

IN THE SUPREME COURT OF FLORIDA

GARY LAWRENCE,

Appellant,

v.

CASE NO. SC00-2290

STATE OF FLORIDA,

Appellee.

\_\_\_\_\_ /

ON APPEAL FROM THE CIRCUIT COURT  
OF THE FIRST JUDICIAL CIRCUIT,  
IN AND FOR SANTA ROSA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The facts of this case are set out in this Court's opinion affirming Lawrence's convictions and sentences:

Shortly after Gary and Brenda Lawrence were married, they separated, and another man, Michael Finken, moved in with Brenda and her two daughters, Stephanie and Kimberly Pitts, and Stephanie's friend, Rachel Matin. On the day of the murder, July 28, 1994, Gary and Michael drove Brenda to work and then drank beer at a friend's house. Later, Gary and Michael picked Brenda up and the three returned to the friend's house where they drank more beer. After the three returned to Brenda's apartment, Gary and Michael argued and Gary hit Michael when he learned that Michael had been sleeping with Brenda. Gary and Michael seemed to resolve their differences, and Michael fell asleep on the couch. Gary and Brenda conversed, and Brenda went through the house collecting weapons -- including a pipe and a baseball bat. Gary and Brenda told Kimberly and Rachel that they were "going to knock off Mike." Gary told Kimberly to "stay in your bedroom no matter what you hear."

The trial court described what happened after Gary and Brenda spoke to the girls:

Thereafter, the two girls heard what they described as a pounding sound. At one point, Rachel Matin stated that she heard the victim say, "stop it, if you stop, I'll leave." She stated that she heard that statement several times. Kimberly Pitts stated she heard the victim say "please don't hit me, I'm already bleeding." The victim's pleas, however, were met with more

pounding. Once the pounding stopped, the girls were required to assist in the clean up and described to the jury what they observed. Kimberly stated that much of the victim's right side of his face was missing and his chin was knocked over to his ear. Rachel Matin stated that there was no skin left on the victim's face and part of his nose was missing. Apparently the victim was still alive. Kimberly observed her mother coming out of the kitchen area with what appeared to be a dagger and then, although not seeing the dagger in her hand at the time, observed her mother make a stabbing motion toward the victim with something in her hand.

It was at that time when Brenda Lawrence requested that the girls obtain the assistance of Chris Wetherbee. Upon his entrance into the home, Cris Wetherbee observed the victim's head being caved in, blood all over, the victim's eyeball protruding approximately three inches and a mop handle shoved into the victim's throat. Wetherbee asked Gary Lawrence, "what's going on?" At which time the Defendant responded by pulling out the mop handle and kicking the victim and making the statement "this is what's going on." Immediately after removing the mop handle from the victim's throat, Wetherbee heard the victim give approximately three or four ragged breaths at which time the victim thereafter stopped breathing and apparently expired. The Defendant, Gary Lawrence, told

Wetherbee that he had beat him with a pipe until it bent and then beat him with a baseball bat.

Chris Wetherbee summarized the victim's state: "And [he] looked like something off of one of the real good horror movies." Gary and Brenda then removed a small amount of money from Michael's pockets, wrapped the body in a shower curtain and placed the body in Michael's car, and Gary drove to a secluded area where he set the body afire. When Gary returned home, he and Brenda danced.

Gary Lawrence was arrested later that evening driving Michael's car and subsequently confessed, admitting that he had beaten Michael because Michael had been sleeping with Brenda. Lawrence was charged with first-degree murder, robbery, grand theft of a motor vehicle, and conspiracy to commit murder. At trial, the medical examiner testified as follows: Michael died of blunt trauma and possible asphyxia; Michael was alive when the mop handle was thrust down his throat; Michael's blood alcohol level was very high; and one or more of the blows to Michael's head could have caused loss of consciousness. Lawrence was convicted of first-degree murder, conspiracy to commit murder, auto theft, and petty theft.

During the penalty phase, Lawrence presented testimony of a brother, a psychologist, and a psychiatrist. The court followed the jury's nine-to-three vote and imposed a sentence of death based on three aggravating circumstances, no statutory mitigating circumstances, and five nonstatutory mitigating circumstances. Lawrence also was sentenced to concurrent five-year terms of imprisonment on the conspiracy and auto theft charges and time served on the petty theft charge. (Brenda

was tried separately and sentenced to life imprisonment for her role in the crimes.)

Lawrence v. State, 698 So.2d 1219, 1220-21 (Fla. 1997), cert. denied, 522 U.S. 1080 (1998) (footnotes omitted).

The trial court found that the state established three aggravators: committed while under sentence of imprisonment; heinous, atrocious, or cruel (HAC); and cold, calculated, and premeditated (CCP). (DAR II 231-34).<sup>1</sup> The court rejected the statutory mitigators (DAR II 234-36), but found as nonstatutory mitigators that Lawrence: cooperated with law enforcement; had a learning disability; had a deprived childhood and poor upbringing; was under the influence of alcohol at the time of the murder; and did not have a history of violent criminal acts. (DAR II 236-38). On appeal Lawrence argued that neither HAC nor CCP had been established and that the trial court erred in rejecting Brenda's life sentence as nonstatutory mitigation. This Court rejected those claims, held that "[c]ompetent substantial evidence supports the trial court's findings," and affirmed Lawrence's convictions and sentences. Id. at 1221-22.

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<sup>1</sup> "DAR II 231-34" refers to pages 231 through 234 of volume II of the record on direct appeal of Lawrence's convictions and sentences (case no. 85725).

Lawrence filed an amended motion for postconviction relief in April 1999. (I 21).<sup>2</sup> The motion contained fourteen claims (I 23-33, grounds A-N), the first of which was comprised of fourteen allegations that trial counsel John Miller was ineffective. (I 23-27). After the state filed its written response (I 37), the circuit court held a Huff hearing on November 11, 1999. See Fla.R.Crim.P. 3.851(c); Huff v. State, 622 So.2d 982 (Fla. 1993). On February 1, 2000 the court set an evidentiary hearing on claims A1 and A3 for June 2000 (I 101), followed by a written order setting out the court's rulings on all claims raised in the motion for postconviction relief. (I 102 et seq.).

Claim A1 alleged that Miller was ineffective for conceding "guilt throughout the trial as to lesser included offenses without consent or advice from Defendant" and for conceding "guilt to 1st degree murder in the penalty phase." (I 23). In claim A3 Lawrence alleged that Miller was ineffective for failing to advise him of his right to testify at the guilt and/or penalty phases. (I 23-24). The evidentiary hearing was held on June 12, 2000.

