IN THE SUPREME COURT OF FLORIDA

JOHN TROY,

Appellant,

v.

CASE NO. SC09-526
DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT,
IN AND FOR SARASOTA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF THE CASE AND FACTS

The following factual summary is taken from this Court's opinion affirming Troy's conviction and death sentence on direct appeal:

> John Troy was indicted for first-degree murder of Bonnie Carroll, as well as armed burglary and armed robbery; a fourth count, attempted sexual battery with a weapon upon Carroll, was later added by information. Troy was separately charged by information for the related armed burglary, aggravated battery, armed kidnapping, and armed robbery of Traci Burchette. Trial by jury resulted in guilty verdicts on all counts in both cases. Following a penalty phase, the jury recommended a death sentence for the murder by an eleven-to-one vote and the trial court imposed a death sentence.
>
> The evidence presented at trial indicated that on September 12, 2001, at approximately 5:30 p.m., the nude and dead body of Bonnie Carroll, twenty, was found in her home in the Timberchase Apartments in Sarasota. Debbie Ortiz, Carroll's mother, discovered her daughter's body. Ortiz had last seen Carroll alive at approximately 11:15 p.m. on September 11, 2001, when Carroll left Ortiz's home with Carroll's two-year-old daughter Cynthia.
>
> Associate medical examiner Dr. Michael Hunter arrived on the scene of the homicide at 2:05 a.m. on September 13. A knife was discovered in close vicinity to Carroll's body, and an electrical cord was found tied around her thigh. Dr. Hunter determined that Carroll was murdered around midnight on September 12. Dr. Hunter also observed a cloth tied around the victim's neck, numerous stab wounds to the front of the body, large incised wounds to the neck area, and blunt force impact injuries around the face. During the autopsy, Dr. Hunter found a piece of cloth inside Carroll's mouth that had been folded over and wedged firmly in the back of her throat. Blood on the fabric indicated that she was alive when it was inserted. The autopsy also revealed another cloth loosely tied

around Carroll's neck and petechial hemorrhages in the eyes--possibly but not conclusively indicating strangulation. Carroll suffered multiple areas of blunt impact injuries to her face, chin, and scalp, including small fresh injuries to the external genitalia and thighs. There were two very small areas of vascular dilation on her external genitalia, but no internal injuries to that area. No semen was identified, but at trial Dr. Hunter noted that all the factors were consistent with someone attempting to sexually batter the victim before she was killed. Carroll's body had suffered a total of fifty-four injuries, including forty-four stab wounds, three areas of incise wounds to the neck, at least seven impact injuries to the face, and multiple defense wounds on the hands.

A knife blade was also broken off within Carroll's body, which Dr. Hunter became aware of via x-ray. A bladeless knife handle was recovered from the counter of Carroll's bathroom. It contained the blood of both Troy and Carroll. Heather Velez, a crime lab microanalyst with the Florida Department of Law Enforcement (FDLE), testified that the bladeless knife handle and the knife blade had at one time been a single piece. Carroll's blood was also found on a steak knife, indicating that two weapons were associated with her injuries. There was no evidence of drugs in her system, and her blood alcohol level of 0.037 was consistent with having had a glass of wine.

John Troy also resided at Timberchase Apartments with his mother, Debra Troy, his girlfriend Marilyn Brooks, and Brooks' daughter. Troy was released from prison on July 25, 2001, approximately five weeks before the murder, after serving a sentence for armed robbery. Upon his release, Troy was placed on two years' probation. His conditional release mandated that he submit to regularly scheduled drug testing; Troy admitted to his probation officer that he would be unable to pass his first scheduled drug test because he had smoked marijuana while incarcerated. The drug test was then rescheduled for September 11, 2001, and on that date, Troy tested positive for cocaine and was informed by his probation officer that

he would soon be reincarcerated for violation of probation.

When he returned to his residence after his failed drug test, Troy got into a series of arguments with Brooks before leaving his apartment to visit Melanie Kozak's residence, where he used cocaine. Brooks testified that Troy took a kitchen knife with him and did not return. On September 11 and 12, Troy made a total of four visits to see Kozak--three before the murder and one after. During each visit, Troy and Kozak ingested cocaine together.

Troy was also involved in an incident with his downstairs neighbor, Karen Curry, on the evening of Carroll's murder. At approximately 12:30 a.m. on September 12, Troy pounded on her rear sliding glass door. She told him to go away, and called the police. Officer Derek Gilbert responded to Curry's call. Officer Gilbert went to the Troy apartment to investigate, but Troy was not home.

Carroll's death occurred some time between Troy's encounter with Curry and a 2 a.m. visit with Kozak. After Carroll's death, Troy stopped by Kozak's house, ingested some cocaine, then drove around in Carroll's car and decided to visit Traci Burchette, a psychiatric nurse and friend of Troy's mother. [n1] Troy parked a couple of streets away from Burchette's house, and then went into her backyard and picked up a two-by-four board. Concealing the board, Troy knocked on Burchette's front door at approximately 6:30 a.m. When she awoke and came to the door, Troy said that his car had broken down and he needed to use her telephone. She invited him in and Troy pretended to call a friend for a ride. Burchette stated that he appeared perfectly normal. She made him coffee, and Troy asked to use her computer. When Burchette leaned down to turn the computer on, she was attacked by Troy from behind. In the attack, Burchette lost fingernails on both hands and broke her knuckles while suffering a skull fracture. Troy bound and gagged her, took her car keys and her ATM card, and left.

n1 Troy and his mother stayed at Burchette's house for a week in August 2001.

Bank records indicated that Troy attempted to use Burchette's ATM card at a Sun Trust Bank in Arcadia at 8:24 a.m. Troy then headed south on Interstate 75 towards Naples. Meanwhile, Burchette managed to call 911; police arrived and she gave a description of Troy and her car. Troy was stopped in Naples by local police mid-afternoon on September 12 in Burchette's car with a female passenger. Police questioned the passenger and located the two-by-four board used in Burchette's attack along the highway near Ft. Myers. DNA testing later revealed Burchette's blood on the two-by-four.

At the time of his arrest, Troy was wearing a pair of tennis shoes, blue jeans, a T-shirt, and a baseball cap. Pursuant to trial stipulations regarding DNA evidence, the shoes contained Carroll's blood, the blue jeans contained both Carroll and Burchette's blood, and the T-shirt tested positive for Burchette's blood. Also, material removed from Carroll's fingernails disclosed a mixture of Troy's DNA. Two pieces of broken glass were recovered from Carroll's bedroom and tested for DNA. One piece, containing her blood, was found lying on her bra. The other piece of glass, which tested positive for Troy's blood, was found lying to the left of Carroll's body. Latent print examiner Jackie Scogin identified a match of Troy's fingerprint on a glass found on Carroll's kitchen counter.

At the outset of trial, with Troy's consent, defense counsel acknowledged in his opening statement both that Troy killed Carroll and that he had attacked Burchette. However, he claimed Troy was only guilty of second-degree murder on the basis that the killing was neither premeditated nor committed during the perpetration of any felony. Although Troy did not contest most of the charges, the defense, in its case and on cross-examinations, introduced physical evidence, photographs, and testimony to corroborate Troy's statements. Specifically, the defense substantiated that Troy was in Carroll's apartment by invitation, that the two of them were socializing prior to their argument which culminated in her murder, and that Troy used drugs while in her

> apartment. There was no evidence of forced entry into Carroll's apartment. Despite the defense claims, Troy was found guilty of first-degree murder and all other charges.

Troy v. State, 948 So. 2d 635, 640-41 (Fla. 2006).

After hearing the penalty phase testimony presented by both the defense and the prosecution, the jury recommended a sentence of death by a vote of eleven to one. Following a Spencer[1] hearing, the trial court followed the jury's recommendation and sentenced Troy to death, finding four aggravating circumstances: (1) the capital felony was especially heinous, atrocious, or cruel (HAC) (great weight); (2) Troy was previously convicted of a capital felony or a felony involving the use of or threat of violence (considerable weight); (3) the capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation (considerable weight); and (4) the capital felony was committed during the commission or attempt to commit a robbery or sexual battery (considerable weight).[2]

In mitigation, the trial judge found that two statutory mitigating circumstances had been established: (1) the capital felony was committed while Troy was under the influence of

[1] Spencer v. State, 615 So. 2d 688 (Fla. 1993).

[2] The trial court also found the pecuniary gain aggravator, but noted that it would be improper doubling to consider it with the robbery aggravator.

extreme mental or emotional disturbance (moderate weight); and (2) Troy's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (considerable weight). The trial court also found numerous nonstatutory mitigating factors - all of which received little weight. These mitigating factors included: (1) Troy's dysfunctional family background; (2) Troy's positive personal characteristics and actions, including protecting a Tennessee correctional officer during a prison incident; (3) Troy's being sexually molested; (4) Troy's "triple addiction" to alcohol, cocaine and marijuana; (5) Troy's lifelong history of mental and emotional problems; (6) Troy's potential for positive contributions if sentenced to life imprisonment; and (7) Troy's expressions of remorse.

On direct appeal to this Court, Troy raised the following issues: (1) Section 775.051, Florida Statutes (2001), excluding voluntary intoxication as a defense, is unconstitutional; (2) the evidence was legally insufficient to prove attempted sexual battery; (3) the trial court erred in denying Troy's right of allocution before the jury, and in allowing the State to introduce Troy's suppressed confession at the Spencer hearing; (4) the trial court erred in excluding Michael Galemore's testimony; (5) the trial court erred in failing to instruct the

jury on the age mitigator; (6) the trial court erred in instructing the jury that the law requires the death penalty in this case; and (7) Florida's death penalty scheme is unconstitutional. Although not raised by Troy, this Court concluded that, in light of the totality of the circumstances, the evidence was sufficient to sustain a conviction of first-degree murder and Troy's death sentence was proportionate. This Court affirmed the judgments and sentence. Troy v. State, 948 So. 2d 635 (Fla. 2006). Troy thereafter petitioned the United States Supreme Court for a writ of certiorari, but on June 18, 2007, the United States Supreme Court denied his petition. Troy v. Florida, 551 U.S. 1135, 127 S. Ct. 2981 (2007).

