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IN THE SUPREME COURT OF FLORIDA

CHESTER LEVON MAXWELL,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CIRCUIT COURT
CASE NO: 80-8767 CFB
FLORIDA SUPREME COURT
CASE NO:

[ANTICIPATORY] RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, STATE OF FLORIDA, by and through undersigned counsel, and files this its Response in opposition to Defendant's Motion for Post-Conviction Relief, as follows:

COURSE OF PRIOR PROCEEDINGS

The State agrees with Defendant's recitation of prior proceedings.

INTRODUCTION

In its Response, "R" refers to the Record on Defendant's direct appeal, a copy of which has been provided to this Court; and "e.a." means emphasis added.

In its Statement of Facts, the Defendant, CHESTER MAXWELL, has been referred to as the "Petitioner", but in the

argument portion, will be referred to as "Defendant". The State of Florida will be referred to as "Respondent", and alternatively, by proper name.

STATEMENT OF THE FACTS

Prior to trial, Petitioner raised several pre-trial suppression motions, seeking, inter alia, to suppress all items seized by officers of the Tallahassee police department, as a result of a search of a bus on September 20, 1980 (R, 1762-1764); all statements, admissions and confessions purportedly made by Petitioner (R, 1747-1748); and all lineup and showup identifications made by the witnesses to the murder of Donald Klein (R, 1749-1750).

At the outset of the pre-trial suppression hearing, held April 9, 1981, the State of Florida asserted that Petitioner had no standing to challenge the alleged search of the luggage by the Tallahassee officers on September 20, 1980, because he had claimed no ownership or possessory interest in the bag found on the bus in Tallahassee. (R, 6-9; 15-16). Petitioner's counsel responded that, despite the charges in Federal law, regarding standing to seek suppression of items seized from a criminal defendant, the Florida Constitution afforded Petitioner a greater protection. (R, 11-14). Petitioner's co-defendant, Dale Leonard Griffin, testified at the suppression hearing that the suitcase found by the Tallahassee officers was his, and that he owned everything in the suitcase. (R, 19-21). The trial court subsequently denied Petitioner's motion to suppress the physical evidence retrieved by the officers in Tallahassee, in-

cluding a knife and 22-calibre handgun, on the basis that Appellant lacked standing to challenge the search and discovery of said items by the police. (R, 22). Subsequent testimony by various Ocala and Tallahassee police officers, further established that Petitioner and Griffin were detained by police officers in Ocala, pursuant to information issued by the Pompano Beach police department (R, 24-26); that both men were given an opportunity to claim all luggage and/or suitcase they were carrying (R, 26-27), and that each was denied having any more bags to retrieve in Ocala. (R, 27). Additional testimony revealed that Tallahassee officers, upon boarding the subject bus when it arrived in said city, retrieved a gun and knife from a bag found abandoned in the bus, after all of the passengers had left the bus with their luggage. (R, 32-33, 45-46). The trial court further denied the motion to suppress said physical evidence, on a finding that the suitcase had been abandoned by the two men. (R, 52).

After argument, the trial court denied all of Petitioner's other suppression motions (R, 57, 58, 84-85, 94), as well as a motion to sever Petitioner's trial, from that of his co-defendant, Griffin. (R, 59-62).

At the opening of the trial, Petitioner's counsel made an ore tenus motion to exclude cameras from the courtroom. (R, 97-98). Said counsel's sole basis for said speaking motion, was made in the form of counsel's general opinion that, while he understood and acknowledged the United States Supreme Court's

ruling on the issue in Chandler[1], "I honestly believe that it [cameras in a courtroom] affects the testimony of witnesses and the reaction of jurors". (R, 98). The trial court denied this motion on the basis of Chandler, and on the failure of Petitioner to show how he would be specifically prejudiced by the presence of cameras in the courtroom. (R, 98).

During the course of voir dire, Petitioner did not object to the excusal, for cause of juror Mather, due to his express views on the death penalty, and his statements and conclusion that his attitude "might" affect his impartiality in determining Petitioner's guilt or innocence. (R, 301-304). Six other jurors, although expressly stating their opposition to the death penalty, were not excused by the trial court for cause, including two who eventually were seated as jurors. (R, 199-201; 325; 337-338; 400; 449-450; 489-490). Petitioner used only eight of his initially alloted ten peremptory challenges, having previously been informed by the trial court that, if deemed necessary, the trial court would possibly afford Petitioner additional peremptory challenges. (R, 100-101; 542-543).

The State initially presented the testimony of three eyewitnesses, Herman Fox, Harold Gelber, and Dr. David Prince, who were present with the deceased, Donald Klein, as the golf "foursome" present when Klein was killed. Herman Fox, Harold Gelber, Dr. David Prince and the deceased Donald Klein, went to Sabal Palm Golf Course at Palm Aire on September 19, 1980 to

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[1]Chandler v. Florida, U.S. (19).

play golf at approximately 8:00 A.M. After playing thirteen holes of golf, they went to the fourteenth hole; Mr. Fox and Dr. Prince were partners and Mr. Gelber and the deceased were partners (R, 570-574, 611-612, 654-657). Mr. Fox and Dr. Prince positioned themselves to tee off while the deceased and Mr. Gelber remained at the golf cart. Mr. Fox testified that as Dr. Prince began to tee off, at about 10:15 A.M., Mr. Fox felt an arm around his neck and then a knife was placed near his jugular vein. (R, 574). Petitioner's co-defendant, Dale Leonard Griffin, demanded Mr. Fox's money and wanted everything in his pockets. After finding nothing, Griffin let him go and went over to Dr. Prince. Griffin took Prince's money by jabbing the knife into Prince's back. (R, 574). After they were robbed, Mr. Fox stated that he saw a second robber with a small black gun, Petitioner. (R, 576). Mr. Fox stared at it until Appellant asked him what he was staring at. Mr. Fox turned around in the opposite direction, heard a pop, turned around and saw Donald Klein put his hands to his stomach and blood came pouring out of the deceased's mouth. (R 577, 579). Griffin told Petitioner that they should "get out of here". (R, 577). Petitioner and Griffin ran through a hold in a chain link fence approximately twenty feet from the golf tee. The shrubbery around the fence was quite dense and the fence was parallel to Atlantic Boulevard. (R 576-577). Mr. Fox stated that the incident was two to three minutes and that he saw the man with the knife for two minutes. He looked at the man with the gun

for a very short time. (R, 577-578).

