

IN THE SUPREME COURT OF FLORIDA

CHARLES W. FINNEY,
Appellant,

vs.

CASE NO. SC00-1351

STATE OF FLORIDA,
Appellee.

-----/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

The appellant, Charles Finney, was indicted in February, 1991, for first degree murder, armed robbery, sexual battery, and dealing in stolen property (DA-R. V1/ 16-19).¹ Finney was represented at trial by court appointed counsel Barbara Pittman (guilt phase) and Richard Escobar (penalty phase) (DA-R. V1/ 37-38). Prior to trial, the defense secured the appointment of an expert witness to assist with penalty phase (DA-R. V1/ 46-47), and a continuance due to the fact that DNA testing on behalf of the defendant would not be completed in time for trial (DA-R. V1/ 31-32).

Prior to trial, the State nolle prossed Count III (DA-R. V2/ 3). The evidence admitted at trial is outlined in this Court's opinion on direct appeal, Finney v. State, 660 So. 2d 674, 678-79 (Fla. 1995), cert. denied, 516 U.S. 1096 (1996), affirming the convictions and sentence of death:

According to the testimony at trial, Sandra Sutherland was discovered stabbed to death in her apartment shortly after 2 p.m. on January 16, 1991. The victim was found lying face down on her bed. Her ankles and wrists were tied and she had been gagged.

¹Throughout this brief, references to the record on appeal in Finney's direct appeal of his convictions and sentences, Florida Supreme Court Case No. 80,990, will be referred to as "DA-R." followed by the applicable volume and page number; references to the record in the instant postconviction appeal, Florida Supreme Court Case No. SC00-1351, will be referred to as "PC-R." followed by the applicable volume and page number.

On a nightstand near the bed was an open jar of face cream. The lid was lying next to the jar. The victim's bedroom had been ransacked, the contents of her purse had been dumped on the floor, and her VCR was missing.

According to the medical examiner the cause of death was multiple stab wounds to the back. Of the thirteen stab wounds, all but one penetrated the lungs causing bleeding and loss of oxygen, ultimately resulting in death. No bruises or other trauma was observed.

Numerous fingerprints were gathered from the victim's apartment, including prints from a piece of paper with German writing and from the jar on the nightstand. Fingerprints also were taken from the missing VCR, which was located at a local pawn shop. Pawn shop records indicated that the VCR was brought in on January 16 at 1:42 p.m. by Charles W. Finney for a loan of thirty dollars. Finney's fingerprints matched prints taken from the pawn ticket, the VCR, the jar lid, and the paper with German writing.

After it was determined that Finney had pawned the victim's VCR, Detective Bell of the Tampa Police Department interviewed Finney on the afternoon of January 30, 1991. Finney told Bell that he knew the victim due to the fact that they had lived near each other in the same apartment complex. Finney told Bell that he had seen the victim twice since she moved to another apartment in the complex. Once, he had talked to her about putting a screened porch on the back of her new apartment and then about two months prior to the murder he talked to her by the mailboxes at the complex. When asked about his whereabouts on the day of the murder, Finney told Detective Bell that he was home sick all day and never left his apartment. Upon being confronted with the fact that he had pawned the victim's VCR, Finney told the detective he found it near the dumpster when he took out the garbage and then pawned it.

Finney called a witness who testified

that the day before the murder he saw the victim arguing with a white male near the mailboxes at the apartment complex. Another defense witness testified that around 10 a.m. on the day of the murder, he saw William Kunkle, who worked as a carpenter at the apartment complex, come out of the victim's apartment. According to the witness, when Kunkle saw him, Kunkle came out of the door very quickly, locked the door with a key, and walked around the corner. The witness's girlfriend offered similar testimony as to Kunkle's conduct. In rebuttal, Kunkle testified that on January 16 he worked in the building next door to Ms. Sutherland's apartment, but had not been in her apartment that day. He denied ever having any conversation or interaction with the victim. The fingerprint examiner also testified during rebuttal that Kunkle's fingerprints did not match those found in the victim's apartment.

The defense sought to recall the medical examiner, Dr. Diggs, to testify that the crime scene was consistent with both a consensual sexual bondage situation and a situation where the victim consented to being bound and gagged out of fear. The State objected to the testimony as speculative. During proffer, Dr. Diggs told the court that whether a bondage situation was consensual was not something that a medical examiner would typically testify about or try to determine. The trial judge disallowed any testimony about the circumstances being consistent with sexual bondage, but allowed Dr. Diggs to testify concerning the probable positions of the victim and of the attacker and about the fact that there were no defensive wounds or other signs of a struggle.

Finney took the stand in his own defense. He testified that he had lived near Ms. Sutherland in the same apartment complex until she moved about eight months prior to the murder. A couple of months after she moved, Ms. Sutherland talked to him about screening in the patio of her new

apartment. At that time, she handed him a piece of paper to write down measurements but took the paper back. Finney testified that he returned about a week or two later but Ms. Sutherland had decided not to screen the patio. On that occasion he was in the victim's apartment, helped her move boxes and took various items out of the boxes. According to Finney the last time he saw Ms. Sutherland was a day or two before the murder. She was coming out of her apartment early one morning. She came over to his car and they talked. He further testified that he found the VCR near the dumpsters at the complex and had pawned it the same day for pocket cash. He stated that he did not steal the VCR and that he did not kill Ms. Sutherland.

Finney was convicted of first-degree murder, armed robbery, and dealing in stolen property (DA-R. V5/ 758). At sentencing, the State presented the testimony of Judy Baker, the victim of Finney's prior violent felony conviction (DA-R. V6/ 820-839). The defense presented the testimony of Finney's common law wife, Tammy Gallimore (DA-R. V6/ 839-859); a close friend and co-worker, Joseph Williams (DA-R. V6/ 860-869); and a forensic psychologist, Dr. Michael Gamache (DA-R. V6/ 869-892). These witnesses described Finney's background and positive character traits, including his strong work ethic and military service; their testimony is more particularly related in Issues V and VI herein.

The jury recommended death by a vote of nine to three (DA-R. V6/ 921). The trial judge followed the recommendation, finding three aggravating factors: 1) Finney previously had been

convicted of a violent felony; 2) the murder was committed for pecuniary gain; and 3) the murder was especially heinous, atrocious or cruel; and five nonstatutory mitigating factors: 1) Finney's contributions to the community as evidenced by his work and military history; 2) Finney's positive character traits; 3) Finney would adjust well to a prison setting and had potential for rehabilitation; 4) Finney had a deprived childhood; and 5) Finney's bonding with and love for his daughter (DA-R. V1/ 153-57).

Finney sought certiorari review in the United States Supreme Court, challenging this Court's finding of a procedural bar on his claim of improper shackling. Review was denied on January 22, 1996. Finney v. Florida, 516 U.S. 1096 (1996).

Finney, through counsel, filed a "shell" motion for postconviction relief on March 31, 1997, and an amended motion on April 16, 1999 (PC-R. V1/ 19-53, 133-162). The trial court held a Huff hearing on May 26, 1999 and thereafter entered an Order granting an evidentiary hearing as to Claim I.B. of the motion, on the issue of "DNA comparison of hair samples and semen stains taken from crime scene with that of Mr. Kunkel [sic], and dependent on said testing, any related issues regarding said test results" (PC-R. V2/ 190). The court held a number of status conferences to ensure that preparations for the evidentiary hearing were ongoing (PC-R. V2/ 247-302; V3/ 303-

345).

