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IN THE SUPREME COURT OF FLORIDA

JOHNNY COPELAND,

Petitioner,

v. CASE NO. 69,428

LOUIE L. WAINWRIGHT,
Secretary, Department of
Corrections, State of Florida,

Respondent.

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JOHNNY COPELAND,

Appellant,

v. CASE NO. 69,482

STATE OF FLORIDA,

Appellee.

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BRIEF FOR RESPONDENT-APPELLEE

JIM SMITH
ATTORNEY GENERAL

MARK C. MENSER
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT/APPELLEE

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## STATEMENT OF THE CASE AND FACTS

Johnny Copeland was properly convicted of first degree (felony) murder, sexual battery, kidnapping and robbery, and sentenced to death. The details of his crime are set forth in sufficient detail in Copeland v. State, 457 So.2d 1012 (Fla. 1984) and will not be repeated here.

As noted above, Copeland appealed his judgment and sentence raising the following grounds:

I. That Fla.Stat. §§782.04; 775.98 and 921.141 are unconstitutional as applied for two reasons:

(a) This Court does not properly review all death cases, and

(b) Felony murder does not require proof of intent.

II. That the Defendant was denied "due process" by the exclusion of anti-capital punishment jurors.

III. That the death penalty is unconstitutional because it is applied unfairly against blacks who murder white victims.

IV. That the trial court erred in denying Copeland's election of venue.

V. The trial court erred in denying Copeland's motion for change of venue (adverse publicity).

VI. The trial court erred in denying the Defendant's motion to suppress statements.

VII. The trial court erred in denying Defendant's motion for mistrial (due to reference to other criminal conduct of the Defendant).

VIII. The trial court erred in sentencing Defendant for the crimes of felony murder and the underlying felony(s).

IX. The trial court erred in applying the aggravating factors and mitigating factors relevant to Copeland's death sentence.

As reported before, Copeland lost his appeal.

On January 14, 1985, Copeland petitioned the United States Supreme Court for certiorari review. The questions presented were:

> (1) Whether Copeland was denied a fair trial under the Sixth Amendment when he was denied a change of venue.
>
> (2) Whether the Eighth Amendment allows the non-triggerman in a felony murder case to be executed.

Certiorari was denied on April 15, 1985, and no further action was taken by Copeland.[1]

A death warrant was signed on September 24, 1986.

On October 14, 1986, Copeland filed a Motion for Post Conviction Relief, a Petition for Writ of Habeas Corpus and

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[1] Copeland v. State, 105 S.Ct. 2051, 85 L.Ed.2d 324 (1985).

(lodged) a petition for stay of execution in the United States Supreme Court.

The Motion for Post Conviction Relief alleged the following grounds:

(1) Prejudicial pretrial publicity denied Copeland a fair trial. (Denial of motion for change of venue as error).

(2) An Enmund v. Florida, *458* U.S. 782 (1982) claim that the state was not required to prove "intent" under its felony murder theory.

(3) The Florida death penalty system is racially discriminatory (against black who kills whites).

*(4)* Copeland's constitutional rights were violated when his statements to law enforcement officers were not suppressed.

(5) The prosecutor and trial judge denigrated the jury's role.

(6) The jury was precluded from considering non-statutory mitigating factors.

(7) Misapplication of the "pecuniary gain" aggravating factor.

(8) That the jury selection system was "discriminatory" because women with small children could be statutorily excused but no reference was made to "men" in the law.

(9) That electrocution is cruel and unusual punishment.

Copeland's habeas corpus petition raised the same arguments as grounds (1), (2) and (3) of his 3.850 petition (though the order of argument was changed).

The voluminous pleadings filed and lodged on Copeland's behalf were signed by Tallahassee counsel and are not known to be the work product of the volunteer counsel who formally, at least, appeared on October 7, 1986.

On October 15, 1986, the Motion for Post Conviction Relief was heard by Hon. Judge Cooksey. The judge found that every one of the arguments presented were offered in violation and disregard of Fla.R.Crim.P. 3.850 and, as such, constituted an abuse. In each instance the claims raised either could (or should) have been raised on direct appeal or merely sought to relitigate claims raised on direct appeal, all contrary to the rule.

