IN THE SUPREME COURT OF FLORIDA

DAVID WYATT JONES,

Appellant,

vs. **Case No. SC 04-2217**

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, David Wyatt Jones, appeals from the denial of his Rule 3.851 postconviction relief motion by the Circuit Court of the Fourth Judicial Circuit, Duval County, Florida, following an evidentiary hearing. The "Initial Brief Of Appellant" will hereinafter be cited to as "IB" with the applicable page.[1] References to appellant will be to "Jones" or "appellant," and references to appellee will be to "the State" or "appellee."

The record on appeal consists of Volumes I-IV (pleadings, orders, evidentiary hearing transcript[2]), Supplemental Volume I (transcript of Huff[3] hearing, etc.), as well as the Index. Reference will be made to the postconviction record as follows: "PCR.R." and "PCR.Supp.," respectively, with citation to any applicable volume and page. In addition, based on the nature of appellant's claims for relief, Appellee relies upon the direct appeal record, which consists of a total of twenty-six volumes. The State therefore respectfully requests that the Court take judicial

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[1] The copy of appellant's initial brief differs in page length from that currently posted on this Court's web site and thus apparently provided by appellant to the Court. Accordingly, and because the State relies upon the service copy received from Jones in responding thereto and thus citing to his brief, a copy of that brief is contemporaneously submitted in Appendix To State's Answer Brief.

[2] A copy of the evidentiary hearing, however, is attached to the "Order Denying Defendant's Amended Motion For Post Conviction Relief" as Exhibit A. PCR.R.-III, at 447-PCR.R.-IV, at 710.

notice of its file in appellant's direct appeal, cause number 90,664. Reference to the direct appeal record will be to the record ("R.") and the trial transcript ("T.Tr."), with the applicable volume and page citations.

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

STATEMENT OF THE CASE AND OF THE FACTS

Original Trial Proceedings

Jones was charged by indictment on February 16, 1995, with the first-degree murder, kidnapping, and robbery of Lori McRae. R.-I, at 3-4. Jones pled not guilty to the charges and proceeded to a jury trial. The jury, on March 21, 1997, following a five-day trial, found Jones guilty as charged. R-IV, at 679; Tr.-XXI, at 1516-1517. The facts underlying petitioner's convictions, as found by this Court on direct appeal, are as follows:

> David Jones, who was thirty-six years old at the time of the crime, was convicted of the first-degree murder of Lori McRae. The evidence at trial revealed that McRae was abducted from a parking lot in the early morning hours of January 31, 1995. Her body was found abandoned in a wooded area in a neighboring county. The most likely cause of death was ligature strangulation.
>
> The evidence revealed that over the two days following her abduction, Jones stole $600 from McRae's ATM account. The first withdrawal, for $300, occurred at 3:09 a.m. on the morning of the murder. Jones was captured on the film of the bank's security camera while making that transaction. Jones eventually attempted over 100 withdrawals in the next two days, but only eleven were successful. Jones was apprehended on February 1 near an ATM machine that police were staking out. At the time, he was driving McRae's Chevy Blazer.
>
> When Jones was arrested he had bloody scratches on his face and reddish stains on his jeans, which later DNA testing revealed "almost conclusively" was McRae's blood. Traces of blood were found in the Blazer as well. The State also presented the testimony of two automobile detailers who testified that Jones attempted to have the

interior of the Blazer cleaned on the day after McRae's disappearance.

After his arrest, Jones was transported to police headquarters and questioned by Detective Parker of the Jacksonville Sheriff's Office, the lead investigator in the case. Jones was properly advised of his rights under Miranda, n1 and initially denied his involvement in McRae's disappearance. He eventually terminated the interview, invoking his right to remain silent and asking to speak with his attorney. Twenty days later, Jones confessed to Detective Parker that he committed the murder and accompanied police to the location where he had hidden McRae's body. Further details of the events surrounding Jones' confession will be discussed in the analysis portion of the opinion.

McRae's body was badly decomposed; thus, an exact determination of the cause of her death was difficult. The medical examiner opined that she died as a result of "ligature strangulation." Her body exhibited multiple bruises and defensive wounds, and there was a blood stain on her jacket.

There was a rope tied around McCrae's [sic] ankles, a cord tied around her neck, and on top of the cord a sleeve from a black sweater. The sleeve from the sweater matched a sweater owned by Jones' wife, and rope found in the trunk of Jones' automobile was of the same type as the rope around McRae's ankles. McRae had on jeans, which were unzipped, exposing her pubic area and buttocks. Whether McRae had been sexually abused could not be determined due to decomposition of the genital area. McRae also had on a blouse, which was missing some buttons. Two buttons later found in McRae's vehicle were from that blouse.

n1 Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).

The jury returned a verdict of guilt of first-degree murder,

robbery, and kidnapping. . . .

* * * * *

Jones v. State, 748 So. 2d 1012, 1016 (Fla. 1999), cert. denied, 530 U.S. 1232 (2000).

On April 10, 1997, the jury returned its advisory verdict for death by a vote of 9-3. R-V, at 858; Tr.-XXVI, at 2120. The parties filed memoranda concerning sentencing, R.-VI, at 989, 1020, 1034, and the trial court held a hearing on April 16, 1997, thereafter sentencing Jones on April 25, 1997. See R.-VI, at 1135. In regard to sentencing, as summarized by this Court,

> . . . . [d]uring the penalty phase, several witnesses testified regarding Jones' addiction to crack cocaine, use of other drugs, and the effect of these drugs on Jones' personality. According to the testimony, Jones began "drinking and drugging" when he was fourteen or fifteen years old. Jones' wife reported that he began serious abuse of illegal substances in 1986, when he began "shooting up" cocaine and dilaudid. He began smoking crack cocaine in 1994, quickly escalating to the point where he spent all his time seeking and smoking crack, often neglecting to eat, bathe, or sleep. Jones' wife testified that they financed their crack habit with extensive shoplifting.
>
> Defense counsel also called Drew Edwards to testify as an expert in the penalty-phase proceedings. Edwards offered his testimony as an expert regarding the effect of cocaine on the brain. Edwards testified that Jones was a crack addict, suffering from these symptoms. Edwards made clear that he did not believe addiction to cocaine is an excuse for crime, yet he admitted that a cocaine addict would suffer impairment of his ability to conform his conduct to the requirements of the law. Edwards testified that despite his addiction, Jones would have always known the difference between right and

wrong.

Another defense expert testified that Jones has an I.Q. of 78, placing him between the fifth and ninth percentiles of the population. The expert testified that standardized tests revealed that Jones had little ability to control his impulses, but admitted that his motivation to get the right answer during his testing appeared to "vary." She opined that he was able to conform his conduct to the requirements of the law, "provided he's not impaired in some other way."

The penalty-phase testimony also revealed that Jones was previously convicted of the murder of Jasper Highsmith in 1986 in Duval County, Florida. The murder was committed after Jones escaped from jail where he was being held on a burglary charge. Jones was found guilty of second-degree murder and sentenced to twenty years in prison. He was released from prison in 1992, after serving only six years. According to the presentence investigation report, not submitted to the jury, Jones' criminal history also included convictions for disorderly conduct, burglary, drug possession, DUI, resisting arrest, and shoplifting.

At the conclusion of the penalty-phase proceedings, the jury recommended the death penalty by a vote of nine to three. The trial court accepted the jury's recommendation and sentenced Jones to death. The trial court found the following four aggravators: (1) that the murder was committed during the course of a kidnapping and a robbery; (2) that Jones had previously been convicted of a violent felony (murder); (3) that the murder was heinous, atrocious or cruel (HAC); and (4) that the murder was committed to avoid arrest. The court found the following statutory mitigators, which it gave "some weight": (1) that Jones' capacity to appreciate the criminality of his conduct was substantially impaired; and (2) that the capital felony was committed while Jones was under the influence of extreme mental or emotional disturbance.

The court also found the following nonstatutory mitigators, which it gave "some weight": (1) that Jones was a crack addict; (2) that Jones is the father of a teenaged son n2 and was a good worker and

> good provider when he was not using drugs on a regular basis; and (3) that jail records after the arrest for the McRae murder indicated that he had exhibited signs of a "psychotic episode." However, as the trial court found in its sentencing order, records one day after the date of Jones' arrest indicated that he showed no signs of mental illness, and no evidence was presented that he was incompetent to proceed or insane at the time of the crime.
>
> n2 Jones' mother has had custody of Jones' son since shortly after the child's birth.
>
> * * * * *

Jones, 748 So. 2d at 1016-1017.

Direct Appeal

Following entry of judgment of conviction and sentence, Jones filed his notice of appeal on May 16, 1997, R.-VI, at 1160, and subsequently raised the following thirteen issues as error on direct appeal:

> (1) Whether his confessions introduced against him were obtained in violation of *Edwards v. Arizona*, 451 U.S. 477, 68 L. Ed. 2d 378, 101 S. Ct. 1880 (1981); (2) whether the defendant is entitled to a new trial based on Detective Parker's testimony regarding Jones' invocation of his right to remain silent; (3) whether Detective Parker's reference to a racial slur used by the defendant during his statement to police and reference to a spider tatoo on his arm allegedly linked with unrelated racial killings require a new trial; (4) whether the evidence was sufficient to establish premeditated murder; (5) whether the trial court committed reversible error in refusing to allow the testimony, during the penalty phase, of a witness who would testify about the impact of crack cocaine; (6) whether the admission of details and photographs regarding the defendant's prior murder conviction requires a new penalty-phase proceeding; (7) whether the trial court's refusal to allow

> the defendant's prior counsel to testify regarding a psychiatric report prepared in 1986 finding the defendant incompetent requires a new trial; (8) whether the evidence supports the avoid arrest aggravator; (9) whether the trial court erred in denying Jones' counsel's motion to withdraw prior to the penalty phase proceeding; (10) whether the trial court erred in allowing the State to introduce victim impact evidence; (11) whether a new penalty phase is required for the trial court's substitution of "or" for "and" in the HAC instruction to the jury, and whether the HAC instruction is unconstitutional; (12) whether the trial court erred in instructing the jury that an aggravating circumstance could be based on the felony underlying the felony-murder conviction; and (13) whether the death penalty is unconstitutional.

Jones, 748 So. 2d at 1017 n.3.

This Court affirmed appellant's sentences in an opinion released on November 12, 1999. Id. at 1012. The United States Supreme Court denied Jones' petition for writ of certiorari on June 12, 2000. Jones v. Florida, 530 U.S. 1232 (2000).

Rule 3.850/3.851 Proceedings

On June 12, 2001, Jones through counsel filed his "Motion To Vacate Judgment Of Conviction And Sentence With Special Request For Leave To Amend." PCR.R.-I, at 1. Appellant thereafter filed his "Amended Motion To Vacate Judgment Of Conviction And Sentences" on April 28, 2003. Id. at I-110. The State filed its "Response To 'Amended Motion To Vacate Judgment Of

Conviction And Sentences'" on June 6, 2003. PCR.Supp. at 57. Appellant raised the following issues in his amended motion for postconviction relief: (I) ineffective assistance of trial counsel at the guilt phase of trial[4]; (II) ineffective assistance of

[4] Within that broad claim were numerous specific allegations of ineffectiveness, as is the case here on appeal. See IB, at 39-67. The subclaims before the trial court appeared to include the following: counsel failed to object, move to strike, or seek a curative instruction in regard to venireman Hyers, PCR.R.-I, at 113¶7; counsel failed to challenge the prosecutor's presentation of victim impact evidence during voir dire, id. at 114¶8, 115¶¶11, 12; counsel was ineffective in respect to the jury's understanding of a life sentence, id. at 114¶¶9-10, 115¶12; counsel failed "to eliminate obviously pro-death penalty jurors," id. at 115-116¶13; trial counsel failed to explain to the jury why defendant was receiving psychotropic medication, to evaluate the propriety of the diagnosis and procedures involved in the use of such medications, or to challenge any statements made by defendant on competency grounds, id. at 116¶14, 117¶16; counsel failed to properly investigate and litigate defendant's competency to stand trial and in relation to the statements he made to police, id. at 116-117¶15, 117-118¶¶17-19; counsel failed to properly present mitigating evidence of defendant's mental condition, failed to develop a trusting relationship with defendant, and failed to properly investigate Mr. Trout, id. at 118¶19; counsel failed to object to the State's opening statement that the victim was sexually assaulted, id. at 119¶20; counsel failed to object to the State's guilt-phase argument that the crime was heinous, atrocious, and cruel, id. at 119¶21; counsel failed to object to a reference to a racial slur made by the defendant, id. at 119¶22; counsel failed to object to the victim's husband's testimony that was victim impact testimony, id. at 120¶23; the fact that counsel elicited evidence of a non-charged offense, id. at 120-121¶¶24-25, 125¶39; counsel failed to object to the State eliciting evidence of a non-charged offense, id. at 121¶26, 123¶32; counsel was ineffective in the manner it offered the psychotropic medication instruction, id. at 121¶27; counsel failed to impeach Amy Hudson, id. at 121-122¶28; counsel failed to properly investigate Jackie Doll Jones, id. at 122-123¶¶29-31; counsel's cross-examination of Diane Hanson reinforced the allegations of a non-charged crime, id. at 123¶33; counsel failed to present evidence that at the time of his statements to police, defendant was under the influence of drugs, id. at 123¶34; counsel should have retained a neuro-pharmacologist and/or used a mental health professional to

trial counsel at the penalty phase of trial[5]; (III) violation of Ake v. Oklahoma, 470

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explain the effects of drugs and withdrawal upon defendant, id. at 123-124¶¶35-36; counsel rejecting the State's offer for the court to issue a curative instruction after Detective Parker testified that defendant invoked his right to silence, id. at 124¶37; counsel failed to object to the prosecutor's closing argument that the victim's shoes were untied because defendant was trying to get her shoes off to take her pants off, id. at 124-125¶38; counsel failed to object to the remark, attributed to defendant, that "I don't give a fuck about that woman," id. at 125-126¶40; counsel failed to present mental health evidence, id. at 126-127¶¶41-46; cumulative error of counsel's errors, id. at 127-128¶47.

[5] Similarly within that broad claim were numerous specific allegations of ineffectiveness, as is the case here on appeal. See IB, at 67-94. The subclaims below appeared to include the following: counsel failed to properly investigate defendant's mental health background for mitigation evidence, PCR.R.-I, at 132-133¶¶12-15, 136-137¶¶25-29; counsel failed to object to the State's penalty phase "opening argument," id. at 133-134¶17; counsel failed to object to the State's reliance upon facts and hearsay allegations regarding defendant's prior conviction, id. at 133-134¶¶17-18; counsel failed to properly object, investigate and present evidence regarding the prior violent felony, id. at 133-134¶¶17-18; counsel failed to object to the State's opening statement characterizing the defense case as using crack as an excuse, id. at 133-134¶17; counsel failed to properly object to the admission of victim impact evidence, id. at 134¶19; counsel failed to properly present the testimony of Jackie Doll Jones, id. at 134-135¶20; counsel failed to file a formal recusal motion, id. at 135¶21; counsel failed to elicit mitigation evidence from the lay witnesses it did present and failed to present family members to testify, id. at 135¶22, 137-138¶¶31-32, 140-143¶38-46; counsel failed to present available evidence regarding proportionate culpability and the culpability of Mr. Trout, id. at 135-136¶23; counsel failed to subpoena Mr. Eaton, id. at 136¶24; counsel failed to properly investigate defendant's life history, id. at 138¶33, 140¶¶38-39, 143-144¶¶46-47; counsel failed to object to various arguments made by the State during its closing argument, id. at 138-139¶34; counsel failed to "know the law and register objections to violations of Mr. Jones' rights," id. at 144¶50; counsel failed to object to "jury instructions and the improper arguments by the State . . . .", id. at 144¶50; counsel failed to object to the State's improper closing arguments, id. at 144¶51; counsel failed to object to improper jury instructions, id. at 144¶52, and cumulative

U.S. 68 (1985); (IV) Ring v. Arizona, 536 U.S. 584 (2002) renders § 921.141, Fla. Stat., unconstitutional; (V) Improper prosecutorial statements during the penalty phase and trial counsel failed to make proper objections to the improper arguments; (VI) Florida's sentencing scheme is unconstitutional; (VII) Unconstitutional aggravating factor; (VIII) Unconstitutional penalty phase instructions and ineffective assistance for not objecting; (IX) Caldwell v. Mississippi, 472 U.S. 320 (1985) violation; (X) Cumulative error; (XI) Lethal injection is unconstitutional; and (XII) Brady v. Maryland, 373 U.S. 83 (1963) violation and ineffective assistance.

Following a Huff hearing held on August 11, 2003, PCR.Supp., at 1-50, the circuit court issued its "Order Following Huff Hearing" on September 15, 2003, PCR.R.-II, at 242-243, granting a hearing as to Claims I, II, V, and Claim XII, and denying a hearing as to Claims III, IV, and VI thru XI. Id. The hearing was held on December 11, 2003. See id. at III-447 – IV-710. Appellant presented the testimony from the following witnesses: Jonathan Lipman, a neuropharmacologist; Joann Sealey, appellant's mother; Jackie Doll Jones, appellant's wife; Jeff Morrow, an incarcerated friend; John Bowden, an inmate previously housed with appellant; Carlos Jones, appellant's brother; Lewis Buzzell, one of appellant's trial attorneys; and Alan Chipperfield, appellant's other trial attorney. The State did not present

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error of counsel's errors, id. at 145¶54.

additional witnesses but did put into evidence Dr. Lipman's "report" that previously had not been disclosed, admitted as State's Exhibit 1, PCR.R.-III, at 491-492; see id. at II-253-284, as well as requesting that the trial court take judicial notice of its file in Jones' criminal trial, which was granted. Id. at IV-708.

