IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-1998

RORY ENRIQUE CONDE,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

On July 12, 1995, Defendant was charged by indictment with the first degree murder of Lazaro Comesana, the first degree murder of Elisa Martinez, the first degree murder of Chairty Nava, the first degree murder of Wanda Crawford, the first degree murder of Necole Schneider and the first degree murder of Rhonda Dunn. (R. 1-4)[1] Prior to trial, Defendant moved to sever the counts, which was granted. (R. 65-66, 5)

The trial on the charge of the first degree murder of Rhonda Dunn commenced on September 13, 1999.[2] (R. 1070) After considering the evidence, the jury found Defendant guilty of the first degree murder of Rhonda Dunn. (R. 1218) The trial court adjudicated Defendant in accordance with the verdict. (R. 1723-24) Following a penalty phase, the jury recommended that Defendant be sentenced to death for the murder of Ms. Dunn by a vote of 9 to 3. (R. 1649)

The trial court followed the jury's recommendation and sentenced Defendant to death for the murder of Ms. Dunn. (R.

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[1] The symbols "R.," "T." and "SR." will refer to the record on appeal, corrected transcripts of proceedings and supplemental record on appeal from Defendant's direct appeal, FSC Case No. SC00-789.

[2] On April 3, 2001, Defendant entered a guilty plea regarding the remaining courts. (PCR. 37) He was sentenced to life imprisonment without the possibility of parole on each count and all of Defendant's sentences were ordered to be served consecutively. (PCR. 37)

1725-51) In support of the death sentence, the trial court found three aggravators: prior violent felonies based on Defendant's prior conviction for armed burglary, armed robbery, armed kidnapping and armed sexual battery; heinous, atrocious or cruel (HAC); and cold, calculated and premeditated (CCP). (R. 1728-32) In mitigation, the trial court found one statutory mitigator: lack of significant criminal history – moderate weight. (R. 1732-33) It found five nonstatutory mitigators: Defendant's family background in that his mother died when he was young and that he was a good and loving family member – moderate weight; Defendant's employment history – moderate weight; Defendant's mental state – little weight; Petitioner's alleged good conduct and adjustment to pretrial detention – little weight; and Defendant's relationship with his children – moderate weight. (R. 1740-41, 1744-45, 1747-48)

It considered and rejected the claims that Defendant was under the influence of extreme mental or emotional disturbance at the time of the crime, that the victim was a participant in Defendant's conduct, that Defendant acted under extreme duress at the time of the crime and that Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired at the time of the crime as mitigation. (R. 1733-40)

It further considered and rejected as mitigation Defendant's age, allegations that Defendant was raised in an abusive and neglectful environment without support, allegations that Defendant was abused as a child, assertions that Defendant was religious, Defendant's alleged remorse, Defendant's alleged potential for rehabilitation, Defendant's attempts to plead guilty in exchange for a life sentence, the fact the jury's recommendation was not unanimous and the fact that the Catholic Church and Colombian Government opposed the death penalty. (R. 1740, 1741-44, 1746-49)

Defendant appealed his conviction and sentence to this Court, raising 13 issues:

> I.
> THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S CAUSE CHALLENGES TO DEATH-PRONE JURORS FOR WHOM THERE WAS MANIFEST REASONABLE DOUBT ABOUT THEIR IMPARTIALITY.
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> II.
> THE TRIAL COURT ERRED IN STRIKING VENIRE PERSON AGUIRREGAVIRIA FOR CAUSE WHERE SHE SPECIFICALLY STATED SHE COULD VOTE FOR THE DEATH PENALTY UNDER APPROPRIATE CIRCUMSTANCES.
>
> III.
> THE CIRCUMSTANTIAL EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT [DEFENDANT'S] PREMEDITATED MURDER CONVICTION.
>
> IV.
> THE TRIAL COURT REVERSIBLY ERRED BY ADMITTING VOLUMINOUS EVIDENCE OF FIVE UNCHARGED HOMICIDES IMPERMISSIBLY RENDERING THIS EVIDENCE A FEATURE OF THE CASE AND DENYING THE DEFENDANT A FAIR TRIAL.

V.

THE TRIAL COURT REVERSIBLY ERRED IN ADMITTING IRRELEVANT AND UNFAIRLY PREJUDICIAL EVIDENCE OF (A) [DEFENDANT'S] AGGRAVATED BATTERY/FALSE IMPRISONMENT OF A WOMAN SIX MONTHS FOLLOWING THE CHARGED HOMICIDE; (B) A POLICE OFFICER'S WARNING TO DUNN THIRTY-SIX HOURS BEFORE HER DEATH REGARDING "THE TAMIAMI STRANGLER' AND (C) [DEFENDANT'S] CONCEALMENT AT THE TIME OF HIS ARREST.

VI.

THE CUMULATIVE EFFECT OF IMPROPER PROSECUTORIAL COMMENTS DURING GUILT PHASE OPENING STATEMENT AND CLOSING ARGUMENT DENIED [DEFENDANT] A FAIR TRIAL

VII.

THE TRIAL COURT ERRED IN FAILING TO SUPPRESS [DEFENDANT'S] CONFESSION WHERE (1) COERCIVE INTERROGATION RENDERED HIS CONFESSION INVOLUNTARY; (2) HIS WAIVERS OF HIS RIGHTS TO SILENCE AND COUNSEL WERE NOT KNOWINGLY, INTELLIGENTLY, OR VOLUNTARILY RENDERED; (3) POLICE FAILED TO HONOR HIS RIGHT TO A PROMPT INITIAL APPEARANCE; (4) HIS INTERROGATION VIOLATED THE VIENNA CONVENTION.

VIII.

THE EVIDENCE WAS LEGALLY INSUFFICIENT TO ESTABLISH THE AGGRAVATORS CCP AND HAC.

IX.

THE TRIAL COURT ERRONEOUSLY REJECTED STATUTORY AND NON-STATUTORY MITIGATORS.

X.

THE DEFENDANT WAS DENIED A FAIR SENTENCING HEARING AS A RESULT OF THE TRIAL COURT'S ERRONEOUS ADMISSION OF COLLATERAL CRIMES EVIDENCE AND THE PROSECUTOR'S RELATED IMPROPER ARGUMENTS.

XI.

THE TRIAL COURT ERRED IN EXCLUDING CRUCIAL DEFENSE EVIDENCE OF [DEFENDANT] BEING SEXUALLY ABUSED AS A CHILD IN VIOLATION OF HIS RIGHT TO PRESENT MITIGATION.

XII.

IMPOSITION OF THE DEATH PENALTY AGAINST [DEFENDANT] IS

CONSTITUTIONALLY DISPROPORTIONATE.

XIII.

FLORIDA'S DEATH PENALTY STATUTE VIOLATES THE UNITED STATES AND FLORIDA CONSTITUTIONS BECAUSE IT (1) DOES NOT REQUIRE NOTICE OF AGGRAVATING CIRCUMSTANCES OR (2) REQUIRE SPECIFIC JURY FINDINGS REGARDING THE SENTENCING FACTORS; (3) PERMITS A NON-UNANIMOUS RECOMMENDATION OF DEATH; (4) IMPROPERLY SHIFTS THE BURDEN OF PROOF AND PERSUASION TO THE DEFENSE; AND (5) FAILS ADEQUATELY TO GUIDE THE JURY'S DISCRETION.

Initial Brief of Appellant, FSC Case No. SC00-789.

On September 4, 2003, this Court affirmed Defendant's conviction and sentence. *Conde v. State*, 860 So. 2d 930 (Fla. 2003). This Court held that the trial court properly denied five of Defendant's cause challenges and that the error in the denial of a sixth was not reversible because Defendant was awarded two additional peremptory challenges at the time of trial. *Id.* at 938-42. It determined that the State's cause challenge had been properly granted and that the evidence was sufficient to sustain Defendant's conviction. *Id.* at 942-43. It determined that the evidence of other crimes and the warnings to Ms. Dunn was properly admitted. *Id.* at 943-50. It found the admission of evidence of Defendant's attempt to conceal himself at the time of his arrest was harmless error. *Id.* at 950. It determined that the issue regarding the comments in closing was largely unpreserved and entirely without merit. *Id.* at 950. It found the motion to suppress had been properly denied. *Id.* at

950-53.

Regarding the penalty phase, this Court held that HAC and CCP were both properly found. *Id.* at 953-55. It found that the mitigation had been properly rejected. *Id.* at 955-57. It found that the collateral crimes evidence was properly admitted and that the trial court properly excluded Chaplain Bizarro's testimony at the penalty phase. *Id.* at 957-58. It found Defendant's death sentence proportionate. *Id.* at 958-59. It determined that the Florida's capital sentencing scheme is constitutional. *Id.* at 959.

In its opinion, this Court found the facts presented at trial were:

> On January 13, 1995, [Defendant] picked up Rhonda Dunn, a prostitute, and took her to his apartment. After twice engaging in sexual relations, Dunn lay on the bed with [Defendant] for approximately five minutes and then got up to enter the bathroom. [Defendant] followed her from behind and began to manually strangle her. A struggle ensued, in which Dunn suffered numerous defensive wounds and fell to the floor with [Defendant] on top, continuing to strangle her. Dunn eventually died from asphyxiation. [Defendant] then disposed of her body by driving it to another location and leaving it on the side of the road.
>
> This sequence of events had occurred on five prior dates. On each occasion, [Defendant] picked up a prostitute, they engaged in sexual relations at his apartment, and [Defendant] then strangled the victim to death, later depositing the body along the side of a road. [FN1] This series of murders occurred over the course of six months and was preceded by the break-up of [Defendant's] marriage, which occurred when his

> wife discovered that [Defendant] was using the services of prostitutes. [Defendant] later confessed to all six murders and stated that after each murder, he knelt over the deceased body and verbally blamed the victim for his marital problems.
>
> [Defendant] was arrested in June of 1995, after fire rescue personnel discovered a woman, naked and bound in duct tape, trapped in his apartment. During the investigation of that crime, evidence was discovered in [Defendant's] apartment that linked him to the series of murders. Upon his arrest, [Defendant] was read his *Miranda* rights, consented to searches of his apartment and automobile, and consented to the taking of saliva and blood samples. He was interrogated over the course of the afternoon and evening of his arrest date but did not admit to the crimes. The next day, he was allowed to telephone his family, after which he confessed to each murder. He was charged by a six-count indictment with the first-degree murder of all six victims. The counts were severed, and his first trial, held in October 1999, was for Dunn's murder. The trial court permitted the State to introduce *Williams* [FN2] rule evidence of the other five murders. On the basis of DNA, fiber, tire, and shoe evidence, together with medical testimony and [Defendant's] confession, the jury found [Defendant] guilty of first-degree murder.
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> * * * *
>
> [FN1] The names of the victims and the dates of their deaths were: Lazaro Comesana, September 16, 1994; Elisa Martinez, October 8, 1994; Charity Nava, November 20, 1994; Wanda Crawford, November 25, 1994; Necole Schneider, December 17, 1994; and Rhonda Dunn, January 13, 1995. Each died of asphyxiation.
>
> [FN2] *Williams v. State*, 110 So. 2d 654 (Fla. 1959).

