IN THE SUPREME COURT OF FLORIDA

ROBERT A. PRESTON,

Appellant,

v.

CASE NO. 70,835

STATE OF FLORIDA,

Appellee.

ANSWER BRIEF OF APPELLEE

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SUMMARY OF ARGUMENT

POINT I, IV & V

These issues were not timely presented to the trial court and therefore are procedurally barred. The matters were never considered nor ruled upon by the lower tribunal and this court is without jurisdiction to determine them on the merits and should necessarily affirm based the trial court's apparent refusal to allow their untimely presentation and consideration. Alternatively, the bulk of the issues raised are not cognizable in any event in a Rule 3.850 proceeding inasmuch as they clearly constitute a "new evidence" claim or are without substantive merit.

POINT II

The trial court properly rejected the appellant's purported "conflict of interest" claim based upon employment by the state attorney's office of one of his former defense attorneys from a previous unrelated case. The issue was not cognizable in a Rule 3.850 proceeding in that it could and should have been raised originally at trial and on direct appeal. Alternatively, Preston has demonstrated neither actual "conflict" nor adverse effect to justify reversal of this case or disqualification of the same state attorney's office for purposes of the Rule 3.850 proceeding below.

POINT III

Preston's claim of a Brady v. Maryland violation for failure to disclose a personnel evaluation of a hair analysis expert whose testimony was presented at trial was properly rejected.

Even if it is assumed that the state had some duty to disclose this information (a contention which appellee rejects) the trial court properly rejected the claim inasmuch as Preston has failed to carry his burden of demonstrating materiality in the non-disclosed evidence.

POINT VI

The appellant's various ineffectiveness of trial counsel allegations were properly rejected by the lower court inasmuch as Preston has failed to demonstrate that his obviously experienced and well-qualified trial counsel acted unreasonably at either the guilt or penalty phase of the proceeding and/or that he was sufficiently prejudiced by this allegedly detrimental conduct so as to justify relief.

POINT VII

Preston's claim that his death penalty conviction should have been reversed in the Rule 3.850 proceeding because he had challenged the effectiveness of his trial counsel in a separate prior criminal case, which conviction was utilized to support an aggravating factor at his penalty hearing, was properly rejected by the trial court based upon this court's decision in Mann v. State, 482 So.2d 1360, 1361 (Fla. 1986); alternatively, the trial court could and should have rejected this claim on a procedural default analysis since it could and should have been raised at the original trial and on a direct appeal therefrom if Preston truly considered his previous conviction to have been tainted by ineffective assistance. Failure to enforce this jurisdictional/procedural bar will undermine its effectiveness in

both the state and federal courts.

POINT VIII

Preston's jury instructions/Caldwell v. Mississippi, 472 U.S. 320 (1985) challenge was not timely presented at trial and/or on direct appeal and it cannot be raised in a Rule 3.850 proceeding. Alternatively, there is no impropriety in the jury instructions given nor does the record demonstrate any misleading of the jury as to the importance of their role in the sentencing scheme.

POINT IX

Preston's assertion that the trial court relied upon improper factual imformation in rejecting one of the potential statutory mitigating factors was also properly rejected by the trial court as improperly raised in a Rule 3.850 context; in any event, however, the error was clearly of a typographical nature and the fact that the judge was specifically apprised of the correct information at trial necessarily demonstrates the lack of prejudice to Preston.

POINT X

Again, Preston's allegation that the trial court "directed" the jury to find an aggravating circumstance in his jury instructions at the penalty phase is untimely raised in a motion for post-conviction relief; however, there is nothing erroneous, fundamentally or otherwise, in the jury instruction at issue in that it simply informed the jurors, as a matter of law that the felony offense at issue would satisfy that aggravating factor if the jury as fact-finders were to determine that the defendant's

prior conviction for that offense had in fact been proven.

POINT XI

Again, Preston's belated penalty phase jury instruction challenges were properly rejected as procedurally barred in a motion for post-conviction relief proceeding. In addition, even if the claims were to be addressed on their merits no actual, as opposed to speculative, prejudice has been shown to the appellant from the instructions, i.e., the appellant has failed to demonstrate that the jury to his detriment was left with the impression that they could not vote to recommend life by less than a majority recommendation nor that they in any way shirked their specific sentencing responsibility because of correct information that the judge under Florida law is the ultimate sentencing authority.

POINT XII

Preston's claim that his Miranda rights were violated in presentation of psychiatric testimony from court-appointed psychiatrists without adequate warning and the assistance of counsel is a question that could and should have been raised initially at trial and on direct appeal and is therefore barred from consideration in a post-conviction proceeding. Alternatively, inasmuch as Preston clearly put his mental health at issue there is no legal impropriety in ordering independent psychiatric examination or the presentation of that testimony at trial so as to demonstrate reversible error nor has their been any showing of actual substantive prejudicial impact based upon the "statements" at issue.

