IN THE SUPREME COURT OF FLORIDA

RALEIGH PORTER,

Appellant,

v. CASE NO. 67805

STATE OF FLORIDA,

Appellee.

BRIEF OF APPELLEE

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SUMMARY OF THE ARGUMENT

I. The lower court correctly denied appellant's claim of ineffective assistance of trial counsel without an evidentiary hearing as the record adequately demonstrated trial counsel chose tactically not to put on family members to testify at the penalty phase. Trial counsel's decisions in this regard need not be second guessed.

An evidentiary hearing is unnessary when the trial record demonstrates that counsel adequately performed under the Sixth Amendment Middleton v. State, 465 So.2d 1218.

II. As to the other remaining claims, these are issues which would have been or should have been raised on appeal and are therefore not cognizable on 3.850.

HISTORY OF THE PROCEEDINGS

I. STATEMENT OF THE CASE AND FACTS

Raleigh Porter was arrested for the murders of Mr. and Mrs. Harry Walrath. (R 1) A state motion to secure evidence, to-wit: fingernail clippings was granted (R 4 - 5) and a defense motion to allow voir dire examination of prospective grand jurors was denied. (R 6, 10) On September 8, 1978, the grand jury returned a two-count indictment charging Porter with first degree murder. (R 11) Porter plead not guilty and a pre-trial motion to dismiss the indictment was denied. (R 11A - 17) Porter then filed a motion for change of venue (R 20 - 21) which was granted on November 2, 1978, and the cause was removed to the Circuit Court of Glades County. (R 81) A second motion for change of venue (R 169 - 170) was filed on November 15, 1978, and after a hearing on November 20, 1978 (R 253 - 256), the motion was denied. (R 172)

At trial, the state's first witness, Richard Olson, a neighbor who lived across the street from the Walraths, testified that he saw a young man approach the Walraths' front door between 6:30 and 7:00 p.m. on August 21, 1978. The man entered the house. (R 485 - 486) Mr. Walrath was seen outside the house. (R 486) About an hour and a half later, Olson saw the Walrath garage door open and the Walrath car back out of the garage; the driver who was alone, got out of the car and closed the garage door. The driver was a young man, not either Mr. or Mrs. Walrath. (R 487) Olson knew something was wrong because

the driver left in a hurry and no lights were on in the house and he didn't feel the Walraths would immediately go to bed after the young man left. Olson rang the Walraths' doorbell and looked through the window but received no response; he then called the Sheriff's Department. (R 488) The witness was unable to identify the young man at the house (R 490) but furnished a physical description to the officers. (R 491)

Corporal Frank Reisinger of the Sheriff's Department responded to a call pertaining to a suspicious incident and spoke to Mr. Olson. (R 493 - 494) He checked the Walrath residence, noticed the bedroom was disarranged with items thrown on the floor and bed and called Sergeant Enderle for a further investigation. (R 494 - 495) He and Enderle entered the house and saw the bodies of two individuals on the floor. (R 496)

Enderle testified that he responded to Reisinger's call and described what was seen inside the Walrath house. A woman's pocketbook was in the bathroom sink with credit cards laying beside it. (R 500) A dead man and woman lay on the floor near the bedroom. Electrical cord was wrapped about each person's neck tightly with a knot tied. (R 500) The car was not in the Walrath garage. Defense counsel stipulated to the identiy of the victims. (R 501) Underneath the body of Mr. Walrath was a broken fingernail which was turned over to Sergeant David Lucas. (R 502) Neither Mr. Walrath nor Mrs. Walrath were missing any fingernails. (R 502) A "bolo" was put out for the Walrath automobile; the 1975 tan Buick was recovered two miles inside

the DeSoto County line on Kings Highway. All the doors were locked and no keys were found near the vehicle. (R 503 - 504)

