IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-631

THOMAS KNIGHT, N/K/A
ASKARI ABDULLAH MUHAMMAD

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

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STATEMENT OF THE CASE AND FACTS

On August 24, 1974, Defendant was charged by indictment with: the first degree murder of Lillian Gans and the first degree murder of Sydney Gans. (RSR. 4)[1] The crimes were alleged to have been committed on July 17, 1974. The matter proceeded to trial in 1975. After considering the evidence presented, the jury found Defendant guilt as charged and recommended the imposition of the death penalty for both murders. (RSR. 379-80) The trial court adjudicated Defendant guilt, followed the jury's recommendation and imposed a sentence of death for each murder. (RSR. 375-78, 412)

Defendant appealed his convictions and sentences to this Court, which affirmed. *Knight v. State*, 338 So. 2d 201 (Fla. 1976). Defendant sought a writ of habeas corpus from this Court, which was denied. *Knight v. State*, 394 So. 2d 997 (Fla. 1981). He sought post conviction relief in the trial court, which was denied, and that denial was affirmed on appeal. *Knight v. State*, 426 So. 2d 533 (Fla. 1982). Defendant also sought a writ of habeas corpus for the United States District Court for the Southern District of Florida, which was denied.

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[1] The symbols "RSR." and "RST." will refer to the record on appeal and transcript of proceedings from Defendant's resentencing, Florida Supreme Court Case No. 87783.

However, on appeal, the Eleventh Circuit found that Defendant's sentencing violated *Hitchcock v. Dugger*, 481 U.S. 393 (1987), and reversed the denial of habeas relief regard his sentences. *Knight v. Dugger*, 863 F.2d 705 (11th Cir. 1988). Rehearing was denied on August 23, 1989. On July 16, 1990, the federal district court entered its order granting Defendant a conditional writ of habeas corpus regarding his sentences. (RSR. 1110)

After the time of the issuance of the Eleventh Circuit's opinion, the proceedings were delayed because Defendant refused to proceed until the writ formally issued, resisted producing discovery, had his counsel withdraw, had new counsel appointed, sought continuances and litigated a virtual class action regarding the funding for experts in capital cases.[2]

The resentencing proceeding commenced on January 23, 1996. (RST. 172) This Court found the following facts had been presented at that proceeding:

> On direct appeal, we related the following material facts:
>
> > Upon arriving at his place of business and parking in his designated space, Mr. Gans was approached by the defendant who was carrying an automatic rifle and was told to re-enter his automobile, to drive home and

[2] A more complete recitation of the history of these proceeding is contained in Issue I in the state habeas response.

> get Mrs. Gans, and to drive to the bank and get $50,000. While inside the bank, Mr. Gans informed the president about the abduction. The police and FBI were alerted. Mr. Gans then returned to his car with the money. He and his wife, shortly thereafter, were found shot to death, the fatal shots--perforating through their necks--having been fired from the rear seat of the vehicle. Thereafter, Knight was apprehended and taken into custody in a weeded area about 2,000 feet from the Gans' vehicle. Underneath him buried in the dirt was an automatic rifle and a paper bag containing $50,000. There were blood stains on his pants.

Knight, 338 So. 2d at 202. During the resentencing hearing, FBI Agent Terry Nelson testified that he was involved in all stages of the surveillance of the criminal episode. He arrived at City National Bank in an unmarked car, and observed the Gans' Mercedes, with Mrs. Gans driving and a black male with a rifle across his lap sitting in the right rear. After Mr. Gans returned to the car, the vehicle departed and followed a circuitous route before heading toward an unpopulated area of south Dade County.

Nelson momentarily lost sight of the Mercedes, and after regaining contact, Nelson again lost sight of the Mercedes as it proceeded along a canal ridge. When Nelson exited his vehicle for a better view, he received a radio call that two individuals had been shot and a black male was seen running into the woods nearby. The surveillance lasted for approximately an hour and covered about twenty miles. Nelson testified that Knight took no actions indicating he was aware of the surveillance. (FN4) The FBI and Dade County police vehicles participating were unmarked and none of the officers were in uniform. One STOL (FN5) aircraft and a helicopter were also involved in parts of the surveillance.

Dr. Joseph Davis, the original medical examiner, testified that Mrs. Gans was killed instantly from a bullet which entered the back right side of her neck and exited her left cheek. Mr. Gans was shot in the

lower right side of the face, with the bullet having exited his jaw. His wound had stippling or gunpowder marks burnt into the flesh, indicating that he had been shot at point-blank range. Mr. Gans was found in the underbrush, a trail of blood indicating that he had been dragged out and away from the vehicle after being shot.

Detective Greg Smith testified that he was a member of the cold-case squad, having been assigned to the case in 1989 because the former lead detective, Detective Ojeda, had retired from the police department. Smith reviewed the trial testimony and reports of witnesses who were no longer available. Smith recounted to the judge and jury the testimony of the deceased Gans' company comptroller, Milton Marinek, the testimony of Detective Ojeda and, in rebuttal testimony, the sworn statement of the helicopter pilot, as well as relating the physical evidence presented at trial.

Numerous witnesses testified on Knight's behalf. They presented testimony that Knight, the second oldest of nine children, came from a family with a history of mental illness and neurological problems. Knight's sisters Mary Ann, Doris, and Edna, as well as Deputy Patrick Duval, detailed the poverty, hunger, and brutal beatings Knight had sustained during his childhood in Fort Pierce. Knight's father was an alcoholic who had stopped providing for his family in 1960. Knight's father beat him often and with brutality. The Knight children often went without food or clothing. In June 1960, Knight's father raped Knight's sister Mary Ann. Knight, nine years old at the time, either witnessed his sister's rape and tried to stop it, or was told about it by Mary Ann immediately thereafter.

Knight was first arrested at age nine for theft. When he was arrested on the same charge several months later, he was committed to the Florida School for Boys, the youngest child ever sent there. He was continually in trouble thereafter, until at age fifteen he was sent to state prison on a burglary conviction. At age nineteen, he was committed to the Northeast Florida State Hospital where he was

diagnosed with drug and poison intoxication, excessive drinking, and paranoid personality.

Numerous mental health experts testified to Knight's longstanding mental problems. Dr. Brad Fisher, a forensic psychologist, opined that Knight was a chronic schizophrenic. He testified that Knight was acting under an extreme mental or emotional disturbance at the time of the murders and that his ability to appreciate the criminality of his conduct was substantially impaired. Dr. Joyce Carbonell, a clinical psychologist, testified that Knight was a schizophrenic and that the statutory mental mitigators were manifested at the time of the murders. Dr. Thomas McLaine, a psychiatrist, testified that he evaluated Knight in 1991, concluding that he fell "somewhere between the severe personality disorder and the schizophrenic." He also opined that at the time of the killings, Knight was under the influence of an extreme mental or emotional disturbance and that his ability to conform his conduct to the requirements of the law was "somewhat impaired all the time and [has] been for most of his 45 years." Dr. Jethro Toomer, a psychologist, opined that the statutory mental mitigators applied at the time of the murders. Dr. David Rothenberg, a clinical psychologist, testified that Knight was a chronic paranoid schizophrenic. Dr. William Corwin, a psychiatrist, stated that Knight was argumentative, evasive, hostile, angry and that "there was some conscious exaggeration of his symptoms with a tendency to present himself as being actually ill." Dr. Arthur Wells, a psychologist, testified that when Knight committed the murders, he was "50 percent or more out of control, had no ability to reason, to judge what he was doing."

In rebuttal, the State called Dr. Eileen Fennell, a neuro-psychologist. She testified that Knight has a paranoid personality disorder, but is a malingerer who does not suffer from paranoid schizophrenia. Dr. Lloyd Miller, a forensic psychologist, likewise testified that Knight is a malingerer who does not have any major mental illnesses. Similarly, Dr. Charles Mutter, a forensic psychiatrist, found Knight to have a paranoid and antisocial personality, but no major mental illness.

> Finally, Detective Smith was recalled on rebuttal and testified that his review of the prior testimony confirmed that no uniformed officers or marked vehicles were involved in the surveillance. Moreover, he testified that the STOL pilot's prior sworn testimony reflected that the pilot first saw the Mercedes after it had stopped and Knight was fleeing and that the helicopter pilot's prior sworn statement confirmed that observation.
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> * * * *
>
> (FN4.) Nelson testified that Knight never became "hinge key," which is an FBI term for a suspect who is looking over his shoulder or who is concerned and paranoid that somebody might be following him.
>
> (FN5.) STOL stands for Short Takeoff and Landing, like the United States Marine Corps AV-8B Harrier aircraft.

Knight v. State, 746 So. 2d 423, 427-29 (Fla. 1988). After considering this evidence, the jury recommended that Defendant be sentenced to death for each murder by a vote of 9 to 3. (RSR. 1459)

The trial court followed the jury's recommendations and sentenced Defendant to death for each of the murders. (RSR. 1516-54) The trial court found 6 aggravators applicable to both murders: prior violent felonies including the murder of Corrections Officer Burke and the contemporaneous murder of the other victim; during the course of a kidnapping; avoid arrest; pecuniary gain; heinous, atrocious and cruel (HAC); and cold, calculated and premeditated (CCP). (RSR. 1517-28) In mitigation, the trial court found that Defendant had been abused

as a child, that Defendant suffered from some mental problem that did not rise to the level of statutory mitigation and that Defendant was raised in poverty. (RSR. 1528-51) The trial court rejected Defendant's claim that he had established that the murder was committed while Defendant was under the influence of an extreme mental or emotional disturbance and that Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law was substantially impaired. (RSR. 1529-47, 1548) In doing so, the trial court expressly found the testimony of Dr. Wells incredible. (RSR. 1529-33)

Defendant appealed his sentences to this Court, raising 17 issues:

> I.
> THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT THE HEARSAY TESTIMONY OF DETECTIVE SMITH, IN VIOLATION OF FLORIDA LAW, THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9, 16, AND 17, AND THE UNITED STATES CONSTITUTION, AMENDMENTS VI, VIII, AND XIV.
>
> II.
> THE TRIAL COURT ERRED IN ALLOWING THE STATE'S PRINCIPLE WITNESS, DETECTIVE SMITH, TO REMAIN IN THE COURTROOM THROUGHOUT THE RESENTENCING PROCEEDINGS, IN VIOLATION OF THE RULE AGAINST WITNESS SEQUESTRATION, SECTION 90.616, FLORIDA STATUTES.
>
> III.
> THE PROSECUTOR'S RELIANCE ON THE NONSTATUTORY AGGRAVATING CIRCUMSTANCE OF FUTURE DANGEROUSNESS TAINTED THE VALIDITY OF THE JURY'S RECOMMENDATION AND UNDERMINED THE RELIABILITY OF THE SENTENCING HEARING, IN VIOLATION OF FLORIDA LAW, THE FLORIDA CONSTITUTION,

ARTICLE I, SECTIONS 9 AND 17, AND THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV.

IV.

THE TRIAL COURT'S REFUSAL TO DETERMINE AND INSTRUCT THE JURY THAT IF SENTENCED TO LIFE, THE SENTENCES WOULD BE CONSECUTIVE WITH MINIMUM MANDATORY TERMS TOTALLING FIFTY YEARS, PRECLUDED THE JURY FROM CONSIDERING RELEVANT MITIGATING EVIDENCE, UNDERMINED THE RELIABILITY OF THE SENTENCING PROCEEDING, AND DENIED THE DEFENDANT DUE PROCESS, IN VIOLATION OF THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9 AND 17, AND THE UNITED STATES CONSTITUTION, AMENDMENTS VI, VIII AND XIV.

V.