POINT XIII

Preston's assertion that the trial court failed to "consider" all available non-statutory and statutory mitigating evidence is, like most of his claims, procedurally barred by failure to timely present it at the trial and to some extent by this court's prior resolution of that claim on direct appeal. Certainly, the "tools" for presenting what is now referred to a Hitchcock claim were available so as to require enforcement of the procedural default rule; however, in any event there is absolutely no record support for a determination that the trial judge did not consider the wealth of non-statutory mitigating evidence presented by a defense counsel obviously aware of the importance of such evidence, especially in light of the specific jury instruction given at the penalty phase that the jurors could consider any aspect of the "defendant's character or record, and any other circumstance of the offense" and the trial judge's factual finding after evidentiary hearing that "no limit was placed on consideration of non-statutory mitigating factors by this court."

POINTS I, IV & V

THE APPELLANT'S FAILURE TO TIMELY PRESENT MOST OF THE VARIED ARGUMENTS INCLUDED WITHIN THESE CLAIMS IN A TIMELY MANNER AND THE LACK OF ANY MERITS DETERMINATION (ORDER) BY THE TRIAL COURT UPON THESE ISSUES NECESSARILY BARS APPELLATE REVIEW.

In a hodge-podge of arguments in Points I, IV & V of his initial brief Preston claims that he wasn't afforded an adequate evidentiary hearing and that his rights were otherwise violated because, inter alia, the state did not comply with his Chapter 119, Florida Statutes Public Records Law request; the trial court did not rule upon his post-evidentiary motion for continuance and order directing state attorney to comply; and that the court did not consider and determine his various affidavit-based claims also generated after the evidentiary hearing on his already amended post-conviction motion. The state submits that this court cannot determine the merits of these claims (such that the state will not address them in this proceeding) and should not otherwise consider them in light of Preston's obvious procedural default in failing to timely raise them and obtain ruling thereon at the trial court level.

The claims are best combined for purposes of an overview of the history of delay caused by Preston in this case. Initially, it must be noted that Preston filed no motion for post-conviction relief in the years following his conviction and sentencing choosing instead to wait until October 31, 1985, only two working days before his scheduled November 5, 1985 execution date. Preston filed his first motion to vacate judgment and sentence

"with leave to amend" (PCR 954-988)[1] along with an application for stay of execution (PCR 989-990). Also attached were various affidavits from Preston's Capital Collateral Representative attorneys purporting to detail how busy they were (PCR 1008-1014). In response to oral arguments held at 3:00 p.m. that same day by the trial court wherein Preston's attorneys - including the head of CCR - alleged that more time was needed to adequately present the post-conviction motion and amend it if necessary, the trial judge indefinitely stayed the scheduled execution and granted Preston's attorneys (Steven Malone and Larry Helm Spalding) until January 31, 1986, to file their "amended motion to vacate judgment and sentence" (PCR 1029, 1030, 1041). Preston filed his amended motion and memorandum in support thereof on January 31, 1986 and sought an evidentiary hearing (PCR 1042-1118). Included in the issues raised therein was the same "Marcus Morales" (Brady claim) apparently still uninvestigated by Preston (PCR 1045). Named counsel for Preston at that time were Spalding, Malone, and Sondra Goldenfarb. On February 4, 1986, a "supplemental appendix" to the amended motion was filed (PCR 1120-1135).

On July 16, 1986 the trial judge ordered an evidentiary hearing on the amended motion to vacate and scheduled it for August 15, 1986 - more than nine months after the original filing of Preston's Rule 3.850 motion (PCR 1154). Immediately

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[1] (PCR) refers to the post-conviction motion record; (R) refers to the original direct appeal record; (AB) refers to appellant's initial brief on his Rule 3.850 appeal.

thereafter - July 18, 1986 - Malone and Goldenfarb moved to withdraw and substitute Spalding as counsel (PCR 1152). On July 30, 1986 Mark Olive, on behalf of Spalding and CCR, filed a motion for continuance of the scheduled evidentiary hearing noting that he had been assigned the case and would need until a date certain - October 14, 1986 (sixty days later) - to adequately prepare (PCR 1155-1159). An amended motion for continuance of the hearing soon followed (PCR 1160-1163) and the trial court again agreed to Preston's extension request this time rescheduling the evidentiary hearing for October 21, 1986 - almost a year after the first Rule 3.850 motion had been filed and the indefinite stay of Preston's execution granted (PCR 1164).

On October 16, 1986, one week prior to this scheduled hearing, Billy Nolas (Preston's present counsel) filed an affirmation in support of his pro hac vice application asserting that he now was counsel for Preston for post-conviction relief purposes and that he had been employed by CCR in September, 1986 and was assigned to represent Preston on October 14, 1986 (only two days before) (PCR 1165-1166). No motion to substitute counsel was made; however, an October 17, 1986 motion for payment of witness fees listed Spalding Olive as apparent counsel for Preston with Nolas "of counsel" (PCR 1171).

