IN THE SUPREME COURT OF FLORIDA

PATRICK C. HANNON,

Appellant,

vs.

CASE NO. SC03-893
Lower Tribunal No. 91-1927

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

KATHERINE V. BLANCO
Assistant Attorney General
Florida Bar No. 0327832
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

FEDERAL CASES

OTHER AUTHORITIES

STATEMENT REGARDING RECORD CITATIONS

The appellate record from Hannon's trial and direct appeal, Florida Supreme Court Case No. 78,678, will be designated as "R followed by the appropriate page number. References to the instant postconviction record will be designated as "PCR"

followed by the appropriate volume and page number.

STATEMENT OF THE CASE AND FACTS

On March 27, 1991, Patrick Hannon and Ronald Richardson were charged by superseding indictment with the premeditated murder of Brandon Snider (Count One) and Robert Carter (Count Two). (R1683-1685). Due to their differing speedy trial expiration dates and Richardson's request for a continuance, their cases were ultimately severed for trial. Hannon's jury trial began on July 15, 1991 and concluded on July 24, 1991. (R1634; 1657-1658; 1783-1784; 1792).

During the trial, Richardson reached a plea agreement with the State in which he agreed to testify and enter a plea of guilty to a charge of accessory after the fact in exchange for a five-year sentence. Richardson was the State's final witness at trial. (R1139-1218). On July 23, 1991, the jury returned guilty verdicts on both counts of murder in the first degree. (R1781-1782). On July 24, 1991, the jury recommended a sentence of death on both counts, by a unanimous vote. (R1587-1634; 1783-1784). On August 5, 1991, the trial court imposed the two death sentences.

On direct appeal, Hannon v. State, 638 So. 2d 39 (Fla. 1994), this Court set forth the pertinent facts as follows:

> Around Christmas 1990, Brandon Snider, a resident of Tampa, went to Indiana to visit relatives. While there, he went to the home of Toni Acker, a former girlfriend, and vandalized her bedroom. On January 9,

1991, Snider returned to Tampa.

On January 10, 1991, Hannon, Ron Richardson, and Jim Acker went to the apartment where Snider and Robert Carter lived. Snider opened the door and was immediately attacked by Acker, who is Toni Acker's brother. Acker stabbed Snider multiple times. When Acker was finished, Hannon cut Snider's throat. During the attack, Snider's screams drew the attention of his neighbors. They also drew the attention of Carter, who was upstairs. Hearing the screams, Carter came downstairs and saw what was happening. He then went back upstairs and hid under his bed. Hannon and Acker followed Carter upstairs. Then Hannon shot Carter six times, killing him.

In July 1991, Hannon was brought to trial for the murders of Snider and Carter. During the trial, Richardson reached an agreement with the State. He pled guilty to being an accessory after the fact and testified against Hannon. Hannon was found guilty of both murders. After a penalty proceeding, the jury unanimously recommended death. The trial court found the following aggravating circumstances applicable to both murders: (1) previous conviction of a violent felony (the contemporaneous killings); (2) the murders were committed during the commission of a burglary; and (3) the murders were heinous, atrocious, or cruel. Sec. 921.141(5)(a), (d), and (h), Fla. Stat. (1991). As to Carter, the court found the additional aggravating factor that the murder was committed to avoid or prevent a lawful arrest. Sec. 921.141(5)(e), Fla. Stat. (1991). In mitigation, the court considered testimony from Hannon's mother and father that Hannon was not a violent person. Also, the court considered the fact that Hannon's original co-defendant, Richardson, was no longer facing the death penalty. The trial court found that the aggravating factors outweighed the mitigating factors and followed the jury's recommendation, imposing separate death sentences on Hannon for the murders of Snider and Carter.

Hannon, 638 So. 2d at 41 (footnotes omitted)

The State's case at trial included both direct and circumstantial evidence. Among other things, the State

presented the testimony of the victims' neighbors who heard the attacks (R270-271, 289-290, 316-317); neighbors/college students who witnessed the three suspects leaving the scene and who noticed, in particular, the "big" man (R296; 303-307; 344-349); law enforcement and medical personnel who observed the blood-spattered apartment (R424-428; 627, 651, 656-661; 695, 702-717; 948-952), the medical examiner who examined the bodies of the murdered victims (R501-519); jail inmates who testified about the defendant's incriminating statements (R866-69; 876-78; 880-87; 889-90; 892-905); photographs of the crime scene (R1092-1093); fingerprint evidence of the defendant's palmprint and fingerprint (R627; 650-659); Robin Eckert, one of the women who had been at Richardson's home on January 10, 1991 (R790-797; 805-813); and Judith Bunker, a forensic consultant in blood stain pattern analysis and crime scene reconstruction. (R1072-1127). On Friday, the last day of the State's scheduled case, the prosecutors learned that Richardson might testify at trial. Richardson testified the following Monday as the State's final witness. (R1139-1218; 1169-1204).

The defense called seventeen (17) witnesses during the guilt phase. Those witnesses included Kamla Allersma, who described Robin Eckert as a liar (R1236-1244); Jim Acker (the then-uncharged suspect); Toni Acker, Snider's former girlfriend who

"knew" that Hannon "would not do that" (R1271-1277); several jail inmates who were incarcerated with Hannon and had never heard him discuss his case (R1305-1307; 1311-1312; 1313; 1333-1335); the defendant's employer (R1322-1328); the defendant's sister, Maureen (R1354-1365); Dr. Owen, a forensic chemist from the University of South Florida (R1406-1423; 1431-1431); the medical examiner (R1291-1291); and the defendant, who described his whereabouts on the night of the murders, discussed his prior visit to the victims' apartment, and addressed the testimony of the State's witnesses. (R1366-1396)

During the penalty phase, the State did not present any additional witnesses, but relied solely on the guilt phase evidence. (R1594). In addition to the evidence presented during the defense case (R 1594), the defense also called three additional witnesses: Toni Acker, who did not believe Hannon "would do anything like that," and the defendant's parents, Barbara and Charles Hannon. (R1597-1600). Barbara Hannon testified that her son had never hurt anybody his whole life and she implored the jury not to take away his freedom "for something he didn't do" and to "give us a chance to prove he never did anything like this." (R1599; 2324). Charles Hannon emphasized that his son had always been a "teddy bear" and had never been violent. He believed his son was innocent and ought

to have a chance to prove it. (R1600).

Post-Conviction Proceedings

The trial court entered two comprehensive orders in this case. The first order, which summarily denied postcoviction relief, in part, was 102 pages in length, and included excerpts from the trial record. (PCR6/1073-1174). Following the evidentiary hearing, the trial court entered a 46-page written order, with additional findings of fact and conclusions of law. (PCR10/1998-2043).

At the evidentiary hearing, Hannon's family members testified on his behalf. Ellen Coker, defendant's sister testified that she left home at age eighteen, when Patrick Hannon was twelve years old, and she joined the Army to get away from their small town. (PCR11/2180-2181, 2187, 2189). Their dad worked two to three jobs at a time, their mother worked, when their sister was ill, both parents spent every night at the hospital with her. (PCR11/2199) Ellen met Joe Episcopo with her husband at the attorney's office and discussed Hannon's having a beard at the time. (PCR11/2206). She knew Hannon was working more than one job and was always a hard worker. (PCR11/2209).

Barbara Hannon, the defendant's mother testified that they put Maureen in parochial school at age 13 as she was using drugs and alcohol. (PCR11/2216, 2221). Although she used to drink a

lot, the kids always looked terrific and the house looked great. She was a Girl Scout leader for eight years. (PCR11/2229). She testified that Hannon could read and was pretty smart, that she had the most trouble with Maureen. (PCR11/2234). She only found out about Hannon's drug use after his conviction. (PCR11/2241-2242). Charles Hannon, the defendant's father, testified that he had no idea about his son's drug or alcohol use; he worked three jobs to provide for his kids. (PCR11/2257-2258, 2261).

Defendant's sister Maureen Hannon, testified that she was doing so much alcohol and drugs that some things were a blur. (PCR11/2298). She felt that she got in trouble a lot and that Pat was always a good child and never got in trouble. (PCR11/2300).

Dr. Barry Crown concluded that Hannon was a "typical person" within "normal limits," (PCR12/2399, 2416), and who had brain damage of a "selective attention disorder," (PCR12/2400), and "difficulty with cognitive processing." (PCR12/2390). Dr. Crown's background facts were obtained from Hannon and affidavits of his family rather than any medical or other records. (PCR12/2387, 2391, 2393-2394, 2396-2398, 2409). Dr. Crown had not attempted to verify the facts they provided, nor talk to family members in person. (PCR12/2410-2412). Dr. Crown felt Hannon had residual brain damage from the long-time drug

ingestion as claimed by Hannon. (PCR12/2392-2393, 2422). On cross-examination, the prosecutor asked, “You’re saying there is brain damage, but you are not saying the brain damage in any way affected his behavioron the date of the crime” to which Dr. Crown replied, “That’s correct.” (PCR12/2419).

Dr. Faye Sultan, a clinical psychologist, is opposed to the death penalty and, therefore, testifies solely for the defense in postconviction cases. Dr. Sultan testified to hearsay from Hannon and his sister Maureen as to other drugs taken by Hannon through the years and around the time of the murders. (PCR12/2436-2438, 2445-2447). Dr. Sultan found that Hannon was essentially normal with areas of concern. (PCR12/2424, 2429, 2432, 2435). Hannon was not incompetent to stand trial nor insane at the time of the murders. Hannon’s IQ score of 112 was bright average. She felt that “some of the behaviors in his life and the lack of judgment and impulsivity that he reported to [her] ... in his history” was different than the “clinical presentation” she “derived from” her “meetings” with Hannon. (PCR12/2433). She wanted the neuropsychological examination to see if there was “some brain reasons” for the difference. (PCR12/2433-2434).

Dr. Sultan reviewed only Defendant’s military records because she was told that school and medical records from New

York had been destroyed. From speaking with the family, Dr. Sultan concluded that Patrick had grown up with little parental supervision or discipline, which had influenced his development. (PCR12/2441-2451). Dr. Sultan concluded that, in 1991, Hannon had "poor skills in living." She attributed this to the parental neglect, lack of discipline and structure, and Hannon's substance abuse, which compromised "his ability to reason, to use good judgment, to logically and sequentially plan something." His ability to think clearly and rationally under stress was compromised. (PCR12/2448-2449).

During his interview with Dr. Lipman on July 31, 2001, Hannon admitted that he was present, but he did not do the murders. (PCR13/2519-2522).

Dr. Sidney Merin, the State's expert in neuropsychology and forensic neuropsychology and psychology, interviewed and tested Hannon on February 19, 2002, and reviewed testing done by Dr. Sultan and by Dr. Barry Crown. Dr. Merin concluded that Hannon had no prefrontal lobe brain damage (the decision-making area of the brain). Hannon's answers demonstrated decision-making both at that time and as related to past events, including Hannon's description of his lenient treatment from his parents and his invoking his Miranda rights and reminding law enforcement what that meant when they had continued to question him thereafter.

(PCR13/2602-2620, 2631-2634). Dr. Merin disagreed with Dr. Crown's finding of prefrontal lobe impairment. When Dr. Merin gave Hannon the entire test, Hannon "passed with flying colors." (PCR13/2620-2622).

Dr. Merin explained the low scores shown by Dr. Sultan's Weschler IQ testing as indicating a dislike for school and learning problems. However, they were not prefrontal lobe area problems and did not impact on Hannon's judgmental and decision-making capabilities. (PCR13/2621, 2626-2629). Dr. Merin found no evidence of pre- or post-traumatic amnesia from trauma to the brain. (PCR13/2630, 2646-2647). From the personality tests he administered, Dr. Merin concluded that Hannon had an inclination toward impulsivity, alcohol and drug dependence, anxiety, anti-social behavior and manipulation. (PCR2636-2637). He found no indications of thought disorder, psychosis, or brain-related problems. (PCR13/2638).

Hannon's trial counsel, Joe Episcopo, testified that he had been a licensed attorney since 1975. He served as a JAG officer in the Air Force until 1981, when he was hired as a felony prosecutor. (PCR11/2057-2058). In 1987, he entered private practice. Before this trial, Mr. Episcopo had handled six capital cases as a prosecutor; this was his first capital case as defense counsel. (PCR11/R2059). There was "no question of

any deals." This case was going to trial because the defense was adamant that Hannon was innocent. (PCR11/R2060-2061).

Mr. Episcopo also had the assistance of a second attorney, Norman Zambonie. Mr. Zambonie went to crime scene to interview the State's witnesses regarding the composite. Mr. Zambonie was "gung ho" in assisting the defense. (PCR11/2061-2062). Mr. Episcipo knew that Hannon was drinking on the night of the murders. Mr. Episcipo intentionally had not deposed Ronald Richardson because he believed it would only benefit the State by allowing the witness to get better prepared for the defense questions. Mr. Episcipo believed Richardson's last minute change was made up and that he could best show that by stressing the good deal he got for testifying and by cross-examining him about obvious details of the apartment. Mr. Episcopo didn't use Michelle Helm's statement because they were not trying to make Richardson look like the a guilty party. (PCR11/2072).

Hannon had never exhibited "any problem in processing and applying new information ...." (PCR11/2150). Nor in paying attention, understanding, making decisions, nor showed any impairment of his mental functions. (PCR11/2117, 2135, 2150). Neither Hannon nor his family indicated to Mr. Episcopo in any way that he had any brain injury. Mr. Episcopo believed that it would have detracted from Hannon's testimony and consistent

defense theory to have called an expert to question Hannon's mental capacity. (PCR11/2161). Before trial, Mr. Episcipo discussed with Hannon, his parents and sister, Maureen, the possibility that they might have to go to penalty phase and that they would probably remain with the defense that Hannon had not been present and was not the type of person who would commit murder. Hannon and his family adamantly maintained his innocence. (PCR11/2060).

Judith Bunker had nothing to do with their case; her testimony was irrelevant. (PCR11/2092) He felt that FBI witness Malone helped their alibi defense. (PCR11 R2094). Their biggest challenge was to explain the prints and the defense had an excellent witness from USF. (PCR11/2108). Mr. Episcopo knew Hannon's criminal history. (PCR11/2125). He didn't investigate Hannon's drug use because it had nothing to do with their defense. (PCR11/2112). If Hannon had said he was there and involved, they would have "made a deal" before Richardson. (PCR11/2116). Hannon was "fine mentally." (PCR11/2116-2117) Hannon participated in every aspect of the case. (PCR11/2140).[1]

[1]For ease of reference in addressing the defendant's specific complaints, those particular additional facts (including record citations) which involve identified witnesses, are set forth within the argument section of the instant brief.

PRELIMINARY STATEMENT

Statement Regarding Procedural Bar

Hannon raises a number of claims which are procedurally barred as claims which could have or should have been raised on direct appeal and are, therefore, not cognizable in a motion to vacate filed pursuant to Florida Rule of Criminal Procedure 3.850. Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1323 (Fla. 1994); Arbelaez v. State, 775 So. 2d 909, 919 (Fla. 2000).

To counter the procedural bar to some of these issues, Hannon has couched his claims in terms of ineffective assistance of counsel in failing to preserve or raise those claims. This Court has repeatedly held that issues which could have been, should have been and/or were raised on direct appeal are procedurally barred in the postconviction proceeding and that "allegations of ineffective assistance of counsel cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal." Thompson v. State, 759 So. 2d 650, 663-64 (Fla. 2000) (quoting, Teffeteller v. Dugger, 734 So. 2d 1009, 1023 (Fla. 1999)).

SUMMARY OF THE ARGUMENT

Issue 1 - Ineffective Assistance / Guilt Phase

The trial court entered two comprehensive written orders in this case. The first order, which summarily denied

postcoviction relief, in part, was 102 pages in length, and included extensive excerpts from the trial record. (PCR6/1073-1174). Following the evidentiary hearing, the trial court's entered a 46-page written order, with additional findings of fact and conclusions of law. (PCR10/1998-2043). The trial court reviewed the trial record, evaluated the evidence presented at the postconviction hearings, and applied the correct legal standards to the defendant's postconviction claims. The defendant failed to establish any deficiency of counsel and resulting prejudice under Strickland. The trial court's underlying factual findings are supported by competent, substantial evidence, and preclude relief on this claim.

Issue 2 - Ineffective Assistance / Penalty Phase

After conducting an evidentiary hearing, the trial court properly denied the defendant's claim of ineffective assistance of counsel at the penalty phase. The defendant has failed to prove any deficiency of counsel and resulting prejudice arising from trial counsel's strategic decision to rely on the defendant's character and to maintain a consistent theory of innocence "adamantly" asserted by the defendant. Furthermore, balanced against the insignificant evidence of mitigation now being urged, there is no reasonable probability that, absent the alleged errors, the sentencer would have concluded that the

mitigating circumstances now offered outweighed the multiple and substantial aggravating circumstances in this case.

Issue 3 - Claims Summarily Denied

The record conclusively establishes that the defendant was not entitled to relief on any of his remaining postconviction allegations; therefore, the trial court properly summarily denied postconviction relief.

Issues 4 and 5 - Avoid Arrest Aggravator and HAC Aggravator

The defendant's challenges to the aggravating factors are procedurally barred and without merit. These claims have been consistently rejected by this Court.

Issue 6 - Innocence of the Death Penalty

Summary denial was appropriate because the defendant failed to "show constitutional error invalidating all of the aggravating circumstances upon which the sentence was based."

Issue 7 - The Ring Claim

The defendant's Ring claim is procedurally barred and without merit. The jury unanimously recommended the death penalty in each case and Hannon's aggravating factors exempt this case from any possible application of Ring. Finally, Ring is not retroactive.

