

IN THE SUPREME COURT OF FLORIDA

WILLIAM MELVIN WHITE,

Appellant,

v.

Case No. SC05-1613

STATE OF FLORIDA,

Appellee.

_____ /

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

STEPHEN D. AKE
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 14087
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501

COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE AND FACTS

This postconviction case arises from the resentencing of William Melvin White to death for the 1978 murder of Gracie Mae Crawford. The relevant facts of the case were described in this Court's most recent opinion in White v. State, 817 So. 2d 799 (Fla. 2002) as follows:

White was a member of a Kentucky chapter of the Outlaws, a motorcycle gang, but was visiting the Orlando chapter. A group of the Outlaws, accompanied by some girl friends, visited an Orlando nightclub where they met Gracie Mae Crawford. Gracie Mae accompanied some of the Outlaws back to their Orlando clubhouse. Soon after returning to the clubhouse, White retired to a bedroom with his girl friend. Sometime thereafter White was called by Richard DiMarino who stated that Crawford liked blacks and that they had to teach her a lesson. White dressed and went into the kitchen area where he joined DiMarino and Guy Ennis Smith in severely beating Crawford. Whether DiMarino or White led the assault is unclear, but one witness testified of White's hitting Crawford with his fist and knocking her to the floor. After the beating, DiMarino and White placed Crawford in the middle of the front seat of White's girl friend's car. White started driving but along the way stopped the car and DiMarino drove the car to the end of a deserted road. (The victim, White and DiMarino had done a lot of drinking that evening, but White's girl friend testified that he knew what he was doing.) After they stopped the car, DiMarino and White pulled Crawford from the car, passed her over a barbed wire fence, and laid her on the ground. White then straddled her, took out his knife, stabbed her fourteen times and slit her throat. He handed the knife to DiMarino who also cut her throat. Crawford died as a result of the wounds inflicted upon her.

While leaving the area White and DiMarino ran out of gas at the SeaWorld parking lot and were later identified by SeaWorld security guards who had given them gas. White and DiMarino went back and picked up

the body of the deceased and thereafter discarded it at a different place. The body was discovered that afternoon.

White, 817 So. 2d at 801-02 (quoting White v. State, 415 So. 2d 719, 719-20 (Fla. 1982)).¹

In 1999, this Court vacated Appellant's death sentence and remanded the case for a new sentencing proceeding before a jury. At this proceeding, in addition to the evidence surrounding the Gracie Mae Crawford murder, the State also introduced evidence that Appellant pled guilty to second degree murder in Tennessee after he was originally sentenced to death in Florida in 1978. The plea colloquy from Tennessee was introduced into evidence and it was established that Appellant and another Outlaws gang member, Michael Markham, participated in the murder of Jim Valentino. (DAR² V5:613-37). As part of the plea agreement, Appellant received a thirty year sentence and Markham was sentenced to twenty years.

¹ Appellant states in his brief that "it would be inappropriate to recite [these] facts as true, for they are not." Initial Brief of Appellant at 10. Contrary to Appellant's assertions, there has never been any evidence alleged, much less established, that would cast any doubt on the facts as found by the jury and relied upon by this Court in affirming Appellant's conviction for murder.

² Citations to the resentencing proceedings will be referred to by "DAR" and the appropriate volume and page number. Citations to the instant postconviction proceedings will be referred to as "PCR" and the appropriate volume and page number. Additionally, any citations to the original 1978 trial will be referred to as "GP" followed by the appropriate volume and page number.

During the plea colloquy, the Tennessee prosecutor asserted that the evidence would show that Appellant, Markham, and an unknown individual entered an apartment and chased the victim into a back bedroom. (DAR V5:621). The victim was killed in the bedroom and his body was dumped into a river. The Tennessee prosecutor indicated that the medical examiner would testify that the victim had 14 stab wounds, a laceration to the neck, and a laceration in the stomach area. (DAR V5:623). The victim died from multiple stab wounds and the autopsy report indicated that there was no evidence of a gunshot wound. (DAR V1:3-12). Appellant substantially agreed with the prosecutor's factual basis. (DAR V5:631).

After hearing all the evidence, closing arguments and jury instructions, the jury returned a verdict recommending death by a vote of ten to two. On January 13, 2000, the trial court conducted a hearing pursuant to Spencer v. State, 615 So. 2d 688 (Fla. 1993), at which time White's trial counsel presented testimony from the codefendant in the Tennessee murder, Michael Markham. Markham testified that he killed the victim by shooting him and "wounding him pretty severely," and by choking the victim to death. (DAR V4:110). Markham denied that Appellant assisted in the murder, but claimed that Appellant simply assisted him in disposing of the body. Prior to

disposing of the body, Markham claimed that he stabbed the body in an attempt to make it sink in the river. (DAR V4:111-12).

On February 15, 2000 and March 20, 2000, at the continued Spencer hearings, the State sought to rebut Markham's testimony by introducing the autopsy report from the Tennessee murder to show that there was no evidence that the victim had been shot.³ Defense counsel filed a motion to exclude consideration of the autopsy report, but the trial court denied the motion. (DAR V5:473-82; V2:25). Defense counsel introduced into evidence a transcript of a deposition of Michael Markham's trial attorney, James Havron. (DAR V2:17-26).

After hearing all the evidence, the trial judge followed the jury's recommendation and sentenced Appellant to death. The court found four aggravating factors: (1) Appellant was previously convicted of another felony involving the use or threat of violence to the person; (2) the capital felony was committed while Appellant was engaged in the commission of a kidnapping; (3) the capital felony was especially heinous, atrocious, or cruel; and (4) the capital felony was committed to disrupt or hinder the enforcement of laws. In mitigation, the

³ The State indicated that it would have attempted to introduce the autopsy report even if it did not rebut Markham's testimony. (DAR V1:10).

court found one statutory mitigator and several nonstatutory mitigators.

Appellant appealed his death sentence and this Court affirmed his death sentence. White v. State, 817 So. 2d 799 (Fla.), cert. denied, 537 U.S. 1091 (2002). After the United State Supreme Court denied certiorari review, Appellant filed a motion for postconviction relief raising numerous claims. On June 28, 2004, the trial court conducted a case management conference and found that only one sub-claim of White's postconviction motion necessitated an evidentiary hearing.

EVIDENTIARY HEARING

On June 23, 2005, the lower court conducted an evidentiary hearing on the second part of Appellant's Claim V alleging that trial counsel was ineffective when making the decision to present Michael Markham at the Spencer hearing rather than before the jury at the penalty phase. Collateral counsel called the two trial attorneys as witnesses, Chandler Muller and Bryan Park. After detailing his extensive experience in criminal law and death penalty cases, lead attorney Chandler Muller testified that he was retained by William White's family for the resentencing hearing. (PCR V1:100-07). Mr. Muller was aware that at the resentencing hearing, the State would be arguing the existence of a new aggravating factor that was not present at

the original 1978 trial - a prior murder conviction from Tennessee wherein Appellant pled guilty to second degree murder along with another codefendant, Michael Markham.

Trial counsel Muller testified that the defense team investigated the prior Tennessee murder case by reviewing the transcribed plea colloquy, speaking with White and codefendant Markham,⁴ and interviewing both White's and Markham's Tennessee trial counsel.⁵ (PCR V1:111-13). Muller listed Markham as a potential witness on his witness list and had Markham present at the time of Appellant's penalty phase before the jury. He testified that his recollection was that he made the decision not to put Markham on as a witness before the jury because the autopsy report did not indicate that the victim had been shot while Markham claimed he had shot the victim.⁶ (PCR V1:118-25).

⁴ Mueller's investigator had spoken with Markham prior to the penalty phase and relayed this information to counsel. Muller and co-counsel Park also spoke to Markham on the telephone prior to the penalty phase. When Markham was flown down for the first time for the penalty phase, Mueller personally met with Markham in his office. (PCR V1:123-28). Markham remained in town during the entire penalty phase. (PCR V1:166-67).

⁵ The trial defense team deposed Markham's attorney, James Havron, on March 1, 2000. (PCR V1:144; V3:168-87).

