IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC03-1618

BYRON BRYANT,

Appellant,

VS.

STATE OF FLORIDA,

Appellee.

****
*** ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA, (Criminal Division)
****
***

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Byron Bryant, was the defendant at trial and will be referred to as "Bryant". Appellee, State of Florida, the prosecution below will be notated as "State". References will be as follows: initial brief - "IB"; appellate record from the second trial (case number 94,902) - "2TR"; and postconviction record - "PCR." Supplemental records will be designated by the symbol "S." All will be followed by the appropriate volume and page number(s).

STATEMENT OF THE CASE AND FACTS

On February 6, 1992, Bryant was indicted for the murder of Leonard Andre and armed robbery with a firearm. Bryant's 1993 conviction and death sentence were reversed and remanded for a new trial because the judge was absent during a read-back of testimony without a valid waiver. Bryant v. State, 656 So.2d 426 (Fla. 1995). Retrial commenced on February 9, 1998 and on February 13, 1998, the jury convicted Bryant of armed robbery and first-degree murder. (2TR V29 1041-42). On April 14, 1998, the penalty phase began. Additional testimony was taken on September 10, 1998. (2TR V24 254, 268-70; V30 1055, 1065-1220, V31 1247-1312). Bryant was sentence to death on September 5, 1999 (2TR V31 1332-40).

On direct appeal, this Court found:

... On December 16, 1991, at approximately 8 p.m., Andre took the receipts of the day to the back of his store. Shortly thereafter, two men came into the store, one going to the back .... At gunpoint, one of the men ordered Andre's wife to open the cash register and demanded money, whereupon she took money from the cash register and gave it to one of the intruders. She then heard gunshots in the back of the store, and the men ran out. She found her husband in the back of the store lying on the floor with blood all around him. The autopsy determined that Andre had been shot three times at close range.

Police developed Bryant as a suspect only after several of his acquaintances contacted the police about his involvement in the murder. Subsequently, Bryant gave police a taped statement in which he admitted to killing Andre during a robbery attempt. In his statement to police, Bryant explained that he was with three other men on the night of the incident and was advised by one of them about the location of Andre's Market and that there was money in the store. Bryant went into the store and walked towards the back ... when Andre turned his back, Bryant pulled out his gun. Andre began to struggle and wrestle with Bryant over the gun, until Bryant got control of the gun and shot Andre. When Andre continued to fight, Bryant shot him again. After shooting Andre the third time, Bryant ran out of the store and left the scene. Bryant admitted in his statement that he shot Andre three times with a .357 magnum and admitted that he had a ski mask in his possession. Bryant told the detective that although he did not wear the ski mask, he dropped it when he ran from the store. During the investigation, a ski mask was found in the alleyway near the market.

After returning home from the scene at Andre's Market, Bryant asked his girlfriend to dispose of the gun he had used in the incident. ... At trial, however, Bryant denied any involvement in the robbery or killing, claiming his statement given to police was the result of police coercion.

> A jury found Bryant guilty as charged. After Bryant waived his right to a jury for sentencing, the trial judge imposed the death penalty for the first-degree murder of Leonard Andre and life in prison for the armed robbery. The court found three aggravating circumstances applied to Bryant: he previously had been convicted of a capital or violent felony; the murder was committed during a robbery; and the murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.... The court found no statutory mitigating circumstances and only one nonstatutory mitigator, remorse, but gave it very little weight. The court concluded that the aggravating circumstances outweighed the mitigating circumstances, and sentenced Bryant to death by electrocution for the first-degree murder and life imprisonment for the armed robbery.

Bryant v. State, 785 So.2d 422, 426-27 (Fla. 2001).

In Bryant's direct appeal, he raised seven issues:

> I - The lower tribunal erred in requiring the Defendant to be shackled before the jury.
>
> II - Electrocution is cruel and unusual punishment.
>
> III - The trial court erred in failing to properly evaluate the non-statutory mitigating circumstances of the Defendant's lack of education.
>
> IV - The lower tribunal erred in failing to [] evaluate the non-statutory mitigator that the Defendant lacked a positive role model.
>
> V - The lower tribunal erred in determining that the Defendant was competent to stand trial.
>
> VI - The lower tribunal failed to exercise its discretion in evaluating the non-statutory mitigating factor of Defendant's neurological impairment.
>
> VII - The death penalty is not proportionally warranted in this case.

(PCR V2 265-396; V3 397-469).

With respect to the use of shackles, this Court found the matter preserved. It concluded that it was harmless error to have failed to hold a hearing before ordering restraints used given the trial judge's "first-hand knowledge of Bryant's incidents of inappropriate and dangerous courtroom behavior" and announcement of the basis for his decision. Bryant, 785 So.2d at 429-30.

In affirming the sentence, this Court noted it "reviews and considers all the circumstances in a case relative to other capital cases" and noted the aggravation in the case. Id., at 436-37. This Court rejected Bryant's argument that the killing was the result of the victim's resistance, not premeditation and found the sentence proportional. Id. On May 9, 2001, rehearing was denied and on April 5, 2001, Mandate issued.

Bryant's September 5, 2001 Supreme Court petition for writ of certiorari raised one issue:

> Whether the analysis employed by the Florida Supreme Court in permitting Mr. Bryant to appear shackled before the jury at the guilt phase of his trial violated his right to a fair trial before an impartial jury, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution?

On November 13, 2001, certiorari was denied (PCR V3 527-96; V4

597-617). Bryant v. Florida, 121 S.Ct. 557 (2001).[1]

During the November 4, 2002 status conference, Bryant's collateral counsel noted that she and her client were in disagreement and Bryant wished her to withdraw (SPCR 35-36). Because Bryant was not present at the status hearing, the matter was reset to the following day so he could appear by telephone. (SPCR 37-39, 41-47). At that hearing Bryant was apprised of what had transpired previously (SPCR 53-58), and Judge Mounts questioned him about his desire to discharge collateral counsel. Bryant voiced that he wanted counsel to withdraw due to a perceived conflict arising from of a law suit counsel had with a fellow judge and colleague of Judge Mounts. (SPCR 59-80). At the November 12, 2002 continued hearing, Bryant announced he would be signing the postconviction motion prepared by counsel. (SPCR 92-94).

Also on November 12, 2002, this Court granted Bryant an additional 30 days to file a postconviction motion. (PCR V4 630). On November 20, 2002, Bryant filed his Initial Postconviction Motion (PCR V1 1-69). The State moved to strike it for non-compliance with Florida Rule of Criminal Procedure

[1] The same day certiorari was denied, Bryant filed a pro se motion in which he requested this Court recall its mandate and order a new appeal because he had the same counsel at trial as on appeal. The motion was stricken. (PCR V4 619-28).

3.851 noting the deficiencies in the pleading. The hearings on the matter were held December 12th and 19th, 2002. (PCR V1 71-79; SPCR 98-106, 111-14). As one of his final acts before retiring, Judge Mounts struck the postconviction motion and rendered the order on December 30, 2002 (PCR V1 83; SPCR 112-13).

On January 16, 2003, Bryant filed a motion to amend or supplement his initial postconviction motion. (PCR V1 84-86). The State objected as there was no postconviction motion pending, the time had expired for filing a rule 3.851 motion, thus, the court lacked authority to permit either a supplement or amendment, and Bryant's only avenue for relief lay with this Court's grant of additional time to file a rule 3.851 motion. (PCR V1 87-107). Over the State's objection, Judge Wennet, who was covering for Judge Brown, granted Bryant's motion to amend. (PCR 108; SPCR 118-23). On March 4, 2003, Bryant served his amended motion (PCR V1 109-170) and on May 2, 2003, the State responded and included an appendix of relevant documents. (PCR V1 186-766).

At the July 3, 2003 Case Management Conference before Judge Brown, and in its response to the postconviction motion, the State argued Judge Wennet erroneously granted Bryant leave to amend when there was no motion pending and the one year plus

extension period had expired. The State posited that the court was without jurisdiction; that Bryant should have moved this Court for an extension, and absent such extension, the postconviction motion was untimely, and had to be dismissed. Also, the State submitted that Florida Rule of Criminal Procedure 3.851(f)(4) did not afford Bryant a method of circumventing the time limits or pleading requirements (PCR V6 36-40). Judge Brown found the court lacked subject matter jurisdiction due to the untimely filing of an amended motion and failure to obtain leave of this Court for an extension of time (PCR V4 786). Anticipating appellate review, the court ruled that if it did have jurisdiction, Bryant was not entitled to relief. (PCR V4 787-93). This appeal (SC03-1618) and a state habeas corpus petition (SC04-83) followed.

SUMMARY OF THE ARGUMENT

Issue I - Summary denial of relief was proper because Bryant's initial postconviction motion was stricken, his request to amend was filed outside the extended time for filing a postconviction motion, and there was no motion pending before the trial court which could be supplemented or amended at the time. Because the motion was filed beyond the one year plus extension time, without meeting the requirements of rule 3.851(d)2), Bryant's only avenue for relief was to seek leave for an extension of time from this Court. Absent such leave or proper pleading, the court was without authority to consider the motion.

Issue II - The court properly denied relief upon finding Bryant failed to present any facts supporting his claims and that the conclusory allegations were refuted by the record. Moreover, the challenge to counsel's decision regarding the shackling, suppression of Bryant's statements, the objection to the avoid arrest aggravator, and Bryant's absence during a portion of voir dire were procedurally barred as issues which either were or could have been raised on direct appeal. Bryant's conclusory claims of ineffective assistance do not overcome the bar.

Issue III - The court properly denied relief because the

claims of ineffective assistance were legally insufficient and procedurally barred. Moreover, trial counsel was successful in preserving the shackling, suppression, and "avoid arrest" issues for appeal, thus, Bryant's complaint that counsel failed in this respect is refuted from the record. Bryant has not shown either deficient performance or prejudice arising from trial counsel's representation.

Issue IV - Bryant waived his penalty phase jury, therefore, the claim is legally insufficient, and he cannot challenge his sentence based upon Ring. Lynch v. State, 841 So. 2d 362, 366 n.1 (Fla. 2003). Moreover, Ring is not retroactive and it has no impact upon Florida's death sentencing. Turner v. Crosby, 339 F.3d 1247 (11th Cir. 2003) (finding Ring is not retroactive); Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003) (noting "we have repeatedly held that maximum penalty under the statute is death and have rejected the other Apprendi arguments" including that aggravators read to the jury must be charged in indictment, submitted to jury and individually found by unanimous jury) Bottoson v. Moore, 833 So. 2d 693 (Fla.) (rejecting claim that Ring invalidated Florida's capital sentencing scheme), cert. denied, 123 S.Ct. 662 (2002); Mills v. Moore, 786 So. 2d 532, 536-38 (Fla.) (determining death is the statutory maximum in Florida), cert. denied, 532 U.S. 1015 (2001).

ARGUMENT

ISSUE I

THE COURT PROPERLY FOUND IT DID NOT HAVE JURISDICTION BECAUSE BRYANT'S AMENDED POSTCONVICTION MOTION WAS FILED BEYOND THE PREVIOUSLY EXTENDED TIME LIMIT (restated)

Bryant argues Florida Rule of Criminal Procedure 3.851(f)(4) provides for amendments of postconviction motion up to 30 days prior to a scheduled evidentiary hearing, provided "good cause" is shown. (IB 9) It is Bryant's position that the striking of his November 20, 2002 initial postconviction motion established "good cause", thus, the court abused its discretion in finding it lacked jurisdiction. The State disagrees. Bryant's initial motion was stricken and the request to supplement or amend was filed after the one year plus extension of time period to file a postconviction motion had expired. As such, the court could not consider the motion and found it lacked jurisdiction. Alternately, the motion was denied properly as it was beyond the filing deadline, no "good cause" was shown to file either a late motion or an amendment/supplementation to a stricken postconviction motion. Consequently, the court dismissed the motion correctly.

