IN THE SUPREME COURT OF FLORIDA

LEVIS LEON ALDRIDGE,
a/k/a LEVIS LEON ALDRICH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 70,175

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, FL 32399-1050

JOY B. SHEARER
Assistant Attorney General
111 Georgia Avenue, Room 204
West Palm Beach, FL 33401
(305) 837-5062

RICHARD G. BARTMON
Assistant Attorney General

Counsel for Appellee

TABLE OF CONTENTS

TABLE OF CONTENTS - Continued

TABLE OF CITATIONS

TABLE OF CITATIONS (cont.)

TABLE OF CITATIONS (cont.)

TABLE OF AUTHORITIES

TABLE OF CITATIONS Cont.)

TABLE OF AUTHORITIES - Continued

PRELIMINARY STATEMENT

The Appellant was the Defendant and the Appellee was the Prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida. In the brief, the parties will be referred to as they appear before this Honorable Court, or by name.

The following symbols will be used:

"R"	The record filed on direct appeal, FSC Case No. 46,958;
"T"	The trial transcript, filed in FSC Case No. 46,958;
"RH"	The record filed in the appeal of Aldridge's prior 3.850 motion, FSC Case No. 61,673;
"TH"	The transcript of the 1981 3.850 hearing, filed in FSC Case No. 61,673;
"P"	The record filed in this appeal from the denial of Aldridge's successive 3.850 motion;
"SA"	The State's appendix, which is separately bound and filed herewith.

STATEMENT OF THE CASE

The present case is Aldridge VI; i.e., this is the sixth occasion in the twelve plus years since his conviction and death sentence that the Appellant has sought relief in this Court. In its Aldridge V opinion, decided in 1983, the court summarized the procedural history of the case as follows:

> . . . . This is the fifth occasion on which this cause has been before this Court.
>
> In Aldridge I we affirmed petitioner's conviction and sentence of death. Aldridge v. State, 351 So.2d 942 (Fla. 1977), cert. denied, 439 U.S. 882, 99 S.Ct. 220, 58 L.Ed.2d 194 (1978).
>
> In Aldridge II, in an unreported order dated December 21, 1979, we denied an application for relief from allegations that this Court, in considering the appeal of Aldridge's conviction and sentence, improperly found two aggravating circumstances which had not been found by the trial judge. Aldridge's petition for certiorari to the United States Supreme Court on this issue was denied. Aldridge v. Florida, 449 U.S. 891, 101 S.Ct. 251, 66 L.Ed.2d 118 (1980).
>
> In Aldridge III, petitioner filed an application for relief under Florida Rule of Criminal Procedure 3.850. We denied relief on all issues except the issue of alleged ineffective assistance of trial counsel. On that issue, we remanded the cause to the trial court for an evidentiary hearing. Aldridge v. State, 402 So.2d 607 (Fla. 1981).

> In Aldridge IV, after the trial court conducted an evidentiary hearing and denied Rule 3.850 relief, the case was returned to this Court and we affirmed, concluding that Aldridge failed to show the required prejudice for a finding of ineffective assistance of counsel under the test adopted by this Court in Knight v. State, 394 So.2d 997 (Fla. 1981). Aldridge v. State, 425 So.2d 1132, 1136 (Fla. 1982).

Aldridge v. Wainwright, 433 So.2d 988, 989 (1983). [Aldridge V was an original habeas action filed in the Florida Supreme Court shortly after the Governor of Florida signed Appellant's second death warrant.]

The present case is an appeal from the trial court's summary denial of the Appellant's successive Fla. R. Crim. P. 3.850 motion. The motion was filed January 2, 1987, the last day it could have been filed in order to fall within the time limitations of the rule.[1] (P 10-61). The Governor of Florida signed a death warrant for the Appellant on February 2, 1987 (P 237). The Appellee filed a response to the motion on February 6, 1987 (P 238-277). Three days later, the trial court denied the motion, both as procedurally barred, and alternatively, as being without merit (P 281-284). The trial court attached pertinent portions of the record to its order; however, the attachments

[1] Rule 3.850 (1985) gave all persons whose judgments and sentences became final prior to January 1, 1985, until January 1, 1987, to file. January 1 was a legal holiday. See, Fla. R. Crim. P. 3.040.

were omitted from the Record on Appeal. The Appellee has therefore prepared an appendix containing the order and attachments which is filed herewith (SA 1-51). A separate order was entered denying the Appellant's motion for issuance of a subpoena duces tecum (P 285).

Subsequently, the Appellant filed a motion for rehearing (P 286-292), which was denied as well (SA 52). This appeal follows (P 293).

STATEMENT OF THE FACTS

The Appellee relies on the findings of fact made by this Court on direct appeal, Aldridge v. State, 351 So.2d 942, 943 (Fla. 1977), and on the appeal from the denial of the prior motion for post-conviction relief. Aldridge v. State, 425 So.2d 1132, 1133-1134 (Fla. 1982). Appellee will, however, highlight a few areas.[2]

Charles Strickland had a confirmed alibi for the time of the murder. Lillie King testified Charles Strickland gave her a ride to a hospital at 11:50 p.m. on September 2, 1974, stayed there with her, and dropped her off at another location at 12:40 a.m. on September 3 (T 409).

Two young girls, Anita Sapp and Jewel Sapp, testified they saw Strickland give his gun to a man on September 2 (T 393-394; 400-402). Jewel Sapp testified Strickland told the girls the man he had given the gun to was the Appellant (T 400, 404). Subsequent to the homicide, Strickland led the police to where he had thrown the gun into a canal; expert testimony established it was the murder weapon (T 482, 490).

The Appellant's explanation for his possession of $500-$600 in cash shortly after the crime was not adequately confirmed by the Department of Corrections receipt.

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[2]The Appellee also relies on and incorporates by reference its statement of the facts in the response filed in the trial court (P 240-244).

The receipt was for $558.58 (T 299). Aldridge had been out of prison for a few days and had paid $200 for a car (T 300), so he could not have still had five to six hundred dollars on the night of the crime.

At the sentencing phase of the trial, defense counsel stated to the jury that the Appellant did not want to spend the rest of his life in prison so for that reason, he was not going to present mitigating circumstances (T 746).

POINTS INVOLVED

I.

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING THE APPELLANT'S SUCCESSIVE CLAIM OF INEFFECTIVE COUNSEL ON THE BASIS THAT IT HAD PREVIOUSLY BEEN LITIGATED AND ON THE ALTERNATIVE GROUND THAT THERE WAS NO SHOWING OF PREJUDICE?

II.

WHETHER THE TRIAL COURT ERRED IN RULING THE APPELLANT'S BRADY CLAIM WAS PROCEDURALLY BARRED BECAUSE IT COULD HAVE BEEN RAISED EARLIER AND THAT IN ANY EVENT, THE PROFFERED EVIDENCE FAILED TO STATE A CLAIM FOR RELIEF BECAUSE IT WAS NOT MATERIAL?

III.

WHETHER THE TRIAL COURT APPROPRIATELY DENIED APPELLANT'S CLAIM THAT HE WAS DENIED A FAIR SENTENCING HEARING UNDER CALDWELL v. MISSISSIPPI, ON THE BASIS OF THE APPELLANT'S FAILURE TO PREVIOUSLY RAISE THE CLAIM AND ON THE ALTERNATE BASIS THAT THE JURY WAS PROPERLY INFORMED OF ITS CAPITAL SENTENCING RESPONSIBILITY?

IV.

WHETHER THE TRIAL COURT APPROPRIATELY DENIED APPELLANT'S CLAIM THAT THE COURT AND JURY WERE IMPROPERLY LIMITED TO CONSIDERATION OF ONLY STATUTORY MITIGATING CIRCUMSTANCES AT SENTENCING ON THE BASIS THAT THE CLAIM WAS PROCEDURALLY BARRED AND WAS CONTRADICTED BY THE RECORD?

POINTS INVOLVED - Continued

V.

WHETHER THE TRIAL COURT APPROPRIATELY DENIED THE APPELLANT'S "RACE OF VICTIM" DISCRIMINATION CLAIM AS ABUSIVE AND SUCCESSIVE, SINCE IT WAS PREVIOUSLY REJECTED AND IS TOTALLY LACKING IN MERIT?

SUMMARY OF THE ARGUMENT

The trial court correctly ruled that both the ineffective counsel and Brady claims were procedurally barred pursuant to Fla. R. Crim. P. 3.850 (1985). The ineffective counsel claim was resolved in the prior litigation and therefore could not be redetermined. The Brady claim, while not previously raised, could have been, and the failure to do so was an abuse of the Fla. R. Crim. P. 3.850 procedure.

The trial court's alternative ruling that the claims lacked merit was also correct. No evidentiary hearing was necessary because the files and records adequately refuted the allegation, which were legally insufficient to state a basis for relief. The "new" evidence is cumulative to what was already known and would not have changed the trial's outcome. Therefore, it does not establish the "prejudice" prong of Strickland v. Washington, 466 U.S. 668 (1984), necessary to prevail on an ineffective counsel claim, nor is it "material" so as to constitute a valid Brady claim. United States v. Bagley, ___ U.S. ___, 87 L.Ed.2d 481 (1985).

The trial court correctly rejected the Appellant's Caldwell claim because although not previously raised, it was known and/or conceivably discoverable at the time of direct appeal, or at least when the first post-conviction

motion was filed in 1979. Caldwell is an evolutionary refinement in the law, so it does not come under the Witt v. State, 387 So.2d 922 (Fla. 1981) exception. Moreover, this claim was rejected on the merits in Pope v. Wainwright, 496 So.2d 796 (Fla. 1986).

The trial court appropriately barred Appellant's "Cooper-Lockett" claim because he failed to raise the issue on direct appeal and it was determined on the merits in his initial post-conviction proceeding. The record shows there was no limitation by the trial court or the State on the presentation or consideration of mitigating circumstances.

The trial court appropriately barred the Appellant's "race of the victim" claim because it was not raised on direct appeal and further, was determined in the previous post-conviction litigation. Moreover, this Court has consistently rejected the claim on its merits in numerous decisions.

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN SUMMARILY DENYING THE APPELLANT'S SUCCESSIVE FLA. R. CRIM. P. 3.850 INEFFECTIVE COUNSEL CLAIM AS IT WAS PROCEDURALLY BARRED; ALTERNATIVELY, THE APPELLANT'S ALLEGATIONS ARE LEGALLY INSUFFICIENT TO DEMONSTRATE PREJUDICE.

II.

THE TRIAL COURT DID NOT ERR IN DETERMINING THE APPELLANT'S BRADY CLAIM WAS PROCEDURALLY BARRED BECAUSE IT COULD HAVE BEEN ASSERTED PREVIOUSLY; ALTERNATIVELY, SUMMARY DENIAL WAS APPROPRIATE BECAUSE THE PROFFERED EVIDENCE IS NOT MATERIAL.