Id. at 937. Defendant sought certiorari review in the United States Supreme Court, which was denied on April 5, 2004. *Conde v. Florida*, 541 U.S. 977 (2004).

On November 12, 2003, the Office of the Attorney General sent its notice of affirmance to the Office of the State Attorney and the Department of Corrections (DOC). (PCR. 40-43)[3] On November 26, 2003, the State Attorney sent its notice of affirmance to the Miami-Dade County Police Department and the Office of the Medical Examiner. (PCR. 45-48) On January 27, 2004, DOC sent its notice of compliance and its notice that it had delivered exempt materials. (PCR. 54-57) On February 10, 2004, the Miami-Dade Police Department moved the lower court for an extension of time in which to produce its public records. (PCR. 60-61) On February 25, 2004, the lower court granted the extension until August 27, 2004. (PCR. 62) On May 19, 2004, the Miami-Dade Police Department sent its notice of compliance. (PCR. 63-64)

On September 23, 2004, Defendant made a request for additional public records to the Miami-Dade Police Department. (PCR. 65-67) He sought information regarding the qualifications and derogatory, non-administrative information from the personnel files of 24 officers and any documents regarding internal affairs investigations of these officers. *Id.* The Miami-Dade Police Department noticed its compliance with this request on February 18, 2005. (PCR-SR. 13-18)

[3] The symbol "PCR." and "PCR-SR." will refer to the record on appeal and supplemental record on appeal in this matter.

On March 23, 2005, Defendant filed his motion for post conviction relief, raising 7 claims:

I.

[DEFENDANT] HAS BEEN DENIED HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, BECAUSE ACESS TO THE FILE AND RECORDS PERTAINING TO [DEFENDANT'S] CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF FLA. R. CRIM. P. 3.852.

II.

THE APPLICATION OF THE NEW RULE 3.851 TO [DEFENDANT] VOLATES HIS RIGHTS TO DUE PROCESS OF LAW AND EQUAL PROTECTION.

III.

[DEFENDANT] WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. TRIAL COUNSEL FAILED TO OBJECT TO PORTIONS OF THE STATE'S CLOSING ARGUMENT WHEREIN SUCH ARGUMENTS AMOUNTED TO PROSECUTORIAL MISCONDUCT WHICH OCCURRED EXCLUSIVELY DURING THE PROSECUTOR'S CLOSING ARGUMENT TO THE JURY. AS A RESULT, THE DEATH SENTENCE IS UNRELIABLE.

IV.

[DEFENDANT] WAS DENIED AN ADEQUATE ADVERSARIAL TESTING AT THE SENTENCING PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE MITIGATING EVIDENCE AND TO ADEQUATELY CHALLENGE THE STATE'S CASE. AS A RESULT, THE DEATH SENTENCE IS UNRELIABLE.

V.

[DEFENDANT'S] SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED DUE TO THE FALLOUT EFFECT OF THE WITHDRAWN PLEA AS IT AFFECTED HIS ABILITY TO COLLECT AND PRESENT MITIGATING INFORMATION DURING HIS SENTENCING PHASE. AS A RESULT, THE DEATH SENTENCE IS UNRELIABLE.

VI.

THE FLORIDA CAPITAL SENTENCING PROCEDURES AS EMPLOYED IN [DEFENDANT'S] CASE VIOLATED HIS SIXTH AMENDMENT RIGHT TO HAVE UNANIMOUS JURY RETURN A VERDICT ADDRESSING HIS GUILT OF ALL THE ELEMENTS NECESSARY FOR THE CRIME OF CAPITAL FIRST DEGREE MURDER.

VII.

[DEFENDANT] IS DENIED HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND UNDER THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION BECAUSE EXECUTION BY ELECTROCUTION AND/OR LETHAL INJECTION IS CRUEL AND UNUSUAL PUNISHMENT.

(PCR. 68-95) Claim III was predicated on counsel's failure to object to comments in closing argument. (PCR. 74-77) Claim IV was based on the failure to have discovered Chaplain Bizarro earlier and on the failure to take step to present the testimony of family members from Colombia. (PCR. 77-82) Claim VII was based on a report from an anti-death penalty organization. (PCR. 91-93)

The lower court held a *Huff* hearing on October 12, 2005. (PCR. 796-823) At the beginning of the hearing, Defendant acknowledged that he had received all of the public records and withdrew Claim I. (PCR. 799) Defendant stood on his pleading regarding Claim II. (PCR. 800-01) The lower listened to argument regarding why an evidentiary hearing should be held on Claim III and reserved ruling. (PCR. 801-08) After listening to argument on Claim IV, it granted an evidentiary hearing

regarding the failure to present the family members and the failure to provide Chaplain Bizarro's statement to the mental health experts but denied a hearing on why Chaplain Bizarro was not discovered earlier. (PCR. 808-11) It denied Claim V as procedurally barred and insufficiently plead. (PCR. 811-13) It also summarily denied Claim VI and VII. (PCR. 813-17) At the end of the hearing, the lower court decided that it would hear evidence on Claim III at the evidentiary hearing. (PCR. 817) It tentatively scheduled the evidentiary hearing for February 17, 2006. (PCR. 818-22)

On February 7, 2006, the State moved the lower court to require Defendant to provide a witness list and reports of experts and to make his witnesses available for deposition. (PCR. 724-26) The State made its request because Defendant had recently indicated that he needed a continuance of the evidentiary hearing because his experts were still working on the case. *Id.* The lower court granted the State's motion, reset the evidentiary hearing for July 25, 2006, and set a discovery cutoff date of May 16, 2006. (PCR. 733)

On June 19, 2006, Defendant served a witness list that listed three witnesses who were titled "Non Expert Witnesses." (PCR. 731-32) Regarding one of the witnesses (Marlene Vargas), Defendant listed an address in Colombia, indicated that she did

not have a visa and requested that the State schedule a video deposition. *Id.* Regarding the other two witnesses, Defendant indicated he had no present addresses. *Id.*

The State then filed a motion to compel compliance with the lower court's discovery order. (PCR. 733-36) It argued that the list was deficient because no expert witnesses were listed on the list despite the fact that the matter had been continued so that expert witnesses would be available. *Id.* It further noted that the request that the State schedule a video deposition of Ms. Vargas was improper, as it did not appear that Ms. Vargas would be testifying at the evidentiary hearing and there had been no request to perpetuate her testimony. *Id.*

On July 5, 2006, Defendant moved to perpetuate the testimony of Ms. Vargas. (PCR. 737-38) He claimed that she was an essential witness to the claim considering the alleged plea offer (Claim V) and to the existence of Chaplain Bizarro. *Id.* The lower court granted the motion to perpetuate but the perpetuation never occurred because Ms. Vargas could not be located. (PCR. 869) On July 6, 2006, Defendant filed an updated witness list, providing addresses for the two other previously listed witnesses and adding another non expert witness. (PCR. 741-42)

On August 21, 2005, the State moved to exclude the

testimony of Manuel Alvarez. (PCR. 746-49) In the motion, the State asserted that Defendant had provided Mr. Alvarez's name as an expert witness he intended to call at the evidentiary hearing. *Id.* The State noted that Mr. Alvarez was an attorney who was being called as an expert on attorney performance, which was not the proper subject of expert testimony. *Id.* On August 22, 2006, Defendant served a written response to this motion, acknowledging that Mr. Alvarez was being called as an expert in attorney performance and arguing that such testimony was properly admissible. (PCR-SR. 10-12)

The evidentiary hearing finally commenced on August 31, 2006. (PCR. 824-26) At the beginning of the hearing, the lower court heard argument on the motion to exclude Mr. Alvarez. (PCR. 827-36) After doing so, it granted the State's motion and excluded the testimony of Mr. Alvarez. (PCR. 836)

Defendant then called Martha Galindo, a friend of Defendant and his family from when Defendant was in school in this country. (PCR. 845-46) Ms. Galindo testified that she heard of Defendant's arrest from the news and went to see Defendant's family. (PCR. 847) When the matter was pending pretrial, she visited Defendant almost every weekend in jail. (PCR. 847-48) During these visits, Defendant told Ms. Galindo that he was meeting with a pastor before he saw her on Saturdays. (PCR.

848) Ms. Galindo believed that the pastor was important to Defendant because he seemed calmer after speaking to the pastor. (PCR. 848) Ms. Galindo stated that she encouraged Defendant to speak to the pastor. (PCR. 850)

Ms. Galindo stated that she spoke pretrial to Laura Blankman, Defendant's investigator, and told her about the pastor. (PCR. 849, 854) She did not meet with the attorneys. (PCR. 850)

Ms. Galindo stated that Defendant's family was happy when they heard about the possibility of a plea agreement. (PCR. 851) She stated that when she heard that a plea would not be possible, she became disillusioned and lost interest in the case. (PCR. 851-52) She claimed that she abandoned her attempts to assist his family in locating people who knew Defendant. (PCR. 852-53) She claimed that other friends, particularly Defendant's best friend William, also lost interest in the case and lost contact with Defendant. (PCR. 853)

On cross, Ms. Galindo stated that she knew Defendant had been abused as a child because Olga Hervis told her. (PCR. 855) Ms. Galindo admitted that Defendant never told her he was abused. (PCR. 855)

Ms. Galindo claimed that she lost interest in the case because she could not do anything. (PCR. 857) She admitted

that William could not be located at the time of trial because he had moved, which was unrelated to the plea. (PCR. 857-58)

Jennie Carrazana, Defendant's sister, testified that she visited Defendant as often as she could when he was detained pretrial. (PCR. 860-61) During these visits, Defendant frequently mentioned that he was visited by a priest. (PCR. 861) Ms. Carrazana believed that the priest was important to Defendant because he mentioned visiting with him. (PCR. 861) She believed that Defendant had a good relationship with the priest and was turning his life around. (PCR. 861-62)

Ms. Carrazana met with Rafael Rodriguez, one of Defendant's trial counsel, for a few minutes before trial in the courthouse. (PCR. 862, 863, 864, 865) She did not tell him about the priest because counsel did not ask. (PCR. 862) She also met with Ms. Blankman for half an hour pretrial but did not tell her about the priest either for the same reason. (PCR. 863, 865)

On cross, Ms. Carrazana stated that she knew that Ms. Blankman was Defendant's investigator and was interviewing her to get information for Defendant's attorneys. (PCR. 866) She recalled that the subject of their discussion was Defendant's background. (PCR. 866-67)