Mr. Fox stated that Griffin was 5'7" and weighed about 140 pounds with a slight afro and was wearing all black. (R, 596). The man with the gun had his hair in an afro and was wearing an orange shirt. (R, 596). At a subsequent lineup, Mr. Fox was able to identify Griffin as the man with the knife. (R, 582, 585). He had no problems and felt no doubts, in identifying Griffin. (R, 605, 609). Mr. Fox also identified Griffin in court. (R, 578). He was not able to identify Petitioner at a lineup. (R. 582).

Dr. Prince corroborated Mr. Fox's testimony and stated that his wallet with his initials in gold and $46.00 were taken from him by the guy with the knife. (R, 614). Although Dr. Prince viewed two lineups, and made selections from both lineups, he was unable to identify Petitioner or Griffin, and he could not positively identify either man in court. (R, 629-630, 632). The men that Dr. Prince picked out at the lineups were in jail at the time of the incident. (R, 746-747). Dr. Prince feared the man with the gun. (R, 633).

Mr. Gelber stated that he and the deceased were talking when suddenly two black men came charging across the tee area. (R, 657). Petitioner, about six inches from Mr. Gelber, stuck a gun into his stomach and demanded his money and his wallet. (R, 657-658). Mr. Gelber stated that he was terrified. (R, 658). Mr. Gelber saw another man holding Dr. Prince around his neck with a knife in his hand. (R, 658). Petitioner told

the deceased that he also wanted his money and wallet. (R, 658). As Mr. Gelber was going to unbutton his button for his wallet, Petitioner told the deceased that he wanted his chain, his watch and his ring. (R, 659). As the deceased took his chain off, which had some emblems or trinkets on it, Petitioner snatched it. The deceased then started to take off his watch but Petitioner said "the ring". As the deceased took off his ring, Petitioner grabbed it, and the deceased said: "My wife gave..."(R, 659-660). Petitioner moved the gun over and shot ~~the deceased in the stomach~~. (R. 660). The deceased grabbed his stomach and said "Harold, I'm shot." (R, 662). The man with the knife came over to Petitioner and said "Let's go". The men went through the fence toward Atlantic Boulevard. (R, 665). Mr. Gelber went over ~~to~~ the fence and saw that the fence had been cut from bottom to top, big enough for someone to go through it. (R, 666). No one could see through the fence because there was a lot of foliage. (R, 665). Mr. Gelber and Mr. Fox went to Mr. Gelber's house, dialed 911 and asked for help. (R, 662). Mr. Gelber stated that the incident lasted about two minutes and he had looked at the "man with the gun" for one and one-half minutes. (R, 660). Mr. Gelber stated that both men were between 5'7" - 5'8" and weighed about 150-160 pounds. (R, 663). The man with the gun was darker than the other man and wore an orange shirt. (R, 663, 691). At subsequent lineups Mr. Gelber was able to identify Petitioner "just like that". (R, 671). There was no

doubt in his mind that Petitioner was "the one". (R, 672). Mr. Gelber identified Petitioner in court, very positively, and stated that he would "never forget him". (R, 660). Gelber was 8-10 inches from Petitioner, when Petitioner fatally shot Klein. (R, 661-662). On cross-examination, Mr. Gelber was asked if Petitioner was a "nondescript person". Mr. Gelber stated: "You say nondescript. I can't forget the face. I'm looking at that face, and I have an image that I wish I could erase from my mind". (R, 692). Mr. Gelber was unable to identify Griffin. (R. 670).

Detective Murray testified that at 10:22 A.M. a call came in. Units were dispatched and at 10:27 A.M. the police arrived at the scene. (R, 696-697). Detective Murray stated that at the time of the incident, there was a lot of vine growth surrounding the fence to make a thick and ideal hiding place. (R, 698-699). Since the date of the incident, the thicket had been torn back. (R, 704). Detective Murray stated that on September 24, 1980, Dr. Prince's wallet was found south of fence in a bush in a clear field. (R, 705). Detective Murray stated that it took him forty-six seconds to run from the fence to Petitioner's apartment. (R, 722). The fence had been freshly cut by an instrument. (R, 728). No fingerprints were found at the scene of the incident. (R, 731).

Dr. Shashi Gore, an assistant medical examiner for Broward County at the time of the shooting, conducted an autopsy of the victim, at 2 P.M. on the day of the murder, after having

examined the body at the scene, approximately one hour after the shooting. (R, 769, 770). Dr. Gore testified that the cause of death was a gunshot wound to Donald Klein's chest, producing massive internal hemorrhage and damage to the vital organs, such as the heart and lungs. (R, 772, 773). Dr. Gore also testified that there was a hypo pigmentation on the deceased's little finger which indicated that an article of jewelry like a ring had been on that finger. (R, 779). Dr. Gore estimated the time of death to be between 9:30 and 11:30 A.M., September 19, 1980. (R, 783).

Willie Pearl Paul testified that Petitioner came over to her mother's house on September 18, 1980 at 10:30 P.M., the night before the incident. (R, 789-790). Petitioner had a gun in his hand, just like the murder weapon, and asked Ms. Paul to purchase it although he did not have bullets to fit the gun. (R, 791). Petitioner stated that the bullets were in his pocket. (R, 792). On September 19, 1981, the day of the incident, Ms. Paul went to Petitioner's home at approximately 2:30 or 3:00 P.M. (R, 792). She went to his door, knocked on his window and woke Petitioner up. (R, 792). Petitioner was "acting kind of nervous". (R, 793). He put on his clothes consisting of a black pair of pants and T-shirt and thereafter put some clothes in a bag stating that he was going to Gainesville. (R, 793-794). Petitioner was then observed by Ms. Paul, taking a gold ring, a gold necklace and some things out of a drawer; a gun which looked like the one she had seen the night before in his posses-

sion, from a dresser drawer. (R, 795). When asked about the ring, Petitioner told Ms. Paul it was none of her business. (R, 795). Ms. Paul stated that Petitioner placed the gun into his pocket. (R, 795).

Judith Walkes, Griffin's sister, testified that at about 5:30 P.M. or 6:00 P.M., Griffin and Petitioner asked her to take them to the bus station. (R, 752-753). Griffin had a black bag that he placed in the trunk of the car. (R, 755). They stopped at Petitioner's house, where Petitioner got a cloth bag from his home and placed it in the back seat. (R, 753, 757). Griffin had a zip-up black bag in his possession at this time. (R, 754). The three individuals proceeded to the Greyhound Bus Station in Fort Lauderdale. (R, 758). Although Ms. Walkes testified that she did not know where they were going, she did state that Griffin had told his mother a couple of weeks earlier that he was going to Quincy, Florida. (R, 762).