An appeal to this Honorable Court ensued, with the briefs at bar being requested after the Appellant alleged that he was unable to prepare a brief.

## SUMMARY OF ARGUMENT

This case is before the Supreme Court not on its merits, but on the propriety of the lower court's determination that the Appellant's claims are procedurally barred. Thus, the "merits" need not and cannot be considered.

Copeland leaves the finding of procedural bars essentially unchallenged. He cannot and does not overcome the fact that every one of his claims was either resolved on direct appeal or could have been raised on appeal, but was not.

Neither Rule 3.850 nor habeas corpus is a substitute for direct appeal or a device for a "second appeal".

Relief should be denied and the findings of the trial court should be summarily affirmed.

## ARGUMENT

### THE APPELLANT IS NOT ENTITLED TO RELIEF.

This appeal comes before the Court as a result of the Circuit Court's summary denial of post conviction relief. In addition to this direct appeal, certain issues come before the Court by way of Mr. Copeland's habeas corpus petition.

On appeal, the only issue properly before this Court is the propriety of the summary discharge and the findings regarding procedural bars to relitigation of Copeland's original appeal and de novo argument of issues that could have been raised on appeal. The merits of the assorted issues were not ruled upon below and any discussion of them here is premature.

### A. Finality

The Appellant's brief strives mightily to reargue issues resolved on direct appeal and argue new issues which he knows, or reasonably should know, are barred as having been available, but not raised on appeal. Copeland tries an emotional appeal to justice, and so shall the State. "Justice" includes a recognized limit on litigation. Therefore, because justice is due to the people *as* well as a murderer, see Evans v. Bennett, 440 U.S. 1301 (1979); Snyder v. Massachussetts, 291 U.S. 97 (1934); State v. Jones, 204 So.2d 515 (Fla. 1967), the Courts have found it necessary to create procedural bars to improper litigation.

In Florida, those procedural bars are strictly enforced and are not arbitrarily or capriciously waived. Francois v. Wainwright, 741 F.2d 1275 (11th Cir. 1984); Palmes v. Wainwright, 725 F.2d 1511 (11th Cir. 1984); Straight v. Wainwright, 772 F.2d 674 (11th Cir. 1985); see also Wainwright v. Sykes, 433 U.S. 72 (1977) and Engle v. Isaac, 456 U.S. 107 (1982).

In actions filed pursuant to Fla.R.Crim.P. 3.850 "finality" remains an important consideration no matter the nature of the case. Bundy v. State, 11 F.L.W. 592 (Fla. 1986). This Court has refused to destroy the concept of finality by ignoring procedural bars and considering the "merits" of barred claims. Bundy v. State, id; Darden v. State, 11 F.L.W. 541 (Fla. 1986); Stewart v. State, 11 F.L.W. 509 (Fla. 1986); Henry v. State, 377 So.2d 692 (Fla. 1979); Scott v. State, 420 So.2d 595 (Fla. 1982); Lane v. State, 388 So.2d 1022 (Fla. 1980); Alvord v. State, 396 So.2d 184 (Fla. 1981); Witt v. State, 387 So.2d 922 (Fla. 1980); Quince v. State, 477 So.2d 545 (Fla. 1985).

There are two fundamental procedural bars:

(A) Claims cannot be raised under Rule 3.850 if they were previously argued on appeal.

(B) Claims cannot be raised under Rule 3.350 if they could have been raised on direct appeal, but were not.

Mr. Copeland's claims all fall within these two catagories, as we shall see.

Inasmuch as his claims are procedurally barred, the State will not engage in any discussion of their so-called "merits". The merits of these claims have never been ruled upon by the Circuit Court and are not properly before this Court. Also, the State respectfully declines to engage in a discourse which could be seen as a "waiver" of its procedural rights and thus undermine the sanctity of our rules and the credibility of our courts in any federal forum.