Jurisdiction, a question of law, is reviewed *de novo*. Seven Hills, Inc. v. Bentley, 848 So.2d 345, 350 (Fla. 1st DCA 2003).

Here, the court found it lacked jurisdiction to entertain the postconviction motion given the procedural history of the case. On November 13, 2001, the Supreme Court denied certiorari review. Bryant, 121 S.Ct. at 557. This Court, on November 12, 2002, granted Bryant a 30 day extension of time to file his postconviction motion. See Bryant v. State, case number SC60-94902 docket. On November 20, 2002, an initial postconviction motion was filed (PCR V1 1-69), however, it failed (1) to include a copy of the judgment and sentence; (2) to contain claims separately pled with detailed factual support; and (3) to give a basis for raising issues which either were, should have been, or could have been raised on direct appeal. The State's request to strike the pleading was granted (PCR V1 71-79, 83; SPCR 112-14).

On January 16, 2003, presenting the same reasons as he did when arguing against the striking of his postconviction motion, Bryant sought leave to supplement or amend the stricken motion. (PCR V1 84-86). The State objected and claimed: (1) the time period had expired for seeking reconsideration of the striking of the motion; (2) the time for filing a postconviction motion had expired and Bryant was required to request permission from this Court for an extension of time; and (3) rule 3.851(f)(4) did not provide for such amendments/supplementations especially

given the fact the motion had been stricken, and thus, there was nothing to amend or supplement. (PCR V1 87-107). Over the State's objection, Bryant was given 30 days to amend his motion ostensibly because it was assumed this Court would not bar the filing of a postconviction motion by a capital defendant (SPCR 123). This issue was re-addressed during the Case Management Conference and the court ruled it lacked jurisdiction.

Rule 3.851(d)(2) provides: "**No motion shall be filed or considered** pursuant to this rule if filed beyond the time limitation provided in subsection (d)(1) unless it alleges" (1) newly discovered evidence; (2) retroactive application of fundamental constitutional right; or (3) "postconviction counsel, through neglect, failed to file the motion." (emphasis supplied) Bryant alleged none of these factors. Instead, he claimed below, as he claims here, that "good cause" was shown to allow for an amended motion merely because the initial motion was stricken. Clearly, under rule 3.851(d)(2), the court could not consider Bryant's motion. As such, the court was without jurisdiction.

Moreover, on February 4, 2003, the court was without authority to grant Bryant time to file an amended motion as the time limit, including the extension period, for filing a postconviction motion had expired. Permitting the filing of an

untimely postconviction motion is beyond the jurisdiction of the trial court. Under rule 3.851(d)(5), it is only this Court which may grant a defendant leave to file a postconviction motion beyond the one year time limitation. Such leave is granted only after the defendant's "counsel makes a showing of good cause for counsel's inability to file the postconviction pleading within the 1-year period established by this rule." Following the striking of the initial motion, Bryant refused to seek an extension of time from this Court. Because the rule does not provide for a trial judge to grant an extension, the court was without jurisdiction here. Such forms a valid, alternate argument supporting Judge Brown's August 8, 2003 finding of a lack of jurisdiction. (PCR V5 786).

However, should this Court find that under the broadest sense of the term the trial court had subject matter jurisdiction, the motion was denied properly as it was not only untimely, but the amendment/supplementation was granted erroneously given the fact there was no postconviction motion pending before the court at the time of the February 4, 2003 ruling. Such amendment was improper under rule 3.851(f)(4).

As noted above, it is proper to deny relief summarily where a postconviction motion has been filed beyond the stated time limitations and no valid basis for the untimeliness has been

established, let alone pled. Under the facts of this case, Bryant had until December 13, 2002 to file a proper postconviction motion. While a motion was filed, it was stricken for failure to comply with the pleading requirements of rule 3.851(e)(1). Bryant did not seek leave of this Court for additional time to file a proper pleading. Also, the amended motion was not filed until March 4, 2003, well beyond the time limit this Court set. Bryant never complied with the pleading requirements of rule 3.851(d)(2) to explain the delay. Cf. Smith v. State, 828 So.2d 409, 409 (Fla. 4th DCA 2002) (affirming summary denial where motion filed beyond rule's time limitation and defendant failed to plead basis for excusing untimely motion). Hence, the court was not permitted to consider the motion and relief was denied properly.

Further, rule 3.851(f)(4) does not permit amendments where there is no motion pending. The prior motion had been stricken. Contrary to Bryant's argument (IB 9), this rule does not apply here and does not furnish a basis for relief.

Rule 3.851(f)(4) provides:

> (4) Amendments. A motion filed under this rule may be amended up to 30 days prior to the evidentiary hearing upon motion and good cause shown. **The trial court may in its discretion grant a motion to amend provided that the motion sets forth the reason the claim was not raised earlier and attaches a copy of the claim sought to be added**. Granting a motion under

> this subdivision shall not be the basis for granting a continuance of the evidentiary hearing unless a manifest injustice would occur if a continuance was not granted. If amendment is allowed, the state shall file an amended answer within 20 days after the amended motion is filed.

(emphasis supplied). This rule contemplates where "good cause" is established, amendments may be authorized up to 30 days prior to a scheduled evidentiary hearing. Good cause is defined as a showing why the defendant did not raise the claim in his initial postconviction motion. A reading of the rule in its entirety, and giving effect to each sentence, establishes not only a time limit for amending the postconviction motion, but that a properly filed postconviction motion must exist **and** that the defendant must be requesting the opportunity to add a **new claim**. "It is axiomatic that all parts of a statute must be read together in order to achieve a consistent whole. Where possible, courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another." Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So.2d 452, 455 (Fla. 1992) (citations omitted). As such, rule 3.851(f)(4) requires that a postconviction motion be pending and that the amendment is to add a new claim, not the submission of an entirely new postconviction motion in an attempt to rectify prior pleading

deficiencies.

Here, Bryant asks this Court to find that the trial court had the authority to grant leave to amend the initial postconviction motion because an evidentiary hearing had not been set. Again, Bryant suggests that "good cause" was shown merely because his motion had been stricken. Were this Court to read the rule as Bryant suggests, full effect would not be given to each sentence of rule 3.851(f)(4) or other provisions of the rule. Also, it would be giving the lower tribunal authority not provided by the rule

When there is no motion pending, permitting a defendant to amend a prior stricken motion allows him to circumvent provisions of rule 3.851. To find the amendment proper would allow Bryant to evade rule 3.851(d) requiring that a postconviction motion be filed within one year of the time the conviction becomes final. See Fla. R. Crim. P. 3.851(d)(2) and (5). He would be circumventing rule 3.851(e) requiring that a sufficiently pled motion be filed detailing the judgment under attack, the disposition of all appellate issues, the nature of the relief sought, and a detailed basis for each factual and legal claim raised. Bryant would have this Court once again permit the filing of shell motions, thereby, extending unilaterally the time for filing a postconviction motion and

disregarding the requirement that such be fully pled. Given this, on July 3, 2003, when the matter was revisited, the summary denial was proper as the new motion should never have been permitted without authorization from this Court. Because the amended motion was not timely and not fully pled, rule 3.851(d)(2) required that it not be considered by the trial court.

Nonetheless, even if the court erred in dismissing on jurisdictional grounds, the court alternately ruled on claims. Ultimately, Bryant obtained his Circuit Court review, the denial of which are addressed in Issues II through IV below.

ISSUE II

SUMMARY DENIAL OF BRYANT'S CLAIMS OF INEFFECTIVE ASSISTANCE OF GUILT AND PENALTY PHASE COUNSEL WAS CORRECT AS THE ISSUES WERE EITHER LEGALLY INSUFFICIENT, PROCEDURALLY BARRED, AND/OR MERITLESS (restated)

It is Bryant's contention that summary denial was improper as counsel rendered ineffective assistance and there were disputed factual issues regarding the shackling and confession issues (IB 11, 14, 18-19). Bryant alleges counsel was ineffective for failing to: (1) properly handle the shackling issue; (2) "dispute and preserve for appeal" the confession issue; (3) challenge the "avoid arrest" aggravator; and (4) stop the proceedings until Bryant was present for jury selection. As

a fifth claim, he asserts the cumulative effect of the errors denied him a fair trial (IB 11, 13). Taking the sub-claims in turn, Bryant has failed to establish entitlement to an evidentiary hearing as each was either legally insufficient, procedurally barred, or refuted from the record. Consequently, there is no cumulative error and the court's order must be affirmed.

A trial court's summary denial of a postconviction motion will be affirmed where the law and competent, substantial evidence support its findings. Diaz v. Dugger, 719 So.2d 865, 868 (Fla. 1998). In Lucas v. State, 841 So.2d 380, 388 (Fla. 2003), this Court stated that: "To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record." See State v. Coney, 845 So.2d 120, 134-35 (Fla. 2003); Peede v. State, 748 So.2d 253, 257 (Fla. 1999).

In order to be entitled to relief on an ineffective assistance claim, Strickland v. Washington, 466 U.S. 688 (1984) requires Bryant demonstrate (1) "that counsel's performance was deficient," meaning that counsel made errors so serious that he

was not functioning as the counsel guaranteed by the Sixth Amendment; and (2) that prejudice resulted. Strickland, 466 U.S. at 687. Recently, this Court re-affirmed the two-prong Strickland analysis.

> First, a defendant must establish conduct on the part of counsel that is outside the broad range of competent performance under prevailing professional standards. *See Kennedy v. State*, 547 So.2d 912, 913 (Fla. 1989). Second, the deficiency in counsel's performance must be shown to have so affected the fairness and reliability of the proceedings that confidence in the outcome is undermined. *See id.*; *see also Rutherford v. State*, 727 So.2d 216, 219 (Fla. 1998)....

Davis v. State, 28 Fla.L.Weekly S835, 836 (Fla. November 20, 2003).

"Judicial scrutiny of counsel's performance must be highly deferential" and the "distorting effects of hindsight" must be eliminated. Strickland, 466 U.S. at 689. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id.

> I. The standard for counsel's performance is "reasonableness under prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984); *accord Williams v. Taylor*, --- U.S. ----, 120 S.Ct. 1495, 1511, 146 L.Ed.2d 389 (2000) (most recent decision reaffirming that merits of ineffective assistance claim are squarely governed by *Strickland*). The purpose of ineffectiveness review is not to grade counsel's performance. *See Strickland*, 104 S.Ct. at 2065; *see also White v. Singletary*, 972 F.2d 1218, 1221 (11th Cir. 1992) ("We are not interested in grading lawyers'

> performances; we are interested in whether the adversarial process at trial, in fact, worked adequately."). We recognize that "[r]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Strickland*, 104 S.Ct. at 2067. Different lawyers have different gifts; this fact, as well as differing circumstances from case to case, means the range of what might be a reasonable approach at trial must be broad. To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But, the issue is not what is possible or "what is prudent or appropriate, but only what is constitutionally compelled."[12] *Burger v. Kemp*, 483 U.S. 776, 107 S.Ct. 3114, 3126, 97 L.Ed.2d 638 (1987)(emphasis added).
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> _____
>
> [12] "The test for ineffectiveness is not whether counsel could have done more; perfection is not required. Nor is the test whether the best criminal defense attorneys might have done more. Instead the test is ... whether what they did was within the 'wide range of reasonable professional assistance.' " *Waters*, 46 F.3d at 1518 (en banc) (citations omitted)(emphasis added).

