IN THE SUPREME COURT OF FLORIDA

WILLIAM VAN POYCK,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 84,324

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA

CORRECTED

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, William Van Poyck,, was the defendant in the trial court and will be referred to herein as "Appellant." Appellee, the State of Florida, was the prosecution in the trial court and will be referred to herein as "the State." References to the record/transcripts from this appeal will be by the symbol "R" and references to the transcripts from the original record on direct appeal will be by the symbol "ROA" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Appellant was convicted and sentenced to death for the 1987 murder of prison guard Officer Griffis. This Court upheld both the sentence and conviction on direct appeal. Van Poyck v. State, 564 So. 2d 1066 (Fla. 1990). In December of 1992, Appellant filed a motion for postconviction relief. An evidentiary hearing was granted on two of the seventeen claims presented. Ultimately the trial court denied all relief.

At the evidentiary hearing. Appellant presented the testimony of the following people. The first to testify was Janet Vogelsang, a clinical social worker. Ms. Voglesang compiled a psychological history of appellant's development since birth. She reviewed appellant's school records, a 1972 report by Dr. Rothenberg, a 1970 report by a counselor for HRS, the criminal history of appellant's brother Jeffrey Van Poyck, appellant's Department of Corrections records, and appellant's trial testimony. (R 167-168). She interviewed appellant's former girlfriend, Traci Rose, appellant's stepsister Toni, his sister Lisa and a psychiatrist, Dr. Phillips[1]. Voglesang also spent three and one-half hours with appellant. (R 173, 170-171).

Vogelsang testified that appellant's early development was greatly affected by a series of events. Appellant's mother drank during her pregnancy with appellant. (R 199). However Vogelsang did not see signs of fetal alcohol syndrome in appellant. (R 222). Appellant lost his mother at the age of sixteen months. (R

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[1] Dr. Phillips also testified on behalf of appellant at the evidentiary hearing.

175). Appellant's father became emotionally withdrawn after the loss of his wife. He further distanced himself from his children through his work. (R 176, 192). Appellant's grandmother was a manic depressive. (R 222). There was no testimony that appellant ever had any contact with this grandmother. After the death of his wife, Mr. Van Poyck hired a Mrs. Danno to care for the children. The children told their father that Mrs. Danno was abusive, consequently she was dismissed. (R 184). Shortly thereafter a maternal aunt, Phyllis Marrin and her husband moved in with the Van Poyck family. Aunt Phyllis was described as mentally unstable. (R 177-178). Although unstable she was not abusive towards the children and loved them very much. (R 272). Aunt Phyllis cared for the children for approximately two years until Mr. Van Poyck remarried. (R 266). Appellant was six years old at the time his father remarried. (R 178). Vogelsang testified that the new Mrs. Van Poyck, Lee, spanked appellant on the average of three times a week. (R 186). Vogelsang described appellant's father as not abusive and well meaning. (R 213, 270). The stepmother Lee Van Poyck was described by an HRS counselor as openly hostile towards the children. (R 213).

Vogelsang reported that appellant's brother Jeffrey was abusive towards him. (R 184). Jeffrey taught appellant how to steal and introduced him to alcohol when appellant was only eight years old. (R 184, 195-196, 199). Vogelsang stated that appellant and his brother and sister experienced problems growing up. (R 182, 186). Appellant was exposed to the criminal justice system at an early age and witnessed violence in prison. (R 187). Vogelsang testified that Appellant was taken to youth hall in

1966 for no reason at all. (R 195). However it was revealed that in 1966 appellant had three criminal charges peding agiast him. All were for breaking and entering and ine for possession of stolen property. (R 263-264). By 1968, there ten additional charges for breaking and entering as well as running away from youth hall. (R 263). In October of 1968 appellant was sent to Florida School for Boys in Okeechobee. He experienced abuse while incarcerated at Okeechobee.(R 188). Appellant began to think about suicide and made suicide attempts. (R 190).[2]

Paul Dumuro a juvenile justice and child welfare consultant. (R 309) testified regarding the documented abuse at Okeechobee. (R 309-337). Dumuro's testimony was limited exclusively to the general conditions of abuse at Okeechobee. Dumuro had no knowledge regarding appellant's incarceration at Okeechobee. (R 335).

Traci Rose, appellant's former girlfriend testified. She stated that she meet appellant in September of 1986. They meet at a bar were Rose worked as a nude dancer. (R 350, 360). Rose had been addicted to cocaine since she was fourteen years old, and claims that she was responsible for getting appellant hooked the drug. (R 348, 360). She further stated that she and appellant started drinking and smoking cocaine the night before

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[2] The only reference to any suicide attempts involved an alleged incident in Florida State Prison. Appellant was sent to the hospital after having swallowed a light bulb. There was never any physical injury to appellant let alone any physical proof that appellant had in fact ate a light bulb. Appellant told his attorney that he faked the incident in an attempt to feign mental illness.

the murder and continued until appellant left the house the morning of the murder. (R 350).

Emily Wilkes, appellant's first cousin offered the following testimony. She had not seen appellant since 1957 when he was three years old. (R385, 387). She had no personal knowledge regarding the abuse by Mrs. Danno, the housekeeper or Lee Van Poyck, the stepmother (R 377, 389-390, 394). She stated that Lee favored appellant. (R 382, 394). She further testified that Aunt Phyllis was not normal but she never heard that Aunt Phyllis was in any abusive towards the children. (R 392). Ms. Wilkes described appellant's father as a wonderful man who loved and provided for his children. (R 394-395, 399). Although he loved his children he had a difficult time expressing his emotions. (R 395).

Charles Hill, also appellant's first cousin testified to the following. Mr. Hill had last seen appellant in 1972 at appellant's father's funeral. (R 425). Prior to that, Mr. Hill had not seen appellant since appellant was eight-ten years old. (R 425). He described appellant's natural mother as a good mother who was a social drinker. (R 402, 403). Appellant's father was a successful man who worked hard. (R 404). Appellant's father was desperate to find someone to take care of the children after his wife died. (R 412). Mr. Hill described Aunt Phyllis as a crack pot who was addicted to prescription drugs. (409). Hill describes appellant's brother Jeff as the source of all of appellant's problems. (R 414, 420).

Roxanne Vining testified that she and her brother were neighborhood friends of Jeffrey Van Poyck and appellant. (R

439). Vining stated that the neighborhood kids including appellant were exposed to drugs at an early age. (R). She described appellant's father as cold.(R). Appellants friends were not allowed in the house. (R 449-450). Ms.Vining met appellant when she was five and had not seen him after she turned ten. (R). She was no personal knowledge of appellant's criminal history. (R 453). She testified that appellant's brother Jeffrey abused him. (R 453).

The next witness to testify for appellant was Albert Rathbone, a gunsmith. (R 462). Rathbone testified generally about the operation of the three weapons that appellant and Valdez brought with them that morning of the murder. (R 463-466). Rathbone testified on cross-examination that the murder weapon would "click" when it misfired. (R 469).

Bruce Kinnane also testified on behalf of appellant. He and appellant met at Florida School for Boys at Okeechobee. (R 478). Kinnane testified about two instances of abuse that he and appellant were subjected to while incarcerated at Okeechobee. Both boys were forced to place their heads in a bin of garbage. Kinnane stated that this was a form of discipline. Kinnane did not explain what infraction had been committed to warrant the punishment. Both boys were also disciplined for having contraband cigarettes in the facility. As punishment they were forced to eat the cigarettes. (R 478). Kinnane stated that appellant loved his father and felt that his stepmother was keeping them apart. (R). Kinnane admitted that he and appellant escaped from Okeechobee on three separate occasions. (R 501).

Appellant also presented the testimony of an inmate, Felix Milian. The men met in prison and have known one another for seventeen years. (R 503-506). Milian is serving a life sentence for robbery and murder.(R 516). Milian described appellant as a peace maker despite appellant's numerous fight and disciplinary reports. (R 507, 518, 521). Appellant was also caught making a weapon in prison. (R 521). There were times when appellant would become withdrawn in prison. (R 509). Appellant loved his father. (R 511). Appellant was badly influenced by his brother Jeffrey. (R 511). Appellant was too loyal to his friend James O'Brien. (R 513-514).

The last witness presented by appellant was psychiatrist Robert Phillips. Dr. Phillips completed forensic evaluation of appellant. (R 559).

Phillips testified that appellant possess above average intelligence. (R 568). He suffers from a personality defect in the area of adaptive functioning. (R 568). Appellant's condition is the result of a dysfunctional developmental history as well as extensive alcohol and substance abuse. (R 560-570). In other words, given his drug dependency he is the most dysfunctional when he is high on drugs. (R 570). Appellant's psychotic behavior stems from his drug use and his personality disorder. (R 575). Appellant has not demonstrated full blown schizophrenia. (R 576).

Appellant functions alright in a regimented setting but becomes dysfunctional when he is not incarcerated. (R 593). Appellant has had two admissions to Florida State Hospital. The first was for one month and the second was for three months. (R

592, 597). Appellant suffers from organic brain dysfunction which may be caused by his mother's drinking during pregnancy or head injuries as a child. (R 609). The most damaging cause of this disorder is the substance abuse. (R 611).

Appellant was under the influence of cocaine on the day of the murder. (R 632-634). Although his organic brain syndrome is in remission now, on the day of the murder it was most prominent. (R 704). Without drugs or alcohol appellant is less dysfunctional and he is able to perform. (R 706-707). Appellant is not psychotic but he has a misguided interpretation of his relationship with O'Brien. (R 749-750).

Appellant had no intent to hurt anyone on the day of the murder. (R 751). Phillips would not change that opinion in spite of the fact that appellant was convicted of the attempted murder of kill Officer Turner. Phillips was equally unimpressed with the fact that appellant was convicted of six counts of manslaughter. Those convicitons were the result of appellant's shooting at pursuing police during his attempt to flee arrest. (R 751-758).

Phillips remained undaunted in his diagnosis of organic brain disorder. This, in spite of the extensive history and opinion of several other psychiatrists who characterized appellant as manipulative , antisocial and sociopathic. (R 765-789, 1070).

The state called Carey Klein as its only witness. Klein testified that he went to see appellant immediately after he was appointed. (R 1043). That first meeting lasted two and half hours. (R 1044). During the early stages of representation no defense became obvious. (R 1056). Eventually Klein decided to

pursue a defense based on appellant's insistence that he was not the person who actually shot Officer Griffis. (R 1056-1057). Throughout his representation of appellant they spent a lot of time together. (R 1058-1059).