Since this Honorable Court's credibility and consistency in applying procedural bars will again be challenged in federal court, in this case just as in the past, we urge this Honorable Court not to engage in any action interpretable as a waiver of our procedural rules. The merits of Copeland's claims should not be ruled upon.

B. Claims Barred As Previously Litigated

As noted above, a Motion for Post Conviction Relief is not a vehicle for reargument of claims disposed of on direct appeal. Johnson v. State, 463 So.2d 207 (Fla. 1985); O'Callaghan v. State, 461 So.2d 1354 (Fla. 1985). Copeland's petition raised five claims which simply renewed arguments raised on appeal. They were:

I. The denial of Copeland's motion for change of venue.

11. The Enmund v. Florida, 458 U.S. 782 (1982) claim.

III. The racial bias (McClesky-Hitchcock) claim.

IV. The suppression (of statements) claim.

VII. The misapplication of the aggravating (pecuniary gain) factor claim.

On appeal, Copeland again attempts to reargue these issues and, as noted above, fails to mention any procedural bar.

On direct appeal, the venue issue was argued with Copeland relying upon Manning v. State, 378 So.2d 274 (Fla. 1979); Murphy v. Florida, 421 U.S. 794 (1975); Jackson v. State, 359 So.2d 1190 (Fla. 1978) and McKaskill v. State, 344 So.2d 1276 (Fla. 1977). Relief, and certiorari, was denied. Now Copeland wants to relitigate the claim, relying upon the same authorities as before. This is patently improper.

Copeland's direct appeal argued the application of Enrnund v. Florida, 458 U.S. 782 (1982) to the facts of this case. In this action, despite the denial of relief and certiorari, Copeland mentions that certiorari was granted in State v. Tison, 690 P.2d 747 (Ariz. 1984), cert granted 106 S.Ct. 1182 (1986), but he fails to even mention the controlling, post - Enmund case of Cabana v. Bullock, 484 U.S. , 106 S.Ct. 689 (1986), which supports this Court's decision. Again, just because Copeland still does not like the prior decision of this Court, that does not give him the right to reargue through an abuse of Rule 3.850.

Mr. Copeland attempts to reargue his claim of racial bias on the grounds that McClesky v. Kemp, 106 S.Ct. 3331 (1986) and Hitchcock v. Wainwright, 106 S.Ct. 2888 (1986) have, by being

accepted, re-opened the claim. (It is to be noted that neither case has been ruled upon adversely to the states involved).

During the pendency of Lockhart v. McCree, some litigants attempted to advance the same argument, without success. Middleton v. Wainwright, 11 F.L.W. 507 (Fla. 1976). It is submitted that the law of this State is settled, and that Copeland has not justified any exception to his procedural bar.

Next, Copeland tries to resurrect his suppression claim, also disposed of on direct appeal, by arguing the pendency of People v. Connelly, 106 S.Ct. 785 (1985) (85-660). Here, in addition to the rule and to Middleton, the State would note that the United States Supreme Court ruled on Colorado v. Connelly, on December 10, 1986 and clearly decided the case against Copeland's interests. Thus, no "change in the law'' has taken place that would justify departure from the procedural bar facing Mr. Copeland.

In his seventh claim, Copeland contested the application of the "pecuniary gain" aggravating factor despite the impropriety of doing so. Given the fact that Copeland has, again, attempted to reargue his appeal, the State will rely upon the above arguments governing abuse of the 3.850 procedure.

C. Claims Not Raised On Appeal

Florida Rule of Criminal Procedure **3.850** states:

> "This rule does not authorize relief based upon grounds which could have or should have been raised at trial and, if properly preserved, on direct appeal".

This established procedural bar antedates even the revised rule and is backed by a substantial body of case law. See Bundy v. State, 11 F.L.W. **294** (Fla. **1986**); Bundy v. State, 11 F.L.W. **592** (Fla. **1986**); Card v. State, 11 F.L.W. **521** (Fla. **1986**); Maxwell v. State, **490 So.2d 927** (Fla. **1986**); Antone v. State, **410** So.2d **157** (Fla. **1982**); Goode v. State, **403** So.2d **932** (Fla. **1981**); Hargrave v. State, **396** So.2d 1127 (Fla. 1981); Witt v. State, **387** So.2d **922** (Fla. 1980); Meeks v. State, *382* So.2d **673** (Fla. 1980); Sullivan v. State, **372** So.2d **938** (Fla. 1979).

