IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-225

RICARDO GONZALEZ,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

On February 14, 1992, Defendant, Pablo San Martin, Leonardo Franqui, Pablo Abreu and Fernando Fernandez were charged by indictment with committing, on January 3, 1992: (1) first degree murder of a law enforcement officer, (2) armed robbery, (3) aggravated assault, (4) two counts of grand theft and (5) two counts of burglary.[1] (R. 1-5)[2] Trial commenced on May 23, 1994. (R. 57) Defendant was tried jointly with Franqui and San Martin. (R. 11) Fernandez was tried at the same time by a separate jury. After considering the evidence, the jury found Defendant guilty as charged on all counts and made a special finding that Officer Bauer was a law enforcement officer in doing so. (T. 2307-08) The trial court adjudicated Defendant in accordance with the verdict. (T. 2317) After a penalty phase, the jury recommended that Defendant be sentenced to death by a vote of 7 to 5. (T. 3259)

Defendant appealed his conviction and sentences to this Court, raising 4 issues:

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[1] Defendant was also charged with possession of a firearm during a criminal offense and an additional count of aggravated assault. (R. 1-4) However, the State entered a nolle prosequi to these charges after opening statement at Defendant's original trial. *Gonzalez v. State*, 700 So. 2d 1217, 1217 n.1 (Fla. 1997), *cert. denied*, 523 U.S. 1062 (1998) and 523 U.S. 1145 (1998).

[2] In this brief, the symbol "R." will refer to the record on direct appeal from the first trial, FSC Case No. 84,841. The symbol "T." will refer to the transcript of the original trial.

I.

THE COURT IMPERMISSIBLY DENIED APPELLANT THE OPPORTUNITY TO EXERCISE PEREMPTORY CHALLENGES.

II.

THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S MOTION FOR SEVERANCE AND PERMITTED THE INTRODUCTION OF CODEFENDANT'S CONFESSIONS IN APPELLANT'S TRIAL.

III.

APPELLANT WAS DENIED AN IMPARTIAL HEARING AT THE PENALTY PHASE OF HIS TRIAL BY THE COURT'S REFUSAL TO SEVER HIS CASE.

IV.

THE IMPOSITION OF THE DEATH PENALTY IS A DISPROPORTIONATE PENALTY TO IMPOSE ON APPELLANT.

Initial Brief of Appellant, FSC Case No. 84,841. This Court affirmed Defendant's conviction but reversed Defendant's death sentence. *Gonzalez v. State*, 700 So. 2d 1217 (1997). The Court found that the trial court had erred in admitting the other codefendants' confession at the joint trial, that such error was harmless in the guilty phase but that the error was harmful in the penalty phase. In issuing its opinion, this Court found the following historical facts:

> The defendant, Ricardo Gonzalez, along with codefendants Pablo San Martin, Leonardo Franqui, Fernando Fernandez, and Pablo Abreu were charged with first-degree murder of a law enforcement officer, armed robbery with a firearm, aggravated assault, unlawful possession of a firearm while engaged in a criminal offense, grand theft in the third degree, and burglary. (FN1) Gonzalez, Franqui, and San Martin were tried together before a jury in May, 1994.
>
> The record reflects that the Kislak National Bank in North Miami, Florida, was robbed by four gunmen on

January 3, 1992. The perpetrators made their getaway in two stolen grey Chevrolet Caprice cars after taking a cash box from one of the drive-in tellers. During the robbery, police officer Steven Bauer was shot and killed. Shortly after the robbery, the vehicles were found abandoned two blocks west of the bank.

Approximately two weeks later, Gonzalez was stopped by police after leaving his residence on January 18, 1992. He subsequently made unrecorded and recorded confessions in which he told police that Franqui had planned the robbery, involved the other participants and himself in the scheme, and chosen the location and date for the crime. He said that Franqui had procured the two stolen Chevrolets, driven one of the cars, and supplied him with the gun he used during the robbery. He further stated that Franqui was the first shooter and shot at the victim three or four times, while he had shot only once. Gonzalez indicated that he shot low and believed he had only wounded the victim in the leg. He was subsequently reinterviewed by police and, among other things, described how Franqui had shouted at the victim not to move before shooting him. (FN2)

Franqui was also questioned by police on January 18, 1992, in a series of unrecorded and recorded sessions. During his preinterview, Franqui initially denied any involvement in the Kislak Bank robbery, but when confronted with the fact that his accomplices were in custody and had implicated him, he ultimately confessed. Franqui stated that Fernandez had hatched the idea for the robbery after talking to a black male, and he had accompanied the two men to the bank a week before the robbery actually took place. He maintained that the black male friend of Fernandez had suggested the use of the two stolen cars, but denied any involvement in the thefts of the vehicles. According to Franqui, San Martin, Fernandez, and Abreu had stolen the vehicles. Franqui did admit to police that he and Gonzalez were armed during the episode, but stated that it was Gonzalez--and not himself--who yelled at the victim to "freeze" when they saw him pulling out his gun. Franqui denied firing the first shot and maintained that he fired only one shot later.

> At trial, over the objection of Gonzalez, the confessions of codefendants San Martin and Franqui were introduced without deletion of their references to Gonzalez, upon the trial court's finding that their confessions "interlocked" with Gonzalez's own confession.
>
> * * * *
>
> (FN1.) One count of aggravated assault and the unlawful possession of a firearm while engaged in a criminal offense were nol-prossed by the State after its opening statement.
>
> (FN2.) San Martin also made a confession to police, in which he stated that the robbery was planned by a black friend of the codefendant Fernandez and that the planning occurred at Fernandez's apartment. San Martin admitted that he had grabbed the money tray during the robbery, but could not say who carried guns or did the shooting.

Id. at 1217-18. Both parties sought certiorari review in the United States Supreme Court, which was denied. *Florida v. Gonzalez*, 523 U.S. 1145 (1998); *Gonzalez v. Florida*, 523 U.S. 1062 (1998).

On remand, the matter proceeded to the new penalty phase on August 10, 1998. (RST. 1)[3] After considering all of the evidence, the jury recommended that Defendant be sentenced to death by a vote of 8 to 4. (RSR. 219, RST. 1851-52)

The trial court sentenced Defendant to death. (RSR. 245-60, 364) The trial court found in aggravation that: (1)

[3] The symbols "RSR." and "RST." will refer to the record on appeal and transcript of proceedings from the resentencing, FSC Case No. 94,154.

Defendant had committed prior violent felonies, based on the contemporaneous armed robbery and aggravated assault; (2) the murder was committed during the course of a robbery; (3) the murder was committed for pecuniary gain; (4) the murder was committed to avoid a lawful arrest; (5) the murder was committed to hinder the enforcement of laws; and (6) the victim was a law enforcement officer engaged in the lawful performance of his duties. (RSR. 245-48, 346-49) The trial court merged the pecuniary gain and during the course of a robbery aggravators and gave them great weight. (RSR. 246, 346-47) The trial court also merged the prevent lawful arrest, the hinder law enforcement and the murder of a law enforcement officer aggravators and gave them great weight. (RSR. 247-48, 348-49) The trial court also gave some weight to the prior violent felony aggravator. (RSR. 246, 346)

In mitigation, the trial court found: (1) Defendant had no significant prior criminal history - some weight; (2) Defendant's brain damage, learning disability and below average intelligence - little weight; (3) Defendant's remorse - little weight; (4) Defendant's cooperation with the authorities - little weight; (5) the life sentences given to two codefendants - little weight; and (6) Defendant's good conduct while incarcerated and potential for rehabilitation - little weight.

(RSR. 249, 257-58, 349-50, 360-62) The trial court considered and rejected the extreme mental or emotional distress mitigator, the minor participation mitigator, the duress mitigator, the capacity to conform mitigator, and the age mitigator. (RSR. 249-55, 350-59) The trial court also rejected the claim that Defendant's family background should be considered mitigating. (RSR. 256, 359-60)

Defendant appealed his sentence to this Court, raising 5 issues:

> I.
> CUSTODIAL STATEMENTS OF NON-TESTIFYING ACCOMPLICES THAT INCULPATED THE DEFENDANT ARE INHERENTLY TOO UNRELIABLE TO BE ADMITTED AT TRIAL. CAN THE ERROR OF ADMITTING SUCH STATEMENT BE HARMLESS ON HEARSAY RULE GROUNDS THAT THERE IS SUFFICIENT CORROBORATION OR MUST THE HARMLESS ERROR ANALYSIS CONSIDER THE DEFENDANT'S LOSS OF THE DYMANIC OF THE CONFRONTATION PROCESS AS A PRODUCER OF TRUTHFUL EVIDENCE.
>
> II.
> THE LEGISLATURE USED THE FACTOR OF THE VICTIM'S STATUS AS A POLICE OFFICER AND HIS CONDUCT IN THAT CAPACITY TO RAISE THE MINIMUM PENALTY FOR FIRST DEGREE MURDER FROM LIFE IMPRISONMENT WITHOUT PAROLE FOR 25 YEARS TO LIFE IN PRISON WITHOUT ELIGIBILITY FOR RELEASE. DOES THE USE OF THESE SAME FACTORS TO RAISE THE SENTENCE TO DEATH CONSTITUTE IMPRESSIBLE DOUBLE COUNTING.
>
> III.
> THE SENTENCING JUDGE REJECTED THE UNCONTROVERTED TESTIMONY OF APPELLANT'S EXPERT AS UNSUPPORTED. THE RECORD CONTAINS COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT THE STATUTORY MITIGATOR ADVANCED BY THE EXPERT, WHICH THE COURT OVERLOOKED. THE EXISTENCE OF ORGANIC AND BEHAVIORAL SUPPORT FOR THE EXPERT OPINION MAKES THE COURT'S REJECTION OF THE MITIGATOR ERROR.

IV.

THE PROSECUTOR'S CLOSING ARGUMENT APPEALED TO THE PASSION OF THE JURY AND THE PROSECUTION TEAM'S INTRODUCTION OF ITS PERSONAL OPINION OF REJECTION OF DEFENSE MITIGATOR EVIDENCE TO THE JURY CONSTITUTED ERROR.

V.

PROPORTIONALITY ANALYSIS REQUIRES THAT THE DEATH SENTENCE IMPOSED AGAINST [DEFENDANT] BE VACATED.

Initial Brief of Appellant, FSC Case No. 94,154. This Court affirmed Defendant's sentence. *Gonzalez v. State*, 786 So. 2d 559 (Fla. 2001).

Because of the enactment of the Death Penalty Reform Act of 2000 (DPRA), the State Attorney's Office originally sent public records notices to the North Miami Police Department, the Department of Corrections, the Florida Department of Law Enforcement (FDLE), the Miami-Dade Police Department and the City of Hialeah Police Department on January 21, 2000, during the pendency of the resentencing appeal. (PCR-SR. 2-11)[4,5] The Notices to the North Miami Police Department, FDLE, Miami-Dade Police Department and City of Hialeah Police Department indicated that the records had previously been requested in *State v. Leonardo Franqui and Pablo San Martin*, Eleventh

[4] The symbols "PCR." and "PCR-SR." will refer to the record on appeal and supplemental record on appeal in the appeal from the denial of the motion for post conviction relief.

[5] A motion to supplement the record is being filed simultaneously with the filing of this brief. As such, the citations to the supplement record are estimates.

Judicial Circuit Case No. 92-6089. (PCR-SR. 4-11) The same day that these notices were sent, the State Attorney's Office also notified that Office of the Attorney General that the Office of the Medical Examiner and the Miami-Dade Department of Corrections and Rehabilitation also had information pertinent to these proceeding. (PCR-SR. 12-13) On February 2, 2000, the Office of the Attorney General notified these agencies that they were required to send their public records to the repository. (PCR-SR. 14-17)

In response to these notices, the Office of the Medical Examiner sent their records on March 13, 2000. (PCR-SR. 18) The Florida Department of Corrections sent its records to the repository on March 23, 2000. (PCR-SR. 19-22) On March 23, 2000, the Department of Corrections sent its notices of compliance and delivery of exempt records. (PCR-SR. 19-22) On September 14, 2000, the Miami-Dade Police Department filed its notice of compliance with the request, noting that the records were already in the records repository under *State v. San Martin*, Case No. F92-6089. (PCR. 93-94) Because this Court ruled that the DPRA was unconstitutional, *Allen v. Butterworth*, 756 So. 2d 52 (Fla. 2000), the production of public records during the pendency of the resentencing appeal then ceased.

Upon the issuance of this Court's mandate, the Office of the Attorney General sent notice of affirmance to the State Attorney's Office and the Department of Corrections on June 14, 2001. (PCR-SR. 23-26) In response, on June 25, 2001, the Office of the State Attorney sent its notices of compliance and delivery of exempt materials, indicating that the records had already been sent to the repository under *State v. Leonardo Franqui and Pablo San Martin*, Eleventh Judicial Circuit Case No. F92-6089. (PCR. 73-74, 85-86) On June 22, 2001, the State Attorney also sent new public records notices to the North Miami Police Department, the City of Hialeah Police Department, the Miami-Dade Police Department and FDLE. (PCR. 75-82) That same day, the Office of the State Attorney again noticed the Office of the Attorney General that the Miami-Dade Department of Corrections and Rehabilitation and the Medical Examiner had pertinent information. (PCR. 83-84) On June 29, 2001, the Office of the Attorney General again notified these agencies to send their records to the repository. (PCR. 87-90) The Miami-Dade Police Department sent its second notice of compliance, again indicating that the record had been sent to the repository under *State v. Leonardo Franqui and Pablo San Martin*, Eleventh Judicial Circuit Case No. F92-6089, on August 15, 2001. (PCR.