In November, 1999, Finney filed a pro se motion for dismissal of counsel, Jack Crooks of Capital Collateral Regional Counsel - Middle Region (PC-R. V2/ 199-207). According to the motion, Finney was concerned that Crooks intended to use Finney's pretrial DNA samples, which Finney feared had been tampered with, to compare with the crime scene evidence in preparing for the evidentiary hearing on this issue (PC-R. V2/ 200-01). Finney asserted that new samples should be taken from him in order to ensure the integrity of any evidentiary testing performed (PC-R. V2/201). Finney also presented vague allegations of dissatisfaction with counsel, noting that he had lost the ability to communicate with counsel and that counsel was employed by the Capital Collateral Regional Counsel for the Middle Region, which had been criticized for the quality of representation provided to other death row inmates (PC-R. V2/ 201-04).

During the next status conference, on Nov. 24, 1999, the parties reviewed Finney's pro se request with the judge (PC-R. V3/ 314-317). Both defense counsel and the prosecutor suggested that the motion could be denied without a hearing; the prosecutor noted that the only specific complaint involved the DNA evidence, which was being addressed (PC-R. V3/ 317). The judge concluded that the motion was legally insufficient, and

denied the motion (PC-R. V3/ 317). Within a few weeks of this hearing, another hearing was held on a defense motion to secure a blood draw from Finney for DNA testing comparison purposes; this motion was granted without objection (PC-R. V2/ 207-09, 210-11; V3/ 320-323).

At a hearing on May 4, 2000, Finney advised the court that he was withdrawing the DNA claim, and consequently the court denied the motion to vacate (PC-R. V3/ 335-340). Finney filed a motion for rehearing, alleging that this Court has indicated that evidentiary hearings should be held on all initial postconviction motions, and requesting that an evidentiary hearing be held on all claims presented in the initial motion (PC-R. V2/ 212-235). After hearing argument of counsel, the court below denied the motion for rehearing (PC-R. V3/ 344).² This appeal follows.

²The order denying the motion to vacate and the order denying the motion for rehearing are not included in the current record on appeal; copies of these orders are appended to this brief as Ex. A and B.

SUMMARY OF THE ARGUMENT

The court below properly summarily denied Finney's motion for postconviction relief. All of the claims which he presents are facially invalid and/or refuted by the record and files in this case. His ineffective assistance of counsel claims, Issues II through VII, do not warrant an evidentiary hearing. His complaint as to the adequacy of his prior postconviction counsel, Issue VIII, does not offer a basis for any relief. His claims challenging the constitutionality of Florida's death penalty statute, cumulative error and actual innocence in sentencing, Issues IX - XI, are procedurally barred, insufficiently pled, and without merit.

ARGUMENT

ISSUE I

**WHETHER THE TRIAL COURT ERRED IN SUMMARILY
DENYING FINNEY'S CLAIMS AND RENDERING A
FACIALLY INSUFFICIENT ORDER.**

Finney initially attacks the adequacy of the trial court's order denying postconviction relief. Specifically, Finney asserts that the trial court was without jurisdiction to enter the order; that the trial court's order does not adequately explain its reasons for denying the motion; that an evidentiary hearing should be ordered because the denial of evidentiary hearings is a cause of unwarranted delay in capital postconviction proceedings; and that the court's order fails to establish that the files and records in this case conclusively show that Finney is entitled to no relief. As will be seen, each of these assertions is without merit.

A trial court's summary denial of a motion to vacate will be affirmed where the court properly applied the law and competent substantial evidence supports its findings. Diaz v. Dugger, 719 So. 2d 865, 868 (Fla. 1998), cert. denied, 526 U.S. 1100 (1999). This Court must accept the factual allegations in the motion to the extent they are not refuted by the record, and the summary denial must be upheld if the claims are facially invalid or conclusively refuted by the record. Peede v. State,

748 So. 2d 253, 257 (Fla. 1999).

Finney first alleges that the court below had no jurisdiction to enter the order denying his postconviction motion, because the previously-filed notice of appeal divested the trial court of jurisdiction. Contrary to Finney's allegation, the notice of appeal filed below did not divest the circuit court of jurisdiction because there was no written order rendered at that time to appeal.³ Therefore, this case is controlled by Florida Rule of Appellate Procedure Rule 9.110(m), which provides that although a premature appeal (when the notice of appeal is filed prior to the written order) may be subject to dismissal before the rendition of the final order, an order which is rendered before the appeal has been dismissed is effective to vest jurisdiction in the appellate court. Thus, it

³ The appellant previously filed an Amended Motion to Remand Jurisdiction which represented that the Notice of Appeal in this case "actually appeals a written order of [May 17, 2000] which denied a motion for rehearing," but this order is not included in the record on appeal, suggesting that it was never properly filed with the clerk below. Even if the order was filed, however, the subsequent Notice of Appeal would be deemed a proper invocation of appellate jurisdiction in this case, and this Court would have "such jurisdiction as may be necessary for a complete determination of the cause," pursuant to Florida Rule of Appellate Procedure 9.040(a), and therefore may now properly consider the validity of the trial court's denial of Finney's motion to vacate. See also, San Martin v. State, 591 So. 2d 301 (Fla. 2d DCA 1991) (entry of nunc pro tunc order after notice of appeal filed was permissible even without formal remand since entry of order was procedural matter relating to cause on appeal within jurisdiction of lower court), rev. denied, 598 So. 2d 78 (Fla. 1992).

is not the trial court which did not have jurisdiction on October 31, 2000 (the date the order was signed), but rather this Court which did not actually have jurisdiction until the order denying the motion to vacate was rendered.

Finney's reliance on Pearson v. State, 657 So. 2d 21 (Fla. 2d DCA 1995), to support his argument as to a lack of jurisdiction in this case is misplaced. Pearson involved an appeal in a case where a juvenile had been sentenced as an adult, which by law requires contemporaneous written findings by the trial court. Although the Pearson court noted that the trial court's jurisdiction had been divested prior to the filing of the written reasons, it also held that the trial court's "nunc pro tunc" findings were insufficient to satisfy the requirement of contemporaneity. In the instant case, there is no legal requirement that a trial judge offer written reasons for the denial of a postconviction motion to vacate contemporaneous with the denial of the motion, and therefore the nunc pro tunc order rendered below is properly before this Court.

Finney's next assertion, that the order fails to sufficiently explain its reasons for denying each claim, is refuted by a review of the order. The twelve-page order addresses the individual issues raised and explains the trial

court's reasons for denying the claims; it is clearly sufficient to permit meaningful appellate review by this Court. See, Diaz, 719 So. 2d at 867 (to support summary denial, trial court must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion).

To the extent that Finney is making a generic argument that the order falls "below any threshold of legal acceptability" under Patton v. State, 25 Fla. L. Weekly S749 (Fla. Sept. 28, 2000), his claim must be rejected. In Patton, this Court denied an attack on a trial court's postconviction order. The trial court in Patton signed an order which had been prepared by the State at the court's request, and Patton alleged that the judge instead should have written his own order of one sentence stating the court denied the motion based upon the State's arguments; this Court noted that such a conclusory order would have been insufficient. The opinion does not proscribe a "threshold of legal acceptability" and there is no reason to suggest that the lengthy order rendered below could be comparable to the one-sentence order which was rejected theoretically in Patton. Thus, the alleged deficiency of the order offers no basis for relief in this appeal.

Finney next asserts that the court below should have granted

an evidentiary hearing because this Court has recognized the denial of evidentiary hearings as an unnecessary cause of delay in capital postconviction proceedings. The fact that this Court has expressed the view that unwarranted delay in many cases could be avoided by requiring an evidentiary hearing on every initial postconviction motion does not demonstrate that a hearing would be beneficial even when legally insufficient motions have been presented, as in the instant case. Despite the consideration of automatic hearings in discussions proposing procedures for timely resolution of postconviction motions, no such requirement currently exists, and the court below cannot be faulted for refusing to have a hearing merely for the sake of having a hearing. Since, as will be seen, none of the claims presented in Finney's postconviction motion warranted evidentiary development, there is no error shown in the trial court's denial of an evidentiary hearing below.

