IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-866

HENRY GARCIA,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

On October 9, 1985, Defendant, along with codefendant Enrique Fernandez, were charged by indictment with the first degree murder of Julia Ballentine, the first degree murder of Mabel Avery, the sexual battery of Ms. Ballentine and the armed burglary of the home of Ms. Ballentine and Ms. Avery. (DAR. 1-3a)[1] The crimes were alleged to have been committed between January 14 and 17, 1983. *Id.*

The matter proceeded to trial in 1988, and Defendant was convicted and sentenced to death for each of the murders. (R. 4, 7)[2] Defendant appealed his conviction and sentences to this Court, which reversed because the trial court had erred in excluding payroll records but allowing the State to comment on the lack of records. *Garcia v. State*, 564 So. 2d 124 (Fla. 1990).

On remand, the matter proceeded to trial on May 13, 1994. (DAR. 4) After considering the evidence and arguments of counsel, the jury found Defendant guilty as charged on each count on May 23, 1991. (DAR-SR. 22-25) The trial court

[1] The symbols "DAR." And "DAR-SR." will refer to the record on appeal, which includes the transcript of proceedings, and the supplemental record on appeal from Defendant's last direct appeal, FSC Case No. 78,411.

[2] The symbols "R." and "SR." will refer to the record on appeal and supplemental record on appeal from these proceedings.

adjudicated Defendant in accordance with the jury's verdicts. (DAR. 125-26)

The penalty phase was conducted on May 28, 1991. (DAR. 26-28) At the conclusion of the penalty phase, the jury unanimously recommended the death penalty for Ms. Ballentine's murder but recommended life by a vote of 7 to 5 for Ms. Avery's murder. (DAR. 188) The trial court followed the jury's recommendation regarding Ms. Ballentine but overrode the jury's recommendation regarding Ms. Avery and imposed death for both of the murders. (DAR. 188-93) The trial court also sentenced Defendant to life imprisonment for the sexual battery and for the burglary. (DAR. 127-29) Each of the sentences was to be served consecutively to each of the other sentences. *Id.*

The facts, as found by this Court, are:

> The record reveals that two elderly sisters, eighty-six-year-old Mabel and ninety-year-old Julia, an invalid, shared a house in a residential area in the Leisure City area of Homestead, Florida. On Monday morning, January 17, 1983, neighbors became concerned when the two sisters failed to answer the phone. Several neighbors gathered at the sister's house and began to knock on the door and windows. As the neighbors proceeded around the house they discovered that the screen door at the back of the house was slashed and that several panes from the jalousie door were broken. One of the neighbors pushed his way in through the door and found the bloody bodies of the sisters in the back bedrooms. Mabel's body was found against the wall in her bedroom. The body was in a sitting position, as if Mabel had been cornered. An examination revealed fourteen stab wounds on the body and nine defensive-type wounds on the arms and hands.

Julia's body was found on the floor of her bedroom face down with her legs spread apart. There were thirty stab wounds on her body, including twelve defensive injuries. In addition, the medical examiner testified that, due to injuries to her vagina and anal canal, it was clear that a sexual battery had occurred on Julia while she was alive.

Based on his examination and other evidence at the crime scene, the medical examiner testified that the two sisters had died in the early morning hours of Sunday, January 16, 1983. This time frame was corroborated by the testimony of a neighbor who lived directly behind the sisters and who stated that she had been awakened at 6 a.m. on the 16th by the sound of breaking glass.

The State produced the following evidence, most of which was circumstantial, to establish [Defendant] as the perpetrator of these offenses. Feliciano, a social and work acquaintance of [Defendant's], was a crew chief who worked the crop fields in South Dade County. He lived with his mother, father, wife, and children in a house that was half a mile away from Mabel and Julia's house. [Defendant], at that time, lived with other family members in a South Dade County labor camp, which was approximately twelve miles away. On the evening of January 15, 1983, Feliciano and [Defendant] went to a pool hall and played pool for a while before they returned to the South Dade County labor camp where [Defendant] was to have a date with a young lady. The young lady, however, decided to go out with someone else and Feliciano testified that [Defendant] became upset and asked Feliciano to take him back to Leisure City, which was not far from either the victim's house or Feliciano's house. Feliciano dropped off [Defendant] at the Leisure City Lounge, but, before doing so, tried to convince [Defendant] to go back home that evening.

Feliciano's mother testified that at about 7 a.m. on the morning of the murders, she looked out her bathroom window and saw [Defendant] running toward her house. [Defendant] was coming from the direction of the victim's house which was only about one-half mile away. She testified that when [Defendant] knocked on her door and asked for her son he was covered with blood. The son, Feliciano, also testified that [Defendant] was covered with blood that morning and

added that the blood was fresh. When Feliciano asked [Defendant] what had happened [Defendant] stated that he had been walking in a field about ten miles away, that he was attacked by two men and a woman, and that he had stabbed the woman with his knife in self-defense. [Defendant] then showed Feliciano his knife which was covered with drying blood. Feliciano testified that [Defendant] did not appear to have been in a fight because he had no injuries and no dirt on his clothing.

Feliciano agreed to drive [Defendant] back to the labor camp where he was staying. On the way [Defendant] kept repeating, "I told them not to get me mad. I have this animal inside of me." [Defendant] did not explain what he meant and Feliciano did not ask. Later that day Feliciano and his mother drove to the spot in the field where they believed [Defendant] had been attacked but could find no tire marks in the dirt nor evidence of a struggle.

The State also presented the testimony of one of [Defendant's] co-workers regarding statements [Defendant] made about the murders. The co-worker testified that in January, 1983, she was working in the fields with [Defendant] when she overheard him speaking with a group of men. According to the co-worker, [Defendant] admitted getting into trouble with some women and that he did not have to worry about them because the women were "already in hell." When one of the men asked how [Defendant] did it, he responded, "I went through the back door and I ripped out the screen door." In rebuttal, the defense introduced into evidence payroll records that indicated that [Defendant] was not working at the time he allegedly made the incriminating statements.

* * * *

In the penalty phase, the State presented evidence of: (1) [Defendant's] conviction for assault with intent to rob in 1968; (2) a conviction in May of 1972 for the crime of bank-robbery and use of a dangerous weapon; (3) a conviction of the offense of mutiny at a United States penitentiary in January of 1979; and (4) a conviction of the crime of aggravated battery with the use of a deadly weapon in the state of Texas on July 1, 1983. The State further put on the testimony of the medical examiner explaining the type of wounds and the pain suffered by the victims in this case.

> [Defendant] chose not to present any evidence in the penalty phase and expressly declined to present evidence that his codefendant had received two life sentences for his role in the murders.
>
> The trial judge followed the jury's unanimous recommendation and sentenced [Defendant] to death for the murder of Julia. In the sentencing order, the trial judge found four aggravating factors [FN1] and no mitigating factors. The jury however recommended a life sentence for the murder of Mabel, but the trial judge overrode that jury recommendation and, relying on the same four aggravators and absence of mitigators, sentenced [Defendant] to death for the murder of Mabel.
>
> * * * *
>
> [FN1] The trial court found the following aggravators were proven beyond a reasonable doubt: (1) the capital felony was committed by a person under a sentence of imprisonment, § 921.141(5)(a), Fla. Stat. (1991); (2) the defendant was previously convicted of another capital felony or of a felony involving a threat of violence to the person, § 921.141(5)(b); (3) the capital felony was committed while the defendant was engaged in the commission of a sexual battery, § 921.141(5)(d); (4) the capital felony was especially heinous, atrocious, or cruel, § 921.141(5)(h).

Garcia v. State, 644 So. 2d 59, 60-62 (Fla. 1994).

Defendant again appealed his convictions and sentences to this Court, raising 12 issues:

> I.
>
> THE TRIAL COURT ERRED IN DENYING DEFENDANT’S MOTIONS FOR JUDGMENT OF ACQUITTAL.
>
> II.
>
> THE COURT ERRED IN INSTRUCTING THE JURY AS TO THE ELEMENTS OF THE OFFENSES CHARGED.
>
> III.
>
> THE COURT ERRED IN READING PORTIONS OF THE TESTIMONY TO THE JURY.
>
> IV.

THE COURT ERRED IN ALLOWING THE PROSECUTION TO INTRODUCE INADMISSIBLE HEARSAY THAT WAS PREJUDICIAL TO DEFENDANT.

V.

THE COURT ERRED IN ADMITTING AND ALLOWING THE IMPROPER USE OF IMFLAMMATORY PHOTOGRAPHS, THE UNFAIR PREJUDICE OF WHICH OUTWEIGHED THEIR RELEVANCE.

VI.

THE COURT ERRED IN DENYING DEFENDANT'S MOTION IN LIMINE AND IN OVERRULING DEFENDANT'S OBJECTIONS TO THE STATE'S EFFORTS TO PLACE A BURDEN ON DEFENDANT TO PROVE HIS INNOCENCE BY PROVING A DEFENSE HE NEVER RAISED AT TRIAL.

VII.

THE COURT ERRED IN INSTRUCTING THE JURY ON CIRCUMSTANTIAL EVIDENCE.

VIII.

THE COURT ERRED IN EXCUSING A JUROR BASED ON THE JUROR'S INCONSISTENT AND INCONCLUSIVE COMMENTS REGARDING THE DEATH PENALTY.

IX.

PROSECUTORIAL MISCONDUCT THROUGHOUT THE TRIAL DEPRIVED DEFENDANT OF A FAIR TRIAL.

X.

THE CUMULATIVE EFFECT OF THE ERRORS MANDATES REVERSAL.

XI.

THE TRIAL COURT ERRED IN SENTENCING DEFENDANT TO DEATH.

A. AGGRAVATING CIRCUMSTANCES.

1. THE COURT ERRED IN FINDING THAT THE CAPITAL FELONIES WERE COMMITTED BY A PERSON UNDER SENTENCE OF IMPRISONMENT.
2. THE COURT ERRED IN FINDING THAT DEFENDANT WAS PREVIOUSLY CONVICTED OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON.
3. THE COURT ERRED IN FINDING THAT THE CAPITAL FELONIES WERE

COMMITTED WHILE DEFENDANT WAS ENGAGED IN A SEXUAL BATTERY.

4. THE COURT ERRED IN FINDING THAT THE CAPITAL FELONIES WERE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.
5. THE COURT ERRED BY THE DOUBLING OF AGGRAVATING CIRCUMSTANCES IN SENTENCING FOR THE KILLING OF JULIA BALLENTINE.

B. MITIGATING CIRCUMSTANCES.
1. GENERAL CONSIDERATIONS
2. MITIGATING CIRCUMSTANCES REJECTED BY THE COURT.
3. MITIGATING CIRCUMSTANCES NOT CONSIDERED BY THE COURT.
4. ERRORS IN INSTRUCTING THE JURY ON MITIGATING CIRCUMSTANCES.
5. REMEDY.

XII.

THE COURT ERRED IN ENHANCING THE SENTENCES FOR SEXUAL BATTERY AND BURGLARY.

Initial Brief of Appellant, FSC Case No. 78,411. This Court affirmed Defendant's convictions and sentences. *Garcia*, 644 So. 2d at 60.

In doing so, this Court found that the lower court properly denied Defendant's motions for judgment of acquittal and that it did not abuse its discretion regarding reading back certain testimony to the jury during deliberations. *Id.* at 62. This Court found that to the extent any hearsay was improperly admitted, any error was harmless. *Id.* The claim of prosecutorial misconduct was rejected because the issues were not preserved, the alleged misconduct did not deprive Defendant of a fair

trial, the issues were without merit and any error was harmless. *Id.* at 62-63. The remaining guilty phase issues were determined to be meritless. *Id.* at 63. This Court found that all of the aggravating factors were properly found and all of the mitigating factors were properly rejected. *Id.* This Court also determined that the sentences for the sexual battery and burglary were proper and that the override was appropriate. *Id.* 63-64. Defendant sought certiorari review in the United States Supreme Court, which was denied on April 24, 1995. *Garcia v. Florida*, 514 U.S. 1085 (1995). Rehearing was denied on June 12, 1995. *Garcia v. Florida*, 515 U.S. 1137 (1995).

On March 6, 1997, Defendant filed a motion to compel public records from the Clerk of the Circuit Court of Dade County, the Dade County Medical Examiner's Office, the Miami-Dade Police Department,[3] the Miami Police Department and the Office of the State Attorney for Dade County. (SR. 36-47) On March 26, 1997, Defendant filed a shell motion for post conviction relief in the lower court. (R. 32-72) The shell motion included a claim that public records had not been provided but did not list any agency that was allegedly not in compliance. (R. 49) On August 1, 1997, Defendant filed an amended motion for post conviction relief. (R. 73-296) The motion asserted that Defendant did not have

[3] The requests were made under the former name of this department, the Metro-Dade Police.

public records from the agencies named in his March 6, 1997 motion to compel.

On December 29, 1998, Defendant served additional public records requests on numerous state agencies, including the Miami-Dade Police Department but not the City of Miami Police Department. (SR. 131-207) On February 17, 1999, Defendant served two additional public records requests on the Dade County Medical Examiner's Office. (SR. 209-12) On April 9, 1999, the trial court held a hearing on the public records issues, at which the court heard argument and made rulings on the outstanding issues. (R. 601-50)

On July 2, 1999, the lower court entered an order requiring Defendant to file a final amended motion for post conviction relief by October 1, 1999. (SR. 342) The court noted that the parties had indicated that the final public records issues were in the process of being resolved and that Defendant was to file any motions regarding the resolutions of those issues by August 13, 1999. *Id.* On August 13, 1999, Defendant instead moved to extend the time for the filing of his motion for post conviction relief for 180 days. (SR. 344-47) Defendant asserted that this extension was necessary because staff had resigned from CCRC-South, Defendant had not obtained public records from the repository, and the office was moving. *Id.* On September 17,

1999, the lower court granted the extension and ordered the final motion be filed by March 24, 2000. (SR. 355)

On February 17, 2000, Defendant served an affidavit requesting additional public records from the Miami-Dade Police Department. (SR. 362-65) The affidavit requested a sworn statement by Gloria Ann Gomez taken in 1983, a report regarding a polygraph of Ms. Gomez, a sworn statement by Juan "Wally" Gomez taken in 1983, "any information regarding who received a reward, and copies of "any and all audiotapes involved with this case" with the exception of two specified tapes. *Id.* The affidavit parroted the language of Fla. R. Crim. P. 3.852(i) and asserted in a conclusory fashion that the materials contained exculpatory information. *Id.*

On February 29, 2000, the Miami-Dade Police Department filed a response and objection to the affidavit. (SR. 371-74) The Department noted that it had provided all of its records regarding any case in which Defendant had been a suspect, witness or victim on November 21, 1996. It averred that it had complied with a prior order that had required it to produce certain records in response to additional requests for public records and noticed its compliance on July 2, 1999. Finally, the Department noted that despite the untimeliness of the present

request, it had again searched its records and had no documents responsive to the additional request.

