

IN THE SUPREME COURT OF FLORIDA

CASE NO.: 96,890

STATE OF FLORIDA,

Appellant / Cross-Appellee,

vs.

LAWRENCE FRANCIS LEWIS,

Appellee / Cross-Appellant.

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH
JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA,
(Criminal Division)

REPLY BRIEF OF APPELLANT / ANSWER BRIEF OF CROSS-APPELLEE

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PRELIMINARY STATEMENT

Appellant/Cross-Appellee, the State of Florida, the prosecution below will be referred to as the “State”. Appellee/Cross-Appellant, Lawrence Francis Lewis, was the defendant at trial and will be referred to as the “Defendant” or “Lewis”. References to the original trial record will be by the symbol “TR”, to the postconviction record will be by the symbol “PCR”, to any supplemental postconviction record will be by the symbol “SPCR”, to the State’s initial brief as “IB”, and to Lewis’ answer brief/initial brief on cross appeal as “AB”, each followed by the appropriate volume and page number(s).

STATEMENT OF THE CASE AND FACTS

The State will rely upon its Statement of the Case and Facts presented in its Initial Brief as well as facts included in the argument portions of the Initial Brief and Reply Brief/Cross-Answer Brief on the Merits.

SUMMARY OF THE ARGUMENT

State's Reply Brief on Appeal Summary

Point I - The trial court erred as a matter of law and fact in vacating Lewis' death sentence. The legal analysis employed by the trial court was flawed as there was no finding of prejudice as required by Strickland v. Washington, 466 U.S. 668 (1984). Further, there is no record support for the finding that trial defense counsel had insufficient time to prepare for the penalty phase as counsel had nearly 30 days between conviction and the commencement of the penalty phase. Lastly, Deaton v. Dugger, 635 So. 2d 4 (Fla. 1993) does not support the order vacating the death sentence in this case as defense counsel may not be deemed ineffective where counsel's efforts at investigating mitigation were obstructed by Lewis and his family.

State's Answer Brief on Cross Appeal Summary

Argument I - The trial court, following an evidentiary hearing, properly entered an order denying relief on the alternative Brady v. Maryland, 373 U.S. 83 (1963) and Strickland claims related to the disclosure of evidence regarding James Mayberry. Further, summary denial of the claims of ineffective assistance of counsel related to impeaching James Mayberry, failing to call David Ballard to testify, and not objecting to the trial court's comments when instructing the jury and addressing a note submitted by the jury during deliberations was proper. Additionally, counsel was not rendered

ineffective by the trial court's resolution of the evidentiary issue related to the change in Tracy Marcam's testimony due to the influence of Lewis' mother, Bonnie Miller.

Argument III¹ - An evidentiary hearing is not necessary in spite of the State's prior agreement that a hearing should be held following this Court's action in Thompson v. State, 731 So. 2d 1235 (Fla. 1998) as the record supports the trial court's initial ruling that the claim was "legally insufficient on its face, and unworthy of comment". However, should this Court reverse the vacation of the death sentence and find that testimony should have been taken, the matter should be remanded to the trial court.

Argument IV - The facts identified by the trial court following an evidentiary hearing have record support and established that Judge Kaplan independently weighed the aggravating and mitigating circumstances and prepared his own sentencing order. The trial court's denial of relief should be affirmed.

Argument V - The proper procedure was followed by the trial court when inspecting documents identified by the State as non-public records and presented for in camera review. The trial court disclosed those documents ruled not to be exempt

¹ Lewis's answer to the State's sole point on appeal was listed as Argument II in Lewis's Answer Brief / Initial Brief on Cross-Appeal. The State has addressed Lewis' Argument II as Point I of Reply Brief on Appellant/Cross-Appellee.

and identified the basis for withholding others. At the same time, the State recognized its duty to disclose all Brady material. This Court's review will reveal that the withheld documents are not subject to disclosure.

Argument VI - Lewis' challenges to the penalty phase instructions on "heinous, atrocious, or cruel", "prior violent felony", "felony murder aggravator", the jury's advisory sentencing role and the "age mitigator", as well as the conclusion age was not mitigation were denied properly. These allegations were either procedurally barred or refuted by the record. Should this Court find some claims not barred, the trial judge's ruling may be affirmed, nonetheless, as it was correct for another reason. See, Caso v. State, 524 So. 2d 422, 424 (Fla. 1988) (determining that "[a] conclusion of decision of a trial court will generally be affirmed, even when based on erroneous reasoning, if the evidence or an alternative theory supports it."). Moreover, the instant claims of ineffectiveness are pled improperly; they are one sentence conclusory allegations which do not establish either prong of Strickland. As such, the trial court's denial of relief was correct and should be affirmed.

ARGUMENT

REPLY BRIEF OF APPELLANT/CROSS-APPELLEE

POINT 1²

THE TRIAL COURT ERRED BOTH AS A MATTER OF LAW AND FACT WHEN VACATING DEFENDANT'S DEATH SENTENCE - REVERSAL OF A DEATH PENALTY IS NOT REQUIRED UNDER DEATON V. DUGGER, 635 So. 2d 4 (FLA. 1993) WHEN IT IS THE AFFIRMATIVE ACTS OF THE DEFENDANT AND HIS FAMILY WHICH PRECLUDED COUNSEL FROM PRESENTING MITIGATING EVIDENCE.

The trial court erred in vacating Lewis' death sentence as a matter of law and fact. Lewis asserts that the trial court's ruling was proper. In an attempt to support his position, Lewis mischaracterizes the trial court's findings, fails to explain the clear ruling that no prejudice resulted, and fails to address the fact that even after being informed that the presentation of mitigating evidence was important in a capital case, Lewis and his family continued to refuse to cooperate with the development and presentation of mitigation.

The standard of review to be utilized in assessing the propriety of a ruling on a motion for postconviction relief following an evidentiary hearing is: "As long as the trial court's findings are supported by competent substantial evidence, 'this Court will

² See note 1.

not “substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.”” Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997), quoting Demps v. State, 462 So. 2d 1074, 1075 (Fla. 1984), quoting Goldfarb v. Robertson, 82 So. 2d 504, 506 (Fla. 1955); Melendez v. State, 718 So. 2d 746 (Fla. 1998). See State v. Riechmann, 777 So. 2d 342 (Fla. 2000) (finding ineffectiveness claims subject to plenary review); Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999) (recognizing that “under Strickland, both the performance and prejudice prongs are mixed questions of law and fact, with deference to be given only to the lower court’s factual findings”). Both prongs of the Strickland test, i.e., deficient performance and prejudice, present mixed questions of law and fact reviewed de novo on appeal. Cade v. Haley, 222 F.3d 1298, 1302 (11th Cir. 2000) (stating that, although a district court’s ultimate conclusions as to deficient performance and prejudice are subject to plenary review, the underlying findings of fact are subject only to clear error review, citing Byrd v. Hasty, 142 F.3d 1395, 1396 (11th Cir. 1998); Strickland, 466 U.S. at 698 (observing that both the performance and prejudice prongs of the ineffectiveness inquiry are mixed questions of law and fact)).

Ineffective assistance of counsel analysis is governed by Strickland, and for a defendant to prevail on such a claim, he must establish (1) counsel’s representation fell

below an objective standard of reasonableness, and (2) but for the deficiency in representation, there is a reasonable probability the result of the proceeding would have been different. In assessing an allegation of ineffectiveness, the Court must start from a “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” Strickland, 466 U.S. at 688-89.

At all times, the defendant has the burden of proving that his counsel’s representation fell below an objective standard of reasonableness, and that he suffered actual and substantial prejudice as a result of the deficient performance. This burden remains on the defendant. Roberts v. Wainwright, 666 F.2d 517, 519 n.3 (11th Cir. 1982). See also Johnston v. Singletary, 162 F.3d 630, 635 (11th Cir. 1998). To demonstrate prejudice, the defendant must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Strickland, 466 U.S. at 694.

The main thrust of Lewis’ argument is that his counsel was ineffective for not investigating mitigation, and therefore, any waiver of mitigation could not have been knowing and voluntary and would result in depriving the jury of mitigation evidence and prejudicing Lewis (AB 47, 77-80, 86-88). In analyzing this claim, it is important to consider all the evidence, however, one fact above all the others is Lewis’ statement to his second attorney, Oliveann Lancy (“Lancy”). This statement gives us the

clearest insight into Lewis' motivation. Lewis confided to Lancy that he wanted a new trial and the only way for him to get one was to not put on any mitigating evidence and to be given the death penalty (PCR IX 266, 299, 307). However, Lewis refuses to acknowledge that he was instrumental in counsel's inability to investigate possible mitigation. Instead, Lewis chalks the statement up to "jailhouse bravado" (AB 85). In reality, given the legal rationale expressed, the statement sounds more like "jailhouse advice." The claim of "jailhouse bravado" does not explain all of Lewis' actions, nor those of his family. Each of Lewis' actions and arguments should be analyzed with this most telling of statements in mind. Without question, Lewis has an ulterior motive, one he has been pursuing since his 1988 trial.

Lewis writes that "the court found as a matter of historical fact that '[d]efense counsel conducted no independent investigation of the Defendant and, as such, could not properly advise the Defendant'" and that the trial court found that defense counsel "were 'remiss' in their duties to prepare for the penalty phase." (AB at 77, 82 citing to PCR VII 1063, 1065). Both these statements mischaracterize the trial court's initial order. The performance prong of Strickland was not analyzed in the first order because the trial court found that Lewis had failed to establish prejudice. When put in context, it is clear that the trial court did not make the findings attributed to her by Lewis. Instead, addressing the claim of ineffective assistance of counsel related to the

preparation for the penalty phase, the trial court outlined Lewis' claims, recognized that Strickland controlled, reviewed the evidence presented, declined to reach the performance prong of Strickland, then analyzed and rejected the claim based upon a finding that there was no prejudice shown. (PCR VII 1062-69). The trial court reasoned:

The Defendant is alleging ineffective assistance of counsel at the penalty phase. The evidence presented reveals that the Defendant instructed his trial counsel not to present any mitigating circumstances at the penalty phase of his trial. While the Defendant requested that no mitigating evidence be presented at the penalty phase, such instruction must be knowing, voluntary and intelligent waiver. The Defendant contends that any "waiver" could not have been knowing, voluntary or intelligent as the defense counsel was deficient in his duties. Defense counsel conducted no independent investigation of the Defendant and, as such, could not properly advise the defendant³.

In addressing this claim of the Defendant, this Court must first look to the standard governing ineffective assistance of counsel at the time of Defendant's penalty phase in September of 1988.

These ineffective assistance of counsel claims are governed by ... Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)....

³ Given the placement of this sentence within the paragraph framing Lewis' claim of ineffective assistance, in addition to the fact that the following two paragraphs identify the standard for reviewing such a claim, it is clear the trial court was not making a finding of fact, but was repeating Lewis' claim.

...

The Defendant now claims in his 3.850 Motion that trial counsel was deficient in his failure to independently conduct an investigation into his background and obtain [] records ... in anticipation of the penalty phase proceeding. Such records, the Defendant claims, would have provided further insight into the Defendant's abused and troubled childhood and, additionally, Defendant's abuse of alcohol.

In evaluating these claims in light of the factual circumstances presented at the evidentiary hearing, this Court is not persuaded that such mitigating evidence, if developed and presented at the penalty phase, would have affected the jury's recommendation or the sentence imposed by the trial judge....

...

The facts of this case warrant a similar finding. While the defense counsel in the case at hand **may have been** remiss⁴ in his duties to prepare for the penalty phase of the trial, it cannot be said with a reasonable probability that had defense counsel conducted an independent investigation of the Defendant's background, that such evidence would have resulted in recommendation of a life sentence by the jury or affected the decision of the sentencing court....

... A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance

⁴ Lewis informed this Court that the trial judge made a finding that trial counsel "were 'remiss'" (AB 82). Such is a misreading of what the trial court stated. Clearly, "may have been" is not a finding that counsel were "remiss." Without question, the trial court did not reach the performance prong, as such, there was no finding of deficient performance.

component of the test when it is clear that the prejudice component is not satisfied....

Furthermore, the trial court in the instant case did properly instruct the jury as to the statutory mitigating circumstances that could be considered and “any other aspect of the defendant’s character of record and any other circumstances of the offense.” ... In the case under consideration here, trial counsel, while not having had the benefit of presenting evidence in mitigation did, in fact, urge the jury to consider the Defendant’s age, his mentality, the intoxication factor surrounding the circumstances of the offense and the provocation by Mr. Mayberry (sic) toward the victim, Mr. Gordon, at the time of the offense; all of which constitute non-statutory mitigating circumstances. The jury recommended a sentence of death by a vote of ten (10) and it is unlikely that any additional evidence of mitigation would have resulted in a different recommendation.

...

... Recognizing that the crux of Defendant’s claim is the lack of mitigating evidence presented and, as a result, not considered by the trial court, this Court nevertheless finds that any evidence presented in support of non-statutory mitigators would not have been sufficient to counter the finding of three (3) aggravators by the trial court in the weighing process. Thus, the result would remain the same.

As such, this Court finds that the Defendant has failed to satisfy the second prong of the Strickland test as the Defendant has not demonstrated that any deficiency of trial counsel affected the fairness and reliability of the proceeding that confidence in the outcome is undermined....

(PCR VII 1062-67) (emphasis supplied).

Clearly, over twelve years after the homicide, and after a full evidentiary hearing on the claim, Lewis has had the opportunity to place on the record all the mitigation he asserts would have been presented had counsel been effective. Yet, even with all this evidence, the trial court found that the result of the penalty phase was not undermined (PCR VII 1067). Given the fact that no prejudice was established under the trial court's initial order, it was error ten months later to vacate the sentence on rehearing without making a specific finding of prejudice to Lewis. It is well settled, both prongs of Strickland must be established; failure to prove one will result in denial of relief. Roberts, 666 F.2d at 519 n.3.

It is Lewis' contention that his counsel rendered deficient representation because he did not conduct a diligent investigation for mitigation and could not have advised his client of what mitigation was being waived (AB 78-80). However, it is clear from the trial record, as well as the evidentiary hearing, that Lewis' counsel were preparing for the penalty phase and investigating possible sources of mitigating evidence during the approximate 30 days before the penalty phase commenced. A mental health expert⁵ was contacted and appointed, Lewis' mother and father were

⁵ With respect to the mental health expert, Lewis attempts to reduce the amount of time considered as penalty phase preparation time (AB 79-80 and n. 51). It is Lewis' contention that it was on the day of the penalty phase that counsel discussed the use of an expert. However, the record does not support that allegation. On August 23, 1998, Kirsch

contacted, and counsel discussed mitigation with Lewis (PCR Vol. IX 239-40, 243-44, 259-63, 270). As explained by Richard Kirsch (“Kirsch”), Lewis’ lead counsel, Lancy, and Dr. Klass, the mental health expert, Lewis was reluctant to meet with the expert, but then agreed. However, Lewis then refused to permit the doctor to testify even though Dr. Klass was prepared to opine that Lewis had an allergy to alcohol which made it impossible to form the intent to kill, and could cause a person to act inappropriately (PCR Vol. IX 239-40, 245-46, 264-66, 268-69, 299-307, 313-16, 318-19, 321; Vol. X 434-35, 437). Additionally, on the day the penalty phase commenced, Kirsch explained that he and Lancy told Lewis repeatedly that it was necessary for mitigation purposes to put on some testimony, but that Lewis refused to permit Dr. Klass to testify. Even though Kirsch reiterated the importance of presenting a mental health expert, and that Dr. Klass was in court prepared to give favorable testimony, Lewis refused to allow such testimony. Desiring to maintain his innocence, Lewis did

obtained the appointment of Dr. Klass (PCR Vol. IX 239-40). Co-counsel Lancy’s August 15, 1988 memorandum to the file indicated that Lewis was unwilling to have Dr. Klass testify at trial (PCR Vol. IV 299-03, 306-08). Clearly, this indicates that counsel’s discussions with the doctor and Lewis occurred before the August 23, 1988 appointment. Dr. Klass’ records reveal he examined Lewis on August 24, 1988 knowing that the defense was interested in mitigating evidence, but Lewis was uncooperative (PCR Vol. IX 312-13; Vol X 434-35, 437). It was only on the eve of trial that Dr. Klass received a telephone call from Lewis’ father informing him Lewis was willing to meet and cooperate (PCR Vol. IX 318-19).

not want any one to implicate him in the crime (PCR Vol. IX 267-70, 314-15, 319; Vol. X 438-41, 444, 449).