Introduction

The Appellant asserts that his ineffective counsel and Brady claims were not procedurally barred under Fla. R. Crim. P. 3.850 and that their merits could not be satisfactorily addressed without an evidentiary hearing. He challenges both aspects of the trial court's ruling to the contrary. It is the State's position that the trial court was correct on both points. First, the claims are clearly barred as successive by Fla. R. Crim. P. 3.850 (1985). Second, the allegations of the motion, when considered in conjunction with the records of the case and the matters appended to the trial court's order (SA 1-51),

are legally insufficient to state a basis for vacating, over twelve years later, the Appellant's lawfully imposed conviction and sentence.

A. The Procedural Bar

The trial court ruled the Appellant's motion was procedurally barred because it raised grounds which were either previously determined on the merits or which could have been alleged in the prior post-conviction motion, and the failure to have raised them at that time was an abuse of procedure (P 281). This was a proper application of the procedural bar of Fla. R. Crim. P. 3.850 (1985), governing successive motions. It provides, in pertinent part:

> A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant or his attorney to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

In both Christopher v. State, 489 So.2d 22 (Fla. 1986) and Stewart v. State, 495 So.2d 164 (Fla. 1986), this Court held that the portion of the rule quoted above was a procedural change which could be applied retroactively to persons who filed their initial post-conviction motions

prior to the rule's January 1, 1985, effective date.[3] Thus, pursuant to the successive motion portion of Rule 3.850, the Appellant was barred from raising the ineffective counsel ground which had been previously addressed on its merits. Darden v. Wainwright, 495 So.2d 179 (Fla. 1986); Christopher v. State, supra; Straight v. State, 488 So.2d 530 (Fla. 1986). He was likewise precluded from raising the new Brady claim not previously asserted, since he failed to show it was not known or conceivably discoverable at the time of the filing of the first motion and there was no demonstrable cause for failing to present it earlier. Stewart v. State, 495 So.2d 164 (Fla. 1986); Christopher v. State, supra.

1. Ineffective Counsel

The Appellant acknowledges his ineffective assistance claim was litigated in the prior 3.850 motion. The motion was filed on November 2, 1979 (SA 5-13), amendments were added on August 19, 1981 (SA 15-21), and there was a two-day evidentiary hearing conducted on the matter on December 8 and 9, 1981 (TH). At the conclusion of the hearing the trial judge, the Honorable Dwight L. Geiger,

[3]Pursuant to these cases, Appellant's argument that the Brady issue is not procedurally barred because it was not previously litigated and when his first motion was filed, piecemeal litigation was permitted, is clearly without merit.

made extensive findings of fact (SA 22-49), and subsequently entered a written order denying the motion (SA 50-51). On appeal, this Court affirmed the trial court's ruling and held that even if defense counsel's failure to take depositions was a deficiency, there was no showing of prejudice that would have affected the outcome. Aldridge v. State, 425 So.2d 1132, 1136 (Fla. 1982).[4]

In view of the thorough and conscientious examination given the ineffective counsel claim by the courts on the first Rule 3.850 litigation, Judge Geiger was certainly justified in his application of the procedural bar when the Appellant sought to re-argue the issue in the successive motion. This Court has clearly held that where claims of ineffective counsel have been previously decided, the fact that defendants raise somewhat different facts to support the same legal claim of counsel ineffectiveness does not entitle them to relitigate the issue. Sullivan v. State, 441 So.2d 609 (Fla. 1983); Darden v. State, 496 So.2d 136 (Fla. 1986); Adams v. State, 484 So.2d 1216 (Fla. 1986); Booker v. State, 12 FLW 52 (Fla. January 5, 1987).

Nevertheless, analogizing to Rule 9(b) of the rules governing 28 U.S.C. §2254 proceedings, the Appellant

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[4]The Eleventh Circuit, in a 28 U.S.C. §2254 appeal, reached this same conclusion. Aldrich v. Wainwright, 777 F.2d 630 (11th Cir. 1985), cert. denied, ___ U.S. ___, 93 L.Ed.2d 297 (1986).

contends he should have been afforded an evidentiary hearing at least as to whether he could show good cause for the failure to previously raise the alleged "newly-discovered" facts underlying the ineffective counsel claim. Assuming arguendo that this Court considers the analogy appropriate, no such hearing was necessary here because the State's response to the motion filed below did not dispute the Appellant's assertions. Rather, the State pointed out that the alleged "new" facts could have been discovered at the time of the prior litigation, based on the Appellant's proffered documents and the case file (P 246-251). Thus, there was nothing alleged in the Appellant's second motion that necessitated looking beyond the existing files and records. In these circumstances, federal courts do not require an evidentiary hearing before applying the Rule 9(b) bar. See, Jones v. Estelle, 722 F.2d 159, 164 (5th Cir. 1983) (en banc); Allen v. Newsome, 795 F.2d 934, 938 (11th Cir. 1986). Accordingly, none was required here.

In a final attempt to obtain a waiver of the Rule 3.850 procedural bar, the Appellant asserts "the ends of justice" require re-determination of the ineffective counsel claim. This is not so; the "ends of justice" require a re-determination only if there is a "colorable showing of factual innocence." Kuhlmann v. Wilson, 474 U.S. ___, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986) (plurality). As the Appellee will develop more fully in its discussion

of the merits, infra, the facts proffered in the successive motion do not even amount to a showing of prejudice under Strickland v. Washington, 466 U.S. 668 (1984). Having failed to meet the prejudice prong of Strickland, which requires only a reasonable likelihood the factfinder would have had a reasonable doubt respecting guilt, Appellant certainly cannot establish the proffered information shows his innocence.

Therefore, the trial court's holding that the Appellant was not entitled to relitigate the ineffective counsel claim was correct and should be affirmed.

2. Brady

The trial court ruled the Appellant's claim based on Brady v. Maryland, 373 U.S. 83 (1963), was procedurally barred because although not raised in the prior motion, it could have been, as the facts alleged in support were available in 1979-1981 (P 282). This ruling was correct, for claims inexcusably omitted from a previous Fla. R. Crim. P. 3.850 motion may be denied without an evidentiary hearing. Adams v. State, 484 So.2d 1216 (Fla. 1986); Thomas v. State, 486 So.2d 577 (Fla. 1986). Certainly the legal basis for the claim existed because Brady was decided in 1963. The factual basis was also available. The Florida Public Records Act, Chapter 119,

was in existence at the time of the prior motion so the Appellant could have sought disclosure of the sheriff's files at that time to ascertain whether there were other suspects. Regarding Strickland's prior representation by the prosecutor, this information was available in the Nineteenth Judicial Circuit Court files as well as the Nineteenth Judicial Circuit Public Defender's Office files. Subpoenas could have been requested during the prior litigation for Strickland's parole records or any other material counsel thought pertinent.

It is evident from an examination of the Appellant's proffer that the purported Brady material could reasonably have been brought to light in the course of the two-year period while the prior Rule 3.850 motion was litigated. For that reason, no evidentiary hearing on the failure to do so was necessary. Jones v. Estelle, supra; Allen v. Newsome, supra. In Thomas v. State, 486 So.2d 577 (Fla. 1986), this Court affirmed a trial court holding that a Brady claim was barred from litigation in a second Fla. R. Crim. P. 3.850 motion because it was an abuse of procedure. Although only the legal holding is stated in the opinion and not the fact the defendant raised a Brady issue, the Eleventh Circuit's opinion in Thomas v. Wainwright, 788 F.2d 684 (11th Cir. 1986), stay/cert. denied, ___ U.S. ___, 106 S.Ct. 1623, 90 L.Ed.2d 173 (1986), approved this

Court's decision and specifically found the Brady argument "both frivolous and an abuse of the writ." Thomas v. Wainwright, at 688. The same result was properly reached by the trial court below.

Finally, as to the Appellant's argument that the Brady issue is deserving of plenary consideration because it raises a colorable claim of innocence, the Appellee will rely on its discussion of the merits, infra. As stated there, the purported Brady evidence is not "material" as that term is defined in United States v. Bagley, ___ U.S. ___, 87 L.Ed.2d 481 (1985). Since it is not material, the "ends of justice" do not require that it be considered. Kuhlmann v. Wilson, supra.

B. Merits

The trial court ruled in the alternative that both the ineffective counsel and Brady claims were without merit (P 282-283). Without waiving its position that the procedural bar aspect of the trial court's ruling is dispositive, the Appellee will likewise discuss the merits in the alternative.

The trial judge was not required to hold an evidentiary hearing because the files and records of the case conclusively refuted the Appellant's claims, and the claims were legally insufficient to state grounds for

relief. As this Court recently held in Agan v. State, 12 FLW 99 (Fla. February 5, 1987), a motion to vacate may be denied where the motion and the record of the case conclusively demonstrate the movant is entitled to no relief. In Agan, the court noted that the trial judge who denied the 3.850 motion had tried the case. While Judge Geiger, who denied the motion below, was not the original trial judge, he conducted the evidentiary hearing in 1981 on the previous post-conviction motion and thus was completely familiar with the case. Other recent decisions of this Court which have approved summary denials of 3.850 motions in capital cases where the records refute the allegations and the claims are legally insufficient include: Bush v. Wainwright, Fla. Sup. Ct. 68,617 and 68,619 (February 26, 1987); Thomas v. State, 486 So.2d 577 (Fla. 1986); Harich v. State, 484 So.2d 1239 (Fla. 1986); Mann v. State, 482 So.2d 1360 (Fla. 1986); and Porter v. State, 478 So.2d 33 (Fla. 1985). These authorities mandate affirmance of the case sub judice.

1. Ineffective Trial Counsel

The Appellant's claim of new evidence which shows his trial counsel were ineffective is, like the matters presented in the prior motion, insufficient to establish prejudice so as to entitle him to relief under Strickland v. Washington, 466 U.S. 668 (1984). The Strickland standard

requires that a defendant show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id., 466 U.S. at 694.

The Appellant claims there was a conflict of interest arising from the fact that the prosecutor, Robert Stone, had represented the State's witness, Charles Strickland, while Stone was a Public Defender in 1972 (P 89-95). This allegation is legally insufficient to show a violation of the Appellant's rights. According to the Appellant's proffered documents, Mr. Stone's representation of Strickland terminated on March 24, 1972, after the filing of a notice of appeal (P 96-98). The litigation involving Strickland was over and Mr. Stone's, as well as the Nineteenth Judicial Circuit Public Defender's, representation of Strickland had terminated over two and a half years before the Appellant was indicted. Strickland's 1972 convictions for larceny of an automobile were unrelated to the 1974 murder committed by Aldridge.

