IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC06-473

JAMES FRANKLIN ROSE

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA, (CRIMINAL DIVISION)

ANSWER BRIEF OF APPELLEE

BILL McCOLLUM
Attorney General
Tallahassee, FL

Leslie T. Campbell
Assistant Attorney General
Florida Bar No.: 0066631
1515 N. Flagler Dr.; Ste. 900
West Palm Beach, FL 33401
Telephone (561) 837-5000
Facsimile (561) 837-5108

Counsel for Appellee

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PRELIMINARY STATEMENT

Appellant, James Franklin Rose, Defendant below, will be referred to as "Rose" and Appellee, State of Florida, will be referred to as "State". "RS" will designate the appellate record from the re-sentencing in SC94317; "PCR" will denote the postconviction record in this case; and "S" before either record will indicate supplemental materials. Rose's initial brief will be notated as "IB." Where appropriate, the volume and page number(s) will be given.

Although not all of the prior records come into play, the following is a listing of the cases reviewed involving the instant homicide and death sentence:

1. Rose v. State, 425 So.2d 521 (Fla. 1982), cert. denied, 461 U.S. 909 (1983) (affirming conviction, reversing sentence, and remanding for resentencing);

2. Rose v. State, 461 So.2d 84 (Fla. 1984), cert. denied, 471 U.S. 1143 (1985) (affirming death sentence);

3. Rose v. State, 675 So.2d 567 (Fla. 1996) (finding penalty phase counsel ineffective, resentencing ordered);

4. Rose v. State, 787 So.2d 786 (Fla. 2001), cert. denied, 535 U.S. 951 (2002) (affirming death sentence)

STATEMENT OF THE CASE AND FACTS

Rose is appealing the summary denial of his postconviction motion addressed to his re-sentencing. This Court has outlined the procedural history of this case as follows:

> James Franklin Rose was indicted for the kidnapping and first-degree murder of eight-year-old Lisa Berry in November 1976. Rose's first trial resulted in a mistrial because the jury could not reach a verdict. On retrial, he was convicted of both counts and sentenced to life on the kidnapping count and death on the murder count. This Court affirmed both of his convictions but vacated the death sentence. *See Rose v. State*, 425 So.2d 521 (Fla. 1982). The Court found the trial court erred during the penalty phase in giving an improper "dynamite" or "*Allen* charge" after the jury sent the following note to the judge: "We are tied six to six, and no one will change their mind at the moment. Please instruct us." We held that the trial court erred in failing to recognize that where seven jurors fail to vote to recommend death, the jury recommendation is for life. The case was remanded for a resentencing. See id. at 525.
>
> At resentencing the new jury recommended a death sentence by a vote of eleven to one, and the trial court sentenced Rose to death. This Court affirmed the sentence. *See Rose v. State*, 461 So.2d 84 (Fla. 1984). Following the Governor's subsequent issuance of a death warrant, Rose petitioned this Court for a writ of habeas corpus and a motion to stay his execution, asserting, among others, claims of ineffective assistance of appellate counsel. This Court denied relief. *See Rose v. Dugger*, 508 So.2d 321 (Fla. 1987). Thereafter, Rose filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850, alleging ineffective assistance of counsel at both the guilt and penalty phases of his trial. The trial court summarily denied the motion without conducting an evidentiary hearing but this Court reversed, and directed the trial court to hold an evidentiary hearing. *See Rose v. State*, 601 So.2d 1181 (Fla. 1992).

> After holding an evidentiary hearing, the trial court again denied all relief. Thereafter, this Court affirmed the trial court's denial of the claim of ineffective assistance of counsel at the guilt phase. *See Rose v. State*, 675 So.2d 567 (Fla. 1996); however, we reversed the trial court's ruling with regard to the penalty phase ineffectiveness of counsel and remanded for a new sentencing. *See id.* at 569. Pursuant to this Court's reversal, a new jury was selected and penalty phase proceedings were held. At the close of this latest penalty phase, the jury recommended death by a vote of nine to three. After the jury's recommendation, sentencing memoranda were submitted by the parties and victim impact evidence was presented to the judge at a *Spencer* hearing. On February 13, 1998, the trial court sentenced Rose to death.

Rose v. State, 787 So.2d 786, 789-90 (Fla. 2001) (footnotes omitted).

This Court also outlined the facts from the original conviction and from the resentencing as follows:

> The essential facts of this case are described in this Court's opinion on Rose's first direct appeal:
>
> > Although circumstantial in nature, the evidence was sufficient for the jury to have found beyond a reasonable doubt that defendant, and no other person, kidnapped and murdered eight-year-old Lisa Berry. The evidence reveals that defendant was the last person to be seen with Lisa at the bowling alley on the night she disappeared. Barbara Berry, Lisa's mother, was at the bowling alley with family and friends when defendant arrived shortly after 9 p.m. on October 22, 1976. According to Barbara, defendant joined her and other team members at the bowling circle where they talked for several minutes. Shortly after 9:30 p.m., defendant said that he was going to the poolroom area of the bowling alley. Lisa told her mother

that she was going with him. Defendant and Lisa were last seen by Lisa's sister Tracy, who testified that Lisa was outside the front door of the bowling alley and defendant was standing just inside the front door. Defendant gave Tracy money for cokes, but when she returned from the snack bar with the cokes, both defendant and Lisa were gone. Upon being informed by Tracy that she could not find defendant and Lisa, Barbara attempted to find them. While looking for them, she was paged for a telephone call which turned out to be from defendant. He asked Barbara the time; she said 10:30. He responded that it was 10:23. He asked what time she would be finished bowling; she said 11:30. Defendant was next seen entering the bowling alley at approximately 11:30 p.m. The medical examiner's testimony established the time of Lisa's death to be within twenty-four hours either side of 1 a.m., October 23, 1976.

The evidence reveals that defendant had a motive for killing Lisa. Although he and Lisa's mother had dated for about nine months, they were no longer dating regularly because he was extremely jealous about her working in the bowling alley bar and being around other men. Lisa's mother testified that defendant told her that he could hurt her and that she did not know what he was capable of doing. A male friend of Barbara's who was at the bowling circle when defendant was there was asked by Lisa if he was going to have breakfast with her and her mother. According to testimony at trial, defendant, after having overheard this conversation had a look on his face as if to say, “What is going on?”

Several people present at the bowling alley testified that when defendant returned at approximately 11:30, he had a large red spot on his lower right trousers leg. Expert testimony revealed the spot to be type B blood. Type B bloodstains also were found on

the outside of the passenger's door of defendant's white van, on the passenger's seat, and on the engine cover. Fingernail scrapings taken from defendant revealed blood. It was stipulated in the record that Lisa had type B blood and that defendant had type A blood.

At about 11:45 p.m. on the night Lisa disappeared, a white van was seen behind a Pantry Pride store located about a quarter of a mile from the bowling alley. Defendant was seen driving his white van that same night. According to testimony at trial, when the search for Lisa began shortly after defendant's return to the bowling alley at 11:30, he drove away and returned at least three times. Lisa's green sweater and pink pants were found the next afternoon behind the Pantry Pride. Her pink blouse was later found in defendant's van. Lisa's nude body was found four days after her disappearance in a canal approximately ten miles from the bowling alley. Her shoes were found about a mile apart alongside a road between the canal and the bowling alley.

A paint-stained hammer was found in the canal about six feet from Lisa's body. Defendant was a painter, and expert testimony revealed that paint samples from the hammer were similar to paint samples taken from paint cans in his van. The medical examiner testified that Lisa's death resulted from severe head injuries caused by blunt force.

Expert witnesses also testified that a green fiber taken from defendant's clothing after his arrest was consistent with fibers from Lisa's green sweater found behind the Pantry Pride and that a crushed hair taken from defendant's sock was consistent with hair from Lisa's hairbrush.

Defendant made numerous inconsistent attempts to account for his whereabouts on

the evening Lisa disappeared and to explain away certain evidence. Defendant told Lisa's mother that he was at the Highway Bar when he telephoned her regarding the time and stated to her that it was 10:23. He was uncharacteristically exact about the time, and he could be clearly heard without background noise which, according to testimony, would not have been possible had he been at the bar when he telephoned since the band at the bar would have been playing loudly at that particular time.

When defendant returned to the bowling alley at 11:30, he pretended that Lisa was still alive. Acting as though Lisa was present at the bowling alley in his visible sight, he commented to Lisa's mother that Lisa was getting chubby and asked who was the person with the goatee to whom Lisa was talking. When she turned around to see who defendant was referring to, she saw neither Lisa nor a person with a goatee.

After initially denying that the spot on his trousers leg was blood, defendant later explained that he had cut himself changing a tire. Testimony indicated the spare tire was fully inflated. He told a police officer that he had cut his leg while crawling underneath the van to check out a noise he had heard. When the officer took defendant to the area where he claimed to have crawled under the van, the officer could not find any impressions in the sand that could have been made by a human body.

In an attempt to cover the blood spot on his trousers which was first noticed and called to his attention upon his return to the bowling alley at 11:30, defendant first covered it with a whitewash or paint. Later, after he went into a restroom, the spot was covered with grease or some black substance. Defendant explained to a police detective that the blood on the seat of his van was from an injured friend whom he had taken

> home about two months earlier. The friend had type A blood. The blood on the seat was type B, the same as Lisa's.
>
> Defendant, at one point, told police detectives that Lisa had last been near the van about two weeks prior to the night of her disappearance. He later stated that Lisa had attempted to get into the van earlier that evening and he told her to get out. Lisa's mother testified that Lisa had not been in defendant's van for about a year.
>
> Defendant was convicted for the kidnapping and first-degree murder of Lisa Berry.

Rose, 425 So.2d at 522-23.