On June 10, 2008, Troy filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851 and raised twelve issues. (PCR V3-4:511-606). The State filed its response on August 11, 2008. (PCR V4:611-58). On December 15, 2008, Troy filed a motion pursuant to Florida Rule of Criminal Procedure 3.575, seeking an order allowing collateral counsel to interview juror Fred Hamblin in order to determine whether there was an undisclosed connection between the juror and the victim’s family. (PCR v4:680-86). On January 23, 2009, the court conducted a case management conference and on March 3, 2009, issued an order summarily denying Troy’s postconviction claims.

(PCR V5:816-834; PCR 1/23/09 Supp. V1:1-31).[3] By separate order on the same date, the court granted Troy's motion to interview juror Hamblin. The court noted that the motion, "though bordering on the tenuous," was sufficient to allow an inquiry of the juror. (PCR V7:1305-07). On April 22, 2009, the court conducted an interview with juror Hamblin, and the victim's father, regarding any possible undisclosed relationship. Both juror Hamblin and the victim's father, Bob Ortiz, testified that they did not even recognize each other, much less, have any type of acquaintance or relationship. (PCR 4/22/09 V8:16-26).[4]

[3] The single supplemental volume is not paginated consecutively. Thus, Appellee will cite to the hearing date, as well as, the applicable page numbers.

[4] Similar to the supplemental volume, volume 8 of the postconviction record is also not paginated consecutively.

SUMMARY OF THE ARGUMENT

Appellant's claim that trial counsel was ineffective for failing to adequately and properly prepare Michael Galemore, a mitigation witness, for his penalty phase testimony by having him meet with Appellant and review Appellant's prison records is without merit and was properly summarily denied by the trial court. The record conclusively refutes Appellant's claim of deficient performance and prejudice. Trial counsel sought to elicit testimony from Galemore, an assistant warden at a local correctional facility, regarding Florida Department of Corrections' policy and procedures for *any* inmate serving a life sentence. The record establishes that this witness' testimony was not intended to be based on personal knowledge of Appellant, but rather, was intended to inform the jury of "common misperceptions about prison life." As this Court noted on direct appeal, the trial court acted within its discretion in excluding this witness' testimony, and trial counsel was not prevented from presenting testimony from numerous other witnesses regarding Appellant's general good behavior in prison. Because the record conclusively establishes that trial counsel did not perform deficiently by failing to prepare the witness and clearly refutes any allegation of prejudice, this Court should affirm the trial court's summary denial of this claim.

The lower court properly denied Appellant's claim of ineffective assistance of trial counsel during voir dire for failing to investigate and question a juror regarding any possible connections with the victim's father. The record clearly refutes Appellant's claim that trial counsel performed deficiently in questioning the juror. Likewise, the record refutes Appellant's allegation that the juror had an "undisclosed" connection with the victim or her family.

The postconviction court properly found that Appellant's claim that penalty phase counsel was ineffective for failing to adequately argue in support of the statutory mitigating jury instruction on age of the defendant was procedurally barred. Appellant cannot relitigate the claim he made to this Court on direct appeal by now couching the claim as an ineffective assistance of counsel. Furthermore, as the lower court noted, the claim is also without merit. As this Court noted on direct appeal, the trial court acted within its discretion in denying the jury instruction on age, and even if there was error, it was harmless because the evidence established that Appellant functioned as a mature adult, and the jury and trial court were aware of the evidence that Appellant relied on to support the allegation of emotional and mental immaturity. As penalty phase counsel requested the jury instruction and informed the trial

court that there was evidence to support giving the instruction, Appellant is unable to establish deficient performance. Furthermore, this Court's finding of harmless error on direct appeal precludes any finding of prejudice based on the trial court's discretionary ruling refusing to instruct the jury on the statutory age mitigating factor.

The postconviction court properly summarily denied Appellant's claim that Florida's lethal injection procedures are unconstitutional as a violation of the Eighth Amendment's prohibition against cruel and unusual punishment. This Court has repeatedly rejected this identical claim, and the trial court properly followed this Court's precedent when denying Appellant's claim.

Appellant raises numerous other legal challenges to Florida's capital sentencing scheme that the lower court properly denied based on this Court's well-established precedent. Specifically, this Court has repeatedly rejected the same arguments Appellant raised below, specifically, his constitutional attack to Florida Statutes, Section 27.702, prohibiting CCRC from filing a federal § 1983 action (issue six), his claim that Rule 4-3.5(d)(4), of the Rules Regulating the Florida Bar is unconstitutional (issue seven), his challenge to the jury instructions that advise the jury that its role is

“advisory,” (issue eight), his premature claim that he may be incompetent to be executed (issue nine), his constitutional attack to Florida’s death penalty statutory scheme (issues ten and eleven), and his cumulative error claim (issue twelve).

STANDARD OF REVIEW

The postconviction court summarily denied all of Troy's claims after conducting a case management conference. This Court has stated that a "defendant is entitled to an evidentiary hearing on a postconviction relief motion unless (1) the motion, files, and records in the case conclusively show that the prisoner is entitled to no relief, or (2) the motion or a particular claim is legally insufficient." Freeman v. State, 761 So. 2d 1055, 1061 (Fla. 2000); see also Parker v. State, 904 So. 2d 370, 376 (Fla. 2005). "The defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden." Griffin v. State, 866 So. 2d 1, 9 (Fla. 2003). Where the postconviction motion lacks sufficient factual allegations, or where the alleged facts do not render the judgment vulnerable to collateral attack, the motion may be summarily denied. Hamilton v. State, 875 So. 2d 586, 591 (Fla. 2004).

A defendant is entitled to an evidentiary hearing on a claim of ineffective assistance of counsel if he alleges specific "facts which are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudiced the defendant." Hamilton v. State, 875 So. 2d 586,

591 (Fla. 2004). However, a "defendant may not simply file a motion for postconviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing." State v. Coney, 845 So. 2d 120, 135 (Fla. 2003). In order for a motion to be facially sufficient, the defendant must allege specific legal and factual grounds that demonstrate a cognizable claim for relief. If a defendant's conclusory allegations are not supported by a properly pled factual basis, the claim is facially insufficient and should be summarily denied. See Davis v. State, 875 So. 2d 359, 368 (Fla. 2003). Thus, an evidentiary hearing is warranted on an ineffective assistance of trial counsel claim only where a defendant alleges specific facts, not conclusively rebutted by the record, which demonstrate a deficiency in performance that prejudiced the defendant. Cherry v. State, 659 So. 2d 1069, 1072 (Fla. 1995).

In order to establish a claim that defense counsel was ineffective, a defendant must establish both deficient performance and prejudice, as set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). As to the first prong, deficient performance, a defendant must establish conduct on the part of counsel that is outside the broad range of competent performance under prevailing professional

standards. See Strickland, 466 U.S. at 688. Second, as to the prejudice prong, the deficient performance must be shown to have so affected the fairness and reliability of the proceedings that confidence in the outcome is undermined. Id. at 694; Gore v. State, 846 So. 2d 461, 467 (Fla. 2003). "When a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong." Waterhouse v. State, 792 So. 2d 1176, 1182 (Fla. 2001); Zakrzewski v. State, 866 So. 2d 688, 692 (Fla. 2003).

This Court has previously stated that "[a] postconviction court's decision regarding whether to grant a rule 3.851 evidentiary hearing depends upon the written materials before the court; thus, for all practical purposes, its ruling is tantamount to a pure question of law and is subject to *de novo* review." Ventura v. State, 2 So. 3d 194, 197 (Fla. 2009).

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY DENIED APPELLANT'S CLAIM THAT PENALTY PHASE COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY AND ADEQUATELY PREPARE A MITIGATION WITNESS, MICHAEL GALEMORE, FOR HIS TESTIMONY, THUS LEADING TO THE EXCLUSION OF HIS TESTIMONY.

In his first postconviction claim, Troy asserted that his penalty phase counsel was ineffective for failing to properly prepare a mitigation witness, Michael Galemore, leading to the trial court's decision to exclude the witness' testimony from the penalty phase. After hearing argument from the parties at the case management conference and reviewing the record, the postconviction court summarily denied the instant claim. (PCR V5:817-22). The State submits that the postconviction court properly summarily denied this claim because the record conclusively establishes that Troy's claim of ineffective assistance of counsel is without merit.

On August 26, 2003, during Troy's penalty phase proceedings, trial counsel informed the court that he wanted to present testimony from Michael Galemore, an assistant warden at Polk County Correctional Institution, regarding the prison conditions for an inmate sentenced to life in prison. (DAR V30:2726-28). Specifically, counsel informed the court that Galemore had not had any contact with Troy and did not know any

of the facts of his case, but counsel wanted Galemore to testify regarding the following:

> The defense proposes to call Mr. Galemore to address some of the following issues: The fact that if the defendant were sentenced to life imprisonment without possibility of parole, that that would be considered close custody, C-L-O-S-E; that under close custody, the inmate would be supervised in a particular fashion; that the inmate would work in prison; that the inmate would have to follow the rules in prison; he would address the issue of drugs in prison; and he would address the issue of leadership in prison by an inmate; the fact that a specific leader is prohibited by the rules, but the Department of Corrections encourages positive leadership when it can be found.
>
> Your Honor, I have also marked as a composite exhibit, Defendant's Exhibit Q, which is the Department of Corrections web page describing, or putting aside common misperceptions about prison life, most common being, A, that inmates don't work in prison, B, that they have access to satellite and cable T.V., C, that prisons are air conditioned, and D, that inmates who are sentenced to life, don't really serve life. Mr. Galemore is well qualified to address all of those issues.
>
> And another area, that if the Court permitted I would ask, is what would the conditions of confinement be on death row? The answer expected would be that you are basically locked into your cell and you don't work.

(DAR V30:2727-28). After reviewing the caselaw provided by trial counsel in support of his argument, the trial court ruled that Mr. Galemore's testimony was not relevant to the penalty phase. (DAR V30:2762-67). Although the trial judge mentioned in passing that Mr. Galemore did not even "have any knowledge of

this particular defendant," it is clear from the context of the court's ruling that the evidence would not have been admissible even had Mr. Galemore been familiar with Troy or his case.

