IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-362

RONNIE JOHNSON,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, CRIMINAL DIVISION

BRIEF OF APPELLEE

CHARLES J. CRIST, JR.
Attorney General
Tallahassee, Florida

SANDRA S. JAGGARD
Assistant Attorney General
Florida Bar No. 0012068
Office of the Attorney General
Rivergate Plaza -- Suite 950
444 Brickell Avenue
Miami, Florida 33131
PH. (305) 377-5441
FAX (305) 377-5654

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

On April 12, 1989, Defendant was charged by indictment with the murder of Lee Arthur Lawrence and the attempted murders of Bernard Williams and Josias Dukes. (R. 1-4)[1] The crime were alleged to have been committed on March 20, 1989. The historical facts of the case are:

> The record reflects the following. Lee Arthur Lawrence was murdered on March 20, 1989. Four suspects were charged in the crime. Ronnie Johnson and Bobbie Robinson were convicted, in separate trials, of first-degree murder and sentenced to death. (FN1) David Ingraham was convicted of first-degree murder and sentenced to life in prison. Rodney Newsome was convicted of second-degree murder and sentenced to twenty-two years in prison.
>
> The relevant incident occurred in the evening of March 20, 1989, at Lee's Grocery in Dade County. Working in the store at the time of the shooting were Valerie Briggs (FN2) and Juanita Meyers. (FN3) Bernard Williams had come to the store with his dog. (FN4) He was Meyers' boyfriend. Before closing time, Briggs asked Meyers to take the trash outside. At that time, the owner (and victim) Lawrence left his office and went to the parking lot. Williams also exited to check on his dog. (FN5) Outside, customer Josias Dukes was using a telephone. Due to his vantage point, Dukes was able to identify Ingraham as the perpetrator who carried the Uzi, a semiautomatic firearm. With these persons present, the violence began. Ingraham opened fire on Bernard Williams. Williams was hit in the back and fell to the ground. Ingraham then shot at Lawrence. Lawrence also fell to the ground. At this point, Johnson exited the store

[1]The symbol “R.” will refer to the record on direct appeal. The symbol “T.” will refer to the transcript of the trial. The symbol “S.R.” will refer to the supplemental record on direct appeal.

(he had been making a purchase inside) and started firing his revolver at Lawrence. Ingraham started firing shots at Dukes. Both Ingraham and Johnson fired stray shots in various directions. Lawrence was killed in this incident. Neither Dukes nor Williams died.

Johnson subsequently confessed to multiple crimes. In his confession, Johnson indicated that "G" had hired him to murder Lawrence. The victim was targeted because of his anti-drug efforts in the community. Johnson stated that he had been offered $1500 to commit the murder.

Prior to trial, Johnson moved to suppress the confession. (FN6) A hearing on the motion was held on June 28, 1991. A total of five persons testified at the hearing. The defense called Johnson. The State called Milton Hull, Gregg Smith, Thomas Romagni, and Danny Borrego.

Officer Hull testified that he found Johnson on his grandmother's porch eating a hot sausage on April 1, 1989. Hull called Johnson over to him. It was a little after 6 p.m. Hull told Johnson that some investigators wanted to talk to him about a murder. If Johnson was willing, Hull would take him to the investigators and bring him back. Actually, however, other detectives transported Johnson after he agreed to go. Hull testified that Johnson was not handcuffed when he was transported. Detective Gregory Smith also testified that Johnson was not handcuffed when he was transported to the Team Police Office. At that point, Johnson signed a (FN7) Metropolitan Dade County Police Department *Miranda* warning form. Detective Thomas Romagni testified that he witnessed Johnson sign this form. Romagni stated that Johnson was not handcuffed when the *Miranda* form was read to him. Detective Danny Borrego then testified that, prior to the signing of the *Miranda* form, he ascertained that Johnson understood the English language, could read, and was not under the influence of drugs or narcotics. In sum, all four officers expressly testified that they neither threatened Johnson nor promised him anything. On the other hand, Johnson testified that

he was handcuffed while being taken to headquarters. He also said that he was told he could avoid the electric chair by cooperating. Johnson stated that he was punched in the chest and arms by investigators during the questioning. Johnson testified that he asked to speak with his family. He says that he was told he could do so only after "what they were doing was over with." Further, he testified that he was scared for his family when he signed the sworn statement.

The motion to suppress was denied. The case proceeded to trial. The jury convicted Johnson of first-degree murder for the death of Lawrence, attempted first-degree murder in the shooting of Williams, and aggravated assault in the shooting towards Dukes. After hearing penalty-phase evidence, the jury recommended that a death sentence be imposed by a margin of seven to five. The trial judge then sentenced Johnson to death on July 16, 1992. In his sentencing order, he found the following four statutory aggravating circumstances: (1) prior violent felony convictions; (FN8) (2) great risk of death to many persons;(FN9) (3) the murder was committed for pecuniary gain; (FN10) and (4) the murder was committed in a cold, calculated, and premeditated manner with no pretense of moral or legal justification. (FN11) The trial judge then considered the following two statutory mitigating factors: (1) that the defendant was under the influence of extreme mental or emotional disturbance at the time of the crime; (FN12) and (2) the age of the defendant at the time of the crime. (FN13) The trial judge rejected both of these factors. As for nonstatutory mitigation, the judge found that it was established that Johnson is a good friend and a man who cares for his family. The judge concluded as follows:

> But this mitigating evidence is overwhelmingly outweighed by the aggravating circumstances. After presiding at three trials of this Defendant, this Court has come to the conclusion that he is a man who murders people for money. This Court has searched the record and its conscience to

find a reason for not imposing the death penalty and has found none.

A sentence of death was imposed.

* * * *

(FN1.) Ronnie Johnson faces another death sentence in case No. 79,383. In that case, he was convicted of murdering Tequila Larkins. Both cases involve murders-for-hire.

(FN2.) Valerie Briggs was also in the laundromat in which Tequila Larkins was murdered on March 11, 1989.

(FN3.) Apparently "Tyrone" also worked that day. There is no indication that he witnessed the murder.

(FN4.) The dog was killed during this shooting incident.

(FN5.) It must be noted that there is testimony that Johnnie Williams (as well as Bernard Williams) was also within 100 feet of the shooting.

(FN6.) While Johnson was tried separately for the murders of Tequila Larkins and Lee Arthur Lawrence, a single hearing was held on the motion to suppress Johnson's confession to both murders.

(FN7.) *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

(FN8.) § 921.141(5)(b), Fla. Stat. (1987).

(FN9.) *Id.* § 921.141(5)(c).

(FN10.) *Id.* § 921.141(5)(f).

(FN11.) *Id.* § 921.141(5)(i).

(FN12.) *Id.* § 921.141(6)(b).

(FN13.) *Id.* § 921.141(6)(g). The judge rejected age as mitigation stating that "[h]e was mature enough to

> know that killing for money is a particularly horrifying way of committing civilization's oldest and most heinous crime." The judge was under the impression that Johnson was twenty-two at the time of the crime. The record reflects that he was only twenty-one. The crime was committed on March 20, 1989. Johnson was born on July 13, 1967. This discrepancy, though, does not alter the validity and trustworthiness of the judge's decision.

Johnson v. State, 696 So. 2d 317, 317-18 (Fla. 1997), *cert. denied*, 522 U.S. 1120 (1998).

Defendant appealed his conviction and sentence to this Court, raising five issues:

> I.
> THE TRIAL COURT ERRED BY FAILING TO GRANT THE DEFENDANT'S MOTION TO SUPPRESS HIS CONFESSION.
>
> II.
> THE TRIAL COURT ERRED BY FAILING TO MAKE A FINDING BY PREPONDERANCE OF THE EVIDENCE THAT THE DEFENDANT'S CONFESSION WAS VOLUNTARILY MADE BEFORE SUBMITTING IT TO THE JURY AS EVIDENCE.
>
> III.
> THE TRIAL COURT ERRED BY IMPOSING THE VERDICT RENDERED BY A JURY WHICH HAD IMPROPERLY DISCUSSED EVIDENCE IN THE CASE AND THE DEFENDANT'S GUILT.
>
> IV.
> THE TRIAL COURT ERRED IN AGGRAVATING THE DEFENDANT'S SENTENCE BASED ON THE FACTOR THAT THE DEFENDANT CREATED A GREAT RISK OF DEATH TO MANY PERSONS.
>
> V.
> THE TRIAL COURT ERRED BY SENTENCING THE DEFENDANT TO THE DEATH PENALTY WHERE THE TWO OTHER CODEFENDANTS RECEIVED LESSER SENTENCES FOR THEIR INVOLVEMENT IN THE CRIME.

The Court affirmed Defendant's convictions and sentences.

Johnson, 696 So. 2d at 326. Defendant sought certiorari review in the United States Supreme Court, which was denied on February 23, 1998. *Johnson v. Florida*, 522 U.S. 1120 (1998).

Thereafter, Defendant instituted the instant proceedings, seeking post conviction relief. In his initial motion, Defendant raises five claims. (PCR. 55-89)[2] Before the State responded, Defendant filed an amended motion for post conviction relief. (PCR. 90-122) The only difference between the initial motion and the amended motion was that in claim IV, Defendant had identified the triggerman as Rodney Newsome in the initial motion and identified the triggerman as David Ingraham in the amended motion. *Id.* The State filed a response to the amended motion. (PCR-SR. 1-45)[3]

After the State responded to this motion, Defendant sought to amend his motion for post conviction relief again. (PCR-SR. 46-50) The lower court granted leave to amend. (PCR. 649) On January 18, 2002, Defendant filed his second amended motion for post conviction relief, asserting the following nine claims:

I.

THAT [DEFENDANT] WAS PREJUDICED BY INEFFECTIVE

---

[2]The symbol "PCR." will refer to the record on this appeal. The symbol "PCR-SR." will refer to the supplemental record on this appeal.

[3]As the State has not received the supplement record, these page numbers are estimates.

ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT AND DEPRIVATION OF HIS RIGHT TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS.

A. [Defendant's] Sixth Amendment Right to Counsel, Right to Due Process and Equal Protection Were Violated When His Court-Appointed Counsel Improperly Delegated Representation to An Unqualified Attorney.

B. [Defendant] Prejudiced by Effective Waiver of Voir Dire on Death-Qualification.

C. [Defendant] Was Prejudiced by Counsel's Failure to Have Requested Individual Voir Dire on Pre-trial Publicity and/or Failing to Move to Strike the Panel When Jurors Made Prejudicial Remarks.

D. [Defendant] Was Prejudiced by Ineffective Assistance of Counsel During Penalty Phase and Sentencing.

E. That [Defendant] Was Prejudiced by Inadequate Investigation Into the Facts and Circumstances Surrounding His Detention by Police That Led to His Taped Confession.

F. [Defendant] Was Deprived of His Right To Effective Assistance of Counsel When No Effort Was Made to Impeach the Credibility of Tremaine Tift.

G. That [Defendant] Was Prejudiced by Ineffective Assistance of Counsel for Failing to Object to the Aggravating Factor of Cold, Calculated and Premeditated (CCP) on the Grounds of Unconstitutional Vagueness, and that [Defendant] Was Denied Due Process and Equal Protection When the Jury Was Given Insufficient Guidance to Determine Whether to Apply the Aggravator.

H. [Defendant] Was Deprived of His Personal Right to Testify.

II.

THAT [DEFENDANT'S] CONFESSION WAS OBTAINED IN VIOLATION OF THE FOURTH, FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

III.

THAT THE STATE SUPPRESSED IMMUNITY GRANTED TO TREMAINE TIFT FOR BEING AN ACCESSORY AFTER THE FACT IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

IV.

THAT THE STATE SUPPRESSED THE IDENTITIES OF WITNESSES WHO COULD HAVE TESTIFIED TO THE CIRCUMSTANCES UNDER WHICH JOHNSON WAS TAKEN INTO CUSTODY.

V.

[DEFENDANT] IS BEING DENIED HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION BECAUSE ACCESS TO THE FILES AND RECORDS PERTAINING TO HIS CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAS BEEN WITHHELD IN VIOLATION OF CHAPTER 119, FLORIDA STATUTES, AND HE CANNOT PREPARE AN ADEQUATE MOTION TO VACATE, SET ASIDE, OR CORRECT ILLEGAL SENTENCE UNTIL HE HAS RECEIVED THOSE MATERIALS AND BEEN AFFORDED DUE TIME TO REVIEW THEM.

VI.

THAT THE SENTENCING JURY WAS MISLED BY COMMENTS, QUESTIONS AND INSTRUCTIONS THAT UNCONSTITUTIONALLY AND INACCURATELY DILUTED THE JURY'S SENSE OF RESPONSIBILITY TOWARDS SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND TRIAL COUNSEL IS INEFFECTIVE FOR NOT PROPERLY OBJECTING.

VII.

THAT THE DEATH SENTENCE IN THIS CASE WAS UNCONSTITUTIONAL IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AS A MATTER OF LAW IN LIGHT OF THE FACT THAT [DEFENDANT] WAS NOT THE TRIGGER MAN, AND THE TRIGGER MAN RECEIVED A REDUCED SENTENCE.

VIII.

THAT [DEFENDANT] WAS PREJUDICED BY THE COURT'S

INSTRUCTIONS CONCERNING NON-STATUTORY AGGRAVATING CIRCUMSTANCES.

IX.

THAT FLORIDA'S DEATH PENALTY PROCEDURE VIOLATES APPRENDI V. NEW JERSEY.

