IN THE SUPREME COURT OF THE STATE OF FLORIDA

AUBREY DENNIS ADAMS,

Appellant,

v

STATE OF FLORIDA,

Appellee.

_____/

CASE NO. ~~56,134~~ 65845

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

AUBREY DENNIS ADAMS, JR., the defendant below and the movant in the Florida Rule of Criminal Procedure 3.850 motion will be referred to as the appellee. References to the prior record on direct appeal to this Honorable Court will be designated by use of the symbol "R" followed by the appropriate page or page numbers in parentheses. References to the transcript of hearing on motions dated April 17, 1978, will be designated by use of the symbol "TM", followed by the appropriate page or page numbers in parentheses. References to the transcript of the pretrial hearing and conference on August 23, 1978, will be designated by use of the symbol "TPT" followed by the appropriate page or page numbers in parentheses. References to the transcript of sentencing and hearing on motion for new trial held on January 16, 1979, will be designated by use of symbol "TS" followed by the appropriate

page or page numbers in parentheses. References to the transcript of trial and testimony which consists of eight (8) separately bound volumes of consecutive pagination will be designated by use of the symbol "TT" followed by the appropriate page or page numbers in parentheses. The above references to the prior record on direct appeal will be few and such references are used solely for the purpose of providing this Court with the factual background leading to the instant motion for post-conviction relief. References to the record on appeal from the denial of the appellant's motion for post-conviction relief will be designated by use of the symbol "RPCM" followed by the appropriate page numbers in parentheses, and will comprise the majority of references in this brief.

A copy of this Court's opinion on direct appeal, and the opinion of the United States Supreme Court denying appellant's petition for writ of certiorari are included in an appendix hereto for the convenience of the Court.

STATEMENT OF THE CASE

On March 16, 1978, a complaint was filed in the Circuit Court of the Fifth Judicial Circuit in and for Marion County, Florida, alleging that on January 23, 1978, the appellant did unlawfully kill a human being while in the attempt to perpetrate sexual battery in violation of Section 782.04 of the Laws of the State of Florida. (R-1) An indictment against the appellant was filed in open court on April 4, 1978. The indictment was for first degree murder and alleged that the appellant on January 23, 1978, in the County of Marion, State of Florida, "did unlawfully from a premeditated design to effect the death of Trisa Gail Thornley or any human being, did kill and murder Trisa Gail Thornley, a human being, by strangling the said Trisa Gail Thornley in violation of Florida Statute 782.04."(R-9).

A motion for change of venue based upon excessive publicity, with affidavits in support thereof, was filed on July 7, 1978. (R-46-48) On that same date, an order was entered changing venue from Marion County, Florida, to Citrus County, Florida, and setting trial to commence on August 28, 1978. (R-50) The trial actually was held at Tavares, Lake County, Florida, and began on October 12, 1978. (R-74;TT-2)

A motion to suppress statements was filed by the appellant on August 28, 1978. (R-59-60) This motion was dated August 23, 1978, and was apparently the motion alluded to at the pretrial hearing held on that same date. (TPT-2)

At that time it was agreed by the parties, with the court's approval, to hear the "one undisposed motion" after the jury had been selected but before they were sworn to try the cause. (TPT-2) However, the motion to suppress was not so heard, both parties announcing that they had no motions to be disposed of prior to jeopardy attaching just before the jury was sworn on October 16, 1978, at 9:18 a.m. (TT-342; 348, 350-351) The appellant did make a Miranda based objection to the admission of statements during trial. (TT-1068-1072; 1084-1087; 1090-1092) The trial court overruled the objection finding that any statements made by the appellant "... after the warning that has been given to him up to this point would be a free and voluntary statement within the meaning of the laws...". (TT-1092)

The guilt phase of the trial was concluded on October 20, 1978, when the jury returned a verdict finding the appellant guilty as charged of murder in the first degree. (TT-1369;1372-1374; R;115) No poll of the jury was requested. (TT-1374) The penalty phase of the trial began one week later on October 27, 1978, and ended on the same date. (TT-1379-1492; R-130) After hearing additional testimony, argument, and instructions, the jury returned their advisory sentence recommending that the court impose the death penalty upon apellant. (TT-1487; 1491-1492; R-130) The appellant requested that the jury be polled as to their advisory sentence. (TT-1493) The trial judge honored this request and each juror agreed and

confirmed that a majority of the jurors joined in the advisory sentence. (TT-1493-1496)

Upon receipt of the jury's advisory sentence, the trial judge withheld adjudication of guilt and ordered a PSI be prepared as rapidly as possible. (TT-1497) By stipulation, it was agreed that sentencing would be held in Marion County. (TT-1497-1498)

A motion for new trial was filed by the appellant on January 12, 1979. (R-139) This motion came up for hearing on January 16, 1979. It was not argued and was orally denied by the trial court. (TS-3) After denying the motion for new trial, the trial judge proceeded to adjudicate the appellant guilty of murder in the first degree and sentenced him to "...be electrocuted till he be dead,,,". (TS-15-16; R-140-141) In support of the sentence imposed, the trial court orally announced and, subsequently entered written findings of fact. (TS-814; R-143-147) The judge found three aggravating circumstances and three mitigating circumstances. (TS-8-14; R-143-147) The aggravating circumstances were 1) that the capital felony was committed while the defendant was engaged in or attempting to engage in, or in the flight after committing or attempting to commit rape and/or kidnapping; 2) that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest; 3) that the capital felony was especially heinous, atrocious, or cruel. The three mitigating circumstances were: 1) that the defendant had no

significant history of prior criminal activity; 2) that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance and 3) that the defendant's age (20) was of significance. Finding that the three mitigating circumstances were insufficient to outweight the three aggravating circumstances, the Court agreed with the jury's advisory sentence, and imposed the death sentence. (TS-14; R-146-147; R-140-142)

Notice of Appeal was filed on February 9, 1979. This Court finding that there was no reversible error affirmed the judgment and sentence of the trial court on February 11, 1982 in Adams v. State, 412 So.2d 850 (Fla. 1982). Rehearing was denied on May 5, 1982. The appellant then petitioned the United States Supreme Court for a writ of certiorari, which was denied on October 4, 1982 in Adams v. Florida, ___ U.S. ___ 103 S.Ct. 182, ___ L.Ed.___2d___ (1982).

An automatic clemency hearing was held on April 25, 1984, and clemency was denied with the Governor's signing of the death warrant on August 21, 1984.

The appellant moved for post-conviction relief and the circuit court summarily denied relief reciting an order into the record and considering all records before the court as an attachment thereto. (RPCM 17-18; 289-303). A stay of execution was also denied (RPCM 294)

STATEMENT OF THE FACTS

I BACKGROUND OF FACTS SURROUNDING CRIME

The most concise statement of the factual background of the murder of Trisa Ann Thornley was set forth in this Court's opinion in Adams v State, 412 So.2d 850 (Fla. 1982) which is contained in the appendix herein and is set forth here for the convenience of the Court so that it may instantly recall those matters leading to the instant conviction, sentence of death and motion for post-conviction relief. No purpose would be served at this juncture by citation to the record of such background material, which is set forth solely for the Court's convenience.

The victim, Trisa Thornley, eight years of age, left school on January 28, 1978, at about 2:30 P.M.. Her body was found on March 15, 1978, in a wooded area near Ocala, Florida, by three men who were gopher hunting. Her hands were tied and taped behind her head and a rope was around her neck. The autopsy showed a bruise on one arm, inflicted prior to death and swelling in the hands induced by tight binding with tape prior to death. The defendant's involvement in the disappearance and death of the victim was shown through circumstantial evidence and by statements, both written and oral, made by him to officers of the Ocala police department.

In his written statements, the defendant stated that he saw the victim walking home from school about a block

and a half from her house and offered to give her a ride home. She got in the car and defendant drove away with her. The defendant remembered "being stopped somewhere and she was screaming and I put my hand over her mouth", and she quit breathing. In his oral statement the defendant said he had removed the clothes from the victim and used some cord which he carried in his car to tie her up so that she would fit into plastic bags. He also said that he tried to have sexual relations with her, but couldn't bring himself to do it. He denied having sexual relations with her.

