

IN THE SUPREME COURT OF FLORIDA

WILLIAM REAVES,

Appellant,

vs.

Case No. 00-0840

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINETENTH JUDICIAL CIRCUIT JUDICIAL CIRCUIT,
IN AND FOR INDIAN RIVER COUNTY, FLORIDA

AMENDED ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS ii

TABLE OF CITATIONS iv

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

ISSUE I

SUMMARY DENIAL OF APPELLANT’S CLAIM OF
INEFFECTIVE ASSISTANCE OF GUILT AND PENALTY
PHASE COUNSEL WAS PROPER (Appellant’s claim IB
& C restated) 4

ISSUE II

THE ISSUE OF PROSECUTORIAL MISCONDUCT IS
PROCEDURALLY BARRED (restated) 41

ISSUE III

REAVES HAS WAIVED HIS CLAIM TO PURSUE PUBLIC
RECORDS (restated) 43

ISSUE IV

THE FINDINGS THAT REAVES’ CLAIM OF INNOCENCE OF
THE DEATH PENALTY IS LEGALLY INSUFFICIENT AND

PROCEDURALLY BARRED WAS CORRECT (restated) 45

ISSUE V

THE TRIAL COURT DID NOT ERR IN FINDING THE CLAIM OF JUROR MISCONDUCT INSUFFICIENT (restated) 49

ISSUE VI

THE TRIAL COURT DID NOT ERR IN FINDING PROCEDURALLY BARRED THE ISSUE OF MR. HINTON’S UNAVAILABILITY AND THE READING OF HIS PRIOR TRIAL TESTIMONY IN REAVES’ RETRIAL (restated) 55

ISSUE VII

SUMMARY DENIAL OF REAVES’ CLAIM CHALLENGING THE PENALTY PHASE INSTRUCTIONS WAS PROPER (restated) . 56

ISSUE VIII

CHALLENGE TO STATE’S DECISION TO SEEK THE DEATH PENALTY IS LEGALLY INSUFFICIENT (restated) 64

ISSUE IX

DENIAL OF RELIEF BASED UPON CLAIM PRESENCE OF UNIFORMED OFFICERS ATTENDED TRIAL WAS PROPER (restated). 66

ISSUE X

FLORIDA’S CAPITAL SENTENCING IS CONSTITUTIONAL (restated) 66

ISSUE XI

THE TRIAL COURT’S SUMMARY DENIAL OF THE CLAIM OF CUMULATIVE ERROR WAS PROPER (restated) 67

ISSUE XII

THE CLAIM OF JUDICIAL BIAS WAS DENIED PROPERLY
BY THE TRIAL COURT (restated)69

ISSUE XIII

THE CHALLENGE TO THE JURY COMPOSITION IS
PROCEDURALLY BARRED (restated) 71

ISSUE XIV

REAVES' ALLEGATION THAT HE IS INSANE TO BE
EXECUTED IS LEGALLY INSUFFICIENT (restated)73

CONCLUSION 75

CERTIFICATE OF SERVICE 75

CERTIFICATE OF FONT 75

TABLE OF CITATIONS

CASES	PAGES
-------	-------

FEDERAL CASES

<u>Brady v. Maryland</u> , 373 U.S. 83 (1963)	40
<u>Hamilton v. Ford</u> , 969 F.2d 1006 (11th Cir. 1992)	8
<u>Hildwin v. Florida</u> , 490 U.S. 638 (1989)	67
<u>Johnson v. Singletary</u> , 938 F.2d 1166 (11th Cir.1991) <u>cert. denied</u> , 506 U.S. 930 (1992)	46
<u>LoConte v. Dugger</u> , 847 F.2d 745 (11th Cir. 1988)	7
<u>McCleskey v. Kemp</u> , 481 U.S. 2792 (1987)	65
<u>Proffitt v. Florida</u> , 428 U.S. 242 (1976)	67
<u>Reaves v. Florida</u> , 513 U.S. 990 (1994)	12
<u>Sawyer v. Whitley</u> , 505 U.S. 333 (1992)	46
<u>Spaziano v. Florida</u> , 468 U.S. 447 (1984)	67
<u>Strickland v. Washington</u> , 466 U.S. 686, 687 (1984)	8
<u>Walton v. Arizona</u> , 497 U.S. 639 (1990)	67
<u>Williams v. Taylor</u> , 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)	9

STATE CASES

<u>Anderson v. State</u> , 627 So. 2d 1170 (Fla. 1993)	7
<u>Arbelaez v. State</u> , 25 Fla. L. Weekly S976 (Fla. October 19, 2000)	23, 30
<u>Armstrong v. State</u> , 642 So. 2d 730 (Fla. 1994)	36
<u>Asay v. State</u> , 769 So. 2d 974 (Fla. 2000)	43
<u>Asay v. State</u> , 25 Fla. L. Weekly S523 (Fla. June 29, 2000)	23
<u>Breedlove v. State</u> , 595 So. 2d 8 (Fla. 1992)	36
<u>Brown v. State</u> , 565 So. 2d 304 (Fla.), <u>cert. denied</u> , 498 U.S. 992 (1990)	63
<u>Caso v. State</u> , 524 So. 2d 422 (Fla. 1988)	70
<u>Cherry v. State</u> , 659 So. 2d 1069 (Fla. 1995)	8
<u>Cherry v. State</u> , 659 So. 2d 1071 (Fla. 1995)	39
<u>Dade County Sch. Board v. Radio Station WQBA</u> , 731 So. 2d 638 (Fla. 1999)	70
<u>Davis v. State</u> , 520 So. 2d 572 (Fla. 1988)	64
<u>Demps v. Dugger</u> , 714 So. 2d 365 (Fla.1998)	63
<u>Demps v. State</u> , 761 So.2d 302 (Fla. 2000)	7,41
<u>Foster v. State</u> , 614 So. 2d 455 (Fla. 1992), <u>cert. denied</u> , 510 U.S. 951 (1993)	66
<u>Fotopoulos v. State</u> , 608 So. 2d 784 (Fla. 1992)	67
<u>Freeman v. State</u> , 761 So. 2d 1055 (Fla. 2000)	43

<u>Freeman v. State</u> , 25 Fla. L. Weekly S451 (Fla. June 8, 2000)	24
<u>Gaskin v. State</u> , 737 So. 2d 509 (Fla. 1999)	44
<u>Gilliam v. State</u> , 582 So. 2d 610 (Fla. 1991)	50
<u>Gordon v. State</u> , 704 So. 2d 107 (Fla. 1997)	73
<u>Gorham v. State</u> , 521 So. 2d 1067 (Fla. 1988)	64
<u>Harbour Island Security v. Doe</u> , 652 So. 2d 1198 (2d DCA 1995)	54
<u>Hildwin v. State</u> , 654 So. 2d 107 (Fla. 1995)	9
<u>Huff v. State</u> , 622 So. 2d 982 (Fla. 1993)	53
<u>Huff v. State</u> , 762 So. 2d 476 (Fla. 2000)	9
<u>Hunter v. State</u> , 660 So. 2d 244 (Fla. 1995), cert. denied, 516 U.S. 1128 (1996)	67
<u>Jackson v. State</u> , 648 So. 2d 85 (Fla. 1994)	60
<u>Jennings v. State</u> , 583 So. 2d 316 (Fla. 1991)	20
<u>Jennings v. State</u> , 718 So. 2d 144 (Fla. 1998)	49
<u>Johnson v. State</u> , 583 So. 2d 657 (Fla. 1991)	32
<u>Johnson v. State</u> , 593 So. 2d 206 (Fla. 1992)	54
<u>Johnson v. State</u> , 660 So. 2d 637 (Fla. 1995)	20
<u>Johnson v. State</u> , 25 Fla. L. Weekly S578 (Fla. July 13,2000) .15	
<u>Johnston v. State</u> , 769 So.2d 990, 1001 (Fla. 2000)	33
<u>Jones v. State</u> , 732 So. 2d 313 (Fla. 1999)	10

<u>Kearse v. State</u> , 770 So. 2d 1119 (Fla. 2000)	44
<u>Kelley v. State</u> , 569 So. 2d 754 (Fla. 1990)	42
<u>Kennedy v. State</u> , 547 So.2d 912 (1989)	6
<u>Kight v. Dugger</u> , 574 So. 2d 1066 (Fla. 1993)	9
<u>Kokal v. State</u> , 718 So. 2d 138 (Fla. 1998)	32
<u>Lambrix v. State</u> , 559 So. 2d 1137 (Fla. 1990)	52
<u>LeCroy v. Dugger</u> , 727 So. 2d 236 (Fla. 1998)	15
<u>Lecroy v. State</u> , 24 Fla. L. Weekly S13, 14 (Fla. 1998)	20
<u>Linehan v. State</u> , 476 So. 2d 1262 (Fla. 1985)	38
<u>Lopez v. Singletary</u> , 634 So. 2d 1054 (Fla. 1993)	45
<u>Mann v. State</u> , 770 So. 2d 1158 (Fla. 2000)	51
<u>Medina v. State</u> , 573 So.2d 93 (Fla. 1990)	42
<u>Mendyk v. State</u> , 592 So. 2d 1076 (Fla. 1992)	17
<u>Metropolitan Dade Cty. V. McKenzie</u> , 555 So. 2d 885 (Fla. 3rd DCA 1990)	55
<u>Muhammad v. State</u> , 603 So. 2d 488 (Fla. 1992)	48
<u>Nelms v. State</u> , 596 So. 2d 441 (Fla. 1992)	34
<u>Occhicone v.State</u> , 768 So.2d 1037 (Fla. 2000)	7
<u>Occichone v. State</u> , 570 So. 2d 902 (Fla. 1990)	41
<u>Occhicone v. State</u> , 25 Fla. L. Weekly S529 (June 29, 2000)	8

<u>Parker v. Dugger</u> , 537 So. 2d 969 (Fla. 1988)	59
<u>Patton v. State</u> , 25 Fla.L. Weekly S749, 752 (Sept. 28,2000). . .	8
<u>Pooler v. State</u> , 704 So. 2d 1375 (Fla. 1997)	59
<u>Provenzano v. Dugger</u> , 561 So. 2d 541 (Fla. 1990)	20
<u>Provenzano v. Dugger</u> , 561 So. 2d 546 (Fla.1991)	10
<u>Rabun and Partners v. Ashoka Enterprises</u> , 604 So. 2d 1284 (Fla. 5th DCA 1995)	54
<u>Ragsdale</u> , 720 So. 2d 203 (Fla. 1998)	6
<u>Ray Cooke Enterprises v. Parsons</u> , 627 So. 2d 1267 (Fla. 4th DCA 1993)	54
<u>Reaves v. State</u> , 574 So. 2d 105 (Fla. 1991)	1,30
<u>Reaves v. State</u> ,639 So.2d 1 (Fla. 1994)	1, 24, 36, 56
<u>Rivera v. Dugger</u> , 629 So. 2d 105 (Fla. 1993)	66
<u>Rivera v. State</u> , 717 So. 2d 477 (Fla. 1998).	8, 36
<u>Roberts v. State</u> , 568 So. 2d 1255 (Fla. 1990)	6
<u>Robinson v. State</u> , 707 So. 2d 688 (Fla. 1998)	72
<u>Robinson v. Moore</u> , 25 Fla. Law. Weekly S647 (Fla. Aug. 28, 2000)	65
<u>Roland v. State</u> , 584 So. 2d 68 (Fla. 1st DCA 1991)	50
<u>Rose v. State</u> , 617 So. 2d 291 (Fla. 1993), cert. denied, 510 U.S. 903 (1993)	6

<u>Routly v. State</u> , 590 So. 2d 397 (Fla. 1991)	41
<u>Rutherford v. State</u> , 727 So. 2d 216 (Fla. 1999)	20
<u>Sconyers v. State</u> , 513 So. 2d 1113 (Fla. 2d DCA 1987)	50
<u>Shellito v. State</u> , 701 So. 2d 837 (Fla.1997)	63
<u>Shere v. State</u> , 579 So. 2d 86 (Fla. 1991)	51
<u>Sims v. State</u> , 754 So. 2d 657 (Fla. 2000)	67
<u>Sochor v. State</u> , 619 So. 2d 285 (Fla. 1993)	62
<u>State v. Bias</u> , 653 So. 2d 380 (Fla. 1995)	29
<u>State v. Dixon</u> , 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974)	62
<u>State v. Reichmann</u> , 25 Fla. L. Weekly S163 (Fla. February 24, 2000)	9
<u>Stephens v. State</u> , 748 So. 2d 1028 (Fla. 1999)	7
<u>Suarez v. Dugger</u> , 527 So. 2d 190 (Fla. 1988)	58
<u>Suarez v. State</u> , 481 So. 2d 1201 (Fla. 1985)	57
<u>Teffeteller v. Dugger</u> , 734 So. 2d 1009 (Fla. 1999)	7
<u>Thompson v. State</u> , 759 So. 2d 650 (Fla. 2000)	64
<u>Valle v. State</u> , 581 So. 2d 40 (Fla. 1991).	58
<u>Valle v. State</u> , 705 So. 2d 1331 (Fla. 1997)	71
<u>Van Poyck v. State</u> , 696 So. 2d 686 (Fla. 1997)	32
<u>Way v. State</u> , 568 So. 2d 1263 (Fla. 1990)	34

White v. State, 559 So. 2d 1097 (Fla. 1990) 32

Woods v. State, 531 So. 2d 79 (Fla. 1988) 74

Zeigler v. State, 452 So. 2d 537 (Fla. 1984),
sentence vacated on other grounds, 524 So. 2d 419 (Fla. 1988) 68

MISCELLANEOUS

Fla. Std. Jury Instr (Crim.) 2.04(a) [pg. 16] 64

PRELIMINARY STATEMENT

Appellant, WILLIAM REAVES, was the defendant in the trial court below and will be referred to herein as "Appellant." Appellee, the State of Florida, was the petitioner in the trial court below and will be referred to herein as "the State." Reference to the proceedings below will be by the symbol "PCR," and reference to the original record will be by the symbol "ROA," followed by the appropriate volume and page number(s).

STATEMENT OF THE CASE AND FACTS

William Reaves was convicted and sentenced to death on September 2, 1987. On appeal, this Court reversed the conviction and sentence because the prosecutor, State Attorney Bruce Colton, had represented Reaves as an Assistant Public Defender in a prior unrelated case. Reaves v. State, 574 So.2d 105 (Fla. 1991).

