IN THE SUPREME COURT OF FLORIDA

CASE NOS. 87,481 and 88,321

WILLIAM L. THOMPSON,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

ANSWER BRIEF OF APPELLEE AND RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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CERTIFICATE OF TYPE STYLE AND FONT

It is hereby certified that the text of this brief is printed in 12 point Courier New, a font that is not proportionately spaced.

PRELIMINARY STATEMENT

The following symbols have been utilized in the instant brief:

R1. Record on appeal of the first guilty plea and sentence, FSC Nos. 49,964, 50,486.

R2. Record on appeal of the second guilty plea and sentence, FSC No. 55,697.

R3. Record on appeal of the second resentencing, FSC No. 75,499.

SR3. Supplemental record on appeal of the second resentencing, FSC No. 75,499.

PCR. Record on appeal of the post-conviction proceedings herein, FSC No. 87,481.

SPCR. Supplemental record on appeal of the post-conviction proceedings herein, FSC No. 87,481.

SPCT. Supplemental Record of the instant post-conviction appeal, Volume 7, containing the transcript of October 31, 1996 proceedings in the lower court. Said supplemental record was furnished to this Court on May 10, 1999. However, the Appellee has never received a copy of this supplemental record. The Appellee received and utilized the transcript from defense counsel. The

symbol SPCT., p. ___, refers to the pages of said transcript and not the supplemental record page numbers.

TABLE OF CITATIONS

Other Authorities

STATEMENT OF THE CASE AND FACTS

A) Prior Proceedings

The Defendant was charged with the first degree murder of Sally Ivester, sexual battery and kidnaping on April 14, 1976. He pled guilty and was sentenced to death on June 24, 1976. Defendant filed a motion for post-conviction relief which was denied. The appeal of said denial and his appeal from the guilty pleas were consolidated. The consolidated proceedings resulted in the withdrawal of the pleas as, "an honest misunderstanding" had contaminated the voluntariness of same. Thompson v. State, 350 So. 2d 701 (Fla. 1977).

Upon remand, the Defendant again entered a plea of guilty in September 1978, and a sentencing jury was convened. The resulting conviction and death sentence were upheld by this Court on direct appeal. Thompson v. State, 389 So. 2d 197 (Fla. 1980). This Court found the historic facts of the offenses as follows:

> ...The appellant Thompson, Rocco Surace, Barbara Savage, and the victim Sally Ivester were staying in a motel room. The girls were instructed to contact their homes to obtain money. The victim received only $25 after telling the others that she thought she could get $200 or $300. Both men became furious. Surace ordered the victim into the bedroom, where he took off his chain belt and began

> hitting her in the face. Surace then forced her to undress, after which the appellant Thompson began to strike her with the chain. Both men continued to beat and torture the victim. They rammed a chair leg into the victim's vagina, tearing the inner wall and causing internal bleeding. They repeated the process with a night stick. The victim was tortured with lit cigarettes and lighters, and was forced to eat her sanitary napkin and lick spilt beer off the floor. This was followed by further severe beatings with the chain, club, and chair leg. The beatings were interrupted only when the victim was taken to a phone booth, where she was instructed to call her mother and request additional funds. After the call, the men resumed battering the victim in the motel room. The victim died as a result of internal bleeding and multiple injuries. The murder had been witnessed by Barbara Savage, who apparently feared equivalent treatment had she tried to leave the motel room.
>
> The appellant was arrested on April 1, 1976, and was examined by two psychiatrists in April and by two other psychiatrists in June of 1976. All four psychiatrists concluded that the appellant knew right from wrong at the time of the offense and had the capacity to aid counsel

389 So. 2d at 198-99.

The Court, on direct appeal of the second plea of guilty and sentence of death considered and rejected the following issues: 1) that additional psychiatric testing should have been done; 2) that a presentence investigation should have been ordered; 3) that the advisory jury should not have been convened, and that jurors

opposed to the imposition of the death penalty should not have been excluded; 4) that gory photographs should not have been admitted; 5) that the trial court ignored evidence of the Defendant's domination by his accomplice, Surace; 6) that the death penalty statute constitutes cruel and unusual punishment; and 7) that the aggravating circumstances did not outweigh the mitigating factors presented. 389 So. 2d at 199-200.

Defendant then filed another Motion to Vacate which was summarily denied without an evidentiary hearing. On appeal, this Court affirmed. Defendant's contentions that, 1) he had falsely testified at Surace's trial and had taken the full blame for the murder, because he had been coerced by Surace to do so; and, 2) his death sentence was inappropriate because Surace received a life sentence, were rejected. Thompson v. State, 410 So. 2d 500 (Fla. 1982). This Court reiterated that Rule 3.850 "may not be used as a vehicle to raise for the first time, issues that could have been raised during the initial appeal on the merits, nor used to retry issues previously litigated on direct appeal." 410 So. 2d at 501.

Defendant thereafter spent the next five years litigating his habeas corpus petition in federal court. Thompson v. Wainwright, 714 F. 2d 1495 (11th Cir. 1983), cert. denied, 466 U.S. 982, 104 S.Ct. 2180, 80 L.Ed.2d 562 (1984); Thompson v. Wainwright, 787 F.

2d 1447 (11th Cir. 1986), cert. denied, 481 U.S. 1042, 107 S.Ct. 1986, 95 L.Ed.2d 825 (1987). The federal proceeding included a full evidentiary hearing, as the State waived exhaustion of state remedies. The federal courts thus considered and rejected claims of: 1) ineffective assistance of counsel relating to the entry of the guilty plea, and as to the sentencing phase; 2) restriction of mitigating evidence; 3) competency to stand trial, 4) failure to appoint additional psychiatric experts; and 5) coercion of the guilty plea by co-defendant Surace.

Defendant thereafter filed his third Motion for Post-conviction relief which the state trial court denied. The Defendant appealed the denial, and also filed a petition for a writ of habeas corpus with this Court. This Court determined that because of the intervening decision of the Supreme Court of the United States in Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), and the restriction placed on the presentation of nonstatutory mitigation in this case, a new sentencing hearing was required. Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987), cert. denied, 485 U.S. 960, 108 S. Ct. 1224, 99 L.Ed.2d 424 (1988). In so ruling, this Court expressly rejected Defendant's remaining contentions for relief by holding, "...we find that procedural default operates to bar any challenge here; these issues have been presented and have been previously resolved in the

federal courts when the State waived exhaustion of state remedies." 515 So. 2d at 176. The defendant had, inter alia, raised multiple claims of ineffective assistance of counsel with respect to the entry of his guilty plea, in addition to a claim of ineffective assistance of appellate counsel. See Brief of Appellant and Petition for Writ of Habeas Corpus, Florida Supreme Court Case Nos. 70,781; 70,739.

Thereafter, a new sentencing hearing was had before a new judge and jury in 1989. The jury's recommendation of death was followed by the resentencing judge, and upheld on appeal. Thompson v. State, 619 So. 2d 261 (Fla. 1993).

The resentencing judge found four (4) aggravating circumstances: 1) crime was committed while Thompson was engaged in the commission of the crime of sexual battery; 2) the crime was committed for financial gain; 3) the crime was especially heinous, atrocious, or cruel; and 4) the crime was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. 619 So. 2d at 264. As noted by this Court: "The trial judge expressly rejected, in detail, each of the mitigating circumstances including that Thompson lacked the capacity to appreciate the criminality of his conduct. The trial judge noted in this regard that, although Thompson's IQ score was in

the dull-normal range, there was evidence that Thompson functioned on a higher level. The trial judge concluded that 'the aggravating factors in this case far outweigh[ed] any possible mitigating circumstance.'" Id.

This Court also set forth a partial summary of the evidence presented, which apart from the evidence with respect to the facts of the crime, included the following:

> Thompson presented numerous witnesses who testified in mitigation of his conviction, including a former church pastor, a church elder, a church member, an elementary school principal, and several family members. Thompson's former church pastor described Thompson as a slow learner and a follower who did not exhibit any violent or aggressive behavior. A church elder described Thompson as someone needing to be led, while the elder's wife described him as very faithful. Testifying from school records, an elementary school principal stated that Thompson had an IQ of seventy-five, had been recommended for special educational placement, and had been a follower, not a leader. Family members testified regarding the filthy home and affectionless environment in which Thompson had been raised. Thompson's ex-wife and mother of his two children described Thompson as a loving and gentle husband who was never physically violent or abusive. She also described Thompson as mentally slow and a follower and that their marriage failed partly because of his alcoholism.
>
> In an affidavit introduced by Thompson, Barbara Savage characterized the codefendant, Rocco Surace, as the gang-leader, who knew how to manipulate people. She described Thompson as a gullible and easygoing person, who was

easily manipulated. However, Savage's characterization of Thompson as a person dominated by Surace was contradicted by her testimony at the original trial.

A psychologist who examined Thompson stated that Thompson was a battered child and characterized him as an extremely depressed person. The psychologist stated that Thompson's IQ was at the lowest possible level of low-average intelligence. The psychologist also found Thompson to be brain-damaged and that his touch with reality was so loose and fragile that she could not tell whether Thompson was aware of what he was doing during the assault.

A psychiatrist testified that he found Thompson to be retarded and easily led and threatened by Surace. He believed Thompson to have been brain-damaged since childhood, possibly since birth. He diagnosed Thompson as having organic brain disease and suffering from personality and stress disorders. A neurologist also testified that Thompson suffered from organic brain disease.

In rebuttal, the State called the codefendant, Rocco Surace. Surace blamed Thompson for the attack on the victim, while acknowledging that he had entered guilty pleas to the same offense. A psychiatrist presented by the State testified that he had evaluated Thompson after the incident in 1976. He found that Thompson could process information and that his memory was intact. The psychologist concluded that Thompson suffered from an inadequate personality disorder and a long-standing pattern of antisocial and impulsive behavior.

The State called another psychiatrist as an expert witness, who had seen Thompson in 1976, and, while he stated that "there was tremendous anger, rage, aggression, and diminished control with the involvement of alcohol and a number of drugs that were used,"

> he did not feel that Thompson's conduct resulted from a mental disorder. He stated his belief that Thompson had the capacity to know what was right and what was wrong. A psychiatrist presented by the prosecution stated that he had examined Thompson in November of 1988 and had found no indication of organic brain disease or any serious deficiencies in Thompson's ability to reason, understand, or know right from wrong. He also stated that he did not believe that Thompson acted under the influence of extreme mental or emotional disturbance or that Thompson's capacity to appreciate the criminality of his conduct was substantially impaired. Furthermore, the psychiatrist stated that he did not believe Thompson acted under the substantial domination of another. Another psychologist presented by the State testified that Thompson had adequate communication skills and good general memory. He did not find Thompson to be overly susceptible to suggestion and found no evidence of major mental illness.

619 So. 2d at 263-64.

The Appellant raised six (6) claims on appeal of the second resentencing: (1) the trial court erred in ruling that the State's witness, Barbara Savage, was unavailable, thus permitting her prior testimony to be read to the jury; (2) the trial court erred by failing to grant Thompson's motion to strike the jury panel and in failing to conduct an individual voir dire when it became apparent that the jury was concerned that Thompson, if sentenced to life, could be released after twelve years because he had already served thirteen years; (3) the trial court erred in permitting the State

to introduce into evidence Thompson's prior inconsistent testimony, given at the trial of the codefendant; (4) the trial court erred in permitting the State to introduce into evidence photographs depicting the victim's post-trauma dissection; (5) the trial court erred in unfairly limiting the testimony of defense witnesses and prohibiting such witnesses from offering opinions as to the appropriateness of the death penalty; and (6) the trial court erred in sentencing the defendant to death. 619 So. 2d at 265. The last claim consisted of four issues: a) the trial court failed to find the existence of the statutory mitigating circumstances of age and no significant history of criminal activity, where these findings had been made in a prior sentencing hearing; b) the trial court erroneously found that the homicide was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification; c) the trial court failed to acknowledge the existence and applicability of numerous additional statutory and nonstatutory mitigating factors; and d) the death penalty in Florida is unconstitutional on its face and as applied to Thompson. 619 So. 2d at 266. On rehearing, the defendant also raised an issue of unconstitutional jury instructions with respect to the HAC aggravator, in violation of Espinosa v. Florida, 112 S.Ct. 2926 (1992).

This Court agreed that the introduction of autopsy photographs

was error, and that the CCP aggravator was not applicable to the facts herein. These errors were found to be harmless beyond a reasonable doubt. 619 So. 2d at 266. The remainder of the issues were rejected. 619 So. 2d at 265-67. The briefs of the parties from that appeal have been included in the instant record. The initial and reply briefs of the Defendant are at SPCR. 520-616; 722-44, respectively. The State's brief is at SPCR. 617-721.

B. The Lower Court Proceedings At Issue On The Instant Appeal

The Appellant's conviction from his guilty plea became final in 1980. His sentencing from the resentencing proceedings became final on November 8, 1993, with the denial of certiorari from the United States Supreme Court. Thompson v. Florida, 510 U.S. 966 (1993).

The Appellant filed his motion for post-conviction relief on May 23, 1995, six (6) months prior to the two-year deadline, in order to avoid a warrant being signed by the Governor's office. (PCR. 1-112). In said motion, the Appellant listed a number of agencies, both within and outside the Eleventh Judicial Circuit, which he claimed had not provided him with public records. (PCR. 7).[1] The defendant, however, did not file any motion to compel;

[1] These agencies listed for "illustrative purposes only, and not representative," included the State Attorney's Office for

did not schedule the motion or his public records request for any hearing; nor did he otherwise notice the agencies involved.

On November 8, 1995, the defendant filed his amended motion for post-conviction relief, which again contained allegations of non-compliance with respect to the same agencies, except that the City of North Miami was deleted and the City of North Miami Beach was added. (SPCR. 85-85). Again, there was no accompanying motion to compel, nor any notice of hearing to the allegedly noncomplying agencies.

More than a month later, on December 12, 1995, the trial court summarily denied the motion for post-conviction relief as successive, and as not containing the required oath or verification by the defendant. (PCR. 295-96). The defendant appealed, and the State requested that this Court relinquish jurisdiction in order to conduct a Huff[2] hearing, which this Court did on August 19, 1996.

Dade County, Metro-Dade Police Department, the Circuit Court Clerk; Florida Parole Commission; Florida Department of Law Enforcement; North Miami Police Department; Dade County Jail; Florida State Prison; and Florida Department of Corrections. (PCR. 7).

[2] Huff v. State, 622 So. 2d 982 (Fla. 1993).

(SPCR. 4).

After relinquishment, the State Attorney's Office filed a Response stating, inter alia, that with respect to any records generated prior to January 25, 1979, same were exempt from disclosure pursuant to Fla. Stat. 119.07(1993). (PCR. 34). It should be noted that the instant crimes took place in 1976 and the defendant pled guilty (for the second time) in 1978. The State also argued that any records which were obtainable prior to the 1989 resentencing, during the course of Appellant's two prior motions for post-conviction relief, filed in 1982 and 1987, respectively,[3] were barred and did not serve as a basis for delaying the instant post-conviction proceedings pursuant to Zeigler v. State, 632 So. 2d 48 (Fla. 1994); Agan v. State, 560 So. 2d 222 (Fla. 1990); Demps v. State, 515 So. 2d 196 (Fla. 1987). (SPCR. 34).

Nonetheless, the State Attorney's Office represented that it had produced its resentencing records, in excess of 3,300 pages of documents, to the defendant in May, 1995, pursuant to the latter's request in April, 1995. The State Attorney's Office also represented that the investigating agency, Metro-Dade Police

[3] See Thompson v. State, 410 So. 2d 500 (Fla. 1982); Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987).

