IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,055

ASKARI ABDULLAH MUHAMMAD,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR BRADFORD COUNTY, FLORIDA CRIMINAL DIVISION

****

BRIEF OF APPELLEE

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INTRODUCTION

The symbol "P.C. ___" designates the record on appeal herein, filed in nine (9) volumes and consisting of pages 1-1636. The record on direct appeal, case no. 63,343, was filed in three (3) volumes, consisting of pages 1 through 480 and will be referred to as "R. ___" herein.

The State's copy of the trial transcripts consists of eight (8) volumes, labelled as volume I through VIII. The first three (3) volumes contain the voir dire of the jury panel and are consecutively paginated 1 through 453. Volumes I through III are thus referred to as "1T. ___". Volumes IV through VI contain the transcripts of the guilt phase of trial and are consecutively paginated as 1 through 510. These three (3) volumes will be referred to as "2T. ___." Volume VII contains the penalty phase evidence and arguments, and is consecutively paginated as 1 through 60. This volume will be referred to as "3T. ___". Volume VIII is the trial court's oral pronouncement of sentence and is consecutively paginated as 1 through 7. This volume will be referred to as "4T. ___."

Additionally, the State's copy of the trial records reflects five (5) "Supplemental Record(s) of Appeal", containing various pretrial transcripts of proceedings and post-trial pleadings, each bearing a different date of preparation by the Clerk of the Eighth Judicial Circuit, in and for Bradford County, as follows:

1. Supplemental Record oF Appeal, prepared July 12, 1983;

2. Supplemental Record oF Appeal, prepared August 30, 1983;

3. Supplemental Record oF Appeal, prepared October 28, 1983;

4. Supplemental Record oF Appeal, prepared April 6, 1984.

5. Supplemental Record oF Appeal, prepared July 9, 1984.

The supplemental Records of Appeal will be referred to as "S.R. 1; ___" through "S.R. 5; ___" in the order noted above, respectively. The "S.R. ___" symbol will be followed by a description of the transcript or document contained therein; i.e., "S.R. 1; TR. (date), p. ___.".

STATEMENT OF THE CASE AND FACTS

Askari Abdullah Muhammad was convicted of murder and sentenced to death. On direct appeal of the judgment and sentence, this Court affirmed both the judgment and sentence. Muhammad v. State, 494 So.2d 969 (Fla. 1986). The pertinent facts regarding the offense and the procedural history of the case are detailed in this Court's prior opinion:

> Muhammad, awaiting execution on death row, fatally stabbed a prison guard in the late afternoon of October 12, 1980. The incident apparently arose out of Muhammad's frustration at being denied permission to see a visitor after he refused to shave his beard. In the past Muhammad had been issued a pass excusing him from shaving regulations for medical reasons. A guard checked with the medical department and determined that Muhammad had no current exemption from the rule. At that time Muhammad was heard to say he would have to start "sticking people."
>
> James Burke, a guard on a later shift who had not been involved with the shaving incident, was routinely taking death row inmates one at a time to be showered. When he unlocked Muhammad's cell, the defendant attacked Burke with a knife made from a sharpened serving spoon. Muhammad inflicted more than a dozen wounds on Burke, including a fatal wound to the heart. The weapon was bent during the attack, but Muhammad continued to stab Burke, who attempted to fend off the blows and yelled for help. The other guard on the prison wing saw the incident from a secure position and summoned help from other areas of the prison. When help arrived, Muhammad ceased his efforts and dropped the knife into a trash box.

Two lawyers were initially appointed to represent Muhammad. One, Susan Cary, had represented Muhammad in matters related to his prior murder case. The other was a public defender. The public defender withdrew after differences arose with Cary. For reasons undisclosed in the record, the original trial judge, Judge Green, ended Cary's appointment and appointed Stephen Bernstein to represent the defendant from the beginning of 1981.

The first indication in the record that Muhammad desired to proceed pro se is found in a transcript of a hearing that took place on January 12, 1981 before Judge Green. At the hearing, Bernstein moved to withdraw and, as the judge observed at the hearing, Muhammad argued "eloquently and obviously with much thought and consideration" to represent himself. Judge Green, advising Muhammad against proceeding pro se, noted Muhammad seemed competent to do so, but asked him to "sleep on it" and write the judge a letter with his final decision. Muhammad wrote the letter, electing to proceed pro se, but insisting, as he had at the hearing, that he wanted "assistance of counsel" in the sense of having a lawyer available to aid in preparation of the case. January 21, 1981, Judge Green recused himself for reasons not known by or raised before this Court, and also denied Muhammad's motion to proceed pro se. Judge Green's order stated that Muhammad did not have the capacity to conduct his own defense either because of the difficulty of preparing while on death row, or because of incompetence, or both.

Muhammad's attorneys were concerned about his mental state from the start. Shortly after the murder, they had Dr. Amin appointed as a defense advisor pursuant to the newly adopted Florida Rule of Criminal Procedure 3.216(a). Dr. Amin had examined Muhammad in matters relating to his prior conviction. February 25, 1981, attorney Bernstein

filed a notice of intent to claim the defense of insanity. June 10, 1981, Judge Carlisle, who had been appointed to replace Judge Green, filed an order appointing Doctors Barnard and Carrera, psychiatrists, to examine Muhammad to determine his competency to stand trial and his sanity at the time of the offense. Fla.R.Crim.P. 3.210(b) and 3.216(d). Muhammad refused to meet the doctors when they tried to examine him July 4, 1981, and met them but refused to cooperate at a second attempt that November.

Based on Muhammad's refusal to speak with the court-appointed experts, Judge Carlisle ruled in a hearing March 8, 1982, that Muhammad would not be allowed to present expert testimony regarding his insanity defense but that he would be allowed to raise the defense. Two weeks prior to the trial date of May 24, 1982, Bernstein filed a written proffer of the evidence and testimony he planned to present relating to the insanity defense.

The proffer included a summary of findings by a psychiatrist and psychologist who treated the defendant during a hospitalization at Northeast Florida State Hospital in 1971, suggesting he was suffering from early stages of schizophrenia. A clinical psychologist diagnosed the defendant a paranoid schizophrenic in 1975 after an examination for a competency hearing before the trial for the prior murders. The diagnosis was echoed by another psychologist in a 1979 evaluation. Finally, Dr. Amin's findings as a defense expert were summarized, including a diagnosis of "schizophrenia form illness" but recommending further testing to rule out epilepsy.

At a hearing May 17, 1982, a week before trial, Bernstein requested a competency hearing. The judge agreed to a final effort to have the two appointed psychiatrists evaluate Muhammad. At

Bernstein's urging, the judge also appointed Dr. Amin as a third expert for the court evaluation. Bernstein also told the judge that Muhammad had refused to meet with him for several months, and that Dr. Amin had not spoken with Muhammad for almost one year, although Dr. Amin had made two attempts during that period.

A letter from Drs. Barnard and Carrera states they were again rebuffed May 18, 1982, and that they were unable to determine the defendant's competency to stand trial, despite "relevant case materials" provided by defense and prosecution attorneys. Dr. Amin was more successful, meeting with the defendant and determining that he was competent to stand trial. A letter to that effect was filed May 19.

May 20, 1982, Judge Carlisle, Bernstein, the state attorney and Muhammad were present at a competency hearing at Florida State Prison. The hearing was unrecorded, although the judge had requested a reporter when the hearing was set. The reconstructed record prepared by defendant's appellate counsel is sketchy, but states that "[b]ased upon Mohammad's [sic] refusal to cooperate with Drs. Barnard and Carrera, and Dr. Amin's report, the court found Mohammad [sic] competent to stand trial. What argument defense counsel made in opposition to the court's order is unknown." Muhammad also raised anew his request to proceed pro se.

Trial was begun May 24, 1982. In a hearing before voir dire began, Judge Carlisle ruled that no evidence of any kind could be presented concerning Muhammad's sanity at the time of the crime. Muhammad again moved to proceed pro se and was denied. The trial ended in mistrial the next day for reasons unknown and not raised to this Court. Two days later, Judge Carlisle filed a recusal and Judge Chance was assigned to

the case. Judge Chance conducted a hearing on Muhammad's motion to proceed pro se June 7, 1982. The judge attempted to dissuade Muhammad, explaining in detail disadvantages and soliciting comment from Muhammad. The hearing ended with the ruling that Muhammad could represent himself. Bernstein was appointed as "standby" counsel, to step in should Muhammad be unable to continue with trial. Muhammad also, for the first time, complained about the competency interview with Dr. Amin. He stated that he thought Amin was meeting with him in his capacity as a defense advisor, not as a court-appointed expert. He said he probably would not have spoken with Dr. Amin had he known the true circumstances of the interview, just as he had not spoken to the other two experts. Although objecting to the determination of competency based on the Amin report, Muhammad did not move to strike the report or suggest any other relief.

Muhammad renewed his objection to the Amin interview at a July 19, 1982 motion hearing.

Prior to trial the court allowed Bernstein to withdraw as standby counsel and appointed a public defender. September 3, 1982, Muhammad filed a motion withdrawing his notice of intent to use the insanity defense and the judge granted Muhammad's motion. At trial, Muhammad's defense consisted solely of holding the state to its burden of proof by pointing out inconsistencies in the testimony of the state's witnesses. The jury found Muhammad guilty as charged. He waived his right to a jury recommendation in the penalty phase and the trial judge sentenced him to death, finding nothing in mitigation and three aggravating circumstances: the defendant was under a sentence of imprisonment, he had been convicted of a prior capital felony, and the murder was heinous, atrocious or cruel.

494 So.2d at 970-72.

On February 23, 1989, Muhammad filed a Motion to Vacate Judgment and Sentence (P.C. 10-140) and supplemented this motion on April 24, 1989. (P.C. 141-362). The State filed a copy of the trial transcripts and the direct appeal briefs. (P.C. 1378). On August 30, 1989, the lower court entered an order summarily denying all of the claims, without requiring a response from the State, finding that they were procedurally barred. (P.C. 1378-84). The order found that the claims raised either were raised on direct appeal, or should have been raised on direct appeal, or were not preserved in the original trial court proceedings. Id.

SUMMARY OF ARGUMENT

Multiple claims raised by the defendant in rule 3.850 proceedings in the lower court were properly found to be procedurally barred. Most of the claims could have or should have been raised in the prior direct appeal of the judgment and sentence. Other claims were already fully addressed by this Court in the prior direct appeal. Still other claims were never preserved in the trial court proceedings and were therefore not cognizable in a Rule 3.850 motion. Additionally, as to many of the claims, the trial transcripts and other pertinent documents which the lower court's order incorporates by reference, conclusively refute the defendant's allegations. Under the foregoing circumstances, the lower court properly denied the motion for post-conviction relief without any evidentiary hearing.

ARGUMENT

I

THE SUMMARY DENIAL OF THE MOTION TO VACATE WAS NOT ERRONEOUS. (RESTATED).

The Appellant first claims that the trial court's order summarily denying the motion for post-conviction relief failed to attach portions of the record conclusively refuting each claim. The trial transcripts and briefs of the parties on direct appeal were filed and expressly relied upon by the trial court. (P.C. 1378). The lower court's order then specifically articulated the basis for denying each claim, by demonstrating that each claim was procedurally barred, as each claim: (1) had already been adjudicated by this Court in the direct appeal; or (2) could have or should have been raised on direct appeal; or (3) had not been properly preserved during the original trial court proceedings. (P.C. 1378-82). Finally, the lower court specifically "incorporated by reference" various pleadings on direct appeal and the trial transcripts. This claim is thus without merit and the Appellant's reliance on Hoffman v. State, 571 So.2d 449 (Fla. 1990) is misplaced.

In Hoffman, supra, at 450, this Court stated:

> Specifically, unless the trial court's order states a rationale based on the record, the court is required to attach those specific parts of the record that directly refute each claim raised.

Thus, where the order specifically relies upon trial transcripts and does state the rationale based on the record, the physical attachment of the portions of the record, which are already in this Court's possession, is not required.

The Appellant also claims that summary denial was improper since he was entitled to an evidentiary hearing on his claims. When claims are found to be procedurally barred, an evidentiary hearing is not needed. Thus, in Eutzy v. State, 536 So.2d 1014, 1015 (Fla. 1989), this Court found a summary denial to be proper, when predicated upon procedural defaults: "We affirm the trial court's summary rejection of claims three through seven, which the court aptly characterized as 'matters that were addressed or could have been addressed on direct appeal and are attacks and criticisms of the decision of the Florida Supreme Court.'" The disposition of this claim depends upon the sufficiency of the Appellant's allegations which will be addressed in the discussion of the remaining claims. Engle v. Dugger, 576 So.2d 696, 699 (Fla. 1991).

II

THE APPELLANT'S CLAIM THAT HE HAD AN INADEQUATE TRANSCRIPT OF TRIAL COURT PROCEEDINGS FOR USE BY THIS COURT IN THE PRIOR DIRECT APPEAL WAS CORRECTLY FOUND BY THE LOWER COURT TO BE PROCEDURALLY BARRED.

The Appellant claims that the record on appeal in the direct appeal from his judgment and sentence was defective and precluded him from receiving full and fair appellate review. These allegations were presented in claim VII of the Rule 3.850 motion. (P.C. 236-48). The lower court found that the claims were procedurally barred:

> Claim VII raises lack of effective appellate review due to the lack of a reliable transcript. Obviously this issue should have been addressed to the Florida Supreme Court. Defendant's experienced appellate counsel did not do so and the appellate court evidently found the record satisfactory. The issue was thus waived and will not be reviewed here.

(P.C. 1380). The summary denial of this claim was proper. Eutzy, supra, at 1015 (summary rejection of "matters that were addressed or could have been addressed on direct appeal and are attacks and criticism of the decision of the Florida Supreme Court" was found to be proper.).

One of the principal claims asserted herein concerns efforts to reconstruct a 1982 hearing in the competency

proceedings, for which a transcript was unavailable. The direct appeal records in this Court reflect that this matter was fully adjudicated during the pendency of the direct appeal. Muhammad had moved, through appellate counsel, to relinquish jurisdiction to the trial court, in November, 1983, for the purpose of reconstructing the competency hearing which had been held on May 20, 1982.[1] (See "Motion to Relinquish Jurisdiction," dated November 3, 1983, case no. 63,343). On February 22, 1984, this Court entered an order relinquishing jurisdiction to the trial court to reconstruct that proceeding. (SR. 4; p. 3). Subsequent proceedings were held in the trial court, which resulted in a Supplemental Record on Appeal, prepared by the Clerk of the Circuit Court on April 6, 1984. (SR. 4). That Supplemental Record included affidavits of both the prosecutor and defense counsel (who had represented the defendant at the 1982 hearing). (SR. 4; pp. 6-10). Those affidavits reflect the facts of what transpired at the hearing. Id. In a further Supplemental Record on Appeal, an order dated June 28, 1984, from the trial court, is included, which states that the affidavits of counsel, in addition to a transcript of proceedings dated May 24, 1982, constitute the reconstruction of the record of the May 20, 1982 hearing. (SR. 5; p. 9). Appellate counsel also prepared a "Statement of the Evidence Heard and Argument Presented" at a

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[1] The Appellee hereby requests that this Court take judicial notice of its own records. See Fla. Stat. §90.202 (6); Foxworth v. Wainwright, 167 So.2d 868, 870 (1964).

hearing held on May 20, 1982, before the Hon. Judge Carlisle, at Florida State Prison. (SR. 5; pp. 5-7).