Issue 8 - Cumulative Error

The defendant failed to demonstrate any individual error in his postconviction relief claims, therefore, his cumulative error claim must be denied.

SUMMARY OF THE DEFENDANT'S CRIMES

Before going to Brandon Snider's apartment with Ron Richardson and Jim Acker on the night of January 10, 1991, the defendant, Patrick Hannon, first armed himself with a loaded handgun, which he concealed from view. When the trio entered the victims' townhouse, Jim Acker repeatedly stabbed Snider, until Snider's "guts" were "hanging out." As Snider called for help, Hannon instead grabbed Snider from behind and slit Snider's throat from ear to ear. (R289-290). Hannon, who was 26 years old, 6'3" tall and weighed approximately 300 pounds, used two lethal weapons that night: a buck knife and a loaded, semi-automatic .380 caliber handgun.

Hannon then chased after his second victim, eyewitness Robbie Carter, as Carter fled upstairs. (R1181-1183; 894-897). Hannon fired his gun as Carter ran up the stairs. (R1185; 1366-1367). When Hannon discovered Carter hiding beneath a bed, Hannon placed the gun against Carter's left side and Hannon fired the gun directly into Carter's torso. As Carter lay trapped beneath the bed after Hannon fired the first shot into

Carter’s left side,

> Hannon shot Carter again,
> . . . and Hannon shot Carter again,
> . . . and Hannon shot Carter again,
> . . . and Hannon shot Carter again,
> . . . and Hannon shot Carter again.

The six gunshots extended in a straight line down from Carter’s left armpit. Each shot was lethal. (R501-502; 511-512; 898-899). Hannon admitted to Ron Richardson that he’d shot Robbie Carter and cut Brandon Snider’s throat, which was “just like taking a pig’s head off.” (R1191-1192).

STANDARDS OF REVIEW

Claims of ineffective assistance of counsel are evaluated under the now familiar two-part test announced some twenty years ago by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984):

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687.

Review of claims of ineffective assistance of counsel are mixed questions of fact and law subject to *de novo* review. Patton v. State, 878 So. 2d 368, 372-373 (Fla. 2004), citing Porter v. State, 788 So. 2d 917, 923 (Fla. 2001). The "trial court's legal conclusions are subject to independent review by this Court, but the factual findings must be given deference . . . In recognizing the trial court's superior vantage point at the evidentiary hearing, this Court will not substitute its judgment for the trial court's judgment on questions of fact, credibility of the witnesses, and weight of the evidence . . .

The factual findings must demonstrate both that counsel was deficient in performance and that the defendant was prejudiced." Id. at 373.

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY DENIED POSTCONVICTION RELIEF ON THE DEFENDANT'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT PHASE

In his first issue, the defendant, Patrick Hannon, contends that the trial court erred in denying postconviction relief on his claims of ineffective assistance of counsel during the guilt phase of his 1991 trial. On appeal, Hannon reasserts the claims he presented below: that trial counsel allegedly was ineffective in failing to (1) present a voluntary intoxication defense, (2) investigate the background of Judith Bunker, the State's blood spatter expert, (3) adequately "prepare for trial," (4) depose Ron Richardson or request a continuance when Richardson agreed to testify, and (5) question Michele Helm, Ron Richardson's ex-girlfriend, about Richardson's alleged jealousy.

Patrick Hannon was represented at trial by attorney Joe Episcopo, an experienced criminal trial attorney who previously had prosecuted capital cases throughout both the guilt and penalty phases of trial. Attorney Episcopo personally interviewed witnesses prior to trial, consulted with Hannon on numerous occasions, spoke with members of Hannon's family, associated with a second attorney, called seventeen (17) defense witnesses during the guilt phase alone, vigorously cross-

examined the State's material witnesses, and steadfastly asserted an actual innocence/alibi defense at trial, in accordance with his client's unwavering declarations. Before his trial, at trial, and during the years following his trial, Hannon never wavered in his emphatic claims of innocence to attorney Episcopo.[2] For the following reasons, the defendant's multiple allegations of ineffective assistance of trial counsel during the guilt phase were properly denied by the trial court.

Voluntary Intoxication

At trial, Patrick Hannon testified on his own behalf. Among

---

[2]At trial in 1991, Hannon testified that he was not at the victims' apartment on the night of the crimes and that he had nothing to do with their deaths. The postconviction hearings in this case were held on two separate dates, February 18, 2002 and June 21, 2002. During the first hearing, Attorney Episcopo testified that Hannon continued to communicate with him for years after the trial, and Hannon always maintained his claim of innocence. In 1991, Hannon's parents also "continued to believe their son did not and could not do this." And, as attorney Episcopo testified in 2002, "I have never heard back from them any other way." (PCR11/2170).

However, during the evidentiary hearing held on June 21, 2002, one of the defendant's current expert witnesses, Dr. Lipman, testified that although Hannon previously had testified at trial that he was not at the victims' apartment on the night of the murders, Hannon since has admitted to Dr. Lipman that he, in fact, was there. (PCR13/2519-2522). According to Hannon's latest statements to Dr. Lipman, although Hannon now admits being present at the victims' apartment on the night of the murders, Hannon claims that he didn't do any of the killings. (PCR13/2519-2522). Thus, more than ten years after he vehemently denied being at the scene, Hannon now admits his presence at the victims' apartment, and simply reverses the respective roles of Hannon and Richardson.

other things, Hannon described, in fact-specific detail, his whereabouts and actions in January of 1991; and, although Hannon admitted that he had been drinking on the night of the crimes, January 10, 1991, Hannon testified that he stayed at Richardson's home that night and had nothing to do with the murders.

Hannon's postconviction counsel now urges this Court to conclude that trial counsel was ineffective for not presenting a voluntary intoxication defense in 1991. However, the defense of voluntary intoxication was not a viable option in this case because, in 1991, (1) Hannon consistently denied even being present at the victims' apartment on the night of the murders, (2) Hannon emphatically denied any involvement at all in the victims' deaths, and (3) Hannon testified on his own behalf at trial and he provided a fact-specific recollection of events and steadfastly proclaimed his innocence – all of which negated the credible use of a voluntary intoxication defense. See, Rivera v. State, 717 So. 2d 477, 485 (Fla. 1998) (reasoning that since a voluntary intoxication defense is, in effect, an admission that you did the crime but lacked the specific intent to be held criminally responsible, a defendant's unwavering professions of innocence short-circuited any credible voluntary intoxication defense during the guilt phase), citing Remeta v. Dugger, 622

So. 2d 452, 455 (Fla. 1993) (approving trial counsel's tactical decision to forego a voluntary intoxication defense which was inconsistent with defendant's theory that accomplice was the main perpetrator and triggerman).

In addressing the failure to rely on a voluntary intoxication defense, the trial court found that Hannon failed to demonstrate any deficiency of counsel under Strickland. In summarily denying postconviction relief on Hannon's initial guilt phase claim, the trial court concluded that Hannon was not entitled to any relief because,

> As to the guilt phase, Defendant testified on his own behalf without raising any mental defense of any kind, but consistently maintained his innocence. (See Trial Transcript, Volume XII, pages 1366-1402, attached). Moreover, "trial counsel's failure to use evidence of Defendant's voluntary intoxication at the time of the offense was not ineffective assistance of counsel where Defendant continually and consistently maintained his innocence, and professions of innocence short-circuited any credible voluntary intoxication defense during the guilt phase." Rivera v. State, 717 So. 2d 477, 485 (Fla. 1998); See also Engle v. Dugger, 576 So. 2d 696, 700 (Fla. 1991). Therefore, Defendant has failed to meet the first prong of Strickland in that Defendant has failed to prove counsel acted deficiently in failing to fully investigate, develop, and present available evidence in support of a voluntary intoxication defense during the guilt phase of Defendant's trial. Since Defendant has failed to meet the first prong of Strickland, it is unnecessary to address the prejudice component. As such, no relief is warranted upon this portion of claim IV. (PCR6/1100-1101) (e.s.)

In this case, Hannon, like the defendant in Rivera,

continually and consistently maintained his innocence at trial. Consequently, although the defense of voluntary intoxication was available at the time of Hannon's trial, since this defense is, in effect, an admission that the defendant "did the crime but lacked the specific intent to be held criminally responsible," Hannon's claim is just like Rivera's, and his "unwavering professions of innocence short-circuited any credible voluntary intoxication defense during the guilt phase." Rivera, 717 So. 2d at 485. Hannon's initial allegations of ineffective assistance during the guilt phase were appropriate for summary denial because they were legally and facially insufficient to warrant relief under Strickland, inasmuch as Hannon did not assert both an alleged deficiency and how he was prejudiced by counsel's failure to raise a defense which was inconsistent with his claim of actual innocence/alibi.

Furthermore, as a practical matter, Hannon had the benefit of vigorously pursuing a claim of actual innocence/alibi while the jury was simultaneously informed of his alcohol consumption. In other words, the jurors learned of Hannon's drinking, but the alibi/innocence defense was not forfeited. At trial, Hannon testified that he was at Ron Richardson's on January 10, 1991, about 10:00 p.m., playing Quarters, a drinking game, with Ron Richardson and his brother, Mike, and that he was pretty drunk

and he stayed overnight to avoid driving his car, because the lights weren't working properly. (R1366, 1368-1369). Hannon and Jim Acker had been to Carter's apartment a few weeks earlier, around Christmas, to deliver some pork and to drink beer. (R1372-1373). Hannon testified that it was January 9th, not January 10th, that Robin and Kamla had been at Richardson's and they were all drinking beer, but he did not stay late because he had to work the next day. (R1379-1380). Hannon described an "incentive plan" with his boss, who was also his landlord, of earning an extra 50 cents an hour for not drinking during the week, because his boss thought people with a hangover had a bad attitude. (R1380). Hannon thought he'd stopped by Richardson's on Thursday, January 10th, to tell him of the keg party planned for the next night at Maureen's house. (R1380). After getting paid on Friday, Hannon picked up the keg and went to his sister Maureen's, and ended up spending the night because he got very drunk that night. (R1382).

As the trial court correctly concluded, defense counsel is not ineffective for failing to pursue a defense which is inconsistent with defendant's defense that he is innocent. Rivera; Cherry v. State, 659 So. 2d 1069, 1072 (Fla. 1995). Moreover, in order to successfully assert the defense of voluntary intoxication, "the defendant must come forward with

evidence of intoxication at the time of the offense sufficient to establish that he was unable to form the intent necessary to commit the crime charged." Rivera, 717 So. 2d at 485 n. 12, quoting Linehan v. State, 476 So. 2d 1262, 1264 (Fla. 1985). Where, as here, the State had evidence of Hannon's ability to form the requisite intent, trial counsel's decision not to present an intoxication defense is evident on the record as within the range of reasonably competent counsel. See, White v. State, 729 So. 2d 909, 912 (Fla. 1999).

In this case, evidence of Hannon's ability to form the requisite intent on the night of January 10, 1991, was presented via several witnesses. Robin Eckert testified that the three men, Richardson, Acker and Hannon, were talking in the kitchen just before the three left, as though they did not want to be overheard by Robin, Kamla and Mike Richardson. (R802, 804-805). Ronald Richardson testified that Hannon obtained Richardson's gun before they left, and Hannon placed the loaded gun in the waistband of his pants and covered it with his T-shirt. (R1176-1178). After arriving at the victims' apartment, they walked about one-and-one-half blocks to the victims' apartment, where Hannon knocked on the door as Acker stood "off to the side." (R1179-1180). After Acker stabbed Brandon Snider repeatedly, Hannon went over to Snider, put his arm around his neck, and

then Snider's throat was cut. Hannon, with the loaded gun in his hand, then chased Carter up the stairs. (R1181-1185). The victims' neighbors, who saw the three men leaving the apartment, described the "big" suspect, the defendant Hannon, as walking swiftly, hunched over, with arms crossed over his stomach as though holding something. (R296-297, 317-319, 344, 349, 352-353). One witness heard Hannon urge his companions to "Go, go, go." (R299). Another witness saw Hannon put something metallic in his waistband and fold his arms over it. (R296-297). Richardson testified that, on the night of the crimes, Hannon disposed of both murder weapons by throwing both the knife and the gun into the river as they drove across a bridge. When the trio returned to Richardson's house, Hannon and Acker changed their clothes. Hannon later destroyed any incriminating evidence when he burned their clothes in a backyard fire at Maureen Hannon's house that night. (R1187-1190). The next day, Hannon admitted to Richardson that he'd shot Carter and cut Snider's throat. (R1191-1192). Hannon's employer, Rusty Horne, testified that Hannon came to work at 7:00 a.m. on January 11, 1991, as normal, and he did not act unusual, even when they heard the news on the radio of the homicides the night before. (R1322, 1324). While in jail, Hannon told two different inmates that a female could blow his alibi. Hannon revealed her name,

Robin, to one inmate; and Hannon told another inmate, John Ring, that she overheard him talking the night of the party and asked who they were planning on killing. (R772, 892, 899-900). When Ring commented that it would be painful to be shot six times "up underneath" the arm, Hannon said "No, six times." Hannon then demonstrated the shot pattern which originated "from the bottom up," and Hannon moved his finger up from his waist and along his side. (R899).

Hannon's own trial testimony specifically related his activities during the relevant time frame. Hannon described his visit to the victims' apartment around Christmas, his actions on the night of the murders, and his activities until his arrest on February 6, 1991. (R1372-1392). According to Hannon, he was working long hours during most of the time, up to the date of the murders and when working long hours, he did nothing else. He would just "come home, take a shower, eat and go to bed and get up the next day." (R1376). According to Hannon, he didn't stay late at Richardson's on January 9th, when Robin and Kamla were there, because he had to work the next day. (R1378-1380). Hannon thought he stopped by Richardson's on January 10th, only long enough to tell Richardson of a keg party at Maureen's on Friday night. (R1380).

During the guilt phase, Hannon's trial counsel presented

numerous witnesses, including Hannon and the uncharged third suspect, Jim Acker, and argued that Hannon was not present at the victims' apartment at the time of the crimes and had nothing to do with the murders. When Richardson "flipped" on the last day of the State's case, defense counsel immediately responded to Richardson's "new" version of events by emphatically reiterating that neither Hannon nor Richardson were ever involved in the crimes. Trial counsel made a compelling argument that Richardson, fearing a conviction, "completely fabricated his story in the 11th hour ... And to him five years was better than the death penalty or two consecutive 25-year sentences..." (R1508). Thus, from defense counsel's perspective both in 1991, and as confirmed in 2002, Ron Richardson, even if innocent, feared a conviction and, thus, would "fabricate a story" in order to secure a five-year sentence, rather than risk either life imprisonment or the death penalty.

Hannon's IAC/voluntary intoxication claim was again addressed during the postconviction evidentiary hearing. Hannon did not testify at the evidentiary hearing, although some of his family members offered historical anecdotes of Hannon's drinking habits. Significantly, no postconviction witness testified that they were actually with Hannon at the time of the murders and observed Hannon's drinking that night. And, although the

defendant's postconviction "mental health" experts echoed what Hannon told them, the defense experts' testimony was merely a repetition of Hannon's own testimony at trial in 1991, wherein he described his drinking on the night of the crimes. (R1368-1369).

At the evidentiary hearing, Mr. Episcopo confirmed that he was aware that Hannon was drinking on the night of the murders. It was Hannon's alibi defense that he was playing Quarters, a drinking game, at Richardson's. (PCR11/2127). Mr. Episcopo also attended Detective Linton's deposition that included her conclusion that Hannon and his friends did a lot of drinking. (PCR11/2128). Hannon weighed around 300 pounds, and Mr. Episcopo was sure Hannon could drink a lot of beer. (PCR11/2132). However, Mr. Episcopo testified that Hannon's prior drug and alcohol use was an area they did not want to go into, because it would be contradictory to defendant's alibi that he was not there. (PCR11/2125, 2153-2154).

Following the evidentiary hearing, the trial court addressed Hannon's related claim of ineffective assistance of counsel in failing to rely on a voluntary intoxication defense during the penalty phase. In denying postconviction relief after the evidentiary hearing, the trial court concluded,

> . . . Lastly, he [Mr. Episcopo] testified that he did not present a voluntary (PCR10/2001) intoxication

> defense during the penalty phase because it was irrelevant because Defendant was not intoxicated at the crime scene, and Defendant adamantly maintained that he was not at the crime scene. (See February 18, 2002 Transcript, pages 109 - 110, attached).
>
> Since the guilt phase defense was that Defendant was innocent, after reviewing the allegations, the court file, and the record, the Court finds that counsel made a reasonable tactical decision in not presenting evidence in support of a voluntary intoxication defense at the penalty phase because counsel concluded that Defendant was not intoxicated at the crime scene and the testimony would destroy Defendant's credibility with the jury and would be inconsistent with the other mitigating evidence. See Jones v. State, 528 So. 2d 1171, 1175 (Fla. 1988)(where guilt-phase defense was that defendant was innocent, counsel make reasonable tactical decision in not calling psychiatrist to testify at penalty phase that defendant was paranoid where counsel concluded that the testimony would destroy the defense's credibility with the jury and would not harmonize with other mitigating evidence). Consequently, Defendant has failed to meet the first prong of Strickland in that he has failed to prove counsel acted deficiently in failing to fully investigate, develop, and present available evidence in support of a voluntary intoxication defense when Defendant was not intoxicated at the crime scene and Defendant adamantly maintained that he was not at the crime scene. See Rivera v. State, 717 So. 2d 477 (Fla. 1998). Since Defendant has failed to meet the first prong of Strickland, it is unnecessary to address the prejudice component. See Downs v. State, 740 So. 2d 506, 518 n. 19 (Fla. 1999). As such, no relief is warranted upon this portion of claim IV. (PCR/2000-2002) (e.s.)