PENALTY PHASE HEARING

In the most recent penalty phase, the State presented evidence through the medical examiner, Dr. Abdullah Fatteh, relating to the time, cause and manner of the victim's death. He testified that despite the decomposed state of the victim's body, he was able to determine that she died of severe head injuries. The external injuries included a fracture at the base of her skull and cerebral hemorrhage. The nature of the hemorrhage indicated that the blows were sustained while she was still alive. He also testified that the injuries to the back of the head were caused by the side or blunt end of a hammer or possibly by the kicking of the victim's head by an adult wearing shoes. Dr. Fatteh initially testified that death likely occurred within minutes to no longer than an hour after the injuries. However, on cross-examination he stated that she probably died within four to eight minutes.

Sergeant Dennis Walker, one of the first to arrive at the bowling alley in response to the missing person call, testified that he encountered Rose and could smell alcohol about Rose's body and that Rose “appeared to be under some influence, but [he] wouldn't say drunk,” as he was cooperative and polite. Retired Detective Arthur McLellan, who got there at

approximately the same time as Sergeant Walker, testified that he did not smell alcohol about Rose's person and felt that Rose was sober. Detective Edward, who interviewed Rose on October 23, 1976, the day after the killing, testified that Rose told him that he momentarily left the bowling alley to get a drink at a local bar and then left the bar after getting the drink. The bartender on duty, however, testified that she did not see Rose at the bar that night. Rose's former probation officer, Charles Dickun, testified that Rose and everyone he interviewed who knew Rose indicated that Rose had an alcohol problem. Dickun's testimony, however, did not pertain to the night of the killing.

Rose presented four witnesses in mitigation. Three testified about his personality and good nature. Judy Greear had known Rose for twenty-four years and had lived with him in 1975. She testified that he was a good man and good to her two children. She added that although Rose was jealous, she had never observed any act of violence on his part. Floyd Templeton, whom Rose worked for as a painter, testified that Rose was honest, trustworthy, and his best worker. Floyd and Mrs. Templeton testified that they trusted Rose with their grandchildren as he used to always play with them when he came over to their home.

The last witness for Rose, Dr. Jethrow Toomer, a mental health expert, presented extensive testimony regarding Rose's troubled history and mental problems. He testified that Rose was born out-of-wedlock and never knew his biological father, who apparently abandoned him a few months after birth. Rose's subsequent relationship with a stepfather was not supportive or nurturing, but was in fact hostile and lacking of any emotional support. Dr. Toomer performed several mental tests upon Rose and testified that the results suggested the likelihood of some organic impairment or brain damage, due in part to two head injuries Rose had suffered from falls, including one from a ladder. He pointed out that Rose had always been a slow learner as evinced by the fact that he was retained in fourth, fifth, and seventh grades of school and then dropped out of school entirely. Rose had scored an eighty-nine on an IQ test and Toomer concluded that Rose suffered the effects of a

borderline personality disorder.

> On cross-examination, the State undermined many of the points made by Dr. Toomer regarding Rose's mental and emotional state before, during, and after the commission of the murder. The State brought up the fact that a more recent IQ test administered to Rose while in prison produced a score of ninety-nine. The State also presented Dr. Toomer with psychological reports performed in the 1970's by other doctors. Two of the reports, performed in 1971 and 1976, concluded that Rose was a sociopath, while another done in 1973 concluded there was no evidence of psychosis or acute emotional distress. Other findings in the reports indicated that Rose's memory was intact, he was an outgoing person, and he was of average intelligence. The State also suggested in its questioning that Dr. Toomer failed to consider important information in arriving at his findings. For instance, Dr. Toomer conceded he never talked to any of the doctors who performed the earlier examinations of Rose. The State also established the doctor's failure to talk to individuals who were close to Rose to get insights on his personal relationships.
>
> Subsequent to the penalty phase trial and the jury's recommendation of death, the court held a Spencer hearing wherein victim impact evidence was presented by the State. Ms. Margaret Szabo, the victim's grandmother, testified about the hardship involved in having to relive this experience and wondered what the victim could have become with her intelligence, compassion and personality. The other witness, Ms. Berry, the victim's mother, testified about her perpetual pain and grief in having to continually go through this process. She also echoed the testimony regarding the victim's intelligence, love, and leadership at such a young age. After the hearing, the trial court sentenced Rose to death.

Rose, 787 So.2d at 791-94. Upon this evidence, Rose received a nine to three jury recommendation for death. The trial court followed that recommendation and sentenced Rose to death based

on the finding of five aggravators,[1] no statutory mitigators, and eight non-statutory mitigators.[2] (RS.15 1591-1611).

On appeal from the resentencing, Rose raised 20 issues,[3] the issues pertinent to this appeal are: "(2) the State violated

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[1] (1) defendant on parole, (2) prior violent felony convictions, (3) felony murder/kidnapping, (4) heinous, atrocious, or cruel ("HAC"), and (5) victim under the age of 12 (RS.15 1591-99)

[2] "Some weight" was given to (1) non-nurturing childhood, (2) employment history, (3) good characteristics; "little weight" was accorded (4) below average intelligence, (5) good person adapted to prison life, (6) good deeds, and finally, and "very little weight" was assigned (7) attempt at cooperation and (8) maintaining innocence. (RS.15 1599-1611)

[3] This Court addressed Rose's claims under the following issues: "(1) the trial court erred in allowing the State to present gruesome photographic evidence; (2) the State violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), in its late release of autopsy photographs; (3) the trial court erred in failing to rule following a hearing held pursuant to *Richardson v. State*, 246 So. 2d 771 (Fla. 1971), concerning the late discovery of the *Brady* material; (4) prosecutorial comments made during closing arguments were harmful to Rose; (5) the State engaged in misconduct in its cross-examination of the defense's expert; (6) the trial court erred in allowing the State to elicit testimony designed to imply that a sexual assault had been committed; (7) the trial court erred in allowing the State to present evidence of the impermissible age aggravator; (8) the trial court erred in (a) its consideration and finding of the "prior violent felony" aggravator and (b) impermissibly doubling this aggravator with the "parole" aggravator; (9) the trial court erred in finding the kidnapping aggravator; (10) the trial court erred in finding HAC; (11) the trial court erred in its consideration of mental mitigation; (12) victim impact testimony was improperly allowed; (13) the trial court erred by refusing to read nonstatutory mitigators; (14) the sentence is not proportional; (15) the time spent on death row violates Rose's constitutional rights; (16) death by electrocution violates state and federal constitutions; and (17) Rose deserves a life sentence on the ground of the penalty phase "*Allen* charge" issue from his original trial.

Rose v. State, 787 So.2d 786, 790 n.3 (Fla. 2001).

Brady v. Maryland, 373 U.S. 83 (1963), in its late release of autopsy photographs; and (3) the trial court erred in failing to rule following a hearing held pursuant to *Richardson v. State*, 246 So. 2d 771 (Fla. 1971), concerning the late discovery of the Brady material." This Court found no reversible error under either theory. The Brady claim was rejected because prejudice had not been shown, i.e. "the photographs would have done very little in either confirming or negating Dr. Fetteh's testimony that the death occurred within four to eight minutes of the head injury." Rose, 787 So.2d at 796. Further, this Court concluded that a Richardson hearing was held, and that counsel's decision not to present the evidence, "rendered harmless" "any failure of the court to formally rule" on the alleged Richardson violation. Rose, 787 So.2d at 797.

Following the affirmance of the sentence on direct appeal, Id. at 806, Rose filed a Petition for Writ of Certiorari with the United States Supreme Court. In it he raised four issues:

> I Whether a six to six vote by an advisory jury is a life recommendation; What happened here?
>
> II Whether this Court can review a case to cure a "fundamental injustice" at any time?
>
> III Whether James Rose's death sentence can stand when the penalty phase jury was tainted by reliance on an aggravating factor declared illegal in violation of the Ex Post Facto Clause of the Florida and United States Constitutions?

> IV Whether erroneously weighed aggravating and mitigating evidence warrants vacating the death sentence imposed despite an initial six-to-six recommendation for life?

(PCR.2 601-50). The State opposed the granting if certiorari (PCR.2 651-92). Before the Supreme Court conferenced, Rose filed a motion to consolidate his case with Ring v. Arizona case no. 01-488 and his Amended Supplemental Authority in Support of James Rose's Petition for a Writ of Certiorari in which he sought to add the claim that Florida's capital sentencing was unconstitutional in light of Apprendi v. New Jersey, 120 S.Ct. 2348 (2000) and State v. Arizona, 25 P.3d 1139 (Ariz 2001). (PCR 719-37). The State responded (PCR 738-815). On March 18, 2002, the Supreme Court denied Rose's motion to consolidate and petition for certiorari. (PCR 816-17). See Rose v. Florida, 535 U.S. 951 (2002).

A Case Management Hearing was held on February 6, 2004 (PCR.13 898-937), and on February 9, 2006, postconviction relief was denied summarily. (PCR.3 842-48). This appeal followed.

SUMMARY OF THE ARGUMENT

GROUND I – Postconviction relief was denied properly. The trial court's reasoning is set forth in its order and supporting documentation is drawn from the State's response. Such was appropriated under McLin v. State, 827 So.2d 948, 954 (Fla. 2002); Anderson v. State, 627 So.2d 1170 (Fla. 1993). Further, the record establishes that the claims were legally insufficient, procedurally barred, meritless, or refuted from the record.

Sub-claim I – The claim of ineffectiveness for not having obtained a ruling on the Richardson issue is procedurally barred and meritless. This Court found on direct appeal that defense counsel placed on the record his reasoning for not presenting the newly disclosed autopsy photographs and Dr. Wright's testimony and that the trial court's failure to give a formal ruling on the Richardson matter was harmless. Rose is barred from cloaking the same issue as one of ineffectiveness to overcome the bar. Moreover, given counsel's announced record strategy and the resolution of the matter on direct appeal, Rose does not meet the dictates of Strickland to prove deficiency and prejudice.

