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IN THE SUPREME COURT OF FLORIDA

NO. 69,003

WILLIAM MICHAEL SQUIRES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

WILLIAM M. SQUIRES will be referred to as the "Appellant" or by proper name in this brief and the STATE OF FLORIDA will be referred to as the "Appellee" or "State". The record on appeal will be referenced by the symbol "R" followed by the appropriate page number. The supplemental record on appeal will be referenced by the symbol "SR" followed by the appropriate page number.

STATEMENT OF THE CASE

Appellant, WILLIAM M. SQUIRES, was charged by indictment in the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, on April 29, 1981 with the first degree murder of Jesse Albritton. Squires was also indicted for the armed robbery and kidnapping of Albritton. This cause proceeded to trial on the indictment and on March 5, 1982, the jury returned a verdict finding Squires guilty as charged. Following the penalty phase of the trial, the jury returned a recommendation to the trial court that it impose the death penalty upon Squires for the first degree murder charge. On March 5, 1982, the trial judge imposed the death penalty upon Squires for the first degree murder of Albritton. On March 15, 1982, the trial judge entered an order setting out his findings of fact in support of the imposition of the death sentence.

The trial judge found the following aggravating factors:

> 1. The capital felony was committed by a person under sentence of imprisonment.
>
> 2. The defendant was previously convicted of another capital felony or of a felony involving the threat of violence to the person.
>
> 3. The capital felony was committed while the defendant was engaged, or was an accomplice in the commission of, or an attempt to commit, or flight after robbery, rape, arson, burglary, kidnapping or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

4. The capital felony was especially heinous, atrocious, or cruel.

5. The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

In mitigation the trial court found:

> . . . THE DEFENDANT WAS AN ACCOMPLICE IN THE CAPITAL FELONY COMMITTED BY ANOTHER PERSON AND HIS PARTICIPATION WAS RELATIVELY MINOR. . .
>
> Evidence based solely on the Defendant's own testimony supports the contention that the defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor. (emphasis added).

Squires appealed his conviction to the Florida Supreme Court. The Public Defender in and for the Tenth Judicial Circuit was appointed to represent Petitioner. On appeal, Assistant Public Defender, Robert F. Moeller, raised the following issues:

> I.
> THE COURT BELOW ERRED IN PERMITTING THE STATE TO ELICIT, OVER DEFENSE OBJECTIONS, IRRELEVANT AND PREJUDICIAL TESTIMONY THAT APPELLANT HAS SHOT AND SHOT AT PEOPLE OTHER THAN THE ALLEGED VICTIM.
>
> II.
> THE COURT BELOW COMMITTED FUNDAMENTAL ERROR IN FAILING TO INSTRUCT THE JURY ON EXCUSABLE AND JUSTIFIABLE HOMICIDE.
>
> III.
> THE COURT BELOW ERRED IN IMPOSING THE DEATH PENALTY UPON WILLIAM SQUIRES AFTER FINDING THAT HE DID NOT KILL, OR ATTEMPT TO KILL, OR INTEND OR CONTEMPLATE THAT LIFE WOULD BE TAKEN.
>
> IV.
> SENTENCING WILLIAM SQUIRES TO DEATH VIOLATED HIS RIGHTS TO DUE PROCESS OF LAW AND EQUAL

PROTECTION WHERE THE FACT THAT THE MURDER WAS COMMITTED DURING THE COURSE OF A ROBBERY AND KIDNAPPING WAS USED TO SUPPORT BOTH A FINDING OF GUILT OF FIRST DEGREE MURDER AND IMPOSITION OF THE DEATH PENALTY.

V.

THE COURT BELOW ERRED IN FINDING THE AGGRAVATING CIRCUMSTANCES THAT THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS, AND CRUEL AND WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

VI.

THE COURT BELOW ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT APPELLAN WAS PREVIOUSLY CONVICTED OF ANOTHER CAPITAL FELONY OR OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON, AS THE EVIDENCE WAS INSUFFICIENT TO SUPPORT ITS FINDING, AND THIS FINDING CONSTITUTED AN IMPROPER "DOUBLING UP" WITH THE FIDING THAT THE CAPITAL FELONY WAS COMMITTED BY A PERSON UNDER SENTENCE OF IMPRISONMENT.

VII.

THE COURT BELOW IMPROPERLY SENTENCED APPELLANT FOR BOTH FELONY-MURDER AND THE UNDERLYING FELONIES.

Squires' conviction and sentence were affirmed by the Florida Supreme Court on direct appeal. Squires v. State, 450 So.2d 208 (Fla. 1984).

A Petition for Writ of Certiorari was filed in the United States Supreme Court on August 7, 1984. As grounds for relief, Squires raised the following issues:

I.

WHETHER IT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT UNDER THE CONSTITUTION OF THE UNITED STATES AND ENMUND V. FLORIDA, FOR THE TRIAL COURT TO SENTENCE A PERSON TO DEATH AFTER FINDING AS A MITIGATING CIRCUMSTANCE THAT HE

WAS AN ACCOMPLICE IN A CAPITAL FELONY COMMITTED BY ANOTHER PERSON AND HIS PARTICIPATION WAS RELATIVELY MINOR?

II.
WHETHER A PERSON'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES ARE VIOLATED WHERE THE FACT THAT A HOMICIDE OCCURRED DURING THE COURSE OF A ROBBERY AND KIDNAPPING IS USED BOTH TO JUSTIFY A FINDING THAT THE PERSON IS GUILTY OF FIRST-DEGREE MURDER AND TO SUPPORT IMPOSITION OF THE DEATH PENALTY?

The petition was denied on October 9, 1984. Squires v. Florida, ___ U.S. ___, 83 L.Ed.2d 204, 105 S.Ct. 268 (1984).

Squires filed his initial 3.850 motion pro se. Subsequently, an amended motion to vacate judgments and sentences pursuant to Rule 3.850 Fla.R.Crim.P. was filed. In support of said motion, Squires made the following allegations:

ISSUE I
INTENTIONAL PROSECUTORIAL MISCONDUCT INCLUDING THE FAILURE TO PROVIDE BRADY MATERIALS AND THE DELIBERATE USE OF FALSE TESTIMONY AND ARGUMENT, FATALLY AND PREJUDICIALLY INFECTED MR. SQUIRES' TRIAL, IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

ISSUE II
MR. SQUIRES WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL, AND HIS CONVICTIONS AND SENTENCE OF DEATH THEREFORE VIOLATE HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

ISSUE III
CRITICAL TESTIMONY WAS TAKEN IN THE ABSENCE OF THE DEFENDANT WHICH VIOLATES HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

ISSUE IV
THE ADMISSION OVER OBJECTION OF STATEMENTS MADE BY DEFENDANT DURING A POLYGRAPH EXAMINATION VIOLATED DEFENDANT'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS, AND RENDERED HIS CONVICTION AND SENTENCE UNCONSTITUTIONAL.

