IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-1283

SEBURT NELSON CONNOR,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

Defendant was charged by indictment with (1) the first degree murder of Lawrence Goodine, (2) the first degree murder of Jessica Goodine, (3) the kidnapping of Jessica Goodine, and (4) the burglary of the Goodine residence with an assault. (DAR. 1-3)[1] The matter proceeded to trial on June 19, 1997. (DAR. 16) After hearing the evidence, the jury found Defendant guilty as charged on all counts. (DAR. 629-32) The trial court adjudicated Defendant in accordance with the verdict. (DAR. 878-79) The facts, as summarized by this Court, are as follows:

> [Defendant] was arrested in Miami on Saturday, November 21, 1992, for the double murder of Lawrence Goodine and Jessica Goodine. The record establishes the following facts surrounding the crimes.
>
> In the 1970s, [Defendant] began an extra-marital affair with Margaret Bennett. When Bennett found out that [Defendant] was married, she ended the relationship. In 1979, Margaret married Lawrence Goodine and the couple had two children, Karen and Jessica. Margaret later separated from Lawrence and in 1988 she renewed her relationship with [Defendant]. [Defendant] became a father figure to Margaret's two children. However, in early 1992, Margaret told [Defendant] that she did not want to see him anymore.
>
> Over the next several months, [Defendant] allegedly harassed Margaret. Her house was burglarized a number of times, with the burglar taking bed sheets,

[1] The parties will be referred to as they stood below. The symbols ADAR.@ and ADAT.@ will refer to the record on appeal and transcript of proceedings on Defendant's direct appeal, FSC Case No. SC93697, respectively.

towels and linens. One witness stated that she observed [Defendant] shoot a gun at Margaret's house as he drove by. One of Margaret's neighbors testified that she received a threatening phone call from a person who she believed was [Defendant]. The caller stated that he was going to kill Margaret and her daughter Karen.

On July 28, 1992, Margaret obtained an ex parte domestic violence injunction against [Defendant]. A permanent injunction was issued on August 19, 1992. [Defendant] told one of Margaret's neighbors that he would stop bothering Margaret if she would go back to her husband Lawrence Goodine. In September of 1992, Margaret complied with [Defendant=s] request and asked Lawrence to move back into her house. In October of 1992, [Defendant] purchased a black 1986 Cadillac, a car that was identical to the car that Margaret already owned. A neighbor testified that she would often see a black Cadillac driving slowly through the neighborhood.

On Thursday, November 19, 1992, Margaret left for work in the morning and her daughters Karen and Jessica (age 10) went to school. Lawrence Goodine remained in the house. He was last seen at the house at 2:30 p.m. Jessica returned home after school and went across the street to play with one of her friends. While the girls were playing, they noticed a black Cadillac at Jessica's house, so Jessica went home. Jessica came back shortly thereafter and told her friend that she was leaving. Jessica left in the Cadillac and Jessica's friend testified that she thought Jessica left with her father.

Jessica's sister Karen came home at approximately 6 p.m. Karen called her mother and told her that neither Lawrence nor Jessica was home and that it appeared that someone had been in the house. Margaret told Jessica [sic] to call the police. When Margaret arrived home, she told the police that she thought [Defendant] had something to do with the disappearances. The police called the [Defendant=s] residence Thursday night and spoke to [Defendant] and Mrs. Connor. Detective Murias later went to the

[Defendant=s] house at about 3 a.m. on Friday, November 20. A black Cadillac was parked outside the house. The property where the [Defendant] lived contained a house and a separate "cottage" behind the house. When Detective Murias arrived, [Defendant] was in the cottage and Mrs. Connor went around to get him. When asked about the disappearances, [Defendant] told Detective Murias that he did not have any contact with Jessica or Lawrence that day.

Late in the afternoon on Friday, November 20, 1992 (one day after Lawrence and Jessica disappeared), Lawrence's body was found in a wooded area near the Fort Lauderdale airport. The cause of death was multiple blunt trauma to the head. He was hit on the head five times and each of the blows would have rendered him unconscious and each was fatal. When his body was removed at 4:30 p.m., he had been dead about 24 hours.

When the detectives went to the Goodine house to report the discovery of Lawrence's body, they noticed blood on the living room carpet and on the wall. Subsequent tests revealed that the blood was probably Lawrence's. The police also noticed a broken chair. Apparently the killer hit Lawrence over the head with a leg from the chair.

The search for Jessica intensified with the discovery of Lawrence's body. Several police officers returned to [Defendant=s] house at 2 a.m. on Saturday, November 21 (approximately four hours after the police discovered the blood at the Goodine residence). The police did not go to the house to arrest [Defendant]; they only went to the house to question him. When Mrs. Connor answered the door, Detective Murias and Detective Tymes told her that they wanted to speak to [Defendant]. [Defendant] came out of the bedroom wearing pajamas, and Detective Tymes told [Defendant] that she "needed to further talk to him" at her office. [Defendant] asked if he could get dressed and he was given permission to do so. Detective Tymes stated that [Defendant] voluntarily agreed to go to the station. As they left the house, Detective Tymes asked [Defendant] if she could search the Cadillac.

He agreed and she filled out a consent form and [Defendant] signed it. Detective Tymes searched the car and noticed blood stains on the rear seat and in the trunk. [Defendant] rode with Detective Tymes to the police station. [Defendant] sat in the front seat and was not handcuffed. While [Defendant] was on his way to the station, Detective Murias and another detective searched the cottage pursuant to Mrs. Connor's consent. The detectives did not see anything suspicious.

Once [Defendant] and Detective Tymes arrived at the station, Detective Tymes advised [Defendant] of his *Miranda* rights, and [Defendant] signed a standard waiver form. Detective Tymes testified that [Defendant] was not told that he was under arrest but that in her mind, [Defendant] was not free to leave. During the questioning, Detective Tymes noticed blood on [Defendant=s] socks and shoes. When asked about the blood, [Defendant] stated that he had a cut on his leg. Detective Tymes asked [Defendant] if she could take his socks and shoes, and [Defendant] consented and signed a consent form. Subsequent DNA tests revealed that the blood on the socks and shoes was that of Lawrence Goodine. Detective Tymes then asked [Defendant] for permission to search the house and cottage. [Defendant] agreed and signed another consent form.

Two other detectives went to the [Defendant=s] residence about 5 a.m. on Saturday morning, November 21. The detectives obtained written consent to search the house from Mrs. Connor and her daughter. After being asked by the detectives, Mrs. Connor handed over the clothes that [Defendant] was wearing on Thursday, November 19. The clothes appeared to have blood stains on them, and subsequent tests revealed that the blood belonged to Lawrence Goodine.

The police obtained a search warrant in order to remove the Cadillac for further processing. The Cadillac was towed about 11 a.m. on Saturday, November 21. Blood stains were found on the pouch behind the driver's seat and on the rear seat. Subsequent DNA tests revealed that the blood was Lawrence Goodine's.

Around 11 a.m. on Saturday, November 21, the police conducted another search of the cottage. The police discovered the body of Jessica wedged between the bed and the wall, wrapped in a comforter. The medical examiner testified that Jessica probably died sometime late on Friday. The cause of death was asphyxia by manual strangulation. Her eyes were puffy, indicating that she had been crying and there was residue of duct tape on her face. A hand had been pressed down over her mouth with sufficient force to cause hemorrhaging along the gum margin. [Defendant] was arrested at 12:30 p.m. on Saturday, November 21.

Prior to trial, defense counsel filed a motion to declare that [Defendant] was incompetent. After a competency hearing, the trial court found that [Defendant] was competent to stand trial. Months later, during jury selection, the trial court held another competency hearing and again found that [Defendant] was competent. The case proceeded to trial, and [Defendant] testified during the guilt phase, claiming that the State planted the evidence and Jessica's body in his house. He stated that the police were trying to get revenge against him for filing a previous civil suit against them. At the conclusion of the guilt phase, [Defendant] was convicted of two counts of first-degree murder, kidnapping, and burglary.

After the penalty phase, the jury recommended death by an eight-to-four vote for the murder of Jessica Goodine and life for the murder of Lawrence Goodine. The trial court found the following five aggravators for the murder of Jessica Goodine: (1) previous capital felony (murder of Lawrence), (2) murder committed while engaged in the commission of a kidnapping, (3) murder committed to avoid arrest, (4) the murder was heinous, atrocious, or cruel (HAC), and (5) the murder was cold, calculated, and premeditated (CCP). The trial court concluded that [Defendant] failed to establish the statutory mental mitigators but did find the nonstatutory mental mitigator that [Defendant] suffered from a mental illness at the time of the offense. The court gave this mitigator substantial weight. The court also found the following

> nonstatutory mental mitigators: (1) [Defendant] is a good father; (2) [Defendant] will die in prison if given life sentences; and (3) [Defendant] has had no disciplinary problems in prison. The court assigned these mitigators small or little weight. The trial court ultimately sentenced [Defendant] to death for the murder of Jessica Goodine. The trial court also imposed a life sentence for the murder of Lawrence Goodine and consecutive sentences of twenty years for the kidnapping and burglary.

Connor v. State, 803 So. 2d 598, 601-04 (Fla. 2001).

On appeal of his convictions and sentences, Defendant alleged:

> I. THE TRIAL COURT ERRED IN DENYING THE MOTIONS TO SUPPRESS, IN VIOLATION OF ARTICLE I, SECTIONS 9 AND 12, OF THE FLORIDA CONSTITUTION, AND AMENDMENTS IV, V, AND XIV TO THE UNITED STATES CONSTITUTION.
>
> II. THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS COMMITTED TO ELIMINATE A WITNESS, IN VIOLATION OF SECTION 921.141, FLORIDA STATUTES, ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, AND AMENDMENTS VIII AND XIV TO THE UNITED STATES CONSTITUTION.
>
> III. THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS COLD, CALCULATED, AND PREMEDITATED, IN VIOLATION OF SECTION 921.141, FLORIDA STATUTES, ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION AND AMENDMENTS VIII AND XIV TO THE UNITED STATES CONSTITUTION.
>
> IV. THE TRIAL COURT ERRED IN REJECTING THE STATUTORY MENTAL MITIGATING CIRCUMSTANCES AND FAILED TO GIVE EFFECT TO UNCONTROVERTED MITIGATING EVIDENCE, IN VIOLATION OF SECTION 921.141, FLORIDA STATUTES, ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, AND AMENDMENTS VIII AND XIV TO THE UNITED STATES CONSTITUTION.
>
> A. THE TRIAL COURT ERRED IN REJECTING THE UNCONTROVERTED EXPERT TESTIMONY ESTABLISHING THE MENTAL MITIGATORS.

> B. THE TRIAL COURT ERRED IN REJECTING THE STATUTORY MITIGATING CIRCUMSTANCE THAT THE CAPITAL OFFENSE WAS COMMITTED WHILE UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.
>
> C. THE TRIAL COURT ERRED IN REJECTING THE STATUTORY MITIGATING CIRCUMSTANCE THAT DEFENDANT=S CAPACITY TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE LAW WAS SUBSTANTIALLY IMPAIRED.
>
> V. THE TRIAL COURT ERRED IN FAILING TO FIND THE STATUTORY MITIGATING CIRCUMSTANCE THAT THE DEFENDANT DID NOT HAVE A SIGNIFICANT PRIOR HISTORY OF CRIMINAL ACTIVITY, IN VIOLATION OF SECTION 921.141, FLORIDA STATUTES, ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, AND AMENDMENTS VIII AND XIV TO THE UNITED STATES CONSTITUTION.
>
> VI. THE DEATH SENTENCE IS DISPROPORTIONATE, IN VIOLATION OF SECTION 921.141, FLORIDA STATUTES, ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, AND AMENDMENTS VIII AND XIV TO THE UNITED STATES CONSTITUTION.

(Appellant’s Brief FSC Case No. 93697)

This Court affirmed Defendant=s convictions and sentences. In doing so, the Court found that all of Defendant=s claims, with the exception of his challenge to the avoid arrest aggravator, were without merit. With regard to the avoid arrest aggravator, the Court found that the evidence was insufficient to support this aggravator but that the error in finding the aggravator was harmless. *Connor v. State*, 803 So. 2d at 610. Defendant requested a rehearing, claiming that this Court=s harmless error analysis was constitutionally deficient. Defendant also raised

for the first time, that Florida=s capital punishment scheme violated *Apprendi v. New Jersey*, 530 U.S. 460 (2000). Rehearing was denied on December 17, 2001. The United States Supreme Court denied certiorari on May 28, 2002.[2] *Connor v. Florida*, 535 U.S. 1103 (2002).

Defendant's motion for post conviction relief was filed on May 23, 2003, raising fifteen claims. (R.40-87)[3] The State served its response on July 22, 2003. (R. 106-70) A scheduled *Huff*[4] hearing was delayed until December 19, 2003, at Defendant=s request. An amended motion was then filed on December 1, 2003. (R. 191-270) The amended motion primarily restated all the claims contained in the original motion but also claimed ineffective assistance of appellate counsel as to nine of the original claims. Defendant also added more allegations of deficiency on the claim if ineffective assistance of trial counsel at the guilt phase. At the conclusion of the *Huff*

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[2] There were two issues raised in the certiorari petition: they were [restated] (1) whether this Court properly found the striking of one aggravating circumstance was harmless, where four valid aggravating circumstances had been found, no statutory mitigation was found; and, (2) whether *Apprendi v. New Jersey*, 530 U.S. 466 (2000), overruled *Hildwin v. Florida*, 490 U.S. 638 (1989).

[3] The symbol "R." will refer to the record on appeal in the instant appeal which includes the transcripts of proceedings.

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

hearing, the lower court ordered an evidentiary hearing on the issue of whether counsel was ineffective at the penalty phase for failing to present mitigation evidence of Defendant's childhood.

Prior to the evidentiary hearing Defendant filed a motion to determine competency. A competency hearing was held on February 18, 2004 at which two mental health experts testified. The court found Defendant to be competent. (R. 648) The evidentiary hearing immediately followed on that date and was continued on April 23, 2004.

At the evidentiary hearing Defendant first called Krincrecess Connor, Defendant's cousin. Krincrecess testified he grew up with Defendant in Honduras. (R. 650) He stated Defendant lived with his mother at times and his maternal grandmother, Eltina, at other times, but was not sure at what ages Defendant lived with each. (R. 652) He recalled that after Defendant's grandmother died, Defendant lived with a man named Tyson Connor, whom he believed to be Defendant's cousin. (R. 653) Krincrecess stated he knew Defendant recognized a man named Dexter Bodden as his father, although he did not know if he was in fact Defendant's biological father. (R. 654) Krincrecess did not think Defendant had a relationship with his father. *Id*. Krincrecess stated that Defendant told him his grandmother made

him kneel down on a coconut grater as punishment. (R. 654-55) He did not know for how long Defendant was made to kneel down on the grater. *Id*. On cross examination Krincrecess admitted he only knew of the coconut grater through Defendant's statement to him, since he never personally witnessed it. (R. 660) He further stated he did not know how often this occurred. *Id*.

