IN THE SUPREME COURT OF FLORIDA

NEWTON SLAWSON,

Appellant,

vs. CASE NO. 90,045

STATE OF FLORIDA,

Appellee.

______________________________/

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

Defendant Slawson was charged with four counts of first degree murder and one count of killing an unborn child by injuring the mother in the deaths of Peggy Williams Wood, Gerald Wood, Jennifer Wood, and Glendon Wood (R. I/17-19).[1] Slawson pled not guilty and trial commenced on March 7, 1990, before the Honorable Robert Bonnano, Circuit Judge. After deliberations, the jury found Slawson guilty as charged. Following the penalty phase of the trial, a jury recommended that the court impose four sentences of death (DA-R. 2144-47). The judge followed the jury's recommendation, finding prior violent felony convictions for each murder based on the contemporaneous killings and, as to the murder of Peggy Wood, finding the aggravating circumstance of heinous, atrocious or cruel (DA-R. 2157-60). In mitigation, the trial court found no significant history of criminal activity, substantial impairment of the capacity to conform conduct to the requirements of law, and murders committed under the influence of extreme mental or emotional disturbance; as well as nonstatutory mitigation of abuse as a child and the ability to act kindly and be friendly (DA-

[1]References to the record on appeal in this case will be designated by the letter "R" followed by the applicable volume/page number; references to the transcripts included in the instant record will be designated as "T" followed by the applicable volume/page number; references to the record on appeal in Slawson's direct appeal from his judgments and sentences, Florida Supreme Court Case No. 75,960, will be designated as "DA-R" followed by the applicable page number.

R. 2160-61).

The facts of this case are recited in this Court's opinion in the direct appeal from Slawson's judgment and sentences, Slawson v. State, 619 So.2d 255, 256-257 (Fla.), cert. denied, 114 S.Ct. 2765 (1994):

> On April 11, 1989, Peggy Williams Wood, her husband Gerald, and their two children, Jennifer, age four, and Glendon, age three, were murdered in their home. Also lost was the eight and one-half month fetus that Peggy Wood was carrying. At the time of the murders, the Wood family was living in a garage apartment next to Peggy Wood's parents' home in Hillsborough County. Around 10:00 p.m. on April 11, Peggy Wood was discovered lying on her parents' back porch. She had been shot twice, once in the abdomen and once in the back, and cut from the base of the sternum to the pelvic area. Her right thigh also had been cut several times. Still conscious, Peggy told her mother, "He killed Gerry and the kids." When asked "who," Peggy answered "Newton did it. Newton killed Gerry and the kids." Peggy Wood died a short time later.
>
> Gerald Wood and the two children were found dead upstairs in the couple's apartment. All three died as a result of gunshot wounds. Gerald Wood had been stabbed in the abdomen after dying from a gunshot wound to the back that entered the heart. At the foot of the couch where Gerald's body was found the body of the couple's unborn baby was discovered. The fetus had two gunshot wounds and several lacerations all of which were caused by injuries to the mother.
>
> Slawson was apprehended later that night. A .357 revolver, which was later determined to be the murder weapon, was found in his automobile. A magazine with incisions drawn on the abdominal area of nude women was also found.
>
> After his arrest, Slawson told detectives

that he went to the Woods' residence on the day of the murders. He took a six inch knife and a .357 revolver. At Gerald's request, Slawson put the gun in the bathroom so the children would not get it. He gave the knife to Gerald Wood to use to cut rock cocaine. Gerald Wood offered to sell Slawson some of the cocaine but Slawson refused the offer. When Peggy said Slawson might be the police, Slawson went to the bathroom to get his gun so he could leave. When Slawson returned, Gerald Wood got up with the knife in his hand. According to his statement, Slawson shot Gerald and may have shot Peggy at that time. As Slawson proceeded to the children's bedroom and shot them, Peggy Wood was screaming. After shooting the children he returned to the living room and shot Peggy again. Slawson then inserted his knife into Peggy Wood's abdomen and cut upward, causing the fetus to be expelled.

Slawson testified at trial that he believed he killed the Wood family but did not remember doing it. He believed that Gerald Wood had put drugs in his beer, causing him to feel odd and to believe he was locked in the apartment. He remembered stabbing Gerald and standing in the kitchen with the gun in his hand. He remembered determining that Gerald and Peggy were dead and trying to save the baby by making the incision into Peggy's abdomen. According to his testimony, when Slawson determined that the baby was not going to survive, he left intending to commit suicide. However, he later returned to the scene to see if he had, in fact, killed the family and was arrested soon thereafter.

Slawson further testified about his "habit" of drawing incisions on pictures of nude women. He explained that he began drawing pictures of mutilated bodies when he was eleven years old. For years, Slawson had lived with a "mental quirk" causing him to continuously think about disemboweling women. While in the Navy, Slawson discussed his problem with a psychologist, who told him the practice of drawing was "a useful tool for actualizing his aggressive tendencies" without actually harming anyone. According to

> Slawson, the psychologist told him to continue to draw but not to identify the pictures with anyone and to destroy the magazines after he drew on the pictures.

This Court affirmed the convictions and sentences on April 1, 1993. Slawson, 619 So.2d at 261. Thereafter, Slawson sought certiorari review in the United States Supreme Court, but his petition was denied on June 27, 1994. Slawson v. Florida, 114 S.Ct. 2765 (1994).

On September 12, 1995, Slawson filed a Motion for Extension of Time to File Motion Under Rule of Criminal Procedure 3.850 and 3.851 and a Petition for Writ of Mandamus in this Court (Florida Supreme Court Case No. 86,453). That motion/petition alleged that counsel had been unable to meet with Slawson due to the revocation of Slawson's front-cuff pass by the Department of Corrections (DOC), and requested additional time for the filing of the postconviction motion as well as an Order directing DOC to reissue Slawson's front-cuff pass. The motion/petition was denied on February 22, 1996.

The appellant filed an unsworn amended motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850 on November 1, 1996, and the State filed a Response on November 12, 1996 (R. I/184-327, 328-361).[2] On December 20, 1996, the court held a hearing pursuant to Huff v. State, 622 So.2d

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[2]Slawson's initial motion and request for leave to amend, filed September 15, 1995, was also unsworn (R. I/27-156).

