IN THE SUPREME COURT OF FLORIDA

DAVID A. GORE,

Appellant,

vs. Case No. 04-1458

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR INDIAN RIVER COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, DAVID A. GORE, was the defendant in the trial court below and will be referred to herein as "Appellant." Appellee, the State of Florida, was the petitioner in the trial court below and will be referred to herein as "the State." Reference to the record on appeal will be by the symbol "ROA," reference to the transcripts and pleadings in these proceedings will by the symbol "PCR," and reference to the supplemental transcripts will be by the symbols "SPCR" followed by the appropriate page number(s).

STATEMENT OF THE FACTS

Appellee accepts appellant's Statement of Case and Facts with the following additions/clarifications. Udell testified that it was standard operating procedure to provide every mental health expert with all medical records, school records and social history. (PCR 812-813). Udell further testified that Jerome Nickerson was pretty good about obtaining such records. (PCR 813). He noted that obtaining such records "would be elementary for capital defense lawyers." (PCR 813). Udell repeatedly stated that he could not answer any questions relating to Nickerson's strategic decisions regarding; presentation of defense witness Robert Stone and jury selection. Those issues were handled by Nickerson alone. (PCR 789-793, 801) Udell testified that pesticide exposure was not something that was ever mentioned as a defense in this case. (PCR 817). He also cautioned that if there is no connection between the pesticide exposure and the defendant's behavior, then, "a jury would punish you for making an argument that makes no sense...." (PCR 817).

Thelma Gore did not know what kind of chemicals were used at the citrus groves. (PCR 66). David had childhood illnesses of tonsillitis, bronchitis, appendicitis and the high fevers associated with those illnesses. (PCR 83-84). She discussed

these illnesses with penalty phase counsel in 1992. (PCR 82).

Dr. Herbert Nigg, is an etymologist with training in toxicology and biochemistry. He is a professor with the University of Florida in the entomology and mycology department. (PCR 865). Dr. Nigg testified that there were three types of pesticides that appellant could have been exposed to during the time he worked in the citrus groves. Those are lead arsenic, organo phosphate and organo chlorine. (PCR 903).

Dr. Joseph Napp, is a professor emeritus with the Ecology Department at the University of Florida. His work at the University of Florida was to evaluate the efficacy of pesticides on Florida citrus. He was also charged with making recommendations to the State of Florida for all pesticides used on Florida citrus. (PCR 922). Dr. Napp testified that there has never been a reported case of arsenic poisoning using lead arsenic on Florida citrus or any documented health problems associated with lead arsenate; there has been no case of a reported long-term effect associated with use of organo phosphates; and there has been no reported case of long-term effects associated with Caldane, a pesticide from the orango chlorine pesticide that was used on Florida citrus. (PCR 913-914, 930-931). Thousands of people like appellant were similarly exposed to these pesticides. (PCR 932-933).

STATEMENT OF THE CASE

Gore was convicted of first degree murder, sexual battery and kidnaping in the murder of a young woman, Lynn Elliot. Those convictions were upheld on appeal. Gore v. State, 475 So. 2d 1205 (Fla. 1985). Following the overturning of his death sentence in federal court, a new penalty phase was conducted in November of 1992. Gore v. Dugger, 763 F.Supp. 1110 (M.D. Fla. 1989) *affirmed* in Dugger v. Gore, 933 F.2d 904 (11th Cir. 1991). Following a jury vote for death by a twelve to zero margin, the trial court sentenced him to death, finding six aggravating factors. On appeal this Court recounted the facts of the murder as follows:

> On July 26, 1983, Gore and his cousin Freddy Waterfield picked up teenagers Lynn Elliott and Regan Martin, who were hitchhiking. Soon after, Gore took a gun out of the glove compartment and handcuffed the two girls while Waterfield drove to Gore's parents' house. Once there, Gore bound each of the girls and placed them in separate bedrooms. Regan Martin testified that Gore cut off her clothes and forced her to perform oral sex on him while he threatened to kill her, and that Gore kept going back and forth between the two rooms. At one point when Gore was out of the room, Martin heard gunshots from outside. When Gore returned he placed her in a closet and then the attic and threatened to kill her if she tried anything. Soon after, Gore surrendered to the police and Martin was rescued. Elliott's nude body was found in the trunk of Gore's car.
>
> Michael Rock, a teenager riding his bike by

> Gore's house on the day in question, testified that he saw Gore and a naked woman (Lynn Elliott) running up the driveway toward the road. Rock watched as Gore caught up with Elliott and dragged her back toward the house. He then saw Gore throw Elliott down and shoot her. Elliott had been shot twice, once in the back of the head and once in the jaw.

Gore v. State, 706 So.2d 1328, 1330 (Fla. 1997). This Court upheld imposition of the death penalty, determining that all six aggravating factors had been established:

> (1) The capital felony was committed by a person under sentence of imprisonment. Gore was on parole after being convicted and sentenced for trespass of a conveyance while armed.
> (2) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to a person. The trial court found that the facts of the aforementioned trespass conviction involved the threat of violence to a person. The court further found that Gore's contemporaneous convictions for kidnaping and sexual battery also satisfied this aggravator.
>
> (3) The crime was committed while the defendant was engaged in the commission of a sexual battery and kidnaping.
>
> (4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. The trial court found that Elliott was in the process of escaping and was killed for the dominant or sole motive to prevent her from identifying Gore because that would lead to his arrest.
>
> 5) The capital felony was especially heinous, atrocious, or cruel (HAC). The

> trial court relied on evidence that Elliott was abducted and handcuffed at gun point, brought to the Gores' residence, and then tightly bound before being sexually assaulted. The court also found that Elliott attempted to flee but Gore caught up with her and dragged her back as she fought to free herself before finally throwing her to the ground and shooting her.
>
> (6) The murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (CCP). The trial court relied on evidence that Gore participated in a detailed plan to kidnap a young girl using a gun, handcuffs, and rope, to transport her to his residence, commit sexual battery, terrorize and then murder her. He also threatened to kill Regan Martin and told her he was "going to do it anyway."

Id at 1331. Postconviction counsel Andrew Graham was appointed in March of 1999. Following the filling of an initial motion, counsel was granted permission to amend the motion following the completion of public records disclosure. The amended motion was filed in January of 2002. The response was filed on May 20, 2002. Following an evidentiary hearing, all relief was denied on June 9, 2004. (PCR 695-704). This appeal followed.

SUMMARY OF ARGUMENT

Issues I and Issue II. Appellant's numerous evidentiary challenges to the trial court's rulings regarding Gore's parole status is procedurally barred as they were raised and rejected on direct appeal.

Issues III and Issue IV. Appellant's claim that there were improper *ex parte* communications between the state and the trial court prior to sentencing was procedurally barred or refuted from the record.

Issue V. The trial court properly denied appellant's claim that counsel was ineffective at the penalty phase.

Issue VI. Appellant's claim that his stay on death row constitutes cruel and unusual punishment is without merit.