A hearing on the affidavit was scheduled and held on the affidavit on March 3, 2003. (R. 23, SR. 1282)[4] On March 7, 2000, the lower court granted Defendant yet another extension of time to file his final motion and required that the motion be filed by April 24, 2000. (SR. 377) On that date, Defendant filed his final amended motion for post conviction relief, raising 30 claims:

> I.
> [DEFENDANT] IS BEING DENIED HIS RIGHT TO EFFECTIVE REPRESENTATION BY THE LACK OF FUNDING AVAILABLE TO FULLY INVESTIGATE AND PREPARE HIS POST-CONVICTION PLEADINGS, UNDERSTAFFING, AND THE UNPRECEDENTED WORKLOAD ON PRESENT COUNSEL AND STAFF, IN VIOLATION OF HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND IN VIOLATION OF SPALDING V. DUGGER.
>
> II.
> [DEFENDANT] IS BEING DENIED HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, BECAUSE ACCESS TO THE FILES AND RECORDS PERTAINING TO [DEFENDANT'S] CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF CHAPTER 119, FLORIDA STATUTES. [DEFENDANT] CANNOT PREPARE AN ADEQUATE 3.850 MOTION UNTIL HE HAD RECEIVED PUBLIC RECORDS MATERIALS AND HAS BEEN AFFORDED DUE TIME TO REVIEW THOSE

[4] The notice of hearing regarding this matter has not been included in the record on appeal. The State is filing a motion to supplement the record with this pleading concurrently with the filing of this brief. As such, the page number is an estimate.

MATERIALS, CONDUCT FOLLOW-UP INVESTIGATION, OBTAIN THE ASSISTANCE OF EXPERT WITNESSES AND AMEND.

III.

[DEFENDANT'S] CONVICTIONS ARE MATERIALLY UNRELIABLE BECAUSE NO ADVERSARIAL TESTING OCCURRED DUE TO THE CUMULATIVE EFFECTS OF INEFFECTIVE ASSISTANCE OF COUNSEL, THE WITHHOLDING OF EXCULPATORY OR IMPEACHMENT MATERIAL, NEWLY DISCOVERED EVIDENCE, AND/OR IMPROPER RULINGS OF THE TRIAL COURT, IN VIOLATION OF [DEFENDANT'S] RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

IV.

[DEFENDANT] WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE STATE WITHHELD EVIDENCE THAT WAS MATERIAL AND EXCULPATORY IN NATURE. SUCH OMISSIONS RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE AND PREVENTED A FULL ADVERSARIAL TESTING OF THE EVIDENCE.

V.

[DEFENDANT'S] RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION WERE VIOLATED BY COUNSEL'S INEFFECTIVENESS DURING VOIR DIRE WHETHER DUE TO COUNSEL'S DEFICIENCIES OR BEING RENDERED INEFFECTIVE BY STATE ACTION.

VI.

[DEFENDANT] WAS DENIED A FAIR TRIAL AND A FAIR, RELIABLE AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, BECAUSE THE PROSECUTOR'S ARGUMENTS AT THE GUILT/INNOCENCE AND PENALTY PHASES PRESENTED IMPRESSIBLE CONSIDERATIONS TO THE JURY, MISSTATED THE LAW AND FACTS, AND WERE INFLAMMATORY AND IMPROPER. DEFENSE COUNSEL'S FAILURE TO RAISE PROPER OBJECTIONS WAS DEFICIENT PERFORMANCE WHICH DENIED [DEFENDANT] EFFECTIVE ASSISTANCE OF COUNSEL.

VII.

[DEFENDANT] WAS DENIED HIS RIGHTS UNDER AKE V. OKLAHOMA AT THE GUILT AND PENALTY PHASES OF HIS CAPITAL TRIAL, WHEN COUNSEL FAILED TO OBTAIN AN ADEQUATE MENTAL HEALTH EVALUATION AND FAILED TO PROVIDE THE NECESSARY BACKGROUND INFORMATION TO THE MENTAL HEALTH CONSULTANT IN VIOLATION OF [DEFENDANT'S] RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS.

VIII.

[DEFENDANT'S] TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE, SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

IX.

[DEFENDANT] WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY THE TRIAL COURT'S AND STATE'S ACTIONS. TRIAL COUNSEL FAILED ADEQUATELY TO INVESTIGATE AND PREPARE MITIGATING EVIDENCE, FAILED TO RETAIN MENTAL HEALTH EXPERTS OR OTHER EXPERTS AND FAILED TO PROVIDE THEM WITH THIS MITIGATION, AND FAILED TO ADEQUATELY CHALLENGE THE STATE'S CASE. COUNSEL FAILED ADEQUATELY TO OBJECT TO EIGHTH AMENDMENT ERROR. [DEFENDANT'S] DUE PROCESS RIGHTS WERE VIOLATED, NO ADVERSARIAL TESTING OCCURRED, COUNSEL'S PERFORMANCE WAS DEFICIENT, AND AS A RESULT, [DEFENDANT'S] DEATH SENTENCE IS UNRELIABLE.

X.

[DEFENDANT] IS INNOCENT OF FIRST DEGREE MURDER AND WAS DENIED AN ADVERSARIAL TESTING.

XI.

[DEFENDANT] IS INNOCENT OF THE DEATH PENALTY. [DEFENDANT] WAS SENTENCED TO DEATH IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

XII.

[DEFENDANT'S] SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS WERE INCORRECT UNDER FLORIDA LAW AND SHIFTED THE BURDEN TO [DEFENDANT] TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE TRIAL COURT EMPLOYED A PRESUMPTION OF DEATH IN SENTENCING [DEFENDANT]. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING TO THESE ERRORS.

XIII.

[DEFENDANT'S] GUILTY VERDICT AND JURY RECOMMENDED DEATH SENTENCE ARE CONSTITUTIONALLY UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, BECAUSE THE TRIAL COURT ERRONEOUSLY INSTRUCTED [DEFENDANT'S] JURY ON THE STANDARD BY WHICH THEY MUST JUDGE EXPERT TESTIMONY. THE JURY MADE DECISIONS OF LAW THAT SHOULD HAVE BEEN WITHIN THE PROVINCE OF THE COURT.

XIV.

[DEFENDANT'S] SENTENCE OF DEATH IS PREMISED UPON FUNDAMENTAL ERROR BECAUSE THE JURY RECEIVED INADEQUATE GUIDANCE CONCERNING THE AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED. FLORIDA'S STATUTE SETTING FORTH THE AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED IN A CAPITAL CASE IS FACIALLY VAGUE AND OVERBOARD IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

XV.

[DEFENDANT'S] DEATH SENTENCE IS FUNDAMENTALLY UNFAIR, ARBITRARY, CAPRICIOUS, AND UNRELIABLE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS DUE TO THE STATE'S INTRODUCTION OF NON-STATUTORY AGGRAVATING FACTORS AND THE STATE'S ARGUMENT UPON NON-STATUTORY AGGRAVATING FACTORS. DEFENSE COUNSEL'S FAILURE TO OBJECT OR ARGUE EFFECTIVELY CONSTITUTES INEFFECTIVE ASSISTANCE.

XVI.

[DEFENDANT'S] SENTENCING JURY WAS MISLED BY COMMENTS, QUESTIONS, AND INSTRUCTIONS THAT UNCONSTITUTIONALLY AND INACCURATELY DILUTED THE JURY'S SENSE OF RESPONSIBILITY TOWARDS SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES

CONSTITUTION. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT PROPERLY OBJECTING.

XVII.

[DEFENDANT] IS DENIED HIS FIRST, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND IS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN PURSUING HIS POST-CONVICTION REMEDIES BECAUSE OF THE RULES PROHIBITING [DEFENDANT'S] LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT.

XVIII.

[DEFENDANT] WAS DENIED HIS RIGHTS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS AND HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN TRIAL COUNSEL FAILED TO OBJECT WHEN THE STATE ATTORNEY OVERBROADLY AND VAGUELY ARGUED AGGRAVATING CIRCUMSTANCES IN VIOLATION OF ESPINOSA V. FLORIDA, STRINGER V. BLACK, SOCHOR V. FLORIDA, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER.

XIX.

[DEFENDANT] IS DENIED HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION, AND RECOGNIZED APPLICABLE PRECEPTS OF INTERNATIONAL LAW, BECAUSE EXECUTION BY ELECTROCUTION AND/OR LETHAL INJECTION IS CRUEL AND/OR UNUSUAL AND INHUMAN AND DEGRADING TREATMENT AND/OR PUNISHMENT.

XX.

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AS APPLIED IN THIS CASE, BECAUSE IT FAILS TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY. TO THE EXTENT THIS ISSUE WAS NOT PROPERLY PRESERVED, [DEFENDANT] RECEIVED IANEFFECTIVE [sic] ASSISTANCE OF COUNSEL.

XXI.

[DEFENDANT'S] DEATH SENTENCE VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE JURY WAS NOT PROVIDED NECESSARY INSTRUCTIONS AND EVIDENCE REGARDING MITIGATING FACTORS, BASED ON OMISSIONS BY

TRIAL COUNSEL AND/OR STATE MISCONDUCT AND/OR TRIAL COURT ERROR AND/OR NEWLY DISCOVERED EVIDENCE.

XXII.

[DEFENDANT] WAS DENIED HIS RIGHT TO A FAIR AND IMPARTIAL JURY BY PREJUDICIAL PRETRIAL PUBLICITY, BY THE LACK OF CHANGE OF VENUE, AND BY EVENTS IN THE COURTROOM DURING TRIAL. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN THIS REGARD AND/OR THE TRIAL COURT ERRED.

XXIII.

THE EIGHTH AMENDMENT AND [DEFENDANT'S] DUE PROCESS RIGHTS WERE VIOLATED BY THE SENTENCING COURT'S REFUSAL TO FIND AND/OR CONSIDER THE MITIGATING CIRCUMSTANCES CLEARLY SET OUT IN THE RECORD.

XXIV.

THE TRIAL COURT'S SENTENCING ORDER DOES NOT REFLECT AN INDEPENDENT WEIGHING OR REASONED JUDGMENT, CONTRARY TO FLORIDA LAW AND THE EIGHT AND FOURTEENTH AMENDMENTS.

XXV.

[DEFENDANT] WAS DENIED A PROPER DIRECT APPEAL OF HIS CONVICTIONS AND DEATH SENTENCE, CONTRARY TO FLORIDA LAW AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, DUE TO OMISSIONS IN THE RECORD. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN THIS REGARD.

XXVI.

THE JURY AND JUDGE WERE PROVIDED WITH AND RELIED UPON MISINFORMATION OF CONSTITUTIONAL MAGNITUDE IN SENTENCING [DEFENDANT] TO DEATH IN VIOLATION OF JOHNSON V. MISSISSIPPI, 108 S. CT. 1981 (1988), AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

XXVII.

[DEFENDANT'S] DEATH SENTENCE IS PREDICATED UPON AN AUTOMATIC AGGRAVATING CIRCUMSTANCE, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN THIS REGARD.

XXVIII.

[DEFENDANT] WAS DENIED HIS RIGHT TO A FAIR TRIAL BEFORE AN IMPARTIAL JUDGE IN VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS, BY THE

> IMPROPER CONDUCT OF THE TRIAL COURT WHICH CREATED A BIAS IN FAVOR OF THE STATE. COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING.
>
> XXIX.
> [DEFENDANT] IS INSANE TO BE EXECUTED.
>
> XXX.
> [DEFENDANT'S] TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE, SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

(SR. 382-632) The motion was verified by Defendant in an oath that stated that he had read the motion and was swearing the facts contained therein were true and correct. (SR. 632)

The public records claim asserted that Defendant had not received records from the Department of Corrections, the Medical Examiner's Office, the Miami-Dade Police, the Homestead Police and the Palmetto Police. (SR. 391-95) Defendant further claimed that Defendant had difficulty reviewing the records in the manner provided by the repository and had already received an extension to file his motion because of this difficulty. *Id.* Additionally, Defendant asserted that he had not received a copy of a sworn statement and polygraph results concerning Ann Gomez from the Miami-Dade Police and a sworn statement from Wally Gomez from the Miami Police, which Defendant asserted should exist. *Id*.

In claim VII, Defendant claimed that evidence that Defendant was drunk at the time of the crime and had been using heroin shortly before the crime could have been presented in mitigation. (SR. 526-34) He also asserted that he had expert testimony that both statutory mitigators applied. Further, he averred that evidence could be presented about "abject poverty, physical and emotional abuse, neglect, abandonment by his parents at a young age, exposure to physical and sexual abuse of others, being forced to work as a migrant farm worker at an early age to help support his family, and the trauma associated with being accused of killing a small child at the age of thirteen and being sent to a reformatory for six (6) years." (SR. 533) He claimed that evidence was available regarding the effects of neurotoxin and pesticide exposure. *Id.*

In claim IX, Defendant reiterated his claim regarding evidence of poverty and abuse, use of substances and neurotoxin and pesticide exposure. (SR. 536-70) Defendant included a 17 page description of what he alleged his life was like from birth until the time of the crime. (SR. 548-65) The description included statements regarding the alleged effect on Defendant of his life experiences. *Id.* Defendant also alleged that he had been a model prisoner during his previous incarcerations. (SR. 566)

On August 17, 2000, the State responded to Defendant's motion. (R. 298-369) After holding a *Huff* hearing, the lower court, by order dated May 9, 2001, granted an evidentiary hearing on the portions of claim III concerning the relationship between Rufina Perez and Feliciano Aguayo and Elizabeth Feliciano, the reward, the use of Josefina Cruz's statement, a voluntary intoxication defense and evidence of other suspects and the portions of Claim IX concerning failure to investigate and present mental health and family background mitigation. (R. 531-43) It found that claims I, II, VII, VIII, X, XI, XVII, XIX, XXIII, XXIV and XXIX did not merit relief as a matter of law or were conclusively refuted by the record. *Id.* It held that claims VI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XX, XXI, XXIII, XXIV, XXV, XXVI, XXVII, XXVIII and XXX were procedurally barred. *Id.* It opined that the other portions of claims III and IX and claims IV, V, VI, XII, XIII, XV, XVI, XVIII, XX, XXI, XXII, XXV, XXVI, XXVII and XXVIII were facially insufficient. *Id.*

On June 18, 2003, Defendant served a pleading attempting to amend his motion for post conviction relief. (SR. 716-912) The motion sought to add a claim based on *Ring v. Arizona*, 536 U.S. 584 (2002), and a claim that a report by an anti-death penalty group constituted newly discovered evidence that lethal injection was unconstitutional. (SR. 893-910) On July 3, 2003,

the State responsed to the two newly added claims. (SR. 914-25) On August 6, 2003, the lower court denied these claims. (SR. 927)

The matter then proceeded to the previously granted evidentiary hearing on November 17, 2003. (R. 25) At the beginning of the evidentiary hearing, one of Defendant's attorney's indicated that he had recently learned that Reemberto Diaz, Defendant's trial counsel, shared office space with the attorney's second cousin. (R. 655-56) Defendant was colloquied and indicated that it did not concern him. (R. 656)

Defendant then personally indicated that he wanted to withdraw any claims related to the penalty phase. (R. 656) The lower court then colloquied Defendant about his desire to waive the penalty phase claims:

> THE COURT: Well, there is a death sentence as you probably know. There's the first guilt phase and if you are found guilty, then we enter into what's called the penalty phase, at which time the Court will take a recommendation from the jury as to what should be done to you
>
> Now, I would like to understand you completely as to what you want to do here. I think what you're saying to me is that you're abandoning or giving up your claims as to the punishment phase; is that correct?
>
> [Defendant:] That's correct.
>
> THE COURT: You want to proceed then only on the part of the claim which has to do with your guilt?
>
> [Defendant:] Right.
>
> THE COURT: Is that correct?
>
> [Defendant:] That is correct.
>
> * * * *

THE COURT: [Defendant], as you know, I'm sure somewhere along the lines whether it be this year or next year or whenever, if you don't prevail in this hearing --
[Defendant:] Right.
THE COURT: -- you probably will be executed. Do you understand that?
[Defendant:] I understand that.
THE COURT: Now, there is nothing wrong with you doing what you're doing. You're free to do what you're doing. I just have to make sure that you fully grasp what it is you're doing.
[Defendant:] I understand fully. I'm not attempting to give up my appeal during the hearing. I just want to abandon that part of my appeal.
THE COURT: Okay. That means essentially that if I deny the relief you're seeking in the guilty portion of this situation, then you will be executed; do you understand that?
[Defendant:] I do.
THE COURT: I'm not going to ask you the reason why you're abandoning this. I don't think it is my right to do that, but I want to make sure that you are doing it on your own because it makes no difference to me. I want you to know that it makes no difference to me at all, not at all.
[Defendant:] I understand that.
THE COURT: And I'm going to do what I think is right whether you agree with it or not because that's my job, that's my function.
[Defendant:] I understand.
THE COURT: And you're giving up something that is important and I want you to realize that. I want you to realize that as a result of this, you may very well be executed.
[Defendant:] I realize that already, yes. I know pretty much exactly what I'm doing.
[The State:] I would ask that Your Honor ask him whether he had consulted with his attorney about it and if he's satisfied with his representation on that issue alone.
[The Court:] [Defense counsel] has been here on your behalf many times. Have you discussed this issue with him?
[Defendant:] We've been back and forth on it a lot of times during the past couple of years. There's been

times when I want to go forward and times when I just couldn't stand it, but I told him last week that I wanted to do this. I was sure.