Krincrecess further stated he believed he attended Defendant's trial twice. (R. 657) He never spoke to Defendant's attorney. *Id*.

Garla Connor, Defendant's daughter, testified next. She stated she had met with Defendant's trial counsel, Eugene Zenobi, just prior to testifying at her father's trial. (R. 662) She stated that Mr. Zenobi had told her to focus her testimony on the good aspects of Defendant and his relationship with her. *Id*. She stated Mr. Zenobi never discussed with her how Defendant disciplined her or her siblings. *Id*.

Ms. Connor described Defendant as a harsh disciplinarian. (R. 663) She recounted a time when her father disciplined her by making her eat a plate of hot peppers without anything to drink. (R. 664) Ms. Connor stated she was beaten with extension cords and ropes. (R. 665) She also stated she was disciplined once or twice with an item called a grating iron. *Id*. Ms. Connor described having a scar from being beaten with an extension cord

and a burn, the exact nature of which she did not recall. (R. 665-66)

Ms. Connor stated that she never discussed her childhood with either of Defendant's attorneys. (R. 667) She did not recall ever speaking to an investigator at the time of trial. (R. 670) She did admit that Defendant's trial attorney asked her about her relationship with Defendant and that in response to that question she did not mention Defendant's abusive disciplinary methods. (R. 672-73)

Defendant then called Dorothy Connor, his wife. Mrs. Connor testified that when her oldest son Eric ran away from home, Defendant had beaten him upon his return, which led to Mrs. Connor reporting the incident to the authorities. (R. 675-76) She also recounted how Defendant would punish all but the youngest of the children by making them kneel on a grater board, which caused them to sustain cuts on the knees. (R. 677-78)

Mrs. Connor stated that during her conversations with Mr. Zenobi she did not recall discussing Defendant's relationship with his children. (R. 679) She testified at Defendant's trial. *Id*. Defendant's trial counsel did not ask her at the time about how Defendant disciplined the children. (R. 679-80)

Erica Connor, Defendant's other daughter, testified next. She, too, described Defendant as a strict disciplinarian. (R.

682) Erica recalled being disciplined with extension cords and rope. *Id*. She stated she had seen Defendant discipline her sister with the grater but that he never used it to discipline her. (R. 685) She recalled an incident where a school counselor had seen a bruise on her and reported it to HRS. (R. 686-87)

Erica testified at trial. (R. 683) She recalled talking to Mr. Zenobi prior to testifying. Although she did not initially recall specifically where that meeting occurred, she then recalled it was at his office. (R. 684) She thought she met with him for an hour. *Id*. Erica recalled being asked what kind of father Defendant was, but not specifically regarding discipline or her childhood. (R. 685)

After Defendant rested, the hearing continued on April 23, 2004, when the State called Defendant's trial counsel Eugene Zenobi. He testified generally regarding the type of mitigation he looks for on a death penalty case, the fact that each case is different and that he considers the specifics of each case, including the make up of the jury, in deciding what type of mitigation to present. (R. 396-99)

Zenobi recalled having several mental health experts and an investigator assist him in the preparation of Defendant's mitigation case. (R. 400-01) He did not recall receiving any information from any of the sources used in investigating

mitigation that Defendant had suffered significant abuse as a child. (R. 401) Zenobi stated he had a strong feeling he would not be presenting any such evidence in light of the case he had tried just before Defendant's, and because such evidence did not fit his approach in this case. (R. 401-02) His choice of approach was primarily guided by the particular composition of the jury that had been selected in this case. (R. 402)

Zenobi testified as to his trial strategy, specifically noting that he thought he had an intelligent jury, a fact that he thought would be advantageous to his strategy of presenting Defendant's mental health issues. (R. 404-07) Just prior to Defendant's case, he had presented a penalty phase case where the primary mitigation had been the defendant's abuse as a child. (R. 409) Zenobi stated that, by contrast, in Defendant's case, the medical testimony on mental mitigation was a much more powerful defense strategy, especially in light of the fact that one of the victims was a child. *Id.* He further elaborated on his strategy by stating that the child abuse issue was more attenuated to the crime, especially in light of Defendant's age, than Defendant's mental health. As such, he felt that the evidence of Defendant's child abuse would not override the sympathy caused by the death of a child. (R. 409-11) He saw the issue of Defendant's abusive childhood as a tangential issue

that he did not want detracting from the jury's focus on Defendant's mental deficiencies. (R. 411) He made a tactical decision on what he wanted the jury to focus. (R. 411, 414)

Zenobi testified that he did investigate Defendant's background and childhood and that he did not discover any evidence of profound child abuse. (R. 430) He recalled being told by Defendant that he had a very difficult childhood in Honduras. (R. 431) Although he did not specifically recall whether an investigator had traveled to Honduras to sort out some of the conflicting stories told to him by Defendant, he recalled looking into Defendant's background in that country and having detailed information regarding Defendant's childhood. (R. 432, 447-48) He did not recall if he was told specifically that Defendant had been made to kneel down on a coconut grater. (R. 431) Although he could not specifically recall which records in particular he was able to obtain, Mr. Zenobi testified that he generally gets a defendant's employment and medical records, and that he believed he had such records in this case. (R. 450)

Zenobi stated he was given a lot of information by Defendant's daughter Garla. (R. 432-33) He spoke to Garla numerous times and met with her personally. (R. 442) He did not recall if he was aware that Defendant had been abusive to his children. (R. 433) He was aware at the time of trial that there

had been allegations that Defendant had been abusive toward the Goodine children. (R. 433-34) He stated that if he had known Defendant had been abusive to his own children, he would have been reluctant to bring that fact to the jury's attention. (R. 434) Zenobi further stated that Defendant had denied the allegations of abuse by Defendant with respect to the instances of which Zenobi was aware at the time of trial. (R. 435-36)

The State then called Dr. Bill Mosman. The parties stipulated to the witness' qualifications as a psychologist. Dr. Mosman testified that he had evaluated Defendant at the time of trial for the purpose of developing mitigation evidence. (R. 453) He stated that the subject of child abuse is always discussed in such an interview as it is clinically significant *Id*. Defendant had described his father as rigid but not abusive. (R. 454) Dr. Mosman explained that he never takes a subject's denial of child abuse at its face. *Id*. Instead, he looks at the subject's body language in response to certain questions as more indicative of whether child abuse was present than the individual's verbal responses. (R. 455) He did not perceive any such nonverbal responses from Defendant. (R. 456)

Dr. Mosman also spoke to Defendant's family members. *Id*. He received no information from those interviews that indicated to him that he needed to further delve into the area of child abuse

since their responses were consistent with what he had gleaned from his evaluation of Defendant. (R. 456-57)

Dr. Mosman stated that, after evaluating Defendant, and from a psychological point of view, he explained to Defendant's trial counsel that he could not establish any clinical connection between any possible abuse Defendant might have suffered as a child and his crimes. (R. 458-59) He explained that child abuse could have such a connection where there is post traumatic stress disorder, flashbacks, or where the crime itself happened in the context of a defendant disciplining a child, none of which were present in this case. (R. 460-61)

On cross examination Dr. Mosman stated that, in his opinion, Defendant was incompetent. (R. 466) He had taken that into consideration when evaluating Defendant with respect to mitigation. (R. 467) He gathered information about Defendant's childhood from a number of sources other than Defendant, including Dr. Eisenstein, Dr. Esther Selvan, Mr. Roy Matthews, Defendant's wife and Defendant's trial counsel. (R. 467-68) He also had access to Zenobi's file and the records containing therein, which included some medical records. (R. 468-69) He did not recall if the file contained school or medical records from Honduras. It should be noted that, although he did not testify at the hearing, Defendant was recorded by the court reporter as

stating that the case investigator, Roy Matthews, had interviewed his people in Honduras. (R. 479)

When asked by Defendant's counsel regarding the value to a jury in hearing about a defendant's deprived childhood, Dr. Mosman stated that would be a legal decision. (R. 472) He could only opine that, clinically, such information could be interpreted in a number of ways, including seeing the deprived childhood as a motivator to better oneself. *Id*. In light of Defendant's employment history in the Merchant Marines and in the county for 18 years, clinically, his childhood could not be taken out of that context to explain his crimes. (R. 472-73)

During the competency hearing held immediately prior to the evidentiary hearing, certain testimony was heard that pertained to the issue of counsel's ineffectiveness with respect to the mitigation evidence of Defendant's abusive childhood. Dr. Hyman Eisenstein, whose qualifications as an expert were stipulated to, testified that he had evaluated Defendant at the time of trial. (R. 589) He had done a great deal of preparation with Mr. Jepeway, Defendant's original trial counsel. *Id*. He did not have an individual conference with Mr. Zenobi prior to his penalty phase testimony. (R. 590-91) Zenobi did not discuss with him Defendant's childhood, nor did he ask Dr. Eisenstein to contact Defendant's family members to ascertain information

regarding Defendant's childhood. (R. 591) He recalled a collective meeting with the trial attorney and the prosecutor prior to testifying at trial. *Id*. He provided counsel with a report. (R. 592)

Dr. Eisenstein met with Defendant's wife, Dorothy Connor, a few days before his testimony at the evidentiary hearing. During that meeting they discussed Defendant's childhood, of which Dorothy had no first hand knowledge. (R. 593-95) Dr. Eisenstein also met with Defendant's cousin, Krincrecess, just before the evidentiary hearing. (R. 596) Krincrecess told Dr. Eisenstein that Defendant had an unstable childhood, limited schooling, and recounted the incident with the grandmother and the coconut grater. (R. 597-99)

Although they were reluctant to discuss it, in his meeting with Defendant's children, Dr. Eisenstein learned that Defendant had been physically abusive to them and mentally abusive to his wife. (R. 603) Dr. Eisenstein explained that the value of the information regarding Defendant's own abusive childhood, had he known it at the time of trial, was that it would explain why Defendant had possibly been abusive to his own children. (R. 601-02) He added that Defendant's childhood would also help to explain why Defendant was a scared individual who then continued to perpetuate abuse on other people. (R. 604)

On cross examination Dr. Eisenstein agreed that, at the time of the penalty phase, Dr. Mosman had been primarily responsible for performing a clinical interview of Defendant and obtaining background information and that, in contrast, he had been primarily retained for the purpose of performing neuropsychological testing and diagnosing any possible neuropsychological disorder. (R. 614) Dr. Eisenstein stated that, despite the fact that a clinical interview was not the primary focus of his evaluation, he had discussed Defendant's family history with Defendant. At that time, Defendant had indicated to him that he had a good relationship with his father and that he was closer to his father than to his mother. (R. 615) At no time, had Defendant given him any indication that he had suffered any form of child abuse *Id*. Dr. Eisenstein admitted that Defendant was not a reliable source of information. (R. 616) He also agreed that Mr. Zenobi had effectively elicited all the relevant information within Dr. Eisenstein's purview during his penalty phase testimony. (R. 617-18)

After hearing this evidence, the lower court denied all of Defendant's claims. (R. 354) This appeal follows that denial.

SUMMARY OF THE ARGUMENT

Defendant's claims regarding ineffectiveness of trial counsel for failure to object to a comment by the State during

jury selection is procedurally barred as it could and should have been brought on direct appeal. It is also facially insufficient and without merit as Defendant fails to sufficiently allege that the comment was improper or that there is a reasonable probability of a different result but for counsel's failure to object to it. Defendant's *Crawford* claim is also procedurally barred and without merit in light of this Court's recent holding that *Crawford* is not retroactive. It is also factually inaccurate. Defendant's claim of error by both the court and ineffectiveness by counsel regarding the striking of the panel following Defendant's inappropriate comments regarding Fidel Castro is waived as it is improperly briefed. It is also procedurally barred, facially insufficient and meritless. The claim of ineffective assistance of trial counsel for failing to object to comments by the court regarding mercy killings is also waived as it too has not been properly briefed. Moreover, the claim is also procedurally barred, facially insufficient and without merit. Defendant's claims regarding his presence at certain proceedings is procedurally barred, facially insufficient and without merit. The substantive claim regarding error by the court in allowing certain evidence that allegedly commented on his silence is procedurally barred as it could and should have been addressed in Defendant's direct appeal. It is

also without merit. Defendant's claim of ineffective assistance based on the same facts is waived for failure to brief, procedurally barred, facially insufficient and without merit. Defendant's claims of ineffective assistance of appellate counsel as to the six above stated claims are not cognizable in this proceeding. Defendant's claim of conflict of interest is procedurally barred, facially insufficient, meritless and was waived. Defendant's claim of ineffective assistance of trial counsel for presenting an ineffective defense is facially insufficient as no prejudice had been properly alleged. Defendant's claim of ineffective assistance at the penalty phase was properly denied by the trial court as the evidence presented at the evidentiary hearing on this claim established that trial counsel had made a reasonable strategic decision and no prejudice was established. Defendant's *Ring* claim is without merit. Defendant's claim that a death sentence is cruel and unusual punishment because his mental illness renders him effectively mentally retarded is without merit. Defendant's claim that he is entitled to a hearing on whether he is mentally retarded is refuted by the record.

ARGUMENT

I. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTOR'S COMMENT DURING VOIR DIRE

Defendant first argues that his trial counsel was ineffective for failing to object to an allegedly prejudicial comment by the prosecutor during jury selection. This claim is procedurally barred, facially insufficient and without merit.

Defendant alleges his attorney was ineffective when, in voir dire, he failed to object to the State=s allegedly prejudicial comment, which Defendant claims suggested that Defendant had a criminal history about which the jury would not be hearing.[5] This claim is procedurally barred, because it should have been raised on direct appeal. *See Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983)(AIssues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack.@). Specifically, this Court has held that claims that counsel was ineffective for failing to object to allegedly improper prosecutorial comments are barred as a matter of law because the issue should have been raised on direct appeal. *Robinson v. State*, 707 So. 2d 688, 697 & n.17 & 18 (Fla. 1998). In *Robinson,* this Court also found other challenges to the jury selection process were, likewise,

[5] Defendant also claims it was ineffective assistance of appellate counsel for failing to raise this issue on direct appeal. However, ineffective assistance of appellate counsel is not cognizable in a 3.851 motion. *See Thompson v. State*, 759 So. 2d 650 (Fla. 2000).

procedurally barred because they, too, could and should have been raised on direct appeal. As such, this claim is procedurally barred and was properly denied summarily by the lower court.