ISSUE V

THERE WAS INSUFFICIENT EVIDENCE THAT MR. SQUIRES KILLED, ATTEMPTED TO KILL, OR INTENDED OR CONTEMPLATED THAT LETHAL FORCE WOULD BE USED, AND THEREFORE, THE IMPOSITION OF THE DEATH PENALTY VIOLATES MR. SQUIRES' EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

ISSUE VI

THE USE OF AN UNDERLYING FELONY TO SUPPORT BOTH A FELONY-MURDER CONVICTION AND AN AGGRAVATING CIRCUMSTANCE VIOLATES MR. SQUIRES' FIFTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

ISSUE VII

THE PENALTY PHASE JURY INSTRUCTIONS, WHEN COUPLED WITH IMPROPER PROSECUTORIAL VOIR DIRE AND ARGUMENT UNCONSTITUTIONALLY AND INACCURATELY DILUTED THE JURY'S SENSE OF RESPONSIBILITY, CONTARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS.

ISSUE VIII

THE ERRONEOUS JURY INSTRUCTION THAT A VERDICT OF LIFE MUST BE MADE BY A MAJORITY OF THE JURY MATERIALLY MISLED THE JURY CREATING THE RISK THAT DEATH WAS IMPOSED DESPITE FACTORS CALLING FOR LIFE.

ISSUE IX

THE DEATH PENALTY IN FLORIDA HAS BEEN IMPOSED IN AN ARBITRARY AND DISCRIMINATORY MANNER, ON THE BASIS OF FACTORS WHICH ARE BARRED FROM CONSIDERATION IN THE CAPITAL SENTENCE DETERMINATION PROCESS BY THE FLORIDA DEATH PENALTY STATUTE AND THE UNITED STATES CONSTITUTION. THESE FACTORS INCLUDE THE FOLLOWING: THE RACE OF THE VICTIM, THE PLACE IN WHICH THE HOMICIDE OCCURRED (GEOGRAPHY), AND THE SEX OF THE DEFENDANT. THE IMPOSITON OF THE DEATH PENALTY ON THE BASIS OF SUCH FACTORS VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND REQUIRES THAT MR. SQUIRES' DEATH SENTENCE, IMPOSED DURING THE PERIOD IN WHICH THE DEATH PENALTY WAS BEING APPLIED UNCONSTITUTIONALLY, BE VACATED.

Contemporaneous with the filing of the Amended Motion to Vacate, Squires also filed a Motion for an Evidentiary Hearing

and a Motion for Discovery.

On June 4, 1986, a hearing on the motions was held before the Honorable Judge M. William Graybill of the Thirteenth Judicial Circuit in and for Hillsborough County. (CR. 936) The motions were denied and this appeal ensued.

Statement of the Facts

In its opinion affirming Squires' conviction and sentence, this Court set forth the salient facts as follows:

> On the evening of September 2, 1980, Jesse Albritton was abducted from the service station where he worked. Incident to the kidnapping, the service station was robbed of an undetermined amount of money and cigarettes. The next day Albritton's body was discovered in a wooded area in Hillsborough County. He had been shot five times at close range - once in the shoulder with a shotgun and four times in the head with a pistol.
>
> At the time of Albritton's murder, Squires was an escapee from the Florida State Prison System, having been sentenced to three consecutive life sentences. Tampa police apprehended Squires on December 24, 1980, after receiving information of the fugitive's whereabouts from Mrs. Charlotte Chambliss. . .
>
> At trial the state called Rex Seimer, a correctional officer at Lake Butler, and Robert Fain, a prison inmate. Both men testified that Squires admitted to them to killing Albritton. Detective Gerald [N]elms also testified that Squires had admitted to robbing the victim and to being present when Albritton was shot. However, Squires told [N]elms that he personally had not pulled the trigger. The state then offered the testimony of Terry and Charlotte Chambliss, both of whom confirmed that Squires was in Tampa on September 2, 1980, the date of Albritton's abduction and

murder. Mr. Chambliss told the court of seeing Squires with several pistols and a shotgun. He also observed several cartons of cigarettes in the back of defendant's automobile. Finally, Mr. Chambliss recounted a conversation he had with Squires during which Squires stated that he had run into trouble during a robbery and had to "dust one." Squires' defense was basically that of alibi, attempting through testimony and credit card records to place himself somewhere else when the crime was committed. Squires v. State, 450 So.2d 208, 210 (Fla. 1984)

SUMMARY OF THE ARGUMENT

Claim I: An evidentiary hearing was not required below on the five requested issues. The admission of Squires' post-polygraph statements and the Enmund v. Florida claim were not properly before the trial court as they were raised on direct appeal and affirmed by this Court. The claim regarding discriminatory application of the death penalty has been decided by this Court previously and the trial court was bound to follow those decisions. The ineffective assistance of counsel claim did not mandate or necessitate an evidentiary hearing because even if the claims were true, it did not establish a claim of ineffective assistance of counsel.

Similarly, the Brady claim did not warrant a hearing because even if the allegations were true (which the record shows they were not) Squires would not be entitled to relief.

Claim II: Appellant's claim that the state knowingly used false testimony is not supported by the record. At worst, appellant has shown a failure to disclose exculpatory evidence. The United States Supreme Court has held that the standard for review where a prosecutor fails to disclose favorable evidence if there is a reasonable probability that the result would have been different if the evidence had not been suppressed. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Given the facts in the instant case, there is no reasonable probability that even if the state had disclosed

Donald Hynes' polygraph examination (which was not admissible or discoverable) there is no reasonable probability that the outcome would have been different. There is also no evidence that the state cut Hynes a deal to keep him from testifying or that police reports were withheld during discovery.

Claim III: Appellant also claims that there was a Brady violation and once again raises the state's failure to disclose Donald Hynes' polygraph examination as well as fingerprint evidence obtained from the scene and ballistics evidence. The polygraph examination of Donald Hynes was not discoverable. Further, even if it had been, the evidence was sufficient in the instant case to withstand the introduction of this factor. Squires' own admissions were consistent with the evidence and the witnesses testimony. Squires had no constitutional right to discovery of the polygraph results and as the evidence was not material, the conviction does not fall for want of it.

There was no evidence that fingerprint evidence was suppressed, but even if it had been, appellant has failed to show materiality of the allegedly suppressed evidence.

Appellant also claims that Detective Nelms intentionally misled him regarding ballistics tests. The record in the instant case does not support this claim. It is obvious from the record that this information was given to the defense by Detective Peterson. No prejudice resulted and the outcome of the trial was not effected. There was no Brady violation in the instant case and, therefore, Squires' conviction and sentence must stand.

Claim IV: In the instant case, Squires has absolutely failed to demonstrate that he was prejudiced by the performance of his counsel and that there is a reasonable probability that his trial would have been different but for his defense counsel's purported errors. The allegations of the instant claim are either refuted by the record or wholly insufficient to establish a claim of ineffective assistance of counsel. Relief was properly denied.

Claim V: The issue of Squires' absence during the telephonic deposition of Charles Barr is a matter which could have been and should have been raised on direct appeal. Since the issue was not raised at the appropriate time in state court, there has been a procedural default in this issue. Further, as to the merits of the issue, Fla.R.Crim.P., 3.190(j) provides that either party can take a deposition to perpetrate testimony and the rule does not require the presence of the defendant when the deposition is being taken by the defense. Squires was present when the deposition was read to the jury, and therefore, he had an opportunity to counter or to add to any statements made by Barr. Squires' absence did not prejudice his case as the only point on which Barr was uncertain was the date. Except for this one point, Barr's testimony was otherwise consistent with Squires' own trial testimony. Even assuming the date he last saw Squires was on the date of the offense, his testimony at trial (which was consistent with Squires') was that Squires left by 11:00 a.m. This would have given Squires enough time to get to

Florida in time to commit the offense. Thus, the jury could have believed Barr and still found Squires guilty. No prejudicial error was committed.

