IN THE SUPREME COURT OF FLORIDA

JOHN B. VINING,

Appellant,

vs. **CASE NO. SC99-67**

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES CITED

PRELIMINARY STATEMENT

Claims that have been raised and rejected on direct appeal are barred and it is inappropriate to use a different argument to relitigate the same issue, Medina v. State, 573 So.2d 293 (Fla. 1990), even if couched in ineffective assistance language. Johnson v. Singletary, 695 So.2d 263, 265 (Fla. 1996). See Robinson v. State, 707 So.2d 688 (Fla. 1998); Valle v. State, 705 So.2d 1331, 1336, n. 6 (Fla. 1997); Cherry v. State, 659 So.2d 1069 (Fla. 1995). See also Asay v. State, ___ So.2d ___, 25 Fla. L. Weekly S523 (Fla. 2000)(approving summary denial of several claims on procedurally barred claims that were raised and rejected on direct appeal, barred claims that although not raised on direct appeal could have been; approving summary denial of claims unsupported by sufficient facts); P.A. Brown v. State, 755 So.2d 616, 619-21, n. 1-7 (Fla. 2000); Thompson v. State, ___ So.2d ___, 25 Fla. L. Weekly S346 (Fla. 2000); Huff v. State, ___ So.2d ___, 25 Fla. L. Weekly S411, 412 (Fla. 2000); Sireci v. State, ___ So.2d ___, 25 Fla. L. Weekly S673 (Fla. 2000).

Accordingly, the following claims raised in the instant appeal merit summary rejection as procedurally barred or otherwise not cognizable in a post-conviction challenge: Issues V, VI, VII, VIII, IX, X, XI, XII and XIV.

STATEMENT OF FACTS

This Court summarized the facts of the case in its affirmance of the judgment and sentence in Vining v. State, 637 So.2d 921, 923-924 (Fla. 1994).

> On December 8, 1997, surveyors discovered the partially decomposed body of a woman in a remote grassy area in Apopka, Florida. The body was fully clothed in a two-piece dress, but no jewelry, purse or shoes were found. Through dental records, the woman was identified as Georgia Caruso. The medical examiner determined that death had occurred two to three weeks prior to the discovery of the body. The medical examination revealed a possibly fatal gunshot wound to the left side of Caruso's jaw and a fatal gunshot wound to her left temple. There were no signs of a struggle where Caruso's body was found, and it appeared that she had been killed elsewhere and transported to the grassy area.
>
> In November 1987, Caruso had placed advertisements in several papers offering diamonds for sale. In response to those advertisements, a man met with Caruso at her fingernail care business, on November 13, 16, and 18, 1987. Caruso introduced the man to Joann Ward, a nail technician employed by Caruso, as "George Williams, a man interested in jewelry I have to sell." Ward described Williams as being in his fifties, five feet eleven inches tall, around 175 pounds, thinning light brown hair, long face, loose facial skin, and wearing a gold watch and glasses. On November 18, 1987, Caruso asked Ward to accompany her to meet Williams in order to have the jewelry appraised. According to Ward, Williams arrived in an older model black Cadillac Fleetwood with tinted windows, and Ward saw him use an inhaler/aspirator. Ward and Caruso followed Williams to the Winter Park

Gem Lab. Ward ran errands while Caruso accompanied Williams to the gem lab.

Earlier in the day, Caruso had arranged for Ellen Zaffis and Kevin Donner, gemologists at the Winter Park Gem Lab, to appraise gems for a prospective buyer. Caruso arrived at the gem lab accompanied by a man that she identified as George Williams. Both Zaffis and Donner gave a description of Williams that was consistent with Ward's description. Donner appraised a 6.03-carat pear-shaped diamond and a 3.5-carat round diamond at a total value of $60,000.

After the appraisal, Caruso told Ward that Williams had decided to buy the diamonds and that she was going to accompany him to the bank to put the purchase money in a safe deposit box. Ward returned alone to work, and never saw Caruso again. Ward and Zaffis testified that when they last saw Caruso she was wearing a two piece dress, black shoes, black earrings, a gold Rolex watch, an anniversary ring, a solitaire engagement ring, the 6-carat pear-shaped diamond ring, and was carrying a black purse.

* * *

The State's case against Vining was based upon circumstantial evidence. Zaffis and Ward identified Vining's picture as George Williams when shown a photographic lineup. At trial, Zaffis, Ward, and Donner also identified Vining as George Williams. Phone records indicated that two calls were made from Vining's residence to a diamond dealer who advertised in the same newspaper as Caruso, but that dealer refused to meet with the caller under circumstances similar to those requested in the instant case. Vining's phone number is 774-6159 and Caruso's personal notebook listed George Williams phone number as 774-6158. Vining used his mother's black Cadillac which was

> discovered burning in a rock pit in Marion County the day after the media reported the discovery of Caruso's body. Phone records indicate that a call was placed to Vining's residence from a pay phone near the rock pit on the day that the car was burned. The day after Caruso disappeared, Vining sold a diamond that had been entrusted to Caruso for consignment. Vining also uses an inhaler/aspirator.

This Court disposed of several claims including a challenge to the relax and recall sessions with witnesses Ward, Zaffis and Donner and a complaint that the trial judge improperly considered matters not presented in open court:

> [3] Vining next claims that the trial court erred in allowing the State to present hypnotically-refreshed testimony, based upon this Court's decision in *Bundy v. State*, 471 So.2d 9 (Fla. 1985)(holding that hypnotically-refreshed testimony is per se inadmissible in a criminal trial), *cert. denied*, 479 U.S. 894, 107 S.Ct. 295, 93 L.Ed.2d 269 (1986). Vining's counsel filed a motion in limine to suppress photographic identifications and in-court identifications of Vining, based upon the contention that the identifying witnesses had participated in hypnotic sessions conducted by the police. During hearing on this motion, a police officer who is a forensic hypnotist testified that witnesses Ward, Zaffis, and Donner had not been hypnotized and were fully conscious and aware of their surroundings throughout the interview. Both witnesses also testified that the relax and recall session did not produce any information that differed from their statements to the Winter Park Police Department and the Orange County Sheriff's Department prior to the session. Based upon

this testimony, the judge ruled that the witnesses had not been hypnotized and denied Vining's motion to suppress the witnesses' identifications. The record in this case supports the judge's conclusion. *See Stokes v. State*, 548 So.2d 188, 190 (Fla. 1989)(defining hypnosis as "an altered state of awareness or perception" and finding that during hypnosis subject is placed in an artificially induced state of sleep or trance). Thus, we find no merit to this issue.

(Id. at 926)

* * *

[8] Vining complains that the trial judge improperly considered matters not presented in open court, including depositions in the court file, the medical examiner's report, and the probate record of Caruso's estate. We find that this issue was waived for purposes of appellate review as defense counsel never objected to the court's consideration of this material. The record contains two letters from the trial judge that clearly inform counsel that the judge had reviewed these materials. The first letter was filed in open court on March 1, 1990, during a motion hearing prior to the penalty phase trial that commenced on March 7, 1990. The second letter was mailed to counsel on March 14, 1990, over three weeks before sentencing by the judge on April 9, 1990. Yet, defense counsel never raised any objection to the judge's review of these materials during the motion hearing, the penalty trial, or the sentencing proceeding. In fact, the record of the motion hearing reveals several instances where the judge discusses his review of the depositions without comment or objection by defense counsel. Thus, contrary to Vining's assertion on appeal, the judge's consideration of this material

> was not revealed for the first time in the sentencing order.
>
> (Id. at 927)

Appellant subsequently filed an Amended Motion to Vacate Judgment and Sentence (PCR Vol. XIII, R1598-1715). The trial court conducted a Huff hearing on June 20, 1997 (PCR Vol. I, R1-130) and thereafter on July 1, 1997 entered an order finding an evidentiary hearing was required as to the following:

> VII. (Brady claims)
>
> IX. (only as to the allegations of counsel's ineffectiveness in connection with the trial judge's independent investigation and consideration of extra-records materials not presented in open court)
>
> X. (only as to the allegations of counsel's ineffectiveness in connection with the trial judge's independent investigation and consideration of extra-records materials not presented in open court)
>
> (PCR Vol. XV, R1970-71)

An evidentiary hearing was held on April 21 and 22, 1999 at which time testimony was taken from Investigator Dan Nazurchuk, Deputy Riggs Gay, attorney Kelly Sims, Judge Joseph P. Baker, attorney Patricia Cashman, and Chandler Muller (PCR Vol. V, R170-287 and Vol. VI, R291-506). Thereafter, the lower court entered a comprehensive order denying all relief (PCR Vol. XVII,

R2481-2509).

In its order denying relief on the Brady claim - Claim VII, below at Vol. XVII, PCR 2486-91 - the court explained:

> Defendant insists that the State withheld evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). This issue was addressed at the evidentiary hearing. Several witnesses testified including Detective Nazarcheck (sic) and both Defendant's trial co-counsel. This Court concludes that Defendant has failed to prove the necessary elements which would entitle him to relief.
>
> There are three components of a true *Brady* violation; the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; the evidence must have been suppressed by the State, either willfully or inadvertantly (sic); and prejudice must have ensued. *See Strickler v. Greene*, 119 S.Ct. 1936, 1958 (1999). "[S]trictly speaking, there is never a real *Brady* violation unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Id.* at 1948. "[T]he question is whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 1952. Further, "the rule encompasses evidence known only to police investigators and not to the prosecutor." *Id.* at 1948.
>
> It is clear that whether willfully or inadvertantly (sic), the State failed to disclose items A, B, D, and G, below, which were not provided to defense counsel. The issue here is the third component - whether Defendant has established the necessary prejudice - that is the most difficult element of the claimed *Brady* violation to

prove.

A. Statement made by witness Joanne Ward indicating that the victim did not have loose stones with her on November 18, 1987.

Defendant argues that Joanne Ward's trial testimony placed "loose stones" in the victim's possession on the day she disappeared, and that Ward's undisclosed statement that the victim did not have loose stones with her, would have enabled him to impeach her testimony on this issue. Thus, Defendant argues, this undisclosed statement would have enabled him to impeach the State's key witness and eliminate motive. However, even if Ward's testimony on this issue had been severely impeached or excluded entirely, other evidence in the record provides strong support for the conclusion that the "motive diamond" was in the victim's possession on the day she disappeared. First, witness Donner testified that although he didn't appraise it, the victim had a one carat round diamond about which she asked a question. (R. 1155). Second, witness Piantieri specifically described a rare diamond which she had purchased and given to witness Ryan to sell. (R. 1208-11). Witness Ryan testified that he gave this diamond, a loose stone, to the victim on the day before she disappeared. (R. 1219). Further, witness Jones testified that a man identified as Defendant sold this stone to him the day after the victim disappeared. (R. 1222-26). In light of the above testimony of these four witnesses, the impeachment value of Ward's statement was minimal, and Defendant cannot prove materiality as to this piece of evidence.

B. Statement of Joanne Ward indicating that the victim got into the suspect's car and left at about 9:00 a.m. on November 18, 1997.

Next, Defendant argues that another piece of undisclosed evidence indicates that Ward told Detective Gay that the victim got into the suspect's car and left at about 9:00 a.m. on November 18, 1987, and was inconsistent with all other versions of the day's events. Thus, Defendant argues, this evidence could have been used to question the accuracy of the testimony concerning the day the victim disappeared. At the evidentiary hearing, Detective Gay testified that his notes included a question mark which indicated that Ward was not sure of the time and was not sure if the victim had gotten into the suspect's car. Detective Gay also testified that this was not a sworn statement, but merely notes he made to remind him of facts about which to question the witness later. At trial, Ward testified that "early in the morning" of November 18, 1987, the suspect entered the shop and he and the victim "walked out of the shop." (R. 1016-17). Her testimony also indicated that she was not sure of the details of that encounter. Hence, the undisclosed notes were not truly inconsistent with the witness's trial testimony. Accordingly, the Court finds that any possible impeachment value was minimal, and no prejudice ensued from nondisclosure of this evidence.

C. Statement of Kevin Donner indicating that he was not paying attention to the victim and the suspect during his appraisal of the diamonds.

Defendant also contends that he did not have Detective Nazarchuk's notes where witness Donner stated that he was not really paying attention when he was in the back room appraising the diamonds. Defendant argues that this statement was inconsistent with Donner's trial testimony and could have been used to impeach him. The record

indicates that Defendant already had this evidence. On December 5, 1989, Detective Nazarchuck (sic) stated (regarding Donner) in his deposition:

> A. And all he says was, you know, he says he didn't pay too much attention because the guy was concerned about, you know, more or less with the rings, and he was in the back. (Attached Deposition, P. 51).

Clearly, this statement revealed the precise information regarding Donner's statement as did the allegedly undisclosed notes. Consequently, the Court finds that this matter was fully disclosed to Defendant.

D. FBI report of the analysis results of a fiber found on the victim's blouse.

Defendant alleges that the State failed to disclose an exculpatory FBI report that showed negative results in the testing of carpet fiber from Mr. Vining's car and a fiber on the victim's blouse. The Court notes that the report merely states that the first fiber, from the victim, is a polyester fiber, the source of which "is not known to the Laboratory." In fact, at the evidentiary hearing, the evidence showed that the victim's body had been exposed to the elements for at least two weeks, and no one could posit where this fiber came from. The only conclusion to be drawn is that the particular polyester fiber taken from the victim's clothes was dissimilar to the particular carpet fiber taken from Defendant's car. Thus, the Court finds that the exculpatory value of this evidence is limited.

