IN THE SUPREME COURT OF FLORIDA

WILLIAM LANAY HARVARD,

Appellant,

v.

CASE NO. 67556

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This pleading has largely been prepared in anticipation of that to which it responds. Although the undersigned counsel has received appellant's brief, the exigencies of time have not allowed for extended scrutiny thereof. Accordingly, should any matter discussed herein be viewed by this court as rendered unnecessary by appellant's brief, the state simply asks that it be disregarded. To the extent that any matter raised on appeal has not been completely addressed herein, appellee requests leave to supplement the presentations in this brief, either ore tenus or in written form, as this court prefers and as circumstances make possible.

STATEMENT OF THE CASE AND FACTS

The state relies upon the discussion of procedural and factual matters pertaining to this case set out in Harvard v. State, 375 So.2d 833 (Fla. 1977), and Harvard v. State, 414 So.2d 1032 (Fla. 1982).

On August 8, 1985, Governor Graham signed a death warrant in this case, effective from noon August 29, 1985 to noon September 5, 1985; execution is presently scheduled for 7:00 a.m., on September 4, 1985.

On August 22, 1984, Harvard filed an eleven point motion for post-conviction relief, appendix thereto and motion for stay of execution in the trial court. All matters were denied without evidentiary hearing on August 26, 1985, following arguments of law, with subsequent rendition of the written order as to the post-conviction motion on August 27, 1985.

SUMMARY OF ARGUMENT

The circuit court's denial of the stay and post-conviction motion was correct, and should be affirmed. As to the arguments presented on the merits, all but one, that relating to various statistical studies, should have been raised on appeal, and were improperly presented in the instant motion; the statistical argument is one which this court has continuously rejected, and Harvard is entitled to no relief thereupon. As to the claims raising ineffective assistance of counsel, all were correctly denied as a matter of law, without evidentiary hearing, because where properly presented, Harvard could not, and did not, satisfy either portion of the Strickland v. Washington, ___U.S.___, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), test, in that he failed to demonstrate either deficiency of performance on the part of counsel or resultant prejudice, to the extent that the sentence of death in this case can be regarded as unreliable. Additionally, it is the state's contention that many of these ineffectiveness claims are actually improper presentations of issues which could have been raised on direct appeal, although raised in a different phraseology.

Harvard's primary contention relates to his allegation that he was denied an individualized and accurate capital sentencing determination due to the alleged unconstitutional application of Florida's capital sentencing statute at the time of such sentencing. Such is a matter which could and should have been raised on direct appeal, and its presentation in the motion to vacate was improper, The alternative allegation that the

reasonable interpretation of the statute at that time acted to render counsel ineffective is simply an improper rephrasing of the merits argument.

POINT I

THE ARGUMENT PERTAINING TO WHETHER OR NOT FLORIDA'S CAPITAL SENTENCING STATUTE, AS REASONABLY INTERPRETED IN 1974, ALLOWED FOR THE CONSIDERATION OF NON-STATUTORY MITIGATING CIRCUMSTANCES IS AN ARGUMENT WHICH COULD AND SHOULD HAVE BEEN RAISED ON DIRECT APPEAL.

In his motion to vacate, Harvard presents as one of his primary arguments a contention that, at the time of his sentencing in June of 1974, the capital sentencing statute, section 921.141, Florida Statutes (1973), was reasonably construed so as to preclude consideration of non-statutory mitigating circumstances. Harvard specifically contends that his counsel reasonably believed that no evidence was admissible which did not go toward those mitigating factors set out in section 921.141(6), and that, accordingly, he did not investigate or present any such evidence; in an alternative argument, to be considered subsequently, Harvard contends that his attorney was ineffective for not presenting this type of evidence. Additionally, this point is extremely broad-based, in that Harvard also attacks the jury instructions as inconsistent with Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and states that both the judge and jury did not consider non-statutory mitigatings in either advising or imposing the sentence of death.

Harvard is not the first to seek to raise these issues by means of a motion for post-conviction relief. Accordingly, a great deal of caselaw has developed on this subject, all of

it indicating that such matters are those which must be raised on direct appeal. Thus, in Armstrong v. State, 429 So.2d 287, 289 (Fla. 1983), the court held that a claim "that the capital felony sentencing law in effect at the time of the trial and the instructions to the jury regarding sentencing improperly limited mitigating circumstances to the circumstances listed in the statute in violation of Lockett v. Ohio, 438 U.S. 586 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)" was one which "could have been raised on direct appeal and therefore [was] not a proper subject for collateral attack." See also, Zeigler v. State, 452 So.2d 537 (Fla. 1984), claim that "because of an ambiguity in the scope of mitigating circumstances, persons sentenced prior to July 3, 1978, [date of Lockett decision] deprived of fully individualized sentencing determination", not cognizable under rule 3.850; Hitchcock v. State, 432 So.2d 42 (Fla. 1983).

Harvard argued below (hearing of August 26, 1985 at 63, 66) and argues in his brief, in essence, that this court does not really follow the above precedents, because, on occasion, in disposing of claims identical to those raised sub judice, this court has often discussed matters beyond mere lack of proper presentation. The state does not find such additional discussion as a waiver of the procedural bar which could, should and does prevent consideration of this issue on the merits in a post-conviction motion. Thus, when this court found the instant issue improperly presented in a post-conviction motion in Armstrong v. State, supra and

Hitchcock v. State, supra, and Cooper v. State, 437 So.2d 1070 (Fla. 1983), the state takes this court's word at face value; given the apparent confusion in the mind of appellant, the state would accordingly ask this court to make a similar finding in this case, because there is no way that it is distinguishable from those cited above.

Cooper is a particularly appropriate precedent, because in such case, the defendant had been convicted, sentenced and had his appeal determined prior to Lockett v. Ohio; when Cooper raised the identical claim made sub judice on appeal from the denial of his motion for post-conviction relief, this court observed that Lockett had not changed the law in Florida and that, as such, nothing in Witt v. State, 387 So.2d 922 (Fla. 1980), could be said to allow Cooper to present the issue as he did. The state finds this court's discussion of the doctrine of finality set out in Witt, to be no less applicable here, than it was there, and suggests that the circuit court's denial of this claim should be affirmed on the basis of Cooper, Witt and Jackson v. State, 438 So.2d 4 (Fla. 1983). In making such suggestion, appellee takes the opportunity to express its disagreement with appellant's contention that the order below can be read as suggesting that this claim was reached on the merits, inasmuch as much of the judge's language seems consistent with his belief that the claim could not properly be brought in circuit court. It can definitely be said that the judge below was presented with the proper grounds to deny the motion in that the state argued procedural default in

its pleading and oral argument (hearing of August 26, 1985 at 45-7, 83-4, 93). Given such fact, the denial of relief as to this ground can safely be affirmed. See, e.g., Stuart v. State, 360 So.2d 406 (Fla. 1978).

