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NOV 17 1986
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IN THE SUPREME COURT OF FLORIDA

NOLLIE LEE MARTIN,
Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections

Respondent.

CASE NO.

SUPPLEMENTAL RESPONSE TO PETITION FOR HABEAS CORPUS

COMES NOW Respondent, Louie L. Wainwright, through his undersigned counsel, and files this its Supplemental Response to the Petition for Habeas Corpus filed by the Petitioner, Nollie Lee Martin, and states:

I. Introduction

This Supplemental Response is being filed due to the fact that only at or about 5:00 p.m. of Wednesday, November 12, 1986, was Respondent served with Petitioner's Petition for Habeas Corpus which raised additional issues not anticipated, therefore not addressed by Respondent its anticipatory Response to Petitioner for Habeas Corpus filed with this Court on or about 2:30 p.m., Wednesday, November 12, 1986.

Respondent readopts and incorporates by reference the procedural history as it appears in pages 2 and 3 of its anticipatory Response.

With reference to the merits of Petitioner's claims, Respondent argues as follows:

I

COMPETENCY TO BE EXECUTED

This issue appears as issue I in Petitioner's Petition for Habeas Corpus.

Respondent readopts and incorporates by reference, the facts and arguments made in its anticipatory Response to Petition for Habeas Corpus, at pages 7-19.

II

PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL ON HIS DIRECT APPEAL.

Petitioner complains that his appellate counsel was ineffective for failing to argue on appeal that Petitioner's absence during the individual voir dire--limited to the effect of media publicity on the prospective jurors--constituted fundamental error. Respondent maintains, however that Petitioner's argument is totally without merit.

First, Respondent submits that the remedy of habeas corpus is not available to Petitioner in this case. The allegation that Petitioner's absence from the individual voir dire was fundamental error was not raised by timely objection at trial nor by argument on appeal. The issue was not raised on the motion for post-conviction relief filed August 18, 1984; the denial of which was affirmed by this Court in Martin v. State, 455 So.2d 370 (Fla. 1984). Thus the writ of habeas corpus is not properly used for purpose of raising issues that could have been raised on appeal. Kennedy v. Wainwright, 483 So.2d 424 (Fla. 1986); Steinhorst v. Wainwright, 477 So.2d 537 (Fla. 1985).

Respondent recognizes that Petitioner has couched the claim under the allegation of ineffectiveness of appellate counsel. This Court has held that only if a case of ineffectiveness of counsel is established, will this Court address the merits of the previously neglected argument by means of a belated appeal. Pope v. Wainwright, 11 F.L.W. 533 (Fla. October 16, 1986); Steinhorst v. Wainwright, supra at 539; Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985). Respondent incorporates by reference the argument made on this ground in its anticipatory Response to Petition for Habeas Corpus lodged with this Court September 12, 1986, prior to being served with Petitioner's Petition.

In Strickland v. Wainwright, 466 U.S. 668, 694 (1986), the Supreme Court held that "[T]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Respondent asserts that as will be demonstrated infra, Petitioner has failed to establish ineffectiveness of appellate counsel under the Strickland standard; therefore, Petitioner should not be allowed to circumvent the rule that habeas corpus proceedings do not provide a second or substitute appeal by the instant allegation of ineffective appellate counsel. McCrae v. Wainwright, 439 So.2d 868 (Fla. 1983). Thus, this Court need not treat the merits of Petitioner's absence during the individual voir dire.

The record herein is very clear that when the trial court was preparing to conduct the individualized voir dire concerning the effect of public on the prospective jurors, defense counsel waived Petitioner's presence after having consulted with Petitioner, stating:

> MR. LUBIN: Yes. For the purpose of the Voir Dire that we will be conducting, I discussed this with my client and we will waive his presence for the purpose of the individual Voir Dire.
>
> THE COURT: For the Voir Dire?
>
> MR. LUBIN: Just for the individual questioning of witnesses.
>
> THE COURT: I see. You don't think it would be helpful to have him here in case they had seen him on television or whatever media?
>
> MR. LUBIN: Well, I think in the unlikely possibility they would not have heard of the case but would recognize his face when he did come in and we have the general Voir Dire, I think that will take care of that.
>
> THE COURT: All right.
>
> [Emphasis added.]
> (R 1213)

In Peede v. State, 474 So.2d 808 (Fla. 1985) this Court held that a defendant can waive his right to be present at stages

of his capital trial. From the record it is clear that defense counsel in the case at bar discussed the matter with Petitioner, and Petitioner agreed that he would waive his presence for the individual voir dire, and that he would be present during the regular jury selection. The record is also clear that Petitioner offered no objections to his absence at any time during the remainder of the trial proceedings. Thus, it is clear that Petitioner subsequently ratified his absence, thus there was no error. Meek v. State, 487 So.2d 1058 (Fla. 1986).