On remand before the Honorable James Balsiger, Reaves was again convicted of first degree murder and sentenced to death on February 25, 1992. In aggravation, Judge Balsiger found that Reaves had three prior violent felony convictions, had committed the murder to avoid arrest, and that the murder was especially heinous, atrocious, or cruel ("HAC"). Reaves v. State, 639 So.2d 1, 3 n.2 (Fla. 1994). In mitigation, Judge Balsiger found Reaves had been honorably discharged from the

military, had a good reputation in his community until he was fifteen or sixteen years of age, and was a good son and brother. Reaves, 639 So.2d at 3 n.3.

On appeal, this Court affirmed the conviction and sentence of death after finding that it was harmless error to have precluded the defense from presenting an unavailable witness' inconsistent statements and struck the HAC aggravator. Id., at 6. Following the affirmance, Reaves' petition for writ of certiorari to the United States Supreme Court was denied. Reaves v. Florida, 513 U.S. 990 (1994).

Subsequently, Reaves filed his final amended 3.850 motion, which he verified on February 22, 1999. (PCR Vol. 4, 543) The State responded on May 13, 1999 (PCR Vol. 5, 629). Following the summary denial of relief (PCR Vol. 7, 1086), this appeal ensued.

SUMMARY OF ARGUMENT

Issue I - Summary denial of appellant's claim of ineffective assistance of counsel was proper given that it was wholly refuted from the original record.

Issue II - The trial court properly found the allegation of prosecutorial misconduct is procedurally barred as it was raised and rejected on direct appeal.

Issue III - The trial court properly found that appellant any further complaint regarding alleged incomplete public records. Issue IV - Summary denial of Reaves' claim that he was innocent of death penalty was proper as the claim was procedurally barred and legally insufficient as pled.

Issue V - Summary denial of Reaves' allegation of juror misconduct was proper as the allegation was lacking in factual specificity.

Issue VI - Reaves' challenge to the admissibility of a witness's prior testimony was procedurally barred, as a variation of same was raised and rejected on direct appeal. Therefore, summary denial was proper.

Issue VII - Reaves' constitutional challenge to the aggravators and applicable jury instructions was procedurally barred, therefore summary denial was proper.

Issue VIII - Reaves' challenge to the prosecutor's decision to seek the death penalty was legally insufficient as pled. The trial court's summary denial was proper.

Issue IX - Reaves' claim that the presence of uniformed police officers in the courtroom unfairly prejudiced him was procedurally barred as it was raised and rejected on direct appeal.

Issue X - Reaves' challenge to the death penalty statute was procedurally barred as it was raised and rejected on direct appeal.

Issue XI - Reaves' claim that his trial was fundamentally unfair because of cumulative error was properly denied as it is a claim that should have been raised on direct appeal.

Issue XII - Reaves' challenge to the trial court's impartiality was properly denied as it was both untimely and not cognizable in postconviction.

Issue XIII - Reaves' challenge to the racial make-up of the jury is legally insufficient as pled, and therefore summary denial was appropriate.

Issue XIV - Reaves' claim that he is insane to be executed is legally insufficient as pled, and therefore summary denial was proper.

ARGUMENT

ISSUE I

SUMMARY DENIAL OF APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF GUILT AND PENALTY PHASE COUNSEL WAS PROPER (Appellant's claim IB & C restated)

Appellant alleges that he received ineffective assistance of counsel at both phases of his trial. He further argues that the trial court incorrectly denied relief absent an evidentiary hearing. With respect to counsel's performance at the penalty phase, appellant presents his claim under three separate sub-issues. The first sub-issue alleges that trial counsel, Mr. Kirschner, failed to properly utilize the services of experts in addictionology, and psychopharmacology, and failed to hire an African-American expert in the area of neuropsychology, and/or psychiatry. (PCR Vol. 12 306-307, 339, 373-374). It is further alleged that counsel did not provide his mental health expert, Dr. Weitz, with appellant's DOC files, which would provided further documentation of chronic drug abuse and prior head injury, (PCR Vol. 12 336, 338), nor did the expert conduct sufficient psychological testing. Had he done so, a diagnosis of post-

traumatic-stress syndrome would have been made. (PCR Vol. 12 306-307, 336-339, 374-375). Trial counsel's failure to do so resulted in the absence of evidence that would have adequately integrated Reaves chronic substance abuse, and intoxication at the time of the murder, with his traumatic Vietnam combat experience. A proper investigation and presentation of this evidence through appropriate mental health experts would have resulted in: (1) a finding of post-traumatic stress disorder; (2) chronic poly-substance abuse sufficient to establish statutory mitigation; (3) organic brain damage¹; (4) and negate any finding of antisocial personality disorder.² The trial court summarily denied this claim as follows, "This claim also is refuted by the record. Dr. Weitz, the defense expert, testified that Reaves suffered from poly-substance abuse, anti-social personality disorder, and Reaves' traumatic experiences in the Vietnam war resulted in a finding that he suffered from "Vietnam Syndrome," at the time of the murder. His ultimate conclusion was that the Defendant committed the murder while he was under the influence of an extreme mental or emotional disturbance, and that his ability to conform his conduct to the requirements of the law, was impaired." (PCR Vol. 7 1099). Additionally, the trial court noted that the jury

¹ A qualified neurologist would have tested for organic brain damage based on Reaves history of head injuries. Such tests led current counsel "to believe" that Reaves has organic brain damage. (PCR Vol. 7 337-338).

² Dr. Weitz, testified at the penalty phase that Reaves suffers from anti-social personality disorder. (ROA Vol. XIII 2041).

was instructed on both of these mental mitigators. (PCR Vol. 7 1099). Finally, the trial court also concluded as a matter of law the following, “The fact that collateral relief counsel now has experts who will testify that the Defendant suffers from post-traumatic stress disorder, brain damage, and drug addiction, does not establish that the original evaluation was deficient. See Rose v. State, 617 So. 2d 291, 295 (Fla. 1993), *cert. denied*, 510 U.S. 903 (1993).” (PCR Vol. 7 1095). A review of the proceedings below as well as the record on appeal clearly establish that summary denial of this claim was proper. See Roberts v. State, 568 So. 2d 1255, 1259 (Fla. 1990)(upholding summary denial of ineffective assistance of counsel claim based on trial court’s conclusion that penalty phase presentation of evidence was very detailed).

When assessing the propriety of denying relief absent an evidentiary hearing, this Court has repeatedly held that summary denial is appropriate, “where the motion lacks sufficient factual allegations, or where alleged facts do not render the judgment vulnerable to collateral attack, the motion may be summarily denied.” Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989). In other words, “[a] hearing is warranted on an ineffective assistance of counsel claim only where a defendant alleges specific facts, not conclusively rebutted by the record, which demonstrate a deficiency in the performance that prejudiced the defendant. A summary or conclusory allegation is insufficient to allow the trial court to examine the specific allegations against the record.” Ragsdale v. State, 720 So.2d 203, 207.(Fla. 1998).

When summarily denying nonbarred claims, trial court's must either (1) conclude that the claim is factually insufficient, i.e., insufficiently pled, or legally insufficient as a matter of law, or (2) conclude that the record conclusively refutes the claim and then explain how the motion and records conclusively show that the defendant is not entitled to relief or attach those portions of the record which support the summary denial. See 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."). Teffeteller v. Dugger, 734 So. 2d 1009, 1016 (Fla. 1999)(affirming summary denial were trial court's denial was based on the existing record).

In cases where there has been a summary denial, the standard of review is de novo for pure questions of law. Demps v. State, 761 So.2d 302 (Fla. 2000) (applying de novo review to summary denial). "To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or the record must conclusively refute them." Occhicone v. State, 768 So.2d 1037, 1041 (Fla. 2000). Under this standard, the instant summary denial should be affirmed.

When reviewing the propriety of the trial court's order, the court's legal conclusion regarding trial counsel's performance is subject to an independent *de novo* review. Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999). Although the trial court

did not make factual findings subsequent to an evidentiary hearing, the facts developed at the original trial, which support the summary denial should be upheld unless they are clearly erroneous. Cf. LoConte v. Dugger, 847 F. 2d 745, 750 (11th Cir. 1988)(explaining that clearly erroneous standard applies to all findings of fact reached by lower court upon a de novo review of the state court record); Hamilton v. Ford, 969 F.2d 1006, 1010 (11th Cir. 1992)(same).

In order to be entitled to relief on this claim, Reaves must demonstrate the following:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

Strickland v. Washington, 466 U.S. 686, 687 (1984). Moreover, the ability to create a more favorable or appealing strategy several years after the fact, does not translate into deficient performance at trial. Patton v. State, 25 Fla. L. Weekly S749, 752 (September 28, 2000)(precluding appellate court from viewing issue of trial counsel's performance with heightened perspective of hindsight); Rose v. State, 675 So. 2d 567, 571 (holding disagreement with trial counsel's choice of strategy does not establish ineffective assistance of counsel); Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995)(concluding standard is not how current counsel would have proceeded in

hindsight); Rivera v. State, 717 So. 2d 482, 486 (Fla. 1998); Occhicone v. State, 25 Fla. L. Weekly S529 (June 29, 2000)(same).

Prior to denying Reaves' request for an evidentiary hearing, the trial court conducted a thorough hearing addressing each claim on the merits. (PCR Vol. 7 268-378). Both sides articulated reasons for urging the court to either hold an evidentiary hearing or deny relief based on the record below. The trial court, well aware of the this Court's clear preference for granting evidentiary hearings, was able to conclude that no such hearing was warranted in the instant case. (PCR Vol. 7 1103). Given the detailed deposition of Dr. Weitz prior to re-trial, his proffered testimony prior to the guilt phase, and his ultimate testimony at the penalty phase, the trial court's rationale for summary denial is clear from the order and is proper. See Huff v. State, 762 So. 2d 476, 481 (Fla. 2000)(upholding summary denial after trial court conducted lengthy hearing and denied claims either because they were procedurally barred, legally insufficient, or refuted from the record); Kight v. Dugger, 574 So. 2d 1066, 1072 (Fla. 1993)(upholding summary denial since record on appeal demonstrates that counsel's performance was adequate or decisions were strategic); Teffeteller, 734 So. 2d at 1016 (same).

In support of his claim, Reaves relies on Hildwin v. State, 654 So. 2d 107 (Fla. 1995); State v. Reichmann, 25 Fla. L. Weekly S163 (Fla. February 24, 2000); and Williams v. Taylor, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). However, the factual

premise for concluding that trial counsel was deficient in all those cases was the complete failure of counsel to conduct any investigation into mitigation. Hildwin 654 So. 2d at 110; Riechmann, 25 Fla. L. Weekly at S164-165; Williams, 146 L.Ed. 2d at 419-421; See also Cherry v. State, 25 Fla. L. Weekly S719, 721 (September 28, 2000)(distinguishing Hildwin since trial counsel's failure to present mitigating evidence of drug abuse was not predicated upon lack of investigation but because the evidence at trial did not support the proposed mitigation). In contrast, and discussed in greater detail below, the record on appeal establishes that trial counsel conducted a very thorough investigation and provided Dr. Weitz with sufficient information necessary to complete a competent evaluation. Simply because that investigation did not lead Dr. Weitz to conclude that Reaves suffered from post-traumatic stress syndrome, or uncover evidence of alleged organic brain damage, does not entitle him to relief. Reaves' good fortune in finding mental health professionals who will now opine that he suffers from such maladies and that he does not suffer from anti-social personality disorder, does not prove that a competent investigation and subsequent evaluation were not conducted at the time of trial. See Rose v. State, 617 So. 2d 291, 295 (Fla. 1993)(rejecting claim that initial findings of mental health experts was deficient simply because defendant obtains new diagnosis of organic brain damage); Provenzano v. Dugger, 561 So. 2d 546 (Fla.1991)(same); Jones v. State, 732 So. 2d 313, 319 (Fla.

1999)(finding counsel's decision not to pursue further mental health investigation after receiving initial unfavorable report reasonable).

The penalty phase theory of defense was centered on the dramatic change in Reaves' life after his Vietnam experience. In support of his claim that Reaves was severely affected by his combat experience, trial counsel presented Dr. Weitz, a clinical psychologist.³ Trial counsel specifically asked for the appointment of Weitz for the purpose of assessing for the presence of post-traumatic stress syndrome. (PCR Vol. 8 1216). Dr. Weitz is a qualified expert in the area of military psychology, with specialized training in the area of post-traumatic-stress syndrome and Vietnam syndrome. (ROA Vol. XIII 2033-2034). At the time of trial, Weitz's twenty-year career was centered largely in clinical and military psychology. He trained at Walter Reed Army Hospital, and was later employed at the Department of Veteran Affairs specializing in readjustment counseling for Vietnam veterans. Eventually he became Director of the Vet Center in Palm Beach County. (ROA Vol. XIII 2027-2030). Weitz authored two publications, one dealing specifically with the psychological impact of the Vietnam war. (ROA Vol. XIII 2029-2031). As a result of his training and experience, Judge Balsiger qualified him, without objection, as an expert in general,

³ Trial counsel moved for appointment of Dr. Weitz as a confidential expert based on his reputation in the area of post-traumatic stress syndrome. (ROA Vol. I 155, Vol. XVI 2413-2415).

clinical, and military psychology, as well as Vietnam Syndrome and post-traumatic stress disorder. (ROA Vol. XIII 2036-37).

Dr. Weitz conducted an eight hour clinical interview of Reaves in January of 1987. (ROA Vol. XIII 2037, PCR Vol. 8 1221, 1412). A confidential eight page written report was prepared following that evaluation. (ROA Vol. XVII 2583-2590). A second clinical interview lasting four hours was conducted in October of 1991. (ROA Vol. XIII 2040). Although no written report appears in the record, Dr. Weitz, in an eight hour deposition, painstakingly explained every notation he made on his eight pages of notes from his initial interview with Reaves as well as five pages of notes from his second interview with Reaves. (PCR Vol. 5 739-982, PCR Vol. 8 1231-1295, 1411-1430).

Dr. Weitz noted in his report and in his deposition that he reviewed both military personnel and medical records from the Veterans Administration. He administered the Cornell Medical Index, to pinpoint areas of stress, he administered the "Minnesota Multiphase Inventory at both interviews, to assist in developing a psychological diagnosis, and he administered the Beck Depression Inventory, (ROA 2038-2041, 2583, PCR Vol. 8 1225). Additionally, Reaves was also asked to provide a written history of his military experience. In addition to the military records, police reports, etc., Reaves' defense counsel at the first trial, Cliff Barnes, had provided the doctor with a written synopsis of Reaves' juvenile and adult criminal records, including the

nature of the charges, witness statements, police reports, and any other information that might relate thereto.⁴ (PCR Vol. 8 1250). Mr. Barnes had also provided the doctor with 10 or 12 sheets of memos summarizing input from either family or friends in terms of impressions and knowledge of Mr. Reaves that [he] could utilize in developing [his] psycho social history. (PCR Vol. 8 1252-1254).