Claim VI: The Enmund v. Florida issue could have been, should have been, and in fact, it was raised on direct appeal. This issue may not be considered in the instant proceeding as it was specifically addressed and rejected by this Court on direct appeal. Nevertheless, there is sufficient evidence in the record to support a finding that Squires not only contemplated that lethal force might be used during the assault and hence possessed an intent to kill, but that he actually committed the murder himself. And in fact, this Court made a specific finding that Squires was personally responsible for the killing.

Claim VII: The issue as to the penalty phase jury instructions and improper prosecutorial voir dire and argument should be rejected because no objections were raised at trial, the issue could have been and should have been raised on direct appeal, and because the record in this cause shows on its face that the issue lacks merit. Squires' trial jury was instructed pursuant to the then existing standard jury instructions that correctly stated that only six votes are necessary for life recommendation. References by the prosecutor to the judge's responsibility to impose sentence and the jury's advisory role is an accurate reflection of Florida's capital sentencing scheme.

Claim VIII: The jury was properly instructed that only six votes were necessary for a life recommendation. Squires' trial

jury was instructed pursuant to the then existing standard jury instructions. Further, this issue must be raised by contemporaneous objection in the trial court below before relief can be granted on direct appeal. There has been a procedural default on this issue.

Claim IX: Squires is attempting to raise an issue which could have, should have and, in fact, was raised on direct appeal. This issue may not be considered in the instant proceeding.

Claim X: Squires could have and should have raised the issue of the arbitrariness of the death penalty on direct appeal since the facts giving rise to it are apparent from the face of the record and the studies upon which this claim was based were available prior to Squires' trial and his subsequent direct appeal.

ARGUMENT

CLAIM I

THE TRIAL COURT CORRECTLY DENIED APPELLANT'S 3.850 MOTION WITHOUT AN EVIDENTIARY HEARING.

Squires' amended motion for post-conviction relief raised ten issues. In a contemporaneous motion Squires suggested that of these ten issues, five warranted an evidentiary hearing, these are:

I. Admission of Squires' post-polygraph statements;

II. The Enmund v. Florida claim;

III. Discriminatory application of the death penalty.

IV. Ineffective Assistance of Counsel;

V. The Brady claim;

(CR. 877-79, 927-28)

The remaining issues for which an evidentiary hearing was not requested were matters which did not warrant an evidentiary hearing as these issues could have been, should have been or were raised on direct appeal. Therefore, summary denial was proper. See, e.g., Raulerson v. State, 420 So.2d 567 (Fla. 1982). Further, an evidentiary hearing ws not mandated even for those issues where it was requested.

Florida Rules of Criminal Procedure 3.850 provides in pertinent part:

> . . . if the motion and the files in the record in the case conclusively show that the prisoner is entitled to no relief, the motion shall be denied without a hearing.
>
> See also Foster v. State, 400 So.2d 1 (Fla. 1981); Meeks v. State, 382 So.2d 673 (Fla. 1980).

The facts of this case conclusively showed that Squires was entitled to no relief and, therefore, the motion was correctly denied without a hearing.

The first two claims, 1) Squires' admissions and 2) the Enmund claim were not properly before the court as they were raised on direct appeal. The trial court was bound by this Court's decision affirming the conviction and sentence. See, Raulerson, supra.

The third claim was the discriminatory application of the death penalty. The trial court was bound by this Court's prior decisions that the studies cited by Squires do not establish grounds for relief and, accordingly, correctly denied the request for an evidentiary hearing. See, e.g., 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).

The fourth claim was ineffective assistance of counsel. One major contribution of Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) to our jurisprudence is the recognition that claims of ineffective assistance of counsel do not mandate or necessitate evidentiary hearings in every

instance. The federal circuit courts have also not required hearings in every case. See, McNeal v. Wainwright, 722 F.2d 674 (11th Cir. 1984); Antone v. Strickland, 706 F.2d 1534 (11th Cir. 1983); Schultz v. Wainwright, 701 F.2d 900 (11th Cir. 1983); Dickson v. Wainwright, 683 F.2d 348 (11th Cir. 1982) and Baldwin v. Blackburn, 653 F.2d 942 (5th Cir. 1981). On the basis of the claims presented a hearing was not mandated.

Similarly, the Brady claim did not warrant a hearing because even if the allegations were true (which the record shows they were not) Squires would not be entitled to relief.

Under Florida law, the trial court should grant an evidentiary hearing only where one is warranted. Jones v. State, 446 So.2d 1059 (Fla. 1984). It is the movant's burden to show his entitlement to a hearing; it must be considered whether the movant would be entitled to relief if the allegations are true. Ramsey v. State, 408 So.2d 675 (Fla. 4th DCA 1981) and Johnson v. State, 362 So.2d 465 (Fla. 2d DCA 1978). However, if the motion and the files in the record of the case conclusively show the defendant is entitled to no relief, the motion can be denied without a hearing. Accord, Rule 3.850, Fla.R.Crim.P.; Porter v. State, 478 So.2d 33 (Fla. 1985); Middleton v. State, 465 So.2d 1218 (Fla. 1985).

Squires failed to meet this burden and as the records in the instant case conclusively showed he was not entitled to relief, the trial court correctly denied the motion without an evidentiary hearing.

CLAIM II

WHETHER THE STATE PRESENTED FALSE TESTIMONY AT THE TRIAL BELOW THAT DEPRIVED APPELLANT OF DUE PROCESS OF LAW AND A RELIABLE CAPITAL SENTENCING DETERMINATION, THUS RESULTING IN A CONVICTION AND SENTENCE THAT VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Appellant Squires presents a web of testimony herein and suggests that the sum of the parts is evidence of the prosecution's knowing use of false testimony. There is also an underlying suggestion that the State "cut a deal" with Donald Hynes to keep him from testifying.

Based on these contentions, Squires maintains that there was a substantial probability that the outcome of his trial would have been affected and that an evidentiary hearing is required to present the extensive non-record facts upon which the claim is based.

As previously noted, it is the movant's burden to show his entitlement to a hearing; it must be considered whether the movant would be entitled to relief if the allegations are true. Ramsey v. State, 408 So.2d 675 (Fla. 4th DCA 1981); Johnson v. State, 362 So.2d 465 (Fla. 2d DCA 1978). An analysis of his claims conclusively shows that Squires failed to meet that burden below.

The holding in Brady v. Maryland, 373 U.S., at 87, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963) requires disclosure only of evidence that is both favorable to the accused and "material either to guilt or punishment." See also Moore v. Illinois, 408

U.S. 786, 794-795, 33 L.Ed.2d 706, 92 S.Ct. 2562 (1972). As the Court explained in United States v. Agurs, 427 U.S. 97, 104, 49 L.Ed.2d 342, 96 S.Ct. 2392 (1976) the Brady rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial:

> "For unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose. . . "
>
> ". . . But to reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." United States v. Agurs, 427 U.S., at 108, 49 L.Ed.2d 342, 96 S.Ct. 2392.

