IN THE SUPREME COURT OF FLORIDA

ANTHONY FARINA,

Case No. SC04-1610

Appellant,

v.

STATE OF FLORIDA,

Appellee.
____________________/

ON APPEAL FROM THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Farina filed a motion to vacate judgment of conviction and sentence with special request for leave to amend on April 4, 2003. (R252-326). The State filed a response on April 23, 2003. (R328-364). An evidentiary hearing was held before Judge C. McFerrin Smith, on December 8, 2003. (R20-179). An Order denying Farina's motion to vacate was issued on April 8, 2004. (R478-495). Farina filed a motion for rehearing on April 21, 2004. (R496-501). The State filed a response (R502-05) and the Court issued an order denying the motion for rehearing on July 8, 2004. (R506-07). Farina timely filed a Notice of Appeal on August 6, 2004. (R512-13).

THE FACTS OF THE CRIME

In the first direct appeal proceedings in these cases, this Court summarized the facts in the following way:

> Van Ness and the other three victims all worked at Taco Bell. After the restaurant closed early on May 9, 1992, Jeffery and Anthony Farina confronted Van Ness and Derek Mason, 16, while the two employees were emptying trash. Jeffery was armed with a .32-caliber pistol, Anthony carried a knife and rope, and both wore gloves.
>
> The Farinas ordered Van Ness and Mason into the restaurant, where they rounded up two other employees. Jeffery held three employees at gunpoint, while Anthony forced employee Kimberly Gordon, 18, to open the safe and hand over the day's receipts. Although there were assurances that no one would be hurt, the Farinas tied the

> employees' hands behind their backs and Anthony forced them into a walk-in freezer.
>
> Survivors testified that Van Ness was shaking and crying as she entered the freezer and she was afraid she would be hurt. Shortly after the employees were led to the freezer, Jeffery shot Mason in the mouth. He then shot employee Gary Robinson, 19, in the chest, and finally shot Van Ness in the head. Gordon was stabbed in the back.
>
> The Farinas fled the restaurant, but were arrested later that day after another Taco Bell employee saw Anthony buying gasoline at a service station and called the police. When arrested, Jeffery had a receipt from a local store indicating that he had purchased .32-caliber bullets, gloves, and clothesline on May 8. The Farinas had $ 1,885 of the $ 2,158 that was taken from Taco Bell.
>
> Van Ness died on May 10. The Farinas were charged with first-degree murder and six other offenses.

Farina (Jeffrey) v. State, 680 So. 2d 392, 394 (Fla. 1996).[1]

THE EVIDENTIARY HEARING FACTS

Farina's first witness was Bill Hathaway, Farina=s attorney at his second penalty phase.[2] Hathaway had been unsuccessful in severing Farina’s case from his co-

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[1]In its direct appeal decision in Anthony Farina’s case, this Court referred to the summary of the facts set out in Jeffrey’s case. *Farina (Anthony) v. State*, 801 So. 2d 44 (Fla. 2001).

[2]This Court remanded the case for a new sentencing proceeding. *Farina v. State*, 679 So. 2d 1151 (Fla. 1996).

defendant brother's case.[3] Hathaway's trial strategy was affected by the denial of severance because he believed his client, Anthony, was less culpable. (R28-9). He would have called Jeffrey as a witness in Anthony's case, but that "wasn't going to occur in a joint situation." (R30). He believed there were fewer aggravating circumstances applicable to Anthony, and Anthony was "not the active participant. He was not the one who fired the fatal shot." In addition, there were additional mitigators as they related to his client. (R30). Although Jeffrey did not testify at trial, Hathaway believed that Jeffrey would have testified that he was the shooter and it was his idea alone, and that no one could have stopped him once he decided to shoot the Taco Bell employees. (R31-2). He would have called Jeffrey as a witness so he could tell the jury that there was no set plan to kill anyone and that Jeffrey was known to be violent and hot-tempered. (R32). Hathaway had spoken with Susen Griffith, Farina's mother, prior to trial. She said that Jeff had a violent temper, was the one

[3] *Farina (Jeffrey) v. State*, 680 So. 2d 392 (Fla. 1996), *remanded*, *Farina v. State*, 763 So. 2d 302 (Fla. 2000).

"more easily agitated, more violent of the two." Jeff was the one who was interested in guns and knives. (R33-4).[4]

Hathaway has been practicing law for thirty years. He was well aware of the procedural and evidentiary requirements regarding a death penalty sentencing phase. (R38-9). Anthony never told him that his brother, Jeffrey, forced him to participate in the robbery. Anthony told Hathaway he planned the robbery two weeks prior to Jeffrey's involvement. Anthony had worked at the Taco Bell and was familiar with the security procedures and where the money was kept. Anthony did not object to the knife and gun being brought to the scene. (R40). Anthony never told him that Jeffrey forced him to follow through with the robbery, and had, in fact, indicated he wanted a show of force. (R40-1).

Susen Griffith, the defendant's mother, said Anthony was "very easy going, more of a follower." (R42). Jeffrey "had a very short fuse and a temper." Jeffrey was the leader and Anthony would let Jeffrey have his way. (R43, 44). Anthony did not own a gun and was not interested in knives. (R45). Jeffrey had been in counseling for his

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[4]Although Jeffrey Farina was sentenced to death after the resentencing on remand, his death sentence was subsequently reduced to a life sentence based on *Brennan v. State*, 754 So. 2d 1 (Fla. 1999). *Farina v. State*, 763 So. 2d 302 (Fla. 2000).

temper prior to the Taco Bell murder. (R47, 48). Anthony and Jeffrey have never told Griffith what transpired at the Taco Bell. (R47).

Katrina Bergenty, Farina's sister, said her brothers "were like fathers ... they were always happy around me." (R49, 50). Anthony (nicknamed TJ) was "laid back" while Jeffrey was "more serious." She did not see Jeffrey upset very often. (R50). Bergenty said her brothers, who are substantially older than she, were very protective. Anthony and Jeffrey have never told her what happened at the Taco Bell. (R52).

Tina O'Neill, a long-time family friend, was close to the family, and was particularly close to Jeffrey. She said, "There were times that Jeff was a sweetheart and there were times to where he would have this dark side, where you knew you left him alone." Anthony was quiet and liked to play. (R54, 55). Jeff would pick fights with Anthony, and "usually won the fights." (R56). Jeffrey, not Anthony, would get into trouble at school. (R56-7). Jeffrey was the leader. (R58). Everyone in the Farina household, as well as Ms. O'Neill, knew that Jeffrey had a gun. (R63-4).

During the segment of her testimony which was a proffer only, O'Neill said her husband, Shawn, had told her he found Jeffrey with a gun to his head, approximately two

weeks to a month before the robbery/murder in this case. Shawn " ... saw Jeff sitting on there on the couch and grabbed the gun away from Jeff and asked Jeff what he was doing. And Jeff told Shawn that he felt like he had let the family down." (R66).

O'Neill knew Jeffrey liked to collect knives. (R66). She was not aware if Anthony owned any knives. (R70). Jeffrey babysat O'Neill's children on occasion -- she did not have any concerns about leaving him alone with her children. (R71).[5]

Jeffrey Farina, appellant's younger brother and co-defendant, was sixteen years old at the time of the robbery/murder. (R73-4). The family was living in a motel where Jeffrey had registered for the room under the name "Buddy Lee Chapman," his assumed identity. (R74-5). Jeffrey worked under this name; had a checking account with this name; and had identification that indicated he was 20 years old. He said, " ... I figured it was easier to function with an identity that stated I was 20 than as a 16 year old. It was easier to get a job and things of that nature." (R75). At one point, he made a decision that Anthony and he would not be moving to Georgia with the rest of the family.

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[5] O'Neill had previously testified that Jeffrey could be violent and would get angry over "absolutely nothing." (R56).

(R76). Jeffrey had previously contemplated suicide because "I just, I didn't care whether I lived or died." (R80-1). Eventually, his mother, her fiancé, Anthony and his fiancée and their two children, sister Katrina, and a friend, John Henderson, all lived in the same motel room. Jeffrey slept on the floor, close to the door, with his gun, "because I knew no one could come in or out of that door without waking me ... I was very paranoid of people that lived around me, and I didn't want someone coming into my home like that." (R81-2).

Anthony approached him about committing a robbery with a knife that Jeffrey owned. Jeffrey told him, "No ... the knife was distinctive and I didn't want to get rid of it. And I knew if he would have used it, it could easily be identified." (R82). He did not recall how he got involved in the Taco Bell robbery but he did prepare ahead of time by purchasing rope, gloves and .32 caliber ammunition.[6] (R82-3). According to Jeffrey, they did not discuss their respective roles for the robbery. (R83).

On the night of the robbery/murder, Jeffrey described the events as follows: "We sat around the house, may have

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[6] Why it was necessary to purchase ammunition when Jeffrey was supposed to be "guarding the family" with this weapon and reportedly had made a suicidal gesture with it is a question that is unanswered.

watched TV or played some video games until we decided it was time to leave. We drove around a little bit and then we went to the Taco Bell restaurant ... My brother went in to see who was in there ... we ran over to Walgreens to purchase a couple of sodas ... and a card ... We sat outside in the parking lot ... we were waiting for it to close ... we discussed how we were going to do it ... my brother didn't think we could get in at that point ... he said he didn't think we should go through with it because we couldn't get in." (R83-4). Jeffrey wanted to continue, "I told him I didn't come all this way and I wasn't turning back with nothing ... a few minutes later a couple of people came out ... we got out of the car and we took custody of them ... " (R84-5). Jeffrey put a gun on one of the people and Anthony put a knife to the other. The four walked back into the restaurant where, "We gathered the other two employees up and took them in the back." Jeffrey watched three of the employees while Anthony took the manager to "get the money ... because he (Anthony) would know where it's at." (R85-6). Anthony and the manager joined the rest of them; Anthony had the money with him, "It was packaged and ready to go to the bank." Upon Jeffrey's direction, Anthony took the money out of the canvas bags. (R86). While Jeffrey tied up the two boys,

Anthony held the gun. When Anthony tied up the two girls, Jeffrey held the gun. (R87). Anthony and Jeffrey went into the manager's office to talk, while the victims remained seated in the back of the restaurant. Anthony and Jeffrey returned to where the four employees were sitting in order to move them into the cooler. The Farina brothers had decided during their talk in the manager's office that they were going to shoot the victims. (R87-8). Anthony told him that the four "could identify him, that he knows them. He asked what we were going to do." Jeffrey said, "I'll shoot them." Anthony said that was Jeffrey's decision to make. (R88). Jeffrey testified, " ... they didn't mean anything to me" and that Anthony could not have stopped him. (R89).