Richard Lenemier, Kenneth Hall, Edward Bullock, and Joseph Cayea, police officers in Ocala, Florida, stated that they were called to the Greyhound station in Ocala as a result of a telephone conversation by the Pompano Police Department to the Ocala Police Department. (R, 878). The police were given the following physical descriptions of Griffin and Petitioner, which were contained in the police report: Griffin was 5'8", 120 pounds, medium complexion, and Petitioner was 5'7", 150 pounds, dark complexion. (R, 880). The initial call did describe Petitioner as 5'8", 195 pounds, but this description was

thereafter changed after a second call by the Pompano Police Department. (R, 883). None of the three eyewitnesses ever described Petitioner as weighing 195 pounds. (R, 1056). At 1:29 A.M., the officers boarded the bus and came into contact with Griffin and Petitioner. (R, 804, 815, 862). About three-quarters towards the rear of the bus, Petitioner was sitting on the left aisle seat and Griffin was sitting on the right aisle seat. (R, 804-805, 815, 850). The defendants gave their names as Chester Simms and Eric Griffin. (R, 815, 850). Petitioner appeared very nervous and he was observed to be wearing a gold ID bracelet and a gold ring. (R, 806, 816, 852). Griffin was observed wearing a gold chain with medallions. (R, 852). Both Petitioner and Griffin were taken off the bus. They were asked if they had any luggage; a light blue canvas drawstring bag found in the baggage overhead in the bus and a large black bag found in the baggage compartment underneath the bus were taken into police custody. (R, 863). After Sergeant Cayea got these two bags, they were asked about, and given a chance to retrieve any other baggage (R, 806, 837), and each said that this was all the baggage they were traveling with. (R, 806, 830, 851, 864). Petitioner and Griffin were asked where they were going and they said Quincy. (R, 865). Sergeant Cayea testified that their tickets reflected that they were going to Quincy, Florida. (R, 865-866). At the bus station, Petitioner was asked if he knew anyone on the bus, and he responded that he was not traveling with anyone. (R, 866). Griffin responded that he was traveling with

someone and pointed to Petitioner and said: "I am traveling with Chester". (R, 866). Petitioner and Griffin were not free to leave at the bus station as they were being detained; their liberty was restrained. (R, 874, 823). Officer Lenemier transported Griffin from the bus station to the Ocala Police Department. (R, 807). Prior to going on duty he had checked the back seat, and found no items therein. (R, 808). After transporting Griffin, he found a gold necklace with Hebrew symbols lying underneath the back seat on the passenger's side, where Griffin had been sitting. (R. 808-809).

Officer Hall testified that he transported Petitioner to the Ocala police station. (R, 818). Prior to going on duty he had checked the rear seats, and found nothing. (R, 818). After transporting Petitioner, he and Sergeant Bullock observed a gold bracelet under the rear seat and a gold ring under the driver's seat on the floor. (R, 818).

Once inside the police station, Petitioner and Griffin were both advised of their rights. (R, 820, 821, 871-872). Petitioner appeared to understand these rights. (R, 820). Officer Hall advised Petitioner the reason he was being detained was that the police were investigating a robbery-homicide at Palm Aire. Petitioner stated that he knew nothing about the crime and did not know where Palm Aire was. (R, 867). The officers asked Petitioner and Griffin if they could look through their luggage because they were looking for weapons. (R, 873). Both Petitioner and Griffin gave the officers permission to look through their

luggage. (R, 865, 872). The officers found only clothing. (R, 865). After Petitioner emptied his pockets, Sergeant Bullock stated that while looking for identification in Appellant's wallet, he found and removed some pay slips with the initials CM which came from Palm Aire Country Club. (R, 853).

Ruth Klein, the victim's wife, identified the bracelet, gold necklace and ring as articles that she had given to her husband on various occasions. (R, 841-843). The jewelry was appraised at approximately $4,600.00. (R, 846-847).

Rosemary Milson. Assistant Personnel Director for the parent corporation of Palm Aire, testified that Appellant worked at Palm Aire from June 2, 1980 until July 11, 1980. (R, 940).

Carl Partlowe, driver of the Greyhound bus, on which Petitioner was riding, stated that after leaving Ocala, he proceeded on to Gainesville. He and the other driver spoke, and as a result of their conversation the other driver called the police. The police were supposed to meet the bus in Tallahassee. (R, 830). In Tallahassee, pursuant to instructions from law enforcement officers, Mr. Partlowe told the passengers to claim all of their baggage inside the bus and then to change buses. (R, 830). Officer Bishop testified that after the people in the bus left and took all their luggage, he walked down the aisle and discovered a flight bag in the overhead rack. (R, 897). The bag was described as a brown plastic B-4 flight bag. (R, 833). As the passengers were given every opportunity to take their luggage from the bus and Petitioner

and Griffin were given the opportunity to get their luggage off the bus, this luggage was considered "abandoned property". (R, 836-837, 898). Officer Bishop unzipped the bag and observed a black vinyl pouch. Inside the pouch was a revolver and knife. (R 897). The bag was found in the overhead rack three-fourths of the way towards the rear of the bus in the same location that Petitioner and Griffin had been sitting. (R 830). Inside the revolver was found five bullets which were cut along the tips. The gun had a capacity of six bullets. (R, 909, 910).

Dennis Gray, an expert in firearms identification, testified that the weapon found in the pouch was a .22 caliber revolver. (R, 1021). Although the gun was chambered for .22 caliber short bullets, .22 caliber long rifle cartridges, with the noses damaged, were found inside the gun. (R, 1021). The bullet removed from the decedent's body was a .22 long rifle cartridge with the nose damaged. (R, 1021-1023). The bullets had been cut, so as to fit and be operable, in Petitioner's revolver. (R, 1025).

After the State rested, (R, 1035), defendant Griffin rested without any testimony and, thereafter, Petitioner presented his defense.

Mildred Clayton, an alibi witness, testified that she and a neighbor were outside at about 8:00 A.M. on September 19, 1980. Twenty minutes later she saw Griffin and about fifteen to twenty minutes later she saw Petitioner. (R, 1064). Petitioner was weeding the front of his lawn, at around 9:30 A.M.,

when Ms. Clayton testified that she went inside her house. (R, 1064, 1069). Ms. Clayton did not know where Petitioner was from 9:30 until 10:30 A.M. (R, 1077-1078). At 10:30 A.M., she saw Petitioner and Griffin walk into Petitioner's apartment in a normal fashion. (R, 1073). Clayton acknowledged that she paid rent for her residence, to Betty Maxwell. (R, 1076). Later in the evening about 5:30 or 6:30, she saw Petitioner and Griffin. (R, 1089). Petitioner was coming out of an apartment with a girl that Ms. Clayton did not know. (R, 1091). Neither person was carrying anything. (R, 1091). Clayton had trouble remembering what she had done the day before the murder. (R, 1093-1094).