Sub-claim II – The assertion that counsel rendered deficient performance when he failed to object to Juror DeMatteis' voir dire question was denied properly on the merits.

The record, when read in context, refutes the allegations raised here, and establishes that the jurors were properly instructed as to their sentencing role. Neither deficiency nor prejudice has been shown from the lack of an objection.

Sub-claim III – Rose claim of ineffective assistance for counsel's failure to object to the State's opening statement comment that Rose stopped talking to the police as a comment of the right to remain silent was denied properly.

Sub-claim IV – The denial of relief on the issue of counsel's effectiveness for not having objected to a single reference by the State to a tangential defense as a "smoke screen" was proper. No prejudice could be shown arising from the one comment.

Sub-claim V – VII – The challenge to Florida's capital sentencing based upon Ring is procedurally barred such a Sixth Amendment claim could have been raised on direct appeal. Moreover, Ring has been held not to be retroactive and Rose's sentence was final before Ring was issued. Furthermore, Rose has prior violent and contemporaneous felony convictions thereby taking the matter outside the purview of Ring.

ARGUMENT

GROUND I

THE SUMMARY DENIAL OF ROSE'S POSTCONVICTION MOTION WAS PROPER AS THE CLAIMS WERE LEGALLY INSUFFICIENT, PROCEDURALLY BARRED, MERITLESS AND/OR REFUTED FROM THE RECORD (restated)

Rose asserts that his motion presented facially valid claims, which should not have been denied summarily. Preliminarily, he complains that the trial court's order fails to attach portions of the record supporting the summary denial and then he challenges the denial of each of his postconviction claims. A review of the order and record establishes that the court's order denying relief summarily met the dictates of Anderson v. State, 627 So.2d 1170, 1171 (Fla. 1993) and Florida Rule of Criminal Procedure 3.851(f)(5)(D) when it outlined the basis for the denial of relief, referenced portions of the record either in the order or by incorporating the State's Response to Defendant's Motion for Postconviction Relief (PCR.2 226-841). Such procedure allows for a meaningful appellate review. Moreover, the individual claims fail as they either are plead insufficiently, procedurally barred, meritless, or refuted from the record. This Court should affirm.

On review, a summary denial of postconviction relief will be affirmed where the law and competent substantial evidence supports its findings. Diaz v. Dugger, 719 So.2d 865, 868 (Fla.

1998). In Lucas v. State, 841 So.2d 380, 388 (Fla. 2003), this Court stated: "To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record." See State v. Coney, 845 So.2d 120, 134-35 (Fla. 2003); Peede v. State, 748 So.2d 253, 257 (Fla. 1999) (citation omitted). To support a summary denial, the court "must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion." McLin v. State, 827 So.2d 948, 954 (Fla. 2002) (quoting Anderson v. State, 627 So.2d 1170 (Fla. 1993)).

RECORD DOCUMENTS NEED NOT BE ATTACHED TO THE ORDER DENYING POSTCONVICTION RELIEF SO LONG AS THE COURT'S ORDER MAKES FACTUAL FINDINGS, CONCLUSIONS OF LAW, AND REFERENCES THOSE PORTIONS OF THE RECORD AS ARE NECESSARY TO PERMIT A MEANINGFUL APPELLATE REVIEW (restated)

Pursuant to rule 3.851(f)(5)(D), the court denying postconviction relief must "mak[e] detailed findings of fact and conclusions of law with respect to each claim, and attach[] or referenc[e] such portions of the record as are necessary to allow for meaningful appellate review." As noted above when discussing the standard of review, attachment of portions of the record are not required where the trial court puts its rationale

in writing. McLin, 827 So.2d at 954; Anderson, 627 So.2d at 1171. Here, the trial judge made detailed findings, referenced case law, and specific portions of the State's response wherein record citations as well as related materials were provided in support of summary denial of relief. Together, these items allow for a meaningful review. The complaint that documents should have been attached to the order must be rejected.

Law for claims of ineffective assistance of counsel - For a defendant to prevail on an ineffectiveness claim, he must establish (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for counsel's deficiency, there is a reasonable probability the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 688-89 (1984).

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

Valle v. State, 778 So.2d 960, 965 (Fla. 2001). At all times, Kearse bears the burden of proving not only counsel's representation fell below an objective standard of

reasonableness, and was not the result of a strategic decision, but also actual and substantial prejudice resulted from the deficiency. See Strickland 466 at 688-89; Gamble v. State, 877 So.2d 706, 711 (Fla. 2004).

In Davis v. State, 875 So.2d 359, 365 (Fla. 2003), this Court reiterated that the deficiency prong of Strickland requires the defendant establish counsel's conduct was "outside the broad range of competent performance under prevailing professional standards." (citing Kennedy v. State, 547 So.2d 912, 913 (Fla. 1989). With respect to performance, "judicial scrutiny must be highly deferential;" "every effort" must "be made to eliminate the distorting effects of hindsight," "reconstruct the circumstances of counsel's challenged conduct," and "evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689; Davis, 875 So.2d at 365. In assessing the claim, the Court must start from a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 688-89 (citation omitted). The ability to create a more favorable strategy years later, does not prove deficiency. See Patton v. State, 784 So. 2d 380 (Fla. 2000); Cherry v. State, 659 So. 2d 1069 (Fla. 1995). "A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the

prejudice component is not satisfied." Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986).

Expounding upon Strickland, the Supreme Court cautioned in Wiggins v. Smith, 539 U.S. 510, 533 (2003):

> In finding that [the] 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*.... 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." ... A decision not to investigate thus "must be directly assessed for reasonableness in all the circumstances."

Wiggins, 539 U.S. at 533. From Williams v. Taylor, 529 U.S. 362 (2000), it is clear the focus is on **what** efforts were undertaken and **why** a specific strategy was chosen over another. Investigation (even non-exhaustive, preliminary one) is not required for counsel reasonably to decline to investigate a line of defense thoroughly. See Strickland, 466 U.S. at 690-91 (stating "[s]trategic choices made after less than complete investigation are reasonable precisely to the extent the reasonable professional judgments support the limitations on investigation.").

SUB-CLAIM I

ROSE'S ASSERTION THAT COUNSEL RENDERED INEFFECTIVE ASSISTANCE FOR FAILING TO OBTAIN A RULING ON THE RICHARDSON INQUIRY WAS DENIED PROPERLY (restated)

Rose posits that this Court's direct appeal finding that trial counsel made a tactical decision regarding the non-use of autopsy photographs and x-rays which were the subject of an alleged Brady/Richardson violations was merely dicta. He claims that such dicta could not form the basis for the trial court's finding of a procedural bar on collateral review when the matter was raised on a claim of ineffective assistance of counsel for not having obtained a formal ruling on the Richardson hearing. Rose adds that counsel's failure to obtain a ruling following the Richardson hearing somehow precluded him from using the recently released evidence to dispute the heinous, atrocious, or cruel aggravator. (IB 18) For relief, Rose seeks a new penalty phase. This claim must fail.

In finding the ineffectiveness claim procedurally barred, the trial court reasoned that the claim was addressed on direct appeal, and noted that counsel had put on the record his discussion of the photographs and his reason for not presenting same. Further, the court noted Rose's agreement with this decision. (PCR.3 843). In coming to this conclusion, the court referenced and adopted the State's Response (PCR.2 259-68; PCR.3

843). Such conclusion has record support.

On direct appeal from the resentencing, this Court addressed the Brady/Richardson issues as follows:

> In issue two, Rose argues the State improperly withheld autopsy photographs until the current proceedings in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Specifically, he argues that the withheld photographs should have been disclosed earlier because they would have been relevant in establishing a more favorable time of death as it relates to the State's assertion of the HAC aggravator. Although this claim appears to constitute a *Richardson* claim as well as a *Brady* issue we find no reversible error under either analysis.
>
> ...
>
> The crux of the controversy here involves the late discovery of photographs which purportedly depict one of the injuries suffered by the victim. As previously mentioned, Dr. Fatteh testified that the victim suffered a fracture at the base of her skull. In order to illustrate the nature of the injuries, including this fracture, the State presented Dr. Fatteh's testimony along with certain photographs, the admissibility of which was challenged and addressed in issue 1, *supra*. However, these photographs are not at issue in the *Brady* claim. **The photographs claimed to be a violation of *Brady* consist of two sets, one containing two prints of the victim's skull, and another containing sixteen other autopsy photographs**, totaling in all eighteen prints. Rose argues the two-print set could be used to show that the fracture resulted not from a head injury, but instead from the erosion of that part of the skull by the work of maggots who had invaded the decaying body in the days after death.
>
> Starting with *Strickler's* first prong, we agree the photographs were in fact material in rebutting the State's evidence of the HAC aggravator.FN4 To the extent that these two photographs might have shown that the victim died very quickly, they might have negated the State's theory on HAC. The second prong of

Strickler was met here as well. These two sets of photographs curiously surfaced in the most recent penalty phase. Because of this late disclosure, the trial court held a *Richardson* hearing. ...

... thus, for the purposes of analysis the photographs appear to have been withheld.

However, *Strickler's* third and dispositive prong has not been met. As asserted, the utility of these photographs would have gone toward establishing some time line in rebutting the HAC aggravator. Nonetheless, it does not seem that the evidence would have established how long it took for the victim to die beyond what was estimated by the medical examiner in his testimony. **Even assuming that the skull fracture resulted from the maggots eating out the particular part of the victim's skull and not from a direct impact to the head, it is hard to see how that establishes a quicker death for the victim. In other words, the photographs would have done very little in either confirming or negating Dr. Fatteh's testimony that the death occurred within four to eight minutes of the head injuries**.