(PCR. 373-431) On March 1, 2002, the State responded to the second amended motion. (PCR. 432-93)

On May 3, 2002, the lower court conducted a *Huff* hearing regarding this matter. (PCR. 653-724) At the *Huff* hearing, Defendant asserted that the State did not have probable cause to arrest him when he was brought to the police station because the identification was not made until after he had given his statement. (PCR. 677) Defendant acknowledged that he had claimed in his motion that Tremaine Tift's testimony was obtained as a result of a plea agreement with Rodney Newsome and that there was no plea agreement with Newsome. (PCR. 680-81) However, he asserted that Tift could have been prosecuted as an accessory after the fact because he rented a hotel room under his name for Newsome. (PCR. 681-85) He also suggested that the State may have had an agreement with Tift and that agreement may have been tacit or may have arisen by operation of law as the result of a subpoena. (PCR. 686-91)

The State responded that by the time of a *Huff* hearing, post conviction claims should have been fully investigated and the

results of that investigation should be alleged in the motion. (PCR. 704-05) The State particularly pointed out that Defendant's claims regarding Tift were insufficiently plead because Defendant did not stated there was any deal other than the allegation of the deal with Newsome that was refuted by the record. (PCR. 710-13) The State also noted that the record already showed the identification occurred before Defendant was picked up by the police. (PCR. 709)

In rebuttal, Defendant acknowledged that he did not even know if Tift could be located. (PCR. 720) As such, he was unable to proffer what Tift would say about a deal. *Id.*

At the end of the *Huff* hearing, the lower court ordered an evidentiary hearing on the claim that counsel was ineffective for failing to investigate Defendant's mental health. (PCR. 721-23) The lower court deferred ruling on whether an evidentiary hearing would be necessary on any of the other claims. *Id.* On August 7, 2002, the lower court entered a written order indicating that this would be the only claim on which an evidentiary hearing would be granted. (PCR. 497)

The evidentiary hearing was held on October 4, 2002. (PCR. 54) At the evidentiary hearing, Defendant presented the testimony of Dr. Merry Haber, his mother Wilhemeina Ferguson and himself. *Id.*

Dr. Haber, a psychologist, testified that in evaluating a defendant to determine if there was any evidence of mitigation, she would interview a defendant's family and friends, examine the defendant, conduct psychological tests on the defendant, review any medical and psychological records of the defendant and review police reports and depositions of witnesses. (PCR. 736-40) In this case, she reviewed the transcript of the penalty phase of trial, Defendant's prison records from his incarceration in these cases and spoke to Defendant and his family. (PCR. 740-41) She also reviewed a brief memo regarding the facts of the crime prepared by Defendant. (PCR. 742)

She stated that had she been asked to evaluate Defendant at the time of his trial, she would not have reviewed the guilt phase testimony, police reports or witness depositions. (PCR. 742) However, she reviews this information in cases on which she presently works. (PCR. 742) She stated that the primary reason why she reviews this new information is to prevent cross examination regarding her limited knowledge of the facts. (PCR. 742-43) She did not believe that information about the crime was relevant to her evaluation because she was merely trying "to explain to them as a human being to jurors that they can see that there might be an explanation for the behavior." (PCR. 744)

Dr. Haber stated that her review of the penalty phase testimony alerted her to a need to psychologically evaluate Defendant. (PCR. 745-46) She felt that the conflicting testimony about whether Defendant abused alcohol and Defendant's alleged refusal to discuss the death of his friend Ant indicated possible emotional problems. (PCR. 746-47) She also was interested in whether there had been domestic violence between Defendant's mother and stepfather. (PCR. 747) She found that there was no domestic violence but that there was conflict over the stepfather's drinking. (PCR. 747) She also felt that Defendant's account of his grandmother's death raised issues. (PCR. 747)

In evaluating Defendant, Dr. Haber met with Defendant on August 7 and 21, 2001. (PCR. 748, 751) She also met Defendant's mother and two younger stepbrothers. (PCR. 748) She gave Defendant the MMPI-2 and the Millon Clinical Multiaxial Inventory. (PCR. 748) Based on this information, she found Defendant to be depressed and anxious. (PCR. 749) She stated that he displayed behavioral problems and had "not resolved certain issues in his life." (PCR. 749)

Dr. Haber felt that one area of conflict in Defendant's life was that he knew that he was homosexual but attempted to hide this from his family. (PCR. 749) Dr. Haber opined that

Defendant was unable to cope with his homosexuality and instead used alcohol, cocaine and marijuana to have sex. (PCR. 750) Dr. Haber also claimed that Defendant prostituted himself and that this affected his self image. (PCR. 750-51)

Dr. Haber acknowledged that fact that she did not see Defendant at the time of trial made her conclusions less certain but believed that her conclusions were valid. (PCR. 751) Dr. Haber diagnosed Defendant as suffering from an adjustment disorder with mixed disturbance of emotion and conduct. (PCR. 751) She also found a sexual disorder and polysubstance abuse. (PCR. 751-52) She stated that these disorders resulted in Defendant acting out, committing crimes, having sex for money, being distressed over his sexual identity and using drugs to self medicate. (PCR. 751-52) She stated that these alleged disorders impaired Defendant's judgment "somewhat." (PCR. 752) She stated that in relation to these crimes, the alleged disorders lead Defendant to act with reckless abandon and without regard for human life. (PCR. 752) She felt that Defendant needed to commit these crimes to "present an image to the world of being cool and tough." (PCR. 752) She admitted that Defendant did commit the crime for pecuniary gain but that status was more of a motivation. (PCR. 752-53)

Dr. Haber admitted that her diagnoses would not have

affected any of the finding of any of the aggravating circumstances. (PCR. 753) However, she felt that it was important for the jury to have this information. (PCR. 753)

Dr. Haber felt that at the time of the crime, Defendant was under the stress of the death of his grandmother and his friend Ant. (PCR. 753-54) She stated that Defendant never had a father or a healthy role model. (PCR. 754) She felt that Defendant felt guilty about the death of Ant because Ant had attempted to repair his friendship with Defendant two days before his death and that Defendant had refused to speak to Ant. (PCR. 754) Dr. Haber stated that these stressors lead Defendant to use substances, which lead to an impairment in his judgment. (PCR. 754) However, she admitted that Defendant had no major mental illness. (PCR. 754)

On cross, Dr. Haber admitted that Defendant was cooperative and appropriate in her interviews with him. (PCR. 755) She admitted that the sentencing transcript reflected that Defendant's mother was a loving person who cared dearly for Defendant. (PCR. 755-56) It also showed that Defendant's stepbrother was a loving person and that he was a good person even though he was the natural child of the allegedly alcoholic stepfather. (PCR. 756) Dr. Haber acknowledged that Defendant had told her that he began using drugs at the age of 13 and that

the first loss of a family member had occurred when Defendant was 11. (PCR. 757)

Dr. Haber admitted that she had learned that Defendant had a criminal history. (PCR. 758) She acknowledged that the prison records that she had reviewed disclosed six disciplinary reports and four stays in solitary confinement. (PCR. 758) She admitted that she had been unaware of the attempted murder of Marshall King and had not been provided with information about this crime. (PCR. 759) She acknowledged that she was not informed that Defendant had been hired by the same person to commit the attempted murder and the two murders. (PCR. 760) She did not review any police reports. (PCR. 760) She had not read Defendant's confession. (PCR. 760) She was unaware that Defendant had been paid $700 for the crimes against Mr. King, paid $700 for the crimes against Ms. Larkins and split $1,500 with two codefendants for the crimes against Mr. Lawrence. (PCR. 760-61) She admitted that all she knew about the crimes came from brief summaries provided by Defendant. (PCR. 762)

Dr. Haber acknowledged that she had relied upon Dr. Ansley's report on Defendant in this case. (PCR. 762) She admitted that Defendant was found to be of average intelligence with no neuropsychological damage and no organic brain damage. (PCR. 762)

Dr. Haber admitted that Defendant voluntarily quit school at 16. (PCR. 762-63) She admitted that Defendant smoked marijuana and drank. (PCR. 763) She stated that Defendant did not use crack but instead smoked cocaine laced marijuana. (PCR. 763-64) In comparison to street addicts, Defendant's drug abuse was not severe. (PCR. 763-64)

Dr. Haber acknowledged that Defendant did not generally reveal his homosexuality until 1995, three years after trial. (PCR. 764-65) However, Dr. Haber assumed that Defendant may have told Ant that he was a homosexual. (PCR. 765) She admitted that in some communities and at certain ages, homosexuals are uncomfortable. (PCR. 765) However, the people who feel uncomfortable about their homosexuality do not always commit crimes. (PCR. 766)

Dr. Haber admitted that adjustment disorder begins within three months of a stressor and lasts no more than six months thereafter unless the stressor continues. (PCR. 766) She admitted that Defendant had adjusted to the death of his cousin when Defendant was 11. (PCR. 766) However, she did not believe that Defendant had adjusted as well to later deaths, especially the death of Ant. (PCR. 766) Dr. Haber admitted that the DMS-III stated that a person should not be diagnosed with adjustment disorder if they were grieving. (PCR. 766) She admitted that a

death was not an enduring stressor. (PCR. 767)

She admitted that adjustment disorder is characterized by a person engaging in maladaptive behavior. (PCR. 767) She stated that this means that they have difficulty doing things that they used to do. (PCR. 767-68) However, people with adjustment disorder can function. (PCR. 769)

Dr. Haber admitted that Defendant had been committing crimes since the age of 14 but did not consider this to be a life of crime. (PCR. 770) She stated that Defendant "had antisocial features and continues to have them." (PCR. 770)

Dr. Haber acknowledged that the testing that she did showed that Defendant had no trauma and did not suffer from post traumatic stress disorder. (PCR. 771) She admitted that Defendant's adjustment disorder did not cause him to commit these crimes and characterized such a statement as foolish. (PCR. 771-72) She admitted that the testing that she gave Defendant showed that he was happy and not pessimistic. (PCR. 772-73) The results of the MMPI was show that Defendant was:

> Somewhat immature and impulsive, a risk-taker who may do things other may not approve of just for the personal enjoyment of doing so. He is likely to be viewed as rebellious. He tends to generally oriented toward pleasure seeking and self-gratification. He may occasionally show bad judgment and tends to be somewhat self-centered, pleasure-oriented, narcissistic, and manipulative. He is not particularly anxious and shows no neurotic or psychotic symptoms.

(PCR. 773) Dr. Haber admitted that the results of her tests were all elevated for antisocial traits and amorality. (PCR. 773-78) However, Dr. Haber refused to diagnose Defendant as antisocial, stating only that he had antisocial and amoral traits. (PCR. 773-78) Dr. Haber admitted that she had given Defendant the Millon test but did not believe that it was valid. (PCR. 778-81)

Dr. Haber admitted that she would have to testify that Defendant had antisocial traits. (PCR. 782) She acknowledged that adjustment disorder did not correlate with becoming a hit man but that antisocial personality disorder did. (PCR. 782-83) When asked to review the criteria for antisocial personality disorder, Dr. Haber had to admit that Defendant met most, if not all, of them. (PCR. 782-84) The one area that she felt was lacking for antisocial personality disorder was that Defendant formed personal relationships. (PCR. 783)

Dr. Haber admitted that she knew that Defendant had been evaluated by a psychologist or psychiatrist before sentencing. (PCR. 785) However, she believed that this evaluation was brief. (PCR. 786)

Dr. Haber was asked how her present diagnosis could have been reached if Defendant did not admit his homosexuality until years after sentencing. (PCR. 787) She responded that Defendant

might have spoke about this issue if the right person had asked him. (PCR. 787)

Ms. Ferguson testified she met with Mr. Huttoe once. (PCR. 793-94) She claimed that Mr. Badini did not prepare her to testify. (PCR. 796) She stated that neither Mr. Badini nor anyone working on his behalf interviewed the family. (PCR. 797) She had no knowledge of Defendant ever suffering from any psychological problems. (PCR. 799) However, she did recall Defendant having nightmares as a small child about a statue of a black cat that had been in his room. (PCR. 799)

Ms. Ferguson stated that she assumed that Defendant was using drugs because he had stolen a TV from a family friend. (PCR. 800) She stated that Mr. Badini told her not to testify about the possibility that Defendant was using drugs. (PCR. 800-01)

On cross, Ms. Ferguson admitted that she had no knowledge that Defendant was using drugs. (PCR. 801-02) She merely assumed that he was using drugs because he stole. (PCR. 801-02) She never saw Defendant act as if he was on drugs. (PCR. 801-02)

Defendant testified that Mr. Huttoe never tried to get a complete biography from Defendant. (PCR. 803) Defendant claimed that he only spoke to Mr. Badini two times. (PCR. 803-04)

Defendant asserted that Mr. Badini did not discuss the penalty phase or attempt to get background information from him during the two visits. (PCR. 804) Defendant claimed that two investigator came to see him but did not inquire about his background. (PCR. 804-05) Defendant admitted that he spoke to Mr. Badini in the jury room when he was in court for hearings. (PCR. 805) However, he claimed that Mr. Badini did not discuss the penalty phase or the case during these discussions. (PCR. 805)

Defendant admitted that he spoke to a psychologist or psychologist at the time of trial. (PCR. 805) He claimed that the interview lasted only 15 minutes because the doctor had another appointment. (PCR. 805) He stated that the doctor did not ask him about his background and merely asked questions related to competency to stand trial. (PCR. 806-07)

Defendant claimed that he was unaware that there would be a penalty phase to his first trial until the end of the first trial. (PCR. 807) Defendant claimed that the only thing that Mr. Badini told him about a penalty phase was that his family would testify as character witnesses. (PCR. 808)

The State presented the testimony of Raymond Badini, Defendant's trial counsel. (PCR. 54) Mr. Badini stated that he had represented numerous defendants charged with first degree

murder facing the death penalty before he represented Defendant. (PCR. 810-11) Mr. Badini stated that he meet with Defendant numerous times during his representation of Defendant and recalled that their first discussion was at the time of arraignment. (PCR. 812-13) Mr. Badini stated that he discussed the case with Defendant. (PCR. 812-13)

Mr. Badini stated that he did meet with Defendant's family but did not go to their home. (PCR. 813) He discussed their testimony with them before he called them. (PCR. 813)

On cross, Mr. Badini stated that he had conducted five penalty phases. (PCR. 815) Mr. Badini asserted that he was aware of the value of mental health evidence in penalty phase proceedings. (PCR. 817-18) Mr. Badini stated that he arranged for Dr. Miller to evaluate Defendant for mental mitigation. (PCR. 819-20) He stated that he did this without having Dr. Miller officially appointed because of problems with funding with the county. (PCR. 819) Mr. Badini stated that he specifically asked Dr. Miller to look for mitigation and not sanity or competence. (PCR. 819) Dr. Miller reported to Mr. Badini that he did not see anything that could be presented in mitigation. (PCR. 824) Mr. Badini did not recall the specifics of his conversations with Dr. Miller or what Dr. Miller had told him about the scope of his evaluation. (PCR. 824-25)

Mr. Badini stated that he spoke to Defendant's family on numerous occasions. (PCR. 825-26) During these discussions, they discussed Defendant's family background. (PCR. 826) These discussion began before trial. (PCR. 826) Mr. Badini was sure that he discussed drug addiction during these discussions. (PCR. 826-27) Mr. Badini was aware of the death of Defendant's grandmother and Ant and believed that the death of Ant was the trigger that resulted in Defendant committing these crimes. (PCR. 828)

After the evidentiary hearing, Defendant submitted a written closing argument. (PCR-SR. 51-74?) Defendant argued that Dr. Haber's testimony supported a finding of the statutory mitigating circumstances of extreme duress and age. (PCR-SR. 65-66) He also insisted that her testimony would have affected the finding of CCP and pecuniary gain as aggravating circumstances. (PCR-SR. 66) Defendant claimed that the testimony of his mother and himself about their contact with Mr. Badini was more credible that Mr. Badini's testimony. (PCR-SR. 68-69) He asserted that his testimony that he was only evaluated for competency was more credible that Mr. Badini's testimony that he was evaluated for mitigation. (PCR-SR. 70-71) He insisted that Mr. Badini was ineffective because he waited too long to have Defendant evaluated and because the evaluation did

not find his alleged mental problems. (PCR-SR. 69-72) He insisted that Dr. Haber's testimony supported a finding of both statutory and nonstatutory mitigation. (PCR-SR. 73)

The State filed a post hearing memorandum in response to this pleading. (PCR. 503-38) The State argued that the evidence showed that Mr. Badini had investigated Defendant's mental health by having Defendant evaluated by Dr. Miller at the time of trial. (PCR. 525) The State averred that the testimony of Defendant and his mother about the scope the penalty phase investigation was incredible because it was inconsistent with the record on appeal, Defendant's mother's testimony was internally inconsistent and they had a motive to be less than truthful. (PCR. 525-26) Moreover, the State asserted that Defendant had not proven that he was prejudiced by any alleged deficiency of Mr. Badini. (PCR. 526) Counsel had presented evidence of the alleged stressors testified to by Dr. Haber and of the effect they allegedly had on Defendant at trial. (PCR. 526-30) Moreover, Defendant had not revealed the fact that he was homosexual at the time of trial, and there was no evidence that he would have done so. (PCR. 530-31) Further, Dr. Haber's testimony would have opened the door to the presentation of Defendant's criminal history and information about Defendant's antisocial tendencies. (PCR. 531) The State pointed out that

Dr. Haber had extensively relied on allegations of drug use, which were contradicted by the testimony of Defendant's family and friends and which, according to Defendant's mother, trial counsel did not want to present the jury. (PCR. 531-32) The State noted that Defendant was not entitled to argued that Dr. Haber's testimony would have supported a finding of any statutory mitigating circumstances or would have affected the finding of any aggravating circumstances because it was not plead in his motion for post conviction relief. (PCR. 533-34) Moreover, any such assertion was not supported by her testimony. *Id.* Finally, the State argued that given the quality of Dr. Haber's conclusion there was no reasonable probability that Defendant would not have been sentenced to death had that testimony been provided. (PCR. 532-33)

Defendant filed a reply to the State's memorandum. (PCR. 546-66) Defendant insisted that he was entitled to argue whatever he wanted regardless of what claims he had plead. (PCR. 546-49) Defendant insisted that Dr. Haber's testimony did support the statutory mental mitigators, did negate aggravating circumstance and did create a reasonable probability that he would not have been sentenced to death. (PCR. 549-56) Defendant insisted that the fact that Defendant was evaluated by Dr. Miller at the time of trial was irrelevant because Defendant

asserted that the evaluation was incomplete and because the evaluation was conducted later than Defendant believed it should have been. (PCR. 556-59) Defendant also sought to add a claim based on *Ake v. Oklahoma*, 470 U.S. 68 (1985). (PCR. 560)

On January 17, 2003, the lower court issued its order denying the motion for post conviction relief. (PCR. 567-76) In the order, the court found that all of the claims that it had summarily denied were facially insufficient, refuted by the record and/or procedurally barred. *Id.* Regarding the claim of ineffective assistance of counsel at the penalty phase, the court found that Defendant was evaluated at the time of trial for mental mitigation and that Defendant had not proven that he was prejudiced by the failure to present Dr. Haber's testimony. *Id.*

This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court properly denied the claim of ineffective assistance of counsel at the penalty phase. Defendant failed to prove either that his counsel was deficient or that he was prejudiced.