Furthermore, the claim is facially insufficient. It is well established that in order to allege a claim of ineffective assistance of counsel sufficiently, Defendant must demonstrate both that counsel's performance was deficient and that the deficient performance prejudiced the defense, which requires a showing that counsel's errors were so serious as to deprive the defendant of a trial whose result is reliable. *Strickland v. Washington*, 466 U.S. 668 (1984). Deficient performance requires a showing that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and a fair assessment of performance of a criminal defense attorney:

> requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. . . . [A] court must indulge a strong presumption that criminal defense counsel's conduct falls within the wide range of reasonable professional assistance, that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Id. at 694-695.

Even if a criminal defendant shows that particular errors of defense counsel were unreasonable, the defendant must show that they actually had an adverse effect on the defense in order to establish ineffective assistance of counsel. The test for prejudice requires the defendant to show that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different, or, alternatively stated in the case at hand, whether there is a reasonable probability that, absent the errors, the fact finder would have found Defendant not guilty. *Id.* at 694.

The complained of comment arose when the State was rehabilitating a juror who had served on a previous criminal case:

> [THE STATE]: Anything that happened in those cases that left you with a bad feeling about the justice system, the court system in any way, shape or form?
>
> MS. STEWART: The criminal case, it was somewhat disconcerting because after we came to a lesser charge we were informed that the gentleman in question has a long criminal history and that was somewhat disconcerting that probably the original charge was probably more appropriate.
>
> [THE STATE]: Can you understand why a person=s criminal record is not part of the trial in the guilty phase? Does it make sense to you?
>
> MS. STEWART: I understand why.
>
> [THE STATE]: Because as soon as people hear that people have a criminal record, their presumption of

innocence is not worth a whole lot because then you will start to assume they probably did it because they did it before and the object is that every person who comes into the courtroom is presumed innocent and, therefore, their prior record is irrelevant to the determination of guilty, and if I was Mr. Zenobi, my concern would be if she doesn't hear about the prior record of the defendant in this case because you won't.

It is irrelevant to the determination, he may have none, you are just not going to know. As far as you know, you will have no record but because of your prior experience you are going to say I wonder if we weren't told something and it's going to affect how you look at this defendant and how you decide this case.

MS. STEWART: It is probable. It is possible.

[THE STATE]: It is possible.

MS. STEWART: Uh-huh.

[THE STATE]: Do you think that that would possibly affect the ease with which you can **B**- in other words, that sounds like something a little easier for me to prove him guilty to you than to somebody else because you are going to be thinking in the back of your mind maybe there is something we are not hearing that we should know about.

Am I reading that right?

MS. STEWART: That may be in the back of my mind.

[THE STATE]: To what extent can you put that aside, or can you?

MS. STEWART: I don't know that I can.

[THE STATE]: Thank you, ma'am.

Does anyone else have that concern?

> Now that it has been brought up, as far as a prior record is concerned, there will be absolutely no information one way or another about this defendant.
>
> Is someone going to be sitting there wondering what are we not being told when maybe there is nothing to tell?
>
> Does anybody have a problem with that?

(DAT. 2628-29). None of the jurors had a problem with it.

Defendant does not sufficiently allege either deficiency or prejudice. Defendant claims that counsel should have objected to the comment but does not cite a single case supporting the proposition that, had such an objection been made, it would have been sustained. Moreover, had an objection to the comment been sustained, the likely remedy would have been a curative instruction. There is no reasonable probability that such an instruction would have led to a different result, especially in light of the overwhelming physical evidence in this case.

Moreover, the claim is without merit and completely refuted by the record. Defendant's selective quotation of the complained of comment might create the impression that the comment could lead to an inference that Defendant in fact had a criminal record. However, when reading the entire context of the exchange between the juror and the prosecutor it is evident that the prosecutor was explaining why an accused's record, or lack thereof, is irrelevant to the determination of guilt and how

hearing about such a record would destroy the presumption of innocence. This becomes crystal clear by the words immediately following the allegedly improper comment when the prosecutor said "he may have none, you are just not going to know." In context, it is clear that, in light of the juror's expression regarding her prior jury experience, where she had learned of the accused's criminal record after rendering a verdict, that the prosecutor was ensuring that none of the jurors would impermissibly speculate on the existence of such a record as they would not be hearing any evidence one way or the other. As the comment is not impermissible, counsel is not ineffective for failing to object to it. *Engle v. Dugger*, 576 So. 2d 696 (Fla. 1991); *Card v. State*, 497 So. 2d 1169 (Fla. 1986); *Kokal v. Dugger*, 718 So.2d 138 (Fla. 1998)(counsel not ineffective for failing to raise meritless issue); *Groover v. Singletary*, 656 So. 2d 424 (Fla. 1995); *Hildwin v. Dugger*, 654 So. 2d 107 (Fla. 1995); *Breedlove v. Singletary*, 595 So. 2d 8, 11 (Fla. 1992).

This claim is procedurally barred as it could have been raised on direct appeal. It is also facially insufficient as Defendant fails to allege neither that the comment was objectionable nor that he was prejudiced by it. As the record conclusively refutes the allegation that the comment was improper, the lower court properly denied this claim summarily.

II. DEFENDANT'S *CRAWFORD* CLAIM

Defendant next asserts that his constitutional right to confront witnesses was violated by the introduction of certain hearsay testimony. This claim is procedurally barred and without merit.

Defendant raises this claim for the first time in this appeal. This claim is, therefore, not properly before this Court since Defendant did not make this assertion in the lower court. *Griffin v. State*, 866 So. 2d 1, 11 n.5 (Fla. 2003)(citing *Doyle v. State*, 526 So. 2d 909, 911 (Fla. 1988)(post conviction claim raised for first time on appeal is procedurally barred)).

Even if it were properly before this Court, this claim is without merit. Defendant complains of four instances where he claims hearsay statements were allowed into evidence. Defendant relies on *Crawford v. Washington*, 541 U.S. 36 (2004), in support of this claim. Since the filing of Defendant's brief, this Court has held that *Crawford* shall not apply retroactively. *Chandler v. Crosby,* 30 Fla. L. Weekly S661 (Fla. Oct. 6, 2005). Accordingly, this claim should be denied.

Furthermore, it should also be noted that the claim is based on erroneous factual allegations. Defendant specifically complains of four "hearsay" statements that Defendant claims were allowed into evidence. However, the record clearly

indicates that two of the statements were not allowed in at all; one was allowed in with a limiting instruction that it was not admitted to prove the truth of the matter asserted, therefore, not hearsay at all; and the last was proven circumstantially to be a statement by Defendant.

With respect to the first, as is quoted by Defendant in his Brief, the court gave a limiting instruction to the jury explaining that the statement was coming in to explain a certain action by the witness and not for the truth of the matter asserted. (DAT. 4586-87) The second statement was objected to and the objection was sustained. (DAT. 4589) Neither was the third complained of statement regarding the injunction allowed into evidence, as it, too, was objected to and the objection was sustained. (DAT. 4595) Finally, Defendant also claims that certain testimony regarding threatening telephone calls received by the witness should have been excluded as hearsay. The substance of the telephone calls was allowed into evidence by the trial judge because the court felt that sufficient evidence had been adduced for the jury to find that it had been Defendant who had made the phone calls. Despite the witness' inability to identify the voice, there was testimony that the caller had called the witness by a name that no one other that Defendant ever used to address the witness. The fact that the calls began

after Defendant and Margaret broke up and ceased after Defendant's arrest was also indicative that Defendant had made the calls. (DAT. 4598-99) Accordingly, this statement was not objectionable as hearsay, since it was being introduced as a statement by the Defendant. An objection based on relevance given the witnesses' inability to identify the caller's voice was made and rejected for the above stated reasons.

Defendant acknowledges that trial counsel objected to the statements. Defendant claims, however, that appellate counsel was ineffective for failing to raise this issue on direct appeal. However, ineffective assistance of appellate counsel is not cognizable in a 3.850 motion. *See Thompson*. Furthermore, in light of the fact that *Crawford* was decided well after Defendant's appeal, and this Court's recent ruling that it is not retroactive, Defendant fails to allege how counsel's performance was deficient or how he was prejudiced. *Walton v. State*, 847 So. 2d 438, 445 (Fla. 2003). Accordingly Defendant is not entitled to relief.

This claim is procedurally barred as it was not brought forward in the lower court. It is also without merit as this Court has recently held *Crawford* shall not apply retroactively. The claim is also meritless as it is based on erroneous

statements of the record. The denial of relief should be affirmed.

III. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO MOVE TO STRIKE THE ENTIRE JURY PANEL FOLLOWING DEFENDANT'S COMMENT REGARDING FIDEL CASTRO

Defendant claims that a comment he made during jury selection expressing positive feelings toward Cuban dictator Fidel Castro, which was overheard by several jurors, some of whom indicated they could not be fair as a result and who were then excused, required the striking of the entire panel. He asserts that his counsel's failure to move to strike the panel was, therefore, ineffective assistance. This claim is waived, procedurally barred, facially insufficient and without merit.

The factual basis for this claim is as follows. The trial court, in trying to determine the depth of one juror=s feelings against the death penalty, gave the following example:

> THE COURT: If Fidel Castro were to be brought here to this country tomorrow and tried, is the death penalty appropriate for him? Would you vote for the death penalty for him?
>
> MR. MACHADO: I would not vote.
>
> THE COURT: Not even for Fidel Castro?
>
> MR. MACHADO: No.

(DAT. 2319-20) Defendant then apparently chose to make his comment that AWhy, Castro, he is a good man,@ (DAT. 2537-38) The

court reporter did not record Defendant=s comment. The record reflects that the trial court was made aware of Defendant=s comment when two veniremembers, Soto and Bendinel, made comments about the Castro comment during individual voir dire. (DAT. 2537-38; 2545-46) Bendinel remarked that possibly a half dozen more jurors heard the remark. (DAT. 2545-46) Thereafter, the State made a general inquiry to the entire panel about whether any of the veniremembers had heard the Castro comment. (DAT. 2743) In response, Koblenzer, Tookes, Fernandez, and Martinez indicated they had heard a comment. (DAT. 2743-44) Rodriguez, Charles and Brown heard about the comment from other jurors. (DAT. 2744) Then, they were all individually voir dired. (DAT. 2748-74) Those veniremembers who indicated they heard the comment and were affected by it were excused for cause. (DAT. 2748-74) Of the jurors that heard any of Defendant=s comments, only Koblenzer and Brown made it onto the jury. Both indicated that the comment would not affect their ability to be fair. (DAT. 2756-59; 2749)

Defendant seems to be asserting that his trial counsel was ineffective for failing to move to strike the entire panel.[6]

[6] Defendant also claims it was ineffective assistance of appellate counsel for failing to raise this issue on direct appeal. However, ineffective assistance of appellate counsel is not cognizable in a 3.851 motion. *See Thompson*.

Initially, the State would note that this claim is insufficiently plead. The allegation of deficiency is made only in the heading for this argument and is not elaborated on in any detail in the body of the argument. Defendant merely recounts the facts surrounding the comment and then states that counsel did not object or move to strike the panel. He does not discuss the lower court's ruling on this claim. Nor does he present any argument as to why the denial was not appropriate. He cites only one entirely inapplicable case. Defendant then states that, in order not to be repetitive, he is relying on the same arguments made as to Claim I. Although this may be proper as to the legal standards, Defendant cannot, in this manner, circumvent the requirements of briefing an issue or of making factual allegations with respect to a claim. Defendant's "failure to fully brief and argue these points constitutes a waiver of these claims." *Coolen v. State*, 696 So. 2d 738, 742 (Fla. 1997)(citing *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990) ("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.")); *see Anderson v. State*, 822 So. 2d 1261, 1268 (Fla. 2002)(failure to brief issue is a waiver of the issue).

Defendant also asserts that, because after individual questioning of the prospective jurors the court could not determine the identity of one of the jurors who had apparently had a conversation with another juror about the comment, and in light of their inflammatory nature, the court should have *sua sponte* discharged the panel. This claim of error by the court is procedurally barred as it could have been brought on direct appeal. *See Smith v. State*, 445 So. 2d at 325; *see also Robinson v. State*, 707 So. 2d at 697 & n.17 & 18. (finding challenges to the jury selection process procedurally barred because they could and should have been raised on direct appeal.) The claim of ineffective assistance of counsel for failing to move to strike the panel is also procedurally barred since phrasing the substantive claim in terms of ineffective assistance of counsel does not negate the bar. *Harvey v. Dugger*, 656 So. 2d 1253, 1256 (Fla. 1995); *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990); *Swafford v. Dugger*, 569 So. 2d 1264, 1267 (Fla. 1990).

With respect to the claim of ineffective assistance, Defendant also fails to sufficiently allege either deficiency or prejudice. Defendant recounts at length the steps taken by the court and the prosecutor to ascertain the identities of the jurors who might have heard Defendant's comments and the ensuing individual questioning with regard to it. What Defendant does

not state is how these efforts were insufficient such that reasonably competent counsel would have acted differently. Nor does he sufficiently allege prejudice. Defendant makes a conclusory allegation that it is very unlikely that a person who makes a positive remark about Fidel Castro could get a fair trial in Miami given the highly emotional nature of the issue in said city. Defendant cites *United States v. Campa*, 419 F.3d 1219 (11th Cir 2005) in support of this claim. The opinion in *Campa* has since been vacated and a rehearing, en banc, granted. *United States v. Campa*, 2005 U.S. App. LEXIS 23517 (11th Cir. 2005). Furthermore, the facts in *Campa* bear no resemblance to the facts of this case. *Campa* involved a denial of a change of venue motion that resulted in defendants, who were accused of spying for the Cuban government, being tried in Miami-Dade County. In addition to being inapplicable on the facts, as the case was decided in 2005 and has since been vacated, it is difficult to understand its relevance to an ineffective assistance of counsel claim. *See Nelms v. State*, 596 So. 2d 441, 442 (Fla. 1992) (Counsel cannot be deemed ineffective for failing to predict changes in the law.) This claim is facially insufficient and was, therefore, properly denied by the lower court.