Dr. Weitz testified during the penalty phase that his Axis I diagnosis of Reaves was polysubstance abuse. (ROA Vol. XIII 2043). His Axis II diagnosis was anti-social personality disorder. (ROA Vol. XIII 2043-44, PCR Vol. 8 1394, 1437). However, he believed that Reaves' behavior at the time of the murder was also affected by additional psychological factors, which he described to the jury as "Vietnam Syndrome," a subclinical variation of Post Traumatic Stress Disorder. (ROA VOL. XIV 2044-53). Dr. Weitz spent a significant amount of time describing for the jury the "Vietnam Syndrome", its symptomology, and manifestation as a result of alcohol or drug abuse. He detailed for the jury Reaves' symptoms of same which occurred on the night of the murder. Weitz further explained its frequency of occurrence within the veteran population, the psychological communities' recognition of same, and the government's attempts to treat same. (ROA Vol. XIV 2044-61).

⁴ Dr. Weitz stated that he made two separate requests to Department of Corrections for appellant's records. Those requests were never granted. His interest in the information was solely to observe how well Reaves was able to adjust to the structured environment of prison life from the time he first interviewed him in 1987 until 1991. (PCR Vol. 8 1403, 1444).

Weitz explained that Reaves exhibited many symptoms of post-traumatic stress syndrome but not all that would be required for such a diagnosis. (ROA Vol. XIV 2044-2045, Vol. XVII 2088).⁵ Weitz was adamant that Reaves did not suffer from post-traumatic-stress syndrome. (PCR Vol. 8 1381-1382, 1390).

Reaves' rather extensive criminal background was detailed in Weitz's his report. Therein he documents Reaves' troubles with the law starting in 1966 at the age of eighteen. (ROA 2584). Before the jury, Weitz explained the basis of his diagnosis that Reaves suffered from anti-social personality disorder. He pointed out that Reaves' first offenses did not occur as a juvenile but rather as a young adult, however that in no way altered his assessment of Reaves as suffering from anti-social personality disorder. (ROA Vol. XIV 2080).⁶ Weitz explained that the diagnosis was based on the continuing and escalating pattern of criminal behavior in this young adult which has never altered with intervention. (ROA Vol. XIV 2078-2081, Vol. XVII 2586).

⁵ In his proffered testimony before the guilt phase, Weitz explained that he did find the presence of post-traumatic stress syndrome in part because Reaves has never experienced flash backs or re-experiencing trauma from Vietnam. (ROA Vol. X 1494).

⁶ Interestingly, as a young adult Reaves "found" himself in the predicament of deciding to join the army to avoid going to jail for his criminal behavior. (ROA Vol. XVII 2584).

Ultimately, Dr. Weitz opined that Reaves committed the murder while he was under the influence of an extreme mental or emotional disturbance, and that Reaves' ability to conform his conduct to the requirements of law was substantially impaired, both of which are statutory mental mitigating factors. (ROA Vol. XIII 2052-53).

Based on this testimony, trial counsel, sought and obtained instructions on both of these mitigating factors. (ROA Vol. XV 2315). Moreover, in his sentencing memorandum, Mr. Kirschner argued numerous nonstatutory mitigating factors including Reaves' acute addiction to narcotics, and that this addiction accompanied with the ingestion of a significant amount of cocaine immediately prior to the shooting, contributed to his lack of judgment on the night of the killing. (ROA Vol. XIX 2979).

This record totally refutes appellant's assertion that trial counsel's investigation and subsequent utilization of a mental health professional was deficient. Weitz, eminently qualified in this area of mental health was provided with all the necessary records and information to arrive at his conclusions. Simply because Reaves can find a new doctor who disagrees with the original penalty phase doctor does not entitle him to relief. Trial counsel uncovered and relied upon virtually the identical information that collateral counsel has presented years later. The basic difference between the mental health assessment conducted at trial and the postconviction assessment years later centers on the existence *vel non* of post-traumatic stress syndrome versus a sub-category of same. That fact in and of itself is of no consequence. Cf. Johnson v.

State, 25 Fla. L. Weekly S578 (Fla. July 13, 2000)(refusing to find counsel's performance deficient simply because new doctors would take issue with failure of prior doctors to detect the existence of organic brain damage). See Rose v. State, 617 So. 2d 291, 295 (Fla. 1993)(rejecting claim that initial findings of mental health experts was deficient simply because defendant obtains different diagnosis now); Provenzano v. Dugger, 561 So. 2d 546 (Fla. 1991)(same); Asay v. State, 25 Fla. L. Weekly S523, 526 (Fla. June 29, 2000)(finding that trial counsel's investigation was not deficient given that most facts now advanced by collateral counsel were known to prior mental health professional); LeCroy v. Dugger, 727 So. 2d 236, 239-240 (Fla. 1998)(upholding summary denial where record demonstrates that prior mental health expert had significant background material upon which to make a competent evaluation); Cherry, supra(same).

Additionally, trial counsel's failure to "convince" the judge to find the existence of statutory mitigation does not in and of itself establish a claim for relief. In rejecting Dr. Weitz's conclusions the trial court based its findings on the hard facts of this case, including Reaves' own deliberate thought processes as evidenced in his confession. (ROA Vol. XIX 3020-21).

In sum, Mr. Kirschner argued the existence of both statutory mental mitigators, as well as numerous nonstatutory mitigators that were based on Reaves' mental health and/or drug use at the time of the murder. Judge Balsiger considered them all, but

specifically rejected any contention that Reaves' drug use/intoxication at the time of the murder substantially impaired Reaves' ability to conform his conduct to the law. According to Judge Balsiger, Reaves' conduct was deliberate and thoughtful, and was calculated to lead to his escape for his crime. Moreover, Reaves' confession to the police was extremely detailed as to the circumstances of the shooting. Any evidence above and beyond what Mr. Kirschner presented and argued would have been met and refuted by Reaves' conduct at the time of and immediately after the murder, as well as by Reaves' ability to recall the events in minute detail. In other words, even if trial counsel could have found a doctor to testify that Reaves suffered from both post-traumatic stress syndrome and possibly organic brain damage⁷, and that he did not have an anti-personality disorder, there is no reasonable probability that testimony from other experts regarding Reaves' drug use, level of impairment, and mental health at that time would have resulted in a life recommendation or an ultimate life sentence. Cf. Mendyk v. State, 592 So.2d 1076, 1079-80 (Fla. 1992); Roberts v. State, 568 So.2d 1255, 1259 (Fla. 1990). Thus, where the record conclusively shows that counsel's conduct, even if deficient, did not prejudice Reaves' case, no evidentiary hearing is necessary. Kennedy v. State, 547 So.2d 912, 914 (Fla. 1989) ("A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the

⁷ Dr. Weitz testified during his deposition that he found no evidence of any other injury or illness other than gonorrhoea. (PCR Vol. 8 1324, 1349).

performance component of the test when it is clear that the prejudice component is not satisfied.”). Summary denial was proper. In his second sub-issue Reaves claims that counsel failed to conduct an investigation into his family background. Reaves alleges that trial counsel was ineffective for allegedly failing to investigate his family/social background, alcohol/drug addiction, and his combat experience in Vietnam. In support of this claim, appellant relies on (1) affidavits from his brother Byron Reaves, friend Eugene Hinton and, Reverend Young; (2) a book on the history of the Vietnam war; and (3) he references to several pages of his motion for postconviction.⁸

A review of those factual allegations referenced above appear to suggest that counsel should have presented evidence of Reaves’ alleged abject poverty as a child, the fact that he developed an addiction to heroin and that he contracted venereal disease while he was in Vietnam. To the extent that counsel did present some evidence regarding his Vietnam experience, Reaves alleges that counsel did an inadequate job in presenting the magnitude of the war atrocities. (PCR Vol. 4 555-567). The trial court summarily denied this claim finding that it was refuted from the record. The trial court noted that Reaves’ social/family history and his Vietnam

⁸ The state asserts that this portion of the claim is not sufficiently pled as mere references to other pleadings or proceedings does not state a proper basis for relief on appeal. Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990); Roberts v. State, 568 So. 2d 1155, 1160 (1990); Knight v. Dugger, 574 So. 2d 1066, 1073 (Fla. 1990)

service, was presented to the jury and therefore cumulative. (PCR Vol. 7 1099-1100). Additionally, the court found the any evidence regarding Reaves' heroin addiction was cumulative and any reference to his venereal disease would have been irrelevant. (PCR Vol. 7 1100). A review of the record supports the court's findings. The state further asserts that any allegation that appellant was subject to abject poverty is not supported by the record.⁹

As noted above, the theme of appellant's penalty phase evidence was a presentation of Reaves' life before and after his experience in Vietnam. In addition to Dr. Weitz, this contrast was developed through civilian and military witnesses who documented relevant experiences in Reaves' life that shaped his psychological makeup. Towards that end he presented seven witnesses. Four of those witnesses; Fran Ross, Will Cobb, and Charlie Jones, all family friends and sister Ann Covington all presented evidence regarding appellant's early life in Gifford. (ROA Vol. XII-XIII 1895-1947). Regarding Reaves' service in the military, Mr. Kirschner presented the testimony of two soldiers, Hector Cuban, and William Wade who served in

⁹ During the penalty phase a photograph of appellant's house was introduced into evidence. (ROA Vol. XII 1895-1903). That photograph was appended to the state's response in the collateral proceedings below. (PCR Vol. 6 1028). Additionally, appellant's brother averred in his affidavit that the family always had enough to eat, clothes to wear and helped others less fortunate. (PCR Vol. 4 619). Consequently any allegation that Reaves' home was a "tumble-down shanty" or that the family suffered from abject poverty is belied from the record.

Reaves' infantry platoon. The witnesses, provided photographs and detailed accounts of "the typical day" in their squad while in Vietnam. Additionally, the witnesses recounted eight or nine specific combat missions encountered by them, including injury and death of fellow soldiers. (ROA Vol. XIII 1949-2026).

Based on this recount of the evidence, summary denial was proper as the motion and record conclusively show that Reaves was not entitled to relief. Trial counsel presented significant evidence of Reaves' military experiences. Any additional evidence, as presented in Reaves' motion, would have been irrelevant or cumulative to that already presented. "It is not negligent to fail to call everyone who may have information about an event. Once counsel puts on evidence sufficient, if believed by the jury, to establish his point, he need not call every witness whose testimony might bolster his position." Jennings v. State, 583 So.2d 316, 321 (Fla. 1991); See Rutherford v. State, 727 So. 2d 216, 224 (Fla. 1999)(affirming summary denial of ineffective assistance of counsel where additional evidence of appellant's harsh childhood and Vietnam experience, although more detailed was cumulative); Provenzano v. Dugger, 561 So.2d 541, 546 (Fla. 1990) ("The additional testimony which Provenzano now suggests should have been given would have been largely cumulative."); Kennedy, 547 So. 2d at 913 (Fla. 1989) ("It was the trial judge's conclusion, and we agree, that Kennedy did not demonstrate how the failure to introduce any further information regarding his background other than that which was

already before the jury prejudicially affected the outcome of his trial.”); LeCroy v. State, 24 Fla. L. Weekly S13, 14 (Fla. 1998) (affirming summary denial of ineffectiveness claim that trial counsel failed to introduce additional evidence of defendant’s family background where defendant failed to establish prejudice prong of Strickland); Roberts, 568 So. 2d at 1259(same).

As for Reaves’ criticism regarding trial counsel’s failure to present more compelling evidence regarding the Vietnam war experience or counsel’s failure to challenge the State’s rebuttal witnesses with historical accounts from books on the conflict, the trial court correctly found the claim to be without merit. A history lesson regarding the war would not have been relevant to Reaves’ character, record, or to the circumstances of the offense. Johnson v. State, 660 So.2d 637, 646 (Fla. 1995) (defining a "mitigating factor" as “matters relevant to the defendant's character or record, or to the circumstances of the offense proffered as a basis for a sentence less than death”).

Likewise allegations that trial counsel unreasonably failed to elicit evidence that Reaves’ contracted a venereal disease is also without merit. It is inconceivable that Reaves would want to present such testimony, much less open the door to inquiry into it. But even taking as true Reaves’ allegation that he wanted Mr. Kirschner to delve into this embarrassing circumstance, there is no reasonable probability that the jury

would have recommended a life sentence or that Judge Balsiger would have sentenced Reaves to life had counsel done so.

Ultimately, even if Mr. Kirschner should have presented the evidence alleged to exist, there is no reasonable probability that the outcome would have been different. Reaves shot Deputy Raczkoski, who was trying to help him, four times in the back. He did so to avoid arrest because he was a multiple violent felony offender unlawfully in possession of a firearm. There is no reasonable probability that additional testimony regarding his service in Vietnam would have convinced the jury to recommend a life sentence and Judge Balsiger to sentence him to life. Thus, even if Mr. Kirschner should have presented such evidence, it would not have affected the outcome. Cf. Provenzano, 561 So.2d at 546 ; Mendyk v. State, 592 So.2d 1076, 1079-80 (Fla. 1992); Rutherford, 7237 So. 2d at 225. Therefore, summary denial was proper.

In his final sub-issue Reaves challenges trial counsel's failure to object to a myriad of allegedly prejudicial testimony. The first such instance involves Reaves' allegation that, despite an order granting his motion in limine, Mr. Kirschner failed to object to "repeated references" to Reaves' prior conviction and sentence of death. Relief was summarily denied since the record completely belies Reaves' factual allegations. (PCR Vol. 7 1101-1102).

On pages 1864-71 of the record, the State introduced the prior testimony of a witness from Reaves' first trial. However, the trial court described the testimony as

“a prior sworn statement by this witness.” Moreover, the testimony was edited to redact any reference to a prior trial.

On pages 2037, 2039, 2078, 2085-86, 2090, 2094, 2096, 2105, and 2112, either the prosecutor or Dr. Weitz mentioned the doctor’s initial evaluation of Reaves in 1987, or Reaves’ statement to the police in 1987, or some other reference to the 1986-87 time period, but neither referenced the prior trial, much less the outcome of same. Similarly, on pages 2156 and 2162, Colonel Ressler referenced only Reaves’ 1987 statement to the police, not a prior trial. Finally, on page 2233, Dr. Cheshire referenced Reaves’ 1991 conviction for battery on a law enforcement officer while in jail, but the State had already introduced the testimony of the jail guard whom Reaves’ battered. Thus, any subsequent reference would have been cumulative, at worst.