Anthony opened the cooler door so the four employees could walk into the cooler. Jeffrey followed the victims and Anthony was behind him. (R89). Jeffrey said, "Once they were in the freezer I started firing." Although he pulled the trigger six times, the gun malfunctioned and three of the bullets in the cylinder failed to fire. After he attempted to re-load it, "I realized it was taking too long, I turned around and took the knife from my brother and handed him the gun." "I turned around and stabbed Kimberly." After he stabbed her twice, "we turned around and walked out."(R90-1).

Jeffrey said he told Anthony to drive to Park's (a local restaurant) where "I knew I could dispose of the rest of the rope, the gloves, the gun, the knife ..." After going to Park's, they returned home, where Jeffrey "had something to eat and I went to sleep." (R91).

Jeffrey decided to tell their mother they had gotten the money at a party. The following morning, Anthony and Jeffrey were arrested at a gas station next to their motel. (R92-3).

After being arrested and while they were in the back of a police car, Anthony made some statements that Jeffrey should have cut the victims' throats. (R93).

Jeffrey said he "could be very violent" at times, prior to his arrest. Anthony was not like that, he was "very laid back." (R94, 95).

Jeffrey said there really was no "mastermind" behind the robbery or murder. "It wasn't planned out to that detail." He did not testify at his brother's penalty phase based on the advice of counsel. (R95).

Jeffrey said Anthony actually stated, " ... we should have cut their f---ing throats" while in custody in the back of the police car. (R96). Although Jeffrey wants to help his brother at this juncture, he "will not lie for him." (R97).

Anthony had originally planned to rob the Taco Bell with someone else. He was familiar with the procedures, knew the employees, knew where the money was kept, and knew how to tell if the manager tried to set off an alarm. (R98). Initially, Jeffrey had suggested injuring himself in order to gain entry into the restaurant. Anthony told him not to do that because the employees would call the police. (R101).[7] Anthony never told him not to shoot the Taco Bell employees. (R102). When they left the restaurant, Jeffrey thought all four employees were dead. (R104). None of the four employees had resisted in any way, but Jeffrey was prepared "in case any of the employees attempted to arrest the gun from me." (R105). Anthony was the one who told the employees to get into the freezer. (R106). Although Jeffrey bought cartridges for the gun ahead of time, and brought the gun into the restaurant, he and Anthony had no intention of shooting and trying to kill the four employees. (R108).[8] Jeffrey testified that he didn't make Anthony do anything (R107), and that he is very close to his brother and wants to help him. (R97).

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[7]He did not cut himself for fear of the police showing up, not because Anthony told him not to do it. (R113).

[8] According to Jeffrey, the weapon, which was fully loaded, was only for self-defense. (R105-106).

Gary Robinson worked with Jeffrey at Park’s. (R118). He knew Jeffrey (by his alias, Buddy Chapman) was the younger brother because it “just seemed that way.” Jeffrey helped get a job for Anthony at the restaurant, as well. (R119).

Dr. Clifford Levin, a psychologist, evaluated Anthony Farina prior to his trial, and again prior to his second penalty phase. (R122 123). He diagnosed Farina as suffering from Dependant Personality Disorder and Antisocial Personality Disorder. (R124). Farina’s mental state at the time of the crime was “consistent with a lower emotional age than it is in maturity.” He had the capacity to function independently, “but he would function in an inadequate way. He tended to flock with his family and stay close to home.” Further, “he was really functioning as a mid-teen, 14-year-old type of level.” (R125).

Dr. Levin interviewed Jeffrey after his incarceration, and also interviewed Farina’s mother. He interviewed long-term family friends Shawn and Tina O’Neill, as well as Gary Robinson, the brothers’ co-worker. He reviewed an evaluation of Jeffrey conducted by Dr. Krop. He became aware that Jeffrey had suffered a head injury at age five, and he had developed an “explosive personality ... would quickly develop a rage reaction, become very aggressive.”

(R126-27). Dr. Krop believed Jeffrey "had the outward appearance of someone who would take charge and be responsible for his actions, but was very impulsive and immature in the way he carried them out." Jeffrey did not describe himself as being dominant over his brother. Anthony would just "defer" to Jeffrey's decisions. (R127). Jeffrey was "the decision maker." (R127-28). Susen Griffith reported that Jeffrey was "an explosive young person who had a relationship with his brother of interdependence and aggression. There were periods of time where he was very physically assaultive of his brother." However, the majority of the time, the brothers "were a very close-knit duo." Anthony deferred to his brother in order to maintain peace and avoid conflicts. (R128). Jeffrey told Dr. Levin that Anthony had second thoughts prior to the robbery/murder, that Anthony was "essentially getting cold feet." (R129). Although Anthony played the role of a "deferring person" he was capable of independent thought,-- "he clearly made some independent thoughts in planning this robbery ..." (R130). Dr. Levin concluded that, "based on years of living together with a pattern of Jeffrey being an explosive personality, Anthony deferring to this type of aggressive behavior and dominance" that Anthony Farina was under the substantial domination of Jeffrey Farina. The

murder and attacks on the victims would not have occurred had Anthony been acting alone. (R132).

Dr. Levin said that Dr. Krop had diagnosed Jeffrey Farina as having an Intermittent Explosive Disorder. (R133). Dr. Levin has not seen Anthony Farina since 1998. (R137). In 1998, Dr. Levin diagnosed Anthony as having Antisocial Personality Disorder and a Dependent Personality Disorder. (R138). Anthony had "difficulty conforming to social norms with respect to lawful behavior. There was impulsivity ... disregard for safety of others." (R139). He was not aggressive and was focused on family. (R140). Anthony saw the world as a dangerous place. He needed to be around his family and friends and did not trust others. (R141). The MMPI results from the 1992 evaluation showed an elevated score in the sociopathy and paranoia scales, as well as the schizophrenia scale. (R146). There has never been any evidence of Anthony being psychotic. (R147).

Dr. Levin's MMPI testing of Anthony generated a valid "four-six-eight triad" profile. Scale four is the psychopathic deviant scale, scale six is the paranoia scale, and scale eight is the "schizophrenia" scale. Four-six-eight triads are commonly seen in violent criminals. (R147-49).

Dr. Levin believed Anthony had difficulty in forming his plan to rob the Taco Bell. (R150). He was institutionalized for three years (age 13 through 16) and never lived alone. (R151). However, he drove a car, maintained employment and did not have a "totally" Dependent Personality. (R152-153).

Anthony was "emotionally neglected, abandoned." His father left the family when he was four years old. He grew up in a hostile environment and had self-image problems. (R157). Anthony barely met the criteria for Antisocial Personality Disorder. (R162). A diagnosis of Antisocial Personality Disorder with Borderline features was not an appropriate diagnosis for Farina. (R165). The primary diagnosis for Anthony Farina was Dependent Personality Disorder. (R169).

An Order denying Farina's motion to vacate was issued on April 8, 2004. (R478-495). Farina file a motion for rehearing on April 21, 2004. (R496-501). The State filed a response (R502-05) and the Court issued an order denying the motion for rehearing on July 8, 2004. (R506-07). Farina timely filed a Notice of Appeal on August 6, 2004. (R512-13).

SUMMARY OF THE ARGUMENT

The collateral proceeding trial court correctly denied relief on Farina's "proportionality claim." That claim was raised and decided on direct appeal, and is not subject to relitigation in a postconviction motion. To the extent that this claim is based on "new" evidence[9], the trial court heard the witnesses testify, and made various credibility choices -- this Court will not substitute its judgment for that of the trial court on questions of fact or the credibility of witnesses.

The claims contained in the amendment to Farina's postconviction motion were decided on the alternate grounds of waiver and lack of merit. While the issues were waived, as the trial court found, those claims are also meritless. The trial court should be affirmed.

The trial court correctly decided the ineffective assistance of counsel claim which was based upon an asserted "failure" to discover evidence that Farina was "dominated" by his younger brother. Resolution of this issue is based exclusively on the credibility of the witnesses, and the trial court was entitled to reject the testimony of Farina's witnesses as incredible. Farina

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[9] "New" evidence, unlike "newly discovered" evidence, is evidence that did not exist at the time of trial.

cannot establish either prong of the two-part *Strickland v. Washington* standard, and the trial court should be affirmed in all respects.

Various claims contained in Farina's Rule 3.851 motion were denied without an evidentiary hearing because they have no legal basis, because they are procedurally barred, or because they were insufficiently pleaded. Farina is not entitled to an evidentiary on a claim that is procedurally barred, nor is he entitled to a hearing on a claim that is based on a legal premise that this Court has repeatedly rejected. Finally, Farina is not entitled to an evidentiary hearing on a claim that is insufficiently pleaded. There is no basis for relief.

The trial court correctly decided the various "legal" claims contained in the Rule 3.851 motion.

The "cumulative error" claim is not a basis for relief because there is no "error" to "cumulate." This claim is no more than an attempt to relitigate claims that have already been decided on the merits.

ARGUMENT

I. THE COLLATERAL PROCEEDING TRIAL COURT CORRECTLY DECIDED THE PROPORTIONALITY/ "NEW EVIDENCE" CLAIM.

On pages 20-45 of his brief, Farina sets out a lengthy, and frequently inaccurate, argument which, in the

final analysis, is nothing more than his continuing disagreement with this Court's denial of his proportionality claim on direct appeal. In his brief, Farina wrongly asserts that every claim contained in his brief is subject to *de novo* review. *Initial Brief,* at 20. While it is true that certain types of post-conviction claims are reviewed *de novo* (such as ineffectiveness of counsel claims), it is also very clear that the trial court's determination of "the relative culpability of the co-perpetrators in a first-degree murder case is a finding of fact which will be sustained on review if supported by competent substantial evidence." *Puccio v. State*, 701 So. 2d 858, 860 (Fla. 1997); *Marquard v. State,* 850 So. 2d 417, 424 (Fla. 2002). Likewise, Florida law is settled that 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." *Porter v. State*, 788 So. 2d 917, 923 (Fla. 2001).

A. This Court's disposition of the proportionality claim.

On direct appeal to this Court after the remand for resentencing, this Court resolved the proportionality claims in the following way:

Finally, Anthony raises three issues relating to the proportionality of his death sentence (issues nine, eleven, and twelve). He claims that death is not the appropriate sentence in his case because he was not the shooter and was a minor participant in the homicide and because the actual triggerman received a life sentence. While the trial court recognized that Anthony did not fire the shot that killed the victim, it also found that "his participation in the crime was major." Additionally, the court concluded that "[Anthony's] involvement was so complete that he was a full partner with his brother who did kill, and that without his full participation, the death would not have occurred."