Attorney Alan Chipperfield testified generally that he had been with the Public Defender's Office since 1979 except for a period of three years, id. at IV-669, and had started handling homicide cases in 1983. Id. at IV-670. Respecting appellant's case, Mr. Chipperfield testified that he was mainly responsible for the penalty phase. Id. Lewis Buzzell, appellant's other trial counsel, generally testified that he had worked as an assistant public defender for nineteen years with an unspecified intervening period, see id. at III-565, and that his first capital trial was in 1984. Id. at III-567. In addition, Mr. Buzzell testified that while appellant's case was not originally charged as a murder when it came into the public defender's office, it was immediately assigned to the homicide unit because it was believed it likely would end up as one, and thus they "started working on it right away." Id. at III-577. Upon questioning by the State, Mr. Buzzell agreed that he and Mr. Chipperfield are regarded as two of the most experienced homicide defense attorneys at least in

Jacksonville if not in the entire State of Florida. Id. at IV-631.[6]

Following the evidentiary hearing, the parties filed their post-hearing memoranda.[7] Id. at II-291-386; see also Appendix To State's Answer Brief, Document 2. The circuit court denied appellant's Rule 3.851 amended motion on October 27, 2004. Id. at II-387 - III-446. Attached to the lower court's order is the evidentiary hearing transcript, identified as Exhibit A. Id. at III-447 – IV-710. Jones filed his notice of appeal on November 17, 2004. Id. at IV-718-719.

[6] Additional evidence presented at the evidentiary hearing specific to the particular issues raised on appeal will be discussed below as it relates to that issue.

[7] The record on appeal does not appear to include appellant's closing argument. Appellant had filed a "Motion To Supplement Record" on April 20, 2005, identifying the need to supplement with the Huff hearing transcript and appellant's closing argument filed with the circuit court. The State filed its own motion to supplement on June 8, 2005, also identifying the need to supplement with the Huff hearing transcript, appellant's closing argument, as well as the State's response to the amended motion. This Court granted the motions on June 10, 2005. Review of the Supplemental Volume I, however, reflects that only the Huff hearing transcript and the State's response to the amended motion were filed. See PCR.Supp., at Page I OF I. That supplemental volume was filed July 14, 2005. On November 14, 2005 the State filed its "Second Motion To Supplement" addressing this situation. As that motion is currently pending, Appellee has submitted an Appendix including appellant's written closing argument.

SUMMARY OF THE ARGUMENT

I.

The lower court properly held that trial counsel did not render ineffective assistance of counsel while preparing for and in representing Jones during the guilt phase of trial.

1. Counsel's decision not to strike venireman Hyers was not ineffective. Counsel need not provide a strategic or tactical reason at the evidentiary hearing for his decision where the record refutes any claim of deficient performance, as was found by the trial court. And because the claim in actuality challenges the venire panel, it is defaulted having not been raised on direct appeal.

2. Counsel's lack of objections to the prosecutor's voir dire examination and guilt phase examination of the victim's husband concerning the fact that the victim was a mother was not ineffective. The prosecutor did not therein introduce a non-statutory aggravating circumstance, but validly inquired as to whether the jury could be fair, as well having elicited a biographical fact from the husband that the victim was a mother of three children. Even if counsel should have objected, appellant cannot establish prejudice in light of the overwhelming evidence of guilt. The claims are also procedurally defaulted.

3. Counsel did not perform ineffectively respecting appellant's allegation

that he was not properly medicated both pretrial and at trial. No evidence was presented as to what and if any medication appellant was receiving at those times. The trial court record also reflects that counsel were aware of appellant's need for and treatment with medication and the positive effect that it had upon him. Appellant also failed to demonstrate prejudice concerning the timing in which his requested jury instruction pertaining to receiving psychotropic medication was given to the jury.

4. Counsel's failure to present expert testimony on addiction was not ineffective as such evidence would have opened the door to damaging mental health information. The evidence concerning appellant's actions the night of the murder also refutes his expert testimony presented at the evidentiary hearing that he was incapable of premeditation. And at the very least, the evidence of appellant's guilt of robbery and kidnapping, and the victim's death as a result, thereby constituting felony murder, defeats appellant's claim of prejudice.

5. Counsel's decision not to object to certain evidence and prosecutorial argument concerning the condition in which the victim's body was found was not ineffective. Such matters did not introduce evidence of a non-charged offense thereby constituting a non-statutory aggravating circumstance. The prosecutor may validly argue reasonable inferences from the evidence, and appellant's attempt to

challenge the prosecutor's argument and evidence that was the basis thereto is to circumvent his default, having not raised the underlying issues on direct appeal. And even if counsel should have objected, appellant cannot establish prejudice in light of the overwhelming evidence of guilt.

6. Counsel's lack of objection to the prosecutor's opening statement describing the crime as a "horrible, heinous, atrocious and cruel first degree murder" was not ineffective. The statement was based upon what the evidence would show, proper as an opening statement. And even if counsel should have objected, appellant cannot establish prejudice in light of the overwhelming evidence of guilt.

7. Counsel did not perform ineffectively in failing to object to the introduction of a racial epithet that appellant had previously made while interviewed by law enforcement, where this Court held on direct appeal that the error was harmless beyond a reasonable doubt.

8. Counsel's failure to impeach Amy Hudson and Jackie Doll Jones was not ineffective. Appellant did not establish how Ms. Hudson should have been impeached, and did not present the evidence that he argued trial counsel should have discovered and used to impeach Jackie Doll Jones.

9. Having failed to establish any of his individual claims of

ineffectiveness, appellant's cumulative error claim must fail.

10. Counsel's lack of objection to the State's closing argument was not ineffective where it was based upon the evidence at trial. And even if counsel should have objected, appellant cannot establish prejudice in light of the overwhelming evidence of guilt.

II.

The lower court properly held that trial counsel did not render ineffective assistance of counsel while preparing for and in representing Jones during the penalty phase of trial.

1. Counsel's investigation into mental mitigation was not ineffective though counsel did not shop around for a more favorable expert opinion, and the presentation of such testimony would have opened the door to damaging evidence that counsel did not want to present.

2. Counsel's lack of objection to the prosecutor's opening statement was not ineffective. The statement that the defense would rely upon appellant's drug addiction to mitigate the sentence was based upon what the prosecutor believed the evidence would be, proper in opening statement.

3. Counsel was not ineffective for not presenting certain lay testimony

during the penalty phase, as it was duplicative of evidence presented, contradicted by appellant's own statements made during mental evaluations, or appellant failed to show that counsel knew of or could reasonably have discovered the witness now relied upon.

ARGUMENTS

Standard of Review – Ineffective Assistance of Trial Counsel

Following an evidentiary hearing, this Court has held that "the performance and prejudice prongs are mixed questions of law and fact subject to a de novo review standard but that the trial court's factual findings are to be given deference." Porter v. State, 788 So. 2d 917, 923 (Fla.) (internal citation omitted), cert. denied, 534 U.S. 1004 (2001); see also Stephens v. State, 748 So. 2d 1028, 1031-1033 (Fla.1999).

The standard governing appellant's claims of ineffective assistance of counsel is well-established:

> In order to prevail on a claim of ineffective assistance of counsel, however, a defendant must demonstrate that (1) counsel's performance was deficient and (2) there is a reasonable probability that the outcome of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). As to the first prong, the defendant must establish that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052; *see Cherry v. State*, 659 So.2d 1069, 1072 (Fla.1995). For the prejudice prong, the reviewing court must determine whether there is a reasonable probability that, but for the deficiency, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 695, 104 S.Ct. 2052; *see also Valle v. State*, 705 So.2d 1331, 1333 (Fla.1997). "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." *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052.

Moore v. State, 820 So. 2d 199, 207-208 (Fla. 2002). The standard for establishing ineffective assistance of counsel is, and is supposed to be, "highly demanding." Kimmelman v. Morrison, 477 U.S. 365, 382 (1986). The test for reasonable attorney performance

> 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 . . . . [W]e 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, 1220-1221 (11th Cir. 1992), cert. denied, 514 U.S. 1131 (1995). Finally, counsel's performance is presumed constitutionally adequate, Strickland v. Washington, 466 U.S. 668, 689 (1984), "[r]easoned trial tactics do not amount to ineffective assistance of counsel," Gorby v. State, 819 So. 2d 664, 678 (Fla. 2002), and "[t]he standard is not how present counsel would have proceeded, but rather whether there was both a deficient performance and a reasonable probability of a different result." Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995).

I.

THE POSTCONVICTION MOTION COURT PROPERLY HELD THAT COUNSEL WAS NOT INEFFECTIVE DURING THE GUILT PHASE OF TRIAL.

1. COUNSEL WAS NOT INEFFECTIVE FOR NOT STRIKING VENIREMAN HYERS[8] AND THE RECORD DOES NOT ESTABLISH JURY CONTAMINATION, AND ABSENT ANY ERROR, THERE IS NO BASIS FOR FINDING "CUMULATIVE EFFECT" (responding to B.1.-B.2 of appellant's brief).

According to appellant,

> . . . counsel rendered ineffective assistance of counsel for failing to object, move to strike, or seek a curative instruction regarding potential Juror Hayes' [sic] response in voir dire that she didn't believe she could put aside what she had read in the newspapers about the case and render a fair and impartial verdict.

IB at 39. Appellant's claim apparently rest upon the proposition that if trial counsel at the postconviction relief evidentiary cannot articulate a strategic or tactical reason for how they dealt with a particular situation, then counsel was ineffective. IB at 39-40.

On this issue, the trial court addressed it as follows:

> The Defendant's first sub-claim alleges that counsel rendered ineffective assistance for failing to object, move to strike or seek a curative instruction when potential juror Hyers, answered in response to the State's questioning, that she did not believe she could put aside what she had read in the newspaper and render a fair and impartial

[8] Appellant mistakenly refers to the venireman as Hayes. Compare IB at 39 with PCR.R.-I, at 113¶7.

> verdict. Initially, this Court notes that the veniremen, including Ms. Hyers, were individually questioned concerning pretrial publicity and any potential exposure. (T.T. 21-44.) However, Ms. Hyers did not recall her exposure to pretrial publicity regarding Defendant's case until later during voir dire. (T.T. 146.) Defendant argues that because Ms. Hyers expressed doubts whether she could not set aside what she knew of Defendant's case tainted the entire venire panel and counsel should have objected, moved to strike or sought a curative instruction. Defendant cannot establish error on the part of counsel or prejudice to his defense. Ms. Hyers was not selected to serve on Defendant's jury. (T.T. 485.) Further, the forty-four other potential jurors specifically questioned, and the panel as a whole, stated that they could follow the law and had not prejudged Defendant's case. (T.T. 149-229, 324-400, 407-468 .) Finally, Defendant makes only a conclusory allegation that if the empaneled jurors had the information that Ms. Hyers did "they would surely convict and condemn" Defendant. Conclusory allegations which lack sufficient factual allegations to warrant review may be summarily denied. Ragsdale v. State, 720 So. 2d 203 (Fla. 1998). Accordingly, Defendant has failed to establish that counsel's failure to object, move to strike or seek a curative instruction was erroneous or resulted in prejudice to his defense.

PCR.R.-II, at 389-390.

First, appellant's claim is in actuality a challenge to the petit jury on the basis that it was tainted by venireman Hyers' answers to questions from the prosecutor. The issue should have been -- but was not -- raised on direct appeal.[9] See Valle v. Moore, 837 So. 2d 905, 909-910 (Fla. 2002). The claim, accordingly, is procedurally barred.

In addition, Jones offers no argument or case law to demonstrate that the trial

[9] Compare supra, at 7-8 (quoting Jones, 748 So. 2d at 1017 n.3).

court erred, focusing instead on trial counsel's inability to point to a strategic decision. IB at 39-40. Nor does appellant argue or otherwise provide the relevance of his reference to trial counsel's testimony at the evidentiary hearing that it was "unusual for the jury to be crying when it rendered the death recommendation . . . ." IB at 39.[10] Similarly, appellant's reference to trial counsel's testimony that "he would have preferred to have more peremptory challenges than he was ultimately allowed," IB at 39, is not connected in any way to the allegation of ineffectiveness in respect to venireman Hyers. Finally, appellant also argues that the trial court should have considered this claim "in the context of defense counsel's accumulated failures . . . ." IB at 40-41. As discussed, infra, at 74-75, however, where counsel did not perform deficiently or there is no prejudice, any cumulative analysis by necessity must fail.

Accordingly, the arguments raised under B.1 and B.2 (IB at 39-42) should be denied.

2. COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE BASED UPON HIS LACK OF OBJECTION TO THE PROSECUTOR'S VOIR DIRE EXAMINATION AND GUILT PHASE EVIDENCE THAT THE VICTIM HAD BEEN A MOTHER, AS SUCH EVIDENCE WAS NOT A NON-STATUTORY

[10] Trial counsel actually testified that "at least some of them were crying" when they returned from the jury room at the penalty phase and that in respect to a capital case, while it was not unusual to see jurors become emotional but to "see tears is a little bit unusual. . . ." PCR.R-III, at 573.

AGGRAVATING CIRCUMSTANCE (responding to B.3-B.7 of appellant's brief).

In paragraph 3, appellant argues "that counsel was ineffective for failing to object to the State's introduction of victim impact evidence in voir dire," IB at 42, and in paragraph 4, further argues counsel's ineffectiveness:

> defense counsel stood mute and, thus, acquiesced in the face of the prosecutorial assault on the Eight [sic] Amendment's Constitutional mandate that a death sentence rest upon a reliable finding, beyond a reasonable doubt, of fixed statutory aggravators which outweigh the mitigation established by a preponderance of the evidence. *See eg*, Ring v. Arizona, 536 U.S. 584 (2002).

IB at 44. Under paragraphs 5 and 6, appellant sets forth his argument as to why the trial court reached the wrong result. Specifically, in paragraph 5, appellant states that while Strickland is the applicable standard for reviewing such claims[11],

> . . . if the Eighth Amendment's Constitutional jurisprudence is to be consistently applied, the ad hoc admission of non-statutory aggravators should, Appellant contends, be deemed prejudicial, especially in the context of a case in which the foundations of the death penalty would seem to be infected with a high degree of intentionally planted, yet entirely unsubstantiated, non-statutory aggravation.

IB 44-45. In paragraph 6, appellant argues that the trial court erroneously accepted "the prosecution's maneuver" that the State was "simply trying to ensure an

[11] Appellant first identified the fact that the trial court rejected his position that the ineffectiveness of counsel in respect to the victim impact claim should be reviewed under United States v. Cronic, 466 U.S. 648 (1984), but then acknowledges Florida v. Nixon, 543 U.S. 175 (2005). IB at 44.

impartial panel . . . ." IB at 45. Lastly, under paragraph 7, appellant argues that counsel was ineffective when the prosecutor introduced victim impact evidence during the guilt phase of trial. IB at 45.

The State will first address the ineffective assistance claim specific to voir dire and the arguments thereunder, and then the ineffective assistance claim pertaining to the introduction of victim impact evidence at trial.

a. Voir dire "victim impact" (B.3-B.6)

At issue is the prosecutor's reference during voir dire to the fact that "the victim had three young children," PCR.R.-I, at 114¶8 (citing T.Tr.-XIV, at 151), and question to the venire panel "if the fact that the victim was a mother upsets anyone to the point that they can't serve." Id. at I-115¶11 (citing T.Tr.-XV, at 228).

In addressing this claim and the arguments made in relation thereto that are similarly raised before this Court, the lower court stated the following:

> In sub-claim two of Defendant's first claim for relief, he alleges that counsel rendered ineffective assistance for failing to object to the State introducing victim impact evidence. Defendant first argues that the State improperly introduced victim impact evidence during voir dire and counsel was ineffective for failing to object to the State's actions. The purported victim impact evidence the State introduced was two statements by Assistant State Attorney Jon Phillips that the victim was a young mother of three children. The first statement concerning the victim being a mother of three children was:

MR. PHILLIPS: Okay. Well, how do you fell [sic] about capital punishment?

A JUROR: Strongly in favor of it.
MR. PHILLIPS: You understand that it is - do you understand what we've been talking about, that it's not automatic, no matter?

A JUROR: I'm certain I could put aside my feelings to give both sides the mitigation issue.

MR. PHILLIPS: For example, some people it would be possible, *I suppose that someone might say anybody who kills, you know, a young mother of three deserves to et [sic] the death penalty*, you understand that it doesn't work that way?

A JUROR: I understand it doesn't work that way.

MR. PHILLIPS: That you have to wait until you hear all the aggravation and even if you know what it is that the point you still would be duty bound to suspend judgment until you hear it all at the penalty phase, could you do that?

A JUROR: Yes, sir.

(T.T. 153.) The second instance of the State referring to the victim as a young mother of three children was:

MR. PHILLIPS: Now, we've said a couple of times and I said a couple of times that one of your duties would be to wait and no matter what you hear about aggravation today that you still would be required to keep an open mind until all the evidence is in, and just to make sure that I'm making myself clear, that would apply as well to
any mitigation that you might hear, you know, if even if you were to hear there are certain mitigating factors today,

> it would still be your duty to not make up your mind today and to wait until you've heard everything, no matter how good or bad you thought the mitigation was and it wouldn't be appropriate for you to decide well, that's bad mitigation or that's good mitigation, does everybody understand that?
>
> A JUROR: Yes.
>
> MR. PHILLIPS: Anybody disagree with the idea of waiting till it's all in front of you before you make up your mind?
>
> A JUROR: No.
>
> MR. PHILIPS: Okay. For instance, you know, *one of the things about this is that we have a mother of three children here who's abducted and murdered, does that fact upset anybody so much that they don't think they can be fair to the defendant in this case?*
>
> A JUROR: No.
>
> MR. Phillips: Please raise your hand if you do.