Since the record conclusively shows that none of the “references” to which Reaves cites were, in fact, references to Reaves’ prior conviction and sentence, the trial court correctly denied these allegations without an evidentiary hearing. (PCR Vol. 7 1101-1102).

In the remainder of this claim Reaves simply strings together a laundry list of actions that trial counsel should or should not have done at the trial. Aside from the conclusory clauses and record cites, Reaves presents no contextual bases for these conclusory statements. For example, Reaves faults Mr. Kirschner for “presenting the testimony of Dr. William Allen Weitz (ROA Vol. XIII 2042).” Trial counsel was

ineffective for “failure to provide Dr. Weitz with records from Washington D.C.” He also cites as error counsel’s “failure to prepare for the penalty phase (ROA Vol. XII 1887 - 1894).” These are the classic types of conclusory allegations to which the Kennedy case refers. “A defendant may not simply file a motion for postconviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing. The defendant must allege specific facts that, when considering the totality of the circumstances, are not conclusively rebutted by the record and that demonstrate a deficiency on the part of counsel which is detrimental to the defendant.” Kennedy, 547 So. 2d at 913. Neither the State nor a reviewing Court should be left to guess at the meaning of these conclusory statements. More importantly, as there is no argument as to how counsel’s actions in these regards prejudiced Reaves’ defense, they are legally insufficient on their face. As a result, summary denial was proper. See Asay v. State, 25 Fla. L. Weekly S523 (Fla. June 29, 2000)(affirming summary denial of claim for failure to comply with rule requiring statement of facts in support of claim); Cf. Freeman v. State, 25 Fla. L. Weekly S451 (Fla. June 8, 2000)(finding that bare allegation of ineffective assistance of counsel does not overcome irrevocable procedural default of underlying claim).

The second segment of this issue focuses on trial counsel’s performance at the guilt phase. Appellant presents this issue under four separate sub-issues. The first claim centers on counsel’s performance during voir dire. Reaves alleges that counsel

failed to establish why four jurors--Brennan, Moore, Bilbrey, and Ujvarosi--were objectionable for cause. Had counsel done so, Reaves alleges, he would have been entitled to a new trial. Reaves argues, counsel “inexplicably failed to make an adequate record while questioning these four jurors during voir dire despite his discomfort with the likelihood of them serving. Because he failed to make an adequate record, he failed to follow-up by making specific challenges for cause on any of the four jurors.” The trial court summarily denied relief since the claim is conclusory and legally insufficient as pled. (PCR Vol. 7 1090). The trial court’s ruling was correct.¹⁰

Neither in his motion or on appeal, does Reaves offer any facts or argument to demonstrate that the four jurors could have been the subject of cause challenges. Mr. Kirschner identified them as jurors whom he would have stricken if given additional peremptories, but Reaves cannot show that these four jurors said anything that would have subjected them to removal for cause. To allege that counsel was ineffective for

¹⁰ The state asserts that this issue is also procedurally barred. On direct appeal Reaves made three separate challenges to the trial court’s rulings on various cause challenges and rejection request for additional peremptory strikes. Reaves v. State, 639 So. 2d 1, 4-5 (Fla. 1994). Although claims of ineffective assistance of counsel are normally cognizable in a postconviction motion, presentation of such a claim is not valid when it is used in a attempt to re-litigate an issue previously raised and rejected on direct appeal. Brown v. State, 25 Fla. L. Weekly S193 n. 7 (March 9, 2000)(precluding attempts to re-litigate claim that defendant was entitled to additional peremptory challenges by couching issue as a claim of ineffective assistance of counsel). The state concedes that this argument was not made before the trial court.

failing to question them further in order to reveal bases for cause challenges begs the question. Unless Reaves can show that trial counsel's failure to challenge these jurors for cause prejudiced his right to a fair and impartial jury, his allegations are legally insufficient. Cf. LeCroy v. Dugger, 727 So. 2d 236, 239(Fla. 1998) (affirming summary denial of ineffectiveness claim that counsel failed to question venire about mental mitigation and death penalty, where defendant failed to allege, much less show, how trial counsel's failure to question the jurors on these subjects prejudiced the defendant).

The second sub-issue alleges that trial counsel failed to effectively cross-examine state witnesses and failed to adequately prepare for trial. Reaves alleges that trial counsel failed to depose Lieutenant Hamilton and asked minimal questions on cross-examination; failed to question the medical examiner about the angle of the bullets or Reaves' position when he shot them; failed to establish through cross-examination that Howard Whitaker did not see the shooting, did not know Reaves, did not know what happened, and did not know if Reaves had the premeditated intent to shoot the officer; and failed to question the authenticity of the police dispatch tape before its admission.

As for Lieutenant Hamilton, Reaves fails to allege what a deposition would have revealed and what trial counsel should have cross-examined the lieutenant about. Appellant fails to allege specific facts that, when considering the totality of the

circumstances, are not conclusively rebutted by the record and that demonstrate a deficiency on the part of counsel which is detrimental to the defendant. Kennedy, 547 So. 2d at, 913; Ragsdale, 720 So.2d at, 207. Thus, absent prima facie allegations that trial counsel was deficient and that this deficiency prejudiced Reaves' defense, this part of Reaves' claim is legally insufficient on its face.

As for the medical examiner's testimony, Dr. Walker testified to the angle of the bullets on direct examination. Using trajectory rods, he explained that all the bullets traveled through the body from the rear to the front, in a slightly upward angle and from left to right. (ROA Vol. VII 1081-83,1098-97).

Based on these record excerpts, it is clear that defense counsel did, contrary to Reaves' allegation, question the medical examiner about the angle of the bullets or Reaves' position when he shot them. Reaves has failed to show what more defense counsel could have done and how it would have prejudiced his case. Therefore, since the record clearly refutes Reaves' allegation, he is not entitled to an evidentiary hearing on this allegation.

As for Reaves' allegation that Mr. Kirschner failed to effectively question Howard Whitaker, the record clearly reveals that Mr. Whitaker did not witness the shooting and could not identify Reaves as the man running from the scene. (ROA Vol. VI 946-60). Reaves fails to show to a reasonable probability that the outcome of the trial would have been different had Mr. Kirschner confirmed that Mr. Whitaker

did not see the shooting, did not know Reaves, did not know what happened, and did not know if Reaves had the premeditated intent to shoot the officer. Therefore, this part of Reaves' claim is legally insufficient on its face and does not warrant an evidentiary hearing. Ragsdale, 720 So.2d at 207 (“[W]here the motion lacks sufficient factual allegations, or where alleged facts do not render the judgment vulnerable to collateral attack, the motion may be summarily denied.”).

Finally, as for Reaves' allegation that Mr. Kirschner failed to challenge the authenticity of the police dispatch tape prior to its admission, this claim is clearly refuted by the record. Prior to trial, Mr. Kirschner moved to appoint an expert audiotape analyst. (ROA Vol. XVI 2464-66). Even though the tapes had been admitted at Reaves' first trial, Judge Balsiger nevertheless granted Kirschner's motion. (ROA Vol. I 175-84). That expert, Joel Charles, testified on Reaves' behalf during the guilt phase. (ROA Vol. X 1535-47). At no time did the expert indicate that the duplicate of the master tape was not authentic.

Moreover, during Detective Pisani's testimony, as the detective described the procedure used for copying the pertinent recordings off the various tracks of the master 911 reel-to-reel tape, Mr. Kirschner had an opportunity to voir dire the witness. (ROA Vol. VI 983-85). During the voir dire, Detective Pisani testified that he had listened to the master 911 tape. (ROA Vol. VI 983-94). Although Mr. Kirschner obviously knew that he was going to impeach the detective on cross-examination with

his deposition testimony that he had not listened to the master tape, Kirschner nevertheless did not object to the introduction of the cassette tape containing the duplicated master tape. (ROA Vol. VI 984, 1009-10). Regardless, despite Kirschner's impeachment of the witness, the detective clarified his deposition testimony by stating that he was present when the master tape was copied and heard various portions of the tape when it was being copied. (ROA Vol. VI 1010-11). Thus, Kirschner's impeachment was minimized by the detective's clarification.

Critically, Reaves has failed to show how Mr. Kirschner could have successfully challenged the tape's authenticity. Mr. Kirschner had an expert compare the copy with the original, and his limited impeachment of Detective Pisani provided no legal basis for exclusion of the duplicate tape. Since Reaves has presented nothing to show that the duplicate tape was, in fact, an inaccurate reproduction of the original, or that it was, in fact, not authentic, this part of his claim is legally insufficient on its face. See LeCroy v. Dugger, 727 So. 2d 236, 239 (Fla. 1998) (affirming summary denial of ineffectiveness claim that counsel failed to hire forensic communications expert to test accuracy of state's transcription of his taped confessions, where defendant presented nothing to show that tapes were, in fact, mistranscribed or not authentic).

The third sub-issue alleges that trial counsel "should have utilized Dr. Weitz's testimony to attempt to negate the specific intent element of premeditated first-degree murder in conjunction with testimony of Mr. Reaves' voluntary intoxication." Trial

counsel's failure to do so was unreasonable. Specifically it is alleged that counsel failed to discover significant evidence of Reaves' drug use history, his drug/alcohol use on the day of the murder, and his mental impairments, namely, his post-traumatic stress disorder. Appellant further speculates that proper investigation and presentation of such evidence would have resulted in the admissibility of Dr. Weitz's testimony at the guilt phase under State v. Bias, 653 So. 2d 380 (Fla. 1995). In further support of this claim, Reaves presents this Court with statements from other lay witnesses who could have offered corroborative evidence for a voluntary intoxication defense.

The trial court summarily denied this claim finding that the record clearly demonstrates that voluntary intoxication was not a viable defense in this case. Given the absence of voluntary intoxication, there was no legal reason to admit the defense of Vietnam Syndrome to negate specific intent. (PCR Vol. 7 1092). In rejecting this claim, the trial court noted that the corroborative evidence being presented now was either irrelevant as it did not relate to the night of the murder or it was belied by the record. (PCR Vol. 7 1092-1093). The record of the proceedings below as well as the record on appeal conclusively supports the trial court's findings. See Arbeleaz v. State, 25 Fla. L. Weekly S586 (Fla. July 13, 2000)(upholding summary denial of ineffective assistance of counsel claim based on counsel's failure to present epilepsy defense since record demonstrates that defendant testified at trial regarding his

condition and new evidence to establish same did not establish that defendant had seizure at the time of the crime.)

Within weeks of his appointment to represent Reaves, Mr. Kirschner moved for the appointment of Dr. William Weitz as a confidential mental health expert to evaluate Reaves' competency and sanity, and to assist in his defense. According to counsel, Dr. Weitz had evaluated Reaves during the first trial and had "done substantial work on the case." (ROA Vol. XVI 2413-15, Vol. I 155). When asked why the court should appoint this particular doctor, defense counsel told Judge Balsiger that "he's the best known and most knowledgeable [post-traumatic stress disorder] expert available at the time." (ROA Vol. I 155). Judge Balsiger ultimately appointed Dr. Weitz and specifically ordered him to assess, among other things, "[w]hether the Defendant possesses sufficient mental faculties to formulate the intent necessary for the offense charged." (ROA Vol. XVI 2433, PCR Vol. 8 1216, 1218).¹¹

In his deposition before re-trial, Dr. Weitz testified that during his initial interview with Reaves on January 24, 1987, Reaves indicated that he went to his girlfriend's house sometime during the day of September 22, 1986. His girlfriend later borrowed his car to go shopping, leaving Reaves without transportation. Reaves watched

¹¹ The state asks this Court to take judicial notice of the fact that prior trial counsel Clifford Barnes, also did not present any other corroborative evidence of intoxication. Reaves v. State, 574 So. 2d 105, 106 (Fla. 1991).

“Monday Night Football,” then fell asleep. Sometime during that day and evening, Reaves ingested one and three-fourths grams of cocaine, by snorting and smoking it, and an unspecified amount of beer. (PCR Vol. 8 1258-1266). In Reaves’ statement to the police, which Dr. Weitz reviewed, Reaves told the detectives that he ran out of cocaine during the evening and decided to walk to the Zippy Mart to call a cab, because his girlfriend never came home with his car. (PCR Vol. 6 1015). Dr. Weitz further testified that he considered Reaves’ cocaine and alcohol consumption in forming his opinions.¹² (PCR Vol. 8 1260-1261, 1352-1257).

Following the State’s case in-chief, defense counsel assured the trial court that he did not want to introduce evidence of diminished capacity, but rather wanted to present Dr. Weitz to support an excusable homicide defense. By analogizing to voluntary intoxication and self-defense cases, trial counsel argued that such testimony was relevant to support his affirmative defense. (ROA Vol. X 1469-71). In proffering Dr. Weitz’ testimony, the doctor reiterated his finding that Reaves’ behavior did not meet the requirements for a voluntary intoxication defense. (ROA Vol. X 1517-18).

The record in this case conclusively shows that voluntary intoxication was not a defense strategy that Mr. Kirschner could present. Dr. Weitz determined that

¹² The record unequivocally establishes that Dr. Weitz was very familiar with appellant’s chronic history of drug abuse. (PCR Vol. 8 1216, 1238,1241, 1253, 1256, 1324, 1338, 1349-1350, ROA Vol. XIII 2041, 2043, 2045, 2046).

Reaves' use of drugs and/or alcohol the day of the murder did not prevent him from forming specific intent. Therefore, contrary to Reaves' assertion now, Mr. Kirschner could not have combined evidence of Reaves' Vietnam Syndrome with evidence of Reaves' drug/alcohol use to present a voluntary intoxication defense to rebut the specific intent element of first-degree murder. See White v. State, 559 So. 2d 1097 (Fla. 1990)(finding counsel's performance not deficient for failing to present voluntary intoxication defense since no support existed for its presentation); Van Poyck v. State, 696 So. 2d 686, 697 (Fla. 1997)(affirming counsel's strategic decision not to pursue voluntary intoxication defense since investigation of same proved futile). Furthermore, Reaves' confession to police along with his inculpatory statement to Eugene Hinton completely undermine any defense of voluntary intoxication. Kokal v. State, 718 So. 2d 138, 141 n.12 (Fla. 1998)(rejecting validity of voluntary intoxication defense given defendant's statement which indicate that he had a clear memory of the events along with mental health professional's refusal to corroborate such a defense); Johnson v. State, 583 So. 2d 657, 661 (Fla. 1991)(affirming denial of claim of ineffective assistance of counsel since new defense presented in collateral proceeding was contradicted by evidence as trial. Simply because the excusable homicide defense proved unsuccessful, does not translate into ineffective assistance of counsel. Reaves has not demonstrated that a viable defense of intoxication existed. Johnston v. State,

769 So. 2d 990, 1001 (Fla. 12000)(rejecting claim of ineffective assistance of counsel simply because defense presented was unsuccessful)

To further support his contention to the contrary, Reaves cites to State v. Bias, 653 So.2d 380 (Fla. 1995), wherein the trial court precluded the defendant's expert from testifying as part of a voluntary intoxication defense that the defendant was unable to form the specific intent for first-degree murder because of the combined effects of alcohol consumption on the day of the murder and schizophrenia. Appellant's reliance on Bias is of no moment. In affirming the district court's reversal of the trial court's ruling, the supreme court determined that the primary focus of the expert's opinion must center upon the defendant's intoxication, and the mental disease or mental defect must not be the feature of the testimony. Id. at 382.

