IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-2380

LEONARDO FRANQUI,

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, Ricardo Gonzalez, 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] Prior to trial, Defendant filed a motion to suppress his confession.

At the hearing on this motion, Defendant offered to stipulate to the admission of the testimony from the suppression hearing in the Hialeah case,[3] but requested that he be allowed to supplement this testimony with additional testimony from Det.

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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. *Franqui v. State*, 699 So. 2d 1332, 1333 n.1 (Fla. 1997).

[2] In this brief, the symbol "R." will refer to the record on direct appeal from the first trial, FSC Case No. SC84,701. The symbol "T." will refer to the transcript of the original trial. The parties will be referred to as they stood in the lower court proceedings.

[3] Defendant had committed four crimes within a six week period: the Republic Bank Robbery on November 29, 1991, the Hialeah Murder on December 6, 1991, this case on January 3, 1992 and the Van Ness kidnapping on January 14, 1992. Defendant was arrested for the Van Ness kidnapping during its commission and confessed to that crime at the time of his arrest. After Fernandez was identified as suspect in this case and confessed, Defendant was brought to the Miami-Dade Police Headquarters on January 17, 1992, interviewed about the other three cases and confessed to each of them. Issues regarding the admissibility of these confessions were litigated in a full suppression hearing during the Hialeah case.

Albert Nabut concerning a statement that he overheard and a statement that was taken after Defendant's first appearance in this case. (T. 100-12) The stipulation was accepted. *Id.* Because the State did not plan to offer the statement made after the first appearance, the parties agreed no additional evidence about this statement would be necessary. *Id.* However, they also agreed that additional evidence concerning the statement Det. Nabut overheard would be heard at a later date. *Id.*

At the subsequent hearing, the parties stipulated to the facts concerning the statement that was overheard. (T. 851-61) The parties then argued about the admission of this statement, and the trial court ruled that the statement was admissible. *Id.*

The matter proceeded to trial on May 23, 1994. (R. 24) After considering the evidence presented, the jury found Petitioner guilty as charged on all counts. (T. 2324-25) The trial court adjudicated Defendant in accordance with the verdicts. (T. 2333) After a penalty phase, the jury recommended a sentence of death for the murder by a vote of 9 to 3. (R. 480) The trial court followed the jury's recommendation and sentenced Defendant to death. (R. 588-601)

Defendant appealed his conviction and sentences to this Court, raising 5 issues:

I.

THE TRIAL COURT'S PRECLUSION OF THE DEFENDANT'S EXERCISE OF PEREMPTORY CHALLENGES ON TWO JURORS CONSTITUTED REVERSIBLE ERROR AND VIOLATED THE FIFTH AND SIXTH AMENDMENTS AND ITS FAILURE TO ACCEPT THE RACE-NEUTRAL REASONS GIVEN BY THE DEFENDANT WAS MANIFESTLY ERRONEOUS.

II.

THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT'S CHALLENGE TO THE STATE'S UNJUSTIFIABLE EXCLUSION OF A FEMALE JUROR WHERE THE STATE FAILED TO OFFER A GENDER-NEUTRAL EXPLANATION FOR ITS EXERCISE OF PEREMPTORY CHALLENGES AGAINST HER, THEREBY VIOLATING THE DEFENDANT'S FIFTH AMENDMENT DUE PROCESS AND SIXTH AMENDMENT IMPARTIAL JURY RIGHTS.

III.

THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO GRANT THE DEFENDANT'S REPEATED MOTIONS FOR SEVERANCE BASED UPON THE UNFAIR PREJUDICE OF THE INTRODUCTION AT THIS JOINT TRIAL OF HIS NON-TESTIFYING CODEFENDANTS' POST-ARREST CONFESSIONS WHICH DIRECTLY INCRIMINATED HIM, THEREBY VIOLATING THE DEFENDANT'S CONFRONTATION AND DUE PROCESS RIGHTS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

IV.

THE TRIAL COURT ERRED IN FAILING TO GRANT THE DEFENDANT RELIEF FROM THE PROSECUTORS' RELENTLESS APPEALS TO THE JURY'S SYMPATHY BY THEIR INJECTION OF IRRELEVANT AND UNFAIRLY INFLAMMATORY EVIDENCE OF THE VICTIM'S PERSONALITY AND CHARACTER INTO THIS LAWSUIT, THEREBY DENYING THE DEFENDANT A FAIR TRIAL AND DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

V.

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO DEATH, THEREBY DENYING THE DEFENDANT DUE PROCESS OF LAW AND EQUAL PROTECTION WHILE IMPOSING A DISPROPORTIONAL, CRUEL AND UNUSUAL, PUNISHMENT UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. The Trial Court Erred in Rejecting altogether the Non-Statutory Mitigating Factors that he was a good employee, that he had demonstrated good conduct and rehabilitation in prison, and that he suffered mental problems, as well as Rejecting and Refusing to Instruct the Jury on Age as Either a Statutory or non-Statutory Mitigating Factor.

B. Death is a Disproportionate Penalty to Impose on [Defendant] in Light of the Circumstances of this Case and Constitutes a Constitutionally Impermissible Application of Capital Punishment.

C. The Death Penalty is Unconstitutional on its Face and as Applied to [Defendant] and Violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Initial Brief of Appellant, FSC Case No. 84,701. This Court affirmed Defendant's conviction but reversed Defendant's death sentence. *Franqui v. State*, 699 So. 2d 1332 (1997). This 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, Leonardo Franqui, along with codefendants Pablo San Martin, Ricardo Gonzalez, 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 third degree, and burglary. [FN1] [Defendant], Gonzalez, 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, codefendant 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 [Defendant] 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 [Defendant] had procured the two stolen Chevys, driven one of the cars, and supplied him with the gun he used during the robbery. He further stated that [Defendant] 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. Gonzalez consented to a search of his apartment which revealed $1200 of the stolen money in his bedroom closet. He was subsequently reinterviewed by police and, among other things, described how [Defendant] had shouted at the victim not to move before shooting him. [FN2]

[Defendant] was also questioned by police on January 18, 1992, in a series of unrecorded and recorded sessions. During his preinterview, [Defendant] 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. [Defendant] 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 [Defendant],

> San Martin, Fernandez and Abreu had stolen the vehicles. [Defendant] 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. [Defendant] denied firing the first shot and maintained that he fired only one shot later.
>
> At trial, over the objection of [Defendant], the confessions of codefendants San Martin and Gonzalez were introduced without deletion of their references to [Defendant], upon the trial court's finding that their confessions "interlocked" with [Defendant's] own confession. In addition, an eyewitness identified [Defendant] as the driver of one of the Chevrolets leaving the bank after the robbery, and his fingerprints were found on the outside of one of the vehicles. Ballistics evidence demonstrated that codefendant Ricardo Gonzalez had fired the fatal shot from his .38 revolver, hitting the victim in the neck, and that [Defendant] had shot the victim in the leg with his .9 mm handgun.
>
> [Defendant] was convicted on all counts, and after a penalty phase trial the jury recommended death by a vote of nine to three. The trial court followed the jury's recommendation and sentenced [Defendant] to death.

Franqui, 699 So. 2d at 1333-34. Both parties sought certiorari review in the United States Supreme Court, which was denied. *Franqui v. Florida*, 523 U.S. 1097 (1998); *Florida v. Franqui*, 523 U.S. 1040 (1998).

On remand, the matter proceeded to the new penalty phase on August 24, 1998. (RST. 1)[4] After considering all of the evidence, the jury recommended that Defendant be sentenced to

[4] The symbols "RSR." and "RST." will refer to the record on appeal and transcript of proceedings from the resentencing, FSC Case No. SC94,269.

death by a vote of 10 to 2. (RSR. 155, RST. 1172) The trial court followed the jury's recommendation and sentenced Defendant to death. (RSR. 158-75, 225-47) The trial court found three aggravating factors: (1) prior violent or capital felonies, including a prior attempted armed robbery and aggravated assault of Pedro Santos, a prior first degree murder of Raul Lopez and attempted armed robbery of the Cabanases, and a prior armed robbery and armed kidnapping of Craig Van Ness, as well as the contemporaneous armed robbery and aggravated assault in this case; (2) during the commission of an armed robbery and for pecuniary gain, merged; and (3) avoid arrest, hinder a governmental function and murder of a law enforcement officer, merged. (RSR. 158-65, 226-37) The trial court accorded great weight to each of these factors. (RSR. 158-65, 226-37) The trial court found as nonstatutory mitigating circumstances: (1) Defendant was a good father - little weight, (2) he cooperated with authorities - little weight, (3) Abreu and San Martin received life sentences - little weight, and (4) Defendant had sought self improvement and found faith in custody - some weight. (RSR. 166-72, 237-45) The trial court considered and rejected Defendant's age as mitigation because of his maturity. (RSR. 167, 238-39) The trial court also rejected Defendant's family history as mitigation because he was never abused and was

able to maintain relationships. (RSR. 167-69, 239-42) Finally, the trial court rejected the fact that Defendant did not fire the fatal bullet as mitigation. (RSR. 172, 244-45)

Defendant appealed his sentence to this Court, raising 6 issues:

> I.
> THE TRIAL COURT ERRED IN EXCUSING FOR CAUSE POTENTIAL JURORS PEREIRA AND LOPEZ.
>
> II.
> THE TRIAL COURT ERRED IN INSTRUCTING AND ALLOWING THE JURY TO BE INSTRUCTED THAT ITS RECOMMENDATION SHOULD BE DEATH IF THE AGGRAVATORS OUTWEIGHED THE MITIGATORS.
>
> III.
> THE TRIAL COURT ERRED IN OVERRULING DEFENSE OBJECTIONS TO PROSECUTORIAL CLOSING ARGUMENT WHICH DENIED [DEFENDANT] A FAIR TRIAL.
>
> IV.
> THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT IT COULD TAKE INTO CONSIDERATION THE LIFE SENTENCES GIVEN TO THE CO-DEFENDANTS AS A MITIGATING FACTOR.
>
> V.
> THE TRIAL COURT ERRED IN ITS SENTENCING ORDER IN FAILING TO FIND AND WEIGH EACH MITIGATING CIRCUMSTANCE PROPOSED BY THE DEFENSE.
>
> VI.
> THE TRIAL COURT ERRED IN FINDING THAT A SENTENCE OF DEATH WAS APPROPRIATE ON THE FACTS OF THIS CASE.

Initial Brief of Appellant, FSC Case No. SC94,269. This Court affirmed Defendant's death sentence on October 18, 2001. *Franqui v. State*, 804 So. 2d 1185 (Fla. 2001). Mandate issued on January 8, 2002.

On January 8, 2003, Defendant filed a shell motion for post conviction relief. (PCR-SR. 759-74)[5,6] The State moved to strike the shell motion, as filed in violation of Fla. R. Crim. P. 3.851. (PCR-SR. 775-81) Defendant then withdrew the shell motion. (PCR-SR. 782-83)

On April 7, 2003, Defendant filed a proper motion for post conviction relief. (PCR. 100-61) The motion contained a list of 18 issues:

> I.
> The procedure for assignment of trial judges in Dade County criminal cases is inherently unfair, particularly as applied to this defendant.
>
> II.
> The circumstances surrounding defendant's waiver of his right to testify show that the waiver was both involuntary and unknowing.
>
> III.
> Circumstances surrounding the purported confession -- chiefly, the length of the questioning, officers' non-responsiveness to defendant's requests for counsel and officers' election not to make an audio or visual recording of any portion of the interrogation -- make the defendant's statement unreliable, illegal and inadmissible.
>
> IV.
> The Court denied the defendant the right to obtain evidence from a material, relevant witness despite the

[5] The symbols "PCR." and "PCR-SR." will refer to the record on appeal and supplemental record on appeal in the present proceeding.

[6] Various documents were not included in the record on appeal. The State has filed a motion to supplement the record with these documents. As such, page numbers for these documents are estimates.

fact that the evidence was not in any way privileged merely because it was the "custom" not to call Assistant State Attorneys to testify.

V.

When the second sentencing court permitted the statement of [Defendant] to be admitted into evidence but failed to permit the defense to present evidence on the confession issue, it denied [Defendant] due process of law.

VI.

Counsel made no effort to litigate the suppression of [Defendant's] statement despite the ample and compelling basis for suppression on these facts.

VII.

Counsel failed to effectively seek the right of [Defendant] to obtain evidence from a material, relevant witness despite the fact that the evidence was not in any way privileged merely because it was the "custom" not to call Assistant State Attorneys to testify.

VIII.

Counsel failed to present relevant lay and expert witnesses. Two lay witnesses would substantiate [Defendant's] request for counsel *before* his statement; and expert mental health professionals would have presented relevant evidence on the conditions of the interrogation, the mental status of [Defendant], and the interaction of these two factors.

IX.

Sentencing counsel (second sentencing) failed to litigate his filed suppression motion, apparently because both he and the judge mistakenly assumed that the confession issue had been litigated and lost before the Supreme Court of Florida.

X.

Sentencing counsel failed to litigate before the jury the surrounding factors of the taking of the confession in order to challenge its voluntariness.

XI.

Sentencing counsel failed to raise Constitutionally valid attacks on the Constitutionality of the Death Penalty pre se and specifically the death penalty scheme in Florida where the sentencing jury merely is an “advisor” to the judge who is the ultimate fact finder and decision maker.

XII.

Counsel failed to make a motion to dismiss based on patent deficiencies in the indictment.

XIII.

In attempting to exercise a peremptory strike against panel member Diaz, Counsel’s delay in presenting neutral reasons beyond his bare dislike of Diaz resulted in the seating of a juror whose ability to be fair should have been the basis on a sustainable defense peremptory challenge.

XIV.

Counsel failed to preserve patent trial court error in disallowing a defense strike against panel member Andani; when the State challenged the strike, defense counsel specifically declined to be heard.

XV.

Counsel failed to litigate his request for individual requested voir dire and motion to sequester; despite the fact that the victim was a police officer, counsel made no attempt to show that Miami’s notoriously sensational press had created adverse pretrial publicity nor did he make any showing of how the defendant was prejudiced.

XVI.

Counsel failed to preserve patent trial error in allowing the State to peremptorily challenge panel member Pascual; Pascual, like seated Juror Pierre-Louis, expressed initial ambivalence about imposing death on a non-triggerman. Counsel accepted the panel without reserving this meritorious objection.

XVII.

During the penalty phase, counsel failed to object to the prosecutor’s serious misstatement of law on closing - “If the aggravating is always stronger,

> always more powerful in your hearts and minds, the Judge is going to tell you it's your obligation that you should vote to recommend for death."
>
> XVIII.
> Appellate counsel also failed to raise the meritorious issue of prosecutorial misconduct based on this duty-to-recommend-death comment in his brief -- this omission and defense counsel's failure to preserve the issue of court error were noted by on appeal by the Florida Supreme Court. Appellate counsel's ineffectiveness is mentioned here because the fact that the Court mentioned it proves this issue's merit. But [Defendant's] claim for relief based on appellate counsel's deficiencies will be made in a separate and appropriate pleading.