More importantly, as part of the *Richardson* process, the trial court offered to allow trial counsel as much time as necessary to go over the two pictures with Dr. Wright, a defense witness, on manner and cause of death, but counsel refused. Counsel appeared concerned that, because of their gruesome nature, the use of the photographs before the jury would have actually hurt his client. Accordingly, in addition to the fact that the photographs were of questionable relevancy to rebut HAC, the fact that counsel tactically chose not to use this material undermines any claim of prejudice. *See Way v. State*, 760 So.2d 903 (Fla. 2000) (affirming denial of postconviction relief where photographic evidence did not put the case in such different light as to undermine confidence in proceeding).FN5

Failure to Rule Upon *Richardson* Hearing

In issue three, Rose argues that the trial court erred in failing to rule on the *Richardson* issue. We disagree. As a general rule, the failure of a party to

> get a timely ruling by a trial court constitutes a waiver of the matter for appellate purposes. *See Richardson v. State*, 437 So.2d 1091, 1094 (Fla. 1983). As just mentioned above, the trial court held a hearing regarding the late discovery of the two sets of photographs. Although it could not be determined whether the State willfully committed improprieties regarding the late discovery of the photographs, **Rose's counsel realized that the use of these photographs would have at best had the effect of a double-edged sword because of their gruesome nature. In a tactical move, Rose's counsel decided not to use the photographs and not to call his own expert despite the trial court's urging. Trial counsel's decision effectively resolved the matter and any failure of the court to formally rule was rendered harmless**. *See Richardson*, 437 So.2d at 1094.
>
> _____
>
> FN4. It should be noted that the *Brady* claim here is limited to penalty phase issues because the photographs only go to the manner of death, not to identity or other reasonable doubt-related factors that might have been relevant at the guilt phase. *Brady*, of course, is applicable to both guilt and punishment. *See Strickler*, 527 U.S. at 280, 119 S.Ct. 1936.
>
> FN5. Contrary to the State's assertion, this *Brady* claim seems to be properly before this Court. Rose brought this matter up below and **a *Richardson* hearing was held determining whether improprieties were committed**. That was sufficient to properly preserve this issue. Nonetheless, as discussed above, the claim is without merit.

Rose, 787 So.2d at 795-97 (emphasis supplied).

This Court's finding that defense counsel was making a tactical decision was based upon the resentencing record where counsel, without putting on the defense medical expert, Dr. Wright, sought an advisory evidentiary ruling on the admissibility of the recently disclosed prints. However, not

having heard from either party's medical expert, the trial court declined to rule in a vacuum, but again offered defense counsel time to discuss the matter with his client and experts (RS.12 1185-86). The trial court stated: "I want Mr. Rose to be able to make an informed and intelligent decision with regard to how he wants to pursue the balance of his case. My understanding when we discussed this issue last week ... in relationship to Dr. Wright, you were awaiting a determination from the doctor after you had an opportunity to present him with the two photographs that represented the skull fracture" (RS.12 1191). With that premise in mind, the following discussion transpired:

> MR. SINGHAL (defense counsel): **I have talked it over with Mr. Rose, and just based on the chance that some of these additional photographs may come in, I am not calling Dr. Wright**.
>
> THE COURT: I am still giving you the chance to proffer Dr. Wright's testimony for the record, and thereafter have the Court make a determination whether or not the matters may be material, and because without his testimony, it is absolutely impossible for this Court to judge what would be appropriate and relevant in rebuttal, if anything, because I haven't heard Dr. Wright's testimony, and therefore, the possible introduction of any of these photographs.
>
> MR. SINGHAL: Although **Dr. Wright** is not here to give the proffer at this time, he certainly would, if called, he would testify as to the wound on the temple being caused by maggots. And in terms of the opinion he would form, in terms of the fracture, based on the two new photographs, which I got on Friday, he **would testify that they are consistent with either a fracture or a suture**.
>
> **It's just my opinion that that's ultimately going**

to open the door. I just can't take the chance of those pictures coming in.

...

THE COURT: My suggestion was, as to whether or not we should break and give the defense the opportunity to consult with Dr. Wright, or any other doctors and experts they feel are necessary, to deal with these particular issues. **Because again, while I understand that the defense is making a tactical and strategic decision based upon the potential and the possibility that one of these photos may become relevant and germane to rebuttal, in the absence of any proffer, any testimony, there may be absolutely no relevance to that. It might be a moot point. I don't know. I am willing to offer the defense whatever time and experts they feel are necessary and appropriate**.

MR. SINGHAL: **Candidly I would like to move on with Dr. Toomer at this point**.

(RS.12 1196-98) (emphasis supplied). Continuing, the judge inquired:

THE COURT: **If I tell you that these 16 photographs, none of them are going to be introduced in rebuttal, are you going to call** Dr. Wright?

MR. SINGHAL: **Then I still have the issue as to the two fractures photographs**.

THE COURT: **The two fracture photographs the doctor has had an opportunity to see?**

MR. SINGHAL: **Correct. I have, in fact, told the State what Dr. Wright's position is on that. I am making the decision not to call Dr. Wright**.

THE COURT: **This is a matter that you have consulted Mr. Rose on?**

MR. SINGHAL: **Yes.**

THE COURT: Mr. Rose, do you wish your attorney to call Dr. Wright as an expert on your

behalf in this penalty phase?

THE DEFENDANT: No, sir.

THE COURT: My understanding is that he did testify on your behalf back in 1983, and part of his testimony consisted of an opinion that one of the fractures that the State alleges was part of the cause of death in this case was not, in fact, a fracture, and that the victim in this case did not have a skull fracture and you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Last week the State produced two photographs that, and I haven't seen them.... But I am led to believe based upon the proffer that's been made in open court, with all parties present last week, that those photographs would be testified to by the current medical examiner, Dr. Perper, that they do, in fact, reflect skull fractures.

These 16 photographs, while it may become an issue in terms of whether or not one of them may be relevant, the fact still remains that the State does have those other two photographs which they would be utilizing with Dr. Perper in rebuttal to clearly demonstrate from their perspective that those are, in fact, skull fractures.

So the issue as to whether or not that one photograph with the maggots covering the face of the victim is relevant or not, the Court certainly could exclude these 16 photographs and permit the State to utilize the two that everybody has had an opportunity to view for a period of, at this point almost five or six days.

(RS.12 1200-02) (emphasis supplied). Concerned this could become an ineffective assistance of counsel claim, this Court once more offered to allow the defense to take whatever time necessary to discuss the prints with its experts and proffer testimony (RS.12 1205-06). Defense counsel acknowledged the

offer, but opted to continue without Dr. Wright (RS.12 1206-07).

From the above, without question, neither this Court, nor the trial court, was speculating as to defense counsel's actions or reasoning.[4] Counsel made an abundantly clear record that he was not seeking to go forward with Dr. Wright's testimony or the introduction of the recently disclosed photographs because he did not want to open the door to further evidence. In his estimation, the photographs were too damaging to chance opening the door to their admission. This was his reasoned opinion which he had discussed with Rose and together they agreed on the tactic not to go forward with such evidence. (RS.12 1185-86, 1191, 1196-98, 1200-02, 1205-07). Neither this Court nor the trial court needed to have further evidentiary development to determine counsel's strategy. As such, the trial court properly considered counsel's decision as tactical, not only because this Court made such a record finding, but because it was supported

[4] Rose relies upon Walker v. State, 792 So. 2d 604, 605 (Fla. 4th DCA 2001); Sampson v. State, 751 So. 2d 602 (Fla. 2d DCA 1998); Guisasola v. State, 667 So. 2d 248, 249 (Fla. 1st DCA 1995); and Collins v. State, 671 So. 2d 827, 828 (Fla. 2d DCA 1996) and submits that this Court's reference to defense counsel's tactical decision not to pursue the admission of Dr. Wright's testimony should be disregarded as dicta because it was not determined after an evidentiary hearing. These cases are not dispositive. While in those cases it was unclear what counsel's decision making was, while here, defense counsel outlined clearly his basis for not going forward with the photographic and expert testimony related to the cause/manner/timing of the victim's death as is evident from this Court's direct appeal opinion and the trial record.

by the trial transcripts.

Given this, and the ruling from this Court that the failure to formally rule on the Richardson hearing was harmless, the matter is procedurally barred when raised on collateral review as one of ineffective assistance of counsel. It is not proper to re-couch a claim as one of ineffective assistance in order to overcome the procedural bar and obtain a second review of the matter. See Rivera v. State, 717 So. 2d 477, 482 n.2 and n.5 (Fla. 1998) (rejecting claim as it was couched in terms of counsel's failure to preserve the matter for appeal in order to overcome the procedural bar); Cherry v. State, 659 So.2d 1069, 1072 (Fla. 1995) (observing that "[t]o counter the procedural bar to some of these issues, Cherry has [impermissibly] couched his claim on appeal, in the alternative, in terms of ineffective assistance of counsel in failing to preserve or raise those claims"); Medina v. State, 573 So. 2d 293, 295 (Fla. 1990) (holding "[a]llegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal"); Harvey v. Dugger, 656 So. 2d 1253, 1256 (Fla. 1995) (same). Moreover, it is inappropriate to use collateral attack to relitigate an issue resolved on direct appeal. See Marajah v. State, 684 So.2d 726, 728 (Fla. 1996).

