IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC05-2191

LEROY POOLER,

Appellant,

VS.

STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA, (Criminal Division)

****

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PRELIMINARY STATEMENT

Appellant, Leroy Pooler, was the defendant at trial and will be referred to as the "Defendant" or "Pooler". Appellee, the State of Florida, the prosecution below will be referred to as the "State". References to the records will be as follows:

1. Direct appeal in case number SC6087771 - "R"

2. Postconviction in case number SC05-2191 - "PC"

Any supplemental records will be designated by an "S" or transcripts will be by the symbols "SR[vol.]" or "ST[vol.]", and to the Appellant's brief will be by the symbol "IB", followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

On February 23, 1995, Leroy Pooler ("Pooler") was indicted for the January 30, 1995 first-degree murder of Kim Brown, attempted first-degree murder of her brother, Alvonza Colson, and armed burglary of their apartment. Trial commenced on January 9, 1996 and the jury returned on January 17, 1996 with a guilty verdict for all counts. (R.19 1320-23). Following the penalty phase, Pooler received the death penalty for the first-degree murder of Kim Brown and life sentences for the attempted first-degree murder and armed burglary counts to be served concurrently.(R.4 697-702, 727-36).

In his initial direct appeal brief, Pooler raised fifteen

issues.[1] All were rejected by this Court and the convictions and sentences were affirmed. Pooler v. State, 704 So. 2d 1375, 1377 (Fla. 1997). The United States Supreme Court, on October 5, 1998, denied Pooler's petition for writ of certiorari in which

[1] I - The trial court erred in taking no action regarding the prosecution comment during voir dire on Appellant's presumption of innocence; II - The trial court erred in failing to instruct the jury on the felony murder theory in Count III of the indictment charging attempted first-degree murder with a firearm of Alvonza Colson; III -The trial court erred in its finding that the capital felony was especially heinous, atrocious, and cruel; IV - The trial court erred by finding the prior violent felony aggravating factor, where the only other convictions of prior violent felonies were contemporaneous to the homicide conviction; V - Death is not proportionately warranted in this case; VI - The trial court erred in rejecting the mitigating circumstances in section 921.141(6)(f) of the Florida Statutes where it was established that Appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired; VII - The trial court erred in rejecting the mitigating circumstances in section 921.141(6)(e) of the Florida Statutes where it was established that Appellant Acted under extreme duress at the time of the offense; VIII - The trial court erred in rejecting the non-statutory mitigating factor that Appellant had a good jail record and has shown an ability to adapt to prison life; IX - The trial court erred in rejecting the non-statutory mitigating factor that Appellant was of low normal intelligence; X - The trial court erred in rejecting the non-statutory mitigating factor that Appellant is rehabilitable; XI - The trial court erred in rejecting the non-statutory mitigating circumstance that the homicide was the result of a heated domestic dispute; XII - The trial court erred in rejecting the non-statutory mitigating factor that Appellant is unlikely to endanger others and will adopt well to prison; XIII - Appellant is being denied due process and a full and fair appellate review due to an incomplete appeal record; XIV - The trial court erred in departing from the guideline sentence in Counts II and III without a contemporaneous departure order; XV - Florida's death penalty statute is unconstitutional.

he raised three questions.[2] Pooler v. Florida, 525 U.S. 848 (1998).

On September 17, 1999, Pooler filed a shell motion for postconviction relief which, on November 1, 1999 was denied summarily (PC.1 1-22, 53-59). Subsequently, by agreement of the parties, the order denying the motion was vacated, and on January 13, 2000, Pooler was given additional time to file an amended motion pursuant to Florida Rule of Criminal Procedure 3.850. (PC.1 65-68) He filed, on March 13, 2000, an amended motion to which the State responded. (PC.1 72-237). On June 28 2000, the trial court[3] conducted a Case management Conference at which the State agreed to an evidentiary hearing on Claims I, II, and VI, but asserted summary denial was proper for the balance of the claims as they were legally insufficient,

[2] Pooler's issues were: (1) By eliminating the option of a sentence of life without parole for the reason set forth in its sentencing order, the trial court in affect imposed a mandatory death sentence on petitioner; (2) Florida failed to genuinely narrow the class of murderers eligible for the death penalty through the felony murder aggravating circumstances; (3) The death penalty imposed upon Petitioner is not proportional to the penalty imposed in similar cases where the defendant was sentenced to life in prison.

[3] Judge Broom presided over the trial and sentenced Pooler to death. Following the hearing pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1983) was held, and evidentiary hearings were scheduled on two occasions before Judge Broom, however, they were cancelled to allow defense counsel to contemplate Pooler's competency and to permit the filing of a supplemental claim. Following Judge Broom's retirement, Judge Stern was appointed, but later was replaced by Judge LaBarge.

procedurally barred, meritless, or refuted from the record as provided in the State's May 5, 2000 Response. (PC.2 239-553; PC.17 21-58). An evidentiary hearing was granted on Claims I, II, and VI. (PC.4 670; PC.17 48).

Subsequently, on September 20, 2002, Pooler sought a stay of the proceedings based on Atkins v. Virginia, 122 S.Ct. 2428 (2002) and Ring v. Arizona, 122 S.Ct. 2428 (2002), to which the State objected. (PC.4 657-70). November 8, 2002, Pooler filed a supplemental claim asserting his conviction and death sentence were obtained in violation of Ring. (PC.4 671-76). On June 4, 2003, the State responded to the Ring claim. (PC.4 679-91, 722-37).

At this time, Pooler's counsel was investigating competency issues, and the case was continued. (PC.4 692-99, 702-06; PC.5 865). On November 12, 2003, Pooler's counsel moved to have his client's competency determined, and the court entered an agreed order on December 16, 2003, appointing experts to examine Pooler. (PC.4 702, 704-07). A competency hearing was held on November 12, 2004, and based upon consideration of the reports of the appointed mental health experts, Drs. Spencer and Brannon, and representation of Pooler's counsel, an order was entered on November 29, 2004, finding Pooler competent. (PC.5 866-67; PC.17 126-129).

On May 16, 2005, an evidentiary hearing was held on

Pooler's postconviction motion. (PC.4 745-61; PC.18 150-372) The court received post-hearing memoranda from the parties addressed to the issues developed at the evidentiary hearing as well as the outstanding claims (PC.8 1200-1944; PC.11 1945-60). Based upon the court's reading of the trial transcript and considering the evidentiary hearing testimony and evidence, all pending claims were resolved on November 4, 2004, with the entry of a written order denying relief. (PC.11 1961-2006; PC.12 2010-55). On November 21, 2005, Pooler filed his notice of appeal. (PC.12 2007-08).

The facts, relevant to the criminal conviction and sentences, were found by this Court on direct appeal aa follows:

> Leroy Pooler was convicted of first-degree murder for the shooting death of his ex-girlfriend, Kim Wright Brown. He also was convicted of burglary and attempted first-degree murder with a firearm. The facts supporting these convictions are as follows. On January 28, 1995, Carolyn Glass, a long-time acquaintance of Kim Brown, told her that Pooler had said he was going to kill her because if he could not have her, no one else would. (Evidence showed that Kim Brown had begun seeing another man.) Two days later, Pooler knocked on the front door of the apartment where Kim and her younger brother, Alvonza Colson, lived with their mother. Seeing Pooler through the door window, Kim told him that she did not want to see him anymore. Alvonza opened the door halfway and asked Pooler what he wanted but would not let him in. When Pooler brandished a gun, Alvonza let go of the door and tried to run out the door, but he was shot in the back by Pooler. Pooler pulled Alvonza back into the apartment by his leg. Kim begged Pooler not to kill her brother or her and began vomiting into her hands. She suggested they take Alvonza to the hospital. Pooler originally agreed but then told

Alvonza to stay and call himself an ambulance while Pooler left with Kim. However, rather than follow Pooler out the door, Kim shut and locked it behind him. Alvonza told Kim to run out the back door for her life while he stayed in the apartment to call for an ambulance. When he discovered that the telephone wires had been cut, he started for the back door, just as Pooler was breaking in through the front entrance.

Pooler first found Alvonza, who was hiding in an area near the back door, but when he heard Kim yelling for help, he left Alvonza and continued after Kim. When he eventually caught up with her, he struck her in the head with his gun, causing it to discharge. In front of numerous witnesses, he pulled her toward his car as she screamed and begged him not to kill her. When she fought against going in the car, Pooler pulled her back toward the apartment building and shot her several times, pausing once to say, "You want some more?" Kim had been shot a total of five times, including once in the head. Pooler then got into his car and drove away.

The jury recommended death by a vote of nine to three. The trial court found the following aggravators: (1) that the defendant had a prior violent felony conviction (contemporaneous attempted first-degree murder of Alvonza); (2) that the murder was committed during the commission of a burglary; and (3) that the murder was heinous, atrocious, or cruel. The trial court found as statutory mitigation that the crime was committed while Pooler was under the influence of extreme mental or emotional disturbance, but gave that finding little weight. The court found the following proposed statutory mitigators had not been established: (1) the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired; (2) the defendant acted under extreme duress or under the substantial domination of another person; and (3) the defendant's age (he was 47).

As nonstatutory mitigation, the trial court found the defendant's honorable service in the military and good employment record, as well as the fact that he was a good parent, had done specific good deeds, possessed

> certain good characteristics, and could be sentenced to life without parole or consecutive life sentences. The only mitigator given considerable weight was Pooler's honorable military service; the others were given some to little weight. The trial court expressly rejected as unestablished nonstatutory mitigation that Pooler has a good jail record and an ability to adapt to prison life; that he has low normal intelligence; that he has mental health problems; that he is rehabilitable; that the homicide was the result of a heated domestic dispute; and that he is unlikely to endanger others and will adapt well to prison. Concluding that each of the three aggravators standing alone would outweigh the mitigating evidence, the court sentenced Pooler to death.

Pooler v. State, 704 So. 2d 1375, 1377 (Fla. 1997).

At the May 16, 2005 evidentiary hearing, Pooler's postconviction claims were combined into two issues: (1) ineffective assistance of guilt phase counsel for failing to investigate and present an intoxication defense (2) ineffective assistance of penalty phase counsel for failing to investigate and present mitigating factors and for failing to obtain and prepare mental health professionals. At the evidentiary hearing, Pooler called Don Carpenter (private investigator for postconviction counsel), Michael Salnick, Esq. (trial counsel), Marvin Jenne (private investigator for trial counsel), Detective Alonso, and Dr. Michael Brannon (psychologist).

Michael Sqalnick ("Salnick"), Pooler's trial counsel, testified that he considered an intoxication defense, but could not ethically present it because there was no evidence Pooler

was intoxicated at the time of the crime. Additionally, Salnick explained that Pooler was adamant that he would not agree to any defense which required admitting to shooting Kim Brown ("Kim"). (PC.18 198). Salnick testified that he had seen Detective Alonso's ("Alonso") report which noted that Pooler had stated being relieved of his cash after passing out from intoxication the night before the killing (PC.14-Defense Exhibit 4; PC.18 178-86, 197-99, 205-08, 236-37)[4] No evidence was presented at the evidentiary hearing that Pooler was actually drunk at the time of the shooting or that he agreed to admit to shooting Kim. According to Salnick, "[Carolyn Glass] heard him (Pooler) make a threat to the victim at a time when he was drinking, not that he was drinking at the time of the incident." (PC.18 224-25). It was Salnick's testimony that he discussed possible defenses with Pooler. Salnick explained that the voluntary intoxication defense was rejected for two reasons: (1) there was no evidence to support a claim that Pooler was drunk at the time of the crime; and (2) Pooler refused to admit to shooting Kim. (PC.18 178-86, 197-99, 205-08, 224-25, 236-37).

The private investigator hired by Salnick, Marvin Jenne ("Jenne"), did not recall seeing Alonso's report, but Jenne

[4] As Salnick recalled, Pooler explained that he had been in a car with a prostitute and fell asleep because he was drunk. When he awakened, his money was gone and he drove to the police station to report the incident. (PC.18 178-86, 197-99, 236-37).

testified at the evidentiary hearing that Pooler was able to recall specifics about the day of the murder. (PC.18 255-58). Jenne also did investigation into Pooler's background for mitigation. Salnick hired Jenne, an experienced private investigator with capital experience, and asked him to find anything and everything on Pooler. This was corroborated by Jenne. (PC.18 235-36, 259-61, 274-78).

Toward this endeavor, Jenne spoke to Pooler on numerous occasions, traveled to Louisiana to interview family members, and sent letters for background documentation to verify and support what Pooler was disclosing to his defense team. Although Jenne was unsuccessful in obtaining Pooler's school records, Salnick was given corroboration from the family that Pooler graduated from high school and was honorably discharged from the military after serving in Vietnam. (PC.18 216-24, 227-29, 260-68, 276-82). Additionally, friends and co-workers of Poller were contacted for mitigation information. (PC.18 228-30, 276-82).

In addition to this lay testimony, Salnick secured the help of or called to testify mental health experts who had examined Pooler, Doctors Levine, Desormeau, Armstrong, and Alexander (R.19 1376, 1412; R.20 1454, 1483). Salnick's strategy was to rely upon the mental health experts who did the competency and psychological evaluations. While Salnick noted that a full

psychological evaluation may be important, he added such depends on the penalty phase presentation and the chosen defense strategy. In this case, Salnick was presenting Pooler's favorable characteristics given the corroborated evidence he had available. (PC.18 209-16). He showed that around the time of the crime, Pooler was diagnosed with depression, had been put on suicide watch, and that these factors were noted by court appointed experts and/or State hired jail doctors who, Salnick believed, would hold more sway with the jury than defense hired experts. (PC.18 230-33).

In response to the suggestion he should have presented evidence of intoxication during the penalty phase, Salnick noted he used intoxication to his advantage. He successfully precluded the State from obtaining an instruction on the cold, calculated, and premeditated ("CCP") aggravating factor arising from Pooler's earlier threat to kill Kim because Pooler had been drinking when he reported the threat to Carolyn Glass a week before the murder. (PC.18 2020-03, 224-25; R.20 1529, 1670).

Dr. Brannon, Pooler's postconviction mental heath expert, found that Pooler **could appreciate** the criminality of his conduct at the time of the crime. The doctor **refused** to find a Post Traumatic Stress Disorder at this time. (PC.18 350-51). As mitigation, he offered: (1) neurological damage/functioning based upon alleged head trauma/injuries as supported by Dr.

Levine's evaluation/report; (2) confabulation; (3) borderline IQ; and (4) alcohol abuse. (PC.18 335-45, 350-51).

The court considered the evidence and trial record before denying relief on the claim counsel was ineffective for failing to present an intoxication defense. It was the court's conclusion:

> The evidence did not support a voluntary intoxication defense and the defendant thwarted any possibility of raising it when he refused to admit to Kim Brown's shooting. Likewise, without evidence of intoxication or the defendant's willingness to admit to the crime charged, there was no basis for seeking a jury instruction on voluntary intoxication.
>
> Defense counsel properly investigated the case, reviewed the evidence, considered how such evidence impacted the case, and developed a strategy consistent with the evidence, and after consultation with his client. Such actions fall within the wide range of professional representation as defined in *Strickland [v. Washington*, 466 U.S. 668 (1984)]. The defendant failed to demonstrate either deficient performance or prejudice arising from the investigation and strategy taken by counsel.

(PC.11 1980).

Similarly, the court rejected the claim of ineffectiveness arising from the penalty phase investigation and strategy. The court noted that Pooler's present argument that he should have been cast in a "bad" instead of "good" light was in direct contrast to the strategy defense counsel followed and was not a proper basis to challenge counsel. (PC.11 1981). Additionally, the court found that Salnick's investigation was reasonable having hired mental heath experts and utilized an experienced

private investigator to obtain background information on Pooler by traveling to Louisiana to meet with family members and to seek supporting documentation. The strategy to present Pooler in a positive light was found, by the court, to be supported by the family and friend, thus, rejecting prejudice arising from counsel's failure to obtain the military and employment records. (PC.11 1982-83). The court credited Salnick's use of Pooler's intoxication a week before the crime to preclude the State from arguing CCP in spite of Pooler's prior threats to kill Kim Brown. (PC.11 1983).