Nelly Conde, another of Defendant's sisters, testified that she was in Colombia when Defendant was arrested and returned to

this country after she heard of the arrest. (PCR. 871-72) Ms. Conde met with Defendant's attorneys a number of times before trial. (PCR. 872) Jeffrey Fink, Defendant's other trial attorney, asked her to provide him with the names of Defendant's family and friends both in Colombia and this country. (PCR. 872-73) Ms. Conde averred that she enlisted the assistance of Ms. Galindo in this effort. (PCR. 873) Ms. Conde acknowledged that she also met with Laura Blankman, Defendant's investigator, who questioned her about family members and friends. (PCR. 874) She further stated that she was interviewed by Olga Hervis and knew that Ms. Hervis also interviewed Defendant, their father and Ms. Galindo. (PCR. 874)

Ms. Conde stated that she had visited Defendant every Saturday during his detention. (PCR. 875) During these visits, Defendant told Ms. Conde that he met with a chaplain named Dan Bizarro every Saturday before he saw her. (PCR. 875-76) Ms. Conde believed that Defendant had developed a relationship with Chaplain Bizarro and that Chaplain Bizarro was important to Defendant. (PCR. 876)

Ms. Conde claimed that she, other family members and Defendant were all interviewed together pretrial by Ms. Hervis. (PCR. 876-78) During this interview, Ms. Hervis asked Defendant about being sexually abused as a child. (PCR. 877) Ms. Hervis

attempted to get Defendant to name the person who allegedly abused him. (PCR. 877) Ms. Conde claimed that when Ms. Hervis asked about their uncle Carlos, Defendant started to cry and refused to speak anymore. (PCR. 877) Ms. Conde also claimed to have been present before trial when Ms. Hervis was told that Defendant had discussed the allegations of sexual abuse with Chaplain Bizarro. (PCR. 878-79) She also claimed to have been informed that Ms. Hervis told Ms. Blankman about Chaplain Bizarro and his knowledge of alleged sexual abuse. (PCR. 879-80) Ms. Conde averred that she then gave Ms. Blankman the name of the chaplain. (PCR. 880)

Ms. Conde stated that her brother told her that he had been offered a plea to life imprisonment. (PCR. 880) Ms. Conde claimed that Defendant was willing to accept the offer. (PCR. 880-81) She claimed that after the plea was no longer possible, she lost faith in the system. (PCR. 881) She averred that other family members and friends quit asking about the court proceedings, although they continued to provide support. (PCR. 881) She further asserted that she quit trying to get names for the defense. (PCR. 882)

On cross, Ms. Conde stated that she had not told Ms. Hervis before trial that Defendant had discussed allegations of sexual abuse with Chaplain Bizarro. (PCR. 884) Instead, she claimed

that she had simply given Ms. Hervis Chaplain Bizarro's name as someone with whom Defendant talked. (PCR. 884) Ms. Conde then claimed that Defendant had told Ms. Hervis that he discussed allegations of sexual abuse with Chaplain Bizarro before trial. (PCR. 884-85) Ms. Conde claimed that Defendant told her about this disclosure after it occurred but before trial. (PCR. 886-87) Ms. Conde asserted that she did not testify about any knowledge of any sexual abuse allegations at trial because she was not asked. (PCR. 887)

Ms. Conde insisted that Defendant's friend William moved away and did not testify at trial. (PCR. 888-89) When confronted with the fact that the record contained William's testimony, Ms. Conde stated that she could not explain the discrepancy except to state that she was not present for the entire trial. (PCR. 889) She claimed not to have realized that numerous penalty phase witnesses had been presented at trial. (PCR. 889)

Ms. Conde admitted that the attorneys questioned her extensively about the hardships in Defendant's childhood. (PCR. 890-91) However, she continued to insist that she never discussed the sexual abuse allegations with the attorneys because she was not directly asked about them. (PCR. 891)

After Defendant rested, the State called Jeffrey Fink,

Defendant's lead trial counsel. (PCR-SR. 6) Mr. Fink testified that he first learned of the existence of Chaplain Bizarro after the guilt phase but probably before the penalty phase. (PCR-SR. 6) Mr. Fink did not recall who alerted him to the existence of Chaplain Bizarro. (PCR-SR. 6)

Mr. Fink did recall that he subpoenaed correctional officers from the Metro West Pretrial Detention facility on December 7, 1999, in an attempt to present evidence that Defendant had behaved well during his pretrial incarceration. (PCR-SR. 6) He had received the names of the officers to subpoena from either Defendant or Laura Blankman. (PCR-SR. 6)

Ms. Blankman was a mitigation specialist with Roy Matthews and Associates. (PCR-SR. 6) She had been employed by counsel to gather records concerning Defendant and assist in formulating a penalty phase defense. (PCR-SR. 6)

On December 8, 1999, which was during the penalty phase of the trial, Chaplain Bizarro appeared in response to the subpoena. (PCR-SR. 6) Mr. Fink first met with Chaplain Bizarro outside of the courtroom. (PCR-SR. 6) Through this meeting, Mr. Fink learned that Defendant had disclosed that he had been abused as a child. (PCR-SR. 6) Chaplain Bizarro told Mr. Fink that Defendant had revealed, very early on in his relationship with Chaplain Bizarro, that Defendant had been sexually abused

as a child. (PCR-SR. 6)

Mr. Fink stated that he had focused his investigation on whether Defendant had been sexually abused as a young person early in his representation of Defendant. (PCR-SR. 6) He did so even though Defendant initially denied such victimization. (PCR-SR. 6) The defense attorneys, Ms. Blankman and Dr. Golden had always believed that there had to be something such as childhood sexual abuse that led him to commit these crimes. (PCR-SR. 6) To further this investigation, Mr. Fink retained Dr. Fred Berlin because of his excellent credentials and his specialization in sex crimes cases. (PCR-SR. 6) He did not tell Dr. Berlin his defense theory. (PCR-SR. 6) Instead, he asked Dr. Berlin look for what was in Defendant's psyche that may have lead him to commit the crimes. (PCR-SR. 6) Mr. Fink also had Ms. Blankman and psychotherapist/social worker, Olga Hervis, interview Defendant, together and extensively. (PCR-SR. 6)

Within a day or two of November 30, 1999, Defendant finally admitted to Ms. Hervis that he had been abused. (PCR-SR. 6) Ms. Hervis then informed Ms. Blankman, who in turn informed Mr. Fink. (PCR-SR. 6) This was the first time that Defendant or anyone else had provided factual support for a claim that he had been abused. (PCR-SR. 6) Prior to this revelation, all of the information the defense had regarding sexual abuse merely showed

that it was possible that Defendant may have been abused. (PCR-SR. 6)

Dr. Berlin's testimony was focused on showing that Defendant suffered from a condition that led to his situation. (PCR-SR. 6) However, Defendant's lack of a history of sexual deviancy prior to the crime was contrary to the norm. (PCR-SR. 6) Dr. Berlin opined that Defendant was suffering from severe depression and that the depression may have resulted from sexual abuse in childhood. (PCR-SR. 6)

If Defendant had admitted to being sexually abused years before trial, Mr. Fink would have provided information about the abuse to Dr. Golden, Dr. Berlin, Ms. Hervis, and others at the time of the disclosure. (PCR-SR. 6)

On cross examination, Mr. Fink confirmed that he always suspected that Defendant had been sexually molested as a child. (PCR-SR. 7) He had this suspicion because he did not believe that Defendant had the character to kill in cold blood. (PCR-SR. 7)

However, Mr. Fink had difficulty in obtaining evidence of Defendant's background. (PCR-SR. 7) Defendant was from Colombia. (PCR-SR. 7) The State Department had issued a warning about traveling to Columbia. (PCR-SR. 7) Moreover, many of Defendant's family members had moved, died, or had otherwise become

unavailable. (PCR-SR. 7) Additionally, one family member was controlling the contact with the other family members and friends, and many of the family members and friends were fearful of Defendant's alleged abuser, his Uncle Carlos de Andres. (PCR-SR. 7) However, Defendant's wife's family, particularly Defendant's father-in-law, was very cooperative. (PCR-SR. 7)

In addition, Mr. Fink found that it is difficult to probe psychological issues that people do not want to disclose. (PCR-SR. 7) People do not disclose their dark secrets to people they do not trust. (PCR-SR. 7) Moreover, there was a cultural barrier to having Defendant reveal that he was sexually abused. (PCR-SR. 7) In an attempt to overcome these obstacles, Mr. Fink retained Ms. Blankman because she was trained to deal with people, people liked her, and people would open up to her. (PCR-SR. 7)

Mr. Fink acknowledged that it is imperative to speak with a defendant's spiritual advisor in developing mitigation if the attorney becomes aware that the defendant was speaking to a spiritual advisor. (PCR-SR. 7) Mr. Fink spoke with, and wrote, Defendant at least six times a year. (PCR-SR. 7) He did not recall Defendant wearing a cross, and was unsure if he ever saw Defendant carrying a Bible. (PCR-SR. 7) He was not sure if he asked Defendant if he was seeking spiritual advice, but his notes did not reflect such a question. (PCR-SR. 7)

Chaplain Bizarro was not a lay person. (PCR-SR. 7) He was ordained or, at least, had some religious training. (PCR-SR. 7) As a result, Chaplain Bizarro refused to speak to Mr. Fink until Defendant consented to him doing so. (PCR-SR. 7)

Mr. Fink stated that his main contact with Defendant's family was through Defendant's sister, Nellie. (PCR-SR. 7) Mr. Fink met with Nellie frequently. (PCR-SR. 7) Mr. Fink did not recall asking Nellie, Jenny Conde, or Martha Galindo, who was assisting Nellie, about the identity of Defendant's priest. (PCR-SR. 7) However, both Mr. Fink and Ms. Blankman did speak to the family at length about the identity of any confidant of Defendant. (PCR-SR. 7)

Defendant then attempted to ask Mr. Fink about an incident concerning a plea offer. (PCR-SR. 7) The State objected that the question was beyond the scope. (PCR-SR. 7) The trial court sustained the objection. (PCR-SR. 7)

On redirect examination, Mr. Fink stated that he believed that his secretary probably informed Chaplain Bizarro of why he was being called as a witness. (PCR-SR. 7) Mr. Fink did recall that Chaplain Bizarro indicated that he needed Defendant's permission before relating anything that Defendant had told him because he believed it to be privileged. (PCR-SR. 7) After reviewing Chaplain Bizarro's testimony about his interaction

with counsel and Defendant from page 9020 of the trial transcript, Mr. Fink stated that there was a time period between when he learned of the existence of Chaplain Bizarro and when Chaplain Bizarro agreed to speak to Mr. Fink. (PCR-SR. 7)

After Mr. Fink's testimony was complete, the State next called J. Rafael Rodriguez, Defendant's other trial counsel. (PCR-SR. 7) Mr. Rodriguez testified that he and Mr. Fink worked hand in hand on both phases of the trial. (PCR-SR. 7)