The lower court also properly denied the claims regarding substitution of counsel and ineffective assistance of counsel during voir dire. The claims were facially insufficient.

The claim regarding the conduct of the motion to suppress was properly denied as refuted by the record and insufficiently plead. The claim regarding the confession was properly denied as procedurally barred, facially insufficient and without merit.

The claim regarding impeachment of Tift was properly denied as facially insufficient and meritless. The *Brady* claim was properly denied as facially insufficient and refuted by the record. The claim regarding the CCP instruction was properly denied as procedurally barred and meritless, as were the *Caldwell* claim, the claim regarding the proportionality of Defendant's sentence and the jury instruction on nonstatutory mitigation. The *Ring* claim was properly denied as meritless.

ARGUMENT

I. THE LOWER COURT PROPERLY DENIED THE CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND PRESENT MITIGATION.

Defendant first asserts that his counsel was ineffective for failing to investigate and present mental health mitigation. However, the lower court properly denied this claim.

In denying this claim after an evidentiary hearing, the lower court found:

> The burden of persuasion in on the petitioner to prove, by a preponderance of competent evidence, that counsel's performance was unreasonable. *See Strickland v. Washington*, [466 U.S. 668,] 104 S. Ct. 2052, 2064 (1984). The standard for counsel's

performance is "reasonableness under prevailing professional norms." *Strickland v. Washington*, 104 S. Ct. 2052, 2065. "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 v. Thomas*, 46 F.3d 1506, 1518 (11th Cir. 1995)(citations omitted).

> 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 a trial must be broad. To state the obvious: trial lawyers, in every case, could have something more or 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.

Burger v. Kemp, 483 U.S. 776, 107 S. Ct. 3314, 3126, 97 L. Ed. 2d 638 (1987), *Chandler v. United States*, 218 F.3d at 1313.

> "It is common practice for petitioners attacking their death sentences to submit affidavits from witnesses who say they could have supplied additional mitigating evidence, had they been called or .. Had they been asked the right questions." Waters, 46 F.3d at 1514 (en banc) But "[t]he mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel." Id. (Noting that such witnesses show nothing more than that, "with the luxury of time and the opportunity to focus more resources on specific parts of a made record, post-conviction counsel will inevitably identify

> shortcomings."). And, basing the inquiry on whether an investigation (if one had been undertaken would have uncovered mitigating evidence or witnesses) is an example of judging counsel's acts from the benefit of hindsight. The proper inquiry was articulated in Rogers v. Zant: "once we conclude that declining to investigate further was a reasonable act, we do not look to see what a further investigation would have produced." 13 F.3d 384, 388 (11th Cir. 1994).

Chandler v. United States, 218 F.3d at 1317.

* * * *

Defendant alleges that trial counsel failed to adequately investigate any statutory mitigating factors that might have applied to convince the jury to recommend life imprisonment. The gist of this claim is that counsel failed to present any psychiatric testimony. For the purposes of this amended motion, Defendant was evaluated by Dr. Haber and Dr. Ansley, at the request of collateral counsel. These mental health experts have reached the conclusion that Defendant suffered from certain adjustment disorders. While neither Dr. Haber nor Dr. Ansley has diagnosed Defendant with a mental illness or found that he was insane at the time the acts were committed, the allegation were sufficient to entitle Defendant to an evidentiary hearing on the issue.

The court held an evidentiary hearing on October 4, 2002. Dr. Haber testified at the hearing. Dr. Haber testified that had she been retained by the Defendant her role would have been to explain the factors that would have affected the Defendant's behavior at the time of the commission of the crime. To do this, she testified that she would have interviewed his family, friends and associates, performed psychological tests, reviewed his medical history, prior hospitalizations, criminal record, and police reports. She further testified that if there was no evidence of mental illness, she would have investigated other mitigating factors: substance abuse, sexual issues, family problems, the neighborhood, and any academic problems. Dr. Haber

stated that she would have wanted to present a picture of a human being to the jury as a psychologist, so that the jury could make an informed decision.

Dr. Haber testified that she found clues for the need for a mental health evaluation. The first clue was that most witnesses testified that the defendant did not have a substance abuse history but his step-father had an alcohol problem. The second clue was that the Defendant would not talk about "Ant". Ant was a friend of the Defendant's who had died shortly before this crime had been committed. The Defendant's brother said that he tried to jump into the casket with Ant. The third clue was domestic violence in the home. The mother and step-father separated when the Defendant was 15 due to alcohol abuse. The fourth clue was the death of the Defendant's grandmother.

Dr. Haber administered several psychological tests. The results indicated that the Defendant suffers from adjustment disorders. She found that his judgment was impaired and that he was mentally confused at the time of her testimony, 13 years after the crime. She further testified that a mental disorder is not a diagnosable condition, but that he was in conflict over the death of people in his life and his sexuality. She further testified that she did not know if this information would have impacted the jury's view of the Defendant as a cold hearted killer.

One of the stressors that Dr. Haber testified about was the fact that the Defendant did not reveal he was a homosexual. The Defendant did not reveal this fact until 1995, when he had already been on death row for three years. He still had not revealed his homosexuality to some family members. Dr. Haber testified that there is no correlation between being homosexual and being a hired killer. As Defendant had still not revealed his sexual orientation to some people, counsel was not ineffective for failing to discover it, especially since there is no correlation between homosexuality and committing murder.

On cross-examination, Dr. Haber testified that a disorder generally begins within three months of a stressor and lasts no more than six months, unless the condition continues. Dr. Haber had earlier testified that the death of Ant and the grandmother were major stressors. On cross-examination she testified that a disorder is different from bereavement and that the

Defendant had adjusted well to the death of a relative when he was eleven.

Dr. Haber also testified to the test results. On the MMPI, the results for the Defendant were that he was somewhat immature, an impulsive risk taker, he had no neurotic or psychotic symptoms, he exercised bad judgment, was pleasure oriented and manipulative, and was not motivated to change his behavior. He tends to blame others for his problems and treatment generally does not work for this type of individual. Given treatment is ineffective for this type of individual, Defendant cannot show that the jury would have recommended life had they heard this testimony.

The results of the MCMI 3 were that the Defendant had antisocial traits, sadistic features, paranoid features, and was aggressive and combative. The Defendant scored as being sadistic.

Dr. Haber also testified that if she performed these tests on the Defendant at the time of his trial, she would have testified that he had anti-social traits and that the jury would have heard the test results. Defendant cannot meet the prejudice prongs of *Strickland, supra,* as Defendant cannot show that if the results of the psychological evaluation would have resulted in a life sentence had they been presented at trial.

In *Morton v. State*, 789 So. 2d 324 (Fla. 2001), the Supreme Court found that in light of the numerous aggravating factors in the double murder case, any omission of antisocial personality disorder as separate mitigating evidence was harmless beyond a reasonable doubt.

The Defendant testified that he talked to Dr. Miller prior to the penalty phase. From the testimony of the Defendant, it appears as though Dr. Miller had conducted a competency examination.

Ray Badini also testified. Mr. Badini stated that he asked Dr. Miller to evaluate the Defendant as a favor to him as the county had refused to pay for a second full psychological evaluation. He testified that he requested Dr. Miller perform a full forensic evaluation to help him with the penalty phase. He did not ask for a competency or sanity evaluation. Mr. Badini did not recall receiving a written report but recalled Dr. Miller telling him there was nothing

there.

Mr. Badini also testified that the Defendant expressed to the jury all that he felt, that [Defendant] had stated that if he wanted to know something, to ask him directly, not a Doctor.

It is clear from the testimony that the Defendant was evaluated by Dr. Miller prior to the penalty phase. While the testimony differs as to the extent of the evaluation, counsel did have an evaluation performed by a competent doctor and cannot be deemed incompetent for failing to have the Defendant evaluated.

Given the testimony of the witnesses that the Defendant wanted to pop the old father and son and that he stood over Mr. Lawrence after he fell to the ground and fired two more shots into him, Defendant has not shown that the jury would have come back with a recommendation of a life sentence had the psychiatric testimony been presented. The testimony that Defendant has an antisocial personality disorder, had sadistic tendencies, and that this type of person does not response well to treatment would not have influenced the jury in a favorable manner.

As to the nonstatutory mitigation, counsel did present family members and Defendant testified. The testimony did not show an abusive upbringing. The testimony was the Defendant was raised without a father present, he was a loving family member, went to church every Sunday, and provided for the family financially. Defendant did not have a substance abuse problem. Counsel presented Defendant as a loving family man in hopes of sparing his life. He lived as a productive member of society prior to the commission of these crimes. Defendant has not shown that the probability that the presentation of this evidence again or the presentation of it in a different manner will result in a life sentence. Defendant has not met the prejudice prong of *Strickland*, *supra*.

[Defendant's] claim that counsel was ineffective for failing to argue the disparate sentences of the co-defendants is unavailing. [Defendant] had previously been hired to kill Mr. King and Ms. Larkins. While co-defendant Ingraham also fired a gun in this murder, [Defendant] hired Ingraham to help kill Mr. Lawrence and directed Ingraham to make sure that Mr. Lawrence was dead. The Supreme Court

> rejected this claim of mitigation on direct appeal. *Johnson*, 696 So. 2d at 325-26. As [Defendant] was more culpable, even if counsel had made this argument, the reasonable probability is that he still would not have been sentenced to life imprisonment. [Defendant] has failed to meet the prejudice prong of *Strickland*.

(PCR. 569-73)

In reviewing the denial of a claim of ineffective assistance of counsel after an evidentiary hearing, this Court is required to give deference to the lower court's findings of fact to the extent that they are supported by competent, substantial evidence. *Stephens v. State*, 748 So. 2d 1028, 1033-34 (Fla. 1999). However, this Court may independently review the lower court's determination of whether those facts support a finding of deficiency and prejudice to support a holding that counsel was not ineffective. *Id.*

Here, the trial court's finding of fact are supported by competent, substantial evidence. Mr. Badini did testified that he had Dr. Miller evaluate Defendant for mitigation and that Dr. Miller found no mitigation. Dr. Haber did testify that Defendant has an adjustment disorder but no major mental illness and no brain damage. She did rely heavily on Defendant's homosexuality in finding this disorder, while admitting that Defendant did not reveal his homosexuality to anyone until years after trial. She did admit that homosexuality did not cause

these crimes and that stating that it was foolish to say that even the adjustment disorder she diagnosed caused these crimes. She did not testify to any statutory mitigation and stated that her diagnosis did not affect the finding of any aggravating circumstance. She did admit that an adjustment disorder generally lasted no more than 6 months. She did acknowledge that bereavement was generally not diagnosed as adjustment disorder, but she relied on Defendant's grief over deaths among his family and friends as support for the adjustment disorder. She admitted that she would have to testify about Defendant's antisocial and amoral tendencies if called. Given these facts, the trial court properly found that Defendant had proven neither deficiency or prejudice. *See State v. Riechmann*, 777 So. 2d 342, 354-55 (Fla. 2000)(claim of ineffective assistance properly denied where evidence did not definitely show that evidence was available at time of trial); *Cade v. Haley*, 222 F.3d 1298, 1305 (11th Cir. 2000)(antisocial personality disorder not mitigating because of negative effect on jury); *Breedlove v. State*, 692 So. 2d 874 (Fla. 1997)(counsel not ineffective for failing to present evidence that may have a negative effect on jury). The denial of the claim should be affirmed.

Additionally, it should be remembered that this was an extremely aggravated case. The evidence showed that Defendant

was hired to kill Mr. Lawrence, that he planned the killing and arranged the participation of other, and that he executed him in a hail of bullets, endangering the lives of several others. Moreover, at the time Defendant committed this crime, Defendant had already acted as a paid hit man in attempting to kill Mr. King and in killing Ms. Larkins. This evidence resulted in the finding of four aggravating circumstances: (1) prior violent felony convictions; (2) great risk of death to many persons; (3) the murder was committed for pecuniary gain; and (4) the murder was committed in a cold, calculated, and premeditated manner with no pretense of moral or legal justification. Under these circumstances, there is no reasonable probability that Defendant would have been sentenced to life had Dr. Haber's testimony that Defendant had a short term difficulty adjusting to the stresses of his life been presented to the jury. *Strickland*. The lower court properly denied this claim and should be affirmed.

Defendant asserts that the lower court erred in finding that counsel did have Defendant evaluated for mental mitigation. However, the finding that counsel did have Defendant evaluated for mitigation is a factual finding. This factual finding is supported by competent, substantial evidence. Mr. Badini testified that he asked Dr. Miller to evaluate Defendant for mitigation and that Dr. Miller reported that such an evaluation

yielded no mental mitigation.

Defendant also asserts even if he was evaluated for mitigation, there was no evidence presented that Dr. Miller's evaluation was reasonable. However, in making this assertion, Defendant ignores the fact that he had the burden of proof at the evidentiary hearing. *Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983). Defendant also ignores that *Strickland* holds that an attorney's conduct is presumed not to be deficient. *Strickland*, 466 U.S. at 689-90. Thus, to the extent that Defendant claims that the record is insufficient, he has failed to overcome the presumption that counsel acted reasonably in relying on Dr. Miller's finding of no mitigation. The denial of the claim should be affirmed.

Moreover, given the nature of the testimony presented by Dr. Haber, it appears that Dr. Miller did conduct an appropriate evaluation. Dr. Haber admitted that she found no signs of major mental illness. (PCR. 754) She acknowledged that she had relied upon Dr. Ansley's report, which stated that Defendant was of average intelligence with no neuropsychological damage and no organic brain damage. (PCR. 762) Dr. Haber characterized as foolish the assertion that the adjustment disorder she diagnosed caused Defendant to committed these crimes. (PCR. 771-72) Dr. Haber admitted that the DSM-III stated that adjustment disorder

was generally not an appropriate diagnosis for one who was grieving. (PCR. 766) Yet, with the exception of his sexuality, Dr. Haber relied upon the deaths of individuals in Defendant's life as the stressors that caused Defendant to have an adjustment disorder. (PCR. 746-47, 749) Dr. Haber admitted that Defendant did not reveal his homosexuality to anyone until 1995, years after trial. (PCR. 764-65) Given the nature of this testimony, it was entirely possible for Dr. Miller to have conducted an adequate evaluation and found no mitigation despite Dr. Haber's conclusion. *Davis v. Singletary*, 119 F.3d 1471, 1475 (11th Cir. 1997). The denial of the claim should be affirmed.

