IN THE SUPREME COURT OF FLORIDA

MARVIN BURNETT JONES,

Appellant,

v. CASE NO. SC04-282

STATE OF FLORIDA,

Appellee.

______________________/

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, MARVIN JONES, the defendant in the trial court, will be referred to as appellant or by his proper name. Appellee, the State of Florida, will be referred to as the State. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The trial transcript will be referred to as (T. Vol. pg). The postconviction record on appeal will be referred to as (PC Vol. pg). The evidentiary hearing transcript will be referred to as (EH Vol. pg). The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

This is an appeal of a trial court's denial of a motion for post-conviction relief following an evidentiary hearing in a capital case. The facts of the crime, as stated in the direct appeal opinion, are:

> Jones purchased a used automobile pursuant to an installment purchase contract from Ezra Harold Stow, the owner of San Pablo Motors in Jacksonville, Florida. The following month, Jones returned the car to Stow because of a "blown engine." Stow and Jones entered into an agreement to rebuild the engine for $1,500. Jones agreed to pay Stow $800 up front and Stow agreed to finance the balance. When the repairs were completed, Stow asked for $800, but Jones instead gave Stow a check for $4,200 to pay off the entire amount owed for the car and repairs and drove the car off the lot.
>
> At the time Jones wrote the check, he had been unemployed for over a year and knew that he only had five dollars in his bank account and had previously bounced six other checks. Ezra Stow was notified by the bank that Jones' check had bounced. At Ezra Stow's request, Monique Stow, Stow's twenty-two- year-old daughter, phoned Jones. Jones agreed to come to San Pablo Motors on March 3, 1992, and make good on the check. Jones arrived at San Pablo Motors at about 6 p.m. on March 3. Jones went into the trailer where Ezra Stow's office was located and told Stow he had to get something from his car.
>
> Jones returned to the trailer with a .25 caliber automatic pistol and shot Monique Stow while she was washing her hands in the bathroom. Jones shot her once between the eyes and again behind her left ear. Stow heard the shots and started to reach for his gun. Jones rushed into Stow's office and aimed his gun to shoot Stow in the face. Stow threw up his arm

as Jones fired and the bullet went through his forearm and then grazed his head. Stow fell to the floor behind his desk, momentarily unconscious. Jones then came around the desk and shot Stow a second time. The bullet entered Stow's cheek, broke his jaw and lodged in his neck. Jones then took the papers for the car from Stow's desk and fled the murder scene. Ezra Stow could not speak due to his injuries, but prior to being taken to the hospital he identified Jones by gestures and writing. Ezra Stow survived his injuries but Monique Stow died later that night.

At trial, Jones testified that Ezra Stow had originally agreed to take the $4,200 check and hold it until Jones could put some money in the bank to cover the check. Jones stated that when he went to San Pablo Motors on March 3 and paid Ezra Stow $4,200 in cash to make good on the bounced check, Stow became angry and requested an additional $2,000. Jones stated that Stow then began to pull out a gun and that he then rapidly shot Stow in self-defense. Jones then got sick at the sight of Stow and went to the bathroom to vomit. He testified that he heard a noise in the bathroom and reflexively shot Monique.

The jury found Jones guilty of first-degree murder of Monique Stow and attempted first-degree murder of Ezra Stow. At the sentencing phase, the jury recommended death by a vote of nine to three. The trial court found that the following aggravators applied to Jones: (1) a previous conviction for a violent felony based on the contemporaneous conviction for attempted first-degree murder of Ezra Stow; (2) that the murder of Monique Stow was committed in a cold, calculated, and premeditated manner; and (3) that the murder of Monique Stow was committed for pecuniary gain. The trial court also found that the following mitigators applied: (1) Jones had no significant history of prior criminal activity and (2) aspects of his character and record, namely: that he served eight years in the Navy in responsible

> positions and with commendations and an honorable discharge, that he is married with two children that he and his wife supported, that during his formative years he had the advantage of a secure middle class home with successful parents, that there was no evidence that he suffered any material, spiritual, or moral privation, and that Jones' parents were supportive, hard-working, industrious and successful. The trial court found that the three aggravating circumstances in the aggregate outweighed the two mitigating circumstances and followed the jury's recommendation that Jones be sentenced to death.

Jones v. State, 690 So.2d 568, 569-570 (Fla. 1996).

On appeal to the Florida Supreme Court, Jones raised the four issues: (1) the trial court erred in finding that the murder was committed for pecuniary gain and in instructing the jury on pecuniary gain; (2) the trial court erred in giving the standard jury instruction to define the cold, calculated, and premeditated aggravating circumstance; (3) the trial court erred by finding the aggravating circumstance of cold, calculated, and premeditated; and (4) the death sentence imposed is disproportionate. *Jones*, 690 So.2d at 570.

Jones then filed a petition for writ of certiorari in the United States Supreme Court raising a claim that the harmless error analysis performed by the Florida Supreme Court regarding the CCP jury instruction was improper. The

petition was denied on October 6, 1997. *Jones v. Florida*, 522 U.S. 880, 118 S.Ct. 205, 139 L.Ed.2d 141 (1997).

On September 17, 1998, Jones filed a shell 3.850 motion for postconviction relief. On December 3, 2001, postconviction counsel filed a motion to interview jurors. The State filed a written objection to the motion to interview jurors on December 10, 2001. The trial court held a hearing on the motion to interview on December 19, 2001. The trial court denied the motion to interview the jurors by written order on March 25, 2002 and in a second order dated June 3, 2002 and yet again in its final order denying postconviction relief as Ground 2.

On April 29, 2002, postconviction counsel filed an amended 3.850 motion raising 23 claims. The State filed a response to the amended motion on June 13 OR September 12, 2002 agreeing that an evidentiary hearing should be held on claims 1, 13, 14, and 15. The trial court held a *Huff* hearing on August 9, 2002. The trial court granted an evidentiary hearing on claims 1, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16 and 21 and summarily denied the remaining claims.

The trial court conducted a three day evidentiary hearing on October 21, 22, and 23, 2002. At the evidentiary hearing, trial counsel, Frank Tassone,

testified. He stated that he graduated from the University of Florida College of Law in 1973. (EH Oct 21 at 12-15). He worked as a prosecutor for seven years. (EH Oct 21 at 13). He was the director of criminal investigations for FDLE for two years. He has been in private practice since 1982 and 50% of his practice is criminal defense work. (EH Oct 21 at 13-14). He had handled 10 to 15 first degree murder cases, as a defense attorney, half of which were capital cases, before handling Jones' case. (EH Oct 21 at 14-15). Trial counsel testified that he reviewed Jones' military records, probably his school records and his lack of criminal history. (EH Oct 21 at 103). During the defendant's testimony during the guilt phase, counsel asked extensive questions regarding Jones' military background. (Trial XX 867-872). The defendant's military awards were introduced by counsel at the penalty phase. (EH Oct 23 106-107). Both parties submitted written post-evidentiary hearing memorandum of law. The trial court denied postconviction relief in an extensive written order.

ARGUMENT

ISSUE I

Jones asserts that his trial counsel was ineffective for failing to object to the cold, calculated and premeditated aggravating circumstance penalty phase jury instruction. The State respectfully disagrees. There was no deficient performance. Jones improperly relies upon a case regarding the CCP instruction that was not decided until after the penalty phase. Jones improper tangles two separate issues. Below, he raised a claim that trial counsel was ineffective for failing to object to the CCP instruction and a separate claim that trial counsel was ineffective for failing to present mental health mitigation. The trial court properly denied the two claims of ineffectiveness.

The trial court's ruling

The trial court ruled:

> In ground seven, Defendant claims counsel rendered ineffective assistance by failing to object to the penalty phase jury instruction on the aggravating factor of "cold, calculated and premeditated." Defendant contends that the Court's instruction on cold, calculated and premeditated during the penalty phase was unconstitutionally vague and overbroad. Defendant raised this exact claim in direct appeal. *Jones v. State*, 690 So. 2d 568 (1996). Defendant, having raised this claim on direct appeal, is procedurally barred from raising it again in a motion for post-conviction relief.

> *Medina v. Sate*, 573 So. 2d 293 (1990) (affirming the denial of postconviction relief and holding that issues that had been raised or should have been raised on direct appeal are barred in postconviciton proceedings).

Standard of review

The standard of review is *de novo*. *Cave v. State*, 2005 WL 167607, *5 (Fla. 2005)(explaining that because both prongs of the *Strickland* test present mixed questions of law and fact, we employ a mixed standard of review, deferring to the circuit court's factual findings (if they are supported by competent, substantial evidence) but reviewing the circuit court's legal conclusions *de novo* citing *Stephens v. State*, 748 So.2d 1028, 1033 (Fla.1999)).

Ineffective Assistance of Counsel

To prevail on a claim of ineffective assistance of trial counsel, a defendant must demonstrate that (1) counsel's performance was deficient and (2) there is a reasonable probability that the outcome of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. As to the first prong, the defendant must establish that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. In reviewing counsel's performance, the court must be highly deferential to

counsel, and in assessing the performance, every effort must 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. For the prejudice prong, the reviewing court must determine whether there is a reasonable probability that, but for the deficiency, the result of the proceeding would have been different. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. *Spencer v. State*, 842 So.2d 52, 61 (Fla. 2003) citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

CCP jury instruction

Jones asserts that his trial counsel was ineffective for not objecting to the unconstitutional cold, calculated and premeditated jury instruction. Jones claims that the CCP jury instruction violated *Jackson v. State*, 648 So.2d 85 (Fla.1994). *Jackson* was not decided until after the penalty phase was complete.

Evidentiary hearing

At the evidentiary hearing, it was established that Jackson was not decided until after the penalty phase was complete. (EH Oct 21 at 37); *Jones v. State*, 690 So.2d 568, 571 (Fla. 1996)(noting: "we did not issue our decision in *Jackson* until approximately two months after Jones' sentencing hearing."). Trial counsel filed several pre-trial motions regarding the jury instructions including the CCP aggravator. (EH Oct 21 at 132).[1] The motion was denied by the trial court. (EH Oct 21 at 135).