Defendant argues that this report is exculpatory because it tended to negate a connection between the victim and Defendant's car. While it may be true that this report *tended* to negate a connection

between the victim and Defendant's car, other evidence in the record provides strong support for the conclusion that Defendant would have been convicted, even if the FBI report had been disclosed to the defense. At trial, witness Ward provided a detailed description of the suspect's vehicle and the suspect. (R. 1010, 1023-24). Both descriptions closely matched Defendant and his vehicle. (R. 1332-34). Further, as detailed above, the testimony of witnesses Piantieri, Ryan and Jones provided a strong connection between the victim and Defendant. Accordingly, the Court finds that Defendant cannot show that there is a reasonable probability that his conviction or sentence would have been different, and thus, cannot show materiality under *Brady*.

E. Notes from an interview between Kevin Donner and Captain Hunter of the Winter Park Police Department to which Donner referred in his deposition.

In his Motion, Defendant alleges that there were notes from an interview between Donner and an officer from the Winter Park Police Department. Defendant concedes that Donner referred to this interview in his deposition. Hence, Defendant should have been on notice that notes may have existed from that interview. Moreover, Defendant does not allege, nor did he argue at the evidentiary hearing that there were inconsistencies between Donner's statements to Captain Hunter, his deposition testimony and his trial testimony. Defendant also did not offer these alleged notes into evidence at the evidentiary hearing. Accordingly, the Court finds that any possible impeachment value is speculative, and no prejudice ensued from nondisclosure of this alleged evidence.

F. Detective Nazarchuk's handwritten notes from December 17, 1987 regarding witnesses

Joanne Ward, Ellen Zaffis and Kevin Donner concerning their descriptions of the man seen with the victim.

Defendant alleges that the State never disclosed these notes. However, Defendant has not shown what inconsistencies appeared in these notes or how these notes could have been used to impeach the witnesses' trial testimony. Accordingly, the Court finds that any possible impeachment value is speculative, and no prejudice ensued from nondisclosure of this alleged evidence.

G. Complete copy of the victim's notebook.

Finally, Defendant alleges that he was not provided with a complete copy of the victim's notebook in which she recorded her jewelry sales and contacts. At trial, the notebook was identified by witness Ward. (R. 1036). Ward testified that she had seen the victim make notations in that particular book, the book appeared to be in substantially the same condition as when she first saw it, and it did not appear to be tampered with in any way. (R. 1037). Ward also testified that there was a notation in reference to George Williams, Defendant's alleged alias, as well as his phone number and the fact that he was looking for a three carat stone. (R. 1037). Ward stated that when the victim failed to return to the shop, Ward had called that phone number, but found that no George Williams was known at that number. (R. 1038). Subsequently, Ward gave the notebook to the police department. (R. 1038). The State then established the chain of custody of the notebook. (R. 1058-63). When the State moved the notebook into evidence, the only objection raised by the defense was that the evidence was cumulative. (R. 1064). At the evidentiary hearing, Defendant failed to show what portions of this book he allegedly failed to receive, or that any of these alleged

> missing portions were exculpatory or impeaching. Accordingly, Defendant has failed to show a violation under ***Brady***.
>
> As detailed above, other evidence in the record provides strong support for the conclusion that Defendant would have been convicted, even if the suppressed documents had been disclosed to the defense. Defendant has not shown that there is a reasonable probability that his conviction or sentence would have been different, and thus, cannot show materiality under ***Brady.*** Accordingly, this claim must be denied.

As to the claim that trial counsel rendered ineffective assistance concerning the trial judge's alleged independent investigation and consideration of extra-records materials not presented in open court, the lower court disposed of that in claims IX and X at Vol. XVII, PCR 2495-96, 2498-99, noting that appellant had failed to satisfy the prejudice prong of Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674 (1984).

Appellant asserts at page 8 of his brief that the state presented a "convoluted and tortured story about a common yellow 1.13 carat diamond that was sold by Mr. Vining on November 19, 1987 for approximately $600.00 (R1222-27)". The transcript of testimony of Gregory Daniel Jones at R1222-1234 contains no such description as a common yellow diamond but Jones did testify that he bought a 1.13 carat diamond for $630.00 from a person who signed the receipt with the name Bruce Vining. He stated on cross-examination that he would not recognize the diamond if he

saw it again (R1231). Witnesses John Slade, Elizabeth Slade-Piantieri, Mark Ryan, Gregory Daniel Jones and James Blanck were all cross-examined by defense counsel (R1200-03; 1215-16; 1220-21; 1230-34; 1241-44; 1249-50).

SUMMARY OF THE ARGUMENT

CLAIM I: Appellant's claim for relief on this point must be denied. The lower court correctly applied the materiality standard of Strickler v. Greene, 527 U.S. 263, 144 L.Ed.2d 286 (1999) and determined that Vining failed that test. Of the material not furnished by the prosecutor none - either singly or cumulatively - provide a reasonable probability of a different outcome had they been provided and other challenged material or information was provided or available to the defense with the exercise of reasonable diligence.

CLAIM II: Relief must be denied on the claim, first because appellant's Gardner claim is a mere repetition of the considered and rejected argument advanced on direct appeal, and secondly because the testimony of Judge Baker refutes the contention that he conducted an independent investigation. Judge Baker further testified that he advised counsel of additional matters he reviewed - see Defense Exhibits 7 and 8 - and there is no error in reading a book pertaining to admissibility in court of hypnosis-related evidence. Furthermore, counsel was neither deficient nor has the prejudice prong of Strickland been satisfied. The record reflects that the court put counsel on notice of having reviewed pre-trial depositions and it is apparent that the defense team did not want to replace Judge

Baker whom they regarded as favorable.

CLAIM III: The lower court correctly denied relief without an evidentiary hearing on the newly-discovered evidence claim and ineffective assistance of counsel at guilt phase claim since as to the former there is no newly-discovered evidence and as to the latter appellant merely is attempting to relitigate claims presented and rejected on direct appeal under the guise of ineffectiveness. Counsel properly acted as an advocate.

CLAIM IV: Trial counsel did not render ineffective assistance at penalty phase and the record demonstrates that counsel ably presented background information for the jury's consideration and appellant now largely suggests that additional cumulative evidence should have been submitted.

CLAIM V: Any substantive challenge to aggravators, instructions and other asserted errors are procedurally barred as matters for direct appeal not subject to collateral attack. The claims are also meritless.

CLAIM VI: Appellant is not entitled to relief on the time limitations of Rule 3.851. It is unrelated to his judgment and sentence, appellant has had additional time to present his claim and this Court has previously rejected similar arguments.

CLAIM VII: Appellant's challenge to the death penalty is

unclear; it is procedurally barred and meritless. Vining's failure to fully brief the claim should be deemed waived. Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990).

CLAIM VIII: Appellant is not entitled to relief under an "innocence of the death penalty" argument pursuant to Sawyer v. Whitley, 505 U.S. 333 (1992). The claim is procedurally barred for not having been raised on appeal and meritless since valid aggravators remain. Consequently, Vining is not ineligible for the death penalty.

CLAIM IX: The juror interview prohibition claim is both procedurally barred and meritless under a host of cases cited herein.

CLAIM X: The unreliable appellate transcript contention is both procedurally barred and meritless. Vining has failed to establish prejudice resulting in the direct appeal.

CLAIM XI: Appellant's absence during court proceedings is both barred and meritless. There is no absolute right to presence where his presence would not be of assistance. See Rutherford v. Moore, ___ So.2d ___, 25 Fla. L. Weekly S891 (Fla. 2000); Cole v. State, 701 So.2d 845 (Fla. 1997).

CLAIM XII: The prosecutorial misconduct claim is both procedurally barred and meritless.

CLAIM XIII: The lower court adequately complied with

appellant's public records claim and gave more than ample opportunity to both CCR and successor counsel to obtain any desired information from agencies.

CLAIM XIV: The cumulative errors claim is meritless; the individual asserted errors are not error or are barred. Appellant fails to factually support the cumulative error claim.

ARGUMENT

CLAIM I

WHETHER THE HEARING COURT FAILED TO PROPERLY CONSIDER EVIDENCE THAT ALLEGEDLY PROVES VINING'S INNOCENCE SUCH AS MATERIAL WITHHELD BY THE STATE (THE BRADY CLAIM).

In Strickler v. Greene, 527 U.S. 263, 144 L.Ed.2d 286 (1999) the United States Supreme Court explained:

> [1b, 5a] This special status explains both the basis for the prosecution's broad duty of disclosure and our conclusion that not every violation of that duty necessarily establishes that the outcome was unjust. Thus the term "*Brady* violation" is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence (FN20)(footnote omitted) - that is, to any suppression of so-called "*Brady* material" - although, strictly speaking, there is never a real "*Brady* violation" unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict. There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued. (emphasis supplied)

The Court further articulated at 144 L.Ed.2d at 307:

> Without a doubt, Stoltzfus' testimony was prejudicial in the sense that it made petitioner's conviction more likely than if she had not testified, and discrediting her

> testimony might have changed the outcome of the trial.
>
> That, however, is not the standard that petitioner must satisfy in order to obtain relief. He must convince us that "there is a reasonable probability" that the result of the trial would have been different if the suppressed documents had been disclosed to the defense. As we stressed in *Kyles*: "[T]he adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." 514 U.S., at 434, 131 L.Ed.2d 490, 115 S.Ct. 1555 (emphasis supplied)

The Strickler language has been adopted by this Court. See, e.g. Sireci v. State, ___ So.2d ___, 25 Fla. L. Weekly S673 (Fla. 2000); Thompson v. State, ___ So.2d ___, 25 Fla. L. Weekly S347, 349 (Fla. 2000). This Court has also recognized that the Brady formulation includes the requirement that the defense must show the defendant did not possess the favorable evidence and could not have obtained it with the exercise of due diligence. Most recently on June 29, 2000 this Court without dissent stated in Occhicone v. State, ___ So.2d ___, 25 Fla. L. Weekly S529, 530 (Fla. 2000) after first acknowledging the decision in Strickler v. Greene that:

> "Although the "due diligence" requirement is absent from the Supreme Court's most recent formulation of the Brady test, it continues to follow that a Brady claim cannot stand if

> a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant."

See also Freeman v. State, ___ So.2d ___, 25 Fla. L. Weekly S451, 452 (Fla. 2000); Buenoano v. State, 708 So.2d 941 (Fla. 1998); Haliburton v. State, 691 So.2d 466 (Fla. 1997); Cherry v. State, 659 So.2d 1069 (Fla. 1995); Hegwood v. State, 575 So.2d 170 (Fla. 1991). Appellee submits that the due diligence element is still a proper consideration in claims calling for a Brady analysis. The United States Supreme Court has not held that it is no longer an element to be considered. That Strickler did not refer to it merely reflects the fact that the diligence prong was absent in the facts of that case and thus it was unnecessary to discuss. See Spivey v. Head, 207 F.3d 1263, 1283 (11th Cir. 2000)(To establish a Brady violation, defendant must prove 1) government possessed evidence favorable to the defense, 2) defendant did not possess it and could not obtain it with any reasonable diligence, 3) that prosecution suppressed the evidence and 4) a reasonable probability exists that the outcome of the proceeding would have been different had the evidence been disclosed to the defense); High v. Head, 209 F.3d 1257, 1265 (11th Cir. 2000) citing n. 33 of Strickler that it was unnecessary to decide, because not raised in the case, the impact of a showing by the state that the defense was aware of

the existence of the documents in question and knew or could reasonably discover how to obtain them. Cf. Young v. State, 739 So.2d 553, 558, n. 11 (Fla. 1999)("In respect to defendant, this should not be read as lessening the requirement of due diligence because information which is available to the defendant through the exercise of due diligence is not a basis for post conviction relief even if undisclosed by the State unless it meets the exacting Bagley materiality standards.") While appellant may have shown that some of the undisclosed items may have been helpful to the defense, that is not the test under Strickler. Rather Vining must establish "that there is a reasonable probability that the result of the trial would have been different if the suppressed documents had been disclosed to the defense"... "The question is ... whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Id. at 307. Vining fails that test. It appears that the defense team of Cashman and Sims did have State Exhibit 2, the three page notes of Ward, State Exhibit 3, the three page written and sworn statement of Joann Ward on November 18, 1987, State Exhibit 4, the ten page taped interview with Ellen Zaffis on December 21, 1987, State Exhibit 5, the twenty-three page interview with Ward on December 17, 1987, State Exhibit 6, the Donner statement of November 17,

1987, State Exhibit 7, the Donner statement of December 22, 1987, and State Exhibit 10, the two page statement of Ward.

(A) The undisclosed portion of Detective Gay's handwritten notes of an interview with witness Joanne Ward that she saw "no loose stones" with the victim.

Detective Gay identified Defense Exhibit 6 as his handwritten note of a conversation with Ward on December 17, 1987 containing the notation "no loose stones". He testified that on that same day Ward gave a taped sworn statement in which she was asked about and gave a full and complete answer about the stones (PCR Vol. V, R204-209; see also State Exhibit 5) He did not have Ward look at, see or adopt his note (PCR Vol. VI, R494). See Williamson v. Moore, 221 F.3d 1177, 1183 (11th Cir. 2000)(non-verbatim, non-adopted witness statements were not admissible at trial as impeachment evidence).

Trial defense co-counsel Kelly Sims admitted that the public defender's file contained a statement from Joanne Ward given to the Winter Park Police Department on November 18, 1987 - which he assumed was received in discovery - wherein Ward described the jewelry worn by Caruso and that she only had these set pieces. Sims conceded that that written statement could have been used to impeach Ward if they so chose on the loose stone (PCR Vol. V, R252-254).