⁶ At the evidentiary hearing, collateral counsel introduced an exhibit showing that the prosecuting attorney faxed a copy of the Tennessee autopsy report to defense counsel on February 9, 2000. (PCR V1:184-85). Muller testified that he had no independent recollection as to when he first received the autopsy report; it was possible that he had obtained it during his own investigation prior to the State sending him a copy and

Muller testified that he was also concerned with Markham's credibility; he did not find Markham credible given the facts set forth in the plea colloquy as compared to Markham's story. (PCR V1:139-42). The fact that Markham was another member of the Outlaws motorcycle gang also factored into trial counsel's decision-making process. (PCR V1:141-42).

On cross-examination, Muller expanded on his strategic decision to not present Markham in front of the jury. (PCR V1:149-52). Muller testified that he was concerned with putting Markham on in front of the jury and he was confident that the judge would be able to put his testimony into perspective when presented at the Spencer hearing. (PCR V1:152-53). Muller knew based on his experience that the prosecutor would cross-examine Markham differently in front of the jury as opposed to the judge alone. (PCR V1:174). Muller acknowledged that it would have been detrimental to present Markham in front of the jury because it would have allowed the prosecuting attorney the opportunity to cross-examine Markham and go over the facts of the previous murder in painstaking detail. (PCR V1:153). Given his experience, Muller also knew that if he presented Markham to the jury, the prosecuting attorney could rebut Markham's story by introducing the autopsy report and detailing the description of

it was also possible that the State had sent him a copy of it at an earlier date. (PCR V1:175-77; 187-88).

the victim's wounds as set forth in the plea colloquy. (PCR V1:159-60). Muller further testified that when determining whether to call Markham at the penalty phase versus the Spencer hearing, he considered the fact that Markham had expressed concern during one of their conversations with being cross-examined by the prosecutor and answering questions unrelated to the Tennessee murder. (PCR V1:161-63).

The other witness at the evidentiary hearing, Bryan Park, testified that he was working with Chandler Muller for a period of time and assisted him in representing Appellant at his resentencing proceeding. Trial counsel Park testified that Michael Markham was Muller's witness and Muller handled the bulk of the investigation with regard to this witness. (PCR V1:191-92). On November 11, 1999, prior to the jury being empanelled for the resentencing, Park and Muller spoke with Markham on the telephone. (PCR V1:193; V2:203). Park testified that he also deposed Markham's Tennessee trial attorney, James Havron. He acknowledged that Mr. Havron's testimony corroborated Markham's story, but he testified that it was expected given that he was Markham's attorney and advocate. (PCR V1:197). Park testified that his recollection of the decision to not present Markham to the jury centered on the fact that Markham, like Appellant, was a member of the Outlaws motorcycle gang and the defense wanted

to limit the number of Outlaws they presented before the jury.
(PCR V2:204).

SUMMARY OF ARGUMENT

The lower court properly summarily denied Appellant's claim that newly discovered evidence exculpates Appellant of the murder of Gracie Mae Crawford. The court properly found that Appellant's claim is procedurally barred. Furthermore, as the lower court properly found, even if the claim was preserved, it lacked merit. Appellant never has established when he discovered this "new" evidence, and more importantly, the evidence was cumulative to that presented at Appellant's trial and there is no probability that the evidence would produce an acquittal upon retrial.

Appellant's allegation of ineffective assistance of 1978 guilt phase trial counsel is procedurally barred. Appellant could have presented this claim in his 1983 postconviction motion, or as an amendment to that motion prior to January 1, 1987. In addition, his claim is without merit. Even assuming his allegation is true, there is no reasonable possibility that Joseph Watts' testimony regarding Richard DiMarino's admission to the murder would have affected the jury verdict.

The lower court properly denied Appellant's conclusory claim of ineffective assistance of resentencing counsel for failure to call Joseph Watts as a witness before the jury. In addition to being insufficiently pled, the claim lacked merit.

Even had resentencing counsel presented the testimony of Watts before the jury, it would not have changed the result of the proceedings. Mr. Watts presumably would have testified that DiMarino admitted to killing the victim. This evidence was consistent with DiMarino's testimony admitting to his involvement and cumulative to other evidence presented. Thus, Appellant is unable to establish that he was prejudiced by resentencing counsel's decision to present Watts at the Spencer hearing, rather than before the jury.

The lower court properly denied Appellant's claim of ineffective assistance of resentencing counsel based on counsel's inability to present the live testimony of Richard DiMarino's brother, John DiMarino. Resentencing counsel placed on the record his efforts in attempting to locate the reluctant witness, and ultimately published John DiMarino's 1978 testimony from Appellant's guilt phase to the resentencing jury. Appellant has failed to demonstrate deficient performance or prejudice as a result of having this testimony published to the jury rather than presented live.

The postconviction court properly denied Appellant's ineffective assistance of counsel claim based on resentencing counsel's handling of Appellant's prior murder conviction from Tennessee at his resentencing hearing. The court properly

summarily denied the portion of this claim regarding counsel's failure to challenge the validity of Appellant's 1980 murder conviction and guilty plea because the record clearly refutes Appellant's allegations. The court granted Appellant an evidentiary hearing on the portion of Appellant's ineffectiveness claim regarding resentencing counsel's decision to present the Tennessee codefendant, Michael Markham, during the Spencer hearing rather than before the jury. Appellant was unable to establish either deficient performance or prejudice as a result of trial counsel's strategic decision to present Markham at the Spencer hearing. Accordingly, this Court should affirm the lower court's denial of this issue.

The lower court properly found that Appellant's Brady/Giglio claim was procedurally barred. Appellant litigated the same exact issue in his 1983 postconviction motion and this Court extensively discussed the issue in its opinion affirming the lower court's denial of this issue. Appellant simply seeks a second review of his previously denied claim.

The postconviction court properly denied Appellant's ineffective assistance of counsel claim based on resentencing counsel's agreement with the State to strike prospective juror Fuentes for cause. The juror indicated that her feelings about the appropriateness of the death penalty would interfere with

her participating as a part of the jury making the sentencing recommendation. Contrary to Appellant's assertions, the record conclusively demonstrates that prospective juror Fuentes was not struck for cause based on her inability to speak or understand the English language.

The lower court properly denied Appellant's ineffective assistance of counsel claim based on resentencing counsel's questioning of prospective juror Williams during voir dire and his failure to challenge the juror for cause. Appellant failed to establish either deficient performance or prejudice as a result of the voir dire questioning. Accordingly, this Court should affirm the lower court's denial of Appellant's postconviction motion.

ARGUMENT

ISSUE I

THE LOWER COURT PROPERLY DENIED APPELLANT'S CLAIM OF NEWLY DISCOVERED EVIDENCE BECAUSE THE ISSUE WAS PROCEDURALLY BARRED, AND EVEN IF PROPERLY RAISED, WAS WITHOUT MERIT.

Appellant argued in his postconviction motion that "newly" discovered evidence of Frank Marasa's statement regarding the murder of Gracie Mae Crawford exculpates him of first degree murder. Specifically, Appellant asserts that the day after the murder, Appellant's codefendant, Richard DiMarino, told Frank Marasa that "he had to get rid of a girl last night." (PCR V1:3-7). Appellant did not allege in his motion when he discovered this "new" evidence.

The lower court summarily denied the instant claim as procedurally barred. (PCR V2:216-17). The court also found that the newly discovered evidence claim did not merit relief on the merits as Appellant failed to establish that (1) the newly discovered evidence was unknown to the defendant or the defendant's counsel at the time of trial and could not have been discovered through due diligence, and (2) that the evidence is of such a nature that it would probably produce an acquittal upon retrial. The State submits that the trial court properly denied Appellant's procedurally barred claim, and alternatively, even if preserved, the court correctly found that Appellant was

unable to establish that he was entitled to relief based on his claim of newly discovered evidence.