982, 983 (Fla. 1993), to determine whether Slawson was entitled to an evidentiary hearing (T. III/35-56). At the Huff hearing, counsel for Slawson advised the court that Slawson met with attorney Dana Drukker on March 9, 1995, regarding the litigation pertaining to the DOC's refusal to issue a front-cuff pass to Slawson, but that Slawson had refused to meet with his attorneys since that time (T. III/39). Counsel asserted that he had retained a mental health expert; that the expert believed that Slawson was presently incompetent, paranoid, schizophrenic, and delusional; and that Slawson's input was necessary in order to provide relevant facts for the development of the postconviction claims (T. III/41-47). Counsel requested that the court conduct a competency determination, or hold the proceedings in abeyance pending this Court's resolution of a similar competency issue in the case of Antonio Carter.[3]

The State responded that Slawson did not have a right to competency in postconviction proceedings, but even if such a right existed, the allegations that Slawson refused to meet with counsel and that an unidentified mental health expert now deemed Slawson to be incompetent were insufficient to warrant a competency hearing (T. III/48-52). Although the State did not waive the verification requirement for postconviction motions, the court below permitted Slawson to proceed with an unverified motion, but denied his

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[3]This Court's opinion in the Carter case was issued on November 13, 1997, and is discussed in Issue II.

requests for a competency hearing or to hold the proceedings in abeyance (T. III/53). The judge ruled, however, that should an evidentiary hearing be necessary on any of the other claims asserted, that she would re-address the competency issue (T. III/53). Counsel for Slawson indicated that he would like a hearing on the ineffective counsel claims, but stated "we feel that we have not been given proper access to our client and we cannot and have not properly developed those claims because he refuses to see us" (T. III/53-54). Counsel asserted that Slawson was refusing to meet with them due to his mental illness, and "until that issue is resolved, Your Honor, I don't feel we can properly go forth with the rest of the motion" (T. III/54). The court then denied the remaining claims, noting the reasons set forth in the State's response (T. III/55).

On January 14, 1997, the trial judge filed her written order, summarily denying the amended motion for postconviction relief (R. II/368-370). This appeal follows.

SUMMARY OF THE ARGUMENT

I. The court below did not err in summarily denying the appellant's motion for postconviction relief. The claims raised were all procedurally barred or insufficiently pled.

II. The court below properly denied the appellant's requests for a competency hearing and/or to hold the proceedings in abeyance. Slawson has never identified specific factual matters at issue which require him to consult with counsel; he has also failed to offer reasonable grounds to believe that he is currently incompetent.

III. The allegations that the appellant was denied the effective assistance of counsel during the guilt phase of his capital trial were not sufficient to warrant an evidentiary hearing. The allegations do not demonstrate a deficient performance which rendered the results of his trial unreliable.

IV. The court below did not err in summarily denying the appellant's claim that he was denied due process by the rules limiting his right to interview jurors. This claim does not present a basis for postconviction relief, especially where no motion to interview jurors has been denied, and is also without merit.

V. The court below did not err in summarily denying the appellant's claim of innocence. No specific facts have ever been offered in support of this claim.

VI. The court below did not err in summarily denying the

appellant’s claim of ineffective mental health assistance. This claim was insufficiently pled, as no specific deficiency with regard to the evaluations conducted below has been identified.

VII. The appellant was not entitled to a hearing on his claim of ineffective assistance of counsel in the penalty phase of his capital trial. The postconviction motion did not specify any mitigation which had not been presented to the appellant’s jury. No deficiency or prejudice has been alleged by the appellant with regard to trial counsel’s penalty phase performance which requires evidentiary development, so the trial court properly rejected this claim.

VIII. The court below did not err in summarily denying the appellant’s claim of ineffective assistance of counsel during voir dire. As no facts were offered in support of this claim, it was insufficiently pled.

IX. The appellant’s claim regarding the jury instructions relating to expert testimony was properly denied as procedurally barred.

X. The appellant’s claim regarding judicial and prosecutorial comments allegedly suggesting that the law required the jury to return a recommendation of death was properly denied as procedurally barred.

XI. The court below did not err in summarily denying the appellant’s claim that the jury was improperly instructed on the aggravating factor of heinous, atrocious, or cruel. This claim was

procedurally barred and without merit.

XII. The appellant's claim that the trial court failed to find and weigh mitigating factors was properly denied as procedurally barred.

XIII. The court below did not err in summarily denying the appellant's claim that he was incompetent at the time of his trial. This claim was procedurally barred and insufficiently pled.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING THE APPELLANT'S MOTION FOR POSTCONVICTION RELIEF.

The appellant initially asserts that the court below erred in summarily denying his motion for postconviction relief, claiming that the files and records do not conclusively establish that he is entitled to no relief. However, an evidentiary hearing is only warranted in a postconviction case where specific facts are alleged which, if true, could support a cognizable claim for relief. No such facts were presented to the court below, and none have been offered to this Court in this appeal.

Although trial courts are encouraged to have evidentiary hearings on postconviction motions, if the motion lacks substantial factual allegations, or where alleged facts do not render the judgment vulnerable to collateral attack, the motion may be summarily denied. Steinhorst v. State, 498 So.2d 414, 414-415 (Fla. 1986); Porter v. State, 478 So.2d 33 (Fla. 1985). A hearing is only warranted where a defendant alleges specific facts, not conclusively rebutted by the record, which demonstrate a legal basis for relief. Cherry v. State, 659 So.2d 1069, 1072 (Fla. 1995) (no hearing warranted on an ineffective assistance of counsel claim where facts did not demonstrate a deficiency in performance

that prejudiced the defendant); Jackson v. Dugger, 633 So.2d 1051, 1055 (Fla. 1993); Mendyk v. State, 592 So.2d 1076, 1079 (Fla. 1992); Roberts v. State, 568 So.2d 1255, 1256-1260 (Fla. 1990); Kennedy v. State, 547 So.2d 912, 913 (Fla. 1989).

In the instant case, as will be seen, all of the issues presented were either procedurally barred or insufficiently pled. Since the postconviction motion filed below did not render the appellant's convictions vulnerable to collateral attack, the trial court properly denied the motion without an evidentiary hearing.

Slawson's claim that the trial court should have held his proceedings in abeyance pending this Court's opinion in Carter v. State, 23 Fla. L. Weekly S147 (Fla. November 13, 1997), is also without merit. No legal authority has been offered which would permit a trial court to stay a postconviction proceeding simply because a similar issue is before this Court in an unrelated case. As noted in Issue II, the trial court's actions with regard to his claim of current incompetence were consistent with Carter, so any delay on that basis would not have changed the outcome of the case.

At the Huff hearing below, the appellant's counsel acknowledged the insufficiency of the motion before the trial court as to all issues other than Slawson's claim of current incompetence (T. III/53-54). On these facts, the trial court's summary denial of the postconviction motion was proper.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING THE APPELLANT'S REQUEST FOR A COMPETENCY DETERMINATION.

Slawson's amended 3.850 asserted, for the first time, that Slawson is presently incompetent, and that his postconviction action "cannot proceed until he has regained his competency" (R. 201). This claim, as pled, did not entitle Slawson to any relief or warrant any further delay in these proceedings.