In any event Reaves cannot be entitled to relief under Bias since this was not the state of the law in 1991-92 when Mr. Kirschner tried this case. While the supreme court later clarified the state of the law in Bias, Mr. Kirschner cannot be deemed ineffective for failing to anticipate the change. See Provenzano v. Dugger, 561 So.2d 541, 545 (Fla. 1990) (affirming summary denial of ineffectiveness claim that counsel failed to object to insanity instruction later found erroneous, because "[t]he fact that a lawyer in another case raised an objection to this instruction and ultimately succeeded in having it set aside does not mean that Provenzano's counsel was

ineffective for not also attacking the instruction”); Nelms v. State, 596 So. 2d 441 (Fla. 1992)(same); Way v. State, 568 So. 2d 1263 (Fla. 1990)(same).

Second, even if Mr. Kirschner should have anticipated the development, the focus of the defense remains on the defendant’s intoxication, and the mental health evidence, if recognized in the mental health community, should have only a tangential role in the expert’s overall opinion.¹³ Here, other than Reaves’ self-serving statements that he was high on cocaine at the time of the murder, he had no corroborative evidence to support a primary defense of intoxication. Thus, the lack of corroborative evidence of Reaves’ intoxication, combined with Dr. Weitz’ opinions that Reaves’ level of intoxication at the time of the murder did not preclude his ability to form specific intent and that Reaves did not suffer from the generally accepted diagnosis of PTSD, legally foreclosed Mr. Kirschner’s presentation of a voluntary intoxication defense.

Importantly, however, Mr. Kirschner did, in fact, seek and obtain an instruction on voluntary intoxication based on Reaves’ statements to the police. The State did not object to the instruction, and the trial court agreed to include it. (ROA Vol. X 1635-37).

¹³ The trial court found that State v. Bias, 653 So. 2d 380, 382 (Fla. 1995) was of no significance to Reaves given the total lack of evidence of intoxication. (PCR Vol. 7 1092).

As for Reaves' allegation that trial counsel did not investigate and discover additional evidence of Reaves' intoxication on the day of the murder, Reaves' alleged "additional evidence" does not support his claim. Reaves' first cites to Kenneth Kibbee's testimony that Reaves appeared "nervous" when Kibbee picked Reaves up in his cab and drove him to a shopping mall. Kibbee picked Reaves up in Melbourne, however, a day or more after the murder. More importantly, Mr. Kirschner asked Kibbee on cross-examination if he had ever had the opportunity to see anybody under the influence of cocaine or crack cocaine. Mr. Kibbee indicated that he had, many times. Mr. Kirschner then asked him if those people "sometimes manifest a nervous kind of demeanor," to which Mr. Kibbee responded, "They do." (ROA Vol. 8 1232). Thus, this testimony did not go undiscovered or undeveloped by Mr. Kirschner.

Reaves next cites to Eugene Hinton's testimony, during cross-examination by defense counsel, that he and Reaves smoked marijuana on the day of the offense. Reaves also indicates that the remains of a marijuana cigarette were confiscated from Hinton's home by the police. According to Hinton's testimony, however, he and Reaves smoked a marijuana cigarette after Reaves shot Deputy Raczkoski, when Reaves showed up at Hinton's house following the shooting. (ROA Vol. VIII 1202). This, of course, in no way relates to Reaves' level of intoxication at the time he shot the deputy. Besides, Mr. Kirschner elicited the information; thus, he could hardly be deemed deficient.

Next, Reaves cites to an affidavit he has obtained from Eugene Hinton, wherein Hinton avers that Reaves “came to [his] house after the police got shot. . . . [Reaves] was all strung out[;] he had been smoking crack and was pretty much out of his head[;] he was real scared.” (PCR Vol. 4 612-613). Hinton, however, had never made such a statement in his three police interviews, his deposition, or his trial testimony, although he was questioned extensively about Reaves’ demeanor when he appeared at Hinton’s house. In fact, Hinton testified that Reaves did not exhibit any signs of intoxication that evening. (ROA Vol. VIII 1208-09). The record clearly refutes any new allegation by Hinton that Reaves “had been smoking crack and was pretty much out of his head” the night he shot Deputy Raczkoski.¹⁴ See Breedlove v. State, 595 So. 2d 8, 10 (Fla. 1992)(affirming summary denial of claim of ineffective assistance of counsel for failing to pursue voluntary intoxication defense as record demonstrates a total lack of available facts to establish defense). Given Hinton’s several prior inconsistent statements along with Reaves’ own confession, this “new” statement would not have changed the outcome of this case. Cf. Armstrong v. State, 642 So. 2d 730 (Fla. 1994)(characterizing recanted testimony as inherently unreliable.)

¹⁴ The state would also note that at the time of the re-trial Hinton made himself “unavailable.” Reaves v. State, 639 So. 2d 1, 3 (Fla. 1994). Consequently, trial counsel would have been unable to present any testimony regarding his encounter with Reaves on that evening. Cf. Rivera v. State, 717 So. 2d 477, 782(Fla. 1998)(rejecting claim of ineffective assistance of counsel for failing to call alibi witnesses since they were unavailable at the time of trial).

Reaves also relies on the statement of Reverend Young, who testified at Reaves' trial, and who now avers that "[d]rugs overpowered [Reaves'] life." (PCR Vol. 4 616). Additionally, Reaves' brother, Byron, who attended the trial but never testified on Reaves' behalf, stated that Reaves "could not get away from drugs although he tried." (PCR Vol. 4 619-620). Again, neither of these potential postconviction witnesses provide any information regarding whether Reaves' was under the influence of drugs and/or alcohol at the time of the murder. They merely indicate that Reaves had used drugs. Such evidence, even if presented, would not have established a defense of voluntary intoxication. Thus, defense counsel could not be deemed deficient for failing to present such evidence.

Reaves also details other evidence that "Reaves was a chronic crack cocaine abuser." He specifically notes that a bag of cocaine was found on the ground at the crime scene, that Reaves attempted to sell cocaine to an undercover officer in Georgia, and that Reaves was in possession of crack cocaine upon his arrest. Again, contrary to Reaves' assertion, such "evidence" does not support a voluntary intoxication defense. "[V]oluntary intoxication is an affirmative defense and . . . the defendant must come forward with evidence of intoxication at the time of the offense sufficient to establish that he was unable to form the intent necessary to commit the crime charged. . . . [E]vidence of alcohol consumption prior to the commission of a crime does not, by itself, mandate the giving of jury instructions with regard to voluntary

intoxication. . . . [W]here the evidence shows the use of intoxicants but does not show intoxication, the instruction is not required.” Linehan v. State, 476 So.2d 1262, 1264 (Fla. 1985). Reaves’ alleged evidence does not show use of intoxicants prior to the murder, much less that he was intoxicated to the extent that he could not form the specific intent to commit first-degree murder. Therefore, defense counsel cannot be deemed deficient for failing to present such evidence. Arbeleaz v. State, 25 Fla. L. Weekly S976 (Fla. October 19, 2000)(upholding summary denial of allegation that counsel was ineffective for failing to present evidence of epilepsy in order to negate specific intent where record shows that appellant testified to same and additional evidence did not demonstrate that he was having a seizure at the time of the murder).

And finally Reaves cannot establish the prejudice prong of Strickland. Even if presentation of this additional evidence of intoxication would have resulted in the admissibility of the Vietnam syndrome it would not have resulted in Reaves’ acquittal. In concluding that summary denial was warranted for this claim, the trial court noted that this Court had already determined even if it were error to preclude admission of “Vietnam Syndrome” evidence, it was harmless. (PCR 1093). See Reaves v. State, 639 So.2d at 4-5 (Fla. 1994). The state asserts that the harmless error finding by this Court on direct appeal precludes a finding of prejudice under Strickland on collateral review of the same issue. Cf. White v. State, 559 So. 2d 1097, 1099-1100 (Fla. 1990)(rejecting ineffective assistance of counsel claim regarding counsel’s failure to

preserve issues for appeal in postconviction appeal based on earlier finding by court on direct appeal that unpreserved alleged errors would not constitute fundamental error); Teffeteller v. Dugger, 734 So. 2d 1009, 1019 (Fla. 1998)(finding that defendant had failed to meet prejudice prong of Strickland on issue that counsel failed to adequately argue case below given that it was rejected without discussion); Cherry v. State, 659 So. 2d 1071, 1072 (Fla. 1995)(same). Reaves has not presented this Court with any facts or new law which would call into question that determination.

In the fourth sub-issue, Reaves claims that Mr. Kirschner “conceded guilt without consulting [him] regarding his strategy or decision.” However, Reaves makes no reference to the record and totally fails to allege in what way he conceded Reaves’ guilt. Therefore, this Court should deny this allegation as legally insufficient on its face. Kennedy, 547 So. 2d at 913.

Regardless, the record refutes this allegation. Faced with Reaves’ full confession to both Eugene Hinton and the police that he, in fact, shot Deputy Raczkoski, Mr. Kirschner maintained that the shooting was an accident and that Reaves should be found not guilty under an affirmative defense of excusable homicide. (ROA Vol. XI 1695-1732). This could hardly be construed as a concession of guilt. Moreover, Dr. Weitz testified in his deposition that, during his second interview with Reaves prior to his retrial, Reaves indicated that “he understood when asked about what the defense strategy or what he understood that basically he was--that this was

not premeditated--this crime was not premeditation.” (PCR Vol. 8 1414-1415). Thus, Mr. Kirschner obviously discussed the defense strategy with Reaves and Reaves understood it and agreed with it. As a result, the trial court summarily denied this claim based on the fact that it was refuted from the record as well as the fact that it was insufficiently pled. (PCR Vol. 7 1094).

In his last argument, Reaves claims that trial counsel failed to challenge the state’s impermissible reference to his prior drug use, crime, and other bad acts. Without any reference to the record, or more specific factual allegations, this claim is legally insufficient as pled. The trial court properly denied the claim as such. (PCR Vol. 7 1094). Ragsdale, 720 So. 2d at 207 (Fla. 1998)(“A summary or conclusory allegation is insufficient to allow the trial court to examine the specific allegations against the record.”).

In a separate issue, Reaves alleges that a violation of Brady v. Maryland, 373 U.S. 83 (1963) occurred when the state failed to disclose, “the remains of an alleged marijuana cigarette butt apparently confiscated from Mr. Hinton’s residence during the questioning of Mr. Hinton by law enforcement concerning Mr. Reaves visit to Hinton’s home after the murder.” The second alleged Brady violation involves, “Other materials in the box include notes regarding witness interviews and copies of automobile registrations.”

In his postconviction motion, Reaves asserted that failure to discover the marijuana cigarette was based on trial counsel's deficient performance under Strickland. (PCR Vol. 4 487). However, on appeal, Reaves relies on a different legal argument, i.e., the state withheld the information. Reaves' new argument on appeal is procedurally barred. Occichone v. State, 570 So. 2d 902, 903 (Fla. 1990).

In any event, the trial court summarily denied the since it was refuted from the record. Reaves' friend Hinton testified that he and Reaves smoked marijuana at Hinton's home after the murder. (PCR Vol. 6 1093). Consequently under any either theory, the claim has no merit, since the jury was informed that appellant was smoking marijuana after he killed Officer Raczkoski. Rivera v. State, 717 So. 2d 477, 483 (Fla. 1998)(finding Brady inapplicable when evidence known to defense); Routly v. State, 590 So. 2d 397, 399-400 (Fla. 1991)(same).

The trial court's summary denial of this claim was proper. The court's analysis is clearly articulated for this Court's review. Relief should be denied.

ISSUE II

THE ISSUE OF PROSECUTORIAL MISCONDUCT IS PROCEDURALLY BARRED (restated).

Reaves asserts the State committed prosecutorial misconduct during its penalty phase closing argument He also claims that "to the extent trial counsel did not preserve any portion of this issue" ineffective assistance was rendered The State

submits summary denial was appropriate as the claim is procedurally barred and legally insufficient. The Court should affirm.

In cases where there has been a summary denial, the standard of review is de novo for pure questions of law. Demps v. State, 761 So.2d 302 (Fla. 2000) (applying de novo review to summary denial). “To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or the record must conclusively refute them.” Occhicone v. State, 768 So.2d 1037, 1041 (Fla. 2000). Under this standard, the instant summary denial should be affirmed.

Reaves’ alleges prosecutorial misconduct during the State’s penalty phase closing arguments deprived him of a fair trial. The State maintains the trial court was correct in finding the claim procedurally barred as the issue of prosecutorial misconduct in the guilt phase was challenged at trial and on direct appeal. Reaves, 639 So.2d at 5 (finding “singularly or cumulatively” the claims of prosecutorial misconduct related to referring to Reaves as a “cocaine seller”, resorting to a “golden rule argument”, “portray[ing] the slain deputy speaking from the grave” either “fall short of the standard for granting a reversal” or were not error when the comments were considered in context). Because Reaves could have included any challenges to the penalty phase comments in his direct appeal claim addressed to guilt phase comments, his attempt to relitigate the issue of prosecutorial misconduct is procedurally barred. See Kelley v. State, 569 So.2d 754, 756 (Fla. 1990) (finding identical claim barred).

“Proceedings under rule 3.850 are not to be used as a second appeal.” Medina v. State, 573 So.2d 293, 295 (Fla. 1990).

Additionally, in a single sentence, Reaves asserts his counsel was ineffective for failing to preserve for review these alleged instances of prosecutorial misconduct in the penalty phase. Here again, the trial court was correct when it found “[t]he allegation that counsel failed to object is conclusory.” (PCR Vol. 7, 1102). Not only is the claim made in a conclusory manner, but it is appended to the substantive challenge to the State’s penalty phase closing argument merely to get around the procedural bar. Such is improper. See Asay v. State, 769 So.2d 974, 989 (Fla. 2000) (finding one-sentence conclusory allegation of ineffectiveness is an improper pleading and attempt to relitigate procedurally barred claims); Freeman v. State, 761 So. 2d 1055, 1067 (Fla. 2000)(same); Gaskin v. State, 737 So.2d 509, 513 n.7 (Fla. 1999)(same); Cherry v. State, 659 So. 2d 1069, 1072 (Fla. 1995)(same). This claim is procedurally barred and legally insufficient. The Court should affirm.