91-92) The North Miami Police Department also filed a similar notice of compliance in April 2002. (PCR. 99)

After mandate issued, the lower court held status conferences at least every 90 days. (PCR. 19-20, 59) Defendant never indicated that he was having any difficulty obtaining public records and never moved to compel any agency for failure to comply with his public records. At one status conference, the State informed the lower court that some agencies had submitted record that were claimed to be exempt from disclosure. The State noted that if Defendant wanted the court to review these records in camera, Defendant need to make an appropriate motion. Defendant did not make any such motion at that time.

On July 19, 2002, Defendant filed a "shell" motion for post conviction relief, which listed 13 claim headings without any factual allegations. (PCR. 145-58) Defendant claimed the motion was incomplete because he had only recently obtained the public records from the repository and needed to review those records to determine whether any public records were missing and to investigate this matter. *Id.* On July 24, 2002, the State moved to strike this motion because it did not comply with Fla. R. Crim. P. 3.851 (2001). (PCR-SR. 27-35) The State argued that this Court had specifically amended Fla. R. Crim. P. 3.851 to eliminate the practice of filing shell motions, that Defendant

had not been diligent in seeking public records, which had been available to him since before his case became final, and that filing a shell motion would not accomplish Defendant's goal of tolling the federal habeas statute of limitations because such motions are not properly filed. *Id.*

On August 8, 2002, the court heard argument on the State's motion. (PCR-SR. 37-56) At the hearing, Defendant argued that he needed additional time to file a proper motion because he did not have public records and the record was allegedly complex in that the investigation of this matter was intertwine with the investigation of the other crimes committed by this group of individuals. (PCR-SR. 45-49) In the course of making this argument, Defendant admitted that he had filed the shell motion to met a time limit. (PCR-SR. 48) Defendant suggested that he be allowed to amend pursuant to Fla. R. Crim. P. 3.851(f)(4). (PCR-SR. 48-49)

The State responded that the public records had been available before this matter was even final and that Defendant had been coming to status hearings and insisting that everything was fine. (PCR-SR. 49) As such, the State asserted that the complaint about public records was without merit. (PCR-SR. 49-50) The State asserted that the motion did not comply with Fla. R. Crim. P. 3.851 in any respect. (PCR-SR. 50) The State

contended that while the court did not have the power to grant leave to amend, the shell motion did not comply with the requirements of Fla. R. Crim. P. 3.851(f)(4) regarding motions for leave to amend. (PCR-SR. 50-51, 52) As such, the State argued that the shell motion was merely an attempt to obtain an extension of the trial court, contrary to the rule. (PCR-SR. 51-53) The State asserted that if Defendant needed an extension, he should request that extension from this Court. (PCR-SR. 53-54) The court then granted the State's motion and struck Defendant's "shell" motion. (PCR. 161)

Defendant then moved this Court for an extension of time in which to file a motion for post conviction relief that complied with Fla. R. Crim. P. 3.851. This Court granted Defendant until January 9, 2003, to file a proper motion.

On January 6, 2003, Defendant finally moved the lower court to conduct an in camera review of the exempt records from the Office of the State Attorney, the Department of Corrections and FDLE. (PCR. 162-67) At the same time, Defendant moved this Court for a second extension of time to file his motion for post conviction relief. (PCR. 171-76) On January 20, 2003, this Court granted Defendant until March 10, 2003, to file his motion with no further extensions allowed.

On January 24, 2003, Defendant had his motion for in camera inspection heard. (PCR. 170, 640-54) The State objected to the in camera inspection on the grounds that Defendant had waived the right to the inspection by failing to seek the inspection diligently. (PCR. 642-45) Defendant stated that he did not have to seek an in camera review in a timely manner and insisted he had been diligent because the issue of exempt public records had been discussed during the numerous status hearings the lower court had conducted. (PCR. 645-46) The State pointed out that the prior discussion of the exempt material had been raised by the State, that the State had suggested that Defendant should request a review if he wanted one and that Defendant had still failed to request any review. (PCR. 646) The lower court agreed to conduct the in camera inspection. (PCR. 650) The State notified the court that most, if not all, of the materials that Defendant sought to have inspected were in the custody of the clerk. (PCR. 644) However, Defendant insisted upon having an order entered requiring the records repository to send the records. (PCR. 645-46) The lower court entered the order Defendant requested. (PCR. 185)

On January 29, 2003, the record repository informed Defendant that the form of the order that he had provided was incorrect. (PCR-SR. 57) Defendant obtained a corrected order

thereafter. (PCR-SR. 58-59) On February 24, 2003, the records repository forwarded those sealed records that it still had that were responsive to the order. (PCR-SR. 60) It also informed Defendant that the remainder of the records were still in the possession of the clerk. *Id.* Originally, the clerk could not locate the exempt materials. (PCR. 657) The lower court then conducted a series of status hearings, during which the clerk's office reported on its attempts to locate the sealed records. (PCR. 657-69) At the hearing on March 6, 2003, the clerk's office provided the court with the sealed records from the Department of Corrections. (PCR. 664-67) The State informed the court that it should review the records to determine whether they were properly claimed to be exempt and whether they contained an *Brady* material even if they were exempt. *Id.* At the hearing on March 7, 2003, the court stated that it had conducted an in camera review of these records and determined that they were exempt.

On March 10, 2003, Defendant filed his motion for post conviction relief, raising 7 claims:

> I.
> [DEFENDANT] WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

II.

[DEFENDANT] WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT HIS RESENTENCING PROCEEDINGS, IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

III.

NEWLY DISCOVERED EVIDENCE OF THE LIFE SENTENCE IMPOSED ON FERNANDO FERNANDEZ REQUIRES THE [DEFENDANT] RECEIVE RELIEF. THE JURY'S FAILURE TO KNOW THAT FERNANDEZ RECEIVED A LIFE SENTENCE UNDERMINES CONFIDENCE IN THE OUTCOME OF ITS 8-4 DEATH RECOMMENDATION.

IV.

THE APPLICATION OF THE NEW RULE 3.851 TO [DEFENDANT] VIOLATES HIS RIGHTS TO DUE PROCESS OF LAW AND EQUAL PROTECTION.

V.

[DEFENDANT'S] RIGHT TO ACCESS TO PUBLIC RECORDS HAD BEEN DENIED DUE TO THE LOSS OF NUMEROUS RECORDS BY THE CLERK OF COURT.

VI.

THE FLORIDA CAPITAL SENTENCING PROCEDURES AS EMPLOYED IN [DEFENDANT'S] CASE VIOLATED HIS SIXTH AMENDMENT RIGHT TO HAVE A UNANIMOUS JURY RETURN A VERDICT ADDRESSING HIS GUILT OF ALL THE ELEMENTS NECESSARY FOR THE CRIME OF CAPITAL FIRST DEGREE MURDER.

VII.

[DEFENDANT] IN[sic] INSANE TO BE EXECUTED, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

(PCR. 187-259) On May 9, 2003, the State responded to Defendant's motion. (PCR. 260-487)

On July 10, 2003, the lower court held a *Huff* hearing in this matter. Defendant asserted that an evidentiary hearing was not necessary regarding Claims V, VI and VII. (PCR. 673-74)

Regarding his claims concerning the failure to object, Defendant asserted an evidentiary hearing was needed to develop why counsel did not object but acknowledge that the prejudice would be judged from the face of the record. (PCR. 674-78, 682-92) He contended that an evidentiary hearing was necessary to develop why counsel did not recall witnesses to present evidence concerning the gun found at the third crime scene. (PCR. 678-82) However, he again asserted that no development would be necessary regarding prejudice and asserted that prejudice was shown because trial counsel had claimed the evidence was relevant to the defense in arguing to present the evidence during the State's case. *Id.* Regarding the presentation of several experts, Defendant again asserted that factual development was necessary only on the issue of deficiency. (PCR. 692-93) With regard to presenting Defendant's testimony and the newly discovered evidence claim, Defendant did not assert what facts needed to be developed. (PCR. 693-99) When pushed by the lower court regarding what evidence needed to be developed about the newly discovered evidence claim, Defendant merely asserted he might call a state attorney. (PCR. 696-97) Regarding the claim about the constitutionality of Fla. R. Crim. P. 3.851, Defendant asserted the reasons why a shell motion was filed and

an appeal from the striking of that motion was not pursued needed to be developed. (PCR. 699-703)

With regard to the public records claim, Defendant argued that the clerk needed to be ordered to find the lost records or the agencies needed to be ordered to send replacement records. (PCR. 703-04) He then asserted that the records needed to be reviewed in camera to determine if the material were properly exempt and if there was any *Brady* material. (PCR. 704-05) Defendant asserted that any notes of witness interviews would be subject to disclosure because it might contain *Brady* material. (PCR. 705-06) The State pointed out that the materials had already been the subject of an in camera review regarding the codefendants, and no *Brady* material was found. (PCR. 707-08)

The State responded that the issues that Defendant claimed counsel was ineffective for failing to preserve had been raised and rejected in the codefendants' appeals and that no showing of prejudice would be possible. (PCR. 710) With regard to the failure to seek to admit the gun found at the third scene, the State pointed out that not only was the gun found not the same caliber as the murder weapon but also the actual murder weapon and other gun used in the crimes had been located, linked to Defendant and admitted into evidence. (PCR. 710-11) As such, there could be no prejudice from the failure to admit an

unrelated weapon. *Id.* It asserted that the comments were proper, any error in the comments would not have affected the outcome and the claims were barred. (PCR. 711-12) It pointed out that Dr. Eisenstein's testimony was incredible without regard to any inconsistency and that the mitigation that was found was based on the experts that Defendant claimed should not have been called. (PCR. 713-14) It asserted that Defendant had not alleged deficiency with regard to his not testifying and deficiency could not be shown. (PCR. 714-15)

Regarding the newly discovered evidence claim, the State pointed out that Defendant was relying on a theory of Fernandez's culpability that had been rejected by this Court in reversing Fernandez's sentence, that this Court's finding controlled and that using that finding, the culpability difference negated an affect on the outcome. (PCR. 715) The State pointed out that the records from the Department of Corrections had already been reviewed and found to be exempt and that other records had been found, reviewed and found to be exempt. (PCR. 715-16) The State Attorney's Office agreed to resubmit its exempt materials, which consisted of attorney notes that were not subject to disclosure. (PCR. 716-18) Regarding the claim about the constitutionality of Fla. R. Crim. P. 3.851, the State asserted that Defendant was suggesting an evidentiary

hearing on a claim of ineffective assistance of post conviction counsel, which is not cognizable and was not properly pled. (PCR. 718-19)

When questioned by the lower court regarding his lack of assertion of deficiency regarding Defendant's testimony, Defendant acknowledged that he was not alleging any interference with his right to testify by counsel. (PCR. 719-21) The trial court found that the only claim on which factual development and an evidentiary hearing was necessary was the portion of claim III, regarding the improper use of mental health experts. (PCR. 721) The trial court entered an order on the *Huff* hearing, reflecting these findings. (PCR-SR. 61-62) The lower court also required the State Attorney's Office to provide it with duplicate copies of its exempt materials so that an in camera review of these materials could be conducted. *Id.*

On August 7, 2003, the State sent notice that it was providing the lower court with an additional copy of its exempt material. (PCR. 497-98) The State also provided Defendant with a copy of some notes that it believed it may have improperly claimed to be exempt previously. *Id.* The lower court reviewed this information in camera and determined that everything was exempt except for one document entitled "Statement of Rents," which it disclosed. (PCR. 499-502)

At the evidentiary hearing, Defendant presented the testimony of Bruce Fleisher and Reemberto Diaz, his trial attorneys. (PCR. 726-82) Mr. Fleisher testified that he had been licensed to practice law in 1973, and practice primarily criminal defense. (PCR. 731-32) He had tried capital cases. (PCR. 732) He and Mr. Diaz represented Defendant both at his original trial and his resentencing. (PCR. 732-33) They collaborated on everything but Mr. Fleisher was in charge of the penalty phase at the original trial. (PCR. 733)

In preparing mitigation, Mr. Fleisher selected the experts, and Mr. Diaz's former partner traveled to Puerto Rico to interview Defendant's family. (PCR. 733) Mr. Fleisher retained Dr. Brad Fisher, Dr. Mary Haber, Dr. Hyman Eisenstein and Dr. Alan Wagschul. (PCR. 734) Mr. Fleisher presented family history mitigation through live testimony and videotaped testimony. (PCR. 734) Mr. Fleisher decided not to call Dr. Haber. (PCR. 735) Dr. Fisher was used to opine about lack of future dangerousness. (PCR. 734, 736)

Mr. Fleisher explained that Dr. Eisenstein conducted neuropsychological testing, believed that there were indications of brain damage and suggested an MRI. (PCR. 735) Dr. Wagschul was hired as a board certified neurologist to confirm the brain damage and conduct the MRI. *Id.* Dr. Wagschul confirmed the brain

damage, and brought in Dr. Tom Nadish, a radiologist, to confirm the brain damage was consistent with pugilistic encephalopathy. (PCR. 735-36)