Although trial courts are encouraged to have evidentiary hearings on postconviction motions, if the motion lacks substantial factual allegations, or where alleged facts do not render the judgment vulnerable to collateral attack, the motion may be summarily denied. Steinhorst v. State, 498 So. 2d 414, 414-415 (Fla. 1986); Porter v. State, 478 So. 2d 33 (Fla. 1985). A hearing is only warranted on an ineffective assistance of

counsel claim where a defendant alleges specific facts, not conclusively rebutted by the record, which demonstrate a deficiency in performance that prejudiced the defendant. LeCroy v. Dugger, 727 So. 2d 236, 239 (Fla. 1998); Cherry v. State, 659 So. 2d 1069, 1072 (Fla. 1995); Jackson v. Dugger, 633 So. 2d 1051, 1055 (Fla. 1993); Mendyk v. State, 592 So. 2d 1076, 1079 (Fla. 1992); Roberts v. State, 568 So. 2d 1255, 1256-1260 (Fla. 1990); Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989).

Finney had the burden of establishing a prima facie case of a legally valid claim in order to receive an evidentiary hearing. Freeman v. State, 761 So. 2d 1055, 1061 (Fla. 2000). Since the postconviction motion filed below did not render Finney's convictions or sentence vulnerable to collateral attack, the trial court properly denied the motion without an evidentiary hearing.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING FINNEY'S CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR FAILING TO OBJECT TO PROSECUTORIAL COMMENTS AND ARGUMENTS.

Finney's next claim challenges the summary denial of his claim of ineffective assistance of trial counsel based on counsel's failure to object to prosecutorial comments and arguments. This claim, premised entirely on the trial transcript, is clearly an improper attempt to use postconviction proceedings as a second appeal, and should be rejected as procedurally barred. Ragsdale v. State, 720 So. 2d 203, 204-205, n. 1, 2 (Fla. 1998); Robinson v. State, 707 So. 2d 688, 697-698 (Fla. 1998) (cannot litigate direct appeal claims under guise of ineffective assistance of counsel). Even if this issue is considered, however, no relief is warranted. The summary denial of this issue must be upheld if the claim is facially invalid or conclusively refuted by the record. Freeman, 761 So. 2d at 1061; Peede, 748 So. 2d at 257. The claim is refuted by the record since the trial transcript shows that no prosecutorial misconduct warranting an objection by the defense occurred.

In Strickland v. Washington, 466 U.S. 668, 689 (1984), the United States Supreme Court established a two-part test for reviewing claims of ineffective assistance of counsel, which

requires a defendant to show that (1) counsel's performance was deficient and fell below the standard for reasonably competent counsel and (2) the deficiency affected the outcome of the proceedings. The first prong of this test requires a defendant to establish that counsel's acts or omissions fell outside the wide range of professionally competent assistance, in that counsel's errors were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687, 690; Valle v. State, 705 So. 2d 1331, 1333 (Fla. 1997); Rose v. State, 675 So. 2d 567, 569 (Fla. 1996). The second prong requires a showing that the "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable," and thus there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. 466 U.S. at 687, 695; 705 So. 2d at 1333; 675 So. 2d at 569. A proper analysis requires that counsel's performance be reviewed with a spirit of deference; there is a strong presumption that counsel's conduct was reasonable. 466 U.S. at 689.

Finney's allegations will be addressed in turn; however, no deficiency or prejudice can be predicated on the failure to object to proper comment and argument. Thus, Finney is not entitled to any relief in this issue.

1. FAILURE TO OBJECT DURING VOIR DIRE

The bulk of this issue, and the two ineffective assistance of counsel claims that follow in Issues III and IV, disputes the adequacy of Finney's trial attorneys during voir dire. As previously noted, the claim that counsel failed to conduct jury selection in a reasonably professional manner is procedurally barred, as it is based entirely on the transcript of the trial and therefore could have been raised on direct appeal. Robinson, 707 So. 2d at 697, n. 16.

Furthermore, a review of the transcript of the jury selection as a whole clearly demonstrates that defense counsel acted reasonably as the advocate required by the Sixth Amendment. It is evident that the lack of any objection to the alleged misconduct by the prosecutor is due to the lack of any misconduct, not to inadequacy of counsel. Finney first challenges prosecutorial remarks which he asserts misstated the law with regard to aggravating and mitigating factors. It is important to review the challenged comments in context. In the first comment, the prosecutor states that the Legislature has authorized the State to rely on the facts of the murder itself in seeking the death penalty (DA-R. V2/ 130-31). This remark was occasioned by prospective juror Goff's comments that she believed in the death penalty and, if phase two followed through

with the presentation "like it should," she would keep an open mind about recommending a death sentence. The prosecutor was obviously concerned that this comment indicated that the prospective juror expected that the State would be submitting evidence in the penalty phase of the trial, and his response was merely a recognition that the statute does not require the State to submit additional evidence, but that the State may rely on guilt phase evidence about the crime itself to justify a death sentence. No impropriety exists with regard to this comment.

Similarly, the second challenged comment was responsive to questions about how the State determines when to seek the death penalty when seeking a murder conviction (DA-R. V2/ 150-52). The prosecutor was expressing that the State is guided by the statute, which sets forth aggravating factors, any one of which may be sufficient for imposition of a death sentence. This is a correct statement of the law, and again no impropriety has been demonstrated.

In the comments now disputed, the prosecutor was not purporting to instruct the jury on the law with regard to their recommendation, he was simply attempting to respond to specific questions and concerns raised about the penalty phase process. As noted at the time, attorneys are constrained in jury selection because they can not discuss the particular facts of the case (DA-R. V2/ 153). The prosecutor's comments below were

appropriate responses to the questions asked and issues raised, and since the remarks were proper, the defense attorneys were not performing deficiently by neglecting to object to these statements.

Finney also asserts that the prosecutor improperly inferred that the State would have other evidence to present during the penalty phase, citing a number of times where the prosecutor asked potential jurors if they could promise to keep an open mind throughout the penalty phase until they had heard all of the evidence presented. Finney does not explain why it was improper for the State to tell the jury that additional evidence, testimony and argument of counsel may be forthcoming at the penalty phase. In fact, the law provides for the presentation of additional evidence in the penalty phase, so the prosecutor was correctly telling the jury what the law requires. Although Finney couches this claim as the prosecutor referring to "other crimes" in the penalty phase, the prosecutor obviously did not reveal that the State had evidence of another crime, or otherwise intimate the nature of any evidence to be presented in any penalty phase. The prosecutor also did not imply that the evidence would be one-sided, and in fact advised the jurors that the State was not required to present any penalty phase testimony, but could simply rely on the facts of the crime as presented in the guilt phase.

Once again, counsel for Finney cannot be deemed to have been ineffective for failing to object to proper argument. Since no impropriety has been demonstrated with regard to the prosecutor's remarks during voir dire, Finney's allegations fall far short of warranting an evidentiary hearing on this claim.

Finney's final assertion in this sub-issue involves trial counsel's failure to object to the prosecutor's statement that he would not "take issue and argue with" the belief that the death penalty should be imposed in every first degree murder case. Once again, reviewed in context, no impropriety can be discerned from this comment. The prosecutor was not offering his personal view, he was merely reminding the potential jurors that individual opinions about the death penalty were not important, what mattered was the jurors' ability to set aside their personal feelings and follow the law. Throughout the jury selection, the prosecutor constantly reminded the prospective panel that the death penalty was not appropriate in all first degree murder cases (See, DA-R. V2/ 105, 106, 113, 122, 128, 131). In fact, immediately before the comments recited in Finney's brief, the prosecutor had told jurors he would not "take issue" with anyone who opposed the death penalty, that all of their feelings were acceptable, but it was important for the lawyers to know what those feelings were (DA-R. V2/ 110; see also, V2/ 119, telling juror concerned with her ability to vote

for death, he's not "trying to take issue with you on anything at all").