Surely, where a defendant refuses to take his counsel's advice to present mitigation or witnesses refuse to talk or assist counsel with the case, counsel should not be deemed deficient. Cf. Asay v. State, 769 So. 2d 974, 985 (Fla. 2000) (affirming denial of claim of ineffective assistance of counsel in penalty phase for failure to investigate/present mitigation based in part on finding that counsel had obtained a mental health evaluation of defendant). The defendant's choice to disregard counsel's advice should not be used as evidence of ineffective assistance. Mitchell v. Kemp, 762 F. 2d 886, 889 (11th Cir. 1985) (holding that "[w]hen a defendant preempts his attorney's strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made"), cert. denied, 483 U.S. 1026 (1987); Alvord v. Wainwright, 725 F. 2d 1282, 1289 (11th Cir. 1984) (finding counsel's assistance proper; counsel may not be labeled ineffective or blamed for following competent defendant's direction), modified, 731 F. 2d 1486 (11th Cir. 1984). See, Gray v. Lucas, 677 F. 2d 1086, 1094 (5th Cir. 1982) (recognizing that capital defendant's direction to counsel that no character witnesses be called does not negate counsel's duty to investigate, but it does limit the scope of the investigation required), cert. denied, 461 U.S. 910 (1983). Also, merely because Lewis's father believed he would be of no

help to his son and Lewis' mother was dissatisfied with the outcome of the trial, therefore, she refused to cooperate with the defense should not result in a finding of deficient performance by the trial attorneys (PCR Vol. IX 241-44, 258-63, 318-19).

Without question, the actions of counsel in this case should not be equated with those of defense counsel in Blanco v. Singletary, 943 F. 2d 1477 (11th Cir. 1991) or Deaton v. Dugger, 635 So. 2d 4 (Fla. 1993) as suggested by Lewis. In Blanco, the attorney had not prepared for the penalty phase even though he knew that it was to commence immediately upon the conclusion of the guilt phase. Blanco, 943, F. 2d at 1500. Moreover, when given an additional four days to procure witnesses, it appeared that counsel merely waited for his witnesses to return his phone calls placed during trial; counsel never managed to meet with any witnesses. Id. at 1500-01. Additionally, Blanco indicated that he did not want any witnesses called and counsel "acquiesced." Id. at 1501.

Similarly, in Deaton, counsel did not prepare for the penalty phase until after there was a conviction, but even during the evening or "couple days" between trial phases, counsel did not explain to his client about mitigation, discuss what could be pursued, attempt to collect defendant's records, or set up witnesses. Deaton, 635 So. 2d at 9. In fact, Deaton's counsel admitted that he did nothing before or after the guilt phase to develop a record or find witnesses to testify for mitigation. Id. From the

foregoing, it is clear that neither counsel even attempted to prepare for the penalty phase of the capital trial.

Conversely, it should not be said that Lewis' counsel did not advise his client, did not investigate for the penalty phase, attempt to develop a penalty phase record, or schedule witnesses. In the instant case, Kirsch did attempt to prepare during the approximate 30 days between the guilt and penalty phases; he retained a mental health expert, and strove to schedule family members to testify. Further, he explained to Lewis the necessity and value of presenting mitigating factors to the judge and jury. Moreover, Lewis, unlike Blanco or Deaton, hindered counsel's efforts. Lewis was not discouraged or disheartened as was suggested of Blanco. Instead, Lewis was obstructive of counsel's efforts and wanted a new trial. Believing the only way to procure a new trial was to be sentenced to death without putting on mitigation, Lewis refused to permit counsel to present the mental health expert or other witnesses. Under the instant facts, Kirsch rendered professional assistance.

Lewis also relies upon Emerson v. Gramley, 91 F. 3d 898 (7th Cir. 1996); Glenn v. Tate, 71 F. 3d 1204 (6th Cir. 1995); Martin v. Maggio, 711 F. 2d 1273 (7th Cir. 1983); Heiney v. State, 620 So. 2d 171 (Fla. 1993); and State v. Lara, 581 So. 2d 1288 (Fla. 1991). None is of assistance to Lewis'. The Seventh Circuit Court of Appeals in Emerson, found defense counsel conducted no investigation for the penalty phase

and that it was counsel's determination that mitigation should not be presented. Emerson, 91 F. 3d at 906. Further, neither counsel nor the trial court informed the defendant of the peril of not making a presentation during the penalty phase. Id. at 906-07. As such, under these "unusual circumstances" the defendant could not make an informed decision. Id. at 907. Similarly, in Glenn, the defendant did not waive mitigation, and the little preparation counsel made for the penalty phase was misdirected. Glenn, 71 F. 3d at 1207. Although lay witnesses were contacted, none was called. Id. Further, counsel acquiesced to the prosecutor's suggestion that a mental health evaluation be completed and made available to the jury without input from the defense. Id. at 1210, n. 5. In Martin, counsel rejected, out of hand, the guilt phase defense of voluntary intoxication in spite of a defense expert's suggestion that the defendant was intoxicated on the day of the crime and that such was a valid defense in Louisiana. In Heiney, the sentence was reversed because counsel did no investigation into mitigation, nor did counsel argue on his client's behalf to the trial court. As in Glenn, the defendant in Lara, did not waive mitigation. Lara, 581 So. 2d at 1289. Instead, the record reflects that Lara's case was the attorney's first capital proceeding and that he "was overwhelmed and panicked"; he spent about ten percent of his time on the penalty phase. Id. No such deficient performance or "unusual circumstances" are present in the instant case.

Additionally, Lewis relies upon Carter v. Bell, 218 F. 3d 581 (6th Cir. 2000). While at first blush it may appear that Carter furthers Lewis' claim, but upon closer examination, it is clear the case is distinguishable. In Carter, "[t]he defense neither investigated nor introduced any evidence of mitigating factors, basing its argument on a theory of residual doubt by appealing to any lingering doubt the jury might have had regarding the conviction in an attempt to dissuade the jury from imposing the death penalty." Id. at 587. Neither counsel had prepared for a capital penalty phase proceeding before Carter's case commenced. Id. at 588. While statutory mitigators were reviewed, non-statutory factors were not considered. Id. Both counsel spent up to 95% of their time on the guilt phase issues. Id. at 588-89. The Sixth Circuit Court of Appeals found that counsel did no legal research or investigation of mitigating circumstances. It was the court's conclusion "that reluctance on Carter's part to present a mental health defense or to testify should not preclude counsel's investigation of these potential factors." Id. at 596 (emphasis supplied). The fact that Carter was merely reluctant and counsel did little or nothing to alter that position or to investigate distinguishes Carter from the instant case. Such differences are highlighted by Frye v. Lee, 235 F. 3d 897 (4th Cir. 2000). The facts of Frye are closer to the case at bar, and support a conclusion that Lewis' counsel were not ineffective and augers against a finding that Lewis' waiver was not knowing and voluntary.

In Frye, the Fourth Circuit Court of Appeals reasoned:

Based on Frye's refusal to allow himself or his family members to participate in the development or presentation of mitigation evidence, Frye's counsel came to the reasonable conclusion that attempting to find such evidence would be fruitless. Simply because a defendant objects to the development of evidence, however, does not necessarily absolve his lawyers from gathering that evidence. The Sixth Circuit, in a situation involving failure to present adequate mitigation evidence, observed that "reluctance on [the defendant's] part to present a mental health defense or to testify should not preclude counsel's investigation of those potential factors." Carter v. Bell, 218 F. 3d 581, 596 (6th Cir. 2000). Similarly, the Eleventh Circuit has found error when defendant's counsel "acquiesced in [the defendant's] defeatism without knowing what evidence [the defendant] was foregoing." Blanco v. Singletary, 943 F. 2d 1477, 1501 (11th Cir. 1991). See also Emerson v. Gramley, 91 F. 3d 898, 908 (7th Cir. 1996).

2.

The controlling distinction in this case, however, is that Frye not only flatly forbade his attorneys from involving his family in investigating his background, but that his defense counsel also took numerous alternative steps to prepare for and present evidence of Frye's personal history. Unlike the cases arising from the Sixth and Eleventh Circuits, *supra*, this is not a situation where counsel completely gave up in response to reluctance or defeatism that ambiguously telegraphed the client's uninformed wishes. Frye gave repeated and explicit instructions to his lawyers about not contacting or involving family members. Nonetheless, counsel convinced him to go to Dorothea Dix Hospital for a psychological evaluation. They then hired Dr. Noble to examine their client and present evidence to

the sentencing jury. These steps were a logical--and indeed thorough--response to Frye's continued insistence that he did not want his family members "to assist in forming mitigating factors[.]" MAR Hearing at 6. As the MAR court concluded, defense counsel painstakingly informed Frye of the consequences of not involving family members in the mitigation stage. Id. Frye, however, refused to accede to the warnings and advice of his lawyers. And it is not our role to second-guess the competence of counsel in these circumstances. Fisher v. Lee, 215 F.3d 438, 447 (4th Cir.2000); Eaton v. Angelone, 139 F.3d 990, 994 (4th Cir.1998).

Frye, 235 F.3d at 904-05 (footnotes omitted) (emphasis supplied).

Porter v. State, 26 Fla. L. Weekly S321 (Fla. May 3, 2001) also is instructive.

In Porter, this Court quoted extensively from the trial court's order denying relief on a claim of ineffective assistance in the penalty phase related to the presentation of mitigation. There, this Court recognized that during the preparation for the penalty phase, Porter was "fatalistic", instructed counsel not to contact his (Porter's) family, and refused to see a doctor scheduled by counsel. Id. at 322. This Court reasoned that:

The lack of cooperation by Porter at the time of trial is significant. We have held that a defense attorney is not ineffective for following such instructions by counsel's client. Sims v. State, 602 So. 2d 1253, 1257 (Fla. 1992). See also Sims v. Singletary, 155 F. 3d 1297, 1316 (11th Cir. 1998) (counsel cannot be deemed deficient for failing to present additional evidence of mitigation of which counsel was unaware due to defendant's refusal to assist in

obtaining the information); Rose v. State, 617 So. 2d 291, 294 (Fla. 1993) (trial counsel not ineffective where defendant preempted trial counsel's strategy).

Porter, 26 Fla. L. Weekly at 322-23 (emphasis supplied). In affirming the denial of relief, this Court stated:

... the trial court found that the defendant failed to cooperate with counsel at the penalty phase of the trial, and thereby defendant limited the available evidence. There is additional postconviction expert testimony regarding mitigation which the trial court found to be entitled to little weight in light of conflicting expert testimony. The trial judge found additional nonstatutory mitigation to be lacking in weight because of the specific facts presented. Finally, following a full evidentiary hearing, the trial judge determined that the additional mitigators were outweighed by the weighty aggravators of a prior violent felony and cold, calculated, and premeditated murder. We agree.

Id. at 324 (emphasis supplied). Based upon this analysis along with the similar factual scenarios of Frye and Porter, the instant trial court's granting of a new sentencing phase for Lewis should not be permitted to stand.

Kirsch, a seasoned attorney with approximately 40 years experience, including other capital cases, did investigate mitigation, albeit after conviction, both by attempting to talk to Lewis' parents and by seeking a mental health expert. While Kirsch was successful in gaining the appointment of a mental health expert, Lewis spoke to the doctor reluctantly, but then refused to permit the expert to testify. Kirsh also argued

for his client's life to the jury and court, and obtained instructions on both mental mitigators, the victim participated/consented to act mitigator, and the "catch all" instruction. Moreover, the trial court questioned counsel and Lewis about the decision to forego mitigation (TR 3153-58, 3187-88, 3190-96; PCR Vol. IX 239-40, 250-51). Hence, Kirsch's performance was far superior to the cases cited by Lewis and such cases should not be permitted to form the basis of a claim that counsel was ineffective or that the waiver of mitigation was not knowing and voluntary.

Lewis also claims that he was not in a position to make an informed decision to waive mitigation when his counsel did not know about such mitigation (AB 80). However, the record establishes that the waiver was voluntary, knowing, and intelligent. In pertinent part, the colloquy between the trial court and defense counsel consisted of the following:

THE COURT: [Defense counsel], have you decided if you are going to call any witnesses?

[DEFENSE COUNSEL]: No, sir, we're not presenting any testimony.

THE COURT: Does Mr. Lewis understand that he has the right to call witnesses in his behalf?

[DEFENSE COUNSEL]: Yes, sir.

THE COURT: He does?

[DEFENSE COUNSEL]: He understands.

THE COURT: He would have a right to call anybody he likes. He can call a doctor, psychologist that's evaluated him. He can call his family, his friends. He can call just about anybody. I just want to make sure he understands that.

(Thereupon, the Defendant and [defense counsel] conferred off the record.)

[DEFENSE COUNSEL]: Yes, he understands.

THE COURT: He understands that. Mr. Lewis, is that your decision?

THE DEFENDANT: Yes, it is.

THE COURT: You do not want to call any witnesses?

THE DEFENDANT: No, sir.

* * * *

THE COURT: Okay. I don't know if there's any family members or whatever but they could have been called and it's Mr. Lewis' desire that he doesn't want to call anybody; is that right?

[DEFENSE COUNSEL]: I think we made that pretty plain.

(TR 3153-58) (emphasis added). Throughout the colloquy, counsel maintained that Lewis did not want to present anything in mitigation (TR 3153-58).

Consistently, this Court has held that defendants have the right to waive the presentation of mitigating evidence. Koon v. Dugger, 619 So. 2d 246 (Fla. 1993); Pettit v. State, 591 So. 2d 618 (Fla.), cert. denied, 121 L. Ed. 2d 68 (1992); Hamblen v. State, 527 So. 2d 800 (Fla. 1988). See Muhammad v. State, 782 So. 2d 343, 363-65 (Fla. 2001) (recognizing defendants may waive mitigation in capital cases). Nonetheless, the waiver must be voluntary, knowing, and intelligent, which is why the trial court questioned Lewis and defense counsel about Lewis' decision to waive mitigating evidence. Moreover, Koon now requires defense counsel to proffer what evidence could be presented were the defendant to allow the presentation of evidence. Koon, 619 So. 2d at 249-50. Although this new requirement is prospective only, as stated in the opinion, the trial court obviously recognized the appropriateness of such a requirement when it asked defense counsel if he would like to proffer potential evidence. (TR 3154). Ultimately, defense counsel refused to do so. (TR 3155).

The testimony from the evidentiary hearing established that Lewis was informed of the need for mitigating factors to be presented, that he was afforded a mental health expert, that his family refused to cooperate with counsel during the penalty phase, and that Lewis refused to permit either his family to be contacted or to have the mental health expert testify. Clearly, Lewis was aware of his options and the consequences stemming from them, yet he chose not to present mitigation in hopes he would be

sentenced to death, and then receive a new trial (TR 3153-58 3187-88, 3190-96; PCR Vol. IX 239-40, 245-46, 250-51, 264-70, 299-07, 314-16, 318-19, 321; Vol. X 434-35, 437-41, 444, 449). Under these circumstances, counsel was not ineffective.

