. (PCR EH 199).

In his order denying post-conviction relief, the trial judge ruled counsel was not ineffective for failing to properly respond to the jury's request for the read back. The court found the defense had requested the read back and it was the trial court who made the decision to allow the jury to decide whether they wanted a read back. The court found Suggs failed to demonstrate either deficient performance or prejudice as a result of trial counsel's actions. (PCR Vol. I 341).

Suggs presented absolutely no testimony or evidence at the evidentiary hearing to demonstrate any failure on trial counsel's part to insist on the read back affected the outcome of Suggs' trial. Further, the record refutes Suggs' claim in its entirety. It is clear both that trial counsel asked the court to allow the read back and it was the court, not trial counsel, who decided to give the jury the option given the lack of a transcript and the logistical difficulties of retrieving the court reporters's notes. The jury withdrew its request for the

read back. To suggest that trial counsel should have then insisted against the jury's wishes is without basis in law or logic.

G. Failure to object to the prosecutor's arguments to the jury.

While Suggs' breaks his claims into separate five paragraphs in his brief, all his claims concern the prosecutor's closing argument to the jury. Suggs alleges trial counsel should have objected when the prosecutor made a blatant Golden Rule argument, referred to the victim as a missing witness, commented on Suggs' right to remain silent, referred to the defense attorneys putting up a smoke screen or creating a diversion, and repeatedly referred to the defense experts as "hired guns" and "Monday morning quarterbacks."

At the evidentiary hearing, trial counsel Stewart testified about his strategy and thought processes during the prosecutor's closing argument. Mr. Stewart testified that different lawyers do things different ways. Mr. Stewart said that while in hindsight, given the verdict, he may do things differently, at the time they made a tactical decision not to object because the prosecutor was spending a good bit of the time talking about the very issues they wanted him to talk about; that is whether Ray Hamilton or Steve Casey had anything to do with the death of

Pauline Casey. Counsel also testified he did not anticipate every objection would necessarily be upheld so "I don't know [objecting] was the best thing to do." (PCR EH 145).

Trial counsel also offered some insight into the prosecutor's specific comments. Mr. Stewart stated he did not think the prosecutor's comments about the victim being the missing witness was objectionable because the prosecutor was not implying the defense failed to call an available witness. Instead, in his view, the prosecutor was only making reference to the physical evidence. Mr. Stewart did not believe the judge would have sustained any objection. (PCR EH 146). Mr. Stewart thought that rather than object to the smokescreen comment by the prosecutor, he adequately answered that in his closing. (PCR EH 148). He also thought that it was better for the prosecutor to be talking about their defense than his own case and felt like they could make some headway from the jury. (PCR EH 149,155). Stewart thought his rapport with the jury was good enough to deal with the prosecutor talking about diversionary tactics. According to Mr. Stewart not making objections during closing is a tactical decision and in the heat of battle one does not have time to make fine distinctions. He agreed in retrospect that he could have made some objections but did not. (PCR EH 149).

Trial counsel Kimmel testified he had been in practice 26 years by the time of the evidentiary hearing and was board-certified in criminal trial practice when he tried this case. (PCR EH 184-185). He had previously represented over 400 defendants and had tried 10 murder cases. The Suggs' case was his third capital murder trial. (PCR EH 185,214). He testified that as a matter of strategy, he does not object during closing unless it is a critical matter. (PCR EH 203). He told the court that he has seen trials where the prosecutor or defense attorney jumps up and objects fifteen times once the jury is really listening to a closing argument and they (the jury) seems to resent it. Mr. Kimmel testified as a result of this observation, he will lay low, unless he thinks it is a critical matter he knows is going to sway the jury one way or the other. He noted that both sides were going to get a little leeway in their closing arguments as long as neither side stepped over any really bad lines. (PCR EH 203). When the prosecutor began attacking defense counsel they thought that was great because they thought it would backfire on the prosecutor. (EH 204). Both trial counsel had worked hard to establish a respect and rapport with the jury and because the State's argument did not rise to an actual insult, they let it go. (PCR EH 204).

The trial court ruled that trial counsels' decision not to object was a tactical one. The court found that, in accord with Ferguson v. State, 593 So.2d 508 (Fla. 1992), a tactical decision not to object to objectionable arguments does not constitute ineffective assistance of counsel. (PCR Vol. I 342). The trial court also found that both counsel were experienced criminal defense attorneys with considerable trial experience including the trial of murder cases. (PCR Vol. I 335).

This claim was raised and addressed by this court on direct appeal. Specifically, Suggs pointed to a number of arguments and tactics of the prosecutor which he asserted deprived him of a fair trial. This Court noted that the issue was not preserved for appeal. However, this Court also reviewed the prosecutor's conduct within the context of the entire record and found "the claim without merit." Suggs at 68. In raising this same issue on appeal, Suggs improperly attempts to relitigate a claim raised and disposed of on direct appeal in the guise of an ineffective assistance of counsel claim. See Thompson v. State, 759 So.2d 650 (Fla. 2000) (improper to raise issues already decided on direct appeal in post-conviction proceedings by making slightly different arguments); Medina v. State, 573 So.2d 293 (Fla. 1990) (ruling that proceedings under rule 3.850 are not to be used as a second appeal and allegations of ineffective assistance cannot

be used to circumvent this rule). Thus, this Court can reject this claim on procedural grounds.

Even if this Court were to rule on this claim on the merits, Suggs is not entitled to the relief he seeks. Trial counsel's failure to object to the prosecutor's closing arguments was a reasoned tactical decision designed, as part of the defense strategy, to convince the jury that reasonable doubt existed as to who actually killed Pauline Casey. While this Court has recognized the decision not to object to improper comments is fraught with danger because it might cause an otherwise appealable issue to be considered procedurally barred, it has also ruled a decision not to object to an otherwise objectionable comment may be made for strategic reasons. Zakrzewski v. State, 866 So. 688 (Fla. 2003); Chandler v. State, 848 So.2d 1031, 1045 (Fla.2003); Ferguson v. State, 593 So.2d 508, 511 (Fla.1992) (ruling that the decision not to object is a tactical one); McCrae v. State, 510 So.2d 874, 878 (Fla.1987) (noting that the failure to object to an improper comment can be a matter of trial strategy upon which reasonable discretion is allowed); Straight v. Wainwright, 422 So.2d 827, 831 (Fla. 1982) (ruling a claim that counsel failed to object soon enough to the prosecutor's improper comments to the jury was a meritless attack on the tactical choices of trial counsel). Reasoned tactics do not

constitute ineffective assistance of counsel. Gorby v. State, 819 So.2d 664, 678 (Fla. 2002).

After an evidentiary hearing, the trial court determined Suggs' two very experienced trial counsel made a tactical decision not to object to the prosecutor's closing arguments. Both counsel felt that the prosecutor talking more about the defense case than his own was a good thing and given their rapport with the jury, negative comments about the defense counsel or the case would simply backfire on the prosecution.

Even if any of these comments were more than fair comments on the evidence or fair rebuttal to the Suggs' closing argument, Suggs has failed to demonstrate counsel's tactical decision not to object to the prosecutor's closing argument was anything other than a reasoned decision to maintain rapport and credibility with the jury.[22] Accordingly, the trial court correctly denied his claim.

H. *Failure to insist on a mistrial when the prosecutor told the jury that Suggs had been in jail* [23]

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[22] The State does not concede any of the comments about which Suggs complains were anything more than a fair comment on the evidence or made in response to Suggs' evidence and argument.

[23] Suggs concedes trial counsel asked for a mistrial but alleges he should have insisted after the trial judge denied his motion for a mistrial.

Suggs claims the prosecutor improperly implied Suggs was in jail in Alabama before the murder when the prosecutor, during opening statement, explained how James Taylor, a witness from the State who had been in prison in Alabama, knew Mr. Suggs.[24] Suggs suggests that as a matter of law, no curative instruction could have cured the prejudicial impact of the error and trial counsel was ineffective for agreeing to a curative instruction.

At the evidentiary hearing, trial counsel Kimmel testified the defense objected to the prosecutor's opening comment and moved for a mistrial which was denied. (PCR EH 191). The trial court fashioned a curative instruction instead, agreed upon by the parties, which informed the jury that the prosecutor did not mean to imply that Suggs was in jail in Alabama. (PCR EH 192).

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[24] While Suggs also suggests that counsel was ineffective for failing to object to the requirement that Suggs wear a leg weight during the entire trial and was seen in the presence of the jury in shackles, Suggs did not present this claim directly to the trial court. Rather, this allegation was made to support the argument trial counsel was ineffective for failing to move for a mistrial when the prosecutor implied Suggs had been in prison in Alabama before the murder. Additionally, Suggs points to nothing in the record on appeal nor presented anything at the evidentiary hearing to support his claim Suggs was seen by the jury in any kind of restraint or that his ability to assist in his defense was hampered by any restraint system. Failure to present this issue directly for the trial court's resolution and failure to present any evidence to support his claim, is cause for denial of this allegation.

Mr. Kimmel thought this curative instruction solved the problem. (PCR EH 192). This Court agreed.