Of the three named counsel only Nolas apparently appeared at the beginning of the scheduled evidentiary hearing, despite the fact that he had not yet been admitted pro hac vice. Once admitted, Nolas represented Preston throughout the proceeding

many times attributing his lack of preparation and failure to have obtained necessary witnesses or conduct investigation of those witnesses who would appear to his short (one week) exposure in the case (PCR 388, 410-413)

Early in the evidentiary proceeding the trial court expressed its displeasure with Preston's continuous attempts to amend and continue the case and questioned counsel as to whether there would ever come an end to their attempts to further prolong the proceeding (PCR 61, 63-64). At another point during the hearing the state objected to allowing Preston to postpone presentation of evidence and further delay the hearing already set and the trial court agreed refusing to let in certain Department of Correction records unsupported by custodian identification, thereby clearly rejecting Preston's attempt to obtain yet another continuance of the proceeding (PCR 406-407). Almost immediately thereafter Preston's counsel asked for a recess to question a witness, Mr. Kutsche, Preston's original trial attorney and the subject of all of the appellant's ineffectiveness allegations, because Nolas was "not prepared to present Mr. Kutsche's testimony. or to cross-examine him" since he had "been running around for seven days trying to present all the other evidence that I could muster" (PCR 411). The trial judge while eventually granting a short recess demonstrated his displeasure with Preston's attempt at yet another delay and his desire to have the case <u>finally and completely litigated</u> in the already oft- delayed evidentiary hearing:

THE COURT: Wait a minute, sir. Mr.

> Kutsche's been out there. He's been down here, and you've talked to him. You ought to know what you're going to do. You ought to be prepared to go with it. If you want to go out. . . I'm not going to five you an hour and a half to prepare for his testimony not since this case has been set for this long to try, sir.
>
> MR. NOLAS: And, Your Honor, with all due respect, that hasn't been my fault personally.
>
> THE COURT: I understand. It hasn't been your fault.
>
> MR. NOLAS: Let me give Your Honor an example of what I mean.
>
> We have two boxes of records from the Public Defender's Office. I have never looked through those. Those are Mr. Kutsche's trial - -
>
> THE COURT: Sir, you represented to me the other day, when you came here, you wanted me to admit you to this case. You said you were prepared to go with it. How, the Capital Collateral Representative, I guess that's the name, you've had. . you've had this case for over a year. I know you haven't had it, but someone's done a lot of work.
>
> But I can't just wait for you to go out there and prepare the case. We've got to go today on it.

(PCR 412-413).

After the defense rested their live testimony (PCR 501) they had to move to reopen the case because Preston (whom counsel had talked to for only one twenty minute interview prior to the hearing) wanted to present some testimony and the court again agreed to Preston's request (PCR 504).

After the <u>final</u> close of testimony the court specifically noted that the evidentiary phase had been concluded and

considered argument on claims for which no testimony was presented (PCR 518-519, 527-557). As the scheduled hearing finally drew to a close defense counsel again sought to "supplement the 3.850 proceeding" and the trial court clarified that request to make sure that no new issues would be raised and in fact limited that request by allowing only a supplemental legal memorandum with argument therein. It is clear from the record that the trial court was not authorizing a further amendment of the already amended motion to vacate (PCR 558-563). The trial court further noted that the appellant had presented his case and "had [his] evidentiary hearing" and that the court would decide the motion presented based upon the evidence heard and the legal memorandum submitted (PCR 565-566).

On November 19, 1986, almost a month after the evidentiary hearing and virtually at the end of the time limit established by the trial court for filing legal memorandum, Preston again sought a continuance and for the first time sought an order from the trial court requiring the state attorney to comply with a public records request (PCR 1196-1200). Why those records were not sought in the interviening one year period from the filing of the initial Rule 3.850 motion (rather than one week before the scheduled hearing) is not apparent nor was their explanation of the necessity for such records in preparing a legal memorandum for which the continuance was ostensibly sought other than to render the "hearing" already held "full, fair, reasonable and just" (PCR 1198). A "supplemental motion" was filed for public records disclosure on November 20, 1986, and on November 24,

1986, Preston finally filed his supplemental memorandum and proposed order addressed to the original amended motion to vacate along with a "supplemental support for motion to vacate" attempting to raise as new substantive claims issues based upon the purported affidavits of Preston's former peer-drug group (including Glen Yazell and James MacGean who had already testified in Preston's behalf at the evidentiary hearing) and prison inmates (PCR 1263-1289). Also submitted was a motion to have a Marcus Morales produced for testimony "essential to the proper disposition of the instant motion" (PCR 1289-1290). Finally, on December 18, 1986, a "consolidated addendum" to the motion to vacate as well as a "request for further fact-finding proceedings" was filed along with an "addendum" to the proposed order already submitted (PCR 1292-1301). No record evidence exists to show an attempt to call these motions up for hearing for disposition of the obvious attempt to again amend the already amended motion to vacate and/or submit a new motion.

On February 12, 1987, the trial court denied the motion to vacate upon which the evidentiary hearing was based and addressed only the issues raised in that original "amended motion" (PCR 1307-1313). No leave to amend or for further fact-finding proceedings was ever granted. Preston's motion for rehearing filed February 26, 1987 (PCR 1314-1341) was likewise denied on June 10, 1987 without opinion (PCR 1344).

The limited issue presented herein involve delay, finality of litigation, as well as judicial discretion and authority. Initially, it is obvious that the appellant's attempt to raise

for substantive determination and relief issues which have never been considered and ruled upon by the trial court is improper. This court sits to review judicial rulings and specifically final orders of lower courts such that absent a ruling or order upon a motion or objection no justiciable controversy is presented and a merits determination is procedurally barred. Richardson v. State, 437 So.2d 1091 (Fla. 1983); State v. Barber, 301 So.2d 7 (Fla. 1974). Indeed, jurisdiction is vested in this court only to review "the order entered on the motion" in this post-conviction proceeding and in this case the order entered addressed only the second amended motion as the only one timely filed before and determined by the trial court. Fla. R. Crim. P. 3.850; see also, Fla. R. App. P. 9.140(b)(1)(C).