Under Florida law, when a codefendant is equally culpable or more culpable than the defendant, disparate treatment of the codefendant may render the defendant's punishment disproportionate. See *Downs v. State*, 572 So. 2d 895 (Fla. 1990); *Slater v. State*, 316 So. 2d 539 (Fla. 1975). Thus, an equally or more culpable codefendant's sentence is relevant to a proportionality analysis. *See Cardona v. State*, 641 So. 2d 361, 365 (Fla. 1994).

Like Anthony, Jeffery was tried on the same charges and convicted, but he is not subject to the death penalty because his age of sixteen at the time of the offense prevents him from receiving the death penalty as a matter of law. *See Brennan*, 754 So. 2d at 5-6 (ruling that imposition of death sentence on a sixteen-year-old defendant constitutes cruel or unusual punishment under Florida Constitution). Rather, Jeffery received the maximum sentence possible for his crimes - a life sentence, without the possibility of parole for twenty-five years. *See Farina*, 763 So. 2d at 303.

Under *Brennan,* when a defendant is sixteen years of age, his or her youth is such a substantial mitigating factor that it cannot be outweighed by any set of aggravating circumstances as a matter of law. In this context, then, Jeffery's less severe sentence is irrelevant to Anthony's

proportionality review because the aggravation and mitigation in their cases are *per se* incomparable. Under *Brennan*, death was never a valid punishment option for Jeffery, and Anthony's death sentence is not disproportionate to the sentence received by his codefendant. *See Henyard v. State*, 689 So. 2d 239, 254-55 (Fla. 1996) (concluding that defendant's death sentence was not disproportionate to fourteen-year-old codefendant's life sentence); *cf. Larzelere v. State*, 676 So. 2d 394 (Fla. 1996) (holding that codefendant's acquittal was irrelevant to proportionality review of defendant's death sentence because codefendant was exonerated from culpability as a matter of law). Thus, we conclude that Anthony's death sentence is not disparate when compared with Jeffery's life sentence and find no merit to issues eleven and twelve.

Finally, we consider Anthony's remaining proportionality claim that death is not the appropriate sentence in comparison to other capital cases (issue nine). In deciding whether death is a proportionate penalty, this Court considers the totality of the circumstances of the case and compares the case with other capital cases. *See Johnson*, 720 So. 2d at 238; *Urbin v. State*, 714 So. 2d 411, 416-17 (Fla. 1998). Proportionality review requires a discrete analysis of the facts, entailing a qualitative review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis. *See Urbin*, 714 So. 2d at 416. It is not a comparison between the number of aggravating and mitigating circumstances. *See Porter v. State*, 564 So. 2d 1060, 1064 (Fla. 1990).

Based upon our review of all the aggravating and mitigating factors, including their nature and quality according to the specific facts of this case, we find that the totality of the circumstances justifies the imposition of the death sentence here. Anthony was a major participant in an armed robbery which included a cold, calculated, and premeditated plan to

> eliminate any witnesses. The four witnesses were shot in either the head or chest in quick succession. The last witness was stabbed only because the gun misfired while pointed at her head. This case is proportionate to other cases where we have upheld the imposition of a death sentence. *See, e.g., Jennings*, 718 So. 2d at 154 (finding death sentence proportionate where murders were cold, calculated, and premeditated and committed during armed robbery to avoid arrest, and defendant had no significant history of prior criminal activity); *Stein v. State*, 632 So. 2d 1361 (Fla. 1994) (same); *LeCroy v. State*, 533 So. 2d 750 (Fla. 1988) (affirming death sentence where murder was committed during course of armed robbery to avoid arrest, and defendant had no significant history of prior criminal activity).

Farina v. State, 801 So. 2d 44, 55-58 (Fla. 2001). To the extent that the direct appeal claims were re-litigated in Farina's post-conviction proceeding, those claims, as the trial court found, are procedurally barred because they were raised and decided on direct appeal.

B. The post-conviction Court's ruling.

Farina raised the proportionality claim in his *Florida Rule of Criminal Procedure* 3.851 proceeding and the trial court denied relief, stating:

> **Ground III:** The defendant claims that there is newly discovered evidence that (a) his co-defendant received a life sentence; (b) victim empathy establishing mitigation that demands a life sentence, and that (c) his death sentence is arbitrary, capricious, disproportionate, disparate, and invalid in violation of the Eighth and Fourteenth Amendments. The defendant contends that the jury was not advised of, nor did the Court consider, his co-defendant's life sentence

as it occurred after the penalty phase. The defendant contends that the death sentence is disproportionate and fundamentally unfair. The defendant contends that his co-defendant brother has newly discovered evidence that would show the domination over Anthony because at the time of the penalty phase, the defendant could not compel his brother to testify. The defendant contends that it is probable that this new evidence, *i.e.,* the life sentence imposed upon the brother and the brother's testimony regarding his domination over the defendant, plus all the other mitigation introduced, a life sentence would be imposed. (No argument was made in this proceeding that the *court* would or should override the jury's death recommendation based on the co-defendant's life sentence. Indeed, the Supreme Court appears to have precluded this possibility when it concluded that the two cases are *per se* incomparable. *Farina, supra,* at 56.) The state argues that the brother's life sentence is not newly discovered evidence as it was discussed in the defendant's direct appeal, and that the supreme court's rejection of the argument shows that the claim has no factual basis. The state also contends that as this issue was raised on direct appeal, it is procedurally barred.

This Court partially agrees with the state. First, the issues of the proportionality of the death sentence in light of the co-defendant's life sentence and the victim impact evidence were raised and rejected on direct appeal. *Farina, supra,* at 52-53; 55-56. Therefore, this portion of the claim is procedurally barred. Even if it were not, the supreme court specifically held *inter alia:* "when a defendant is sixteen years of age, his or her youth is such a substantial mitigating factor that it cannot be outweighed by any set of aggravating factors as a matter of law. In this context then, Jeffery's less severe sentence is irrelevant to Anthony's proportionality review because the aggravation and mitigation in their cases are *per se* incomparable." *Id.*, at 56.

Second is the claim of new evidence showing the brother's substantial domination over the defendant. This Court does not believe the testimony of the defendant's brother, mother, sister, or psychologist exculpates the defendant (App-B). [FN1] In a general sense their testimony may be characterized as supporting the defense hypothesis that the defendant was submissive while his brother was dominating. However, the testimony of the brother was not entirely exculpatory, as was that of the other defense witnesses. He said: "We really didn't have any defined older/younger brother attitude." (App-B-56). He also said that who made the decision depended on the situation (App-B-56-57). One could reasonably infer that since the defendant originally planned the crime (App-B-63), he took charge when he and his brother were carrying out his plan.

FN1 References to the appendix are indicated: "(App-letter designation-page number)."

The testimony of the three surviving victims at the 1998 re-sentencing (App-A), which this Court finds credible, clearly contradicts the defense claims that the defendant's brother dominated the defendant and was the leader. Derek Mason testified in part: "Anthony said, go inside and get the manager." (App-A-1266). He also testified that Anthony offered to let them smoke and then directed those who were not smoking to stand so that their hands could be tied behind their backs (App-A-1267). Mason further testified: "Anthony pretty much told Jeffery what to do" (App-A1868). Anthony called Mason over to the others at the cooler and herded them all inside (App-A-1269).

Kimberly Gordon was the manager on duty. As she was counting the money brought in during her shift, the Farina brothers came in with Mason and Michelle Van Ness. Anthony told the employees to go to the back of the store (App-A-1482). The defendant told Gordon that he knew that she had keys to the safe and they went to the front to get the money (App-A-1482). Like Mason, Gordon

testified that the defendant let those who wanted to smoke and had the others stand to be tied (App-A-1483). When asked who was doing the talking, Gordon replied: "Anthony was doing - I never heard Jeffery talk" (App-A-1485). Similarly the following exchange took place:

Q From watching everything that happened and experiencing it, did it appear that one or the other of the brothers were [sic] in charge?

A It appeared that Anthony was in charge.

Q Why was that? Why did you reach that conclusion?

A Because he did all of the talking.

(App-A-1487).

Gordon also testified that it was the defendant who led them into the cooler. She, moreover, specifically recalled that it was the defendant who then had the victims go into the freezer (App-A-1488).

The other surviving victim, Gary Robinson, testified, too, that the defendant led the victims into the freezer (App-A-1531). The following exchange took place:

Q Do you have an opinion now as to who was in charge, who seemed to be in charge of the robbery to you that night?

A Well, Anthony was doing most of the talking.

(App-A-1543).

> In considering a claim based upon newly discovered evidence, this Court explained in *Jones v. State,* 709 So. 2d 512, 521 (Fla. 1998): Two requirements must be met in order for a conviction to be set aside on the basis of newly discovered evidence. First, in order to be considered newly discovered, the

> evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence." *Torres-Arboleda v. Dugger,* 636 So. 2d 1321, 1324-25 (Fla. 1994). Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. To reach this conclusion the trial court is required to "consider all newly discovered evidence which would be admissible" at trial and then evaluate the "weight of both the newly discovered evidence and the evidence which was introduced at the trial." *Jones v. State,* 709 So. 2d 512, 521 (Fla. 1998) (citations omitted).

Robinson v. State, ____So. 2d____, 2004 WL 170362 (Fla. 2004).

"The *Jones* standard is also applicable where the issue is whether a life or death sentence should have been imposed." *Scott v. Dugger,* 604 So. 2d 465, 468 (Fla. 1992). This Court has evaluated the weight of both the newly discovered evidence and the evidence that was introduced at the re-sentencing. As alluded to above, the Court finds the exculpatory evidence offered at the December 8, 2003, evidentiary hearing to be incredible. The defendant's brother has clear motive to fabricate or exaggerate now that he no longer faces the death penalty. On the other hand, if there was any reason for the victims to contrive their testimony to prejudice one brother over the other, it would be contrived against Jeffrey. It was at his hand that Michelle Vann Ness died and the other three were seriously wounded. Yet the victims testified without exception that it was the defendant who was in charge.

After weighing all the evidence, the Court finds that there is no probability that-the defendant

> would receive a recommendation of life from a jury upon retrial.
>
> The defense claim that the defendant's sentence is arbitrary, capricious, disproportionate, disparate, and invalid in violation of the Eighth and Fourteenth Amendments is barred or without merit or both. The supreme court directly rejected the proportionality argument on the appeal from the re-sentencing. *Farina, supra,* at 56. For the reasons detailed in that decision, there was nothing arbitrary or capricious about the imposition of the death penalty upon the defendant. The claims are barred because they could have been raised on direct appeal but were not. *See Woods v. State,* 531 So. 2d 79 (Fla. 1988).