Two expert witnesses testified that the cause of death was strangulation, but one of the experts stated that the child could have died from manual suffocation. One expert rendered an opinion that the victim's wrists had been taped prior to death. The defendant, in his oral statement, said that he had removed the victim's clothes, but there was an indication from this statement that the clothes were removed after she quit breathing. However, the State argued that as a matter of logic, the clothes were removed prior to the time the wrists were bound, and, at that time, the victim was still alive.

The record shows that defendant had visited in the home of the victim and she voluntarily accompanied defendant during the fatal ride. The victim knew and could have indentified the defendant. The defendant encased the body in white plastic garbage bags and tied it with rope and disposed of

of the body in a desolate area. The defendant concealed his crime effectively for a period of time from January 23, 1978, to March 15, 1978.

ARGUMENT

I. THE TRIAL COURT PROPERLY FOUND THAT THE DEFENDANT HAD WAIVED HIS RIGHT TO ASSERT VARIOUS CLAIMS IN A COLLATERAL RELIEF PROCEEDING.

At the hearing on the Appellant's motion for post-conviction relief the trial court found that the Appellant had waived the right to assert various claims in a collateral relief proceeding. The propriety of such judicial determination will be addressed separately below in the following sub-sections in regard to each claim raised by the Appellant and found to be waived by the trial court.

A. A DEATH PENALTY BASED ON A GENERAL VERDICT OF GUILT WHICH IN TURN IS BASED EITHER UPON A FINDING OF PRE-MEDITATED MURDER OR AN ALTERNATIVE THEORY UNDER THE FELONY MURDER RULE VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The trial court denied relief as to this ground, on the basis that it was a claim that was or should have been raised on the defendant's direct appeal and not now by way of a Florida Rule of Criminal Procedure 3.850 motion, and cited McCrae v State, 437 So.2d 1388 (Fla. 1983). (RPCM 296).

The State would submit that the trial judge's reasoning was eminently correct pursuant to the rule established in McCrae. The purpose of the rule providing for post-conviction relief is to provide a means of inquiry into the alleged constitutional infirmity of a judgment and sentence, not to review ordinary trial errors cognizable by means of direct appeal, as motion procedure is neither a second appeal nor a

substitute appeal and thus matters which were raised on appeal and decided adversely to the movant are not cognizable by motion under Rule 3.850. McCrae, supra, at 1390. Any matters which could have been presented on appeal are also foreclosed from consideration by motion under Rule 3.850 and therefore, a motion for post-conviction relief based upon grounds which either were or could have been raised as issues on appeal may be summarily denied. McCrae at 1390.

Even assuming the defendant was not cognizant of Enmund v Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed. 2d 1140 (1982), which was decided the same year that this Court affirmed the defendant's conviction, relief on this basis is not warranted, as on direct appeal this Court determined from the record before it clear evidence of premeditation, in that the defendant visited the home of the victim and she voluntarily accompanied him during the fatal ride and the evidence further supported the finding that the death was caused by strangulation, not by the defendant placing his hand over the mouth of the victim so as to keep her from screaming or yelling and further, her hands were tied and taped behind her head and a rope was around her neck. Adams v State, 412 So. 2d 850, 852-853 (Fla. 1982). This claim is simply a resurrection in another form of an issue previously decided on direct appeal. Moreover, the ground is insufficient to assert a basis for relief and the defendant has no standing to press such a claim upon the Court, as when the defendant himself

commits the murder, Enmund v Florida, does not apply. Funchess v State, 449 So.2d 1283, 1286 (Fla. 1984).

B. DEFENDANT'S CONVICTION AND SENTENCE WERE BASED UPON A STATUTE DECLARED UNCONSTITUTIONAL PRIOR TO THE DATE OF THE OFFENSE. THE JURY WAS IMPROPERLY INSTRUCTED ON THE FELONY MURDER ISSUE AS TO "THE ABOMINABLE AND DETESTABLE CRIME AGAINST NATURE," WHICH VIOLATED DEFENDANT'S RIGHT TO A FAIR TRIAL AND DUE PROCESS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS.

The trial court also denied relief on the basis of this claim as it was a claim that either was or should have been raised on the defendant's direct appeal and not by way of a Rule 3.850 motion pursuant to McCrae v State, supra. (RPCM 296).

The State would submit that the trial court was correct in so ruling that this issue was not a proper subject for collateral relief proceedings. The defendant raised this issue on direct appeal and this Court acknowledged that the instruction included a reference to a crime which does not exist, and found, however, that although an erroneous or uninvited felony murder instruction was given, the evidence of premeditation was sufficient to render the erroneous instruction harmless. Adams v State, 412 So.2d 850, 852-853 (Fla. 1982). The issue cannot now be reopened in collateral proceedings. Post-conviction proceedings are not intended to afford a defendant a second appeal of matters that were raised on direct appeal. Cooper v State, 437 So.2d 1070, 1072 (Fla. 1983).

C. BECAUSE OF THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ON THE ELEMENTS OF THE UNDERLYING FELONY MURDER OFFENSES, DEFENDANT WAS DENIED A FAIR TRIAL AND DUE PROCESS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS AND A SENTENCE OF DEATH WOULD BE VIOLATIVE OF THE EIGHTH AMENDMENT.

The trial court determined that this was also an issue which either was or should have been raised on the defendant's direct appeal pursuant to McCrae, supra, and not by way of a 3.850 motion. The court also noted that the failure to give this instruction is, in any event, not error, citing Dobbert v. State. (RPCM 297).

The trial court's ruling in this regard was entirely proper. This issue was raised on direct appeal and this Court held that under the indictment the State could prosecute under both the theory of premeditation and the theory of felony-murder and that there was sufficient evidence of premeditation so that a request for an instruction is a prerequisite to raising an alleged error on appeal. Adams v. State, 412 So.2d 850, 852-853 (Fla. 1982). Issues which were addressed at trial or on direct appeal are not subject to collateral attack and are properly dismissed. Demps v. State, 416 So.2d 808, 809 (Fla. 1982); Meeks v. State, 382 So.2d 673, 675 (Fla. 1984); Adams v. State, 380 So.2d 423, 424 (Fla. 1983); See, Jones v. State, 446 So.2d 1059, 1062 (Fla. 1984). Post-conviction proceedings are not intended to afford a defendant a second appeal of matters that were raised on direct appeal. Cooper v. State, 437 So.2d

1070 (Fla. 1983).

In Dobbert v State, __So.2d__, (Fla. 1984) No. 65, 465, and 65,782 (Fla. Aug. 28, 1984)[9 FLW 326] at 328, this Court specifically agreed, citing McCrae v State, 437 So.2d 1388 (Fla. 1983), that the failure to instruct on the underlying offenses enumerated for felony-murder were not cognizable in a Rule 3.850 proceeding because they could have been raised on direct appeal. In the instant case, the claim actually was raised on direct appeal.

D. MANDATED INSTRUCTIONS TO THE JURY IN THE PENALTY PHASE OF CAPITAL TRIALS TO CONSIDER ALL THE AGGRAVATING CIRCUMSTANCES SPECIFIED IN THE DEATH PENALTY STATUTE CREATES A SUBSTANTIAL RISK THAT DEATH IS IMPOSED ON THE BASIS OF AGGRAVATING CIRCUMSTANCES NOT SUPPORTED BY THE EVIDENCE AND ARE VIOLATIVE OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The trial court also denied relief on this ground finding that it was or should have been raised on the defendant's direct appeal and not by way of 3.850 motion, again citing McCrae, supra. (RPCM 297).

The trial court properly denied relief on this ground as counsel failed to object at trial and the issue should have been raised on direct appeal. Issues which either were or could have been addressed at trial or on direct appeal are not subject to collateral attack and are properly dismissed. Demps v State, 416 So.2d 808, 809 (Fla. 1982); Meeks v State, 382 So.2d 673, 675 (Fla. 1980); Adams v State, 380 So.2d 423, 424 (Fla. 1980); See, Jones v State, 446 So.2d 1059, 1062 (Fla.