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<sup>2</sup> "I 21" refers to page 21 of volume I of the record on appeal in the instant case. That record consists of volumes I and II, pages 1 through 325, and a single volume of supplemental record containing the transcript of the June 12, 2000 evidentiary hearing. (SR I 1-85).

At that hearing Lawrence testified in his own behalf. Lawrence could not remember if Miller talked with him about conceding guilt to second- or third-degree murder or manslaughter (SR I 13), but said that he did not authorize Miller to do so or did not remember doing so. (SR I 14-16). He finally said that he did not remember anything he and Miller talked about. (SR I 17). He also did not remember if he and Miller talked about whether he should testify at trial. (SR I 17-19). Lawrence's memory was similarly deficient on cross-examination. (SR I 19-26).

After Lawrence rested (SR I 28), the state called Miller as a witness. Miller described his work on Lawrence's case, including talking with Lawrence, reviewing voluminous discovery materials, and deposing all the state's witnesses. (SR I 31). He discussed strategy and tactics with Lawrence and his conclusion that, due to Lawrence's confessions and the eyewitness testimony, it would be impossible to convince the jury that he was not guilty. (SR I 32-33). Miller also discussed an intoxication defense and trying to cast as much blame as possible on Brenda. (SR I 34-36). He was concerned about Lawrence testifying during the guilt phase (SR I 39), but talked with him about testifying in both phases. (SR I 36-39). Lawrence, however, was adamant that he would not testify. (SR

I 39, 47). Miller testified that he always discussed strategy with Lawrence, but described Lawrence as "apathetic" (SR I 33, 44). (SR I 33-45).

After the evidentiary hearing, the parties filed written closing arguments. (I 159 et seq.; 178 et seq.). The circuit court issued a final order denying relief on October 11, 2000 (II 192), and this appeal followed.

## SUMMARY OF ARGUMENT

### ISSUE I.

The record conclusively shows that the circuit court did not err in summarily denying Lawrence's claim that Miller was ineffective in presenting the affirmative defense of voluntary intoxication.

### ISSUE II.

The circuit court did not err in finding that Lawrence failed to prove that Miller was ineffective for conceding guilt to some crime less than first-degree murder.

### ISSUE III.

Lawrence has demonstrated no error in the circuit court's denial of his claim that Miller was ineffective for not informing him of his right to testify.

### ISSUE IV.

The circuit court did not err in summarily denying the complaint about the prosecutor's argument.

### ISSUE V.

No error has been shown in the summary denial of Lawrence's claim that co-counsel should have been appointed.

### ISSUE VI.

Lawrence's complaint about the instruction on the under sentence of imprisonment aggravator is procedurally barred.



ARGUMENT

ISSUE I

WHETHER THE CIRCUIT COURT ERRED IN SUMMARILY DENYING THE CLAIMS OF INEFFECTIVENESS REGARDING LAWRENCE'S USE OF INTOXICANTS.

Lawrence claims that trial counsel was ineffective for not adequately presenting his intoxication during both the guilt and penalty phases and that the circuit court erred in summarily denying these claims. There is no merit to this issue.

Claims A2, A4, and A6 in the amended postconviction motion alleged that counsel was ineffective for: not adequately presenting the affirmative defense of voluntary intoxication and not presenting to the jury a jail nurse's testimony of how much alcohol Lawrence told her he consumed; failing to use an expert at the penalty phase to testify as to his impairment; and failing to present evidence of his extreme emotional disturbance. (I 23-25). The circuit court made the following findings on claims A2, A4, and A6:

B. Issue 2 argues that the trial counsel was inadequate in his presentation of the Defendant's mental deficiencies and use of intoxicants in both the guilt and penalty phases of the trial.

(1) The court finds that the allegation that trial counsel presented insufficient evidence of intoxication on the day of the crime is not supported by the record. The trial transcripts establish extensive testimony from different witnesses

that the Defendant had been drinking heavily on the day of the murder. Exhibit (A). [I 114-20]. Additionally, counsel ask[ed] for an instruction [on] the defense of voluntary intoxication and the court having determined that sufficient evidence had been introduced to support the instruction charged the jury with this instruction. Defendant also alleges that trial counsel's failure to introduce the testimony of the jail nurse as to the Defendant's statements made to her on the amount he had consumed was IAOC. Introduction of this evidence was hearsay and the court so ruled, preserving it for appellate review. Defendant, however, argues that trial counsel was ineffective for not finding a way to introduce the nurse[']s testimony on the amount of intoxicants Defendant told her he had consumed. The court finds that the amount of intoxicants that the Defendant told the nurse he had consumed would have been redundant to the testimony provided by other witnesses. The number of witnesses testifying as to the Defendant[']s degree of intoxication still must be weighed by the trier of fact against the Defendant's clear recall of facts and coherent confession of the details involved with the murder. Exhibit (B). [I 121-32].

The Defendant also argues that inadequate presentation of the Defendant's history of the use of intoxicants and drugs was a contributor to the court's sentence of death in the penalty phase. The record shows that trial counsel introduced expert testimony of the Defendant's history of the long term use of drugs and alcohol, Exhibit (C) [I 133-40], and the trial court found the Defendant's intoxication was a nonstatutory mitigator. Exhibit (D). [I 141-42].

(2) Defendant's allegations are not supported by the record and no hearing is required.

\* \* \*

E. Issue 4 argues that trial counsel was inadequate for failure to utilize adequate expert testimony as to Defendant's impairment from intoxicants or drugs.

(1) Dr. Larson, a board certified psychologist, and Dr. Galloway, a board certified psychiatrist, were both appointed by the court to examine the Defendant to determine his possible insanity at the time of the crime and his competency to proceed, as well as, his mental condition. Both Dr. Larson and Dr. Galloway testified during the penalty phase of the trial and gave detailed evaluations of the Defendant's history of the use of intoxicants. Dr. Larson testified that the Defendant did not have a major mental illness but did exhibit a pattern of personality disorders (Exhibit (E)) [I 143-46], and how the features and characteristics might be manifested by the Defendant's history of substance abuse particularly alcohol. Dr. Galloway testified that the Defendant had no diagnosable organic defects but that he had difficulty with his intellect and emotional development. Exhibit (F). [I 147-50]. Collateral counsel's bare claim on this issue does not provide any substantive assertion of what could be accomplished by additional expert witnesses that could have changed the outcome of the trial

(2) No hearing is required.

\* \* \*

G. Issue 6 argues that trial counsel was ineffective for failing to develop and present a more effective defense of mental

mitigation in the penalty phase. Collateral counsel does acknowledge that trial counsel presented the testimony of two (2) mental health experts.