Subsequently, the court rejected the remaining claims which were not the subject of the evidentiary hearing. In so doing, the court made findings of fact, and legal conclusion all supported by the record and case law. (PC.11 1984-2006). This appeal followed.

SUMMARY OF THE ARGUMENT

Issue I - The court's findings that counsel considered an intoxication defense but rejected it for lack of evidence as well as Pooler's decision not to admit to the killing are supported by substantial, competent evidence. Further the finding of lack of prejudice under Strickland is supported by the law.

Issues II and VI - The court properly resolved factual issues and applied the law in determining counsel effectively represented Poller during the penalty phase.

Issue III - Poolers assertion that the court erred in not finding mitigation is procedurally barred and without merit.

Issues IV, V, and VII - A procedural bar was applied properly where Pooler was raising claims of trial error regarding jury instructions and prosecutorial arguments.

Issue VIII - The court correctly denied the claim of cumulative error due to the inadequate pleading and because "trial errors" are procedurally barred.

Issue IX - Pooler failed to present a valid ground for juror interviews.

Issue X - The claim of ineffective assistance for failing to present a forensic expert to testify about the length of time it took the victim to die in order to refute HAC is legally insufficient and without merit.

Issue XI - Pooler's challenge to trial court error in admitting gruesome photographs was denied properly as procedurally barred and meritless.

Issue XII - Pooler is not innocent of the death penalty.

Issue XIII - Pooler's claim that the death penalty is unconstitutional is procedurally barred and meritless.

Issue XIV - The challenge to Florida's death penalty under Ring v. Arizona was denied properly.

ARGUMENT

ISSUE I

THE COURT'S REJECTION OF THE CLAIM OF INEFFECTIVE ASSISTANCE FOR FAILING TO PRESENT A VOLUNTARY INTOXICATION DEFENSE AT TRIAL IS SUPPORTED BY THE RECORD (restated)

It is Pooler's position that the trial court erred in rejecting his claim of ineffective assistance of counsel. Pooler asserts that there was evidence he was grossly intoxicated at the time of the killing and that counsel was ineffective in not investigating and presenting a voluntary intoxication defense. In support of this claim below, he pointed to Detective Frank Alonso's police report, the trial testimony of Carolyn Glass that she had seen Pooler drinking a week before the murder, and letters by Pooler's nephews, Brian Weaver, and Darren Warren, in which they allege Pooler had been drinking large quantities of alcohol days before Kim's shooting. Pooler adds to this list by citing to Dr. Michael Gutman's January 27, 2000 report. (IB 27).

Claims of ineffective assistance of counsel are governed by Strickland v. Washington, 466 U.S. 668 (1984). This was recognized by the trial court. Contrary to Pooler's position, and reliance upon Francis v. Spraggins, 720 F.2d 1190, 1195

(11th Cir. 1983),[5] the court properly resolved evidentiary matters, supported its findings with competent, substantial evidence, and applied the appropriate law. This Court should affirm.

The standard of review for ineffectiveness claims following an evidentiary hearing is *de novo*, with deference given the trial court's factual findings. "For ineffective assistance of counsel claims raised in postconviction proceedings, the appellate court affords deference to findings of fact based on competent, substantial evidence, and independently reviews deficiency and prejudice as mixed questions of law and fact." Freeman v. State, 858 So.2d 319, 323 (Fla. 2003).

> ... we review the deficiency and prejudice prongs as "mixed questions of law and fact subject to a *de novo* review standard but ... the trial court's factual findings are to be given deference. So long as the [trial court's] decisions are supported by competent, substantial evidence, this Court will not substitute its judgment for that of the trial court on questions of fact and, likewise, on the credibility of the witnesses and the weight to be given to the evidence.

[5] Pooler's reliance upon Francis is misplaced. In Francis, the question was whether counsel was ineffective in conceding his client's guilt where the defendant had plead not guilty and had taken the stand to profess innocence. Here, Pooler's counsel investigated the defense his client now claims should have been offered, but rejected it based on lack of evidence and his client's refusal to admit he was the shooter which is required in order to proceed with a voluntary intoxication defense.

Arbelaez v. State, 898 So.2d 25, 32 (Fla. 2005).[6]

For a defendant to prevail on an ineffectiveness claim, he must establish (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for counsel's deficiency, there is a reasonable probability the result of the proceeding would have been different. Strickland, 466 U.S. 688-89.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Valle v. State, 778 So.2d 960, 965 (Fla. 2001). At all times, the defendant bears the burden of proving not only counsel's representation fell below an objective standard of reasonableness, and was not the result of a strategic decision, but also actual and substantial prejudice resulted from the deficiency. See Strickland, 466 at 688-89; Gamble v. State, 877 So.2d 706, 711 (Fla. 2004).

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[6] See Reed v. State, 875 So.2d 415 (Fla. 2004); Davis v. State, 875 So.2d 359, 365 (Fla. 2003); State v. Riechmann, 777 So. 2d 342 (Fla. 2000); Sims v. State, 754 So. 2d 657, 670 (Fla. 2000).

In Davis v. State, 875 So.2d 359, 365 (Fla. 2003), this Court reiterated that the deficiency prong of Strickland requires the defendant establish counsel's conduct was "outside the broad range of competent performance under prevailing professional standards." (citing Kennedy v. State, 547 So.2d 912, 913 (Fla. 1989). With respect to performance, "judicial scrutiny must be highly deferential;" "every effort" must "be made to eliminate the distorting effects of hindsight," "reconstruct the circumstances of counsel's challenged conduct," and "evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689; Davis, 875 So.2d at 365. In assessing the claim, the Court must start from a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 688-89 (citation omitted). The ability to create a more favorable strategy years later, does not prove deficiency. See Patton v. State, 784 So. 2d 380 (Fla. 2000); Cherry v. State, 659 So. 2d 1069 (Fla. 1995). Moreover, "[c]laims expressing mere disagreement with trial counsel's strategy are insufficient." Stewart v. State, 801 So.2d 59, 65 (Fla. 2001). "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." Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla.

1986). From Williams v. Taylor, 529 U.S. 362 (2000), it is clear the focus is on **what** efforts were undertaken and **why** a specific strategy was chosen over another. Investigation (even non-exhaustive, preliminary one) is not required for counsel reasonably to decline to investigate a line of defense thoroughly. See Strickland, 466 U.S. at 690-91 (stating "[s]trategic choices made after less than complete investigation are reasonable precisely to the extent the reasonable professional judgments support the limitations on investigation.").

In denying relief on this point, the trial court reasoned:

> The evidence presented during the May 16, 2005 hearing established that trial counsel Michael Salnick ("Salnick") considered an intoxication defense, but did not present it because: (1) there was no evidence that the defendant was intoxicated at the time of the crimes, and (2) the defendant was adamant about not presenting any defense which required that he admit shooting Kim Brown.

(PC.11 1967). This was based on the trial court's recognition that Detective Alonso ("Alonso") had met with Pooler just two to three hours before the murder. Although Pooler smelled of alcohol, Alonso did not find Pooler inebriated; Pooler did not act drunk, his speech was not slurred, he was attentive, and gave an exact accounting of the money taken from him. Further, as observed by Alonso, Pooler was able to drive. (PC.11 1967-68).

The trial court also considered Carolyn Glass' re-direct examination from the trial where she reported that Pooler had been drinking all day the Sunday before the murder and would look up at the victim's apartment stating he would kill all inside. (PC.11 1969; R 1145). Also, the court noted the handwritten statements by Pooler's nephews, Darren and Brian Warren ("Darren" and "Brian"), where in Darren reported living with Pooler in the summer of 1994 after and that his uncle, since his return from Vietnam was moody and started drinking. Darren wrote that Pooler experienced flashbacks to the war. (PC.11 1969). Similarly, Brian's February 29, 2000 statement noted that in 1994 and early 1995 he would visit Pooler in West Palm Beach. At this time Pooler was "drinking heavily" - drinking to the extreme - and would become violent and unable to control his temper. Like his brother, Brian reported that Pooler seemed to be suffering from flashbacks to Vietnam. When intoxicated, Pooler would threaten to kill Kim Brown and on the day of the murder, Pooler called Brian to report that Kim had been killed, but did not recall what had happened. Brian thought Pooler seemed to be drunk. (PC.11 1970-71).

The trial court's order provide that before developing a defense strategy, Salnick had hired a private investigator, Marvin Jene ("Jenne"), with whom he had worked on all his significant cases and that he had tasked Jenne with finding

anything and everything he could about Pooler. (PC.11 1971). The court also found that although Jenne had not read Detective Alonso's report, Salnick had and given Salnick's testimony, the report did not support the intoxication defense. The report indicated that Pooler was intoxicated at 3:00 a.m., but had been sleeping for some three, almost four hours before reporting his theft to Dectective Alonso. Further, Salnick did not want the jury to know that Pooler had been with a prostitute just six hours before he killed Kim. (PC.11 1972-73; PC.18 236-37). Also noted in the court's order were the facts that Salnick discussed the contents of Detective Alonso's report with Pooler and that such showed that some five to six hours passed between the time Pooler reported being drunk and the killing. During a portion of this time, Pooler was sleeping off the alcohol he had consumed. (PC.11 1973).

The court found:

> After considering Detective Alonso's report, the statements provided by Brian and Darren Warren, and the testimony provided by Carolyn Glass as deposition and trial, Salnick concluded that these merely indicated that the defendant had been drinking sometime before the murder, not that he was intoxicated at the time of the murder. In fact, Detective Alonso's report did not indicate that the defendant was intoxicated a few hours before the murder. As noted by Salnick, the defendant told him that he had fallen asleep. (PCR-T 56-57). Similarly, the deposition and trial testimony of Carolyn Glass merely indicated that on January 23, 25, or 29, 1995, approximately a week before the murder, the defendant was drinking and threatening to kill Kim Brown. (ROA-

> T 1129-1145). As noted by Salnick during the may 16, 2005 evidentiary hearing: "[Carolyn Glass] heard him [defendant] make a threat to the victim at a time when he was drinking, not that he was drinking at the time of the incident." (PCR-T 76).
>
> Moreover, the effectiveness of a voluntary intoxication defense in the instant action was further diminished by the fact that the defendant was able to recall specific details about the day of the murder.

(PC.11 1973-74). The court credited Jenne's testimony for supporting the fact Pooler explained in great detail the events leading up to and during, and after the crime. (PC.11 1974; PC.18 282-84). It was the court's conclusion that "[t]he record is abundantly clear that Salnick was aware of a possible intoxication defense, that he considered it carefully after discussing it with his client, and that based on the merits of the defense, he made a strategic decision to not pursue it." (PC.11 1976).

Continuing, the court also determined that Pooler would not permit Salnick to present a defense which required an admission to the shooting of Kim Brown. (PC.11 1976). The court opined:

> The defense strategy, as explained by Salnick, was predicated upon the fact that at no time would the defendant agree or admit the he shot Kim Brown (PCR-T 31). In fact, Salnick refuted that Jenne even suggested to him that the defendant was considering an intoxication defense, given the defendant's strong position that he would not admit to shooting the victim. (PCR-T 58-59). Salnick reasoned: "When your client tells you 'I'm not going forward with you admitting that I shot somebody,' you make a strategic decision based on the information that you have" (PCR-T 36-37). Salnick further noted:

It is something worth getting out there, actually, and finding out – you say there are all these people who saw him drink – let's make sure I answer the question – you are presuming that all these people saw him drink. I'm telling you that I had a client who told me that he would not have a defense based upon any admission that he did the shooting; that would have included insanity, that would have included intoxication; he was not going to permit that, and I was absolutely, no question, he was very clear on the fact that that's what he wanted, and based upon that information we made a strategic decision to proceed with sufficiency of the evidence.

(PCR-T 49).

...

...This testimony is borne out in Salnick's memorandum to the defendant on the eve of trial memorializing what he had done on the case and the strategy he agreed to follow:

> This shall confirm all that has been done regarding your case pursuant to our conversation and meetings. Trial is set to start September 14, 1995. The plea offer at this time would avoid you being subject to the Death Penalty if you plead guilty to first degree murder....
>
> ...
>
> We discussed a defense theory, and I am of the belief that self-defense will not be credible before the jury, due to the fact that none of the physical evidence or live testimony in any way will support it. Your testimony would be the only evidence of self defense. You indicated you did not want me to argue to the jury it was second degree murder or manslaughter, because that would tell the jury you did the shooting. When you, Mr. Jenne and myself met this past week, you agreed that the only viable defense is sufficiency of the evidence. The

> theory is now somewhat waekened by the most recent depositions.
>
> ...
>
> With sufficiency of the evidence as a theory, the jury will have to disbelieve the eyewitnesses, and be convinced that all the inconsistencies we have discussed are enough to either find you not guilty, or at least for a lesser charge. There is no way to predict.
>
> ...
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> My opinion would be that if you wanted to guarantee no electric chair to take the plea.... We have gone over all of this in person, but I just wanted you to have this for your review.

(A-Ex. 27 - Defense Evidence 6)

The Florida Supreme Court recognized voluntary intoxication as a defense to first degree murder in *Reaves v. State*, 826 So.2d 932, 938-39, n.9 (Fla. 2002)....

> ...

Thus, in order to claim that he was too intoxicated to have formulated the necessary specific intent to commit the crime, it was necessary for the defendant to admit to shooting Kim Brown. As noted earlier, the defendant was adamant about not advancing any defense that required an admission on his part to shooting Kim Brown. Such unwavering position was critical factor in counsel's strategic decision and gave him no choice but to reject a voluntary intoxication defense and pursue an alternate theory of defense.

The Florida Supreme Court's decision in *Rivera v. State*, 717 So.2d 477 (Fla. 1998), is dispositive of defendant's claim of ineffective assistance of counsel on this ground.

> This claim is without merit as to the guilt

> phase. As the State notes, Malavenda did not pursue a voluntary intoxication defense at trial because Rivera maintained his innocence. Beyond the fact that this was probably a sound tactical decision since there was no evidence Rivera was intoxicated at the time of the murder, we have determine that "[w]hen a defendant preempts his attorney's strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made." *Rose v. State*, 617 So. 2d 291, 294 (Fla 1993)(quoting *Mitchell v. Kemp*, 762 F.2d 886, 889 (11th Cir. 1985))....

Rivera, 717 So. 2d at 485 (footnotes omitted).

> In conclusion, the defendant's claim of ineffective assistance of counsel based on trial counsel's failure to advance a voluntary intoxication defense fails on both grounds raised. The evidence did not support a voluntary intoxication defense and the defendant thwarted any possibility of raising it when he refused to admit to Kim Brown's shooting. Likewise, without evidence of intoxication or the defendant's willingness to admit to the crime charged, there was no basis for seeking a jury instruction on voluntary intoxication.
>
> Defense counsel properly investigated the case, reviewed the evidence, and considered how such evidence impacted the case, and developed a strategy consistent with the evidence, and after consultation with his client. Such actions fall within the wide range of professional representation as defined in *Strickland*. The defendant has failed to demonstrate either deficient performance or prejudice arising from the investigation and strategy taken by counsel.

(PC.11 1976-80).

These findings of fact are supported by the record, and the legal conclusions comport with the law as discussed below. This Court should affirm the denial of postconviction relief.

In 1995, voluntary intoxication was a recognized defense to first-degree murder. As noted in Reaves v. State, 826 So.2d 932, 938-39, n.9 (Fla. 2002)

> Voluntary intoxication is a separate theory and is available to negate specific intent, such as the element of premeditation essential in first-degree murder. [FN9] **In order to successfully assert the defense of voluntary intoxication, "the defendant must come forward with evidence of intoxication at the time of the offense sufficient to establish that he was unable to form the intent necessary to commit the crime charged."** *Rivera v. State*, 717 So.2d 477, 485 n. 12 (Fla. 1998) (quoting *Linehan v. State*, 476 So.2d 1262, 1264 (Fla. 1985)).
>
> _____
>
> FN9. *Gardner v. State*, 480 So.2d 91, 92 (Fla.1985) ("Voluntary intoxication is a defense to the specific intent crimes of first-degree murder and robbery."); *Burch v. State*, 478 So.2d 1050, 1051 (Fla. 1985) ("We explicitly recognized [in *Cirack v. State*, 201 So.2d 706 (Fla. 1967),] that the defense of voluntary intoxication was available to negate specific intent ....").