Department, had also produced its documents to the defendant. (SPCR. 34; SPCT. p. 7). With respect to agencies that had no connection with the State Attorney's Office or those that were located outside of Dade County, such as the Florida Department of Corrections, the Florida State Prison, the Florida Parole Commission, the Clerk of the Circuit Court, etc., the State's Response argued that it had no obligation to provide those agencies' records pursuant to Hoffman v. State, 613 So.2 d 405 (Fla. 1992); Parole Commission v. Lockett, 620 So. 2d 153 (Fla. 1993); Jackson v. Dugger, 633 So. 2d 105 (Fla. 1993). (SPCR. 34-35). The State added, "If Defendant was dissatisfied with the response to access to public records, it was incumbent upon him to pursue the issue before the trial judge. The failure to do so is considered a waiver of the issue. Lopez v. Singletary, 634 So. 2d 1056 (Fla. 1993)." (SPCR. 35).

After the above response, the state scheduled a hearing on October 17, 1996. At said hearing, counsel for the Defendant, while acknowledging the need for a motion to compel, stated that she needed time to file such a motion: "I'd like to pursue Chapter 119 of the public records. We'd like time to file the motion to compel." (SPCR. 870). The trial court then scheduled another hearing for October 31, 1996.

The defense again did not file any motion to compel, nor did it notice any of the agencies for said hearing. Instead, at the October 31, 1996 hearing, defense counsel, while again acknowledging the need for a motion to compel, stated that, "indeed some of the agencies listed in the Amended Motion [for post conviction relief] may have complied since 1995, and that's the subject of a 119 hearing. That needs to be proven to the Court." (SPCT. p. 10). Defense counsel added that the State Attorney's Office could not represent "any other law enforcement agency that has been asked to comply with Chapter 119;" and, that it was necessary to have the "actual records custodian in court to testify about what they did do, or they don't do." (SPCT. pp. 11, 12).

In response to the trial court's question as to why a motion to compel had not been filed, defense counsel stated, "we had no room in which to file a Motion to Compel." (SPCT. 13). The State argued that the defense had had ample time to file a motion to compel and the failure to do so constituted a waiver of the public records issue in accordance with its prior written response, set forth above:

> MR. ROSENBLATT: The original public records requests were made in April of 1995. They filed their initial Motion to Vacate in May of 1995. The Amended Motion was filed in November of 1995, although it was summarily dismissed on December 22, 1995.

> No action was taken between April and November or December to move to compel production.
>
> Subsequently, when the Court relinquished jurisdiction on August 19th to this Court, no action has been taken from August 19th to now [October 31] to compel any greater production.

(SPCT. at p. 14).

The State also reiterated that the State Attorney's Office and Metro-Dade Police Department had, in fact, complied with the defendant's public records request, and produced both a receipt for copies received by the defendant from the State Attorney's Office and a letter from the custodian of records from Metro-Dade reflecting production of its records, to the trial court. (SPCT. pp. 14-15; 5-6).

The trial court stated that its preliminary inclination was to find a waiver for not having pursued the public records previously, "and/or that there had been sufficient compliance with what had been pled." (SPCT. p. 17). The court requested that the State prepare a draft order with said alternative grounds, and that the defense send a "brief letter" with any objections to said order so as to enable the court to "modify" this order if necessary. (SPCT. pp. 17-18). The trial court then scheduled a hearing, "as to whether there is a need of any further evidentiary hearing [on the

Amended Motion for Post-Conviction Relief]," for November 14, 1996. (SPCT. pp. 18-19).

On November 8, 1996, prior to the submission of the proposed order on public records, the defense served a Motion to Disqualify the judge based upon the October 31, 1996 hearing. (SPCR. 39-51). The grounds for said motion were that: a) the judge had adversely ruled against the defendant on the public records issue; and, b) during the course of said hearing the judge had asked the assistant state attorney whether the Amended Motion to Vacate could be denied without an evidentiary hearing. Id. The State, in its prior written Response to the Amended Motion to Vacate, had in fact argued that said motion should be denied without an evidentiary hearing. (SPCR. 18-37).

Subsequently, on November 13, 1996, the defendant also served a Motion of Non-compliance and Motion to Strike. The defendant's motion stated that the proposed order on public records had not been received, and that, if a proposed order was submitted, then same should be stricken. (SPCR. 52-53).

The November 14, 1996 hearing was thus canceled and reset. (SPCR. 873-75). The State filed its response to the defendant's Motion to Disqualify on November 22, 1996. (SPCR. 881-84). The

trial court issued a written order denying the defendant's Motion for Disqualification as insufficient on January 27, 1997. (SPCR. 55-56). Another Huff hearing was scheduled for February 6, 1997. (SPCR. 303-346).

At the February 6, 1997 Huff hearing, the defense again argued that it had not been granted a "chapter 119 hearing" on public record claims. (SPCR. 309-311). Again, in the interim between October 31, 1996 and the February 6, 1997 hearing, no motion to compel nor any attempt to notice the alleged noncomplying agencies had been made. The trial court thus inquired:

> THE COURT: Is there any obligation on your part to articulate what it is in those records that you believe would entitle Mr. Thompson to R. 3.850 relief or that records are out there and we don't have this and there could be something in them, and therefore, we get to have a hearing?

(SPCR. 311). Defense counsel responded that, "If I can state it with any more particularity, I would, but I don't know the things we haven't gotten. All I know is that a case that's been investigated by the Metro-Dade Police Department, that has had two resentencings and the original proceeding is going to have more than a hundred pages." (SPCR. 311-12). The State reiterated that all records with respect to the 1989 resentencing at issue had been received from the State Attorney's Office, and any records pertaining to the 1976 and 1978 proceedings could have been obtained in the prior post-

conviction proceedings [in 1982 and 1987], and were additionally barred pursuant to Fla. Stat. 119.07, which exempts any records generated prior to January, 1979. (SPCR. 331-32).

Unbeknownst to the trial court and the State, the defense on February 5, 1997, the day prior to the above Huff hearing, had served a number of public records requests, to some of the very agencies it had claimed had not complied in the original and amended motions for post-conviction relief. (SPCR. 234-258). The record reflects that said requests all stated that they were a "first request for production of records." Id. The record further reflects that the bulk of said requests were not even delivered until after the Huff hearing which was conducted on February 6, 1997. (SPCR. 260-273). The Defendant did not only fail to mention any of said requests at the Huff hearing, but did not subsequently request or schedule any hearing on same either.[4] The trial court,

[4] The record contains the responses to some of the February 5, 1997 requests. Some of the agencies, such as the Attorney General's Office, the State Attorney's Office and the Florida Department of Law Enforcement, responded that the February 5, 1997 requests were not "first" requests for production, and that they had previously provided their records to the defendant in May through October, 1995. (SPCR. 802, 811, 819). Other agencies with the "first request for production of records," such as the Department of Corrections, filed notices of compliance with respect to records in their custody, while objecting to such burdensome requests as production of the complete "personnel files of every DOC employee who had participated in the "control and care" of the defendant since 1976, or "log sheets" reflecting all of the defendant's movements or visitors since 1976. (SPCR. 775-76). The Department

at the above Huff hearing, had noted that it would have to enter an order within 30 days of said hearing, as the already enlarged period for relinquishment was about to expire.[5] (SPCR.344-45).

With respect to the substance of the claims in the Amended Motion for Post-Conviction relief, the defendant, at the Huff hearing, argued that his ineffective assistance of counsel at resentencing claims required an evidentiary hearing. (SPCR. 308-9; 315-20). The State noted that the substance underlying the majority of said claims had been raised and rejected on the merits by this Court on appeal of the resentencing. (SPCR. 323-24; 333-

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noted that the cost of producing all of the personnel files, in excess of 900 in just one of its correction facilities, would be in excess of $45,000; the visitor log sheets, prior to 1992, were noted to be difficult to locate in light of the Department's record retention and destruction schedules. Id. Another agency, the City of Miami's Police Department, also objected on the grounds of overbroad and burdensome requests. (SPCR. 822).

[5] This Court had enlarged the period for relinquishment because the original judge who had summarily denied post-conviction relief in 1995 had been transferred to the civil division, and a new judge, the Hon. Judge Barr, had been substituted. (SPCR. 745).

38). The State argued that the remainder of said claims were legally insufficient and should have been raised in prior proceedings. Id. The defense, while admitting that the underlying substance of the bulk of its claims had been raised and rejected on appeal, nonetheless argued that an evidentiary hearing was necessary in order to explore the sufficiency of trial counsel's objections at the resentencing. (SPCR. 315-20).

The trial court, in accordance with its announced intent to enter an order within 30 days, did so on March 6, 1997. (SPCR. 274-89). With respect to the public records, the trial court found that, "the State had either complied with its 119 obligations or the Defendant's delay in seeking them constituted a waiver of his rights." (SPCR. 282). The trial court also summarily denied post-conviction relief, as it found that all of the 45 claims raised by the defendant were procedurally barred, as they could have been or were raised on direct appeal of the resentencing; or, that they could and should have been raised during prior post-conviction proceedings, or, that they were legally insufficient. (SPCR. 282-89).

The defendant then filed a notice of appeal on March 25, 1997, without having filed any motion for rehearing. Thereafter, on May 7, 1997, the defendant moved this Court to relinquish jurisdiction

to address public records issues. This Court denied the motion to relinquish.

In the instant appeal, the defendant has raised 18 issues, some of which are a combination of the 45 issues raised below. The instant appeal was also consolidated with the Defendant's prior habeas corpus petition, FSC Case No. 88,321. In said petition, the defendant has raised 36 claims, all of which are a repetition of the issues raised in the instant appeal, but cast in terms of ineffective assistance of appellate counsel. The Appellee's brief herein addresses all claims raised in the instant appeal, as well as the corresponding issues raised in the habeas corpus petition.

SUMMARY OF THE ARGUMENT

I. The state attorney and police department timely provided their records; contentions with respect to other agencies were untimely and waived in light of Defendant's failure to specify non-compliance or pursue other available remedies.

II. The motion to disqualify was properly denied as insufficient, as it was based on prior adverse rulings and questions from the judge seeking clarification of the parties legal positions.

III. The summary denial of the motion to vacate was appropriate, as the individual claims were properly rejected on the basis of procedural bars and legal insufficiency.

IV. The claim regarding incomplete transcripts of pretrial motion hearings should have been raised on direct appeal. Furthermore, the record was adequate as it contained the actual motions and rulings thereon. The Appellant also had the opportunity to obtain said transcripts, but failed to do so.

V. The circumstances regarding counsel's alleged conflict of interest were contained in the record, and thus should have been raised on direct appeal. Moreover, the Defendant has never alleged or demonstrated any adverse effect on counsel's performance.

VI. Circumstances regarding the Brady claim were known at the time of the resentencing, and thus could have been raised on direct appeal. Furthermore, there is no proffer or showing that the outcome of resentencing would probably have been different.

VII and VIII. Claims with respect to unavailable witness, and preclusion of opinion testimony as to the propriety of the death penalty, were raised and rejected on direct appeal.

IX. Ineffective assistance claims for failure to object to proper closing arguments and to standard jury instructions were properly rejected. Summary denial of other claims of ineffectivenss based on issues which were raised at resentencing, or raised and rejected on direct appeal, was also proper.

X, XI, XII. Claims with respect to automatic aggravator, burden shifting, and Caldwell instructions were all procedurally barred, as they should have been raised on direct appeal. Moroever, said claims have been repeated rejected in the past, and the allegations of ineffectiveness with respect to these claims are without merit.

XIII. Claims of erroneous jury instructions on CCP are barred, where there were no objections at trial and the issue was not raised on appeal. Claims of ineffectiveness for failure to object to then valid instructions are without merit.

XIV. Issues with respect to the 1980 guilty plea herein were successive and time barred.

XV. Claims of non-statutory aggravating factors were raised on direct appeal, and reargument of said issues is not permissible.

XVI. Complaints as to the rule prohibiting juror interviews should have been raised on direct appeal.

XVII and XVIII. Claims with respect to insanity for execution purposes, and death by electrocution, were not raised in the court below and are procedurally barred.

ARGUMENT

I. THE LOWER COURT PROPERLY FOUND THAT THE DEFENDANT HAD RECEIVED THE PUBLIC RECORDS HE WAS ENTITLED TO AND HAD WAIVED ANY COMPLAINTS AS TO NON-COMPLIANCE.

The Appellant claims that he has not received public records; that he was entitled to an evidentiary public records hearing which he did not receive; and, that he should be granted another opportunity to amend his motion for post-conviction relief. The trial court ruled that Appellant has in fact received those public records which he was entitled to, and that the remainder of his contentions had been waived due to failure to timely pursue same. The record herein fully supports the trial court's ruling, and reflects that both the State Attorney's Office and the investigatory agency, Metro Dade Police Department, timely provided their records of the resentencing herein to the Appellant. With respect to other agencies complained of herein, the record reflects that, in the four (4) year interim between the finality of the resentencing in 1993 and the denial of post-conviction relief in 1997, despite repeated arguments by the State and the opportunity to do so, the Appellant never filed any motion to compel, never attempted to schedule any desired public records hearing, and did not, in any other way, provide notice to the complained of agencies as to what records had not been received. The record further reflects that even some of the agencies complained of on appeal have in fact

provided those records which Appellant was entitled to. The trial court's ruling was thus in accordance with this Court's precedent in Lopez v. Singletary, 634 So. 2d 1056 (Fla. 1993), and should not be disturbed.

A). Complaints As To Non-Compliance During The 1995 Proceeding

First, insofar as the Appellant complains of any public records requests with respect to the entities listed in his initial and amended motions for post-conviction relief which were summarily denied on December 12, 1995, his claims are entirely devoid of merit.

The record reflects that a year and a half after the finality of the second resentencing, in May 1995, the Appellant filed his initial motion for post-conviction relief (Motion). Therein, he complained of either non-compliance or insufficient compliance by the State Attorney's Office, the investigating police agency - Metro Dade Police Department, and, a number of other entities which had no connection with the State Attorney's Office and some of which were located outside of Dade County - i.e., Dade County Circuit Court Clerk, Dade County Jail, City of North Miami Police Department (this entity was not an investigating agency for the instant crimes), Florida Department of Corrections (DOC), Florida

State Prison, Florida Department of Law Enforcement, and Florida Parole Commission. (PCR. 7). The Motion did not contain a request for a public records hearing. It was not accompanied by any motion to compel. Nor did the defendant ever attempt to schedule any hearing thereon. The defendant did not pursue any remedies available under Chapter 119, Florida Statutes, either.

On November 8, 1995, the last day of the two (2) year deadline, the Appellant filed an Amended Motion for Post-Conviction Relief (Amended Motion). The Amended Motion again complained of non-compliance or insufficient compliance by all the entities listed above, except that the City of North Miami Beach Police Department was substituted for the City of North Miami Police Department - neither of said entities investigated the instant crimes.[6] (PCR. 135-36). Again, the Amended Motion did not contain any request for a public records hearing. The Defendant did not file any motion to compel, nor did he attempt to schedule any hearing in the court below. None of the remedies available

[6] The Amended Motion also listed a number of individual police officers who had not responded to public records requests. The State would note that requests for public records can only be directed to the designated custodian of records in an agency subject to Chapter 119, Florida Statutes; requests to individuals are impermissible under both the law in effect in 1995 and currently. See s. 119.07, Florida Statutes (1995); Lopez v. Singletary, 634 So. 2d 1056 (Fla. 1993); Fla.R.Crim.P. 3.852 (1996).

under Chapter 119, Florida Statutes, were pursued either. Post-conviction relief was summarily denied on December 12, 1995.

The record further reflects that the State Attorney's Office had provided all of its records of the resentencing hearing in May, 1995, pursuant to a defense request for same in April, 1995. The State presented an invoice for copies from an independent company which reflected that the defense investigator had picked up in excess of 3,000 pages of records in May, 1995. The State also presented the response letter of the custodian of records of the investigating police agency, Metro Dade Police Department, reflecting that it had also provided its records of the resentencing.