Additionally in Ward's December 17, 1987 taped statement to

Detective Nazurchuk (State Exhibit 5, p. 7) this exchange occurs:

> "Q. Okay, can you explain to me what she meant by she forgot the stones, were they loose stones?
> A. There, it was two, it was two rings that he was interested in purchasing, one was uh, a six carat pear shaped and the other one was a three carat round diamond with two and a half carats of baguettes around it and she had a lock box in her car ..."

Sims agreed that Ward could have been impeached with this statement (PCR Vol. V, R256-258) as well as with the Ward deposition at page 20.

Similarly, trial counsel Cashman acknowledged, somewhat reluctantly, that State Exhibit 5 was a twenty-three page typed statement of Joanne Ward (stamped as if sent to her in discovery) that was available to her for use in impeaching Ward. And page 2 of State Exhibit 14 listed the 23 page typed statement of Ward (Vol. VI, PCR 372-373); see also R2224).

Thus, Vining had sufficient material to impeach Ward regarding "no loose stones" available if the defense chose to utilize it. See Jones v. State, 708 So.2d 512, 519 (Fla. 1998). Cashman also identified State Exhibit 10 out of the Public Defender's file - a handwritten statement from Ms. Ward and this document was available to impeach Ward if they chose (PCR Vol. VI, R374-378).

Vining also fails to establish the materiality - prejudice prong. As the lower court explained, even if the Ward testimony were severely impeached or even excluded entirely, other evidence in the record provided strong support for the conclusion that the "motive diamond" was in the victim's possession on the day of the disappearance through witnesses Donner, Piantieri, Ryan and Jones. Additionally, appellee submits Vining is mistaken in suggesting that there can be no motive for the killing if that one diamond is challenged. As this Court's opinion on direct appeal summarized Donner appraised a 6.03 carat pear-shaped diamond and a 3.5 carat round diamond at a total of $60,000. 637 So.2d at 923. These were not recovered after she left the premises with Vining/George Williams. Appellant's motive in killing was for all the jewelry she had. Furthermore, there were independent lines of proof inculpating appellant. Appellant's car like that driven by the suspect was found burning in another county the same day publicity began on Caruso's disappearance, the phone call placed to the Vining residence from near the site of the burning car, the suspect and Vining's use of an aspirator, a phone number for the suspect written in Caruso's notebook was only one digit off Vining's phone number, and Joseph Taylor's testimony of a similar effort for a meeting to buy jewelry at the same time

period with phone records establishing that Taylor's phone number had been called from appellant's wife's phone. All of this was independent of Ward.

(B) Detective Gay's note that Caruso may have left with the suspect at 9 A.M. the morning of the disappearance.

Detective Gay, the author of the note, explained these were working notes; he made the question mark and parenthesis. Ward wasn't quite sure what time, thought possibly Georgia got into car and left but wasn't sure and left (PCR Vol. VI, R487-490). It was not Ward's statement; she did not adopt it or sign it as her own (PCR Vol. VI, R494)(State Exhibit 2 and Defense Exhibit 6).

Trial counsel Kelly Sims admitted that he could not assess whether the note would assist in impeaching the Ward testimony (PCR Vol. V, R246-250). This item has no impeachment value as it concerns the events occurring in the morning. Ward stated in the three page handwritten statement (State Exhibit 3), her taped statement (State Exhibit 5, p. 5), her pre-trial deposition (R2683-84) and trial testimony (R1016-18) that the suspect contacted Georgia at the store in the morning but it was after Ward returned from lunch that she and Georgia met the suspect in the afternoon of that same day to have the rings appraised at the shop of Donner and Zaffis. It is irrelevant

what happened in the morning. The lower court correctly observed that the trial testimony was not truly inconsistent with the undisclosed note (PCR Vol. XVII, R2488).

(C) The Kevin Donner statement that he was not paying attention to the victim and the suspect during the appraisal of the diamonds.

The record indicates that Vining had this evidence. The December 5, 1989 deposition of Detective Nazurchuk stated regarding Donner:

> A. And all he says was, you know, he says he didn't pay too much attention because the guy was concerned about, you know, more or less with the rings, and he was in the back. (R3535)

This is the precise information in the Nazurchuk handwritten notes (Defense Exhibit 1).[1]

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[1]Trial counsel Cashman's insistence below that the prosecutor kept notes from her at discovery must be tempered by consideration of the evidence in the record. At the pre-trial deposition of Detective Nazurchuk on December 15, 1989 (R3485-3581) the prosecutor contended that under the Florida rules of discovery he had no objection to the witness reviewing his notes to answer questions, but that if the defense wanted to have the notes produced she could file a motion and they could argue if they should be produced or not (R3508-09). The prosecutor reiterated his view that under the discovery rules the reports the officer writes were discoverable but his notes were not (R3517). Defense counsel Cashman repeatedly stated she was not asking to see or to provide the notes (R3508, 3519-20). See Fla. R. Cr. P. 3.220(a) (1989). See also Spaziano v. State, 570 So.2d 289, 291 (Fla. 1990)(investigator's notes concerning interview with Suarez are really no more than inferences that the investigator drew from his investigation. The notes are not

Trial attorney Sims admitted that attempting to impeach with a deputy's note would probably be objectionable (PCR Vol. V, R239), and in any event the Nazurchuk deposition was available to use for impeachment and that Sims did cross-examine Donner on that point (PCR Vol. V, R240-243; R1158).

(D) FBI report of the analysis results of a fiber found on the victim's blouse.

The lower court noted that an FBI report showing negative results in the testing of carpet fiber from Vining's car and a fiber on the victim's blouse merely states that the first fiber from the victim is a polyester fiber the source of which was not known to the laboratory. The victim's body had been exposed to the elements and no one could posit where this fiber came from. The only conclusion to be drawn is that the particular polyester fiber taken from the victim's clothes was dissimilar to the particular carpet fiber taken from Vining's car (PCR Vol. XVII, R2489).

It is not clear to appellee that in fact the challenged FBI

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evidence that would have been admissible). Defense attorney Cashman admitted at the evidentiary hearing that she was familiar with the Florida rules of procedure and that preliminary notes are exempt from discovery (Vol. VI, PCR 443), and at first was non-responsive then did not know or remember whether she felt the need to file an additional motion after her conversation with the prosecutor at the deposition (PCR 363-367).

lab report was withheld from the defense prior to trial. At the evidentiary hearing, attorney Kelly Sims didn't recall seeing Defense Exhibit 4 and didn't recall any car fiber being introduced (correctly so; none was.) (PCR Vol. V, R225).Attorney Cashman didn't believe she saw Defense Exhibit 4 (PCR. Vol. VI, R355). However, in Detective Nazarchuk's second deposition, on December 15, 1989, the following exchange took place between him and Cashman:

> "A. Okay. Following Martha's direction, I located the auto interior place in Longwood, and I talked to Larry Curtis. Larry had said he didn't have any records, because he just took over the place.
> Q. (Interposing) um-hum.
> A. ...and the place didn't appear like there was any good recordkeeping there anyway.
> Q. Um-hum.
> A. And I asked him if he had any old records there that would show whether or not Mr. Vining had his car interior worked on, or whatever upholstery work was done.
> Q. Of what significance is the upholstery work?
> A. Okay. <u>There was a piece of fiber that was supposed to have been found on Georgia Caruso's clothing</u>.
> Q. (Interposing) Um-hum.
> A. ...<u>at the FDLE lab</u>.
> Q. Um-hum.
> A. They had no idea where it was from.
> Q. Um-hum.
> A. So when I heard about the interior stuff...
> Q. Um-hum.
> A. ...we checked it out...
> Q. (Interposing) Um-hum.
> A. ...for further studies...
> Q. (Interposing) Um-hum.

A. ...and they were not able to make any determination.
Q. Um-hum.
A. So when I found out about this, I went out there and talked to this guy, Larry Curtis,
who is the new owner...
Q. (Interposing) Um-hum.
A. ..of the place. And I asked him if he can show me or tell me anything about what might have been done to the Cadillac.
Q. Um-hum.
A. And he says he has no records to prove--to show anything. Okay. But he says–I said, well, what kind of carpet do you use? And he said, well--he says, I can give you that. He says, we're using the same--the same stuff that the other guy used. And, of course, he gave me a piece. I packaged it in evidence and sent it to the FBI lab.
Q. Did they get a match?
A. No. No match.
Q. No match?
A. (No verbal response).
Q. Was it inconclusive, or was it this doesn't match?
A. No. It just doesn't match. That report should– you should have that report."

(R3664-66) (emphasis supplied)

The direct appeal record also reflects correspondence from Cashman to assistant state attorney Latham on October 3, 1989 acknowledging receipt in discovery of twelve pages of FDLE reports and one page report from FBI laboratory (R2225). The state furnished the defense a lab transmittal sheet to the FDLE Crime Lab on November 22, 1989 (R2233) and another lab transmittal sheet on January 5, 1990 (R2325).

At the evidentiary hearing below, although attorney Cashman claimed that she attempted to get any forensics (PCR. Vol. VI, R354), she clearly was told by the detective in the December deposition that the FBI lab reported no match, that she should have that report, and she registered neither any surprise, nor did she make any effort subsequently to obtain the report she now claims she didn't receive. Cashman admitted that she viewed the evidence in the case (PCR 391), initially had no recollection if she knew there was debris sweepings from the blouse of Georgia Caruso (R391) until shown State's Exhibit 15, a note from her file made by her investigator Barbara Pizarroz indicating that she had reviewed evidence including debris from Georgia Caruso's blouse and a piece of carpet from the car and from a shop but she made no moves to have any of the debris compared to anything (PCR Vol. VI, R401). Co-counsel Kelly Sims also testified regarding Defense Exhibit 4 that "I don't recall this document. Again, that doesn't mean I never saw it. I just don't recall it." (PCR Vol. V, R225) and he admitted having read all the depositions before trial(PCR V. 239).Sims admitted on cross-examination that from this FBI report it cannot be determined where the fiber found on Caruso's body came from (PCR 260-262), and that it had nothing to do with the diamonds or the phone linkage to Joe Taylor who placed a similar ad (PCR 263).

See Provenzano v. State, 616 So.2d 428 (Fla. 1993)(No Brady violation where defense could have obtained information through due diligence); Freeman, supra; Buenoano, supra; Haliburton, supra; Cherry, supra; Hegwood, supra.

But even if the prosecution withheld the information, inadvertently or otherwise, this Court should affirm the lower court's denial of relief. Vining has failed to satisfy the requirement that he show how the evidence was favorable to the defense. Jones v. State, 709 So.2d 572 (Fla. 1998); Sims v. Singletary, 155 F.3d 1297 (11th Cir. 1998); Bryan v. State, 748 So.2d 1003 (Fla. 1999); Downs v. State, 740 So.2d 506 (Fla. 1999); Melendez v. State, 718 So.2d 746 (Fla. 1998); Buenoano v. State, 708 So.2d 941 (Fla. 1998); Spaziano v. Singletary, 36 F.3d 1028 (11th Cir. 1994)(reasonable probability of a different result is possible only if the suppressed information is itself admissible evidence or would have led to admissible evidence).

Appellant has failed in his burden. As the lower court stated, the lab report merely states that the first fiber from the victim - whose body had been left in the deserted area for at least two weeks - exposed to the elements - was a polyester fiber the source of which was unknown. The FBI report that showed negative results in the testing of carpet fiber from Vining's car or Nazarchuk's delivery and the fiber on the

victim's blouse meant only that the blouse fiber was dissimilar to the carpet fiber. This dissimilarity is insufficient to undermine confidence in the outcome of the case as required by Strickler, especially since as noted in the testimony below the non-match fiber had nothing to do with the other evidence inculpating Vining (the identification of appellant as "George Williams", the man who accompanied Caruso to the appraisal shop by Ward, Zaffis, and Donner; Vining's subsequent sale of the Merola diamond, the burning of the car and telephone linkage from that site and his residence and the calls to Joseph Taylor who ran a similar newspaper ad as Caruso in the same time period). The mere possibility that undisclosed information might have helped the defense or might have affected the outcome of the trial does not establish materiality. See Strickler, supra, 144 L.Ed.2d at 308 ("District Court was surely correct that there is a reasonable possibility that either a total, or just a substantial, discount of Stoltzfus' testimony might have produced a different result...however, petitioner's burden is to establish a reasonable probability of a different result). Accord, U.S. v. Agurs, 427 U.S. 97, 109, 49 L.Ed.2d 342, 353 (1976).

Appellant contends that the lower court failed to comply with Strickler by considering the Brady claims cumulatively and

did so only on an individual piece by piece basis. The claim is meritless. After discussing and rejecting each sub-issue (PCR Vol. VII, R2487-91) the lower court added a conclusory paragraph:

> "As detailed above, other evidence in the record provides strong support for the conclusion that Defendant would have been convicted, even if the suppressed documents had been disclosed to the defense. Defendant has not shown that there is reasonable probability that his conviction or sentence would have been different, and thus, cannot show materiality under *Brady*. Accordingly, this claim must be denied."
>
> (PR Vol. VII, R2491)

As the Fourth Circuit Court of Appeals stated in Middleton v. Evatt, No. 94-4015, 1996 WL 63038, cert. denied, 519 U.S. 876, 136 L.Ed.2d 135 (1996) regarding an ineffectiveness claim:

> "Second, the fact that the district court analyzed all of the alleged errors reportedly does not necessarily mean that it viewed them in a vacuum, but merely that it specifically addressed each alleged error. The district court's recognition of each alleged error necessarily entailed an evaluation for cumulative effect. (see attached copy)

The lower court correctly denied relief. See M. Rose v. State, ___ So.2d ___, 25 Fla. L. Weekly S824 (Fla. 2000).