ISSUE III

REAVES HAS WAIVED HIS CLAIM TO PURSUE PUBLIC RECORDS (restated)

Contending he requested information on his jurors from four public agencies and that the Marion County Clerk of Court reported the requested records were destroyed, Reaves claims he is unable to assure this Court that all relevant materials

have been disclosed by the public agencies. As found by the trial court, this issue has been waived. Summary denial was appropriate.

Review of a trial court's decision related to public records should be under the abuse of discretion standard. It is the postconviction movant's responsibility to voice dissatisfaction with a response to a public records request and to pursue the issue before the trial judge. Gaskin v. State, 737 So.2d 509, 518 (Fla. 1999). The continuation or termination of a public records request period, like a motion for continuance, is a discretionary act resting with the trial court. Kearse v. State, 770 So.2d 1119, 1127 (Fla. 2000) ("granting of a continuance is within a trial court's discretion, and the court's ruling will only be reversed when an abuse of discretion is shown"). See, Asay v. State, 769 So.2d 974, 982, n.16 (Fla. 2000) (finding defendant waived public records request by seeking records after evidentiary hearing).

Reaves maintained he could not plead his case fully because four agencies failed to comply with public records requests made in December 1998¹⁵. Reaves has waived this claim as the trial court noted in its order denying relief. (PCR Vol. 7, 1088-89, 1108-09)

Irrespective of the trial court's October 1998 requirement that any difficulties in obtaining public records be brought to the court's attention, the record also

¹⁵ However, as to one agency respondent, Reaves admits that the Agency reported that the records were destroyed.

establishes that on February 19, 1999, the matter of outstanding public records was addressed by the trial court and, yet another offer of time and assistance was extended. It was decided the parties would attempt to gather the remaining records, however, if Reaves ran into difficulties, he was to set the matter for hearing and the trial court would become involved (PCR Vol. 12, 257-265). Reaves was to contact the judge's office to set a hearing if the matter was not resolved within two weeks (PCR Vol. 12, 265). Collateral counsel has failed to file a motion to compel or make other good-faith attempts to obtain these records. Hence, Reaves waived any claim based on the non-disclosure of records. See Lopez v. Singletary, 634 So.2d 1054, 1058 (Fla. 1993) (finding “[a]s a final word on access to public records, we hold that any postconviction movant dissatisfied with the response to any requested access must pursue the issue before the trial judge or that issue will be waived”). Based upon Reaves' tactic, relief was denied relief properly. This Court should find the issue waived, and affirm.

ISSUE IV

THE FINDING THAT REAVES' CLAIM OF INNOCENCE OF THE DEATH PENALTY IS LEGALLY INSUFFICIENT AND PROCEDURALLY BARRED WAS CORRECT (restated)

Claiming innocence, Reave maintains he is able to show both innocence of first-degree murder and the death penalty. His allegation of innocence of first-degree

murder is based upon his claim he did not possess the requisite intent to kill due to his mental condition, in the form of post-traumatic stress disorder, and drug use. The remainder of the claim proceeds on four separate claims of innocence of the death penalty. Challenging the aggravators found, Reaves asserts that his “prior violent felonies” were too remote in time (20 years before the present murder), the “avoid arrest” aggravator is not supported by the record due to his claim of mental illness and substance abuse, and that the HAC aggravator, which he contends is unconstitutionally vague, cannot support the death sentence here. Reaves also seeks relief claiming his death penalty is disproportionate. The trial court was correct in finding the issues presented were legally insufficient and/or procedurally barred. The State submits summary denial was proper.

In cases where there has been a summary denial, the standard of review is de novo for pure questions of law. Demps v. State, 761 So.2d 302 (Fla. 2000) (applying de novo review to trial court’s summary denial based upon finding claim was one raised on direct appeal). “To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or the record must conclusively refute them.” Occhicone v. State, 768 So.2d 1037, 1041 (Fla. 2000). Under this standard, the instant summary denial should be affirmed.

Actual innocence of the death penalty must focus upon the defendant’s eligibility for the death penalty, and not on additional mitigation he may have to offer.

Sawyer v. Whitley, 505 U.S. 333, 345-46 (1992). Additionally, to make a colorable showing that he is actually innocent of the death penalty, Reaves must allege a constitutional error that implicates all of the aggravating factors found to be present by the sentencing body. Johnson v. Singletary, 938 F. 2d 1166, 1183 (11th Cir.1991) (en banc) (emphasis in original), cert. denied, 506 U.S. 930 n. 46 (1992). Reave has not met this standard.

The claim is legally insufficient on its face because Reaves fails to make factual allegations which support his conclusions. He does not allege how the evidence fails to support the “avoid arrest” aggravator, how the HAC instruction is vague, or why his sentence is disproportionate. Mere conclusory allegations are insufficient to warrant relief. Ragsdale v. State, 720 So.2d 203, 207 (Fla. 1998); Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989).

Under the guise of innocence of the death penalty, Reaves attempts to relitigate an unsuccessful challenge to the prior violent felony aggravator based upon the same argument presented to the trial court, namely the remoteness in time of the aggravators. In fact, on page 66 of his Initial Brief in this appeal, Reaves admits that his counsel had objected to the use of these convictions as aggravators at trial. (ROA Vol. XII, 1829-34). Such was overruled (ROA Vol. XII, 1833-34). Having failed to pursue this issue on appeal as he could have and should have, Reaves is procedurally barred from challenging the basis of the “prior violent felony” aggravating circumstances here.

Mahammad; See, Arbelaez v. State, 25 Fla. L. Weekly S976, n.8 (Fla. October 19, 2000) (rejecting as procedurally barred claim of innocence of the death penalty where defendant could have but did not raise challenge on direct appeal)

However, more important to this argument is the fact he has not challenged the finding of the remaining prior violent felony for the battery on a law enforcement officer which occurred while Reaves was awaiting trial on the instant murder. Because he attacks only two of the three prior violent felony convictions found by the trial court beyond a reasonable doubt, his claim of “innocence of the death penalty” is legally insufficient. Reaves is not innocent of the death penalty.

Next Reaves challenges the sufficiency of the evidence to establish the “avoid arrest” aggravator. This argument was rejected by the trial court. (ROA Vol. XIX, 3013).

Moreover, on direct appeal, this Court found the “avoid arrest” aggravator proven. Reaves, 639 So.2d at 6, n.11. Given this appellate determination, there is no merit to Reaves’ claim he is innocent of the death penalty. Johnson, 938 F.2d at 1183 (finding for defendant to be innocent of the death penalty all aggravating factors must be invalid).

Reaves also challenges the HAC aggravator claiming the instruction is “unconstitutionally vague” and may not be relied upon to support the death penalty here. On direct appeal, Reaves challenged the HAC instruction as unconstitutional due

to arbitrariness and successfully challenged the trial court's reliance upon HAC to impose the death penalty Reaves, 639 So.2d at 6. However, this Court concluded that the use of HAC was harmless error beyond a reasonable doubt. Reaves, 639 So. 2d at 6. Hence, any new challenge attacking the trial court's reliance upon HAC is procedurally barred. "Issues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack." Muhammad v. State, 603 So. 2d 488, 489 (Fla. 1992). "Proceedings under rule 3.850 are not to be used as a second appeal." Medina v. State, 573 So.2d 293, 295 (Fla. 1990).

Based upon the foregoing, Reaves is not innocent of the death penalty. Under Johnson, 938 F. 2d at 1183 the defendant must show that all of the aggravators are improper. Having failed to show that all aggravating circumstances were invalid, clearly, Reaves is not innocent of the death penalty. This Court should affirm.

As for the proportionality claim Reaves raises here, this Court performed a proportionality analysis as is its duty in every capital case, whether raised as an issue or not. E.g., Jennings v. State, 718 So.2d 144, 154 (Fla. 1998) (opining that "[t]hough not directly raised by Jennings, we turn now to our required independent review of the sufficiency of the evidence as well as the proportionality of Jennings' death sentences as compared to other cases where we have affirmed death sentences."). Thus, even if not explicitly stated, this Court's affirmance of the death penalty in Reaves, 639 So.2d at 6 n.11, based upon the valid aggravators of "prior violent felony" and "avoid

arrest” in spite of the initial reliance upon an HAC finding, is a proportionality determination, thereby making the instant claim procedurally barred. Muhammad, 603 So.2d at, 489; Medina v. State, 573 So.2d at 295. Moreover, Reaves has not presented any new case law which would call into question this Court’s proportionality determination. The trial court’s ruling finding a procedural bar should be affirmed.

ISSUE V

THE TRIAL COURT DID NOT ERR IN FINDING THE CLAIM OF JUROR MISCONDUCT INSUFFICIENT (restated).

Initially Reaves argues the prohibition against juror interviews impinges upon his right to free association and speech (**Initial Brief 58**). Next he claims the summary denial was error, asserting the trial court failed to recognize that trial defense counsel was the source cited to establish juror misconduct and the need for juror interviews. Additionally, Reaves declares his trial attorney “unreasonably failed to move for a mistrial or bring the [juror] misconduct to the court’s attention.” This argument was raised below and rested upon the same ambiguous pleadings. Summary denial by the trial court was proper. Reaves’ pleading deficiencies at both the trial and appellate levels precludes the granting of relief.

In cases where there has been a summary denial, the standard of review is de novo for pure questions of law. Demps v. State, 761 So.2d 302 (Fla. 2000) (applying de novo review to trial court’s summary denial based upon finding claim was one

raised on direct appeal). “To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or the record must conclusively refute them.” Occhicone v. State, 768 So.2d 1037, 1041 (Fla. 2000). Under this standard, the instant summary denial should be affirmed.

There is no violation of the First Amendment to the United States Constitution; the law allows juror interviews under certain circumstances. See Roland v. State, 584 So. 2d 68, 70 (Fla. 1st DCA 1991) (finding no criminal rule allowing for post-verdict juror interviews, but noting application for such by motion “as a matter of practice”); Sconyers v. State, 513 So. 2d 1113, 1115 (Fla. 2d DCA 1987) (construing criminal rules to allow post-verdict juror interviews upon motion which makes a prima facie showing of juror misconduct); cf. Gilliam v. State, 582 So. 2d 610, 611 (Fla. 1991) (affirming denial of defendant’s motion to conduct post-verdict interview of jurors where defendant failed to make prima facie showing of misconduct); Shere v. State, 579 So. 2d 86, 94 (Fla. 1991)(affirming denial of defendant’s motion to conduct post-verdict juror interviews); Fla. R. Civ. P. 1.431(h) (providing “[a] party who believes that grounds for legal challenge to a verdict exists may move for an order permitting an interview of a juror or jurors to determine whether the verdict is subject to challenge.”). If Reaves could make a prima facie showing of misconduct, he could obtain juror interviews. His inability to meet the requirements, however, does not affect the constitutionality of his conviction and sentence. See, Mann v. State, 770

So.2d 1158, (Fla. 2000) (finding procedurally barred claim challenging constitutionality of prohibition of juror interviews); Arbelaez v. State, 25 Fla. L. Weekly S586 (Fla., Jul 13, 2000) (rejecting as procedurally barred and meritless challenge to rule prohibiting juror interviews); Young v. State, 739 So.2d 553, 555, n. 5 (Fla. 1999) (finding procedurally barred claim “that Florida Bar Rule of Professional Conduct, forbidding juror interviews, is unconstitutional”).

Turning to the allegation of misconduct, Reaves’ 3.850 motion was plainly insufficient to warrant an evidentiary hearing, much less the ultimate relief requested. The factual allegation supporting his claim was presented in a single sentence. (PCR Vol. 4, 514). Alternatively, he alleged in a single sentence that counsel was ineffective for failing to move for a mistrial or bring the misconduct to the court’s attention. (PCR Vol. 4, 515). These conclusory allegations were denied properly. Kennedy, 547 So. 2d at 913 (opining, “defendant may not simply file a motion for post-conviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing”).

In its response to the Amended Motion to Vacate, the State noted that Reaves’ claim was legally insufficient on its face in that he not only failed to allege the source of the information (collateral counsel “has learned through investigation”) and failed to name the two jurors who allegedly approached trial counsel, but he has also failed to alleged when and where the jurors approached trial counsel. The timing is most

critical to the claim. If the unnamed jurors approached trial counsel after the verdict, but before the notice of appeal, the substantive claim would be procedurally barred because trial counsel could have raised the issue in a motion for new trial and then, if denied, raised it on appeal. Reaves' postconviction claim would then rest solely on whether counsel's representation was deficient for failing to raise the matter and/or whether his failure to do so prejudiced Reaves' case. See Lambrix v. State, 559 So.2d 1137, 1138 (Fla. 1990) (reasoning "this claim of juror misconduct is based on information which was contained in the original record of the case and, consequently, must be raised on direct appeal. The claim is procedurally barred in a rule 3.850 proceeding except as a basis for a claim of ineffectiveness of trial counsel."). If, on the other hand, the jurors approached counsel too late for him to do anything, then Reaves' alternative allegation of ineffectiveness has no basis in fact and is, therefore, legally insufficient on its face. The claim would then become a newly discovered evidence claim and would be evaluated under that standard.

Because of the pleading deficiency, the State was unable to respond fully to the allegation. At the Huff¹⁶ hearing, the State noted that it was inappropriate for the defense to attempt to bring in additional factual allegations/evidence and that the decision to grant an evidentiary hearing rested upon the four corners of the pleading (PCR Vol. 12, 309-15). Were his claim made in good faith, Reaves would have pled

¹⁶ Huff v. State, 622 So.2d 982 (Fla. 1993).

the factual allegations in his initial motion, namely who told him about the conversation his trial counsel allegedly had with two jurors and who those jurors were, as required by Rule 3.850. Instead, what Reaves presented to the trial court was vague single-sentence alternative allegations which were legally insufficient on their face and not warranting of an evidentiary hearing or the ultimate relief he requested. This pleading deficiency was recognized by the trial court when it found “[t]he Defendant **does not identify the source**¹⁷ of the information, **and does not identify the female jurors** who claimed that one of the jurors discussed Mr. Reaves['] guilt during the trial” (R Vol. 7, 1096) (emphasis supplied).