<u>Merits</u>

There is no deficient performance. Trial counsel is expected to know the law at the time of the trial or the penalty phase, he is not required to guess that a court will declare a jury instruction unconstitutional at a later date. *Johnson v. State*, 2005 WL 729169, 12 (Fla. 2005)(rejecting a claim that that counsel was ineffective for failing to object to the CCP jury instruction which was

[1] In the direct appeal, this Court noted that during pretrial, Jones submitted two motions regarding the CCP aggravator. One was a motion to declare section 921.141(5)(i), Florida Statutes (1993), unconstitutional, on the grounds that the statutory CCP aggravator was vague, overbroad, arbitrary and capricious on its face and as applied. The other motion moved to prohibit any instruction being given on the CCP aggravator, on the grounds that the statutory CCP aggravator was impermissibly vague and overbroad on its face and as applied and that the facts did not support such aggravator. *Jones v. State*, 690 So.2d 568, 571 (Fla. 1996).

found by this Court to be unconstitutionally vague in *Jackson* because "[t]his Court has consistently held that trial and appellate counsel cannot be held ineffective for failing to anticipate changes in the law"); *Walton v. State*, 847 So.2d 438, 445 (Fla. 2003)(rejecting a claim that trial and appellate counsel were ineffective for failing to raise a Jackson issue because "trial and appellate counsel cannot be faulted for failing to assert claims that did not exist at the time they represented Walton."); *Pitts v. Cook*, 923 F.2d 1568, 1574 (11th Cir. 1991)(noting that lawyers rarely, if ever, are required to be innovative to be effective). Because *Jackson* did not exist at the time of the penalty phase, trial counsel was not deficient for not objecting to the standard jury instruction.

Moreover, there is no prejudice. The Florida Supreme Court found the *Jackson* error in this case to be harmless. *Jones*, 690 So.2d at 571. The *Jones* Court stated: "even if Jones had properly preserved his *Jackson* claim, any error in instructing the jury on the CCP aggravator would have been harmless beyond a reasonable doubt because of the extent of the evidence supporting that aggravator and the strength of the other aggravators as compared to the mitigating evidence." *Jones*, 690 So.2d at 571. Postconviction counsel argues this Court would not have

found the *Jackson* error to be harmless if trial counsel had presented expert mental health testimony. First, he did not present this theory of prejudice to the trial court. These were two separate claims below. Jones argues that the result of the proceeding would have been different but the "proceeding" at issue when you raise a penalty phase jury instruction issue is the penalty phase and the jury's recommendation, not the appeal. Trial counsel is trial counsel, not appellate counsel. Jones may not assert prejudice from his trial counsel's conduct based on an appellate court's harmless error analysis. The trial court properly denied relief.

ISSUE II

Expert Testimony

Jones asserts that his trial counsel was ineffective for failing to present mental mitigation contained in Dr. Ernest Miller's report. There is no ineffectiveness. There is no deficient performance. As the trial court found, this was a reasonable tactical decision. Trial counsel retained a qualified mental health expert and discussed the findings with the expert and then made a tactical decision not to call the expert. Nor is there any prejudice. Dr. Miller did not find either statutory mental mitigator. Moreover, as the trial court found, much of the information contained in Dr. Miller's report was presented via family and friends.

The trial court's ruling

> In ground 13, Defendant claims counsel rendered ineffective assistance by failing fully to present or investigate available mitigating evidence through the mental health professional retained by the defense prior to trial. After being retained by Mr. Tassone, Dr. Ernest Miller, a forensic psychologist, conducted a psychiatric evaluation of Defendant. Dr. Miller prepared a report on potential mitigation evidence (Defendant's Exhibit 1) and Defendant asserts counsel was ineffective for failing properly to investigate and present such nonstatutory mitigation to the jury.
>
> According to Defendant's Motion, Dr. Miller's report contained information about Defendant's relationships with his two brothers

and two sisters; his education; his history in the Navy; his stable marital relationship; his stable residential history until the time of the incident; his compulsive personality type; his lack of a history of violence; that Defendant's actions in this case were out of keeping with his manner of dealing with frustrations; that Defendant never had a drinking problem and has never used street drugs; that Defendant has been depressed since the incident and has had trouble sleeping; his estimated intelligence; his positive recreations and hobbies; and his positive personality traits.

Mr. Tassone testified at the evidentiary hearing that he did not have an independent recollection of asking Dr. Miller to expound on the statutory and nonstatutory mitigation to which he could testify. (T.1, pg. 67). Mr. Tassone testified that he did not call Dr. Miller as a mitigation witness but that there were a number of areas of nonstatutory mitigation contained in Dr. Miller's report. (T.1, pg. 69).

Although Dr. Miller was not called to testify during the penalty phase about non-statutory mitigation, there were several witnesses who testified and virtually all of the information contained in Dr. Miller's report was presented to the jury. For example, defense counsel called Defendant's mother and father, Defendant's sister Ardee, Defendant's wife Tracey and Defendant's best friend, Robert. Additionally, Defendant testified at the penalty phase.

Specifically addressing all of the information contained in Dr. Miller's report, Defendant's sister Ardee Harris, testified that "[e]verybody liked Marvin, he was one of those fun loving people, could get along with everybody. And he participated in the band in school and when I (Ardee) came along, let's see, I was in the 10th grade, he was in the 12th grade and he kind of looked after me." (T.T. 1232). Defendant's father, Arthur Jones, testified that other than the childhood things, Marvin never got

into any trouble with the law growing up. (T.T. 1225). Defendant's mother, Mabel Jones, testified that growing up, Marvin interacted well with is brothers and sisters and that he had chores and daily routines around the house growing up. (T.T. 1229). Ms. Jones, further, when asked if Defendant had expressed remorse since the offenses, testified that when she went to see him and hugged him he began to cry. (T.T. 1229-1230).

Defendant's brother-in-law, Ronald McCorvey, testified that Defendant "always took time to spend time with the family and he interacted real well with our family." (T.T. 1233). Mr. McCorvey testified that Defendant "enjoyed being with his kids, spending time with the kids and with his wife, my sister, he always would romance my sister with flowers and candy, he was a real good family man." (T.T. 1234). Mr. McCorvey, further, testified that he has never know Defendant to be a violent man or threaten violence. (T.T. pg. 1234). Defendant's wife, Tracey Jones, testified that Defendant participated in the marriage in the raising of the children and that he was "a loving , caring father, he helped [her] out with everything, with the kids and everything." (T.T. pg. 1240).

Defendant also testified during the penalty phase. Defendant testified that he was born in Brooklyn, and moved to Moultrie, Georgia in 1970 or 1971. Defendant went to grade school and high school in Moultrie, Georgia and graduated from high school at the age of 17. Defendant went to active duty in the Navy in 1984. Defendant testified at great length concerning his service in the Navy and his many awards and commendations received throughout his eight years of military service. Mr. Jones testified that he participated in the raising of his children by getting them ready for school, taking them to the park and taking them everywhere he went. Defendant also testified that since the incidents, he has expressed remorse for the death of Monique Stow. (T.T. 1249-1267).

Defendant's best friend, Robert Walker, testified that Defendant played the trumpet and other instruments and he and Defendant were in a band together and that participated in civic community or charitable events. Mr. Walker testified the band would play talent shows and fund raisers. Mr. Walker testified that Defendant loved his parents, his sisters and brothers and his wife and children. (T.T. 1277-1279).

This testimony presented much of the potential mitigation evidence contained in Dr. Miller's report. In fact, the testimony was presented by people who were either closely related to Defendant or shared a long-term relationship with him. These people, including Defendant's parents, siblings, wife and best friend were in a better position to testify about non-statutory mitigation than Dr. Miller who evaluated Defendant at the beginning of the case. Any testimony that Dr. Miller could have provided would have been largely cumulative to the testimony presented by Defendant's family and friends. Counsel cannot be deemed ineffective for failing to present cumulative testimony. *Valle v. State*, 705 So.2d 1331 (Fla. 1997); *Card v. State*, 1169 (Fla. 1986).

Moreover, Mr. Tassone testified at the evidentiary hearing that he "felt that the bulk of the mitigation that [I] wanted to present was gotten in through other witnesses and that there were some areas of Dr. Miller's report that [I] did not want the state to go into." (T.1, pg. 143). Significantly, Mr. Tassone testified that there were things in his conversations with Dr. Miller that may not have appeared in the report that, if Dr. Miller were exposed to cross examination, would be adverse. (T.1, pgs. 166-167). Defendant argues that Mr. Tassone's fears regarding cross-examination of Dr. Miller were unfounded because any such adverse testimony could have been excluded at trial. Cross-examination, however, is a dynamic process that cannot always be scripted or predicted with certainty. Mr. Tassone, further, testified that

he "felt that I had established Marvin Jones' family life, his married life, his career to a substantial extent in front of that jury. I don't think the jury was unaware that this was a good man who committed this act." (T.3, pg. 110). It was within the wide range of professional judgment for Mr. Tassone to make a tactical decision not to call Dr. Miller to testify during the penalty phase to avoid opening Dr. Miller up to cross examination, particularly when Mr. Tassone believed sufficient mitigation had been presented through other witnesses. Such a decision by counsel does not amount to ineffective assistance. *Songer v. State*, 419 So.2d 1044 (Fla. 1982); *Gonzalez v. State*, 579 So.2d 145, 146 (Fla. 3d DCA 1991) ("Tactical decisions of counsel do not constitute ineffective assistance of counsel.")

Evidentiary hearing

At the evidentiary hearing, trial counsel testified that he retained a mental health expert but did not have him testify at the penalty phase. (EH Oct 21 at 58). Trial counsel testified that he always retained mental health experts in capital cases. (EH Oct 21 at 62). Dr. Miller's report dated November 5, 1993 was introduced into evidence at the evidentiary hearing. (EH Oct 21 at 58). Trial counsel testified that he had worked with Dr. Miller in previous cases and that Dr. Miller was one of the better experts available locally. (EH Oct 21 at 63). While he retained Dr. Miller to confirm his lay opinion that Jones was not insane, he also had the doctor examine possible

mental mitigation. (EH Oct 21 at 65). Trial counsel testified that he had telephone conversations with Dr. Miller regarding statutory and non-statutory mental mitigation. (EH Oct 21 at 67-68,75).

Dr. Miller's report states that he reviewed copies of various police reports. The report diagnosed Jones as having compulsive personality type. (EH Oct 21 at 71). Trial counsel agreed that this could be argued as non-statutory mitigation. (EH Oct 21 at 72-73). The report also diagnosed Jones as suffering from depression which trial counsel also agreed could be argued as non-statutory mitigation. (EH Oct 21 at 75). Trial counsel explained that he seeks a confidential evaluation because he does not want the State to see it. (EH Oct 21 at 140). Mental health reports do not contain pure mitigation, often they contain items that are of an aggravating nature. (EH Oct 21 at 140). Trial counsel testified that there were some areas of Dr. Miller's opinions that he did not want to go into. (EH Oct 21 at 142). While there was nothing in the report itself, the conversations he had with Dr. Miller presented this problem, including Dr. Miller's potential testimony regarding Jones' act of bringing a gun to the business with him. (EH Oct 21 at 166-167). Dr. Miller doubted Jones version of events. (EH Oct 21 at 168-169). Moreover, some

of Dr. Miller’s testimony opened the possibility of the jury being exposed to future dangerousness. Trial counsel acknowledged that if he presented Dr. Miller as a witness the State could cross-examine him regarding any statements the defendant made. (EH Oct 21 at 141). Trial counsel noted that the sole impression the jury got of Jones’ background was a good history. (EH Oct 21 at 142).