This case is a case of delay caused by the appellant who clearly benefitted from the original ninety day indefinite stay of execution which blossomed under his constant extension requests to almost a year before the trial court made clear that there would be no further amendments and no further extensions of the already too long delayed evidentiary hearing. It is just this type of incessant delay in death penalty post-conviction proceedings that this court has moved to limit. See, Fla. R. Crim. P. 3.851. That same finality interest is likewise demonstrated in the time limitations now incorporated in Florida Rule of Criminal Procedure 3.850 for all post-conviction proceedings.

Here the trial court to made clear Preston's time limit for alleging and proving his entitlement for post-conviction

relief. Given the strictures of Rule 3.851 now imposed in post-conviction death warrant proceedings, the one year time limit imposed in this case for investigation, preparation and proof through evidentiary hearing was not unreasonable and the trial court's implicit finding of "procedural default"[2] was well within the discretion typically afforded lower court's in determining such issues.

This court has taken pains to make defendants well aware that delay and failure to follow established time limits will not be excused simply because it is a death penalty case. White v. State, 511 So.2d 984 (Fla. 1987). Preston's time limit for presentation of his Rule 3.850 motion filed a year earlier was October 1986 as clearly established by the trial court and his belated discovery of new arguments and evidence within a month after the conclusion of the evidentiary hearing finally held illustrates that with due diligence during that intervening year the same could have been presented. In fact, at least two of Preston's new evidence affidavits were presented by witnesses who had obviously already been contacted by him in that interim period and actually testified on his behalf at the evidentiary hearing. What was Preston and the counsel from CCR chargeable with presentation of his post-conviction claims doing for an entire year? Even assuming a hurried compilation and

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[2] There is of course no record determination by the trial court on the issue of belated amendment and therefore no order for this court to review. It also should be noted that no petition for writ of mandamus to seek and order from the trial court was ever made.

investigation for purposes of filing the initial motion to vacate there is no excuse for failure to complete investigation and incorporate all claims within the original ninety time period provided by the trial court for amendment of that initial motion. It goes without saying, therefore, that the failure to raise any additional claims and to adequately investigate those claims presented within the additional nine month period and to completely present necessary evidence to support all claims finally raised at the evidentiary hearing specifically extended at Preston's request to October, 1986 is inexcusable.

Preston's attempt to present what was in effect nothing more than a second/third motion to vacate with new arguments, new factual allegations, and a new request for evidentiary hearing based on "information previously assertainable through the exercise of due dilligence" should be rejected by this court. Demps v. State, 12 F.L.W. 561 (Fla. Nov. 4, 1987).

In Stano v. State, 497 So.2d 1185 (Fla. 1986), this Court affirmed a trial court's denial of a Rule 3.850 motion where defense counsel attempted to delay the scheduled evidentiary hearing upon an ineffectiveness claim already raised to allow more time for investigation and presentation of witnesses. The trial court refused the extension and denied the motion. This case presents a clearly comparable factual scenario.

In Ferro v. State, 510 So.2d 339, 340 (Fla. 2d DCA 1987), the court affirmed the trial court's rejection of an attempt to file an "addendum" to a previous Rule 3.850 motion stating:

...We cannot say that the decision

> to handle the 'addendum' separately was incorrect. We have no intention of encouraging the piecemeal litigation that inevitably would result from endless last-minute supplementations of 3.850 motions. Instead, the courts have a right to expect that pleadings will not be filed, whether by lawyers or lay persons, until sufficiently and completely drafted.

The rationales of White, Stano, and Ferro all support the concept of judicial authority to deal with a defendant's incessant attempts at delay (especially in the death warrant context). In this case too there has been no showing of an abuse of discretion in the trial court's apparent refusal to allow further amendements/continuance of Preston's motion for post-conviction relief beyond the extraordinary one year time period already obtained through Preston's incessant attempts at delay. The trial court properly brought to an end Preston's attempt to turn his post-conviction motion into a never-ending saga of new arguments and new requests for evidentiary hearings such that even if there were a properly presented judicial determination or order for review in this context no basis for reversal of the trial court's exercise of discretion and judicial authority to assure finality in this proceeding has been demonstrated.[3]

Alternatively, the state submits that even if this court

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[3] In any event, this court would certainly be without authority to grant relief in this case inasmuch as the new motion for post-conviction relief submitted by Preston masquerading as an unauthorized "addendum" was not facially sufficient under Florida Rule of Criminal Procedure 3.850 inasmuch as it was not under oath. Gorham v. State, 494 So.2d 211 (Fla. 1986).

were to somehow address the merits of the claims raised, notwithstanding the trial court's failure to do so, the purported affidavits at issue cannot justify Rule 3.850 relief inasmuch as they clearly constitute a "new evidence" claim. Demps v. State, 416 So.2d 808 (Fla. 1982). That limited portion of the single affidavit upon which Preston bases his new Brady claim would of course be barred by the procedural default already noted.