(PCR. 110-12) In addition, Defendant asserted, as facts unrelated to any of the numbered claims, that the State was permitted to present the facts of Defendant's prior convictions, which alleged related to nonstatutory aggravation, and that the jury instruction on the prior violent felony aggravator was allegedly flawed. (PCR. 106, 109) He also included conclusory allegation that the during the course of a felony aggravator was an unconstitutional automatic aggravator, that the preclusion of juror interviews was unconstitutional and that the trial court refused to consider Defendant's allegedly low IQ in sentencing him. (PCR. 109-10, 134-35, 136-37, 138)

Defendant asserted that he was seeking an evidentiary hearing on three issues: (1) the claims regarding the manner in which Defendant's cases were all assigned to one judge; (2) the claims regarding the litigation regarding Defendant's

confession; and (3) ineffective assistance of counsel. (PCR. 113-17)

At the *Huff* hearing, Defendant argued that an evidentiary hearing was necessary on the case assignment claim to present evidence of the psychological impact of hearing the facts of all of Defendant crimes. (PCR-SR. 179) On the second claim, he asserted that evidence could be presented regarding trial counsel's advice regarding Defendant testifying from counsel and Defendant. (PCR-SR. 186-87) Regarding the confession issue, Defendant asserted that he wanted to present testimony from city officials regarding why there is a policy not to record all interrogations completely and officials from other entities about why they have such a policy. (PCR-SR. 189-91) On the ineffective assistance claims, Defendant asserted that testimony from trial counsel, Defendant and a legal expert on deficiency were necessary. (PCR-SR. 194-99, 204-09) He also asserted that a mental health expert could be presented regarding the confession issue. (PCR-SR. 199-200)

Defendant acknowledged that his claims regarding Mr. DiGregory and presentation of evidence concerning the circumstances of his confession at resentencing were legal issues. (PCR-SR. 192-94) Defendant presented no argument on his factual assertions that were unrelated to his listed claims.

(PCR-SR. 163-274)

At the end of the *Huff* hearing, the trial court granted an evidentiary hearing on Claims II, VI, VIII and X. (PCR-SR. 245-53, 26162) As a condition of granting the evidentiary hearing on Claim II, the trial court required Defendant to file an affidavit regarding the propose content of Defendant's testimony to make the claim legally sufficient. (PCR-SR. 248-49) The trial court entered a written order in conformity with its oral pronouncement. (PCR. 184-86) Defendant subsequently elected to withdraw Claim II rather than provide the affidavit. (PCR. 190-91)

Prior to the evidentiary hearing, the State moved to exclude the expert testimony Defendant planned to offer that his confession was coerced on the grounds that such evidence would not aid the trier of fact and was so new and novel as to provide no basis for a claim of ineffective assistance of counsel. (PCR. 207-12)

The State also moved the trial court to preclude depositions of the officers who took Defendant's confessions. (PCR. 213-15) The State argued that Defendant needed to show good cause to be entitled to conduct a post conviction deposition and that Defendant had not shown any good cause, particularly since the officers had been deposed and testified

about the circumstances of Defendant's confessions on numerous occasions. *Id*. Defendant filed a response, asserting that he was not required to show good cause to conduct post conviction discovery, that he should be allowed to depose the witnesses as if they had never previously testify or been deposed and that he should be provided with the records of Defendant's other cases. The trial court ordered the State to provide the officers' prior depositions but refused to grant Defendant's blanket request. (PCR. 249-50)

The State also moved in limine to exclude any expert testimony by Melvin Black regarding his opinion of whether counsel was ineffective. (PCR. 220-23) It argued that expert testimony from an attorney would not assist the trier of fact and was irrelevant, as it concerned issues of law. *Id.* Defendant filed a response, arguing that such testimony should be admissible. (PCR. 225-32)

In preparation for the evidentiary hearing, the State deposed Mr. Black and learned that Defendant's trial counsel, Eric Cohen, had voluntarily met with Mr. Black to discuss his conduct at trial and his reasons for that conduct. (PCR. 241) However, Mr. Cohen refused to meet with the State voluntarily. (PCR. 241) As a result, the State served Mr. Cohen with a subpoena, issued on February 26, 2004, to appear on March 4,

2004, at a prehearing conference with the State concerning this matter. (PCR. 238) Mr. Cohen moved to quash the subpoena, asserting that the State could not use investigative subpoenas to compel him to attend the conference. (PCR. 233-37) The State responded that investigative subpoenas were applicable to post conviction proceedings and asserted that since Defendant had claimed Mr. Cohen was ineffective, he had waived any attorney/client privilege regarding every area of the litigation in which ineffectiveness had been claimed. (PCR. 240-45) The State pointed out that if Mr. Cohen believed that an area of the State's questioning concerned an issue about which Defendant had not claimed ineffective assistance, he could assert the privilege regarding that area. (PCR. 241-42)

At the hearing on the motion, Mr. Cohen argued that investigative subpoenas did not apply to post conviction proceedings and that the State was not seeking to interview Mr. Cohen about the commission of a crime. (PCR. 282-84) He also mentioned that investigative subpoena cannot be used to circumvent the discovery rules. (PCR. 283) The State responded that there was no discovery rule regarding post conviction proceedings and that it was investigate a violation of the law: the crimes committed in this case. (PCR. 284-85) It also pointed out that Mr. Cohen had willingly assisted Defendant but

refused to speak with the State and that any concern Mr. Cohen might have concerning the attorney-client privilege was misplaced as Defendant had waived the privilege by claiming ineffective assistance. (PCR. 286-87) In the course of presenting its argument, the State asserted, as an example of why investigative subpoena should be allowed, a situation where new evidence came to light that someone else might have committed the crime and the State's need to investigate such evidence. (PCR. 287) Mr. Cohen agreed that such a situation would warrant the issuance of an investigative subpoena but maintained his argument because there was no such claim in this case. (PCR. 287-88) After considering these arguments, the lower court denied the motion to quash. (PCR. 288)

On March 8, 2004, Defendant moved the trial court to allow depositions of the officers involved in taking Defendant's confessions regarding the techniques the officers used in interrogating Defendant and an orders that might have been given about the method of interrogation. (PCR. 249-53) Defendant stated that he had now reviewed the prior depositions of the officers and that these areas had not been covered. *Id.*

On August 17, 2004, Defendant served an a pleading entitled "Emergency Motion for Production of State Attorney Notes; Motion to Take Judicial Notice of Admission of Ineffective Assistance

of Counsel Made by Eric Cohen, or in the Lesser Alternative, to Estop the State from Denying Mr. Cohen's Admission; Request for Continuance of the Currently Scheduled Evidentiary Hearing in Order to Obtain Transcript of *Ex Parte* Hearing on Mr. Cohen's Motion to Quash, or to Appeal Denial Thereof." (PCR-SR. 740-49) In the pleading, Defendant claimed that he only recently became aware that the State had spoken to, and subpoenaed, Mr. Cohen. *Id.* He claimed that Mr. Cohen had admitted that he had been ineffective during his discussion with the State Attorney. *Id.* He asserted that he had not waived the attorney-client privilege and that the use of the subpoena was improper because it circumvent the discovery rules and was not applicable unless the State was investigating a crime. *Id.* He sought production of the notes the prosecutor had taken during the meeting with Mr. Cohen, that the Court take judicial notice of Mr. Cohen's ineffectiveness or estop the State from contesting that Mr. Cohen was ineffective, provide the pleadings regarding the motion to quash and the transcript of the hearing on the motion and continue the evidentiary hearing. Alternatively, Defendant requested that the lower court stay the proceedings so he could appeal if it denied the other relief.

The State filed a response to the motion, asserting that it had not served its response to the motion to quash on Defendant

because Mr. Cohen had not served the motion to quash on Defendant but that it believed that Mr. Cohen had told Defendant of the proceedings and pleadings and recalled Defendant personally being present at the hearing on the motion. (PCR. 750-56) The State also pointed out that Defendant had waived his attorney-client privilege with Mr. Cohen, as a matter of law, by claiming that Mr. Cohen was ineffective, that Mr. Cohen had never admitted that he was ineffective to the State, that Defendant and his alleged legal expert Mr. Black had met with Mr. Cohen privately and there were no discovery rules governing post conviction proceedings to circumvent. *Id.* The State asserted that Defendant had not shown any prejudice because of the manner in which the motion to quash was litigated, as he had not presented any arguments that had not already been considered. Further, the State objected to the production of the prosecutor's notes because they were work product, to the taking of judicial notice of ineffectiveness as it is not a fact that can be noticed and to continuing the evidentiary hearing. *Id.*

At the hearing on the motion, Defendant argued that a subpoena should not have been used to speak to Mr. Cohen because the State was not investigating a crime. (PCR-SR. 640, 669-70) When the Court indicated that this argument had already been

considered at a hearing in open court, Defendant indicated that he had yet to receive and review the transcript of the hearing. (PCR-SR. 640-41) Defendant also argued that the State should have been required to take a deposition and that he should have been allowed to assert the attorney-client privilege that he insisted had not been waived. (PCR-SR. 642-43, 661-62, 665-67) Defendant insisted that he should be able to investigate what was discussed with the prosecutor during the meeting since no formal statement was taken. (PCR-SR. 646, 664, 667) Defendant admitted he had discussed the meeting with Mr. Cohen but insisted that he still needed to know what the State had gleaned from the meeting. (PCR-SR. 646-47, 651-52) Defendant insisted that he would have argued the issue differently but could not articulate any different arguments. (PCR-SR. 643-44, 656-57, 664-65) He also requested to review any notes the prosecutor might have taken during his meeting with Mr. Cohen. (PCR-SR. 657)

During the argument, the lower court reviewed court and jail records that indicated that Defendant was personally present during the hearing on the motion to quash. (PCR-SR. 652-53) The State indicated that it probably did not have any notes and had not conduct a formal interview but had simply spoken to Mr. Cohen about his conduct in the case in preparation

for calling him as a state witness, since Defendant had indicated that he was unsure whether he would be calling Mr. Cohen as his witness. (PCR-SR. 650, 657, 659-60) The State also pointed out that Mr. Cohen had spoken privately with Defendant and his expert and the State was simply attempting to have a similar discussion with Mr. Cohen. (PCR-SR. 658-59) It asserted that it thought Mr. Cohen had informed Defendant of the subpoena and that Defendant was personally present at the hearing on the motion to quash. (PCR-SR. 660)

During the argument, the lower court indicated it was its fault for failing to ensure that Defendant's post conviction counsel was present for the hearing. (PCR-SR. 663-64) After listening to the argument, the court ordered the State to provide it with any notes that might exist regarding its discussion with Mr. Cohen. (PCR-SR. 676) It denied all other relief sought by Defendant without prejudice to Defendant raising the issue again after Defendant reviewed the transcript and if any problem arose during the evidentiary hearing. (PCR-SR. 677-85)

The evidentiary hearing was held on August 24, 2004. (PCR-SR. 465-635) At the evidentiary hearing, Defendant presented the testimony of Eric Cohen, his trial counsel, Melvin Black, an alleged expert in the performance of attorneys, and Christian

Meisner, a psychologist. *Id.* The State presented no witnesses. *Id.*

Mr. Cohen testified that he had represented Defendant on one occasion regarding two criminal cases before Defendant's arrest in January 1992. (PCR-SR. 483-84) As a result, he was retained to represent Defendant when he was arrested in January 1992, in connection with other charges. (PCR-SR. 484) Mr. Cohen subsequently learned that Defendant had been arrested in connection with this case. (PCR-SR. 485)

When Mr. Cohen went to see Defendant after his arrest in this matter, Defendant claimed that he had been beaten and threatened into confessing by Det. Crawford, who Defendant claimed was left alone with him in the interview room. (PCR-SR. 487) Based on these statements, Mr. Cohen focused his efforts in moving to suppress on the voluntariness of the statement and on the fact that counsel had been appointed to represent Defendant at a first appearance in the case in which Defendant was originally arrested. (PCR-SR. 494-95) As factual investigation to support these claims, Mr. Cohen obtained documents from the court file about the appointment of counsel in the other case, logs from the jail regarding Defendant's movements and the detectives' work logs. (PCR-SR. 495-96) Mr. Cohen explained that the issue of appointment of counsel in the

other case was not fruitful because Defendant had only invoked his Sixth Amendment right to counsel, which is offense specific. (PCR-SR. 494-96)

Mr. Cohen stated that he had Dr. Jethro Toomer appointed to evaluate Defendant for mitigation. (PCR-SR. 496) He did not believe he considered using mental health evidence regarding suppression. (PCR-SR. 496) His understanding of the law regarding the relevance of mental health issues to suppression was that mental health could be relevant if the mental health issues caused the defendant not to understand his rights. (PCR-SR. 497)

Mr. Cohen recognized a letter that Dr. Toomer had sent him that was dated March 24, 1993, and would have been received by Mr. Cohen a few days later. (PCR-SR. 499-500) He recognized that the letter reported problems with Defendant's cognitive functioning, memory and emotional stability and a low IQ score. (PCR-SR. 500-02) Mr. Cohen stated that such information would not be useful in litigating the voluntariness of a confession but might be helpful in litigating whether a defendant's waiver of his *Miranda* rights was intelligent. (PCR-SR. 502-03)

Since the confession to this crime and the Hialeah case were taken during the same interrogation, involved the same witnesses and were before the same judge, Mr. Cohen fully

prepared to litigate suppression at the time of the suppression hearing in that case. (PCR-SR. 505) Mr. Cohen saw no reason to reserve issues to litigate at a separate suppression hearing in this case because Defendant was facing the death penalty in both cases. (PCR-SR. 505-06) Mr. Cohen did no additional investigation or research to prepare to litigate suppression in this matter. (PCR-SR. 507)

Mr. Cohen did not recall whether he considered attempting to claim that Defendant did not have the mental capacity to waive his rights and why he decided not to present it if he did. (PCR-SR. 507-08) Mr. Cohen did not believe that he was aware of any expert testimony relevant to the voluntariness of a confession at the time this matter was pending. (PCR-SR. 508)

Mr. Cohen believed that the resentencing judge had precluded him from presenting any evidence of lingering doubt at the resentencing. (PCR-SR. 510-11) As a result, Mr. Cohen did not attempt to present evidence regarding the voluntariness of the confession at resentencing, as he believed that this would have been considered lingering doubt evidence. *Id.*

On cross, Mr. Cohen stated that he always tried to stay current regarding the state of the law by reading the Florida Law Weekly every week. (PCR-SR. 512) He did research regarding the issues in these cases at the time he was litigation them.