Chandler v. U.S., 218 F.3d 1305, 1313 n.12 (11th Cir. 2000).

(1) The shackling issue - Bryant claims he was improperly shackled and that “counsel failed to object to and preserve the issue for appellate review.” (IB 13). In support, Bryant states counsel “failed to refute evidence of petitioner’s prior violent courtroom behavior and failed to dispute that any of the acts had occurred.” (IB 14) Further, he contends counsel failed to proffer evidence that: (1) the trial court erred; (2) Bryant exhibited appropriate courtroom behavior after the 1993

sentencing; or (3) that less restrictive restraints were available (IB 14).

In resolving the issue below, the court stated:

> 6. Bryant's claim of ineffective assistance of counsel with respect to the shackling issue is procedurally barred because the use of shackles was completely resolved on appeal, and the Florida Supreme Court found defense counsel both timely objected and made the request that the trial court make an inquiry into the necessity for the shackles. The defense counsel's request for the inquiry preserved the issue. Bello v. State, 547 So. 2d 914, 918 (Fla. 1989); See, e.g. Taylor v. State, 28 FLW D1522 (4th DCA July 2, 2003).
>
> 7. Further, the claim is legally insufficient and conclusory. Defendant fails to explain what trial counsel could have done, given that there was no factual dispute with respect to the observations Judge Mounts personally made during Bryant's first trial, nor was there a factual issue as to the subsequent charge of aggravated assault, nor as to the book-throwing incident directed at Circuit Judge Walter Colbath. Finally, Defendant asserts no facts to support a claim that, but for trial counsel's actions, the result would have been different. Thus, under Strickland v. Washington, 466 U.S. 688 (1984), Defendant's claim fails.

(PCR V5 787). This is supported by the record as counsel protested the need for restraints, preserved the matter for appeal, discussed Bryant's courtroom behavior, and addressed less visible restraints. Moreover, this Court reviewed the use of restraints and found shackling proper, thus, no prejudice can be shown.

As he did below (PCR V1 114-15, 137-42), Bryant fails to

allege facts in support of his allegations of deficient performance. Bryant presented nothing but conclusory allegations that counsel failed to take certain actions. For example, Bryant alleged counsel failed to challenge the validity of the information used to require restraints or to dispute that a book was thrown at another judge. (PCR V1 114). Such is an insufficiently pled claim subject to summary denial. Ragsdale v. State, 720 So.2d 203, 207 (Fla. 1998) (stating although courts are encouraged to conduct evidentiary hearings, a conclusory claim "is insufficient to allow the trial court to examine the specific allegations against the record"); Kennedy v. State, 547 So.2d 912, 913 (Fla. 1989) (opining "defendant may not simply file a motion for post-conviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing"). As his amended motion reveals, and as pled here, Bryant has offered no facts which counsel should or could have offered to challenge the use of restraints or further preserve the matter for appeal. This pleading deficiency precludes review of counsel's performance against the record.

In the Case Management Conference, when asked what factual disputes exist, postconviction counsel informed the court that she could not dispute that the chair throwing incident took

place, but that counsel should have argued Bryant was no longer violent based upon the time between the first and second trials. Collateral counsel suggested that prison records should have been produced. She asserted that Bryant had had many court hearings where he acted properly, however, she admitted Bryant had been shackled or wore a stun belt then. (PCR V6 31-32). Even with this additional opportunity to support his claim factually, Bryant could not and did not offer anything to dispute his prior violent outbursts. Hence, his claim on this issue was conclusory and summary denial was proper. Ragsdale, 720 So.2d at 207.

The propriety of the use of shackles was found preserved for appeal and rejected by this Court. See Bryant, 785 So.2d at 429-30. Hence, as the court found, the matter was procedurally barred. "Issues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack." Muhammad v. State, 603 So.2d 488, 489 (Fla. 1992); Spencer v. State, 842 So.2d 52, 60-61 (Fla. 2003); Vining v. State, 827 So.2d 201, 218 (Fla. 2002); Smith v. State, 445 So.2d 323, 325 (Fla. 1983). It is inappropriate to use a different argument, such as ineffective assistance of counsel, to re-litigate the same issue. State v. Riechmann 777 So.2d 342, 353 n.14 (Fla. 2000) (finding claims procedurally barred

because defendant was couching them in terms of ineffective assistance when they had been raised and rejected on direct appeal); Medina v. State, 573 So. 2d 293, 295 (Fla. 1990) (holding "[a]llegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal").

Turning to the merits of the ineffectiveness claim, on retrial, counsel argued that although Bryant behaved improperly when the verdict was read in his first trial, he had behaved appropriately since and requested an evidentiary hearing on the necessity of restraints. (2TR V23 29-31; V28 743-47). Upon denial of the hearing, counsel sought leave to appeal, which likewise was denied (2TR V23 44-45). The record establishes counsel objected to the use of restraints, challenged the court's reliance upon the prior violent courtroom and jail behavior given their alleged staleness, discussed less visible restraints, requested an evidentiary hearing, and raised the issue pre-trial, during voir dire, and prior to Bryant testifying as well as including the matter as a basis for a new trial (2TR V17 3003-03; V23 29-31, 44-45; V28 743-47). Counsel cannot be faulted for not disputing unassailable facts such as the chair and book throwing incidents, and the aggravated battery charge received in jail while awaiting retrial. Nor

should counsel be blamed for the adverse ruling.

With respect to the allegation that less restrictive restraints should have been considered, the matter is barred as it was addressed on direct appeal. Considering the matter, this Court stated: "It should also be mentioned that, from the very outset of Bryant's retrial, the judge offered Bryant the opportunity to wear an electronic restraining belt which could be concealed underneath his clothing--and would not have been visible to the jury. Insofar as Bryant complains about the visibility of the restraints, **he has only himself to blame**." Bryant v. State, 785 So.2d 422, 431, n.6 (Fla. 2001) (emphasis supplied). Such unquestionably refutes Bryant's allegation here and offers him no basis for relief.

Prejudice has not been established. By failing to proffer facts calling into question the evidecne relied upon at trial and appeal, Bryant is unable to show that, but for counsel's actions, the result of the proceeding would have been different. Undisturbed is the fact Bryant displayed violent courtroom behavior and was violent while incarcerated before his re-trial. Referring to the "chair throwing" incident, Judge Mounts stated he had "never seen a more violent act in a Court of Law." By receiving confirmation from the prosecutor that the State was proceeding on the 1998 aggravated battery committed while

awaiting retrial, Judge Mounts recognized Bryant's continued violent behavior and rejected any contention of a change in circumstances (2TR V28 744). This Court found such was a valid basis for shackles. Bryant, 785 So.2d at 429-30. Judge Mounts had the discretion to order restraints and based upon his personal knowledge of Bryant's behavior, such was appropriate.[2] For further analysis see Issue III(1).

(2) The confession issue - Here, Bryant alleges counsel was "ineffective for failing to preserve properly as an appellate issue the trial court's erroneous order denying defense motion to suppress the defendant's statements as involuntary" and for "failing to obtain a false confession expert to testify at the suppression hearing." (IB 12). In his motion, Bryant alleged:

> (b) Trial counsel was ineffective in failing to suppress the defendant's statements. Trial counsel was ineffective in failing to preserve this issue for direct appeal. This failure was prejudicial to the defendant because there was no other evidence linking the defendant to the crime, such as witness identification or physical evidence. Defendant's alleged coerced statements were the only evidence linking defendant to the instant crime.
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> ...

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[2] Illinois v. Allen, 397 U.S. 337, 343-44 (1970) (finding due to defendant's conduct he may forfeit right to appear free of physical restraints); Derrick v. State, 581 So.2d 31, 35 (Fla. 1991) (finding shackling proper); Correll v. Dugger, 558 So.2d 422, 424 (Fla. 1990); Stewart v. State, 549 So.2d 171, 173-74 (Fla. 1989); Diaz v. State, 513 So.2d 1045, 1047 (Fla. 1987).

> (g) Trial counsel was ineffective for failing to preserve as an appellate issue the trial court's erroneous order denying defense's motion to suppress the defendant's statements as involuntary. Trial counsel was ineffective for failing to preserve as an appellate issue the trial court's erroneous order denying defense's motion to suppress the defendant's arrest based on lack of probable cause.

(PCR V1 115, 120). The accompanying memorandum of law contained the statement that counsel failed to preserve for appellate review the denial of the motion to suppress and the issue of lack of probable cause to arrest. (PCR V1 138). Unrelated to the ineffectiveness claim, and without any reference to counsel's actions, Bryant presented two stand alone claims of (1) "That the conviction was obtained by a violation of the privilege against self-incrimination; that the conviction obtained was due to use of evidence obtained pursuant to an unlawful arrest" (PCR V1 124-31) and (2) "That the conviction was obtained by use of a coerced confession." (PCR V1 131-33).

Of import is the fact that Bryant did not allege in his written pleading below that counsel should have obtained a "false confession" expert. That allegation was raised for the first time at the Case Management Conference, and even then, Bryant did not identify the expert or outline what he would say beyond "whether the confession was coerced" and whether Bryant was telling the truth or lying during his police statement. When pressed, collateral counsel offered that trial counsel was

ineffective because he did not explore the possibility of getting a false confession expert to testify. (SPCR 26-27). The State responded that this was the first time Bryant was alleging ineffectiveness based upon the failure to obtain a "false confession" expert, but that the confession issue was addressed at trial and could have been raised on direct appeal. (SPCR 44-45). Moreover, the written pleading and record revealed that counsel, based upon the first and second trials, did claim the confession was coerced, but on the grounds that Bryant's mother was offered in exchange for the confession or that a detective brandished his weapon in the interview room (S2TR V2 166-253).

The trial court resolved the matter as follows:

> 8. Defendant's claim that trial counsel was ineffective relative to failing to suppress Defendant's statement is procedurally barred because trial counsel did move to suppress and did object when the statement was admitted at trial. Thus, the claim could have been raised on appeal, although it was not. Defendant fails to assert any factual basis for his claim that trial counsel could have done more to preserve the matter for appeal. This Court finds that the claim that counsel was ineffective in this respect is legally insufficient.

(PCR V5 787-88). The court denied the claims challenging the validity of the confession stating: "Defendant claims that he is entitled to post conviction relief because his confession was obtained following an unlawful arrest and was coerced. These claims are procedurally barred, having been preserved and not

raised on appeal." (PCR V5 792, ¶20).

Here, Bryant limits his challenge to counsel's effectiveness. As evidence of disputed facts, Bryant alleges a factual determination was necessary to show counsel was deficient in not listing/calling family members and a "false confession expert" to dispute the confession and finding of probable cause (IB 15).

The allegation about not calling family members was not made in connection with the ineffectiveness claim below, and as such, is not preserved for appellate review. It is well established that for an issue to be preserved for appeal, it must be presented to the lower court and "the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved." Archer v. State, 613 So.2d 446 (Fla. 1993). See Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982).

Moreover, neither below nor here, has Bryant alleged what the family members or "false confession expert" would present, or that they were available at the time of the trial. Consequently, he has not met the pleading requirements necessary for an evidentiary hearing. Ragsdale, 720 So.2d at 207; Kennedy, 547 So.2d at 913. Such supports the finding of legal insufficiency.

Similarly, Bryant alleges counsel was ineffective for proceeding to trial not "properly prepared to present evidence to support said defense" (IB 16). This allegation was not presented below, thus it is unpreserved. Steinhorst, 412 So.2d at 338. It also is devoid of factual support, is merely conclusory, and does not present a basis for remanding for an evidentiary hearing. Ragsdale, 720 So.2d at 207; Kennedy, 547 So.2d at 913.