In addition to attacking the capital sentencing structure in Florida per se, Harvard also attacks the jury instructions used at his sentencing proceeding, as violative of Lockett, and contends that the sentencing judge in this case did not consider any non-statutory mitigating circumstances; as to the latter matter, Harvard seeks to draw sustenance from discussion of this issue at the proceedings of August 26, 1985. As to the issue regarding jury instructions, this is clearly one which could and should have been raised on direct appeal. See, Antone v. State, 410 So.2d 157 (Fla. 1982); Middleton v. State, 465 So.2d 1218 (Fla. 1985). Further, despite whatever contention of "new evidence", Harvard may seek to raise in reference to the matter pertaining tc the judge, such claim again represents one which could and should have been raised on direct appeal. See, Jackson v. State, 437 So.2d 147 (Fla. 1983); Smith v. State, 457 So.2d 1380 (Fla. 1984); Alvord v. State, 396 So.2d 184 (Fla. 1981); Magill v. State, 457 So.2d 1367 (Fla. 1984). Furthermore, although Harvard has never explained this discrepancy, given the fact that he asserted in his motion to vacate below that this claim had never been raised elsewhere, he raised in his initial brief, filed March 18, 1981 at pages 36-38, the contention that his sentence must be vacated as the trial judge had limited his consideration

of mitigating factors to those enumerated in the statutes (see, brief of appellant, March 18, 1981 at 36-38). In the decision in that appeal, Harvard v. State, 414 So.2d 1032, 1037 (Fla. 1982), this court expressly rejected Harvard's "attempt to seek review of issues in this proceeding which could have been raised in the 1977 appeal." If this claim was improperly presented in the 1982 appeal, it is doubly so in the 1985 motion for post-conviction relief, and appeal from the ruling thereupon. It is procedurally defaulted.

RESPONSE TO ALTERNATIVE ARGUMENT

Harvard has also presented an alternative ground, in which he rephrases his claim of ineffective assistance of counsel. Whereas argument in the alternative is a well recognized practice, one is tempted to find that Harvard has overstepped the bounds as such in reference to the instant case. Whereas at one point in his motion Harvard defends the reasonableness of his counsel's apparent belief that evidence as to non-statutory mitigatings would not be admitted, apparently in an attempt to excuse such counsel's failure to object to the jury instructions, subsequently he turns on counsel, and asserts ineffectiveness in reference to the same action. This procedure has been condemned by the Florida Supreme Court. Thus in Hitchcock, supra, the court noted with displeasure the appellant's attempt to recharacterize a previously-disposed-of appellate point as ineffective assistance of counsel. The claim therein was identical to that sub judice - that operation of law, i.e., the then-current state of the law, had prevented counsel from presenting non-statutory mitigating evidence. The court approved summary denial of a motion for post-conviction relief raising this claim, finding it to be an improper attempt to present appellate issues in a post-conviction proceeding. The state contends that Hitchcock should dictate the result sub judice, and that it should not matter greatly that Harvard did not present this issue or a similar claim on appeal. Similarly, in Sireci v. State, 469 So.2d 119 (Fla. 1985), the court refused to address the merits of an ineffective assistance of counsel claim, finding such to

be the improper reraising of an appellate point "under the guise of ineffective assistance of counsel". As here, one of the claims was counsel's failure to investigate and present evidence of non-statutory mitigating circumstances. Hitchcock and Sireci would seem to preclude Harvard from making an "end-run" around Florida's rules on procedural default. Because Harvard should have raised these issues on appeal he should not be allowed to obtain relief by simply changing their labels at this juncture.

Without waiving the above contentions as to the impropriety of the ineffectiveness claim, the state contends that Harvard would be unable to satisfy either the performance or prejudice "prong" of Strickland v. Washington, ____ U.S. ____, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to satisfy the former, Harvard would have to show that no reasonable counsel, as of the time of the sentencing hearing in 1974, would have believed that the statute, as construed, precluded him from introducing evidence as to nonstatutory mitigating circumstances. The Florida Supreme Court has expressly rejected this argument as a matter law, in Muhammad v. State, 426 So.2d 533, 538 (Fla. 1982), observing that counsel, in a pre-1978 sentencing proceeding, would not be expected to predict the decision of Lockett v. Ohio. Muhammad obviously applies sub judice, and any claim of ineffective assistance of counsel in this regard, however phrased or presented, should be denied.

Additionally, the state contends that Harvard has failed to show that counsel's actions, or inactions, in pursuance

of any belief regarding the statute, led to or contributed to the production of an unreliable result, i.e., the instant death sentence. Despite the allegations in the instant motion to vacate, evidence of non-statutory mitigating factors were presented to the judge and jury, and were argued by defense counsel in his closing argument. Thus, when Harvard's sister was called to testify, she told the jury and court that Harvard loved his children "very much" (sentencing proceeding of June 24, 1974 at 55); such testimony goes toward no statutory mitigating circumstance. Similarly, Harvard opened his testimony, in answer to counsel's question, by stating that he was employed in the field of dental industry, building medical and dental cabinets (sentencing proceeding of June 24, 1974 at 62); this testimony goes toward no statutory mitigating circumstance.

Harvard then proceeded to present in great detail his version of the events in Jacksonville and the circumstances of his marriage, and divorce, as to his second wife; perhaps most significantly, Harvard continued to insist that he was innocent of the crime, and sought to cast doubt upon his guilt (sentencing proceeding of June 24, 1974 at 62-81).

Defense counsel emphasized doubt as to guilt as a factor which the jury should consider in ultimately rendering its sentence in his closing argument (sentencing proceeding of June 24, 1974 at 941-3, 945-6). As Harvard noted in his application for stay of execution, doubt as to guilt is not a statutory mitigating circumstance (application for stay at 21, 22). Thus, evidence of non-statutory mitigating factors was presented to the judge and jury.

Once presented, there is nothing to indicate that the jury did not fully consider these matters. The instructions to the jury in this case did not inform them that the mitigating circumstances, in contrast to the aggravating factors, were "limited", and the preliminary instructions given by the judge indicated that evidence would be produced at the sentencing hearing, as to any matter that the court deemed relevant to sentencing; after hearing all the evidence, the jury was to deliberate (sentencing proceeding of June 24, 1974 at 900, 956-7). Further, it has to be noted that by means of the presentence investigation report, and his opportunity at the second sentencing hearing to amplify or clarify matters presented therein, Harvard was provided sufficient opportunity to present to the judge evidence of any non-statutory mitigating circumstance. Compare, Lightbourne v. State, 471 So.2d 21 (Fla. 1985); Magill, supra. It has to be noted that the death sentence in this case was reimposed following remand by this court's order, and also, was imposed after Lockett v. Ohio, supra. It is a reliable sentence, in that there is nothing to indicate that either the original jury or sentencing and resentencing judge failed to consider all the matters in mitigation which Harvard chose to present.