After the record was so reconstructed, Muhammad, through appellate counsel, moved to reverse the judgment and sentence on the grounds that the reconstructed record was insufficient. (See "Motion to Reverse the Trial Court's Judgment and Sentence and Remand for a New Trial," dated August 9, 1984, case no. 63,343). On August 27, 1984, this Court entered an order denying that motion. This Court then proceeded to address the competency issues in its opinion of July 17, 1986. Muhammad v. State, 494 So.2d 969 (Fla. 1986). It is clear from the foregoing, that the adequacy of the reconstructed record was thoroughly addressed in the prior appeal. Furthermore, this Court, by addressing the competency issues on the merits, was fully aware of the nature of the record and obviously concluded that the record was sufficient for purposes of appellate review.

Not only was this claim adjudicated in the direct appeal, as noted above, but, contrary to the Appellant's argument, a complete verbatim transcript of the entire course of proceedings is not constitutionally required for adequate appellate review. In Griffin v. Illinois, 351 U.S. 12, 20, 76 S.Ct. 585, 100 L.Ed. 891 (1956), indicated that alternatives to verbatim transcripts could provide an adequate basis for appellate review:

> We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. The Supreme Court may find other means of affording adequate and effective appellate review to indigent defendants. For example, it may be that bystanders' bills of exceptions or other methods of reporting trial proceedings could be used in some cases. The Illinois Supreme Court appears to have broad power to promulgate rules of procedure and appellate practice. We are confident that the State will provide corrective rules to meet the problem which this case lays bare.

The alternatives to transcription were elaborated upon in Draper v. Washington, 372 U.S. 487, 495, 83 S.Ct. 774, 9 L.Ed.2d 899 (1963), reaffirming the notion that adequate substitutes for the transcript can exist:

> In considering here whether petitioners here received an adequate appellate review, we reaffirm the principle, declared by the Court in Griffin, that a State need not purchase a stenographer's transcript in every case where a defendant cannot buy it. 351 U.S. at 20. Alternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise. A statement of facts agreed to by both sides, a full narrative statement based perhaps on the trial judge's minutes taken during trial or on the court reporter's untranscribed notes, or on a bystander's bill of exceptions might all be adequate substitutes, equally as good as a transcript.

See also, Mayer v. Chicago, 404 U.S. 189, 193-95, 92 S.Ct. 410, 30 L.Ed.2d 372 (1971) (reaffirming the foregoing principles); Morgan v. Massey, 526 F.2d 347 (5th Cir. 1976) (holding that a reconstructed record can be sufficient, and, upholding procedures of Florida Appellate Rules for reconstruction of record); Bransford v. Brown, 806 F.2d 83, 85-86 (6th Cir. 1986) ("lower courts, interpreting Griffin and Norvell [v. Illinois, 373 U.S. 420 (1963)] in the context of cases where transcripts were simply missing, have held that the fourteenth amendment does not require a word-by-word transcript where the production of such is impossible and the failure to produce the transcript is not invidiously motivated. [citations omitted]. We agree with those decisions, and hold that in this case, where the defendant's trial attorney communicated with his appellate attorney, the absence of the jury instruction transcripts is not a per se denial of his due process right to a fair appeal.").

Thus, this Court's prior determination that the direct appeal record regarding competency was sufficient was fully consistent with due process concerns and should not be relitigated.

Several other matters briefly alluded to by the Appellant are all of a nature that they could have and should have been raised on direct appeal: the alleged failure of the court reporter to transcribe the first trial, which resulted in a

mistrial; and the absence of documents in the direct appeal record showing the reason for Judge Green's recusal. These matters should have been fully pursued on direct appeal. As to the mistrial, it should be of no consequence to the prior record on appeal since it did not lead to the instant conviction and sentence. As to the recusal of Judge Green, that, too, has nothing to do with whether the ultimate trial was fair. A defendant has no right to any particular judge; only to an impartial judge. State ex rel. Brown v. Dewell, 131 Fla. 566, 179 So. 695, 698 (1938) ("One charged with crime is guaranteed a fair and an impartial trial. He is not entitled to more, nor is he entitled to be tried by any particular judge or jury."); City of Miami v. Clarke, 222 So.2d 214, 215 (Fla. 3d DCA 1969) (same). Moreover, the State would note that the Appellant's allegations with respect to Judge Green's recusal were in fact contained in the record on direct appeal. (S.R. 1; Tr. dated 1/12/81, at pp. 10-11, 13-15).

The Appellant also asserts this Court never received the PSI report during the direct appeal:

> Further, there was never compliance with this Court's order to transmit the presentence investigation (PSI) (PC 1091). A thorough search of this Court's record on direct appeal fails to reveal the PSI report.

Brief of Appellant, p. 15. The foregoing is a misrepresentation of the record. On January 29, 1985, the Clerk of this Court issued a letter addressed to the Department of Corrections, with copies furnished to the State and to Muhammad's appellate counsel, stating:

> I have this date received the below-listed pleadings or documents:
>
> Presentence Investigation Report (Confidential)

A copy of that letter is included in an Appendix to this Brief of Appellee. Indeed, again contrary to the Appellant's representations, after receipt of the above letter, Muhammad's direct appeal counsel filed another Motion to Relinquish Jurisdiction, in which he explicitly acknowledged that this Court had received the PSI report:

> 5. On January 29, 1985, this Court received a confidential presentence investigation report from the Department of Corrections.

(See Motion to Relinquish Jurisdiction, dated February 18, 1985, case no. 63,343) (P.C. 949).

The Appellant also suggests that he was unable to obtain adequate appellate review in the direct appeal with respect to the PSI issues:

> The record before the Court does not reflect that Mr. Muhammad was ever provided with the PSI report or that he ever understood that he had the right to rebut the inaccuracies in the PSI.

Brief of Appellant, p. 15. In fact, the allegation that the record on direct appeal did not reflect that Muhammad was provided with the PSI report, was raised in the above noted Motion to Relinquish Jurisdiction, dated February 18, 1985. This Court denied the motion because the record amply reflected that the defendant was provided with the PSI report.

Once again, the disingenuous misrepresentations persist. The Appendix to Muhammad's Rule 3.850 motion includes a copy of the PSI report, along with a cover letter, dated December 2, 1982, from the Department of Corrections to the Clerk of the Circuit Court, which states that the PSI report is being enclosed. (P.C. 1093). The letter reflects that a copy was furnished to Muhammad.

Moreover, the State would note that, in 360 pages worth of a Rule 3.850 motion, with the opportunity to allege anything and everything under the sun, under oath, Muhammad never affirmatively stated that he did not receive the PSI report.[2]

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[2] The allegations in the motion for post-conviction relief and supplement thereto, with respect to the PSI, consisted of the following: "There is nothing in the record to indicated that Mr. Muhammad ever received a copy of his presentence investigation.

The direct appeal record includes the defendant's pretrial Motion for Presentence Investigation, wherein Muhammad's pretrial counsel specifically requested a PSI for the purposes of mitigation and specifically demanded an opportunity to rebut any information therein (R. 87-88), the order granting that motion (R. 278), and Muhammad's signed receipt, dated July 30, 1982, acknowledging receipt of a copy of the entire file of the Circuit Court Clerk's Office. (R. 409). Furthermore, at the sentencing proceedings on January 20, 1983, the judge verbally states, in the defendant's presence, that the court "ordered a Pre-Sentence Investigation and reviewed that at great length." (4T., p. 5). Upon hearing the reference to the PSI report, the defendant did not utter any objection. Thereafter, the written order of the trial court imposing sentence on the defendant, dated January 20, 1983, again specifically stated: "This Court, in reviewing the facts of the case considered only those facts and circumstances which were known and made available to the Defendant." (R. 455). Eight (8) days later, on January 28, 1983, Muhammad filed a Motion for New Trial, attacking virtually every aspect of the guilt and penalty phases of trial, but there was no mention of any PSI violations. (R.452-454).

However, even if he did receive it, the Court never advised him that he had the right to rebut or explain the incomplete and distorted version of the facts contained therein." (P.C. 247; see also P.C. 324) (emphasis added).

The bottom line of all of this is that the foregoing claim is disingenuous and misleading. It was a matter which was specifically presented and denied in the direct appeal. The record, as noted above, amply reflected receipt of the PSI by the defendant. There is no reason to reopen this matter, since there was no affirmative statement by Muhammad, under oath, in the lower court, that the latter did not receive the PSI. See, Lightbourne v. State, 471 So.2d 27, 28 (Fla. 1985); Doyle v. State, 526 So.2d 909, 911 (Fla. 1988) (matters not raised below cannot be raised for the first time on appeal).

The Appellant also claims that the record on direct appeal was defective with respect to matters pertaining to the issue of an allegedly biased grand jury. This, too, is something which could have and should have been raised on direct appeal. The Brief of Appellant alleges that "the clerk [of the circuit court] failed to transmit these materials to this Court until less than 24 hours before appellate counsel was to file his brief." Brief of Appellant, p. 15. The Appellant suggests that this is why counsel from the direct appeal did not brief this issue. Once again, this claim can only be described as disingenuous.

In a subsequent section of this Brief, pp. 87-89, infra, addressing the grand jury claim, the Brief of Appellee points out that the materials pertaining to the grand jury issue were

in the original volumes of the direct appeal, which had been prepared by the Clerk of the Circuit Court in April, 1983, over one year before appellate counsel submitted the Brief of Appellant. (R. 24-30, 226-228, 259-261, 271). Furthermore, Appellant's claim that this Court did not receive the portions of the record regarding the grand jury proceedings until one day before the submission of the defendant's brief is absolute nonsense. The defendant's brief was served on October 1, 1984. The defendant's Rule 3.850 motion alleged that "the clerk failed to transmit these materials to the Florida Supreme Court until August 31, 1984, less than 24 hours before appellate counsel filed his brief (App. ___, ___)." (P.C. 239). The motion did not cite with specificity which portion of the Appendix to the motion it was referring to, but it is obvious that the motion was referring to Appendix 10. (P.C. 640-641). That Appendix is the letter dated August 30, 1983, and filed with the Clerk of this Court on August 31, 1983, reflecting receipt by this Court of a Supplemental Record on Appeal. Several things must be noted. First, these documents were received by this Court one year and one month prior to the submission of the defendant's brief in the direct appeal. Second, this supplemental record did not include the grand jury materials. The grand jury materials were included in the original two volumes of the record on appeal, which had been prepared and transmitted even earlier - in April, 1983. (R. 24-30, 226-228, 259-261, 271).

The Appellant also suggests that prior appellate counsel was ineffective for not arguing the issue that the grand jury was biased. Very simply, that could never be the case, as the ensuing verdict of guilty by the petit jury would render any possible grand jury bias harmless. See, Rogers v. State, 511 So.2d 526, 531 (Fla. 1987) ("Even assuming arguendo that this grand juror was biased and participated in returning the indictment, the petit jury's subsequent guilty verdict rendered any resulting error presumptively harmless. . . ."); Porter v. Wainwright, 805 F.2d 930, 941 (11th Cir. 1986) ("Applying the Supreme Court's reasoning in United States v. Mechanik, . . . to the facts of this case, we conclude that, assuming the truth of Porter's claims [that the grand jury which indicted him was improperly constituted in that one of its members was related to the homicide victim], the petit jury's verdict of guilty renders any error harmless beyond a reasonable doubt."). Appellate counsel can not be ineffective for arguing a point which has little chance of success. Engle v. Dugger, supra, at 704.

The foregoing analysis clearly shows that all of the claims pertaining to the record in the direct appeal were matters which either were raised during the direct appeal, or which could have and should have been raised in the direct appeal; they are not cognizable in Rule 3.850 proceedings. Moreover, the claims asserted herein are typically disingenuous and misrepresent what the actual documents reflect. The lower

court properly found that all of these matters were procedurally barred. Eutzy, supra.

III

THE APPELLANT'S CLAIM THAT THERE WAS AN INVALID WAIVER OF COUNSEL UNDER FARETTA WAS PROPERLY FOUND TO BE PROCEDURALLY BARRED BY THE LOWER COURT, AS THAT ISSUE HAD PREVIOUSLY BEEN DECIDED BY THIS COURT IN THE DIRECT APPEAL.

The post-conviction court summarily denied the claim of a lack of a valid Faretta v. California, 422 U.S. 806 (1975) waiver, because this Court exhaustively addressed and decided same on direct appeal. (P.C. 1379); see also, Muhammad, supra, 494 So.2d at 974-76, wherein this Court, in part, noted:

> Muhammad's appellate counsel next raises the question of whether Judge Chance properly granted Muhammad's motion to proceed pro se. Appellant urges that the judge failed to question whether Muhammad was competent to make the decision to waive counsel and to conduct his own defense. Appellant relies on Westbrook v. Arizona, 384 U.S. 150, 86 S.Ct. 1320, 16 L.Ed.2d 429 (1966), wherein the Court held that, despite a prior determination of competency to stand trial, an inquiry must be made into whether a defendant is competent to waive his right to counsel and conduct his own defense. See also Massey v. Moore, 348 U.S. 105, 75 S.Ct. 145, 99 L.Ed. 135 (1954): "One might not be insane in the sense of being incapable of standing trial and yet lack the capacity to stand trial without benefit of counsel." Id. at 108, 75 S.Ct. at 147.
>
> . . .
>
> We reject the argument of counsel. In Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), the Supreme Court found that the defendant should have been allowed to waive counsel

because "[t]he record affirmatively shows that Faretta was literate, competent, and understanding, and that he was voluntarily exercising his informed free will." 422 U.S. at 835, 95 S.Ct. at 2541. This is the appropriate standard to apply in the instant case, Jones v. State, 449 So.2d 253 (Fla.), cert. denied, 469 U.S. 893, 105 S.Ct. 269, 83 L.Ed.2d 205 (1984), and the record supports Muhammad's waiver.

Judge Chance conducted a lengthy and detailed inquiry pursuant to the requirements of Faretta before accepting Muhammad's waiver with this finding:

> I personally think you're making a mistake, I really do, but that is your decision. And I'm convinced from talking with you and from the time we spent here today that you're competent and capable to make a mistake. Everybody can make a mistake. I made a mistake last week and blew the engine on my car. I can do that. You can make a mistake just like I did.
>
> If you want to, and all I want to make sure today is, that you know what you're doing and that's what you want to do. Now, I'm not going to stand in your way, although I don't think you're making a good decision. But that's - I'm not going on trial and so I don't have that decision to make. So I'm going to grant your motion.