Even if the merits are reached, keeping evidence from the jury which is negative or counter productive to the defense is

sound, professional strategy, thus, neither deficiency nor prejudice could be shown. Breedlove v. State, 692 So. 2d 874, 877-78 (Fla. 1997) (holding counsel was not ineffective for failing to present testimony of friends/family that would have been subject to cross-examination and countered any value defendant might have gained from favorable evidence); Ferguson v. State, 593 So. 2d 508, 510 (Fla. 1992) (finding counsel's decision not to present mental health experts was "reasonable strategy in light of the negative aspects of the expert testimony"); State v. Bolender, 503 So.2d 1247, 1250 (Fla. 1987) (holding "[s]trategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected").

Counsel's decision not to go forward with the evidence mooted the need for a ruling on the discovery violation especially in light of the fact that two damaging photographs were found to be admissible and this evidence was considered by the defense expert to be consistent with the State's theory that the victim suffered a skull fracture. Given this, counsel was not deficient in failing to obtain a ruling on a moot issue.

Furthermore, this Court recognized that the challenged photographs could have harmed the defense and were of questionable relevancy to rebut the heinous, atrocious, or cruel ("HAC") aggravator as they did not refute the medical examiner's

testimony that death took between four and eight minutes. Moreover, the fact that Lisa Berry died of a skull fracture was not at issue in this case as guilt had been established in a prior trial. The only issues related to the appropriateness of the sentence as supported by the aggravating and mitigating circumstances. Hence, the photographs would have to rebut HAC to have any relevancy. As this Court noted in its review of the HAC aggravator, the events Lisa Berry experienced **before her death**, and not the manner and timing of her death, were what established the HAC aggravator. Rose, 787 So.2d at 801-02. Given this Court's resolution of the Brady/Richardson issue as well as the affirmance of the HAC aggravator, neither deficient performance nor prejudice have been shown under Strickland and relief was denied properly.

As adopted by the trial court, the fact that counsel failed to obtain a formal ruling on his Richardson claim did not preclude the defense from presenting the newly disclosed photographs or Dr. Wright given that he had possession of the photographs and that Dr. Wright was a retained defense expert. Rose does not reveal how he was precluded from presenting such evidence. Moreover, he agreed, on the record, with counsel's decision not to pursue Dr. Wright and the claim that maggots caused the head injury. The evidence was not lost to the defense due to counsel's failure to obtain a ruling on the

alleged discovery violation. Again, no prejudice can be established as it cannot be shown that the result of the trial would have been different had counsel requested a formal ruling. At best, the State would have been precluded from showing the additional 16 autopsy photographs, which did not come in at trial in any case. Yet, counsel was still faced with the skull X-rays which showed the fracture, an opinion with which Dr. Wright would agree, and the blood evidence establishing that eight-year-old Lisa Berry was stripped naked before she was killed miles from her place of abduction. The fact she was driven miles from where her mother waited, was stripped of her clothing before her death, and suffered anguish before the fatal blows were struck, removes any claim of prejudice arising from not obtaining a formal ruling on the Richardson matter.

SUB-CLAIM II

THE CLAIM OF INEFFECTIVENESS ARISING FROM COUNSEL'S FAILURE TO OBJECT TO JUROR DEMATTEIS ALLEGED EXPRESSED BELIEF THAT ROSE HAD BEEN SENTENCED TO DEATH PREVIOUSLY WAS DENIED PROPERLY (restated)

Rose asserts that the trial court erred in finding this claim procedurally barred.[5] (IB at 23). Also, he asserts that Juror Doris DeMatteis ("DeMatteis") announced in front of the

[5] A review of the State's response, and the court's order adopting it reveals that neither rested on a procedural bar defense or finding. (PCR.2 268-74; PCR.3 843-44). As such, the State will not address this further.

jury during voir dire her belief that Rose had been sentenced to death previously and that this colored her view of the evidence and her vote for death while infesting the other jurors with the belief that a prior jury had found sufficient evidence to recommend death. (IB 21-22). It is Rose's position that counsel was ineffective in not objecting to and moving to correct DeMatteis' comment. As the court concluded properly, the claim is meritless and refuted by the record as Rose misconstrues DeMatteis' comments, makes the unfounded assumptions she announced that he had been sentenced to death previously, and that she voted for death. When the question/comments are read in context, there is no basis for an objection. Moreover, given the fact that the jurors who were chosen to constitute Rose's jury all agreed to follow the law, no prejudice can be shown. The summary denial should be affirmed.

In his opening remarks to the venire, the trial judge explained Rose's convictions for murder and kidnapping had been affirmed, but the case was returned to have a sentencing. The jury was told not to be concerned with guilt phase issues, but to consider whether a life without the possibility of parole for 25 years or a death sentence should be imposed. (RS.1 99-101).

During State's voir dire, the following colloquy was had:

> MR. RAY: ... This sentencing proceeding we're going to have is a little different than a criminal trial. Now, I know a number of you all have been on a

criminal trial, and in a criminal trial you have to prove the guilt of the accused. And you all understand that that issue has already been resolved? ...

And we're not here to retry whether or not Mr. Rose is guilty of murder in the first degree. We're here to consider the facts of the case inasmuch as they are relevant to any of the aggravating circumstances that the judge feels would be appropriate in this case which we will talk about at a later time possibly.

How many people have heard the -- other than today -- the definition, "reasonable doubt?" ... But, that standard applies in this case to proof of only the aggravating circumstances.

Do you all understand that? We have to prove those to you beyond and to the exclusion of every reasonable doubt. We don't have to prove guilt. Do you all understand that that's already been done?

Is there anyone in the group before me here ... first, do any of you all, does it bother you that, hey, look, I mean, I'm here, I didn't hear all of the facts of that first jury necessarily while they found Mr. Rose guilty of murder in the first degree, and now they're asking me to recommend to His Honor what sentence to impose. Does that bother any of you? If it does, let me know.

MS. DEMATTEIS: Yes

MR. RAY: Ms. DeMatteis, tell me about that.

MS. DEMATTEIS: **Well, is the case going to be explained to us? I mean, why he was sentenced? Or is it we're just going to take it up and decide his fate, because that's what it is?**

MR. RAY: No. **Certainly evidence will be presented to you regarding each of the aggravating circumstances** that we, the State, feels are appropriate. And one of those aggravating circumstances may be that ... the crime of murder was committed while he was engaged in the commission of

the crime of kidnapping.

Certainly evidence would have to be presented to you all regarding that fact. And, basically, you know, **I think this jury will most likely hear similar evidence that the guilt-phase jury heard, and you will -- the State will certainly attempt to give you a factual basis upon which to rest your decision**, whatever it may be.

Does that solve your concern a little bit?

MS. DEMATTEIS: **Yes. I would say it satisfies me a little bit, you know, so I'm not just going to listen and then say, well, he is going to be this or that.**

MR. RAY: You understand, of course, you remember as a -- you were on a criminal jury once before?

MS. DEMATTEIS: Yes.

MR. RAY: Remember they talked about if you had to walk out here right now, what sentence would you recommend if we said it's over?

MS. DEMATTEIS: Yes.

MR. RAY: **Well, you've heard no evidence, right, so you would have to say life, right?**

MS. DEMATTEIS: **Yes.**

MR. RAY: Because you've heard no evidence. So the State would certainly -- is certainly going to present evidence that it feels would satisfy the aggravating circumstances that we feel apply to this case.

So there will be a factual basis presented to you. Now, whether or not it's sufficient to satisfy each of you beyond and to the exclusion of every reasonable doubt certainly remains to be seen.

(RS.4 138-41).

Further clarification was given by the judge and prosecutor

in response to Ms. Hausler's question whether a prior sentencing occurred.

> THE COURT: The reason that we are back with respect to the issue of sentencing goes back to what I had indicated to you earlier.
>
> An appellate court ... had an opportunity to review the conviction of Mr. Rose and they affirmed that conviction, which means he is guilty of the kidnapping and of the murder in the first degree.
>
> **The appellate court sent the case back ... with instructions that the defendant is to have a new trial to decide what sentence should be imposed on the murder conviction.** That's why we're back. We're here pursuant to the orders of a higher tribunal.
>
> MS. HUASLER: Why, was something wrong the first time?
>
> THE COURT: Ma'am, I can only tell you what the appellate court tells me to do and that's to have a new sentencing phase.
>
> ...
>
> THE COURT: **The only thing I can ask of you is whether or not, if you are selected as a juror in this case, if you can listen to the facts, listen to the law, and apply the law to the facts as you find them in making a recommendation to the Court**. That's really the bottom line.
>
> MR. RAY: What I can say is that the only thing you are supposed to consider and the judge will give you this, when you arrive at your opinion as to whether or not your advisory recommendation is the facts that are relevant to the aggravating circumstances in this case --
>
> ...
>
> MR. RAY: Ms. Hausler, let me ask you this: The judge has already told you all that the sentence for the kidnapping has already been imposed.

...

MR. RAY: So you're not really to consider that.

MS HAUSLER: He's guilty of that and he is guilty of murder?

MR. RAY: Yes, ma'am. He has been found guilty by a trial jury of those two offenses. But you're not to consider the sentence regarding the kidnapping because that's already been given, as the judge has instructed you.

And the judge is explaining that a higher court has told this Court that the sentencing proceeding for the murder case, the murder conviction, has to be redone.

MS. HAUSLER: **Start all over again, In other words --**

...

MR. RAY:-- **for the re-sentencing**.

(RS.4 142-44)

From the foregoing, it is clear that DeMatteis was not announcing that Rose had been sentenced to death before. Instead, the juror voiced her concern that she would have some evidence upon which to make a decision. In Johnson v. State, 903 So.2d 888, 896-97 (Fla. 2005), this Court reasoned that:

> [i]n order for the statement of one venire member to taint the panel, the venire member must mention facts that would not otherwise be presented to the jury. No venire member in Johnson's case mentioned a fact that would not otherwise be presented to the jury. A venire member's expression of an opinion before the entire panel is not normally considered sufficient to taint the remainder of the panel.