This claim is both procedurally barred and without merit as this Court has already decided this claim adversely to Suggs' position. On direct appeal, this Court considered Suggs' claim the trial judge erroneously denied his motion for mistrial. This Court explained its decision on this issue this way:

> ... During opening arguments, the prosecutor stated that Taylor, a climate of Suggs', would tell the jury that "[Taylor is] from Alabama. He's been in prison up there. He and the Defendant--he knew the Defendant." At the close of the prosecutor's argument, Suggs moved for a mistrial based on the fact that the jury could infer from this statement that Suggs had been in prison with Taylor. Before ruling, the trial judge reviewed the transcript and listened to the statement on the court reporter's tape, after which the trial judge found no misrepresentation by the State. Later, however, the trial judge determined that it was a "close call" as to whether a reasonable person might infer that Suggs had been in prison with Taylor. Consequently, Suggs and the prosecutor reached an agreement as to the following statement that the prosecutor subsequently read to the jury:
>
> In order to avoid any possible misunderstanding that may have been created yesterday, I would like to make a brief statement: I did not intend to imply that Mr. Taylor met Mr. Suggs in prison in Alabama. The evidence will show the first time they met was in the Walton County Jail after Mr. Suggs' arrest in this case.
>
> Based on this curative statement and the fact that Taylor and Suggs never served together in prison, we find that the prosecutor's curative statement was sufficient to remove any impression created in the

> minds of the jurors that Suggs may have served time in prison with Taylor in Alabama.

Suggs, 644 So.2d at 68.

As this Court determined the agreed upon curative instruction removed any implication Suggs had been in jail with state witness James Taylor, counsel cannot be ineffective for failing to agree to the instruction. Additionally, counsel cannot be considered ineffective for failing to move for a mistrial or preserve the issue for appeal when counsel both moved for a mistrial and preserved the issue for appeal.[25]

Once again, Suggs improperly seeks to use these collateral proceedings to relitigate an issue already decided adversely to him on appeal. See Thompson v. State, 759 So.2d 650 (Fla. 2000) (improper to raise issues already decided on direct appeal in post-conviction proceedings by making slightly different arguments); Medina v. State, 573 So.2d 293 (Fla. 1990) (ruling that proceedings under rule 3.850 are not to be used as a second appeal and allegations of ineffective assistance cannot be used to circumvent this rule). His claim was properly denied by the trial court.

I. Cumulative error

[25] This Court, in considering this claim on the merits, determined impliedly that trial counsel properly preserved this issue when he asked for a mistrial.

Suggs alleges that trial counsels' errors, both individually and cumulatively, were so egregious as to prevent a reliable adversarial testing of Suggs' guilt. Suggs has failed, however, to demonstrate any error in the trial judge's rejection of each of his guilt phase ineffective of assistance of counsel claims. When a defendant fails to demonstrate any individual error in his motion for post-conviction relief, it is axiomatic his cumulative error claim must fail. Downs v. State, 740 So.2d 506, 509 (Fla. 1999); Bryan v. State, 748 So.2d 1003, 1008 (Fla. 1999) (concluding that the defendant's cumulative effect claim was properly denied where individual allegations of error were found to be without merit). Here, as was the case in the trial court, Suggs has failed to demonstrate any individual error. Accordingly, any cumulative error claim must fail. Reed v. State, 29 Fla.L.Weekly S156 (Fla. April 15, 2004).

III.

WHETHER THE TRIAL JUDGE ERRED IN DENYING SUGGS' CLAIM HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE.

Suggs identifies three principal failures of trial counsel at the penalty phase: (a) Failure to offer proof of Sugi's incarceration record as mitigation; (b) Failure to object to unconstitutional HAD and C.P. jury instructions; (c) Failure to present mental health mitigation evidence.

A. Failure to offer proof of Suggs' incarceration record in mitigation.

Without citing to anywhere in the record on appeal, Suggs claims there was available evidence that he was a model prisoner in Alabama for ten years. Suggs claims he caused no problems for other inmates or prison personnel and was granted several passes outside of prison to visit with his family because of his good behavior. Suggs claims that trial counsel should have presented this evidence to the jury during the penalty phase and that his failure to do so was unreasonable.

At the evidentiary hearing, collateral counsel posed questions to trial counsel about his failure to obtain prison records and to present evidence of Suggs' good behavior in prison prior to the murder of Pauline Casey. Mr. Kimmel testified he did not want to highlight Suggs' prior incarceration. Mr. Kimmel testified that the first powerful fact likely to send Suggs to the electric chair was what was done to Pauline Casey. The second, in his view, was the fact that "Ernie Suggs [] had

already done a murder and gone to prison." (PCR EH 281). Trial counsel testified they were not going to "touch anything that talked about him being an inmate". (PCR EH 281). While he could not prevent the State from introducing evidence of his prior conviction, he could "avoid throwing gasoline on the fire by continuing to keep talking about his prior incarceration." (PCR EH 282). Mr. Kimmel testified that, in his opinion, talking to a Santa Rosa county jury about how Suggs was a good prisoner when he was in an Alabama prison for murder was not an exercise in good common sense. (PCR EH 281).

The trial judge ruled that trial counsel made a tactical decision not to present Suggs' prison records during the penalty phase of Suggs' trial. The trial judge found trial counsel's decision not to present these records (along with school and medical records) to be a reasonable decision and not ineffective assistance of counsel. (PCR Vol 1. 345).

The United States Supreme Court has ruled a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is relevant to the sentencing determination. Skipper v. South Carolina, 476 U.S. 1 (1986). *Accord* Valle v. State, 502 So.2d 1225 (Fla. 1987). In citing to Cooper v. Dugger, 526 So.2d 900, 902 (Fla. 1988), Suggs argues counsel was ineffective for failing

to present such evidence because a "defendant's potential for rehabilitation is a significant factor in mitigation." (IB 65).

In Cooper, this Court recognized that a defendant's good behavior in prison was evidence that could be presented as mitigation during the penalty phase of a capital trial. While it is clear that such evidence, in some cases, could demonstrate a potential for rehabilitation upon release after twenty-five years or the likelihood a defendant would pose no threat to others while spending his life in prison, none of the cases cited by Suggs require an effective counsel to present such evidence. This is especially true in this case, where Suggs had killed before, been released from prison, and killed again.

It borders on the absurd to suggest that Skipper and its progeny requires counsel to present such evidence when Suggs' first murder followed by the murder of Pauline Casey, spoke volumes about his potential for rehabilitation and future dangerousness, none of which was favorable to Suggs. Rather, the record suggests that in this case, a suggestion from trial counsel to the jury that Suggs had a good potential for rehabilitation would have been pure folly. This Court has determined that when an attorney has made a tactical decision not to present mitigating evidence after a full investigation, counsel is not ineffective. Moreover, this court has

specifically ruled that “an attorney's reasoned decision not to present evidence of dubious mitigating value does not constitute ineffective assistance.” Gore v. State, 846 So.2d 461, 470 (Fla. 2003); Gorby v. State, 819 So.2d 664, 675 (Fla. 2002).

In this case, trial counsel determined that evidence of Suggs’ good prison record would unnecessarily highlight the reason for Suggs’ previous incarceration in Alabama. Trial counsel also determined this underlying conviction would be a significant consideration in the jury’s recommendation for death and as such, decided not to "touch anything that talked about him being an inmate". (EH 281). The record shows trial counsel considered the possibility of presenting Skipper evidence during the penalty phase, but rejected it because, in his opinion, it would be do more harm than good. The evidence presented at the evidentiary hearing supports a conclusion that counsel's decision not to present certain evidence in mitigation was a reasonable trial strategy. Gore v. State, 846 So.2d at 470 (Fla. 2003).

B. Failure to object to unconstitutional HAC and CCP. instructions.

Suggs argues that trial counsel was ineffective in failing to object to the heinous, atrocious, or cruel (HAC) jury instruction struck down by United States Supreme Court in Espinoza v. Florida, 505 U.S. 1079 (1992). This claim is

completely without merit. This issue was raised and rejected on direct appeal. Further, the instruction given in this case was not the one struck down by the United States Supreme Court in Espinoza.

On direct appeal, Suggs alleged that the trial judge erred in instructing the jury in accord with the standard HAC instruction because that particular jury instruction was declared invalid in Espinoza v. Florida. In denying Suggs' challenge to the HAC instruction, this Court in Suggs v. State, 644 So.2d 64,70 (Fla. 1994) ruled the instruction given in Suggs' case was not the same instruction struck down in Espinoza. Trial counsel cannot be deemed ineffective for failing to object to a standard jury instruction that had not been invalidated at the time of the defendant's sentencing. Thompson v. State, 759 So.2d 650, 665 (Fla. 2000) (ruling that counsel's failure to object to standard jury instructions that have not been invalidated by this Court does not constitute deficient performance); Downs v. State, 740 So.2d 506, 517 (Fla. 1999).

Even if this were not the case, Suggs can show no prejudice for any failure to object, as the murder was undisputedly HAC. On direct appeal, this Court affirmed the trial court's conclusion that Suggs acted with utter indifference to the suffering of Pauline Casey, and that the murder was a

conscienceless, pitiless crime which was unnecessarily torturous to the victim. Because this Court found the evidence supported beyond a reasonable doubt the murder was HAC, Suggs can show no prejudice for any failure on the part of trial counsel to object to the standard HAC jury instruction.