Furthermore, the Chapter 119, public record request allegation was not an integral part of the Rule 3.850 proceeding and is in fact a totally separate issue upon which reversal of the instant Rule 3.850 denial could not be predicated. Indeed, the separate nature of the relief requested by motion to vacate and a motion to compel response to a public records law request is best evinced by Preston's failure to raise his challenge to the state court's denial of that request until after the evidentiary hearing in this cause and only then as a partial (but irrelevant) explanation for his request for a continuance of the scheduled legal memorandum. The granting of public records disclosure, over the state attorney's assertion of privelege (PCR 1297) requires a civil action to enforce the disclosure request as contemplated by Section 119.07 and Section 119.11, Florida Statutes (1987). That action is not in the nature of a motion to vacate under Rule 3.850 and appellate disposition of the public records question (when actually presented to an appellate court) after a ruling thereon by a civil court properly vested with jurisdiction to determine that issue after the filing of a proper civil action) must necessarily have no effect on the outcome of

this appeal of a specific order rendered in a specific criminal action.

"Marcus Morales"/Brady Claim

The only claim even potentially cognizable for this court upon denial of the Rule 3.850 motion ruled upon by the trial court below is Preston's contention that the state's failure to notify his counsel of the fact that the police had discovered keys bearing the name "Marcus A. Morales" in the victim's automobile constituted a violation of the dictates of Brady v. Maryland, 373 U.S. 83 (1963) and its progeny. This assertoin was, however, properly rejected by the trial court as procedurally barred since it was previously presented and rejected at the trial court level through Preston's motion for new trial and the hearing thereon (PCR 1307) (R 2770-2771, 2980-2981, 2987-3009, 2782).

Preston's contention that his claim can't be barred because Brady claims may be initially raised by Rule 3.850 motion under Florida law is irrelevant to this case. Certainly, while post-conviction proceedings may be utilized to initially raise such a claim it may also be raised by new trial motion - as it was in this case - and determined by the trial court. See, Fla. R. Crim. P. 3.600(b)(8). Indeed, as conceded by Preston in his first motion to vacate, the trial judge (who ultimately denied Preston's motion for post-conviction relief) did in fact deny the new trial motion "holding that Mr. Preston had failed to demonstrate the materiality of the keys" (PCR 963). That assertion is clearly supported by the trial record and the

appellee notes that the same trial judge again at the evidentiary hearing noted the substantial other evidence introduced against Preston in questioning the importance of the "Marcus Morales" Brady claim (PCR 403).

With this historical background the trial court's rejection of the claim because it could have been raised on direct appeal after the new trial motion ruling was not error and the fact that most such Brady claims are raised by Rule 3.850 motion is of no consequence under the particular factual scenario of this case. McCrae v. State, 510 So.2d 874 (Fla. 1987); Bundy v. State, 497 So.2d 1209 (Fla. 1986); Buford v. State, 492 So.2d 355 (Fla. 1986); Harich v. State, 484 So.2d 1239 (Fla. 1986).

Finally, the appellant's failure to timely present at the scheduled evidentiary hearing any admissible evidence on the "Marcus Morales" claim amply supports the trial court's finding that "no new evidence has been presented which would alter this court's previous ruling" (PCR 1307). The same lack of a showing of "materiality" necessary to support a Brady claim (as discussed in Point III herein) which justified rejection of the new trial motion also bars relief in Preston's latest attempt to improperly regurgitate that claim. The affidavits of inmates and Preston's drug group friends relied upon are not evidence and were never considered by the trial court in rejecting those claims actually and finally evaluated at the evidentiary hearing upon the only amended version of Preston's motion to vacate accepted by the trial court.

POINT II

THE APPELLANT'S CONFLICT OF INTEREST CLAIM IS JURISDICTIONALLY BARRED FROM PRESENTATION IN A MOTION FOR POST-CONVICTION RELIEF UNDER RULE 3.850; ALTERNATIVELY, THE TRIAL COURT PROPERLY REJECTED THE CLAIM GIVEN THE APPELLANT'S FAILURE TO ESTABLISH ANY ACTUAL AND PREJUDICIAL CONFLICT.

As the state will do often in the ensuing brief it is respectfully submitted that this issue could and should have been raised prior to trial, at trial, or on direct appeal such that it is not properly cognizable in a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. The clear language of the rule limits a trial court's jurisdiction and authority by providing that:

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

Even assuming the issue to be properly presented by motion for post-conviction relief there is no basis for reversal of Preston's conviction and sentence based upon Preston's legal representation years before the offense at issue in a totally unrelated misdemeanor case by an individual who subsequently became a member of the state attorneys office but who had no substantive role in the death penalty prosecution of the appellant. There was unequivocal undisputed testimony that no discussions of privleged communications or any other matters with

reference to Preston were had between the attorney and others in his office. The trial court's findings of fact rejecting Preston's attempt to demonstrate a substantive involvement by Assistant State Attorney Marblestone in this case and to thereby demonstrate actual conflict are clearly supported by the record.