In Carter, 23 Fla. L. Weekly at S148, this Court examined the appropriate considerations when postconviction counsel alleges that a capital defendant is currently incompetent and unable to assist in investigating and presenting his postconviction motion. Pursuant to Carter, a trial court must conduct a competency determination "only after a capital defendant shows there are specific factual matters at issue that require the defendant to competently consult with counsel." No such specific issues have been identified in this case.

Slawson's counsel identifies three broad, general areas about which he claims he must consult with Slawson: possible facts pertaining to his abuse as a child; possible facts pertaining to his mental illness; and possible facts pertaining to his relationship with trial counsel. As to the first two areas, there is no likelihood that the development of particular facts can generate a cognizable postconviction claim. Slawson's abuse as a child was well established at his sentencing proceeding, and the

trial court found and weighed this abuse as nonstatutory mitigation. Slawson's mother testified that she physically abused Slawson when he was growing up -- she admitted that she whipped him, often and hard; she tied him up; she locked him in a closet for hours at a time when he was between the ages of five and ten (DA-R. 1560-61). She stated that she was sick, and angry, and took out all of her frustrations on Slawson, but he remained very loyal and loving (DA-R. 1561). She remarried when Slawson was ten, and her husband was an alcoholic that was violent and abusive toward Slawson (DA-R. 1562). Dr. Berland noted that Slawson's stepfather had repeatedly slammed Slawson's head into a wall (DA-R. 1637). On these facts, it is not true that "[c]ounsel must confer with Mr. Slawson to determine whether he experienced any abuse, and who may have been the perpetrator or perpetrators" (Appellant's Initial Brief, p. 8); counsel can read the transcript from the sentencing hearing to ascertain these facts. In addition, since the judge and jury were aware of his abuse as a child at the time of sentencing, no meritorious postconviction claim can be developed from these facts.

The same reasoning applies to rebut counsel's assertions that he must meet with Slawson to develop facts relating to his mental illness. Slawson's mental and emotional problems were thoroughly explored at the time of trial, and both statutory mental mitigators were found and weighed by the judge (DA-R. 2160). In addition, according to the appellant's brief, Slawson himself would not be a

reliable source of such information (Appellant's Initial Brief, p. 39). Since Slawson is not the best source and clearly not the only source of information relating to his mental health at the time of trial, and since the record reflects that all mental health issues were thoroughly investigated at that time, this is not a specific factual matter requiring Slawson to competently consult with counsel.

The last area alleged as requiring Slawson's input is his relationship with trial counsel. Facts concerning Slawson's relationship with trial counsel will not lead to a postconviction claim since the Sixth Amendment does not assure a "meaningful relationship" with counsel as part of the constitutional right to counsel. Morris v. Slappy, 461 U.S. 1, 13-14 (1983). Although Slawson could have relevant information about counsel's specific performance, there are other sources also available which have not been explored in this case. Slawson's trial attorneys, family members, trial witnesses, court pleadings, and other attorneys are all potential sources which could, at a minimum, assist in identifying a specific factual matter which might require Slawson's personal input. However, these sources have apparently not been investigated, and no specific factual matter, as required by Carter, has been identified.

Thus, Slawson's allegations in this regard are insufficiently pled. In addition, even if his assertions were sufficient to suggest that there are specific factual matters (rather than broad

legal claims) which require Slawson's input, his motion failed to allege reasonable grounds to believe that he is presently incompetent. See, Carter, 23 Fla. L. Weekly at S148. The motion merely asserted that current counsel has retained a mental health expert, and that this expert has concluded that Slawson must be incompetent. This same expert, according to the motion, has also concluded "within a reasonable degree of medical certainty," that Slawson was insane at the time of the murders. The expert has never met with or spoken to Slawson, but bases these conclusions on a review of Slawson's history, Slawson's current refusal to meet with counsel, and discussions with collateral counsel.

Inasmuch as this alleged expert is never identified, his credentials are never disclosed, and there is no supplemental affidavit or other provision of specific facts to support his conclusion of incompetence, this issue is insufficiently pled. Rule 3.850(c)(6) expressly requires the recitation of specific facts relied upon in support of a postconviction motion. See, Jackson, 633 So.2d at 1054 ("Conclusory allegations are not sufficient to require an evidentiary hearing"); Kennedy, 547 So.2d at 913.

Even if the allegations submitted in this claim went beyond the unsubstantiated speculation of incompetence, this claim is refuted by the record. The amended motion admits that Slawson met with postconviction counsel regarding litigation of the Department of Corrections' refusal to issue a front-cuff pass to Slawson (R.

193); it is apparent from this admission that Slawson can and will meet with his attorneys when he sees fit. The conclusion of the newly-retained alleged mental health expert that there can be "no other explanation for [Slawson's] conduct the night of the homicides" other than insanity is refuted by the mental health evidence presented during Slawson's trial, including defense experts Dr. Sidney Merin (testifying at DA-R. 886-887 that Slawson did not meet Florida's definition of insanity at the time of the murders), and Dr. Michael Maher (testifying at DA-R. 971 that Slawson was not insane at the time of the crimes).

For all of the foregoing reasons, the court below properly denied any relief on this claim. This Court must affirm the summary denial of this issue.[4]

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[4]Slawson's argument with regard to the appropriate standard of competency to be applied in postconviction proceedings need not be considered in this case. In Carter, this Court directed the Criminal Procedure Rules Committee to propose rules as to this issue; the appellant's comments should be directed to that committee.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING THE APPELLANT'S CLAIM ALLEGING INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT PHASE OF HIS CAPITAL TRIAL.

Slawson's next claim alleges that he was denied the effective assistance of counsel in the guilt phase of his capital trial. Slawson's claim focuses on trial counsel's failure to object to the testimony of Dr. Stanton Samenow, or to preclude Dr. Samenow from testifying at all. The propriety of Dr. Samenow's testimony was examined by this Court in Slawson's direct appeal, and there is no basis to revisit this issue under the guise of an ineffective assistance of counsel claim. See, Robinson v. State, 23 Fla. L. Weekly S85, S89 (Fla. February 12, 1998); Cherry, 659 So.2d at 1072 (inappropriate to use a different argument to relitigate a claim previously rejected); Medina v. State, 573 So.2d 293 (Fla. 1990) (ineffective assistance of counsel can't be used to circumvent the rule against using 3.850 as a second appeal). The appellant cannot turn this into a cognizable claim simply by converting the issue to effective assistance of counsel.