On direct appeal, Troy argued that the trial court erred in excluding Galemore's testimony from the penalty phase, but this Court ruled that the trial court acted within its sound discretion in excluding Galemore's proffered testimony. This court stated:

> Troy's next claim involves the exclusion of the proffered testimony of Department of Corrections official Michael Galemore, an assistant warden at the Polk County Correctional Institution. He asserts that this exclusion violated the Eighth and Fourteenth Amendments because Galemore's testimony was relevant to the mitigating factor of Troy's potential for rehabilitation and positive contribution in a structured prison environment.
>
> According to the trial records, defense counsel planned to call Galemore to testify that, hypothetically, were Troy sentenced to life imprisonment, it would be considered close custody, that Troy would be supervised in a particular fashion, and that he would work while in prison. Galemore was also to testify regarding the presence of drugs in prison, specifically that they are not easily obtained. The trial judge granted the State's motion to exclude him as a witness, emphasizing that Galemore had no personal knowledge of the defendant or the case.
>
> The trial judge made clear that defense counsel still had the right to argue potential parole ineligibility to the jury as a mitigating factor, to present evidence as to whether Troy would pose a threat to prison personnel or other inmates, and to argue whether he was well-suited to imprisonment. Defense counsel made use of all of these options,

> presenting witnesses in mitigation regarding Troy's behavior in prison, [footnote 9] and arguing during closing that, if the jury chose life imprisonment, "John Troy will be in prison until the day he dies."
>
> > [footnote 9: Troy called eight witnesses during the penalty phase to testify as to his general good behavior in prison, stretching back to his first periods of incarceration in Tennessee beginning at age eighteen.]
>
> A trial court's ruling on the admission of evidence is reviewed by an appellate court under an abuse of discretion standard. Randolph v. State, 853 So. 2d 1051, 1062 (Fla. 2003) ("The admissibility of evidence lies in the sound discretion of the trial court and trial court decisions will be affirmed absent a showing of abuse of discretion.").
>
> **We conclude that the trial court did not abuse its discretion in excluding Galemore's testimony. First, it should be noted that Galemore's testimony was offered during the penalty phase of Troy's trial, which lasted over four and a half days. Defense counsel called twenty-nine witnesses during this phase, indicating that the judge was not categorically excluding mitigation evidence or the presentation of defense witnesses. Furthermore, Galemore had never met Troy, nor had he ever witnessed Troy during one of his periods of incarceration, making his potential assessment regarding Troy's possible prison experience entirely speculative. When considered in context of the entire penalty phase, the other witnesses called, and the arguments defense counsel nevertheless made regarding a possible life sentence, the exclusion of Galemore as a witness was not an abuse of discretion.**

Troy, 948 So. 2d at 650-51 (emphasis added).

In his postconviction claim, Troy claimed that effective trial counsel would have "properly and adequately" prepared Galemore to testify by having him meet with Troy, review Troy's

prison records, and review the "proposed or existing testimony of the eight witnesses who, in fact, testified as to Troy's general good behavior in prison beginning at age eighteen." (PCR V3:525). Troy claimed in his motion that trial counsel's alleged deficient performance in failing to prepare Galemore was evidenced by his written comments to his investigator on January 27, 2003, wherein trial counsel indicated that "[t]his will be the first time in his career that [Galemore] has had to testify. I think the more details that we could offer regarding our line of questioning the better witness he would be."[5] (PCR V3:525). Troy's claim of ineffective assistance of counsel is without merit because the record conclusively establishes that trial counsel did not perform deficiently, and even if counsel was

[5] The January 26, 2003, memo was never attached to the 3.851 motion and is not part of the record on appeal from either the direct appeal or the instant postconviction proceeding. Appellant stated in his postconviction motion that trial counsel wrote the memo to his investigator (PCR V3:525), and in his Initial Brief, Appellant claims that the investigator made the notations (Initial Brief of Appellant at 21). Nevertheless, it is clear that the memo, allegedly written three days after trial counsel first interviewed Galemore (PCR V3:518), does not establish any deficiency on the part of trial counsel. Rather, the memo, prepared six months before the witness' testimony, indicates that trial counsel needed to prepare the witness for his anticipated testimony. There has been no showing that counsel failed to provide the witness with the details of his anticipated line of questioning. In fact, the record shows that at the time Galemore's testimony was proffered to the trial court, defense counsel had printed up the information he anticipated would be elicited from this witness. (DAR V30:2727; V9:1601-09).

deficient, there was no prejudice as a result of the trial court's exclusion of Galemore's testimony.

As the lower court properly found when denying this claim, the record clearly indicates that trial counsel intended to call Galemore for a limited purpose that was completely independent of his knowledge of Appellant or his circumstances. In summarily denying this claim, the court stated:

> The Court denies as to this ground for several reasons. First, the Defendant's counsel did not perform ineffectively. **Counsel's stated purpose in offering Mr. Galemore's testimony was to show that *any* person sentenced to life imprisonment without the possibility of parole would (1) be under close custody, and as such would be supervised in a particular manner; (2) work while imprisoned; (3) have to follow the rules of prison, including those pertaining to the use of drugs; and (4) have to follow the rules regarding leadership.** Indeed, on his subsequently-file[d] 'Mitigation Proffer,' the Defendant's counsel indicated that Mr. Galemore's testimony was to be 'regarding Department of Corrections policy and procedures.' *See* Attachemnt 5 [See PCR V6:1057-59]. It appears that counsel also intended to offer an exhibit relating to 'common misperceptions about prison life.' **Mr. Galemore's testimony was not intended to be based on personal knowledge, but a general knowledge of DOC's policies and procedures regarding various issues. The obvious import of such evidence would have been that, generally speaking, a defendant sentenced to life without the possibility of parole would be more productive than one sentenced to death, and to clear up 'misperceptions' about the life of an inmate serving a life sentence.** Although the Court found that parole ineligibility and the Defendant's threat while in prison were proper mitigation considerations, it found that the 'testimony as proffered' by Mr. Galemore did not address those issues. It therefore

> does not appear that Mr. Galemore's personal knowledge would have made his testimony more appropriate.
>
> Second, as noted by the Supreme Court, the trial court made clear that the defense 'still had the right to argue potential parole ineligibility to the jury as a mitigating factor, to present evidence as to whether [the Defendant] would pose a threat to prison personnel or other inmates, and to argue whether he was well-suited to imprisonment.' *Troy*, 948 So. 2d at 650. Indeed, the Defendant was allowed to present evidence and argument to the jury pertaining to what life would be like in prison while serving a life sentence without the possibility of parole and the Defendant's nature while he is in prison, and the jury was instructed that a life sentence meant life without the possibility of parole. *See* Attachment 2, pp. 2834-2858, 2976-2983; 3154-3156; 3431-3433. This evidence satisfied the nonstatutory mitigator, and the record demonstrates that the Court considered this mitigation evidence in its Sentencing Order. *See* Attachments 3, 6, and 7.

(PCR V5:820-22) (emphasis added). Appellant argues that the court erred in denying this claim because the court did not consider that, if trial counsel had "properly and adequately" prepared Galemore for his testimony, trial counsel would have altered his proffer in order to make Galemore's testimony admissible. Appellant's argument is misplaced and without merit.

Appellant's claim is based on the faulty premise that counsel performed deficiently by failing to prepare Galemore by providing him with information regarding Troy and his case, and that such alleged deficiency caused him prejudice which affected the jury's eleven to one recommendation for death. First, the

record clearly refutes any allegation of deficient performance. Trial counsel's comments and proffer of Galemore's testimony clearly demonstrates that the entirety of Galemore's testimony was related to conditions in prison for *any* inmate sentenced to life, not specifically the defendant in this case. Trial counsel sought to introduce generic concepts such as the type of supervision and living conditions given to inmates sentenced to life imprisonment and the availability of drugs while incarcerated. The witness' knowledge, or lack thereof, of Troy's case was irrelevant to his proffered testimony.

Appellant erroneously asserts that trial counsel was deficient because he was unaware of the applicable law from Skipper v. South Carolina, 476 U.S. 1, 106 S. Ct. 1669 (1986), and Valle v. State, 502 So. 2d 1225 (Fla. 1987), regarding the admissibility of "model prisoner" type evidence. Contrary to Appellant's assertion, it is clear that trial counsel understood the law because he presented such evidence from at least eight other witnesses. Trial counsel presented testimony from twenty-nine witnesses at the penalty phase, including multiple correctional officers who, unlike Galemore, actually had direct contact and supervisory roles over Appellant, to testify regarding Appellant's conduct in a structured environment and

his ability to adapt to a life sentence in prison and be a model prisoner.[6]

Contrary to Appellant's assertions, the record clearly establishes that trial counsel understood that he could present evidence pursuant to Skipper/Valle regarding Troy's behavior while incarcerated and his ability to adapt to a life in prison, as trial counsel did in fact present voluminous evidence of this type. Appellant fails to recognize that trial counsel sought to present a different type of evidence from Galemore, evidence which the trial court properly excluded from the penalty phase. Trial counsel unsuccessfully attempted to present alleged

[6] At the penalty phase, trial counsel presented evidence from family members regarding Appellant's ability to be a productive member of society while serving a life sentence and presented testimony from a number of other law enforcement/correctional employees with personal knowledge of Appellant. In summary fashion, trial counsel presented testimony from: (1) a jail nurse, Debra Garrison, regarding Troy's good behavior (DAR V28:2537-41); (2) Joey Dale, a Tennessee correctional officer, who testified regarding the conditions of the jail that housed Appellant and his experience supervising Appellant, including an incident where Appellant rescued the officer during an altercation with several other inmates (DAR V29:2644-55); (3) Kenny Byrd, a Florida DOC correctional officer who testified regarding the "closed custody" classification conditions and his supervision experience with Appellant (DAR V31:2834-42); (4) Lisa Pitts, a Florida DOC officer who supervised Appellant (DAR V31:2847-52); (5) Jim Davis, a Tennessee correctional officer who supervised Appellant (DAR V31:2859-62); (6) Fred Holloway, a Tennessee juvenile officer who supervised Appellant (DAR V31:2867-81); (7) Raymond White, a Sarasota County Sheriff Officer who supervised Appellant in jail while awaiting trial (DAR V32:2976-78); and (8) William Franciosi, another Sarasota correctional officer who supervised Appellant at the jail (DAR V32:2984-85).