Defendant also asserts that he proved that he was prejudiced because Dr. Haber's testimony supported the finding of extreme duress or under the substantial domination of another person. However, this assertion is meritless. Initially, the State would note that Defendant's assertion is based on a misunderstanding of the nature of this mitigating circumstance. As this Court has noted, "'Duress' is often used in the vernacular to denote internal pressure, but it actually refers to external provocation such as imprisonment or the use of force or threats." *Toole v. State*, 479 So.2d 731, 734 (Fla. 1985). Here, Dr. Haber did not testify that Defendant decided to commit

this murder because there was any external provocation. Instead, she testified that Defendant had an adjustment disorder because of his undisclosed homosexuality and the deaths of individuals around Defendant. Under these circumstances, Dr. Haber's testimony would not, as a matter of law, support the extreme duress mitigator. The denial of the claim should be affirmed.

Moreover, Dr. Haber did not testify that any of the mental mitigators were present in this case. In fact, she expressly disavowed that Defendant's alleged adjustment disorder caused the commission of this crime. She labeled any such claim as foolish. With regard to the age mitigator, Dr. Haber did not provide any testimony regarding Defendant's age, either chronological or emotional. She also did not say that Defendant did not know the difference between right and wrong. Thus, the lower court properly found that Defendant did not prove that any statutory mitigating circumstances would have been presented had Dr. Haber testified. *Smith*, 445 So. 2d at 325. The denial of the claim should be affirmed.

Defendant also contends that Dr. Haber's testimony would have rebutted certain unnamed aggravating circumstances. However, there is no evidence to support this assertion. Dr. Haber testified that her diagnosis would not have affected any

of the findings in aggravation. (PCR. 753) She acknowledged that Defendant committed these crimes for pecuniary gain. (PCR. 752-53) She also admitted that Defendant had no major mental illness. (PCR. 754) She testified that Dr. Ansley, a neuropsychologist, had found Defendant to be of average intelligence with no neuropsychological damage and no organic brain damage. (PCR. 762) Thus, Defendant did not prove that the presentation of Dr. Haber's testimony would have negated the finding of any aggravating circumstance. *Smith*, 445 So. 2d at 325. The denial of the claim should be affirmed.

Defendant next contends that the lower court improperly rejected his claim because Dr. Haber's testimony revealed that Defendant had an antisocial personality. However, this Court has held that counsel cannot be deemed ineffective for failing to present evidence as mitigation that would have caused damaging information to be admitted. *Breedlove v. State*, 692 So. 2d 874 (Fla. 1997). Many courts do not even consider antisocial personality disorder mitigating because of the negative effect of informing a jury that a defendant is a person who understands right from wrong but acts in disregard of the rights of others. *See Cade v. Haley*, 222 F.3d 1298, 1305 (11th Cir. 2000); *Weeks v. Jones*, 26 F.3d 1030, 1035 n.4 (11th Cir. 1994); *Harris v. Pulley*, 885 F.2d 1354, 1383 (9th Cir. 1988).

Thus, the lower court's rejection of Defendant's claim because it would have opened the door to damaging information was proper. *Cummings-el v. State*, 28 Fla. L. Weekly S757 (Fla. Oct. 9, 2003). The denial of the claim should be affirmed.

Defendant's reliance on *Wiggins v. Smith*, 123 S. Ct. 2527 (2003), is misplaced. In *Wiggins*, counsel had sought to bifurcate the penalty phase such that evidence that the defendant's participation in the crime was insufficient to make the defendant eligible for the death penalty would be presented first and that traditional mitigating evidence would be presented only after the jury had determined the eligibility question. The trial court refused to bifurcate the proceedings the day before the penalty phase began. Counsel had some information that the defendant's upbringing had been horrific. In fact, they informed the sentencing jury that it would hear about the defendant's life during opening statement at the penalty phase. However, counsel presented no such evidence at the penalty phase and did not even proffer such evidence when he proffered evidence to preserve the bifurcation issue for appeal.

During post conviction litigation, evidence was presented that the defendant had been severely physically and sexually abused as a child. Additionally, the defendant's mother had neglected him and left him without food, and the defendant was

placed in foster care at the age of 6. The abuse continued while the defendant was in foster care. Counsel testified that they were aware of some of this information at the time of trial from a presentencing report and foster care record. Counsel stated that they did not pursue this information further because they made the strategic decision to contest the defendant eligibility for a death sentence instead of presenting traditional mitigation.

The Court found that counsel's strategic decision was unreasonable because counsel was aware of information that indicated that further investigation would be fruitful and investigations of a defendant's social history were routinely conducted. Moreover, until the trial court denied the motion to bifurcate, counsel had a reason to have conducted the investigate because they had planned to present such evidence at the second phase of the bifurcated proceeding. Even at that point, counsel did not solely contest the defendant's eligibility for the death penalty at the sentencing hearing. Instead, counsel present some traditional mitigating evidence. Additionally, the Court found that the record did not support a finding that counsel knew of the sexual abuse at the time they decided not to present such evidence. Given all of these circumstances and the nature of the mitigation itself, the Court

found that the defendant had proven that his counsel was ineffective.

Here, counsel did not have any information that Defendant had any mental problems. The fact that counsel found it enigmatic that someone from a nice home would choose to be a hired killer did not indicate that he had grounds to believe that Defendant was mentally ill. Moreover, counsel did have Defendant evaluated and was told there was no mitigation to present. In fact, Defendant's post conviction expert admitted that Defendant had no major mental illness, was of average intelligence and had no neuropsychological damage or brain damage. Instead, the expert opined that Defendant had difficulty dealing with the stresses in his life based on a stress Defendant did not reveal to anyone until years after trial and that was temporary in nature. Under these circumstances, ***Wiggins***, which itself notes it was not requiring counsel to investigate every conceivable line of mitigation or to present every bit of mitigation that could be found, ***Id.*** at 2541, does not show that the lower court erred in denying this claim. The denial of the claim should be affirmed.

II. THE LOWER COURT PROPERLY DENIED THE CLAIM REGARDING THE SUBSTITUTION OF COUNSEL.

Defendant next contends that his rights were violated

because the lawyer who was originally appointed to represent him referred the case to another lawyer. However, the lower court properly summarily denied this claim.

In the lower court, and in this Court, Defendant has not alleged how he was prejudiced by the fact the he was represented by Mr. Badini and Ms. Carr instead of Mr. Huttoe. Instead, Defendant asked the lower court, and asks this Court, to presume that he was prejudiced by being represented by an attorney other than the one appointed by the trial court. However, in *Morris v. Slappy*, 461 U.S. 1 (1983), the United States Supreme Court held that an indigent defendant does not have a right to be represented by a particular attorney. *Accord Koon v. State*, 513 So. 2d 1253, 1255 (Fla. 1987)("An indigent defendant has an absolute right to counsel, but he does not have a right to have a particular lawyer represent him."). Because the right to have a particular attorney represent him did not exist, the Court rejected the concept that no prejudice had to be shown to support a claim the Sixth Amendment was violated because counsel was substituted without a defendant's consent. *Slappy*, 461 U.S. at 14 n.6. As the United States Supreme Court has already rejected the notion that prejudice should be presumed because counsel is substituted, the lower court properly refused to presume prejudice in this matter.

Instead, the lower court properly analyzed this claim under *Strickland v. Washington*, 466 U.S. 668 (1984). *Woodberry v. State*, 611 So. 2d 1291 (Fla. 4th DCA 1992)(*Strickland* applies to claims of ineffective assistance, where one court-appointed attorney substitute for another court-appointed attorney). Under *Strickland*, a defendant must allege both deficient conduct of counsel and prejudice to allege sufficiently a claim of ineffective assistance of counsel. In this case, Defendant never alleged any prejudice resulting simply from the fact that he was represented by Badini and Carr instead of Huttoe. As such, the lower court properly summarily denied this claim. *Jackson v. Dugger*, 633 So. 2d 1051, 1054 (Fla. 1993). It should be affirmed.

The cases relied upon by Defendant do not support his claim that he is entitled to relief. In *McKinnon v. State*, 526 P.2d 18 (Alaska 1974), the court removed the attorney who had represented the defendant for at least a year, over the defendant's objection, because he perceived that the attorney had not acted with diligence. In *Smith v. Superior Court of Los Angles County*, 440 P.2d 65 (Cal. 1968), the court removed the attorney who had represented the defendant for years, over defendant's objection, because the attorney did not exhibit appropriate courtroom demeanor and because the attorney had not

previously tried a death penalty case. Here, the Court did not remove Defendant's attorney and Defendant did not object to being represented by Mr. Badini and Ms. Carr. Moreover, as Defendant admits, Mr. Badini and Ms. Carr represented him throughout most of the proceedings in this case. Given these circumstances, neither *McKinnon* nor *Smith* support Defendant's claim.

Next, Defendant relies upon the presumed prejudice standard enunciated in *United States v. Cronic*, 466 U.S. 648 (1984). Again, this case does not support Defendant's position. In *Cronic*, the Court found that the appointment of an inexperienced lawyer 25 days before trial did not support a presumption of prejudice. Thus, it does not support a presumption of prejudice where a lawyer was substituted early in the course of the litigation. Defendant also cites to *Gibson v. State*, 721 So. 2d 363, 366 (Fla. 2d DCA 1998). However, the issue in *Gibson* was whether the assignment of a new assistant public defender to a case on the Friday before a Monday trial required a continuance. As such, the court had no occasion to determine what standard would apply to a claim that counsel was ineffective.

Defendant also attempts to claim that the alleged arrangement between Badini and Carr and Huttoe over payment for representing Defendant caused them to have a conflict of

interest. As such, he asserts that the lower court should have applied the standard enunciated in *Cuyler v. Sullivan*, 446 U.S. 335 (1980). However, in *Mickens v. Taylor*, 535 U.S. 162, 174-76 (2002), the Court noted that it had never applied the *Cuyler* standard outside the area of alleged conflicts based upon concurrent representation of multiple defendants in a single criminal prosecution. It also asserted that the purpose behind the *Cuyler* rule was best suited to this type of conflict and no others because the rule was not designed "to enforce the Canon of Legal Ethics." *Id.* at 176.

In this case, Defendant's claim of a conflict of interest does not rely upon an allegation of multiple representation. Instead, Defendant asserts a conflict of interest because of the amount of compensation that Mr. Badini, Ms. Carr and Mr. Huttoe could expect to obtain by having Badini and Carr represent Defendant. As the United States Supreme Court recognized in *Mickens*, this is not the type of alleged conflict to which *Cuyler* applies. As such, the lower court properly refused to apply *Cuyler* and properly applied *Strickland*. Since Defendant did not properly plead prejudice under *Strickland*, the lower court properly summarily denied this claim. It should be affirmed.

While Defendant asserts that the amount of compensation an

attorney receives was recognized as a source of conflict in *Beets v. Scott*, 65 F.3d 1258 (5th Cir. 1995), this is untrue. In *Beets*, the Fifth Circuit, en banc, refused to apply *Cuyler* outside of situations involving multiple representation. *Id.* at 1265-72; *see also Bonin v. Calderon*, 59 F.3d 815, 826 (9th Cir. 1995). In discussing how applying *Cuyler* to alleged conflicts of interest that do not involve multiple representation would allow the *Cuyler* exception to swallow the *Strickland* rule, the court used the amount of fees paid as an example of how any ineffectiveness claim could be converted into a *Cuyler* claim if *Cuyler* was not limited. As such, *Beets* supports the lower court's refusal to apply *Cuyler*; not Defendant's claim that it should be applied. The denial of the claim should be affirmed.

In *Bryan v. State*, 753 So. 2d 1244, 1250 n.5 (Fla. 2000), this Court refused to apply *Cuyler* to a claim that a conflict existed between an attorney's self interest and the interests of his client. In *Bryan*, the attorney had admitted to being an alcoholic at the time of the defendant's trial. *Bryan v. State*, 748 So. 2d 1003, 1009 (Fla. 1999). The defendant then claimed that the alcoholism created a conflict between the attorney's self-interest in drinking and his duty to provide competent representation to his claim. *Bryan*, 753 So. 2d at 1250 n.5.

This Court rejected that claim and instead analyzed the defendant's claim of ineffective assistance under *Strickland*. *Id.* at 1247-50 & n.5. Here, Defendant claimed a conflict between his counsels' self interest in maximizing their compensation in this case and their duty to represent him fully. As this is the same type of conflict that was alleged to exist in *Bryan*, the lower court properly refused to analyze this claim under *Cuyler*. Since Defendant did not properly allege prejudice under *Strickland*, the lower court properly denied this claim and should be affirmed.

Even if the claim was properly analyzed under *Cuyler*, the lower court properly summarily denied the claim. Under *Cuyler*, a defendant must show that "his counsel actively represented conflicting interests and that the conflict adverse affected counsel's performance." *Quince v. State*, 732 So. 2d 1059, 1063 (Fla. 1999); *see also Cuyler*, 446 U.S. at 350. According to Defendant's own allegations, Mr. Huttoe did not represent him. As such, any alleged conflict with Huttoe could not have adverse affected his representation of Defendant. Moreover, Defendant does not specify any adverse affect on Badini's representation, except to generally assert that Badini did not spend enough time on the case. However, such a conclusory allegation is insufficient to show an adverse effect. *Griffin v. State*, 28

Fla. L. Weekly S723, S726 (Fla. Sept. 25, 2003); *Ragsdale v. State*, 720 So. 2d 203, 203, 207 (Fla. 1998). Thus, the lower court properly denied this claim and should be affirmed.

To the extent that the real gravamen of this claim is that the trial court erred in allowing Badini and Carr to represent Defendant at trial despite the fact that Huttoe had been appointed, the claim was properly denied as procedurally barred. The fact that Huttoe was appointed yet Badini and Carr represented Defendant at trial was apparent from the face of the record. Issue that are apparent from the face of the record are issues that could have and should have been raised on direct appeal. *Kelly v. State*, 569 So. 2d 754, 756 (Fla. 1990); *Lambrix v. Singletary*, 559 So. 2d 1137, 1138 (Fla. 1990). Issues that could have and should have been raised on direct appeal are procedurally barred in post conviction proceedings. *Francis v. Barton*, 581 So. 2d 583 (Fla.), *cert. denied*, 501 U.S. 1245 (1991). As this issue was apparent from the face of the record, it should have been raised on direct appeal and is now procedurally barred. The lower court's denial of this claim should be affirmed.

III. THE LOWER COURT PROPERLY DENIED THE CLAIM THAT COUNSEL WAS INEFFECTIVE IN THE CONDUCT OF VOIR DIRE.

Defendant next contends that the lower court erred in

summarily denying his claim that his counsel was ineffective in failing to question the venire adequately about their views on the death penalty. Defendant appears to contend that an evidentiary hearing was necessary to present testimony from lawyers on the importance of questioning the venire about the death penalty. Defendant also appears to contend a showing of prejudice was not necessary to support this claim. However, the lower court properly denied this claim.