The factual findings of the trial court are supported by competent, substantial evidence and, therefore, are entitled to deference. Zakrzewski v. State, 866 So. 2d 688, 692 (Fla. 2003). Even if Hannon could point to some other evidence, any

conflicts in the testimony are to be resolved in favor of the trial court's ruling as the trial court is "in a superior position 'to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor, and credibility of the witnesses.'" Power v. State, 29 Fla. L. Weekly S207, S208 (Fla. May 6, 2004) (quoting Stephens v. State, 748 So. 2d at 1034). In this case, as in Pietri v. State, 2004 Fla. LEXIS 1368, 10-19 (Fla. 2004), the defendant "did not present any evidence at the postconviction evidentiary hearing to demonstrate that he was in fact intoxicated at the time of the offense. Furthermore, he did not present any competent evidence proving his inability to form the specific intent to commit the crime." Id., citing, Henry v. State, 862 So. 2d 679 (Fla. 2003).

As confirmed during the evidentiary hearing, Mr. Episcopo based his decision not to pursue a voluntary intoxication defense based upon conversations with Hannon himself. See, Davis v. State, 875 So. 2d 359, 367 (Fla. 2003), citing Stewart v. State, 801 So. 2d 59 (Fla. 2001) (counsel not ineffective for not pursuing a voluntary intoxication defense where conversations with the defendant persuaded him that an intoxication defense would not be appropriate); State v. Williams, 797 So. 2d 1235 (Fla. 2001) (counsel not ineffective for failing to pursue voluntary intoxication defense as

inconsistent with defendant's theory of the case). Hannon failed to demonstrate any deficiency of counsel under Strickland and trial counsel was not ineffective for failing to present a voluntary intoxication defense, which was clearly inconsistent with the defense strategy of actual innocence.

Although trial counsel pursued the defense of actual innocence/alibi based on his client's unwavering declarations, collateral counsel now urges reversal based on a claim that another defense was available. However, trial counsel "cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions." Stewart v. State, 801 So. 2d 59, 65-66 (Fla. 2001). Even if another defense might have been available, Hannon has not shown that there is a reasonable probability that, but for counsel's alleged unprofessional errors, the result of the proceeding would have been different. See, Lusk v. State, 498 So. 2d 902, 905 (Fla. 1986) (trial counsel's decision to rely on self-defense was strategic choice within the acceptable range of competent choices.) Hannon has not alleged, nor shown, the existence of any deficient performance *and* resulting prejudice under Strickland; and, therefore, postconviction relief was properly denied.

Blood Spatter Expert Judith Bunker

Judith Bunker testified as a blood spatter expert during the guilt phase of Hannon's trial in 1991. In his postconviction motion, Hannon alleged multiple, intertwined complaints regarding expert witness Judith Bunker; and both of the trial court's comprehensive written orders address Hannon's specified challenges. In summarily denying postconviction relief on Hannon's claim of "exaggerated credentials," the trial court found that here, as in Correll v. State, 698 So. 2d 522 (Fla. 1997), Judith Bunker's exaggeration of her credentials was not prejudicial since "Ms. Bunker's testimony was based on her extensive experience in the field of blood spatter analysis." (PCR6/1099). In summarily denying relief on Hannon's claim of ineffective assistance of counsel based on the "failure to adequately investigate" Ms. Bunker's background, the trial court further explained,

> Defendant claims counsel failed to adequately investigate Ms. Bunker's background, thereby failing to prevent Ms. Bunker's qualification as an expert where she misrepresented her expertise to the Court, the jury, and defense counsel. Defendant further claims Brady to the extent that the State knew that Ms. Bunker's testimony was false and/or misleading but suppressed this information and failed to correct her false testimony.
>
> However, as previously discussed in claim III, the Florida Supreme Court in Correll v. State, 698 So. 2d 522 (Fla. 1997), held that Ms. Judith Bunker's

exaggeration of her credentials did not warrant relief. The Florida Supreme Court in Correll stated that "the discrepancies between the level of education, training, and experience Bunker testified to at trial and the asserted level of education, training, and experience she actually had were not so great as to make any difference in the outcome of the case." Id. at 524.

On July 19, 1991, in Defendant's case, Ms. Judith Bunker testified regarding her extensive training, education, and experience. (See Trial Transcript, Volume X, pages 1076-1083, attached). Similar to Correll, this Court finds that Ms. Judith Bunker's exaggeration of her credentials is not prejudicial when Ms. Bunker's testimony was based on her extensive experience in the field of blood spatter analysis. (See Trial Transcript, Volume X, pages 1076-1126, attached). Moreover, the Florida Supreme Court, on direct appeal, stated the following with respect to Ms. Bunker's testimony at Defendant's trial:

> Bunker's testimony relating to the blood splatter evidence was presented to assist the jury in understanding the facts before it. The clothing was admitted into evidence and used by Bunker to explain how the murders occurred. The splatter evidence was consistent and tied in with other evidence detailing the manner of commission of the crime.

Hannon v. State, 638 So. 2d 39, 43 (Fla. 1994). Therefore, the Florida Supreme Court found Ms. Bunker's testimony admissible. Id.

"A trial court's ruling regarding the admissibility of evidence will not be disturbed absent an abuse of discretion." Hannon v. State, 638 So. 2d 39, 43 (Fla. 1994), citing Blanco v. State, 452 So. 2d 520, 523 (Fla. 1984), cert. denied, 469 U.S. 1181, 105 S.Ct. 940, 83 L.Ed.2d 953 (1985). The Florida Supreme Court, on direct appeal, found that this Court did not abuse its discretion in admitting Ms. Bunker's testimony regarding blood spatter analysis. Id. at 43. Therefore, Defendant's claims regarding the

> admissibility of Ms. Bunker's testimony are without merit. As such, no relief is warranted upon this portion of claim IV. (PCR6/1103-1104) (e.s.)

Hannon now asserts that Ms. Bunker would not have been qualified at his trial in 1991, but for trial counsel's failure to adequately investigate her exaggerated credentials. However, this assertion is patently incorrect under this Court's prior decisions in both Correll and Hannon. Correll's trial was held in 1986. See, Correll, 698 So. 2d at 523. Hannon's jury trial was held five years later, in 1991. In Correll's postconviction proceeding, as here, the trial court found that Ms. Bunker's qualification as an expert at Correll's trial was based almost entirely on her experience in the relatively new field of blood spatter analysis, and not on her education. On appeal, this Court in Correll specifically found that "the discrepancies between the level of education, training, and experience Bunker testified to at trial and the asserted level of education, training, and experience she actually had were not so great as to make any difference in the outcome of the case." Correll, 698 So. 2d at 524. Furthermore,

> The only alleged misrepresentation of any import was Bunker's assertion that she had worked as an assistant and technical specialist for the medical examiner's office from 1970 through 1982, when in reality she was a secretary at the medical examiner's office from 1970 to 1974, an assistant to the medical examiner from 1974 to 1981, and a technical specialist for the last five months of her employment with the

> medical examiner's office. In view of the fact that it is undisputed that she worked on thousands of cases while in the employ of the medical examiner, even this discrepancy becomes less serious.
>
> However, assuming for the sake of argument that Bunker's testimony did contain serious discrepancies that could not have been discovered during trial, we are convinced that these discrepancies did not have any impact on the outcome of the case in light of the overwhelming evidence presented at trial in support of Correll's guilt. Moreover, Bunker's testimony was not crucial to the State's case and merely corroborated the medical examiner's testimony. 698 So. 2d at 524.

See also, Gorby v. State, 819 So. 2d 664, 677 (Fla. 2002) ("We have previously determined that the issue of whether Judith Bunker's allegedly exaggerated educational qualifications were presented to a jury would have had little effect on the outcome of a case, given that she had been recognized as a blood spatter expert in numerous other cases.")[3] Moreover, as previously noted, this Court upheld the admissibility of Ms. Bunker's testimony, noting its consistency with other evidence detailing how the murders were committed. Hannon, 638 So. 2d at 43.

In addition to Ms. Bunker, several other witnesses at trial testified about the bloodstains, patterns and blood spatters. Hillsborough Sheriff's Deputy Shoemaker, described the blood

---

[3]In denying postconviction relief on this same claim in co-perpetrator James Acker's postconviction motion, the trial court in the Acker case found that "[t]he testimony of the expert, Judith Bunker, was admissible and the showing of deficiencies in her resume were minimal. Her testimony would have been admitted." (PCR4/706).

that he and Deputy Swoope observed at the victim's apartment. (R424, 426-428). Hillsborough Sheriff's latent print examiner, Royce Wilson, also described the large amount of blood he observed throughout the apartment, including blood on the front door, on the mirror and wall at the bottom of the stairs, on the stair bannister, on the fan in the living room and on the outside of the upstairs bedroom door. (R627, 651, 656-661). In addition, the police video and photographs of the crime scene were admitted into evidence, showing the extent of the blood and spatter evidence. (R462-479, 522-523). Hillsborough Sheriff's Detective Lingo described the photos and relation to the blood spatter he observed throughout the victim's apartment. (R695, 702-717). Detective Linton described the blood on the outside of the door and near the handle and lock on the inside, and the huge amount of blood she saw in the living room, on the floor, sofa and window, and on walls and stairwell. (R948-952). F.B.I. special agent Spaulding testified that testing of blood collected from the mirror, the bannister at the bottom of the stairs, the broken window sill, the fan in the den, the stereo speaker in front of the broken window, the wall at the bottom of the stairs, and from the couch end table next to the window, showed that it was consistent with the known blood sample from victim Snider. (R583-584, 592, 601-605).

At trial, defense counsel used Ms. Bunker's presentation by offering into evidence one of her slides, an enlargement of a photograph of the front door. The photographs from which Ms. Bunker prepared her slides, showing the bloodstain patterns and blood splatters about the apartment, were also in evidence. (R1092-1093). When the same inference could have been drawn from other testimony or evidence,[4] this Court has found no prejudice under Strickland. See, Johnson v. State, 593 So. 2d 206, 209 (Fla. 1992).

Hannon does not dispute that Snider's gruesome murder left behind a blood-spattered scene. During closing argument, defense counsel minimized Ms. Bunker's testimony and argued that the State brought "in a blood spatter expert to tell us something we already know. We know how Mr. Snider died ... We know how blood spatters when someone's neck is cut. What's the point." (R1502). During closing argument, defense counsel also agreed that "all the witnesses saw blood" inside the victims' apartment. (R1520). Because the record shows conclusively that Hannon was entitled no relief on this claim in light of the

[4]Richardson's case had been effectively severed on July 15, 1991, the morning of trial. (R2168-2169, 2211-2212). Consequently, Richardson remained in jail while the other witnesses testified at Hannon's trial. The recognition that Richardson's subsequent description of the sequence of the murders was consistent with Judith Bunker's prior testimony only reinforces the accuracy of her findings.

other compelling evidence presented at trial, summary denial was proper. See Fla. R. Crim. P. 3.850(d) ("If the motion, files, and records in the case conclusively show that the prisoner is entitled to no relief, the motion shall be denied without a hearing.")

Adequacy of Trial Preparation

Hannon's entire argument on this issue consists of a single paragraph in which he merely lists the sequential allegations presented below and concludes that he was "entitled to an evidentiary hearing." (Initial Brief of Appellant at 52-53). The State submits that merely making reference to arguments which were raised below does not suffice to preserve issues and, therefore, this claim is waived. See, Cooper v. State, 856 So. 2d 969, 977, n. 7 (Fla. 2003) (rejecting similar arguments as insufficient for consideration); Sweet v. State, 810 So. 2d 854 (Fla. 2002) ("because on appeal Sweet simply recites these claims from his postconviction motion in a sentence or two, without elaboration or explanation, we conclude that these instances of alleged ineffectiveness are not preserved for appellate review.")

The trial court below entered a detailed, fact-specific written order specifically addressing each of Hannon's "adequacy of trial preparation" complaints, including the alleged failure

to obtain the defendant's rap sheet, review photographs, impeach state witnesses, and question jurors on views on capital punishment. (PCR6/1101-1102, 1105-1110). In summarily denying relief on Hannon's barrage of claims, the trial court evaluated each allegation in conjunction with the trial record and the applicable Strickland standards and found that Hannon failed to establish any entitlement to relief under Strickland. Thus, even if this claim is considered, no relief is due because Hannon has not identified any error in the treatment of these claims below.

Evidentiary Hearing

Next, Hannon asserts that trial counsel was ineffective in allegedly failing to (1) depose Ron Richardson and/or request a continuance, (2) adequately prepare for the State's expert, Judith Bunker, and (3) question Michele Helm about Richardson's alleged jealousy. The trial court conducted an evidentiary hearing on these allegations, and the denial of this claim involved the application of legal principles to the facts as found below. Therefore, this Court must review the factual findings for competent, substantial evidence, paying deference to the trial court's findings, and review of the legal conclusions is *de novo*. Stephens v. State, 748 So. 2d 1028, 1029 (Fla. 1999); Guzman v. State, 721 So. 2d 1155, 1159 (Fla.

1998). Furthermore, contrary to Hannon's current allegations, the trial court's comprehensive written order painstakingly addresses not only the testimony presented at the evidentiary hearing, but also the testimony and evidence presented at Hannon's trial.

Failure to Depose Ron Richardson and/or Request a Continuance

Hannon claims that trial counsel was ineffective in failing to depose Ron Richardson and/or request a continuance when Richardson decided to testify. Hannon now concludes that Hannon's alibi/innocence defense "was gone" once Richardson became the State's final witness. Therefore, collateral counsel concludes that trial counsel should have changed their defense theory of alibi/innocence when Richardson changed his "story." Additionally, Hannon asserts that attorney Episcopo was unprepared to cross-examine Richardson at trial. However, from trial counsel's assessment –- both at trial in 1991 and as confirmed in 2002 – the fact that Richardson testified as a State witness did not mean that Hannon's alibi/innocence theory was "gone." Rather, from trial counsel's perspective, neither Hannon nor Richardson were involved in the crimes; however, Richardson, even if innocent, feared a conviction and, thus, he would "fabricate" a new "story at the 11th hour" in order to secure a five-year sentence and avoid the possibility of the

death penalty or sentence of life imprisonment. Therefore, Richardson's trial testimony, which contradicted all of his prior statements, was subjected to vigorous cross-examination.

The trial court's comprehensive order denying postconviction relief following the evidentiary hearing states, in pertinent part:

> In the fourth sub-claim, Defendant claims ineffective assistance of counsel due to counsel's failure to depose state witness, Ronald Richardson, despite being given the opportunity to do so during trial. Specifically, Defendant claims that once counsel learned that Mr. Richardson was going to be the State's key witness against Defendant, counsel had an obligation to investigate Mr. Richardson, look into his background, determine his motive for testifying, and develop any information that could have been used to impeach him.
>
> At the February 18, 2002 evidentiary hearing, Mr. Joe Episcopo testified on direct examination that he never authorized any investigation into Ron Richardson's background, and he was not sure if he ever got a criminal history report on Ron Richardson. (See February 18, 2002 Transcript, page 22, attached). Moreover, Mr. Episcopo testified that he never authorized any investigation into Ron Richardson's relationship with Defendant after Mr. Richardson Turned State's evidence. (See February 18, 2002 Transcript, page 22, attached). However, Mr. Episcopo testified that after receiving Ron's statement during the trial, he asked the Court for an half hour break so that he could review the statement. (See February 18, 2002 Transcript, page 120, attached). Mr. Episcopo further testified that he chose not to depose Ron Richardson because he likes to use police reports for impeachment, and he was going to handle Ron by putting Mike, Ron's brother, on the stand. (See February 18, 2002 Transcript, pages 25 and 110 - 111, attached). Moreover, Mr. Episcopo stated that he was not interested in making Ron look bad in front of the jury because he did not want to ruin Defendant's alibi

> defense, and questioning Ron about his involvement in the murders and his motive to lie would be inconsistent with Defendant's alibi defense. (See February 18, 2002 Transcript, page 28, attached).
>
> Furthermore, Mr. Episcopo stated that Ron did not remember anything when he testified, was not prepared, was inherently unbelievable, and he felt that the jury would have a lot of problems believing Ron because he received a great deal from the State. (See February 18, 2002 Transcript, pages 25, 90, and 114 - 115, attached). Lastly, Mr. Episcopo testified that he never had any intention nor desire to depose Ron, and believed that Ron lied at trial because he could not remember the details about the apartment. (See February 18, 2002 Transcript, pages 89 - 90, and 112, attached). Consequently, Defendant has failed to meet the first prong of Strickland in that he has failed to prove how counsel acted deficiently when he made a strategic decision not to investigate Mr. Richardson, look into his background, determine his motive for testifying, and develop any information that could have been used to impeach him. Since Defendant has failed to meet the first prong of Strickland, it is unnecessary to address the prejudice component. See Downs v. State, 740 So. 2d 506, 518 n. 19 (Fla. 1999). As such, no relief is warranted upon this portion of claim IV. (PCR10/2002-2004).

The trial court applied the same reasoning in rejecting Hannon's related claim that Richardson's decision to testify should have prompted counsel to move for a continuance, with the trial court specifically finding that the Defendant failed to meet the first prong of Strickland in that

> . . . he has failed to prove how counsel acted deficiently when he did ask the Court for an opportunity to review the statement upon receiving it, and made a strategic decision not to request a continuance after he learned that Mr. Richardson would be a witness against Defendant. Since Defendant has failed to meet the first prong of Strickland, it is

> unnecessary to address the prejudice component. See Downs v. State, 740 So. 2d 506, 518 n. 19 (Fla. 1999). As such, no relief is warranted upon this portion of claim IV. (PCR10/2005).