Mr. Rodriguez, who is fluent in Spanish, also stated that he received a list of Defendant's family members in Colombia from Defendant's sister, Nellie. (PCR-SR. 8) During the summer of 1999, Mr. Rodriguez traveled to Baranquilla, Colombia with Laura Blankman, who was not fluent in Spanish, and spent five days interviewing family members. (PCR-SR. 8) At that time, Colombia was in the midst of a guerilla war. (PCR-SR. 8) As a result of the fighting, Mr. Rodriguez and Ms. Blankman remained at a hotel in Baraquilla to meet with the family members. (PCR-SR. 8) The ability to interview the family about sexual abuse was further complicated by the fact that the family members were poor and looked to Defendant's uncle, the alleged abuser, for financial support. (PCR-SR. 8) Defendant's uncle had recently won the Colombia lottery. (PCR-SR. 8) This lack of finances also prevented the defense from presenting the family members' live

testimony at the penalty phase, as did the family members' lack of the visas necessary to travel to the United States. (PCR-SR. 8)

In addition to the information gathered by Mr. Rodriguez and Ms. Blankman in Colombia, Olga Hervis, a family systems analyst, was retained. (PCR-SR. 8) Ms. Hervis received family information for Colombia and made additional calls to the family there. (PCR-SR. 8) Ms. Hervis was assisted by Ms. Zapata, a psychologist and the sister-in-law of Carlos de Andres. (PCR-SR. 8) Mr. Rodriguez believed that someone had spoken to all the relevant family members in an attempt to get background information about Defendant. (PCR-SR. 8)

Mr. Rodriguez first learned of the existence of Chaplain Bizarro during the actual conduct of the trial of the penalty phase. (PCR-SR. 8) A few weeks before the penalty phase began, Mr. Fink sent Ms. Blankman to the jail to interview witnesses who could provide information relevant to Defendant's lack of future dangerousness while incarcerated. (PCR-SR. 8) Ms. Blankman had reported that she had run into Chaplain Bizarro during this visit and that Chaplain Bizarro had stated that he had very good information about Defendant. (PCR-SR. 8) Chaplain Bizarro told Ms. Blankman that he had spoken to Defendant approximately six months after Defendant's arrest and that

Defendant had admitted to Chaplain Bizarro that he had been the victim of sexual abuse. (PCR-SR. 8)

Defendant had also admitted sexual abuse to Ms. Hervis. (PCR-SR. 8) However, this admission only occurred immediately before the penalty phase. (PCR-SR. 8) Ms. Hervis had previously had several sessions with Defendant before he broke down and admitted that his Uncle Carlos had sexually abused him. (PCR-SR. 8)

On cross examination, Mr. Rodriguez testified that he became the second chair attorney near the end of 1995. (PCR-SR. 8) He stated that Defendant had been arrested in June of that year. (PCR-SR. 8) As a second chair attorney, Mr. Rodriguez split responsibility for both phases of the trial with Mr. Fink. (PCR-SR. 8)

Defendant never admitted that he had been sexually abused as a child to either Mr. Rodriguez or Mr. Fink. (PCR-SR. 8) However, Mr. Rodriguez had suspected that Defendant had been sexually abused as a child. (PCR-SR. 8) This suspicion arose as a result of Mr. Rodriguez's interviews in Colombia. (PCR-SR. 8) During those interviews, a neighbor had informed Mr. Rodriguez that he thought his son had been abused by Alfredo, who shared a room with Defendant. (PCR-SR. 8) As a result, the attorneys suspected that Defendant may have been abused as well. (PCR-SR.

8)

Mr. Rodriguez stated that he had been an attorney for 26 years. (PCR-SR. 8) During that time, Mr. Rodriguez had represented many Hispanic defendants. (PCR-SR. 8) He was aware that Hispanic defendants were reluctant to admit sexual abuse, as there was a cultural taboo about disclosing abuse. (PCR-SR. 8)

The experts also suspected that there was something undisclosed in Defendant's background because Defendant's actions were not normal. (PCR-SR. 9) Sexual abuse was a potential area of undisclosed trauma. (PCR-SR. 9) This was especially true because these were sexually motivated crimes. (PCR-SR. 9) As a result, Mr. Rodriguez was of the opinion that sexual abuse would have been a powerful mitigator in this case. (PCR-SR. 9) As such, Mr. Rodriguez and the defense team had interviewed as many family members and friends as possible about sexual abuse. (PCR-SR. 9)

Mr. Rodriguez did not recall specifically asking either Defendant or his sister Nellie about the identity of Defendant's priest. (PCR-SR. 9) Defendant had never indicated that his religious life was significant, and Mr. Rodriguez had not perceived Defendant as a particularly spiritual person. (PCR-SR. 9) Further, Mr. Rodriguez had instructed Defendant not to speak

to anyone in the jail. (PCR-SR. 9) However, Mr. Rodriguez acknowledged that it was possible that Defendant might have unburdened himself to a priest. (PCR-SR. 9)

Mr. Rodriguez was not keen on the use of questionnaires. (PCR-SR. 9) Instead, he preferred to sit down with people and take his own notes. (PCR-SR. 9) He did not have any notes indicating that he asked anyone about the identity of a priest or spiritual advisor. (PCR-SR. 9) However, he had questioned people about religion generally. (PCR-SR. 9) The responses he received indicated that Defendant did not have a church-going background. (PCR-SR. 9) As such, Mr. Rodriguez did not get into the issue of a priest or spiritual advisor. (PCR-SR. 9)

After presenting Mr. Rodriguez's testimony, the State rested, and Defendant indicated he had no rebuttal. (PCR-SR. 9) Defendant then presented his closing argument. (PCR-SR. 9) In the argument, Defendant asserted that Mr. Fink testified that the experts told counsel that they suspected that Defendant had been sexually abused as a child because there was no evidence of sexual deviance in Defendant's background and something must have triggered Defendant's behavior. (PCR-SR. 9) Because the guilt phase evidence was overwhelming, counsel should have focused their efforts in developing mitigation. (PCR-SR. 9) Knowing that Dr. Berlin believed that Defendant had to have been

abused as a child and that the family in Colombia did not provide the information, counsel should have sought to locate someone else in whom Defendant would have confided. (PCR-SR. 9) As such, to be effective, the attorneys should have asked about the identity of Defendant's priest or spiritual advisor. (PCR-SR. 9) By failing to do so, counsel were ineffective. (PCR-SR. 9)

In its closing argument, the State responded that the evidentiary hearing had been limited to the issue on which the lower court had granted a hearing after the *Huff* hearing. (PCR-SR. 9) It argued that most of the testimony, which it summarized, was not directed to those issues. (PCR-SR. 9) It asserted that Nellie's testimony was not credible. (PCR-SR. 9) The State pointed to the inconsistencies between Nellie's testimony about the disclosure of sexual abuse before trial on direct and cross and Ms. Hervis's testimony. (PCR-SR. 9) It asserted that the attorneys had no indication that would have caused them to have known what Defendant told to a priest or advisor, who refused to disclose Defendant's confidences until after Defendant made a waiver during trial. (PCR-SR. 9) Instead, counsel did conduct a reasonable investigation into Defendant's background by going to Colombia and interviewing family members and friends. (PCR-SR. 9) The fact that the investigation was

hampered by a guerilla war and the economic condition of the family did not make the investigation unreasonable. (PCR-SR. 9)

On September 22, 2006, the lower court entered its written order denying Defendant's motion for post conviction relief. (PCR. 778-89) It found that the public records claim was insufficiently plead and had been withdrawn at the *Huff* hearing. (PCR. 781) It determined that the claim about the constitutionality of Fla. R. Crim. P. 3.851 was without merit as a matter of law. *Id.* It found that Defendant had not presented any evidence in support of Claim III and that this Court's ruling on direct appeal showed there was no prejudice. (PCR. 782) It determined that Defendant had failed to prove that counsel was ineffective during the penalty phase. (PCR. 782-85) It found that the claim about the alleged plea offer was insufficiently plead, the evidence presented at the evidentiary hearing did not prove the claim and the record refuted the claim. (PCR. 785-86) It determined that the *Ring* claim was procedurally barred and meritless, and that the execution claim was without merit as a matter of law. (PCR. 786-88)

This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court properly denied the claim that counsel was ineffective for failing to object to comments in closing. The claim is procedurally barred and meritless and Defendant failed to prove the claim after being given an evidentiary hearing on it.

The trial court did not abuse its discretion in excluding the testimony of Manual Alvarez. The proffered subject of the testimony would have concerned an issue of law and would not have aided the trier of fact.

The lower court properly denied the claim of ineffective assistance of counsel at the penalty phase after an evidentiary hearing. The lower court's findings of fact are support by competent, substantial evidence and it properly applied the law to those facts.

The lower court properly denied the claim regarding the plea offer. The claim is procedurally barred, insufficiently plead, refuted by the record, unproven, and without merit as a matter of law. The *Ring* claim was properly denied as procedurally barred and meritless.

ARGUMENT

I. THE LOWER COURT PROPERLY DENIED THE CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO COMMENTS DURING THE STATE'S CLOSING ARGUMENT.

Defendant first asserts that the lower court erred in denying his claim that his counsel was ineffective for failing to object to comments in closing. Defendant claims that the prosecutor's comments disparaged defense counsel and the defense theory. Defendant argues only a portion of the claim made below, based on those comments that were not specifically raised on direct appeal. Therefore, to the extent Defendant has not briefed his arguments regarding other comments in closing, he has waived review of the trial court's ruling. *See Anderson v. State*, 822 So. 2d 1261, 1268 (Fla. 2002).

Here, the lower court denied this claim after an evidentiary hearing, stating:

> Defendant alleges counsel was ineffective by failing to object to numerous comments made by the prosecutor during closing arguments. At the evidentiary hearing, counsel for Defendant stated that he was standing on his motion on this issue.
>
> The Florida Supreme Court reviewed the arguments for fundamental error and concluded that no fundamental error occurred. *Conde*, 860 So. 2d at 950. As such, Defendant cannot show prejudice pursuant to *Strickland*, supra.
>
> This claim is denied.

(PCR. 782)

This claim was properly summarily denied as it is procedurally barred. This Court has repeatedly held that where a claim was raised and decided on direct appeal, it cannot be re-litigated in a post conviction proceeding again under the guise of ineffective assistance of counsel. *Lugo v. State*, 33 Fla. L. Weekly S824, S829-30 (Fla. Oct. 8, 2008); *Preston v. State*, 970 So. 2d 789, 805 (Fla. 2007); *Franqui v. State*, 965 So. 2d 22, 35 (Fla. 2007); *Miller v. State*, 926 So. 2d 1243 (Fla. 2006); *Freeman v. State*, 761 So. 2d 1055, 1067 (Fla. 2000). In fact, in *Robinson v. State*, 707 So. 2d 688, 697-99 (Fla. 1998), this Court directly held that claims regarding the propriety of comments in closing and the effective assistance of counsel for failing to object to comments in closing to be procedurally barred "[a]s a matter of law." Moreover, this Court has held that relying on different grounds or arguments regarding an issue that was raised and rejected as a claim of ineffective assistance of counsel does not lift the bar. *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1991); *see also Harvey v. Dugger,* 656 So. 2d 1253, 1256 (Fla. 1995); *Turner v. Dugger,* 614 So. 2d 1075, 1077 (1992).