Jean Carolyn Williams, another alibi witness, testified that she was outside her apartment, on September 19, 1980, when Petitioner came out of his apartment between 7:30 and 7:45 A.M. (R, 1101). At about 8:00 A.M., Petitioner went to the store for cigarettes and was gone about fifteen to twenty minutes. (R, 1102). Petitioner and Griffin proceeded to pull weeds for about thirty minutes and then went into Petitioner's apartment. (R, 1103, 1105). At around 10:25 or 10:30 A.M., while going to her sister's house, she saw Petitioner and Griffin leave his apartment and go east away from the direction of the golf course. (R, 1107, 1108). When she got back to her apartment around 10:35 A.M. (as her sister was not present), she saw Petitioner and Griffin return to Petitioner's apartment in a normal fashion. (R, 1110). The State impeached her several times, with her

prior deposition testimony, especially on her memory of times. (R, 1122-1159). She later saw Petitioner at about 5:00 or 5:30 P.M. with a girl she did not recognize. (R, 1130). She acknowledged paying rent to Petitioner's father, who also drove her to the courthouse, for her testimony. (R, 1122, 1159).

Petitioner testified that occasionally he used the name Chester Levon Simms because it was his mother's name. (R, 1183). On September 19, 1980, he left his house early to get cigaretts. (R, 1183). After he came from the store, he saw Griffin. The proceeded to pull weeds and lay sod and thereafter went into his house with Griffin and played bongo drums. (R, 1185, 1186). They left his house and walked east to the stop sign which was away from the golf course. They started to go to the park, but changed their minds and went back to Petitioner's apartment. (R, 1186-1187). Petitioner could not give an estimate of what time any of these events occurred. (R, 1188). Thereafter, Petitioner and Griffin allegedly went to visit a cousin of Griffin's. Petitioner did not know the cousin's name. (R, 1188). Later in the day, after finding his uncle in Hallandale was not home, Petitioner testified that they went back to Pompano and went to the park. (R, 1189). At the park they met Bo Bo, who was selling jewelry. (R, 1190). Griffin bought the jewelry for $100.00 because Petitioner stated that he could have sold it at the Palm Aire Shopping Center for a lot more money. (R, 1191, 1206). Griffin gave the ring and bracelet to Petitioner and kept the chain.

(R, 1207). Petitioner stated that he never went to sell the jewelry because he was exhausted from playing tennis. (R, 1209, 1210). Petitioner could not remember who he played tennis with, but he stated that he played for about 5 minutes, with his regular clothes on, before buying the jewelry from Bo Bo. (R, 1211, 1212). Thereafter, Petitioner went home and went to sleep. (R, 1192). When he awoke, Willie Pearl Paul was banging on his door and she proceeded to tell him about the murder and how the police were looking for him. (R, 1192). Since Petitioner thought the police officers wouldn't be fair with him, he and Griffin decided to leave town. (R, 1192-1193). They asked Griffin's sister, Judy Walkes, to take them to the bus station in Fort Lauderdale. They decided to go to Jacksonville to visit Griffin's sister. (R, 1193-1194). Griffin paid for the bus tickets. (R, 1221).

On cross-examination, when asked if he was surprised that the tickets said they were going to Tallahassee, Petitioner stated he did not recall if they were going to Jacksonville. (R, 1221). When asked how he knew that a bus was leaving Fort Lauderdale at 6:30, Petitioner stated he was lucky. (R, 1224). Petitioner stated that he did not care about the brown bag later found on the bus because it was not part of the luggage he claimed in Ocala, and was not his. (R, 1225-1227). Although Petitioner said that the gun in the bag was not his, he then stated that he did not know how the gun got into the bag. (R, 1233). Petitioner admitted trying to sell the gun the pre-

vious night to Willie Pearl Paul (R, 1230, 1231), and had given Griffin the gun to keep. (R, 1234). Appellant denied telling the police officers that he had been traveling alone and that he did not know where Palm Aire was (R, 1237), but admitted he did not give his name as Maxwell, when detained in Ocala. (R, 1236).

At the charge conference, Petitioner's counsel reversed his earlier request for a special alibi defense instruction (R, 1176, 1241); renewed his earlier motion for judgment of acquittal (R, 1036, 1241); requested the giving of lesser included offenses to the jury (R, 1243, 1244); and asked that the accomplice instruction not be given, which was granted by the trial court. (R, 1251). The trial Court further denied Petitioner's motion for a statement of the statutory aggravating circumstances the Stated intended to rely upon at the sentencing phase, and the prosecutor represented that he would provide all available information, in terms of the aggravating circumstances and evidence he would so rely upon, to defense counsel. (R, 1253). No further objections on this basis were made by Petitioner's counsel.

At the sentencing hearing, the State presented three witnesses. Sergeant Frederick testified that on March 27, 1975, he came in contact with Petitioner testifying that he was surveilling the scene for armed robberies and purse snatchings. (R, 1381). After a couple exited their car, Petitioner and other individuals were observed getting out of their car,

attacking and robbing the couple. (R, 1382). Petitioner was carrying a revolver which he was observed pointing at the couple. (R, 1382).

Lieutenant McCann testified that on said date, he observed Petitioner sitting in a parking lot of a motel. As he approached to effect an arrest for this robbery, Petitioner threw a .22 revolver out the car window. (R, 1385-1386).

Judge Cocalis testified that while an Assistant State Attorney in May, 1975, she was the prosecutor in the robbery charge against Petitioner, and a judgment and sentence was entered against him (8 years), upon a plea of guilty. (R, 1388-1389).

Petitioner presented four character witnesses. Loretta Pembleton, a close friend, stated that Petitioner was like an older brother to her and had taught her to deal with the community. (R, 1397). She thought that Petitioner had a lot to offer society. (R, 1398).

Willie Johnson testified that Petitioner would act as a friend towards her family, would clean the yard and was very nice with her children. (R, 1399-1400).

Frances Lenora Mincey testified that Petitioner was very considerate, had never caused trouble, would help her clean the yard or paint, and "deserved a chance". (R, 1404).

Joseph Maxwell, Petitioner's father, stated that Petitioner always took care of the yard. (R, 1407). He stated Petitioner was like a big brother to the children in the neigh-

borhood (R, 1407-1408), and had a great deal to offer society. (R, 1408). He further testified that Petitioner had been raised by his grandmother for about seven or eight years, before coming to live with him. (R, 1406).

The trial court imposed the death sentence on Petitioner, following a jury advisory sentence of death, agreed to by a majority of the jury. (R, 1429, 1435-1439).