Respondent acknowledges that in Francis v. State, 413 So.2d 1175, 1177 (Fla. 1982) this Court stated that a defendant has the constitutional right to be present "at the stages of his trial where fundamental fairness might be thwarted by his absence." That the exercise of peremptory challenges is essential to the fairness of a trial by jury and is one of the most important rights secured to a defendant. This is so because peremptory challenges permit rejection for real or imagined partiality and is often exercised on the basis of sudden impression and unaccountable prejudicies based only on the bare looks and gestures of another or upon a juror's habits and associations. It is sometimes exercised on grounds normally thought irrelevant to legal proceedings or official action, such as the race, religion, nationality, occupation or affiliations of people summoned for jury duty. Francis, id. at 1179. The distinction from the instant case is obvious. Here the Petitioner was voluntarily absent from the individual questioning of prospective jurors on the sole issue of media publicity. the record is clear, the prospective jurors were aksed whether they had seen any media reports on this case; if the answer was affirmative, the juror was then asked whether he had been influenced by the publicity on the guilt or innocence of Petitioner. During this examination thirty persons were prequalified, and the rest were excused for cause. (R 2080). No peremptory challenges were exercised during this phase of voir dire, and the defense was not precluded from questioning the

jurors on this issue during the actual voir dire at which time Petitioner was present. Clearly the excusal of those predisposed veniremen did not prejudice Petitioner and in fact benefitted him.

Respondent submits, therefore, that Petitioner's appellate counsel was not ineffective in failing to raise this issue on direct appeal for the reason that under Francis v. State, supra, defense counsel could have reasonably concluded that any error was harmless due to the fact that Petitioner was not prejudiced by the excusal for cause of the tainted prospective jurors. This strategic reason for not raising this issue on appeal, thus, cannot be considered as constituting ineffective assistance of counsel. McCrae v. Wainwright, supra. It is important to emphasize that appellate counsel is not required to press every conceivable claim under appeal. Jones v. Barnes, 463 U.S. (1983).

Petitioner in support of this claim heavily relies in the case of Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1984), cert denied ___U.S.___, 105 S.Ct. 2344, 85 L.Ed.2d 862 (1985). However, that case is not determinative here. The Eleventh Circuit after reasserting the right of an accused to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings, at 755, remanded the case to the district court for an evidentiary hearing to determine, inter alia, whether Hall's absence was at a non-critical stage of the trial and, therefore, harmless. Id at 775. Thus, Respondent asserts that Hall v. Wainwright does not resolve the issue sub judice.

Respondent submits that the case out of the Eleventh Circuit controlling herein is United States v. Willis, 750 F.2d 1486 (11th Cir.), cert. denied ___U.S.___, 106 S.Ct. 144, 88 L.Ed.2d 119 (1985), where in a situation very similar to the case at bar, it was found that even thought the defendants had been absent during the individual questioning of veniremen in chambers, they had been prsent during the general voir dire, and

defense counsel thoroughly explored the effect of pretrial publicity during the individual voir dire. The Court then held the defendants therein failed "even to suggest any prejudice arising from their absence," and "[e]ven assuming a Rule 43 violation, the error was harmless." Id at 1500.

The United States Supreme Court addressed the issue of a defendant's absence during court communications with a jury in Rogers v. United States, 422 U.S. 35 (1975). There the Court found that a violatin of Rule 43 of the Federal Rules of Criminal Procedure (substantially similar to Fla.R.Crim.P. 3.180) which guaranties a defendant the right to be present at every stage of his trial may be considered harmless error. See also, United States v. Gradsky, 434 F.2d 880 (5th Cir. 1970), where the Court rejected the defendant's contentions that their constitutional rights had been violated and found beyond a reasonable doubt that any possible error in their absence from the hearings did not affect their substantial rights. In Rushen v. Spain, U.S.___ ___, 104 S.Ct. ___, 78 L.Ed.2d 267 (12983) also the Court held that the right to be present during all critical stages of criminal proceedings and the right to be represented by counsel are subject to harmless error analysis.