THE TRIAL COURT'S INSTRUCTION THAT DEFENDANT'S ABSENCE AT TRIAL WAS THE RESULT OF HIS MISCONDUCT IN THE COURTROOM, AND THAT THE DAILY DELAYS WERE CAUSED BY THE NEED TO REASSESS HIS WILLINGNESS TO BEHAVE, DENIED THE DEFENDANT DUE PROCESS AND A RELIABLE SENTENCING DETERMINATION, IN VIOLATION OF THE FLORIDA CONSTITUTION, SECTIONS 9 AND 17, AND THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV.

VI.

THE TRIAL COURT ERRED IN ALLOWING THE TESTIMONY OF DR. MILLER, WHO HAD BEEN APPOINTED SOLELY FOR THE PURPOSE OF EVALUATING APPELLANT'S COMPETENCE AND HAD NO OPINION AS TO HIS MENTAL STATUS AT THE TIME OF THE CRIME, IN VIOLATION OF FLORIDA LAW, THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9 AND 17 AND THE UNITED STATES CONSTITUTION, AMENDMENTS V, VI, VIII, AND XIV.

VII.

THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL'S PEREMPTORY CHALLENGE OF JUROR RIVERO-SAIZ, IN VIOLATION OF FLORIDA LAW, THE FLORIDA CONSTITUTION, ARTICLE I, SECTION 9, AND THE UNITED STATES CONSTITUTION, AMENDMENT XIV.

VIII.

THE TRIAL COURT ERRED IN EXCLUDING JURORS WELDON AND ZARIBAF, AND ALTERNATE JUROR CUNNINGHAM, FROM THE PANEL, IN VIOLATION OF FLORIDA LAW, THE FLORIDA

CONSTITUTION, ARTICLE I, SECTIONS 9 AND 16, AND THE UNITED STATES CONSTITUTION, AMENDMENTS VI AND XIV.

IX.

THE DEFENDANT WAS DENIED A FUNDAMENTALLY FAIR AND RELIABLE SENTENCING HEARING BY THE PROSECUTOR'S IMPROPER ARGUMENT, COMMENTS, AND INTRODUCTION OF IRRELEVANT AND HIGHLY PREJUDICIAL FACTS, IN VIOLATION OF THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9 AND 17, AND THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV.

X.

THE TRIAL COURT'S REFUSAL TO INSTRUCT ON THE MERGING OF AGGRAVATORS ESTABLISHED BY A SINGLE ASPECT OF THE OFFENSE UNDERMINED THE RELIABILITY OF THE JURY'S RECOMMENDATION IN VIOLATION OF THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9 AND 17, AND THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV.

XI.

THE TRIAL COURT ERRED IN INSTRUCTING THE JURORS ON THE PRIOR-VIOLENT-FELONY AGGRAVATING CIRCUMSTANCE, AND IN ALLOWING THE STATE TO PRESENT EVIDENCE AND ARGUMENT REGARDING THE DEFENDANT'S CONVICTION FOR THE SUBSEQUENT MURDER OF OFFICER BURKE, IN VIOLATION OF FLORIDA LAW, THE FLORIDA CONSTITUTION, ARTICLE I, SECTION 17, AND THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV.

XII.

THE TRIAL COURT ERRED IN INSTRUCTING THE JURORS ON THE CCP AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9 AND 17, AND THE UNITED STATES CONSTITUTION, ARTICLE I, SECTION 10, AND AMENDMENTS VIII AND XIV.

XIII.

THE TRIAL COURT'S INSTRUCTION OF THE HAC AGGRAVATING CIRCUMSTANCE DENIED THE DEFENDANT DUE PROCESS OF LAW AND UNDERMINED THE RELIABILITY OF THE JURY'S RECOMMENDATION, IN VIOLATION OF THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9 AND 17, AND THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV.

XIV.

THE TRIAL COURT'S REFUSAL TO GIVE THE DEFENSE REQUESTED INSTRUCTION ON THE STATUTORY MENTAL MITIGATING CIRCUMSTANCES DENIED THE DEFENDANT DUE PROCESS OF LAW AND UNDERMINED THE RELIABILITY OF THE JURY'S RECOMMENDATION, IN VIOLATION OF THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9 AND 17, AND THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV.

XV.

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO DEATH IN VIOLATION OF SECTION 921.141, FLORIDA STATUTES, THE FLORIDA CONSTITUTION, ARTICLE I, SECTION 17, AND THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV.

A. The Trial Court Erred in Giving Little Weight to the Nonstatutory Mitigating Circumstances.

B. The Trial Court Erred in Finding the HAC Aggravating Circumstance and the Court's Reliance on an Incident that Never Happened Seriously Undermined the Reliability of the Sentencing.

C. The Trial Court Erred in Rejecting the Extreme Emotional Disturbance and Substantial Impairment Statutory Mitigating Circumstances.

D. The Trial Court Erred in Finding that the Murder was Committed in a Cold, Calculated and Premeditated Manner.

E. The Trial Court Erred in Finding and Giving Great Weight to the "Prior Violent Felony" Aggravating Circumstance.

F. The Trial Court Erred in Finding the Pecuniary Gain Aggravator.

G. The Trial Court Erred in Finding the "Avoid Arrest" Aggravator.

H. The Trial Court Erred in Separately Finding the Felony Murder Aggravator.

XVI.

FLORIDA'S DEATH PENALTY STATUTE VIOLATES THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9 AND 17, AND THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV, BECAUSE IT IMPROPERLY SHIFTS THE BURDEN OF PROOF AND PERSUASION TO THE DEFENSE, FAILS ADEQUATELY TO GUIDE THE JURY'S DISCRETION, AND DOES NOT REQUIRE WRITTEN FINDINGS REGARDING THE SENTENCING FACTORS THEREBY PRECLUDING ADEQUATE APPELLATE REVIEW.

XVII.

BECAUSE OF THE THE [sic] INORDINATE LENGTH OF TIME THAT THE DEFENDANT HAS SPENT ON DEATH ROW, ADDING HIS EXECUTION TO THAT PUNISHMENT WOULD CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE FLORIDA CONSTITUTION, ARTICLE I, SECTION 17, THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV, AND BINDING NORMS OF INTERNATIONAL LAW.

Initial Brief of Appellant, Florida Supreme Court Case No. 87783. This Court affirmed Defendant's sentences. *Knight v. State*, 746 So. 2d 423 (Fla. 1998). The only error found by this Court was that the evidence was insufficient to support a finding of HAC. *Id.* at 435-36. However, this error was found to be harmless. *Id.* Defendant next sought certiorari review of the decision, which was denied on November 8, 1999. *Knight v. Florida*, 528 U.S. 990 (1999).

On March 27, 2002, Defendant filed his amended motion for post conviction relief, raising 28 claims:

I.

ACCESS TO THE FILES AND RECORDS PERTAINING TO [DEFENDANT'S] CASE IN THE POSSESSION OF CERTAIN STATE AGENICES HAVE BEEN WITHHELD IN VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THE EIGHTH AMENDMENT, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

II.

THE STATE'S EIGHTH YEAR DELAY IN PROSECUTING [DEFENDANT] AND SEEKING THE DEATH PENALTY VIOLATED [DEFENDANT'S] FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS. THE STATE'S DELAY AND VIOLATION OF [DEFENDANT'S] DUE PROCESS RIGHTS PRECLUDED THE STATE'S ABILITY TO SEEK A SENTENCE OF DEATH.

III.

[DEFENDANT] WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT ALL STAGES OF HIS RESENTENCING IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS DUE TO THE ACTIONS OF THE STATE IN FAILING TO RESENTENCE [DEFENDANT] WITHIN A REASONABLE AMOUNT OF TIME. ADDITIONALLY, COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE [DEFENDANT'S] CASE, TO CHALLENGE THE STATE'S CASE, AND FAILED TO ZEALOUSLY ADVOCATE ON BEHALF OF HIS CLIENT. COUNSEL FAILED TO OBJECT TO OBVIOUS INADMISSIBLE EVIDENCE. COUNSEL FAILED TO EFFECTIVELY CROSS EXAMINE THE STATE'S WITNESSES. COUNSEL FAILED TO ADEQUATELY OBJECT TO EIGHTH AMENDMENT ERROR. A FULL ADVERSARIAL TESTING DID NOT OCCUR. THE COURT AND STATE RENDERED COUNSEL INEFFECTIVE. COUNSEL'S PERFORMANCE WAS DEFICIENT, AND AS A RESULT, [DEFENDANT'S] DEATH SENTENCE IS UNRELIABLE.

IV.

[DEFENDANT] WAS DENIED HIS RIGHTS UNDER AKE V. OKLAHOMA AT HIS RESENTENCING, WHEN COUNSEL FAILED TO OBTAIN AN ADEQUATE MENTAL HEALTH EVALUATION AND FAILED TO PROVIDE THE NECESSARY BACKGROUND INFORMATION TO THE MENTAL HEALTH CONSULTANTS, ALL IN VIOLATION OF [DEFENDANT'S] RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS.

V.

FLORIDA'S SENTENCING PROCEDURE REQUIRING ONLY A BARE MAJORITY OF JURORS TO RECOMMEND DEATH VIOLATES 921.141, FLORIDA STATUTES, ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION AND AMENDMENTS SIX, EIGHT AND FOURTEEN OF THE UNITED STATES CONSTITUTION. [DEFENDANT'S] COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE.

VI.

THE STATE'S USE OF MISLEADING TESTIMONY AND IMPROPER ARGUMENT AND FAILURE TO DISCLOSE MATERIAL EXCULPATORY INFORMATION TO [DEFENDANT] VIOLATED BRADY V. MARYLAND, U.S. V. GIGLIO AND THE CONSTITUTIONAL RIGHTS OF [DEFENDANT] UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. [DEFENDANT'S] COUNSEL WAS INEFFECTIVE FOR

NOT OBJECTING TO THE IMPROPER CONDUCT BY THE STATE AND RENDERED INEFFECTIVE BY THE STATE'S ACTIONS. [DEFENDANT] WAS DENIED A PROPER ADVERSARIAL TESTING.

VII.

THE PROSECUTOR'S INFLAMMATORY AND IMPROPER COMMENTS AND ARGUMENTS RENDERED [DEFENDANT'S] DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE FOR FAILING TO OBJECT, THEREBY DENYING [DEFENDANT] HIS RIGHTS UNDER THE SIXTH AMENDMENT AND HIS RIGHT TO A RELIABLE DIRECT APPEAL.

VIII.

[DEFENDANT'S] EIGHTH AMENDMENT RIGHTS WERE VIOLATED BY THE SENTENCING COURT'S REFUSAL TO FIND AND WEIGH THE MITIGATING CIRCUMSTANCES SET OUT IN THE RECORD. THE RE-SENTENCING COURT FAILED TO RENDER CONSTITUTIONALLY MANDATED INDIVIDUALIZED SENTENCING REQUIRED.

IX.

THE INTRODUCTION OF NONSTATUTORY AGGRAVATING FACTORS SO PREVERTED THE SENTENCING PHASE OF [DEFENDANT'S] TRIAL THAT IT RESULTED IN THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

X.

[DEFENDANT'S] SENTENCING JURY WAS IMPROPERLY INSTRUCTED ON AGGRAVATING FACTORS DUE TO THE VAGUENESS OF THE INSTRUCTIONS AND THE FACT THAT THE AGGRAVATING FACTORS DID NOT APPLY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

XI.

[DEFENDANT'S] 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.

XII.

[DEFENDANT'S] SENTENCE OF DEATH VIOLATES THE FIFTH,

SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE THE LAW SHIFTED THE BURDEN TO [DEFENDANT] TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE TRIAL COURT EMPLOYED A PRESUMPTION OF DEATH IN SENTENCING [DEFENDANT].