Finney's failure to establish any impropriety in the prosecutor's comment again compels the conclusion that his attorneys were not deficient in failing to object. Furthermore, even if any deficiency could be presumed on these facts, no possible prejudice has even been suggested. The transcript of the penalty phase establishes that the jury was completely and accurately instructed on the law with regard to weighing the aggravating and mitigating circumstances (DA-R. V6/ 916-920). This case was highly aggravating and the nine to three recommendation for death would surely have been obtained even if the challenged comments from jury selection had never been made. No basis for an evidentiary hearing on ineffective assistance of counsel has been presented in this claim, and this Court must affirm the summary denial of this issue entered below.

2. FAILURE TO OBJECT TO PROSECUTORIAL ARGUMENT

Finney also asserts that his attorney was ineffective in failing to object to the prosecutor's penalty phase closing argument. It must be noted again that this claim is procedurally barred, as the issue of the propriety of the State's argument was considered by this Court in the direct appeal, and therefore is not subject to being revisited in

postconviction proceedings. Finney, 660 So. 2d at 683; see, Arbelaez v. State, 25 Fla. L. Weekly S586, S588 (Fla. July 13, 2000); Robinson, 707 So. 2d at 697-698 (cannot relitigate direct appeal claims under guise of ineffective assistance of counsel).

Furthermore, no reasonable claim of deficient performance by trial counsel in failing to object can be offered. The transcript of the State's argument reflects that the prosecutor, in discussing the aggravating factor of pecuniary gain, stated that the fact that the victim had been killed for a mere thirty dollars was "disgusting" (DA-R. V6/ 901). Within the same page on the transcript, the prosecutor addressed the facts of Finney's prior conviction -- a rape and robbery two weeks after the murder in this case -- and also characterized that crime as "disgusting" (DA-R. V6/ 901-02). At that point, defense counsel in fact objected and requested a mistrial, claiming the prosecutor had twice offered his personal views of disgust (DA-R. V6/ 902-03). Since defense counsel in fact objected to this argument, Finney's current claim that counsel was deficient for not objecting is without merit and clearly refuted by the record. In addition, any claim of prejudice would be unavailing since this Court considered the prosecutor's characterization of the prior conviction as "disgusting" on direct appeal and determined that "the argument was not so egregious as to warrant

reversal." 660 So. 2d at 683.

Thus, Finney's claim of ineffective assistance of trial counsel due to failure to object to prosecutorial comments is rebutted by the trial record. Therefore, the court below properly denied an evidentiary hearing on this claim. See, LeCroy, 727 So. 2d at 239 (noting defendant's burden to allege specific facts which are not conclusively rebutted by the record and which demonstrate a deficiency on the part of counsel that was detrimental to the defendant).

ISSUE III

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING FINNEY'S CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR FAILING TO ADEQUATELY QUESTION POTENTIAL JURORS ABOUT THEIR VIEWS ON RACE.

Finney's next claim asserts that counsel was ineffective for failing to adequately question potential jurors about their views on race. Once again, this claim is procedurally barred, Robinson, 707 So. 2d at 697, n. 16, as well as without merit. This Court must affirm the summary denial of claims that are facially invalid or conclusively refuted by the record. Freeman, 761 So. 2d at 1061; Peede, 748 So. 2d at 257. A review of the record in this case establishes the invalidity of the claim presented, and therefore no relief is warranted.

As this issue is presented in Finney's brief, defense counsel was allegedly alerted to the need to inquire about race when a prospective juror stated that she "thought it was a racial thing at the time," which, according to Finney, referred "to the pre-trial press accounts of a black man killing a white woman" (Initial Brief of Appellant, p. 16). Finney's conclusion that the prospective juror's reference to a "racial thing" had something to do with the crime in this case is inexplicable. The statement was made shortly after defense counsel Pittman's questioning of the panel began. The exchange occurred as follows:

MS. PITTMAN: Okay. This question is directed to this side of the room: Has anyone on this side of the room ever been wrongly accused of doing something that wasn't so nice? Okay, Ms. Kinsey. How did that make you feel?

MS. KINSEY: I thought it was a racial thing at the time.

MS. PITTMAN: Okay. Anyone else? Anyone on this side of the room been the subject of a not-so-nice rumor that wasn't true? Okay. Ms. McLawhorn, how did that make you feel?

(DA-R. V2/168). During the entire jury selection, there was never any reference to any pretrial press about a black man killing a white woman. Finney clearly has no basis to suggest that race was ever an issue in the proceedings below.

Finney's claim in this issue is a classic example of the Monday-morning quarterbacking prohibited by Strickland. His argument simply criticizes counsel's actions during jury selection and speculates that counsel's performance was deficient and prejudicial. Notably, Finney never explains how his current suggestions for trying the case could have possibly made any difference, and this allegation of ineffectiveness again falls short of demanding an evidentiary hearing.

Similarly, no possible prejudice can be discerned from this allegation of ineffective assistance of counsel. There is no claim that any juror on the panel was biased or prejudiced, and Finney has not offered a particular objection to any of the jurors that participated in his trial. The evidence against

Finney was strong, and no reasonable claim of a different verdict has been offered. No allegation of innocence is submitted and no new theory of defense has been suggested. In fact, Finney's brief does not even present a conclusory allegation of prejudice with regard to this issue. Since the outcome would not have been different even if voir dire had been conducted as now suggested, no prejudice accrued. See, Thomas v. Borg, 159 F.3d 1147, 1152 (9th Cir. 1998) (in rejecting claim that counsel was ineffective for failing to establish underrepresentation of blacks on his jury, court found no prejudice because evidence was so overwhelming that no reasonable juror, black or white, would have voted to acquit Thomas), cert. denied, 526 U.S. 1055 (1999).

Given the speculative nature of Finney's second-guessing trial counsel's jury selection, the lack of any clearly identifiable bias among the jurors that convicted him, and the absence of any possible prejudice, the court below properly summarily denied this claim.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING FINNEY'S CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR FAILING TO ADEQUATELY CHALLENGE THE PROSECUTOR'S EXCLUSION OF JURORS OPPOSED TO THE DEATH PENALTY.

Finney's next claim asserts that counsel was ineffective for failing to adequately challenge the exclusion of two prospective jurors who were released for cause due to their views on the death penalty. Once again, this claim is procedurally barred, Robinson, 707 So. 2d at 697, n. 16, as well as without merit. This Court must affirm the summary denial of claims which are facially invalid or conclusively refuted by the record. Freeman, 761 So. 2d at 1061; Peede, 748 So. 2d at 257. This claim is clearly refuted by the record, both because counsel did object to the exclusion of these jurors, and because the court's granting of the State's cause challenges was proper.

Finney disputes the cause challenges granted on prospective jurors Jennings and Silas. The most glaring impediment to relief on this claim is that during the bench conference to challenge jurors, defense counsel did oppose the excusal of both Jennings and Silas, stating that she had rehabilitated them during her questioning (DA-R. V3/ 218, 220-221). The next morning, prior to the jury being sworn, defense counsel again reiterated her objection to the granting of these challenges (DA-R. V3/ 243-44: "Judge, one other thing I would like to put

on the record concerning the voir dire yesterday. We would like the record to note that we object to the Court striking Juror No. 2, Mr. Jennings; Juror No. 15, Ms. Jackson; and Juror No. 25, Mr. Silas." V3/ 247, jury sworn). Thus, the claim of deficiency for failing to challenge the State's exclusion of Jennings and Silas is clearly refuted by the record.