All of this mitigation was developed prior to the initial trial. (PCR. 736) Mr. Fleisher felt it was best to present all of the mitigation because Defendant had killed a police officer. (PCR. 736-37) Mr. Fleisher believed that his presentation was effective, given that the initial recommendation was 7-5. (PCR. 736) Mr. Fleisher and Mr. Diaz decided to pursue the same strategy at resentencing. (PCR. 737) Mr. Fleisher believed it was important to present as much mitigation as possible and did not believe the experts contradicted one another. (PCR. 737-38) He stated that Dr. Eisenstein found brain damage, Dr. Wagschul confirmed the brain damage, and Dr. Fisher was testifying about future dangerousness. (PCR. 737-38) He believed that any inconsistencies in their testimony were minor and did not outweigh the benefits of presenting a board certified neurologist to confirm the brain damage and presenting as much mitigation as possible. (PCR. 738-39)

Mr. Fleisher stated that he did not present Dr. Wagschul's testimony live at resentencing. (PCR. 739) Dr. Wagschul was reluctant to testify because of a payment problem with the county. (PCR. 739) Moreover, Mr. Fleisher did not wish to

subject to cross examination by Abraham Laeser, the prosecutor assigned for the resentencing, whom Mr. Fleisher considered a better prosecutor than the prosecutor who conducted the original trial. (PCR. 739-40) As such, Mr. Fleisher elected to have Dr. Wagschul's prior testimony read to the jury. (PCR. 740) Mr. Fleisher believed he provided Dr. Wagschul's results to Dr. Eisenstein. (PCR. 743)

On cross, Mr. Fleisher stated that he sought the appointment of Dr. Haber shortly after his appointment. (PCR. 745) Mr. Fleisher usually hires a forensic psychologist or psychiatrist, such as Dr. Haber, first and then hired other experts based on the first expert's recommendations. (PCR. 746) In this case, Dr. Haber suggested neuropsychological testing, and Dr. Eisenstein was retained. (PCR. 746-47) Dr. Eisenstein conducted neuropsychological testing, suggested the appointment of a neurologist and Dr. Wagschul was retained. (PCR. 747-48) Mr. Fleisher informed the experts of Defendant's lack of a criminal history and history of head trauma, particularly while boxing. (PCR. 749)

Mr. Fleisher stated he used all of the doctors he retained to get demonstrable confirmation of brain damage. (PCR. 749-51) Mr. Fleisher believed this would be powerful mitigation. (PCR. 750-51) Mr. Fleisher also believed that Dr. Fisher was a good

witness and provided valuable testimony that Defendant would do well in prison. (PCR. 753-56) Dr. Fisher was aware of the other experts results but was not evaluating or testifying concerning any issue of brain damage. (PCR. 756) Mr. Fleisher did not believe he would have been representing Defendant effectively by failing to present evidence of a demonstrable brain injury or of lack of future dangerousness. (PCR. 756)

On redirect, Mr. Fleisher stated that he was aware that one expert could rely on the testing of another. (PCR. 758-59) Mr. Fleisher did not believe that Dr. Eisenstein would have been able to provide the testimony that Dr. Fisher provided, however. (PCR. 759-60)

On questioning by the lower court, Mr. Fleisher stated that he did not believe his experts gave inconsistent opinions. (PCR. 760-61) Moreover, Mr. Fleisher believed that juries listened to medical doctors more than other experts. (PCR. 761) He believed the presentation of this testimony enhanced Dr. Eisenstein's testimony. (PCR. 761)

Mr. Diaz testified that he had been an attorney since 1979, and practice primarily criminal defense. (PCR. 773) Mr. Diaz believed he had participated in about 40 capital cases before he represented Defendant. (PCR. 776) Mr. Diaz confirmed that he and Mr. Fleisher represented Defendant both at the original

trial and on resentencing. (PCR. 773-74) Mr. Diaz stated that Mr. Fleisher was more familiar with the sentencing issues. (PCR. 774-75) He and Mr. Fleisher discussed strategy for the resentencing, including the calling mental health experts and altering the presentation from the first trial. (PCR. 775-76, 776-77) Mr. Diaz believed that Mr. Fleisher had done everything that could be done in preparation for the original penalty phase. (PCR. 776) Mr. Diaz deferred to Mr. Fleisher's judgment regarding the presentation of mitigation. (PCR. 777) Mr. Diaz did not recall discussing any inconsistencies in the testimony of the experts. (PCR. 777-78)

On January 2, 2004, the lower court entered its order denying the motion for post conviction relief. (PCR. 505-600) The lower court indicated that it had limited the evidentiary hearing because the other claims did not require additional factual development. *Id.* It rejected the claim of ineffective assistance of counsel at the guilt phase because the comments in opening were proper, there was no prejudice from the failure to object to the evidence and there was no prejudice from failing to introduce a .9 mm handgun found in a car near the crime scene given that the weapons actually used in the crime were admitted and linked to the defendants. *Id.* It rejected the claim of ineffective assistance at resentencing regarding the comments

because the majority of the comments were proper, there was no reasonable probability of a different result from the improper comment and complaints regarding some of the comments were procedurally barred. It rejected the claim that counsel was ineffective for calling experts other than Dr. Eisenstein because counsel made a strategic decision and there was no prejudice. It denied the claim of ineffective assistance for failing to call Defendant as a witness because it was facially insufficient and refuted by the record. It rejected the newly discovered evidence claim based on the difference in culpability of Defendant and Fernandez found by this Court. It determined that Fla. R. Crim. P. 3.851 (2001), was not unconstitutional. With regard to the public records claim, it found that an in camera review had been conducted of all of the exempt materials and noted Defendant's delay in pursuing public records. It rejected the *Ring* claim based on this Court's precedent and the fact that all of the aggravators had been found by a unanimous jury at the guilt phase. It dismissed the sanity to be executed claim without prejudice. *Id.*

This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court properly denied the claims of ineffective assistance at the guilt phase as they were insufficiently pled and meritless. It also properly denied the claims of ineffective assistance of counsel at the resentence, other than the portion of the claim regarding calling experts for these same reasons. The lower court properly denied the newly discovered evidence claim as without merit.

Any issue regarding public records compliance was waived by Defendant's lack of diligence in seeking public records. Moreover, the lower court did not abuse its discretion in ruling on the public records issues. The lower court did not abuse its discretion in striking Defendant's shell motion, as the motion did not comply with Fla. R. Crim. P. 3.851, Defendant was not prepared to comply with the rule in a reasonable time and Defendant was permitted to file a proper motion after this Court granted Defendant extensions of time to do so.

The *Ring* claim was properly denied. The sanity to be executed claim is not properly before this Court, was facially insufficient and is not ripe.

ARGUMENT

I. THE CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE WERE PROPERLY DENIED.

Defendant first asserts that the lower court erred in summarily denying his claims that his counsel was ineffective at the guilt phase. However, the lower court properly denied these claims because there was no prejudice from the alleged deficiencies.

In order to plead properly a claim of ineffective assistance of counsel, Defendant must demonstrate both that counsel's performance was deficient, and that the deficient performance prejudiced the defense, which requires a showing that counsel's errors were so serious as to deprive the defendant of a trial whose result is reliable. *Strickland v. Washington*, 466 U.S. 668 (1984).

Deficient performance requires a showing that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and a fair assessment of performance of a criminal defense attorney:

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

> challenged action might be considered sound trial strategy.

Strickland, 466 U.S. at 694-695.

Even if a criminal defendant shows that particular errors of defense counsel were unreasonable, the defendant must show that they actually had an adverse effect on the defense in order to establish ineffective assistance of counsel. The test for prejudice requires the defendant to show that, but for counsel's unprofessional errors, the result of the proceeding would have been different, or, alternatively stated, whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt. *Strickland*, 466 U.S. at 694.

Defendant first asserts that the lower court erred in rejecting his claim that his counsel was ineffective for failing to object to the State’s opening statement and to the admission of certain evidence about Off. Bauer. Defendant asserts that the lower court should have held an evidentiary hearing to determine why counsel did not object. However, the lower court properly summarily denied this claim.

In *Robinson v. State*, 707 So. 2d 688, 697-99 (Fla. 1998), the defendant contended, as Defendant does here, that his counsel was ineffective for failing to object to allegedly improper comments in closing both at the guilt and penalty

phases of trial. *Id.* at 697 & n.17 & 18. In response to a claim that the lower court had improperly summarily denied the claims, this Court stated, "[a]s a matter of law, we find that [the] claims . . ., are procedurally barred because they could have been raised on direct appeal." In accordance with *Robinson*, this claim was properly summarily denied as procedurally barred.

Even if the claim had not been procedurally barred, the claim was still properly summarily denied. The lower court properly found that the comments about which Defendant asserts his counsel was ineffective for failing to object were proper. (PCR. 512) Immediately before opening statements were delivered to the jury trying Defendant, Franqui and San Martin, the State delivered an almost identical opening statement to the jury trying Fernandez. *Compare* T. 852-57 *with* T. 873-79. During this opening statement, Fernandez's counsel did object to comments of a similar nature to those about which Defendant complains. *Id.* At the conclusion of the State's opening, Fernandez's counsel moved for a mistrial on the basis that the State's opening had improperly inflamed the jury. (T. 858-59) The trial court denied the motion for mistrial, finding that the opening statement was not improper. (T. 859) Fernandez raised the issue on appeal, and this Court found the opening statement

was proper. *Fernandez v. State*, 730 So. 2d 277, 281 (Fla. 1999). Since this Court has already found the State's nearly identical opening statement proper, the lower court properly found the opening statement proper. As the opening statement was proper, counsel cannot be deemed ineffective for failing to make the nonmeritorious objection that it was not. *Kokal v. Dugger*, 718 So. 2d 138 (Fla. 1998)(counsel not ineffective for failing to raise meritless issue); *Groover v. Singletary*, 656 So. 2d 424 (Fla. 1995); *Hildwin v. Dugger*, 654 So. 2d 107 (Fla.), *cert. denied*, 516 U.S. 965 (1995); *Breedlove v. Singletary*, 595 So. 2d 8, 11 (Fla. 1992). Thus, the claim was properly summarily denied.

While Defendant suggests an evidentiary hearing was necessary to deny this claim, it was not. In his motion, Defendant did not suggest that factual development was necessary on this claim or why. (PCR. 193-94) At the *Huff* hearing, Defendant suggested that evidentiary development was necessary to show why counsel did not object but the issue of prejudice could be ascertained by reviewing the record. (PCR. 674-78) Since the comments were proper, there was no prejudice from the failure to object to them. *Strickland*. The Court has made clear that it is not necessary to address deficiency when there is a lack of prejudice. *Strickland*, 466 U.S. at 697. Since

Defendant could not show prejudice, the claim was properly summarily denied.

Defendant next contends that counsel was ineffective for failing to object to LaSonya Hadley's testimony about Officer Bauer's working relationship with her or to the conversation that Officer Bauer had with Ms. Hadley immediately before the crime. (T. 936, 938-39) The lower court found that there was no prejudice from the failure to object to this testimony. (PCR. 513) This finding was proper. Codefendant Leonardo Franqui raised an issue regarding the admission of this testimony on appeal, and this Court found any error in the admission of this testimony harmless. *Franqui v. State*, 699 So. 2d 1332, 1334 n.4 (Fla. 1997). By finding any error in the admission of this testimony harmless, this Court found that the admission of the testimony did not affect the jury's verdicts beyond a reasonable doubt. *See State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). Since this Court has already determined that the admission of this testimony did not affect the jury's verdict beyond a reasonable doubt, Defendant cannot show by a preponderance of the evidence that it would create a reasonable probability of a different result at trial had the objection been made. *See Chandler v. State*, 848 So. 2d 1031, 1045 (Fla. 2003). Thus, the claim was properly summarily denied.

Defendant again asserts that an evidentiary hearing was necessary on the question of deficiency only. (PCR. 674-78) However, since there was no prejudice, there was no reason to even address deficiency. *Strickland*, 466 U.S. at 697. As such, there was no need for an evidentiary hearing. The denial of the claim should be affirmed.

Defendant next asserts that the lower court erred in denying his claim that his counsel was ineffective for failing to present evidence that a .9 mm handgun and latex gloves were recovered from a third crime scene. However, the claim was properly denied. In the lower court, Defendant's only statement of how he was prejudiced by the failure to present this evidence was to rely on the trial court's statement that the gun might be relevant to the defense and counsel's statement that it was. (PCR. 198-99) Defendant made no attempt to assert prejudice other than these conclusory statements. However, such conclusory statements are insufficient to state a valid claim. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998). As such, the claim was properly summarily denied.

In an attempt to bolster the assertions he made in the lower court, Defendant relies on statements made by the lower court at the *Huff* hearing and in its order, expressing concern about the issue and stating that the evidence appeared relevant

and exculpatory on its face. Defendant then attempts to use those statements to show that the lower court improperly relied upon the strength of the State's case in finding that there was no prejudice. However, Defendant has taken these statements out of context. When considered in context of the record as a whole, the lower court properly found that there was no reasonable probability of a different result had counsel actually attempted to admit the gun, since it had nothing to do with these crimes.