Id. at 897 (citations omitted). Given the fact that Rose misconstrues the record, he cannot show that counsel's failure to object to DeMatteis' question was deficient performance. Jones v. State, 845 So. 2d 55, 67 (Fla. 2003) (affirming summary denial of ineffectiveness claim and finding record established that jury was not misinformed by State as to its sentencing duty). In fact, such refutes his claim.

The additional clarification given by this Court in response to Ms. Hausler clearly informed the jurors they were to disregard what happened previously and render a sentencing verdict based upon the facts presented in the new penalty phase and the law as given by this Court. The record further reflects that the jury was instructed properly on its sentencing role. Jones, 845 So. 2d at 67 (finding no prejudice could be found in ineffectiveness claim challenging State's questioning in voir dire about jury's sentencing role where trial court instructed jury properly). Furthermore, the jurors are presumed to follow the law. United States v. Olano, 507 U.S. 725, 740 (1993)(finding there is a presumption, absent contrary evidence, jurors follow court's instructions). Hence, when instructed to base their decision only upon the evidence presented at trial, and absent any evidence to the contrary, the jurors are presumed to have done just that. Rose has not shown that any juror was biased or had an animus toward him based upon arising from the

resentencing. As such, relief was denied properly. See Davis v. State, 928 So.2d 1089, 1117 (Fla. 2005) (rejecting collateral claim as without foundation where records showed jurors were not questioned during voir dire on the topics the defendant alleged counsel should inquired into and even if the Court assumed deficient performance, the defendant failed to prove prejudice as he could not show "that any unqualified juror served in this case, that any juror was biased or had an animus toward" those suffering from the same mental condition as the defendant). Cf. Mungin v. State, 932 So.2d 986, 996 (Fla. 2006) (affirming summary denial of ineffectiveness claim in part because prejudice could not be shown). Given that the record refutes the initial premise that DeMatteis announced Rose had been sentenced to death, neither deficiency or prejudice under Strickland have been shown and relief was denied properly.

SUB-CLAIM III

THE SUMMARY DENIAL OF THE CLAIM COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THE STATE'S COMMENT THAT ROSE INVOKED HIS RIGHT TO REMAIN SILENT WAS DENIED PROPERLY AS MERITLESS (restated)

It is Rose's contention that summary denial was improper as his penalty phase counsel rendered ineffective assistance. Rose maintains that his counsel was deficient in not objecting to the prosecutor's argument which outlined that Rose waived his right to remain silent, spoke to the police for a period of time until

they asked whether Rose was making up part of his account of the night of the murder, at which point he declined to speak to the police anymore (IB at 24-25). In relying on the state's reasoning presented in its Response to the postconviction motion, the court found the claim to be without merit stating: "The comment goes to the defendant's guilt which had previously been determined and upheld. The comment would not change the outcome of the penalty phase." (PCR.3 844) That ruling should be affirmed as it is supported by the record.

Rose points to three comments, spanning 17 pages, and asserts that counsel was ineffective for not objecting. The prosecutor outlined the following in opening statement:

> As I said, Detective Bukata at that time that Detective Tipton obtained the fingerprint scrapings, which he had done at Detective Bukata's request, was speaking to Mr. Rose in the detective bureau. And this is in the morning of the 23rd. And he was asking Mr. Rose about any involvement.
>
> Mr. Rose had been advised of his rights, constitutional rights, to remain silent by Detective McLellan and Wlaker, and he was further advised of his constitutional rights by Detective John Bukata on a written form.
>
> And after that he was talking to him about any involvement he may have had in the disappearance of Lisa Berry. And at that time, he took from Mr. Rose evidence which you will see, which consists of a pair of white pants, a shirt that's multi-colored. It's basic blue, but it's got a lot of strange design on it and some shoes and some socks that Mr. Rose had on.
>
> Bukata also observed the stains on these white pants, and he also noticed what he thought to be a red

substance, which he felt was blood, on the inside of the arches of each show that Mr. Rose had on. And he commented to Mr. Rose about the shoes and, in his opinion, Mr. Rose kind of tried to wipe the shoes. So that's when he asked for the clothing, and he got the clothing from Mr. Rose, which he gave to them.

...

And Mr. Rose told him about his activities that night. And Rose said, yeah, he had left the bowling alley and he went to the Highway Bar, which was located north of the bowling alley ....

And there was a bar, and I think a Grand Union or a grocery store next to it called the Highway bar. And he said that he had, when he was leaving that – Lisa had tried to go, when he was leaving the bowling alley, that Lisa had tried to go with him, and he wouldn't let her.

He told her to go back to the bowling alley when he went out to get in the van, and that he had called Barbara from the Highway Bar. And then he changed his version from calling her from the bar, that he had called her from a phone nearby the bar, from inside the bar, he had called her from a phone near the bar.

Rose told him that he saw Lisa walk by, when he was talking to Barbara, with a man with a goatee, and that he had commented to Barbara that Lisa was getting chunky.

... And when he asked him – after he asked him if he could have fingernail scrapings, he said "Yeah." And then he says he goes to like trying to clean out his fingernails with his other fingernails. ...

Also, Jim Rose told, when asked about the blood that was – that he thought was on his pants by Bukata, he said, "Well, you know where I could have gotten that from is, I gave a guy by the name of Bobby Lewis a ride for the Highway Bar about two months ago, and he got shot at the Highway Bar."

(RS.6 457-61)

Continuing with his opening statement, the prosecutor noted:

> Detective King spoke to Jim Rose and he reiterated to Detective king his simpatuous (sic) relationship with Barbara, admitting to him he was very jealous, mentioned specifically Walter Isler for some reason who was an older man, to Detective king, and he mentioned them going out to eat. Evidently, they had gone out to eat several weeks before or something like that.
>
> And he said as he was leaving ... as he was leaving the bowling alley, Lisa came to the van and he took her back into the bowling alley because he didn't want her to go with him.
>
> ...
>
> Detective king was not assigned to this case. They asked him to speak with Jim because he knew him and they were trying to find out where Lisa berry was at this time. But Mr. Rose did not indicate to Detective king that he had anything to do with the disappearance of Lisa Berry.
>
> Lisa was found by civilians on October 26th, 1976, about 7:10 in the evening. And her body was found floating face down in the N-19 Canal....
>
> There used to be a restaurant called the Kapok Tree Inn. ... It's approximately 10 ½ miles from the bowling alley....
>
> There were no clothes on the body....
>
> ...
>
> As a result of his autopsy, his opinion in that Lisa died from blunt trauma to the head....

(RS.6 463-65).

The prosecutor stated:

> There was paint in the cans in Mr. Rose's car.

The canal where Lisa's body was extracted from was drained. ... Well, almost underneath the body, they found a hammer covered with mud....

You'll see photographs of the people who took the hammer out, holding the hammer up....

...

Now the police were suspicious, as I stated, of Mr. Rose. So they started surveilling Mr. Rose, following him, watching him.

And Mr. Rose at that time was living in Pompano. And one day Sergeant White was behind him. ... And Mr. Rose stopped his car, so White stopped his.

And Sergeant White is going to testify that Rose got out of his car and came up to him and says, "Hi, look, the girl with me is scared. When the time comes to arrest me, I'll come peacefully. Don't knock down any doors." Now, that was on October 24th.

On October 25th, Detective Al Van Sant, ... he knew Rose's mother and stepfather. He went to see Rose in a bar on Sample Road. And he saw Rose was unshaven. His hand appeared to be swollen and scratched.

And earlier Richie Hoffman ... went back in the van and got that pink rag off the paint cans. And that pink rag ... was the blouse that Lisa had been wearing that night.

So Van Sant said, "Jim, how did that blouse get in your van?" And Jim Rose categorically denied, "In no way it could have been in my van. It's not hers."

And about that time Jim Rose's mother came to speak with him and the stepfather and Al, who was with another officer, Detective Unger, they were in plain clothes ... spoke with Jim Rose and his mother. And she left and they spoke with Jim some more.

They took a ride with Jim. They were searching for information. This was on the 25th. They still hadn't found Lisa's body in that canal. And Al asked

him about the blood on the pants and in the van. And, once again, Jim Rose reiterated his story to him about Bobby Lewis.

Well, at that time they didn't know what Bobby Lewis's blood type was, as we do today, blood type A. The blood on the pants, the testimony will show, was blood type B. The defendant said it's either Bobby Lewis's blood or it's paint.

On the 26th Jim Rose got his van back. He went to the police station with a lady he was living with at that time, Judy Crumb. He got his van back. And at that time, Al Van Sant took ... took him up to the detective bureau and they had a cup of coffee. Judy was there. And Jim ... they went over the events of that night again.

Jim told him before he went to the bowling alley, he had gone to Monk's Lounge. ... And he left for the bowling alley and arrived about 9:00. And he did go to the Highway bar, as we heard. That's when he heard the noise under the van and he cut himself.

He said at the Highway Bar he had a couple of beers and he spoke to the barmaid, and that he had called Barbara from the phone booth at the Highway Bar.

Then he says that on the way, that Lisa had tried to get in the van. And she had actually – when he is leaving the bowling alley, she had actually got (sic) into the van and reached across – kind of entered the van. And the reason she could was because on the way from the Monk's Lounge, he had picked up a passenger and he had forgotten to lock the door. And so that would explain about Lisa being in the van.

On October 26th, Van Sant spoke with Jim Rose again after the body had been found and a hair had been removed from one of Jim Rose's blue socks. And the hair, in the opinion of John Penney, is consistent with the head hair of Lisa Berry. He can't say it's the same, but he can say it is similar to and consistent with her hair.