In addition, no possible prejudice can be discerned since the record reflects that both Jennings and Silas were properly excluded. Thus, any further objection to the granting of these challenges would not have prevailed on appeal. Finney's brief simply selects isolated portions of the questioning of these veniremen, and asserts that their indications of being able to keep an open mind precluded the cause challenges. Such is not the test. Even if a prospective juror responds affirmatively to a defense attorney's query whether he could follow the oath administered and apply the law as instructed by the judge, an excusal for cause may be appropriate where he has previously expressed uncertainty during voir dire. Kimbrough v. State, 700 So. 2d 634, 639 (Fla. 1997).

A trial court's decision on whether or not to strike a juror for cause is reviewed for abuse of discretion, and will not be disturbed absent manifest error. Kearse v. State, 770 So. 2d 1119 (Fla. 2000) (noting that a trial court has great discretion when deciding whether to grant or deny a challenge for cause,

recognizing that the trial court has a unique vantage point because the trial court is able to see the jurors' voir dire responses and make observations which simply cannot be discerned from an appellate record, and concluding that it is the trial court's duty to determine whether a challenge for cause is proper); Fernandez v. State, 730 So. 2d 277, 281 (Fla. 1999); Kimbrough, 700 So. 2d at 639; Castro v. State, 644 So. 2d 987 (Fla. 1994) (excusing a juror for cause is subject to abuse of discretion review because the trial court has the opportunity to observe and evaluate the prospective juror's demeanor and credibility). No abuse of discretion could be shown the granting of the cause challenges to prospective jurors Jennings and Silas, and therefore any failure to object to these rulings could not be prejudicial to Finney.

Once again, Finney's brief does not even present a conclusory allegation of prejudice with this issue. Clearly, his claim in this regard is refuted by the record, and the court below properly summarily denied this claim. See, LeCroy, 727 So. 2d at 239 (noting defendant's burden to allege specific facts which are not conclusively rebutted by the record and which demonstrate a deficiency on the part of counsel that was detrimental to the defendant).

ISSUE V

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING FINNEY'S CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR FAILING TO PRESENT MITIGATION WITNESSES.

Finney next faults penalty phase counsel for failing to present additional witnesses to provide mitigation evidence. Although this is an appropriate claim for postconviction consideration, Finney's allegations are insufficient to warrant an evidentiary hearing. Therefore, this claim was also properly summarily denied. This Court must affirm the summary denial of claims that are facially invalid. Freeman, 761 So. 2d at 1061; Peede, 748 So. 2d at 257. This claim is facially invalid because it does not offer specific facts of mitigating evidence which could have been presented or how such evidence could have affected the outcome of the case to warrant an evidentiary hearing.

Finney identifies several witnesses which he asserts should have been presented during the penalty phase of his trial: Anastasia Jones, a fellow employee at the Huddle House where Finney worked; Jo Ann Nelson and Otis Williams, both of whom worked with Finney at the University of South Florida; and relatives Katherine Richardson, Rev. Billy Stubbs, Jamie Wesley, Lynn Wesley, and Joyce Wesley. However, Finney does not offer a single fact to which any of these witnesses could have testified. The most he provides is a characterization of the

witnesses as "background and character witnesses" that "could have provided the jury and the court with a different view of the defendant as a person" (Initial Brief of Appellant, p. 20). Finney's failure to allege specific facts regarding possible evidence that could have been presented through these witnesses renders his postconviction allegation facially insufficient. Rule 3.850(c)(6) expressly requires the recitation of the facts relied upon in support of a postconviction motion; the conclusory nature of this claim, as presented, compelled summary denial. See, LeCroy, 727 So. 2d at 239; Jackson, 633 So. 2d at 1054 ("Conclusory allegations are not sufficient to require an evidentiary hearing"); Kennedy, 547 So. 2d at 913.

A review of the penalty phase testimony that was presented at Finney's trial reveals that a great deal of background and character evidence was provided to the judge and jury. Finney's common law wife, Tammy Gallimore, spoke at length about Finney's positive character traits, describing him as gentle, kind and caring and relating how he had supported her emotionally and financially as she pursued her education and through her pregnancy and the birth of their daughter (DA-R. V6/ 840-856). She spoke of his being a hard worker, taking a second job when they lived in Georgia in order to make voluntary child support payments to his ex-wife and again when they were in Florida to help their financial situation (DA-R. V6/ 841-42, 854-55). She

described his devotion to their daughter, even through his incarceration, and extensively discussed his artistic talents (DA-R. V6/ 848-54). She noted that everyone liked Finney, and that he always had stable employment as well as helping her around the house (DA-R. V6/ 840-43, 846, 849).

The defense also presented Joseph Williams, a friend that met Finney and helped him get a job at the University Community Hospital shortly after Finney moved to Florida (DA-R. V6/ 861-63). Williams testified that he loved Finney like a son, that Williams' two sons, ex-wife, and mother all liked Finney a lot (DA-R. V6/ 864-66, 868). He expressed that Finney was honest, appreciative, completely trustworthy, very spiritual, and crazy about his (Finney's) family (DA-R. V6/ 863-66). He knew that Finney had been honorably discharged from the service and stated Finney was "the best working man" Williams had ever seen; he would do anything that anyone asked of him, a dependable, enthusiastic employee (DA-R. V6/ 865, 867).

Another penalty phase witness was Dr. Michael Gamache, a forensic psychologist (DA-R. V6/ 869-70). Dr. Gamache conducted two clinical examinations, spending a total of five to five and a half hours with Finney (DA-R. V6/873). He described Finney's background in detail. Finney had been born in Macon, Georgia, where his family lived at or near poverty level (DA-R. V6/ 874). His mother was a dietician, and his father was a carpenter (DA-

R. V6/ 874). His father was also a very heavy drinker; he abandoned the family when Finney was about three (DA-R. V6/ 874). Finney was the youngest of three children (DA-R. V6/ 874). He described Finney as an average or better student that got along well with teachers and other students (DA-R. V6/ 875). He noted that Finney enlisted in the Army after graduation, serving two years in the First Airborne Ranger Division before being honorably discharged (DA-R. V6/ 875-76). Upon returning to Macon, he used his military benefits to pursue education and career goals (DA-R. V6/ 876). He had gotten married while in the military, and had a son born in 1973, when he was still in the Army (DA-R. V6/ 876). He maintained stable employment and provided for his family, ultimately landing a "plum" job at a power plant with job security and benefits (DA-R. V6/ 876-78). He and his wife were both religious, but they grew apart and started losing interest in each other; they were separated and then divorced (DA-R. V6/ 877-78). Finney met Tammy and they became close; he was willing to give up his secure job to come with her to Florida, where she wanted to continue her education (DA-R. V6/ 879).

Dr. Gamache noted that Finney had been a very good employee his entire adult life; there was never any problem or dissatisfaction with his work habits (DA-R. V6/ 880). Gamache had spoken with Tammy at length, and she had corroborated

Finney's description of the ending of his first marriage and the strength of their relationship, as well as Finney's very close bond with his daughter (DA-R. V6/ 880-81). He noted that Finney, Tammy, and daughter Shannon were a very tight, loving family, and that the family relationships were very strong and positive, without any serious problems (DA-R. V6/ 880-81).