Issue VII. Appellant's as applied constitutional challenge to Florida's death penalty statute is vague and without merit.

ARGUMENT

ISSUE I

APPELLANT'S CLAIM THAT THE STATE KNOWINGLY ELICITED FALSE TESTIMONY REGARDING HIS ELIGIBILITY FOR FUTURE PAROLE WAS PROPERLY DENIED AS THE CLAIM WAS RAISED AND REJECTED ON DIRECT APPEAL AND IS THEREFORE PROCEDURALLY BARRED (Issues I and II restated)

In his motion for postconviction relief, Gore argued that his due process rights were violated because jurors were presented with a false picture regarding his parole status. This violation was the end result of several allegedly erroneous rulings by the trial court. For instance, the trial court improperly precluded appellant from telling the jury that the only sentencing options were "death" or "life with no possibility of parole". Next, the state was allowed to inform the jury that Gore would be eligible for parole after twenty-five years. Thirdly, during jury deliberations, and in response to a jury question, the trial court erroneously informed the jury that Gore would receive credit for the time he has already served. Fourth, the state allowed former prosecutor Robert Stone to provide false testimony that Gore was in fact eligible for parole at any point when in fact he would have to serve at least fifty years. Fifth, the jury was told to rely on their recollection of the testimony regarding when Gore would be

eligible for parole. And finally, appellant was precluded from arguing that the jury could consider in mitigation the practical fact that he would never be released from prison. (PCR 283-287).

The trial court summarily denied this claim finding it to be procedurally barred because the identical allegations were raised and rejected on direct appeal. (PCR 697-698, 702). The trial court's determination was correct. (PCR 398-404). This Court should affirm. See Marajah v. State, 684 So. 2d 726, 728 (Fla. 1996)(finding it inappropriate to use collateral attack to re-litigate previous issue). Harvey v. Dugger, 656 So.2d 1253, 1256 (Fla. 1995) (same).

On appeal this Court stated:

> Gore's second argument is that the trial court through multiple errors permitted the State to mislead the jury as to his eligibility for parole. Specifically, Gore asserts that in light of his numerous other life sentences, he could not have been considered for parole for at least fifty years if given a life sentence. According to Gore, the jury was misled into believing that Gore was subject to parole either immediately on some of these offenses or at most within fifteen years. As part of this argument, Gore contends that it was error to deny his request to omit possibility of parole after twenty-five years from the life sentence instruction. We disagree. The jury was correctly instructed that a life sentence for the murder of Lynn Elliott included eligibility for parole after twenty-five years. § 775.082(1), Fla. Stat. (1983). It would have been error for the trial court to instruct the jury otherwise.

Gore v. State, 706 So. 2d 3128, 1332 (Fla. 1997). This Court further explained:

> Also in connection with this argument, Gore posits that the trial court erred in its responses to two questions issued by the jury during deliberations. The first question asked whether, if given a life sentence, Gore would receive credit for the ten years he had already served, to which the court instructed the jury that he would. However, even defense counsel conceded this point at trial. The jury's second question asked if and when parole could occur on these other life sentences. The court instructed the jury to rely on their recollection of the evidence that had been presented. This was not error. The record shows that in its cross-examination of former prosecutor Robert Stone, the State elicited testimony that none of Gore's life sentences contained a minimum mandatory sentence. Defense counsel did not object to the line of questioning; thus any objection was waived. We also note that defense counsel was free to argue that as a practical matter Gore would spend his life in prison.

Gore, 706 So. 2d at 1333. (emphasis added).

Because these issues have been rejected previously and Gore has not alleged any new facts or law that would warrant additional review, collateral relief was denied properly.

Irrespective of the procedural bar, appellant’s claims remain without merit, thereby still entitling him to no relief. The law is clear the only possible sentences that Gore could have received, were either, death or life without the possibility of parole for twenty-five years. The jury was

properly instructed. See Downs v. State, 572 So. 2d 895 (Fla. 1990); Green v. State, 907 So. 2d 489 (Fla. 2005).

With regards to appellant's attack on the accuracy of Stone's testimony, he still is not entitled to relief. Because appellant's crimes were committed before October 1, 1983, he was eligible for parole on the noncapital offenses. Stone's testimony to that effect was correct. Appellant's reliance on Turner v. State, 645 So. 2d 444 (Fla. 1994), and Weller v. State, 547 So. 2d 997 (Fla. 1st DCA 1989), remains unpersuasive. Turner involved consecutive sentences for two counts of capital murder. Consequently, both counts were subject to the minimum mandatory twenty-five-year sentence. Weller involved concurrent sentences which included one with a minimum mandatory fifteen-year sentence. In the instant case, appellant's prior life felonies do not include any minimum mandatory sentences-- a fact even noted by defense counsel. (R 3202). Thus, Stone's testimony regarding appellant's parole eligibility for the prior non capital convictions was factually and legally correct. Appellant's repeated attempts to demonstrate otherwise are without merit.

Moreover, the record makes clear that the state never argued that death was the only appropriate sentence, because appellant would be eligible for parole in fifteen or twenty-five years. The state simply objected to appellant's attempts to

mislead the jury regarding the possible sentences for his capital conviction. And contrary to appellant's assertion in his initial brief, appellant was never precluded from arguing as a practical matter, that he would not be released on parole given his prior non capital convictions. In fact, defense counsel told the jury:

> That's where you can consider that ten years-- almost ten years after this crime has been committed, the tragedy that has gone on, the tragedy for everybody. That's where you can consider whether or not there is some mitigation here that could lead you to believe that we should stop the killing. That's where you can consider as Mr. Stone told you that my client has not one but two life sentences already. That's where you can consider the age of my client right now. That's where you can consider if you impose a third life sentence whether or not my client will ever get out of prison.
>
> And I respectfully submit to you that if you return a life sentence without the possibility of parole for twenty-five years, with additional life sentences that he already has, that my client will die in prison. He will never get out. And when you go back and you consider this, I want you to keep an open mind. The society has a right to protect itself. We don't have to kill to protect ourselves. Thank you.

(R 3609-3610)(emphasis added).

In summation, these claims are procedurally barred and Gore cannot overcome that procedural default. In the alternative, the claims remain without merit. Summary denial was proper.

ISSUE III

THE TRIAL COURT PROPERLY DENIED WITHOUT AN EVIDENTIARY HEARING APPELLANT'S CLAIM THAT THE TRIAL COURT AND THE STATE ENGAGED IN EX PARTE COMMUNICATIONS (Appellant's Issues III and IV restated)

In his postconviction motion, appellant alleged that the assistant state attorney and the trial court intentionally engaged in improper *ex parte* communications prior to sentencing. However at the case management hearing, postconviction counsel conceded the following:

> I think that I alleged in my Motion that there was ex parte communications between the Court and the prosecutor's office, you asked them to write that memorandum. I have no facts to back up that allegation so I think that I did overspeak in my Motion and I regret that and we'll withdraw that part from my Motion.