Under the facts of this case, it is clear that there is no reasonable possibility that Petitioner's absence during the individual vior dire could have affected the outcome of this case. Where, as in the instant case, there is no reasonable possibility that the Petitioner's absence was in any manner prejudicial to his case, his absence should be found as harmless error. Hitchock v. State, 413 So.2d 741, 744 (Fla.), cert denied, 459 U.S. 960 (1972). The absence of Petitioner during the limited individual voir dire even if found to be error, does not rise to a level of fundamental error on the facts of this case.

Petitioner having failed to show that but for appellate counsel's alleged errors the result of the proceedings would have been differrent, it is clear that Petitioner has not been denied

effective assistance of counsel. The Petitioner, thus, should not be allowed to circumvent the rule that habeas corpus proceedings do not provide a second or substitute appeal by raising this meritless allegation of ineffective assistance of appellate counsel.

Respondent acknowledges that Petitioner raised the shifting of the burden to prove innocence by the instructions given to the jury on ineffectiveness of appellate counsel basis by incorporation by reference to issue 3. Respondent submits, Petitioner once again has failed to meet the Strickland standard as he has failed to show deficient performance or prejudice under that issue as well. The merits of that claim will be discussed infra.

In conclusion, Respondent submits that this Court's remarks in Downs v. State, 453 So.2d 1102 (Fla. 1984), are particularly appropriate to the instant case where there were twenty-seven issues raised on appeal:

> In Florida, there has been a recent proliferation of ineffectiveness of counseling challenges. Criminal trials resolved unfavorably to the defendant have increasingly come to be followed by a second trial of counsel's unsuccessful defense. Although courts have found most of these challenges to be without merit, defense counsel, in many of the cases, have been unjustly subjected to unfounded attacks upon their professional competence. A claim of ineffective assistance of counsel is extraordinary and should be made only when the facts warrant it. It is not a claim that is appropriate in every case. It should be the exception rather than the rule.

453 So.2d at 1107.

Based on the foregoing, the Respondent submits that this Court should deny Petitioner's petition for writ of habeas corpus due to ineffective assistance of appellate counsel

III

Sandstrom issue: INSANITY INSTRUCTIONS, BURDEN OF PROOF

A. MERITS

In his third claim for state habeas relief, Petitioner challenges the instructions on insanity actually given at trial, as seating an impermissible burden of proof on Martin, on the issue of insanity, hereby allegedly violating his Fourteenth Amendment due process rights. This claim lacks both procedural and substantive merit.

It is clear from the Record that Martin neither challenged the insanity instructions as proposed at the charge conference (T. 3977), or as actually given (T. 4145-4148), and did not raise this issue on direct appeal. Since this claim challenging the propriety of jury instructions, at the guilt-innocence phase, clearly should or could have been preserved at trial and/or both brought on direct appeal, said claim is barred, and Petitioner should not be allowed to use the vehicle of habeas corpus to obtain a de facto second appeal on this issue. Thomas v. State, 486 So.2d 574 (Fla. 1986); Kennedy v. Wainwright, 483 So.2d 424 (Fla. 1986); Steinhorst v. Wainwright, 477 So.2d 537 (Fla. 1985); McCrae v. State, 439 So.2d 868 (Fla. 1983). Petitioner's claim can not be characteriaed as fundemental error, since it does not "go to the foundation" of the case. Snook v. State, 478 So.2d 403, 405 (Fla. 3d DCA 1985); Ferguson v. State 417 So.2d 639 (Fla. 1982). The United States Supreme Court's recent determination that harmless error analysis is applicable to an error under Sandstrom v. Montana, 442 U.S. 510 (1979), additionally supports rejection of Petitioner's claim of fundemental error. Rose v. Clark, 478 U.S ___, 106 S.Ct.___, 92 L.Ed.2d 460 (1986). Petitioner's failure to establish "cause" and "prejudice", for his failure to bring this claim on direct appeal, can not be established by ocunsel's performance, since not ineffective on this issue, infra, Murray v. Carrier, 106 S.Ct. 2639 (1986); Wainwright v. Sykes, 433 U.S. 72 (1977). Petitioner's assertion that he has so established "cause", by his proof of insanity, is a mere conclusory, "bootstrap"-type

argument that does not establish that any "external factors" prevented such a claim on direct appeal, Murray, supra, at 2644-2646, or that he was actually innocent, notwithstanding his procedural default. Murray, at 2650.