There was obviously no conflict arising from these facts, for a conflict of interest arises when one defendant stands to gain significantly by adding probative evidence or advancing plausible arguments that are damaging to the cause of a co-defendant whom counsel is also representing.

Webb v. State, 433 So.2d 496, 498 (Fla. 1983). In this case, Strickland and Aldridge were never co-defendants. This Court recently held in Porter v. State, 478 So.2d 33 (Fla. 1985), that a summary denial of a 3.850 motion was correct where a claim of conflict of interest was belied by the record. The court found "no meaningful conflict of interest impeded Porter's counsel" where the defense attorney withdrew from representation of a witness who was charged with an unrelated crime. The witness testified as to statements the defendant made to him while they were both in jail, was cross-examined by the defense attorney, and there was no indication the prior representation limited the cross-examination. In both Porter and Webb, supra, the alleged conflict arose from simultaneous representation of defendants and witnesses for the State. Here, the representation was separated by two and a half years, so no possible conflict existed.

As to the fact that Mr. Stone, who had represented Strickland in 1972, prosecuted Aldridge in 1974 with Strickland as a State witness, there was no due process violation. In State v. Fitzpatrick, 464 So.2d 1185, 1188 (Fla. 1985), this Court held that when a Public Defender becomes a prosecutor, there is no violation of due process unless the lawyer acts directly against a former client in a related manner and/or provides assistance to those who do. In 1972, Aldridge was not a client of the Nineteenth Judicial

Circuit Public Defender, so there was no conflict. See also, Mills v. State, 476 So.2d 172 (Fla. 1985) [representation of defendant's accomplice who became the chief State witness on unrelated charges did not cause conflict where the Public Defender withdrew as soon as the accomplice's involvement in the defendant's capital crime became known.] Therefore, since the record conclusively refutes the conflict of interest claim, and it is legally insufficient to show a violation of due process, the trial court correctly determined that trial counsel were not ineffective for failing to raise the issue.

The Appellant has also made several assertions of the purported "new" evidence concerning Strickland. He claims Strickland was promised transactional immunity, that the State interceded with the parole commission on his behalf, and that Strickland had been diagnosed as a sociopath.

At trial, Strickland testified he met the Appellant while they were both in prison (T 342-343). On September 2, 1974, the two men had been paroled. Aldridge called Strickland and asked if he could borrow a shotgun to go hunting (T 345-346). Although Strickland knew he was violating his parole by doing so, he agreed (T 346). Strickland delivered the gun to Aldridge at the parking

lot of the Fort Pierce hotel (T 347).[5] Around 1:30 a.m. on September 3, Strickland received a call from Aldridge (T 352). Aldridge said he had had to kill a man (T 352). The next day, Strickland and Aldridge went and recovered the gun from the Central Truck Line (T 353-355). Aldridge told Strickland he had robbed DiVagno's restaurant. The victim tried to pull off Aldridge's mask so he shot him three times (T 355). Strickland disposed of the gun in a canal, because he did not want to be caught with it and he was on parole (T 357). Strickland stated the State Attorney had "granted immunity for my testimony." (T 358). Upon further questioning, the prosecutor clarified the immunity was "just for what you [Strickland] said." (T 359). Strickland admitted he had initially lied to the prosecutor by telling him the gun had been stolen from his car; however, he later admitted he had discarded it (T 359, 361).

On cross-examination, Strickland testified his parole had not been violated although the incident had occurred back in September (T 362). He stated he owned another gun in addition to the one he had loaned Aldridge (T 363). Strickland admitted he was a "convicted felon" (T 364), and that owning weapons was a parole violation (T 365). He again admitted lying to the State Attorney about the gun's whereabouts (T 371-372). Regarding his

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[5]The testimony regarding delivery of the gun was corroborated by Anita and Jewel Sapp, who witnessed the incident (T 393-394; 400-404).

possible parole revocation, Strickland stated, "They said they couldn't tell me what they was going to do until after the trial was over" (T 373). Defense counsel asked if the reason for the delay was to see if Aldridge was convicted. His final question on cross-examination was, "What other purpose would there be in waiting until after the trial is over?" Strickland responded, "I don't know." (T 373).

The Appellee has recapped Strickland's trial testimony in detail in order to show that the trial court below was clearly correct in concluding that the present allegations of new evidence do not show prejudice because they "are essentially cumulative" to what was known previously.

First, concerning Strickland's immunity, the jury was aware that Strickland had received use immunity for his testimony (T 358-359). Appellant has not shown otherwise; the "memo to file" dated September 13, 1974, was prepared by someone employed by the parole commission who was making a notation of what he had been told by Strickland's parole officer (P 67). The memo simply states, "The State Attorney is going to grant immunity to Strickland," and does not specify whether the immunity was use or transactional, a distinction which eludes most laymen. The Appellant's accusations are unsubstantiated.

Second, the alleged intercession by the State with the parole commission on Strickland's behalf is based

on the same "memo to file" cited above (P 67). An examination of this document discloses that it discusses both Strickland and Appellant. It states that the sheriff's office has begged the commission not to take action on either case--Strickland's or Aldridge's. Thus, clearly the State did not make a favorable "deal" for Strickland. The sheriff's office was, on the date of the memo, still investigating the murder (the indictment was returned a month later, October 17, 1974 (R 1-2)), and it simply wanted the parole commission to delay taking action while the investigation was being conducted. The jury at trial was well aware the parole commission action was delayed until the trial was over (T 373).

There were additional allegations in the Appellant's motion pertaining to purported leniency given to Strickland in other areas, but an examination of the attachments to the motion reveals that these incidents arose after Strickland testified in Aldridge's case (P 68-72). This could not possibly have affected his testimony, and trial counsel can hardly be found ineffective for failing to investigate events that had not yet taken place. The January 10, 1975, memo was prepared two days after Aldridge was sentenced (P 68-71). It recommends deferring action on any parole violations arising from a January 8, 1975, episode where Strickland was charged with maliciously killing an animal, pending the outcome of the criminal

prosecution for this offense (P 68-71). After Strickland's acquittal by the court (not the State) for lack of evidence, his parole officer recommended on March 4, 1975, that the parole continue (P 72). Clearly, these matters are legally insufficient to establish the ineffective counsel claim because they would not have affected the outcome of the trial which concluded before they occurred.

The Appellant also claims his trial counsel were ineffective for failing to discover Strickland's prison psychological reports where he had been diagnosed as a sociopath. This allegation rests on an October 2, 1975, pre-sentence investigation (remember, Aldridge was sentenced January 8, 1975), which states in reference to Strickland, "According to psychological reports the subject does possess a sociopathic personality, he learns little from past mistakes." (P 78). This report, prepared ten months after the sentence was imposed in the instant case, is not sufficient to show prejudice under the standard of Strickland v. Washington, supra.

Aside from the time discrepancy, the diagnosis would not serve to disqualify Strickland as a witness, for clearly he understood the nature and obligations of his oath and was able to give lucid, coherent testimony. Powell v. State, 373 So.2d 73 (Fla. 1st DCA 1979). It would have been admissible, if at all, only for impeachment

of the witness' reputation for truthfulness. §90.609, Fla. Stat. In his testimony, Strickland freely admitted that he was both a convicted felon (T 364) and a liar (T 372). This "new" evidence is at best, cumulative, and would not have affected the trial's outcome.

In sum, the foregoing matters raised by the Appellant are nothing more than an attempt to further impeach Strickland. This was the subject of the prior Rule 3.850 litigation. As the Eleventh Circuit noted in its collateral review of this case, Strickland's testimony was substantially impeached. The jury was made aware of Strickland's criminal record, the fact that he had lied under oath, that he had violated his parole, and that he owned the murder weapon. Aldrich v. Wainwright, 777 F.2d 630, 637 (11th Cir. 1985). The supposed new evidence proffered by the Appellant does not in any way show his innocence. The fact remains that Strickland's testimony was corroborated by other evidence showing Aldridge's guilt and Strickland had an alibi, confirmed by Lillie King, for the time of the murder. Aldrich v. Wainwright, 777 F.2d, at 636.

The next area of evidence which the Appellant contends establishes his trial counsel's ineffectiveness is based on the fact that a review of the sheriff's file shows that at the outset of the investigation, there were two other persons whose names were considered. The first,

Harold Bickelnopt, was the last person known to be at the restaurant (P 128). The second, Ronald Quillet, supposedly borrowed his brother Reginald's gun and later said he had "got a white male" (P 141). Once again, in the course of the prior 3.850 litigation, the file could have been subpoenaed and the sheriff's investigators asked if they had other leads.

In any event, this evidence does not point towards Aldridge's innocence, nor would it have changed the trial's outcome. There is absolutely NO evidence that either of these two gentlemen had anything to do with the crime. Strickland's gun was proved to be the murder weapon, so obviously it was not Ronald Quillet's. Harold Bickelnopt was not a suspect; there was just a request to get his hair and blood samples (P 103-104) to compare with those at the scene, which were eventually determined to be the victim's. In the twelve years since the sentence was imposed, there has been no evidence disclosed to show that anyone other than Aldridge committed the murder.

Finally, in footnote 7 of his brief, at pages 16-17, the Appellant alleges his prior record consists of unconstitutional (either uncounseled[6] or ineffectively counseled) convictions. This aspect of the ineffectiveness

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[6]The claim that some of the convictions were uncounseled is belied by their date. Gideon v. Wainwright, 372 U.S. 335 (1963) was decided March 18, 1963. By July 1, 1963, the Florida Public Defender system was in place. See Ch. 63-409, Laws of Florida. The Appellant's convictions date from 1964 (P 143-231).

claim too was properly denied by the trial court. In Mann v. Wainwright, 482 So.2d 1360 (Fla. 1986), this Court held it is not appropriate in a collateral attack of a death sentence to challenge prior convictions. Likewise, in Adams v. State, 449 So.2d 819 (Fla. 1984), this Court refused in a successive collateral attack to consider a challenge to prior convictions which could have been presented earlier. Pursuant to these authorities, the trial court properly found the matter was not cognizable in the proceeding below (P 203).

In sum, the "new" evidence of prejudice is nothing that could not have been discovered previously. The Appellant's motion itself, and when considered in conjunction with the case files, is legally insufficient to state a claim for relief under Strickland v. Washington, supra, or, as discussed earlier, to justify waiving the procedural bar to relitigate this issue which was conclusively determined in the previous 3.850 litigation.