1984).

E. BY ALLOWING THE JURY TO CONSIDER ALL DEGREES OF HOMOCIDE REGARDLESS OF THE EVIDENTIARY BASIS FOR SAME, THE FLORIDA DEATH PENALTY STATUTE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

The trial court also determined that this ground was one that either was or should have been raised on the defendant's direct appeal and not by way of 3.850 motion, again, citing McCrae, supra, and denied relief. (RPCM 298).

The trial court properly denied relief on this ground. The defendant did not object at trial to such instructions nor raise this issue on direct appeal and such claim is not now cognizable on a collateral relief proceeding. Thompson v State, 410 So.2d 500 (Fla. 1982). Further, the claim that the current standard jury instructions which require instructing only on those lesser degrees of homocides supported by the evidence and which is similar to the instruction upheld in Hopper v Evans, 456 U.S. 605, 102 S.Ct. 2049, 72 L.Ed. 2d 367 (1982) makes the former jury instruction arbitrary because of unchanneled jury discretion does not meet the test set out in Witt v State, 387 So.2d 922 (Fla.) cert. denied 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed. 2d 612 (1980) for providing relief because of a change in the law. Hitchcock v State, 432 So.2d 42,44 (Fla. 1983) Cf.; See, Riley v State, 433 So.2d 976, 979 (Fla. 1983).

F. BY REQUIRING THAT THE DEATH PENALTY RECOMMENDATION BE AGREED UPON BY SEVEN OR MORE JURORS, THE JURY INSTRUCTIONS VIOLATED THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The trial court also denied relief as to this ground on the basis that it either was or should have been raised on the defendant's direct appeal and not by way of a Rule 3.850 motion, again citing McCrae, supra.

The trial court properly denied relief on this basis. The alleged error that the jury was improperly instructed during the sentencing phase of trial that the jury's advisory verdict of either life imprisonment or death must be reached by a majority vote of the jury is waived by lack of contemporaneous objection at trial. Ford v Wainwright, 451 So.2d 471, 474 (Fla. 1984). Counsel in the instant case failed to so object. Nor was the issue raised on appeal. Collateral relief proceedings may not be used as a vehicle to raise, for the first time, issues that could have been raised during the initial appeal on merits. Thompson v State, 410 So.2d 500 (Fla. 1982). Moreover, the instruction has been changed, but not the statute on which it was based. It was an accurate statement of the jury instruction at the time of trial, and accurately tracked the statute in effect at that time, which remains unchanged and a subsequent change in the jury instructions does not constitute a change in the law which will merit relief in a collateral proceeding under the rule of Witt v State, 387 So.2d 922 (Fla. cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed. 2d 612

(1980); Ford v Wainwright, 451 So.2d 471, 474 (Fla. 1984).

G. BY FAILING TO CLEARLY EXPLAIN THE NATURE AND FUNCTION OF MITIGATING CIRCUMSTANCES AND FAILING TO INFORM THE JURY THEY COULD RECOMMEND LIFE EVEN THOUGH THEY FOUND AGGRAVATING CIRCUMSTANCES, THE JURY INSTRUCTIONS VIOLATED DEFENDANT'S RIGHTS UNDER THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The trial court also denied relief on this ground, finding that it was an issue that either was or should have been raised on the defendant's direct appeal and not by way of a Rule 3.850 motion, again citing McCrae, supra. (RPCM 298).

The trial court properly denied relief on this ground. This issue is not a proper subject of collateral relief proceedings. Trial counsel made no objection below nor was the matter raised on direct appeal. Collateral relief proceedings may not be used as a vehicle to raise, for the first time, issues that the petitioner could have raised during the initial appeal on the merits. Thompson v State, 410 So.2d 500 (Fla. 1982).

H. THE EXECUTION OF THE DEFENDANT, IN VIEW OF THE OVERWHELMING MITIGATING CIRCUMSTANCES IN HIS CASE, CONSTITUTES EXCESSIVE AND DISPROPORTIONATE PUNISHMENT FORBIDDEN BY THE EIGHTH AND FOURTEENTH AMENDMENTS.

The trial court also denied relief on this basis because it found it was an issue that either was or should have been raised in the defendant's direct appeal and not by way of a Rule 3.850 motion for a post-conviction relief, again citing McCrae. supra.

The trial court properly denied relief on this ground as it was not the proper subject of a collateral relief proceeding. The issue as to the weighing of aggravating and mitigating factors was raised on direct appeal and this Court held that the findings of the trial judge were sufficient to show that the sentence of death resulted from reasoned judgment and was appropriate under the circumstances. Adams v. State, 412 So.2d 850, 857 (Fla. 1982). Collateral relief proceedings may not be used to retry issues previously litigated on direct appeal. Thompson v. State, 410 So.2d 500 (Fla. 1982).

I. THE APPLICATION OF SECTION 921.141(5)(e), FLORIDIA STATUTES, IN THIS CASE IS IN VIOLATION OF RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS IN THAT AN AGGRAVATING CIRCUMSTANCE WAS APPLIED IN AN ARBITRARY FASHION. THE CAPITAL FELONY WAS COMMITTED TO AVOID OR PREVENT A LAWFUL ARREST.

The trial court denied relief on this ground on the basis that it was, again, an issue which either was or should have been raised in the defendant's direct appeal and not by way of a Rule 3.850 motion, citing McCrae, supra. (RCPM 299).

The trial court properly denied relief on this basis, as the issue was not a proper subject of collateral relief proceedings. The defendant argued on direct appeal that the trial court erred in finding this aggravating factor, and this Court held that there was sufficient competent evidence in the record from which the judge could find that the defendant committed the capital felony in an effort to avoid or prevent a lawful arrest. Adams v. State, 412 So.2d 850, 856 (Fla. 1982). Collateral relief proceedings may not be used to retry issues

previously litigated on direct appeal. Thompson v State, 410 So.2d 500 (Fla. 1982).

J. DEFENDANT WAS TRIED BEFORE A JURY FOR MURDER IN THE FIRST DEGREE WHILE HE WAS NOT COMPETENT TO STAND TRIAL. THIS DEPRIVED HIM OF EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS.

The trial court denied relief on this ground on the basis that the point either was or should have been raised in the defendant's appeal and not by way of a Rule 3.850 motion, again citing McCrae, supra. (RPCM 299).

The trial court properly denied relief on this ground as this issue was not assigned as error at trial nor was it raised on direct appeal. Thompson v State, 410 So.2d 500 (Fla. 1982). It is actually part of a broader attack raised on the motion for post-conviction relief under the category of ineffective assistance of counsel which the court found to be frivolous in this regard and which will be discussed under the topic of ineffective assistance of counsel in this brief for the sake of brevity and clarity.

ARGUMENT

II. THE TRIAL COURT PROPERLY DETERMINED THAT THE DEFENDANT WAS NOT ENTITLED TO A JUDICIAL DETERMINATION OF WHETHER HE WAS COMPETENT TO PROCEED IN THE TRIAL COURT ON A MOTION FOR POST-CONVICTION RELIEF.

The defendant contended that under the Eighth and Fourteenth Amendments to the United States Constitution, he was entitled to a determination of whether he was competent to proceed in judicial proceedings before the lower court on a motion to vacate and post-conviction relief. The trial court denied the defendant's request for a judicial determination of competency to proceed on the Rule 3.850 motions reserving to the defendant the right to bring a Writ of Prohibition in the appropriate court because this type of attack is not allowed under a Rule 3.850 motion and there had been no attempt to attack the sentence. (RPCM 300). It is well settled, and needs no citation, that a decision of the lower court, if correct for any reason, should be upheld on appeal. Therefore, there is no need to conduct an in-depth analysis of the reasoning behind the lower court's denial of this relief, as this Court most recently set forth the law in this regard in Jackson v State, 452 So.2d 533 (Fla. 1984), where it held that a defendant is not entitled to a judicial determination of his competency to assist counsel either in preparing a Rule 3.850 motion or a petition for a Writ of Habeas Corpus.