Judge Chance's ruling sums up the dilemma of permitting a defendant to proceed pro se. It also embodies a determination of competency and compliance with the Faretta standard.

. . .

We have reviewed in detail Muhammad's alleged ramblings at hearings and trial and find them wordy and at times flowery,

> but they clearly demonstrate an intelligence well aware of what is going on and responding in an appropriate manner.
>
> . . .
>
> We have reviewed the record and find no fundamental error. Indeed, Muhammad conducted his defense as well as any layman could be expected to do.

Muhammad, supra, at 974-76 (emphasis added).

The Appellant admits that the sufficiency of the Faretta waiver of counsel was considered on direct appeal but states that the issue should have been addressed in his post-conviction motion because of newly discovered evidence that was unknown to this Court on direct appeal. Brief of Appellant, p. 18. The Appellant then states that the "newly discovered evidence" is a long history of mental illness prior to trial, consisting of: (1) a diagnosis of paranoid schizophrenia and potential danger, rendered a year prior to the offense; (2) an "independent evaluation obtained by collateral counsel" establishing that Muhammad's "major mental illness is further complicated by an organic brain disorder"; (3) a diagnosis of Muhammad's "murderous potential", rendered ten years before the offense at a state hospital; (4) former trial counsels' affidavits as to their concern about Muhammad's mental state at the time of trial; and (5) a new mental health diagnosis that Muhammad "was insane at the time of the offense." See Brief of Appellant at pp. 18-22.

This Court's opinion on direct appeal, however, reflects that it was well aware of Muhammad's prior mental history:

> Muhammad's attorneys were concerned about his mental state from the start. Shortly after the murder, they had Dr. Amin appointed as a defense advisor pursuant to the newly adopted Florida Rule of Criminal Procedure 3.216(a). Dr. Amin had examined Muhammad in matters relating to his prior conviction. February 25, 1981, attorney Bernstein filed a notice of intent to claim the defense of insanity. . . .
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> . . .
>
> . . . Bernstein filed a written proffer of the evidence and testimony he planned to present relating to the insanity defense.
>
> The proffer included a summary of findings by a psychiatrist and psychologist who treated the defendant during a hospitalization at Northeast Florida State Hospital in 1971, suggesting he was suffering from early stages of schizophrenia. A clinical psychologist diagnosed the defendant a paranoid schizophrenic in 1975 after an examination for a competency hearing before the trial for the prior murders. The diagnosis was echoed by another psychologist in a 1979 evaluation. Finally, Dr. Amin's findings as a defense expert were summarized, including a diagnosis of "schizophrenia form illness" but recommending further testing to rule out epilepsy.

Muhammad, supra, 494 So.2d at 970-71 (emphasis added).

It is thus obvious that the mental history of the defendant was in fact well known to this Court[3] , when it decided that Muhammad was competent to stand trial, competent to waive counsel, did waive his right to counsel with "intelligence" and while "well aware of what is going on and responding in an appropriate manner", and, "conducted his defense as well as any layman could be expected to." 494 So.2d at 972-76. The summary denial of this issue on the above grounds by the post-conviction court was thus correct, as the issue was fully addressed on direct appeal.

With respect to the Appellant's arguments of new evidence that a "woefully incompetent mental evaluation and conclusion" was rendered by the psychiatric expert at trial, said issue has been more comprehensively briefed in Appellant's point IV on appeal. This issue will thus be addressed in Argument IV, pp. 40-51, herein, for the purpose of clarity.

As to Appellant's argument that a higher degree of mental competency, above and beyond competency to stand trial, is required for a valid waiver of counsel, this issue too, was explicity raised and rejected on direct appeal. See, Initial

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[3] See also, Knight v. State, 394 So.2d 997 (Fla. 1981), and Muhammad v.State, 426 So.2d 533 (Fla. 1982), where the Defendant's competency was repeatedly confirmed by four psychiatrists and the trial court, and repeatedly reviewed by this Court.

Brief of Appellant, case no. 63,343, at pp. 20-30, where direct appeal appellate counsel relied upon the same case law and American Bar Association Standards for Criminal Justice, cited by the Appellant herein; see also, Muhammad, supra, at 974-76, where this Court expressly first addressed these concerns, and then, in part, stated:

> The Faretta standard does not require a determination that a defendant meet some special competency requirement as to his ability to represent himself. The Faretta Court noted that the question of whether the defendant had sufficient technical legal skills to represent himself was irrelevant to waiver of counsel. If one may be intellectually incompetent in legal skills yet waive counsel, then no standard of mental competence beyond competence to stand trial is required. Mental competency in the context of Faretta only relates to the ability to waive the right to counsel. Competency may be, however, only one of several factors to be considered when a defendant waives a right, as in the case of waiver of counsel-Faretta requires that the court find that the defendant is not only competent, but also "literate . . . and understanding, and that he [is] voluntarily exercising his informed free will." 422 U.S. at 835, 95 S.Ct. at 2541. The requirements of literacy and understanding appear to be the factors suggested in Massey, which in combination with competency constitute "capacity to stand trial without benefit of counsel." 348 U.S. at 105, 75 S.Ct. at 145.
>
> Inherent in appellant's argument is the assumption that the level of competency necessary to waive counsel is greater than the level required to simply stand trial. Competency to waive counsel is at the very least the same as competency to stand trial. . . .

(emphasis added)

The Appellant's argument that this Court should now reverse its opinion on direct appeal and hold that a higher degree of mental competency is required in light of Johnston v. State, 497 So.2d 863 (Fla. 1986), is thus without merit. As noted throughout this argument, this Court on direct appeal held that Muhammad was mentally competent to stand trial and competent to waive counsel, because, in addition to the former factor, he was literate, understanding, and voluntarily and intelligently exercised his free will, as reflected by the detailed Faretta inquiry by Judge Chance, and, this Court's own review of his actions and statements at hearings and trial, which "clearly" demonstrated "an intelligence well aware of what is going on and responding in an appropriate manner." Muhammad, supra, 494 So.2d at 974-76. In Johnston, supra, this Court merely upheld the denial of Johnston's request for self representation, because the trial court had concluded that the desired waiver of counsel was "neither knowing nor intelligent," due in part to Johnston's age, education and past admissions into mental hospitals. There is thus no inconsistency between Muhammad, supra, and Johnston, supra, necessitating a reconsideration of the former opinion.

Finally, the Appellant has also argued that Muhammad's waiver was invalid, because, the trial court "accepted the

waiver of counsel conditioned on the availability of the assistance of standby counsel," but that "collateral investigation" revealed that the court thereafter, and, "off the record", ordered standby counsel not to consult with Muhammad, "without the knowledge of the pro se defendant, without notice, and without an opportunity to be heard." Brief of Appellant, pp. 37-40, 22-31. However, in his voluminous motion for post-conviction relief in the lower court, the defendant never alleged any "off the record" orders done without knowledge, notice or opportunity to be heard by the defendant. (P.C. 346, et seq.). Thus, this argument is procedurally barred because allegations of "off the record" orders were not raised in the defendant's Rule 3.850 motion and cannot be raised for the first time in this appeal. Doyle v. State, 526 So.2d 909, 911 (Fla. 1988).

The State would note that the only allegations with regards to this argument were contained in claim XVI of the consolidated motion for post-conviction relief, attacking various allegedly erroneous pretrial rulings, wherein the defendant stated:

> After assuring Mr. Muhammad that Mr. Bernstein would be assisting him if he chose to waive counsel, Judge Chance subsequently permitted Mr. Bernstein to withdraw and ordered Mr. Replogle not to assist or consult with Muhammad.

(P.C. 346)[4]

Likewise, the affidavit of standby counsel Replogle submitted in support of the above claim, makes no mention of any "off the record" orders, and, in relevant part states:

> I have been asked to act as standby counsel in the past for defendants who are representing themselves. Generally, I have counselled with them during breaks in the trial in regard to various issues as they come up during the proceeding. In Mr. Muhammad's case I did not do this because I had been ordered by Judge Chance not to consult with Mr. Muhammad. I had never heard of any other judge ever issuing such an order. It was clear to me that Mr. Muhammad needed my assistance. My hands, however, were tied.

(P.C. 913-914). Consistent with the above affidavit, the record on direct appeal reflects that Mr. Replogle was expressly ordered not to consult with Mr. Muhammad unless the latter requested it. (2T., pp. 434-35). The record reflects that the order was made, in the defendant's presence, due to Muhammad's objections that he did not "want to intimate in any way that Mr. Replogle is assistant of counsel because Mr. Replogle has not assisted me [Muhammad] in this case." Id. Thus, the allegations in the motion for post-conviction relief and the allegations in

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[4] See also, defendant's Motion for Rehearing wherein collateral counsel stated: "the Court promised him [Muhammad] the assistance of counsel, but later entered a contrary instruction that counsel could not assist him. It was a classic 'bait and switch', but Mr. Muhammad was too schizophrenic, grandiose and mentally ill to recognize the deception. (P.C. 1391).

Replogle's affidavit were a matter of record before this Court on direct appeal, when the waiver of counsel was affirmed.

Some background information from the record on direct appeal is perhaps helpful at this juncture. As noted by the Appellant, "this Court has stated that there is not and neither should there be any requirement for the appointment of 'assisting counsel' to aid the pro se conduct of a defendant's criminal case." Hammond v. State, 264 So.2d 463, 465 (Fla. 1972). See also, State v. Tait, 387 So.2d 338, 339 (Fla. 1980)." See Brief of Appellant, p. 28.

In the instant case, after the lengthy Faretta inquiry, expressly addressed and approved by this Court on direct appeal, the trial court appointed Mr. Bernstein as a "stand by" counsel to answer questions with regard to legal procedure, but not to actively participate in the preparation of defense:

> THE COURT: In the event that the court grants your motion to represent yourself, it is probable that I will ask Mr. Bernstein to remain as a legal advisor or in terms of his role in your preparation of your case, that if you had any questions with regard to the legal procedure, the proceedings in the case and so forth, that Mr. Bernstein will be available to you to answer those questions. I would not request Mr. Bernstein to perform an active participation in your preparation of your defense in that either one or the other of you is going to be the lawyer.
>
> . . .

> MR. MUHAMMAD: Here Your Honor, I believe I cannot object to the court appointing Mr. Bernstein or any other attorney as stand by counsel. I have no intention of addressing the matter of the court appointing Mr. Bernstein as stand by counsel, Your Honor. My only interest is that I be permitted to represent myself. My only interest is that I be allowed other certain rights that I believe I am entitled to as the defendant in this case. I would not even contemplate asking Mr. Bernstein to assist me in any regard due to the conflicts that me and Mr. Bernstein have had in the past.

SR. 3; Tr. 6/7/82, at pp. 19-20.

The defendant thereafter filed a motion for "assistance of counsel." At the hearing on this motion, the defendant again persisted that he was "not requesting representation by counsel or representation of counsel," but was seeking an assistant who would not "speak or act in and on behalf of the defendant." S.R. 1; Tr. 7/19/82, pp. 14-15. This motion was denied. The trial court's order of denial specifically stated: "an indigent defendant charged in a criminal case has a right to court counsel to represent him, or, he has a right to waive court appointed counsel and proceed pro se. Neither the Constitution of the United States nor of the State of Florida provide a defendant, who wishes to proceed pro se, with the right to court

appointed counsel to advise him in preparing his own defense." (R. 404).[5]

At the same hearing, Mr. Bernstein, who had turned over all of his files containing the twenty month preparation of this case to the defendant, was allowed to withdraw on his own motion:

> MR. BERNSTEIN: I was appointed by this court as stand by counsel. The position I see requires no particular preparatory actions on the part of the attorney who would be available to the defendant in case he wanted to ask a question in a

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[5] Despite Appellant's earlier noted admission that there is no requirement for the appointment of "assisting counsel to aid the pro se conduct of a defendant's criminal case," the Appellant has later argued that once defendant demands and has been granted the assistance of stand-by counsel, "the aid and assistance by stand-by counsel, to be used as the defendant sees fit, has then become unequivocally protected by the sixth and fourteenth amendments. Cf. McKaskle v. Wiggins, 465 U.S. 168 (1984)." See Brief of Appellant at p. 39. This novel argument is entirely without any merit.

In Wiggins, supra, the trial court allowed the defendant to represent himself and also appointed stand-by counsel in the defense. Stand-by counsel participated during the trial; sometimes over Wiggins' objections and at other times with the latter's acquiescence. After his conviction, Wiggins moved for a new trial on the grounds that stand-by counsel had unfairly interfered with his defense. The United States Supreme Court ruled that Wiggin's sixth amendment right to conduct his own defense was not violated by his stand-by counsel's unsolicited participation in trial.

Contrary to the Appellant's argument, however, the Court also expressly added that, "Faretta does not require a trial judge to permit hybrid representation of the type Wiggins was actually allowed. . . . A defendant does not have a constitutional right to choreograph special appearances by counsel." Wiggins, supra, 78 L.Ed.2d at 136.

> legal proceeding. There is no conflict that I'm aware of that would necessitate the Public Defender's office from withdrawing from such appointment, and no particular need for my services as opposed to the Public Defender's services. And it's easier for the Public Defender to be here. . . .

S.R. 1; Tr. 7/19/82, pp. 54-55. The Public Defender's office was then appointed as stand by counsel.

Subsequently, immediately prior to voir dire and trial, the court reaffirmed its earlier orders that standby counsel was available to answer any questions about legal procedure, if the defendant requested it:

> THE COURT: If you have any questions during the course of trial, I know that you have not used Mr. Replogle of the Public Defender's office much in the past, but if you have any questions Mr. Replogle is present to assist you.
>
> Are you ready for jury selection?
>
> MR. MUHAMMAD: I have a question Your Honor.
>
> THE COURT: Yes, sir.
>
> MR. MUHAMMAD: Regarding Mr. Replogle, you say if I have a question, he is there. What do you mean he is there to assist me? I have already requested assistance of counsel and this court has ruled on my motion. I'm not clear on the language.
>
> THE COURT: If you have any question about legal proceedings that are going on in the courtroom, you may ask Mr. Replogle a question. That seems clear enough.

MR. MUHAMMAD: Okay, Your Honor.

(1T., p. 8). The next day, during voir dire, Muhammad objected to the Court's offer of utilizing stand by counsel:

> MR. MUHAMMAD: Your Honor, you stated to me yesterday before we started when you were stating your concern regarding security. I believe you stated that if I wish, I could ask Mr. Replogle questions concerning courtroom procedure.
>
> For the record, I would like to object to the Court's offer that I use Mr. Replogle because if I'm not mistaken, this Court entered an order appointing the office of the Public Defender as standby counsel, not assistance of counsel. As I have requested --
>
> THE COURT: Your objection is noted for the record.