Preston's entire argument hinges upon the fact that Marblestone appeared at a 1980 continuance hearing at the request of the prosecuting attorney handling this case only to communicate that attorney's objection to any motion to continue; however, the trial court noted that the objection of the prosecuting attorney communicated through Marblestone was not even a "vigorous objection" and that there was no evidence to show that Marblestone did in fact "participate in the prosecution of the Defendant" (R 1308). This evaluation was necessarily based upon substantial record evidence including a credibility evaluation by the trial court judge which Preston would apparently have this court reconduct in a de novo fact finding proceeding to which the state would strenuously object. The transcript of that 1980 continuance hearing makes clear that no privleged information was communicated and that Marblestone's involvement was limited to nothing more than a regurgitation of what counsel handling the case but unable to appear, had asked him to say (PCR 124-126).

In a "throw the baby out with the bathwater" approach Preston argues that his conviction and death sentence as well as the Rule 3.850 proceedings should be invalidated merely because Marblestone decided to become an assistant state attorney years

after he had represented Preston on a misdemeanor charge and despite the unequivocal and unimpeached assertion that no information revealed to him in that previous prosecution was ever disseminated to any of his co-workers or utilized against Preston in this case. This is so because Preston's 1974 conviction for resisting arrest without violence "was used to aggravate sentence and rebut mitigation during the proceedings resulting in Mr. Preston's sentence of death." (AB 15). This assertion is of course false in that the misdemeanor conviction at issue was not relied upon by the trial court for purposes of determining aggravating circumstances (R 2813-2816). Furthermore, while the prior conviction was mentioned for purposes of negating a statutory mitigating circumstance it was obviously of limited consequence in light of the appellant's own statements at trial, noted by the trial court in his sentencing order, that Preston was a repeated drug law violator and perpetrator of violent criminal acts (R 2816). In any event, as correctly concluded by the trial court, there is nothing in the record or in the testimony at the hearing on the post-conviction motion to demonstrate that Marblestone provided any "prejudicial information relating to the charges against the Defendant" (PCR 1308).

As correctly determined by the trial court this Court's decision in State v. Fitzpatrick, 464 So.2d 1185 (Fla. 1985) controls the disqualification issue raised. Although Fitzpatrick did not address the question of the propriety of conviction and sentence based upon alleged "conflict" which was the real issue

to be addressed in the post-conviction proceeding below, it does govern the issue of disqualification by motion prior to trial of state attorney offices which employ as prosecutors individuals who have once been defense counsel and received confidential communications. The post-conviction motion proceeding is, however, a distinguishable factual and legal context from a defendant's initial trial by criminal charge; indeed, Preston has yet to explain just what actual prejudice he would have suffered because of Marblestone's previous 1974 misdemeanor representation vis-a-vis the issues raised in the motion for post-conviction relief. Certainly, no evidence whatsoever was introduced at the evidentiary hearing by Marblestone that was of a privileged nature or that in any way could have affected the legal or factual outcome of any of the issues raised.

In Fitzpatrick this Court found that although confidential communications had transpired between the now assistant state attorney and Fitzpatrick which communications had specifically "related to the criminal case that is currently being prosecuted" disqualification of the entire state attorneys office was nonetheless unnecessary because the record established that the disqualified attorney had neither provided prejudicial information relating to the pending criminal charge nor had personally assisted in the prosecution of that charge. Here, even assuming confidential communications between Preston and Marblestone in 1974 because of the misdemeanor charge it is clear that that charge was totally unrelated to the years later murder prosecution.

The trial court's specific finding that Marblestone did not provide any "prejudicial information relating to the charges against the Defendant" is clearly supported by the record testimony and there was no showing that Marblestone in any way assisted in the prosecution of the Rule 3.850 proceeding other than to serve as a witness in that cause such that disqualification of the state attorneys office from that proceeding was clearly unwarranted under Fitzpatrick. Similarly, although Marblestone's presence at the motion to continue hearing in October of 1980 was perhaps improvident, especially given Marblestone's clear determination to remain apart from the case, it is obvious that no prejudicial impact to Preston was demonstrated from Marblestone's mere statement that the state would object to any motion to continue (made on behalf of the actual prosecuting attorney as a matter of convenience), Marbleston's continuance hearing presence was of no substance or import in the cause such that it cannot be said that Marblestone "personally assisted" in the prosecution of the case, i.e., attempted to prove Preston's guilt. At best, Marblestone's involvement was tangential in nature and as a limited preliminary procedural input was of no substantive consequence or actual prejudicial impact to Preston and cannot serve as the basis for invalidating a legally and factually reliable conviction and sentence in this cause. See, § 924.33, Fla. Stat. (1985).

No actual prejudice, i.e., adverse effect upon defense counsel's representation having been demonstrated there is of course, no basis for reversal even assuming a conflict of

interest equivalent to the "joint represenation" problem of Cuyler v. Sullivan, 446 U.S. 335, 350 (1980) as apparently urged by Preston. See, Lightbourne v. Dugger, 829 F.2d 1012, 1023 (11th Cir. 1987). Certainly no "divided loyalties" issue is presented by the facts of this case nor has there been any showing that his trial counsel, Mr. Kutsche, was actively representing conflicting interest or that he was adversely effected/actively prejudiced.

POINT III

THE TRIAL COURT DID NOT ERR IN REJECTING PRESTON'S BRADY[4] CLAIM.