In Brady and Agurs, the prosecutor failed to disclose exculpatory evidence. In the present case, Squires claims the State failed to disclose evidence that was contrary to the testimony of its star witness and, accordingly, the State knowingly used false testimony.

The Court in United States v. Bagley, 473 U.S. ____, 87 L.Ed.2d 481, 105 S.Ct. ____ (1985), noted that the standard for review where a prosecutor knowingly uses perjured testimony is equivalent to the harmless-error doctrine as set forth in Chapman v. California, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967). Bagley, supra, n.9.

In his initial brief, Squires claims that there was evidence that the State knew Donald Hynes had no part in the murder of Jesse Albritton and, therefore, it follows that the State knew Terry Chambliss was testifying falsely when he claimed Donald Hynes was with Squires during the murder. The defense reaches this conclusion because Hynes passed a polygraph, was not charged and did not testify at trial. Polygraph testifying has not taken its place alongside fingerprint analysis as an established forensic science. Farmer v. City of Fort Lauderdale, 427 So.2d 187 (Fla. 1983). Hynes' responses to the polygraph examiner are not determinative of his presence at the scene of Albritton's murder.[1]

That Hynes was not charged and did not testify does not signify that the State knew the testimony of Terry and Charlotte Chambliss was false. To the contrary, their testimony was corroborated by Squires' own statements.

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[1] It is interesting to note here that the defense apparently agrees with the contention that polygraphs are fallible when it argues that Hynes' passing of the polygraph on the issue of knowledge of Squires status as an escapee was not supported by Hynes' prior statements and thus, should not have been believed.

This conviction was not based on false or perjured testimony. However, even if it was, under the harmless error standard the conviction and sentence would stand in light of the overwhelming evidence of guilt presented at trial.

A review of the claims set forth by Squires and the facts of the instant case do not support the allegation of the knowing use of perjured testimony. At the most, Appellant's claims amount to a charge of failure to disclose favorable evidence that could have been used to impeach Terry Chambliss' testimony.

Impeachment evidence, as well as exculpatory evidence falls within the Brady rule. See, United States v. Bagley, 473 U.S. ___, 87 L.Ed.2d 481, 105 S.Ct. ___ (1985).

> Such evidence is "evidence favorable to an accused," **Brady**, 373 U.S. at 87, 10 L.Ed.2d 215, 83 S.Ct. 1194, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal. Cf. **Napue v. Illinois**, 360 U.s. 264, 269, 3 L.Ed.2d 1217, 79 S.Ct. 1173 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend").
>
> Bagley at 87 L.Ed.2d 490.

The Court went on to hold that the standard of review in the other Brady-type situations ("no request", "general request", and "specific request" cases of failure to disclose favorable evidence) is that the evidence is material only if there is a reasonable probability that the result would have been different. A "reasonable probability" is a probability

sufficient to undermine confidence in the outcome. See, Bagley, supra. There is no reasonable probability that the outcome would have been different.

Squires also contends that Hynes was obviously "cut a deal" to keep him from testifying. This argument defies logic. If Hynes was guilty he surely would not admit his guilt unless the State gave him immunity. Rather than signifying that the State gave him a deal, Hynes' failure to testify signifies that he was not given a deal.

If the defense had felt Hynes' testimony was important, he could have been called by them. By the time of the trial, Squires knew that the State was relying on Chambliss' testimony. If Hynes could truly contradict this, he would have been called as a witness by Appellant.

Appellant addresses the question of whether he had been provided a copy of Nelm's police report (also suggested herein) in his Claim III. Therefore, the State will present argument on this claim in the same order as presented by Appellant.

Appellant also contends that the use of the Chambliss' testimony without the impeaching testimony of Donald Hynes may have affected the outcome of the penalty phase because the jurors may have entertained a "whimsical" doubt which could have kept them from voting for the death penalty. Appellant bases this conclusion on the fact that Chambliss' testimony was the only thing outside of Squires' own statements to tie him to the crime.

This argument presents an oversimplistic view of the evidence. First of all, Squires' own statements were overwhelmingly damning. So much so as to take care of any "whimsical doubt". Squires repeatedly admitted killing Albritton.

Second, both Squires' and Chambliss' stories were confirmed by the weapons retrieved from the pond. Squires had said the shotgun malfunctioned and that they had to finish Albritton off with a revolver. The shotgun retrieved from the pond did not function in a normal manner and the autopsy showed that the killing blow was not delivered by the shotgun blast (CR. 133).

Further, Squires admitted he killed Albritton because he refused to honor a stolen credit card. This was consistent with his own defense - supported by records of stolen credit card transactions.

There was no false testimony used and there is nothing to support a claim that there was a reasonable probability the outcome would have been different.

CLAIM III

WHETHER THE STATE SUPPRESSED MATERIAL EVIDENCE IN VIOLATION OF BRADY V. MARYLAND.

This claim was one of those issues for which Squires requested an evidentiary hearing. A hearing was correctly denied as Squires failed to show that even if his allegations were true, there was reasonable probability that the outcome would have been different. Cf. United States v. Bagley, supra, Rule 3.850 Fla.R.Crim.P..

Squires claims the State withheld the following evidence:

1) facts relating to Donald Hynes;

2) fingerprint evidence, and

3) ballistics evidence.

1) Donald Hynes

This claim was presented in Appellant's Claim II. This claim appears to rest on the fact that Hynes passed a polygraph and that obviously, if the defense knew that, it could have seriously impeached the testimony of Terry Chambliss. This argument overlooks the fact that Florida courts have consistently held a defendant cannot demand discovery from the State of the polygraph results of a witness since such tests are not admissible in evidence. See, Carter v. State, 474 So.2d 397 (Fla. 3d DCA 1985); Farmer v. City of Fort Lauderdale, 427 So.2d 187 (Fla. 1983); Anderson v. State, 241 So.2d 390 (Fla. 1979), vacated on other grounds, 408 U.S. 938, 92 S.Ct. 2868, 33 L.Ed.2d 758 (1972). Beyond the polygraph results - which are not conclusive - there was no evidence exculpating Hynes.

Further, even if the results of the polygraph had been obtainable under the rules of discovery, reversal is not warranted. Where a defendant makes a general request for discovery and the State fails to disclose exculpatory evidence, he still has the burden of showing the evidence was material.

In United States v. Bagley, supra, the Court held:

> We find the Strickland formulation of the **Agurs** test for materiality sufficiently flexible to cover the "no request," "general request," and "specific request" cases of prosecutorial failure to disclose evidence favorable to the accused: The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.
>
> Id., at 87 L.Ed.2d 494.

As previously noted, the evidence was sufficient in the instant case to withstand the introduction of this one factor. Squires' own admissions were consistent with the evidence and Chambliss' testimony. Squires had no constitutional right to discovery of the polygraph results and as the evidence was not material, the conviction does not fall for want of it.

2) Fingerprints

Assuming that there were actually good prints taken from the scene and assuming Detective Fletcher's testimony that there were some latent lifts misled the defense, this is still far far short of demonstrating that the undisclosed evidence probably would have resulted in an acquittal. It would not be surprising for there to have been numerous sets of fingerprints from the scene

as it was a public gas station. Further, there is nothing in the reports that indicates clear prints were found -- only that attempts were made to match the prints of suspects to what was found.