Sergeant David Lucas took photos of the house where the victims were found and identified Exhibit 1. (R 508 - 509) The bedroom scene included a wallet laying open on a dresser and the drawers were disheveled; it appeared as though someone had rifled through the drawers. Jewelry was strewn all over the bed and various jewelry boxes were dumped out on the bed. (R 509) In a bathroom a woman's purse lay on the counter with its contents dumped on the counter. A television stand (without television) was in the living room. In the bedroom where the victims were located, a lamp cord was cut away from the lamp. A wallet lay on the bathroom floor next to the counter. Papers were strewn all over the floor. (R 510) The witness further described the ransacked condition of the house; suitcases appeared to have been opened, jewelry chests lay on the bed, the bedspreads were moved, dresser drawers appeared to have been gone through and it appeared someone had looked under the mattress on the bed. (R 572) Dust had accumulated on an area of the television stand. (R 513) A rug was overturned in the living room. In a second bathroom, a purse sitting on the counter had its contents dumped out; the medicine cabinet was open. The officers attempted to lift fingerprints; the only identifiable ones belonged to the victims. There appeared to be some glove prints found in the house. (R 573 - 575) The victims' prints also were found on the car. (R 575)

Sheriff's investigator Frederick Kleynen was present when the two bodies were removed to the mortuary and he attended the autopsy the following morning. (R 521) He identified Exhibits 2 and 3 as the electrical cords removed from the victims' necks; they appeared to have been cut from an electrical appliance. (R 522 - 524)

Detective T. Thurlin Runkle identified a photograph of the Walrath's' automobile (Exhibit 4). (R 528) On August 22nd he contacted Tammy Lloyd and recovered coins and jewelry from her (Exhibit 5). (R 529) On the following day, August 23rd, he took a trip to Cape Coral with Tammy Lloyd and Dinah Raymond to recover items in a coin shop there; the items referred to in Exhibit 5 were nto recovered at the coin shop, but other items were recovered there. (R 530 - 531)

Pathologist Dr. R. H. Imami performed an autopsy on both Mr. and Mrs. Walrath. As to Mr. Walrath, Imami noticed bruises on the neck and chest. The chest was flailed. There was internal hemorrhage in the left side of the brain, multiple hemorrhages within the lungs and multiple rib fractures on both sides. The sternum, or front flap of the chest, was broken into. There was a laceration within the heart and the lungs were congested with blood. The victim's age was approximately seventy-four. The cause of the internal injuries was blows to the head and body. (R 538 - 539) The cause of death was multiple traumatic injuries, including both the blows and strangulation. (R 540) Examination of Mrs. Walrath revealed evidence of strangulation,

broken larynx and broken hyoid bond, multiple rib fractures on the chest, blood in the chest cavity and surrounding the heart and a hematoma on the left side of the skin; the victim was sixty-seven years old. (R 541) The cause of death was the multiple blows to the chest and possible strangulation. (R 542) Neither victims' injuries could have been self-inflicted. (R 540, 543)

Harold Thompson was the foreman of the crew in which Porter worked. (R 546) On August 21st they were burying cable in the vicinity of Harbor and Midway Boulevard. (R 546) Later, at about 6:30 p.m., Thompson went to Porter's apartment at Pelican Bay in Charlotte Harbor; Porter was not there but Tammy and Dinah were. Thompson went there to do his laundry and stayed there until about eight o'clock. (R 547) The witness did not see Porter that evening nor the next day (August 22) at work. (R 548) Thompson recalled that on August 21st, while at work, an elderly man at the corner of Harbor and Midway discussed the cutting of his sprinkler line with Thompson. (R 549)

Stanley Campbell who was also working burying telephone cables on August 21st recalled that Porter talked with Mr. Walrath after the sprinkler line was cut. Porter and Walrath walked down the back of the house and Porter returned five minutes later. (R 551 - 553)

Tammy Lloyd was living with Porter and Dinah Raymond at Pelican Bay on August 21st. (R 559 - 560) Porter returned from work about four or five and the two women drove Porter to a stop

sign in Port Charlotte and let him out. He said he was going to do a B and E. (R 561 - 562) Porter returned to the apartment about ten or ten-thirty. He said he got the car and some other stuff. They then went for a ride in the newly-acquired car. She recognized Exhibit 4 as depicting this car. (R 563) They drove by the house Porter had entered (he said) and she saw police there. They returned home, Porter gave her some jewelry (Exhibt 5) and he got rid of the car. (R 564) Porter told her he got the jewelry from the house he broke into. On August 22nd she turned the jewelry over to Officer Runkle and told him where she got it. Porter also had a television in the stolen car, along with some jewelry and silverware. (R 565 - 566) Porter admitted to her he killed two old people. He did not go to work the next day. (R 567) Instead, they drove somewhere and got rid of the coins. (R 567) Ms. Lloyd admitted she initially lied to the police. (R 571)