Like for the HAC instruction, Suggs can demonstrate no prejudice for trial counsel's failure to object to the CCP instruction given to Suggs' jury at the penalty phase. The trial court found, and this court affirmed, the murder was indeed cold, calculated and premeditated. In her sentencing order, Judge Melvin described the medical evidence outlining the type and location of Ms. Casey's stab wounds. The court found that these "type of wounds were particularly expedient, giving their goal of death, and reflect the calculating mind of the Defendant. The entire criminal episode reflects the Defendant's careful plan to rob [the victim], kidnap her, kill her, and hide her body, all with the aim of avoiding detection. Mr. Suggs was particularly careful because, as he explained to his cellmates, he was not going to be stupid this time." Suggs at 70. As this Court found that Judge Melvin properly found that the murder was cruel and cold, calculated, and premeditated, Suggs can show no error.

In any event, Suggs claim must fail because at the time of Suggs trial, the CCP instruction given was a valid instruction.

Only some two years after Suggs' trial did this Court strike down the standard CCP instruction used at Suggs' trial. Jackson v. State, 648 So.2d 85 (Fla. 1994). Therefore, even if trial counsel had made the proper objections, the trial court would have acted appropriately in overruling any objection. Trial counsel cannot be deemed ineffective for failing to object to a standard jury instruction that had not been invalidated at the time of the defendant's sentencing or to anticipate changes in the law two years hence. Thompson v. State, 759 So.2d 650, 665 (Fla. 2000) (ruling that counsel's failure to object to standard jury instructions that have not been invalidated by this Court does not constitute deficient performance); Downs v. State, 740 So.2d 506, 517 (Fla. 1999).

C. Failure to present available mental health mitigation evidence.

Suggs claims trial counsel was ineffective for failing to present evidence that Suggs suffers from a deficit in intellectual functioning and organic brain damage. Suggs claims that had this evidence been presented at trial, he likely would have received a life sentence.

During the evidentiary hearing, Dr. Barry Crown, a psychologist, testified on behalf of Mr. Suggs. (PCR EH 11-13). Dr. Crown reported that Suggs had a tenth grade education but

later obtained his GED, had attended community college and vocational schools, and had taken auto mechanics and gunsmith classes. (PCR EH 16). Dr. Crown also told the trial judge Suggs was not married, had no children, and had historically consumed alcohol, smoked marijuana and huffed. (PCR EH 17). Suggs also had two motorcycle accidents where he lost consciousness. (PCR EH 17).

Dr. Crown testified that he performed a neuropsychological evaluation of Suggs on January 7, 1997 and administered various psychological tests.(PCR EH 15) [26] Dr. Crown determined Suggs had the vocabulary of a nineteen year old which was normal for someone with his educational background. (PCR EH 21). Suggs' IQ was between 102 or 112. (PCR EH 22). Dr. Crown also determined that Suggs had normal nonverbal recall and memory and his simple attention processes were normal. (PCR EH 27).

Dr. Crown testified that Suggs also had some significant mental deficits and impairments that existed from an early age. (PCR EH 30). For instance, Suggs' ability to use information in

[26] Dr. Crown performed a aphasia screening, a language use and development, a test of intellectual and cognitive processing, a verbal and nonverbal memory test, learning ability and problem solving test, left right hemisphere testing, hearing tests, a general processing test. (PCR EH 17-18). Scores on these tests cannot be faked. (PCR EH 19). Dr. Crown performed a Shipley Institute of Living Scale. (PCR EH 20)

a problem solving manner and engage in abstract problem solving is that of a person who is fourteen years old. (PCR EH 21-22). Tests also showed that Suggs had mild impairment in constructional ability and a deficit in attention and mental flexibility. (PCR EH 23-24). Suggs scored in the dysfunctional level on the Category test which requires test takers to learn new problem solving strategies and then rapidly apply them in new situations. (PCR EH 24). Suggs performed below average on the Single Digit Modalities Test which measures visual and verbal processing. (PCR EH 24). According to Dr. Crown, Suggs cannot use his brain in an efficient manner - the engine just doesn't work. (PCR EH 34,36). Suggs had a flat affect and depression. (PCR EH 27). Dr. Crown had spoken with Dr. Fay Sultan who was treating Suggs and she also thought Suggs was depressed. (EH 27).

Dr. Crown diagnosed Suggs as having "significant neuropsychological deficits and impairments" which was indicative of organic brain damage. (PCR EH 28). Dr. Crown opined that this as a long term condition that may have been aggravated by accidents and is exacerbated by alcohol or drugs. (PCR EH 29-30,35).

During cross-examination, Dr. Crown testified that Suggs did not suffer from a personality disorder. He also testified that

Suggs impairments would not affect his ability to comprehend the need to dispose of evidence if he were involved in a crime. (PCR EH 32). Dr. Crown also testified that Suggs did not suffer from any mental psychotic disorder. (PCR EH 33).

Trial counsel, Robert Kimmel, also testified at the evidentiary hearing concerning Suggs' claim he was ineffective for failing to investigate and present available mental health mitigation. Mr. Kimmel testified that prior to trial, Suggs was evaluated by psychologist, Dr. James Larson. Counsel testified he received a copy of Dr. Larson's report. Based upon the contents of the report, Mr. Kimmel decided not to present the results of Dr. Larson's evaluation during the penalty phase. (PCR EH 205). Mr. Kimmel told the court that it "was not in our best interest to use Dr. Larson's report or to use Dr. Larson live..." (PCR EH 205).

At the evidentiary hearing, Mr. Kimmel pointed to several specific things within the report that prompted him not to present the report or Dr. Larson's live testimony. (PCR EH 207-209). First, the report indicated Suggs tried to influence the report to help his defense. (PCR EH 208). The report also stated that Suggs does not suffer from any mental infirmity, disease or defect. (PCR EH 208). Additionally, Suggs refused to

complete a list of forty fill in the blank questions and was not cooperative with Dr. Larson. (PCR EH 208-209).

Mr. Kimmel testified that based upon the circumstances in the case there was "very reason in the world to keep a psychologist out of the courtroom." (PCR EH 205). He also told the court that Dr. Larson was known to him and is "not one of these people that is always for the prosecution.... but wants to help and [] do an honest and objective job." (PCR EH 208). While trial counsel did not obtain school records as Dr. Larson's report suggested, Mr. Kimmel told the court he did not want to get into the defendant's school records because "there were some unpleasant thing in Ernie's past that you wouldn't want a jury to hear about" (PCR EH 277).

In rejecting Suggs' claim that counsel was ineffective for failing to adequately investigate and present available mental health mitigation, the trial court ruled that, given Dr. Crown's testimony at the evidentiary hearing that Suggs suffered from no major psychosis and had an IQ within normal limits, Suggs failed to demonstrate prejudice for failing to present the testimony of a mental health expert during the penalty phase of Suggs' trial. (PCR Vol I, 343-344). The court found that even if the jury had given credit to an expert's opinion that Suggs suffered from organic brain disorder, the jury would have also concluded Suggs'

IQ was within a normal limit and did not suffer from a major mental disorder. The court found that even if such evidence had been presented at the trial, the results of the proceedings would not have been different. (PCR Vol I. 344).

This Court has stated that in evaluating the Strickland prongs of deficiency and prejudice, it is important to focus on the nature of the mental mitigation the defendant now claims should have been presented. This Court has noted that such focus allows this Court to determine whether trial counsel's choice was a reasonable and informed strategic decision and to determine whether the failure to present such testimony (assuming that the failure amounted to a deficiency in performance) deprived the defendant of a reliable penalty phase proceeding. Sweet v. State, 810 So.2d 854 (Fla. 2002). In this case, it is clear based on Dr. Crown's testimony, that the trial judge correctly determined that had counsel presented such testimony, the results of the proceedings would not have been different.

At most, Dr. Crown's testimony established Suggs had mental deficits in processing information and in retrieving information stored in his brain. According to Dr. Crown, Suggs was not impaired to the point of preventing him from being self-sufficient, supporting himself, being employed, or being aware of the need to dispose of evidence of a crime. Additionally, Suggs

has a normal IQ and does not suffer from any mental psychotic disorder. (PCR EH 31-34).

Dr. Crown's testimony, itself, did not establish either two mental health mitigators were present at the time of the murder nor establish that Suggs' was in the throes of any mental impairment or disorder at the time he drug Pauline Casey from the Teddy Bear Bar at knifepoint and murdered her on a back country road. Even if Dr. Crown's evidentiary hearing testimony would have been considered by the jury, it is not reasonably probable this additional evidence would have led to the imposition of a life sentence, or outweighed the seven aggravators found by the trial court in this case. In addition to a finding of no prejudice, the trial court could have properly found the failure to present mental health testimony at the penalty phase was a reasonable tactical decision under the circumstances. Trial counsel is not deficient where he makes a reasonable strategic decision not to present mental mitigation testimony during the penalty phase because it could open the door to other damaging testimony. Griffin v. State, 866 So.2d 1, 9 (Fla. 2003).

This is not a case where trial counsel did not investigate the possibility of presenting mental health mitigation at the penalty phase. Rather, Suggs was evaluated by an objective

mental health expert and received a report that trial counsel determined would do more harm than good. (PCR Evd. 382-393).

The report, introduced during the evidentiary hearing, established that Suggs was not cooperative with the evaluation. (PCR Evd. 383). Dr. Larson reported that Suggs grew up in a fairly stable family and disclaimed any physical or sexual abuse. (PCR Evd. 384). Assuming the validity of the test results, Dr. Larson indicated Suggs' profile fit one who, ***inter alia***, is immature, egocentric, resentful, hostile, and has not developed appropriate ways to express their anger in a timely and modulated fashion. (PCR Evd. 389). According to Dr. Larson, such people also have histories of marital disharmony, sexual maladjustment, alcoholism, and poor interpersonal relationships that gratify their own anti-social personalities. (PCR Evd. 389).