(1) A review of the court record and specifically the testimony of the two (2) mental health experts paint a picture of the Defendant as suffering a series of development problems[,] personality disorders, and low I.Q. but these problems when taken individually or in sum did not reach the degree of emotional disturbance necessary for counsel to argue extreme emotional disturbance. In summary, collateral counsel offers no new insight or possible errors in the testimony presented but argues that trial counsel was obligated to keep trying to find a more effective presentation of the Defendant's perceived mental deficiencies.

(2) The issue is not sufficiently pled to require an evidentiary hearing.

(I 103-07).

Lawrence relies on Gaskin v. State, 737 So.2d 509 (Fla. 1999), and Freeman v. State, 761 So.2d 1055 (Fla. 2000), in arguing that the circuit court erred in summarily denying these three claims of ineffectiveness. These cases, however, are factually distinguishable. The issue in Gaskin that relates to the instant case was Gaskin's allegation that his trial counsel failed to supply his mental health expert with sufficient information about Gaskin, in spite of the expert's requests for such, to enable the expert to perform an adequate mental health evaluation and assessment. Lawrence makes no such claim. This

Court agreed with Freeman that the allegations in his postconviction motion about what two new mental health experts would testify to at an evidentiary hearing cast doubt on the adequacy of the mental health evaluation done by the expert who testified at Freeman's penalty phase. Lawrence's amended postconviction motion, on the other hand, contains nothing but conclusory, unsupported allegations.

As the circuit court found, the record conclusively refutes claim A2. Miller argued at the guilt phase that Lawrence was intoxicated (DAR V 181-85; DAR VII 706-10), and his cross-examination of the state's witnesses established that Lawrence had been drinking heavily the day of the murder. (E.g., DAR V 225, 243, 245, 295; DAR VI 382). Miller called Carol Thomas, a jail nurse, to testify as to the quantity of alcohol Lawrence told her he consumed the day of the murder. (DAR VII 641). The trial court upheld the state's hearsay objection because her testimony would not properly identify the quantity consumed by Lawrence and because Lawrence's statement to her was self-serving. (DAR VII 651). At Miller's request the trial court agreed to include an instruction on the defense of voluntary intoxication (DAR VI 677) and, thereafter, did so. (DAR VII 737-38).

In the penalty phase, psychologist James Larson testified that Lawrence began using drugs and alcohol "at a very early age" (DAR III 461) and that Lawrence was immature and prone to jealousy and inappropriate expressions of anger that were worsened by his use of alcohol. (DAR III 482-84). Miller's sentencing memorandum urged that Lawrence's addiction to alcohol and drugs and his being intoxicated at the time of the murder should be found in mitigation. (DAR II 219; III 602). Thereafter, the trial court found Lawrence's intoxication to be a nonstatutory mitigator. (DAR II 237).

The exclusion of Thomas' testimony could have been raised on direct appeal, but Lawrence has not demonstrated that any reversible error occurred regarding the trial court's refusal to allow her to testify. This conclusory claim fails to allege what more Miller could have done to convince the jury that Lawrence was too intoxicated to be convicted of first-degree murder, especially in light of Lawrence's detailed confession that demonstrated his excellent recall of the events of July 28, 1994. (E.g., DAR VI 423 et seq.). Lawrence has not shown that no reasonable attorney would have proceeded differently than Miller did or that the result would have been different. As the circuit court found, the record conclusively shows that claim A2 has no merit. See Sireci v. State, 773 So.2d 34, 45 (Fla. 2000)

(summary denial proper where record conclusively refutes claim); Downs v. State, 740 So.2d 506, 515-16 (Fla. 1999) (evidence complained about in postconviction motion was, in fact, presented at trial); Haliburton v. Singletary, 691 So.2d 466, 471 (Fla. 1997) (summary denial approved where supported by competent substantial evidence).

To warrant an evidentiary hearing, a postconviction movant must allege specific facts that are not conclusively rebutted by the record and that demonstrate prejudicial performance by trial counsel. Waterhouse v State, no. SC95106, slip op. at 7-8 (Fla. May 31, 2001); Arbelaez v. State, 775 So.2d 909, 915 (Fla. 2000); Freeman, 761 So.2d at 1061; Thompson v. State, 759 So.2d 650, 663 (Fla. 2000); Gaskin, 737 So.2d at 516. Conclusory allegations are insufficient to require an evidentiary hearing. Waterhouse; Asay v. State, 769 So.2d 974, 982 (Fla. 2000); Freeman, 761 So.2d at 1061. The circuit court did not err in finding that claims A4 and A6 were too ill-pled to require a hearing.

As set out above, the intoxication defense was fully presented to the jury. Moreover, as Lawrence admits, both a psychiatrist and a psychologist testified at the penalty phase. Claim A4 fails to set out what experts could have testified to what facts differently from the testimony of Drs. Galloway and

Larson and fails allege that their evaluations were inadequate. Cf. Jones v. State, 732 So.2d 313 (Fla. 1999) (presenting mental health experts that merely reach a different conclusion does not demonstrate that the original evaluation was inadequate).<sup>3</sup> Lawrence's conclusory allegation in claim A6 that the experts failed "to establish Defendant's severe inadequacy" is also insufficiently pled. He failed to show what witnesses Miller could have found and presented that would have testified that Lawrence was incompetent or insane or that the statutory mental mitigators applied and failed to demonstrate that the evaluations by Galloway and Larson were less than professional and adequate.

When considering summary denials, this Court's standard of review is to "examine each claim to determine if it is legally sufficient, and, if so, determine whether or not the claim is refuted by the record." Freeman, 761 So.2d at 1061. In performing its review this Court will find that the circuit court correctly found that claims A2, A4, and A6 are conclusively rebutted by the record and/or are insufficiently

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<sup>3</sup> Even if Lawrence had found an expert who would testify more favorably than Galloway and Larson, he has not demonstrated that Miller could have found a similar expert for trial. See Kokal v. Dugger, 718 So.2d 138 (Fla. 1998).

pled. Therefore, that court's summary denial of these claims should be affirmed.

## ISSUE II

WHETHER THE CIRCUIT COURT CORRECTLY FOUND NO  
INEFFECTIVENESS IN TRIAL COUNSEL'S  
CONCESSION OF LAWRENCE'S GUILT TO SOME CRIME  
LESS THAN FIRST-DEGREE MURDER.

Lawrence argues that the circuit court erred in finding that his trial counsel was not ineffective for conceding that he was guilty and urges this Court to adopt a rule requiring on-the-record agreement by a defendant when an attorney argues that such defendant is guilty of a lesser offense. There is no merit to this claim, and the circuit court's denial of relief should be affirmed.