To uphold the lower court's summary denial of claims raised in a postconviction motion, the claims must be either facially invalid or conclusively refuted by the record. Peede v. State, 748 So. 2d 253, 257 (Fla. 1999); see also Teffeteller v. Dugger, 734 So. 2d 1009, 1016 (Fla. 1999) (stating that a motion for postconviction relief can be denied without a hearing when the motion and the record conclusively demonstrate that the defendant is entitled to no relief). Where no evidentiary hearing is held below, this Court must accept the defendant's factual allegations to the extent they are not refuted by the record. Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (Fla. 1989); Griffin v. State, 866 So. 2d 1 (Fla. 2003).

Appellant claims that because he filed his original postconviction motion in 1983, the time requirements of the present postconviction rule do not apply to his claim. This is not the case. Appellant's judgment and sentence became final in 1982. See White v. State, 415 So. 2d 719 (Fla.), cert. denied, 459 U.S. 1055 (1982). Appellant filed his initial rule 3.850 motion in 1983, and that motion was not ruled upon until 1996. On appeal of the denial of his 3.850 motion, this Court affirmed the trial court's order as to his conviction, however, based on

a Hitchcock⁷ error, this Court vacated Appellant's death sentence and remanded for a new sentencing hearing. See White v. State, 729 So. 2d 909 (Fla. 1999).

As the lower court properly found, during the 12½ years that Appellant's 3.850 motion was pending, he never sought to amend his motion to raise the instant claim. Because Appellant failed to do so, the court correctly found that he is barred from raising the instant issue in these proceedings. As this Court noted in the procedurally-identical case of Zeigler v. State, 632 So. 2d 48, 50 (Fla. 1993), "[a]n individual whose judgment and sentence became final prior to January 1, 1985, had until January 1, 1987, to file under the rule." See also Sireci v. State, 773 So. 2d 34, 44 (Fla. 2000) (holding that Sireci's conviction became final in 1982 and, even though he was resentenced to death in 1990, his claims of ineffective assistance of counsel at the guilt phase were time-barred and successive); Downs v. State, 740 So. 2d 506, 513 (Fla. 1999) (recognizing January 1, 1987, as the deadline for seeking postconviction relief for those convictions which became final prior to January 1, 1985); Breedlove v. Singletary, 595 So. 2d 8, 11 (Fla. 1992) (overlooking procedural default when defendant failed to amend postconviction claim because of unique fact that

⁷ Hitchcock v. Dugger, 481 U.S. 393 (1987).

Breedlove was represented by the public defender's office at both his trial and during his first rule 3.850 postconviction proceeding).⁸

The only exception to this procedural bar is when "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence." Zeigler, 632 So. 2d at 50 (quoting Florida Rule of Criminal Procedure 3.850(b)(1)). Appellant has not alleged, much less demonstrated, why he could not have raised the instant claim, the Richard DiMarino statement to Frank Marasa, either in his 1983 postconviction motion, or by amendment to it. Appellant's conclusory allegation in his postconviction motion that the lower court and "the Courts of Florida are uniquely aware of the Code of Silence practiced by the Outlaw Motorcycle Club" is insufficient to explain why Marasa could not have been

⁸ Appellant argues in his brief that his case is in the "exact same procedural posture" of Mr. James Hitchcock's case, and cites to an order from this Court remanding Hitchcock's case to the circuit court in order to conduct an evidentiary hearing on Hitchcock's guilt phase issues. This order was issued after oral arguments were conducted before the Court after the denial of the postconviction proceedings. However, as a review of the briefs and oral argument in that case reveals, Hitchcock's case is not in the same procedural posture as Appellant's. Notably, unlike White, Hitchcock did not raise any guilt phase issues in his original postconviction proceeding. Furthermore, this Court's unpublished order in Hitchcock did not reverse the well established law in Zeigler, Sireci, or Downs.

interviewed during the preparation for Appellant's original 3.850 motion, or during the decade plus after Appellant's original motion was filed. Because Appellant has wholly failed to specifically explain why he could not have raised the Marasa issue in his original postconviction motion, and therefore why the time and successive petitions bar should not apply to this claim, the State submits that the lower court properly denied the claim as procedurally barred.

In addition to finding Appellant's claim procedurally barred, the lower court also found that Appellant failed to carry his burden of establishing a viable newly discovered evidence claim. This Court has set forth the two requirements a defendant must demonstrate in order to prevail on a newly discovered evidence claim:

Two requirements must be met in order for a conviction to be set aside on the basis of newly discovered evidence. First, in order to be considered newly discovered, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence."

Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. To reach this conclusion the trial court is required to "consider all newly discovered evidence which would be admissible" at trial and then evaluate the "weight of both the newly discovered evidence and the evidence which was introduced at the trial."

Robinson v. State, 865 So.2d 1259, 1262 (Fla. 2004) (citations omitted). Appellant fails to meet either of the two requirements set forth in Robinson. In the above discussion of the timeliness and successive pleading procedural bars, it has been noted that Appellant has failed to explain why his proposed witness, Marasa, could not have been discovered by diligent efforts either prior to trial, in the preparation for White's 1983 postconviction motion, or in preparation for an amendment of that motion at some point prior to 1996 when it was denied by the trial court. Moreover, the transcript of the 1999 penalty phase clearly shows that Frank Marasa had been discovered by penalty phase trial counsel, and that they decided not to call Marasa as a matter of strategy. (DAR V9:1166). Marasa's testimony cannot now be "newly discovered" because Marasa was known, and had been talked to, by the time of the 1999 proceeding.

Additionally, as the trial court properly found, even assuming for the sake of argument that Appellant could establish the first requirement, it is clear that Marasa's statement, as set out in Appellant's postconviction motion, is not evidence which would have produced a different outcome in White's 1978 guilt trial. At that trial, Richard DiMarino testified under oath that he helped Appellant take the victim out to the

deserted area where she was killed, that he helped put her over a fence, and that he also cut her throat. (GP V3:484-92). It was therefore quite clear to the guilt phase jury that DiMarino and Appellant murdered the victim. If DiMarino told Marasa the day after the murder that "he had to get rid of a girl last night," then that statement was consistent with what DiMarino actually told the 1978 guilt phase jury himself. It simply is not "new" information in any sense of the word, and certainly would not have changed the outcome of the guilt trial. The proposed Marasa testimony simply duplicates the testimony of John DiMarino, which was in fact presented to the jury. (GP V4:602-16). It is therefore merely cumulative evidence. Cumulative evidence cannot raise a reasonable probability that a different outcome would have been obtained if such evidence had been admitted. See Valle v. State, 705 So.2d 1331, 1334 (Fla. 1997) (claim that defense counsel was ineffective for failing to call witnesses that would have been cumulative to other evidence was properly denied without an evidentiary hearing). Based on these reasons, the State submits that the trial court properly found that Appellant's newly discovered evidence claim, in addition to being procedurally barred, was without merit.

ISSUE II

APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL BASED ON COUNSEL'S DECISION NOT TO CALL JOSEPH WATTS AT APPELLANT'S 1978 TRIAL IS PROCEDURALLY BARRED AND WITHOUT MERIT.

Appellant claimed in his postconviction motion that his 1978 trial counsel was ineffective for failing to call Joseph Watts, a member of the Outlaws motorcycle gang, to testify that Richard DiMarino "admitted to Mr. Watts that he killed Gracie Mae Crawford." (PCR V1:7). Appellant has failed to articulate a reason why he could not have raised the alleged ineffective assistance of counsel claim in, or an amendment to, his 1983 postconviction motion. As such, the lower court properly found, for the same reasons as set forth in Issue I, supra, that this claim is procedurally barred.

The lower court also found that, even if the claim is not procedurally barred, it lacks substantive merit. (PCR V2:218). In order to establish a claim of ineffective assistance of counsel, a defendant must establish *both* deficient performance and prejudice, as set forth in Strickland v. Washington, 466 U.S. 668 (1984). As to the first prong, deficient performance, a defendant must establish conduct on the part of counsel that is outside the broad range of competent performance under prevailing professional standards. See Strickland, 466 U.S. at 688. Under the second prong, "[t]he defendant must show that

there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Id. at 694. Trial counsel's deficient performance must be shown to have so affected the fairness and reliability of the proceedings that confidence in the outcome is undermined. Id.; Gore v. State, 846 So. 2d 461, 467 (Fla. 2003). "When a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong." Waterhouse v. State, 792 So. 2d 1176, 1182 (Fla. 2001); Zakrzewski v. State, 866 So. 2d 688, 692 (Fla. 2003).