Dr. Larson also concluded Suggs did not suffer from any mental disease, defect, or infirmity. (PCR Evd. 392). Further, Dr. Larson found no evidence that Suggs was, at the time of the murder, under the influence of extreme emotional disturbance. Dr. Larson also found that Suggs' capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was unimpaired. (PCR Evd. 392).

When counsel pursues mental health mitigation and receives unusable or unfavorable reports, trial counsel is not ineffective

for failing to present the expert's findings. Hodges v. State, 28 Fla.L.Weekly S475 (Fla. June 19, 2003); Occhicone v. State, 768 So.2d 1037, 1048 (Fla. 2000); Asay v. State, 769 So.2d 974, 986 (Fla. 2000) (no ineffective assistance of counsel in deciding against pursuing additional mental health mitigation after receiving an unfavorable diagnosis); 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).

The evidence adduced at the evidentiary hearing established that Dr. Larson's report was replete with matters that a reasonable trial counsel would want to keep from the jury. These harmful matters, coupled with Dr. Larson's conclusions that Suggs was not mentally ill and that neither statutory mental health mitigator existed, establish that trial counsel's decision not to present available mental health evidence was both informed and objectively reasonable. Henry v. State, 862 So.2d 679 (Fla. 2003) (noting that defense counsel's reasonable, informed, strategic decisions do not constitute ineffective assistance if alternative courses have been considered and rejected).

IV.

WHETHER THE TRIAL JUDGE ERRED IN DENYING SUGGS' CLAIM THAT HE WAS ENTITLED TO RELIEF ON THE BASIS OF NEWLY DISCOVERED EVIDENCE.

Suggs claims newly discovered evidence establishes that William (Alex) Wells confessed to killing Pauline Casey. According to Suggs, Wells confessed to George Broxson, another inmate, that it was he, rather than Suggs, who had killed Pauline Casey. (IB 73). Suggs also alleges, without any citations to the record on appeal, that other violent crimes perpetrated by Wells were committed in a manner similar to the Pauline Casey murder. Suggs claims that such evidence would be admissible at trial to show it was Wells, not Suggs, that murdered Pauline Casey.[27]

At the evidentiary hearing held in conjunction with Suggs' post-conviction motion, Broxson testified as did Wells. Broxson testified he was serving a life sentence for the murder of a four year old child (PCR EH 38, 51). He told the court that for most of 1990 to 1992 he was housed at the Walton County Jail. Broxson testified he was incarcerated with Alex Wells and that they were both in the same cell pod for about six months.

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[27] While Suggs claims, in footnote 15 of his initial brief that the Panama City Police Department has withheld certain public records from him, Suggs did not allege he attempted to compel production by a properly filed motion to compel pursuant to Rule 3.851, Florida Rules of Criminal Procedure or that the trial judge in this case wrongfully denied such a motion.

Broxson told the court that Wells talked about some homicide he committed and said he had pictures of them. (PCR EH 41). Broxson told the judge that Wells related that Casey was on a dirt road and he and a friend knew where the body was and were going to see the body. According to Broxson, Wells said they were stopped by an officer who told them that they could not go down the road because there was a body down the road.[28] (PCR EH 42).

When asked to tell the court what Wells told him about the murder of Pauline Casey, Broxson replied "He told me so much, you know so many homicides there, I don't like talking about it, to be honest with you." (PCR EH 42). When asked again, Broxson testified Wells told him he killed Pauline Casey and he had a picture of her. Broxson said Wells showed him a picture of her, while she was alive, that Wells kept in his Bible. (PCR EH 43). Broxson provided no details about the picture or the person depicted in it. Broxson also testified that Wells confessed to four or five other homicides. Broxson did not identify any of

[28] In his statement to defense investigator Shockley, Broxson stated that Wells told him that it was Deputy Sunday who had prevented him from going down the road to see the body the day after the murder. (PCR Evidence 358). Deputy Sunday testified at the evidentiary hearing that he did not see Wells the day the victim's body was found. (PCR 174,177).

the alleged victims and provided no details about those murders. (PCR EH 43-44).

Broxson gave no specifics at all about what Wells had told him about the murder of Pauline Casey. For instance, Broxson did not testify that Wells told him he stabbed Pauline Casey to death, whether or not he attempted to sexually assault her before the murder, where and how he inflicted her fatal injuries, how he knew her, how he chose her for his victim, how her forced her to leave the Teddy Bear Bar, how he transported her to the site where she was killed, or any other details of the murder.[29]

On cross-examination, Broxson testified he did not tell Suggs, or anyone else at the time, that Wells had confessed to the murder. When the prosecutor asked him whether he was concerned that a man was facing charges for killing someone [when he] had evidence to indicate he didn't, Broxson told the

[29] Broxson also did not testify as to any of the details that he allegedly provided in an interview report prepared by defense investigator George Shockley. For instance, the report indicates that Wells allegedly told Broxson that he was intending to go bury the body but was stopped by the Walton County Sheriff's Department. In his testimony at the evidentiary hearing, Broxson testified that Wells told him that he and his "partner" knew where the body was and were going to "see the body". When asked specifically whether Wells told him why they were going down the road to where the body was, Broxson said that Wells did not. (PCR EH 42-43).

prosecutor that he did not have evidence and it wasn't his fault the State framed Suggs and put him on death row when the State knew he was innocent. (PCR EH 56).[30]

Broxson admitted that he knew that another inmate (Wally Byars) was planning on testifying that Suggs admitted to him he had murdered Pauline Casey. When Broxson was asked why he did not tell Suggs or anyone else about Wells confession at that point, Broxson testified that "to be totally honest with you, sir, it wasn't any of my business." (PCR EH 60).

William Wells testified at the evidentiary hearing as well. He testified he knew George Broxson because they slept next to each other at the Walton County Jail. He denied telling Broxson he killed Pauline Casey. He also denied showing Broxson a picture of Pauline Casey and denied killing her. (PCR EH 83).

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[30] Broxson testified he eventually did tell someone that Wells had confessed to him after Wells had pled guilty to another homicide. He testified that FDLE came down to question him but he did not initiate the contact or cooperate with them in order to get his sentence reduced. According to an interview report by defense investigator Gerald Shockley, FDLE agent Dennis Haley told him that he interviewed Broxson in connection with the murder of Donna Callahan. Broxson told Agent Haley that Wells had admitted to killing Donna Callahan and went into detail about how Callahan was killed. Agent Haley also reported that Broxson told him that he believed Wells also killed Pauline Casey. Agent Haley told Mr. Shockley that Broxson did not tell him that Wells admitted to the killing. (PCR Evd. 364).

On cross-examination, Wells admitted he was serving two life sentences for the death of a store clerk named Donna Callahan. He testified he pled guilty but contended it was actually his brother who killed Ms. Callahan. He told the court he had a federal habeas corpus proceeding pending and is hopeful his conviction will be overturned. He agreed with collateral counsel's suggestion it would not do his case any good if he started admitting to other murders. (PCR EH 85). Wells was not questioned about the details of any other murder or violent crime he may have committed, including the Callahan murder.

In his order denying post-conviction relief, the trial judge found that, after hearing the testimony of both Wells and Broxson, Broxson was not a credible witness (PCR Vol. I 342). The trial court also found that Suggs' allegations about Wells' similar crimes were not supported by any detailed evidence at the evidentiary hearing. The trial court ruled that, in any event, such evidence would not be admissible at trial because Suggs failed to establish the uniqueness of these other crimes (reverse Williams rule evidence)so as to show that Wells, rather than Suggs, committed the instant crime. (PCR Vol. I 343).

In evaluating claims of newly discovered evidence in a motion for post-conviction relief, the trial court must first determine whether the evidence was unknown and could not have

been known at the time of trial through due diligence. See Robinson v. State, 770 So.2d 1167 (Fla. 2000) (citing Jones v. State, 591 So.2d 911, 916 (Fla.1991) (Jones I)); Murrah v. State, 773 So.2d 622 (Fla. 1st DCA 2000). Once past this threshold finding, a court must apply the second prong, which requires a finding that the newly discovered evidence would probably produce an acquittal on retrial. Robinson, 770 So.2d at 1170. The trial court did not address whether this evidence was known or could have been discovered prior to trial. However, the trial court found Suggs had not met the second prong of this test because (1) Broxson's testimony was not credible, and (2) Suggs had failed to show the evidence of Wells' alleged other crimes would be admissible at any trial.

As long as the trial judge's findings are supported by competent substantial evidence, this Court has ruled it will not substitute its own judgment for that of the trial court on questions of fact, including the credibility of the witnesses and the weight given to the evidence by the trial court. Rogers v. State, 783 So.2d 980 (Fla. 2001).

In this case, there was competent, substantial evidence upon which the trial court could find George Broxson's testimony incredible. First, Broxson refused to provide any details about the murder of Pauline Casey as they were allegedly related to him

by William Wells. When asked to relate what Wells had told him about his involvement in the death of Pauline Casey, Broxson said only that "He told me so much, you know, I mean, so many homicides there. I don't like talking about it, to be honest with you." (PCR EH 42). Even when pressed for details by collateral counsel, the most he would say is that Wells said he killed her and showed him a picture. At the hearing, Broxson denied that Wells told him why he and a partner wanted to go down the dirt road where the body was, even though he allegedly told defense investigator Gerald Shockley Wells said he wanted to go back and bury the body. (PCR Evd. 358).