(T.T. 228-229.)

The Florida Supreme Court has explained that: "The purpose of the voir dire proceeding is to secure an impartial jury for the accused. Consequently, the possible bias of a member of the jury venire which ... might affect the fairness of the trial of the accused, is clearly a proper ground of inquiry in this proceeding." Evans v. State, 808 So. 2d 92, 105 (Fla. 2001) (citing Lewis v. State, 377 So. 2d 640, 642-643 (Fla. 1979)). The State's two instances of asking whether the victim being a mother of three children might affect the venire panel's ability to be fair to Defendant and not prejudge the case was not improper as they were intended to ensure that an impartial jury was selected. Accordingly, Defendant has failed to establish error on the part of

counsel for failing to object to the State's two instances of referring to the victim as a mother of three children during voir dire.

Defendant, also, argues that counsel's failure to object to the State's introducing purported victim impact evidence during voir dire constituted per se ineffective assistance pursuant to the United States Supreme Court's decision in United States v. Cronic, 466 U.S. 648 (1984). The Florida Supreme Court has recently stated in Dillbeck v. State, 29 Fla. L. Weekly S 437 (Fla. August 26, 2004):

> Ineffective assistance of counsel claims generally are analyzed under the two-pronged test articulated in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). See Nixon II, 758 So.2d at 622 ("We emphasize that the Strickland standard normally applies to ineffective assistance of counsel claims.") Under Strickland, a defendant is entitled to relief if he can show that his counsel's performance was deficient and that he was prejudiced by the deficient performance. 466 U.S. at 687, 104 S.Ct. 2052. However, if the defendant can demonstrate that counsel "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing," the law will presume prejudice and deem counsel ineffective per se. Cronic, 466 U.S. at 659, 104 S.Ct. 2039.

The Defendant has failed to allege or present evidence that establishes that counsel's failure to object to the State's introducing purported victim impact evidence during voir dire resulted in counsel entirely failing to subject the State's case against Defendant to meaningful adversarial testing as required under Cronic. Moreover, the United States Supreme Court has stated that the presumption of prejudice standard set forth in Cronic does not apply to allegations of specific errors by counsel and that such claims are to be evaluated under the Strickland test. Bell v. Cone, 353 U.S. 685, 697-698 (2002). Accordingly, the Defendant's instant allegation that he is entitle to relief pursuant to Cronic is without merit.

PCR.R.-II, at 390-393 (emphasis added).

Appellant cites no pertinent precedent in support of his argument.[12] Nor

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[12] In arguing that it was the "State's Strategy of Introducing Non-Statutory Mitigation [sic]," IB at 43¶4, appellant cites Ring v. Arizona, 536 U.S. 584 (2002) for the proposition that the Eighth Amendment "mandate[s] that a death sentence rest upon a reliable finding, beyond a reasonable doubt, of fixed statutory aggravators which outweigh the mitigation established by a preponderance of the evidence." IB at 44¶4. The argument is without merit:

First, appellant appears to be arguing for the first time that counsel's violation of Jones' Sixth Amendment right permitted a violation of his Eighth Amendment right. Appellant cannot, however, raise a new claim for the first time on appeal. Archer v. State, 613 So. 2d 446, 448 (Fla. 1993) ("For an issue to be preserved for appeal, however, it must be presented to the lower court and the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved.") (internal citation and quotation marks omitted). Moreover, appellant's contention challenging the legality of the prosecutor's statements also should have been raised on direct appeal, as it is well settled that postconviction proceedings are not to be used as a second appeal in order to raise procedurally barred claims. Stewart v. State, 801 So. 2d 59, 64 n.6 (Fla. 2001) (claim of "overbroad prosecutorial argument on aggravating circumstances and *ineffectiveness of counsel for failing to object to the same*" held procedurally defaulted as not raised on direct appeal) (emphasis added).

Secondly, Ring does not stand for the proposition as stated by appellant. Rather, in that case the United States Supreme Court only decided the Sixth Amendment issue before it: "The question presented is whether that aggravating factor may be found by the judge, as Arizona law specifies, or whether the Sixth Amendment's jury trial guarantee,[ ] made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury.[ ]" Ring, 536 U.S. at 597 (internal footnotes omitted). And as further stated, "Ring's claim is tightly delineated: He contends only that the *Sixth Amendment* required jury findings on the aggravating circumstances asserted against him." Id. at 597 n.4 (emphasis added).

does he address the purpose of voir dire. Moreover, "[w]hether a trial judge should have allowed interrogation of jurors on specific subjects is reviewed [on direct appeal] under an abuse of discretion standard." Davis v. State, 698 So. 2d 1182, 1190 (Fla. 1997) (citing Farina v. State, 679 So. 2d 1151, 1154 (Fla. 1996), receded from on other grounds, Franqui v. State, 699 So. 2d 1312, 1320 (Fla. 1997)), cert. denied, 522 U.S. 1127 (1998). Here, inquiring whether the veniremen could wait until they heard all of the evidence before deciding on punishment, notwithstanding the fact that the victim was a mother of three, was a proper inquiry into whether the

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And finally, appellant makes no effort to explain the relevance as to how counsel's failure to object to the prosecutor's statements during voir dire implicate the Eighth Amendment, which "guarantees individuals the right not to be subjected to excessive sanctions. The right flows from the basic precept of justice that punishment for crime should be graduated and proportioned to [the] offense." Roper v. Simmons, 125 S.Ct. 1183, 1190 (2005) (internal quotation marks omitted). To the extent that appellant relies upon his belief that the statements constituted the introduction of non-statutory aggravation, see IB at 43¶3, 44¶4, 45¶¶5,6, a matter of which the State does not agree, he fails to cite any authority for the proposition that the Eighth Amendment prohibits evidence of that type. To the contrary, a number of states permit the introduction of all evidence that may be aggravating, albeit non-statutory. See, e.g., § 565.032(2), R.S.Mo.; 11 Del. C. § 4209(c)(1); Idaho Code § 19-2515(6); see also 18 USCS § 3592(c) (federal death penalty provision for homicide). And the United States Supreme Court has upheld under the federal constitution the introduction of nonstatutory aggravating evidence. Barclay v. Florida, 463 U.S. 939, 956 (1983) (improper consideration of nonstatutory aggravator under state law did not violate the Eighth Amendment) (plurality); accord id. at 966 ("The Florida rule that statutory aggravating factors must be exclusive affords greater protection than the Federal Constitution requires.") (Stevens, J. and Powell, J., concurring in the judgment).

veniremen could follow the law. Davis, 698 So. 2d at 1190 (holding that it was not improper for prosecutor to question a prospective juror whether it would bother him that the victim was a child with a learning disability); cf. Cummings v. State, 715 So. 2d 944, 948 (Fla. 1998) (review of whether potential juror should have been excused for cause following the prosecutor's question whether it would make a difference to the venireman if the victim was a child). Here, appellant relies upon two brief instances where the prosecutor made such an inquiry. And in light of the overwhelming evidence both of guilt and in support of the death sentence, see supra, at 5-6, appellant's conclusory allegations of prejudice, see IB at 43¶3, 44¶5, are illusory.[13]

b. Guilt phase "victim impact"

Appellant also argues that the prosecutor's presentation of testimony from the victim's husband that he now lives with their "motherless kids" was also in furtherance of his "de facto victim-impact aggravator. . . ." IB at 45, 46.

The trial court addressed the claim as follows:

> Finally, Defendant alleges that counsel was ineffective for failing to object to the State eliciting purported victim impact evidence at trial

[13] Though seemingly abandoning his claim that prejudice should be presumed under Cronic, IB at 44¶5, appellant's concession seems questionable in light of his apparent argument otherwise, based on the assertion that consistent application of Eighth Amendment jurisprudence should result in "the ad hoc admission of non-statutory aggravators should . . . be deemed prejudicial . . . ." IB at 44¶5.

> from the victim's husband. Defendant argues that counsel should have object to the crucial testimony of the victim's husband answering the State's question of whom did he and the victim live with by answering "Kids." (T.T. 557.) Defendant merely makes a conclusory allegation that this testimony was crucial to the State's prosecution. Conclusory allegations which lack sufficient factual allegations to warrant review may be summarily denied. Ragsdale v. State, 720 So. 2d 203 (Fla. 1998). Accordingly, Defendant has failed to establish that counsel's performance was deficient. Moreover, assuming arguendo that counsel was deficient in failing to object, Defendant has failed to establish that counsel's deficient performance prejudice his defense in light of the evidence at trial established that Defendant stole $600 from the victim's ATM account, was in possession of the victim's ATM card and vehicle, had attempted to have the interior of the vehicle cleaned, had scratches on his face and reddish stains on his jeans that was almost conclusively the victim's blood, confessed to the police and led the police to the victim's body. See Jones v. State, 748 So. 2d 1012, 1016-1017 (Fla. 1999).

PCR.R.-II, at 393.

At issue, taken in context, is the following examination by the prosecutor of the victim's husband:

> Q Would you state your full name, please.
>
> A Douglas Charles McRae.
>
> Q Mr. McRae, did you know Lori McRae?
>
> A Yes.
>
> Q How did you know her?
>
> A She was my wife.
>
> Q How long had you been married prior to her death?

A About four years.

Q What area of town did y'all live in?

A Westside.

Q And did she work outside the home?

A The Post Office on 1100 Kings Road.

Q Is that in Duval County?

A Yes.

Q What sort of work did she do at the Post Office?

A She was L. S. M. operator.

Q What is that?

A Those are the ones you usually see on the snippets at television where the girls are keying in, the machines is picking up the letters.

Q *With whom did y'all live?*

A *Kids.*

T.Tr.-XVI, at 556-557 (emphasis added).

In the first instance, the subclaim as to counsel's failure to object to the introduction of evidence is procedurally barred because the underlying issue as to the admissibility of the testimony that the victim was the mother of three children

was improper should have been -- but was not -- raised on direct appeal. Compare supra, at 6-7 (quoting Jones, 748 So. 2d at 1017 n.3). It is well settled that postconviction proceedings are not to be used as a second appeal in order to raise procedurally barred claims. See, e.g., Finney v. State, 831 So. 2d 651, 657 (Fla. 2002).

Further, contrary to appellant's characterization of the testimony as "victim impact evidence," the testimony is simply a biographical fact. Moreover, the reference was isolated; not "the crucial testimony at trial" that appellant had claimed in his Rule 3.850/3.851 motion. See PCR.R.-I, at 120¶23. And as was the case concerning the two comments during voir dire, appellant cannot establish prejudice based on counsel's failure to object in light of the overwhelming evidence of guilt, as found by the trial court. Id. at II-393.

Therefore, the claims raised in B.3-B.7 (IB at 42-47) should be denied.

3. THE TRIAL COURT PROPERLY HELD THAT COUNSEL WAS NOT INEFFECTIVE IN THE HANDLING OF APPELLANT HAVING BEEN MEDICATED BOTH PRETRIAL AND AT TRIAL (responding to B.8-B.9, B.11, and B.13-B.14 of appellant's brief).

Appellant argues counsel provided ineffective assistance in relation to his having been medicated both before and during trial. IB at 47-48, 49, 50-51.

The trial court rejected the claim as follows:

> In sub-claim five of Defendant's first claim for relief, he alleges

counsel rendered ineffective assistance for failing to present evidence that Defendant was under the influence of powerful medication while in police custody; the effects of those drugs on a mentally ill individual suddenly detoxifying from continuous use of crack cocaine; how this medication impacted on issues including insanity, competency, suppression of statements, ability to form premeditation and mitigation. Defendant argues that counsel failed to protect Defendant's rights regarding the administration of medication. Defendant also argues that counsel failed to challenge Defendant's statements made to the police arguing competency grounds due to this medication and impeach State witnesses on Defendant's statements based on the issue of the medication. Initially, this Court notes that Defendant has failed to present evidence of what medication, including dosage and frequency, he was receiving while in police custody, the effects of this medication on Defendant or the impact it had on issues of insanity, competency, suppression of statements or mitigation. Regarding premeditation, Defendant presented no evidence that he was on or needed to be on the medication he received while in custody. Defendant, further, failed to present evidence that he was not properly medicated while in custody of the police. Accordingly, these allegations are merely conclusory. Conclusory allegations of ineffective assistance of counsel fail to establish entitlement to relief. Parker, *supra*.

Concerning Defendant's allegation that counsel failed to challenge Defendant's statements made to the police arguing competency grounds due to this medication and impeach State witnesses on Defendant's statements, Defendant presented one witness at the evidentiary hearing. John Bowden testified at the evidentiary hearing that he was currently incarcerated for Robbery of a Vehicle, had five to seven felony convictions and had been housed with Defendant in the Duval County Jail in 1995. (Exhibit "A," pages 218-219) Mr. Bowden testified that when he first saw Defendant that Defendant appeared to be "strung out." (Exhibit "A," pages 219-220.) Mr. Bowden's testimony does not address any information regarding the medication Defendant was receiving of the effects it had on Defendant. (Exhibit "A," pages 218-221.) Further, Defendant has failed to refute Detective Parker's trial testimony that when he spoke

with Defendant, he did not appear to be under the influence such that his faculties were impaired and that Defendant appeared to be coherent and did not appear to be under the influence of any drugs or alcohol. (T.T. 1287-1288, 1330, 1334-1335.) Accordingly, Defendant has failed to establish that counsel was ineffective for failing to challenge Defendant's statements to the police based on the effects of the medication he was receiving while in custody and impeach State witnesses on Defendant's statements.

In sub-claim six of Defendant's first claim, he alleges that counsel was ineffective for failing to request the instruction that Defendant was on psychotropic medication at the opening of the trial and for failing to explain to the jury why Defendant was on this medication. Initially, this Court notes that counsel requested that the jury be instructed that Defendant was on psychotropic medication. (R.O.A. Vol. II, pages 338-339.) After discussing the requested instruction with the Court, the State and defense counsel agreed to the Court's suggestion that the instruction be given prior to the commencement of testimony. (T.T. 512-514.) However, the instruction that Defendant was taking psychotropic medication was not read until the State had commenced its case-in-chief. (T.T. 646.) Since the record demonstrates that counsel did in fact request that the Court give the jury an instruction regarding Defendant taking psychotropic medication: Defendant has failed to establish error on the part of counsel.

Defendant also alleges counsel was ineffective for failing to ensure that the psychotropic medication instruction was read prior to the commencement of the State's case-in-chief, the Defendant's claim is without merit. Assuming arguendo that counsel's failure to ensure that this instruction was read to the jury prior to the State commencing its case-in-chief was erroneous, Defendant has failed to establish that but for this error, there is a reasonable probability that the outcome of the proceeding would have been different. Mr. Buzzell testified at the evidentiary hearing that the defense had requested the instruction in case Defendant appeared to be drugged. (Exhibit "A," pages 134-135.) Mr. Buzzell, further, testified that there was no specific trial strategy regarding Defendant taking psychotropic medication during

the trial and that Defendant was quite
polite and conducted himself very well, even when he was agitated. (Exhibit "A," pages 135-136.) Defendant has failed to establish how the late reading of the psychotropic medication instruction to the jury resulted in prejudice to his defense.

Finally, Defendant has failed to allege or present what admissible evidence counsel should have presented at trial to explain why Defendant was on psychotropic medication or how this evidence was relevant to the determination of Defendant's guilt or sentence. Also, Defendant has failed to alleged or present how the defense's psychotropic medication instruction read to the jury inflamed and confused the jury, place Defendant in a negative light and otherwise hurt his case. Accordingly, Defendant's allegations that counsel was ineffective for failing to evidence at trial to explain why Defendant was on psychotropic medication and that counsel's psychotropic medication instruction was prejudicial to the defense are merely conclusory. Conclusory allegations of ineffective assistance of counsel fail to establish entitlement to relief. Parker, *supra*. Defendant's allegations in sub-claim six of claim one are without merit.

* * * * *

Mr. Buzzell testified at the evidentiary hearing regarding that he discussed with the mental health experts Defendant's need for medication at trial and the impact it might have on issues such as insanity, competency, and suppression of statements. (Exhibit "A," page 159.) Mr. Buzzell testified that testimony regarding this would not have been helpful to the defense. (Exhibit "A," page 160.) Mr. Buzzell testified that he was told by Dr. Krop that if he (Dr. Krop) was called to testify on issues such as competency and insanity, decidedly unhelpful things would come out on cross-examination. (Exhibit "A," page 160.)

PCR.R.-II, at 396-399, 401.

Appellant first argues that the trial court's "order is contradictory" based

upon the finding that no evidence was presented by appellant as to what medication he was on and the amount, as well as the finding that appellant did not present any evidence that he was improperly medicated. IB at 47. There is nothing inconsistent with the lower court's order: for appellant to establish that he was overmedicated, he would have had to present evidence that he was in fact on medication, and that based upon the type or types of medication and the dosage, that he was not treated appropriately for whatever reason the medication was being administered. Appellant did not do so and the trial court so ruled.