C. Farina's argument is based on a false legal premise.

In an effort to avoid the *res judicata* procedural bar, Farina has attempted to blend a proportionality argument with what he describes as a "newly discovered evidence" claim. And, in an effort to split the claims and obtain relief, Farina erroneously suggests that the trial court did not actually decide the "newly discovered evidence" claim. The true facts are that the trial court discussed the evidence at length, recognized the proper standard for evaluating "newly discovered evidence" claims, and concluded that "[a]fter weighing all the evidence, the Court finds that there is no probability that the defendant would receive a recommendation of life from a jury upon retrial." (R483). To the extent that any of the claims at

issue can properly be categorized as "newly discovered evidence" claims, such claims were correctly resolved by the trial court.

To the extent that Farina's claim is that his death sentence is disproportionate, that claim is procedurally barred -- this Court decided that claim adversely to him on direct appeal, and Farina is not entitled to relitigate it in this proceeding. The trial court correctly found that claim procedurally barred and refused to consider it.

With respect to the "newly discovered evidence" component, the life sentence ultimately given to Farina's co-defendant is not "newly discovered evidence" at all. This Court has explicitly held that "newly discovered evidence, by its very nature, is evidence **which existed** but was unknown at the time of sentencing." *Porter v. State*, 653 So. 2d 374, 380 (Fla. 1995).[10] Because the co-defendant had **not** been sentenced to life at the time of sentencing, his ultimate sentence is "new," not "newly discovered" -- Farina's argument that the trial court should have applied the "newly discovered evidence" standard of review to this issue is erroneous. And, unlike the more typical scenario

[10] *Scott v. Dugger*, *supra*, treats "new" evidence the same as "newly discovered" evidence, at least in this context. In light of *Porter's* clear explanation of the distinctions, the State suggests that *Porter* controls.

presented to this Court, the proportionality of Farina's death sentence was fully reviewed by this Court on direct appeal and upheld. The proportionality issue is not subject to relitigation, and the Circuit Court correctly denied relief on procedural bar grounds. That disposition should not be disturbed.

D. The trial court properly rejected the co-defendant's testimony.

To the extent that Farina argues that the trial court did not properly consider the testimony of the co-defendant (who is no longer subject to a death sentence) and others concerning the relationship and interpersonal dynamics between the defendants, the collateral proceeding trial court properly assessed the testimony from the evidentiary hearing against the testimony from trial, credited the trial testimony, and found that the evidentiary hearing testimony was not credible.[11] (R481-483). Those credibility choices are the province of the trial court, and this Court should not substitute its judgment for that of the judge

[11] The trial court stated that it did not believe that the evidentiary hearing testimony exculpated the defendant. Farina criticizes the court's use of this term, *Initial Brief,* at 35, asserting that this language indicates a misunderstanding of "the law as it relates to mitigation." That argument makes no sense, given that Farina's claim is ultimately that he is "innocent of the death penalty." Farina's efforts to manufacture error based on the use of the term "exculpatory" is meritless.

who saw the witnesses testify and was situated to be able to assess their credibility. *Porter, supra.* Finally, to the extent that Farina discusses the applicability of the various aggravators found by the sentencing court, the collateral proceeding trial court rejected those claims after hearing the testimony of the witnesses. That disposition is supported by competent substantial evidence, and should not be disturbed.

II. THE CLAIMS CONTAINED IN THE "AMENDMENT" WERE PROPERLY RESOLVED.

On pages 45-49 of his brief, Farina argues that the trial court improperly found that the amendments to claims III and V were waived, and argues, cryptically, that "it is the State, not the defense who has waived this issue for appeal." *Initial Brief*, at 46. Farina also argues that:

> The lower court also ruled on the merits. However, in order to preserve this issue for appeal, Anthony Farina argues that the lower court's finding of a waiver was erroneous.

Initial Brief, at 45 n. 7. Whatever the issue that Farina wishes to preserve may be, the lower court fully addressed the amendment issue in its order, and found that the issue was waived, and, in the alternative, without merit. In resolving the issue, the trial court stated:

> The defense filed an amendment to claims III and V (App-C). As the state pointed out in its response (App-D), the requirements under rule

3.851(f)(4) were not met. Neither party called the matter up for a hearing and, as a result, the Court rendered no ruling. Although the Court finds the claims to be waived because they were not argued and no objection was voiced at the evidentiary hearing, *cf*. *Darling v. State,* 808 So. 2d 145, 165, n. 18 (Fla. 2002), the merits *vel non* of the claims will be addressed here.

In its first claim the defense reargues that the brother's life sentence compels the same sentence for the defendant. As pointed out *ante,* the supreme court ruled on direct appeal that the brothers' mitigation and aggravation are *per se* incomparable because of the young age of the brother. *Farina, supra,* at 56. (As stated in the court's ruling regarding Ground III, *ante,* no argument was made in this proceeding that the *court* would or should override the jury's death recommendation based on the co-defendant's life sentence. Indeed, the Supreme Court appears to have precluded this possibility when it concluded that the two cases are *per se* incomparable.)

The balance of the argument related to claim III is dependant upon the exculpatory testimony adduced by the defense witness. However, as pointed out above, this evidence is discredited, primarily because of the exculpatory witness' motivation to fabricate or exaggerate, and because of the credible, contradictory testimony offered by the three surviving victims at the re-sentencing.

Under claim V the defense first argues that trial counsel was ineffective for not investigating the purported years of drug abuse by the defendant. The record refutes the claim of hard drug abuse. The defendant was a user of marijuana (App-A-2123). Moreover, the argument is conclusory. Collateral counsel's faulting of trial counsel for not obtaining the services of a neuropharmocologist is flawed for the same reason. Without any evidence suggesting years of drug use by the defendant, this contention is speculation and refuted by the record.

> Next the defense attempts to liken the instant case to cases involving a defendant who arranged for a killing but who was not present for the actual killing, *Omelus v. State,* 584 So. 2d 566 (Fla. 1991), and *Archer v. State,* 613 So. 2d 446 (Fla. 1993). Those cases and the instant one are incomparable. The defendant, who was orchestrating the crimes, was present at the crime scene and perceived the suffering of the victims, particularly Michelle Vann Ness. *Farina, supra,* at 53.
>
> The defense puts a previously raised contention in a slightly different light when it argues that trial counsel was ineffective for failing to present witnesses to testify that the defendant's brother was dominant over the defendant. These witnesses testified to that effect at the evidentiary hearing, and their testimony was found by this Court to be incredible. Once again, standing in stark contrast to the defense witnesses is the credible testimony of all three surviving victims. All of the victims testified that the defendant, who did all or almost all of the talking at the crime scene, was in charge of what took place.
>
> In this proceeding, the defendant has failed to establish either deficient representation or prejudice. There is no reasonable probability that the outcome would have been different had trial counsel done as collateral counsel argues should have been done. Nor is there any likelihood that the result have been different had the jury received the newly discovered evidence.

That disposition of these claims is correct, and should not be disturbed.

III. THE TRIAL COURT CORRECTLY FOUND THAT AMENDED CLAIM V WAS MERITLESS.

On pages 49-58 of his brief, Farina argues that the trial court erroneously rejected his claim that trial

counsel was ineffective for “failing to investigate and present” evidence “that Jeffrey was the more aggressive, violent brother and dominated Anthony.” *Initial Brief*, at 49. Whether counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), is reviewed *de novo. Stephens v. State*, 748 So. 2d 1028 (Fla. 1999) (requiring *de novo* review of ineffective assistance of counsel claims); *Sims v. State*, 754 So. 2d 657, 670 (Fla. 2000). Both prongs of the *Strickland* test, deficient performance and prejudice, present mixed questions of law and fact which are reviewed *de novo* on appeal. *Cade v. Haley,* 222 F.3d 1298, 1302 (11th Cir. 2000) (although a district court’s ultimate conclusions as to deficient performance and prejudice are subject to plenary review, the underlying findings of fact are subject only to clear error review, *citing Byrd v. Hasty*, 142 F.3d 1395, 1396 (11th Cir. 1998); *Strickland*, 466 U.S. at 698 (observing that both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact).[12]

INEFFECTIVE ASSISTANCE OF COUNSEL --
THE LEGAL STANDARD

[12] The heading on page 49 of Farina’s brief also states that counsel failed to “adequately challenge the state’s case.” No such issue is contained in argument III.

Ineffective assistance of counsel claims are evaluated using the well-known deficient performance/resulting prejudice standard articulated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). That two-part standard is in the conjunctive, and, unless the defendant establishes **both** deficient performance **and** prejudice**, he has not carried his burden of proof**, which, under settled Florida law is on the defendant at the post-conviction stage. *Walton v. State*, 847 So. 2d 438 (Fla. 2003); *Cave v. State*, 529 So. 2d 293, 297 (Fla. 1988).

The Florida Supreme Court has clearly stated the legal standard under which a claim of ineffective assistance of counsel is evaluated:

> In order to successfully prove an ineffective assistance of counsel claim a defendant must establish the two prongs defined by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984):
>
> > A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial,

> a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. at 687, 104 S.Ct. 2052. To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052. According to *Strickland*, "a court must indulge a strong presumption that 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.'" 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The *Strickland* court also explained how counsel's actions should be evaluated:

> Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

Gudinas v. State, 816 So. 2d 1095, 1101-1102 (Fla. 2002). The Eleventh Circuit has described the *Strickland* analysis in the following terms:

> . . . our decisions teach that whether counsel's performance is constitutionally deficient depends upon the totality of the circumstances viewed through a lens shaped by the rules and presumptions set down in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and its progeny. Under those rules and presumptions, "the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between." *Rogers v. Zant,* 13 F.3d 384, 386 (11th Cir. 1994). That result is no accident but instead flows from deliberate policy decisions the Supreme Court has made mandating that "[j]udicial scrutiny of counsel's performance must be highly deferential," and prohibiting "[i]ntensive scrutiny of counsel and rigid requirements for acceptable assistance." *Strickland*, 466 U.S. at 689-90, 104 S.Ct. at 2065-66. The Supreme Court has instructed us to begin any ineffective assistance inquiry with "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065; *accord, e.g., Atkins v. Singletary*, 965 F.2d 952, 958 (11th Cir. 1992) ("We also should always presume strongly that counsel's performance was reasonable and adequate ...."). Because constitutionally acceptable performance is not narrowly defined, but instead encompasses a "wide range," a petitioner seeking to rebut the strong presumption of effectiveness bears a difficult burden. As we have explained:
>
>> The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial....

> > We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.
>
> *White v. Singletary*, 972 F.2d 1218, 1220-21 (11th Cir. 1992).

Waters v. Thomas, 46 F.2d 1506, 1511-12 (11th Cir. 1995).