(PCR-SR. 512-13) Mr. Cohen knew that he had no basis to seek the recusal of Judge Sorondo simply because he had ruled against him in the Hialeah case. (PCR-SR. 513)

Mr. Cohen recalled there having been an issue concerning certain statements Defendant made to his girlfriend that were overheard by Det. Nabut. (PCR-SR. 513-14) He knew he spoke to Defendant's girlfriend to investigate the issue. (PCR-SR. 514) However, he did not recall when he litigated this issue or there being a suppression hearing in this case. (PCR-SR. 514-15)

Mr. Cohen stated that he was not suggesting that he would have presented different facts and arguments if the cases had not been tried before the same judge. (PCR-SR. 515-16) Instead, he was merely suggesting that he might have presented the evidence and arguments again with a different judge. (PCR-SR. 516)

Mr. Cohen stated that he had never had any difficulty communicating with Defendant over the years that he represented Defendant. (PCR-SR. 516) He never had any concern that Defendant might be retarded. (PCR-SR. 517) Mr. Cohen stated that he would have been more inclined to pursue mental health issues if Dr. Toomer's report was consistent with his own observation. (PCR-SR. 517-18) Mr. Cohen acknowledged that Dr. Toomer had testified at the Hialeah penalty phase and that the

trial court had made findings about that testimony. (PCR-SR. 518)

Mr. Cohen did not recall when experts on confessions became the subject of legal publications. (PCR-SR. 520-21) However, Mr. Cohen stated that he did not become aware of this emerging field until after this case was tried. (PCR-SR. 521-22)

Mr. Cohen admitted that Defendant claimed to have been physically coerced into confessing, that he would not have attempted to get Defendant to change the facts and that Defendant's assertions colored his litigation of the suppression issue. (PCR-SR. 522-23) Mr. Cohen admitted that he would have litigated the motion to suppress based on the same facts and law had a second full suppression hearing been held, even before a new judge. (PCR-SR. 523)

Defendant next called Melvin Black. (PCR-SR. 528) Before he began testifying, the State renewed its objection to his testimony. (PCR-SR. 528-29)

Mr. Black stated that he had been admitted to practice since 1969, and practiced primarily in the area of criminal trials. (PCR-SR. 530) Mr. Black had been counsel in 300 to 400 jury trial and had litigated suppression about 100 times. (PCr-SR. 530-31) Mr. Black had never been counsel in a death penalty case that had proceeded to a penalty phase even though he had

tried first degree murders. (PCR-SR. 533) Mr. Black had never been accepted by a court as an expert witness on the issue of attorney performance in litigating suppression issues. (PCR-SR. 534)

Mr. Black was strongly opposed to the death penalty. (PCR-SR. 533) He considered the death penalty an unacceptable act. *Id.* However, Mr. Black did not believe this colored his opinions. (PCR-SR. 536)

In preparation of this case, Mr. Black reviewed the suppression hearing transcript and the order on suppression and spoke to Mr. Cohen. (PCR-SR. 537-38) Mr. Black described the assessment he was making as:

> not whether or not a lawyer is a good lawyer or a bad lawyer, but whether or not a lawyer made an error in judgment on a particular issue at the particular time.

(PCR-SR. 538) Based on this standard, Mr. Black believed that Mr. Cohen was deficient for not "revisit[ing] each and every aspect of the suppression issue before he made the decision to waive the opportunity to litigate the issues in front of Judge Sor[o]ndo a second time." (PCR-SR. 539) He also asserted that Mr. Cohen should have considered using Dr. Toomer's opinion to claim that Defendant did not make a knowing, intelligent and voluntary waiver of his rights. (PCR-SR. 539)

Mr. Black believed that Dr. Toomer's opinion that Defendant's judgment and abstract reasoning were poor indicated that he could not understand his *Miranda* rights. (PCR-SR. 539-40) He also felt that Dr. Toomer's opinion that Defendant's cognitive functioning was impaired showed that Defendant could not understand and utilize his rights. (PCR-SR. 540) He also believed that Defendant's IQ score indicated that Defendant could not understand his rights. (PCR-SR. 540-41)

He felt that Mr. Cohen should have considered this information in deciding how to proceed on the suppression issue. (PCR-SR. 541-42) Mr. Black acknowledged that this information came into Mr. Cohen's possession after the Hialeah suppression hearing. (PCR-SR. 542) He believed that an effective lawyer would have filed a new motion to suppress, added additional grounds and called Dr. Toomer at a new suppression hearing. (PCR-SR. 543-44) He stated that Mr. Cohen should have pursued this information even if his interaction with Defendant contradicted Dr. Toomer's opinion. (PCR-SR. 544-45) Mr. Black believed that Mr. Cohen should have hired a different expert to present this information if Dr. Toomer had been found to be incredible when he testified to these conclusions previously. (PCR-SR. 546)

Mr. Black was aware of psychological expertise concerning conditions that lead to involuntary and coerced confessions. (PCR-SR. 548) Mr. Black did not know of any case law permitting such testimony to be admitted at the time this matter was litigated and had never even attempted to introduce such testimony himself. (PCR-SR. 549-50) However, Mr. Black believed that Mr. Cohen was ineffective for failing to present this testimony. *Id.* Mr. Black based this opinion on his view that:

> competent representation, your honor, is that a lawyer needs to use tools that are available and needs to try to bring all of those tools to bare [sic] and the fact that you may do one thing and overlook something else, doesn't mean you have competent [representation].

(PCR-SR. 550)

On cross, Mr. Black stated that he had never read a case in which expertise on coerce confessions had been deemed admissible at the time Defendant's case had been litigated. (PCR-SR. 551) However, he had been told that one such case existed somewhere. *Id.* Despite the lack of legal support, Mr. Black believed that Mr. Cohen was deficient for failing to present the argument. (PCR-SR. 551-52)

Mr. Black stated that he had never seen any other psychological information about Defendant's IQ. (PCR-SR. 553) However, Mr. Black did not believe that Defendant's present counsel was being ineffective for failing to litigate

Defendant's competency based on this information. (PCR-SR. 553-54) Mr. Black based this opinion on his belief that there is a different standard of competency to waive a Constitutional right than to stand trial. (PCR-SR. 554)

Mr. Black stated that Mr. Cohen was deficient because he did not claim that Defendant was unable to understand and waive his *Miranda* right based on his alleged mental condition. (PCR-SR. 554-55) Mr. Black admitted that Defendant had testified that he understood and invoked his rights. (PCR-SR. 556) However, Mr. Black claimed that this did not mean that Defendant understood his rights sufficiently to waive them. (PCR-SR. 556-58) Mr. Black insisted that it would be proper to claim that a defendant did not understand his rights even if the client had told the lawyer that he understood his rights and invoked them. (PCR-SR. 558-60) Mr. Black acknowledged that Defendant had been read his rights at the time of his initial arrest in the Van Ness kidnapping, waived those rights and confessed to that crime. (PCR-SR. 561-62)

Mr. Black insisted that if the trial court had found Dr. Toomer incredible, the evidence still should have been presented. (PCR-SR. 563-64) He stated that counsel should have gotten another expert to present this information. *Id.*

On redirect, Mr. Black admitted that Defendant had

testified that he told the police, “that I didn’t want to tell them about my case without my lawyer present,” and “that I didn’t want to speak to him, that I had a lawyer and I wanted to speak to my lawyer prior” before he was read his *Miranda* rights. (PCR-SR. 565) However, he claimed that this did not indicate that Defendant understood his rights because the statements were not made in response to *Miranda* warnings. (PCR-SR. 566-67) He claimed that Defendant was just reciting words without understanding them. (PCR-SR. 577-80)

Finally, over the State’s objection, Defendant presented the testimony of Dr. Christian Meisner. (PCR-SR. 585-94) Dr. Meisner stated that he received his doctorate in cognitive psychology in 2001. (PCR-SR. 595)

Dr. Meisner stated that he reviewed Defendant’s confessions, the transcript of the suppression hearing, Defendant’s *Miranda* rights waiver form, a book published in 1992 by a Professor Johnson and a book published in 1993 by Acastman. (PCR-SR. 601-02, 604) He also spoke to Defendant. (PCR-SR. 606)

Dr. Meisner believed that testimony about psychological influence on confessions was first presented to a court in the late 1980's or early 1990's by Professor Aronson.[7] (PCR-SR. 603-04) He stated that there were about three professors who were

[7] The case to which Dr. Meisner alluded was *People v. Page*, 2 Cal. Rptr. 898 (Cal. Ct. App. 1991).

testifying about this information in the early 1990's. (PCR-SR. 605) He also believed that an attorney could have discovered this area through the Acastman book. (PCR-SR. 604) However, Dr. Meisner stated that there was no experiments into this area before 1996, and that the expert were basing there opinions on observational data. (PCR-SR. 607)

Dr. Meisner stated that one manner in which police coerce individuals into confessing is through a minimization-maximization technique. (PCR-SR. 610) In this technique, the police minimize the suspect's actions or the consequences of those actions by suggesting that the victim deserved what he got or that they would assist the suspect in later proceedings. (PCR-SR. 610-11) The maximization occurs through physical force, intimidation, threats or false statement about the evidence against the suspect. (PCR-SR. 611)

According to Defendant's statement, maximization occurred in this case through physical beatings, intimidation, and claims to know that Defendant was guilty and lying. (PCR-SR. 612) Minimization occurred through Det. Smith's request for Defendant's help and Det. Nabut's alleged promise of a 15 year sentence. (PCR-SR. 612)

Dr. Meisner also stated that Defendant's assertion that Det. Crawford left the room after he invoked his rights and

returned later to continue the interview was an example of a technique used to coerce a confession. (PCR-SR. 616-17) Dr. Meisner averred that Defendant's claim that the officers only read him the portion of the Rights Waiver form in which his rights were enumerated and not the portion containing the waiver was another example of a coercive technique. (PCR-SR. 617-18)

Dr. Meisner opined that if Defendant's statements were true, factors existed that lead to a false or involuntary confession. (PCR-SR. 618) Dr. Meisner could not say whether Defendant's confession was either false or involuntary. (PCR-SR. 618-29)

Dr. Meisner stated that Defendant did understand his *Miranda* rights when they were read to him. (PCR-SR. 617) Dr. Meisner stated that this was consistent with Defendant's suppression hearing testimony. (PCR-SR. 627) Dr. Meisner stated that Defendant understood he had a right to an attorney. (PCR-SR. 627)

On cross, Dr. Meisner admitted that he would not have been available at the time this matter was litigated. (PCR-SR. 619) The only people who would have been were a person named Johnson from England and possibly Drs. Casson and Ofshe. (PCR-SR. 619-20) He did not know if anyone was informing the legal community of this area at the time of this case. (PCR-SR. 620-21) Dr.

Meisner stated that this work was being done in the academic world and the only knowledge he had of this work being disseminated outside the academic world was that a Royal Commission was involved in the research in England. (PCR-SR. 620-21) He stated that in the United States, there were probably no more than 10 people involved in this work at the time of this case. (PCR-SR. 630) The literature that Dr. Meisner relied upon was psychological literature, and he did not know if it had been introduced into legal circles at the time of this matter. (PCR-SR. 630-31)

Dr. Meisner admitted that people use techniques to get others to speak to them all the time in life. (PCR-SR. 624) Use of these techniques was not always coercive. (PCR-SR. 625) Dr. Meisner admitted that he was aware that matters that he considered coercive were not legally considered coercive. (PCR-SR. 625)

While Dr. Meisner had spoken to Defendant, he had never tried to speak to the officers involved in taking Defendant's confession. (PCR-SR. 625-26) He had not even read their depositions. (PCR-SR. 626)

Dr. Meisner stated that his opinion about the coercive techniques depended on one believing Defendant. (PCR-SR. 628) If one believed the police, no coercive techniques were used in

this matter. (PCR-SR. 631-32)

In his post hearing memo, Defendant argued that he had shown that his counsel was ineffective because counsel received Dr. Toomer's report after the Hialeah suppression hearing had been conducted and failed to use this "new" information as a basis for litigating suppression in this matter based on the assertion that it showed Defendant did not understand his *Miranda* rights. (PCR-SR. 384-406) He also asserted that he showed that counsel was ineffective for failing to present expert testimony on whether Defendant's confession was coerced. (PCR-SR. 406-12) In reasserting his claim that an evidentiary hearing should have been granted on his case assignment claim, Defendant acknowledged that the selection of the judge who would hear all of a defendant or group of codefendant's cases was "by happenstance." (PCR-SR. 413)

Further, Defendant sought to interject new issues into the proceeding in his post hearing memo. (PCR-SR. 423-24) Specifically, Defendant sought to add claims that separate *Miranda* waivers had to be obtained when the subject of the interrogation changed from one crime to another. (PCR-SR. 423-24) He also appeared to seek to add a claim that counsel was ineffective for failing to move to recuse Judge Sorondo. (PCR-SR. 405)

On November 9, 2004, the lower court issued its order denying the motion for post conviction relief. (PCR. 290-329) The order analyzed and rejected the claims Defendant raised but made no mention of the conclusory assertions unrelated to the claims. *Id.*

This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court properly determined that Defendant failed to prove that his counsel was ineffective for the manner in which he litigated the motion to suppress his confession. The lower court also properly rejected Defendant's challenge to the assignment of a trial judge to this matter, as it did not have jurisdiction to consider the challenge and the claim was barred and meritless. For these reasons, the lower court properly refused to hold an evidentiary hearing on this claim.

The claim that counsel was ineffective in failing to present mitigation is not properly before this Court since it was not presented below. Moreover, the vague allegations that were made on this issue in other claims were facially insufficient and without merit. Portion of the claim regarding voir dire were also not presented below, and the claim that was presented was properly denied as procedurally barred and facially insufficient. The lower court did not abuse its discretion in refusing to quash the State's investigative subpoena. The claim regarding closing argument was properly rejected as procedurally barred and without merit. The *Ring* claim was also properly rejected.

ARGUMENT

I. THE LOWER COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL REGARDING SUPPRESSION.

Defendant first asserts that the lower court erred in denying his claim that his trial counsel was ineffective with regard to the manner in which he litigated the issue of suppression of Defendant's confession. However, the lower court properly denied the portions of the claim that were presented to it and the remainder is not properly before this Court.

Defendant appears to contend that trial counsel was ineffective in failing to litigate the voluntariness of his confession before the guilt phase jury. However, Defendant did not raise this issue below. In the lower court, Defendant claimed that his confession should have been suppressed because of the length of the interrogation, the failure to acknowledge Defendant's alleged invocation of his right to counsel and the failure to record the entire interrogation. (PCR. 110) He also asserted that the resentencing court erred in refusing to admit evidence regarding the confession. *Id.* Defendant further contended that his counsel was ineffective for failing to litigate suppress either before trial or resentencing, for failing to call lay and expert witnesses regarding suppression and for failing to present evidence regarding the circumstances

of the confession to the resentencing jury. (PCR. 110-11) However, he did not assert that counsel was ineffective in failing to litigate the circumstances of his confession before the guilt phase jury. Since the issue 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); *Doyle v. State*, 526 So. 2d 909, 911 (Fla. 1988). It should be rejected.