Preston claims that the state's failure to alert the defense to a personnel evaluation of a hair analysis expert who had previously worked at the Sanford Crime Lab and presented testimony at Preston's trial requires reversal of his conviction because of the "conditional" nature of that evaluation which would have been of impeachment value to the defense. Preston relies on Brady v. Maryland, and its progeny in challenging the alleged due process violation because it "undeniably" created a reasonable probability that had the evidence been disclosed to the defense the result in this case would have been different (AB 35). Indeed, Preston asserts that the omitted evidence was of such substantial import it necessarily affected not only the jury's decision at the guilt phase of the trial but also at the penalty phase, a claim that is impossible to understand in light of the total inapplicability of the hair analysis testimony at the penalty phase (AB 31). Simply put Preston's claim is factually and legally unsupported.

The trial court's succinct finding of fact prefacing his rejection of Preston's Brady claim is amply supported by evidence of record and itself serves to support the court's proper legal conclusion:

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[4] Brady v. Maryland, 373 U.S. 83 (1963).

I. DIANA BASS'S TESTIMONY
A. FINDING OF FACT

> The court finds as a matter of fact that Diana Bass' testimony was not misleading or based upon improper technique. The record at best shows only that Diana Bass was the subject of a critical employee evaluation and was being retrained. Robert Kopec, the author of the critical evaluation indicated that he had no knowledge of her work on this case. James Halligan, the Defendant's expert could not disagree with Diana Bass' conclusion, could not state that her conclusion was misleading, and could not state that she had not used proper techniques.
>
> B. LEGAL CONCLUSION
>
> The court concludes that the Defendant is entitled to no relief on this ground.

(PCR 1307)

Under Brady "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." Id. at 373 U.S. 887. Impeachment evidence as well as exculpatory evidence falls within the Brady rule. United States v. Bagley, 473 U.S. 667 (1985). However, this Court has noted that while the state cannot withhold material evidence favorable to an accused it is not the state's duty to actively assist the defense in investigating the case. The defense has the initial burden of trying to discover impeachment evidence and the state is not required to prepare the defense's case especially where evidence is as accessible to the defense as to the state. Hansbrough v.

State, 509 So.2d 1081, 1084 (Fla. 1987).

In this case there was no specific request by the defense for personnel files of those expert witnesses to be called by the state; furthermore, there was no showing at the evidentiary hearing nor would it logically be expected that the prosecutor had any awareness of the individual personnel files of each of his prospective expert witnesses so as to provide them to the defense. Indeed, it should be noted that the hair analysis expert - Diana Bass - was no longer even employed by the Sanford Crime Lab at the time of the trial. While the prosecutor is logically chargable with knowledge of his entire file and even imputed with knowledge possessed by the police as his investigatory arm, at what point does a prosecutor's involvement with a witness become so tangential that evidence of which he is not aware is not necessarily made his responsibility for Brady purposes? See, Arango v. State, 467 So.2d 692, 693 (Fla. 1985), vacated, 106 S.Ct. 41 (1985). If the state had independently hired a research laboratory to perform the expert hair analysis in this case would the prosecutor be responsible for picking through the business' personnel files so as to spoon-feed defense counsel?

Here, Preston's trial counsel did an in-depth cross-examination of Bass wherein he noted that she no longer worked for the Sanford Crime Lab and also specifically confirmed his own knowledge that a Mr. Steve Platt was Bass' supervisor for the time period when this hair analysis was done (R 1107-1114, 1108). Obviously defense counsel had done some preliminary

research into Bass' background in the lab having already determined the name of her immediate supervisor so as to allow for independent investigation of her professionalism and access to her performance evaluations. How then can it be said that it was the prosecutor's constitutional duty to independently conduct this tangential investigation into the personnel files of a witness who was only collaterally involved in this case; was not truly a part of the prosecutorial/law enforcment arm of the state; and was instead nothing more than a hired technician who but for her contractual status (employee vs. independent contractor) would not even be considered a "state" employee?

Even if the prosecutor had some constitutional due process duty to conduct investigation for the defense and provide them with the personnel evaluation at issue, neither that evaluation nor the testimony adduced at the evidentiary hearing demonstrated any impropriety in her evaluation of the hair samples in this case or in her obviously limited conclusion at trial that two pubic hair samples recovered from Preston's jacket and belt buckle were merely "consistent" in appearance to the known hair samples of the victim such that those hairs could "possibly" have come from her (R 1104-1106, 1114). Defense counsel in cross-examination closely questioned Bass' analysis techniques and stressed the fact that Bass' conclusion amounted to nothing more than "a simple possibility" that the hairs came from the same person - the victim (R 1107-1114). Preston was unable to demonstrate at the evidentiary hearing that Bass' conclusion was erroneous; that the actual analysis performed in this case was

improper; or that her testimony misled the jury in any way in this case.