Thus, the trial court could properly consider that Broxson's testimony at the hearing about Wells' motivation to see the body (PCR EH 42) was inconsistent with the details Broxson had related earlier to a defense investigator. Too, this alleged confession about knowing where the body was and going down a dirt road to "see it" makes no sense in relation to an allegation that Wells was the actual killer.

Next, while Broxson testified Wells showed him a picture of Pauline Casey, he provided no details about the picture or the person in it. Additionally, Broxson reported the picture was of Pauline Casey while she was alive. Given the likelihood that Ms. Casey's death attracted significant media attention in small

Walton County, Wells' alleged possession of a picture of Pauline Casey, taken while she was alive, was of no probative value. Finally, William Wells testified he did not confess to George Broxson that he murder Pauline Casey and in fact that he did not kill her.

The trial judge is entitled to judge the relative credibility of the witnesses in conjunction with a claim of newly discovered evidence. Rogers v. State, 783 So.2d at 1004. In this case, he did so and ruled Broxson was not a credible witness. Because the trial judge's findings are supported by competent substantial evidence, this Court should affirm the trial court's ruling.

Insofar as Suggs' claim that reverse Williams rule evidence would have likely produced an acquittal, the trial judge correctly ruled that Suggs did not demonstrate such evidence would be admissible at a re-trial. A defendant may introduce similar fact evidence to show someone other than himself committed the crime for which he is charged, however the evidence must demonstrate a close similarity of facts; a unique or "fingerprint" type of information, for the evidence to be relevant. In this case, the trial court found (1) Suggs introduced no real details to support his claim that similar fact evidence existed that would link Wells to the murder of Pauline

Casey, and (2) Suggs failed to demonstrate the similarity between other crimes committed by Wells and the murder of Pauline Casey. Relying on this court's ruling in State v. Savino, 567 So.2d 892, 894 (Fla. 1990), the trial court ruled that Suggs had not demonstrated such evidence was admissible and, accordingly, could not show that this evidence would probably produce an acquittal at trial.

The record supports a conclusion that, at the evidentiary hearing, Suggs failed to present any evidence to support his claim that Wells' other crimes of violence were so similar to the murder of Pauline Casey that such evidence would have been admissible to show that it was Wells, and not Suggs, who kidnapped and killed Pauline Casey. Likewise, none of the allegations in Suggs' initial brief about these allegedly similar crimes are supported by the record. For instance, while Suggs consumes several pages of his initial brief relating the details of Wells' other alleged violent crimes against Donna Callahan, Joann Kemp, and Ruth Bills, Suggs provides no record citations to support these alleged "facts". (IB at 76-78). Suggs he failed to proffer any evidence of these allegedly similar crimes to the trial court so as to allow it to properly determine whether the murder was relevant and sufficiently similar to Casey's murder to warrant admissibility. Gore v. State, 784 So.2d 418, 432 (Fla.

2001). As Suggs failed to demonstrate this allegedly similar fact evidence linking Wells to the crime would have been admissible upon retrial, Suggs claim of newly discovered evidence must fail.

V.

WHETHER SUGGS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HE WAS ABSENT FROM CRITICAL STAGES OF HIS TRIAL.

Suggs alleges he was absent from critical stages of his trial. In particular, Suggs contends he was absent from a portion of the jury selection process during which three potential jurors were stricken on the basis of their answers to the jury questionnaires. Suggs alleges this absence violated his right to a fair trial and denied him the right to be meaningfully involved in the defense of his case.

The record reflects the attorneys and trial judge met in chambers to address some "housekeeping matters" before jury selection commenced. (TR. XI 1895).[31] The judge noted the jury

[31] The record reflects counsel and the trial judge took a brief recess during the conference in order to allow the judge to retrieve all of the jury questionnaires as well as a stipulated to statement-of-the-case to be read to the venire in order to determine whether any member of the venire had prior knowledge of the case. During this break, the Clerk of the Court, in open court, swore the venire and posed some preliminary qualifying questions. No member of the venire was excused during this session. (TR. XI 1903-1907).

questionnaires indicated that about 10% of the 100 strong venire had admitted having some knowledge of the case. (TR. XI 1896). A discussion ensued regarding how best to question these particular jurors so as to ensure the remainder of the venire was not exposed to another juror's knowledge about the case. (TR. XI 1898). The parties also discussed potential jurors' stated views on the death penalty that would need to be explored. Both trial counsel and the prosecutor identified certain jurors for individual questioning. In all, the parties identified 23 jurors to be questioned individually.

Both trial counsel and the prosecutor agreed that three potential jurors' views on the case, as reflected in their questionnaires, would justify a challenge for cause and that rehabilitation would be impossible. The first, Catherine Malczynski, had opined that Suggs was guilty. The court excused her for cause by agreement of the parties. (TR. XI 1916) Charles Wayne Baxley indicated on his questionnaire that he had already formed an opinion that Suggs was guilty. The Court also excused him for cause by agreement of both parties. Finally, the prosecutor exercised a challenge for cause against Hollis Matthews. Mr. Matthews indicated on his questionnaire that he could not vote guilty if the death penalty was a possible

penalty. Trial counsel agreed that Mr. Hollis was legally subject to a challenge for cause.[32] (TR. XI 1919).

After the three jurors were struck for cause, Judge Melvin asked trial counsel whether he still wished to continue without Mr. Suggs present.[33] Trial counsel told Judge Melvin he had thought about the issue and believed Mr. Suggs should be present.

Suggs was brought into the conference. The following dialogue took place between the Court, Mr. Suggs, and counsel for the State and the Defense:

> COURT: Good morning, Mr. Suggs
>
> DEFENDANT: Good morning.
>
> COURT: We have done some housekeeping chores and then had begun to discuss some of the jurors, prospective jurors. The State and Defense have stipulated to my striking for cause three jurors. That is the process were involved in when I realized I needed to ask them again, because they had waived your appearance. We moved beyond housekeeping and into more substantive matters. We realized we needed to take a break. Do you want to any ask any questions about those three that have been excused for cause?

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[32] Trial counsel did, however, preserve his objection to the striking of jurors who might not vote for the imposition of the death penalty. (TR. I 39-40).

[33] The Court noted that it had asked trial counsel previously whether he wanted Mr. Suggs present during the pre-trial conference and trial counsel had waived his presence. (TR. XI. 1919-1920).

TRIAL COUNSEL (KIMMEL): The stipulation, so he will know and it will be on the record, was still having reserved previously made motions objecting to strikes for Witherspoon[34] death penalty matters. But with that we conceded in the form of a stipulation that there was a sufficient factual basis on their questionnaire for the Court to find they could be struck for Witherspoon.

PROSECUTOR: May I? There were two of them moved for cause on behalf of or by the Defendant. That was Catherine Malczynski and Charles Baxley. They were no objected to by the State.

TRIAL COUNSEL (STEWART): Both of those indicated, just for the record, they had formed an opinion.
PROSECUTOR: Predisposition of guilty. There was another one that the State moved for cause, a Mr. Pace I believe his name was. Defense Counsel had objected.

TRIAL COUNSEL (STEWART): Robert Pace.

PROSECUTOR: Right. We were proceeding with him being left in the pool at this point subject to my being able to question him further about his opinion. I moved to challenge Hollis Matthews on the basis he could not sit in the guilt phase of this trial because of his opinion on the death penalty and I believe that was without objection.

TRIAL COUNSEL (KIMMEL): With the same Witherspoon reservation.

PROSECUTOR: At this point, I would move to challenge for cause Edward Holloway based on his response he gave in his questionnaire where he said, "I could not vote for a conviction if there was a possibility of the death penalty."

TRIAL COUNSEL (KIMMEL): We concede that satisfies Witherspoon. We do not seek further rehabilitation.

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[34] Witherspoon v. Illinois, 391 U.S. 510 (1968).

> COURT: If you are satisfied in terms of making this decision based only upon the responses in the jury questionnaire?
>
> TRIAL COUNSEL (KIMMEL): Yes, ma'am.
>
> COURT: Let me back up for a moment. Mr. Suggs, we have given you a fairly detailed summary of the activities regarding those jurors before you came into the room. Do you have any questions about those? Do you need a moment to discuss any of that with your Counsel before we proceed?
>
> TRIAL COUNSEL (STEWART): If you want to, you can.
>
> SUGGS: No, ma'am.

(TR. XI 1920-1922).

Insofar as Suggs attempts to argue this issue substantively, his claim is procedurally barred. A defendant's claim he was involuntarily absent during critical stages of the proceedings can be, and should be, raised on direct appeal. Armstrong v. State, 862 So.2d 705 (Fla. 2003)(ruling that the defendant's claim he was effectively absent from critical stages of his trial was procedurally barred because it could have been raised on direct appeal); Vining v. State, 827 So.2d 201, 217 (Fla. 2001); Hardwick v. Dugger, 648 So.2d 100, 105 (Fla. 1994)(same). Because Suggs did not raise this issue on direct appeal, his substantive claim is procedurally barred.

As to his claim that trial counsel was ineffective for failing to ensure his presence at each critical stage of the

proceedings, Suggs' argument is without merit. Suggs has alleged no actual prejudice resulting from his absence from the pre-trial conference held just prior to jury selection. Suggs has not made any claim the three potential jurors were unlawfully struck or that trial counsel should not have suggested, or agreed to, the challenges for cause. For instance, two of the three jurors struck before voir dire had already decided Suggs was guilty.