At the evidentiary hearing, collateral counsel also presented the testimony of Dr. Miller. (EH Oct 23 at 4). The State stipulated to Dr. Miller’s expert qualifications. Dr. Miller is more often an expert witness for the State than for the defense. (EH Oct 23 at 7). Dr. Miller’s raw data was no longer available. (EH Oct 23 at 10). Defense counsel provided documents to him including arrest & booking report; the homicide report and the technician reports. (EH Oct 23 at 10). Dr. Miller performed a rapid assessment IQ test which showed Jones’ IQ to be normal. (EH Oct 23 at 13). Dr. Miller did not find either statutory mental mitigator. (EH Oct 23 at 14-15). Dr. Miller found that Jones had a compulsive personality with a focus on orderliness and precision. (EH Oct 23 at 15). If his environment is not structured and predictable, it creates anxiety. (EH Oct 23 at 13). A person with Jones’ numerous problems at the time, such as his unemployment and unstable

home life, who has a compulsive personality would be significantly affected. (EH Oct 23 at 20-21). In his opinion, the murder did not appear to be logically planned but he did not have his notes to verify this. (EH Oct 23 at 21). Jones was in a state of discontrol. (EH Oct 23 at 22). Jones was depressed following the murder and lost 40 pounds. (EH Oct 23 at 23). Those with a compulsive personality can function "quite well in the world." (EH Oct 23 at 27). Dr. Miller could not be sure, due to the lack of notes, whether Jones suffered from a compulsive personality disorder or merely had traits of the disorder. (EH Oct 23 at 28).

In *Gaskin v. State*, 822 So.2d 1243 (Fla. 2002), the Florida Supreme held that defense counsel's decision not to present mental health evidence in mitigation was a reasonable strategic decision. Gaskin alleged that trial counsel should have called mental health experts to testify at the penalty phase about mental mitigation. The trial court noted that Dr. Krop, one of the defense mental health experts at trial, testified at the evidentiary hearing that he expressly told counsel before trial that he would not be of much help to the defense because he would have to testify about Gaskin's extensive history of past criminal conduct, sexual deviancy, and lack of remorse. The trial

court also stated that trial counsel testified at the hearing that he made a strategic decision not to present mental health experts precisely because Gaskin's background contained many negatives. *Gaskin*, 822 So.2d at 1248.

Here, as in *Gaskin*, defense counsel's telephone conversations with Dr. Miller led him to believe that Dr. Miller would not be helpful. While presenting Dr. Miller's testimony raised some concerns, the real problem was that Dr. Miller could not be of much help. Dr. Miller did not find either statutory mental mitigator. Dr Miller's compulsive personality diagnosis, even if it rose to the level of a disorder, was balanced by the statement that those with the disorder can function "quite well in the world". It is not deficient performance to decide not to call an expert witness that presents some concerns when that witness is of marginal value, especially in a case, like this one, where counsel's main penalty phase strategy was to highlight the defendant's "golden" background through lay testimony.

Dr. McMahon

Jones asserts that trial counsel was ineffective for failing to present the mental mitigating evidence of anxiety. There is no deficient performance. Counsel consulted with a mental health expert, Dr. Miller, who

found that Jones did not suffer from any major mental illness. Trial counsel is not required to consult a bevy of experts. Nor is there any prejudice. Anxiety is quite common and insignificant as mitigation. The trial court properly denied this claim.

The trial court’s order

> In ground 14, of his motion, defendant claims counsel rendered ineffective assistance by failing adequately to investigate and present mitigating evidence from a mental health professional during the penalty phase of the child [sic]. Defendant contends that if trial counsel had conducted an adequately mental health investigation, significant mitigating evidence could have been discovered and presented.
>
> In support of his motion, defendant presented testimony of Dr. Elizabeth McMahon, a neuropsychologist who evaluated the defendant in 2000, several years after his trial and conviction. Dr. McMahon prepared a written report which was admitted into evidence. (Defendant’s Exhibit Four). At the hearing, Dr. McMahon testified to the substance of the matters contained into the report and the observations, findings, and opinions regarding her evaluation of the Defendant. Defendant argues trial counsel was ineffective by failing to locate an expert such as Dr. McMahon and present her testimony during the penalty phase of the trial.
>
> The courts have recognized “the obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated.” *State v. Lewis*, 835 So.2d 1102, 1113 (Fla. 2002). An attorney has a strict duty to conduct “a reasonable investigation of a defendant’s background for possible mitigating evidence.” *Ragsdale v. State*, 798 So.2d 713, 716 (Fla. 2001). In evaluating post-conviction claims similar to those raised by defendant, the Supreme

Court has held: When evaluating claims counsel was ineffective for failing to present mitigating evidence, this court has phrased the defendant's burden as showing that counsel's ineffectiveness "deprived the defendant of a reliable penalty phase proceeding." *Asay v. State*, 769 So.2d 974, 985 (Fla. 2000).

A court's post-conviction review of trial counsel's performance is made on an objective basis. The test is "reasonableness under prevailing professional norms." This analysis, in turn, includes a "context-dependant consideration of the challenged conduct as seen 'from counsel's perspective at the time." *Wiggins v. Smith*, 123 S.Ct. 2527, 2536 (2003). However, when evaluating the error prong of *Strickland*, 466 U.S. 668, a court must make every effort to avoid the distorting dangers of hindsight. See Coleman, 718 So.2d 827.

Mr. Tassone testified at the evidentiary hearing, "I didn't think that there were many, if any, areas of Dr. Miller's report that at that time would have caused me alarm that I should have sought either more psychiatric testimony, mental health testimony or [I] would have put someone on the stand for that." (T.1, pgs. 143-144). Considering the absence of any finding by Dr. Miller of a cognitive dysfunction of psychological disorder, Mr. Tassone acted reasonably in not deciding to conduct further mental health evaluations of Defendant. Everything in his family, school, Navy, and employment history indicated that Defendant did not suffer from significant psychological disorders or deficits and was instead a well-rounded, loving family man. (T.1, pgs. 145-146).

Dr. McMahon's report perhaps provides a more detailed perspective of Defendant's personality and psychological profile. However, her findings and conclusions are largely consistent with Dr. Miller's opinion that Defendant was essentially normal from a psychological perspective. For example, Dr. McMahon testified that Defendant had an average IQ (T.3, p. 64) and no cognitive

dysfunction (T.3, p. 66). She further testified Defendant's neuropsychological assessment was within normal limits (T.3, pgs. 66, 94) and Defendant had good impulse control. (T.3, p 67). She noted, however, that upon being faced with anxiety, Defendant experienced some distortion in his perception and some immaturity of behavior. (T.3, pg 67). Dr. McMahon observed that while under stress, Defendant was likely to act through his feelings without thinking (T.3, p 73), and that he had a tendency to misperceive what people were saying, particularly about him. When this happened Defendant had a tendency to become very angry, particularly if he felt that the other person was attacking his family. (T.3, pgs. 78, 80). Dr. McMahon observed that defendant did have "some soft signs" of problems in the right side of his brain, but did not find such problems significant. (T.3, pg. 94). Dr. Miller's report did not indicate anything in the nature of a right brain hemisphere dysfunction (T.3, pg. 145-146), and Defendant never told his trial counsel of any psychological problems or diagnoses in his past. (T.3, pgs. 145-146).

Dr. McMahon's evaluation of Defendant largely corroborates that conducted by Dr. Miller. Both professionals found Defendant to be essentially normal, with all neurological assessments within normal limits and no cognitive dysfunction. The matters raised by Dr. McMahon concerning Defendant's reaction to stress and anxiety appear to describe normal human behavior. It is apparent that at the time of trial, the most significant mitigation evidence available was the exemplary life otherwise led by Defendant as testified to in detail by his family and friends. When weighed against such compelling testimony about Defendant's strong personal relationships and history of accomplishments, the potential expert psychological testimony was not of great consequence. At least this was the judgment of trial counsel and on this post-conviction record, such judgment appears reasonable. The fact that after the trial is over, a second, arguably more favorable psychological report is obtained does not

establish that the defendant received ineffective assistance at trial.

Defendant's argument on this point is less persuasive than similar arguments the Supreme Court has rejected in *Asay v. State*, 769 So.2d 974 (Fla. 2000), and *Davis v. State*, 28 Fla.L.Weekly S835 (Fla. November 20, 2003). In Asay, trial counsel obtained a psychological evaluation of the defendant, which was unfavorable and apparently resulted in the professional not being called to testify at the penalty phase. Post-conviction, the defendant presented testimony from two other mental health professionals to support an argument that trial counsel was ineffective for not securing and presenting testimony from such professionals at trial. The Supreme Court rejected this argument, finding that trial counsel properly relied upon an evaluation report obtained from a competent professional. In so holding, the Supreme Court stated that trial counsel "was not deficient where the defendant had been examined prior to trial by mental health experts and the defendant was simply able to secure a more favorable diagnosis in postconviction." *See Asay v. State*, 769 So.2d at 985. In *Davis*, the Supreme Court similarly rejected an argument that trial counsel was deficient for not securing and presenting more favorable mental health evaluation testimony during the penalty phase. The defense had presented testimony at trial from three mental health experts. Postconviction, the defendant offered testimony from experts arguably more qualified to address the subject issues of child sex abuse and post-traumatic stress syndrome. However, testimony from the post-conviction experts was similar to that of the experts who testified at trial. The Supreme Court held that "trial counsel was not deficient simply because Davis was able to secure a 'more favorable' report on postconviction." 28 Fla.L.Weekly at S838.

In this action, Mr. Tassone acted reasonably in relying on Dr. Miller's report as an accurate statement of Defendant's psychological condition

> and in concluding that no further psychological evaluation would be likely to assist in the defense at trial. As found previously, Mr. Tassone further acted reasonably in deciding not to call Dr. Miller at trial inasmuch as the doctor did find any significant neurological or psychological disorders, and that it was not worth the inherent risk of cross examination to call the doctor as a witness. This tactical decision was bolstered by the determination that the best mitigation strategy for Defendant would be to present him as a normal person, a law abiding man who had many good qualities and who had developed many good relationships with family, friends, employers, and fellow employees.
>
> Moreover, just as in *Davis*, Defendant has failed to demonstrate any prejudice even if the defense counsel had been ineffective in not presenting mental health expert testimony. In many respects, Dr. McMahon's testimony was consistent with Dr. Miller's. Moreover, to the extent Dr. McMahon's testimony attempted to apply her findings to Defendant's mental state at the time of the crimes (T.3, pgs. 91-92), such testimony was speculative and likely inadmissible or of little probative value at trial. See *Asay*, 769 So.2d 786-87.