The trial court's ruling is supported by competent, substantial evidence. Before Richardson testified, attorney Episcopo was provided with a copy of the sworn statement given by Richardson to the prosecutors less than 24 hours earlier. During the evidentiary hearing, Mr. Episcopo explained that he deliberately did not depose Ron Richardson because he believed it would only benefit the State by allowing Richardson to get better prepared. Mr. Episcopo had a copy of Richardson's sworn statement, and in his assessment, Richardson's lack of awareness of obvious items inside the victim's apartment, such as the whole set of weights right inside the door, would reveal that his trial testimony was untrue. (PCR11/2133-2134,2154-2156,2164).

When Richardson changed his mind on the last day of the State's case (R1097-1099, 1127-1135) and decided to testify, Mr. Episcopo believed Richardson's 11th hour change was fabricated and that he could best show that it was by stressing the good deal Richardson received for testifying and by cross-examining Richardson about the obvious details of the apartment, and establishing that Richardson had no knowledge of any of the obvious features in the apartment. (PCR11/2063-2064, 2068-2069).

On cross-examintation at trial, Richardson had to admit that he was not familiar with the apartment. (R1204-1205, 1216). Mr. Episcopo concluded that deposing Richardson would only have allowed Richardson the opportunity to improve his testimony for trial. PCR11/2070-2071). Although defense counsel wanted to show that Richardson's changed "story" at trial was untrue, Mr. Episcopo simultaneously did not want to make Richardson look guilty, because he wanted to preserve Hannon's innocence defense/alibi, and this defense was supported by all of Richardson's prior statements. (PCR11/2071-2072).

At trial, Richardson admitted that his trial testimony was different than all his prior statements of his involvement, and the jury was apprized of defense counsel's assertion that Richardson was lying at trial and that all his prior statements were actually correct. The defense assertion that Richardson did not fail the polygraph, as contrasted with his statements during the polygraph, would have been inadmissible at trial. (PCR10/1944-1945). See, Sochor v. State, 883 So. 2d 766 (Fla. 2004) (affirming summary denial of postconviction relief and noting that as for the polygraph tests, their results would not have been admissible at trial without the consent of both parties), citing Walsh v. State, 418 So. 2d 1000, 1002 (Fla. 1982). However, defense counsel, without mentioning the

polygraph, did impeach Richardson about his statements to Detective Metzgar, who had been the polygraph examiner. During cross-examination, Richardson admitted telling the detectives that he had nothing to do with the offense and knew nothing about it and that he had lied to them. (R931-932).

Finally, the defendant did not establish at the evidentiary hearing that deposing Richardson would have supplied any further impeaching information. Mr. Episcopo's explanation for not deposing Richardson was a reasonable, tactical decision. Mr. Episcopo knew what Richardson would say at trial and that it would contradict what he had said many times before. Mr. Episcopo impeached Richardson with his contradictory statements and his 11th hour change in his testimony. Furthermore, Hannon failed to show in the evidentiary hearing that counsel was ineffective for failing to request a continuance. Mr. Episcopo testified that, for the same reasons he had not deposed Ronald Richardson, he had not requested a continuance. Trial counsel felt it would only have allowed the State to get Richardson better prepared. (PCR11/2155-2156). At trial, defense counsel extensively cross-examined Richardson, including discrepancies between his testimony and all of his prior statements, which called into question Richardson's credibility. Defense counsel cross-examined Richardson about the deal he expected from the

State, and that he was trading his own liability for first degree murder for a conviction for accessory after the fact and a five-year sentence. Mr. Episcopo made the jury well-aware of issues affecting Richardson's credibility, and Hannon has failed to show anything that could have been gained from a continuance that would have affected the outcome. Hannon failed to establish any deficiency of counsel and resulting prejudice.

Failure to "Adequately Prepare" for Witness Judith Bunker

Following the evidentiary hearing, the trial court again addressed Hannon's multiple allegations regarding expert witness Judith Bunker and found that Hannon failed to demonstrate any deficiency of counsel under Strickland. The trial court's final written order on this claim states, in pertinent part:

> In the sixth sub-claim, Defendant claims ineffective assistance of counsel due to counsel's failure to discover any information on which Judith Bunker, the blood spatter expert, relied upon in reaching her conclusion. At the February 18, 2002 evidentiary hearing, Mr. Episcopo testified that attacking Ms. Bunker would not have helped the defense because her testimony was irrelevant and did not hurt Defendant's case. (See February 18, 2002 Transcript, pages 40 and 46, attached). Moreover, Mr. Episcopo testified that Ms. Bunker did not have anything against Defendant, she did not put any of the victims' blood on Defendant, the State did not need her for their case, and he had no intention of attacking her. (See February 18, 2002 Transcript, page 113, attached). Consequently, Defendant has failed to meet the first prong of Strickland in that he has failed to prove how counsel acted deficiently when he made a strategic decision not to discover any information on which Ms. Bunker relied upon in reaching her

conclusion. Since Defendant has failed to meet the first prong of Strickland, it is unnecessary to address the prejudice component. See Downs v. State, 740 So. 2d 506, 518 n. 19 (Fla. 1999). As such, no relief is warranted upon this portion of claim IV.

Defendant further claims that counsel failed to properly prepare for cross-examination of Ms. Judith Bunker, and failed to question her on her alleged expertise, her methodology, and the bases for her opinion. At the February 18, 2002 evidentiary hearing, Mr. Episcopo testified that although he received Ms. Bunker's Curriculum vitae prior to trial, he did not recall deposing Ms. Bunker prior to trial. (See February 18, 2002 Transcript, page 35, attached). However, Mr. Episcopo testified that he did not do any investigation into Ms. Bunker's credentials because he did not want the jury to think he was playing both sides. (See February 18, 2002 Transcript, page 40, attached). Mr. Episcopo further testified that he never questioned Ms. Bunker's credentials because he didn't want to give the jury the impression that he was impeaching a witness that was not relevant to the alibi defense, and questioning her extensively would have had nothing to do with the alibi defense. (See February 18, 2002 Transcript, pages 34 - 35, attached).

Moreover, Mr. Episcopo testified that Ms. Bunker did not have anything against Defendant, she did not put any of the victims' blood on Defendant, the State did not need her for their case, and he had no intention of attacking her. (See February 18, 2002 Transcript, page 113, attached). Consequently, Defendant has failed to meet the first prong of Strickland in that he has failed to prove how counsel acted deficiently when he made a strategic decision not to extensively cross-examine Ms. Judith Bunker, and question her on her alleged expertise, her methodology, and the bases for her opinion. Since Defendant has failed to meet the first prong of Strickland, it is unnecessary to address the prejudice component. See Downs v. State, 740 So. 2d 506, 518 n. 19 (Fla. 1999). As such, no relief is warranted upon this portion of claim IV. (PCR10/2005-2007).

The factual findings of the trial court are supported by

competent substantial evidence and, therefore, are entitled to deference. Zakrzewski v. State, 866 So. 2d 688, 692 (Fla. 2003). During the evidentiary hearing, Mr. Episcopo testified that it was his tactical decision not to challenge the blood splatter testimony because it was "irrelevant" to Hannon's defense that he did not commit the murders and was not present at the victims' apartment at the time of the crimes. Mr. Episcopo testified that Judith Bunker's testimony would have been an issue if Hannon had taken the position at trial that he was present at the time of the murders, but did not commit them. (PCR11/2116). Mr. Episcopo testified in February of 2002, four months before the defendant's expert witness, Dr. Lipman, testified. Therefore, Mr. Episcopo did not know that Hannon now has admitted to Dr. Lipman that he was present at the victims' apartment, but claimed to Dr. Lipman that he did not commit the murders.[5] (PCR11/2190-2193,2205).

During the evidentiary hearing, trial counsel explained his tactical reasons for not challenging Ms. Bunker's credentials or testimony as *irrelevant* to the innocence/alibi defense of defendant's not being present at the time of the murders. (PCR11/2078, 2082, 2084-2085, 2090-2091). Hannon has not

[5]Dr. Lipman's notes of his interview of Hannon on July 31, 2001, were introduced into evidence by the State during Dr. Lipman's testimony at the evidentiary hearing. (PCR13/2535).

demonstrated what defense counsel could have gained that would have changed the outcome from deposing Ms. Bunker or challenging her testimony through cross-examination on the points now raised. Defense counsel's objections at trial to Ms. Bunker's testimony as inflammatory, irrelevant, and to the introduction of her slides as cumulative to the Sheriff's photos were denied, and the trial court's evidentiary rulings were affirmed on direct appeal. (R1073, 1082, 1092-1093, 1444-1447); Hannon, 638 So. 2d at 43. Additionally, this Court previously found the blood splatter evidence and Ms. Bunker's testimony to have been properly admitted at Hannon's trial. Hannon, 638 So. 2d at 43.

In light of the fact that numerous other witnesses also testified to the blood splatters at the scene, (R424, 426-428, 627, 651, 656-661, 695, 702-7-7 948-952), and the video and photos taken by the Hillsborough Sheriff's Office of the blood present at the scene were in evidence, (R462-479), Hannon has not demonstrated any prejudice resulting from Ms. Bunker's testimony. Counsel is not ineffective for failing to object to evidence when the same inference could have been drawn from other testimony or evidence. See, Johnson v. State, 593 So. 2d 206, 209 (Fla. 1992).

Finally, and most significantly from defense counsel's perspective at trial, Ms. Bunker's testimony of the blood

splatters did not link Hannon to the scene. Moreover, at the time of trial, Mr. Episcopo hired a forensic chemist, Professor Owen of the University of South Florida, to explain the presence of the blood stains which had been identified, by both the defense's hired fingerprint expert and the State's fingerprint expert, as Hannon's palm print at the scene. (PCR11/2144-2145). Because Hannon failed to demonstrate any deficiency of counsel and resulting prejudice under Strickland, postconviction relief was correctly denied.

Failure to Further Question Michele Helm

Hannon next faults trial counsel for not exploring Michele Helm's deposition testimony that Ron Richardson was jealous and had accused her of sleeping around with other men, including Jim Acker and Robbie Carter. Following the evidentiary hearing, the trial court found that defense counsel made a strategic decision on this point; and, therefore, Hannon failed to establish any deficiency of counsel under Strickland. As the trial court's order explains,

> In the eleventh sub-claim, Defendant claims ineffective assistance of counsel due to counsel's failure to further question Ms. Michele Helm, Mr. Richardson's former girlfriend, regarding the testimony she gave during her July 9, 1991 deposition that Mr. Richardson was a very jealous person who was violent and had threatened to kill her, and often accused her of sleeping with other men, including Robbie Carter and Jim Acker. At the February 18, 2002 evidentiary hearing, Mr. Episcopo testified that he

> was not concerned about what Ms. Michele Helm could have done to attack Ron Richardson. (See February 18, 2002 Transcript, page 114, attached). He further testified that her testimony regarding specific bad acts of Ron had nothing to do with Defendant's alibi defense, and would have been inadmissible. (See February 18, 2002 Transcript, page 115, attached). Consequently, Defendant has failed to meet the first prong of Strickland in that he has failed to prove how counsel acted deficiently when he made a strategic decision not to further question Ms. Michele Helm regarding the testimony she gave during her July 9, 1991 deposition that Mr. Richardson was a very jealous person who was violent and had threatened to kill her, and often accused her of sleeping with other men, including Robbie Carter and Jim Acker. Since Defendant has failed to meet the first prong of Strickland, it is unnecessary to address the prejudice component. See Downs v. State, 740 So. 2d 506, 518 n. 19 (Fla. 1999). As such, no relief is warranted upon this portion of claim IV. (PCR10/2007).

During the evidentiary hearing, Mr. Episcopo confirmed that he had attended Michele Helm's deposition in which she stated that Ron Richardson had accused her of sleeping with Carter, Acker, and everybody. (PCR11/2068, 2073). However, the assertion that Michele Helm described Richardson as being jealous and accused her of sleeping with everybody, including Jim Acker and Robby Carter, would have been inadmissible as impeachment evidence at trial. Fernandez v. State, 730 So. 2d 277, 281-283 (Fla. 1999). Mr. Episcopo explained, further, that he had not wanted to use this type of impeachment of Richardson as detracting from his main cross-examination of showing that Richardson had a reason to lie, of the five-year sentence he had

bargained with the State at the last minute in exchange for his changed testimony, and of showing that Richardson knew little about the obvious features of the apartment, more consistent with his having not been there and which was consistent with defendant's alibi defense. (PCR11/2068-2069, 2071-2072, 2159). "I felt the less we did with him, the better, because he didn't remember the apartment. He didn't remember hardly anything. His testimony wasn't that good. He wasn't prepared." (PCR11/2159).

Furthermore, Mr. Episcopo was not questioned during the evidentiary hearing about any alleged prior violent acts of Richardson, therefore, this portion of Hannon's argument should be considered abandoned and merely speculative.

Conclusion

Finally, Hannon's collateral counsel apparently concludes that trial counsel should have abandoned their innocence/alibi defense once Richardson became a State witness, and asserts that trial counsel's "intransigence" kept him from adequately investigating and impeaching some unnamed "key state witnesses." (See, Initial Brief of Appellant at 60). The State strongly disputes collateral counsel's characterization. Defense counsel presented an extensive case, both through cross-examination of State witnesses and by calling 17 witnesses during the guilt

phase, to both contradict the State's witnesses and to support Hannon's testimony that he was not present at the victims' apartment and that he did not commit the murders. (R1369, 1402). At trial, Hannon maintained that he did not fit the description given, nor look like the composite created by the four eyewitnesses (R381, 384; 1376, 1385-1386), who observed the "big" suspect leave the apartment hunched over and arms crossed over his stomach, as though carrying something in his waistband. (R293-294, 296-297, 307, 314, 317-321, 343-345, 349, 351-353). Hannon addressed, and explained away, the testimony of Robin Eckert and Kamla Allersma, by testifying that the events they recalled had occurred the night before the murders.

Hannon explained the presence of his palmprint and fingerprint by testifying that he had been to the victims' apartment two or three weeks before the murders. According to Hannon, during this prior visit, he had brought a pork loin for a barbecue, he had cut up the pork loin while he was at the apartment, and had gone upstairs to use the bathroom. (R1372-1374). Hannon explained his incriminating statements to inmate witnesses as being statements taken out of context, or matters overheard in phone conversations which were misunderstood, or as statements read by the other inmates from the 800 to 1,000 pages of police reports and autopsy report, which he had by his bed

and shared with them. (R1394-1396).

In support of Hannon's trial testimony, defense counsel called numerous witnesses to say that Hannon did not look like the composite or match the physical description given by the eyewitnesses. (R1262, 1270, 1323, 1325, 1332, 1338, 1364, 1438, 1443). Defense counsel also called Kamla Allersma to contradict much of Robin Eckert's testimony and to say that Robin Eckert had a reputation for lying. (R1232-1240). Defense counsel called Hannon's sister, Maureen, who testified that she had not seen her brother on Thursday, January 10, 1991, but it was Wednesday when Robin and Kamla were waiting for them at Richardson's when they arrived home from the slaughterhouse, smelly and dirty, as they were only on Mondays and Wednesdays. (R1354, 1362).

Defense counsel also called the then-uncharged third suspect, James Acker, who testified that he was at home with his wife Michele on January 10, 1991, which she confirmed in her testimony for the defense. (R1261-1263) According to Acker, it was Wednesday when Acker, Robin, and another girl were at Richardson's (R1337). In addition, Acker stated that he was with Hannon around Christmas when Hannon had taken the pork loin to Carter's apartment and cut it up there. (R1339). Michele Acker confirmed that she was with her husband and Hannon when

they went to Carter's apartment. Defense counsel also called Dr. Terrance Owen, a professor of synthetic organic chemistry at the University of South Florida, who concluded that the prints identified as being those of defendant at the scene were more consistent with having been left in dead animal meat protein than in fresh human blood. (R1414-1415, 1421).

Defense counsel presented the testimony of five cellmates who stated that they had never heard defendant talk about his case to them or anyone else, and one cellmate who did speak to Hannon about his case and read defendant's police reports, saw other cellmates read them, and heard Keith Fernandez say he would do whatever it took to get out of jail. (R1304-1307, 1311-1312, 1315, 1333-1335). In addition, defense counsel vigorously cross-examined the State's material witnesses and introduced evidence in the defense case of Hannon's cooperation with the police and having not shaved or cut his hair for the purpose of changing his appearance. (R728, 1004, 1013, 1387-1391). In this case, defense counsel relied on an innocence/alibi defense which was based on his client's steadfast, consistent declarations before, during, and after trial. Trial counsel's strategy was both informed and reasonable under the circumstances presented to trial counsel in 1991. Hannon has not established the existence of any

deficiency of trial counsel and resulting prejudice under Strickland and its progeny.

ISSUE II

THE TRIAL COURT PROPERLY DENIED THE CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE DURING THE PENALTY PHASE

Hannon's next issue challenges the performance of his attorney at the penalty phase of the trial. In support of his claim, Hannon relies, primarily, on Wiggins v. Smith, 539 U.S. 510 (2003) and Williams v. Taylor, 529 U.S. 362 (2000).

However, Wiggins merely applied the Strickland standards to the facts of that case, and it did not change the legal standard for the determination of prejudice in evaluating a claim of ineffective assistance of counsel. Hannon also cites extensively to the ABA standards addressed by the Court in Wiggins. However, at the time of the defendant's trial, the Court in Strickland had emphasized that "prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable, but they are only guides," Id. at 688.