XIII.

FLORIDA'S STATUTE SETTING FORTH THE AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED IN A CAPITAL CASE IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. THE FACIAL INVALIDITY OF THE STATUTE WAS NOT CURE IN [DEFENDANT'S] CASE BECAUSE THE JURY DID NOT RECEIVE ADEQUATE GUIDANCE. AS A RESULT, [DEFENDANT'S] SENTENCE OF DEATH IS PREMISED UPON FUNDAMENTAL ERROR THAT NOW MUST BE CORRECTED.

XIV.

[DEFENDANT] IS INNOCENT OF THE DEATH PENALTY.

XV.

[DEFENDANT] WAS DENIED HIS RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, WHEN THE PROSECUTOR IMPERMISSIBLY SUGGESTED TO THE JURY THAT THE LAW REQUIRED THAT IT RECOMMEND A SENTENCE OF DEATH.

XVI.

[DEFENDANT'S] COUNSEL IS PROHIBITED FROM INTERVIEWING JURORS IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. AS A RESULT OF THE RULE, [DEFENDANT] IS PREVENTED FROM FULLY PRESENTING IDENTIFIABLE AND VALID CLAIMS FOR POST CONVICTION RELIEF.

XVII.

JUROR MISCONDUCT OCCURRED IN [DEFENDANT'S] RESENTENCING IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

XVIII.

FLORIDA'S CAPITAL SENTENCING STATUTE IS

UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE BECAUSE IT FAILS TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY, AND IT VIOLATES THE CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND PROHIBITING CRUEL AND UNUSUAL PUNISHMENT.

XIX.

REQUIRING [DEFENDANT], A DEATH SENTENCED INDIVIDUAL, TO FILE A MOTION UNDER RULE 3.851 OF THE RULES OF CRIMINAL PROCEDURE ONE YEAR AFTER HIS SENTENCE HAS BECOME FINAL VIOLATES HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW UNDER THE EIGHTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION. THIS RULE ALSO DENIES [DEFENDANT] EFFECTIVE ASSISTANCE OF COUNSEL AND ACCESS TO THE COURTS OF THE STATE OF FLORIDA AND THE UNITED STATES, AS WELL AS HIS RIGHT TO PETITION FOR A WRIT OF HABEAS CORPUS.

XX.

JUDICIAL BIAS THROUGHOUT [DEFENDANT'S] RESENTENCING CONSTITUTES FUNDAMENTAL ERROR AND DENIED [DEFENDANT'S] RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. [DEFENDANT] WAS DENIED A FAIR ADVERSARIAL TESTING.

XXI.

[DEFENDANT] WAS ABSENT FROM CRITICAL STAGES OF HIS RE-SENTENCING PROCEEDING. AS A RESULT, [DEFENDANT'S] RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS THE UNITED STATES CONSTITUTION WERE VIOLATED.

XXII.

[DEFENDANT'S] RE-SENTENCING COUNSEL WAS LABORING UNDER AN ACTUAL CONFLICT OF INTEREST RESULTING IN PREJUDICE TO [DEFENDANT] AND IN VIOLATION OF HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING FLORIDA LAW.

XXIII.

AN INVALID PRIOR CONVICTION WAS INTRODUCED INTO EVIDENCE AT [DEFENDANT'S] RESENTENCING PROCEEDINGS TO ESTABLISH THE EXISTENCE OF AN AGGRAVATING CIRCUMSTANCE IN VIOLATION OF JOHNSON V. MISSISSIPPI, 486 U.S. 578

(1988), AND DUEST V. SINGLETARY, 997 F.2D 1336 (11TH CIR. 1993).

XXIV.

[DEFENDANT'S] SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BECAUSE NO RELIABLE TRANSCRIPT OF HIS CAPITAL TRIAL EXISTS, RELIABLE APPELLATE REVIEW WAS AND IS IMPOSSIBLE, THERE IS NO WAY TO ENSURE THAT WHICH OCCURRED IN THE TRIAL COURT WAS OR CAN BE REVIEWED ON APPEAL, DUE TO OMISSIONS IN THE RECORD AND THE JUDGMENT AND SENTENCE MUST BE VACATED.

XXV.

NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT [DEFENDANT'S] CAPITAL CONVICTION AND SENTENCE ARE CONSTITUTIONAL UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

XXVI.

[DEFENDANT'S] RIGHTS TO DUE PROCESS WAS DENIED WHEN THE TRIAL COURT FAILED TO CONDUCT A RELIABLE COMPETENCY HEARING TO RESOLVE DISPUTED ISSUES OF COMPETENCY CONTRARY TO THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

XXVII.

[DEFENDANT'S] EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS [DEFENDANT] MAY BE INCOMPETENT AT THE TIME OF EXECUTION.

XXVIII.

[DEFENDANT'S] TRIAL COURT PROCEEDINGS WERE FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

(PCR. 170-324)

When Defendant did not file a second amended motion for post conviction relief within the time granted by the lower court, the State responded to the amended motion for post conviction

relief. (PCR-SR. 141-262) The lower court then held a *Huff* hearing at which Defendant asserted that he did not have to allege prejudice in support of his claims. (PCR. 524-47)

On January 15, 2003, the trial court issued its written order denying the motion for post conviction relief. (PCR. 435-74) The Court held that it had already ruled on Defendant's public records requests and that Claim I was without merit. *Id.* The Court found that Claims II, VIII, IX, X, XI, XII, XIII, XV, XVI, XVII, XVIII, XXI, XXIII, XXIV and XXVI were procedurally barred. *Id.* It also found that Claims II, III, IV, VI, VII, VIII, XIII, XIV, XV, XXII, XXIII, XXV and XXVI were facially insufficient. *Id.* Additionally, the lower court found that Claims III, IV, VI, XII, XVII and XXVI were conclusively refuted by the record. *Id.* It also found that Claim V, X, XI, XII, XIII, XV, XVIII, XIX, XX, XXI, XXII and XXVIII were without merit, as a matter of law. *Id.* Finally, it found that Claim XXVII was not ripe. Defendant moved for rehearing, which was denied. (PCR-SR. 265-313) This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court properly summarily denied the claims of delay, ineffective assistance of counsel, failure to provide background information to the experts, improper prosecutorial comments, juror misconduct, judicial bias, violation of the right to be present, and conflict of interest. These claims were procedurally barred, facially insufficient, refuted by the record and without merit as a matter of law.

The *Ring* claim was properly denied because *Ring* is not retroactive, and the claim lacks merit. The claim regarding the alleged presentation of nonstatutory aggravation was properly denied as procedurally barred.

The claim regarding the jury instructions on the aggravating circumstances were properly denied as procedurally barred and without merit. The *Caldwell* claim, the burden shifting claim, the claim regarding the constitutionality of Florida's capital sentencing scheme and the claim regarding the comments in voir dire were also properly denied. The claim that Defendant may be insane to be executed is not ripe. The public records claim has been waived because it is not sufficiently argued.

ARGUMENT

I. THE LOWER COURT PROPERLY SUMMARILY DENIED DEFENDANT'S CLAIMS.

Defendant next asserts that the lower court erred in summarily denying a number of his claims. Defendant generally asserts that the lower court was required to grant an evidentiary hearing unless the record conclusively refuted his claims and contends that it did not. However, as this Court stated in *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998):

> We have encouraged trial courts to hold evidentiary hearings on postconviction motions. However, where the motion lacks sufficient factual allegations, or where alleged facts do not render the judgment vulnerable to collateral attack, the motion may be summarily denied. *Steinhorst v. State*, 498 So. 2d 414 (Fla. 1986). **A hearing is warranted on an ineffective assistance of counsel claim only where a defendant alleges specific facts, not conclusively rebutted by the record, which demonstrate a deficiency in the performance that prejudiced the defendant.** *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995); *Jackson v. Dugger*, 633 So. 2d 1051 (Fla. 1993). A summary or conclusory allegation is insufficient to allow the trial court to examine the specific allegations against the record.

(Emphasis added); *see also Kennedy v. State*, 547 So. 2d 912, 913 (Fla. 1989)("A defendant may not simply file a motion for postconviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing.") Moreover, a trial court is not obliged to hold an evidentiary hearing on claims that are procedurally

barred. *See Francis v. Barton*, 581 So. 2d 583 (Fla.), *cert. denied*, 501 U.S. 1245 (1991). As the trial court repeatedly stated in its order, this is the standard it applied in denying Defendant's claims. (PCR. 435-74)

A. THE CLAIM REGARDING THE DELAY WAS PROPERLY SUMMARILY DENIED.

Defendant first asserts that the lower court erred in summarily denying his claim that he was entitled to post conviction relief because of the delay in his resentencing. Defendant asserts that the lower court should not have found this claim procedurally barred, should have attached records to show that Defendant contributed to the delay and should have held an evidentiary hearing to establish the relevant prejudice even if he caused the delay. However, the lower court's summary denial of this claim was proper.

Defendant first asserts that the lower court should not have found this claim procedurally barred because the claim he raised about the delay on direct appeal and the claim he presently asserts are not the same. However, the procedural bar stands whether the claims are the same or not. A defendant is procedurally barred from raising a variant of a claim that was raised on direct appeal. *Mann v. Moore*, 794 So. 2d 595, 602 (Fla. 2001); *Thompson v. State*, 759 So. 2d 650, 657 n.6 (Fla.

2000). Moreover, this claim of delay could have and should have been raised on direct appeal. *Francis v. Barton*, 581 So. 2d 583 (Fla.), *cert. denied*, 501 U.S. 1245 (1991). As such, the lower court properly denied the claim as procedurally barred.

Defendant next faults the lower court for failing to attach portions of the record to its order of denial. However, this Court has held that a lower court does not have to attach portions of the record, where its order clearly explains why the claim was summarily denied. *Patton v. State*, 784 So. 2d 380, 388 (Fla. 2000). In this case, the lower court clearly explained why it was denying the claim: the claim was procedurally barred, Defendant caused the delay and his claims of prejudice resulting from the delay were insufficient and refuted by the record. (PCR. 439-40) As such, the summary denial of the claim was proper.

Moreover, the record does reflect that Defendant caused the delay and that his claims of prejudice were insufficient and refuted by the record. The writ of habeas corpus requiring resentencing did not issue until July 16, 1990, and Defendant refused to proceed to trial until the writ formally issued. (RSR. 1110, 1579-90) After representing Defendant on resentencing for over a year, Defendant's counsel withdrew, new counsel was appointed and this counsel received continuances to

prepare for trial. (RSR. 6, 660-62, 1597-89) Within a month of the new trial date, Defendant moved for a determination of his competence and then refused to be evaluated.[3] (RSR. 667-79, 699-701) After this resulted in a finding of competence, Defendant moved for a new competency evaluation with female doctors, which was granted. (RSR. 6, 708-29) Because the doctor Defendant suggested insisted on being paid is excess of the approved rate and counsel was not available, a new competency hearing and the trial were delayed. (RSR. 1616, 730-31, 734, 1618-19, 1623-25, 1649-71) After that competency hearing, Defendant again requested a several month continuance, which was granted. (RSR. 1998-2000)

When a issue arose regarding payment of his experts, Defendant insisted upon litigating a virtual class action regarding payment of experts instead of addressing the issue of payment of experts in his case. (RSR. 769-81, 815-920, 928-1006, 1116-18, 1121-24, 2104-10, 2112-14, 2119-22, 2137-38, 2495-06, 2551-52, 2557-59) The insistence on litigating in this manner further delayed the trial.