Reaves, 826 So.2d at 938-39, n.9 (emphasis supplied). See Dufour v. State, 905 So.2d 42, 52 (Fla. 2005); Occhicone v. State, 768 So.2d 1037, 1045 (Fla. 2000); Rivera v. State, 717 So.2d 477, 485 (Fla. 1998); Linehan v. State, 476 So.2d 1262, 1264 (Fla. 1985) (opining "voluntary intoxication is an affirmative defense and that the defendant must come forward with evidence of intoxication at the time of the offense sufficient to establish that he was unable to form the intent necessary to commit the crime charged").

During the evidentiary hearing, Salnick and his private

investigator, Jenne , were questioned about their investigation, consideration, and decisions regarding an intoxication defense. Salnick explained that he had been practicing criminal law for 16 years before taking Pooler's case and that he had taken all the necessary death penalty seminars to allow him to represent a capital defendant. (PC.18 226-27). Before Pooler's case, Salnick had done at least five death penalty cases, including both Duane Owen death penalty cases, however, not all of the cases required penalty phases. (PC.18 233-34). As part of his representation of Pooler, Salnick had an attorney and law clerk working with him, in addition to hiring Jenne, and his staff, as his private investigator. Given this assistance, Salnick believed it was appropriate for him to represent Pooler during both phases of the case. (PC.18 222-24).

Before developing a defense strategy, Salnick hired Jenne,[7] with whom he had worked on almost all of his significant cases, and directed Jenne to find anything and everything possible related to Pooler, whether it be good or bad. Jenne and Salnick were in contact on many aspects of the case. As part of his investigation, Jenne went to Louisiana, including some very dangerous parts of the state. (PC.18 235-36). He also utilized

[7] By 1995, Jenne had been in law enforcement or private investigation for 15 years and had been involved with five to ten death penalty cases with Salnick and other counsel. (PC.18 275-76).

other private investigators in his office to assist with Pooler's case. (PC.18 276-77).

Although Jenne did not recall seeing Detective Alonso's ("Alonso") report,[8] Salnick had seen the report and considered voluntary intoxication as a possible defense. He also found no basis to dispute the times contained in the report: (1) 3:00 a.m. offense, grand theft; (2) 6:43 a.m. to 7:15 a.m. report to police. The contents of Alonso's report were discussed with Pooler. As Salnick recalled, Pooler explained that he had been in a car with a prostitute and fell asleep because he was drunk. When he awakened, his money was gone and he drove to the police station to report the incident. Salnick noted that while the report indicated that Pooler was drunk at 3:00 a.m., it also revealed Pooler had been sleeping for approximately three hours before making his police report. (PC.18 183-84, 236-37). This Court will recall that the instant crimes occurred between 8:00 a.m. and 9:00 a.m. that same morning, thus, Pooler had some five to six hours between the time he self-reported being drunk and the time of the murder. (R.1 33; R.15 794; PC.18 236-37). There was no testimony or other evidence admitted at the hearing that

[8] However, Jenne's review of the document during the hearing revealed that his interest in a voluntary intoxication defense would not have been "sparked" because the report does not indicate that Pooler was drunk at the time of the crime and because Palm Beach County juries were not accepting such defenses, instead they were convicting the defendants.

Pooler drank between the time he reported his theft to Alonso and the time of the murder.[9]

[9] While Poller points to Dr. Gutman's January 27, 2000 report (IB 27; PC.16 Defense Exhibit 17), a review of it establishes that the doctor's accounting of Pooler's drinking came from Pooler's uncorroborated self-report. Without citing to his source of this information, Dr. Gutman stated:

> O. On the day of the event, which was 8:00 in the morning on a Monday after the Super Bowl, he (Pooler) had been drinking all day with friends and with Kim the night before. He had drunk gin, vodka, rum, and beer. He used no drugs, but had consumed a large amount of alcohol. He had been, in the past, consuming large amounts of alcohol for many years following his return from Vietnam. He now has little recollection for all the events that happened at the time of the offense. Investigative findings reveal the Inmate went to the Police Station to report his car missing in the early morning of the shooting. An interviewing Police Officer recorded he was grossly inebriated.

(PC.16 Defense Exhibit 17, pgs 3-4). Such is refuted from the record. Detective Alonso's report has Pooler claiming his wallet with $301.00 in cash was taken, not a car. Moreover, Detective Alonso testified that Pooler was not drunk, although he smelled of alcohol. Pooler's speech was not slurred and he was able to communicate specifics about the theft. Further, he was able to drive competently. (PC.18 296-98). No evidence was introduced at the evidentiary hearing regarding Pooler's drinking on the day of the murder. Given the lack of evidence, and Dr. Gutman's clear error in interpreting what ever documentation to which he was referring, his conclusion that Pooler had been "drinking for up to 24 hours prior to the offense" should be rejected. Likewise, the statement "He (Pooler) indicates that he was drinking large amounts of liquor and beer, and that the total mount of alcohol consumed could have been over one quart" is self-serving, self-reporting with no independent corroboration. The best the doctor could report was: "**[i]f he (Pooler) had been drinking** for 15 hours **and had consumed a quart** during that time, his blood alcohol level would have been between 0.5 and 0.6, thus, putting him many times over the legal limit and obviously in an altered state of awareness

As with Alonso's report, a review of the statements of Pooler's nephews, Brian Weaver, and Darren Warren, given in February and March, 2000, reveals that neither nephew indicates that Pooler was intoxicated **at the time of the crime**. It was Salnick's position that Alonso's report did not indicate that Pooler was intoxicated a few hours before the murder, in fact, Pooler told Salnick he had fallen asleep. (PC.18 205-07). Similarly, Carolyn Glass's deposition and trial testimony accounts merely indicate that about a week before Kim's murder[10] (January 23 25, or 29 1995), Pooler was drinking as he was talking to Glass and threatening to kill Kim. (R.6 872-74; R.17 1129-31, 1145). As Salnick noted: "[Carolyn Glass] heard him (Pooler) make a threat to the victim at a time when he was drinking, not that he was drinking at the time of the incident." (PC.18 224-25).

Salnick discussed possible defenses with Pooler. Salnick explained that the voluntary intoxication defense was rejected for two reasons: (1) there was no evidence to support a claim

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and consciousness that would have had the effect of causing him to have significantly diminished capacity to appreciate the wrongfulness of his acts. (emphasis supplied) Based on that statement, Dr. Gutman is not even sure if alcohol was consumed. As such, his conclusion that Pooler "suffered from a severe intoxication at the time of the alleged offense" is mere speculation and does not support any aspect of the ineffectiveness claim raised here.

[10] The murder took place on January 30, 1995. (R.15 794).

that Pooler was drunk at the time of the crime; and (2) Pooler refused to admit to shooting Kim. (PC.18 178-86, 197-99, 205-08, 224-25, 236-37). Because Salnick was bound by the facts, his clients' refusal to admit to the shooting, and duty to present a valid, ethical defense, the strategic decision was made to pursue a "sufficiency of the evidence" defense. (PC.18 190-208).

The defense strategy, as explained by Salnick, was based on the fact that at no time would Pooler agree or admit that he committed the crime. In fact, Salnick refuted that Jenne's September 11, 1995 letter to him even suggested that Pooler was considering an intoxication defense. As reasoned by Salnick: "When your client tells you 'I'm not going forward with you admitting that I shot somebody,' you make strategic decision based on the information that you have." Further, Salnick noted: "--you are presuming that all these people saw him drink. I'm telling you that I had a client who told me that he would not have a defense based upon any admission the he did the shooting; the would have included insanity, that would have included intoxication; he was not going to permit that, and I (sic) was absolutely, no question, he was very clear on the fact that that's what he wanted, and based upon that information we made a strategic decision to proceed with sufficiency of the evidence." (PC.18 178-86, 197-99, 205-08, 224-25, 236-37).

Salnick explained that Pooler,

> ... made it very clear he would not let us participate with a defense that would have him admit that he did the shooting. If a jury would find him guilty of something less, good for him; he didn't want to plead guilty to life so we followed his directives and he did not want a defense that would cause me to say to the jury "Leroy did it, he was drunk," ..." because if I did that, we'd still be here right now, and you'd be asking me questions the other way."

(PC.18 225). This testimony is borne out in Salnick's memo to Pooler on the eve of trial memorializing what had been done on the case and the strategy that agreed to follow.

> This shall confirm all that has been done regarding you case pursuant to our conversations and meetings. ... The plea offer at this time would avoid you being subject to the Death Penalty if you plead guilty to first degree murder....
>
> ...
>
> ... You indicated you did not want me to argue to the jury it was second degree murder or manslaughter, because that would tell the jury you did the shooting. When you, Mr. Jenne and myself met this past week, you agreed that the only viable defense is sufficiency of the evidence. That theory is now somewhat weakened by the most recent depositions.
>
> ...
>
> I redeposed the firearms examiner who will now say the bullets found and casings found all were fired from the same gun.
>
> The crime scene technician indicated there were no fingerprints found on anything.
>
> With sufficiency of the evidence as a theory, the jury will have to disbelieve the eyewitnesses, and be convinced that all the inconsistencies we have discussed are enough to either find you not guilty, or at least for a lesser charge. There is no way to predict.

...

> My opinion would be that if you wanted to guarantee no electric chair to take the plea. ... We have gone over all of this in person, but I just wanted you to have this for your review.

(Defense Evidence 6).

The evidence did not support a voluntary intoxication defense and Pooler thwarted any possibility of raising such a defense when he refused to admit to Kim's shooting. Further, there was no evidence of intoxication to offer to counter the premeditation element of first-degree murder. Likewise, without evidence of intoxication or Pooler's willingness to admit to the crime charged,[11] there was no basis for seeking a jury instruction on voluntary intoxication. Salnick investigated the matter, reviewed the evidence, considered how such evidence impacted the case, and developed a strategy consistent with the evidence, and after consultation with his client. Pooler's unwavering refusal to admit to the shooting was a critical factor in counsel's strategic decision and forced him to reject a voluntary intoxication defense. Such actions fall within the wide range of professional representation as defined by Strickland. Pooler has failed to show either deficient

[11] See Brown v. State, 894 So.2d 137, 146 (Fla. 2004) (noting "[f]ailure to present an intoxication defense cannot constitute ineffective assistance of counsel when the defendant asserts his innocence.")

performance or prejudice arising from the investigation and strategy taken by counsel.

Rivera v. State, 717 So.2d 477 (Fla. 1998), as the trial court noted, is dispositive of Pooler's claim of ineffective assistance of counsel.

> This claim is without merit as to the guilt phase. As the State notes, Malavenda did not pursue a voluntary intoxication defense at trial because Rivera maintained his innocence. Beyond the fact that this was probably a sound tactical decision since there was no evidence Rivera was intoxicated at the time of the murder, we have determined that "[w]hen a defendant preempts his attorney's strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made." *Rose v. State*, 617 So.2d 291, 294 (Fla. 1993) (quoting *Mitchell v. Kemp*, 762 F.2d 886, 889 (11th Cir.1985)). Therefore, since a voluntary intoxication defense is, in effect, an admission that you did the crime but lacked the specific intent to be held criminally responsible, Rivera's unwavering professions of innocence short-circuited any credible voluntary intoxication defense during the guilt phase. *Accord Remeta v. Dugger*, 622 So.2d 452, 455 (Fla. 1993) (approving counsel's tactical decision to forego a voluntary intoxication defense which was inconsistent with defendant's theory of the case that accomplice was the main perpetrator and triggerman in the murder). Accordingly, we find that Malavenda was not ineffective in foregoing such a strategy, *Rose*, and affirm the trial court's denial of relief on this claim.

Rivera, 717 So.2d at 485 (footnote omitted). See Dufour, 905 So.2d at 52, n.3 (rejecting claim of ineffectiveness for failure to present a voluntary intoxication defense in part on the fact that "[w]hile Dufour presented evidence at the evidentiary hearing concerning his extensive drug and alcohol use, Dufour

did not present any competent evidence demonstrating that he was actually intoxicated at the time of the offense" and refusing to "second-guess counsel's strategic decisions concerning whether an intoxication defense will be pursued" when alternate theories were considered); Pietri v. State, 885 So.2d 245, 255 (Fla. 2004) (rejecting ineffective assistance claim for failing to raise intoxication defense because defendant could not demonstrate that he was actually intoxicated at the time of the offense); Henry v. State, 862 So.2d 679, 683 (Fla. 2003) (rejecting claim of ineffective assistance for not raising a voluntary intoxication defense where defendant did not present any evidence he was actually intoxicated at the time of the offense); White v. State, 559 So. 2d 1097, 1099 (Fla. 1990) (rejecting ineffectiveness claim based on failure to assert voluntary intoxication defense where counsel testified such a defense was inconsistent with deliberateness of defendant's criminal actions).

Also of note is Jenne's testimony that Pooler was able to recall specifics about the day of the murder. A defendant giving specifics about the crime is inconsistent with a voluntary intoxication defense. See Stewart, 801 So.2d at 65-66 (rejecting ineffectiveness claim for not pursuing a voluntary intoxication defense in part based on counsel's testimony that defendant provided detailed account of the crime); Occhicone,

768 So.2d at 1048 (affirming denial of ineffectiveness claim for counsel's failure to present additional evidence supporting a voluntary intoxication defense where counsel testified he opted against presenting the evidence because defendant's taped statements to a psychologist demonstrated that the defendant "had a good recall of what transpired the night of the murders and therefore was not intoxicated to the level of not being able to premeditate the murders"); Johnson v. State, 593 So.2d 206, 209 (Fla. 1992) (holding counsel's decision not to pursue intoxication defense was strategy decision, not deficient performance, where counsel explained he rejected the defense because defendant "recounted the incident with 'great detail and particularity' in his confession"). Based upon the foregoing, this Court should affirm the rejection of Pooler's claim of ineffective assistance of counsel.

ISSUES II AND VI

PENALTY PHASE COUNSEL PROPERLY INVESTIGATED AND PRESENTED A MITIGATION CASE, POOLER HAS FAILED TO PROVE INEFFECTIVE ASSISTANCE OF COUNSEL (restated)

Pooler asserts in **Issue II** that his counsel, Salnick, rendered ineffective assistance during the investigation and presentation of mitigation as counsel failed to obtain school, military, and employment records which allowed Pooler to present a fictional account to his attorney and the court. Pooler complains that this fictional account, which painted a more

positive picture of his abilities and life, permitted the trial court to reject or give less weight to mitigation which was or should have been offered. It is Pooler's position that counsel should have investigated/presented evidence of: (1) intoxication; (2) his failure to graduate from high school and that he had an IQ of 75;[12] (3) his "less than stellar military career"; (4) mental health experts to conduct a full evaluation; and (5) his employment as a furniture mover hired "for his brawn, not his brain" to support new mitigation and the mitigators either rejected or given less weight by the sentencing court. (IB 31-36). In Issue VI, Pooler continues his challenge to penalty phase counsel by alleging it was ineffective to not supply the mental health experts with background information and to use doctors who had done the competency evaluation to present mitigation testimony. (IB 63-64).

The pith of Pooler's argument at the May 16, 2005 evidentiary hearing and here is that counsel should have offered a penalty phase case showing Pooler in a less favorable light.

[12] Pooler makes several references to a boarderline I.Q. and possible mental retardation. He has not made a claim under Florida Rule of Criminal Procedure 3.202, although such rule was in existence at the time his postconviction motion was pending. Moreover, when Dr. Levine tested Pooler during the pre-trial competency proceedings, he scored an 80 I.Q. (R.10 122) and Dr. Alexander, who evaluated Poller pre-trial, opined that: "Clearly [Pooler] is not mentally retarded...." (R.10 76)

Such argument was referred to in the hearing as "bad is good" when it comes to penalty phase mitigation cases. (PC.18 227-28) As is clear from the questioning of Salnick and his investigator, Jenne, the thrust of the argument is a disagreement with the strategy of presenting Pooler in a favorable light and disappointment that Salnick was unable to obtain certain records, even though requested, and found family members to corroborate Pooler's positive story about his accomplishments. Moreover, Pooler's new mental health expert has failed to present anything by way of mitigation which is different from that which was presented at trial or would undermine confidence in the sentencing decision. The court's rejection of this complaint is supported by the evidence and law as outlined in Strickland. The denial of relief should be affirmed.