Even if the issue is considered, however, Slawson has failed to demonstrate that his counsel was ineffective with regard to Dr. Samenow's testimony. In Strickland v. Washington, 466 U.S. 668, 689 (1984), the United States Supreme Court established a two-part test for reviewing claims of ineffective assistance of counsel, which requires a defendant to show that (1) counsel's performance

was deficient and fell below the standard for reasonably competent counsel and (2) the deficiency affected the outcome of the proceedings. The first prong of this test requires a defendant to establish that counsel's acts or omissions fell outside the wide range of professionally competent assistance, in that counsel's errors were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687, 690; Valle v. State, 22 Fla. L. Weekly S751 (Fla. December 11, 1997); Rose v. State, 675 So.2d 567, 569 (Fla. 1996). The second prong requires a showing that the "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable," and thus there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. 466 U.S. at 687, 695; 22 Fla. L. Weekly at S751; 675 So.2d at 569.

In this case, the only possible deficiency specified is counsel's performance with regard to Dr. Samenow. As will be seen, this asserted deficiency did not justify the granting of an evidentiary hearing in this case.

Dr. Samenow is a licensed clinical psychologist, presented at trial by the State as a rebuttal witness (DA-R. 1192-1226). In support of his intoxication defense, Slawson had presented two experts, Dr. Merin and Dr. Maher, both of whom opined that Slawson's ingestion of cocaine and alcohol rendered him so intoxicated that he was unable to form the intent to kill at the

time of the crime. In rebuttal, Dr. Samenow testified that, in his opinion, it was "extremely difficult" and "virtually impossible" to reconstruct the mental state of a defendant in a criminal case after the fact (DA-R. 1202). This conclusion was based on Samenow's research and experience in a seventeen year study of criminal offenders, based at St. Elizabeth's Hospital in Washington, D.C. (DA-R. 1201). According to Samenow, the difficulty with reconstructing a mental state after the fact is caused by the fact that the reconstruction is based on what the person is telling the expert, and the defendant is not a reliable source because he is in legal jeopardy at the time (DA-R. 1203). His interviews of defendants that had been adjudicated and were no longer in legal jeopardy revealed that many had not been mentally ill, but had calculated an insanity defense in order to be sent to a hospital rather than a prison (DA-R. 1203). His findings had been published in a three volume treatise, "The Criminal Personality" (DA-R. 1194, 1204).

Samenow also testified that he had reviewed relevant materials in this case, including letters, police reports, depositions, and news articles, and concluded that he was not able to form an opinion as to whether or not Slawson had the mental ability to form a specific intent to kill (DA-R. 1204-06, 1211). He noted Dr. Merin's reliance on what Slawson had told Merin and suggested that, due to Slawson's situation, this was not a reliable basis for Merin's opinion (DA-R. 1206). Furthermore, according to Samenow,

the psychological tests conducted by Merin are not useful to reconstruct a past mental state, only to assess a current mental state (DA-R. 1207). Samenow also testified that his review of the materials did not reveal any indicia of mental illness, although Slawson clearly had problems, such as his substance abuse (DA-R. 1209). Finally, Samenow concluded that, based on Slawson's statements to Dr. Merin that he had not used illegal drugs since high school and his statements to Dr. Maher admitting substantial illegal drug use while in the Navy and through the time he moved to Tampa in late 1980, that Slawson had a credibility problem (DA-R. 1210).

On cross examination, defense counsel challenged the validity of Samenow's conclusions and the reliability of the seventeen year study (DA-R. 1212-19). He questioned Samenow's assertion that the defendants, still locked up, were no longer in legal jeopardy once they had been adjudicated (DA-R. 1215-17). He pointed out that, although Samenow claimed to be unable to determine a mental state after the fact, Samenow was doing just that by essentially negating the findings of the courts that had determined these defendants to be insane (DA-R. 1217-19). Samenow also testified that, although he believed in psychosis, he had never found anyone that committed a crime while in a psychotic state, or while their mental faculties were substantially impaired (DA-R. 1219-20). Samenow clarified that he wasn't saying psychotic or impaired people didn't commit crimes, only that the crimes were not caused by the psychosis or

impairment (DA-R. 1221).

Slawson now submits that his trial counsel was ineffective for failing to effectively cross examine Samenow, or to prevent him from testifying all together. He claims that Samenow's entire testimony should have been excluded as irrelevant because it did not assist the jury; he merely told them it was impossible to do what the law required - assess Slawson's mental state at the time of his crime. However, he has failed to identify a legal basis for excluding Samenow as a witness. His assertions that Samenow's testimony was confusing, contradictory, and unreliable do not demonstrate any legal grounds for exclusion.

Clearly, much of Samenow's testimony was relevant and admissible. He assisted the fact finders by discussing appropriate considerations in weighing the testimony of the defense experts, such as the experts' reliance on Slawson's statements in reaching their conclusions. His findings from his seventeen year study of the criminally insane - that many defendants are able to beat the system by adjudications of not guilty by reason of insanity, despite being sane at the time of the crime - was also relevant. The testimony which this Court disapproved in the direct appeal, that insanity and impairment defenses were essentially charades, was not the only testimony offered through this witness. The major focus of Samenow's testimony did not relate to the legitimacy of these defenses, only to the applicability of these defenses in particular cases. The fact that defense counsel brought out

Samenow's bias against this defense, which the jury knew (from the judge's instructions) to be a legally recognized defense, only served to diminish Samenow's credibility and cannot be reasonably accepted as a basis of ineffectiveness of counsel.

Thus, Slawson's postconviction allegations fail to show that trial counsel's conduct fell outside the wide range of reasonable professional assistance. He has also failed to show that the results of the trial would have been different. This Court specifically found that, even with the improper testimony by Samenow, Slawson was *not* "deprived of a defense." 619 So.2d at 259. Therefore, his allegations fail to meet his heavy burden of demonstrating a colorable claim of ineffective assistance of counsel sufficient to warrant an evidentiary hearing. An examination of the entire transcript in the instant case reveals that Slawson's counsel acted as advocates, aggressively cross examining Dr. Samenow and presenting their own witnesses to refute Samenow's testimony.

Slawson's motion also summarily alleges that other guilt phase errors were committed by trial counsel. These "errors" are only identified by conclusory allegations that counsel failed to investigate and prepare, failed to know the law, and failed to object to trial errors. Since no specific facts are offered in support of his allegation of other guilt phase errors, no relief is warranted. See, Jackson, 633 So.2d at 1054 ("Conclusory allegations are not sufficient to require an evidentiary hearing"). "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." Kennedy, 547 So.2d at 913.