Appellant also disputes the trial court's conclusion that his lay witness did not establish what medication and dosage appellant had been taking. According to appellant, "[a]s a drug addict himself, Mr. Bowden knew of what he spoke," IB at 48, being that appellant "appeared to be 'strung out.'" Id. Moreover, appellant asserts that the trial court was required to read Dr. Lipman's testimony "in conjunction with Mr. Bowden's testimony and vice versa." Id. Once again, however, appellant fails to explain how Dr. Lipman's conclusions concerning appellant's mental condition provides a basis for establishing that appellant was being medicated, what that medication was as well as the frequency it was taken. And in respect to Mr. Bowden, no evidence was presented that he was even present when appellant made his various statements to authorities, one of the instances that

Jones contends that the medication adversely effected. Moreover, the impeachment value of Mr. Bowden's testimony is minimal compared to that of the experienced law enforcement officers, particularly in light of the fact that Mr. Bowden had between five and seven felony convictions and was a drug addict himself. PCR.R.-IV, at 665, 666, respectively. Thus appellant cannot establish prejudice. In addition, appellant made no showing that counsel was even aware of Mr. Bowden. Nor does appellant cite any authority for his proposition that based upon the way he purportedly looked prior to trial, he carried his burden of establishing that the unidentified medication that he apparently was taking at the unidentified dosage and frequency, was overmedicating him. Noticeably missing is any evidence from appellant of jail records documenting the distribution of medication and/or physician records of prescribing medication for appellant. Let alone that any such medication, even if established, would have resulted in overmedication. Allegations alone do not establish a claim of ineffective assistance. See Gaskin v. State, 737 So. 2d 509, 514 n.10 (Fla. 1999) ("It is during the evidentiary hearing that [defendant] must come forward with witnesses to substantiate the allegations raised in the postconviction motion."), receded in part on other grounds, Nelson v. State, 875 So. 2d 579, 582-583 (Fla. 2004).

Appellant also relies upon the following colloquy, see IB at 49¶11 to support

his proposition that he must have been on medication and that he looked overmedicated:

> Q [by Mr. Brody] Do you recall talking to Mr. Jones during the trial?
>
> A [by Mr. Chipperfield] Oh, sure.
>
> Q And you recall going over to see him?
>
> A Sure.
>
> Q But you don't recall whether he was on any medications before trial or during trial?
>
> A I just don't remember.
>
> Q But if you did ask the Judge to advise the jury that he was on psychotropic medication during the trial then he was probably on psychotropic medication?
>
> A Then I must have known he was on something if I asked that, I just don't remember.
>
> Q That's why you asked for that instruction?
>
> A If we asked for it that would have been why.
>
> Q And you would have been a little worried about his appearance maybe to the jury, you wanted to explain that?
>
> Did you -- did you -- that was a yes, a nod, I think?
>
> A Yes.

PCR.R.-IV, at 683. Interestingly, however, appellant does not directly question

attorney Buzzell as to the motion for the instruction that he signed as counsel, see R.-II, at 339, and ignores evidence that counsel had every reason to believe that Jones was in fact properly medicated, based upon the motion filed by the defense at trial for an instruction concerning that medication:

> . . . . This motion is filed for the following reasons:
>
> 1. David Jones is, in fact, being administered psychotropic medications by the medical staff at the jail as follows:
>
> a. Trilafon, a psychotropic medication used in the management of psychotic disorders, 12 mg. in the morning, 60 mg. at 1:00 p.m. and 9:00 p.m.
>
> b. Ativan, a tranquilizer and anti-anxiety medication, 2 mg. daily.
>
> c. Sinequan, an anti-depressant and anti-anxiety medication, 75 mg. at bedtime.
>
> 2. Before he was put on psychotropic medications on February 16, 1995, jail medical personnel noted that he was actively hallucinating and was disoriented in all three spheres. He would surely not be competent for trial if he were not on his present medication.
>
> 3. Defendant was previously declared incompetent for trial in 1986, and was sent to Florida State Hospital for several months. He stabilized and was declared competent.
>
> * * * * *

R.-II, at 338-339.[14] The motion requesting the instruction, dated January 16, 1996,

[14] The instruction at issue as actually provided by the trial court simply stated:

was obviously drafted pretrial and more closely in time to trial held in March, 1997, than when the evidentiary hearing was held in December, 2003. That motion does not include any mention that the instruction was necessary because of how Jones looked.[15]

Nor did appellant present any testimony that the medication and the dosage and frequency referenced by counsel in its motion was the same medication he was taking at trial, and that it would have resulted in overmedication. Instead, appellant disregards Mr. Buzzell's testimony at the evidentiary hearing in response to the question "whether Mr. Jones exhibited any signs during trials [sic] being on medication?" PCR.R.-III, at 581. According to Mr. Buzzell who represented

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> THE COURT: . . . . Before we call the first witness I'd like to read to you a very short statement. David Wyatt Jones, the defendant in this case is proceeding to trial with the aid of psychotropic medication for a mental or emotional condition and has been using that medication since the commencement of this trial. . . .

T.Tr.-XVII, at 646.

[15] In any event, once again, testimony concerning how appellant looked is insufficient to establish that drug treatment in fact resulted in overmedication. And to the extent that appellant faults trial counsel for not explaining to the jury the basis for his receiving psychotropic medication, see IB at 50¶12, appellant did not raise that claim before the trial court and is precluded from doing so now on appeal. To the extent that appellant seems to insinuate that the medication was given on the basis of his "cocaine addiction," see id., appellant himself failed to present any evidence at the evidentiary hearing as to why he was on the medication.

Jones for over two years, id. at III-565, and had the "main responsibility" to communicate with him, id. at III-576, appellant "was really quite polite and conducted himself very well during the trial." Id. at III-581. In addition, evidence was presented at trial that at the time appellant confessed to police, he appeared to be coherent and did not appear to be under the influence of any drugs or alcohol. T.Tr.-XX, at 1246, 1262-1263, 1330, 1334-1335.

Moreover, having failed to demonstrate that he did in fact look overmedicated and was in fact so, appellant also fails to set forth the instruction at issue and explain how he was prejudiced when it was given after the trial court had intended. Compare IB at 51¶¶13-14. This is particularly the case where the instruction was read after opening statements and the brief testimony from six State witnesses, see T.Tr.-XVI, at 526-555, 556-640, but before the remainder of the trial that included the majority of the guilt phase including the presentation of nearly thirty additional state witnesses, as well as the entire penalty phase. See T.Tr.-XVII - XXVI, at 647-1393. And while appellant faults the trial court's analysis even assuming that counsel was deficient in not seeing that the instruction was read earlier, id. at 51¶13, he continues to assert and rely upon facts not proved, i.e., "Appellant was sedated and must have appeared drugged, as that is the reason counsel requested this instruction . . . ."). Id. Moreover, appellant misstates the

record when he asserts that, in respect to the defense's request for the instruction, "the State apparently agreed was necessary." Id. To the contrary, the State initially filed a motion in limine. R.-IV, at 627. Thereafter, at trial, the parties conferred with the trial court and announced that they had "come to an agreement to disagree. . . ." T.Tr.-XVI, at 512, wherein the State would maintain its objection based upon its motion in limine. Id. at XVI-512-514.

The claims raised in B.8-B.9, B.11, and B.13-B.14 (IB at 47-48, 49, 50-51) should be denied.

4. COUNSEL DID NOT INEFFECTIVELY REPRESENT APPELLANT THOUGH EXPERT TESTIMONY ON ADDICTION WAS NOT PRESENTED WHERE ANY MENTAL HEALTH TESTIMONY WOULD HAVE OPENED THE DOOR TO DAMAGING INFORMATION, AND EVEN IF COUNSEL COULD HAVE PRESENTED EVIDENCE ON LACK OF PREMEDITATION THE EVIDENCE SUPPORTING A FELONY MURDER CONVICTION WAS SUFFICIENT (responding to B.10, B.12, B.15, and B.24 of appellant's brief).

Appellant argues on appeal that "counsel was ineffective in failing to present expert testimony on addiction. . . ." which "would have subsumed Mr. Jones' 'mental state at the time of the crime' as well as his history of addiction and mental illness." IB at 52 (B.15). Jones also argues that

> counsel could have, but failed to, present strong evidence of Mr. Jones' mental health history and history of drug abuse, much of it educating the jury about the condition resembling insanity that Mr. Jones was in at the time of this terrible, but explainable, though not excusable, crime, such that, when the claims are considered together and cumulatively, there is the real probability that the jury would have

> convicted Mr. Jones of, at most, second degree murder. Certainly, the Hearing Court, upholding Mr. Jones' conviction, has erred in ignoring the weight and credibility of the evidence presented at the hearing.

IB at 67 (B.24); see IB at 50 (B.12) (same); see also IB, at 48-49 (B.10) (contending that the trial court should have considered Dr. Lipman's conclusions that appellant suffered from "cocaine psychosis" after his arrest in 1986 for murder as well as "from a psychosis spectrum disorder.").

Before the trial court Jones' claim pertained to counsel's failure to investigate and present evidence that he was not competent to stand trial, PCR.R.-I, at 116¶15, 117¶17, 118¶19, and that the presentation of expert testimony regarding his mental condition and "the cumulative impact of years of drug and alcohol abuse of the recent year-long addiction to crack cocaine, and the long-standing history of mental illness" would have provided a basis for an insanity defense and voluntary intoxication defense, amongst other challenges, PCR.R.-I, at 117¶18, as well as "properly educate the jury regarding Mr. Jones' inability to form the requisite premeditation required for a conviction of first-degree murder . . . ." Id. at 118¶19.

In reviewing that claim, the trial court denied relief as follows:

> In sub-claim seven of Defendant first claim, he alleges that counsel rendered ineffective assistance for failing to properly investigate and challenge his competency to stand trial and for failing to investigate and present evidence of Defendant's mental state at the time of the offense with regards to supporting an insanity defense or establishing that Defendant did not have the ability to form

premeditation. The Defendant's first allegation of ineffective assistance concerning counsel's investigation and challenge of Defendant's competency to stand trial. Initially, this Court notes that Dr. Harry Krop was appointed, and subsequently reappointed twice, by the Court as a defense expert to evaluate Defendant's mental health. (R.O.A. Vol. I, 6-7, 31-32; Vol. II, 321-322.) Counsel also sought and received an order directing that Defendant be evaluated on the issue of mental incompetence to proceed. (R.O.A. Vol. I, 15-17, 20-21.) Dr. Wade Myers' and Dr. George Bernard's written reports filed on August 17, 1995, and August 21, 1995, respectively, found that Defendant was competent to proceed. (R.O.A. Vol. I, 45-53, 58-63.) Further, Mr. Buzzell testified at the evidentiary hearing that he spent hours and hours of time working with both the defense's confidential psychiatric expert and the court appointed mental health experts. (Exhibit "A," page 129.) Mr. Buzzell testified that he recall discussing the issue of Defendant taking psychotropic medication with the mental health experts. (Exhibit "A," page 159.) Mr. Buzzell also testified he learned from Dr. Krop that there were both helpful and harmful issues regarding Defendant's mental health that could come out at trial. (Exhibit "A," pages 159-160.) Based on Defendant having been examined by three mental health experts on the issue of competency and Defendant's mental health and counsel's work with these experts, Defendant has failed to establish counsel was deficient for failing to properly investigate and challenge Defendant's competency to stand trial.

Defendant also argues counsel failed to investigate and present evidence of Defendant's mental state at the time of the offense with regards to supporting an insanity defense or establishing that Defendant did not have the ability to form premeditation. Defendant presented Dr. Jonathan Lipman, a neuropharmacologist, to testify at the evidentiary hearing regarding Defendant's use of cocaine and the effects it had on his mental state at the time of the instant offenses. Dr. Lipman testified that Defendant was "constitutionally vulnerable to experiencing the psychosis producing effect of cocaine" that develops only on chronic use. (Exhibit "A," pages 17-18.) Dr. Lipman testified that in his opinion Defendant was acting under the influence of chronic cocaine psychosis at the time of the instant offenses. (Exhibit "A,"

page 21.) Dr. Lipman testified that at the time of the instant offenses, Defendant was disorganized, irrationally fearful and paranoid. (Exhibit "A," pages 38-39)

On cross-examination by the State, Dr. Lipman testified that his opinion of Defendant's symptomology was based on previous psychological evaluations of Defendant, individuals who saw Defendant and those who testified at Defendant's trial, including Mrs. Jones. (Exhibit "A," pages 43-44.) Dr. Lipman, further, testified that at the time: the mental health experts who evaluated Defendant in 1986, and in 1995, in relation to the instant case, were correct in their own way regarding Defendant's mental state, but that in hindsight Defendant has psychosis spectrum disorder. (Exhibit "A," pages 63-64.) Dr. Lipman testified that Defendant understood the criminality of his act but did not want to suffer the consequences. (Exhibit "A," page 69.)

Mr. Buzzell testified at the evidentiary hearing regarding that he discussed with the mental health experts Defendant's need for medication at trial and the impact it might have on issues such as insanity, competency, and suppression of statements. (Exhibit "A," page 159.) Mr. Buzzell testified that testimony regarding this would not have been helpful to the defense. (Exhibit "A," page 160.) Mr. Buzzell testified that he was told by Dr. Krop that if he (Dr. Krop) was called to testify on issues such as competency and insanity, decidedly unhelpful things would come out on cross-examination. (Exhibit "A," page 160.)

The Florida Supreme Court has held "that counsel's reasonable mental health investigation and presentation of evidence is not rendered incompetent 'merely because the defendant has now secured the testimony of a more favorable mental health expert.'" Rivera v. State, 859 So.2d 495, 504 (Fla. 2003) (quoting Asay v. State, 769 So.2d 974, 986 (Fla. 2000). Further, the fact a defendant finds a new expert to give more favorable mental health testimony does not, in itself, render counsel ineffective. Freeman v. State, 858 So. 2d 319, 327 (Fla. 2003). At the time of Defendant's trial, counsel had consulted with both the defense expert witness and the two experts appointed for evaluating Defendant's competence. Accordingly, Defendant has

> failed to establish error on the part of counsel for failing to investigate Defendant's mental state at the time of the instant offenses with regard to premeditation and insanity issues. Regarding the failure to present evidence of the Defendant's mental state during the guilt phase, this Court finds that counsel made a tactical decision not to present evidence of Defendant's mental state during the guilt phase based upon his conversations with the mental health experts, and particularly Dr. Krop. Songer v. State, 419 So. 2d 1044 (Fla. 1982); Gonzalez v. State, 579 So. 2d 145, 146 (Fla. 3d DCA 1991) ("Tactical decisions of counsel do not constitute ineffective assistance of counsel.") Accordingly, Defendant has failed to establish error on the part of counsel.

PCR.R.-II, at 399-400 and id. at IV-401-402.

First, appellant does not address controlling authority that has rejected essentially the same argument. In Pietri v. State, 885 So. 2d 245 (Fla. 2004), this Court stated as follows:

> We recently addressed this identical question in Spencer. There, in postconviction, Spencer claimed that his trial counsel was ineffective for failing to present expert testimony in the guilt phase regarding his "dissociative state" that occurred during the murder. See Spencer, 842 So. 2d at 62. At an evidentiary hearing, Spencer presented two experts to support his claim, one of whom was Dr. Lipman, the same witness Pietri has presented here. See id. In Spencer, Dr. Lipman stated "that he could also have testified that Spencer's mind was impaired at the time of the offense based upon the residual effects of a two-week alcoholic binge even though Spencer's blood alcohol level was zero at the time of the murder." Id. This Court concluded that "the evidence of Spencer's 'dissociative state' would not have been admissible during the guilt phase of the trial." Id. at 63. Dr. Lipman's substantially similar testimony likewise would have been inadmissible during the guilt phase of Pietri's trial.
>
> In another recent decision, this Court again rejected a claim that

counsel was ineffective for failing to present the defense that the defendant was incapable of forming the premeditated intent to kill because of his abuse of crack cocaine before the murder. See Henry v. State, 862 So. 2d 679 (Fla. 2003). There, we wrote:

> As we said in State v. Bias, Gurganus [v. State, 451 So. 2d 817 (Fla. 1984),] stands for the principle that "it is proper for an expert to testify 'as to the effect of a given quantity of intoxicants' on the mind of the accused when there is sufficient evidence in the record to show or support an inference of the consumption of intoxicants." 653 So. 2d at 383. Thus an expert "may need to explain why a certain quantity of intoxicants causes intoxication in the defendant whereas it would not in other individuals." Id.

Id. at 683 (emphasis supplied). In Henry, we denied the claim because Henry had "failed to present any evidence that he was actually intoxicated at the time of the offense." Id. We noted that Henry did not present any evidence that the mental health experts or anyone else could have testified that he was intoxicated at the time of the offense. See id. Similarly, Pietri did not present any evidence at the evidentiary hearing to establish that he was actually intoxicated at the time of the offense. Therefore, because Pietri could not demonstrate that he was actually intoxicated at the time of the offense and, further, because the evidence of "metabolic intoxication," which allegedly produced a diminished capacity, would have been inadmissible at trial, Pietri's defense counsel was not ineffective for failing to present a voluntary intoxication defense and Pietri's first claim is therefore denied.

Id. at 254-255 (internal footnote omitted). Nor does appellant explain the relevancy of the determination that he was originally ruled not competent to stand trial in respect to the *1986* murder case. Compare IB at 48. Moreover, this Court on direct appeal rejected appellant's claim that the trial court erred in refusing "to allow

the defendant's prior counsel to testify regarding a psychiatric report prepared in 1986 finding the defendant incompetent . . ." Jones, 748 So. 2d at 1017 n.3.