So Al Van Sant asked him. He said, "How can her

> hair get on your socks?" And Jim said, "Well, when we were at the bowling alley, she sat on my lap." That statement in the only evidence that it happened at the bowling alley.
>
> He also asked him, "How could her hair be crushed?" ....
>
> And Jim Rose said he couldn't have done it because he couldn't have driven that far that fast, as to where the body was found.
>
> On the 28th, Al talks to him again and asks him about whether or not he had a hammer. And Jim Rose said he did. And he said it had dark paint on the handle, similar to the hammer that's in evidence. And at that time, the defendant denied to Al Van Sant that he ever made the call from the Highway Bar.
>
> And Van Sant said words to the effect, "Look, are you making up this story regarding Lisa with a man at the bowling alley that you saw?" And at that time, Jim Rose terminated the conversation, wouldn't speak anymore.

(RS.6 468-74).

Initially, it must be noted that Rose did not remain silent as was outlined by the prosecutor and as evidence by Rose's conversations with the police which were presented in court. (RS.8 686-87, 690-91, 695-96, 703, 707-11; RS.9 854, 858-62, 866-69, 873-77, 881-82, 893-95, 897-908, 922-24, 933-38, RS.10 988, 1079-81). Instead he spoke to the police and lied, until the police asked if he were making up a very specific part of his story, i.e., whether he saw Lisa with a man with a goatee. A prior jury had decided this issue already when it rendered a guilty verdict. Hence, the prosecutor's comments are a comment

on the facts, not Rose's right to remain silent. Counsel should not be found deficient as there was nothing inherently improper in the comment. In Downs v. Moore, 801 So.2d 906, 911-12 (Fla. 2001), this Court reasoned:

> However, this Court has held that *Doyle*'s [*Doyle v. Ohio*, 426 U.S. 610 (1976)] prohibition does not apply where the defendant does not invoke his Fifth Amendment privilege against self-incrimination. *See Valle v. State*, 474 So. 2d 796 (Fla. 1985), *vacated on other grounds*, 476 U.S. 1102, 106 S.Ct. 1943, 90 L.Ed.2d 353 (1986). In *Valle*, this Court found that where a defendant refuses to answer one question out of many during a lengthy interrogation following the defendant's waiver of his constitutional rights, the State is not precluded from subsequently admitting evidence of the defendant's silence at trial. *See id.* at 801 (citing *Ragland v. State*, 358 So.2d 100 (Fla. 3d DCA 1978)).

Moreover, because Rose had been convicted of the murder and kidnapping, even if the prosecutor's opening statement comments were objectionable, no prejudice can be shown from the failure to object. There is no reasonable possibility the prosecutor's single comment in an opening statement, which is not evidence, would have altered the result when the jury was considering aggravating and mitigating factors associated with the appropriateness of the sentence. See Chandler v. State, 534 So.2d 701, 703-04 (Fla. 1988) (finding comment during defendant's re-sentencing harmless because of defendant's prior conviction, thus, prosecutor's comment would not have affected jury's deliberations); Bertolotti v. State, 476 So.2d 130, 132-

33 (Fla. 1985) (finding State not permitted to raise an inference of guilt through defendant's silence, "[b]ut where, as here, the determination of guilt has already been made, such comment does not call into question the fairness of the penalty phase trial as a whole" especially in light of the evidence of aggravation presented).

Here, Rose is unable to show any valid connection between the description of how his confession ended and the aggravating factors proven beyond a reasonable doubt. The felony murder aggravator was established with Rose's prior convictions for burglary and the contemporaneous kidnapping which were affirmed on appeal. The prior violent felonies and under sentence of imprisonment aggravators were established via those convictions, and the HAC aggravator was proven from the facts of the case as established by the testimonies of police officers, family members, and the medical examiner. There is no reasonable possibility, that but for the single comment in opening statement, especially where Rose did not remain silent, that he would have received a life sentence. The summary denial of this claim should be affirmed. See Blackwood v. State, 2006 WL 2883125, *6 (Fla. Jan. 6, 2006) (affirming summary denial where underlying comment found to be harmless).

SUB-CLAIM IV

THE COURT PROPERLY REJECTED THE CLAIM OF INEFFECTIVENESS FOR COUNSEL'S FAILURE TO OBJECT TO THE PHRASE "SMOKE SCREEN" (restated)

Rose maintains that the court erred in summarily denying his claim of ineffective assistance for counsel's failure to object when the prosecution referred to a portion of the defense argument as a "smoke screen." (IB at 27-28). Pointing to McGee v. State, 435 So.2d 854 (Fla. 1st DCA 1983), Rose claims that the timeline argument was susceptible to the conclusion that he could not have done all of the conduct of which he was accused. (IB at 28). Contrary to Rose's assertion, the failure to object did not prejudice the defense in this case as Rose's guilt had been decided by a prior jury, thus, the timeline defense did not impact in the least the jury's sentencing decision and Rose has not carry his burden of proving such under Strickland.

Although an evidentiary hearing was not held on this claim, such was unnecessary. Defense counsel's lack of an objection was clear from the record, thus, if Rose cannot show prejudice, he had not carried his burden under Strickland. "A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied." Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla.), cert. denied, 479 U.S. 972 (1986). When the challenged comment is read in

context, and in light of its sole use against "guilt phase" issues, and the overwhelming evidence of aggravation and minimal mitigation, it cannot be said that but for the comment, Rose would have received a life sentence. See Ferguson v. State, 593 So.2d 508, 511 (Fla. 1992) (reasoning "We also reject Ferguson's argument as to counsel's failure to object to statements in the prosecutor's closing. The decision not to object is a tactical one. Although some of the prosecutor's remarks were objectionable, he did not dwell on these inappropriate comments, nor were they so severely inflammatory or damaging as to render counsel's silence deficient performance."). Hence, prejudice has not been shown.

While characterization of defense arguments as "smoke screens" has been found improper, no court has held that it is *per se* evidence of harmful error or ineffective assistance of counsel for not raising an objection. See Suggs v. State, 923 So.2d 419, 433 (Fla. 2005); Ferguson, 593 So.2d at 511. In stead, the focus is on the number of times the argument is put forward, other harmful errors committed at trial, and recognition that such a comment may be left unchallenged by defense counsel for tactical reasons.[6] See Anderson v. State, 863

[6] As noted above, there was no evidentiary hearing, but, such is not fatal to the State's position. First, the "smoke screen" comment was made once, thus, counsel could reasonably have deemed it unworthy of an objection which would only have

So.2d 169, 187 (Fla. 2003) (recognizing prosecutor's comments were improper, but were not so many or as egregious as in those cases were reversal was required); Waters v. State, 486 So.2d 614, 616 (Fla. 5th DCA 1986) (reversing for a new trial based upon several errors including the prosecutors **repeated** characterization of the defense counsel's closing arguments as "misleading and as a smoke screen"); McGee, 435 So.2d at 859 (finding use of "smoke screen" comment harmless in light of entire case).

As part of his defense case, Rose questioned Detective McLellan about reports he received from four witnesses regarding the time they last saw the victim, Lisa Berry. (RS.8 720-32). It was the defense's position that the time line undercut the HAC aggravator. Over the State's objection, the evidence was permitted. (RS.8 732). The detective reported that Lisa was seen by Fay Growsowski, Linda Nieves, Robert Autry, and Joseph Autry between 11:00 p.m. and 11:45 p.m. (RS.8 732-33). In closing, the State challenged the value of such accounts given

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highlighted the State's point. Second, and for the same reasons, there was no need for an objection as the comment did not attack the substantive issues of aggravation or mitigation, but went more toward a residual doubt argument. See Chandler v. United States, 218 F.3d 1305 1314 (11th Cir. 2000) (noting "counsel cannot be adjudged incompetent for performing in a particular way in a case, as long as the approach taken 'might be considered sound trial strategy.'") (quoting Darden v. Wainwright, 477 U.S. 168 (1986). Third, the aggravation overwhelmed the mitigation, thus, the result of the sentencing would not have been different.

the other evidence supporting HAC.

In his closing argument, the prosecutor asserted:

> I had a question based on the evidence with the two statutory mitigators that the Court will instruct you on that are exactly the same as two of the conclusions that Dr. Toomer arrived at as a result of his psychological evaluations.
>
> And he told you that going into this psych evaluation of Mr. Rose, he knew what the statutory mitigators were. He knew those. He said that Mr. Rose was acting under extreme emotional or mental distress. That's one of his conclusions. That's one of the mitigators that you have to consider.
>
> Well I submit to you, ladies and gentlemen, that when Mr. Rose committed this crime, he was calm, cool, calculated, intentional, deliberate, focused, extremely well oriented in time and place.
>
> He called Barbara up after he had kidnapped Lisa. Oh, I just wanted to tell you I am at the Highway Bar. I will pick you up, I will see you after bowling. What time it it by the way? 10:23. No, he says it's 10:30. He is establishing an alibi that he was at the Highway Bar, because he talked to Barbara on the phone. Barbara, I think as I recall the testimony, he was never concerned about time. This is kind of out of character to her for him.
>
> Then he drives back to the bowling alley, he approaches the Szabos, and hey you got blood on your pants. He doesn't say oh, my God, oh geez. He very calmly says no, that's not blood. Well, I cut myself changing my tire. Then he gave a number of other stories to the police. They did talk to him for a long time. They were trying to find out where she was. They were trying to find the body. They thought he killed Lisa.
>
> Then he goes looking for Lisa and he comes back and he's changed his pants, from white to the blue, that was probably when he put the paint on them, letting them dry. Then he comes back in, and I think somewhere along there he goes in the bathroom and he

> comes back out, there is grease on the blood spot on the right leg.
>
> Then he is sitting there with Barbara, he says, you know, who is that guy with Lisa walking by there with the goatee? I submit to you Lisa was dead. She wasn't in that bowling alley.
>
> This smoke screen about the Grawbowskis' and Autrys, their recollection of time, ladies and gentlemen, look, you got to draw upon your human experience, common sense. When things like this happen, people aren't looking at your watches oh, yes, I need to remember what time it is. But we do know for sure that Mr. Rose called Barbara somewhere between 10:23 and 10:30. He already left the bowling alley, that's consistent with all the other testimony. He arrived about 11:30 when he came back.
>
> So I question that mitigator. And even if you find it to exist, what has it got (sic) do with anything regarding mitigation of Mr. Rose's heinous, atrocious, and cruel brutal murder of this little eight year old girl? What does it got (sic) to do with it?