The state asserts that given the sensitive nature of this claim, appellants are required to pled their claim with greater specificity and attach affidavits which demonstrate personal knowledge. See Harbour Island Security v. Doe, 652 So. 2d 1198 (2d DCA 1995)(recognizing strong policy against allowing for juror interviews); Johnson v. State, 593 So. 2d 206, 210 (Fla. 1992) (announcing “this Court cautions against permitting jury interviews to support post-conviction relief for allegations such as those made in this case.”); see also Sconyers, 513 So. 2d at 1117 (cautioning, “[l]et there be no mistake, misinterpretation or misconstruction--this opinion is not to be read as opening ‘Pandora’s box’ to permit interviews of jurors on matters which

¹⁷ The state does note that at the Huff hearing, counsel explained that mistakenly she forgot to include the source of the information, i.e., trial counsel Mr. Krischner. (PCR 309).

inhere in the verdict.”); Gilliam, 582 So. 2d at 611 (finding that appellant’s failure to attach affidavits to motion to interview jurors warranted denial of the request). Reaves’ decision not to even identify the jurors or give any greater detail other than to say the juror was discussing appellant’s guilt should be met with skepticism.

Additionally, although not specifically raised below, any discussion among jurors regarding appellant’s guilt regardless of its timing, is a matter which inheres in the verdict and is not subject to inquiry. Cf. Ray Cooke Enterprises v. Parsons, 627 So. 2d 1267 (Fla. 4th DCA 1993) (explaining that alleged confusion or misunderstanding regarding judge’s instructions was speculative and would involve an improper inquiry into matters that inhere in the verdict); Rabun and Partners v. Ashoka Enterprises, 604 So. 2d 1284, 1285 (Fla. 5th DCA 1995) (ruling that it was inappropriate to allow for juror interviews based on allegation that jury relied on impermissible reasons for their verdict); Metropolitan Dade Cty. V. McKenzie, 555 So. 2d 885 (Fla. 3rd DCA 1990) (prohibiting juror interviews based on allegation that racial bias played role in deliberations). Summary denial was appropriate.

ISSUE VI

THE TRIAL COURT DID NOT ERR IN FINDING PROCEDURALLY BARRED THE ISSUE OF MR. HINTON’S UNAVAILABILITY AND THE READING OF HIS PRIOR TRIAL TESTIMONY IN REAVES’ RETRIAL (restated).

For the first time in postconviction litigation, Reaves asserts the trial court erred when it found Erman Eugene Hinton (“Hinton”) “unavailable” for trial and permitted his prior testimony to be admitted in the retrial as substantive evidence. Additionally, Reaves challenges this Court’s finding of harmless error on direct appeal arising from the admission of Hinton’s prior testimony without those portions showing his inconsistent statements. These procedurally barred issues were denied properly.

In cases where there has been a summary denial, the standard of review is de novo for pure questions of law. Demps v. State, 761 So.2d 302 (Fla. 2000) (applying de novo review to trial court’s summary denial based upon finding claim was one raised on direct appeal). “To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or the record must conclusively refute them.” Occhicone v. State, 768 So.2d 1037, 1041 (Fla. 2000). Under this standard, the instant summary denial should be affirmed.

Although Reaves now challenges Hinton’s “unavailability”, he conceded that point on direct appeal. This precludes relitigation of the issue now. Reaves is procedurally barred from raising the issue here as a trial court error. Medina v. State, 573 So.2d 293, 295 (Fla. 1990) (finding rule 3.850 motions may not be used as second appeal).

On direct appeal, Reaves contended it was reversible error not to admit Hinton's inconsistent statements. This Court agreed, however, found the error harmless. Reaves v. State, 639 So. 2d 1, 3-4 (Fla. 1994).

In an attempt to relitigate the issue of whether the trial court should have admitted Hinton's inconsistent statements in hopes that this Court will change its determination on the matter and find harmful error, Reaves claims this Court overlooked a myriad of possible reasons, however, each is nothing more than factors inherent in this Court's harmless error analysis. Inasmuch as the issue of Hinton's prior inconsistent statements was resolved on direct appeal, it may not form a basis for postconviction relief. Medina, 573 So.2d at 295. This Court should affirm the trial court's decision that the matter is procedurally barred. Medina v. State, 573 So.2d 293, 295 (Fla. 1990) (finding rule 3.850 motions may not be used as second appeal).

ISSUE VII

SUMMARY DENIAL OF REAVES' CLAIM CHALLENGING THE PENALTY PHASE INSTRUCTIONS WAS PROPER (restated).

Here, Reaves challenges his sentence of death based upon (1) use of certain aggravating circumstances, (2) undermining of jurors' sentencing responsibility, (3) burden shifting, and (4) the expert testimony instruction. These issues were rejected summarily (PCR Vol. 12 1096-98). Such was appropriate as they were procedurally barred and/or legally insufficient. This Court should affirm the trial court.

In cases where there has been a summary denial, the standard of review is de novo for pure questions of law. Demps v. State, 761 So.2d 302 (Fla. 2000) (applying de novo review to trial court's summary denial based upon finding claim was one raised on direct appeal). "To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or the record must conclusively refute them." Occhicone v. State, 768 So.2d 1037, 1041 (Fla. 2000). Under this standard, the instant summary denial should be affirmed.

Reaves asserts that over his objection, the jury was instructed improperly on: (1) prior violent felony, (2) murder committed to disrupt/hinder law enforcement, and (3) murder committed to avoid arrest. This claim is procedurally barred. Trial counsel requested a doubling instruction and sought to preclude the giving of instructions on "avoid arrest" and "hindrance of a law enforcement officer" in addition, in his sentencing memorandum, challenging reliance upon these aggravators (ROA Vol. XVIII, 2748, 2764-70; Vol. XIX, 2944, 2959, 2975-76). The trial court rejected the request to give a doubling instruction under Suarez v. State, 481 So.2d 1201, 1209 (Fla. 1985), and Valle v. State, 581 So.2d 40, 47 (Fla. 1991). (ROA Vol. XV, 2254-56). Yet, Reaves failed to assert an "improper doubling" claim on direct appeal, although he could have done so. Because the claim could have been raised on appeal, it is procedurally barred in a motion for postconviction relief. See Suarez v. Dugger,

527 So.2d 190, 194 n.3 (Fla. 1988) (finding identical claim barred). This Court should affirm.

Seeking relief, Reaves contends the trial court's failure to include this Court's limiting instruction with the "avoid arrest" instruction resulted in the aggravator being "broadly applied." He also contends the HAC instruction was facially vague and overbroad. Both claims are barred.

On direct appeal this Court opined that reliance on the "HAC" factor was harmless error and that there was sufficient evidence to sustain the finding of the aggravating factor of "avoid arrest."

Reaves, 639 So.2d at 6 n.11. As such, this Court determination precludes any further review. See Muhammad v. State, 603 So. 2d 488, 489 (Fla. 1992). Cf. Jennings v. State, 583 So.2d 316, 323 n.3 (Fla. 1991) (finding challenges to HAC and CCP instructions procedurally barred). "Proceedings under rule 3.850 are not to be used as a second appeal." Medina v. State, 573 So.2d 293, 295 (Fla. 1990).

Here, Reaves claims section 921.141(5), Florida Statutes, which enumerates the aggravating factors, is unconstitutional on its face (**Initial Brief 64**). He challenged the statute below and challenged the instruction on direct appeal on page 86 of his initial direct appeal brief. Clearly, the matter is barred. "Proceedings under rule 3.850 are not to be used as a second appeal." Medina v. State, 573 So.2d at 295. Furthermore, this claim is without merit. This Court has repeatedly upheld the

constitutionality of the death penalty statute. E.g., Pooler v. State, 704 So.2d 1375, 1380-81 (Fla. 1997). The trial court's denial was proper and this Court should affirm.

It is Reaves' claim the trial judge's application of the aggravating factor "victim was a law enforcement officer" constituted an ex post facto violation and although the trial court did not find this aggravator, the jury was permitted to consider it in making its sentencing recommendation. Reaves also claims the aggravator is vague and changed the punishment he received.

In rejecting this contention the trial court reasoned the matter was procedurally barred (PCR Vol. 7, 1096-97). Such was a proper evaluation of the claim. As the trial court noted, and as admitted by Reaves here, trial defense counsel objected to the use of this aggravator. (ROA Vol. XIV 2183; Vol. XV 2254; Vol. XVIII 2803-08). Reaves could have, and should have, challenged on direct appeal the application of this aggravating factor. "Issues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack." Muhammad v. State, 603 So. 2d 488, 489 (Fla. 1992). See, Parker v. Dugger, 537 So.2d 969 (Fla. 1988) (finding ex post facto challenge to application of CCP factor procedurally barred). "Proceedings under rule 3.850 are not to be used as a second appeal." Medina v. State, 573 So.2d 293, 295 (Fla. 1990).

Regardless, the claim is without merit as this Court has rejected this challenge previously. E.g., Jackson v. State, 648 So.2d 85 (Fla. 1994) (finding application of

"victim was law enforcement officer" aggravator did not violate ex post facto clause). Also, the trial judge found this aggravator doubled with the "avoid arrest" aggravator, and thus, refused to find its existence. (ROA Vol. XIX, 3015-16). As a matter of law, this claim is legally insufficient.

Reaves challenges the use of his two 1973 convictions for conspiracy to commit robbery and grand theft, claiming they were not felonies involving the use or threat of violence, and therefore, the trial court should not have used them to support the "prior violent felony" aggravating factor. Addressing the "prior violent felony" aggravator, in its sentencing order, the trial court found that violence was involved in the conspiracy to commit robbery and the grand theft convictions where Reaves had held guns to the heads of clerks at two area motels while demanding money (ROA Vol. XIX 3010-11). The third conviction involved the beating of a corrections officer by Reaves while he was awaiting trial on the instant murder (ROA Vol. XIX, 3011-12).

Clearly, this claim is procedurally barred. At the commencement of the penalty phase, Reaves sought to preclude the use of the 1973 convictions involving the conspiracy to commit robbery and grand theft at two area hotels (ROA Vol. XII 1829-34). Such was overruled (ROA Vol. XII 1833-34). Hence, Reaves, who admits his trial counsel had objected to the aggravator's use, could have, and should have, challenged the court's findings and the instruction on direct appeal. Muhammad v. State, 603 So. 2d at, 489 (Fla. 1992). Also, the constitutionality of the "prior violent

felony” aggravator was addressed and rejected on direct appeal where this Court found “no constitutional infirmity in the statute.” Reaves, 639 So.2d at 6. Medina, 573 So.2d at 295.

Furthermore, the conclusory allegation raised below, and in this appeal, that “[t]o the extent trial counsel did not properly preserve this claim, Mr. Reaves received ineffective assistance of counsel” is legally insufficient and was rejected properly by the trial court. “Allegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal.” Id. See Asay v. State, 769 So.2d 974, 989 (Fla. 2000) (finding “one sentence” conclusory allegation that counsel was ineffective is an improper pleading and attempt to relitigate procedurally barred claims); Freeman v. State, 761 So. 2d 1055, 1067 (Fla. 2000)(same); Rivera v. State, 717 So. 2d 477, 480 n.2 (Fla. 1998) (same). This Court should affirm.

Reaves also maintains the jurors’ sentencing responsibility was undermined when the trial court instructed that their sentencing recommendation was advisory. This issue was raised and rejected on direct appeal as this Court noted, “We finally find no constitutional infirmity in the statute.” Reaves, 639 So.2d at 6.

Clearly, the claim is procedurally barred and the trial court’s order should be upheld. “Issues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack.” Muhammad v. State, 603 So. 2d

488, 489 (Fla. 1992). Furthermore, the claim is meritless as this Court has repeatedly rejected identical claims. E.g., Sochor v. State, 619 So. 2d 285, 291-92 (Fla. 1993) (opining, “Florida’s standard jury instructions fully advise the jury of the importance of its role and do not violate Caldwell.”). The trial court’s finding that the claim was procedurally barred, and in the alternative, without merit should be affirmed.

Citing to State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974), Reaves maintains the penalty phase jury instructions improperly shift the burden to the defendant to prove whether he should live or die. As a second ground for relief, Reaves asserts his trial counsel failed to object below. The State disagrees that relief is warranted. Instead, it submits the trial court was correct in finding the substantive matter procedurally barred and the assertion of ineffective assistance of counsel to be legally insufficient and conclusory (R 1098). Moreover, the contention that Florida’s capital sentencing scheme shifts the burden to the defense is meritless.

Challenges to the penalty phase jury instructions are matters which could have been raised on direct appeal and as such are procedurally barred from consideration in postconviction relief litigation. Occhicone v. State, 768 So.2d 1037, 1040 n.3 (Fla. 2000) (citing Buenoano v. Dugger, 559 So.2d 1116, 1118 (Fla. 1990); Gorham v. State, 521 So.2d 1067, 1070 (Fla. 1988). See Jennings v. State, 583 So.2d 316, 323 n.3 (Fla. 1991) (finding identical claim procedurally barred). Additionally a “one-sentence” allegation of ineffective assistance will not overcome a procedural bar. See,

Asay v. State, 769 So.2d 974, 989 (Fla. 2000) (finding “one sentence” conclusory allegation of counsel’s ineffectiveness is improper pleading and attempt to relitigate procedurally barred claims); Freeman v. State, 761 So.2d 1055, 1067 (Fla. 2000)(same). As such, the trial court’s summary denial was appropriate.

Finally, the claim was denied correctly, as the matter is without merit. Repeatedly, the claim of burden shifting in the penalty phase has been found meritless. See, Demps v. Dugger, 714 So.2d 365 (Fla.1998); Shellito v. State, 701 So.2d 837 (Fla.1997); Brown v. State, 565 So.2d 304, 308 (Fla.), cert. denied, 498 U.S. 992 (1990).

Reaves claims that the trial court erred in giving the expert witness instruction as it was an erroneous statement of the law. Reaves also asserts trial counsel’s failure to object was ineffective assistance. The State submits the challenge to the instruction was one which could have been addressed on direct appeal, and having failed to raise it there, the matter is procedurally barred. Further, the one-sentence accusation of ineffective assistance is legally insufficient. Also, the challenge to the instruction is meritless. Occhicone v. State, 768 So.2d 1037, 1040 n.3 (Fla. 2000) (citing Buenoano v. Dugger, 559 So.2d 1116, 1118 (Fla. 1990); Gorham v. State, 521 So.2d 1067, 1070 (Fla. 1988); Asay, 769 So.2d at 989 (finding “one sentence” conclusory allegation that counsel was ineffective is an improper pleading and attempt to relitigate procedurally

barred claims); Freeman, 761 So. 2d at 1067 (same). As such, summary denial was appropriate.