At the beginning of the *Huff* hearing, the lower court had not yet reviewed the transcripts of the trial and resentencing. (PCR. 672) As such, the fact that the lower court initially had a concern about this claim is attributable to its failure to understand the lack of significance of the .9 mm the police found at the third crime scene. Moreover, what the lower court actually said in denying this claim was:

> Defendant alleges that trial counsel was ineffective for failing to introduce evidence that a 9 millimeter firearm was discovered at another, unrelated scene not far from the robbery and murder in this case. Defendant proffers that, had trial counsel called two witnesses to testify (police detectives LaPorte and Pearce), the following evidence would have been presented to the jury:
>
> During the course of the robbery/murder investigation, two crime scenes developed. The first was the crime scene at the bank where the robbery and murder occurred. The second crime scene was where the two getaway vehicles were eventually found. However, a third scene developed during the investigation, five

or six blocks away; at that crime scene another automobile was found, and in that automobile the detectives found latex gloves and a 9 millimeter firearm. When the weapon was discovered, it was "jammed" and not operable. Two guns were used in the robbery and murder in this case. One was a .38 caliber and the other a 9 millimeter.

On its face, this evidence certainly appears significant and perhaps even exculpatory, pointing to the possibility that some other individual, in some other car, committed the robbery and murder and abandoned the car and gun at this third scene. However, some amplification is needed to place this evidence in proper context.

Defendant's counsel attempted to elicit this evidence on cross-examination of two Detectives, LaPorte and Pearce. The court sustained the State's objection to this line of questioning as outside the scope of direct and defense counsel at sidebar announced his intention to call these two detectives during the defense case. (T. 1086-87). [FN2] Whether this was "puffing" by the defense, whether defense counsel ever intended to call these witnesses, or was simply trying to convince the court to change its ruling, is immaterial. Even if Defendant could establish the deficiency prong under **Strickland**, a review of the trial record reveals that Defendant cannot establish the requisite prejudice under **Strickland** and therefore is not entitled to relief.

Considering this proffered evidence in the context of the entire trial record, it is clear that Defendant has failed to establish a reasonable probability that this testimony would have affected the outcome of the case. The evidence at trial included the following relevant facts:

- Co-defendant San Martin told police he disposed of the guns used in the robbery and murder by throwing them in the river. The police recovered the guns (a .38 caliber and a 9 millimeter) at the location described by San Martin. (T. 1758-62;1790-1806).

- At the scene of the robbery and murder police recovered one projectile, one casing, and several fragments of projectiles. Projectiles were also recovered from the victim's body. (T. 1006-07;1046-47).

> - The two guns recovered from the location described by San Martin were subjected to ballistics testing; those guns conclusively matched the casing and bullet recovered from the murder scene and the projectiles recovered from the victim's body. (T. 1869-88).
>
> - The projectile fragments recovered from the scene of the robbery and murder were consistent with the 9 millimeter recovered by police at the location described by co-defendant San Martin. (T. 1885-86). The condition of the projectiles prevented more conclusive testing.
>
> **Given the strength and conclusiveness of the evidence which linked these two guns to the murder, the discovery of another 9 millimeter gun (in an inoperable condition) at a crime scene several blocks away creates no probability— reasonable or otherwise— that such evidence would have had any effect on the outcome of the trial.**
>
> * * * *
>
> [FN2] In fact, the defense called no witnesses and introduced no exhibits at the guilt phase of the trial. Given this Court's finding that Defendant cannot meet his burden under the prejudice prong of **Strickland**, the Court need not determine whether counsel's decision not to present the proffered testimony was a tactical decision intended to preserve Defendant's right to rebuttal argument in closing.

(PCR. 513-16)(emphasis added). These findings were entirely proper.

Testimony was presented at trial that a .9 mm handgun and a .38 caliber handgun were located at the spot where San Martin indicated that he had placed them. (T. 1758-62, 1790-1806) Robert Kennington testified that the guns recovered from the location indicated by San Martin were a conclusive ballistics match to the casing and bullet recovered from the scene and the bullets recovered from Off. Bauer's body. (T. 1869-88) The

fragments recovered from the scene were consistent with the .9mm recovered from the water. (T. 1885-86) Since the actual guns used in these crimes were found, linked to the codefendant and admitted into evidence, presenting an inoperable weapon that was not of the caliber of the murder weapon and was not connected to this crime in anyway would not have supported a defense that this rogue weapon was used to commit the crime by others. It also would not have created a reasonable probability that Defendant would not have been convicted. *Strickland*. Thus, the lower court properly determined that there was no prejudice. It should be affirmed.

While the lower court did not consider the strength of the State's case in denying this claim, it would not have been error for the lower court to have done so. In *Strickland*, itself, the Court described how a determination of prejudice should be made:

> In making this determination, a court hearing an ineffectiveness claim must consider **the totality of the evidence before the judge or jury**. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. **Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.** Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the

> defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

Id. at 695-96 (emphasis added). As such, it would not have been improper for the lower court to consider the overwhelming nature of the evidence against Defendant had it done so.[6] It should be affirmed.

While Defendant suggests that an evidentiary hearing was necessary on this claim, there was no need for one. In his motion, Defendant did not assert that this claim required factual development or why. (PCR. 195-99) At the *Huff* hearing, Defendant suggested that factual development was necessary regarding the deficiency prong of *Strickland* but that prejudice could be determined on the face of the record. (PCR. 678-82) The lower court properly found that the record established that Defendant could not establish prejudice, as argued s*upra*. The Court has made clear that it is not necessary for a court to even address the deficiency prong when there is no prejudice. *Strickland*, 466 U.S. at 697. Because Defendant could not establish prejudice and did not ask for the opportunity to try, there was no need for an evidentiary hearing. The claim was properly summarily denied, and the denial should be affirmed.

[6] The overwhelming evidence included Defendant's confession and physical evidence linking the guns used in the crimes and the proceeds of the robbery to Defendant and the codefendants.

II. THE CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL AT RESENTENING WERE PROPERLY DENIED.

Defendant next contends that the lower court erred in denying his claims that his counsel was ineffective at resentencing. He contends that the lower court should not have summarily denied his claims regarding the comments about weighing the aggravating and mitigating circumstances, his claim that comments about the advisory nature of the jury recommendation violated *Caldwell v. Mississippi*, 472 U.S. 320 (1985), and his claim that the jury instructions shifted the burden of proof. He also complains about the summary denial of his claims that counsel was ineffective for failing to object to victim impact evidence, for failing to request a jury instruction on victim impact evidence, for failing to object to comments in closing and for failing to present Defendant's testimony. Finally, he asserts that the lower court erred in denying his claim that counsel was ineffective for presenting experts other than Dr. Eisenstein. However, the lower court properly denied these claims.

With regard to the comments on weighing, the claim was properly denied. Most of the time the trial court did not inform that it had to recommend a death sentence if the aggravating factors outweighed the mitigating factors. (RST.

26-27, 665) Instead, it merely told the jury that it should make such a recommendation. (RST. 26-27, 665) Only one of the comment about which Defendant complains informed the venire that it was required to recommend death. (RST. 536-37) The State's comments did not say that the law required that the veniremember vote for death; only that they should do so. (RST. 536-37) At the conclusion of trial, the jury was read the standard jury instruction on the weighing process.

While Defendant appears to contend that all of these comments misstated the law, this is not true. In *Franqui v. State*, 804 So. 2d 1185, 1191-94 (Fla. 2001), this Court held that only those comments that informed the jury that it must, or was required by law to, return a recommendation of death if the aggravators outweighed the mitigators were improper. This Court did not hold that comments that informed the jury that it should do so were improper.[7] Such comments are, in fact, not improper because "should" indicates that something is discretionary and not mandatory. *State v. Thomas*, 528 So. 2d 1274, 1275 (Fla. 3d DCA 1988); *University of South Florida v. Tucker*, 374 So. 2d 16, 17 (Fla. 2d DCA 1979). As such, the comments that did not inform the jury that a death recommendation had to be returned or was required by the law were not improper. Since these

[7] The issue of whether comments using the word should were improper was raised in *Franqui*. (PCR. 361-69, 438-43, 477-79)

comments were not improper, counsel cannot be deemed ineffective for failing to claim that they were. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. As such, the claim was properly denied.

With regard to the one comment that did, arguably, indicate that a death recommendation was required, the claim should still be denied. Defendant did not demonstrated that there is a reasonable probability that he would not have been sentenced to death had counsel objected to this comment. This comment was brief in a lengthy voir dire. Under *Franqui*, Defendant would not have been entitled to a curative instruction based on these comments. *Franqui*, 804 So. 2d at 1194. Moreover, the jury was given the standard jury instruction on the weighing process during final instructions. As this Court held in *Franqui* and *Henyard v. State*, 689 So. 2d 239 (Fla. 1996), such a brief comment during voir dire is harmless beyond a reasonable doubt. As such, there is no reasonable probability of a different result had counsel objected to this comment. *Strickland*. The claim was properly denied.

With regard to the claims regarding victim impact evidence, they were properly denied. Under Florida law, victim impact evidence is admissible at the penalty phase. §921.141(7), Fla.

Stat. (1997); *Farina v. State*, 680 So. 2d 392, 399 (Fla. 1996); *Allen v. State*, 662 So. 2d 323, 328 (Fla. 1995). As such, counsel cannot be deemed ineffective for failing to make the nonmeritorious objection that it was not. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim was properly denied.

Defendant now asserts that even if victim impact evidence is admissible, Ms. Hadley and Ms. Watson were not qualified to testify regarding victim impact because they were not family member. However, this argument is not properly before this Court, as it was not raised below. In his motion for post conviction relief, Defendant asserted only that the testimony of Ms. Hadley and Ms. Watson was victim impact evidence, such evidence was inadmissible and a jury instruction should have been requested on victim impact evidence. (PCR. 208-12) At the *Huff* hearing, Defendant repeated the allegations in his motion. (PCR. 688-90) Since Defendant did not assert that Ms. Hadley and Ms. Watson were improper witnesses from whom to elicit victim impact evidence below, this Court should not consider this claim now. *Griffin v. State*, 866 So. 2d 1, 11 n.5 (Fla. 2003).

Even if the claim had been presented below, it would still have been properly denied. While Defendant asserts that Ms.

Hadley and Ms. Watson were incompetent to testify because they were not members of Off. Bauer's family, this is not true. In *Payne v. Tennessee*, 501 U.S. 808 (1991), the Court held that the Constitution did not bar the admission of "evidence about the victim and about the impact of the murder of the victim on the victim's family." *Id.* at 827; *see also Farina v. State*, 680 So. 2d 392, 399 (Fla. 1996). In discussing why this was true, the Court stressed that a capital sentencing jury should be able to consider the harm caused, both to individuals and to society, by the crime the defendant committed. *Id.* at 819-22. Consistent with *Payne*, §921.141(7), Fla. Stat. (1997) expressly authorizes the admission of victim impact evidence "designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death." Nothing in this statute or the case law restricts the persons competent to testify regarding this subject matter to the victim's family. In fact, this Court has affirmed the admission of victim impact evidence by persons other than members of the victim's family. *Huggins v. State*, 889 So. 2d 743, 765 (Fla. 2004)(best friend); *Kormandy v. State*, 845 So. 2d 41, 53-54 (Fla. 2003)(longtime friend); *Farina v. State*, 801 So. 2d 44, 52 (Fla. 2001)(friends); *Windom v. State*, 656 So. 2d 432, 438 (Fla. 1995)(police officer). Thus, the lower court properly

determined that the evidence was admissible, and counsel could not been deemed ineffective for failing to claim that it was not. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. It should be affirmed.

With regard to the jury instruction on victim impact evidence, the claim was properly denied. In his motion, Defendant contended that the jury was not told it could not consider the victim impact evidence as an aggravator. (PCR. 212) However, the jury was expressly instructed that the aggravating factor that could be considered were limited to those on which the trial court instructed it. (RSR. 183, RST. 1829) Victim impact evidence was not included in the list of aggravating circumstances that were to be considered. (RSR. 183-89, RST. 1829-30) The jury was also told that it could not consider sympathy for anyone. (RST. 1836, 1837) The jury instruction on victim impact evidence that the Court approved in *Alston v. State*, 723 So. 2d 148, 160 (Fla. 1998), was "you shall not consider the victim impact evidence as an aggravating circumstance, but the victim impact evidence may be considered by you in making your decision in this matter." *Accord Kearse v. State*, 770 So. 2d 1119 (Fla. 2000)(proper to give instruction that victim impact evidence could be considered but not as

aggravation). The giving of this type of instruction would have given the jury more leeway in considering the victim impact evidence than the giving of the instructions that the aggravating circumstances were limited to those enumerated and that sympathy could not be considered. As such, there is no reasonable probability that the giving of a jury instruction on victim impact evidence would have affected the outcome. *Strickland*. The claim was properly denied.

With regard to the *Caldwell* claim, this Court has repeatedly held that informing the jury that it was making an advisory recommendation as to the sentence and that the judge makes the final sentencing decision does not violate *Caldwell*. *Dufour v. State*, 905 So. 2d 42, 67 (Fla. 2005); *Griffin v. State*, 866 So. 2d 1, 14 (Fla. 2003). Since the comments did not violate *Caldwell*, counsel cannot be deemed ineffective for failing to make the nonmeritorious assertion that it did. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim was properly denied.

While Defendant suggests that an evidentiary hearing was required, this is not true. The only evidentiary development Defendant suggested was necessary was the presentation of trial counsel's testimony regarding why he did not object to the

unobjectionable comments. (PCR. 686) However, Defendant cannot establish prejudice since the comments did not violate *Caldwell*. Since Defendant cannot establish prejudice, there is no reason to assess deficiency, and no reason to hold an evidentiary hearing for the purpose of doing so. *Strickland*, 466 U.S. at 697.