(SPCR 15). Following this concession, all that remained of the claim was that a post-penalty phase memorandum written by the prosecutor was itself an *ex parte* communication, because counsel may have been unaware of the state's memorandum. This improper communication prejudiced appellant because the sentencing order was "virtually verbatim" to the findings and conclusions proposed by the state in its memo.

Gore makes this claim irrespective of the fact that the memo in question contained a "cc" notation indicating that a copy had been sent to defense counsel, Robert Udel. Based on

these circumstances and relying on Rose v. State, 601 So. 2d 1181 (Fla. 1982); Smith v. State, 708 So. 2d 253 (Fla. 1998) and Reese v. State, 728 So. 2d 727 (Fla. 1999), Gore claimed that he was entitled to an evidentiary hearing on this claim. The trial court summarily denied the claim on the merits finding

> The Court listened to the arguments of both parties at the penalty phase retrial which began on November 9, 1992 and concluded when the jury returned its advisory verdict on November 21, 1992. The court scheduled the re-sentencing hearing for December 8, 1992. On December 4, 1992, the State filed with the Court a letter incorporating a memorandum of law supporting its position that a sentence of death should be imposed. At the end of the document, there is a notation that a copy was provided to defense counsel, Robert Udell. The Court entered its written findings on December 8, 1992. Upon comparison of the State's letter and the Court's findings, it s apparent that the Court independently weighed the aggravating and mitigating circumstances to determine what penalty should be imposed."

(PCR 699). The trial court's ruling was proper. Cf. Rodriguez v. State, 30 Fla. Law Weekly S385 (Hay 25, 2005)(finding evidence in support of ex parte communication to be speculative at best).[1]

[1] The state asserts that summary denial was proper, however, the trial court should have found the claim procedurally barred given that the memorandum in question is a part of the record of appeal. Consequently any "evidence" in support of this allegation could have and should have been raised on direct appeal. (ROA 4547-4556). Cf Demmps v. Dugger, 714 So. 2d 365, 367 (Fla. 1998) (finding challenge to jury instructions to be

The trial court also found that Rose and Reese were distinguishable. In both cases, the defendant had never been given the opportunity to be heard on the issue of sentencing. Herein Gore along with the state were both given that opportunity on November 9, 1992. (PCR 699).

Also distinguishable was Smith. Therein, the state and trial court engaged in three *ex parte* conversations without the defendant's knowledge. No such *ex parte* discussions took place herein nor is there any such allegation as conceded by counsel at the hearing. (PCR 699, SPCR 15). The trial court's ruling was correct and must be affirmed as appellant misreads the record below.[2]

The trial court denied relief because the record on appeal rebuted Gore's contentions.[3] The case law is clear that summary denial is proper if an issue is rebutted from the record. Eg. Pietri v. State, 885 So. 2d 245, 270 (Fla. 2004) (upholding summary denial of a claim that trial court improperly adopted the state's sentencing memo as issue was rebutted from record).

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barred as it was an issue that could have bene raised on direct appeal.

[2] Appellant also alleges that the trial court improperly denied a motion to disqualify because he was a material witness to this claim and then exacerbated that error by making factual findings absent an evidentiary hearing.

[3] The state's memorandum is included in the record on appeal. (ROA 4547-4556).

That is precisely what occurred below.

The record on appeal reveals the following. The cover letter and accompanying memorandum of law prepared by the assistant state attorney was not a proposed order to the judge, but rather a document outlining the state's already well known position. (ROA 4547-4556). Nowhere in that letter is there even a remote reference that the pleading was in anyway the result of a communication, an invitation, an order, or directive from the trial court to the state. To the contrary, the cover letter requests that the judge take the state's arguments into consideration. Both the state and the defense presented argument at the sentencing hearing; (ROA 4547-4548). The state's memorandum was nothing more than cumulative argument as it did not include anything different or new. (ROA 4547-4556). The trial court's order was not identical to the state's memo; (ROA 4547-4556, 4563-4577) and the state's memo indicated that a copy of same had been sent to the appellant on the very same day. (ROA 4556).[4] The fact that the court's sentencing order relies on some of the same facts that were presented and argued by the state does not establish that the state usurped the judge's role or that the judge adopted in toto the state's

[4] Simply because former counsel does not recall whether he received the state's memo or that he is "relatively certain that he never got a copy of that Memorandum"does not prove that he did not. (SPCR 13).

memorandum without conducting its own independent analysis. Because the record on appeal refuted Gore's claim, summary denial was proper.[5] Pietri, 885 So. 2d at 270 (explaining no due process violation occurs provided defendant had opportunity to object to state's arguments); Glock v. State, 776 So. 2d 243 (Fla. 2001) (same); Compare Rose, 601 So.2d at 1182 (finding it proper to assume that an *ex parte* communication occurred because state originally conceded that a hearing was warranted and then submitted proposed order contradicting that position without notice to other side or opportunity to be heard).

Gore also claimed an *ex parte* communication occurred between the state and the predecessor judge. This allegation was based solely on the fact that the state filed a motion entitled, "Ex Parte Motion to Appoint Counsel, Transport the Defendant and Set for Pre-Sentencing and Sentencing Hearing". (ROA 4004-4008). Summary denial was warranted as this issue is legally insufficient as pled.

This Court has made clear that not all *ex parte* communications are improper. A review of the "Ex Parte" Motion

[5] Gore's ancillary claim that the Judge Vaughn should have granted the motion to disqualify based on the argument that he was to be a witness must also fail. See State v. Smith, 656 So. 2d 1248, 1250 n3 (Fla. 1994)(cautioning postconviction litigants that the necessity of having trial judge's testify at such hearings is very limited and must only be exercised when good cause is shown); Rivera v. State, 717 So. 2d 477, 481 (Fla. 1998)(same).

clearly demonstrates that the subject matter of the motion was purely administrative and therefore not improper. (ROA 4004-4008). Therein, the state was simply attempting to move the case forward, which would include the need for Gore to be appointed counsel. Gore's frivolous argument illustrates the potential for abuse regarding claims of *ex parte* communications. Barwick v. State, 660 So. 2d 685, 692 (Fla. 1995)(explaining that communications which involve administrative issues including the setting of hearing dates is permissible Scott v. State, 717 So. 2d 908, 911 (Fla. 1998)(same); Lebron v. State, 799 So. 2d 997, 1019 (Fla. 2001)(same); Sochor v. State, 883 So. 2d 766, 787 (Fla. 2004).