THE COURT: All right. So the, if we could just go through the list of the pleadings and determine which issues are still alive and which are not.

[The State:] In your order, on the hearing order entitled Order o[n] Request of Evidentiary Hearing signed by Your Honor on May 9, 2001, claims which he would be waiving are claims seven, I believe, that the Defendant alleges his right to assistance of competent mental health expert such as a neurologist and toxicologist was denied.

Claim that Counsel provided ineffective assistance during the penalty phase --

THE COURT: That would be what number?

[The State:] Claim nine.

THE COURT: Nine?

[The State:] Uh-huh. Part of that specifically that Counsel was ineffective in failing to present evidence of Defendant's mental and physical health by not obtaining the testimony of experts such as a clinical psychologist, neurologist, serologist. Toxicologist.

That one claim, you're going to have an evidentiary hearing on.

THE COURT: What number?

[The State:] That was part of nine, 9-B. 9-C, counsel was ineffective in failing to present evidence of his childhood upbringing.

* * * *

THE COURT: Sir, anyone forcing you to do this?

[Defendant:] No, sir. This is all my own.

THE COURT: Okay. No one influenced you in making this decision?

[Defendant:] Nobody.

THE COURT: And is this then still your sole decision?

[Defendant:] My sole decision. Actually, against my Counsel's wishes, yes.

THE COURT: Fine. That Court will find, after that inquiry, that the Defendant has made a free and voluntary waiver of his claims as to the death sentence portion of his 3.850 relief as stated here today.

[The State:] Just so the record is very clear, could you ask [Defendant] about whether or not he's taking

> any type of drugs or are under the influence of any type of alcohol as well as just ask quickly about his educational background, so it's clear he understands and he's an intelligent person and he is competent, you know, those questions.
> THE COURT: All Right. While making this decision, Sir, did you ingest any alcohol, psychotropic drugs or anything?
> [Defendant:] No. I had a vitamin pill is all.
> THE COURT: I didn't hear you.
> [Defendant:] I had a vitamin pill. No medications.

(R. 657, 658-61, 663-64)

Defendant then called Diaz, who immediately corrected Defendant's attorney about his relationship with the attorney's cousin. (R. 665-68) Diaz explained that he and the attorney's cousin shared cases together, that the shared cases amounted to about 20% of Diaz's business, that it did not affect his testimony in this matter and that the situation was more than just the sharing of office space. *Id.* After listening to this explanation, Defendant still wanted to go forward with the hearing. *Id.*

Diaz then testified that Defendant was originally represented by Clinton Pitts and was convicted and sentenced to death. (R. 669-70) After this Court reversed, Diaz was appointed to represent Defendant. (R. 670) Diaz got Pitts' file, which included all discovery and depositions, and consulted with Pitts throughout his representation of Defendant. (R. 670) Diaz did not request additional discovery or take additional depositions

but did interview witnesses, including someone named Wally. (R. 670-71) Diaz relied upon the investigation of the matter that had already been completed but may have had an investigator do additional work. (R. 671) Diaz had also read the transcript of the prior trial before he retried the case. (R. 674)

Diaz believed that the State had no physical evidence linking Defendant to the crime, that it was presenting a circumstantial evidence case and that Feliciano Aguayo, Elizabeth Feliciano and Rufina Perez were significant witnesses. (R. 672-73) Diaz did not recall the State arguing that there was no relationship between these witnesses and believed it was clear that since the witnesses worked together, some relationship existed. (R. 674) Diaz recalled being aware of some distant familial relationship between Defendant and a witness but did not recall which witness. (R. 675) Diaz stated that he would not have tried to show a familial relationship between anyone in the case unless there was some negative aspect of the relationship that could be used to show a bias. (R. 675-76)

Diaz stated that he did try to show that Perez was testifying in an attempt to collect a reward. (R. 676) He testified that without evidence of a reward actually being given, he would not have attempted to show that there was a familial relationship between Feliciano, Aguayo and Perez to

demonstrate that they were working together to get the reward. (R. 676) Diaz stated that without any evidence of a witness actually seeking or receiving a reward, he did not wish to push the reward issue too much because it could backfire. (R. 676) He also averred that he did not try to show that a reward was being offered without a link to the witnesses for the same reason. (R. 677)

Diaz recalled that he probably suggested in opening that Defendant had too much to drink on the night of the crime. (R. 678) He stated that Aguayo had limited knowledge of the amount Defendant had actually consumed because he was not with Defendant all night and most of his knowledge was of purchasing beer and being in establishments that served alcohol. (R. 678) When confronted with Aguayo's statement to the police in which he had suggested that Defendant purchase beer and drink it at home and Defendant insisted upon being dropped off at a bar instead, Diaz stated that it would not have shown how much alcohol Defendant consumed. (R. 679-81) He stated that showing how much beer someone wanted to buy but did not buy would not show how much beer he drank. (R. 682-83) Diaz stated that he believed that the important time period in which Defendant was allegedly consuming alcohol was after 11 p.m. (R. 681) He averred that he planned to support his statement about Defendant

drinking through the exculpatory statement Defendant had given regarding his whereabouts at the time of the crime. (R. 681-82) Diaz was not trying to raise an intoxication defense and instead was attempting to use Defendant's consumption of alcohol to show why Defendant's exculpatory statement was inconsistent with the evidence. (R. 682)

Diaz's theory of defense was that Defendant had not committed the crimes. (R. 683) As part of that defense, Diaz wanted to show that other suspects, such as John Conners, Jr., may have committed the crime. (R. 683) He concentrated on Conners because a hair had been found at the crime scene that had been a focus of the police investigation and the hair had been described as coming from someone who did not regularly wash his hair. (R. 683-84) Diaz did not call Det. Gordils to testify that an attempt had been made to determine if Conners had left a hair sample in a police car in which Conners had been. (R. 685-86) However, Diaz did recall questioning other police personnel regarding Conners' presence in police vehicles and attempts to gather evidence in this regard. (R. 686) Diaz did not recall whether he had seen a police report regarding a glass fragment similar to the glass in the windows at the victims' home being found in the back of a police car. (R. 687-88) Diaz stated that

he did not call Det. Gordils because he chose to question the lead detective assigned to the case. (R. 688-89)

On cross, Diaz stated that after reviewing Pitts' file, discussing the case with Pitts and reading this Court's opinion from the first direct appeal, he decided to include assertions that other, including Conners, may have committed the crime. (R. 690-91) One problem with attempting to present more evidence implicating Conners was that Diaz was risking opening the door regarding why the police had focused on Defendant: his codefendant had confessed and implicated him. (R. 700-01) Diaz admitted that he was always concerned that Fernandez's confession would be used against Defendant; either by the State making a deal with Fernandez or asking a question that would elicit a response about the confession from a witness. (R. 702-03) As such, Diaz chose to limit the amount of information implicating Conners that he presented. (R. 703-05) Diaz wanted to raise the possibility that Conners committed the crimes and make the State show why he had not been charged. (R. 708)

Diaz stated that he chose to call Tech. Gilbert to testify about other suspects and not to call the detectives. (R. 714) He believed that Tech. Gilbert was far less likely than the detectives to remark on Fernandez's confession because he was

involved in processing evidence and not interviewing witnesses. (R. 714-15)

Diaz stated that he had expected Tech. Rhodes to defend his opinions more forcefully at trial. (R. 705-06) However, he still believed that Tech. Rhodes' testimony was useful because Diaz did not need to prove that it was Conners' hair and only needed to raise a reasonable doubt. (R. 706-07)

In speaking with Defendant, Diaz confirmed that Aguayo's statements about Defendant's condition and statements to Aguayo and Feliciano after the murders were true. (R. 692-93) Defendant told Diaz that Feliciano could not have seen him approaching the house if she had been in the shower when that happened. (R. 694-95) Diaz stated that he was aware that a reward was never paid in this case. (R. 697)

Diaz stated that Defendant had told him that he was not drinking with anyone else after he was dropped off at the bar by Aguayo. (R. 698) As such, Defendant was the only person who could testify regarding the amount of alcohol he consumed. (R. 700) Defendant was not going to testify. (R. 700)

After Diaz testified, Defendant admitted the deposition of Rufina Perez that had been taken to perpetuate her testimony. (R. 722) Perez testified that the first time she spoke to the police was when a woman and two men stated that they were

investigators in the summer of 1983. (SR. 1228-29, 1235) At that time, Perez was living in a labor camp on 132d Court in house number 40. (SR. 1229) Perez stated that the conversation occurred in a police car after the officers had come to her house and asked her to speak to them in their car. (SR. 1233) The investigators inquired if she knew Defendant and Enrique Fernandez, and Perez responded that she did not know Defendant well but did know Fernandez since he had been a childhood friend of her son. (SR. 1229) The woman mentioned the fact the Perez's son had been sentenced to life imprisonment, which surprised Perez as her son had died in December 1982. (SR. 1234) Perez did not tell these investigators about hearing Defendant speaking with Fernandez. (SR. 1237-29) She insisted that she had never made such a statement because it was not true. (SR. 1251-52) None of the investigators appeared to be taking notes during the conversation. (SR. 1239-40)

Perez stated that her name was Rufina Perez and that she was usually called Fina. (SR. 1230) She had previously been married to a Ramos and a Cruz but she never used either of their last names. (SR. 1230) She averred that she had never been called Josefina Cruz. (SR. 1230) Perez stated that 13600 SW 312th Street was her father's former address. (SR. 1235) Perez never lived at this address but did visit her parents there.

(SR. 1235-36) Perez stated Feliciano Aguayo was married to her sister Linda and Elizabeth Feliciano was his mother. (SR. 1240-41) Perez stated that she and Feliciano knew each other but did not generally talk to each other or visit each other. (SR. 1241) Feliciano's husband was not Aguayo's father. (SR. 1242-42)

Perez heard of the murders shortly after they occurred on the local news. (SR. 1242) She had not heard of any reward. (SR. 1242-43, 1252) She never received a reward, never discussed a reward with anyone and never sought a reward. (SR. 1252) Perez insisted that she never had a discussion with Feliciano about Feliciano wanting Perez's car titled to arrange bond for Aguayo. (SR. 1253) Perez stated that anyone who claimed that she had told Feliciano or her husband to tell the police that Defendant committed the crimes to get a reward was a liar. (SR. 1254)

Perez said she had overheard Defendant speaking of the crimes with a group of men. (SR. 1243-44) The conversation occurred during a break at work. *Id.* She said the Mexican slang expression that was said was used in the plural. (SR. 1243-47)

Perez stated that she spoke to a different group of detectives a couple years after the crime. (SR. 1247-48) She gave these detectives a sworn statement. (SR. 1248) This sworn statement included her knowledge of this matter. (SR. 1258) She

also gave a deposition to Fernandez's attorney and testified in multiple court proceedings. (SR. 1259)

In discussing the context in which the phrase "te las chingastes" was used, Perez stated that the men with Defendant asked Defendant if he had fucked them up and Defendant responded that he had fucked them up and that they would not bother him anymore because they were in hell. (SR. 1249) She stated that the words used in conversation indicated that "them" were female. (SR. 1250) Perez stated that when Defendant realized she could hear him, he first lowered his voice and then stopped talking. (SR. 1250) Perez did not know the men with whom Defendant was speaking. (SR. 1251)

On cross, Perez stated that she was not Josefina Cruz and had never made the statements ascribed to Josefina Cruz in a police report. (SR. 1264-67) She had never said that codefendant Fernandez was a party to the conversation she overheard Defendant having about this matter. (SR. 1285) She had never seen the report. (SR. 1267-68) Perez did admit that she had a son named Richard Ramos. (SR. 1288) Perez stated that she did not give a sworn statement in 1983 because she was not asked to do so. (SR. 1291)

Perez had not told the State that she was related to Aguayo until the post conviction proceedings. (SR. 1268) No one had

ever asked her. (SR. 1269) Perez stated that she was a friend of codefendant Fernandez and initially denied ever describing herself as his aunt or girlfriend. (SR. 1269-70) When confronted with documents that she had submitted to Union Correctional Institution regarding visiting Fernandez in November 1998 and March 1989, she admitted she had claimed to be Fernandez's aunt or girlfriend. (SR. 1270-73) She had not told the State she was attempting to visit Fernandez. (SR. 1273-74) Perez stated that she and Fernandez's mother were good friends. (SR. 1273)

Defendant attempted to get Perez to state that "te las chingastes" would have other meaning in either a Mexican dialect of Spanish or another dialect of Spanish. (SR. 1275-79) However, Perez stated that the only use of the phrase that she knew of was, "Did you fuck them up?" (SR. 1275-79) Perez stated that she knew that Defendant has an uncle named Wally. (SR. 1285) However, she did not know if Wally was a farm contractor or if Defendant had worked for him. (SR. 1285-86) Perez had never worked for Wally. (SR. 1285) Perez did not know how many times she had worked in the fields with Defendant but did know it was more than one day. (SR. 1286)

Perez stated that she never watched a television broadcast about these crimes with Feliciano and her husband. (SR. 1307) Perez did watch the 11 p.m. news most days at her own home. (SR.

1307-08) Perez stated that she had overheard Defendant's conversation about this matter before she saw a news broadcast about it. (SR. 1309) Perez stated that she did not know who made the anonymous call to the police about this matter. (SR. 1316) She had heard some gossip on the subject. (SR. 1316-17) She insisted that she had not made the call. (SR. 1317)

Defendant then rested his case. (R. 722) The State elected to present no evidence. (R. 722) After considering the evidence, the lower court denied remaining claims in the post conviction motion on April 13, 2004. (R. 568-71) The Court found that Defendant had waived the penalty phase claims. *Id.* Regarding the guilt phase claims, the lower court found that Defendant had failed to prove either deficiency or prejudice regarding any of the claims. *Id.* This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court properly permitted the waiver of the penalty phase claims are an adequate colloquy. Defendant has waived the remaining claims by failing to adequately brief them. Moreover, the lower court properly denied the remaining claims. The records Defendant was seeking did not exist, Defendant failed to prove the claims upon which he was granted an evidentiary hearing, and the remaining claims were procedurally, facially insufficient and without merit.

ARGUMENT

I. THE WAIVER CLAIM.

Defendant first asserts that the lower court erred in allowing Defendant to waive his penalty phase claims. Defendant appears to assert that the lower court was required to conduct a colloquy with Defendant during which his post conviction counsel and the State should have been required to proffer mitigation. He also appears to contend that the trial court should have questioned Defendant differently about his decision to waive his claims. He seems to claim that such a colloquy was constitutionally required. In the course of making this claim, Defendant also discusses the lower court's colloquy regarding a distant familiar relationship between one of Defendant's post conviction counsel and a business associate of Defendant's trial counsel. He further continually references the fact that there was no discussion of waiving mitigation at trial. However, Defendant has presented no basis for relief.