In the instant case, the lower court found that Appellant failed to establish the second prong of the Strickland analysis because there was no reasonable probability that the evidence from Watts would have produced a different result at trial. (PCR V2:218). At Appellant's 1978 trial, DiMarino admitted under oath to slicing Gracie Mae Crawford's throat, and DiMarino (along with Appellant) did murder Crawford. They both were seen together moments after the murder by security personnel at Sea World a short distance from where the murder took place (with Appellant having a bloodstain on his shirtless torso, and DiMarino having no visible blood on his clothing). DiMarino was convicted of murdering Crawford by a jury, and sentenced for

that crime. Thus, even if Richard DiMarino told Joseph Watts that he killed Gracie Maw Crawford, that statement would be consistent with DiMarino's testimony elicited at Appellant's guilt phase trial. As the trial court properly found, the evidence would be consistent with DiMarino's trial testimony and cumulative to the other evidence. As such, the trial court properly summarily denied the instant issue. See Valle v. State, 705 So.2d 1331, 1334 (Fla. 1997) (claim that defense counsel was ineffective for failing to call witnesses that would have been cumulative to other evidence was properly denied without an evidentiary hearing); Bryant v. State, 901 So. 2d 810, 821-22 (Fla. 2005) (affirming trial court's summary denial of ineffective assistance of counsel claim based on a failure to call certain witnesses).

ISSUE III

THE LOWER COURT PROPERLY DENIED APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF RESENTENCING COUNSEL BASED ON COUNSEL'S FAILURE TO PRESENT THE TESTIMONY OF JOSEPH WATTS BEFORE THE JURY.

Appellant argued in claim III of his postconviction motion that his resentencing trial counsel was ineffective for failing to present the testimony of Joseph Watts before the resentencing jury because Watts' testimony "would have negated the culpability of Mr. White's involvement," and "because the HAC aggravator was used, Mr. Watts' testimony would have directly refuted this important evidence causing prejudice." (PCR V1:11). The trial court denied the instant claim as "conclusory, speculative, and not specific" based on Appellant's failure to specifically allege the substance of Watts' testimony. The court also addressed the claim on the merits and found that Appellant was not entitled to relief. The State submits that the trial court properly summarily denied the instant claim.

In the recent case of Bryant v. State, 901 So. 2d 810 (Fla. 2005), this Court affirmed the lower court's summary denial of an ineffective assistance of counsel claim because the claim was insufficiently pled. "We recently held that when a defendant alleges ineffective assistance of counsel for failure to call specific witnesses, a defendant is 'required to allege what

testimony defense counsel could have elicited from witnesses and how defense counsel's failure to call, interview, or present the witnesses who would have testified prejudiced the case.'" Id. at 821 (quoting Nelson v. State, 875 So. 2d 579, 583 (Fla. 2004)); see also Davis v. State, 875 So. 2d 359, 367-68 (Fla. 2003) (trial court properly denied, without a hearing, postconviction claim that trial counsel was ineffective for failing to argue to jury as to inherent unreliability of defendant's confession, because defendant failed to plead the claim specifically); Maharaj v. State, 778 So. 2d 944, 956 (Fla. 2000) ("Postconviction relief cannot be based on speculation or possibility."); Ragsdale v. State, 720 So. 2d 203, 207 (Fla. 1998) (Although this Court encourages trial courts to conduct evidentiary hearings, a summary or conclusory claim "is insufficient to allow the trial court to examine the specific allegations against the record"); Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989) ("A defendant may not simply file a motion for postconviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing. The defendant must allege specific facts that, when considering the totality of the circumstances, are not conclusively rebutted by the record and

that demonstrate a deficiency on the part of counsel which is detrimental to the defendant.").

In the instant case, Appellant fails to specifically allege what Joseph Watts would have testified to had he been called as a witness at the 1999 penalty phase trial.⁹ Appellant merely makes the conclusory statement that "[h]is testimony would have negated the culpability of Mr. White's involvement" and "because the HAC aggravator was used, Mr. Watt's testimony would have directly refuted this important evidence causing prejudice." A postconviction claim of ineffective assistance of counsel based upon an omitted witness should be summarily denied where the defendant alleges no specific evidence on what the alleged omitted witness would have said if called. See Finney v. State, 831 So. 2d 651, 658 (Fla. 2002).

Appellant does not explain with any detail how Watts' testimony that DiMarino admitted to killing Gracie Mae Crawford would have negated Appellant's culpability or refuted the HAC aggravator. As the trial court properly noted when denying this issue on the merits, evidence that DiMarino admitted to the killing to Watts was consistent with DiMarino's trial testimony and cumulative to other evidence.

⁹ Presumably, Watts' testimony would have been no more specific than that offered by Watts at the Spencer hearing before the trial judge. At that time, Watts simply testified that DiMarino told him he had killed a girl. (DAR V4:128-29).

Richard DiMarino testified at the resentencing that he was the driver of the vehicle that transported Gracie Mae Crawford to the location where she was murdered (PT 919); that he assisted Gracie Mae Crawford to the area where she was stabbed (PT 922); that he slit Gracie Mae Crawford's throat (PT 924, 958); and that he was convicted of third degree murder for the killing of Gracie Mae Crawford (PT 930). John DiMarino's 1978 guilt phase testimony was published to the jury in which he testified that the day after the murder his brother, Richard DiMarino, told him that 'he had to take care of some business the night before' and that 'he had slit her throat and stabbed her.' (PT 1058).

(PCR V2:219). Additionally, the trial court found that Watts' testimony was unlikely to have resulted in a life recommendation¹⁰ by the jury because, not only was it cumulative, but Watts claimed that DiMarino's admission was motivated by his desire to brag, and thus, the court found that the jury would not have been swayed by Watts' testimony. As previously noted, trial counsel presented Watts' testimony at the Spencer hearing on January 13, 2000. At that time, Watts indicated that DiMarino admitted to killing the victim, but DiMarino never mentioned any specifics and did not mention Appellant's name. As the lower court properly noted, there is no reasonable

¹⁰ Appellant contends the trial court misconstrued the prejudice prong of Strickland. Contrary to Appellant's assertion, the trial court properly analyzed Appellant's claim. This Court has previously held that in order to establish prejudice under Strickland, a defendant must demonstrate that, but for counsel's errors, he probably would have received a life sentence. See Gaskin v. State, 822 So. 2d 1243, 1247 (Fla. 2002); Hildwin v. Dugger, 654 So. 2d 107, 109 (Fla. 1995).

probability that this testimony would have produced a different result. Accordingly, for the reasons expressed above, this Court should affirm the lower court's summary denial of the instant claim.¹¹

¹¹ The lower court properly denied the instant claim based on a finding that Appellant was unable to establish prejudice. See Lucas v. State, 841 So. 2d 380 (Fla. 2003) (stating that a court considering a claim of ineffectiveness of counsel "need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied."). Although the court did not address the deficient performance prong, and did not grant an evidentiary hearing as to this claim, it should be noted that both resentencing counsel stated that they had a strategic reason for presenting the Outlaw gang members at the Spencer hearing rather than before the jury. (PCR V1:141-42; V2:204).

ISSUE IV

THE LOWER COURT PROPERLY DENIED APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF RESENTENCING COUNSEL BASED ON COUNSEL'S FAILURE TO PRESENT THE TESTIMONY OF JOHN DIMARINO BEFORE THE RESENTENCING JURY.