The claim is procedurally barred. At trial, counsel moved to suppress Bryant's statement on the grounds there was no probable cause to arrest and that the statement was coerced. Counsel objected when the statement was admitted at trial. (2TR V28 808-09, S2TR V2 166-253). The suppression issue could have been raised on appeal, but was not, thus it is barred from review as the ineffectiveness claim is nothing more than an attempt to overcome the bar to obtain a second appeal. Muhammad, 603 So.2d at 489. See Asay v. State, 769 So.2d 974, 989 (Fla. 2000) (finding "one sentence" conclusory allegation of ineffectiveness is improper pleading and attempt to relitigate procedurally barred claim); Freeman v. State, 761 So.2d 1055, 1067 (Fla. 2000); Harvey v. Dugger, 656 So.2d 1253, 1256 (Fla. 1995); Medina, 573 So.2d at 295 (holding collateral proceedings cannot serve as second appeal). Moreover, merely because a

defendant is able to find an expert years later to give a more favorable opinion does not establish that counsel was ineffective. Elledge v. Dugger, 823 F.2d 1439, 1446 (11th Cir.) (opining "[m]erely proving that someone--years later--located an expert who will testify favorably is irrelevant unless the petitioner, the eventual expert, counsel or some other person can establish a reasonable likelihood that a similar expert could have been found at the pertinent time by an ordinarily competent attorney using reasonably diligent effort"), modified on other grounds, 833 F.2d 250 (11th Cir. 1987).

Bryant's reliance upon Tejada v. Dubois, 142 F.3d 18, 25 (1st Cir. 1998) and Washington v. Texas, 388 U.S. 14, 19-20 (1967) is misplaced here. The question before this Court is whether an evidentiary hearing should have been granted to resolve disputed facts. The recent allegation that counsel failed to present an unidentified defense is not the issue. Further, the record reveals that the confession was challenged at the suppression hearing. Hence, there was no unconstitutional failure in the adversarial process. Counsel may not be deemed deficient merely because the court ruled against him. Bush v. Wainwright, 505 So.2d 409, 411 (Fla. 1987) (finding counsel's lack of success on actions pursued following sound defense strategies "augurs no ineffectiveness of

counsel"); Songer v. State, 419 So.2d 1044 (Fla. 1982). Cf. Swafford v. Dugger, 569 So.2d 1264, 1266 (Fla. 1990) (noting "[a]fter appellate counsel raises an issue, failing to convince this Court to rule in an appellant's favor is not ineffective performance."). The court denied the suppression motion after consideration, thus, the evidence was presented properly to the jury. Bryant has not shown deficient performance or prejudice. Relief must be denied. For further analysis see Issue III(2).

(3) The avoid arrest aggravator - It is Bryant's position counsel was ineffective in not challenging the avoid arrest aggravator, and that there was no evidence supporting aggravator. (IB 11). The court properly denied relief. (PCR V5 789).

The challenge to counsel's actions related to the avoid arrest aggravator is legally insufficient and barred. The thrust of the claim, as it was below, is that the record does not support the aggravator, thus, counsel was ineffective for not challenging it. Yet, Bryant fails to identify what evidence counsel should have offered to dispute the aggravator. The claim was denied properly as conclusory. Kennedy, 547 So. 2d at 913.

Moreover, counsel challenged this aggravator at trial (2TR V13 2298-2308; V30 1221-22; S2TR V2 258-60, 263). As such, he

cannot be deemed deficient under Strickland merely for obtaining an adverse ruling. Griffin v. State, 866 So.2d 1, 16 (Fla. 2003) (finding counsel's performance cannot be deemed deficient when he raised the very same suppression issue at trial as was complained of on collateral review); Bush, 505 So. 2d at 411. In his postconviction motion, as well as here, Bryant merely recasts a direct appeal issue as one of ineffective assistance. This gives another basis for affirming the summary denial of relief. Schwab v. State, 814 So.2d 402, 413 (Fla. 2002) (barring review of ineffectiveness claim contesting propriety of aggravator which was nothing but veiled attempt to reargue rejected appellate claim); Rutherford v. State, 727 So.2d 216, 218-19 n. 2 (Fla. 1998) (finding claim which could have been raised on appeal even though now couched as ineffectiveness of counsel was procedurally barred); Rivera v. State, 717 So.2d 477, 480 n.2 (Fla. 1998); Cherry v. State, 659 So.2d 1069, 1072 (Fla. 1995).

At trial, counsel argued the murder was not committed in order to facilitate Bryant’s escape (2TR V30 1221-22; S2TR V2 258-60, 263). The judge found otherwise, and noted the homicide victim was “effectuating a lawful citizen’s arrest” and Bryant killed him during the detention and for the purpose of preventing or avoiding the citizen’s arrest and eventual police

arrest. (2TR V22 3860-64). This rested in large measure upon Bryant's confession:

> So um, the we up to the front of the store wrestling so it was like this man strong, he started to get on top of me now. So, I'm trying with all my might to push him off me. So, then, um he turned his hand a loose. He loosed his hand from the gun some kind of way to try to, you know, push off. So then he rolled on the side, he wasn't on top of me no more, he rolled over like on his side. And when he rolled over on his side, then I got control of the gun, then I shot him one time. So then he was still fighting with me. He ain't, he didn't give up. So, then I shot him again, the he just hollered again, but he was still fighting with me. I was pulling away, but he was still holding on. So, I shot him the third time, then he just hollered for his wife. When I shot him the third time I just used all the force that I had and I pushed him off me and I pulled away. Then when I got up, I was finna (sic) run out the store. Then he grabbed a hold to my pants leg. He was you know, he was still hollering like that. But he was trying to hold me at the same time. The I yanked my pants away from, then I ran out and jumped in the car.
>
> . . .
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> We was struggling and it was like both of us was fighting for our life. And my only out, the only way I could leave that store was to shoot him.

(2TR V28 821-23, 832).

Although the "avoid arrest" aggravator usually is associated with homicides of police officers, it may be found where a witness is killed. Riley v. State, 366 So.2d 19, 22 (Fla. 1978). The State must show something more than the victim's death; the State must show that witness elimination is the dominant purpose of the murder. Geralds v. State, 601 So.2d

1157, 1164 (Fla. 1992). While transportation of the victim to a remote location before the murder has supported the "avoid arrest" aggravator, see Feenie v. State, 648 So. 2d 95 (Fla. 1994); Preston v. State, 607 So.2d 404 (Fla. 1992) and Cave v. State, 476 So.2d 180 (Fla. 1985), such is not a required fact. This Court has considered other factors such as "whether the defendant used gloves, wore a mask, or made any incriminating statements about witness elimination; whether the victims offered resistance; and whether the victims were confined or were in a position to pose a threat to the defendant" in order to determine if the aggravator was established. Farina v. State, 801 So.2d 44, 54 (Fla. 2001). See Philmore v. State, 820 So.2d 919, 935 (Fla. 2002) (affirming avoid arrest aggravator where defendant confessed that killing was to facilitate escape); Consalvo v. State, 697 So.2d 805, 819 (Fla. 1996) (judging avoid arrest aggravator proven where victim knew defendant, was pressing charges for prior crime, and awoke during burglary threatening to call police); Harvey v. State, 529 So.2d 1083, 1087 (Fla. 1988) (finding avoid arrest aggravator where victims knew assailants and defendants discussed killing victims to avoid detection), vacated on other grounds, 28 Fla. L. Weekly S513 (Fla. Jul 03, 2003) (finding ineffective assistance of counsel for conceding guilt).

The facts of this case differ significantly from Hurst v. State, 819 So.2d 689, 695 (Fla. 2002) where the State did not seek the aggravator and the jury was not instructed, but the court found it upon the speculative evidence Hurst killed even though he could have completed the robbery without killing and did not want the victim to see his face. Here, Bryant entered the store without a mask, although one was dropped while fleeing, grappled with the owner over the gun, then confessed that he shot the victim three times at point blank range with a .357 magnum revolver in order to escape the scene. Bryant confessed he had to shoot the victim to break free of Mr. Andre's grasp and leave the store. (2TR V28 821-23, 832). Mr. Andre's murder was more than the result of a robbery gone awry. Clearly, Bryant's sole motivation for the shooting, as he confessed, was to eliminate Mr. Andre who was the robbery victim and was detaining him. Floyd v. State, 850 So.2d 383, 406 (Fla. 2002) (noting avoid arrest aggravator may be based on defendant's statements describing motivation for killing).

Counsel's representation with respect to the aggravator did not result in prejudice as the factor is supported by the record. This Court has noted that it has an independent duty to review the sufficiency of the evidence and sentence proportionality. Jennings v. State, 718 So.2d 144, 154 (Fla.

1998). The proportionality assessment necessitates that this Court review "all of the aggravating and mitigating factors, including their nature and quality according to the specific facts of this case." Id. Such review was done in Bryant's case upon this Court's recognition that Bryant did not challenge the avoid arrest aggravator on appeal. Bryant, 785 So.2d at 436-37. This Court identified no deficiency in the aggravation found by the trial court. Bryant, 785 So.2d at 436-37. Clearly, the avoid arrest aggravator rests upon substantial competent evidence, and this Court's prior review shows that the result of the proceedings were not undermined. Moreover, the cases cited by this Court in the proportionality review show that even if the avoid arrest aggravator were not utilized, the sentence would be proportionate. Id. at 437. Bryant has failed to carry his burden under Strickland.

(4) Bryant's absence from voir dire - The sum total of Bryant's claim is "[t]rial counsel was also ineffective for allowing the trial to proceed without the presence of appellant and without the participation of appellant during jury selection." (IB 13). This is the same manner in which the claim was presented below. The claim is insufficiently pled here and should be deemed waived. Moreover, counsel took all appropriate steps to preserve the issue when Bryant voluntarily absented

himself from court. Relief must be denied.

Given Bryant's single sentence allegation of error without any supporting facts or argument should be found waived. Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990) (opining "purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived."); Cooper v. State, 856 So.2d 969, 977 n.7 (Fla. 2003); Roberts v. State, 568 So.2d 1255 (Fla. 1990).

In assessing the issue, the trial court found:

> 15. Defendant claims his counsel was ineffective by proceeding with voir dire in his absence. Defendant fails to allege any facts to show either a deficient performance by counsel or resulting prejudice. LeCroy v. State, 727 So.2d 236, 240 (Fla. 1998) (Affirming summary denial and reasoning that claim was conclusory where Defense presented nothing to substantiate allegations). Further, trial counsel did tell Judge Mounts he could not go against his client's wishes, and his client instructed the attorney not to participate in the trial.
>
> Judge Mounts found that counsel was prepared for trial, and that Bryant was being manipulative. Bryant then asked to be removed from the courtroom with knowledge that the trial would continue and arrangements were made for him to see and hear the proceedings in the holding cell. Counsel then objected to proceeding any further without the client present and Judge Mounts overruled the objection. Defense counsel objected when Judge Mounts instructed the jury on Bryant's absence and made a motion for mistrial. Judge mounts ordered Defense counsel to continue representing his client at trial, despite

> Defendant's objection. Ultimately, the trial judge allowed Defendant to return and the voir dire process continued. Counsel preserved the issue of Defendant's absence by repeated objections. See Exhibit "E" (Transcript Pages 31-33; 47-63; 82-90; 101-105; and 115 & 116, attached and incorporated herein.).
>
> 16. Defendant has failed to set forth what his attorney could have done over and above what his attorney, in fact, did to preserve the issue of Defendant's absence for appeal. Further, it was the Defendant himself who attempted to disrupt the process of the trial. See Knight v. State, 746 So.2d 423 (Fla. 1998). Defendant has shown no deficiency on the part of counsel nor resulting prejudice.