Thus, Squires has not only failed to show that any evidence was suppressed, but also has failed to show materiality of the allegedly suppressed evidence. No evidentiary hearing was necessary on this issue and no relief is warranted here.

3) Ballistics

Squires claims that Detective Nelms' testimony conflicts with a police report prepared earlier by Nelms. A review of the two does not reveal an inconsistency. Nelms testified that weapons were taken from Squires from the Carrollton, Georgia incident but he did not know of any taken and tested for the Albritton murder. The report said a .38 was taken from Carrollton Police Department and tested. This is what he testified to and is entirely consistent with his report.

Further, materiality also fails here because the defense had received this information from Detective Peterson - as Nelms advised he could (R. CR. 131- 133). The defense knew the guns retrieved from the pond were tested and if Nelms was inconsistent on the testing, no prejudice would have resulted and the outcome of the trial would not have been effected.

Squires uses innuendo and quantum leaps of logic to show that police reports were not provided to the defense. The record belies this assertion. The prosecutor agreed to open his file

for the defendant's counsel to inspect, copy, test and photograph all material and information within the State's possession and control pursuant to 3.220(a)(ii)(xi) Fla.R.Crim.P.. Also, the State's notice of discovery included the names of Donald Hynes, Detective Fletcher, Nelms, Peterson and Terry Chambliss as having information (R.203-5). A Brady violation is not established where a defendant has equal access to the material at issue. United States v. Cortez, 757 F.2d 1204 (11th Cir. 1985); United States v. McMahon, 715 F.2d 498 (11th Cir. 1983):

> "Moreover, 'the government is not obliged under Brady to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself.' United States v. Prior, 546 F.2d 1254, 1259 (5th Cir. 1977). See also, e.g., United States v. Brown, 628 F.2d 471, 473 (5th Cir. 1980) ("in no way can information known and available to the defendant be said to have been suppressed by the Government.") Appellants' counsel knew, or should have known, about the two psychiatric reports long before the day of trial because the existence of the reports was revealed at the trial of appellants' co-defendant, Abbott. See United States v. Abbott, 665 F.2d 352 (11th Cir. 1981). Had they exercised reasonable diligence, appellants' counsel could have contacted the doctors who prepared the reports, just as Abbott's attorney did, and obtained any relevant information or called them as witnesses. Consequently, appellants' Brady claim is without merit."
>
> United States v. McMahon, supra, at 501, 502.

There was no Brady violation in the instant case and, therefore, Squires' conviction and sentence must stand.

CLAIM IV

THE RECORDS AND TRANSCRIPTS IN THIS CAUSE DEMONSTRATE THAT SQUIRES RECEIVED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

A claim of ineffective assistance of counsel must be viewed in light of the United States Supreme Court's recent decision in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The Supreme Court has now set forth a two-prong test: (1) the burden is upon the defendant to show that counsel's performance was deficient (i.e., counsel made errors so serious that counsel did not function as "counsel" within the meaning of the Sixth Amendment); and (2) the defendant must show that the deficient performance prejudiced the defense insofar as there is a high probability that the outcome of the proceeding would have been different but for the actions of defense counsel. In applying this two-prong test, a reviewing court must indulge in a strong presumption that counsel's representation was effective. Our State Supreme Court has determined that the test set forth in Strickland does not "differ significantly" with the test espoused by the Florida Supreme Court in Knight v. State, 394 So.2d 997 (Fla. 1981); Jackson v. State 452 So.2d 533 (Fla. 1984); Down v. State, 453 So.2d 1102 (Fla. 1984); Mikenas v. State, 460 So.2d 359 (Fla. 1984).

In the instant case, Squires has absolutely failed to demonstrate that he was prejudiced and that there is a reasonable probability that his trial would have been different but for his

defense counsel's purported errors. The State maintains, however, that not only was Squires not prejudiced by defense counsel's actions, but trial counsel rendered reasonably effective counsel.

Squires' contentions with respect to the alleged ineffectiveness of trial counsel merely amount to hindsight second-guessing by Squires and his most recent counsel, unhappy with the fact that trial counsel was not successful. The record reflects that trial counsel filed numerous pre-trial motions and presented an elaborate alibi defense at trial. The fact that this defense was ultimately unsuccessful does not render counsel ineffective. Cf. Sireci v. State, 469 So.2d 119 (Fla. 1985). Appellee will individually address the more significant of Squires' claims here.

Squires claims his counsel was ineffective for failing to interview and call Donald Hynes as a witness. Ordinarily a trial attorney's decision not to call a witness he deems would not be fruitful is a strategic decision not open to attack. Washington v. State, 397 So.2d 285 (Fla. 1981). Squires presents not one shred of evidence that Hynes would have testified if called, or that such testimony would have benefitted Squires. The fact that Hynes passed a polygraph in relation to the charged offense would not have been admissible, see, e.g., Farmer v. City of Fort Lauderdale, supra, and the State would not have been precluded from attacking Hynes' credibility.

Squires next argues that counsel should have challenged the voluntariness of his statements to law enforcement officers. Squires testified under oath at trial, long after any claimed effects of medication had worn off, as to his reasons for the admissions (R.842-853). Nothing in this sworn, presumably truthful testimony, supports the claim now being made. Likewise, it is preposterous to assume that one under the influence of chronic pain and pain killers would confess to a murder as a result thereof.

Defense counsel did challenge the admissions to Al Dayton, the polygraph examiner. The objection was fully considered by the trial judge and rejected (R.544-545). This does not render counsel ineffective. Likewise, the suggestion that guard, Rex Seimer and prisoner Robert Fain may have been acting as State agents in eliciting admissions from Squires is wholly without foundation in the record.

The record reflects that both Charlotte and Terry Chambliss were vigorously cross-examined by trial counsel. Defense counsel brought out that Terry Chambliss' pending charges and the prospective sentences be faced to establish his motives for testifying. Charlotte Chambliss' credibility was also vigorously attacked. That Squires present counsel would take a different approach to the examination of these witnesses and Detective Peterson does not render trial attorney Edwards ineffective.

The record reflects that the victim's mother, Velma Austin, was called to tesify as to some of the events prior to the

robbery and to the condition she left the gas station in. (Mrs. Austin was the clerk on duty prior to Albritton). Defense counsel did stipulate to the identity of the body (R.499). The testimony Mrs. Austin gave was relevant to the prosecution's case and could not have been avoided by defense counsel.

The credit card receipts were available during trial. The claim that they should have been furnished sooner lacks merit.

Squires makes no showing that Gwendolyn Chambers would ever have been available for trial (she lived in Alabama) or that she would have given favorable testimony.

Charles Barr's present affidavit as to the hour he last saw Squires (CR. 787-89) was refuted by Squires own trial testimony (R.816). The Barr testimony presented at trial, on the other hand, was consistent with Squires' presumably truthful testimony.