Appellant argues that resentencing counsel was ineffective for failing to present the testimony of John "Patches" DiMarino before the jury. The record from the resentencing hearing clearly indicates that counsel attempted to present John DiMarino's testimony before the jury, but counsel was unable to locate the witness. Counsel presented the testimony of his private investigator to detail the attempts that were made to contact John DiMarino. (DAR V8:1051-54). As the record indicates, John DiMarino was unwilling to testify and purposefully did not want to be located. (DAR V8:1053-54). As a result, resentencing counsel published the testimony from John DiMarino at Appellant's 1978 trial to the resentencing jury.¹²

John DiMarino testified regarding the victim being beaten inside the Outlaws' clubhouse, and stated that the victim left with his brother, Richard DiMarino, and Appellant. (DAR V8:1056-57). The following day, Richard told him that he had "taken care of some business" last night and had slit the

¹² Numerous witnesses were unavailable for the resentencing hearing in 1999, so both the State and defense counsel utilized the 1978 trial transcripts.

victim's throat and stabbed her.¹³ (DAR V8:1058). According to John DiMarino, his brother never specifically mentioned Appellant's involvement in the murder, but stated that "White was pretty drunk and wasn't too much help to him." (DAR V8:1065).

Appellant asserts that resentencing counsel was ineffective for not presenting John DiMarino's "live" testimony before the jury because his testimony would have (1) provided "powerful impeachment against Richard DiMarino;" (2) negated the HAC aggravator; and (3) provided a basis for relief under this Court's proportionality review.¹⁴ The State submits that the trial court properly summarily denied the instant claim based on Appellant's inability to establish either deficient performance or prejudice as required by Strickland.

As the lower court properly found, resentencing counsel was not deficient in attempting to present John DiMarino's testimony

¹³ Richard DiMarino denied making any admissions to his brother. (GP V4:656-76).

¹⁴ Appellant states in his brief that John DiMarino's "reliable evidence" was corroborated by the testimony of Joseph Watts and Frank Marasa. Initial Brief of Appellant at 31. This is an erroneous assertion. Although John DiMarino claimed that his brother confessed to *stabbing and* slicing the victim's throat, this testimony was rebutted by Richard DiMarino. Furthermore, neither Watts nor Marasa claimed that Richard DiMarino stabbed the victim. Both of these witnesses indicated that Richard said he had killed the victim, but this was consistent with Richard DiMarino's own testimony that he slit the victim's throat after Appellant stabbed her multiple times and sliced her throat.

live to the jury. Counsel introduced testimony regarding his efforts to produce John DiMarino's testimony in person at the 1999 resentencing trial. It is apparent from that testimony that trial counsel made reasonable efforts to secure the attendance of John DiMarino in 1999, but was unable to do so in spite of those efforts. (DAR V8:1051-1054). Clearly those efforts were within the broad range of competent performance under prevailing professional standards.

Furthermore, in order to obtain relief on an ineffective assistance claim, a defendant must show that he suffered prejudice, i.e., that there is a reasonable probability that the outcome in the case would have been different had trial counsel acted as the defendant claims he should have done. In the instant case, Appellant cannot meet that burden. This is so because the 1978 trial jury, which served in both the guilt and penalty phases, heard the "live" testimony of John DiMarino and unanimously recommended the death penalty. (GP V4:602-16); see also White v. State, 817 So. 2d 799, 802 (Fla. 2002). There is therefore no reason to believe that the 1999 jury would have found differently had it heard John DiMarino's testimony live as opposed to having it read to them. It should also be noted that at both the 1978 proceedings and the 1999 resentencing, the Sea World personnel who saw DiMarino and White a short time after

the murder noticed that White wore no shirt, and that he had blood on his person. In contrast, DiMarino was wearing a shirt with no obvious blood stains. The Sea World personnel testimony supported DiMarino's testimony that Appellant had been the primary actor in the stabbing. This Court rejected Appellant's argument that his sentence was disproportionate with that of Richard DiMarino, even after hearing the testimony of John DiMarino:

The evidence clearly establishes that Defendant delivered the fatal stab wounds to the victim's body, and handed the knife to DiMarino to slit her throat. Further, an employee from Sea World testified that he observed no blood on DiMarino, yet noticed what appeared to be a spot of blood on Defendant's forearm.

White v. State, 817 So. d 799, 810 (Fla. 2002).

The record clearly supports the trial court's summary denial of the instant claim based on a finding that Appellant is unable to establish deficient performance and prejudice. Obviously, Appellant was not prejudiced by trial counsel's failure to obtain John DiMarino's presence before the jury. John DiMarino's testimony was in fact presented to the 1999 jury by publishing his testimony from Appellant's 1978 guilt phase trial. Appellant fails to allege what information would have been imparted to the 1999 jury by hearing John DiMarino in person that they did not receive from hearing his 1978 trial testimony.

Lastly, John DiMarino's testimony went only to the guilt of Richard DiMarino. Although in an apparent abundance of caution the 1978 testimony of this witness was allowed into evidence at the 1999 penalty phase trial, the only logical effect of this testimony was to prove that Richard DiMarino, and not Appellant was the sole murderer of Gracie Mae Crawford, and thereby, to raise a lingering doubt as to Appellant's guilt. Such testimony would not have been admissible in the 1999 penalty phase had a prosecution objection been offered and granted because lingering reasonable doubt regarding a defendant's guilt is not a permissible mitigating circumstance for presentation at the penalty phase. See Duest v. State, 855 So. 2d 33, 40 (Fla. 2003) (stating that "a defendant has no right to present evidence of lingering doubt"). Therefore, Appellant's penalty phase counsel cannot be deemed ineffective for failing to present "lingering doubt" evidence because it was not admissible in the first place. The record reflects that resentencing counsel nevertheless zealously represented the interests of Appellant by successfully presenting the inadmissible testimony of John DiMarino from the 1978 trial. Accordingly, Appellant's claim of ineffective assistance of counsel is without merit.

ISSUE V

**THE LOWER COURT PROPERLY DENIED APPELLANT'S CLAIM OF
INEFFECTIVE ASSISTANCE OF RESENTENCING COUNSEL BASED
ON COUNSEL'S HANDLING OF APPELLANT'S PRIOR CONVICTION
FOR MURDER IN TENNESSEE.**

Appellant presented two subissues in the instant claim: (1) that resentencing counsel was ineffective for failing to properly challenge the validity of his 1980 Tennessee murder conviction and guilty plea; and (2) that counsel was ineffective for failing to present the testimony of Appellant's codefendant in the Tennessee case, Michael Markham, to the resentencing jury rather than before the judge at the Spencer hearing. The trial court summarily denied the first portion of this claim, and granted Appellant an evidentiary hearing on the second portion of the claim. After conducting an evidentiary hearing that included the testimony from both resentencing counsel, the court denied Appellant's claim based on a finding that Appellant was unable to establish either deficient performance or prejudice as required by Strickland.

The State submits that the lower court properly denied these two subissues. As previously noted, a postconviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief. Davis v. State, 875 So. 2d 359, 367-68 (Fla. 2003). In this case, the postconviction motion and record

conclusively establish that Appellant was not entitled to relief on his claim involving the failure of counsel to challenge the validity of Appellant's 1980 murder conviction and guilty plea.

Appellant makes numerous arguments regarding the failure of counsel to challenge the plea, but the record refutes his claim that the plea was not knowingly, intelligently, and voluntarily entered and that the State failed to establish a factual basis for the plea. As the lower court noted when denying this aspect of the claim:

The transcript of the Tennessee plea which was read into the record at White's 1999 penalty trial indicates that: a factual basis for the plea was given; waiver paperwork was made out and filed with the Tennessee Court; White stated twice that he was pleading to the murder because he was guilty of it; he stated that he was doing so freely and voluntarily; and in his presence, his attorney waived his right to confrontation. (PT 617-633).¹⁵ Based upon this record, there does not appear to be a valid basis to attack the plea and conviction. Further, the plea and conviction were almost 20 years old, and any collateral challenge was probably procedurally barred.

Assuming arguendo, however, that the plea was invalid, White's motion is legally insufficient in that it does not allege that White would not have been convicted at trial had he not entered the plea. Thus, no prejudice can be shown. See Parker v. State, 611 So. 2d 1224, 1227 (Fla. 1992).