Moreover, even if sufficiently pled, this claim is without merit. Counsel was not ineffective for failing to strike the

panel, because such a motion would be without merit. This Court has previously stated that "[a] venire member's expression of an opinion before the entire panel is not normally considered sufficient to taint the remainder of the panel." *Johnson v. State*, 903 So. 2d 888, 897 (Fla. 2005). Moreover, Defendant's comment was not in response to any question put to Defendant. Defendant is not entitled to profit from his own misconduct. *See Wike v. State*, 698 So. 2d 817, 820-21 (Fla. 1997); *see also Illinois v. Allen*, 397 U.S. 337, 346-47 (1970) (in evaluating whether trial judge erred in removing defendant from courtroom due to disruptive behavior Court stated the accused should not be permitted by disruptive conduct to indefinitely avoid being tried.) There was no ineffective assistance of counsel, because the claim is not meritorious. *See Engle v. Dugger*, 576 So. 2d 696 (Fla. 1991); *Card v. State*, 497 So. 2d 1169 (Fla. 1986).

Furthermore, in light of the fact that the only two jurors who heard the comment and were subsequently seated stated they were not influenced by it, no prejudice resulted from counsel's failure to object of to move to strike the panel. The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court. *Lusk v. State*, 446 So. 2d 1038, 1041 (Fla. 1984);

Pentecost v. State, 545 So. 2d 861, 862 (Fla. 1989). Florida law allows for the rehabilitation of prospective jurors whose responses during voir dire examination raise questions concerning their impartiality. *See Martinez v. State*, 795 So. 2d 279, 282-83 (Fla. 3d DCA 2001). The record reflects that all the veniremembers who heard the comment were individually questioned and those affected were excused for cause. There was no error in allowing the two jurors to serve, as neither exhibited any bias. Thus, there is no reasonable probability that striking the entire panel would have led to a different verdict.

This claim was waived by Defendant's failure to properly brief the issue. It is also procedurally barred as the claim, particularly as to the alleged failure by the court, could have been brought on direct appeal. Moreover, Defendant has failed to sufficiently allege either prong of the *Strickland* test for ineffective assistance of counsel. As such, this claim was properly summarily denied by the lower court.

IV. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE COURT'S USE OF MERCY KILLINGS AS AN EXAMPLE TO EXPLAIN DEGREES OF CULPABILITY

Defendant claims the he received ineffective assistance of counsel when his trial counsel failed to object to the trial court's use of a mercy killing as an example of a first degree

murder case that might not warrant the death penalty.[7] This claim is improperly briefed, procedurally barred, facially insufficient and without merit.

As with the claim above, this claim is insufficiently plead. The only mention of the alleged deficiency is once again in the heading for the claim. No argument whatsoever is advanced. Defendant does not cite a single case. Again, only a reference to earlier arguments is offered. In fact, Defendant does not even include a conclusory allegation of prejudice. Instead, he merely states the alleged issue, and states that trial counsel was ineffective for failing to preserve it. Such a pleading is facially insufficient even to raise a claim. *See Anderson v. State*, 822 So. 2d at 1268; *Ragsdale v. State*, 720 So. 2d at 207. The claim has been waived by Defendant's failure to properly brief it. See Duest v. Dugger, 555 So. 2d at 852; *Coolen v. State,* 696 So. 2d at 742.

Furthermore, this issue could and should have been raised on direct appeal and is, therefore, procedurally barred. *Smith; Robinson.* Allegations of ineffective assistance cannot be used to circumvent the rule that post conviction proceedings are not

[7] Defendant also claims it was ineffective assistance of appellate counsel for failing to raise this issue on direct appeal. However, ineffective assistance of appellate counsel is not cognizable in a 3.851 motion. *See Thompson*.

to be used as second appeals. *Harvey; Medina; Swafford*. Accordingly, this claim was properly denied by the lower court.

Moreover, Defendant again fails to make sufficient allegations of fact. No allegation of deficiency or prejudice is expressly made with respect to this claim other than the conclusory statement in the heading of the section, that counsel's failure to object amounted to ineffective assistance and that counsel's failure to "preserve" the issue was ineffective. Mere failure to preserve an issue is not ineffective assistance of counsel. "To support a claim of ineffective assistance of trial counsel, not only must the defendant demonstrate that counsel's performance was deficient, he must also demonstrate that this deficiency affected the outcome of the *trial* proceedings." *Pope v. State*, 569 So. 2d 1241, 1245 (Fla. 1990)(citing *Strickland v. Washington*, 466 U.S. 668 (1984)(emphasis added)). "A showing that there is a reasonable probability that trial counsel's failure . . . actually compromised the defendant's right to a fair trial is required to support a claim of ineffective assistance of *trial* counsel." *Id*. (emphasis added) In order for a claim to be facially sufficient, a defendant must make more than a conclusory assertion of both deficiency and prejudice. *Ragsdale,* 720 So. 2d at 207. Because Defendant has not sufficiently

alleged that there is a reasonable probability that the outcome of his trial would have been affected by counsel's alleged failure to object to the court's use of a mercy killing as an example of a case where the death penalty might not be appropriate, the trial court's summary denial of this claim was proper.

Furthermore, even if this claim had been properly pled, it is nonetheless without merit. In *Wainwright v. Witt*, 469 U.S. 412 (1985), the United States Supreme Court held that "the proper standard for determining when a prospective juror may be excused for cause because of his or her views on capital punishment . . . is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Id.* at 424 (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)). In illustrating the jury:s responsibility not to have any fixed notions of which cases deserve death, even should someone be convicted of premeditated first degree murder, the trial court on a few occasions gave the following, or similar, example:

> THE COURT: You think that there are cases of felony murder either-or (sic) where the death penalty might be an issue?
>
> MS. BACH: Premeditated, yes.

THE COURT: Or premeditated where the death penalty is not appropriate?

MS. BACH: No, I think if there is premeditated murder, it is appropriate for the death penalty.

THE COURT: How long have you lived in Dade County?

MS. BACH: Twenty **B**- since 1972.

THE COURT: Do you remember a case, probably right around the time you moved here, and (sic) older gentleman who was about 70 years old, his wife was extremely ill. He was convicted of killing his wife. Some people termed it a mercy killing.

Would you think that case, even if he was convicted of first degree murder, was that case appropriate for the death penalty?

MS. BACH: I didn=t say that. I said I would listen to both sides.

THE COURT: So there might be cases where the death penalty is not appropriate?

MS. BACH: Oh, yes. Right.

(DAT. 2322-23, 2360) Defendant=s assertion that this colloquy instructed the jury that in the case at hand, given that it was not a mercy killings, they could only return a recommendation of death is absurd.

Shortly after this exchange, a juror indicated some difficulty in understanding what could possibly mitigate a premeditated murder. In discussing how to address the juror’s questions, both the State and defense counsel agreed that the mercy killing example was unobjectionable in driving home the

point that anything about the case or Defendant could be a mitigating circumstance. (DAT. 2359) Counsel stated AI have no problem with the Court=s explanation.@ (DAT. 2359) The court committed no error and Defendant fails to provide any legal support to the contrary. As such there was no ineffective assistance of counsel. *Engle v. Dugger*, 576 So. 2d 696 (Fla. 1991); *Card v. State*, 497 So. 2d 1169 (Fla. 1986).

This claim was waived by Defendant's failure to properly brief the issue. It is also procedurally barred as it could have been raised in Defendant's direct appeal. Moreover, it is facially insufficient and without merit. The lower court's summary denial of this claim should be affirmed.

V. DEFENDANT'S RIGHT TO BE PRESENT WAS NOT VIOLATED

Defendant claims that the trial court violated his right to be present during critical stages of the proceedings as there were portions of his trial that were allegedly conducted outside his presence.[8] This claim is procedurally barred, facially insufficient and without merit.

[8] Defendant also claims it was ineffective assistance of appellate counsel for failing to raise this issue on direct appeal. However, ineffective assistance of appellate counsel is not cognizable in a 3.851 motion. *See Thompson.*

It should be noted that Defendant is not claiming trial counsel was ineffective for failing to object to the proceedings in which he claims he was absent.

Claims that could have and should have been raised on direct appeal are procedurally barred in post conviction proceedings. *Smith; Harvey; Medina; Swafford*. This court has previously held specifically that a claim relating to the Defendant's presence at a critical stage of the proceeding is procedurally barred in a motion for post conviction relief since it could have been raise on direct appeal. *Cook v. State*, 792 So. 2d 1197, 1200 (Fla. 2001). Therefore, this claim was properly found by the lower court to be procedurally barred.

The lower court also found this claim to be facially insufficient. Defendant simply makes the conclusory allegation that his rights were violated because "[i]t appears from the record that [he] was not present during several occasions during trial." (Appellant's Brief, p. 37) Defendant first claims his rights were violated when, on January 26, 1998, it "appears" he was not present for a discussion regarding jury questioning, a discussion that encompasses all of a page and a half of transcript, before his presence was noted for the record. (DAT. 2884-85) Defendant then lists thirteen other instances where his presence was not noted in the record. The absence of a notation on the record is patently insufficient to assert this claim, especially in light of the fact that Defendant, better than any other individual, should be able to easily and definitively

assert his absence. The absence of such a notation is particularly of no import in this case since the parties had a stipulation to Defendant=s presence at all times, which was noted in the record. (DAT 2407) AA defendant may not simply file a motion for postconviction relief containing conclusory allegations . . . and then expect to receive an evidentiary hearing. The defendant must allege specific facts that, when considering the totality of the circumstances, are not conclusively rebutted by the record.@ *Kennedy v. State*, 547 So. 2d 912, 913 (Fla. 1989). Defendant=s claim is legally insufficient, as he has not plead any facts or elements that would support such a claim. The lower court's denial of this claim as facially insufficient should be affirmed.

It should also be noted that Defendant's motion merely contained the listing of the dates when he was "apparently" absent. Defendant now seeks to add allegations in his brief that were not advanced below. Specifically, the allegation that he was not "brought out" on March 18, 1998 while the court discussed mitigating and aggravating evidence is advanced in his brief for the first time. The claim with respect to the court's communication with jurors regarding the health of one of the juror, who fell ill and could not continue to serve was brought below as part of an ineffective assistance of counsel claim. He

now brings the claim as a substantive claim of error by the court. Thus, neither claim is properly before this Court as Defendant did not make the assertions in the lower court. *Griffin v. State*, 866 So. 2d at 11 n.5 (citing *Doyle v. State*, 526 So. 2d 909, 911 (Fla. 1988)(post conviction claim raised for first time on appeal is procedurally barred)).

Moreover, even if sufficiently plead below, the claims are without merit. With respect to the first instance complained of with any specificity beyond the absence of a notation on the record, January 26, 1998, the court and counsel were present, but the jury was absent. The court stated it was going to dismiss two jurors for cause because of their religious beliefs, a purely legal determination. The actions taken in Defendant=s absence, if indeed he was absent, in no way infringed his rights. *See Rutherford v. Moore*, 774 So. 2d 637, 647 (Fla. 2000)(at bench and charge conferences where only legal matters heard, defendant's presence would be of no assistance to counsel and did not frustrate the fairness of the proceedings).

Defendant also asserts he was not present on March 18, 1998, when the court allegedly discussed mitigating and aggravating evidence. On that date, the court specifically asked Defendant’s trial counsel if he wanted Defendant brought out. (DAT. 5913) Counsel indicated it was not necessary if the court

was merely scheduling the next date. *Id*. The court indicated it was just scheduling. The "crucial hearing" in question was essentially the court telling the attorneys for each side which mitigating and aggravating factor the court wished the parties to address more fully in their further arguments and sentencing memoranda. (DAT. 5913-23) As the arguments were heard on a later date, when the Defendant was present, Defendant fails to sufficiently allege any prejudice resulting form his absence on this particular occasion. *Rutherford*.

Defendant further alleges that it "appears" he arrived after the trial began on January 30, 1998. With respect to this instance, it should be noted that, at the beginning of the afternoon session, the Court and counsel were briefly discussing an evidentiary matter before bringing the jury in, because AMr. Zenobi has waived@ Defendant=s presence. (DAT 3897) The court indicated, presumably to the bailiff, "whenever you like you can bring the defendant in." *Id*. On this occasion, again, a purely a legal determination regarding the suppression of a statement was being made. When the jury was brought in, the record reflected Defendant was again present. (DAT 3900) Furthermore, as the court ruled in favor of Defendant, Defendant fails to explain how he was prejudiced by his counsel=s waiver. *Rutherford*

Defendant's last vaguely specific allegation with respect to his absence is that the court acted improperly when the judge, upon hearing that a juror was feeling ill, went into the jury room to ascertain the nature of the illness. It is unclear from the record whether the parties accompanied the judge. The court then placed on the record the nature of his inquiry, that the juror was ill and unable to continue, that an ambulance had been called, and that, in light of the circumstances, the court intended to excuse the juror from further service and was substituting her with an alternate. (DAT. 4458-61)

In *Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934), the United States Supreme Court recognized that a defendant has a due process right to be present when Ahis presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.@ The Court further opined that Awhen presence would be useless, or the benefit but a shadow,@ no violation of the right to be present is shown. *Id.* at 106-07. This Court has recognized that a defendant does not have a right to be present at bench conferences where purely legal issues are discussed. *Rutherford*, 774 So. 2d at 647; *Harwick v. Dugger*, 648 So. 2d 100, 105 (Fla. 1994); s*ee also Coney v. State*, 653 So. 2d 1009 (Fla. 1995) (Where a routine status conference wherein several technical, procedural and legal

issues were discussed in the absence of an express waiver by Defendant this Court found the error to be harmless.)

Furthermore, reversal is not mandated "in every case where the defendant is absent during a communication with the jury. *Meek v. State*, 474 So. 2d 340, 342 (Fla. Dist. Ct. App. 1985) (citing Rose v. State, 425 So.2d 521 (Fla. 1982). Where there are communications between the judge and a juror outside the presence of the parties, a harmless error analysis applies. *See Williams v. State*, 488 So. 2d 62, 64 (Fla. 1986). Indeed, the United States Supreme Court has held that, even where such communications are not recorded and are not subsequently disclosed to counsel, they are still subject to a harmless error analysis. *See Rushen v. Spain*, 464 U.S. 114 (1983). Here, Defendant knew about the communication. It is clear from the record that the court stated its intention to check on the juror just prior to doing so and in fact, spoke to the parties at sidebar. (DAT. 4458) No objection was made at the time, as the parties understood that the meeting pertained only to an administrative matter. *See McGriff v. State*, 553 So. 2d 232 (Fla. 1st DCA 1989) (Where the court communicated with jurors regarding issues of timing of deliberations, sequestration logistics, trial publicity and their safety from public spectators, the court informed the parties to the substance of

the communication and no objection was made, error was harmless as no prejudice resulted). Here, after the complained of communication, the court explained, on the record and in the presence of Defendant what had occurred. An objection was made at the time to the substitution of the sick juror. Since the only matter for which Defendant's presence was of any import was discussed in his presence, no prejudice resulted from the communication.