(PCR V5 790-91). Such is supported by the record. These factual findings are supported by the record. Bryant voluntarily absented himself from the proceedings, counsel objected at each juncture to voir dire continuing in Bryant's absence, Judge Mounts made audio and video communications available to Bryant in the holding cell, and eventually Bryant returned during voir dire. (2TR V23 2-21, 27-33, 38-56, 59-63, 82-85, 88, 90, 98, 101-05, 113-30, 134).

Conclusory claims such as Bryant's one sentence indictment of counsel are improper. Atwater v. State, 788 So.2d 223, 229 (Fla. 2001) (finding defendant bears burden of establishing prima facie case based upon legally valid claim; conclusory allegations are insufficient to meet burden); Ragsdale, 720 So.2d at 207. Bryant fails to allege facts to show either deficient performance or prejudice. LeCroy v. State, 727 So.2d

236, 239-40 (Fla. 1998) (upholding summary denial where there is no factual support for claim); Engle v. State, 576 So.2d 698, 700 (Fla. 1992).

Clearly, the issue of Bryant's absence was preserved for appeal. Counsel objected to the proceedings, but was overruled. (2TR V23 32-33, 48-55, 63, 82-85, 88, 90, 98, 101-05, 115-16). Bryant may not use an ineffectiveness claim to overcome the procedural bar. Hardwick v. Dugger, 648 So.2d 100, 105 (Fla. 1994) (denying postconviction relief where defendant failed to raise issue of absence from critical stage of trial on direct appeal); Lopez v. Singletary, 634 So.2d 1054 (Fla. 1993) (same). See Harvey, 656 So. 2d at 1256 (finding claims which could have but were not raised on direct appeal procedurally barred; defendant not permitted to use different argument to relitigate direct appeal issue); Medina, 573 So. 2d at 295 (holding the "[a]llegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal.").

For these same reasons, counsel cannot be found ineffective. He objected to the judge's response to Bryant's voluntary absence. It is improper for Bryant to complain about counsel's actions, when it was Bryant's ploy to attempt to manipulate the trial, insert error, and disrupt the ordered process of justice.

Counsel attempted to protect his client's interest by objecting, but was ordered to go forward. Steps were taken to permit Bryant to see, hear, and participate from a separate room. From this, neither deficiency nor prejudice have been shown as required by Strickland. The summary denial must be affirmed.

(5) Cumulative error - As his final sub-claim, Bryant submits the alleged errors had a cumulative effect which prejudiced him. As is clear from the above, no errors were committed, therefore, *a fortiori,* Bryant has suffered no cumulative effect which invalidates his conviction or sentence. See Davis, 28 Fla. L. Weekly at S837, n.9 (rejecting claim of cumulative error whree no individual error shown; Atwater v. State, 788 So.2d 223, 228 n. 5 (Fla. 2001); Downs v. State, 740 So.2d 506, 509 n. 5 (Fla. 1999). See also Zeigler v. State, 452 So.2d 537, 539 (Fla. 1984) (rejecting defendant's argument of cumulative error as the points either were raised or could have been, presented at trial or on direct appeal, thus, were not cognizable), sentence vacated on other grounds, 524 So.2d 419 (Fla. 1988). Because there were no errors, reliance on Cherry v. State, 659 So. 2d 1069 (Fla. 1995) and State v. Gunsby, 670 So. 2d 920 (Fla. 1996) is misplaced.

ISSUE III

THE COURT PROPERLY DISPOSED OF THE

INEFFECTIVENESS CLAIMS ADDRESSED TO SHACKLING, THE CONFESSION, AND AVOID ARREST AGGRAVATOR (restated)

In the heading of the three sub-claims in this issue, Bryant alleges the court erred and should have found counsel ineffective for failing: (1) "to properly preserve for appeal the shackling of appellant before the jury" (IB 20), (2) "to properly preserve for appeal and dispute appellant's confession" (IB 35), and (3) "to dispute and properly preserve for appeal the aggravator of 'avoiding arrest.'". (IB 53). The summary denial was correct as the claims were legally insufficient, procedurally barred, and/or refuted from the record. This Court should affirm.

A trial court's summary denial of a motion to vacate will be affirmed where the law and competent substantial evidence support its findings. Diaz, 719 So. 2d at 868. In Lucas, 841 So. 2d at 388, this Court stated that: "To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record." See Coney, 845 So.2d at 134-35; Peede, 748 So.2d at 257.

(1) The shackling issue - In resolving the issue below, the

court concluded that the matter was procedurally barred because the shackling issue was raised and rejected on direct appeal and this Court had found the matter preserved for review. Further, the allegations were conclusory and legally insufficient because Bryant failed to allege what trial counsel could have done to dispute Judge Mount's personal observations and knowledge of Bryant's prior violent acts. Bryant also failed to allege how he was prejudiced by counsel's performance. (PCR V5 787). The court's findings and conclusions have record support and should not be disturbed.

Here, Bryant alleges counsel should have been found ineffective because he did not preserve the shackling matter for appeal as he "failed to refute evidence of petitioner's prior violent courtroom behavior and failed to dispute that any of the acts had occurred." (IB 20). For support, he points to this Court's opinion noting counsel did not dispute the existence of Bryant's prior violent acts (IB 26) and suggests the issue was affirmed "because it was better addressed" in collateral review (IB 27). It is Bryant's position counsel could have submitted prison records and transcripts from post-chair throwing hearings to show Bryant was well behaved in court and to explore the circumstances surrounding the aggravated assault charge received in jail awaiting retrial. Bryant complains counsel did not

explore the "book throwing" incident or proffer how he behaved with counsel, private investigators, and experts. He criticizes counsel for not asking the court to warn him that disruptive behavior would require shackling (IB 27-28) and maintains that the court erred in not making findings he was violent or had intentions of disrupting court. (IB 28-29). As a final argument, Bryant demands an evidentiary hearing on whether counsel properly preserved the shackling issue for appeal (IB 30).

This is the first time Bryant alleges that counsel should have proffered testimony from experts and investigators as to how he behaved with them. Such, it is not preserved for appeal. Archer, 613 So.2d at 446; Steinhorst, 412 So.2d at 338.

In support of his claim he had good behavior after the chair-throwing incident, Bryant states that "it should be noted that [he] was not shackled for any pre-trial or post-trial hearings. (IB 25). This is refuted by the record. Not only did Judge Mounts note that Bryant had been shackled during pretrial hearings (S2TR V1 37), but during the motion to suppress hearing, Bryant addressed the court and asked to have at least one hand uncuffed. (S2TR V2 167). Moreover, in the Case Management Conference, collateral counsel admitted Bryant had been restrained during pretrial hearings (PCR V6 31-32)

Consequently, Bryant may not rely upon such a factual error in an attempt to undermine the actions of either the trial judge or counsel.

Bryant's claim here is essentially the same argument presented in Issue II, thus, the State reincorporates and relies upon all its arguments made therein. See Bryant, 785 So. 2d at 429-30 (finding shackling issues preserved for appeal and properly required); Riechmann 777 So.2d at 353, n.14 (finding claims procedurally barred); Rivera, 717 So. 2d at 480 n.2; Valle v. State, 705 So. 2d 1331, 1336 n. 6 (Fla. 1997). The record establishes that the matter is legally insufficient, procedurally barred, and meritless.

The remainder of Bryant's challenge to his counsel rests upon allegations counsel failed to preserve the issue for appeal because he did not refute the existence of the prior violent acts. The State notes there is a basic flaw in Bryant's argument. He confuses preservation of an appellate issue with the sufficiency of the evidence presented in support of the defense position below. Bryant focuses on his allegation that no evidence was proffered to refute the prior incidents of courtroom and jailhouse violence, and suggests that this proves the matter was not preserved (IB 30).

Not only does the record refute the claim that the matter

was not preserved, but counsel also sought removal of the restraints and suggested that the time between the violent acts tended to show restraints were unnecessary. (2TR V17 3003-03, 3095-3112; 2TR V23 8-9, 12-17, 27-31, 44-46, 130; V25 474, V27 743-47; S2TR V1 19-20, 37-40, 58-59, 72-74; V2 257). Counsel put the facts before the court, asked that Bryant not be required to wear restraints, and preserved the matter for later review. Trial counsel cannot be faulted for the adverse ruling. Bush, 505 So. 2d at 411 (Fla. 1987) (finding counsel's lack of success on actions pursued following sound defense strategies "augurs no ineffectiveness of counsel").

Moreover, even here, Bryant does not offer what evidence could have been offered at trial which was not presented, thus, rendering the matter legally insufficient. Freeman, 761 So.2d at 1061 (opining "defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden."); Ragsdale, 720 So.2d at 207 (stating although courts are encouraged to conduct evidentiary hearings, conclusory claims are "insufficient to allow the trial court to examine the specific allegations against the record").

With respect to the prior violent actions both in court and in jail awaiting trial, Bryant does not state what evidence

exists to show that those acts were not committed. In fact, trial defense counsel, and the record establishes, that such violence took place and such was admitted to by not only the 1998 counsel, but those representing Bryant in 1993. (2TR V22 3095-96, 3099-3104, 3108-12 V27 743-47). Consequently, Bryant has not met the pleading requirements under Strickland. Moreover, given this Court's finding on direct appeal that the matter was preserved for review and that Judge Mount's personal knowledge was sufficient to order shackles, Bryant, 785 So. 2d at 429-30, Bryant is unable to establish prejudice arising from counsel's representation. "A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied." Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986). The court's basis for order shackling during the trial was valid and rested upon facts personally known to the court or reported by the parties. That basis was the chair-throwing incident, other violent acts, and the record of the pending aggravated assault charge. Given these facts, Bryant cannot show that the ruling would have been different absent counsel's alleged deficiency as required by Strickland. Prejudice cannot be shown arising from counsel's representation.

Bryant also complains of trial court error. He alleges Judge Mounts failed to make findings that Bryant was violent or had intentions of disrupting the court. (IB 28-29). This claim is procedurally barred and refuted from the record. It is barred because it is alleging trial court error which could have and was raised and rejected on direct appeal. "Issues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack." Muhammad, 603 So. 2d at 489; Spencer, 842 So. 2d at 60-61. Also, Judge Mounts noted Bryant's prior violent behavior as the basis for the restraints, thus, review on direct appeal was possible and was resolved against Bryant. Bryant, 785 So. 2d at 429-30. Relief must be denied.

As a final argument, Bryant claims he was "entitled to an evidentiary hearing to determine whether he intended to disrupt the court proceedings and jeopardize the safety of courtroom personnel at his second trial." He suggests that if the State cannot prove that he intended to be disruptive, then he is entitled to a new trial (IB 28-30). The issue is not what Bryant intended, but what counsel did during his representation, i.e., whether counsel's actions were deficient and caused prejudice under Strickland. No matter what Bryant says in 2004 with respect to his 1998 intentions, such does not call into

question the facts of prior violent courtroom/jail behavior, how counsel presented those facts to the court, and how the trial judge resolved the matter. The order denying relief should be affirmed.

(2) The confession issue - Other than alleging in the title "trial counsel was ineffective in failing to properly preserve for appeal and dispute appellant's confession," Bryant makes no argument on the point. At no time does he discuss counsel's actions except to say that counsel moved to suppress the confession on the grounds there was no probable cause (IB 35, 38). As such, Bryant has waived the issue. Duest, 555 So.2d at 852 (opining "purpose of an appellate brief is to present arguments in support of the points on appeal" - notation to issues without elucidation is insufficient and issue will be deemed waived).