Thus, there is no prejudice in this cause, because there was no exclusion or lack of consideration of evidence as demonstrated by the record. Similarly, there is no prejudice in this cause because, judging by the evidence now proffered, one can say with certainty that, had it been admitted then, it

would have had no appreciable effect on the result. (See, appendix B and C to motion to vacate). In order for a reliable result to have been reached below, it was not necessary that cumulative evidence be presented as to Harvard's family life, love for his children or his employment. Likewise, the state contends that in order for a reliable result to have been reached below, it was not necessary that the jury be told that various family members had never seen Harvard violent; the jury had already convicted Harvard of the murder at this point, thus rejecting any hypothesis he might seek to raise as to his true nature. Compare, Griffin v. Wainwright, 760 F.2d 1505, 1512 (11th Cir. 1985), counsel not required to call every witness, and not required to call witness to testify that defendant never exhibited violent tendencies in his presence, once jury convicted defendant of murder. Further, the fact that Harvard is presently attentive to his family was obviously unknown at the time of the sentencing hearing, and the fact that he had a relatively normal and happy childhood, as he stated at the clemency proceedings, as opposed to a deprived or miserable one, would seem to be a good argument for holding him fully responsible for his actions and punishing accordingly. Because at this point this court is in a position to assess the potential impact of the evidence now proffered, to the extent that any was not presented, Harvard has failed to show sufficient prejudice to justify relief on this claim. See, Magill v. State, 457 So.2d 1367 (Fla. 1984); Middleton v. State, 465 So.2d 1218 (1985); Washington v. State, 397 So.2d 285 (Fla. 1981);

Adams v. State, 380 So.2d 423 (Fla. 1980).

Additionally, while the state does not dispute the defendant's right to present evidence in mitigation, it must be noted that the instant death sentence is not simply premised upon an absence of mitigating findings; it is based upon the finding of two valid aggravating factors - that the instant homicide was committed in a heinous, atrocious or cruel manner and that it was committed by one previously convicted of a felony involving the use or threat of violence. Significantly, Harvard can argue nothing at this point to suggest that either finding was an error. The judge in this case has found these factors twice, and this court has twice affirmed him. As argued above, the sentence of death in this case is one validly rendered and reliable.

The state further notes that, in essence, the failure of counsel to present the evidence now proffered, in the means now contemplated, may actually have served to prevent prejudice to the defense. Specifically, Harvard contends at this juncture that his eldest daughter should have been allowed to testify as to his affection for her. It is worth noting that JoAnn Harvard was listed as a state's witness (original record at 88). It would appear that her father had directed her to assist him in his campaign of harassment against Ann Bovard, and, during the cross-examination of Harvard by the prosecutor at the sentencing proceeding, the state attorney asked Harvard, whether, in light of his inconsistent testimony, it would be necessary to call his daughter to testify against him (sentencing proceeding of June

24, 1974 at 113-115). Additionally, it has to be noted that at such time, Harvard was extensively cross-examined as to his campaign of harassment against Ann Bovard; any family member who had sought to take the stand to attest to his good character would have been subject to impeachment as to their knowledge, or lack thereof, of the specific acts of misconduct brought out by the state during cross-examination (sentencing proceeding of June 24, 1974 at 99-104, 113-119, 120-133, 137-145). As it was, one must note that Harvard's very taking of the stand at the proceeding entitled the state to present various rebuttal witnesses, whose testimony cannot be said to have greatly enhanced Harvard's reputation.

Thus, Harvard has failed to demonstrate not only that the evidence which his counsel allegedly failed to present would have benefited him, but he has further failed to demonstrate that had counsel done exactly what he now wishes, he would not have in fact been prejudiced. The evidence proffered at this juncture must be regarded as simply insufficient to cast any doubt upon the reliability of the sentence. Compare, Francois v. Wainwright, 763 F.2d 1188 (11th Cir. 1985); Ford v. Strickland, 696 F.2d 804 (1983); Magill v. State, supra. Due to the prominence of this claim in Harvard's pleading, the state has addressed this alternative argument at length. It maintains its position, however, that this claim was not properly presented to the state court on the merits, and that the allegation of ineffective assistance of counsel, was itself improperly presented.

POINT II

NO HEARING IS REQUIRED AS TO APPELLANT'S CLAIM THAT HE HAS BEEN DENIED A FAIR, RELIABLE AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION.

Given the fact that the claim as to which the instant evidentiary hearing is alleged to be necessary is one that was improperly presented to the court below and one which suffers the same disability in this court, appellee contends that no hearing is necessary. Further, appellant's request for a hearing on this matter would seem to relate to his "hybrid" ineffectiveness of counsel claim, i.e., that counsel, although acting reasonably, was ineffective; such claim has been considered in point I, supra. A further reading of appellant's brief in this matter (brief at 30), seems to suggest that he is also seeking this hearing in order to have a chance to prove that all sentencing proceedings prior to Lockett v. Ohio were unconstitutional; such claim, again, to the extent it was presented below, would have been improperly presented, and is similarly not proper before this court. Because it would seem that appellant cannot prevail on the merits, due to lack of proper presentation, the state cannot see the necessity for any hearing in which he would seek to prove an invalid premise. To the extent that further arguemnt is required as to this point, the state would respectfully ask this court to consider the arguments presented in point I, supra.

POINT III

DENIAL OF APPELLANT'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL WITHOUT EVIDENTIARY HEARING WAS NOT ERROR.

Appellant contends on appeal that the circuit judge was in error in rejecting the claims presented as to ineffective assistance of counsel, as a matter law, without an evidentiary hearing. In each instance, appellant failed to satisfy either the performance or prejudice component of the test for ineffective assistance of counsel set out in Strickland v. Washington, ____ U.S. ____, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). It is clear from consideration of the record, and motion and attachments thereto that nothing done or undone by counsel affected the result below to the extent that the ultimate sentence of death has been rendered unreliable. Each of these claims will be considered individually, subsequently, in greater detail.

POINT III (A)

THE ARGUMENT PERTAINING TO THE ADMISSION INTO EVIDENCE AT THE SENTENCING PROCEEDING OF 1974 OF DETAILS CONCERNING HARVARD'S PRIOR CONVICTION OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE COULD AND SHOULD HAVE BEEN RAISED ON DIRECT APPEAL; THE ALTERNATIVE CONTENTION OF INEFFECTIVE ASSISTANCE OF COUNSEL IN REFERENCE TO THIS CLAIM IS INSUFFICIENT AS A MATTER OF LAW.