In claim A1 of his amended motion for postconviction relief Lawrence alleged that Miller was ineffective for conceding "guilt throughout the trial as to lesser included offenses without consent or advice from Defendant." (I 23). After the Huff hearing, the court granted an evidentiary hearing on this claim. (I 102). Both Lawrence and Miller testified at the evidentiary hearing, and the circuit court made the following findings in denying the claim:

The Defendant alleges that trial counsel  
conceded guilt to lesser included offenses  
during counsel's opening and closing remarks  
in the guilt phase of his trial (Exhibits

"B" and "C") and also conceded guilt to first-degree murder during closing arguments in the penalty phase without the Defendant's consent. (Exhibit "D"). The Defendant contends that counsel's comments were contrary to his plea of not guilty and the functional equivalent of a guilty plea. See *Nixon v. State*, 758 So.2d 618, 620 (Fla. 2000); *Wiley v. Sowders*, 647 F.2d 642, 649 (6th Cir. 1981). Consequently, due process requires that the Defendant consent on the record to counsel's concession of guilt. See *Wiley*, 647 F.2d at 650.

The Defendant's reliance on *Nixon* and *Wiley* is misplaced. In those cases, defense counsel conceded guilt to the charged offenses. In the instant case, defense counsel never conceded guilt to first degree premeditated murder. Although counsel stated that the Defendant was guilty of something, he continually reiterated that the evidence did not support a conviction of premeditated murder. To challenge the premeditation charge during the guilt phase, counsel presented evidence that the murder was prompted by an emotional rage while the Defendant was extremely intoxicated. The record further reveals that counsel cross-examined the State's witnesses, called witnesses on the Defendant's behalf, and subjected the State's charge of premeditated murder to meaningful adversarial testing.

At the penalty phase, the jury had already determined that the Defendant was guilty of first degree premeditated murder. However, during counsel's closing argument, he continued to argue that the Defendant was intoxicated and lost control of his emotions at the time of the murder. (Exhibit "C" at 118, 120). Thus, when counsel's statement that "[w]e have never at any time in this case disputed Gary Lawrence's guilt" is taken in context, it is clear that counsel

is referring to the concession of guilt to the lesser included offenses. Therefore, the Defendant has failed to demonstrate that counsel's actions were the functional equivalent of a guilty plea.

Having determined that counsel's comments were not the functional equivalent of a guilty plea, the Court must evaluate whether counsel's decision to concede guilt to the lesser included offenses constituted ineffective assistance. The record reveals that the State possessed a tremendous amount of incriminating evidence against the Defendant. This evidence included the following: a substantial amount of physical evidence, a tape-recorded confession, unsolicited admissions of guilt, and several witnesses who could testify to the Defendant's involvement. In addition, the Defendant admitted his involvement in the murder to his counsel. (Evidentiary Hr'g Tr. at 32, 35). [SR I 32, 35].

At the evidentiary hearing, John Miller, the Defendant's trial counsel, testified that his basic strategy was to keep the Defendant off of death row. Due to the overwhelming amount of incriminating evidence, he believed that it would be impossible to convince a jury that the Defendant was not guilty of something. (Evidentiary Hr'g Tr. at 32-33). [SR I 32-33]. Furthermore, due to the Defendant's prior record, any conviction would likely result in a life sentence. (Evidentiary Hr'g Tr. at 40). [SR I 40]. As a result, trial counsel adopted a strategy that would acknowledge guilt to the lesser included offenses in order to maintain credibility with the jury on counsel's defenses to the premeditated murder charge. (Evidentiary Hr'g Tr. at 41). [SR I 41].

Mr. Miller also testified that he had extensive discussions with the Defendant

regarding his case and that he believed the Defendant did consent to his trial strategy. (Evidentiary Hr'g Tr. at 31-44). [SR I 31-44]. Trial counsel described his strategy discussions in the following manner:

I would tell Mr. Lawrence my strategy and what I thought based on my experience, and what I thought of the evidence was best. He never argued with me. He never second guessed me. He never said, 'why don't you do it this way?' The term I keep using is he was very apathetic to it, and I understood, you know, from talking to him and from talking to my experts, the two experts that I had, that he wasn't as intellectually gifted as some other people were, you know. He read in a very low percentile. His academic skills obviously were very lacking, and that goes all the way back from his -- you know, to his childhood.

In my discussions with him though despite all that I never had any doubt in my mind that he understood what I was saying and that he never objected to it.

(Evidentiary Hr'g Tr. at 44). [SR I 44].

Conversely, the Defendant could not recall any details regarding his discussions with Mr. Miller but he stated that to the best of his knowledge he did not consent to trial counsel's strategy to concede guilt to the lesser included offenses. (Evidentiary Hr'g Tr. at 12-16). [SR I 12-16]. Based on Mr. Miller's testimony, the Court finds that the Defendant consented to counsel's trial strategy. See *Brown v. State*, 755 So.2d 616, 630 (Fla. 2000) (finding consent of

trial tactics where the defendant failed to present any evidence that he did not consent to defense counsel's tactics and defense counsel testified that he repeatedly informed the defendant of his strategy and that defendant was agreeable to everything). Furthermore, there is no due process requirement that the trial court conduct an on-the-record inquiry as to whether a defendant agrees with the defense strategy of conceding guilt to lesser included charge. See *Harris*, [768 So.2d 1179 (Fla. 4th DCA 2000)]; *York v. State*, 731 So.2d 802, 804 (Fla. 4th DCA 1999); *Geddis v. State*, 715 So.2d 991, 992 (Fla. 4th DCA 1998). See also *Wiley v. Sowders*, 669 F.2d 386, 389 (6th Cir. 1982).

In consideration of the overwhelming inculpatory evidence, counsel's concessions constituted a reasonable and informed tactical decision. See *Harris v. State*, [768 So.2d 1179] (4th DCA Sept. 20, 2000). See also *Brown*, 755 So.2d at 630 (finding defense counsel's tactical decision to concede guilt to lesser homicide charge reasonable in light of defendant's confession); *Mcneal v. Wainwright*, 722 F.2d 674, 676 (11th Cir. 1982) (holding that defense counsel's arguments to the jury concerning manslaughter were tactical in view of the overwhelming evidence against the defendant). Moreover, the Defendant has failed to demonstrate that there is a reasonable probability that the outcome of his trial would have been different absent these concessions. See *Harris*, [768 So.2d at 1182-83]. Therefore, counsel's decision to argue for a lesser conviction in an attempt to avoid a death sentence does not constitute ineffective assistance of counsel. See *Brown*, 755 So.2d at 630.

(II 194-97).