(1T., p. 277).

The record does not reflect any requests for any consultations until Mr. Replogle sought to consult with the defendant. (2T., pp. 434-35). Consistent with his prior actions above, the defendant again objected, and the trial court expressly ordered Mr. Replogle not to interfere unless requested by the defendant:

> MR. REPLOGLE: I have offered to assist the defendant in reviewing the instructions. Could we, perhaps, go into the library to do that rather than back to the holding cell?
>
> THE COURT: You have consistently refused the Court's offer of Mr. Replogle's

assistance. I don't want to force anything upon you.

MR. MUHAMMAD: Your Honor, I want to go on the record as understanding the Court. I have entered an order denying my request for assistance of counsel. I want the record to reflect, it is my understanding that the Court entered an order appointing Mr. Replogle as standby counsel in this case.

Mr. Replogle, he asked that did I want him to assist me in reviewing these instructions, and I stated to him that it was not necessary, that if he wanted to review these instructions, he is welcome to do so. However, I don't want to intimate in any way that Mr. Replogle is assistant of counsel because Mr. Replogle has not assisted me in this cause.

THE COURT: I understand, that's what I wanted to record. Mr. Replogle, under those circumstance, I don't think that you should. Mr. Muhammad, I have asked Mr. Replogle to be here as standby counsel in the event that you cannot proceed.

MR. MUHAMMAD: Yes, sir.

THE COURT: I also asked him to be here in the event that you needed some legal jury and that he would provide that, upon your request, only upon your request, in that I didn't because of our previous concerns about this that you have a right to represent yourself. The Court in no way is forcing counsel upon you.

As a result, if you request it, Mr. Replogle assisting you in going over those jury instructions, he indicated to me that he is willing to do so, but without your request, I ask Mr. Replogle to remain in his seat away from you so it does not appear that you are represented by counsel or that he is participating in any way.

(2T., pp. 434-35).

As seen by the foregoing, the role of standby counsel was clearly delineated in the record of direct appeal before this Court,[6] which was also filed before the lower court during the post-conviction proceedings. The sufficiency of the Faretta inquiry, the validity of Mr. Muhammad's request for self-representation and the waiver of his right to counsel were all decided on direct appeal based upon this record. The post-conviction court, which did not have the benefit of the Appellant's newly asserted claim of "off the record" orders,

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[6] As part of his "bait and switch" argument herein, the Appellant has also stated that during the Faretta inquiry, Muhammad was led to believe that he would have physical access to a library, to the services of an investigator, and, that "four out of five" defense motions would be granted. The Appellant has added that the defendant's requests for these services were later denied." The State would first note that what Muhammad was led to believe was a matter of record on direct appeal and this issue should thus have been raised on direct appeal. Moreover, the Appellant has misrepresented the record. At the Faretta inquiry, (SR. 3, Tr. June 7, 1982), Muhammad was explicitly: 1) asked whether he understood his status with respect to seeing people, access to law books, secretaries, typing, etc., at that time (Id. at pp. 12, 14); (2) told that there would be no change of status as a result of his self representation (Id.); (3) told and stated that he understood that "it is possible, probable, likely that any motions for any extraordinary treatment will be denied (Id. at 14); (4) told to assume that his requests for joint counsel in order to take depositions, etc. and/or an investigator would be denied, and, he still responded, "I would proceed as the defendant in this cause." (Id. at p. 18). Moreover, contrary to the Appellant's arguments, Muhammad further added: "Your Honor, I come before this Court with the clear understanding that any and every request I may submit to this court may or may not be granted." The judge responded: "And knowing that, you still would prefer to represent yourself rather than having Mr. Bernstein represent you?" Muhammad responded; "Yes, Your Honor." (Id. at p. 25).

thus correctly denied the attacks on the validity of allowing Mr. Muhammad to represent himself.

IV

APPELLANT'S CLAIM THAT THE MENTAL HEALTH EXPERT WHO PRONOUNCED HIM COMPETENT FAILED TO CONDUCT A PROFESSIONAL AND APPROPRIATE EVALUATION, WAS CORRECTLY FOUND BY THE LOWER COURT TO BE PROCEDURALLY BARRED.

The Appellant has argued that he was entitled to an evidentiary hearing below as the mental health expert who pronounced him competent at trial, Dr. Amin, conducted an inadequate evaluation, because: (1) he did not separately address the requirements of Fla. R. Crim. P. 3.211; (2) he did not perform adequate testing; (3) he did not obtain an adequate history; and, (4) "A cursory interview and pro forma presentation of opinion, based solely on what little was gleaned from the interview is all the mental health 'assistance' that Mr. Muhammad received." See Brief of Appellant, p. 41.

Initially, the State would note that the sufficiency of Amin's report and the latter's failure to address the criteria in Fla. R. Crim. P. 3.211 were expressly and exhaustively raised on direct appeal, as follows:

ISSUE I

> THE COURT ERRED IN FINDING MUHAMMAD COMPETENT TO STAND TRIAL AS IT HAD INSUFFICIENT FACTS UPON WHICH TO FIND HIM COMPETENT.
>
> (1) Failure to follow Rule 3.210, Florida Rules of Criminal Procedure
>
> (2) Deficiencies in the manner in which Amin examined Muhammad
>
> (3) Muhammad's report and the factors listed in Rule 3.211, Florida Rules of Criminal Procedure

See Initial Brief of Appellant, case no. 63,343; P.C. 1322-33.

This Court, in turn, exhaustively addressed the above issues and determined them adversely to the defendant as follows:

> Muhammad attacks the determination that he was competent on the ground that it is not supported by sufficient evidence. First, he claims the trial court failed to follow the dictates of Florida Rule of Criminal Procedure 3.210. The rule requires the court to appoint "no more than three nor fewer than two experts" to examine the defendant. However, it does not require that the experts succeed in examining the defendant. Muhammad refused to cooperate on three separate occasions with Drs. Barnard and Carrera. Dr. Amin's examination found Muhammad competent. Appellant refers us to Ross v. State, 386 So.2d 1191 (Fla. 1980), wherein we held that an unequivocal finding of competency by one expert is sufficient and it is not error to refuse to appoint a second expert when the defense fails to present evidence that further examination is needed. Here, appellant argues, Dr. Amin's report was not unequivocal and the evidence in the proffer suggested the need for further examination.

We find no merit in this argument. Three experts had been appointed and the defendant consistently refused to be examined by two of them. There is no duty for the court to order a futile attempt at further examination. A defendant may not thwart the process by refusing to be examined. The lack of expert testimony under these circumstances is alone not grounds for finding error. The reports of experts are "merely advisory to the Court, which itself retains the responsibility of the decision." Brown v. State, 245 So.2d 68, 70 (Fla. 1971), vacated in part on other grounds, 408 U.S. 938, 92 S.Ct. 2870, 33 L.Ed.2d 759 (1972).

If the court has followed the procedures of the rules and the defendant's own intransigence deprives the court of expert testimony, the court must still proceed to determine competency in the absence of such evidence. The record demonstrates that Judge Carlisle had an opportunity to observe Muhammad's behavior at the competency hearing, to review a letter and various pleadings handwritten by the defendant and a part of the file, and to review the proffer of expert evidence. The proffer indicates Muhammad suffered mental problems, but one need not be mentally healthy to be competent to stand trial. Nothing in the record available to Judge Carlisle dispositively demonstrates Muhammad was incompetent. See Williams v. State, 396 So.2d 267 (Fla. 3d DCA), review denied, 407 So.2d 1107 (Fla. 1981) (probability that defendant was "more likely than not" incompetent at time of trial insufficient grounds to order new trial). Muhammad's pleadings and behavior both before and after the determination of competency clearly indicate he had "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding [and had a] rational, as well as factual,

> understanding of the proceedings against him." § 916.12(1), Fla. Stat. (1982). Even if the Amin report were excluded there is sufficient evidence to support the determination of competency.
>
> . . .
>
> Muhammad also attacks the Amin report for alleged failure to include matters required by Florida Rules of Criminal Procedure 3.216(e) and 3.211(a)(1). A cooperative defendant objecting to admission of reports substantially deficient under these rules may well be entitled to have those objections sustained. See Livingston v. State, 415 So.2d 872 (Fla. 2d DCA 1982) (defendant entitled to new competency hearing when experts' testimony fails to show the matters outlined in rules 3.211 and 3.216 were considered). Muhammad neither cooperated nor objected. An expert's report is merely evidence for the court to utilize in determining competency. A determination of competency is not invalid because of deficiencies in a report unless the deficiencies substantially undermine the sufficiency of evidence supporting competency.

Muhammad, supra, 494 So.2d at 972-74. As seen from the foregoing, the lower court correctly found this issue to be procedurally barred as it had been raised and fully addressed on direct appeal. (P.C. 1378-79).

The Appellant's reliance on Mason v. State, 489 So.2d 734 (Fla. 1986) is misguided. In Mason, supra, the defendant in his motion for post-conviction relief, proffered significant evidence of an extensive history of mental disorders "which had not been uncovered by the defense counsel at trial." Mason,

supra, at 736. Furthermore, this Court found that a "possibility exists that his [proffered] evidence was not considered by the evaluating psychiatrists at trial." Id. This Court thus remanded for an evidentiary hearing as to whether the original examining psychiatrists would have reached the same conclusion as to competency, had they been fully aware of Mason's history. Id. As noted above, in the instant case, this Court on direct appeal, upon a review of the record, found Muhammad's pleadings and behavior both before and after the determination of competency, "clearly indicated that he had 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding [and had a] rational, as well as factual, understanding of the proceedings against him." Muhammad, supra, 494 So.2d at 973.

Moreover, the record provided by the Appellant himself conclusively refutes the current arguments that Dr. Amin did not consider adequate background information, did no adequate testing and merely relied upon a "cursory interview" and self report by Muhammad. Collateral counsel provided the post-conviction court with a deposition of Dr. Amin taken prior to his competency report on Muhammad. (P.C. 459-509).

The deposition reflects that Dr. Amin was[7] a black psychiatrist, first contacted by Muhammad's counsel in prior

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[7] Dr. Amin is apparently now deceased according to the Appellant's records below. (P.C. 1427).

post-conviction proceedings for the unrelated Miami murders.[8] He was contacted because counsel had felt that a doctor's familiarity with a patient's socio-cultural background would develop a more accurate evaluation. (P.C. 461-62). Dr. Amin's socio-cultural bacground was very similar to Muhammad's. (P.C. 475). At the time of the first contact with Muhammad in 1979, Dr. Amin was the only black psychiatrist in the State and a "leader in both the Islamic community" and, "the greater African community at large." Id. He was also the psychiatric expert for the NAACP (P.C. 466) and the administrator for the State hospital system. (P.C. 467). Dr. Amin was licensed in Florida, Georgia, California and Massachussetts. (P.C. 479).

Dr. Amin spent more than fifty (50) hours of "travel time, evaluation time and interview time" in considering Muhammad's mental state. (P.C. 469). Dr. Amin had considered all prior legal records, medical reports, and the testimony of all psychiatrists both for the defense and the State from the prior offenses. (P.C. 467-68). Dr. Amin then travelled to the area where Muhammad grew up and was raised, and interviewed the latter's family and friends, "at length." (P.C. 469). He then documented a complete history of the defendant's background (P.C. 1062-64), virtually identical to that given by the newly

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[8] See Knight v.State, 338 So.2d 201 (Fla. 1976); Knight v. State, 394 So.2d 997 (Fla. 1981); and Muhammad v. State, 426 So.2d 533 (Fla. 1982).

discovered collateral experts. Dr. Amin also studied Muhammad's prior hospitalization records. (P.C. 469, 481). He had "numerous" conversations with Muhammad's attorneys. (P.C. 471). Amin then conducted at least three (3) interviews with Muhammad prior to the instant murder. (P.C. 464). During his second and third interviews, Dr. Amin personally conducted a "battery of tests, mental status exams," upon Muhammad. (P.C. 474-75). Dr. Amin explained that the battery of tests given by a psychiatarist is different than those given by psychologists. (P.C. 479). Nevertheless, Amin did study prior psychologists' reports who had administered psychological tests such as "MMPI's" and a variety of other peronality evaluation tests." (P.C. 480).

After these three (3) interviews, Amin again met with Muhammad, in November 1980, approximately a month after the instant offenses, for a period of four (4) hours. (P.C. 493). During this interview, Dr. Amin administered further tests to Muhammad. Id. Dr. Amin, who was also a "nutritionist", further did a "nutritional history" of Muhammad to determine the level of the latter's "substance abuse" (including LSD, marijuana, alcohol and cocaine). (P.C. 481). Dr. Amin also consulted with professors of psychiatry from Harvard University with regards to Muhammad's case. (P.C. 489-90). Finally, Dr. Amin again met with Muhammad on May 10, 1982, for the fifth time, for the purpose of determining competency. (P.C. 910). He diagnosed Muhammad as suffering from a schizophrenia-like mental illness.

As seen from the above record in the post-conviction motion's Appendix, the now deceased Dr. Amin went to truly remarkable lengths in order to thoroughly investigate the defendant's background and mental status. The Appellant has not proffered any additional background material or testing, nor suggested any inaccuracies in the information relied upon by Dr. Amin when he rendered his opinion of competency.[9] Thus, pursuant to Mason, supra, there is no reason to remand for an evidentiary hearing as Dr. Amin was fully aware of Muhammad's

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[9] The "critical" information according to collateral counsel that was not available to Dr. Amin consists of information (1) that Muhammad had been abused by his mother as well as father; (2) that he had abnormal results in skull series testing; (3) that he had suffered from serious head injuries; (4) that he had been suicidal and suffers from organic brain damage. Dr. Amin, who had personally interviewed family and friends with respect to Muhammad's childhood was well aware of his abused background and had in fact specifically noted that Muhammad had received "abusive treatment from both parents." (P.C. 1065). The new reports and other records provided by collateral counsel do not reflect any "skull series testing." As to the "serious head injuries" suffered by Muhammad, collateral expert Fisher, specifically notes that Muhammad did not report any major head injuries. (P.C. 1422-23). The other collateral expert, Carbonell, merely states: that Muhammad's "hospital records indicate that he was hit in the head as a child and hospitalized two times, but do not indicate the cause of the previous hospitalizations." (P.C. 919). Carbonell adds that no hospital records of head injury can be found. (P.C. 924). In any event, the state would note that Dr. Amin specifically stated that he had all of Muhammad's hospital records. Likewise, as to organic brain damage, Carbonell has merely concluded that Muhammad "now shows signs of organic brain damage." (P.C. 929). Likewise, Dr. Fisher has merely concluded that Muhammad, "has a history of drug abuse, alcohol abuse and nutritional deficits that may well have resulted in some level of organic brain damage." As noted previously, Dr. Amin was well aware of Muhammad's alleged history of drug abuse and indeed personally conducted nutritional tests upon Muhammad. (P.C. 481, 1066).

history and there is no possibility that currently proffered evidence was not considered by Dr. Amin. Merely because the Appellant has chosen to mischaracterize his own records does not provide a basis for the claim of incompetency of the mental health examination at trial. Engle v.Dugger, 576 So.2d 696, 702 (Fla. 1991) (Engle alleged that he had been recently examined by new mental health experts who had concluded he had serious mental health problems. This Court held, "this does not demonstrate that the three mental health experts who examined him contemporaneous with his trial and sentencing conducted unprofessional examinations. Mental health experts often reach differing conclusions. Contrary to Engle's suggestion, his original examining mental health experts were aware of his prior alcohol and drug abuse. This is not a case like Mason v. State, 489 So.2d 734 (Fla. 1986), in which a history of mental retardation and psychiatric hospitalization had been overlooked.").