In Wiggins, the postconviction evidence which the jury did not hear included Wiggins' long history of severe physical and sexual abuse at the hands of his alcoholic mother and various foster parents. That abuse included going for days without food, his hospitalization for physical injury, and repeated rapes and gang-rapes. Wiggins, 539 U.S. at 516-517. The abuse occurred throughout Wiggins' childhood, teenage years, and even

into early adulthood and was documented in medical, school, and social services records. Id. The Supreme Court described it as Wiggins' "excruciating life history." 539 U.S. at 537.

In Williams v. Taylor, 529 U.S. 362 (2000), trial counsel failed to investigate and discover evidence that "Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody." Id. at 395. Additionally, there was evidence that Williams was borderline mentally retarded and had a fifth grade education. Id. at 396. Unlike Wiggins or Williams, this defendant's family history and background is unremarkable in comparison.

The court below conducted an evidentiary hearing on Hannon's claim of ineffective assistance during the penalty phase. The denial of this claim involved the application of legal principles to the facts as found below; therefore, this Court must review the factual findings for competent, substantial evidence, paying deference to the trial court's findings, and review of the legal conclusions is *de novo*. Stephens, 748 So.

2d at 1029.

The issue before this Court is not "what present counsel or this Court might now view as the best strategy, but rather whether the strategy was within the broad range of discretion afforded to counsel actually responsible for the defense." Cooper v. State, 856 So. 2d 969, 976 (Fla. 2003), citing Occhicone v. State, 768 So. 2d 1037, 1049 (Fla. 2000). In denying postconviction relief following the evidentiary hearing, the trial court found no deficiency under Strickland. As the trial court's final written order explains:

> Mr. Episcopo testified that Defendant agreed to present the innocence defense at the penalty phase, and Defendant never changed his position that he was not there. (See February 18, 2002 Transcript, pages 72 - 73, 98, and 101, attached). Mr. Episcopo testified that his role in the penalty phase investigation was to try to establish in the case in chief that Defendant did not have the type of character to commit the murders. (See February 18, 2002 Transcript, page 65, attached). He further testified that since he knew about Defendant's background, namely his prior criminal record, he was not going to bring it to the jury's attention because the State did not, and considered it a "victory" that his prior criminal record never came out in the penalty phase. (See February 18, 2002 Transcript, pages 67 - 68, 77, 79, and 82, attached). He further testified that he knew of Defendant's drug use, however, Defendant never told him that he had a drinking problem. (See February 18, 2002 Transcript, page 81, 84, and 87, attached). Furthermore, Mr. Episcopo testified that he had inquired of Defendant's parents as to whether Defendant was born with any problems. (See February 18, 2002 Transcript, page 76, attached). He testified that he never inquired of Defendant's parents about Defendant's life as a child

because there was no indication that it was bad or that the parents neglected Defendant, so he did not see how Defendant's drug or alcohol use growing up was relevant to their alibi defense and did not want to go into it. (See February 18, 2002 Transcript, pages 79 - 85, attached). He testified that although he put on the testimony of Tony Acker, and Defendant's parents during the penalty phase, the whole theme for the penalty phase was developed at the beginning of the trial, which Mr. Episcopo elaborated on with the following:

> And you look at their testimony and that's exactly what the thrust was. Not that he had a drug problem. Not that he had mental problems, that he failed school. That he was some abused person. None of that stuff. If his parents had believed that, they certainly would have raised it with me. That was not what they talked about ever. They never brought that up.

(See February 18, 2002 Transcript, pages 102 - 103, attached). He testified that he never discussed with either Defendant or his family any of the alleged mental health mitigation, namely concussions suffered during football practice, Defendant being hit in the head at a gas station, head injuries suffered during a car accident, or any problems with Defendant's brain because it was not an issue since Defendant never said anything and Defendant's family never brought them to Mr. Episcopo's attention. (See February 18, 2002 Transcript, pages 105 - 106, attached). Neither Defendant nor Defendant's family ever indicated in any way to Mr. Episcopo that Defendant had any substantial drug or alcohol problems. (See February 18, 2002 Transcript, page 107, attached).

Mr. Episcopo also presented mitigation evidence during the guilt phase when he put Defendant on the stand and had Defendant testify to the fact that he attended school up to the eleventh grade, that he was a hard worker, he was able to get a job with Rusty Horn and Stucco and wanted to work, make money, and learn a trade, he had various jobs, with an incentive to earn an extra fifty cents an hour if he did not

> drink too much, and he would visit his sister's house on special occasions with his nieces and nephews. (See February 18, 2002 Transcript, pages 107 - 109, attached). Consequently, Defendant has failed to meet the first prong of Strickland in that he has failed to prove counsel acted deficiently in conceding that no statutory mitigators existed, that counsel was unfamiliar with the law regarding non-statutory mitigation, and that counsel failed to present a wealth of compelling mitigation evidence when Defendant adamantly maintained that he was not at the crime scene and some mitigation evidence was presented even though Defendant agreed that no statutory mitigation or non-statutory mitigation would be presented during the penalty phase. Since Defendant has failed to meet the first prong of Strickland, it is unnecessary to address the prejudice component. See Downs v. State, 740 So. 2d 506, 518 n. 19 (Fla. 1999). As such, no relief is warranted upon this portion of claim IV. (PCR10/2013-2014) (e.s.)

As previously noted, in reviewing the denial of a claim of ineffective assistance of counsel after an evidentiary hearing, this Court is required to give deference to the trial court's findings of fact to the extent that they are supported by competent, substantial evidence. Stephens v. State, 748 So. 2d 1028, 1033-34 (Fla. 1999). Here, the trial court's findings are supported by the following competent, substantial evidence.

Hannon told Mr. Episcopo that he did not commit the murders and did not want to make a deal with the State, even to save his life. (PCR11/2163). It was Hannon's decision that mitigation would not be presented in the penalty phase. (PCR11/2140-2142, 2145-2146, 2168). Mr. Episcopo testified to Hannon having been "adamant," even after the guilty verdict, about not being there

and not being guilty and that defendant had stated in his testimony at trial, and before the trial court for sentencing, (R1641-1642), and for the five years that he communicated with Mr. Episcopo after trial. (PCR11/2111, 2114-2117, 2134, 2148). Mr. Episcopo felt it was important to preserve Hannon's chance for a retrial, when the actual murderer was found, without Hannon having admitted any guilt in the penalty phase. (PCR11/2145-21462149). Hannon and his parents agreed. (PCR11/2116, 2170). Mr. Episcopo testified that the defense was not just that Hannon did not commit the murders, but that he had an alibi of not being present at the time of the murders. (PCR11/2110-2111). He stressed that the defense strategy would have been different if Hannon had admitted to being present. (PCR11/2116-2117).

Although it was Hannon's desire and shared decision that Mr. Episcopo not present mitigation evidence, Mr. Episcopo agreed to revisit that decision with Hannon after the Court's inquiry at trial. Thus, the joint decision was then made that they would reemphasize Hannon's character during the penalty phase as precluding murder, with the hope of creating some doubt in the minds of the jurors as to the appropriateness of a death penalty recommendation. (PCR11/2109-2111, 2114-2118, 2140-2142, 2146, 2166-2172). Mr. Episcopo considered this character evidence to

be nonstatutory mitigation, which collateral counsel has deemed an "invalid" lingering doubt argument.

The defendant's own expert witness, Mr. Norgard, recognized that lingering doubt, although not a valid mitigating factor, nevertheless may be a factor in the jury's death recommendation vote. (PCR11/2232-2233). Thus, while not recognized as a valid statutory mitigating factor, defense counsel's continued reliance on the defendant's claim of innocence during the penalty phase has been approved as a reasoned, strategic decision. For example, in Chandler v. United States, 218 F.3d 1305, 1320 (11th Cir. 2000), trial counsel focused on obtaining an acquittal and then, at sentencing, on lingering doubt. The Eleventh Circuit specifically found that this strategy was a reasonable one and the federal appellate court relied, in part, on Tarver v. Hopper, 169 F.3d 710, 715-16 (11th Cir. 1999) which cited a "law review study concluding that 'the best thing a capital Defendant can do to improve his chances of receiving a life sentence ... is to raise doubt about his guilt.'"

This Court also has recognized, in passing, that lingering doubt occasionally has been permitted at the trial court level in Florida. For example, during the postconviction proceedings in Haliburton v. Singletary, 691 So. 2d 466, 471 (Fla. 1997), trial counsel concluded that testimony that Haliburton's

emotional problems and deprived upbringing caused him to commit the crime or lessened his culpability would have conflicted with the picture of charity and pacifism painted by the other defense witnesses and would have been inconsistent with Haliburton's lingering doubt argument. Trial counsel's penalty phase strategy was to humanize Haliburton. Even though this strategy was unsuccessful, this Court found that Haliburton had not established either any deficiency or resulting prejudice under Strickland. Haliburton, 691 So. 2d at 471. In Hegwood v. State, 575 So. 2d 170, 175 (Fla. 1991), decided the same year as Hannon's trial, Justice Ehrlich's dissent concluded that lingering doubt was a likely reason for the jury's life recommendation. See also, Allen v. State, 662 So. 2d 323, 329 (Fla. 1995); Henyard v. State, 689 So. 2d 239, 253 (Fla. 1996).

During the guilt phase, Rusty Horne, Roy Kilgore and the defendant testified to Hannon's character as one incapable of murder. During the penalty phase, the trial court specifically allowed the opinion testimony of Toni Acker that she did not think Hannon could ever be guilty of such a crime. (R1595-1596). In addition, defense counsel also presented the testimony of the defendant's parents, albeit against the defendant's wishes. (PCR11/2109-2110). At the time of Hannon's trial, defense counsel reasonably, and correctly, anticipated

that the trial court might allow the defense to rely on a lingering doubt argument during the penalty phase, based on the defendant's character as one not capable of murder.

Hannon's parents and two of his sisters testified in the evidentiary hearing to nonstatutory mitigation which collateral counsel asserted should have presented about the family's background. From working long hours and their drinking, the parents were said to have paid insufficient attention to Hannon during his childhood and were ignorant of or lacked concern for his drinking, drug use and skipping school. Hannon elected not to testify in the evidentiary hearing and had testified in the guilt phase at trial only to his drinking habits around the time of the murders. The defendant's psychologist, Dr. Faye Sultan, testified to hearsay reports from Hannon and his sister Maureen as to other drugs taken by Hannon through the years and around the time of the murders. (PCR11/2107-2109, 2116-2118). Maureen testified to Hannon's using drugs and alcohol with her when they were young and to his alcohol and cocaine use around the time of the murders. On cross-examination, she explained that defendant only drank on weekends after working for Rusty, for whom he worked six or seven days a week and got paid extra for not having a hangover. (PCR12/2280-2281, 2284-2286, 2289). Both the defendant and Maureen testified at trial without mentioning

Hannon's use of drugs, and Maureen was not with Hannon on the night of the murders. (PCR12/2298-2299).

Dr. Sultan reviewed only Hannon's military records; she was informed that school and medical records from New York had been destroyed. She read portions of the trial record of family members' testimony and a codefendant's testimony and reviewed Dr. Merin's report. She spoke with the defendant's mother and father and sisters, Maureen and Ellen. From speaking with the sisters, especially, Dr. Sultan concluded that Hannon had grown up with little parental supervision or discipline, which had influenced his development. She claimed that the parents, in retrospect, also felt they had not provided the guidance he needed. (PCR12/2441-2451).

Dr. Sultan summarized the overall picture of defendant by 1991 as having "poor skills in living." She attributed this to the parental neglect, lack of discipline and structure, and defendant's substance abuse. She described his substance abuses as compromising "his ability to reason, to use good judgment, to logically and sequentially plan something." He was irritable and not good at sustaining attention or focus. His ability to think clearly and rationally under stress was compromised. (PCR12/2448-2449).

Mr. Episcopo testified that, before trial, he had discussed

with Hannon and his parents and sister, Maureen, the possibility that they might have to go to a penalty phase and they would probably remain with the defense theory that Hannon had not been present and was not the type of person who would commit murder. (PCR11/2142, 2146, 2170). No critical decisions were made that did not include input and agreement from Hannon and his parents. (PCR11/2114-2117, 2143, 2146-2147). Hannon's father confirmed that the defendant did not want them to testify during the penalty phase. (PCR12/2267). Hannon did not testify or contradict that he did not want Mr. Episcopo to present any mitigation during the penalty phase. Before trial, Mr. Episcopo, with the participation of Hannon and his parents, investigated this defense theme (that Hannon had not been present and was not the type of person who would commit murder), and he consistently presented this theory at trial, both through cross-examination of State witnesses and during the presentation of defense witnesses in the guilt phase and the penalty phase. (PCR11/2147-2148). Attorney Norgard agreed that mitigating circumstances may be brought out in the guilt phase, as well as the penalty phase. (PCR11/2221, 2224).

In addition to the defense "character" theme (that Hannon was not the type of person who could commit murder), additional nonstatutory mitigation was developed during the guilt phase

concerning the defendant's background. For example, Hannon's own testimony during the guilt phase established that he had attended high school through the 11th grade, he was a hard worker, who had obtained a job with Rusty Horne in stucco work, where he earned an extra fifty cents an hour for not drinking too much, and he previously worked at a gas station on tires and brakes, delivering auto parts and delivering pizza, and maintained good family relations with his sister and her children. (PCR11/2152-2153).

Maureen also confirmed that Mr. Episcopo spoke with her before trial and asked about other persons for witnesses. (PCR12/2294-2295). Mr. Episcopo testified that he was aware of defendant's fairly lengthy criminal history record of cocaine charges, burglary, grand theft, carrying a concealed firearm, and escape, and he considered it a major victory that the jury never learned of it. (PCR11/2113, 2123-2126). He was also aware of Hannon's drinking because it was part of the alibi defense. Mr. Episcopo was also aware that Hannon had prior cocaine and marijuana charges and had used those drugs and he did not want that information known to the jury, either. (PCR11/2125-2128, 2151). Mr. Episcopo was unaware from observing Hannon or talking with him or his family that Hannon had any drug or alcohol problem. (PCR11/2127-2131, 2146).

Hannon had not gone through withdrawal based on Mr. Episcopo's observations of Hannon at the jail. (PCR11/2134, 2151).

For five years after Hannon's trial, Mr. Episcopo continued to correspond with Hannon, and Hannon never wavered from his claim of innocence/alibi, that he was not present and did not commit the murders. Hannon never raised with Mr. Episcopo either before, during, or after trial, that drinking and drugs were mitigating as to his conduct. (PCR11/2134-2135). Certainly, a criminal defendant has the obligation to notify counsel of his own condition, or matters peculiarly within his own knowledge. See, Mills v. State, 603 So. 2d 482 (Fla. 1992); Stewart v. State, 801 So. 2d 59, 66-67 (Fla. 2001). In this case, as in Stewart, defense counsel testified that no member of the defendant's family provided information in their interviews before the penalty phase of the defendant having suffered any abuse from his parents, (PCR11/2129, 2146), and the defendant, himself, reported none. Nor did they report that Hannon had any brain problems or mental deficiency. (PCR11/2119-2122, 2138-2139, 2146, 2149-2150). Nor did Mr. Episcopo personally observe any problems with the defendant's mental status. (PCR11/2150). See also, Chandler v. United States, 218 F.3d 1305, 1318-19 (11th Cir. 2000) (quoting from Strickland at 2066, and reiterating that the reasonableness of counsel's investigation

depends on the facts provided by the defendant).

Mr. Episcopo has not been shown to have been ineffective for failing to contradict the defendant's innocence/alibi defense, by introducing evidence of Hannon's history of using alcohol and drugs and that he was using alcohol on the night of the murders. Furthermore, the latter was already before the jury for consideration in the penalty phase by virtue of Hannon's own testimony in the guilt phase that he was drinking that night at Richardson's house. The former would have been insignificant in light of Hannon's actions that supported the multiple aggravating factors of heinous, atrocious and cruel as to both victims, committed while engaged in commission of a burglary as to both victims, previous conviction of the other murder as to both victims, and committed for the purpose of avoiding arrest as to the second victim. (R1806, 1808).

Even now, the defendant's current mental health experts did not testify that they felt Hannon's history of substance abuse meant that he was substantially impaired on the night of the murders. See Jennings v. State, 583 So. 2d 316, 320 (Fla. 1991). In this case, as in Lawrence v. State, 691 So. 2d 1068, 1076 (Fla. 1997), any slight mitigation from defendant's history of alcohol and drug consumption was outweighed by the many and substantial aggravators.

The fact that collateral counsel, with hindsight, might now use a different tactical approach during the penalty phase is irrelevant. Collateral counsel presented testimony which established, at best, Hannon's alleged personality change and inability to control his impulses; this was ostensibly attributed to excessive alcohol and drug use which allegedly began as the result of a lack of parental supervision. Hannon has not, and credibly cannot, establish that Mr. Episcopo's tactical approach in 1991, based on Hannon's insistence on not being present and his character as preventing the conduct of murder, was outside the broad range of reasonably effective assistance.

Hannon has failed to present any credible evidence that would have been truly mitigating or undermined the aggravating circumstances presented at trial. Moreover, it is not sufficient to establish that counsel could have done more. Rather, to carry his burden to prove deficient performance, Hannon must establish that "'counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" Windom v. State, 29 Fla. L. Weekly S191, S192 (Fla. May 6, 2004), quoting Strickland.

Moreover, even if Hannon had established that counsel's performance was deficient, he has not established that counsel's

performance prejudiced him. Strickland requires the defendant to show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown of the adversary process that renders the result unreliable. Strickland, 466 U.S. at 687. Thus, in order to establish the prejudice prong, Hannon must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. When considering a claim of ineffective assistance of penalty phase counsel, "the question is whether there is a reasonable probability that, absent the errors, the sentencer... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Id. at 695. See Sochor v. State, 883 So. 2d 766 (Fla. 2004).