A juror must be excused for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind. Bryant v. State, 656 So.2d 426, 428 (Fla. 1995); Hamilton v. State, 547 So.2d 630, 632 (Fla. 1989); Singer v. State, 109 So.2d 7, 23-24 (Fla. 1959). As both Baxley and Malczynski had already decided Suggs was guilty before trial had even begun, both jurors were subject to a legal challenge for cause. Likewise Mr. Hollis was subject to a challenge for cause because his answers on the jury questionnaire apparently reflected that his views on the death penalty would prevent or substantially impair the performance of his duties as a juror. Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); Ault v. State, 866 So.2d 674 (Fla. 2003).

As all three potential jurors were subject to cause as a matter of law, Suggs has also failed to show, or even assert, how he could have made a meaningful contribution to counsel's legal

arguments during these preliminary proceedings. Moreover, the record affirmatively refutes his claim he was denied his right to be meaningfully involved in the defense of his case.

The record reflects that Mr. Suggs was brought into chambers and given a detailed summary of the proceedings that had been conducted outside Suggs' presence. Further, the trial court initially gave Suggs the opportunity to ask the Court any questions about the jurors that were struck for cause and then later offered Suggs the chance to discuss the strikes with defense counsel. (TR. XI. 1920, 1922). Suggs asked no questions of the court and affirmatively declined the opportunity to discuss the three strikes with trial counsel. (TR. XI 1922). The three potential jurors struck in chambers were not actually excused until after the trial judge gave some preliminary instructions, in open court, with Suggs present. Suggs posed no objection or raised no concerns about their excusal at that time. (TR. XI 1933). Accordingly, it is clear Suggs had the opportunity to consult with his trial counsel shortly after the challenges for cause were granted but before the jurors were actually excused. Because Suggs has not shown he was prejudiced by his absence from this pre-trial conference, he has failed to meet the Strickland prejudice prong necessary to demonstrate ineffective assistance of counsel. Vining v. State, 827 So.2d

201, 218 (Fla. 2002). This court should affirm the trial court's summary denial of this claim.

VI.

WHETHER SUGGS WAS DENIED HIS RIGHT TO CONFLICT FREE COUNSEL

Suggs claims his right to conflict free counsel was violated when he was represented by the Public Defender's Office during several critical stages of the proceedings. Suggs alleges these critical stages included numerous critical depositions, hearings, and examinations. Without citing to any record evidence, Suggs alleges that both he and state witness Wally Byars were represented by the same Public Defender at a time Byars claims Suggs made incriminating statements to him. Suggs makes no specific allegation of, nor points to any evidence that supports, any actual deficient conduct on the part of trial counsel during the time this alleged conflict existed.

Further, Suggs does not even identify, in his brief, the assistant public defender who had this alleged conflict. A deposition taken of Wally Byars on May 23, 1991, reflects that Assistant Public Defender (APD) John Mooneyham apparently represented Byars, on an unrelated case, in August 1990. It was in August 1990 when Byars made a statement to law enforcement

that Suggs had made inculpatory statements about the murder of Pauline Casey. At the time APD Loveless took his deposition in May 1991, Byars had already been sentenced to a three year minimum mandatory sentence on the charges pending against him and apparently was no longer represented by the Office of the Public Defender. (TR. IV 695-696).

The record reflects that Suggs was appointed counsel from the Office of the Public Defender on August 8, 1990. (TR. I 4). The same day, APD Mooneyham filed a boilerplate invocation of the right to remain silent. (TR. I 1). On August 22, 1990, an indictment charging Suggs with murder, kidnapping, robbery, and possession of a firearm by a convicted felon, was handed down by a Walton County grand jury. (TR. I 11).

On September 6, 1990, APD Mooneyham filed a written plea of not guilty on Suggs' behalf. The same day, a request for discovery was filed by Public Defender Jack Behr. (TR. I 15-16). Six days later on September 12, 1990, Dr. Larson was appointed as a confidential defense expert at the request of APD, Earl Loveless. (TR. I 19). Thereafter, the record demonstrates that APD Loveless, and not APD Mooneyham, assumed sole representation of Suggs during critical stages of the proceedings.

On September 20, 1990, the State filed an initial answer to Suggs' demand for discovery. Neither Byars or Taylor were on the first witness list. On January 17, 1991, the State filed an

amended answer to discovery which listed Wally Byars and James Taylor as a witness for the State. On June 19, 1991, APD Loveless filed a motion to withdraw from the case because Suggs had retained private counsel.[35] The court granted the motion. (TR. VI 950-956).

Trial counsel Donald Stewart filed a notice of appearance in the case on June 19, 1991. Trial commenced a year later in June 1992. Along with co-counsel Robert Kimmel, Donald Stewart represented Suggs during both phases of Suggs capital trial.

A conflict of interest claim emanates from the Sixth Amendment guarantees of effective assistance of counsel. For claims of ineffective assistance of counsel based on a conflict of interest, the defendant must demonstrate (1) that counsel actively represented conflicting interests, and (2) that this actual conflict of interest adversely affected his lawyer's performance. Wright v. State, 857 So.2d 861 (Fla. 2003); Cuyler v. Sullivan, 446 U.S. 335, 350, (1980) (ruling that in order to establish an ineffectiveness claim premised on an alleged conflict of interest, the defendant must "establish that an actual conflict of interest adversely affected his lawyer's performance."); Cooper v. State, 856 So.2d 969 (Fla. 2003); Hunter v. State, 817 So.2d 786, 792 (Fla. 2002); *See also* Gamble

[35] The record reflects that the relationship between Suggs and Loveless had become contentious. (TR. Vol. V 777-819).

v. State, 29 Fla.L.Weekly S215 (Fla. May 6, 2004); Quince v. State, 732 So.2d 1059, 1065 (Fla. 1999).

The record specifically refutes Suggs' claim his appointed attorney labored under an actual conflict of interest when he actively represented Wally Byars and Suggs in August 1990. While the record establishes Mr. Mooneyham represented Wally Byars on unrelated charges sometimes between May 1990 and May 1991, the record also establishes Mr. Mooneyham did not actively represent Mr. Suggs beyond filing two boilerplate pleadings shortly after Suggs' arrest. (TR. Vol I 1, 15). Any claim these initial filings created an actual conflict of interest is without support in law or logic. Further, Suggs' claim that both he and Byars were actually represented by the **same lawyer** is not supported by the record.

Additionally, any potential conflict created by representation of Suggs and Byars by attorneys from the same public defender's office was resolved when Mr. Loveless withdrew from the case and trial counsel Stewart assumed responsibility for Suggs' case.[36] Accordingly, any concerns concerning divided loyalty or counsel being placed in a situation of having to

[36] In Bouie v. State, 559 So.2d 1113, 1115 (Fla. 1990), this court noted that as a general rule a public defender's office cannot represent defendants with conflicting interests.

impeach or cross-examine a former client was resolved with the substitution of counsel.

Finally, Suggs has failed to allege, or point to any place in the record that supports his claim an actual conflict of interest adversely affected Mr. Loveless' representation.[37] In Herring v. State, 730 So.2d 1264, 1267 (Fla. 1998), this Court noted that "[t]o demonstrate an actual conflict, the defendant must identify specific evidence in the record that suggests that his or her interests were impaired or compromised for the benefit of the attorney or another party." In this case, the record supports a conclusion Mr. Loveless zealously represented Suggs during his nine month period of appointment.

On September 6, 1990, Mr. Loveless filed a motion to obtain a confidential mental health expert to assist in the preparation of Suggs' case. On January 24, 1991, APD Loveless filed nineteen motions on behalf of Mr. Suggs including motions to declare Florida's death penalty unconstitutional, a motion in limine, a motion for a statement of particulars, a motion to strike aggravating circumstances, motions to produce criminal records of state witnesses and identification materials, and three motions to vacate the death penalty. (TR. I, 33-104). From January 1991 to May 1991, APD Loveless took or participated in over thirty

[37] While Suggs hints his "lawyer was working for the State" (IB 85), this allegation is completely unsupported by the record.

depositions of state and defense witnesses, including "jailhouse snitches" Wally Byars[38] and James Taylor, and filed a motion to suppress all the evidence seized from Suggs' home. (TR. I 105-198, II, III, IV 693-766, and V 775-776). This record evidence refutes any notion that Mr. Loveless' efforts on Suggs' behalf were impaired or compromised for the benefit of the Office of the Public Defender, himself, or another party. Herring v. State, 730 So.2d at 1267. Because Suggs has failed to demonstrate that any conflict of interest impaired or compromised Mr. Loveless' efforts on his behalf, this Court should deny his claim.

VII.

WHETHER SUGGS WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL WAIVED SUGGS' RIGHT TO A RICHARDSON HEARING, WAIVED HIS PRESENCE DURING JURY SELECTION, WAIVED HIS RIGHT TO CONFLICT FREE COUNSEL, WAIVED HIS RIGHT TO CHALLENGE THE SEARCH OF SUGGS' RESIDENCE, AND WAIVED HIS RIGHT TO A CONFIDENTIAL MENTAL HEALTH EXPERT.

Suggs raises the same issues in this claim as he did in Claims II, III, V, VI and VIII. Because the State has addressed each of these claims fully in its answer brief, the State will not repeat the same arguments as Suggs did here.

VIII.

WHETHER SUGGS' RIGHT TO BE FREE FROM UNREASONABLE SEARCH AND SEIZURE WAS VIOLATED.