Defendant next appears to contend that the lower court erred in summarily denying his claim that counsel was ineffective for failing to challenge the admissibility of his confession on the grounds that the entire interrogation was not recorded. However, this claim was properly summarily denied.

This Court has recognized that counsel cannot be deemed ineffective for failing to raise an issue based on a right that had not been recognized at the time of trial. *See Muhammad v. State*, 426 So. 2d 533, 538 (Fla. 1982)(there is no "deficient conduct," where a claim is based upon rights which are not established at the time of trial). No Florida court has recognized a right for a defendant to have his interrogation recorded. In fact, the existence of such right has been rejected. *State v. Dupont*, 659 So. 2d 405, 408 (Fla. 2d DCA 1995). While Defendant suggests that *Sparkman v. State*, 902 So. 2d 253 (Fla. 4th DCA 2005), and *Walker v. State*, 842 So. 2d 894

(Fla. 2d DCA 2003), address the issue, this is not true. The issue presented in both of these cases concerns the propriety of redacting statements the police made to the defendants during the interrogation from the tape played to the jury. In fact, this Court has even rejected the claim that a waiver of rights must be made in writing. *See Sliney v. State*, 699 So. 2d 662 (Fla. 1997)(waiver of rights does not even have to be in writing). A majority of courts to address the issue of whether interrogations must be recorded have refused to compel the record of confessions. *United States v. Short*, 947 F.2d 1445, 1451 (10th Cir. 1991); *Baynor v. State*, 736 A.2d 325, 738-39 (Md. Ct. App. 1999)(collecting cases holding that interrogations do not have to be recorded). Since the right to have one's confession suppressed unless the entire interrogation was not recorded was not recognized at the time of trial (and has still not been recognized), counsel cannot be deemed ineffective for failing to present this argument, the claim was properly denied.

Defendant next appears to assert that the lower court erred in denying the remainder of his ineffectiveness claims regarding suppression. However, he is entitled to no relief. The lower court granted an evidentiary hearing on these claims. It then denied these claims:

> To place the claims into proper context the following background is necessary.

On January 12, 1992, several individuals robbed a Kislak Bank in North Miami and in the course of that robbery police officer Steven Bauer was shot and killed (referred to as the "North Miami case" or "Bauer case").

On January 14, 1992, Defendant was arrested for an armed robbery ("the Van Ness case") unrelated to the North Miami case. On January 18, as a result of police investigation, it was determined that Defendant had been involved in the North Miami case. Detectives went to the jail and took Defendant to the Miami-Dade police department for questioning.

While Defendant was being questioned about the North Miami case, detectives from the Hialeah Police Department received information that Defendant was involved in another murder occurring in Hialeah ("the Hialeah case"). Hialeah detectives went to the Miami-Dade police department and questioned Defendant regarding the Hialeah case. Defendant gave a confession to both the North Miami case and the Hialeah case.

Defendant filed a motion to suppress in both the Hialeah Case and in the North Miami case. He raising several issues, including the fact that he was already represented by counsel and had signed an invocation of right to counsel form on January 15; that at the time of questioning he invoked his right to counsel and his right to remain silent, but the officers beat him and coerced him into giving a confession in both cases. Defendant also asserted he was told by police that if he confessed he would escape the death penalty and would probably received only 15 years in prison. The facts and circumstances surrounding the two confessions were virtually identical, one following directly on the heels of the other.

Following a hearing on the motion to suppress Defendant's confession in the Hialeah case, Judge Sorondo denied the motion. In between Judge Sorondo's order denying the motion to suppress in the Hialeah case and the hearing on the motion to suppress in this case, Mr. Cohen received a report from Dr. Jethro Toomer, a psychologist retained by Defendant to conduct a psychological evaluation of Defendant. That evaluation was conducted in early 1993, and a report was sent to Mr. Cohen on March 24, 1993. That report made the following observations about Defendant:

- Judgment is poor and ability to reason abstractly and discriminatively is limited.
- Cognitive functioning appears limited and to some degree, faulty.
- He has little insight into the motives for h is [sic] behavior and overall reasoning appears concrete.
- His response to objective testing are characteristic of emotional dysfunction, anxiety and depression, reflective of insufficient emotional and impulse control.
- His level of intellectual functioning is in the mentally deficient range with a Beta IQ of less than 60. This is reflective of very serious deficits in overall psychological functioning and cognitive processing skills. A person scoring at this level would have deficits that would combine to severely impair his ability to engage in higher order thinking, i.e., project consequences, reason abstractly and discriminatively and engage in long-range planning or to interpret his environment and orient his behavior appropriately.

This report, Defendant contends, should have been presented to Judge Sorondo in litigating the motion to suppress, and should have been supplemented with additional mental health experts in seeking to establish the mental inability of Defendant to understand and waive *Miranda* and thus, the involuntary nature of Defendant's confession.

In order to adequately address these claims, this Court reviewed the testimony from the hearing on the Motion to Suppress in the Hialeah case, as well as Judge Sorondo's Order denying the Motion to Suppress. The relevant aspects of that testimony are summarized below.

Testimony presented by the State:

Defendant and co-defendant San Martin were arrested on January 14, 1992 in connection with the Van Ness robbery. (H.T. 67-69) Defendant gave a confession to Det. Mantecon on that same day. (H.T. 69-74) Following Defendant's arrest, and while he was in jail, detectives received information that

Defendant was involved in the North Miami/Bauer murder. (H.T. 131-32) On January 18, a meeting was held to determine if Defendant should be taken out of jail and brought to the station for questioning on the North Miami/Bauer case. (H.T. 133-35) Det. Mantecon advised Sgt. Rivers that Defendant had confessed to the Van Ness robbery on January 14, and that Defendant was read his *Miranda* rights, waived those rights, and did not invoke his right to counsel or right to remain silent at any time during the confession in the Van Ness case. (H.T. 74-76, 103-06)

Det. Smith and Det. Crawford went to the jail and asked Defendant to accompany them to the police station. Defendant agreed to go. (H.T. 85-88, 107). At the station, Defendant was placed in an interview room, read his *Miranda* rights and executed a rights waiver form at 12:57 p.m. (H.T. 88-93, 101, 109-110). Defendant did not ask for an attorney, and was not threatened, coerced, or promised anything. (H.T. 88, 93-94)

Det. Smith interviewed Defendant for about two and one-half hours, and at no time was physical force used or threatened. (H.T. 111-12). Defendant confessed to the North Miami/Bauer case. (H.T. 129). During the interview, Defendant was given food and drink. He never invoked his rights and provided a full oral statement. At that time, however, he refused to give a formal statement. (H.T. 199-200, 117). Following the confession in this case, Hialeah Detectives Nabut and Nazarrio arrived at the station, having received information that Defendant was involved in the Hialeah case. They questioned defendant and at no time did Defendant invoke his rights and at no time was Defendant coerced, threatened, struck or promised anything. (H.T. 115-20, 163). Defendant confessed to the Hialeah case. (H.T. 149) After confessing to the Hialeah case, Defendant agreed to give formal statements on the North Miami case as well as the Hialeah case. The taking of the formal statement began at about 11:40 p.m. (H.T. 121-22, 153)

The detectives testified that Defendant appeared alert, uninjured, and able to comprehend throughout the process. (H.T. 122, 137, 139). Sgt. Rivers said the only discussion about sentencing was in response to Defendant’s question about what would happen to

him. Rivers said he told Defendant that a judge and jury would determine what would happen, but told Defendant the one thing he had going for him is that he told the truth. (H.T. 138). Defendant was not told he would receive any favorable treatment or avoid the death penalty by confessing. (H.T. 141). Defendant was never promised 15 years in exchange for his confession. (H.T. 163).

During the questioning about the Hialeah case, Defendant's wife, Vivian Gonzalez, arrived at the police station. (H.T. 154) She was permitted to speak with Defendant alone in a room, but Hialeah Det. Nabut monitored the conversation and was able to overhear their conversation. (H.T. 154-55). Nabut testified he never overheard Defendant make any statement about wanting an attorney or about not wanting to speak with police. (H.T. 155).

Nabut said he never promised anything to Defendant to get him to confess and never discussed sentencing or the death penalty. (H.T. 197-98).

Testimony presented by Defendant

The Defendant testified that, a day after his arrest (in the Van Ness case), he signed a notice of counsel form given him by his public defender. [FN11] He was told not to speak to anyone about his case. (H.T. 351-52).

Defendant testified that on January 18, Det. Smith and Det. Crawford came to the jail and told him they were taking him to the station to question him about his pending robbery case (Van Ness case). [FN12] Defendant says he was taken into the station, handcuffed to a table in the interview room, and questioned for 15 minutes about the Van Ness case. (H.T. 355). Defendant testified he told the officer "I didn't want to speak to him, that I had a lawyer, to speak to my lawyer." (H.T. 355). The officer did not read him his *Miranda* rights before questioning him. (H.T. 355-56).

Upon further questioning, Defendant denied any knowledge or involvement. Det. Crawford began to slap Defendant, causing him to fall to the floor, and then Crawford kicked Defendant. (H.T. 360). At this point Defendant was read his *Miranda* rights. Defendant testified at the evidentiary hearing that he

understood those rights when they were read to him. (H.T. 361-62).

Defendant testified he was then asked questions about the North Miami case, and Defendant told Det. Crawford that "he had just read my rights and he told me I had the right to remain silent and I didn't want to speak to him." (H.T. 362). In response, Defendant testified, Det. Crawford began hitting Defendant. (H.T. 363).

Defendant said he was later told by Det. Nabut that he (Defendant) might get 15 years if he cooperated and that if he did not cooperate there were 100 officers who would beat him. (H.T. 255-56).

Defendant said his wife, Vivian, came to the police station. He spoke with her but did not know the police could overhear the conversation. He told Vivian to call his lawyer and if she could not reach the lawyer to call his family to have them contact his attorney. (H.T. 368).

On cross-examination, Defendant admitted he waived his *Miranda* rights on January 14 and confessed to the Van Ness case. (H.T. 372-73).

Judge Sorondo, in his order denying the motion to suppress, found that "the Defendant waived his right to counsel on every occasion he was interrogated." The court rejected Defendant's testimony as "not credible" and concluded "the detectives were being sincere in their testimony." The court concluded that the statements were freely and voluntarily given after Defendant was fully advised of his constitutional rights.

Thereafter, Defendant filed a motion to suppress in the instant case. A separate hearing was held before Judge Sorondo on that motion to suppress, although trial counsel did stipulate to the admission of the testimony from the previous Hialeah suppression hearing. (T. 100-05). The defendant presented additional testimony in the form of Detective Nabut, to question him further about the conversation he allegedly overheard between Defendant and his wife, Vivian Gonzalez. (T. 849-60). Judge Sorondo denied the motion to suppress in this case as well.

Therefore, Claim Six is inaccurately framed, and this Court assumes that Defendant contests not the entire failure to litigate the motion to suppress (since the record establishes it was in fact

litigated) but rather the manner in which it was litigated--namely, the stipulation to the prior testimony, and the failure to present lay and expert witnesses, as raised in Claim Eight.

This Court held an evidentiary hearing which was devoted primarily (though not entirely) to this claim. Defendant presented three witnesses:

Eric Cohen-Defendant's trial counsel;

Mel Black-criminal defense attorney, offered as a legal expert on the issue of whether Eric Cohen's actions (or inactions) under this claim were "deficient" under **Strickland**[v. Washington, 466 U.S. 668 (1984)].

Chris Meisner-psychologist and assistant professor of psychology at FIU, presented as an expert in psychology of police interrogations and confessions.

The Court will not discuss exhaustively the testimony elicited from each of these witnesses at the hearing. The Court heard the testimony, and later reviewed the transcript of that testimony. The Court makes the following findings (and, to the extent necessary, the appropriate credibility determinations):

1. Failure to call civilian witnesses:

Defendant's wife arrived at the police station while the police were questioning Defendant about this case. Defendant was allowed to meet with his wife and, Defendant contends, during his conversation he told his wife that he wanted a lawyer and asked her to call his lawyer. Defendant also asserts that he told his wife that if she was unable to contact his lawyer, she was to contact his family, who would then get in touch with his lawyer.

These witnesses were not presented at the hearing on the motion to suppress in this case and Defendant now argues this constitutes ineffective assistance of counsel. Although this Court granted an evidentiary hearing on this claim, Defendant failed to present any evidence or testimony regarding these witnesses. No evidence was presented regarding what these witnesses would have said if called to testify at a motion to suppress. Defendant had thus abandoned this portion of the claim, as he cannot demonstrate what these witnesses would have testified to had they been called

at the hearing on the motion to suppress, or how that testimony would have impacted the ultimate result of the motion to suppress.

To the extent that this Court could consider this matter on its merits, Mr. Cohen testified at the evidentiary hearing that he met with family members and interviewed them regarding conversations occurring between Defendant and his wife while at the police station. (E.H. 50). In the absence of any evidence to the contrary, it appears that Mr. Cohen did investigate this issue and the decision not to call these family members as witnesses at the motion to suppress is presumed to be strategic. **Strickland**, 466 U.S. at 689-91, a presumption which Defendant had failed to rebut.

Even if the Court was able to accept as true Defendant's assertions as to what these witnesses would have said, there is no reasonable likelihood that the motion to suppress would have been granted. First, the aunt and uncle's testimony (Mr. and Mrs. Mario Franqui) is hearsay. Second, to the extent this testimony is admissible, it is cumulative to what Defendant testified to at the hearing. Likewise the testimony of Defendant's wife would have been cumulative to the testimony of the Defendant, who asserted at the hearing that he invoked his right to silence and requested an attorney several times during the interrogation. The trial court was required to make credibility determinations, because Defendant's testimony was directly at odds with the testimony of the police officers, who testified that at no time did Defendant invoke his right to remain silent or ask to speak with an attorney. Detective Nabut also said that while he overheard the conversation between Defendant and his wife, he did not recall Defendant ever asking his wife to contact his attorney or that he did not want to speak to the police. Defendant has failed to establish the prejudice required under **Strickland**.

2. Failure to call expert mental health witnesses:

In between Judge Sorondo's order denying the motion to suppress in the Hialeah case and the hearing on the motion to suppress in this case, Mr. Cohen received a report from Dr. Jethro Toomer, a

psychologist retained by Defendant to conduct a psychological evaluation of Defendany. That evaluation was conducted in early 1993, and a report was sent to Mr. Cohen on March 24, 1993. That report, discussed earlier, indicates Defendant suffers from certain mental limitations, and states that Defendant has an intellectual functioning in the mentally deficient range.