In addition to his assertion that prejudice was established because counsel failed to commence his investigation for the penalty phase until after there had been a conviction, Lewis claims additional prejudice exists in that other mitigation in the form of vacation of Lewis' conviction for aggravated assault with a deadly weapon on James Mayberry ("Mayberry") (Count III), impeachment of Mayberry, failure to present Mayberry's polygraph report, failure to present Dr. Blinder, and failure to prepare Dr. Frick properly for his testimony (AB 91-93). Taking each in turn, this Court will find that none establishes prejudice.

The basis for the trial court's vacating Lewis' conviction for Aggravated Assault was that it, along with Robbery with a deadly weapon committed against Mayberry, arose out of a single incident. As such, the Aggravated Assault charge was vacated; however, the Robbery conviction was permitted to stand (TR 3568-70, 3575). Clearly, given the instant facts, the lack of a conviction for Aggravated Assault would not undermine confidence in the outcome of the penalty phase. The conviction was not used as aggravation and the jury heard about Lewis' acts as part of the criminal events culminating in murder. Whether or not there was an additional assault

conviction, certainly, would not detract from the reliability of the death sentence here. Moreover, Lewis has not cited a case which supports his contention that this is mitigating evidence under these facts.

Lewis also contends that the jury did not hear additional evidence tending to diminish Mayberry's credibility. Lewis refers to his "Argument I." Defense counsel did not render ineffective assistance by his manner or extent of cross-examination of Mayberry as will be discussed more fully in the State's answer to Argument I on Cross-Appeal, *infra*. Moreover, the State did not violate Brady v. Maryland, 373 U.S. 83 (1963) in its disclosure of evidence about Mayberry. Because the evidence now sought could have been discovered and would have been cumulative to the impeachment presented, the result of the penalty phase is not undermined.

With respect to counsel's failure to introduce the results of Mayberry's polygraph test, there is no prejudice. Florida courts have long held that polygraph evidence is inadmissible absent a stipulation between the parties. See Davis v. State, 520 So. 2d 572 (Fla. 1988); Delap v. State, 440 So. 2d 1242 (Fla.1983), cert. denied, 467 U.S. 1264 (1984). While "[t]he rules of evidence may be relaxed during the penalty phase of a capital trial, but they emphatically are not to be completely ignored." Johnson v. State, 660 So. 2d 637, 645 (Fla. 1995). As such, without the State's agreement, the polygraph results would not have been admitted. Lewis has not cited

one Florida case⁶ which has permitted the use of polygraph results where both parties did not agree. Hence, there has been no showing that this evidence would be admissible or mitigating. No prejudice could arise from counsel's decision.

Lewis also points to counsel's failure to call Dr. Blinder and Dr. Frick to testify. However, Lewis cites no case law for the proposition that either doctors' testimony was admissible. It appears that both doctors would have been employed to discuss a witness' perception of events while under the influence of alcohol or other substances (TR 1957-2014, 3436-37). The propriety of the exclusion of Dr. Blinder's testimony was discussed on direct appeal. This Court opined:

[Lewis] asserts it was error to exclude a psychiatrist's opinion regarding the eyewitness-identification process, the effects of drugs on memory, and the unwarranted reliance of jurors on eyewitness testimony. In Johnson v. State, 438 So. 2d 774 (Fla.1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984), we held that exclusion of such testimony is not an abuse of discretion. We said, "a jury is fully capable of assessing a witness' ability to perceive and remember, given the assistance of cross-examination and cautionary instructions, without the aid of expert testimony." Id. at 777. The psychiatrist admitted he could not testify regarding the reliability of any

⁶ Rupe v. Wood, 93 F. 3d 1434 (9th Cir. 1996) is a federal habeas appeal from Washington State. Washington's evidentiary rules allow for the admission of this type of evidence to show the relative culpability of co-defendant/co-perpetrators. Such is not the state of the law in Florida, and therefore, Rupe is distinguishable and does not further Lewis' position.

specific witness, but could only offer general comments about how a witness arrives at his conclusions. We find no abuse of discretion here.

Lewis v. State, 572 So. 2d 908, 911 (Fla. 1990). Clearly, if Dr. Blinder's testimony was excluded properly, then there could be no prejudice in not presenting Dr. Frick's testimony. Moreover, if the jury is considered competent to evaluate a witness' ability to perceive events for the guilt phase, then such would also be true of the jury's ability in the penalty phase.

From the foregoing, this Court should find that the trial court erred in vacating Lewis' death sentence. Defense counsel acted professionally in his endeavors to investigate mitigating circumstances, but was thwarted by Lewis' actions. It is also clear that Lewis was aware of the importance to make a penalty phase presentation, but chose to waive mitigation by precluding his family and his expert to testify.

ANSWER BRIEF OF APPELLANT/CROSS-APPELLEE

ARGUMENT I

THE TRIAL COURT CORRECTLY FOUND THAT LEWIS WAS NOT ENTITLED TO RELIEF UNDER EITHER BRADY V. MARYLAND, 373 U.S. 83 (1963) OR STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984) RELATED TO THE GUILT PHASE OF THE TRIAL (restated).

In his motion for postconviction relief, Lewis asserted either the State withheld exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963) or his counsel was ineffective under Strickland v. Washington, 466 U.S. 668 (1984) for not discovering and presenting such exculpatory evidence related to James Mayberry (“Mayberry”) (PCR III 237-53). The trial court granted an evidentiary hearing on this issue (PCR V 655). Lewis also alleged counsel was ineffective for failing to impeach Mayberry with information in the defense’s possession (PCR III 253-59), for failing to call David Ballard (PCR III 260-71), and for failing to object to the discussion the trial court had with the jury preceding the guilt phase instructions, and during deliberations when the jury requested certain testimony be read back to them (PCR III 279-83). Additionally, Lewis asserted that his counsel was rendered ineffective by the rulings on and use of Tracy Marcum’s testimony (PCR III 272-77). The trial court denied the request for an evidentiary hearing on these issues and found they “fail as

either being procedurally barred, insufficiently pled, or refuted by the record.” (PCR V 655-56). On appeal, Lewis claims the trial court erred in finding no Brady violation (AB 5, 23-24), in summarily denying relief on his other guilt phase ineffective assistance claims, and for failing to attach portions of the record (AB 5, 33, 36, 41, 43, 46). The State disagrees.

The testimony developed at the evidentiary hearing supports the denial of the Brady and Strickland claims as it relates to Mayberry and as will be discussed in more detail below. Additionally, while the trial court did not attach portions of the record or make detailed findings on those portions of Lewis’ ineffectiveness claims for which an evidentiary hearing was denied, affirmance of the denial of relief is appropriate. The trial court had the benefit of the parties’ pleadings in the postconviction matter, the trial record and transcript, and the benefit of argument from counsel at the hearing pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993). Denial of relief was warranted; the trial court’s ruling on Lewis’ Brady and ineffective assistance of counsel during guilt phase claims should be affirmed.

The standard of review applied by an appellate court when reviewing a ruling on a postconviction motion to vacate following an evidentiary hearing is: “As long as the trial court’s findings are supported by competent substantial evidence, ‘this Court will not “substitute its judgment for that of the trial court on questions of fact, likewise of

the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.”” Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997), quoting Demps v. State, 462 So. 2d 1074, 1075 (Fla. 1984), quoting Goldfarb v. Robertson, 82 So. 2d 504, 506 (Fla. 1955); Melendez v. State, 718 So. 2d 746 (Fla. 1998). A trial court’s finding, after evaluating conflicting evidence, that Brady material had been disclosed is a factual finding which should be upheld so long as it is supported by competent, substantial evidence. Way v. State, 760 So. 2d 903, 911 (Fla. 2000); Stephens v. State, 748 So. 2d 1028 (Fla. 1999).

When there has been a summary denial of a motion to vacate, the ruling will be affirmed where the law and competent substantial evidence supports the trial court’s findings. Diaz v. Dugger, 719 So. 2d 865, 868 (Fla. 1998). Whether counsel was ineffective under Strickland, is reviewed de novo. Stephens, 748 So. 2d at 1028 (requiring de novo review of ineffective assistance of counsel); Sims v. State, 754 So. 2d 657, 670 (Fla. 2000). Both prongs of the Strickland test, i.e., deficient performance and prejudice, present mixed questions of law and fact reviewed de novo on appeal. Cade v. Haley, 222 F.3d at 1302 (stating that, although a district court’s ultimate conclusions as to deficient performance and prejudice are subject to plenary review, the underlying findings of fact are subject only to clear error review, citing Byrd v. Hasty, 142 F.3d at 1396; Strickland, 466 U.S. at 698, 104 S.Ct. 2052 (observing that

both the performance and prejudice prongs of the ineffectiveness inquiry are mixed questions of law and fact).

Addressing Lewis' Brady and alternative Strickland claims regarding information about Mayberry's criminal charges and/or convictions occurring after the instant murder, the trial court reasoned:

While it is clear from the testimony presented and the documentary evidence admitted at the hearing that Mr. Mayberry had pending criminal charges in Broward and Dade County, it is not clear from the evidence that the State deliberately failed to disclose the existence of the pending charges to defense counsel in violation of Brady v. Maryland. Further, no evidence was presented to support a finding that the State provided Mr. Mayberry with medical assistance prior to his testifying at trial.

Mr. Kirsch was aware that Mr. Mayberry was the State's key witness, as he (Mr. Mayberry) identified the Defendant as the assailant. Mr. Kirsch was aware of Mayberry's criminal record and that he was convicted of numerous crimes. Mr. Kirsch does not recall receiving any of the letters sent by Mr. Ray regarding Mr. Mayberry's pending charges in Broward and Dade County nor did Mr. Kirsch have any idea that Mr. Ray was in contact with anyone in Dade County regarding Mr. Mayberry or his pending charges in Dade County. However, Mr. Kirsch testified that he recalls there were pending charges against Mr. Mayberry, but he does not recall receiving any documents in connection with these pending charges.

Kirsch testified that when he first saw Mayberry he was in bad shape and appeared to be in need of medical attention. By the time of the trial, Mayberry appeared to be

in much better shape. Kirsch does not recall any information regarding any assistance being provided to Mayberry -- medical or other. Kirsch testified that he would want to know if there was any State action on behalf of a witness, as such information could have been used as impeachment.

Ralph Ray testified that he believes criminal histories are Brady material. Mr. Ray further testifies that Mr. Kirsch asked for criminal histories and was sent a criminal history on all witnesses. Mr. Ray testified that he did not negotiate a plea with Dade County regarding the pending criminal charges against Mr. Mayberry nor did Mr. Ray ask for any leniency or special treatment for Mr. Mayberry. Mr. Ray further testified that he did not promise or give leniency in the pending Broward County cases.

Mr. Ray had no knowledge of paying any hospital bills for Mr. Mayberry, providing treatment or giving any money to seek medical treatment. Mr. Ray did advise Mr. Kirsch, via letter, of the disposition of the Broward and Dade cases.

Terrell Gardiner is an investigator for the Broward County State Attorney's Office. Mr. Gardiner left a message for Mr. Mayberry at his sister's home advising that prepayment needed for treatment was not required. Mr. Gardiner suggested that Mr. Mayberry should seek treatment for his medical condition (i.e. sores, etc.).

Bill Altfield was an Assistant State Attorney in Dade County and the prosecutor assigned to Mr. Mayberry's pending Dade County case. Mr. Altfield testified that he spoke with Ralph Ray who advised that Johnson (a.k.a. Mayberry) was a key witness, did not need special treatment and to stick to guidelines, which were five (5) to seven (7) years.

James Mayberry received the statutory maximum sentence of five (5) years on both the Broward and Dade cases.

After hearing all the evidence presented at the hearing, considering argument of counsel, reviewing the legal memoranda and cases provided in support of this claim, this **Court finds that there was no Brady violation** by the state and that **even if a Brady violation was found to exist, any non-disclosure would be harmless and would not have any affect on the outcome of the trial.** Furthermore, **while it could be said that defense counsel was negligent in not obtaining the necessary documentation pertaining to the pending Dade and Broward cases, the Defendant has failed to show any prejudice flowing from this negligence.** As such, the requirements set forth in Strickland, *infra*. have not been satisfied and the Defendant's claim for relief on this ground is denied.

(PCR V 1061-62).

On appeal, Lewis asserts the trial court erred in denying relief after an evidentiary hearing on the Brady claim related to Mayberry (AB 23-24). Appellee maintains that the "lower court erred in concluding that Mr. Lewis failed to show deliberate failure to disclose." (AB 24). Further, Lewis' position is that "[t]here was information withheld from defense counsel by the State; in the alternative, counsel was deficient, as the lower court found." (AB 25). Not only was there no Brady violation, but there was neither deficient performance by defense counsel nor prejudice established as required by Strickland.

To establish a Brady violation, a defendant must show⁷:

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

Hegwood v. State, 575 So. 2d 170, 172 (Fla. 1991) (quoting United States v. Meros,

⁷ In Way v. State, 760 So. 2d 903, 910 (2000), this Court quoted Strickler v. Greene, 527 U.S. 263 (1999) stating:

There are three components of a true Brady violation: [1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued.

Strickler, 119 S.Ct. at 1948.

However, in order for evidence to be deemed "suppressed", it is only reasonable for the defendant to prove he neither had the evidence nor was able to discover it through due diligence. If the defendant had the evidence, it could hardly be considered suppressed. In fact, in Way this Court recognized that where the evidence was available equally to the defense and State or that the defense was aware of the evidence and could have obtained it, the evidence had not been suppressed. Way, 760 So. 2d at 911. See, Occhicone v. State, 768 So. 2d 1037, 1042 (Fla. 2000) (reasoning that "[a]lthough the "due diligence" requirement is absent from the Supreme Court's most recent formulation of the Brady test, it continues to follow that a Brady claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant.").

866 F.2d 1304, 1308 (11th Cir. 1989)). See, Strickler v. Greene, 527 U.S. 263 (1999); U.S. v. Starrett, 55 F.3d 1525, 1555 (11th Cir. 1995); Jones v. State, 709 So. 2d 512, 519 (Fla. 1998). "[F]avorable evidence is material and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Kyles v. Whitley, 514 U.S. 419, 435 (1995). Evidence has not been suppressed, and therefore, "[t]here is no Brady violation where the information is equally accessible to the defense and the prosecution, or where the defense either had the information or could have obtained it through the exercise of reasonable diligence.'" Freeman v. State, 761 So. 2d 1055, 1061-62 (Fla. 2000) (quoting Provenzano v. State, 616 So. 2d 428, 430 (Fla. 1993)). Prejudice is shown by the suppression of exculpatory, material evidence, that is where "there is a reasonable probability that the result of the trial would have been different if the suppressed documents had been disclosed to the defense." Stickler, 119 S. Ct. at 1952. "Reasonable probability" is "a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985) (plurality); Kyles, 514 U.S. at 435. When pleading a Brady claim, a petitioner must show that counsel did not possess the evidence and could not have obtained it with due diligence, **and** the prosecution suppressed the favorable, material evidence. Based upon the trial record

and the evidentiary hearing testimony, it is clear there was no Brady violation and the trial court's ruling on this issue should be affirmed.

Ineffective assistance of counsel analysis is governed by Strickland, and for a defendant to prevail on such a claim, he must establish (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for the deficiency in representation, there is a reasonable probability the result of the proceeding would have been different. Strickland, 466 U.S. at 688-89, 694. In assessing an allegation of ineffectiveness assistance, the Court must start from a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 688-89. At all times, the defendant has the burden of proving counsel's representation fell below an objective standard of reasonableness, and that he suffered actual and substantial prejudice as a result of the deficient performance. Roberts, 666 F. 2d at 519 n.3. See Johnston, 162 F. 3d at 635. To demonstrate prejudice, the defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. Thus, the defendant must show not only that his counsel's performance was below constitutional standards, but that he suffered prejudice as a result of such deficient performance.