(RS.14 1432-35).

Clearly, the use of the phrase "smoke screen" was limited to the timeline offered by the defense as a tangential basis for challenging HAC. Such timeline was refuted by the State's evidence based upon when Rose was last seen at the alley with Lisa before her disappearance between 9:15 and 9:45 p.m., the phone call Rose made from the Highway Bar near 10:30 p.m. where in he gave a specific hour, and the time, approximately 35

minutes,[7] it would take to drive to and from the canal where Lisa's body was found. Moreover, the failure to present this timeline in the prior guilt phase was found not to be ineffective assistance of counsel. Rose v. State, 675 So.2d 567 (Fla. 1996). Here, the State's argument was addressed more toward the residual doubt claim, and tangentially to the HAC aggravator.

To the extent that the argument goes to residual doubt, such is not a proper mitigating factor.[8] See Sims v. State, 681 So. 2d 1112, 1117 (Fla. 1996) (finding lingering doubt not an appropriate mitigating circumstance). As such, the fact that the State made such a comment, certainly does not establish prejudice for the entire penalty phase as would be required for relief under Strickland.

Furthermore, The HAC aggravator was established by more than the disagreement as to when Lisa was last seen. As this Court noted in affirming the HAC aggravator:

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[7] This estimation did not include the time it would take to kill disrobe and kill the child, or the time to discard the evidence behind a local grocery store. (RS.8 971).

[8] It is well settled; a defendant does not have the right to present evidence of lingering or residual doubt as mitigation. Bates v. State, 750 So. 2d 6, 9 n.2 (Fla. 1999) (following Franklin v. Lynaugh, 487 U.S. 164 (1988) and concluding there is no constitutional right to present "lingering doubt" evidence); Preston v. State, 607 So. 2d 404, 411 (Fla. 1992) (same); King v. State, 514 So. 2d 354, 357-58 (Fla. 1987)(same), cert. denied, 487 U.S. 1241 (1988); Aldridge v. State, 503 So. 2d 1257, 1259-60 (Fla. 1987) (same).

> As reflected by the record and the trial court's order, there is sufficient evidence to support the finding of this aggravator. Though the exact time of death could not be determined, the State asserts that the young victim was aware of her fate during her abduction and in the moments leading to her death. For example, the State asserts that this was established by the fact that the victim was found in the *802 canal and no blood was found on the clothes she wore that night. The State claims this indicates that Rose removed her clothes before applying the fatal blows. As stated by Dr. Fatteh, had she been wearing her clothes at the time of the blows, some blood would have landed on some part of her clothes. Therefore, it was proper for the jury to have inferred that, though the exact time it took for the victim to die was unknown, the victim consciously suffered anguish prior to the striking of the fatal blows. *See, e.g., Wyatt v. State*, 641 So.2d 1336, 1340 (Fla. 1994).

Rose, 787 So.2d at 801-02.

As this Court will recall, in addition to the HAC aggravator, four other aggravators were found. No statutory mitigators were established, but some non-statutory mitigators of some to very little weight were found.[9] The single, isolated challenge to a tangential timeline defense, which neither supported recognized mitigation nor undermined HAC, does not

[9] Five aggravators were found, (1) defendant on parole, (2) prior violent felony convictions, (3) committed during kidnapping, (4) HAC, and (5) victim under the age of 12. No statutory mitigators were found, but eight non-statutory mitigators were found established. "Some weight" was given the three mitigators, (a) non-nurturing childhood, (b) employment history, (c) good characteristics; "little weight" was accorded the three non-statutory mitigators (d) below average intelligence, (e) good person adapted to prison life, (f) good deeds, and finally, "very little weight" was assigned the last two mitigators (g) attempt at cooperation and (h) maintaining innocence. (RS.15 1591-99)

establish Strickland prejudice. The trial court correctly denied relief, and this Court should affirm.

SUB-CLAIMS V – VII

THE CLAIMS THAT ROSE'S DEATH SENTENCE IS UNCONSTITUTIONAL UNDER RING V. ARIZONA ARE INSUFFICIELTY ARGUED ON APPEAL, PROCEDURALLY BARRED, AND HAVE BEEN REJECTED REPREATEDLY (restated)

The sum total of Rose's argument on appeal is that he challenged his death sentence in his collateral review on the grounds that the jury should have determined the aggravating circumstances and that the facts constituting the aggravating circumstances should have been charged in the indictment. (IB 31). For support, Rose "incorporates his arguments below." Such is insufficiently pled. Moreover, the United States Supreme Court as well as this Court has found that Ring v. Arizona, 122 S.Ct. 2448 (2002) is not retroactive. Further, challenges to Florida's capital sentencing based upon Ring have been rejected consistently. Also, where the defendant has a prior violent felony convictions and/or a contemporaneous conviction, as does Rose, this Court has rejected the challenges based upon Ring.

It is well settled, where a appellant merely references a pleading below, this Court will find the matter insufficiently pled and the matter waived. See Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990) (opining "purpose of an appellate brief is to

present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived."); Cooper v. State, 856 So.2d 969, 977 n.7 (Fla. 2003); Roberts v. State, 568 So.2d 1255 (Fla. 1990). Rose, like Duest, does not elucidate his appellate argument beyond referencing his postconviction motion. Such should be found waived.

Moreover, this claim is procedurally barred. Rose challenged the constitutionality of section 921.141, Florida Statutes prior to his 1997 re-sentencing. He claimed the statute was unconstitutional under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and related Florida Constitutional provisions in part because the aggravating factors were not required to be included in the indictment and found beyond a reasonable doubt by a unanimous jury. Further he complained that the statute unconstitutionally permitted the judge to consider aggravating factors the jury may not have considered or found not to exist. (pcr.3 838-41). Because Rose challenged the constitutionality of the statute at trial as a violation of the Sixth Amendment,[10] he could have, but

[10] Such a claim has been known since Proffitt v. Florida, 428 U.S. 242, 252 (1976) (holding Constitution does not require jury sentencing). See Hildwin v. Florida, 490 U.S. 638 (1989);

having failed to do so on appeal. As a result, Rose is procedurally barred from asserting the claim here. "Issues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack." Muhammad v. State, 603 So. 2d 488, 489 (Fla. 1992). See Valle v. State, 705 So.2d 1331, 1335 (Fla. 1997); Wike v. State, 698 So. 2d 817, 820-21 (Fla. 1997).

However, should the merits be reached, the State offers the following. In denying relief below, the trial court relied upon Schriro v. Summerlin, 124 S.Ct. 2519 (2004); Bottoson v. Moore, 833 So.2d 693 (Fla. 2002); and King v. Moore, 831 So.2d 143 (Fla. 2002). (PCR.3 845-47). Such properly disposed of the claim as Ring as not retroactive to sentences that became final before June 24, 2002. Rose's sentence became final on March 18, 2002 with the denial of certiorari. Rose v. Florida, 535 U.S. 951 (2002). Under Summerlin, Rose is not entitled to relief. See Ponticelli v. State, 941 So.2d 1073, 1106 (Fla. 2006) (noting Ring is not retroactive under Summerlin and Florida Supreme Court's precedent); Johnson v. State, 904 So.2d 400 (Fla. 2005).

Also, this Court has rejected the need to have the aggravators charged in the indictment or to have the jury make

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Spaziano v. Florida, 468 U.S. 447, 472 (1984); Chandler v. State, 423 So. 2d 171, 173 n.1 (Fla. 1983).

specific findings in aggravation. See Mills v. Moore, 786 So.2d 532 (Fla. 2001); Shere v. Moore, 830 So.2d 56 (Fla. 2003); Porter v. Crosby, 840 So. 2d 981 (Fla. 2003) (stating "we have repeatedly held that maximum penalty under the statute is death and have rejected" arguments that aggravators need to be charged in the indictment, submitted to jury and individually found by unanimous jury). Likewise, the finding of a prior or contemporaneous felony has been found a sufficient basis to reject challenges based upon Ring. See Walls v. State, 926 So.2d 1156, 1174-75 (Fla. 2006); Duest v. State, 855 So.2d 33, 49 (Fla. 2003), cert. denied, 541 U.S. 993 (2004); Kormondy v. State, 845 So.2d 41, n. 3 (Fla. 2003); Grim v. State, 841 So.2d 455, 465 (Fla.), cert. denied, 540 U.S. 892 (2003). Rose has both prior violent felonies (two prior burglary convictions) and a contemporaneous kidnapping for the abduction of Lisa Berry. Rose has shown no basis for relief. This Court must affirm.

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to: Steven J. Hammer, Esq.; Law Offices of Steven J. Hammer, P.A., 440 South Andrews Avenue, Fort Lauderdale, FL 33301 this 27th day of February, 2007.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

LESLIE T. CAMPBELL
Assistant Attorney General
Florida Bar No. 0066631
1515 N. Flagler Dr.; Ste. 900
Telephone: (561) 837-5000
Facsimile: (561) 837-5108

COUNSEL FOR APPELLEE