Defendant appears to base his claim on the theory that the colloquy was inadequate because Defendant was waiving mitigation and *Muhammad v. State*, 782 So. 2d 343 (Fla. 2001), and *Koon v. Dugger*, 619 So. 2d 246 (Fla. 1993), apply. However, Defendant was not waiving mitigation; he was withdrawing post conviction claims regarding the penalty phase. *Koon* established a procedure

for trial courts to follow in future cases when a defendant did not wish to present mitigation at a penalty phase. *Id.* at 250. *Muhammad* had nothing to do with a colloquy of a defendant. Instead, *Muhammad* established a prospective requirement that a trial court order a presentence investigation report (PSI) in cases in which a defendant waived the presentation of mitigation at a penalty phase. As such, neither of these cases address the issue of the need for, nature of or extent of a colloquy regarding withdrawal of a post conviction claim. Thus, they are not applicable here.

Moreover, the requirements of *Koon* do not analytically apply to the waiver of a post conviction claim. This Court adopted the prospective procedure in *Koon* to facilitate appellate review of whether the decision to waive mitigation was being made knowingly and voluntarily and not as the result of ineffective assistance of counsel in preparing a mitigation case. *Koon*, 619 So. 2d at 249-50; *see also Spann v. State*, 857 So. 2d 845, 853 (Fla. 2003); *Waterhouse v. State*, 792 So. 2d 1176, 1184 (Fla. 2001). However, these concerns are not presented in the waiver of a post conviction claim.

In a post conviction context, there is no reason to guard against an assertion that the failure to pursue a claim is the result of ineffective assistance of counsel. This is so because

this Court has repeatedly held that a claim of ineffective assistance of post conviction counsel does not provide a basis for relief. *Kokal v. State*, 901 So. 2d 766, 777 (Fla. 2005). Thus, having a colloquy to guard against a claim of ineffective assistance of such counsel is unnecessary.

Moreover, for a post conviction claim to be facially sufficient, the motion must allege facts in support of the claim. Fla. R. Crim. P. 3.850(c)(6) (2000); Fla. R. Crim. P. 3.851(e)(1)(E); *see also Vining v. State*, 827 So. 2d 212-13 (Fla. 2002). Mere conclusory allegations are insufficient to even require an evidentiary hearing. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998). Additionally, a motion must be verified by the defendant. Fla. R. Crim. P. 3.850(c) (2000); Fla. R. Crim. P. 3.851(e)(1); *Groover v. State*, 703 So. 2d 1035 1038 (Fla. 1997). Such verification requires that a defendant swear under oath that he has read the motion and the facts contained therein are true and correct. *Scott v. State*, 464 So. 2d 1171 (Fla. 1985); *see also State v. Shearer*, 628 So. 2d 1102 (Fla. 1993). Because of these requirements, a defendant will already be aware of the facts underlying the claim before the defendant is even in a position to attempt to waive their presentation. Since the defendant will already know what the claim is and the facts underlying it, the need for the colloquy to include the

facts to make sure that the defendant knows what he is waiving is not presented.

Because the reasons why this Court included the requirement that counsel inform the trial court of what mitigation is available are not present in a waiver of a post conviction claim, there is no reason to expand *Koon* to cover the withdrawal of post conviction claims. This is particularly true when one considers that a defendant does not have a constitutional right to engage in post conviction litigation or to have counsel at such proceedings. *Murray v. Giarratano*, 491 U.S. 1 (1989); *Pennsylvannia v. Finley*, 481 U.S. 551 (1987); *Kokal*, 901 So. 2d at 777-78. This Court had held that only a *Faretta*-type inquiry regarding a defendant's understanding of the consequences of waiving post conviction litigation is necessary to waive post conviction litigation in its entirety. *Durocher v. Singletary*, 623 So. 2d 482 (Fla. 1993). Moreover, this Court has held that a defendant's failure to present evidence in support of his claims waives the claims after an evidentiary hearing is ordered. *Owen v. State*, 773 So. 2d 510, 515 (Fla. 2000). Thus, Defendant's claim that *Koon* should apply should be rejected, and the lower court's denial of the penalty phase claims should be affirmed.

Even if *Koon* did apply, Defendant would still be entitled to no relief. This Court has rejected the claim that a waiver

colloquy must include a detailed recitation of everything that could have been presented in mitigation. *Spann*, 857 So. 2d at 854. Instead, this Court has only required that the colloquy be thorough enough to ensure that the waiver is voluntary and not the result of ineffective assistance. *Spann*, 857 So. 2d at 854; *Waterhouse*, 792 So. 2d at 1184; *Chandler v. State*, 702 So. 2d 186, 199-200 (Fla. 1997); *see also Anderson v. State*, 822 So. 2d 1261, 1268 (Fla. 2002); *Overton v. State*, 801 So. 2d 877, 902-04 (Fla. 2001). Here, the motion for post conviction relief set forth the mitigation that counsel was allegedly ineffective for failing to present. It included a 17-page recitation of the alleged facts of Defendant's life, stated that Defendant allegedly qualified for both of the statutory mental health mitigators and averred that expert testimony could be presented that Defendant suffered from brain damage and behavioral problems. (SR. 526-34, 536-70). While Defendant suggests that he might not have read the motion, the motion is accompanied by his sworn verification that he had done so. (SR. 632) During the colloquy that the lower court conducted, Defendant expressly stated that he wanted to withdraw the claims, that he had discussed withdrawing the claims with his counsel on many occasions and that the decision to withdraw the claims was his alone and not the product of coercion. He was also informed of

the nature of the claims he was withdrawing. (R. 657, 658-61, 663-64) Such a colloquy was sufficient to satisfy *Koon* even if *Koon* was applicable. Thus, the waiver was proper.

Defendant also appears to contend that the lower court should have required a proffer of mitigation by the State and defense so that it could determine whether mitigation existed. However, the lower court was not evaluating whether mitigation existed; it was evaluating a claim that counsel was ineffective for failing to present mitigation. To prove such a claim, Defendant needed to show both that his counsel was deficient and that he was prejudiced by the alleged deficiency. *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland* itself, the Court made clear that it was not necessary to address both deficiency and prejudice if claim failed on one of the prongs. *Id.* at 697. Moreover, the Court stated that counsel is presumed not to be deficient. *Id.* at 689-90. By waiving presentation of evidence on the claim, Defendant necessarily failed to carry his burden of proof to overcome that presumption and prove deficiency. *See Smith v. State*, 445 So. 2d 323 (Fla. 1983). Thus, there was never any reason for the lower court to consider whether Defendant could show prejudice, and no reason to require the lower court to listen to a proffer of evidence directed at that issue. Thus, Defendant’s contention should be rejected.

To the extent that Defendant is complaining about an alleged conflict of interest with post conviction counsel, Defendant is again entitled to no relief. Claims based on conflicts of interest arise under the Sixth Amendments guarantee of effective assistance of counsel. *See Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Wright v. State*, 857 So. 2d 861, 871 (Fla. 2003). However, Defendant had no Sixth Amendment right to the effective assistance of post conviction counsel. *Murray v. Giarratano*, 491 U.S. 1 (1989); *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Kokal*, 901 So. 2d at 777-78. As such, there is no basis for even recognizing a claim based on an alleged conflict of interest by post conviction counsel.

Moreover, while Petitioner complains about the quality of the colloquy regarding a potential conflict of interest, the United States Supreme Court has rejected the requirement that a colloquy even be conducted if there was no objection to being forced to represent conflicting interests at trial. *Mickens v. Taylor*, 535 U.S. 162, 168, 173-74 (2002). Instead, the Court required a defendant to show that the alleged conflict had an adverse impact on the representation to present a conflict claim regarding trial counsel. *Id.* at 173-74. The Court even questioned the applicability of any of its conflict of interest precedent to cases, such as this one, that did not involve

multiple representation. *Id.* at 174-76. Here, Defendant does not allege any adverse effect on the representation based on the alleged conflict. Moreover, it does not appear that one could be demonstrated since Defendant's counsel was not even fully aware of the alleged conflict until Diaz started to testify. *See Hunter v. State*, 817 So. 2d 786, 791-93 (Fla. 2002). To the extent that Defendant is attempting to assert that the adverse effect was the waiver of the penalty phase claims, the record refutes this allegation. Defendant, himself, testified that he was waiving these claims against his counsel's advice before Diaz stated that his relationship with counsel's cousin was more than an office sharing arrangement. (R. 663) Given that there was no requirement for a colloquy, that Defendant is not even raising a type of conflict that is cognizable and that there is no adverse effect, Defendant's complaints about the colloquy that was conducted are without merit even if a claim of conflict of post conviction counsel was cognizable. Defendant is entitled to no relief.

To the extent that Defendant is really complaining that the trial court did not conduct a *Koon* inquiry at the time of trial, he is entitled to no relief. First, Defendant did not raise this claim in his motion for post conviction relief. This Court has held that claims raised for the first time on the appeal from

the denial of the motion for post conviction relief are not properly before this Court. *Griffin v. State*, 866 So. 2d 1, 11 n.5 (Fla. 2003). Second, this Court has held that claims regarding the alleged inadequacy of a *Koon* inquiry are procedurally barred in post conviction proceedings. *Wainwright v. State*, 896 So. 2d 695, 703 n.7 (Fla. 2004). Third, this Court has repeatedly held that *Koon* does not apply to cases, such as this one, that were tried before *Koon* became final. *Allen v. State*, 662 So. 2d 323, 329 (Fla. 1995)(*Koon* only applicable to cases tried after June 1993); *Waterhouse*, 792 So. 2d at 1184; *see also Anderson*, 822 So. 2d at 1268. Thus, to the extent that Defendant is complaining about the lack of *Koon* inquiry at trial, he is entitled to no relief.

II. THE PUBLIC RECORDS CLAIM.

Defendant next asserts that the case should be remanded because all public records were not disclosed. Specifically, Defendant asserts that a sworn statement of Ann Gomez allegedly taken in 1983 and the results of a polygraph examination of her were not disclosed by the Miami-Dade Police and that notes of a statement made by Wally Gomez to the Miami Police were not disclosed.

In presenting this issue, Defendant makes no attempt to argue why the lower court’s actions in denying these claims in

anyway entitle him to any relief. Instead, he simply recites where he allegedly raised these claims below and how the lower court ruled regarding these claims. However, this Court has made clear that the "purpose of an appellate brief is to present arguments in support of the points on appeal." *Duest v. State*, 555 So. 2d 849, 852 (Fla. 1990). Thus, this Court has required defendants to present arguments that explain why the lower court erred in its rulings. *See Shere v. State*, 742 So. 2d 215, 217 n.6 (Fla. 1999). Merely referring to the arguments presented below is insufficient to meet the burden of presenting an argument on appeal. *Duest*, 555 So. 2d at 852. Moreover, the arguments must be presented in more than a cursory fashion. *Bryant v. State*, 901 So. 2d 810, 827-28 (Fla. 2005); *Cooper v. State*, 856 So. 2d 969, 977 n.7 (Fla. 2003); *Reeves v. Crosby*, 837 So. 2d 396, 398 (Fla. 2003); *Lawrence v. State*, 831 So. 2d 121, 133 (Fla. 2002). When an issue is not sufficiently briefed, it is considered waived. *Bryant*, 901 So. 2d at 827-28; *Duest*, 555 So. 2d at 852. Since Defendant has not presented any argument regarding why the lower court improperly denied this claim, it is waived.

Even if the claim had not been waived, Defendant would still be entitled to no relief. To the extent that Defendant is asserting that he was denied records regarding Wally Gomez from

the Miami Police Department, the record does not reflect that Defendant ever requested such records from that department. Since Defendant had not diligently pursued records from that Department, any claim about their alleged failure to produce was properly denied. *Thompson v.* State, 759 So. 2d 650, 658 (Fla. 2000).

To the extent that Defendant meant to raise the claim exclusively regarding the Miami-Dade Police, he is still entitled to no relief. Pursuant to Fla. R. Crim. P. 3.852(i), to have been entitled to public records production at that time, Defendant had to show that he had made a timely and diligent search of the records already produced, identify the records particularly and establish that the records were either relevant or calculated to lead to the discovery of admissible information. Here, while Defendant's motion parroted these requirements, Defendant offered no explanation of why it took Defendant almost 3½ years after he had received the case file in this matter and almost a year after he had received other records related to the officer who investigated this matter and other witnesses, suspects and the codefendant before he filed this request. Further, while Defendant asserted in a conclusory fashion that this information was exculpatory, he made no attempt to establish this was true. The lack of pleading is

particularly important as neither of these individuals testified at trial, Defendant was provided with a 1985 statement of Ms. Gomez (R. 484-511), Diaz testified he interviewed Wally before trial (R. 670-71), the polygraph results would not have been admissible and Defendant's investigator had spoken to the witnesses during the post conviction proceedings. Given the insufficient nature of the pleading, the lower court properly denied it. Fla. R. Crim. P. 3.851(i).

Even if the pleading had been sufficient, the records request would have still been properly denied. Miami-Dade Police stated that it had done a search of its records and had nothing responsive to the request. Defendant's only response was that these records should exist. However, this Court has upheld the denial of a public records claim in the face of such allegations. *Johnson v. State*, 904 So. 2d 400, 403-05 (Fla. 2005). The claim was properly denied.

III. THE EVIDENTIARY HEARING AND *BRADY* CLAIMS.

Defendant next asserts that he was deprived of a fair trial because of the combined effects of ineffective assistance of counsel, withholding of exculpatory evidence or newly discovered evidence. Specifically, Defendant refers to his claims regarding the familial relationship between the State's witnesses, the reward and the presentation of other suspects, the intoxication

defense and the claim based on *Brady v. Maryland*, 373 So. 2d 83 (1963). However, Defendant is entitled to no relief as he has waived these issues and they were properly denied.

Again, Defendant recites the claims he raised in the lower court and mentions the lower court's ruling but presents no argument regarding why the lower court erred in rendering its ruling. Since Defendant has not presented any argument concerning why the lower court erred, he has waived these claims. *Bryant*, 901 So. 2d at 827-28; *Duest*, 555 So. 2d at 852. The denial of post conviction relief should be affirmed.

Even if the issues were not waived, Defendant would still be entitled to no relief. The lower court properly denied the claims. With regard to the claims of ineffective assistance of counsel, the lower court held an evidentiary hearing on these claims. In reviewing these claims, therefore, this Court is required to give deference to the lower court's findings of fact to the extent that they are supported by competent, substantial evidence. *Stephens v. State*, 748 So. 2d 1028, 1033-34 (Fla. 1999). However, this Court may independently review the lower court's determination of whether those facts support a finding of deficiency and prejudice to support a holding that counsel was not ineffective. *Id.*

The lower court explained its denial of these claims:

The current standard is contained in the case of Strickland v. Washington, 104 S. Ct. 2052, 2064 (1984).

In setting forth the test the Court held that a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. 104 S. Ct. 2068.

This Court finds that defendant did not meet his burden with evidence presented at the evidentiary hearing that counsel's performance was either deficient or prejudicial, such that his constitutional right to effective assistance of counsel was violated.