ARGUMENT

III. THE TIRAL COURT PROPERLY FOUND THAT THE GROUNDS RAISED BY THE DEFENDANT WHICH WERE CLOTHED AS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS EITHER WERE OR SHOULD HAVE BEEN RAISED IN THE DEFENDANT'S DIRECT APPEAL AND NOT IN A COLLATERAL RELIEF PROCEEDING.

The trial court determined at the hearing on the defendant's motion for post-conviction relief that numerous grounds brought by the appellant, which were clothed as ineffective assistance of counsel claims, were claims which either were raised on the defendant's direct appeal or should have been so raised; the trial court again citing McCrae. The State will address each such claim brought by the defendant separately under the sub-headings below. Before separately addressing each claim, the State would ask the Court to take notice of the trial judge's general comment as to defense counsel's effectiveness at the trial of this cause which relates to all ineffectiveness claims brought by the defendant and to be discussed herein:

> ...the defendant had two private attorneys, both known by this court and both highly respected in the legal community. The lead counsel has an excellent background in criminal law both as a prosecutor and defense atnory and vast trial experience. A review of the file will show a thorough investigation of the law and facts by the defendant's trial counsel. (RPCM 301).

A. FAILURE TO FILE ANY TYPE OF MOTION CHALLENGING THE CONSTITUTIONALITY OF THE DEATH PENALTY AS APPLIED TO THE CASE.

As to the defendant's assertion that his trial counsel failed to file any type of motion challenging the constitutionality of the death penalty as applied to the case, the court below at the hearing on the defendant's motion for post-conviction relief determined that this was a claim that either was or should have been raised in the defendant's direct appeal and not in a 3.850 motion.

The trial cout's reasoning in this regard seems to be based on the dictates of logic. A challenge to the constitutionality of the death penalty is one that could have been made on direct appeal, and indeed challenges were made on direct appeal as to the applicability of the death penalty in the instant case, in regard to the applicability of aggravating circumstances and the weighing of aggravating and mitigating circumstances by the trial court. See, Adams v State, 412 So. 2d 850 (Fla. 1982).

The trial court would seem to be correct in applying McCrae to the instant claim and finding that it was one which either was or should have been raised on direct appeal. In essence, an ipso facto determination of effectiveness of counsel would not seem unwarranted in an instance such as this one where the death penalty has actually been attacked on direct appeal as inapplicable to the case and the defendant does not

inform the court which specific constitutional attack he feels should have been brought by trial counsel. It is also a well-known tenet of appellate law that a judgment or decree will be affirmed if sustainable under any theory revealed by the record on appeal and an appellate court is not bound by an erroneous rationale or reasoning of a trial court if the record reveals an alternative basis upon which to uphold the order or judgment. Aetna Insurance Co. v. Settemrino, 324 So.2d 113 (Fla. 3d DCA 1976); Hester v Graham, 332 So.2d 660 (Fla. 2d DCA 1976). This claim was properly denied because it is a deficient one as it does not set forth sufficient facts to support the claim for relief but, rather only conclusions of law. See, McElroy v State, 436 So.2d 417, 418 (Fla. 1st DCA 1983). The defendant did not inform the court which among many constitutional attacks upon the death penalty should have been made, nor does the defendant allege or demonstrate how such a failure could have prejudiced him, creating a reasonable probability that but for such an error the result of the proceeding would have been different pursuant to Strickland v Washington, __U.S.__104 S.Ct. 2052, __L.Ed.2d__ (1984), when the death penalty has been constantly upheld by the United States Supreme Court and this Court against numerous constitutional attacks and such a motion has de minimus, if any chance of success. This claim was insufficient as a matter of law and was one that was thinly disguised as an ineffective assistance of counsel claim, but in actuality was an attempt to relitigate an issue previously litigated on direct appeal or which could have been so litigated.

B. PREPARATION OF AN INADEQUATE MOTION TO SUPPRESS ORAL AND WRITTEN ADMISSIONS FOLLOWED BY A PERFUNCTORY ARGUMENT IN FRONT OF THE JURY RATHER THAN AT A PRE-TRIAL HEARING.

Again, the trial court determined that this was a claim that either was or should have been raised in the defendant's direct appeal and not in a 3.850 motion. (RPCM 300).

The State would submit that the trial court's reasoning is correct and that the motion to suppress oral and written admissions was argued before the court and was an issue, which if the defendant felt was viable, could have been raised on his direct appeal, but was not. In essence, not only did trial counsel not pursue this claim for lack of a proper basis, but appellate counsel also did not believe this claim to be susceptible to proper attack on appeal although he had before him an adequate record of arguments made to the judge by trial counsel on which to base any claim of error in this respect. This is, in essence, an attempt to litigate an issue that to this very point in time, two trial attorneys and one appellate attorney evidently felt had no merit. Although in this claim of ineffective assistance of counsel, the defendant contends that a perfunctory argument was made "in front of the jury" rather than at a pre-trial hearing, this contention is simply false and is belied by the record. At the point where counsel for the defendant first objected to testimony relating to his motion to suppress, the judge actually removed the jury from the courtroom. (TT 1068-1069). All other objections made by

defense counsel in regard to the motion to suppress were made at the bench, before the judge. (TT1084;1090). Any implication on the part of the defendant that the jury was a witness or spectator to suppression arguments of trial counsel is simply inaccurate and belied by the record. Moreover, the record shows that trial counsel vigorously pursued his suppression arguments, which were at best only a little short of engaging in frivolity. (TT1068-1092). Officer Fluno, interviewed the defendant on March 15, 1978, first advising the defendant that he was a suspect in the disappearance of the victim and then showing the defendant his Miranda rights which he read and signed. (TT 1077-1078). Prior to Officer Stephenson talking to the defendant he was again advised to recall the rights that he had already signed (TT 1079). Officer Fluno felt that the defendant understood the Miranda warnings and was fully cognizant of the meaning of each of the numbered items and that the defendant would have been afforded the opportunity of calling a lawyer had he so wanted one (TT 1082;1084). Defense counsel lodged an objection on the basis that there was only an assumption that the defendant had the present ability to take advantage of his Miranda rights. (TT 1085). An attack was further made on the voluntariness of the statement. (TT 1085). Further testimony established that Officer Stephenson interviewed the defendant the prior night of March 15th. (TT 1089). Stephenson testified that the defendant stated that he had remembered his rights as he had been previously ad-

vised (TT 1090). Officer Stephenson testified that he had gone to the defendant's apartment on March 15th (TT 1058-1059). He advised the defendant that he was there because a phone call was made to the Thornley residence and advised him of his constitutional rights which he read from a Miranda card, which included the admonition that if you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning. (TT 1061). This Miranda warning preceded the later one given by Sergeant Fluno at the police station. There is simply no basis for the defendant's claim that the argument made by trial counsel was only a perfunctory one. The State would submit that on the basis of the record below, the trial court properly found that this was an issue that should have or could have been raised on direct appeal and the record bespeaks of the fact that such a meritless claim was properly not raised on direct appeal. There is no reason to subject trial counsel to, in essence, a trial of his performance in collateral relief proceedings when the record itself shows that such a claim was not and could not properly be prosecuted on a direct appeal, for lack of merit.

Further, the defendant's claim is deficient because it does not set forth sufficient facts to support the claim for relief but rather only conclusions of law. McElroy v State, 436 So.2d 417,418 (Fla. 1st DCA 1983). The defendant has not identified in what manner the motion was inadequate or what should have been raised in the motion and how the failure to

include such allegations prejudiced him, and fails to demonstrate why a lengthier argument should have been required on the motion actually filed and in general has not shown a "possibility" of success in regard to a suppression motion, which might have created a reasonable probability that the result of the proceeding would have been different under Strickland v Washington, __U.S.__, 104 S.Ct. 2052, __L.Ed.2d__ (1984).

C. FAILURE TO OBJECT TO A JURY INSTRUCTION BASED ON AN UNCONSTITUTIONAL AND NON-EXISTENT STATUTE.

The trial court found that this claim was one that either was or should have been raised in the defendant's direct appeal and not a Rule 3.850 motion. (RPCM 300).