With respect to other entities complained of in the initial and Amended Motion for post-conviction relief, the law in effect at the time said motions were filed and denied in 1995, was that the State Attorney's Office had no obligation to provide records in the possession of such entities, and, that the defendant was required to pursue remedies provided in Chapter 119, Florida Statutes, if he was dissatisfied with any public records compliance by said entities. See, Hoffman v. State, 613 So. 2d 405, 406 (Fla. 1992) ("We agree that with respect to agencies outside the judicial circuit in which the case was tried and those within the circuit

which have no connection with the State Attorney, requests for public records should be pursued under the procedure outlined in Chapter 119, Florida Statutes. Because those requests will be made directly to such agencies, they will be in a position to raise any defenses to the disclosure which they may deem applicable."); see also Jackson v. Dugger, 633 So. 2d 1051 (Fla. 1993) (same). Moreover, with respect to the Parole Commission, the State notes that said agency's records are not subject to public records' requests pursuant to the separation of powers doctrine. Parole Commission v. Lockett, 620 So. 2d 153 (Fla. 1993); Asay v. Parole Commission, 649 So. 2d 859 (Fla. 1994). Likewise, the Clerk's Office is not subject to the Public Records Act, either.[7] Times Publishing Company v. Ake, 660 So.2 d 255 (Fla. 1995).

Thus, insofar as the Appellant herein complains of any public records issue in the 1995 proceedings, the trial court properly found that the defendant received those records which he was entitled to and had waived any contentions with respect to other entities. Lopez v. Singletary, 634 So. 2d 1054, 1058 (Fla. 1993) (We hold that any post-conviction movant dissatisfied with the

[7] The State would also note that the defendant's complaint with respect to the Clerk's Office was that it had not produced the defendant's public school records which were introduced into evidence at the second resentencing herein. (SPCR. 135). Said school records were, however, contained in the record on appeal of the second resentencing. (R3. 468-504).

response to any requested access must pursue the issue before the trial judge or that issue will be waived.").

B). Complaints As To Non-Compliance After Relinquishment In 1996

As noted in the Statement of the Case and Facts herein, after the Defendant appealed the December, 1995 summary denial of his Amended Motion for post-conviction relief, the State moved this Court to relinquish jurisdiction, as no Huff hearing had been conducted with respect to the substantive issues raised in the defendant's Amended Motion. This Court relinquished jurisdiction to the trial court for said purpose on August 19, 1996. The written order denying post-conviction relief was entered on March 6, 1997, and the notice of appeal herein was filed on March 25, 1997. Insofar as the Appellant complains of public record compliance issues after the relinquishment by this Court, said issues were also properly found to have been waived, as the Appellant never filed any motion to compel in the court below, despite repeatedly acknowledging that he had a duty to do so and that the scope of compliance by various agencies had changed since the 1995 proceedings.

Prior to the relinquishment of jurisdiction herein, this Court, on April 25, 1996, rendered its decision in Ventura v.

State, 673 So. 2d 479, 481 (Fla. 1996), where it explicitly recognized that a post-conviction movant dissatisfied with any response to a public records request should file a motion to compel directed to the compliance of agencies: "Ventura should have requested the records and moved the trial judge to compel compliance at an earlier date." Similarly, on April 26, 1996, this Court promulgated Fla.R.Crim.P. 3.852. 673 So. 2d 483. Fla.R.Crim.P. 3.852(f)(2) (1996), required:

> Motions to compel or complaints about requests for production of Chapter 119 records, which requests were received prior to the effective date of this rule, shall be filed in the trial court, with a copy to the trial judge, and served on the attorney general and all counsel of record no more than 30 days after the effective date of this rule. This shall be in lieu of any independent actions pending for production of chapter 119 records.[8]

[8] Fla.R.Crim.P. 3.852 was amended and became effective on October 31, 1996. 683 So. 2d 475. The amendment to subsection (f)(2) was not significant, in that it only added a requirement that the motion to compel also be served on the trial judge. On November 26, 1996, with four (4) days remaining in the deadline for filing motions to compel, this Court tolled Fla.R.Crim.P. 3.852(f)(2). The tolling ended on March 3, 1997. The notice of appeal herein was filed on March 25, 1997, with no motion to compel ever having been filed.

Fla.R.Crim.P. 3.852(g)(3) (1996) further provided:

> The failure to file a motion to compel or complaint pursuant to the time period set forth in subdivisions (f)(1) and (f)(2) waives any motion to compel or any complaint.

(Emphasis added). No motion to compel has been filed at any juncture in lower court proceedings, despite repeated acknowledgments by Appellant that such a motion was necessary in order to provide notice to the various agencies that Appellant deemed their compliance defective or insufficient. Instead, as will be seen below, the Appellant stated that the information with respect to non-compliance or insufficient compliance contained in his original and Amended Motions for post-conviction relief in 1995 was stale, as some of the agencies had in fact complied to his satisfaction in the interim between the 1995 motions and the proceedings on remand. However, the Appellant would not specify what agencies were not in compliance; he did not file any motion to compel; nor did he otherwise notice any such agency for a hearing on this matter.

After relinquishment of jurisdiction by this Court, the State Attorney's Office filed a Response to the amended motion to vacate. It stated that both its office and the investigating police agency, Metro Dade Police Department, had provided their records to the Defendant, notwithstanding the fact that any records generated

prior to 1979 (with respect to the two prior guilty pleas and sentencing) were exempt pursuant to s. 119.07(h), Florida Statutes (1995), and could additionally have been requested in the course of prior post-conviction proceedings. (SPCR. 34). The State Attorney also stated that it could not produce records in the possession of agencies outside Dade County or those which had no connection with it, in accordance with Hoffman v. State, Jackson v. Dugger, Lockett v. Parole Commission, supra. The State Attorney's response also stated that if the defendant was dissatisfied with the response to public records requests, "it was incumbent upon him to pursue the issue before the trial judge. The failure to do so is considered a waiver of the issue." (SPCR. 35). The State then scheduled the defendant's amended motion for post-conviction relief for hearing on October 17, 1996. (SPCR. 17).

At said hearing, counsel for the Defendant expressly acknowledged that he needed to file a motion to compel public records but that he needed more time to do so: "I'd like to pursue Chapter 119 of the public records. We'd like time to file the motion to compel." (SPCR. 870). The trial court set another hearing for October 31, 1996, stating that it would review the Amended Motion and the State's Response, and, that it would hear any matter which could be heard at that time. (SPCR. 870-71).

Despite the State's Response and his own admission that a motion to compel was necessary, the Appellant still made no attempt to file such a motion. Instead, at the October 31, 1996 hearing, the Appellant argued that the State Attorney's Office could not represent any other agency (SPCT. p. 11), and that the "custodian of records" for every alleged non-complying agency was required to appear in person and testify as to, "what they did do, or the don't do." (SPCT. p. 12). Of course, the Appellant had not attempted, in any way, to provide any notice of hearing to any of the agencies that their presence or testimony was desired, either. Indeed, even the identities of the alleged non-complying agencies could not be ascertained, as the Appellant stated that the information with respect to non-compliance by various agencies listed in his amended motion was stale, because some of these agencies (without specification) had, in fact, complied since then! (SPCT. pp. 4, 10).

At this juncture, the trial court asked why no motion to compel had been filed. (SPCT. p. 12). The Appellant responded that he had had "no room" to do so, due to the predecessor judge's summary denial of post-conviction relief in 1995. (SPCT. p. 13). The State argued that a motion to compel and/or a public records hearing could have been requested at any time after the Appellant became aware of the alleged non-compliance and at least since May,

1995, when he filed his motion for post-conviction relief alleging incomplete compliance; from May until November, 1995, when the defendant repeated these allegations in the amended motion; and, thereafter until December 12, 1995, when the predecessor judge summarily denied post-conviction relief. The State also argued that jurisdiction had been returned to the trial court in August, and in the interim until October 31, 1996, the defendant, despite every opportunity to do so, had failed to pursue his remedies. (SPCT. pp. 13-14). The State Attorney additionally reiterated that both his office and the investigating agency, Metro Dade Police Department, had provided their records of the resentencing. He provided an invoice reflecting that a copy of the State Attorney's records had been picked up by the defense investigator in May, 1995, after a request for records by the defendant in April, 1995. (SPCT. pp. 6, 14-15). The State Attorney also provided a letter from the custodian of records from Metro Dade, stating that it had complied with the defendant's request. Id. The State Attorney also reiterated that any records generated prior to 1979, when the defendant's first two guilty pleas and sentencings had taken place, were not only exempt pursuant to the public records act, but could also have been pursued during the prior post-conviction proceedings herein, and claims arising therefrom were thus barred. (SPCT. pp. 6-7).

The trial court, after the above arguments, stated that its

"preliminary inclination" was to find that the defendant had been provided the records he was entitled to, and had waived the remainder of his contentions. (SPCT. pp. 17-18). The trial court then requested that the State Attorney draft a proposed order to this effect, submit same to defense counsel, and for the latter to submit a brief letter stating any objections so as to enable the trial court to modify the proposed order. Id.

On November 8, 1997, however, the Appellant moved to disqualify the judge, in part due to her comments with respect to the public records issue. The Appellant also moved to prevent the State Attorney from filing the proposed order on public records.

The trial court denied the motion to disqualify on January 27, 1997 and scheduled the Huff hearing for which this Court had remanded on February 6, 1997. The Appellant still did not file a motion to compel, did not notice the alleged non-complying agencies for any hearing, nor, indeed, did he ever provide any updated information as to which agencies had allegedly not complied with his requests since the amended motion had been filed. At the Huff hearing, the Appellant argued that he was entitled to an evidentiary hearing on public records, again without providing any response as to why he had not pursued remedies in the interim 4 years since the finality of his resentencing. (SPCR. 309-13). The

trial court, having also heard legal arguments with respect to the substantive claims in the amended motion at the Huff hearing, stated that she would enter a written order with respect to all issues, including public records, within 30 days, in order to comply with this Court's period of relinquishment.

Several days after the Huff hearing, the Appellant filed various notices that he had served a multitude of agencies with a "first request for production of records." (SPCR. 234-58). Again, there was no accompanying request for a public records hearing, nor any information as to any alleged non-compliance. Indeed, the defendant had not even mentioned these requests during the Huff hearing. On March 6, 1997, the trial court entered her written order finding that the defendant had received those public records which he was entitled to and the remainder of his contentions with respect to non-compliance had been waived due to his failure to pursue his remedies. The Appellant appealed the written order on March 25, 1997, without having moved for rehearing and without having filed any other motions or requests.

As is clear from the foregoing, the Appellant also waived any complaints with respect to public records issues after the relinquishment of jurisdiction by this Court in the 1996 and 1997

proceedings herein. Pursuant to Ventura[9] and Fla.R.Crim.P. 3.852(f)(2) and (g)(3) (1996), the defendant had a duty to file a motion to compel, but did not do so. The Appellant, while on the one hand stating that there was new information as to compliance with public records since the filing of the amended motion in 1996, and requesting that custodians of records be present, refused to specify which agencies had in fact not complied and whose presence was necessary.[10] As is clear from the foregoing, there was no

[9] The Appellant's reliance on Ventura is unwarranted. In that case, the defendant had, in fact, filed two motions to compel in the trial court which the latter granted. However, the trial judge then refused to allow Ventura to amend his motion for post-conviction relief with the public records which were compelled. 673 So. 2d at 480-81. In the instant case, there was no motion to compel.

[10] The Appellee would note that contrary to the Appellant's argument, an evidentiary hearing with the custodian of records is not required in every case. See Downs v. State, 24 Fla. L. Weekly S231 (Fla. May 20, 1999) ("Contrary to Downs' assertion, we do not

impediment to the filing of a motion to compel, or prior pursuit of Chapter 119 remedies, or scheduling a public records hearing with notice to agencies which had allegedly not complied, in the four (4) years since the finality of the resentencing in 1993 to the denial of post-conviction relief on March 25, 1997.

Finally, insofar as the Appellant may be complaining of non-compliance with public requests mailed on February 5, 1997, the day before the Huff hearing, the State notes that said requests were erroneously mislabeled as "first requests for production of public records" by the Appellant. (SPCR. 234-58; 260-273). Fla.R.Crim.P. 3.852(I)(1), in effect at the time of said requests, specifically provided that, "[t]he rule shall not be a basis for renewing requests that have been previously initiated." Moreover, the Appellant did nothing beyond filing a copy of said requests in the trial court. (SPCR. 234-58, 260-73). The Appellant did not mention a word about having served such requests at the Huff hearing

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read our opinion in Walton to require an evidentiary hearing in every case. Rather, we remanded for an evidentiary hearing in Walton because the trial court summarily denied Walton's motion on the mistaken belief that non compliance with a public records request may not be raised in a rule 3.850 motion. Id. No such error occurred in the instant case.").

herein. Thereafter, despite being on notice that the trial court had to enter a ruling within 30 days in order to comply with this Court's order on relinquishment (SPCR. 344-45), he failed to request any hearing or file anything to explain whether further action was necessary with respect to such requests. Even after the trial court entered its order on March 6, 1997, the Appellant failed to move for rehearing and instead filed his notice of appeal, depriving the lower court of jurisdiction on March 25, 1997. The Appellant's contentions are thus without merit. Lopez v. Singletary, supra.

II. THE APPELLANT'S MOTION TO DISQUALIFY THE JUDGE WAS PROPERLY DENIED AS IT WAS LEGALLY INSUFFICIENT.

The Appellant contends that his motion to disqualify the judge was erroneously denied. The trial court denied this motion as insufficient, because it was based on adverse rulings and questions seeking to clarify the parties' positions during the course of the litigation below. (SPCR. 55-56). The denial of the motion was in accordance with this Court's prior precedents and should not be disturbed on appeal. See Barwick v. State, 660 So. 2d 685 (Fla. 1995); Nateman v. Greenbaum, 582 So. 2d 643 (Fla. 3d DCA 1991), rev. denied 591 So. 2d 183 (Fla. 1991).

The record reflects that prior to any hearing, the State Attorney filed a Response to the defendant's Amended Motion to Vacate, specifically stating that the defendant's substantive claims therein did not justify an evidentiary hearing. (SPCR. 18-38). With respect to the public records claim contained in said Motion, the State's response argued that, a) both the State Attorney and the investigating police agency had in fact provided their records to the defendant; b) the State Attorney had no control over and could not produce records in the hands of agencies not connected with it; and, c) that it was incumbent on the defendant to pursue public records issues before the trial judge or consider same waived. (SPCR. 34-35).

The State then scheduled a hearing on the Amended Motion to Vacate for October 17, 1996.(SPCR. 17). At said hearing, the Defendant acknowledged that he should file a motion to compel with respect to public records. (SPCR. 870). The court then stated that it would take both the Amended Motion to Vacate and the State's Response thereto under advisement, and would hear any arguments which could be heard, on October 31, 1996. (SPCR. 869-71).

On October 31, 1996, at the commencement of the hearing, the State reiterated the position in its prior response that no evidentiary hearing was required with respect to the substantive

claims in the amended motion. (SPCT. p. 5). The parties then proceeded to set forth extensive arguments as to whether the defendant's public records claims were waived, as defendant had still not filed a motion to compel nor pursued other available remedies as noted in Issue I herein. (SPCT. pp. 5-16).

At the conclusion of the above arguments, the trial court requested a side bar conference outside the presence of the court reporter. (SPCT.pp. 16-17). There were no objections to said side bar. Id.

After the side bar, the record reflects that the trial court stated that its "preliminary inclination" was to find that the public records which the defendant was entitled to had been complied with and that the remainder of the defendant's contentions as to public records had been waived. Id. The trial court then requested that the State Attorney prepare a proposed order to this effect, and for the defendant to supply a brief letter stating any objections thereto so as to enable the judge to modify the proposed order. (SPCT. pp. 17-18). The trial court then stated that it would hold the Huff hearing, "as to whether there is the need of any further evidentiary hearing," on November 14, 1996. (SPCT. pp. 18-19). Again, there were no objections to the side bar conference which was held prior to these pronouncements.

Eight (8) days later, the defendant filed a motion to disqualify, on the grounds that at the side bar conference at the above hearing, the judge had: a) expressed her inclination to have the State prepare an order stating that the public records requests had been complied with and/or waived; and, b) asked the State Attorney, "You say there is a way I can summarily deny this." (SPCR. 42-43).