In pertinent part defendant alleged that his trial counsel, Reemberto Diaz ineffectively assisted defendant by failing to discover a family relationship between Elizabeth Feliciano, Feliciano Aguero and Rufina Perez-Cruz. He asserts that Perez-Cruz lied about her testimony in order to collect a reward. However, there was no evidence a reward had been paid. There was also no evidence to show that the three witnesses cited above had conspired to lie to collect a reward. Thus, there is no reasonable probability that failure to discover that putative fact would have affected the trial. Further Rufina Perez-Cruz testified at trial that she was unaware of a reward and had not received any. Indeed the only witness who testified that she knew of a reward was Elizabeth Feliciano, who further testified that she did not get any reward money nor did she seek any. Ms. Perez-Cruz's testimony was not contradicted at the evidentiary hearing, since neither of the Felicianos testified at the evidentiary hearing.

Thus, defendant failed to show that Rufina Perez-Cruz had lied in her trial testimony concerning a reward.

The defendant alleged that counsel was ineffective in not cross-examining Rufina Perez-Cruz with a statement she gave to the police while using the name Josefina Cruz. However, in her perpetuated testimony, she said that she goes by the name Fina or Rufina Perez and that she does not use the name Cruz or Josefina Cruz. She denied telling the police that she heard defendant and Enrique Fernandez talking in the field and that the defendant was saying he had stabbed a woman to death possibly old. This was the only thing she really

admitted saying. She also denied refusing to go with the officers to make a sworn statement. It is obvious that evidence established that the "report" of Detective Miriam Royle (f/k/a Gordilla) was not a reliable account of what Ms. Perez-Cruz had told the police when they first interviewed her.

In this so-called report which begins by reciting a conversation that this officer had with Feliciano Aguayo and his mother Elizabeth Feliciano. This "report" states that Aguayo had a sister-in-law named Josefina Cruz. This person is probably Ms. Cruz-Perez, because it also refers to her son. This confusing and non-probative report is riddled with contradictions and fictional denials of no help to this defendant. Thus the evidence is really filled with inaccurate reports. Thus the evidence is uncontradicted that Detective Royle inaccurately reported the comments of the individual she believed was Josefina Cruz.

The Court finds that counsel was not ineffective in finding and cross examining Ms. Perez-Cruz with the statements in the police report.

First, it is not clear that Detective Royle was referring to Ms. Perez-Cruz so that counsel should have been on notice that there may have been an inconsistent statement is in fact ridiculous. Again, because Ms. Perez-Cruz has denied making those statements to Detective Royle, the impeachment value of the statement is of little or no value for impeachment purposes.

Furthermore the record reflects that trial counsel did effectively cross examine Rosefina Perez-Cruz, when he asked her why she had not come forward immediately with the information that defendant had killed (or said she had heard the defendant say) one of the victims. Her answer that she thought he was joking was an implication that suggested she came forward later because of a reward and only because of the reward. This little nugget was later mentioned in defense counsel's closing argument to discredit her credibility by pointing to the reward on a motive for her damaging testimony.

It is clear that to further use that police report as impeachment was not prejudicial under the standards of Strickland v. Washington, supra.

The defendant also alleged that defendant's counsel was ineffective for failing to present evidence of

> intoxication through the testimony of Feliciano Aguayo. Firstly Aguayo did testify about some fairly heavy drinking. To make more of it flies in the face of the evidence. The only other person who could have testified about the defendant's drinking was the defendant himself. He did not testify nor was he going to testify. Moreover, the testimony of Aguayo as to how many beers the defendant drank cannot be shown by the amount of beer bought by the defendant.
>
> Furthermore, the defendant's defense was not really based on intoxication. The defense was that defendant did not commit the crimes. Counsel should not be criticized as ineffective for failing to present more evidence of intoxication when the defendant's position is "I didn't do it". Jones v. State, 855 So. 2d 1050 (Fla. 2000).
>
> In regard to the "other suspects" issue. The defendant at the evidentiary hearing produced no testimony concerning other suspects. John Connors, Jr. was mentioned frequently during the case but no evidence connecting him to the case was offered.
>
> The court finds that the evidentiary hearing clearly demonstrated that the defendant failed to meet his burden to show that trial counsel provided ineffective assistance of counsel.

(R. 568-71)

With regard to the family relationship, Diaz testified that he would not have used evidence that witnesses were related without some ability to show that the relationship influenced their testimony. Perez testified that she was Aguayo's sister-in-law but that she did not socialize with Feliciano. She denied having any knowledge about, or desire to collect, a reward. She emphatically denied discussing a reward with Aguayo or Feliciano or using her car to obtain a bond for Aguayo. Defendant presented no evidence to rebut Perez's testimony. Under these

circumstances, the lower court properly determined that Defendant had failed to show any deficiency. *Cummings-el v. State*, 863 So. 2d 246, 250-53 (Fla. 2003). Further, while Defendant asserts that presenting evidence of the familial relationship would have rebutted the State's assertion that the witnesses did not know one another and had no reason to conspire, the presentation of this evidence would not have created a reasonable probability of a different result. While the State did assert that there was no reason for the witnesses to conspire, it did not assert that the witnesses were unrelated to each other in any manner. Instead, the State asserted that the witnesses were unrelated to each other in time and circumstance and that there was no evidence that the witnesses socialized and conspired. (DAR. 588, 1360, 1362, 1397) Given that the State also admitted that Feliciano and Aguayo were related, the jury could not have taken these comments to mean that the witnesses had no relationships at all, as Defendant contends. Given the evidence that was presented, there is no reasonable probability that Defendant would not have been convicted had it been presented. *Strickland*. The claim was properly denied.

With regard to the impeachment issue, the only evidence presented on this claim was Perez's testimony. Defendant never

asked Diaz about the report or why he did not use it to cross examine Perez. As such, the lower court properly found that Defendant did not prove deficiency. *See Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983). Moreover, Perez did deny using the name Josefina Cruz, living at the address listed in the report as hers, making the statements in the report, seeking a reward, socializing with Feliciano and refusing to give a sworn statement. Defendant presented no evidence to rebut Perez's statement. Moreover, the report does show that inaccuracies, including attributing the alleged statement of Perez to Feliciano. (R. 567) Under these circumstances, the lower court properly rejected this claim. *Strickland*.

With regard to the claim regarding intoxication, the only evidence presented at the evidentiary hearing was Diaz's testimony. Diaz did testify that the defense was that Defendant did not commit the crime, that he was only using intoxication to show that Defendant's version of the events were muddled and that Defendant was the only person who could have testified to his level of intoxication at the time of trial and that Defendant was not going to testify. Diaz accurately stated that using Aguayo's testimony about the amount of beer he suggested Defendant buy would not have shown the amount of intoxicants used. Defendant presented no evidence to show the amount of

intoxicants he had used, when he used them or what his state of intoxication was at 6:30 Sunday morning when the crime occurred. Under these circumstances, the lower court properly denied Defendant's claim. *Jones v. State*, 855 So. 2d 611, 616-17 (Fla. 2003).

With regard to the claim about other suspects, again the only evidence that was presented was Diaz's testimony. Diaz testified that he made a strategic decision to present the issue of other suspects in the manner he did to avoid opening the door to Fernandez's confession, which implicated Defendant. Defendant did not show that Diaz was unaware of any information on the subject of other suspects. Under these circumstances, the lower court properly determined that Diaz was not deficient for making this strategic decision. *See Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000). Moreover, Defendant did not present any evidence of other suspects at the evidentiary hearing. *See Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983). As such, the lower court properly denied this claim.

With regard to the *Brady* claim, the lower court properly summarily denied this claim. In his *Brady* claim, Defendant failed to allege anything that the State had withheld. (SR. 107) Instead, Defendant merely asserted that to the extent that the State had withheld some evidence from Defendant, *Brady* was

violated and referred to his public records and ineffective assistance claims. Under these circumstances, the claim was facially insufficient and properly denied as such. *Ragsdale*, 720 So. 2d at 207. Moreover, while Defendant now refers to his public records claim, his claim about a family relationship between the witnesses and his assertion that Perez had a relationship with the codefendant, he did not raise these claims below and they are not properly before this Court. *Griffin v. State*, 866 So. 2d 1, 11 n.5 (Fla. 2003). Moreover, Defendant has still not pled all of the elements of a *Brady* claim. As such, it was properly denied.

IV. THE VOIR DIRE CLAIM.

Defendant next asserts that his trial counsel was ineffective during voir dire. Defendant specifically mentions the alleged failure to ask any questions regarding any predisposition to a death sentence, the alleged failure to exercise a cause challenge against Juror Hepburn and the alleged failure to question Juror Gentile and two other veniremembers Defendant does not even name[5] about pretrial publicity. However, the lower court properly summarily denied this claim as it was insufficiently plead and refuted by the record.

[5] The record cites reflect Defendant was referring to Dan Rankow and Diane Capilla.

Again, Defendant recites the claims he raised in the lower court and mentions the lower court's ruling but presents no argument regarding why the lower court erred in rendering its ruling. Since Defendant has not presented any argument concerning why the lower court erred, he has waived these claims. *Bryant*, 901 So. 2d at 827-28; *Duest*, 555 So. 2d at 852. The denial of post conviction relief should be affirmed.

Even if the issue had been properly briefed and not waived, Defendant would still be entitled to no relief. The lower court properly denied the claim as facially insufficient. In order to state a facially sufficient claim of ineffective assistance of counsel, a defendant must allege both that his counsel was deficient in a specific manner and that the defendant was prejudiced by the alleged deficiency. *Strickland v. Washington*, 466 U.S. 668 (1984); *see also Phillips v. State*, 894 So. 2d 28, 35-36 (Fla. 2004)(requiring proof of both prongs in a claim of ineffective assistance of counsel at voir dire). To allege prejudice sufficiently, a defendant must demonstrate that but for counsel's allegedly deficient conduct, there is a reasonable probability that the result of the trial would have been different. *Id.* at 694. Moreover, the allegation of prejudice must be more than conclusory. *Ragsdale*, 720 So. 2d at 207.

Here, the claim Defendant presented in the lower court asserted that counsel was deficient for failing to question the veniremembers about their views on the death penalty, for failing to attempt to rehabilitate veniremembers who were opposed to the death penalty, for failing to seek to excuse Mr. Hepburn for cause, for failing to question the venire about pretrial publicity and for the manner in which he question the venire generally. (SR. 489-505) However, Defendant made no allegation of prejudice even in a conclusory manner. (SR. 489-505) Instead, Defendant made statements asserting that the effect of the alleged deficiency could never been known. (SR. 494, 503) Given the lack of allegations of prejudice, the claim was facially sufficient. *Phillips*, 894 So. 2d at 35-36; *Ragsdale*, 720 So. 2d at 207. The claim was properly denied as such.

Moreover, the record conclusively refutes Defendant's claim that his counsel did not question veniremembers about exposure to pretrial publicity. Defense counsel did question those veniremembers who indicated that they had heard of the case in the media. (DAR. 339-40, 363-65, 424-46, 500) Thus, he cannot be deemed ineffective for failing to do so. *Strickland*.

During its questioning, the State inquired if anyone had read or heard about the case in the media. (DAR. 331-32) Gentile

and two other veniremembers indicated that they had. (DAR. 332) At sidebar during the State's questioning, Mr. Gentile stated that he had read in the media that two elderly ladies were stabbed to death during a break-in and that the crime was gruesome and sick. (DAR. 338) Other than these basic facts, he had no knowledge of the matter. (DAR. 338-39) He stated that nothing he knew about the case would influence him as a juror. (DAR. 339) Defense counsel questioned Mr. Gentile about when he heard of the case and from what media outlet. (DAR. 339-40) He elicited that Mr. Gentile had not discussed what he had learned with anybody and that the only opinion he had formed was that the crime was terrible. (DAR. 340)

At sidebar, Mr. Rankow stated that he had read about the case when the crimes happened. (DAR. 361) The only thing he recalled was that the crime was particularly violent. (DAR. 361-62) When asked about having formed any opinions based on the publicity, he initially stated that he was perturbed by what happened but then stated that he had formed no fixed opinions regarding Defendant. (DAR. 362) Mr. Rankow stated that the nature of the crime would not cause him to find Defendant guilty unless the State proved that he was guilty. (DAR. 362-63) Defense counsel then questioned Mr. Rankow regarding whether he would hold the State to a lower burden of proof because of the

nature of the crime. (DAR. 363) Based on this questioning, Rankow made statements that the nature of the crime could possibly influence his verdict, that he would have difficulty viewing the evidence and that he could not give Defendant a fair trial. (DAR. 363-65)

Ms. Capilla stated at sidebar that she remembered reading about the case but did not recall any details. (DAR. 423-24) She remembered reading about the case upset her because she had an elderly mother. (DAR. 424) She had not formed any opinions about the case. (DAR. 424) Defense counsel questioned Ms. Capilla about when and where she read about the case. (DAR. 424-25) He elicited that all Ms. Capilla remembered was the nature of the victims and the manner of the murders. (DAR. 425) Upon defense questioning, Ms. Capilla stated that the only opinion she had formed was that the crime was horrible but she had formed no opinion about Defendant’s guilt, which she regarded as a separate issue. (DAR. 425) Ms. Capilla did not believe that her limited knowledge of the case would influence her decision as a juror. (DAR. 425-26)

During his questioning of the venire, Defendant referred Mr. Rankow back to the prior sidebar and asked if he still maintained his beliefs. (DAR. 500) Mr. Rankow responded affirmatively. (DAR. 500)

Since defense counsel did question those veniremembers who indicated that they had ever heard of the case about their media exposure, counsel cannot be deemed ineffective for failing to do so. *Strickland*. Thus, the claim was properly summarily denied.

To the extent that Defendant is complaining that counsel did not ask the veniremembers again if any of them had heard of the case in the media, the claim was still properly summarily denied. The State inquired if any veniremembers had been exposed to the media coverage of this matter. Only Mr. Gentile, Mr. Rankow and Ms. Capilla indicated that they had been exposed. When the State questioned other veniremembers about whether they had indicated that they had been exposed to the media coverage in this matter, they all denied it. (DAR. 356, 358, 385) This Court has previously held that where the matter had already been the subject of voir dire questioning, counsel is not ineffective for failing to repeat the question. *Teffeteller v. Dugger*, 734 So. 2d 1009 (Fla. 1999); *see also Johnson v. State*, 903 So. 2d 888, 895-96 (Fla. 2005). Thus, the claim was properly summarily denied.[6]

[6] Moreover, the record reflects that none of the veniremembers who had been exposed to pretrial publicity served in this matter. Defendant used a peremptory challenge on Mr. Gentile. (DAR. 545) Defendant successfully moved to excused Mr. Rankow for cause based on his statements about publicity. (DAR. 549) Ms. Capilla was not reached during jury selection. (DAR. 4-6)

The record also refutes Defendant's claim with regard to the failure to seek to excuse Mr. Hepburn for cause. Hepburn was not the proper subject of a cause challenge. *Brown v. State*, 755 So. 2d 737 (Fla. 4th DCA 2000). Under Florida law, a veniremember is not subject to a cause challenge merely because he or a family member has been the victim of a crime.

Here, when the trial court inquired if any veniremember would have difficulty being fair simply because of the nature of the charges, the entire venire responded no. (DAR. 238-39) The trial court stated in the question that it was particularly concerned with individuals who might have been or had a family member who had been either a defendant or a victim of a similar crime. *Id.*

Later, Dwight Hepburn informed the court that his brother had been the victim of a crime. (DAR. 267) During defense questioning, Mr. Hepburn stated that he had testified as a witness in cases regarding building code violations. (DAR. 489-90, 491) He stated that his prior interactions with the State as a witness in cases regarding building code violations would not influence him as a juror nor would he be embarrassed to run into the prosecutor if he had returned a not guilty verdict. (DAR. 490-91) Defense counsel later informed the court that Mr.