"mitigating" evidence from Galemore regarding the general conditions in Florida prisons for inmates that are sentenced to life imprisonment and also regarding the ability of inmates to obtain drugs while in prison.[7] (DAR V30:2765-66). Trial counsel argued that such evidence should be admissible based on the ABA Guidelines concerning trial counsel's representation in capital cases and this Court's decision in Ford v. State, 802 So. 2d 1121 (Fla. 2001). The trial court reviewed this Court's decision in Ford and properly found that it "did not stand for the proposition that the defendant is allowed to introduce the type of testimony that it has proffered here through the witness, proposed witness Galemore." (DAR V30:2762-63); see also Troy, 948 So. 2d at 650-51 (finding that the trial court did not abuse its discretion in excluding Galemore's testimony). As this Court has never held that this type of evidence regarding the conditions and policies of Florida's Department of Corrections is admissible as mitigating evidence in a capital case, there can be no showing of deficient performance. See Owen v. State, 986 So. 2d 534, 543 (Fla. 2008) (noting that trial counsel's failure to present certain expert testimony is not deficient performance when that testimony would be

[7] The trial court had previously ruled regarding the inadmissibility of any evidence or argument regarding inmates obtaining drugs while in prison. (DAR V31:2839-41).

inadmissible at trial); Pietri v. State, 885 So. 2d 245, 254 (Fla. 2004).

Because the lower court properly found that trial counsel was not deficient for failing to prepare Mr. Galemore, this Court need not even consider the second prong of the Strickland analysis. See Strickland, 466 U.S. at 697 ("There is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one."); Waterhouse v. State, 792 So. 2d 1176, 1182 (Fla. 2001) ("When a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong."). Even if this Court were to address the prejudice prong of Strickland based on a finding that trial counsel was somehow deficient for failing to prepare this witness with the specifics of Troy's case, the State submits that the record conclusively establishes that Troy was unable to meet his burden of establishing prejudice as a result. As this Court noted on direct appeal, the trial court acted within its sound discretion in excluding Galemore's proffered testimony and defense counsel was not prohibited from making any arguments to the jury regarding Troy's potential for rehabilitation and potential positive contributions while in a structured prison environment.

Furthermore, as previously noted, defense counsel presented numerous witnesses regarding Troy's good behavior in prison. Assuming *arguendo* that trial counsel had provided Galemore with information regarding Troy's case, his testimony regarding Troy's behavior in the Department of Corrections would have been cumulative to the numerous other witnesses who actually had personal experience with Troy over a lengthy period of time. Certainly, as the trial court ruled at the time, Galemore's testimony regarding the general conditions of an inmate's incarceration would not have been admissible. Thus, at best, assuming that trial counsel had arranged for Galemore to interview Troy and review his prison records, Galemore's testimony would have been much more limited than that of the other eight witnesses who actually had personal dealings with Troy while he was under their supervision and/or incarcerated. Galemore's testimony would not have changed the outcome of the proceedings or the jury's eleven to one recommendation given the considerable aggravation in this case compared to the mitigation. Thus, because the record clearly refuted Troy's claim of ineffective assistance of counsel, this Court should affirm the lower court's summary denial of the instant claim.

ISSUE II

THE TRIAL COURT PROPERLY SUMMARILY DENIED APPELLANT'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND QUESTION A JUROR REGARDING AN ALLEGED UNDISCLOSED CONNECTION WITH THE VICTIM OR HER FAMILY. THE RECORD ALSO REFUTES APPELLANT'S CLAIM OF FUNDAMENTAL ERROR BASED ON THE SEATING OF A JUROR WITH AN UNDISCLOSED CONNECTION.

In his second postconviction issue, Troy claimed that trial counsel was ineffective for failing to discover an alleged undisclosed connection between a juror and the victim's family. Troy's claim was based entirely on unsubstantiated speculation that there was an undisclosed connection between juror Fred Hamblin and the victim's father, Bob Ortiz, because both men were members of the Siesta Key Chamber of Commerce, and lived and worked in the same geographical area.[8] The State submits that the trial court properly summarily denied Appellant's ineffective assistance of counsel claim because it was speculative and Appellant was unable to meet his burden under Strickland.

At the beginning of voir dire, the trial court inquired whether any members of the venire knew the victims or witnesses involved in this case. The court specifically asked:

[8] In a separate proceeding on Appellant's motion to interview the juror, the trial court conducted a colloquy with juror Hamblin and the victim's father, Bob Ortiz. As will be discussed in more detail infra, the record clearly establishes that the two men did not have any undisclosed connection.

"[O]bviously, one person we have named in the Information, in the Indictment is Bonnie Carroll. Did anybody know Bonnie Carroll or members of her family? Bonnie Ortiz Carroll, C-a-r-r-o-l-l? Any takers on that? No. Okay." (DAR V12:227).

Juror Hamblin did not indicate that he knew the victim or her family, but he did acknowledge that he was aware of the case after seeing a headline regarding the case in the local newspaper. (DAR V12:234, 265-66). During further voir dire, defense counsel utilized Mr. Hamblin's responses on his juror questionnaire to question him regarding, among other areas of interest, his health problems. (DAR V16:702-07).

Appellant argues that trial counsel was ineffective for failing to discover any connection between juror Hamblin and the victim's father. Appellant asserts that trial counsel should have realized there was a close connection between juror Hamblin and the victim's father, Bob Ortiz, because both men were members of the Siesta Key Chamber of Commerce, juror Hamblin lived and worked in real estate on Siesta Key, and Bob Ortiz lived and worked as a property manager of a condominium on Siesta Key.[9] Appellant's claim regarding an alleged undisclosed connection between juror Hamblin and the victim's father is

[9] In his postconviction motion, Appellant relied on 2000 Census data and characterized Siesta Key as a small community of 7,000 residents. (PCR V3:528)

based, in part, on the trial testimony of the victim's mother, Betty Ortiz, wherein she indicated that her husband accepted a job as a condominium manager on Siesta Key (guilt phase DAR V20:1298) and his job included planning social events for the residents. (penalty phase DAR V28:2428).[10] Additionally, Appellant relies on a discovery made during the postconviction process wherein a CCRC investigator found a one-sentence notation in the "Comings and Goings" business section of the *Sarasota Herald-Tribune*, dated August 11, 2003, indicating that Bob Ortiz had been elected Treasurer of the Siesta Key Chamber of Commerce.[11] (PCR V4:699). Appellant argues that, given the fact that Bob Ortiz worked as a property manager of a condominium on Siesta Key, competent trial counsel should have

[10] Bob Ortiz did not testify at the guilt phase, but read an extremely brief victim impact statement during the penalty phase. (DAR V28:2430).

[11] Appellant makes numerous vague and disparaging allegations regarding Bob Ortiz' alleged "volatile" character. In support of his postconviction claim, Appellant alleged that his mother had to get a restraining order against Bob Ortiz soon after the homicide, that Mr. Ortiz continued to communicate with Appellant with threats and diatribe, including developing a MySpace page devoted to soliciting suggestions to make Appellant's life miserable. (PCR V3:528-29). However, Appellant has never claimed that trial counsel was aware of any of these alleged incidents. Instead, Appellant asserts that trial counsel should have been aware of Mr. Ortiz' "volatile" demeanor based on his testimony at the penalty phase. As noted, however, the record reflects that Mr. Ortiz simply read a very brief victim impact statement at the penalty phase without incident. (DAR V28:2429-30). Furthermore, the alleged fact that Mr. Ortiz spoke with unidentified jurors after the proceedings is irrelevant to the instant claim.

discovered and explored the "multiple and close business and geographical links between Mr. Hamblin and the Ortiz family." Initial Brief at 36-37.

In the instant case, the record on appeal clearly refutes Appellant's claim that trial counsel was deficient for failing to discover any alleged connection between juror Hamblin and the victim's father. Juror Hamblin indicated on his juror questionnaire that he worked in the real estate business and was a member of the Siesta Key Chamber of Commerce. (PCR V4:697). On the day voir dire began, the *Sarasota Herald-Tribune* apparently published a small notation in its "Business Weekly" section referencing the recent election of the Siesta Key Chamber of Commerce's new officers, including Bob Ortiz as Treasurer. Trial counsel cannot be deemed to have performed deficiently for failing to discover this innocuous note in a newspaper article, or in failing to discover any alleged connection between juror Hamblin and the victim's family simply because juror Hamblin was in the real estate business and lived and worked in the same community as the victim's father. As the trial court properly noted, during voir dire proceedings, "there was scant information to alert defendant's trial counsel that such a relationship might exist, warranting more detailed questioning." (PCR V7:1306).

The record indicates that juror Hamblin never gave any untruthful answers during voir dire. The trial court inquired whether the jurors knew any of Bonnie Ortiz Carroll's family members, and juror Hamblin did not respond. Compare Young v. State, 720 So. 2d 1101 (Fla. 1st DCA 1998) (stating that, in light of direct questions regarding personal experiences with sexual abuse, it was "abundantly clear from the transcript of the voir dire proceedings that no person sufficiently perceptive and alert to be qualified to act as a juror could have sat through voir dire without realizing that it was . . . her duty to make known to the parties and the court" her own sexual abuse). Certainly, trial counsel was not deficient for failing to discover any alleged undisclosed connection between juror Hamblin and the victim's family based on the juror's questionnaire or on trial counsel's general knowledge of the victim's family. Because Appellant's speculative and vague claim did not warrant an evidentiary hearing, the trial court properly summarily denied the instant claim. See Gordon v. State, 863 So. 2d 1215, 1218 (Fla. 2003) ("A motion for postconviction relief can be denied without an evidentiary hearing when the motion and the record conclusively demonstrate that the movant is entitled to no relief. A defendant may not simply file a motion for postconviction relief containing

conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing. The defendant must allege specific facts that, when considering the totality of the circumstances, are not conclusively rebutted by the record and that demonstrate a deficiency on the part of counsel which is detrimental to the defendant.") (quoting LeCroy v. Dugger, 727 So. 2d 236, 239 (Fla. 1998)).

As previously discussed, the trial judge properly summarily denied Appellant's claim that trial counsel was ineffective for failing to investigate and question juror Hamblin and properly rejected his claim that there was an undisclosed connection between juror Hamblin and the victim's family. As the court noted in its order denying relief, the claim was speculative and the record clearly refuted Appellant's allegation that trial counsel performed deficiently when conducting voir dire regarding the alleged undisclosed connection between juror Hamblin and Bob Ortiz. However, despite his finding that it bordered on the "tenuous," the trial court in an abundance of caution granted Appellant's motion to interview juror Hamblin because collateral counsel claimed he had a good faith basis to believe that there were grounds to challenge the guilty verdict and the jury's recommendation of death.