Here, Defendant raised the issue of the propriety of comments in closing on direct appeal. (Initial Brief, SC00-789,

at 57) While Defendant pointed to other comments,[4] he alleged the same impropriety regarding the comments, that the comments were improper attacks on the defense, specifically that the defense was trying to lead the jury down a different road. This Court rejected the argument, specifically finding:

> [Defendant] argues error in the . . . prosecutor's alleged personal attacks on defense counsel. . . . [W]e find that the essential premise of the prosecutor's argument, that the defense's focus on certain issues was designed to lead the jury down the wrong road, was not improper. *See Rimmer v. State,* 825 So.2d 304, 324 n. 16 (Fla.), *cert. denied,* 537 U.S. 1034, 123 S. Ct. 567, 154 L. Ed. 2d 453 (2002).

Conde, 860 So. 2d at 950 n.12. As the propriety of the prosecutor's comments that Defendant was leading the jury down the wrong road was raised and rejected on direct appeal based on the "essential premise" of the prosecutor's whole argument, the lower court properly determined that Defendant's present claim is barred and that raising the claim in the guise of ineffective assistance of counsel relying on different comments did not lift the bar. (PCR. 782) It should be affirmed.

Moreover, to the extent Defendant argues this claim as if it were an appeal from a summary denial, this is not true. At the *Huff* hearing, the lower court granted an evidentiary hearing. (PCR. 817) The lower court then proceeded with the

[4] The comments raised on direct appeal dealt with references to two cross examinations and comments regarding the DNA evidence. (Initial Brief, SC00-789 at 57)

evidentiary hearing it had ordered. (PCR. 826) However, during his opening statement, Defendant indicated that he was standing on his motion. (PCR. 842-43) The lower court denied this claim partially based on this refusal and the resultant failure by Defendant to carry his burden of proof. (PCR. 782) The order denying the motion explains that Defendant refused to present evidence and chose to stand on his pleadings at the evidentiary hearing. (PCR. 782) Under these circumstances, it cannot be said that the claim was summarily denied. *See Owen v. State*, 773 So. 2d 510, 513-14 (Fla. 2000).

Furthermore, denying this claim because Defendant refused to proceed with an ordered evidentiary hearing is entirely proper. This Court has held that defendants bear the burden of proof at post conviction hearing and that they must present evidence beyond mere speculation to carry that burden. *Maharaj v. State*, 778 So. 2d 944, 951 (Fla. 2000); *Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983). In *Owen*, this Court held that a defendant who refuses to proceed and present evidence at an ordered evidentiary hearing waives the claims for relief upon which an evidentiary hearing was ordered. 773 So. 2d at 513-14; *see also Ferrell v.* State, 918 So. 2d 163, 173-74 (Fla. 2005). Here, the lower court granted Defendant an evidentiary hearing on Claim III. Defendant declined to present evidence at the

evidentiary hearing and chose to stand on his pleading. (PCR> 842-43) As such, he did not carry his burden of proof and waived this claim. The denial of the claim should be affirmed.

Additionally, the claim was properly denied because the claim is meritless. Counsel is not deficient where the comments made were not objectionable. *Jones v. State*, 949 So. 2d 1021, 1031-32 (Fla. 2006). Furthermore, comments that do not constitute reversible error cannot establish the prejudice necessary to demonstrate an ineffective assistance of counsel claim. *Lugo*, 33 Fla. L. Weekly at S829.

The first comment came after the prosecutor's repetition of the defense's request that the jury "do the right thing" by rendering a true verdict and fully stated: "At the beginning of this case you took an oath. You may not remember the words in it, but it was to render a true verdict according to the law and the evidence. It didn't say render a true verdict according to some theory or some plan or something the lawyers come up with, just the law that the Judge is going to tell you at the end of the case and the evidence." (T. 7766-67) Thereafter, the prosecutor explained that the evidence was the testimony and exhibits admitted during the case. (T. 7767) This is a completely proper explanation that the jury's duty is to follow the law provided by the judge and apply it to the evidence

presented to them during the trial. *See Smith v. State*, 699 So. 2d 629, 235-36 (Fla. 1997) (competent juror standard is to follow law and apply it to the facts).

The second comment was also an appropriate argument to the jury that it should focus on the evidence presented and issues to be decided in the case. After explaining that the State's purpose was to drive reasonable doubt from the jurors' minds, the prosecutor commented that the jurors should deliberate as to whether something was said by the lawyers or was said by the witness and whether it was said to help them make a decision or to "distract [them] from the true issues in this case." (T. 7769) This argument was proper response to the cross examinations conducted and the arguments previously made by Defendant wherein Defendant attempted to impeach the State's witnesses and argue about the mistakes made by the police, medical examiners and forensics, and arguments that the evidence was not credible. *See Pace v. State*, 854 So. 2d 167, 179 (Fla. 2003); *Garcia v. State*, 644 So. 2d 59, 62-63 (Fla. 1994).

The third comment regarded how the issue being decided in the case was who killed Rhonda Dunn, and not the quality of the witnesses or whether the police did a good or lousy job investigating the case, wherein the prosecutor argued that nothing Defendant presented had anything to do with who killed

Rhonda Dunn. (T. 7816) This was appropriate reply to Defendant's arguments as stated previously. *Pace*, 854 So. 2d at 179; *Garcia*, 644 So. 2d at 62-63. Likewise, it was appropriate commentary regarding the attempts to steer the jury away from the real issue it had to decide. *Conde*, 860 So. 2d at 950 n.12.

Finally, the comment regarding an attorney's ability to change white to black was appropriate analogy regarding Defendant's attempts to get the jury to not examine the real issues in the case. (T. 7820-21) The prosecutor was asking the jury to focus on the issues and determinations it was going to be making; not Defendant's attempts to distract them from the real issues. *Rimmer v. State*, 825 So. 2d 304, 324 n.16 (Fla. 2002); *White v. State*, 377 So. 2d 1149, 1150 (Fla. 1979) ("[i]t is proper for a prosecutor in closing argument to refer to the evidence as it exists before the jury and to point out that there is an absence of evidence on a certain issue").

Accordingly, the comments were completely appropriate argument regarding Defendant's attempts to steer the jury down the wrong path and the jury's true duty in deciding the case, as this Court previously acknowledged. *Conde*, 860 So. 2d at 950 n.12. As such, the lower court properly determined that counsel was not ineffective for failing to make nonmeritorious objections that the comments were improper. *Kokal v. Dugger*,

718 So. 2d 138 (Fla. 1998)(counsel not ineffective for failing to raise meritless issue); *Groover v. Singletary*, 656 So. 2d 424 (Fla. 1995); *Hildwin v. Dugger*, 654 So. 2d 107 (Fla.), *cert. denied*, 516 U.S. 965 (1995); *Breedlove v. Singletary*, 595 So. 2d 8, 11 (Fla. 1992). This Court should affirm.

II. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING THE TESTIMONY OF AN EXPERT ON INEFFECTIVE ASSITANCE OF COUNSEL.

Defendant next asserts that the lower court abused its discretion in excluding the proposed testimony of Manuel Alvarez. The trial court did not abuse its discretion[5] because Mr. Alvarez's testimony invaded the province of the court and would not have added the finder of fact.

The aid of an expert is only appropriate when a trial court determines that the subject is beyond the common understanding of the fact-finder and that the testimony will aid the fact-finder in rendering a decision. § 90.702, Fla. Stat. (2004); *Jones v. State*, 748 So. 2d 1012 (Fla. 1999). "The question of whether a strategy or tactic is reasonable on a post conviction relief proceeding is decided by the trial court as an issue of law." *Casey v. State*, 969 So. 2d 1055, 1058 (Fla. 4th DCA 2007); *see also Strickland v. Washington*, 466 U.S. 668, 690 (1984). Therefore, where a defendant seeks to proffer an expert opinion regarding whether trial counsel rendered ineffective assistance - the trial court properly prevents such testimony. *Casey*, 969 So. 2d at 1058. The testimony would not assist the trial court in any way as the inquiry "is a question of law to

[5] A trial court's decision regarding the admissibility of evidence is reviewed for an abuse of discretion. *Ray v. State*, 755 So. 2d 604, 610 (Fla. 2000); *Zack v. State*, 753 So. 2d 9, 25 (Fla. 2000).

be decided by the . . . court" and is not one determined by the live testimony of an expert. *Id*. (quoting *Provenzano v. Singletary*, 148 F.3d 1327, 1331-32 (11th Cir. 1998)); *see also Strickland*, 466 U.S. at 690.

In *Casey*, the Fourth District Court of Appeals of Florida determined that the trial court's exclusion of the defendant's proffered expert on his trial counsel's ineffectiveness was proper. 969 So. 2d at 1058-59. There, the court recognized that the *Strickland* reasonableness prong does not require expert opinion, finding that "[t]estimony is not required as to whether the actions taken [by trial counsel] were 'reasonable,' as this is a matter of law to be made by the judge after consideration of the factual testimony." *Id*. at 1059.

An expert opinion that professional norms exist and that trial counsel's actions fell below those standards of effective representation conflicts with the trial court's mixed decision. In *Freund v. Butterworth*, 165 F.3d 839, 863 n.34 (11th Cir. 1999), the U.S. Court of Appeals for the Eleventh Circuit stated, "[p]ermitting 'expert' testimony to establish ineffective assistance is inconsistent with our recognition that the issue involved is a mixed question of law and fact that the court decides." Specifically, the expert witness in *Freund* "opined that the law firm's representation of [defendant] fell

below the constitutional standard of effective representation because it presented conflicts of interest with the law firm's prior representations of [the co-defendants]." *Id*. at 857. Likewise, in *McCarver v. Lee*, 221 F.3d 583, 598 (4th Cir. 2000), in upholding the district court's denial of an evidentiary hearing, the U.S Court of Appeals for the Fourth Circuit stated that the defendant "has not explicated how the testimony of a 'legal expert' assessing trial counsel's performance would aid a federal court in this particular case in making the legal determination whether trial counsel was constitutionally ineffective."