To prove that counsel rendered ineffective assistance, Lawrence must demonstrate both that Miller's performance was deficient, i.e., that he made such serious errors that he did not function as the counsel guaranteed by the Sixth Amendment, and that the deficient performance prejudiced him, i.e., "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland v. Washington, 466 U.S. 668, 687 (1984). A postconviction movant must make both showings, i.e., both incompetence and prejudice. Id.; Kimmelman v. Morrison, 477 U.S. 365 (1986); Valle v. State, 778 So.2d 960 (Fla. 2001); Asay v. State, 769 So.2d 974 (Fla. 2000); Cherry v. State, 659 So.2d 1069, 1073 (Fla. 1995) ("The standard is not how present counsel would have proceeded, but rather whether there was both a deficient performance and a reasonable probability of a different result.") (emphasis in original). This standard "is highly demanding." Kimmelman, 477 U.S. at 382. Only those postconviction movants "who can prove under Strickland that they have been denied a fair trial by the gross incompetence of their attorneys will be granted" relief. Id.; Rogers v. Zant, 13 F.3d 384, 386 (11th Cir. 1994) (cases granting relief will be few and far between because "[e]ven if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness

grounds unless it is shown that no reasonable lawyer, in the circumstances, would have done so. This burden, which is petitioner's to bear, is and is supposed to be a heavy one.") (emphasis supplied).

Moreover, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Strickland v. Washington, 466 U.S. at 688. Counsel should be presumed competent, and second-guessing counsel's performance through hindsight should be avoided. Id. at 689; Kimmelman; White v. Singletary, 972 F.2d 1218 (11th Cir. 1992); Atkins v. Singletary, 965 F.2d 952 (11th Cir. 1992); Valle, 778 So.2d at 965-66; Shere v. State, 742 So.2d 205 (Fla. 1999); White v. State, 664 So.2d 242 (Fla. 1995).

While the standard for a postconviction movant claiming counsel was ineffective is a demanding one, competent trial counsel must perform at a minimum level, not a maximum one. "The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at the trial." White, 972 F.2d at 1220; see also Hendricks v. Calderon, 70 F.3d 1032, 1039 (9th Cir. 1995) (Strickland v. Washington requires only minimal competence);

Teffeteller v. Dugger, 734 So.2d 1009, 1022 n.14 (Fla. 1999) ("the legal standard is reasonably effective counsel, not perfect or error-free counsel"). A court "need not determine whether counsel's performance was deficient when it is clear that the alleged deficiency was not prejudicial." Williamson v. Dugger, 651 So.2d 84, 88 (Fla. 1994).

When considering ineffective assistance claims, this Court will defer to the circuit court's findings of fact and will review the conclusions regarding deficient performance and prejudice de novo. See Valle, 778 So.2d at 966; Cherry v. State, 781 So.2d 1040, 1048 (Fla. 2000); Stephens v. State, 748 So.2d 1028, 1033-34 (Fla. 1999) (same); see also Blanco v. State, 702 So.2d 1250, 1252 (Fla. 1997) (if the factual findings following an evidentiary hearing are supported by competent substantial evidence, an appellate court will not substitute its judgment for the circuit court's on questions of fact, credibility, or weight); Rose v. State, 675 So.2d 567, 571 (Fla. 1996) (same). The circuit court's findings are supported by the record evidence from both the evidentiary hearing and the trial, and its conclusion that Miller's assistance was not deficient and that Lawrence suffered no prejudice is supported by both the evidence and the law. The denial of relief on this claim, therefore, should be affirmed.

Lawrence relies primarily on Nixon v. Singletary, 758 So.2d 618 (Fla. 2000), but, as the circuit court stated, Nixon is distinguishable from the instant case. Nixon's trial counsel told the jury in both opening and closing guilt-phase arguments that it would find Nixon guilty of the crime charged, i.e., first-degree premeditated murder. Id. at 620. This Court remanded for an evidentiary hearing on Nixon's claim that counsel's argument was, in reality, a guilty plea that he did not agree to enter. Id. at 624. Central to Lawrence's argument is the statement that, "if Nixon can establish that he did not consent to counsel's strategy, then we would find counsel to be ineffective per se and Cronic would control." Id. at 623.

United States v. Cronic, 466 U.S. 648 (1984), was a companion case to Strickland v. Washington, and discussed instances where a defendant would not have to demonstrate the prejudice component of the Strickland v. Washington test for ineffective assistance. Cronic, however, "applies to only a very narrow spectrum of cases where the circumstances leading to counsel's ineffectiveness are so egregious that the defendant was in effect denied any meaningful assistance at all." Chadwick v. Green, 740 F.2d 897, 901 (11th Cir. 1984); Nixon, 758 So.2d at 622 ("Cronic only applies to the narrow spectrum of cases where the defendant was completely denied effective

assistance of counsel"). Such defendant "must show that his counsel's performance was so impeded by the circumstances that it is unlikely that any lawyer could have provided effective assistance given the situation." Id. at 901. This Court remanded for an evidentiary hearing to give Nixon the opportunity to prove his claim. Lawrence, however, has already had the opportunity to prove that his case meets the presumed prejudice standard of Cronic, but failed to do so.

At the evidentiary hearing, collateral counsel quoted portions of trial counsel's arguments and asked Lawrence if he had given Miller permission to argue that he was guilty of some crime. Lawrence answered variously that he could not remember doing so and that, as far as he knew, he did not agree to such argument. (SR I 13-17). Miller, on the other hand, did remember discussing strategy for the trial with Lawrence. Miller testified that, after conducting extensive discovery and in view of Lawrence's numerous confessions, including the taped confession, and the expected eyewitness testimony, keeping Lawrence off death row would be the best possible result. (SR I 32-33). Miller stated that he discussed the situation with Lawrence, who was rather apathetic and disinterested, and that it was decided that the trial strategy would be to use Lawrence's intoxication on the day of the murder as a defense to

premeditation and to portray Brenda as the instigator of the murder. (SR I 32-36). According to Miller, he had several discussions with Lawrence about the strategy of admitting guilt and trying to secure a lesser sentence than death. (SR I 40-41). Such strategy also allowed Miller to argue as nonstatutory mitigation in the penalty phase that Lawrence was remorseful and had told the truth and cooperated with the police (SR I 41-43), which the trial court found as nonstatutory mitigation. (DAR II 236). Lawrence never disagreed with Miller's assessment of the case and the proposed strategy. (SR I 43-44).

In opening argument at the guilt phase, Miller stressed that the murder was not premeditated or planned, "but basically a crime of passion." (DAR V 172, 184, 189-90). Miller stated that the jury was going to find Lawrence "guilty of something," (DAR V 189), but always argued that that "something" should be less than first-degree murder. Thereafter, Miller vigorously cross-examined the state's witnesses, emphasizing how much alcohol Lawrence consumed the day of the murder and Brenda's role in the crime (e.g., DAR V 224 et seq.; DAR V 243 et seq.; DAR V 295 et seq.; DAR VI 343; DAR VI 382 et seq.) and held the state to its burden of proving its case. During closing argument, Miller admitted that Lawrence killed the victim, but argued that the murder was prompted by a jealous rage, not a

premeditated plan (DAR VII 698-99, 701-06, 723) and that Lawrence was too intoxicated to plan to kill the victim. (DAR VII 706-10, 716, 718-19). Finally, Miller argued that, because of the lack of premeditation, the jury could convict Lawrence of no more than second-degree murder or even manslaughter. (DAR VII 724).