As to all of the alleged bases of ineffective assistance of counsel, the appellant has failed to show or even seriously allege any prejudice. The overwhelming nature of the evidence of the appellant's guilt, including Peggy Wood's dying declaration identifying him as the one that had butchered her family, clearly demonstrates the lack of any prejudice. Hildwin v. Dugger, 654 So.2d 107, 109 (Fla.), cert. denied, 116 S.Ct. 420 (1995). Furthermore, the facts of this case refuted his intoxication defense -- Slawson described his actions in postarrest statements and testimony, including his attempt to cut out Peggy's fetus in order to save the baby. His recall and the assignment of a motive to his actions with regard to the unborn baby are inconsistent with an intoxication defense.[5] See, Jennings v. State, 583 So.2d 316, 319 (Fla. 1991); White v. State, 559 So.2d 1097, 1099 (Fla.), cert. denied, 116 S.Ct. 591 (1995). Therefore, no hearing on the claim of ineffective assistance of guilt phase counsel was necessary.

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[5]In light of this evidence, Slawson's assertion that the prosecutor "relied heavily" on Dr. Samenow's testimony in his closing argument is without merit. That assertion was based on the prosecutor's statement that the intoxication defense was "sheer nonsense" in this case "based on the testimony you heard from the stand, based on all the evidence that you have seen" (Appellant's Initial Brief, p. 21), but these statements encompass Slawson's statements as much as Dr. Samenow's testimony.

A review of the postconviction motion establishes that this claim was insufficiently pled and no evidentiary hearing was warranted. Jackson, 633 So.2d at 1054-1055; Engle v. Dugger, 576 So.2d 696, 699 (Fla. 1991); Lambrix v. State, 534 So.2d 1151, 1154 (Fla. 1988). The trial court's summary denial of the appellant's claim that he was denied his right to the effective assistance of counsel at trial was proper. Slawson has never alleged specific facts which would warrant an evidentiary hearing on this issue. Therefore, he is not entitled to any relief.

ISSUE IV

WHETHER THE COURT BELOW ERRED IN SUMMARILY DENYING THE APPELLANT'S CLAIM THAT HE HAS BEEN DENIED DUE PROCESS DUE TO HIS INABILITY TO INTERVIEW JURORS.

The appellant's next claim, protesting his inability to interview jurors, cannot compel postconviction relief. It must be noted initially that this claim is not appropriate for a motion to vacate under Rule 3.850, since it does not attack the validity of the appellant's convictions or sentences. Foster v. State, 400 So.2d 1 (Fla. 1981). This is particularly true in the instant case, since Slawson has never even filed a motion in the trial court requesting permission to interview jurors.

Even if the claim is considered, however, Slawson has not demonstrated that relief is warranted. Florida Rule of Professional Conduct 4-3.5(d)(4) does not impose a blanket prohibition on the appellant's right to contact the jurors that deliberated his fate, as implied in his brief; it only restricts any such contact to circumstances where an attorney can demonstrate to the trial judge that he has reason to believe that grounds for a legal challenge to the verdict may exist. Even if these restrictions are construed to potentially impinge upon a constitutional right, the rule is valid because it serves vital governmental interests in protecting the finality of a verdict, preserving juror privacy, and promoting full and free debate during the deliberation process.

The United States Supreme Court has held that "long-recognized and very substantial concerns" justify protecting jury deliberations from the intrusive inquiry which the appellant's attorney is apparently seeking to conduct in this issue. Tanner v. United States, 483 U.S. 107 (1986). Federal courts have consistently upheld the federal restrictions on post-trial juror interviews against constitutional challenges much like Slawson offers in his brief. See, United States v. Hooshmand, 931 F.2d 725, 736-737 (11th Cir. 1991); United States v. Griek, 920 F.2d 840, 842-844 (11th Cir. 1991). The reasoning of those cases applies equally well to Florida's rule restricting juror contact when considered in light of Florida's constitutional right of access to the courts, and demonstrates that the appellant is not entitled to relief in this issue.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING THE APPELLANT'S CLAIM ALLEGING ACTUAL INNOCENCE.

On appeal, as in the postconviction motion filed below, Slawson fails to allege *any* facts to support his claim of actual innocence. Given the absolute lack of factual allegations, Slawson has not even demonstrated a good faith basis for offering this issue. He is clearly not entitled to relief. Jackson, 633 So.2d at 1054; Kennedy, 547 So.2d at 913.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING THE APPELLANT'S CLAIM ALLEGING INEFFECTIVE MENTAL HEALTH ASSISTANCE.

Slawson's next claim asserts that he was denied competent mental health assistance. Citing Ake v. Oklahoma, 470 U.S. 68 (1985), he contends that he was denied an alleged constitutional right to effective mental health assistance because an unidentified expert now concludes that the appellant suffers serious mental problems. Once again, a review of the record demonstrates that no evidentiary hearing was warranted on this claim.

This Court has rejected similar claims in postconviction proceedings as procedurally barred. See, Johnson v. State, 593 So.2d 206, 208 (Fla.), cert. denied, 506 U.S. 839 (1992); Medina, 573 So.2d at 295. To the extent that the appellant relies on Ake to allege that the state deprived him of resources to prepare and present his defense, this is a direct appeal issue which could have been raised on appeal. See, Morgan v. State, 639 So.2d 6, 12 (Fla. 1994) (applying Ake in direct appeal case); Burch v. State, 522 So.2d 810 (Fla. 1988). To the extent that the appellant is asserting counsel was ineffective for failing to ensure adequate mental health assistance, he has failed to identify any specific deficiency with regard to counsel's performance. The appellant does not describe any information which counsel should have discovered or provided to his trial mental health experts. Thus, his allegations are insufficient.

To the extent that any substantive mental health claim remains, the 3.850 motion was legally insufficient in light of the trial record. As will be seen, his conclusory allegations were refuted by the testimony of the experts presented in his trial.

The appellant has not identified any specific deficiency with regard to the three evaluations conducted below. He has not cited any relevant mental health evidence which was available at the time but not considered by his trial experts. The appellant's claim that his new, unnamed expert could have offered more favorable testimony is not a sufficient basis for relief. Engle, 576 So.2d at 700; Provenzano v. Dugger, 561 So.2d 541, 546 (Fla. 1990); Correll v. State, 558 So.2d 422, 426 (Fla. 1990); Hill v. Dugger, 556 So.2d 1385, 1388 (Fla.), cert. denied, 116 S.Ct. 196 (1995); Stano v. State, 520 So.2d 278, 281 (Fla. 1988) ("That Stano has now found experts whose opinions may be more favorable to him is of little consequence"). As in Correll, "There is no assertion that [Slawson] had ever received prior mental health treatment." 558 So.2d at 426. See also, Engle, 576 So.2d at 701 ("This is not a case like Mason v. State, 489 So.2d 734 (Fla. 1986), in which a history of mental retardation and psychiatric hospitalizations had been overlooked").