Initially, it must be noted Lewis misconstrues the trial court's ruling on his

Brady and Strickland claims related to Mayberry. The judge did not find defense counsel negligent. What the trial court stated was that “while it could be said that defense counsel was negligent in not obtaining the necessary documentation pertaining to the pending Dade and Broward cases, the Defendant has failed to show prejudice flowing from this negligence.” (PCR V 1062). This is not a finding of negligence; it is merely acknowledging there may be a question, but it matters not, because no prejudice has been established.

Additionally, Lewis asserts the defense was unaware that Mayberry was released from jail and the charges stemming from Mayberry’s May 21, 1987 arrest were dropped by the Dade County prosecutor following Mayberry’s identification of Lewis as the perpetrator of the instant homicide (AB 26-27). This allegation is refuted from the record which shows that defense counsel Richard Kirsch (“Kirsch”) was aware of the Dade charges pending against Mayberry. During the July 7, 1988 suppression hearing, Detective Gill was questioned by Kirsch, the prosecutor, Mr. Ray, and the trial judge. Detective Gill was questioned about the timing of Mayberry’s photo identification of Lewis, Mayberry’s subsequent release from the Dade Stockade, and the resolution of those criminal charges. Detective Gill’s examination included:

Q [By the Court] Did you show a photo lineup to Mr. Mayberry?

A Yes, sir, I did.

Q **Was that on June 4th, 1987?**

A Yes, sir.

...

THE COURT: Any questioning on that area? That's really what I want to find out; whether he seemed to have any problem with it. Okay.

...

Q [By Mr. Ray] ... did you have any idea or mind set that time was of the essence to see if you could get to Mr. Mayberry rather than have a physical lineup?

A Yes. Time was of the essence at that point.

...

A **Because prior to that we had difficulty, me locating Mr. Mayberry. Then I found out he was in jail and was told that the charges that he was being held on he'd probably be released on very shortly and I wanted to get a hold of him while I could.**

Q In fact, **was he ever prosecuted on those charges?**

A **No, sir, he wasn't.**

Q Was he in fact released shortly thereafter?

A Yes, sir

...

Q **(By Mr. Kirsch) When he was released,**
where was he released to?

A To his sister's home, I believe.

...

Q You didn't know he was in the Broward
County Jail?

A I know he ended up in the Broward County
Jail but I don't know when.

...

Q **He had an arrest warrant out for him in**
Broward County?

...

Q **You went there [Dade Stockade] June 4th?**

A Yes, sir.

Q Do you know when he was released?

...

A It was shortly thereafter.

...

Q You didn't know whether he was going to be

released or not; did you?

A **According to the detective down there they said they didn't think he was going to be held.**

Q **That was after you got down there?**

A **No, no. That was before I got down there. After I found out he was in jail I called the detective.**

(TR Vol. III 485-91) (emphasis supplied).

Based upon this examination, it is clear Kirsch was aware of the Dade County charges pending on June 4, 1987 and that before July 7, 1988, such charges were dropped by the Dade State Attorney's office. Also, prior to June 4, 1987, Dade County had decided not to hold Mayberry on those charges. Further, there was evidence in the postconviction record substantiating the fact that Kirsch was sent a letter advising him that there were outstanding Dade and Broward County charges filed against Mayberry. Hence, the trial court was correct to find no Brady violation.

The main thrust of Lewis' challenge to the denial of the Brady claim relates to the trial court's statement that "it is not clear from the evidence that the State deliberately failed to disclose the existence of the pending charges to defense counsel in violation of Brady v. Maryland." (PCR Vol. V 1061, AB 23) (emphasis added). While the State agrees that whether it acted deliberately or inadvertently in failing to

disclose the details of the disposition of Mayberry's pending charges is irrelevant in a Brady analysis; the trial court's verbiage in this case does not undermine the correctness of its conclusion. Lewis' postconviction claim, as presented to the trial court, was that the State failed to disclose, or Kirsch failed to discover and use as impeachment, specific details surrounding Mayberry's pending charges from Broward and Dade County at or near the time of the trial.⁸ However, Lewis failed to prove, that he and/or Kirsch did not know the specifics of the disposition of Mayberry's pending charges. All of the facts upon which Lewis bases this allegation were available at the time of trial. The State provided defense counsel with James Mayberry's statements to the police, as counsel makes reference to them in Mayberry's deposition. And defense counsel conducted a lengthy deposition of Mayberry prior to trial. (PCR Vol.

⁸ The State does not dispute that Lewis' prosecutor, Ralph Ray, spoke to Mayberry's Dade County prosecutor, Bill Altfield, about Mayberry's pending charges. However, Altfield testified at the hearing that Ray specifically told him not to seek or to encourage favorable treatment for Mayberry because of Mayberry's cooperation in Lewis' case. Altfield also testified that Mayberry pled "straight up," and that Mayberry's Dade defense attorney cited Mayberry's cooperation in Lewis' case to support a downward departure. Over the State's objection, the Dade circuit judge gave Mayberry a one-cell downward departure for that reason. Altfield contacted his office's legal department to discuss a possible appeal, but ultimately decided that he had no legal basis to do so. Thus, other than the ultimate disposition of Mayberry's pending charges, which the State disclosed by letter to Lewis' attorney, there was nothing about the circumstances of Mayberry's plea and sentencing which was "favorable" to Lewis that the State was required to disclose.

IV 489-584). Thus, by questioning Mayberry more thoroughly, defense counsel could have discovered all of the evidence which Lewis alleges was important. Freeman, 761 So. 2d at 1061-62 (opining that “[t]here is no Brady violation where the information is equally accessible to the defense and the prosecution, or where the defense either had the information or could have obtained it through the exercise of reasonable diligence.”); Roberts v. State, 568 So. 2d 1255, 1260 (Fla. 1990) (same). After all, Kirsch not only deposed Mayberry extensively about his criminal history, including these charges, but he also cross-examined Mayberry at the suppression hearing and at trial about them. Further, counsel inquired of Detective Gill about Mayberry’s Dade charges pending in June 1987 (TR 402, 485-91, 1837-39). Moreover, the State introduced letters at the evidentiary hearing sent by the prosecutor to Kirsch detailing the charges and their dispositions.⁹ That ten years later, Kirsch did not remember

⁹ Defendant’s Exhibit #1 at the evidentiary hearing was a letter from Ralph Ray to Richard Kirsch dated March 10, 1988, informing Kirsch that Mayberry “was arrested on August 18, 1987, in Dade County under the name of Frank B. Johnson, and charged with Burglary of a Conveyance, in Case Number: 87-26874CF, before the Honorable Allen Kornblum, Circuit Court Judge.” It also informed Kirsch that Mayberry “was arrested in this circuit on September 7, 1987, and charged with the following criminal offenses, in two (2) separate Informations: Grand Theft Auto, Case Number: 87-11670CF, and Possession of Cannabis, in Case Number: 87-15071CF, both of these case are before the Honorable Robert W. Tyson, Circuit Court Judge.” (PCR XII 619).

Defendant’s Exhibit #2 was a letter from Ray to Kirsch dated July 1, 1988, detailing the disposition of those cases

receiving those letters does not in any way prove that he did not receive them and did not understand their import. Lewis has the burden of proving that he did not have the information; Kirsch's inability to remember what he knew, and when he knew it, is not sufficient proof of a Brady violation. Moreover, Lewis also failed to prove that neither he nor Kirsch could not have obtained the specifics of the disposition of Mayberry's pending charges with due diligence. Obviously, Kirsch was aware Mayberry had pending charges, since he deposed and cross-examined him about them (TR 402, 485-91 1837-39).

At trial, Mayberry testified on direct examination that he was in prison for two grand thefts, possession of cannabis, and possession of burglary tools, originating from three separate cases from Broward and Dade counties. (TR 1837-38). He was sentenced to five and a half years in Dade County and five years in Broward County and had been in prison before on other charges. (TR 1838-39). On cross-examination, Mayberry testified that he was currently serving a sentence under the name Frank Johnson because he gave the police a fictitious name when he was arrested in Dade County. (TR 2015-16). He had been "out on the street" between jail sentences from February to July, except for 21 days he spent in jail in Dade County

specifically citing the case numbers, trial judges' names, plea entered, and sentence imposed.

until the charges were dropped against him. (TR 2016). Since counsel knew the details of Mayberry's criminal history, including his alias, his sentences for various offenses, and the fact that charges had been dropped, counsel obviously made a strategic decision not to impeach Mayberry any further with more of the same. Regardless, as detailed above, other evidence of Lewis' guilt conclusively shows a lack of prejudice from counsel's failure to impeach Mayberry with this additional evidence. See Roberts, 568 So. 2d at 1260 (finding no prejudice from counsel's failure to impeach witnesses about exposure to criminal charges and contact with state about unrelated legal matters).

Mr. Ray also provided the case numbers and lead charges to direct Kirsch in his investigation. Absolutely no evidence was presented by Lewis that Kirsch could not have called (and did not call) Mayberry's prosecutor or defense counsel in either the Broward or Dade County cases, or that he could not have reviewed the circuit court files for the specifics on those cases. Moreover, Kirsch could have spoken directly to Mayberry about those cases. Clearly, Kirsch knew that certain Dade charges were dropped and that others were pending by the time of trial.

Being unable to establish that the defense did not have and could not have obtained, with due diligence, the information Lewis now alleges the State withheld, Lewis has failed to prove the second prong of the Brady analysis. See, Freeman, 761

So. 2d at 1061-62 (holding that there is no Brady violation where evidence equally available to both parties or where defense could have obtained evidence through use of due diligence). By failing to prove that the State suppressed the evidence, in light of the letters the prosecutor sent to Kirsch, and the examination of Detective Gill at the suppression hearing, Lewis has not proven the third prong of Brady as well. Thus, the trial court properly determined that the State committed no Brady violation.

In this appeal, Lewis also challenges the trial court's determination that materiality under Brady was not established (AB 25, 32). Alternatively, Lewis makes a claim of prejudice under the Strickland analysis (AB 32). The trial court properly found Lewis failed to prove "materiality," i.e., "that the favorable evidence suppressed by the State 'could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" Buenoano v. State, 708 So. 2d 941, 948-49 (Fla. 1998) (quoting Kyles, 514 U.S. at 435). Even though the trial judge refers to a harmless error test ("even if a Brady violation was found to exist, any non-disclosure would be harmless and would not have any affect on the outcome of the trial" (PCR V 1063)), the ultimate decision to deny relief is supported by the record and should be affirmed.

It was Mayberry's trial testimony that he was sentenced to five years in prison in Broward County (TR 1838). Even though Mayberry scored a recommended range

of 9-12 years, his only felony offense was a third-degree felony (grand theft) with a statutory maximum of five years. Thus, at that time, he could not have been sentenced to a guidelines sentence; he could not have received a sentence above the statutory maximum. The fact that Kirsch did not elicit testimony that Mayberry's Broward sentence ran concurrently with the Dade charges surely does not undermine confidence in the outcome, because such testimony would not have, within a reasonable probability, affected the verdict. Furthermore, even without Mayberry's testimony and identification of Lewis, the evidence at trial revealed the following: Lewis appeared at Tracy Marcum's ("Marcum") house around 11 p.m. on the night of the murder driving the victim's truck with the victim cowering on the floorboard. The victim, Michael Gordon, said he was in pain and asked for some water, but Lewis ignored his pleas and told Marcum not to talk to him. Lewis told Marcum to tell Dave Ballard to put gas in his Jeep which was parked on Flamingo Road (TR 1587-93). Marcum also overheard two conversations in which Lewis indicated that he hit a guy on U.S. 27 and left the body in the median (TR 1600-01, 1607-09, 1629-30). Charles Hedden ("Hedden") testified that Lewis drove up in the victim's truck and showed him the victim, who was cowering on the floorboard. Lewis told Hedden he had gotten into a fight with the "guy" and hurt him. Also, when Lewis grabbed the victim's arm, which looked broken, the man yelled. Lewis told Hedden to get his Jeep which was

broken down on Flamingo Road (TR 1702-05). The next day, Lewis admitted to Hedden “that he might have killed somebody.” (TR 1712). Later that night, Lewis and Wendy Rivera went to fix his Jeep. During the drive, Lewis told her he killed someone (TR 2251-53). Finally, when the police arrested Lewis and told him he was being arrested for the murder of Michael Gordon, Lewis responded, “[t]hat wasn’t a murder. That was more like a fight. I was pissed off.” (R 2368-71). Based on this, there is no reasonable probability the outcome would have been different had counsel impeached Mayberry more specifically with the details of the pending charges, with the timing of Mayberry’s release from jail, or the sentences he received. Cf. Roberts, 568 So. 2d at 1259 (finding defendant’s claim that counsel failed to impeach surviving victim with undisclosed information from state’s files not warranting evidentiary hearing or relief); Mendyk v. State, 592 So. 2d 1076, 1079 (Fla. 1992). The denial of postconviction relief should be affirmed.

Additionally, Lewis has failed to establish materiality under Brady or prejudice under Strickland with respect to the allegation that Terry Gardner (“Gardner”), an investigator for the Broward State Attorney’s Office, assisted Mayberry in getting medical treatment a month after Lewis was indicted (AB 27-28). The testimony from the evidentiary hearing reveals that Gardner merely called Broward General Hospital and learned that it would treat Mayberry’s medical problem and then bill Mayberry for

the treatment. Such communication does not establish materiality or prejudice. See Roberts, 568 So. 2d at 1259-60 (finding notes and information from state's files legally insufficient to warrant relief). Moreover, as recounted above, even without Mayberry's testimony and identification of Lewis, the evidence at trial revealed that there was overwhelming evidence establishing Lewis' guilt (TR 1587-93, 1600-01, 1607-09, 1629-30, 1702-05, 1712, 2251-53, 2368-71). Based on this evidence, there is no reasonable probability the outcome would have been different had Kirsch impeached Mayberry with evidence of his contact with Gardner. Cf. Roberts, 568 So. 2d at 1259 (finding defendant's claim counsel failed to impeach surviving victim with undisclosed information from state's files did not warrant evidentiary hearing or relief).

Analyzing Lewis' assertion that the trial court erred in not granting an evidentiary hearing and relief on his claims of ineffective assistance of counsel related to (1) additional impeachment of Mayberry, (2) failure to call David Ballard ("Ballard") to testify, and (3) failure to object to the trial judge's instructions/discourse with the jury, this Court will find no merit to these claims. It is Lewis' position that "there was additional impeachment evidence which counsel, without a reasonable tactic or strategy, failed to use at trial" to "attack Mayberry's credibility as to his in- and out-of-court identifications of Mayberry." (AB 33). Through his recitation of the facts

gleaned from the transcript, Lewis claims that Kirsch failed to impeach Mayberry based upon (1) Mayberry's admitted inability to describe his assailant with particularity immediately following the crime, (2) that, at one point, Mayberry identified David Ballard ("Ballard") as the suspect, (3) that Mayberry had read a newspaper article about the murder before his trial testimony, and (4) that Mayberry's sister told him the suspect's name after the police had arrested Lewis. (AB 34-36). The record reveals, however, that defense counsel elicited all of this information at trial. (TR 2026-28, 2039-42, 2057-58, 2128-33). Thus, Kirsch's conduct was neither deficient nor prejudicial. Moreover, Mayberry's lack of specificity in describing Lewis and the alleged suggestiveness of the photo lineup were challenged in the pre-trial motion to suppress Mayberry's identification of Lewis. In spite of the strenuous attack Kirsch made to Mayberry's ability to identify Lewis (TR III 417-20, 424-26, 429-30, 436-40, 456-61, 474-79), the State's cross-examination (TR III 462-69) established that Mayberry was able to identify Lewis as his attacker even though Mayberry was unable to articulate Lewis' features or to identify distinguishing markings. As the trial court reasoned in denying the motion to suppress Mayberry's identification of Lewis:

... [Mayberry] seems pretty clear that he saw the person in the truck and I think the questioning might have been a little bit deceiving if you look at the questions on the record. I think you were asking him if there was anything distinguishable about [Lewis], about the man and his

features. I think all will agree Mr. Lewis didn't have any distinguishable features. He doesn't have a big nose, scars or facial hair. I think that's what he was trying to say and I think he did say that on cross examination.