Defendant relies on *Francis v State*, 413 So. 2d 1175 (Fla. 1982) in support of this claim. In *Francis* the proceeding involved was the exercise of peremptory challenges. As this Court explained in Francis "[t]he exercise of peremptory challenges has been held to be essential to the fairness of a trial by jury and has been described as one of the most important rights secured to a defendant." *Id.* at 1178-79. The exercise of a peremptory challenge is clearly a matter in which a defendant can assist, as it is distinctly subjective and can be based on "grounds normally thought irrelevant to legal proceedings." *Id*. at 1179. Furthermore, in *Francis*, this Court reversed the defendant's conviction because it could not determine from the record if any prejudice had been suffered. By contrast, in this case, it is clear that no prejudice was suffered. The communication was merely an exchange regarding the

health of a juror. There were no arguments or decisions to be made, even by the attorneys. There was merely a relay of information from the juror in question to the court. Thus, as the claim is without merit it was properly denied

Defendant=s claim that his right to be present during critical stages of the proceedings was violated is procedurally barred, legally insufficient, and without merit. As such, this claim was properly summarily denied.

VI. DEFENDANT'S RIGHT TO REMAIN SILENT WAS NOT VIOLATED BY TESTIMONY REGARDING HIS STATEMENT TO POLICE FOLLOWING A WAIVER OF MIRANDA

Defendant next claims that the trial court violated his right to remain silent by allowing testimony by law enforcement that Defendant had no response to certain questions posed during an interview. He also appears to claim that counsel was ineffective for failing to object to its introduction. These claims are waived, procedurally barred, facially insufficient and without merit.

Initially, the State would note that it is unclear if Defendant is alleging trial counsel was ineffective for failing to object to the complained of testimony. Unlike several of the other ineffectiveness claims, which the State also submits are improperly briefed, in this claim Defendant does not even assert this allegation in the heading of the argument. He does,

however, state the fact that trial counsel did not object and references earlier arguments made "with regards to the issue of ineffective assistance of counsel." [9] If Defendant is in fact attempting to raise this claim, it has been waived by his failure to properly brief it. *Anderson.*

If this Court were to find otherwise, Defendant still fails to state a facially sufficient claim. No argument whatsoever is made, and no legal support advanced to establish that, had an objection been made, it would have been sustained. Nor is there an allegation that there is a reasonable probability that the result of the proceeding would have been different. *Strickland*.

With respect to the substantive claim that the court erred in allowing the testimony, this claim is procedurally barred. Clearly, an alleged violation of Defendant=s Fifth Amendment right to remain silent could and should have been raised on direct appeal. *See Cook v. State*, 792 So. 2d 1197, 1200-01 (Fla. 2001); *Ragsdale v. State*, 720 So. 2d 203 (Fla. 1998); *Johnson v. State*, 593 So. 2d 206 (Fla. 1992).

[9] If by this statement Defendant is also claiming it was ineffective assistance of appellate counsel for failing to raise this issue on direct appeal the State would again note that ineffective assistance of appellate counsel is not cognizable in a 3.851 motion. *See Thompson*.

Moreover, the claim is without merit as the court did not err in allowing the questioning. The complained of testimony pertains to Defendant's failure to respond to particular questions posed after Defendant freely and voluntarily waived his *Miranda* rights which were explained to him by Detective Tymes. (DAT. 4633-39, State=s Exhibit 86) Defendant freely responded to numerous questions concerning personal information, employment, Margaret Goodine, and Larry Goodine. (DAT. 4639-42) When Detective Tymes asked Defendant related questions as to his knowledge of Larry Goodine=s death, Defendant did not respond. (DAT. 4643) Defendant did not invoke his rights, either. At this point, Detective Tymes noticed the blood splatter on Defendant=s shoes and socks, and asked Defendant questions about it, to which Defendant did respond. (DAT. 4643-44)

After a few hours of interviewing Defendant, Detective Tymes spoke with Detective Bayas about taking over the interview to see if they could make further progress. (DAT. 4718) Detective Bayas then resumed the interview with Defendant. They spoke of numerous things, and Defendant never exercised his right to remain silent. When Detective Bayas asked him about why he bought a car so identical to Margaret Goodine=s, AHe didn=t really give a response to that.@ (DAT. 4725) The interview then continued, with Defendant answering questions, including

specifically denying hurting Larry Goodine. (DAT. 4726) The questions about Larry Goodine that Defendant had not responded to with Detective Tymes, Defendant answered with denials to Detective Bayas.

The testimony by the detectives did not violate Defendant=s right to remain silent. The prohibition against commenting on a defendant's silence does not apply when the defendant does not invoke his Fifth Amendment right. *Hutchinson v. State*, 882 So. 2d 943, 955 (Fla. 2004) (citing *Valle v. State*, 474 So. 2d 796, 800-01 (Fla. 1985)). In *Valle*, this Court held that where a defendant has not exercised his *Miranda* rights, the refusal to answer a question during an interview does not invoke a defendant=s Fifth Amendment right to remain silent. Here, like in *Valle*, Defendant freely and voluntarily conversed with police after having received his Miranda rights. Comment on the refusal to answer a question is not violative of Defendant=s constitutional right to remain silent, when said right has not been invoked. *Id.; see also Ragland v. State*, 358 So. 2d 100 (Fla. 3rd DCA 1978).

In this case, Defendant did not exercise his right to silence. He freely and voluntarily waived his *Miranda* rights, both verbally and in writing, and participated in the lengthy interview. He then did not respond to a line of questioning

concerning hurting Larry Goodine with Detective Tymes, but answered the same questions concerning Larry Goodine with denials when questioned by Detective Bayas. Clearly, Defendant's right to remain silent was not violated.

Defendant's only legal support for this claim, *State v. Kinchen*, 490 So. 2d 21, 22 (Fla. 1985), involved an improper comment on the Defendant's failure to testify at trial. It is, therefore, entirely inapplicable to testimony regarding a custodial interrogation where *Miranda* warnings were administered and waived.

If this Court were to find that Defendant's allegation of ineffective assistance of counsel was not waived and is sufficiently plead, it too would be without merit. As the testimony is not objectionable for the reasons stated above, counsel cannot be ineffective for failing to object to it. *See Engle v. Dugger*, 576 So. 2d 696; *Card v. State*, 497 So. 2d 1169.

The substantive claim is procedurally barred and without merit. The ineffective assistance claim has been waived, is procedurally barred, facially insufficient and without merit, as the testimony was not objectionable. As such, this claim was properly summarily denied by the lower court.

VII. DEFENDANT DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL AS A RESULT OF A CONFLICT OF INTEREST

Defendant asserts that he did not receive the effective assistance of counsel at trial in that his attorneys labored under an actual conflict of interest. This claim is procedurally barred, facially insufficient and without merit.

This claim arises out of the fact that Defendant filed a bar complaint against Louis Jepeway, the attorney who was initially appointed as first chair in this case, alleging complicity in the taking of Defendant's property. Mr. Jepeway was eventually relieved, as the trial court found that the complaint created a conflict of interest, and substituted him with Mr. Zenobi, who had, until then, acted as second chair.

Defendant first asserts that he received ineffective assistance of counsel because the trial court did not remove Mr. Jepeway as his counsel immediately upon the conflict arising. At the time Defendant filed his complaint, Defendant's competency was being litigated before the trial court. The trial court did not discharge Mr. Jepeway until the competency determination was made, and Defendant was found to be competent. This claim is procedurally barred, facially insufficient and without merit.

This claim is procedurally barred as it could have been raised on Defendant's direct appeal. This Court has previously barred a post conviction claim of conflict of interest where the

facts underlying the conflict were known to Defendant at the time of his direct appeal. *Thompson v. State*, 759 So. 2d at 661. Therefore, the trial court's denial of this claim based on the procedural bar was appropriate and should be affirmed.

Moreover, the claim is facially insufficient. To establish a claim of ineffective assistance of counsel based on a conflict of interest, the defendant must demonstrate (1) that counsel actively represented conflicting interests, and (2) that this actual conflict of interest adversely affected his lawyer's performance. *Wright v. State*, 857 So. 2d 861 (Fla. 2003); *see also Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980)(ruling that in order to establish an ineffectiveness claim premised on an alleged conflict of interest, the defendant must "establish that an actual conflict of interest adversely affected his lawyer's performance.") As Mr. Jepeway was discharged following the competency hearing, to plead a facially sufficient claim, Defendant must allege that the representation during that proceeding was adversely affected by the conflict. Defendant does not even make a conclusory allegation of adverse impact as to this claim. Furthermore, given that the only proceeding that could have been affected was the competency determination, which rests primarily on the evaluation by experts, with little input from counsel, and the fact that Defendant has been found

competent in several subsequent examinations, it is difficult to see what adverse effect Defendant would have alleged if he had properly plead this claim.

If Defendant's discussion of *Holloway v. Arkansas*, 435 U.S. 475 (1978), is advanced for the purpose of establishing that Defendant need not show adverse effect when the court is aware of the conflict, the State would note that Defendant's discussion most notably ignores the United States Supreme Court decision in *Mickens* v. *Taylor*, 535 U.S. 162 (2002). In *Mickens,* the U.S. Supreme Court explained that, in its earlier decisions on conflict, when the court spoke of an *actual* conflict of interest, it necessarily was speaking of a conflict that adversely affected counsel's representation. *Id*. Without a showing of such an impact, a mere theoretical division of loyalties does not amount to an actual conflict of interest. *Id.* The Court made clear that *Cuyler* was a limited exception for conflicts of interest resulting from representation of multiple defendants. *Id.* at 174-76. The Court pointed out that *Cuyler* was not intended to apply outside such a context and noted that it had never even applied the test to a successive representation case, let alone other claims of conflict of interest:

> It must be said, however, that the language of *Sullivan* itself does not clearly establish, or indeed even support, such expansive application. "Until," it

said, "a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." 446 U.S. at 350 (emphasis added). Both *Sullivan* itself, *see id.* at 348-349, and *Holloway*, *see* 435 U.S. at 490-491, stressed the high probability of prejudice arising from multiple concurrent representation, and the difficulty of proving that prejudice. *See also* Geer, Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney, 62 Minn. L. Rev. 119, 125-140 (1978); Lowenthal, Joint Representation in Criminal Cases: A Critical Appraisal, 64 Va. L. Rev. 939, 941-950 (1978). Not all attorney conflicts present comparable difficulties. Thus, the Federal Rules of Criminal Procedure treat concurrent representation and prior representation differently, requiring a trial court to inquire into the likelihood of conflict whenever jointly charged defendants are represented by a single attorney (Rule 44(c)), but not when counsel previously represented another defendant in a substantially related matter, even where the trial court is aware of the prior representation. *See Sullivan, supra*, at 346, n. 10 (citing the Rule).

This is not to suggest that one ethical duty is more or less important than another. The purpose of our *Holloway* and *Sullivan* exceptions from the ordinary requirements of *Strickland*, however, is not to enforce the Canons of Legal Ethics, but to apply needed prophylaxis in situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel. *See Nix v. Whiteside*, 475 U.S. 157, 165, 89 L. Ed. 2d 123, 106 S. Ct. 988 (1986) ("Breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel"). In resolving this case on the grounds on which it was presented to us, we do not rule upon the need for the *Sullivan* prophylaxis in cases of successive representation. Whether *Sullivan* should be extended to such cases remains, as far as the jurisprudence of this Court is concerned, an open question.

Id. at 175-76. In *Beets v. Collins*, 65 F.3d 1258 (5th Cir. 1995)(en banc), which was cited with approval in *Mickens*, the Court refused to apply *Cuyler* to conflicts of interest outside the area of multiple representations. In doing so, the Court reasoned that applying *Cuyler* to alleged conflicts of interest that were not based on multiple representation would allow the *Cuyler* exception to swallow the *Strickland* rule.

Defendant cites *Satterwhite v. Texas*, 486 U.S. 249 (1988) in support of the proposition that the U.S. Supreme Court has extended the *Holloway* automatic reversal rule to cases other than those involving a joint representation conflict. Defendant's reliance on *Satterwhite* is misplaced as the case did not involve a conflict of interest at all. Rather, in that case the defendant was denied representation when he had to submit to a psychiatric evaluation without any notice to counsel. Neither *Holloway* nor *Satterwhite* relieve Defendant's burden to allege adverse impact. As no such effect is asserted, this claim is facially insufficient.

Furthermore, the claim is without merit. Competent defendants have the constitutional right to refuse professional counsel and to represent themselves, or not, if they so choose. *Faretta v. California*, 422 U.S. 806 (1975)(error to allow appellant to waive his right to counsel without also determining

whether he was literate, competent and understanding of this choice, so that the court was assured that the appellant was voluntarily exercising his informed free will); *Hamblen v. State*, 527 So. 2d 800 (Fla. 1988). However, Defendant must be mentally competent to dismiss counsel. *Ford v. Haley*, 195 F.3d 603, 605 (11th Cir. 1999). Therefore, as the trial court found in its decision, if Defendant had been found incompetent, he could not have met the *Faretta* standard in order to dismiss his attorney. Logically, the court chose to finish the competency determination before addressing the dismissal of counsel. As there was no error in doing so, the claim was properly denied.

Defendant also asserts that he did not receive effective assistance of counsel at his trial because, Eugene Zenobi, who had been co-counsel throughout the proceedings prior to the removal of Mr. Jepeway, and who then became his only attorney for the remainder of the trial, had a business relationship to Mr. Jepeway, and therefore, was imputed the same conflict. As with the claim of conflict with respect to Mr. Jepeway, this claim, too, is based on facts that were known to Defendant at the time of his direct appeal. Accordingly, this claims is procedurally barred. *Thompson*.

Even if not procedurally barred, this claim, too, is facially insufficient. Although as to this claim Defendant at

least makes a conclusory allegation of adverse impact, the claim is, nonetheless, insufficient. Defendant attempts to reference all other claims of error by counsel complained of throughout his brief to establish the adverse impact. In order to establish adverse effect the Defendant must:

> . . . satisfy three elements. First he must point to some plausible alternative defense strategy or tactic [that] might have been pursued. Second, he must demonstrate that the alternative strategy or tactic was reasonable under the facts. Because prejudice is presumed, the [defendant] need not show that the defense would necessarily have been successful if [the alternative strategy or tactic] had been used, rather he only need prove that the alternative possessed sufficient substance to be a viable alternative. Finally, he must show some link between the actual conflict and the decision to forgo the alternative strategy of defense. In other words, he must establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interest.