The Appellant has now merely proffered the legal conclusions of two psychologists who have evaluated the defendant approximately nine years after the commission of the offense, without the extensive interviews, testing and independent investigation of the defendant's background, and who state that the defendant suffers from essentially the same mental illness diagnosed by Dr. Amin. There is no requirement that the issue of a defendant's competency must be reopened

because the psychiatrist who examined the defendant reached a legitimate conclusion based on the symptoms displayed by the defendant but failed to associate those symptoms with another mental deficiency. Jackson v. Dugger, 547 So.2d 1197, 1200 (Fla. 1989); see also, Correll v. Dugger, 558 So.2d 422, 426 (Fla. 1990) (smmary denial of claim that defendant did not receive a professionally competent mental health evaluation because three recent experts examined him and found that he suffered brain damage as a result of excessive use of drugs was affirmed, because: "the fact that Correll has now obtained psychiatric opinions which seriously question his mental capacity does not mean that he is entitled to a new penalty hearing. Correll's attorney had specifically alerted Dr. Pollack [trial expert] to Correll's prior drug and alcohol use, and Dr. Pollock explored this area with Correll.").

Likewise, the defendant's argument that his counsel was ineffective for failing to obtain and provide Dr. Amin with an adequate history and records, is without merit. As demonstrated above, Dr. Amin did in fact obtain the most complete history and records imaginable in this case. The State would also note that merely producing mental health experts, several years after trial, who testify to clinical conclusions contradicting those rendered at time of trial, is insufficient to establish either prejudice to the defendant or deficient conduct by his counsel. Elledge v. Dugger, 823 F.2d 1439, 1446 (11th Cir. 1987).

Instead, the court must determine whether it is reasonably likely that a reasonable attorney, operating under the circumstances of the case and acting in a reasonably professional manner, would have located such witnesses. The Appellant has entirely ignored that Muhammad, prior to trial, repeatedly refused to be examined by court-appointed psychiatrists. Muhammad, supra, 494 So.2d at 971, 975. There is thus no evidence that Muhammad would have allowed the current experts to evaluate him at the time of trial.

Finally, the Appellant has claimed that Dr. Amin's report was "confidential and priveledged" and its use by the trial court was thus in violation of Estelle v. Smith, 451 U.S. 454 (1981). Once again, this issue was raised on direct appeal (Brief of Appellant, case no. 63,343, at pp. 13-15), and this Court denied it as follows:

> Muhammad claims he did not know the purpose of Dr. Amin's competency examination, that neither his attorney nor Dr. Amin informed him of the reason for the interview, and that he thought he was meeting with Dr. Amin in the role of defense expert pursuant to his appointment under Florida Rule of Criminal Procedure 3.216(a), and thus his communications were protected by the attorney-client privilege of the rule. See State v. Hamilton, 448 So.2d 1007 (Fla. 1984).
>
> We find no merit in this claim. Muhammad waived the privilege when he failed to object to submission of the report at the May 20, 1982 competency hearing. The record shows Judge

> Carlisle's handwritten annotation on the report that it was submitted as a joint exhibit, indicating that Bernstein waived any alleged privilege as to the report, and the reconstructed record does not indicate Muhammad raised any objection to the waiver. Compare Lebowitz v. State, 313 So.2d 473 (Fla. 3d DCA 1975), cert. denied, 330 So.2d 19 (Fla.), vacated on other grounds, 429 U.S. 808, 97 S.Ct. 44, 50 L.Ed.2d 68 (1976) (defendant may impeach witness by eliciting psychiatrist's opinion as to competence of witness, but content of conversations with the witness is protected by psychiatrist-patient privilege of section 90.242, Florida Statutes (1973)).

Muhammad, supra, 494 So.2d at 973. The trial judge thus correctly found this argument to be procedurally barred, as it was raised and addressed on direct appeal.

V

APPELLANT'S CLAIM THAT THE TRIAL COURT'S DENIAL OF THE RIGHT TO INTRODUCE EVIDENCE OF INSANITY DEPRIVED HIM OF EFFECTIVE ASSISTANCE OF COUNSEL AND THE RIGHT TO DEFEND WAS PROPERY HELD TO BE PROCEDURALLY BARRED BY THE LOWER COURT.

The Appellant has argued that he was denied his right to defend when the trial court precluded him from presenting an insanity defense as a result of his own refusal to be examined by court-appointed experts. The Appellant has added that Muhammad's counsel was thus rendered "per se ineffective." Once again, this issue was expressly raised on direct appeal, see Initial Brief of Appellant, at pp. 31-35, case no. 63,343, and, rejected by this Court, as follows:

> Appellate counsel next asserts error in the trial court's ruling that appointed trial counsel would be unable to present any evidence of insanity because of the defendant's refusal to cooperate with the court experts. Subsequent to this ruling, Muhammad filed a pro se motion a month before trial to withdraw the notice of intent to raise the insanity defense. The trial court permitted the state to withdraw its motion to strike the insanity defense and granted Muhammad's motion. Muhammad was competent to make the motion and therefore he has waived any claim of error.

Muhammad, supra, 494 So.2d at 976. As noted previously, Muhammad was competent, and validly waived his right to counsel and proceeded to trial representing himself. Muhammad himself then elected to withdraw his notice of insanity. Thus, the

trial court did not "preclude" any defense. Moreover, there can be no claim of ineffectiveness when Muhammad represented himself at trial. Faretta, supra, 45 L.Ed.2d at 581, n. 46 (". . . a defendant who elects to represent himself can not thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'"). The summary denial of this claim was thus entirely proper, as the issue of alleged exclusion of evidence of insanity was fully considered on direct appeal.

VI

THE TRIAL COURT'S SUMMARY DENIAL OF MUHAMMAD'S CLAIM OF COMPETENCY WAS PROPER.

The State has exhaustively addressed the issue of the defendant's competency in issues III and IV herein. The Appellee relies on those arguments at pp. 24-51 herein. Those prior arguments herein, clearly reflect that the lower court properly held Muhammad's competency claim to be procedurally barred, as it was fully resolved on direct appeal and no new evidence was proffered to disturb that holding. Engle v.Dugger, Jackson v. Dugger, Correll v. Dugger, supra.

VII

THE APPELLANT'S CLAIM THAT HE WAS NOT COMPETENT TO WAIVE A SENTENCING JURY AND THAT THE TRIAL COURT FAILED TO CONDUCT PENALTY PROCEEDINGS BEFORE AN ADVISORY JURY, WERE PROPERLY DETERMINED TO BE PROCEDURALLY BARRED.

The Appellant claims that he was not competent to waive the advisory jury for the sentencing proceedings, and that the trial court therefore erred in failing to conduct the penalty proceedings before an advisory jury. These issues were raised in claim IV of the motion for post-conviction relief. (P.C. 205-11). The lower court found these claims to be procedurally barred:

> Claim IV continues the assumption that the defendant was not competent and thus his election to waive a sentencing jury was invalid. This claim fails for two reasons. First, the incompetency assumption that underpins the claim has been resolved adversely to the defendant by the appellate court. Second, this issue should have been raised on direct appeal.

(P.C. 1379).

In the direct appeal, this Court specifically addressed two competency issues, finding that the defendant was competent to stand trial and that he was competent to waive counsel. Muhammad v. State, 494 So.2d 969, 972-76 (Fla. 1986). As the underlying competency issues were already adjudicated by this Court in the direct appeal, the competency issues are not

subject to collateral attack. Armstrong v. State, 429 So.2d 287, 288 (Fla. 1983) (issues resolved on direct appeal are not subject to collateral attack); Sireci v. State, 469 So.2d 119 (Fla. 1985) (same); Engle v. Dugger, supra; see also, Arguments III and IV herein.

Prior to accepting the defendant's decision to waive the advisory sentencing jury, the trial judge questioned the defendant, to determine whether he was making the decision knowingly and voluntarily, and to determine whether the defendant understood his rights. (3T., pp. 4-11). That transcript reflects that the defendant was speaking coherently and intelligently, and that he further stated that he was not "coerced." (Id. at p. 9). To the extent that the Appellant is now claiming that the trial court's inquiry of the defendant at that point in time was somehow defective, that is a claim which could have and should have been raised on direct appeal and it is now barred. The transcript of that colloquy was a part of the record on appeal from the direct appeal and any alleged deficiency in the court's examination of the defendant could have and should have been presented on direct appeal. Sireci v. State, supra, at 120.

Furthermore, as noted above, this issue is really no different than the competency issues which were already determined by this Court on direct appeal. The Brief of

Appellant suggests that there was a further sign of the defendant's incompetency when waiving the advisory jury, since one of his reasons for the waiver was not rational. The Appellant claims that the irrational reason for the waiver was the "length of time", a mere eight days, since the jury had recessed in between the guilt phase and sentencing phase. Brief of Appellant, p. 59. The Brief of Appellant incorrectly states the defendant's stated reasons for wanting the waiver of the advisory jury. The defendant's concern was not the mere number of days in between the guilt and sentencing phases. Rather, the defendant's own words indicate that he was concerned because the jurors were not sequestered during that time and that therefore they may have been subjected to external influences, and because of the presence of uniformed officers in the courtroom. (3T. pp. 9, 11). The reasons asserted were clearly cogent and in no way irrational. It is therefore readily apparent that the Appellant's state of mind at the time of this waiver of the advisory jury was in no way distinctive from his state of mind at any other time during the trial court proceedings. Therefore, this Court's determination that the lower court's competency determinations were proper is equally applicable to the question of competency at the time of the waiver of the advisory jury. The lower court's conclusion that this issue is procedurally barred is therefore proper. Sireci v. State, supra.

VIII

THE APPELLANT'S CLAIMS THAT HE WAS DENIED HIS RIGHTS AS A PRO SE DEFENDANT WERE PROPERLY FOUND TO BE PROCEDURALLY BARRED BY THE LOWER COURT.

A. The Appellant claims that he was denied a fair trial because prison authorities made slanderous allegations about his counsel. The motion for post-conviction relief briefly alludes to this in claim X, without ever alleging what those "slanderous allegations" were. The sole reference to this in the Brief of Appellant, pp. 64-65, is a quote from Judge Green in which he indicates that he cannot try this case and he refers to non-specified allegations by persons in positions of authority "concerning your relationship between you and Miss Cary." As is apparent from the citation, the transcript of the hearing where the quote was obtained was contained in the record on direct appeal. (SR. 1, Tr. January 12, 1981). The lower court found that all allegations of prosecutorial misconduct in claim X were procedurally barred since they could have and should have been raised on direct appeal. Since Judge Green alluded to this prior to trial, the defendant could have and should have raised this claim on direct appeal. It is therefore procedurally barred. Zeigler v. State, 452 So.2d 537, 538-39 (Fla. 1989). It is also apparent that the claim is frivolous, since the allegedly slanderous allegations are never specified and they were never uttered before the jury or the sentencing judge.

The Appellant also asserts in this issue that prison authorities refused to allow counsel to consult with Appellant until forced to do so by court order. (Brief of Appellant, p. 64). The Appellant's Brief does not indicate where this claim was included in the 360 page motion for post-conviction relief. It does not appear as though this claim was ever presented below and, if that is so, the claim is procedurally barred, because the claim must be presented to the trial court before the appellate court. Tillman v. State, 471 So.2d 32 (Fla. 1985); Doyle, supra. If the claim is anywhere to be found in the rule 3.850 motion, it is likewise procedurally barred. Since the issue of Muhammad's ability to consult with counsel resulted in a court order (see Brief of Appellant, p. 64), the issue was raised in the trial court and could have and should have been raised on direct appeal. Zeigler, supra.

B. The Appellant claims that he was indicted by a biased grand jury. (Brief of Appellant, p. 65). This issue was raised in claim XI of the motion for post-conviction relief. (P.C. 283-86). The lower court ruled that this issue was procedurally barred since it could have and should have been raised on direct appeal. (P.C. 1380). The record reflects that defense counsel had raised this issue in a Motion to Abate the indictment. (R. 226). As the issue had been raised in the trial court, it could have and should have been raised on direct appeal, and is now procedurally barred. State v. Glenn, 558 So.2d 4 (Fla. 1990).

This issue is also addressed in greater detail in section II of the Argument portion of this Brief of Appellee, supra, at pp. 21-23.

C. The Appellant claims that there was some unspecified impropriety or prejudice resulting from the recusal of Judges Green and Carlisle. (Brief of Appellant, p. 65). The ambiguous complaints about the recusal of the judges appear to relate to claim X of the Rule 3.850 motion. (R. 274-75), which the lower court found to have been procedurally barred, as it could have and should have been raised on direct appeal. (P.C. 1380). As the judges' recusals were a matter of record, prior to the trial, any alleged impropriety as a result of the recusals would be a matter which could have and should have been raised on direct appeal. Zeigler, supra. Moreover, as previously noted, a defendant does not have a right to be tried by any particular judge. State ex rel. Brown v. Dewell, supra; City of Miami v. Clarke, supra.

D. The Appellant claims that he was denied meaningful access to the prison law library after he had obtained permission to represent himself and while he was preparing for trial. (Brief of Appellant, pp. 65-67; P.C. 222-29). The lower court ruled that this claim was procedurally barred because it had been raised in the trial court, prior to trial, and could have and should have been raised on direct appeal. (P.C. 1380). The lower court's ruling is supported by the record.

The supplemental record on appeal from the prior direct appeal contains the transcript of a pre-trial hearing held on July 19, 1982. (SR. 1, Tr. 7/19/82). At this hearing, the defendant told the judge that he was being denied physical access to the prison law library. (Id. at pp. 26-36). The defendant explained that the prison authorities made him submit requests to the law librarian who would then respond to these, indicating whether the prison library had the information or not, and if so, copies of the materials would be sent to him. Muhammad added that he was requesting physical access to the library between the hours of 1:00 to 3:00 a.m. (Id. at p. 27). The trial court inquired as to the details of what had happened on each of Muhammad's requests to the librarian. (Id. at pp. 34-36). The judge did not grant the defendant's request for relief.