The testimony that was presented at the penalty phase compelled the trial judge to find and weigh mitigating factors including Finney's contribution to community and society as evidenced by his exemplary work and military history; his positive character traits; his ability to adjust well in prison and his excellent potential for rehabilitation; his deprived childhood; and his continued contribution to his family through the bonding and love he showed for his daughter through frequent visitations and contacts (DA-R. V1/155-56). No additional mitigating factors are identified in Finney's postconviction motion as available through the other witnesses he now claims should have been presented.

Finney's failure to allege any information or evidence that could have been presented had the newly identified witnesses testified at trial is fatal to his claim. Although he faults the court below for rejecting this claim based on counsel's representation at the Huff hearing that these witnesses "may have been somewhat cumulative" to the trial testimony, he fails

to suggest how the outcome of his trial could have been affected had the additional witnesses testified. Therefore, no claim worthy of an evidentiary hearing has been offered. As in Ragsdale, "[Finney] has provided insufficient facts as to what would have been introduced or how the outcome would have been different had counsel acted otherwise" to obtain an evidentiary hearing. 720 So. 2d at 208.

Since Finney has not identified any evidence that would have contributed to the family history and character testimony which was presented at his resentencing, this allegation of ineffective assistance did not warrant an evidentiary hearing. See, Provenzano v. Dugger, 561 So. 2d 541, 546 (Fla. 1990) (cumulative background witnesses would not have changed result of penalty proceeding); 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).

On these facts, Finney has failed to offer sufficient allegations of any attorney deficiency to warrant an evidentiary hearing on this claim. However, Strickland also counsels that, if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, it is not necessary to address whether counsel's performance fell below the standard of reasonably competent counsel. 466 U.S. at 697. In this case,

even if deficient performance is presumed, the lack of prejudice is clear.

In Buenoano v. Dugger, 559 So. 2d 1116 (Fla. 1990), trial counsel had allegedly failed to present mitigating evidence that Buenoano had an impoverished childhood and was psychologically dysfunctional. Buenoano's mother had died when Buenoano was young, she had frequently been moved between foster homes and orphanages where there were reports of sexual abuse, and there was available evidence of psychological problems. Without determining whether Buenoano's counsel had been deficient, the court held that there could be no prejudice in the failure to present such evidence in light of the aggravated nature of the crime. See also, Routly v. State, 590 So. 2d 397, 401-402 (Fla. 1991) (additional evidence as to defendant's difficult childhood and significant educational/behavioral problems did not provide reasonable probability of life sentence if evidence had been presented); Rutherford v. State, 727 So. 2d 216, 224-225 (Fla. 1998) (postconviction identification of evidence cumulative to that at trial will not establish ineffectiveness of counsel).

In light of the testimony that was presented at the penalty phase, the newly proffered witnesses are not compelling. Finney was presented as a nice person and a hard worker. Defense presented the circumstances of Finney's father having been a very heavy drinker who abandoned the family when Finney was

about three years old. This is clearly not a case where the postconviction motion revealed substantial mitigation, or any mitigation, that had not been presented at trial.

In order to establish prejudice to demonstrate a Sixth Amendment violation in a penalty phase proceeding, a defendant must show that, but for the alleged errors, the sentencer would have weighed the balance of the aggravating and mitigating factors and found that the circumstances did not warrant the death penalty. Strickland, 466 U.S. at 694. The aggravating factors found in this case were: prior violent felony conviction, committed for pecuniary gain, and committed in a heinous, atrocious or cruel manner. This was a senseless, brutal crime against a young neighbor woman. Finney has not and cannot meet the standard required to prove that his penalty phase attorney was ineffective when the facts to support the aggravating factors are compared to the allegations of cumulative mitigation now argued by collateral counsel.

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

represented in the penalty phase of his trial. Therefore, the court below properly summarily denied this claim.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING FINNEY'S CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR FAILING TO PROVIDE THE DEFENSE MENTAL HEALTH EXPERT WITH ADEQUATE BACKGROUND INFORMATION.

Finney's next allegation of ineffective assistance of counsel asserts that counsel failed to provide sufficient background evidence to the mental health expert, Dr. Gamache. As noted previously, Dr. Gamache testified extensively at trial about Finney's childhood and background; Finney has not identified any errors or omissions in the background testimony given by Gamache at trial. Furthermore, he has not alleged how the provision of any additional background information would have affected Gamache's opinions at the time of trial. Once again, this Court must affirm the ruling below because claims which are facially invalid or conclusively refuted by the record are properly summarily denied. Freeman, 761 So. 2d at 1061; Peede, 748 So. 2d at 257.

Finney's failure to allege any information which should have been, but was not, provided to the expert again precludes the granting of relief in this issue. He has simply not provided sufficient facts to have warranted an evidentiary hearing. He has not identified any specific deficiency with regard to his mental health evaluation or with Dr. Gamache's conclusions. He has not cited any relevant mental health evidence which was

available at the time but not considered by his expert. Finney does not even claim that a new expert could offer additional, favorable mental health testimony, but even if he did, such would not be a sufficient basis for relief. Engle v. Dugger, 576 So. 2d 696, 700-01 (Fla. 1991) ("This is not a case ... in which a history of mental retardation and psychiatric hospitalizations had been overlooked"); Correll v. State, 558 So. 2d 422, 426 (Fla. 1990); Hill v. Dugger, 556 So. 2d 1385, 1388 (Fla. 1990), cert. denied, 116 S. Ct. 196 (1995); Stano v. State, 520 So. 2d 278, 281 (Fla. 1988) ("That Stano has now found experts whose opinions may be more favorable to him is of little consequence").

Mental health evaluations may be considered constitutionally inadequate so as to warrant a new sentencing hearing where the mental health expert ignored "clear indications" of either mental retardation or organic brain damage. Rose v. State, 617 So. 2d 291, 295 (Fla.), cert. denied, 510 U.S. 903 (1993); State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987). In order to obtain an evidentiary hearing on this claim, Finney must have alleged more than the conclusory argument presented in his motion. Engle, 576 So. 2d at 702. Since he has failed to specifically identify any inadequacies in his mental health examination, or to otherwise show that his mental health assistance was constitutionally ineffective, this claim was

properly summarily denied.

Similarly, no possible prejudice can be discerned from the allegations of ineffective assistance of counsel based on the failure to provide additional background information to Dr. Gamache. Dr. Gamache testified at trial that he had conducted tests which revealed that Finney was not psychotic, had no major depression or mania, and no learning disability (DA-R. V6/ 882-89). Finney had at least average intelligence, with good verbal skills and good job skills, and he had been truthful in the testing; there were no significant elevations observed in any of the clinical scales (DA-R. V6/ 884, 889). In addition, Dr. Gamache had spoken extensively to Tammy, and she corroborated information about Finney's background and his love for and bonding with his daughter; Gamache observed that he would not rely on an inmate's self-serving statements in a clinical evaluation (DA-R. V6/ 880, 890). Finney's failure to allege how the provision of additional information would have affected the testimony presented at trial compelled summary rejection of this claim.

Once again, Finney's claim in this regard is factually insufficient. LeCroy, 727 So. 2d at 239; Jackson, 633 So. 2d at 1054. On the facts of this case, the trial court's summary denial of this claim was proper.

ISSUE VII

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING FINNEY'S CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR FAILING TO RETAIN A CRIME SCENE EXPERT.