In short, nothing in the alleged errors of trial counsel, demonstrates ineffective assistance of counsel at the guilt phase. Likewise, it is not necessarily error to refuse to call character witnesses at the penalty phase. Stanley v. Zant, 697 F.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). Likewise, an attorney has an obligation to defer to the choices of his competent client. Alvord v. Wainwright, 725 F.2d

1282 (11th Cir. 1984); Foster v. Strickland, 707 F.2d 1339 (11th Cir. 1983). The mitigating evidence which Squires now says should have been produced is hardly sufficient to undermine confidence in the outcome of the proceeding. Cf. Strickland v. Washington, supra. Certainly the danger of allowing the State to rebut evidence of good character in this case is apparent. Likewise, the type of assistance Squires rendered to law enforcement is suspect, especially in light of the fact that he has apparently claimed his prior testimony in another capital case was coerced. See, Demps v. State, 416 So.2d 808 (Fla. 1982); Demps v. State, 462 So.2d 1074 (Fla. 1984).

Finally, it should be noted that the jury was instructed in accordance with the standard jury instructions, counsel's failure to object thereto does not render him ineffective.

Squires closes this issue with a laundry list of claims he says, taken cumulatively, show he received ineffective assistance of counsel. As to each of these items, the State submits that no errors or omissions were committed by defense counsel, and that this conclusion is clearly supported by the record.

The determination of whether the assistance rendered by counsel is reasonably effective is not to be based solely upon his performance at trial. "Rather than take isolated instances out of context, we determine whether effective service was rendered based on the totality of the circumstances." United States v. Gibbs, 662 F.2d 728 (11th Cir. 1981); Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982); Adams v. Balkcom,

688 F.2d 734 (11th Cir. 1982). The defendant has the burden of proving that he did not have effective assistance of counsel. Adams v. Balkcom, supra; United States v. Phillips, 664 F.2d 971 (5th Cir. 1981).

The benchmark for judging claims of ineffectiveness is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, supra. In order for a defendant to succeed on a claim of constitutionally deficient representation so as to obtain a reversal of conviction, the United States Supreme Court held that he must first show both that counsel's performance was deficient; that is; a showing that the attorney was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that there is a reasonable probability that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial, the result of which is reliable. 104 S.Ct. 2064, 2068. Prejudice does not embrace errors which are merely detrimental to defendant's case. Adams v. Balkcom, supra, 739; Washington v. Watkins, 655 F.2d 1346, 1360 (5th Cir. 1981), cert. denied, 456 U.S. 946, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982).

The Court in Strickland v. Washington, supra, rejected the notion that rigid guidelines are to be utilized when assessing such a claim and instead held that the measure of an attorney's performance should be predicated upon reasonableness under pre-

vailing professional norms. The Court provided clear direction to lower federal and state courts requiring that judicial scrutiny of counsel's performance must be highly deferential. The lower courts were clearly directed that every effort must be made to eliminate the distorting effects of hindsight and to try and reconstruct circumstances and evaluate conduct based on those circumstances as they existed at the time. Utilizing the foregoing standards it is clear that the allegations of the instant claim are either refuted by the record or wholly insufficient to establish a claim of ineffective assistance of counsel. No evidentiary hearing was required, and relief was properly denied. See, Strickland v. Washington, supra (hearing not always required).

CLAIM V

WHETHER CRITICAL TESTIMONY WAS TAKEN IN THE ABSENCE OF THE DEFENDANT, IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

The State submits the issue of Squires' absence during the telephonic deposition of Charles Barr is a matter which could have been and should have been raised on direct appeal. Since the issue was not raised at the appropriate time in state court, there has been a procedural default on this issue. See, Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 549 (1977). In Sykes, the Supreme Court held federal habeas relief was not available to a defendant who had failed to comply with a state contemporaneous objection rule absent a showing of cause for the non-compliance and actual prejudice resulting therefrom. Accord, Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982).

While Sykes itself was concerned with failure to object in the trial court, the rationale from Sykes has been applied to situations where an issue was not raised on direct appeal and it could have been. Under such circumstances, the federal courts have also found a procedural default. See, e.g., Ford v. Strickland, 676 F.2d 434 (11th Cir. 1982); Gibson v. Spalding, 665 F.2d 863 (9th Cir. 1981); Huffman v. Wainwright, 651 F.2d 347 (5th Cir. 1981); Forman v. Smith, 633 F.2d 634 (2nd Cir. 1980) and Cole v. Stevenson, 620 F.2d 1055 (4th Cir. 1980).

Squires raised this issue for the first time in his motion pursuant to Rule 3.850, Florida Rules of Criminal Procedure. It is clear under Florida law that an issue which was or could have been raised on direct appeal cannot be litigated by a post-conviction motion under Rule 3.850. Porter v. State, 478 So.2d 33 (Fla. 1985) and Merrill v. State, 364 So.2d 42 (Fla. 1st DCA 1978), cert. denied, 372 So.2d 470 (Fla. 1979). The fact that the basis for the collateral attack is alleged to be of constitutional dimension does not preclude a waiver by failure to assert it on direct appeal. Clark v. State, 363 So.2d 331 (Fla. 1978) and Roth v. State, 385 So.2d 114 (Fla. 3d DCA 1980).

The Florida Supreme Court has held on several occasions that a ground for relief which is known at the conclusion of trial should be raised on direct appeal. If that ground is not raised on direct appeal, motion pursuant to 3.850 is not an appropriate remedy. See, Ford v. State, 407 So.2d 907 (Fla. 1981) and Hargrove v. State, 396 So.2d 1127 (Fla. 1981). The matter of Squires' absence was certainly known at the trial's conclusion. Therefore, as the issue should have been raised on direct appeal a motion under Rule 3.850 could not substitute for appeal.

The State submits Squires has failed to demonstrate cause and prejudice for the default. See, Engle v. Isaac, supra. Should Squires argue ineffectiveness of counsel as cause, such an argument would be meritless. Allegations of ineffective assistance of counsel do not satisfy the cause requirement of Sykes. See, Lumpkin v. Ricketts, 551 F.2d 680 (5th Cir. 1977),

cert. denied, 54 L.Ed.2d 316 (1977); Indiviglio v. United States, 612 F.2d 624 (2nd Cir. 1979), cert. denied, 455 U.S. 933, 63 L.Ed.2d 768 (1980); Tyler v. Phelps, 643 F.2d 1095 (5th Cir. 1981); Washington v. Estelle, 648 F.2d 276 (5th Cir. 1981); Sullivan v. Wainwright, 695 F.2d 1306 (11th Cir. 1983). The State is aware of the Eleventh Circuit's opinion in Birt v. Montgomery, 725 F.2d 587 (11th Cir. 1984). The court in Birt indicated if counsel is found to be ineffective, the federal habeas court will not hold the defendant to a state procedural waiver on constitutional claims. Sub judice, appellate counsel has not been held ineffective.

At the hearing below on the motion to vacate, the Honorable Judge Graybill held that Squires' presence at the deposition was unnecessary because under Fla.R.Crim.P. 3.190(j) either party can take a deposition to perpetuate testimony and the rule does not require the presence of the defendant when the deposition is being taken by the defense. Further, the court noted that since Squires was present when the deposition was read to the jury, he had an opportunity to counter or add to any statements made by Barr.

Squires argues that this was incorrect because the rule requires a court order to be obtained via pre-trial motion. This argument fails for two reasons. First, the rule does not require a pre-trial motion. The rule only grants discretion to the court to deny same when it is not made 10 days before trial. Second, the narrow reading Squires gives the rule would simply act to

preclude the taking of the depositions and thus, act to the detriment of Squires' case.