The State respectfully submits that the trial judge's request, after having reviewed written pleadings and hearing arguments thereon, for a proposed order by one party, with the additional request to the other party to provide its objections thereto so as to enable the judge to modify the proposed order, is a legally insufficient ground for recusal. The rule providing for disqualification of a judge is not intended as a vehicle to oust the judge because of disagreements with the judge's rulings. Barwick, 660 So. 2d at 692; see also Hardwick v. Dugger, 648 So. 2d 100, 103 (Fla. 1994); Provenzano v. State, 616 So. 2d 428, 432 (Fla. 1993); Jackson v. State, 599 So. 2d 103 (Fla. 1992); Gilliam v. State, 582 So.2 d 610 (Fla. 1991); Fischer v. Knuck, 497 So. 2d 240, 242 (Fla. 1986); Tafero v. State, 403 So. 2d 355 (Fla. 1981).

Likewise, the judge's questioning of a party, with respect to a relevant matter which has been previously set forth in the party's

pleadings and argued in open court, so as to clarify the party's position, is not a ground for disqualification. Nateman v. Greenbaum, 582 So. 2d at 644 (disqualifying a judge because his examination of a party on relevant matters gives a clue as to how he maybe inclined to rule at the end of evidence, "would wreak administrative havoc in the circuit court by inviting mid-hearing motions for recusal. The unacceptable alternative is a blanket rule against a judge's examination of parties or witnesses."); Barwick, supra.

The Appellant's reliance upon Suarez v. Dugger, 527 So.2 d 190 (Fla. 1988), is unwarranted. In that case, the trial judge admitted to having made public comments that the case had no "merit," immediately after a warrant was signed, and before any pleadings were filed before him. In the instant case, the judge had taken the State's written pleadings under advisement and the State had reiterated its position in open court, prior to the court having asked a clarifying question with respect to the State's position and without having ruled on the merits. The Appellant's reliance upon Chastine v. Broome, 629 So.2 d 293, 294 (Fla. 4th DCA 1993), is similarly without merit. In that case, the trial judge was "passing" notes to the prosecution, which contained "tips" as to how to cross-examine witnesses. No such conduct occurred in the instant case. The instant claim is without merit. Barwick, supra.

III. THE LOWER COURT DID NOT ERR IN SUMMARILY DENYING THE MOTION TO VACATE WITHOUT AN EVIDENTIARY HEARING.

The Appellant contends that the lower court erred in summarily denying the motion to vacate without an evidentiary hearing. Each and every claim in the motion to vacate, to which the Appellant alludes in this argument, is fully addressed in the ensuing arguments contained in this Brief of Appellee. A review of each and every one of those arguments clearly demonstrates the summary denial of the claims in the motion to vacate was proper, as the claims were either procedurally barred - e.g., could have or should have been raised on direct appeal and relitigated claims already addressed on direct appeal; or, should have been raised in prior post-conviction proceedings; or, legally insufficient on their face - e.g., where the allegations, even if true, would not entitle the defendant to relief - or conclusively refuted by the record. Under such circumstances, there was no need to conduct an evidentiary hearing. See Kennedy v. State, 547 So. 2d 912, 913-14 (Fla. 1989); Engle v. Dugger, 576 So. 2d 696, 699-700 (Fla. 1991).

Specifically, the Appellant has argued that his ineffective assistance of counsel claims as to the second resentencing warranted an evidentiary hearing. These claims, however, comprised of allegations that trial counsel did not sufficiently object to: a)issues which were raised and rejected on the merits on direct

appeal; or, b) issues such as standard jury instructions or other proper statements of the law at the time of trial. Said claims did not warrant any evidentiary hearing, as attempts to relitigate issues raised and rejected on direct appeal under the guise of ineffectiveness are barred. Medina v. State, 573 So. 2d 23 (Fla. 1990); Turner v. Dugger, 614 So. 2d 1075 (Fla. 1992); Marek v. Singletary, 626 So. 2d 160 (Fla. 1993); Lopez v. Singletary, 634 So. 2d at 1057. Likewise, no evidentiary hearing is required, and counsel can not be deemed ineffective for failing to object to standard jury instructions or other statements of the law which had been upheld by this Court at the time of trial. Harvey v. Dugger, 656 So. 2d 1253, 1258 (Fla. 1995); Mendyk v. State, 592 so. 2d 1076, 1080 (Fla. 1992).

Finally, the Appellant's contention that the trial court's order is reversible because of insufficient records attachments is also without merit. The trial court, in the instant case, was furnished with all the records and files herein. (SPCR. 322, 343). The State filed a comprehensive response with its specific position as to every claim. (SPCR. 69-103). Both parties extensively addressed claims and the application of specific procedural bars, sufficiency of factual and legal allegations, and whether the record conclusively refuted same, at the Huff hearings in the trial court. The lower court's ruling in turn specifically

sets forth both its rationale - i.e. - whether a claim was procedurally barred, insufficient or conclusively refuted by the record - and its reliance upon the State's response, with respect to each individual claim. The failure to attach records under these circumstances is not error. See, Mills v. State, 684 So. 2d 801, 804 (Fla. 1996) (summary denial of post-conviction relief, without attaching those portions of the record conclusively showing the defendant was not entitled to relief, was not error where the trial court provided an explanation for its ruling by specifically finding that the issues were, "procedurally barred as respecting maters which were or could have been raised previously for the reasons contained [in] the state's Response."); Anderson v. State, 627 So. 2d 1170, 1171 (Fla. 1993) ("To support summary denial without a hearing, a trial court must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion."); Hoffman v. State, 571 So. 2d 449, 450 (Fla. 1990) ("unless the trial court's order states a rationale based on the record, the court is required to attach those specific parts of the record that directly refute each claim raised.") (emphasis added); Bland v. State, 563 So. 2d 794, 795 (Fla. 1st DCA 1990) (failure to attach portion of record not error, where the record reflects that the trial court, in summarily denying relief, took into consideration the transcript of the trial testimony); Crump v. State, 412 So. 2d 441 (Fla. 4th DCA 1982)

(failure to attach portions of record not error, where the claims were procedurally barred or insufficient). As previously noted, the propriety of the trial court's ruling with respect to every individual claim is addressed in the ensuing arguments herein.

IV. THE TRIAL COURT PROPERLY FOUND THE CLAIM OF INCOMPLETE RECORD ON APPEAL WAS PROCEDURALLY BARRED, AND THE CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IS WITHOUT MERIT WHERE AN ADEQUATE RECORD EXISTS AND NO PREJUDICE HAS BEEN DEMONSTRATED.

In the lower court, the Defendant alleged that the record on direct appeal of the resentencing was incomplete because although the transcripts of the resentencing itself were complete, the record contained transcripts for two (2) days of motion hearings prior to the commencement of the resentencing. The Defendant noted that other motions had been argued in the year prior to the resentencing, but that such hearings had not been transcribed. The Defendant thus argued that he was denied a proper direct appeal. The lower court found that the issue of the adequacy of the record could and should have been raised on direct appeal in this Court. (SPCR. 282-83). The lower court's ruling was proper. See, e.g., Morgan v. State, 415 So. 2d 6, 8-9 (Fla. 1982) (claim of error in failure to report and transcribe "a number of pre-trial hearings, and several bench conferences," was rejected on direct appeal); Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1323 (Fla. 1994) (claim of absence from and lack of transcription of charge conferences held to be procedurally barred as it could and should have been raised on direct appeal).

The Appellant has also argued that he was denied effective

assistance of appellate counsel on direct appeal of the resentencing (see issues I and II in the habeas corpus petition). This contention is without merit, because an adequate record is available, but Appellant has not even attempted to allege any prejudice.

First, the lack of complete transcripts of pretrial motion hearings is not a per se ground for reversal; prejudice must be demonstrated. Morgan, supra; see also, Songer v. Wainwright, 423 So. 2d 355, 356 (Fla. 1982) (claim of ineffective assistance of appellate counsel, for having failed to include the charge conference and having failed to contest its absence in the record on direct appeal, rejected where defendant suffered no prejudice because the written jury instructions were included in the record); Turner v. Dugger, 614 So. 2d 1075, 1079-80 (Fla. 1992) (claim of ineffective assistance of counsel for absence of transcribed bench conferences rejected where, "the fact that bench conferences were not reported did not prejudice the appeal); see also, Draper v. Washington, 372 U.S. 487, 495 (1963):

> In considering here whether petitioners here received an adequate appellate review, we reaffirm the principle, declared by the Court in Griffin, that a State need not purchase a stenographer's transcript in every case where a defendant cannot buy it. 351 U.S. at 20. Alternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent

> report of the events at trial from which the appellant's contentions arise. A statement of facts agreed to by both sides, a full narrative statement based perhaps on the trial judge's minutes taken during trial or on the court reporter's untranscribed notes, or on a bystander's bill of exceptions might all be adequate substitutes, equally as good as a transcript.

In the instant case, the record on appeal of the resentencing reflects that the pretrial motions complained of herein were in writing and included in the record. (R3. 1-227). The disposition of said motions is also included in the record. Id. Moreover, the record reflects that trial counsel specifically reviewed the motions filed in the year prior to resentencing, and requested that the trial court rehear arguments on motions which he wished to adopt or reassert.[11] (R3. 841-42). The request was granted. Id. Trial counsel reargued the motions desired and said arguments were transcribed and included in the record. (R3. 844; 905-944).

[11] The prior motions had been filed by the Public Defender's Office which subsequently withdrew from the case. (R3. 84).

More importantly, this is not a case where the pretrial motion hearings were not reported. The motions included in the record reflect, on their face, the date when they were heard, the disposition thereof, the names of counsel present for both parties, and the name of the court reporter present. See, e.g., (R3. 32; 70; 71; 83-156; 215; 218). Indeed, in the court below, at the Huff hearing conducted four years after the finality of the sentencing, post-conviction counsel for the defendant conceded that said motion hearings were reported but not transcribed, because there has never been any request to do so.[12] Said counsel also conceded that she could obtain said transcripts, but that she had not done so because she believed a court order was necessary, although she had never previously requested any such order:

> [Post-conviction defense counsel]: Moving on to the omissions in the record on appeal. . . .
>
> They basically deal with a time period between April of 1988 and May of 1989 in which presentencing, I guess you can call it since there wasn't a guilt phase, presentencing proceedings were taking place that weren't transcribed. And I know from experience that those proceedings as well as the proceedings in your courtroom are always transcribed particularly motions to withdraw and particularly on a capital case. So I know they exist.

[12] The record on direct appeal of the resentencing reflects that the Appellant's designations to the court reporter simply did not request that said pretrial motion hearings be transcribed. (R3. 783-85).

> I am more than willing since I included that claim to attempt to reconstruct what happened or attempt to go back and find these records, but I think I need a court order to do so.

(SPCR. 313-14).

Neither the initial nor the Amended Motions for post-conviction relief contain any request for an order of transcription. Post-conviction counsel did not in fact request such an order either. Moreover, the State respectfully submits that no such order was necessary. The defendant was provided with attorneys, funding and two years within which to complete her investigation; said transcripts could have been obtained at any time prior to the deadline for filing post-conviction relief in November, 1995.

The Appellant's reliance upon Delap v. State, 350 So. 2d 462 (Fla. 1997) and Griffin v. Illinois, 351 U.S. 12 (1956), is unwarranted. In Delap, on direct appeal, the transcript of the voir dire, charge conferences, jury instructions, and closing arguments, during both the guilt and penalty phases, had been requested by the defendant, but were unavailable and could not be reconstructed in any form. 350 So. 2d at 463. Likewise, in Griffin, the defendant had alleged reversible error which required

a transcript for review of these errors; however, the defendants' request for the transcript had been denied, as they could not pay for it. 351 U.S. at 13-14. The Court held that the defendants were entitled to the transcript free of charge, but emphasized: "We do not hold, however, that [the State] must purchase a stenographer's transcript in every case where a defendant can not buy it." 351 U.S. at 19. The Court held that other means of affording adequate review were permissible. Id.; see also, Draper v. Washington, supra. In the instant case, the written motions, their disposition and re-argument thereon, were part of the record; yet, to date, no error with respect to same has been alleged so as to require a transcript. Moreover, the hearings on said motion were reported and there was no impediment to obtaining a transcript; the defendant merely did not ask the court reporter to transcribe the notes. As such, no prejudice has been demonstrated, and the Appellant's conclusory contentions with respect to denial of a proper appeal and ineffective assistance of appellate counsel are without merit. Morgan, supra; Songer, supra; Turner, supra.

V. THE CLAIM WITH RESPECT TO PRIOR POST-CONVICTION COUNSEL'S CONFLICT OF INTEREST IS PROCEDURALLY BARRED, AND CLAIMS OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL ARE WITHOUT MERIT AS NO PREJUDICE HAS BEEN ALLEGED.

In the lower court, based upon the facts alleged in the prior counsel's Motion to Withdraw as Counsel (R3. 68-69), Defendant

alleged that his Sixth Amendment rights were violated because said prior counsel had a conflict of interest. (SPCR. 112-20). The lower court found this claim to be procedurally barred as it "could have and should have been raised on direct appeal." (SPCR. 284). The lower court's order was in accordance with this Court's prior precedent and should not be disturbed. Koon v. Dugger, 619 So. 2d 246, 247 (Fla. 1993) (claim that defendant "was denied the right to counsel because his attorney had a conflict of interest" was procedurally barred where it could or should have been raised on direct appeal).

The Defendant has also, in issue IX of his habeas corpus petition, claimed that is appellate counsel was ineffective for having failed to raise the conflict of interest issue. The defendant's contention is without merit as he has failed to allege any prejudice or adverse effect with respect to the alleged conflict of interest. See Quince v. State, 24 Fla L. Weekly S173, 174 (Fla. April 8, 1999) ("'a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance' in order to prevail on a conflict of interest claim. Cuyler, 446 U.S. at 350.").

In the instant case, the record reflects and the Defendant concedes that the complained of attorney, Mr. Von Zamft, did not

represent the defendant during any of the proceedings with respect to the first plea of guilty and sentence of death, the second plea of guilty and sentence of death, nor the first round of post-conviction proceedings herein. Mr. Von Zamft first represented the Defendant, as a volunteer, during the federal habeas corpus proceeding in 1982. He continued his representation through the second state post-conviction proceedings, where he participated as co-counsel with the office of the Capital Collateral Representative (CCR). Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987). This Court granted the Defendant a resentencing in the latter proceeding. Id. After denial of certiorari relief by the United States Supreme Court, see Dugger v. Thompson, 108 S.Ct. 1224 (1988), this Court issued its mandate on April 20, 1988, returning jurisdiction to the circuit court for the conduct of the resentencing at issue herein. (R3. 169).

One (1) day later, on April 21, 1988, Mr. Von Zamft filed his Motion to Withdraw as Counsel, on the grounds that there was a possibility that the State would utilize a former client of Von Zamft's, Detective Ojeda, as a witness during the resentencing proceedings. (R3. 68-69). The trial court granted the motion to withdraw, and the Public Defender's Office was appointed as counsel of record for the resentencing, on May 4, 1988. (R3. 169). The resentencing then continued, more than a year later, on May 22,

1989, and Detective Ojeda did not testify at said proceeding.

The State would first note that Mr. Von Zamft's participation in collateral proceedings was not error since the requirements of Strickland v. Washington, 466 U.S. 668 (1984), are not applicable to such collateral proceedings. See, Lambrix v. State, 698 So. 2d 247, 248 (Fla. 1996); Murray v. Giarratano, 492 U.S. 1 (1989); Pennsylvania v. Finley, 481 U.S. 551 (1987). As to the resentencing herein, Mr. Von Zamft moved to withdraw the day after jurisdiction for resentencing was returned to the trial court, which motion was granted. Less than two weeks thereafter new counsel began their representation of the Defendant. Moreover, Ojeda did not testify at the resentencing. The Defendant has thus not shown any "actual" conflict of interest; nor has he alleged any action by Mr. Von Zamft in the less than two week period before the motion to withdraw was granted, which "adversely" affected the Defendant at the resentencing herein. See Quince, supra. The claim of ineffective assistance of appellate counsel for failure to raise a conflict of interest issue is thus without merit as appellate counsel cannot be faulted for failing to raise meritless issues. Lopez v. Singletary, 634 So. 2d at 1059.