Under *Strickland*, courts deciding an ineffectiveness claim must Aindulge a strong presumption that counsel=s conduct falls within the wide range of reasonable professional assistance,@ and that counsel Amade all significant decisions in the exercise of reasonable professional judgment.@ *Strickland,* 466 U.S. at 689-90. In other words, if the record is incomplete or unclear about counsel=s actions, the presumption is that counsel did what he should have done and that he exercised reasonable professional judgment. *See, Williams v. Head*, 185 F.3d 1223, 1228 (11th Cir. 1999). Counsel=s competence is presumed, *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986), and, A[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect.@ *Yarborough v. Gentry*, 540 U.S. 1 (2003) **(presumption of competence is controlling even when the reviewing court has Ano way of knowing whether a seemingly unusual or misguided**

action by counsel has a sound strategic motive.@); *Massaro v. United States,* 538 U.S. 500, 505 (2003). *Accord, Sallahdin v. Mullin*, 380 F.3d 1242 (10th Cir. 2004); *Chandler v. United States*, 218 F.3d 1305 (11th Cir. 2000); *State v. Caskey*, 690 N.W.2d 26 (Wis. 2004); *Wilson v. Henry*, 185 F.3d 986 (9th Cir. 1999); *Romine v. Head*, 253 F.3d 1349 (11th Cir. 2001); *Romero v. Lynaugh,* 884 F.2d 871, 878 (5th Cir. 1989) (AAt that hearing [trial counsel], while unable to recall all the reasons for his actions taken some two years earlier, **explained his reasons in general terms**, ... @). When Athe evidence does not clearly explain what happened, or more accurately **why something failed to happen, the party with the burden loses.@** *Romine v. Head*, 253 F.3d 1349, 1357-58 (11th Cir. 2001) (emphasis added); *Putman v. Head*, 268 F.3d 1223, 1246 (11th Cir. 2001) (same); *Accord, Garlotte v. Fordice*, 515 U.S. 39, 46-7 (1995); *Hardwick v. Crosby*, 320 F.3d 1127, 1161 (11th Cir. 2003); *Johnson v. Alabama*, 256 F.3d 1156, 1176 (11th Cir. 2001); *Chandler v. United States*, 218 F.3d 1305, 1327 (11th Cir. 2000); *Van Poyck v. Florida Dept. of Corrections*, 290 F.3d 1318, 1322-23 (11th Cir. 2002).

To the extent that Farina argues that *Wiggins v. Smith* requires counsel to investigate every conceivable line of

mitigation, that is not what that case held. Instead, the Court stated:

> ... we emphasize that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of *Strickland,* 466 U.S., at 689, 104 S.Ct. 2052. We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." *Id.,* at 690-691, 104 S.Ct. 2052. A decision not to investigate thus "must be directly assessed for reasonableness in all the circumstances." *Id.,* at 691, 104 S.Ct. 2052.

Wiggins v. Smith, 539 U.S. 510, 533 (2003).

The Eleventh Circuit Court of Appeals has emphasized:

> In death penalty cases, *Strickland*'s prejudice inquiry is no sanitary, academic exercise -- we are aware that, in reality, some cases almost certainly cannot be won by defendants. *Strickland* and several of our cases reflect the reality of death penalty litigation: sometimes the *best* lawyering, not just reasonable lawyering, cannot convince the sentencer to overlook the facts of a brutal murder -- or, even, a less brutal murder for which there is strong evidence of guilt in fact. *Id.* at 696, 104 S.Ct. at 2069; *see also Thompson v. Wainwright,* 787 F.2d 1447, 1453 (11th Cir. 1986) ("Nothing [the lawyer] could have presented would have rebutted the testimony concerning Thompson's participation in the brutal torture murder."); *Daugherty v. Dugger,* 839 F.2d 1426, 1432 (11th Cir. 1988) ("given the severity of the aggravating circumstances," failure to

> present psychiatric testimony was not prejudicial).
>
> Clisby had killed before. He killed his victim in this case brutally with an axe, in the victim's own house. He argues that the sentencer should have been told that Clisby was unintelligent -- but not retarded and not incompetent to stand trial -- and that his "antisocial" personality was made worse by his drug and alcohol abuse. Given the aggravating and mitigating factors, nothing Clisby has put forth undermines our confidence in the outcome of his sentencing proceeding. Clisby has failed to show us that he suffered prejudice, even *if* we were to assume inadequate performance on the part of his defense counsel.

Clisby v. State of Ala., 26 F.3d 1054, 1057 (11th Cir. 1994).

THE CIRCUIT COURT'S FINDINGS.

In denying relief on the "domination" claim, the lower court stated:

> The defense puts a previously raised contention in a slightly different light when it argues that trial counsel was ineffective for failing to present witnesses to testify that the defendant's brother was dominant over the defendant. These witnesses testified to that effect at the evidentiary hearing, and their testimony was found by this Court to be incredible. Once again, standing in stark contrast to the defense witnesses is the credible testimony of all three surviving victims. All of the victims testified that the defendant, who did all or almost all of the talking at the crime scene, was in charge of what took place.
>
> In this proceeding, the defendant has failed to establish either deficient representation or prejudice. There is no reasonable probability that the outcome would have been different had

> trial counsel done as collateral counsel argues should have been done. Nor is there any likelihood that the result [would] have been different had the jury received the newly discovered evidence.

(R494).[13]

THE TRIAL COURT ORDER SHOULD NOT BE DISTURBED

When stripped of its pretensions, Farina's brief is no more than his continuing disagreement with the trial court's ruling. The true facts are that this claim turns entirely on the credibility of the witnesses, and the trial court was within its province when it found that Farina's witnesses were not credible. *Marquard, supra* (this court will not substitute its judgment for that of the trial court as to the credibility of witnesses). Because those witnesses are not credible, Farina cannot establish either the deficient performance or the prejudice prong of *Strickland*. Because he must establish both prongs in order to prevail on an ineffectiveness claim, there is no basis for relief, and the trial court's decision should not be disturbed.

IV. THE TRIAL COURT PROPERLY DENIED CERTAIN CLAIMS WITHOUT AN EVIDENTIARY HEARING.

[13] The trial court had previously discussed the credibility of these witnesses in connection with Claim III of the motion. See pages 21-29, above.

On pages 58-64 of his brief, Farina argues that the trial court should have allowed an evidentiary hearing on various claims contained in the Rule 3.851 motion. However, the trial court found that these claims were without legal basis, procedurally barred, or insufficiently pleaded in the Rule 3.851 motion. Those rulings are correct, and should not be disturbed.

A. The "juror interview" claim is meritless as a matter of law.

On pages 60-61 of his brief, Farina argues that *Florida Rule of Professional Responsibility* 4-3.5(d)(4), which prohibits juror interviews, is "unconstitutional as applied." Farina does, however, recognize that this claim is one that must be raised on direct appeal, and that this claim has repeatedly been rejected on the merits by this Court, but nonetheless asserts that it is raised "to preserve it for federal review." *Initial Brief*, at 61. Putting aside the issue of whether a procedurally barred claim can be "preserved" (or resurrected) for federal habeas corpus purposes, Florida law is clear that this claim is procedurally barred, as the trial court found. (R479).

In denying relief on this claim, the trial court stated:

The defendant claims that the rules prohibiting his counsel from interviewing jurors to determine whether misconduct existed violates Equal Protection and the First, Sixth, Eighth, and Fourteenth Amendments of the United States and Florida Constitutions. The defendant claims that since the first penalty phase jury recommended death with a 7-5 vote and the second penalty phase jury recommended death with a 12-0 vote, and the only difference between the two penalty phases was the victim impact evidence, it goes without saying that the only possible explanation for the shift was the victim impact evidence. The defendant claims that the rule against juror interview precludes the finding that the jury improperly considered the victim impact evidence as aggravating circumstances. The defendant claims that since he is incarcerated the prohibition violates Equal Protection as a free defendant could properly approach the jurors to determining if misconduct occurred. The defendant further claims that his rights to a fair trial and access to courts are violated by this prohibition as he cannot determine whether extraneous influences affected his jury, and that the record clearly shows that many of the jurors had knowledge of the case from outside sources. The state responds that this claim is procedurally-barred as a claim that could have or should have been raised on direct appeal. The state alternatively responds that this claim is without merit and presents nothing more than a fishing expedition into areas that are prohibited.

This Court agrees with the state. This type of claim has been found procedurally barred by the Florida Supreme Court. *See Marquard v. State,* 27 Fla. L. Weekly S973, n. 1 & 2 (Fla. Nov. 21, 2002) *(citing Rose v. State,* 774 So. 2d 629, 637 n. 12 (Fla. 2000)); *Gorby v. State,* 819 So. 2d 664, 674, n. 7 & 8 (Fla. 2002); *Brown v. State,* 755 So. 2d 616, 621 n. 5 & 7 (Fla. 2000). Furthermore, this type of claim has also been found without merit. *Sweet v. Moore,* 822 So. 2d 1269, 1274 (Fla. 2002) *(citing Johnson v. State,* 804 So. 2d 1218, 1224 (Fla. 2001); *Arbelaez v.*

> *State,* 775 So. 2d 909, 920 (Fla. 2000)). In addition, the defendant raised the issue of victim impact evidence on direct appeal and it was rejected. *Farina, supra,* at 52-53 (Fla. 2001).

(R479).

Those findings are correct in all respects, and should not be disturbed. However, since this claim is, first and foremost, procedurally barred, this Court should clearly state that this claim is denied on that basis in order to protect the integrity and validity of Florida's procedural bar rules. *See, e.g., Harris v. Reed*, 489 U.S. 255, 273 (1989). And, while this claim is also meritless, this Court should clearly state in its decision that the procedural bar is an adequate and independent basis for the affirmance of the denial of relief, and that the procedural bar is intended to be the primary basis for affirmance. In order to maintain the integrity of Florida's procedural rules, and to ensure that there is no misinterpretation of this Court's intent during federal review, any discussion of the merits of this claim should make clear that the lack of merit is an alternative and secondary basis for affirmance of the denial of relief.

B. The ineffectiveness/"victim impact" claim was properly denied without an evidentiary hearing.

On pages 61-62 of his brief, Farina argues that he was entitled to an evidentiary hearing on his claim that trial counsel failed to adequately object to victim impact evidence. Because the victim impact issue was raised on direct appeal and rejected, the trial court found this claim procedurally barred, and denied relief.