As the prison law library issue was explored in detail at a pretrial hearing, the defendant could have raised this issue on direct appeal. State v. Glenn, 558 So.2d 4 (Fla. 1990) ("Generally, matters which could have or should have been raised on direct appeal may not be considered by a motion for postconviction relief. . . .").

With respect to this claim, the State would further note several things. First, when the trial court inquired as to the

status of the defendant's requests to the law library, the only specific complaint he had was that the librarian had responded once that the library did not contain Atlantic Reporters. (S.R. 2; Tr. 7/19/82 transcripts, pp. 34-35). When the court specifically asked about any other requests which were made and denied, the defendant did not provide any details. Id. at p. 36.

Next, it should be noted that the Brief of Appellant alleges that the defendant "was assured access to a law library" at the time that he waived counsel, and the Brief of Appellant cites "R. 389" for this proposition. (Brief of Appellant, p. 65). That citation - R. 389 - contains no such "assurance." "R. 389" is nothing more than the order permitting self-representation. Indeed, at the pretrial Faretta inquiry, on June 7, 1982, when the defendant expressed his desire for self-representation, the judge stated:

> You understand about your access better than I do to law books, secretaries, typing, telephones, and all of those kinds of things?

(SR. 3, Tr. 6/7/82, at p. 14). The defendant responded: ". . . and if I'm confronted with any problems, I can only request this Court to assist me in having or assist in addressing rights that I believe I am entitled." Id. The judge then added:

> We'll get into that later. What I want you to know, what I want to convey so that we can get an understanding is that I may deny all of that, which you might

> believe is a severe handicap to representing you.

Id. at p. 15.

Lastly, the State would note that actual physical access to the library itself is not required. Bounds v. Smith, 430 U.S. 817, 828, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977), held that "the constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." (emphasis added). The Fourth District Court of Appeal, in emphasizing the foregoing alternative language in Wells v. State, 358 So.2d 1113 (Fla. 4th DCA 1978), has held that actual access to law books is not a mandated right for an indigent defendant representing himself.

Furthermore, as the sole articulated problem was the fact that the prison library did not have the Atlantic Reporter, the defendant never articulated facts which would demonstrate a denial of access to the law library. Although the defendant disputed the prosecutor's claim that the prison furnishes books to the inmate's cell, on request, and then furnishes photocopies, the defendant never asserted any factual instance where the described policy was not adhered to.

E. The Appellant claims that he was deprived of the services of an investigator. (Brief of Appellant, pp. 67-68). This issue was raised in claim XVI of the Rule 3.850 motion, which the lower court found procedurally barred. (P.C. 325, 1382). The lower court ruled as follows:

> Claim XVI attacks what is described as erroneous pretrial rulings of the trial court. Some of these rulings have been directly reviewed by the Florida Supreme Court. The balance were never raised on appeal. Review by Motion to Vacate is precluded.

(P.C. 1382). The record reflects that Muhammad's pretrial motion for an investigator was denied. (R. 396-97, 404-05). As the issue was raised in the trial court, it could have and should have been raised on direct appeal and is now procedurally barred. Furthermore, it should be noted that the record reflects that Muhammad's trial counsel, in the course of his twenty (20) months preparation, had the services of an investigator, and the Court had already granted costs for such services. (R. 273).

F. The Appellant claims that the trial court erred ins striking the insanity defense. (Brief of Appellant, p. 68). This issue was raised in claim XVI(F) of the Rule 3.850 motion. (P.C. 327-42). The lower court found that this claim was procedurally barred as it had already been addressed by this Court in the direct appeal. (P.C. 1382). In the direct appeal, this Court previously ruled on this issue:

> Appellate counsel next asserts error in the trial court's ruling that appointed trial counsel would be unable to present any evidence of insanity because of the defendant's refusal to cooperate with the court experts. Subsequent to this ruling, Muhammad filed a pro se motion a month before trial to withdraw the notice of intent to raise the insanity defense. The trial court permitted the state to withdraw its motion to strike the insanity defense and granted Muhammad's motion. Muhammad was competent to make the motion and therefore he has waived any claim of error.

494 So.2d at 976. As the issue was raised and decided in the direct appeal, it is procedurally barred in the rule 3.850 proceedings. Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987); Bush v. Wainwright, 505 So.2d 409 (Fla. 1987); State v. Bolender, 503 So.2d 1247 (Fla. 1987); Harich v. State, 484 So.2d 1239 (Fla. 1986). This claim is also discussed in Argument Section V of this Brief of Appellee.

G. The Appellant claims that the trial court erred in denying his pro se motion to transcribe pretrial hearings. (Brief of Appellant, p. 68). The Brief of Appellant asserts that the Appellant's pretrial motions to transcribe certain pretrial hearings were denied. Id. As the denial was a matter of record, this issue could should have been raised on direct appeal and is now procedurally barred. Sireci, supra.

H. The Appellant claims that the State failed to provide discovery or that there was an insufficient Richardson inquiry. (Brief of Appellant, pp. 68-69). This issue was raised in claim VIII of the Rule 3.850 motion. (P.C. 248-55). The lower court found that the issue was barred, as it should have been raised on direct appeal. (P.C. 1380). This issue is fully addressed in Argument IX(A) of this Brief of Appellee, infra, at pp. 75-81.

I. The Appellant claims that his stand-by counsel was ordered not to consult with him. This claim is fully addressed in Argument III of this Brief of Appellee, supra, at pp. 30-40.

J. The Appellant claims that he was denied meaningful access to the court insofar as the court refused to issue a witness subpoena for Officer Wade to appear as a defense witness. (Brief of Appellant, pp. 69-71). This claim was raised in claim VI of the Rule 3.850 motion. (P.C. 222, 229-36). This claim was also raised at trial and is barred because it could have and should have been raised on direct appeal.

During cross-examination of a state witness, Mr. Padgett, on October 25, 1982, the defendant requested that the court issue a subpoena for Officer S. Wade, and the judge directed the Clerk of the Court to take care of it at the next recess. (2T. p. 307). Later that same day, after the state rested its case, the defendant advised the court that he had prepared a witness

list and he read out 12 names, which did not include the name of Officer Wade. Id. at 369. The defendant requested that the named witnesses be called for the next day. Id. at 370. The prosecutor then advised the court as to which of the named witnesses were present in court and which were at the prison. Id. The defendant then called his first witness, one of those who was present in the courthouse already. Id. at 371. After the presentation of a further witness, Mr. Henderson, on the same day, October 25th, the following transpired:

> MR. MUHAMMAD: Mr. Elwell informed me that this next witness, Mr. Turner, is not in the area. He informed me that he is in Tallahassee. He will be here tomorrow.
>
> MR. ELWELL: He has not been served pursuant to the subpoena by the defense.
>
> THE COURT: Do you have another witness?
>
> MR. MUHAMMAD: That's the only witness that I have not called, Your Honor.

Id. at 424-25. The case was then recessed until the next day, when Turner was called and testified. Id. at 426.

After Turner's testimony, the defendant inquired as to whether Wade was present and the judge responded: "You told me yesterday that Mr. Turner was your last witness." Id. at 429. The colloquy continued:

> MR. MUHAMMAD: Yes, sir, Your Honor, I did because I had been told that these other people, they could not be located.

> MR. ELLWELL: That's not correct. I don't know anything about Mr. Wade. All that I told the defendant was that D.A. Fipps --
>
> MR. MUHAMMAD: I was speaking of prison officials. I was talking to prison officials asking them if they knew where these people were, and it was the prison officials telling me they didn't know -- Life Officer Wade, I was told that the last that had been heard of him, I believe it was at Tomoca, this is a facility around Volusia county where he is.
>
> THE COURT: Do you have any other witnesses, Mr. Muhammad?
>
> MR. MUHAMMAD: I was told by Mr. Elwell, Mr. Fipps, he could not be located.
>
> MR. ELWELL: We think he is outside the State of Florida. He has not been available for either side since the inception of the case.
>
> MR. MUHAMMAD: With the witnesses not being available, I have no other choice but so say that I have no other witnesses, Your Honor.

(2T., pp. 429-30). The defendant then rested. Id. at 430.

The Appendix to the Motion for Post-Conviction Relief includes some of the subpoenas issued on October 25th, with notes regarding return of process. In the short span of less than 24 hours, several of the subpoenas were served - L.N. Ball, K.O. Crawford and H.J. Owens. (P.C. 512-13). As to Wade, there was a note as to inability to serve, since he was not on shift and lived in Gainesville. (P.C. 512). Thus, the liaison officer receiving the subpoena could not accept service for Wade.

The foregoing facts reveal several things. First, as the issue was fully discussed at trial, any perceived failure of the court could have and should have been raised on direct appeal. This issue is therefore procedurally barred.

Furthermore, the record conclusively refutes the Appellant's claim for several reasons. First, the inability to serve Officer Wade was a direct result of the defendant's untimely request for the issuance of a subpoena. The defendant did not request any subpoenas until the end of the state's case-in-chief. As service of process frequently can take several days, especially if there are problems in locating the persons to be served, such last minute requests for service cannot reasonably expect mandatory command performances. Thus, many cases have noted that criminal defendants have not been denied compulsory issuance of process when requests for the issuance of subpoenas are untimely. See, e.g., United States v. Rinchack, 820 F.2d 1557, 1566 (11th Cir. 1987) ("In exercising its discretion [to grant issuance of witness subpoena], the court may consider other factors pertaining to the prospective witnesses' testimony as well, including materiality, competency and the timeliness of the request. . . . The appellate courts have upheld the refusal of district courts to issue a Rule 17(b) subpoena where the request was untimely, the testimony sought was cumulative, or the defendant failed to make a satisfactory

showing of indigency or necessity); United States v. Stoker, 522 F.2d 576, 579 (10th Cir. 1975); United States v. Goodwin, 625 F.2d 693, 703-04 (5th Cir. 1980) (issuance of subpoena can be denied without violating Sixth Amendment based upon several factors, including the timeliness of the request); United States v. Sims, 637 F.2d 625, 629 (9th Cir. 1980); United States v. Pitts, 569 F.2d 343, 349 at n. 10 (5th Cir. 1978); United States v. Hedgwood, 562 F.2d 946, 952 (5th Cir. 1977). In the instant case, the above facts clearly reflect the untimely request for the issuance of the subpoena.

Timeliness is an especially important factor when it comes to serving law enforcement officers, and it is built into §48.031(4)(a), which permits a designated law enforcement officer to refuse to accept service for other employees/officers in three situations:

> 1. For a witness who is no longer employed by the agency at that place of employment;
>
> 2. If the witness is not scheduled to work prior to the date the witness is required to appear; or
>
> 3. If the appearance date is less than 5 days from the date of service.

The defendant obviously failed to comply with the statutory five-day requirement and had no reasonable expectation of immediate service and production of the witness. The problems

with Wade were compounded by the fact that he was not on shift when service was attempted and he lived in a different county.

In addition to the foregoing, the colloquy between the defendant and the court reflects that the defendant waived the service of the subpoena for Officer Wade. When the court inquired whether the defendant had any more witnesses, Muhammad responded, only Turner, obviously leading the court to believe Muhammad no longer desired Wade's presence. When Wade ultimately was not present, Muhammad did not request any further continuance for the purpose of obtaining his presence. Notwithstanding the foregoing, the State engaged in clearly reasonable efforts to procure Wade's presence. In view of Muhammad's implicit withdrawal of the intention to present Wade as a witness, the issue regarding the subpoena must be deemed waived. See, United States v. De La Vega, 913 F.2d 861, 863 (11th Cir. 1990).

Finally, the record also reflects that Muhammad never attempted to demonstrate the relevancy or importance of Wade to the court. That is yet a further reason for not attributing any fault to the State for not doing anything beyond its initial efforts to subpoena Wade. Accordingly, not only was this issue procedurally barred, as it could have been raised on direct appeal, but it is conclusively refuted by the record.

The Appellant similarly complains that the State failed to serve subpoenas on, or produce, Officers Phipps and Jarvis. All of the foregoing arguments are equally applicable. First, the issue could have and should have been raised on direct appeal. Second, the issue is conclusively refuted by the record. The requests for subpoenas were untimely. After Turner testified, and before Muhammad rested, he never attempted to call Jarvis or Phipps, and indicated that he had no further witnesses. Moreover, as to Phipps, the record reflects that he was outside the State of Florida and not available. (2T., pp. 369-71). Thus, Muhammad clearly waived this claim as well.

K. The Appellant claims that he was not present at critical stages of the proceedings. (Brief of Appellant, pp. 72-77). These claims were asserted in claims XV and XVI of the Rule 3.850 motion. (P.C. 173-83). The lower court ruled that these claims were procedurally barred as the allegations were based upon the trial transcripts, and they could have and should have been raised on direct appeal. (P.C. 1381).

With respect to the alleged instances in which the defendant claims to have been absent from trial proceedings, the defendant never asserted any objections, at any time, during the trial court proceedings. Nor are there ever any objections during trial that he was being excluded from bench conferences. Rule 3.850, in pertinent part, states:

> This rule does not authorize relief based upon grounds which could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence.

Thus, Troedel v. State, 479 So.2d 736, 737 (Fla. 1985), holds that:

> Other arguments appellant makes are contentions of procedural error that could have been and should have been raised by means of objection or motion at trial and argument on appeal. Not having been argued on appeal, or not having been preserved for appeal by motion or objection at trial, they are foreclosed from consideration and are not cognizable by motion under rule 3.850.

See also, Preston v. State, 528 So.2d 896, 899 (Fla. 1988) (multiple issues deemed procedurally barred where there were no objections at trial and no argument of issues on appeal); Blanco v. Wainwright, 507 So.2d 1377, 1380 (Fla. 1987) (specifically holding that a claim that a defendant was absent from critical stages of the trial is procedurally barred because it should have been presented on direct appeal); Henderson v. Dugger, 522 So.2d 835, 836 (Fla. 1988) (same). Accordingly, the lower court correctly determined that this issue was procedurally barred.

With respect to the alleged absences from the trial, the State would further note several facts. As to the instance in which the judge announces that the prosecution had indicated

that the court could consider nonstatutory mitigating circumstances (4T., p. 6), the judge had already imposed sentence and pronounced his findings. (Id. at pp. 4-6). Therefore, there is not basis for finding that this is a critical stage, as the trial and sentencing were already fully over. With respect to various bench conferences, the Appellant does not claim that he was absent from the courtroom; only that he was not at the bench. Thus, the Appellant was obviously aware that any such bench conferences were occurring, was in a position to object and failed to do so.

The other alleged instance occurs at the conclusion of closing arguments in the penalty phase. (3T., pp. 59-60). The defendant finished his argument, and the judge stated:

> Thank you, Take the defendant out first, the evidence and arguments of counsel, I find that the State has established at least several of the aggravating circumstances. . . .