The appeal at bar fails to set forth any basis for departing from the rule.

Copeland's motion for post conviction relief sets forth four claims which could and should, if preserved, have been raised on direct appeal. They are:

**(5)** The prosecutor and trial judge denigrated the jury's role in the sentencing process.

**(6)** The jury was precluded from considering non-statutory mitigating factors.

(8) The jury selection system used in Florida is sexually discriminatory.

(9) Electrocution is cruel and unusual punishment.

These issues shall be disposed of in order.

Issue (5), by Mr. Copeland's admission, was not raised on direct appeal. Mr. Copeland states that the procedural bar created by Rule 3.850 should not be applied because the issue was not available for review prior to the decision in Caldwell v. Mississippi, U.S. , 86 L.Ed.2d 231, 238 (1985). The State disagrees.

Mr. Copeland argues that the Caldwell decision "changed" the law and was "unforseeable" at the time his case was appealed. This argument totally ignores the Caldwell decision and the procedural underpinnings of these two dissimilar cases.

In Caldwell, the prosecutor told the "sentencer" (the jury) that it was free to vote for a death sentence and let some appellate court correct any error. This argument was objected to at trial and thus preserved for appeal. The Mississippi Supreme Court, sua sponte, waived any procedural bar caused by Caldwell's failure to include this issue on appeal and considered the claim. This issue was briefed and argued, with Mississippi finally ruling, on the basis of California v. Ramos, *463* U.S. 992 (1983) that the appellate reference was not an error of reversible proportions.

Certiorari was granted in *1984,* the same year Copeland's appeal was decided.

Copeland, relying upon Tedder v. State, 322 So.2d 908 (Fla. 1975). claims that the prosecutor and trial judge "misled" his jury just as in Caldwell. If we assumed arguendo this was true,

Copeland would nevertheless not be entitled to relief. If Caldwell was capable of objecting to a prosecutor's improper argument, so was Copeland. Tedder was a 1975 case known throughout Florida during Copeland's trial. It did not (and would not) take Caldwell to prompt anyone to object to a misrepresentation of Tedder. The objection, based on Tedder, was available and not raised. It could have been raised at trial and could and should have been raised on direct appeal.

The State would note that, unlike ~~Caldwell~~, the law was, in fact, not misrepresented to Copeland's jury. While Copeland argues Tedder, supra, he has failed to recite the subsequent, definitive case of Spaziano v. Florida, *468* U.S. , 82 L.Ed.2d *340* (1984). Spaziano rejected the notion that Tedder elevates the status of a Florida non-binding jury recommendation to the dignity of an actual "sentence" and affirmed, indirectly, the correctness of the comments rendered sub judice.

Thus, the claims that Caldwell somehow "changed" the law of Florida is erroneous and oblivious to controlling precedents, including Caldwell itself. Caldwell does not represent any fundamental change in the law. In fact, the State would note that Caldwell opens with a discussion of Mississippi's procedural holding that Caldwell was only accepted for review because Mississippi had waived its procedural bars to the issue. Had Mississippi not done this, the Supreme Court would have denied certiorari

No waiver of any procedural bar has been granted in this case. The Appellant is wrong to suggest that Caldwell justifies "ignoral" of our procedural bar when he knows or reasonably ought to know the true history of these cases. But, then again, Copeland has ignored virtually all controlling law governing Rule 3.850, *so* perhaps this argument was to be expected.

A final comment should be made. Mississippi ppted to waive its procedural bar, in the interest of justice, due to a misrepresentation of the law by the prosecutor. The interests of justice do not compel the same result here.

First, the law was not misrepresented here but in fact was correct under Spaziano, supra.