With regards to the penalty phase defense, Klein obtained appellant's DOC file in hopes of establishing model prison behavior and mental health evidence. (R 1064). Klein testified that the first ten years of incarceration were horrible. Appellant was involved in a lot of fights. He was also caught manufacturing a weapon. (R 1065). A summary of the mental health evidence in prison revealed that appellant's initial diagnosis was paranoid schizophrenia, unspecified origin. (R 1068). Appellant was in Florida State Hospital on two separate occasions. He received drug therapy in prison. During his second stay at the hospital appellant attempted an escape. (R 1068-1069). Shortly thereafter, appellant's psychosis disappeared. (R 1070).

Appellant told Klein that he had faked mental illness to get out of the general population. (R 1070-1071). He also told Klein that he faked eating a light bulb. (R 1071). The reports indicated that appellant was a malingerer and was faking. (R 1072-1075). Klein would still have used this evidence if he could have found evidence to establish that appellant was in fact mentally ill. (R 1071).

To that end, Klein obtained the services of Dr. Villalobos. (R 1076). Klein provided the doctor appellant's background including DOC files. (R 1077). Villalobos spent an afternoon with appellant and requested that testing be done. (R 1079). The

tests were done by Dr. Rahaim. (R 1081-1082, 1205). Rahaim was paid $1,000 for the testing. (R 1205-1207). Villalobos did not want to testify. He was unhappy with the lack of time given to investigate and prepare. Villalobos was also unhappy with the results that he had obtained. (R 1083, 1203-1205). Appellant did not have organic brain disorder (R 1180-1182). Appellant was not psychotic. He was a sociopath. (R 1183). Due to the negative aspects of Villalobos' findings, Klein asked him not to write a report. (R 1183-1184). Villalobos was paid $350 for his work. (R1190-1191).

Klein investigated the possibility of presenting a voluntary intoxication defense. He concluded that there was simply no such evidence evidence. Furthermore, appellant told Klein that he was intoxicated the day of the murder. Appellant approached the escape attempt of his friend as if he were a mercenary. (R 1085-1088).

Klein was concerned about picking a jury but was ultimately happy with the one that was chosen. (R 1089). He did not want to move for a change of venue.

Klein made a decision not to attack Officer Turner too much during cross-examination. He was a very sympathetic witness to the jury. (R 1090).

Klein's plan for penalty phase was to show that appellant was not the shooter. Valdez's actions were totally independent of Van Poyck's. This strategy was consistent with the guilt phase strategy. (R 1216).

SUMMARY OF ARGUMENT

The trial court properly refused to allow appellant the opportunity to either reopen the evidentiary hearing or submit an affidavit of Dr. Villalobos. Appellant has always been aware of the possible necessity for calling the doctor. Furthermore, appellant was not surprised by the testimony of Mr. Klein. Counsel had the opportunity to impeach Klein and he chose no to do so. The trial court was not required to reopen the evidentiary hearing.

The trial court properly determined that trial counsel did not render ineffective assistance of counsel at the penalty phase. The evidence presented now is either rebutted by other evidence or simply not mitigating in nature. Furthermore, presentation of mental health evidence would open the door to other damaging evidence. After an adequate investigation Klein made a tactical decision not to pursue mental health evidence. That decision was reasonable.

The trial court properly determined that trial counsel did not render ineffective assistance of counsel at the guilt phase. Klein investigated the possibility of presenting a voluntary intoxication defense. There was no evidence to establish that theory. Appellant has failed to demonstrate that there was any other viable defense to present. Klein's performance was constitutionally sound.

The aggravating factor of "great risk" is constitutional on it's face and as applied. The applicable jury instruction is also constitutionally sound.

The trial court properly determined that the prosecutor's note was work product and not material exculpatory evidence.

Appellant claims that the jury weighed an improper aggravating factor. The trial court properly found that this claim should have been raised on direct appeal.

The trial court properly found that appellant's constitutional attack on the penalty phase jury instructions is procedurally barred.

The trial cour properly found that appellant 's challenges to various jurors is procedurally barred.

Th trial court properly found that appellant's attack to the prosecutor's closing argument is procedurally bared.

The trial court properly found that appellant's claim of newly discovered evidence is procedurally barred. The evidence is not new as it was presented on direct appeal.

The trial court properly denied appellant's challenge to the trial court's Enmund/Tison findings as it was procedurally barred.

The trial court properly found barred appellant's constitutional challenge to the aggravating factors.

The trial court properly found barred appellant's challenge to the penalty phase jury instructions.

The trial court properly found barred appellant's challenged to the trial court's determination with regards to the mitigating evidence.

The trial court properly found barred appellant's challenge to the jury instructions relating to Florida, death penalty scheme.

The trial court properly found barred appellant's challenge to the instruction on excusable homicide.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST TO REOPEN THE EVIDENTIARY HEARING OR IN THE ALTERNATIVE TO ALLOW INTO EVIDENCE AN AFFIDAVIT FROM THE NONTESTIFYING WITNESS

Appellant claims that he was denied due process when the trial court refused to reopen the evidentiary hearing or accept the affidavit of Dr. Villalobos. Appellant explains the reasons for his 11th hour request as follows. He argues that he did not know that Villalobos would become a "necessary" witness until just before the start of the evidentiary hearing. At that time it was revealed that Carey Klein, appellant's original trial attorney, informed that state of certain statements made to Klein by Van Poyck and Dr. Villalobos.[3] Present counsel for appellant claims that they were unaware that such statements would be revealed. Counsel further claims that they were not aware that Villalobos ever made any such statements to Klein. A review of the proceedings will demonstrate that appellant's present counsel concentrated their efforts on suppressing the statements of Villalobos and Klein based on the attorney-client privilege[4] rather than preparing to either rebut of impeach Klein's testimony. It was not until all those efforts failed, did

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[3] The content of the statements were as follows; (1) Van Poyck told Klein that he feigned mental illness while in prison; (2) Dr. Villalobos told Klein that he should not call him as a witness because Van Poyck told the doctor that he feigned mental illness Furthermore, Villalobos told Klein that Van Poyck was a sociopath and there with nothing wrong with him.

[4] To that end it must be noted that appellant did not call Klein as a witness in this case. Klein testified for the state.

counsel attempt to change that strategy. The trial court properly denied appellant's request.

A chronological review of litigation of appellant's motion for postconviction relief demonstrates that appellant was given ample time to present his claims and litigate the motion. The motion was filed on December 5, 1992. Attached to that motion were affidavits from twenty-three people. An affidavit of Carey Klein, prepared and sworn to on December 10, 1992 was not filed in court until February 1994.[5] The state filed a response in May of 1993. Numerous status conferences were held in preparation for the evidentiary hearing. (R 1-141). Oral argument was held in August 31, 1993. (R 1-141). An evidentiary hearing was first scheduled for September of 1993. At the request of defense counsel it was reset for January 18, 1994. Ultimately it was conducted on February 23, 1994 through March 1, 1994. The trial court ordered, over the strenuous objection of defense counsel, that reciprocal witness lists be furnished. The state timely complied listing Carey Klein as a state witness. Neither side listed Dr. Villalobos as a witness.[6]

Appellant now claims that Dr. Villalobos became a "necessary" witness. He asserts that the importance of Villalobos did not become apparent until Klein made certain statements to the prosecutor before the start of the evidentiary

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[5] Dr. Villalobos was referenced in the motion for postconviction relief and in the affidavit of Michael Dubiner, co-counsel for appellant. There was no affidavit submitted by Dr. Villalobos in the original motion.

[6] Appellant concedes that he has spoken to Villalobos at the time the original motion was filed.

hearing. Appellant's motion for postconviction relief contains an allegation that Klein's trial performance was constitutionally deficient at the penalty phase. Specifically appellant alleges that counsel did not conduct a proper investigation into mental health evidence. If he had done so, a substantial amount of evidence would have been uncovered and should have been presented. It cannot be seriously argued that Klein's conversations with Villalobos would not be relevant for the purposes of this claim. The record contained bills in the amount of $350 to Villalobos for his interview and consultation with Klein. (R 1191,1223). There was also a bill from a psychologist, Dr. Rahaim in the amount of $1,000 for his services. (R 1206-1207). Obviously why no "adequate" evaluation was conducted by Villalobos would be germane to this issue. Counsel was acutely aware of the potential importance of Klein and Villalobos. Appellant's claim that Villalobos did not become "necessary" until right before the evidentiary hearing is simply illogical.

Also untenable is appellant's claim that he was unaware of Villalobos' statement to Klein. In preparation for the evidentiary hearing, Klein meet with the prosecutor on February 17, 1994. He also meet with appellant's collateral counsel on February 22, 1994. (R 148). On February 23, 1994, counsel for appellant filed a motion to disqualify the prosecutor Allen Geesy. (R 148-151, 4825-4827). The basis for the motion was that Klein violated the attorney-client privilege as well as the psychotherapist-patient privilege. Counsel argued that it was not until February 22nd did it become apparent that maybe Villalobos and Dr. Rahaim would become witnesses. (R 151). At no

time did counsel ever say that they were surprised or unaware of the statements revealed to the prosecutor by Klein. At no time did he indicate that there was a problem in finding Dr. Villalobos. (R 1080). He simply mentioned the possibility which was then acknowledged by the trial court. (R 151).

On February 28, 1994, appellant filed a second motion to disqualify the entire State Attorney's Office based on the same allegation that the state was in possession of confidential information. (R 4829-4834). Again appellant did not indicate that there was any surprise in Klein's statement. To the contrary the prosecutor pointed out to the court that appellant's counsel was well aware of the fact that Klein would answer specific questions regarding what was told to him by appellant, if he was asked. (R 804-806). Appellant counsel never objected to the state's assertion. Counsel simply reiterated his point that anything said to Klein was confidential and should not have been revealed to the state. (R 805-806).

The lack of surprise regarding Klein's statement is further demonstrated in appellant counsel's performance during cross-examination of Klein. When given the golden opportunity to impeach Klein before the trier of fact, the issue of "surprise" was never addressed. (R 1129, 1181, 1183, 1193, 1200, 1204).

Finally at the close of the Klein's testimony, counsel attempted to place the burden for calling Villalobos on the state. (R 1251). Counsel mentioned that Villalobos did not have any files regarding the case and nothing to substantiate his work. (R 1252). Counsel proffered to the court that Klein was aware of appellant's position that the privilege had not been

waived. (R 1253). Once again, counsel never mentioned that appellant was in anyway surprised by Klein's statement regarding Villalobos.