2. Brady

The Appellant, citing Brady v. Maryland, 373 U.S. 83 (1963), claims the State deliberately withheld favorable evidence, failed to disclose the prosecutor's attorney/client relationship to Strickland and permitted false testimony. As underlying facts, the Appellant relies on the same matters alleged in support of his

ineffective counsel claim, i.e.: Bickelnopt and Quillet were potential suspects; Mr. Stone's 1972 representation of Strickland on unrelated charges when Mr. Stone was an Assistant Public Defender; and certain information concerning Strickland (contact with the parole commission, the type of immunity given to him, and the diagnosis as a sociopath). This is inherently inconsistent: if trial counsel were ineffective for failing to find and exploit the information as the Appellant claims, how then can the State be charged with withholding it?

In Stone v. State, 481 So.2d 478 (Fla. 1985), the defendant raised a similar dual claim. This Court held that where "the evidence which Stone asserts was withheld from defense counsel by the prosecutor is the same evidence which he claims his trial counsel was ineffective for not presenting at sentencing," the court's decision on the ineffective counsel claim that the outcome would not have been different "defeats Stone's Brady claim as well, for the test of 'materiality' of the suppressed evidence has not been met." Stone, 481 So.2d at 480. As the Appellee has discussed in Section I. B (1), supra, the evidence does not establish trial counsel's ineffectiveness. Accordingly, it likewise is not "material" so as to establish a due process violation under Brady.

Moreover, as the State has already shown, there was no withheld evidence. Strickland's "deal" was disclosed

in his testimony: he was given use immunity. The parole commission took no action to revoke his parole prior to the trial (T 358; 361-362). Prosecutor Stone's representation of Strickland in 1972 was a matter of public record (and the case file certainly would have been contained in the Public Defender's Office). The pre-sentence investigation which referred to Strickland as a sociopath was prepared after the trial in this case, as was the subsequent disposition of the offenses allegedly committed on the day of his testimony. There can be no violation of Brady v. Maryland, 373 U.S. 83 (1963), where the defense is aware of the evidence. Smith v. State, 445 So.2d 323 (Fla. 1983); Smith v. State, 453 So.2d 388, 389 (Fla. 1984). In this case, the defense was aware that Strickland was a convicted felon, received use immunity, admittedly had lied, and that the parole revocation decision had been deferred. At trial defense counsel made the jury aware of these facts as well. The events occurring after the trial obviously were not deliberately withheld by the State. Brady does not require that a prosecutor have ESP.

Furthermore, the trial court was correct in its ruling that even if the Brady allegations could be substantiated and were not known at trial, there was no basis for relief because the evidence was not "material" (P 283). In United States v. Bagley, ___ U.S. ___, 87 L.Ed.2d 481 (1985),

the court held that evidence is "material" under Brady only if, had it been disclosed and used effectively, it may have made the difference between conviction and acquittal. Id., at 490. The standard of Strickland v. Washington, supra, applies so that 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 494; see also, Ashley v. State, 479 So.2d 837 (Fla. 1st DCA 1985).

The evidence proffered by the Appellant failed to meet this test of materiality. With regard to the existence of Bickelnopt and Quillet as possible suspects, it is clear that neither of these gentlemen committed the crime. (See pages 27-28, supra). There is nothing in this evidence to create a reasonable doubt that did not otherwise exist. Thomas v. Wainwright, 788 F.2d 684, 688 (11th Cir. 1986), stay/cert. denied, ___ U.S. ___, 106 S.Ct. 1623, 90 L.Ed.2d 173 (1986).

As the Appellee has discussed at pages 21-22, supra, Mr. Stone's 1972 representation of Strickland on unrelated charges did not give rise to a conflict of interest. It is thus not the type of information which should be disclosed under Brady; ergo, it was not material.

Concerning the purported grant of transactional immunity and other considerations given to Strickland by the State, the trial court correctly relied on Palmes v. Wainwright, 460 So.2d 362, 365 (Fla. 1984), in denying relief. In Palmes this Court held that where a chief State witness was impeached by the defense at trial on the ground of her participation in the crime and her immunity from prosecution, the claimed Brady evidence that the witness had been given promises of special assistance and was threatened with the loss of custody of her child, even if true, was not material. The court reasoned that this information would only have added marginally to the defendant's ability to impeach the witness and it was not material to the question of guilt or innocence. As in Palmes, in this case trial defense counsel had ample information to impeach Strickland. Thus, the "new" evidence submitted in the Appellant's motion would at best have been cumulative to the impeachment material that was available. Therefore, it was not "material" as that term is defined in United States v. Bagley, supra. See also, Carillo v. State, 382 So.2d at 429 (Fla. 3rd DCA 1980). The trial court thus properly denied the Appellant's claim and its order should be affirmed.

III. TRIAL COURT APPROPRIATELY DENIED THE APPELLANT'S CLAIM THAT HE WAS DEPRIVED OF A FAIR SENTENCING HEARING UNDER CALDWELL V. MISSISSIPPI ON THE BASIS OF APPELLANT'S PREVIOUS FAILURE TO RAISE THE CLAIM, AND ON THE ALTERNATE BASIS THAT THE JURY WAS PROPERLY INFORMED OF ITS CAPITAL SENTENCING RESPONSIBILITIES.

Appellant maintains that the U.S. Supreme Court's decision in Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), constituted a fundamental change in the law which, if applied to Appellant's circumstances, mandates vacating the death sentence. Specifically, Aldridge argues that the issuance of Caldwell excuses his failure to raise this claim at trial, on direct appeal, and/or in his prior 1979 post-conviction motion, and provides support for his conclusions that the trial courts and prosecutor's comments allegedly diminished the jury's accurate understanding of its capital sentencing responsibilities. The trial court rejected this claim, stating that Appellant's failure to raise this claim in prior direct appellate and initial collateral proceedings, procedurally barred the claim, (P, 282). The Court alternatively concluded that the complained-of comment". . .properly informed the jurors of their proper statutory role in the sentencing process." (P, 283). Based on the circumstances in the Record, and Appellant's misconception and overbroad construction of the nature and effect of the Caldwell decision, this Court should affirm the trial court's denial of relief on this claim, in all respects.

Appellant has virtually conceded the correctness of the trial court's express notation of his failure to raise this claim at

trial, on direct appeal, or in his initial post-conviction motion. (P, 256, 282). Thus, Appellant's claim was appropriately barred by the trial court, under Rule 3.850, Fla.R.Crim.Pro. (1985), which states in relevant part:

> A second or successive motion may be. . . if new or different grounds are alleged, the judge finds that the failure of movant or his attorney to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

(e.a.). Under prevailing case law, Appellant can not show that the grounds of his so-called "Caldwell" claim, were not known or conceivably discoverable, when he filed his first motion, and it was therefore appropriately barred, procedurally. Stewart v. State, 495 So.2d 164 (Fla. 1986); Christopher v. State, 484 So.2d 22 (Fla. 1986); Funchess v. Wainwright, 487 So.2d 295 (Fla. 1986); Witt v. State, 465 So.2d 510 (1985).

The Caldwell decision, and its references to Florida cases in existence well before Petitioner's trial, appellant or intial collateral proceedings, clearly demonstrates its status as an "evolutionary refinement" in the law, and not the type or magnitude of "jurisprudential upheavel" that would permit Appellate to avoid the procedural bar applied by the trial court. Witt v. State, 387 So.2d 922, 929 (Fla. 1981), cert. denied, 449 U.S. 1067 (1980). In Caldwell, the U.S. Supreme Court specifically observed that ". . .legal authorities almost uniformly have strongly condemned the sort of argument offered by the prosecutor [in Caldwell]." Caldwell, 105 S.Ct, supra, at 2642. (e.a.). The Court further observed that such prosecutorial argument presented in Caldwell,

(which was held to have erroneously mislead a Mississippi jury, as to its proper role in capital sentencing), had been viewed as improper by this Court, in two decisions, Pait v. State, 112 So.2d 380 (Fla. 1959), and Blackwell v. State, 76 Fla. 124, 79 So. 731, 735-736 (1918), which date back some fifty-seven years before Appellant's trial. Caldwell, 105 S.Ct, at 2642; 242, n.5. An examination of the Pait and Blackwell decisions, shows that the nature of the comments therein, and this Court's reversal of first-degree murder convictions and vacating of death penalties, are very close to those condemned in Caldwell. Pait, supra, at 383-384 (prosecutor erroneously told jury that State had no further opportunity for appellate review, and that "This is the last time the People of this State will try this case in this court", while the defendant would have further appellate opportunities); Blackwell, supra, at 735-736 (prosecutor told jury that "If there is any error committed in this case, the Supreme Court, over in the capitol of our state, is there to correct it, if any error should be done" and trial court agreed this was "legitimate argument"). Thus, the legal basis for the Caldwell claim, according to the Caldwell language itself, was easily known or conceivably discoverable, at the time of Appellant's first post-conviction motion. Christopher, supra, at 24, 25; Witt, supra, at 512. This conclusion is substantiated by reference to Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), upon which Appellant heavily relies, wherein the Eleventh Circuit panel interpreted and relied on this Court's decision in Tedder v. State, 322 So.2d 908 (Fla. 1975). Adams, supra,

at 1529. The Tedder decision, and its legal grounds and rationale, were clearly known, before Appellant's 1979 motion. Christopher; Witt. [7] Thus, Appellant's reliance on Caldwell, to provide support for his assertion that his "new" claim is not an abusive successive one, actually serves to substantiate the trial court's conclusion that this claim is abusive and successive. Christopher; Witt; Rule 3.850, supra.[8]

These Florida (and Federal) decisions, demonstrating the existence of a basis for a Caldwell claim, prior to Appellant's 1979 proceeding, can not be distinguished, on the basis that they preceded Furman, supra, or Lockett v. Ohio, 438 U.S. 181 (1978), which formed the genesis of the requirements for fairness, reliability and individualized capital sentencing determinations. Clearly, the Lockett decision, denied before Aldridge's 1979 motion provides an even clearer basis for concluding the "availability" of this claim existed, prior to 1979. Christopher; Witt. Even assuming arguendo hat Caldwell is interpreted as a decision applying the Lockett

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[7]It is significant to briefly note that the review and decision in Caldwell, dealing with the propriety of prosecutorial argument, was consistent with and in substantial part relied on, prior Federal precedent, in existence long before Appellant's 1979 collateral proceeding. Caldwell, at 2644-2646; Donnelly v. DeChristofoso, 414 U.S. 637 (1974); see also Fleming v. Kemp, 637 F.Supp 1547, 1554 (M.D. Ga. 1986), stay granted, other grounds, 794 F.2d 1478 (11th Cir. 1986).

[8]Appellant's contention that the 1984 version of Rule 3.850, can not be retroactively applied to his pre-1984 circumstances, was expressly rejected bu this Court in Christopher, when it deemed said procedural change was applicable to capital defendants, like Aldridge, who filed post-convictions motion prior to January 1, 1985. Christopher, 489 So.2d, at 25.

requirements to different factual circumstances, this circumstance would clearly not render Appellant's present claim "unknown", or not "conceivably discoverable". Id. As the U.S. Supreme Court has stated, regarding the application and/or avoidance of procedural bars, to collateral claims brought by criminal defendants:

> . . .the question is not whether subsequent legal developments have made counsel's task easier, but whether, at the time of the default, the claim was 'available' at all.