In his motion to vacate, Harvard seems to be attacking the sentencing court's allowance into evidence of details concerning his prior conviction of aggravated assault, i.e., his shooting of his former sister-in-law, Mary Jane Sweat in Jacksonville in 1969. Harvard contends that at the time of the sentencing hearing in 1974, it could not have reasonably been predicted that the evidence would have been admitted in such great detail; he further notes that his defense counsel objected unsuccessfully to the court's ruling in this regard (transcript of sentencing hearing of June 24, 1974, at 911-916). Clearly, the admission of evidence at a sentencing proceeding is an issue which should have been raised on direct appeal, rather than by means of a motion for post-conviction relief, pursuant to Florida Rule of Criminal Procedure 3.850. See, Thompson v. State, 410 So.2d 500 (Fla. 1982), Armstrong v. State, 429 So.2d 287 (Fla. 1983). Due to defense counsel's timely objection, this issue existed as a viable appellate ground, and Harvard's failure to properly present it constitutes procedural default,

such that it need not be considered on the merits.

Harvard, however, as he does elsewhere, seeks to rephrase his claim as one of ineffective assistance, noting that his counsel, having objected, did not then proceed to move for a continuance, in order to investigate and obtain evidence to rebut the state's witnesses on this subject; the state continues to maintain that this type of alternate argument, as to points which should have been raised on appeal, is improper under Hitchcock v. State, 432 So.2d 42 (Fla. 1983) and Sireci v. State, 469 So.2d 119 (Fla. 1985). Additionally, in this instance, Harvard's claim can be summarily rejected on the basis of the record. The Florida inquiry as to ineffective assistance of counsel is comparable to that enunciated by the United States Supreme Court in Strickland v. Washington, ____ U.S. ____, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); either the performance or prejudice component can be considered, and, if either fails, the inquiry ends. The state suggests that Harvard cannot show prejudice in regard to this alleged omission of counsel, which, in any event, the state further suggests he has failed to demonstrate is one which no reasonable counsel would have committed.

This claim is patently unworthy of consideration, in that by virture of the "evidence" presented at the resentencing proceeding of February 9, 1979, one can fully appreciate the lack of persuasiveness of the evidence which Harvard now complains should have been admitted in 1974. Indeed, one reading the transcript of either sentencing proceeding would be hard pressed to conclude that the matter of the Jacksonville

incident received inadequate attention from the defense at either juncture. In his motion, the only matters which Harvard would seem to be able to contend were not raised at the original sentencing proceeding were those which were actually presented at the second, i.e., testimony by Harvard's original trial counsel from Jacksonville as to various inconsistencies in testimony of Mary Jane Sweat and Betty Phillips. It can safely be said that, to the extent that the sentencing jury was deprived of this testimony, such deprivation had no appreciable affect on the result.

Despite defense counsel's present-day assertion of complete surprise and unpreparedness in reference to this claim, assertions which should be read in accordance with Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985), the record indicates that, despite counsel's alleged mindset, his acts produced extremely effective results for his client. Thus, counsel showed great preparedness in cross-examining Harvard's first wife, bringing out Harvard's love for his children, her negligence of them, her unfaithfulness and her possible aggression at the time of the incident (sentencing proceeding of June 24, 1974, at 26-29); counsel likewise cross-examined Mary Jane Sweat concerning the existence of domestic problems between Harvard and his first wife and her possible aggression at the time of the incident (sentencing proceeding of June 24, 1974, at 39-43). Counsel then built upon the facts adduced or at least suggested during these cross-examinations, during his presentation of the defense case. He first called Harvard's

sister, Leveta LaMontagne, who informed the jury as to what an unfit mother Harvard's first wife was (sentencing proceeding of June 14, 1974, at 52-61). At this point, Harvard himself was called to the stand, and he fully presented his side of the story in reference to the Jacksonville incident, describing how his daughter had first told him of his first wife's drunkenness and unfaithfulness, how upset he had become at such a point, and how the pistol, with which he shot both women, had gone off during a scuffle (sentencing proceeding of June 24, 1974, at 62-71).

Inasmuch as defense counsel could not undo the fact that his client, Harvard, had pled guilty to aggravated assault, he acted reasonably in, to the extent then possible, trying to put such fact in the best possible light. The fact that counsel did not present cumulative evidence which could only tend to impeach the credibility of the two women is not a deficiency so prejudical as to render the result unreliable, given the fact that the jury fully heard Harvard's version of the events. Compare, Lightbourne v. State, 471 So.2d 27 (Fla. 1985); Adams v. State, 380 So.2d 423 (Fla. 1980). Further, the instant death sentence is supported by two valid aggravating circumstances, and no mitigating circumstances were found. It cannot be said that counsel's handling of the evidence as to one aggravating circumstance, which he could not disprove, had any appreciable effect on the ultimate result, in that should only the other aggravating circumstance, heinous attrocious or cruel, pursuant to section 921.141(5)(h), Florida

Statutes (1973), "survive", death is still the appropriate sentence. See, Barclay v. Florida, 463 U.S. 880, 103 S.Ct. 3418 (1983); Adams v. State, 449 So.2d 819 (Fla. 1984); Raulerson v. State, 420 So.2d 567 (Fla. 1982). This claim of ineffectiveness fails on each prong of Washington, in that Harvard has failed to demonstrate that no reasonable counsel would not have acted as his did in the instant case, and in that he has failed to show resultant prejudice in reference to counsel's actions, which calls the propriety of the result below into question.

Lastly, it would seem that even as to this claim, Harvard is again trying to revisit what should have been an appellate issue, and to a great extent, seems to have been. Harvard was allowed free rein at his sentencing proceeding of February 9, 1979 to present evidence as to the "true facts" of the Jacksonville incident; the presiding judge found that the alleged "impeachment" was not significantly contradictory or inconsistent with that presented by Betty Phillips and Mary Jane Sweat in the 1975 proceeding. Such findings should be regarded as law of the case in this instance, see, Preston v. State, 444 So.2d 939 (Fla. 1984), and, in the state's humble opinion, this matter should finally be allowed to end. Regardless of the phraseology of his argument in reference to this point, Harvard is entitled to no relief. Denial of the motion to vacate was correct and should be affirmed.

POINT III (B)

NO INEFFECTIVE ASSISTANCE OF COUNSEL HAS BEEN SHOWN AS TO THE ALLEGED FAILURE OF COUNSEL TO OBTAIN AN APPROPRIATE PSYCHIATRIC EVALUATION.