A review of the action taken by appellant's collateral counsel reveal that the strategy was to suppress Klein's statements by claiming that they were privileged[7]. Counsel was not the least bit interested in diffusing the statements through impeachment of the very witness who made them. Counsel ignored several opportunities to address the "surprise" statement during Klein's testimony. Counsel's strategy to suppress the statements failed. The trial court was not bound to delay the proceedings any further to afford appellant the additional opportunity to switch strategies. Counsel had the opportunity to either impeach Klein, claiming that his testimony was consistent with what they told him, or rebut his testimony through Villalobos. The trial court properly denied appellant's request. Espinosa v. State, 589 So. 2d 887 (Fla. 1991)(delay by defendant in preparing for penalty phase doe not warrant the right to a continuance).

Nor was appellant entitled to have the benefit of Villalobos taylor made statement to rebut Klein's testimony without affording the state the opportunity to cross-examine the affiant. Appellant's failure to call Villalobos at the appropriate time was appellant's own doing. The trial court properly denied appellant's request. Espinosa.

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[7] Appellant chose not to call Klein as a witness.

ISSUE II

THE TRIAL COURT PROPERLY DETERMINED THAT APPELLANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS TRIAL

Appellant claims that trial counsel was ineffective for failing to present mental mitigating evidence that would have established three statutory mitigating factors[8]. Klein's failure to present such evidence was the result of his failure to properly investigate appellant's family background and mental health history. Appellant theorizes that any explanation offered by Klein regarding his actions cannot be considered informed strategic decisions.

Appellant further opines that if Klein had conducted an investigation he would have uncovered the presence of the following mitigating evidence; (1) appellant's mother died when he was an infant; (2) appellant was physically abused by a housekeeper, his stepmother and brother; (3) appellant was raised for a period of time by an unstable aunt; (4) appellant became dependent on drugs and alcohol at an early age; (5) appellant was exposed to juvenile institution at an early age; (6) while in prison, appellant had an extensive history of mental illness; (7) a personality disorder drove appellant to attempt the rescue of O'Brien.

The proper standard to be applied in assessing counsel's performance is as follows:

> First the defendant must show that counsel's performance was deficient. This

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[8] Fla. Stat. Sections 921.141 (5) (b), (e), and (f).

> requires showing that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). The Court further cautioned that :

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effect of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's prospective at the time. Because of difficulties inherent in making an evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might" be considered sound trial strategy."

Strickland, 466 U.S. at 689. The Court further explained:

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant.

Id, at 691.

With these principles in mind, it is apparent that appellant has not demonstrated that Carey Klein's performance was deficient. Evidence presented at the evidentiary hearing

demonstrates that Klein's performance was dictated by informed tactical decisions after an adequate investigation into the existence vel non of mitigating evidence.

Furthermore, even if Klein's performance was deficient, appellant cannot demonstrate that a reasonable probability exits that the outcome of the proceedings would have been different. As will be demonstrated below, any history of appellant's mental health history would have opened the door to damaging information. Such information would emphasize appellant's chronic criminal past as well as undermine the credibility of any diagnosis that appellant suffers from any legitimate mental illness.

Klein, testifying for the state, described in detail what efforts were made regarding the development of mitigating evidence. Based on the information obtained, Klein chose not to present evidence relating to appellant's mental health. From his initial visit with appellant, Klein was aware that appellant had a history of mental health problems. (R 1044, 1046). Throughout his representation, Klein maintained extensive contact with Van Poyck. (R 1058). Penalty phase evidence was constantly an issue during their discussions. (R 1051, 1058, 1105). Early on in the investigation, Klein obtained appellant's extensive Department of Corrections (DOC) file. Since appellant had been in prison for seventeen years prior to the murder, Klein was hoping to find evidence to establish both mental health mitigation and model prison behavior. (R 1064). Klein soon discovered that there was no evidence to establish model prison behavior.

Appellant had accumulated twenty-six disciplinary reports for fighting in prison. He was ultimately transferred to Florida State Prison from Union Correctional Institute because he was caught manufacturing a weapon. Appellant was committed to Florida State Hospital on two separate occasions. During the second hospital stay, appellant unsuccessfully attempted to escape from the prison hospital. (R 1064-1070, 518, 523, 524, 765, 780). Most of the negative aspect of appellant's prison history occurred in the first ten years. (R 789). Although the last five years of incarceration were better than the first, Klein was concerned that the overall negative aspect of his prison stay would be admitted. (R 1065-1066). Appellant was serving a life sentence for armed robbery. Prior to this sentence, appellant had an extensive juvenile criminal record which included thirteen convictions for breaking and entering. Appellant had previously been committed to juvenile facilities. His stay at those facilities included disciplinary problems as well as attempted escapes.

Along with a review of the DOC files, Klein obtained the names of three people he received from appellant. According to appellant, these people were to have knowledge regarding Van Poyck's model prison history. (R 1066). However, consistent with the prison records, these people could not provide helpful information. Two of the people Klein spoke to had nothing but negative things to say about appellant including that he was a con. (R 1067). The other one had no information whatsoever. (R 1067).

In addition to the negative information regarding appellant's behavior in prison, the DOC files contained extremely damaging information regarding appellants' mental health history. While incarcerated, appellant was confined to Florida State Hospital on two separate occasions. Appellant's first stay was from September to October of 1974. Initially he was diagnosed with paranoid schizophrenia and given anti-psychotic medicine. (R 766, 769). However appellant never exhibited any residual signs of schizophrenia. (R 773). In June of 1975 appellant allegedly ate a light bulb. (R 775).[9] At that same time, appellant claimed that he was using LSD in prison and was consequently suffering from flashbacks. (R 777). Appellant was readmitted to the hospital. (R 774). As with the first admission, appellant's second stay was precipitated by illegal drug use. There was no signs of psychosis or schizophrenia. (R 779-784). Several doctors observed that appellant was not psychotic, he engaged in manipulative ploys and his psychotic episodes were the result of his use of illicit drugs. (R 784, 771, 770, 774). Because of his drug problem, appellant remained in the hospital to participate in a drug therapy program. (R 779-780). During that stay, appellant attempted to escape from the hospital in September of 1975. (R 780-781). (R 780). The initial diagnosis of schizophrenia was substituted with a final diagnosis of personality disorder, antisocial type. (R 781). Appellant's

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[9] There was never any physical evidence to establish that appellant had in fact done so. Nor did appellant sustain any physical injury because of the alleged consumption. (R 775-777). Klein testified that appellant told him that he had in fact faked the incident to feign mental health illness in order to be placed back in the hospital. (R 775-777).

psychotic episodes were all the result of his illicit drug use. (R 780-784). The reports indicate that from 1977 until 1983 appellant did not show any signs of psychosis. [10]

Also contained in appellant's prison files was a prophetic letter written by appellant. He wrote that he would wind up on death row someday for killing a prison guard. (R 1101-1102). At trial Appellant admitted that he had been planning the escape attempt for his friend O'Brien since 1985. (R 26). Klein did not want the jury to see that letter.

Consistent with the diagnosis of psychiatrists from Florida State Hospital that appellant was not mentally ill, appellant told Klein that he had faked mental illness while in prison. He told him that he researched the topic of schizophrenia and feigned mental illness. (R 1074). In spite of all this negative information, Klein still sought to investigate the potential for mitigating evidence. Klein obtained the services of Dr. Villalobos. Dr. Villalobos reviewed appellant's prison files. (R). Villalobos meet with appellant and ordered psychological testing for appellant. Dr. Rahaim performed those tests. (R 1192, 1200, 1235). Ultimately Villalobos advised Klein not call him as a witness. Villalobos' findings would not be helpful. Villalobos diagnosed Van Poyck as a sociopath. There was no evidence of organic brain disorder and appellant was not crazy. (R 1065, 1083, 1091-1093, 1183). Villalobos also stated that

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[10] After his second admission in Florida State Hospital appellant attempted to receive credit for gain time lost while he was in the hospital. That was unsuccessful. Shortly thereafter, appellant's mental health problems disappeared for the remainder of his incarceration. (R 1102).

appellant had told him that he had faked mental illness while in prison. Given all the negative information from Villalobos, Klein asked him not to write a report. (R 1104, 1183). [11]

As demonstrated above, Klein did investigate the possibility of finding of mitigating evidence. Even after a review of the prison files indicated that appellant's mental health problems were all drug induced and appellant was in fact not mentally disturbed, Klein continued to pursue that avenue. Once Villalobos confirmed the repeated findings of the doctors in prison, along with appellant's statements to both Villalobos and Klein, there was nothing more for Klein to do with regards to this line of mitigation. Klein's performance was more than reasonable. Furthermore, the pursuit of such evidence was not without risk. The negative aspect of appellant's past would also come before the jury. Klein's strategic decision not to pursue this line of defense was reasonable. Ferguson v. State, 593 So. 2d 508, 510 (Fla. 1992)(attorney's tactical decision not to pursue mental health evidence is reasonable given the fact that such testimony would open the door to damaging evidence on cross-examination); White v. State, 559 So. 2d 1097, 1099 (Fla. 1990)(attorney not ineffective for failing to pursue defense that

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[11] Klein testified that he was under the impression that he would have more time between the guilt and penalty phase in order to develope a case for mitigation. (R 1159, 1160, 1163, 1198, 1203, 1219, 1220, 1237). Due to scheduling problems and the mistaken belief that he would have more time, the testing by Rahaim was not done until the day before the penalty phase. (R 1062). Villalobos expressed his disdain for the lack of adequate time to evaluate and prepare for court. Klein insisted that whatever testing Villalobos wanted done was in fact done. (R 1235). Consequently, although he wished he had more time, there was no indication that any helpful mitigating evidence was present. (R 1180-1182).

is rebutted by the facts, including defendant's own statements); Rose v., State, 617 So. 2d 291, 294 (Fla. 1993); Johnson v. State, 583 So. 2d 206, 209 (Fla. 1992).

Aside from failing to establish that Klein's performance was not deficient, appellant cannot establish prejudice. There is no reasonable probability that the outcome of the penalty phase would have been different had this evidence been presented. The evidence is either; (1) not supported by the facts; (2) cannot be considered mitigating or (3) was already been presented at trial.