Smith v. Murray, 477 U.S. ___, 106 S.Ct 2661, 91 L.Ed.2d 434, 446 (1986). Thus, it is clearly demonstrable that Caldwell does not constitute a fundamental "clean break with the past", Witt, 387 So.2d, at 29, so as to avoid an abuse of the rule finding. The trial court's finding of abuse of the rule, R, 282, should thus be affirmed.

Appellant's claim is further clearly barred, as the legal effect of his waiver of any challenge to the allegedly offending trial court or prosecutorial comments, at trial or on direct appeal. (R, 282). In State v. Sireci, 12 F.L.W. 57, 58 (Fla. January 5, 1987) one of this Court's latest pronouncements on the Caldwell issue, this Court did not reach the merits of the claim, but deemed it waived, by virtue of the failure of the defendant to raise it, at trial, or on direct appeal. This ruling, involving an appeal from a second Rule 3.850 proceeding in Sireci, reiterated this conclusion by this Court in Middleton v. State, 465 So.2d 1218, 1226 (Fla. 1985), that a Caldwell-type claim, must be preserved at trial, or on direct appeal, and does not constitute fundamental error. The conclusions of the Court to this effect, in these cases, is consis-

tent with the Caldwell decision itself, since the language of Caldwell clearly indicates a willingness to honor such a state procedural bar, to reject such a claim, if so found by the state courts. Caldwell, 105 S.Ct, at 2638-2639. Thus, Appellant's claim was properly barred as not cognizable in his successive post-conviction motion, because of his waiver of the claim at trial, and on direct appeal. Henry v. State, 12 F.L.W. 44 (Fla. December 30, 1986); Straight v. State, 488 So.2d 530 (Fla. 1986); Thomas v. State, 486 So.2d 577 (Fla. 1986); Christopher, supra, at 24. Appellant's reliance on Adams v. Wainwright, supra, and Caldwell, supra, as an exception under this Court's Witt decision, must be rejected, for the same reasons, supra, and based on the same decisions, as argued by Appellee, on "abuse of procedure". Caldwell; Sireci, supra; Middleton, supra; Straight, supra; Christopher; see also Darden v. Wainwright, 477 U.S. ___, 106 S.Ct ___, 91 L.Ed.2d 144, 158-159, n.15 (1986); Pope v. Wainwright, 496 So.2d 796, 805 (Fla. 1986).

Appellant's reliance on this Court's decision in Darden v. State, 475 So.2d 217, 220-221 (Fla. 1985), is unavailing, when this Court's express language in Darden is examined. This Court specifically noted in Darden that Appellant's Caldwell claim --- challenging the propriety of prosecutorial comments at the guilt phase, under Caldwell --- amounted to a re-labelling of a claim that had been "litigated for years". Darden, supra, at 221 (e.a.). Thus, this Court's specific observation, of Appellant's attempt to"bootstap" the nature of previously rejected claims, under the guise of

Caldwell, Id, must be read as at least an alternative holding, rejecting the Caldwell claim on procedural bar grounds. Christopher, supra; Rule 3.850, supra (can dismiss a successive post-conviction motion, if same grounds are alleged, and were determined previously on the merits). As such, this Court's decision in Darden, can not be considered as an inconsistent application of Rule 3.850 procedural bars. Id.

Assuming arguendo this Court reaches the merits of Appellant's Caldwell claim, the trial court's alternative substantive holding, that the comments to the jury were proper and not erroneously misleading, under this Court's definitive holding in Pope v. Wainwright, 496 So.2d 798 (Fla. 1986), should be affirmed. In examining Appellant's references to the trial transcript, none of the complained-of statements, during voir dire, did anything but appropriately inform the jury of its "advisory" role in Florida capital sentencing:

> MR. STONE [prosecutor]: Let me explain something to you. If you find the defendant, Mr. Aldridge, guilty of murder in the first degree, you may as a jury sit may hear additional evidence, or you may not hear additional evidence, depending on what the attorneys decide to do, then you will be asked to render an advisory aopinion, which is advisory only to this Court, as to whether ot not life or death should be imposed and only require a majority, meaning seven out of twelve to render that advisory opinion. Now, could you sit on a jury that you may be asked to sit and render an advisory opinion? Could you do that?
>
> (No audible responsees.)
>
> Let me ask you, Mrs. Constant. Do you believe in the death penalty?
>
> MRS. CONSTANT: It is very difficult to say. I guess I believe in the death penalty if somebody else has to do it.

MR. STONE: But could you still sit on the trial and determine the guilt or innocent knowing that the ultimate decision of life or death will be with the Judge?

MRS. CONSTANT: Yes, I could.

(T, 60)(e.a.).

* * *

MR. STONE: Could you sit on a jury where if you found Mr. Aldridge guilty of first degree murder the ultimate penalty might be death" Do you feel you could still serve on that jury?

MRS. SKINNER: I feel I could sit, although I could not give that penalty myself.

MR. STONE: You realize the penalty lies with the Court?

MRS. SKINNER: Yes.

MR. STONE: But you are saying in no case could you ever recommend death?

MRS. SKINNER: No, sir, I couldn't.

(T, 97)(e.a.).

* * *

MR. STONE: If we prove Mr. Aldridge is guilty beyond a reasonable doubt and you feel that we have proved that he has committed first degree murder beyond a reasonable doubt, could you bring back that verdict even though eventually this jury might advise and that the Court might impose the death penalty?

MRS. SKINNER: Yes.

(T, 98)(e.a.)

* * *

MR. STONE: And you can serve on a jury and if the facts warranted it you could advise an advisory opinion of death even though the final decision is with the Court or the decision, period? I think the jury makes only a recommendation. You are not concerned with that -- but you do believe in the death penalty?

MRS. STANLEY: Yes.

(T, 100)(e.a.). As is clear from those emphasized portions, the prosecutor appropriately observed the jury's proper statutory role, in a way that did not diminish their sentencing responsibilities. The same is true, for the trial court's statement to the jury, referenced by Appellant in his brief:

> THE COURT: Ladies and gentlemen of the jury, you have found the defendant guilty of murder in the first degree. The punishment for this crime is either death or life imprisonment. Final decision as to what punishment shall be imposed rests solely and only with the Judge of this Court. However, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the defendant.

(T, 730)(e.a.).

These comments and instructions are clearly and precisely in accord with this Court's pronouncement in Pope, supra, and did not in any way violate Aldridge's rights:

> We find nothing erroneous about informing the jury of the limits of its sentencing responsibility, as long as the significance of its recommendation is adequately observed. It would be unreasonable to prohibit the trial court of the State from attempting to relieve some of the anxiety felt by jurors impaneled in a first-degree murder trial. We perceive no Eighth Amendment requirements that a jury whose role it is to advise the trial court on the appropriate sentence should be made to feel it bears the same degree of responsibility as that borne by a true sentencing jury.

Pope, supra, at 805 (emphasis added). Significantly, the Florida statutory scheme places the responsibility of "ultimate sentence" with the judge, whereas the Caldwell decision was based on state law, delegating such responsibility to a "true sentencing jury". Pope, at 805. Thus, the effect of the trial court and prosecutorial

statements, coupled with the sentencing instructions, can not be compared or equated with ". . . state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court". Caldwell, 105 S.Ct, at 2640.

Appellant has also suggested that the trial court itself, because of anticipation that the death penalty would be invalidated, minimized its own sense of responsibility. Appellant's transcript reference demonstrates little more than a neutral statement, reflecting the need for Aldridge to have counsel, because of the possibility (T, 17-18), of the death penalty and can not be equated with the magnitude of offending comments stressed by the Court in Caldwell. Further, it is the height of inconsistency, for Appellant to rely on other transcript references, pointing out the trial court's ultimate responsibility for capital sentencing, as recognized by the trial court itself. (T, 730). Further, the trial court's written findings do not indicate anything but an appreciation by the court, of the seriousness of its task. Pope; Caldwell; R, 85-86.

In sum, none of the prosecutorial or court comments were misleading or erroneous, in terms of advising the jurors of their advisory role in capital sentencing, under Florida law. As such, these remarks were appropriate, under the U.S. Supreme Court's Caldwell and Darden decisions, and this Court's ruling in Pope, supra, informing the jurors of their role, in a manner that did not diminish their responsibilities. Caldwell, 105 S.Ct., at 2643, 3646, 2647; Darden, 91 L.Ed.2d, supra, at 158-159, n.15; Pope, supra, at 805. Furthermore, Appellant's reliance on Caldwell, is a challenge,

in effect, to the validity of the nature of the jury's advisory role under the Florida capital sentencing scheme, which would require the reversal of the U.S. Supreme Court's decisions, approving such a role for the jury in capital sentencing. Pope v. Wainwright, at 805; Spaziano v. Florida, 468 U.S. 447 (1984); Dobbert v. Florida, 432 U.S. 282, 295 (1977); Proffitt v. Florida, 428 U.S. 242, 249 (1976).

Since the jury was not mislead, or led to believe it had an unconstitutionally diminished role in capital sentencing, Aldridge's claim of error must be rejected by this Court.

IV. TRIAL COURT APPROPRIATELY DENIED APPELLANT'S CLAIM THAT THE COURT AND THE JURY WERE IMPROPERLY LIMITED TO CONSIDERATION OF ONLY STATUTORY CIRCUMSTANCES, AT SENTENCING, ON THE BASIS THAT THE CLAIM WAS ABUSIVE AND PROCEDURALLY BARRED, AND WAS CONTRADICTED BY THE RECORD.

Appellant maintains that both the trial court and jury were prevented from consideration of non-statutory mitigating circumstances, in recommending and imposing the death penalty, in alleged violation of his Eighth and Fourteenth Amendment rights under Lockett v. Ohio, 438 U.S. 586 (1978). Specifically, Appellant has challenged certain prosecutorial and trial court references to such limitations[9], and the jury instructions themselves, as improperly reflecting erroneous constructions of Florida law on the consideration of such non-statutory mitigating circumstances, announced in Cooper v. State, 336 S.Ct 1133 (Fla. 1976), cert. denied, 431 U.S. 925 (1977), and allegedly corrected by Lockett, supra, in 1978. Appellant further argues that the issuance of this Court's decisions in Harvard v. State, 486 So.2d 532 (Fla. 1986), and Lucas v. State, 490 So.2d 947 (Fla. 1986), constitutes a fundamental shift in law governing such claims, that requires re-examination of his death sentence. The trial court determined that Appellant's so-called "Cooper-

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[9]It is especially significant and noteworthy that, in the subject post-conviction motion being appealed, Appellant did not challenge the prosecutorial and trial court statements he now includes, in his present brief, to this Court. (P, 50-52). As such, this Court should consider any referrence to, or argument on these remarks, as procedurally barred, by this circumstance alone. Clark v. State, 363 So.2d 331, 335 (Fla. 1978).