Finney's last allegation of ineffective assistance of counsel disputes his attorney's failure to retain a crime scene expert to show "that the victim engaged in some form of sexual activity" prior to her murder (Initial Brief of Appellant, p. 25). Once again, although he faults counsel for allegedly failing to investigate, he characteristically fails to allege any information or evidence that could have been discovered had additional investigation been undertaken. He criticizes counsel for failing to secure a crime scene expert without suggesting what testimony such an expert could have provided or how this could have affected the trial. His failure to allege specific facts or to suggest how the outcome of his trial could have been affected had the case been tried differently establishes that again no claim worthy of an evidentiary hearing has been offered. As in Ragsdale, "[Finney] has provided insufficient facts as to what would have been introduced or how the outcome would have been different had counsel acted otherwise" to obtain an evidentiary hearing. 720 So. 2d at 208. Thus, the court below properly summarily denied this allegation of guilt phase ineffective assistance of counsel.

Similarly, no possible prejudice can be discerned from this

allegation of ineffective assistance of counsel. The evidence against Finney was strong, and no reasonable claim of a different verdict has been offered. No allegation of innocence is submitted and no new theory of defense has been suggested. Although Finney now criticizes his attorney's alleged failure to investigate, he never identifies what fruit may have been borne of further investigation or how the outcome may have been affected. In fact, Finney's brief does not even present a conclusory allegation of guilt phase prejudice with this issue.

Clearly, his claim in this regard is factually insufficient. See, LeCroy, 727 So. 2d at 239 (noting defendant's burden to allege *specific facts* which are not conclusively rebutted by the record and which demonstrate a deficiency on the part of counsel that was detrimental to the defendant). The trial court's summary denial of this claim was proper.

ISSUE VIII

WHETHER THE TRIAL COURT ERRED IN FAILING TO ENSURE THE RENDITION OF EFFECTIVE ASSISTANCE OF POSTCONVICTION COUNSEL.

Finney's next claim asserts that a remand is necessary because the court below failed to comply with Section 27.711(12), Florida Statutes,⁴ requiring judicial oversight of the quality of postconviction representation. He alleges that his pro se motion complaining of the adequacy of counsel was denied without a hearing and that the facts of this case warrant a remand for further postconviction proceedings as ordered by this Court in Peede v. State, 748 So. 2d 253 (Fla. 1999), and Fotopolous v. State, Case No. 91,277. He also notes that this Court has provided relief to postconviction defendants due to omissions by counsel in Williams v. State, 25 Fla. L. Weekly S1069 (Fla. Nov. 22, 2000), and Steele v. Kehoe, 747 So. 2d 931 (Fla. 1999). Finally, he offers new versions of issues previously pled below and in Issues II through VI of his appellate brief which he claims compel further consideration in the circuit court. As will be seen, neither the facts of this case nor the authorities cited by Finney mandate a remand for further proceedings.

The record on appeal reflects that the court below conducted

⁴It should be noted that this statutory directive applies to cases in which registry counsel has been appointed by the trial court pursuant to Section 27.710, Florida Statutes.

regular hearings to ensure that this case was properly litigated. See, PC-R. V2/ 247-54 (Sept. 4, 1997, status conference); PC-R. V2/ 255-58 (June 30, 1998, status conference); PC-R. V2/ 259-62 (Nov. 16, 1998, status conference); PC-R. V2/ 263-67 (Jan. 21, 1999, status conference, dates set for filing postconviction motion, response, and Huff hearing); PC-R. V2/ 268-71 (March 15, 1999, status conference); PC-R. V2/ 272-98 (May 26, 1999, Huff hearing; evidentiary hearing granted on Claim 1(B) and set for Aug. 21); PC-R. V2/ 299-302 (June 16, 1999, defense motion to release samples granted); PC-R. V2/ 303-08 (Aug. 30, 1999, granting continuance of evidentiary hearing because samples not provided); PC-R. V2/ 309-13 (Oct. 11, 1999, status conference); PC-R. V2/ 314-19 (Nov. 24, 1999, status conference, defense lab still working on evidence; Finney's pro se Motion for Appointment of Competent Counsel heard and denied); PC-R. V2/ 320-23 (Dec. 20, 1999, granting defense motion to compel Department of Corrections to allow independent blood draw from Finney); PC-R. V2/ 324-30 (Jan. 24, 2000, status conference, still getting blood draw); PC-R. V2/ 331-34 (April 4, 2000, status conference, still waiting for lab results); PC-R. V2/ 335-40 (May 4, 2000, defense withdraws prior DNA claim, court denies postconviction motion); PC-R. V2/ 341-45 (May 17, 2000, denying motion for rehearing).

Finney's pro se motion to dismiss Jack Crooks and secure the

appointment of other postconviction counsel was properly denied. However, it must be noted initially that even if it should not have been denied, it would be moot at this point and therefore no basis for a remand since Finney is now represented by different, and clearly competent, counsel. Current counsel Joseph Hobson has had an opportunity to meet with Finney and to review all of the records and transcripts in this case; if there were additional issues that should have been litigated in the postconviction motion filed below, he certainly could have identified those issues in his initial brief. He has not identified any new issues,⁵ although he has provided additional arguments on the claims raised below. Thus, any relief which could be provided upon a remand -- specifically, the provision of different postconviction counsel -- has already been afforded to Finney, and any issue regarding the denial of his pro se motion is moot.

Furthermore, the record in this case reflects that the pro se motion was properly denied. The ruling on a motion to dismiss court appointed counsel is within trial court's discretion, and therefore the standard of review is for an abuse of discretion. Howell v. State, 707 So. 2d 674, 680 (Fla.

⁵Finney has presented two claims in his appellate brief, Issues X and XI, which were not raised in his postconviction motion, but these are meritless claims which are routinely denied in postconviction, and he does not attempt to explain why counsel below should have included them in the postconviction motion.

1998); Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973). Although Finney analogizes his motion to one which requires a hearing on the adequacy of counsel pursuant to Nelson, there are obvious distinctions between Finney's motion and the situation addressed in Nelson. Most critically, a Nelson hearing is required when a criminal defendant expresses dissatisfaction with his appointed attorney as a way to ensure that the constitutional right to counsel is not infringed by incompetent representation. Of course, there is no constitutional right to postconviction counsel, and as this Court has recognized, claims of ineffective assistance of postconviction counsel do not present a valid basis for relief. See, Lambrix v. State, 698 So. 2d 247, 248 (Fla. 1996), cert. denied, 522 U.S. 1122 (1998); Murray v. Giarratano, 492 U.S. 1 (1989); Pennsylvania v. Finley, 481 U.S. 551 (1987).

This principle has not been eviscerated by Peede v. State, 748 So. 2d 253 (Fla. 1999), or Fotopolous v. State, Case No. 91,277. Although Finney claims that Peede was remanded "for a new 3.850 to be filed because of concerns [this Court] had with the quality of postconviction counsel," (Initial Brief of Appellant, p. 27), in fact a reading of Peede establishes that the case was remanded for an evidentiary hearing, not a new motion, because the prior motion warranted an evidentiary hearing and should not have been summarily denied. Similarly,

in Fotopolous, this Court's order (attached hereto as Ex. C) does not indicate that the remand was occasioned by a finding of ineffective assistance of postconviction counsel. In fact, the remand order suggests that there were continuing, outstanding public records issues to be addressed, suggesting the remand was not entered due to ineffective assistance of counsel.

Finney's reliance on Steele v. Kehoe, 747 So. 2d 931 (Fla. 1999), and Williams v. State, 25 Fla. L. Weekly S1069 (Fla. Nov. 22, 2000) to establish a right to relief premised on ineffective assistance of postconviction counsel is also misplaced. In those cases, this Court did not recognize any claim of ineffective assistance of collateral counsel, but resolved the issues presented on due process grounds. Those cases involved defendants that had been denied the opportunity to pursue initial postconviction remedies because their collateral attorneys did not properly invoke the postconviction process. The total deprivation of collateral review was a lack of process that could not stand under the Fifth Amendment. Because Finney has not been denied the process of postconviction review, his case is markedly different than Steele, and Williams.