In the lower court, Defendant contended that his counsel was ineffective for failing to question the venire about their views on the death penalty. Defendant did not claim that he was not required to show prejudice under *Strickland*. Instead, he asserted that he was prejudice because counsel's questioning did not discover any veniremember whose views about the death penalty might have caused them to be excusable or that counsel might have been able to rehabilitate any veniremember whose views against the death penalty rendered them excusable for cause. However, Defendant did not assert what questions should have been asked or that the asking of any such questions would have rendered any veniremember excusable. He did not identify any veniremember who could have been rehabilitated or any questions counsel could have asked that would have rehabilitated any veniremember. As the motion below contained nothing more

than a conclusory allegation of prejudice, the lower court properly denied the claim. *Griffin v. State*, 28 Fla. L. Weekly S723, S726 (Fla. Sept. 25, 2003); *Ragsdale v. State*, 720 So. 2d 203, 203, 207 (Fla. 1998).

Moreover, the record reflects that the venire was questioned about the areas that Defendant claims counsel was ineffective for not exploring. During voir dire, the trial court inquired whether any of the veniremember could not recommend the death penalty under any circumstances. (T. 705-06, 794-96) Mr. Heffernan, Mr. Bastos, Mr. Wood and Ms. Rousseau responded affirmatively. (T. 705-06, 796) These veniremembers were then question about whether their views would affect their decision during the guilt phase. (T. 706-07, 796) Mr. Heffernan stated that he thought his views would affect his guilt phase verdict, and Mr. Bastos responded that he did not think it would affect him but that it would be a "great trauma." (T. 706-07) Mr. Wood and Ms. Rousseau stated that there views would not affect them in the guilt phase. (T. 796)

During its questioning, the State explored the veniremembers feeling about the death penalty, both for and against. (T. 731-47, 826-50) The State repeated explained that the death penalty was not appropriate for all first degree murders. (T. 732-33, 736-37, 827-28) It explained the concepts of aggravating and

mitigating circumstances and weighing and the burden of proof on aggravating and mitigating circumstances. (T. 732-33, 830-31) It questioned the veniremembers about whether they would automatically recommend death if Defendant was found guilty. (T. 733-34, 736-37, 740-41, 742, 744, 827, 837, 840-41, 842-43, 843-44, 848-49)

During this questioning, most of the veniremembers indicated that they would not automatically recommend death. (T. 734, 736-37, 740-41, 742, 744, 837, 840-41, 842-43, 843-44, 848-49) Ms. Simoes stated that she was leaning more toward a recommendation of death and thought it would be difficult to recommend life. (T. 848)

Mr. Bastos indicated that he was opposed to the death penalty, that being on the jury would traumatize him and that he could not sit in judgment of another person. (T. 734-36) He stated that he could not recommend death. (T. 735)

Mr. Heffernan stated that he was opposed to the death penalty and that he was concerned that a person sentenced to death might be innocent. (T. 737) The State attempted to assuage Mr. Heffernan’s concerns by emphasizing the burden of proof and the fact that the sentencing recommendation did not have to be unanimous. (T. 737-38) However, Mr. Heffernan insisted that he was not sure be could be objective during the

guilt phase. (T. 738-40)

Mr. Bahamon stated that he was against the death penalty as a matter of principal. (T. 747) Ms. De La Rosa stated that she would never recommend a death sentence. (T. 834) She stated her beliefs about the death penalty might influence her decision in the guilt phase. (T. 835-36) Mr. Mittenzwei stated that he believed in the death penalty but could never vote to recommend it. (T. 838-39) Mr. Wood and Ms. Rousseau reiterated that they would never recommend a death sentence. (T. 847, 850)

During general voir dire questioning by the State, Mr. Bastos stated that he was opposed to punishment generally. (T. 750) Mr. Heffernan stated that he did not believe that he should be seated as a juror because he was not sure his views on capital punishment would not affect him. (T. 768) Mr. Hoehl described his experiences as a crime victim, stated that he believed the justice system was too lenient and stated that he could not be fair. (T. 804) He later stated that he did not believe that the death penalty was carried out enough. (T. 827)

During his question of the second panel, defense counsel mention the death penalty and informed the jury that it was their duty to apply the law as given to them by the trial court to the facts as they find them. (T. 891) During this discussion, defense counsel stated that he had not noted one

veniremember's name. (T. 891) However, he was able to state what the veniremember had stated earlier during questioning by the State. (T. 891)

The trial court granted the State's cause challenges to Mr. Heffernan, Mr. Bahamon, Mr. Wood and Ms. Rousseau because of their views on the death penalty. (T. 780, 783, 901, 903) The State also moved to excuse Mr. Bastos for cause because of his views on the death penalty, and the trial court excused him. (T. 779) However, the trial court stated that he had a language problem. (T. 779) Mr. Hoehl and Ms. De La Rosa were also excused for cause without grounds being given. (T. 894, 895) Ms. Simoes was excused for cause as an alternate. (T. 902) The State exercised a peremptory challenge against Mr. Mittenzwei. (T. 896) Defendant excused two veniremembers for cause for various reasons. (T. 779-80, 781-82)

In *Teffeteller v. Dugger*, 734 So. 2d 1009, 1020-21 (Fla. 1999), this Court affirmed the summary denial of a similar post conviction claim. There, the defendant had asserted that his counsel was ineffective for failing to question the venire about pretrial publicity. This Court noted that both the trial court and the State had already questioned the veniremembers about pretrial publicity. This Court then held that the claim was properly denied:

> In light of this questioning of the prospective jurors, we cannot fault trial counsel for failing to repeat the questioning. Thus, Teffeteller has failed to prove that deficient performance in this regard. Moreover, in light of the procedure followed by the court, even if counsel was remiss in not asking additional questions during voir dire, it resulted in no prejudice to Teffeteller and no relief is warranted on this basis.

Id. at 1020-21.

Here, the State and trial court questioned the veniremembers about their views about the death penalty. Views both for and against the death penalty were explored. In fact, one veniremember who indicated an inability to return a life recommendation was excused for cause. Those veniremembers who were against the death penalty made their views abundantly clear. Defendant did not alleged that further questioning of these veniremembers would have changed their mind or that had they changed their minds, the trial court would not have had a reasonable doubt about their true feeling about the death penalty. *See Bryant v. State*, 656 So. 2d 426, 428 (Fla. 1995)(veniremember's statement that he would follow the law insufficient to remove doubt about qualifications because of other statements during voir dire); *Taylor v. State*, 638 So. 2d 30, 32 (Fla. 1994)(same); *Trotter v. State*, 576 So. 2d 691, 694 (Fla. 1990)(same). Under these circumstances, the lower court properly concluded that Defendant had not sufficiently alleged

that there was a reasonable probability that but for counsel's actions during voir dire the composition of the jury, much less the result of the proceedings, would have been different. *Strickland*. Thus, the lower court properly denied this claim and should be affirmed.

In an attempt to show that the lower court erred in summarily denying this claim, Defendant asserts that prejudice should have been presumed under *United States v. Cronic*, 466 U.S. 648 (1984). However, Defendant did not claim that *Cronic* applied to this claim below. As such, the assertion that *Cronic* requires this Court to presume prejudice is not properly before this Court. *Griffin v. State*, 28 Fla. L. Weekly S723, S726 n.5 (Fla. Sept. 25, 2003); *Doyle v. State*, 526 So. 2d 909, 911 (Fla. 1988)(post conviction claim raised for first time on appeal and never presented to the circuit court was procedurally barred on appeal). The denial of the claim should be affirmed.

Even if the assertion that *Cronic* applied was properly before this Court, the denial of the claim should be affirmed. In *Bell v. Cone*, 535 U.S. 685 (2002), the Court held that *Cronic* did not apply unless the defendant was deprived of counsel entirely or counsel did nothing at all throughout a proceeding. The Court held that the attorney's failure to present any mitigating at a sentencing hearing and to make a closing

argument were not the type of attorney conduct that implicated *Cronic*.

Here, Defendant's assertion that *Cronic* should have been applied is based on counsel's failure to ask particular types of questions during voir dire. Moreover, the record reflects that counsel did question the venire during voir dire and did exercise challenges thereto. As such, under *Bell*, *Cronic* does not apply. Instead, the claim is properly judged under *Strickland*. As the lower court properly applied *Strickland*, the denial of the claim should be affirmed.

The cases relied upon by Defendant do not support his assertion that prejudice should be presumed. In *White v. Luebbers*, 307 F.3d 722, 727-29 (8th Cir. 2002), the defendant had claimed that his trial counsel was ineffective for failing to question the venire about the death penalty. Counsel had justified his decision not to question the venire about the death penalty by stating that he did not wish to emphasize that it was a death penalty case. *Id.* at 728. The court found that counsel was deficient because this was an unreasonable strategic decision. *Id.* However, the court affirmed the denial of relief on this claim because the defendant could not show a reasonable probability that the composition of the jury or result of the proceeding would have been different. *Id.* The court expressly

rejected the defendant’s invitation to presume prejudice:

> Petitioner argues, however, that prejudice should be presumed. The Supreme Court has recently recognized and restated this exception to the general rule of *Strickland*:
>
> > We have spared the defendant the need of showing probable effect upon the outcome, and have simply presumed such effect, where assistance of counsel has been denied entirely or during a critical stage of the proceeding. When that has occurred, the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary. But only in "circumstances of that magnitude" do we forego individual inquiry into whether counsel's inadequate performance undermined the reliability of the verdict.
>
> *Mickens v. Taylor*, 535 U.S. 162, 152 L. Ed. 2d 291, 122 S. Ct. 1237, 1240-41 (2002) (internal citations omitted). The principal authority usually cited in support of this exception is *United States v. Cronic*, 466 U.S. 648, 80 L. Ed. 2d 657, 104 S. Ct. 2039 (1984). In our view, the exception does not apply here. *Cf. Bell v. Cone*, 535 U.S. 685, 152 L. Ed. 2d 914, 122 S. Ct. 1843, 1851-52 (2002) (applying *Strickland* prejudice requirement where attorney did not offer mitigating factors and waived closing argument at penalty phase). Counsel was not denied entirely, nor was the assistance of counsel denied entirely during a critical stage of the proceeding. We agree that voir dire is a critical stage, but petitioner did have counsel, and counsel proceeded on the basis of his own professional judgment, even though misguided. More importantly, we do not believe that the likelihood of prejudice is inherently so great in the present situation as to justify dispensing with the usual requirement that prejudice must be shown. Mr. White points out that his lawyer failed to ask a single question of twenty-four potential jurors who were removed for cause because they had expressed reservations about the death penalty. There is simply no way of gauging the

> likelihood that some of those jurors would have served on the actual trial jury if voir dire questions had been asked, nor is there any way of showing that the jurors who did actually serve were not completely fair. The Supreme Court has applied the presumption-of-prejudice exception to *Strickland* in very few cases, most of them apparently involving active representation of conflicting interests. *Mickens, supra*, 122 S. Ct. at 1241. This is not such a case, nor, in our opinion, is there any similar reason for presuming prejudice.

Id. at 728-29. Thus, *White* does not support Defendant's assertion that prejudice should be presumed, and instead, shows that the claim was properly denied. *See also Fennie v. State*, 855 So. 2d 597, 601-03 (Fla. 2003)(refusing to apply *Cronic* to a claim of ineffective assistance of counsel regarding voir dire question).

IV. THE LOWER COURT PROPERLY DENIED THE CLAIM REGARDING INDIVIDUAL VOIR DIRE.

Defendant next alleges that his counsel was ineffective for failing to request individual voir dire and for failing to move to strike the venire. Defendant appear to contend that having individual voir dire would have prevented the veniremembers from hearing a brief synopsis of the facts and would have prevented the veniremembers from hearing each others views. However, the lower court properly denied this claim.

In *Teffeteller v. Dugger*, 734 So. 2d 1009, 1028-29 (Fla. 1999), this Court held that the failure to conduct individual

voir dire was not error unless it rendered the trial fundamentally unfair. This Court stated that asking the veniremembers about their knowledge of the case and their ability to set aside that knowledge was sufficient to ensure that the trial was not fundamentally unfair. *See also State v. Knight*, 853 So. 2d 380, 394-95 (Fla. 2003)(where voir dire method used did not expose venire to other veniremembers knowledge of the case, refusal to conduct individual voir dire not error). In order for the statement of one veniremember to taint the panel, the veniremember must mention facts that would not otherwise be presented to the jury. *Pender v. State*, 530 So. 2d 391 (Fla. 1st DCA 1988); *Wilding v. State*, 427 So. 2d 1069 (Fla. 2d DCA 1983); *Kelly v. State*, 371 So. 2d 162 (Fla. 1st DCA 1979). A veniremember's expression of an opinion before the entire panel is not normally considered sufficient to taint the remainder of the panel. *Brower v. State*, 727 So. 2d 1026, 1027 (Fla. 4th DCA 1999); *State v. Taylor*, 324 S.W.2d 643 (Mo. 1959); *see also Stone v. State*, 208 So. 2d 676 (Fla. 3d DCA 1968); *Lunday v. State*, 298 P. 1054 (Okla. Crim. App. 1931).

In the lower court and this Court, Defendant has asserted that individual voir dire should have been granted because it would have prevented the trial court for providing the venire was a brief synopsis of the facts of the case. However, as the

lower court held, in order for the trial court to ascertain whether any of the veniremembers had been exposed to pretrial publicity, it was necessary for the trial court to give the veniremembers a brief synopsis of the facts of the case. Without such a synopsis, it would have been impossible for the veniremembers to state whether they had been exposed to information about this case, particularly in a place like Miami, where murder is not uncommon. Such a synopsis would have had to be given whether the veniremembers were questioned individually or as a group. As asking for individual voir dire would not have changed the information the trial court had to give the veniremembers, the lower court properly found that Defendant had not raised a sufficient claim. The summary denial of the claim should be affirmed.

Moreover, while Defendant asserts that no evidence was presented that Mr. Lawrence was seeking to prevent drug dealing in the area, this is untrue. Det. Borrego testified that Defendant told him that the reason he was hired to kill Mr. Lawrence was that Mr. Lawrence would call the police and identify drug dealers. (T. 1273) In his confession, Defendant stated that he was hired to shoot at Mr. Lawrence because Mr. Lawrence was interfering with the sale of drugs in the area of his store. (T. 1287-88) As such, the synopsis that the trial

court gave was supported by Defendant's own statements.

Defendant additionally claims that counsel should have requested individual voir dire or move to strike the panel based on comments made by veniremembers during the questioning about the pretrial publicity. However, none of these comments concerned inadmissible facts. Instead, they concerned veniremember's opinions. As such, they were not of the type to taint the remainder of the venire.

None of the veniremember who had been exposed to the pretrial publicity stated what they had learned. Ms. Hearne indicated that she was happy to hear that someone had been caught but that she thought she would not "transfer those feeling to this gentleman." (T. 708) Mr. Heffernan indicated that he thought the death of Mr. Lawrence was a tragedy, but that it would not influence him regarding Defendant. (T. 708) Ms. Harris and Ms. Heller stated that they too were happy that the perpetrators had been caught and that it would affect their ability to serve as jurors. (T. 709) Mr. Rogers, Mr. Ferguson, Mr. Brown, Ms. Stone, Ms. Farach, Mr. Kaspert, Mr. Wood, Ms. Bruton, Mr. Burke, Ms. Simoes and Mr. Kleppinger stated that they had read about the case but could be fair. (T. 709-10, 808-12) There was no mention of what the pretrial publicity concerned.