The Second District Court of Appeal of Florida has also found that the testimony of an expert to explain Florida law is inappropriate:

> [t]his court has repeatedly held that "opinion testimony as to the legal interpretation of Florida law is not a proper subject of expert testimony." *See, e.g., Brophy v. Condon (In re Estate of Williams),* 771 So.2d 7, 8 (Fla. 2d DCA 2000). Construction of language in a deed "is a legal determination to be made by the trial judge, with the assistance of counsels' legal arguments, not by way of 'expert opinion.' " *See Lee County v. Barnett Banks, Inc.,* 711 So.2d 34, 34 (Fla. 2d DCA 1997) (discussing expert opinion about statutory construction).

Hann v. Balogh, 920 So.2d 1250, 1251-1252 (Fla. 2d DCA 2006).

Several other states uphold the trial court's decision not to allow the testimony of a legal expert on ineffectiveness. *Commonwealth v. Peterkin*, 513 A.2d 373 (Pa. 1986); *see also Clemmons v. State*, 785 S.W.2d 524 (Mo. 1990) (upholding lower court's exclusion of expert attorney testimony); *State v. Ohler,* 366 N.W.2d 771 (Neb. 1985) (holding not error for lower court to exclude expert testimony on ineffectiveness); *Lytle v. Jordan*, 22 P.3d 666 (N.M. 2001) (stating it is superfluous for expert to advise court on application of law on ultimate issue of effectiveness); *State v. Moore*, 641 A.2d 268 (N.J. Super. Ct. 1994) (upholding denial of evidentiary hearing where the only proffered evidence was testimony of expert attorney witness).

Here, Defendant sought to present Mr. Alvarez for the sole purpose of identifying actions of Defendant's trial counsel that would be shown to be outside professional norms. (PCR-SR. 11) Defendant presently clarifies the specific purpose of Mr. Alvarez's testimony: to explain that not discovering Chaplain Bizarro was unreasonable. Mr. Alvarez's testimony pointing out his opinion regarding how Defendant's trial counsel was deficient would not have aided the trial court in understanding the factual evidence and would have encroached into the lower court's legal analysis under *Strickland*. *Strickland*, 466 U.S. at 690; *Stephens v. State*, 748 So. 2d 1028, 1033-35 (Fla. 1999)

(explaining factual evidence required to prove ineffectiveness claim); *Casey*, 969 So. 2d at 1058. As such, Mr. Alvarez's testimony was properly excluded.

Moreover, even if Defendant proffered Mr. Alvarez's testimony in order to provide the post conviction court with evidence regarding the standard of practice, Defendant is still not entitled to relief. As recently ruled by this Court, a post conviction court does not abuse its discretion in refusing to hear such testimony as this is only one form of the various "guides" a post conviction court may consider when making its legal determination. *Lynch v. State*, 33 Fla. L. Weekly S880, S892 (Fla. Nov. 6, 2008) Having other guides available to it, the post conviction court did not abuse its discretion in preventing the testimony of Mr. Alvarez, even if it had been offered as evidence of prevailing professional norms.

Furthermore, where, as here, "the presiding postconviction judge has been adjudicating capital cases in Florida for many years" and tried numerous capital cases for many years prior to taking the bench, Mr. Alvarez's testimony could not have assisted the post conviction court in any way. *Lynch*, 33 Fla. L. Weekly at S892. The usefulness of testimony regarding what the standard of practice was at a particular juncture in history necessarily goes hand in hand with the relative inexperience of

the judge making the *Strickland* analysis. *Lynch*, 33 Fla. L. Weekly at S892. Furthermore, as opinion testimony,[6] such evidence is only admissible where useful to the trier of fact, in this case, the post conviction judge. Here, Mr. Alvarez's testimony was simply irrelevant and inadmissible as it was not beyond the common understanding of, and would not have aided, this particular post conviction court in making its decision. § 90.702, Fla. Stat. (2004). This Court should affirm.

[6] If such testimony is not opinion, but fact testimony, it is unclear how such testimony would be incorporated into the traditional *Strickland* evidentiary hearing and analysis, as the prevailing professional norms at a specific time in history is not a "fact" regarding what occurred at trial to establish an ineffectiveness claim. *Compare Stephens*, 748 So. 2d at 1033-35 (explaining difference between facts heard and opinion, i.e. decision, rendered) *with* § 90.401, Fla. Stat. (defining relevant evidence as evidence tending to prove or disprove a material fact).

III. THE TRIAL COURT PROPERLY DENIED THE CLAIM REGARDING INVESTIGATION AND PRESENTATION OF MITIGATION.

Defendant next asserts that the lower court erred in denying his claim that his counsel was ineffective for failing to investigate and present mitigating evidence. Defendant claims that his counsel knew or should have known about alleged sexual abuse and Defendant's relationship with Chaplain Bizarro. Defendant argues that counsel was deficient because he was required to investigate these areas to be effective. However, the lower court properly rejected this claim after an evidentiary hearing.

The State notes that Defendant raised this issue as well as the issue of alleged ineffectiveness for failing to go to Columbia sooner in the lower court. Once again, to the extent Defendant has not briefed this additional argument, he has waived review of the trial court's ruling. *Anderson v. State*, 822 So. 2d 1261, 1268 (Fla. 2002) Moreover, the lower court properly denied the claim based on both arguments.

In denying this claim after an evidentiary hearing, the lower court held:

> Defendant alleges that trial counsel did not adequately review and investigate his background. Specifically, Defendant alleges that counsel listed Chaplain Bizarro late as a witness, and following a Richardson [sic] hearing, the Chaplain was not allowed to testify.

At the evidentiary hearing, Rafael Rodriguez, one of Defendant's trial attorneys testified that the Defendant did not have a church going background and he didn't pursue who the spiritual advisor was as Defendant was not religious. Religion was not prevalent in the Defendant's life at the time he was arrested, according to both the Defendant and his sister Nely.

While Defendant's sisters and Marta Galindo testified that the Defendant spoke to them of Chaplain Bizarro, they testified that they did not mention this to the attorneys. Also, the testimony at the evidentiary hearing revealed that the Defendant talked to Chaplain Bizarro on Saturday morning. Defendant's sisters and Marta would visit on Saturday, after his visit with the Chaplain. As Defendant's meeting with the Chaplain preceded his visits with the family, and as he was instructed not to talk to other inmates, given the limited stimuli, Defendant's visit with the Chaplain is one of the few new things he had to talk about.

Both Rafael Rodriguez and Jeffery Fink, lead trial counsel, testified that they did not discover the content of Chaplain Bizarro's alleged conversation with Defendant regarding sexual abuse until after the penalty phase was in progress. Chaplain Bizarro was initially subpoenaed to testify on the issue of future dangerousness and to show the Defendant was a model prisoner. Mr. Fink testified that the Chaplain would not discuss the contents of his conversations with the defendant until the Defendant gave him permission to disclose the contents.

Additionally, on direct appeal, Defendant argued that the exclusion of the chaplain's testimony was error. As noted in the Florida Supreme Court opinion, one of the reasons the trial court excluded the testimony of the chaplain is that the testimony is cumulative to that of Dr. Olga Hervis, a psychotherapist. *Conde*, 860 So. 2d at 958. The court found that "even if the [trial] court erred in excluding the chaplain's testimony, the error was harmless beyond a reasonable doubt. [sic] *Conde*, 860 So. 2d at 958.

Defendant cannot show prejudice and meet that prong of the *Strickland* test.

Additionally, it is refuted by the record. As noted by the Florida Supreme Court, the trial court found mitigating evidence of alleged physical, mental, and sexual abuse controverted by other evidence that Conde's maternal and paternal grandmothers shared in his upbringing, and the court found the testimony of his stepmother quite credible that he was never abused or mistreated by her or his father. *Conde*, 860 So. 2d at 957.

Defendant also alleges that counsel was ineffective by failing to timely contact family members in Colombia. At the evidentiary hearing, Nely Conde testified that she met with Laura Blankman, the investigator, many times. Laura asked her questions about the family here and in Columbia.

Attorney Rafael Rodriguez testified that he received a list of family members who lived in Colombia. Nely Conde facilitated a meeting with the family members in Baranquilla in December, 1999. Mr. Rodriguez was in Baranquilla for 5 days, meeting with the family members with Laura Blankman, who video taped the meetings. He discussed the possibility of the family members coming to Florida to testify, but the family was poor and could not afford to lose any income. They looked to Carlos Andreas for money, as he had won the lottery. Colombia was also in the middle of a guerilla war, which complicated matters. He thought that someone on the defense team had talked to all relevant family members. He questioned as many relatives and friends as he could about the possibility of the Defendant being sexually abused.

Given the conditions in Colombia and the poverty of the family, counsel was not ineffective by failing to go to Colombia sooner. It is unlikely that family members would have come to testify at trial. As counsel talked to all relevant family members, and some of their testimony was given to the jury by Olga Hervis, the result would not have been different. Defendant cannot show prejudice under *Strickland*, *supra*. Additionally, the record reflects that counsel

> called numerous witnesses to testify on Defendant's behalf.
>
> * * * *
>
> This claim is denied.

(PCR. 782-85)

In reviewing the denial of a claim of ineffective assistance of counsel after an evidentiary hearing, this Court is required to give deference to the lower court's findings of fact to the extent that they are supported by competent, substantial evidence. *Stephens v. State*, 748 So. 2d 1028, 1033-34 (Fla. 1999). However, this Court may independently review the lower court's determination of whether those facts support findings of deficiency and prejudice to support a holding that counsel was ineffective. *Id.*

Here, the lower court's findings of fact regarding the testimony of the witnesses offered to explain the circumstances of Chaplain Bizarro's relationship with Defendant and trial counsel's knowledge of that relationship are fully supported by competent, substantial evidence. Each of the witnesses the lower court named did, in fact, testify in accordance with the lower court's description of their testimony regarding their knowledge of Defendant's relationship with Chaplain Bizarro prior to trial and Defendant's confession to him regarding prior sexual abuse. (PCR. 848-50, 858, 862, 867, 874-76, 890; PCR-SR.

6-9) Mr. Rodriguez testified that he was not aware that Defendant was religious, and that religion was not a part of his life. (PCR-SR. 7) Marta Galindo and Defendant's sisters, Jennie Carrazana and Nelly Conde, testified that while they were aware of Chaplain Bizarro, due to their Saturday morning visits, they never told the trial attorneys. (PCR. 848-851, 858, 862, 867, 875-76, 890) Mr. Rodriguez and Mr. Fink testified that they did not learn that Defendant confessed the sexual abuse to Chaplain Bizarro until after the penalty phase began, as he had been subpoenaed to testify regarding Defendant's good behavior in jail and would not discuss Defendant without Defendant's prior consent. (PCR-SR 6-8)

Likewise, the lower court's findings of fact regarding the testimony of the witnesses offered to explain why counsel did not go to Columbia sooner are fully supported by competent, substantial evidence. Nelly Conde testified that she spoke with both Mr. Fink and Laura Blankman regarding the family in Columbia. (PCR. 872-74) Mr. Rodriguez testified that he went to Columbia in 1999 and stayed in a hotel to meet with family members due to the on-going guerrilla war. After talking to Defendant's family in Columbia for five days, Mr. Rodriguez was unable to secure their testimony during the trial due to

financial hardship and an unwillingness to talk to him. (PCR-SR. 8)

Because the lower court's findings of fact are supported by competent, substantial evidence, this Court is required to defer to those findings. *Stephens*, 748 So. 2d at 1033-34. Given these findings of fact, the lower court was correct to find that Defendant had failed to establish that he was prejudiced due to counsel's failure to discover Chaplain Bizarro sooner or travel to Columbia sooner.