<u>Evidentiary hearing testimony</u>

At the evidentiary hearing, collateral counsel also presented the testimony of Dr. Elizabeth McMahon. (EH Oct 23 at 54). She testified that, in the majority of cases where she is retained by the defense, she does not testify, including in mitigation. (EH Oct 23 at 61,92). She has had defense counsel in other cases choose not to call her as a mitigating witness if the mitigation was minor. (EH Oct 23 at 94). She prepared a preliminary report regarding her

evaluation of Marvin Jones which was introduced as Defense exhibit 4. (EH Oct 23 at 61-62). She interviewed Jones four times and performed a neuropsychological evaluation. (EH Oct 23 at 63,64,65). She also performed an IQ test which showed that Jones' IQ is average. (EH Oct 23 at 63,66). His neuropsychological evaluation showed that he was within normal limits. (EH Oct 23 at 66). Jones did have "some soft signs" of right side problems but nothing significant. (EH Oct 23 at 94). Anxiety tends to distort his perceptions. (EH Oct 23 at 68-79).

Trial counsel testified that there was nothing in Dr. Miller's report that made him think to seek further mental health reports from other experts. (EH Oct at 143-144). The defendant never told trial counsel about any problems and nothing in Dr. Miller's report indicts anything of in the nature of a right hemisphere dysfunction. (EH Oct at 145-146).

<u>Merits</u>

In *Asay v. State*, 769 So.2d 974 (Fla.2000), the Florida Supreme Court explained that counsel may be ineffective for failing to investigate mitigating circumstances where substantial mitigating evidence could have been presented. However, the Court also explained that where counsel did conduct a reasonable investigation

of mental health mitigation prior to trial and then made a strategic decision not to present this information, the Court will affirm the trial court's findings that counsel's performance was not deficient. The *Asay* Court then found no ineffectiveness following an evidentiary hearing where the defendant had been examined prior to trial by a mental health expert who gave an unfavorable diagnosis. The first evaluation is not rendered less than competent simply because appellant has been able to provide testimony to conflict with the first evaluation. The trial court in *Asay* made a factual finding that penalty phase counsel reasonably relied upon the first mental health report, which concluded that the defendant suffered from antisocial personality disorder and did not exhibit an emotional or cognitive disturbance and therefore, the trial court correctly found that trial counsel conducted a reasonable investigation into mental health mitigation evidence, which is not rendered incompetent merely because the defendant has now secured the testimony of a more favorable mental health expert. The *Asay* Court explained that in assessing prejudice, it is important to focus on the nature of the mental health mitigation presented at the evidentiary hearing. The mitigation presented at the evidentiary hearing was "of a qualitatively lesser caliber" than in

other cases where the Court found that counsel rendered ineffective assistance for failing to present mental health mitigation and therefore, affirmed the trial court's finding that the existence of this additional mental health mitigation did not undermine the reliability of the penalty phase proceeding.

Basically, this expert testified that Marvin Jones is normal. There is nothing mitigating about that. The "additional" mitigating evidence seems to be that he is affected by anxiety. Anxiety is quite common and is not compelling mitigation. Anxiety is of a "qualitatively lesser caliber" than other mitigation. Here, as in *Asay*, this additional mental health mitigation did not undermine the reliability of the penalty phase proceeding. Trial counsel was not ineffective in failing to present this minor mental mitigation of these two experts.

Abigail Taylor

Jones asserts the trial counsel was ineffective for failing to present additional mitigation witnesses. As the trial court found, this testimony was cumulative of other mitigating testimony actual presented. Counsel is not ineffective for failing to call a herd of witnesses to testify to the same matter. Furthermore, there is no prejudice. The issue of the defendant good background was

not disputed. The trial court properly denied this claim of ineffectiveness.

The trial court's ruling

> At the evidentiary hearing, Defendant presented the testimony of Lee Houston, Porsha Hernandez, and Abigail Taylor. Mr. Houston testified he grew up with Defendant, Ms. Hernandez testified she went to high school with Defendant, and Ms. Taylor testified Defendant was like a best friend to her husband. (T.2, pgs. 5-15, 35-54, 85-106). This Court finds the type of mitigation testimony that these three additional witnesses could have provided was already presented through other witnesses. Any testimony that Mr. Houston, Ms. Hernandez, or Ms. Taylor would have provided would have been cumulative testimony. Counsel is not ineffective for failing to present cumulative testimony. *Gudinas v. State*, 816 So.2d 1095 (Fla. 2002). This is not a case where counsel failed to investigate and present mitigation. As discussed above, counsel presented several of Defendant's family members and friends to testify about Defendant's character. Defendant has failed to meet his burden under *Strickland* by proving that had counsel called the three additional witnesses, their testimony would have provided a reasonable probability, sufficient to undermine confidence in the outcome, that the outcome of the proceeding would have been different. *Strickland*.

Evidentiary hearing testimony

At the evidentiary hearing, Abigail Taylor, testified that Jones was a good person who advised her husband to straighten up and be a good husband and father, who was well liked and who was not violent. (EH Oct 22 at 92-96). She was aware that the Saab was always breaking down. (EH

Oct 22 at 97). Jones had told her that he had done something bad while crying. (EH Oct 22 at 97-98).

Merits

Abigail Taylor is the wife of Tracy Taylor, who testified for the State at trial, that Jones confessed to him. She did not testify that she was available at the time of the trial. Nor did she explain why she did not testify at the original penalty phase. *Nelson v. State*, 875 So.2d 579, 582-84 (Fla.2004)(clarifying that a facially sufficient claim of ineffective assistance of counsel claim for failure to call a witness must include an assertion that the witness would have been available to testify at trial). She was clearly aware the trial was in progress.

There is no deficient performance or prejudice. Her testimony only establishes Jones' good character, prior to the murder, which was conceded by the prosecutors. There is no prejudice from failing to call a witness who would only testimony to a fact that was not disputed by the prosecution. There is no prejudice. The trial court properly denied these claims of ineffectiveness.

ISSUE III

Jones asserts that his trial counsel was ineffective for failing to argue some other motive than financial gain existed such as anger or revenge to preclude the pecuniary gain aggravator. There is no deficient performance. Counsel in fact argued that pecuniary gain was not the motive for the murder. Counsel argued that the motive was self-defense. There is no prejudice.

The trial court's ruling

> In ground four, Defendant claims counsel rendered ineffective assistance by failing adequately to contest the application of the pecuniary gain aggravating factor. Defendant contends that at the penalty phase, counsel should have presented argument as to a motive other than financial gain. Defendant asserts that there were other theories of motive to rebut the State's contention that the motive was financial gain but that counsel failed to present these other theories to the jury.
>
> Mr. Tassone, in fact, did argue that pecuniary gain was not a motive. He argued that ample independent records existed to prove Defendant's debt to Pablo Motors so that Jones' taking the records from Mr. Stow's office would not allow him to avoid the obligation. (TT. 1333-34). Moreover, Mr. Tassone noted that Jones left behind money found on Mr. Stow and in Ms. Stow's wallet, demonstrating that Jones was not motivated by financial considerations. (TT. 1333).
>
> Tassone was faced with a record that included his own client's testimony regarding a financial dispute with Ezra Stow. In his penalty phase argument, Tassone appropriately and understandably emphasized Defendant's lack of any

> prior criminal record, his family history and the value of his past and future life. (TT. 1337-40). The Court finds that Mr. Tassone's penalty phase argument on the pecuniary gain aggravator was "within the evidence range of reasonable professional assistance" and that Defendant has failed to show he was prejudiced by ineffective assistance of counsel.
>
> Moreover, Defendant raised this issue in his direct appeal.[2] The Florida Supreme Court found that the evidence was sufficient to support the aggravator of pecuniary gain.[3] Accordingly, the instant claim is barred by the law-of-the-case doctrine. *State v. McBride*, 848 So.2d 287 (Fla. 2003); *Florida Dep't of Transp. v. Juliano*, 801 So.2d 101 (Fla. 2001).

Evidentiary hearing testimony

At the evidentiary hearing, trial counsel did not explain why he seemed to start an argument in closing and not return to it. (EH Oct 21 at 102). However, his basic

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[2] Defendant challenged the sufficiency of the evidence presented to support the pecuniary gain aggravating factor. Specifically, Defendant alleged that "the evidence was insufficient to prove the pecuniary gain aggravator beyond a reasonable doubt because it failed to exclude a reasonably hypothesis that he entered the car dealership merely to work out an agreement with Ezra Stow regarding the car." *Jones v. State*, 690 So.2d 568, 570 (Fla. 1996).

[3] The Florida Supreme Court held "[a]lthough Jones already had physical possession of the car at the time of the crimes, based on the evidence in this case there is no reasonable hypothesis other than that Jones murdered Monique Stow and attempted to murder Ezra Stow in order to obtain ownership of the car and to resolve the problem over the dishonored check. The fact that the car papers were missing from Ezra Stow's desk after the murder and attempted murder support this finding as does the fact that after committing the crimes Jones disposed of car papers and the gun and hid the car." *Jones*, 690 So.2d at 570.

theory was that the motive for the murder was self-defense, not pecuniary gain, which he repeatedly presented at trial. (EH Oct 21 at 163). His opinion was that the prosecutors did an excellent job of presenting their version including establishing the motive was pecuniary gain. (EH Oct 21 at 130).

Procedural Bar

This claim is barred by the law of the case doctrine because it has already been litigated in the Florida Supreme Court adversely to the defendant. The Florida Supreme Court, on direct appeal, specifically rejected the claim that this murder was committed as a result of anger, finding the "record below contains competent, substantial evidence to support the trial court's finding that this was a premeditated murder committed for pecuniary gain rather than a killing resulting from out-of-control emotions." *Jones*, 690 So.2d at 572. The Florida Supreme Court specifically rejected the afterthought argument as well. *Jones*, 690 So.2d at 572 (stating the evidence also established that Monique was not killed as an afterthought). Jones may not raise an ineffectiveness claim when the underlying factual basis for the claim has already been rejected by this Court.

Merits

Post-conviction counsel seems to be faulting trial counsel for not being able to establish some other motive for the crime other than pecuniary gain. Counsel cannot change the facts of the crime. Counsel is not ineffective for not being able to pull a rabbit out of his hat or manufacture another motive. *Burris v. Farley*, 51 F.3d 655, 662 (7th Cir. 1995)(noting that "lawyers are not miracle workers" and that "most convictions follow ineluctably from the defendants' illegal deeds"). There is no deficient performance because trial counsel argued this to the extent that he could.

There is no prejudice. Jones asserts that the prejudice from counsel failure to argue another motive is that this Court affirmed the pecuniary gain aggravator. But this Court did not affirm based on argument but rather on the evidence. Argument is not evidence. This Court found that the "record below contains competent, substantial evidence to support the trial court's finding that this was a premeditated murder committed for pecuniary gain rather than a killing resulting from out-of-control emotions." *Jones*, 690 So.2d at 572.