During its voir dire questioning, the State asked the veniremembers about their ability to set aside what they had heard but did not discuss the substance of what was heard or seen. (T. 726-31) In his voir dire examination, Defendant mentioned that the codefendants' trial had been televised and emphasized that the jury could only consider what was presented in court. (T. 773-75, 886)

As seen above, none of the veniremembers made comments that could be considered to have tainted the remainder of the venire. *Brower v. State*, 727 So. 2d 1026, 1027 (Fla. 4th DCA 1999); *State v. Taylor*, 324 S.W.2d 643 (Mo. 1959); *see also Stone v. State*, 208 So. 2d 676 (Fla. 3d DCA 1968); *Lunday v. State*, 298 P. 1054 (Okla. Crim. App. 1931). Thus, the fact that these comments were made does not show that Defendant was prejudiced from the failure of counsel to request individual voir dire. *Teffeteller*. Nor would a motion to strike the venire have been meritorious. Thus, the lower court properly denied this claim and should be affirmed. *Kokal v. Dugger*, 718 So. 2d 138, 143 (Fla. 1998); *Groover v. Singletary*, 656 So. 2d 424, 425 (Fla. 1995); *Hildwin v. Dugger*, 654 So. 2d 107, 111 (Fla. 1995); *Breedlove v. Singletary*, 595 So. 2d 8, 11 (Fla. 1992).

The cases relied upon by Defendant do not support his contention that the venire should have been stricken. In

Overton v. State, 757 So. 2d 537 (Fla. 3d DCA 2000), the issue of striking the venire was not raised or addressed. Instead, the issue was whether the trial court had erred in denying cause challenges to veniremembers who knew that the defendant had previously been sentenced to death for a different crime. Moreover, the decision was based on the veniremembers' knowledge of an inadmissible fact and not the expression of any opinion. *Richardson*, *Wilding* and *Kelly* also involve veniremembers knowledge of inadmissible facts. In *Brower*, the majority opinion stated that expressions of opinion were insufficient to require a panel to be stricken. As such, none of these cases support Defendant's assertion that a motion to strike the panel would have been meritorious. The denial of the claim should be affirmed.

V. THE LOWER COURT PROPERLY DENIED THE CLAIM THAT COUNSEL WAS INEFFECTIVE IN THE HANDLING OF THE MOTION TO SUPPRESS.

Defendant next contends that his counsel was ineffective for failing to investigate the circumstances of his arrest and statement. Defendant appears to contend that had counsel investigated he would have discovered that Defendant was illegally arrested and that he was deceived into waiving his *Miranda* rights.

With regarding to the claim that counsel should have

presented the testimony of Brown, Isom and Faison to show that Defendant did not voluntarily accompany the officers, the lower court properly denied this claim. At the time that Defendant left with the officers, Defendant had already been identified as the person who killed Tequila Larkins. (T. 283) While Defendant now asserts that this identification was not positive, an assertion not made below, the only uncertainty in the identification was that Defendant had been wearing a hat at the time of the crime and was not in the photograph used in the lineup. (T. 283) However, this uncertainty did not cause the identification not to be positive, as this noted in the Larkins appeal. *Johnson v. State*, 696 So. 2d 326, 333 (Fla. 1996). As such, the police did have probable cause to arrest Defendant. *See State v. Gavin*, 594 So. 2d 346 (Fla. 2d DCA 1992); *Downs v. State*, 439 So. 2d 963 (Fla. 1st DCA 1983).

The fact that Officer Hull affected Defendant's arrest, instead of Det. Borrego, is irrelevant. Off. Hull acted at the direction of Det. Borrego. (T. 238, 241) Thus, the fact that Det. Borrego had probable cause to arrest Defendant is imputed to Off. Hull under the fellow officer rule. *See Routly v. State*, 440 So. 2d 1257 1261 (Fla. 1983); *Smith v. State*, 719 So. 2d 1018 (Fla. 3d DCA 1998). As such, testimony from Anita Miller, Terrace Isom and David Faison that Defendant did not

voluntarily would not have affected the outcome of trial, and counsel cannot be deemed ineffective for failing to present it. *Strickland*. The lower court properly denied this claim and should be affirmed.

Defendant also assails the trial court's rejection of his claim that his counsel was ineffective for failing to elicit that Det. Borrego deceived him while he was confessing. However, the lower court properly denied this claim as facially insufficient and refuted by the record.

In the lower court, the totality of Defendant's allegations with regard to this contention were:

> Badini also failed to develop adequate cross-examination of Detective Borrego that would have shown the use of deception to obtain [Defendant's] confession. During [Defendant's] interrogation, Detective Borrego insisted that Newsome was in the police station providing information. Newsome was not arrested by police until 8:45 p.m. Although deception can be utilized by the police to some degree in order to obtain a confession, gross deception can implicate the due process clause. Walls v. State, 580 So. 2d 131 (Fla. 1991); Voltaire v. State, 697 So. 2d 1002 (Fla. 4th DCA 1997). Even if the deception was not on a scale that would have implicated [Defendant's] due process rights, the use of deception can render a waiver of Miranda rights involuntary. Fare v. Michael C., 442 U.S. 707, 725, 99 S. Ct. 2560, 2572, 61 L. Ed. 2d 197 (1979); Ramirez v. State, 739 So. 2d 568 (Fla. 1999); Dooley v. State, 743 So. 2d 65, 67 (Fla. 4th DCA 1999).

(PCR. 416-17) As can be seen from the foregoing, Defendant did not explain below, and does not explain here, how he was

deceived into waiving his rights. Instead, Defendant sole assertion about deception was that he was informed that Newsome was in the police station and providing information during his interrogation.

In *Frazier v. Cupp*, 394 U.S. 731, 739 (1969), the Court held that falsely informing a defendant that a codefendant had confessed did not result in the defendant's confession being involuntary. In *Colorado v. Spring*, 479 U.S. 564 (1987), the Court held that the failure to inform the defendant of all of the crimes about which he would be interrogated did not render the defendant's waiver of his rights involuntary, where the defendant was fully and accurately informed of his rights and waived them. *See also Moran v. Burbine*, 475 U.S. 412 (1986)(not telling defendant that attorney had been hired to represent him by his family did not render confession involuntary); *United States v. Castaneda-Castaneda*, 729 F.2d 1360 (11th Cir. 1984)(defendant falsely informed codefendant had confessed). Florida Courts have long adhered to these same principal. *Escobar v. State*, 699 So. 2d 988, 944 (Fla. 1997); *Grant v. State*, 171 So. 2d 361, 363 n.1 (Fla. 1965); *State v. Mallory*, 670 So. 2d 103 (Fla. 1st DCA 1996). Only misstatements that mislead a defendant about the nature of the rights he was waiving, the consequences of the waiver or the import of

confessing have been held to invalidate a waiver of *Miranda* rights. *Mallory*, 670 So. 2d at 106-07; *Manning v. State*, 506 So. 2d 1094, 1097-98 (Fla. 3d DCA 1987).

Here, Defendant's allegation of deception concerned the evidence that State possessed against him and not the nature of his rights, the consequences of waiving them or the import of confessing. As such, presenting evidence that the police lied to him about Newsome's presence and statements would not have rendered his confession inadmissible. Thus, counsel could not have been deemed ineffective for failing to make this non-meritorious claim. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The denial of the claim should be affirmed.

The cases relied upon by Defendant do not support an contention that his statement would have been inadmissible if counsel could have shown that the police deceived Defendant about Newsome. In *Fare*, the claim concerned whether a request by a juvenile for his probation officer was the equivalent of an invocation of his rights to counsel. The Court held that it was not and that the confession was admissible. In *Ramirez* and *Dooley*, the alleged deception concerned the nature of the rights being waived, the consequences of the waiver and the import of confessing. Here, the alleged deception does not concern any of

these issues. As such, none of these cases support Defendant's contention. The denial of the claim should be affirmed.

Moreover, the lower court also properly denied this claim because it was conclusively refuted by the record. The record reflects that Defendant was picked up at 6:20 p.m., was read his *Miranda* rights and waived them at 7:30 p.m. and was then interviewed until 1:43 a.m. the following morning before he gave a stenographically recorded statement. (T. 260, 269-70) Thus, merely asserting that Newsome was not arrested until 8:45 p.m. would not show that Det. Borrego's statement that Newsome was present in the station and speaking to the police was false. The record also reflects that counsel did question Det. Borrego about Newsome and Det. Borrego's use of Newsome's statements during the suppression hearing. (T. 285-86) As a result, Det. Borrego testified that Newsome was brought to the station after Defendant got to the station but during the time that Defendant was being questioned. (T. 285) During the questioning, Det. Borrego left the interview room to consult with the detective who was interviewing Newsome. (T. 285-86) Det. Borrego denied ever informing Defendant of the content of any statement given by Newsome. (T. 286) Instead, Det. Borrego stated that he asked questions related to inconsistencies between Defendant's statements and the information received from Newsome and

informed Defendant that Newsome was present at the station. (T. 286) Given that the facts alleged do not show Det. Borrego lied and that counsel did question Borrego about Newsome's presence and the use of information gathered from Newsome in questioning Defendant, the lower court properly denied the claim. *Strickland*. The denial of the claim should be affirmed.

VI. DEFENDANT'S CLAIM REGARDING THE SUPPRESSION OF HIS CONFESSION WAS PROPERLY DENIED.

Defendant next alleges that his confession should have been suppressed because he was placed under oath and the administration of an oath compelled his statement. However, the lower court properly denied this claim as it is procedurally barred, facially insufficient, without merit and refuted by the record.

Claims that could have and should have been raised on direct appeal are procedurally barred in post conviction proceedings. *Francis v. Barton*, 581 So. 2d 583 (Fla.), *cert. denied*, 501 U.S. 1245 (1991). Issues regarding whether a confession should have been suppressed as involuntary are issues that could have and should have been raised on direct appeal. *See Christopher v. State*, 489 So. 2d 22, 24 (Fla. 1986). As such, this claim is procedurally barred. The lower court properly summarily denied it and should be affirmed.

Even if the claim was not procedurally barred, the lower court would still have properly denied it. The claim was facially insufficient. The entirety of Defendant's allegation on this claim in the lower court was:

> The police started to coerce [Defendant] into waiving his Miranda rights by administering the oath. Bram v. United States, 168 U.S. 532, 544-550, 18 S. Ct. 183, 187-190, 42 L. Ed. 567 (1897). By administering the oath, which is recognized as a form of compelled speech, the police were compelling [Defendant] to answer the questions being propounded. In order to speak the truth, [Defendant] would have to speak. [Defendant] should be entitled to a new suppression hearing where he could present legal or factual arguments not originally presented. This challenge to the voluntariness of the confession is independent of the argument . . . that issues and witnesses were not presented to the Court because of counsel's incompetence. [Defendant] believes that . . . the administration of the oath rendered his confession inadmissible.

(PCR. 422) As can be seen from the foregoing, Defendant did not allege what oath was administered to him or when that oath was allegedly administered. Instead, he merely alleged in a conclusory fashion that some oath was administered and that this oath in some way compelled Defendant to confess. This Court has held that conclusory assertions are insufficient to state a claim for post conviction relief. *Griffin v. State*, 28 Fla. L. Weekly S723, S726 (Fla. Sept. 25, 2003); *Ragsdale v. State*, 720 So. 2d 203, 203, 207 (Fla. 1998). As the allegation here was conclusory, the lower properly summarily denied this claim as

facially insufficient. It should be affirmed.

Even if the claim was not procedurally barred and was facially sufficient, Defendant would still be entitled to no relief because the claim lacks merit. Defendant contends that *United States v. Bram*, 168 U.S. 532 (1897), holds that the administration of an oath compels a defendant to confess. However, *Bram* does not so hold. Instead, *Bram* merely states that English courts had previously held that the giving of an oath compels testimony. *Id.* at 544-50. Thus, *Bram* does not support Defendant's assertion that his confession should have been suppressed simply because he was administered an oath.

Moreover, the giving of an oath does not compel testimony as a matter of law. Both this Court and the United States Supreme Court have stated that the purpose of giving an oath is to ensure that the person placed under oath does not lie. *See Maryland v. Craig*, 497 U.S. 836, 845-46 (1990); *Harrell v. State*, 709 So. 2d 1364, 1371 (1998). The United States Supreme Court has held that the Fifth Amendment protection against self-incrimination does not give a defendant the right to lie. *Brogan v. United States*, 522 U.S. 398, 404-05 (1998). In fact, courts have held that informing a suspect of the penalty for making a false statement during an interrogation is not coercive, whether the suspect is given *Miranda* warnings or not.

United States v. Braxton, 112 F.3d 777, 782-83 (4th Cir. 1997)(en banc); *Rivers v. United States*, 400 F.2d 935, 943 (5th Cir. 1968); *see also United States v. Barfield*, 507 F.2d 53, 56 (5th Cir. 1975)("[I]t is now clearly the law that *ordinarily* [] an admonishment [to tell the truth] does not furnish sufficient inducement to render objectionable a confession thereby obtained unless *threats* or *promises* are brought into play."). As such, placing Defendant under oath did not compel his statement as a matter of law. The claim was properly denied.

Moreover, any claim that Defendant was compel to speak because he was placed under oath is refuted by the record. The record reflects that the oath that Defendant took was at the beginning of his stenographically recorded statement. (T. 308) The stenographically recorded statement did not begin until 1:43 a.m. on April 2, 1989. (T. 269) Defendant had executed a waiver of his *Miranda* rights at 7:30 p.m. on April 1, 1989, six hours before he was placed under oath. (T. 254, 266) During this six hour period, Defendant was interviewed and provided statements about this crime, the Larkins murder and the King attempted murder. (T. 270, 287) Additionally, Defendant testified at the suppression hearing and did not claim that any oath compelled his statement. (T. 297-317) As Defendant had waived his rights six hours before any oath was administered,

had been speaking to the police for those six hours before the oath was administered and never claimed that he felt compel to speak because of the oath, the record refutes Defendant's assertion that an oath compelled him to speak to the police. The lower court properly denied the claim and should be affirmed.

VII. THE LOWER COURT PROPERLY SUMMARILY DENIED THE CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO IMPEACH TREMAINE TIFT.

Defendant next alleges that his counsel was ineffective for failing to impeach Tremaine Tift. Defendant avers that Tift should have been charged as an accessory after the fact in this case and that Tift was covering for one of the codefendants. Defendant asserts that this gave Tift as motive to testify against him that should have been exposed through cross examination. However, the lower court properly denied this claim.

In the lower court, Defendant entire allegation about the alleged immunity given to Tift was:

> In order to give Newsome the benefit of Tift's testimony against [Defendant],[4] the State declined to prosecute him as an accessory after the fact. This

[4]In the lower court, Defendant had claimed that Tift's testimony was obtained by the State as the result of a plea agreement with Newsome. The State pointed out that Newsome never entered a plea. As such, Defendant withdrew this portion of the claim at the *Huff* hearing.

> was done despite his admission to having registered a room at a local hotel for Newsome, [Defendant], and Ingraham after the murder.

(PCR. 417) As such, the only basis alleged below to support the assertion that Tift should have been charged as an accessory after the fact was that Tift rented a hotel room for Defendant and his codefendants. However, the mere fact that Tift rented a hotel room for Defendant after the crime is not sufficient to have exposed Tift to liability as an accessory after the fact. Such a conclusory allegation is insufficient to require an evidentiary hearing. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998). The lower court properly summarily denied this claim.