To the extent he challenges appellate counsel's actions (IB 44), the claim is not cognizable. Attacks upon appellate counsel's performance are not cognizable in rule 3.851 litigation. Such is reserved for state habeas corpus review. Vining v. State 827 So.2d 201, 216 -217 (Fla. 2002) Thompson v. State, 759 So.2d 650, 660 (Fla. 2000); Teffeteller v. Dugger, 734 So.2d 1009, 1026 (Fla. 1999). Moreover, Bryant does not identify appellate counsel's deficiency or prejudice arising

from the representation. He does not present analysis on the point and it should not be considered waived. Duest, 555 So.2d at 852. This matter was raised in the habeas petition in case number SC04-83. The State directs this Court to the response to Issue I of the habeas corpus response as further support that appellate counsel was not ineffective.

The focus of Bryant's claim is that his confession should have been suppressed as it was the result of an unlawful arrest; one made without probable cause given the alleged lack of physical evidence and reliance upon anonymous informants to the police and witnesses who harbored bias against Bryant (IB 36-44, 50-53). It is also alleged that the confession was coerced because a police officer put a firearm to Bryant's head to procure the confession (IB 44). Bryant further argues his confession was coerced because it was conditioned upon a promise, namely, the "production of his mother." (IB 44-50). The relief sought is a new trial.

Below, Bryant asserted ineffective assistance of counsel respecting the suppression issue as well as trial court error in denying the motion to suppress (PCR V1 114, 120, 124-33, 138, 164-68). The court denied relief on the ineffectiveness claim finding it procedurally barred because counsel had moved to suppress the confession and objected when the statement was

offered into evidence. Also, it was legally insufficient as Bryant failed to identify what more counsel could have done (PCR V5 787-88). Relief was denied on the allegation of trial court error based upon the finding it was procedurally barred as the matter could have been raised on direct appeal. (PCR V5 792). Such rulings are proper, and should be affirmed.

With respect to the claim of trial court error, it is well settled, "[i]ssues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack." Muhammad, 603 So. 2d at 489. See Spencer v. State, 842 So. 2d 52, 60-61 (Fla. 2003); Vining v. State, 827 So. 2d 201, 218 (Fla. 2002); Smith v. State, 445 So. 2d 323, 325 (Fla. 1983). Here, counsel moved to suppress the confession on retrial. Counsel reincorporated the testimony from the 1993 suppression hearing and presented additional testimony and argument. Trial counsel reasserted his objection when the confession was offered at trial (2TR V28 808-09; S2TR V2 166-253). Clearly the matter was preserved for appeal. As such, a challenge to the trial court's suppression ruling is barred on collateral review. Muhammad, 603 So.2d at 489.

However, should this Court reach the merits of the ineffective assistance claim, in spite of Bryant's failure to present any analysis on the point, the following discussion of

the record establishes that counsel was not ineffective and the motion to suppress was denied properly. Kimmelman v. Morrison, 477 U.S. 365, 375-81 (1986) (noting "[w]here defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious" and that the two prongs of Strickland have been met). The State relies upon its analysis presented in Issue II as further support of the summary.

Conclusory allegations are legally insufficient on their face and may be denied summarily. Kennedy, 547 So.2d at 913. The "defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden." Atwater, 788 So.2d at 229. All Bryant asserted below, as well as here, is that counsel failed to suppress his confession and did not preserve the issue for appeal (IB 53; PCR V1 114-15, 120, 138). Bryant fails to plead what more counsel could have done to preserve the issue for appeal or what actions, arguments, or evidence should have been presented other than obtaining a favorable result. The claim is legally insufficient. LeCroy, 727 So.2d at 239 (upholding summary denial where there was no factual support for conclusory claim).

Moreover, the claim is procedurally barred. At trial, counsel moved to suppress Bryant's statement and objected when it was admitted at trial. (2TR V28 808-09; S2TR V2 166-253). The suppression issue could have been raised on appeal, but was not. Consequently, the matter is barred from review. See Asay, 769 So.2d at 989 (finding "one sentence" conclusory allegation of ineffectiveness is improper pleading and attempt to relitigate procedurally barred claim); Freeman, 761 So.2d at 1067(same); Medina, 573 So.2d at 295 (holding postconviction proceedings cannot serve as second appeal).

The same facts which support the procedural bar, prove counsel was not ineffective with respect to preserving the matter. Defense counsel moved to suppress Bryant's statements and objected when those statements were offered at trial (2TR V28 808-09). As such, the issue was preserved for appeal. State v. Gaines, 770 So. 2d 1221, 1227 n.7 (Fla. 2000) (noting defendant is required to renew pretrial suppression motion at time evidence is introduced in order to preserve issue for appellate review); Routly v. State, 440 So.2d 1257, 1260 (Fla. 1983) (same). Moreover, counsel accomplished what Bryant claims should have been done. Consequently, ineffectiveness has not been proven. See Griffin, 866 So.2d at 16 (finding counsel's performance cannot be deemed deficient when he raised the very

same suppression issue at trial as was complained of on collateral review); Jones v. State, 845 So.2d 55, 66 (Fla. 2003) (rejecting claim of ineffective assistance related to seeking suppression of defendant's confession where counsel moved to suppress confession, presented evidence at hearing, and objected when the confession was admitted at trial); Teffeteller v. Dugger, 734 So.2d 1009, 1019-20 (Fla. 1999).

Furthermore, the motion to suppress was denied properly, thus, no prejudice can be established. Counsel cross-examined the detectives who took Bryant's confession. (S2TR V2 166-253). The propriety of the arrest and the circumstances leading up to the confession were addressed. The questioning involved how Bryant became a suspect in the murder, the persons who gave taped statements linking him to the crime through his admissions (S2TR V2 173-81, 193-99, 212-17, 223-26, 228-29, 238), the circumstances of his arrest (S2TR V2 186, 192, 231-32), the decision to permit Bryant's mother/family to visit before his confession (S2TR V2 198, 204-06, 210, 234-35), whether the detectives were armed during the interview (S2TR V2 210-11, 221, 233), and evidence Bryant waived his Miranda v. Arizona, 384 U.S. 436 (1966) rights. (S2TR V2 200-03, 208-10, 234-35, 239).

Prior to Bryant's arrest, the police were contacted by Betty Bouie and Mary Williams, who gave taped statements informing the

police Bryant had committed the murder (S2TR V2 173-75). Ms. Bouie overheard Bryant admit to killing the victim during a robbery and noted a ski mask had been used (S2TR V2 175-76, 212-15). Mary Williams confirmed Bryant had admitted to the homicide during which a mask was used and that he had given the gun to Cheryl Evans (S2TR V2 176, 214-15). Detective Harman knew Tara Bouie, and following up on these accounts, took her taped statement (S2TR V2 176-77, 217, 228). She reported confronting Bryant about the murder and his admitting to the crimes during which he lost his ski mask (S2TR V2 176-77). Detective Hartman testified a ski mask had been found at the scene. The police also contacted Mr. Remy who gave a taped statement advising the police that he met Bryant through Cheryl Evans and Bryant had been introduced as the person who shot the Haitian man (S2TR V2 178-80). Believing they had probable cause to arrest Bryant, the police contacted Cheryl Evans. When she arrived at the station for another matter, and the police saw Bryant was with her, they arrested him (S2TR V2 180-81, 186, 192, 231-38).

Before talking to Bryant, the police took Ms. Evans' statement (S2TR V2 193, 228-29, 233). She reported that Bryant had returned home very excited, fearing he had been shot. Smelling of fish, he confessed he had shot a Haitian man in an

armed robbery. The gun used was Ms. Evan's .357 black snub-nosed revolver (S2TR V2 194).

Bryant, prior to his interview, was given Miranda warnings which he waived orally (S2TR V2 186-87, 191-92, 198- 201, 220, 234, 239). At no time did Bryant indicate he did not want to talk to the police (S2TR V2 203, 234-36). After the police had played Mr. Remy's taped statement, Bryant inquired whether the police thought he committed the crime (S2TR V2 204-05, 234-35). When the police replied affirmatively, Bryant asked to see his mother/family and then offered to give a statement explaining exactly what happened. Bryant did not condition his statement upon seeing his mother (S2TR V2 204-05, 234-35).

Bryant's family was called, several members arrived with food, and stayed for approximately 30 to 60 minutes (S2TR V2 205-06, 210, 235). Cheryl Evans was present with some children (S2TR V2 235). Following the visit, Bryant gave a taped statement admitting his involvement in the planning and execution of the robbery and homicide. He admitted he did not have to give the statement, and that it was of his "own free will." (S2TR V2 208-10).

Defense counsel argued that the statement was involuntary because of the "promise" to Bryant that he could see his mother (S2TR V2 245-47). Also, the defense asserted that the statement

was involuntary because the informants were unknown to the police and there had been no verification of the informants' statements, thus, the police could not make an arrest (S2TR V2 247-48). The Court concluded no promises were made and the permission for Bryant to see his family was an accommodation, an act of courtesy, mere kindness on the part of the police. The Court found the statement voluntary just as it was voluntary following the suppression hearing from the first trial (S2TR V2 253).

This Court has explained:

> Probable cause for arrest exists where an officer "has reasonable grounds to believe that the suspect has committed a felony. The standard of conclusiveness and probability is less than that required to support a conviction." ... The question of probable cause is viewed from the perspective of a police officer with specialized training and takes into account the "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."

Walker v. State, 707 So.2d 300, 312 (Fla. 1997) (citations omitted). See Francis v. State, 808 So.2d 110, 124 (Fla. 2001) Blanco v. State, 452 So.2d 520, 523 (Fla. 1984).

The record supports a finding of probable cause to arrest Bryant when he arrived at the station. Statements had been taken from four named witnesses, and another prior to Bryant giving his statement, who heard him admit to using a .357 caliber gun in the shooting death of a Haitian man during a

robbery where a ski mask was used, and that Bryant had smelled of fish afterwards.[3] The police found bullets of the same caliber as the weapon Bryant said he used, a ski mask, a toppled fish barrel, and a Haitian victim.

One of the witnesses, Tara Bouie, was known to Detective Hartman, and all the witnesses gave their names, met with the police in person, and gave statements. They qualify as "citizen-informants" of high reliability and afforded the police probable cause to believe Bryant committed a felony. In State v. Maynard, 783 So.2d 226, 230 (Fla. 2001), this Court noted: "A citizen-informant is one who is 'motivated not by pecuniary gain, but by the desire to further justice.' State v. Talbott, 425 So.2d 600, 602 n. 1 (Fla. 4th DCA 1982) (quoting Barfield v. State, 396 So.2d 793, 796 (Fla. 1st DCA 1981))." "Tips from known reliable informants, such as an identifiable citizen who observes criminal conduct and reports it, along with his own identity to the police, will almost invariably be found sufficient to justify police action" J.L. v. State, 727 So.2d 204, 206 (Fla. 1998).