The standard of review for claims of ineffectiveness of counsel following an evidentiary hearing is *de novo*, with deference given the trial court's factual findings. "For ineffective assistance of counsel claims raised in postconviction proceedings, the appellate court affords deference to findings of fact based on competent, substantial evidence, and independently reviews deficiency and prejudice as mixed questions of law and fact." Freeman, 858 So.2d at 323. See Arbelaez, 898 So.2d at 32.

This Court has held that in order to prove ineffectiveness of penalty phase counsel for his failure to present additional mitigation under Strickland, the defendant must establish "both (1) that the identified acts or omissions of counsel were deficient, or outside the wide range of professionally competent assistance, and (2) that the deficient performance prejudiced the defense such that, without the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different." Occhicone, 768 So.2d at 1048. This Court has discussed the Strickland standard stating:

> We have repeatedly held that to establish a claim of ineffective assistance of trial counsel, a defendant must prove two elements:
>
> > First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.
>
> *Vallee v. State*, 778 So.2d 960, 965 (Fla. 2001) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). In *Valle*, we further explained:

> In evaluating whether an attorney's conduct is deficient, "there is 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,'" and the defendant "bears the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." This Court has held that defense counsel's strategic choices do not constitute deficient conduct if alternate courses of action have been considered and rejected. Moreover, "[t]o establish prejudice, [a defendant] 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'"
>
> *Id.* at 965-66 (citations omitted)(quoting ***Brown v. State***, 775 So.2d 616, 628 (Fla. 2000), and ***Williams v. Taylor***, 529 U.S. 362, 391 (2000)).

Arbelaez, 898 So.2d at 31-32.

In Wiggins v. Smith, 539 U.S. 510, 533 (2003) the Court addressed the sufficiency of a mitigation investigation and cautioned:

> In finding that Schlaich and Nethercott's investigation did not meet *Strickland*'s performance standards, **we emphasize that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does Strickland require defense counsel to present mitigating evidence at sentencing in every case**. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of *Strickland*. 466 U.S., at 689, 80 L Ed 2d 674, 104 S Ct 2052. We base our conclusion on the much more limited principle that "strategic choices made after less than

> complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." *Id.*, at 690-691, 80 L Ed 2d 674, 104 S Ct 2052. A decision not to investigate thus "must be directly assessed for reasonableness in all the circumstances." *Id.*, at 691, 80 L Ed 2d 674, 104 S Ct 2052.

Wiggins, 539 U.S. at 533 (emphasis supplied).

Jones v. State 845 So.2d 55, 67-68 (Fla. 2003) is also instructive.

> *Ake* requires that a defendant have access to a "competent psychiatrist [or other mental health professional] who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Id.* at 83, 105 S.Ct. 1087. This Court has stated that one of the most compelling indications for granting an evidentiary hearing on an *Ake* claim occurs when one or more of a defendant's mental health experts "ignore[s] clear indications of either mental retardation or organic brain damage." *State v. Sireci*, 502 So.2d 1221, 1224 (Fla. 1987). In *Mann v. State*, 770 So.2d 1158 (Fla. 2000), the appellant (Mann), who had been sentenced to death for a capital murder, claimed that he was entitled to an evidentiary hearing on his postconviction *Ake* claim. In upholding the denial of the evidentiary hearing, we stated:
>
> > The record reveals that Carbonel [Mann's confidential mental health expert] performed an extensive evaluation of Mann that included neuropsychological testing based on his history of serious alcohol and substance abuse and his history of head injury. Carbonel testified that, in addition to interviewing Mann, she reviewed numerous documents including affidavits from family members, Mann's childhood health records, records from correctional institutions, hospital records, and expert testimony from prior proceedings. Carbonel also testified that she did a lengthy psychological evaluation of Mann and conducted various

> tests including a Minnesota Multiphasic Personality Inventory (MMPI) and a Wechsler Adult Intelligence Scale test, among others. Based on this evaluation, Carbonel was able to testify to the existence of the two statutory mental mitigators.
>
> The record demonstrates that Mann's expert performed all the essential tasks required by *Ake*. Thus, Mann's request for an evidentiary hearing was properly denied.

Id. at 1164. The mental health evaluation detailed above is substantially the same as that provided Jones in the instant case. Specifically, Dr. Krop testified during Jones's re-sentencing that he administered a battery of tests similar to those detailed in Mann.[25] Equally important, Dr. Krop related not only that Jones suffered from no severe brain damage, but also that brain damage did not contribute to his actions on the day of the murders. Furthermore, he stated that Jones has an IQ of 107. Thus, the record refutes any suggestion that Dr. Krop ignored the type of serious brain damage or mental retardation we detailed in *Sireci*. An evidentiary hearing on this portion of the *Ake* claim was properly denied.

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[25] Dr. Krop administered the following tests: Minnesota Multiphasic Personality Inventory (MMPI) (administered twice--updated version in 1991, before Jones's re-sentencing), Wechsler Adult Intelligence, Prescott Attitude Survey, Beck Depression Inventory, Bender Gestalt, Wechsler Memory, Tennessee Self-Concept Scale, and Malin Clinical Multi- Axial Inventory. Dr. Krop described this battery of tests as "psychological and neuropsychological." He did not engage in testing based on alcohol or drug abuse because he saw no indications of a substance abuse problem."

Jones 845 So.2d at 67-68. To prove an Ake v. Oklahoma, 470 U.S. 68 (1985) claim, the defendant must establish that the psychological examination was "grossly insufficient" and the expert "ignore[d] clear indications of either mental retardation

or organic brain damage" before a new sentencing hearing is required. State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987).

Following the evidentiary hearing on this issue, and after reviewing the entire trial transcript and the parties' post-hearing memoranda, the trial court made the following factual findings and legal conclusions:

> The defendant contends that it was deficient performance on the part of his counsel under *Strickland* and *Ake v. Oklahoma*, 470 U.S. 69 (1985), to fail to obtain and supply the school, military, and employment records of the defendant to a mental health expert retained to conduct an evaluation with mitigation in mind. The defendant contends that such a deficiency led the sentencing court to reject the mitigators of: (1) capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law; (2) dull intelligence; (3) mental health problems; (4) defendant's age; and (5) intoxication.
>
> During the May 16, 2005 evidentiary hearing, the defendant argued that trial counsel should have offered a penalty phase case which presented the defendant in a less favorable light. This argument was referred to during the hearing as "bad is good" when it comes to penalty phase mitigation cases (PCR-T 78-79). Clearly, this argument is in direct contrast with the strategy utilized by the trial counsel of presenting the defendant in a favorable light.
>
> The Florida Supreme Court has held that in order to prove ineffectiveness of penalty phase counsel for his failure to present additional mitigation....
>
> According to Salnick's testimony during the May 16, 2005 evidentiary hearing, he was admitted to the Florida Bar in 1979; thus, in 1995 he had been practicing law for approximately 16 years (PCR-T 25, 77-78). He has tried over five first-degree murder cases[2] (PCR-T 784-85) and had attended the required death penalty seminars before the defendant's trial

(PCR-T 78).

During the course of representing the defendant, Salnick was authorized by the court to have a confidential defense mental health expert for competency and mitigation, and later opted to present the testimony [of] Laurence Levine, Ph.D (ROA-T 1376-1411, 1421-1442), Jude Desmoreau, M.D. (ROA-T 1412-1421), Michael Armstrong, M.D. (ROA-T 1454-1473), and Stephen Alexander, Ph.D. (ROA-T 1483-1504). These mental health experts evaluated the defendant for competency purposes and mental health issues for the court and in the jail. (ROA-R 358-61, 368, 462-65; PCR-T 81-83).

Salnick, as discussed earlier, retained the services of Jenne, an experienced private investigator with capital experience. Jenne traveled to Louisiana to meet with defendant's family members, and sent letters for background documentation to verify and support what the defendant was disclosing to his defense team. It is clear from the evidence presented that trial counsel conducted a reasonable investigation, and when written documentation was not available, alternate means of corroboration was found (i.e., family members).

During the evidentiary hearing, Salnick testified that his strategy was to present the defendant in a positive light, that he had been a productive member of society, and crime free for fifteen years before the murder. He pressed the issue that the defendant had served in the military in Vietnam, re-enlisted, raised a daughter, took care of his relatives, was a good parent, worked at the same job for eight years and was well-liked by his co-workers. (PCR-T 67-68). Thus, given the corroboration obtained from family members, the failure to obtain defendant's military and employment records was not prejudicial.

With respect to defendant's claim that counsel was deficient in failing to present evidence of intoxication during the penalty phase, Salnick successfully precluded the State from obtaining an instruction on the cold, calculated, and premeditated aggravating circumstance arising from the defendant's threat to kill Kim Brown as he was drinking and

talking to Carolyn Glass approximately one week before the murder (PCR-T 53-56, 76; ROA-T 1529, 1670).

Accordingly, given the aforesaid findings, the court finds that the defendant has failed in his burden to prove that trial counsel did not properly investigate mitigating factors to present to the court and jury.

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[2]When asked how many capital cases he has handled over the years, Mr. Salnick testified: "I don't have a number, but I will say a significant amount. I can't remember them by Phase Iis, only when you get to Phase II is not something you forget, and Duane Owen end up in Phase II; Mr. Pooler, Phase II, and this, Charles Carraba ended in front of Judge Horowitz. I know there were one or two acquittals that I got, first degree, in early 90s, so I can't give you a definite number" (PCR-T 85).

CLAIM VI

...

The defendant contends that trial counsel failed to do an adequate investigation and give his mental health experts sufficient background materials regarding military records, school records, and intoxication/substance abuse to allow the expert to do a proper evaluation for mitigation purposes. To prove a claim under *Ake v. Oklahoma*.... The evidence presented revealed, however, that information regarding defendant's school, military and employment history was given to the mental health experts. In addition, jail and medical records as well as the fact that there was no prior report of psychiatric treatment were given to the experts. (ROA-T 74, 76, 100-01, 119-20, 121, 1380, 1392-93, 1398-99, 1438, 1413-15). As noted earlier, trial counsel presented the testimony of four mental health experts during the penalty phase which is an compliance with *Wiggins v. Smith*, 539 U.S. 510, 533 (2003) and *Ake v. Oklahoma*, 470 U.S. 69 (1985).

Accordingly, given the aforesaid findings, the court finds that the defendant has failed to meet his burden under *Strickland* and *Ake*.

(PC.11 1981-84).

Pooler's main complaint is that counsel failed to develop the negative aspects of his life. For support, he points to Rompilla v. Beard, 125 S.Ct. 2456 (2005). (IB 39). However, the United States Supreme Court in Rompilla stated: "the duty to investigate does not force defense lawyers to scour the globe on the off-chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." Rompilla, 125 S.Ct. at 2463. The Court also cited to Wiggins, 539 U.S. at 525 which likewise does not require counsel to investigate every conceivable line of mitigation and the failure to investigate would be excused where counsel has evidence suggesting further investigation would be fruitless. Moreover, unlike counsel in Rompilla, Salnick did seek Pooler's records, however, those efforts were thwarted in part, and only then relied upon family/friends for corroboration. As will be clear from the following, counsel took all reasonable steps to uncover mitigation, developed a penalty phase strategy based on the evidence discovered, and presented such to the judge and jury. Pooler's disagreement with the strategy followed, that of humanizing him and placing him in a favorable light, and counsel's willingness to believe the history Pooler reported and

confirmed by family members does not amount, as the court found, to ineffective assistance.

Pooler's written allegations[13] set forth in his amended motion for postconviction relief (PC.1 79-93) differed substantially from the proof he presented at the evidentiary hearing. There, he offered witnesses, and based upon his questions, presented the argument that it was deficient performance under Strickland and Ake to fail to obtain and subsequently supply the school, military, and employment records[14] to a mental health expert retained to conduct an evaluation with mitigation in mind. According to Pooler, such alleged deficiency prejudiced him by permitting the sentencing court to reject the mitigators of: (1) capacity to appreciate criminality of his conduct and to conform his conduct to the requirements of law; (2) dull intelligence; (3) mental health problems; and (4) intoxication. Pooler's most recent mental health expert, Dr. Brannon, offered that he would have opined about Pooler's: (1) indicated neurological damage/functioning based upon alleged head trauma/injuries; (2) confabulation; (3)

[13] These will be addressed at the conclusion of the State's analysis of the evidentiary hearing matters.

[14] Pooler also suggested that the additional records would be evidence that he had been dishonest with counsel, i.e., that Pooler had not graduated from high school, did not have a good academic record, had not been honorably discharged from the military, and did not have a good employment record.

borderline IQ; and (4) alcohol abuse. (PC.18 335-45, 350-51).

The thrust Pooler's argument, as noted above, is his disagreement with the strategy counsel took in the penalty phase to present positive aspects of Pooler's life as opposed to presenting Pooler in a less favorable light. Pooler's postconviction counsel argued that the proper strategy to follow was that "bad is good" when it comes to death penalty mitigation. (PC.18 227-28). Mere disagreement with prior counsel's strategy does not entitle Pooler to relief. See Brown v. State, 894 So.2d 137, 147 (Fla. 2004) (holding "[s]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct"); Stewart v. State, 801 So.2d 59, 65 (Fla. 2001) (finding "[c]laims expressing mere disagreement with trial counsel's strategy are insufficient"); Occhicone, 768 So.2d at 1048 (opining "[c]ounsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions. Moreover, strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct."); Rose v. State, 675 So.2d 567 (Fla. 1996) (holding disagreement with defense counsel's strategy was not ineffectiveness); Cherry, 659

So.2d at 1069 (concluding standard is not how current counsel would have proceeded in hindsight).

Further, it is the State's position Salnick conducted a professional investigation, and based on those results, made his strategic decision to present Pooler in a favorable light in front of the jury instead of the recent suggestion of making Pooler look "bad." (PC.18 227-37). The trial court found such was reasonably professional representation falling within the dictates of Strickland (PC.11 1981-83). As analyzed below, the court's finding that Pooler failed to show deficiency or prejudice under Strickland, Wiggins, or Ake are supported by the evidence and law.

As the record and evidentiary hearing evidence reveals, Salnick was an experienced criminal defense attorney with over 16 years of criminal work, more than five capital cases, and had completed the appropriate death penalty seminars before Pooler's trial. (PC.18 227-38). He was authorized to have a confidential defense mental health expert for competency and mitigation, and later opted to present four experts who had evaluated Pooler for competency and mental health issues for the court and in the jail. (R.2 358-61, 368, 462-65; PC.18 230-32). Also, Salnick hired Jenne, an experienced private investigator with capital experience, and asked him to find anything and everything on Pooler. This was corroborated by Jenne. PC.18 235-36, 259-61,

274-78). Toward this endeavor, Jenne spoke to Pooler on numerous occasions, traveled to Louisiana to interview family members, and sent letters for background documentation to verify and support what Pooler was disclosing to his defense team. Although Jenne was unsuccessful in obtaining Pooler's school records, Salnick was given corroboration from the family that Pooler graduated from high school and was honorably discharged from the military after serving in Vietnam. (PC.18 216-24, 227-29, 260-68, 276-82). Salnick explained: "And eventually what Mr. Pooler told me and what his brother told me, and what his brother shared with my investigator obviously was not true, but we had no way of knowing that, and when someone tells you they were (sic) honorably discharged from Vietnam and the relatives back it up, I think that's extremely reasonable to present it and use it to present it to the jury." (PC.18 220).

Jenne and Salnick also spoke to Pooler's co-workers and discovered that one co-worker, Alice Bradford, had positive things to say about Pooler while the other, Mr. Weeks, spoke of Pooler's violent background. (PC.18 228-32, 281-83). From this, it is clear that counsel conducted a reasonable investigation, and when written documentation was not available, an alternate means of corroboration was found, namely, family members and other who knew Pooler. Based on this evidence, counsel made his strategic decisions. An ineffective assistance claim does not

arise from the failure to present mitigation evidence where that evidence presents a double-edged sword. See, Carroll v. State, 815 So.2d 601, 614-15 & n. 15 (Fla. 2002); Asay v. State, 769 So.2d 974, 988 (Fla. 2000).