(TR Vol. III 501). Even though, Lewis attempts to make the most out of Mayberry's statement that he could not give a better description, it is clear the impeachment conducted by Kirsch before the jury would not have been enhanced by following the line of questioning rejected by the trial judge at the suppression hearing. Because Lewis has not established Kirsch did not impeach Mayberry effectively, and has not proven the trial result was undermined by the tact Kirsch pursued, the trial court denied relief properly under the Strickland analysis. This Court should affirm.

Lewis also claims counsel failed to impeach Mayberry with the fact that there were significant differences in the pictures used for the photo array shown to Mayberry. (AB 36). The suggestive nature of the photo lineup was resolved on appeal adversely to Lewis'. This Court found:

The photographs used in the lineup were made part of the record. We agree with the trial court's determination that there was nothing suggestive about this six-Polaroid-picture lineup of white males, with varying shades of brown or dark hair, in informal pose and clothing. That being the case, there is no merit to appellant's further assertion that Mayberry's in-court identification of appellant was tainted by the photo-lineup.

Lewis, 572 So. 2d at 910. Thus, the matter should be found procedurally barred as

it is improper to use a different argument, such as ineffective assistance of counsel, to circumvent a procedural bar. Medina v. State, 573 So. 2d 293, 295 (Fla. 1990) (holding the “[a]llegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal.”)

Further, no one testified at the trial about the photo lineup or Mayberry’s out-of-court identification. Thus, defense counsel would have had no reason to impeach Mayberry on this issue. Moreover, prejudice cannot be shown because discussing the photo array would have only highlighted the fact that Mayberry had selected Lewis’ picture as depicting his assailant, thereby bolstering Mayberry’s credibility.

Besides counsel’s failure to impeach Mayberry, Lewis claims the jury never heard from Ballard and was unaware of the exculpatory statements he made regarding Lewis. (AB 37). As a remedy, Lewis seeks an evidentiary hearing. Because Kirsch did not render ineffective assistance by not calling Ballard, neither an evidentiary hearing nor relief is warranted. In a recitation of facts, Lewis asserts the following information was not provided to the jury: (1) Ballard’s police statements and grand jury testimony contradict each other with respect to the manner of the victim’s death, disposal of the body, and discarding of an alleged murder weapon; (2) the police fed Ballard information and then coerced him into relating the substance of conversations he had with Lewis about the murder, (3) the medical examiner’s testimony that the

victim was killed in the median as opposed to somewhere else was inconsistent with other witnesses' versions of events, including Ballard's, and (4) Ballard implicated Lewis again after Ballard's grand jury testimony, but only because Ballard had pending charges that either were dismissed or resolved with leniency. (AB 37-41).

Implicit in Lewis' argument is the assertion Kirsch should have called Ballard as a witness when the State did not present him. In light of Ballard's inculpatory statements to the police before and after his grand jury testimony that Lewis confessed to the murder, Lewis is unable to show prejudice arising from counsel's actions as required by Strickland. See Jones v. State, 528 So. 2d 1171 (Fla. 1988) (finding trial counsel's decision not to call a witness given his unpredictability was a reasonable tactical decision). Clearly, had Ballard been called, he could have been impeached easily with his statement implicating Lewis in the murder. Given this, it was not ineffective for not calling a witness who could have placed the defendant at the crime scene and testified to inculpatory statements the defendant made following the crime. Summary denial was proper.

Nonetheless, even if Ballard should have been called by the defense, there is no reasonable possibility that the outcome of the proceeding would have been different. As noted previously, Marcum and Hedden saw Lewis driving the injured victim around in the victim's truck. Marcum also overheard Lewis tell Ballard that he hit the victim

and left his body in the median of U.S. 27. Lewis also told Hedden and Wendy Rivera that he killed somebody. Finally, when the police told Lewis that he was being arrested for the murder of Michael Gordon, Lewis responded, “[T]hat wasn’t a murder. That was more like a fight. I was pissed off.” (TR 1587-93, 1600-01, 1607-09, 1629-30, 1702-05, 1712, 2251-53, 2368-71). Thus, even if counsel had called Ballard, there is no reasonable probability the outcome of the trial would have been different.

In footnote 27, Lewis refers to the fact that Mayberry identified Ballard as the person who assaulted the victim and got into his truck. Lewis implies that Kirsch should have presented this information to the jury (AB 38 n. 27). The record refutes any claim of ineffective assistance and reveals that defense counsel questioned Mayberry at length regarding the physical similarities between Ballard and Mayberry's description of the assailant, and the fact that Mayberry referred to Ballard as "the suspect" during his statement to the police. (TR 2128-33). Contrary to Lewis' assertion, the jury was aware that Ballard met Mayberry's description of the assailant. Ultimately, however, although Kirsh cross-examined Mayberry extensively in an attempt to discredit his testimony, Mayberry identified Lewis positively as the person who attacked the victim, climbed in the truck with Mayberry, and then drove off in the victim's truck after Mayberry jumped out. (TR 1874). Counsel's inability to

effectively impeach Mayberry's testimony does not amount to ineffective assistance of counsel. See Knight v. Dugger, 574 So. 2d 1066, 1073 (Fla. 1990).

As his next claim of ineffective assistance, Lewis asserts Kirsch failed to object to comments made by the trial court prior to giving the jury the guilt phase instructions and in response to a jury request during deliberations (AB 41-43). While it is true counsel did not object to the trial court's comments to the jury, such was not deficient performance and did not result in prejudice for Lewis. When the comments are viewed in context, it is clear that such were proper; the jury was not misadvised. See Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990); Mendyk v. State, 592 So. 2d 1076 (Fla. 1992). However, even if the comments were improper and counsel should have objected, there is no reasonable probability the outcome would have been different. Lewis has failed to show any prejudice arising from the judge's comments. The denial of the claim for postconviction relief was proper and should be affirmed.

At the commencement of the guilt phase jury instructions, the trial judge prefaced the instructions with the following:

The evidentiary portion of the trial was very interesting in my opinion, not necessarily this case, but it's always interesting to me. The closing arguments of the lawyers is always a very interesting part of the case and instructions of law by me to the jury are usually pretty boring. It can't compete with the evidence and the articulate lawyers in their discussions. It's just not that

interesting but it is very important. If you will notice during the closing arguments and the evidentiary portion the courtroom had a lot of people in it but when they know the Judge is going to instruct everybody runs. Basically, there's not many people in here.

So, it is kind of boring but its very important. It's as important as any other portion of the case and you should listen as carefully as possible.

(TR Vol. XIX 2951-52)(emphasis supplied).

The record shows the judge acknowledged that the instructions were not the most interesting part of the case when compared with closing arguments or witness testimony; however, the instructions were important and the jury should "listen as carefully as possible." Taken as a whole, there is nothing objectionable in these comments nor is there any misstatement of the law. It cannot be said counsel rendered deficient performance when not objecting.

Likewise, even if the comments were improper, there is no reasonable possibility that the outcome of the trial would have been altered had the comments not been made. As identified above, the evidence presented against Lewis was extensive. It showed the senseless kidnapping of Gordon, the breaking of his arm, and the cruel manner in which Gordon was driven around for hours and displayed to Lewis' friends before Lewis bludgeoned Gordon to death and left him in the median of U.S. 27 and Griffin Road. (TR 1587-93, 1600-01, 1607-09, 1629-30, 1702-05, 1712, 2251-53,

2368-71).

Turning to Lewis' challenge to the trial judge's comments to the jury in response to the request for a re-back of testimony (AB 42), these comments too, when read in context, show neither deficient performance by counsel or prejudice arise from his failure to object. The record reflects that at 2:40 p.m. the jury requested "testimony or evidence that Lawrence Lewis was seen in the truck at Holly Lakes Trailer Park, including transcripts of testimony from Martin Martin, Stacy Johnson, Chuckie Heddon, Tracy Markum and then it says Mayberry's testimony identifying Lawrence Lewis." (TR Vol. XIX 3025, 3028). The specifics of the request were discussed by the parties and the trial judge (TR Vo. XIX 3025-28). It was agreed that the testimony should not be culled to select those portions which the parties believed would answer the jury's question. Instead, the appropriate manner of addressing the request was to tell the jury that they could have the testimony of these witnesses, but that the entire testimony would have to be re-read and that such could take between four and eight hours. Defense counsel stated he presumed the jury was entitled to the testimony, "but I object, strenuously object to any piecemeal testimony. I would insist or request, I should say, that any witnesses whose testimony they want to hear would be in toto, direct, cross and redirect." (TR Vol. XIX 3027).

When the jurors were recalled, the trial court informed them that they were

entitled to the testimony, that the court reporters were ready to read the testimony to them, but it could not be read piecemeal. The trial judge told the jury that such read back could take from four to eight hours and the “only fair way to do it is to read the whole thing back. Everybody’s testimony that you want. And we will be glad to do that and we are ready to do that.” (TR Vol. XIX 3029). Additionally, the jurors were told that the amount of time to have the testimony re-read “should not be part of your consideration” regarding how they wanted to proceed. (TR Vol. XIX 3029-30). The decision to proceed with the read-back was left to the jury. At 3:20 p.m., the jury advised the trial court that it would rely upon its collective recollection. (TR Vol. XIX 3031).

Lewis asserts that the trial court’s comments to the jury made them feel “guilty” and the trial court should have ordered the requested testimony be read to the jury without question (AB 42-43). However, as is evident from the discussions with the court and counsel, the jury was asking for specific portions and all parties agreed that they should not be the ones picking out portions of the record to give to the jury. Instead, the jury was informed, in a proper fashion, that they could have all of the testimony and that the amount of time needed to comply with their request was of no moment. The record reflects defense counsel’s position and agreement with the way the trial court informed the jury (TR Vol. XIX 3029-30). Lewis has not cited one case

which calls into question the manner in which the jury was instructed nor has he presented any evidence that the resolution of this matter prejudiced him as required by Strickland.

Next, Lewis asserts that his counsel was rendered ineffective by the actions of the State and points to the State's use of Tracy Marcum's testimony as his initial example of an external force which caused defense counsel to render ineffective assistance (AB 43). A review of the record will reveal that summary denial of this claim was appropriate.

Prior to Marcum testifying, the State informed the trial court that Marcum previously had given sworn statements to the police and grand jury exonerating Lewis, but had later admitted she fabricated her testimony at the insistence of Lewis' mother who offered her money to create an alibi for Lewis. The State also indicated that Marcum's trial testimony would be consistent with her deposition testimony wherein she implicated Lewis in the murder. Although the State conceded that Lewis' mother's coercion was not admissible because the State could not show Lewis was aware of his mother's conduct, nevertheless, it believed that if the defense sought to impeach Marcum with her prior inconsistent statements, then the State could question her regarding the reason for her change in testimony. The State stipulated that the court should give a limiting instruction. (TR 1554-74).

After extensive discussion by the parties, the judge agreed to allow the State to rehabilitate the witness if the defense impeached her with her prior statements and fashioned a limiting instruction (TR 1574-77). Thereafter, Marcum implicated Lewis in the murder on direct examination (TR 1590-93, 1600-01, 1608-09), was impeached with her prior inconsistent statements on cross-examination (T 1632-44), was rehabilitated on redirect over defense counsel's objection (TR 1655-76), and was further impeached on recross-examination (TR 1679-87). As indicated, the proposed limiting instruction was given (TR 1657-58, 1661-62, 1676-77).

Lewis asserts that "[t]he trial court agreed with the prosecutor, thus creating the external force which totally constrained counsel's performance." (AB 45). In addition, Lewis complains that the State's use of Marcum's testimony and its argument supporting such use required a mistrial and that "Kirsch was forced into being ineffective at the hands of the state." (AB 46). Such complaints, however, guised as ineffective assistance of counsel claims, are merely thinly veiled attempts to challenge the trial court's rulings regarding the admission of the evidence and argument. It is well settled, "[a]llegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal." Medina v. State, 573 So. 2d 293 (Fla. 1990). See Rivera v. State, 717 So. 2d 477, 482 n.5 (Fla. 1998) (concluding it is impermissible to recast a claim in order to overcome finding that claim

was one which could have and should have been raised on direct appeal); Knight, 574 So. 2d at 1073 (opining that “[s]ummary denial was also proper in connection with the portion of claim 3 alleging that interference by the court and state rendered counsel ineffective. A procedural bar cannot be avoided by simply couching otherwise-barred claims in terms of ineffective assistance of counsel.”); King v. State, 597 So. 2d 780 (Fla. 1992); Roberts, 568 So. 2d at 1259-60. Given the fact that Kirsch had argued against the State’s rehabilitation of Marcum and the reference to Lewis’ mother’s actions suborning false testimony, Lewis could have and should have raised these claims on direct appeal. Thus, he is procedurally barred from raising them now under the guise of ineffective assistance of counsel. Summary denial was appropriate.

Regardless, Kirsch argued vehemently against the State's ability to rehabilitate Marcum with the reason for her change in testimony, and objected to the State's argument in closing. Ultimately, he made the tactical decision to impeach Marcum with her prior inconsistent statements. Such a tactical decision, even if ultimately ineffective in persuading the jury, was a reasonable one under the circumstances and cannot constitute ineffective assistance of counsel. See Bush v. Wainwright, 505 So. 2d 409, 411 (Fla. 1987) (reasoning that “[t]he claimed errors of counsel involve ... actions pursued following sound strategies of the defense. The fact that these strategies resulted in a conviction augurs no ineffectiveness of counsel.”). Even absent this

witness' testimony, however, there is no reasonable possibility that the outcome would have been different. Thus, since Lewis can show no prejudice as required by Strickland, no relief is warranted.

As to his final guilt phase ineffectiveness issue, Lewis maintains that the trial court erred in not taking into account the cumulative effect of the allegations of ineffective assistance (AB 46-47). As relief, Lewis seeks an evidentiary hearing. Neither an evidentiary hearing nor relief is warranted.

As analyzed above, the individual claims either are procedurally barred or meritless. Thus, Lewis has suffered no cumulative effect which invalidates his sentence. See Zeigler v. State, 452 So. 2d 537, 539 (Fla. 1984) (reasoning defendant'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). Likewise, there is no need for an evidentiary hearing as each claim was refuted from the record. No ineffective assistance has been shown. Affirmance of the trial court's denial of relief is in order.

ARGUMENT III

WHETHER AN EVIDENTIARY HEARING ON
LEWIS'S CLAIM OF JUDGE KAPLAN'S JUDICIAL
BIAS IS REQUIRED SHOULD THIS COURT
REVERSE THE TRIAL COURT'S VACATING OF THE
SENTENCE.

Lewis claims he is entitled to an evidentiary hearing on his claim of judicial bias should this Court reverse the order granting a new sentencing. The State submits that an evidentiary hearing is not necessary, and that the trial court's original decision that the claim was "legally insufficient on its face, and unworthy of comment" (PCR 653) should be affirmed in spite of the fact that an evidentiary hearing had been scheduled prior to the granting of relief on a separate claim and the ordering of a new sentencing. However, should this Court reverse the vacation of the death penalty, and find that evidence should have been taken on this claim, the matter should be remanded to the trial court as that would be the appropriate venue to resolve issue of fact.