ISSUE V

THE TRIAL COURT PROPERLY FOUND THAT COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE

Gore alleged that trial counsel committed three specific errors at the re-sentencing hearing which rendered counsel's performance constitutionally deficient under Strickland v. Washington, 466 U.S. 688 (1984) and Wiggins v. Smith, 539 U.S. 522 (2003). In order to be entitled to relief on this claim, Gore was required to demonstrate the following:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

Strickland, 466 U.S. at 687 (1984). The Court explained further what it meant by "deficient":

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance 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. Because of the difficulties inherent in making the

> evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Id. at 689 (citation omitted). Moreover, the ability to create a more favorable or appealing strategy several years after the fact, does not translate into deficient performance at trial. Patton v. State, 784 So. 2d 380 (Fla. 2000)(precluding appellate court from viewing issue of trial counsel's performance with heightened perspective of hindsight); Rose v. State, 675 So. 2d 567, 571 (Fla. 1996) (holding disagreement with trial counsel's choice of strategy does not establish ineffective assistance of counsel); Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995) (concluding standard is not how current counsel would have proceeded in hindsight); Rivera v. State, 717 So. 2d 482, 486 (Fla. 1998); Occhicone v. State, 768 So. 2d 1037 (Fla. 2000).

With regard to any factual findings made below, this Court cannot disturb those findings if they are supported by the record. See Stephens v. State, 748 So. 2d 1028, 1033 (Fla. 1999) (reaffirming that appellate court defers to the circuit court's factual findings); Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997) (reasoning standard of review following Rule 3.850 evidentiary hearing is that if factual findings are supported by substantial evidence, appellate court will not substitute its judgment for trial judge's on questions of fact,

credibility, or weight). See also Hodges v. State, 2003 Fla. LEXIS 1062, 29 Fla. L. Weekly S598, S600 (Fla. June 19, 2003) ("Ineffective assistance of counsel claims are mixed questions of law and fact, and are thus subject to plenary review based on the Strickland test. Under this standard, the Court conducts an independent review of the trial court's legal conclusions, while giving deference to the trial court's factual findings.") (citation omitted); Sochor v. State; 883 So. 2d 766, 772 (Fla. 2004) (same). With these principles in mind, the trial court's factual findings and applicable legal determinations must be upheld.

The first issue involves trial counsel's decision to call former prosecutor Robert Stone to testify. Appellant alleges that counsel was ineffective in the following manner:

> (1)the decision to call Gore's original prosecutor without any preparation for or knowledge of his anticipated testimony;
> (2) the failure to object to false testimony elicited by the state from this witness during cross examination; and
> (3) the failure to call any witness to rebut Stone's testimony and to inform the jury of Gore's ineligibility of parole for a minimum of fifty years.

Initial brief at 67-68. The prejudice suffered due to counsel's deficient performance was exacerbated by numerous erroneous rulings by the court during jury selection, closing arguments, and jury deliberations. The trial court; (1) repeatedly denied

challenges for cause to various jurors; (2) overruled defense objections to the state's alleged improper argument regarding appellant's parole status, and (3) erroneously permitted improper answers to the jury's questions during deliberations. **Initial brief at 63-65.** These erroneous rulings left appellant with a biased jury unfairly susceptible to being negatively influenced by his parole eligibility.[6] **Initial brief at 60.**

Although claims of ineffective assistance of counsel are generally cognizable in motions for postconviction relief, in this case the issues are procedurally barred because the underlying allegations regarding the propriety of Stone's testimony was fully litigated on direct appeal. On direct appeal, appellant raised the following issues: (1) the trial court erred in denying challenges for cause against jurors Kramer and Tobin (PCR 398-404, 494-505,480-486; (2) the state was improperly allowed to mislead the jury regarding Gore's parole status by objecting to the defense's proposed jury instruction, by precluding the defense from arguing same to the venire, by misrepresenting Gore's parole status through the

[6] The record clearly rebuts any claim that the state ever argued that Gore should be sentenced to death because if his potential parole eligibility. The state argued that based on Gore's actions, he was not entitled to ask the jury for their sympathy. (ROA 3583). In fact this issue was previously rejected by this Court in direct appeal. Gore v. State, 706 So. 2d 1328, 1332 n. 2 (Fla. 1997).

testimony of Bob Stone, and (3) by allowing the court to misadvise the jury regarding Gore's parole status through answers to three specific questions tendered during deliberations. (PCR 398-404, 487-496). This Court explicitly rejected all of these claims. Gore, 706 So. 2d at 1332-1333. The state urged the trial court to summarily deny the claim based on a procedural bar, however, the court granted appellant an evidentiary hearing finding that it was not refuted from the record. (PCR 701). The trial court's decision to allow appellant to relitigate these issues was incorrect. See Rivera, 717 So.2d at 480 n.2 (Fla. 1998)(finding claim to be procedurally barred as it is merely using a different argument to raise prior claim); Marajah v. State, 684 So. 2d 726, 728 (Fla. 1996) (finding it inappropriate to use collateral attack to relitigate previous issue). Harvey v. Dugger, 656 So.2d 1253, 1256 (Fla. 1995) (same).

In any event, the trial court denied relief properly. The trial court noted that appellant's evidentiary presentation was lacking because he failed to call the one person who solely was responsible for any decisions surrounding Stone's testimony. That person was lead counsel, Jerome Nickerson.[7] Instead,

[7] Udell explained that Nickerson was lead counsel due to his experience and that Udell was co-counsel. Udell further stated that between the two of them, Nickerson was the one who spent the bulk of the time with Gore. (PCR 12, 17).

appellant called Robert Udell, co-counsel. Udell repeatedly was unable to answer any questions regarding what precipitated the decision to call Stone. In fact when asked directly what went into the decision making process regarding the decision to call Stone Udell stated:

> I didn't, I did not participate in that decision, it wasn't my decision. I just really didn't understand where Jay was headed with it and the answer is I had no part, I did not participate in that decision to either do that or not do that. You have to ask him.

(PCR 789). In response to whether anyone talked to Stone to discuss his upcoming testimony Udell stated:

> I wouldn't have done that, it was an issue Jay was handling. He understood the theory, so if anybody did, he would have. I didn't.

(PCR 790). When asked why no one took Stone's deposition, Udell responded:

> I don't know. Again you'll have to ask Mr. Nickerson, I didn't know why he was presenting this at all.

(PCR 793).

Udell was also asked questions regarding what strategy decisions were at play during jury selection. Udell repeated:

> I was sitting second chair, Jay picked this jury. You know, again, I know it's a problem that you don't have him, but you're going to have to ask him. I don't know why. I deferred to his expertise throughout the trial, including jury selection.

(PCR 801).

In denying relief, trial court observed:

> Regarding the "Robert Stone issue," Mr. Gore's primary trial counsel at the re-sentencing hearing was Jerome Nickerson. He was not presented as a a witness by the defense at the evidentiary hearing. There was no explanation as to why and/or no evidence as to what efforts, if any, where made to secure his attendance.

(PCR 986). The court further noted:

> Mr. Udell testified that the decision to call Mr. Stone was Mr. Nickerson's decision and that Mr. Udell had no input in that decision. On many question(s) by Gore's counsel such as why Mr. Stone was not depose prior to re-sentencing, Mr. Udell testified that only Mr. Nickerson could answer those question(s).