Instead, in arguing that the trial court erred in its ruling, appellant first focuses on what his expert at the evidentiary hearing testified to, without regard to the proposition that counsel does not have a duty to "shop around" for an expert that will render a more favorable opinion. Rivera v. State, 859 So. 2d 495, 504 (Fla. 2003). Indeed, this Court has previously stated that "the presentation of testimony during postconviction proceedings of more favorable mental health experts does not automatically establish that the original evaluations were insufficient." Cooper v. State, 856 So. 2d 969, 976 n.5 (Fla. 2003) (citing cases), cert. denied, 540 U.S. 1222 (2004).

Appellant thereafter appears to fault the trial court for its consideration of the fact that appellant had been examined concerning the competency issue. IB at 52. This is notwithstanding that appellant had raised the issue below that counsel was ineffective in respect to presenting evidence of his incompetency. See PCR.R.-I, at 116¶15, 117¶17, 118¶19. Appellant thereafter asserts that counsel did not present "any doctor with any records on which the facts of Mr. Jones' history of addiction and depression could have been properly analyzed and a proper diagnosis rendered." IB at 52-53. No citation to the record is provided, and in any event

appellant neglects to identify what information is contained in the unidentified records[16] reflecting appellant's "history of addiction and depression" that precluded Dr. Myers, Dr. Barnard, and Dr. Krop from conducting a proper evaluation.[17] Nor does Dr. Lipman identify in his report what information the above-listed psychiatrists did not have that resulted in inadequate evaluations. And

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[16] Only in a subsequent claim does appellant identify what records were reviewed by Dr. Lipman, see IB at 68-69, but even there appellant does not state what information was not included in the records that Drs. Myers, Barnard, and Krop did have, and how that would have rendered there evaluations, and thus conclusions, suspect.

[17] Interestingly, the report from Dr. Lipman, admitted during the evidentiary hearing as State's Exhibit 1, see PCR.R.-III, at 492, includes information contrary to that testified to by appellant's mother. For example, while Mrs. Sealy testified at trial that Jones had not been physically abused, T.Tr.-XXV, at 1806, Dr. Lipman's report provides that "Whitey [appellant's mother's boyfriend] would punish David, hitting him with a belt, for no reason that David understood." State's Exhibit 1, at 2. Similarly, Mrs. Sealy testified at trial that appellant was not expelled from school, PCR.R.-XXV, at 1775, while Dr. Lipman reported that appellant was expelled while in junior high school. State's Exhibit 1, at 3. Appellant's own accounts of his history, moreover, varied between the experts he talked to. For example, pertaining to appellant's family history, "he denied having any problems with his mother or stepfather . . . ." when talking to Dr. Barnard, R.-I, at 60, but told Dr. Myers nineteen days later that his "mother 'whipped with a belt' . . . ." Id. at 48. Similarly, in respect to his educational history, while interviewed by Dr. Barnard on April 10, 1995, he related that " . . . he had finished the 9th or 10th grade . . . . [and] thought he had been expelled from school but he did not know the reason for his expulsion," id. at 60, whereas on April 29, 1995, he told Dr. Myers that "[h]e dropped out of high school in the tenth grade to help financially support the family. Id. at 48. Not only are the 1995 self-reports inconsistent with one another, but each is also inconsistent with appellant's most recent self-report given to Dr. Lipman in April, 2003.

quite to the contrary, in respect to appellant's psychiatric records from his earlier murder prosecution, the record clearly reflects that both Dr. Myers and Dr. Barnard had those materials. R.-I, at 45 (under "SOURCES OF DATA," "(5) Investigation reports, depositions, *competency reports*, and other materials related to Mr. Jones' 1986 arrest for homicide.") (emphasis added); id. at 62 ("under "Collateral Data," I also reviewed past police records and *psychiatric records* of the defendant for a murder charge in 1986 as well as *more current medical and psychiatric records* of the defendant during his present incarceration.") (emphasis added), respectively.

Appellant also does not address pertinent testimony adduced at the evidentiary hearing from his trial counsel primarily responsible for the guilt phase:

> Q Do you recall if you presented any evidence regarding how Mr. Jones' need for medication might impact any issue in the case, be it the insanity, competency, suppression of statements.
>
> A Did we present that?
>
> Q Requirements for First Degree Murder, the medication that Mr. Jones is on might impact the broad issues where his mental state is an issue?
>
> A I'm certain we discussed those kind of issues with the mental health experts, I don't recall actually presenting anything in evidence before the Court or the jury about that.
>
> Q Was that because you just didn't feel like you got anything good from the mental health experts?
>
> A Basically, yes. I shouldn't say anything good, I would

say not sufficient to be able to present it or be more accurate to say their opinion in that regard wasn't such that it would have been helpful to present it on behalf of the defense.

Q So there was something bad you didn't want to present that you had to weigh against?

A Right.

Q What they would say?

A My recollection --

Q Is that right?

A Yes, sir. And I even recall Doctor Krop essentially telling me that if they had to call him as a witness on some of these issues that there was other things that he would have to say if he was cross examined that would be decidedly unhelpful to our position.

Q Certainly that wasn't the first time Doctor Krop had told you that, was it?

A In this case?

Q No, in your broader experience.

A No, it wasn't the first time. When I deal with expert witnesses I want their honest opinions, so that's what I expect to get, if it's good, bad or indifferent, to me I want to know before I go into court.

* * * * *

PCR.R.-IV, at 605-606.[18]

[18] Appellant also did not present the testimony of Dr. Krop or produce any report that he might have generated to refute trial counsel's testimony found credible by

Finally, appellant ignores the vitiating fact concerning the sworn statement from another inmate, Dennis Hutto, who appellant talked with apparently because Hutto had previously done paralegal work, indicating that Jones

> expressed concern about the death penalty and wondered how he could avoid it on at least two occasions. He [Jones] reportedly explained to Mr. Hutto that he needed to get on medication and go on the "second floor" (medical section of the jail), and asked if Mr. Hutto thought it would help if he used the insanity plea. He [Jones] said that he had done it years ago and that, as a result, they had sent him to Chattahoochee. Mr. Jones reportedly also asked if his being on drugs would keep him from getting the death penalty . . . .

See R.-I, at 49 (referring to R.-V, at 970-981); see also id at 62 (same). Moreover, as previously discussed, this Court held that even if evidence of premeditation was insufficient, there was sufficient evidence supporting the felony murder theory for which appellant was charged and the jury was instructed upon. Jones, 748 So. 2d at 1023-1024. Appellant neglects to address either of the above. Compare IB 52-53.

The claim raised in B.15 and B.24 (IB at 51-54, 66-67) should be denied.

5. THE TRIAL COURT PROPERLY REJECTED APPELLANT'S CLAIM OF INEFFECTIVENESS FOR FAILING TO OBJECT WHERE THE PROSECUTER COMMENTED UPON AND INTRODUCED EVIDENCE OF THE CONDITION IN WHICH THE VICTIM'S BODY WAS FOUND (responding to B.16-B.17 of appellant's brief).

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the lower court, notwithstanding that Dr. Krop was a pretrial confidential expert for the defense.

Under claims B.16-B.17, Jones contends that from the beginning of trial through the penalty phase, the prosecutor implemented a strategy to portray "Appellant as a rapist and sexual batterer, despite the absence of any evidence that a rape or sexual battery occurred and the fact that no count of sexual battery was filed. . . ." IB at 54. Now on appeal appellant seems to be arguing the cumulative effect of what counsel did not do, as well as what he did do:

> . . . Mr. Jones' assertion is that counsel's ineffectiveness in introducing further non-statutory aggravation (with the earlier "motherless children" prosecutorial comments) was, to a reasonable probability, prejudicial to him, and this assertion is supported by the record. Since counsel had failed to educate the jury on the mental disorder, the addiction, and the insanity, or near insanity, gripping Mr. Jones when this crime was instigated, failed to provide the jury with an understanding of the fury of the cravings driving Mr. Jones, and had both allowed the prosecutor to speculate willy nilly that Mr. Jones tried, almost nonchalantly, to slip a sexual assault in as well, the unassailable conclusion is that it is not surprising that the jury would want Mr. Jones killed. This conclusion is supported, however, by significant non-statutory aggravation, rendering it manifestly unreliable. . . .

IB at 56-57. Appellant makes this argument irrespective of the fact that none of the individual matters did not constitute error. In addition, it bears noting that appellant does not identify for the Court what comment during opening statement, what evidence, and what portions of the State's closing argument or arguments he believes counsel was ineffective for not raising an objection nor even cites to the

pertinent part of the record. Compare IB at 54-59.

The essence of Jones' argument is that the prosecutor's reference in opening statement pertaining to the condition that the victim's body was found, see T.Tr.-XVI, at 527 -- that her jeans were unbuttoned, unzipped, and pulled down below and exposing her buttocks and pubic area -- evidence establishing the condition of the victim's body as found, see id. at XVI-570-571, XVII-614, and closing argument in guilt phase, see id. at XXI-1453, 1460[19], constituted the introduction of evidence of a nonstatutory aggravating factor, and counsel's failure to object was ineffective. Appellant did not raise the underlying claim on direct appeal, and it is thus procedurally barred. Porter, 788 So. 2d at 921 & n.6. It is well settled that postconviction proceedings are not to be used as a second appeal in order to raise procedurally barred claims. See, e.g., Finney, 831 So. 2d at 657. Appellant also cited the prosecutor's hypothetical question to FDLE crime lab analyst Diane Hanson, see T.Tr.-XIX, at 1090, as a further attempt to establish that the victim had been raped.[20]

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[19] Counsel did object to the portion of the prosecutor's guilt phase closing argument on page 1460 -- "There's another thing I guess we don't know, is why her pants are unbuttoned" -- as well as having requested a mistrial which was denied. Counsel thus was not ineffective in respect to that argument, and appellant did not raise the issue on direct appeal that the denial of request for a mistrial was erroneously denied. Compare Jones, 748 So. 2d at 1017 n.3.

[20] At issue is the following colloquy:

Q My question is: Is there anything unusual about having a mixed stain submitted to your laboratory?

A It does occur if there is a mixture of DNA, it's certainly not as common.

Q For example, if -- and I'm not suggesting that this applies to this case necessarily but just for example in a rape case when you have semen came from a rape kit submitted is it common that the material would contain a mixture of DNA from the donor of the semen and from the female?

* * * * *

Id. This inquiry came after Ms. Hanson testified that a stain on the blue jeans subjected to DNA testing "was a mixture." Id. at 1089-1090. Defense counsel followed upon on cross-examination as follows:

Q Now, you described in a hypothetical to Mr. Phillips that a lot – well, at least some of your work deals with analysis of body fluids other than blood, for instance semen?

A That's correct.

Q And there's a presumptive test for the presence of semen called the acid phosphatase test, ...

A Yes, that's correct, it's acid phosphatase.

Q And you, in fact, applied that presumptive testing to some stains on the blue jeans identified as belonging to David Jones, right?

A Yes, to one area on the blue jeans I did.

Q And that test did not test positive for the possible presence of semen, is that right?

In rejecting relief, the trial court reviewed the evidentiary hearing testimony of defense counsel Buzzell. PCR.R.-III, at 403-409 (quoting id. at IV-637-640). The court thereafter held as follows:

> This Court specifically finds Mr. Buzzell's testimony was both more credible and more persuasive than the Defendant's testimony and allegations. Laramore v. State, 699 So. 2d 846 (Fla. 4th DCA 1997). Further, this Court finds counsel made a tactical decision to not object to the State's introduction of the physical condition of the victim's body and the State's inference that Defendant committed a sexual battery on the victim based on this evidence. Instead of objecting to the evidence, counsel chose to use the State's evidence to establish the inconclusive nature of the evidence itself and to disprove the State's argument that Defendant had committed a sexual battery. Songer v. State, 419 So. 2d 1044 (Fla. 1982); Gonzalez v. State, 579 So. 2d 145, 146 (Fla. 3d DCA 1991) ("Tactical decisions of counsel do not constitute ineffective assistance of counsel.") Further, opening statements project what counsel expects the evidence to show and are not considered evidence. Occhicone v. State, 570 So. 2d 902, 904 (Fla. 1990). This Court, also, points out that "the proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn fiom the evidence." Griffin v. State, 866 So. 2d 1, 16 (Fla. 2003) citing Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985). The Florida Supreme Court in Griffin further held that "[m]erely arguing a conclusion that can be drawn from the evidence is permissible fair comment." 866 So. 2d at 16, citing Mann v. State, 603 So. 2d 1141, 1143 (Fla. 1992). Finally, this Court notes that wide latitude is permitted in arguing to a jury. Thomas v. State,

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A That's correct, it was negative.

* * * * *

Id. at XIX-1099-1100.

> 326 So. 2d 413 (Fla. 1975); Spencer v. State, 133 So. 2d 729 (Fla. 1961). Accordingly, this Court finds that the Defendant has failed to establish error on the part of counsel or prejudice to his case.

Id. at III-409-410.

This Court has addressed the standard by which it reviews claims of improper prosecutorial argument:

> [i]n order to require a new trial based on improper prosecutorial comments, the prosecutor's comments must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise.

Anderson v. State, 863 So. 2d 169, 187 (Fla. 2003), cert. denied, 541 U.S. 940 (2004). In addition, "wide latitude is permitted in arguing to a jury." Perez v. State, 2005 Fla. LEXIS 2057 *32 (Fla. Oct. 27, 2005). Moreover, the parties can argue all reasonable inferences from the evidence. Dessaure v. State, 891 So. 2d 455, 468 (Fla. 2004); Cherry v. State, 829 So. 2d 873, 880 (Fla. 2002). As stated by this Court in Dessaure,

> [c]losing argument presents an opportunity for both the State and the defendant to argue all reasonable inferences that might be drawn from the evidence. Indeed, "the proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence."

Id. at 468 (quoting Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985)).

Here the prosecutor argued that the evidence did not establish appellant's intent or what happened after the victim's pants were unbuttoned, unzipped, and pulled down, where evidence had also been adduced that the victim's genitalia had been completely decomposed. Tr.-XVII, at 614, 617. Contrary to appellant's contention, the prosecutor did not argue that the victim had in fact been raped. Moreover, the notion that the condition of the victim's body and how she was treated by petitioner is not relevant in a first degree murder case where the petitioner is charged with both felony and premeditated murder defies logic.

Finally, even if the Court were to conclude that the prosecutor's references to the condition of the body as left by and the result of appellant's actions, and the evidence thereof, Jones is not entitled to relief. Jones cannot, and has not, demonstrated prejudice in light of the overwhelming evidence of his guilt of committing first degree murder, whether premeditated or felony murder based upon the jury's finding that appellant also kidnapped and robbed the victim, and the "ample evidence in support of the aggravators found by the trial judge." Fennie v. State, 855 So. 2d 597, 610 (Fla. 2003), cert. denied, 541 U.S. 975 (2004).

The claim raised in B.16-B.17 (IB at 54-59) should be denied.

6. TRIAL COUNSEL'S LACK OF OBJECTION TO THE PROSECUTOR'S GUILT PHASE OPENING STATEMENT DESCRIBING THE MURDER AS "HORRIBLE, HEINOUS, ATROCIOUS AND CRUEL FIRST DEGREE MURDER" DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE AS THE

ARGUMENT WAS PROPER, AND BASED UPON THE OVERWHELMING EVIDENCE OF GUILT, NOT PREJUDICIAL (responding to B.18 of appellant's brief).

Under B.18 appellant argues that the prosecutor asserted the heinous, atrocious and cruel aggravator into the guilt phase of trial. IB at 59. Jones does not, as was the case above, set forth for the Court what portion of the prosecutor's opening statement gives rise to his assertion that "the only logical reason for the State's conduct is to inflame the jury to find first degree murder and to, subsequently, reach the question of death and to dispose of both the question and the accused accordingly." Id. Appellant also argues that

> "under the *Giglio* standard, which the Hearing Court failed to properly apply and erred in failing to find the reasonable likelihood that the State's inflammatory conduct, the well wrought and intentionally executed plan to get the jury to recommend Mr. Jones' death, had the desired effect. See Guzman v. State, 686 So. 2d 498 (Fla. 2003) (sending case back to Hearing Court to apply *Giglio* tests); Giglio v. U.S., 405 U.S. 150 (1972).

Id. at 60.[21]

Before the trial court, appellant argued that counsel was ineffective for failing

[21] Appellant does not explain why the trial court should have applied Giglio v. United States, 405 U.S. 150 (1972). As the Court is well aware, in order to establish a Giglio violation, the defendant must show "that: (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material." Guzman v. State, 868 So. 2d 498, 505 (Fla. 2003). Thus even if appellant had cited to Giglio in the court below, which he did not, there would have been no basis for reviewing an opening statement under the standard governing the

to object to the prosecutor's "argument in the guilt-phase that the crime was heinous, atrocious, and cruel, and aggravating circumstance which is not relevant to the jury until the penalty phase." PCR.R.-I, at 119¶21. Appellant cited to the trial transcript, at page 526. Id.

Apparently appellant's citation to page 526 was a mistake, as the portion of the prosecutor's *opening statement* where the prosecutor refers to the murder as heinous, atrocious and cruel appears on page 534 of the transcript. T.Tr.-XVI, at 534. Because appellant did not dispute the actual citation, the State will address the opening statement there.

The trial court addressed the conclusory allegation, stating:

> In sub-claim ten of Defendant's first claim, he alleges that counsel rendered ineffective assistance for failing to object to the State's opening statement during the guilt phase regarding the aggravating circumstance of heinous, atrocious and cruel, which was made solely to inflame the jury. The purpose of opening statements is to outline what counsel expects the evidence to show and are not considered evidence. Occhicone v. State, 570 So. 2d 902, 904 (Fla. 1990). The State's alleged inflammatory statement was:
>
> > We do not know exactly how long he kept her alive, and we don't know exactly what he did to her but we do know enough to know everything that's important to know for the purpose of proving that he's guilty of first degree murder, and not just first degree murder but horrible, heinous, atrocious and cruel first degree murder.