Throughout these pretrial proceedings, Defendant refused to

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[3] While Defendant suggests that the refusal to be evaluated should not have been held against Defendant because he was incompetent and his refusal was not voluntary, the trial court found Defendant competent and his actions voluntary throughout these proceedings, as explained in Issue I.H., *infra*.

provide discovery despite being ordered to do so. (RSR. 6, 23-24, 668-69, 737-40), 767, 1133, 1792-94, 2574-76, 2580-85, 2589-96) Because of Defendant's delay in providing discovery, the State was unable to prepare for the resentencing. (RSR. 1786-88, 1794-96)

As can be seen from the foregoing, the record fully supports that Defendant delayed the resentencing proceedings. As Defendant caused the delay, he could not later complain about it. *Keen v. State*, 775 So. 2d 263, 277 (Fla. 2000); *San Martin v. State*, 705 So. 2d 1337, 1347 (Fla. 1997). The claim was properly summarily denied.

The lower court also properly found that Defendant's claim of prejudice because the trial court considered time between the evaluations and the crime in rejecting Defendant's experts opinions was also properly denied as refuted by the record and facially insufficient. Most of Defendant's experts had evaluated him before the resentencing proceeding was ever ordered.[4] One of his experts evaluated him shortly after the resentencing was order.[5] Only one of Defendant's experts (Dr.

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[4] Dr. Wells evaluated Defendant in 1971, Dr. Fisher saw Defendant in 1979 and 1989, Dr. Carbonell saw Defendant in 1989, and Dr. Rothenberg and Dr. Corwin both saw Defendant in 1974. (RSR. 1529-34, 1535-37, 1538-40)

[5] Dr. McClaine examined Defendant in 1991. (RSR. 1534)

Toomer) first evaluated him in 1994, well after the resentencing was ordered. (RSR. 1537-38) Moreover, Dr. Corwin testified that he recalled Defendant had his report and was able to testify about Defendant because he recalled him. (RSR. 2682-84) There was no evidence in the trial record or allegation in the motion that the notes were lost during the time of the resentencing. was pending. As such, the record conclusively shows that the delay Defendant is presently claiming did not cause the prejudice he is asserting. The claim was properly summarily denied.

B. THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL WAS PROPERLY DENIED.

Defendant next contends that the lower court erred in denying his claim that his counsel was ineffective at resentencing. However, the lower court properly denied this claim as facially insufficient and refuted by the record.[6]

Defendant first contended that his counsel was ineffective because of the delay in the resentencing proceedings. However, as explained in Issue I.A., *supra*, the claim regarding the delay

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[6] In the course of this claim, Defendant asserts that his counsel was ineffective for failing to provide background material to his experts, for having a conflict of interest and for failing to object to comments in closing. These issues are separate raised in Issue I.C., I.I. and I.E., *infra*. The State relies on its answer to those claims where they are separately raised.

is without merit. As such, counsel cannot be deemed ineffective because of the delay. *Kokal v. Dugger*, 718 So. 2d 138 (Fla. 1998)(counsel not ineffective for failing to raise meritless issue); *Groover v. Singletary*, 656 So. 2d 424 (Fla. 1995); *Hildwin v. Dugger*, 654 So. 2d 107 (Fla.), *cert. denied*, 516 U.S. 965 (1995); *Breedlove v. Singletary*, 595 So. 2d 8, 11 (Fla. 1992). This is true despite Defendant's assertion that counsel should have made a nonmeritorious objection to the State's cross examination of his experts about the time of their evaluations because this was a valid inquiry on cross. *See Valle v. State*, 581 So. 2d 40, 46 (Fla. 1991). The same is true of the claim that Dr. Fennel's finding of malingering was irrelavant, as it rebutted Defendant's experts' claims that he suffered from a life long mental illness. The claim was properly denied.

Defendant next contended that his counsel was ineffective for failing to present evidence that Defendant was aware of the police pursuit. However, Defendant does not assert what evidence counsel could have presented to show that Defendant was aware of the police pursuit. As such, this claim is facially insufficient and should be denied. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998).

Moreover, counsel did try to show that the police pursuit was noticeable. (RST. 2070-2105, 2229, 2458-61) Defendant, who

would have had the most direct knowledge of whether he was aware of the police pursuit, refused to testify. (RST. 3376-83) As counsel did attempt to present this evidence, he cannot be deemed ineffective for failing to do so. *Strickland*. The claim was properly summarily denied.

Even if counsel could show that Defendant was aware of the pursuit, the claim should still be denied. Defendant's claim was that knowledge of the pursuit would show that Defendant killed the victims in a psychotic break. However, Defendant had the presence of mind to take the victims to a deserted area before he killed them. During the pursuit, Defendant did not react to the pursuit in such a way as to trigger a police response. He took the victims to a spot where the police could not see the actual shooting. After shooting the victims, he hid in an wooded area that had enough ventilation to prevent the tear gas fired by the police from forcing him to expose himself. He covered himself with vegetation to prevent the police from finding him. He took the gun and the money with him as he fled. Under these circumstances showing Defendant's purposeful actions that evidence a consciousness on the wrongfulness of his activities, there is no reasonable probability that showing Defendant was aware of pursuit would have resulted in a life sentence. *Strickland*. The claim was properly summarily denied.

Defendant also contended that his counsel was ineffective for failing to present evidence regarding Defendant's alleged mental illness, his family life and the alleged stress that Defendant was under before the crime. However, counsel did present evidence regarding Defendant's mental illness. He called 7 mental health experts. (RST. 2502-2600, 2681-2707, 2732-2807, 2840-2920, 2937-3007, 3020-3100, 3137-3249) Dr. Fisher testified about the abuse Defendant suffered as a child and the fact that Defendant's father raped his sister in Defendant's presence and was then returned to the family home. (RST. 2513-14) Defendant's sisters testified about the abuse, the rape and its aftermath, the condition of the family, Defendant's drug use and the history of mental problems in the family. (RST. 2669-80, 2707-20, 2721-28) Dr. Corwin and Dr. Wells discussed Defendant's drug abuse. (RST. 2698-99, 2740, 2756) Deputy Pat Duval testified about the abuse of Defendant and Defendant's behavior as a child. (RST. 2927-37) As counsel did present this evidence, he cannot be deemed ineffective for failing to do so. *Strickland*. Moreover, counsel cannot be deemed ineffective for failing to present cumulative evidence. *State v. Riechmann*, 777 So. 2d 342, 356 (Fla. 2000); *see also Valle v. State*, 705 So. 2d 1331, 1334-35 (Fla. 1997); *Provenzano v. Dugger*, 561 So. 2d 541, 545-46 (Fla. 1990). The claim was

properly summarily denied.

Defendant also asserted that his counsel was ineffective for failing to act upon news coverage of the case. Defendant did not assert that there was a reasonable probability that any such action would have affected the outcome of the trial. Under these circumstances, the claim was facially insufficient and properly summarily denied. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998).

Even if the claim was sufficient, the claim was still properly denied. To the extent that Defendant was asserting that counsel should have moved for a change of venue, the claim was meritless.

> The test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and pre-conceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom.

McCaskill v. State, 344 So. 2d 1276, 1278 (Fla. 1977); *see also Rolling v. State*, 695 So. 2d 278, 284 (Fla. 1997). In applying this test, a trial judge must evaluate two prongs: (1) the extent and nature of the pretrial publicity; and (2) the difficulty encountered in actually selecting a jury. *Rolling*, 695 So. 2d at 285.

Here, there was no difficulty in seating a jury. Of the 106

veniremembers questioned, only 34 had ever been exposed to any news coverage about the case. (RST. 386-91, 1161-64, 1184) Those veniremembers who had been exposed were questioned individually, and those who were not qualified in that they could not set aside what they had heard were excused. (RST. 392-532, 1178-1204, 1208-1311) Under these circumstances, there was no basis to change venue. As such, counsel cannot be deemed ineffective for failing to request a change of venue, and the claim was properly summarily denied. *See Patton v. State*, 784 So. 2d 380, 389-90 (Fla. 2000); *Groover v. Singletary*, 656 So. 2d 424 (Fla. 1995); *see also Card v. Dugger*, 911 F.2d 1494 (11th Cir. 1990).

The lower court also properly denied the claim regarding jury sequestration as the entirety of the claim was one sentence. Such conclusory allegations are insufficient to state a claim, and the attempt was properly summarily denied. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998).

Defendant also asserted that his counsel was ineffective for failing to object to references to his prior escapes, misconduct and juvenile record. However, this information was presented by the defense to explain how Defendant's background caused him to be mentally ill. (RST. 2514-16) Moreover, counsel did object when the State discussed the fact that Dr. Fisher was hired by

CCR for a clemency proceeding regarding a death sentence. (RST. 2541-44, 2575, 3260) The escapes were presented because it was relevant to the one hospitalization Defendant ever had. (RST. 2550-51) The prior arrests were relevant to how Defendant came to be at Okeechobee and how Defendant ended up in the hospital. (RST. 2552-53) Dr. Fisher used this evidence as part of his diagnosis of mental illness. (RST. 2554) Defendant objected when the State alluded to the escape in this case. (RST. 2557-59, 2935) He objected when the State mentioned Defendant's sanity. (RST. 2568-69, 2893, 3201-06) He argued against the admissibility of such evidence. (RST. 2602-15) He objected when the State asked if Defendant had to do something very bad to have been placed in juvenile detention at 9. (RST. 2885) When the State asked about Ms. Cary, Defendant objected. (RST. 2917-18, 2986-87) He also objected to Det. Smith testifying about the statements of other witnesses. (RST. 2352-53, 2363-64, 2386-88) As Defendant did object and presented some of this evidence himself to support his claimed mental illness, counsel cannot be deemed ineffective. *Strickland*. The claim was properly denied.

Defendant next asserted that counsel was ineffective for failing to preserve issues for appeal. However, Defendant never alleged how the failure to preserve these issues for appeal

created a reasonable probability of a different result at trial. As this was what Defendant needed to assert to allege prejudice, *Pope v. State*, 569 So. 2d 1241, 1245 (Fla. 1990), the claim was facially insufficient and properly denied. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998).

In a sentence, Defendant asserted that his counsel was ineffective for failing to voir dire the jury adequately. However, Defendant did not assert specifically what counsel should have done or not have done. He did not contend what effect any such action or inaction would have had on the outcome of the resentencing. As such, this claim was facially insufficient and properly summarily denied as such. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998).

Moreover, the record reflects that counsel did extensively voir dire the venire, as did the trial court and the State. (RST. 378-690, 733-1097, 1153-1204, 1208-1311, 1318-1456, 1486-1529, 1552-1672, 1677-1774, 1779-1838) He challenged veniremembers for cause, he used peremptory challenges and he objected to the State's challenges. (RST. 706-23, 1100-29, 1456-82, 1838-76) As counsel did adequately voir dire the venire, this claim was without merit. *Strickland*. The claim was properly denied. Moreover, the trial court found Defendant's asserted reason for challenging Ms. Rivero-Saiz to

be unsupported by the record, and thus, properly refused to allow a peremptory challenge to her. (RST. 1125-27) The claim was properly denied.

While Defendant asserts that counsel was ineffective for failing to request an instruction that the during the course of a kidnapping aggravator merged with HAC and the avoid arrest aggravator merged with the pecuniary gain aggravator, these aggravators do not merge. *See Spann v. State*, 857 So. 2d 845, 856 (Fla. 2003); *Sireci v. Moore*, 825 So. 2d 882, 885-86 (Fla. 2002); *see also Smith v. State*, 424 So. 2d 726 (Fla. 1982). As such, counsel cannot be deemed ineffective for failing to argue that they do. *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 claim was properly denied.