The trial court held:

> The defendant claims that trial counsel failed to adequately object to the "parade of victim impact evidence in the form of letters and testimony." The defendant claims that the letters only contained characterizations and opinions about the crime and him, *i.e.,* "It is patently unfair that Anthony Farina be allowed to continue living while an individual of much greater worth and promise lies dead in the grave!" The defendant claims that had counsel adequately objected to these letters on the basis that they are improper commenting on him and the crime, the penalty phase jury would not have received this "flood of victim impact evidence," and there is a reasonable probability that it would have made a recommendation of life. The state argues that this claim is procedurally barred as the substantive victim impact claim was raised on appeal and found without merit. Hence, there is no basis of relief on ineffectiveness because there was no failure to make adequate objections, and there is no basis for an evidentiary hearing.
>
> This Court agrees with the state. First, the defendant raised the victim impact evidence issue on direct appeal, and it was rejected by the Florida Supreme Court. *See* 801 So. 2d at 52-53 ("we find no error in the admission of this evidence."). Direct appeal claims rephrased in the guise of ineffective assistance of counsel are also procedurally barred. *Arbelaez v. State,* 775 So. 2d 909, 915 (Fla. 2000) (holding that a defendant may not relitigate procedurally barred

> claims by couching them in terms of ineffective assistance of counsel) *(citing Valle v. State,* 705 So. 2d 1331, 1336 n. 6 (Fla. 1997)); *Johnson v. State,* 593 So. 2d 206, 207 (Fla. 1992), *cert. denied,* 506 U.S. 839 (1992); *Kight v. Dugger,* 574 So. 2d 1066 (Fla. 1990); *Nledina v. State,* 573 So. 2d 293 (Fla. 1990); *Kelly v. State,* 569 So. 2d 754, 759 (Fla. 1990); *Blanco v. Wainwright,* 507 So. 2d 1377 (Fla. 1987); *Simpson v State,* 479 So. 2d 314 (Fla. 5th DCA 1985); *Sireci v. State,* 469 So. 2d 119 (Fla. 1985), *cert. denied* 478 U.S. 1010 (1986). Thus, it is procedurally barred. Second, although denying the claim on the procedural bar, this Court notes that the defendant only points to one line in one letter as improper characterization. Hence, in light of the twelve (12) witnesses' testimony regarding victim impact, there is not a reasonable probability that the "flood" (*i.e.*, the remaining 11 witnesses) would not have been received by the jury.

(R479-80). Those findings are in accord with long-settled Florida law, and should not be disturbed.

To the extent that Farina claims that he is only attempting to preserve this claim for federal habeas purposes, the State agrees that there is no basis for reversal of the trial court's order. To the extent that Farina makes reference to raising this claim in his State Habeas proceeding (where a "victim impact" type of claim is raised on pages 30-37), the habeas claim is not the same as the Rule 3.851 claim, and the issues have nothing in common but the broad "victim impact" label.

To the extent that Farina's claim is that he was entitled to an evidentiary hearing on this claim, that

argument is based upon a distorted interpretation of Rule 3.851. In Farina's view, he is "entitled" to an evidentiary hearing on **any** claim he designates, and the trial court has no option but to allow such a hearing. That position is particularly untenable in a case, such as this one, where the substantive claim was squarely rejected on appeal by this Court. *Farina v. State*, 801 So. 2d at 53 ("we find no error in the admission of this [victim impact] evidence.") Under these facts, there is no basis for a hearing on the ineffectiveness component because Farina can never establish prejudice in light of this Court's finding that the evidence was properly admitted.[14] This Court should take this opportunity to make clear that Rule 3.851 does not give the defendant an unfettered right to an evidentiary hearing on any claim he chooses, regardless of its procedural posture. When, as here, the substantive claim has been decided on direct appeal, merely pleading the claim in the guise of ineffectiveness of counsel does not avoid the application of the well-established procedural bar. *See, Arbelaez v. State*, 775 So. 2d 909, 915 (Fla. 2000).

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[14] The State does not concede any deficiency in counsel's performance -- however, Farina cannot, as a matter of law, establish prejudice because of this Court's decision on direct appeal.

C. The pre-trial and *voir dire* ineffectiveness claim was properly denied as procedurally barred.

On pages 62-63 of his brief, Farina argues that he was entitled to an evidentiary hearing on a non-specific claim of ineffective assistance at the pre-trial and *voir dire* stages of his capital trial. In denying relief on this claim, the trial court stated:

> The defendant claims he received ineffective assistance of counsel pretrial and during *voir dire* in that counsel failed to strike prejudiced jurors and failed to use all peremptory challenges, and that trial counsel was rendered ineffective by the improper rulings of the trial court. The state claims that the defendant does not specifically differentiate between the guilt phase or the resentencing phase, thus, it is impossible to identify what discrete claims are being raised. The state argues that this claim encompasses ineffectiveness based on improper rulings, which could have or should have been raised on appeal. Thus, they are procedurally barred. The state alternatively argues that prejudicial juror component is procedurally barred as it was raised on direct appeal. The state finally argues that the failure to use all peremptory challenges as unreasonable attorney performance is nonsense. The state also notes that in the guilt phase, counsel requested and received six additional challenges, exhausted them, and was denied more. Thus, if the claim pertains to the guilt phase, it has no basis in fact.
>
> This Court agrees with the state. First, all references to the improper rulings of the trial court are procedurally barred as these issues were or could have or should have been raised on direct appeal. Second, although denying on the procedural bar, this Court notes that this claim is also insufficient. Assuming that this claim refers to the re-sentencing jury as the guilt

> phase counsel exhausted all peremptories, including additional ones, the defendant claims that counsel knew that most of the jurors held outside knowledge about the case, and that counsel failed to use all the peremptory challenges in connection with four jurors challenged for cause but not stricken. The defendant claims that this was unreasonable attorney performance and prejudiced jurors remained on the jury, which adversely affected the outcome of his trial. This claim does not sufficiently set forth a pleading of prejudice and is mere general conclusion.

(R484). Those findings are supported by competent substantial evidence, and should not be disturbed.

D. The suppression and denial of co-counsel claims are procedurally barred.

On pages 63-64 of his brief, Farina argues that he should have been afforded an evidentiary hearing on his claims regarding the suppression of certain tape recorded statements and the denial of his motion for co-counsel. The trial court found both claims procedurally barred, stating:

> The defendant claims that counsel was ineffective in his representation in that he failed to adequately understand capital case law, and/or the trial court rendered counsel ineffective by its failure to provide necessary funds. The defendant claims that the Court's reliance on the "rule of the case" doctrine in ruling on the motion to sever and motion to play the tapes in entirety was improper because the new penalty phase was a *de novo* proceeding. The defendant claims had counsel known this case law, he could have persuasively and effectively argued the suppression of the tapes. The defendant also claims that counsel repeatedly requested co-counsel to assist in mitigation, however, the Court repeatedly heard these claims, but never

ruled on the motion. The defendant claims that the Court, in effect, rejected the motion without addressing the necessity of co-counsel. The defendant claims that he was denied a fair trial by counsel's ineffectiveness or by the Court's actions. The state contends that the failure to rule on co-counsel is procedurally barred as it could have or should have been raised on direct appeal. The state also contends that the failure to understand ineffectiveness claim is also procedurally barred as the merits of the trial motions were addressed on direct appeal, and the supreme court found them to be without merit.

This Court agrees with the state. These issues are procedurally barred. First, the rulings regarding the tapes and the severance were raised on appeal and rejected. *Farina, supra,* at 50-52. The defendant is only rephrasing these same claims in a guise of ineffective assistance of counsel, which is also procedurally barred. *See Arbelaez, supra,* at 915 *(citing Valle, supra,* at 1336 n. 6); *Johnson, supra,* at 207; *Kight, supra,* at 1066; *Medina, supra,* at 293; *Kelly, supra,* at 759; *Blanco, supra,* at 1377; *Simpson, supra,* at 314; *Sireci, supra,* at 119. Further, since the Florida Supreme Court found the admittance of the tapes and the denial of severance proper, counsel cannot be deemed ineffective for failing to raise futile arguments. *See Harvey v. Dugger,* 656 So. 2d 1253, 1255 (Fla. 1995); *Swafford v. Dugger,* 569 So. 2d 1264, 1266 (Fla. 1990); *King v. Dugger,* 555 So. 2d 355, 357-58 (Fla. 1990); *Magill v. State,* 457 So. 2d 1367, 1370 (Fla. 1984). Second, regarding the request for co-counsel, this is also an issue that could have or should have been raised on appeal rephrased in the guise of ineffectiveness. Hence, it is barred. Further, the defendant does not allege any actions or omissions of counsel that fell below the reasonable standard, *i.e.,* the defendant alleges that counsel repeatedly requested co-counsel. Thus, it is also insufficient.

(R484-5). Those rulings are correct, are in accord with long-settled Florida law, and should not be disturbed.

To the extent that further discussion of this claim is necessary, this claim falls into the same category as sub-claim B, above. It stands reason on its head to suggest that the trial court is required to conduct an evidentiary hearing on a claim of ineffectiveness when the underlying substantive claim was decided on direct appeal. At the most basic level, the doctrines of *stare decisis* and *res judicata* foreclosed the trial court from granting relief, and an evidentiary hearing would have served no purpose unless the trial court is authorized to reverse a decision of this Court. That is not, and has never been, the law. Farina's argument has no basis in law or reason, and should be rejected.

V. THE "LEGAL CLAIMS" WERE PROPERLY DECIDED

On pages 65-73 of his brief, Farina raises eight (8) separately denominated claims relating to the constitutionality of the Florida death penalty act. These claims were raised in the trial court as Grounds VI, VII, VIII, IX, X, XI, and XIII. (R485-493). The trial court denied relief on these claims on procedural bar grounds, stating:

Ground VI: The defendant claims that Florida's capital sentencing scheme is unconstitutional on its face and as applied for failure to prevent the arbitrary and capricious imposition of death, and for violating the constitutional guarantees prohibiting cruel and unusual punishment, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. The defendant alleges that execution by electrocution imposes physical and psychological torture, which constitutes cruel and unusual punishment. The defendant alleges that the Florida death sentencing structure fails to provide any standard of proof, and does not have the independent reweighing of aggravating and mitigating circumstances. The defendant contends that the aggravating circumstances in Florida have been applied in a vague and inconsistent manner, and the jury received vague instructions. The defendant also asserts that Florida law creates a presumption of death in every felony murder case. The state responds that these claims were, or could have or should have, been raised on direct appeal. Thus, they are procedurally barred. The state alternatively responds that the claims lack merit. This Court agrees with the state. The defendant raised numerous constitutional challenges to Florida's death penalty statute on appeal, and these arguments were rejected by the supreme court, including the argument about execution by electrocution. *Farina, supra,* at 55. As the state points out, if the currently raised arguments are not identical to those raised on appeal, they are also procedurally barred as they could have been raised. *See Johnson v. State*, 769 So. 2d 990, 1005, n. 8 (Fla. 2000); *Arbelaez, supra*, at 915; *Pope v. State*, 702 So. 2d 221, 222-24 (Fla. 1998); *Hunter v*. State, 660 So. 2d 244, 252-53 (Fla. 1995); *Fotopoulos v. State*, 608 So. 2d 784, 794 n. 7 (Fla. 1992), *cert. denied,* 508 U.S. 924 (1993). Finally, these claims have all been rejected as without merit by the supreme court. *Hunter, supra,* at 252-53; *Fotopoulos*, *supra* at 794 n. 7; *see* also *Larzelere v*. State, 676 So. 2d 394, 407-08 n. 7 (Fla. 1996).