In order to convict an individual of being an accessory after the fact, the State must prove (1) a crime has been committed by another person, (2) the accessory knew the person had committed the crime, (3) the accessory "maintained, assisted or gave any other aid" to the person who committed the crime, (4) the accessory gave the aid with the intent that the person who committed the crime avoid or escape arrest and (5) the accessory is not related by blood or marriage to the person who committed the crime. *See Bowen v. State*, 791 So. 2d 44, 50 (Fla. 2d DCA 2001); Fla. Std. Jury Instr. (Crim.) Accessory After the Fact. To prove that the accessory knew that the

person committed the crime, the State must prove either that the accessory directly knew the crime had been committed or had sufficient reliable information about the facts would have known that the crime had been committed. *Bowen*, 791 So. 2d at 51. Evidence that raises a mere suspicion that a crime has occurred is insufficient. *Bowen*, 791 So. 2d at 51. Moreover, accessory after the fact is a specific intent crime, and the State must prove that the aid was given specifically to avoid or escape arrest. *Bowen*, 791 So. 2d at 53; *see Helms v. State*, 349 So. 2d 726 (Fla. 4th DCA 1977)(evidence that defendant knew property was stolen and help thieves dispose of it insufficient to sustain conviction for accessory after the fact without prove that defendant did so with intent to aid thieves in avoiding arrest). Where the State's proof of this crime is circumstantial, it must be inconsistent with any reasonable hypothesis of innocence. *Gawronski v. State*, 444 So. 2d 490 (Fla. 2d DCA 1984)(fact that defendant's car was used as getaway car for attempted robbery and that defendant engaged in chase with police and was caught in car with robber after crime insufficient to support conviction for accessory after the fact, where defendant claimed to have loaned car to robber); *Holley v. State*, 406 So. 2d 65 (Fla. 1st DCA 1981)(evidence that defendant was driving people who had committed robbery after crime, fled at sight of police

and was found hiding near some money insufficient to convict defendant as accessory after the fact).

Here, the only fact asserted below to support that Tift should have been charged as an accessory after the fact was that Tift rented a hotel room for Newsome and Defendant after they had committed the crime. However, the mere fact that Tift rented a hotel room does not show that he knew Defendant or Newsome had committed any crime or that he intent to assist them in avoiding arrest by doing so. *Bowen*; *Gawronski*; *Holley*. Since Defendant did not sufficiently allege that Tift was guilty of being an accessory after the fact, he did not sufficiently plead that there was any basis to impeach Tift with any alleged failure to prosecute him for such a crime. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. As such, the lower court properly summarily denied this claim and should be affirmed.

In a belated attempt to show that Tift was an accessory fact the fact and could have been impeached with the fact that he was not charged as such, Defendant now asserts that the lower court improperly relied on Tift's testimony from another case and that this record reflects that Tift knew that Defendant had killed someone down south and that he needed a hotel room. First, this assertion was not made below. Instead, it is being raised for

the first time in this proceeding. As such, it is not properly before this Court. *Griffin v. State*, 28 Fla. L. Weekly S723, S726 n.5 (Fla. Sept. 25, 2003); *Doyle v. State*, 526 So. 2d 909, 911 (Fla. 1988)(post conviction claim raised for first time on appeal and never presented to the circuit court was procedurally barred on appeal). The denial of the claim should be affirmed.

Second, the assertion is untrue. Tift testified in this case that he did not know that Defendant had killed anyone until two or three weeks after the crime. (T. 1139) Moreover, Tift did not testified that he knew Defendant had killed anyone down south. Instead, Tift testified that Defendant approached him before the crime and solicited Tift's participation in killing an old man and his son down south. (T. 1133) Defendant did not state when this crime was planned. (T. 1133) Tift stated that he did not believe that Defendant was actually planning to kill anyone and was simply bragging. (T. 1145-46) Moreover, Tift testified that he rented the room for Newsome and Defendant merely because he had identification and that he routinely rented rooms for others who did not have identification. (T. 1143) As such, the record shows that Tift did not know that Newsome and Defendant had committed a crime when he rented the hotel room for them. Moreover, there is no evidence that Tift intended to aid Newsome and Defendant in avoiding arrest when he

rented the room. Under these circumstances, Tift could not have been charged as an accessory after the fact, and there was no basis for claiming that he was being given immunity from prosecution for this crime. *Bowen*. Since Tift committed no crime and was given no immunity, counsel cannot be deemed ineffective for failing to try to impeach him on this nonexistent basis. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The lower court properly summarily denied this claim and should be affirmed.

The lower court also properly summarily denied this claim because there is no reasonable probability that the result of the proceeding would have been different had counsel attempted to impeach Tift about being an accessory after the fact and being Newsome's friend. Tift's relationship with Newsome and his having rented the hotel room after the crime were presented to the jury. During its opening statement, the State informed the jury that Tift and Newsome were "god-brothers," and Tift testified to this fact on direct. (T. 931, 1120) The State also indicated in opening that Tift had assisted Newsome and Defendant in renting a hotel room after the murder and presented testimony from the hotel manager and Tift about the rental of the hotel room and the circumstances surrounding it. (T. 931,

1058-61, 1133-46) During closing argument, counsel discussed Tift's credibility. (T. 1414) In doing so, counsel noted that Tift had checked Defendant and Newsome into the hotel and that Tift was a good friend of Newsome. *Id.* As this evidence was already before the jury and used to attack Tift's credibility, counsel cannot be deemed ineffective for failing to present it again through questions of Tift. *State v. Riechmann*, 777 So. 2d 342, 356 (Fla. 2000)(counsel cannot be deemed ineffective for failing to present cumulative evidence). The lower court properly summarily denied this claim and should be affirmed.

VIII. DEFENDANT'S CLAIMS REGARDING THE JURY INSTRUCTION ON CCP WERE PROPERLY DENIED AS PROCEDURALLY BARRED AND WITHOUT MERIT.

Defendant next contends that the jury instruction on the cold, calculated and premeditated aggravating circumstance (CCP) was unconstitutionally vague. He also contends that his counsel was ineffective for failing to object to this instruction. However, the lower court properly denied these claims as procedurally barred and without merit.

This Court has held that claims that the jury instruction on CCP was unconstitutionally vague are procedurally barred unless a specific objection was made to this instruction at trial and the issue was pursue on appeal. *Pope v. State*, 702 So. 2d 221, 223-24 (Fla. 1997). Here, counsel did not object to

the instruction at trial and did not raise the issue on appeal. (S.R. 137-40, 165) As such, this issue is procedurally barred. Moreover, couching the claim in terms of ineffective assistance of counsel does not lift the bar. *Harvey v. Dugger*, 656 So. 2d 1253, 1256 (Fla. 1995); *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990); *Swafford v. Dugger*, 569 So. 2d 1264, 1267 (Fla. 1990). As such, the lower court properly denied this claim. It should be affirmed.

Even if the claim of ineffective assistance of trial counsel was not procedurally barred, Defendant would still be entitled to no relief. Defendant's trial occurred in May 1992. (R. 6, 286) This Court did not determine that the standard jury instruction on CCP given in this case was unconstitutional until this Court decided *Jackson v. State*, 648 So. 2d 85 (Fla. 1994). Moreover, *Jackson* was based on the decision in *Espinosa v. Florida*, 505 U.S. 1079 (1992). Both of these cases were decided after Defendant's trial. This Court has held that counsel cannot be deemed ineffective for failing to anticipate a change in the law. *Walton v. State*, 847 So. 2d 438, 445 (Fla. 2003). As both *Jackson* and *Espinosa* represent changes in the law, Defendant's counsel cannot be deemed ineffective for failing to anticipate them. The lower court properly denied this claim and should be affirmed.

Even if the claim was not barred or counsel could be deemed deficient for failing to object, Defendant would still be entitled to no relief. There is no reasonable probability that had counsel objected to the instruction on CCP, Defendant would not have been sentenced to death. As argued in response to Defendant's state habeas petition, Case No. SC03-1752, any error in the jury instruction on CCP was harmless. Thus, there is no reasonable probability that CCP would not have been found, and Defendant would not have been sentenced to death, had counsel objected to the instruction on CCP. The lower court properly denied this claim and should be affirmed.

IX. THE *BRADY* CLAIM WAS PROPERLY DENIED.

Defendant next asserts that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by suppressing the identity of witnesses who allegedly could have shown that Defendant's arrest was illegal. However, the lower court properly denied this claim.

In order to plead a *Brady* claim properly, a defendant must allege:

> [1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued.

Way v. State, 760 So. 2d 903, 910 (Fla. 2000)(quoting *Strickler*

v. Greene, 527 U.S. 263, 281-82 (1999)). Inherent in the requirement that the State suppressed the evidence is a requirement that the State actually possess the evidence and that the defendant could not have obtained it. *See United States v. Grintjes*, 237 F.3d 876, 880 (7th Cir. 2001) (holding *Brady* does not apply where evidence could have been discovered by defense with use of diligence); *United States v. Corrado*, 227 F.3d 528, 538 (6th Cir. 2000)(same); *High v. Head*, 209 F.3d 1257, 1265 (11th Cir. 2000) (finding *Strickler* has not abandoned due diligence requirement of *Brady*); *United States v. Maloof*, 205 F.3d 819, 827 (5th Cir. 2000)(same); *Johns v. Bowersox*, 203 F.3d 538, 545 (8th Cir. 2000)(defining "state suppression" component of *Brady* as "[t]here is no suppression of evidence if the defendant could have learned of the information through 'reasonable diligence'"); *United States v. Hotte*, 189 F.3d 462 (2d Cir. 1999)(same). In fact, this Court has acknowledged that a defendant cannot show that a *Brady* violation occurred if the defendant knew of the existence of the evidence or in fact had the evidence. *Maharaj v. State*, 778 So. 2d 944, 954 (Fla. 2000)(“Although the "due diligence" requirement is absent from the Supreme Court's most recent formulation of the *Brady* test, it continues to follow that a *Brady* claim cannot stand if a

defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant.")(quoting *Occhicone v. State*, 768 So. 2d 1037, 1042 (Fla. 2000)). In reviewing a trial court's decision concerning a *Brady* violation, this Court makes an independent review of the trial court's legal conclusions but gives deference to the trial court's findings of fact. *Rogers v. State*, 782 So. 2d 373, 376-77 (Fla. 2001).

Initially, the claim was properly summarily denied because it is facially insufficient. In the lower court, the entirety of Defendant's allegations on this claim were:

> In Issue I, Section E, [Defendant] accuses Badini of failing to investigate the circumstance surrounding his encounter with the police on April 1, 1989, which resulted in his confession. His failure to have investigated these witnesses was assisted by the failure of the State to list the witnesses in discovery.
>
> Rule 3.220 of the Florida Rules of Criminal Procedure requires the State to list all witnesses to an event regardless of its intention to call those witnesses to testify. Had Anita Brown, Terrace Isom, and David Faison been listed as witnesses, they would have been deposed, and the fact that [Defendant] did not voluntarily accompany the police to the police station would have been revealed before the Motion to Suppress was heard. [Defendant] was prejudiced by the State's failure to have listed these witnesses prior to the suppression hearing.

(PCR. 425) As can be seen from the forgoing, Defendant did not

assert that the State possessed any information about any of the three named individuals. As such, he did not assert that the State possessed any exculpatory or impeaching information from these witnesses. *See State v. Knight*, 853 So. 2d 380, 386 n.6. (Fla. 2003)(no *Brady* violation, where witnesses had not informed State of exculpatory information). In fact, Defendant did not even assert that the State was aware of the identity of these individuals. As such, the lower court properly denied this claim as facially insufficient. *Ragsdale*.

Moreover, consideration of the allegations contained in the claim of ineffective assistance of counsel does not make this claim facially sufficient. With regard to Brown, Defendant asserts that he was on her front porch and gave her his beeper and money before accompanying the police. Given this assertion, it appears that Defendant was fully aware that Brown had witnessed the circumstances of his encounter with the officers. Additionally, there is no assertion that the police knew the identity of Ms. Brown. In fact, Defendant made a point of asserting that Officer Hull was incorrect in his belief that Defendant was on his grandmother's porch. Thus, it would appear that Defendant's knowledge of this alleged witness was superior to the State's knowledge of her. Because Defendant was aware of Ms. Brown and her potential testimony, the State cannot be said

to have committed a *Brady* violation with regard to her. *Maharaj*, 778 So. 2d at 954. The claim was properly summarily denied.

With regard to Isom, Defendant's allegations in the claim of ineffective assistance of counsel are limited to assertions that other officers chased Isom and placed him in a police car. However, the record reflects that Defendant knew that Isom was arrested at the same time as he was. At the suppression hearing, Defendant cross examined Det. Borrego about the fact that Defendant and Isom were both at the team police office when Det. Borrego first spoke to Defendant. (T. 282) Defendant himself testified that Isom was not in the area when he was approached by Off. Hull but that he and Isom traveled to the team police office in the same car. (T. 311) Because Defendant was aware of Isom and his potential testimony, the State cannot be said to have committed a *Brady* violation with regard to him. *Maharaj*, 778 So. 2d at 954. The claim was properly summarily denied.

Even if the claim had been sufficiently plead and concerned information about which Defendant was not already aware, Defendant would still be entitled to no relief. As argued in Issue V, the police had probable cause to arrest Defendant for the murder of Ms. Larkins at the time be went to the police

station. As such, presenting witnesses to testify that Defendant did not voluntarily accompany the officers would not have affected the outcome of the hearing on the motion to suppress, much less created a reasonable probability that Defendant would not have been convicted. *Kyles v. Whitley*, 514 U.S. 419 (1995). Thus, the lower court properly denied this claim. It should be affirmed.

Defendant also assails the lower court for finding that a portion of this claim was procedurally barred. However, such a finding was proper. Defendant asserted a violation of Fla. R. Crim. P. 3.220 for failing to list Brown, Isom and Faison as witnesses without any assertion that the State was aware of their existence or that the State knew that they possessed any exculpatory or impeaching evidence. Moreover, the record reflects that Defendant was fully aware of at least Brown and Isom. Under these circumstances, it appears that Defendant was simply asserting that the State violated Fla. R. Crim. P. 3.220 and not that the State had withheld any exculpatory or impeaching evidence. However, a simple assertion that the State violated Rule 3.220 regarding information about which a defendant was aware is an issue that could have and should have been raised on direct appeal. *See State v. Riechmann*, 777 So. 2d 342, 361 n.20 (Fla. 2000). Thus, the lower court properly

denied the claim as procedurally barred.

X. THE *CALDWELL* CLAIM WAS PROPERLY DENIED AS PROCEDURALLY BARRED AND WITHOUT MERIT.

Defendant next contends that comments to the jury that its role was advisory violated *Caldwell v. Mississippi*, 472 U.S. 320 (1985). He also alleges that his counsel was ineffective for failing to object to these comments. However, the lower court properly denied this claim as procedurally barred and without merit.

Claims that comments and instructions improperly informed the jury of its role in sentencing are issues that could have and should have been raised on direct appeal. *Griffin v. State*, 28 Fla. L. Weekly S723, S727 (Fla. Sept. 25, 2003); *Oats v. Dugger*, 638 So. 2d 20, 21 & n.1 (Fla. 1994). Issues that could have and should have been raised on direct appeal are barred in post conviction proceedings. *Francis v. Barton*, 581 So. 2d 583 (Fla.), *cert. denied*, 501 U.S. 1245 (1991). As such, the lower court properly rejected this claim as procedurally barred.

Even if the claim was not procedurally barred, Defendant would still be entitled to no relief because the claim lacks merit. In *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994)(quoting *Dugger v. Adams*, 489 U.S. 401, 407 (1989)), the Court held that "to establish a *Caldwell* violation, a defendant necessarily must

show that the remarks to the jury improperly described the role assigned to the jury under local law." In *Combs v. State*, 525 So. 2d 853, 855-58 (Fla. 1988), this Court held that informing the jury that their recommendation regarding sentencing is advisory is a correct statement of Florida law. As such, there was no *Caldwell* violation in this case. *Griffin*, 28 Fla. L. Weekly at S727. The lower court properly denied this claim as meritless.