The trial court was correct in determining that this was a topic for direct appeal rather than one for collateral relief proceedings. In fact, the defendant raised this issue on direct appeal and this Court found that although an erroneous instruction was given, the evidence of premeditation was sufficient to render the instruction harmless. Adams v State, 412 So.2d 850,853 (Fla. 1982). Such an instruction does not render a trial fundamentally unfair. McCrae v Wainwright, 439 So.2d 868 (Fla. 1983). In view of this, the failure to object to the instruction, cannot, in logic, be a prejudicial error if the error itself does not result in prejudice. See, Jent v State, 435 So.2d 809,812 (Fla. 1983); Dobbert v State, __So.2d__, (Fla. 1984) No. 65,465, and 65,782 (Fla. Aug. 28, 1984)[9 FLW 326]. This claim was the proper topic of a direct appeal and the

bringing of it in collateral relief proceedings was a blatant attempt to enter through the back door, once the front door had been closed. Ineffectiveness of counsel cannot be utilized as a guise to litigate matters which either should have or were presented on direct appeal.

D. FAILURE TO OBJECT TO A JURY INSTRUCTION WHICH DID NOT GIVE THE ELEMENTS OF THE UNDERLYING FELONY MURDER OFFENCES.

The trial court also denied relief on this claim as it was or should have been raised in the defendant's direct appeal rather than in a collateral relief proceeding. (RPCM 300).

The trial court was eminently correct in so ruling. On direct appeal this exact issue was raised and this Court held that there was sufficient evidence of premeditation to excuse or render harmless the failure to instruct the jury on the elements of the underlying felonies ofsexual battery and kidnapping. Adams v State, 412 So.2d 850,852-853 (Fla. 1982). Therefore, the omission of the instruction was not error and the omission of an objection thereto was not a deficiency. Muhammad v State, 426 So.2d 533,538 (Fla. 1982). Nor can the defendant possibly demonstrate the requisite prejudice pursuant to Strickland, supra in view of the fact that on direct appeal this Court held that there was sufficient evidence of premeditation to render the instruction harmless. Adams v State at 853. Pursuant to Knight v State, 394 So.2d 997, 1002 (Fla. 1981), failure to give the instruction is not prejudicial. If failure to give the instruction is not prejudicial, certainly the failure to object

cannot have resulted in prejudice. See, Jent v State, 408 So.2d 1024 (Fla. 1981). This is, again, an attempt to enter through the back door when the front door has been closed. This is an issue which has been fully litigated and cannot be resurrected in the disguise of an ineffective assistance of counsel claim.

E. FAILURE TO OBJECT TO JURY INSTRUCTIONS WHICH ALLOWED THE JURY TO CONSIDER ALL THE AGGRAVATING CIRCUMSTANCES LISTED IN THE DEATH PENALTY STATUTE EVEN THOUGH THERE WAS NO EVIDENCE TO SUPPORT SAME.

The trial court also found in regard to this claim that it was one that should have been or was raised on direct appeal and is not cognizable in a collateral relief proceeding. (RPCM 300).

The State would first direct this Court's attention to the lament of the trial judge below as to the expediency required in cases, such as the instant one, where the Governor has signed a death warrant and a defendant subsequently brings a motion for post-conviction relief in what is a "shotgun approach", requiring in an inordinately minute amount of time, the review of a trial, in which the parties had much more time to prepare than that extended to the court and state in collateral relief proceedings. (RPCM 293). In view of such a shotgun approach the lower court asked this court to review the record which it attached to its verbal and transcribed order, in lieu of reviewing parts of the record supporting its summary denial (RPCM 293). The State would submit that nowhere on appeal is

this shotgun approach more obvious than in the instant claim. Instructing on all of the statutory aggravating circumstances has been upheld previously. Striaght v Wainwright, 422 So.2d 827 (Fla. 1982); Hitchcock v State, 432 So.2d 42,44 (Fla. 1983) (f); Riley v State, 433 So.2d 976,979 (Fla. 1983). For the judge to have instructed only on those factors which he found supported by the evidence would have improperly invaded the province of the jury. Striaght at 830. Therefore, counsel's failure to argue such issue is not, as a matter of law, substantially deficient when measured against the standard expected of competent attorneys. See, Striaght, supra, 422 So. 2d at 830. This is an issue which would have been the proper subject of a direct appeal. Had the defendant so raised such an issue on his direct appeal, however, he would have met defeat for instructing on all statutory aggravating circumstances has been upheld previously. This ineffective assistance of counsel claim is a typical attempt to raise under the guise of ineffective assistance of counsel an issue that is the proper subject of direct appeal and, in this instance, one that obviously was not pursued on direct appeal for it inevitably would have met defeat because of the state of the law at the time. Raising such issues under the guise of ineffective assistance of counsel should be firmly prohibited as they are needless smoke screens entailing much research and only serve to divert the attention of the State and the court from any viable issues which may have been raised in collateral relief proceedings, and when, in cases such as the instant one, the Governor has

signed a death warrant, create hours of needless labor in a situation where expedience is of utmost importance. The trial court was within its right to deny this ineffectiveness claim as one that should have been addressed on direct appeal.

F. FAILURE TO OBJECT TO JURY INSTRUCTIONS WHICH ALLOWED THE JURY TO CONSIDER ALL LESSER DEGREES OF HOMOCIDE EVEN THOUGH THERE WAS NO EVIDENTIARY BASIS FOR THE SAME.

The trial court denied this claim as well on the basis that it was an issue susceptible of determination on direct appeal and either was or should have been addressed on said appeal. (RPCM 300).

The trial court properly determined that this was an issue that the defendant could have raised on direct appeal. Failure to object to such an instruction is not error and the omission of an objection thereto is not a deficiency. This Court has upheld the constitutionality of the direction in the standard jury instructions. Hopper v Evans, 456 U.S. 605, 102 S.Ct. 2049 72 L.Ed. 367 (1982) is not applicable because in that case Alabama law prohibited the instructions on lesser included offenses in capital murder cases. The rule of law established in Hopper is that due process provides that the defendants in capital cases are entitled, as in every other criminal case, to an instruction on lesser-included offenses when the evidence warrants such an instruction. Hopper was never intended to limit the giving of lesser included offense instructions in capital cases. Aldridge v Wainwright, 433 So.2d 988,990 (Fla. 1983). The defendant simply cannot show prejudice in counsel's

unwillingness to engage in the futile. Had such an issue been raised on direct appeal, and the appropriate law ascertained by the vehicle of direct appeal, such unnecessary claims would not appear in collateral relief proceedings under the guise of ineffective assistance of counsel. This Court should require as a preliminary basis for asserting such ineffective assistance of counsel claims a determination of such issues on direct appeal. It is patently ludicrous to require counsel to appear at an evidentiary hearing on an ineffective assistance of counsel claim only to state what the law was at the time of trial. The trial court properly determined that this issue was a proper one for direct appeal.

G. FAILURE TO OBJECT TO JURY INSTRUCTIONS THAT REQUIRE THE DEATH PENALTY RECOMMENDATION TO BE AGREED UPON BY SEVEN OR MORE JURORS, EVEN THOUGH SIX IS SUFFICIENT TO RECOMMEND LIFE.

The trial court determined that this also was an issue which either was or should have been raised in the defendant's direct appeal and not in a Rule 3.850 motion. (RPCM 300).

The trial court was again correct in holding that this was an issue that could properly have been treated on direct appeal. The simple failure to object to a jury instruction does not preclude raising that issue on appeal if the error thereupon is a fundamental one. Had this issue been raised on direct appeal, the defendant would have learned that such instructions are not violative of the Sixth, Eighth or Four-

teenth Amendments to the Federal Constitution. Riley v State, 433 So.2d 976,979 (Fla. 1983); Aldridge v State, 433 So.2d 988, 990 (Fla. 1983). The defendant, having had the benefit of a direct appeal would not have raised such an issue in the guise of ineffective assistance of counsel on collateral relief proceedings, in essence, complaining of prejudice by a counsel's unwillingness to engage in the futile. Such claims simply are not properly raised in collateral relief proceedings and serve only to divert attention from any real issues. The fact that this issue does not constitute a change in the law which merits relief in a collateral proceeding under the rule of Witt v State, 387 So.2d 922 (Fla. cert. denied, 449 U.S. 1067,101 S.Ct. 796, 66 L.Ed.2d 612 (1980), does not give counsel carte blanche to circumvent the rule of Witt by realleging such a claim under the guise of ineffective assistance of counsel.