Phillips testified that appellant suffered from a personality deficit particularly in the area of adaptive functioning and organic brain damage. The personality disorder was caused by poor childhood development and a history of alcohol and substance abuse. (R 426). His personality disorder is exacerbated by the use of drugs. (R 428). Phillips conceded that appellant's organic brain disorder is at least partially the result of his long term use of illegal drugs and excessive drinking. (R 433, 652). The remaining causes may stem from the following; (a) history of mental illness in his family[12]; (b) accounts of alcohol consumption by Van Poyck's mother during pregnancy[13]; (c)loss of his mother at sixteen months of age[14];

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[12] Appellant's grandmother suffered from manic depression and died in a mental institution. Appellant never meet his grandmother.

[13] This evidence was presented by Janet Voglesang. The source of her information is not known. Voglesang also stated that she saw no signs of fetal alcohol syndrome in appellant.

Appellant's cousin, Charles Hill, testified at the evidentiary hearing that Mrs. Van Poyck was a good mother and a social drinker.

(d) emotionally withdrawn father[15]; (e) abusive caretaker,[16] (f) abusive stepmother[17] (g) mentally unstable aunt[18]; and (h) institutional abuse at Okeechobee School for Boys[19] (R 124, 436-448).

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[14] The fact that appellant lost his mother at such an early age was presented at the penalty phase.

[15] There was testimony presented at the penalty phase regarding appellant's father and his inability to express his love for his children.

Witnesses presented at the evidentiary hearing and at trial testified that Mr. Van Poyck loved his children, he was a caring man and was a good provider. This despite the fact Mr. Van Poyck lost his leg in World War II, and was confined to a wheel chair.

[16] Janet Voglesang testified at the evidentiary hearing that the first caretaker hired after the death of appellant's mother was abusive. As soon as Mr.Van Poyck became aware of this, she was dismissed.

The jury was presented with this information through the testimony of appellant's brother at the penalty phase.

[17] This information was presented through the testimony of Janet Voglesang. She testified that Lee Van Poyck, spanked appellant about three times a week. The source of this information is not known.

Emily Wilkes, appellant's cousin also testified at the evidentiary hearing that appellant was favored by Lee. She had not heard that Lee ever was abusive to the children.

At the penalty phase, appellant's brother Jeffrey, testified that Lee did spank appellant a lot, but was not abusive.

[18] Several witnesses testified that appellant's Aunt Phyllis was mentally unstable. Those same witnesses also testified that Aunt Phyllis loved the children and was not physically abusive.

At the penalty phase, witnesses also testified that Aunt Phyllis was mentally unstable.

[19] The only witness with personal knowledge regarding any abuse suffered by appellant was Bruce Kinnan. He testified that he and appellant were forced to eat cigarettes and that they had their heads dunked in a pale of garbage.

Kinnan was told by appellant that one time he had been hog tied.

Phillips also offered an opinion regarding appellant's mental state on the day of the murder. He opines that appellant was heavily influenced on the day of the murder because of his organic brain disorder. His disorder was severely exacerbated that day due in large part to the use of cocaine just prior to the murder.[20] (R 608-609). This conclusion was based in part on the statement of appellant's girl friend, Traci Rose[21] that she and appellant were high on cocaine both the night before and the day of the murder.

The opinion/diagnosis of Phillips is severely undermined by the fact that there is absolutely no evidence to corroborate his theory that appellant was high that day. Other than Traci Rose's testimony seven years later, all the evidence rebuts this contention. Klein testified that he investigated the possibility that appellant was intoxicated that day. Appellant told Klein that he was sober that day. Appellant testified at his own trial that he knew exactly what his was doing that day. There simply was no evidence of support that theory. Klein's actions were reasonable. Johnson v. State, 593 So. 2d at 206; Henderson v. Dugger, 522 So. 2d 835, 838 (Fla. 1988)(trial counsel's failure to raise insanity defense or voluntary intoxication

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[20] Phillips could not offer an opinion as to whether or not appellant would have attempted the escape if he were not under the influence of cocaine.(R 750).

[21] Traci Rose's credibility is questionable. She testified that Van Poyck did not use cocaine until he meet her. As a matter of fact, she stated that appellant did use cocaine until a week before the murder. This testimony is in complete contradiction to Phillip's testimony that appellant frequently use cocaine throughout his drugging experience. (R 203-205, 529-532, 535, 537).

defense not deficient performance given that the record is devoid of any factual support for either defense). None of the witnesses ever stated or described appellant as high that day including the emergency room doctor who treated appellant after he was apprehended. (R 546). Phillips' opinion is further rebutted by the fact that appellant was able to shoot at and hit four pursuing police cars during a high speed chase through West Palm Beach. (R 610). White.

Phillips also concluded that appellant did not have an intent to hurt anyone on the day of the murder. (R 609). His only intent was to free his friend. Phillips' finding is totally refuted by the facts of the case. While still in prison in 1985, appellant thought about this escape attempt. Also while in prison, appellant expressed in writing that he would end up killing a prison guard. Immediately after Officer Griffis was shot, appellant pointed a gun at Officer Turner, told him was a dead man and pulled the trigger, (R 609, 614-616). During the high speed chase through West Palm Beach, appellant shot off thirty rounds of ammunition at pursuing police. To state that appellant did have an intent to hurt anyone that day defies logic.

The evidence presented regarding appellant's chronic criminal history and drug induced mental problems is not compelling mitigating evidence. The decision to use illicit drugs, the long history of criminal activity, the repeated behavioral problems in prison, and the consistent return to crime every time he is released from prison is not mitigating evidence. Furthermore, whatever minimal value this information does have

would soon be dispelled by the very negative opinions of prison psychiatrists, and of Dr. Villalobos. In summation, presentation of this evidence would not have resulted in a life sentence. Rose v. State , 617 So. 2d 291, 294 (Fla. 1993)(voluntary use of drugs not necessarily mitigating evidence); Routly v. State, 590 So. 2d 397, 401-402 (Fla. 1991).

Finally a good deal of the testimony is cumulative. Absent the diagnosis of Phillips, the remaining evidence presented at the evidentiary hearing was identical to what was presented at the penalty phase. This was accomplished through the testimony of appellant's paternal aunt, Ann Van Poyck; stepmother, Lee Van Poyck; brother, Jeffrey Van Poyck and appellant himself the identical testimony was presented. Appellant's mother died when he was an infant. Appellant's father was withdrawn and unable to show affection, (ROA 3314-3315, 3353). Van Poyck, 54 So. 2d at 1069. Also admitted at trial was evidence that Mrs. Danno, the first housekeeper, was abusive towards the children. (ROA 3254-3261, 3310-3311). After Mrs. Danno was fired, Aunt Phyllis cared for the children. Although she was not abusive, she was a very unstable person. (ROA 3342-3345, 3367, 3309). Also at trial there was evidence that appellant's stepmother spanked appellant often but was not abusive. (ROA 3307-3308, 3372). Also consistent with Vogelsang's testimony at the evidentiary hearing, the penalty phase testimony revealed that all the Van Poyck children experienced problems. (ROA 3379. Likewise there was testimony at the penalty phase that Jeffrey Van Poyck was a very bad influence on his brother. (ROA 3318-3333, 3382-3383, 3387). During closing argument Klein emphasized all of these factors in

an attempt to persuade the jury that life was the appropriate sentence. (R 3545-3574). Given the fact that this evidence was before the jury at trial, appellant cannot establish prejudice. Provenzano v. Dugger, 564 So. 2d 541, 546 (Fla. 1990)(further testimony from experts regarding defendant's background would be cumulative to family members testimony presented at trial); Chandler v. Dugger, 634 So. 2d 1066, 1069 (Fla. 1990); James v. State, 489 So. 2d 737, 739 (Fla. 1986).

The trial court properly determined that Klein's did not render ineffective assistance of counsel at the penalty phase. Klein's investigation revealed nothing but negative information. Even if evidence of appellant's organic brain disorder was admitted at trial, the impact of the negative information uncovered by Klein would diminish any mitigating effect. As articulated above, the credibility of Phillips' diagnosis would be severely called into question. His conclusions are premised on assumptions with no factual support. The trial court's ruling must be sustained.

ISSUE III

THE TRIAL COURT PROPERLY CONCLUDED THAT APPELLANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS TRIAL

Appellant alleges that trial counsel, Carey Klein, provided ineffective assistance at trial. The three main contentions are that; (1) Klein failed to present evidence that appellant was not the trigger man; (2) Klein failed to properly impeach Officer Turner; and (3) Klein failed to present the viable defense of voluntary intoxication. The trial court properly determined that there was no evidence presented that would have established the existence of any viable defense. Consequently, appellant cannot demonstrate the requisite prejudice needed to establish a claim of ineffective assistance of counsel. (R 4982).

Appellant's own witnesses testified that there was no viable defense at the guilt phase. Carey Houghwout testified that there was no viable defense as to guilt including voluntary intoxication. (R 1003-1004). At best, the guilt phase should have been used to begin a theme for the penalty phase. (R 1003-1004). Klein's co-counsel at trial, Michael Dubiner, testified at the evidentiary hearing that first degree murder would have been the verdict regardless of the defense. (R 894-896). To continue to suggest that there existed any defense that would establish Klein was ineffective at the guilt phase borders on the incredible.

Appellant's first claim is that Klein failed to present evidence that he did not fire the fatal shots that killed Officer Griffis. Specifically Klein should have pursued DNA testing on the clothes of Valdez in an attempt to demonstrate that the blood

on Valdez was that of Officer Griffis. Klein made a tactical decision not to pursue further testing. Once it had be determined that Van Poyck did not have Officer Griffis' blood on him, there was nothing to be gained by pursuing further testing. (R 1092-1093). If the blood on Valdez was not that of the Officer nothing would have been gained. The important fact was that Van Poyck did not have the victim's blood on him. However even if it could have been established only Valdez had the victim's blood on his clothes, such information would not have changed the outcome of the case. There were other reasonable explanations to account for the presence of the victim's blood on Valdez. Valdez searched the pockets of the Officer after he was dead looking for the keys to the van. Klein chose not to pursue this avenue because it's limited probative value did not outweigh the importance of being able to have two closing arguments. (R 1092-1093). Klein reasoned that since there was no real exculpatory evidence to be presented, closing argument in this case was crucial. (R 1149). Mitchell v. State, 595 So. 2d 938, 941 (Fla. 1992). In any event this Court has already determined that there was insufficient evidence to establish that appellant was the shooter. Van Poyck, 564 So. 2d at 1069. Appellant could not obtain any better result at the guilt phase. The presence of the victim's blood on Valdez, while none was found on Van Poyck, would do to negate a finding of felony murder.[22]

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[22] Appellant argued on direct appeal that the jury acquitted him of premeditated murder. Consequently, appellant could not have obtained a better result in front of the jury.