In his motion to vacate, Harvard contends that he was denied effective assistance of counsel, due to trial counsel's alleged failure to obtain an appropriate psychiatric evaluation or to object to the court's failure to order such. As with a number of his other claims, Harvard's trial attorney has discussed this matter in his affidavit. Attorney Dressler asserts therein that during the course of his pretrial representation of Harvard, he became convinced that his client suffered from "a serious mental or emotional disturbance"; when he broached this matter to Harvard, however, the latter categorically stated that he wanted nothing to do with psychiatrists or psychologists. Nevertheless, Dressler maintains that, after Harvard testified at the penalty phase, he felt that he could no longer be bound by his client's decision, and that, accordingly, he moved for evaluation of Harvard, under section 921.141(7), Florida Statutes (1973). According to the affidavit, the presiding judge, although granting this motion, did not order the type of evaluation that counsel wished, although, for inexplicable reasons, Dressler did not object to this omission in 1974 (see, appendix A to motion to vacate). Harvard asserts that his counsel's failure to obtain an evaluation as to his capacity to commit the crime and his failure to object to the

court's failure to order such, following granting of a motion to such effect, constitutes ineffective assistance of counsel, such that the sentence must be vacated.

Before evaluating this claim under Strickland v. Washington, ____ U.S. ____, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the state suggests that a good deal of it must be regarded as contradicted, or implausible, in light of the record in this case; further, the state maintains its request that counsel's latter-day position on these issues be read in conjunction with Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985). The record indicates that counsel did request that his client be evaluated as to sanity at the sentencing proceeding (sentencing proceeding of June 24, 1974 at 960). Following rendition of the advisory verdict, the judge appointed two experts to examine Harvard and to determine whether, at the present time, he was insane (original record at 32). Such reports were provided to and received by counsel, by the time that sentence was pronounced on October 4, 1974. This is uncontravertible, given the fact that Attorney Dressler argued to the court those portions of the reports which he regarded as favorable, noting that Dr. Blood had opined that Harvard had an antisocial personality disorder (proceedings of October 4, 1974, at 4). Counsel then pleaded for life on behalf of his client, arguing to the judge that he could consider anything (proceeding of October 4, 1974 at 4-9; 10-12).

It has to be stressed that counsel's words of 1985 cannot be squared with his actions of 1974. It is simply in-

credible to believe that counsel did not get what he wanted or what he had asked for, in reference to the psycological evaluations, which he argued to Judge McGreggor constituted a cause to spare his client's life. Because of the factual underpinnings of this claim are contradicted by the record, the state contends that it should be summarily rejected. Because Harvard cannot satisfy either the performance or prejudice prong of Strickland v. Washington, supra, it must also be summarily denied as a matter of law. Harvard has failed to demonstrate that no reasonable counsel in 1974 would have acted as his did in regard to this matter, or that consequential prejudice from any deficiency is such that the result, i.e., the death sentence, is unreliable.

In assessing counsel's competence, and any resultant prejudice, one must look to the actual situation he was in. Attorney Dressler represented a man who not only did not want to raise an insanity defense, but who had positively rejected such, and who had also demanded, and received, a defense presented at sentencing based on denial of guilt. William Lanay Harvard continues to insist to this day that Ralph Baggett pulled the trigger. The contention that Harvard has been denied effective assistance of counsel because latter-day psychiatrists, examining him a decade after the offense, have testimony which might be relevant as to the existance of that statutory mitigating factor relating to "extreme mental or emotional disturbance", pursuant to section 921.141(b)(6), Florida Statutes (1973) (motion at 74), must fail, because: (1) coun-

sel is not ineffective for not raising a defense which is inconsistent with that chosen by his client, see, Straight v. Wainwright, 422 So.2d 827 (Fla. 1982), Alvord v. State, 396 So.2d 184 (Fla. 1981), Alvord v. Wainwright, 725 F.2d 1282 (11th Cir. 1984), Middleton v. State, 465 So.2d 1218 (Fla. 1985), and also (2) psychological testimony is not necessary to establish this mitigating circumstance, and Harvard's own testimony at the sentencing proceeding, as to his consumption of alcohol and Ann Bovard's "harassment" of him and his new girlfriend sufficiently presented this matter to the jury (sentencing proceeding of June 24, 1974 at 75, 77, 124-5, 138-9, 141-3). See, Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985).

Thus, the state contends that Harvard has failed to demonstrate that his attorney acted as no competent counsel would have. Further, the psychological "evidence" which has been proffered at this time, and obtained after sentencing, supports such conculsion as to lack of ineffective assistance, The reports contained in the appendix to Harvard's motion to vacate (see, appendix D and E), are all based upon Harvard's own statements to the doctors involved, made at least a decade after the events referred to; neither psychologist is in a position to offer independent evidence as to Harvard's emotional or mental state in February of 1974. The reports of Doctors Blood and Wilder, presented closest in time to the events in question, are good indications that, had counsel requested any sort of preliminary evaluation, no report or information ob-

tained at such time would have been of appreciable benefit. See, Washington v. State, 397 So.2d 285 (Fla. 1981); Middleton, supra.

The only "real" evidence to support the mitigating factor at issue was presented by Harvard himself; had counsel called to the stand psychiatric witnesses to present Harvard's own words, the inconsistencies between the defense theories would only have been made plainer to the jury. As it was, Harvard was able, through his own testimony, to present his primary defense of innocence, as well as to suggest to the jury, and the ultimate sentencer and reviewer in this case, the possible existence of, and all relevant evidence available as to his mental and emotional state. Compare, Middleton, supra. The sentencing result in this cause is reliable, in that it is supported by the finding of two valid aggravating circumstances. It cannot be said that the evidence which Harvard proffers at this time, alleged not to have been obtained earlier due to counsel's infirmities, would have had any appreciable effect on the result. Harvard has failed to satisfy Strickland v. Washington. See, Middleton, supra. This claim can be summarily rejected. Denial of the motion to vacate was correct and should be affirmed.

POINT III (C)

NO INEFFECTIVE ASSISTANCE OF COUNSEL HAS BEEN SHOWN IN REFERENCE TO THE CLOSING ARGUMENT PRESENTED BY DEFENSE COUNSEL AT THE 1974 SENTENCING PROCEEDING.

In his motion to vacate, Harvard contends that he was denied effective assistance of counsel, due to the closing argument made by such counsel at the penalty phase in 1974. As in Johnson v. Wainwright, 463 So.2d 207, 211 (Fla. 1985), defense counsel has submitted an affidavit, in which he evinces a desire to confess incompetence, by claiming that the action complained of was not undertaken for strategic reasons; indeed, Attorney Dressler specifically contends that he "cannot now recall" why he presented the particular argument which he did and that he "certainly would not make such an argument today." (See, appendix A to motion to vacate). The attorney does, however, hypothesize that he might have made the argument due to the fact that Florida's capital sentencing statute was so new, and, by implication, because he did not know what a "reasonable" attorney would argue in such proceeding.