On the merits (assuming arguendo no finding of procedural default), Martin has not established thatthe trial court's instructions on insanity were either erroneous, or reversibly so. The analysis in Sandstrom, supra; Francis v. Franklin, 471 U.S ___, 105 S.Ct.___, 85 L.Ed.2d 344 (1985) and In re Winship, 397 U.S. 358 (1970), seeks to prohibit any jury instructions that require a defendant rather than the State, to bear the burden of proof of an essential element of hte crime charged against him. Rose, 92 L.Ed.2d, supra, at 472; Francis, 85 L.Ed.2d, supra, at 353-355; Sandstrom, 442 U.S. supra, at 512-516. Thus in decisions such as Francis and Sandstrom, as well as their progeny, e.g. see Tucker v. Kemp, 762 F.2d 1496 (11th Cir. 1985) (en banc), and Davis and Kemp, 752 F.2d 1515 (11th Cir. 1985) (en banc), the Federal courts found that instructions seating mandatory presumtions that required juries to place the burden of proof or persuasion on the defendant, on the issue of intent or malice, violated the 14th Amendment protection that the State bear the burden of proof, on constiuent facts and elements of the charged crime. Francis; Sandstrom.

These circumstances are necessarily different and distinguishable, from Martin's position, which involves, as the subject challenged intoduction, the affirmative defense of insanity. While due process considerations require the State to prove the criminal elements of an offense, a defendnat's burden to affirmatively plead and demonstrate an affirmative defense is not unconstitutional due process grounds. Snook, supra, at 405; Patterson v. New York, 432 U.S 197, 209 (1977). Thus the Sandstrom Francis rule and analysis, to this extent, does not apply to insanity, since such a defense is not per se an element of first-degree murder to be proved, for conviciton. Sandstrom, at 512.

In examining the actual charge given to the jury, and the nature of presumptions therein, Sandstrom, at 514; Francis, at 353, it can not be said that Petitioner had an unconstitionally placed burden of proof as to this issue. The jury was inforced taht "is for you to determine the question of sanity of the defndant...", and that unless the contrary was "shown by the evidence" Martin was to be presumed sane; however, the jury charge continued that if there was evidence which "tends to raise a reasonable doubt" as to sanity, the State had to prove sanity, beyond a reasonable doubt, and that any remaining existence of reasonable doubt as to sanity at the time of the crime, obligated the jury to acquit Petitioner, as "not guilty by reason of insanity". (T. 4146, 4147). Taken as a whole, the State clearly retained the burden of proof as to sanity, if the defendant raised such an issue as an affirmative defense. At most, Petitioner had the burder of asserting and/or going forward with evidence of doubt to sanity, which triggered the State's ultimate burden of proof. Yohn v. State, 476 So.2d 123, 124-128 (Fla. 1985). Thus, the placement of the burden of production at most on the defendant, and the ultimate burden of proof on the State as to sanity if at issue satisfies the requirements of Sandstrom, and does not offend due process. Sandstrom, at 515, 516. Furthermore, the instruction to the jury, that it is their decision to determine the issue, when coupled with the other above-referenced instructions, leaves the jury a choice, such that the presumption, if any, is permissive, rather than mandatory. Francis, at 353-354, Sandstrom, at 515. Of crucial significance, is that State herein, unlike the prosecution is Francis, Sandstrom and like cases, retained the burden of proving intent, as an element of murder, whether or not Petitioner satisfied his burden of prosecution, under the given instruction. Rose; Francis; Sandstrom.

Assuming arguendo that the challenged instruction was error under Sandstrom, such error was harmless, in light of the overwhelming evidence of guilt, including the intent element,

against Petitioner. As noted by this Court. in reciting and approving the trial court's factual finding in support of the death penalty, there was substantial competent evidence demonstratiny the confessed, extremely violent and deliberate killing of a defenseless woman, by repeated stab wounds to the throat, preceded by a struggle by the victim. Martin, 420 So.2d, at 584. This Court also observed that there was substantial competent evidence to support the "reconciliation" of conflicting evidence, at sentencing, against Petitioner, on the mental mitigating factors of "extreme mental or emotional disturbance", and "substantial impairment of his capacity to appreciate the criminality of his conduct, and/or conform it to law. Id., §921.141(6)(b),(6)(f), Fla.Stat. (1977). Under such circumstances, any error was harmless beyond a reasonable doubt. Rose, 92 L.Ed.2d, at 471, 472; Dobbs v.Kemp, 790 F.2d 1499, 1508-1509 (11th Cir. 1986).