This report, Defendant contends, should have been presented to Judge Sorondo in litigating the motion to suppress, and should have been supplemented with additional mental health experts in seeking to establish Defendant could not comprehend the nature of *Miranda* and could not validly waive his *Miranda* rights, thus rendering the confession involuntary.

It must be noted that Mr. Cohen did testify at the evidentiary hearing that he failed to consider using Dr. Toomer's report in litigating the motion to suppress in this case. Mr. Cohen acknowledged that he did not think about Defendant's mental health in terms of the suppression issue. (E.H. 32). His action thus cannot fairly be characterized as a "tactical: decision, because it was not genuinely considered or investigated.

This does not end the analysis of the "deficient performance" prong of **Strickland**, however, because, given the circumstances facing Mr. Cohen at the time in question, it would have been unreasonable to expect Mr. Cohen to utilize this report in a second motion to suppress. It must be kept in mind that the hearing on the motion to suppress had already been held in the Hialeah case, and at the hearing Defendant testified under oath:

1. On January 15, the day after his arrest on the Van Ness case, he signed a form invoking his right to counsel.
2. Upon being questioned by police on January 18, Defendant told the police he didn't want to speak to him, that he had a lawyer, and that they should speak to his lawyer.
3. The police officers did not read him his *Miranda* rights before beginning their questioning of him, but he invoked those rights on his own.
4. When Defendant was finally read his rights, he was forced to sign them. However, Defendant did understand those rights when they were read to

him.

5. When Defendant was asked questions about the North Miami case, he asked the detective how he could continue to question him, since "he had just read my rights and he told me I had a right to remain silent and I didn't want to speak to him."

The position taken by Defendant in his motion to suppress was that he had already invoked his right to counsel (in the Van Ness case); that this invocation carried over to questioning in this case; that he was never even Mirandized before being questioned in this (and the Hialeah case); that he unilaterally asserted his right to counsel and right to remain silent; and that his invocation of these rights was ignored and instead he was beaten, threatened, and corced into confessing.

In addition to his client's own testimony, Mr. Cohen had information affecting the reasonableness of the decision not to raise Defendant's mental status in relitigating the suppression issue:

1. Mr. Cohen was acquainted with [Defendant] and had represented him on previous cases. Mr. Cohen did not believe [Defendant] was unable to understand the proceedings or unable to communicate effectively with Mr. Cohen. Mr. Cohen did not agree with Dr. Toomer's evaluation of Defendant's mental condition. (E.H. 53)

2. By the time of the hearing on the motion to suppress in this case, Defendant had already been sentenced in the Hialeah case. At the sentencing, this very same report of Dr. Toomer was presented, along with Dr. Toomer's testimony. In his sentencing order, Judge Sorondo addressed Dr. Toomer's conclusions about Defendant: the court found no evidence was presented (by Dr. Toomer or anyone else) regarding Defendant's lack of capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. With regard to Dr. Toomer's assertions that Defendant's IQ was deficient, Judge Sorondo held:

> The court has considered the results of Dr. Toomer's tests as concerns the defendant's IQ. Since it is impossible for the court to verify the accuracy or validity of such a test, the court must consider it in light of

> the facts known to the court. In making this analysis the court is conscious of the fact that although an individual's performance on such a test may be unable to exceed his true abilities it may easily reflect less than his best efforts.
>
> The defense suggest that this court should accept, as a non-statutory mitigating factor the fact that according to Dr. Toomer, [Defendant] is mentally retarded. Every piece of evidence presented in this trial, penalty phase and sentencing hearings, with the exception of Dr. Toomer's testimony, definitively establishes that [Defendant] is not mentally retarded. The crimes he committed, as described above, reflect an unshakeable pattern of premeditation, calculation and shrewd planning that are totally inconsistent with mental retardation.
>
> …
>
> In order to find that this defendant is mentally retarded the court would have to accept Dr. Toomer's test result and ignore the clear and irrefutable logic of the facts of this case. This court is unwilling to do this and therefore rejects the existence of this non-statutory mitigating circumstance.

(Sentencing order, Case No. F92-6089B, entered November 23, 1993, pp. 13-14)

While these findings were made in a sentencing order in Defendant's Hialeah case, and the considerations underlying that Order were different from those in the motion to suppress, the factual findings are nonetheless quite relevant in determining the reasonableness of Mr. Cohen's actions. In light of the Defendant's own testimony, Mr. Cohen's personal knowledge of Defendant's mental functioning, and the trial court's clear dismissal of Dr. Toomer's evaluation and testimony, was it objectively unreasonable for Mr. Cohen not to relitigate the suppression issue, presenting as additionally testimony Dr. Toomer and his report? As the Court in **Strickland** found:

> In any ineffectiveness case, a particular decision not to investigate must be directly

> assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgment.
>
> **Strickland**, 466 U.S. at 691.

This Court concludes that it was certainly not unreasonable for Mr. Cohen to conduct no further investigation into the use of Dr. Toomer's report, nor was it unreasonable to refrain from arguing, in a second motion to suppress, his client's inability to comprehend *Miranda* when his own client, under oath, had testified that he understood his rights, he unilaterally invoked those rights prior to questioning, the police ignored his invocation, failed to Mirandize him at all, and beat a confession out of him. Whether such an alternative presentation **could possibly** have been made is not the proper focus [FN13]; the issue is more accurately frames as whether such a presentation **should** have been made, and whether the resulting failure to do so fell below objective standards of reasonableness. An attorney's assistance cannot be deemed ineffective when his decisions are based upon information provided to him by his client. **Fotopoulos v. State**, 838 So. 2d 1122 (Fla. 2003). As the Supreme Court noted in **Strickland**:

> [W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.
>
> **Strickland**, 466 U.S. at 691.

In the instant case, the "reason"--Defendant's version that he was never Mirandized, that he unilaterally invoked his right to counsel and right to silence as soon as the officer began questioning him--was provided not only to trial counsel, but was presented by Defendant in his own sworn testimony during the first motion to suppress. Trial counsel was virtually "married" to this version of the interrogation and confession. Defendant has failed to argue persuasively how Mr. Cohen could have reasonably presented and argued Dr. Toomer's report in light of Defendant's own statements at the first motion to suppress hearing, and the apparent contradictory position that he was never even read *Miranda*. [FN14]

The testimony of Mr. Black, Defendant's legal

expert, did not materially assist the Court on this issue. Hindsight being what it is (20-20), measured some ten years later, there are always things an attorney could have done differently in an effort to achieve a different (i.e., theoretically better) result:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance…. Even the best criminal defense attorneys would not defend a particular client in the same way.

Strickland, 466 U.S. at 689.

Given the circumstances facing Mr. Cohen at the time, and his client's own testimony at the first motion to suppress, it cannot be said that the failure to present Dr. Toomer's testimony at a second motion to suppress constitutes deficient performance such that Defendant was deprived of the assistance of counsel that is guaranteed by the sixth amendment.

In addition to his client's own testimony, and the trial court's determination that Dr. Toomer's opinions were unsupported, it must be kept in mind that this case was tried in 1994, not 2004. The admissibility of expert testimony regarding a defendant's competency to waive *Miranda*, while a relatively hot topic in today's legal circules, garnered relatively little notice in 1994. At the evidentiary hearing, for example, Mr. Black could not provide the name of a single case permitting such testimony in 1993 and 1994. (E.H. 87-88). Mr. Black testified: "I have been informed there was a case." (*Id.*). Mr. Black testified he had not read the solitary case to which he referred.

In a similar vein, Dr. Meisner, the Defendant's psychologist, could testify that, to his knowledge, two major publications existed as of 1992-93 regarding the psychological effect of police tactics and

interrogation. (E.H. 138-40). The first, "Psychology of Interrogations, Confessions and Testimony", was published in 1992. The second, "Confessions in the Courtroom", was published in 1993, and was written not only for researchers but for lawyers and other practitioners as well. (E.H. 139-40).

He believed that there were one or two psychologists (named Professor Eliot Aaronson and Professor Ofshe), who were the first to testify as experts in this area in the late 1980's or early 1990's. (E.H. 139).

At the time this case was pending, there was a dearth of literature on this issue. The number of experts available to testify to the psychology of interrogations and confessions was extremely limited. It cannot be reasonably argued that this area was sufficiently well-established at the time to render Mr. Cohen's actions deficient for failing to secure one of these two experts to testify, in conjunction with Dr. Toomer, regarding the psychological techniques used by the police, the mental capacity of his client, and the resulting involuntary waiver.

Even if Mr. Cohen performance could be found constitutionally deficient, Defendant has failed to meet the prejudice prong of **Strickland**. There is no reasonable probability, had Dr. Toomer's report been presented, that the result of the motion to suppress would have been different. The following reasons compel such a conclusion

1. Dr. Toomer did not testify at the evidentiary hearing, and we do not known what he would have opined with regard to Defendant's ability to comprehend and knowingly waive his *Miranda* rights. All we have is Dr. Toomer's report, which itself would not have been admissible at the hearing on the motion to suppress. Even if it were admissible, Dr. Toomer's report did not contain an opinion regarding Defendant's ability to comprehend or waive *Miranda*.

2. Defendant failed to present any witness at the evidentiary hearing to opine that Defendant could not comprehend *Miranda* or did not have the mental capacity to waive *Miranda*. Dr. Meisner, who did testify at the hearing, was called as an expert in the area of psychology of

interrogations and confessions. He testified not regarding Defendant's mental capacity, but rather the techniques used by the police that can lead to false or unreliable confessions.

3. Defendant failed at the evidentiary hearing to establish what witness was available in 1992-94 to testify to the issues raised by Dr. Meisner or what that witness would have said. [FN15]

These failures, when considered together with Defendant's testimony at the Hialeah motion to suppress; the credibility and factual findings made by Judge Sorondo in denying that motion; Judge Sorondo's findings in his Sentencing Order that Dr. Toomer's opinions were unsupported by any evidence or fact, lead to the inescapable conclusion that Defendant has failed to establish either prong of **Strickland** regarding the failure to relitigate the motion to suppress. It is therefore denied.

* * * *

This claim [that counsel was ineffective for failing to present evidence concerning the circumstances under which the confession was taken to the resentencing jury] is denied for the same reasons discussed in Claims Five and Nine, *supra* at 15-16.

* * * *

[FN11] This form, entitled "Notice of Invocation of Right to Counsel", bore Defendant's signature and was admitted into evidence at the hearing. It provided, among other things, that Defendant was invoking his right to have counsel present before any police questioning in the case.

[FN12] Even though Defendant had admittedly given a confession in the Van Ness case four days earlier.

[FN13] It is difficult, however, to envision just how Defendant would have handled this argument in an intellectually honest manner. His position at the hearing on the motion to suppress in this case (consistent with his testimony at the hearing on the motion to suppress in the Hialeah case) would presumably go something like this: 1) The police never read me my *Miranda* rights; 2) I do not recall

> ever waiving my *Miranda* rights; 3) Before they began questioning me, I invoked my right to remain silent and my right to have my attorney present before questioning; 4) When they continued to question me, I told them I was invoking my right to remain silent; 5) I only confessed because the police beat me, threatened me, and promised me a 15-year sentence; 6) However, if the court finds that I was read my *Miranda* rights, then I did not have the mental capacity to understand them or to knowingly waive them.
>
> [FN14] Defendant never even addressed how Mr. Cohen could have taken the position that Defendant validly invoked his right to counsel (in the Van Ness case) by signing the "Notice of Invocation of Counsel" form, while at the same time arguing that Defendant did not have the mental capacity to understand and waive *Miranda* before being questioned about this case.
>
> [FN15] It was established at the evidentiary hearing that Dr. Meisner is 29 years old. (E.H. 137). At the time Defendant was indicted in this case, Dr. Meisner was a high school senior. Dr. Meisner acknowledged he would not have been available to testify as a defense expert in 1992-94. (E.H. 155).

(PCR. 312-29)

Because there was an evidentiary hearing on these claims, this Court is required to accept the lower court's factual findings 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 to support a holding that counsel was not ineffective. *Id.* Here, the lower court's factual findings are supported by competent, substantial

evidence. Moreover, given these findings, the lower court properly denied the claims.

In challenging the lower court's denial of these claims, Defendant makes numerous misstatements of the record and the law. Defendant first asserts that the decision of how to litigate suppression was a decision that he had to make personally. Brief at 38 n.17. However, the United States Supreme Court has recognized that most decisions regarding how to litigate a case do not require a defendant to make the decision concerning them personally. *Illinois v. Taylor*, 484 U.S. 400, 417-18 (1988). In fact, the Court has rejected the notion that a defendant has a personal right to decide whether to concede guilt before the guilt phase jury. *Florida v. Nixon*, 543 U.S. 175 (2004). As such, Defendant's assertion that he had to make the decision on how to proceed regarding suppression is without merit.

Defendant next contends that he had refused to speak to the police at the time of his arrest. Brief at 39 n.18. However, the record reflects that at the time of his arrest on the Van Ness, Defendant waived his *Miranda* rights and confessed. (HT. 67-74)[8] Defendant testified that he had done so at the

[8] Among the documents not included in the record on appeal are the transcripts concerning the suppression issue for the appeal in Defendant's other death case, FSC Case No. SC83,816. The

suppression hearing. (HT. 373) Thus, Defendant is incorrect in asserting that Defendant declined to speak to the police at the time of his arrest.[9]

Defendant next suggests that counsel had Dr. Toomer's report at the time of the Hialeah suppression hearing. Brief at 40 n. 19. However, the record reflects that the Hialeah suppression hearing was held on March 4, 1993. (HT. 1) Dr. Toomer did not issue his report until March 24, 1993. (PCR-SR. 499-500) Mr. Cohen testified he would have received the report a few days after it was issued. *Id.* As such, the record refutes Defendant's assertion that counsel had Dr. Toomer's report before the Hialeah suppression hearing and supports the lower court's factual finding that the report was received after the Hialeah suppression hearing. (PCR. 313) Its factual finding must be accepted. *Stephens*.

Defendant next asserts that the State knew that "mental health challenges can render 'waivers' null and void." Brief 42 n.20. However, there is nothing in the record to support this

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State has included these documents with its motion to supplement the record. Because these documents have already been presented to the court in connection with the other case, the State will refer to these documents by the symbol "HT." and the page number appearing in that record.