Psychiatric evaluations may be considered constitutionally inadequate so as to warrant a new sentencing hearing where the mental health expert ignored "clear indications" of either mental retardation or organic brain damage. Rose v. State, 617 So.2d 291,

295 (Fla.), <u>cert. denied</u>, 510 U.S. 903 (1993); <u>State v. Sireci</u>, 502 So.2d 1221, 1224 (Fla. 1987). No such indications have been identified in this case. Slawson's claim that the psychiatric examinations "ignored indications of schizophrenia" (Appellant's Initial Brief, p. 39) is clearly insufficient, since the alleged indications are not specified. Furthermore, Dr. Berland testified that the appellant displayed symptoms of schizophrenia, including hallucinations, delusions, and affective disturbances (DA-R. 1620, 1633).

The record in this case conclusively rebuts Slawson's claim that his mental health examinations were inadequate. In guilt phase, Slawson's attorneys presented the testimony of two mental health experts, Dr. Maher and Dr. Merin. Both had met with Slawson repeatedly and opined that Slawson was unable to form the intent to kill at the time of the murders due to his cocaine and/or alcohol intoxication (R. 879-881, 958-961). These experts did not rely solely on Slawson's self-report, but reviewed Slawson's military, medical and psychological reports, witness statements, police reports, statements from Slawson's family, and depositions (R. 879-881, 959-960).

In penalty phase, Dr. Robert Berland testified about mental health mitigation, concluding that both statutory mental mitigating factors applied (R. 1590). Dr. Berland testified that Slawson suffered from an extreme emotional disturbance and was substantially impaired in his ability to conform his conduct to the

law (R. 1591-92). Berland testified at length about the psychological tests he had administered, noting Slawson's scores indicated "some kind of chronic or long lasting psychotic disturbance," and showed elevated results on scales measuring schizophrenia, mania, and sociopathic thinking (DA-R. 1612-15). The tests also indicated that Slawson tried to underestimate the severity of his symptoms, suggesting that his profile would have been higher if he had been completely honest (DA-R. 1613). Berland also reviewed the results of Dr. Merin's personality inventory, which had been conducted nine months before Berland's testing, closer to the time of Slawson's arrest (DA-R. 1612, 1616-19). Merin's results showed even higher scores on the schizophrenia scale, especially as to indications of hallucinations (DA-R. 1616-17). Berland attributed the difference to several possible factors, including the possibility that Merin's tests were exacerbated by a continuing influence from prior drug use (DA-R. 1618-20).

Berland also administered an intelligence test which indicated that Slawson is very bright, with an overall IQ of 131, in the superior range (DA-R. 1624-25). This was consistent with Merin's conclusion of an overall IQ of 122, using a revised test that typically scored a little lower (DA-R. 1626-28). Berland's test demonstrated an unusual variance in scores among the various subtests, suggesting brain damage (DA-R. 1626). The particular subtest on which Slawson scored an abnormally low (as compared to

the other subtests) IQ of 99 indicated that there was widespread or diffuse brain damage such as one gets from huffing gasoline or paint thinner, rather than reflecting damage in a single location from an injury (DA-R. 1627-28, 1661).

Berland also related an extensive list of incidents that appeared to have produced some brain injury, including outlining the history of head injuries and other causes of brain damage noted in the appellant's brief: Slawson's mother having fallen on her stomach during pregnancy; difficulties in childbirth; falling and cracking his forehead as a toddler; being diagnosed with a skull fracture while in the military; being hit on the head by a tree swing when he was 5; falling from a seesaw when he was 7; being hit in the face and back of the head and knocked out when he was 8; being thrown from a horse when he was 12; being subject to physical abuse by his step-father, including having his head slammed into a wall; being diagnosed with high blood pressure; being hit in the head repeatedly with a pool cue when he was 31; and being in a motorcycle accident shortly thereafter which cracked his helmet (DA-R. 1636-38). Slawson's history of drug and alcohol abuse was also noted (DA-R. 1618, 1635, 1645, 1659, 1667-68). Thus, although Slawson's postconviction motion suggests this information was not known to his mental health experts, these facts were clearly known at the time of trial and, in fact, were presented to Slawson's jury.

In addition, Berland did not rely solely on Slawson's self-

report, but interviewed a number of lay witnesses (DA-R. 1639). Some of these witnesses may have been biased by their desire to help Slawson, but others were disinterested, or even afraid of him (DA-R. 1641-43). Berland concluded that his clinical interview with Slawson, the results of his psychological testing, and the statements of independent witnesses were all consistent with each other and corroborated his results (DA-R. 1643). He determined that Slawson had a long-standing psychotic disturbance which extended well back into his childhood, with at least some origins due to brain damage, and also displayed symptoms of an inherited disorder that complicated his brain-damage psychosis (DA-R. 1644-45). He also diagnosed an organic personality syndrome, featuring paranoia, emotional irritability and instability, poor reaction control, and distorted judgment (DA-R. 1648-50). Berland discussed how neither Slawson's high intelligence nor his ability to look and act completely normal cast any doubt on the existence of brain damage (DA-R. 1657-58, 1669).

Thus, the expert testimony presented refutes the allegations now offered by Slawson. Even if Slawson has been able to find a mental health expert whom Slawson believes could have offered more favorable testimony (although none is specifically identified in the motion), this is not a sufficient basis for relief. Provenzano, 561 So.2d at 546; Stano, 520 So.2d at 281. In addition, Slawson's failure to allege specifically what any new expert would testify to demonstrates that no evidentiary hearing is

warranted on this claim. Jackson, 633 So.2d at 1054. Although Slawson makes a bald assertion that his mental health experts and his attorneys failed to conduct adequate background investigations, he does not identify any potential evidence or information that may have been discovered if further investigations had been conducted. Other than referring to "compelling" testimony and "compelling" mitigation he asserts could have been discovered and presented, he has offered nothing in the way of specific facts to support this claim. He asserts that "indications of schizophrenia" were ignored, yet he fails to allege what the specific indicators were, and he does not claim that he can establish any indicators beyond those discussed at trial if granted an evidentiary hearing.

In order to obtain an evidentiary hearing on this claim, Slawson must allege more than the conclusory argument presented in his motion. His allegations that a new, unidentified expert can offer relevant mental health evidence does not demonstrate that the examinations conducted were insufficient. Engle, 576 So.2d at 702. Since Slawson has failed to specifically identify any inadequacies in his mental health examination, or to otherwise show that his mental health assistance was constitutionally ineffective, this claim was properly summarily denied.

ISSUE VII

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING THE APPELLANT'S CLAIM ALLEGING INEFFECTIVE ASSISTANCE OF COUNSEL IN THE PENALTY PHASE OF HIS CAPITAL TRIAL.