Counsel is not ineffective where the alleged error would not entitle him to a new trial. *Chandler v. State*, 848 So. 2d 1031, 1046 (Fla. 2003). Here, as noted by the post conviction court, this Court already determined that Defendant was not harmed by the exclusion of Chaplain Bizarro's testimony. *Conde*, 860 So. 2d at 958.

Likewise, counsel is not ineffective for failing to present cumulative testimony. *Valle v. State*, 705 So. 2d 1331, 1334-35 (Fla. 1997). Here, as likewise previously noted by this Court, Dr. Olga Hervis testified regarding Defendant's self-reported sexual abuse. Chaplain Bizarro's testimony would have been cumulative to this self-same evidence of abuse. Additionally, other family members testified on Defendant's behalf regarding his upbringing and childhood. Presenting additional family

members from Columbia would have been cumulative to the evidence presented at trial.

Furthermore, counsel is not ineffective for failing to present evidence that was not available to him the time of trial. *State v. Riechmann*, 777 So. 2d 342, 354-55 (Fla. 2000). (claim of ineffective assistance properly denied where evidence did not definitely show that evidence was available at time of trial). Here, counsel testified that Chaplain Bizarro would not speak with them unless and until Defendant relinquished any confidentiality. As such, prior to the morning Chaplain Bizarro came to respond to subpoena, trial counsel had no way of knowing that Defendant told him of sexual abuse. Additionally, Defendant's family in Columbia could not travel to the United States because of financial hardship, inability to get visas and on-going warfare in Columbia. (PCR-SR. 8)

Finally, Defendant would have received little benefit from Chaplain Bizarro's testimony or further testimony from family members. The trial court, as noted by the post conviction court and previously by this Court, found the testimony of Defendant's grandmother and father that he was never abused or mistreated credible. (PCR. 784); *Conde*, 860 So. 2d at 957. Since the evidence was not credible, counsel cannot be deemed ineffective

for failing to present it. *Griffin v. State*, 866 So. 2d 1, 9 (2003).

Given that the failure to present Chaplain Bizarro was already found to not have harmed Defendant, the cumulative nature of the testimony, and the lack of credibility the lower court gave to Defendant's allegations of abuse, the lower court properly determined that the presentation of the post conviction evidence would not have created a reasonable probability that Defendant would not have been sentenced to death. *Johnson v. State*, 921 So. 2d 490, 501 (Fla. 2005)(counsel not ineffective for failing to present evidence that would not create a reasonable probability that "the jury 'would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'")(quoting *Strickland v. Washington*, 466 U.S. 668, 695 (1984); *State v. Riechmann*, 777 So. 2d 342, 356 (Fla. 2000)(failing to present cumulative evidence is not ineffective assistance); *Valle v. State*, 705 So. 2d 1331, 1335 (Fla. 1997)(same). The lower court should be affirmed.

Despite the fact that the lower court's rejection of these claims is based on factual findings fully support by the record and conclusion that are entirely in accordance with the law, Defendant appears to argue that his counsel cannot be deemed effective unless they actually undertook the investigation he

alleges did not take place. However, the law does not support this assertion.

In *Strickland*, 466 U.S. at 691, the Court directly defined the duty that counsel had to follow to be effective was "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." In *Wiggins v. Smith*, 539 U.S. 510 (2003), the case upon which Defendant relies, the Court reiterated that this was the duty imposed for counsel to be considered effective and that it was not altering the nature of counsel's duty:

> 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.

Id. at 533. In fact, the United States Supreme Court has rejected claims that counsel was ineffective for failing to investigate mitigation more thoroughly on many occasions.

Strickland, 466 U.S. at 699; *Burger v. Kemp*, 483 U.S. 776, 794 (1987); *Darden v. Wainwright*, 477 U.S. 168, 186 (1986). Thus, the law does not support Defendant's assertion that counsel was deficient merely because he did not investigate the mitigation that Defendant believes he should have as thoroughly as Defendant believes he should have. The lower court should be affirmed.

Further, counsel's investigation regarding mitigation was reasonable. Counsel obtained a psychological evaluation of Defendant wherein Defendant acknowledged being sexually abused, which counsel suspected, and presented this evidence during the penalty phase. Having learned of family members in Columbia from Defendant's sister, counsel went to Columbia during a guerilla war, interviewed family members, sought to have them testify at trial, but was thwarted by lack of cooperation and funding. (PCR-SR. 8) No one ever mentioned to counsel that Defendant was talking to Chaplain Bizarro and counsel had no reason to believe Defendant was religious, indeed, even Chaplain Bizarro acknowledged that Defendant was not religious. (T. 9311) Once known to counsel, counsel attempted to talk to Chaplain Bizarro who initially refused to speak to counsel due to confidentiality with Defendant, was subpoenaed to testify regarding Defendant's good behavior in jail, and right before

his testimony, informed counsel that Defendant acknowledged prior sexual abuse to him. The investigation undertaken was reasonable.

The case relied upon by Defendant does not compel a different result. In *Wiggins*, the Court found that counsel's decision to limit their investigation into Defendant's family background was not reasonable because the limited investigation that counsel had conducted showed that Defendant had been horribly abused as a child, which would have been powerful mitigation, and counsel's statement that they were concentrating on Defendant's lack of responsibility for the crime was inconsistent with their actions at the time of trial. *Wiggins*, 539 U.S. at 523-27. As *Wiggins* involved considerably less investigation than that undertaken here, it does not support Defendant's assertion that counsel's investigation was not reasonable.

Nor does Defendant's reliance on the ABA guidelines provide a basis for relief. Defendant refers to the ABA guidelines as if they were rules that must be followed for counsel to be effective. However, in *Strickland v. Washington*, 466 U.S. 668 (1984), the Court clearly rejected this argument:

> Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to

> determining what is reasonable, **but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause.** Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.

Id. at 688-89 (emphasis added) (internal citation omitted). *Wiggins* did not alter this holding. 539 U.S. at 522-24. Therefore, to the extent Defendant argues that defense counsel was ineffective because of an alleged violation of the ABA guidelines, this is not the law. The lower court should be affirmed.

Even if Defendant had shown that counsel was deficient, the lower court should still be affirmed. As seen above, the court found that Defendant was not prejudiced. As the Court noted in *Strickland*, it is not necessary for a court to engage in a deficiency determination if Defendant was not prejudiced by the alleged deficiency. *Strickland*, 466 U.S. at 697. Thus, since the lower court properly determined that there was no prejudice, it should be affirmed.

IV. THE CLAIM REGARDING THE ALLEGED PLEA OFFER WAS PROPERLY DENIED.

Defendant next asserts that the lower court erred in denying his claim that his rights were somehow violated because plea negotiations did not result in a final plea agreement. However, the lower court properly denied this claim.

This Court has repeatedly held that issues that could have and should have been raised on direct appeal are procedurally barred. *Pooler v. State*, 980 So. 2d 460, 470 (Fla. 2008); *Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983); *Demps v. State*, 416 So. 2d 808, 809 (Fla. 1982); *Meeks v. State*, 382 So. 2d 673, 675 (Fla. 1980). This Court has agreed that a claim could and should have been raised on direct appeal when it was thoroughly addressed at the time of trial. *Kimbrough v. State*, 886 So. 2d 965, 983 (Fla. 2004). Moreover, this Court has held that attempting to raise an issue that is procedurally barred in the guise of a claim of ineffective assistance of counsel does not lift the bar. *Rodriguez v. State*, 919 So. 2d 1252, 1262 n.7 (Fla. 2005); *Freeman v. State*, 761 So. 2d 1055, 1067 (Fla. 2000). Applying this precedent, the lower court properly denied this claim as procedurally barred, since the record reflects that the issue was thoroughly addressed at the time of trial.

Prior to trial, Defendant entered into plea negotiations with the County Attorney. (R. 427) According to Defendant, the

County Attorney represented to him that the State had informed him that it would not offer a plea agreement but "might be willing to stand by, without serious objection and without appeal," if Defendant entered into a plea agreement with the trial court. (R. 427) During an *ex parte* hearing regarding a cost motion, Defendant and the County Attorney discussed the possibility of a plea agreement with the trial court. (R. 416, 427-28, T. 625-27) As the State was not present at the hearing, the trial court informed Defendant and the County Attorney that the State would need to be present to discuss a plea agreement but indicated that it would be willing to entertain the proposed court offered plea agreement. (R. 416, 427, T. 625-26)

At a subsequent unrecorded hearing at which the State was present, Defendant again proposed entering into a plea agreement with the trial court. (R. 416, 428) During the course of this hearing, the trial court indicated that it would be willing to extend a court offered plea agreement if the State would promise not to appeal the plea, the victims' families agreed to the plea and a sentence could be structured to ensure that Defendant would never be released from prison. (R. 416, 428, T. 619, 627-28)

At a subsequent hearing, the State moved to recuse the trial judge because it did not believe that it could receive a

fair hearing before the judge based on his participation in plea negotiation, which were in part *ex parte*. (T. 606) The trial court initially denied the motion. (T. 607) The State then presented an objection to the court offered plea and presented the testimony of several family members of the victims, who testified that they objected to the plea agreement. (T. 607-16) The State indicated that the family members had determined to object to the plea agreement after the unrecorded hearing. (T. 616-17) After considering this evidence, the trial court indicated that its conditions for accepting the plea were not satisfied and that it believed the State had acted in bad faith in moving to disqualify it to cover up the fact that the State had not made it fully aware of the State's position. (T. 619-20) Because it had commented on the truth of the allegations in the State's motion for disqualification, it then granted the motion to disqualify. (T. 620)

After the trial court announced this ruling, Defendant objected, claiming that the State had induced the trial court to act improperly. (T. 621-35) The alleged inducement consisted of its alleged statement to the County Attorney that it might be willing to allow a court offered plea without strenuous objection and its indications to the trial court that its conditions for the plea could be satisfied. *Id.* Defendant

insisted that he should be allowed to enter the court offered plea even though the conditions precedent, which he acknowledged existed, had not been met. *Id.* Defendant further suggested that the State had convinced the victims' families to object and that discovery and a hearing were necessary on this allegation. *Id.* However, the trial court stood by its ruling. (T. 627-36)