Also without merit is appellant's claim that Klein should have presented the testimony of Lori Sondick, Valdez's girlfriend. She could have testified that the three guns used by appellant and Valdez were all provided by Valdez. Sondick would have also stated that she bought the gun that ultimately proved to be the murder weapon. Klein explained at the evidentiary hearing that he was prepared to call Sondick but he made the decision not to do so. First of all through the cross-examination of the state's ballistic expert, Klein was able to establish that the physical evidence tends to show that Valdez was the shooter. (R 1112, ROA 2293-2313, 2327-2338, 2339-2340, 2880-2889, 2895). Secondly appellant testified that Valdez supplied all the weapons. That testimony was not challenged in anyway. (R 2569, 2628). Consequently without loosing the advantage of double closing argument, Klein was able to present to the jury evidence that Valdez was the shooter. (R 1112-1113). The reasonableness of this decision is further illustrated by the fact that Sondick's testimony would not have been anymore probative than what was already before the jury. The jury already knew that appellant did in fact have possession of a gun during the escape attempt. (R 1113, 1128). The fact that Valdez provided/owned the weapons does not in anyway cast doubt on the fact that appellant was in possession of one of those guns. Sondick's testimony was not compelling enough to sacrifice Klein's opportunity to address the jury twice. Mitchell; Ferguson v. State, 593 So. 2d 510 (Fla. 1993)(trial counsel's presentation of evidence through nonexpert reasonable strategy in light of negative information that would have been presented through cross-examination of expert).

Appellant also claims that Klein should have more vigorously pursued the impeachment of Officer Turner. Appellant fails to establish that Kleins' performance was deficient. At the evidentiary hearing appellant's witness, Michael Dubiner testified that he could not say that Klein was unprepared for the cross-examination of Turner. The most damaging opinion offered by Dubiner was that the impeachemnt of Turner was a matter of different styles. (R 838-839). Dubiner could not pinpoint to any questions that should have been asked by Klein but were not. (R 890). As a matter of fact Dubiner could not say that even with more preparation could Klein have done a better job. (R 891). Appellant's other expert witness, Carey Houghwout, was equally unpersuasive. The most critical testimony offered by Houghwout was that the cross-examination was not very clear. (R 997). Appellant has failed to establish his claim. Dubiner's and Houghwout's testimony do not demonstrate that Klein 's performance was deficient.[23] Knight v. Dugger, 574 So. 2d 1066, 1073 (Fla. 1990); Jennings v. State, 583 So. 2d 316, 321 (Fla. 1992).

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[23] To further bolster his claim that Klein's impeachment of Officer Turner was deficient, appellant presented the testimony of a firearms expert. Appellant was attempting to impeach Turners' explanation regarding the misfiring of appellant's gun. Turner stated that when appellant fired the gun at him, he heard a click.

Appellant's ballistic expert at the evidentiary hearing was to provide evidence that Turner's explanation was not possible. In other wourds, the gun would not "click" when it misfired. On cross-examination, the defense witness conceded that the murder weapon could "click" if it misfired. That testimony corroborates Turner's testimony at trial.

At the evidentiary hearing Klein explained his strategy with respect to Turner. He thought along time about the cross-examination of Turner. (R 1090). He was concerned about attacking Turner too much given that he would be a sympathetic witness the jury. (R 1090). Turner was impeached with inconsistencies from his deposition. Klein choose the more critical aspects of the inconsistencies on which to focus. (R 1126). He though that at the time it was more important to focus in on Turner's inconsistency regarding whether or nor he could identify the murder weapon. (R 1126). A review of the trial record reveals that Turner was thoroughly impeached. (ROA 1753-1797, 1799-1800). Turner's inconsistent statements were thoroughly discussed during both closing arguments. (R ROA 2894-2896, 2906-2908, 3002-3004). Williamson v. State, 651 So. 2d 84, 88(Fla. 1994).

Appellant asserts that Klein's ineffectiveness prevented the presentation of a voluntary intoxication defense. A reasonable investigation would have uncovered the testimony of Traci Rose, appellant's girlfriend. She testified at the evidentiary hearing that she and appellant drank and snorted cocaine the night before the murder and the morning of the murder. Rose saw appellant leave their apartment the morning of the murder at 7:30 A.M. He took a small amount of cocaine with him when he left that morning. (R 350). Rose's account is contradicted by Klein's testimony as well as inconsistent with the evidence presented at trial.[24]

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[24] Rose also testified at the evidentiary hearing that she was responsible for introducing appellant to cocaine. She stated

Klein testified that he did investigate the possibility of developing a voluntary intoxication defense. (R 1086-1088). He looked for evidence of cocaine in the car and did not find any. Id.He pursued that avenue during depositions. There was uniform agreement in the depositions of all the witnesses that appellant appeared normal that day. Valdez was the one that appeared to be out of control. (R 1088). Furthermore appellant told Klein that he was sober that day. Appellant approached the escape attempt as if he were a mercenary. (R 1087). Appellant's trial testimony further negates this claim. He set out to free his friend and did not anticipate that Valdez would kill Officer Griffis. (ROA 2575-2618). Appellant was able to successfully shoot at and hit three pursuing police cars during a high speed chase through downtown West Palm Beach. Klein's performance cannot be called into question given the total lack of evidence to support a voluntary intoxication defense.[25] White; Johnson.

Next appellant claims that Klein's performance was deficient for his failure to pursue a change of venue. Given that none of appellant's witnesses even address this issue, the trial court properly found that appellant failed to factually support this claim. (R 4982). Phillips v. State, 608 So. 2d 778 (Fla. 1992). Appellant's cursory treatment of the issue in the initial brief

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that appellant had not used cocaine before he met her. This assertion is in total contradiction to another defense witness, Dr. Phillips who stated that appellant was addicted to cocaine for many years. (R 344-347, 670-673, 676, 677).

[25] To further establish this claim, appellant states that appellant was seen buying a can of Schlitz Malt liquor on the day of the murder. A review of the record indicated that it was Valdez who purchased the liquor and not appellant. (R 1937).

does not establish a claim for relief. Duest v. Dugger, 555 So. 2d. 852 (Fla. 1990). Appellant's argument that an unidentified juror was exposed to details of the case does not establish grounds for relief.

Klein made a strategic choice not to pursue a change of venue. The demographics indicated that Palm Beach County was a good venue for a phase two jury. The only other better place would have been Dade County or Broward County. He was concerned that the trial would be moved north were juries are more likely to vote for the death penalty. (R 1084-1085). Such a strategical choice is sound. Provenzano v. State, 561 So. 2d 541, 544 (Fla., 1990). Klein was satisfied with the jury that he picked. (R 1089-1090). There was no emotional outburst by the family, nor was the courtroom atmosphere inappropriate or improper. There were guards in the courtroom but they were in the back in the most unobtrusive place. (R 1243-1244). Appellant's claim is totally devoid of any factual support. Phillips.

Appellant's claim that Klein's performance was deficient at voir dire is also devoid of merit. Again the trial court properly determined that appellant failed to establish any record support for his claim. (R 4982). Phillips. That decision is further supported by the record on appeal. Juror Rich stated that he was neutral when it came to an opinion regarding the death penalty. (ROA 476). He further stated that he would follow the judge's instructions and would not automatically vote for death. (ROA 478). Juror Blanchard stated that she was neutral regarding her opinion on the death penalty. She would follow the jury instructions and could however impose such a sentence. (ROA

505-506). Juror Moody stated that she was in favor of capital punishment but would not automatically vote for any particular sentence. (ROA 508-514). She further stated without hesitation on five separate occasions that she would listen to the evidence, follow the instructions and make a decision. (ROA 508-514). Juror Baker stated without hesitation that she would put aside her past experiences and base her verdict on the evidence. (ROA 1058). Juror Hancock stated that her past experience would not cause her any problems. (R 1144). Juror Dillon also stated that she could be impartial regardless of her brother's occupation. (ROA 1339). Nothing in the record even suggests that any of these jurors could not live up to their assertions that they would be impartial and fair. Lusk v. State, 446 So. 2d 1038 (Fla.) cert. denied, 469 U.S. 873 (1984); Pentecost v. State, 545 So. 2d 1079 (Fla. 1989).

Appellant claims that counsel inexcusably conceded that he had committed the underlying felonies of robbery and attempted escape. Absent that concession there is a reasonable possibility that appellant would not have been convicted of felony murder. The trial court ruled that counsel did not concede guilt. (R 4974). The court further determined that even if counsel did conceded guilt as to the underlying felonies, the overwhelming evidence of guilt would render any error was harmless. The trial court's ruling is supported by the record.

Appellant takes Klein's closing argument out of context. During closing argument Klein stated that death did not occur as a consequence of or in furtherance of either the robbery or attempted escape. The death of Officer Griffis was committed by

the independent act of Valdez. (ROA 2899-2900). Klein attempted to emphasize that Van Poyck's intent was only to free his friend, O'Brien. Murder was never part of the plan. (ROA 2900). Consequently, contrary to appellant's assertions otherwise, Klein did argue that death was not apart of the plan, nor was the death of Officer Griffis committed in furtherance of either felony. Given the overwhelming evidence against appellant, with respect to committing the felonies, counsel's actions were reasonable.

Officer Turner testified unequivocally that appellant pointed a gun at him and took his gun. (ROA 1685-1691). Van Poyck, knowledgable about the felony murder rule, admitted on the stand that he put a gun to Turner's head, put him in fear and took his gun. (ROA 2633-2634). Turner was permanently deprived of his gun, which was then used during the remainder of the crime. (ROA 2633-2634).

Appellant also claims that in order to establish Van Poyck's guilt for felony murder, the state was required to prove that O'Brien had the intent to escape. He further opines that O'Brien's acquittal of attempted escape, which occurred after Van Poyck's trial is further evidence that there was insufficient to establish the attempted escape. Appellant's claim is legally incorrect. First of all this identical argument was raised and rejected on direct appeal.Van Poyck, 564 So. 2d at 1069. Secondly there was overwhelming evidence that Van Poyck intended and attempted to free O'Brien. Appellant himself admitted that he planned the escape and had been contemplating same since 1985. (ROA 2648, 2680, 2622, 2571-97). The trial court properly concluded that absent counsel's alleged concession, there is no likelihood that a different result would have been obtained.