Id. The judge then continues to speak for another page, indicating that the defendant elected not to provide any evidence of mitigating circumstances. Id. at 59-60. The judge then states that after the filing of the PSI report, the sentencing hearing would be scheduled. Id. at 60. A recess is then declared. With respect to the statement "Take the defendant out first," even if that ambiguous statement indicates that the defendant was being taken out while the judge was

speaking without interruption, the defendant obviously would have been aware that the court was still speaking and would have been in a position to object to his premature removal from the courtroom. Furthermore, the transcript conclusively refutes the notion that this was a critical stage of the proceedings, as the judge was not making his findings and was not imposing sentence; he was merely deferring further action pending a PSI report.[10]

L. The Appellant claims that the trial court erred in failing to provide him with a copy of the presentence investigation report and an opportunity to rebut its contents. (Brief of Appellant, p. 77). That issue is fully addressed in Argument II of this Brief of Appellee, at pp. 17-21 supra. It, too, should have been raised on direct appeal. It is also conclusively refuted by the record, which reflects that the Appellant was fully aware of the report. See, pp. 17-21, herein.

In conclusion, the lower court's determinations that the foregoing claims were procedurally barred are supported by the record and controlling case law.

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[10] It would also appear that since the judge spoke for about a minute after saying "Take the defendant out first," common sense would dictate that since the defendant is escorted by security guards, and since the defendant had just finished his closing argument, seconds earlier, it is inconceivable that the defendant would have been out of the courtroom before the judge uttered his final few words.

IX

VARIOUS CLAIMS BASED UPON ALLEGED MISCONDUCT OF THE STATE WERE PROPERLY FOUND TO BE PROCEDURALLY BARRED BY THE LOWER COURT.

A. The Appellant claims that the prosecution, during trial, failed to turn over allegedly exculpatory evidence, consisting of statements of prison employees. (Brief of Appellant, pp. 79-82). The Appellant claims that this resulted in violations of both Richardson v. State, 246 So.2d 771 (Fla. 1971), and Brady v. Maryland, 373 U.S. 83 (1963). This claim was raised in claim VIII of the Rule 3.850 motion. (P.C. 248-55). The Appellant alleged that he presented this issue to the trial court and that, at that time, the prosecutor erroneously asserted that there were no relevant statements by any employees. (P.C. 251-53). The Appellant claims that when the trial court denied any relief based upon the alleged failure of the State to comply with the discovery rules, the trial court ruled without an adequate inquiry under Richardson, supra. The Appellant also claims that there were employee statements, that those statements were not provided by the prosecution, that those statements "contained a great deal of exculpatory information regarding Mr. Muhammand's mental state during the time period surrounding the offense." (P.C. 253). In making such allegations regarding allegedly exculpatory evidence, the Appellant was attempting to allege a violation of Brady, supra.

The trial court denied the foregoing claim, stating the following:

> Claim VIII alleges a Brady violation because the State withheld exculpatory evidence. This allegation is not based on newly discovered evidence but rather on alleged discovery violations by the State before and during trial and the trial court's failure to conduct a Richardson inquiry. Once again this is an issue that should have been raised on direct appeal.

(P.C. 1380).

The claim that the trial court conducted an inadequate Richardson inquiry is clearly one which could have and should have been raised on direct appeal. The record reflects that at trial, the defendant complained about not being provided with employee statements. (R. 1428; P.C. 250-53; SR. 2, Tr. 10/13/82). The record further reflects that the trial judge inquired: "What about statements made by employees?" Id. When the prosecutor responded that there were "no statements relative to the Defendant made by employees," the judge denied the defendant's discovery related motions. Id.

As the foregoing alleged discovery violation was raised during the trial, any alleged inadequacy in the Richardson inquiry could have and should have been raised on direct appeal. The Richardson claim is therefore improper in a Rule 3.850 motion. Generally, matters which could have or should have been

raised on direct appeal may not be considered by motion for post-conviction relief. Glenn, supra. When a discovery-related claim is known and raised during trial, it must also be raised on direct appeal, not in a motion for post-conviction relief. Preston v. State, 528 So.2d 896, 898 (Fla. 1988). In Preston, the defendant claimed that the State failed to notify defense counsel "that the police had discovered keys bearing the name 'Marcus A. Morales" in the victim's automobile. The existence of the keys came to light during the original trial. Appellant asserted the Brady violation in his motion for new trial, which the court denied on the premise that appellant had failed to demonstrate the materiality of the keys." 528 So.2d at 898. Since the issue had been raised at trial, this Court ruled that "[t]his issue could have been raised on direct appeal, and appellant is procedurally barred from now raising the claim." Id. So, too, the alleged inadequacy of the Richardson inquiry could have been raised on direct appeal and is now barred. See also, Brown v. State, 515 So.2d 211 (Fla. 1987) (adequacy of Richardson inquiry reviewable on direct appeal).

The Appellant further asserts that not only was this a Richardson violation, but that a Brady violation occurred as well, since the employee statements do exist and they allegedly contain "a great deal of exculpatory information regarding Mr. Muhammad's mental state during the time period surrounding the offense." (P.C. 253). The motion for post-conviction relief did

not attach any of the alleged employee statements which the Appellant claims were suppressed. The motion did not specify the content of any of the statements which the Appellant claims were suppressed. The motion does not even specify the names of the alleged employees.[11] The sole allegation was that these statements supposedly contained exculpatory information regarding the defendant's mental state at or about the time of the offense.

Such conclusory allegations regarding the allegedly suppressed employee statements were insufficient to warrant any hearing. See, e.g., Kennedy v. State, 547 So.2d 912, 913 (Fla. 1989). Kennedy found conclusory allegations regarding ineffective assistance of counsel insufficient to warrant an evidentiary hearing:

> . . . A defendant may not simply file a motion for post-conviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing. The defendant must allege specific facts that, when considering the totality of the circumstances, are not conclusively rebutted by the record and that demonstrate a deficiency on the part of counsel which is detrimental to the defendant.

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[11] The record on direct appeal reflects that the State's Answer to Demand for Discovery provided the written and oral statements of at least twenty-two (22) employees. (R.166-168).

Id. So, too, a defendant asserting a Brady violation in a motion for post-conviction relief, is not entitled to an evidentiary hearing unless there are specific, factual allegations, delineating who the suppressed statements were from, what the suppressed statements said, and how the information in the suppressed statements would be exculpatory. For example, in Lightbourne v. Dugger, 549 So.2d 1364, 1365 (Fla. 1989), allegations in a motion for post-conviction relief were deemed sufficient to warrant an evidentiary hearing. There, the defendant alleged extensive details regarding two cellmates who were acting in concert with the state when they obtained incriminating statements from the defendant. The newly discovered, and allegedly suppressed, evidence regarding the cellmates' agency for the state is extremely detailed in the motion. Id. Thus, the details enabled a court to determine whether there was a sufficient basis for a Brady claim. The conclusory allegations in the instant case do not provide any such basis.

By comparison, in Gorham v. State, 521 So.2d 1067, 1068 (Fla. 1988), the defendant alleged that photos and plaster casts of a bloody footprint beside the victim's body had been suppressed. This Brady claim was insufficient to warrant an evidentiary hearing, as the motion "only raises the possibility that the photograph and plaster casts 'might have proven' that someone else brought the wallet to the body of Carl Peterson

after the murder." Id. The allegations in the instant case similarly do not demonstrate that the allegedly suppressed evidence would probably have affected the outcome of the proceedings.[12] Thus, the instant allegations are also insufficient to warrant an evidentiary hearing. See also, Swafford v. Dugger, 569 So.2d 1264, 1267 (Fla. 1990) (this Court upheld summary denial of Brady claim without an evidentiary hearing where the defendant failed to establish, in the Rule 3.850 motion, the materiality of the information he claims the state withheld). Accordingly, this claim was properly denied by the trial court.

B. The Appellant claims that other instances of prosecutorial misconduct occurred during the trial. In

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[12] A Brady claim must demonstrate the materiality of the suppressed evidence, and evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985). The instant allegations clearly do not detail any facts demonstrating any such materiality. The Brief of Appellant, pp. 80-81, contains a few alleged details from the allegedly suppressed statements. Since these factual allegations were not included in the motion below and were in no way submitted to the court below, they are not a proper part of the record in this Court and cannot be considered by this Court. Doyle, supra. Moreover, the argument that the State presented a "false factual scenario that Mr. Muhhamad refused to shave because of his religion;" see Appellant's Brief of p. 80, is entirely without record support. The record reflects that there was no evidence or argument presented by the State to the jury or the sentencer that defendant did anything for religious reasons. In fact the state correction officer witnesses testified that Muhammad told them that he was unable to shave due to a skin condition. (2T., p. 294); see also Muhammad, supra, 494 So.2d at 970.

particular, the Appellant complains about prosecutorial comments during opening argument - that the victim was a law-abiding family man, murdered by a "cancer of society" - and during closing argument - that the victim, a family man, had just started a new job. (R. 984, 1440). These claims were presented in claims X and XIV of the Rule 3.850 motion. (P.C. 273-77, 03-306). The lower court found that these claims were procedurally barred:

> Claim XIV is styled as a violation of the U.S. Supreme Court's dictates in Booth v. Maryland, 107 S.Ct. 2529 (1987). However, as the defendant's motion makes clear, this is not a Booth issue. The defendant makes no argument that a victim impact statement played any role in the sentencing decision as in Booth. It is evident on the face of the defendant's motion that what he objects to are remarks made by the prosecutor in various arguments to the court, not to a sentencing jury. The defendant failed to object in the trial court and the issue was not pursued on appeal. Our Supreme Court has noted that no language in Booth suggests it should be applied retroactively in cases where there was no objection at trial. Grossman v. State, 525 So.2d 833 (Fla. 1988). This claim is therefore procedurally barred.

(P.C. 1381). As to claim X, the lower court ruled that the allegations of prosecutorial misconduct could have and should have been raised on appeal. This Court has made it clear that claims predicated on Booth are not cognizable in Rule 3.850 proceedings where there was no objection in the trial court and the issue was not presented on direct appeal. Adams v. State,

543 So.2d 1244 (Fla. 1989); Preston v. State, 531 So.2d 287, 289 (Fla. 1988); Porter v. Dugger, 559 So.2d 201 (Fla. 1990). See also, Grossman v. State, 525 So.2d 833 (Fla. 1988).

The Brief of Appellant, pp. 82-83, also argues that the comments were improper appeals to emotions, in reliance upon Rosso v. State, 505 So.2d 611 (Fla. 3d DCA 1987). Regardless of the purported legal predicate for the claim, the procedural bar still applies, as there were no objections at trial. Preston v. State, 528 So.2d at 899; Troedel, supra.

The Appellant also interjects several other claims into this issue, all of which have been fully dealt with elsewhere in this brief - i.e., the Brady claim; the subpoena for Officer Wade; the alleged bias of the grand jury; the recusal of Judge's Green and Carlisle. (Brief of Appellant, pp. 83-85). As detailed elsewhere in the Brief of Appellee, all of those claims are procedurally barred as they could have and should have been presented on direct appeal. See Brief of Appellee, pp. 76-81; 66-71; 58-60, supra.

C. The Appellant complains about the presence of large numbers of uniformed officers in the courtroom. This issue was raised in claim X of the motion for post-conviction relief. (P.C. 277-83). The lower court ruled that all allegations of prosecutorial misconduct, in claim X, were procedurally barred,

as they could have and should have been raised on direct appeal. (P.C. 1380).

A review of the pertinent portions of the trial record reveals that the defendant never objected to the presence of the officers and never requested that the court have the officers removed from the courtroom. The Brief of Appellant is inaccurate when it asserts that "Mr. Muhammad . . . requested that the State do something about it. The State did not. Defense counsel asked the court to do something about it -- remove them. The court refused." (Brief of Appellant, PP. 86-87). No such requests were ever made. (3T; Tr. 11/4/82, pp. 1-60).

At the commencement of the sentencing proceedings, the defendant advised the court that he wanted to waive his right to the advisory sentencing jury. (3T., pp. 5-6). The court inquired whether the defendant had been threatened or coerced, and he responded:

> Your Honor, I thought, regarding this matter, and I decided that it is in my best interest as other decisions made by me during these proceedings. No, Your Honor, I have not been coerced. No, Your Honor, I have not been threatened. . . .

(3T., p. 9). The defendant continued to explain:

> . . . It is based, in part, with the jury being absent from these proceedings the several days that we have been away, in conjunction with the representation of the Department of Corrections in this courtroom, I feel that for this jury to be influenced as I am influenced by this overwhelming presence of the Department of Corrections, I feel that it is to my best interest to exercise this right, Your Honor.

Id. The defendant then explained that he was concerned about the fact that the jury had not been sequestered during the eight-day period between the guilty phase and sentencing phase. Id. at 11. It is important to note that all of the foregoing proceedings occurred before the jury had ever entered the courtroom. Id. at 4.[13] Thus, the jury was not in the courtroom at the time of the presence of the officers, at the outset of the penalty phase proceedings, and had in no way been affected by the officers in the courtroom.

It can readily be seen from the foregoing verbatim account that the defendant never requested that the officers be removed from the courtroom. Nor did the defendant ever pursue this issue on direct appeal. In view of the foregoing, the issue of the officers' presence was not preserved and the issue is not cognizable in Rule 3.850 proceedings. Troedel, supra; Preston, supra. Furthermore, even if the issue was preserved,

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[13] Before the jury was even brought into the courtroom, the defendant stated, "Your Honor, before the jury comes in, I have a motion." (3T. at p. 4).

it is an issue which could have and should have been raised on direct appeal, and the issue is again not cognizable in a Rule 3.850 motion. Sireci, supra.

The State would note that in Woods v. State, 490 So.2d 24 (Fla. 1986), this Court held that a trial court did not abuse its discretion in failing to exclude uniformed spectators from the courtroom. However, the Eleventh Circuit Court of Appeals, in Woods v. Dugger, 923 F.2d 1454 (11th Cir. 1991), disagreed. It is important to note that in Woods, defense counsel explicitly asked the court to clear the uniformed spectators from the courtroom, and the judge refused. 490 So.2d at 27. Thus, not only was the claim fully preserved, but it was presented on direct appeal as well.

X

THE LOWER COURT CORRECTLY HELD THAT THE APPELLANT'S CLAIMS THAT THERE SHOULD HAVE BEEN A CHANGE OF VENUE AND THAT THERE SHOULD HAVE BEEN INDIVIDUAL, SEQUESTERED VOIR DIRE, WERE PROCEDURALLY BARRED.

The Appellant claims that there should have been a change of venue due to adverse pretrial publicity regarding the case. In a related argument, the Appellant contends that there should have been individual, sequestered voir dire regarding what the venire members had previously heard about the case. These issues were presented in claim XVII of the Rule 3.850 motion.

(P.C. 352). The lower court ruled that these claims were procedurally barred, as they could have and should have been raised on direct appeal. (P.C. 1382).