With regard to the claim regarding burden shifting, again this Court has repeatedly found the claim to be without merit. *Rodriguez v. State*, 30 Fla. L. Weekly S385, S393 (Fla. May 26, 2005); *Griffin v. State*, 866 So. 2d 1, 14 (Fla. 2003). Since the claim is without merit, counsel cannot be deemed ineffective for failing to raise it. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim was properly denied. Moreover, an evidentiary hearing to develop why counsel did not object to the unobjectionable instruction was not necessary as Defendant cannot show prejudice and there was no reason to address deficiency. *Strickland*, 466 U.S. at 697. The denial of the claim should be affirmed.

With regard to the claim that counsel was ineffective for failing to object to comments in closing, again the claim was properly denied. While Defendant asserts that the lower court erred in finding the claim barred, this Court has held that

claims that were raised and rejected on direct appeal are procedurally barred in post conviction. *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995). This Court has also held that the same bar applies to issues that could have and should have been raised on direct appeal. *Freeman v. State*, 761 So. 2d 1005, 1067 (Fla. 2000). This Court has also held that using different grounds to reargue an issue raised on direct appeal also results in a procedural bar. *Breedlove v. Singletary*, 595 So. 2d 8, 10 (Fla. 1992). Moreover, this Court has repeatedly held that recasting barred claims in the guise of claims of ineffective assistance of counsel does not lift the bar. *Rodriguez v. State*, 30 Fla. L. Weekly S385, S393 (Fla. May 26, 2005). Here, an issue of comments in closing was raised on appeal. Thus, the lower court properly determined that the claim was barred. It should be affirmed.

In an attempt to avoid the bar, Defendant asserts that this Court did not review the merits of the claims he raised on appeal and that he could not have raised the other comments because they were unpreserved. However, a review of this Court's analysis of the comments on direct appeal shows that this Court did more than simply find the issue regarding the comments unpreserved. *Gonzalez*, 786 So. 2d at 567-69. If fact, this Court expressly stated that "the comments either individually or

cumulatively [did not] amount to fundamental error so as to entitled him to relief." *Gonzalez*, 786 So. 2d at 569. Moreover, Defendant could have raised the issue of whether the other comments resulted in fundamental error on direct appeal even though the issue was unpreserved. *See Rodriguez*, 30 Fla. L. Weekly at S394. Thus, the lower court properly found the claim to be procedurally barred.

Even if the claim was not barred, Defendant would still be entitled to no relief. In rejecting the claim on direct appeal, the Court held that "the comments either individually or cumulatively [did not] amount to fundamental error so as to entitled him to relief." *Gonzalez*, 786 So. 2d at 569. This Court has held that such a finding precludes a finding of prejudice in a claim of ineffective assistance of counsel. *Chandler v. State*, 848 So. 2d 1031, 1045 (Fla. 2003)("Because Chandler could not show the comments were fundamental error on direct appeal, he likewise cannot show that trial counsel's failure to object to the comments resulted in prejudice sufficient to undermine the outcome of the case under the prejudice prong of the Strickland test. *See Strickland*, 466 U.S. at 694."). Thus, under *Chandler*, the claim was properly denied because Defendant could not show prejudice. The denial should be affirmed.

In an attempt to avoid the lack of prejudice inherent in this Court's determination that there was no fundamental error, Defendant asserts that he was prejudiced because a different standard of review would have applied on appeal. However, the determination of prejudice from a claim of ineffective assistance of **trial** counsel must be based on whether there is a reasonable probability of a different result at **trial**; the alleged effect on a direct appeal does not satisfy this standard. *Pope v. State*, 569 So. 2d 1241, 1244-45 (Fla. 1990). Thus, Defendant's claim of prejudice based on a different standard of review on appeal is irrelevant to the issue. The claim was properly denied.

With regard to the claim regarding the comments that were not presented on appeal, they were properly denied. Defendant first asserted that the comments about Off. Bauer's badge and his last words were improper comments on victim impact evidence and encouraged the jury to decide the case based on sympathy. However, this is untrue. The fact that Off. Bauer was a law enforcement officer killed while performing his duties supported three aggravating factors: avoid arrest, hinder a governmental function and murder of a law enforcement officer.[8] The State's

[8] Moreover, the existence of these aggravators shows that police officers are different as victims under Florida's capital sentencing statute.

comments about the badge asserted that these aggravators, as symbolized by Off. Bauer's badge, outweighed the mitigation and explained why the State believed that such aggravators were entitled to such weight. In addition, this Court found that Officer Bauer's dying words were admissible to prove that he was a law enforcement officer killed in the line of duty. *San Martin v. State*, 717 So. 2d 462, 470-71 (Fla. 1998). Since this Court has already found that these statements were properly admitted for this purpose, it was entirely proper for the State to comment that they served this purpose. *Franqui v. State*, 804 So. 2d 1185 (Fla. 2001); *Thomas v. State*, 748 So. 2d 970, 984 (Fla. 1999); *Breedlove v. State*, 413 So. 2d 1, 8 (Fla. 1982). The proper function of a penalty phase closing argument is to discuss what aggravating and mitigating circumstances have been proven and what weight should be assigned to each. *See Bertolotti v. State*, 476 So. 2d 130, 134 (Fla. 1985); *see also Rodriguez v. State*, 30 Fla. L. Weekly S385, S394 (Fla. May 26, 2005). Thus, the comments were not improper. As such, counsel cannot be deemed ineffective for failing to claim that they were. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

With regard to the comment about George Bernand Shaw, the claim was properly denied. While Defendant asserts that the

comment was intended to elicit sympathy for Off. Bauer, this is not true when the comment is read in context. Immediately before the comment at issue, the State pointed out that the tears shed by the defense witnesses were the result of Defendant's actions and that they should not cause the jury to render a recommendation based on sympathy for Defendant or his family. (RST. 1794-97) Immediately after the portion of the argument Defendant quotes, the State commented:

> You told us very early on that you understood that sympathy can play no part in your verdict. I'm not asking you to be sympathetic to the officer, his family, his friends but I'm also asking you not to be sympathetic to the defendant and his family. That's not part of the law. Sympathy is not part of the law. The rules say, you can only rely on the law and the evidence. That's what you said in your oath.

(RST. 1798) Considered in the context in which the comment was made, it did not ask the jury to return a recommendation based on emotion and sympathy. Instead, it urged the jury to ignore the displays of emotion to which it had been exposed and give weight to the during the course of a robbery and for pecuniary gain aggravators. Asking the jury to give weight to aggravating circumstances is not improper. *See Bertolotti v. State*, 476 So. 2d 130, 134 (Fla. 1985). Since the comment was not improper, counsel cannot be deemed ineffective for failing to make a meritless objection. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So.

2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. Thus, the claim was properly denied.

With regard to the comment that Defendant asserts improperly asked the jury to send a message to the community and told the jury that it had a duty to recommend death, the claim was properly denied. When the comment is read in context, it merely asserted that the evidence in this case showed that death was an appropriate recommendation in this case. As such, it was not improper. *Rodriguez v. State*, 30 Fla. L. Weekly S385, S394 (Fla. May 26, 2005). Thus, counsel cannot be deemed ineffective for failing to make the nonmeritorious assertion that it was. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The lower court properly denied the claim and should be affirmed.

With regard to the claim that counsel was ineffective for failing to call experts other than Dr. Eisenstein, the lower court held an evidentiary hearing on this claim. In reviewing this claim, therefore, this Court is required to give deference to the lower court's findings of fact to the extent that they are supported by competent, substantial evidence. *Stephens v. State*, 748 So. 2d 1028, 1033-34 (Fla. 1999). However, this Court may independently review the lower court's determination of

whether those facts support a finding of deficiency and prejudice. *Id.*

Here, the lower court denied the claim, stating:

> More often than not, a claim raised in this area attacks defense counsel's failure to call mental health experts, whose testimony (it is claimed) would have provided additional mitigation evidence. By contrast, Defendant asserts in this case that trial counsel provided ineffective assistance of counsel by calling too many experts at the penalty phase. Defendant contends that these defense experts actually contradicted each other, and that, as a result, provided testimony that was damaging and prejudicial to the defense. Further, Defendant contends that as a result of this testimony, the State did not have to call an expert in rebuttal.
>
> As it applies to a failure to present evidence (or, as here, an alleged decision to present contradictory or inconsistent evidence), it is clear that Defendant cannot meet the deficiency prong of **Strickland** simply by introducing mental health evidence superior to that presented at the penalty phase proceeding. **Pace v. State**, 854 So.2d 167 (Fla. 2003); **Asay v. State**, 760 So.2d 974 (Fla. 2000).
>
> Adapting that holding to the claim in this case, simply because Defendant establishes that the penalty phase presentation could have been more effective (through the presentation of less witnesses or different witnesses), does not necessarily lead to the conclusion that counsel's performance was deficient. Keeping in mind the admonition in **Strickland** -- in reviewing an ineffective assistance claim, courts should give proper deference to the attorney's decision-making process-- there will always be actions or strategies which, in hindsight (i.e., after conviction) an attorney might have done differently. To conclude otherwise is to concede that the case is unwinnable regardless of the attorney's performance, a concession which will seldom be made. Moreover, it is widely recognized that "even the best criminal defense attorneys would not defend a particular client in the same way." **Strickland** 466 U.S. at 689 (and authorities cited).

It is clear that, in this case, defense counsel conducted a thorough investigation into the mental health mitigation, both from a factual perspective (family members and history) and through the use of expert testimony. They consulted with and utilized no less than five medical experts in the area to cultivate and present mental health mitigation to the jury. Certainly, then, it cannot be said that defense counsel's decision or strategy was borne of a failure to investigate. *Cf.* **Riechmann v. State**, 777 So.2d 342 (Fla. 2000). As the **Strickland** Court noted, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." 466 U.S. at 690. Defendant has failed to satisfy this burden.

Defendant contends that counsel was ineffective in presenting three expert witnesses who contradicted each other on at least one major issue-- the existence and extent of brain damage. Defendant contends that had counsel called only one of the three experts, a cohesive and consistent mitigation theory would have been presented and a reasonable probability exists that six or more jurors would have recommended life.

A review of the relevant portion of the record is necessary to put this claim in its proper perspective:

At the first sentencing proceeding, Defendant's attorney, Bruce Fleisher, presented the testimony of the following witnesses on this issue:

- Dr. Merry Haber, a forensic psychologist;
- Dr. Alan Wagshul, a board-certified neurologist and a professor of neurology at the University of Miami Medical School;
- Dr. Hyman Eisenstein, a board-certified neuropsychologist;
- Dr. Brad Fisher, a doctor who had conducted research on future dangerousness.

(E.H.1 at 9).

At the resentencing proceeding, Dr. Haber did not testify, and Dr. Wagshul did not testify live. However, Dr. Wagshul's prior testimony from the first sentencing was read to the jury. (E.H.1 at 9, 13-15).

Dr. Haber was the first doctor to evaluate Defendant. She acted as a "screen psychologist" and made initial findings regarding Defendant's mental illness and recommended further evaluation and testing by a neuropsychologist. (E.H. 1 at 20-21).

Following her recommendation, the defense then retained Dr. Eisenstein, a neuropsychologist, to conduct a series of psychological tests. Based upon his testing, Dr. Eisenstein was of the opinion that Defendant suffered organic brain damage. (E.H. 1 at 21-22).

After obtaining the results of the psychological testing, the defense retained Dr. Wagshul to conduct an electroencephalogram (EEG) of Defendant's brain to obtain demonstrable evidence of brain damage, supporting Dr. Eisenstein's opinion that Defendant suffered from organic brain damage. (E.H. 1 at 24-25). The EEG confirmed the existence of brain damage, and Dr. Wagshul diagnosed Defendant as suffering from pugilistic encephalopathy, a form of brain damage resulting from boxing which could lead to impulsive behavior.

In addition to obtaining an EEG, Dr. Wagshul referred Defendant to Dr. Tom Naidich, a neuroradiologist who performed a Magnetic Imaging Resonance (MRI) test and photographed Defendant's brain, providing visible, photographic evidence of the damage to Defendant's brain. (E.H. 1 at 25-26). Dr. Wagshul provided testimony regarding the results of the MRI as well as the EEG.

Each of the three expert witnesses provided evidence in support of distinct mitigating circumstances:

1. Dr. Wagshul's testimony was the key to establishing the existence of organic brain damage as a mitigating circumstance and to provide visual proof of that damage through the use of the EEG and MRI.

2. Dr. Eisenstein's testimony, while premised on the existence of organic brain damage, was intended to provide evidence of a separate mitigating circumstance: the claim that Defendant acted impulsively on the day in question and was under "extreme mental or emotional distress" at the time he committed the offenses.

3. Dr. Fischer's testimony was intended to provide a third mitigating circumstance: Defendant's lack of future dangerousness and potential for rehabilitation.

Given this perspective of the evidence, Defendant's claim is unavailing for several reasons:

1. The trial court rejected Dr. Eisenstein's testimony as incredible. The trial court cited numerous portions of the evidence from trial and sentencing, separate and apart from the testimony of the other experts, which were wholly inconsistent with Dr. Eisenstein's opinion that Defendant acted impulsively or under extreme mental or emotional distress. For example, the Defendant's own confession in which he admitted to having planned the robbery 10 days before it was committed and meeting with the co-defendants the day before the crimes to discuss the plan. The court also noted that, in spite of his brain damage, Defendant was able to conform his conduct to the law every day of his life prior to the date of these crimes, and everyday thereafter. Finally, the court noted Defendant's employment history, in which he was able to maintain long-term employment at several jobs, even working as a technician at an optical lab.