Thereafter, Defendant moved to enforce "the plea agreement" or to preclude the imposition of a death sentence. (R. 426-33) In this motion, Defendant claimed that he had a "de facto plea agreement" when the State indicated that it believed that the prior judge's conditions precedent to the acceptance of a court offered plea could be met, that he was prejudiced, *inter alia*, because "important penalty phase witnesses, who once would have accepted a life sentence for Defendant, were influence and turned," and that he was now entitled to have the alleged plea agreement accepted or the imposition of the death penalty precluded. *Id.* However, Defendant admitted in the motion that the State had never offered a plea or indicated a willingness to make such an offer and that the State had always indicated that it would object to a court offered plea. *Id.*

Defendant subsequently moved for disclosure of contact information for all of the victims' family members and friends who either appeared at the hearing where the original trial

judge recused himself or spoke to the State or police between the time Defendant informed the State of his *ex parte* communication with the trial court about a plea offer and the hearing. (R. 434-35) At the hearing on this motion, Defendant insisted that he needed to be able to conduct depositions of the prosecutor and the people he spoke with concerning the possibility of a plea to be able to go forward with his motion to enforce the "plea." (T. 710-11) The State responded that it did not believe the request was appropriate as the people involved would not be discoverable witnesses, the request invaded their right to privacy, the request also sought work product and the claim did not appear to be meritorious. (T. 711-12) Defendant insisted that he needed conduct information because he planned to present evidence at a hearing on his motion to enforce the "plea." (T. 712-13) The trial court denied the motion, stating that it viewed the issue as a legal issue. (T. 712-15)

Defendant then filed a memorandum of law in support of the motion to enforce the "plea." (T. 441-46) In that pleading, Defendant insisted that an evidentiary hearing was necessary on the motion at which he could attempt to prove that the State coerced the family members to object to the court offered plea. *Id.*

At the hearing on the motion to enforce the "plea," Defendant argued that he was entitled to evidentiary hearing to prove that the State prevented the entry of a plea through surreptitious means and that he was entitled to a life sentence because he had "detrimentally relied" on the negotiations with the court concerning the plea. (T. 730-32) The State responded that it did not concede that the facts Defendant alleged were true, that it instead believed they were an unprofessional personal attack on the prosecutor and that it did not matter because Defendant had never had a plea accepted, such that there was nothing to enforce. (T. 732-33) Further, the State asserted that there had been no harm to Defendant, as he stood in the same position he was before he tried to get the court to offer a plea. (T. 733-34) After considering these arguments, the trial court denied the motion. (T. 734)

As can be seen from the foregoing, Defendant raised and litigated the issue of whether he was entitled to a life sentence based on the alleged plea offer thoroughly at the time of trial. As such, any issue about it could have and should have been raised on direct appeal. *Kimbrough*, 886 So. 2d at 983. The lower court properly denied this claim as procedurally barred. *Pooler*, 980 So. 2d at 470; *Smith*, 445 So. 2d at 325; *Demps*, 416 So. 2d at 809 (Fla. 1982); *Meeks*, 382 So. 2d at 675.

It should be affirmed.

Even if the claim had not been barred, the lower court would still have properly denied this claim because it was insufficiently plead. This Court has held that conclusory allegations are insufficient to present a claim in a post conviction motion. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998). Here, Defendant merely presented this claim in conclusory terms. (PCR. 83-84) In fact, Defendant merely alleged that a plea was offered subject to certain conditions precedent, that the conditions precedent were not met, that it became public knowledge that Defendant had attempted to enter a plea and that friends and coworkers no longer wanted to be involved and he lost touch with several people. However, Defendant did not identify these people, suggest what information they had and suggest how this affected anything. Moreover, his entire allegation regarding counsel allegedly being ineffective regarding this issue consisted of a single sentence: "Trial counsel's failure to present the prejudice suffered by the defense due to the withdrawal or denial of the plea was deficient, thereby prejudicing" Defendant. (PCR. 84) Given the conclusory nature of this claim, the lower court properly denied it as insufficiently plead. *Ragsdale*, 720 So. 2d at 207. It should be affirmed.

Even if the claim was not barred and was sufficiently plead, Defendant would still be entitled to no relief. The record refutes the few facts that Defendant did allege. In his motion, Defendant suggested that the State offered a plea agreement conditioned on acceptance by the trial court and agreement of the victims' families. However, as seen above, the record reflects that the State did not offer a plea agreement. Instead, the record shows that the State refused to do so. The record further reflects that the State never even agreed not to object to a court offered plea. Instead, it merely suggested that it might not vigorously object and pursue an appeal based on its objection. Further, the trial record shows that Defendant did present the testimony of numerous coworkers, friends and family members at the penalty phase. (T. 8046-8243, 8318-50, 8360-8438) As such, the record refutes the claims that the State ever made a plea offer and that the court-offered plea prevent Defendant from presenting mitigation. The denial of the claim should be affirmed.

Moreover, the claim is without merit as a matter of law. In *Weatherford v. Bursey*, 429 U.S. 545, 561-62 (1977), the Court considered and rejected a claim that alleged government misconduct deprived a defendant of an opportunity to enter into a plea bargain. In doing so, the Court stated, "[b]ut there is

no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial. It is a novel argument that constitutional rights are infringed by trying the defendant rather than accepting his plea of guilty." *Id.* at 562. This Court has similarly rejected the assertion that a defendant has a right to bargain for a plea. *Parker v. State*, 790 So. 2d 1033, 1034 (Fla. 2001). As such, the courts of this State have rejected arguments that a defendant is deprived of some right because a condition placed on the acceptance of a plea made it impossible for the defendant to enter a plea. *Winokur v. State*, 605 So. 2d 100, 102 (Fla. 4th DCA 1992)(rejecting claim that requirement that codefendant also enter plea deprive defendant of due process).

Additionally, this Court has held that a plea offer is not binding until it is actually accepted by the court and required parties and the defendant is actually sentenced under the agreement. *Davis v. State*, 308 So. 2d 27 (Fla. 1975); *see also Rollman v. State*, 887 So. 2d 1233 (Fla. 2004); *Goins v. State*, 672 So. 2d 30, 31 (Fla. 1996). As such, this Court has rejected the assertion that a defendant is entitled to performance of the terms of the proposed plea agreement when the court decides not to accept the terms before the sentence is imposed. *Rollman*, 887 So. 2d at 1235-36; *Davis*, 308 So. 2d at 29. This Court has

stated that this principle applied regardless of why the plea was not accepted. *Rollman*, 887 So. 2d at 1235 ("We continue to agree that a trial court retains the authority to alter a prior plea arrangement up until the time sentence is imposed, so long as the trial court provides the defendant an opportunity to withdraw any plea that was entered in reliance on the promised sentence. **It does not matter whether the judge simply changed his mind, or whether there was a misunderstanding.**")(emphasis added). The United States Supreme Court has also rejected the concept that a defendant is entitled to specific performance of a plea offer, where the offer was withdrawn before it was fully accepted. *Mabry v. Johnson*, 467 U.S. 504 (1984). In reaching this conclusion, the Court stated, "Neither is the question whether the prosecutor was negligent or otherwise culpable in first making and then withdrawing his offer relevant. The Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty." *Id.* at 511. In fact, this Court has embodied this principle in Fla. R. Crim. P. 3.172(g): "No plea offer or negotiation is binding until it is accepted by the trial judge formally after making all the inquiries, advisements, and determinations required by this rule. Until that time, **it may be withdrawn by either party without any necessary justification**."

(emphasis added).

Given this body of law, Defendant's claim that he was entitled to a remedy because the plea he sought was not consummated is without merit as a matter of law. This is particularly true here. As Defendant has always admitted, the court offered plea was contingent on the lack of objection by the victims' families and that condition was never met. As such, the lower court also properly denied this claim because it was without merit as a matter of law. The denial of the claim should be affirmed.

Further, despite the fact that the claim was barred, was insufficiently plead and was without merit as a matter of law, the lower court allowed Defendant to present evidence regarding this claim at the evidentiary hearing. The only evidence that Defendant presented in support of this claim was the testimony of Martha Galindo and Nelly Conde, who stated in general terms that Defendant's inability to enter the plea caused them and others to become disillusioned with the system and less willing to assist. (PCR. 851-53, 880-82) However, the only specific harm to Defendant that either could identify was that Defendant's best friend William allegedly moved and could not be contacted to testify at trial. (PCR. 851-53, 880-82) Yet, the record reflects that Defendant's friend William Serra did

testify at the penalty phase. (T. 8046-79) As such, Defendant failed to prove that he was prejudiced because he was unable to satisfy the conditions precedent to have the trial court extend its plea offer. The denial of the claim should be affirmed.

V. THE LOWER COURT PROPERLY DENIED DEFENDANT'S *RING* CLAIM AS PROCEDURALLY BARRED AND MERITLESS.

Defendant finally asserts that the lower court erred in denying his claim that his sentence violated *Ring v. Arizona*, 536 U.S. 584 (2002). However, the lower court properly denied this claim as procedurally barred and without merit.

This Court has repeatedly held that claims that were raised and rejected on direct appeal are procedurally barred in post conviction proceedings. *Pooler v. State*, 980 So. 2d 460, 470 (Fla. 2008); *Rogers v. State*, 957 So. 2d 538, 553 (Fla. 2007); *Rodriguez v. State*, 919 So. 2d 1252, 1262 n.7 (Fla. 2005); *Turner v. Dugger*, 614 So. 2d 1075, 1078 (Fla. 1992). Here, Defendant claimed on direct appeal that Florida's capital sentence scheme was unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Initial Brief of Appellant, FSC Case No. 00-789, at 94-96. Defendant subsequently asserted that *Ring* showed that this was true. Reply Brief of Appellant, FSC Case No. 00-789, at 34-35. This Court rejected this claim, noting that Defendant's death sentence was supported by the prior violent felony aggravator. *Conde v. State*, 860 So. 2d 930, 959 (Fla. 2003). Because this issue was raised and rejected on direct appeal, the lower court properly determined that this claim was procedurally barred. It should be affirmed.

Moreover, this Court has repeatedly rejected the claim that

Florida capital sentencing is unconstitutional under *Ring*. *Bevel v. State*, 983 So. 2d 505, 525-26 (Fla. 2008); *Bryant v. State*, 901 So. 2d 810, 823 (Fla. 2005); *Robinson v. State*, 865 So. 2d 1259, 1265 (Fla. 2004); *Jones v. State*, 855 So. 2d 611, 619 (Fla. 2003). As such, the lower court also properly found that this claim was meritless. It should be affirmed.

CONCLUSION

For the foregoing reasons, the order denying the motion for post conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to **Gustavo J. Garcia-Montes**, 2333 Brickell Avenue, Suite A-1, Miami, Florida 33129, this ____ day of December 2008.

_____
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CERTIFICATE OF COMPLIANCE

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

_____
LISA A. DAVIS
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