Second, the comments were not made to the sentencer. In fact, some were made by the sentencer, advising the jury of his role.

Third, most of the quoted comments were made to veniremen as part of a "Wi herspoon inquiry". The comments were keyed to explain to pro-defense-biased jurors that the judge, not they, would actually sentence Copeland to death. This was done *so* that anti-death jurors (pro-Copeland jurors) could be prompted to stay on the jury by getting them to say that, under those circumstances, they "could" convict Copeland and render a fair verdict. Thus, these comments were made, without defense objection, to help Copeland, not prejudice him.

In this regard, the State would note that in footnote (7) of the opinion in Dobbert v. Florida, *432* U.S. *282* (1977), the

Supreme Court refused to find that "minimizing" a jurors role could provoke a death recommendation from that same jury. In fact, the Dobbert court, tacitly recognizing juror's natural reluctance to impose death, opined that a "minimizing" instruction would actually encourage a life recommendation, because jurors could play "Pontius Pilate" and wash their hands of the case - letting the judge do the unpleasant task of imposing death.

Copeland, relying upon Adains v. Wainwright, (for which a motion for rehearing is pending), contends that he should obtain relief because Adams was granted federal habeas corpus relief. It is submitted that the Adams court, like Copeland, completely ignored Spaziano (despite the fact it was cited by our office) and relied unnaturally upon Tedder. The Eleventh Circuit committed one other error. It ignored Caldwell itself while purporting to rely on it.

Not only does Caldwell recognize that Mississippi could have imposed a procedural bar, it also takes time to distinguish Donnelly v. De Christoforo, *416* U.S. *637* (1974), which limits a court's power *to* reverse a conviction based upon "improper prosecutorial comments". The Caldwell court noted that the Donnelly court found the prosecutor's arguments improper, but not so egregious as to require reversal.

In our case the comments rendered could not be considered egregious or prejudicial, especially since, in contrast to Caldwell, no one even objected to them. As noted in Engle v. Isaac, *456* U.S. 107 (1982), not every error is of fundamental or even

constitutional magnitude. If unobjected to, even an error of constitutional magnitude may be procedurally barred. Furthermore, if an "improper" argument is so innocuous when made that no one bothered to object, it is hard to later contend, much less establish, that the defendant was "prejudiced" by it. See Wainwright v. Sykes, 433 U.S. 72 (1977).

Nothing in this record indicates any reason to depart from the obvious procedural bar confronting us or to invite unwarranted federal review. The Circuit Court's finding of a procedural bar to relief should be affirmed.

Copeland's next claim was an attempt to argue the trial court's alleged failure to consider, or let the advisory jury consider, non-statutory mitigating evidence. As Copeland is well aware, non-statutory mitigating factors were allowed to be presented and, in fact, were argued. Thus, his claim is false.[2]

The merits cannot be considered, however, and, to avoid federal intervention, should not be.

The fact is that Copeland was tried in 1979, after publication of the decision in Lockett v. Ohio, 438 U.S. 586 (1978). Counsel could have and should have objected pursuant to Lockett at trial and raised the issue on appeal. (Copeland's appeal was not even decided until 1984). In fact, Copeland's case post-dates Songer v. State, 365 So.2d 696 (Fla. 1978), which

[2]Copeland called Dr. Wray to testify to his prison-medication adjustment and the "domination" of Copeland by others. Counsel for Copeland let Copeland address the jury in general about his conduct. Counsel then argued ''residual doubt about guilt". (R 2140-45, 2150-53, 2194).

Copeland names as the case, prior to which, Courts "may have been confused".

It is to be noted that a similar attempt to use the Harvard and Songer cases to bootstrap an improper Lockett claim failed in Straight v. Wainwright, 11 F.L.W. 227 (Fla. 1986), cert. denied, U.S. (1986). (The court may notice its files).

The Lockett claim was one which could and should, if preserved, have been raised on direct appeal. It was not, and for obvious reasons. The claim is procedurally barred.