As his next claim, Slawson merely repeats the allegations made in support of Issue III, pertaining to the adequacy of his legal representation in the guilt phase of his trial, and Issue VI, pertaining to the adequacy of the mental health expert assistance. Slawson suggests that his attorneys' alleged failure to competently challenge the testimony of state witness Dr. Samenow also prejudiced him in the penalty phase, since jurors were misled into believing that mental impairment could not be considered in mitigation. The record, however, refutes the suggestion that the jurors could have applied Dr. Samenow's testimony in such a manner. Defense counsel discussed the unrebutted mental mitigation that had been presented, and the trial court specifically instructed the jury to consider mental mitigation (DA-R. 1693-94, 1700, 1703-07, 1713-14).

Slawson's allegations that counsel failed to adequately investigate or present mitigating evidence is also refuted by the record. It is important to keep in mind the evidence that was presented during the penalty phase. Slawson's mother testified to his positive character traits, and to the abuse he suffered at her hands and the hands of his stepfather as he was growing up (DA-R. 1559-62). His uncle, with whom Slawson lived at the time of the

murders, and three friends testified to many acts of kindness and compassion displayed by Slawson (DA-R. 1564-83). Dr. Berland provided lengthy testimony of Slawson's brain damage and psychosis, including the applicability of both statutory mental mitigators (DA-R. 1583-1669). Berland also discussed his history of drug abuse, his honorable discharges from the Army and Navy, and his good behavior while in jail awaiting trial (DA-R. 1630, 1644-46, 1678).

In fact, Slawson has not identified *any* additional testimony or evidence that should have been presented for mitigation purposes. Therefore, this allegation of ineffective assistance did not warrant an evidentiary hearing. See, Foster v. Dugger, 823 F.2d 402, 406 (11th Cir.) (the mere fact that other witnesses might have been available or other testimony might have been elicited is not a sufficient ground to prove ineffectiveness), cert. denied, 487 U.S. 1241 (1988). As in Spaziano v. Singletary, 36 F.3d 1028 (11th Cir.), cert. denied, 115 S.Ct. 911 (1995), "[t]here is nothing in the record to indicate that [Slawson's] present counsel are either more experienced or wiser than his trial counsel, but even if they were, the fact that they would have pursued a different strategy is not enough." If the best lawyers or even most good lawyers "could have conducted a more thorough investigation that might have borne fruit," (which the appellant does not even allege) it does not mean that this attorney's performance fell outside the wide range of reasonably effective

assistance. Id. at 1040, 1041.

Although the appellant asserts that he suffers from brain damage and would present evidence of his mental condition at an evidentiary hearing, these conclusory allegations are insufficient -- particularly in light of the substantial mental mitigating evidence actually presented. See, Jackson, 633 So.2d at 1054 (claim that defense counsel ineffective for failing to present mental health defenses insufficient for hearing where record reflected counsel had obtained services of mental health expert and postconviction pleadings failed to show what expert would have testified to if called at trial); compare, Cherry, 659 So.2d at 1074 (hearing required where motion and supporting material alleged substantial background mitigation and specifically identified three mental health experts indicating Cherry was mentally retarded, brain damaged, and incompetent at time of trial); and Harvey v. Dugger, 656 So.2d 1253, 1257 (Fla. 1995) (hearing required where motion presented substantial mitigating evidence of childhood difficulties, substance abuse, affidavits by a psychiatrist stating Harvey suffered brain damage and depression at time of offense, and allegation that defense expert witness from trial had recommended psychiatric evaluation).

On these facts, Slawson has failed to offer sufficient allegations of any attorney deficiency to warrant an evidentiary hearing on this claim. However, Strickland also counsels that, if it is easier to dispose of an ineffectiveness claim on the ground

of lack of sufficient prejudice, it is not necessary to address whether counsel's performance fell below the standard of reasonably competent counsel. 466 U.S. at 697. Slawson has not even attempted to establish prejudice. He committed a brutal, horrific crime and destroyed an entire family, including two young children. He has offered only cumulative mental health evidence and a "strong possibility" of child abuse as additional mitigation. Clearly, none of this could have made any difference, since the trial judge weighed both statutory mental mitigators and child abuse as nonstatutory mitigation. See, Provenzano, 561 So.2d at 546 (cumulative background witnesses would not have changed result of penalty proceeding); Routly v. State, 590 So.2d 397, 401-402 (Fla. 1991) (additional evidence as to defendant's difficult childhood and significant educational/behavioral problems did not provide reasonable probability of life sentence if evidence had been presented); Mendyk, 592 So.2d at 1080 (asserted failure to investigate and present evidence of mental deficiencies, intoxication at time of offense, history of substance abuse, deprived childhood, and lack of significant prior criminal activity "simply does not constitute the quantum capable of persuading us that it would have made a difference in this case," given three strong aggravators, and did not even warrant a postconviction evidentiary hearing). This is clearly not a case where the postconviction motion revealed substantial mitigation, or, for that matter, *any* mitigation that had not been presented at trial; it

only offers evidence cumulative to that considered by the judge and jury at the time of sentencing. In order to establish prejudice to demonstrate a Sixth Amendment violation in a penalty phase proceeding, a defendant must show that, but for the alleged errors, the sentencer would have weighed the balance of the aggravating and mitigating factors and found that the circumstances did not warrant the death penalty. Strickland, 466 U.S. at 694. The aggravating factors found in this case were the prior violent felony convictions for the three contemporaneous murders and, as to Peggy Wood, committed in a heinous, atrocious or cruel manner. The appellant has not and cannot meet the standard required to prove that his attorneys were ineffective when the facts to support these aggravating factors are compared to the purported mitigation now argued by collateral counsel.

The investigation and presentation of mitigating evidence in this case was well within the realm of constitutionally adequate assistance of counsel. Trial counsel conducted a reasonable investigation, presented appropriate penalty phase evidence, and forcefully argued for the jury to recommend sparing Slawson's life. There has been no deficient performance established in the way Slawson was represented in the penalty phase of his trial.

On these facts, the appellant has failed to demonstrate any error in the denial of his claim that his attorneys were ineffective in the investigation and presentation of mitigating evidence. The trial court properly summarily denied this issue.

ISSUE VIII

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING THE APPELLANT'S CLAIM ALLEGING INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE VOIR DIRE OF HIS CAPITAL TRIAL.

Slawson's next claim asserts that his trial attorneys were ineffective during voir dire. Since there have never been any facts offered in support of this claim, it was properly summarily denied. Jackson, 633 So.2d at 1054; Kennedy, 547 So.2d at 913.

ISSUE IX

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING THE APPELLANT'S CLAIM CHALLENGING THE PROPRIETY OF INSTRUCTIONS TO THE JURY.