[9] At a subsequent first appearance on the Van Ness case, Defendant signed a form that purported to invoke his rights. However, this Court has held that such forms are ineffective as an invocation of *Miranda* rights. *Sapp v. State*, 690 So. 2d 581 (Fla. 1997).

assertion. No one from the State testified at the suppression hearing or the evidentiary hearing. Moreover, the law is to the contrary. In *Colorado v. Connelly*, 479 U.S. 157, 167 (1986), the Court held that a defendant's mental state did not render a confession or a waiver of one's *Miranda* rights involuntary, absent evidence of coercive police activity. *See also Hudson v. State*, 538 So. 2d 829, 830 n.4 (Fla. 1989). Moreover, in *Godinez v. Moran*, 509 U.S. 389 (1993), the Court rejected the concept that there is a special level of mental competence to waive a constitutional right. Instead, the Court held that a defendant who was competent to stand trial is also competent to waive his rights. As such, neither the record nor the law supports Defendant's assertion.

Defendant also alleges that Defendant gave no statement to the officers investigating this case until after he had spoke to the Hialeah detectives about the Hialeah case. Brief at 43. However, the record reflects that Defendant gave a full oral confession to this crime before he was ever questioned about the Hialeah case. (HT. 117, 129). Defendant did initial refuse to have the confession recorded. (HT. 117) However, he did not refuse to make a statement.

Defendant further asserts that it has been conceded that there was no litigation of suppression in this case. However,

the State has always taken the position that there was litigation of suppression in this case. (PCR-SR. 118, 120-21, 722) The record supports the State's assertion. (T. 100-12, 849-51) These facts support the lower court's factual finding that suppression was litigated in this case. (PCR. 318) As such, the lower court's finding should be accepted, and Defendant's assertion rejected. *Stephens*.

Applying the real facts, law and appropriate standard of review, the denial of these claims should be affirmed. To the extent that Defendant is suggesting that counsel was ineffective for stipulating to the testimony from the prior suppression hearing, the denial of this claim was proper. At the evidentiary hearing, Defendant presented no evidence to support a finding that counsel was ineffective for stipulating. In fact, Defendant continued to stipulate to the consideration of this testimony, despite the fact that the officers were available at the evidentiary hearing. (PCR-SR. 584) As Defendant had the burden of proving his claim, *Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983), and did not do so, the lower court properly denied this claim. It should be affirmed.

To the extent that Defendant is suggesting that he was precluded from litigating this claim because the lower court refused to allow him to depose the officers, he is entitled to

no relief. This Court has made it abundantly clear that a trial court has discretion to allow discovery upon a showing of good cause. *Rodriguez v. State*, 31 Fla. L. Weekly S39, S47 (Fla. Jan. 19. 2006). Here, Defendant never showed any good cause why he needed to depose the officers about the circumstances of the interrogation, particularly considering that the officers had testified repeatedly, both in depositions and in court, regarding the circumstances under which Defendant confessed. As such, the lower court did not abuse its discretion in refusing to allow the depositions.

To the extent that Defendant is asserting that the lower court erred in denying his claims regarding the presentation of expert witnesses, again Defendant is entitled to no relief. As seen above, the lower court denied the claim with regard to the presentation of mental state evidence regarding the waiver of *Miranda* because counsel's decision not to investigate and present such evidence was reasonable and prejudice was not proven. As noted by the lower court, by the time of the suppression hearing in this case, Mr. Cohen had presented Defendant's testimony at the Hialeah suppression hearing that he invoked his rights, was never properly advised of his rights (although he understood his rights) and was coerced into confessing by beatings, threats of additional beatings and a

promise of a 15 year sentence. Mr. Cohen was aware that Dr. Toomer's testimony had been rejected at the Hialeah sentencing hearing based on credibility issues. Mr. Cohen had also represented Defendant previously with ever have any difficulty communicating with Defendant. (PCR-SR. 516-18) Moreover, pursuant to *Connelly* and *Godinez*, the only relevance that mental health evidence would have had to whether a waiver was voluntary is to show that a defendant did not understand his *Miranda* rights or was incompetent under the standard of competency to stand trial at the time of the waiver. Mr. Cohen testified that he was aware of this limitation. (PCR-SR. 497) Given this evidence and the findings based on it, the lower court properly found that Mr. Cohen's decision not to investigate and present this evidence was reasonable. *Strickland v. Washington*, 466 U.S. 668 (1984). It should be affirmed.

Moreover, the lower court properly found that Defendant did not prove that he was prejudice by the failure to present this evidence. At the evidentiary hearing, Defendant did not present any testimony regarding his mental state. Instead, he merely admitted Dr. Toomer's report as something that Mr. Cohen had received. As the lower court properly noted, this report was inadmissible hearsay. *See State v. Sigerson*, 282 So. 2d 649 (Fla. 2d DCA 1973). Moreover, as the lower court noted, the

report does not address Defendant's competence or his understanding of his rights. Instead, the letter asserts merely that Defendant had problems with judgment and a low score on a Beta IQ test.[10] However, "neither low intelligence, mental deficiency, nor bizarre, volatile, and irrational behavior can be equated with mental incompetence." *Medina v. Singletary*, 59 F.3d 1095, 1107 (11th Cir. 1995). Further, the record, including Defendant's own testimony and Dr. Meisner testimony, reflect that Defendant did understand his *Miranda* rights. Under these circumstances, the lower court properly found that Defendant did not prove prejudice. *Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983). The denial of the claim should be affirmed.

To the extent that Defendant is complaining about the denial of the claim that counsel was ineffective for failing to present testimony about coerced confessions at the suppression hearing, the lower court also properly denied this claim. The lower court's finding that such evidence was not available at the time of trial is supported by competent, substantial evidence in Dr. Meisner's testimony. Since Defendant did not show that this evidence was available at the time of trial, the

[10] When Dr. Toomer testified in the penalty phase of Defendant's other case, he admitted that Defendant's IQ score on the WAIS-R was 83 full scale and 92 performance. (HT. 3198-99)

lower court properly concluded that counsel was not ineffective for failing to seek to present it. *State v. Riechmann*, 777 So. 2d 342, 354-55 (Fla. 2000)(claim of ineffective assistance properly denied where evidence did not definitely show that evidence was available at time of trial); *see also Elledge v. Dugger*, 823 F.2d 1439, 1446 (11th Cir. 1987). It should be affirmed.

Defendant finally assails the lower court for finding that counsel was not ineffective for failing to attempt to present evidence regarding the circumstances under which he confessed at resentencing. Defendant seems to assert that such evidence should have been admissible under the rule of completeness. However, as this Court has made clear, the rule of completeness allows the presentation of the remainder of a statement when a portion of the statement has been admitted by one's opponent. *Evans v. State*, 808 So. 2d 92, 104 (Fla. 2001); *Reese v. State*, 694 So. 2d 678, 683-84 (Fla. 1997); *Ramirez v. State*, 739 So. 2d 568, 580 (Fla. 1999). Here, there was no admission of only a portion of a statement. Instead, Defendant's full confession was admitted. As such, the rule of completeness is irrelevant. The claim was properly denied.

Defendant also asserts that the lower court was incorrect in finding that this evidence was essential prohibited evidence

of lingering doubt. While Defendant insists that he was not attempting to establish lingering doubt, Defendant does not explain what relevance the circumstances under which he confessed would have to sentencing otherwise.[11] Instead, he merely asserts that he was challenging the State's evidence. However, this Court has held that a defendant is not entitled to challenge the State's evidence of a defendant's guilt at a resentencing. *Way v. State*, 760 So. 2d 903, 916 (Fla. 2000). Moreover, while Defendant insists that he is allowed to present "virtually any evidence which he believes is mitigating," the United States Supreme Court has recently reaffirmed that this does not include evidence that is relevant merely to the guilt of the defendant. *See Oregon v. Guzek*, 126 S. Ct. 1226 (2006). As such, the lower court properly rejected Defendant's assertion that his counsel was ineffective for failing to attempt to present this evidence at resentencing. *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). It should be affirmed.

[11] To the extent that Defendant is asserting that his mental state generally was relevant to sentencing, the issue is addressed *infra* at Issue III.

II. THE JUDICIAL ASSIGNMENT CLAIM SHOULD BE REJECTED.

Defendant next contends that the lower court erred in denying his claim that he was denied due process because all of his pending cases were assigned to a single judge. He appears to assert that the lower court should have ordered an evidentiary hearing to consider evidence of the affect of hearing about all of Defendant's criminal activity on a judge in making a sentencing decision. However, Defendant is entitled to no relief, as he has waived the claim and it was properly denied.

In his brief, Defendant presents no argument concerning how or why the lower court was wrong to find that this claim was procedurally barred, that it had no jurisdiction to consider the issue or that the claim was meritless. Instead, he simply reiterated the argument he presented below. However, this Court has made clear that the "purpose of an appellate brief is to present arguments in support of the points on appeal." *Duest v. State*, 555 So. 2d 849, 852 (Fla. 1990). Thus, this Court has required defendants to present arguments that explain why the lower court erred in its rulings. *See Shere v. State*, 742 So. 2d 215, 217 n.6 (Fla. 1999). Merely referring to the arguments presented below is insufficient to meet the burden of presenting an argument on appeal. *Duest*, 555 So. 2d at 852. Moreover, the

arguments must be presented in more than a cursory fashion. *Bryant v. State*, 901 So. 2d 810, 827-28 (Fla. 2005); *Cooper v. State*, 856 So. 2d 969, 977 n.7 (Fla. 2003); *Reeves v. Crosby*, 837 So. 2d 396, 398 (Fla. 2003); *Lawrence v. State*, 831 So. 2d 121, 133 (Fla. 2002). When an issue is not sufficiently briefed, it is considered waived. *Bryant*, 901 So. 2d at 827-28; *Duest*, 555 So. 2d at 852. Since Defendant has not presented any argument regarding why the lower court improperly denied this claim, it is waived.

Even if the issue had not been waived, Defendant would still be entitled to no relief, as the lower court properly denied this claim. In *Wild v. Dozier*, 672 So. 2d 16, 17-18 (Fla. 1996), this Court held that it had exclusive jurisdiction to review administrative orders regarding case assignments. As such, the lower court was correct in holding that it did not have jurisdiction to consider this claim. The denial of the claim should be affirmed.

This Court further held in *Wild* that the appropriate manner to challenge an assignment was to challenge the assignment in the trial court and then seek a writ of prohibition in this Court. *Id.* at 18. However, a writ of prohibition will not lie once the act that the defendant seeks to prevent the trial judge from doing has been done. *English v. McCrary*, 348 So. 2d 293

(Fla. 1977). Moreover, a claim that a trial judge should have been recused from trial of a case is procedurally barred in post conviction proceedings. *Schwab v. State*, 814 So. 2d 402, 406 (Fla. 2002). As such, the lower court was correct to find this claim procedurally barred and deny it as such.

Moreover, the lower court was correct to find this claim without merit. In *Kruckenberg v. Powell*, 422 So. 2d 994 (Fla. 5th DCA 1982), the court addressed the issue of a litigant's power to challenge the assignment of his case to a particular judge:

> The assignment and reassignment of specific court cases between or among the judges of a multi-judge court is a matter within the internal government of that court and is directed and controlled by policy adopted by the judges of that court, either directly or by and through their chief judge. If such policy is in writing, it is properly documented by an administrative order or similar directive usually directed to the clerk of the court for ministerial implementation.
>
> Where the court has jurisdiction, it is the court, and not the particular judges thereof, that has jurisdiction over a particular cause, controversy and the parties thereto. Every duly elected or appointed judge of a court has the bare power or authority to exercise all of the jurisdiction of that court. Administrative orders evidencing internal matters of self-government of the court do not limit the lawful authority of any judge of the court, nor do they bestow rights on litigants. In legal contemplation judges, like litigants, are all equal before the law. Subject only to substantive law relating to disqualification of judges, litigants have no right to have, or not have, any particular judge of a court hear their cause and no due process right to be heard

> before any assignment or reassignment of a particular case to a particular judge.
>
> The assignment and reassignment of cases in a busy multi-judge court presents a continuous administrative problem resulting, not only from the disqualification of judges in particular cases and the need to conserve judicial labor by the consolidation of companion and other related cases, but also from many other complex causes, including the rotation of judges between divisions of the court, equalization and control of individual judge case loads, the temporary absence of judges or the temporary inability of judges to perform services, termination of the service of individual judges by death, retirement or otherwise, and other good reasons. Contrary to petitioner's assertion, in the administration of the internal matters of a court the judges thereof exercise an authority that goes far beyond the judicial discretion that judges exercise in the disposition of cases and controversies before the court. A litigant does not have standing to enforce internal court policy, which is a matter of judicial administration and the proper concern of the judges of the particular court and of the administrative supervision of the judicial system.

Id. at 995-96; *see also Adler v. Seligman of Florida, Inc.*, 492 So. 2d 730, 731-32 (Fla. 4th DCA 1986); *Allen v. Bridge*, 427 So. 2d 249 (Fla. 4th DCA 1983). Here, all of Defendant's cases were assigned to Judge Sorondo pursuant to Administrative Orders 94-23 and 79-4. As such, under *Kruckenberg*, this claim is meritless.

Moreover, in *Rodriguez v. State*, 31 Fla. L. Weekly S39, S46-S47 (Fla. Jan. 19, 2006), this Court stated that "[t]he mere departure from a random assignment procedure is insufficient to overturn a decision; a litigant must establish prejudice from

any improper assignment." Here, the prejudice that Defendant has alleged is that Judge Sorondo was exposed to the facts of the suppression issue and of Defendant's prior felonies. However, this Court has held that the fact that a judge has previously heard the facts is not a basis for disqualification. *Rivera v. State*, 717 So. 2d 477, 481 (Fla. 1998). This Court has also held that even harsh comments made in the course of rulings are not grounds for disqualification. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998). This is particularly true regarding hearing the facts of Defendant's prior felony convictions, as all of these cases involved crimes relevant to the prior violent felony aggravator. This Court has held that evidence of such crimes is admissible at a penalty phase. *Rodriguez*, 31 Fla. L. Weekly at S49; *Rodriguez v. State*, 753 So. 2d 29, 44 (Fla. 2000); *Rhodes v. State*, 547 So. 2d 1201, 1204 (Fla. 1989); *Tompkins v. State*, 502 So. 2d 415, 419 (Fla. 1986). As such, there was no impropriety in the trial court knowing the facts of Defendant's prior violent felonies at the time of sentencing. Finally, it should be remembered that Judge Sorondo did not enter the sentence Defendant is presently serving. Instead, Defendant's sentence in this case was entered by Judge Robert Scola. Judge Scola did not participate in Defendant's trials in any of the other three cases. Under these

circumstances, there was no prejudice. The claim was without merit and properly denied as such. The denial of the claim should be affirmed.

III. THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT RESENTENCING SHOULD BE REJECTED.

Defendant next appears to claim that his counsel was ineffective for failing to investigate and present evidence in support of alleged mental mitigation. However, Defendant is entitled to no relief as Defendant did not raise this claim below and the random allegations presented in other claims were facially insufficient and refuted by the record.