Jones also asserts that the taking of the paperwork may have been an afterthought. This Court has already

rejected any afterthought theory. *Jones*, 690 So.2d at 572 (stating the evidence also established that Monique was not killed as an afterthought).

ISSUE IV

Jones asserts that the postconviction court erred in denying his motion to interview jurors.

The trial court's ruling

> In ground two, Defendant claims this Court's order denying his request to interview jurors violated his constitutional rights. Defendant contends this Court erred in denying his request based on the facts and the law raised in the notice of intention to interview jurors. Defendant, further, asserts that Rule 4-3.5(d)(4), Rules Regulating The Florida Bar, is unconstitutional. This Court addressed these claims by Defendant in a written order entered on March 25, 2002, (Ex. "A") and an opinion filed June 3, 2002. (Ex. "B"). Accordingly, for the reasons set forth in the prior order, Defendant's claims regarding juror interviews are denied.

Standard of review

The standard of review is abuse of discretion. *State v. Goldwire*, 762 So.2d 996 (Fla. 5th DCA 2000)(holding that the trial court abused its discretion by conducting a hearing on allegations of juror misconduct regarding a videotape label that was introduced at trial).

Procedurally Barred

This Court has repeatedly held that claim of juror misconduct are not proper in postconviction litigation. The claim should have been raised as error in the direct appeal of this case. They are not proper claims in postconviction proceedings when, as here, the basis of the

claim was known at the time of the direct appeal. *Parker v. State*, 2005 WL 673686, *6 (Fla. 2005)(rejecting a denial of his claim related to juror interviews and the trial court's failure to declare rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar unconstitutional because this claim should have been raised on direct appeal and concluding that it was procedurally barred from raising this issue); *Jennings v. State*, 782 So.2d 853, 864 (Fla. 2001)(holding that movant was procedurally barred from raising claim that he should have been allowed to interview jurors in postconviction proceedings because issue could have and should have been raised on direct appeal); *Gaskin v. State*, 737 So.2d 509, 512 n. 5, 513 n. 6 (Fla.1999) (same).[4]

In *Arbelaez v. State*, 775 So.2d 909 (Fla. 2000), the Florida Supreme Court, in the postconviction proceedings of a capital case, rejected Arbelaez's claim that he should have been permitted to conduct juror interviews. The Court found this claim to be "both procedurally barred and legally insufficient." The Court explained that any claims relating to Arbelaez's inability to interview jurors should

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[4] The newspaper article was not known until after sentencing. However, the other claims of juror misconduct raised in the motion to interview were known and the basis of a claim in the motion for new trial. The known claims could have been raised in the direct appeal. Moreover, any constitutional challenge to the rule could have been raised on direct appeal.

and could have been raised on direct appeal. Furthermore, Arbelaez did not make a prima facie showing of any juror misconduct in his postconviction motion. As the Court observed, "he appears to be complaining about a defendant's inability to conduct 'fishing expedition' interviews with the jurors after a guilty verdict is returned." Accordingly, the Court concluded that, even if the claims were not procedurally barred, Arbelaez would not be entitled to relief and no evidentiary hearing was required on his juror interview claim. *Arbelaez*, 775 So.2d at 920.

Merits

In *Johnson v. State*, 804 So.2d 1218 (Fla. 2001), the Florida Supreme Court held the trial court properly denied the juror interview claim. Johnson was an appeal from a summary denial of a 3.850 motion in a capital case. Johnson asserted that he was denied effective assistance of postconviction counsel because his postconviction attorneys were prohibited, by rule, from interviewing jurors. *Johnson*, 804 So.2d at 1225. The trial court found the claim to be untimely, procedurally barred, and failed to show any juror misconduct. This Court, citing *Arbelaez v. State*, 775 So.2d 909 (Fla.2000), classified Johnson claims as an impermissible "fishing expedition". The *Johnson* Court held that the trial court properly denied this claim

without an evidentiary hearing because it was "without merit and procedurally barred". *Johnson*, 804 So.2d at 1225.

<u>No Juror Misconduct</u>

Jones asserts that certain statements made by several of the jurors reported in a March 12, 1995 Jacksonville Times Union newspaper article are evidence of juror misconduct. However, none of these statements reveal any juror misconduct. Foreman McGee opined that if the defendant did it once [commit murder], he could do it again. This is a statement regarding "specific deterrence." Just as a prosecutor properly may make such arguments in closing to justify the imposition of the death penalty, a juror properly may use "specific deterrence" reasoning in reaching a decision regarding the death penalty. *Duren v. Hopper*, 161 F.3d 655, 662-663 (11th Cir. 1998)(holding prosecutor's argument concerning possible future murders by Duren or others are proper references to either specific or general deterrence); *Brooks v. Kemp*, 762 F.2d 1383, 1407 (11th Cir.1985)(en banc)(finding that arguments based on special and general deterrence are appropriate in light of accepted penalogical justifications for use of death as a punishment). Juror Rooks, who expressed sympathy for the defendant repeatedly, thought that the judge knew more about the case because the judge

had access to all the other documents and that it was good to have another opinion [the judge's] as a sort of check and balance on the jury's recommendation. Judges, in fact, often do know more about the case and have access to additional information about the defendant such as the PSI. *Muhammad v. State*, 782 So. 2d 343, 361-365 (Fla. 2001)(finding that the trial court erred by according great weight to the jury's death recommendation where the defendant refused to present mitigating evidence and requiring the trial court to order and consider the PSI and other available mitigation evidence, such as school records, military records, and medical records and call as court witnesses persons with mitigating evidence, regardless of the defendant wishes at the new sentencing hearing). This juror's endorsement of the checks-and-balances theory of decision making is just good common sense. Juror Jefson, who noted the "awesome responsibility" of making a death recommendation, was concerned about the victims and wanted to send a message to others who commit murder that death is a possible punishment but also expressed the view that this was a "one-time incident" and that Jones would not be a threat to society. Concern for the victims is not juror misconduct. Nor is the general deterrence rationale that this juror

expressed improper. penalty. *Duren*, 161 F.3d at 662-663; *Brooks*, 762 F.2d at 1407. Juror Jefson also stated that it helped people that the final decision was the judge's. This is an accurate statement of Florida law, not a violation of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). The final decision regarding the imposition of the death penalty is the judge's in Florida. This juror properly understood his role as that of co-sentencer but not final sentencer. Nothing in the newspaper accounts reveal any misconduct.

The jurors' statements reveal no misconduct. These jurors did not discuss any matter that they should not have discussed. The jurors did not say that the door influenced their decision or that the late hour caused them to "retreat from their previous individual decisions". Their statements merely show proper, normal, jury deliberations and thought processes. The trial court did not abuse its discretion by refusing to allow Jones to conduct a fishing expedition on these meritless allegations of juror misconduct.

This Court has rejected claims of ineffective assistance of counsel for failing to interview jurors. *Parker v. State*, 2005 WL 673686, *6 (Fla. 2005)(noting that the Court has "cautioned against permitting jury interviews

to support post-conviction relief for allegations which focus upon jury deliberations” and therefore, counsel could not inquire into the jury's deliberations as Parker asserts.). Here, trial counsel could not have moved to interview the jurors based on the newspaper article because jurisdiction over this case vested in this Court with the filing of the notice of appeal in 1994 and the article was not published until 1995. He was not attorney of record by this time, appellate counsel, was.

ISSUE V

Jones asserts that limiting his access to public records violates due process. This Court has repeatedly rejected due process challenges to the public records statute and rule. Trial counsel's files were destroyed in a fire after the trial was finished. Fires and floods are acts of god, not due process violations.

The trial court's ruling

> In ground 21, Defendant claims that his constitutional rights are being violated because his trial counsel's files have been destroyed by fire. Defendant contends that the destruction of the trial files prevents collateral counsel from providing adequate review and effective assistance. Mr. Tassone testified at the evidentiary hearing that subsequent to Defendant's trial, the files were stored in Mr. Tassone's office. Mr. Tassone testified that on March 21, 1994, "someone threw some molotov cocktails through the window of [his] office and two other offices that kind of form a triangle there in that area." (T.1, pg. 23). Mr. Tassone, further, testified that a "substantial" portion of his office was destroyed by the fire and, specifically, Defendant's files were destroyed in the fire. (T.1, pg. 24).
>
> Defendant's trial file was destroyed through no fault of any one directly involved in this case. Mr. Tassone's testimony establishes that the fire at his office was an uncontrollable and unforeseeeable act that was not intended purposely to destroy Defendant's trial file. Although the destruction of the trial file is unfortunate, this Court finds that the absence of a trial file has not prejudiced Defendant and thus a violation of Defendant's constitutional rights has not been established. Defendant was granted a hearing and was permitted to question Mr. Tassone concerning

> all aspects of his representation of Defendant. Accordingly, Defendant has been afforded a sufficient opportunity to adequately explore his claims for post-conviction relief.
>
> In ground 22, Defendant claims he is being denied his right to public records because Florida's law governing access to public records is unconstitutional. Defendant raises several specific challenges to the laws governing access to public records. Defendant, however, does not allege which public records he has been denied nor does he reference any specific records request that was denied improperly. Moreover, Defendant filed numerous public records requests all of which were complied with by the various agencies. Defendant has made no claim that he has been improperly denied any records he requested. Accordingly, Defendant's claim is denied.

<u>Evidentiary hearing</u>

At the evidentiary hearing, trial counsel testified that his files relating to this case were completely destroyed by fire. (EH Oct 21 at 23-24). The fire was the result of arson and occurred on March 21, 1994 shortly after the trial was complete. (EH Oct 21 at 23). The arsonist was not prosecuted in that case but was for a later arson. (EH Oct 21 at 155).

<u>Merits</u>

This Court has repeatedly rejected claims that the public records requirements violate due process. *Mills v. State*, 786 So.2d 547, 552 (Fla. 2001)(affirming denial of public records requests that were "overly broad, of

questionable relevance, and unlikely to lead to discoverable evidence" citing *Glock v. Moore*, 776 So.2d 243 (Fla. 2001) and *Sims v. State*, 753 So.2d 66 (Fla.2000) and observing that "it is equally clear that this discovery tool is not intended to be a procedure authorizing a fishing expedition for records unrelated to a colorable claim for postconviction relief."). Jones completely fails to acknowledge the controlling precedent against his position.

Fires are not a violation of due process or the right to counsel. Cf. *Bottoson v. State*, 674 So.2d 621, 624 (Fla. 1996)(holding trial counsel was not ineffective in failing to present the defendant's depression where the medical records were destroyed in a fire). Collateral counsel seems to be saying that anytime trial counsel's files are destroyed, whether by fire or flood, a defendant's constitutional rights are violated. Nothing that happened to counsel's files after the trial could affect Jones' trial rights. Moreover, because the files support trial counsel against a claim of ineffectiveness, the destruction of the records probably harms the State more than the defendant.