VI. THE TRIAL COURT PROPERLY FOUND THE BRADY CLAIM WITH RESPECT TO UNAVAILABILITY OF A FORMER WITNESS TO BE PROCEDURALLY BARRED AND

INSUFFICIENT, AND CONTENTIONS OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL ARE WITHOUT MERIT.

The Defendant claims that the State withheld information in violation of Brady v. Maryland, 473 U.S. 667 (1963). This is based on allegations that the State "may have frightened" witness Savage into being unavailable, by having "threatened" to call the police if Savage did not appear. Brief of Appellant at p. 40. According to the Defendant, this threat occurred three (3) months after the assistant state attorney and a police detective, Smith, interviewed Savage in Georgia. Id. The record on appeal of the resentencing, however, reflects that prior to resentencing, the State filed a Motion to Utilize Savage's Sworn Testimony at the Former Trial, which stated that the prosecution: a) had located Savage in Georgia in June, 1988; b) had interviewed her at that time; and, c) had then subpoenaed her three (3) months later, in September, 1988, which subpoena was returned. (R3. 515; 127; R3.S2 1-54).[13] The circumstances of Savage's unavailability at that time and subsequently, were then extensively delved into at presentencing hearings in the trial court. (R3. 877-953). These circumstances were also fully set forth in the briefs of the parties on appeal of

[13] The symbol R3.S2 refers to the second supplemental record on direct appeal of resentencing, which contains the deposition of Detective Smith with respect to his 1988 interview of Savage in Georgia, when he was accompanied by the assistant state attorney.

the resentencing,[14] where the Appellant raised a multitude of issues with respect to Savage's unavailability, such as: a) alleged erroneous finding of unavailability by the trial court; b) the alleged denial of funds and time for the defense to locate her; c) the alleged denial of the right to confront Savage; and, d) the alleged denial of the right to present mitigating evidence from her. (SPCR. 563-573; 672-686; 728-32). This Court found no error. Thompson v. State, 619 So. 2d at 265. In light of the fact that the circumstances of Savage's unavailability were fully set forth at both the resentencing and appeal thereof, the lower court properly found the Brady claim to be procedurally barred. (SPCR. 284-85). See, Rose v. State, 675 So. 2d 567, 569, n. 1 (Fla. 1996); Lambrix v. State, 559 So. 2d 1137, 1138 (Fla. 1990) (claims based on information contained in the original record of case must be raised on direct appeal).

The Appellant, in Claim XIII of his habeas corpus petition, has also claimed ineffective assistance of appellate counsel in this regard. This contention is without merit as the instant claim

[14] The briefs of the parties were provided to the lower court and were included in the record of the post-conviction appeal herein. (SPCR. 520-616 - Brief of Appellant; SPCR. 617-721 - Brief of Appellee; SPCR. 722-44 - Reply Brief of Appellant).

is legally insufficient. First, the Appellee fails to see how attempting to secure the attendance of a witness by subpoenaing her, constitutes "frightening" the witness into being unavailable.

Moreover, there is no showing of a reasonable probability that if Savage had attended the resentencing, the outcome would have been different. In order to establish a claim based on the State's withholding of material, exculpatory evidence in violation of Brady v. Maryland, a defendant must establish the following factors:

> (1) that the Government possessed evidence favorable to the defendant. . . ; (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

Melendez v. State, 718 So. 2d 746, 748 (Fla. 1998) (quoting Hegwood v. State, 575 So. 2d 170, 172 (Fla. 1991); see also, Rivera v. State, 717 So. 2d 477, 483 (Fla. 1998); Jones v. State, 709 So. 2d 512, 519 (Fla.), cert. denied, 118 S.Ct. 1350 (1998).

In the instant case, Savage's former testimony at Defendant's 1978 trial, with respect to the facts of the offenses herein, was read at the 1989 resentencing. (R3. 1702-1820). The State presented evidence at the resentencing that this 1978 testimony was accurate (R3. 2683), and there is no proffer to the contrary in the instant proceedings. Moreover, the defendant had pled guilty. The

facts of the offenses were also established at the resentencing through the presentation of the defendant's confession to the police immediately after the crimes in 1976 (R3. 1931-55), the defendant's subsequent sworn testimony at the trial of his co-defendant in 1978 (R3. 277-331; 1996-2043), and, the codefendant's live testimony at the resentencing (R3. 2702-35), all of which corroborated Savage's description of the offenses. As such, no probability of a different outcome exists.

Insofar as the Appellant argues that Savage could have provided mitigating evidence, the State would note that prior post-conviction counsel did in fact locate Ms. Savage in 1987, less than two (2) years prior to the resentencing at issue herein. (R3. 2361-81). Said post-conviction counsel then secured an affidavit from Savage with respect to mitigating factors. Id. This affidavit by Savage was then read to the 1989 resentencing jury herein. (R3. 2472-78). As the alleged mitigating evidence by Ms. Savage was in fact presented at the resentencing, and there is no proffer of what more could have been presented had she been available, the State again fails to see how the outcome of the resentencing would have been different. Brady, supra; Melendez, supra. The defendant's contentions with respect to ineffective assistance of appellate counsel are thus without merit. Lambrix v. Singletary, 641 So. 2d 847, 848-49 (Fla. 1994) (appellate counsel is not ineffective for

failing to raise claims which would have been rejected on appeal); Lopez v. Singletary, 634 So. 2d at 1059 (same).

VII. DEFENDANT'S CLAIM OF ERRONEOUS PRESENTATION OF SAVAGE'S TESTIMONY AT RESENTENCING WAS PROPERLY FOUND TO BE PROCEDURALLY BARRED, AND CLAIMS OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL ARE WITHOUT MERIT WHERE THE INSTANT CLAIM WAS RAISED AND REJECTED ON APPEAL.

The Appellant contends that the resentencing court erroneously allowed the presentation of the unavailable witness, Savage's, former testimony from 1978 at the resentencing, because Savage was in possession of nonstatutory mitigating evidence which was not contained in her former testimony. The Appellant thus argues that the limitations in Savage's former testimony with respect to nonstatutory mitigating evidence constituted an error, at resentencing, under Hitchcock v. Dugger, 481 U.S. 393 (1987). The State notes that this issue was argued by the trial counsel at the time of resentencing. (R3. 928-31; 943). Likewise, as noted in issue VI, herein, appellate counsel specifically presented this issue and relied upon Hitchcock, on appeal of the resentencing. (See Initial and Reply Briefs of Appellant on appeal of second resentencing, SPCR. 570; 730-32). The issue was rejected by this Court. As noted in issue VI herein, post-conviction counsel had located Ms. Savage in 1987 and secured an affidavit from her with respect to nonstatutory mitigating evidence. The resentencing court then allowed said affidavit to be read to the resentencing jury.

The lower court thus properly found the instant claim to be procedurally barred as it was in fact raised and rejected on direct appeal of resentencing. (SPCR. 284-86).

The Appellee would also note that the Defendant has claimed that his trial counsel was ineffective for having failed to argue this issue. The Defendant, in his habeas corpus petition, claims XIV and XX, additionally contends that appellate counsel was ineffective for having failed to raise this issue. As seen above and in Argument VI herein, trial counsel raised the issue at resentencing and appellate counsel raised same on appeal. The defendant's contentions are thus without merit, as reargument of issues raised and decided adversely against the defendant, under the guise of ineffective assistance of counsel, is impermissible. Francis v. Barton, 581 So. 2d 583, 584 (Fla. 1991) ("issues raised and disposed of on direct appeal are procedurally barred in post conviction proceedings."); Lopez v. Singletary, 634 So. 2d at 1057; Medina v. State, 573 So. 2d 293, 295 (Fla. 1990); Valle v. State, 705 So. 2d 1331, 1337, n. 5 (Fla. 1998) (attempts to relitigate procedurally barred claims by couching them in terms of ineffective assistance of counsel are impermissible).

VIII. THE CLAIM THAT PRECLUSION OF PROFFERED WITNESSES' OPINIONS WITH RESPECT TO THE IMPOSITION OF THE DEATH PENALTY CONSTITUTED IMPROPER EXCLUSION OF MITIGATING EVIDENCE WAS RAISED AND REJECTED ON DIRECT APPEAL, AND THUS PROPERLY FOUND TO BE PROCEDURALLY BARRED IN THESE POST-CONVICTION PROCEEDINGS.

At the resentencing, the Defendant proffered testimony from the 1976 sentencing judge, Joseph Durant, who was then a member of the Public Defender's Office. (R3. 2456). Mr. Durant had sentenced the defendant to death in 1976, after a unanimous jury recommendation of death, and after having found two (2) statutory mitigating factors. (R3. 2458-59). The Defendant, at the 1989 resentencing, proffered Mr. Durant's testimony that he was against the death penalty, and that he would not have sentenced the Defendant to death if mitigating circumstances had been presented. (R3. 2434). The Defendant had also proffered testimony from his prior attorneys that they did not think the defendant should be sentenced to death.

On direct appeal, appellate counsel argued that the resentencing court had erroneously restricted the presentation of mitigating evidence by precluding the above said proffers that the Defendant should not be sentenced to death. The argument contained a specific record citation to Durant's proffer - R3. 2434, now relied upon in this appeal. See Brief of Appellant on direct appeal of resentencing, at p. 61; SPCR. 590.

This Court rejected the instant claim and held:

> Thompson, in his fifth claim, asserts that the trial court's refusal to allow certain defense witnesses to express their personal opinions concerning the appropriateness of the death penalty in Thompson's case improperly restricted his ability to present a defense. We find no abuse of discretion in the trial court's ruling. Floyd v. State, 569 So. 2d 1225 (Fla. 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 2912, 115 L.Ed. 2d 1075 (1991); Patterson v. State, 513 So. 2d 1257 (Fla. 1987); Jackson v. State, 498 So. 2d 906 (Fla. 1986).

619 So. 2d at 266. The lower court thus properly rejected this claim as procedurally barred. (SPCR. 288). Francis v. Barton, 581 So. 2d at 584.

The Appellant, in his petition for writ of habeas corpus, Issues XX and XXXVI, has again raised the instant claim and has added conclusory allegations that appellate counsel was ineffective. The latter claims are without merit because, as noted above, appellate counsel in fact raised this issue, which was rejected by this Court. Habeas corpus can not be utilized for "second appeals." Swafford v. Dugger, 569 So. 2d 1264, 1266 (Fla. 1990) (After appellate counsel raises an issue, failing to convince this Court to rule in Appellant's favor is not ineffective performance."); Harvey v. Dugger, 656 So. 2d 1253, 1258 (Fla. 1995).

IX. THE CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL AT RESENTENCING WERE PROPERLY DEEMED INSUFFICIENT AND BARRED.

The Appellant has listed a multitude of alleged errors by counsel at the resentencing. The lower court properly deemed same insufficient and barred. (SPCR. 283, 285-86). For ease of reference, the complaints herein have been broken into four (4) categories: 1) alleged errors during arguments of counsel; 2) issues which were litigated at resentencing, raised on direct appeal and found to be without merit or harmless beyond a reasonable doubt by this Court; 3) issues which were raised by defense counsel at resentencing but not raised on appeal; and, 4) failure to object to various standard jury instructions.

1) Arguments of Counsel

The Appellant has first listed a number of arguments by the prosecution at resentencing, and concludes that defense counsel was ineffective for failing to object to same. The Court has held such claims to be procedurally barred. Robinson v. State, 707 So. 2d 688, 697-98 (Fla. 1998):

> Robinson next argues that trial court erroneously ruled that claims .....XIII (FN.17) and XIV (FN.18) were procedurally barred because he was improperly attempting "to relitigate substantive matters under the guise of ineffective assistance." We find no merit in this claim ... as a matter of law, we find that claims ... XIII and XIV below are procedurally barred because they could have

> been raised on direct appeal...
>
> FN.17. "Mr. Robinson was denied effective assistance of counsel because Pearl failed to object to numerous improper arguments by the prosecutor in closing, and failed to request a mistrial because of improper arguments, ..."
>
> FN.18. "The prosecutor's improper closing arguments at penalty phase rendered Mr. Robinson's death sentence unreliable, and Mr. Robinson was denied effective assistance of counsel at penalty phose by Pearl's failure to object thereto, ..."

The lower court thus properly rejected the alleged errors with respect to improprieties in arguments, as procedurally barred. Said alleged errors could have been raised on direct appeal if they constituted fundamental error. Robinson, supra; See also Lucas v. State, 568 So. 2d 18, 21 (Fla. 1990).

The State would note, however, that said alleged errors were neither reversible, nor did they remotely approach fundamental error. The Appellant has first complained of a single "golden rule" comment at the commencement of opening arguments, in the context of a resentencing which took place over a period of more than a week. The prosecutor stated that, if she were to ask the jurors to "imagine" that the victim suffered, and then proceeded to describe the facts of the offenses which were subsequently presented to the jury. (R3. 1602). The prosecutor should have asked the jury to "consider" as opposed to "imagine" the victim's suffering, which

would have been perfectly appropriate as the State had alleged and had the burden of proving the HAC aggravating factor. A "golden rule" argument in the context of a sentencing involving the HAC factor, even if preserved, is not grounds for reversal, let alone fundamental error. Bertolotti v. State, 476 So. 2d 130,133 (Fla. 1985)(multiple prosecutorial comments, including a "golden rule" comment, did not warrant reversal of sentence even though preserved for appellate review); Walker v. State, 707 So. 2d 300, 315-16 (Fla. 1998)(same).

The Appellant has also complained of prosecutorial comments describing the factual circumstances herein as "horrible" or the "worst case." Appellant's brief at p. 49. The State respectfully submits that these comments on the evidence herein were entirely appropriate in the context of the factual circumstances of the instant case,[15] when the State was relying on HAC where, "[w]hat is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies. The consciousless or pitiless crime which is unnecessarily torturous to the victims." See Sochor v. Florida, 504 U.S. 527, 536

[15] This Court found the torture murder of the victim to be, "heinous, atrocious, or cruel under any definition of the terms and beyond a reasonable doubt." Thompson, 619 So. 2d at 267.

(1992), quoting State v. Dixon, 283 So. 2d 1,9 (Fla. 1973). Fair comments on the evidence are not objectionable. Lucas, 568 So. 2d at 21.

Likewise, the prosecutor's comments with respect to the defendant being an antisocial personality were based upon the mental health testimony presented. One doctor had testified that the defendant had an antisocial personality disorder. (R3. 2763-65). Another expert had further defined an antisocial personality as: "a person whose conduct is such that they do what they want, when they want, if they want, how they want with little or no regard for other people." (R3. 2982-83). The prosecutor's comments which merely repeated the mental health testimony, were thus not objectionable either.

The Appellant next complains of the prosecutor having called the Defendant "retarded", "bump-on-a-log," and allegedly urged the jury to use Defendant's prior testimony as non-statutory aggravation. Again, the prosecutor's comments were in accordance with the mitigation testimony presented at the resentencing. One of the defense psychiatrists had testified that he considered Defendant to be retarded. (R3. 2392).[16] This psychiatrist and

[16] Other mental health testimony, presented in rebuttal, reflected that Defendant was of average intelligence. (R3. 2898,

other defense psychologists testified that Defendant was a follower, that he had been dominated by his co-defendant, and that Defendant was not even aware of what had happened during these crimes. (R3. 2507-08; 2526; 2864; 2529; 2602). Moreover, it should be noted that prior to resentencing, Defendant had testified on behalf of the co-defendant, Surace, at the latter's trial. At that trial, Defendant had testified that Surace had no involvement in the crimes, and that he (Defendant) was solely responsible for same. Due to Defendant's testimony, the Surace trial jury convicted Surace of second-degree murder.[17] The Defendant's position at the instant resentencing was, however, that Defendant had lied at the Surace trial, and, that Surace was more culpable and had dominated the defendant. The defense was thus arguing that Defendant should not receive a death sentence, since Surace had not received such a sentence. In response to said arguments, the prosecutor pointed out that the only reason Surace had not been convicted of first-degree murder, was because of Defendant's prior testimony which by his own admission was a lie. (R3. 3083-85). In this context, the prosecutor stated, "and that's why he [Defendant] is not entitled to say if Rocco's [co-defendant] not on death row, why should I be on

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2904-5). The Appellant's contention that the prosecutor "misrepresented" the mental health testimony by arguing that Defendant was of average intelligence, is thus also without merit.