While Defendant asserts that counsel was ineffective for failing to move to strike Dr. Mutter's testimony, Dr. Mutter's testimony rebutted Defendant's experts' testimony that he suffered from a major mental illness, and despite counsel's rigorous attempts to get Dr. Mutter to equate mitigation with insanity, he refused to do so. (RST. 3601-57) As such, counsel cannot be deemed ineffective for failing to make this nonmeritorious motion. *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 claim was properly denied.

Defendant next alleged that counsel was ineffective for failing to object to comments and questions to the defense experts. However, he did not identify the comments or questions, allege how they were improper or how the failure to object resulted in prejudice. As such, the claim was facially insufficient and properly summarily denied. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998).

Defendant also asserted that his counsel was ineffective for failing to litigate the issue of competency properly. However, Defendant raised the issue of competency immediately before trial and argued for a new competency hearing at that time. (RST. 75-102) Counsel also vigorously advocated that Defendant's behavior at the time of trial indicated that he was incompetent. The mere fact that counsel did not persuade the trial court does not show that counsel was ineffective. *See Brown v. State*, 846 So. 2d 1114, 1126 (Fla. 2003); *Haliburton v. Singletary*, 691 So. 2d 466, 472 (Fla. 1997); *Sims v. Singletary*, 622 So. 2d 980, 981 (Fla. 1993); *Douglas v. State*, 373 So. 2d 895, 896 (Fla. 1979). The claim was properly summarily denied.

Defendant next asserted that his counsel was ineffective for failing to claim that his conviction for the murder of Off. Burke was invalid. However, the claim that the conviction is

invalid is without merit. In fact, this Court determined that the *Brady* claim from the Bradford County case was without merit. *State v. Knight*, 866 So. 2d 1195 (Fla. 2003). As such, counsel cannot be deemed ineffective for failing to raise this 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 claim was properly denied.

Moreover, the jury was informed that Defendant was refused a visit with his mother, who had not visited for several years, because he refused to shave before he killed Off. Burke. They were informed that Defendant had received a disciplinary report. They were told that Defendant was kept in a small cell on Q wing as a result of the disciplinary report. (RST. 2233-2301) Dr. Fisher testified that the death of Off. Burke was the result of Defendant's mental illness. (RST. 2555-56) Dr. Carbonell also stated that Defendant was under extreme mental distress when he killed Off. Burke. (RST. 2874-76) Steven Bernstein, the attorney who represented Defendant in the Burke homicide pretrial, testified regarding his inability to relate to Defendant rationally. (RST. 3387-3402) As this information was presented to the jury, counsel cannot be deemed ineffective for failing to present it. The claim was properly denied.

C. THE *AKE* CLAIM WAS PROPERLY DENIED.

Defendant next asserts that the lower court erred in denying his claim that his counsel was ineffective for failing to provide background materials to his mental health professionals. However, this claim was properly denied as refuted by the record and facially insufficient.

In claiming that counsel was ineffective for failing to provide background information to the experts, Defendant did not assert that providing the background information would have affected the experts opinions, much less the outcome of the proceedings. However, if the provision of background material would not change an experts opinion, counsel cannot be deemed ineffective for failing to provide that information. *Breedlove v. State*, 692 So. 2d 874 (Fla. 1997)(no prejudice shown where experts opinions did not change); *Oats v. Dugger*, 638 So. 2d 20 (Fla. 1994). Thus, the claim was facially insufficient and properly summarily denied. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998).

Moreover, the record reflects that counsel did provide background material to the experts. Dr. Fisher testified that he had been provided with 6 boxes full of background materials. (RST. 2511-13) Dr. Corwin stated that he reviewed the report of Defendant's hospitalization. (RST. 2685) Dr. Wells stated that

he had reviewed background information. (RST. 2749-52) Dr. Carbonell stated that she reviewed voluminous records. (RST. 2848) Dr. McClane stated that he reviewed documents. (RST. 2949-51) Dr. Toomer stated that he reviewed numerous documents. (RST. 3038-39) Given the information that counsel did provide to the experts, the lower court's finding that Defendant's conclusory allegations concerning the failure to provide background materials was proper denied. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998). This is particularly true, given that many of the circumstances that Defendant claims were not presented were actually noted by this Court in its direct appeal opinion. *Knight*, 746 So. 2d at 428-29.

Even if counsel had not provided the background material to the experts, the claim was still properly denied. The record reflects that the experts' opinions that Defendant was psychotic at the time he committed the crime were contrary to the facts. Here, Defendant was able to lie in wait for Mr. Gans to arrive at work. He had the presence of mind to realize that he needed a hostage while Mr. Gans went into the bank to get the money. To obtain that hostage, he forced Mr. Gans to drive to his home and get his wife. Defendant had Mr. Gans lure his wife to the car without exiting it and having the chance to escape. Defendant then had Mr. Gans travel to his bank and get the

money. Once the money was obtained, Defendant had the presence of mind to take his victims to a secluded area before he killed them. He had the car driven legally to avoid giving the police reason to stop it. He took the victims behind a hill to prevent anyone from inadvertently seeing the killing. After the victims were dead, Defendant hid himself in a wooded area. However, he selected a section of the wooded area where the tear gas would not be as effective as a nearby wooded area. He covered himself to avoid detection. He took the money and the gun with him.

This extensive evidence of purposeful behavior was inconsistent with the actions of someone who was not in touch with reality. The provision of additional background information about Defendant would not have changed the fact that his actions were goal directed. As such, there is no reasonable probability that providing such background information would have changed the outcome of the resentencing. *Strickland*. The claim was properly denied.

D. THE *BRADY* CLAIM WAS PROPERLY DENIED.

Defendant next asserts that the lower court erred in denying his claim that State violated *Brady v. Maryland*, 373 U.S. 83 (1963). Specifically, Defendant asserted that the State suppressed the alleged *Brady* material from the Bradford County case and the fact that Defendant knew he was being followed.

However, the lower court properly denied these claims.

While Defendant asserts that the State could still be found to have violated *Brady* even though he had possession of the alleged *Brady* material from Bradford County case at the time of resentencing, this is untrue. This Court has held that there is no *Brady* violation, where the defendant already had the information that was allegedly withheld. *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 fact, this Court rejected the *Brady* claim in the Bradford County case because he had the allegedly withheld information in that case. *State v. Knight*, 866 So. 2d 1195 (Fla. 2003). Thus, the claim was properly summarily denied.

This same analysis applies to Defendant’s claim that the State suppressed the fact that he knew he was being followed. Since Defendant allegedly knew he was being followed, Defendant had this information. Thus, the State could not have committed a *Brady* violation. *Maharaj v. State*, 778 So. 2d 944, 954 (Fla.

2000). In fact, Defendant was in a better position than the State to know what he was aware of. As such, the lower court properly denied this claim.

Moreover, while Defendant asserts that he alternatively plead the claim regarding the Bradford County information as a claim of ineffective assistance of counsel, it was not sufficiently plead. The entirety of Defendant's allegation of ineffective assistance of counsel was a single sentence saying that information was not presented to the jury because of prosecutorial misconduct or ineffective assistance of counsel. However, this Court has held that such a cursory allegation is insufficient to raise such a claim. *See Asay v. State*, 769 So. 2d 974, 982 (Fla. 2000). Moreover, as argued in Issue I.B., *supra*, counsel did present evidence regarding Defendant's mental state at the time of the Bradford County murder. As such, he cannot be deemed ineffective for having failed to do so. The claim was properly denied.

E. THE CLAIM REGARDING THE COMMENTS IN CLOSING WAS PROPERLY DENIED.

Defendant next contends that the lower court improperly summarily denied his claim that the State made improper comments in closing and that his counsel was ineffective for failing to object to these comments. However, the lower court properly

denied this claim.

Issues regarding comments by the State are issues that could have and should have been raised on direct appeal. *Koon v. Dugger*, 619 So.2d 246, 247 (Fla. 1993); *Wood v. State*, 531 So.2d 79, 83 (Fla. 1988). As such, they are procedurally barred in post conviction proceedings. *Francis v. Barton*, 581 So. 2d 583 (Fla.), *cert. denied*, 501 U.S. 1245 (1991). The claim was properly denied. Moreover, couching the claim in terms of ineffective assistance of counsel did not lift that bar. *Robinson v. State*, 707 So. 2d 688, 697-99 (Fla. 1998).

Moreover, Defendant did raise issues regarding the State's comments on direct appeal. Initial Brief of Appellant, Case No. 87,783, at 48-51, 71-72. This Court held that the comments were not sufficient to have deprived Defendant of a fair trial. *Knight*, 746 So. 2d at 430-31 & n.10, 433-34. As such, the lower court properly denied this claim as procedurally barred. *Cherry v. State*, 659 So. 2d 1069, 1072-73 (Fla. 1995). Moreover, since this Court has already determined that comments did not deprive Defendant of a fair trial, counsel cannot be deemed ineffective for failing to object to them. *See Chandler v. State*, 848 So. 2d 1031, 1046 (Fla. 2003)(finding on direct appeal that error did not affect outcome precludes finding of prejudice in post conviction proceedings). The claim was properly summarily

denied.

Moreover, the few comments that were not raised on direct appeal were not improper. This Court has held that there is nothing wrong with telling the jury the issue for it to decide is whether the mitigation outweighs the aggravation. *Richardson v. State*, 706 So. 2d 1349, 1356 (Fla. 1998). The State's comments that Defendant was not mentally ill and was simply antisocial were proper comments on whether Defendant had proven mitigation when read in context, as were the comments about Defendant's actions after committing the murders. *Breedlove v. State*, 413 So. 2d 1, 8 (Fla. 1982) The same is true of the State's comment that Defendant committed this crime for pecuniary gain and that Defendant had a prior violent felony conviction, as well as the comment that Defendant started running because he realized the police were present after he had killed the victims. Moreover, it is entirely proper for a factfinder to disregard an expert's opinion because it is inconsistent with the facts. *Walls v. State*, 641 So. 2d 381 (Fla. 1994). As such, commenting to the jury that it should disregard the experts' opinions about the mental mitigators because they were inconsistent with the facts was not improper. The State also did not improper comment on the premeditation required for CCP, as when read in context, the State first spoke

of simply premeditation and then stated that CCP required more planning, such as that presented in the case. (RST. 3800-05) Moreover, the State's argument about the victim's apprehension of death were also proper inferences from the evidence. *Breedlove*. The State's comments about Defendant's background were merely comments on the weigh to be given to the proposed mitigation. As the comments were proper, counsel cannot be deemed ineffective for failing to claim they were not. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. Moreover, counsel did object when the State commented that the jury should not consider Defendant's absence from the proceedings. (RST. 3814-15) The claim was properly denied.

F. THE CLAIM OF JUROR MISCONDUCT WAS PROPERLY SUMMARILY DENIED.

Defendant next asserts that the lower court erred in summarily denying his claim of juror misconduct. However, the lower court properly summarily denied this claim.

Defendant based his claim of jury misconduct on the fact that two juror indicated that they had seen a newspaper story about the case and that three jurors had heard a conversation by

a courthouse employee.[7] Both of these incidents were fully explored at the time of trial, including questioning the jurors at issue and ensure that the information had not been disclosed to the other jurors. (DAT. 2823-39, 3441-75) In fact, Defendant asserted on direct appeal that it was error for the trial court to have excused three of the jurors. Initial Brief of Appellant, Case No. 87783, at 68-70. This Court rejected the claim. *Knight*, 746 So. 2d at 433. The other incident could have, and should have, been raised on direct appeal. *Brown v. State*, 755 So. 2d 616, 637 (Fla. 2000). As such, the lower court properly denied this claim as procedurally barred. *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995).