Lockett" claim was barred, by the adverse resolution of the same claim by this Court, against Appellant, in his prior post-conviction proceedings, (SA, 2), and alternatively had no merit, in light of the nature of the jury instructions, and Appellant's stated preference for the death penalty, at his sentencing hearing. (SA, 3). Because of Appellant's erroneous interpretations of Florida decisional law, and the Record circumstances that demonstrate no such limitations, in law or fact, on the presentation of non-statutory mitigation, the trial court's summary denial should be affirmed.

Appellant's concession of his prior presentation of this claim, with adverse results, Appellant's Brief, at 30, 46, virtually mandates an affirmance of the trial court's conclusion, that his present Cooper-Lockett claim is abusive and successive. Darden v. Wainwright, 496 So.2d 136 (Fla. 1986); State v. Ziegler, 494 So.2d 957, 958 (Fla. 1986); Sireci v. Wainwright, supra; Martin v. Wainwright, 12 F.L.W. 89 (Fla. November 13, 1986); Christopher, supra; Straight, supra; Witt v. State, 465 So.2d 510 (Fla. 1980). As specifically noted in Ziegler, supra, Appellant's Cooper-Lockett claim was similarly rejected by the trial court, and approved by this Court, (procedurally and substantively), as a claim which could or should have been brought on direct appeal. (SA, 2, 14). Ziegler, at 758; Aldridge v. State, 425 So.2d 1132, 1136 (Fla. 1982). Appellant's present Cooper-Lockett claim was properly rejected, as no more than the same claim, under a different label, and/or based on different facts for the same ground. Adams v. Wainwright, 470 So.2d 687, 689 (Fla. 1981); Dobbert v. State, 456 So.2d 424, 429-430 (Fla. 1984);

Sullivan v. State, 441 So.2d 609, 612-612 (Fla. 1983). As with William Thomas Ziegler, (who, like Aldridge, was appealing the denial of his successive Rule 3.850 motion, on Cooper-Lockett grounds), Appellant's reliance on Lucas and Harvard, to avoid the correct application of procedural bars to his Cooper-Lockett claim, has no merit.

The decisions in Harvard and Lucas, did not reflect a suddenly new and fundamental recognition by this Court of the validity of the Lockett decision, as requiring consideration of non-statutory mitigating circumstances.[10] As noted in Ziegler, the Harvard case was interpreted by this Court as "neither mandat[ing] nor allow[ing] an evidentiary hearing to reconsider the issue", that had already been previously raised and rejected. Ziegler, at 958 (e.a.). 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 or shift in the law, in accordance with Witt, supra, 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, on a Federal level, by the Eleventh Circuit in Hargrave v. State, 804 F.2d 1182 (11th Cir.

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[10]In fact, this Court's opinion in Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956 (1979), as wll as Lockett, was issued prior to Appellant's 1979 post-conviction proceedings.

1986), in which said the Court deemed the Cooper-Lockett claim, and line of cases, to represent an evolutionary refinement, not constituting the type of jurisdictional or novel legal upheavel that would obviate a finding of abuse of the writ, the counterpart and basis for Florida's "abuse of process" under Rule 3.850. Hargrave, supra, at 1189. In fact, the very nature of the decisions in Hitchcock v. State, 432 So.2d 42 (Fla. 1983), and Hitchcock v. Wainwright, 770 F.2d 1514 (11th Cir. 1985)(en banc), in recounting 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 v. Wainwright, 769 F.2d 1488 (11th Cir. 1985)(en banc); Hargrave supra. The decision in Ziegler, affirming the denial of successive post-conviction relief, further reflects the fact that the Eleventh Circuit's decision in Hitchcock, as an intermediate Federal decision, can not be considered a "change in the law", that would otherwise permit a successive petition to be considered, under Witt. Witt, 465 So.2d, at 512; Witt, 387 So.2d, supra; State v. Washington, 453 So.2d 389, 392 (Fla. 1985)

In the absence of any express statement by this Court, or 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 (June 9, 1986), the mere pendency of this issue in Hitchcock, in and of itself, does not present circumstances establishing that Aldridge has not abused the process. Ziegler, supra; Martin v. Wainwright, 12 F.L.W. 89, 90, n.3 (Fla. November 13, 1986); Wicker v. McCotter, 798 F.2d 155, 157-158 (5th Cir. 1986). This Court's express rejection of such a similarly successive claim in Martin, supra, at a time when certiorari had been accepted in Hitchcock on June 9, 1986, and arguments had been held before the U.S. Supreme Court in October, 1986, compels this result. This conclusion is further compelled, by the U.S. Supreme Court's rejection of Appellant's Cooper-Lockett claim, and similar reliance on the grant of certiorari in Hitchcock, to deny certiorari last term in Aldrich's case, after Hitchcock was accepted and argued. Aldrich v. Wainwright, ___ U.S. ___, ___ S.Ct ___, 93 L.Ed.2d 297 (1986).

Appellant also cites to this Court's ordering of supplemental briefs in Riley v. Wainwright, Case No: 69,953, in November, 1986, as further evidence of Florida's status, in the alleged "midst of a fundamental shift" in Florida law, such that Witt can be applied herein, to avoid an "abusive, successive motion" finding. However, such an order for supplemental briefing, in and of itself, can no more be deemed a basis for Appellant's Witt argument, than the granting of certiorari in Hitchcock, particularly in light of this Court's Martin opinion, subsequent to the order in Riley. Furthermore, supplemental briefing requests by this Court, on the applicability of particular decisions in other cases to Riley, is not a per se indicator that Mr. Riley will likely be successful, on the

Lockett issue. See e.g. Parker v. State, 476 So.2d 134, 138 (Fla. 1985) (although supplemental brief ordered on factual applicability of State v. Neil, 457 So.2d 481 (Fla. 1984), to defendant's case, State ultimately prevailed on the issue). Under Witt, 387 So.2d, supra, a mere request for supplemental briefs, clearly does not constitute a "change in the law", sufficient to avoid applying procedural bars to Aldridge's Cooper-Lockett claim. Finally, even if Riley should prevail, a ruling, holding Lockett retrocactive, will not benefit Appellant, on the merits, infra.

It is further clear that, based on the same reasoning and arguments regarding "abuse of process", the trial court's observation of Appellant's failure to raise this claim at trial or on direct appeal, additionally and correctly bars the claim. (SA, 2). Herring, 12 F.L.W., at 44; Straight; Thomas, supra; Christopher, supra. It is clear, from the chronology of proceedings in this case, that the trial court rejected Aldridge's claim, on this basis, in its June, 1981 Order, (SA, 14)and that the Federal courts have noted the trial court and this Court's consistent application of this bar to consideration of the Cooper-Lockett claim. Aldrich v. Wainwright, Case No: 83-8315, Southern District of Florida, Order Denying Relief, December 2, 1983, at 4; Aldrich v. Wainwright, 777 F.2d 630, 638-639 (11th Cir. 1985). As already argued by Appellee, and noted in Ziegler and Hargrave, Appellant's reliance on Hitchcock and Songer in the Eleventh Circuit, and Lucas and Harvard before this Court, does not provide a basis for successful application of the Witt "change in law" exception, to escape the conclusion that

Appellant's waiver and procedural defaults, bars his Cooper-Lockett claim as well. supra. This claim must thus be rejected, for the same reasons and arguments already expressed by Appellee.

Appellant is further ignoring the effect of the trial court's rejection of this claim, on the merits, in 1981, (SA, 16), and affirmance of said ruling by the Florida Supreme Court, Aldridge, 425 So.2d, supra, at 1136, between the parties in the same proceeding, as "law of the case". Terry v. State, 467 So.2d 761, 765 (Fla. 4th DCA 1985); Cruz v. State, 437 So.2d 692, 698 (Fla. 1st DCA 1983) (on rehearing); Airvac, Inc. v. Ranger Insurance Company, 330 So.2d 467. 469 (Fla. 1976); Parrish v. State, 14 So.2d 171 (Fla. 1943). It is clear that reliance on the decisions in Lucas and Harvard, involving different facts, in a different case between different parties, has no effect on this procedural bar to Appellant's Cooper-Lockett claim. Id.

Assuming arguendo this Court rejects Appellee's argument, on the procedural basis upholding the trial court's ruling, said court's alternate ruling on the merits was clearly appropriate under the circumstances. Appellant's challenge to the nature of the jury instructions, which as given informed the jury of the mitigating circumstances that could be considered, after informing them of the statutorily limited aggravating circumstances to consider, T, 749, Appellant's Brief, at 29, has been consistently rejected in other capital cases. Proffitt v. Florida, 428 U.S., supra, at 250, n.8; Tafero v. Wainwright, 796 F.2d 1314, 1321 (11th Cir. 1986); Alvord v. Wainwright, 725 F.2d 1282, 1299 (11th Cir. 1986); Ford v. Strick-

land, 696 F.2d 804, 811-812 (11th Cir. 1983)(en banc). Said instructions did not affirmatively preclude or limit consideration of non-statutory mitigating circumstances by the jury. Alvord, supra, at 1299.

Appellant now maintains and cites to certain trial transcripts references, that he did not allege or refer to before the trial court,[11] as evidence that his trial defense counsel, the prosecutor, and the trial court all considered themselves to be bound to only statutory mitigating circumstances. The Record completely belies this claim, demonstrating instead that none of the participants felt so limited.

Appellant maintains that his trial counsel's statements, at the state post-conviction hearing, expressly show that counsel believed he was limited to merely statutory mitigation. Appellant's Brief, at 27, n.9. However, Appellant's selective and conclusory reference, when examined in context, reveals that defense counsel's decision not to permit mitigation, was based on Appellant's decision and instructions to this effect (T, 598-606), because of his express preference for the death penalty, over additional jail time:

> Q [State attorney]: Now, isn't it true that regardless of the state of the law, Mr. Aldridge had told you that if they convicted him for first degree murder, he wanted to die, period?
>
> A [defense counsel at trial]: That he did tell me.
>
> Q: And that he did not want the jury to recommend life. And, in fact, he didn't want the Judge to give him life?

---

[11] See n.9. supra.

A: He did not want to go through the penalty phase. He wanted to waive the penalty phase and have -- I think that was his specific instruction, that I drafted at his request, that I requested the Court to give. The Court denied it, instructing the jury that if they found him guilty of murder in the first degree that he would be sentenced to death; words to that effect.