Hepburn had been a witness for him in cases he had handled years earlier. (DAR. 550)

After the jury had been selected but before opening statement, the State informed the court that Mr. Hepburn's brother had been murdered in the City of Miami and that the case regarding that murder was open. (DAR. 566-67) The State explained that Mr. Hepburn's brother had worked for Dade County, and that while at work, a robbery occurred in the area. (DAR. 568) Mr. Hepburn's brother had been struck by a stray bullet and killed. (DAR. 568) The trial court decided to question Mr. Hepburn about the incident. (DAR. 568) In doing so, the Court expressed the concern that questioning was necessary to ensure that Mr. Hepburn was not the proper subject of a cause challenge. (DAR. 567)

During questioning, Mr. Hepburn indicated that his brother was a building inspector, like Mr. Hepburn. (DAR. 569, 488-89) His brother had been a member of an inspection task force in the Overtown/Liberty City area and had been accidentally shot during a robbery of someone else. (DAR. 569-70) Mr. Hepburn affirmed that he bore no ill feelings because of the crime against his brother and that it would have no effect on his service as a juror. (DAR. 569-70) Upon questioning by the defense, Mr. Hepburn stated that the incident with his brother was entirely

separate from this matter, that he had no involvement in the investigation into his brother's death and that it would have no effect on his service in this matter. (DAR. 571-72)

Upon inquiry by the defense, the State indicated that a detective from the same department that had investigated Defendant's crimes had been assigned to Mr. Hepburn's brother's murder. (DAR. 572-73) However, that detective had left the homicide division. (DAR. 573) After conferring with Defendant, defense counsel announced that the defense was satisfied with Mr. Hepburn. (DAR. 573)

As can be seen from the forgoing, Mr. Hepburn never indicated that the fact that his brother had been killed during a robbery would affect his ability to be fair and impartial. Instead, he continually asserted that the crime against his brother was an entirely separate matter that would have no effect on his service in this matter. Thus, Mr. Hepburn would not have been properly excused for cause. *Brown v. State*, 755 So. 2d 737 (Fla. 4th DCA 2000). Since any attempt to challenge Hepburn for cause would have been without merit, counsel cannot be deemed ineffective for failing to make that attempt. *Kokal v. Dugger*, 718 So. 2d 138, 143 (Fla. 1998); *Groover v. Singletary*, 656 So. 2d 424, 425 (Fla. 1995); *Hildwin v. Dugger*,

654 So. 2d 107, 111 (Fla. 1995); *Breedlove v. Singletary*, 595 So. 2d 8, 11 (Fla. 1992).

Moreover, while Defendant asserts that the trial court expressed a willingness to excuse Mr. Hepburn for cause, this is not true. In discussing the need to question Hepburn about his brother being a murder victim, the trial court merely indicated that Mr. Hepburn should be questioned because questioning might reveal grounds for a cause challenge. (DAR. 567) Thus, the record does not reflect that the trial court ever believed that Mr. Hepburn was the proper subject of a cause challenge, which he was not. The claim was properly denied.

V. THE COMMENTS CLAIM.

Defendant next contends that counsel was ineffective for failing to object to comments the State made during opening and closing argument. However, Defendant is entitled to no relief as the issue is waived and the claims were properly denied.

Again, Defendant merely asserts the claim he raised below and the lower court's ruling. He presents no argument concerning why the lower court's ruling was improper. By failing to present any argument, Defendant has waived this issue. *Bryant*, 901 So. 2d at 827-28; *Duest*, 555 So. 2d at 852. The denial of post conviction relief should be affirmed.

Even if the claim had not been waived, Defendant would still be entitled to no relief. This Court has held that claims of error regarding comments by the State and of ineffective assistance of counsel for failing to object to such comments are procedurally barred in post conviction proceedings. *Robinson v. State*, 707 So. 2d 688, 697-99 (Fla. 1998). Moreover, on direct appeal, Defendant raised issues regarding the State's comments. Initial Brief of Appellant, FSC Case No. 78,411, at 41-58. This Court rejected the issues as unpreserved, without merit and harmless. *Garcia*, 644 So. 2d at 62-63. Moreover, this Court stated that Defendant was not deprived of a fair trial by the comments and entitled to no relief even if the issues had been preserved for review. *Id.* Again, the claim is procedurally barred. *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995). Further, since this Court determined that the comments did not deprive Defendant of a fair trial, Defendant could not establish that he was prejudiced by the comments. *Chandler v. State*, 848 So. 2d 1031, 1046 (Fla. 2003). This claim was properly denied.

Moreover, Defendant did not explain how he was prejudiced by his counsel's failure to object to the State's comments about thoroughness of the investigation or to a multitude of comments that were, and are, referred to only by page number and assertion of impropriety in the comments. (SR. 506-26) Such a

lack of pleading is particularly important with regard to the comments about the thoroughness of the investigation, as a theme of the defense was that despite a thorough investigation, the State was unable to find any physical evidence linking Defendant to the crime. Since the claim was insufficiently plead, it was properly denied. *Ragsdale*, 720 So. 2d at 207.

Further, with regard to the comment that the witnesses were unrelated, Defendant takes the comment out of context. The State did not assert that the witnesses had no relationship; it asserted that the witnesses were unrelated in time and circumstances. (DAR. 588) The jury could not have interpreted the comment in the manner Defendant suggests because the State later asserted that Aguayo and Feliciano did have a family relationship. (DAR. 588-607) Moreover, despite having been granted an evidentiary hearing on the issue, Defendant did not show that the family relationship gave any of these witnesses a motive to lie. Under these circumstances, the comment was not improper, and the claim concerning it was properly denied. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

VI. THE SUMMARY DENIAL CLAIM.

Defendant next asserts certain claims were improperly summarily denied. Defendant lists a variety of disparate claims

that were summarily denied.[7] However, Defendant is entitled to no relief as he has waived this issue and the claims were properly denied.

Again, Defendant fails to present any argument regarding why the denial of each of the various claims were improperly summarily denied. Instead, he again simply lists the claims and states how the lower court disposed on them. Again, such a presentation is insufficient to present an issue in this appeal and the issues have been waived. *Bryant*, 901 So. 2d at 827-28; *Duest*, 555 So. 2d at 852. Even if Defendant had sufficiently presented the issues in this appeal, Defendant would still be entitled to no relief. The claims were properly denied.

Defendant first mentions his claim that counsel was ineffective for failing to object to the medical examiner's testimony concerning the victims' suffering.[8] However, Defendant failed to assert how counsel's alleged deficiencies created a reasonable probability that Defendant would not have been sentenced to death. (SR. 537-40) This is particularly true given that the medical examiner's testimony at the guilt phase

[7] Defendant includes in this issues claim upon which he was granted an evidentiary hearing. These claims have been addressed in Issue II. The State relies upon its response under that issue to those claims.

[8] While Defendant refers to this claim again in discussing guilt phase issues, Dr. Marraccini did not testify regarding the victims' suffering at the guilt phase. (DAR. 846-70, 895-942)

centered on the manner and timing of the victims' death (DAR. 846-70, 895-942) and the testimony at the penalty phase centered on the victims' suffering (DAR. 1576-90), that the victims' died of multiple stab wounds and that a doctor is qualified to testify to the pain a wound would cause. *Cummings-el v. State*, 863 So. 2d 246, 249-50 (Fla. 2003); *Davis v. State*, 859 So. 2d 465, 478 (Fla. 2003). The claim was properly denied.

Defendant next mentions his claim that counsel was ineffective for failing to present evidence that Defendant was a good prisoner to the jury and for failing to object to the manner in which the State rebutted this evidence at the sentencing hearing. However, the claims were properly denied as refuted by the record. During the sentencing hearing, counsel noted he had not presented evidence regarding Defendant's good behavior while incarcerated because he did not want the jury to know the history of the case. (DAR. 1639) However, he did want the trial court to consider it. *Id.* With regard to the good behavior, the State noted that Defendant had been on death row without an opportunity to misbehave. (DAR. 1640-41) Defendant did not attempt to rebut this statement. (DAR. 1641) Since the record reflects counsel made a strategic decision to present the good prisoner evidence in the manner he did and the rebuttal evidence was presented in open court and Defendant had the

opportunity to rebut it, the claim was without merit and properly denied. *Strickland*; *Pope v. Wainwright*, 496 So. 2d 798, 803-04 (Fla. 1986).

Defendant next mentions his claim that counsel was ineffective for failing to object to letters that allegedly contained victim impact statements and sentencing recommendations. However, Defendant did not allege to what letters he was referring or how counsel's failure to object to these alleged letters created a reasonable probability of a different result at sentencing. (SR. 566-67) As such, the claim was facially insufficient and properly denied. *Ragsdale*, 720 So. 2d at 207. Moreover, the sentencing order does not indicate that the trial court considered anything but the evidence that was properly before the court and presented in Defendant's presence. (DAR. 188-95) Under these circumstances, there was no impropriety. *Mann v. State*, 603 So. 2d 1141, 1144 (Fla. 1992). The claim was properly denied.

Defendant next contends that his counsel was ineffective for conceding that HAC was applicable to this matter. In the lower court, Defendant did not assert what argument could have been made that HAC did not apply to this matter or how he was prejudiced by the failure to present that argument. (SR. 567) Instead, Defendant merely asserted, as he does here, that

conceding the existence of an aggravator is per se ineffective assistance and prejudice is presumed. Defendant cites no support for these assertions. However, the United States Supreme Court has rejected the notion that even conceding a defendant's guilt to first degree murder is per se ineffective and that prejudice is presumed. *Florida v. Nixon*, 125 S. Ct. 551 (2004). Instead, the United States Supreme Court held that such claims are governed by *Strickland*. *See also Dillbeck v. State*, 882 So. 2d 969, 972 n.9 (Fla. 2004). Defendant did not sufficiently allege a claim under *Strickland*. *Ragsdale*, 720 So. 2d at 207. Moreover, both victims died as the result of multiple stab wounds, including defense wounds. "The HAC aggravator has been repeatedly upheld where, as here, the victim was repeatedly stabbed and remained conscious during at least part of the attack." *Davis v. State*, 859 So. 2d 465, 478 (Fla. 2003)(citing *Francis v. State*, 808 So. 2d 110, 134-35 (Fla. 2001)). As such, the lower court properly denied this claim and should be affirmed.

Defendant next mentions his claim that nonstatutory aggravation was considered. He also asserts that the State commented on nonstatutory aggravation and that counsel was ineffective for failing to object. The only specific allegedly nonstatutory aggravation factor to which Defendant refers is the

State's mention of the fact that Defendant was in violation of his parole at the time he committed these crimes. However, this Court has repeatedly held that claims that nonstatutory aggravation was considered are procedurally barred in post conviction proceedings. *Porter v.* State, 788 So. 2d 917, 921 (Fla. 2001). Further, it was proper for the State to comment on Defendant's parole status. The under sentence of imprisonment aggravator is proven by showing that a defendant was on parole. *Carter v. State*, 576 So. 2d 1291, 1293 (Fla. 1989). Not only the existence of the aggravating circumstances but also the weight to be accorded to them are proper subjects of a penalty phase closing argument. *See Bertolotti v. State*, 476 So. 2d 130, 134 (Fla. 1985); *see also Wuornos v. State*, 664 So. 2d 1012, 1018 (Fla. 1994). The State's argument, based on properly admitted evidence that Defendant was on parole and limited by the terms of his parole to being in Western Texas at the time the murder was committed, was a proper comment on the existence and weight to be accorded to the under a sentence of imprisonment aggravator. *See Allen v. State*, 662 So. 2d 323, 331 (Fla. 1995). Since the comment was proper, counsel cannot be deemed ineffective for failing to make the nonmeritorious objection that it was not. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d

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

Defendant next asserts that counsel was ineffective for failing to object to the jury instructions on the aggravating circumstances. However, Defendant never asserted what instruction on which aggravating circumstance was vague and what objection counsel should have made. (DAR. 584-88) Instead, he merely asserted in vague terms that the instructions were vague and that had counsel objected the jury would have probably found no more than one unidentified aggravator. *Id.* Such vague assertions are insufficient to state a claim for relief. *Griffin v.* State, 866 So. 2d 1, 14-15 (Fla. 2003). As such, the lower court properly denied this claim.

Moreover, the trial court read the jury the standard jury instructions on each of the four aggravating factors, including the post-*Espinosa* standard instruction on HAC. (DAR. 157-60, 1624-25) This Court has rejected challenges to these instructions and claims that counsel was ineffective for failing to object to them. *Vining v. State*, 827 So. 2d 201, 214-15 (Fla. 2002)(under a sentence of imprisonment); *Card v. State*, 803 So. 2d 613, 628 (Fla. 2001)(during the course of a felony); *Hudson v. State*, 708 So. 2d 256, 261 (Fla. 1998)(prior violent felony);

Hall v. State, 614 So. 2d 473, 478 (Fla. 1993)(HAC). As such, the claims were properly denied.

Next, Defendant mentions his claim that the trial court failed to instruct the jury on the burden of proof regarding mitigation and that counsel was ineffective for failing to object. However, this Court has repeatedly held that claims regarding the propriety of jury instructions are procedurally barred in post conviction proceedings. *Thompson v. State*, 759 So. 2d 650, 667 (Fla. 2000); *Valle v. State*, 705 So. 2d 1331, 1335 (Fla. 1997). As such, the lower court properly denied this claim and should be affirmed.

Moreover, the claim was facially insufficient. The basis of Defendant's claim was that the transcript reflects that the trial court deviated from the standard jury instructions when it read the penalty phase instructions and that such a deviation was prejudicial. (SR. 568-69) However, such a conclusory allegation of prejudice is insufficient to state a claim of ineffective assistance of counsel. *Ragsdale*, 720 So. 2d at 207. Thus, the claim was properly denied.

Moreover, in determining whether an alleged instructional error has been demonstrated, it must be remembered that:

> [A] single instruction cannot be considered alone, but must be considered in light of ***all*** other instructions bearing upon the subject, and if, when so considered,

> the law appears to have been fairly presented to the jury, the assignment on the instruction must fail.

Higginbotham v. State, 19 So. 2d 829, 830 (Fla. 1944)(emphasis added); *see also Esty v. State*, 642 So. 2d 1074, 1080 (Fla. 1994). Moreover, the United States Supreme Court has also required that the allegedly improper instruction be viewed not just in light of the other instructions given but also in light of the entire record. *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). In considering the totality of the instructions and record, error is only properly found if "'there is a reasonable likelihood that the jury has applied the challenged instruction in a way'" that violates the Constitution. *Id.* (quoting *Boyde v. California*, 494 U.S. 370, 380 (1990)).

Here, the standard jury instructions, which the trial court provided to the jury in writing during its deliberations (DAR. 1628), state:

> A mitigating circumstance need not be proven beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it established.

(DAR. 166) However, the transcript reflects[9] that in reading the instructions, the trial court merely stated:

> If you are convinced that a mitigating circumstance exists, you may consider it as established.

[9] In denying the claim, the lower court noted that it appeared that this was a transcription error. (R. 538)

(DAR. 1626) Given the totality of the instructions that were given, both oral and written, there is no reasonable likelihood that the jury did not understand the burden of proof regarding mitigation and applied the instructions in an unconstitutional way. As such, there was no cognizable error in the instructions. *See Parker v. Sec'y for the Dept. of Corrections*, 331 F.3d 764, 779-80 (11th Cir. 2003). Counsel cannot be deemed ineffective for failing to make a nonmeritorious claim that there was. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim was properly denied.