Moreover, the lower court also properly denied this claim because it is without merit. In *Derrick v. State*, 581 So. 2d 31, 35 (Fla. 1991), this Court adopted a procedure for a trial court to employ when the prejudicial media coverage appears during trial. Under this procedure, the trial court is to inquire of the jurors if any of them have been exposed to the media coverage and if so, whether they can set aside that to which they were exposed. A trial court is only required to

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[7] Four jurors were actually at issue: Ms. Weldon, Ms. Collier, Ms. Zaribaf and Ms. Cunningham. (DAT. 2823-39, 3441-75) Ms. Weldon was exposed to both the newspaper story and the conversation.

excuse those jurors about whom it has a reasonable doubt that they be fair. *Singleton v. State*, 783 So. 2d 970, 973-74 (Fla. 2001).

The trial court in this case followed that procedure. It questioned the entire jury to determine if there had been any exposure to the media coverage. (DAT. 2823) It ensure that those that had been exposed had not discussed the issue with other jurors. (DAT. 2823) It then questioned the exposed jurors individually to discover the extent of the exposure and its influence on the jurors. (DAT. 2823-34) It allowed the parties to question the jurors about these issues.[8] *Id.* It listened to argument of counsel and then determined that it has no reasonable doubt about the jurors' ability to be fair and impartial. (DAT. 2834-39) As such, the trial court did not abuse its discretion regarding this issue. The claim was properly summarily denied.

While Defendant relies on the State's assertion that Ms. Weldon was not being candid with the Court to bolster this claim, it remains meritless. It is the trial court that must

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[8] As the jurors were already questioned about this issue (and the issue concerning the clerk's conversation (RST. 3441-63)), Defendant's assertion that jury interviews need to be conducted is without merit. *See Powell v. Allstate Ins. Co.*, 652 So. 2d 354, 357 (Fla. 1995)(jury interviews must be limited to the scope of the alleged misconduct).

have a reasonable doubt about the juror's ability to be impartial; not the State. *See Singleton*, 783 So. 2d at 973. The trial court found that it believed Ms. Weldon could be fair and impartial. (DAT. 2838-39) Moreover, Ms. Weldon was later removed from the jury after hearing the clerk's conversation, as were Ms. Zaribaf and Ms. Cunningham. (DAT. 3471-75) This Court has held that the appropriate remedy for misconduct limited to certain jurors is to remove those jurors. *Scull v. State*, 533 So. 2d 1137, 1141 (Fla. 1988). Thus, the claim is without merit and was properly summarily denied.

G. THE CLAIM REGARDING RECUSAL OF THE TRIAL COURT WAS PROPERLY SUMMARILY DENIED.

Defendant next asserts that the lower court erred in summarily denying his claim that the trial court was biased against him. However, the lower court properly summarily denied this claim.

This claim was properly denied because it is procedurally barred. Defendant's claim that the trial court was biased was based on the trial court's ruling that Defendant forfeited his right to be present by willful misconduct and a statement the trial court made concerning a scheduling problem with one of Defendant's experts. Both of these alleged bases for recusal have been known since the time of trial. Grounds from recusing

a judge that are not raised within 10 days of when the defendant became aware of them are waived. *Willacy v. State*, 696 So. 2d 693 (Fla. 1997). As more than 10 days past between the time of trial and the filing of this claim, it was waived. The lower court properly summarily denied the claim.

Moreover, the claim was also without merit as a matter of law. The first alleged basis for the recusal of the trial court is that the trial court found Defendant competent[9] and his disruption of the proceedings intentional.[10] However, such findings are nothing more than rulings of the court. This Court has held that adverse rulings of a court are not grounds for disqualification. *Rivera v. State*, 717 So. 2d 477, 480 (Fla. 1998); *see also Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998)(even harshly worded rulings not a basis for recusal). The claim was properly denied.

The same is true regarding the second alleged basis for recusal. The trial court had instructed the parties from the day before trial, and continuing throughout trial, that their

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[9] The ruling of the trial court that Defendant refers to on page 2497 of the trial transcript was also a finding that Defendant was competent and his misconduct intentional. (DAT. 2496-99)

[10] As argued in Issue I.H., *infra*, the record refutes Defendant's assertion that the trial court predetermined this issue.

witnesses needed to be available to testify such that delays were not occasioned. (DAT. 167-68, 1883-85, 2019-24) Despite this order, Defendant indicated that he was having difficulty getting Dr. Rothenberg to come to court. (DAT. 2452, 2500-01, 2544-45, 2664-65) When the issue arose again for the third straight day, the trial court inquired why there was a problem scheduling Dr. Rothenberg. (DAT. 2820-21) Defendant stated that Dr. Rothenberg wished to testify at a particular time and that he did not wish to present the evidence in that order. (DAT. 2821) The trial court responded:

> Doctor Rothenberg is a royal pain in my neck. You know he is really pushing it. These proceedings are not made for his convenience.

(DAT. 2821) Given this context, the trial court was merely enforcing its scheduling order and not evidencing bias against Defendant. *Ragsdale*, 720 So. 2d at 207. The comment does not state a basis for a disqualification of the trial court. The claim was properly summarily denied.

H. THE CLAIM REGARDING THE RIGHT TO BE PRESENT WAS PROPERLY SUMMARILY DENIED.

Defendant next contends that the lower court erred in summarily denying his claim that he was denied his right to be present. However, this claim has not been adequately presented in this appeal. Moreover, the claim was properly summarily

denied.

Initially, the State would note that Defendant has not properly presented this issue. Defendant's entire presentation of this issue in his brief is:

> [Defendant] alleged that his absence from the courtroom was due to mental illness and that given the opportunity he could present evidence to support his claim. This issue involved issues of disputed fact and was not conclusively refuted by the record. The lower court erred in denying an evidentiary hearing on this claim.

Initial Brief at 49. The lower court denied this claim because it was procedurally barred and refuted by the record.[11] (PCR. 468-70) Defendant makes no attempt to explain why the lower court's ruling was incorrect. However, this Court has held that such a summary presentation of an issue is insufficient to raise an issue. *See Anderson v. State*, 822 So. 2d 1261, 1268 (Fla. 2002). The denial of the claim should be affirmed.

Moreover, the lower court's determination that this claim was procedurally barred was proper. This Court had held that claims regarding a defendant's right to be present are issues that could have and should have been raised on direct appeal. *Vining v. State*, 827 So. 2d 201, 217 (Fla. 2002). As such, the lower court properly denied this claim as procedurally barred.

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[11] The lower court also denied a claim that Defendant's mental illness rendered him incompetent as procedurally barred, facially insufficient and refuted by the record. (PCR. 472)

Moreover, the lower court also properly summarily denied this claim because it was facially insufficient. Defendant's allegation with regard to this claim below was:

> Due to [Defendant's] mental illness, he was unable to conduct himself appropriately in the courtroom. Consequently the judge had [Defendant] removed from all of the re-sentencing proceedings. The re-sentencing judge predetermined that [Defendant's] actions were the product of his will rather than mental illness and failed to conduct an adequate competency hearing. Consequently, [Defendant] was wrongfully precluded from being present during voir dire, bench conferences, testimony and the entire re-sentencing proceeding. At an evidentiary hearing undersigned counsel will present non record evidence and expert testimony that due to [Defendant's] mental illness he was not competent and that re-sentencing counsel was ineffective for failing to present this evidence.

(PCR. 306) As can be seen from the forgoing, Defendant's allegations were conclusory. Conclusory allegations are insufficient to state a claim for post conviction relief. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998). As such, the lower court properly summarily denied the claim.

Moreover, the claim is conclusively refuted by the record. Contrary to Defendant's assertions, the trial court did not predetermine that Defendant's conduct was willful and did hold adequate competency hearings during the proceedings. Prior to trial, the trial court considered the issue of Defendant's competency twice. (RSR. 6, 677-79, 699-701, 708-27, 1675-1776,

1800-2000) The trial court conducted an extensive competency hearing during which it heard from 4 experts (who had reviewed the prior reports from numerous experts and Defendant's prison and jail mental health experts) and considered the reports of another experts. (RSR. 1673-1776, 1800-2000)

During this hearing, the trial court had the opportunity to see Defendant's obstructive behavior. Defendant jumped from his chair, ran to the prosecutor, fell to the ground and claimed to be being attacked. (RSR. 1892-95) Dr. Jacobson, who observed the behavior, did not believe that it was indicative of mental illness. (RSR. 1896-97) Instead, he characterized it as "dramatic behavior." (RSR. 1897) He stated that it was an attempt to fake psychosis and malinger. (RSR. 1898) After considering this evidence and its own observation of Defendant, the trial court found that Defendant was competent and that the outburst was willful. (RSR. 1995)

On the day before trial, Defendant argued to the trial court that Defendant had always been mental disturbed and informed the trial court of the history of evaluations of Defendant. (RST. 26-59) Defendant thereafter asked the trial court to reconsider its ruling on Defendant's competence, which the trial court refused to do without new evidence. (RST. 75-102)

When Defendant began to disrupt the proceedings, the trial

court did not immediately have Defendant removed from the courtroom. (RST. 174-203) Instead, the trial court had Defendant evaluated by a psychiatrist, heard the doctor's testimony that Defendant's conduct was willful and not the result of mental illness, heard the testimony of two jail guards that Defendant behaved normally outside of court and considered argument of counsel. (RST. 181-244) Only after considering all of this testimony did the trial court find Defendant competent and his actions willful. (RST. 245-46)

Even then, the trial court did not remove Defendant from the courtroom. Instead, the trial court proceeded to commence voir dire while Defendant occasionally shouted out loud. (RST. 249-62) The trial court cautioned Defendant against continuing such behavior and gave Defendant time to consider his options over the lunch recess. (RST. 262-63)

After the lunch break, Defendant instead escalated his misbehavior by speaking to the trial court about waiving his rights but refusing to be colloquied about which rights he wanted to waive and his understanding of the waiver. (RST. 266-85) When the trial court attempted to proceed, Defendant continually interrupted the proceedings until the trial court had him removed. (RST. 285-94)

During the middle of trial, Defendant presented the

testimony of Dr. Fisher on the issue of competence. (RST. 2475-85) Dr. Fisher believed that Defendant's alleged delusions caused him to be unable to consult with counsel. *Id.* After considering this testimony and the argument of counsel, the trial court again found Defendant competent. (RST. 2490-99)

As can be seen from the foregoing, the record conclusively establishes that Defendant was competent at the time of trial and that his misbehavior was willful. The record also conclusively establishes that the trial court did not predetermine that Defendant's conduct was willful and instead reached that conclusion based on the consideration of the evidence presented. As this Court stated on direct appeal:

> [T]he judge's actions were consistent with this Court's case law, as well as United States Supreme Court precedent. *See Illinois v. Allen*, 397 U.S. 337, 343, 25 L. Ed. 2d 353, 90 S. Ct. 1057 (1970) ("The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case."); *Valdes v. State*, 626 So. 2d 1316, 1321 (Fla. 1993) (pronouncing that "trial judges must be given sufficient discretion to meet the circumstances of each case where a defendant disrupts the proceedings"); *Diaz v. State*, 513 So. 2d 1045, 1047 (Fla. 1987) (applying Allen in finding that the "court's obligation to maintain safety and security in the courtroom outweighs, under proper circumstances, the risk that the security measures may impair the defendant's presumption of innocence"); *accord Joseph v. State*, 625 So. 2d 109 (Fla. 3d DCA 1993).

* * * *

> [T]he judge acted within his discretion in repeatedly removing Knight from the courtroom, especially considering the testimony of numerous guards and jailhouse officials that Knight's out-of-court demeanor was completely at odds with his in-court histrionics.

Knight, 746 So. 2d at 436. The claim was properly summarily denied.