Q: So, regardless of the state of the law in regards to mitigating circumstances, as we know it today -- that mitigating circumstances aren't limited to those listed in the statute -- regardless of what the law had been, whether it was just like it is today, in those circumstances, you wouldn't have presented anything in mitigation , would you?

A: Not --

Q: Per the instructions of your client?

A: Not if my client had given me the same instructions that he gave me then. But if he had known the state of the law as it is today, he might not have instructed me the same way.

Q: Do you really believe that?

A: I don't know. I don't know --

Q: He was pretty strong about not wanting to go back to jail and serve any more time, wasn't he?

A: Yes, sir.

Q: In other words, he'd just gotten out of jail that he'd been in for some ten years?

A: That is correct.

Q: He was on parole and now he's back in jail?

A: That is correct.

Q: And he told you, "I don't like it here and if I'm going to have to stay here, I want to be executed."

A: He had never been under a death sentence, though.

Q: But he knew he was facing one now, didn't he?

A: Yes, he knew that.

Q: At the time. Now --

A: At the time of the trial. He also maintained his innocence, so, I mean -- for what it's worth.

Q: But he told you if he got convicted he wanted to die, he didn't want any mitigation, he didn't want to get life in prison?

A: That's correct.

(TH, 214-216). This conclusion is substantiated by defense counsel's express statements at trial, to the Court and jury, expressing his client's express and enequivocal decision, not to present anything in mitigation, including whimsical doubt:

THE COURT: All right, do you gentlemen wish to address the jury on the subject of the advisory sentence?

MR. STONE[prosecutor]: Yes, sir, I would like to make some comments.

MR. SCHWARZ [defense counsel]: Your Honor, in view of the instructions received from my client, we will make no argument in mitigation of sentence.

(T, 740). * * *

MR. SCHWARZ: As I indicated, ladies and gentlemen, my client has not asked for me to plead for an advisory opinion for life imprisonment. Under the statute, as Mr. Stone has made out, on a capital offense such as this, a life sentence requires the serving of -- a mandatory serving of a minimum of twenty-five calendar years before even being eligible for parole. Mr. Aldridge has spent ten years in the state prison. He has no desire to spend the rest of his life there. He has, therefore, asked me and I will accede to his wishes and not request that there be mitigating circumstances presented.

(T, 746); see also, T, 598-604. Mr. Schwarz and Mr. Gary (additional defense counsel), pursuant to their client's wishes, further told the Court they had nothing to say on his behalf, before the sentence was imposed, after the jury returned its death recommendation. (T,

755). Thus, Appellant's contention that his counsel felt limited, so as not to present non-statutory mitigation, including "lingering doubt", was the result of his client's specific instruction, and not any misconception of Florida law. See Aldrich v. Wainwright, 777 F.2d, supra, at 639.

Appellant relies on the trial colloquy, on Appellant's own motion to waive sentencing proceedings, because of his preference for death, T, 594-607, as evidence of counsel's understanding of what he could present in mitigation. However, counsel's own questioning of his client, demonstrate that both he and counsel were aware that, in addition to statutory mitigating factors, it was possible to consider Appellant's denial of the crime -- in essence, "lingering doubt" -- as a non-statutory mitigating circumstance. (T, 607). Additionally, said colloquy, T, 594-607, bolsters the conclusion that Appellant's failure to present mitigation, was the product of his own choice for death, unaffected by whatever available mitigation could have been presented, non-statutory or otherwise.

Appellant maintains that the prosecutor's statements, limited the jury's consideration of mitigating circumstances. However, it is clear that the State's comments, as to the absence of any mitigating circumstances, informed the jurors that they should "listen to what the Court says is a mitigating circumstance", and then determine that "there is nothing mitigating at all" that applied to Aldridge. (T, 741-742). The court informed and instructed the jury that their sentencing recommendation should be based on the evidence heard "while trying the guilt or innocence of the defendant", as well

any additional evidence presented at sentencing. (T, 731, 747). The jury was then affirmatively limited to statutory aggravating factors, but not to statutory mitigating factors, in a manner approved in Tafero, Alvord and Ford, supra. Thus, the prosecutor's admonition to the jury to determine the propriety of a death sentence, after "listen[ing] to the Court's instructions" (T, 745), which did not so limit consideration of mitigation, certainly did not violate Appellant's rights.

Finally, the trial court's instructions, statements and sentencing order, do not in any way demonstrate that he felt limited to consideration of purely statutory mitigation. Defense counsel's statements to this effect, at the post-conviction hearing, were no more than Mr. Schwarz's unverified "belief" and "opinion". (RH, 191, 192). As already indicated, the trial court instructed the jury to consider all evidence presented, including that at the guilt-innocence phase, T, 731, 747, which the Court clearly would not have done, had the judge considered himself limited. The trial court's sentencing order, contrary to Appellant's interpretations, did not exhibit anything to show the trial court considered himself statutorily limited, when, after the trial court's weighing process, and finding of fact,he stated:

> All of which [aggravating circumstances], taken together, make the capital felony especially heinous, atrocious and cruel and far outweigh any mitigating circumstances shown by the evidence and which must be considered by the Court.

(R, 86)(e.a.). The Court thus clearly referred to the "evidence, which must be considered", and not the statutory list of mitigating

factors in contemplating and considering mitigation. This conclusion is in no way contradicted by the trial court's identification of "possible" mitigation that the jury "might consider", in denying Appellant's motion to waive sentencing. (T, 604-606). The trial court did not in any way say that mitigation was affirmatively limited to statutory factors (T, 605-606); denied Appellant's motion to waive sentencing (T, 604); and further told Appellant that the jury could consider "all the evidence presented". (T, 606). Clearly, no affirmative limits were given, or interpreted as such during said colloquy, by Appellant and counsel. T, 606,607. The giving of the instructions, approved in Ford, Alvord and Tafero as not affirmatively presenting non-statutory mitigation, further mandate a rejection of Appellant's unsubstantiated interpretation of the trial record.

It is this abundantly clear that Appellant had no restrictions placed upon him, in presentation or consideration by the trial judge and jury, of mitigation evidence. Ziegler, supra, at 958; Maxwell v. Wainwright, 490 So.2d 927 (Fla. 1986); Tafero v. Wainwright, 796 F.2d, supra, at 1321; Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986). The absence of mitigation, stemming from Appellant's clear preference for death over prison, demonstrate that the consideration of non-statutory mitigating circumstances was not illegally limited. Tafero, supra; Thompson, supra; Thomas v. Wainwright, 767 F.2d 738 (11th Cir. 1985); Shriver v. Wainwright, 715 F.2d 1452, 1457 (11th Cir. 1983); see also Aldrich, 777 F.2d, at 639. There are no circumstances in the Record, such as an express

statement by the trial court that he misinterpreted Florida law, to limit mitigation to purely statutory considerations, Harvard, supra, at 539; or that defense counsel specifically informed the jury, at a very sparse sentencing hearing by both sides, that they could not consider non-statutory mitigating evidence, Lucas , supra, at 966. Ziegler, at 958; Martin, 12 F.L.W., supra, at 90, n.3; Spaziano v. State, 489 So.2d 720, 721 (Fla. 1986).

Thus, the effect, if any, of confusion that might have arisen as a result of the decision in Cooper, supra, clearly did not materially affect or prejudice Aldridge's sentencing determination rights. Ziegler; Spanziano, supra; Tafero; Thompson, supra; Hitchcock, 770 F.2d, supra; Johnson v. Wainwright, 778 F.2d 623 (11th Cir. 1985); Palmes v. Wainwright, 725 F.2d 1551 (11th Cir. 1984). Appellant's Cooper-Lockett claim, gives him no meritorious basis for post-conviction or stay relief.

POINT V

TRIAL COURT APPROPRIATELY DENIED APPELLANT'S "RACE OF VICTIM" DISCRIMINATION CLAIM AS ABUSIVE AND SUCCESSIVE, SINCE IT WAS AND IS TOTALLY LACKING IN MERIT.

As alleged by numerous other capital defendants, Appellant, a white male who murdered another white male, has asserted that the death penalty is imposed in Florida, in an arbitrary and discriminatory manner, primarily based on factors such as the race of a capital defendant's victim. The trial court relied on the denial of this claim, by the court itself, and this Court previously, to procedurally bar its re-consideration, and the denial of the so-called "race of the victim" claim by this Court in other cases, on the merits. (SA, 2, 3). The correctness of the trial court's conclusions, is fully supported by the Record, and relevant case law, to make summary denial by said court, an appropriate ruling.

Appellant's "race of victim" argument, clearly constituted an abuse of process, as a successor motion under Rule 3.850, supra. This claim, as presently alleged, was expressly raised in Aldridge's original 1979 post-conviction motion, Appellant's Rule 3.850 Motion, at 6, (SA, 10), and was amongst those claims denied by the trial court in June, 1981, both procedurally and on the merits, (SA, 14), and affirmed as such by the Florida Supreme Court. Aldridge, 425 So.2d, at 1136; Aldridge, 402 So.2d, at 607. These clearly adverse determinations, on the merits, of

Aldridge's present "race of victim" claim, which does not raise any new or different grounds, firmly support a finding of abuse of process. Rule 3.850, supra; Sireci v. Wainwright, 12 FLW, at 58-59; Martin v. Wainwright, 12 FLW, at 90; Darden v. Wainwright, 496 So.2d 136 (Fla. 1986); Straight, supra, at 530; Christopher, at 24; McCrae, supra, at 1390.

Appellant continues to rely on the pendency of McClesky v. Kemp, 753 F.2d 877 (11th Cir.), cert. granted, 106 S.Ct 3331 (July 7, 1986), and Hitchcock v. Wainwright, supra, to avoid or excuse the presently abusive nature of his claim. This argument was unequivocally rejected by this Court in Hardwick v. State, 496 So.2d 796-797 (Fla. 1986), wherein this Court concluded that the granting of certiorari in said cases, does not justify re-evaluation of a "race of victim" claim previously rejected. Moreover, under Federal decisions, the pendency of Hitchcock and McClesky, before the U.S. Supreme Court, does not require re-examination or abeyance of consideration of this issue, or this proceeding, since the nature of the claim itself, does not meet the "ends of justice" test of Kuhlman v. Wilson, 91 L.Ed.2d, supra, at 381 (1986). Moore v. Blackburn, 806 F.2d 560, 565 (5th Cir. 1986); Evans v. McCotter, 805 F.2d 1210, 1215 (5th Cir. 1986), application for stay denied, 40 Cr.L.Rptr. 4115 (December 3, 1986). There is little question that Aldridge's generalized claim,

challenging the application of the Florida death penalty, has no bearing whatsoever on the specific question of his guilt or innocence. Kuhlmann, supra, at 382. Moreover, the Fifth Circuit, in a series of recent decisions, has concluded (even assuming that an intervening change in the law, such as a decision in McClesky and Hitchcock, might constitute an "ends of justice" exception, to a finding of successive bar), that the granting of certiorari and pendency of McClesky and Hitchcock, can NOT support avoidance of an "abuse of the writ" finding. Evans v. McCotter, 805 F.2d 1210, 1215 (5th Cir. 1986), application for stay denied, 40 Cr.L.Rptr. 4115 (December 3, 1986); Johnson v. McCotter, 804 F.2d 300 (5th Cir. 1986); Wicker v. McCotter, 798 F.2d 155 (5th Cir. 1986). In the face of these decisions, and those in Florida such as Hardwick, Martin, and Sireci, supra, an acceptance of Aldridge's reliance on McClesky and Hitchcock, would substantially frustrate the State's valid interest in enforcement of its laws, finality of its judgment, and fulfillment of criminal justice goals of deterence, punishment and rehabilitation. Kuhlmann, at 380-381; Adams v. Wainwright, 484 So.2d, 1216, 1217 (Fla. 1986).