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner has alleged that, should this Court chose not to review his Sandstrom claim on its independent merits, that it examine the claim, from the standpoint of ineffective counsel on appeal. This claim is equally unavailing to Petitioner.

Initially, appellate counsel can not be faulted for failing to bring this claim on appeal, because it was not properly preserved by objection at trial. (T. 3977); Jackson v. State, 452 So.2d 533, 536 (Fla. 1984). Additionally, appellate counsel could have reasonably determined that under the analysis argued here in 3A, supra, such a claim was without merit. Francis v. Wainwright, 741 F.2d 1275, 1285 (11th Cir. 1984); Funchess v. State, 449 So.2d 1283, 1286 (1984). Finally, appellate counsel could reasonably have determined that trial counsel had strategically determined that he had met the burden of production, such that the State was forced to its burden of proof of sanity at the time of the crime, under the instructions given. Smith, supra; McCrae; supra; Demps v.State, 416 So.2d 808 (Fla. 1982). Such a reasonable construction is borne out by this

Court's observance of the presentation of one doctor at trial who deemed him insane, and the existence of "numerous psychiatric examinations" of Petitioner, which seated conflicting testimony on insanity. Martin, at 584. This Court's resolution of such conflicts, lends further credence to the reasonable of appeallate counsel's decision to force this issue, and perhaps concentrate on issues, such as the admission of the confession, thought to be more dispositive and meritorious. Id.; also, see Cave, 476 So.2d at 183, n. 1.

IV.

THE JURY WAS CORRECTLY INSTRUCTED AS TO THE CONSEQUENCES OF RETURNING A VERDICT OF NOT GUILTY BY REASON OF INSANITY AS WELL AS TO THE CONSEQUENCES OF A VERDICT OF GUILTY.

Once again Petitioner complains that the trial court erred in instructing the jury as to the consequences of returning a verdict of not guilty by reason of insanity. Respondent would point out however that this issue was decided against Petitioner when he raised it in his direct appeal to this Court. Martin, 420 So.2d at 584-585. This Court's previous determination of this issue constitutes the law of the case as to this particular claim. Greene v. Massey, 384 So.2d 24 (Fla. 1980). Respondent would further point out that because Petitioner raised this issue on his direct appeal, he may not raise it now in his present petition for writ of habeas corpus. Kennedy v. Wainwright, 424 So.2d 483 (Fla. 1986); Armstrong v. State, 429 So.2d 287 (Fla. 1983). Habeas Corpus is not a vehicle for obtaining a second determination of matters previously decided on appeal. Messer v. State, 439 So.2d 875 (Fla. 1983).

Respondent maintains that this issue was correctly decided by this court in its previous opinion affirming Petitioner's conviciton and sentence of death and that it need not be re-examined now. Kuhlman v. Wilson, 474 U.S. 106 S.Ct. __, 91 L.Ed.2d 364 (1986).

In the instant case, the trial court instructed the jury regarding the consequences of a verdict of not guilty by reason of insanity in a manner slightly at variance with Florida Standard Jury Instruction 2.16. (R. 4168-4169). The court used the term "may" rather than "shall" when instructing the jury as to the various alternatives which could be made in the disposition of a defendant who was found not guilty by reason of insanity. Respondent maintains that the meaning of the instructions were done no injustice by the use of the word "may". The context which the word shall is used in Fla.R.Crim.P. 3.217 (formerly 3.210) clearly evinces directory action rather

than mandatory action. This is so because of the fact that various alternatives are given for the disposition of such a defendant. Obviously, the trial court cannot mandatorily comply with each of the alternatives at the same time. Use of the word "may" therefore does not change the meaning of the law. Furhtermore, while it is true that the tial court modified the Florida Standard Jury Instruction in this regard, it stated on the record why it was doing so, including the legal basis therefore (R. 3977). As such, Fla.R.Crim.P. 3,895 was fully complied with. Yohn v. State, supra.