At no time did Miller concede that Lawrence was guilty of the crime charged, i.e., first-degree murder. Therefore, Miller's concession of guilt was not the functional equivalent of a guilty plea as in cases such as Nixon and Wiley v. Sowers, 647 F.2d 642 (6th Cir.), cert. denied, 454 U.S. 1091 (1981). Instead, Miller's strategy of being forthright with the jury and arguing for something less than first-degree murder was reasonable trial strategy given Lawrence's confessions and the eyewitness testimony. Brown v. State, 755 So.2d 616, 629-31 (Fla. 2000); Harris v. State, 768 So.2d 1179 (Fla. 4th DCA 2000).

At the penalty phase Lawrence's conviction of first-degree murder was an established fact. Miller's statement in closing argument that the defense had never disputed Lawrence's guilt (DAR III 554) was a simple acknowledgment of the facts of this case and was made in the context of arguing that Lawrence should not be sentenced to death. That this strategy failed does not

mean that Miller rendered ineffective assistance. See Teffeteller, 734 So.2d at 1019-20 (failing to persuade the judge and jury to accept the defense point of view is not ineffectiveness); Haliburton, 691 So.2d at 471 (same); Ferguson v. State, 593 So.2d 508, 511 (Fla. 1992) (same).

The statement in Nixon that "in the future" trial courts should inquire if a concession of guilt has been agreed to by a defendant, 758 So.2d at 625, does not apply to this case. Miller, unlike Nixon's counsel, did not concede that Lawrence committed first-degree premeditated murder. On-the-record agreement to counsel's concession might assist in the review of cases such as Nixon, but the instant case is not the equivalent of Nixon, and Lawrence has failed to demonstrate why such should be required in all cases.<sup>4</sup> Instead, due process does not require a formal on-the-record agreement. See York v. State, 731 So.2d 802 (Fla. 4th DCA 1999); Geddis v. State, 715 So.2d 991 (Fla. 4th DCA 1998).

Lawrence complains that the evidentiary hearing was, essentially, a "swearing match" between him and trial counsel that was, somehow, unfair to him. However, as this Court has

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<sup>4</sup> In Nixon v. Singletary, 758 So.2d 618, 623-25 (Fla. 2000), this Court relied on Wiley v. Sowders, 647 F.2d 642 (6th Cir. 1981) (Wiley I). In Wiley v. Sowders, 669 F.2d 386, 389 (6th Cir. 1981), however, the Sixth Circuit stated that its requiring on-the-record consent in Wiley I was dicta.

stated, "the role of the trial judge in an evidentiary hearing is to make credibility determinations and findings of fact." Shere v. State, 742 at 218 n.7; Bottoson v. State, 674 So.2d 621, 622 n.2 (Fla. 1996) (conflicts in the evidence are to be resolved by the finder of fact); Sireci v. State, 587 So.2d 450, 453 (Fla. 1991) (it "is the trial court's duty to resolve conflicts in the evidence, and that determination should be final if supported by competent, substantial evidence."), cert. denied, 503 U.S. 946 (1992). The circuit court resolved the conflicts in the evidence, and its determination that Miller was more credible than Lawrence is supported by competent, substantial evidence.

Cronic does not control this case. Instead, as the circuit court held, this claim of ineffectiveness should be decided under the Strickland v. Washington standards. See United States v. Earthman, 920 F.2d 934 (6th Cir. 1990); Chadwick, 740 F.2d at 901; Brown, 755 So.2d at 629-31. Lawrence failed to show either substandard performance or prejudice, let alone both, regarding the concession that he was guilty of some crime. Therefore, the circuit court's denial of claim A1 should be affirmed.

### ISSUE III

WHETHER THE CIRCUIT COURT CORRECTLY DENIED  
THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

REGARDING LAWRENCE'S BEING INFORMED OF HIS  
RIGHT TO TESTIFY.

Lawrence argues that the circuit court erred in denying his claim that trial counsel was ineffective for not informing him that he had the right to testify at both the guilt and penalty phases of his trial. He also suggests that this Court should require an affirmative, on-the-record waiver of the right to testify. There is no merit to this claim.

Claim A3 of the amended motion alleged that "[d]efense counsel failed to adequately prepare for trial for failure to advise defendant of his right to testify at the trial (guilt phase or penalty phase) so that the jury was unaware of the extent of his alcohol and drug abuse both long standing and at the time of the crime." (I 23-24). The circuit court granted Lawrence an evidentiary hearing on this claim. (I 104). After the hearing, the court made the following findings in denying relief:

The Defendant alleges that counsel failed to advise the Defendant of his right to testify at trial and, thus, the jury was unaware of the extent of his drug and alcohol abuse at the time of the offense and throughout his life. Further, on account of the Defendant's diminished mental ability, due process requires an on record determination that the Defendant voluntarily and intelligently waived his right to testify.

Similar to his testimony regarding trial strategy discussions, the Defendant testified at the evidentiary hearing that he could not recall any discussions where counsel advised him on his right to testify. (Evidentiary Hr's Tr. at 17) [SR I 17]. On the other hand, Mr. Miller testified that he had lengthy discussions with the Defendant concerning whether he should testify and the Defendant told him "point blank he was not going to testify in either the guilt phase or the penalty phase." (Evidentiary Hr'g Tr. at 39, 44-45) [SR I 39, 44-45]. Counsel said that the Defendant agreed with his position that the Defendant should not testify in the guilt phase due to the potential information that might be revealed on cross-examination. (Evidentiary Hr'g Tr. at 36-39) [SR I 36-39]. As to the penalty phase, counsel encouraged the Defendant to testify but he refused. (Evidentiary Hr'g Tr. at 44-47) [SR I 44-47]. Based on Mr. Miller's testimony, the Court finds that trial counsel advised the Defendant of his right to testify and the Defendant personally made the choice not to testify.

In addition, the Defendant erroneously contends that counsel should have obtained the waiver of his right to testify on-the-record to ensure that the waiver was knowing and intelligent. However, due process does not require that the Defendant waive his right to testify on-the-record. See *Torres-Arboledo v. State*, 524 So.2d 403, 410-411 (Fla. 1988). See also *Carmichael v. State*, 715 So.2d 247, 255 (Fla. 1998) (Pariente, J., concurring in result only). Therefore, the Defendant has failed to demonstrate either a deficient performance by counsel or the probability of a different outcome based on counsel's actions.