Probable cause existed based upon the fact the witnesses

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[3] While Cheryl Evans did not give her statement until after the police had arrested Bryant, the statement was given before Bryant was interviewed. If there was an illegal arrest, such was cured by the further evidence linking Bryant to the crime.

were known, either from prior contact with the police or by giving their names and sworn statements. The witnesses were in a position to know of Bryant's criminal behavior; they overheard his admissions. Moreover, the police confirmed the evidence disclosed by the witnesses, i.e., the caliber of weapon, use of a ski mask, and that the assailant had upset a bucket of fish. Such established probable cause to arrest. Francis, 808 So.2d at 124 (recognizing police had probable cause based upon citizen reports); Krawczuk v. State, 634 So.2d 1070, 1071-73 (Fla. 1994) (finding probable cause to arrest where police were informed by witness that he may have purchased stolen items from defendant); Blanco, 452 So.2d at 523 (finding probable cause based upon officer's belief defendant matched assailant's description and given his proximity in time and place to crime scene), vacated on other grounds, Blanco v. Singletary, 943 F.2d 1477, 1481 (11th Cir. 1991); Routly, 440 So.2d at 1261 (recognizing police had probable cause based upon statement of defendant's girlfriend, an eye witness, who implicated defendant); Milbin v. State, 792 So.2d 1272, 1274 (Fla. 4th DCA 2001) (opining "witness who provides information to a police officer through 'face to face' communication is deemed to be sufficiently reliable"). Bryant's subsequent confession following Miranda warnings was admitted properly into evidence. As such, no

prejudice can be shown under Strickland arising from counsel's representation during the suppression hearing.

Given the evidence produced during the suppression hearing, Bryant's reliance on Swartz v. State, 857 So.2d 950 (Fla. 4th DCA 2003); Pinkney v. State, 666 So.2d 590 (Fla. 4th DCA 1996); Cunningham v. State, 591 So.2d 1058 (Fla. 2d DCA 1991) do not support the granting of relief here. The police had independent evidence of the crime and had sworn statements from identifiable witnesses. As such, probable cause to arrest was established.

In the initial trial, Bryant complained that his confession was coerced in part because a detective threatened him with a gun. The motion was denied. During the retrial, Bryant adopted the prior suppression motion and added the argument that his confession was induced based upon a promise to permit him to see his mother before giving a statement. During the suppression hearing for the second trial, Judge Mounts found that no promises were made to induce Bryant to make a statement and reaffirmed his ruling from the first trial (S2TR V2 253).

A copy of Bryant's taped statement transcribed during the original motion to suppress was entered into evidence, but the tape was not replayed during the hearing (S2TR V2 183-84). According to the detectives, Bryant arrived at the station at 7:15 p.m. and was handcuffed almost the entire time because of

security concerns (S2TR V2 192, 220). Bryant was given his Miranda warnings. While he orally waived them, the detectives failed to have him sign the waiver. (S2TR V2 195-96, 200-03, 234, 239). Initially, Bryant denied involvement, but once confronted with what the police knew, Bryant asked to see his family and said he would give a statement afterwards; he did not make this a condition of giving a statement (S2TR V2 204-05, 234-35). Bryant was permitted to see his family for 30 to 60 minutes (S2TR V2 205, 210, 235). Subsequently, he confessed his involvement in the murder and robbery (S2TR V2 208-10, 236) and confirmed he was given his rights:

> Yes, I had a right not to say nothing ... the testimony I give was of my own free will. It wasn't no promises or nothing like that. ... I know I could have just ... went to jail or went to trial without giving no statement because I know how the law work with Police Officer ... the whole thing was on my own free will."

The statement started at 10:14 p.m. and concluded at 10:56 p.m. (S2TR V2 208-09, 239).

The tape of Bryant's confession as played at trial, reveals he acknowledged that he was read his Miranda rights and identified the rights card the police employed. He had no questions and declined any further explanation of his rights (2TR V28 811). Bryant acknowledged he did not sign the rights card because he was handcuffed, but that the card was read to

him. Also, he was promised nothing, was treated fairly, they did not talk about anything different off tape than on, and he knew he did not have to talk to the police (2TR V28 837-38).

There was no evidence presented during the suppression hearing that the police used a gun to force Bryant to confess. At trial, Detective Brand testified he never showed or brandished his weapon at Bryant, although Bryant may have seen an ankle revolver. Similarly, Detective Hartman averred he was armed during the interview. No promises were made to induce the confession. Although he testified in the 1993 trial that Detective Brand had pointed a gun during the interview, Bryant never told Detective Hartman of the alleged incident or filed a formal complaint (2TR V27 730-31; V28 758-60, 774-77, 782, 803, 805, 841, 851, 857).

Sliney v. State, 699 So. 2d 662, 667-68 (Fla. 1997) provides:

> A confession obtained by means of physical or psychological coercion or a violation of a constitutional right will be deemed involuntary and inadmissible. In order for a confession to be admissible, the State must demonstrate by a preponderance of the evidence that the confession was voluntary. ... Whether a confession is voluntary depends on the totality of the circumstances surrounding the confession.

Sliney, 699 So. 2d at 667-68 (citations omitted). Here. there was no evidence of physical coercion, Bryant noted he was given

his rights and that he waived them of his "own free will." The Supreme Court has noted that a state judge's failure to grant relief equates to an express finding that a witness is not credible where it is clear that the state judge would have granted relief had he found the witness credible. Marshall v. Loneberger, 459 U.S. 422, 433 (1983), citing LaVallee v. Della Rose, 410 U.S. 690 (1973). It should be found that Judge Mounts rejected the contention that a gun was used to coerce Bryant. From the totality of the circumstances, the record supports the conclusion that the confession was knowing and voluntary. Bryant has not alleged, nor can he show that the result of the proceeding would have been different as required under the Strickland standard.

Similarly, the record from the suppression hearing supports the finding that Bryant was promised nothing for his confession. In fact, it was Bryant's request to see his mother/family and his own words established that he knew he did not have to talk to the police. (S2TR V2 208-10). These facts distinguish Bryant's situation from those of the defendants in Almeida v. State, 737 So.2d 520 (Fla. 1999) and Albriton v. State, 769 So.2d 438 (Fla. 2d DCA 2000). Additionally, Bryant was not subjected to a multi-day interrogation during which he reported being exhausted as decried in Gaspard v. State, 387 So.2d 1016,

1022 (Fla. 1st DCA 1980). Instead, Bryant was quested for a few short hours, was afforded food, and a visit from his family which was made at his request. The agreement to permit Bryant to see his family did not delude him about hus situation nor was it in exchange for the confession.

As the record shows, it was Bryant who said he would talk after seeing his family. The police placed no condition on Bryant confessing nor on contacting Bryant's family. Clearly, Bryant knew the decision to talk was his and he was unencumbered by any improper influences or promises. To be voluntary, a confession cannot be obtained through direct or implied promises. See Johnson v. State, 696 So.2d 326, 329 (Fla. 1997). The detectives explained it was Bryant who said he would give a statement after seeing his family. As the trial court found, the police merely accommodated Bryant's request. See Maqueira v. State, 588 So.2d 221, 223 (Fla. 1991) (upholding confession where defendant's testimony was inconsistent with all other testimony); Bruno v. State, 574 So.2d 76, 79-80 (Fla. 1991) (concluding court could properly find no improper promises made); McDole v. State, 283 So.2d 553, 554 (Fla. 1973) (reasoning where evidence is contradictory testimony of police and defendant, finding of voluntariness may be considered supported by preponderance of evidence).

From the foregoing, it is clear that trial counsel challenged the confession on the grounds Bryant asserts support the suppression of the statement. Further, counsel preserved the matter for appeal. As such, counsel rendered effective and professional assistance. Griffin, 866 So. 2d at 16; Jones, 845 So. 2d at 66; Teffeteller, 734 So. 2d at 1019-20. No prejudice has been shown as the trial court denied the suppression motion correctly. Hence, the result of the proceeding would not have been different. Postconviction relief was denied properly.

(3) The avoid arrest aggravator - Again, merely in the title to this sub-claim, Bryant asserts that counsel was ineffective in not disputing and properly preserving for appeal the avoid arrest aggravator (IB 53-56). No discussion of the Strickland standard, how counsel was deficient, or how his representation prejudicial is offered by Bryant. Under Duest, 555 So.2d at 852; Cooper, 856 So. 2d at 977 n.7; Roberts, 568 So.2d at 1255, the appellate issue is not sufficiently analyzed and should be found waived.

However, assuming this Court reaches the merits, relief should be denied as the trial court correctly found the claim legally insufficient. Bryant failed to state what more counsel should have done to challenge the "avoid arrest" aggravator and the claim was refuted from the record as trial counsel

challenged the aggravator.

In his postconviction motion, Bryant argued "[f]urthermore, trial counsel was ineffective in failing to dispute the finding of the trial court that the killing was committed for the purpose of avoiding or preventing lawful arrest or effectuating an escape from custody." Bryant then alleged that the record did not support the finding of this aggravator and again asserted "trial counsel was ineffective for failing to challenge it. (PCR V1 118-19). In his memorandum of law attached to the rule 3.851 motion, Bryant reiterated, "trial counsel failed to dispute two of the three aggravators." Such is the sum total of the argument presented below. Bryant failed to explain what counsel should have done to challenge this aggravator that he did not do and Bryant made no effort to even plead prejudice as required under Strickland. Upon this, the trial court properly found the matter legally insufficient. See Davis, 28 Fla. L. Weekly at S836-37 (finding bare allegation of ineffectiveness insufficient to warrant evidentiary hearing); Armstrong v. State, 862 So.2d 705, 712 (Fla. 2003) (finding claim conclusory because defendant failed to plead prejudice); Freeman v. State, 761 So. 2d 1055, 1061 (Fla.2000) (reaffirming "defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not

sufficient to meet this burden.").

Also, counsel objected to the avoid arrest aggravator (2TR V30 1221-22; S2TR V2 258-60, 263), consequently, Bryant's complaint is refuted from the record. See Griffin, 866 So.2d at 16 (rejecting defendant's claim of ineffectiveness for not challenging admission of confession where record showed counsel did move to suppress); Floyd v. State, 808 So.2d 175, 182 (Fla. 2002) (affirming summary denial where record conclusively rebuts allegation of deficiency). Because counsel objected to the aggravator, the issue could have been raised on direct appeal. Having failed to raise it there, Bryant cannot couch the claim in terms of ineffective assistance to obtain review of an appellate issue. Riechmann, 777 So.2d at 353 n.14 (finding claims barred because defendant was couching them in terms of ineffectiveness assistance when they had been raised and rejected on direct appeal); Rivera, 717 So.2d at 480 n.2 (finding it impermissible to recast claim which could have or was raised on appeal as one of ineffective assistance in order to overcome the procedural bar or to relitigate and issue considered on direct appeal); Cherry, 659 So.2d at 1072 (opining "[t]o counter the procedural bar to some of these issues, Cherry has [impermissibly] couched his claim on appeal, in the alternative, in terms of ineffective assistance of counsel in

failing to preserve or raise those claims").

The finding of the aggravator was proper and is supported by substantial competent evidence as analyzed in the State's response to Issue II(3) and reincorporated here. See Floyd v. State, 850 So. 2d 383, 406 (Fla. 2002) (reaffirming avoid arrest aggravator may be based on defendant's statements describing his motivation for killing). Moreover, this Court's review on direct appeal established that the aggravator was applied properly, and with or without the avoid arrest aggravator, the sentence was proportional. Bryant, 785 So.2d at 436-37; Jennings, 718 So.2d at 154. As such, no prejudice can be shown from counsel's performance. For additional support to show the lack of prejudice, the State reincorporates its argument presented in Issue II of the habeas corpus petition (case number SC04-83). Given these factors, Bryant is unable to show that the result of his sentencing would have been different.[4] Freeman v. State, 563 So.2d 73 (Fla. 1990).

ISSUE IV

THE COURT CORRECTLY CONCLUDED THE CHALLENGE TO THE DEATH SENTENCE BASED UPON RING V.