After granting the motion to interview juror Hamblin, the court conducted a colloquy with the juror wherein he indicated that, at the time of Appellant's trial, he was a member of the Siesta Key Chamber of Commerce, but he never attended any meetings and only recalled attending one "Business Card Exchange" social event, but could not recall whether it was before or after the trial. (PCR 4/22/09 V8:16-21). Nevertheless, juror Hamblin unequivocally testified that he did not know Bob Ortiz at the time of the trial. (PCR 4/22/09 V8:20). The judge brought Bob Ortiz into the courtroom while juror Hamblin remained at the witness stand and inquired of Mr. Ortiz. Both juror Hamblin and Bob Ortiz denied knowing each other and neither of them remembered the other from trial. (PCR 4/22/09 V8:22-25). The trial court did not issue any type of order as a result of the juror interview because Appellant never filed any challenge based on the juror's answers. (PCR 4/22/09 V8:30-32).

Appellant now argues that the court erred in denying him discovery for the juror interview and he also attempts to minimize the witnesses' clear testimony at the hearing by citing to isolated excerpts in an attempt to assert that the juror's recollection was faulty. Contrary to Appellant's assertion, a full evidentiary hearing was not warranted based on his

speculative postconviction claim. Although the trial court would have obviously acted within its discretion in denying the motion to interview the juror, the court acted on the side of caution and allowed the interview. The testimony from juror Hamblin and Bob Ortiz establishes beyond any doubt that the two men did not know each other and that there were no reasonable grounds to challenge the jury's verdict or death recommendation based on an alleged undisclosed relationship. Although juror Hamblin did not recall Bob Ortiz from the 2003 trial, Hamblin's 2009 testimony does not demonstrate that he had a "spotty" recollection which discovery materials would have refreshed. Bob Ortiz' only involvement in the trial was reading a brief victim impact statement at the penalty phase (DAR V28:2430), and he was only one of forty eight witnesses presented throughout Appellant's trial and penalty phase. Contrary to Appellant's assertions, the record clearly refutes his claim that juror Hamblin knew the victim's family.

Appellant also briefly alludes to alleged deficient performance by trial counsel for failing to inquire as to the amount of sympathy of the jury towards the victim's family after two incidents during the penalty phase. Appellant notes that the jury foreperson was removed from the panel prior to the penalty phase closing argument after the juror gave an

unsolicited hug to the victim's mother during a court recess, and told her "I admire your strength." (DAR V35:3346-51). The other incident referenced by Appellant was a request by the jury to take a group photograph. (DAR V33:3094). Both of these incidents were a matter of record and Appellant could have raised any issue regarding alleged juror misconduct on direct appeal, and because he failed to do so, he is procedurally barred from raising the issue under the cloak of ineffective assistance of counsel. See generally Freeman v. State, 761 So. 2d 1055, 1067 (Fla. 2000) (stating that trial court properly found defendant's claim procedurally barred and his allegation of ineffective assistance of counsel was insufficient to overcome the procedural bar); Gore v. State, 846 So. 2d 461, 466 n.4 (Fla. 2003). Additionally, the trial court properly rejected Appellant's allegations that trial counsel performed deficiently. Because the record refutes Appellant's claim of ineffective assistance of counsel, this Court should affirm the trial court's summary denial of the instant claim.

ISSUE III

THE TRIAL COURT PROPERLY SUMMARILY DENIED APPELLANT'S INEFFECTIVE ASSISTANCE OF PENALTY PHASE COUNSEL CLAIM BASED ON THE ALLEGATION THAT PENALTY PHASE COUNSEL PERFORMED DEFICIENTLY BY FAILING TO PROPERLY PREPARE AND ARGUE THAT THE INSTRUCTION FOR THE STATUTORY MITIGATOR OF AGE BE GIVEN TO THE JURY AND IN FAILING TO ARGUE TO THE TRIAL COURT THAT THE MITIGATOR APPLIED IN THIS CASE.

In his third claim, Appellant asserts that the trial court erred in summarily denying his ineffective assistance of penalty phase counsel claim based on his allegation that counsel failed to properly argue in support of his request for a jury instruction on the statutory mitigating circumstance of age of the defendant. The lower court properly denied the instant claim as procedurally barred and also properly denied the claim on the merits after finding that Appellant failed to establish deficient performance and prejudice as required by Strickland.

In denying Appellant's ineffective assistance of penalty phase counsel claim, the lower court stated:

> At the time of the crime, the Defendant was 31 years of age. In Ground III, he claims that his counsel was ineffective during the penalty phase for failing effectively to request and argue that the instruction for the statutory mitigator of age should be given to the jury. Specifically, the Defendant asserts that the following supported the age mitigator jury instruction:
>
> 1. He was already immature when he was molested: "he was emotionally and psychologically less mature than the average child of his chronological years";

2. his ability to function was limited to an adolescent level, which required a highly structured environment;

3. psychiatric and drug treatment failed because he was functionally a teenager;

4. the 10-year prison term from which he was released prior to the murder "interfered with any maturation which might have taken him past the 15-year-old level he had always functioned at. This particular fact ... takes [him] from a 31 year old to a 21 year old, in a sense, and rebuts the argument that emotional or psychological immaturity may be relevant for a young adult close to the age of majority, but not for a 31-year-old";

5. as a long-term inmate, he missed out on the changes in free society because of his isolation and as a result he was "on hold" while in prison and could not move along developmentally or culturally while isolated;

6. his impaired capacity to appreciate the criminality of his conduct arose from the fact that he was functioning on a very impulsive, reflexive level, rather than a thoughtful level, which is a characteristic of adolescent behavior; and

7. severe emotional and mental distress arising from chronic drug use and chronic lifelong depression.

The State argues that the issue was addressed on appeal, and in any event, even if the Defendant's counsel had made further arguments, the Court would have denied the instruction.

The age of the Defendant at the time of the crime may be a mitigating circumstance if it is relevant to his mental and emotional maturity and his ability to take responsibility for his own acts and to appreciate the consequences flowing from them. *See* §

921.141(6)(g), Fla. Stat.; *Eutzy v. State*, 458 So. 2d 755, 759 (Fla. 1984). In other words, the Defendant's age may be a mitigator if his age is relevant to his mental/emotional maturity and ability to take responsibility.[*11] The existence and weight to be given to an age mitigator depends on the evidence presented at the trial and sentencing hearing. *See Nelson v. State*, 850 So. 2d 514 (Fla. 2003).

> [*11 In this case, the Court interprets the Defendant's argument as it was abuse (including substance and sexual abuse) suffered by the Defendant as being the reason for his alleged emotional and mental immaturity and his ability to take responsibility for his own acts and to appreciate the consequences flowing from them, not his age. The requirement is that his *age* be relevant to these deficits, not other factors.]

The record reflects that the defense did request the statutory age mitigator:

> TEBRUGGE: I'm requesting the age mitigator or statutory age mitigator. I know that typically involves a youthful defendant, 17 or 18. But the Legislature simply said, the age of the Defendant at the time of the crime. It could be argued that a 33-year-old Defendant having to serve life imprisonment without possibility of parole is potentially even a worse sentence due to the amount of time that he may actually serve. And, also, Judge, *there was some testimony about the Defendant's emotional immaturity that may be relevant to the consideration of that factor.*
>
> STATE: Judge, we would oppose the age mitigator. The case law indicates that if age is to be given any weight, it should be linked with some other characteristic of the Defendant or the crime. And in this case, there's been nothing like that. It's typically in a case where you have an older person that maybe has a low IQ or low mental age, something of that fashion, or like Mr. Tebrugge said, a young person 19, 20 years old. That sort of thing.

COURT: All right. I deny that request.

Attachment 2, pp. 3324-3325 (emphasis added). In addition, on appeal, the Supreme Court addressed the Defendant's claim that this ruling by the trial court was erroneous:

> [W]e find no clear abuse of discretion in the trial judge's decision to deny [the Defendant's] request. First, [he] was thirty-one at the time of his crimes, nearly thirteen years older than the legal age of majority. Furthermore . . . there is ample evidence that Troy functioned as a mature adult, including the fact that he was employed and cared for his girlfriend's daughter. [He] also failed to present any additional evidence regarding the applicability of the age mitigator before he was sentenced at his *Spencer* hearing. However, the record indicates that the judge did find and assign weight to various other mitigators that could have a bearing on [his] emotional maturity, including the fact that the crime was committed while [he] was under extreme mental or emotional disturbance, that [his] capacity to appreciate the criminality of his conduct was impaired, that his family background was dysfunctional, and that he had a long history of severe substance abuse and mental and emotional problems. All of these matters were also presented to the jury. In essence then, [he] was able to assert the substance of the claim he now makes, and thus was not deprived of the opportunity to assert his emotional immaturity. Given the unrestricted opportunity, [his] counsel took full advantage and pursued the strategy of advancing [his] emotional maturity as part of nonstatutory mitigation.

Troy, 948 So. 2d at 652.

The Defendant attempts to now couch this claim in terms of an IAC claim, and to relitigate the same issue addressed on appeal. It is, therefore, procedurally barred. *See Medina v, State*, 573 So. 2d

> 293, 295 (Fla. 1990) ("allegations of ineffective assistance of counsel cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal"). Nevertheless, even addressing the merits of the claim, the Court denies it. The trial court heard all of the evidence that was presented by the Defendant to support this claim, and the Supreme Court fully evaluated the propriety of an age mitigator instruction. A review of the record and the Supreme Court's opinion makes clear that the issue of emotional maturity of the Defendant was fully presented to the jury for its consideration. In any event, the claim of ineffective assistance of counsel on this ground has not been proven and is therefore DENIED.

(PCR V5:824-27) (footnotes omitted except for footnote *11).