[17] Thompson v. State, 389 So. 2d at 200.

death row? That's the answer, because he lied to the jury." (R3. 3085). The State would note that this Court on direct appeal, rejected the Defendant's contention that the presentation of this testimony from the co-defendant's trial constituted non-statutory aggravation, and held that it was proper "to rebut Thompson's defense." Thompson, 619 So. 2d at 265-66. Fair comment on evidence which had been properly admitted is not objectionable, and does not constitute reversible or fundamental error. Lucas at 568 So. 2d at 21.

The Appellant next complains that the prosecutor diminished the mitigating evidence by stating that, "they want you to consider minuscule, meaningless things." (R3. 3087, 3059) The record reflects, however, that the "minuscule" things referred to by the prosecutor, consisted of mitigation testimony that Defendant was "a good boy;" that he "wanted to give all of his teachers Christmas trees;" and, that his mother had "cried" on the stand. (R3. 3059). The prosecutor while arguing that the weight of these factors was "minuscule",[18] also added that the jury could give these "whatever weight you want." Id. The comments were thus not objectionable.

[18] The State would note that the Defendant was 24 years old at the time of the crime, and that sympathy for the defendant's family members is not a mitigating factor and is not entitled to any weight. Saffle v. Parks, 494 U.S. 484 (1990); Valle v. State, 581 So. 2d 40, 47 (Fla. 1991).

The Appellant next contends that the State urged the jury to sentence the Defendant to death because the sentence had been previously imposed. The record reflects that, to the contrary, the prosecutor stated that the prior sentence "should have no bearing on what you do, because this jury will decide what's to be done. The past is the past." (R3. 3058).[19]

Finally the Appellant also complains that defense counsel's own closing arguments were defective, because defense counsel: a) limited the all inclusive mitigating factor to "a few enumerated examples," and b) conceded that the prosecution had proven three aggravating factors. Again, the record does not support the Appellant's contentions. The record reflects that defense counsel not only argued the applicability of every statutory mitigating circumstance, (R3. 3095-3102), but also argued every factor which was arguable from the evidence, within the all inclusive mitigator, such as: 1) alcohol and drugs consumed on the day of the crimes, 2)

[19] As noted in issue XV, at pp. 94-5, herein, the defendant had given self reports of his legal and criminal history to the various mental health experts; in said reports he had detailed all of prior proceedings herein, including the prior sentences of death.

a pattern of substance abuse and lifestyle which had led to "mental debilitation," 3) Defendant's family background and alleged abuse and disabilities during childhood, 4) reduced culpability, 5) rehabilitation potential, 6) intellectual capacity, 7) organic brain damage, 8) remorse, 9) the co-defendant's sentence, 10) Defendant's relationships with his wife and children, etc. (R3. 3102-13). Defense counsel also argued:

> Mr. Waksman [prosecutor] spent the majority of his argument describing for you the horribleness of the crime. We are not telling you that this was not a horrible crime. We are not telling you that this was not an unpleasant way to die.
>
> Mr. Waksman has emphasized over and over again the one, essential factor of his case and that is the crime, itself. You have heard that the Supreme Court has twice sent this case back and that's why you are here today, because you're not to just take into consideration the one horrible crime itself, and make your decision. Because, if that was the only thing your decision would be based on, there would be no need for me to be sitting here.
>
> What you're supposed to take into consideration is the totality of the circumstances. This man's [Defendant's] life, what brought him to this day and whether considering all of those things this is the type of case that merits the death penalty.

(R3. 3089-90).

Defense counsel then argued that although the legislature had designated more than ten (10) aggravators, the State had been only

able to argue four, and that in the "light most favorable" to the prosecutor, three may have been proven. (R3. 3090-94). In the context of the foregoing, defense counsel stated that the HAC aggravating factor existed. (R3. 3093). The totality of defense counsel's argument as seen above, thus does not constitute error, let alone reversible error, in light of the circumstances herein where this Court has held, "[g]iven the substantial evidence in the record establishing the manner in which the victim was murdered, we find that the murder was heinous, atrocious, or cruel under any definition of the terms and beyond a reasonable doubt." Thompson, 619 So. 2d at 267.

As seen above, the lower court's summary denial of the ineffective assistance of counsel claims with respect to failure to object to arguments was proper. The arguments were in most instances entirely appropriate and none constituted reversible, let alone, fundamental error. Bertolotti, Walker, Lucas, supra.

Moreover, the Appellant's issues XIV and XVII in the habeas corpus petition, which allege ineffective assistance of appellate counsel claim for failure to raise the propriety of said arguments is also without merit. Lopez v. Singletary, supra (appellate counsel can not be deemed ineffective for failing to raise meritless issues).

2) Issues Presented at Resentencing and Raised on Appeal

The second category of claims of ineffective assistance of trial counsel are issues which were presented at the resentencing by trial counsel, and were then raised on direct appeal and rejected by the Court. The lower court thus properly rejected these claims, as post-conviction proceedings are not a second appeal, and issues litigated on direct appeal can not be relitigated under the guise of ineffective assistance of counsel. Medina, supra; Francis v. Barton, 581 So. 2d at 584 ("issues raised on disposed of on direct appeal are procedurally barred in post conviction proceedings."); Valle v. State, 705 So. 2d at 1336, n. 6 (attempt to relitigate procedurally barred claims by couching them in terms of ineffective assistance of counsel does not lift the bar).

The Appellant has first claimed that defense counsel did not "strenuously" object to admission of prejudicial photographs. This issue was raised on direct appeal and the record reflects that defense counsel had in fact objected. (SPCR. 586-89). This Court found, "it was error to admit the autopsy photographs, but the error was harmless given the testimony of the eyewitness, the medical examiner, and the appellant himself, and the other photographs admitted into evidence. State v. DiGuilio, 491 So. 2d

1129 (Fla. 1986)." Thompson, 619 So. 2d at 261.[20]

The Appellant next contends that the trial court rendered counsel ineffective by a) admitting the unavailable witness, Savage's, testimony, and, b) precluding defense witnesses' opinions with respect to the propriety of a death sentence. As noted extensively in Arguments VI, VII and VIII herein, every component of said claims now relied upon by the Appellant was raised on direct appeal, and rejected on the merits, by this Court. See also SPCR. 563-73; 590-95; 728-32; 738-39; Thompson, 619 So. 2d at 265-66.

Finally, the Appellant also contends that the trial court rendered counsel ineffective by failing to strike the panel of potential jurors or conducting individual voir dire, after a potential juror, Garson, expressed concern that the defendant could be released within twelve years if given a life sentence. Again, this issue, including the very quotes by potential juror Garson,

[20] The Appellant, in issue XI of the habeas corpus petition, has faulted the propriety of the harmless error finding by this Court, without in any way adding to the arguments previously raised on direct appeal. Again, issues raised on direct appeal are procedurally barred. Francis v. Barton; Swafford v. Dugger, supra.

relied upon by the Appellant herein, was raised on direct appeal. (SPCR. 574-81). This Court rejected the claim: "We find that this claim is without merit because defense counsel agreed that the problem could be remedied by an instruction from the trial judge that the question of parole was irrelevant to the issues before the jurors. Furthermore, this claim was not preserved for appeal by a timely objection." Thompson, 619 So. 2d at 265.

Regardless of the alternative holding of lack of preservation, this Court also properly rejected the claim on the merits, as the judge had instructed the jury that parole eligibility was irrelevant. See Valle v. State, 581 So. 2d 40, 46 (Fla. 1991) (irrelevancy of parole instruction at resentencing was appropriate, where the jury knew of prior sentencing proceeding); Waterhouse v. State, 596 So. 2d 1008, 1015 (Fla. 1992) (judge's instruction at resentencing, that the jury would have to depend on evidence and instructions, in response to jury's question with respect to defendant's eligibility for parole if he was sentenced to life, upheld. This Court noted, "it cannot reasonably be argued that the jury would have been less likely to recommend the death penalty had it been informed that Waterhouse would receive credit for the ten years he had already served on death row. . . ."). As the underlying merits of the instant claim were rejected by this Court, trial counsel can not be deemed ineffective. Valle v. State, 705

So. 2d at 1335 (where issue was raised on direct appeal, and alternatively addressed on the merits and for lack of preservation, relitigation of issue under guise of ineffective assistance was insufficient and barred).

The State would note that in conjunction with the above claim, the Appellant has claimed several other instances of ineffectiveness, which are also without merit as a matter of law. The Appellant first claims that trial counsel was ineffective for failing to inform the jury why the defendant was being resentenced. As is abundantly clear from section 1 of the instant argument, however, counsel did present uncontroverted evidence that this Court had reversed the sentence. Indeed, counsel then argued that this Court had twice reversed the sentence, because the State had exclusively focused on the facts of the crimes and precluded consideration of the totality of the circumstances of the defendant's life. (R3. 3089-90).

The Appellant also contends that trial counsel was ineffective for failing to present evidence that the defendant "would not be eligible for parole if sentenced to life." Brief of Appellant at p. 53. The defendant, however, was eligible for parole, and no such evidence could thus be presented! See Hudson v. State, 708 So. 2d 256, 262 (Fla. 1998); Stewart v. State, 549 So. 2d 171, 175 (Fla.

1989); Harvey v. State, 529 So. 2d 1083 (Fla. 1988); King v. Dugger, 555 So. 2d 355, 359 (Fla. 1990.

The Appellant's final contention, that counsel was ineffective for failing to tell the jury or request instruction that the Defendant had pled guilty and was sentenced to life imprisonment for non-capital crimes, and thus had no prospect for release, is equally without merit. First, the law prohibits instructions as to the penalties for non-capital crimes for which a defendant has been convicted. Gorby v. State, 630 So. 2d 544, 548 (Fla. 1993); Nixon v. State, 572 So. 2d 1336, 1344 (Fla. 1990). Second, the defendant received consecutive life terms with respect to his non-capital crimes after the 1989 resentencing jury recommended death and the judge imposed the sentence (R3. 3771-72; 756-57). Nonetheless, the jury, at the outset and at the request of defense counsel, was instructed that the defendant had pled guilty with a sentence of "life imprisonment on the kidnapping and sexual battery charges." (R3. 1004). Defense counsel then utilized testimony from co-defendant Surace, who had been convicted of the same charges as the Defendant, except that the co-defendant had been found guilty of second degree, as opposed to first degree, murder. The co-defendant, at the 1989 resentencing, had testified that his presumptive parole date was in approximately 30 years, in the year

2018. (R3. 2706). During closing argument, defense counsel then argued that Defendant's prospects for release were virtually nonexistent, in light of the fact that the co-defendant, without even a first-degree murder conviction and without any minimum mandatory term, was not eligible for parole for at least another 30 years. (R3. 3106-7). This was despite the fact that such speculative arguments with respect to sentences on non-capital crimes are not permissible. See Marquard v. State, 641 So. 2d 54, 57 (Fla. 1994); Franqui v. State, 699 So. 2d 1312, 1326 (Fla. 1997). The lower court's summary denial of the instant non-meritorious claims was thus proper.

Finally, the Appellant has again argued all of the foregoing contentions in his petition for writ of habeas corpus, issues XIV, XX, XXXI through XXXIV, inclusive, but added conclusory allegations of ineffective assistance of appellate counsel. Again, issues raised on direct appeal are procedurally barred and appellate counsel can not be deemed ineffective for failing to raise meritless issues. Lopez v. Singletary, supra.

3) Failure to Object to Standard Jury Instructions

The Appellant's next category of ineffective assistance of counsel issues consists of claims of failure to object to standard

jury instructions which have been upheld and have not been invalidated by this Court.[21] Such claims are insufficient as a matter of law, as the failure to object to instructions which have been upheld and not invalidated by this Court does not establish deficient conduct within the meaning of Strickland v. Washington. Downs v. State, 24 Fla. L. Weekly at S234; Harvey v. Dugger, 656 So. 2d at 1258.

[21] Although the Appellant has also faulted counsel for having failed to object to standard jury instructions which were subsequently invalidated by this Court, see, e.g., issue XIII herein, such arguments have not been raised in the instant claim.

The Appellant first claims that standard jury instructions with respect to expert testimony are erroneous in light of Ramirez v. State, 651 So. 2d 1164 (Fla. 1995), and that the 1989 resentencing counsel should have objected to same. The State would first note that Ramirez v. State did not involve jury instructions on expert testimony, and has in no way invalidated the standard jury instructions complained of herein, which are still in effect.[22] In Ramirez, this Court reiterated the trial court's gate-keeping function, in initially assessing and ruling on the admissibility of an expert's opinion testimony in light of the latter's qualifications. 651 So. 2d at 1167. However, contrary to the Appellant's claim, this Court then held that, after the initial determination of admissibility by the trial judge, "it is then up to the jury to determine the credibility of the expert's opinion, which it may either accept or reject. Wuornos v. State, 644 So. 2d 1000, 1010 (Fla. 1994) ('[T]he finder of fact is not necessarily required to accept [expert] testimony.'); Walls v. State, 641 So. 2d 381, 390 (Fla. 1994) ('[E]xpert opinion testimony [is] not necessarily binding even if uncontroverted.')." Id. (Emphasis added). See also Charles W. Erhardt, Florida Evidence (1998 ed.),

[22] Likewise, Strickland v. Francis, 730 F. 2d 1542 (11th Cir. 1984), relied upon by Appellant, does not involve jury instructions or any invalidation thereof. Said decision involved uncontroverted expert testimony on competency, which the appellate court held should have been accepted.

s. 702.1 ("Whether a witness is qualified as an expert is a preliminary question of fact which must be determined by the trial judge prior to the admission of the expert's opinion."); s. 702.5 ("Whenever an expert testifies, counsel may cross-examine the expert regarding any matter about which the expert testifies in establishing his or her qualifications, both as a basis of arguing that the witness is not qualified as an expert and to argue that even if he or she is qualified, the jury should not give the opinion testimony great weight."). The Appellant's claim of ineffectiveness to object to valid instructions was thus properly rejected. Downs v. State, Harvey v. Dugger, supra.

The Appellant next contends that counsel was ineffective in failing to object to the standard capital sentencing instructions with respect to reasonable doubt, and failing to request an additional instruction on the definition of reasonable doubt. As noted by this Court in Archer v. State, 673 So. 2d 17, 20 (Fla. 1996), while the standard guilt phase jury instructions provide a constitutionally proper definition of reasonable doubt, "there is no corresponding definition in the standard sentencing phase jury instructions." At a resentencing, where no guilt phase instructions are given but the standard sentencing instructions are given, there is no error in failing to provide a definition of reasonable doubt. Id. As noted by this Court, "[w]hile the State

must prove each element of a crime beyond a reasonable doubt, our cases have not found error when a jury is instructed on this standard but not given a definition of the term." Id. See also Victor v. Nebraska, 511 U.S. 1, 5 (1994) ("The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course [citation omitted]. Indeed, so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, . . . , the Constitution does not require any particular form of words be used in advising the jury of the government's burden of proof.") (emphasis added). The Appellant's claims of ineffective assistance of trial counsel at resentencing were thus properly found to be insufficient by the lower court. Downs v. State, Harvey v. Dugger, supra.

The State would note that the above contentions have also been raised in claims XXXV and XXX, respectively, of Appellant's petition for writ of habeas corpus, accompanied by conclusory allegations of ineffective assistance of appellate counsel. Said claims are also without merit as appellate counsel can not be deemed ineffective for failing to raise unpreserved issues, or issues without merit. Lopez v. Singletary, Swafford v. Dugger, supra.