Larry Schapp was at Porter's apartment in Pelican Bay on August 21st. Porter was not there at six o'clock. Schapp stayed until about seven. (R 572 - 573) Porter, Tammy and Dinah returned from shopping and left again. Schapp remained in the apartment to finish his laundry and Dinah and Tammy returned without Porter. Schapp then left and returned to his own apartment. (R 574) Schapp was at the Holiday Inn later in the evening and heard there had been a double murder. (R 575) When Schapp heard of a murder and auto theft, he had a feeling something might have happened with Porter. Schapp returned to the

Porter apartment at eleven or eleven thirty. (R 575 - 576) Porter was there with Dinah, Tammy and a fellow named Shawn. Schapp asked Porter if he were involved and Porter answered that he had robbed and killed them. A television set and other articles taken from the house were there. (R 576 - 577) It was decided that some of the items should be removed from the Porter premises. The television set was dumped in bushes up the road by Schapp and Shawn. (R 577) On August 22nd, he showed Detective Kleynen where the television set was. (R 578) Tammy, Dinah and Porter returned from the shopping trip earlier that evening around six or shortly thereafter. (R 578) Schapp helped Porter afterwards because he was afraid of him. (R 580)

Larry Schapp who testified at trial also gave a deposition prior to trial. (SR 1 - 16) In that deposition, he testified that appellant had told him of a prior arrest for breaking and entering and he talked of committing another B & E to get an automobile. (SR 4) Porter mentioned having met some people who just moved into the area and of his desire to break in and steal an auto and if necessary leave no witnesses. (SR 5) Porter mentioned he was divorced. (SR 6)

Dinah Raymond was at Porter's apartment on August 21st. (R 589) Porter returned from work at five or five-thirty and she drove him, at Porter's request, to a street corner and let him out. (R 590 - 591) She returned to the apartment, went to sleep and did not see him again that night. (R 591 - 592) The next day Porter did not go to work; she and Porter and Tammy

drove to Fort Myers. Porter stopped at a coin shop in Coral Gables . R 593 - 594) She admitted initially lying to police. (R 598) She knew Porter by the name Cisco. (R 600)

Investigator Kleynen was recalled to the stand and evidence custodian stated that Exhibit 5 had been in his custody since received rrom Runkle (R 609); that Exhibit 6 were photos of television taken after contacting Larry Schapp (R 610 - 612); that the keys to the Walrath car and other papers belonging to the victims were discovered in a trash dumpster behind the Pelican Bay apartments. (R 613 - 620)

Sergeant David Lucas was recalled and identified Exhiit 12, a composite photograph of Porter's hands and Exhibit 11, the fingernail given to him by Sergeant Enderle at the crime scene. (R 636 - 638)

Matha Lee Thomas had been in the county jail for a month and a half when Porter was brought into the jail. (R 644) Porter told him that he was charged with two counts of first degree murder and that he had killed the two people; he said he had strangled them after knocking them down. (R 645) He also said he told Tammy and Dinah about it. The witness had two felony and three or four misdemeanor convictions. (R 647)

The defendant presented no evidence. (R 648) The jury returned guilty verdicts on both counts. (R 715; 182 - 183)

At the sentencing phase, Sergeant David Allen Lucas identified Exhibits 13 and 14, photographs of the victims Mr. and Mrs. Walrath and they were admitted into evidence. (R 740 - 742)

Porter testified that he had a prior conviction for receiving stolen property, was twenty-two years old and was married with two children. He told the jury he felt like a fetus and that it was up to them to abort him or let him live. (R 743 - 7440