In Thompson v. State, 731 So. 2d 1235 (Fla. 1998), this Court considered a claim of judicial biased leveled against the same jurist, Judge Kaplan, stemming from an interview His Honor gave to CBS News. The case had come to the Court on the summary denial of postconviction relief. In reversing, the Court stated that many of the penalty phase claims "would at the minimum warrant an evidentiary hearing." Id. at 1236. While, the Court did not mention which claims mandated reversal, the Court opined:

This case is procedurally complicated (sic) by questions regarding the bias of the original trial judge at the time he made the jury override determination, and his ultimate recusal. This case has already experienced considerable delay. Therefore, rather than reversing for an evidentiary hearing on the 3.850 motion, we conclude that in this case it would be more appropriate to simply reverse for a resentencing before the trial judge....

Thompson, 731 So. 2d at 1236 (footnote and citation omitted) (emphasis supplied).

In part, it appears the Court reversed due to the extended age of the case as well as the complicated nature of the claims interrelated with allegations of judicial bias.

Because the Court's opinion was worded broadly, and the remedy granted was unique (new sentencing without an evidentiary hearing) the State sought a rehearing. In part, the State asserted the defendant gained relief based upon allegations, not facts fleshed out during an adversary hearing and such a decision sets a dangerous precedent with potentially far reaching repercussions (PRC 1133-36). Rehearing was denied. Id. at 1235.

As a result of the recognition of the time delay suffered in Thompson, and the lack of clarity as to which claims of judicial bias and/or ineffective assistance warranted the resentencing, the State agreed to an evidentiary hearing in Lewis' case which also involved allegations about Judge Kaplan and his CBS interview (PCR 1140). However, the State would urge this Court to revisit the broad sweep of its

decision in Thompson in order to avoid the continued erosion of the standard of proof that a defendant must establish in order to prove judicial bias. Further, the State submits that the issue of judicial bias raised by Lewis here is meritless and asks that this Court find that the trial judge's initial summary denial of the claim was proper. Even though an evidentiary hearing was scheduled based upon the State's concession, such a hearing is unnecessary and does not detract from the trial court's initial finding that the claim was "legally insufficient on its face, and unworthy of comment." (PCR 653).

The standard of review for this summary denials is that the decision will be affirmed where the law and competent substantial evidence supports the trial court. Diaz, 719 So. 2d at 868. "If a postconviction motion is denied without an evidentiary hearing, the motion and record must show that no relief is warranted." Lopez v. Singletary, 634 So. 2d 1054, 1056 (Fla. 1993).

Here, Lewis' sole basis for support of an evidentiary hearing is the State's concession at an earlier time. His failure to explain to this Court what "extensive facts" he was relying upon to show Judge Kaplan's alleged lack of impartiality is blamed on "page limitations." (AB 94-95). Such should be found to be insufficient. Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990) (rejecting attempt to raise a claim without briefing the issue). However, the State will address the claim of judicial bias and show

how frivolous and “legally insufficient on its face” (PCR 653) the claim was. Summary denial was appropriate.

In his motion for postconviction relief, Lewis claimed Judge Kaplan was predisposed to sentence him to death “[b]ecause of Judge Kaplan’s extra-judicial bias against criminal defendants and his personal feelings about such critical issues as mitigation and mercy when dealing with criminal cases.” (PCR Vol. III 116-139). Lewis based this allegation on comments Judge Kaplan made during a post-trial interview for a segment of the CBS news program, “48 Hours” entitled “Rough Justice,” and in a letter to the Clemency Board regarding Lewis’ case. Lewis quoted extensively from Judge Kaplan’s deposition regarding the interview and letter, but nothing in the interview, letter, or deposition indicate that Judge Kaplan was predisposed to sentence Lewis to death.

Regarding Judge Kaplan’s comments during the CBS interview, he explained that one of his goals was to keep convicted, violent people off the street so that they could not victimize anyone else. (Supp Vol. IV at 580-86). Here, upon his conviction after a jury trial, Lewis was facing either life imprisonment or the death penalty. Either way, Lewis was going to be “off the street.” Judge Kaplan’s general philosophy does not evince animosity toward criminal defendants in general or toward Lewis specifically. Further, there is no evidence to support an implication that Judge Kaplan

had a predisposition for any penalty. In his postconviction motion, Lewis failed to establish how Judge Kaplan's philosophy had any effect on his ultimate decision to follow the jury's death recommendation. A motion to disqualify judge a "must be well-founded and contain facts germane to the judge's undue bias, prejudice, or sympathy" Rivera, 717 So. 2d at 480-81 (quoting Jackson v. State, 599 So. 2d 103, 107 (1992)). Allegations based upon sheer speculation "do not constitute legally sufficient grounds to support a motion for disqualification." Asay v. State, 769 So. 2d 974, 981 (Fla. 2000). Simply because Judge Kaplan's general philosophy is to prevent convicted criminals from victimizing others does not mean he is biased against all defendants, or Lewis in particular. Cf. Keenan v. Watson, 525 So. 2d 476, 477 (Fla. 5th DCA 1988) (finding allegation that judge sentences drug violators more heavily than others legally insufficient to warrant recusal); Quince v. State, 592 So. 2d 669, 670 (Fla. 1992) (finding allegation that judge made disparaging comment in public about out-of-state attorneys where defendant had an out-of-state attorney legally insufficient to warrant recusal).

Also alleged in the postconviction motion as an indication of bias was Judge Kaplan's past practice of giving lengthy prison sentences. Judge Kaplan explained that at one-time he used to give convicted defendants lengthy jail/prison sentences so that after gaintime credits they would spend the appropriate amount of time incarcerated

(Supp. Vol. IV at 586-88). Based upon this explanation, Lewis once again has failed to show how this philosophy or practice had any effect on Judge Kaplan's sentencing decision in this case. Given Lewis' conviction for first-degree murder, Judge Kaplan could have sentenced him to life imprisonment with a minimum mandatory of 25 calendar years, clearly, a lengthy sentence by any standards. The mere fact that Judge Kaplan had on occasion sentenced other defendants to longer prison sentences to compensate for gaintime does not show a predisposition to impose a death sentence here. Cf. Keenan, 525 So. 2d at 477. There is no merit to Lewis' claim.

Much was attempted to be made of Judge Kaplan's alleged skeptical attitude toward defendants who plead for mercy in sentencing, however, Judge Kaplan explained that he "look[s] at them with skepticism on something like that," but admitted that "a lot of them do still get me." (Supp. Vol. IV at 593-95). Judge Kaplan made no emphatic statement that he does not consider pleas of mercy or mitigation in sentencing. In fact, when asked if he would have considered any type of mitigation without skepticism in Lewis' case, Judge Kaplan stated,

I don't know. You'd have to tell me what it was. I'd have to know and I'd have to listen, see how they testified, see what they said to determine if I thought they were conning me or not.

If I thought they were truthful, I would have to decide whether it's sufficient enough to merit a [sic] mitigation.

(Supp. Vol. IV at 608-09) (emphasis added). Without question, that was the proper answer. As a society, we would not want jurists to make decisions without hearing all of the evidence or putting the matter in context. For Judge Kaplan to have said that in all cases he would accept without question a particular type of mitigation or aggravation would not be proper. From Judge Kaplan's comments, it cannot be disputed that had Lewis chosen to present mitigation, Judge Kaplan would have considered it. Mitigation would not have been rejected out-of-hand.

Turning to the challenge to the letter to the Clemency Board, Judge Kaplan explained that a capital punishment clemency specialist with the clemency department of the Florida Parole and Probation Commission called and asked if he had any comments regarding Lewis' application for clemency. Judge Kaplan explained that his written response was based on the evidence he heard at the trial. He did not consider anything else or talk to anyone about the case. Based on what he heard at trial, he opposed clemency and wrote a letter expressing his feelings. (Supp. Vol. IV at 600-06). Such a post-trial expression of his opinion, however, does not indicate a predisposition to impose the death penalty. Cf. Suarez v. Dugger, 527 So. 2d 190 (Fla. 1988) (finding allegation that judge expressed interest in speedy execution in letter to clemency board legally insufficient to warrant recusal).

Given the frivolous nature of Lewis' allegations of bias raised in the motion for

postconviction relief, which Judge Kaplan completely refuted in his deposition, it is obvious that Judge Kaplan did not violate any ethical canons. Because there is no evidence of judicial bias or a predisposition to impose a particular sentence, there was no reason for Judge Kaplan to make any disclosure to counsel or to recuse himself from Lewis' case.

This Court should deny Lewis' request for an evidentiary hearing on this issue as the claim is legally insufficient on its face. However, should the State prevail on its appeal of the granting of a new sentencing for Lewis, but the Court is unable to determine that the claim of judicial bias is legally insufficient, then the matter should be returned to the trial court for an evidentiary hearing on the claim.

ARGUMENT IV

THE TRIAL COURT PROPERLY DENIED LEWIS' CLAIM THAT THE SENTENCING COURT DID NOT INDEPENDENTLY WEIGH THE AGGRAVATING AND MITIGATING CIRCUMSTANCES AND ALLEGATION THAT THE SENTENCING ORDER WAS PREPARED BY THE STATE (restated).

Here, Lewis admits that he had an evidentiary hearing on this matter, but asserts that he is entitled to a resentencing. The State disagrees. The evidentiary hearing, along with the trial record, established that Judge Kaplan independently weighed the

aggravating and mitigating circumstances present in the case and prepared his own sentencing order. The trial court's denial of this claim should be affirmed.

The standard of review applied by an appellate court when reviewing a trial court's ruling on a rule 3.850 motion to vacate following an evidentiary hearing is: "As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not "substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'"" Blanco, 702 So. 2d at 1252.

Following acceptance of the jury's sentencing recommendation, Judge Kaplan explained that sentencing would occur at a later time, "because I have to review some factors myself before I decide what sentence he should receive." (TR 3200) (emphasis added). At the final sentencing hearing, the trial court read its written sentencing order into the record (TR 3216-33). Then, two months after sentencing, at a hearing on Lewis' motion for new trial, Kirsch argued that there were no legally sufficient reasons to depart from the guidelines and to impose consecutive sentences for the contemporaneous noncapital offenses (TR 3238-48). During this discussion, defense counsel commented that the trial court had to reduce its departure reasons to writing, and the trial court asked counsel if he had seen the written sentencing order (TR 3248). Kirsch asked the court if it were referring to the one the State had

prepared, and the trial court replied, “That’s the only one.” (TR 3248). The true nature of this statement will be discussed in more detail below. Thereafter, the following colloquy occurred:

MR. KIRSCH: Yes, sir. Your Honor when I got it Your Honor was looking at it to determine whether or not that was the factual situation.

THE COURT: I told you that, Mr. Ray...

MR. KIRSCH: I find nothing wrong with the factual situation.

THE COURT: That Mr. Ray had supplied me with some of the details of geography which went on through the trial. I couldn’t remember southwest corner or half a mile or whatever. I asked to you [sic] take a look at it for me to see if you felt there was any --

MR. KIRSCH: Errors in directions....

THE COURT: Errors in geography or times and you indicated that it seemed right.

MR. KIRSCH: I want the record clear that we do not feel that the reasons given by the Court for enhancement were sufficient.

THE COURT: I think you made that clear.

(TR 3249) (emphasis added).

It is clear, Judge Kaplan understood prior to sentencing his duty to independently weigh the evidence and the aggravating and mitigating factors. It is also

clear that, while the State may have supplied Judge Kaplan with geographical or temporal information, Judge Kaplan formulated the contents of his written sentencing order.

At the postconviction evidentiary hearing, it was Judge Kaplan's testimony that he prepared the sentencing order and that Ralph Ray ("Ray"), the Assistant State Attorney, provided some geographical descriptions which were in evidence, but the sentencing order was the Judge's own order (PCR Vol. X 422-23). According to Judge Kaplan, "I don't have any independent recollection as to who typed [the sentencing order] up, but I prepared it, no question about it." (PCR Vol. X 422) (emphasis supplied). Continuing, Judge Kaplan explained that assuming the order was in the same font as used by the State in its motions:

... it's possible that they did type it up. But I can guarantee you that this is my order and I know from looking at the transcript that Mr. Ray supplied me with some of the geographical descriptions that were in evidence which I needed. In other words, the sight of the killing and where the victims were stopped by Mr. Lewis.

(PCR Vol.X 423)(emphasis supplied). Judge Kaplan admitted the conversation he had with Ray regarding the geographical information was ex parte (PCR Vol.X 423-24).

In response to a question as to how the communication with the State happened, Judge Kaplan explained: "No, I couldn't swear a hundred percent that it

happened this way, but I do all my sentencing orders the same way and I think I have a good idea of probably what happened”; Judge Kaplan did not recall anyone drafting any orders (PCR Vol. X 424). When confronted with what appeared to be a statement that the State had prepared the sentencing order, Judge Kaplan noted that during his discussion with Kirsch and Ray on the record (TR 3248-49), Kirsch had cut him off several times, thereby making a distorted transcript (PCR Vol. X 426-27). The point Judge Kaplan was attempting to make was that his sentencing order was the only sentencing order (PCR Vol. X 426-27). Explaining how, in all probability, the communication with Ray occurred and how the State may have come into possession of an unsigned sentencing order, Judge Kaplan testified:

... if that happened, I would have called him up and said, Mr. Ray, or called the secretary, I may not have talked to him, I may have said I don't remember these directions, could Mr. Ray provide me with them. I could have said that or I could have said, I'm sending up an order, stick them in there. I really don't remember. I don't remember that to be, to have happened. I mean, this is a surprise to me that you came up with that. It was prepared in his office, but anything is possible.

(PCR Vol. X 428-29). Additionally, Judge Kaplan offered that near the time the sentencing order was prepared, his office may have been using same model typewriter as the State (PCR Vol. X 429). Judge Kaplan did admit it was possible he would make rulings in court on motions then ask either the State or defense to draw up an

order. (PCR Vol. X 432). Also, Judge Kaplan testified he would never have the State prepare findings; he does need the State “to figure out what findings were necessary in this case or any case.” (PCR Vol. X 431-32). Nonetheless, independent of the State, Judge Kaplan weighed the aggravating and mitigating circumstances in Lewis’ case. (PCR Vol. X 432).

In conjunction with this issue, Ray testified that he had no recollection about an ex parte conversation with the trial court. Further, Ray had no present recollection of supplying Judge Kaplan with geographical information. According to Ray, he did not know how the sentencing order was prepared in this case. (PCR Vol. XII 621-22, 631). It was Ray’s belief that an ex parte communication regarding the sentencing would have been unethical (PCR XII 631). Ray interpreted the August 11, 1988 colloquy with Kirsch and Judge Kaplan to be that both parties received copies of the judge’s sentencing order (PCR Vol. XII 632).

Upon this testimony, the postconviction trial court concluded there was no basis for relief. The postconviction judge opined:

At the evidentiary hearing ... Judge Kaplan testified that he independently weighed aggravating and mitigating factors. Judge Kaplan testified that he prepared the Sentencing Order and that Ralph Ray only supplied geographical locations, i.e. street information, of where State proved incident occurred. Prosecuting state attorney, Ralph Ray, testified that he has prosecuted ten (10) capital

murder cases and has no recollection of ever having prepared any Sentencing Order. Nor did Mr. Ray ever argue for the imposition of the death penalty ex-parte with the judge and he testified that to do so would be highly unethical.

This Court ... finds that the Defendant has failed to show cause why relief should be granted....

(PCR 1070) (footnote omitted).