The U.S. Supreme Court's refusal to block executions of capital defendants with "11th hour" successive petitions containing the McClesky-Hitchcock claim, Evans, supra; Wicker v. McCotter, 798 F.2d 155 (5th Cir. 1986),

application for stay denied, 39 Cr.L.Rptr. 4184 (August 25, 1986); Rook v. Rice, 783 F.2d 401 (4th Cir. 1986), application for stay denied, ___U.S.___, ___S.Ct___, 92 L.Ed.2d 745 (1986), further substantiate a finding that Appellant's claim is a successive, elusive one. Sireci; Martin; Stewart, supra; Hardwick, supra; Darden, supra.

Aldridge's reliance on any "new" studies, not previously raised in his State post-conviction motion (or "additional" studies, several of which were available in 1983 when Defendant filed his Federal habeas action, to those originally cited for support therein), constitutes a clear abuse of process. Stewart v. State, 495 So.2d 164 (Fla. 1986). The Gross and Mauro studies, as well as others presented now, do not comprise changes in facts or law, so as to avoid a finding of abuse. Mere amendment or addition of statistical studies, under the guise of new facts or law, which merely duplicate or are cumulative of other studies previously presented and rejected, should not avoid this conclusion. Stewart, supra, Hardwick, supra; Darden, supra; Christopher; Witt, 465 So.2d, at 512; Sullivan v. Wainwright, 464 U.S. 109 (1983). Such a conclusion is particularly appropriate, when Defendant's claim adds nothing to the various empirical studies, used to support the "race of victim" claim in other cases, that have been flatly rejected. Herring v. State, 12 FLW, at 44; Hardwick; Stewart; Smith v. State, 457 So.2d 1380 (Fla. 1986); State v. Henry,

456 So.2d 466 (Fla. 1984); State v. Washington, supra, and cases cited therein; Adams v. State, 449 So.2d 819 (Fla. 1986) Henry v. State, 377 So.2d 692 (Fla. 1979). Further, in view of these decisions, the argument that the decisions in McClesky or Hitchcock present a "novel claim", under Witt, supra, must also be rejected.

It should also be noted that the doctrine of "law of the case" operates to bar this claim as well, due to the trial court's rejection of this claim, on the merits, in its 1981 ruling, as upheld by the Florida Supreme Court in Aldridge, 425 So.2d, supra, at 1136. Terry, supra; Cruz, supra; Parrish, supra.

Assuming arguendo this Court goes beyond the trial court's procedural bar ruling, rejecting Aldridge's claim that the Florida death penalty is imposed in an arbitrary and racially discriminatory manner, based on the race of the victim of capital defendants, Aldridge's claim must be rejected, based on past and current decisions of the Florida Supreme Court, various Federal circuit panels, and the U.S. Supreme Court, which have consistently and universally rejected this claim on its merits, based on the statistical studies upon which Aldridge relies.

As reiterated most recently by the Florida Supreme Court in Herring, supra; Hardwick, supra; Darden, supra; and Stewart, supra, this Court has consistently and repeatedly rejected the claim, based on the same studies Aldridge

relies upon, that the Florida death penalty is arbitrarily and/or discriminatorily imposed, based on the race of the victim, sex of the defendant or geographical locale of the homicide. Herring; Hardwick; Darden; Stewart; Harvard v. State, 486 So.2d 537, 540 (Fla. 1986); Sireci v. State, 469 So.2d 119 (Fla. 1985); O'Callaghan v. Wainwright, 461 So.2d 1354, 1355 (Fla. 1984); Tafero v. State, 459 So.2d 1034, 1037 (Fla. 1984); Smith v. State, 457 So.2d 389 (Fla. 1986); Adams v. State, 449 So.2d 819 (Fla. 1984); Sullivan v. State, 441 So.2d 609 (Fla. 1983); Meeks v. State, 382 So.2d 673 (Fla. 1980). Thus, given said Court's most recent treatment of the issue, the pendency of McClesky and Hitchcock, before the U.S. Supreme Court, has not altered this Court's continuous rejection of the claim.

As noted recently in McClesky, supra, the existence of generalized statistical studies, which do not even pretend to demonstrate evidence that defendant herein was the subject of discrimination, and a demonstration of mere general disparities, which could not possibly account for race-neutral variables, does not warrant an evidentiary hearing, or habeas relief. McClesky, 753 F.2d, supra, at 892-894; Ross v. Kemp, 756 F.2d 1483, 1491 (11th Cir. 1986)(en banc). Furthermore, the degree of disparity in the Gross and Mauro studies, as noted recently in McClesky, does not compel an inference of intent to discriminate. McClesky, at 897;

Ross, supra, at 1491.

Significantly, the United States Supreme Court's rulings in Wainwright v. Adams, ___U.S.___, 104 S.Ct. 2183, 80 L.Ed.2d 809 (1984); Wainwright v. Ford, ___U.S.___, 104 S.Ct. 3498, 82 L.Ed.2d 911 (1984); and Sullivan v. Wainwright, 464 U.S. 109 (1983), indicate that Aldridge can draw no support, or demonstrate a substantial likelihood of success on the merits, from the Supreme Court's review of Hitchcock, supra. In Wainwright v. Ford, supra, a clear majority of the Court (5 justices in Adams; 6 justices in Ford), rejected the "race of the victim" discrimination claim, based on the same Gross and Mauro studies, that has been proffered herein. Adams, 80 L.Ed.2d, supra, at 809; Ford, supra, at 911. The Court specifically held in Ford, citing its prior rulings in Sullivan and Adams, that the Gross and Mauro studies were insufficient to raise a substantial ground upon which relief could be granted. Id. It is particularly significant that in two of the three cases, the Court refused to grant stays of execution[12], and allowed the executions in Sullivan and Adams to proceed, even when, in Adams, the decision in McClesky was pending. Adams, at 809; Sullivan, 82 L.Ed.2d, supra, at 111. This

[12]In Adams, the Court vacated the Eleventh Circuit's entry of a stay; in Ford, the Court granted a stay on different grounds, but expressly stated there was abuse of discretion by the 11th Circuit in granting a stay, on the "race of victim" issue; in Sullivan, the Court noted no basis for contesting the rejection of said claim by both Florida Supreme Court, Federal District Court, and 11th Circuit in that case.

approach by the U.S. Supreme Court, appears to have continued, most recently, in Evans, supra. In view of the consistent rejection of this claim, by the United States Supreme Court at the "eleventh hour", preceding imminent executions, Aldridge's various claims for habeas relief, an evidentiary hearing, or a stay of execution, pending Hitchcock, should be denied.

It is further significant that in relying on a statistically-based argument in support of this claim, Petitioner advocates the granting of habeas relief, in an Unconstitutional manner. As implicitly noted in McClesky, death penalty statutes, such as in Florida, were validated in decisions like Proffitt; Woodson v. North Carolina, 428 U.S. 280 (1976), and Roberts v. Louisiana, 428 U.S. 325 (1976), on the express basis that sentencing discretion was exercised and appropriately channelled, by appropriate guidelines and circumstances. Proffitt, supra. Defendant challenges the results of the very exercise of the type of channelled discretion that makes such statutes Constitutionally valid. McClesky, at 898-899. The logical result of Aldridge's position would be a mechanistic application of the death penalty, based on statistical showings, that would in effect make death penalty mandatory in certain statistical circumstances, and eliminate discretion, in a manner which violates the Constitution. Woodson, supra; Roberts, supra.

Finally, Aldridge's argument requires the absurd

conclusion, in this case, that the jury somehow discriminated against defendant because his victim was white, yet did not so discriminate against him because of his white racial status. It would appear to be totally illogical to conclude, in order to find validity in Petitioner's claim, that the jury would effectively distinguish between defendant and his victim, when of the same race, and apply racism to one and not the other. This inherent inconsistency compels the conclusion that if the jury in this case advised that a white defendant be put to death, then both the jury, and the operation of the Florida death penalty in this case, cannot be considered racially discriminatory. This result, and the rejection of Petitioner's claim, is further mandated by the complexity and existence of numerous race-neutral variables at work in the Florida death penalty legislative scheme, which cannot be statistically reduced. McClesky, at 898-899.

Finally, it is crucial that Aldridge and his victim were both white, which would make the McClesky case totally inapplicable, from a factual standpoint, to him. Wicker, supra; Berry, supra. Furthermore, Aldridge, like all other claimants on this issue before him, has completely failed to demonstrate that the Florida death penalty was discriminatorily applied against him, at his trial, on the basis of the white race of his victim. Ross; McClesky; Sullivan; Adams; Wicker; Ford. Like all capital defendants before

him, summary rejection of Aldridge's claim, by the trial court, was entirely appropriate. (SA, 3).

CONCLUSION

WHEREFORE, based on the foregoing reasons and authorities, it is evident the Appellant's arguments in this case - Aldridge VI - are both procedurally barred and completely lacking in merit.

The "ends of justice" as applied to the Appellant do not require further litigation, twelve and a half years after the murder was committed. Rather, "the ends of justice" would be best served by a ruling that the State's legitimate interest in finality requires affirmance of the trial court's order denying the successive motion for post conviction relief, and the denial of a stay of execution.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida 32301

JOY B. SHEARER
Assistant Attorney General
111 Georgia Avenue - Suite 204
West Palm Beach, Florida 33401
Telephone (305) 837-5062

RICHARD G. BARTMON
Assistant Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appendix has been furnished, by courier delivery, to STEVEN H. MALONE, ESQUIRE, Assistant Public Defender, The Governmental Center, 9th Floor, 301 North Olive Avenue, West Palm Beach, Florida 33401, on this 10th day of March, 1987.

Of Counsel