Thus, Finney's suggestion that a lack of effective assistance of collateral counsel may entitle a capital defendant to another opportunity to present claims which reasonably should have been presented in an initial motion for postconviction

relief is not persuasive. There is clearly no constitutional right to collateral counsel, and therefore any alleged lack of effective assistance of counsel in postconviction proceedings cannot create any right to file a successive motion seeking postconviction relief. See, Lambrix, 698 So. 2d at 248; Keeney v. Tamayo-Reyes, 504 U.S. 1, 10, n. 5 (1992). However, even if a capital defendant's statutory right to counsel deserves the protections afforded by Nelson and its progeny, the motion filed below was insufficient to warrant a more extensive hearing than that provided below.

The only specific complaint noted in the pro se motion was the assertion that counsel's intention to use pretrial DNA samples from Finney was inadequate because of the belief that tampering with those samples may have taken place (PC-R. V2/ 199-206). This concern was obviously resolved when the defense, within a couple of weeks, secured an independent blood draw from Finney to use for comparison testing purposes (PC-R. V2/ 207-211; V3/ 320-323). The other general allegations of dissatisfaction with counsel included in the motion did not require further consideration. See, Lowe v. State, 650 So. 2d 969, 975 (Fla. 1994) (merely generalized grievances are insufficient to warrant dismissal of court appointed counsel); Wilder v. State, 587 So. 2d 543, 545 (Fla. 1st DCA 1991) (thorough inquiry required where defendant makes a "seemingly

substantial complaint" regarding counsel).

Finally, Finney does not attempt to establish how counsel's failure to raise any additional issues in his initial postconviction motion could have prejudiced him. He certainly has not identified any issues which he believes should have been raised which could have made a difference in this case. Although his appellate brief raises two claims (Issues X and XI) which were never presented below, both of these claims can be easily dismissed, since they are conclusory, standard allegations of cumulative error and innocence of the death penalty which this Court routinely rejects in postconviction appeals.

Furthermore, current counsel for Finney has re-argued several of the ineffective assistance of counsel issues which were presented below, and even as now argued in the current brief, the issues do not warrant an evidentiary hearing. Three of these issues involve trial counsel's failure to object to prosecutorial comments and argument. Although these claims are now padded with additional record citations, they continue to be both procedurally barred since they are direct appeal issues attempting to be relitigated under the guise of ineffective assistance of counsel, as well as without merit because still no prosecutorial impropriety is demonstrated.

Similarly, the newly re-argued claim that counsel was

ineffective for failing to present mitigation witnesses remains facially insufficient. Although Finney has at least finally provided some indication of additional mitigating evidence which counsel did not present, this evidence is not compelling. Finney notes that, as a child of three or four, he fell off a rocking chair and received a scar on his head; that he suffered from anemia; that in elementary school he had a reading problem and exhibited a stubborn demeanor; that, as a teenager, his best friend drowned, he was shot by a cousin, and he witnesses the hit and run death of another cousin; and that, while in the military, he handled coded military messages in Germany and completed a training course in voice radio. In addition, Finney notes that he developed a drug problem while in the military, smoking hashish and marijuana and using heroin, for which he never received professional counseling but did attend a rehabilitation treatment program.

In light of the mitigating testimony that was presented at trial, and considering the aggravated nature of the murder in this case, none of this newly proffered evidence can be considered substantial or compelling enough to possibly make a difference. There was testimony presented at sentencing about his military service, which took place in 1972-74 (DA-R. V6/865, 875-76). Neither the fact that he may have briefly used drugs nearly twenty years before the murder, nor his typical

childhood bumps and traumas, could have led to any different result in this case. The cases previously cited in Issue V of this brief continue to refute the need for any evidentiary hearing on this claim.

Similarly, the new argument as to alleged ineffectiveness for failure to provide adequate background information to the mental health expert suffers the same flaws as the previous argument -- there still is no identification of any particular information that should have been provided, no allegation that Dr. Gamache's testimony as to Finney's background was inaccurate or incomplete, and no assertion as to how Dr. Gamache's opinions would change had further information been provided. Again, for the reasons expressed in Issue VI of this brief, no evidentiary hearing is warranted.

Finally, the argument that Finney's postconviction counsel was ineffective because he was "regrettably meek and nonchalant" in arguing the motion for rehearing does not offer any basis for relief. Finney's current counsel does not even make a conclusory showing of deficiency or prejudice in this claim.

Thus, Finney's allegation that he was denied effective assistance of counsel in the presentation of his motion for postconviction relief must be rejected.

ISSUE IX

WHETHER FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL.

Finney's next issue asserts that Florida's death penalty statute is unconstitutional on its face and as applied. This issue is not cognizable on appeal; therefore, there is no standard of review. This claim is both procedurally barred and without merit, and was therefore properly summarily denied by the court below. See, Hall v. State, 742 So. 2d 225, 226 (Fla. 1999); LeCroy, 727 So. 2d at 241, n. 11; Ragsdale, 720 So. 2d at 204-205, n. 1, 2; Ziegler v. State, 452 So. 2d 537, 539 (Fla. 1984). To the extent that Finney is challenging Florida's lethal injection statute which did not exist at the time of his resentencing, this Court has rejected his claim on the merits. Sims v. State, 754 So. 2d 657 (Fla.), cert. denied, 120 S.Ct. 1233 (2000); Bryan v. State, 753 So. 2d 1244 (Fla.), cert. denied, 120 S.Ct. 1236 (2000); Provenzano v. State, 761 So. 2d 1097 (Fla. 2000).

ISSUE X

WHETHER FINNEY'S TRIAL WAS FRAUGHT WITH
PROCEDURAL AND SUBSTANTIVE ERRORS WHICH,
WHEN VIEWED CUMULATIVELY, COMPEL RELIEF.

Finney's claim that cumulative trial errors compel relief was never presented to the trial court. This issue is not cognizable in this appeal; therefore, there is no standard of review. Since this issue was not included in his postconviction motion, it is procedurally barred. See, Shere v. State, 742 So. 2d 215, 219, n. 9 (Fla. 1999); Doyle v. State, 526 So. 2d 909, 911 (Fla. 1988). In addition, since no showing of constitutional error has been made with regard to any of the claims currently or previously presented, no relief is warranted. In the absence of any demonstrated errors, this claim must be rejected as meritless. Downs v. State, 740 So. 2d 506, 509, n. 5, (Fla. 1999); Mendyk v. State, 592 So. 2d 1076, 1081 (Fla. 1992).

ISSUE XI

WHETHER FINNEY IS INNOCENT OF THE DEATH PENALTY AND SENTENCED TO DEATH IN VIOLATION OF THE UNITED STATES CONSTITUTION.

Finney's last claim asserts that he is actually innocent of the death penalty. This issue is not cognizable in this appeal; therefore, there is no standard of review. Once again, this issue is procedurally barred since it was not included in his postconviction motion. Shere, 742 So. 2d at 219, n. 9; Doyle, 526 So. 2d at 911. Finney's position seems to be that the aggravating factors found by the trial court were all invalid, and therefore death was not a proper sentence. His argument on this issue is clearly procedurally barred, particularly since this Court specifically upheld the applicability of each of the three aggravating factors in his direct appeal, and expressly found the sentence imposed in this case to be proportional. Finney, 660 So. 2d at 680, 684-85. His current brief offers no basis for reconsideration of the prior affirmance of his death sentence, and no reasonable basis exists for a different result. No relief is warranted on this claim.

CONCLUSION

Based on the foregoing arguments and authorities, the summary denial of the appellant's motion for postconviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Joseph T. Hobson, Esq., Assistant Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida, 33619, this _____ day of April, 2001.

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