Moreover, an attorney may not be found ineffective for failing to object to use of a standard jury instruction. Thompson v. State 759 So.2d 650, 665 (Fla. 2000)(finding counsel not ineffective for failing to object to expert witness instruction which has not been overturned by the Florida Supreme Court). The trial court gave the standard expert witnesses instruction when it informed the jury.

(ROA Vol. XI 1779-80). With minor variations in words (emphasized above) and punctuation, the instruction given mirrors the standard instruction approved by this Court at the time of Reaves' trial. See Fla. Std. Jury Instr (Crim.) 2.04(a) [pg. 16]. See, Davis v. State, 520 So.2d 572, 574 (Fla. 1988) (upholding standard instruction on expert witness to be sufficient explanation of how jury should treat expert's testimony). Given the fact the standard instruction was read to the jury, the instant claim is meritless and summary denial was proper.

ISSUE VIII

CHALLENGE TO STATE'S DECISION TO SEEK THE DEATH PENALTY IS LEGALLY INSUFFICIENT (restated).

As Reaves' next issue, he asserts the State exercised its discretion to seek the death penalty against him in a racially discriminatory manner. This issue was raised on direct appeal as it relates to the judiciary and in his postconviction relief motion as it

relates to the Prosecution. In neither pleading does Reaves give any supporting facts or allege any proof for his claim.

In cases where there has been a summary denial, the standard of review is de novo for pure questions of law. Demps v. State, 761 So.2d 302 (Fla. 2000) (applying de novo review to trial court's summary denial based upon finding claim was one raised on direct appeal). "To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or the record must conclusively refute them." Occhicone v. State, 768 So.2d 1037, 1041 (Fla. 2000). Under this standard, the instant summary denial should be affirmed.

This Court should affirm the trial court's finding that the "allegation is conclusory and legally insufficient." (PCR Vol. 7, 1096). Without **any** factual allegations, Reaves claim is legally insufficient on its face. Kennedy, 547 So. 2d 912, 913. McCleskey v. Kemp, 481 U.S. 2792 (1987) ("holding that generalized statistical evidence of the disparate impact of the death penalty on minority defendants is not sufficient to prove a racial discriminatory purpose in the application of the Georgia capital punishment statute"); Robinson v. Moore, 25 Fla. Law. Weekly S647 (Fla. Aug. 28, 2000) (recognizing federal standard for analyzing racial discrimination in State's decision to seek death penalty - any "inferences of abuse of prosecutorial discretion requires 'exceptionally clear proof' of discrimination" - lack of factual allegations

makes claim procedurally barred); Foster v. State, 614 So.2d 455, 463 (Fla. 1992), cert. denied, 510 U.S. 951 (1993).

ISSUE IX

DENIAL OF RELIEF BASED UPON CLAIM PRESENCE OF UNIFORMED OFFICERS ATTENDED TRIAL WAS PROPER (restated).

Reaves asserts the presence of uniformed officers in the courtroom prejudiced him. The State submits the matter was denied properly as procedurally barred.

The standard of review is de novo for pure questions of law. Demps v. State, 761 So.2d 302 (Fla. 2000) (applying de novo review to trial court's summary denial based upon finding claim was one raised on direct appeal). "To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or the record must conclusively refute them." Occhicone v. State, 768 So.2d 1037, 1041 (Fla. 2000).

This issue was raised and rejected at trial and on direct appeal. (ROA Vol. V 703-04; Vol. IX 1322-23; Vol. XVIII 2830-32). Consequently it is procedurally barred. (PCR Vol. 7, 1097). See Rivera v. Dugger, 629 So.2d 105 (Fla. 1993) (finding identical claim procedurally barred). Summary denial was appropriate and should be affirmed.

ISSUE X

FLORIDA'S CAPITAL SENTENCING IS
CONSTITUTIONAL (restated).

Reaves contends the death penalty statute denies him due process and constitutes cruel and unusual punishment. He challenged it on direct appeal. Reaves, 639 So.2d at 6. “Proceedings under rule 3.850 are not to be used as a second appeal.” Medina, 573 So.2d at 295.

The standard of review is de novo for questions of law. Demps v. State, 761 So.2d at 306 (applying de novo review). “To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or the record must conclusively refute them.” Occhicone, 768 So.2d at 1041. The instant summary denial should be affirmed.

Florida's death penalty statute has been upheld repeatedly. See, Sims v. State, 754 So.2d 657, 664 (Fla. 2000)(holding retroactive application of execution method did not violate Ex Post Facto clause); Pooler, 704 So.2d at 1380-81 (affirming death penalty statute is constitutional); Hunter v. State, 660 So.2d 244, 252-53 (Fla. 1995), cert. denied, 516 U.S. 1128 (1996); Fotopoulos v. State, 608 So.2d 784, 794 n. 7 (Fla. 1992). In Walton v. Arizona, 497 U.S. 639 (1990), the United States Supreme Court noted challenges to Florida's capital sentencing have been rejected. See, Hildwin v. Florida, 490 U.S. 638 (1989); Spaziano v. Florida, 468 U.S. 447 (1984);

Proffitt v. Florida, 428 U.S. 242 (1976). Hence, this claim was denied properly and should be affirmed.

ISSUE XI

THE TRIAL COURT'S SUMMARY DENIAL OF THE CLAIM OF CUMULATIVE ERROR WAS PROPER (restated).

Declaring his trial fundamentally unfair based upon the “cumulative effect” of errors and “flaws in the system” pointed out in his brief and on direct appeal, Reaves seeks relief. The State submits no relief is warranted.

In cases where there has been a summary denial, the standard of review is de novo for pure questions of law. Demps v. State, 761 So.2d 302 (Fla. 2000) (applying de novo review to trial court's summary denial based upon finding claim was one raised on direct appeal). “To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or the record must conclusively refute them.” Occhicone v. State, 768 So.2d 1037, 1041 (Fla. 2000). Under this standard, the instant summary denial should be affirmed.

This claim was raised in the postconviction proceeding and was found to be procedurally barred (PCR Vol. 7, 1098-99). Such was a proper ruling as Reaves could have, and should have, challenged on direct appeal all of the errors he now claims occurred. Rivera v. State, 717 So.2d 477, 488 n.1 and 2 (Fla. 1998) (finding identical claim procedurally barred). Regardless, because the State maintains the

individual claims are either procedurally barred or without merit, *a fortiori* Reaves has suffered no cumulative effect which rendered his sentence invalid. See Occhicone v. State, 768 So.2d 1037, 1040 n.3 (Fla. 2000) (concluding “any claim that cumulative errors committed at trial prejudiced the outcome of [defendant’s] case must be raised on direct appeal” otherwise they are procedurally barred); Zeigler v. State, 452 So. 2d 537, 539 (Fla. 1984) (reasoning that “[i]n spite of Zeigler's novel, though not convincing, argument that all nineteen points should be viewed as a pattern which could not be seen until after the trial, we hold that all but two of the points raised either were, or could have been, presented at trial or on direct appeal. Therefore, they are not cognizable under rule 3.850.”), sentence vacated on other grounds, 524 So. 2d 419 (Fla. 1988). This Court should affirm the trial court’s decision that the matter is procedurally barred.

ISSUE XII

THE CLAIM OF JUDICIAL BIAS WAS DENIED PROPERLY BY THE TRIAL COURT (restated).

In postconviction litigation, Reaves challenges the impartiality of the trial judge. In ruling upon this claim, the postconviction trial court found the claim meritless based upon this Court’s statement on direct appeal finding that “[t]he record demonstrates that Judge [Balsinger] handled this first-degree murder trial in an exemplary manner.”

Reaves, 639 So.2d at 7, n 10 (PCR Vol. 12 1102). Such was a proper ruling and should be affirmed.

The standard of review for questions of law is de novo. Demps, 761 So.2d at 306 (applying de novo review). “To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or the record must conclusively refute them.” Occhicone v. State, 768 So.2d 1037, 1041 (Fla. 2000). The instant summary denial should be affirmed.

Here, Reaves claims he was denied an adversarial testing because Judge Balsiger was biased in favor of the State. Specifically, Reaves claims Judge Balsiger “rushed the proceedings,” overruled defense counsel’s objections, sustained the State’s objections, failed to admit relevant evidence, chastised defense witnesses, precluded mitigation evidence, denied defense counsel the opportunity to proffer evidence, assisted the prosecution in its case, commented on the jury’s sentencing recommendation, failed to consider and weigh mitigation, and failed to restrict the presence of uniform officers in the courtroom. Alternatively, Reaves claims his trial counsel was ineffective for failing to challenge Judge Balsiger’s impartiality. The State submits that not only is the claim time barred and procedurally barred, but it is legally insufficient.

Initially it must be noted that this claim is time barred¹⁸. Pursuant to rule 2.160, Florida Rules of Judicial Administration, a party must seek the recusal of the trial court within ten days “after discovery of facts constituting the grounds for the motion...” See, Rivera v. State, 717 So.2d 477, 481, n.3 (Fla. 1998).

Also, the matter is procedurally barred because, Reaves is attempting to recast claims of trial error into an assertion of trial court bias or ineffective assistance of counsel. Neither is proper. “Proceedings under rule 3.850 are not to be used as a second appeal.” Medina, 573 So.2d at 295; Rivera, 717 So. 2d at 480 n.2 (finding it impermissible to recast claim which could have or was raised on appeal as one of ineffective assistance to overcome procedural bar or relitigate direct appeal issue). See, Asay v. State, 769 So.2d 974, 989 (Fla. 2000) (finding “one sentence” conclusory allegation of ineffectiveness is an improper pleading and attempt to relitigate procedurally barred claim); Freeman v. State, 761 So. 2d 1055, 1067 (Fla. 2000)(same);

¹⁸ The State admits this argument was not raised below, yet, it may be considered here. See Dade County Sch. Bd. v. Radio Station WOBA, 731 So.2d 638, 645 (Fla. 1999) (concluding “appellee, in arguing for the affirmance in judgment, is not limited to legal arguments expressly asserted as grounds for the judgment below”); Caso v. State, 524 So.2d 422, 424 (Fla. 1988) (announcing “conclusion or decision of a trial court will generally be affirmed, even when based on erroneous reasoning, if the evidence or an alternate theory supports it”).

To the extent Reaves faults trial counsel for failing to object to Judge Balsiger's conduct, the factual allegations are legally insufficient on their face. Neither the single-sentence allegation in Reaves' motion nor the single-sentence reasserted here support the need for an evidentiary hearing, much less, relief. Reaves' assertions presented in the postconviction motion fail to allege Judge Balsiger spoke about the case outside the courtroom. Significantly, unlike in Valle v. State, 705 So.2d 1331, 1333-34 (Fla. 1997), Judge Balsiger's contact, if any, was not made in front of the jury and was not as personal as that in Valle. Merely speaking to persons in the hallway does not, by itself, constitute legally sufficient grounds for an evidentiary hearing or ultimate relief. In short, had trial counsel made these allegations in a motion to disqualify, they would have been legally insufficient. Thus, trial counsel may not be deemed ineffective for not raising a non-meritorious issue. Hence, the claim was denied properly and this Court should affirm.

ISSUE XIII

THE CHALLENGE TO THE JURY COMPOSITION IS PROCEDURALLY BARRED (restated).

It is Reaves' claim the State exercised its peremptory challenges in a discriminatory manner, but admits the racial make-up of the jury and the alternates is unknown. He also contends that "to the extent trial counsel did not properly preserve

this claim, Mr. Reaves received ineffective assistance of counsel.” Not only is the matter procedurally barred, but it is legally insufficient. Reaves is not entitled to relief.

In summary denial case, the standard of review is de novo for pure questions of law. Demps v. State, 761 So.2d 302 (Fla. 2000) (applying de novo review to trial court’s summary denial). “To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or the record must conclusively refute them.” Occhicone v. State, 768 So.2d 1037, 1041 (Fla. 2000). Under this standard, the instant summary denial should be affirmed.

Reaves could have, and should have, raised this issue on direct appeal. See Robinson v. State, 707 So.2d 688, 698 (Fla. 1998) (finding identical claim procedurally barred). To the extent Reaves alleges his counsel was ineffective for failing to object, “[a]llegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal.” Medina, 573 So.2d at 295. See, Asay, 769 So.2d at 989 (finding “one sentence” conclusory allegation that counsel was ineffective is an improper pleading and attempt to relitigate procedurally barred claims).

This claim is legally insufficient as Reaves fails to allege the racial makeup of the community, jury pool, venire, or ultimate jury. As reasoned in Robinson, such a claim is legally insufficient where the defense fails to show that the venires from which jurors are picked in his county would “systematically exclude distinctive groups in the

community.” Robinson, 707 So.2d at 698; Gordon v. State, 704 So.2d 107, 111 (Fla. 1997). Summary denial of the claim was proper were the proponent failed to show, either at trial or in his postconviction motion, that a racial group was excluded systematically. Robinson, 707 So.2d at 699. Given this, the trial court denied the instant claim properly. That decision should be affirmed.

ISSUE XIV

REAVES’ ALLEGATION THAT HE IS INSANE TO BE EXECUTED IS LEGALLY INSUFFICIENT (restated).

Reaves claims he is “insane to be executed” and “acknowledges that this claim is not ripe for consideration”, but asserts he raises it to preserve the claim for later review. The State agrees the claim is premature, however, raising it now will not preserve it for later consideration. The claim was denied properly as legally insufficient. This Court should affirm.

In summary denial case, the standard of review is de novo for pure questions of law. Demps v. State, 761 So.2d 302 (Fla. 2000) (applying de novo review to trial court’s summary denial). “To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or the record must conclusively refute them.” Occhicone v. State, 768 So.2d 1037, 1041 (Fla. 2000). Under this standard, the instant summary denial should be affirmed.

A defendant's claim that, in the future, he will be insane and not eligible for execution is legally insufficient to warrant relief. Summary denial is appropriate. See, LeCroy v. Dugger, 727 So. 2d 236, 239 (Fla. 1998). The state also asserts this claim should have been raised on direct appeal. Cf. Woods v. State, 531 So. 2d 79, 80 (Fla. 1988)(finding procedurally barred claim that executing defendant with diminished capacity is cruel and unusual punishment).

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court affirm Appellant's conviction and sentence of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to William Hennis, III, Assisitant CCRC, Law Office of the Capital Regional Counsel-South, 101 N.E. 3rd Ave. Suite 400, Fort Lauderdale, Florida 33301, this ____ day of January, 2001.

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of the type used in this brief is Courier New, 12 point, a font that is not proportionately spaced.

CELIA A. TERENCE
Assistant Attorney General