Novaton 271 F.3d 968, 1011 (11th Cir. 2001)(quoting *Freund v. Butterworth*, 165 F.3d 839 at 860). As outlined in the above discussion with respect to the facial insufficiency of each claim of ineffective assistance of counsel, Defendant does not advance a plausible alternative defense strategy for any of the claims. Moreover, Defendant fails to allege any link between the conflict and alleged deficiencies.

Defendant's reliance on the case of *Campbell v. Rice*, 265 F.3d 878 (9th Cir. 2001), to establish that automatic reversal is

required because the court failed to inquire further, is likewise misplaced. After issuing this opinion, the Ninth Circuit stayed the mandate pending the U.S. Supreme Court's decision in *Mickens v. Taylor*. Following the decision in *Mickens*, the Ninth Circuit withdrew the cited opinion and issued a new one. In *Campbell v. Rice*, 302 F.3d 892,897 (9th Cir. 2002), the court explained that, in light of *Mickens*, the defendant could only get relief if he established adverse effect. The court upheld the district court's denial of the conflict claim because the defendant had not sufficiently established adverse effect. *Id*. at 898-99. It should also be noted that the court subsequently issued an en banc opinion adopting the three-judge-panel's affirmance on the conflict claim and further explaining that *Mickens* made clear the *Holloway* automatic reversal rule applied only to cases involving dual representation to which counsel had objected. *Campbell v. Rice*, 408 F.3d 1166 (9th Cir. 2005)(en banc). Here, as Defendant failed to allege adverse impact, this claim is facially insufficient.

Moreover, Defendant's claim that his counsel was operating under an actual conflict of interest is without merit as there were no grounds to remove Mr. Zenobi. Although Defendant had moved, pro se, seeking to remove both his attorneys, the Bar complaint, that was the basis of the court's finding of conflict

as to Mr. Jepeway, was only filed as to Mr. Jepeway and not Mr. Zenobi. Thus, Defendant's claim that Mr. Zenobi had a conflict of interest is predicated solely on the fact that he shared office space with Mr. Jepeway.

The rules pertaining to the imputation of conflict are embodied in Rule 4-1.10 of the Rules Regulating the Florida Bar adopted by this Court. The rule states:

> While lawyers are associated in a firm, none of them shall knowingly represent a client when any 1 of them practicing alone would be prohibited from doing so

Fla. Bar Reg. R. 4-1.10. The comment to this rule specifically defines a firm stating that:

> For purposes of the Rules of Professional Conduct, the term "firm" includes lawyers in a private firm and lawyers employed in the legal department of a corporation or other organization or in a legal services organization. Whether 2 or more lawyers constitute a firm within this definition can depend on the specific facts. For example, 2 practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm.

Id. The comment further specifies that:

> it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to another.

Id.

Defendant cites no legal authority to the contrary. Nor does he make any factual allegations that the relationship in this case was different than that contemplated by the comment of the rule. The United States Court of Appeals for the Fifth Circuit, in a case with similar facts, has held that where the defendant's attorney shared office space with an attorney who previously represented a witness who testified against the defendant, such relationship was not proper basis for disqualification. *United States v. Varca*, 896 F.2d 900 (1990); *see also Commonwealth v. Allison*, 751 N.E.2d 868, (Mass. 2001). As the relationship between the conflicted attorney and Mr. Zenobi did not qualify for an imputed conflict, Defendant's claim is without merit.

The State would finally note that this claim was waived when the court inquired, after discharging Mr. Jepeway, whether Defendant had an objection to being represented by Mr. Zenobi as follows:

> THE COURT: Right now what I'm trying to determine is whether there's a conflict of interest between you and your client, and that's the purpose of this query and not for anything else. How do you feel about Mr. Zenobi, Mr. Connor?
>
> THE DEFENDANT: Well, would you pardon me if I state they are fooling? He works together.
>
> THE COURT: Well, they don't always work together. They're not all partners. Can you try and separate

them in your mind and tell me how you feel about Mr. Zenobi?

THE DEFENDANT: Well, to be honest, me and Mr. Zenobi had communicate (sic), good B-

THE COURT: Take a breath.

THE DEFENDANT: We had very good communication at the beginning. But after this brief came up and this incident that happened to go on 9/21/94 that I have got absolutely no help from these attorneys.

THE COURT: Okay. Would you be willing to discuss with Mr. Zenobi right at this time or within a few days about your case and see how you feel about it?

THE DEFENDANT: Well, as I stated, me and Mr. Zenobi had pretty good understanding.

THE COURT: I realize that. So what I'm asking you is whether you feel about Mr. Zenobi as you do about Mr. Jepeway. In other words, do you still want Mr. Zenobi to be your lawyer?

THE DEFENDANT: Yes, I wouldn't mind.

(DAT. 934-35) Mr. Zenobi continued his representation of Defendant. Thus, this claim was waived.

This Court should affirm the lower court's denial of both these claims as procedurally barred. Even were this issue not procedurally barred, it has not been properly plead. Moreover, the claims are without merit. The alleged conflict as to Mr. Zenobi was waived. As such, the claim was properly summarily denied.

VIII. COUNSEL'S PREPARATION FOR AND PERFORMANCE DURING THE GUILT PHASE WAS NOT INEFFECTIVE

Defendant alleges he received ineffective assistance of counsel because his trial attorney failed to investigate and prepare for the guilt phase of the trial properly. Defendant additionally alleges that counsel was ineffective in his trial strategy, direct and cross examination and in failing to present crucial witnesses and evidence.

Defendant alleges counsel should have (i) introduced evidence of Faisha Thomas' allegedly inconsistent statement; (ii) should have more vigorously questioned why certain evidence, including Jessica's body, was not found on an initial search of the Goodine residence and Defendant's cottage; (iii) should have called Wendell McLaughlin and Police Officer Taylor to challenge the State's theory that Defendant had placed phone calls threatening Margaret Goodine; (iv) should have sought a court order requiring that unidentified prints found in the Goodine home and in Defendant's car be submitted for comparison, and should have focused the defense on said prints; (v) should have more vigorously cross examined Margaret Goodine; (vi) should have investigated and confronted Margaret Goodine as to possible pecuniary motive stemming from the guardianship of Jessica Goodine and Larry Goodine's real estate assets; (vii) should have investigated the missing .357 magnum; (viii) should

have more vigorously cross examined Detective Tymes regarding an allegedly inconsistent statement; and (ix) should have more effectively examined Defendant on direct. Defendant alleges that each of these would have strengthened Defendant's theory that someone else committed the murders and that evidence was planted to frame him. However, each of these claims was properly denied as facially insufficient.

Defendant's first allegation of deficiency involves the testimony of Faisha Thomas, Jessica Goodine's neighbor and friend, and the last person to see her alive. Defendant claims that counsel should have cross examined Faisha about a statement contained in a police report. As quoted,[10] the report states Faisha told the police she saw Jessica get into a black Cadillac at 5:30 or 6:00 and that Larry Goodine was driving the car. As reported, Defendant alleges the statement establishes Larry Goodine was not killed inside the Goodine house and that the blood evidence found therein was planted. Defendant's claim first assumes that counsel could have used the statement to impeach the witness. At trial, Faisha testified she did not remember what time it was when she and Jessica were playing together and Jessica went home and that she was not sure who was

[10] The police report does not appear to have been made part of the record.

driving the Cadillac but she thought it was Jessica's father. (DAT. 3828, 3830) Before impeaching the witness with the prior statement, the witness would have had to have been given an opportunity to explain any inconsistency. § 90.614, Fla. Stat.; *Garcia v. State*, 351 So. 2d 1098, 1099 (Fla. 3d DCA 1977); *Urga v. State*, 104 So. 2d 43, 45 (Fla. 2d DCA 1958). In light of the fact that the witness was seven years old at the time of her best friend's murder, the general unawareness of time at such a young age, the emotional impact of the events, or inaccurate reporting by the detective, would have much more likely explained any discrepancy. Moreover, since the witness did not specify a time frame for the events and she was equivocal about the identity of the driver, it is not clear that the prior statement is entirely inconsistent with her trial testimony. *See State v. Hoggins*, 718 So. 2d 761, 770-71 (Fla. 1998) (to be inconsistent, a prior statement must either contradict or materially differ from the testimony at trial). Defendant failed to show counsel's performance was deficient for failing to cross examine a twelve-year-old witness about a statement made six years earlier, and which Defendant has not established would have been admissible for purposes of impeachment. As neither deficiency nor prejudice was sufficiently alleged with respect to this claim, the lower court properly denied it.

Defendant's next claim raises questions as to why Miami-Dade Detective Murias did not find certain blood evidence in the Goodine home when he first visited it to take a missing persons report, or why detectives who searched Defendant's cottage did not find Jessica's body until a second search was conducted. Defendant, however, does not even attempt to allege what counsel failed to do about it. Counsel opened on the fact that police could not have possibly missed the body in such a small room (DAT. 3636-37). The state then defused the effect of any such questioning as to Det. Murias' search of the cottage when he explained on direct that, at the time, he was looking for a live person, and went into detail as to the difference between conducting a visual versus a physical search, and highlighted the fact that the room was dark. (DAT. 3966-68) Moreover, counsel did address the issue on cross examination by highlighting the minute size of the room and the fact that the detective took time to look in the bathroom and under the bed. (DAT. 3972-76) He again addressed it in closing arguments. (DAT. 5086-89) As the record clearly refutes the claim that counsel was deficient for failing to address this issue, the lower court's denial of this claim should be affirmed.

With respect to the blood evidence in the Goodine home, the record reflects that Mrs. Goodine was asked about the bloody

towel and chair, and indicated she had not noticed them until Detective Murias asked her about them. (DAT. 3783-85) The State had preemptively highlighted that Mrs. Goodine was upset upon the realization that her husband and child were missing. (DAT. 3784-85) Defendant fails to identify what additional information cross examination would have revealed about her failure to immediately notice these things, other than for her to repeat that she was pretty upset over her missing husband and daughter. There was also testimony that some of the blood evidence was found under a runner, not in plain view. (DAT. 3665) Counsel was not deficient in his approach to these issues. Thus, the lower court properly denied the claim summarily.

Defendant next claims that counsel should have called Wendell McLaughlin and Police Officer Taylor to rebut the State's theory that certain telephone calls received by Alice McLaughlin, Wendell's wife, threatening Margaret's and her daughter Karen's lives were made by Defendant. Defendant claims the testimony is probative because Mr. McLaughlin was familiar with Defendant's voice so that, if Defendant had been the caller, Wendell would have been able to state so. The fact that Mr. McLaughlin received threatening phone calls by an unidentified individual does not contradict Alice McLaughlin's testimony as to the threatening phone calls she received. Even

if one were to concede Mr. McLaughlin would have been able to identify Defendant's voice, the testimony relates to different calls than those testified to by Alice. As such, the testimony would not have been admissible as proper impeachment. *See* § 90.608, Fla. Stat.

Similarly, the substance of the report prepared by Officer Taylor regarding threatening phone calls received by the McLaughlins and by Margaret while she was allegedly still involved with Defendant is irrelevant to Alice's testimony. The inference that only one individual was calling the McLaughlin residence making threats is not only baseless, but is in fact in direct contradiction to Defendant's assertions that there are a number of people who could have committed the murders. As the testimony would not be probative, it is not admissible. *Id*. Counsel was, therefore, not ineffective. *Pietri v. State*, 885 So. 2d 245, 252 (Fla. 2004)(counsel not ineffective for failing to present inadmissible evidence).

Defendant contends that his counsel was ineffective in that he failed to obtain a court order to compare one latent fingerprint of value from inside the Goodine home and five from Defendant's car to FBI or Metro Dade files, and that he failed to make this the "focal point" of the defense. The fingerprint expert testified there was one latent print that did not match

the four Goodines or the Defendant. (DAT. 4538) Defense counsel elicited on cross that the examiner had not compared the print to any other available Alocal file, Metro file or FBI file.@ (DAT. 4544) Defendant failed to even allege what the evidence would have been had counsel done what he now asserts should have been done. Defendant has not attempted to have the print analyzed, he has not cited any results, and he has never presented any evidence of a viable alternate suspect. Even if deficient performance were presumed in this regard, Defendant can show no prejudice. A court Aneed not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied.@ *Kennedy v. State*, 547 So. 2d 912, 913 (Fla. 1989). Even had the latent print come back with the identification of another individual, that fact would in no way exonerate Defendant in this case, who claimed the police framed him. It would not explain Larry Goodine=s blood on Defendant=s shoes, socks and clothes. It would not have explained Larry Goodine=s blood in Defendant=s car. It would not explain Jessica Goodine's body being found in Defendant=s cottage. It would not explain the burglaries, threats and harassment of Margaret Goodine by Defendant. In short, there is no reasonable probability that the outcome of this trial would have been

different. Thus, counsel cannot be deemed ineffective. *Strickland*.

To the extent Defendant complains his counsel should have more vigorously cross examined Margaret Goodine regarding the time she usually arrived home from work, or if, and why, she arrived late that day, he fails to allege sufficiently deficiency or prejudice. Defendant merely asks rhetorical questions about why Margaret did not get home immediately upon learning that Defendant had, once again, burglarized her home. Defendant has not alleged that questions to Ms. Goodine about her whereabouts would have led the jury not to convict Defendant. This is particularly true given the blood evidence found on Defendant=s property and the discovery of Jessica=s body in his home. Thus, the claim is facially insufficient. *See Kennedy v. State*, 547 So. 2d 912, 913 (Fla. 1989)(mere conclusory allegations are not sufficient).

Defendant also claims his trial counsel failed to investigate evidence that Jessica Goodine had a substantial sum of money at the time of her death. This assertion is supported by the fact that a guardianship had been opened in Miami-Dade Circuit Court and that a petition for probate was filed by Margaret Goodine. As Defendant states that Margaret was the sole beneficiary of this undetermined amount, he seems to be alleging

that Margaret was the true killer. This piece of "crucial" evidence still leaves unanswered how Margaret, the one with the pecuniary gain motive, could have planted the blood evidence on the clothing Defendant was wearing at the time of his arrest, or his car, or how she had access to his cottage to deposit her daughter's body. In light of the overwhelming blood evidence, it would have been foolish for counsel to even suggest the theory that Margaret killed her husband and child to get some unspecified amount of money.