Claim VII: The defendant asserts that Florida's statute setting forth the aggravating circumstances is facially vague and overbroad in violation of the Eighth and Fourteenth Amendments. The defendant argues further that the facial invalidity was not cured because the jury did not receive adequate guidance. Thus, his death sentence is premised upon fundamental error. The defendant specifically points out that the CCP, prior violent felony, and HAC were vague and overbroad and counsel objected to the statute on these grounds. The defendant also contends that the state failed to prove the aggravators beyond a reasonable doubt. The defendant finally asserts that to the extent counsel did not adequately preserve this issue, he was denied effective assistance of counsel. The state responds that this claim was, or could have or should have been, raised on direct appeal, and that alternatively, the claims lack merit. The state also responds that the ineffective portion is also procedurally barred as rephrasing of a direct appeal claim.

The Court agrees with the state. The defendant raised numerous constitutional challenges to Florida's death penalty statute on appeal, and these arguments were rejected by the supreme court, including the argument about execution by electrocution. *Farina, supra,* at 55. As the state points out, if the currently raised arguments are not identical to those raised on appeal, they are also procedurally barred as they could have. *See Johnson v.* State, 769 So. 2d 990, 1005, n. 8 (Fla. 2000); *Arbelaez, supra* at 915; *Pope v. State,* 702 So. 2d 221, 222-24 (Fla. 1998); *Hunter v. State,* 660 So. 2d 244, 252-53 (Fla. 1995); *Fotopoulos v. State,* 608 So. 2d 784, 794 n. 7 (Fla. 1992), *cert. denied*, 508 U.S. 924 (1993). Finally, although the Court is denying on the basis of the procedural bar, it notes that these claims have all been rejected as without merit by the supreme court. *Hunter, supra,* at 252-53; *Fotopoulos, supra,* at 794 n. 7; *see also Larzelere v. State,* 676 So. 2d 394, 407-08 n. 7 (Fla. 1996).

Claim VIII: The defendant claims that his sentence rests upon an unconstitutionally automatic aggravating circumstance in violation of *Stringer v. Black, Maynard v. Cartwright, Hitchcock v. Dugger,* and the Sixth, Eighth, and Fourteenth Amendments. The defendant contends that the jury was instructed, and the Court found, that the murder was committed during the course of a robbery. The defendant also contends that counsel objected to the instruction on the felony murder aggravating factor, but to the extent counsel failed to propose a constitutionally adequate instruction and provide appropriate legal argument, counsel was ineffective. The defendant contends that the use of this aggravator was illusory and an automatic aggravator. The state argues that this claim has no basis in fact as the Court did not find that aggravator.

This Court agrees with the state. This claim is conclusively refuted by the record and warrants no relief. The Court did not find that the murder was committed during the course of a robbery. *Farina, supra* at 48 (showing that the Court found the murder was committed for pecuniary gain). Furthermore, regarding the jury instruction portion of this claim, it is a claim that could have or should have been raised on direct appeal, and is also rephrased in the guise of ineffective assistance. Thus, it is procedurally barred. *See Arbelaez v. State,* 775 So. 2d 909, 915 (Fla. 2000); *see also Garcia v. State,* 622 So. 2d 1325, 1326, n. 5 (Fla. 1993). Although denying due to the procedural bar, this Court notes that this automatic aggravator argument has been found without merit by the supreme court. *See White v. State,* 403 So. 2d 331 (Fla. 1981), *abrogation recognized, on other grounds, Holland v. State,* 773 So. 2d 1065, 1078 (Fla. 2000); *Teffeteller v. Dagger,* 734 So. 2d 1009, 1016, n. 9 (Fla. 1999) *(citing Teffeteller v. State,* 439 So. 2d 840, 846 (Fla. 1983)); *Johnson v. State,* 660 So. 2d 637, 647 (Fla. 1995) *(citing Lowenfield v. Phelps,* 484 U.S. 231 (1988); and *Stewart v. State,* 588 So. 2d 972 (Fla. 1991), *cert. denied,* 503 U.S. 976 (1992)).

Claim IX: The defendant claims that the CCP aggravator is unconstitutionally vague, his sentencing jury was improperly instructed on CCP, which as a matter of law did not apply to his case, in violation of the Eighth and Fourteenth Amendments. The defendant contends that the Court instructed the jury that they could consider that "the crime for which the defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." The defendant states that counsel objected to the jury being instructed on CCP. The defendant contends that the instruction given was not in accordance with the limiting construction by the supreme court. The defendant also contends that to the extent counsel failed to adequately object, he received ineffective assistance of counsel. The state argues that this issue is procedurally barred as it was, or could have or should have been, raised on direct appeal. The state alternatively argues that the claim is without merit.

This Court agrees with the state. This claim is procedurally barred, as it was a direct appeal claim. *Farina, supra,* at 54. As the state points out, if the currently raised arguments are not identical to those raised on appeal, they are also procedurally barred as they could have been raised. *See Johnson, supra,* at 1005 n. 8; *Arbelaez, supra,* at 915; *Pope, supra,* at 222-24. Finally, although denying on the basis of procedural bar, this Court notes that the claim has been rejected as without merit by the supreme court where the facts clearly show CCP under any definition. *Larzelere, supra,* at 403; *see also Farina, supra,* at 54.

Claim X: The defendant claims that his jury was improperly instructed on the HAC aggravator in violation of *Espinosa v. Florida, Stringer v. Black, Maynard v. Cartwright, Hitchcock v. Dugger,* and the Eighth and Fourteenth Amendments. The defendant contends that the Court did not give the instruction approved in *State v. Dixon,* 233 So. 2d 1, 9 (Fla. 1973). Thus, the jury was

not instructed that they must find beyond a reasonable doubt that he intended his actions to be HAC. Hence, the instruction was unconstitutionally vague. The defendant also asserts that the state failed to prove HAC beyond a reasonable doubt. The defendant states that counsel objected to HAC as an aggravator and the vagueness argument was presented to both the trial and supreme courts. The defendant contends that any failure to adequately raise this issue is ineffective assistance. The state argues that this claim is procedurally barred as a claim that could have or should have been raised on direct appeal. The state also argues that the jury was instructed in accord with settled law, hence counsel cannot be deemed ineffective for not objecting to a jury instruction that correctly states the law. The state finally contends that Florida law is clear that there is no intent element to HAC.

This Court agrees with the state. This issue is procedurally barred as it could have or should have been raised on appeal. *Harvey v. Dugger,* 650 So. 2d 987 (Fla. 1995); *Reed v. State,* 640 So. 2d 1094 (Fla. 1994) (holding that postconviction claim that jury instructions concerning aggravating circumstances in capital murder prosecution were unconstitutionally vague was procedurally barred by accused's failure to object to instructions at trial or to raise issue on direct appeal); *White v. Dugger,* 565 So. 2d 700 (Fla. 1990) (holding that prisoner convicted of capital murder was procedurally barred from raising claim that jury was improperly instructed concerning aggravating factors; that claim should have been raised on direct appeal had it been properly preserved). As such, the rephrasing of this claim in the guise of ineffective assistance of counsel is also barred. *Arbelaez, supra,* at 915. Further, although denying on the procedural bar, this Court notes that the claim has been rejected as without merit by the supreme court where the facts clearly show HAC under any definition. *Chandler v. State,* 634 So. 2d 1066, 1069 (Fla. 1994); *Farina, supra,* at 53; *see also Lugo v. State,* 845 So. 2d 74 (Fla. 2003) ("The

`intention of the killer to inflict pain on the victim is not a necessary element of the (HAC] aggravator."' (citing *Guzman v. State,* 721 So. 2d 1155, 1160 (Fla. 1998)).

Claim XI: The defendant claims that his jury was misled by comments, questions, and instructions. that unconstitutionally and inaccurately diluted the jury's sense of responsibility towards sentencing in violation of the Eighth and Fourteenth Amendments. The defendant also claims that to the extent that this issue was not properly litigated at trial or on appeal, he received ineffective assistance. The defendant contends that the Court committed *Caldwell v. Mississippi,* 472 U.S. 320 (1985), error in instructing the jury that its sentence was merely advisory and repeated references to the jury's decision as a recommendation. The defendant urges that the state repeated these terms over counsel's objections. The state argues that this claim is procedurally barred as it was, or could have or should have been, raised on appeal. The state argues alternatively that the claim lacks merit.

This Court agrees with the state. This claim is procedurally barred as it was or could have or should have been raised on direct appeal. *Farina, supra,* at 55; *Harvey, supra,* at 987; *Reed, supra,* at 1094; *White, supra*, at 700. As such, the rephrasing of this claim in the guise of ineffective assistance of counsel is also barred. *Arbelaez, supra,* at 915. Moreover, although denying on the basis of the procedural bar, this Court notes that these claims have been held without merit when the Court has read the standard jury instructions. *Burns v. State,* 699 So. 2d 646, 654 (Fla. 1997) ("We have recognized that *Tedder* notwithstanding, the standard jury instruction fully advises the jury of the importance of its role and correctly states the law."); *Johnson v. State,* 660 So. 2d 637, 647 (Fla. 1995) (finding no merit to defendant's argument that Florida's jury instructions denigrate the role of the jury in violation of *Caldwell) (citing Combs v. State,* 525 So. 2d 853

(Fla. 1988); *Grossman v. State,* 525 So. 2d 833 (Fla. 1988), *cert. denied,* 489 U.S. 1071 (1989)); *Sochor v. State,* 619 So. 2d 285, 291 (Fla. 1993) ("Florida's standard jury instructions fully advise the jury of the importance of its role and do not violate *Calchvell."); see also Johnston v. Singletary,* 162 F.3d 630, 643-44 (11th Cir. 1998) *(citing Davis v. Singletary,* 119 F.3d 1471, 1482 (11th Cir. 1997), *cert. denied,* 523 U.S. 1141 (1998)). Therefore, counsel cannot be deemed ineffective for failing to raise futile arguments. *Harvey,* 656 So. 2d at 1258; *Swafford,* 569 So. 2d at 1266; *King,* 555 So. 2d at 357-58; *Magill,* 457 So. 2d at 1370. In addition, any claims of ineffective appellate counsel are not proper in a 3.850 motion. *See Davis v. State,* 789 So. 2d 978, 981 (Fla. 2001); *Rutherford v. Moore,* 774 So. 2d 637, 643 (Fla. 2000).