(II 197-98).

This claim is governed by the same standards as set out in issue II, supra. First, Lawrence must establish deficient performance by Miller that prejudiced him, i.e., he must show that, but for Miller's failure to inform him of his right to testify, he would not have been convicted and sentenced to death. See Valle; Cherry; Asay. Second, this Court will review the circuit court's conclusions as to ineffectiveness de novo. See Valle; Cherry; Stephens. Finally, the circuit court's findings of fact will not be disturbed if supported by competent substantial evidence. Cherry; Stephens. The record supports the circuit court's findings and conclusions.

Although granted an evidentiary hearing on this claim, Lawrence failed to demonstrate that Miller performed in a substandard manner that prejudiced him. Instead, the record shows that he knew he had the right to testify and affirmatively and adamantly refused to exercise it. Lawrence never stated what his testimony would have been and has not shown a reasonable probability that his testimony would have produced a different result. See Shere, 742 So.2d at 221-22; Cole v. State, 700 So.2d 33 (Fla. 5th DCA 1997); Wilson v. State, 659 So.2d 1253 (Fla.1st DCA 1995).

Citing an out-of-state case, Lawrence argues that this Court should adopt a rule requiring a record waiver of the right to

testify. As he acknowledges, however, this Court has considered and rejected this claim. E.g., Torres-Arboledo v. State, 524 So.2d 410-11 (Fla. 1988); Occhicone v. State, 570 So.2d 902 (Fla. 1990); see State v. Singletary, 549 So.2d 996 (Fla. 1989). Lawrence has presented no good reason to reconsider this claim.

Lawrence again complains that the evidentiary hearing was nothing more than a credibility contest between him and Miller. As set out in issue II, *supra*, however, the court's responsibility at an evidentiary hearing is to resolve conflicts in the evidence. Shere. No error has been shown in the circuit court's denial of claim A3, and that denial should be affirmed.

#### ISSUE IV

##### WHETHER THE CIRCUIT COURT PROPERLY DENIED LAWRENCE'S COMPLAINTS ABOUT THE PROSECUTOR'S ARGUMENT.

Lawrence claims that the circuit court erred in summarily denying his complaints that 1) in the guilt phase the prosecutor argued that the evidence against him was uncontroverted; and 2) in the penalty phase the prosecutor argued that the state had established the under sentence of imprisonment aggravator. There is no merit to this issue.

In claim A13 of the amended postconviction motion Lawrence alleged that the prosecutor's use of the word "uncontroverted" in describing the evidence against him was a prejudicial comment

on his right to remain silent and that trial counsel was ineffective for not objecting. (I 26-27). The court denied this claim as follows:

M. Issue 13 argues that the prosecutor argued repeatedly during closing argument in the guilt phase that the evidence was uncontroverted and trial counsel failed to object or move for mistrial. The Defendant did not testify and these comments were an unfair attempt to comment on his right to not testify.

(1) Volume VII, p.685 of the trial transcripts documents at least six (6) incidents of the prosecutor's comments on uncontroverted evidence. [DAR VII 685]. These comments on the uncontroverted nature of certain evidence developed during the trial were not an indirect comment on Defendant's right to remain silent. The Florida Supreme Court has addressed the area of permissible comments in *Melton v. State*, 638 So.2d 927 (Fla. 1994), citing *White v. State*, 377 So.2d 1149 (Fla. 1979) which permits the prosecutor to refer to the evidence as it exists before the jury, *i.e.*, that the evidence is uncontroverted.

(2) The statements are within the area of permissible comments [and] no hearing is required.

(I 109-10).

In its findings the circuit court relied on Melton v. State, 638 So.2d 927 (Fla. 1994), and White v. State, 377 So.2d 1149 (Fla. 1979). As Lawrence points out, this Court qualified White in Rodriguez v. State, 753 So.2d 29, 37-39 (Fla. 2000), based on

the remarks made in White, Rodriguez, and other cases cited in Rodriguez. All of the cases relied on, both in Rodriguez and currently by Lawrence, are factually distinguishable.

In Rodriguez this Court held that the prosecutor's argument that there was no evidence implicating anyone but the defendant and a co-perpetrator and that "[t]here were no two sides" was an improper comment on silence. Rodriguez, 753 So.2d at 37. The Court relied on State v. Marshall, 476 So.2d 150 (Fla. 1985), which found that the prosecutor's comment that "the only person the jury heard from" was a comment on silence where only that witness and the defendant, who did not testify, could have testified to the events. Id. at 151-53. Rodriguez also relied on Heath v. State, 648 So.2d 660, 663 (Fla. 1994), where the prosecutor stated that the defendant's brother would be the only witness to testify as to what happened where the brother and the defendant were the only eyewitnesses. Lawrence also relies on Kolsky v. State, 182 So.2d 305, 309 (Fla. 2d DCA 1966), where the prosecutor vouched for his witness and stated that Kolsky lied, and Osgood v. State, 192 So.2d 64, 65 (Fla. 2d DCA 1966), where the state conceded that an improper comment on silence was made. Nothing similar happened in this case.

Lawrence's theory of defense was voluntary intoxication and that Brenda instigated the homicide. As pointed out in issue

II, supra, the evidence against Lawrence, including his confessions and the eyewitness testimony, was uncontroverted and overwhelming. In the cases Lawrence relies on the evidence was not as strong as in this case, and the prosecutors' comments could be construed as pointing out the fact that the defendants did not take the stand and deny the crimes with which they were charged. Given the facts of this case, however, there was no way to demonstrate that Lawrence did not commit some crime. As this Court pointed out in Melton, 638 So.2d at 930: "A prosecutor can review the evidence as a whole and point out that it is uncontradicted." This is only what Lawrence's prosecutor did in closing argument.

The prosecutor's argument, on the facts of this case, is not reasonably susceptible to being interpreted as a comment on Lawrence' failure to testify. As the circuit court found, it was within the arena of permissible comments. Lawrence has failed to demonstrate that all reasonable lawyers would have objected to the prosecutor's argument and that the argument prejudiced him. Thus, he has not shown that his counsel was ineffective, and the circuit court's summary denial of claim A13 should be affirmed.

Lawrence also complains, in a single sentence, that the prosecutor improperly argued that one witness' testimony

established an aggravator. This is a combination of claims A7 and E in the amended postconviction motion. (I 25, 28). The circuit court summarily denied these claims as follows:

H. Issue 7 argues trial counsel failed to object or move for mistrial during the State's argument in the penalty phase which sought to shift the burden of proof as to the defense of intoxication and mental impairment.