H. FAILURE TO OBJECT TO JURY INSTRUCTIONS THAT FAILED TO CLEARLY DEFINE AND EXPLAIN THE NATURE AND FUNCTION OF MITIGATING CIRCUMSTANCES AND FAILED TO INFORM THE JURY THEY COULD RECOMMEND LIFE EVEN THOUGH THEY FOUND AGGRAVATING CIRCUMSTANCES.

The trial court also determined that this claim was one that either was or should have been raised in the defense direct appeal and not in a rule 3.850 motion. (RPCM 300).

This an issue which is clearly susceptable to determination on direct appeal rather than have the trial court entertain it in the thinly disguished form of an ineffective

assistance of counsel claim. Bringing such claim in the guise of an ineffective assistance of counsel claim nearly deprives this Court of the declaring that which is harmless error as harmless in an effort to hold trial counsel responsible for acts committed by the trial judge which this court would not hold as prejudicial. Moreover, the trial court also properly denied relief on this ground as the defendant has not make an adequate showing of prejudice under Strickland, supra. Pursuant to section 921.141(2)(3), Florida Statutes, the jury renders an advisory sentence. The record does not reflect nor does it show how this alleged failure may have influenced the jury's rendering of an advisory sentence. Even if such alleged failure did influence the jury, no prejudice has been established by the defendant as pursuant to the above statute, it is the judge who determines the sentence. Such jury override was recently upheld by the United States Supreme Court in Spaziano v. Florida, ___ U.S. ___, 104 S.Ct. 3154, ___L.Ed. 2d ___ (1984). Prejudice simply is not and cannot be established under Strickland.

I. REMAINED MUTE WHILE THE PROSECUTION ARGUED THAT THE JURY CONSIDER A STATUTORY AGGRAVATING CIRCUMSTANCE FOR WHICH THERE WAS INSUFFICIENT EVIDENTARY SUPPORT - THAT THE MURDER WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST.

The trial court determined that this also was an issue which either was or should have been raised in the defendant's direct appeal and not in a Rule 3.850 motion (RPCM 300).

The trial court's reasoning was again entirely correct in denying relief on the basis of this ground. The defendant has failed to allege even a substantial deficiency on the part of counsel nor could counsel's actions have resulted in any prejudice under Strickland, supra. On direct appeal the defendant argued that the trial court erred in finding that the State had proved beyond a reasonable doubt that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. This court held that there was sufficient competent evidence in the record from which the judge could find that the defendant committed this capital felony in an effort to avoid or prevent a lawful arrest. Adams v. State, 412 So.2d 850, 856 (Fla. 1982). Counsel committed no error since the highest state court has affirmed the trial court's finding of this aggravating circumstance. Collateral relief proceedings may not be used to retry issues previously litigated on direct appeal. Thompson v. State, 410 So.2d 500 (Fla. 1982). This is simply an attempt to resurrect a dead issue in the form of ineffectiveness of counsel and is devoid of merit. Moreover the decision to object to such an aggravating factor is a matter of tactics. Straight v. Wainwright, 422 So.2d. 827, 829 (Fla. 1982).

J. FAILED TO FILE ANY MOTIONS TO SUPPRESS OR CHALLENGE, ON FOURTH AMENDMENT OR OTHER GROUNDS, THE VARIOUS SEARCH AND SEIZURES MADE, INCLUDING BUT NOT LIMITED TO: (A) THE WIRETAP WHEREBY THE STATE TRACED A TELEPHONE

CALL TO THE DEFENDANT'S RESIDENCE; (B) THE VARIOUS SEARCH WARRANTS TO SEARCH DEFENDANT'S PROPERTY AND VARIOUS AFFIDAVITS IN SUPPORT OF SAID SEARCH WARRANTS; AND (C) THE MOTION FOR DISCOVERY FOR DISCOVERY BY THE STATE SEEKING HAIR SAMPLES.

The trial court properly denied this ground for relief as the record clearly shows that counsel challenged the taking of hair samples as evidence by orders granting additional discovery. The orders reflect that the court heard argument of counsel for not only the state but counsel for the defense. Further, the court also held a telephone conversation with the hair examiner during which counsel for the defendant had an opportunity to question the examiner regarding the proposed analysis. (RPCM 252-253). With respect to challenging the wiretap and warrants, the defendant made no allegations that any attack would even have been successful. Further, with no specific allegation of any ground for a tap other than a broad Fourth Amendment brush, this alleged failure to attack is mere speculation, and insufficient to meet the pleading requirements of Strickland v. Washington, supra. The trial court need not even have reached the issue of whether this should have been raised or could have been raised or was raised on direct appeal as the claim itself is both insufficient on its face and frivolous.

K. FAILURE TO OBJECT TO REPEATED READINGS OF THE INDICTMENT.

The trial court determined that this also was an issue which either was or should have been raised in the defen-

dant's direct appeal and not in a Rule 3.850 motion. (RPCM 300).

It is obvious that the issue of repeated readings of the indictment, if fundamental error, could have been raised on direct appeal. The fact that they were not so raised bespeaks of a presumption of correctness on the part of trial counsel as appellate counsel, reviewing the events of trial in retrospect, did not find this alleged error either fundamental, or worthy of being addressed by this Court. In essence, until this point in time two trial attorneys and one appellate attorney have found this claim to be so insubstantial as to not even bring it to the attention of this Court. There is good reason for their actions. The record reveals that the trial court clearly informed the jury that the indictment is not to be considered as evidence in the case (RPCM 254). Moreover there was no showing below of a reasonable probability that the outcome would have been different had counsel objected to the subsequent readings of the indictment. Absent any showing of prejudice this claim also fails under Strickland, supra.

ARGUMENT

IV. THE TRIAL COURT PROPERLY FOUND TO BE FRIVOLOUS AND DEVOID OF MERIT DEFENDANT'S CLAIMS THAT TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE THE ISSUE OF THE DEFENDANT'S COMPETANCY TO STAND TRIAL AND SANITY AT THE TIME OF THE OFFENSE, LIMITING HIMSELF TO THE EVALUATION OF ONE PSYCHIATRIST AND THEREBY FAILING TO PRESENT EXPERT TESTIMONY AS TO THE DEGREE TO WHICH THE DEFENDANT COULD CONTROL HIS ACTIONS OR CONFORM THEM TO THE REQUIREMENTS OF LAW.

The trial court determined that the above claim was frivolous and of no merit as the defendant had two private attorneys', both known by the trial court and both highly respected in the legal community and the lead counsel has an excellent background in criminal law both as a prosecutor and defense attorney and vast trial experience. (RPCM 301). The court further stated that a review of the file will show a thorough investigation of the law and facts by the defendant's trial counsel and their strategy should not now be challengeable. (RPCM 301). The trial court further stated:

> ...at best, defendant now--excuse me at best, defendant's new assertion that his lawyers should have done these things set out in sub paragraphs 10 through 13 is a mere speculation as to what an expert may have said and that had the defendant finally found an expert who could have qualified before the court in that field and had the witness so testify that the court and/or jury would have accepted and believed the witness, thereby changing the outcome of the trial. Pure speculation as to what might have possibly happened is not enough to have the lower court grant a 3.850 motion hearing, citing Martin

v. State, Supreme Court number 65,788 decided August 28, 1984. (RPCM 301).