The prosecutor requested that he be permitted to cross-examine Porter as to all crimes he committed, not just convictions (R 745) and the court denied the request. (R 747) The state proffered that Sergeant Lucas would testify that Porter had confessed to him of prior crimes for which he had not been convicted. The court still denied such examination. (R 749)

The jury returned an advisory sentence of life imprisonment on both counts. (R 780; 184 - 185) The trial judge rejected the recommendation of the jury, and imposed the sentence of death[1] after writing his findings in support of the death sentence. (R 787 - 792; 187 - 192)

On June 4, 1981, the Florida Supreme Court affirmed the judgments and conviction but remanded for resentencing. (SRR 1 - 7) Porter v. State, 400 So.2 d 5 (Fla. 1981). Upon remand, appellant filed a motion for continuance (RR 4) which was granted (RR 11, 17), a motion to preclude the reimposition of the death penalty (RR 6 - 8) which was denied (RR 1, 15) and a motion requesting court to permit defendant to present character

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[1] In addition, Porter apparently was given a consecutive ten year sentence following a no contest plea on an escape charge. (R 793)

and background testimony from family members prior to resentencing (RR 9 - 10) which was granted. (R 11, 16) Appellant filed a witness list naming Mrs. Myrtle Porter. (RR 18)

At the hearing on August 3, 1981, the prosecutor sought to call as a witness Larry Schapp and defense counel objected. (R 33 - 34) Porter introduced a copy of a notice of nolle prosequi on Matha Lee Thomas. (SRR 8; RR 34) Porter did not assert as a fact that the state made a promise with Thomas. (RR 35) Porter then called Larry Schapp as a witness. Schapp testified that he was presently undergoing treatment through an alcoholic rehabilitation program. (RR 37) A grand theft charge was dropped at the request of the victim on July 20, 1981. (RR 37, 39 - 40; SR 9) A copy of the D.W.I. charges also was introduced. (RR 40 - 41; SRR 10)

Schapp admitted that he had given a deposition on November 13, 1978 in the presence of Assistant Public Defender Widmeyer and prosecutor Berry, that he took an oath to tell the truth, and did testify truthfully in the deposition. (RR 42 - 43; see also SR 1 - 16)

Porter offered no other evidence. (RR 43) The court stated it took into account only statutory aggravating factors, took into account all (not merely statutory) mitigating circumstances which were presented to the court, would take Porter's employment into consideration. (RR 44) The trial court reimposed the sentence of death. (RR 45 - 49; 21 - 25)

II. PORTER'S DIRECT APPEAL TO THE FLORIDA SUPREME COURT

On his direct appeal, Porter raised six issues:

I.

The trial court erred by denying appellant's motion to allow defense counsel to examine grand jurors on voir dire where extensive publicity created a substantial danger of bias on the part of the grand jurors.

II.

The trial court erred by finding two aggravating circumstances on the basis of "testimony" never presented at trial;, not disclosed to defense counsel prior to sentencing, and without giving appellant any opportunity to explain or deny such "testimony".

III.

The trial court erred by finding the murders especially heinous, atrocious and cruel because the circumstance underlying the court's finding were not proven beyond a reasonable doubts.

IV.

The trial court erred by rejecting appellant's youthful age and the fact that he is married and has two small children as mitigating circumstances and by using these circumstances as non-statutory aggravating circumstances to appellant's detriment.

V.

The trial court erred by failing to consider the facts that appellant had no significant history of prior criminal activity and was gainfully employed as mitigating circumstances.

VI.

The trial court erred by sentencing appellant to death after the jury recommended

> that he be sentenced to life imprisonment because the facts suggesting a sentence of death were not so clear and convincing that virtually no reasonable person could differ and because imposition of a death sentence following a jury recommendation of life constitutes cruel and unusual punishment and violates both the double jeopardy and due process clause of the constitution.

On June 4, 1981, the Supreme Court of Florida affirmed the convictions but reversed the sentences because of procedural error. Porter v. State, 400 So.2d 5 (Fla. 1981).

Upon remand, the trial court re-imposed the sentence of death.