Additional postconviction evidence and circumstances establishing a defendant's tumultuous childhood, mental health mitigation, and addiction to drugs and alcohol abuse have been deemed insufficient to establish prejudice under Strickland. As this Court noted in Randolph v. State, 853 So. 2d 1051, 1061 (Fla. 2003):

> The instant case is remarkably similar to Robinson v. State, 707 So. 2d 688 (Fla. 1998), and Breedlove v. State, 692 So. 2d 874 (Fla. 1997). In both cases, the defendants claimed that defense counsel was ineffective for failing to investigate each defendant's background, failing to furnish mental health experts with relevant information which would have supported their testimony about mitigating factors, and failing to call family members and friends who would have testified about each defendant's childhood abuse, mental instability, and addiction to drugs and alcohol. See Robinson, 707 So. 2d at 695; Breedlove, 692 So. 2d at 877. However, we found that neither Robinson nor Breedlove demonstrated the prejudice necessary to mandate relief under Strickland because the mitigation overlooked by defense counsel would not have changed the outcome of the defendant's sentence in light of the evidence. See Robinson, 707 So. 2d at 697; Breedlove, 692 So. 2d at 878; see also Tompkins v. Dugger, 549 So. 2d 1370, 1373 (Fla. 1989) (finding the mitigating evidence overlooked by defense counsel would not have changed the outcome and therefore did not demonstrate prejudice under the Strickland test). We reach the same conclusion in this case.

To merit relief on a claim of ineffective assistance of counsel, the defendant must show not only deficient performance, but also that the deficient performance so prejudiced his defense that, without the alleged errors, there is a "reasonable probability that the balance of aggravating and mitigating circumstances would have been different." Bolender v. Singletary, 16 F.3d 1547, 1556-57 (11th Cir. 1994); Hildwin v. Dugger, 654 So. 2d 107, 109 (Fla. 1995). This Court has denied relief in a number of similar cases where collateral counsel asserts that additional information should have been discovered.

Sweet v. State, 810 So. 2d 854 (Fla. 2002); Bruno v. State, 807 So. 2d 55 (Fla. 2001); Robinson v. State, 707 So. 2d 688, 695-697 (Fla. 1998).

Furthermore, the failure to present evidence that the defendant was raised in a two-parent family where his mother was allegedly an alcoholic and that the defendant began a life of drug abuse at an early age, does not undermine confidence in the outcome. In this case, trial counsel presented testimony during the guilt and penalty phase which served to "humanize" the defendant in front of the jury. In addition to his parents and Toni Acker, Hannon testified at trial and defense counsel was able to elicit certain humanizing testimony from him. See, Waters v. Thomas, 46 F.3d 1506, 1519 (11th Cir. 1995) ("putting the defendant on the stand sometimes can help 'humanize' him in the eyes of the jury"). On the whole, trial counsel's performance in this case was within the "wide range of reasonable professional assistance." Strickland, 466 U.S. at 689.

In this case, the balance of aggravating and mitigating circumstances that led to the imposition of the two death sentences in this case would not have been different had counsel introduced the mitigating testimony now offered. Here, "humanizing" testimony from Hannon, his friends, and family

members was presented at trial and the testimony of his current mental health experts would not have been sufficient to overcome the circumstances surrounding Hannon's two horrific murders. Balanced against the insignificant evidence of mitigation now being urged, the defendant has failed to establish prejudice. There is no reasonable probability that, absent the alleged errors, the sentencer would have concluded that the mitigating circumstances now offered outweighed the substantial aggravating circumstances found by the trial court. In other words, there is no reasonable likelihood that had the jury been given extensive details about Hannon's history of using alcohol and illicit drugs, and his poor decision making, that the results of the proceedings would have been different. Mills v. State, 603 So. 2d 482, 486 (Fla. 1992) (upholding trial court's denial of relief where new psychologist's testimony is premised on poor impulse control would not have resulted in life sentence); Tompkins v. State, 549 So. 2d 1370, 1373 (Fla. 1989) (upholding denial of postconviction relief where evidence of abused childhood and drug and alcohol addiction would not have outweighed the aggravating factors which include prior violent sexual batteries and HAC); Mendyk v. State, 592 So. 2d 1076, 1079-1080 (Fla. 1992) (same). Furthermore, given the aggravators applicable to both victims, prior violent felony,

felony murder, and HAC, it is not likely the mitigation presented now would have outweighed such aggravation. See, Breedlove v. State, 692 So. 2d 874 (Fla. 1997) (concluding aggravators of prior violent felony, felony murder, and HAC far outweighed childhood beatings and alcohol abuse mitigation offered in postconviction hearing). Lastly, in Wiggins, the Court concluded that the undiscovered mitigation may have made a difference to at least one juror. However, in this case, it is important to note that the jury recommendation of death in each case was a unanimous 12-0 recommendation.

ISSUE III

THE TRIAL COURT CORRECTLY SUMMARILY DENIED RELIEF ON HANNON'S REMAINING CLAIMS WHERE THE MOTION, FILES, AND RECORDS CONCLUSIVELY SHOWED THE DEFENDANT WAS NOT ENTITLED TO RELIEF

A defendant is entitled to an evidentiary hearing on his motion for postconviction relief unless (1) the motion, files, and records in the case conclusively show that the defendant is not entitled to any relief, or (2) the motion or a particular claim is facially invalid. See, Cook v. State, 792 So. 2d 1197, 1201-1202 (Fla. 2001). A trial court's summary denial of a motion to vacate will be affirmed where the trial court properly applied the law and competent, substantial evidence supports its findings. Diaz v. Dugger, 719 So. 2d 865, 868 (Fla. 1998).

Hannon argues that the trial court erred in summarily

denying postconviction relief on the following claims: (1) an alleged Brady/Giglio violation (Richardson's plea agreement and five-year sentence); (2) alleged presentation of unreliable and non-scientific evidence (blood spatter testimony); (3) alleged conflict of interest; (4) use of jailhouse informants; (5) alleged use of misleading and improper argument; (6) failure to object to alleged constitutional error: (a) burden shifting, (b) Caldwell claim, (c) "automatic" aggravator; and (7) "newly discovered" evidence. For the following reasons, the trial court properly summarily denied postconviction relief on each of the foregoing claims.

Alleged Brady/Giglio Violation[6] (Richardson's plea agreement and five-year sentence)

Collateral counsel alleges that Richardson "only received a suspended sentence and never spent a day in jail for this offense." (Initial Brief at 83). Hannon's accusation is patently incorrect; it is, at best, a negligent misstatement and, at worst, a blatant misrepresentation. Ron Richardson was arrested on the instant murder charges in March of 1991, and he was transported to and from the jail in order to testify at Hannon's jury trial in July of 1991. The following year, on May 15, 1992, Richardson entered a guilty plea to the charge of

[6]Brady v. Maryland, 373 U.S. 83, 87 (1963)and Giglio v. United States, 405 U.S. 150 (1972)

accessory after the fact. On May 15, 1993, Richardson was sentenced to a five-year term and he was credited with the time spent while incarcerated. Thus, Richardson's sentence was not a "suspended sentence" and Richardson received credit for more than 400 days of incarceration.

In summarily denying postconviction relief on Hannon's hybrid Brady/Giglio complaint, the trial court found no violation presented. The details of Richardson's plea agreement were known at the time and presented to the jury. As to any assertion that Richardson's "deal" allegedly was not accurately reflected, the fact that Richardson could get out earlier than five years with gain time was brought to the jury's attention by defense counsel's cross-examination at trial. (PCR6/1098, citing R1214).

Moreover, as the trial court found,

> Furthermore, on May 15, 1992, Mr. Richardson was sentenced to five (5) years prison for his participation in the crime. (See Judgment and Sentence, attached). The fact that Mr. Richardson did not serve five years in Florida State Prison due to gain time awarded by the Department of Corrections does not prove that the State suppressed evidence or presented false testimony. The award and forfeiture of statutory gain time is a function of the Department of Corrections, not the Court. See Harvey v. State, 616 So. 2d 521 (Fla. 2d DCA 1993). Therefore, Defendant has failed to prove either a Brady violation or a Giglio violation in that Defendant has failed to prove that the testimony was suppressed or that the State presented false testimony. As such, no relief is warranted upon this portion of claim III.

> Second, Defendant claims that Mr. Acker was sentenced after Defendant, and therefore, Mr. Acker's sentence constitutes newly discovered evidence. Defendant further claims that if Defendant's counsel would have had the facts that came out at Mr. Acker's trial, it is more likely he would have been able to prove that Defendant's role in the crime was that of the least culpable co-defendant. However, the Florida Supreme Court, on direct appeal, found that the Defendant was the most culpable of the three accomplices and found that Defendant's two death sentences were justified. See Hannon v. State, 638 So. 2d 39, 44 (Fla. 1994). Therefore, this issue is procedurally barred by the Florida Supreme Court's decision on direct appeal, and nothing in this portion of claim III alleging newly discovered evidence invalidates or changes the Florida Supreme Court's findings regarding Defendant's culpability in relation to his co-defendants. See Demps v. State, 761 So. 2d 302, 306 (Fla. 2000). Since this issue is procedurally barred, no relief is warranted upon this portion of claim III. (PCR/1094-1099)

Hannon has not identified any credible basis to undermine this Court's finding that Hannon was the most culpable of the perpetrators. Hannon's conclusory allegations do not require any reconsideration of this issue.

Alleged Presentation of Unreliable and Non-scientific Evidence (Judith Bunker's Blood Spatter Testimony)

Hannon's underlying complaint is procedurally barred inasmuch as this issue is one which could have been raised at trial and on direct appeal.

The law is well established that Hannon cannot avoid a procedural bar on direct appeal issues by presenting them under the guise of ineffective assistance of counsel. It is improper

to recast a direct appeal issue into a claim of ineffective assistance of counsel, and therefore summary denial was appropriate. Asay v. State, 769 So. 2d 974 (Fla. 2000); Robinson v. State, 707 So. 2d 688, 699 (Fla. 1998). Moreover, the defendant's complaints of ineffective assistance of trial counsel with respect to the blood spatter expert were explored at the evidentiary hearing and previously addressed. To the extent Hannon suggests misconduct by the State, the trial court found that the State was unaware of any impropriety. The State cannot be held responsible for a civilian witness misrepresenting her credentials. See, Smith v. Massey, 235 F.3d 1259 (10th Cir. 2000) (false testimony of state bureau of investigation agent could not be imputed to prosecutor).

Conflict of Interest

This issue could have been raised previously because the facts were clearly known at the time of trial. Thus, the issue is procedurally barred. Jackson v. Dugger, 633 So. 2d 1051, 1055 (Fla. 1993) (trial court's denial of motion to withdraw based on conflict of interest was barred); Francis v. State, 529 So. 2d 670, 672 (Fla. 1988) (conflict of interest claim should have been raised on direct appeal). In summarily denying postconviction relief on this claim, the trial court found this issue was procedurally barred and contradicted by the record.

As the trial court's order explains,

> "To prove a claim that an actual conflict of interest existed between a Defendant and his counsel, the Defendant must show that his counsel actively represented conflicting interests and that the conflict adversely affected counsel's performance. Quince v. State, 732 So. 2d 1059, 1063 (Fla. 1999). However, the facts that formed the basis for the aforementioned alleged conflict of interest were known to Defendant at the time of his trial, and therefore, could have been raised on direct appeal. As such, this claim is procedurally barred as it should have been raised on direct appeal. See Thompson v. State, 759 So. 2d 650, 661 (Fla. 2000); Jackson v. Dugger, 633 So. 2d 1051, 1055 (Fla. 1993); Koon v. Dugger, 619 So. 2d 246, 247-248 (Fla. 1993).
>
> Moreover, Defendant's attorney tried to get co-defendant Richardson to testify on Defendant's behalf. (See Trial Transcript, Volume XI, pages 1214, 1216 - 1217, attached). Specifically, co-defendant Richardson testified during redirect examination that "he [Mr. Episcopo] told me that if I would testify for Pat and we beat the case, that anybody could beat my case because they didn't have much evidence against me." (See Trial Transcript, Volume XI, page 1217, attached). Therefore, Defendant has failed to prove that his counsel was actively representing conflicting interests. As such, no relief is warranted with respect to this portion of claim VI.
>
> Defendant further claims that counsel was blinded to pursuing avenues of investigation that may have pointed to the co-defendant Richardson's role in the killings. However, Defendant has failed to specifically allege what evidence may have been available to show that co-defendant Richardson's role was more significant than Defendant's. Therefore, Defendant has failed to prove that the alleged conflict adversely affected counsel's performance. As such, no relief is warranted with respect to this portion of claim VI.
>
> Lastly, Defendant claims that counsel's pursuit to represent co-defendant Richardson clouded counsel's

> ability to effectively cross-examine Mr. Richardson. A review of the cross-examination of Mr. Richardson reflects that Mr. Episcopo impeached Mr. Richardson several times with prior statements Mr. Richardson made. (See Trial Transcript, Volume XI, pages 1193-1216, attached). Moreover, Mr. Episcopo was able to get Mr. Richardson to testify that he had changed his story and previously lied. (See Trial Transcript, Volume XI, pages 1194, 1196-1199, 1217, attached). After reviewing Mr. Episcopo's cross-examination and recross-examination of Mr. Richardson, the Court finds that Mr. Episcopo effectively cross-examined Mr. Richardson. (See Volume XI, pages 1193-1218, attached). Therefore, Defendant has failed to prove that counsel's alleged pursuit to represent co-defendant Richardson affected counsel's ability to effectively cross-examine Mr. Richardson. As such, no relief is warranted with respect to this portion of claim VI. (PCR/1129-1132)

In Cooper v. State, 856 So. 2d 969, 974 (Fla. 2003), this Court affirmed the summary denial of another capital defendant's postconviction claim based on an alleged conflict of interest. In Cooper, this Court emphasized that "[a] possible, speculative, or merely hypothetical conflict is insufficient to impugn a criminal conviction." Id., citing Hunter v. State, 817 So. 2d 786, 791-92 (Fla. 2002). In this case, as in Cooper, a review of the facts contained in the record before this Court reveals no actual conflict, and the defendant's assertions amount to no more than the speculation deemed insufficient in Hunter and Cooper.

Jailhouse informants

In this subsidiary claim, Hannon focuses on two inmates,

Jonathan Ring and Keith Fernandez. With respect to these two inmates, the trial court concluded that summary denial was appropriate because:

> As to jailhouse informant Jonathan Ring, Defendant claims the State investigator Scott Hopkins wrote a letter on September 6, 1991 to the superintendent of the prison where Mr. Ring was housed requesting that gain time that Mr. Ring had lost while waiting to testify be reinstated. However, the letter written on September 6, 1991, was written subsequent to July 23, 1991, the date the guilt phase of Defendant's trial ended. Therefore, the fact that Mr. Hopkins wrote this letter after the trial, does not prove that Mr. Ring was promised anything in exchange for his testimony in Defendant's case. As such, no relief is warranted with respect to this portion of claim VII.
>
> * * *
>
> Third, Defendant claims Mr. Fernandez and other informants were acting as agents of the State and Defendant's right to counsel was violated. However, Mr. Fernandez testified that he was asked by a deputy or detective if he had any information, and he replied, "Yeah", but he was never offered anything for his cooperation in the case, nor was he aware that Mr. Hellickson and Mr. Lewis told his prosecutor that they had no objection to him being released from custody. (See Trial Transcript, Volume VII, pages 773 - 774, 776-779, attached). Moreover, during the deposition of Mr. Fernandez, Defendant's counsel was made aware that Mr. Fernandez and Defendant had talked about Defendant's case, but Mr. Fernandez never stated, either at the deposition or at trial, that Defendant confessed to him. (See Trial Transcript, Volume VII, pages 769-788, Deposition of Mr. Fernandez, attached). Therefore, Defendant has failed to prove that Mr. Fernandez and the other inmates who testified against Defendant were agents of the State. Since Defendant has failed to prove Mr. Fernandez and the other inmates wee agents of the State, no relief is warranted with respect to this portion of claim VII.
>
> Fourth, Defendant claims ineffective assistance of counsel to the extent that counsel failed to discover

> the aforementioned information. However, since Mr. Fernandez and the other inmates were not agents of the State, counsel was not ineffective for failing to raise nonmeritorious issues. See Parker v. State, 611 So. 2d 1224, 1227 (Fla. 1993) Moreover, Defendant's counsel attempted to discredit the six informants of the State with testimony from several inmates that they never heard Defendant talk to anyone in the jail regarding his case. (See Trial Transcript, Volume XII, pages 1305-1316, 1333-1335, attached). As such, no relief is warranted with respect to this portion of claim VII. (PCR6/1134-1136)

Where the record conclusively establishes that a defendant is not entitled to relief, summary denial of postconviction relief is appropriate. See, Gudinas v. State, 816 So. 2d 1095, 1101 n. 6 (Fla. 2002) (finding no error in trial court's summarily denying legally sufficient claims where claims were conclusively refuted by trial record).

Alleged Misleading and Improper Argument

Issues that were, or could have been, raised at trial and on direct appeal are not cognizable in a postconviction motion. Cherry v. State, 659 So. 2d 1069, 1072 (Fla. 1995). Hannon's challenge to the prosecutor's closing is an issue which could have been raised at trial and on direct appeal. Therefore, this claim is procedurally barred. Moreover, the trial court specifically found that the State's "slaughterhouse" argument was supported by the trial testimony given of Mr. Ring, Mr. Acker, and the defendant. As to the ineffective assistance of counsel claim, Hannon failed to demonstrate any deficiency under

Strickland in that he has failed to prove that the State's argument was not supported by a factual basis. Therefore, this claim was properly summarily denied.