In the instant case, Appellant's argument on this issue mirrors the argument he made to this Court on direct appeal. In his direct appeal brief to this Court, Appellant argued that he was entitled to the age mitigating instruction because there was evidence linking his chronological age of 31 to a lack of mental and emotional maturity. See Initial Brief of Appellant at 93-96, Troy v. State (Case No. SC04-332). In rejecting this claim, this Court stated:

> At trial, defense counsel asserted entitlement to the statutory age mitigator, arguing that a life sentence without the possibility of parole could be a more severe sentence due to the time Troy would serve, being only thirty-three at the time of his sentencing. Defense counsel went on to argue that "there was some testimony about the Defendant's emotional maturity that may be relevant to the consideration of that factor." The trial judge denied defense counsel's request.

Troy argues that the trial court erroneously denied his requested instruction to the jury on the statutory mitigating factor of age because the evidence established his emotional immaturity and arrested psychological development at the level of a teenager.

In his brief, Troy argues that during the penalty phase, psychologist Dr. Maher testified that the trauma from the sexual molestation and ensuing trial in Troy's teen years arrested his psychological and emotional development, and also that Troy has functioned throughout his life at an adolescent level. These claims are borne out by the record. **However, we are not inclined to reverse the trial judge's decision on the age mitigator, given that we do not find a clear demonstration of abuse of discretion or harmful error.**

In Nelson v. State, 850 So. 2d 514 (Fla. 2003), this Court addressed the applicability of the statutory age mitigator if the defendant is over eighteen years of age. We summarized the applicable law as follows:

> [W]here the defendant is not a minor, as in the instant case, "no per se rule exists which pinpoints a particular age as an automatic factor in mitigation." [Shellito v. State, 701 So. 2d 837, 843 (Fla. 1997)]. The existence and weight to be given to this mitigator depends on the evidence presented at trial and the sentencing hearing. See id. For example, this Court has held that age twenty, in and of itself, does not require a finding of the age mitigator. See Garcia v. State, 492 So. 2d 360, 367 (Fla. 1986).
>
> In Gudinas v. State, 693 So. 2d 953 (Fla. 1997), we held, "Although Gudinas is certainly correct that he had a troubling past and had always been small for his age, there was no evidence presented that he was unable to take responsibility for his acts and appreciate the consequences thereof at the time of the murders." Id. at 967. In

> that case, we found that there was substantial, competent evidence in the record to support the trial court's finding "that Gudinas was mentally and emotionally mature enough that his age should not be considered as a mitigator." Id.

Nelson, 850 So. 2d at 528-29. In Nelson, this Court ultimately supported the trial court's rejection of the age mitigator, as we found there was ample evidence establishing that Nelson functioned as a mature adult. Id. at 529 (finding that Nelson "obtained and temporarily held a job; he provided his child's mother with money to buy necessities when she was visiting; Nelson did not have a home of his own, but arranged to stay with [others]; and Nelson did not have a driver's license or a car, yet was able to travel places on his own. See Hurst v. State, 819 So. 2d 689, 698 (Fla. 2002) (holding that the evidence did not support a finding that a non-minor suffered from mental and emotional problems sufficient to warrant age as a mitigator and noting that Hurst owned his own car, performed adequately in school, and helped with child care within his family")).

However, we have on occasion found error in a trial court's denial of the statutory age mitigator instruction. In Campbell v. State, 679 So. 2d 720 (Fla. 1996), this Court, remanding for resentencing on other grounds, held that the trial court erred in not giving a requested jury instruction on the age mitigator when the defendant was twenty-one years old at the time of his crime. Id. at 725-26. We held, "[E]vidence was presented showing Campbell's relatively young chronological age at the time of the crime . . . and linking this to the defendant's significant emotional immaturity. . . . In light of this evidence, the court should have given the requested instruction." Id. at 726.

Applying this case law to the instant facts, we find no clear abuse of discretion in the trial judge's decision to deny Troy's request. First, Troy was thirty-one at the time of his crimes, nearly thirteen years older than the legal age of majority. Furthermore, pursuant to Nelson, there is ample

> evidence that Troy functioned as a mature adult, including the fact that he was employed and cared for his girlfriend's daughter. Troy also failed to present any additional evidence regarding the applicability of the age mitigator before he was sentenced at his Spencer hearing. However, the record indicates that the judge did find and assign weight to various other mitigators that could have a bearing on Troy's emotional maturity, including the fact that the crime was committed while Troy was under extreme mental or emotional disturbance, that Troy's capacity to appreciate the criminality of his conduct was impaired, that his family background was dysfunctional, and that he had a long history of severe substance abuse and mental and emotional problems. All of these matters were also presented to the jury. **In essence then, Troy was able to assert the substance of the claim he now makes, and thus was not deprived of the opportunity to assert his emotional immaturity. Given the unrestricted opportunity, Troy's counsel took full advantage and pursued the strategy of advancing Troy's emotional maturity as part of nonstatutory mitigation. We find no error by the trial court.**

Troy, 948 So. 2d at 651-52 (emphasis added).

As the lower court properly found, Appellant's claim is procedurally barred as it is a claim which was raised and rejected on direct appeal. Appellant's attempt to counter the procedural bar by couching his claim in terms of ineffective assistance of counsel is unavailing and misplaced. This Court has consistently recognized that "[a]llegations of ineffective assistance cannot be used to circumvent the rule that post conviction proceedings cannot serve as a second appeal." Medina v. State, 573 So. 2d 293, 295 (Fla. 1990); Cherry v. State, 659 So. 2d 1069, 1072 (Fla. 1995). Here, Appellant attempts to

relitigate the issue of this Court's rejection of his claim on direct appeal by arguing ineffective assistance of counsel. However, Appellant relies on the same exact evidence and arguments presented in his direct appeal proceedings before this Court. Accordingly, this Court should affirm the lower court's ruling that the instant claim was procedurally barred.

Additionally, even if this Court were to find that the lower court erred in finding the claim procedurally barred, this Court should affirm the lower court's ruling rejecting the claim on the merits. In order to establish an ineffective assistance of counsel claim under Strickland, Appellant had to establish that trial counsel performed deficiently, and that counsel's deficient performance resulted in prejudice that undermined confidence in the outcome of the proceedings. In this case, the record clearly refuted Appellant's allegation of ineffective assistance of counsel.

Appellant properly concedes that trial counsel requested the age mitigating instruction and presented argument in support of his position, but Appellant claims that had trial counsel more vigorously presented his argument, the trial court would have been convinced that the instruction was applicable. This argument is without merit because the trial court was obviously aware of the testimony presented at the penalty phase that

allegedly supported giving the instruction. Despite being aware of this evidence, the trial court denied penalty phase counsel's request to give the instruction. Because Appellant's allegations fail to demonstrate that penalty phase counsel was deficient, the lower court properly found that Appellant failed to meet his burden under Strickland.

In addition to failing to establish deficient performance on the part of penalty phase counsel, Appellant also failed to establish prejudice. Appellant cannot establish prejudice because, as this Court noted when analyzing this claim on direct appeal, the trial court did not abuse its discretion by refusing to give the statutory age mitigating jury instruction, and even if the court did err, the failure to give the instruction was harmless error. Troy, 948 So. 2d at 651-52. This Court noted that Appellant was 31 years old at the time of the murder and functioned as a mature adult. Furthermore, as this Court noted, Appellant successfully presented other mitigating factors, both statutory mental mitigating factors and nonstatutory mitigation, which provided the jury with the substance of his claim. Because Appellant was not deprived of his opportunity to present the basis of his claim to the jury and trial court, this Court found that any error in failing to give the requested instruction was harmless.

This Court's ruling that there was no harmful error precludes any subsequent postconviction claim of prejudice under Strickland. See Cox v. State, 966 So. 2d 337, 347-48 (Fla. 2007) (stating that a finding on direct appeal that error was harmless was "fatal" to defendant's subsequent postconviction claim because defendant was unable to meet Strickland's prejudice standard given previous finding of harmlessness). In the instant case, this Court has already determined that Appellant was not prejudiced by the trial court's ruling denying his request to instruct the jury on the statutory age mitigator. Thus, this Court should affirm the trial court's ruling denying Appellant's procedurally barred and meritless allegation of ineffective assistance of counsel claim.

ISSUE IV

THE POSTCONVICTION COURT PROPERLY DENIED APPELLANT'S CLAIM THAT FLORIDA'S LETHAL INJECTION PROCEDURES ARE UNCONSTITUTIONAL.

In his fourth claim, Appellant argues that the postconviction court erred in summarily denying his challenge to Florida's lethal injection method of execution. Appellant acknowledged in his postconviction motion that this Court had rejected his claim in Lightbourne v. McCollum, 969 So. 2d 326 (Fla. 2007), and Schwab v. State, 969 So. 2d 318 (Fla. 2007), but argued that the court had to reassess the issue on an individual basis in light of the United States Supreme Court's decision in Baze v. Rees, 553 U.S. 35, 128 S. Ct. 1520 (2008). The postconviction court found that, "[e]ven assuming this claim was properly raised in this motion" based on Appellant's failure to raise the issue at trial and on direct appeal, it was without merit. (PCR V5:827).

In Lightbourne, this Court considered the constitutionality of Florida's lethal injection procedures following an extensive evidentiary hearing in the circuit court. This Court concluded that, under the protocols adopted by the Department of Corrections in August, 2007, Florida's procedures do not present a substantial risk of harm and do not violate the Eighth Amendment. Lightbourne, 969 So. 2d at 353. In Lightbourne,

this Court discussed and applied several standards. In fact, the court expressly considered and rejected the argument that the adoption of a different standard by the United States Supreme Court in Baze would affect the court's ruling to uphold the constitutionality of Florida's execution procedures. Lightbourne, 969 So. 2d at 352 ("Alternatively, even if the Court did review this claim under a 'foreseeable risk' standard as Lightbourne proposes or 'an unnecessary' risk as the Baze petitioners propose, we likewise would find that Lightbourne has failed to carry his burden of showing an Eighth Amendment violation"). This Court specifically found that "Lightbourne has not shown a **substantial, foreseeable or unnecessary risk** of pain." Lightbourne, 969 So. 2d at 353 (emphasis added).