Squires argues nevertheless, that he was absent during testimony at his capital trial without an express record waiver and thus, it was fundamental error. This argument totally ignores the reasoning of the court below and the rule. Squires was not absent during the presentation of the testimony in his case. He was clearly present when said testimony was presented to the trier of fact.

Further, recent cases from the Supreme Court indicate a defendant's absence during certain stages of a criminal trial does not per se require reversal. See, Rushen v. Spain, 464 U.S. 114, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983) and United States v. Gagnon, 470 U.S. ____, 84 L.Ed.2d 486 (1985). And under Florida law a defendant may voluntarily or involuntarily absent himself even in a capital case. Peede v. State, 474 So.2d 808 (Fla. 1985).

Squires' absence did not prejudice his case, contrary to his assertion. The only point on which Barr was uncertain was the date. Further, Barr's testimony was otherwise consistent with Squires' own trial testimony. Even assuming the date he last saw Squires was on the date of the offense, his testimony at trial was that Squires

left by 11:00 a.m. (R.693). This would have given Squires enough time to get to Florida in time to commit the offense. Thus, the jury could have believed Barr and still found Squires guilty.

No prejudicial error was committed.

CLAIM VI

WHETHER THERE WAS INSUFFICIENT EVIDENCE THAT MR. SQUIRES KILLED, ATTEMPTED TO KILL, OR INTENDED OR CONTEMPLATED THAT LETHAL FORCE WOULD BE USED, AND THEREFORE, THE IMPOSITION OF THE DEATH PENALTY VIOLATED MR. SQUIRES' EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Squires asserts that there was insufficient evidence that he killed, attempted to kill, or intended or contemplated that lethal force would be used, and therefore, the imposition of the death penalty violated his eighth and fourteenth amendment rights. He relies on Enmund v. Florida, 458 U.S. 782 (1982) to support this position.

This issue could have, should have, and in fact, was raised on direct appeal. This issue may not be considered in the instant proceeding. See, e.g., Armstrong v. State, 429 So.2d 287 (Fla. 1983), Christopher v. State, 416 So.2d 450 (Fla. 1982). This issue was specifically addressed and rejected by this Court. Squires v. State, supra.

Even if this Honorable Court were to reach the merits of the defendant's claims, Enmund is not applicable to the instant case. See, Adams v. Wainwright, 709 F.2d 1443, 1446-47 (11th Cir. 1983). In that case, the Court stated:

> Although Enmund did hold that the death sentece could not be imposed where no intent is shown and the killing occurs during the perpetration of a felony, that case is readily distinguishable. Defendant Earl Enmund in that case was waiting in the getaway car during a planned robbery when one or both of his co-felons shot and killed two victims who resisted the robbery. The Supreme Court held the death penalty disproportionate to Enmund's

> culpability, reasoning that he personally "did not kill or attempt to kill" or have "any intention of participating in or facilitating a murder." Here Adams personally killed his victim, savagely beating him to death. Adams acted alone. He is fully culpable for the murder. Under these circumstances, the death penalty is not "grossly disproportionate and excessive."
>
> Id. at 1447 (citation omitted)

The defendant argues that Enmund is applicable because there was a possibility the jury believed Squires was acting in concert with another person. The Eleventh Circuit has rejected a similar argument in Ross v. Hopper, 716 F.2d 1528 (11th Cir. 1983). The Court in Ross emphasized that the United States Supreme Court reversed the Florida Supreme Court's decision in Enmund because "the Florida Supreme Court affirmed the death penalty in the absence of proof that Enmund killed or attempted to kill, regardless of whether Enmund intended or contemplated that life would be taken." Id. at 1532 quoting Enmund, 458 U.S. at 801, 102 S.Ct. at 3378 (Emphasis added by Ross panel).

In Ross, although no one actually saw the defendant commit the murder, there was sufficient evidence that he was an active participant in the crime to uphold the first degree murder conviction. At least one witness in Ross testified that the defendant stated that he had shot the murder victim. In addition, witnesses testified that they heard gunshots and saw defendant holding a gun either just before or after the murder.

Furthermore, the theory of the State was that Ross himself was the triggerman. Finally, as the court in Ross pointed out:

> The case is readily distinguishable from Enmund, where the evidence supported no more than an inference that at the time of the killing the defendant was seated in a get-away car at the side of the road waiting for the robbers to escape. Here is sufficient evidence in the record to support a conclusion that Ross contemplated that life would be taken, intended to kill, and actually killed Lieutenant Meredith. Examining the individual culpability of the defendant, as did the Supreme court in Enmund, it is reasonable to conclude that the punishment was not disproportionate in relation to Ross' participation in the crime.
>
> Ross, 716 F.2d at 1533.

There is sufficient evidence in the record to support a finding that Squires not only contemplated that lethal force might be used during the assault and hence possessed an intent to kill, but that he actually committed the murder himself. And in fact, this court made a specific finding that Squires was personally responsible for the killing.

> "When viewed in total, both the sentencing order and the record point to one conclusion -- Squires was personally responsible for the shooting death of Jesse Albritton. Accordingly, Squires' reliance on Enmund is unfounded. We find no reversible error. Smith v. State, 424 So.2d 726 (Fla. 1982), cert. denied, 103 S.Ct. 3129 (1983)."

The United States Supreme Court in Cabanna v. Bullock, 474 U.S. ___, 88 L.Ed.2d 704, 106 S.Ct. 689 (1985) held:

> ". . . the court must examine the entire course of the state-court proceedings against the defendant in order to determine whether, at some point in the process, the requisite factual finding as to the defendant's culpabi-

> lity has been made. If it has, the finding must be presumed correct by virtue of 28. U.S.C. §2254(d) [28 USCS §2254(d)], see, Sumner v. Mata, 449 U.S. 549, 66 L.Ed.2d 722, 101 S.Ct. 764 (1981), and unless the habeas petitioner can bear the heavy burden of overcoming the presumption, the court is obliged to hold that the Eighth Amendment as interpreted in Enmund is not offended by the death sentence."
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> Id. at 717-18.

As a specific finding has been made, this court is bound to follow its own binding precedent and must deny relief on this claim. No evidentiary hearing was required.

CLAIM VII

WHETHER THE PENALTY PHASE JURY INSTRUCTIONS, REINFORCED BY IMPROPER PROSECUTORIAL VOIR DIRE AND ARGUMENT, UNCONSTITUTIONALLY AND INACCURATELY DILUTED THE JURY'S SENSE OF RESPONSIBILITY, CONTRARY TO CALDWELL V. MISSISSIPPI, 105 S.CT. 2633 (1985),AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

As we continue to note, issues which were raised on direct appeal or could have and should have been raised on direct appeal may not be considered on a motion for post-conviction relief made pursuant to Rule 3.850, Fla.R.Crim.P. 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).

Squires could have and should have raised this issue on direct appeal since the facts giving rise to it are apparent from the face of the record. Cf. Stewart v. State, 420 So.2d 862 (Fla. 1982). Of course, having failed to object to the prosecutor's comments or the jury instruction at trial, Squires was precluded from raising this issue in the absence of fundamental error. See, e.g., Darden v. State, 475 So.2d 214 (Fla. 1985); Castor v. State, 365 So.2d 701 (Fla. 1978); Lucas v. State, 376 So.2d 1149 (Fla. 1979); Ray v. State, 403 So.2d 956 (Fla. 1981).