Next, Defendant alludes to his claim that counsel was ineffective for failing to object to a comment the trial court made regarding scheduling the penalty phase. In presenting this claim, Defendant did not assert how objecting to this comment would have created a reasonable probability of a different result at the penalty phase. (SR. 569) This lack of pleading is important as the record reflects that the trial court had already discussed scheduling the penalty phase with counsel. (DAR. 1445) The claim was facially insufficient and properly denied. *Ragsdale*, 720 So. 2d at 207.

Defendant next mentions his claim that he is allegedly innocent of the death penalty. However, to prove a claim of

actual innocence of the death penalty, a defendant must show "based on the evidence proffered plus all record evidence, a fair probability that a rational fact finder would have entertained a reasonable doubt as to the existence of those facts which are prerequisites under state or federal law for the imposition of the death penalty." *Sawyer v. Whitley*, 505 U.S. 333, 346 (1992)(quoting *Sawyer v. Whitley*, 945 F.2d 812 (5th Cir. 1991)). The Court further noted that "the 'actual innocence' requirement must focus on those elements that render a defendant eligible for the death penalty, and not on additional mitigating evidence that was prevented from being introduced as a result of a claimed constitutional error." *Id.* at 347. In applying this test to Florida's sentencing law, the Eleventh Circuit stated:

> a petitioner may make a colorable showing that he is actually innocent of the death penalty by presenting evidence that an alleged constitutional error implicates all of the aggravating factors found to be present by the sentencing body. That is, but for the constitutional error, the sentencing body could not have found any aggravating factors and thus petitioner was ineligible for the death penalty.

Johnson v. Singletary, 938 F.2d 1166, 1183 (11th Cir. 1991)(en banc). This formulation was cited with approval in *Sawyer*. *Sawyer*, 505 U.S. at 347 & n.15.

Here, Defendant based his claim on the assertions that presentation of evidence of his mental state at the time of

these crimes would have negated three, unspecified aggravators, that HAC was improperly found without evidence of intent to torture and that counsel conceded the applicability of the during course of a sexual battery and prior violent felony aggravators. (SR. 571-76) However, other than linking his mental state to the alleged intent to torture element of HAC, Defendant made no attempt to explain what evidence of his mental state at the time of the crime would have affected which aggravator or how. Further, Defendant does not explain what counsel could have done to challenge the during the course of a felony or prior violent felony aggravators.[10] Since Defendant did not sufficiently allege how all of the aggravating factors found in this matter would be inapplicable, the claim was facially insufficient and properly denied. *Ragsdale*, 720 So. 2d at 207.

Moreover, despite Defendant's assertions, it appears that none of the aggravators were improperly found. The under a sentence of prison and prior violent felony aggravators have nothing to do with Defendant's mental state at the time of the crime. While Defendant asserts that there is an intent to torture element of HAC that his mental state would have affected, this Court has repeatedly rejected this assertion.

[10] As explained, *supra*, with regard to HAC, conceding the presence of an aggravator is not ineffective assistance pre se. *See Florida v. Nixon*, 125 S. Ct. 551 (2004); *Dillbeck v. State*, 882 So. 2d 969, 972 n.9 (Fla. 2004).

Belcher v. State, 851 So. 2d 678, 683-84 (Fla. 2003). Moreover, Defendant did not assert that he was insane at the time the crimes were committed and instead only claimed that he was intoxicated. However, intoxication was never a defense to sexual battery, a general intent crime. *Sochor v. State*, 619 So. 2d 285, 290 (Fla. 1993). Florida does not recognize other mental health defenses based on a mental state less than insanity. *See Chestnut v. State*, 538 So. 2d 820 (Fla. 1989). Further, this Court found that each of the aggravators was supported by the record on appeal. *Garcia*, 644 So. 2d at 63. Thus, the lower court properly denied this claim and should be affirmed.

Defendant next mentions his claim that the penalty phase jury instructions and comments shifted the burden of proof and that counsel was ineffective for failing to object. However, this Court has repeatedly rejected these claims, as procedurally barred and without merit. *Demps v. Dugger*, 714 So. 2d 365, 367-68 (Fla. 1998). As such, the lower court properly denied these claims and should be affirmed.

Defendant next mentions his claim that the jury's sense of responsibility for sentencing was unconstitutionally diminished by being told that they were making an advisory recommendation and that his counsel was ineffective for failing to object. However, this Court has repeatedly held that claims alleging

violations of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), and ineffective assistance for failing to raise the issue are procedurally barred in post conviction litigation. *Dufour v. State*, 905 So. 2d 42 (Fla. 2005); *Johnson v. State*, 903 So. 2d 888, 899 (Fla. 2005). Moreover, this Court has repeatedly rejected claims that *Caldwell* is violated by informing the jury that it is returning an advisory recommendation. *Mansfield v.* State, 30 Fla. L. Weekly S598 (Fla. Jul. 7, 2005). As such, the lower court properly denied this claim and should be affirmed.

Defendant next alludes to his claim regarding the State's comments concerning the aggravators in the penalty phase closing argument. However, this Court has held that claims regarding comments in closing and alleged ineffectiveness for failing to object are barred as a matter of law in post conviction proceedings. *Robinson v. State*, 707 So. 2d 688, 697-99 (Fla. 1998). As such, the claim was properly denied. Moreover, the only impropriety mentioned in the claim below was the State's failure to argue concerning Defendant's mental state in connection with HAC. (SR. 599-602) However, Defendant's mental state is not an element of HAC. *Belcher*, 851 So. 2d at 683-84. As such, the claim was without merit and properly denied.

Defendant next mentions his claim that Florida's capital sentencing statute is unconstitutional because it fails to

prevent the arbitrary imposition of the death penalty. However, this Court had repeatedly held that this claim is procedurally barred in post conviction litigation and is without merit. *Elledge v. State*, 30 Fla. L. Weekly S429 (Fla. Jun. 9, 2005). As such, the lower court properly denied this claim and should be affirmed.

Defendant next mentions his claim that the trial court erred in failing to find mitigation. In support of this claim in the lower court, Defendant relied on his assertion that he had been a good prisoner while incarcerated prior to trial. (SR. 611-14) However, issues regarding the failure of the trial court to find mitigation are procedurally barred in post conviction proceedings. *Robinson v. State*, 30 Fla. L. Weekly S576 (Fla. Jul. 7, 2005). Moreover, Defendant raised this claim on direct appeal, and this Court rejected it. *Garcia*, 644 So. 2d at 63. As such, the claim is again barred. *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995). Thus, the lower court properly denied it.

Defendant next refers to his claim that the trial court failed to make an independent sentencing decision. In the lower court, Defendant had based this claim on the assertion that the Court entered its sentencing order on the same day as the sentencing hearing after only a short break and that the order tracked the findings made at the sentencing hearing. (SR. 614-

16) In *Walton v. State*, 847 So. 2d 438, 446 (Fla. 2003), this Court held that claims such as this regarding the conduct of a trial court in writing a sentencing order are procedurally barred in post conviction proceedings. Since the claim was based only on the conduct of the trial court at the sentencing hearing, the lower court properly denied this claim as procedurally barred and should be affirmed.

Moreover, while Defendant asserted that the claim was based on *Patterson v. State*, 513 So. 2d 1257 (Fla. 1987), the only fact asserted in support of the claim was that the trial court entered its sentencing order immediately after listening to counsel's argument at the sentencing hearing. (SR. 616) However, *Patterson* did not address the need to set a separate hearing to enter the sentencing order after the hearing to listen to argument by counsel. Instead, the requirement that the trial court hold a separate hearing to enter the sentencing order was first recognized in *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

In *Armstrong v. State*, 642 So. 2d 730, 737-38 (Fla. 1994), this Court addressed the right of individuals, like Defendant, who were sentenced before *Spencer* was decided to relief based solely on the fact that the trial court entered the sentencing order at the hearing where it heard from the defense after the

jury's recommendation. This Court held that unless the defendant could show that he was prejudiced from the failure to delay sentencing, the defendant was entitled to no relief. *Id.* at 738.

Here, Defendant did not allege how he was prejudiced by the failure to hold another hearing before sentencing him. As such, the claim was properly denied as facially insufficient. Moreover, this Court has found that prejudice is not established when the factors asserted at the sentencing hearing had been presented prior to the sentencing hearing. *Armstrong*, 642 So. 2d at 738.

Here, at the sentencing hearing, Defendant argued that there was a rational basis for the jury to have recommended death for one murder and life for the other. (DAR. 1638) Defendant asserted that Ms. Ballentine had suffered more before she died than did Ms. Avery. (DAR. 1638) Defendant also argued that overrides were suspect and might be eliminated in the future. (DAR. 1638-39) He asserted that Defendant had behaved well while incarcerated prior to trial. (DAR. 1639) Finally, he claimed that Defendant would never be released from prison if sentenced to life. (DAR. 1639)

However, Defendant had already presented these same claims prior to the sentencing hearing. In the sentencing memorandum he served on July 1, 1991, eleven days before the sentencing

hearing, Defendant presented the same arguments concerning the override and the alleged good prison behavior. (DAR. 183-87) At the penalty phase before the jury, Defendant argued that he would never be released from prison if sentenced to life. (DAR. 1617, 1621) Moreover, Defendant raised the trial court's failure to address his good prison behavior, its failure to address the fact that he would never be released if sentence to life and the propriety of the override on appeal, and this Court rejected these claims. *Garcia*, 644 So. 2d at 63, 64. Under these circumstances, Defendant did not show prejudice, and the claim was properly summarily denied.

Defendant next refers to his claim that several bench conferences were not recorded and were therefore not part of the record on appeal. However, this Court has held that challenges to the completeness of the record on appeal are procedurally barred in post conviction proceedings. *Thompson v. State*, 759 So. 2d 650, 660 (Fla. 2000). As such, the lower court properly denied this claim and should be affirmed.

Defendant next refers to his claim that his sentence was improper because the consideration of his prior conviction was improper under *Johnson v. Mississippi*, 486 U.S. 578 (1988). However, in order to state a basis for relief under *Johnson*, a defendant must show that the convictions have been invalidated.

Phillips v. State, 894 So. 2d 28, 36 (Fla. 2004). Here, Defendant did not even allege that any of his prior convictions had been vacated. As such, the lower court properly summarily denied this claim.

Defendant next mentions his claim that counsel was ineffective for failing to claim that it was improper to consider the during the course of a felony aggravator because he was convicted of felony murder. However, this Court has repeatedly rejected challenges to the during the course of a felony aggravator on the grounds that it duplicates an element of the underlying crime. *Griffin v. State*, 866 So. 2d 1, 14 (Fla. 2003). Because the aggravator is not improper, counsel cannot be deemed ineffective for failing to make the nonmeritorious claim that it is. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. As such, the claim was properly denied, and the lower court should be affirmed.

Defendant next complains that the lower court rejected his claim that he is insane to be executed as premature. However, this Court has repeatedly upheld the rejection of claims that a defendant was insane to be executed when the claim was raised in an initial motion for post conviction relief and the defendant's execution was not imminent because the issue is premature.

Ferrell v. State, 30 Fla. L. Weekly S451 (Fla. Jun. 16, 2005). As such, the lower court properly denied this claim as premature and should be affirmed.

Defendant next asserts that he is seeking to preserve any rights he might have to challenge his sentence based on *Ring v. Arizona*, 536 U.S. 584 (2002). However, Defendant has no rights under *Ring* to preserve. Both this Court and the United States Supreme Court have held that *Ring* does not apply retroactively to cases, such as this one, where the sentence was final before *Ring* was decided. *Schriro v. Summerlin*, 542 U.S. 348 (2004); *Johnson v. State*, 904 So. 2d 400 (Fla. 2005). Moreover, this Court has repeatedly rejected *Ring* claims in cases where the death sentences was supported by the prior violent felony aggravator and the during the course of a felony aggravator. *Gamble v.* State, 877 So. 2d 706, 719 (Fla. 2004); *Jones v. State*, 855 So. 2d 611, 619 (Fla. 2003). This Court has also rejected a *Ring* claim were the sentence was supported by the under a sentence of imprisonment aggravator. *Allen v. State*, 845 So. 2d 1255, 1261-62 (Fla. 2003). This Court has even rejected the claim in the context of a jury override, where one of these aggravators was applicable. *Marshall v. Crosby*, 30 Fla. L. Weekly S399 (Fla. May 26, 2005); *Weaver v. State*, 894 So. 2d 178, 201 n.21 (Fla. 2004). As such, Defendant is entitled to no

relief based on *Ring*. The claim was properly summarily denied and should be affirmed.

Defendant next mentions his claim that lethal injection and electrocution are unconstitutionally cruel and unusual. However, this Court has repeatedly rejected this claim. *Johnson v. State*, 904 So. 2d 400 (Fla. 2005). As such, the lower court properly denied this claim and should be affirmed.

Next, Defendant alludes to his claim that counsel was ineffective for failing to impeach Perez. However, other than the portions of the claim upon which he was granted an evidentiary hearing, Defendant never alleged how Perez Cruz would have responded to the questions he asserted should have been asked of her or how the answers would have affected the outcome. (SR. 421-40) As such, the claim was facially insufficient and properly denied as such. *Ragsdale*, 720 So. 2d at 207.

The lack of specific pleading is particularly important given Perez's testimony. During direct, Perez indicated that Defendant was standing 10 to 12 feet from her when she overheard his statement. (DAR. 1025) Perez admitted she had heard of the murders before she overheard the statement and considered the statement significant. (DAR. 1029) She believed she heard the statement a couple days after the murder. (DAR. 1039) She stated

that she never discussed the statement with anyone. (DAR. 1043-44) She explained that it seemed like a joke. (DAR. 1044)

Perez stated that the meaning of “te las chingastes” was “Did you Fuck them up?” (DAR. 1026) At the evidentiary hearing, Perez stated that she knew of no other use of this phrase. (SR. 1275-79)

Perez stated that she knew three of Trevino’s daughters: Ida, Irma and Irene. (DAR. 1035) At the time of the murders, Irma kept the payroll records and later Ida did. (DAR. 1035-36) She knew Defendant to be friendly with both Irma and Marylou. (DAR. 1036-37) Perez later admitted that she did not know which of Trevino’s daughters did what. (DAR. 1045-47)

Perez stated that she and Defendant had both worked for Trevino in early January 1983. (DAR. 1047) When pressed for names of individuals who worked with her, Perez named Codefendant Fernandez and Trevino’s sons but could name no one else but Defendant. (DAR. 1047-50) Perez explained that she knew Defendant’s name because he worked in the fields with her frequently. (DAR. 1050) When asked if she was sure Defendant was employed by Trevino, Perez responded that she was unsure from whom Defendant was employed but did know he worked in the same field with her. (DAR. 1051)

Given the nature of Perez's responses, Defendant needed to explain what else he expected her to say if she had been asked the questions he says should have been asked. Without such pleading, the claim was insufficient and properly denied as such. *Ragsdale*, 720 So. 2d at 207.

Defendant next mentions his claim that counsel was ineffective for failing to subpoena William Diaz. In discussing the claim, Defendant asserts that he detailed the attempt to locate Diaz. However, Defendant fails to mention that he never asserted what Diaz could have testified about or how that would have affected the outcome of the trial. (SR. 405-07) To sufficiently allege a claim of ineffective assistance, such allegations about the subject matter of Diaz's testimony were necessary. *See Nelson v. State*, 875 So. 2d 579 (Fla. 2004). Since Defendant did not make the necessary allegations in his motion, the claim was facially insufficient and properly denied.