As this court discussed in detail in its recent Ventura decision, the Baze plurality decision does not require that this Court reconsider Lightbourne or other decisions upholding Florida's lethal injection procedures. Ventura v. State, 2 So. 3d 194, 198-201 (Fla. 2009); see also Tompkins v. State, 994 So. 2d 1072 (Fla. 2008); Henyard v. State, 992 So. 2d 120 (Fla. 2008). Additionally, contrary to his allegations, Appellant was not entitled to an evidentiary hearing as his allegations were identical to those made by countless other capital defendants who have claimed that Florida's lethal injection procedures and

training protocols were inadequate. See Muhammad v. State, 2009 Westlaw 3807205, SC09-170 (Nov. 5, 2009) (unpublished opinion); Marek v. State, 8 So. 3d 1123 (Fla. 2009); Power v. State, 992 So. 2d 218 (Fla. 2008); Tompkins, supra.

Appellant asserts that the lower court should have conducted an evidentiary hearing in order to address the potential issue of his venous access, and the court should have heard from veterinarians and others experienced in euthanasia, and allowed testimony about the training, experience and identity of the actual executioners. These identical claims have already been addressed and rejected by this Court. See Lightbourne, 969 So. 2d at 352 (stating that the determination of "the specific methodology and the chemicals to be used are matters left to the DOC and the executive branch, and this Court cannot interfere with the DOC's decisions in these matters unless the petitioner shows that there are inherent deficiencies that rise to an Eighth Amendment violation"); Schwab v. State, 969 So. 2d 318 (Fla. 2007); Sims v. State, 754 So. 2d 657, 668 (Fla. 2000). Although Appellant notes that the venous access issue "has come to the forefront" after a failed execution of inmate Romell Broom in Ohio in September, 2009, Appellant has never alleged any problems with his venous access, but rather, simply noted in his postconviction motion that the court should

grant an evidentiary hearing to address "the *potential* issues of Mr. Troy's venous access." (PCR V3:547); see also Spencer v. State, 2009 Westlaw 3858067, SC08-2270 (Fla. Nov. 18, 2009) (unpublished opinion) (rejecting defendant's claim that, due to his current and future health, Florida's lethal injection procedures pose a substantial risk of unnecessary and wanton pain in violation of the Eighth Amendment, because the defendant failed to identify the medical conditions that would contribute to difficulty gaining venous access and did not allege that such conditions presently exist). Notably, as this Court noted in Grossman v. State, 2009 WL 500730 (Fla. Feb. 26, 2009) (unpublished opinion), Florida's current lethal injection procedures "take into consideration the individual physical attributes of each inmate and provide for individualized procedures in light of any health concerns such as obesity . . . the procedures appear to anticipate the complications that might arise with a common medical condition like obesity and provide for means to deal with any such complications." Appellant offers no further claim beyond the allegations already considered by this Court and rejected in Lightbourne. Because his challenges to the current protocols as well as the chemicals used for judicial execution in Florida have been repeatedly

rejected, this Court should affirm the postconviction court's summary denial of the instant claim.

ISSUE V

THE TRIAL COURT PROPERLY DENIED APPELLANT'S CONSTITUTIONAL ATTACK TO FLORIDA STATUTES, SECTION 945.10, WHICH PROHIBITS DISCLOSURE OF THE IDENTITY OF MEMBERS OF THE EXECUTION TEAM.

In this claim, Appellant argues that Florida Statutes, Section 945.10 which exempts from disclosure information about the identity of the executioner, violates his constitutional rights under the Eighth Amendment. The postconviction court summarily denied Appellant's claim based on recent precedent from this Court. (PCR V5:828, citing Ventura v. State, 2 So. 2d 194, 197 n.3 (Fla. 2009); Henyard v. State, 992 So. 2d 120, 128-29 (Fla. 2008)). Appellant repeats the same exact argument in this claim that has been repeatedly rejected by this Court in numerous other cases, and his argument has not become any more persuasive by repetition. See Cox v. State, 5 So. 3d 659 (Fla. 2009); Ventura, supra; Henyard, supra; Bryan v. State, 753 So. 2d 1244, 1250-51 (Fla. 2000). Because Appellant's procedurally barred claim is without merit, this Court should affirm the postconviction court's summary denial of the instant claim.

CLAIM VI

APPELLANT'S CONSTITUTIONAL CHALLENGE TO FLORIDA STATUTES, SECTION 27.702, IS WITHOUT MERIT AND WAS PROPERLY SUMMARILY DENIED BY THE POSTCONVICTION COURT.

Appellant's contention that Florida Statutes, section 27.702 is unconstitutional because it prohibits CCRC from filing an action in federal court pursuant to 42 U.S.C. § 1983, has been repeatedly rejected by this Court. In Diaz v. State, 945 So. 2d 1136, 1154-55 (Fla. 2006), this Court stated:

> Diaz has also filed a petition under the Court's constitutional all writs authority, in which he claims that section 27.702, Florida Statute (2006), is unconstitutional both facially and as applied in his case. We find no merit to this claim. Section 27.702 specifies the duties of Capital Collateral Regional Counsel in representing individuals convicted and sentenced to death in Florida in "collateral actions challenging the legality of the judgment and sentence imposed." Id. §27.702(1). Pursuant to the statute, CCRC attorneys "shall file only those postconviction or collateral actions authorized by statute." This Court has held that the "postconviction or collateral actions authorized by statute" do not include civil rights actions under 42 U.S.C. § 1983. State ex rel. Butterworth v. Kenny, 714 So. 2d 404, 410 (Fla. 1998).
>
> Diaz contends that his due process rights have been violated because his CCRC attorneys cannot file a section 1983 action in federal court to challenge Florida's lethal injection procedures and lethal injection as a method of execution. Diaz further alleges that he has no other avenue available to bring such a federal challenge in light of the holding in Hill v. McDonough, 126 S. Ct. 2096, 165 L. Ed. 2d 44 (2006). We conclude that Diaz has misinterpreted the Hill decision. In Hill, the defendant filed a federal action under section 1983 to challenge the lethal injection procedure as cruel and unusual punishment. The federal district court and the Eleventh Circuit

Court of Appeals both denied Hill's claim, holding that his section 1983 claim was the functional equivalent of a habeas petition. Because Hill had sought federal habeas relief earlier, his section 1983 action was deemed successive and thus procedurally barred. Hill, 126 S. Ct. at 2097. However, the United States Supreme Court reversed and held that a challenge to the constitutionality of the lethal injection procedure did not have to be brought in a habeas petition, but could proceed under section 1983. Id. at 2098. However, contrary to Diaz's assertions here, the United States Supreme Court did not hold that a constitutional challenge to lethal injection procedures could not be brought under a habeas petition.

Accordingly, Diaz did have an alternative avenue for challenging the lethal injection procedure in federal court, but did not utilize it. In 1999, Diaz filed a federal habeas petition in federal district court. The petition was pending until January 2004 On January 14, 2000, section 922.105 was amended to provide for lethal injection as the method of execution in Florida. See ch. 2000-2, § 3, at 4, Laws of Fla. Also, while his federal habeas petition was pending, Diaz filed two habeas petitions in this Court. See Diaz v. Moore, 828 So. 2d 385 (Fla. 2001); Diaz v. Crosby, 869 So. 2d 538 (Fla. 2003).

Under 28 U.S.C. § 2254, an application for a writ of habeas corpus in a federal court may be granted if the applicant has exhausted the remedies available in the state courts. Thus, had Diaz raised a lethal injection claim in either of his two state habeas petitions that were filed after lethal injection was adopted as the method of execution in Florida, he could have then raised the claim in his initial federal habeas petition that was pending from 1999 until 2004. However, Diaz did not utilize this avenue that was available to him. Thus, it was due to his own lack of diligence that he missed the opportunity to challenge execution by lethal injection in a federal habeas action. Accordingly, we find no violation of Diaz's due process rights and no basis for striking down section 27.702 as unconstitutional We deny Diaz's petition for all writs relief.

See also Cox v. State, 5 So. 3d 659 (Fla. 2009); Ventura v. State, 2 So. 3d 194 (Fla. 2009); Henyard v. State, 992 So. 2d 120 (Fla. 2008). Florida Statutes, section 27.702 does not deny Appellant any right to challenge lethal injection in a federal civil action, it only denies use of his taxpayer-supplied capital counsel for doing so. His attack on the statute is no more than a request for an unwarranted extension of his statutory right to counsel. Because Appellant's claim is without merit and has repeatedly been rejected, this Court should affirm the postconviction court's summary denial of the instant claim.

CLAIM VII

THE POSTCONVICTION COURT PROPERLY REJECTED APPELLANT'S CONSTITUTIONAL CHALLENGE TO THE RULES PROHIBITING JUROR INTERVIEWS.

Appellant's next claim involves a constitutional attack to the rules governing juror interviews, Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar. The postconviction court summarily denied the instant claim based on this Court's precedent. (PCR V5:829). Although not addressed by the lower court, Appellee submits that the instant claim was procedurally barred as it was a claim that could have been raised on direct appeal, but was not. See Ragsdale v. State, 720 So. 2d 203, 205 n.1 & 2 (Fla. 1998); Gaskin v. State, 737 So. 2d 509, 530 n.6 (Fla. 1999); see also Brown v. State, 755 So. 2d 616, 620-21, n.1, 4, 5, 7 (Fla. 2000); Mann v. State, 770 So. 2d 1158, 1161, n.2 (Fla. 2000); Johnson v. State, 804 So. 2d 1218 (Fla. 2001), Arbelaez v. State, 775 So. 2d 909 (Fla. 2000).

Appellant asserts that the rule prohibiting his counsel from interviewing jurors, Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar, is unconstitutional because it violates his constitutional rights of equal protection and due process. In Barnhill v. State, 971 So. 2d 106, 116-17 (Fla. 2007), this Court rejected the same exact claim that Appellant raises in the instant case:

> Barnhill argues that rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar and Florida Rule of Criminal Procedure 3.575 violate his constitutional right of equal protection and deny him adequate assistance of counsel in pursuing his postconviction remedies. The State argues this issue is procedurally barred because it was not raised on direct appeal. The State also argues that Barnhill fails to identify a specific incident of juror misconduct. We deny relief on this issue consistent with our prior decisions which have found that rule 4-3.5(d)(4) and rule 3.575, which collectively restrict an attorney's ability to interview jurors after trial, do not violate the defendant's constitutional rights. See Power v. State, 886 So. 2d 952, 957 (Fla. 2004); Sweet v. Moore, 822 So. 2d 1269, 1274 (Fla. 2002); Johnson v. State, 804 So. 2d 1218, 1225 (Fla. 2001).