To the state, this "reason" is a perfectly acceptable one. It is clear that Attorney Dressler, whether he now realizes it or not, was a pioneer defense attorney, as far as participation in Florida's capital sentencing procedure is concerned. He can only be adjudged ineffective at this point in time if his conduct, as measured by the standards of reasonableness under the prevailing professional norms at the time the

conduct occurred, was so deficient that Harvard was denied a sentencing hearing whose result is reliable. See, Strickland v. Washington, ____ U.S. ____, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The fact that counsel would not make the same argument today is irrelevant, given the fact that his conduct is viewed as of the time of commission. See, Downs v. State, 453 So.2d 1102 (Fla. 1984); Dobbert v. State, 456 So.2d 424 (Fla. 1984). Further, the fact that Attorney Dressler cannot presently recall a strategic reason for this choice of argument, which may not be surprising, given the fact that over a decade has passed between the event in question and execution of the instant affidavit, does not indicate that there was not such a reason at the time.

This is a perfect example of an attorney being judged by 20-20 hindsight. Further, the timing of the raising of this claim, in a post-conviction motion filed August 22, 1985, is susceptible to the inference that Harvard has been perfectly satisfied with the closing argument delivered by his counsel, until the appearance of a case which arguably casts doubt upon the propriety of some of its contents, Caldwell v. Mississippi, ____ U.S. ____, 105 S.Ct. 2633 (1985), on June 11, 1985; it would, of course, not be without precedent for the scheduling of an imminent execution to cause one in the circumstances of Harvard to scrutinize his attorney's performance, however distant in the past, with searching probity. In any event, the fact that a prosecutor may not now make some of the arguments which defense counsel did in 1974 is hardly a badge of inef-

fectiveness. In the instant claim, Harvard ignores over ninety per cent of the argument presented on his behalf.

It is true that during defense argument, Attorney Dressler offered his opinion that the new statute was unconstitutional and would be eventually stricken down (sentencing proceeding of June 24, 1974 at 935). To the state, this would seem to be an extremely effective argument against a death recommendation, in that no one on the jury would want to be in the position of recommending an invalid death sentence; such would especially be the case, if such sentence were carried out, prior to the statute's demise. The state further suggests that Attorney Dressler's remarks were intended to place a distance between the jury and the capital sentencing statute, so as to make their likelihood of a death recommendation even more remote. It is also crystal clear that Attorney Dressler repeatedly made plain to the jury the fact that they had a real choice in this case,

> . . . you are here to tell that man sitting on the bench that we want Mr. Harvard put in the electric chair or we don't want him put there. And, again, as I have told you before, based on the evidence that you have heard, you have got to be convinced beyond and to the exclusion of any reasonable doubt of the guilt and the premeditation . . . (sentencing proceeding of June 24, 1974 at 939-940)
>
> . . . . . .
>
> I submit to you that doing justice in this case is not putting a man in the electric chair and, if you think that he ought to be removed

> from society, that is what the law says, twenty-five years before he would even be eligible for parole. (sentencing proceeding of June 24, 1974 at 945).

A man who did not believe that the jury's verdict was of any value would not bother to make these arguments.

Furthermore, a man who did not believe that the jury's verdict was worth anything, and wished to communicate such fact to the jury, would not repeatedly emphasize the fact that his client was innocent, suggesting that for the jury to recommend death, on the basis of the testimony of Ralph Baggett, who had never passed a lie detector, would be the act of a jury "inflamed by emotion"; at such point, Dressler appropriately observed that such "inflamed" decision would be reversed either by the trial judge or the reviewing court (sentencing proceeding of June 24, 1974 at 942-943). Thus, rather than seeking to dilute the jury's sense of its own responsibility, it would seem that defense counsel was emphasizing to them the importance of their verdict, and urging that such verdict not be one of death. Defense counsel concluded his arguments by asking for mercy for his client (sentencing proceeding of June 24, 1974 at 948).

The state suggests that those isolated comments relied by Harvard at this juncture (sentencing proceeding of June 24, 1974 at 940-1, 943, 946), can simply be regarded as rhetorical excesses, which cannot be said to have tainted the entire argument such that no reasonable attorney would have delivered it in 1974. The overall tenor of the closing argu-

ment directly informed the jury of their discretion in this matter, and, it must be noted, that in telling the jury that their verdict was only advisory, counsel was not telling them anything that they had not already learned from the judge's preliminary instructions (sentencing proceeding of June 24, 1974 at 899-904). This contention is without merit.

Further, even should counsel's conduct be regarded as at all deficient, it is clear that it did not render the result below unfair or unreliable. Following defense counsel's argument, the prosecutor immediately contended that the jury's recommendation was "vitally important", in that it was persuasive to the court and was an expression of how the jurors, as members of the community, felt about a crime committed in their midst (sentencing proceeding of June 24, 1974 at 953-4). Additionally, the preliminary instructions given by the judge, as noted above, delineated for the jury their role in the capital sentencing procedure. The fact that the jury did not return immediately with a verdict, and the fact that when they did so such verdict had been arrived at by a divided vote, is indicative that the jury recognized that their verdict was vitally important.

Finally it must be recognized that the death sentence in this case is not premised upon inflamed emotion, but rather upon the finding of two valid statutory aggravating factors. The jury recommended death in this case, not due to the conduct of counsel, but rather due to that of his client. Counsel's present-day recrimination regarding his argument is en-

tirely unnecessary; whether he recognizes it or not he rendered his client effective assistance. This claim can be summarily rejected. Denial of the motion to vacate was correct and should be affirmed.

POINT III (D)

THE ARGUMENT PERTAINING TO ALLEGED IMPROPER CLOSING ARGUMENT BY THE PROSECUTOR IN THE 1974 SENTENCING PROCEEDING COULD AND SHOULD HAVE BEEN PRESENTED ON DIRECT APPEAL.

In his motion to vacate, Harvard contends that certain statements made by the prosecutor in his rebuttal closing argument, unobjected to by trial counsel, constitute fundamental error; such statements made in response to defense counsel's discussion of the changeability of law regarding capital sentencing, as well as his prediction that the instant law would be struck down, simply noted that that provision of the statute which set a twenty-five year cap on parole, for those sentenced to life, was likewise subject to change by a legislature (original sentencing at 953, 935). It is well recognized that issues pertaining to closing argument are matters which must be raised on direct appeal, and are improperly presented in a motion to vacate. See, Booker v. State, 441 So.2d 148 (Fla. 1983); Johnson v. State, 463 So.2d 207 (Fla. 1985); Francois v. State, 470 So.2d 687 (Fla. 1985). Although Harvard does not acknowledge this in his motion (motion at 94), he did attempt to raise this issue on appeal following reimposition of the death sentence (see, initial brief of appellant, March 18, 1981, pages 48-50); in its opinion, Harvard v. State, 414 So.2d 1032, 1037 (Fla. 1982), the Florida Supreme Court expressly rejected Harvard's "attempt to seek review of issues in this

proceeding which could have been raised in the 1977 appeal." This issue is improperly presented, and should not be considered on the merits.