(PCR 986). Based on the failure to present any relevant testimony at the evidentiary hearing, relief was properly denied.[8] See Suggs v. State, 30 Fla. L. Weekly S812 (Fla. November 17, 2005) (affirming denial of Giglio claim following evidentiary hearing as defendant did not present any credible evidence in support of same, including the failure to call key witness to alleged violation); Cf. Owen v. State, 773 So.2d 510 (Fla. 2000) (finding appellant's decision to present witness who admittedly had no knowledge regarding co-counsel's strategic decisions coupled with appellant's failure to present the

[8] Gore did not attempt to establish that Nickerson was unavailable. (PCR 986).

appropriate witness amounted to a waiver of the postconviction evidentiary hearing); See Phillips v. State, 608 So. 2d 778, 780 n. 1. (Fla. 1992) (rejecting Brady claim as defendant failed to offer proof that favorable treatment bestowed upon testifying inmate was predicated on favorable testimony).

Notwithstanding appellant's failure to meet his burden by presenting the appropriate witness, the trial court relying on the record on appeal was able to make the following conclusions:

> the Courts find that a reasonable defense strategy was evident. Specifically, calling Mr. Stone allowed the defense to argue that Gore's co-defendant, Waterfield's sentence(s) of life imprisonment was disproportionate and therefore inequitable when compared to Gore's death sentence. This testimony permitted the defense to argue that Gore's three life consecutive sentences would prohibit his release from custody. Stone's testimony enabled the defense to argue that Waterfield was more culpable than Gore who was less culpable and a follower and to argue the State's inconsistent arguments made at Waterfield's trial that he was more culpable than Gore. Udell agreed that calling Mr. Stone as a witness on behalf of Gore allowed the defense to make those arguments.

(PCR 986-987). These findings are supported by both Udell's evidentiary hearing testimony and the record on direct appeal. (PCR 25-27, 47-48, 50-51; ROA 3200-3202, 3591-3592, 3594-3597, 3609-3610; 3596-3597, 3600-3603, 3608).

The penalty phase defense presented by Nickerson was; Gore's sentence was disparate to that of his co-defendant

Waterfield; Gore had an impoverished upbringing, a history of alcoholism, a history of depression, and love for his children; and that death was not appropriate given that Gore would never be released from prison. (ROA 4570-4575). Appellant cannot establish that these defenses were in some way lacking, or that no reasonable attorney would have presented this evidence. Relief was properly denied as Nickerson's performance was constitutionally sound. See Walton v. State, 847 So. 2d 438, 449 (Fla. 2003) (explaining, "[t]his Court has consistently held that "the sentence of an accomplice may indeed affect the imposition of a death sentence upon a defendant." Foster v. State, 778 So. 2d 906, 922 (Fla. 2000); see also Keen v. State, 775 So. 2d 263, 285-86 (Fla. 2000)"); see also Brooks v. State, 30 Fla. L. Weekly S481 (Fla. June 23, 2005) (recognizing defendant's death sentence is improper when more culpable co-defendant received life sentence); Slater v. State, 316 So. 2d 539 (Fla. 1975) (determining death penalty disproportionate where the triggerman received a life sentence and the accomplice was sentenced to death). Relief was properly denied.

The trial court also rejected Gore's re-argument that Stone's testimony was inaccurate and therefore should have been challenged by defense counsel. The trial court stated as follows:

> Moreover, Stone's testimony was accurate.

> His testimony that the life sentences received by both Waterfiled and Gore included the possibility of parole. See Gore v. State, 706 So. 2d at 1332-1333 n.5. Gore now alleges the failure to object to this was prejudicial. Even if Gore's counsel had objected it would have been overruled by the trial court.

(PCR 987). Appellant has not presented any new case law which demonstrates that Stone's testimony was incorrect. See also Whitfield v. State, 706 So. 2d 1, 5 (Fla. 1997) (finding notifying jury of possibility of parole correctly defined life sentence); Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992). Relief was denied properly.

Next appellant alleged that trial counsel was ineffective for his failure to properly impeach the state's mental health expert, Dr. Cheshire regarding his fee and the number of times he had testified for the state in his career. Over the state's objection, appellant was granted an evidentiary hearing on this claim.

At the hearing, Appellant presented the testimony of a board certified civil trial lawyer David Chestnut.[9] Chestnut opined that a proper cross-examination should have included inquiry of Cheshire's fee, and the percentage of work that is conducted for the state. Such information would have assisted

[9] Mr. Chestnut conceded that he was not qualified to handle a capital case as a criminal defense lawyer. (PCR 949).

in establishing Cheshire's bias.[10] (PCR 941-943).

The trial court denied relief concluding,

> While is should have been asked, and even if this court finds deficiency in counsel's performance, it does not meet the second prong of the Strickland test, when compared with the other aggravating evidence presented by the state.

(PCR 996).

The state asserts that relief was properly denied, as Gore did not establish either prong of Strickland. Simply because a "Strickland expert" opines that counsel should have conducted cross-examination in a certain manner does not establish the claim as there is no per se rule regarding ineffective assistance of counsel claims. See Roe v. Flores-Ortega, 145 L.Ed. 2d 985 (2000) (rejecting argument that counsel must always follow certain mechanical rules to be deemed constitutionally effective). Gore cannot establish that trial counsel was deficient.

In fact Nickerson's cross-examination of Cheshire was extremely thorough. The cross, approximately forty pages, was devoted to a challenge of Cheshire' conclusions. Counsel tested the doctor's memory of the facts of the crime, and he tested Cheshire's overall knowledge of Gore's background. (ROA 3466-

[10] No information was presented at the evidentiary hearing regarding what percentage of Cheshire's practice was devoted to testifying for the state.

3504). Counsel devoted some of his efforts on Cheshire's opinion that alcohol did not play a significant role in this murder. Obviously the focus was to discredit Chesire's professional opinions with information germane to those opinions, including details of the crime and information about Gore's background.

A review of the cross-examination of Gore's mental health experts reveals a similar strategy employed by the state. Defense experts were questioned on their knowledge of the facts of the crime, with a specific focus towards Gore's alleged intoxication, as well their familiarity of Gore's family background. (ROA 2896-2964, 3060-3085). Gore did not establish that counsel's performance during cross-examination was deficient. Cf. Van Poyck v. State, 694 So. 2d 686, 697 (Fla. 1997)(rejecting claim that impeachment of witness was not sufficient where counsel testified that decision was to be sensitive to witness and where cross was adequate).