In affirming Petitioner's conviction and sentence, the Florida Supreme Court rejected Petitioner's challenges to the presence of cameras in the courtroom; the excusal for cause of a juror; and the majority finding by the jury, as to its advisory sentence, on the primary basis that Petitioner had failed to preserve such claims for appellate review, by not stating any or proper objections in the trial court. Maxwell v. State, 443 So.2d 967 (Fla. 1983), at 969-971. On Petitioner's remaining challenges to his conviction, the Supreme Court ruled that the trial court's denial of Petitioner's suppression motion, as to the briefcase on the bus, was appropriately based on Petitioner's abandonment of the physical evidence. Maxwell, at 969. The Court further determined that Petitioner's allegations in contesting the presence of cameras in the courtroom, were insufficiently stated under the requirements of State procedural law. Maxwell, at 969-970. The Court additionally concluded that Petitioner was not entitled to pre-trial notice of the aggravating circumstances the State intended to rely upon, at the sentencing phase. Maxwell, at 970. The Court's conclusion further acknowl-

edged that defense counsel had filed an affidavit, claiming he had received the pre-sentence investigation report before sentencing, thus rendering any challenge to such fact, insufficient on its face. Maxwell, at 970-971.

The Florida Supreme Court additionally reviewed Appellant's sentence, and reversed three of the five aggravating circumstances found by the trial court to exist. Maxwell, at 971. The Court further concluded that the death sentence was appropriate, given the existence of two valid aggravating circumstances (prior conviction of a violent felony, as documented at sentencing, and commission of the murder during the course of the robbery, as demonstrated by the facts of the murder itself, the facts of the case, and the lack of any mitigating factors. Id.

ARGUMENT AGAINST GRANTING MOTION FOR POST-CONVICTION RELIEF

Petitioner has raised eight arguments as grounds for post-conviction relief. Seven of these grounds involve issues which either could or should have been raised on direct appeal. Armstrong v. State, 429 So. 2d 287 (Fla. 1983).

Each of these issues will be discussed sequentially, as they appear in the Petition, and referred to by letter as therein, in the interest of convenience.

A. Alleged Witterspoon Violation

Petitioner first alleges that a prospective juror, Bernard Jackson, should not have been excused for cause. Thus, Petitioner suggests that Jackson's express feelings against the death penalty, by reference to the Record, was an improper basis for excusal, under the governing standards of Witterspoon v. Illinois, 391 U.S. 510 (1968).

This is clearly an issue that should have been raised on direct appeal, thus barring post-conviction relief on this ground. Armstrong, supra. Moreover, Jackson's excusal for cause by the trial court, occurred without challenge or objection by defense counsel (R.500,501), thus further barring relief on procedural grounds. Maggard v. State, 399 So. 2d 973 (Fla. 1981), cert. denied, 454 U.S. 1059, 102 So. Ct. 610, 70 L.Ed 2d 598 (1981); Brown v. State, 381 So. 2d 690 (Fla. 1980).

Assuming Petitioner's claim on this ground is not stricken, see State's Motion to Strike, (accompanying this pleading, and incorporated herein), it is clear that Jackson's statements reflected an attitude towards the death penalty which would have prevented him from impartially deciding upon the question of Defendant's guilt or innocence. Witterspoon, supra, at 523, n.21; Spinkellink v. Wainwright, 578 F. 2d 582 (5th Cir. 1978) (en banc); Herring v. State, 446 So. 2d 1049 (Fla. 1984); White v. State, 446 So. 2d 1031 (Fla. 1984). One of the references by Defendant clearly demonstrates that, in the knowledge that Defendant could receive the death penalty upon a finding of guilt, Defendant "... after hearing all the evidence, decide that they are guilty, that I would not want to

be a part of if it was the decision for them to get the death penalty. "(R.500) (emphasis added). Such a statement clearly revealed that juror Jackson would be prevented from an impartial decision in the guilty phase, by his feelings against the death penalty. Witterspoon, supra; Herring, supra.

These unequivocal sentiments were further renewed by Jackson, by his express indications that he could not be part of proceedings that might result in the imposition of the death penalty. (R.500, 501). Witterspoon, supra. The trial court's excusal of Jackson, made only after an extensive individualized inquiry, which was initiated by Jackson's express hesitation and reservations in his ability to presume Defendant's innocence, R.475-479, reflected the State's equally significant interest in obtaining a jury that was not "acquittal-prone". Spinkellink, supra, at 593-596.

Further note should be made that six other prospective jurors, although expressing opposition to the death penalty, were not excused for cause; in fact, two such jurors, Salem & Yoder, wound up on the petit jury panel. (R.199-201; 325;337-338, 400; 449-450, 489-490). The panel was thus clearly not "prosecution-prone, by virtue of any of the Witterspoon inquires conducted. Spinkellink; Maggard, supra. Additionally, assuming arguendo that Jackson's excusal was error, the State could easily have exercised a peremptory challenge to remove Jackson, since it only used half of its allowed twenty such challenges. Gall v. Commonwealth of Kentucky, 607 SW 2d 97 (Ky 1980. Alderman v. State, 246 SE 2d 642 (Ga. 1978); State v. George, 346 So. 2d 696 (La 1977).

Petitioner relies on the Eleventh Circuit's decision in Witt v. Wainwright, 714 F.2d 1069 (11th Cir 1984), pet for review granted, ___U.S.___, 104 S.Ct 2168, 80 L.Ed.2d 551 (1984), to support his claim on this issue. However, it is clear, as already argued, that Petitioner's Witherspoon claim is precluded from consideration by this Court, because of procedural default. The Florida Supreme Court's disposition of this claim, solely on procedural grounds, as to Mather, see Maxwell, at 970, and the failure to object or raise on direct appeal as to Jackson, differs markedly from the same court's decision on this issue in Witt v. State, 342 So.2d 497 (1977), at 499, which was purely on substantive grounds. This significant distribution renders the Eleventh Circuit's Witt decision inapplicable, on procedural grounds, to the cause herein. Witt, supra, at 1082, n. 9.

B. Prejudicial Display of Defendant in Custody

As with part A, the claim that Defendant's custodial status was made known to the jury, in alleged violation of his Constitutional rights, should have been raised on direct appeal, and is barred from consideration herein Armstrong, supra.