Salnick, developed his strategy given the evidence he had before him which was corroborated by friends and family, i.e., that Pooler had graduated from high school and served his country honorably in Vietnam. During the hearing, Salnick noted that his overall penalty phase strategy was to show Pooler in a positive light, that he had been a productive member of society, and crime free for 15 years before this murder. Pooler served his country in Vietnam, re-enlisted, raised his daughter, took care of relatives, was a good parent, worked at the same job for eight years, where he was liked by his co-workers. It was Salnick's design to present positive information about Pooler. Salnick admitted to the jurors that they had convicted Pooler, but asked that they consider sparing his life given that there were positive aspects to it. Clearly, Salnick did not want to present a co-worker, who had reported Pooler was violent, and was known to have carried a gun.

Had the military records and Pooler's co-worker, Mr. Weeks, been presented, such would have "backfired" against the defense strategy of presenting Pooler in a favorable light. Clearly no prejudice may be found arising from the failure to obtain the

military and employment records given the corroboration counsel obtained from the family and the positive report obtained by Alice Bradford. Further, counsel may not be deemed deficient if his client does not disclose the truth about his background, especially in light of corroboration of the account by family members. "A tactical decision amounts to ineffective assistance of counsel only if it was so patently unreasonable that no competent attorney would have chosen it." Alexander v. Dugger, 841 F.2d 371, 375 (11th Cir. 1988). Any flaw in this strategy should be placed squarely where it belongs, namely, at Pooler's feet because he refused to tell his lawyer the truth. An attorney is permitted to rely upon his client's representation. Rose v. State, 617 So.2d 291, 294 (Fla. 1993) (finding no claim of ineffectiveness can be made where client preempt's his attorney's strategy) (quoting Mitchell v. Kepmt, 762 F.2d 886, 889 (11th Cir. 1985). It must be remembered that what may appear unprofessional in one case, "may be sound or even brilliant in another." Strickland, 466 U.S. at 693. Here, Salnick did not just rely upon Pooler's representations, but he obtained corroboration from the family when he could not obtain documentation from other sources. There has been neither deficiency nor prejudice shown.

With respect to the use of intoxication during the penalty phase, Salnick successfully precluded the State from obtaining

an instruction on the cold, calculated, and premeditated aggravating factor arising from a threat to kill Kim made by Pooler as he was drinking and talking to Carolyn Glass a week before the murder. (R.20 1529; R.21 1670). Such establishes that counsel considered the evidence and made an appropriate, and in this case, winning argument therefrom. This is the antitheses of ineffective assistance. See Occhicone, 768 So.2d at 1048 (stating "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct").

Also, contrary to Pooler's position that his intoxication at the time of the crime should have been offered to support the mitigator of inability to conform his conduct to the requirements of the law (IB 33), the State would note that the court found there was no evidence that Pooler was intoxicated at the time of the crime. (PC.11 1980). The State relies upon its answer to **Issue I**, reincorporated here, to show that there was no evidence that Pooler was inebriated at the time of the crime. As such, Pooler's reliance upon Stewart v. State, 558 So.2d 416 (Fla. 1990) and his argument here fail.

Pooler has not carried his burden of proving that absent counsel's alleged failing, the trial court would have found the age mitigator. In rejecting the age mitigator, the sentencing

court reasoned:

> The Defendant was **47-years-old** at the time of the crime. The **Defendant's age**, along with the other evidence about his Marine Corps service and job history, establish the Defendant to be an experienced and mature person, who knew what he was undertaking, as evidenced by his comments, and who knew the killing was without any justification. He was competent and not mentally ill. This mitigating factor has not been established and thus will not be considered by the Court.

(R.4 731). Here, Pooler argues that this mitigator would not have been rejected had the military records been obtained. Similarly, he argues that had the "fiction" of Pooler's life not been presented, the sentencing court would not have been able to reject the age mitigator based on experience, maturity, and lack of mental illness.

Contrary to Pooler's position, no mental illness was shown,[15] the fact that he was in the Marines and saw action in Vietnam has not been amended by the new records, and his steady employment for eight years has not changed. More important, the Court rejection of the age mitigator based on Pooler age alone at the time of the crime, 47 years-old, cannot change. As such,

[15] Dr. Brannon, Pooler's new mental health expert, offered mitigation of: (1) neurological damage/functioning based upon alleged head trauma/injuries as supported by Dr. Levine's evaluation/report; (2) confabulation; (3) borderline IQ; and (4) alcohol abuse. (PC.18 335-45, 350-51). Further, Dr. Brannon **did not** find Post Traumatic Stress Disorder (PC.18 350-51). Absent from this list is an identified mental illness which supports one of the mental health statutory mitigators.

Pooler has not shown that the failure to bring forward military records to show that he had less than an honorable discharge had any effect upon the rejection of the age mitigator for a 47 year-old man.[16] See Simmons v. State, 934 So.2d 1100, 1110 (Fla. 2006) (rejecting age mitigator because defendant was 27 years-old and there was no evidence he was functioning below his age level in anything but reading); Caballero v. State, 851 So.2d

[16] See Blackwood v. State, 777 So.2d 399, 410 (Fla. 2000) (finding court's failure to consider age mitigator harmless given that: "the record on appeal reflects that appellant was thirty-seven at the time of the killing and that at that time he had no history of prior criminal activity. Thus, the evidence may support the statutory age mitigator as broadly discussed in Dixon. However, the record shows that defense counsel did not request a jury instruction on age as a mitigating factor, did not argue to the jury that age was a mitigating factor, and did not urge the judge to consider the appellant's age as a statutory mitigating factor") (footnote omitted); Burns v. State, 699 So.2d 646, 648 n.4 (Fla. 1997) (finding 42 year-old defendant entitled to age mitigator "to the extent that it demonstrates, in conjunction with Burns' lack of a history of prior criminal activity, the length of time Burns obeyed the law prior to committing this crime"). In contrast, Pooler is not entitled to relief given his extensive criminal history and noted by this Court on direct appeal: "Pooler's presentence investigation (PSI) report, which revealed that Pooler had been arrested about twenty-six times between 1972 and 1994, had served five sentences in Louisiana between 1975 and 1988 for aggravated assault, aggravated assault with a deadly weapon, battery, and resisting an officer, and was placed on probation for a 1994 aggravated assault charge in Florida." Pooler v. State, 704 So. 2d 1375, 1379-80 (Fla. 1997). Clearly, Pooler would not qualify for the age mitigator under these circumstances, thus, no prejudice can be shown under Strickland.

655, 662 (Fla. 2003) (affirming rejection of age mitigator for defendant who was 20 years-old at time of crime): Pagan v. State, 830 So.2d 792, 816 (Fla. 2002) (rejecting age mitigator - defendant 23 years-old at time of crime); Rose v. State, 787 So.2d 786, 804 (Fla. 2001) declining to find age mitigator for 31 year-old man).

Turning to Pooler's assertion that counsel failed to do an adequate investigation and give the mental health experts sufficient background materials regarding military records, school records, and intoxication/substance abuse to allow the expert to do a proper evaluation for mitigation purposes, this Court will find that a reasonable investigation was undertaken and all of the records available at the time were turned over to the experts. To prove an Ake claim, the defendant must establish that the psychological examination was "grossly insufficient" and that the expert "ignore[d] clear indications of either mental retardation or organic brain damage" before a new sentencing hearing is required. State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987). It is clear from the above analysis, that Salnick investigated Pooler's background. Further, information was generated by talking to Pooler, and those who knew him. Contrary to Pooler's assertion, these accounts of his schooling, military, and employment history were passed onto the mental health experts. Additionally, the jail and medical

records, along with the fact there was no prior reports of psychiatric treatment, were disclosed to the experts. (R.10 74, 76, 100-01, 119-20, 121; R.19 1380-84, 1388, 1391-93, 1398-99, 1413-15, 1438; R.20 1465-66, 1492, 1495, 1497). For the penalty phase, Salnick secured the assistance of Doctors Levine, Desormeau, Armstrong, and Alexander (R.19 1376, 1412; R.20 1454, 1483). Such complies with the requirements of Wiggins; and Ake. Competent assistance was retained and Salnick provided the experts with access to Pooler, his records and/or corroborated evidence.

As noted above, Pooler situation differs from that of the defendant in Rompilla. There, counsel did not bother to look for the "school, medical, police, and prison records", but instead relied upon the family members and mental health doctors to advise what may be useful. Rompilla, 125 S.Ct. at 2461. However here, Salnick sent his investigator to Louisiana, to some of the more dangerous areas, in search of records and family. It was after Jenne's efforts to find records bore no fruits did Salnick rely upon the family members who corroborated Poller's account. This difference in efforts between Rompilla's counsel and Pooler's distinguishes Rompilla from the instant matter. It also establishes that Salnick was not deficient under Strickland as defined by Wiggins and Rompilla as Salnick made the effort to discover evidence, but was merely

unsuccessful, thus he did not have certain records to give to his experts.

Further, it was Salnick's strategy to rely upon the mental health experts who did the competency and psychological evaluations. While Salnick noted that a full psychological evaluation may be important, such depends on the penalty phase presentation, and the chosen defense strategy. (PC.18 209-16). Here, Salnick presented Pooler's favorable characteristics given the corroborated evidence available. Dr. Levine, Pooler's trial expert, conducted psychological/neuropsychological testing. (R.10 100-09, 122; R.19 1383-85, 1438). In addition to presenting Dr. Levine, Salnick presented three other mental health experts who reported that around the time of the crime, Pooler was diagnosed with depression, had been put on suicide watch, and had other psychological issues. Salnick reasoned that presentation of these factors by court appointed experts and/or State hired jail doctors would hold more sway with the jury than defense hired experts. (PC.18 230-33) All of this fits within the chosen defense scheme of showing Pooler in a more favorable light, but with some psychological issues.

This case is different from Arbelaez, 898 So.2d at 33-35 with respect to the investigation conducted. In Arbelaez, counsel rested upon competency doctors without further investigation where there was clear evidence of mental health

issues. Id. Here, Salnick incorporated the mental health evidence into his strategy, enhanced it with corroborated evidence of favorable aspects of Pooler's life, and chose the doctors who would testify for the defense. Unlike counsel in Arbelaez, Salnick did not abandon any area of investigation. Instead, he considered it and then chose the best way to proceed; in this case, presenting four mental health experts whose testimony dove-tailed into the penalty phase strategy developed by Salnick of presenting Pooler in a positive light with some mental health issues.

While Pooler takes exception to Salnick's plan to use those mental health experts and to follow a positive character defense in the penalty phase, the newest defense expert, Dr. Brannon, did not offer any mitigation which would establish prejudice as defined by Strickland. In Damren v. State, 838 So.2d 512, 517 (Fla. 2003), this Court reviewed the defendant's recent discovery of an expert to testify about "potential brain damage" and reasoned that the finding of a new doctor "does not equate to a finding that the initial investigation was insufficient." See Asay v. State, 769 So.2d 974, 986 (Fla. 2000) (finding defense counsel's investigation of mental health mitigation was reasonable and counsel could not be declared incompetent "merely because the defendant has now secured the testimony of a more favorable mental health expert.").

Moreover, Dr. Brannon did not offer anything which would undermine confidence in the sentence and his testimony supported Salnick's strategy in part. Here, Dr. Brannon admitted that Pooler was discharged from the military, i.e., it was **not** a dishonorable discharge. Further, Dr. Brannon found that Pooler **could appreciate** the criminality of his conduct at the time of the crime. Dr. Brannon **refused** to find a Post Traumatic Stress Disorder. As mitigation, he offered: (1) neurological damage/functioning based upon alleged head trauma/injuries as supported by Dr. Levine's evaluation/report; (2) confabulation; (3) borderline IQ; and (4) alcohol abuse. (PC.18 335-45, 350-51).[17] None of these undermines confidence in the sentencing.

Assuming, but not conceding, that neurological damage was shown[18] and that this might go to the mitigator of "under the influence of extreme mental or emotional disturbance," Dr. Levine testified for the defense in the penalty phase and the

[17] Pooler refers to Dr. Gutman's report (IB 47), however, that was introduced as part of the materials Dr. Brannon considered. Dr. Gutman did not testify at the evidentiary hearing. However, he did not report anything not covered in general by Dr. Brannon.

[18] During the competency hearing, Dr. Levine testified that Pooler did not report any psychiatric treatment prior to the crime. Further, Pooler denied any change in his mental ability following a 30-year old car accident where he had been thrown through the windshield. Dr. Levine noted a 1994 work-related head injury. (R.10 119-21). During the penalty phase, Dr. Levine opined that Pooler's history was compatible with brain damage, but there were no medical reports supporting such a diagnosis. (R.19 1398-99).

sentencing court found this mitigator, but gave it little weight. (R.4 730). As such, Dr. Brannon has offered nothing new and no prejudice can be shown. Maharaj v. State, 778 So.2d 944, 957 (Fla. 2000) (noting "[f]ailure to present cumulative evidence is not ineffective assistance of counsel."); Valle v. State, 705 So.2d 1331, 1334-35 (Fla. 1997) (affirming summary denial of ineffectiveness claim based on allegation counsel failed to present cumulative evidence).

To the extent Pooler challenges the weight assigned the mitigation found, such is meritless. The relevant weight assigned a mitigator is within the sentencing court's province. Campbell v. State, 571 So.2d 415, 419-20 (Fla. 1990), receded from in part, Trease v. State, 768 So.2d 1050, 1055 (Fla. 2000) (holding that, though court must consider all mitigating circumstances, it may assign "little or no" weight to mitigator). See Kearse v. State, 770 So.2d 1119, 1134 (Fla. 2000) (observing whether mitigator exists and weight assigned are matters within sentencing court's discretion); Alston v. State, 723 So.2d 148, 162 (Fla. 1998)(finding sentence within court's discretion where detailed order identified mitigators, and weight assigned each).

Dr. Brannon also opined that Pooler was confabulating i.e., he was being untruthful, not because he was lying, but because he did not know what happened, and was merely filling in the

blanks. This factor could be looked at from a different perspective; Pooler was exaggerating his good qualities. Consistently, Pooler made himself look better than his records proved. Clearly, counsel cannot be faulted where he is unable to obtain records detailing his client's history[19] and where his client lied about his background, but family members corroborated that account. Philmore v. State, -- So.2d --, 2006 WL 1641932 *3-4 (Fla. Jun. 15, 2006) (rejecting ineffectiveness claim where counsel relied upon client's account to make strategic decision, but client was not truthful with counsel) In either case, Pooler was untruthful. To the extent that this could be seen as mitigation, it would hardly undermine the strong aggravation in this case, which was determined to be a prior violent felony, HAC, and felony murder. Rivera v. State, 859 So.2d 495, 505 (Fla. 2003) (finding HAC and prior violent felony aggravators are weighty factors).

Similarly, the fact Pooler over stated his history was alluded to by Dr. Levine as inconsistent with the test results obtained, although such was not termed "confabulation." (R.19 1383-93, 1395-96, 1440-42). Given this, Dr. Brannon's new

[19] Again, it is Salnick's attempt to find the records which distinguishes this matter from Rompilla v. Beard, 125 S.Ct. 2456 (2005). The law requires that there be a reasonable search, not an exhaustive or successful one. See Wiggins v. Smith, 539 U.S. 510, 533 (2003).

account is cumulative to that given to the jury. Gudinas v. State, 816 So.2d 1095, 1106 (Fla. 2002) (finding that trial counsel was not ineffective for failing to present evidence in mitigation that was cumulative to evidence already presented in mitigation). Moreover, merely because a defendant has found an expert, years later, to give a more favorable diagnosis does not establish ineffective assistance. Damren v. State, 838 So.2d 512, 517 (Fla. 2003) (noting defendant's recent discovery of expert to testify about "potential brain dam " "does not equate to a finding that the initial investigation was insufficient"); Asay v. State, 769 So.2d 974, 986 (Fla. 2000) (finding counsel's investigation of mental health mitigation was reasonable and counsel could not be declared incompetent "merely because the defendant has now secured the testimony of a more favorable mental health expert"; Jones v. State, 732 So. 2d 313, 320 (Fla. 1999)(reasoning mental health expert's evaluation is not rendered inadequate or incompetent merely because the defendant had found an expert who would provide testimony conflicting with the original expert).