Irrespective of trial counsel's performance, Gore cannot establish prejudice. Gore must demonstrate that the deficient performance so prejudiced his defense that there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different. Robinson v. State, 707 So. 2d 688 (Fla. 1998). This he cannot do. The argument for mitigation was severely undercut by the lack of evidence to

support same and not because the state's witness was not adequately impeached. In rejecting statutory mitigation the trial court found no evidence to support Gore's contention that he was intoxicated at the time of the crime. (ROA 4570). The court further found that appellant's conduct both before and after the murder was deliberate. (ROA 4570, 4572). Cf. Rutherford v. State, 727 So. 2d 216 (Fla. 1998)(rejecting claim of ineffective assistance of counsel for failure to object to hearsay testimony since testimony was only marginally relevant to the bulk of the aggravating factors). It is mere speculation that a jury or judge would have found the existence of several mitigating factors, including mental instability, intoxication, and domination of another in support of life sentence simply because Chesire's fees were greater than those of the defense doctors. The illogical nature of this assumption is underscored by the overwhelming evidence in support of the aggravation found. The trial court found the existence of six aggravating factors which have all been upheld on direct appeal. (ROA 4564-69). Gore, 706 So. 2d at 1333-1334. Even if the jury was aware of how much money Dr. Chesire was paid for his services, that information would not have cause six jurors to change their mind and recommend life. Consequently the state asserts that Gore cannot establish the requisite prejudice under Strickland.

Next Gore claims that co-counsel Udell was ineffective for

deferring to lead counsel Jerome Nickerson. This issue is procedurally barred as it was not raised below. (PCR 268-283). Second, Gore does not allege with any specificity the facts in support of that allegation. Consequently summary denial is warranted as this claim is legally insufficient as pled. In LeCroy v. Dugger, 727 So. 2d 236 (Fla. 1998), the Court explained:

> A motion for postconviction relief can be denied without an evidentiary hearing when the motion and the record conclusively demonstrate that the movant is entitled to no relief. A defendant may not simply file a motion for postconviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing. The defendant must allege specific facts that, when considering the totality of the circumstances, are not conclusively rebutted by the record and that demonstrate a deficiency on the part of counsel which is detrimental to the defendant.

LeCroy, 727 So. 2d at 239 (*quoting* Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989); Gordon v. State, 863 So. 2d 1215, 1218 (Fla. 2003).

The next alleged error committed by counsel involved counsel's "failure" to present as mitigation, Gore's "acute pesticide toxicity" which he contracted from working in citrus fields in the late 1970's and early 1980's. Following an evidentiary hearing on this claim, the trial court denied relief

finding,

> The Court heard from Gore's mother Thelma Gore, his aunt Dorothy Stokes and two experts who are PhD's in entomology. None of this evidence establishes or proves Gore's claims. Most importantly, not one witness ever testifies that Gore was ever exposed to any of these chemical(s) much less that he suffered from any illness, not to mention any lasting neurological malady. Consequently nothing was presented proven as to how this would have affected the trial.
>
> This claim is completely meritless and unproven and warrants no further discussion by this court.

(PCR 997).

On appeal, Gore simply regurgitates the argument presented below without ever addressing the trial court's explicit findings that appellant failed completely in presenting any evidence to establish this claim. A review of the proceedings below demonstrates that the trial court's factual findings are supported by the record, consequently, under the principles outlined by this Court, this Court must affirm.

At the evidentiary hearing, Gore's mother, Thelma Gore, reported that Gore accompanied his father to the citrus groves, worked in the groves, recreated and ate mammals, fowl, fish, and amphibians caught in the groves. The family lived near the groves, drew water from shallow wells, and grew their own vegetables which they sprayed with chemicals (PCR 831-837, 846-847). She does not recall any time Gore returning from the

groves with chemicals on his clothing (PCR 834-836). Mrs. Gore also related her son's childhood medical history which included incidents of headaches, convulsions and high fevers often associated with colds, pneumonia, tonsillitis, appendicitis, bronchitis, and ear infections. She believed these were normal childhood illnesses. (PCR 838-842, 850-852). Mrs. Gore does not recall defense counsel asking about pesticide usage/exposure, but she recalls telling Gore's initial counsel about the convulsions and speaking to the resentencing counsel about Gore's childhood health and testifying about ant bites and convulsions in the 1992 penalty phase. (PCR 847-850, 852-853). According to Mrs. Gore, today her son is in good health except for diabetes, which runs in the family, and heart problems. (PCR 862).

Dorothy Stokes ("Stokes"), Gore's aunt, concurred that Gore's family lived in a rural area and that Gore and his father worked in the groves. Stoke witnessed planes dusting and fertilizing the fields (PCR 856-857). She reported that two cousins were involved in accidents with agricultural chemicals, and one is dying of cancer. (PCR 858-862). It was Stokes' recollection Gore had high fevers and headaches as a child. According to Stokes, she never saw muscle control problems in Gore. (PCR 858-860). Neither Udell or Nickerson asked about citrus chemicals. (PCR 862).

Gore also presented the testimony of Drs. Napp and Nigg. Dr. Herbert Nigg, is an etymologist with training in toxicology and biochemistry. He is a professor with the University of Florida in the entomology and mycology department. (PCR 865). Dr. Nigg testified that there were three types of pesticides that appellant could have been exposed to during the time he worked in the citrus groves. Those are lead arsenic, organo phosphate and organo chlorine. (PCR 903). According to Dr. Nigg, recent blood tests on Gore could not give a picture of what he was like 20 years ago as too many factors are involved, however, Gore's blood results appeared "too clean" to Dr. Nigg. (PCR 882-888, 897). Dr. Nigg claimed he could not explain, and no one really knows how chlorinated hydrocarbons effect humans. Organophsophates interfere with nerve signals and the long term effects on those who spray the chemicals daily is "probably nil." (PCR 897-899, 909-913). While Gore may have been exposed to Calthane and Lead Arsenate, the doctors know of no side effects in humans (PCR 913-914, 930-931). There has never been an overexposure to Calthane or Ethion in Florida (PCR 932). Statewide, thousands of people were exposed to the same chemicals as Gore. (PCR 933).

Dr. Joseph Napp, is a professor emeritus with the Ecology Department at the University of Florida. His work at the University of Florida was to evaluate the efficacy of pesticides

on Florida citrus. He was also charged with making recommendations to the State of Florida for all pesticides used on Florida citrus. (PCR 922). Dr. Napp testified that there has never been a reported case of arsenic poisoning using lead arsenic on Florida citrus or any documented health problems associated with lead arsenate; there has been no case of a reported long-term effect associated with use of organo phosphates; and there has been no reported case of long-term effects associated with Caldane, a pesticide from the orango chlorine pesticide that was used on Florida citrus. (PCR 913-914, 930-931). Thousands of people like appellant were similarly exposed to these pesticides. (PCR 932-933).

Udell testified that he would be very surprised if Nickerson had not obtained Gore's school and childhood medical records.[11] He also noted the defense experts discussed reviewing the school and medical records and had access to Gore's family. (PCR 785, 812-814). Nickerson spent a bulk of time trying to discover Gore's life history and became close to Gore's parents during the process. (PCR 785). Udell participated in the discussion about Gore's background, but the issue of pesticide

[11] Again Gore's failure to call Nickerson is fatal to his claim. Without Nickerson, Gore is unable to prove that the records were not obtained for the 1992 resentencing especially in light of the testimony that Nickerson did a thorough investigation and the defense experts had school and medical records (PCR 812-814).

exposure and its possible reflection in the medical records was not raised. (PCR 816-818). If Nickerson knew of pesticide exposure, he did not discuss it with Udell. He also emphasized that there was an advantage of having a case remanded for resentencing because now a lawyer has the benefit of hindsight and can assess what strategies worked and did not work previously. (PCR 816-818).