These facts and circumstances were considered and relied upon by the court in its rejection of Dr. Eisenstein's opinion that Defendant acted impulsively and under extreme mental and emotional distress at the time he committed the crimes. A fair reading of the trial court's sentencing order leads one reasonably to conclude that the trial court would have rejected Dr. Eisenstein's testimony even if the other experts had not testified.

Further, under cross-examination Dr. Eisenstein was forced to concede a variety of weaknesses in his opinion and in the testing which formed the basis for his opinions. (RST. 1522-42).

2. While the experts did have differing opinions on certain issues, all were in agreement that the Defendant suffered organic brain damage. Defendant implies in his motion that Dr. Wagshul and Mr. Fisher opined that Defendant did not suffer brain damage. This is an inaccurate characterization of the evidence. Rather, Dr. Wagshul and Dr. Fisher both found that Defendant suffered organic brain damage, confirmed by the MRI which revealed that two of the cavities in Defendant's brain were filled with spinal fluid. Dr. Wagshul believed this organic brain damage was likely a result of his boxing history. (See Trial Court's Resentencing Order, RSR. 249-53).

The witnesses differed on whether this brain damage could lead to the kind of impulsivity or emotional distress which Dr. Eisenstein believed led Defendant to commit the crimes of which he was convicted.

While Dr. Wagshul did opine that this injury can lead to impulsive behavior, he did not believe it would cause someone to rob a bank and kill a police officer. Dr. Wagshul also conceded that Defendant's brain wave activity appeared normal. Both Dr. Wagshul and Dr. Fisher acknowledged that they observed no abnormalities in the Defendant's speech, movement, or mannerisms. (See Trial Court's Resentencing Order, RSR. 252-53).

Defendant asserts that this inconsistency is critical and should have led trial counsel to refrain from presenting the testimony of Dr. Wagshul and Dr. Fisher at resentencing. Defendant's claim— that Drs. Wagshul and Fischer contradicted Dr. Eisenstein regarding the extent of Defendant's brain damage or its effect on Defendant's actions in this case— ignores the broader, more critical purposes served by the testimony of these two witnesses. Without Dr. Wagshul's testimony, Defendant would have been left with Dr. Eisenstein's psychological testing to establish the existence of brain damage. Dr. Wagshul provided a very credible witness with board certification and excellent credentials, and physical evidence of the brain damage relied upon by Dr. Eisenstein. Dr. Fisher provided crucial testimony that Defendant would not be a danger if sentenced to life in prison and that he had potential for rehabilitation if sentenced to life instead of death.

3. Perhaps the most telling evidence of the weakness of Defendant's argument: in rejecting the testimony of Dr. Eisenstein as incredible, the trial court also rejected the proffered mitigating circumstance of "extreme mental and emotional distress". By contrast, the trial court found the existence of several mitigating circumstances, including: brain damage (the primary purpose for Dr. Wagshul's testimony); and good conduct while incarcerated and potential for rehabilitation (the primary purpose for Dr. Fisher's testimony). Had the defense presented only Dr. Eisenstein, it is likely that the trial court (and the jury) would not have

> found that these other two mitigating circumstances were established.
>
> 4. It must be remembered that Dr. Wagshul did not testify live at the resentencing. The defense merely read his prior testimony from the first sentencing. Even if Defendant had presented only the testimony of Dr. Eisenstein, the State could have introduced portions of the prior testimony of Dr. Wagshul, to the extent his testimony in fact contradicted or impeached Dr. Eisenstein. Therefore, the jury and the trial court might very well have been made aware of Dr. Wagshul's opinions, even if Defendant had chosen not to present them to the jury.
>
> This Court finds that the actions of defense counsel were not only not deficient, they were, in this Court's opinion, logical, strategically sound, and professionally reasonable.

(PCR. 523-30) The lower court's findings of fact are supported by competent, substantial evidence and must be accepted by this Court. *Stephens*, 748 So. 2d at 1033-34.

Defendant appears to claim that the lower court erred in finding that Defendant's counsel made a strategic decision to present all of the doctors' opinions. However, the determination that counsel made a strategic decision is a finding of fact. *Bolender v. Singletary*, 16 F.3d 1547, 1558 n.12 (11th Cir. 1994). As such, it is reviewed to determine whether it is supported by competent, substantial evidence under *Stephens*. Here, the finding was supported by Mr. Fleisher's testimony that he made a strategic decision to present all of the doctors. (PCR. 736-39) As such, the determination that counsel made a strategic decision should be affirmed.

Defendant also appears to assert that even if counsel did make a strategic decision, the decision was not reasonable. However, this court has held that strategic choices made by a criminal defense counsel after thorough investigation of law and facts relevant to plausible options are "virtually unchallengeable." They may only be overturned if they were "so patently unreasonable that no competent attorney would have chosen it." *Haliburton v. State*, 691 So. 2d 466, 471 (Fla. 1997)(quoting *Palmes v. Wainwright*, 725 F.2d 1511, 1521 (11th Cir. 1984)(quoting *Adams v. Wainwright*, 709 F.2d 1443, 1445 (11th Cir. 1983))). Here, Defendant did not suggest that counsel did not conduct a thorough investigation. In fact, the record shows that counsel did conduct such an investigation. Counsel hired Dr. Haber to screen for mental problems. (PCR. 745) Based on her evaluation and recommendation, counsel had Defendant evaluated by Dr. Eisenstein, who recommended a neurologist. (PCR. 746-47) Dr. Wagschul was then retained and his recommendation was followed by retaining Dr. Nadish. (PCR. 735-36, 747-48) Moreover, Dr. Fisher was retained to opine regarding rehabilitation potential. (PCR. 734, 736) As such, Defendant’s challenge to his counsel’s strategic decision should be rejected.

Defendant also appears to suggest that the lower court improperly found that he was not prejudiced. However, the lower court's finding was proper. As the lower court noted, Dr. Eisenstein's lack of credibility did not depend on the contradiction by Dr. Fisher and Dr. Wagschul. As noted by the trial court in its sentencing order, Dr. Eisenstein's opinion of Defendant's mental state was based on the results of his testing, which showed that Defendant was normal and was entirely inconsistent with all of the other evidence presented. (RSR. 249-53) Moreover, Dr. Eisenstein failed to consider factors that might have explained Defendant's subnormal performance on some tests in that he ignored Defendant's lack of an index finger on one hand as resulting in lower scores on tests evaluating the use of one's hands and Defendant's first language being Spanish as resulting on lower scores on some verbal tests. (RST. 1529-30, 1541) Moreover, the basis for Dr Eisenstein's opinion was that Defendant's brain damage caused him to be impulsive. However, Dr. Eisenstein admitted, and the evidence showed, that the crime was planned for at least 10 days before it was committed. Moreover, the evidence showed that Defendant was capable of behaving and holding responsible jobs before he committed this crime. As such, Dr. Eisenstein would not have been credible even if the other doctors had not been presented.

Moreover, presenting only Dr. Eisenstein would not have prevented the State from making comments in closing about him. Since he was incredible without regard to the other doctors' opinions, the State would have still been able to comment on his lack of credibility. Thus, the lower court properly found that presenting only Dr. Eisenstein's testimony would not have created a reasonable probability of a different result at trial.

Moreover, it should be remembered that the mitigation that was found was based on Dr. Wagschul and Dr. Fisher's testimony. Based on the testimony of Dr. Wagschul and Dr. Fisher, brain damage and potential for rehabilitation were found. (RSR. 256-58) As such, by eliminating the other doctors' testimony, Defendant would have weakened his mitigation case. Thus, the lower court properly found that there was no reasonable probability that Defendant would not have been sentenced to death had only Dr. Eisenstein testified. *Strickland*. The lower court properly denied the claim and should be affirmed.

While Defendant asserts that the lower court did not adequately consider the effect on the jury and failed to consider that the jury recommendation was 8-4, this is untrue. In determining *Strickland* prejudice, the lower court and this Court were required to make an objective evaluation of the evidence and ignore the idiosyncrasies of a particular jury.

Strickland, 466 U.S. at 694-95. Here, the lower court merely used the numerous contradictions inherent in Dr. Eisenstein's testimony as illustrated in the sentencing order in making this evaluation. Moreover, in asserting that he only needed to convince two more jurors, Defendant ignores that his present assertions would have eliminated mitigation that was found based on medically verifiable evidence. As such, the claim was properly rejected.

To the extent that Defendant is suggesting that Dr. Eisenstein could have testified to the other doctors' conclusions, Defendant failed to prove this was true. He did not present any evidence on prejudice at the evidentiary hearing. However, Defendant had the burden of proof at the evidentiary hearing. *Smith v. State*, 445 So. 2d 323 (Fla. 1983). As such, this assertion should be rejected. Moreover, as the lower court pointed out, Dr. Wagshul's prior testimony could have been used to impeach Dr. Eisenstein had counsel done as Defendant suggests. *See* §90.608, Fla. Stat.; *see Huggins v. State*, 889 So. 2d 743, 755-56 (Fla. 2004). Thus, the lower court properly denied this claim. It should be affirmed.

With regard to the claim concerning Defendant's testimony, Defendant asserts that the lower court improperly found that his claim was facially insufficient because he sufficiently alleged

prejudice and that the existence of a colloquy in which he waived his right to testify did not refute the claim. However, the lower court properly denied this claim.

In denying this claim, the lower court stated:

> Defendant concedes in his motion that the trial court conducted a colloquy regarding Defendant's desire to testify at his resentencing proceeding. However, Defendant alleges "the record is not entirely clear on the voluntary nature of his waiver." (Defendant's Motion, p. 39). Defendant also alleges that "Mr. Gonzalez possessed important evidence as to his version of the events leading to the killing of Officer Bauer." *Id.*
>
> Defendant's motion, however, does not directly assert that his failure to testify was due to some action of counsel. Rather it alleges: "[H]e indeed wished to testify but, due to his mental and intellectual deficits, deferred his decision to the recommendation of counsel rather than making a truly voluntary personal decision." *Id.*
>
> It is likely that this claim is legally insufficient, because it contains nothing more than a conclusory allegation that Defendant's "mental and intellectual deficits" prevented a valid waiver of his right to testify. Defendant makes no other factual assertions in this regard.
>
> However, even assuming its legal sufficiency, this claim is conclusively refuted by the record. The trial court conducted the following colloquy during the resentencing:
>
> THE COURT: Is your client going to testify?
> MR. GONZALEZ: No.
> MR. GONZALEZ: ...we had an opportunity, we have discussed this in the past but I have conferred with him again, as to him testifying or not. It is my recommendation that he not testify and he's going to listen to me.
>
> ....
>
> THE COURT: All right. Now, let me talk to Mr. Gonzalez. First of all, Mr. Gonzalez, do you understand that as a defendant in a criminal case, you have a constitutional right either to

> testify or not to testify at this sentencing hearing; do you understand?
> MR. GONZALEZ: Yes sir.
> THE COURT: Now, even though it's your personal decision to make, you should consider the advice of your attorneys. But you understand that if you disagree with your attorneys about this decision, you have the right to overrule them. Do you understand?
> MR. GONZALEZ: Yes.
> THE COURT: And is it your personal decision to testify or not to testify in this proceeding?
> MR. GONZALEZ: I'm following their advice.
> THE COURT: Which is to do what?
> MR. GONZALEZ: Which is not to testify.
> THE COURT: All right. Is that your personal decision after listening to them?
> MR. GONZALEZ: Yes.
> THE COURT: Have they promised you anything or forced you in any way to not testify?
> MR. GONZALEZ: No.
> THE COURT: Do you understand that you can not follow their advice and if you really want to testify you can do that?
> MR. GONZALEZ: Right.
> THE COURT: And do you not want to testify?
> MR. GONZALEZ: No.
>
> (RST. 1593-96). The record conclusively establishes that Defendant made a knowing and voluntary waiver of his right to testify at his resentencing proceeding.[FN4]
>
> * * * *
>
> [FN4]It is worth noting that Defendant did not testify at the guilt phase of his trial or at the first sentencing proceeding.

(PCR. 530-33) As can be seen from the foregoing, the lower court found that Defendant's claim failed to allege deficiency sufficiently and that any alleged deficiency was conclusively refuted by the record. As such, Defendant's argument that he

sufficiently alleged prejudice and that his prejudice claim is not refuted by the record is irrelevant. It should be rejected.

Moreover, the lower court properly found that Defendant did not sufficiently allege deficiency and that the allegation of deficiency was conclusively refuted by the record. In *Oisorio v. State*, 676 So. 2d 1363 (Fla. 1996), this Court adopted the Eleventh Circuit's approach to claims of ineffective assistance of counsel for preventing a defendant from testifying from *United States v. Teague*, 953 F.2d 1525 (11th Cir. 1992). The Eleventh Circuit described how a defendant could show that his counsel was deficient for preventing him from testifying:

> Where the defendant claims a violation of his right to testify by defense counsel, the essence of the claim is that the action or inaction of the attorney deprived the defendant of the ability to choose whether or not to testify in his own behalf. In other words, by not protecting the defendant's right to testify, defense counsel's performance fell below the constitutional minimum, thereby violating the first prong of the *Strickland* test. For example, if defense counsel refused to accept the defendant's decision to testify and would not call him to the stand, counsel would have acted unethically to prevent the defendant from exercising his fundamental constitutional right to testify. Alternatively, if defense counsel never informed the defendant of the right to testify, and that the ultimate decision belongs to the defendant, counsel would have neglected the vital professional responsibility of ensuring that the defendant's right to testify is protected and that any waiver of that right is knowing and voluntary. Under such circumstances, defense counsel has not acted " 'within the range of competence demanded of attorneys in criminal cases,' " and the defendant clearly has not received reasonably effective assistance of counsel.