As with so many of his claims, Harvard attempts to avoid this obstacle by rephrasing the issue as one of ineffective assistance of counsel, in reference to trial counsel's failure to object; the state maintains its position that such alternative pleading as to matters which should have been raised on appeal is improper under Hitchcock v. State, 432 So.2d 42 (Fla. 1983) and Sireci v. State, 469 So.2d 119 (Fla. 1985). In evaluating any claim of ineffectiveness, one can, pursuant to Strickland v. Washington, ____ U.S. ____, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), look to either the prejudice or performance component; should either fail, the inquiry ends. Here, the state maintains that Harvard cannot show prejudice. The Florida Supreme Court has only reversed one death sentence on the basis of improper prosecutorial argument. In Teffeteller v. State, 439 So.2d 840 (Fla. 1983), the court found the prosecutor's argument that if the defendant were not sentenced to death he would be released in twenty-five years and kill certain specific individuals to be fundamentally improper.

The argument sub judice is nothing on par with that in Teffeteller, and counsel's failure to object to it, and preserve the issue for appeal, did not affect the result below. The Florida Supreme Court held in Paramore v. State, 229 So.2d 855 (Fla. 1969), an early capital case, that it was not fundamental error to inform the jury that a life sentence was not

inviolate, in that it was common knowledge that all persons convicted of a crime were subject to parole. Here, following defense counsel's discussion of the changeability of law, the prosecutor simply observed that the twenty-five year limit on parole eligibility, imposed upon one sentenced to life, was not impervious to legislative change. He did not, in contrast to the situation in Teffeteller, invite the jury to speculate as to what Harvard would do if released at any juncture, and his remarks are simply not subject to interpretation as fundamental error. It has to be noted that comments similar to these have been found insufficient grounds for either mistrial or reversal. See, Harris v. State, 438 So.2d 787 (Fla. 1983); Parker v. State, 456 So.2d 436 (Fla. 1984). In Harris, the comment was to the effect that the defendant would walk out of prison, if paroled, at age 52, "as he walked out before." In Parker, the comment was to the effect that the defendant would not have been able to commit the instant murder, given his life sentences, if life had meant life. Because preservation of this issue for appeal, through timely objection at trial, would have not have benefited Harvard in any material respect, summary disposition of his claim of ineffectiveness is proper. Denial of the motion to vacate was correct and should be affirmed.

POINT IV

DENIAL OF RELIEF AS TO APPELLANT'S CLAIMS REGARDING THE JURY INSTRUCTIONS AT THE PENALTY PHASE WAS NOT ERROR.

Appellant contends on appeal that the circuit judge was in error in denying his arguments in reference to the jury instructions at the penalty phase; each claim was presented was presented as a "merits" point, with an alternative allegation of ineffective assistance of counsel. The state maintains that all of these issues represent ones which should have been presented on direct appeal, and often unsuccessfully were, and that appellant's rephrasing of them as claims of ineffective assistance of counsel was improper. Each claim will now be considered in the order presented, in greater detail.

POINT IV (A)

THE ARGUMENT PERTAINING TO THE PENALTY PHASE JURY INSTRUCTIONS' ALLEGED FAILURE TO INFORM THE JURY AS TO THE STATE'S BURDEN OF PROOF COULD AND SHOULD HAVE BEEN PRESENTED ON DIRECT APPEAL.

In his motion, Harvard contends that fundamental error has occurred in relation to the fact that the penalty phase jury instructions allegedly did not inform the jury as to the state's burden of proof. The Florida Supreme Court has considered this identical claim in Songer v. State, 419 So.2d 1044 (Fla. 1982) and Armstrong v. State, 429 So.2d 287 (Fla. 1982). In Armstrong, the court held that the matter was not subject to consideration in a rule 3.850 motion; in Songer, the court expressly rejected the contention made therein that the alleged error was fundamental.

This was an issue which was clearly available for consideration at the time of Harvard's direct appeal. Although such is not reflected in the motion (motion at 94), it is also one which Harvard did attempt to raise in his initial brief, filed in the appeal following reimposition of sentence (see, initial brief of appellant, March 18, 1981 at 39-45). In Harvard v. State, 414 So.2d 1032, 1037 (Fla. 1982), the Florida Supreme Court expressly rejected Harvard's "attempt to seek review of issues in this proceeding which could have been raised in the 1977 appeal." This claim is procedurally defaulted and improperly presented and should not be considered on the merits.

As in a number of other claims, Harvard attempts to avoid this obstacle by presenting an alternative argument, couched in terms of ineffectiveness of counsel. The state suggests that this is improper, pursuant to Hitchcock v. State, 432 So.2d 42 (Fla. 1983) and Sireci v State, 469 So.2d 119 (Fla. 1985). In any event, no ineffectiveness of counsel exists as a matter of law. The Florida inquiry as to ineffective assistance of counsel is comparable to that enunciated by the United States Supreme Court in Strickland v. Washington, ____ U.S. ____, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). See, Downs v. State, 453 So.2d 1102 (Fla. 1984). It is clear, that in evaluating a claim of ineffectiveness, one can examine either the performance or prejudice component of the claims; should either fail, such claims can immediately be rejected. Here, inasmuch as it has been held that this claim does not raise fundamental error, and that the jury instructions as given were not fundamentally erroneous, see, Songer, the state contends that Harvard cannot show prejudice. Even if his counsel had objected, no relief would have been obtained. This claim does not merit further discussion. Denial of the motion to vacate was correct and should be affirmed.

POINT IV (B)

THE ARGUMENT PERTAINING TO THE PENALTY PHASE JURY INSTRUCTIONS' ALLEGED SHIFTING OF THE BURDEN COULD AND SHOULD HAVE BEEN RAISED ON DIRECT APPEAL.

In his motion to vacate, Harvard contends that the penalty phase jury instructions were fundamentally erroneous in that, allegedly, they allowed the jury to assume the defendant had the burden to demonstrate that death was not the appropriate sentence, thus improperly shifting the burden of proof. In Zeigler v. State, 452 So.2d 537 (Fla. 1984), the Florida Supreme Court expressly held that this identical claim was one which should have been raised on direct appeal and one which was not cognizable in a motion to vacate. In Smith v. State, 457 So.2d 1380 (Fla. 1984), the court further stated that the matter did not represent a claim of fundamental error. In light of the above, the state contends that this claim is procedurally defaulted due to Harvard's failure to raise it on appeal, and should not be considered on the merits.

However, Harvard presents an alternative assertion of ineffective assistance of counsel as to this claim; the state maintains its assertion that such alternative pleading as to matters which should have been raised on appeal is improper under Hitchcock v. State, 432 So.2d 42 (Fla. 1983) and Sireci v. State, 469 So.2d 119 (Fla. 1985). In any event, as the Florida Supreme Court held in Downs v. State, 453 So.2d 1102 (Fla. 1984), the Florida inquiry upon this matter is com-

parable to that enunciated by the United States Supreme Court in Strickland v. Washington, ____ U.S. ____, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In such opinion, the court noted that in evaluating relief on this claim, either the performance or prejudice component could be reviewed first, and if either fails, no further consideration is warranted. Here, the state contends that Harvard cannot show prejudice, in that, because any error was not fundamental, see Smith, supra, counsel's failure to object had no effect upon the result. Denial of the motion to vacate was correct and should be affirmed.