ISSUE VI

Jones asserts that the "prior" violent felony aggravator should encompass only "prior" felonies, not contemporaneous ones. This issue is procedurally barred. Jones is raising a statutory construction challenge to the aggravator. Such a challenge should have been raised in the direct appeal; it is not proper in post-conviction litigation. Moreover, this exact claim was not presented to the postconviction court. Postconviction counsel raised an ineffectiveness of trial counsel claim for failing to object to the aggravator on this basis, not a straight claim that the aggravator should be limited to prior felonies. Postconviction counsel may not raise one claim in the trial court and then morph the claim on appeal. Furthermore, the challenge is meritless. This Court has repeatedly rejected such challenges to the prior violent felony aggravator.

The trial court's ruling

> In ground three, Defendant claims counsel rendered ineffective assistance by failing to know the law, failing to argue effectively or failing to object to evidence and argument at trial. Defendant claims counsel failed to object to the penalty phase instruction on the aggravating factor of "prior violent felony." During the penalty phase, the Court instructed the jury that Defendant had previously been convicted of the attempted first degree murder of Ezra Stow. Defendant contends that since

> Defendant was convicted of the attempted murder and the first-degree murder in the same case, the attempted murder conviction was a contemporaneous conviction rather than a prior conviction and should not have been weighed as an aggravator to support a death sentence. Defendant argues that the State should not have been permitted to use the contemporaneous conviction to support the aggravator of prior violent felony. Defendant had no significant criminal history prior to the March 3, 1992, shooting at San Pablo Motors.
>
> At the evidentiary hearing, Mr. Tassone testified that he did not recall filing any motions to challenge the use of the contemporaneous conviction. (T.1, pg. 33). However, any objection would have been meritless. The use of contemporaneous convictions prior to sentencing can qualify as previous convictions. *Francis v. State*, 808 So.2d 110, 136 (Fla. 2001); and *Mahn v. State*, 714 So.2d 391 (1998). "Trial counsel cannot be deemed ineffective for failing to raise meritless claims or claims that had no reasonable probability of affecting the outcome of the proceeding." *Teffeteller v. Dugger*, 734 So.2d 1009, 1023 (Fla. 1999). Accordingly, Defendant has failed to demonstrate error on the part of counsel or prejudice to his case.

Evidentiary hearing

At the evidentiary hearing, trial counsel testified that he could not recall making an objection on this basis or his reasoning for not doing so. (EH Oct 21 at 33). Trial counsel testified that he did not like using a contemporaneous felony as a "prior" violent felony aggravator because it could be confusing to a jury who was also being asked to weigh the no significant criminal history mitigator. (EH Oct 21 at 35). Trial counsel agreed

that the law, both at the time of trial and currently, allows the state to use a contemporaneous murder to establish the prior violent felony aggravator. (EH Oct 21 at 127).

Procedural Bar

This claim is procedurally barred in postconviction litigation. *Thompson v. State*, 796 So.2d 511, 514 n.5 (Fla. 2001)(rejecting an automatic aggravator attack on the felony murder aggravator in post-convition litigation as procedurally barred because it should have been raised on direct appeal); *Vining v. State*, 827 So.2d 201, 213 (Fla. 2002)(finding the substantive claim that death sentence rests on an unconstitutional automatic aggravating circumstance should have been raised on direct appeal and thus is procedurally barred). If Jones wanted to challenge this Court's interpretation of the prior violent felony aggravator, he needed to do so in his direct appeal.

Merits

The Florida Supreme Court held repeatedly that a contemporaneous murder may be used to establish a prior violent felony aggravator. *Francis v. State*, 808 So.2d 110, 136 (Fla. 2001)(stating that "[t]his Court has repeatedly held that where a defendant is convicted of multiple murders, arising from the same criminal episode, the

contemporaneous conviction as to one victim may support the finding of the prior violent felony aggravator as to the murder of another victim.”); *Knight v. State*, 746 So.2d 423, 434 (Fla.1998)(explaining that under *Elledge v. State*, 346 So.2d 998 (Fla.1977), and its progeny, previous violent felony convictions suffice for purposes of the prior violent felony aggravator so long as the convictions predate the sentencing); *Lucas v. State*, 376 So.2d 1149, 1152-1153 (Fla.1979). The trial court properly denied this meritless claim.

Victim Impact

Jones asserts that his trial counsel was ineffective for failing to request a limiting instruction regarding victim impact evidence. There is no deficient performance Trial counsel objected for the record. Nor is there any prejudice because this was innocuous victim impact evidence.

Trial

During the penalty phase, the State presented the testimony of Carol West as victim impact testimony. (XXII 1221). She was the mother of a boyfriend of Monique Stow who knew the victim for about one year. She was the State’s sole witness and her testimony lasted two pages. She testified that the victim was a “peaceful, friendly,

loving” person which was the extent of her testimony. (1222). On cross, defense counsel established that the witness had only known the victim for approximately one year. (1222). Prior to Ms. West’s testimony, the prosecutor proffered her testimony. (1215-1217). Defense counsel, Mr. Tassone, objected to the testimony and clarified that his objection was to the statute for purposes of preserving the objection for appellate review. (1217, 1219).

Evidentiary hearing

At the evidentiary hearing, counsel testified he did not recall the reason he did not request a limiting instruction regarding the proper use of victim impact evidence. (EH Oct. 21 at 53-56,171-173). However, he testified that such limiting instructions are usually ineffective. (EH Oct. 21 at 57). Trial counsel acknowledged that the victim impact evidence introduced by the State was very limited in nature and was “not as much as I have had in other even non-capital cases” (EH Oct. 21 at 136). Trial counsel acknowledged that he was aware that the State had numerous victim impact witnesses that it could have called but refrained from doing so through discovery and because many of them attended the trial and that the state did not argue victim impact in closing. (EH Oct. 21 at 137).

The trial court's ruling

> In ground nine, Defendant claims counsel rendered ineffective assistance by failing to request a limiting instruction concerning the victim impact evidence presented during the penalty phase. Defendant concedes in his motion that counsel objected to the admission of the victim impact evidence but contends that the jury was never instructed how to evaluate such evidence could not be considered an aggravating factor.
>
> Florida has passed legislation that allows victim impact evidence to be presented during the penalty phase. Section 921.141(8), Florida Statues. Additionally, the Florida Supreme Court has held that victim impact testimony is permitted during the penalty phase of a capital trial. Windom v. State, 656 So. 2d 432 (Fla. 1995). Witnesses who provide victim impact testimony are limited to testimony that addresses the victim's uniqueness and the loss of the victim to the community. Id.; Section 921.141(8), Florida Statues. Witnesses providing such testimony cannot provide opinions and characterizations about the crime. Payne v. Tennessee, 501 U.S.808 (1991).

Merits

There is no deficient performance. Rather than requesting a limiting instruction, trial counsel objected to the testimony altogether. Counsel objected for the record to raise the issue in the Florida Supreme Court. Counsel decided to challenge the statute at the appellate court level by preserving the issue for appeal at a time when the admissibility of this evidence was still an open question. *Windom v. State*, 656 So.2d 432, 438 (Fla.1995).

The trial in this case was held in February of 1994 just prior to the decision in *Windom*. There is no deficient performance.

Nor is there any prejudice. Victim impact evidence is admissible in Florida. *Farina v. State*, 801 So.2d 44, 52 (Fla. 2001)(noting both the Florida Constitution and the Florida Statutes instruct that victim impact evidence is to be heard citing art. I, § 16, Fla. Const. and § 921.141(7), Fla. Stat. (2000)); *Burns v. State*, 699 So.2d 646, 653 (Fla.1997)(rejecting challenges to the victim impact statute based upon claim that it allows the admission of irrelevant evidence which does not pertain to any aggravator or mitigator). A friend, who knew the victim, testifying that she was friendly is the most innocuous victim impact testimony imaginable. Indeed, it is not really impact evidence at all. Ms. West did not describe, in any manner, what impact the victim's death had on her or anyone else. True victim impact evidence is the describing how the child misses his mother and cries for her. *Payne v. Tennessee*, 501 U.S. 808, 823, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991)(allowing grandmother's testimony that young boy who lost his mother and his sister "cries for his mom," "doesn't seem to understand why she doesn't come home," misses his sister and worries about her).

Jones asserts that it is a non-statutory aggravating factor. However, it is statutorily authorized. § 921.141(7), Fla. Stat. (1994)

Shifting the Burden

Jones asserts that trial counsel was ineffective for failing to object to the jury instruction on mitigating circumstances outweighing aggravating circumstances because it improperly shifted the burden to the defendant to prove life was the appropriate sentence. There is no deficient performance or prejudice. This Court has repeatedly rejected such claims.

The trial court's ruling

> Mr. Tassone testified at the evidentiary hearing that he did not recall filing any special jury instructions or specifically objecting to the issue of burden shifting. (T.1, pg. 28.) The record reveals that the penalty phase instructions. Florida Standard Jury Instructions (1993). (T.T. 1219-1220; 1341-1346.)
>
> Initially, this Court finds the instant claim is procedurally barred because it could have and should have been raised on direct appeal. *Sireci v. State*, 773 So. 2d 34 (Fla. 2000); *Harvey v. Dugger*, 656 So. 2d 1253 (Fla. 1995). Defendant may not attempt to circumvent this procedural bar by inserting conclusory allegation of ineffective assistance of counsel. *Thompson v. State*, 796 So. 2d 511, n. 5. (Fla. 2001). Moreover, the Florida Supreme Court has rejected Defendant's claim that counsel was ineffective for failing to object to the penalty phase instructions as improperly shifting the burden to Defendant to establish that mitigators outweighed aggravators. *Thompson v. State*, 796

> So. 2d 511, n. 5. (Fla. 2001); *Downs v. State*, 740 So.2d 506 (Fla. 1999); *Harvey v. Dugger*, 656 So.2d 1253 (Fla. 1995); *Shellito v. State*, 701 So.2d 837 (Fla. 1997). Accordingly, counsel cannot be deemed ineffective for failing to raise an objection. *Teffeteller*, 734 So.2d 1009.

Evidentiary hearing

At the evidentiary hearing, counsel testified that he perceived his duty to preserve any issue that adversely impacts his client regardless of the current position of the appellate courts. (EH Oct. 21 at 28). Trial counsel testified that the judge was a "stickler" for the standard jury instruction which he "always used" and would ask counsel why he should use counsel's instruction over those prepared by the Florida Supreme Court. (EH Oct. 21 at 138).