Next, Defendant refers to his claim that counsel was ineffective for failing to prepare Ida Paz to testify and failing to question her regarding with which of her sisters Defendant had a relationship. However, Defendant never explained what counsel could have done to make Paz more willing to testify, what additional preparation could have been done or how that additional preparation would have affected the outcome of

trial. (SR. 409-10, 435-36, 475-78) Defendant did not explain how showing that he dated Marylou instead of Irma or Irene would have affected the outcome of trial. The lack of specific pleading was particularly important since Paz was subpoenaed and refused to comply both at the time of the original trial and the second trial. (DAR. 1222-23, 1226-29, 1296-97) Moreover, despite the State's attempt to have Paz testify that the records were not disclosed to the police, Paz insisted they were. (DAR. 1317-19) Finally, Perez testified that Defendant was friends with both Irma and Marylou and Aguayo testified that Defendant was supposed to be on a date with Marylou the night of the murder. Since the claim was not sufficiently plead, it was properly summarily denied. *Ragsdale*, 720 So. 2d at 207.

Defendant next alludes to his claims that counsel was ineffective for failing to object testimony regarding methods of gathering fingerprints and the lack of other suspects. However, while Defendant asserted that testimony regarding the possibility of lifting prints from human bodies was irrelevant because it was not attempted in this matter, the testimony was that it was attempted but was unsuccessful. (DAR. 745-48) While Defendant claims that counsel did not object when the State presented evidence that there were never any other suspects, the record reflects that counsel did object and that the State did

not suggest that there were never other suspects. (DAR. 1212) Moreover, the State presented evidence that other suspects were considered. (DAR. 937-38) Moreover, these claims consisted of little more than complaints that counsel did not object without any explanation of what objection could have been made or how the lack of objection would create a reasonable probability of a different result at trial. (SR. 415-16) The lack of specific pleading was particularly important here because there was no physical evidence linking Defendant to the crime and Defendant was relying on this as part of his defense. As such, the claims were facially insufficient and properly denied as such. *Ragsdale*, 720 So. 2d at 207.

Next, Defendant mentions the denial of his claim that counsel was ineffective for failing to object to testimony concerning blood spatter. Again, Defendant did not explain how objecting to Tech. Gilbert's testimony would have created a reasonable probability of a different result at trial. (SR. 416) As such, this claim was facially insufficient. *Ragsdale*, 720 So. 2d at 207. This is particularly true because the State, contrary to Defendant's assertion, established during its direct that Tech. Gilbert had education, training and experience in crime scene analysis, including blood spatter analysis. (DAR. 731-34) Under these circumstances, claiming that Tech. Gilbert

was not qualified to testify regarding the importance of blood evidence in crime scene analysis and the lack of blood spatter at this scene would not have been meritorious, and counsel cannot be deemed ineffective for failing to raise it. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

Defendant next mentions his claim that counsel was ineffective for failing to present evidence that Defendant worked for Wally Gomez. In asserting this claim, Defendant relied upon the former testimony of Aguayo. However, while Aguayo testified that he worked for Wally Gomez with Defendant at the first trial, he stated that this occurred in December. (DAR2. 1332, 1335) He did not recall working with Defendant in January. (DAR2. 1332) Moreover, while Defendant mentions calling Gomez and other witnesses, he did not assert what these witnesses would have said if called or if these witnesses were available. However, such allegations are necessary to plead a claim sufficiently. *Nelson v. State*, 875 So. 2d 579 (Fla. 2004). The lack of this type of pleading is particularly important when one considers that Perez actually testified that Defendant worked with her for Trevino in early January and frequently worked the same field as her, although she did not know who paid Defendant. (DAR. 1047, 1050, 1051). Under these circumstances,

the lower court properly found that the claim was insufficiently plead.

Defendant next alludes to his claim that counsel was ineffective for failing to attempt to impeach Aguayo. However, Defendant never alleged what attempting to impeach Aguayo would have shown or how those responses would have affected the outcome of trial. (SR. 440-55) The lack of pleading was particularly important given Aguayo's testimony.

Aguayo told the State that it had not been raining when he was with Defendant and he did not know if it rained during the night. (DAR. 959) He stated on direct that he and Defendant went out between 6 and 7 p.m. but stated on cross it was between 4 and shortly before 7 p.m. (DAR. 980-81) He did not give a time he saw Defendant the next morning on direct. (DAR. 953-64) When questioned on this area on cross, Aguayo could not give an exact time, stating only it was after 6 and before 8 a.m. (DAR. 992) Aguayo stated that he did not recall exact times. (DAR. 980-81)

Defendant elicited that Aguayo never asked anyone else about Defendant being in a fight and his search for the scene of the attack consisted of spending 4 to 6 minutes driving past an 800 to 1100 feet long corn field, stopping in one spot and looking briefly from the road. (DAR. 1007-09) Aguayo admitted that he could not be certain there had been no fight. (DAR.

1010) Defendant did not tell Aguayo exactly where in the field the attack occurred. (DAR. 1016)

When questioned about giving statements to the police, Aguayo stated that he remembered giving one statement. (DAR. 1010-11) However, he did not recall any other statements or the content of the statement he recalled giving. *Id.* He knew he spoke to the police the day after the murders. (DAR. 971)

When asked about the amount Defendant drank and when, Aguayo stated that he recalled Defendant having two beers early in the evening. (DAR. 984) However, he did not remember Defendant drinking the rest of the time they were together. (DAR. 984) He did not know if Defendant drank after he went home. (DAR. 989-91)

Given the nature of Aguayo's testimony, Defendant needed to allege what would have happened had counsel attempted to impeach him in the manner Defendant suggested. Without such pleading, the claim was facially insufficient and properly denied as such. *Ragsdale*, 720 So. 2d at 207.

Next, Defendant mentions his claim that counsel was ineffective for the manner in which he cross examined Tech. Gilbert, Sgt. Gribbons, Dr. Marraccini, Ximena Evans, Sgt. Radcliff and Det. LeClair. However, Defendant did not mention what would have been elicited had counsel cross examined these

witnesses in a different fashion or how anything that might have been elicited would have created a reasonable probability of a different result at trial. (SR. 459-62) In fact, Defendant did not even suggest what area should have been the subject of cross examination of Tech. Gilbert, Sgt. Gribbons or Dr. Marraccini. *Id.* Under these circumstances, the claim was properly denied as facially insufficient. *Ragsdale*, 720 So. 2d at 207.

Next, Defendant mentions his claim that counsel was ineffective for failing to prepare Tech. Gilbert and Criminalist Rhodes to testify as defense witnesses. However, Defendant did not allege what counsel should have done to prepare these witnesses or how doing so would have created a reasonable probability of a different result at trial. (SR. 462-475) Instead, he merely asserted in conclusory terms that prejudice from the failure to prepare these witnesses was manifest and that he was prejudiced by the lack of preparation. (SR. 471, 472) However, such conclusory assertions are not sufficient to state a claim. *Ragsdale*, 720 So. 2d at 207. The claim was properly denied.

Next, Defendant mentions his claim that counsel was ineffective during closing argument. In presenting this claim, Defendant complained about the nature of the closing argument presented but never asserted what argument could have been

presented based on the trial evidence or how the making of such an argument would have created a reasonable probability of a different result. (SR. 478-83) Thus, the claim was facially insufficient and properly denied as such. *Ragsdale*, 720 So. 2d at 207. This is particularly true when one considers that counsel emphasized in his closing the State had attempted to use the nature of the crimes, which was not in dispute, to distract the jury from the issue of the lack of evidence, the lack of physical evidence tying Defendant to the crime, the inconsistencies in the evidence, the credibility of witnesses and the fact that the work records either showed Defendant never worked with Perez or worked with her before the crimes. (DAR. 1371-96) Counsel stressed that he had no burden of proof and that the issues he raised about the State's case showed that there was a reasonable doubt that Defendant committed the crime. *Id.* The claim was properly denied.

Defendant next alludes to his claim that counsel was ineffective for failing to challenge the State's use of Defendant's statement to Aguayo. However, the claim was properly summarily denied. In his motion, Defendant admitted that counsel did object to the admission of his exculpatory statement. He simply asserted that counsel should have argued that admission of the statement would shift the burden of proof. However,

counsel argued that it was improper to require Defendant to show where he was at the time the crimes were committed and that admitting his exculpatory statement and allowing the State to show it was false would require Defendant to show where he was when the crimes were committed. (DAR. 214-19) The State argued it was proper to admit an exculpatory statement that the State would show was false as evidence of consciousness of guilt. (DAR. 219-20) The trial court found the statements were admissible. (DAR. 220) Defendant responded that he was not claiming the statements were inadmissible but was arguing that the manner in which the State would use the statements would shift the burden of proof. (DAR. 221) The trial court still found the evidence admissible. (DAR. 221) When the State admitted the plat maps, Defendant renewed this objection. (DAR. 1099) He again renewed the objection when his statement to the police was admitted. (DAR. 1141) At the close of the evidence, Defendant renewed his objection. (DAR. 1338-39) Since counsel did make the objection Defendant claims he should have, the trial court properly rejected this claim. *Strickland*.

Defendant next alludes to the denial of his claim under *Ake v. Oklahoma*, 470 U.S. 68 (1985). Defendant asserts that the finding that there was no request for an expert that was denied was irrelevant. He also asserts that he should have been allowed

to show that an expert would have assisted with an intoxication defense. However, the lower court acted properly. First, to claim of violation of *Ake*, a defendant must show some action by the trial court that deprived him of expert assistance. *Clisby v. Jones*, 960 F.2d 925 (11th Cir. 1992). Thus, the lower court's finding that there was no action by the trial court was relevant.

Moreover, while Defendant suggests that an expert would have supported an intoxication defense, counsel was not ineffective for failing to present an intoxication defense for the reason asserted in Issue III. Additionally, despite having been granted an evidentiary hearing on the voluntary intoxication defense, Defendant never presented any evidence of his use of intoxicants and state of intoxication at the time the crime was committed. An expert is not entitled to testify in support of an intoxication defense until nonhearsay evidence on these issues had been presented. *Holsworth v. State*, 522 So. 2d 348, 352 (Fla. 1988); *Burch v. State*, 478 So. 2d 1050, 1051-52 (Fla. 1985); *Cirack v. State*, 201 So. 2d 706 (Fla. 1967). Since Defendant did not present such evidence, any attempt to present an expert would have been nonmeritorious, and counsel cannot be deemed ineffective. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So.

2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

Defendant next alludes to his claim that innocent of first degree felony murder because there was no evidence of a robbery[11] occurred and his counsel conceded that a sexual battery occurred. However, other than making general allegations Defendant did not explain how this claim provided a basis for relief. Thus, the claim was facially insufficient. *Ragsdale*, 720 So. 2d at 207. To the extent that Defendant is asserting that the evidence was insufficient to convict him, the claim is procedurally barred and properly denied as such. *Burr v. State*, 518 So. 2d 903, 905 (Fla. 1987).

Next, Defendant refers to his claim that counsel was ineffective for failing to object to the standard jury instruction on expert witnesses. However, this Court has repeatedly rejected this claim. *Rodriguez v. State*, 30 Fla. L. Weekly S385 (Fla. May 26, 2005); *Thompson v. State*, 759 So. 2d 650, 665 (Fla. 2000). As such, the claim was properly denied.

Defendant then alludes to his claim that counsel was ineffective for failing to move for a change of venue. However, only three veniremembers, none of whom served on the jury, had ever even heard of the pretrial publicity in this matter. (DAR.

[11] Defendant was not charged with robbery or any felony based on robbery. (DAR. 1-3)

4-6, 332, 545, 549) Moreover, while Defendant asserts that the record reflects that the jury was exposed to publicity after trial commenced, this is untrue. Instead, while the record reflects that the case and the prosecutor were the subject of publicity during trial, the jurors stated that had not seen the publicity when questioned. (DAR. 709-19) Under these circumstances, counsel cannot be deemed ineffective for failing to make a nonmeritorious motion for change of venue. *Patton v. State*, 784 So. 2d 380, 389-90 (Fla. 2000).

Defendant next refers to his claim that the trial court was biased and that counsel was ineffective for failing to object. To the extent that Defendant was asserting that the lower court should have been recused because of bias, the lower court properly denied the claim as procedurally barred. Fla. R. Jud. Admin. 2.160(e); *see also Willacy v. State*, 696 So. 2d 693 (Fla. 1997). Moreover, Defendant only made a conclusory allegation of prejudice from the alleged ineffective assistance of counsel. (SR. 624-26) As such, the claim was facially insufficient and properly denied. *Ragsdale*, 720 So. 2d at 207.

Further, the record reflects that any attempt to disqualify the trial court would have been without merit. In the middle of the guilt phse, the trial court received a call from one of the jurors, indicating that he would never vote for death. (DAR.

878) The court informed the parties of the call and requested the parties' positions on what should be done. (DAR. 878-80) It asked the parties to research the issue and took a recess for this purpose. (DAR. 880) The trial court colloquied the juror, who maintained that he could be fair in the guilt phase but would vote for life in the penalty phase. (DAR. 880-89) The trial court then indicated that based on *Jennings v. State*, 512 So. 2d 169 (Fla. 1987), it would allow the juror to remain through the guilt phase but would consider replacing the juror for the penalty phase. (DAR. 890) The trial court indicated that the State had provided *Jennings*. (DAR. 891)

During the read back of Aguayo's testimony, the State requested a sidebar and indicated that it wanted the portion of Aguayo's testimony regarding Defendant bleeding included in the read back. (DAR. 1510) The trial court deferred addressing the issue until the end of the read back. (DAR. 1511) When the read back was finished, the parties came sidebar again. (DAR. 1515) When the court reporter was having difficulty finding the testimony and defense counsel and one prosecutor had offered their recollections, the trial court asked the other prosecutor for hers. (DAR. 1516)

After the trial court initially indicated that it would deny the request to read back the testimony of Rhodes, the trial

court listened to argument by trial counsel and one of the prosecutors, who urged him to read back all of Rhodes' testimony. (DAR. 1528-30) The trial court then asked the other prosecutor her position and she agreed that Rhodes' testimony should be read. (DAR. 1530-31)

Given what is reflected in the record, it does not appear that there was any improper ex parte communication. *Roberts v. State*, 840 So. 2d 962, 970 (Fla. 2002); *Arbelaez v. State*, 775 So. 2d 909, 916 (Fla. 2000). Moreover, there was no basis for a litigant to have had a reasonable fear that the trial judge was not impartial. *See Mansfield v. State*, 30 Fla. L. Weekly S598 (Fla. Jul. 7, 2005). The claim was properly denied.

Finally, Defendant refers to his claim that counsel was ineffective for failing to impeach Feliciano with her prior statement to the police. However, in making this claim Defendant did not assert what would have occurred had counsel attempted to impeach Feliciano in the manner he suggested or how this attempt at impeachment would have created a reasonable probability of a different result at trial. (SR. 456-58) The lack of pleading is particularly important as Defendant admitted being at the house that morning in clothes that were bloody. (DAR. 1150-57) Under these circumstances, the lower court properly denied the claim as facially insufficient. *Ragsdale*, 720 So. 2d at 207.

VII. THE CUMULATIVE ERROR CLAIM.

Defendant next asserts that the lower court should have granted him an evidentiary hearing on the alleged cumulative effect of the alleged errors. However, where the individual errors alleged are either procedurally barred or without merit, the claim of cumulative error also fails. *Downs v. State*, 740 So. 2d 506, 509 n.5 (Fla. 1999). As seen above, Defendant's individual claims are all procedurally barred or without merit. As such, the lower court properly denied the claim of cumulative error.

CONCLUSION

For the foregoing reasons, denial of the motion for post conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to William M. Hennis, III, 101 N.E. 3rd Avenue, Suite 400, Miami, Florida 33301, this 31st day of October 2005.

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CERTIFICATE OF COMPLIANCE

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

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