Next appellant claims that Klein was ineffective for failing to preserve a claim regarding a Neil/Slappy[26] violation. The trial court properly found that counsel did preserve this issue for appeal. Consequently Klein's performance regarding this issue cannot be questioned. The state exercised a peremptory challenge on a Ms. LaCounte based on her personal dislike for the death penalty. (ROA 484, 1129-1130). Klein objected to the striking of Ms. LaCounte. The state offered it's reason. (ROA 1129-1130, 1132). The court accepted the state's response and allowed the strike in spite of Klein 's objection. (ROA 1129-1132). Counsel did all that was required to preserve this issue.

Appellant next complains that Klein should have objected to the prosecutor's comment that the evidence did not demonstrate that Valdez was the shooter. The trial court properly determined that the prosecutor's remarks were permissible. A review of the record reveals that the prosecutor's comment was not improper. The prosecutor was simply commenting on the evidence. Much of the cross-examination of state witnesses centered on appellant's theory that Valdez was the shooter. Van Poyck's direct testimony centered on the same theory. The prosecutor was allowed to comment on that presentation. Breedlove v. State, 413 So. 8, 10 (Fla.); Mann v. State, 603 So. 2d 1141, 1143 (Fla. 1992). Furthermore the jury was properly instructed on the burden of proof. (ROA 3037). Relief was properly denied as Klein was not ineffective for failing to object to the prosecutor's comments.

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[26] State v. Neil, 457 So. 2d 481 (Fla. 1984); State v. Slappy, 522 So. 2d 18 (Fla. 1988).

Appellant claims that Klein was ineffective because he impermissibly relied upon appellant in preparing and presenting his case. The trial court found this claim to be without merit given there was no viable defense at trial. (R 4982). The trial court's ruling was proper.

Appellant alleges that Klein relied upon Van Poyck to make critical decisions. Appellant never specifies what the critical decisions are or how they affected the outcome of the case. At the evidentiary hearing, Caery Houghwout testified that it looked like Klein was relying on appellant throughout the trial. (R 999). Houghwout never explained the basis for that opinion. More importantly she never stated specifically what decisions were made by appellant. Klein testified that he made appellant co-counsel so he could have access to the law library. Dubiner testified that appellant was very knowledgable in the law and was good at research. This evidence was presented as nonstatutory mitigating evidence. Van Poyck, 564 So. 2d at 1069. Such a presentation does not indicate that Klein somehow relied upon his client to make critical decisions. This claim is simply void of any factual support. The trial court properly denied relief.

In appellants' last claim he alleges that counsel should have objected to various prosecutorial comments. The trial court ruled that counsel is not required to object to make every conceivable objection. Furthermore the jury was properly instructed on the law and none of the remarks amounted to fundamental error. (R 4975).

A review of the record demonstrates that none of the remarks were error. The prosecutor's comment that the plan was to get

want they wanted or kill the guards was a permissible comment on the evidence. That statement was followed by a reference to Officer Turner's testimony that appellant threatened to kill Turner if he did not turn over the keys. (ROA 2921). Furthermore there was evidence to establish that Van Poyck intended to kill Turner. The prosecutor's comment was a permissible interpretation of what was established by the evidence.

Appellant next claims the prosecutor impermissible distorted appellant's trial testimony by accusing him of lying. The prosecutor's comment that Van Poyck denied taking Turner's gun was correct. Van Poyck testified that neither guard was armed and that Turner's gun was on the seat consequently he did not take the gun from Turner. (ROA 2647-2648). There was no error. Mann.

Appellant also claims that the prosecutor impermissibly warned the jury that they should not be taken in by the partial instructions that appeared on the defense's exhibit. The prosecutor was commenting on the extraneous writing appearing on that exhibit. Counsel is not required to make every conceivable objection. White v. State, 559 So. 2d 1097, 1100 (Fla. 1990). In any event, the jury was properly instructed on the law, consequently, an objection to the prosecutor's comments would not have changed the outcome of the case.

Lastly appellant contends that the prosecutor's opening argument included an reference to the penalty phase. Appellant claims that such a reference was impermissible as it anticipated that a penalty phase would be necessary. The jury was well aware of the fact that the state was seeking/preparing for a

penalty phase. Reference to that possibility was appropriate. Appellant has not been able to establish that any of the comments were deserving of an objection. Furthermore even if any of the comments were improper, there is no showing that the result of the proceedings would have been different.

The trial court properly found that Klein did not render ineffective assistance of counsel at the guilt phase. None of the comments were impermissible. Mann. Furthermore, appellant cannot establish that any of the comments were so prejudicial as to vitiate the entire trial. Bertollotti v. State, 476 So. 2d 130, 133 (Fla. 1985); Jones v. State, 612 So. 2d 1370 (Fla.1992).

ISSUE IV

THE TRIAL COURT PROPERLY DENIED RELIEF REGARDING APPELLANT'S CLAIM THAT THE JURY WEIGHED AN INVALID AGGRAVATING FACTOR OF "GREAT RISK TO MANY"

Appellant complains that the jury was allowed to consider the invalid aggravating factor of "great risk".[27] Appellant alleges that the factor is invalid because the jury instruction is susceptible to misinterpretation. Appellant recognizes that this Court has applied a narrowing construction of the factor starting with Kampff v. State, 371 So. 2d 1007 (Fla. 1979). Regardless of this Court's application, the aggravator is inherently subjective and can be misapplied. The trial court found this claim to be procedurally barred since it was raised on direct appeal. (R 4976). On direct appeal appellant claimed that the aggravating factor was vague, there was insufficient evidence to establish the existence of this factor and the trial court erroneously rejected appellant's request for a limiting instruction. Van Poyck, 564 So. 2d at 1070. This Court denied relief on the merits. Id. Although this issue is properly before this Court again based on Jackson v. State, 648 So. 2d 85 (Fla. 1994), the trial court's ruling should be upheld. Caso v. State, 524 So. 2d 422, 424 (Fla. 1988)(ruling of trial court will be affirmed, even if based on erroneous reasoning, if evidence or alternative theory supports the outcome).[28]

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[27] Section 921.141 (5)(c), Fla. Stat.

[28] The trial court's order denying relief based on a procedural bar was rendered months before this Court's opinion in Jackson v. State, 648 So. 2d 85 (Fla. 1994) became final.

Appellant claims that the prosecutor misstated the law during closing argument regarding what facts should be considered regarding this aggravating factor. Given the alleged misstatement by the prosecutor, it is highly likely that the jury relied upon impermissible facts when considering the existence of this factor. Appellant's argument is without merit for three reasons.

First of all the prosecutor's closing argument was a correct statement of what the jury could consider. The prosecutor did not say that the mere presence of others in the vicinity of the homicide was sufficient to find this aggravator. The prosecutor specifically named several people who were present during appellant's random shooting. His closing argument recapped the real and present danger with which these people were faced. Appellant was seen shooting at the van and randomly shooting in the air. People in the parking lot were threatened by appellant. A nearby doctor's office was full of people who witnesses the shooting. Bullet marks and a bullet hole were found on the wall of the doctor's office as people inside were taking cover. Officer Turner was hit in the shoulder by a ricochet bullet. (ROA 3482-3500, 3507-3508).

Appellant claims that the prosecutor impermissibly discussed the events of the high speed car chase where appellant fired at least 20-30 rounds of ammunition at the police. The high speed chase occurred on two busy streets in the middle of the day in West Palm Beach. (ROA 3495-3496). The prosecutor's reference to that chase was permissible. Delap v. State, 440 So. 2d 1242, 1246 (Fla. 1983); Suarez v. State, 481 So. 2d 1201 (Fla.) cert.

denied, 476 U.S. 1178, 106 S.Ct. 2908, 90 L. Ed. 2d 994 (1985). The trial court's order, which specifically referenced all the above evidence was upheld by this Court on direct appeal.(ROA 4197-4198). Van Poyck, 564 So. 2d at 1070. The prosecutor's argument to the jury regarding the appropriate evidence to consider was a correct statement of the law. Consequently, appellant's assumption that the jury relied upon improper evidence which was beyond the narrowing construction of this Court is void of any factual support.

Secondly, people of ordinary intelligence and knowledge know the meaning of the terms "great risk" and "many" people. State v. Dixon, 283 So. 2d 1, 9 (Fla. 1983). This Court's construction of an aggravating factor is not necessarily required to be incorporated in the jury instructions defining the aggravating factors. Unlike the aggravating factors of "heinous, atrocious, and cruel" and "cold, calculated and premeditated" the terms of this factor are not so vague as to the leave the jury without sufficient guidance. See generally, Whitton v. State, 649 So. 2d 861, 867 n. 10 (Fla. 1994)(avoid arrest factor is unlike the HAC factor and does not contain vague terms, consequently Espinosa v. Florida, 112 S.Ct. 2926, 120 L. Ed. 2d 854 (1992) does not require further limiting instructions).

Thirdly, appellant's ignores this Court's original finding that there was sufficient evidence to establish this factor. Consequently, any error in failing to give a limiting instruction was harmless. Atwater v. State, 626 So. 2d 1325 (Fla. 1993); Chandler v. State, 634 So. 2d 1066, 1069 (Fla. 1994)(Espinosa issue not preserved for post conviction appeal, however

sufficient evidence established the existence of "HAC", consequently any error in instruction was harmless); Thompson v. State, 619 SO. 2d 261 (Fla.) cert. denied, 114 S.Ct. 445, 126 L. Ed. 2d 378 (1993)(insufficiency in the instruction regarding "HAC" was harmless given the overwhelming evidence of same); Foster v. State, 20 Fla. L. Weekly S91, 92 (February 23, 1995)(finding sufficient evidence to establish "CCP" on direct appeal will support a finding of same at resentencing).

ISSUE V

THE TRIAL COURT PROPERLY DETERMINED WITHOUT AN EVIDENTIARY HEARING, THAT THE ALLEGED EXCULPATORY EVIDENCE WAS IN FACT NOT EVIDENCE NOR WAS IT MATERIAL

Appellant claims that the trial court erred in denying this claim without an evidentiary hearing. Through a chapter 119 request, appellant obtained a note written by the prosecutor to himself. The note made reference to the deposition of the medical examiner. The trial court ruled that the prosecutor's note was not evidence but merely work product. Furthermore, even if it were evidence it would not be material in the sense that it would have changed the outcome. (R 4976). Appellant does not argue that the prosecutor's note is in fact evidence but that he should have been given the "opportunity to discover the evidence on which the note was based". Appellant's initial brief at 78. Appellant's argument is legally incorrect.