4) Non-Meritorious Claims Raised at Resentencing

Finally, the Appellant also contends that the trial court erred or that trial counsel were ineffective for: a) failing to ensure defendant's presence at critical stages of trial; b) failing to sequester the victim's mother; c) failing to disqualify assistant state attorney Waksman, as he was a material witness with respect to Savage's unavailability; d) failing to control audience members who distracted the jury; and, e) failing to ensure that defendant's rights under Ake v. Oklahoma, 470 U.S. 68 (1985), were protected. The lower court properly summarily denied the instant claims; they are an improper attempt to relitigate matters which could have been raised on direct appeal, and which are also entirely devoid of merit.

First, with respect to the presence of the defendant, the record citations relied upon by the Appellant reflect that the Defendant was not present for two occasions where the trial court granted defense counsel's requests for cost reimbursements. See Brief of Appellant at p. 52; R3. 796, 879. Another instance cited by the Appellant, R3. 1824, in fact reflects that the defendant was present! The last instance, R3. 1665-76, reflects that the defendant was absent during the parties' legal arguments with respect to sequestration of the victim's mother. The record further reflects, however, that the defendant was then brought into court

(R3. 1676) and the parties reargued their positions in his presence. (R3. 1676-85). In the defendant's presence, the trial court then briefly questioned the victim's mother and ruled that she could remain in the courtroom. (R3. 1686-90). All said proceedings were reported and part of the record on direct appeal. More importantly, none constitutes a "critical stage" of the proceedings as claimed by the Appellant. See Hardwick v. Dugger, 648 So .2d 100, 105 (Fla. 1995) (claim of ineffectiveness for defendant's absence at conferences found to be without merit, where there is no showing that said conferences required defendant's consultation or contribution); Coney v. State, 653 So. 2d 1009, 1016 at n. 5 (Fla. 1995)) (same).

The Appellant's next related claim, with respect to the victim's mother, is in the same posture. The latter had briefly testified in the prior trials with respect to a phone call by the victim, asking for money, during the time of the crimes. (R3. 1645; 1651-52). The mother wished to be present during the resentencing, and the prosecution argued that it was her constitutional right to do so. Id. The defense objected on the grounds of the sequestration rule, and that the mother might become emotional. The prosecution noted that as her prior testimony was extremely limited and a matter of record, there was no likelihood of any changes. Id. The trial court further ascertained that the mother

was not emotional, that she would abide by the court's instructions, and admonished her not to show any emotion during her testimony. (R3. 1686-90). The trial court then allowed the mother to remain during trial. The record further reflects that she then testified in accordance with her prior testimony and without any emotion. (R3. 1981-95). The sequestration of witnesses is within the discretion of the trial judge. Knight v. State, 721 So. 2d 287, 293 (Fla. 1998). No error has been demonstrated, and the claims of deficient conduct are insufficient where Appellant has not demonstrated what more could have been done or what prejudice occurred.

Likewise, the Appellant's third contention with respect to the disqualification of the prosecutor is also without merit. The record reflects that prior to resentencing, the defense filed a motion to disqualify the prosecutor, on the grounds that he had previously interviewed witness Savage, in the presence of Detective Smith. (R3. 153-56). The defense alleged that the prosecutor was a material witness, as Savage had by then become unavailable. Id. The trial court denied by motion. (R3. 156). As noted by the State, the defense had failed to prove materiality (R3. 173-74); the defense could have and did take Detective Smith's deposition in this regard. Moreover, the mere fact that the defense wished to utilize the prosecutor as a witness is insufficient to disqualify

the latter. Scott v. Dugger, 717 So. 2d 908, 909-10 (Fla. 1998). Again, no error, nor any prejudice, has been demonstrated.

Fourth, the Appellant contends that the trial court rendered defense counsel ineffective by failing to control audience members. The record citation relied upon by the Appellant (R3. 1909),[23] reflects that midway during resentencing, defense counsel requested a side bar and informed the court that two people, seated behind the defense table, had "sighed" and said "oh my God." (R3. 1909). The trial judge immediately excused the jury. He then admonished the audience, outside the presence of the jury, not to make any comments. Id. The record does not reflect any recurrence of any problems with the audience. As such, the State fails to see what deficient conduct or prejudice occurred, especially in the absence of any indication that the jurors had heard any of the comments complained about. This claim was properly summarily denied as well.

It should be noted that the Appellant, in the petition for writ of habeas corpus, issues XIV and XX, has reargued the above four contentions, but added allegations of ineffective assistance of appellate counsel. Again, appellate counsel can not be deemed

[23] Brief of Appellant at p. 56.

ineffective for failing to raise meritless issues. Lopez v. Singletary.

Finally, the Appellant, without any elaboration, has claimed that, "Counsel was also ineffective for failing to ensure that Mr. Thompson's rights under Ake v. Oklahoma, 470 U.S. 68 (1985), were protected." Brief of Appellant at p. 51. The Court in Ake held that a defendant must have "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." 470 U.S. at 85 (emphasis added). As noted by this Court on direct appeal, the Defendant herein not only had the assistance of a psychiatrist (Dr. Stillman), but the assistance of two other psychologists (Drs. Carbonell and Marina), in addition to a neurologist, all of whom testified on his behalf. Thompson, 619 So. 2d at 264.[24] The State again fails to see what rights the defendant was deprived of.

The State would note that in issue XXI of the habeas corpus petition, the Appellant has again repeated the Ake claim, has outlined the personal history of the defendant, and then claimed that the resentencing jury never heard said history. See petition, pp. 65-68. The Appellant has stated that trial counsel was

[24] See also the parties briefs on direct appeal. (SPCR. 547-50; 661-65).

ineffective for having failed to present said history (petition, pp. 68-69), although the title of said issue states that appellate counsel was ineffective. See petition, p. 63. The statement of case and facts in the Initial Brief of Appellant on direct appeal of the resentencing, recounts the testimony and evidence on behalf of the Defendant from his mother, brother, cousins, ex-wife, pastor, school personnel, family friends, neighbors, the four (4) defense mental health experts, and eyewitness Savage. (SPCR. 542-50; 602-13). That statement of the case and facts reflects that every aspect of the personal history contained in the petition at pp. 65-68 and now relied upon by the Appellant, was in fact presented to the resentencing jury. The Appellant has not identified any information which was not presented.

In related claims, issues XVI and XXVI of the habeas corpus petition, Appellant also contends that appellate counsel was ineffective, for failing to argue that statutory and nonstatutory mitigation had been established but that the trial court had erroneously failed to find same. The State would again note that the very factors listed by the Appellant at this juncture, were in fact argued by appellate counsel in the direct appeal briefs. (SPCR. 602-13; 596-98). This Court rejected these issues, stating:

> In his final claim, Thompson contends that the imposition of the death penalty was in error because: (1) the trial court failed to find the existence of the statutory mitigating circumstances of age and no

> significant history of criminal activity, where these findings had been made in a prior sentencing hearing; . . . (3) the trial court failed to acknowledge the existence and applicability of numerous additional statutory and nonstatutory mitigating factors; . . . .
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> In King v. Dugger, 555 So. 2d 355 (Fla. 1990), we addressed the claim that a resentencing court erred by failing to find statutory mitigating factors which were found in a prior sentencing proceeding. Consistent with that decision, the fact that the first judge who sentenced Thompson found his age and lack of criminal history "in mitigation did not create any vested entitlement or right requiring the second judge to accede to the first's findings." Id. at 358. Thompson's resentencing was a "completely new proceeding, separate and distinct, from his first sentencing. A trial court is not obligated to find mitigating circumstances. . . ." Id. Furthermore, "a mitigating circumstance in one proceeding is not an 'ultimate fact' that collateral estoppel or the law of the case would preclude being rejected on resentencing." Id. at 358-59.
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> . . .
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> Based on the testimony and record in this cause, we also find no error in the sentencing court's rejection of the statutory and nonstatutory mitigating circumstances. Although there is evidence to support Thompson's contention that several statutory and nonstatutory mitigating factors should have been found, there is also evidence presented by the State that supports the trial judge's rejection of these mitigating circumstances.

Thompson, 619 So. 2d at 266-67. As repeatedly noted herein, post-conviction proceedings are not a second appeal, and issues which

have been raised on direct appeal are procedurally barred in post-conviction proceedings. Conclusory allegations of ineffectiveness do not lift the bar. Medina v. State, Swafford v. Dugger, Lopez v. Singletary, Francis v. Barton, Harvey v. Dugger; Valle v. State, supra.

X. CLAIM WITH RESPECT TO AUTOMATIC AGGRAVATING FACTOR WAS PROPERLY FOUND TO BE PROCEDURALLY BARRED, AND ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL ARE WITHOUT MERIT.

The Appellant claims error in the trial judge's use of the felony-murder aggravator (sexual battery), on the grounds that it creates an automatic aggravator and renders death a possible penalty even in the absence of premeditation. The lower court properly found this issue to be procedurally barred, as it should have been raised on direct appeal. (SPCR. 285-86). See Lopez v. Singletary, 634 So. 2d at 1056.

Moreover, this Court and the federal courts have repeatedly rejected this contention. Lowenfield v. Phelps, 480 U.S. 231 (1988); Stewart v. State, 588 So. 2d 972 (Fla. 1991); Johnson v. State, 660 So. 2d 637, 647 (Fla. 1995). As such, Appellant's conclusory allegations of ineffective assistance of appellate counsel contained in issue XIX of the habeas corpus petition with respect to this claim, are also without merit. Lopez v. Singletary, 634 So. 2d at 1056, n. 5 (allegations of ineffectiveness with

respect to procedurally barred claim as to automatic aggravating circumstance are without merit); Lopez v. Singletary, 634 So. 2d at 1059 (appellate counsel is not ineffective for failing to raise claims not properly preserved for appeal); Harvey v. Dugger, 656 So. 2d at 1258 (appellate counsel can not be found ineffective for failing to raise non-meritorious issues).

XI. CLAIM THAT PENALTY PHASE JURY INSTRUCTIONS IMPROPERLY SHIFTED THE BURDEN TO THE DEFENDANT WAS PROPERLY HELD TO BE PROCEDURALLY BARRED, AND ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL ARE WITHOUT MERIT.

The Appellant claims that the standard jury instructions, the State and the resentencing judge shifted the burden of proving mitigating circumstances to him. The lower court held this claim to be procedurally barred, as it should have been raised on direct appeal, in accordance with this Court's well-established precedents. See, Smith v. Dugger, 565 So. 2d 1293, 1294 at n. 2 (Fla. 1990); Buenoano v. Dugger, 559 So. 2d 1116, 1118 (Fla. 1989); Clark v. Dugger, 559 So. 2d 192, 193 (Fla. 1990); Correll v. Dugger, 558 So. 2d 422, 426 at n. 6 (Fla. 1990).

Moreover, this claim has repeatedly been rejected on the merits by this Court. See, Johnson v. State, 660 So. 2d at 647; Robinson v. State, 547 So. 2d 108, 113 at n. 6 (Fla. 1991). The defendant's conclusory allegations of ineffective assistance of

trial counsel in this appeal, and ineffective assistance of appellate counsel, contained in claim XV of his habeas corpus petition, are thus without merit. Harvey v. Dugger, 656 So.2 d at 1258 (trial counsel's failure to object to valid standard jury instructions does not constitute ineffectiveness); Lopez v. Singletary, 634 So. 2d at 1059 (appellate counsel is not ineffective for failing to raise claims not properly preserved for appeal).

XII. CLAIM OF CALDWELL, INFRA, ERROR WAS PROPERLY FOUND TO BE PROCEDURALLY BARRED, AND ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL ARE WITHOUT MERIT.

The defendant, in the court below, claimed that his resentencing jury was advised that its role was advisory and limited to a recommendation, in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). The lower court properly found this claim to be procedurally barred, in accordance with this Court's well-established precedents. Buenoano, 559 So. 2d at 1118; Clark, 559 So. 2d at 193; Correll, 558 So. 2d at 426, n. 6. (SPCR. 286). Moreover, couching procedurally barred claims under the guise of ineffectiveness does not lift the ban.

Finally, the conclusory allegations of ineffective assistance of appellate counsel as to this claim, contained in claim XXII of the defendant's habeas corpus petition, are also without merit.

Lopez v. Singletary, 634 So. 2d at 1059 (appellate counsel is not ineffective for failing to raise claims not properly preserved for appeal); Harvey v. Dugger, 656 So. 2d at 1258 (appellate counsel is not ineffective for failing to raise non-meritorious issues).

XIII. CLAIMS OF IMPROPER JURY INSTRUCTION WITH RESPECT TO THE COLD, CALCULATED AND PREMEDITATED FACTOR (CCP) WERE PROPERLY FOUND TO BE PROCEDURALLY BARRED, AND CLAIMS OF INEFFECTIVENESS ARE WITHOUT MERIT.

In the court below, the defendant claimed that the CCP aggravator was unconstitutional, and that the jury instructions thereon were improper. The lower court properly found this claim to be procedurally barred in accordance with Harvey v. Dugger, 656 So. 2d at 1258. (SPCR. 286).

At the 1989 resentencing, the jury was instructed in accordance with the standard jury instructions on CCP. Said jury instructions were invalidated in 1994, in Jackson v. State, 648 So. 2d 85 (Fla. 1994). As noted by the Appellant, there were no objections to these jury instructions by trial counsel, nor was any jury instructional error raised on appeal. Appellate counsel raised the issue of the applicability of the CCP factor, and this Court found CCP inapplicable, noting that it "was harmless error under the circumstances of this case." Thompson v. State, 619 So. 2d at 266. The lower court thus properly found the instant claim

to be procedurally barred, as the jury instructions were not challenged at the resentencing nor on appeal thereof. Downs v. State, 24 Fla. L. Weekly at S234 (Fla. May 20, 1999); Harvey v. Dugger, 656 So. 2d at 1258; Bush v. State, 682 So. 2d 85, 88 (Fla. 1996); Crump v. State, 654 So. 2d 545, 548 (Fla. 1995); James v. State, 615 So. 2d 668, 669 (Fla. 1993).

The defendant's claim of ineffective assistance of trial counsel is without merit, as the failure to object to standard jury instructions previously upheld by this Court does not constitute deficient conduct under the standards set forth in Strickland v. Washington. Harvey v. Dugger, 656 So. 2d at 1258 (counsel may not be deemed ineffective under Strickland for failing to object to jury instructions where this Court previously upheld validity of those instructions); Mendyk, 592 So. 2d at 1080 ("When jury instructions are proper, the failure to object does not constitute a serious and substantial deficiency that is reasonably below the standard of competent counsel."); Downs, supra.

Likewise, defendant's claim with respect to ineffective assistance of appellate counsel, contained in issues XXIII and XXV of the petition for habeas corpus, is without merit. Harvey v. Dugger, supra; Lopez v. Singletary, 634 So. 2d at 1059 (appellate counsel is not ineffective for failing to raise claims not properly

preserved for appeal); Downs, 24 Fla. L. Weekly at S235, n. 18 (appellate counsel is not ineffective for failing to raise issues which would have been rejected at the time). The State would also note that in claim III of the petition for writ of habeas corpus, the Appellant has also faulted the finding of harmless error by this Court, with respect to the applicability of the CCP factor. Again, habeas corpus is not a second appeal, and issues raised and decided on direct appeal are procedurally barred. Francis v. Barton; Swafford v. Dugger, supra.

Finally, the petition for writ of habeas corpus, in claims XXIV and XXV, has raised similar claims of unconstitutionality of the jury instructions with respect to the HAC aggravator, and ineffective assistance of appellate counsel with respect thereto.[25]

[25] Insofar as the habeas corpus petition also raises ineffective assistance of trial counsel with respect to this issue, the claim is barred as claims of ineffective assistance of trial counsel cannot be raised on habeas corpus. Breedlove v. Singletary, 595 So. 2d 8, 10 (Fla. 1992). Moreover, trial counsel cannot be deemed ineffective for failure to object to standard jury instructions which had been upheld at the time by this Court. Harvey v. Dugger, 656 So. 2d at 1258; Downs v. State, 24 Fla. L. Weekly at S234.