CLAIM II

WHETHER APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AND A FAIR AND IMPARTIAL TRIBUNAL BECAUSE TRIAL JUDGE ALLEGEDLY UTILIZED EXTRA-RECORD INFORMATION IN VIOLATION OF GARDNER V. FLORIDA, 430 U.S. 349 (1977).

A. There Is No Gardner Violation

Appellant next re-argues the Gardner claim unsuccessfully utilized in his prior direct appeal, but adding the cloak of ineffective assistance of counsel. This Court previously concluded the issue was waived for purposes of appellate review as defense counsel never objected to the Court's consideration of the material. Vining v. State, 637 So.2d 921, 927 (Fla. 1994):

> [8] Vining complains that the trial judge improperly considered matters not presented in open court, including depositions in the court file, the medical examiner's report, and the probate record of Caruso's estate. We find that this issue was waived for purposes of appellate review as defense counsel never objected to the court's consideration of this material. The record contains two letters from the trial judge that clearly inform counsel that the judge had reviewed these materials. The first letter was filed in open court on March 1, 1990, during a motion hearing prior to the penalty phase trial that commenced on March 7, 1990. The second letter was mailed to counsel on March 14, 1990, over three weeks before sentencing by the judge on April 9, 1990. Yet, defense counsel never raised any objection to the judge's review

> of these materials during the motion hearing, the penalty trial, or the sentencing proceeding. In fact, the record of the motion hearing reveals several instances where the judge discusses his review of depositions without comment or objection by defense counsel. Thus, contrary to Vining's assertion on appeal, the judge's consideration of this material was not revealed for the first time in the sentencing order.

As this Court's opinion reflects the direct appeal record shows that on March 1, 1990 Judge Baker wrote a letter to the prosecutor and trial defense attorney Cashman informing them that as he had told them he would do in an earlier phone call, he called Dr. Heggert and confirmed that the written autopsy report is the only written report on the victim Georgia Caruso (there were no toxicology reports, no tissue examinations). In another letter on March 14, 1990, Judge Baker wrote that during and since the trial he had read all the depositions and had attempted to obtain documents not in the record such as Dr. Heggert's report and the probate records of the estate of Caruso, and that since he lived in downtown Winter Park he was familiar with that area where events occurred in the case and that he expected to drive out to the Jamestown Shopping Center. Judge Baker related that it had been his preference, as a lawyer and a judge, to go to the places that he hears testified about, that he did not want to overlook anything that might make the

case more clear and his decision more appropriate (Vol. XIX, R2575, 2622; Defense Exhibits 7 and 8).

Additionally, during the penalty phase testimony on March 7, 1990, defense counsel Cashman objected that the use of Detective Ferguson would involve nonstatutory aggravation regarding the details of a Georgia offense; the court noted that it had read Ferguson's deposition (R1959-60, 1986-87, 1990). Appellant interposed no complaint or objection on Gardner grounds.[2]

At the evidentiary hearing Judge Baker testified that he did not conduct any independent investigation (PCR Vol. VI, R295). He recalled that he had read a book Trance on Trial, a book about

hypnosis, its admissibility in the courtroom (R298) before ruling on the motion to suppress in this case (R299). The witness explained that under F.S. 90.204(2) a court may use any

[2]Additionally, at trial when the defense renewed its motion to suppress the testimony of Donner on his identification of Vining, the court commented that it had read about hypnosis, that Judge Baker wanted the record to reflect that what the witnesses were talking about was a state of concentration which is not mind-altering but a state of relaxation - that he had an experience with it and was familiar with it - and that the witnesses had not described the susceptibility to suggestion that the Stokes case described and that he still didn't believe the testimony of the witnesses should be excluded (R1138-1141). Again, the defense submitted no objection or request for relief at that time.

source of pertinent and reliable information whether or not furnished by a party, except as to F.S. 90.403. He tried to be scrupulous about telling everybody what he looked at at the trial. He did not talk to Mr. Jordan prior to ruling on the motion to suppress; if he had he would have been obligated to say so (R302-303)[3].

As to the Defense Exhibit 8 the sentencing order refers to probate records, Judge Baker stated that he didn't ask for it but had asked a clerk of probate clerk/classmate if there were a probate file and later he received an envelope of estate file and thought he should disclose that he had it and filed it in the court file (R310). The witness further explained that he usually reads the depositions in a case of this seriousness to be sure he didn't overlook anything. He reads the court file to get a flavor of what the case is about. There was no jury view of the crime scene, but that he walked by the jewelry store near his house to get a general idea of what the witnesses were talking about. Judge Baker felt that he scrupulously complied with his obligations and if anything came in front of him that might have a bearing on this case he would have said so (R310-317). Judge Baker added that his letters to the prosecutor and

[3]In another case that went to the Supreme Court he was scrupulous to identify an expert witness in a case (R303).

defense counsel (Defense Exhibits 7 and 8) gave them an opportunity to make any comments or objections or reactions they wanted to (R323). His reason for writing for the medical examiner report was to get all information available to perfect the court file. Judge Baker did not depend on the report on anything he did in the case thereafter (R324). His purpose in reading the deposition, Dr. Heggert's report and probate records was to have as much material for review of the case by the appellate court within reason without exceeding the role of the judge. He obtained them and put them in the file for whatever they were worth. He didn't find anything in them that had any bearing on the case (R325-326). They did not have any information that was different than he already knew. Judge Baker notified the parties of his familiarity with the particular area where the jewelry store was located and notified them before sentencing about driving to the Jamestown Shopping Center to see the stairway and how things were laid out. The visits only made the testimony more understandable to him and he didn't recall relying on anything in the depositions that was not in the testimony (R327)[4]. There is no testimonial support for the baseless assertion that the court thought that the

[4]Both Judge Baker and trial attorney Cashman agreed jury did not see autopsy report, deposition or the probate file (R306, 310-11, 313, 325; 349-50, 356, 425).

state's case was suspect or in need of additional investigation or assistance.

Trial co-counsel Kelly Sims significantly stated that his feelings at the time and even now were that he didn't know that Judge Baker was capable of giving a death sentence; and that one of the reasons they didn't object was it seemed like they were guilt phase issues (not related to aggravating or mitigating circumstances) the judge was dealing with (R233-234). On cross-examination he reiterated that Judge Baker was desirable from the defense viewpoint, that he felt positive about it, and the defense had a team which included Lou Lorincz that discussed those issues (R272). Defense Exhibits 7 and 8 - the letters from Judge Baker - he felt dealt with guilt phase and couldn't think of anything that went to penalty phase (R275-276).

Trial defense counsel Cashman acknowledged that the judge's letters were dated March 1 and March 14 (the penalty phase occurred on March 7 - R1931-2111) and the latter was after the penalty phase but prior to sentencing. She stated that she didn't recall what she felt when she got the letter, has no independent recollection of getting it in the mail although she has seen it in the file (PCR Vol. VI, R367). She admitted that the issue had come up earlier in the same case whether or not to recuse Judge Baker and they regularly staffed cases with Lou

Lorincz (R368-369). Cashman conceded that while she maintained there was a Gardner violation in the judge's viewing extra-record matters, she did not interpose any Gardner complaint when Judge Baker mentioned having read the Ferguson deposition at penalty phase. At this point she was before a judge she trusted and respected (PCR Vol. VI, R416-419). She knew about his reading the Ferguson deposition (R421) and at no time after sentencing did she move for a new sentencing or for recusal of Judge Baker (R424-425).

As Judge Baker emphasized in his testimony, he provided notice to the parties in his March 1 and March 14 letters, and in his sentencing order he recited having read the depositions filed with the clerk, reviewed the medical examiner's report and obtained the estate file of Georgia Caruso (R2630). Judge Baker did not find anything that had any bearing on the case and he put the material in the file for whatever value they might have to reviewing courts (PCR Vol. VI, R325-27).

Appellant boldly asserts that a Gardner violation cannot be harmless, with no supporting authority cited. Appellee's research has uncovered Consalvo v. State, 697 So.2d 805 (Fla. 1996) where this Court explained and distinguished Porter v. State, 400 So.2d 5 (Fla. 1981)(the trial court's critical findings came from the acquaintance's deposition testimony which

differed from that presented at trial):

> "Because the trial judge sentenced Porter to death, relying in part on information not presented in open court and not proved at trial, we found the trial judge deprived Porter of due process of law. Id."

(697 So.2d at 817)

But in Consalvo, the trial court's sentencing order quoted two statements from depositions which were never presented in open court and referred to the testimony of a penalty phase witness Gail Russell but she apparently did not testify to all the matters referred to by the court but the substance of her statement was substantiated by several trial witnesses. Thus,

> "...the trial court did not actually rely on any information that was not otherwise proven during trial. That was not the case in Porter. We find the violation was harmless beyond a reasonable doubt and that the error complained of did not contribute to the sentence of death."

(Id. at 818)

See also Asay v. State, ___ So.2d ___, 25 Fla. L. Weekly S959 (Fla. 2000) denying judicial bias claim first on the basis that the claims were procedurally barred since the grounds upon which the claims were based were known at the time of direct appeal citing Rivera v. State, 717 So.2d 477, 481, n. 3 (Fla. 1998); Stano v. State, 520 So.2d 278, 281 (Fla. 1988) and Ziegler v. State, 452 So.2d 537, 539 (Fla. 1984) and distinguishing Porter

v. State, 723 So.2d 191 (Fla. 1998) where the evidence of actual bias was unknown at the time of the original trial and direct appeal and on the additional basis that the challenged remarks were legally insufficient. Similarly in the case at bar, Judge Baker's comments at trial on the proffer of the Donner testimony and in the two letters of March 1990 (Defense Exhibits 7 and 8) in which he announced - as he previously had told the parties he would do - that he had seen the autopsy report and his notice to the parties that he had read all the depositions, Dr. Hegert's report and the Caruso probate records and his informing them of his plan to visit the Jamestown Shopping Center before sentencing all demonstrate that the judge gave notice to the parties and the complete and total lack of objection or stated concern by the defense team (as this Court noted on the last appeal) demonstrates the total lack of merit to this claim.

In summary, appellant's renewed Gardner claim must fail, first since as this Court previously rejected the claim by finding that the review of depositions, medical examiner's report and probate records had been disclosed prior to the sentencing order and secondly as the testimony of Judge Baker makes clear he informed the parties as to extra record materials considered, simply collected them to have as much information available as appropriate (and for the reviewing courts) and most

significantly there was no information that he had not heard at the trial. As in Consalvo, relief must be denied. Appellant's failure to identify prejudicial error requires affirmance[5].

B. The Ineffective Assistance of Counsel Prong

With respect to the contention that trial counsel were ineffective in failing to adequately cross-examine state witnesses Ward, Zaffis and Donner in their identification of appellant Vining as the man who accompanied victim Georgia Caruso to the gem appraisal store, the record reflects that counsel performed as capable advocates. Zaffis was cross-examined on whether she was "pressed" for time as she had indicated in a police interview (R1093), admitted that there was not an actual plotting of the diamonds done (R1095), and whether she read newspapers following the Caruso disappearance (R1096).

Witness Kevin Donner was cross-examined as to whether he had

[5]The evidence at both guilt and penalty phases was overwhelming. Eyewitnesses had identified appellant being with the victim shortly before her disappearance, he sold a diamond consigned to her afterwards, the car he was driving was burned and telephone records connected Vining's residence to the site of the burning and to a diamond dealer whom Vining similarly attempted to meet. Public Defender Durocher had characterized the state's case as overwhelming (State Exhibit 13). Penalty phase witness Gail Flemming's testimony was "very compelling" according to Judge Baker (PCR Vol. VI, R331) and "devastating" according to Cashman (PCR Vol. VI, R422) and the jury recommendation of death was by a decisive eleven to one vote, with no suggestion the jury was exposed to improper material.

described the man as having whitening hair and heavy eyebrows in his deposition, that it was kind of a busy day, that he was in an adjoining room and spent most of the time appraising the stones (R1157-58). Joanne Ward was cross-examined that Detectives Nazurchuk and Gay visited her about eight times and showed her several sets of photos (R1045); the witness did not recall whether she might have said to Detective Nazurchuk that she wasn't certain, but that she said she was almost positive and "that would be the same as not certain, as far as I'm concerned" (R1045-1046). She was examined on her description of the car as a Fleetwood Cadillac (R1047-48) and her recollection of seeing a CB antenna (R1048). The witness admitted that after seeing the man with Georgia Caruso several months passed before being shown any photographs and that the deposition revealed she saw more than one photo line-up (R1049-50).

While trial attorney Cashman suggested at the hearing below that she had an unclear, vague recollection of being constrained by the judge, not to use the word hypnosis or to refer to it (PCR Vol. VI, R348-349), she did not point to any specific point in the record where the court allegedly "constrained" her and even now Vining points to no such prohibition. Cashman's recollection was similarly erroneous in mentioning that all her motions, to prohibit in-court identification of witnesses, to

prohibit state from calling hypnotist and tainted witnesses, etc. were denied (PCR Vol. VI, R347-349). In fact the trial court granted the defense motion to prohibit the state from calling the hypnotist (except for rebuttal)(R1785). The record of the trial reveals no proscription by the court directing counsel what words to use or not use; rather, the trial court merely made a ruling on a proposed defense motion which was adverse to defense counsel and which was subsequently affirmed on appeal. Trial counsel adequately acted as an advocate in the cross-examination of witnesses Ward, Zaffis and Donner, and mere second-guessing years later as to questions that might have been asked do not yield a finding of a Sixth Amendment deficiency[6].