On appeal, Porter raised five issues:

> I.
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> The trial court erred by finding three aggravating factors on the basis of circumstances which the state had not proved beyond a reasonable doubt.
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> II.
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> The trial court erred by rejecting appellant's youthful age and the fact that he is married and has two small chidren as mitigating circumstances and by using these circumstances as non-statutory aggravating circumstances to appellant's detriment.
>
> III.
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> The trial court erred by failing to find as mitigating circumstances that appellant had no signficant history of prior criminal activity and was gainfully employed.
>
> IV.
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> The trial court erred by sentencing appellant to death after the jury recommended that he be sentenced to life imprisonment

because the facts suggesting a sentence of death were not so clear and convincing that virtually no reasonable person could differ.

V.

The imposition of the death sentences upon appellant after the jury recommended life imprisonment violated the constitutional guarantee against double jeopardy, deprived appellant of due process of law and subjected appellant to cruel and unusual punishment.

On January 17, 183, the Florida Supreme Court affirmed the sentences of death. Porter v. State, 429 So.2d 293 (Fla. 1983) Porter sought certiorari and the United States Supreme Court denied his petition on October 3, 1983. Porter v. Florida, ___ U.S. __, 78 L.Ed.2d 176.

III. THE POST CONVICTION PROCEEDING

On October 22, 1985, Porter filed a motion for post-conviction relief pursuant to Rule 3.850 Rules of Criminal Procedure. Following argument the trial court entered an order denying relief. Porter now appeals.

ARGUMENT

POINT I

THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIM.

In Strickland v. Washington, ___ U.S. ___, 80 L.Ed.2d 674 (1984), the Supreme Court announced its standard of effective assistance of counsel.

> "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable."
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> (80 L.Ed.2d at 693)

The Court opined that in a claim of ineffectiveness the defendant must show that counsel's representation fell below an objective standard of reasonableness. Judicial scrutiny of counsel's performance must be highly deferential; every effort must be made to eliminate the distorting effect of hindsight. The Court sought to avoid encouragement to the proliferation of ineffectiveness challenges:

> "Intensive scrutiny of counsel and rigid requirements for acceptable assistance could

> dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases and undermine the trust between attorney and client."
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> (80 L.Ed.2d at 695)

The Court concluded that the state courts had properly concluded the ineffectiveness claim was meritless without holding an evidentiary hearing.

The Florida Supreme Court has adopted Strickland. See Quince v. State, ___ So.2d ___ 10 F.L.W. 493; Lightbourne v. State, ___ So.2d ___ 10 F.L.W. 303 (June 3, 1985); Sireci v. State, 469 So2d 119 (Fla. 1985); Witt v. Wainwright, 465 So.2d 510 (Fla. 1985); Jackson v. State, 452 So.2d 533 (Fla. 1984); Shriner v. State, 452 So.2d 929 (Fla. 1984); Downs v. State, 453 So.2d 1102 (Fla. 1984); Dobbert v. State, 456 So.2d 424 (Fla. 1984); Adams v. State, 456 So.2d 888 (Fla. 1984); Smith v. State, 456 So.2d 1380 (Fla. 1984); Clark v. State, 460 So2.d 886 (Fla. 1984); Mikenas v. State, 460 So.2d 359 (Fla. 1984); Tafero v. State, 459 So.2d 1034 (Fla. 1984).

Porter's contentions with respect to the alleged ineffectiveness of trial counsel merely amounts to hindsight second-guessing by Porter and his most recent counsel, unhappy with the fact that trial counsel was not totally successful.

The record reflects that trial counsel filed a motion to allow defense counsel to examine grand jurors on voir dire (R 6), filed a motion to prohibit state attorney from presenting inadmissible evidence before the grand jury (R 7), filed a

motion to have grand jury proceedings reported (R 8), filed a motion to dismiss the indictment (R 12 - 160), filed a motion for change of venue (R 20 - 80), filed a second motion for change of venue (R 169 - 170), filed a motion in limine (R 178 - 179), filed a motion for new trial (R 193 - 194), filed a memorandum of law (R 199 - 201) filed several special requested instructions. (R 230 - 244) It can hardly be said that counsel failed to function as the counsel required by the Sixth Amendment; counsel ably put the state to its burden of proof, ably crossexamined witnesses and argued to the jury at both the guilt and penalty phases.