Id. at 1534.

In the lower court, Defendant did not allege ant action or inaction by counsel that prevented him from testifying. (PCR. 225) He did not assert that he was not informed that he had a right to testify, that he could personally choose whether to testify or not, that his counsel's advice against testifying was based on any mistake of law or fact, or that his counsel refused to call Defendant if Defendant had chosen to testify. Moreover, the colloquy that the trial court does refute any claim that Defendant was unaware that he had a personal right to testify, which he chose not to exercise. In fact, when questioned at the *Huff* hearing, Defendant acknowledged he was not claiming that counsel interfered with his right to testify in any manner. (PCR. 719-21) Instead, Defendant's entire allegation of deficiency was he deferred to counsel "due to his mental and intellectual deficits." (PCR. 225) However, such a conclusory allegation is insufficient to state a claim of ineffective assistance of counsel. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998). The lower court properly summarily denied the claim on this basis and should be affirmed.

Moreover, Defendant's claim that his alleged mental and intellectual deficits rendered his decision not to testify not "truly voluntary," would not be sufficient to show that his

waiver was not voluntary. The United States Supreme Court has made it clearly that alleged mental problems only prevent a defendant from waiving a constitutional right if the defendant is incompetent to stand trial. *See Godinez v. Moran*, 509 U.S. 389 (1993)(no special standard of competency to waive constitutional rights); *see also Colorado v. Connelly*, 479 U.S. 157 (1986)(*Miranda* waiver voluntary even though the defendant was mentally ill and waived his rights because of that illness). Defendant has never claimed that he was incompetent to stand trial or was incompetent under the legal definition of incompetence at any time. As such, his allegations were not sufficient as a matter of law to show that his decision not to testify was involuntary. The lower court properly summarily denied this claim and should be affirmed.

III. THE NEWLY DISCOVERED EVIDENCE CLAIM WAS PROPERLY DENIED.

Defendant next contends that the lower court erred in denying his claim that this Court's reduction of the death sentence of Fernando Fernandez constituted newly discovered evidence. Defendant asserts that the refusal to grant relief on this claim prevent him from presenting valid mitigation. Defendant also disputes the lower court's finding that Fernandez was less culpable than Defendant. He contends that an evidentiary hearing was needed on this claim to present an assistant state attorney to prove that the State's position was that Fernandez was the mastermind. However, this claim was properly denied.

First, it does not appear that Fernandez's sentence qualifies as newly discovered evidence. In *Steinhorst v. State*, 638 So. 2d 33, 35 (Fla. 1994), this Court determined that where a codefendant's sentence had been reduced while the defendant's case was still on appeal, the codefendant's sentence did not qualify as newly discovered evidence. Here, Defendant's resentencing appeal was pending when Fernandez's sentence was reduced. As such, Fernandez's sentence does not qualify as newly discovered evidence under *Steinhorst*. The claim was properly denied.

Moreover, Defendant's argument centers around his assertion that Fernandez was the mastermind. The assertion that Fernandez was the mastermind is based on the State's theory of prosecution of Fernandez and the dissenting opinion of Justice Wells in Fernandez's appeal. However, in ordering Fernandez sentenced to life, this Court rejected the State's theory and found that Fernandez was not sufficiently culpable to be sentenced because his involvement was similar to that of Abreu and San Martin. *Fernandez v. State*, 730 So. 2d 277, 283 (Fla. 1999). This Court has held that where a jury or a court has made a determination of culpability, it is that determination that controls on the issue of culpability and not anyone's theory of culpability. *See Shere v. Moore*, 830 So. 2d 56, 61-62 (Fla. 2002). As such, the State's theory that Fernandez was the mastermind is irrelevant.[9] Defendant's reliance on Justice Wells's dissent is equally availing. A dissenting opinion does not contain the finding of the Court and has no precedential effect. *See Munnerlyn v. Wingster*, 825 So. 2d 481, 482 (Fla. 5th DCA 2002); *Bauer v. State*, 528 So. 2d 6, 9 (Fla. 2d DCA 1988); *see also*

[9] Defendant's request for an evidentiary hearing on this claim centered on calling a prosecutor to confirm that its theory was that Fernandez was the mastermind. (PCR. 696-97) However, the State has never disputed that this was its theory. The State's position is that since its theory was rejected, it was irrelevant. As such, there was no need for a hearing to present irrelevant testimony.

Mills v. Moore, 786 So. 2d 532, 540 (Fla. 2001)(Harding, J., concurring)("While I respect the opinions of those justices, their dissenting opinions are just that--dissenting opinions; the positions expressed in those opinions did not carry the day. Hence, such opinions have no precedential value."). Since this Court's determination of Fernandez's culpability controls, the lower court properly found that Defendant and Fernandez were not equally culpable.

Given that Defendant and Fernandez were not equally culpable, the lower court properly found that Fernandez's life sentence would not create a probability of a different result at resentencing. *See Scott v. Dugger*, 604 So. 2d 465, 468 (Fla. 1992). This conclusion is also supported by the fact that the jury was informed that both San Martin and Abreu were sentenced to life. This Court's finding was that Fernandez had the same level of culpability of these two codefendants. *Fernandez*, 730 So. 2d at 283. The claim was properly denied. The lower court should be affirmed.

While regard to the contention that the failure to grant relief on this claim precluded Defendant from presenting valid mitigation, this issue is not properly before this Court. In his motion for post conviction relief, Defendant did not assert that a refusal to grant relief on this claim would result in

preventing a defendant from presenting valid mitigation. (PCR. 227-28) Defendant did not make this argument at the *Huff* hearing. (PCR. 693-99) Since this argument was not presented to the lower court, it is not properly before this Court. *Griffin v. State*, 866 So. 2d 1, 11 n.5 (Fla. 2003); *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982)(objection must be based on same grounds raised on appeal for issue to be preserved). The denial of the claim should be affirmed.

Even if the claim was properly before this Court, it has no merit. The cases upon which Defendant relies arose in the context of direct review of a criminal conviction. *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Bell v. Ohio*, 438 U.S. 637 (1978); *Lockett v. Ohio*, 438 U.S. 586 (1978). Here, this case is not on direct review. Moreover, the United States Supreme Court rejected the notion that any error that affected the presentation of mitigation would automatically entitle a defendant to post conviction relief when it adopted the prejudice standard in *Strickland*. *Id.* at 691-99. The use of different standards to evaluate post conviction claims reflects the respect for the finality of criminal conviction, which both this Court and the United States Supreme Court had expressed. *See Lackawanna County Dist. Atty. v. Coss*, 532 U.S. 394, 402-03 (2001); *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980). Thus,

the lower court properly refused to grant relief without a showing of a reasonable likelihood of a different result at resentencing. Since there was none, the denial of this claim should be affirmed.

IV. THE LOWER COURT PROPERLY REFUTED TO DISCLOSE ANY ADDITIONAL PUBLIC RECORDS.

Defendant next asserts that the lower court improperly determined that the State Attorney had properly asserted an exemption to public records disclosure regarding certain documents. Defendant contends that any notes of any conversation with a witness are not properly exempt and should have been disclosed. However, the lower court did not abuse its discretion in refusing to disclose the documents.[10]

This Court has held that a defendant who lacked diligence in seeking public records disclosure waives his right to such disclosure. *See Pace v. State*, 854 So. 2d 167, 180 (Fla. 2003); *Vining v. State*, 827 So. 2d 201, 218-19 (Fla. 2002); *Reaves v. State*, 826 So. 2d 932, 942-43 (Fla. 2002); *Cook v. State*, 792 So. 2d 1197, 1204-05 (Fla. 2001); Here, Defendant lacked any diligence whatsoever. Because of the enactment of the DPRA and the pendency of the codefendants' post conviction proceedings in their related case, most, if not all, of the public records in this matter had been provided to the repository before Defendant's convictions and sentences ever became final. (PCR. 73-74, 85-86, 91-94, 99, PCR-SR. 18-22) During a status hearing, the State specifically informed Defendant that there were exempt

[10] A trial court's ruling on a public records request is reviewed for an abuse of discretion. *State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003).

materials at the repository and that he should request an *in camera* inspection of those records. Yet, Defendant waited until the time for seeking post conviction relief had expired and this Court's first extension of that time limitation had almost expired before he ever requested any *in camera* review. Given the utter lack of diligence demonstrated in this matter, Defendant waived his right to public records disclosure. The denial of disclosure should be affirmed on this basis alone.

Moreover, Defendant boldly asserts that any notes of any conversations with witnesses are automatically subject to disclosure. However, this Court has long recognized that attorneys' notes to themselves are not public records and not subjection to disclosure. *Jennings v. State*, 782 So. 2d 853, 864-65 (Fla. 2001)(affirming order finding notes of witness interviews not to be public records); *Arbelaez v. State*, 775 So. 2d 909, 917-18 (Fla. 2000); *Rose v. State*, 774 So. 2d 629, 636-37 (Fla. 2000); *Patton v. State*, 784 So. 2d 380, 389 (Fla. 2000); *Lopez v. State*, 696 So. 2d 725, 727-28 (Fla. 1997); *Kokal v. State*, 562 So. 2d 324, 327 (Fla. 1990); *see also State v. Lewis*, 838 So. 2d 1102, 1118-19 (Fla. 2002). Here, the State cited to these cases in providing the materials to the lower court for the *in camera* review. (PCR. 498) The lower court reviewed the notes in question and determined that the State had

properly refused to disclose these documents. (PCR. 499-502) Defendant has not shown that the lower court abused its discretion in making this determination. It should be affirmed.

Defendant appears to contend that *Young v. State*, 739 So. 2d 553 (Fla. 1999), overruled this body of law. However, *Young* did not purport to analyze a public records disclosure claim and does not make any mention of overruling these cases. This Court has stated that it "does not intentionally overrule itself sub silentio." *Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002). Moreover, *Young* did not reject the State assertion that certain *Brady* materials had been improperly withheld because an attorney's notes of witness interviews were automatically subject to disclosure. *Young*, 739 So. 2d at 559. Instead, this Court rejected the claim because "the [State's *Brady*] obligation exists even if such a document is work product or exempt from the public records law," and the materials at issues were *Brady* materials. *Id.* at 559.

To the extent that Defendant is suggesting that the lower court either did not consider whether these materials contained *Brady* materials or improperly determined that there was no *Brady* material, he is entitled to no relief. In requesting an *in camera* review, Defendant specifically asserted that the lower court was to review the material to determine not only whether

the materials were properly claimed to be exempt but also to determine whether there was any *Brady* material in the exempt materials. (PCR. 165, 704-06) The State agreed that any exempt materials that constituted *Brady* materials had to be disclosed. (PCR. 497-98, 664-67, 707-08) The State's position was that there were no *Brady* materials. (PCR. 707-08) As such, the record demonstrates that the lower court was fully aware that it needed to consider whether any of the exempt materials were nonetheless subject to disclosure if it constituted *Brady* information. By denying disclosure, the lower court implicitly found that there was no *Brady* material. Defendant has not shown any error in this regard. As such, the lower court's refusal to disclose this information should be affirmed.

V. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN STRIKING DEFENDANT'S SHELL MOTION.

Defendant next contends that the lower court erred in striking his shell motion because it did not give him the opportunity to amend his pleading. However, the lower court did not abuse its discretion.[11]

Defendant's convictions and sentences began final on August 9, 2001, when the time for seeking certiorari review of this Court's May 10, 2001 affirmance of Defendant's death sentence expired and Defendant had not sought certiorari.[12] Because of the enactment of the DPRA and the pendency of the codefendants' post conviction litigation in the related case, most, if at all, of the public records in this matter had been sent to the repository before Defendant's case ever became final. The lower court held status hearings pursuant to Fla. R. Crim. P. 3.851(c)(2), and Defendant did not complain of the lack of public records, request additional public records or move to compel. Defendant did not even seek an in camera review of the exempt materials at the repository during the one year period for filing a motion for post conviction relief, even though the

[11] The standard of review regarding the granting of a motion to strike is abuse of discretion. *Bryant v. State*, 901 So. 2d 810, 818 (Fla. 2005).

[12] Pursuant to United States Supreme Court Rule 13, the 90 day period to file a certiorari petition runs from the date on which the opinion issued, if as here, no motion for rehearing is filed in the lower court.

State had reminded Defendant that such a review could be conducted on Defendant's request.[13]

Despite the availability of public records materials, Defendant filed a shell motion for post conviction relief on July 19, 2002, less than a month before the time expired for seeking post conviction review pursuant to Fla. R. Crim. P. 3.851(d)(1)(A). (PCR. 145-58) In the motion, Defendant asserted that the reason the motion was incomplete was that counsel had not had time to review the public records and investigate the case. *Id.* The motion was a true shell motion in that it consisted of complaints about why the motion was incomplete, procedural history and headings for 13 claims without any supporting facts or arguments alleged. *Id.* The motion acknowledged that it was being filed merely to extend the time for seeking post conviction relief in federal court. (PCR. 146)

In moving to strike this motion, the State specifically requested that the striking of the motion be without prejudice to Defendant filing a proper motion. (PCR-SR. 32) The trial court granted the State's motion. (PCR. 161) When Defendant's final motion for post conviction relief was filed on March 10,

[13] Defendant first sought an in camera review around the time the period this Court had allowed in granting Defendant's first motion for extension expired.