Merits

There is no deficient performance. While trial counsel's attitude regarding his duty is admirable, it is not the legal test for ineffectiveness. Counsel has no duty to object to jury instructions that both the federal and state courts have affirmed. This court has repeatedly rejected such ineffectiveness claims. *Sweet v. Moore*, 822 So.2d 1269, 1274 (Fla. 2002)rejecting an ineffective assistance of appellate counsel claim based on burden shifting); *Harvey v. Dugger*, 656 So.2d 1253, 1257, n.5 (Fla.1995)(finding ineffective assistance of counsel claim

based on counsel's failure to object to jury instruction that allegedly shifted burden to defense to establish that mitigators outweighed aggravators to be without merit as a matter of law); *Teffeteller v. Dugger*, 734 So.2d 1009, 1024 (Fla. 1999)(rejecting an ineffectiveness claim for failing to object to the jury instructions which shifted the burden to him to prove that the mitigating circumstances outweighed the aggravating circumstances because "[w]hen viewed as a whole, the instructions given by the court did not shift the burden of proof to the defendant.").

Furthermore, there is no prejudice because the Florida Supreme Court has held that the instruction is proper. *Griffin v. State*, 866 So.2d 1, 14 (Fla. 2003)(noting: "[w]e have also repeatedly rejected claims that the standard jury instruction impermissibly shifts the burden to the defense to prove that death is not the appropriate sentence citing *Sweet v. Moore*, 822 So.2d 1269, 1274 (Fla.2002); *Carroll v. State*, 815 So.2d 601, 622-23 (Fla.2002); *San Martin v. State*, 705 So.2d 1337, 1350 (Fla.1997)(concluding that weighing provisions in Florida's death penalty statute requiring the jury to determine "[w]hether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist" and the standard

jury instruction thereon did not unconstitutionally shift the burden to the defendant to prove why he should not be given a death sentence). The Eleventh Circuit has also rejected a burden shifting attack on Florida's jury instructions. *Cave v. Singletary*, 971 F.2d 1513,1521(11th Cir. 1992)(finding that no improper shifting of the burden of proof occurred because Florida's instructions makes clear that the burden is on the State to establish beyond a reasonable doubt the existence of an aggravating circumstance, while the defendant need only reasonably convince the jury that a mitigating circumstance exists). Because neither the Florida Supreme Court nor the Eleventh Circuit has found any merit to such claims, there is no prejudice.

Caldwell claim

Jones asserts his trial counsel was ineffective for failing to object to the jury instructions as a violation of *Caldwell v. Mississippi*, 472 U.S.320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). There is no deficient performance. There was no basis for an objection because the jury instructions are perfectly proper. Counsel is not ineffective for failing to make baseless objections. Nor is there any prejudice. Both this Court and the Eleventh

Circuit have rejected *Caldwell* challenges to Florida's jury instructions. The trial court properly denied this claim.

The trial court's ruling

> In ground 11, Defendant claims counsel rendered ineffective assistance by failing to object to the improper penalty phase instructions pursuant to Caldwell v. Mississippi, 472 U.S. 320 (1985). Defendant contends that the penalty phase jury instructions improperly minimized and denigrated the role of the jury. Defendant claims that the instructions repeatedly referred to the jury's role in sentencing as advisory and minimized the jury's sense of responsibility for determining the appropriateness of a death sentence.
>
> Mr. Tassone testified at the evidentiary hearing that he did not recall filing any type of challenged based on Caldwell. (T.1, pg. 30). This Court notes the penalty phase instructions given in the instant case were the standard penalty phase instructions. (T.T. 1219-1220; 1341-1346). The Florida Supreme Court has held that Florida's standard penalty-phase instructions do not violate *Caldwell*. See *Thomas v. State*, 838 So.2d 535 (Fla. 2003); *Combs v. State*, 525 So.2d 853 (Fla. 1988). Accordingly, counsel cannot be deemed ineffective for failing to raise an objection. *Teffeteller*.

Evidentiary hearing

At the evidentiary hearing, trial counsel testified that he had studied the *Caldwell* opinion at one time, but could not recall making an objection based on Caldwell or his reasoning for not doing so. (EH Oct 21 at 28-29). However, it was brought to his attention that in fact he

had filed a pretrial Caldwell motion which was denied. (EH Oct 21 at 138).

Merits

There is no deficient performance nor is there any prejudice because the jury instructions do not violate *Caldwell*. In *Caldwell*, the prosecutor's comments at sentencing violated the Eighth Amendment by leading the jury to believe that ultimate responsibility for determining the appropriateness of the death sentence rested with the state supreme court. However, to establish a *Caldwell* violation, a defendant necessarily must show that the remarks improperly described the role assigned to the jury by local law. *Romano v. Oklahoma*, 512 U.S. 1, 9, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994)(clarifying *Caldwell*). The trial court's statement to the jury regarding their sentencing role is an accurate description of Florida law, and therefore, does not amount to a *Caldwell* violation. ; *Brown v. State*, 721 So.2d 274, 283 (Fla.1998)(holding that the standard jury instructions fully advise the jury of the importance of its role, correctly state the law, do not denigrate the role of the jury, and do not violate *Caldwell*); *Davis v. Singletary*, 119 F.3d 1471, 1482 (11th Cir. 1997)(describing jury's sentencing verdict as advisory, as recommendation to judge, and describing judge

as final sentencing authority is an accurate statement of Florida law and, therefore, does not violate *Caldwell*); *Lowery v. Anderson*, 225 F.3d 833, 841 (7th Cir. 2000)(holding that trial judge's statement that the "jury's decision is merely a recommendation" is an accurate statement of Indiana law and, therefore, does not violate *Caldwell*); *Scott v. Mitchell*, 209 F.3d 854, 877 (6th Cir. 2000)(holding that trial judge's statement to the jury that its recommendation of death would be "just that--a recommendation," is an accurate statement of Ohio law and, therefore, does not violate *Caldwell*). Florida's jury instructions do not mislead the jury as to its role in the sentencing process. This Court has also reaffirmed that Florida jury instruction do not violate *Caldwell* in the wake of *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). *Globe v. State*, 877 So.2d 663, 673 (Fla. 2004)(explaining that *Caldwell* and *Ring* involve independent concerns because *Ring*'s focus is on jury findings that render a defendant eligible for the death penalty, while *Caldwell* centers on the jury's role in the decision to impose death upon death-eligible defendants).

This Court has rejected claims that counsel was ineffective for failing to make *Caldwell* objections. *Johnson v. State*, 2005 WL 729169, 15 (Fla. 2005)(rejecting

an ineffectiveness claim for failing to make a *Caldwell* objection because counsel cannot be deemed ineffective for failing to raise a nonmeritorious issue). The trial court properly denied this claim.

Catch-all mitigation instructions

Jones asserts that his trial counsel was ineffective for failing to object to the catch-all jury instruction on mitigation because it does not explain the nature, meaning and effect of mitigation. There was no deficient performance. Nor was there any prejudice.

The trial court's ruling

> In ground 12, Defendant claims counsel rendered ineffective assistance by failing to object to the penalty phase jury instructions not he grounds that the instructions improperly instructed the jury regarding the nature, meaning and effect of mitigation. Defendant contends that the penalty phase instructions failed to define what mitigation was and failed to instruct the jury that mitigation evidence must be considered.
>
> Defendant does not alleged what instruction should have been requested by counsel that would have adequately defined a mitigating circumstance. Further, none of the many cases cited by Defendant in his motion addresses the issue of failure of a Florida trial court adequately to instruct the jury on the definition of mitigating factors. The Florida Supreme Court has repeatedly upheld the standard jury instructions in capital cases. *Gamble v. State*, 659 So.2d 242 (Fla. 1995). The standard instructions were given in the instant case. (T.T. 1219-1220; 1341-1346). Accordingly, there was nothing improper about the instructions and

> counsel cannot be deemed ineffective for failing to raise a meritless objection. *Teffeteller*.

Evidentiary hearing

At the evidentiary hearing, trial counsel testified that he could not recall making an objection on this basis or his reasoning for not doing so. (EH Oct 21 at 32). Trial counsel noted that the State had conceded at trial that the defendant's background was golden. (EH Oct 21 at 132; EH Oct 23 108).

Merits

There is no deficient performance nor prejudice because courts have held that the "catch-all" standard jury instruction on nonstatutory mitigation when coupled with counsel's right to argue mitigation is sufficient. The language of the catch-all, "any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death" is from *Lockett*. *Lockett*, 438 U.S. at 604, 98 S.Ct. 2954. Through the combination of counsel's arguments and the catch-all instruction, the jury would know that it could consider anything to be mitigating. The due process right to inform the jury may be satisfied either through a jury instruction or argument of counsel. *Simmons v. South Carolina*, 512 U.S. 154, 114

S.Ct. 2187, 129 L.Ed.2d 133 (1994)(O'Connor, J., concurring)(holding that due process entitles the defendant to inform the jury of his parole ineligibility, either by a jury instruction or by counsel's argument). A capital defendant receives both a general jury instruction on mitigation and the right to present specific argument by counsel.

In *Boyde v. California*, 494 U.S. 370, 381, 110 S.Ct. 1190, 1198, 108 L.Ed.2d 316 (1990), the United States Supreme Court upheld a catch-all mitigating jury instruction. California's general mitigating instruction, referred to as factor (k), allowed the jury to consider: "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Boyde argued that this jury instruction violated the Eighth Amendment because it did not allow the jury to consider his background and character as mitigating evidence because the language "extenuates the gravity of the crime" limited mitigating circumstances to those related to the crime. The *Boyde* Court reasoned that there was no reasonable likelihood that the jury interpreted the catch-all instruction as preventing consideration of mitigating background and character evidence. The Supreme Court noted defense counsel had stressed a broad reading of the

instruction in his argument to the jury: "[I]t is almost a catchall phrase. Any other circumstance, and it means just that, any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse." The Supreme Court also noted the prosecutor never suggested that Boyde's mitigation evidence could not be considered. The Supreme Court noted that the jury was unlikely to engage in "technical hairsplitting"; rather, the jury was likely to engage in "commonsense understanding" of the instruction. The Supreme Court found that the instruction language "any other circumstance" certainly included a defendant's background and character.

California's catch-all instruction at issue in *Boyde* was more narrow than Florida's catch-all instruction which contains no "extenuates the gravity of the crime" limiting language. Florida's catch-all instruction allows the jury to consider "any other aspects of the defendant's character or record" as mitigating evidence.

The Florida Supreme Court has held repeatedly that the "catch-all" standard jury instruction on nonstatutory mitigation, when coupled with counsel's right to argue mitigation, is sufficient. *Belcher v. State*, 851 So.2d 678, 684-85 (Fla.), *cert. denied*, 540 U.S. 1054, 124 S.Ct. 816, 157 L.Ed.2d 706 (2003); *Downs v. Moore*, 801 So.2d 906, 913

(Fla. 2001)(holding that the "catch-all" standard jury instruction on nonstatutory mitigation when coupled with counsel's right to argue mitigation is sufficient to advise the jury on nonstatutory mitigating circumstances); *Booker v. State*, 773 So.2d 1079, 1091 (Fla.2000); *Zakrzewski v. State*, 717 So.2d 488, 495 (Fla.1998); *Elledge v. State*, 706 So.2d 1340, 1346 (Fla.1997); *James v. State*, 695 So.2d 1229, 1238 (Fla.1997). There was no basis for an objection. This Court has rejected ineffective assistance of counsel claim for failing to object to the catch-all. *Johnson v. State*, 2005 WL 729169, 14 (Fla. 2005)(rejecting an ineffectiveness claim for failing to object to the nonstatutory mitigating circumstance jury instruction because counsel cannot be deemed ineffective for failing to raise a nonmeritorious issue).