Without being redundant, the claims that Florida's jury selection system is sexually biased and that electrocution is cruel and unusual punishment are patently frivilous, bad faith, procedurally barred claims which not only could have been raised on direct appeal, but have been. They are unworthy of serious discussion.

## D. Competence To Stand Trial

Copeland's brief raises a claim not presented to the Circuit Court; to wit: "incompetence to stand trial". The claim is "supported" by the eleventh hour affidavits of two well known anti-death activists, Drs. Krop and Lewis, reciting their now standard assessment that the Defendant was ill at the time of the offense and/or trial.

Copeland contends that he has the right to argue this issue on appeal because:

(A) He reserved the right to amend his petition, and

(B) Counsel allegedly appeared late and had little time to prepare.

The State does not dispute the fact that a litigant may amend a complaint before an answer is filed or, with leave of court, up to the time of trial. There is no way, however, that anyone can represent that they have the right to amend after trial and while ~~on~~ appeal, and then seek to reverse the Circuit Court's order on the basis of the amendment. While the State appreciates that this is a capital case, it hopes and presumes we still have some standards. McNealy v. State, 183 So.2d 738 (Fla. 1st DCA 1966); Wilder v. State, 156 So.2d 395 (Fla. 1st DCA 1963).

It is, of course, a well established principle of Florida law that a party cannot raise ~~de novo~~ claims on appeal. Sanford v. Rubin, 237 So.2d 134 (Fla. 1970); Gillman v. State, 346 So.2d 586 (Fla. 1st DCA 1977).

What Copeland wants this Court to do is create a special rule just for his benefit. Despite Fla.R.Civ.P. 1.190, he wants to "amend" pleadings while on appeal, or in the alternative, leave to raise de novo claims on appeal. This State, to curtail abuses of process, enacted Fla.R.Crim.P. 3.850 and expressly stated therein that "successive" petitions raissing claims that could have been raised earlier are not allowed. If this Honorable Court allows Copeland to get away with this scheme, rule 3.850 will be emasculated. Criminals will not file "successive" petitions, they will instead file "amendments" to their first petition. We should not permit such chicanery.

Copeland appeals to the Court's sympathy by contending that his counsel was a "last minute" volunteer who had to prepare his case "in haste".

Then a lawyer takes a case he is bound by our code of professional responsibility to handle it correctly or not at all. State v. Meyer, 430 So.2d 440 (Fla. 1983). Constraints of time do not justify disobedience of our rules, Meyer, id.

It is not uncommon for death cases to be challenged at virtually the eleventh hour by massive petitions allegedly prepared by some last minute volunteer. Indeed, no matter the size or complexity of the record, the timing of defense motions never seems to vary. The rubric of "late appearing counsel" has been overused to the point that the federal system no longer considers it an excuse. Antone v. Dugger, 465 U.S. 200 (1984).

In Adams v. Wainwright, F.2d (11th Cir. 1986), slip opinion, Case 86-3207 (Nov. 13, 1986), cited by the Petitioner in his Caldwell claim, the court addressed almost the same situation (two last minute mental reports submitted under the excuse that counsel appeared late in the case and, in his haste, could not or did not include them in his petition). The Court held:

> "Failure to present a claim in a previous habeas petition because of the haste with which the petition was prepared does not prevent that failure from constituting an abuse of the writ. Antone v. Dugger, 465 U.S. 200, 206, n. 4, 104 S.Ct. 962, 965, n. 4. 79 L.Ed.2d 147 (1984) (per curiam). This is true even though counsel was appointed when execution was imminent and counsel therefore did not have sufficient time to familiarize himself with the case".

Thus, even if we assume arguendo that Copeland's counsel had only six days to read the record, locate experts, research and draft pleadings, print them and send them to Florida (and the State will not), the late appearance is not an excuse.

Copeland's "trial coinpetence" stands as an issue that is not properly before this Court.

The State submits that Copeland's experts, the ubuquitous Drs. Krop and Lewis, relied (as does Copeland) upon reports and information prepared prior to trial and certainly prior to his appeal. The cumulative reports, which do nothing other than re-evaluate old data on past competence and toss in egregious new tests, do little more than show that Copeland could have raised the competence claim on direct appeal if it was really valid.