Appellant is not entitled to relief for his reliance on the testimony of Chandler Muller. Both this Court and the federal

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[6]Even if trial counsel had asked additional questions, as the testimony of Ward and Zaffis at the motion to suppress clearly shows, it would have made no difference. According to Ward, she relaxed, received no suggestions from the interviewer, and gave no different information than previously (R1745-49). She didn't think she was hypnotized. She used the word hypnotized in her deposition because "whenever you think of relaxation, you think of hypnotism" (R1758). Zaffis testified she was not placed under hypnosis, the interviewer did not suggest any facts, and she did not provide different information afterwards (R1765, 1767-68). She told Watson what she remembered after he told her to relax (R1772). Similarly, on Donner's proffer before testifying, he stated he went through a relaxation exercise for recall, was 100% aware of what was going on (R1117-18); it didn't change his memory whatsoever and he didn't recall anything different about features or anything given in earlier statements (R1132).

courts have repeatedly stressed that an attorney's own admission that he or she is ineffective is of little persuasion in these proceedings. See, e.g. Routly v. State, 590 So.2d 397, 401, n. 4 (Fla. 1991); Kelley v. State, 569 So.2d 754, 761 (Fla. 1990); Breedlove v. State, 692 So.2d 874, 877, n. 3 (Fla. 1997); Atkins v. Singletary, 965 F.2d 952, 960 (11th Cir. 1992); Harris v. Dugger, 874 F.2d 756, 761, n. 4 (11th Cir. 1989); Provenzano v. Singletary, 148 F.3d 1327, 1331-32 (11th Cir. 1998)("Accordingly, it would not matter if a petitioner could assemble affidavits from a dozen attorneys swearing that the strategy used at his trial was unreasonable. The question is not one to be decided by plebiscite, by affidavits, by deposition, or by live testimony. It is a question of law to be decided by the state courts, by the district court, and by this Court, each in its own turn." Id. at 1332)

It would seem that general opinions by another attorney unfamiliar with the case or defense strategy should merit even less weight. To the extent that Muller's testimony is offered for the proposition that trial counsel should always have available or use an expert, this Court has rejected such a claim. Atkins v. Dugger, 541 So.2d 1165, 1166 (Fla. 1989)("One tactic available to counsel is to present expert testimony. However, it is by no means the only tactic, nor is it

required.")

In any event Muller noted that it appeared Judge Baker assiduously wanted to put on the record things he felt were important on issues (PCR Vol. VI, R470). Muller conceded on cross-examination he had not gone through the full attorney file or talked to the people involved (PCR Vol. VI, R475); he hadn't seen the State Exhibit 16 dealing with discussions why it might not be desirable to remove this judge. He admitted that a defense lawyer may not want to recuse a judge (PCR Vol. VI, R476, 478).

Vining also contends that counsel rendered ineffective assistance by failing to object to Judge Baker's consideration of extra-record material. Under Strickland v. Washington, 466 U.S. 668 (1984) a defendant must satisfy two conditions to prevail. Vining must establish the acts or omissions of counsel which fall below reasonable professional judgment and he must show that but for counsel's unprofessional errors there is a reasonable probability the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Vining has failed in his burden.

Trial counsel Kelly Sims indicated that his feelings then and now were that he didn't know whether Judge Baker was ever

capable of giving a death sentence and that it seemed like it was guilt phase issues that the judge was dealing with when Sims found out about it and one of the reasons they didn't object was it didn't relate to aggravating or mitigating circumstances (PCR Vol. V, R233-234). He repeated that Judge Baker was desirable, he felt positive about him, and there was a team including Lou Lorincz that discussed issues (PCR 272). Trial Counsel Cashman acknowledged Defense Exhibits 7 and 8 (the letters from Judge Baker on March 1 and March 14) and opined that penalty phase had been completed, all that remained was sentencing and suggested it was too late for a contemporaneous objection (PCR Vol. VI, R352-353).

On cross, Cashman claimed that she did not recall what she felt when she got the letter, had no independent recollection of getting it in the mail but had seen it in the file. She acknowledged that an issue had come up earlier in the case of whether or not to recuse Judge Baker and they regularly staffed cases with Lou Lorincz (PCR 367-369). Her assertion that she would have urged a Gardner violation had she known about it is belied by the fact that she didn't urge a Gardner claim at the penalty phase when it was clear on the discussion of the admissibility of Ferguson's testimony that Judge Baker had read his pre-trial deposition (R1986-1990; PCR 411-418). Cashman

admitted that by the time of sentencing she had Judge Baker's March 14 letter relating that he had read all the depositions and the medical examiner's report (PCR 424-425). That letter also recited the court's receipt of the Caruso probate records and the court's announced intention to drive to the Jamestown Shopping Center (Vol. XIX, R2622; Defense Exhibit 7 or 8). Cashman did not at any time move for recusal or a new sentencing and conceded the jury did not have access to the autopsy report or probate file (PCR 424-425). There is no reason to believe the jury reviewed the autopsy report or had access to the probate file (PCR 425).

Additionally, the Public Defender's file included State Exhibit 16, a note from Lou Lorincz, the Chief Assistant Public Defender to trial defense attorney Cashman and the issue of whether the defense should ask for Judge Baker to be recused on another issue. It is clear from the substance of the note that the defense team wanted to keep Judge Baker on the case[7].

There was no deficient performance by counsel in failing to object to Judge Baker's perusal of items such as depositions, autopsy report, probate file or to the court's familiarity with hypnosis (see R1138-1141) and even if there were the trial court

[7]As stated previously, even defense witness Muller acknowledged that it is sometimes desirable from a defense standpoint not to want to recuse a Judge (PCR Vol. VI, R478).

correctly determined that the prejudice prong of Strickland remained unsatisfied (PCR Vol. XVII, R2496). In the guilt phase there was overwhelming evidence which included three eyewitnesses who placed appellant with victim Caruso immediately prior to her disappearance following the gem appraisal, appellant's prompt selling of a diamond consigned to the victim, the burning of the Cadillac and the telephonic records connected to Vining's residence from the site of the burned car and the similar attempt to make a diamond deal with Joseph Taylor.[8] At penalty phase, all agreed that the testimony of Gail Flemming was devastating and on appeal this Court - after excluding the CCP finding - found that the record supported the trial court's findings of homicide committed during a robbery, committed by a person under sentence of imprisonment, and prior conviction of a felony involving the use of violence; this Court also approved the court's finding and treatment of proffered mitigation. Vining v. State, 637 So.2d at 928. The jury was not exposed to any improper material and the trial judge's sentencing order was based on record information. Any possible error was harmless. Consalvo, supra.

The lower court appropriately concluded that relief could

[8]See also State Exhibit 13 in which the Public Defender stated in a letter to Vining that the state's evidence was overwhelming.

be denied simply by reference to the failure to satisfy the prejudice prong and thus it was unnecessary even to address the deficiency prong. See Glock v. Moore, 195 F.3d 625 (11th Cir. 2000); Strickland, supra; Medina, supra; Johnson, supra; Robinson, supra.

CLAIM III

WHETHER APPELLANT WAS DENIED A FULL AND FAIR HEARING BY THE LOWER COURT'S FAILURE TO GRANT A HEARING ON INEFFECTIVE ASSISTANCE OF COUNSEL AT GUILT PHASE AND THE NEWLY-DISCOVERED EVIDENCE CLAIM.

C. The Merola Diamond

The lower court disposed of appellant's complaint regarding the Merola diamond in Claim V, below at PCR Vol. 17, R2484-86:

> "Defendant alleges newly discovered evidence of two "potential" expert witnesses' opinions that the subject diamond could not be positively identified. Defendant also raises an ineffective assistance of counsel argument as to this claim as well. Newly discovered evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence." *Jones v. State*, 591 So.2d 911, 916 (Fla. 1991)(quoting *Hallman v. State*, 371 So.2d 482, 485 (Fla. 1979)). *See also Gunsby v. State*, 670 So.2d 920 (Fla. 1996)(newly discovered evidence standard of *Jones* requires that the evidence be of such nature that it would probably produce an acquittal on retrial). These potential expert witnesses' opinions are not considered newly discovered evidence under the *Jones* standard because Defendant's trial counsel knew of these witnesses at the time Defendant was originally tried.
>
> Next, Defendant basically raises an ineffective assistance of counsel argument regarding questioning of the identification of the diamond and of the "chain of custody". Defendant has failed to show that there was both a deficient performance and a

> reasonable probability of a different result as required by *Strickland v. Washington*, 466 U.S. 668 (1984). In addition to the testimony of John Slade (R. 1199), Elizabeth Slade-Piantieri (R. 1214), and Kevin Dudley (R. 1262-63) positively identifying the diamond in question, the record revealed that the jury was also exposed to testimony of Mark Ryan (R. 1220), Gregory Jones (R. 1230-31), and James Blanck (R. 1241-43), that placed doubt as to identification of the recovered diamond as the diamond the victim had in her possession. Defense counsel aptly cross-examined John Slade (R. 1200-03), Elizabeth Slade-Piantieri (R. 1215-16), Mark Ryan (R. 1220-21), Gregory Jones (R. 1230-34), James Blanck (R. 1241-44), and Kevin Dudley (R. 1263-64) regarding their jewelry experience, the extensive number of diamonds they inspected in the course of their work, the lack of a plotting and appraisal of the diamond in question, and their ability to positively identify the recovered diamond as the diamond involved in the subject crime. The record clearly shows that defense counsel's cross-examination was aimed at questioning the witnesses' identification of the recovered diamond and the "chain of custody" the State was attempting to establish. These witnesses' conflicting testimony was properly left to the jury, whose job it was to evaluate the testimony and render a verdict.
>
> Furthermore, even if Defendant had brought in an independent diamond expert to examine the diamond, he has failed to show that there is a reasonable probability that such expert testimony would have changed the outcome of the verdict in this case. Accordingly, this claim must be summarily denied."

In Vining's Amended Petition - after noting that post-conviction counsel had been denied access to the diamond - Vining alleged

that trial counsel was deficient in failing to request access to the diamond, that trial counsel spoke to potential expert witnesses who could have been used at trial, and that trial counsel was deficient in failing to question the chain of custody by state witnesses (PCR Vol. XIII, R1642-45). At the Huff hearing on June 20, 1997, post-conviction counsel explained that the diamond itself was not new evidence (PCR Vol. I, R48) and that they wanted an expert to look at that diamond and say that the expert defense counsel hired was wrong (that the diamond could be identified two years later), "but we won't know that until we see the diamond" (PCR Vol. I, R50). After the court entered its order limiting the issues for evidentiary hearing post-conviction counsel filed a motion for rehearing, urging that trial counsel was ineffective "by failing to retain independent experts to examine the diamond in evidence", that trial counsel had contacted an expert who could testify that a diamond could not be identified two years later unless appraised with a plotting of the diamond had been done and used for comparison and that Vining can present an expert to testify that the descriptions of the two diamonds in the trial testimony appear to describe two different diamonds and attached as an Exhibit a Declaration of Joseph Firmani (PCR Vol. XV, R1978-79).

See Firmani statement attached as Appellee Exhibit I.[9]

The lower court did not abuse its discretion either in failing to restrict Vining access to and examination of the diamond or in denying the request for an evidentiary hearing. Simply put, the allegations in the Amended Petition, and even considering the Firmani Declaration Exhibit, are insufficient to qualify either as newly-discovered evidence as Judge Bronson's order ably states or to establish that counsel's performance fell below the standards demanded in Strickland v. Washington, 466 U.S. 668 (1984). To the extent that Vining may still be complaining about counsel's performance in the treatment of the witnesses who testified at trial - as the lower court articulated - the record shows able cross-examination and the state satisfactorily showed chain of custody. To the extent

[9]The Firmani declaration refers to testimony describing two diamonds. In Description A the reference is to "heavy make ... distinctive, because it was a very thick stone ... the girdle was extremely, I mean extremely, thick." Appellee Exhibit I. While Firmani does not identify the person, he is presumably referring to the deposition of Kevin Donner (R2897; also State Exhibit 11 at evidentiary hearing). Firmani then refers to Description B wherein "this gentleman" described the most unusual thing of the diamond was the green tone and calls it out of round with an I-1 clarity. Witness John Slade seems to match "Description B" (R1189-1202). The Firmani criticism seems to be that each witness is focusing on a different characteristic. But both the Donner deposition and the Slade trial testimony agree that the diamond was poorly cut and Donner admitted only briefly looking at - and not appraising - this diamond (R2897; R1155).

that Vining is urging - as he did below in the Huff hearing - that counsel was deficient because the experts they did consult with were wrong and that counsel should have found an expert to come up with a different opinion, the Sixth Amendment is not violated merely because collateral counsel is able to find someone with a differing opinion. See Stano v. State, 520 So.2d 278, 281 (Fla. 1988); Provenzano v. Dugger, 561 So.2d 541, 546 (Fla. 1990)("The mere fact that Provenzano has now secured an expert who might have offered more favorable testimony is an insufficient basis for relief").