With respect to Pooler's IQ, the sentencing court had rejected the mitigator of "dull intelligence" because of Pooler's graduation from high school, military service, and job record. Pooler has not shown that his military and employment records would not continue to support rejection of this

mitigator. Alice Bradford noted that Poller maintained his job for **eight years** and Dr. Brannon admitted Pooler was **not** dishonorably discharged, merely that he was discharged after an incident with an officer in Vietnam. However, even assuming that the "dull intelligence" mitigator is supported by the IQ results of 75 and 80 (R.4 734), it would not have created the possibility of the imposition of a life sentence, especially in light of the strong aggravation in this case of HAC, prior violent felony, and felony murder, Rivera, 859 So.2d at 505, and the sentencing court's statement: "Each aggravator, standing alone, would be sufficient" to outweigh the mitigation. See Lawrence v. State, 698 So.2d 1219 (Fla. 1997) (finding sentence proportional based on three strong aggravators weighed against five non-statutory mitigators of learning disability, low IQ, deprived childhood, influence of alcohol, and lack of violent history); Spencer v. State, 691 So.2d 1062 (Fla. 1996) (finding sentence proportional based on aggravation of HAC and prior conviction for a violent felony, balanced against two mental heath mitigators, and a number of nonstatutory mitigators including drug and alcohol abuse, paranoid personality disorder, sexual abuse by his father, honorable military record, good employment record, and the ability to function in a structured environment).

Furthermore, neither deficiency nor prejudice has been

shown with respect to the rejection of the statutory mitigator of "capacity to appreciate criminality of his conduct and to conform his conduct to the requirements of law." While the sentencing court relied in part on Pooler's military and school records to reject this mitigating circumstance, the Court also stated that: "Dr. Alexander testified the Defendant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law **was not impaired**." (R.4 730; R.20 1500-01) (emphasis supplied). Like Dr. Alexander, Dr. Brannon agreed that Pooler's ability to appreciate the criminality of his acts or to conform his conduct to the requirements of the law **was not impaired**. (PC.18 350-51). Clearly, the mitigator has not been shown, thus, merely looking at the prejudice prong of Strickland, Pooler has not shown entitlement to relief. Strickland, 466 U.S. at 697 (reasoning "there is no reason for a court deciding an ineffective assistance claim to ... address both components of the inquiry if the defendant makes an insufficient showing on one."); Maxwell, 490 So.2d at 932 (recognizing 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.").

Alcohol abuse does not establish prejudice. As an initial point, the affidavits of Pooler's nephews should not be

considered as substantive evidence or for the truth of the matter they contain. See Robinson v. State, 707 So.2d 688, 690-92 (Fla. 1998) (denying postconviction relief on claim of newly discovered evidence in part because affiant/recanting witness did not testify and finding that affidavit was inadmissible hearsay); Parker v. State, 873 So.2d 270, 282-83 (Fla. 2004) (affirming the exclusion of affidavits from non-testifying family members because the affidavits were hearsay and the state did not have a fair opportunity to rebut the hearsay); Randolph v. State, 853 So.2d 1051, 1062 (Fla. 2003) (affirming postconviction court's refusal to admit affidavit from deceased witness as it did not fall under a exception to the hearsay rule). The State had no objection to the admission of the affidavits as evidence of what Dr. Brannon was provided or considered when evaluating Pooler.

Nonetheless, given that the court appears to have considered the affidavits as substantive evidence, and found they support mitigation of alcohol abuse, Pooler is not entitled to relief. The record is clear that Pooler was not intoxicated, or abusing alcohol at the time of the crime, thus, this mitigator would be of little if any weight in light of the aggravation in this case. The strong aggravation of HAC, prior violent felony, and felony murder, would outweigh any new mitigation of alcohol abuse. Rivera, 859 So.2d at 505. Without

question, this additional mitigation would not render it "reasonably probable" that alcohol abuse days prior to the murder would outweigh the aggravation in this case and support a life sentence. Rivera, 717 So.2d at 485 n. 12; Asay, 769 So.2d at 988; Rutherford v. State, 727 So.2d 216, 226 (Fla. 1998); Breedlove v. State, 692 So.2d 874 878 (Fla. 1997). This Court should affirm the denial of postconviction relief following an evidentiary hearing.

Although not addressed in his postconviction motion, Pooler asserts that counsel was ineffective in not moving for a co-counsel to oversee the penalty phase. (IB 51).[20] The appointment of counsel is not a right but a privilege. The granting of co-counsel is within the sound discretion of the trial court, based on the complexity of the case. See Armstrong v. State, 642 So.2d 730, 737 (Fla. 1994) (noting "Appointment of multiple counsel to represent an indigent defendant is within the discretion of the trial judge and is based on a determination of the complexity of a given case and the attorney's effectiveness therein"); Lowe v. State, 650 So.2d 969, 974-75 (Fla. 1994) (announcing "decision

[20] Because this issue was not raised below, this Court should find it unpreserved. It is well established that for an issue to be preserved for appeal, it must be presented to the lower court and "the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved." Archer v. State, 613 So.2d 446 (Fla. 1993). See Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

of whether to appoint co-counsel is not a right but is a privilege that is subject to the trial court's discretion.");

Cummings-El v. State, 863 So.2d 246, 250, n.6, 258 (Fla. 2003).

Here, Salnick noted that as part of his representation of Pooler, he had an attorney and law clerk working with him, in addition to hiring Jenne, and his staff, as his private investigators. Given this assistance, Salnick believed it was appropriate for him to represent Pooler during both phases of the case. (PCR 74-75). Pooler has not shown that failing to ask for a second-chair counsel was deficient or that but for the failure to obtain co-counsel, the result of his sentencing would have been different. Even without a co-counsel, there has been a finding of effective assistance of counsel which is supported by the law and facts. Pooler has not carried his burden under Strickland to show both deficiency and prejudice arising from the failure to seek a second attorney for the penalty phase.

ISSUE III

AN EVIDENTIARY HEARING ON CLAIM III OF POOLER'S POSTCONVICTION MOTION HEARING MEMORANDUM WAS DENIED PROPERLY AS THE ISSUE WAS PROCEDURALLY BARRED AND WITHOUT MERIT (restated).

Pooler maintains that in addition to counsel's errors outlined in his Issue II in this appeal, the **sentencing court** failed to find other mitigating factors which were supported by

the record. (IB 53). He claims the sentencing court failed to find mitigating factors of: (1) good jail behavior while awaiting trial; (2) low I.Q.; and (3) age. It is Pooler's position that the postconviction court erred in not granting a hearing on this issue. He also adds that "[o]ther factors, such as those discussed in Issue II, should have been found to be mitigating, but were not due to trial counsel's ineffective assistance." (IB 53).[21] Challenges to trial court error are

[21] With respect to this last allegation, the State would rely on its answer to Issues II and VI, reincorporated here, to establish that counsel was not ineffective during the penalty phase as addressed to the factors actually raised by Pooler in Issue II. Because he does not specify what "other factors" he is referring to, the State assumes that all were raised in Issue II and limits its argument to those. If Pooler has other mitigators in mind, he has failed to express them and this Court should deem them waived. See Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990) (opining "purpose of an appellate brief is to present arguments in support of the points on appeal" - notation to issues without elucidation is insufficient and issue will be deemed waived); Cooper v. State, 856 So.2d 969, 977 n.7 (Fla. 2003); Roberts v. State, 568 So.2d 1255 (Fla. 1990). Furthermore, a single sentence allegation of ineffective assistance, without more, does not present a fully briefed appellate argument. Duest, Cooper, Roberts.

Furthermore, during the July 28, 2000, Huff/Case Management Hearing, the State agreed to a hearing on Claim II of the Amended Motion for Postconviction Relief which was a claim of ineffective assistance of counsel related to several mitigators including: (1) good jail behavior; (2) dull intelligence (I.Q.); and (3) age (PC.1 10-11, 14-15; PC.17 23). An evidentiary hearing was granted on Claim II, however, no evidence was offered on the "good jail behavior" and "age" mitigators. As such, to the extent that Pooler was claiming ineffectiveness of counsel regarding the three issues, he had his opportunity and either failed to come forward with evidence, or the evidence, in this case on I.Q./dull intelligence, did not meet the Strickland standard.

procedurally barred as such could have been raised on direct appeal. It is well settled, “[i]ssues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack." Muhammad v. State, 603 So. 2d 488, 489 (Fla. 1992); Spencer v. State, 842 So. 2d 52, 60-61 (Fla. 2003); Vining v. State, 827 So. 2d 201, 218 (Fla. 2002); Smith v. State, 445 So. 2d 323, 325 (Fla. 1983).

A trial court’s summary denial of a postconviction motion will be affirmed where the law and competent, substantial evidence support its findings. Diaz v. Dugger, 719 So.2d 865, 868 (Fla. 1998). In Lucas v. State, 841 So.2d 380, 388 (Fla. 2003), this Court stated that: “To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record.” See State v. Coney, 845 So.2d 120, 134-35 (Fla. 2003); Peede v. State, 748 So.2d 253, 257 (Fla. 1999). Also, "[t]o support summary denial without a hearing, a trial court must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion." McLin v. State, 827 So.2d 948, 954 (Fla. 2002) (quoting Anderson v. State, 627 So.2d 1170, 1171 (Fla. 1993)).

The court found these sub-claim procedurally barred as each had been raised and rejected on direct appeal. (PC.11 1985-88). Such rulings are supported by the record.

Good Behavior While Awaiting Trial - On direct appeal, Pooler challenged the court's rejection of the mitigator of "good behavior while awaiting trial." Pooler, 704 So.2d at 1379-80. This Court e Court agreed it was an abuse of discretion to reject the mitigator based upon Deputy Rack's testimony regarding a report of an instance where Pooler threatened another inmate during the year he awaited trial, however, such was harmless given the trial court's later reference to the presentence investigation report ("PSI") showing 26 arrests between 1975 and 1995, five incarcerations in Louisiana between 1974 and 1988 for "aggravated assault, aggravated assault with a deadly weapon, battery, and resisting an officer", and a probationary term in Florida an aggravated assault charge. Pooler, 704 So. 2d at 1379-80. Clearly, the issue of Pooler's jail behavior was raised and rejected on appeal and it may not be re-litigated in a motion for postconviction relief. Muhammad, 603 So.2d at 489 (holding "issues which either were or could have been litigated at trial or on direct appeal are not cognizable through collateral attack"). See Windom v. State, 886 So.2d 915, 930 (Fla. 2004); Harvey v. Dugger, 656 So. 2d 1253, 1256 (Fla. 1995); Turner v. Dugger, 614 So.2d 1075, 1078

(Fla. 1992).

Pooler's Age - The claim of trial court error in rejecting the age mitigator is procedurally barred. Pooler asked for the statutory mitigator (R.20 1669), however, the sentencing court rejected the mitigator.[22] This finding was not challenged on direct appeal, thus, Pooler is barred from raising the matter now. Muhammad, 603 So. 2d at 489. See, Engle v. Dugger, 576 So. 2d 696 (Fla. 1991); Atkins v. Dugger, 541 So.2d 1165, 1166 n.1 (Fla. 1989); Roberts v. State, 568 So.2d 1255, 1257-58 (Fla. 1990); Correll v. Dugger, 558 So.2d 422, 425 (Fla. 1990). Also, Pooler has not shown that the age mitigator would apply to him. The State reincorporates its argument presented in Issues II and VI above. See Simmons, 934 So.2d at 1110; Caballero, 851 So.2d at 662; Pagan, 830 So.2d at 816; Rose, 787 So.2d at 804; Blackwood, 777 So.2d at 410; Burns, 699 So.2d at 648 n.4 (finding age mitigator for 42 year-old man on the grounds he had

[22] The court stated:

> The Defendant was 47-years-old at the time of the crime. The Defendant's age, along with the other evidence about his Marine Corps service and job history, establish the Defendant to be an experienced and mature person, who knew what he was undertaking, as evidenced by his comments, and who knew the killing was without justification. He was competent and not mentally ill. The mitigating factor has not been established and thus will not be considered by the Court.

(R.4 731).

no criminal history) At the time of the murder, Pooler was 47-years old, had been in the military, had been employed for several years with the same company, and had an extensive violent criminal history. Clearly, Pooler has not shown entitlement to the mitigating factor.

Low IQ/Dull Intelligence[23] - Pooler's assertion that the sentencing court should have found his low IQ mitigating was raised and rejected on direct appeal. Pooler, 704 So. 2d at 1380.[24] Given this, Pooler is procedurally barred from rearguing this point as trial court error on collateral review. Mahammad, 603 So. 2d at 489 (holding issues which were raised and rejected on direct appeal are not cognizable in postconviction proceeding). To the extent that there can be a claim of ineffective assistance drawn from the pleading, the State relies on its answer to Issues II and VI to establish no ineffectiveness arising from counsel's penalty phase

[23] The trial record reveals that Pooler's IQ was between 75 and 85, with 80 noted as the average. (ROA-T 1380-84).

[24] This Court found:

> Pooler also takes issue with the trial court's rejection of his low-normal intelligence as nonstatutory mitigation. The trial court found that this was not established as mitigation because although his I.Q. tested at 80, Pooler's functional level was higher, as evidenced by his education, military service, and employment record. We find no abuse of discretion in the trial court's ruling.

Pooler, 704 So.2d at 1380.

presentation of Pooler's mental status.

ISSUES IV, V, AND VII

THE COURT PROPERLY APPLIED A PROCEDURAL BAR AND FOUND MERITLESS POOLER'S CLAIMS THAT THE TRIAL COURT GAVE ERRONEOUS INSTRUCTIONS AND THAT THE STATE MADE IMPROPER ARGUMENTS REGARDING THE JURY'S "ADVISORY SENTENCING ROLE," SHIFTED THE BURDEN TO THE DEFENSE TO PROVE A LIFE SENTENCE, AND APPLIED THE FELONY MURDER AGGRAVATOR WHICH IS AN AUTOMATIC AGGRAVATORS (restated)

Pooler raises three issues challenging the trial court's instructions and the prosecutor's argument to the penalty phase jury. It is Pooler's alleges in: **Issue IV** that the jury sense of sentencing responsibility was negatively impacted in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985) when instructed that their role was advisory (IB 54); **Issue V** that the instructions and argument shifted to him the burden of proving a life sentence (IB 57); and **Issue VII** that his sentence is unconstitutional due to the instruction and application of the felony murder aggravator which he characterizes as an automatic aggravator. (IB 70-72) Included in each argument is a single sentence or conclusory allegation that counsel was ineffective in not objecting and/or litigating these issues. (IB 56, 57, 61, 71 He also asserts that evidentiary hearings should have been granted on these claims. (IB 54, 61, 72). As the trial court found (PC.11 1988-90), Pooler's direct attack upon the actions of the trial court and prosecutor are procedurally

barred in this litigation. Moreover, the use of a single sentence/conclusory claim of ineffective assistance cannot be used to overcome the procedural bar. Additionally, trial counsel objected to the complained of instructions/argument, thus, there the matter could have been raised on appeal and the ineffectiveness claim is without merit. These rulings are supported by the record and law, thus, the evidentiary and postconviction relief were denied properly.[25] This Court should affirm.

Each of Pooler's complaints of trial error have been rejected by this Court recently in addition to the denial of alternate claims of ineffective assistance pled in conclusory terms. See Rodriguez v. State, 919 So.2d 1252, 1280-81 (Fla. 2005).[26] The claim of trial error could have been raised on

[25] A trial court's summary denial of a postconviction motion will be affirmed where the law and competent, substantial evidence support its findings. Diaz v. Dugger, 719 So.2d 865, 868 (Fla. 1998).