Answering arguendo this Court reaches the substantive merits, Defendant's motion to strike the panel was appropriately denied by the trial court. (R.367,368). Defendant seems to suggest, by his reference to the trial transcript, that the observance by the jury of the defendant, being escorted into the courtroom by bailiffs and a deputy sheriff,per se prejudiced his right to a fair trial. (R.367,368). This argument has been rejected by courts which impose upon a defendant the burden of proving that such observance actually prejudiced him. United States v. Diecidue, 603 F. 2d 535, 549 (5th Cir. 1979); Wright v. State of Texas, 533 F. 2d 185 (5th Cir 1976). Defendant made no such showing, and, did not request a cautionary or curative instruction, or a poll or hearing to be held to determine if such observance had in fact prejudiced any member of the jury. Dupont v. Hall, 555 F. 2d 15, 17 (1st Cir. 1977); Wright, supra, at 187, 188. In view of these circumstances, and the fact that the jury could be reasonably presumed to understand that the presence of bailiffs and sheriff constituted routine security measures and use of court personnel, Defendant is not entitled to state habeas relief on this ground. Dupont, supra; Wright, supra; Diecidue, supra.

C. Limitation of consideration of mitigating circumstances

As with Defendant's prior points, Defendant's apparent objection to the trial court's instructions on the consideration of mitigating circumstances in the penalty phase, should have been set forth on direct appeal, and is not cognizable herein. Armstrong. Further, Defendant's failure to object to such instructions, most particularly when given immediately prior to jury deliberations on an advisory sentence (R.1422-1429), precludes consideration herein Demps v. State, 395 So. 2d 501,505 (Fla. 1981); Jent v. State, 408 So. 2d 1024, 1032 (Fla. 1981).

As to the merits of Defendant's position, it is evident from the Record that the trial court gave the standard jury instructions on consideration of aggravating and mitigating circumstances by the jury at sentencing. (R.1422-1429); see Florida Standard Jury Instructions in Criminal Cases, Penalty Proceedings - Criminal Cases, at 77-82. It has been held that the giving of such instructions, which expressly limit consideration to statutory aggravating circumstances, but do not so limit consideration of mitigating circumstances, (R.1422-23); Florida Standard Jury Instructions, supra, at 80,82,does not limit or underly restrict a jury to only those mitigating circumstances which have been statutorily enumerated. Elledge v. State,408 So. 2d 1021, 1024 (Fla. 1981); Demps, supra; Peek v. State, 395 So. 2d 492, 496, (Fla. 1980); Songer v. State, 365 So. 2d 696, 700 (Fla. 1978) (on rehearing), cert denied, 441 U.S. 956, 99 So. Ct. 2185, 60 L. Ed. 2d 1060 (1979). Thus, the trial court's instruction did not so limit or confine jury consideration as Defendant alleges, and was entirely consistent with the dictates

of due process. Peek, supra, at 496, 497; Lockett v. Ohio, 438 U.S. 586 (1978).

The record demonstrates that all four defense witnesses presented at the sentencing hearing, offered testimony as to Defendant's background, character, and chances for rehabilitation, which did not fit into any of the particularized statutory mitigating circumstances. (R.1396-1408); Section 921.121(6), Florida Statutes (1983); Armstrong, supra, at 289,290; Peek, supra; also, see Ford v. Strickland, 696 F. 2d 804, 813 (11th Cir 1983) (en banc); Booker v. Wainwright, 703 F. 2d 1251, 1260 (11th Cir 1980). The nature of defense counsel's closing argument further substantiates the conclusion that the jury's consideration of non-statutory mitigating circumstances and supporting evidence was not limited or foreclosed by the trial court or prosecutor. Ford, supra; Armstrong, supra; Lockett, supra.

Thus, Defendant's claim appears to be an attempt to "bootstrap" the trial court's discretionary decision to afford no weight to any mitigation evidence of circumstances presented, into a Constitutional deprivation of the right to have such evidence considered by the sentencing jury. Riley v. State, 413 So. 2d 1173, 1175 (Fla. 1982). As such, and because otherwise lacking in merit, this claim must be rejected by this Court.

D. Instruction on Majority Vote:

Initially, State maintains that Defendant has waived challenge to the trial court's instruction to the jury by failing to object thereto at trial. See Ford v. Wainwright, 451 So. 2d 471 (Fla. 1984). The issue presently raised could have, and should have, been raised at trial and on direct appeal, but was not. See Maxwell v. State, 443 So. 2d 967 (Fla. 1983); Christopher v. State, 416 So. 2d 450 (Fla. 1982). Points which could have been presented to the court in the initial appeal but which were waived by lack of argument on initial appeal, or by lack of objection at the trial court, were not subject to collateral attack in post-conviction proceedings and by habeas corpus. Armstrong v. State, 429 So. 2d 287 (Fla. 1983); and Aldridge v. Wainwright, 433 So. 2d 988 (Fla. 1983). Therefore, this issue has been waived for purposes of both collateral post-conviction relief and habeas corpus relief. See Armstrong, supra; Ford, supra. As well, pursuant to Florida law regarding the preservation of issues for appellate review via contemporaneous objection, pursuant to Wainwright v. Sykes, 433 U.S. 72, 97 So. Ct. 2497, 53 L. Ed. 2d 594 (1977), Appellant is barred from raising the issue herein under the doctrine of waiver. See Castor v. State, 365 So. 2d 701 (Fla. 1978).

Addressing this point on the merits, Defendant contends that the trial court's instruction to the jury that a majority vote was required to return an advisory verdict of either death or life imprisonment violated his Sixth,Eighth, and Fourteenth Amendments to the U.S. Constitution. State maintains that

pursuant to §921.141 Fla. Stat.(1979), the trial court properly advised the jury that a majority vote was required. Section 921.141 requires the recommendation of a majority of the jury, and such statute has been held to be constitutional under the Sixth, Eighth, and Fourteenth Amendments. Proffitt v. Florida, 428 U.S. 242, 965 So. Ct. 2960, 49 L. Ed. 2d 913 (1976); Spinkellink v. Wainwright, 578 F. 2d 582 (5th Cir. 1978). As well, the instructions as given, and challenged by the Defendant, were contained within the Florida Standard Jury Instructions in Criminal Cases (1981), at 81-83, and as such were not erroneous See Aldridge, supra.

E. Instruction on Aggravating Circumstances:

Defendant contends that the trial court erroneously instructed the jury on all aggravating circumstances set forth in the Florida death penalty statute, including those as to which no evidence was presented, in violation of the Sixth, Eighth, and Fourteenth Amendments to the U.S Constitution. State initially maintains that the Defendant failed to object thereto at trial, and failed to raise this issue on direct appeal when he had the opportunity to do so, and therefore the Defendant has waived this issue. See Ford, supra; Christopher, supra; Armstrong, supra; Aldridge, supra; Sykes, supra.

Addressing this point on the merits, pursuant to Aldridge, supra, at 990, the Florida Standard Jury Instructions as used by the trial court (R.1422-1424), which present to the jury in the penalty phase of the trial all of the statutory, § 921.141(5), aggravating circumstances, are neither erroneous nor do they create fundamental error. As clearly stated in Straight v. Wainwright, 422 So. 2d 827, 830 (1982), it is proper for the judge to instruct on all the statutory aggravating circumstances, and for the judge to have instructed only on those factors which were found to be supported by the evidence would improperly invade the province of the jury.