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[4] See Mendoza v. State, 700 So.2d 670, 672 (Fla. 1997); Pope v. State, 679 So. 2d 710, 716 (Fla. 1996); Heath v. State, 648 So.2d 660 (Fla. 1994); Melton v. State, 638 So. 2d 927, 930 (Fla. 1994).

ARIZONA[5] WAS LEGALLY INSUFFICIENT AS BRYANT WAIVED HIS PENALTY PHASE JURY (restated)

It is Bryant's position that the court erred in finding the challenge to the death sentence based upon Ring to be legally insufficient. Contrary to Bryant's position, the claim is legally insufficient because he waived his penalty phase jury, and therefore he cannot challenge his sentence based upon Ring. Lynch v. State, 841 So. 2d 362, 366 n.1 (Fla. 2003). Ring is not applicable to this situation. Moreover, Ring in not retroactive and it has no impact upon Florida's death sentencing. Turner v. Crosby, 339 F.3d 1247 (11th Cir. 2003) (finding Ring is not retroactive); Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003) (noting "we have repeatedly held that maximum penalty under the statute is death and have rejected the other Apprendi arguments" including that aggravators read to the jury must be charged in indictment, submitted to jury and individually found by unanimous jury) Bottoson v. Moore, 833 So. 2d 693 (Fla.) (rejecting claim that Ring invalidated Florida's capital sentencing scheme), cert. denied, 123 S.Ct. 662 (2002); Mills v. Moore, 786 So. 2d 532, 536-38 (Fla.) (determining death is the statutory maximum in Florida), cert. denied, 532 U.S. 1015 (2001).

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[5] Ring v. Arizona, 536 U.S. 584 (2002).

In denying relief, the trial court reasoned:

> 21. Defendant's claim that his death sentence is unconstitutional under Ring v. Arizona, 122 S.Ct. 2428 (2002) and Apprendi v. New Jersey, 530 U.S. 466 (2000) is legally insufficient where he knowingly and voluntarily waived his right to a jury during the penalty phase of his trial. Further, the Florida Supreme Court has found that Ring does not render Florida's capital sentencing procedure unconstitutional. Bottoson v. Moore, 833 So.2d 693 (Fal.), Cert. denied, 123 S.Ct. 662 (2002); King v. Moore, 831 So.2d 143 (Fla.), Cert denied, 123 S.Ct. 657 (2002).

(PCR V5 792). Such is supported by the record and law.

Bryant maintains that his death sentence is unconstitutional under Ring and Apprendi v. New Jersey, 530 U.S. 466 (2000) because a jury was not involved in the penalty phase (IB 58-59). He asks this Court to apply Ring retroactively (IB 60-61) and find: (1) that the aggravator is an element of the crime which must be charged in the indictment, proven beyond a reasonable doubt, and found by a unanimous jury (IB 62-63, 65-68); (2) that death is not the statutory maximum (IB 63-65). This Court has rejected Ring challenges consistently.

Ring cannot form the basis for relief here as Bryant knowingly and voluntarily waived his penalty phase jury. Bryant does not challenge the validity of his waiver of the penalty phase jury, and has not suggested he could not waive the jury. More important, he has not explained how Ring could be applied to require jury sentencing where there has been a valid waiver

of a jury.

Following defense counsel's announcement that Bryant would be waiving his penalty phase counsel (2TR V21 3529), the trial court questioned Bryant about this decision. Upon the court's colloquy, Bryant stated he was waiving the jury (STR 268-70). Such colloquy was sufficient to establish a knowing and voluntary waiver of a constitutional right. See Guzman v. State, 721 So.2d 1155, 1158 n.1 (Fla. 1998) (finding defendant's waiver of jury knowing and voluntary where trial court questioned defendant).[6]

Irrespective of whether Ring impacts Florida's sentencing scheme, Bryant cannot complain that he did not have a jury sentencing recommendation when he sought and was granted the dismissal of the jury. See Guzman v. State, 868 So.2d 498, 511 (Fla. 2003) (rejecting claim that defendant's waiver of penalty phase jury was invalid "because Ring and Apprendi did not invalidate any aspect of Florida's death sentencing scheme ... Thus, Ring did not expand Guzman's jury rights beyond what he knew when he waived those rights."); Lynch v. State, 841 So.2d

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[6] See State v. Hernandez, 645 So.2d 432, 434-35 (Fla. 1994) (finding written waiver of penalty phase jury unnecessary); Holmes v. State, 374 So.2d 944, 949 (Fla. 1979) (finding waiver of penalty phase jury knowing and voluntary pursuant to State v. Carr, 336 So.2d 358 (Fla. 1976) where "[d]efendant was represented by counsel and the record contains an expressed waiver by counsel in the presence of the defendant.").

362, 366 n.1 (Fla. 2003) (finding "[b]ecause appellant requested and was granted a penalty phase conducted without a jury, he has not and cannot present a claim attacking the constitutionality of Florida's death penalty scheme under the United States Supreme Court's recent holding in Ring"); Labadie v. State, 840 So.2d 332, 334 (Fla. 5th DCA 2003) (finding specious argument that sentencing violated Apprendi because jury did not find weight of illegal drugs where defendant waived right to jury trial). There is nothing in Ring which deprives a defendant of the option to waive a constitutional right including the right to a jury trial. Patton v. United States, 281 U.S. 276 (1930). Quoting Proffitt v. Florida, 428 U.S. 242, 252 (1976), Ring acknowledged that "[i]t has never [been] suggested that jury sentencing is constitutionally required",[7] rather Ring involves only the requirement that the jury find the defendant death-eligible. Ring, 122 S.Ct. at 2447, n.4. In Florida, such takes place at time of conviction. See Porter, 840 So.2d at 986; Mills, 786 So.2d at 536-38 Moreover, the jury determination is for the guilt phase, while sentencing rests with the trial

[7] See Harris v. Alabama, 513 U.S. 504, 515 (1995) (holding that "[t]he Constitution permits the trial judge, acting alone, to impose a capital sentence. It is thus not offended when a State further requires the sentencing judge to consider a jury's recommendation and trusts the judge to give it the proper weight.)

court. See Spaziano v. Florida, 468 U.S. 447 (1984) (finding Sixth Amendment has no guarantee of right to jury on sentencing issue). Hence, Ring does not further Bryant's position.

Should the Court consider the claim, it should find it procedurally barred as neither Ring nor Apprendi are retroactive.[8] See U.S. v. Cotton, 122 S.Ct. 1781 (2002) (holding indictment's failure to include quantity of drugs was Apprendi error, but did not seriously affect fairness of judicial proceedings, thus, it was not plain error); Turner v. Crosby, 339 F.3d 1247 (11th Cir. 2003) (finding Ring not retroactive). See also, Windom v. State, 2004 WL 1057640 at 16-31 (Fla. May 6, 2004) (Cantero, J., concurring with Wells, J. and Bell, J. that Ring is not retroactive). While Ring was decided recently, the issue addressed is neither new nor novel. Instead, the Sixth Amendment claim, or a variation of it, has been known prior to Proffitt v. Florida, 428 U.S. 242, 252 (1976) (holding Constitution does not require jury sentencing). The basis for the claim of constitutional error has been available since before Bryant was sentenced. Bryant has not proven Ring or

[8] The Supreme Court has held that a violation of the right to a jury trial is not retroactive. DeStefano v. Woods, 392 U.S. 631 (1968) (refusing to apply right to jury trial retroactively because there were no serious doubts about fairness/reliability of fact-finding process being done by judge rather than jury).

Apprendi are retroactive under Witt v. State, 387 So.2d 922, 929-30 (Fla. 1980). A new decision is entitled to retroactive application only where it is of fundamental significance, which so drastically alters the underpinnings of Bryant's sentence that "obvious injustice" exists. Witt, 387 So. 2d at 929-30; New v. State, 807 So.2d 52 (Fla. 2001). Likewise, because it was an issue which could have been raised on appeal, but was not, the claim is barred.

Ring has not overruled those Supreme Court and Florida Supreme Court cases finding Florida's capital sentencing constitutional. Bottoson, 833 So.2d at 694-95. Ring has no application in Florida as the statutory maximum sentence upon conviction is death. Porter, 840 So.2d at 986 (repeating that the statutory maximum for first-degree murder is death; Mills, 786 So.2d at 536-38. Because Bryant was death eligible upon conviction, Ring does not require jury sentencing, invalidate his death sentence, or render Florida's sentencing scheme unconstitutional.[9] Further, this Court has rejected claims that

[9] Moreover, because the defendant is death eligible upon conviction, the aggravating factors are not elements of the crime nor do they increase the punishment the defendant faces. Aggravators are merely sentencing selection factors used to determine whether the sentence should be death or life. Poland v. Arizona, 476 U.S. 147, 156 (1986) (explaining aggravators are not separate penalties or offenses, but are guides for selecting between sentencing alternatives)

the aggravators must be included in the indictment and found by a unanimous jury beyond a reasonable doubt. Porter, 840 So.2d at 986. This Court has rejected numerous challenges to the death sentence based upon Ring.[10] Here too, this Court should conclude Ring is not applicable to Florida's capital sentencing and reject Bryant's claim.

However, even under Ring, Bryant's sentence is proper as he has prior violent felony convictions and his unanimous guilt phase jury convicted him of the contemporaneous armed robbery. A jury has found unanimously two aggravating factors and the imposition of the death penalty, without additional jury involvement was proper. See Stewart v. Crosby, 2004 WL 1064813, at 1 (Fla. May 13, 2004) (finding "prior violent felony aggravator alone satisfies the mandates of the United States Constitution; therefore, imposition of the death penalty was

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[10] See Patton v. State, 2004 WL 1119303, at 7 (Fla.) (Fla. May 20, 2004); Reed v. State, 29 Fla. L. Weekly S227 (Fla. April 15, 2004); Globe v. State, 29 Fla. L. Weekly S119 (Fla. March 18, 2004); Pace v. State, 854 So.2d 167 (Fla. 2003); Chandler v. State, 848 So.2d 1031 (Fla. 2003); Banks v. State, 842 So.2d 788 (Fla. 2003); Lugo v. State, 845 So.2d 74, 119 n. 79 (Fla. 2003); Jones v. State, 845 So.2d 55 (Fla. 2003); Cole v. State, 841 So.2d 409 (Fla. 2003); Porter v. Crosby, 840 So.2d 981 (Fla. 2003); Lucas v. State, 841 So. 2d 380 (Fla. 2003); Spencer v. State, 842 So.2d 52 (Fla. 2003); Fotopoulos v. State, 838 So.2d 1122 (Fla. 2002); Bruno v. Moore, 838 So.2d 485 (Fla. 2002); Doorbal v. State, 837 So.2d 940, 963 (Fla. 2003); Marquard v. State, 850 So.2d 417 (Fla. 2002); Bottoson v. Moore, 833 So.2d 693 (Fla. 2002); King v. Moore, 831 So.2d 143 (Fla. 2002).

constitutional."); Windom v. State, 2004 WL 1057640 at 12 (Fla. May 6, 2004); Lugo v. State, 845 So.2d 74, 119 n. 79 (Fla. 2003); Banks v. State, 842 So.2d 788, 793 (Fla. 2003) (denying Ring claim and noting that "felony murder" and the "prior violent felony" aggravators justified denying Ring claim).

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court affirm the denial of postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Jo Ann Barone Kotzen, Esq., 224 Datura Street, Suite 1300, West Palm Beach, FL 33401, on June 16, 2004.

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LESLIE T. CAMPBELL

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 on June 16, 2004.

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LESLIE T. CAMPBELL