To the extent Defendant asserts counsel should have mentioned at trial that a .357 magnum was missing from Margaret Goodine's bedroom, he has failed to show its relevancy and thus, its admissibility. No gun was used in committing the murders in this case, nor has any evidence shown that any gun helped facilitate the murders. Since this evidence would not have been admissible, § 90.401, Fla. Stat., counsel cannot have been ineffective for failing to present it. *Pietri.*

Defendant argues that counsel should have cross examined Det. Tymes about an allegedly inconsistent statement. Defendant alleges that Det. Tymes' trial testimony to the effect that Defendant knew the location of Larry Goodine's body before ever being told this fact is inconsistent with her deposition testimony. Defendant claims that in her deposition Det. Tymes

testified that Defendant made no incriminating statements. Even taking Defendant's selective quotation of the statement at its face, it is clear that the statement is not inconsistent.[11] The quoted language states that Defendant made "no admission." A statement can be incriminating without it rising to the level of an admission. A statement such as "why didn't they take [the victim] up to [the scene where the other victim's body was found]" when the accused had not been told of the location, is a perfect example of such a statement. It is not an admission, but in context, it certainly is incriminating. As the statement is not inconsistent, s*ee Hoggins*, counsel could not have used it to impeach the witness. Counsel is not ineffective for failing to present inadmissible evidence. *Pietri*.

To the extent Defendant claims counsel should have more effectively examined him during the case in chief, the claim is insufficient. Defendant fails to specify what should have been asked and presented, and how any alternative questioning would have been more consistent with the defense. The direct examination consisted of counsel having Defendant explain where he was, what he did, and who he talked to the day the victims

[11] It should be noted that the way Defendant has referenced this quotation it would appear this was a continuous response to some question. However, it appears from the same quotation in Defendant's amended motion that these are separate lines, each representing the response to separate, unquoted, questions.

disappeared. Defendant also described catching the police planting evidence, which was his defense. Defendant denied any involvement in the murders. The direct examination was entirely and directly relevant to Defendant=s defense that he did not kill the victims. Defendant specifically complains that counsel asked questions that were in direct conflict with the testimony of police officer. In light of the fact that Defendant maintained he was framed by the police, and that this theory was the only one that could explain most of the blood evidence, showing the police to be liars is entirely consistent with the defense. Counsel's performance was not deficient. *Strickland.*

As previously stated, Defendant has not sufficiently alleged *Strickland* prejudice. The evidence Defendant complains should have been introduced by his counsel, assuming admissibility and relevancy, would have, at best, advanced a theory that someone, other than Defendant, committed the murders. Such theory does not explain how clothing taken by police from Defendant himself and from his home, could have contained Larry Goodine's blood. Neither does it explain how the real killer could have planted blood evidence in Defendant's car or how this person had access to Defendant's cottage. Nothing Defendant now alleges counsel should have done would have advanced the only defense consistent with the blood evidence,

and the one Defendant testified to at trial, that the police planted the evidence. The State=s case was overwhelming. The threats to, and harassment of, Margaret Goodine leading to the restraining order against Defendant; the Cadillac purchased by Defendant that was identical to that owned by Margaret Goodine; the last sighting of Jessica Goodine alive leaving in that Cadillac driven by a man; the blood of Larry Goodine found on Defendant=s shoes, socks and clothing; the presence of the items burglarized from Margaret Goodine's home in Defendant=s cottage; and the discovery of Jessica Goodine=s body in Defendant=s cottage were all compelling and devastating evidence of Defendant=s guilt. Thus, no prejudice has been sufficiently alleged as to any of the above claims. There clearly was no reasonable possibility that the outcome would have been different. The claim was, thus, properly summarily denied.

IX. COUNSEL'S INVESTIGATION OF AND PRESENTATION OF MITIGATION WAS NOT INEFFECTIVE

Defendant argues that the lower court erred in denying his claim that his trial counsel was ineffective for failing to prepare properly for the penalty phase of his trial and for failing to investigate and present mitigation evidence properly regarding Defendant's abusive childhood. Two of the sub claims were properly denied summarily by the lower court as they were

facially insufficient. The remaining claim, on which an evidentiary hearing was heard, was properly denied, as the findings of the lower court are supported by substantial and competent evidence adduced at said hearing. *Stephens v. State*, 748 So. 2d 1028, 1034 (Fla. 1999).

Defendant initially alleges that his trial counsel was ineffective in that he should have known that presenting the testimony of Doctors Eisenstein and Mosman would lead to cross examination that revealed certain prior bad acts by Defendant. Defendant argues that counsel should have preemptively brought out these incidents and used them to highlight the fact that Defendant's mental status was "not normal". As the lower court pointed out in summarily denying this claim, counsel objected to the testimony and even moved for a mistrial when the objection was overruled. Defendant failed to allege sufficiently how these efforts to keep this damaging evidence out, rather than the preemptive strike approach, amounts to deficient performance. Defendant argues that by bringing the prior bad acts out himself, counsel could have argued that the incidents lend further support to the fact that Defendant was not "functioning rationally". However, the record clearly establishes that Defendant was not deprived of the argument he claims counsel should have made. The testimony of the doctors spoke directly to

Defendant=s mental condition, which included the prior bad acts. On the cross examination Defendant complains of, where the State brought out the four prior incidents, Dr. Eisenstein acknowledged and incorporated the prior bad acts into his explanation of Defendant=s paranoia and his inability to adapt his behavior. (DAT. 5564-65) It should be noted that Defendant also argues counsel could have argued a lack of significant criminal history. The record shows that he did in fact do so. (DAT. 5855-57) Counsel clearly explained how his argument was not inconsistent with the prior bad acts because, he argued, a criminal history would require convictions and the jury had merely heard allegations of Defendant's conduct. Accordingly, counsel's performance was not deficient. As the jury would have heard the evidence of the prior bad acts in any event, and the jury did hear testimony putting them in the context of mental instability, there is no reasonable probability that the jury would have returned a life sentence recommendation. As the record clearly refutes any allegation of deficiency or prejudice, the lower court's summary denial of this claim was proper.

Defendant next claims Counsel should have presented the testimony of Dr. Sanford Jacobson who, despite having found Defendant competent, would have testified that Defendant had

paranoid thinking, had trouble adapting his behavior, and that there was evidence of organic brain dysfunction. This testimony is cumulative to other mental health expert testimony presented to the jury. (DAT. 5450, 5440-47) Counsel cannot be found ineffective for failing to present cumulative evidence. ***Gudinas v. State***, 816 So. 2d 1095, 1106 (Fla. 2002).

Moreover, the record clearly establishes that the trial court considered the mental health testimony from the sentencing hearing, as well as from the prior competency hearings. (DAR. 2206-07) In its sentencing order, the court specifically considered Dr. Jacobson=s testimony. (DAR. 2208-09) It is clear from the record that Defendant=s mental state was properly presented to the court. The sentencing court concluded that the defense failed to prove the statutory mitigation of extreme mental or emotional disturbance. (DAR. 2213-14) The court did find that the defense established the non-statutory mitigator that Defendant suffers from a mental or emotional illness, and gave the mitigator substantial weight. (DAR. 2214) In denying this claim, the post conviction court specifically stated it was doing so because it had considered Dr. Jacobson’s testimony in its sentencing decision. (R. 371) As neither deficient performance nor prejudice have been properly established and are

refuted by the record, the denial of this claim should be affirmed. *Stephens.*

Lastly, Defendant claims that trial counsel was ineffective in that he failed to present the testimony of Defendant's cousin regarding his abusive childhood. The lower court denied this claim after hearing testimony from Defendant's cousin, Defendant's daughters, Defendant's wife, trial counsel, and Dr. Mosman. The trial court found that the evidence established that trial counsel had made a strategic decision not to present evidence regarding child abuse. (R. 371) The court also questioned the credibility of the daughters' new testimony in light of their penalty phase testimony painting Defendant as a wonderful and loving father. (R. 370-71) The court also relied on Dr. Mosman's testimony that no connection between the childhood abuse and the crimes could be established. (R. 371) The record clearly shows that there is substantial and competent evidence upon which the lower court based these findings. Accordingly, the denial of this claim should be affirmed.

When evaluating an ineffectiveness claim following an evidentiary hearing, this Court has held that:

> The performance and prejudice prongs are mixed questions of law and fact subject to a de novo review standard but . . . the trial court's factual findings are to be given deference. *See Stephens v. State*, 748 So. 2d 1028, 1034 (Fla. 1999). So long as its

> decisions are supported by competent, substantial evidence, this Court will not substitute its judgment for that of the trial court on questions of fact and, likewise, on the credibility of the witnesses and the weight to be given to the evidence by the trial court. *Id.* We recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact.

Porter v. State, 788 So. 2d 917, 923 (Fla. 2001).

In evaluating an ineffective assistance of counsel claim specifically pertaining to the sentencing phase of a capital trial, this Court has held that:

> "An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence." *Porter v. Singletary*, 14 F.3d 554, 557 (11th Cir.), *cert. denied*, 130 L. Ed. 2d 435, 115 S. Ct. 532 (1994). The failure to do so "may render counsel's assistance ineffective." *Bolender*, 16 F.3d at 1557.

Rose v. State, 675 So. 2d 567, 571 (Fla. 1996). Furthermore, with respect to claims of ineffective assistance of counsel for failing to investigate and present evidence at the penalty phase, the United States Supreme Court has held that:

> Our principal concern in deciding whether [counsel] exercised "reasonable professional judgment" is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence . . . was itself reasonable. In assessing counsel's investigation, we must conduct an objective review of their performance, measured for "reasonableness under prevailing professional norms," which includes a context-dependent consideration of

> the challenged conduct as seen "from counsel's perspective at the time."

Wiggins v. Smith, 539 U.S. 510, 522-23 (2003)(citations omitted).

The burden of proving both *Strickland* elements is upon Defendant. *See Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983. Furthermore, when evaluating claims that counsel was ineffective for failing to investigate or present mitigating evidence, this Court has phrased the defendant's burden as showing that counsel's ineffectiveness "deprived the defendant of a reliable penalty phase proceeding." *Asay v. State*, 769 So. 2d 974, 985 (Fla. 2000)(quoting *Rutherford v. State*, 727 So. 2d 216, 223 (Fla. 1998)).

The Court must consider, in evaluating the competence of counsel, Athe actual performance of counsel in preparation for and during the penalty phase proceedings, as well as the reasons advanced therefor.@ *Rose v. State*, 675 So. 2d at 572. Counsel is entitled to great latitude in making strategic decisions. *Id.* The lower court found that the decision not to elicit evidence of Defendant's deprived childhood was a strategic one. This finding is supported by the testimony of Defendant's trial counsel, Eugene Zenobi, who testified that he wanted the jury to focus on the mental health testimony. (R. 411, 414) Zenobi also

stated his decision was partly guided by a case, which he had tried shortly before Defendant's trial, in which the defendant's abuse had been the focus of the penalty phase presentation, as it was the strongest mitigator. (R. 409) By contrast, in Defendant's case, he had strong mental health testimony to support a finding of the mental mitigators. *Id*. In his view, the issue of Defendant's abusive childhood was a tangential one that might detract from the primary focus of his presentation. (R. 411)

Moreover, other evidence presented at the evidentiary hearing contradicts any assertion that counsel's strategy was an unreasonable one. Dr. Mosman testified that, clinically, he could not take Defendant's abuse as a child out of context and use it to explain Defendant's crime. (R. 472-73) Defendant had led a fairly normal life, with a family and a stable history of employment. The penalty phase testimony of his three children and his wife also showed that Defendant had adapted well to adult life, being a loving and supportive father, and a good provider. Defendant's childhood evidence, even if accepted as a mitigating circumstance, would have been entitled to little, if any, weight. S*ee Francis v. Dugger*, 908 F.2dd 696, 703 (11th Cir. 1990)(given the fact that [defendant] was thirty-one years old when he murdered [the victim], evidence of a deprived and

abusive childhood is entitled to little, if any, mitigating weight); s*ee also Rose v. State*, 617 So. 2d at 294 (counsel was not ineffective in failing to present childhood-based mitigation where the defendant was 33 at the time of the murder, and the evidence would have been inconsistent with other proffered mitigation and defendant=s maintenance of innocence). Defendant failed to show that this was not a reasonable tactical decision.

As far as Defendant's contention that counsel should have presented evidence that Defendant himself had become an abuser to his own children, which would support the argument that he had been abused as a child, Defendant again fails to show counsel was deficient. Zenobi testified that, although he did not recall being aware of that fact, he was aware of allegations that Defendant had been abusive with the Goodine children. (R. 433-34) Defendant had denied the allegations. (R. 435-36) Zenobi would have been reluctant to present such evidence. (R. 434) Clearly this evidence would have been in direct conflict with the penalty phase testimony of Defendant's children. At the penalty phase, several of the children testified in detail as to what a wonderful father Defendant had been. (DAT. 5340-49, 5363-70, 5378-85) They went on to give specific instances of what a good influence Defendant had been growing up, and continued to be, despite his incarceration. It would have also conflicted

with counsel's argument that Defendant could not have murdered Jessica, with whom he had a loving relationship and whom he viewed as his daughter. (DAT. 5106) This Court has recognized that not presenting conflicting evidence is not deficient performance. S*ee Rutherford v. State*, 727 So. 2d at 225 (finding that evoking images of an abusive childhood and debilitating war experience would have been inconsistent with the reasonable penalty phase strategy to humanize defendant); *see also Cummings-El v. State, 863 So. 2d 246 (Fla. 2003).* Moreover, as to this evidence Defendant again fails to establish counsel's strategy was unreasonable. The sentencing court, in fact, found the fact that Defendant was a good father to be a non-statutory mitigator. Clearly counsel could not have proceeded with the evidence that Defendant was an excellent father and that he was physically abusive to his children at the same time. There is no indication that the abuse strategy would have been more successful that presenting Defendant as a good father. Furthermore, presenting evidence of Defendant's abuse on his children would have highlighted the fact that they, unlike their father, had managed to overcome the effects of child abuse, because they had gone on to become educated, employed and seemingly well adjusted adults. This Court has recognized that the failure to present additional family testimony that would

have informed the jury of negative information is not ineffective. *Breedlove v. State*, 692 So. 2d 874 (Fla. 1997). Therefore, counsel was not ineffective for failing to present evidence that Defendant had been physically abusive to his children.

After a full opportunity to develop his claim, Defendant not only failed to establish that counsel's choices were unreasonable, but he also failed to establish that counsel's investigation was deficient. Counsel clearly did substantial investigation, including an investigation into Defendant=s background and childhood. (R. 430-32) In addition to gathering information from Defendant, counsel spoke with Defendant=s family members numerous times. (R. 433-34, 442) He presented the testimony of three children and Defendant=s wife at the penalty phase. He investigated Defendant=s incarceration history, and had a correctional officer testify in Defendant=s behalf. Counsel is only required to conduct a Areasonable investigation,@ and there is no question that he did. With respect to Defendant's own abuse of his children, in light of their testimony at the penalty phase to the contrary (DAT. 5342, 5352, 5365, 5380), counsel cannot be deemed ineffective for failing to discover the abuse. *Correll v. Dugger*, 558 So. 2d 422 (Fla. 1990). Moreover, the abuse toward his children is only relevant to mitigation as

it lends support to the fact that Defendant himself was abused. Dr. Mosman testified that Defendant denied having been abused and that Defendant did not exhibit nonverbal responses that would indicate to him Defedant was not being forthcoming with respect to this topic. (R. 454-56) Thus, in light of the evidence to the contrary, counsel was not deficient for failing to discover that Defendant had been physically abused as a child. *Correll*.