Vining argues that the lower court "ignored the big picture" because if Vining sold a different diamond than the recovered Merola diamond, the motive for the Caruso homicide disappears. Appellee would submit that it does not detract from the identity of witnesses Zaffis, Donner and Ward that Vining was "George Williams" and the 6.03 carat pear-shaped diamond and 3.5 carat round diamond appraised at a total of $60,000 were never seen again when Caruso disappeared while accompanied by Vining. It is something of a misnomer to call the Merola diamond a motive diamond. There was sufficient motive, irrespective of the Merola diamond; nor does it change the other circumstantial evidence (the torching of Vining's black Cadillac, the phone calls to Vining's residence, the calls to diamond dealer Joseph

Taylor, etc.). That Vining only received some six hundred dollars when he sold it to Gregory Daniel Jones means very little since the sale occurred only a day after he had met with Caruso for the appraisal at Winter Park Gem Lab and he obviously was not in a good position to bargain for a better price.

The lower court correctly denied relief on this claim without an evidentiary hearing and the failure to provide Exhibit 18 did not constitute an abuse of discretion in light of the pleadings presented.[10]

B. The Ineffective Assistance of Counsel at Guilt Phase Claim

In Claim IV of the post-conviction motion, the lower court explained the denial of relief at PCR Vol. XVII, R2483-84:

> "Claim IV
>
> Defendant essentially asserts that the State failed to disclose to the jury that three critical State witnesses, Joanne Ward, Ellen Zaffis, and Kevin Donner, had been hypnotized by the Orange County Sheriff's Office prior to identifying Defendant. Defendant alleges that such hypnotically-induced evidence violated *Stokes v. State*, 548 So.2d 188 (Fla. 1989).

[10]Finally, it is difficult to imagine how, since the diamond which apparently still has not been examined by Vining's new expert and thus precludes Firmani from offering anything other than a preliminary opinion, it can now be argued by Vining's most recent counsel that it cannot be the same diamond Vining possessed at the time of the crime.

> This issue of alleged hypnotically-refreshed testimony is improperly raised in this rule 3.850 motion because it was previously raised on direct appeal and found to be without merit. *Vining v. State*, 637 So.2d 921, 926 (Fla.), *cert. denied*, 513 U.S. 1022 (1994). *See also Medina v. State*, 573 So.2d 293 (Fla. 1990); *Torres-Arboleda v. Dugger*, 636 So.2d 1321, 1323 (Fla. 1994)("[p]roceedings under rule 3.850 are not to be used as a second appeal; nor is it appropriate to use a different argument to relitigate the same issue."). Thus, this issue is procedurally barred as law of the case. Moreover, Defendant is not allowed to bypass the procedural bar by simply couching the claim in terms of ineffective assistance of counsel. *See Medina v. State*, 573 So.2d 293, 295 (Fla. 1990). Accordingly, this claim is without merit."

See also Huff hearing, PCR Vol. I, R33-41.

In this appeal Vining contends that trial counsel failed to challenge the state's case with discrepancies in the witnesses' testimony and he refers to the testimony of three eyewitnesses at trial - Zaffis, Donner and Ward. To the extent that appellant is again attempting to litigate the rejected claim on direct appeal concerning the alleged hypnotically-aided testimony of Zaffis, Donner and Ward, see Vining v. State, 637 So.2d 921, 926 (Fla. 1994), the case law is legion that the post-conviction vehicle is not available for such a tactic. This is not a second appeal and claims that were or could have been litigated may not be relitigated while couched in the

language of ineffective counsel.

This Court determined there was "no merit to this issue" and explained that:

> During the hearing on this motion, a police officer who is a forensic hypnotist testified that witnesses Ward, Zaffis, and Donner had not been hypnotized, but had only been asked to relax and recall details from the day that Caruso disappeared. (FN8). The officer further testified that he asked only open-ended questions and suggested no details to the three witnesses. Both Ward and Zaffis testified that they had not been hypnotized and were fully conscious and aware of their surrounding throughout the interview. Both witnesses also testified that the relax and recall session did not produce any information that differed from their statements to the Winter Park Police Department and the Orange County Sheriff's Department prior to the session. Based upon this testimony, the judge ruled that the witnesses had not been hypnotized and denied Vining's motion to suppress the witnesses' identification. The record in this case supports the judge's conclusion. See *Stokes v. State*, 548 So.2d 188, 190 (Fla. 1989) (defining hypnosis as "an altered state of awareness or perception" and finding that during hypnosis subject is placed in an artificially induced state of sleep or trance).
>
> (Text at 926)

Since there was no merit to the contention that the witnesses were hypnotized, it follows that appellant cannot satisfy either the deficiency prong or the resulting prejudice prong of Strickland to show that counsel fell below Sixth Amendment

standards.

As to the cross-examination of Joanne Ward, she was cross-examined on her identification:

> "Q. Do you recall a notation saying that you didn't feel certain?
> A. No, I don't. Well, no, I don't recall saying that.
> Q. Do you think you might have said that to Detective Nazarchuk, that you weren't certain?
> A. I don't know if I said that or not. I just said was almost positive. That would be the same as not certain, as far as I'm concerned."
>
> (emphasis supplied)(R1045-46)

Ward stated on cross that she had seen several arrays of photos by the police (R1045). Defense counsel also cross-examined Ward utilizing her prior deposition (R1050) and questioned her on whether she was shown three or more photo line-ups and that the last photo line-up was more than a month after November of 1987 (R1049-51). Appellant seems to criticize trial counsel for not impeaching Ward who did not recall at trial having been shown a photo of someone named George Williams and saying she was 85% certain it was him (R1046) with a deposition of Detective England on that point (R3018), but even England admitted he was

not there at the time (R3018).[11] While current counsel may have adopted as a preference a different manner of cross-examination matters not. See Spaziano v. Singletary, 36 F.3d 1028, 1041 (11th Cir. 1994)("There is nothing in the record to indicate that Spaziano's present counsel are either more experienced or wiser than his trial counsel, but even if they were, the fact that they would have pursued a different strategy is not enough...[citation omitted]. The question is not what the best lawyers would have done, but instead is only whether a competent attorney reasonably could have acted as this one did given the same circumstances"); Mills v. State, 603 So.2d 482, 485 (Fla. 1992).[12]

Similarly, the trial record reflects that counsel acted as capable advocates in the cross-examination of witnesses Zaffis and Donner (R1091-1097, 1098-99; R1157-59), asking the former witness if she were pressed for time when she saw Georgia Caruso

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[11]Trial counsel Sims admitted that it would only be useful to impeach a witness with what a witness told a deputy "if the prosecutor allowed it to be useful" (PCR Vol. V, R239) and to impeach with a deputy's note would probably be objectionable (PCR Vol. V, R239).

[12]Appellee additionally notes that to pursue the course advanced by current second-guessing counsel would have given the prosecutor the option of calling as a rebuttal witness police officer Jimmie Watson to repeat his pre-trial motion to suppress testimony (R1727-41) and thereby lose the victory earlier obtained that the defense motion to exclude Watson was granted except for usage in rebuttal. (R1785)

on the day in question and asking for an assessment of the man accompanying Caruso and whether she followed the media activity in the case, and asking the latter witness whether he only spent about five minutes conversing with the man, asking about the color of his hair and whether he had heavy eyebrows and whether he was shown a photo lineup. The witness Donner on direct examination had acknowledged that he spent most of the time in the back room doing the appraisal (R1155). That current counsel would opt for a different approach does not render trial counsel’s performance inadequate.

CLAIM IV

WHETHER TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE AT PENALTY PHASE.

The lower court concluded that no evidentiary hearing was needed on this point, except with respect to the claim about the trial judge's consideration of extra-judicial materials (PCR Vol. XVII, R2482). Vining argues that there should have been an evidentiary hearing on the claim that counsel failed to investigate and present mitigating evidence about his mental deficits and brain damage, that he had good moral character, that his mother was an alcoholic, that he was a good student and son, that he stuttered as a child and volunteered for his community, saved his wife's life and succumbed to alcoholism. On this score, the lower court ruled at Claim IX, PCR Vol. XVII, R2497:

> Defendant next asserts that had the true picture of his turbulent life and other evidence demonstrating his good moral character and background been presented to the jury, the outcome of the penalty phase would have been different. Defendant's claim is refuted by the record. At sentencing, defense counsel took extensive testimony from six of Defendant's relatives regarding Defendant's alcoholism and second marriage (R. 2010-14, Jane Crawford, Defendant's ex-wife), his mother's alcoholism, his childhood, his stuttering problem, his college education, his voluntary work in the community (R. 2015-31, Edward Vining, Jr., Defendant's brother),

> the fact that Defendant was a family person and a good influence on others (R. 2032-36, Charlie Costar, Jr., Defendant's family friend; R. 2037-39, Trez Vining, Defendant's brother), the fact that Defendant was a good father (R. 2040-42, Travis Vining, Defendant's son), and the fact that he saved his first wife's life (R. 2043-44), Roxanne Vining, Defendant's daughter). Also, Defendant's claim that the trial court improperly rejected such mitigating evidence is procedurally barred because it was raised and rejected on direct appeal. *See Vining*, 637 So. 2d at 928. Hence, this claim is without merit.

Courts have consistently determined that trial counsel does not render ineffective assistance by failing to call witnesses to provide cumulative testimony to that which has been provided. See, e.g. Woods v. State, 531 So.2d 79, 82 (Fla. 1988)("More is not necessarily better"); Maxwell v. State, 490 So.2d 927, 932 (Fla. 1986)("The fact that a more thorough and detailed presentation could have been made does not establish counsel's performance as deficient"); Foster v. Dugger, 823 F.2d 402, 406 (11th Cir. 1987)(the mere fact that other witnesses might have been available or other testimony might have been elicited is not a sufficient ground to prove ineffectiveness); Stewart v. Dugger, 877 F.2d 851 (11th Cir. 1989)(proffer of additional character witnesses would not have had significant impact on the trial as it was merely cumulative); Kennedy v. Dugger, 933 F.3d 905 (11th Cir. 1991)(failure to present cumulative witnesses did

not amount to ineffectiveness); Waters v. Thomas, 46 F.3d 1506, 1511 (11th Cir. 1995)(en banc)("we have never held that counsel must present all available mitigating circumstance evidence in general. . ."); Glock v. Moore, 195 F.3d 625 (11th Cir. 2000)(failure to present repetitive and cumulative witnesses at penalty phase not ineffective); P.A. Brown v. State, 755 So.2d 616, 637 (Fla. 2000)(failure to present additional lay witnesses to describe childhood abuse and low intelligence was not prejudicial and would have been cumulative to evidence presented); Valle v. State, 705 So.2d 1331, 1334 (Fla. 1997).

Appellant adds, citing post-conviction counsel's Motion for Rehearing and Judge Bronson's order of denial (PCR Vol. XV, R1977-81), that an evidentiary hearing was required on the claim that trial counsel was ineffective in penalty phase for allegedly having failed to investigate and present mental health mitigating evidence. The Motion for Rehearing alludes to a report of Dr. Karen Froming, a copy of which appellee attaches herewith as Exhibit II. A review of that document shows a mere repetition of the story presented at penalty phase about the problem with alcoholism in the Vining family, along with the opinion that appellant "likely" has brain damage from alcohol consumption. Appellee notes that at the Huff hearing when the opportunity was available to urge which issues required an

evidentiary hearing, Vining's counsel failed to point to this matter as one of significance requiring a hearing (PCR Vol. I, R66-75). See Ragsdale v. State, 720 So.2d 203, 207-208 (Fla. 1998)(approving summary denial where defendant fails to allege specific or sufficient facts as to what would have been introduced or how the outcome would have been different if counsel had acted otherwise). In any event, it matters not since the law does not require trial counsel to utilize an expert. See Atkins v. Dugger, 541 So.2d 1165, 1166 (Fla. 1989).

Summary denial of this claim was proper as the facts were either insufficiently pled or refuted by the record. See Ragsdale v. State, 720 So.2d 203, 207 (Fla. 1998); Occhicone v. State, ___ So.2d ___, 25 Fla. L. Weekly S529, 531 (Fla. 2000); Lecroy v. Dugger, 727 So.2d 236 (Fla. 1998).

Further, there is no reasonable probability of a different outcome anyway given the presence of three strong valid aggravators (murder committed during a robbery, committed by a person under sentence of imprisonment, and prior conviction of a felony involving the use of violence to the person), the nature of the crime and the paucity of mitigation presented at trial and proffered now. See Buenoano v. Dugger, 559 So.2d 1116 (Fla. 1990); Mendyk v. State, 592 So.2d 1076, 1080 (Fla. 1992).

To the extent that appellant may be reasserting that counsel

was ineffective in the treatment at penalty phase of witnesses Det. Ferguson and Gail Flemming, the court below adequately disposed of that:

> As to Defendant's claim regarding defense counsel's inadequate preparation and investigation regarding the penalty phase testimony of Det. Ferguson and Gail Flemming, Defendant failed to demonstrate how the failure to elicit any further information regarding Defendant's criminal episode in Georgia other than that which was already before the jury prejudicially affected the outcome of his trial. There does not appear to be any reasonable probability that cross-examination of Ms. Flemming or further cross-examination of Det. Ferguson by defense counsel would have altered or affected the outcome of the trial. In fact, cross-examining Ms. Flemming and not limiting Det. Ferguson's testimony probably would have opened the door to extremely damaging State rebuttal, such as further details of Defendant's crimes in Georgia. Thus, this claim is without merit (PCR Vol. XVII, R. 2498).

Appellant further seeks to repeat the argument advanced in Claim II that the trial court abandoned its judicial responsibility to function as a neutral arbiter, and that counsel failed to ensure Vining's presence at sidebar conferences which he presents in Claim XIII, infra. Appellee too will rely on its Answer in those issues, rather than repeat them here.