Claim XIII: Defendant claims that the Florida death sentencing statute, as applied, is unconstitutional under the Sixth, Eighth, and Fourteenth Amendments because the aggravating circumstances were neither noticed nor proven beyond a reasonable doubt to a unanimous jury. The defendant raises arguments based on the *Apprendi v. New Jersey,* 540 U.S. 466 (2000), and *Ring v. Arizona,* 536 U.S. 584 (2002), decisions. The defendant contends that his judgments and sentences of death must be vacated as death is not within the maximum penalty for a conviction of first degree murder. The defendant also contends that the role of the jury in Florida's capital sentencing scheme neither satisfies the Sixth Amendment, nor renders harmless the failure to satisfy *Apprendi* and *Ring,* as the jury does not make findings of fact regarding the aggravators, *i.e,,* elements of capital murder. The defendant also contends that the jury's advisory recommendation is not based on proof beyond a reasonable doubt. The defendant asserts that an unanimous 12-member jury verdict is required in capital cases under U.S. constitutional common law and Florida constitutional law. The defendant asserts that the harmless error doctrine cannot be applied to deny relief regarding an unanimous jury verdict.

The defendant finally asserts that his death sentence violates the state and federal constitutions because the elements of the offense necessary to establish capital murder, *i.e.,* the aggravating circumstances, were not charged in the indictment. The state argues that this claim is procedurally barred as it could have or should have been raised on direct appeal. The state alternatively argues that the Florida Supreme Court has consistently held that unlike *Arizona*, the statutory maximum sentence for first degree murder in Florida is death. Thus, there is no legal basis for this claim. Finally, the state argues that the aggravating circumstance that the defendant had previously been convicted of a violent felony, by definition, falls outside the reach of *Apprendi* and *Ring.* As such, *Apprendi* and *Ring* are inapplicable to the instant case.

This Court agrees with the state. First, it has been held that an *Apprendi* claim is procedurally barred if not properly preserved for review. *See Barnes v. State,* 794 So. 2d 590 (Fla. 2001); *McGregor v. State,* 789 So. 2d 976, 977 (Fla. 2001). Nor is the *Apprendi* claim a retroactive, fundamental change in the law. *Hughes v. State,* 826 So. 2d 1070 (Fla. 1st DCA 2002), *rev. granted by,* 837 So. 2d 410 (Fla. 2003). Thus, this claim is procedurally barred. Second, the Florida Supreme Court, recently and consistently, has held that these types of arguments, in light of *Ring,* are without merit as the maximum penalty in Florida for first degree murder is death. *Porter v. Crosby,* 840 So. 2d 981 (Fla. 2003) *(citing Mills v. Moore,* 786 So. 2d 532, 536-37 (Fla. 2001); and *Mann v. Moore,* 794 So. 2d 595, 599 (Fla. 2001)); *King v. Moore,* 831 So. 2d 143 (Fla. 2002) ("Although *King* contends that he is entitled to relief under *Ring,* we decline to so hold. The United States Supreme Court in February 2002 stayed *King's* execution and placed the present case in abeyance while it decided *Ring*. That Court then, in June 2002, issued its decision in *Ring,* summarily denied King's petition for certiorari, and lifted the stay without mentioning *Ring* in the King order. The Court did not direct the Florida Supreme.

Court to reconsider *King* in light of *Ring.") (citing Rodriduez De Quijas v. Shearson/American Express,* 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.")); *Bottoson v. Moore,* 833 So. 2d 693 (Fla. 2002) (same); *see also Banks v. State,* 842 So. 2d 788 (Fla. 2003) ("In *Bottoson,* we rejected the type of constitutional challenge Banks presents in this case. We again reject this claim."); *Grim v. State,* 28 Fla. L. Weekly S247 (Fla. Mar. 20, 2003) (same); *Jones v. State,* 845 So. 2d 55 (Fla. 2003) (same); *Kormondy v. State,* 845 So. 2d 41 (Fla. 2003) (same); *Doorbal v. State,* 837 So. 2d 940, 963 (Fla. 2003) (same); *Anderson v. State,* 28 Fla. L. Weekly S51 (Fla. Jan. 16, 2003) (same); *Conahan v. State,* 844 So. 2d 629 (Fla. 2003) (same); *Spencer v. State,* 842 So. 2d 52 (Fla. 2003) (same); *Lucas v. State,* 841 So. 2d 380 (Fla. 2003) (same); *Fotopoulos v. State,* 838 So. 2d 1122, 1136 (Fla. 2002) (same); *Bruno v. Moore,* 838 So. 2d 485, 492 (Fla. 2002) (same); *Marquard v. State,* 27 Fla. L. Weekly S973 (Fla. Nov. 21, 2002) (same); *Chavez v. State,* 832 So. 2d 730, 767 (Fla. 2002) (same).

Finally, the Florida Supreme Court has held that the same type of aggravator as in the defendant's case involves factors that were submitted to a jury and found beyond a reasonable doubt, hence not in violation of *Ring* or *Apprendi. Doorbal,* 837 So. 2d at 963 ("Of note, Doorbal argues that his death sentences were unconstitutionally imposed because Florida's capital sentencing scheme violates the United States and Florida constitutions by failing to require that aggravating circumstances be enumerated and charged in the indictment and by further failing to require specific, unanimous jury findings of aggravating circumstances. These arguments must fail because here, one of the aggravating circumstances found by the trial judge to support the sentences of death was that

Doorbal had been convicted of a prior violent felony, namely the contemporaneous murders of Griga and Furton, and the kidnapping, robbery, and attempted murder of Schiller. Because these felonies were charged by indictment, and a jury unanimously found Doorbal guilty of them, the prior violent felony aggravator alone clearly satisfies the mandates of the United States and Florida constitutions, and therefore imposition of the death penalty was constitutional."); *Farina, supra,* at 48 ("the trial judge found five aggravating factors: (1) defendant was previously convicted of another capital felony or felony involving use or threat of violence based upon the attempted murders of the other restaurant employees;"); *see also*, *Apprendi*, 530 U.S. at 490 *("[o]ther than the fact of a prior conviction,* any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt.") (emphasis added); *Searles v. State,* 816 So. 2d 793 (Fla. 2d DCA 2002) (holding that when the jury finds that defendant committed DUI causing great bodily harm, and the court adds victim injury points that result in a sentence beyond the statutory maximum, the jury's finding is sufficient to avoid violating *Apprendi); cf. Banks,* 28 Fla. L. Weekly at S253 ("Additionally, it should be noted that the trial court found as aggravating factors that Banks had been previously convicted of a violent felony and that the murder was committed during the course of a felony. Both factors involve circumstances that were submitted to the jury and found to exist beyond a reasonable doubt."); *Grim,* 28 Fla. L. Weekly at S247 ("The aggravating circumstances which were present in this case included multiple convictions for prior violent felonies and a contemporaneous felony of a sexual battery, both of which were found unanimously by a jury."); *Jones,* 28 Fla. L. Weekly 5140 ("Additionally, two of the aggravating circumstances present here were that Jones had been convicted of a prior violent felony, and that the instant murder was committed while Jones was engaged in the commission of a robbery and burglary, both of

which were charged by indictment and found unanimously by a jury.”).

Farina asserts that these claims are raised merely to preserve them for federal habeas review -- this Court should explicitly affirm the denial of relief on procedural bar grounds in order to protect the integrity of Florida’s long-settled procedural rules. However, as the trial Court found as an alternative basis for the denial of relief, each claim contained herein has been rejected on the merits by this Court. And, with respect to the *Ring v. Arizona* claim set out on pages 70-73 of Farina’s brief, this Court held, in *Johnson,* that *Ring* is not retroactively applicable to cases, such as this one, which were final before *Ring* was decided. *Johnson v. State*, 904 So. 2d 400 (Fla. 2005).[15]

VI. THE CUMULATIVE ERROR CLAIM

On pages 73-74 of his brief, Farina argues that he is entitled to relief based upon “cumulative error” occurring during the course of his trial, appeal, and post-conviction proceedings. This claim, despite its pretensions, is nothing more than an attempt to relitigate claims that have

[15] *Johnson* was decided on April 28, 2005. Farina’s brief, which was filed on May 27, 2005, does not acknowledge the *Johnson* decision. Likewise, in *Schriro v. Summerlin*, 542 U.S. 348 (2004), the United States Supreme Court held that *Ring* is not retroactive.

been litigated and decided on the merits. The trial court denied relief, stating:

> **Claim XII:** The defendant contends that the cumulative effect of many unidentified errors on appeal and those pointed out in the motion to vacate the judgment and sentence (but not pointed out in this ground) deprived him of a fair trial. The nonspecific argument is denied. A "defendant's failure to fully brief and argue specific points on appeal constitutes a waiver of these claims." *Tompkins v. State,* So.___2d___,28 Fla. L. Weekly 5767, 2003 WL 22304578 (Fla. October 9, 2003). The same type of omission constitutes a waiver in the trial court. In any event, there were no errors, individually or collectively that deprived the defendant of a fair trial or sentencing.

(R490). That disposition is correct, and should not be disturbed.

To the extent that further discussion is necessary, Farina's claim, on page 74 of his brief, that the trial court should have considered "any error deemed harmless on direct appeal," that argument is based on a false interpretation of this Court's direct appeal and resentencing decisions. The true facts are that this Court decided each issue against Farina on the merits, rather than based upon a harmless error analysis. *Farina v. State*, 801 So. 2d 44 (Fla. 2001); *Farina v. State*, 679 So. 2d 1151 (Fla. 1996).[16] Because no error was "deemed harmless" on

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[16] On direct appeal, this Court did engage in a harmless error analysis of the confession issue as an alternative to

direct appeal to begin with, there are no such "errors" that can be considered as "cumulative error."[17] The trial court properly denied relief on the cumulative error claim, and that decision should be affirmed in all respects.

CONCLUSION

WHEREFORE, based upon the foregoing arguments and authorities, the Appellee submits that the denial of post-conviction relief should be affirmed.

Respectfully submitted,

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the denial of relief on the merits. *Farina v. State*, 679 So. 2d at 1157.

[17] The State does not concede that an error found harmless on direct appeal is properly a part of any "cumulative error" -- after all, if the error was harmless, it cannot have been prejudicial. Farina's argument seems to be an attempt to gain a second bite at the apple using a theory that is akin to recasting a substantive claim as one of ineffectiveness of counsel.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **Marie-Louise Samuels Parmer and David D. Bass,** Assistant CCRC - Middle, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619 on this ____ day of August, 2005.

____
Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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