The appellant's next claim is procedurally barred. Challenges to the propriety of jury instructions must be presented at trial and on direct appeal. This Court consistently rejects postconviction claims attacking jury instructions as barred. Harvey, 656 So.2d at 1255-1256; Roberts, 568 So.2d at 1257-1258; Engle, 576 So.2d at 701. Any impropriety as to instructions or comments directed to the jury would necessarily be reflected in the record on appeal, and therefore must have been raised as a direct appeal issue. Gorham v. State, 521 So.2d 1067, 1070 (Fla. 1988) ("Because a claim of error regarding the instructions given by the trial court should have been raised on direct appeal, the issue is not cognizable through collateral attack"). Thus, this issue was subject to summary denial. No relief is warranted.

ISSUE X

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING THE APPELLANT'S CLAIM CHALLENGING THE PROPRIETY OF JUDICIAL AND PROSECUTORIAL COMMENTS MADE DURING HIS CAPITAL TRIAL.

The appellant's next claim is also procedurally barred. Challenges to the propriety of judicial and prosecutorial comments must be presented at trial and on direct appeal. Such comments are certainly reflected in the record and therefore must be challenged on direct appeal. Kelley v. State, 569 So.2d 754, 756 (Fla. 1990). No relief is warranted.

ISSUE XI

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING THE APPELLANT'S CLAIM CHALLENGING THE VALIDITY OF THE HEINOUS, ATROCIOUS OR CRUEL JURY INSTRUCTION.

Slawson's next claim was rejected by this Court in his direct appeal, and cannot be relitigated in a postconviction motion. Thus, this issue must be denied as barred. Engle, 576 So.2d at 699 ("This claim is procedurally barred because it was rejected in the appeal from Engle's resentencing"). Although this Court considered a similar issue on a postconviction motion in James v. State, 615 So.2d 668, 669 (Fla. 1993), that case does not compel consideration in this appeal because James' direct appeal had been decided prior to Espinosa v. Florida, 505 U.S. 1079 (1992), and this Court determined, since the issue had been raised at trial and on appeal, "it would not be fair to deprive [James] of the Espinosa ruling." Slawson has not been deprived of Espinosa, since the applicable law was considered in his direct appeal.

In addition, the claim is without merit. On direct appeal, this Court addressed the adequacy of the instruction in light of Espinosa, and specifically found any Espinosa error was to be harmless beyond any reasonable doubt. See, 619 So.2d at 261. No relief is warranted.

ISSUE XII

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING THE APPELLANT'S CLAIM ALLEGING THAT THE SENTENCING JUDGE FAILED TO FIND AND WEIGH MITIGATING CIRCUMSTANCES.

The appellant's next claim is also procedurally barred. The sufficiency of a court's findings with regard to mitigating factors is clearly an issue which must be presented in a direct appeal. Thus, this claim was properly summarily denied. Harvey, 656 So.2d at 1255-1256; Turner v. Dugger, 614 So.2d 1075, 1077 (Fla. 1992); Engle, 576 So.2d at 702; Agan v. State, 560 So.2d 222, 223 (Fla. 1990). No relief is warranted.

ISSUE XIII

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING THE APPELLANT'S CLAIM ALLEGING THAT HE WAS INCOMPETENT AT THE TIME OF HIS CAPITAL TRIAL.

Slawson's next claim cannot compel any relief. He asserts that he was incompetent at the time of trial, and that his attorneys or the trial judge should have ordered a competency evaluation. This claim is without merit since the record reflects that Slawson was evaluated by three experts and examined for competency prior to trial (DA-R. 879-800, 958-959, 1590). Since Slawson fails to identify any specific indicators of his alleged incompetency that would have put the court or counsel on notice as to the need for any further evaluation, this claim was insufficiently pled and therefore properly summarily denied by the trial court.

To the extent that the appellant is claiming the trial court should have conducted a competency hearing or requested further evaluations pursuant to Florida Rule of Criminal Procedure 3.210, this is a direct appeal issue. Johnston v. Dugger, 583 So.2d 657, 660 (Fla.), cert. denied, 115 S.Ct. 1262 (1995); see also, Kilgore v. State, 688 So.2d 895 (Fla.) (reviewing claim that trial court should have conducted competency hearing on direct appeal), cert. denied, 118 S.Ct. 103 (1997). Furthermore, the law is clear that a court will not be found to have violated this rule unless it ignored clear indications that a competency evaluation was

required. Wuornos v. State, 644 So.2d 1012, 1017 (Fla.), cert. denied, 115 S.Ct. 1708 (1995). The only indications suggested by Slawson are his extensive mental health history, his bizarre behavior, and the explanation he provided about the murders, all of which were known at the time of his pretrial evaluations. No additional indications that were not known prior to trial have been alleged.

To the extent that the appellant is challenging counsel's performance in failing to further explore his competency, he has failed to offer any facts that would have alerted counsel as to the need for such investigation. A defense attorney is only bound to seek further expert assistance if evidence exists which calls a defendant's sanity into question. Bush v. Wainwright, 505 So.2d 409, 410 (Fla.), cert. denied, 484 U.S. 873 (1987). In Bush, as in the instant case, defense counsel secured an expert to assist the defense. This Court held that Bush's claim of incompetency was properly summarily denied, specifically rejecting that the numerous psychological problems identified by the mental health expert assisting postconviction counsel sufficiently raised a valid question as to Bush's competency to be tried. 505 So.2d at 411. Accord, Copeland v. Wainwright, 505 So.2d 425, 429 (Fla.), vacated on other grounds, 484 U.S. 807 (1987).

To the extent that the appellant is not claiming error due to his trial court's inaction or his attorneys' alleged ineffectiveness but is merely asserting that his due process rights

were violated because he was tried while incompetent, his motion is refuted by the affirmative finding of competency at the time of trial (DA-R. 958). In addition, the appellant does not allege that a new mental health expert would testify that he was incompetent at trial. This is insufficient. Bush, 505 So.2d at 412 (Barkett, J., concurring) (allegation that expert would now testify to *possibility* of incompetence falls short of adequately raising factual question of competency).

There is no indication either in the direct appeal record or in the postconviction pleadings that the appellant did not rationally understand the proceedings against him at the time of trial. To the contrary, the record reflects that Slawson had an IQ of 131, looked and acted appropriately at all times, and had been found competent (See, DA-R. 958 - Dr. Maher examined him for competency; 1624-25; 1657-58 - Dr. Berland addresses fact that Slawson looks and acts appropriate does not suggest he is not mentally ill; Appellant's Initial Brief, p. 61 - offering Slawson's exemplary courtroom behavior as mitigation). In light of the absence of specific facts to support the appellant's conclusory assertion that he was incompetent at the time of trial, the court below properly denied this issue. No relief is warranted.

CONCLUSION

Based on the foregoing arguments and authorities, the trial court's summary denial of postconviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Chris DeBock, Office of the Capital Collateral Representative, 405 North Reo Street, Suite 150, Tampa, Florida 33609-1004, this _____ day of March, 1998.

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COUNSEL FOR APPELLEE