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presentation of false testimony.

> (T.T. 533-534.) The standard for review of prosecutorial misconduct is whether "the error committed was so prejudicial as to vitiate the entire trial." Cobb v. State, 376 So. 2d 230, 232 (Fla. 1979). Jones v. State, 612 So. 2d 1370 (Fla. 1993); State v. Murray, 443 So. 2d 955 (Fla. 1984). The comment by the prosecutor, which the Defendant complains of, did not rise to the level of vitiating the entire trial. Further, the comment by the prosecutor did not "'inflame the minds and passions of the jurors so that their verdict reflect[ed] an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.'" Jones v. State, 612 So. 2d 1370, 1374 (Fla. 1993) quoting Bertolotti v. State, 476 So. 2d 130 (Fla. 1985). Therefore, the Defendant cannot establish the counsel was ineffective for failing to object to these comments. Moreover, assuming arguendo that counsel was deficient in failing to object, Defendant has failed to establish that counsel's deficient performance prejudice his defense in light of the evidence at trial established that Defendant stole $600 from the victim's ATM account, was in possession of the victim's ATM card and vehicle, had attempted to have the interior of the vehicle cleaned, had scratches on his face and reddish stains on his jeans that was almost conclusively the victim's blood, confessed to the police and led the police to the victim's body. Jones v. State, 748 So. 2d 1012, 1016-1017 (Fla. 1999).

PCR.R.-III, at 410-411.

"Opening statements are for the purpose of allowing attorneys to make the jury aware of the evidence believed to be forthcoming." Terrazas v. State, 696 So. 2d 1309, 1310 (Fla. 2nd DCA 1997). And even if the prosecutor's characterization of what he believed the evidence would establish was not proper, "[w]hether or not such a statement is so prejudicial as to require a new trial depends on the strength of the evidence against the defendant." First v. State, 696 So. 2d 1357, 1358 (Fla.

2nd DCA 1997) (internal quotation marks and citation omitted). Absent such a showing, appellant's conclusory claim that the statement resulted in the guilty verdict and death sentence, IB at 60, fails to establish the requisite prejudice under Strickland. As the lower court found, PCR.R.-III, at 411, the evidence of guilt was overwhelming.

Therefore, the claim raised in B.18 (IB at 59-60) should be denied.

7. COUNSEL WAS NOT INEFFECTIVE WHERE APPELLANT FAILED TO DEMONSTRATE THAT HE WAS PREJUDICED BY THE INTRODUCTION OF EVIDENCE -- A RACIAL EPITHET THAT APPELLANT STATED TO LAW ENFORCEMENT WHILE BEING QUESTIONED -- FOR WHICH THIS COURT HELD ON DIRECT APPEAL WAS HARMLESS (responding to B.19 of appellant's brief).

Before the trial court, appellant had argued that

> 22. Defense counsel was prejudicially deficient when they fail to object to the State's not-so-veiled reference to a racial slur Mr. Jones allegedly used when describing some black men he got into a fight with. This statement is irrelevant and inflammatory, and the State is using it to show that Mr. Jones is a racist and that he has a propensity for violence, neither of which is a proper consideration of the jury. . . .

PCR.R.-I, at 119. In his post-evidentiary hearing closing, appellant argued that

> [d]efense counsel failed to seek to exclude or object to a racial slur attributed to the defendant when describing a fight he got into with some black me. [sic] Counsel admitted at the hearing such a term is never benign, and it's introduction is so irrelevant to the crime actually charged that it can only be seen as an attempt to inflame the jurors.

Appendix To State's Answer Brief, at Document 2 ("Closing Argument Of Defendant's Counsel"), page 20.[22]

In rejecting relief, the trial court stated the following:

> . . . The Florida Supreme Court addressed the underlying issue of the State introducing irrelevant evidence suggesting Defendant harbored a racial prejudice against African-Americans. The Court stated:
>
> > In this case the jury was informed that Jones used a racial slur when he first gave his version of events to explain the scratches on his face in an attempt to deny his involvement in the murder. The detective did not repeat the racial slur but only indicated that a racial slur was used. Therefore, in this case we do not agree that the comments constituted impermissible appeals to the biases or prejudices of the jurors.
>
> Jones v. State, 748 So. 2d 1012, 1023 (Fla 1999). The Court, further, held:
>
> > However, in this case we do not find that there was any attempt to inject race as an issue at trial, or an impermissible appeal to bias or prejudice. We further note that Jones was a white male charged with murdering a white female. In addition, the actual racial slur was not used before the jury and the comment was not repeated or subsequently highlighted. Based on the foregoing, we find that even if the admission of this reference to Jones using a racial slur was error, it was harmless beyond a

[22] Although this Court ordered, on June 10, 2005, that a supplemental record be filed to include, *inter alia*, appellant's post-hearing Rule 3.850 closing argument, that pleading was not included in the supplemental record filed in the Court on July 14, 2005. The State's motion filed November 14, 2005, to further supplement the record to include appellant's pleading, is currently pending before the Court. Accordingly, the State has filed the closing argument as part of its Appendix contemporaneously filed with its Answer Brief.

reasonable doubt.

> Id. (citing State v. DiGuilio 491 So. 2d 1129, 1935 (Fla. 1986).) In light of the Florida Supreme Court's determination that the admission of this reference to Defendant using a racial slur was harmless beyond a reasonable doubt, Defendant cannot establish that there is a reasonable probability that the outcome of the proceeding would have been different had counsel objected to the State's "not-so-veiled" reference to a racial slur attributed to the Defendant. Strickland.

PCR.R.-III, at 411-412.

Appellant now complains that the lower court erred because it considered the claim barred "apparently as a matter of law" based upon this Court's prior determination, IB at 60, and "[t]he Hearing Court's arguably cavalier disposal of this claim failed to consider this Court's stern and crystal clear admonishment that no party can seek to take advantage of racial animosity or prejudice in the Florida courts." Id. at 60-61. Thereafter, appellant argues that the trial court's error is based upon its failure to review counsel's lack of objection to the statement in conjunction with other matters. First, appellant seeks to fault the trial court for not considering a claim that was not be for it. Secondly, at least one of the "strategies" that appellant now cites was not raised as ineffective assistance for lack of an objection. Compare IB at 61 (referring to appellant's tattoos) with supra, at 9-11 & n.4-5.

Noticeably silent is appellant's citation to authority supporting his argument

that the admission of evidence held to be harmless beyond a reasonable doubt may nonetheless be a basis for finding ineffective assistance. This Court has held to the contrary, see, e.g., Peterka v. State, 890 So. 2d 219, 238 (Fla. 2004), cert. denied, 125 S.Ct. 2911 (2005); Hodges v. State, 885 So. 2d 338, 355 (Fla. 2003), and appellant makes no attempt to establish that there was prejudice beyond his affirmation that there was. IB at 61.

Therefore, the claim raised in B.19 (IB at 60-61) should be denied.

8. COUNSEL DID NOT PERFORM INEFFECTIVELY THOUGH HE DID NOT IMPEACH STATE WITNESSES AMY HUDSON AND JACKIE DOLL JONES ON MATTERS ASSERTED BY APPELLANT (responding to B.20-B.21 of appellant's brief)

a. Amy Hudson

Appellant argues that counsel should have impeached Amy Hudson "with inconsistencies between her deposition testimony and her trial testimony . . . ." IB at 61. According to appellant, "the Hearing Court found that counsel's performance was *not sufficient* . . . ." but then continues by stating that the trial court provided "that, assuming arguendo that the performance was deficient, Mr. Jones failed to establish prejudice." Id. (italicized emphasis added; underlined emphasis in original). Appellant cites page 26 of the trial court's order. Review of the lower court's order reflects that there was no such finding of deficient

performance:

> In sub-claim twelve of Defendant's first claim, he alleges that counsel was ineffective for failing to impeach Amy Hudson on inconsistencies between her deposition and trial testimony and her opinion that the individual was might be a crack addict. Mr. Buzzell testified at the evidentiary hearing that he did not recall the fact that Ms. Hudson had given to support her opinion that the man she saw might have been a crack addict. (Exhibit "A," pages 160-161.) Mr. Buzzell further testified that if he had evidence that could have impeached her testimony at trial he would have used it. (Exhibit "A," page 161.) Mr. Chipperfield testified at the evidentiary hearing that he would have impeached Ms. Hudson with previous inconsistent testimony if he thought it would have made a difference. (Exhibit "A," page 241.) *Defendant has failed to establish error on the part of counsel for failing to impeach Ms. Hudson* with her deposition testimony or challenge her opinion that the man she saw was a crack addict. Further, assuming arguendo, that counsel's performance was deficient, Defendant has failed to establish prejudice to his case from Ms. Hudson's opinion that the man she saw was a crack addict since Mr. Buzzell testified at the evidentiary hearing that he believed the defense had presented an abundance of evidence to establish that Defendant was a crack addict. (Exhibit "A," pages 144-145.) Accordingly, Defendant [sic] allegations are without merit.

PCR.R.-III, at 412-413 (emphasis added).

In light of the trial court's denial of this claim, appellant argues that "[w]hile Mr. Jones argues that the record is clear that he was a crack addict, counsel still had cause to question the veracity of a witness and to inquire regarding inconsistencies in sworn testimony provided by the witness." On appeal appellant fails to identify what inconsistencies he believes counsel should have impeached Ms. Hudson with,

nor explains why there was cause to question her "veracity." See IB at 62. Appellant's claim before the trial court was not anymore exacting:

> 28. Defense counsel failed to impeach Amy Hudson, who testified at trial that she saw a man in a long-sleeved shirt (T. 773) with the fact that in her sworn deposition she testified that she didn't remember the clothes. Counsel also elicited testimony from her that she thought the man might be a crack addict, although she did not have the expertise to make these observations. (T. 772) Defense counsel failed to strike her comments. In fact, defense counsel did not even develop a strategy to defend or explain the cocaine allusions.

PCR.R.-II, at 121-122.

How the witnesses' testimony would be subject to impeachment is not only not addressed, but appellant also fails to explain how he was prejudiced. While appellant argues that Ms. Hudson's testimony concerning Jones looking like a crack addict was "negative, and questionable," IB at 62, he offers no basis for such a conclusory opinion. Instead, appellant seeks to introduce a separate claim of ineffective assistance within this claim of failure to impeach, again contending that the defense should have presented the testimony of expert testimony on addiction. IB at 62. As stated above, he neglects to address how the presentation of such testimony would have created a reasonable probability that the result of trial would have been different. Nor could he, as appellant was also convicted of robbery and kidnapping, and there was unquestionably sufficient evidence to support a

conviction of first degree murder based upon felony murder -- including appellant's own admissions to having killed and abducted the victim, directing police to the secluded area in which he had concealed her body, being arrested in the victim's vehicle while in position of her ATM card, and finally, videotaped using that card.

Therefore, the claim raised in B.20 (IB at 61-62) should be denied.

b. Jackie Doll Jones

In respect to his claim that counsel was ineffective for failing to investigate his wife Jackie Doll Jones, appellant seeks this Court to disregard the lower court's credibility findings:

> . . . the Hearing Court's finding that Mrs. Jones' testimony, that she didn't know that she had a warrant in Texas when she testified, is erroneous given Mrs. Jones' extensive criminal history. There is no way that a woman of her experience would not know that a warrant was issued if she failed to appear in court. Similarly, her testimony, that she returned to Florida to testify with two Assistant State Attorneys but that she was not in their custody arguably, stretches the limit of credibility. (EHT. 86-87; 93-94; 91-92; 94) The finding that her testimony was free of any coercive pressure by the State is itself not credible. . . . The Hearing Court's findings of credibility regarding Mrs. Jones are not supported by the weight of the evidence. By a straightforward investigation, counsel could have easily discovered the existence of the Texas warrant and used that to argue that Mrs. Jones was testifying under pressure from the State. . . .

IB at 63.

Notwithstanding his argument, appellant does not point to any evidence that

would render the trial court's credibility findings suspect. And while appellant simply relies upon his assertion of that Mrs. Jones' "extensive criminal record," he failed to present the testimony of either of the assistant state attorneys that purportedly brought Mrs. Jones back to Jacksonville "in custody." Nor did appellant present the testimony or any record evidence that would have established in fact that Mrs. Jones knew that a warrant had been issued for a charge pending in Texas.

The trial court addressed this claim as follows:

> In sub-claim thirteen of Defendant's first claim for relief, he alleges that counsel was ineffective for failing to investigate and discover that Jackie Doll Jones had an outstanding warrant in Texas; present evidence of the details surrounding Mrs. Jones' agreement to testify for the State; adequately interview Mrs. Jones while she was in the State's care; impeach Mrs. Jones on her testimony that she received no special treatment from the State and was more responsible than Defendant; and present testimony to refute Mrs. Jones' testimony that Defendant threatened her.
>
> At the evidentiary hearing held on December 11, 2003, Mrs. Jones testified that at the time of Defendant's trial she and the State were not aware that there was an outstanding charges against her in Texas and that she did not learn of the charges until she was pulled over for a traffic violation in Michigan. (Exhibit "A," pages 83-86, 96-97.) Mrs. Jones testified that she eventually served thirteen months of incarceration and the remainder of a three year sentenced on probation in South Carolina stemming from the charges from Texas and that the State of Florida did not assist her in getting any kind of deal on the Texas charges. (Exhibit "A," pages 86-87, 93-94.) Mrs. Jones testified that she did not have a deal with the State to testify and that it was her choice to testify at Defendant's trial. (Exhibit "A," page 87.)

Mrs. Jones testified that she returned to Florida to testify at Defendant's trial in the company of two Assistant State Attorneys, but that she was not in custody. (Exhibit "A," pages 91-92.) Mrs. Jones, further, testified that she spoke with defense counsel prior to Defendant's trial. (Exhibit "A," page 94.)

Defendant's trial counsel, Lewis Buzzell, testified at the evidentiary hearing regarding Mrs. Jones. Mr. Buzzell testified that Mrs. Jones' testimony was presented by the defense during the penalty phase to show Defendant's behavior prior to the instant charges. (Exhibit "A," page 162.) Mr. Buzzell testified that he did not recall Mrs. Jones ever discussing any charges that may have been pending in Texas. (Exhibit "A," pages 162-163.) Mr. Buzzell testified that in his opinion Mrs. Jones was a believable and credible witness in terns of what her relationship was with Defendant at the time and regarding what they did and how Defendant behaved. (Exhibit "A," page 163.) Mr. Buzzell testified that Mrs. Jones tried to portray herself in a better light than Defendant, but that he did not view this to be unusual in his experience and that it was common for people who themselves are engaged in criminal activity to do this. (Exhibit "A," pages 164-165.)

Initially, this Court notes that Defendant failed to present any evidence to support the allegation that counsel was ineffective for failing to impeach Mrs. Jones on her testimony at trial that Defendant had threatened her. Mrs. Jones' testimony refutes the claim that counsel should have discovered that she had outstanding charges in Texas as both she and the State were unaware of the outstanding charges. Mrs. Jones' testimony also refutes the claim that she had a deal with the State and received special treatment from the State. Finally, Mrs. Jones' and Mr. Buzzell's testimony refute the allegation that counsel failed to adequately interview Mrs. Jones. Accordingly, Defendant has failed to establish error on the part of counsel. Strickland.

PCR.R.-III, at 413-414.

The governing standard in respect to credibility findings is as follows:

[i]n reviewing the denial of a 3.850 claim where the trial court has

> conducted an evidentiary hearing, this Court generally affords deference to the trial court's factual findings. See Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997). "As long as the trial court's findings are supported by competent substantial evidence, this Court will not 'substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'" McLin v. State, 827 So. 2d 948, 954 n.4 (Fla. 2002) (quoting Blanco, 702 So. 2d at 1252).

Rodriguez v. State, 2005 Fla. LEXIS 1169 *27-28 (Fla. May 26, 2005). Accordingly, while appellant may not find Mrs. Jones' testimony believable, he presented no basis for this Court to reject the trial court's finding based upon the evidence presented. Peterka, 890 So. 2d at 235.

Therefore, the claim raised in B.21 (IB at 62-64) should be denied.[23]

9. THE TRIAL COURT PROPERLY REJECTED APPELLANT'S CLAIM OF CUMULATIVE ERROR WHERE THERE WAS NO INDIVIDUAL ERROR (responding to B.22 of appellant's brief)

Appellant argues that the trial court erred in not cumulatively considering the

[23] Immediately following his argument that counsel was ineffective for failing to investigate and impeach Jackie Doll Jones is a paragraph dealing with an entirely different claim, though not demarked as such as are appellant's claims within the argument section of his brief. IB at 64. In that paragraph appellant appears to challenge the trial court's determination that counsel was not ineffective for not requesting a curative instruction when Detective Parker testified that appellant had invoked his Fifth Amendment right to remain silent. Id. The lower court denied the claim on the basis that this Court, on direct appeal, held that the error was harmless, and thus appellant did not establish his right to relief under Strickland. PCR.R.-III, at 414-415 (citing Jones, 748 So. 2d at 1021). Appellant argues that the trial court did not consider the claim "in the context of the other errors asserted herein." IB at 64. As discussed above, however, in the absence of any errors appellant is unable

conduct complained of such that "the prejudicial impact is apparent." IB at 64. And while this claim purportedly falls under appellant's group of guilt phase ineffective assistance of counsel claims, he argues that the prejudice was the eventual sentence of death. IB at 65.