Initially, the State would note that Defendant did not raise a claim that his counsel was ineffective in failing to investigate and present mitigation. Instead, Defendant's motion listed 18 claims, none of which concerned the presentation of mitigation. (PCR. 110-11) In the course of presenting argument about the issues he did raise, Defendant mentioned the trial court's alleged failure to consider Defendant's allegedly low IQ as mitigation. (PCR. 110) He also asserted that mental mitigation was available but not presented at resentencing. (PCR. 134-37) When the State considered these random assertions to be an attempt to raise a claim of ineffective assistance of counsel at resentencing for failing to investigate and present mitigation, Defendant filed a reply brief insisting that the State had "missed the point." (PCR. 165) At the *Huff* hearing, Defendant asserted that the issues he was raising were those contained in the list of issues. (PCR-SR. 178) He made no

allegations of raising any other claims and presented no arguments in support of any other claims. Under these circumstances, it cannot be said that Defendant raised this issue below. Since the issue was not raised below, it is not properly before this Court. *Griffin v. State*, 866 So. 2d 1, 11 n.5 (Fla. 2003); *Doyle v. State*, 526 So. 2d 909, 911 (Fla. 1988). It should be rejected.

Even if the issue had been raised below, it would still have been properly denied. The allegations in Defendant's own motion showed that counsel had an evaluation of Defendant's mental state performed and had presented this information unsuccessfully at the sentencing hearing in the Hialeah case. (PCR. 134-37) At the *Spencer* hearing on resentencing, Defendant confirmed that a strategic decision had been made not to present this evidence again:

> THE COURT: All right. You had indicated the last time you were considering presenting the former testimony of one of the doctors, you and [Defendant] have agreed not to present that?
> MR. COHEN: Unfortunately, Judge, the situation is that we have not been able to find a report. But based on our conversations previously, I don't think that there's anything in that report that we would be submitting to the Court.
> THE COURT: I just want to make sure there's not a claim later that not finding the report in some way --
> MR. COHEN: No.
> THE COURT: --prevented you from making an effective presentation or prevents me from making an appropriate sentence. Does the State have a copy of the report?

> MR. COHEN: We don't have the report present now but obviously we reviewed the report previously and the doctor did testify at the sentencing hearing of what we refer to as the Hialeah case. **So we're well aware of contents and the findings of the doctor. And it's our decision not to present that evidence to the jury and I don't see any reason why that decision would change in presenting any evidence to the Court.**
> THE COURT: All right. Have you spoken to [Defendant] with about that?
> MR. COHEN: We mentioned it briefly the other day. I don't think he has any different feelings about that.
> THE COURT: **[Defendant], do you agree with Mr. Cohen's decision not to have me consider the testimony or the report of that doctor?**
> **[Defendant:] Yes, your honor.**

(RSR. 191-92)(emphasis added). As the record reflects that counsel did investigate and made a strategic decision, with the agreement of Defendant, not to present the evidence, counsel could not be deemed ineffective for failing to present this evidence. *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))). The claim would have been properly denied had it been raised.

Moreover, Defendant's allegations did not point to any deficiency in the conduct of the investigation or evaluation. (PCR. 134-37) Instead, he merely asserted that since the original doctor's testimony had been rejected, counsel should have obtained another expert to confirm the original doctor.

Id. However, this Court has recognized that counsel is not ineffective for failing to shop for an expert. *Pace v. State*, 854 So. 2d 167, 175 (Fla. 2003). This Court has further held that to show that counsel was ineffective with regard to the investigation of a defendant's mental health, where an evaluation was performed, that the defendant must show that counsel failed to provide the expert with materials that would have changed the expert's opinion. *Knight v. State*, 30 Fla. L. Weekly S768, S774 (Fla. Nov. 3, 2005); *Breedlove v. State*, 692 So. 2d 874 (Fla. 1997). Moreover, this Court has recognized that there is no such thing as a claim of ineffective assistance of a mental health professional on its own. *Walls v. State*, 31 Fla. L. Weekly S101, S108 (Fla. Feb. 9, 2006). Since Defendant did not include any allegations to support any of these theories of a claim, the claim would have been properly denied had it been asserted. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998).

IV. THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT VOIR DIRE WAS PROPERLY DENIED.

Defendant next contends that the lower court erred in rejecting his claims regarding voir dire. He appears to assert that his peremptory challenge to Juror Diaz should have been upheld without the need for a nondiscriminatory reason because both he and the juror were Hispanic males. He also appears to contend that counsel was ineffective for failing to proffer a nondiscriminatory reason for his attempt to exercise a peremptory challenge to Juror Andani. However, the lower court properly rejected the issues that were presented to it.

With regard to the assertions regarding Juror Diaz, this matter is not properly before this Court. In the lower court, Defendant did not assert the claim he is presenting to this Court. In his brief, Defendant appears to be claiming that the trial court erred in conducting a *Neil* inquiry because both he and Juror Diaz were Hispanic males. However, in the lower court, the claim that Defendant raised was that counsel was ineffective for failing to assert a genuine, race-neutral reason for attempting the exercise a peremptory challenge against Juror Diaz more quickly. (PCR. 111, 147-49) Since Defendant did not raise the issue below that he is presently attempting to raise in this Court, the issue is not properly before this Court. *Griffin v. State*, 866 So. 2d 1, 11 n.5 (Fla. 2003); *Doyle v.*

State, 526 So. 2d 909, 911 (Fla. 1988). It should be rejected.

Even if the claim had been raised below, Defendant would still be entitled to no relief. While Defendant chastises the lower court in the heading of the claim for not realizing that this was a claim of ineffective assistance of counsel,[12] Defendant then proceeds to assert error in requiring Defendant to provide a race-neutral reason for his challenge to Juror Diaz without even mentioning how counsel was allegedly deficient regarding being required to provide such a reason. As such, it appears that Defendant is claiming that the trial court erred in requiring Defendant to provide a race-neutral reason for the challenge. However, such claims are procedurally barred in post conviction proceedings. *Bottoson v. State*, 674 So. 2d 621, 622 & n.1 (Fla. 1996). As such, the lower court would have properly denied this claim as procedurally barred had it been raised below.

Even if the issue was properly before this Court and was not procedurally barred, Defendant would still be entitled to no relief. While Defendant appears to contend that his sharing of a race and gender with Juror Diaz immunized his peremptory challenge from being questioned as discriminatory, the United

[12] That chastisement is without merit as a review of the lower court's order clearly shows that it analyzed the claim presented to it as a claim of ineffective assistance of counsel. (PCR. 307-08)

States Supreme Court has rejected the assertion that an allegation of discrimination in selection of jury members can be rebutted by showing simply that the entity doing the selecting is composed of members of the same group against which discrimination is alleged. *See Castaneda v. Partida*, 430 U.S. 482, 499 (1977)("Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group."); *id.* at 500 (rejecting reasoning "that human beings would not discriminate against their own kind."). Moreover, in *Powell v. Ohio*, 499 U.S. 400 (1991), the Court eliminated the requirement that there be an identity of race between the veniremember against whom discrimination is alleged and the defendant because discrimination injured the veniremembers and society in general. In *Georgia v. McCollum*, 505 U.S. 42, 48-50 (1992), the Court relied upon these same theories of harm to hold that the prohibition against discriminatory use of peremptories applied with equal force to peremptory challenges exercised by criminal defendants. Under these precedent, Defendant's claim that his use of peremptory challenges is immunized by his sharing an ethnicity with veniremember Diaz is without merit. The claim would have been properly denied had it been raised below.

Further, to the extent that Defendant is actually trying to raise the claim he raised below, he is still entitled to no relief. The claim Defendant raised below was that his counsel was ineffective for failing to provide valid, nondiscriminatory reasons for exercising a challenge to Veniremembers Diaz more quickly and for refusing to respond after the State challenged counsel's proffered reason for striking Veniremember Andani. (PCR. 147-49) This Court found that the trial court had properly rejected defense peremptory challenges to this verniremembers on direct appeal. *Franqui v. State*, 699 So. 2d 1332, 1335 (Fla. 1997). As the issue was raised and rejected on direct appeal, the claim was properly denied as procedurally barred. *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995). Further, recasting the claim in terms of ineffective assistance of counsel does not negate the bar. *Harvey v. Dugger*, 656 So. 2d 1253, 1256 (Fla. 1995); *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990); *Swafford v. Dugger*, 569 So. 2d 1264, 1267 (Fla. 1990). The claim was properly denied.

Moreover, none of Defendant's claims regarding counsel's alleged ineffective assistance for failing to litigate any of the peremptory challenges were facially sufficient. Defendant did not allege that there is a reasonable probability that the result of his trial would have been different had counsel

litigated these issues differently or why that might be true. In order to allege a facially sufficient claim of ineffective assistance, a defendant must alleged prejudice. *Strickland*. As Defendant did not do so, the claim was facially insufficient. Moreover, while Defendant now asserts that he showed that these jurors were biased, he did not do so. Defendant has never claimed that these jurors should have been excused for cause. Instead, he has merely asserted that they should have been excused peremptorily. The United States Supreme Court has recognized that not being able to exercise a peremptory challenge does not, in itself, demonstrate that a juror was partial. *Ross v. Oklahoma*, 487 U.S. 81 (1988). As such, the claim was properly denied.

Defendant's reliance on *Thompson v. State*, 796 So. 2d 511 (Fla. 2001), is misplaced. In that case, the defendant had asserted that counsel was ineffective for failing to exercise a cause challenge to a veniremember who had indicated extreme difficulty with a defendant not testifying. Here, none of the alleged ineffectiveness concerns cause challenges. Instead, Defendant is complaining about the manner in which counsel litigated peremptory challenges, which are not of a constitutional dimension. *Ross v. Oklahoma*, 487 U.S. 81 (1988). As such, *Thompson* does not support Defendant's claims.

V. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO QUASH THE SUBPOENA.

Defendant next asserts that the trial court erred in denying a motion to quash an investigative subpoena to his trial counsel. However, the lower court did not abuse its discretion in denying Defendant's motion to quash the subpoena.

Pursuant to §27.04, Fla. Stat., State Attorneys are given the authority to compel witnesses to appear before them and give testimony:

> The state attorney shall have summoned all witnesses required on behalf of the state; and he or she is allowed the process of his or her court to summon witnesses from throughout the state to appear before the state attorney in or out of term time at such convenient places in the state attorney's judicial circuit and at such convenient times as may be designated in the summons, to testify before him or her as to any violation of the law upon which they may be interrogated, and he or she is empowered to administer oaths to all witnesses summoned to testify by the process of his or her court or who may voluntarily appear before the state attorney to testify as to any violation or violations of the law.

This Court has held that this statute is remedial in nature and should be liberally construed. *Barnes v. State*, 58 So. 2d 157, 159-60 (Fla. 1951); *Collier v. Baker*, 20 So. 2d 652, 653 (Fla. 1945). This Court recognized that the only limitation the statute places upon the State Attorney's subpoena power was that it limited the use of such subpoenas to interrogations about violations of criminal law. *Barnes*, 58 So. 2d at 159-60. As

such, this Court held that the statute allows the issuance of subpoenas both before and after charges have been filed and against witnesses that have been listed as defense witnesses. *Id.*; *see also Collier*, 20 So. 2d at 653. In doing so, this Court noted that the State Attorney not only had the duty to prosecute crimes but to cease such prosecution if information came to light showing that the prosecution was unjust. *Barnes*, 58 So. 2d at 159. Such reasoning is consistent with this Court's, and the United States Supreme Court's, admonition that a prosecutor's duty is to see that justice is done. *See Berger v. United States*, 295 U.S. 78, 88 (1935); *Craig v. State*, 685 So. 2d 1224, 1229 (Fla. 1996). As a result of that duty, this Court has held that prosecutors are responsible for seeing that a defendant receives a fair and impartial trial. *Gluck v. State*, 62 So. 2d 71, 73 (Fla. 1952).

These principals show that the lower court was correct in refusing to quash the subpoena. In issuing the subpoena, the State was merely attempting to do its duty to seek justice and ensure that it had fulfilled its duty to see that Defendant had been provided with a fair trial. Under these circumstances, the lower court did not abuse its discretion[13] in finding that

[13] Rulings on motions to quash subpoenas are reviewed for abuses of discretion. *See Downs v. State*, 572 So. 2d 895, 900 (Fla. 1990).

§27.04, Fla. Stat. should be construed liberally to allow the State to use it to fulfill its duties in post conviction proceedings. Thus, Defendant's assertion that the §27.04, Fla. Stat. has no applicability to post conviction proceedings should be rejected.

Further, holding that investigative subpoenas could not be issued when a case had entered the post conviction stage would constrain the State's ability to do its duties. If a prosecutor received information when a case had entered the post conviction stage that indicated that the convicted defendant was actually innocent, the State must be allowed to investigate that evidence to ensure that it has seen that justice is done and that the convicted defendant did receive a fair trial. As this Court recognized in *Barnes*, the State Attorney's subpoena power was designed to allow such investigation so that the State can fulfill its duties. Moreover, allowing the State to use its subpoena power permits the State to conduct this investigation without having to inform the person whom the new evidence indicates may have committed the crime and permits the State to prosecute that person if appropriate. *See State v. Investigation*, 802 So. 2d 1141, 1144 (Fla. 2d DCA 2001). Thus, the lower court did not abuse its discretion in determining that investigative subpoenas could be issued when a case was in the

post conviction stage. It should be upheld.

Despite the liberal construction required of the statute authorizing such subpoena, Defendant asserts that the lower court abused its discretion because the State did not prove that it was investigating a crime. However, the courts of this State have held that the State is not required to prove the relevancy of its investigation in order to avoid having a subpoena quashed. *Investigation*, 802 So. 2d at 1144; *Imparato v. Spicola*, 238 So. 2d 503, 507 (Fla. 2d DCA 1970). Moreover, the State was investigating crimes: the crimes Defendant committed against Off. Bauer, Ms. Hadley, Ms. Watson and the Kislak National Bank. As this Court noted in *Barnes*, the State's power to investigate includes not only its ability to look for evidence that a defendant is guilty, but also its ability to determine that it has done its job to seek justice. Thus, the lower court did not abuse its discretion in refusing to quash the subpoena.

The fact that the State was doing its duty to ensure that justice was being done with regard to the prosecution of acts that are criminal distinguishes this matter from *Morgan v. State*, 309 So. 2d 552 (Fla. 2d DCA 1975). In *Morgan*, the State asserted that it was using its subpoena power to investigation a violation of a statute. However, violation of that statute did not constitute a crime. Moreover, the State specifically

disclaimed any suggestion that it was investigating whether a crime had been committed under a different statute. Here, murder, robbery and the other crimes of which Defendant stands convicted are crimes. The State was merely attempt to ensure that it was doing justice with regard to these crimes. As such, *Morgan* is not applicable.