[26] There, this Court opined:

> Rodriguez also claims that trial counsel's failure to object to a number of jury instructions constituted ineffective assistance. These include instructions on the aggravating circumstances, an alleged **"burden shifting"** instruction on the weight of the aggravating and mitigating circumstances, an instruction that allegedly **diluted the jury's sense of responsibility for sentencing**, and the instruction concerning the aggravating circumstance that the **murder was committed in the course of a felony**, which Rodriguez contends resulted in an **automatic aggravating circumstance**.

direct appeal. Counsel challenged the propriety of informing the jury of its advisory role.[27] (R.3 443-44, 453-54; R.4 630-

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> Claims regarding the adequacy or constitutionality of jury instructions should be raised on direct appeal. ... Moreover, we will not consider such procedurally barred claims under the guise of ineffective assistance of counsel....
>
> When jury instructions are proper, the failure to object does not constitute deficient performance by counsel. ... The instruction that purportedly diluted the jury's responsibility for its sentencing role is consistent with Florida's statutory scheme in which the jury "**renders an advisory sentence to the court" and the trial court, "notwithstanding the recommendation of a majority of the jury**," enters the sentence. ... We have also repeatedly **rejected claims that the standard jury instruction impermissibly shifts the burden to the defense to prove that death is not the appropriate sentence**. ... We have **previously concluded that the "murder in the course of a felony" aggravating circumstance is not an unconstitutional automatic aggravator**, nor does instruction on the felony aggravator allow the jury to consider an automatic aggravator in recommending whether to impose the death sentence....
>
> Therefore, Rodriguez has failed to demonstrate that trial counsel's performance was deficient and that there is a reasonable probability that the result would have been different had trial counsel objected to the jury instructions in question. ... The trial court's denial of these claims was proper.

Rodriguez v. State, 919 So.2d 1252, 1280-81 (Fla. 2005).

[27] The sentencing court instructed the jury:

> As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge. However, it is your duty to follow the law that will now be given you by the Court and render to the Court an advisory sentence based upon your

632; R.10 173, 216-17, 220; R.19 1351-52; R.20 1555). Salnick also objected to the alleged "burden shifting"[28] (R.1 96-108,

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> determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient aggravating circumstances exist to outweigh any mitigating circumstances found to exist.
>
> The judge is to give great weight to your recommendation. Only under unusual circumstances can the Court disregard your recommendation.

(R.21 1620-21). (See R.19 1351-52, 1360-61). The contested instruction followed the standard jury instruction, gave an accurate account of the law, and informed the jury of its responsibility. See Dougan v. State, 595 So.2d 1, 4 (Fla. 1992) (finding "Florida's death penalty statute, and the instructions and recommendation forms based on it, set out a clear and objective standard for channeling the jury's discretion"). Moreover, Pooler's reliance upon Caldwell v. Mississippi, 472 U.S. 320 (1985) is inappropriate. This Court has held: "the standard jury instruction fully advises the jury of the importance of its role, correctly states the law, [] and does not denigrate the role of the jury. Brown v. State, 721 So. 2d 274, 283 (Fla. 1998)(citation omitted); Burns v. State, 699 So. 2d 646, 654 (Fla. 1997)(holding sentencing instruction correctly states the law and advises jury of importance of its role), cert. denied, 118 S.Ct. 1063; Combs v. State, 525 So. 2d 853, 855-56 (Fla. 1988)(holding Caldwell inapplicable to Florida death cases).

[28] Before retiring to deliberate, the jurors were instructed:

> However, it is your duty to follow the law that will now be given you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient aggravating circumstances exist to outweigh any mitigating circumstances found to exist.

(R.21 1620). Further the jury was informed:

> If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without the possibility of parole.
>
> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether aggravating circumstances exist that outweigh the mitigating circumstances.

(R.21 1623-24). The jury also was told:

> If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.
>
> 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 as established.
>
> The sentence that you recommend to the Court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances and your advisory sentence must be based on these considerations.
>
> It must be emphasized that the procedure to be followed by the jury is not a mere counting process of the number of aggravating circumstances and the number of mitigating circumstances, but a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances.

(R.21 1625-26). The record established the jury was instructed properly and no burden shifting occurred. Henry v. State, 613 So. 2d 429, 433 n.13 (Fla. 1992) (rejecting contention death penalty statute shifts burden of proof to defendant). The court denied relief properly.

116-23; R.10 175-76) and the felony murder aggravator instruction.[29] (R.1 168-75; R.10 178-79). As such, Pooler is procedurally barred here. Spencer, 842 So.2d at 60-61 (finding claims with could have been raised on direct appeal to be barred on collateral review); Vining, 827 So. 2d at 218 (same).

Pooler's attempt to overcome the bar by offering in single-sentences claims that defense counsel was ineffective for failing to object or litigate these issues are legally insufficient. See Asay, 769 So.2d at 989 (finding "one sentence" conclusory allegation that counsel was ineffective is an improper pleading and attempt to relitigate procedurally barred claims); Rivera, 717 So.2d at 480 n.2 (finding it impermissible to recast claim which could have or was raised on appeal as one of ineffective assistance in order to overcome the procedural bar or to relitigate and issue considered on appeal). Moreover, the ineffectiveness claims are meritless as counsel objected to the instructions as noted above. Counsel may not be deemed ineffective where his objection or motion was denied. Bush v. Wainwright, 505 So. 2d 409, 411 (Fla. 1987) (finding counsel's

[29] This Court repeatedly has found this aggravating factor, and its attendant instruction, constitutionally sound. See Rodriguez v. State, 919 So.2d 1253, 180-81 (Fla. 2005); Blanco v. State, 706 So. 2d 7, 11 (Fla. 1997) (finding felony murder instruction not vague or over broad); Banks v. State, 700 So.2d 363, 367 (Fla. 1997)(finding felony murder instruction constitutional) Johnson v. State, 660 So. 2d 637, 647-48 (Fla. 1995) (citing Lowenfield v. Phelps, 484 U.S. 231 (1988)); Hunter v. State, 660 So. 2d 244, 253 & n.11 (Fla. 1995) (same)

lack of success on actions pursued following sound defense strategies "augurs no ineffectiveness of counsel"); Songer v. State, 419 So.2d 1044 (Fla. 1982). Further, as provided in Rodriguez, 919 So.2d at 1280-81, counsel cannot be ineffective for not having objected to proper instructions.

ISSUE VIII

THE CLAIM OF CUMULATIVE ERRORS WAS DENIED PROPERLY (restated)

Pooler claims he did not receive a constitutionally fair trial as he received ineffective assistance of counsel, and the "sheer number and types of errors involved in his trial" and these "dictated the sentence he would receive. (IB 73). It appears Pooler is limiting his argument to the penalty phase as he addresses the errors he set forth in Issues II and VI. Below, he merely referenced "trial errors" without identifying which errors. The trial court denied this claim summarily due to the inadequate pleading and because "trial error" are procedurally barred in collateral litigation. (PC.11 1992-93).[30]

[30] The trial court reasoned:

> The defendant contends that he did not receive a fair trial under the Eighth Amendment due to cumulative trial errors. He does not, however, identify the alleged errors he wishes this court to consider, nor does he explain how these matters caused a constitutional violation. Mere conclusory allegations are legally insufficient and are subject to summary denial. Kennedy v. Singletary, 602 So.2d 1285 (Fla. 1992).

The claim is legally insufficient because Pooler does nothing more than reference errors discussed in other parts of the motion or in another brief. Mere conclusory allegations are legally insufficient and are subject to summary denial. Kennedy, 547 So. 2d at 913 (opining that "[a] defendant may not simply file a motion for post-conviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing"). With regard to the claim of ineffectiveness of penalty phase counsel, the State relies upon its answer to Issues II and VI. Should this claim be read to include all of the allegations, both trial errors and counsel's ineffectiveness, Pooler has failed to show error. See Zeigler v. State, 452 So. 2d 537, 539 (Fla. 1984) (opining "[i]n spite of Zeigler's novel, though not convincing, argument that all nineteen points should be viewed as a pattern which could not have been seen until after the trial, we hold that all but two of the points raised either were or could have been, presented at trial or on direct appeal. Therefore, they are not cognizable under rule 3.850."), sentence vacated on other

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> The issues raised by the defendant are also barred to the extent that he claims judicial errors. *Occhicone v. State*, 768 So.2d 1037, 1040 n.3 (Fla. 2000)....

(PC.11 1992-93)

grounds, 524 So.2d 419 (Fla. 1988);[31] Wike v. State, 813 So. 2d 12, 22 (Fla 2002); Rose v. State, 774 So. 2d 629, 635 n. 10 (Fla. 2000); Downs v. State, 740 So.2d 506, 509 (Fla. 1999) (finding where allegations of individual error are found to be without merit, a cumulative error argument based on the asserted errors must likewise fall).

ISSUE IX

POOLER FAILED TO PRESENT A VALID GROUND FOR JUROR INTERVIEWS AS SUCH THE REQUEST WAS DENIED PROPERLY (restated)

It is Pooler's complaint that the Florida Rule of Professional Responsibility 4-3.5(d)(4) and its prohibition against lawyers initiating communication with jurors impinges on his right to free association and speech. (IB 74) Pooler admits that he cannot cite to any juror misconduct, but he claims that it is due to his inability to interview the jurors first. (IB 77). Also. Pooler adds that the denial of juror interviews denies him access to the court. (IB 79). The trial court found this matter without merit given this Court's repeated rejection of such claims and recognition juror interviews are permitted once a proper showing is made (PC.11 1995-96). The denial of

[31] As in Zeigler, all but a few claims are procedurally barred, thus, Grunsby v. State, 670 So.2d 920, 924 (Fla. 1996) is distinguishable.

relief must be affirmed.[32]

These challenges have been rejected repeatedly as procedurally barred and meritless. Pooler has not presented anything which undermines this Court's prior decision on the matter. In Elledge v. State, 919 So.2d 57 (Fla. 2005), this Court opined:

> With regard to Elledge's claim regarding the constitutionality of the rule governing an attorney's ability to interview jurors, we determine that the substantive constitutional challenge to the rule governing juror interviews is procedurally barred as it was not raised on direct appeal. ... Procedural bar notwithstanding, Elledge's claim lacks merit. ...

Elledge, 919 So.2d at 77-78 (citations and footnote omitted). See Parker v. State, 904 So.2d 370 (Fla. 2005); Griffin v. State, 866 So.2d 1, 20 (Fla. 2003); Arbelaez v. State, 775 So.2d 909, 920 (Fla. 2000) (rejecting claim that rule 4-3.5(d)(4) is unconstitutional as procedurally barred as "[a]ny claims relating to Arbelaez's inability to interview jurors should and could have been raised on direct appeal," and as legally insufficient because Arbelaez did not make a prima facie showing of any juror misconduct, but instead complains about his inability to conduct "fishing expedition" interviews with jurors after guilty verdict).

[32] A court's summary denial of a postconviction motion will be affirmed where the law and competent, substantial evidence support its findings. Diaz v. Dugger, 719 So.2d 865, 868 (Fla. 1998).

Moreover, the law allows juror interviews under certain circumstances, thus, there is no due process or equal protection violation. See Marshall v. State, 854 So. 2d 1235 (Fla. 2003); Johnson v. State, 804 So.2d 1218, 1225 (Fla. 2001); Baptist Hospital of Miami, Inc. v. Maler, 579 So.2d 97, 100 (Fla. 1991). Clearly, if Pooler can make a prima facie showing of misconduct, he may obtain juror interviews. His inability to meet this requirement, however, does not exempt his attorney from the rules of professional conduct, permit the appointment of a "social scientist" to conduct a "fishing expedition" decried in Arbelaez, 775 So.2d at 920, or render his conviction and sentence constitutionally infirm. See Griffin, 866 So.2d at 20.

ISSUE X

SUMMARY DENIAL OF THE CLAIM COUNSEL WAS INEFFECTIVE FOR FAILING TO OBTAIN PROPER FORENSIC EXPERTS WAS PROPER (restated)

Initially, Pooler asserts that counsel was ineffective for failing to obtain an expert in pathology to counter the finding of heinous atrocious and cruel aggravator ("HAC") to show that death was instantaneous. (IB 79-80). He then argues in such conclusory terms that under Ake[33] he is entitled to an expert and

[33] Pooler's recitation of Ake v. Oklahoma, 470 U.S. 68 (1985) and his other cases where experts were appointed do not factor into the instant claim. The question before this Court is whether counsel was ineffective for not seeking an expert, not whether Pooler was entitled a pathology expert's effective assistance. Even if it is assumed that had counsel requested

that "counsel failed to conduct any forensic investigation", thus, "the defense was unable to present critical information to the judge and jury. (IB 80).[34] This claim, as pled, is legally insufficient. It does not delineate what the defense expert would opine to show the victim's death was instantaneous, what statutory and non-statutory information was not presented to the jury, or what crucial information should have been presented to counter the aggravation, other than the HAC aggravator. Moreover, with respect to HAC, the focus was not on the manner or timing of the killing itself, but on Kim Brown's awareness the day before and at the start of the attack that her death was pending. Given these failings, the summary denial of relief was

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the expert, one would have had to be granted, the facts of this case render that issue irrelevant. As will be discussed, it was not the length of time it took Kim to die, but the suffering and fear she experienced knowing she was going to die well before the first shot was fired.

[34] Later he submits:

> Defense counsel failed to ensure that Mr. Pooler received the assistance of a competent qualified pathologist to develop evidence rebutting aggravating factors and supporting mitigating factors. Mr. Pooler was prejudiced by being denied any defenses to the death sentence based upon the available forensic evidence, and being deprived of the opportunity to present statutory and non-statutory mitigating circumstances to the jury. The trial court erred in failing to grant an evidentiary hearing on this issue. The record does not conclusively establish that Mr. Pooler is not entitled to relief on this issue.

(IB 85).

correct and should be affirmed.[35]

In denying relief on this issue, Claim XII of the postconviction relief motion, the court found:

> The Defendant contends that his trial counsel was ineffective for failing to request that a forensic pathologist expert be appointed to investigate the findings of the State's witnesses and to assist in the impeachment of their testimony (Amended Motion at 50). He maintains a defense forensic expert could have opined that the victim died instantly, therefore, refuting the heinous atrocious and cruel aggravator (Amended Motion at 50).
>
> The defendant failed to identify, however, what evidence or expert opinion his trial counsel could have offered to show the victim's death was instantaneous so as to refute the heinous, atrocious and cruel finding, thereby rendering the claim legally insufficient. The defendant's claim is legally insufficient as he asserts counsel was ineffective for failing to find an expert "capable of rendering a reasoned opinion regarding numerous forensic issues in this case" and presenting "statutory and nonstatutory mitigating circumstances to the jury." (A-Ex.1 - Amended Motion at 50 and 54). He fails to delineate what "critical information" was not presented to the jury or what mitigating evidence was not presented other than to assert that the killing was instantaneous.
>
> Furthermore, according to the evidence presented, the focus of the heinous, atrocious or cruel aggravator was on the anguish and fear that Kim Brown endured leading up to her death, not on the length of time it took her to die. As noted by the Florida Supreme Court in its opinion on defendant's direct appeal, "... In this case, the record contains evidence over and above the fact that the victim pleaded for her

[35] A court's summary denial of a postconviction motion will be affirmed where the law and competent, substantial evidence support its findings. Diaz v. Dugger, 719 So.2d 865, 868 (Fla. 1998).

> life and received multiple gunshot wounds. Kin Brown learned of Pooler's threats to kill her some two days before she was killed, giving her ample time to ponder her fate. Any doubts she may have had about the sincerity of Poller's threat must have been dispelled when he visited her apartment that morning with a gun, forced his was in, and shot her fleeing brother in the back. One need not speculate too much about what was going through Kim Brown's mind during this time, as her fear was such that it caused her to vomit. Even after Kim succeeded in locking Pooler out of the apartment, he broke his way back in, whereupon she and her brother ran out of the apartment in an effort to escape. Once he caught up with Kim, Pooler struck her in the head with his gun and dragged her to his car as she screamed and begged for him not to kill her. Pooler's final words to her before killing her were, 'Bitch, didn't I tell you I'd kill you?' and 'You want some more?' We conclude that the circumstances of the victim's death support the trial court's finding that the HAC aggravator had been established." *Pooler*, 704 So.2d at 1378 (citations omitted).
>
> Thus, given the focus was on the events preceding the shooting, the testimony of an expert forensic witness would have been irrelevant: this, the defendant is unable to establish either prong of *Strickland*. Accordingly, Claim XII is denied.

(PC.11 1997-98).