In any event, having failed to establish any individual error as to his individual assertions of attorney ineffectiveness, as found by the trial court and as discussed throughout this brief, any claim of "cumulative error" is without merit as the lower court ruled, PCR.R.-III, at 417-418, and is entirely consistent with this Court's prior determinations of the same claim. See, e.g., Mansfield v. State, 911 So. 2d 1160, 2005 Fla. LEXIS 1453 *10 n.6 (Fla. 2005) (lack of any individual error defeats claim of cumulative error, citing Griffin v. State, 866 So. 2d 1, 22 (Fla. 2003), cert. denied, 125 S.Ct. 413 (2004)); Rodriguez v. State, 2005 Fla. LEXIS 1169 *65-66 (Fla. May 26, 2005) (same); Bryant v. State, 901 So. 2d 810, 820 n.6 (Fla. 2005) (same).

Therefore, the claim raised in B.22 (IB at 64-65) should be denied.

10. TRIAL COUNSEL'S LACK OF OBJECTION TO THE PROSECUTOR'S GUILT PHASE CLOSING ARGUMENT DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE (responding to B.23 of appellant's brief)

Appellant argues that "[t]he Court ultimately holds that the argument did not

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to establish cumulative error.

inflame the jury's emotions, but provides no basis for this conclusion," IB at 66, and cites to pages 1462-1466 of the trial transcript as the source of the instances of the prosecutor's guilt phase argument that he believes inflammatory and for which it is alleged counsel was ineffective for failing to object. Id. at 65-66.

While appellant faults the trial court's ruling as providing "no basis" for its conclusion, he ignores the very case law that he cites. See id. at 66 (citing cases cited by the lower court's order at PCR.R.-III, at 417). That court addressed this claim of guilt phase ineffectiveness as follows:

> In sub-claim fifteen of Defendant's first claim, he alleges that counsel rendered ineffective assistance for failing to object to the State's inflammatory remark when it commented on statements attributed to Defendant during its closing argument. The alleged improper comment during closing arguments was made in the context of Assistant State Attorney Jon Phillips arguing Defendant's state of mind. Specifically, Mr. Phillips argued:
>
> > So, the only real question here that the defense has ever tried to raise, and I don't mean to say that it really is a real question, because it's not. I'm just telling you this is what they've said. Our client is a crack addict. That's basically the only point they've made throughout this whole trial, that he is a crack addict, that he did this to get money for crack.
> >
> > Well, that's not a legal excuse. It's not a defense to be a crack addict and it's not a defense to be even under the influence of crack when you commit a crime like this. It is a partial defense if you are so intoxicated that you are incapable of forming the specific intent to commit the crimes, but there has to be some reason to believe that he

was so intoxicated that he didn't know what he was doing, that he couldn't form the specific intent to do these things, and the evidence clearly shows, no matter how much crack he was smoking, that he knew what he was doing while he was doing it. He's able to drive, he's able to pick out a victim.

You know, somebody who doesn't know what the heck they're doing, you know, might attack a defensive tackle because they can't comprehend this guy is twice my size and going to clean the clock with me or clean the floor with me. Somebody who knows what he's doing is going to pick out somebody smaller than him, like a young woman, somebody who's vulnerable. You know, he didn't pick out somebody to abduct in front of everybody. He waited until 1:00 o'clock in the morning when there was nobody around. He knew what he was doing. He knew enough not to leave her there to call the police. He knew enough to remember how to get to the house where he left his Fairmont. He remembered her PIN number a hundred and five times. He manipulated the bank machine. He knew he could strangle somebody. He succeeded in strangling Lori. He cleaned up the interior of the car. He knew enough to ask those folks at the car wash to please clean out my car.

He behaved throughout as a person who knew exactly what he was doing and basically everything he did was goal directed. It was -- he did what he wanted to do. He made all these attempts. He kept trying and trying. The evidence shows that the defendant knew what he had planned to do and lie executed a plan and he had the specific intent to take her car at the time he did it and there's no other reason or suggestion why he attacked her if it wasn't for the purpose of robbing her. It doesn't make any sense at all, other than that.

So, is there ever any evidence at all that during this entire

> period of time that he was incoherent or not able to know what he's doing? I mean look at what lie said to Detective Parker after it's all over. He doesn't say I'm really sorry I did this, I didn't know what I was doing because I was on crack. He makes up an elaborate story basically to the effect that I am an innocent victim of circumstance, except that I did steal the car from this guy and I did use the ATM machines, but there was no violence and there was no woman involved at all.
>
> And then he sticks with that story throughout. He knows what he's doing. The first thing he says is to give an alibi. He says he was at the Duck Pond that night until 2:00 a.m. He gives an alibi. I wasn't anywhere near that Winn-Dixie. Now, if he doesn't know what he's doing, why is lie giving an alibi like that? It doesn't make sense to say that he did not know what he was doing or that he was incapable of forming an intent to do things.
>
> He was coherent enough to blame others for his scratches, wasn't he? He made up a story about that, too. In fact, he made up a couple of stories. The detective even asked him, now, does crack control you where you don't know what you're doing? And he says, no, it just makes me paranoid, but I know what I'm doing. Well, that was one of the few times lie told the truth.
> In fact, probably the truest thing he said, the most truthful thing he said during this whole episode was what he said to Detective Parker when he said, :[sic]I don't give a fuck about that woman." This defendant is so guilty, he is guilty, guilty, guilty. I ask you to find the truth.

(T.T. 1462-1466.)

Initially, this Court notes that wide latitude is permitted in arguing to a jury. Thomas v. State, 326 So. 2d 413 (Fla. 1975); Spencer v. State, 133 So. 2d 729 (Fla. 1961). Logical inferences may

> be drawn, and counsel is allowed to advance all legitimate arguments. Spencer. The standard for review of prosecutorial misconduct is whether "the error committed was so prejudicial as to vitiate the entire trial." Cobb v. State, 376 So. 2d 230, 232 (Fla. 1979). [sic] Jones v. State, 612 So. 2d 1370 (Fla. 1993); State v. Murray, 443 So. 2d 955 (Fla. 1984). The comments by the prosecutor, which the Defendant complains of, did not rise to the level of vitiating the entire trial. Further, the comments by the prosecutor did not "'inflame the minds and passions of the jurors so that their verdict reflect[ed] an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.'" Jones v. State, 612 So. 2d 1370, 1374 (Fla. 1993) quoting Bertolotti v. State, 476 So. 2d 130 (Fla. 1985). Therefore, the Defendant cannot establish the counsel was ineffective for failing to object to these comments or that he suffered prejudice.
>
> To the extent Defendant argues that there was substantial evidence available and unused witnesses which would have undercut the State's argument by establishing Defendant's mental state and manipulation of the case by the police and that counsel could have demonstrated that Defendant's statement was made to stop Detective Parker from harassing him, Defendant makes mere conclusory allegations that such evidence existed. The Defendant failed to present any evidence at the evidentiary hearing to support these allegations. Conclusory allegations which lack sufficient factual allegations to warrant review may be summarily denied. Ragsdale v. State, 720 So. 2d 203 (Fla. 1998). Accordingly, the Defendant's allegations are without merit.

PCR.R.-III, at 415-417.

Appellant seeks a new rule of law, that the prosecutor must ignore the evidence at trial, including Jones' own statements to the police that were admitted. Appellant does not establish that the matters that he finds objectionable were

outside of the evidence. Ford v. State, 702 So. 2d 279, 280 (Fla. 4th DCA 1997) ("It is well settled that a prosecutor must confine closing argument to evidence in the record, and must refrain from comments that could not be reasonably inferred from the evidence.") (citing Huff v. State, 437 So. 2d 1087, 1090 (Fla. 1983)). Not only does appellant make no attempt to demonstrate why the prosecutor's argument was improper, but he is incorrect, as the prosecutor's arguments were based upon evidence at trial and reasonable inferences therefrom, i.e., appellant's actions were deliberate and controlled -- where, e.g., he did not rob the Walgreens' clerk but instead abducted Mrs. McRae who he had seen in the store, drove her vehicle, knew to get her pin number to access her bank account using the ATM card, concealed her body in a remote area -- and appellant did not care about his victim as he admitted -- where, e.g., appellant told Detective Parker that "I don't give a fuck about this woman," T.Tr.-XX, at 1318, and his actions reflected as much: he kidnapped and killed Mrs. McRae as opposed to only stealing money from her, beat and strangled her, and then after concealing her body, did not lead authorities to her body until some twenty days had passed, resulting in great decomposition. Accordingly, there was nothing improper about the prosecutor's statements during closing argument. Moreover, appellant does not address the issue of prejudice. In light of the substantial evidence of guilt, see supra, at 5-7

(quoting Jones, 748 So. 2d at 1016), appellant cannot meet his burden.

Therefore, the claim raised in B.23 (IB at 65-66) should be denied.

Based upon the foregoing discussion, Argument I should be denied in its entirety.

II.

THE POSTCONVICTION MOTION COURT PROPERLY HELD THAT TRIAL COUNSEL DID NOT PERFORM INEFFECTIVELY IN RESPECT TO HIS PENALTY PHASE INVESTIGATION AND PRESENTATION OF MITIGATION EVIDENCE.

1. THE TRIAL COURT PROPERLY DETERMINED THAT COUNSEL DID NOT PERFORM INEFFECTIVELY IN ITS INVESTIGATION AND PRESENTATION OF EXPERT TESTIMONY TO SUPPORT THE STATUTORY MENTAL MITIGATORS (responding to C.1 of appellant's brief).

Before the trial court, appellant had argued that counsel was ineffective in their investigation and thus presentation of "mental health mitigation" by a "mental health expert." PCR.R.-I, at 132-134, ¶¶12-15; 136-137, ¶¶25-29. In rejecting this claim, the lower court stated as follows:

> . . . . The Defendant's first sub-claim alleges that counsel rendered ineffective assistance for failing to investigate and present mental health testimony to establish substantial and compelling statutory and non-statutory mitigation. Initially, this Court notes that counsel presented the expert testimony of Drew Edwards during the penalty phase of Defendant's trial who testified concerning cocaine addition, its effect on the brain and on human behavior, its treatment and testified on cocaine's effect on the brain and specifically Defendant's drug addiction and drug use. (T.T. 1906-1928.) Counsel also presented the testimony of clinical psychologist Dr. Sherry Risch, Ph.D., who testified concerning Defendant's low IQ and his deficient ability to analyze a situation and think of consequences. (T.T. 1854-1856.)
>
> Defendant presented Dr. Jonathan Lipman, a neuropharmacologist, testified at the evidentiary hearing that Defendant was "constitutionally vulnerable to experiencing the psychosis producing effect of cocaine" that develops only on chronic use.

(Exhibit "A," pages 17-18.) Dr. Lipman testified that in his opinion Defendant was acting under the influence of chronic cocaine psychosis at the time of the instant offenses. (Exhibit "A," page 21.) Dr. Lipman testified that at the time of the instant offenses, Defendant was disorganized, irrationally fearful, under extreme duress, and substantially impaired at the time of the instant offenses. (Exhibit "A," pages 38-39.) Dr. Lipman testified that in his opinion both statutory mental health mitigating circumstances applied to Defendant. (Exhibit "A," pages 39-40.)

On cross-examination by the State, Dr. Lipman testified that his opinion of Defendant's symptomology was based on previous psychological evaluations of Defendant, individuals who saw Defendant and those who testified at Defendant's trial, including Mrs. Jones. (Exhibit "A," pages 43-44.) Dr. Lipman testified that he would have informed the jury the Defendant had an underlying psychotic vulnerability and that he has a psychosis spectrum disorder. (Exhibit "A," page 50.) Dr. Lipman, further, testified that at the time, the mental health experts who evaluated Defendant in 1986, and in 1995, in relation to the instant case, were correct in their own way regarding Defendant's mental state, but that in hindsight Defendant has psychosis spectrum disorder. (Exhibit "A," pages 63-64.) Dr. Lipman testified that Defendant knew what he was doing a[t] the time, but that his actions were the product of a deranged mind. (Exhibit "A," page 66.) Dr. Lipman testified that Defendant understood the criminality of his act but did not want to suffer the consequences. (Exhibit "A," page 69.)

Mr. Buzzell testified at the evidentiary hearing that counsel spent a lot of time researching Defendant's background, having Defendant examined and trying to come up with evidence regarding his mental health. (Exhibit "A," page 143.) Mr. Buzzell testified that a thrust of the defense's trial strategy, and especially in the penalty phase, was to show that Defendant was a cocaine addict and the intent element was muted by this addiction. (Exhibit "A," page 162.) Mr. Chipperfield testified that the defense's strategy during the penalty phase was to show that Defendant was a drug addict, that the instant offenses occurred when he was using or craving drugs, and that he's a [sic]

Mrs. Jones testified good person when not on drugs. (Exhibit "A," page 226.) Mr. Chipperfield testified that the defense presented an expert who testified concerning how cocaine affects a person's behavior and how an addiction to cocaine also affects a person's behavior. (Exhibit "A," page 227.) Mr. Chipperfield explained penalty phase expert witness Drew Edwards' testimony regarding cocaine. (Exhibit "A," pages 245-246.)

This Court notes "that counsel's reasonable mental health investigation and presentation of evidence is not rendered incompetent 'merely because the defendant has now secured the testimony of a more favorable mental health expert.'" Rivera v. State, 859 So.2d 495, 504 (Fla. 2003) (quoting Asay v. State, 769 So. 2d 974, 986 (Fla. 2000). Further, the fact a defendant finds a new expert to give more favorable mental health testimony does not, in itself, render counsel ineffective. Freeman v. State, 858 So. 2d 319, 327 (Fla. 2003). This Court found the existence of, but gave little weight to, the statutory mitigators of Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of the was substantially impaired and that Defendant was [under] the influence of extreme mental or emotional disturbance when he committed the instant offenses. (R.O.A. Vol VI, pages 1140-1141.) This Court finds that Defendant's new mental health expert testimony does not establish that counsel was deficient in investigating and presenting mental health testimony to establish mitigation during Defendant's penalty phase.

* * * * *

In sub-claim nine of Defendant's second claim for relief, he alleges that counsel was ineffective for failing . . . to prepare and present expert witness testimony regarding [sic] Defendant's schizophrenia and substance abuse. . . .

Defendant also alleges counsel failed to prepare and present expert witness testimony regarding [sic] Defendant's schizophrenia. Dr. Wade C. Myers' psychiatric evaluation of Defendant which was filed on August 17, 1995, diagnosed Defendant with "Antisocial Personality Disorder," that he possibly suffered from a "Psychotic

Disorder Not Otherwise Specified,[”] suffered from “Cocaine Dependence” and at the time of his evaluation suffered from a “Depressive Disorder Not Otherwise Specified.” (R.O.A. Vol I, page 51.) Dr. George W. Barnard’s evaluation of Defendant opined that Defendant did not suffer from a severe mental disorder but had traits of an antisocial personality disorder and a history of substance abuse. (R.O.A. Vol I, page 62.) Dr. Bernard, further, opined that Defendant presented a pattern of malingering a mental disorder. (R.O.A. Vol I, page 62.) At the evidentiary hearing, Defendant’s neuropharmacology expert, Dr. Lipman, testified that in his opinion Defendant was acting under the influence of chronic cocaine psychosis at the time of the instant offenses. (Exhibit “A,” page 21.) Dr. Lipman testified that Defendant had psychoaffective disorder and not schizophrenia when he was evaluated in 1986. (Exhibit “A,” pages 32-33.) Dr. Lipman testified that Defendant has a psychosis spectrum disorder. (Exhibit “A.” page 50.) Finally, Dr. Lipman testified that at the time, the mental health experts who evaluated Defendant in 1986, and in 1995, in relation to the instant case, were correct in their own way regarding Defendant’s mental state, but that in hindsight Defendant has psychosis spectrum disorder. (Exhibit “A,” pages 63-64.)

This Court notes “that counsel’s reasonable mental health investigation and presentation of evidence is not rendered incompetent ‘merely because the defendant has now secured the testimony of a more favorable mental health expert.’” Rivera v. State, 859 So.2d 495, 504 (Fla. 2003) (quoting Asay v. State, 769 So. 2d 974, 986 (Fla. 2000). Further, the fact a defendant finds a new expert to give more favorable mental health testimony does not, in itself, render counsel ineffective. Freeman v. State, 858 So. 2d 319, 327 (Fla. 2003). The Defendant has failed to establish error on the part of
counsel for failing to present expert testimony regarding his schizophrenia. Neither Dr. Myers nor Dr. Barnard diagnosed Defendant as suffering from Schizophrenia. Further, Defendant’s expert witness presented at the evidentiary hearing diagnosed Defendant as suffering from psychosis spectrum disorder and not schizophrenia. Accordingly, Defendant has failed to establish that he is suffering from schizophrenia and that counsel should have presented expert testimony on this condition.

> Finally, Defendant alleges counsel failed to prepare and present expert witness testimony regrading [sic] Defendant's substance abuse. Defendant's allegation is without merit. Counsel presented the testimony of Drew Edwards during the penalty phase of Defendant's trial. Mr. Edwards was qualified as an expert in cocaine addition, its effect on the brain and on human behavior, its treatment and testified on cocaine's effect on the brain and specifically Defendant's drug addiction and drug use. (T.T. 1906-1928.) Accordingly, Defendant has failed to establish that counsel was deficient for failing to prepare and present expert witness testimony regarding [sic] Defendant's substance abuse.

PCR.R.-III, at 418-420, 429-431.