Section 921.141(3), Florida Statutes provides that a trial judge must draft his own sentencing order in a capital case and must independently weigh the aggravating and mitigating circumstances presented. Capital sentences have been vacated when this Court has found that the State prepared the sentencing order and the trial judge failed to independently weigh the aggravation and mitigation. State v. Riechmann, 777 So. 2d 342 (Fla. 2000) (granting new sentencing in light of finding trial court did not prepare sentencing order and did not weigh the aggravating and mitigation circumstances independent of the State's prepared sentencing order); Patterson v. State, 513 So. 2d 1257 (1987) (same). However, in Nibert v. State, 508 So. 2d 1, 4 (1987), the death sentence was affirmed where the judge placed his factual findings on the record and in defense counsel's presence, asked the State to reduce those findings to writing. This Court reasoned:

We reject Nibert's argument that the death penalty was unlawfully imposed because the judge did not actually

prepare the order of findings in support of the death sentence. The record reflects that the trial judge made the findings and conducted the weighing process necessary to satisfy the requirements of section 921.141, Florida Statutes (1985). We further note that defense counsel did not object when the court instructed the state attorney to reduce his findings to writing. Although we strongly urge trial courts to prepare the written statements of the findings in support of the death penalty, the failure to do so does not constitute reversible error so long as the record reflects that the trial judge made the requisite findings at the sentencing hearing.

Id. at 4.

In the instant case, Judge Kaplan disclosed to the defense, in open court that he had contacted the State to obtain geographical information. As such, any taint from the communication was dissipated as the defense knew of the content of the communication. Cf., Brake v. Swan, 767 So. 2d 500, 503-04 (Fla. 3d DCA 2000) (reasoning that had the fact that the judge had not spoken to opposing counsel ex parte been made known there would have been no well founded fear and recusal would not have been necessary).

Additionally, at the point in time when Judge Kaplan made his disclosure, Lewis was on notice of the communication and could have taken steps such as asking for a recusal within ten days under Florida Rule of Criminal Procedure 3.230 which has since been repealed and replaced with Florida Rule of Judicial Procedure 2.160. Having failed to seek a recusal, Lewis should be barred from using this as a basis for

a claim of ineffective assistance or proof of judicial bias at this late date. Cf. Rivera, 717 So. 2d at 481, n.3 (finding defendant's failure to seek recusal of the trial court within period set by rule forever precludes defendant from seeking recusal at later date).

More important, the postconviction judge's findings are supported by the record. Not only did Judge Kaplan "guarantee" that he prepared the sentencing order, but that he independently weighted the aggravators and mitigators. There is no evidence that the State made factual findings or evaluated the appropriateness of the death sentence. The State provided geographical information as to the location of the crime. This information was disclosed to the defense, and the trial court was informed by Kirsch that he found nothing wrong with the factual situation (TR 3248-49). Lewis has presented nothing to undermine the postconviction court's factual findings and conclusions. As such, the denial of relief should be affirmed.

In addition to claiming that the trial court erred, Lewis also asserts that his counsel was ineffective for not having sought to disqualify the trial court prior to sentencing once it was learned that the State had supplied some geographical information (AB 97). The standard of review for an ineffective assistance of counsel claim is governed by Strickland and is reviewed de novo. Stephens v. State, 748 So. 2d 1028 (Fla. 1999) (requiring de novo review of ineffective assistance of counsel); Sims v. State, 754 So. 2d 657, 670 (Fla. 2000). Both prongs of the Strickland test,

i.e., deficient performance and prejudice, present mixed questions of law and fact reviewed de novo on appeal. Cade v. Haley, 222 F.3d 1298, 1302 (11th Cir. 2000) (stating that, although a district court’s ultimate conclusions as to deficient performance and prejudice are subject to plenary review, the underlying findings of fact are subject only to clear error review, citing Byrd v. Hasty, 142 F.3d 1395, 1396 (11th Cir. 1998); Strickland, 466 U.S. at 698 (observing that both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact).

While the ineffectiveness argument was not presented in Lewis’ motion for postconviction relief in conjunction with his challenge to the preparation of the sentencing order, it was mentioned by counsel at the Huff¹⁰ hearing and in passing in Claim II of the postconviction motion (PCR Vol. VIII 148; Vol. III 329). However, it was not argued fully by counsel. Other than case law and a challenge to the court’s denial of the “no significant criminal history” mitigator the extent of the claim is:

Trial counsel also failed to object to the State’s preparation of the sentencing order in this ex parte contact that occurred in the preparation of the sentencing order. For trial counsel to acquiesce to this occurrence is a fundamental violation of Mr. Lewis’s rights. Trial counsel never obtained permission or a waiver from Mr. Lewis to allow the State to prepare the sentencing order.

¹⁰ Huff v. State, 622 So. 2d 982 (Fla. 1993).

(PCR Vol. III 329). At best, the challenge to counsel's effectiveness was directed toward his failure to object to the rejection of the "no significant criminal history" mitigator. As such, the matter should be considered waived and/or unpreserved. Duest, 555 So. 2d at 852 (rejecting defendant's attempt to raise a claim without briefing the issue); Steinhorst v. State, 412 So. 2d 332, 338 (Fla.1982) (holding "in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below."). Neither Strickland prong has been pled here.

There is no proof that counsel was deficient in his handling of the information that the State gave Judge Kaplan geographical information only, nor is there any evidence that had counsel sought to have Judge Kaplan recuse himself that the result of the proceedings would have been different as Judge Kaplan made a full disclosure of the content of his conversation with the State and removed any taint from the communication. Conversely, it appears that the claim of ineffective assistance was offered by Lewis to counter the procedural bar argument raised by the State in its response to the motion for postconviction relief (PCR VII 147-48). The extent of Lewis' claim of ineffective assistance as presented in the Huff hearing was that: "Defense counsel did render prejudicial performance in essence, acquiescent (sic) to fundamental constitutional error, acquiescent (sic) to the State and the trial court

discussing this matter and to having the State provide the Court with facts and doing the weighing of the aggravating and mitigating circumstances.” (PCR Vol. VIII 148). Conclusory claims are insufficient to warrant relief under Strickland. Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989) (motion for postconviction relief under Strickland must allege specific facts and not conclusory allegations). Furthermore, conclusory claims of ineffective assistance which are presented in order to overcome a procedural bar may be denied summarily. Rivera v. State, 717 So. 2d at 480 n.2, 487 (finding it impermissible to recast claim which could have or was raised on appeal as one of ineffective assistance in order to overcome the procedural bar or to relitigate an issue considered on direct appeal). Moreover, if the trial court’s contact with the State for geographical information was, as Lewis now claims, fundamental error, clearly the claim could have been raised on direct appeal, but was not. This is neither the proper time nor vehicle for challenging the effectiveness of appellate counsel. Freeman, 761 So. 2d at 1069 (finding claims of ineffectiveness of appellate counsel should be raised in petition for writ of habeas corpus; such claims “ may not be used as a disguise to raise issues which should have been raised on direct appeal or in a postconviction motion”); Downs v. State, 740 So.2d 506, 509 n. 5 (Fla. 1999) (stating “[c]laims for ineffective assistance of appellate counsel are not cognizable in a rule 3.850 motion for postconviction relief” such should be raised in a petition for writ of

habeas corpus); Groover v. Singletary, 656 So. 2d 424 (Fla. 1995); Chandler v. Dugger, 634 So. 2d 1066, 1068 (Fla. 1994).

Because the claim of ineffective assistance was not pled properly, this Court should deny any relief requested. Additionally, because there is no evidence that the trial court did not prepare its own sentencing order and did not weigh the aggravating and mitigating factors independently, Lewis' claim must fail; he is not entitled to a new sentencing.

ARGUMENT V

THE WITHHELD DOCUMENTS SHOULD NOT BE DISCLOSED AS THEY ARE NOT PUBLIC RECORDS AND DO NOT CONTAIN BRADY MATERIAL (restated).

Lewis asserts numerous documents identified as “prosecutor’s notes” and submitted to the trial court by the State Attorney’s Office were withheld, but such did not qualify for public records exemption¹¹ (AB 98). Also, Lewis requests that this Court release the documents and permit him to amend his postconviction motion (AB

¹¹ The trial court withheld Executive Clemency and Parole Commission documents as well as NCIC, FCIC, and FBI material. Lewis does not challenge those findings, thus, he has waived any appeal and those documents will not be addressed.

98). The State submits the trial court followed the proper procedure in reviewing, in camera, the papers presented, disclosed those found not to be exempt, and identified the basis for withholding others (PCR Vol. I 86-87). Further, the State recognized its duty to disclose all Brady material (PCR Vol. I 81-83). This Court's review will reveal that the withheld material was not subject to disclosure and affirm the trial court's ruling.

The case law suggests the standard of review for a public record determination is plenary. Arbelaez v. State, 775 So. 2d 909, 918 (Fla. 2000) (opining "we have reviewed the challenged documents and conclude that the trial court correctly found that they did not constitute public records"); Ragsdale v. State, 720 So. 2d 203, 206 (Fla. 1998) (same).

Under Ragsdale, 720 So. 2d at 206, a party claiming a public records exemption and in doubt as to whether the document must be disclosed, must submit it to the trial court for an in camera inspection. In State v. Kokal, 562 So. 2d 324, 327 (Fla. 1990), this Court discussed what constitutes a public record and that prosecutor's notes are not subject to public records disclosure.

We do agree with the state attorney that some of the documents in his files are not public records. In Shevin v. Byron, Harmless, Schaffer, Reid & Associates, Inc., 379 So. 2d 633, 640 (Fla. 1980), we pointed out:

To give content to the public records law ... we hold that a public record, for purposes of section 119.011(1), is any material prepared in connection with official agency business which is intended to perpetuate, communicate or formalize knowledge of some type. To be contrasted with "public records" are materials prepared as drafts or notes, which constitute mere precursors of governmental "records" and are not, in themselves, intended as final evidence of the knowledge to be recorded. Matters which obviously would not be public records are rough drafts, notes to be used in preparing some other documentary material, and tapes or notes taken by a secretary as dictation....

Further, not all trial preparation materials are public records.* We agree with Orange County v. Florida Land Co., 450 So.2d 341, 344 (Fla. 5th DCA), review denied, 458 So. 2d 273 (Fla. 1984), which described certain documents as not within the term "public records":

... a list in rough outline form of items of evidence which may be needed for trial.... a list of questions the county attorney planned to ask a witness.... a proposed trial outline.... handwritten notes regarding the county's sewage system and a meeting with Florida Land's attorneys.... notes (in rough form) regarding the deposition of an anticipated witness. These documents are merely notes from the attorneys to themselves designed for their own personal use in remembering certain things. ... We cannot imagine that the Legislature, in enacting the Public Records Act, intended to include within the term

"public records" this type of material. See Shevin v. Byron, Harmless.

... we hold that that portion of the state attorney's files which fall within the provisions of the Public Records Act are not exempt from disclosure because Kokal's conviction and sentence have become final. Thus, the state attorney should have provided Kokal with these records upon his request. If he had a doubt as to whether he was required to disclose a particular document, he should have furnished it in camera to the trial judge for a determination. Of course, the state attorney was not required to disclose his current file relating to the motion for postconviction relief because there is ongoing litigation with respect to those documents.

* Of course, the state attorney is obligated to disclose any document in his files which is exculpatory. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

Kokal, 562 So. 2d 327-28. “[P]retrial materials which include notes from the attorneys to themselves designed for their own personal use in remembering certain things or preliminary guides intended to aid the attorneys when they later formalize their knowledge are not within the term ‘public record.’” Lopez v. State, 696 So. 2d 725, 728 (Fla. 1997).

While recognizing in Johnson v. Butterworth, 713 So. 2d 985, 987 (Fla. 1998), that attorney’s notes and draft are not public records and are never subject to public records disclosure, this Court opined “the State is obligated to disclose any document

in its possession which is exculpatory.... This obligation exists regardless of whether a particular document is work product or exempt from chapter 119 discovery.” Id. at 986 (citation omitted) (emphasis supplied). See, Young v. State, 739 So.2d 553, 558 (Fla. 1999)(recognizing “State is obligated to disclose to a defendant all exculpatory evidence in its possession”). Also, “‘it is the State that decides which information must be disclosed’ and unless defense counsel brings to the court’s attention that exculpatory evidence was withheld, ‘the prosecutor’s decision on disclosure is final.’” Roberts v. State, 668 So. 2d 580, 582 (Fla. 1996).

Here, the State provided defense counsel with a list of the documents it was claiming as public records (PCR Vol. I 71) and filed a response to Lewis’ motion to compel disclosure. In its response, the State gave its legal reasons for withholding these documents (PCR Vol. I 72-85), then turned them over to the trial court for in camera review (PCR Vol. VIII 34-43)¹². The trial court examined the material and determined that the criminal history records from Executive Clemency and the Parole Commission were exempt from public records disclosure (PCR Vol. I 86). With respect to Department of Corrections (“DOC”) documents identified as “Prison

¹² The transcript identified Mr. Blinderman as representing the State Attorney’s office. This appears erroneous, as it was Ms. Bailey who represented the State. Nonetheless, it is clear the State identified the documents for which it was claiming an exception and delivered the material for an in camera review.

Records” and contained in the State’s file, the judge found the material did not constitute confidential documents, and was not exempt under section 945.10(1), Florida Statutes. The DOC material identified as “mental health, medical or substance abuse records” was found to be confidential and should not have been disclosed to the State under section 945.10(1)(a). However, because section 945.10(3), Florida Statutes provided for a method of disclosure to the defense, the trial court ordered release of that material (PCR Vol. I 86-87). Reviewing the “prosecutor’s notes”, the trial court found: “[t]he requested prosecutor’s notes are not public records and are, therefore, not subject to disclosure under Section 119. However, no exemption applies to the subpoenas found within the stack of prosecutor’s notes. Accordingly, they are subject to disclosure.” (PCR 86-87).

Clearly, the trial court reviewed the documents offered by the State as exempt from public records disclosure. The trial court’s review revealed that certain records should be disclosed, while other were exempt. The documents withheld were attorney’s notes and not public records. This was the appropriate procedure to follow and this Court’s review of those exempt documents will confirm the appropriateness of that ruling. The trial court complied with the procedure set out in Ragsdale. In Rose v. State, 774 So. 2d 629, 636 (Fla. 2000), this Court affirmed the trial judge’s resolution of a public records request related to attorney’s notes finding full

compliance with Ragsdale where the trial court conducted the in camera review and determined which documents should have been disclosed¹³. Like in Rose, Lewis has failed to show any error in the trial court's in camera review or in resolution that prosecutor's notes are not public records subject to disclosure. The ruling should be affirmed.

ARGUMENT VI

LEWIS' CHALLENGES TO VARIOUS JURY INSTRUCTIONS GIVEN DURING THE PENALTY PHASE AND THE TRIAL COURT'S RULING TO NOT GIVE AN INSTRUCTION ON AGE AS A MITIGATING FACTOR WERE DENIED PROPERLY AS PROCEDURALLY BARRED (restated).

As his final issue on appeal, Lewis challenges the instructions given on "heinous, atrocious, or cruel" ("HAC"), "prior violent felony", felony murder aggravator, and the jury's advisory sentencing role was undermined. (AB 98-100). Additionally, he claims that the trial court erred in not giving an instruction that Lewis' age could be a mitigator and in not considering age as mitigation (AB 100). Appended to each claim is a one sentence allegation of ineffective assistance (AB 98-100). Denial

¹³ While it was noted that the trial judge in Rose v. State, 774 So. 2d 629, 636-37 n. 11 (Fla. 2000) found the documents not Brady v. Maryland, 373 U.S. 83 (1963) material, that finding was not a requisite to affirming the ruling.

of these claims was appropriate and should be affirmed.

The standard of review to be employed here is that a trial court's summary denial of a motion to vacate will be affirmed where the law and competent substantial evidence supports its findings. Diaz, 719 So. 2d at 868; Lopez, 634 So. 2d at 1056.