(1) The example provided to support the assertion quotes the prosecutor's argument in support the aggravator for the Defendant having committed the crime while under a sentence of imprisonment. [DAR III 524]. Defendant may not simply file motions containing conclusory allegations, the motion must allege specific facts that demonstrate deficiency on the part of counsel. *Kennedy v. State*, 547 So.2d 912 (Fla. 1st DCA 1989).

(2) No evidentiary hearing required.

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2. Claims 2 through 14 (Grounds B through N) have been categorized into 7 identifiable categories and addressed by the court as to their merit for conducting an evidentiary hearing.

A. Category 1, claims that could have or should have been raised on direct appeal.

Claim 5, (Ground E) Due Process Violation on Improper Aggravator Evidence and claim 6, (Ground F) Trial Court improperly admitted hearsay evidence on wire transfer of money are claims alleging the court ruled incorrectly. Both claims were

extensively argued during the trial and they could have or should have been raised on direct appeal and are therefore procedurally barred. No hearing is required.

(I 107, 110-11).

The complaint about the circuit court's summary denial of claims A7 and E is insufficiently briefed for this Court to review it. As stated in Shere, 742 So.2d at 217 n.6: "In a heading in his brief, Shere asserts that the trial court erred by summarily denying nineteen of the twenty-three claims raised in his 3.850 motion. However, for most of these claims, Shere did not present any argument or allege on what grounds the trial court erred in denying these claims. We find that these claims are insufficiently presented for review." Moreover, "[t]he purpose of an appellate brief is to present arguments in support of the points on appeal." Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990) This subclaim, therefore, should be summarily denied. See also Teffeteller, 734 So.2d at 1020; Coolen v. State, 696 So.2d 738, 742 n.2 (Fla. 1997); Kight v. Dugger, 574 So.2d 1066, 1073 (Fla. 1990); Roberts v. State, 568 So.2d 1255, 1260 (Fla. 1990).

There is also no merit to any complaint about the applicability of the under imprisonment aggravator. Colleen Poole, a parole supervisor with the Department of Corrections, testified at the penalty phase that Lawrence was given a

conditional release from state prison on January 10, 1994; that he would be under state supervision until October 18, 1995; that he was under such supervision on July 28, 1994, the date of this murder; and that he was released from prison on conditions, violation of which would result in his being sent back to prison. (DAR III 455-56). These facts support finding under sentence of imprisonment in aggravation, and this Court affirmed that aggravator on direct appeal. See Lawrence, 698 So.2d at 1221-22. As the circuit court found, Lawrence's conclusory allegations warrant only summary denial. See Asay, 769 So.2d at 989. The court's ruling should be affirmed.

#### ISSUE V

WHETHER THE CIRCUIT COURT PROPERLY SUMMARILY DENIED THE CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR NOT REQUESTING THE APPOINTMENT OF CO-COUNSEL.

In claim A8 of his amended motion Lawrence argued that trial counsel was ineffective for not seeking the appointment of co-counsel. (I 25). The circuit court summarily denied the claim because "the Florida Supreme Court does not recognize a Constitutional right to co-counsel or second chair counsel for the Defendant in capital cases. Jimenez v. State, 703 So.2d 437 (Fla. 1997)." (I 108). See also Trease v. State, 768 So.2d 1050 (Fla. 2000); Ferrell v. State, 653 So.2d 367 (Fla. 1995),

cert. denied, 520 U.S. 1123 (1997); Lowe v. State, 650 So.2d 969 (Fla. 1994), cert. denied, 516 U.S. 857 (1995); Armstrong v. State, 642 So.2d 730 (Fla. 1994), cert. denied, 514 U.S. 1085 (1995). Lawrence acknowledges that appointment of co-counsel in capital cases is discretionary with the courts. (Initial brief at 39). However, he states: "Due to its particular nature a bifurcated death trial is so complex that the issues of guilt and penalty must be under taken by separate counsel." (Initial brief at 39-40). He also urges the Court to adopt a mandatory co-counsel rule for capital cases and states that the instant trial court abused its discretion in failing to appoint co-counsel. (Initial brief at 40).

The request for a mandatory rule and the allegation that the court abused its discretion by not appointing co-counsel (apparently on its own motion) are raised for the first time in this appeal. Claims raised for the first time on appeal, however, are procedurally barred. See Shere v. State, 742 So.2d 215 (Fla. 1999); Doyle v. State, 526 So.2d 909 (Fla. 1988). The last two claims in this issue, therefore, should be summarily denied.

As alleged in the amended motion, "Defendant's counsel was inadequately prepared for a death penalty as he was not assisted by death penalty counsel." (I 25). That single conclusory

sentence, totally unsupported by facts, is insufficient to state a claim for relief. See Asay, 769 So.2d at 989 (summary denial is proper "for failure to comply with the requirement in rule 3.850(c)(6) that defendants allege 'a brief statement of the facts (and other conditions) relied on in support of the motion.'" The claim ignores the fact that at the penalty phase counsel presented Lawrence's school and prison records (DAR III 460), testimony from Lawrence's brother, a psychologist, and a psychiatrist (DAR III 461; 494; 496), and argued strenuously that Lawrence should not be sentenced to death. (DAR III 532). Lawrence has failed to show any error in the circuit court's summary denial of this conclusory and ill-pled claim, and that denial should be affirmed.

#### ISSUE VI

WHETHER TRIAL COUNSEL WAS INEFFECTIVE  
REGARDING THE INSTRUCTION ON THE UNDER  
SENTENCE OF IMPRISONMENT AGGRAVATOR.

Claim L of the amended postconviction motion alleged that trial counsel was ineffective for failing to object to the instruction given on the under sentence of imprisonment aggravator or to proffer "adequate" instructions. (I 32). The circuit court summarily denied the claim because it had been included to preserve the jury instruction complaint for future

federal proceedings. (I 111-12). This holding should be affirmed.

This claim is procedurally barred because, if preserved, it could have been raised on direct appeal. Occhicone v. State, 768 So.2d 1037, 1040 n.3 (Fla. 2000); Downs v. State, 740 So.2d 506, 517 (Fla. 1999). However, the trial court gave the standard instruction on this aggravator, and that instruction has not been declared invalid. Counsel, therefore, cannot be deemed ineffective. See Waterhouse, slip op. at 38-39; Downs, 740 So.2d at 517-18; Mendyk v. State, 592 So.2d 1076, 1080 (Fla. 1992). No relief is warranted on this issue.

CONCLUSION

For the foregoing reasons the State of Florida asks this Court to affirm the denial of Lawrence's motion for postconviction relief.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Joseph F. McDermott, 7116-A Gulf Boulevard, St. Pete Beach, Florida 33706, this 5th day of June 2001.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210.

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