The trial court properly denied relief on these claims on the basis of the record. The instant claims are variations on the same theme and are belied by the record. The lower court entered an order for admission of a psychiatrist to the county jail to evaluate the defendant. (RPCM 110). According to the transcript of the sentencing hearing, the defendant was examined by his own doctor, Dr. Sullwold (RPCM 133). It was Dr. Sullwold's opinion that at the time of the crime the defendant knew the difference between right and wrong (RPCM 134). Dr. Sullwold was found to be an expert in the field of psychiatry by the court (TS 1393). It cannot be contended that counsel did not obtain the opinion of a well respected expert. Given the psychiatrists adamant opinion that the defendant was sane at the time of the murder, which is reflected in the record, rather than by needless testimony at an evidentiary hearing, counsel was not obligated to seek additional expert opinion in the hope of fabricating an insanity defense. See, Holmes v. State, 429 So.2d 297, 300 (Fla. 1983). The very fact that counsel did not seek additional expert examination bespeaks of counsel's opinion at that time the defendant was also competent. Dr. Carr, who was accepted by the court as a general practitioner examined all the patients in the jail and testified that the defendant seemed mentally competent and stable the dozen times he saw him in the jail. (RPCM 167; 169). The contention that the defendant was unable

to assist in his defense is simply belied by the record. Counsel filed a notice of alibi listing the names of numerous witnesses which he may have called in regard to the defense of alibi (RPCM 251). The defendant obviously was competent enough to advise counsel as to his whereabouts at the actual time of the crime and to assist counsel in drafting and formulating an alibi defense and was able to remember and recall events sometime prior to trial. Findings by a new psychiatrist or other expert at this time would only be based on the same information available at trial, resulting in a different conclusion in retrospect. No new information has been discovered - only a doctor who draws different conclusions. Booker v. State, 413 So.2d 756, 757 (Fla. 1982). Counsel clearly investigated the defendant's past and called members of the defendant's family as mitigation witnesses (RPCM 135-153). Aside from this claim being refuted by the record, the defendant has shown no prejudice under Strickland, supra. The defendant's claim that another expert would have completely undermined prior findings is speculative. At best, another expert's testimony would have given the jury and judge one more bit of information to be considered and weighed along with other testimony. There is simply no reason to abridge the doctrine of finality in this instance because no showing has been made that a new psychologist or psychiatrist's testimony would have produced more fairness and uniformity. Martin v. State, ___ So.2d ___ (Fla. 1984) case no. 65,788 (Fla. August 28, 1984) [9 FLW 325].

ARGUMENT

V. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S REQUEST TO HOLD AN EVIDENTIARY HEARING ON HIS FLORIDA RULE OF CRIMINAL PROCEDURE 3.850 MOTION.

The state has purposefully and fully addressed each and every claim raised by the defendant below in his Florida Rule of Criminal Procedure 3.850 motion. No purpose would be served by rehashing under the issue of whether an evidentiary hearing should have been held, those claims raised by the defendant. The state refers the court to the preceeding portions of its brief to show that such claims were claims which either were or should have been raised on direct appeal or claims which were subject to being addressed on direct appeal but presented second hand to the trial court in the thinly veiled form of ineffective assistance claims.

The only issue the defendant can even arguably assert as having warranted an evidentiary hearing was the claim that counsel failed to properly investigate and possibly assert the issues of the defendant's competancy to stand trial and his sanity. The defendant simply alleged in his motion for post-conviction relief that "expert opinion will show that the defendant <u>has</u> mental disorders that render him incapable of recalling traumatic experiences which are unacceptable and undesirable to his conscious perception of himself" (RPCM 34). This diagnosis is obviously a post-conviction one and is simply and opinion on the defedant's condition at the <u>present</u>. Even if the trial court accepted the defendant's contention that

he now suffers from catathymic amnesia, relief could still not be afforded to the defendant as an amnesiac could certainly not be capable of remembering whether he could remember and aid his counsel at the time of trial, which is certainly a traumatic event. Dr.Gilels' present diagnosis of the defendant simply cannot be applied retrospectively to the defendant at the time of trial. As in Booker v. State, 413 So.2d 756, 757 (Fla. 1982), not only has no new information been discovered but a doctor who draws different conclusions has not even been discovered. All that has been discovered is a doctor who is willing to testify that the defendant is now an amnesiac. The substance of the doctors proposed testimony is obvious from the defendant's motion for post-conviction relief and such testimony, being fruitless, is certainly not worthy of presentation at a needless evidentiary hearing. There is simply no reason to abridge the doctrine of finality in this instance because no showing has been made that a new psychologist's testimony would have produced more fairness and uniformity. Martin v. State, ___ So. 2d ___ (Fla. 1984) case no. 65,788 (Fla. August 28, 1984) [9 FLW 325].

The defendant, pursuant to his motion for post-conviction relief, proposed to present at an evidentiary hearing the testimony of original trial counsel that the defendant could not help him, thereby rasing a legitimate doubt as to the defendant's competency to stand trial. The state would point out to this Court that original trial counsel's view that the defendant could not help him is a retrospective one.

Counsel obviously did not harbor such an opinion at the time of trial itself or he would have pursued the matter further, securing the services of another psychiatrist to establish such a claim. It is all too easy to doubt oneself retrospectively when the result of a finding of effectiveness may be death to one who is a former client. The Supreme Court has emphasized that in judging ineffectiveness claims, a court must judge the reasonableness of challenged conduct of counsel on the facts of the particular case viewed as of the time of counsels conduct. Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052, 2066 ___ L.Ed.2d ___ (1984). The courts have recently expressed a concern as to counsel being unjustly subjected to unfounded attacks upon their professional competence. Downs v. State, No. 64, 184 (Fla. June 21, 1984) [9 FLW 253]; Strickland, supra, 104 S.Ct. at 2066. The state would suggest that aside from putting a defense attorney's competence into issue, ineffective assistance of counsel attacks may also subject defense counsel to a personal and moral dilema "... the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality differs more from life imprisonment than a 100-year prison term differs from one of only a year or two..." Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality opinion). It is absolutely naive to assume that there exist no lawyers who are morally opossed to capital punishment. It is even more naive to assume that no attorney will act on his moral convictions or on a higher law than the law

of this state and country. Whatever our views, we all, at times, answer to a law higher than that of the land. Even though it may be a rare attorney who will "roll-over" on behalf of his client, courts simply must accept the fact that that the non-commital attorney who seeks neither to cause or accelerate the death of his client, or to be declared ineffective, is a fact of life in collateral relief proceedings. After an analysis of the inconvenience caused to counsel in such collateral relief proceedings, Justice O'Connor stated that "...if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Strickland, supra, 104 S.Ct. at 2070. The State would submit that such course should also be followed whenever possible to avoid subjecting counsel to a personal or moral dilema in which he may be tempted to say "well maybe I should have..." No purpose is served by the holding of an evidentiary hearing with its attendant verbalized conjecture, when the actual state of the matters at the time of trial can be gleaned from the record itself.

In Florida, there has been a recent proliferation of ineffectiveness of counsel challenges. Criminal trials resolved unafavorably to the defendant have increasingly come to be followed by a second trial of counsel's unsuccessful defense. A claim of ineffectiveness of counsel is extraordinary and should be made only when the facts warrant it. It is not a claim that is appropriate in every case. It should be

the exception rather than the rule. Downs v. State, supra, at 255. So too, should an evidentiary hearing be the exception rather than the rule.

ARGUMENT

VI. THE TRIAL COURT PROPERLY ENTERED A VERBAL ORDER DENYING THE DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF ATTACHING TO SUCH ORDER THE ENTIRE FILE WHICH CONCLUSIVELY SHOWED THAT THE DEFENDANT WAS ENTITLED TO NO RELIEF.

The trial court noted that it was handed the six motions in regard to post-conviction relief at about four p.m on September 5, 1984 and the trial court had not had sufficient time to draft written orders on each of the claims and, in view of this, asked the higher courts to accept the verbal order that it rendered in open court which was reduced to writing by the official court reporter. The court noted that this was necessary in order to maintain an orderly appeal of the defendant's case through the courts. (RPCM 292). The court also specifically stated that it was aware of the rule that if the lower court does not hold an evidentiary hearing, it should attach that part of the record that conclusively shows that the defendant is entitled to no relief. However, the court stated that "because of the defendant's shotgun approach to his 3.850 motion and because the court is of the opinion that the appeals court will want to review the entire record in the case the court hereby directs the clerk to forward the entire file to the appellate court and attaches the entire file to the order as grounds for showing the defendant is not entitled to any relief." (RPCM 293-294).