(PCR V2:221-22). The court correctly noted that the record refutes Appellant's current claim, and even assuming the plea

¹⁵ In addition to the judgment and sentence of the Tennessee murder, the State also published the plea agreement at Appellant's resentencing hearing. (DAR V5:612-35).

was invalid, Appellant's allegations in his motion were legally insufficient. In Parker v. State, 611 So. 2d 1224, 1227 (Fla. 1992), this Court addressed a similar claim and held that it was insufficient for a postconviction defendant to attack only the validity of the prior plea itself, rather he must also allege that he would not have been convicted at trial had he not entered the plea.

Parker's claim that his sentence rests on two prior unconstitutional convictions, which could have been raised on direct appeal, also is barred procedurally. In order to prevail on his claim that trial counsel was ineffective in failing to challenge these prior convictions, Parker must show that his trial counsel's performance was deficient and that the result of the proceeding would have been different absent the deficient performance. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We agree with the trial judge's conclusions that Parker failed to meet the Strickland test. She found:

(a) The 1967 Florida conviction for first-degree murder. In this case, Parker was convicted of first-degree murder upon his plea of guilty to the charge. He was sentenced to life in prison. In challenging this conviction, [Parker] argues that his plea resulted from coercion, fear, and secret threats, and was, therefore, not voluntarily entered. **Nowhere in his collateral attack does he allege that, but for the [actions] of his trial counsel, he would have pleaded not guilty and would likely have been acquitted by a jury. Therefore, even though there may be a basis to set aside and vacate the guilty plea, there is no basis to find that [Parker] would not have been convicted of murder after a jury trial. Thus, no prejudice can be shown.**

(b) The Washington, D.C. conviction of second-degree murder. [Parker] argues that trial counsel should have collaterally attacked the Washington, D.C. conviction on the ground that evidence of the gun in

the D.C. case was illegally admitted into evidence and should have been suppressed. Assuming that counsel here had the duty to initiate this collateral attack and that [Parker] could show that his Washington counsel had been deficient in failing to file a motion to suppress, Mr. Parker still would not meet his burden of demonstrating prejudice. There is no reason to believe that without evidence of the gun in the Washington case Mr. Parker would have been acquitted. There were eye witnesses to the shooting in the Washington bar who identified Parker as the shooter, and Parker, himself, admitted the shooting and asserted the defense of self-defense.

Id. at 1227 (emphasis added).

As to Appellant's second claim regarding counsel's alleged ineffectiveness for not presenting Michael Markham, a codefendant in the Tennessee murder, before the jury, the trial court granted Appellant an evidentiary hearing on this aspect of his claim and subsequently denied the claim because Appellant failed to demonstrate deficient performance or prejudice. When reviewing a trial court's ruling on an ineffectiveness claim, this Court must defer to the trial court's findings on factual issues, but must review the trial court's ultimate conclusions on the deficiency and prejudice prongs de novo. Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001). In this case, the court denied the claim because Appellant failed to meet his burden of proof.

Proper analysis of Appellant's claim requires this Court to eliminate the distorting effects of hindsight and evaluate the performance from counsel's perspective at the time, and to

indulge a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment; the burden is on the defendant to show otherwise. Strickland, 466 U.S. at 689. Where the record is incomplete or unclear about counsel's actions, counsel must be afforded the presumption that he performed competently. Kimmelman v. Morrison, 477 U.S. 365, 384 (1986).

In the instant case, Appellant failed to meet his burden of proof by establishing resentencing counsels' decision was outside the broad range of competent performance under prevailing professional standards. Both resentencing counsel testified at the evidentiary hearing concerning their extensive investigation of the prior Tennessee murder case. Counsel conducted a thorough investigation of the facts surrounding the Tennessee case and secured codefendant Markham's presence during Appellant's penalty phase.¹⁶ After counsel spoke with and personally met with Markham, a decision was made not to call him before the jury. Collateral counsel's hindsight assertion that

¹⁶ Appellant's allegation that this case is more egregious than Rompilla v. Beard, 545 U.S. 374 (2005), is unavailing. In Rompilla, the defense attorneys did not review the prosecutor's file regarding a prior felony offense that the prosecution planned on utilizing to establish an aggravating factor. Unlike the facts in Rompilla, Appellant's attorneys conducted an extensive investigation into the Tennessee murder, including sending an investigator to research the case, speaking with Markham and Markham's defense attorney, and reviewing the plea hearing and autopsy report.

the outcome would have been different had Markham been presented to the jury is without merit. See Occhicone v. State, 768 So. 2d 1037 (Fla. 2000) (stating that trial counsel is not ineffective merely because current counsel disagrees with trial counsel's strategic decisions). Second-guessing defense counsel's strategy is clearly not the applicable standard for an ineffective assistance of counsel claim. Shere v. State, 742 So. 2d 215, 219 n.9 (Fla. 1999). Collateral counsel has failed to show that resentencing counsel's strategic decision constituted deficient performance. Accordingly, this Court should deny Appellant's postconviction claim that resentencing counsel was ineffective for making the strategic decision to present Markham at the Spencer hearing rather than before the jury.

Additionally, as the lower court properly noted, Appellant failed to establish that he suffered prejudice as a result of resentencing counsel's strategic decision to present the testimony of Michael Markham at the Spencer hearing rather than before the jury. Simply put, Markham's testimony at the Spencer hearing was not credible. Markham testified that he shot the victim and then choked him to death. He stated that he stabbed the victim multiple times at a different location in order to sink the body. (DAR V4:R.110-12). According to Markham's

testimony, White's only involvement was assisting Markham in placing the body into the trunk of his vehicle, and then helping him throw the body into a river. (DAR V4:R.111-12).

Markham's testimony at the January 13, 2000, Spencer hearing clearly contradicted the sworn testimony he gave at his plea to the Tennessee murder in 1980. In the 1980 plea, Markham listened to the factual basis given by the prosecutor and agreed that the facts as related were substantially accurate. The prosecutor indicated that, had the medical examiner testified, he would not have detailed any gunshot wound, but would have noted that the victim had a laceration to the neck, 14 stab wounds to the body, and a laceration in the belly and one stab wound in the back. (DAR V5:Tr.623). According to an eyewitness, Markham, White, and an unknown individual entered the victim's residence and Markham and White chased the victim into a bedroom where the witness heard the victim screaming. Subsequently, blood found on the bedroom mattress was tested and matched the victim's blood type. (DAR V5:T.621-26).

Obviously, the factual basis detailed in the plea agreement in 1980 differed greatly from the testimony Markham gave at the Spencer hearing in 2000. In making the strategic decision to forego presenting Markham in front of the jury, trial counsel factored into their decision-making process the fact, among

others, that Markham was not credible. In addressing this aspect of Appellant's claim, the lower court stated:

At the evidentiary hearing, resentencing counsel, Chandler R. Muller, testified that he has been a practicing attorney for 37 years with ninety-five percent of his practice in criminal law. He is state board certified and nationally board certified as a criminal trial advocate. He has tried six to ten capital cases to verdict. He has attended various seminars concerning handling capital cases and was up to date on Florida case law at the time of resentencing. Additionally, he was part of the Volunteer Lawyers Resource Center and through this organization advised other attorneys on how to practice effectively in the field of death penalty litigation and collateral relief.

Mr. Muller testified that he was aware of the facts surrounding the Tennessee murder and the plea. The Tennessee murder was bad and he did not want to focus on something really bad. However, he did not neglect Mr. Markham as a potential witness. He had his investigator, Chris Cox, interview Mr. Markham in Alabama and listed Mr. Markham as a potential witness. His co-counsel, Bryan Park, deposed Mr. Markham's Tennessee attorney, spoke to Mr. Markham on the telephone and arrangements were made for Mr. Markham to come down for the penalty phase jury trial. The evidence demonstrated that Mr. Markham flew to Orlando on November 13, 1999 and remained until November 19, 1999. Prior to the trial, Mr. Muller personally met with Mr. Markham. Although he thought Mr. Markham's testimony would be beneficial for a judge to hear, he did not think he was very credible. He did not call Mr. Markham before the jury because "something bothered him." His theory of defense was to present White as a follower, to let the jury know about his terrible life and differentiate him from the other members of the Outlaw motorcycle club. He did not want to call as a witness someone with whom Mr. White associated and who would appear unsympathetic or untruthful before the jury. He was also concerned about the jury hearing the facts, seeing autopsy reports or photos, if available, of the Tennessee murder. Therefore, he made "a call" based upon his

experience and did not present Mr. Markham as a witness to the jury, but instead put him on with the judge because he felt the judge had the ability to put the whole picture together.