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[38] Suggs makes no claim here that Loveless failed to adequately investigate or preserve Byars' motive to lie or to attack his credibility during his May 1991 deposition.

Suggs claims that law enforcement officers procured search warrants to search Suggs' home and vehicle that violated the "particularity" requirement of the Fourth Amendment. Suggs claims the evidence, which he fails to identify, should have been suppressed because the search warrants violated the particularity requirement of the Fourth Amendment. Suggs claims as well that trial counsel was ineffective for failing to identify and argue the lack of particularity in the warrants in seeking suppression of the evidence.

Suggs' substantive Fourth Amendment claim is procedurally barred. On March 27, 1991, Mr. Loveless on Suggs' behalf filed a motion to suppress all the evidence found in Suggs' home and vehicle. Suggs claimed the search of his home and vehicle was illegal because his initial detention was unlawful and any subsequent consent to search was tainted. Further, Suggs claimed the subsequently obtain warrants were invalid as they were obtained from information substantially obtained as a result of the initial unlawful detention.[39]

A motion hearing was held on Suggs' suppression motion. (TR. I 846-948). After the hearing, the trial judge denied Suggs' motion. (TR. I 837-838). On direct appeal, Suggs argued the

[39] Suggs filed an amended *pro se* motion which challenged, *inter alia*, the particularity of the search warrants. (TR Vol. V 791). Suggs withdrew this motion at the motion hearing. (TR Vol. V 849).

trial judge improperly denied his motion to suppress the evidence found at his home,[40] claiming his initial detention by police was illegal and that the consent form he signed agreeing to allow the law enforcement officers to search his home was improperly obtained.

In affirming the trial court's denial of Suggs' motion, this Court ruled that Suggs was legitimately stopped by the officer because he was speeding and voluntarily agreed to accompany the officer to the station, going so far as to show another officer how to drive his vehicle. Finally, once at the station, Suggs not only voluntarily agreed to allow officers to search his home--he did so only after reaching an agreement with the officers not to charge him with the illegal possession of weapons that he kept at his home. Suggs at 68. Because Suggs raised a Fourth Amendment claim on direct appeal and this Court decided the claim adversely to Suggs, his substantive claim is procedurally barred.

Additionally, Suggs can show no prejudice for the failure of trial counsel to challenge the description of the property to be seized. Suggs is incorrect that the warrant violates the particularity requirement of the Fourth Amendment. Deputy Steve

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[40] He did not challenge the denial of the motion to suppress concerning search of his vehicle. Because this claim could and should have been raised on direct appeal, this substantive claim is procedurally barred.

Sunday testified during the hearing held on Suggs' motion to suppress that it was only after Suggs consented to a search of his home and vehicle and suspected proceeds of the robbery from the Teddy Bear Club had been found, was he notified the body was found.[41] (TR. V 880). Additionally, in the affidavit attached to the warrant, Deputy Sunday described the suspected evidence found during the consent search, which included $173 in small bills, numerous firearms, as well as folding and hunting knives.

This Court has ruled the particularity requirement of the Fourth Amendment must be given a reasonable interpretation consistent with the character of the property sought. For instance, when the purpose of the search is to find specific property, the warrant should particularly describe this property in order to preclude the possibility of the police seizing any other. On the other hand, it follows that when the object of the warrant is not to obtain specific items of property, but rather to obtain all property of a certain character, it is not necessary to describe a particular article of property. Green v. State, 668 So.2d 301,306 (Fla. 1996); Carlton v. State, 448 So.2d 250,252 (Fla. 1984).

[41] At the hearing on Suggs' motion to suppress, Deputy Sunday testified that before entering Suggs' home, he knew that approximately $200 was missing from the club where Pauline Casey worked on what was to be the last day of her life. (TR. Vol. V 881).

In this case, the warrant specified the officers could search and seize evidence and contraband in connection with the murder and robbery of Pauline Casey. Thus, the warrant, on its face limited the officer's discretion in what could be seized pursuant to the warrant, precluded a general exploratory search of Suggs' vehicle and home, and safeguarded Suggs' rights against the arbitrary invasion of his home by law enforcement officers. Carlton v. State, 448 So.2d at 252 (Fla. 1984). Because the trial court could have properly found the search warrant, under the circumstances, did not violate the particularity requirement of the Fourth Amendment, counsel cannot be deemed ineffective for failing to include a challenge to the warrant in his motion to suppress all the evidence found in Suggs' home and car.

Even if this Court would determine the warrant did not satisfy the particularity requirement and counsel should have challenged its validity, Suggs can demonstrate no prejudice for counsel's failure to challenge the warrant. On direct appeal, this Court found that Suggs' initial detention was legal and that he freely and voluntarily consented to a search of his home and vehicle. (TR. V 838). Because Suggs consented to the search of his home and vehicle, the evidence admitted at trial was admissible regardless of whether the warrants were invalid. Accordingly, Suggs can show no prejudice for failing to contest

the warrants particularity because the evidence would have been admissible to a valid exception to the warrant requirement.

IX.

WHETHER SUGGS IS INNOCENT OF THE DEATH PENALTY.

Suggs alleges he is innocent of the death penalty. Suggs claims the jury instructions on aggravating circumstances were erroneous, vague, and failed to adequately channel the sentencing discretion of the jury or genuinely narrow the class of persons eligible for the death penalty. Suggs points specifically to two of the aggravating factors and alleges these aggravating factors are unconstitutional as a matter of law.[42] Suggs claims the HAC aggravating factor was held unconstitutional by Espinosa v. Florida, 505 U.S. 10798, and the CCP aggravator was found unconstitutional by this court in Jackson v. State, 648 So.2d 85 (Fla. 1994). Finally, Suggs claims his death sentence was disproportionate.

In order to prevail on an "innocent of the death penalty" claim, a defendant must demonstrate constitutional error that invalidates all of the aggravating circumstances upon which the sentence was based. Griffin v. State, 866 So.2d 1, 18 (Fla. 2004); Vining v. State, 827 So.2d 201 (Fla. 2003). Other than

[42] Presumably, Suggs does not actually contend the HAC and CCP aggravators are unconstitutional. Rather, the gravamen of Suggs' claim is that the jury instructions for the HAC and CCP aggravators have been declared unconstitutional.

the HAC and CCP instructions, Suggs makes no specific complaint about the other five aggravators upon which the jury was instructed. Suggs points to no case law from this Court, or any other court for that matter, that supports the notion the instructions for the prior violent felony aggravator, under a sentence of imprisonment aggravator, murder in the course of a felony aggravator, avoid or prevent lawful arrest aggravator, or pecuniary gain aggravator, are constitutionally infirm either facially or as applied in this case. While Suggs claims the HAC aggravator was declared unconstitutional by the United States Supreme Court in Espinosa v. Florida, this Court in Suggs' direct appeal came to the opposite conclusion. In Suggs v. State, 640 So.2d 64 (Fla. 1994), this Court noted that "the instruction given is not the invalid instruction at issue in Espinosa." Suggs at 70. Further, this Court ruled the trial judge properly found the murder was heinous, atrocious or cruel.

Additionally, though Suggs is correct in his assertion the CCP instruction given in his case was apparently one invalidated by this Court some two years after Suggs' trial in Jackson v. State, 648 So.2d 85 (Fla. 1994), Suggs cannot show he is innocent of the death penalty because he has failed to show constitutional error invalidating any of the aggravators found in this case, save one. Even so, this court found on direct appeal the evidence was sufficient to support the trial judge's conclusion

the murder was CCP. Suggs at 70. As Suggs has not shown constitutional error that would invalidate all of the seven aggravating circumstances found to exist in this case, Suggs has failed to show he is innocent of the death penalty.

Finally, Suggs' claim that his death sentence is not proportional is without merit and is procedurally barred. This issue has already been decided adversely against Suggs. Though this Court did not specifically discuss the proportionality of Suggs' death sentence on direct appeal, a proportionality review is inherent in this Court's review of every capital case. This Court has noted that, simply because it does not mention its proportionality review in its written opinion, does not mean such review is not done. Ferguson v. Singletary, 632 So.2d 53, 58 (Fla. 1994). On direct appeal, this Court unanimously affirmed Suggs' convictions and sentence to death. As such, this Court has already determined Suggs death sentence was proportionate.

X.
WHETHER SUGGS' INABILITY TO INTERVIEW JURORS DENIED HIM DUE PROCESS OF LAW

Suggs argues the Florida Rule of Professional Conduct limiting his right to interview his jurors is unconstitutional because it denies him due process, violates his rights under the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the

United States Constitution, and denies him access to the courts. Suggs argues he should be entitled to interview jurors to discover if overt acts of misconduct impinging upon the defendant's constitutional rights took place in the jury room. [43] Suggs claims he should be allowed to discover how the medical examiner's testimony, during which two jurors got physically ill, impacted the jury's verdict.

Initially, this claim is procedurally barred because Suggs failed to raise this issue on direct appeal. A claim attacking the constitutionality the Florida Bar Rule of Professional Conduct governing interviews of jurors can and should be raised on direct appeal. Because Suggs failed to do so, this claim is procedurally barred. Allen v. State, 854 So.2d 1255, 1258 n.4 (Fla. 2003); Marquad v. State, 850 So.2d 417, 423 n.2 (Fla. 2003) (deciding that a post-conviction challenge to the rule prohibiting counsel from interviewing the jurors is unconstitutional is procedurally barred because it should have been raised on direct appeal); Rose v. State, 774 So.2d 629, 637 n.7 (Fla. 2000)(holding that the claim attacking the constitutionality of the Florida Bar Rule of Professional Conduct governing interviews of jurors is procedurally barred because Rose could have raised this issue on direct appeal); Young v.