POINT IV (C)

THE ARGUMENT PERTAINING TO THE PENALTY PHASE JURY INSTRUCTIONS' ALLEGED FAILURE TO INFORM THE JURY AS TO HOW TO WEIGH THE AGGRAVATING AND MITIGATING FACTORS COULD AND SHOULD HAVE BEEN PRESENTED ON DIRECT APPEAL.

In his motion to vacate, Harvard contends that the penalty phase instructions to the jury were fundamentally erroneous, in that, allegedly, they failed to inform that, even after weighing the aggravating and mitigating circumstances, they still were required to determine whether death was the appropriate penalty. This, like all other issues pertaining to jury instructions, was one which should have been raised on appeal, and Harvard's failure to do so precludes consideration of this matter on a motion to vacate. See, Armstrong v. State, 429 So.2d 287 (Fla. 1983); Thompson v. State, 410 So.2d 500 (Fla. 1982). The state finds this claim analogous to that asserted in Adams v. State, 456 So.2d 888 (Fla. 1984) and Francois v. State, 423 So.2d 357 (Fla. 1982). In the former case, the defendant urged, in a motion to vacate, that it had been error for the court to fail to instruct the jury that they could recommend life even though they found aggravating circumstances. The Florida Supreme Court found this to be an improperly presented claim, citing to McRae v. Wainwright, 439 So.2d 868 (Fla. 1983), such latter case holding that a prisoner who seeks relief in a collateral proceeding based upon a jury instruction not challenged at trial bears the burden of

proving that the instruction given affected the trial in such a way as to render the proceeding fundamentally unfair. The instruction in Adams was not fundamentally erroneous, and the state contends neither was that sub judice. Harvard has procedurally defaulted on this cliam.

As in his other claims, Harvard raises an alternative ground of ineffective assistance of counsel; the state responds by contending that such alternative pleading, as to matters which should have been raised on direct appeal is improper in light of Hitchcock v. State, 432 So.2d 42 (Fla. 1983) and Sireci v. State, 469 So.2d 119 (Fla. 1985). In any event, due to the lack of fundamental error, Harvard cannot prevail on this assertion. Under Strickland v. Washington, ____ U.S. ____, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), one can examine either the performance or prejudice component of an ineffectiveness claim; should either portion fail, the inquiry ends. Because the error was not fundamental, trial counsel's failure to object cannot be said to have prejudiced Harvard or to have rendered the result below unfair. It is worth noting that the Florida Supreme Court in Adams, supra, reached the identical conclusion in rejecting a claim of error in reference to a failure to instruct, which the state contends is on all fours with the situation in the case at bar. Denial of the motion to vacate was correct and should be affirmed.

POINT IV (D)

THE ARGUMENT PERTAINING TO THE PENALTY PHASE JURY INSTRUCTIONS' ALLEGED FAILURE TO INFORM THE JURY OF THE ROLE PLAYED BY MITIGATING CIRCUMSTANCES COULD AND SHOULD HAVE BEEN PRESENTED ON DIRECT APPEAL.

In his motion to vacate, Harvard asserts that fundamental error occurred in regard to the jury instructions' alleged failure to inform the jury of the role played by the mitigating circumstances. In Adams v. State, 456 So.2d 888 (Fla. 1984), the Florida Supreme Court, confronted with the identical claim, held that such matter was one which had to be raised on direct appeal, and could not be presented initially in a motion to vacate. Accordingly, given Harvard's failure to raise this issue on direct appeal, the state contends that this issue is procedurally defaulted, and should not be considered on the merits.

Further, Adams also raised his claims in the alternative as does Harvard, asserting ineffective assistance of counsel in reference to trial counsel's failure to object to the jury instructions; the state continues to maintain that this procedure of alternate pleading, alleging ineffective assistance of counsel in reference to every claim which could have been raised on appeal but was not, violates Hitchcock v. State, 432 So.2d 42 (Fla. 1983) and Sireci v. State, 469 So.2d 115 (Fla. 1985). In any event, this claim of ineffectiveness was rejected in Adams, on the basis of Strickland v. Washington,

____ U.S. ____, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the court finding that the failure to object was not such a deficient performance as to deprive the defendant of "a fair trial, a trial whose result is reliable." Such summary disposition of the ineffectiveness claim is warranted, and is the proper result sub judice. Denial of the motion to vacate was correct and should be affirmed.

POINT V

DENIAL OF APPELLANT'S CLAIM REGARDING THE ALLEGED DISCRIMINATORY APPLICATION OF THE DEATH PENALTY, AND HIS CLAIM THAT ELECTROCUTION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT, WAS NOT ERROR.

In this claim, appellant combines two of those presented below, one regarding the alleged discriminatory application of the death penalty, in light of certain statistical evidence, and the other regarding the allegation that electrocution constitutes cruel and unusual punishment, in light of evolving standards of decency. The circuit judge correctly found that, no doubt pursuant to Booker v. State, 441 So.2d 148 (Fla. 1983), that the latter claim was procedurally defaulted, in that it could and should have been, and was, raised on direct appeal (see, initial brief of appellant, March 18, 1981 at 52). This court, in its opinion in Harvards second appeal, stated that it rejected his "attempt to seek review of issues in this proceeding which could have been raised in the 1977 appeal." See, Harvard v. State, 414 So.2d 1032, 1037 (1982). Denial of this claim was proper.

As to appellant's other claim as to the arbitrary application of the death penalty, he is correct in recognizing that this claim has been previously rejected, as have the statistical studies upon which it is based. In that appellant did not present these statistical studies to the court below, a fact noted in the judge's order, is questionable whether this claim is properly presented. In any event, appellant

has failed to demonstrate any reason why this cause should not be determines in accordance with State v. Washington, 453 So.2d 389 (Fla. 1984); Martin v. State, 455 So.2d 370 (Fla. 1984); Dobbert v. State, 456 So.2d 424 (Fla. 1984). No relief is warranted.

CONCLUSION

WHEREFORE, for the aforementioned reasons, appellee, State of Florida, moves this honorable court to affirm the denial of appellant's motion for stay of execution and motion for post-conviction relief or vacation of the death sentence, in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Answer Brief of Appellee has been furnished by ~~mail~~ delivery to Craig Barnard or associates, Assistant Public Defenders, 224 Datura Street/13th Floor, West Palm Beach, Florida 33401, and counsel for the appellant, this 29 day of August, 1985.

RICHARD B. MARTELL
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