Regarding Petitioner's argument that the trial court on voir dire, improperly told the jury that if Petitioner was not sentenced to death, he could be sentenced to life in prison without eligibility for parole for twenty-five (25) years "unless the legislature changes its mind", Respondent would submit that since Petitioner did not raise this particular aspect of this issue earlier, he is prevented from raising it now. Armstrong, supra. Further any confusion as to this statement was cleared up when the trial court correctly instructed the jury that the sentence for first degree murder was death or life without parole for twenty-five (25) years (R. 4489). Romero v. State, 341 So.2d 263 (Fla. 3d DCA 1977); cert denied, 347 So.2d 1250 (Fla. 1977). Thus, it is clear that the jury was correctly instructed as to the consequences of a verdict of guilt. Contrary to Petitioner's assertions otherwise, the jury was not left to speculate as to whether Petitioner might be able to walk the streets at the whim of the legislature. California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983). Hence, the jury was also not prevented from recommending life by virtue of the judges earlier comments.

V

COOPER-LOCKETT CLAIM - ABUSE OF PROCESS, FLORIDA

Defendant has alleged that the existence, consideration and/or presentation of non-statutory mitigating circumstances at his sentencing hearing, was unfairly precluded or limited, in violation of his Eighth and Fourteenth Amendment rights, according to Harvard, 486 So.2d 537 (Fla. 1986); Lockett v. Ohio, 438 U.S. 586 (1978), and other similar cases. Because this claim was or could have been known, and presented at the time of Martin's initial post-conviction motion, Defendant has clearly abused Rule 3.850, Fla.R.Crim.P. (1985).

An examination of Martin's initial motion, filed in August, 1984, demonstrates that such a "Cooper-Lockett" claim was not raised in any manner, therein. Defendant's Rule 3.850 Motion, August 20, 1984, at 1-50; Martin v. State, 455 So.2d 370 (Fla. 1984). Thus, this ground, as presently stated, clearly presents a new or different claim, and if such ground was known or discoverable in August, 1984, and no cause for not then raising the claim is demonstrable, Martin must be deemed to have abused the rule. Stewart, 11 FLW, at 509; Christopher, at 24; Witt, at 512.

It is clear that the Cooper-Lockett claim, which arose as a result of the decision in Lockett in 1978, and this Court's decisions in Cooper v. State, 336 So.2d 1133 (Fla. 1976), cert. denied, 431 U.S. 925 (1977), and Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956 (1979), was known, as of August, 1984. State v. Ziegler, 11 FLW 233 (Fla., May 19, 1986); Hitchcock v. Wainwright, 770 F.2d 1514 (11th Cir. 1985)(en banc); Hitchcock v. State, 432 So.2d 42 (Fla. 1983); Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985)(en banc). The Eleventh Circuit's tracing of the Lockett claim, in Hitchcock, 770 F.2d, supra, at 1516-1517, in a variety of circumstances, certainly reflects a chronological history, pre-dating Martin's first state post-conviction motion in August, 1984. As with other capital defendants such as Songer and Hitchcock, Martin

could certainly have known or discovered the legal bases for such a claim in 1984. It is even more clear that, from the trial Record, Martin could have discovered the factual bases for a Cooper-Lockett claim, which he now initially raises, when he first filed for state post-conviction relief, then represented by the same counsel as now. Hitchcock, at 1516-1517. Since no reasonable cause has been presented for Martin's failure to raise this claim in his 1984 state collateral proceeding, this claim should be dismissed, and/or considered procedurally barred.

Contrary to Martin's assertions and implications, the decisions by this Court in Harvard, and the 11th Circuit in Hitchcock, cannot be deemed to be a change in the law, that could not have been discovered, so as to avoid an "abuse of the rule" finding. Witt, 465 So.2d, at 512. As this Court noted in Ziegler, supra, when faced with a similar Harvard claim, alleging improper restrictions on the presentation of non-statutory mitigating circumstances, the Harvard case "neither mandates nor allows an evidentiary hearing to reconsider the issue." Ziegler, at 233 (emphasis added). The conclusion this Court reached in Ziegler, to deny post-conviction relief because of a successive petition, further substantiates the conclusion that the advent of Harvard does not create a change in the law, in accordance with Witt v. State, 387 So.2d 922 (Fla. 1980), that is so radical and novel a concept that the merits of the claim should be reached, notwithstanding the procedural bars to its consideration. Ziegler; Harvard; Witt, supra. This has been most recently confirmed by the Eleventh Circuit in Hargrave v. State, Case No. 84-5102 (11th Cir., Nov. 3, 1986), slip op., at 11-12, in which said Court deemed the Cooper-Lockett claim, and line of cases, to represent an evolutionary refinement, not constituting the type of jurisdictional or novel legal upheaval that would obviate a finding of abuse of the writ. Id. In fact, the very nature of the Hitchcock