Defendant's reliance on *Mann v. Dugger*, 844 F.2d 1446 (11th Cir. 1988), and *Adams v. Wainwright*, 804 F.2d 1526 (11th Cir. 1986), is misplaced. *Adams* was reversed by the United States Supreme Court in *Dugger v. Adams*, 489 U.S. 401 (1989). Moreover, the Eleventh Circuit recognized that the United States Supreme Court had overruled *Mann* in *Davis v. Singletary*, 119 F.3d 1471, 1482 (11th Cir. 1997). As such, neither *Mann* nor *Adams* is good law. Petitioner's reliance on them is misplaced. The claim was properly denied, and the denial should be affirmed.

With regard to the claim of ineffective assistance of counsel for failing to object to this instruction, the claim again was properly denied. Counsel cannot be deemed ineffective for failing to raise a nonmeritorious issue. *Kokal*, 718 So. 2d

at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. As argued, *supra*, any claim that there was a *Caldwell* violation would have been meritless. As such, counsel cannot be deemed ineffective for failing to raise this issue. The claim was properly denied.

XI. THE CLAIM REGARDING THE PROPORTIONALITY OF DEFENDANT'S SENTENCE WAS PROPERLY DENIED.

Defendant next contends that his death sentence is disproportionate because David Ingraham received a life sentence. Defendant also appears to assert that he did not possess the appropriate level of intent to justify a death sentence. However, the claim regarding the culpability of Ingraham was properly denied as procedurally barred. The claim regarding Defendant's level of intent is not properly before this Court, is procedurally barred and is without merit.

With regard to the claim that Defendant's sentence is disproportionate in light of Ingraham's sentence, the lower court properly denied this claim as procedurally barred. (PCR. 575-76) On direct appeal, Defendant raised this claim. Initial Brief of Appellant, Florida Supreme Court Case No. 80, 278, at 41-44. This Court rejected the claim:

> Finally, Johnson argues that his death sentence is disproportionate in light of the resolution reached in the case against co-defendant Ingraham. Specifically, Johnson points out that Ingraham received a life

> sentence for his participation in the attack. Johnson avers that the facts of this case demonstrate that he is no more culpable than Ingraham. Johnson's rights to equal protection and due process are violated, he claims, if his death sentence is not vacated. We disagree. It is not disputed that Johnson was a triggerman. It also is clear that the balance of aggravation and mitigation in this case supports the imposition of the death sentence. Further, we find unconvincing Johnson's efforts to equate Ingraham's culpability with his own. As we have stated, Johnson was the leader of the attack. He recruited Ingraham and Newsome to participate. Indeed, the trial judge accurately reported in his order that Johnson "hired accomplices, arranged to get the murder weapons and arranged transportation to and from the murder scene." In view of his greater culpability, there is nothing disproportionate about his sentence. *Larzelere v. State*, 676 So. 2d 394, 407 (Fla.), *cert. denied*, 519 U.S. 1043, 117 S. Ct. 615, 136 L. Ed. 2d 539 (1996); *Hayes v. State*, 581 So. 2d 121, 127 (Fla. 1991); *Downs v. State*, 572 So. 2d 895, 901 (Fla. 1990). Accordingly, we find no merit in this claim.

Johnson, 696 So. 2d at 325-26. As this Court had already rejected this claim on direct appeal, the lower court properly denied this claim as procedurally barred. *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995). The denial of the claim should be affirmed.

To the extent Defendant is claiming that the evidence of his intent was insufficient to satisfy *Enmund/Tison*,[5] this claim is not properly before this Court. Defendant appears to assert that he cannot be sentenced to death based merely upon the fact

---

[5]*Enmund v. Florida*, 458 U.S. 782 (Fla. 1982); *Tison v. Arizona*, 481 U.S. 137 (1987).

that he was a triggerman and used a gun during this crime. However, Defendant did not present this claim to the lower court. As such, it cannot be raised now. *Griffin v. State*, 28 Fla. L. Weekly S723, S726 n.5 (Fla. Sept. 25, 2003); *Doyle v. State*, 526 So. 2d 909, 911 (Fla. 1988)(post conviction claim raised for first time on appeal and never presented to the circuit court was procedurally barred on appeal).

In his motion for post conviction relief, Defendant did not assert a claim that the evidence was insufficient to satisfy *Enmund/Tison*. Instead, Defendant merely mentioned these cases in the course of making his argument that his sentence was disproportionate in light of Ingraham's sentence. The claim, as presented in the lower court was:

> The death sentence in this case is disparate and disproportionate given the circumstances and the resolution of the case of David Ingraham, a more culpable co-defendant. In Edmund [sic] v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), the U.S. Supreme Court declared that the death penalty would not be appropriate to a non-trigger man in a felony murder context. The defendant was a participant in the underlying felony presented to the jury under a felony murder theory, but his co-defendant had killed the individual. In Tison v. Arizona, 104 U.S. 1676 [sic], 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), the Supreme Court modified somewhat its holding in Edmund [sic] and declared that a defendant who had substantial participation in the underlying felony could be sentenced to death even if he was not the trigger man. See also, Hazen v. State, 700 So. 2d 1207 (Fla. 1997); Slater v. State, 316 So. 2d 539 (Fla. 1975).

> Accepting for purposes of argument that [Defendant] and Ingraham both set out to kill Lee Lawrence at his grocery store, it was Ingraham who shot and killed him. Ingraham, who was more culpable than [Defendant] in this case, received a sentence of life imprisonment. To have a non-trigger man sentenced to death, when a trigger man was serving a reduced sentence of life imprisonment invalidates the death penalty on the basis of proportionality.

(PCR. 427-28) As can be seen from the foregoing, Defendant did not contend that the fact he used a gun was insufficient to satisfy *Enmund/Tison* below. Thus, the claim is not properly before this Court, and the denial of motion for post conviction relief should be affirmed.

Even if the issue was properly before this Court, Defendant would still be entitled to no relief as the claim is procedurally barred. Issues that could have and should have been raised on direct appeal are procedurally barred in post conviction proceedings. *Francis v. Barton*, 581 So. 2d 583 (Fla.), *cert. denied*, 501 U.S. 1245 (1991). Claims regarding whether the evidence was sufficient to satisfy *Enmund/Tison* are issues that could have and should have been raised on direct appeal. *Teffeteller v. Dugger*, 734 So. 2d 1009, 1015-16 & n.8, 1025 & n.19, 1026 (Fla. 1999). As such, this claim is procedurally barred. The lower court would have properly denied this claim had it been presented to it. The denial of the motion for post conviction relief should be affirmed.

Even if the issue was not procedurally barred, Defendant would still be entitled to no relief. In *Enmund v. Florida*, 458 U.S. 782, 797 (Fla. 1982), the Court found that the death penalty could not be imposed on a defendant who did not "himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." In *Tison v. Arizona*, 481 U.S. 137, 158 (1987), the Court found that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." As can be seen from these holding, these cases apply to felony murder cases. Here, Defendant was not charged with felony murder in connection with the death of Mr. Lawrence; the indictment only charged premeditated murder. (R. 1) The only theory of first degree murder on which the jury was instructed was premeditated murder. (R. 131, T. 1464-66) The only theory of felony murder was Defendant's theory that the murder had occurred while he was committing the crime of shooting a deadly missile into an occupied structure, and he was therefore guilty of only third degree murder. (T. 1402-62) The jury, however, found Defendant guilt of first degree murder as charged in the indictment. (T. 1514) As such, the jury found that Defendant, at a minimum, intended for Mr. Lawrence to be killed. Such a finding satisfies *Enmund/Tison*. *Teffeteller*,

734 So. 2d at 1018. The denial of the motion for post conviction relief should be affirmed.

XII. THE CLAIM REGARDING THE JURY INSTRUCTION ON NONSTATUTORY MITIGATION WAS PROPERLY DENIED AS PROCEDURALLY BARRED AND WITHOUT MERIT.

Defendant next contends that the jury instruction on nonstatutory mitigation was insufficient and that his counsel was ineffective for not objecting to this instruction. However, the lower court properly denied this claim as procedurally barred and without merit.

Claims that could have and should have been raised on direct appeal are procedurally barred in post conviction proceedings. *Francis v. Barton*, 581 So. 2d 583 (Fla.), *cert. denied*, 501 U.S. 1245 (1991). Issues regarding the propriety of jury instructions on mitigating circumstances are issues that could have and should have been raised on direct appeal. *See Koon v. Dugger*, 619 So. 2d 246, 247-48 (Fla. 1993). As such, Defendant's claim that the jury instruction on nonstatutory mitigation was insufficient is procedurally barred. The denial of the claim should be affirmed.

Even if the claim was not procedurally barred, Defendant would still be entitled to no relief. In this case, the trial court gave the standard "catch-all" instruction on nonstatutory mitigation, which informed the jury that it could consider in

mitigation "[a]ny other aspect of the defendant's character or record, and any other circumstances of the offense." (R. 296, S.R. 162) This Court has repeatedly held that a trial court is only required to give this instruction on nonstatutory mitigation. *E.g., Belcher v. State*, 851 So. 2d 678, 684-85 (Fla. 2003); *Downs v. Moore*, 801 So. 2d 906, 912-13 (Fla. 2001); *Rose v. State*, 787 So. 2d 786, 804 (Fla. 2001); *James v. State*, 695 So. 2d 1229, 1236 (Fla. 1997). As such, any claim that the trial court erred in giving this instruction is without merit. The denial of the claim should be affirmed.

With regard to the claim of ineffective assistance of counsel for failing to object to this instruction, the claim again was properly denied. Counsel cannot be deemed ineffective for failing to raise a nonmeritorious issue. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. As argued, *supra*, any claim that the catch-all instruction on nonstatutory mitigation was insufficient would have been meritless. As such, counsel cannot be deemed ineffective for failing to raise this issue. The claim was properly denied.

XIII. THE *RING* CLAIM WAS PROPERLY DENIED.

Defendant finally contends that Florida capital sentencing scheme is unconstitutional under *Ring v. Arizona*, 536 U.S. 584

(2002). However, the lower court properly denied this claim.

As Defendant acknowledges, this Court has held that *Ring* did not invalidate Florida's capital sentencing scheme. *Davis v. State*, 28 Fla. L. Weekly S835 (Fla. Nov. 20, 2003); *Jones v. State*, 855 So. 2d 611, 619 (Fla. 2003); *Duest v. State*, 855 So. 2d 33, 49 (Fla. 2003); *Doorbal v. State*, 837 So. 2d 940, 963 (Fla. 2003); *Bottoson v. Moore*, 833 So. 2d 693 (Fla.), *cert. denied*, 537 U.S. 1070 (2002); *King v. Moore*, 831 So. 2d 143 (Fla.), *cert. denied*, 537 U.S. 1067 (2002). The lower court was bound by this Court's decisions. *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973); *see also Hernandez v. Garwood*, 390 So. 2d 357 (Fla. 1980). As such, the lower court properly denied this claim and should be affirmed.

Moreover, despite Defendant's assertion that this Court's rulings were erroneous, *Ring* does not apply to Florida's capital sentencing scheme and to this case in particular. *Ring* applied *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to Arizona's capital sentencing scheme. *Apprendi* held that other than the fact of a prior conviction, any fact that increases the statutory maximum for an offense must be submitted to a jury. In *Harris v. United States*, 536 U.S. 545 (2002), the Court had that even under *Apprendi* (and its progeny *Ring*), not all of the

facts used to determine an appropriate sentence are element of the offense. Instead, only facts that increases a statutory maximum have become elements of the offense. As this Court has ruled, the statutory maximum for first degree murder in Florida is death. *Shere v. Moore*, 830 So. 2d 56, 61 (Fla. 2002). Thus, this Court's prior rejections of *Ring* claim were proper. The lower court properly followed those decisions and should be affirmed.

Moreover, *Ring* does not apply retroactively under the principles of *Witt v. State*, 387 So. 2d 922, 929-30 (Fla. 1980). Pursuant to *Witt*, *Ring* and *Apprendi* are only entitled to retroactive application if it is a decision of fundamental significance, which so drastically alters the underpinnings of King's death sentence that "obvious injustice" exists. *New v. State*, 807 So. 2d 52 (Fla. 2001). In determining whether this standard has been met, this Court must consider three factors: the purpose served by the new case; the extent of reliance on the old law; and the effect on the administration of justice from retroactive application. *Ferguson v. State*, 789 So. 2d 306, 311 (Fla. 2001). Application of these factors to *Ring*, which did not directly or indirectly address Florida law, provides no basis for consideration of *Ring* in this case.

Moreover, Defendant has not even attempted to assert how *Ring* does satisfy these requirements. As such, the claim should be denied.

In fact, several courts have determined that *Ring* does not apply retroactively to defendants whose convictions were final before *Ring* was decided. *Turner v. Crosby*, 339 F.3d 1247 (11th Cir. 2003); *Szabo v. Walls*, 313 F.3d 392, 398-99 (7th Cir. 2002); *State v. Towery*, 64 P.3d 828 (Ariz. 2003). As *Ring* does not apply retroactively to this case, the lower court's denial of this claim should be affirmed.

While Defendant asserts that a jury should have sentenced him, *Ring* does not directly or indirectly preclude a judge from serving in the role of sentencer. There is no language in *Ring* that suggests that, once a defendant has been convicted of a capital offense, a judge may not hear evidence or make findings in addition to any findings a jury may have made. Justice Scalia commented that, "[t]hose States that leave the ultimate life-or-death decision to the judge may continue to do so." *Ring*, 122 S. Ct. at 2445 (Scalia, J., concurring). The fact that Florida provides an additional level of judicial consideration to enhance the reliability of the sentence before a death sentence is imposed does not render our capital sentencing statute unconstitutional. To the extent that

Defendant criticizes state law for requiring judicial participation in capital sentencing, he does not identify how judicial findings after a jury recommendation can interfere with the right to a jury trial. Any suggestion that *Ring* has removed the judge from the sentencing process is not well taken. The judicial role in Florida alleviates Eighth Amendment concerns as well, and in fact provides defendants with another "bite at the apple" in securing a life sentence; it also enhances appellate review and provides a reasoned basis for a proportionality analysis. Because *Ring* does not require a jury to impose a death sentence or a jury finding that aggravation outweighs mitigation, the lower court properly rejected this claim and should be affirmed.

Further, Defendant's death sentence was supported by a prior violent felony conviction, which provides a basis to impose a sentence higher than authorized by the jury without any additional jury findings. *See Almendarez-Torres v. United States*, 523 U.S. 224 (1998); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). There is no constitutional violation because the prior conviction constitutes a finding by a jury which the judge may rely upon to impose an aggravated sentence. As such, the denial of the claim should be affirmed.

CONCLUSION

For the foregoing reasons, the order denying Defendant's motion for post conviction relief should be affirmed.

Respectfully submitted,

CHARLES J. CRIST, JR.
Attorney General
Tallahassee, Florida

_____
SANDRA S. JAGGARD
Assistant Attorney General
Florida Bar No. 0012068
Office of the Attorney General
Rivergate Plaza -- Suite 950
444 Brickell Avenue
Miami, Florida 33131
PH. (305) 377-5441
FAX (305) 377-5654

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to Charles G. White, 1031 Ives Dairy Road, Suite 228, Miami, Florida 33179, this 22nd day of December, 2003.

_____
SANDRA S. JAGGARD
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is type in Courier New 12-point font.

_____
SANDRA S. JAGGARD
Assistant Attorney General