CLAIM V

FAILURE TO OBJECT TO CONSTITUTIONAL ERROR.

B. Automatic Aggravator

Appellant contends that trial counsel failed to object, and was thus ineffective, to the instruction on the commission of the crime of robbery aggravator which he deems to be an improper automatic aggravator. The lower court properly denied relief at Claim XVII, below (Vol. XVII, R2505)[13] on the grounds that it was procedurally barred for the failure to urge on direct appeal[14] and also that it was meritless since this Court has rejected it on many times. See Jones v. State, 648 So.2d 669 (Fla. 1994); see also Blanco v. State, 706 So.2d 7, 11 (Fla. 1998)(J. Wells, concurring).

Obviously, counsel cannot be deemed to be ineffective for failing to make a meritless argument. Melendez v. State, 612 So.2d 1366, 1369 (Fla. 1992).

B. and C. Vague Instruction on CCP Factor and Vague Statute

The lower court addressed this point below at Claim VIII(D), Vol. XVII, R2494 and Claim XV, Vol. XVII, R2503. The lower

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[13]See also ruling at Claim VIII(c), Vol. XVII, R2493.

[14]It is also procedurally barred for the failure to contemporaneously object at trial (R2092). See Stewart v. State, 632 So.2d 59 (Fla. 1993); Thompson v. State, 619 So.2d 261 (Fla. 1993).

court correctly ruled that the claim was procedurally barred since challenges to constitutional validity of instructions must be objected to at trial and raised on direct appeal. See Jackson v. State, 648 So.2d 85 (Fla. 1994); Hodges v. State, 619 So.2d 272 (Fla. 1993); Wuornos v. State, 676 So.2d 972, 974 (Fla. 1996); Pope v. State, 702 So.2d 221 (Fla. 1997); P.A. Brown v. State, 755 So.2d 616 (Fla. 2000). It is not sufficient merely for the defense to argue evidentiary insufficiency to preserve a challenge to the constitutional validity of an instruction. Additionally, trial counsel could not be deemed derelict in failing to predict the subsequently-decided Jackson decision of this Court. Cf. Lambrix v. Singletary, 641 So.2d 847, 848 (Fla. 1994); Henderson v. Singletary, 617 So.2d 313 (Fla. 1993).

D. Eddings/Lockett Error

The lower court rejected this contention at Claim XXII, below (PCR Vol. XVII, R2507). Such a claim should have been urged on direct appeal as it contains matters of record in the trial court's consideration of mitigating evidence which was presented. Appellant may not now relitigate or litigate anew such claims since post-conviction is not a second appeal. Cherry v. State, 659 So.2d 1069 (Fla. 1995). Obviously this Court on direct appeal rejected the complaint raised at that

time. Vining v. State, 637 So.2d 921, 928 (Fla. 1994).

E. Prior Violent Felony Aggravator

The lower court correctly denied relief on this claim at Claim XIV (PCR Vol. XVII, R2309) on the basis that CCR had announced at the Huff hearing that it could not proceed on the claim (PCR Vol. I, pp. 101-102). The claim has been abandoned below. Cf. Robinson v. State, 707 So.2d 688, 700 (Fla. 1998)(subclaim regarding alleged susceptibility to police pressure and low IQ procedurally barred since issue was not raised below).

F. Under Sentence of Imprisonment Aggravator

The lower court correctly determined relief was unavailable on this point at Claim XVI, below (PCR Vol. XVII, R2504). It is both procedurally barred and meritless:

> ...Defendant alleges that his jury was improperly instructed on the "under sentence of imprisonment aggravator." Further, Defendant notes that although defense counsel argued in closing that this factor should not be accorded great weight because Defendant was on parole (R. 2160), defense counsel was ineffective for failing to request constitutionally adequate limiting instructions or object to the inadequate instruction.
>
> Initially, the Court finds that this issue should have been raised on direct appeal and is procedurally barred. *See Hardwick v. Dugger*, 648 So.2d 100 (Fla. 1994); *Jackson v. Dugger*, 633 So.2d 1051 (Fla. 1993). Further, Defendant is not

> allowed to bypass the procedural bar by simply couching the claim in terms of ineffective assistance of counsel. *See Bryan v. Dugger*, 641 So.2d 61, 63 (Fla. 1994). Nonetheless, the jury instruction given by the trial judge is the standard instruction still in use today. Counsel could not have been ineffective for failing to object to a proper jury instruction. *See Mendyk v. State*, 592 So.2d 1076, 1080 (Fla. 1992)("When jury instructions are proper, the failure to object does not constitute a serious and substantial deficiency that is measurably below the standard of competent counsel"), *overruled on other grounds, Hoffman v. State*, 613 So.2d 405 (Fla. 1992). Hence, this claim is without merit.

Appellant is simply wrong in suggesting that the Constitution requires an instruction to the jury as to how much weight they should give an aggravator. See Tuilaepa v. California, 512 U.S. 967, 979, 129 L.Ed.2d 750, 764 (1994)(A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision).

CLAIM VI

RULE 3.851

Appellant's challenge to the one year deadline of Rule 3.851 was properly rejected below; it was unrelated to Vining's judgment and sentence. Additionally, as noted by the lower court, appellant has had more than two years to file his motion given the numerous extensions by this Court and the circuit court. Claim II, below, Vol. XVII, R2482-83. Similar claims have been rejected in the past. M. Johnson v. State, 536 So.2d 1009 (Fla. 1988); Remeta v. Dugger, 622 So.2d 452, 456 (Fla. 1993); Roberts v. State, 568 So.2d 1255 (Fla. 1990).

CLAIM VII

DEATH PENALTY UNCONSTITUTIONAL

It remains unclear precisely what appellant's complaint is. In claim XX, below (at Vol. XVII, R2506-07) the lower court correctly rejected the defense challenge to the constitutionality of the death penalty statute since the claim was raised and rejected on direct appeal and is thus barred now. See Vining v. State, 637 So.2d at 927. And such arguments have been rejected many times. Thompson v. State, 619 So.2d 261, 267 (Fla. 1993); Fennie v. State, 648 So.2d 95 (Fla. 1994); Hunter v. State, 660 So.2d 244 (Fla. 1995); Fotopoulos v. State, 608 So.2d 784 (Fla. 1992).

In claim XXV below, the lower court properly rejected a challenge to electrocution as being violative of the cruel and unusual punishment clause both on procedural bar grounds for the failure to assert on direct appeal and on the merits (Vol. XVII, R2508). See Jones v. Butterworth, 691 So.2d 481 (Fla. 1997); Provenzano v. Moore, 744 So.2d 413 (Fla. 1999); Jones v. State, 701 So.2d 76 (Fla. 1997). Appellant did not raise below but suggests now a challenge to lethal injection; such an attempt should be disallowed and deemed barred. See Robinson, supra. Such a claim is also meritless. Provenzano v. State, 761 So.2d 1097 (Fla. 2000); Sims v. State,754 So.2d 657 (Fla.), cert.

denied, 120 S.Ct. 1233 (2000).

Appellant's failure to fully brief his claim should be deemed a bar. Cf. Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990).

Appellant may not now assert that he has preserved "any" challenge to the death penalty.

CLAIM VIII

INNOCENCE OF THE DEATH PENALTY

The lower court ruled at Claim VIII, Vol. XVII, R2494:

> Finally, Defendant alleges that in light of the foregoing, he is ineligible for death because his death sentence is disproportionate where there are three valid aggravating circumstances and one mitigating circumstance. Again, this claim should have been raised on direct appeal. Additionally, the Florida Supreme Court has rejected this argument, upholding death sentences where there were two valid aggravators, no statutory mitigators, and weak nonstatutory mitigation. *Consalvo v. State*, 697 So.2d 805 (Fla. 1996); *Melton v. State*, 638 So.2d 927 (Fla.), *cert. denied*, 513 U.S. 971 (1994); *Bowden v. State*, 588 So.2d 225 (Fla. 1991), *cert. denied,* 503 U.S. 975 (1992).

Appellant is not entitled to relief under Sawyer v. Whitley, 505 U.S. 333, 348, 120 L.Ed.2d 269, 285 (1992)(claim of innocence of death must be rejected in a successive habeas petition unless petitioner has shown by clear and convincing evidence that but for constitutional error no reasonable juror would find him eligible for the death penalty). On direct appeal, after rejecting the CCP aggravator, this Court approved the findings on homicide during a robbery, by a person under sentence of imprisonment, and prior conviction of a felony involving the use of violence. 637 So.2d at 928. Thus,

appellant is not ineligible for death.[15] See In re Medina, 109 F.3d 1556, 1566 (11th Cir. 1997)(to prevail on innocent of death claim, applicant must show constitutional error invalidating all of the aggravating circumstances); In re Provenzano, 215 F.3d 1233 (11th Cir. 2000). The claim is also barred for not having been asserted on direct appeal.

[15]Vining is not aided by the state cases cited. Johnson v. Singletary, 612 So.2d 575 (Fla. 1993) does not support the claim asserted. Jones v. State, 591 So.2d 911 (Fla. 1991) held defendant was entitled to a hearing on newly discovered evidence which could have led to an acquittal. Scott v. Dugger, 604 So.2d 465 (Fla. 1992) turned on the discovery that an equally culpable co-defendant subsequently received a life sentence. The Sawyer principle was not implicated.

CLAIM IX

JUROR INTERVIEWS PROHIBITED

The lower court disposed of appellant's challenge to Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar at pages 19 and 20 of its order under Claim XII (Vol. XVII, R2499-2500).

The lower court noted that appellant did not allege any particular reason to believe that any particular juror was incompetent or otherwise unqualified to serve, and that a juror is precluded from impeaching his own verdict.

Appellee adds the following supportive argument.

This claim is procedurally barred for the failure to raise on direct appeal. See Ragsdale v. State, 720 So.2d 203, 205, n. 1 & 2 (Fla. 1998); Thompson v. State, 25 Fla. L. Weekly S346 at 352 n. 12 (Fla. 2000); Gaskin v. State, 737 So.2d 509, 530, n. 6 (Fla. 1999). See also P.A. Brown v. State, 755 So.2d 616, 620-621, n. 1,4,5,7, (Fla. 2000); L. Mann v. State, ___ So.2d ___, 25 Fla. L. Weekly S727 (Fla. 2000); M. Rose v. State, ___ So.2d ___, 25 Fla. L. Weekly S824 (Fla. 2000); Young v. State, 739 So. 2d 553, 555, n. 5 (Fla. 1999).

Additionally, this claim does not constitute a collateral attack on the conviction or sentence and thus is not cognizable under Rule 3.850. See e.g. Foster v. State, 400 So.2d 1 (Fla. 1981).

Finally, Florida Rule of Professional Conduct 4-3.5(d)(4) is a valid rule because it serves vital governmental interests in protecting the finality of a verdict, preserving juror privacy, and promoting full and free debate during the deliberation process. See Tanner v. United States, 483 U.S. 107, 127, 97 L.Ed.2d 90, 110 (1986); United States v. Hooshmand, 931 F.2d 725, 736-737 (11th Cir. 1991); United States v. Griek, 920 F.2d 840, 842-844 (11th Cir. 1991); See also Cave v. State, 476 So.2d 180, 187 (Fla. 1985)("This respect for jury deliberations is particularly appropriate where, as here, we are dealing with an advisory sentence which does not require a unanimous vote for a recommendation of death or a majority vote for a recommendation of life imprisonment. To examine the thought process of the individual members of a jury divided 7-5 on its recommendation would be a fruitless quagmire which would transfer the acknowledged differences of opinion among the individual jurors into open court. These differences do not have to be reconciled; they only have to be recorded in a vote."); Songer v. State, 463 So.2d 229, 231 (Fla. 1985)(F.S. 90.607[2][b] does not authorize a juror to testify as to any matter which inheres in the verdict); Johnson v. State, 593 So.2d 206, 210 (Fla. 1992).("[T]his Court cautions against permitting jury interviews to support post-conviction relief for

allegations such as those made in this case.”)

CLAIM X

UNRELIABLE APPELLATE TRANSCRIPTS

The lower court correctly denied relief on appellant's claim that portions of the proceedings were off the record during voir dire (R5, 32-33, 59), trial (R1221, 1330) and that portions of penalty phase were not transcribed or were conducted off the record (R2186-92)[16] since such a claim is procedurally barred for the failure to urge on direct appeal. See Claim XI below at Vol. XVII, PCR2499. See, e.g. Johnson v. State, 593 So.2d 206 (Fla. 1992); Thompson v. State, 759 So.2d 650, 660 (Fla. 2000); Huff v. State,762 So.2d 476, 478-79, n. 2 (Fla. 2000).

Moreover, appellant has failed to demonstrate how the allegedly-defective transcript prejudiced his direct appeal. See Velez v. State, 645 So.2d 42 (Fla. 4 DCA 1994); White v. Florida Department of Corrections, 939 F.2d 912 (11th Cir. 1991).

[16]Appellee cannot discern anything missing at the sentencing proceeding (R2187-92).

CLAIM XI

ABSENCE DURING COURT PROCEEDINGS

Appellant next argues that he was absent during critical stages of the proceedings and that defense counsel failed to object. Vining cites the direct appeal record where motions were filed to suppress hypnotically-tainted evidence (R2279-91), in limine regarding Williams-Rule evidence (R2292-93), to discharge based on Interstate Agreement on Detainers (R2328-30), and to prohibit in-court identification by witnesses whose memory had been hypnotically refreshed (R2294-95). He claims also that he was absent when during jury deliberation the jury submitted a question to the court (R1652).