Petitioner's current complaint that counsel should have done something more or different at the penalty phase is without merit. Counsel had Raleigh Porter testify and humanized him by showing that he was married with two children. (R 744) He succeeded in persuading the trial judge that the prosecutor should not be allowed to inquire into Porter's other criminal activity (R 746 - 747)[1] And, significantly, counsel was able to obtain for Porter a life recommendation from the jury. (R 780 - 783) That the Supreme Court of Florida ultimately concluded that a sentence of death was appropriate does not deviate from counsel's performance.

Current counsel asserts that an alternative course of

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[1] The state may negate the mitigating factor of no significant prior criminal activity without showing criminal convictions. Smith v. State, 407 So.2d 894 (Fla. 1981).

action was preferable. But there is no absolute duty to present mitigating character evidence. Stanley v. Zant, 697 So.2d 955 (11th Cir. 1983). An attorney may decide as a reasonable trial strategy not to pursue character-oriented mitigating evidence where there is a reasonable belief that the prosecutor may demonstrate contrary character evidence. Burger v. Kemp, 753 F.2d 930 (11th Cir. 1985); Knighton v. Maggio, 740 F.2d 1344 (11th Cir. 1984); Mitchell v. Kemp, 762 F.2d 886 (11th Cir. 1985).

The record reflects that trial counsel were aware that they were not limited in any way in the mitigating evidence to present. Trial counsel filed a memorandum of law urging that mitigating circumstances were not limited to those listed in the statute (R 199 - 201), and requested and were granted a special instruction to that effect. (R 231; 751, 776)

Further, after the Supreme Court's remand for resentencing, on July 14, 1981, trial counsel filed a motion requesting permission to present character and background testimony from family members. (RR 9 - 10) That motion was granted on July 15, 1981. (RR 16) Defense counsel filed a witness list naming Mrs. Myrtle Porter. (RR 18) Mrs. Porter did not testify at the resentencing proceeding of August 3, 1981 (RR 31 - 50) presumably because the defense decided not to use her. Courts should not second-guess counsel's decision on what witnesses to call to testify. Quince v. State, 9/5/85 So.2d __, 10 F.L.W. 493; Brown v. State, 439 So.2d 872 (Fla. 1983); Magill v. State, 457 So.2d

1367 (Fla. 1984); see also Messer v. Kemp, 760 F.2d 1080 (11th Cir. 1985); Solomon v. Kemp, 735 F.2d 395 (11th Cir. 1984).

POINT II

GROUNDS TWO THROUGH ELEVEN RAISED IN THE LOWER COURT.

Petitioner's claims two through eleven for relief must be rejected. It is well settled that issues which were raised on direct appeal or could have been raised or should ahve been raised on direct appeal may not be considered via Rule 3.850. See Raulerson v. State, 420 So.2d 567 (Fla. 1982); Booker v. State, 441 So.2d 148 (Fla. 1983); McCrae v. State, 437 So.2d 1388 (Fla. 1983); Palmes v. State, 425 So.2d 4 (Fla. 1983); Hall v. State, 420 So.2d 872 (Fla. 1982); Smith v. State, 457 So.2d 1380 (Fla. 1984); Sireci v. State, 469 So.2d 119 (Fla. 1985). Petitioner's claims two through eleven are thus precluded from consideration now.

With respect to point two - the alleged conflict of interest by counsel Widmeyer - even if this point could be argued collaterally, it is clear that no meaningful conflict of interest impeded Widmeyer. Counsel quickly acted to withdraw from the representation of Mr. Matha Thomas, counsel ably, yet concisely cross-examined Thomas (R 646 - 648) and in fact, Thomas' testimony was cumulative to that of others regarding Porter's admissions of the crime. This point is without merit. Cf. Webb v. State, 433 So.2d 496 (Fla. 1983).

Porter's claim raised in Point 3 below regarding the attack on the grand jury member, collateral relief is unavailable. Attacks on the grand jury must be timely made or are waived.