decision, in its recounting of the evolution of the claim, and its result -- an evaluation of each case, on a case-by-case basis, utilizing various criteria to determine whether there was improper restriction of the presenting of non-statutory mitigation -- did not alter, change or revolutionize prior precedent on the issue. See Hitchcock; Songer, supra; Hargrave, supra. In any event, the decision in Hitchcock, as an intermediate Federal decision, cannot be considered a "change in the law," or "clear break with the past" within the meaning and application of a successive petition bar to consideration. Witt, 465 So.2d, at 512; Witt, 387 So.2d, supra; State v. Washington, 453 So.2d 389, 392 (Fla. 1985); Reed, 82 L.Ed.2d, supra, at 15-16.

Thus, since Martin failed to initially claim the benefit of a Cooper-Lockett claim, and has offered no justifiable cause for this failure, his claim should be dismissed, as an abuse of process under Rule 3.850. Stewart, at 509; Christopher; Witt; Ziegler.

In the absence of any express statement by the U.S. Supreme Court that all successive petitions raising a Cooper-Lockett claim should be stayed, pending resolution of Hitchcock v. Wainwright, cert. granted, ___U.S.___, 106 S. Ct 2888, 90 L.Ed.2d 976 (1986), the mere pendency of this issue in Hitchcock, in and of itself, does not warrant a stay of execution, or circumstance establishing, by a preponderance of evidence, that Martin has not abused the writ. Potts, supra; Wicker v. McCotter, 798 F.2d 155, 157-158 (5th Cir. 1986).

V-B

MARTIN RECEIVED AN INDIVIDUALIZED SENTENCING DETERMINATION IN WHICH CONSIDERATION OF MITIGATING FACTORS WAS NOT LIMITED

The Florida death penalty scheme has never limited the circumstances to be considered in mitigation to those enumerated in the statute. The United States Supreme Court noted this fact in its decision approving the Florida law, Proffitt v. Florida, 428 U.S. 242, 250 n. 8 (1976), issued well before its definitive holding in Lockett v. Ohio, 438 U.S. 586 (1978), that mitigating factors cannot be limited.

Relying on the language in Proffitt, defense counsel at trial repeatedly stated it was his opinion that the mitigating factors were not limited. (T 4406, 4223, 4270, 4479). The trial court agreed, and granted defense counsel's request that the jury be given a special instruction to that effect. (T 4413-4414). Evidence and argument relating to non-statutory mitigating factors were presented. The trial court instructed the jury, "The aggravating circumstances which you may consider are limited to those upon which I will instruct you. However, there is no such limitation upon the mitigating factors which you may consider." (T 4491).

In light of the foregoing facts, it is evident that in Martin's May, 1978, sentencing proceeding, consideration of the mitigating factors was not limited. No court to date has granted relief to a defendant claiming a "Cooper/Lockett problem" in the face of facts like these, and Martin is entitled to none.

In Harvard v. State, 486 So.2d 537 (Fla. 1986), the Florida Supreme Court did hold a defendant seeking post-conviction relief is entitled to resentencing when it is apparent from the record the sentencing judge believed the mitigating factors were limited. However,

in Maxwell v. Wainwright, 490 So.2d 927 (Fla. 1986), and Spaziano v. State, 489 So.2d 720 (Fla. 1986), and Zeigler v. State, 11 FLW 233 (Fla. op. filed May 19, 1986), decided subsequently, the court examined the records and in those cases determined the defendants were not entitled to relief because there was no restriction on the evidence in mitigation. As the State has discussed, in this case it is clear from the record there was no limitation. Thus, under the foregoing decisions, there is no error.

Moreover, the direct appeal was not decided until 1982. If there were any error in this regard, it could have been raised on direct appeal. The failure to do so is a procedural default which, standing alone, is a sufficient reason to deny relief. Zeigler v. State, supra.