I. THE CONFLICT CLAIM WAS PROPERLY SUMMARILY DENIED.

Defendant next contends that the lower court erred in summarily denying his claim that his counsel labored under a conflict of interest. However, the lower court properly summarily denied this claim as it was facially insufficient.

While Defendant asserts that the lower court erred in denying this claim because it was not conclusively refuted by the record, this is untrue. The lower court denied this claim because it was facially insufficient in that Defendant did not allege an adverse affect that allegedly stemmed from the alleged conflict of interest and that the asserted conflict of interest was not a conflict of interest as a matter of law. (PCR. 470) As the lower court did not find that the claim was conclusively refuted by the record, it did not err by doing so.

Moreover, the lower court did properly find that the claim was facially insufficient. In order to obtain post conviction

relief based on a conflict of interest, a defendant must show that his attorney was operating under an actual conflict of interest and that the conflict adversely affected his representation. *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980). A mere "possible conflict of interest is insufficient to impugn a criminal conviction." *Id.*; *see also Quince v. State*, 732 So. 2d 1059 (Fla. 1999); *Hernandez v. State*, 750 So. 2d 50, 55 (Fla. 3d DCA 1999). In order to make this showing, the defendant must identify specific lapses in representation from the conflict of interest. *Quince*, 732 So. 2d at 1065. In fact, the United States Supreme Court recently defined an actual conflict of interest as "a conflict *that affected counsel's performance* -- as opposed to a mere theoretical division of loyalties." *Mickens v. Taylor*, 535 U.S. 162, 171 (2002). The Court also noted that the conflict had to "significantly affect[] counsel's performance" before the requirement for showing prejudice under *Strickland* would not apply. *Id.* at 173. As such, while Defendant is correct that he did not have to allege *Strickland* prejudice, he was required to identify some adverse affect that the alleged conflict of interest had on his attorney's performance.

However, neither in the trial court or in this Court has Defendant identified any adverse affect that the alleged

conflict of interest had on his counsel's performance. In fact, Defendant has not even alleged in a conclusory fashion that the alleged conflict had an adverse affect on the representation. As such, the claim was facially insufficient and was properly summarily denied. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998).

Moreover, counsel's alleged fear of Defendant did not even constitute a conflict of interest as a matter of law. Claims of conflict of interest must generally be based on dual representation and not on conflicts with an attorney's self interest. *See Beets v. Scott*, 65 F.3d 1258, 1270-71 (5th Cir. 1995); *Bonin v. Calderon*, 59 F.3d 815, 826 (9th Cir. 1995). In fact, the Court noted in *Mickens* that it had not extended the definition of a conflict of interest beyond the issue of multiple representation and indicated that such a extension might not be warranted. *Mickens*, 535 U.S. at 174-76. Here, the alleged conflict of interest was based on counsels' concern for their own safety. (RSR. 1895-96, RST. 57) As such a fear does not concern any dual representation, it does not support a claim of conflict of interest. Thus, the lower court properly summarily denied this claim.

J. THE SUMMARY DENIAL OF THE CUMULATIVE ERROR CLAIM WAS PROPER.

Defendant next asserts that the lower court erred in denying his claim of cumulative error. However, the lower court's summary denial of this proper. This Court has held that where the individual errors alleged are either procedurally barred or without merit, the cumulative error claim also fails. *Downs v. State*, 740 So. 2d 506, 509 n.5 (Fla. 1999). As argued throughout this brief, the lower court properly found the individual claims procedurally barred and without merit. As such, the lower court properly summarily denied this claim.

II. DEFENDANT'S *RING* CLAIM WAS PROPERLY SUMMARILY DENIED.

Defendant next asserts that the trial court erred in denying his claim that his death sentence violated *Ring v. Arizona*, 536 U.S. 584 (2002), because the jury did not unanimously recommend death. However, this claim was properly summarily denied.

In *Schriro v. Summerlin*, 124 S. Ct. 2519 (2004), the Court held that *Ring* did not apply retroactively to cases that were final when *Ring* issued. Defendant's sentence became final on November 8, 1999, when the United States Supreme Court denied certiorari from resentencing appeal. *Knight v. State*, 528 U.S. 990 (1999). *Ring* was not issued until June 24, 2002. As such, Defendant is entitled to no relief. The lower court properly

summarily denied this claim.

Moreover, this Court has repeatedly rejected *Ring* challenges to Florida's capital sentencing scheme, particularly in cases in which the death sentence was supported by the prior violent felony aggravator, as is true here. *E.g.*, *Reed v. State*, 29 Fla. L. Weekly S156 (Fla. Apr. 15, 2004). As such, the lower court properly summarily denied this claim. It should be affirmed.

III. THE CLAIM REGARDING THE ALLEGED USE OF NONSTATUTORY AGGRAVATION WAS PROPERLY DENIED.

Defendant next asserts that the trial court erred in denying his claim that State improperly presented nonstatutory aggravation. However, the lower court properly denied this claim as procedurally barred.

On direct appeal, Defendant asserted that the trial court erred in allowing the State to present nonstatutory aggravation and in finding of HAC based on speculation and that consideration of the Bradford County conviction was improper. Initial Brief of Appellant, Florida Supreme Court Case No. 87783, at 48-51, 74-76, 84-86. This Court found that these claims did not present reversible error. *Knight*, 746 So. 2d at 431 n.10, 434, 435-36. As these issues were raised, these claims are procedurally barred. *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995). 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). To the extent this claim was not raised on direct appeal, the claim is still procedurally barred because the claim could have and should have been raised on direct appeal. *Francis v. Barton*, 581 So. 2d 583 (Fla.), *cert. denied*, 501 U.S. 1245 (1991). Thus, the lower court properly denied this claim as procedurally barred.

IV. THE CLAIM REGARDING THE AGGRAVATORS WAS PROPERLY DENIED.

Defendant next contends that the trial court erred in denying his claim that the trial court erred in instructing the jury on the aggravating circumstances. Specifically, Defendant asserted that the evidence was insufficient to support an instruction on CCP and HAC, that the jury should not have been allowed to consider his murder from Bradford County, that the instruction on the pecuniary gain aggravator was vague, that the jury should not have been instructed on the during the course of a kidnapping aggravator because he was not charged with kidnapping, that the avoid arrest aggravator doubled with the "flight" aggravator and that an automatic aggravator was considered in this case. However, the lower court properly

summarily denied this claim as procedurally barred, facially insufficient and without merit as a matter of law.

Issues regarding the propriety of the jury instructions regarding aggravating circumstances are issues that could have and should have been raised on direct appeal. *Thompson v. State*, 759 So. 2d 650, 667 (Fla. 2000); *Valle v. State*, 705 So. 2d 1331, 1335 (Fla. 1997). 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). In fact, Defendant raised most of the claims he now raises on direct appeal. Initial Brief of Appellant, Case No. 87783, at 73-81, 84-85, 90-93, 95-96. This Court rejected all of these claims. *Knight*, 746 So. 2d at 434-36. Thus, the claim are procedurally barred. *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995). The lower court properly summarily denied this claim and should be affirmed.

Moreover, the lower court also properly denied this claim as without merit as a matter of law. This Court found the evidence sufficient to support CCP on direct appeal. *Knight*, 746 So. 2d at 436. As such, Defendant's claim that the trial court erred in instructing the jury on the aggravator because the evidence was insufficient was properly summarily denied.

This Court found that the error in instructing the jury on,

and finding, HAC was harmless. *Id.* at 435-36. While Defendant asserts that such an error cannot be harmless, both this Court and the United States Supreme Court have held that instructing a jury on an aggravator that is not supported by sufficient evidence can be harmless error. *Sochor v. Florida*, 504 U.S. 527, 538 (1992); *Foster v. State*, 679 So. 2d 747, 753-74 (Fla. 1996); *Johnson v. Singletary*, 612 So. 2d 575, 576 (Fla. 1993). As such, this claim was properly summarily denied.

While Defendant asserts that it was improper to allow the jury to consider his Bradford County murder conviction, this is untrue. This Court specifically rejected this claim when it was raised on direct appeal. *Knight*, 746 So. 2d at 434. Moreover, the facts presented about this conviction were true, and counsel did present evidence concerning Defendant's alleged mental state at the time of that crime. (RST. 2233-2301, 2555-56, 2874-76, 3387-3402) As such, this claim was properly denied.

While Defendant asserts that the jury instruction on the pecuniary gain aggravator was flawed because it did not inform the jury that the sole motive for the murder had to be financial gain, the instruction was proper. This Court has held that financial gain does not have to be the sole motive for the murder for the pecuniary gain aggravator to apply, that the finding of pecuniary gain is not inconsistent with the finding

of avoid arrest and that the aggravator and instruction thereon are not unconstitutionally vague. *Card v. State*, 803 So. 2d 613, 625, 628 & n.16 (Fla. 2001). As such, this claim was properly summarily denied.

While Defendant asserts that it was improper to instruct the jury on the during the course of a kidnapping aggravator because he was not charged or convicted of kidnapping, this is not true. This Court has directly held, "The state need not charge and convict of felony murder or any felony in order for the court to find the aggravating factor of murder committed during the course of a felony." *Occhicone v. State*, 570 So. 2d 902, 905 (Fla. 1990); *see also Pietri v. State*, 644 So. 2d 1347, 1353 n.11 (Fla. 1994). As such, the jury was properly instructed on this aggravator.

Defendant also contends that the form of the instruction allowed the jury to find the aggravator based both upon flight and the commission of a kidnapping. However, this is untrue. The instruction provided that the jury could consider as an aggravating factor that Defendant killed during the course of a kidnapping. (RSR. 1473) It explained that it did not matter when during the kidnapping the murders occurred. *Id.* Defendant's claim appears to be based on the mere use of the word flight in the instruction. However, it is well settled

that:

> [A] single instruction cannot be considered alone, but must be considered in light of ***all*** other instructions bearing upon the subject, and if, when so considered, the law appears to have been fairly presented to the jury, the assignment on the instruction must fail.

Higginbotham v. State, 19 So. 2d 829, 830 (Fla. 1944)(emphasis added); *see also Esty v. State*, 642 So. 2d 1074, 1080 (Fla. 1994). When the instruction is considered as a whole, the instruction was proper. Thus, the claim was properly summarily denied.

Defendant next contends that the instruction on the avoid arrest aggravator was improper because it permitted double counting with the "flight" aggravator. However, as there was no flight aggravator, there was no improper doubling. As such, this meritless claim was properly summarily denied.

While Defendant asserts that the imposition of the death penalty is based on an unconstitutional automatic aggravator, this is untrue. The fact that an aggravator, such as the during the course of a felony aggravator, is found in the guilt phase does not render that aggravator unconstitutional. *Sims v. State*, 681 So. 2d 1112 (Fla. 1996); *Kearse v. State*, 662 So. 2d 677 (Fla. 1995); *see also Lowenfield v. Phelps*, 484 U.S. 231 (1988). As such, the claim is without merit and was properly summarily denied.

V. THE CLAIM REGARDING THE ALLEGED *CALDWELL* ERROR WAS PROPERLY SUMMARILY DENIED.

Defendant next asserts that the lower court erred in denying his claim that comments in his case violated *Caldwell v. Mississippi*, 472 U.S. 320 (1985), and the jury was not properly instructed on a tie vote. However, these claims were properly summarily denied as procedurally barred, facially insufficient and without merit.

Claims of *Caldwell* error and claims of ineffective assistance of counsel based on alleged *Caldwell* errors are procedurally barred in post conviction motions. *Oats v. Dugger*, 638 So. 2d 20, 21 & n.1 (Fla. 1994). The same is true of issues regarding the propriety of jury instructions. *Thompson v. State*, 759 So. 2d 650, 667 (Fla. 2000); *Valle v. State*, 705 So. 2d 1331, 1335 (Fla. 1997). As such, this claim was properly be denied.