Failure to Object to Alleged Constitutional Error: Burden Shifting; Caldwell Claim, and "Automatic" Aggravating Factor

Hannon's underlying complaints should have been raised on direct appeal, if preserved at trial, and, therefore, were procedurally barred. See, Thompson v. State, 759 So. 2d 650, 665 n.10 (Fla. 2000). Moreover, in addressing the jury advisory sentence charge, the trial court noted that the defendant received an additional instruction at trial. As the trial court explained,

> Defendant further claims that the Court failed to instruct the jury that its recommendation would carry great weight and only would be overridden in circumstances where no reasonable person could agree with it. However, on July 24, 1991, prior to giving the jury the advisory sentence charge, the Court asked Defense counsel the following:
>
> > "When the Court gives the introductory instruction to the jury with reference to the penalty phase, does the defendant request the additional paragraph: "The Court must give great weight to the jury's advisory sentence because it represents the judgment of the community as to whether the death penalty is appropriate. This means that the Court is bound to follow the jury's advisory sentence unless the Court finds that no jury, comprised of reasonable persons, could ever return such an advisory sentence."

(See Trial Transcript, Volume XIV, page 1590,

> attached). Whereupon, Defendant's counsel responded, "Yes, we request that." (See Trial Transcript, Volume XIV, page 1590, attached). Subsequently, during the advisory sentence charge to the jury, the Court did give the aforementioned instruction to the jury. (See Trial Transcript, Volume XIV, page 1593, attached). As such, no relief is warranted with respect to this portion of claim XI. (PCR6/1152-1153)

Hannon's allegations of ineffective assistance of counsel for failing to object to alleged constitutional error (burden shifting; Caldwell claim, and "automatic" aggravating factor) was properly summarily denied. This Court recently upheld the summary denial of nearly identical claims of ineffective assistance of counsel in Sochor v. State, 883 So. 2d 766, 2004 Fla. LEXIS 985, 53-55 (Fla. 2004), stating:

> Sochor argues that his attorney was ineffective for failing to object to the following jury instructions: (1) the instructions regarding the "prior violent felony," "committed during the course of a felony," "cold, calculated, and premeditated," and "heinous, atrocious, or cruel" aggravating circumstances; (2) the instruction that he claims improperly shifted to him the burden of proving that a death sentence was inappropriate; (3) the instruction that he claims led the jury to believe that its role was merely "advisory," in violation of Caldwell v. Mississippi, 472 U.S. 320, 86 L. Ed. 2d 231, 105 S. Ct. 2633 (1985); and (4) the instruction concerning the "murder in the course of a felony" aggravating circumstance, which he claims violated Stringer v. Black, 503 U.S. 222, 117 L. Ed. 2d 367, 112 S. Ct. 1130 (1992), by rendering that aggravating circumstance "illusory."
>
> We reject each of these claims because Sochor cannot demonstrate the prejudice required to prevail on an ineffective assistance of counsel claim. On

> direct appeal, we found that the "prior violent felony," "committed during the course of a felony," and "heinous, atrocious, or cruel" aggravating circumstances were supported by the evidence. Sochor, 619 So. 2d at 292. And although we found on direct appeal that the "cold, calculated, and premeditated" aggravating circumstance was not supported by the evidence, we held the error to be harmless beyond a reasonable doubt. Id. at 292-93. We also held that the burden-shifting claim, while not preserved for review, was nevertheless without merit. Id. at 291 n.10; see also Demps v. Dugger, 714 So. 2d 365, 367-68 & n.8 (Fla. 1998) (holding such a claim to be procedurally barred as an issue that should have been raised on direct appeal and noting that such claims repeatedly have been rejected on the merits). We also stated on direct appeal that Florida's standard jury instructions do not violate Caldwell. See Sochor, 619 So. 2d at 291. And finally, we previously have held that there is no merit to the argument that an underlying felony cannot be used as an aggravating circumstance. See Freeman v. State, 761 So. 2d 1055, 1067 (Fla. 2000).

Here, as in Sochor, Hannon's claims were correctly denied.

Newly Discovered Evidence

Lastly, Hannon alleges that he has "newly discovered evidence" from Kelly Reynolds, who is Ron Richardson's niece, and who purportedly had a child who was fathered by Jim Acker. In summarily denying postconviction relief on Hannon's claim regarding Kelly Reynolds, the trial court found "the statements do not make any reference to Defendant or the testimony Mr. Richardson gave in Defendant's trial." Therefore, "the alleged statements do not meet the newly discovered evidence standard as they are not of such nature that they would probably produce an

acquittal on retrial." As the trial court explained,

> As to Defendant's claim that Mr. Ronald Richardson, the State's key witness against Defendant, gave materially false information at trial. Defendant claims several witnesses could testify that Mr. Richardson said he told the prosecutors what they wanted to hear and what he needed to say to keep himself out of prison, however, Defendant only names Kelley Reynolds, co-defendant Ronald Richardson's niece. Specifically, Defendant claims Kelley Reynolds testified on April 30, 1999, that in 1992 or early 1993, she heard Ronald Richardson say that Jim Acker was not present when the murders occurred, and that he [Richardson] told prosecutors what they wanted to hear because he wanted out of prison. In addition, Kelley Reynolds testified that she heard Ronald Richardson, on the phone, tell his brother Mike, to forget the money Mr. Ronald Richardson owed Mike because Mr. Ronald Richardson had saved Mike from going to prison for life.
>
> However, neither of these statements make any reference to Defendant or the testimony Mr. Ronald Richardson gave in Defendant's trial. Since the statements do not make any reference to Defendant or the testimony Mr. Richardson gave in Defendant's trial, the alleged statements do not meet the newly discovered evidence standard as they are not of such nature that they would probably produce an acquittal on retrial. As such, no relief is warranted upon this portion of claim XIX. (PCR6/1167-1168)

Finally, in addressing Hannon's postconviction challenge to the testimony of FBI agent Michael Malone, the trial court found summary denial was appropriate because:

> With respect to Defendant's claim that Special FBI Agent Michael Malone gave unreliable and false testimony during trial, Defendant has failed to prove that Mr. Malone gave unreliable or false testimony during Defendant's trial. Moreover, at trial, Mr. Malone, on direct examination, testified as follows:

HELLICKSON: Did you have occasion in this case to examine any items or substances for hair or fiber?

MALONE: Yes, I did.

HELLICKSON: What did you examine?

MALONE: Briefly or basically, I examined all of the items from both of the victims and from their residence. All of the items were hairs, and compared these hairs against known samples that I had.

HELLICKSON: Do you have a list there of the items that you did, in fact, examine?

MALONE: Yes, I do.

HELLICKSON: Do you have that here?

MALONE: The entire list. These are all items coming from Mr. Carter, Mr. Snider or their residence. I look at fingernail scrapings from Mr. Carter, fingernail scrapings from Mr. Snider, a pair of shorts, another pair of shorts, a shirt, the front door of the apartment, the bedroom door of the apartment, vacuum sweepings, several series of vacuum sweepings from the apartment and a sink trap that was removed from the apartment.

HELLICKSON: What were the finds of your examination?

MALONE: There were no hairs like Mr. Hannon anywhere in the residence or on the victims.

HELLICKSON: How did you make this finding?

MALONE: I took all of the hairs, all of the unidentified hairs from the residence or the victims and compared them to Mr.

Hannon's hairs, and none of them matched.

(See Trial Transcript, Volume V, pages 542-543, attached). Therefore, Defendant was not prejudiced by Mr. Malone's testimony as Mr. Malone testified that hair and fiber collected at the scene did not match that of the Defendant. (See Trial Transcript, Volume V, pages 542-543, attached).

In addition, Mr. Malone testified that the fabric found on the door was of a "particular pattern consistent with the type that would be made by an item such as a blue jean fabric." (See Trial Transcript, Volume V, page 548, attached). Mr. Malone never testified that Defendant was wearing blue jeans. (See Trial Transcript, Volume V, pages 538-552, attached). Moreover, Mr. Michael Harold Egan, an eye witness, testified at trial that he noticed three gentlemen coming out of a walkway, looking very suspicious, wearing ratty clothes and ratty jeans. (See Trial Transcript, Volume II, pages 295-296, attached). Mr. Ronald Richardson testified at trial that both Defendant and himself were wearing jeans. (See Trial Transcript, Volume XI, pages 1203-1204, attached). Again, Defendant was not prejudiced by this testimony because all three perpetrators were observed to have worn blue jeans. Since Defendant was not prejudiced by the aforementioned testimony, Defendant has failed to prove that the newly discovered evidence would probably produce an acquittal on retrial. As such, no relief is warranted with respect to this portion of claim XIX.

Lastly, Defendant claims that the F.B.I. Crime Laboratory investigation by the U.S. Department of Justice was withheld by the State. In White v. State, 644 So. 2d 242, 244 (Fla. 1995), the Florida Supreme Court cited Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), where the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violated due process where the evidence is material either to guilt or punishment..." The United States Supreme Court later explained the meaning of "material" in U.S. v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985):

> The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.
>
> Id. at 682, 105 S.Ct. at 3383.
>
> By virtue of the fact that Defendant failed to prove that Mr. Malone gave false or misleading testimony, and the fact that Mr. Malone's testimony did not prejudice the Defendant, Defendant has failed to prove that had the evidence been disclosed by the State, there is a reasonable probability that the result of the proceeding would have been different. As such, no relief is warranted with respect to this portion of claim XIX. (PCR6/1168-1171)

As evidenced by the trial court's comprehensive analysis, the trial court applied the correct legal standards to the record facts in this case. A trial court's summary denial of a motion to vacate will be affirmed where the trial court properly applied the law and competent, substantial evidence supports its findings. Diaz v. Dugger, 719 So. 2d 865, 868 (Fla. 1998). Therefore, the trial court's order must be affirmed.

ISSUE IV

THE "AVOID ARREST" CLAIM

In this issue, Hannon alleges that the avoid arrest aggravator is "vague and improperly applied." Hannon's challenge to the avoid arrest aggravator is procedurally barred as it was available for, and raised on, direct appeal, where it

was addressed and resolved by this Court. See, Hannon, 638 So. 2d at 43-44. On direct appeal, this Court found that the evidence supported the trial court's application of the avoid arrest aggravating factor to Hannon's second victim, Robert Carter. Therefore, on direct appeal, this Court necessarily applied its own "limiting construction" to this aggravating factor. On direct appeal, this Court specifically found,

> . . . In the instant case, the record reflects that Hannon, Acker, and Richardson went to the home of Snider and Carter to kill Snider. The motive was the conflict between Snider and Jim Acker's sister. Carter was not a party to this conflict. Carter, however, lived with Snider, and witnessed Snider's murder. Carter knew, and could identify, Hannon and the others. After his arrest and incarceration, Hannon told a cellmate that one of the victims was a "real jerk," but that the other was a "pretty nice guy" who was just in the wrong place at the wrong time. In the course of discussing another cellmate's crime, Hannon told him that he should not have left any witnesses. Clearly, the murder of Carter was ancillary to the primary purpose of obtaining revenge against Brandon Snider. See Troedel v. State, 462 So. 2d 392, 398 (Fla. 1984). The finding that Carter was murdered for the purpose of avoiding or preventing lawful arrest is fully supported by the record.

Hannon, 638 So. 2d at 43-44.

Thus, this Court's decision on direct appeal has resolved any underlying issue whether the avoid arrest aggravator is applicable in this case. Hannon's additional constitutional complaints involve claims which were cognizable at trial and direct appeal, and, therefore, are procedurally barred on

postconviction review.

In summarily denying relief on Hannon's postconviction claim, the trial court correctly applied the procedural bar and additionally found that Hannon was not entitled to relief because "the avoiding arrest factor does not contain terms so vague as to leave the jury without sufficient guidance for determining the absence or presence of the factor." Whitton v. State, 649 So. 2d 861, 867 n. 10 (Fla. 1994). (PCR6/1154-1155). As the trial court's order explains:

> Defendant claims avoiding or preventing a lawful arrest aggravating factor is unconstitutionally vague, was improperly applied and the jury received inadequate instructions. However, the substantive claim was raised and resolved on direct appeal. See Hannon v. State, 638 So. 2d 39, 44 (Fla. 1994), stating that the "finding that Carter was murdered for the purpose of avoiding or preventing a lawful arrest is fully supported by the record." Moreover, "the avoiding arrest factor does not contain terms so vague as to leave the jury without sufficient guidance for determining the absence or presence of the factor." Whitton v. State, 649 So. 2d 861, 867 n. 10 (Fla. 1994).
>
> As to Defendant's claim that the instruction unconstitutionally violated Espinosa v. Florida, 112 S.Ct. 2926 (1992), Stringer v. Black, 112 S.Ct. 1130 (1992), Sochor v. Florida, 112 S.Ct. 2114 (1992), and Maynard v. Cartwright, 108 S.Ct. 1853 (1988), and the Eighth and Fourteenth Amendments to the United States [sic], as previously discussed, "the avoiding arrest factor does not contain terms so vague as to leave the jury without sufficient guidance for determining the absence or presence of the factor." Whitton v. State, 649 So. 2d 861, 867 n. 10 (Fla. 1994). "Accordingly, Espinosa v. Florida, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), and its progeny do not require

> a limiting instruction in order to make this aggravator constitutionally sound." Id. As such, no relief is warranted with respect to this portion of claim XIII. (PCR6/1154-1155)

Hannon's challenge to the avoid arrest aggravator is both procedurally barred and, ultimately, without merit. In Reed v. State, 875 So. 2d 415, 439 (Fla. 2004), this Court recently reiterated that the now-challenged aggravating circumstances have withstood the defendant's similar attacks. Id. at 439, citing Whitton, 649 So. 2d at 867 n. 10 (noting the avoid arrest factor does not contain terms so vague as to leave the jury without sufficient guidance for determining the absence or presence of the factor); Washington v. State, 653 So. 2d 362 (Fla. 1994) (finding HAC aggravating circumstance was neither vague nor arbitrarily and capriciously applied). The trial court properly summarily denied postconviction relief on this claim.

ISSUE V

THE "HAC" CLAIM

In this issue, Hannon submits one paragraph asserting a "misapplication" of the HAC aggravating factor and realleging that the HAC jury instruction was unconstitutionally vague under Espinosa v. Florida, 505 U.S. 1079 (1992). Again, the State respectfully submits that Hannon's conclusory allegations are insufficient to fairly present this claim on appeal. See,

Cooper v. State, 856 So. 2d 969, 977, n. 7 (Fla. 2003). Assuming, *arguendo*, that this issue is properly before this Court, the trial court correctly summarily denied postconviction relief to the procedurally barred challenges to the application of the HAC aggravator and jury instruction.

On direct appeal, Hannon previously challenged the HAC instruction and this Court, citing Espinosa, found both procedural bar and harmless error on the instruction given. Hannon, at 43. Moreover, this Court's prior ruling on direct appeal also precludes any claim for relief on Hannon's procedurally barred challenge to the application of the HAC aggravator as a matter of fact and law.[7] On direct appeal, Issue VI of Hannon's initial brief raised an issue of whether the evidence was sufficient to support the HAC aggravator. Therefore, sufficiency of the evidence, which has already been reviewed and upheld by this Court, is not a claim now available for relitigation in this postconviction proceeding. See, Shere v. State, 742 So. 2d 215, 224 (Fla. 1999).

In summarily denying postconviction relief to Hannon's

---

[7]On direct appeal, this Court also rejected "Hannon's additional argument that Florida's heinous, atrocious, or cruel aggravating circumstance itself is unconstitutionally vague, is applied in an arbitrary and capricious manner, and does not genuinely narrow the class of persons eligible for the death penalty." Hannon, 638 So. 2d at 43, n. 3 (citations omitted).

procedurally barred challenges to the HAC aggravators, the trial court correctly applied the procedural bar and found:

> Second, Defendant claims the jury instruction regarding the aggravating factor of heinous, atrocious, and cruel was unconstitutionally vague. However, this claim was raised and resolved on direct appeal. See Hannon v. State, 638 So. 2d 39, 43 (Fla. 1994), finding that Defendant's claim that the instruction to the jury on the heinous, atrocious, or cruel aggravating circumstance was unconstitutionally vague was procedurally barred due to counsel's failure to object to the wording of the instruction. See also Ponticelli v. State, 618 So. 2d 154 (Fla.), cert. denied, 510 U.S. 935, 114 S.Ct. 352, 126 L.Ed.2d 316 (1993); Rose v. State, 617 So. 2d 291, 297-98 (Fla.) cert. denied, 510 U.S. 903, 114 S. Ct. 279, 126 L.Ed.2d 230 (1993); Johnson v. Singletary, 612 So. 2d 575, 577 (Fla. 1993), citing Kennedy v. Singletary, 602 So. 2d 1285 (Fla.), cert. denied, 505 U.S. 1233, 113 S.Ct. 2, 120 L.Ed.2d 931 (1992).
>
> Moreover, on direct appeal, the Florida Supreme Court stated that "even if the claim had been preserved, we are convinced beyond a reasonable doubt that the failure to give an adequate instruction on that aggravating factor was harmless error." Hannon at 43. As such, no relief is warranted upon this portion of claim XIV. (PCR6/1156) (e.s.) (See also,PCR6/1157-1158)

Finally, Hannon's postconviction claim is not only procedurally barred, but meritless because the evidence presented at trial clearly established that the HAC factor would have been found to exist under any definition of its terms. See, State v. Salmon, 636 So. 2d 16, 17 (Fla. 1994). From the testimony of the witnesses at the apartment complex who heard the victims pleading, to the law enforcement witnesses who observed the scene, numerous state witnesses established that

the victims' murders were committed in a heinous, atrocious and cruel manner. After Brandon Snider was stabbed multiple times, he shouted to his roommate to "call 911" because his "guts" were "hanging out." Despite Snider's pleas for help, Hannon instead grabbed Snider and slit Snider's throat from ear to ear. Then, Hannon pulled out his loaded gun and chased his second unnarmed victim, Robert Carter, as Carter ran up the stairs. When Hannon found Carter hiding underneath a bed, Hannon shot Carter six times at close range. There can be no serious dispute that both of these murders were heinous, atrocious and cruel.