2003, more than 7 months after the time for seeking post conviction relief expired, Defendant's motion was not treated as untimely. Instead, it was addressed on its merits. (PCR. 505-600)

Because the motion completed failed to comply with Fla. R. Crim. P. 3.851(e), the lower court properly struck the motion as an improper shell motion. This is particularly true, since the motion that was granted expressly asked for the striking to be without prejudice to the filing of a proper motion and the motion Defendant subsequently filed was treated as timely. The lower court should be affirmed.

While Defendant suggests that the lower court erred because it did not grant Defendant leave to amend within a reasonable time under *Bryant v. State*, 901 So. 2d 810 (Fla. 2005), this is not true. In *Bryant*, the defendant had filed a 69-page initial motion. *Id.* at 819. The motion was stricken "for mostly technical deficiencies in form." *Id.* When the defendant subsequently filed a final motion, it was dismissed as untimely. *Id.* at 817. This Court stated that the trial court should have allowed Defendant a reasonable period, which would normally be between 10 and 30 days to have amended his motion. *Id.* at 819. Even while so holding, this Court stated that it did not mean to authorize the filing of true shell motion, "those that contain

sparse facts and argument and are filed merely to comply with deadlines," and that this Court had the sole authority to grant motions for extension. *Id.* at 818, 819.

Here, the motion to strike that was granted specifically requested that the motion be stricken without prejudice to Defendant filing a proper motion. The motion was a true shell motion. It did not assert a single fact or argument in support of its 13 claim headings and expressly stated that it was being filed to comply with deadlines. Moreover, a period of 10 to 30 days to amend would not have assisted Defendant, as Defendant did not file his final motion until about 7 months after the shell motion was stricken. According to the motions for extension that Defendant filed in this Court, a period of 150 days was required to file the motion. Moreover, the motion Defendant eventually filed was treated as a timely filed motion. Given these differences, *Bryant* does not show that the lower court abused its discretion in striking the shell motion. It should be affirmed.

Moreover, this case presents a perfect example of why a motion to strike should be granted. Because of the enactment of the DPRA and the pendency of the codefendants' post conviction proceedings in the connected case, most, if not all, of the public records were in the repository when this matter became

final. Despite the lower court's holding of regular status hearings, Defendant never moved to compel any public records or sought any additional public records. He did not even seek an in camera review of exempt materials during the year after the case became final. However, when the time came for filing a motion for post conviction relief, Defendant filed a shell motion with no facts or argument in support of any claim for post conviction relief. Defendant admitted that he did so to comply with a filing deadline. Moreover, Defendant was able to obtain the extensions of time for filing his motion in the proper way: by seeking and being granted extensions in this Court. Through this method, Defendant was allowed an additional 7 months to seek post conviction relief. Finding any impropriety in the lower court's actions regarding the shell motion in this matter would condone, encourage and authorize the filing of improper shell motions. However, this Court has stated that it does not wish to do so. *Bryant*, 901 So. 2d at 819. In fact, this Court amended Fla. R. Crim. P. 3.851, to express ban the practice of filing shell motions. *See Amendments to Fla. R. Crim. P. 3.851, 3.852, and 3.993*, 797 So. 2d 1213 (Fla. 2001). Under these circumstances, the shell motion was properly stricken. The lower court should be affirmed.

VI. THE CLAIM REGARDING THE CONSTITUTIONALITY OF FLA. R. CRIM. P. 3.851 WAS PROPERLY DENIED.

Defendant next asserts that the lower court erred in denying his claim that Fla. R. Crim. P. 3.851, as amended in 2001, is unconstitutional. He contends that because the new rule prohibits the filing of "shell" motions, it violates equal protection and due process. Defendant also appears to contend that he received ineffective assistance of post conviction counsel in filing the shell motion. However, this claim was properly summarily denied, as without merit.

While Defendant asserts that Fla. R. Crim. P. 3.851 is unconstitutional, this Court has repeatedly rejected challenges to the constitutionality of this rule. *Vining v. State*, 827 So. 2d 201, 215 (Fla. 2002); *Arbelaez v. State*, 775 So. 2d 909, 919 (Fla. 2000). Moreover, this Court had a rational basis for amending Fla. R. Crim. P. 3.851 to eliminate the practice of filing shell motion. The time for processing post conviction motions in capital cases had become excessive. The adoption of a one year time limit had not curbed the excess because defendants were routinely filing shell motions. To curb these excesses, this Court required that defendants file motions for post conviction relief that would actually have some substance. This Court gave ample notice of the change by issuing an opinion

on July 12, 2001, announcing its intention to eliminate shell motion as of October 1, 2001. *See Amendments to Fla. R. Crim. P. 3.851, 3.852, and 3.993*, 797 So. 2d 1213 (Fla. 2001). To avoid prejudicing the rights of those defendants who had already filed shell motion without notice that such filings would be deemed improper, this Court did not make the change applicable to those defendants. Given that this Court has a rational basis for banning shell motions, doing so does not violate equal protection or due process. The claim was properly denied.

While Defendant asserts that his counsel was ineffective for filing a shell motion, Defendant is entitled to no relief. This Court has repeatedly held that a claim of ineffective assistance of post conviction counsel does not present a valid basis for relief. *Kokal v. State*, 901 So. 2d 766, 777 (Fla. 2005); *Spencer v. State*, 842 So. 2d 54, 72 (Fla. 2003); *Vining v. State*, 827 So. 2d 201, 215 (Fla. 2002); *Carroll v. State*, 815 So. 2d 601, 609 n.8 (Fla. 2002); *Foster v. State*, 810 So. 2d 910, 917 (Fla. 2002); *King v. State*, 808 So. 2d 1237, 1245 (Fla. 2002); *Waterhouse v. State*, 792 So. 2d 1176, 1193 (Fla. 2001); *State v. Riechmann*, 777 So. 2d 342, 346 n.22 (Fla. 2000); *Shere v. State*, 742 So. 2d 215, 217 n.6 (Fla. 1999); *Downs v. State*, 740 So. 2d 506, 514 n.11 (Fla. 1999); *State ex rel. Butterworth v. Kenny*, 714 So. 2d 404, 408 (Fla. 1998); *Lambrix v. State*, 698

So. 2d 247, 248 (Fla. 1996). This holding is consistent with the holdings of the United States Supreme Court. *Coleman v. Thompson*, 501 U.S. 722, 752-54 (1991); *Murray v. Giarratano*, 492 U.S. 1 (1989); *Pennsylvania v. Finley*, 481 U.S. 551 (1987). In fact, Congress has now codified the prohibition against claims of ineffective assistance of post conviction counsel. 28 U.S.C. §2254(i). As such, this claim was properly denied.

Even if a claim of ineffective assistance of post conviction counsel did exist, Defendant would not be entitled to any relief. Defendant suffered no prejudice to ability to seek post conviction relief. This Court granted his belated motions for extension of time to file his state post conviction motion, and that motion is being litigated. No one ever claimed that his belatedly filed motion should have been dismissed as untimely.[14] Thus, there has been, and will be, no prejudice to Defendant's ability to litigate his post conviction claims in state court because he was not entitled to file a shell motion. As such, there is no reasonable probability that a different result would obtain in these proceeding had counsel not filed a

[14] Since the motion filed after the extensions was never challenged as untimely, there is no merit to Defendant's claim regarding the extension to the time limitation granted to other defendants whose attorneys fail to file timely motions. Defendant received exactly the relief these other defendants received: the ability to litigate a motion for post conviction relief filed outside the time limitations for filing such motions in state court.

shell motion. Thus, counsel could not be deemed ineffective for doing so. *Strickland*. The claim should be denied.

Defendant's real claim of prejudice from the improper filing of the shell motion is that the statute of limitation for the filing of a federal habeas petition ran because Defendant did not file a proper state post conviction motion in a timely manner. However, in order to demonstrate prejudice within the meaning of *Strickland*, a defendant must show that there is a reasonable probability of a different result in the proceeding in which the alleged deficiency occurred. *See Pope v. State*, 569 So. 2d 1241, 1245 (Fla. 1990). Since the alleged prejudice here is not in this proceeding, the claim was properly denied.

VII. THE *RING* CLAIM WAS PROPERLY DENIED.

Defendant next asserts that he is presenting his claim that Florida's sentencing scheme violated *Ring v. Arizona*, 536 U.S. 584 (2002), to preserve it in case the law should change. However, Defendant has no rights under *Ring* to preserve. Both this Court and the United States Supreme Court have held that *Ring* does not apply retroactively to cases, such as this one, where the sentence was final before *Ring* was decided. *Schriro v. Summerlin*, 542 U.S. 348 (2004); *Johnson v. State*, 904 So. 2d 400 (Fla. 2005).

Moreover, the six aggravating factors found in this matter were all charged in the indictment and found by the jury unanimously at the guilt phase. The aggravators found were prior violent felony conviction, during the course of a robbery, pecuniary gain, avoid arrest, hinder a governmental function and murder of a law enforcement officer. (RSR. 245-48) The prior violent felony aggravator was based on the contemporaneous conviction for the aggravated assault on LaSonya Hadley. (RSR. 245) Defendant was charged with this crime in the indictment. (R. 3) At trial, the jury unanimously found Defendant guilt of this crime. (R. 481) The during the course of a robbery and pecuniary gain aggravators were based on the commission of the

murder during the course of the robbery of the Kislak National Bank. (RSR. 246) Defendant was charged with this robbery in the indictment and found guilt of this crime unanimously during the guilt phase. (R. 1-2, 481) The avoid arrest, hinder governmental function and murder of a law enforcement officer were based on the fact that Off. Bauer was a police officer performing his duty at the time he was killed. (RSR. 247-48) The indictment specifically alleged that Off. Bauer was a police officer performing his duty at the time he was killed. (R. 1) In the guilt phase, the jury specifically found that these allegations were proven beyond a reasonable doubt unanimously. (R. 480) Since all the aggravators were charged in the indictment and unanimously found by the jury at the guilt phase, Defendant's *Ring* claims are specious and were properly denied. *Doorbal v. State*, 837 So. 2d 940 (Fla. 2003). The denial of the claim should be affirmed.

VIII. THE ISSUE REGARDING SANITY TO BE EXECUTED SHOULD BE REJECTED.

Defendant next asserts that he is raising his claim that he is insane to be executed to preserve it. However, this Court does not have jurisdiction to consider this issue as there is no final order on this claim. Moreover, the claim was properly rejected as it was facially insufficient and not ripe.

First, the lower court denied this claim without prejudice. As such, there is no final order on this claim to appeal. *Hancock v. Piper*, 186 So. 2d 489 (Fla. 1966); *see also McGurn v. Scott*, 596 So. 2d 1042, 1043 (Fla. 1992)("It is well settled that a judgment attains the degree of finality necessary to support an appeal when it adjudicates the merits of the cause and disposes of the action between the parties, leaving no judicial labor to be done except the execution of the judgment."); *S.L.T. Warehouse Co. v. Webb*, 304 So. 2d 97, 99 (Fla. 1974)("Generally, the test employed by the appellate court to determine finality of an order, judgment or decree is whether the order in question constitutes an end to the judicial labor in the cause, and nothing further remains to be done by the court to effectuate a termination of the cause as between the parties directly affected."). Since there is no final order to appeal, this Court is without jurisdiction to consider this issue. *Edler v. State*, 673 So. 2d 970 (Fla. 1st DCA 1996);

Rozier v. State, 603 So. 2d 120 (5th DCA 1992); *State v. Parrish*, 551 So. 2d 602 (Fla. 4th DCA 1989); *McCoy v. State*, 487 So. 2d 1095 (Fla. 1st DCA 1986); *White v. State*, 450 So. 2d 556 (Fla. 2d DCA 1984). Thus, this Court should not even consider this claim.

Moreover, the claim was facially insufficient. Defendant did not assert any facts to show that he will be incompetent to be executed. In fact, he does not assert that he is now, or has ever been, incompetent to proceed. Instead, Defendant merely asserts in a conclusory fashion that he may be incompetent in the future. Such assertions are facially insufficient to state a claim. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998). As such, the claim was facially insufficient.

Further, this claim was not ripe. This claim cannot be raised until an execution is imminent. *See Herrera' v. Collins*, 506 U.S. 390, 405-06 (1993)("[T]he issue of sanity [to be executed] is properly considered in proximity to the execution."); *Martinez-Villareal v. Stewart*, 118 F.3d 625 (9th Cir. 1997)(same), *aff'd*, 523 U.S. 637 (1998). Here, Defendant's execution is not imminent; no warrant had been issued for his execution, and no date has been set. As such, this claim is not ripe for adjudication at this juncture and was properly summarily denied.

Moreover, pursuant to Fla. R. Crim. P. 3.811(c), Defendant cannot raise this issue in any court until he has properly raised the issue with the Governor pursuant to §922.07, Fla. Stat. (1999). Defendant has not alleged that he has followed this procedure. Thus, the claim was again premature and properly rejected.

CONCLUSION

For the foregoing reasons, the order denying post conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to **Todd Scher,** 5600 Collins Avenue, 15-B, Miami Beach, Florida 33140, this 16th day of December 2005.

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CERTIFICATE OF COMPLIANCE

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

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