Bryan Park, resentencing co-counsel, testified that Mr. Markham was Mr. Muller's witness. However, he succinctly stated that it was Mr. Muller's and his opinion that the more "Outlaws" they called as witnesses the more damaging it would be to the defense. They believed that there was a "chance of the defendant getting dirty by association."

. . .

Based upon the facts presented at the evidentiary hearing, the Court determines that counsel's decision not to present the testimony of Mr. Markham to the penalty phase jury, but to instead present his testimony at the Spencer hearing, was a reasonable trial strategy. Thus, White has failed to show deficient performance on the part of resentencing counsel.

Additionally, this Court heard Mr. Markham's testimony at the Spencer hearing. His testimony was not credible. It was contradicted by the factual basis given at the time of the Tennessee murder to which Mr. Markham agreed to under oath (PT 621-27) and by the Tennessee autopsy report introduced into evidence during the Spencer hearing. Moreover, White had admitted to the murder under oath and was convicted of second degree murder. As such, White has failed to demonstrate prejudice.

(PCR V2:222-25).

The State submits that the lower court properly found that Appellant failed to show any prejudice as a result of trial counsel's decision. See Cherry v. State, 781 So. 2d 1040 (Fla. 2000) (stating that in order to prevail on an ineffective assistance claim in the penalty phase of a death penalty case, the defendant must show that there is a reasonable probability that, absent trial counsel's error, the sentencer would have

concluded that the balance of the aggravating and mitigating circumstances did not warrant death). In this case, the lower court was aware of Markham's testimony prior to following the jury's recommendation and resentencing Appellant to death. Clearly, there is no reasonable probability that the outcome would have been different had Markham testified before the jury. Accordingly, this Court should affirm the lower court's denial of Appellant's ineffective assistance of counsel claim.

ISSUE VI

**THE LOWER COURT PROPERLY FOUND THAT APPELLANT'S BRADY
AND GIGLIO CLAIM THAT WAS RAISED IN HIS 1983
POSTCONVICTION MOTION WAS PROCEDURALLY BARRED.**

In his current postconviction motion, Appellant has raised the same exact Brady/Giglio claim that he raised in his 1983 postconviction motion which was fully litigated at that time. His claim at that time was denied by the trial court, and extensively discussed by this Court in its opinion affirming the lower court's denial of this issue. In White v. State, 729 So. 2d 909, 912 (Fla. 1999), this Court stated:

In this claim, appellant contends that the State failed to disclose all the essential details of the deal with DiMarino, the State's chief witness, in violation of Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), and then in violation of Giglio v. United States, 405 U.S. 150, 31 L. Ed. 2d 104, 92 S. Ct. 763 (1972), allowed DiMarino to testify falsely when he omitted several aspects of the agreement. We address each claim seriatim. At trial, the State presented the testimony of DiMarino. By this time, DiMarino had been convicted of third-degree murder and other felonies in connection with this crime and sentenced to concurrent terms of fifteen years' imprisonment. DiMarino testified that it was appellant who stabbed Ms. Crawford fourteen times and slit her throat. On cross-examination, DiMarino testified that in exchange for his testimony the State promised protection from the Outlaws gang and that sentences on pending charges would run concurrently with his sentence on Crawford's murder. Appellant now claims that the State failed to disclose: (1) a written memorandum in which the State agreed not to seek enhanced punishment although DiMarino qualified as a habitual offender and to drop other charges; and (2) a \$1,000 payment to DiMarino's wife. Appellant claims that the failure to provide this information,

which would have been used to impeach DiMarino, resulted in prejudice. We disagree.

The trial court's order denying relief on this issue focused on the materiality of the evidence. To demonstrate materiality, the defendant must establish a reasonable probability that the outcome of the case would have been different. See Kyles v. Whitley, 514 U.S. 419, 435, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995) (citing United States v. Bagley, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985)). In analyzing this issue the court explained that courts must focus on whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. 514 U.S. at 435. The trial court below concluded that this additional information was not material.

Defense counsel conducted an excellent cross-examination of DiMarino. [Appellant's] attorney showed the jury that DiMarino had much to gain by his testimony. Defense counsel brought out that DiMarino lied when it was to his benefit, that he obtained a better sentencing deal via his testimony, that he would be kept safe from the Outlaws and that his girlfriend and child would be taken care of. Even though some of the details of the agreement were not presented to the jury, counsel more than sufficiently acquainted the jury with the fact that there was an agreement between DiMarino and the State and counsel introduced most of the agreement's major components. The additional material of which [appellant] now complains would not have added to DiMarino's impeachment. Consequently, this court finds there is no reasonable probability that this evidence, if it had been presented at trial, would have changed the outcome.

Order at 7-8. We agree with the trial court's analysis of this issue and, after reviewing the entire trial record, find that the cumulative effect of the State's failure to disclose the memorandum does not undermine our confidence in the jury's conviction. For this same reason, we do not find any error under Giglio. See Craig v. State, 685 So. 2d 1224, 1226 (Fla. 1996). Therefore, we affirm the trial court's order with respect to this issue.

Appellant argued in the instant postconviction proceedings that because this Court had "clarified" the Giglio and Brady materiality standards in Guzman v. State, 868 So. 2d 498 (Fla. 2003), the lower court should, in effect, review this Court's 1999 White decision with respect to their clarified Giglio analysis. As the lower court properly found, Appellant is not entitled to such review. In denying this claim, the lower court stated:

White contends that even though this claim was previously raised in his 1983 postconviction motion, the court used the wrong standard of materiality based upon prior precedent of the Florida Supreme Court and its decision "should no longer be afforded the status of 'law of the case.'" White argues that this court should determine the materiality prong as stated in Guzman v. State, 868 So. 2d 498 (Fla. 2003).

White's claim is procedurally barred. As White concedes, this claim was previously raised in his 1983 motion. The Florida Supreme Court addressed this issue in its 1999 opinion. White v. State, 792 [sic] So. 2d 909, 912 (Fla. 1999). Claims that were or could have been presented in a postconviction motion cannot be relitigated in a subsequent postconviction motion. See Wright v. State, 857 So. 2d 861, 868 (Fla. 1999).

(PCR V2:225); see also Downs v. State, 740 So. 2d 506, 518 n.10 (Fla. 1999) (stating that a claim raised in earlier postconviction motion is barred in subsequent postconviction motion even if based on different facts); Atkins v. State, 663 So. 2d 624, 626 (Fla. 1995) (explaining that issues that were or could have been presented in a postconviction motion cannot be

relitigated in a subsequent postconviction motion). Because Appellant has already litigated the instant issue in his 1983 postconviction motion, the lower court properly found that he was procedurally barred from relitigating the issue. Thus, this Court should affirm the lower court's denial of the instant claim.

ISSUE VII

THE LOWER COURT PROPERLY SUMMARILY DENIED APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF RESENTENCING COUNSEL BASED ON COUNSEL'S AGREEMENT WITH THE STATE TO STRIKE PROSPECTIVE JUROR FUENTES FOR CAUSE.

Appellant claims that resentencing counsel's agreement to strike prospective juror Fuentes for cause constituted ineffective assistance of counsel. The trial court summarily denied Appellant's claim based on a review of the record. As previously noted, a defendant is not entitled to an evidentiary hearing when the record conclusively demonstrates that he is not entitled to relief. See Davis v. State, 875 So. 2d 359, 367-68 (Fla. 2003). Here, the record conclusively establishes that prospective juror Fuentes indicated that her feelings about the appropriateness of the death penalty would interfere with her participating as a part of the jury making the sentencing recommendation.