Udel also explained that in Gore's case, extensive mitigation was presented stemming from his family life, Waterfield's bad influence, alcohol use, divorce and separation from his children, intercession on his sister's behalf when Waterfield attempted to rape her, Gore's convulsions as a baby and high fevers as a child, and Waterfield's term of years sentence compared to the State seeking death for Gore. (PCR 809-815). While Udell speculated the pesticide issue could have been presented even though there was no connection between the chemical exposure and the crimes, this 28 year veteran capital attorney noted that creating arguments that make little sense to the jury or could be viewed as "lawyer talk", should be done with caution as the jury may punish the defense for such arguments. (PCR 816-818).

In sum Gore's evidentiary presentation did not provide any evidence that established this alleged toxicity to pesticides.

The state asserts that the court's findings that, "[t]his

claim is completely meritless and unproven and warrants no further discussion by this court", is completely supported by the record recounted above and therefore must be affirmed. Ironically Gore faulted penalty phase counsel for not presenting this pesticide toxicity defense, yet he too did not present any evidence that his childhood ailments were caused by pesticides, or that such alleged exposure played any role in the kidnappings, rapes, and murder committed in this case. Relief was denied properly. See Holland v. State, 30 Fla. L. Weekly S792 (Fla. November 10 2005) (recognizing the maxim that there can be no finding of deficient performance for failing to investigate or present mitigation evidence unless the defendant establishes that mitigation exists.); see also Gore v. State, 846 So. 2d 461, 469-70 (Fla. 2003) (holding, in part, that defendant failed to prove his ineffectiveness claim by failing to present any evidence at the evidentiary hearing from witnesses he claimed would be helpful); Cf Gilliam v. State, 817 So. 2d 768 (Fla. 2002) (upholding denial of relief where court found expert's testimony to be deserving of little weight); Asay v. State, 769 So. 2d 974 (Fla. 2000) (upholding trial court's rejection of expert opinion as speculative given that experts were unfamiliar with significant facts of the crime).

Moreover, although Nickerson was not called as a witness to discuss whether he considered "acute pesticide toxicity" as a

penalty phase theory of mitigation, the record below as well as the record on appeal, establish that the investigation that was conducted was constitutionally adequate. Unlike the facts of Wiggins v. Smith, 123 S.Ct. 2527 (2003), where counsel conducted no investigation, Nickerson did conduct a thorough review of his background, including obtaining school and medical records (PCR 785, 812-815). Counsel did investigate Gore's history and in fact presented eight family members two psychiatrists, Dr. Macaluso and Dr. Maher.[12]

The specific subject matters presented as mitigation were; 1) co-defendant Freddie Waterfield's pathological influence on Gore and Waterfield's disproportionate sentence; 2) Gore grew up in an impoverished environment, and suffered numerous maladies such as convulsions, high fevers and sever headaches; 3) Gore's father was an alcoholic who was very abusive; 4) Gore suffered from depression after the break-up of his marriages and loss of custody of his children; 5) Gore also suffered from alcoholism, and a personality disorder, all of which contributed to his actions at the time of the crimes and prompted the psychiatrists to testify that the statutory mental health mitigators were

[12] Dr. Maher, testified that Gore's capacity to appreciate the criminality of his conduct was substantially impaired at the time of the offense and that he was suffering from extreme emotional and mental disturbance. (ROA 2881-2882). Dr. Macaluso, an expert in addictive behavior found that Gore was intoxicated at the time of the crime and the family history of chemical dependency was pervasive. history. (ROA 3053-3060).

satisfied in this case.

The mental health experts reviewed prior evaluations, psychological screening reports, DOC files, school records, police reports interviewed family members, read depositions of certain witness. (ROA 2696-3174). Nickerson's investigation, preparation, and ultimate presentation establish that Gore received constitutionally adequate representation. See Davis v. State, 915 So. 2d 95, 112-19 (Fla. 2005) (finding counsel's investigation into defendant's background, family history, and records was effective assistance as counsel's investigation was meaningful); Asay v. State, 769 So. 2d 974, 985 (Fla. 2000). See Rose v. State, 675 So. 2d 567, 571 (Fla. 1996)(holding disagreement with trial counsel's choice of strategy does not establish ineffective assistance of counsel); Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995)(concluding standard is not how current counsel would have proceeded in hindsight); Rivera v. State, 717 So. 2d 477, 486 (Fla. 1998); Occhicone v. State, 768 So. 2d 1037 (Fla. 2000)(same).

Moreover, no prejudice has been shown because even if Gore was given a mitigator of exposure to pesticides as a child, the sentencing result would not be different especially in light of the six strong aggravating factors here. This is especially true in light of the lack of evidence supporting mental health mitigation. Cf. Rutherford, 727 So. 2d at 216 (rejecting

ineffectiveness claim for failure to object to hearsay where testimony was only marginally relevant to bulk of aggravators). Likewise, the strength of the aggravation would outweigh the questionable mental heath mitigation which speculatively could have been found in the absence of Dr. Cheshire's testimony. The strong aggravation in this case included: (1) Gore was under sentence of imprisonment at time of murder; (2) prior violent felony; (3) felony murder; (4) avoid arrest; (5) heinous, atrocious, or cruel; and (6) cold, calculated, and premeditated. Gore, 706 So. 2d at 1333-34. In fact, in rejecting the mitigation, the trial court noted the complete lack of any evidence of intoxication. In fact Gore's actions were deliberate. (ROA 4570-4572). Hence, Gore has not carried his burden under Strickland. Relief must be denied.

Next appellant alleges that counsel was ineffective for failing to challenge for cause Juror Tobin. Summary denial of this claim is warranted for numerous reasons. First of all although the issue as pled was legally insufficient, the trial court granted appellant a hearing on same. (PCR 701). As noted above, appellant did not offer any evidence in support of this claim. Consequently relief was denied properly.

On appeal, appellant adds the single phrase that Tobin was unfit for jury duty because he would not amenable to considering impoverished childhood as mitigation. **Initial brief 82.**

Summary denial is still warranted as the claim is legally insufficient as pled. LeCroy supra.

In any event, the record rebuts any notion that appellant was prejudiced for counsel's failure to have Tobin stricken for cause. As noted above, because counsel did not preserve the issue for appellate review, this Court refused to address the issue. However irrespective of the fact that it was not reviewed, appellant cannot prevail on this claim because he cannot establish prejudice under Strickland. Because this Court has already determined that review was not warranted because the alleged error did not go to the heart of the case, there can be no finding of prejudice under Strickland. In other words, but for trial counsel's omission/failure to preserve the issue for review, a reasonable probability does not exist that the outcome of the trial would have been different. Consequently appellant cannot meet his burden under the prejudice prong of Strickland. See White v. State, 559 So. 2d 1097, 1099-1100 (Fla. 1990)(rejecting ineffective assistance of counsel claim regarding counsel's failure to preserve issues for appeal in postconviction appeal based on earlier finding by court on direct appeal that unpreserved alleged errors would not constitute fundamental error). Because appellant cannot establish prejudice the claim can be summarily denied. Kennedy v State, 547 So. 2d 912, 914 (Fla. 1989).