Importantly, to this issue, the Florida Supreme Court in Maxwell, supra at 971 scrutinized the trial court findings as to aggravating and mitigating circumstances, and struck three of the five aggravating circumstances. Despite those three errors, the Supreme Court concluded that the sentence of death was still

lawful because the two remaining aggravating circumstances outweighed the absence of any mitigating circumstances; those two remaining aggravating circumstances are unrefutable by the evidence presented. See Maxwell,supra,at 971.

As well, defense counsel for Defendant was given the opportunity to address the statutory aggravating circumstances before the jury (R.1419-1421), and did in fact contend to the jury that certain circumstances were not applicable. Finally, §921.141, which enumerates the aggravating circumstances herein challenged, has been found constitutional. Proffitt, supra; Spinkellink, supra.

F. Instructions on heinous, atrocious, or cruel aggravating circumstances:

Defendant contends that the trial court's intructions on §921.141(5)(h), that the capital felony was especially heinous, atrocious, or cruel, violated his Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution, by failing to adequately channel the jury's sentencing discretion. State maintains that §921.141(5) specifically limits the discretion of the jury in that they may only consider those aggravating circumstances enumerated within that subsection. Peek v. State, 395 So. 2d 492 (Fla. 1981). The channelling as set forth in §921.141(5) has been held constitutional in Proffitt, supra, and aggravating factor §921.141(5)(h) has as well been held not violative of the Eighth and Fourteenth Amendments. Dobbert v. Strickland, 532 F. Supp. 545 (1982) affirmed 718 F.2d 1518. There was no error in the trial court's defining of "heinous", "atrocious", or "cruel", in its instructions to the jury. See Proffitt, supra; Proffitt v. Wainwright, 685 F. 2d 1227 (11th Cir. 1982).

Again, State maintains that the Defendant has waived his challenge to this issue by failing to object at trial, and by failing to raise this issue on direct appeal (see points "D" and "E" supra).

As well, and importantly, any complaint by Defendant regarding jury consideration of §921.141(5)(h) was rectified by the Florida Supreme Court when it eliminated that subsection as an aggravating circumstance. Maxwell, supra at 971. Therefore, Defendant cannot show prejudice in this regard.

G. Disclosure of Presentence Report to Defendant:

Defendant contends that the failure to disclose to the defendant the contents of the presentence report prior to or at the time of sentencing violated his Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

It is clear that defense counsel received a copy of the full presentence report prior to sentencing, Maxwell, supra at 971, as was proved by affidavit. Therefore, Gardner v. Florida, 430 U.S. 349, 97 So. Ct. 1197, 51 L. Ed. 2d 393 (1977) is distinguishable in that regard. See Songer v. State, 419 So. 2d 1044, 1047 (Fla. 1982).

Defendant has failed to allege that he was damaged in any manner by his alleged failure to see the presentence report. Songer, supra. Defendant has made a bare, self-serving, allegation that he did not see the presentence report, in contrast with the affidavit which supplemented the record revealing that the defense counsel received said report.

Again, State reiterates that this issue was not raised on direct appeal, wherein Defendant only raised the issue of defense counsel not receiving the presentence report, and as such the issue is waived (See points "D" and "E").

H. Ineffective Assistance of Counsel

Defendant's assertions of ineffective assistance of trial counsel must be evaluated by applying the test and underlying criteria outlined in Strickland v. Washington, ___U.S. ___,104 S.Ct 2052, 80 L.Ed.2d 674 (1984). As stated therein, Defendant must first demonstrate that trial counsel's performance was deficient, such that he "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, supra, at 2064. In reviewing the performance of such counsel, this Court is required to accord a high degree of deference to the relative effectiveness of counsel, and:

> ... indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy'. [Citation omitted].

Strickland, supra, at 2066 (e.a.). The court must thereupon determine, based on these criteria, whether performance of counsel "... so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland, at 2065; Downs v. State, 453 So.2d 1102 (Fla. 1984).

Independent of this requirement, it is further incumbent upon Defendant herein to demonstrate that "... there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different." Strickland, at 2068; Downs, supra. In a capital case, Defendant must establish whether such a probability exists that "...absent the errors, the sentences - including an appellate court, to the extent it independently reweighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, at 2069 (e.a.); Downs, at 1108.

Defendant first claims that counsel's failure to object to the trial court's excusal of jurors Jackson and Mather under the Witherspoon criteria. constituted ineffective assistance. As already argued, the excusal of Jackson was clearly proper under the Witherspoon criteria. Witherspoon, supra; Herring, supra; White, supra. It is further clear from the examination of the Record that, despite his initial reticence, juror Mather displayed express antagonism towards the death penalty, such that the trial court was correct in concluding that his views made him very unsure that he could provide Defendant with a fair trial. (R, 303). Since the Record further shows that Mather concluded he could not impartially reflect on the question of guilt or innocence because of his anti-death penalty views, his excusal was clearly warranted. Witherspoon, supra; Herring, supra; Spinkellink, supra. The same arguments stated herein, as to Jackson, apply with equal force to Mather's excusal.

In view of such proper excusals, counsel's decision not to object cannot be considered ineffective assistance.

Moore v. Maggio, 740 F.2d 308 (5th Cir 1984). Such a decision by defense counsel can clearly be viewed as strategic, reflecting his perception of the futility of such an objection, based on both jurors' express statements, disqualifying them under Witherspoon. Furthermore, such a strategic decision was likely based on a view that the State would exclude said jurors by preemptory challenges, if they could not do so by "cause" challenges. Point A, supra. Defense counsel's actions in this regard does not cause a lack of reliability in the fairness of the trial. Strickland, supra; or have any effect on the validity of the conviction. Messer v. State, 439 So.2d 875, 878 (Fla. 1983).

Additionally, counsel's performance need not even be examined or highly scrutinized, since Defendant has completely failed to establish the "prejudice" element of Strickland. The absence of such lack of objection to excusal of the two subject jurors would not have altered the guilt/innocence phase in any meaningful way, and would surely not have led to the trial court or the Florida Supreme Court (on direct appeal) to conclude that, absent such alleged error, a death sentence would not have been imposed or considered appropriate. Strickland, at 2068; Maxwell v. State, 443 So.2d 967, 971 (Fla. 1983). Given the overwhelming evidence of guilt presented against Defendant at trial, see Statement of Facts, supra, Defendant's claim of ineffective assistance fails on this point. Strickland, supra, Larsen v. Maggio, 736 So.2d 215 (5th Cir 1984);

Raulerson v. Wainwright, 732 So.2d 803 (11th Cir 1984); Ford v. State, 407 So.2d 907 (Fla. 1981).