[43] Suggs makes no showing or claim he filed a motion to interview jurors in the trial court that was improperly denied.

State, 739 So. 2d 553, 555 n.5 (Fla. 1999) (concluding that postconviction claim regarding the constitutionality of rule which limits an attorney's right to interview jurors after the conclusion of trial was procedurally barred because not raised on direct appeal).

Suggs claim also fails on the merits. Suggs' argument is premised on the notion that Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar prevents collateral counsel from interviewing jurors. This is not the case.

The rule actually prohibits a lawyer from initiating communication with any juror regarding a trial with which the lawyer is connected, except to determine whether the verdict may be subject to legal challenge. The rule also provides that a lawyer "may not interview the jurors for this purpose unless the lawyer has reason to believe that grounds for such challenge may exist."R. Regulating Fla. Bar 4-3.5(d)(4).

The rule's foundation rests on strong public policy against allowing litigants to harass jurors or to upset a verdict by attempting to ascertain some improper motive underlying it. Marshall v. State, 854 So.2d 1235 (Fla. 2003). Suggs proffers no basis to believe that grounds for a legal challenge to his convictions and sentence to death will be illuminated by an interview of his jurors. Rather that pointing to specific evidence of juror misconduct or prejudicial outside influence,

Suggs presents only a bare bones claim challenging the rule on constitutional grounds.[44] Significantly, Suggs never filed a motion with the trial court requesting he be allowed to interview jurors. At its core, Suggs complaint is that the rule impermissibly forbids him from conducting a fishing expedition in hopes of landing a keeper. Suggs claim should be denied.

XI.

WHETHER FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL UNDER THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Insofar as Suggs makes a claim that Florida's death penalty statute constitutes cruel and unusual punishment, this same argument was raised in Suggs' twelfth claim and is discussed in detail below. Suggs claims that Florida's capital sentencing statute is arbitrary and capricious because it fails to limit the

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[44] Jury inquiry may be permitted in the face of allegations which involve an overt prejudicial act or external influence (e.g. cases in which a juror related personal knowledge of non-record facts to other jurors, an assertion a juror received information outside the courtroom, or where jurors allegedly read newspapers contrary to the court's orders. On the other hand, matters which inhere in the verdict or seek to invade the jury's deliberative process may not be the subject of juror interviews. For instance inquiry into whether jurors misunderstood certain jury instructions, whether a juror attempted to discuss guilt prematurely, jurors' consideration of a defendant's failure to testify, or discussion of matters the trial judge instructed the jury to disregard are not permitted as these are matters which inheres in the verdict or relates to deliberation. Reeves v. State, 826 So.2d 932 (Fla. 2003); Devoney v. State, 717 So.2d 501 (Fla. 1998). The effect of the medical examiner's testimony on the minds, or stomachs, of the jury would clearly be a matter that inheres in the jury's verdict.

class of persons eligible for the death penalty and violates due process is without merit.

In Lugo v. State, 845 So.2d 74, 119 (Fla. 2003), this Court rejected Lugo's claim that Florida's death penalty statute is unconstitutionally arbitrary and capricious. *See also* Shere v. State, 579 So.2d 86, 94 (Fla. 1991); Hodges v. State, 28 Fla. L. Weekly S475 (Fla. June 19, 2003)(refusing to reconsider long established law rejecting arguments that Florida's death penalty statute is unconstitutional because it fails to prevent the arbitrary and capricious imposition of the death penalty, violates due process, and constitutes cruel and unusual punishment).

XII.

WHETHER FLORIDA'S DEATH PENALTY CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

This claim is procedurally barred. Constitutional challenges to Florida's death penalty scheme can and should be raised on direct appeal. Gorby v. State, 819 So.2d 664, 687 (Fla. 2002) (Gorby's challenge to the constitutionality of Florida's death penalty statute procedurally barred because it could have been raised on direct appeal); Arbelaez v. State, 775 So.2d 909, 919 (Fla. 2000) (challenges to the constitutionality of Florida's death penalty scheme should be raised on direct appeal); Woods v. State, 531 So.2d 79,82 (Fla. 1988)(ruling Wood's claim that executing an adult with diminished mental

capacity is cruel and unusual punishment could have been and should have been raised, if at all, on direct appeal); Doyle v. State, 526 So.2d 909, 911 (Fla. 1988)(claims that execution under Florida's capital sentencing scheme constitutes cruel and unusual would have been barred, if raised in Doyle's 3.850 motion, because it could have been raised on direct appeal). Because Suggs failed to raise this issue on direct appeal, he is barred from litigating this issue on collateral attack.

Additionally, this claim is without merit. This Court has consistently rejected claims identical to the one Suggs presents here. In Cole v. State, 841 So.2d 409 (Fla. 2003), this Court rejected Cole's claim that execution by lethal injection and electrocution constitutes cruel or unusual punishment. *See also* Power v. State, 2004 LEXIS 662 (Fla. May 6, 2004)(denying Power's claim that Florida's capital sentencing scheme unconstitutionally permits cruel and unusual punishment); Griffin v. State, 866 So.2d 1, (Fla. 2004)(noting that this Court has repeatedly rejected claims that death by electrocution or lethal injection is unconstitutional); (King v. State, 808 So.2d 1237 (Fla. 2003) (rejecting as meritless King's claim that execution by lethal injection or Florida's procedures implementing lethal injection constitute cruel punishment, unusual punishment, or both); Francis v. State, 808 So.2d 110 (Fla. 2003) (noting that Francis' claim that execution by electrocution is unconstitutional has

already been decided adversely to him); Thompson v. State, 796 So.2d 511 (Fla. 2001) (statute authorizing death by lethal injection does not offend notions of separation of powers; its retroactive application does not violate state or federal ex post facto clauses, and death by lethal injection does not constitute cruel and unusual punishment); Provenzano v. State, 761 So.2d 1097, 1099 (Fla. 2000) (ruling that execution by lethal injection does not constitute cruel or unusual punishment); Sims v. State, 754 So.2d 657 (Fla. 2000)(ruling that death by lethal injection is neither cruel nor unusual); Provenzano v. Moore, 744 So. 2d 413, 416 (Fla. 1999) (execution by electrocution in Florida's electric chair does not constitute cruel or unusual punishment).

XIII.

WHETHER SUGGS IS INSANE TO BE EXECUTED.

This claim is not ripe for review as no death warrant has been signed and Suggs' execution is not pending. Florida Rule of Criminal Procedure 3.811(a) provides that "[a] person under sentence of death shall not be executed while insane to be executed." Section 922.07(1), Florida Statutes (2002), provides that the Governor shall stay the execution when he is informed a person under a death sentence may be insane. Whether an inmate is presently insane so as to prohibit execution is not ripe for review until a death warrant has been signed and execution is

imminent. Griffin v. State, 866 So.2d 1 (Fla. 2004). *See also* Provenzano v. State, 751 So. 2d 37, 41 (Fla. 1999) (Harding, C.J., concurring) (stating that history of incompetence has no relevance regarding whether defendant "is incompetent to be executed at the present time"). Because this issue is not ripe for review, it is not appropriately before this Court.

XIV.

WHETHER THE TRIAL COURT ERRED IN FAILING TO CONDUCT A CUMULATIVE ERROR ANALYSIS.

Suggs claims the trial court improperly failed to conduct a cumulative error analysis. Suggs is incorrect. The trial judge, in considering the totality of Suggs' claim he was denied an adversarial testing, considered Suggs' claim of cumulative error. Contrary to Suggs' argument to this Court that the "State's circumstantial case against Mr. Suggs was weak from the beginning" and that no physical evidence linked Suggs to the crime (IB 97), the trial court found there was physical evidence linking Suggs to the crime, including the victim's fingerprints found on the exterior passenger window and a palm print inside the passenger door handle. (PCR Vol. I, 346).

From the four corners of the order denying Suggs' post-conviction motion, it is clear the trial court considered his claims of newly discovered evidence in context to all the evidence actually presented at trial. It is also clear the court conducted a cumulative error analysis. The trial court found

that Suggs had not met his burden to show trial counsel was ineffective nor to demonstrate the evidence presented at the hearing would have produced a different result on retrial. In its order denying Suggs' motion for post-conviction relief, the trial court ruled, that "[t]he defendant is entitled to no relief on his cumulative error claim." (PCR. I 346).

When a defendant fails to demonstrate any individual error in his motion for post-conviction relief, it is axiomatic his cumulative error claim must fail. Downs v. State, 740 So.2d 506, 509 (Fla. 1999); Bryan v. State, 748 So.2d 1003, 1008 (Fla. 1999) (concluding that the defendant's cumulative effect claim was properly denied where individual allegations of error were found to be without merit). Suggs has failed to demonstrate any individual error. Accordingly, any cumulative error claim must fail. Reed v. State, 29 Fla.L.Weekly S156 (Fla. April 15, 2004).

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court affirm the denial of Suggs' motion for post-conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Hilliard Moldof, Esq. 1311 SE Second Avenue, Fort Lauderdale, Florida 33316 17th day of June 2004.

_____
MEREDITH CHARBULA
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

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MEREDITH CHARBULA