ISSUE VII

Jones argues that he is innocent of the death penalty. This claim was not raised below. Moreover, this is not a proper "innocent of the death penalty" claim. Jones is actually raising a legal, not a factual, challenges to his death sentence. This claim is procedurally barred because the claim underlying his innocence of the death penalty argument are claims which should have been (and some of which were) raised in the direct appeal.

The trial court's ruling

The trial court did not rule on this claim because it was not raised below.

Procedurally barred

This claim is procedurally barred. The individual claims underlying Jones' "innocence of the death penalty" argument should have been raised on direct appeal. Moreover, some of the component parts of this claim were, in fact, raised on direct appeal. Both the sufficiency of the evidence to support the pecuniary gain and the CCP aggravator were raised on direct appeal and are, therefore, barred by the law of the case doctrine in postconviction litigation. *Jones*, 690 So.2d at 570 (stating: "[w]e agree that killing for the purpose of obtaining a car constitutes commission of a murder for pecuniary gain and that this

aggravating factor is present in this case"); *Jones v. State*, 690 So.2d 568, 571 (Fla.1996)(explaining that "even if Jones had properly preserved his *Jackson* claim, any error in instructing the jury on the CCP aggravator would have been harmless beyond a reasonable doubt because of the extent of the evidence supporting that aggravator . . ."). This claim is procedurally barred.

Merits

Innocence of the death penalty means actual, factual innocence of the death penalty. For example, if a defendant is sentenced to death based solely on the prior violent felony aggravator, but the prior conviction is vacated, then the defendant would have a valid innocent of the death penalty claim. Cf. *Johnson v. United States*, 125 S.Ct. 1571 (Apr 04, 2005). Legal claims such as "contradictory jury instructions" and "unconstitutionally vague and overbroad" jury instructions, however, are not proper claims of innocence of the death penalty. Counsel is attempting to relitigate this Court's affirmance of the aggravators and finding of proportionality via the label "innocence of the death penalty."

ISSUE VIII

Jones asserts that his death sentence violates *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). First, *Ring* is not retroactive. Moreover, this Court has repeatedly denied *Ring* challenges. Furthermore, the jury made a contemporaneous finding of the prior violent aggravator in the guilt phase by convicting Jones of attempted murder. So, any *Ring* claim is meritless.

<u>The trial court's ruling</u>:

> Defendant argues that Florida's death penalty statute, section 921.141 Florida Statutes (2003), is unconstitutional under the holdings in *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Defendant was found guilty of first degree murder of Monique Stow and the attempted first degree murder of Ezra Stow. He was convicted of these two crimes and the jury was instructed, and the trial court relied, on the aggravating circumstance of a previous conviction of a violent felony based on the contemporaneous attempted murder conviction.
>
> The Supreme Court of Florida has denied relief even in direct appeals where there has been a prior violent felony aggravator. See *Davis v. State*, 28 Fla.L.Weekly S835 (Fla. November 20, 2003); *Duest v. State*, 855 So.2d 33, 49 (Fla. 2003); See also *Doorbal v. State*, 837 So.2d 940, 963 (Fla. 2003) (stating that prior violent felony aggravator based on contemporaneous crimes charged by indictment and of which defendant was found guilty by a unanimous jury "clearly satisfies the mandate of the United States and Florida constitutions"). The Supreme Court has also denied relief to post-conviction defendants raising this issue. See *Davis v. State*, 28 Fla.L.Weekly S835 (Fla.,

November 20, 2003); *Jones v. State*, 855 So.2d 611, 619 (Fla. 2003); *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002); *King v. Moore*, 831 So.2d 143 (Fla. 2002); and *Sergini*, 123 S.Ct. 657 (2002). Defendant is not entitled to relief on this issue.

Retroactivity

Jones' conviction and sentence were final in 1997, which was five years before *Ring* was decided in 2002. For Jones to obtain relief, *Ring* would have to be applied retroactively. *Ring*, however, is not retroactive. The United States Supreme Court has held that Ring is not retroactive. *Schriro v. Summerlin*, - U.S. -, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004). The *Summerlin* Court reasoned that jury findings do not seriously increase accuracy and therefore, *Ring* is not retroactive. The Florida Supreme Court has also held that *Ring* is not retroactive. *Monlyn v. State*, - So.2d -, 29 Fla. L. Weekly S741, 2004 WL 2797191 (Fla. Dec. 2, 2004)(Cantero, J., concurring)(advocating the adoption of the federal test for retroactivity and concluding *Ring* is not retroactive under *Teague v. Lane*, 489 U.S. 288 (1989)); *Monlyn v. State*, - So.2d -, 2004 WL 2797191, 29 Fla. L. Weekly S741 (Fla. Dec. 2, 2004)(Pariente, J., concurring)(using the state test for retroactivity and concluding *Ring* is not retroactive under *Witt v. State*, 387 So.2d 922 (Fla. 1980)). Justices

Cantero, Wells, Bell, Pariente and Quince all agreed that *Ring* is not retroactive, albeit under different test of retroactivity. Because five of the seven Justices of the Florida Supreme Court agreed that *Ring* is not retroactive, this is the holding of the *Monlyn* Court. Moreover, in an earlier decision, three Justices, while advocating the adoption of federal retroactivity test, had concluded that *Ring* was not retroactive under the state retroactivity test either. *Windom v. State*, 886 So.2d 915 (Fla. 2004)(Cantero, J., concurring)(concluding *Ring* not retroactive under either *Teague* or *Witt*). So, five Florida Supreme Court Justices also agree that *Ring* is not retroactive under state law either. *Ring* is not retroactive under either federal or state law.

Merits

The Florida Supreme Court has repeatedly rejected *Ring* challenges to Florida's death penalty statute. *Johnson v. State,* 2005 WL 729169, *15 (Fla. 2005)(noting that "this Court has repeatedly rejected similar claims" citing *Bottoson v. Moore*, 833 So.2d 693 (Fla.), *cert. denied*, 537 U.S. 1070, 123 S.Ct. 662, 154 L.Ed.2d 564 (2002); *King v. Moore*, 831 So.2d 143 (Fla.), *cert. denied*, 537 U.S. 1067, 123 S.Ct. 657, 154 L.Ed.2d 556 (2002). The jury made a finding of the prior violent felony aggravator in the guilt

phase by convicting Jones of the attempted murder of Ezra Stow. One of the aggravators was found by jury in the guilt phase. *Johnson v. State,* 2005 WL 729169, *15 (Fla. 2005)(rejecting a *Ring* claim in part because one of the aggravating circumstances found by the trial court in the case was Johnson's prior conviction of a violent felony, "a factor which under *Apprendi* and *Ring* need not be found by the jury" citing *Jones v. State*, 855 So.2d 611, 619 (Fla.2003)); *Doorbal v. State*, 837 So.2d 940, 963 (Fla.) (rejecting *Ring* claim where one of the aggravating circumstances found by the trial judge was defendant's prior conviction for a violent felony), *cert. denied*, 539 U.S. 962, 123 S.Ct. 2647, 156 L.Ed.2d 663 (2003). Jones' death sentence does not violate *Ring*.

ISSUE IX

Jones contends that Florida's death penalty statute violates *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) and *Mullaney v. Wilbur*, 421 U.S. 684, 702-703 n. 31, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) because it does not contain a standard of proof for determining whether aggravators outweigh mitigators. Weighing is not a fact with an associated standard of proof; rather, it is a moral judgment not subject to a standard of proof. The weighing process is not fact-finding; rather, it is a balancing process carried out after the facts are found. *Waldrop v. State*, 2002 WL 31630710 (Ala. Nov. 22, 2002)(rejecting a claim that *Ring* required the weighing be done with the beyond a reasonable doubt standard of proof because "the weighing process is not a factual determination and is not susceptible to any quantum of proof; rather, the weighing process is a moral or legal judgment that takes into account a theoretically limitless set of facts); *Borchardt v. State*, 786 A.2d 631, 637-654, 653, n.6 (Md. App. 2001)(rejecting a claim that, pursuant to *Apprendi*, due process requires a determination that the aggravating circumstances outweigh any mitigating circumstances to be made beyond a reasonable doubt); *Whisenhant v. State*, 482 So.2d 1225, 1235 (Ala. Crim. App.

1982), aff'd, 482 So.2d 1241, 1245 (Ala. 1983)(observing that while the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard, . . . the relative weight is not); *People v. Rodriguez*, 726 P.2d 113, 144 (Cal. 1986) (observing the sentencing function is inherently moral and normative, not factual); *State v. Sivak*, 674 P.2d 396, 401 (Idaho 1983)(observing weighing process not susceptible to proof); *Moore v. State*, 479 N.E.2d 1264, 1281 (Ind. 1985) (observing weight is not fact, but "balancing process"); *State v. Bolder*, 635 S.W.2d 673, 684 (Mo. 1982) (en banc) (observing weighing is not a factual determination, but "a more subjective process"); *Johnson v. State*, 731 P.2d 993, 1005 (Okla. App. 1987)(observing it is not factual, but a "balancing process"); *Ford v. Strickland*, 696 F.2d 804, 818 (11th Cir. 1983)(distinguishing proof of facts from the weighing of facts).

ISSUE X

Jones contends that lethal injection is cruel and unusual punishment.[5] This Court has repeatedly and consistently rejected Eighth Amendment challenges to lethal injection. *Sochor v. State*, 883 So.2d 766, 789 (Fla. 2004)(stating that a claim that execution by electrocution or by lethal injection constitutes cruel and unusual punishment "is without merit" citing *Sims v. State*, 754 So.2d 657, 668 (Fla. 2000)(holding that execution by lethal injection is not cruel and unusual punishment)); *Provenzano v. State*, 761 So.2d 1097, 1099 (Fla. 2000)(holding that "execution by lethal injection does not amount to cruel and/or unusual punishment.").

[5] This issue is listed in the table of contents and the summary of the argument, however, no such issue is included in the body of the brief.

CONCLUSION

The State respectfully requests this Honorable Court affirm the trial court's denial of the postconviction motion following an evidentiary hearing.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Robert Norgard, P.O. Box 811, Bartow, Florida 33831, this 19th day of April, 2005.

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Certificate of Compliance

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