As a preliminary matter, Lewis's single sentence argument of ineffective assistance of counsel¹⁴ added to the end of each penalty phase instruction challenge presented here is an insufficient pleading on two levels. First, it is insufficient to present an appellate claim in unsupported, conclusory terms and second, an ineffectiveness claim cannot be used to overcome a procedural bar. Lewis may not merely refer to his arguments raised below and have them considered sufficiently pled on appeal. In Duest, 555 So. 2d at 852, the Court rejected an attempt to raise a claim without briefing the issue.

Duest also seeks to raise eleven other claims by simply referring to arguments presented in his motion for postconviction relief. The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.

¹⁴ Lewis claims either "[t]o the extent trial counsel failed to object" or "[t]o the extent trial counsel failed to know the law and object, Mr. Lewis was denied effective assistance of counsel." (AB 99-100).

Id. at 851-52. Moreover, a one sentence assertion that counsel was ineffective is legally insufficient. 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 (finding that bare allegation of ineffective assistance of counsel does not overcome irrevocable procedural default of underlying claim). As such, each of Lewis’ challenges on appeal are insufficiently pled and should be found waived.

A. Heinous, Atratus, or Cruel Instruction

At trial, Lewis’ counsel failed to challenge the HAC instruction on constitutional grounds; it was counsel’s position at trial that the facts did not support the giving of the HAC instruction. On direct appeal, this Court determined that the facts supported the finding that the crime was HAC. Lewis, 572 So. 2d at 912 n. 9. Here, Lewis’ claim is that the HAC instruction was unconstitutional and counsel was ineffective for not objecting (AB 98-99).

This claim is procedurally barred. As announced in James v. State, 615 So. 2d 668, 669 (Fla. 1993), “Claims that the instruction on the heinous, atrocious, or cruel aggravator is unconstitutionally vague [under Espinosa v. Florida, 505 U.S. 1079 (1992)] are procedurally barred unless a specific objection on that ground is made at trial and pursued on appeal.” See Sims v. State, 622 So. 2d 980 (Fla. 1993) (finding

challenge to HAC instruction based upon Espinosa procedurally barred for failure to object at trial); Koon, 619 So. 2d at 248 (finding challenge to HAC instruction procedurally barred because no objection raised at trial and challenged on appeal was on different grounds than raised in postconviction motion); Turner v. Dugger, 614 So. 2d 1075, 1081 (Fla. 1992) (same).

Lewis is unable to prove either deficient performance or prejudice under Strickland¹⁵. First, Espinosa had not been decided at the time of Lewis' sentencing and cannot be the basis for a claim of ineffective assistance. See, Lambrix v. Singletary, 520 U.S. 518 (1997); Glock v. Singletary, 65 F.3d 878, 890 (11th Cir.1995); Cherry v. State, 25 Fla. L. Weekly S719 (Fla. Sept. 28, 2000). Second, while Godfrey v. Georgia, 446 U.S. 420 (Fla. 1980) may afford Lewis some temporary solace by supporting an inference of deficient performance, he will not be able to establish the prejudice prong as evidenced by Cherry; State v. Breedlove, 655 So. 2d 74 (1995); and Chandler v. Dugger, 634 So. 2d 1066, 1069 (Fla. 1994) as under any definition of HAC, Lewis' crime would be deemed heinous, atrocious, or cruel.

¹⁵ Lewis must demonstrate (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for the deficiency in representation, there is a reasonable probability the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 688-89, 694. See, Johnston v. Singletary, 162 F. 3d 630, 635 (11th Cir. 1998); Roberts v. Wainwright, 666 F. 2d 517, 519 n.3 (11th Cir. 1982).

Counsel is not required to anticipate changes in the law. Nelms v. State, 596 So. 2d 441, 442 (Fla. 1992) (announcing that “[d]efense counsel cannot be held ineffective for failing to anticipate changes in the law.”); Stevens v. State, 552 So. 2d 1082, 1085 (Fla. 1989) (same). Espinosa announced a new rule of law. See, Lambrix, 520 U.S. at 528, 539-40; Glock, 65 F.3d at 890; Cherry, 25 Fla. L. Weekly at S719. Thus, counsel cannot be held accountable for not anticipating this change and cannot be deemed deficient for not objecting to the HAC instruction four years before Espinosa was decided.

Nonetheless, even if this Court finds that counsel was deficient, prejudice has not been established prejudice arising from counsel’s failure to object to the HAC instruction. Given the facts of the instant case, there is no reasonable probability that the outcome of the proceedings would have been different had a more detailed HAC instruction been given. Lewis attacked Michael Gordon with a metal pipe, breaking Gordon’s arm. Lewis then drove around in Gordon’s truck with his victim cowering on the floorboard, begging for help, while displayed to Lewis’ friends. At some point, Lewis drove Gordon to the intersection of Griffin Road and U.S. 27 where, in the median, Lewis bludgeoned Gordon to death with a tire iron. Gordon sustained numerous defensive wounds. (TR 847-50, 1082, 1331-51, 1590-93 1600-01, 1607-09, 1702-05, 1712, 1864-65, 1870-72, 2251-53, 2368-71). On direct appeal, this Court

found that HAC was supported by the record. Lewis, 572 So. 2d at 912 n. 9. Given this determination, and under these facts, Gordon’s murder was committed in a heinous, atrocious, or cruel manner under any definition of HAC. Cf. Breedlove, 655 So. 2d at 76-77 (finding use of HAC instruction later found to be unconstitutional was harmless error as the manner in which murder was committed was HAC under any definition); Chandler, 634 So. 2d at 1069 (finding invalid HAC instruction harmless in bludgeoning murder of elderly couple where “aggravator clearly existed and, under any instruction, would have been found”). Thus, even if defense counsel improperly failed to raise an objection to the HAC instruction, there was no prejudice as the crime qualified as heinous, atrocious, or cruel under any definition.

B. Prior Violent Felony Instruction

Lewis asserts the “prior violent felony” instruction is “unconstitutionally overbroad” because it “fails to define the elements of the aggravating factor which the jury must find.” (AB 99). Additionally, he asserts his counsel was ineffective for not objecting at trial (AB 99). While Lewis’ counsel did not raise a constitutional challenge at trial or on appeal, the challenge to this instruction and counsel’s performance was rejected properly.

Constitutional challenges to the “prior violent felony” instruction have been rejected consistently. Hudson v. State, 708 So. 2d 256, 261 (Fla. 1998) (rejecting

claim that prior violent felony aggravator is unconstitutionally vague). Because the “prior violent felony” instruction has been upheld upon appellate review, defense counsel performance may not be deemed deficient, much less prejudicial. Mendyk, 592 So. 2d at 1080 (opining “[w]hen jury instructions are proper, the failure to object does not constitute a serious and substantial deficiency that is measurably below the standard of competent counsel.”). As such, Lewis has failed to show deficient performance. Moreover, Lewis has not even pled that his prior violent felony convictions would not qualify as aggravating circumstances. Hence he has failed to carry his burden of proving both prongs of the Strickland analysis. The summary denial should be affirmed.

C. Felony Murder Instruction

It is Lewis’ position that the “felony murder” instruction is an “automatic aggravator” and the “to the extent trial counsel failed [to] know the law and object, Mr. Lewis was denied effective assistance of counsel.” (AB 99). Even assuming that the merits of Lewis’ claim should be reached, he has failed to establish either prong of Strickland.

Like challenges to the “prior violent felony” instruction, constitutional attacks upon the “felony murder” instruction have been rejected consistently. Hudson, 708 So. 2d at 262 (rejecting argument that the murder in the course of a felony aggravator

is an invalid, automatic aggravator); Blanco v. State, 706 So. 2d 7, 11 (Fla. 1997) (finding felony murder instruction not vague or over broad); Banks v. State, 700 So.2d 363, 367 (Fla.1997) (finding felony murder instruction constitutional); Johnson v. State, 660 So. 2d 637, 647 (Fla. 1995)(same); Hunter v. State, 660 So. 2d 244, 253 & n.11 (Fla. 1995) (same). As such, defense counsel should not be deemed deficient for not objecting to an instruction which has be upheld repeatedly. Moreover, even had counsel objected, there is no likelihood that the result of the proceedings would have been different given the fact the instruction has been affirmed on numerous occasions and both the HAC and prior violent felony aggravators were proven beyond a reasonable doubt. Lewis has not established deficient performance and prejudice as required by Strickland. The summary denial of his claim should be affirmed.

D. Instruction on Jury’s Advisory Sentencing Role

The extent of Lewis’ challenge to the “Jury’s Advisory Sentencing Role” is that the instruction given violated Calwell v. Mississippi, 472 U.S. 320 (1985) and to the extent counsel failed to know the law or object, he was ineffective. Such an appellate presentation falls far below the pleading requirements of Strickland where both deficient performance and prejudice must be shown. However, if the Court resolves to review this issue, it will find that relief was denied properly as procedurally barred.

In his postconviction relief motion, Lewis asserted that the trial court and

prosecutor misled the jury about its sentencing role and that defense counsel was ineffective for not objecting (PRC Vol. III 390-91). Neither in his motion to vacate his sentence nor here on appeal does Lewis elucidate how the jury was misled or what instruction should have been given.

Conversely, the trial record reveals that the “Jury’s Advisory Sentencing Role” instruction was discussed, and amended with defense counsel’s agreement. At the trial, the judge offered to embellish the standard instruction:

THE COURT: First thing, this is a suggested change to the instructions for the advisory sentence phase....

Even though the final decision as to the punishment to be imposed rests solely with the Judge of this Court your advisory sentence will be given great weight and your decision in this regard is a primary and critical factor in the Court's determination as to the proper sentence to be imposed upon the defendant....

I think that should be inserted....

[DEFENSE COUNSEL]: I agree.

(TR Vol. XX 3134) (emphasis supplied). This instruction was given at the commencement of the penalty phase (TR Vol. XX 3159). Lewis raised no issue regarding the instruction on direct appeal. Such was a proper statement of the law as under Florida’s capital sentencing structure; the jury's sentencing recommendation is given “great weight” regardless of whether the recommendation is for life, see Tedder

v. State, 322 So. 2d 908, 910 (Fla. 1975), or death, see Smith v. State, 515 So. 2d 182, 185 (Fla. 1987), cert. denied, 485 U.S. 971 (1988); Grossman v. State, 525 So. 2d 833, 839, n. 1 (Fla. 1988), cert. denied, 89 U.S. 1071 (1989).

The final instructions to the jury included:

Ladies and gentlemen, of the jury, it is now your duty to advise me as to what punishment should be imposed upon the defendant for his crime of murder in the first degree.

As you have been told, the final decision as to what punishment shall be imposed is my responsibility. However, it's your duty to follow the law that will now be given to you by me and render to me an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances that you may find to exist.

Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or innocence of Mr. Lewis and evidence that was presented to you during these proceedings; the only evidence being the certified copy of conviction of prior crime.

(TR Vol. XX 3190-91). This too was proper as it tracked the standard instruction which provides:

Ladies and gentlemen of the jury, it is now your duty to advise the court as to what punishment should be imposed upon the defendant.... As you have been told, the final decision as to what punishment shall be imposed is the

responsibility of the judge; however, it is your duty to follow the law that will now be given you by the court and render to the court an advisory sentence....

Standard Jury Instruction Penalty Proceedings - Capital Cases, section 921.141, Florida Statutes.

Taken separately or together, the instructions were correct accountings of the law. Neither undermined the jury's sense of responsibility. Hence, no error occurred nor was ineffective assistance rendered. Moreover, the instant challenge, based upon Caldwell v. Mississippi, has been rejected consistently.

Florida's capital sentencing provides that the jury recommend a sentence which will be afforded great weight, but the sentencing responsibility lies with the judge. Addressing this issue, this Court opined "the standard jury instruction fully advises the jury of the importance of its role, correctly states the law, [] and does not denigrate the role of the jury." Brown v. State, 721 So. 2d 274, 283 (Fla. 1998)(citation omitted); Burns v. State, 699 So. 2d 646, 654 (Fla. 1997)(holding instruction correctly states law and advises jury of importance of its sentencing role), cert. denied, 118 S.Ct. 1063 (1998); Combs v. State, 525 So. 2d 853, 855-56 (Fla. 1988)(holding Caldwell inapplicable to Florida death cases). It is unnecessary to inform jurors under what conditions the advisory opinion would be overridden. Burns, 699 So. 2d at 654; Turner v. State, 614 So. 2d 1075, 1079 (Fla. 1992). Because the record reflects the

jury was instructed accurately, the instant claim is meritless and was denied properly. The trial court's ruling should be affirmed even if this Court does not find the matter procedurally barred. See, Caso, 524 So. 2d 424 (determining that “[a] conclusion of decision of a trial court will generally be affirmed, even when based on erroneous reasoning, if the evidence or an alternative theory supports it.”).

E. Refusal To Give Instruction on Age as Mitigation

Lewis claims that the trial court erred in prohibiting an instruction on the mitigating factor of age, and in failing to find age as a mitigator (AB 100). The trial court's denial of this claim was proper as it is procedurally barred. An instruction on age as a mitigating factor was requested and discussed below (TR Vol. XX 3116-17). As such, on direct appeal to this Court, Lewis should have, could have, but chose not to raise the issue of the judge's refusal to give the “Age” instruction or to find age as mitigation, the claim is procedurally barred. Engle v. Dugger, 576 So. 2d 696 (Fla. 1991); Atkins v. Dugger, 541 So. 2d 1165, 1166 n.1 (Fla. 1989); Roberts v. State, 568 So. 2d 1255, 1257-58 (Fla. 1990); Correll v. Dugger, 558 So. 2d 422, 425 (Fla. 1990). Given these facts, Lewis has not established how the trial court's summary denial was improper.

Moreover, because defense counsel did argue for the “age” mitigator, but such was denied, he did not render deficient performance. Counsel may not be deemed

deficient merely because the trial court ruled against him. Bush, 505 So. 2d at 411 (finding counsel's lack of success on actions pursued following sound strategies "augurs no ineffectiveness of counsel"); Songer v. State, 419 So. 2d 1044 (Fla. 1982).

Furthermore, in Scull v. State, 533 So. 2d 1137, 1143 (Fla. 1988), this Court stated that a trial court could reject age as a mitigator where the defendants "were twenty to twenty-five years old at the time their offenses were committed" and there is no showing of immaturity or a comparatively low emotional age. See Scull, 533 So.2d at 1143 (reasoning defendant's age of twenty-four will not establish mitigator without additional evidence supporting low emotional age). Additionally in Mahn v. State, 714 So. 2d 391 (Fla. 1998), this Court reasoned:

We have long held that the fact that a defendant is youthful, "without more, is not significant." ... Therefore, if a defendant's age is to be accorded any significant weight as a mitigating factor, "it must be linked with some other characteristic of the defendant or the crime such as immaturity." ... see also Sims v. State, 681 So. 2d 1112, 1117 (Fla.1996) (finding that "without more," defendant's age of twenty-four was not a statutory mitigator since no evidence showed that his "mental, emotional, or intellectual age was lower than his chronological age").

Mahn, 714 So. 2d at 400 (citations omitted).

Lewis has not linked his age to a claim of low emotional age as is required by Mahn and Scull. As such, no prejudice is established as required by Strickland.

Further, he has failed to show the sentencing proceeding would have been different had the “age” instruction been given. Lewis did not establish that his mental age was less than his chronological age, therefore, the trial court’s rejection of the mitigator was proper. The summary denial of this claim should be affirmed.

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court reverse the trial court's order vacating Lewis' death sentence and affirm the trial court's order denying postconviction relief in all other respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Todd G. Scher, Esq. Capital Collateral Regional Counsel, 101 NE 3rd Avenue, Suite 400, Fort Lauderdale, Fl 33301 on July 17, 2001.

LESLIE T. CAMPBELL

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately on July, 2001.

LESLIE T. CAMPBELL