While disavowing the position that defense counsel was constitutionally required to locate and present a more favorable expert, see IB at 83, that is precisely the argument underlying appellant's invitation for this Court to hold counsel ineffective for not discovering and presenting the testimony of an expert for which the trial court would have accorded greater weight to its finding of the statutory mental mitigators. How could his argument be otherwise, as trial counsel submitted and the lower court had in fact found (1) that appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired; and (2) the capital felony was committed while Jones was under the influence of extreme mental or emotional disturbance. R.-VI, at 1139-1141; see also supra, at 5-6 (quoting Jones, 748 So. 2d

at 1016-1017 (which set forth a summary of the defense's penalty phase evidence)). Appellant's position becomes all the more clear based upon his characterization of his penalty phase expert, Drew Edwards, as "a lay witness . . . whose testimony is both quantitatively and qualitatively dwarfed by the informative and persuasive elegance of Dr. Lipman's testimony." IB at 79-80 (citing TT. 1906-1928). Similarly, appellant assigns ineffectiveness to counsel because collateral counsel was able to locate an expert to testify "that Mr. Jones had previously suffered from a schizophrenic psychotic breakdown"[24] and that trial counsel "would have wanted to use it." IB at 80-81 (citing PCR.R.-IV, at 623). However, as previously observed, supra, at 49, and recognized by the lower court, failure to shop around for an expert that will testify more favorably does not constitute ineffective

[24] As the trial court stated, however, Dr. Lipman did not conclude that appellant suffered from schizophrenia, PCR.R.-III, at 431; see also id. at 479, is contrary to the psychiatric determinations by Drs. Myers and Barnard. Compare R.-I, at 51 ("Mr. Jones meets criteria for **Antisocial Personality Disorder** . . . . It is possible that Mr. Jones is suffering from a **Psychotic Disorder Not Otherwise Specified** . . . . At the time of arrest, Mr. Jones was suffering from **Cocaine Dependence** . . . .") (emphasis in original); id at 62 ("[D]efendant does not have a severe mental disorder but rather presents indications of having traits of an antisocial personality disorder and a history of substance abuse. He does present a pattern of malingering a mental disorder." Moreover, Dr. Lipman is not a psychiatrist or psychologist, but a Ph.D. neuropharmocologist, and as testified to during the evidentiary hearing, "[n]europharmacology is that branch of science dealing with the effects of drugs and toxins on nerve brain and behavior." PCR.R.-III, at 454. Appellant did not establish that Dr. Lipman would be qualified at trial to provide medical diagnoses if properly challenged at trial.

assistance. Rivera, 859 So. 2d at 504; Cooper, 856 So. 2d at 976 n.5.

Moreover, while asserting that trial counsel should have presented various testimony, appellant ignores the damaging evidence that would have also been adduced at trial, including that appellant has an antisocial personality disorder, he malingers mental illness or at least the extent thereof, as well as testimony that appellant sought to avoid the death penalty by essentially faking bad. Appellant also misstates the evidence produced at the evidentiary hearing: while appellant argues that trial counsel "admitted that evidence, such as Mr. Jones' brother, Carlos, and his mother provided, that Mr. Jones' father was a brutal violent alcoholic, may be mitigation to present in the penalty-phase," IB at 82, he provides no basis for its relevance given that appellant was two-years-old when his mother divorced his father, and as testified to by his mother, that violence was directed at her. PCR.R.-III, at 522, 526; see also T.Tr.-XXV, at 1806. Finally, appellant appears to believe that the prior violent felony aggravator could have been contested through the use of his mental mitigation. IB at 81-82. There is no question, however, that appellant was convicted for the murder of Jasper Highsmith in 1986. Indeed, he pled guilty. See T.Tr.-XXIV, at 1677-1678 (certified copy of appellant's guilty plea for his commission of Mr. Highsmith's murder). Appellant offers no explanation how any projected evidence could have precluded a finding

that a conviction for first-degree murder was not a "prior violent felony."

Therefore, the claim raised in C.1 (IB at 67-84) should be denied.

2. TRIAL COUNSEL'S LACK OF OBJECTION TO THE PROSECUTOR'S OPENING PENALTY PHASE STATEMENT WAS NOT INEFFECTIVE (responding to C.2 of appellant's brief).

Appellant argues that counsel was also ineffective during the penalty phase for not objecting to the prosecutor's opening statement. Without citation to the record, Jones argues as follows:

> Further, counsel failed to object to the State's use of inflammatory hyperbole in opening statements in the penalty-phase. The State's mis-characterization of the nature of mitigation is "an excuse as intended to cause the jury to question the defense's motivation in presenting the very evidence that it had as duty and the burden to present. By challenging the nature of mitigation with no objection by the defense, the State was permitted to skewer the process and, in essence, advise the jury to question the motivation for the presentation of mitigation rather than to judiciously weigh the mitigation presented.

IB at 84.

The trial court rejected this claim as follows:

> In sub-claim two of Defendant's second claim for relief, he alleges that counsel rendered ineffective assistance for failing to object to the State's inflammatory penalty phase opening statements. Specifically, Defendant argues that counsel should have objected to the State's inflammatory hyperbole that Defendant deserved to die and for characterizing the defense's penalty phase case as using crack cocaine as an excuse. The State's statement that the Defendant deserved the death penalty was based on its belief that the strength of the evidence of the aggravating circumstances to be presented during

> the penalty phase would support a verdict of death. (T.T. 1632-1636.) Further, the State stated to the jury that it expected the defense to present during its penalty phase case evidence that Defendant was a crack addict. (T.T. 1639-1640.) Opening statements project what counsel expects the evidence to show and are not considered evidence. Occhicone, *supra*. As the State's comments merely projected what it believed the evidence to be presented would show and what it expected the defense to present, the Defendant has not established that counsel's failure to object to these alleged improper comments was outside the wide range of reasonable professional assistance. Strickland. Accordingly, Defendant's second sub-claim to claim two is without merit.

PCR.R.-III, at 420-421.

Appellant does not address the trial court's ruling on the claim. Id. Instead, beyond his conclusory argument of error, he also argues that trial counsel's use of Jackie Doll Jones during the penalty phase concerning appellant's drug addition was "specious, at best, when presented without an expert to explain the nexus between the addition and the crime cogently to the jury." IB at 84-85. Given that this last claim of error has nothing to do with his original claim and does not address why the prosecutor could not have reasonably have believed that the defense was going to be appellant's drug addiction, as it was the basis for his defense during the guilty phase, the argument is irrelevant to his claim of counsel's ineffectiveness for not objecting to the opening statement.[25]

[25] Appellant did raise a separate claim of ineffectiveness in respect to counsel's preparation and presentation of Jackie Doll Jones' testimony during the penalty

Moreover, review of the prosecutor's opening statement in context reflects that any objection would have been denied:

> [by Ms. Corey, Assistant State Attorney] Now, in this weighing process you will have to consider the mitigation that we expect the defense to put on. And we expect that they are entitled to put on anything about the defendant that they so choose. They only have to establish their mitigation by putting it on for you basically and then the Judge will tell you how to weigh it.
>
> But very briefly, ladies and gentlemen, we expect they will put on some doctors, some family members, some people who have had contact with this defendant to tell you that he just didn't really mean to kill Lori McRae because he was a crack addict or because of any other reasons that they choose to put before you. That this murder of Lori McRae, this strangulation, the robbery leaving her body, that all of those things aren't really his fault because he was addicted to crack cocaine. And we expect, ladies and gentlemen, they will argue to you there are other aspects of his life that should cause you to go back in that room and say this man deserves to live. But the State, Mr. Phillips and I, expect at the close of this penalty phase that you will unanimously recommend death for David Wyatt Jones.
>
> * * * * *

T.Tr.-XXIV, at 1639-1640. As the above reflects, the prosecutor based her argument on what she anticipated the evidence to be and the defense did in fact present evidence regarding Jones' life and the effect that his drug addiction had on him. "Opening statements are for the purpose of allowing attorneys to make the

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phase, PCR.R.-II, at 134-135, though apparently not raised on appeal. Jones does, however, argue that counsel was ineffective for not presenting expert witness mitigating testimony, addressed supra, at 81-88.

jury aware of the evidence believed to be forthcoming." Terrazas, 696 So. 2d at 1310.

Therefore, the claim raised in C.2 (IB at 84-85) should be denied.

3. COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE NOTWITHSTANDING THAT HE DID NOT PRESENT THE TESTIMONY OF APPELLANT'S MOTHER AND A BROTHER, AS WELL AS A LONG-TERM FRIEND THAT HAD FREQUENTLY USED DRUGS AND COMMITTED A BURGLARY WITH APPELLANT (responding to C.3 of appellant's brief)

Lastly, appellant argues that counsel was ineffective for failing to present certain mitigation evidence through lay witnesses. According to appellant, he

> presented a strong range of testimony at the hearing which would have truly allowed the jury to know Mr. Jones, whose life and fate they were charged to decide. The hearing [sic] has overlooked or failed to consider the great majority of this testimony. The Hearing Court's cursory review of the testimony of Mr. Jones' mother and brother fails to assess the weight and credibility of the testimony presented.

IB at 85. Appellant thereafter sets forth testimony from his mother, brother Carlos, wife Jackie Doll Jones, and his long-term friend Jeffery Morrow, incarcerated at the time of the evidentiary hearing for grand theft and a ten-time (at least) felon. Id. at 85-92. In arguing counsel's ineffectiveness, appellant asserts that "[t]rial counsel did not present a tactical or strategic reason for not presenting any of this strong, persuasive testimony. Further, counsel had access to all of these witnesses." Id. at 93.

Review of the trial court's order rejecting this claim reflects that appellant's assertion of what the evidence would establish simply is not accurate, as refuted by the record, or that such evidence was testified to at trial:

> In sub-claim seven of Defendant's second claim, he alleges that counsel was ineffective for failing to investigate and present substantial available mitigation evidence from lay witnesses. Defendant alleges that counsel should have presented testimony of family, friends and other significant influences to provide anecdotal testimony regarding Defendant's schizophrenia and substance abuse. Defendant argues counsel should have presented testimony of family members, including his brother Carlos, that Defendant's father was violently abusive to his mother and entire family; that Defendant suffered head injuries and was burned as a result of his pajamas being immolated; that Defendant exhibited multiple personalities; and that Defendant was essentially a loner except for his mother and cousin for the better part of his childhood. Initially, this Court notes that except for Defendant's brother, Carlos Jones, Defendant claims that there were family members, friends and other significant influences available to testify for mitigation purposes lack sufficient factual allegations to warrant review. Conclusory allegations which lack sufficient factual allegations to warrant review may be summarily denied. Ragsdale v. State, 720 So. 2d 203 (Fla. 1998).
>
> Defendant's allegations that counsel failed to present testimony from family members that Defendant suffered head injuries, had a substance abuse and was essentially a loner except for his mother and cousin for the better part of his childhood are refuted by the record. Defendant's mother, Joann Sealy, testified at Defendant's trial contrary to his assertion that he was essentially a loner except for his mother and cousin for the better part of his childhood by testifying that Defendant had a great relationship with his siblings and had no problems in his childhood. (T.T. 1776). Ms. Sealy also testified regarding Defendant's drug use and head injury. (T.T. 1785- 1786, 1791.) Accordingly, Defendant's [sic] has failed to establish error on the part of counsel with regard to these allegations.

Defendant's brother, Carlos Jones, testified at the evidentiary hearing. Mr. Jones testified that he remember his father as an alcoholic who was abusive toward his family and had on two occasions threatened to shoot Mr. Jones, his mother, sister and Defendant. (Exhibit "A," pages 110-113.) Mr. Jones testified that during the second time his father threatened to shoot family member, his mother struck his father in the head with a frying pan and left the home with Mr. Jones and his siblings never to return. (Exhibit "A," page 113.) Mr. Jones testified that there was a five to six year age difference between him and Defendant and that he experienced more of the violence than Defendant due to that age difference. (Exhibit "A," page 115.)

Defendant's mother, Joann Sealy, also testified at the evidentiary hearing. Ms. Sealy testified that her husband was an alcoholic whose violence was mostly directed at her because their children were very young. (Exhibit "A," pages 75-76.) Ms. Sealy testified that Defendant was friends with his cousin, Ricky Bevel, and that they were playmates growing up. (Exhibit "A," pages 77-78.) Ms. Sealy testified that Defendant was never around his father, Carlos Jones, Sr., much growing up because she had divorced him when Defendant was not quite two years old. (Exhibit "A," page 80.)

Defendant's allegations that counsel was ineffective for failing to have his brother testify regarding Defendant's schizophrenia and substance abuse; that Defendant's father was violently abusive to his mother and entire family; that Defendant was burned as a result of his pajamas being immolated; and that Defendant exhibited multiple personalities are without merit. Mr. Jones provided no testimony at the evidentiary hearing regarding Defendant's schizophrenia and substance abuse; Defendant being burned as a result of his pajamas being immolated; or that Defendant exhibited multiple personalities. (Exhibit "A," pages 110- 118.) Further, Mr. Jones' testimony regarding his father's alcoholism and abuse toward his family is diminished by Ms. Sealy's testimony that Defendant was not even two years old when she divorced Defendant's father and that Defendant was never around his father for significant periods of time. Accordingly, Defendant has

> failed to establish error on the part of counsel for failing to present Mr. Jones' testimony.

PCR.R.-III, at 425-427.

First, having failed to assert in his amended postconviction motion that there were friends that were available to testify as lay witnesses that counsel should have presented, compare PCR.R.-I, at 135¶22 ("Counsel failed to elicit substantial mitigation from the lay witnesses *it did present* and failed to present family members . . . .") (emphasis added), the trial court properly did not consider the new claim in respect to the testimony of Jeffrey Morrow.

Moreover, appellant does not address how the testimony from Mr. Morrow would have provided "substantial mitigation" or identify what evidence could have been presented through Mr. Morrow that was not presented at trial, that would have actually been mitigating. Mr. Morrow testified that he had at least ten felony convictions and was currently incarcerated, PCR.R.-III, at 548; he met appellant in the 1980s through his mother, a heroin dealer, when appellant and Jackie Doll Jones came to buy heroin, id.; he and appellant frequently used drugs, including heroin and a mixture of cocaine and heroin, id. at 549-550; prior to appellant's conviction for his first murder that he committed, Mr. Morrow and appellant were arrested together for committing a burglary, id. at 550-551; he "lost contact with David after

he escaped out of the jail . . . ." before the second murder, id. at 553; and he was aware that appellant had tried to sell the vehicle from the victim of the first murder. Id. at 554. Nor did appellant demonstrate that counsel was even aware of Jeffrey Morrow to interview him and make the determination of whether to present him at the penalty phase.

In regard to appellant's mother, Joann Sealy, as noted by the lower court, she testified at trial. T.Tr.-XXV, at 1769-1807. While appellant sets forth what his mother testified to at the evidentiary hearing, he does not identify how counsel was ineffective in preparing her for the penalty phase and what she testified to most recently that was not presented at trial and that would not have been contradicted by the record at trial. See IB at 85-87. Indeed, at trial Mrs. Sealy testified in greater detail to the same facts as testified to at the evidentiary hearing: she separated from and then divorced appellant's father because he had a problem with alcohol, T.Tr.-XXV, at 1770-1771; after they divorced she was responsible for raising the children and "worked quit a bit, . . . two, sometimes three jobs . . . . ," id. at 1772-1773; appellant dropped out of school but never got in trouble, id. at 1775; appellant got along with his siblings and others and was helpful at home, id. at 1776; appellant got in trouble with alcohol and committed a crime while in the service, id. at 1780; she described appellant having a drug problem and problems with Jackie Doll Jones

based upon drug use, id. at 1782-1786, 1788-1790; and she had legal custody of appellant and Jackie Doll Jones' child. Id. at 1783. In addition, at trial Mrs. Sealy denied that appellant had been physically or mentally abused. Id. at 1806. In comparison, her testimony at the evidentiary hearing was substantially the same, yet not as comprehensive: her children "were very young, very young" when appellant's father was violent with her, PCR.R.-III, at 522, and appellant "was never around his father that much because when [she] divorced his father he was not quite two years old . . . . ," id. at 526; that she worked more than one job, id. at 523; appellant was close to his cousin Ricky Bevel, id. at 523-524; described generally turbulent relationship between appellant and Jackie Doll Jones, id. at 524-525; she has legal custody over appellant and Jackie Doll Jones' son, Davy because of the situation of the parents, id. at 525; and appellant loves his son. Id. at 525-526.

Pertaining to his brother Carlos, appellant also fails to identify what testimony he could have given that was not testified to at trial and not contradicted by the record. Specifically, appellant does not explain the relevance of Carlos Jones' testimony concerning the physical abuse of their father, given the fact that appellant was two-years-old when their mother divorced Carlos Jones Sr., id. at 1771; that there was a five or six-year age difference between appellant and his older brother,

PCR.R.-III, at 561, as well as the fact that their mother actually had separated from him at least for a period of time when appellant was four months of age, T.Tr.-XXV, at 1770; and testified at trial that appellant was not physically abused. Id. at 1806.

Therefore, having failed to demonstrate that counsel was deficient and that he was prejudiced as a result, the claim raised in C.3 (IB at 85-94) should be denied.

Based upon the foregoing discussion, the claims as raised under Argument II should be denied in their entirety.

CONCLUSION

Based on the foregoing arguments and authorities, the lower court's Order denying appellant's motion for postconviction relief under Rules 3.850/3.851 should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a true and correct copy of the foregoing was mailed, postage prepaid, on this 6th day of December, 2005, to:

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CERTIFICATE OF TYPE SIZE AND STYLE

Undersigned counsel hereby certifies that this brief was typed using Times New Roman 14-point font, in conformity with Fla. R. App. P. 9.210(a).

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