Appellant erroneously claims that potential juror Fuentes was struck for cause based on her inability to fluently speak or understand the English language. As the lower court properly found, the record clearly refutes Appellant's claim that Ms. Fuentes was struck solely on the basis of her admitted language difficulties. Rather, as the postconviction court noted:

Ms. Fuentes advised that her feelings about the appropriateness of the death penalty would interfere with her ability to participate as part of the jury

that would make the sentencing decision and that she did not believe she could do it. (PT 93) Further, she stated that she wasn't sure she would be able to make a decision based upon her own conscience, if the other jurors disagreed with her. (PT 95-96) Based upon the record, the challenge was proper and counsel's performance was not deficient. See Palmer v. State, 425 So. 2d 4, 7 (Fla. 1983).

(PCR V2:226); see also Maxwell v. Wainwright, 490 So. 2d 927, 930 (Fla. 1986) (affirming summary denial of defendant's postconviction claim that juror who merely expressed hesitancy about the use of capital punishment was improperly excused for cause as procedurally barred, but noting, "[m]oreover, under established Florida law, the juror was properly excused because, based on the record of the original trial, it was clear that the possibility of a death sentence rendered the juror unable to impartially participate in the determination of guilt or innocence"); Kimbrough v. State, 700 So. 2d 634, 638-39 (Fla. 1997) (finding that even though prospective juror responded to questions from defense attorney that she could follow the oath administered to her and apply the law as instructed by the judge, her previous answers expressed uncertainty as to her abilities to act in accordance with the juror's instructions and oath, and thus, the trial court did not abuse its discretion in excusing juror for cause). Because the record clearly establishes that prospective juror Fuentes was not struck for cause solely because of language difficulties, as alleged by

Appellant, but rather was properly struck based on her inability to act in accordance with the juror's instructions and oath, this Court should affirm the lower court's summary denial of his ineffective assistance of counsel claim.

ISSUE VIII

APPELLANT'S ARGUMENT THAT HE WAS DEPRIVED OF HIS EQUAL PROTECTION RIGHTS WHEN PROSPECTIVE JUROR FUENTES WAS STRUCK FOR CAUSE ON THE BASIS OF HER LANGUAGE DIFFICULTIES IS WITHOUT MERIT.

As noted in Issue VI, supra, it is clear that Fuentes was struck because she told the court that her feelings about the death penalty would interfere with her ability to act as part of the jury. It is also clear that although Fuentes' difficulty with the English language was raised, it was not the only factor which led her to be challenged and dismissed as a juror for cause. As such, the lower court properly summarily denied the instant claim based on a finding that the record refutes Appellant's claim that the juror was struck solely on the basis of her difficulty in speaking and understanding English.

ISSUE IX

THE POSTCONVICTION JUDGE PROPERLY SUMMARILY DENIED APPELLANT'S INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIM BASED ON TRIAL COUNSEL'S QUESTIONING OF PROSPECTIVE JUROR WILLIAMS AND COUNSEL'S FAILURE TO CHALLENGE THE JUROR FOR CAUSE.

Appellant's claim of ineffective assistance of trial counsel is without merit. The lower court properly found that the record clearly refutes White's claim that trial counsel was ineffective for failing to further question prospective juror Williams regarding the racial overtones in the case and for failing to challenge the juror for cause. The court found that Appellant was unable to establish either deficient performance or prejudice. (PCR V2:228-29).

The record of the penalty phase indicates that the possibility of there being a racial component to some of the evidence was covered at least three times with Juror Williams; on individual voir dire (DAR V2:320), in group voir dire with the prosecutor (DAR V3:487-88), and again in group voir dire with defense counsel. (DAR V3:495-96). In his group voir dire presentation, the prosecutor made it clear that although the racial component had a bearing in explaining the actions of the persons involved in the circumstances leading up to the murder of Gracie Mae Crawford, this factor was not being introduced as

an aggravating factor, and should not be considered by the jury as such:

MR. LERNER: I'M GOING TO TELL YOU THAT RIGHT NOW THAT IN FLORIDA THE RACE OF THE VICTIM OR THE, IN THIS CASE VICTIM AND MR. WHITE WERE BOTH CAUCASIANS, THEY WEREN'T, NEITHER OF THEM WERE PEOPLE OF COLOR. BUT IN THIS STATE RACE AS A MOTIVATION IS NOT AN AGGRAVATING FACTOR. I'M NOT GOING TO ARGUE THAT TO YOU, I'M NOT GOING TO TELL YOU THAT SHOULD SUPPORT A DEATH SENTENCE. AND I DON'T, CERTAINLY DON'T THINK THAT MR. MULLER IS GOING TO ARGUE THAT AS MITIGATION. IT MAY COME IN TO EXPLAIN HOW THINGS HAPPENED.

(DAR V3:488). At the close of the prosecutor's voir dire, after the possibility of racial components possibly being a part of the facts of the case had twice been specifically covered, the prosecutor asked the prospective jurors (including juror Williams) this question:

MR. LERNER: DO ANY OF YOU HAVE ANY QUESTIONS OF ME ABOUT ANYTHING THAT'S COME TO YOUR MIND SINCE YOU CAME IN AND TALKED TO US OR WHILE YOU'VE BEEN OUT IN THE HALL WAITING? NO? OKAY.

(DAR V3:492). At this point, although Juror Williams had the opportunity to do so, he did not volunteer that the race issue was a problem with his impartiality or his ability to follow the law.

Given this record, Appellant has failed to raise a reasonable probability that Juror Williams would have revealed a significant racial bias, even if had he been questioned more closely by defense counsel about that issue in individual voir

dire. Moreover, there is another reason that Appellant has failed to show a reasonable probability of a different outcome had defense counsel acted differently with respect to prospective juror Williams. The record reveals that defense counsel used all his peremptory challenges. (DAR V3:527). Appellant does not allege which of the jurors who were struck would have made better jurors. He also fails to allege why he would have had a better possibility of success if Williams had been stricken for cause and a new set of prospective jurors had been brought up. Appellant's entire claim is based upon nothing but conjecture and speculation, both of which are insufficient to support a valid ineffective assistance claim. See Maharaj v. State, 778 So. 2d 944, 956 (Fla. 2000) ("Postconviction relief cannot be based on speculation or possibility.").

Lastly, the record refutes the notion that defense counsel could have developed a valid basis for a challenge for cause. The transcript passage set out by Appellant in his brief shows that, during questioning by defense counsel, prospective juror Williams affirmed that he had no strong beliefs that would prevent him from following the law as the judge instructed him. (DAR V2:313). He understood that he would weigh the factors involved. (DAR V2:313). Prospective juror Williams stated that "given the circumstances, I believe I could, I can weigh the

situation and follow through," (DAR V2:315), and that if he found the mitigating circumstances outweighed the aggravating circumstances, then he could recommend a life sentence. (DAR V2:315). Such a record refutes a valid ineffective assistance claim. See Griffin v. State, 866 So. 2d 1 (Fla. 2003) (summary denial of postconviction claim that failure to challenge juror for cause constituted ineffective assistance was appropriate where voir dire transcript indicated that juror could lay aside any bias or prejudice and render verdict solely upon the evidence and instructions of the court); Mansfield v. State, 911 So. 2d 1160 (Fla. 2005) (denying ineffective assistance of trial counsel claim because the trial record revealed that the trial court, the State, and defense counsel engaged in substantial questioning of the potential jurors and the record supported the lower court's finding that trial counsel questioned prospective jurors so that counsel could reasonably conclude that the jurors could lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court). Accordingly, this Court should affirm the lower court's denial of this claim based on Appellant's inability to demonstrate either deficient performance or prejudice.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the trial court's denial of Appellant's motion for postconviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Peter J. Cannon, Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, this 6th day of July, 2006.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

STEPHEN D. AKE
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 14087
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501

COUNSEL FOR APPELLEE