In any event, Squires' claim is without merit. A close reading of the instruction and remarks complained of demonstrates that the jury was not misled in its role, nor was there an incorrect statement of Florida law. California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1981). In fact, the instruction complained of tracked the applicable standard jury instruction. (R.1028) Florida Standard Jury Instructions in Criminal Cases, (1981 ed.), p.78. References by the prosecutor to the judge's responsibility to impose sentence and the jury's advisory role is an accurate reflection of Florida's capital sentencing scheme. See, Section 921.141, Florida Statutes.

Squires' argument relies exclusively on the United States Supreme Court's decision in Caldwell v. Mississippi, 472 U.S. , 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). That cause is easily distinguished from the instant cause, as was pointed out recently by the Florida Supreme Court in Darden v. State, 475 So.2d 217, 221 (Fla. 1985):

> ". . . **Darden** also attempts to show that as in **Caldwell**, the jury was misled as to its role in the sentencing process. In **Caldwell** the Court interpreted comments by the state to have misled the jury to believe that it was not the final sentencing authority, because its decision was subject to appellate review. We do not find such egregious misinformation in the record of this trial, and we also note that Mississippi's capital punishment statute vests in the jury the ultimate decision of life or death, whereas, in Florida, that decision resides with the trial judge. . . "

Here, the trial judge followed Florida's Standard Jury Instructions in instructing the jury as to their role in the penalty phase of the trial. There was no misinformation in the record. Under the circumstances, the State would submit that no error is present here.

This claim should be rejected because no objections were raised at trial, the issue should have and could have been raised on direct appeal, and because the record in this cause shows on its face that the issue lacks merit. No evidentiary hearing was requested and none was required on this issue.

Squires' trial jury was instructed pursuant to the then existing Standard Jury Instructions. (R.1031-1032) This instruction correctly states that only six votes are necessary for a life recommendation, in addition to the language complained of by Squires.

This issue must be raised by contemporaneous objection in the trial court before relief can be granted on direct appeal. Rembert v. State, 445 So.2d 337 (Fla. 1984); Jackson v. State, 438 So.2d 4 (Fla. 1983). The Florida Supreme Court has held that this claim may not be raised on a collateral proceeding. Jackson, supra; Ford v. Wainwright, 451 so.2d 471 (Fla. 1984).

Based on this Court's own precedent, this claim should be denied.

CLAIM VIII

THE JURY WAS PROPERLY INSTRUCTED THAT ONLY SIX VOTES WERE NECESSARY FOR A LIFE RECOMMENDATION. REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED.

Squires' trial jury was instructed pursuant to the then existing Standard Jury Instructions. (R.1031-1032) This instruction correctly states that only six votes are necessary for a life recommendation, in addition to the language complained of by Squires.

This issue must be raised by contemporaneous objection in the trial court before relief can be granted on direct appeal. Rembert v. State, 445 So.2d 337 (Fla. 1984); Jackson v. State, 438 So.2d 4 (Fla. 1983). This Court has held that this claim may not be raised in a collateral proceeding. Jackson, supra; Ford v. Wainwright, 451 So.2d 471 (Fla. 1974).

No relief is warranted on this claim and an evidentiary hearing was not required.

CLAIM IX

WHETHER THE ERRONEOUS JURY INSTRUCTION THAT A VERDICT OF LIFE MUST BE MADE BY A MAJORITY OF THE JURY MATERIALLY MISLED THE JURY AS TO ITS ROLE AT SENTENCING AND CREATED THE RISK THAT DEATH WAS IMPOSED DESPITE FACTORS CALLING FOR LIFE, AND MR. SQUIRES' DEATH SENTENCE WAS THUS IMPOSED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.[2]

Again, it is necessary to note that Squires is attempting to raise an issue which could have, should have and, in fact, was raised on direct appeal. This issue may not be considered in the instant proceeding. See, e.g., Armstrong v. State, 429 So.2d 287 (Fla. 1983); Christopher v. State, 416 So.2d 450 (Fla. 1982). Squires raised the instant claim on direct appeal. It was specifically addressed and rejected by this Honorable Court. Squires v. State, supra at 212. As noted in the statement of facts, this issue was also raised in Squires' certiorari petition to the United States Supreme Court. Certiorari was denied. Squires v. Florida, ___ U.S. ___, 83 L.Ed.2d 204 (1984).

Relief is not warranted on this claim.

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[2] Of course, it should be remembered that this Court has held that the evidence was sufficient to establish Squires' guilt of premeditated murder. Squires v. State, supra.

CLAIM X

WHETHER THE DEATH PENALTY IS IMPOSED IN FLORIDA ON THE BASIS OF IMPERMISSIBLE, ARBITRARY, AND DISCRIMINATORY FACTORS, INCLUDING RACE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

As we continue to note, issues which were raised on direct appeal or could have and should have been raised on direct appeal may not be considered on a motion for post-conviction relief made pursuant to Rule 3.850, Fla.R.Crim.P., See, Stone v. State, 481 So.2d 478 (Fla. 1985); Meeks v. State, 382 So.2d 673 (Fla. 1980); Witt v. State, 387 So.2d 922 (Fla. 1980), cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980).

Squires could have and should have raised this issue on direct appeal since the facts giving rise to it are apparent from the face of the record and the studies upon which this claim was based were available prior to Squires' trial and his subsequent direct appeal.

> On the face of the petition, the Court can discern one possible reason for failing to properly raise this issue in the Florida courts. The statistical study on which petitioner relies in his petition, Gross & Mauro, Patterns of Death, 37 Stan. L. Rev. 27, see Petition, at 122, was not published until 1984. However, the unconstitutional effect of race, one of the factors asserted by petitioner, on the imposition of the death penalty was realized at least as long ago as 1972 when the Supreme Court decided Furman v. Georgia, 408 U.s. 236. Therefore, this Court agrees with the Florida Supreme Court which found that this issue could have been raised on direct appeal.

Stone v. Wainwright, Case No. 86-792-Civ-J-14 (M.D. Fla. 1986)

Of course, having failed to raise this claim below, Squires was precluded from raising this issue on direct appeal.

Appellant's reliance on Stewart v. Wainwright, 11 F.L.W. 508 (Fla. 1986) is misplaced. This Court in Stewart held that it is not proper to raise this claim for the first time in a petition for habeas corpus. Where, as here, the information upon which the claim is based was known previously, it is not proper to raise it for the first time in 3.850 proceeding. Cf. Stone v. State, supra.

Further, this claim has consistently been rejected by both State and Federal courts 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. denied, ____ U.S. ____, 79 L.Ed.2d 203 (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).

The trial court was bound by this Court's prior decisions that the studies cited by Squires do not establish grounds for relief and, accordingly, correctly denied the request for an evidentiary hearing. See, e.g., Henry v. State, supra; Thomas v. State, supra; Sullivan v. State, supra.

CONCLUSION

Based on the foregoing arguments and citations of authority, the judgment and sentence of the trial court should be affirmed.

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. mail to Larry Helm Spalding, Capital Collateral Representative, Mark Evan Olive, Litigation Director, Office of the Capital Collateral Representative, 225 West Jefferson Street, The Independent Building, Tallahassee, Florida 32301, this 5th day of December 1986.

OF COUNSEL FOR APPELLEE