Dykman v. State, 294 So.2d 633 (Fla. 1974); Wright v. Wainwright, 537 F.2d 224 (5th Cir. 1976); Florida Statutes 905.05; see also Davis v. United States, 411 U.S. 233, 36 L.Ed.2d 216 (1973). Porter has not demonstrated either cause for not presenting his claim earlier (he has not alleged how an attorney with due diligence could not have learned that which he now presents) and more significantly, he cannot demonstrate resulting prejudice since a grand jury only determines the sufficience to charge a crime and the petit jury has determined Porter's guilt beyond a reasonable doubt. Indeed, Porter does not even claim that the now challenged grand juror even voted for an indictment; or that this grand juror was related by blood or marriage to anyone.

Appellant Porter's claims that his pre-trial request to voir dire the grand jury members was considered previously by this court and this court determined the trial court's ruling to be correct. Porter v. State, 400 So.2d 5.

As to point 4 - an assertion that the jury did not make a finding of Porter's intent to kill, appellant failed to raise this issue on direct appeal; consequently relitigation is precluded. Appellee would add that the instant case is not only a felony-murder, but was also a premeditated murder. Consequently, Enmund v. Florida, 458 U.S. 782 (1982) is inapplicable. Even in felony-murder cases the Eleventh Circuit Court of Appeals has rejected the claim that a jury must make specific findings of intent to kill. Ross v. Kemp, 756 F.2d 1483 (11th Cir. 1985)

As to point 5 - a Witherspoon-Grigsby claim, again litigation is precluded because not raised on direct appeal. Additionally, this court has rejected the claim most recently in Witt v. State, 465 So.2d 510 (Fla. 1985) as did the United States Supreme Court. Witt v. Wainwright, 84 L.Ed.2d 801.

As to point six and seven - attacks on certain aggravating factors, these claims were discussed on the direct appeal brief and therefore may not be relitigated. If the claims were not presented in the fashion now desired, 3.850 may not be used for that purpose.

As to the contention in point eight that electrocution is cruel and unusual punishment, not only is this a claim precluded from collateral attack because of the failure to raise it on direct appeal, but also the claim is without merit. Booker v. State, 397 So.2d 910 (Fla. 1981).

As to point 9, the claim that the imposition of the death

penalty following a jury's life recommendation is unconstitutional, Porter did raise that issue on direct appeal and it was rejected. Porter v. State, 429 So.2d 293 (Fla. 1983). No constitutional infirmity is presented. Spaziano v. Florida, 468 U.S. __, 82 L.Ed.2d 340 (1984).

As to point ten, even if Porter's claim that the death penalty is arbitrary and capricious could be urged collaterally, the claim must be rejected as it has consistently been rejected to date. See Thomas v. Wainwright, 767 F.2d 738 (11th Cir. 1985); Henry v. Wainwright, 743 F.2d 761 (11th Cir. 1984); Washington v. Wainwright, 737 F.2d 922 (11th Cir. 1984); Sullivan v. Wainwright, 721 F.2d 316 (11th Cir. 1983), application for stay denied, 464 U.S. 109, 78 L.Ed.2d 210 (1983); Adams v. Wainwright, 709 F.2d 1443 (11th Cir. 1983), cert. den. __ U.S. __, 79 L.Ed.2d 203 (1984); Wainwright v. Ford, ___ U.S. ___, 80 L.Ed.2d 809 (1984); Sullivan v. Wainwright, 464 U.S. 109, 78 L.Ed.2d 210 (1983); Booker v. Wainwright, 764 F.2d 1371 (11th Cir. 1984); Henry v. State, 377 So.2d 692 (Fla. 1979); Thomas v. State, 421 So.2d 160 (Fla. 1982); Sullivan v. State, 441 So.2d 609 (Fla. 1983).

As to appellant's complaint in ground eleven that the evidence was insufficient to support a felony-murder, this too is not cognizable on 3.850 since it could have been or might have been raised on direct appeal.

The lower court's order denying the motion for post-conviction relief should be affirmed. The stay of execution application should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Ralph Benjamine Reid, KIMBRELL, HAMANN, et al., 799 Brickell Plaza, Suite 900, Miami, Florida 33131, this 23rd day of October, 1985.

OF COUNSEL FOR APPELLEE.