It is the state's position that no interests are served by needless remandation to a lower court for the entry

of a written order when an oral explanation is in the record, is subsequently reduced to writing by the official court reporter and provides the opportunity for a meaningful appellate review. See, Harvey v. State, case no. 83-2344 (Fla. 4th DCA, June 13, 1984) [9 FLW 1332]; CF. Caves v. State, 445 So.2d 341 (Fla. 1984); Thompson v. State, 328 So.2d 1 (Fla. 1976).

This court has before it the entire recorded history of the defendant's case from the trial and direct appeal to the collateral attack upon the sentence. This recorded history was incorporated by the trial judge into his sentencing order to substantiate and reflect his appropriate findings of fact. That the trial judge did not specifically point to those parts of the records that substantiated his findings, is not of significance. That which the trial judge may not have done, was done by the state and did not represent an insignificant endeavor. The trial court in its order cited specific case law to this Court which this court will find directly relates to those portions of the attached record which pertain to issues raised by the defendant in the collateral relief proceeding. It is an extraordinary and grandiose feat for a trial judge holding expedited hearings in view of a death warrant to not only review the record but then separate certain parts thereof, xeroxing the same, and attaching it to an order, especially when reference to the record will accomplish the same purpose. Such a feat is next to impossible when the trial court is deluged by what it considers to be a "shotgun" motion raising issue upon issue at the twelfth hour. To impose such

requirements upon a trial judge who, because of the will of the people, as reflected in the death penalty statute, is already acting in all due deliberation and expedience, is to elevate form over substance and to frustrate the judicial process by needless technicalities.

ARGUMENT

VII. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT RELIEF ON HIS FLORIDA RULE OF CRIMINAL PROCEDURE 3.850 MOTION FOR A POST-CONVICTION RELIEF ON THE ALTERNATIVE GROUND THAT THE DEFENDANT HAD WAIVED HIS RIGHT TO BRING SUCH A MOTION.

At the hearing on the defendant's motion for a post-conviction relief, the trial court lamented the fact that it was handed six motions at about four p.m on September 5, 1984 and did not even have sufficient time to draft written orders on each of them (RPCM 292). The trial court further noted that it was aware of the recent case of Williams v. State, ___ So.2d. ___ (Fla. 1984), No. AY-161 (Fla. 1st DCA, August 23, 1984) [9 FLW 1826], in which the First District Court of Appeal determined that a defendant could not waive his right under Rule 3.850. However, the trial court urged this court to visit this question and rule that a defendant can waive his right to 3.850 review under circumstances where the defendant intentionally fails to utilize his rights to such review within a reasonable time after a defendant either had discovered or should have discovered the now complained of defects as such intentional delay will frustrate the judicial process in an attempt to carry out a lawful sentence (RPCM 292).

The state would also ask this court to visit this issue as the instant decision is in direct and express conflict with Williams, supra as acknowlegded by the court below. However, since this is an alternative ground for the court's ruling below, and, in essence, is, therefore, somewhat of an

academic question, the state would ask that this court not grant a stay of execution or delay deciding this case on the basis of this issue. If the court feels that this issue warrants a high degree of deliberation and cannot be decided within the time set for the execution of the defendant, the state would request that this Court sever this issue from the instant appeal, as an alternative ground for the trial court's ruling and determine the case forthwith, making a later determination as to the instant issue.

In Williams, supra, the First Court of Appeal stated that it was error to deny Williams' motion as untimely because "Rule 3.850 provides that a motion for relief under the rule may be made at any time." [9 FLW at 1827].

It should first be noted that proceedings under the rule are civil in nature, even though they are brought under the Florida Rules of Criminal Procedure. Tolar v. State, 196 So.2d 1 (Fla. 4th DCA 1967). Many standards, therefore, normally applicable to criminal proceedings are not absolutely required; for example, the right to counsel. McCall v. State, 224 So.2d 370 (Fla. 4th DCA 1969). This is properly so as "...the presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment." Strickland v. Washington, ___ U.S. ___ 104 S.Ct. 2052, 2070, ___ L. Ed.2d ___, (1984). The state has secured a final judgment and collateral relief proceedings cannot be utilized to afford the defendant decade upon decade of subsequent mini-trials, after his initial conviction and sentence.

The fact that a motion for relief under Rule 3.850 may be made at any time, does not lead to the simple conclusion that it must be granted at any time that it is made. Capital defendants all too frequently engage in the questionable practice of waiting until the Eleventh Hour to raise or prosecute issues which could have and should have been raised months or years before. Delaying the filing of a motion for post-conviction relief and scheduling it for hearing after a death warrant has been signed and just prior to the scheduled execution date can be described at best as dilatory and, at worst as an abuse of process. See, Arango v. State, 437 So.2d 1099, 1104 (Fla. 1983). There simply is no right to a "last minute flurry of activity" and the setting in motion of a "slide for life" which takes its toll on all involved when a defendant feels that his life is now in jeopardy by the signing of a death warrant. His life has been in potential jeopardy from the day the act was committed leading to his conviction. That jeopardy was actualized with the affirmance of the conviction and sentence on direct review and the denial of a petition for writ of certiorari by the Court, when the presumption of finality and legality attached to the conviction and sentence. "...It must be remembered that direct appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception. When the process of direct review--which, if a federal question is involved, included the right to petition the Court for a writ of certiorari - comes to an end, a presumption of finality and legality attach-

es to the conviction and sentence. Barefoot v. Estelle, ___ U.S. ___ 103 S.Ct. 3383, 3391 ___L.Ed.___, (1983). Florida Rule of Criminal Procedure 3.850 contemplates pro se filings. No special consideration should be given capital defendants simply because their crime is more atrocious than that of other convicted defendants. This Court affirmed Aubrey Dennis Adams, Jr conviction and sentence on February 11, 1982 in Adams v. State, 412 So.2d 850 (Fla. 1982). Rehearing was denied on May 5, 1982. The United States Supreme Court denied certiorari on October 4, 1982 in Adams v. Florida, ___ U.S. ___ 103 S.Ct. 182, ___L.Ed.2d.___ (1982). This capital defendant has had close to two years in which to ascertain and bring whatever attacks he so chose to bring in collateral relief proceedings. Yet the record shows, that the instant attack was precipitated and brought only upon and after the signing of a death warrant, at the Eleventh Hour, causing the State and the trial judge below to engage in what is almost an impossible task--to review the entire record and respond in a miniscule period of time to numerous insubstantial claims. Such flurry of activity should be condemned by this Court. The fact that such "flurry of activity" is set in motion by a capital defendant is of no significance. A capital defendant simply cannot be set apart from all other defendants as being special simply because his crime is more atrocious.

It is no secret that collateral relief proceedings are a hybrid civil-quasi-criminal action. Habeas Corpus is also such a hybrid action. Habeas Corpus is governed by equi-

table principles. Sanders v. United States, 373 U.S.1. 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963). So too are state collateral proceedings which are civil in nature. What is at stake is not the integrity of the state convictions, but whether it is reasonable that it took approximately five years from the time of trial for this capital defendant to determine that his trial counsel was ineffective and he was denied a fair trial. The State's clear position is that it was not reasonable and the defendant's present dissatisfaction is only the spurious by-product of the signing of a death warrant. Such delay has prejudiced the State and thwarted justice. In a few sleepless nights and days counsel for the State was forced to learn and evaluate what the defendant has known for close to five years. The trial judge was not even afforded the time to prepare a written order - opening another avenue of attack to this defendant. Such spurious death penalty "flurry of activity" should be condemned by all courts. Such delay is prohibited in federal courts under Rule 9, 28 U.S.C. § 2254 and the equitable doctrine of laches is equally applicable to state court collateral relief proceedings, which are civil in nature, when a defendant's delay results in such a flurry of last minute activity, comparable to a trapeze artist's "slide for life", taking an enormous toll upon state officers.

CONCLUSION

Based on the arguments and authorities presented herein, Appellee respectfully prays this Honorable Court affirm the order of the circuit court denying Appellant's motion for post conviction relief.

Respectfully submitted,

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