The record reflects that the defendant had moved for an individual sequestered voir dire and a change of venue due to extensive pretrial publicity. (R. 431). The trial of this cause began more than two years after the commission of the offense. Approximately ten days prior to trial, with respect to the individual voir dire, the trial court ruled, that:

> I will at the beginning of the case make a general announcement and indicate -- ask for an indication from the jurors those people that know anything about the facts and circumstances, or have they heard anything about the facts and circumstances. We will then proceed with the individual sequestered examination of those individuals and exclude from the jury panel for cause anyone who should know of Mr. Muhammad's status.

(SR. 2; Tr. 10/11/82; at p. 36).

The trial judge then denied the defendant's motion for change of venue, "at this point subject to renewal at such time as it appears that you cannot get a fair and impartial jury in Bradford County." (S.R. 2, Tr. 10/11/82, at p.23). The trial judge added: "During jury selection you may renew this motion if it appears during jury selection that there are not sufficient members of the jury panel that would not be prejudiced in this cause." Id.

Subsequently, the transcript of the voir dire reflects that the sequestration procedures announced above were adhered to. First thirty-two potential jurors were available to be questioned in groups of twelve. (1T; R. 6, 9). The Court would first ask if any of the jurors knew or had read about the facts and circumstances of the case, and instructed the venire that if anyone did know anything, they should confine their answer to yes or no; if the answer was yes, that juror would be sequestered for individual questioning. (1T. p. 5, 12). The record reflects that of the first group of twelve potential jurors, none was familiar with the circumstances of this case. (1T. 14, 23). As for the remaining groups of potential jurors, the record reflects that six jurors knew "something" about the case. (1T., pp. 110, 206, 337, 407). These jurors were all separated from the venire and individually questioned as to their knowledge. (1T., 202, 210, 270, 338, 408). All of these jurors were then excused. (2T. 202, 270, 273, 408). Finally, the record reflects that Muhammad did not during jury selection renew his motion for change of venue! (1T., pp. 1-453).

As seen from the foregoing, individual sequestration and change of venue claims should have, if at all, been raised on direct appeal, and the failure to raise the same precludes their assertion in Rule 3.850 proceedings. Armstrong v. State, 429 So.2d 287, 288 (Fla. 1983); Henderson v. Dugger, 522 So.2d 835, 836 (Fla. 1988).

XI

THE LOWER COURT CORRECTLY HELD THAT THE APPELLANT'S CLAIM REGARDING A BIASED GRAND JURY WAS PROCEDURALLY BARRED.

The Appellant claims that he was indicted by a biased grand jury. This issue was raised in claim XI of the motion for post-conviction relief. (P.C. 283-86). The lower court ruled that this issue was procedurally barred since it could have and should have been raised on direct appeal. (P.C. 1380). Prior to trial, the defendant's Motion to Voir Dire Grand Jurors, Motion to Compel the Production of Testimony Before the Grand Jury, and Motion to Abate the Indictment were all filed and denied. (R. 24, 26, 226). The Motion to Abate the Indictment was based on allegations that many members of the grand jury were either employed by the Department of Corrections, or had been so employed, or had close relatives who were so employed. As the issue had been raised in the trial court, it could have and should have been raised on direct appeal, and is now procedurally barred. State v. Glenn, 558 So.2d 4 (Fla. 1990).

The Brief of Appellant asserts that the Appellant should be excused for not having raised this issue in the direct appeal "[b]ecause the record was not complete, this issue was not raised on appeal." Brief of Appellant, p. 94. The Appellant asserts no facts, and provides no citations of any sort, for this disingenuous allegation. Indeed, the record fully reflects

that appellate counsel for the direct appeal had an adequate record from which this issue could have been briefed, long prior to the submission of the direct appeal briefs. Volumes I, II and III of the original record on appeal from the direct appeal, which contained all of the motions pertaining to the grand jury issues, were completed by the Clerk of the Circuit Court on April 27, 1983 and were received by the parties in May, 1983. The Brief of Appellant, in the direct appeal, was not submitted until October 1, 1984. The Appellant's basis for this claim appears to be Appendix 10 to the rule 3.850 motion which shows that a supplemental record on appeal, containing no documents pertaining to the grand jury claim, was received by this Court on August 31, 1983 (not 1984), one year and one month before the Appellant's direct appeal brief was submitted. Thus, an ample record existed long prior to the submission of the direct appeal briefs, and this issue was properly determined to be procedurally barred.

This issue is also discussed at length in section II of the Argument of this Brief of Appellee, supra, pp. 21-23. It is noted there that any grand jury bias claim, even if true, would have to be deemed harmless, in light of the ensuing petit jury guilty verdict. Rogers v. State, 511 So.2d 526, 531 (Fla. 1987); Porter v. Wainwright, 805 F.2d 930, 941 (11th Cir. 1986).

XII

THE TRIAL COURT DID NOT ERR IN FAILING TO CONSIDER MR. MUHAMMAD'S MENTAL DEFICIENCIES AS NONSTATUTORY MITIGATING CIRCUMSTANCES AND IN CONSIDERING NONSTAUTOTRY AGGRAVATING FACTORS IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

A. Alleged failure to consider nonstatutory mitigation

The post-conviction judge summarily denied this issue, stating that it was specifically raised on direct appeal and rejected by this Court. (P.C. 1380-81). Indeed, the Appellant's brief on direct appeal specifically raised the following issue:

ISSUE V

THE COURT ERRED IN FAILING TO CONSIDER IN MITIGATION EVIDENCE OF MUHAMMAD'S MENTAL STATUS.

See, Initial Brief of Appellant, Case No. 63,343, p. 37, et seq.

This Court, in turn, addressed this issue as follows:

> Appellate counsel also asserts error in the trial court's failure to find that Muhammad's mental condition was a mitigating factor. However, based on Muhammad's position regarding responsibility for his actions, the trial court was not obliged to infer a mitigating circumstance, contrary to the wishes of a competent defendant proceeding pro se who neither requested mitigation on these grounds nor presented any evidence to support such a conclusion. The trial judge properly

> considered and rejected finding that the defendant was under the influence of extreme mental or emotional disturbance or suffered from a substantial impairment of the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

Muhammad, supra, 494 So.2d at 976 (emphasis added).

The Appellant has erroneously relied on Hitchcock v. Dugger, 481 U.S. 393 (1989), as fundamental change of law for reconsideration of this issue. (R. 455). A Hitchcock violation is based on a violation of Lockett v. Ohio, 438 U.S. 586 (1978). See, Bolender v. Dugger, 564 So.2d 1057, 1058 (Fla. 1990). As noted by this Court:

> The United States Supreme Court filed Lockett on July 3, 1978. On December 21, 1978 we filed our opinion on rehearing in Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979), which brought Florida's capital sentencing into line with Lockett.

Id.

The penalty phase in the instant case took place on November 4, 1982 and January 20, 1983. (R. 455). Approximately two years prior to the penalty phase proceedings, the pretrial counsel herein filed a motion to declare Florida's capital sentencing statute unconstitutional under Lockett, supra, which

the trial court denied. (R. 148-151; 150). In response to this defense motion, the State filed an "Answer and Memorandum in Support of the Validity of Florida's Death Penalty Statute" (R. 233), wherein it stated: "The list of mitigating circumstances allowed in Florida is not restricted, however, to those enumerated in Florida Statuite 921.141." (R. 235).

Furthermore, the trial judge, prior to the start of the penalty phase on November 4, 1982, specifically advised Mr. Muhammad that he could present "any other aspect of the defendant's character or record or any other circumstances of this offense" for determining mitigation:

> Q. [The Court]: You understand that you have a right to present to this jury evidence of mitigation that includes whether or not you had a prior significant history of criminal activity, whether this offense was committed under the influence of extreme mental or emotional distsurbance, the victim was a participant in the defendant's conduct or consented to the act, the defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person.
>
> The defendant acted under extreme duress or under substantial domination of another person, the capacity of the defendant to appreciate his criminal conduct or to conform his conduct to the requirements of law, substantially impaired age of the defendant at the time of the crime, or any other aspect of the defendant's character or record or any other circumstances of this offense.

> Those matters may be presented by you to a jury for determination; do you understand that, that that may be done?
>
> (3T. at p. 10)
>
> . . .
>
> Q. Do you understand that you have a right to compel witnesses and evidence to be present at this proceeding to testify and present evidence to the jury, and you have a right to testify yourself to the jury on any mitigating factors in this case?
>
> A. I do understand that, Your Honor.
>
> (Id. at p. 11)

It is thus clear that all parties, including the judge, were well aware of Lockett, and there is no basis to support the instant Hitchcock claim. Bolender, supra, at 1058. Muhammad, having been advised of his right to present and have determined any mitigating factor, statutory or otherwise, merely chose to rely on his arguments that death was an inappropriate sanction in the instant case because he had committed only a "routine killing":

> [The Defendant]: I believe that if this court would take into consideration representations made by the defendant before this court, the defendant is not worthy of the sanction of the death penalty in this case. I believe the Legislature of the State of Florida has reserved that punishment for those killings that are set aside, that are unique, that are different. I don't believe the Legislature of the State of Florida intended the death penalty to be imposed for a routine killing.

(3T., pp. 48-49)

Thus, as previously noted by this Court on direct appeal, the trial court was not obliged to "infer" the mitigating circumstances now required by the Appellant, where Mr. Muhammad neither requested mitigation on these grounds nor presented any evidence thereon. Muhammad, supra, 494 So.2d at 976; see also, Lucas v. State, 568 So.2d 18, 23-24 ("As the State points out, Lucas did not point out to the trial court all of the nonstatutory mitigating circumstances he now faults this Court for not considering. Because nonstatutory mitigating evidence is so individualized, the defense must share the burden and identify for the Court the specific nonstatutory mitigating circumstances it is attempting to establish.").

B. The erroneous consideration of nonstatutory aggravating circumstances

The Appellant contends that nonstatutory factors were introduced into the sentencing proceeding. The post-conviction judge found this issue to be procedurally barred, as it should have been raised on direct appeal. The Appellant first states that the prosecutor's penalty phase argument, conducted before the judge, in the absence of a jury, and without any objections or appeal thereof, was improper and constituted nonstatutory aggravation. This issue was correctly found to be procedurally barred. Atkins v. Dugger, 541 So.2d 1165, 1166, n. 1 (11) and

(13) (Fla. 1989); Henderson v. Dugger, 522 So.2d 835, 836 (Fla. 1988). The Appellant has also argued that the trial court improperly considered various aspects of the presentence report in determining Appellant's sentence. This issue was also correctly found to be procedurally barred. Lightbourne v. State, 471 So.2d 27, 28 (Fla. 1985); Lightbourne v. Dugger, 829 F.2d 1012, 1026-27 (11th Cir. 1982); Henderson, supra.

Moreover, the State would note that there is no indication of any reliance on any nonstatutory aggravating factors in either the trial court's oral pronouncement or written order imposing sentence. (4T; R. 455-63). The record reflects that the prosecutor was arguing lack of remorse as part of the cold, calculated, premeditated aggravating factor, because, prior to the crime, the defendant had stated that he was going to "start sticking people," and immediately after stabbing the victim had added, "Good, I hope the mother fucker is dead." (3T. at pp. 35-37). The sentencing judge, however, expressly rejected the aggravating factor of cold, calculated and premeditated and stated: "Again choosing to error on the side of the Defendant, I find that there is no aggravating circumstances under this paragraph." (R. 459).[14]

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[14] Earlier, the sentencer had also rejected the aggravating factor of disruption or hindrance of the lawful exercise of any governmental function, finding some evidence thereof, but "choos[ing] to error on the side of the Defendant and conclud[ing] that this is not an aggravating circumstance under this paragraph." (R. 457-58).

XIII

APPELLANT'S BURDEN SHIFTING CLAIM WAS PROCEDURALLY BARRED AND PROPERLY DENIED.

In his motion for post-conviction relief, Muhammad alleged that the trial court improperly shifted the burden to him to prove that the death penalty was inappropriate. The lower court summarily denied this claim on the basis that it could have been raised on direct appeal, and therefore was procedurally barred. (P.C. 1381). The lower court was correct. Atkins v. Dugger, 541 So.2d 1165, 1166, n. 1 (3) (Fla. 1985); Hamblen v. Dugger, 546 So.2d 1039 (Fla. 1989); Jones v. Dugger, 533 So.2d 290, 293 (Fla. 1988); Henderson v. Dugger, 522 So.2d 835, 836 (Fla. 1988); Adams v. State, 543 So.2d 1244 (Fla. 1989).

XIV

THE APPELLANT'S CLAIM BASED UPON ALLEGED VIOLATIONS OF BOOTH V. MARYLAND, SUPRA, WAS PROPERLY FOUND TO BE PROCEDURALLY BARRED BY THE LOWER COURT.

The trial court properly found this claim to be procedurally barred. (P.C. 1381). There were no objections as to the prosecutor's comments during trial and this issue was not raised on appeal. Grossman v. State, 525 So.2d 833 (Fla. 1988); Clark v. State, 533 So.2d 1144 (Fla. 1988); Correll v.Dugger, supra, at 426, n. 6; Hamblen v. Dugger, supra, at 1042.

XV

APPELLANT'S CLAIM THAT THE HEINOUS, ATROCIOUS AND CRUEL AGGRAVATING CIRCUMSTANCE WAS APPLIED IN AN UNCONSTITUTIONAL MANNER WAS PROPERLY FOUND TO BE PROCEDURALLY BARRED.

In his motion for post-conviction relief, Appellant alleged that his death sentence, which rests in part on the finding of the aggravating circumstance of heinous, atrocious and cruel, is invalid in light of Maynard v. Cartwright, 108 S.Ct. 1853 (1988). The lower court correctly found this claim to be procedurally barred as follows:

> . . . Maynard dealt with an inadequate jury instruction on this aggravating circumstance. In the instant case there were no jury instructions. The defendant waived the sentencing jury. There is no Maynard issue. In any event, no objection was made at trial and the Florida Supreme Court has consistently

> found Maynard claims to be procedurally barred where not raised at trial or on direct appeal. Lightbourne v. Dugger, f14 FLW 376 (Fla. 1989) [549 So.2d 1364, 1366]. (P.C. 1382).

The case law cited above supports the procedural bar. See also, Smalley v. State, 546 So.2d 720, 722 (Fla. 1989).

CONCLUSION

Based upon the foregoing facts and citations of authorities, the Appellee respectfully requests that this court affirm the lower court's order denying the Motion to Vacate Judgement and Sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by mail to **LARRY HELM SPALDING**, and **JUDITH J. DOUGHERTY**, C.C.R., OFFICE OF THE COLLATERAL CAPITAL REPRESENTATIVE, 1533 South Monroe Street, Tallahassee, Florida 32301 on this 10 day of June, 1991.

FARIBA N. KOMEILY
Assistant Attorney General