First of all for information to be considered Brady[29] material it must be evidence. As already noted, Mr. Geesy's note to himself is not admissible evidence. Spaziano v. Dugger, 570 So. 2d 289, 291 (Fla. 1990). Secondly the evidence must be material. Evidence is material only if "there is a reasonable probability that had the evidence been admitted at trial, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. United States v. Bagley, 473 U.S. 667, 682 (1985). A determination regarding materiality must be made

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[29] Brady v, Maryland, 373 U.S. 83 (1967).

in the context of the entire record. Cruse v. State, 588 So. 2d 983, 987 (Fla. 1992). If Mr. Geesy's note was admitted at trial it cannot be seriously argued that there is a reasonable probability that the outcome would have been different. Cruse. This Court made a factual determination that Van Poyck was guilty of felony murder since there was no evidence to prove that he was the shooter. Van Poyck, 564 So. 2d at 1070.

A review of the medical examiner's deposition reveals that the doctor speculates that Officer Griffis was standing at the right rear of the van when he was shot. He also stated that the Office's head was at a 90 degree angle to the gun when he was shot. (R 1601). Mr. Geesy's note is nothing more than his own speculation as to the possible position of the shooter. Mr. Geesey's note does entitles appellant to engage in a fishing expedition under the guise of a Brady violation. The trial court did not err in refusing to grant an evidentiary to allow for the discovery of evidence. Spaziano.

ISSUE VI

THE TRIAL COURT'S SUMMARY DENIAL BASED ON A PROCEDURAL BAR OF APPELLANT'S CLAIM THAT THE JURY AND JUDGE WEIGHED INVALID AGGRAVATING FACTORS WAS PROPER

Appellant claims that the judge and jury improperly weighed as an aggravating factor the erroneous conclusion that he was the actual shooter. The basis for this assumption is the special verdict form[30], and the judge's sentencing order which includes the phrase that Van Poyck may have pulled the trigger[31] . The trial court summarily denied this claim because it had been raised on direct appeal. (R 4976). Appellant attempts to circumvent this procedural default with the following; (1) this Court found on direct appeal that there was insufficient evidence of premeditation; (2) Espinosa v. Florida, 112 S.Ct. 2926 (1992) is a fundamental change in the law which applies to the circumstances of the instant case. Appellant's argument is without merit.

The question regarding whether or not appellant was the actual triggerman has been raised on direct appeal under four different appellate issues; (1) the trial court erred in failing to make the requisite findings under Tison v. Arizona, 481 U.S. 137 (1987)and Enmunds v. Florida, 458 U.S. 782 (1982); (2) the trial court failed to direct the jury to make the Enmund/Tison

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[30] As noted by appellant, the jury checked the box indicating "felony murder" and "both", but did not check the box indicating premeditated murder.

[31] Appellant's argument is very disingenuous given the fact that on direct appeal, appellant argued that the jury had in fact acquitted him of premeditated murder. See initial brief pgs. 29-31.

findings; (3) there was insufficient evidence to establish premeditated murder and; (4) the death sentence was disproportionate since Van Poyck was not the triggerman. Van Poyck, 564 So. 2d 1069-1070. Appellant is simply presenting a fifth argument to the same issue, review is precluded. Francis v. Barton, 581 So. 2d 583, 584 (Fla.), cert. denied, 111 S.Ct. 2879, 115 L. Ed. 2d 1045 (1991); Ferguson v. Singletary, 632 So. 2d 53,56 (Fla. 1993)(argument that jury's recommendation was tainted by other aggravators overturned on direct appeal is procedurally barred for not raising it on direct appeal).

The fact that this Court agreed with appellant on direct appeal regarding the lack of evidence to establish premeditation, does not constitute newly discovered evidence. Appellant's reliance on Scott v. Dugger, 604 So. 2d 465 (Fla. 1992) does not offer any support for this proposition. In Scott the newly discovered evidence was the fact that Scott's co-defendant subsequently received a life sentence. That fact was not in existence at the time of Scotts' trial and obviously could not have been considered by the judge and jury. In the instant case, appellant has always argued, at guilt phase, penalty phase, and on appeal against the finding of premeditation, i.e., appellant was not the triggerman. At the guilt phase, the jury heard arguments from both the prosecutor and defense counsel regarding felony murder. (ROA 2987-3001. The jury was properly instructed regarding both premeditated murder and felony murder. (ROA 3025-3026). At the penalty phase the state never relied upon premeditation as an "aggravating factor". As a matter of fact just prior to the penalty phase the trial court, with the

agreement of both sides made it clear that he would not emphasize either theory of first degree murder:

> THE COURT: Does everybody then agree as to, "Ladies and gentlemen of the jury, you have found the Defendant guilty of first degree murder," and I leave it at that?
>
> MR. KLEIN: Yes Judge.
>
> THE COURT: Not first degree felony and/or first degree premeditated and not both?
>
> MR. KLEIN: Right.

(ROA 3183). During the penalty phase the state presented and argued solely for the four statutory aggravating factors that were found by the trial court and upheld by this Court. (ROA 3482-3500, 3507-3508). When discussing the mitigating factors, the state never argued that appellant was the shooter, to the contrary the state told the jury to assume that the co-defendant was the actual shooter. (ROA 3511-3512) The state simply emphasized the Enmund/Tison standard. (ROA 3520, 3537-3539). The jury also heard defense counsel argue that appellant did not commit the murder and his participation was minor. (ROA 3562-3565). The jury was properly instructed regarding what factors they were to consider in aggravation as well what was to be considered for purposes of Enmund/Tison. It cannot be assumed that the jury improperly relied upon premeditation as an aggravating factor. Johnson v. Singletary, 612 So. 2d 575, 576 (Fla. 1993)(courts are required to presume that that unsupported theories did in weigh in jury's consideration provided that the jury was properly instructed). Appellants's claim that the judge and jury relied on the "aggravating factor of premeditation" is not supported by the record.

Also without merit is appellants' claim that Espinosa is a fundamental change in the law which will overcome a procedural bar. This Court has rejected that argument. Doyle v. Singletary, 20 Fla.L. Weekly S249 (Fla. June 1, 1995); Chandler v. Dugger, 634 So. 2d 1066 (Fla. 1993); Jackson v.Dugger, 633 So.2d 1051 (Fla. 1993). In any event appellant's reliance on Espinosa is misplaced. Espinosa centers on a vagueness challenge to jury instructions applicable to aggravating factors. An aggravating factor that is accompanied by an inadequate jury instruction renders the factor invalid. Id. In the instant case, there is no such challenge or finding. To the contrary all the aggravating factors were upheld by this Court. Van Poyck, 564 So. 2d at 1071. This Court's findings with regard to premeditation simply do not involve any concern for aggravating factors and their applicable jury instructions. Lastly, appellant ignores the fact his participation in the entire criminal episode more than warranted a sentence of death under Enmund/Tison. Consequently any error with respect to the issue of premeditation would be harmless error.

ISSUE VII

TRIAL COURT'S SUMMARY DENIAL OF APPELLANT'S CLAIM THAT THE PENALTY PHASE JURY INSTRUCTIONS AND PROSECUTOR'S ARGUMENT IMPERMISSIBLY SHIFTED THE BURDEN OF PROOF TO THE DEFENDANT WAS PROPER

Appellant claims that the trial court erred in finding his challenge to penalty phase jury instructions procedurally barred. Appellant claims that the error was exacerbated by improper prosecutorial comment. The trial court's ruling was proper. Stewart v. State, 632 So. 2d 59, 60 (Fla. 1993).

In any event there was no error. Both the jury instructions and the prosecutors comments were a correct statement of the law. Blystone v. Pennsylvania, 110 S. Ct. 1078 (1990); Boyde v. California, 110 S. Ct. 1190 (1990).

ISSUE VIII

THE TRIAL COURT PROPERLY FOUND PROCEDURALLY BARRED APPELLANT'S CLAIM THAT THE COURT ERRED IN REFUSING TO GRANT VARIOUS CHALLENGES FOR CAUSE

Appellant claims that the trial court erred in denying eleven cause challenges. The cause challenges were based on the allegation that these people would automatically vote for death. Of the eleven, two actually sat as jurors. Of the remaining nine, seven were peremptorily challenged and the final two were excused for other reasons. Van Poyck, 564 So. 2d at 1071. On direct appeal, appellant only challenged the trial court's refusal to excuse the two jurors who were ultimately excused for personal reasons. The alleged error with respect to the remaining nine was not presented. Given that this issue was raised on appeal, relitigation is precluded. The trial court properly found the claim to be procedurally barred. Francis v. Barton, 581 So. 2d; Roberts v. State, 568 So.2d 1255, 1257 (Fla. 1990).

Appellant's reliance on Morgan v. Illinois, 504 U.S. 719 (1992) to overcome this procedural bar is void of merit. Morgan does not undermine this Court's original opinion. As presented on appeal, the two jurors challenged ultimately did not sit. However appellant was not forced to exercise a peremptory challenge on either one of them. There is simply no prejudice with respect to those jurors. That ruling is no way effected by Morgan. Appellant's attempt to make the same argument regarding nine different jurors is procedurally barred. Appellant in no way even attempts to explain why a challenge to those jurors was

not raised on appeal. Morgan is not new law. In the opinion itself, the United States Supreme Court held that the issue in Morgan had already been decided in Ross v. Oklahoma, 487 U.S. 81 (1988) and Morgan was merely a reiteration of that view. Morgan, 119 L. Ed.2d at 502. Ross was decided five months before the commencement of appellant's trial. This claim is procedurally barred.

ISSUE IX

THE TRIAL COURT WAS CORRECT IN SUMMARILY DENYING APPELLANT'S CHALLENGE TO THE PROSECUTOR'S CLOSING ARGUMENTS

Appellant presents numerous instances of alleged improper prosecutorial comments. The trial court properly found that this claim was not cognizable on collateral review. Roberts, supra; Atkins v. Dugger, 541 So. 2d 1165, 1166 n. 1 (Fla. 1989).

In order to grant relief appellant must demonstrate that fundamental error is present. Crump v. State, 622 So. 2d 963 (Fla. 1993). Appellant cannot demonstrate that any of the comments influenced the jurors to the extent that the verdict was based on an emotional response rather than on the evidence presented. Jones v. State, 612 So. 2d 1370 (Fla. 1992). They were either a correct statement of the law, (ROA 1443, 3477-3478), proper and logical inferences from the evidence, (ROA 271-274, 2938-2946, 2925, 2921, 3496),or were fair reply. (ROA 2916-2917). Mann v. State, 603 So. 2d 1141, 1143 (Fla. 1992)(arguing conclusions that can be drawn from the evidence is permissible). Neither review nor relief is warranted.