See also Tompkins v. State, 994 So. 2d 1072 (Fla. 2008); Sexton v. State, 997 So. 2d 1073, 1089 (Fla. 2008); Evans v. State, 995 So. 2d 933 (Fla. 2008). Because Appellant's claim is procedurally barred and without merit, this Court should affirm the postconviction court's summary denial of the instant issue.

CLAIM VIII

THE POSTCONVICTION COURT PROPERLY DENIED APPELLANT'S CLAIM THAT THE JURY WAS IMPROPERLY INSTRUCTED ON THEIR RESPONSIBILITY IN VIOLATION OF CALDWELL V. MISSISSIPPI, 472 U.S. 320 (1985).

In claim eight of his postconviction motion, Appellant asserted that the jury was unconstitutionally instructed because they were told their role was merely "advisory." Appellant relied on Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633 (1985), to support his legal argument. The postconviction court, *assuming arguendo* that the claim was properly presented, summarily denied the claim based on this Court's well-established precedent. (PCR v5:829-30). The State submits that the instant claim is procedurally barred as a claim that, if properly preserved by contemporaneous objection at trial, must be raised on direct appeal. See Gore v. State, 846 So. 2d 461, 466 n.4 (Fla. 2003); Jones v. State, 845 So. 2d 55, 72 n.38 (Fla. 2003); Cherry v. State, 659 So. 2d 1069, 1072 (Fla. 1995).

In addition to the procedural bar, this Court has repeatedly rejected this claim on the merits as it is well established that the rationale of Caldwell is not applicable to Florida because the judge, rather than the jury, renders the sentence. See Card v. State, 803 So. 2d 613, 628 (Fla. 2001) ("We hold the following claims are without merit: . . . (2) the standard jury instructions that refer to the jury as advisory

and that refer to the jury's verdict as a recommendation violate Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985)"); Melendez v. State, 612 So. 2d 1366, 1369 (Fla. 1992) (stating that Caldwell does not control Florida law on capital sentencing and the instructions as given adequately advised the jury of its responsibility); Combs v. State, 525 So. 2d 853, 855-56 (Fla. 1988) (holding Caldwell inapplicable to Florida death cases). Likewise, in the instant case, as the postconviction court correctly noted, the jury was instructed on the applicable law in accordance with the standard jury instructions. (PCR V5:830). This Court has opined that "the standard jury instruction fully advises the jury of the importance of its role, correctly states the law . . . and does not denigrate the role of the jury." Brown v. State, 721 So. 2d 274, 283 (Fla. 1998) (citation omitted). Thus, this Court should affirm the postconviction court's denial of this claim.

CLAIM IX

WHETHER APPELLANT'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS APPELLANT MAY BE INCOMPETENT AT TIME OF EXECUTION?

In his ninth claim, Appellant asserts that his Eighth Amendment right against cruel and unusual punishment will be violated if he is found incompetent at the time of his execution. Appellant acknowledges that the claim is not ripe for review and that he raised the issue only in order to preserve the claim for federal review. The lower court denied the instant claim as premature based on this Court's precedent. (PCR V5:830-31). Under Florida Rules of Criminal Procedure 3.811 and 3.812, the issue of competency for execution cannot be raised until the Governor has issued a death warrant. See Parker v. State, 904 So. 2d 370, 380-81 (Fla. 2005); Cole v. State, 841 So. 2d 409, 430 (Fla. 2003); Brown v. Moore, 800 So. 2d 223, 224 (Fla. 2001). As this Court noted in Barnhill v. State, 971 So. 2d 106, 118 (Fla. 2007):

> Barnhill concedes that his claim involving competency to be executed is not ripe for review as he has not yet been found incompetent and a death warrant has not been signed. He contends that he is only raising this issue for preservation purposes. This Court has repeatedly found that no relief is warranted on similar claims. See State v. Coney, 845 So. 2d 120, 137 n.19 (Fla. 2003) (rejecting the defendant's claim that he is insane to be executed where he acknowledged that claim was not yet ripe and was being raised only for preservation purposes); Jones v. State, 845 So. 2d 55, 74 (Fla. 2003) (finding claim that defendant may

> be insane to be executed "not ripe for review" where defendant was not yet found incompetent and death warrant not yet been signed; noting that defendant made claim "simply to preserve it for review in the federal court system"); Hall v. Moore, 792 So. 2d 447, 450 (Fla. 2001) (stating that it is premature for a death-sentenced individual to present a claim of incompetency or insanity, with regard to his execution, if a death warrant has not been signed).

Because the instant claim is not ripe for review, this Court should deny the instant claim.

CLAIM X

FLORIDA'S DEATH PENALTY STATUTORY SCHEME IS CONSTITUTIONAL.

Appellant alleges that Florida's death penalty statute is unconstitutional and violates Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), and Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428 (2002), because the aggravators are not charged in the indictment, the statute permits jury recommendations of death based upon a majority vote, and the statute does not require jury unanimity as to the existence of specific aggravating factors. Appellant raised a portion of this claim on direct appeal and this Court held:

> Troy next argues that Florida's death penalty statute is unconstitutionally invalid because it does not require the findings of each aggravating factor to be made by the jury, pursuant to Ring. This Court has denied relief in appeals where the trial judge has found the "during the course of a felony" aggravator. See Robinson v. State, 865 So. 2d 1259, 1265 (Fla. 2004) ("This Court has held that the aggravators of murder committed 'during the course of a felony' and prior violent felony involve facts that were already submitted to a jury during trial and, hence, are in compliance with Ring.") (citing Owen v. Crosby, 854 So. 2d 182, 193 (Fla. 2003)). Given that Troy was convicted of this crime simultaneously with two counts of armed burglary, two counts of armed robbery, and attempted sexual battery, relief on this Ring claim is denied.

Troy v. State, 948 So. 2d 635, 653-54 (Fla. 2006).

Additionally, as Appellant properly recognizes, this Court has consistently rejected his constitutional challenges to

Florida's death penalty statute. See Merck v. State, 975 So. 2d 1054 (Fla. 2007) (noting that a defendant is not entitled to notice of aggravating factors in the indictment and jury may recommend death by a majority vote); Marshall v. Crosby, 911 So. 2d 1129 (Fla. 2005) (noting that this Court has rejected Ring claims in over fifty cases); Kormondy v. State, 845 So. 2d 41, 54 (Fla. 2003) (Ring does not encompass Florida procedures or require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the jury). As the postconviction court properly summarily denied the instant claim based on this Court's precedent (PCR V5:831-32), this Court should affirm the lower court's ruling.

CLAIM XI

THE POSTCONVICTION COURT PROPERLY DENIED APPELLANT'S CLAIM THAT FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED FOR FAILING TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY AND FOR VIOLATING THE GUARANTEE AGAINST CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND TO THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Appellant alleges a multitude of constitutional challenges regarding Florida's death penalty statute. The lower court summarily denied the claim as procedurally barred and also found that the claims were without merit. Specifically, the court stated:

> In Ground XI, the Defendant argues that the death penalty is unconstitutional, in that:
>
> (1) execution by lethal injection imposes unnecessary physical and psychological torture without commensurate justification;
>
> (2) the statute fails to provide any standard of proof for determining that aggravating circumstances 'outweigh' mitigating circumstances;
>
> (3) the statute fails to define for the judge's consideration each of the aggravating factors listed in the statute;
>
> (4) the procedure does not allow the independent reweighing of aggravating and mitigating circumstances;
>
> (5) the aggravating circumstances have been applied in a vague and inconsistent manner;

> (6) the statute creates a 'presumption of death' whereby if only one aggravating factor is present it can only be overcome by mitigating evidence so strong as to outweigh the aggravating factor; and
>
> (7) this 'presumption of death' violates the Eighth Amendment, in that the death penalty is not applied only to the worst offenders.
>
> The Court finds that these issues should have been raised on direct appeal. Nevertheless, even assuming that these claims were properly raised in this motion, the Court denies them. Each of these claims has been previously rejected by the Florida Supreme Court. See, e.g., Ventura v. State, [2 So. 3d 194 (Fla. 2009)] (noting repeated and consistent rejection of Eighth Amendment challenges to Florida's current lethal-injection protocol); Henyard v. State, 992 So. 2d 120, 129-30 (Fla. 2008) (Baze does not alter Florida's standard to review Eighth Amendment challenges); San Martin v. State, 705 So. 2d 1337, 1350 n.5 (Fla. 1997) (concluding that weighing provisions in Florida's death penalty statute requiring the jury to determine '[w]hether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist' and the standard jury instruction thereon did not unconstitutionally shift the burden to the defendant to prove why he should not be given a death sentence).

(PCR V5:832-33) (footnote omitted). As none of these issues were raised on direct appeal, the postconviction court properly found that these claims were procedurally barred. Furthermore, as this Court has repeatedly noted, the individual claims lack merit. Accordingly, this Court should affirm the postconviction court's summary denial of this claim.

CLAIM XII

APPELLANT'S CUMULATIVE ERROR CLAIM IS WITHOUT MERIT.

Appellant claims in his final issue that the arguments contained in his brief, when considered cumulatively by this Court, should cause this Court to vacate his judgment and sentence and order a new trial. The State has shown, however, that none of Appellant's claims have merit. The lower court agreed and found that because Appellant had failed to establish any of his allegations of ineffective assistance of counsel, he was not entitled to relief under a cumulative error analysis. (PCR V5:833).

Because there is no individual error to consider, Appellant is not entitled to combine meritless issues together in an attempt to create a valid "cumulative error" claim. See Brown v. State, 846 So. 2d 1114, 1126 (Fla. 2003) (upholding lower court's denial of cumulative error claim when each of the individual claims of ineffective assistance of counsel had been denied); Mann v. Moore, 794 So. 2d 595 (Fla. 2001) (finding no cumulative effect to consider where all claims were either meritless or procedurally barred); Downs v. State, 740 So. 2d 506, 509 (Fla. 1999) (concluding that where allegations of individual error do not warrant relief, a cumulative error argument based thereon is without merit).

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the lower court's 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. Regular Mail to David R. Gemmer, Assistant Capital Collateral Regional Counsel, CCRC - Middle, 3801 Corporex Drive, Suite 210, Tampa, Florida, 33609, on this 28th day of January, 2010.

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,

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