As the trial court found, Pooler has not alleged how counsel's actions were deficient nor how they resulted in prejudice as described by Strickland. His claim is legally insufficient as defined by Kennedy v. State, 547 So.2d 912, 913 (Fla. 1989) (opining "defendant may not simply file a motion for post-conviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing"). To be entitled to an

evidentiary hearing, Pooler "must allege specific facts which are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudiced [him]." Roberts v. State, 568 So.2d 1255, 1259 (Fla. 1990). Furthermore, it is clear from this Court's direct appeal opinion that the finding of the HAC aggravator was based upon eye-witness testimony and Kim Brown's fear leading up to her death, not that of the medical examiner. Pooler, 704 So.2d at 1378. The HAC aggravator was established beyond a reasonable doubt, from the facts Kim knew of the death threat Pooler had made against her, and the knowledge of her imminent death as he pushed his way into the apartment, and shot her brother before chasing her through the apartment complex as she pleaded for her life. An expert forensic witness could not have refuted this evidence, therefore, Pooler is unable to establish either prong of Strickland.[36] A forensic expert's testimony related to how

[36] Pooler has failed to show that an expert could have offered him any assistance in refuting the HAC factors considered and affirmed by this Court as supporting HAC. Hence, counsel cannot be deemed ineffective for not having secured the assistance of an irrelevant expert. Moreover, no prejudice can be shown because even if the death was instantaneous, the terror Kim experienced as Pooler chased her, and the knowledge of her imminent death as she pled that he not kill her, established the aggravating factor. The result of the proceeding would not have been different even if a defense expert would have proven Kim died instantaneously with the first gun shot. "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."

long it took the victim to die after she was shot is irrelevant to the HAC determination. This Court should affirm the denial of postconviction relief.

ISSUE XI

THE SUMMARY DENIAL OF POOLER'S CLAIM OF INEFFECTIVE ASSISTANCE ARISING FROM THE INTRODUCTION OF ALLEGEDLY GRUESOME PHOTOGRAPHS WAS PROPER (restated)

Here, Pooler maintains it was error to deny him an evidentiary hearing on his claim that it was error to have admitted allegedly gruesome photographs at this trial. In the header to the issue, Pooler notes that this is a claim of ineffectiveness of counsel, however, he does not explain how counsel was deficient or the alleged prejudice under Strickland. Instead, Pooler points to State v. DiGuilio, 491 So.2d 1129 (Fla. 1986) to support his argument that "[t]he trial court's error in admitting these photographs cannot be considered harmless beyond a reasonable doubt." (IB 86-87) As the trial

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Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla.), cert. denied, 479 U.S. 972 (1986). See Strickland, 466 U.S. at 697, 104 S.Ct. 2052 (announcing that "there is no reason for a court deciding an ineffective assistance claim to ... address both components of the inquiry if the defendant makes an insufficient showing on one."). Further, as the issue of the sufficiency of the evidence supporting HAC was litigated previously, Pooler may not now attempt to recast the challenge to the HAC finding under the guise of a claim of ineffective assistance of counsel. Freeman v. State, 761 So. 2d 1055, 1067 (Fla. 2000) (holding that claims that could have been raised on direct appeal cannot be relitigated under the guise of ineffective assistance of counsel)

court found in denying relief, this matter is procedurally barred as it is a claim of trial court error which could have been raised on direct appeal, legally insufficient for making the ineffectiveness argument in a single sentence without identifying either Strickland prong, and meritless given that counsel did object to the admission of the photographs. (PC.11 1999-2000).[37]

The propriety of the admission of autopsy and crime scene photographs is an issue that could have been raised on direct appeal. Hence, Pooler is procedurally barred from presenting it on collateral review. See Arbelaez, 775 So.2d at 919 (finding challenge to admission of gruesome photographs procedurally barred); Muhammad, 603 So.2d at 489 (holding "[i]ssues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack").

Furthermore, he may not use a single-sentence claim of ineffective assistance of counsel (located in the issue header)[38]

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[37] A court's summary denial of a postconviction motion will be affirmed where the law and competent, substantial evidence support its findings. Diaz v. Dugger, 719 So.2d 865, 868 (Fla. 1998).

[38] Moreover, to present the ineffectiveness claim in the header without more elucidation should render the matter waived. See Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990) (opining "purpose of an appellate brief is to present arguments in support of the points on appeal" - notation to issues without elucidation is insufficient and issue will be deemed waived); Cooper v. State, 856 So.2d 969, 977 n.7 (Fla. 2003); Roberts v.

to overcome the procedural bar. See Asay, 769 So.2d at 989 (finding "one sentence" conclusory allegation that counsel was ineffective is an improper pleading and attempt to relitigate procedurally barred claims); Freeman v. State, 761 So. 2d 1055, 1061 (Fla. 2000) (holding claims that could have been raised on direct appeal cannot be relitigated under guise of ineffective assistance); Rivera, 717 So.2d at 480 n.2 (same) Cherry, 659 So.2d at 1072 (same).

However, if the merits of the ineffectiveness claim are reached, the summary denial was proper based upon the record evidence. Although unsuccessful, defense counsel challenged the admission of the photographs by written motion and when the State offered them into evidence (R.3 407-09; R.15 844; R.16 934-35). Bush, 505 So.2d at 411 (finding counsel's lack of success on actions following sound strategies "augurs no ineffectiveness of counsel"). After hearing argument of counsel, and reviewing the photographs, the court admitted the photographs concluding each appeared to depict a different wound and none appeared particularly gory (R.16 934-35). Because counsel raised a timely, albeit unsuccessful objection, he may not be deemed ineffective under Strickland. This Court should

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State, 568 So.2d 1255 (Fla. 1990). A single sentence allegation of ineffective assistance, without more, does not present a fully briefed appellate argument.

affirm.

ISSUE XII

POOLER IS NOT "INNOCENT OF THE DEATH PENALTY" AND HIS CLAIM AND REQUEST FOR AN EVIDENTIARY HEARING WERE DENIED PROPERLY (restated)

In this issue, Pooler asserts he is innocent of the death penalty, that his sentence is not proportionate given the new mitigation "discussed" elsewhere, that the trial court erred in not granting a hearing, and "[t]o the extent that trial counsel failed to adequately raise this issue" Pooler was denied effective counsel. (IB 88). The trial court denied relief summarily finding that Pooler had failed to show that none of the aggravators applied to him and that proportionality review was the duty of this Court on direct appeal and such could not be raised in the postconviction litigation in addition to Pooler's pleading deficiencies.[39] The law and competent, substantial evidence support the court's denial of relief.

Below, the court found and reasoned:

> Actual innocence of the death penalty must focus upon the applicability of all the aggravation circumstances in defendant's case, and not on additional mitigation he may have to offer. *Sawyer v. Whitley*, 505 U.S. 333, 345-46 (1992).
>
> ...

[39] A court's summary denial of a postconviction motion will be affirmed where the law and competent, substantial evidence support its findings. Diaz v. Dugger, 719 So.2d 865, 868 (Fla. 1998).

> The record in the instant case revealed that the defendant failed to demonstrate that none of the aggravators apply. What's more, on direct appeal, the Florida Supreme Court affirmed the aggravation found. *Pooler*, 704 So.2d 1378-79, 1381 (affirming HAC and prior violent felony aggravators and determining sentence proportional based in part on aggravation found in case). Because the defendant cannot overcome the Florida Supreme Court's ruling, this issue is without merit as a matter of law. *See Elledge v. State*, 911 So.2d 57 (Fla. 2005) (finding "Elledge's contention that he is innocent of the death penalty was decided adversely to Elledge on direct appeal and is not cognizable in the postconviction proceeding"); *Sochor v. State*, 883 So2d 766, 788 (Fla. 2004)(rejecting claim of "innocent of the death penalty" because the Court found on direct appeal "that the evidence supported the existence of three aggravating circumstances").
>
> Similarly, defendant's claim that his death sentence was disproportionate (S-Ex. 1 - Amended Motion at 57) must also be denied because it was resolved adversely to his position here by the Florida Supreme Court. *Pooler*, 704 So.2d at 1381. Consequently, it cannot be raised in a postconviction proceeding.
>
> Even if the aforesaid claims were cognizable in a postconviction setting, defendant's claim is insufficient because he does not explain how or why the aggravators are constitutionally infirm. He does not identify the "non-record" facts the trial court supposedly relied upon in finding that the heinous, atrocious and cruel aggravating circumstances were proven....

(PC.11 2001-02).

Below, Pooler had not argued that the felony murder aggravator did not apply to him. He again omits that argument here, hence the claim is legally insufficient because he has not shown that none of the aggravators apply. Likewise, he did not

identify what non-record evidence was used to support the HAC aggravaor, thus, again making the claim legally insufficient. Further, to the extent that this issue is one of trial court error, it is procedurally barred. See State v. Coney, 845 So. 2d 120, 137 (Fla. 2003) (rejecting as procedurally barred claim of "innocent of the death penalty" as it was in part asserting trial court error). Moreover, as pointed out by the trial court, this Court affirmed the HAC and prior violent felony aggravators, as well as proportionality on direct appeal. Pooler, 704 So.2d 1378-79, 1381. Furthermore, his single sentence reference to counsel's ineffective assistance is insufficiently pled. See Asay, 769 So.2d at 989 (finding "one sentence" conclusory allegation that counsel was ineffective is an improper pleading and attempt to relitigate procedurally barred claims). The summary denial was appropriate in this case and should be affirmed.

ISSUE XIII

THE SUMMARY DENIAL OF POOLER'S CHALLENGE TO FLORIDA'S DEATH PENALTY STATUTE AS UNCONSTITUTIONAL WAS CORRECT (restated)

Pooler asserts that he should have been granted an evidentiary hearing on his claim that Florida's capital sentencing is unconstitutional under the Eighth Amendments to the United States Constitution because it: (1) does not prevent arbitrary imposition of the death penalty; (2) does not "provide

any standard of proof for determining that aggravating circumstances 'outweigh' the mitigating factors"; (3) does not "define 'sufficient aggravating circumstances'"; (4) does not "define for the consideration each of the aggravating circumstances listed in the statute"; (5) does not "have the independent reweighing of aggravating and mitigating circumstances; (6) allows for the application of an aggravator in a vague and inconsistent manner; and (7) creates a presumption of death upon a single aggravating circumstance. According to Pooler, "[t]o the extent trial counsel failed to properly raise this issue, defense counsel rendered prejudicially deficient assistance." (IB 89-90).[40]

The trial court denied relief finding:

> (1) The defendant challenged the constitutionality of §921.141 at trial and on direct appeal (A-Ex.5 - ROA-R 96-227, 250-77, 284-98; ROA-T 171-97, 216-23). *Pooler*, 704 So.2d at 1380-81. The instant challenge is one which could have been raised on direct appeal and, to the extent that he failed to address any issues at that time, he is procedurally barred from doing so in a postconviction setting. *Muhammad*, 603 So.2d at 489.
>
> (2) The Florida Supreme Court has affirmed the constitutionality of Florida's death penalty statute on numerous occasions. *See Hunter v. State*, 660 So.2d 244, 252-53 (Fla. 1995)....

[40] A court's summary denial of a postconviction motion will be affirmed where the law and competent, substantial evidence support its findings. Diaz v. Dugger, 719 So.2d 865, 868 (Fla. 1998).

(citations omitted).

> (3) The Florida Supreme Court has recognized the death penalty is constitutional and the determination to have a death penalty is a legislative decision. *Booker v. State*, 514 So.2d 1079, 1081 (Fla. 1987).... (citation omitted)

(PC.11 2003-04).

Pooler has offered nothing to undermine the court's conclusions which were based on well settled law. This claim is legally insufficient and procedurally barred with respect to the single sentence allegation of ineffectiveness of counsel. See Asay, 769 So.2d at 989 (finding "one sentence" conclusory allegation that counsel was ineffective is an improper pleading and attempt to relitigate procedurally barred claims). This matter is procedurally barred as it could have and was raised on direct appeal. Pooler, 704 So.2d at 1380-81. See Muhammad, 603 So.2d at 489 (noting "[i]ssues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack."); Medina v. State, 573 So. 2d 293 (Fla. 1990) (opining that "[a]llegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal"). Moreover, Florida's death penalty statute has been found constitutional consistently and Pooler has offered nothing to contradict those rulings. Hunter v. State, 660 So.2d 244, 252-53 (Fla. 1995) (upholding Florida's death penalty statute

against constitutional challenges).[41] The summary denial of relief should be affirmed.

ISSUE XIV

POOLER'S CLAIM THAT RING V. ARIZONA RENDERS FLORIDA CAPITAL SENTENCING UNCONSTITUTIONAL IS PROCEDURALLY BARRED AND MERITLESS (restated)

Here, Pooler raises a Sixth Amendment challenge to §921.141 Fla. Stat. based upon Ring v. Arizona, 536 U.S. 584 (2002) on the grounds: (1) that the jury was instructed that its sentencing recommendation was merely advisory; (2) that the aggravators were not included in the indictment; (3) that the sentencing jury recommendation need not be unanimous; (4) that the aggravators must be proven beyond a reasonable doubt; and (5) that the jury must be the sentencer. As the trial court concluded,[42] the record and case law establish Pooler is entitled

[41] See Proffitt v. Florida, 428 U.S. 242, 255-56 (1976); Rodriguez v. State, 919 So.2d 1252 (Fla. 2005); Elledge v. State, 919 So.2d 57 (Fla. 2005); Griffin v. State, 866 So.2d 1, 14 (Fla. 2003); Cox v. State, 819 So.2d 705, 725 (Fla. 2002); Freeman v. State, 761 So.2d 1055, 1067 (Fla. 2000); Shellito v. State, 701 So.2d 837, 842-43 (Fla. 1997); Fotopoulos v. State, 608 So.2d 784, 794 & n. 7 (Fla. 1992).

[42] In entering its summary denial, the court reasoned:

> The Florida Supreme Court has held consistently that *Ring* does not apply to the Florida death sentence process. *See Mills v. State*, 786 So.2d 532 (Fla. 2001); *Shere v. Moore*, 830 So.2d 56 (Fla. 2003); *Porter v. Crosby*, 840 So.2d 981 (Fla. 2003).
>
> Further, both the Florida Supreme Court and the United State's Supreme Court have determined that *Ring* is not

to no relief.[43]

Ring v. Arizona, 536 U.S. 584 (2002) does not apply in Florida the statutory maximum sentence for first degree murder in Florida is death and death eligibility occurs at the time of conviction for first-degree murder. See Mills v. Moore, 786 So.2d 532 (Fla. 2001); Shere v. Moore, 830 So.2d 56 (Fla. 2003); Porter v. Crosby, 840 So. 2d 981 (Fla. 2003) (stating "we have repeatedly held that maximum penalty under the statute is death and have rejected the other Apprendi arguments" [that aggravators need to be charged in the indictment, submitted to jury and individually found by unanimous jury]). Further, Ring is not to be applied retroactively. Schriro v. Summerlin, 124 S.Ct. 2519 (2004); Johnson v. State, 904 So.2d 400 (Fla. 2005). Given that Pooler's conviction and sentence became final November 6, 1997, he cannot rely upon Ring for relief. Finally, Pooler not only has a prior violent felony conviction, but a contemporaneous felony murder finding. Pooler, 704 So.2d at 1377. Consequently, there was no Sixth Amendment violation and

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> to be applied retroactively. The defendant's conviction and sentence became final on November 6, 1997. Consequently, he cannot rely on ***Ring*** for relief in postconviction. ***Scriro v. Summerlin***, 124 S.Ct. 2519 (2004); Johnson v. State, 904 So.2d 400 (Fla. 2005).

[43] A court's summary denial of a postconviction motion will be affirmed where the law and competent, substantial evidence support its findings. Diaz v. Dugger, 719 So.2d 865, 868 (Fla. 1998).

relief must be denied. Bryant v. State, 901 So.2d 810, 823 (Fla. 2005). See Kormondy v. State, 845 So.2d 41, n. 3 (Fla. 2003) (concluding simultaneous convictions of felonies which then form basis for aggravating factor is sufficient to satisfy Ring); Jones v. Crosby, 845 So.2d 55 (Fla. 2003) (same). Relief was denied properly.

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court affirm denial of postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Bradley M. Collins, Esq. and Matthew D. Bavaro, Esq., Bradley M. Collins, P.A. 600 South Andrews Avenue, Suite 500, Fort Lauderdale, FL 33301 on this _____ day of November, 2006.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately on this 27th day of November, 2006.

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LESLIE T. CAMPBELL