Vining also alleges that he was not present at a number of side-bar conferences (R2045, R1939-40, 1944-45, 1950-53, 1958-60, 1970-74, 1985-88, 1988-90, 1995-97, 2006-08, 2121-22, 2124-25, 2131-32, 2138-41, 2147-48, 2153-54, 2175-76)[17]. Appellant maintains that this was serious error and that counsel was deficient in failing to object to such alleged absences.

Appellee would answer that the lower court correctly rejected the claim and denied relief. See Claim XIII, PCR Vol. XVII, R2500-2503. Rutherford v. Moore, ___ So.2d ___, 25 Fla.

[17]The record does not reflect affirmatively that Vining was absent during the court proceedings; rather, it is merely silent as to whether he was present.

L. Weekly S891 (Fla. 2000).

Appellee initially asks this Court to once again enforce its procedural default policy as this claim was not raised at trial nor urged on appeal and it could have been. Should the Court fail to enforce its procedural default policy the risk appears that a federal court on habeas review may determine that the state courts are not consistent but rather arbitrary in the enforcement of its rules and decline to afford them any respect. In any event if this Court reaches the merits of a federal claim - without also applying its valid procedural bars - the federal courts can and must address the merits and may feel free to second-guess this Court's determination. See Harris v. Reed, 489 U.S. 255, 103 L.Ed.2d 308 (1989).

In Gudinas v. State, 693 So.2d 953, 961 (Fla. 1997) this Court explained:

> [3,4] Gudinas did not raise a contemporaneous objection to his exclusion from the in-chambers discussion between the attorneys and the trial judge. Therefore, we agree with the State that this issue is procedurally barred. *Davis v. State*, 461 So.2d 67, 71 (Fla. 1984)(stating that "[i]n the absence of fundamental error the failure to object precludes consideration of this point on appeal"), *cert. denied*, 473 U.S. 913, 105 S.Ct. 3540, 87 L.Ed.2d 663 (1985). However, Gudinas appears to be claiming fundamental error, citing *Francis v. State*, 413 So.2d 1175, 1177 (Fla. 1982), for the proposition a defendant has the

> "constitutional right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence." Fundamental error is "error which reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Archer v. State*, 673 So.2d 17, 20 (Fla. 1996)(quoting *State v. Delva*, 575 So.2d 643, 644-45 (Fla. 1991)), *cert. denied,* ___ U.S. ___, 117 S.Ct. 197, 136 L.Ed.2d 134 (1996).
>
> * * *
>
> Therefore, in summary, we agree with the State that, first, the issue is procedurally barred, and, second, even if it was preserved and there was error, it would be harmless because Gudinas' absence did not frustrate the fairness of the proceeding and his presence would not have assisted the defense in any way. *See Garcia v. State,* 492 So.2d 360 (Fla. 1986).
>
> (Id. at 962)

See also Cole v. State, 701 So.2d 845 (Fla. 1997)(failure to contemporaneously object at trial bars appellate claim that lower court erred in holding bench conferences in hallway without defendant's presence).

The lower court correctly determined that Vining's absence from pre-trial and pre-penalty phase proceeding (if he was absent) do not constitute fundamental error and appellant could not have made a meaningful contribution to counsel's legal arguments. See Roberts v. State, 510 So.2d 885 (Fla. 1987). Moreover, these proceedings were not critical stages of the

trial. Fla. Rule Cr.P. 3.180(a); Provenzano v. Dugger, 561 So.2d 541, 548 (Fla. 1990); Garcia v. State, 492 So.2d 360 (Fla. 1986); Rutherford v. Moore, ___ So.2d ___, 25 Fla. L. Weekly S891 (Fla. 2000)..

With regard to the bench conferences during voir dire and the guilt and penalty phases, any claim of fundamental error and counsel ineffectiveness is meritless. See Hardwick v. Dugger, 648 So.2d 100, 105 (Fla. 1994); Cole v. State, supra at 850 (defendant does not have a constitutional right to be present at bench conferences involving purely legal matters). Appellant cannot benefit from Coney v. State, 653 So.2d 1009 (Fla. 1995) since it was not retroactively applicable to Vining's case. See Boyett v. State, 688 So.2d 308 (Fla. 1996).

The appellant's complaint that he may have been absent when the jury asked a question during deliberations is harmless error if error at all. The record shows that the jury presented a question (R2505)(regarding whether a guilty verdict includes an advisory verdict in the present deliberation) to which both the defense counsel and the court and prosecutor all agreed was that the answer was no (R1652-53). See Meek v. State, 487 So.2d 1058 (Fla. 1986)(any error in defendant's absence during court's answer to legal question presented by jury would have been harmless when trial court's instructions were a correct

statement of the law to which defense counsel agreed.)[18] Roberts v. State, 510 So.2d 885 (Fla. 1987); Morgan v. State, 492 So.2d 1072 (Fla. 1986).

Appellant insists that the lower court deemed the claim procedurally barred but failed to address counsel's role in failing to ensure Vining's presence at the off the record bench conferences and cites Detective Ferguson's testimony at penalty phase. At PCR 2498 the lower court referred to its discussion subsequently in claim XIII at PCR 2500-03. The lower court's decision at Claim XIII is extensive regarding the counsel ineffectiveness prong (PCR Vol. XVII, R2500-03). With regard to Detective Ferguson's testimony at penalty phase, the side-bar conferences dealt with legal matters (R1958-60, R1966-68, R1970-74) and at the bench conference at R1985-88 the trial court sustained the defense objection and the prosecutor had no further questions (R1990). Moreover, Detective Ferguson's deposition had been taken earlier (R1959, R3052-3161) so Vining can not validly urge unawareness.[19]

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[18]Even a case cited by appellant, Gethers v. State, 620 So.2d 201 (Fla. 4 DCA 1993) reports that absence from bench conferences can be harmless error.

[19]Appellant does not identify what disputed facts from Vining's confession Ferguson related. As stated above, the trial court sustained the defense's objection at the last side-bar (R1985, 1990).

Appellant was present at all critical stages of the trial. This claim is totally without merit.

CLAIM XII

PROSECUTORIAL MISCONDUCT - COLLATERAL CRIMES

The trial court correctly denied relief on the basis that the prosecutorial misconduct claim was raised and rejected on direct appeal and thus procedurally barred[20], and to the extent it was not raised, it is barred because it could have and should have been. Claim XIX, below at Vol. XVII, R2506, Vining v. State, 637 So.2d 921, 927 (Fla. 1994); see also Medina v. State, 573 So.2d 293, 295 (Fla. 1990); Cherry v. State, 659 So.2d 1069, 1072 (Fla. 1995).

[20]This Court found “no merit to this issue”.

CLAIM XIII

PUBLIC RECORDS

Appellant next makes a vague assertion regarding a public records claim and notes that the level of cooperation between CCRC and Assistant State Attorney Coffman was non-existent prior to current counsel's involvement on February 26, 1998. The record reflects that the lower court scheduled a two hour hearing on June 14, 1996 (PCR Vol. VIII, R537-544, 545-595, 596-654). Testimony was taken from F.D.L.E. employee Catherine Warniment (PCR 570-579), Orange County Sheriff's Department Records Custodian Pam Cavender (PCR 580-630) and Orange County Corrections Division Custodian of Medical Records Charlene Clouchete (PCR 639-653). Apparently witness Warniment had no significant records, analytical or otherwise that are not contained in the file and she was not claiming any exemption (PCR 579).

At a subsequent hearing on August 1, 1996 on a continuation of the motion to compel, CCR counsel Mr. Scher acknowledged that they had received documents from F.D.L.E. since the last hearing but couldn't specify what documents he didn't have since the other attorney (Jennifer Corey) looked at them the last time (PCR 661-663). The court noted the lack of due diligence in failing to look at what had been given (PCR 670-671; PCR 682-

683). The court recited:

> "CCR has been involved in the case a number of years. I think that it's time for you to know which records you need if you need any. I suspect that there's not a legitimate need for any addition of records otherwise that list of records would have been provided to the court so the court can deal with it."
>
> (PCR 683)

The defendant's motion to compel production of public records pursuant to chapter 119 was denied "for the reasons stated on the record during the hearing conducted before the Court on August 1, 1996". This order was entered September 6, 1996 (PCR Vol. X, R1014). The court granted a defense motion for leave to amend its post-conviction motion on September 7, 1996 (R1015) and granted a 45 day extension to file the Amended Motion on September 27, 1996 (R1033). On December 17, 1996 the court allowed defendant to file an amended motion for post-conviction relief by December 23, 1996 (PCR Vol. XIII, R1595-96). An Amended Motion to Vacate was filed on December 23, 1996 (Vol. XIII, R1598-1715). A Huff hearing was conducted on June 20, 1997 (PCR Vol. I, R1-130)[21].

At a hearing on February 26, 1998, Mr. Moser of CCRC for the Middle Region announced that Vining's family was attempting to

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[21]On July 1, 1997 the court entered an order finding an evidentiary hearing was required as to Claim VII (Brady) and portions of Claims IX and X (PCR Vol. XV, R1970-71).

retain attorney Backhus and Backhus represented that she was prepared to enter her appearance at that time provided the court granted Moser's motion to withdraw (PCR Vol. II, R132-135). Appellant announced he wanted Backhus to represent him (PCR 137). The court granted substitution of counsel (PCR 143).

The court indicated it would schedule an evidentiary hearing in about five months (PCR 146). On November 13, 1998 the lower court conducted a hearing (PCR Vol. VII, R507-536) on attorney Backhus' Motion to Amend Rule 3.850 Motion or in the Alternative Motion to Expand the Scope of Issues at Evidentiary Hearing (PCR Vol. XVI, R2175-2181). The state filed a response to that motion (PCR Vol. XVI, R2183-89) and on November 19, 1998 the lower court denied the motion but granted the defense request for additional public records and scheduled the evidentiary hearing for April 21-23, 1999 (PCR Vol. XVI, R2195). The court at that time - on November 19, 1998 - permitted appellant to submit a demand to each agency with a list of specific documents alleged to be in possession of that agency and to submit to the court a list of all documents requested and that each agency shall comply with the demand within fifteen days of the date of the demand and file a notice of compliance with the court (PCR 2195). Since the evidentiary hearing proceeded without further complaint on this point five months later, the conclusion is

apparent that Vining was satisfied with the documents received and there were no further documents desired.

Appellant argues at page 99 of the brief that "Detective Nazurchuk's notes have been provided to defense counsel however, no other officer's notes have been forthcoming". Yet, at the evidentiary hearing conducted five months after the court's ruling on attorney Backhus' motion, the defense introduced as Exhibit 6, Deputy Riggs Gay's handwritten notes (PCR Vol. V, R33-34).

As to appellant's claim about the hair analysis and the Interstate Agreement on Detainer issue, the prosecutor correctly argued below that the motion to extend speedy trial was dated January 16, 1990 and stated that hair analysis had not been completed and the report of analyst Dawn Rainwater was dated January 29, 1990. Any claim that the state knew that the basis for the motion to extend speedy trial was false is refuted by the record. Obviously, the state attorney's decision not to call Rainwater was probably prompted by the contents of the report - three pubic hairs from the victim's blouse consistent with appellant's pubic hairs did not merit the challenge of prejudice of introducing a sexual battery issue into the case

(PCR Vol. XVI, R2186-2193)[22]

The claim is meritless and should be rejected.

[22]The direct appeal record reflects that a proffer of Dawn Rainwater's testimony was made at trial, that she was deposed afterwards, and the prosecutor decided to use her only as a rebuttal witness (R1393-1411). Since the defense called no witnesses, she was not called. Appellee can furnish the Court a copy of the Rainwater deposition taken at trial should the Court desire it.

CLAIM XIV

CUMULATIVE ERRORS

The lower court correctly determined that appellant's cumulative error contention lacked merit. See Claim XXI at PCR Vol. XVII, 2507. Appellee adds that many of the claims are procedurally barred and not cognizable collaterally and Vining may not attempt to avoid the consequences of a procedural bar in this fashion. Vining provides no factual support for the contention.

Appellee denies that there is any cumulative error requiring the granting of relief. Since the individual alleged errors are without merit, the cumulative error contention must fail. See Downs v. State, 740 So.2d 506, 509, n. 5 (Fla. 1999); Freeman v. State, ___ So.2d ___, 25 Fla. L. Weekly S451, 455 (Fla. 2000); L. Mann v. State, ___ So.2d ___, 25 Fla. L. Weekly S727 (Fla. 2000); Melendez v. State, 718 So.2d 746, 749 (Fla. 1998).

CONCLUSION

Based on the foregoing arguments and authorities, the trial court's order denying postconviction relief must be affirmed.

Respectfully submitted,

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_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Terri L. Backhus, 303 South Westland Avenue, Tampa, Florida 33606, this _____ day of December, 2000.

_____
COUNSEL FOR APPELLEE

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is presented in 12 point Courier New, a font that is not proportionately spaced.

_____
COUNSEL FOR APPELLEE

IN THE SUPREME COURT OF FLORIDA

JOHN B. VINING,

Appellant,

vs. **CASE NO. SC99-67**

STATE OF FLORIDA,

Appellee.

_____/

INDEX TO EXHIBITS

Exhibit I: Joseph Firmani, Master Gemologist Appraiser Jewelry Appraisal dated July 19, 1997.

Exhibit II: Karen Bronk Froming, Ph.D. Psychological report of John Bruce Vining, June 11 and 12, 1996

Attachment: Opinion - Middleton v. Evatt, No. 94-4015, 1996 WL 63038, cert. denied, 519 U.S. 876, 136 L.Ed.2d 135 (1996)