ISSUE VI

THE "INNOCENCE OF THE DEATH PENALTY" CLAIM

Next, Hannon sets forth one paragraph in which he summarily asserts that he is "innocent of the death penalty" because the State allegedly failed to establish "any aggravating circumstances making him death eligible." In addition, Hannon claims that his sentences are disproportionate. (Initial Brief of Appellant at 98).

Again, the State respectfully submits that Hannon's conclusory allegations are woefully inadequate to fairly preserve this issue for appeal. See, Cooper v. State, 856 So. 2d 969, 977, n. 7 (Fla. 2003); Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990). Assuming, *arguendo*, that Hannon's claim that

he is “innocent of the death penalty” is not waived, which the State does not concede and specifically disputes, the trial court’s summary denial of relief was proper for the following reasons.

In order to prevail on a claim that he is “innocent of the death penalty” claim, the defendant must demonstrate constitutional error that invalidates all of the aggravating circumstances upon which the sentence was based. Griffin v. State, 866 So. 2d 1, 18 (Fla. 2004); Vining v. State, 827 So. 2d 201 (Fla. 2003). In this case, the trial court found the following aggravating circumstances applicable to both murders: (1) previous conviction of a violent felony (the contemporaneous killings); (2) the murders were committed during the commission of a burglary; and (3) the murders were heinous, atrocious, or cruel. § 921.141 (5)(a), (d), and (h), Fla. Stat. (1991). As to Carter, the trial court found the additional aggravating factor that the murder was committed to avoid or prevent a lawful arrest. § 921.141 (5)(e), Fla. Stat. (1991). Hannon, 638 So. 2d at 41.

On direct appeal, Hannon challenged the aggravating factors of HAC, prior violent felony, and avoid arrest, and this Court upheld all of the challenged aggravators. This Court held that the HAC aggravating factors were correctly applied to both

victims and the evidence also supported the finding that the murder of one victim, Carter, was committed for the purpose of avoiding or preventing lawful arrest. Hannon, 638 So. 2d at 43-44. This Court also determined that Hannon's claim that the facts did not support the prior violent felony aggravating factor was without merit. Finally, this Court found that Hannon was the most culpable of the three accomplices and that his two death sentences were justified. In denying postconviction relief on Hannon's claim that he is "innocent of the death penalty," the trial court addressed each of the defendant's specific complaints in turn. As the trial court's cogent written order summarily denying postconviction relief states, in pertinent part:

> Defendant claims the State failed to show or establish any aggravating circumstances making him death eligible and his death sentence is disproportionate. Specifically, Defendant claims the State failed to prove the necessary intent for the heinous, atrocious, or cruel aggravating factor. However, this issue was addressed and resolved on direct appeal. The Florida Supreme Court in Hannon v. State, 638 So. 2d 39 (Fla. 1994), held that the evidence supported the finding of aggravating circumstance and the death sentence was proportionate. Moreover, the Florida Supreme Court in Hannon, found that the facts regarding both Brandon Snider's murder and Robert Carter's murder supported the heinous, atrocious, and cruel aggravating factor. Id. at 43. Since the issue was addressed on appeal, no relief is warranted upon this portion of claim XVI.
>
> Defendant further claims that the jury was improperly instructed that it could consider burglary to support the aggravator that the crime was committed

during the course of a felony. Defendant claims these instructions were erroneous, vague, and failed to adequately channel the sentencing discretion of the judge and jury, and genuinely narrow the class of persons eligible for the death penalty. As to Defendant's claim that the jury was improperly instructed that it could consider burglary to support the aggravator that the crime was committed during the course of a felony, §921.141(5)(d), Florida Statute (Supp. 1990) reads as follows:

(5) Aggravating circumstances shall be limited to the following:

> (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

Therefore, §921.141(5)(d), Florida Statute (Supp. 1990) lists burglary as one of the enumerated crimes. As such, the jury was properly instructed that it could consider burglary to support the aggravator that the crime was committed during the course of a felony, and no relief is warranted upon this portion of claim XVI.

As to Defendant's claim that the aforementioned §921.141, Florida Statute (Supp. 1990), which contains the capital sentencing instructions, has continuously been upheld by the Florida Supreme Court. See Hunter v. State, 660 So. 2d 244, 252 (Fla. 1995), cert. denied, 516 U.S. 1128, 116 S.Ct. 946, 133 L.Ed.2d 871 (1996). Moreover, the unconstitutionality of the capital sentencing statute is an issue that should have been raised on appeal and is procedurally barred. See Peede v. State, 748 So. 2d 253, 256 (Fla. 1999); Ragsdale, v. State, 720 So. 2d 203, 204 n.1 and 2 (Fla. 1998). Since this is an issue that should have been raised on direct appeal, no relief is warranted upon this portion of claim XVI.

As to Defendant's claim that the aforementioned instructions failed to adequately channel the

sentencing discretion of the judge and jury, the Florida Supreme Court has previously rejected this claim as having no merit. See Washington v. State, 653 So. 2d 362, 366 (Fla. 1995); Lucas v. State, 613 So. 2d 408, 410 (Fla. 1992). Since the Florida Supreme Court has previously addressed this claim and found it to be meritless, no relief is warranted upon this portion of claim XVI.

As to Defendant's claim that the aforementioned instructions fail to genuinely narrow the class of persons eligible for the death penalty, the Florida Supreme Court has previously rejected this claim and found that Florida's capital felony sentencing statue does "narrow the class of death-eligible defendant." See Blanco v. State, 706 So. 2d 7, 11 (Fla. 1998); See also Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). As such, no relief is warranted upon this portion of claim XVI.

Defendant further claims that Defendant's death sentence is disproportionate. Specifically, Defendant claims the lack of aggravating circumstances, the unpresented mitigating evidence, and the life sentence of Jim Acker and no sentence of Ron Richardson render the death sentence disproportionate. As to the lack of aggravating circumstances, this claim is without merit as the Florida Supreme Court, on direct appeal, held that the evidence supported the finding of the heinous, atrocious, or cruel aggravating circumstance and that the evidence supported the finding that the murder of one victim, Carter, was committed for the purpose of avoiding or preventing lawful arrest. Hannon v. State, 638 So. 2d 39, 43-44 (Fla. 1994). Moreover, the Florida Supreme Court found Defendant's claim that the facts did not support the prior violent felony aggravating factor to be without merit. Id. at 44. As such, no relief is warranted upon this portion of claim XVI.

As to the unpresented mitigation evidence, the Court examined, in claim IX above, the mitigating evidence that was presented during the penalty phase of Defendant's trial. (See Trial Transcript, Volume XIV, pages 1598-1600, and 1615-1617, attached). After reviewing the record regarding the mitigating evidence presented during the penalty phase of Defendant's trial, the Court finds that it cannot conclusively refute this portion of claim XVI. As such, an

evidentiary hearing will be necessary on this portion of claim XVI.

As to the co-defendant's sentences, the Florida Supreme Court on direct appeal found that Defendant was the most culpable of the three accomplices and found that Defendant's two death sentences were justified. See Hannon at 44. Since the Florida Supreme Court addressed this issue on appeal, no relief is warranted with respect to this portion of claim XVI.

As to Defendant's claim that the death sentence is disproportionate, the Florida Supreme Court, on direct appeal, held that the death sentence was proportionate. See Hannon v. State, 638 So. 2d 39 (Fla. 1994). As such, no relief is warranted with respect to this portion of claim XVI.

Lastly, Defendant claims ineffective assistance of counsel to the extent that trial or appellate counsel failed to adequately preserve the aforementioned issues or failed to raise them on appeal. Based on the Court's finding with respect to the unpresented mitigation evidence, an evidentiary hearing will be necessary on this portion of claim XVI with respect to the unpresented mitigation evidence. As to all other allegations raised in claim XVI, counsel is not ineffective for failing to raise nonmeritorious issues. See Parker v. State, 611 So. 2d 1224, 1227 (Fla. 1993). As such, no relief is warranted with respect to those portions of ground XVI. (PCR6/1159-1162)

Summary denial[8] of postconviction relief was appropriate

[8]As evidenced by the excerpt from the trial court's order above, the trial court reserved ruling on Hannon's claim of ineffective assistance of trial counsel based on the "unpresented mitigation." Following the evidentiary hearing, the trial court reiterated that, on direct appeal, this Court rejected Hannon's claim that his sentence was disproportionate. Hannon v. State, 638 So. 2d 39 (Fla. 1994). Therefore, this issue was procedurally barred. Additionally, the trial court's final order summarized the "unpresented mitigation" and, based on the trial court's ruling on the remainder of this claim, found no relief warranted with respect to Defendant's auxiliary claim of ineffective assistance of trial counsel." (PCR11/2039).

because the defendant in this case failed to "show constitutional error invalidating all of the aggravating circumstances upon which the sentence was based." See, Griffin, 866 So. 2d at 17-18. In Griffin, the trial court found four aggravating circumstances: CCP, previous conviction of a violent felony, that the murder was committed during the course of a burglary, and that the murder was committed to avoid arrest. In this case, as in Griffin, the defendant failed to show constitutional error that would invalidate all of these aggravating circumstances, therefore, summary denial of relief was proper. See, Griffin, 866 So. 2d at 17-18.

Aside from his conclusory allegations in a single paragraph, Hannon does not raise any specified complaint about the aggravators upon which the jurors were instructed. Hannon does not contend that instructions for the aggravating factors of prior violent felony, murder in the course of a felony, or avoid or prevent lawful arrest are constitutionally infirm, either facially or as applied in this case. On direct appeal, Hannon previously relied on a claim that the HAC instruction was declared unconstitutionally vague by the United States Supreme Court in Espinosa v. Florida, 505 U.S. 1079 (1992); however, this Court found this claim procedurally barred. Additionally, even if Hannon's challenge to the HAC instruction had been

preserved, this Court remained "convinced beyond a reasonable doubt that the failure to give an adequate instruction on that aggravating factor was harmless error." Hannon, 638 So. 2d at 43. Finally, this Court held that the trial judge properly found the murders of both victims were heinous, atrocious or cruel. Inasmuch as Hannon has not shown constitutional error that would invalidate all of the aggravating circumstances found to exist in this case, he has failed to show he is innocent of the death penalty.

Lastly, Hannon's claim that his death sentence is disproportional is both procedurally barred and without merit. This issue has already been decided adversely against Hannon on direct appeal. Therefore, his current claim is procedurally barred in this postconviction proceeding. Additionally, on direct appeal, this Court unanimously affirmed Hannon's convictions and death sentences, finding that "Hannon is the most culpable of the three accomplices in this case, and the two death sentences are justified." Hannon, 638 So. 2d at 44.

In Sochor v. State, 883 So. 2d 766, 2004 Fla. LEXIS 985, 55-56 (Fla. 2004), the defendant claimed that he was entitled to relief for constitutional errors, even though otherwise procedurally barred, because he is "innocent of the death penalty." This Court rejected Sochor's postconviction claim

because this Court, on direct appeal, previously found that the evidence supported the existence of three aggravating circumstances. See also, Allen v. State, 854 So. 2d 1255, 1258 n. 5 (Fla. 2003) (holding that innocence of death penalty claim lacks merit because defendant did not allege that all the aggravating circumstances supporting his death sentence were invalid, and because this Court had already conducted a proportionality review on direct appeal). In this case, as in Sochor and Allen, this Court previously upheld the multiple aggravating factors found by the trial court and conducted a proportionality review on direct appeal. Therefore, like the defendants in Sochor and Allen, Hannon is not entitled to postconviction relief on his claim that he is "innocent of the death penalty."

ISSUE VII

THE RING v. ARIZONA CLAIM

In this issue, Hannon's entire argument consists of two sentences. First, Hannon states that Florida's capital sentencing violates Ring v. Arizona, 536 U.S. 584 (2002); and, second, Hannon declares that he "hereby preserves any arguments as to the constitutionality of the death penalty." (See, Initial Brief of Appellant at 99). For the following reasons, Hannon's Ring claim is procedurally barred and, alternatively, without

merit.

First, Hannon did not raise any Ring claim in his postconviction motion; and, therefore, his current argument, based on Ring, is unpreserved for appeal. Furthermore, Hannon's current, self-serving declaration is woefully inadequate to preserve "any arguments as to the constitutionality of the death penalty." See, Cooper v. State, 856 So. 2d 969, 977, n. 7 (Fla. 2003).

Second, Hannon did not raise any constitutional challenge to Florida's capital sentencing structure at trial and on direct appeal. Therefore, Hannon's Ring claim is procedurally barred. See, Allen v. State, 854 So. 2d 1255 n. 4 (Fla. 2003); Finney v. State, 831 So. 2d 651, 657 (Fla. 2002) (ruling that because Finney could have raised a claim that Florida's capital sentencing statute was unconstitutional on direct appeal his claim was procedurally barred on post-conviction motion).

Third, although the Ring claim is more fully addressed in the State's Response to Petition for Habeas Corpus, the State also reiterates that this Court has consistently rejected postconviction challenges to § 921.141, Florida Statutes, based on Ring. See, Zakrzewski v. State, 866 So. 2d 688 (Fla. 2003), citing e.g., Wright v. State, 857 So. 2d 861 (Fla. 2003); Jones v. State, 855 So. 2d 611 (Fla. 2003); Chandler v. State, 848 So.

2d 1031, 1034 n. 4 (Fla. 2003).

Fourth, Hannon's claim is not only procedurally barred, but meritless as well. Hannon was convicted of two counts of first-degree murder and the jury unanimously recommended a death sentence on each count. The trial court found the following aggravating circumstances applicable to both murders: (1) previous conviction of a violent felony (the contemporaneous killings); (2) the murders were committed during the commission of a burglary; and (3) the murders were heinous, atrocious, or cruel. As to the second victim, Robert Carter, the trial court found the additional aggravating factor that the murder was committed to avoid or prevent a lawful arrest. Hannon v. State, 638 So. 2d 39, 41 (Fla. 1994). This Court upheld the aggravating factors which were challenged on direct appeal (HAC, prior violent felony, avoid arrest). Hannon, 638 So. 2d at 43-44. In light of the jury's unanimous recommendations and Hannon's aggravating circumstances, Hannon would not be eligible for any relief under Ring. See, Doorbal v. State, 837 So. 2d 940, 963 (Fla.) (stating that prior violent felony aggravator based on contemporaneous crimes charged by indictment and on which defendant was found guilty by unanimous jury "clearly satisfies the mandates of the United States and Florida Constitutions"), cert. denied, 539 U.S. 962 (2003); Duest v.

State, 855 So. 2d 33 (Fla. 2003); Anderson v. State, 863 So. 2d 169, 189 (Fla. 2003) (relying in part on unanimous death recommendation and prior violent felony conviction to reject Ring claim), cert. denied, 158 L.Ed.2d 363, 72 U.S.L.W. 3598 (2004)

Finally, even if Ring arguably applied to Florida's capital sentencing scheme, it is not retroactive. In Schriro v. Summerlin, 124 S. Ct. 2519 (2004), the United States Supreme Court ruled that Ring announced a new procedural rule that does not apply retroactively to cases already final on direct review. Additionally, under the principles of Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980), Ring is only entitled to retroactive application if it is a decision of fundamental significance, which so drastically alters the underpinnings of the defendant's death sentence that "obvious injustice" exists. See New v. State, 807 So. 2d 52 (Fla. 2001). Application of the Witt factors to Ring offers no basis for consideration of Hannon's procedurally barred Ring claim. See also, Windom v. State, 29 Fla. L. Weekly S 191 (Fla. May 6, 2004). Thus, no relief is warranted.

ISSUE VIII

CUMULATIVE ERROR

The trial court entered two comprehensive written orders in

this case. The first order, which summarily denied postcoviction relief, in part, was 102 pages in length, and included excerpts from the trial record. (PCR6/1073-1174). Following the evidentiary hearing, the trial court entered a 46-page written order, with additional findings of fact and conclusions of law. (PCR10/1998-2043). These two comprehensive written orders confirm that the trial court painstakingly reviewed the trial record, evaluated the evidence presented at the postconviction hearings, and applied the correct legal standards to the defendant's postconviction claims. Hannon's individual claims are either procedurally barred or meritless. When a defendant fails to demonstrate any individual error in his motion for postconviction relief, his cumulative error claim likewise must fail. Bryan v. State, 748 So. 2d 1003, 1008 (Fla. 1999) (concluding that the defendant's cumulative effect claim was properly denied where individual allegations of error were found to be without merit). Hannon has failed to demonstrate any individual error. Accordingly, any claim of cumulative error claim must fail. Reed v. State, 875 So. 2d 415 (Fla. 2004); Vining v. State, 827 So. 2d 201, 209 (Fla. 2002) (stating that where the alleged individual errors are without merit, the contention of cumulative error is also without merit).

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Suzanne Keffer, Assistant CCRC-South, 101 N.E. 3rd Avenue, Suite 400, Fort Lauderdale, FL 33301; and James A. Hellickson, Assistant State Attorney, Sixth Judicial Circuit, P. O. Box 5028, Clearwater, FL 33758-5028, this 23rd day of November, 2004.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

KATHERINE V. BLANCO
Assistant Attorney General
Florida Bar No. 0327832
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501

COUNSEL FOR APPELLEE