Defendant has raised a variety of claims, attacking defense counsel's alleged failure to investigate and prepare for the sentencing phase, including interviewing or presenting various witnesses, and investigating possible mental and psychological impairments Defendant is now alleged, for the first time, to have been suffering from at trial. It is axiomatic that the decision to investigate or present certain mitigation evidence and witnesses is strictly a matter of strategy and tactics, within the discretion of individual counsel. Strickland, supra; Magill v. State, 9 FLW 399 (Fla. Sup. Court, September 20, 1984); Brown v. State, 439 So.2d 872 (Fla. 1983); Songer v. Wainwright, 571 F.Supp. 1384 (N D Fla. 1983); Stanley v. Zant, 697 F.2d 955 (11th Cir 1983). The Record demonstrates that defense counsel did present mitigation testimony and witnesses, on subjects such as Defendant's character and background, which went beyond the statutory factors of mitigation. (R, 1396-1408). Thomas v. State, 421 So.2d 160 (Fla. 1982). In light of defense counsel's presentation, the failure to investigate certain other possible witnesses or claims did not constitute deficient performance. Thomas, supra; Brown, supra; see also, Raulerson, supra; Murray v. Maggio, 736 F.2d 279 (5th Cir 1984); Solomon v. Kemp, 735 F.2d 395, 402-403 (11th Cir 1984); Gomez v. McCaskle, 734 F.2d 1107 (5th Cir 1984); Bowden v. Francis, 733 F.2d 740 (11th Cir 1984).

Although Defendant claims to have attached records concerning Defendant's elementary school and prison records, and affidavits from family members, these have not been attached to any of the State's copies of Defendant's motion, and there is no allegations in the motion that indicate what such records would have shown, and how such specifically enumerated instances of abuse and stunted intellectual development would have affected the outcome. Strickland, supra; Boykins v. Wainwright, 737 F.2d 1539, 1543 (11th Cir 1984); Morgan v. State, 9 FLW 428, 429 (Fla Sup.Court, September 27, 1984). Defendant has not made any sufficient showing that the inclusion of such testimony would have resulted in a conclusion that "the balance of aggravating and mitigating circumstances did not warrant death." Strickland, at 2088.

Defense counsel's alleged failure to object to jury instructions which allegedly limited the consideration of mitigating circumstances, did not constitute deficient performance or prejudice the outcome. See Point C, supra. Since the instructions complained of were standard ones, authorized by the Florida Supreme Court, Point C, supra, and did not unduly limit consideration of non-statutory mitigation evidence or circumstances, defense counsel's decision not to object does not constitute ineffective performance. Strickland; Peek, supra; Songer, supra. Furthermore, defense counsel's presentation of non-statutory mitigation testimony (R, 1396-1408), totally defeats this claim, on both prongs of Strickland. Peek, supra;

Ford v. Strickland, supra.

Defendant's argument that the failure to seek a post-trial severance of Defendant from his co-defendant, Dale Griffin, was deficient performance, is utterly speculative and specious. Defense counsel sought severance of trial at its outset, which was properly denied, since there was no indication that Griffin would testify at all, or in a manner exculpatory to Defendant. (R, 59-62); State v. Talavera, 243 So.2d 595 (Fla. 1971). There is no Federal or Florida rule authorizing severance under the circumstances alleged by counsel in his present motion. Furthermore, there is nothing in the Record which would indicate that the jury was prejudiced in any sense, by the prosecutor's lack of a recommendation of death as to Griffin, as opposed to defendant. It is entirely speculative to suggest that a lack of reference to Griffin by the prosecutor at sentencing, prejudiced Defendant; in fact, Defendant may very well have benefitted by such a lack of objection to the prosecution's failure to mention Griffin, vis-a-vis a death penalty recommendation. Assuming arguendo, Defendant would be entitled to move for severance at such a time, based on such alleged circumstances, the trial court's ultimate discretion in matters of severance, certainly leads to the conclusion that counsel was not ineffective, merely by not requesting same. McCray v. State, 416 So.2d 804 (Fla. 1982); Crum v. State, 398 So.2d 810 (Fla. 1981); United States v. Kopituk, 690 F.2d 1289 (11th Cir 1982). Finally, there is no showing that the trial court, as the ultimate "sentencer", was

prejudiced in its evaluations and conclusions as to the propriety of the death penalty, by the State's action.

Defendant's allegation that defense counsel's failure to object to the allegedly improper doubling of the aggravating circumstances of felony murder, Section 921.141(d), and pecuniary gain, Section 921.141(f), completely ignores the Record. Defense counsel specifically informed and argued to the jury that the aforementioned two "aggravating circumstances" should be considered only as one factor. (R, 1419). Additionally, the Florida Supreme Court, on direct appeal, specifically rectified this circumstance, by expressly limiting both factors to a single valid aggravating circumstance. Maxwell, 443 So. 2d, at 971.

Similarly, defense counsel urged, in closing argument at sentencing, that the difference between this case and that depicted in the movie "In Cold Blood", prevented a finding that defendant murdered Donald Klein in a cold, calculated and premeditated manner. (R, 1419, 1420); Section 921.141(i), Florida Statutes (1983). The Florida Supreme Court's rejection of this circumstance, Maxwell, at 971, as in the case of 921.141(d) and (f) as two separate circumstances, means Defendant suffered no prejudice. Strickland. Finally, as argued in Point E, the instructions on all possible statutory aggravating circumstances, did not offend or violate any of Defendant's Constitutional rights.

CONCLUSION

Since all of Defendant's claims lack procedural and/or substantive merit, the State of Florida respectfully requests that Defendant's Motion for Post-conviction relief, application for stay of execution, and any and other further relief requested by Defendant, be denied.

Respectfully submitted,

JIM SMITH
Attorney General
Tallahassee, Florida 32304

Richard G. Bartmon

RICHARD G. BARTMON
Assistant Attorney General
111 Georgia Avenue - Suite 204
West Palm Beach, Florida 33401
Telephone (305) 837-5062

Counsel for Respondent

Robert L. Teitler

ROBERT L. TEITLER
Assistant Attorney General
111 Georgia Avenue - Suite 204
West Palm Beach, Florida 33401
Telephone (305) 837-5062

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Motion for Post-Conviction Relief has been mailed to STEVEN H. MALONE, 233 Third Street North, St. Petersburg, Florida, this 5th day of November, 1984.

Richard G. Barbrow
Of Counsel

Of Counsel