The Eleventh Circuit, too, has dealt with Cooper/Lockett claims on a case by case basis, by examining the case record to determine if mitigating factors were limited. In Hitchcock v. Wainwright, 770 F.2d 1514 (11th Cir. 1985) (en banc), the court held an analysis should be made in each case to evaluate the claim in light of the case's particular facts. If it is clear non-statutory factors were not considered, relief must be granted. E.g., Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985). If there was no restriction, relief should be denied. E.g., Johnson v. Wainwright, 778 F.2d 623 (11th Cir. 1985); Tafero v. Wainwright, 796 F.2d 1314 (11th Cir. 1986); Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986); Palmes v. Wainwright, 725 F.2d 1511 (11th Cir. 1984).

As the State has shown, an examination of the record here requires denial of relief. Mitigating evidence and argument were presented and the jury was specifically instructed that it could consider non-statutory factors in mitigation. It is the overwhelming nature of the aggravating factors, and not restriction of evidence in mitigation, that led to the imposition of the death penalty in this case.

VI

"ENMUND" CLAIM

As his sixth claim, Petitioner further argues that his Eighth Amendment rights were violated, by the absence of a specific jury finding that he was guilty of premeditated murder, in light of his alleged lack of mental culpability. This claim lacks both procedural and substantive merit.

This claim clearly represents an argument which could have or should have been brought, in Petitioner's initial direct appeal of his conviction and sentence in 1982. As such this claim is procedurally barred herein. Thomas v. State, 486 So.2d 574 (Fla. 1986); Kennedy v. Wainwright, 483 So.2d 424 (Fla. 1986); Steinhorst v. Wainwright, 477 So.2d 537 (Fla. 1985); McCrae v. State, 439 So.2d 868 (Fla. 1983); Hargrave v. State, 388 So.2d 1021 (Fla. 1980).

Assuming arguendo this Court reaches the merits, Appellant can not possibly place himself in the same position as the getaway driver who did not kill, intend to kill, attempt to kill, or contemplate that a killing or lethal force would be used. Enmund v. Florida, 458 U.S. 782 (1982); Cabana v. Bullock, ___U.S. ___,106 S.Ct. 689, 88 L.Ed.2d 704 (1986). As noted by this Court on direct appeal, Martin took the victim, after robbing her at knife point, and committing sexual battery upon her, to a county dump and walked her to an area where he alone first tried to "strangle or suffocate" the victim, then "stabbed her several times in the throat", which was the cause of her death. Martin, 420 So.2d 583, 584 (Fla. 1982). This Court further referred to Petitioners confessions to the killing, and to the fact that the jury's verdict, and trial court's factual findings were "amply supported by the record". Martin, supra, at 585. Thus, this Court's prior reference to and approval of the trial court's factual findings, clearly fulfill the requirements of Enmund and Cabana, which does not require the jury to make a specific finding as to intent or premeditation. Cabana, 88 L.Ed.2d, at 711, 715, 716; Tafero v. Wainwright, 796 F.2d 1314,

1318 (11th Cir. 1986). Furthermore, the Eighth Amendment concerns therein are inapplicable to Petitioner, who by himself clearly killed, attempted to kill, and/or intended to kill. Enmund; Cabana; Jones v. Thizpen, 788 F.2d 1101 (5th Cir. 1986); Garcia v. State, 492 So.2d 360, 368 (Fla. 1986); Case v. State, 476 So.2d 180, 187 (Fla. 1985)

VII
"RACE OF VICTIM" CLAIM

With reference to this issue, which appears as issue 7 in Petitioner's Petition for Habeas Corpus, Respondent readopts and incorporates by reference, the argument made in its anticipatory Response to Petition for Habeas Corpus, at pages 20-31.

CONCLUSION

WHEREFORE based upon on the foregoing reasons and authorities cited herein, as well as reasons and authorities cited in its anticipatory Response to Petition for Habeas Corpus, Respondent respectfully requests that the Petitioner's Petition for Habeas Corpus be DENIED and DISMISSED by this Honorable Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Supplemental Response to Petition for Habeas Corpus has been furnished to, MICHAEL A. MELLO, ESQUIRE, Office of the Collateral Representative, Independent Life Building, 225 Jefferson Street, Tallahassee, Florida 32301, 13th day of November, 1986.

OF COUNSEL