Even if Defendant had established deficient performance by counsel, he failed to establish the requisite prejudice under *Strickland*. Defendant is not prejudiced if there is no reasonable probability that the additional mitigation would have outweighed the aggravators in the case and led to a life sentence. *See Rutherford v. State*, 727 So. 2d at 225-26; *Haliburton v. Singletary*, 691 So. 2d 466, 471 (Fla. 1997). When examining whether Defendant was prejudiced by counsel's failure to present this mitigation, the Court must consider the nature of the aggravating and mitigating evidence that was presented in the penalty phase. *See Asay*.

The evidence presented at the evidentiary hearing does not create a reasonable probability of a different result. Krincrecess could only testify that he had been told by Defendant that he was made to kneel on a coconut grater. (R.

660) He had no firsthand knowledge of this fact. He also did not know how long Defendant was made to kneel on this contraption or how often this occurred. (R. 654-55) Krincrecess provided vague information regarding Defendant's various homes where Defendant grew up, his limited schooling, and the fact that Defendant shined shoes and ran errands as a child. (R. 651-52) Despite Defendant's assertions, no testimony was elicited at the evidentiary hearing regarding Defendant having to support himself as a child, Defendant having to eat a pie made of pig manure as punishment, the length of time Defendant was made to kneel on the coconut grater, or the financial and emotional strain that the extramarital affair with Margaret Goodine caused Defendant.

At the penalty phase, counsel presented extensive mental health testimony. There was extensive testimony from mental health professionals establishing that Defendant suffered from organic brain damage; that he had paranoid ideations; and that he had great difficulty adapting his behavior to changes in circumstances. Counsel also presented testimony of Defendant's children that established that he was a loving and caring father who greatly influenced their lives, even into adulthood, and despite his incarceration. The jury did not find that this powerful mental mitigation, in addition to the great loss

Defendant's death would cause on his family, sufficiently outweighed the overwhelming evidence in aggravation. The kidnapping and strangulation death of Jessica Goodine was truly horrible. The aggravating factors of heinous, atrocious and cruel (HAC) and cold, calculated and premeditated (CCP) were found beyond a reasonable doubt in this case. CCP and HAC, are two of the "most serious aggravators set out in the statutory sentencing scheme." *Card v. State*, 803 So. 2d 613, 623 (Fla. 2001); *Larkins v. State*, 739 So. 2d 90, 95 (Fla. 1999). Although the sentencing court found that Defendant failed to prove the statutory mitigator, it did give substantial weight to Defendant's mental condition. Nonetheless, the aggravating circumstances far outweighed any mitigators. Mr. Zenobi presented a strong mitigation case. The jury rejected powerful evidence that Defendant's capacity to appreciate his conduct and his ability to conform his conduct to the requirements of law was substantially diminished by organic brain damage, and that despite that fact, he had been a good father and had a meaningful impact on his children's lives even throughout his incarceration. There is no reasonable probability that the jury would have made a different recommendation if they had heard the testimony adduced at the evidentiary hearing regarding the abuse Defendant suffered as a child and the perpetuation of that abuse

on his own children. Accordingly, the lower court correctly found that Defendant had not met his burden of establishing prejudice. Neither did he establish that counsel's strategy to have the jury focus on the evidence presented and not muddy the waters with the attenuated issue of an abusive childhood was unreasonable. Thus, the lower court's denial of this claim was proper and should be affirmed.

X. DEFENDANT'S RING CLAIM IS MERITLESS

Defendant argues that Florida's capital sentencing scheme is unconstitutional pursuant to the U.S. Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002) because under said scheme the trial judge, not the advisory jury, makes the findings of fact required to impose a death sentence. Both this Court and the United States Supreme Court have held that *Ring* does not apply retroactively to cases, such as this one, where the sentence was final before *Ring* was decided. *Schriro v. Summerlin*, 542 U.S. 348 (2004); *Johnson v. State*, 904 So. 2d 400 (Fla. 2005). Moreover, this Court has repeatedly rejected *Ring* claims in cases where the death sentence was supported by the "prior violent felony" and the "during the course of a felony" aggravators. *Gamble v. State*, 877 So. 2d 706, 719 (Fla. 2004); *Jones v. State*, 855 So. 2d 611, 619 (Fla. 2003). As such,

Defendant is entitled to no relief based on *Ring*. The claim was properly denied and should be affirmed.

XI. DEFENDANT'S SENTENCE DOES NOT VIOLATE THE 8TH OR 14TH AMENDMENTS

Defendant alleges that his sentence violates the Eighth Amendment's prohibition against cruel and unusual punishment because he suffers from a "host of mental and psychological disorders" including organic brain damage, paranoid schizophrenia, frontal lobe damage, stuttering and micrographia. Defendant further states that his condition is deteriorating and will continue to do so due to hypertension and vascular disease. This claim is procedurally barred and without merit.

It should initially be noted that this is the first time Defendant makes this claim. Below, Defendant argued that execution was cruel and unusual punishment because he is mentally retarded. (R. 258) As that claim is clearly refuted by the record, Defendant now seeks to change the theory upon which he argues he is entitled to relief under the 8th Amendment. Such amendment at this juncture is entirely improper. Accordingly, this claim is not properly before this Court. *Griffin v. State*, 866 So. 2d 1, 11 n.5 (Fla. 2003)(citing *Doyle v. State*, 526 So. 2d 909, 911 (Fla. 1988)(post conviction claim raised for first time on appeal is procedurally barred)).

Furthermore, Defendant fails to cite a single case that supports the proposition that it is cruel and unusual punishment to execute an individual who suffer from organic brain damage, frontal lobe damage, micrographia, paranoid schizophrenia, stuttering, or any other mental illness, short of legal insanity or mental retardation. He seems to argue that because the United States Supreme Court has recently held that the 8th Amendment prohibits the execution of juveniles, and in so holding the Court outlined some similarities between the execution of the mentally retarded to the execution of juvenile offenders, and that because the U.S. Supreme Court has described the cruel and unusual punishment clause as "evolving" and "progressive," this is somehow an invitation on this Court to extend the same analysis to those who are mentally infirm. This Court has previously rejected the argument that application of the death penalty to the mentally ill (but not legally insane) is cruel and unusual punishment. *Bello v. State*, 547 So. 2d 914, 916, n1 (Fla. 1989). This Court has also rejected the argument that brain damage renders a defendant effectively mentally retarded such that his death sentence was disproportionate and violative of *Atkins v. Virginia*, 536 U.S. 304 (2002). *Zack v. State*, 911

So. 2d 1190 (Fla. 2005).[12] Defendant's claim is, therefore, without merit.

Defendant alternatively requests that this Court remand the matter to the lower court for a full evidentiary hearing on the issue of retardation. This claim was properly denied summarily by the lower court as it is procedurally barred, facially insufficient, and refuted by the record.

Defendant did not claim that execution of the mentally retarded was unconstitutional at the time of his direct appeal. He raised this claim for the first time in his motion for post conviction relief. As such, this claim is procedurally barred. *See Brown v. State*, 755 So. 2d 616, 621 n.7 (Fla. 2000) (postconviction claim that Eighth Amendment forbids the execution of mentally retarded was procedurally barred); *Woods v. State*, 531 So. 2d 79 (Fla. 1988). The lower court's summary denial of this claim should be affirmed.

[12] It should also be noted that here, like in *Zach*, a proportionality argument was advanced in Defendant's direct appeal. The sentencing court discussed at length in its order the testimony that it had taken into consideration regarding Defendant's mental deficiencies. Not only had the jury heard much of the evidence in this regard, but the sentencing court also weighed testimony that had been advanced for the purpose of determining competency, but which clearly was relevant to mitigation as well. This Court upheld the sentence following a proportionality review.

Moreover, as is stated in the lower court's order, Defendant fails to meet the statutory requirements to show he is mentally retarded and the claim is refuted by the record. Under the criteria set forth by Florida law, a person is mentally retarded when he or she has an IQ of 70 or below and the significant subaverage general intellectual functioning exists concurrently with deficits in adaptive behavior and both were manifested prior to the age of eighteen. *See* § 916.106 (12), Fla. Stat. (2003); *see also Cherry v. State*, 781 So. 2d 1040, 1041 (Fla. 2000) (accepting expert testimony that in order to be found retarded, an individual must score 70 or below on standardized intelligence test). Defendant has not alleged any IQ scores less than 70. Nor has Defendant asserted any problems with adaptive functioning. Defendant also fails to allege that either existed prior to his attaining the age of 18.

Defendant seems to be arguing that his latest IQ score is close enough to 70 that we should give him the benefit of the doubt. Defendant claims that Dr. Eisenstein's testimony during the most recent competency hearing, that Defendant's mental health is declining and that his new testing revealed a full scale IQ score of 74 puts him in the "borderline range." Contrary to Defendant's assertion, this testimony was rebutted, primarily by Dr. Ainsley's testimony that in her evaluation of

Defendant she did not detect any memory deficit that would be consistent with Dr. Eisenstein's test results. (R. 622-23) She also indicated that Defendant had expressed to her his dislike of Dr. Eisenstein and his conclusion that Defendant was incompetent, and that such a feeling from the subject toward the tester is likely to affect test results. (R. 626, 629)

Even if we were to take this new score at its face, it does not support a claim of retardation for three reasons. First, the score is still well above the score required for a finding of retardation. It should be noted that in *Zack* the evidence showed the defendant to have an IQ of 79. Second, Defendant's argument ignores that Florida's definition of retardation requires that the deficiency manifest itself prior to the age of eighteen. Dr. Eisenstein testimony explaining Defendant's "deterioration" clearly refutes such early manifestation. In fact, the testimony seemed to suggest that Defendant's IQ is now "borderline" because it has declined in recent years and this is, at least in part, due to Defendant's present dementia and hypertension, ailments commonly associated with old age. Thirdly, there has never been any allegation of deficiency in adaptive functioning. As such, the claim is insufficiently plead.

Moreover, it is refuted by the record. After being examined by a host of mental health professionals, there is not a single

opinion that supports that Defendant is mentally retarded. During Defendant=s sentencing presentation, Dr. Eisenstein testified Defendant was tested in 1995, and achieved a verbal score of 88, a performance score of 81, and a full scale score of 84. (DAT. 5451) This puts Defendant in the low average range. (DAT 5451) Dr. Eisenstein testified that Defendant=s Wexler test scores Awere actually equal and even higher than his IQ scores.@ (DAT. 5459) Dr. Mosman testified for Defendant, stating that A[i]n context, I clearly know that he is not mentally retarded, but I also know that there are some areas of functioning that fall into that area.@ (DAT. 5712) Defendant himself denies any deficit, claiming his mental state was Aas perfect as anybody in this courtroom today.@ (DAT. 5585) Defendant=s daughter testified that Defendant was not mentally retarded, and gave several examples of her interaction with Defendant that exhibit perfectly normal adaptive functioning. (DAT. 5343-50) The State's expert, Dr. Garcia, noted Defendant=s IQ scores in February 1993 were 88 for verbal, and A81 and 84" for performance. (DAT. 5756) He also noted Defendant showed no problems functioning, as he had held a job for many years, was married and raised a family, had a mistress, and was starting a business in Central America. (DAT. 5760) All of these events are indicative of normal adaptive functioning. Dr. Jacobson

testified that Defendant is very focused, cognitively functional and an extremely controlled individual. (DAT. 711, 749, 785) Given that the record already refuted Defendant=s claim of mental retardation, this claim was properly denied summarily by the lower court.

XII. DEFENDANT'S SENTENCE IS NOT CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF FLORIDA'S CONSTITUTION

Defendant next argues that his death sentence violates Florida's Constitutional prohibition against cruel and unusual because he is, in fact, mentally retarded. For all the reasons stated in the above claim, in which Defendant made a different claim but alternatively requested an evidentiary hearing on mental retardation, this claim was properly denied by the lower court.

Defendant additionally argues that Florida's statute § 921.137 arbitrarily applies the death penalty because the date of sentencing, rather than the date of the crime, determines whether a mentally retarded person can be executed. In light of this Court's decision in ***Phillips v. State***, 894 So. 2d. 28 (Fla. 2004), Defendant is not precluded from bringing a proper claim of mental retardation. Moreover, the lower court denied Defendant's claim of mental retardation because it was refuted by the record, not on retroactivity.

Defendant again alternatively requests that this Court remand the matter to the Circuit Court to conduct an evidentiary hearing on retardation. This claim has been addressed fully in the argument above. For the reasons stated in that argument, the lower court properly denied this claim summarily.

XIII. THE CIRCUIT COURT DID NOT ERR IN DENYING DEFENDANT'S POST CONVICTION MOTION WITHOUT AN EVIDENTIARY HEARING

Defendant asserts that the lower court erred in denying all but one of his claims without an evidentiary hearing. A motion for post conviction relief can be denied without a hearing when the motion and the record conclusively demonstrate that the movant is entitled to no relief. *Roberts v. State,* 568 So. 2d 1255 (Fla. 1990). For the reasons enumerated in the above discussions for each of these claims, and for the reasons stated by the lower court in its detailed order denying relief, each of these claims is procedurally barred and/or facially insufficient. Accordingly, each was properly denied summarily.

XIV. DEFENDANT'S CUMMULATIVE ERROR CLAIM

Defendant lastly claims that his trial was fraught with such a quantity of errors that the cumulative effect deprived him of a fundamentally fair proceeding to which he is entitled under the Sixth, Eighth and Fourteenth Amendments. Defendant fails to make sufficient factual allegations with respect to

this claim. Even if sufficient factual allegation had been made with respect to this claim, it would still fail. Where the individual errors alleged are either procedurally barred or without merit, the claim of cumulative error also fails. *Downs v. State*, 740 So. 2d 506, 509 n.5 (Fla. 1999).

CONCLUSION

For the foregoing reasons, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to **Israel J. Encinosa**, 111 N.E. 1 Street, Suite 603, Miami, FL 33132 this 13th day of December 2005.

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CERTIFICATE OF COMPLIANCE

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

_____
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