Defendant also appears to assert that the subpoena should have been quashed because the use of the subpoena circumvented the rules of discovery. Defendant relies upon *Able Builders Sanitation Co. v. State*, 368 So. 2d 1340 (Fla. 1979). In *Able Builders*, the court held that the State could not use its power to issue investigative subpoenas to circumvent the rules of discovery. However, this Court has held that the rules of discovery are not applicable to post conviction proceedings. *Rodriguez v. State*, 31 Fla. L. Weekly S39, S47 (Fla. Jan. 19, 2005); *State v. Lewis*, 656 So. 2d 1248 (Fla. 1994). Since the rules are inapplicable, the subpoena could not be used to circumvent them. As such, Defendant's claim that the use of the subpoena did so is without merit and should be rejected.

Defendant next appears to assert that the use of the subpoena allowed the State to violate his attorney-client privilege with Mr. Cohen. However, this Court has held that the filing of a motion for post conviction relief waives any

attorney-client privilege with regarding to any matter relevant to the claims of ineffective assistance of counsel raised therein. *Arbelaez v. State*, 775 So. 2d 909, 917 (Fla. 2000); *Reed v. State*, 640 So. 2d 1094, 1097 (Fla. 1994); *Lecroy v. State*, 641 So. 2d 853 (Fla. 1994); *Turner v. State*, 530 So. 2d 45, 46 (Fla. 1987); *see also* §90.502(4)(c), Fla. Stat. This Court has stated that it is the act of raising the claim that waives the privilege. *Arbelaez*, 775 So. 2d at 917. Here, Defendant filed a motion for post conviction relief asserting numerous claims of ineffective assistance of counsel with regard to his investigation and presentation of almost every aspect of Mr. Cohen's representation of him through the guilt phase of trial. As such, he had waived any attorney-client privilege with regard to any matter relevant to the disposition of these claims. Because Defendant had waived any attorney-client privilege, it was not violated. The claim should be rejected.

Despite the law clearly holding that the attorney-client privilege had been waived, Defendant insists that he must have such a privilege because the State had allegedly taken inconsistent positions on the issue. However, a review of the records shows that the State did not take such inconsistent positions. In its pleadings, the State took the position that Mr. Cohen was free to assert the attorney-client privilege with

regard to any matter not within the scope of the waiver. (PCR-SR. 282-83) In *Reed*, this Court noted that the waiver of the attorney-client privilege inherent in the filing of claims of ineffective assistance of counsel would not extend to "matters unrelated to the crimes for which the defendant was convicted, such as evidence of other crimes." *Id.* at 1098; *accord Arbelaez*, 775 So. 2d at 917. The State's pleading merely acknowledged this limited exception to the waiver. It did not constitute a position inconsistent with its position that Defendant had waived his privilege with regard to this crime and matters relevant to the claims. Thus, Defendant's position is without merit and should be rejected.

Defendant also appears to suggest that the State has no right to meet with witnesses privately. Defendant appears to suggest that Mr. Cohen was similarly situated to Mr. Black and Dr. Meisner, whom the State chose to depose. However, in presenting these arguments, Defendant ignores that Mr. Cohen was not similarly situated to Mr. Black or Dr. Meisner. Mr. Black and Dr. Meisner were defense, post conviction expert witnesses. The State had indicated that it was going to present Mr. Cohen as its own fact witness. In fact, even at the hearing on Defendant's emergency motion, he indicated that he was not sure if he would present Mr. Cohen's testimony but the State

indicated that it was going to do so. (PCR-SR. 650, 659) This Court has made clear that the State does have the authority to conduct private meetings with its witnesses. *See Dufour v. State*, 495 So. 2d 154, 161-62 (Fla. 1986). As such, there was nothing improper about the State privately interviewing a witness it intended to call.

While Defendant appears to suggest that *In re: Amendments to Florida Rules of Criminal Procedure--Conform Rules to 2004 Legislation*, 900 So. 2d 528 (Fla. 2005), indicates that a new controversy has arisen concerning the scope of the State's ability to use investigative subpoena, this is untrue. The portion of the commentary to which Defendant cites is from the 1968 adoption of Fla. R. Crim. P. 3.220. *Id.* at 542. As such, this language does not indicate that there is a live controversy regarding the scope of discovery depositions under a rule that is inapplicable to this proceeding. As such, this case does not support Defendant's claims.

Defendant further suggests that *Mordenti v. State*, 894 So. 2d 161 (Fla. 2004), supports a requirement that discovery be made to both parties equally. However, Defendant does not explain how this proposition would assist him in any way. As Defendant admits, Mr. Cohen met privately with not only Defendant but also with his alleged expert Mr. Black. As such,

any claim that discovery should be provided equally to both side would compel allowing the State to speak to Mr. Cohen privately. Moreover, while Defendant suggests that he should be privy to what Mr. Cohen told the State, he acknowledged that he had discussed the issue with Mr. Cohen. (PCR-SR. 646-47, 651-52) This discussion, together with Defendant and his expert's private meeting with Mr. Cohen, should have informed Defendant of the substance of Mr. Cohen's testimony. Further, while Defendant insists that Mr. Cohen confessed his ineffectiveness, Defendant ignores that the determination of ineffectiveness is a question of law. *Stephens v. State*, 748 So. 2d 1028, 1033-34 (Fla. 1999). Thus, it is not a fact subject to "confession." Moreover, this argument also ignores that any admission of deficiency is not even binding on the court. *Breedlove v. State*, 692 So. 2d 874, 877 n.3 (Fla. 1991); *Routly v. State*, 590 So. 2d 397, 401 n.4 (Fla. 1991). Finally, it appears that what Defendant believes was a confession of ineffectiveness was the subject of Mr. Cohen's testimony at the evidentiary hearing: Mr. Cohen stated that he did not investigate presenting mental health evidence at a suppression hearing and did not recall whether he considered doing so. Under these circumstances, Defendant's reliance on *Mordenti* is misplaced, as are his assertions about the content of the State's discussions with Mr.

Cohen.

Defendant also complains that he was not served with the motion to quash the subpoena or notice of the hearing on the motion. Defendant insists that the State is solely responsible because it "produced and litigated motions." Brief at 69. However, the State did not file the motion or set it for hearing. Mr. Cohen filed the motion and set the hearing. (PCR. 233-37, 239) The State merely filed a response to the motion filed by Mr. Cohen. While Defendant insists that he should be given an explanation of why the State did not serve a copy of it response on him, he received such an explanation at the hearing on his motion: the State served its response in accordance with the certificate of service on the motion.

To the extent that Defendant is suggesting that the hearing constituted an ex parte communication between the State and the trial court, it was not. Instead, there was an adversarial hearing at which both the trial court and State indicated that Defendant was personally present. (PCR-SR. 652-53, 660) As such, there was no ex parte proceeding.

Moreover, the remedy provided when a proceeding is conducted without notice is generally rehearing the proceeding with notice. *See Tufo v. Oxford Resource Corp.*, 603 So. 2d 112 (Fla. 4th DCA 1992). Here, Defendant was afforded this remedy

below. He was allowed to reargue the motion. However, he was unable to present anything that was not presented at the time of the original hearing. He also had the opportunity to learn of the content of the State's meeting with Mr. Cohen from Mr. Cohen. The trial court also ordered the State to produce any notes it had from the meeting. He was even given the opportunity to present further argument on the issue, an opportunity of which Defendant did not avail himself below. Under these circumstances, Defendant is entitled to no further relief. The order of the lower court should be affirmed.

Defendant also asserts that as a remedy this Court should exclude Mr. Cohen's testimony. Defendant's relies on ***State v. Johnson***, 814 So. 2d 390 (Fla. 2002), as support for this assertion. However, *Johnson* does not support Defendant's position. In *Johnson*, this Court found that the use of an investigative subpoena was improper because it conflict with a specific statute designed to protect the constitutional right to privacy. ***Id.*** at 393. Further, the Court held that blanket imposition of exclusionary rule was improper. ***Id.*** at 394. Here, there is no specific statute that the State ignored. As asserted earlier, the rules of discovery are inapplicable. Moreover, speaking to Mr. Cohen did not impinge on any of Defendant's constitutional rights, and he had waived his

statutory attorney-client privilege. As such, *Johnson* does not support Defendant's claim.

Moreover, Defendant does not explain how exclusion of Mr. Cohen's testimony would assist him. Pursuant to *Strickland v. Washington*, 466 U.S. 668, 689 (1984), counsel performance was presumptively effective. Moreover, Defendant had the burden of overcoming that presumption and showing Mr. Cohen was ineffective. *Id.*; *Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983). Defendant relies extensively on Mr. Cohen's testimony to assert that he proved his claim. As such, excluding Mr. Cohen's testimony would be of no benefit to Defendant. The lower court should be affirmed.

VI. THE CLAIM REGARDING CLOSING ARGUMENT WAS PROPERLY DENIED.

Defendant next asserts that the lower court erred in denying his claim regarding comments in voir dire and closing. 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 procedurally barred and properly summarily denied as such.

Moreover, Defendant claimed that the comment at issue here was error during Defendant's resentencing appeal, including claiming that the comment was fundamental error. This Court refused to grant Defendant any relief. *Franqui v. State*, 804 So. 2d 1185, 1194 & n.8 (Fla. 2001). Since this issue was raised and rejected on direct appeal, it is procedurally barred. *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995). Further, recasting the claim in terms of ineffective assistance of

counsel does not negate the bar. *Harvey v. Dugger*, 656 So. 2d 1253, 1256 (Fla. 1995); *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990); *Swafford v. Dugger*, 569 So. 2d 1264, 1267 (Fla. 1990). Moreover, this Court has recognized that when a claim of fundamental error was rejected on direct appeal, a defendant cannot prove prejudice to raise a claim of ineffective assistance of counsel regarding that claim. *See Chandler v. State*, 848 So. 2d 1031, 1046 (Fla. 2003)(finding on direct appeal that error did not affect outcome precludes finding of prejudice in post conviction proceedings). As such, this claim was properly denied.

VII. THE DENIAL OF THE *RING* CLAIMS SHOULD BE AFFIRMED.

Defendant next asserts that he is entitled to relief based on *Ring v. Arizona*, 536 U.S. 584 (2002). Defendant appears to assert that *Ring* is violated because the State is permitted to charge first degree murder alternatively as felony or premeditated murder, the aggravating circumstances are not charged in the indictment, the State is not require to state in the indictment that it is seeking the death penalty, the jury is not required to specify whether it found Defendant guilty of felony or premeditated murder, the jury is not required to be unanimous in finding aggravators, the jury is not required to specify the aggravators it has found and the jury only returns a advisory sentencing recommendation.[14] However, Defendant is entitled to no relief as the lower court properly denied this claim.

Both this Court and the United States Supreme Court have

[14] In the course of presenting this argument, Defendant also suggests that the fact that he did not fire the fatal bullet should have precluded him from being sentenced to death or been considered powerful mitigation. However, Defendant did not raise these claims in his motion for post conviction relief. As such, they are not properly before this Court. *Griffin v. State*, 866 So. 2d 1, 11 n.5 (Fla. 2003). Moreover, Defendant raised the claims that his not having fired the fatal shot should have precluded imposition of the death penalty or been considered mitigating on resentencing appeal, and this Court rejected them. *Franqui v. State*, 804 So. 2d 1185, 1196, 1197 (Fla. 2001). As such, these claims are procedurally barred. *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995).

held that *Ring* does not apply retroactively to cases, 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). Here, Defendant's sentence has been final since approximately April 8, 2002, when the time for seeking certiorari review from this Court's affirmance of Defendant's sentence after resentencing expired. *Ring* was not decided until June 24, 2002. Since Defendant's conviction was final at that time, Defendant is entitled to no relief.

Further, all of Defendant's claims have been repeatedly rejected. *Schad v. Arizona*, 501 U.S. 624, 645 (1991)(jury allowed to return verdict that does not specify whether premeditated or felony murder found); *Ferrell v. State*, 918 So. 2d 163, 180 (Fla. 2005)(*Ring* does not require aggravators to be charged in indictment or individual found to jury); *Mansfield v. State*, 911 So. 2d 1160, 1178 (Fla. 2005)(rejecting claim that jury must specify whether murder was premeditated or felony murder even under *Ring*); *Parker v. State*, 904 So. 2d 370, 382-83 (Fla. 2005)(State allowed to charge alternatively premeditated and felony murder and *Ring* does not require aggravators to be found unanimously); *Robinson v. State*, 865 So. 2d 1259, 1266 (Fla. 2004)(rejecting claim that *Ring* shows that Florida's advisory jury scheme is unconstitutional).

Moreover, while Defendant asserts that the aggravators were not charged in the indictment or specifically found unanimously by the jury, he is simply incorrect under the facts of this case. In this matter, three aggravators were found: (1) prior violent felonies; (2) during the course of a robbery and for pecuniary gain, merged; (3) murder of a law enforcement officer, hinder a governmental function and avoid arrest, merged. (RSR. 158-65) Among the convictions used to support the prior violent felony aggravators were the convictions for the armed robbery and aggravated assault against the other victims in this matter. (RSR. 158-62) The during the course of a robbery and pecuniary gain aggravators were based on the fact that the murder occurred during the course of robbing the Kislak National Bank. (RSR. 162-63) The murder of a law enforcement officer, hinder governmental function and avoid arrest aggravators were based on the fact that Officer Bauer was a law enforcement officer performing his duty by attempting to arrest Defendant and the codefendants. (RSR. 163-65)

In the indictment, he was charged with the murder of "Steven Bauer, a Law Enforcement Officer, during the course of or in the scope of said victim's duty." (R. 15) He also charged with the robbery of the bank and the aggravated assault on Ms. Hadley. (R. 15-16, 17) In returning its verdicts, the

jury specifically found that Off. Bauer was a law enforcement officer, that Defendant had robbed the Kislak National Bank and that he had committed an aggravated assault of Ms. Hadley. (T. 2323-24) As such, factual support for each of the aggravators was charged in the indictment and specifically found by the jury. Defendant's claim is without merit, was properly denied and should be affirmed.

VIII. THE CLAIM REGARDING THE DENIAL OF AN EVIDENTIARY HEARING SHOULD BE REJECTED.

Defendant next complains renews his complaint that the lower court refused to conduct an evidentiary hearing on his claim regarding the administrative rule on case assignments in Dade County. The State has already addressed why this claim was properly summarily denied in Issue II, *supra*. For the reasons asserted therein, the lower court properly refused to hold an evidentiary hearing on a claim over which it had no jurisdiction, which was procedurally barred and which had no merit on the facts that Defendant alleged that were not in dispute. The State relies upon those arguments.

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 **Mary Catherine Bonner,** 207 S.W. 12th Court, Ft. Lauderdale, Florida 33315, this 28th day of March, 2006.

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Assistant Attorney General

CERTIFICATE OF COMPLIANCE

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

_____
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