Moreover, the claim regarding the tie vote was properly denied because it is facially insufficient. The entirety of Defendant's allegation on this claim below was, "The court also failed to instruct the jury that a 6-6 vote was a life sentence." (PCR. 276) However, such conclusory allegations are facially insufficient to state a claim. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998). The claim was properly summarily

denied.

Moreover, under *Caldwell*, error is committed when a jury is misled regarding its responsibility for a sentencing decision so as to diminish its sense of responsibility for that decision. However, "[t]o establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Dugger v. Adams*, 489 U.S. 401, 407 (1989). This Court has recognized that the jury's penalty phase decision is merely advisory and that the judge does make the final sentencing decision. *Combs v. State*, 525 So. 2d 853, 855-58 (Fla. 1988). Defendant's reliance on *Mann v. Dugger*, 844 F.2d 1446 (11th Cir. 1988), which the Eleventh Circuit has recognized as being overruled by the United States Supreme Court, *Davis v. Singletary*, 119 F.3d 1471, 1482 (11th Cir. 1997), does not change this result. Defendant's reliance on *Ring* also does not change this result. *Patton v. State*, 29 Fla. L. Weekly S243, S246 (Fla. May 20, 2004). As such, informing the jury that they were recommending and advisory sentence and that the trial court would make the final determination of sentence does not violate *Caldwell*. The claim was properly summarily denied.

Additionally, the trial court expressly stated to the jury

when it was instructing them, "If the vote is six to six, it means a life recommendation." (RST. 3926) The trial court also read the standard jury instructions on the voting procedure. (RSR. 1483, RST. 3928); Fla. Std. Jury Instr. (Crim.) Penalty Phase Proceedings. As such, Defendant's claim that the trial court did not instruct the jury on a tie vote is conclusively refuted by the record. It was properly summarily denied.

VI. THE LOWER COURT PROPERLY DENIED THE BURDEN SHIFTING CLAIM.

Defendant next asserts that the lower court erred in denying his claim that the jury instructions shifted the burden to him. However, this claim was properly summarily denied.

On direct appeal, Defendant asserted that the jury instruction that the mitigation had to outweigh the aggravation unconstitutionally shifted the burden of proof. Initial Brief of Appellant, Florida Supreme Court Case No. 87783, at 94-95. This Court rejected this claim summarily. *Knight*, 746 So. 2d at 429 n.6 & 7 ("Finally, claim (16) has been consistently rejected by this Court, most recently in *Richardson v. State*, 706 So. 2d 1349, 1356 (Fla. 1998).") As this issue was raised and rejected on direct appeal, it does not provide a basis for post conviction relief. *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995). Defendant's reliance on *Ring* does not change this

result. *Patton v. State*, 29 Fla. L. Weekly S243, S246 (Fla. May 20, 2004). As such, the claim was properly summarily denied.

VII. THE CLAIM THAT THE AGGRAVATORS WERE VAGUE AND UNPROVEN WAS PROPERLY SUMMARILY DENIED.

Defendant next asserts that the lower court erred in denying his claim that the aggravating circumstances are unconstitutionally vague and that the evidence was insufficient to support them. However, the lower court properly summarily denied this claim.

Claims that the aggravators are vague and overbroad and that the evidence was insufficient to support the aggravators are issues that could have and should have been raised on direct appeal. *Thompson v. State*, 759 So. 2d 650, 667 (Fla. 2000); *Valle v. State*, 705 So. 2d 1331, 1335 (Fla. 1997). 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). In fact, Defendant alleged on direct appeal that HAC and CCP were unconstitutionally vague and that the evidence was insufficient to support the aggravators. Initial Brief of Appellant, Florida Supreme Court Case No. 87783, at 77-81, 84-86, 90-94. As such, this issue is procedurally barred. *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995). The claim was properly

summarily denied.

Even if the claim was not procedurally barred, the claim was still be properly summarily denied as facially insufficient. Defendant did not assert which aggravators were allegedly vague and overbroad or why that might be true. (PCR. 279-80) He did not assert which aggravating circumstances were allegedly not proven. *Id.* Instead, Defendant merely asserted in conclusory terms that certain unspecified aggravating circumstances were vague, overbroad and not proven. *Id.* As such, this claim is facially insufficient. *Griffin v. State*, 866 So. 2d 1, 14-15 (Fla. 2003). The claim was properly summarily denied.

Even if the claim was not procedurally barred and was facially sufficient, the claim would still have properly been summarily denied. On direct appeal, this Court found that HAC and CCP were not vague. *Knight*, 746 So. 2d at 429 n.7, 434. This Court found the evidence was sufficient to support all of the aggravators except HAC but found the error in finding HAC harmless. *Id.* at 434-36. This Court has previously rejected vagueness and overbreath challenges four remaining aggravators. *Card v. State*, 803 So. 2d 613, 628 (Fla. 2001)(pecuniary gain, avoid arrest, during the course of a felony); *Gaskin v. State*, 737 So. 2d 509, 513 n.7 (Fla. 1999)(prior violent felony). As such, this claim has no merit and was properly summarily denied.

VIII. THE CLAIM REGARDING COMMENTS IN VOIR DIRE WAS PROPELY DENIED.

Defendant next asserts that the lower court erred in denying his claim regarding comments during voir dire. Specifically, Defendant had asserted that the State commented that a death recommendation was required and that the weighing process was a counting process. However, the lower court properly summarily denied this claim.

Issues regarding comments by the State are issues that could have and should have been raised on direct appeal. *Robinson v. State*, 707 So.2d 688, 697-99 (Fla. 1998); *Koon v. Dugger*, 619 So. 2d 246, 247 (Fla. 1993); *Wood v. State*, 531 So. 2d 79, 83 (Fla. 1988). As such, they are procedurally barred in post conviction proceedings. *Francis v. Barton*, 581 So. 2d 583 (Fla.), *cert. denied*, 501 U.S. 1245 (1991). The lower court properly summarily denied this claim.

Moreover, the claim was also properly denied as facially insufficient. Defendant never cited to any comment that was allegedly improper. (PCR. 285-89) While he claimed that his counsel was ineffective for failing to object to the comments that he did not specify, he did not allege how the failure to object created a reasonable probability that the result of the resentencing would have been different had counsel objected.

Instead, he asserted that counsel failed to preserve the issue for appeal. However, as this was a claim of trial counsel's alleged ineffectiveness, Defendant needed to show that the result of the trial would have been different. *See Pope v. State*, 569 So. 2d 1241, 1245 (Fla. 1990). As such, the claim was facially insufficient and was properly summarily denied. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998).

Moreover, the claim was also summarily denied as it is without merit. In *Franqui v. State*, 804 So. 2d 1185, 1191-94 (Fla. 2001), the Court held that only those comments that informed the jury that it must, or was required by law to, return a recommendation of death if the aggravators outweighed the mitigators were improper. The Court did not hold that comments that informed the jury that it should do so were improper. Such comments are, in fact, not improper because "should" indicates that something is discretionary and not mandatory. *State v. Thomas*, 528 So. 2d 1274, 1275 (Fla. 3d DCA 1988); *University of South Florida v. Tucker*, 374 So. 2d 16, 17 (Fla. 2d DCA 1979). As this was the nature of the comments, they were not improper. (RST. 907-09, 1736-49) Since these comments were not improper, counsel cannot be deemed ineffective for failing to claim that they were. *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 claim was properly summarily denied.

Even if the State had indicated that a death recommendation was required, the claim should still be denied. Defendant has not demonstrated that there is a reasonable probability that he would not have been sentenced to death had counsel objected to any such comment. Under *Franqui*, Defendant would not have been entitled to a curative instruction based on these comments. *Franqui*, 804 So. 2d at 1194. Moreover, the jury was given the standard jury instruction on the weighing process during final instructions. As this Court held in *Franqui* and *Henyard v. State*, 689 So. 2d 239 (Fla. 1996), brief comments during voir dire are harmless beyond a reasonable doubt. As such, Defendant cannot show that there is a reasonable probability that he would not have been sentenced to death had counsel objected to the comments. *Strickland*. The claim was properly summarily denied.

Moreover, while Defendant asserts that the State commented to the jury that the weighing process was merely a counting process, this is untrue. Instead, the record reflects that the State explained that the weighing process was qualitative not quantitative and inquired about the veniremembers' ability to accept this concept. (RST. 862-63, 1710-11) As the State did not improperly comment on the weighing process, counsel cannot

be deemed ineffective for failing to make the nonmeritorious claim that it did. *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.

IX. THE CLAIM THAT THE FLORIDA CAPITAL PUNISHMENT STATUTE IS UNCONSTITUTIONAL WAS PROPERLY SUMMARILY DENIED.

Defendant next asserts that the lower court erred in denying his claim that Florida's capital sentencing statute is unconstitutional. He contends that the statute fails to prevent the arbitrary and capricious imposition of the death penalty, that execution by either electrocution or lethal injection is cruel and unusual, that the statute does not sufficiently define "outweigh," "sufficient aggravating circumstances," or the individual aggravating circumstances, that the jury instructions on the aggravating circumstances are vague and overbroad and that there is a presumption of death.

However, this claim is procedurally barred as a claim that could have and should have been raised on direct appeal. *Byrd v. State*, 597 So. 2d 252 (Fla. 1992). Moreover, the claim is entirely devoid of merit, as it has been repeatedly rejected by the Florida Supreme Court. *Johnson v. State*, 660 So. 2d 637, 647-48 (Fla. 1995); *Wuornos v. State*, 644 So. 2d 1012, 1020 & n.5 (Fla. 1994); *Fotopolus v. State*, 608 So. 2d 784, 794 & n.7

(Fla. 1992); *Arango v. State*, 411 So. 2d 172, 174 (Fla. 1982). As such, this claim was properly summarily denied.

X. THE LOWER COURT PROPERLY DENIED THE CLAIM THAT DEFENDANT IS INSANE TO BE EXECUTED.

Defendant next asserts he will be insane to be executed in the future. However, this claim cannot be raised until an execution is imminent. *See Herrera v. Collins*, 506 U.S. 390, 405-06 (1993)("[T]he issue of sanity [to be executed] is properly considered in proximity to the execution."); *Martinez-Villareal v. Stewart*, 118 F.3d 625 (9th Cir. 1997)(same), *aff'd*, 523 U.S. 637 (1998). Here, Defendant's execution is not imminent; no warrant had been issued for his execution, and no date has been set. As such, this claim is not ripe for adjudication at this juncture and was properly summarily denied.

XI. ISSUE REGARDING THE PUBLIC RECORDS IS INSUFFICIENTLY ASSERTED.

Defendant asserts in an unnumbered claim that this Court should review the materials submitted to this Court under seal to determine if it contains any *Brady* material. However, Defendant offers no explanation or argument for why the lower court erred in determining that Defendant was not entitled to disclosure of the materials. He does not even explain what *Brady* material he expects to be present in the material. However, this Court has held that "[t]he purpose of an appellate

brief is to present arguments in support of the points on appeal. Merely making references to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed waived." *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990). As Defendant has not presented any argument in support of a claim that the lower court did not fulfill its due to conduct a proper *in camera* inspection, this claim has been waived and should be denied.

CONCLUSION

For the foregoing reasons, the lower court's denial of the motion for post conviction relief should be affirmed.

Respectfully submitted,

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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 Heidi E. Brewer, 2006 Atapha Nene, Tallahassee, Florida 32301, this 2nd day of August 2004.

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CERTIFICATE OF COMPLIANCE

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

_____
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