The issue of the unconstitutionality of the HAC jury instructions was, however, raised on appeal and rejected:

> On rehearing, Thompson now asserts that he is entitled to a new sentencing hearing because the jury instruction given on the heinous, atrocious, or cruel aggravating factor was defective under the United States Supreme Court's recent decision in Espinosa v. Florida, --- U.S. ---, 112 S.Ct. 2926, 120 L.Ed. 2d 854 (1992). We disagree. Given the substantial evidence in the record establishing the manner in which the victim was murdered, we find that the murder was heinous, atrocious, or cruel under any definition of the terms and beyond a reasonable doubt. Therefore, any error in the instruction was harmless beyond a reasonable doubt and did not affect the sentence recommended by the jury and imposed by the judge. Further, we note that Thompson's trial counsel did not object to the instruction read to the jury and thus failed to preserve the issue for appeal. See Sochor v. Florida, --- U.S. ---, 112 S.Ct. 2114, 119 L.Ed. 2d 326 (1992). We find that this claim is procedurally barred. Kennedy v. Singletary, 602 So. 2d 1285 (Fla. 1992). We also conclude that the reading to the jury of the instruction on the heinous, atrocious, or cruel aggravator does not, under these circumstances, mandate a new sentencing hearing under Espinosa.

619 So. 2d at 266-67. Again, issues which were raised and rejected on direct appeal are procedurally barred. Harvey v. Dugger, 656 So. 2d at 1258.

XIV. THE CLAIM WITH RESPECT TO THE CIRCUMSTANCES OF DEFENDANT'S 1978 PLEA OF GUILTY WERE PROPERLY FOUND TO BE PROCEDURALLY BARRED.

The Appellant contends that his 1978 pleas of guilty to the instant offenses were not valid, as he was not competent at that time, and, his 1978 trial counsel did not adequately investigate and did not adequately inform the Defendant of the consequences of his plea. The lower court properly found these claims to be procedurally barred, as they could have and should have been raised: a) on direct appeal of the convictions and, in fact, were in part raised during the prior 1980 direct appeal of the guilty plea; and, b) during the two prior post-conviction proceedings which were conducted in 1982 and 1987. (SPCR. 283). Indeed, the State would note that on direct appeal of the guilty plea, this Court, in light of four (4) prior findings of sanity and competence, by two (2) psychologists and two (2) psychiatrists, determined:

> We find that the trial court properly inquired into the competency of the appellant at the time he entered his second guilty plea in this case.

Thompson v. State, 389 So. 2d 197, 199 (Fla. 1980).

Moreover, during the second 1987 post-conviction proceedings with respect to the guilty plea at issue herein, this Court held the contentions raised herein to be procedurally barred:

> On Mr. Thompson's remaining contention, we find that procedural default operates to bar any challenge here; these issues have been

> presented and have been previously resolved in the federal courts when the State waived exhaustion of state remedies.

Thompson v. Dugger, 515 So. 2d 173, 176 (Fla. 1987). The procedurally barred contentions referenced in that decision were, inter alia: 1) ineffective assistance of counsel relating to the entry of the guilty plea; 2) competency to stand trial; 3) failure to appoint additional psychiatric experts; and, 4) coercion of the guilty plea. Said issues had been rejected after a full evidentiary hearing. Thompson v. Wainwright, 787 F. 2d 1447 (11th Cir. 1986).

The lower court thus properly found the instant claims to be procedurally barred, as they were not only successive and should have been, or were in fact, raised in prior proceedings, but were also time barred. There are no claims of newly discovered evidence with respect to this issue. See Downs, 24 Fla. L. Weekly at S233:

> . . . Downs' initial sentence and conviction became final in 1980. Rule 3.850 expressly provides: "Any person whose judgment and sentence became final prior to January 1, 1985, shall have until January 1, 1987, to file a motion in accordance with this rule." Fla.R.Crim.P. 3.850 (1992). Accordingly, under rule 3.850, Downs had until January 1, 1987, at the latest, to request postconviction relief as far as the issue of guilt is concerned, unless he establishes the existence of newly discovered evidence. *See Bolender v. State*, 658 So. 2d 82, 85 (Fla. 1995). By definition, newly discovered evidence concerns facts that were "unknown by the trial court, by

> the party, or by counsel at the time of trial" and which could not have been discovered by the defendant or counsel through the use of due diligence. *See Robinson v. State*, 707 So. 2d 688, 691 (Fla. 1998). Because we find Downs was aware at the time of trial of the evidence he now claims is newly discovered, his claim for ineffective assistance of guilt-phase counsel based on newly discovered evidence is procedurally barred. [FN. 11] Accordingly, we find no error in the trial court's summary denial of this claim.
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> [FN. 11] Downs also argues that to the extent this Court finds this claim should have been raised in the initial 3.850 motion, postconviction counsel rendered ineffective assistance for failing to do so. However, we have held that claims for ineffective assistance of postconviction counsel do not constitute a valid basis for relief. *See Lambrix v. State*, 698 So.2 d 247, 248 (Fla. 1996), *cert. denied*, 118 S.Ct. 1064 (1998).

See also Lambrix v. State, 698 So. 2d 247, 248 (Fla. 1996); Zeigler v. State, 654 So. 2d 1162, 1164-65 (Fla. 1995); Stewart v. State, 632 So. 2d 59, 61 (Fla. 1993); Foster v. State, 614 So. 2d 455, 458 (Fla. 1992).

The Appellant has also raised a number of variations of the instant claim in his petition for writ of habeas corpus, issues IV through VIII, inclusive, and issues X and XII. The State would note that this is the second state petition for writ of habeas corpus with respect to issues relating to the 1978 guilty plea. See Thompson v. Dugger, 515 So. 2d 173, 174 (Fla. 1987). The claims of

ineffective assistance of prior appellate counsel are thus barred, as they are successive. Francis v. Barton, 581 So. 2d at 584-85. To the extent that Appellant has couched said claims in terms of ineffective assistance of appellate counsel on resentencing or prior post-conviction counsel, such allegations do not lift the bar. Appellate counsel on resentencing can not be deemed ineffective for failing to raise procedurally barred claims. Lopez v. Singeltary, supra. Likewise, claims of ineffective assistance of post-conviction counsel do not constitute a valid basis for relief. Lambrix v. State, 698 So. 2d at 248; Downs, 24 Fla. L. Weekly at S235, n. 11.

XV. THE CLAIM OF PRESENTATION OF NON-STATUTORY AGGRAVATORS WAS PROPERLY FOUND TO BE PROCEDURALLY BARRED.

The Appellant first contends that the resentencing jury was presented with non-statutory aggravating circumstances in the form of: 1) Defendant's false testimony at the trial of his co-defendant; 2) the argument that Defendant had been previously sentenced to death; and, 3) evidence of uncharged crimes presented through the State's rebuttal psychiatric testimony. The lower court properly found these claims procedurally barred as they are direct appeal issues. (SPCR. 287).

First, with respect to the presentation of Defendant's

testimony at his co-defendant's trial, appellate counsel in fact raised this issue in Claim III of the direct appeal of the resentencing herein. (SPCR. 82-85). This Court rejected the claim on the merits as follows:

> Thompson's third claim involves the admissibility of his prior testimony given at the trial of his codefendant, Rocco Surace. At the Surace trial, Thompson testified that he alone was responsible for the beating death of the victim. It is argued that this testimony helped to establish as an additional nonstatutory aggravating circumstance that Thompson had helped his equally guilty codefendant avoid the death penalty and, ultimately, a mandatory minimum sentence. We reject this contention and find that Thompson's prior inconsistent testimony met the requirements of section 90.801(2)(a), Florida Statutes (1987), and was admissible. The prior testimony was also admissible to support the State's case and to rebut Thompson's defense. See *Johnson v. State*, 465 So. 2d 499 (Fla. 1985), cert. denied, 474 U.S. 865, 106 S.Ct. 186, 88 L.Ed.2d 155 (1985).

Thompson, 619 So. 2d at 265-66.

Post conviction proceedings are not a second appeal, and issues raised on direct appeal are procedurally barred. Swafford v. Dugger, 569 So. 2d 1264, 1267 (Fla. 1990); Harvey v. Dugger, Francis v. Barton, supra.

With respect to the additional arguments presented in support of the instant claim, the State would note that,"it is not

appropriate to use a different argument to relitigate the same issue." Medina v. State, 573 So. 2d at 295. See also, Cherry v. State, 659 So. 2d 1069 (Fla. 1995)(defendant could not relitigate in postconviction motion, issue which was considered and rejected on direct appeal, even though defendant recharacterized the issue). In any event, the State would note that the prosecutor's argument with respect to the falsity of the Defendant's testifying at the co-defendant trial was in rebuttal to the Defendant's claim that he should receive the same sentence as his co-defendant because they were equally culpable. The prosecutor was merely pointing out that the co-defendant received a lesser sentence due to Thompson having taken the full responsibility for the crime and denying the co-defendant's culpability at the latter's trial. See pp. 62-63 herein. There was thus no impropriety.

Moreover, the Appellant's additional arguments are also without merit. With respect to the prosecutor's comment that defendant had been previously sentenced to death, Appellant has neglected to mention that the prosecutor immediately added: "Now, that should have no bearing on what you do, because this jury will decide what's to be done. The past is the past." (R3. 3058). It should also be noted that at the commencement of its resentencing case, the Defendant had presented extensive psycho social history by Dr. Marina. The latter had, on direct examination, stated that

Defendant "had been on death row for 12 years." (R3. 2506). The Defendant had also presented testimony from a multitude of attorneys and judges who were involved in his prior cases. Moreover, Defendant's self report to yet another mental health expert, Dr. Haber, had detailed the sequence of his convictions and resentencings, along with the reasons for the reversal of the prior proceedings. (R3. 2958-59). Again, there was no impropriety.

Finally, with respect to evidence of uncharged crimes, the State would note that this evidence, which was presented in rebuttal, was also proper. Defense witness, Dr. Marina, had relied upon the Defendant's report of his legal and criminal history; she mentioned a prior history of vagrancy, forgery and an escape attempt where Defendant had stabbed himself. (R3. 2506, 2529; 3538). Dr. Marina opined that Defendant was impulsive and had poor control. (R3. 2524-25). Another defense witness, Dr. Carbonnel, had similarly relied upon Defendant's report of his criminal history. This witness testified that the Defendant was a follower; as seen by Defendant's "history that indicates that he is not a mean person;" "He doesn't have a violent history. I think he has a forgery, a vagrancy and a loitering." (R3. 80-81). The State then presented another self-report of the Defendant, wherein he had admitted to committing armed robberies.

Evidence of uncharged crimes to rebut alleged mitigating factors of a lack of substantial or violent criminal history and having been dominated by the co-defendant, is proper and does not constitute error. Washington v. State, 362 So. 2d 658, 666 (Fla. 1978); Hildwin v. State, 531 So. 2d 124, 127-28 (Fla. 1988)("We hold that during the penalty phase of a capital case, the State may rebut defense evidence of the Defendant's non violent nature by direct evidence of specific acts of violence committed by the Defendant provided, however, that in the absence of a conviction for any such acts, the jury shall not be told of any arrests or criminal charges arising therefrom."). As is abundantly clear from the above, proper rebuttal to the Defendant's evidence and arguments does not constitute presentation of non-statutory aggravating factors. The instant claim was properly found to be procedurally barred, and is also without merit.

The Appellant also complains that there were no "merger" jury instructions and that the aggravating factors could thus have been "doubled". The lower court's finding of procedural bar was also proper with respect to this claim, as such a claim could and should have been raised on direct appeal. Harvey v. Dugger, 656 So. 2d at 1256; Valle v. State, 705 So. 2d at 1335. To the extent that the Appellant claims that the issue was not preserved by trial counsel, the State notes that at the time of this 1989 resentencing, "This

issue was governed by Suarez v. State, 481 So. 2d 1201 (Fla. 1985), cert. denied, 476 U.S. 1178 (1986), in which we determined that the failure to instruct a jury on duplicative aggravating factors is not reversible error when the trial court does not give the factors double weight in its sentencing order." Armstrong v. State, 642 So. 2d 730, 734 (Fla. 1994). See also, Wuornos v. State, 644 So. 2d 1000, 1006 (Fla. 1994)(the holding in Castro v. State, 592 So. 2d 259, 261 (Fla. 1992) that limiting jury instructions are proper when requested is "prospective" only). Moreover, contrary to the Appellant's claim, the HAC and CCP aggravating circumstances are not duplicative. See Squires v. State, 450 So. 2d 208, 212 (Fla. 1984). The failure to "preserve" the instant claim was thus not deficient conduct, and the claim of ineffectiveness in this regard is without merit. Harvey v. Dugger, 656 So. 2d 1256; Downs v. State, 24 Fla. L. Weekly S.234 n.5.

Finally, the Defendant's conclusory allegations of ineffective assistance of appellate counsel, contained in issues XXVII and XXVIII of the petition for writ of habeas corpus with respect to the above claims, are also without merit. Appellate counsel did in fact raise the claim of alleged presentation of non-statutory aggravating evidence. To the extent that the Defendant complains of unpreserved arguments which were not raised on appeal, appellate counsel cannot be deemed ineffective for raising unpreserved and

non-meritorious issues. Lopez v. Singletary, Harvey v. Dugger, supra.

XVI. THE LOWER COURT PROPERLY FOUND THE CLAIM WITH RESPECT TO JURY INTERVIEWS TO BE PROCEDURALLY BARRED.

The Appellant contends that the rule prohibiting defense counsel from interviewing jurors, to explore misconduct, is invalid. The lower court properly found this claim to be procedurally barred, as it should have been raised on direct appeal. (SPCR. 287-8). See, e.g. Shere v. State, 579 So. 2d 86, 94-95 (Fla. 1991); State v. Hamilton, 574 So. 2d 124, 130 (Fla. 1991).

XVII. THE CLAIM OF INSANITY WAS NOT RAISED IN THE LOWER COURT AND IS PROCEDURALLY BARRED.

The Defendant claims that he is insane to be executed, in violation of Ford v. Wainwright, 477 U.S. 399 (1986). This claim was not raised in the court below and is thus procedurally barred. Doyle v. State, 526 So. 2d 909, 910 (Fla. 1988)(claims which are not raised in Fla.R.Crim.P. 3.850 motion in the trial court cannot be raised for the first time on appeal thereof, and are procedurally barred.). Moreover, as conceded by the Appellant, the claim is also insufficient.

XVIII. CLAIM OF NEWLY DISCOVERED EVIDENCE WITH RESPECT TO 1998 EXECUTIONS WAS NOT RAISED IN THE LOWER COURT AND IS PROCEDURALLY BARRED.

Appellant claims that four executions conducted in the electric chair in 1998 demonstrate that the use of electrocution is cruel and unusual. The instant claim is barred as it was not raised in the post-conviction court below. Doyle, 526 So. 2d at 911.

The Appellant, in his petition for writ of habeas corpus, issue XVIII, has also claimed that Florida's capital sentencing is unconstitutional on its face and as applied (on other grounds). There are no allegations of ineffective assistance of appellate counsel with respect to said claim.[26] This issue could and should have been raised on direct appeal; habeas corpus can not be used for additional appeals of such issues. Lopez v. Singletary, 634 So. 2d at 1059.

[26] The allegations of ineffective assistance of trial counsel contained in said issue are barred, as habeas is not the proper avenue for such claims. Breedlove v. Singletary, supra.

CONCLUSION

Based on the foregoing, the Appellee/Respondent respectfully submits that the denial of post-conviction relief by the lower court should be affirmed, and the petition for writ of habeas corpus should be denied.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **ANSWER BRIEF OF APPELLEE** was furnished by prepaid first class mail to **MELISSA MINSK DONOHO**, Assistant CCRC, Office of the CCRC-South, 1444 Biscayne Blvd., Suite 202, Miami, Florida 3313222-1422 on this 5th day of June, 1999.

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