ISSUE X

THE TRIAL COURT 'S SUMMARY DENIAL OF APPELLANT'S CLAIM OF NEWLY DISCOVERED EVIDENCE WAS PROPER GIVEN THAT THE ISSUE WAS RAISED ON DIRECT APPEAL AND THE EVIDENCE NOW PRESENTED IS NOT NEW

Appellant claims that newly discovered evidence exists to establish his innocence. This evidence consists of; (1) Officer Turner's statement that Van Poyck was on the passenger side of the van when Griffis was killed; (2) O'Brien was subsequently acquitted of attempted escape; and (3) an affidavit from O'Brien which states that Van Poyck was on the side of the van when Officer Griffis was shot. According to Van Poyck this evidence makes it clear that Van Poyck did not kill Officer Griffis and it negates the existence of the underlying felony of attempted escape. On direct appeal appellant challenged the sufficiency of the evidence to establish his conviction for aiding in an escape. Van Poyck, 564 So. 2d at 1068-1069. O'Brien's acquittal of the attempted escape charge was brought forth on direct appeal. Also on direct appeal, appellant challenged the sufficiency of the evidence to establish premeditated murder. Id at 1069. Consequently the trial court properly found the claim to be procedurally barred. Francis v. Barton, 581 So.2d 583 (Fla.), cert. denied, 111 S.Ct. 2879, 115 L. Ed. 2d 1045 (1991).

A claim of newly discovered evidence will overcome the procedural bar if appellant can demonstrate that "the asserted facts were unknown by the parties and could not have been known by appellant or counsel by the use of due diligence. Jones v. State, 591 So. 2d. 911, 916 (Fla. 1991) citing to, Hallman v.

State, 371 So. 2d 482 (Fla. 1979). Appellant cannot meet that burden. As already noted, O'Brien's acquittal was relied upon in appellant's initial brief on appeal. Turner's statement has been available as it apart of the original record on appeal. (R 1955-1958). Appellant does not even attempt to explain why he could not obtain an affidavit from O'Brien before now. O'Brien has always been available, as a matter of fact Van Poyck had intended to testify at O'Briens' trial. Given that none of this information qualifies as newly discovered evidence, appellant cannot overcome the procedural bar.

Even if appellant could overcome the first hurdle regarding the availability of this evidence, relief would still not be warranted. The evidence must be of such a nature that it would probably produce an acquittal on retrial. Jones, 591 So. 2d at 915. Irrespective of "O'Brien's acquittal appellant stated on the witness stand that he intended to break his friend out of jail. Van Poyck, 564 So. 2d at 1068. A fact that he still maintains today through the testimony of Dr. Phillips. Turner's "new" statement is consistent/cumulative with his trial testimony. Finally, the credibility of O'Brien's affidavit must be questioned given it's untimeliness. See generally Armstrong v. State, 642 So. 2d 730, 735 (Fla. 1994). In any event, appellant has already received the benefit of the doubt with respect to the question of who was the triggerman. On direct appeal this Court determined that insufficient evidence existed to establish premeditated murder. Van Poyck, 564 So. 2d at 1069. This does negate his culpability for first degree murder under felony murder. Id. Nor does it call into question his death sentence

under Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L. Ed. 2d 1140 (1982). Id at 1070-1071. Both review and relief are not warranted.

ISSUE XI

THE SUMMARY DENIAL OF APPELLANT'S ENMUND/TISON CLAIM WAS PROPER GIVEN THAT THE ISSUE WAS LITIGATED ON DIRECT APPEAL

Appellant again attacks the trial court's determination regarding its Enmund/Tison findings. Appellant also repeats an attack regarding the applicable jury instruction. The trial court properly determined that this issue is procedurally barred given that the two identical issues were raised on direct appeal. Van Poyck, 564 at 1070.

To overcome the procedural bar appellant claims that this Court's decision in Jackson v. State, 575 So. 2d 181 (Fla. 1991) somehow calls into question its decision in the direct appeal of the instant case. Appellant is in error. In both Jackson and in the instant case, this Court recognized and applied the standard of Enmund/Tison. Jackson, 575 So. 2d at 191; Van Poyck, 564 So. 2d 1070-1071. Simply because application of the identical standard in two different factual circumstances results in two different outcomes, does not call into the question the propriety of either decision. The trial court's summary denial was proper.

ISSUE XII

THE TRIAL COURT'S SUMMARY DENIAL OF APPELLANT'S CLAIM THAT HIS CONVICTION FOR FELONY MURDER AUTOMATICALLY MADE HIM ELIGIBLE FOR THE DEATH PENALTY WAS PROPER GIVEN THAT THE ISSUE WAS RAISED ON DIRECT APPEAL

Appellant argues that his conviction for felony murder automatically makes him eligible for a death sentence given application of the felony murder aggravator.[32] Such a procedure lead to capricious results. The trial court found this claim to be barred since it was raised on direct appeal. (R 4977). Van Poyck, 564 So. 2d at 1070. The trial court's ruling was proper. Appellant does not even attempt to overcome this procedural bar. Review should be denied. Stewart v. State, 588 So. 2d 972, 973 (Fla. 1991).

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[32] Section 921.141(5)(d)Fla. Stat.

ISSUE XIII

THE TRIAL COURT'S SUMMARY DENIAL OF APPELLANT'S CLAIM REGARDING ALLEGED ANTISYMPATHY COMMENTS WAS PROPER

Appellant alleges various instances of impermissible prosecutorial comment and improper jury instructions. Van Poyck claims that the statements precluded consideration of mitigating evidence. The trial court found this claim to be procedurally barred as it should have been raised on direct appeal. (R 4978). Appellant has failed to overcome this procedural default. Swafford v. Dugger, 569 So. 2d 1265, 1266 (Fla. 1991).[33]

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[33] This claim is without merit. There is absolutely no indication that the judge or jury did not consider all the alleged mitigation presented. Jones v. Dugger, 928 F. 2d 1020, 1029 (11th Cir. 1991); Kennedy v. Dugger, 933 F. 2f 905, 915 (11th Cir. 1991).

ISSUE XIV

TRIAL COURT'S SUMMARY DENIAL OF APPELLANT'S CHALLENGE TO THE TRIAL COURT'S DISPOSITION OF MITIGATING EVIDENCE WAS PROPER AS THE ISSUE WAS RAISED AND REJECTED ON DIRECT APPEAL

Appellant claims that the trial court refused to consider uncontroverted mitigating evidence. The identical issue was raised and rejected on direct appeal. Van Poyck v.State, 564 So. 2d 1066, 1069 (Fla. 1990)[34] . The trial court's summary denial of this claim was proper. Chandler v.Singletary, 634 So. 2d 1066 (Fla. 1992); Roberts v. State, 568 So. 2d 1255 (Fla. 1990).

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[34] Appellant reliance on Campbell v. State, 571 So. 2d 415 (Fla. 1990)is to no avail as this Court has determined that Campbell will not be given retroactive application on collateral review. Gilliam v. State, 582 So. 2d 610, 612 (Fla., 1991).

ISSUE XV

THE TRIAL COURT'S SUMMARY DENIAL OF APPELLANT'S CHALLENGE TO THE PENALTY PHASE JURY INSTRUCTIONS WAS PROPER AS THE ISSUE WAS RAISED AND REJECTED ON DIRECT APPEAL

Appellant claims that the penalty phase jury instructions that appear at pps. 3578, 3580-3581 of the record are vague and confusing.[35] They are constitutionally impermissible because they preclude consideration of relevant evidence. This issue was raised and rejected on direct appeal. The trial court's summary denial was proper. Koon v. State, 619 So.2d 246, 248 (Fla. 1993); Atkins v. Dugger, 541 So. 2d 1165. 1166 n.1 (Fla. 1989).

Appellant attempts to overcome the procedural bar by relying on testimony presented at another evidentiary hearing in another case, regarding the same claim. The opinion of a criminologist who is knowledgeable in death penalty law in Tennessee does not constitute newly discovered evidence under the requirements of Jones v. State, 591 So. 2d 911 (Fla. 1991).

In any event this Court has repeatedly upheld the constitutionality of the penalty phase jury instructions in Florida. Gamble v. State, 20 Fla.L.Weekly S242 (Fla. May 25, 1995); Walls v. State, 641 So. 2d 381, 389 (Fla. 1994); Jackson v. State, 530 So. 2d 269 (Fla. 1988).

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[35] The instructions appearing at those pages deal with the jury's advisory role and the mitigating circumstances.

ISSUE XVI

THE TRIAL COURT PROPERLY DETERMINED THAT APPELLANTS'S CLAIM REGARDING THE JURY INSTRUCTION ON JUSTIFIABLE AND EXCUSABLE HOMICIDE IS PROCEDURALLY BARRED

Appellant claims that the trial court erred in failing to give the long form instruction on excusable homicide. Given that there was no request for the instruction or objection to the instruction actually given, review is precluded. Adams v. State, 412 So. 2d 850, (Fla.) cert. denied 459 US. 852, 103 S.Ct. 182, 74 L. Ed. 2d 148 (1982); Smith v. State, 573 So. 2d 306 (Fla. 1990).

During the charge conference, appellant requested an instruction on manslaughter and attempted manslaughter. (ROA 2685-2699). The trial judge instructed the jury on the defense of excusable and justifiable homicide. (ROA 3022-3023, 3029). There was no objection to use of the "short form" as opposed to the "long form". Furthermore there was no objection to the court's reference to the instruction rather than reading it a second or third time. (ROA 3029). Given the lack of an objection and the fact that such an error is not fundamental, review is precluded. Smith.

In any event, any error must be considered harmless. Appellant's convictions for attempted manslaughter do not in any way affect his conviction and sentence for first degree murder. The jury did not hear or consider any otherwise impermissible evidence relating to the charges for attempted first degree murder. The judge did not rely on any of those convictions to support the death sentence. See generally, Preston v. State, 564

So. 2d 120 (Fla. 1990); Sochor v. State, 619 So. 2d 285 (Fla.1993). Appellant is not entitled to relief.

CONCLUSION

Based on the foregoing arguments and authorities, the State respectfully requests that this Honorable Court affirm the trial court's denial of appellant's motion for postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Matthew Lawry, Volunteer Lawyers' Resource Center, 805 North Gadsen Street, Tallahassee, Florida 32303-6313 and Jeff Davis of Quarles & Brady, 411 East Wisconsin Ave. Milwuakee, Wisconsin, 53202-4496, this **24th** day of **July,** 1995.

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