Despite Krop's and Lewis' all too predictable determinations, the fact remains that Copeland was not incompetent at trial. Dr. Wray concluded Copeland was competent to stand trial. *(R-423,* 2148). Dr. Cook said Copeland was competent and uncooperative. *(R-403).* Dr. Semon flatly accused Copeland of faking mental illness to his face - causing an immediate mood change from "incoherent" to lucid, sinister and threatening. *(R-401).*

The record also shows that Copeland was a skilled brickmason and that he executed affidavits prior to trial. There was no actual support for the claim of "retardation". The State is neither surprised nor impressed that Copeland was cooperative with Krop or Lewis or that they were willing to find him incompetent.

In Card v. State, 11 F.L.W. 521, 523 (Fla. 1986), the Court held:

> "In a further attempt to prove that Card was incompetent to stand trial, and thus circumstances existed at trial which should have led the trial court to believe that serious doubts existed regarding Card's competency, Card belatedly presents this Court with two letters from psychologists addressed to defense counsel. Both of these letters were dated three days before the then scheduled execution and filed with this Court one day prior to the previously scheduled execution. At the outset we find it necessary to warn that we view reports filed by psychologists hours before a scheduled execution with great suspicion, particularly in a case such as this when three experts have previously determined that the defendant was competent to stand trial".

Adams, Card and this case are strikingly similar and, we suggest, just part of an established plan of attack.

The State would note that in Drope v. Missouri, U.S. , 86 L.Ed.2d 231 (1982), the Supreme Court upheld the Missouri court's decision not to consider "new" psychiatric evidence of "past" incompetence. Drope reviewed the case from the standpoint of facts available at trial.

Again, our facts include three psychiatric findings of competence, one that Copeland is a faker, Copeland's status as a brickmason, Copeland's sworn affidavits and his testimony - which was clear and accurate even if not as eloquent as he would like.

In State v. W.L.S., 485 So.2d 421 (Fla.1986) and Hill v. State, 473 So.2d 1253 (Fla. 1985), this Court held that the State

cannot establish "past competence" through recent evaluations of a defendant's psyche. Basic fairness and due process concerns dictate that the defense cannot prove past "incompetence" either.

The entire competency issue is subordinate to the obvious procedural bars to this abusive and improper claim. It is procedurally barred and should be rejected on that basis alone if our courts, and rules are to be accorded any respect.

## ARGUMENT

## COPELAND IS NOT ENTITLED TO HABEAS CORPUS RELIEF

Out of an "abundance of caution" Mr. Copeland repeated several claims raised pursuant to Rule 3.850 in a habeas corpus petition. The issues were the venue issue, the Enmund claim and the McClesky - Hitchcock claim. These issues cannot be raised by habeas corpus. See Hardwick v. Wainwright, 11 F.L.W. 545 (Fla. 1986); Thomas v. Wainwright, 11 F.L.W. 174 (Fla. 1986) State ex rel Copeland v. Mayo, 87 So.2d 501 (1956); Messer v. Wainwright, 439 So.2d 875 (Fla. 1983); Pannier v. Wainwright, 423 So.2d 533 (Fla. 5th DCA 1982).

No further discussion is necessary.

## CONCLUSION

The trial court did not err in denying Copeland's motion for post conviction relief on procedural grounds.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

MARK C. MENSER
Assistant Attorney General

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, Florida 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT/APPELLEE

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Jay Topkis, Richard Rosen, Eric Freedman, Hal Neier, Jon Kaplon and Clyde Allison, PAUL, WEISS, RIFKIND, WHARTON & GARRISON, 1285 Avenue of the Americas, New York, New York, 10019; to YEAGER & LANG, 888 Seventh Avenue, New York, New York, 10106; and to Joyce Davis, 1713 Kathryn Avenue, Tallahassee, Florida 32308, this ____ day of January, 1987.

MARK C. MENSER
Assistant Attorney General

OF COUNSEL