In any event, the record refutes Gore's allegation that Tobin would have been excused for cause had the motion been made. Tobin stated that he would not form an opinion regarding his recommendation until he heard all of the evidence. (ROA 962). He stated that he would be fair and impartial and would follow the law as instructed by the court. (ROA 496, 499, 543). He also expressed positive feelings towards appellant's proposed mitigation. Tobin stated he would keep an open mind to any psychiatric testimony (ROA 1137), and he further stated that he had been exposed to a relationship where one person had an unnatural influence over another. (ROA 1137). Appellant cannot demonstrate that Tobin was an objectionable juror. Based on these responses and the applicable case law, a challenge for cause would not have been granted. See Lusk v. State, 446 So. 2d 1038, 1041 (Fla.), cert. denied, 469 U.S. 873, 105 S. Ct. 229, 83 L. Ed. 2d 158 (1984)(defining an impartial juror as someone who "can lay aside any prejudices or biases he may have and render a verdict solely on the evidence."). A challenge for cause is not appropriate simply because a person has a strong opinion about any particular subject. See Fitzpatrick v. State, 437 So. 2d 1072, 1075 (Fla. 1983) (ruling that strong feelings in favor of the death penalty do not render a prospective juror incompetent in capital cases). As long as jurors indicate that they are able to abide by the court's instructions, irrespective

of personal feelings, a cause As challenge need not be granted. Penn v. State, 574 So. 2d 1079 (Fla. 1991). Relief was denied properly.

Appellant also alleges that the trial counsel erred in failing to properly object to the "cold, calculated and premeditated" jury instruction. Gore claims that this Court found the instruction given herein was constitutionally deficient and therefore the "error" undermines confidence in his sentence. The trial court summarily denied this claim finding it to be procedurally barred and in the alternative without merit, as appellant cannot establish prejudice. (PCR 701-702).

Summary denial is warranted as Gore cannot establish the requisite prejudice under Strickland. This Court determined the following on direct appeal:

> Even though the case was tried prior to this Court's decision in Jackson v. State, 648 So. 2d 85 (Fla. 1994), the State also requested an expanded CCP instruction. Defense counsel objected to the expanded instruction but once again declined to explain how the instruction could be changed to meet his objection. The CCP instruction ultimately given n10 incorporated some but not all of the provisions of the CCP instruction suggested in Jackson or the current standard criminal jury instruction on CCP. Assuming, without deciding, that the CCP instruction as given was inadequate, we are convinced that any error in the instruction was harmless beyond a reasonable doubt in light of the overwhelming evidence of CCP as well as the other circumstances of the case.

Gore, 706 So. 2d at 1334. Whether the instruction was inadequate, a finding not made by this Court, the existence of the this factor was established beyond a reasonable doubt. Gore is not entitled to relief. In fact this Court recounted the evidence in support of this factor as follows:

> As to the CCP finding, the facts of this case clearly support this aggravator. The evidence showed that Gore had planned in advance to both kidnap and kill Elliott and Martin. Gore repeatedly threatened to kill the two girls throughout the ordeal. He told Regan Martin that he was "going to do it anyway" as he was sexually assaulting her, and this occurred before Elliott was killed. That statement illustrates the heightened degree of premeditation necessary to sustain the CCP aggravator. The fact that the actual murder may have taken place earlier than Gore had planned it does not change this result.

Id at 1335. Summary denial was proper.

ISSUE VI

WHETHER APPELLANT'S SENTENCE OF DEATH SHOULD BE REDUCED TO LIFE BECAUSE HE HAS BEEN ON DEATH ROW TWENTY-TWO YEARS

Gore contends that his sentence of death has become a cruel and unusual punishment because of the length of time he has served on death row. Gore has been on death row for twenty-two years, which he contends should entitle him to a life sentence. He acknowledges that this Court has rejected similar arguments, when the length of time has been eighteen years. See Hitchcock v. State, 673 So. 2d 859 (Fla. 1996). However, he argues, "Although this Court has found 18 years did not rise to the level of cruel and unusual punishment, some period of time must do so." **Initial brief at 88.** This claim must be denied.

First, Gore never raised this argument below, consequently appellate review is prohibited. Occhicone v. State, 570 So. 2d 902, 906 (Fla. 1990)(precluding review of issue on appeal as appellant did not raise the specific argument below). Second, this Court has repeatedly refused to find a "per se" rule that a certain period of time on death row will automatically be considered an Eighth Amendment violation. See Parker v. State, 873 So. 2d 270 (Fla. 2004)(rejecting claim that eighteen years on death row constitutes cruel and unusual punishment); Rose v. State, 787 So. 2d 786, 805 (Fla. 2001)(rejecting claim that twenty-four years on death row amounts to cruel and unusual

punishment); Lucas v. State, 841 So. 2d 380, 389 (Fla. Fla. 2003); Foster v. State, 810 So. 2d 910, 916 (Fla. 2002); Elledge v. State, 911 So. 2d 57, 77 (Fla. 2005). Relief must be denied.

ISSUE VII

WHETHER THE TRIAL COURT DENIED PROPERLY APPELLANT'S CONSTITUTIONAL CHALLENGE TO FLORIDA'S DEATH PENALTY STATUTE

Appellant claims that Florida's death penalty statute is arbitrary and capricious and therefore is unconstitutional as applied. The state argued below that the issue was procedurally barred as it should have been raised on direct appeal. The trial court found the claim to be without merit. (PCR 703).

The state asserts that the issue was barred and review was precluded. However, irrespective of that, summary denial was appropriate. First of all, the claim as presented on direct appeal is legally insufficient as pled. Appellant alleges that Gore has been represented by nine different attorneys over the past twenty-two years. **Initial brief at 92.** The state asserts that this argument is insufficient and does not warrant further review.

In the alternative, the argument is completely void of merit. Summary denial is warranted. Atwater v. State, 788 So. 2d 223, 228 (Fla. 2001); Hunter v. State, 660 So.2d 244, 252-253 (Fla. 1995); Robinson v. State, 574 So. 2d 108, 113 (Fla. 1991); Fotopoulos v. State, 608 So. 2d 784, 79; Gamble v. State, 659 So. 2d 242, 246 (Fla. 1995).

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court affirm the trial court's denial of postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Andrew Graham, Esq., 10 Suntree Place, Melbourne, Fl. 32940, this ____ day of January 2006.

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of the type used in this brief is Courier New, 12 point, a font that is not proportionately spaced.

_____
CELIA A. TERENZIO
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