In any event, the evidence that the pubic hairs discovered on Preston's clothing could "possibly" have come from the victim had little significance in light of the other overwhelming evidence adduced against Preston including, inter alia, the discovery without explanation of Preston's fingerprints both inside and outside of the victim's automobile; the discovery of blood stains obviously consistent with those of the victim on Preston's jacket; food stamps stolen from the store discovered in the victim's room; and Preston's own admissions both before and after the offense that he was going to go steal some money and afterwards that he had in fact done so. These and other factors supplied the basis for Preston's conviction such that the mere "possibility" evidence provided by the hair sample analysis (which Preston can only speculate was invalid) even if eliminated would not have affected the outcome of this case. Accordingly, it can hardly be said that the alleged Brady/Bagley evidence at issue was "material" since there is no reasonable probability that, had the evidence been disclosed to the defense, the result of the guilt or penalty phase of the proceeding would have been different, i.e., the "conditional" evaluation and "expert" evidence relied upon by Preston would not undermine confidence in the outcome of this case given its relatively insignificant import in the original trial and the lack of any real proof that in this case Bass' hair sample analysis and "possibility" conclusion were improper. United States v. Bagley, supra, 473 U.S. at 682.

POINT VI

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS WHERE THE EFFORTS OF PRESTON'S ATTORNEY, EXPERIENCED IN CAPITAL CASES WERE NOT DEMONSTRATED TO BE UNREASONABLE UNDER THE CIRCUMSTANCES AND NO SHOWING OF PREJUDICE SUFFICIENT TO SATISFY THE STRICKLAND STANDARD HAD BEEN PRESENTED.

In a well-reasoned order complete with factual findings supported by the record the trial court rejected Preston's ineffective assistance of counsel claims finding, inter alia, that Preston's trial attorney was experienced in capital cases (having tried "as many as 20 capital cases...as both a prosecutor and public defender") and that defense counsel's trial preparation and strategic judgments with reference to presenting the available evidence on behalf of his client were not professionally unreasonable under the standards of Strickland v. Washington, 466 U.S. 668 (1984) and Downs v. State, 453 So.2d 1102 (Fla. 1984) (PCR 1308-1310). Respondent relies upon the factual and legal conclusions within that order and incorporates them by reference in asking this Court to reject Preston's claims of ineffective assistance which are very clearly based simply upon "the distorting effects of hindsight" and Preston's refusal to "evaluate the conduct from counsel's perspective at the time" as required by Strickland. Id., 466 U.S. at 689.

In Downs, this Court noted the "recent proliferation of ineffectiveness of counsel challenges" and opined that:

...a claim of ineffective assistance

> of counsel is extraordinary and should be made only when the facts warrant it. It is not a claim that is appropriate in every case. It should be the exception rather than the rule.

Id., 453 So.2d at 1107.

It is becoming painfully clear that at least in the context of death penalty cases for which execution warrants are pending the claim of ineffective assistance is far from extraordinary and is in fact utilized in every case, even in cases such as this one where experienced counsel provided reasonable assistance under prevailing professional norms given the circumstances that he was presented at that time.

Preston's reference to the language and import of Strickland is notably limited in that he fails to note, as did this Court in Downs, that judicial scrutiny of counsel's performance must be "highly deferential" in that a court should not succumb to the "all too tempting" urge to second-guess counsel's assistance after conviction or adverse sentence. Strickland v. Washington, supra, at 466 U.S. 689. Nor does Preston note that in order to eliminate the distorting 20-20 effects of hindsight the case must be evaluated in light of the circumstances present at that time; furthermore:

> Because of the difficulties inherent in making the evaluation a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial

strategy.'

Id., at 689 (citation omitted).

Unless the court is able to determine in light of all the circumstances of the case, viewed as of the time of counsel's conduct, that the specified acts were outside the "wide range of professionally competent assistance" and to overcome the strong presumption that counsel in fact "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment" relief is unwarranted. Id., at 466 U.S. 690.

The Strickland Court likewise evaluated the standards to be utilized in evaluating counsel's duty to investigate noting that:

> These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. As the Court of Appeals concluded, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments and support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Id., 466 U.S. at 690-691 (underscoring supplied).

Here, although Preston would apparently ignore the obvious and substantial deference that should be afforded trial counsel in the ineffectiveness context the trial judge in denying relief clearly did not and properly applied the standards announced in Strickland and Downs.

The testimony of Preston's trial counsel, Mr. Kutsche, clearly supports the factual findings of the trial court in rejecting the claim and details counsel's well-reasoned evaluation of the evidence against his client and his alternative defense strategies presented through the case (PCR 415-463). Kutsche's testimony revealed a great deal of criminal law experience having been admitted to practice in 1965 and given his work with both the state attorney and the public defender's office (PCR 464-467). In addition, Kutsche noted his wealth of capital case experience as both a prosecutor and defense counsel through which he had gained familiarity both with the nature of the guilt and penalty phases of such a case (PCR 452-453).

He detailed his extensive investigative efforts on behalf of Mr. Preston including his search for mental health and drug related experts who could present the insanity/diminished capacity defenses that he realized would be the crux of this case by searching for qualified individuals/psychiatrists in the field to assist in that process. Investigation involved telephoning or consulting with four or five different doctors in an effort to locate someone who had a specific expertise with PCP, Preston's alleged drug of choice at issue (PCR 416-425). Kutsche's search included contacts throughout Florida as well as psychiatric

experts in North Carolina, Washington D.C., and Atlanta (PCR 423-425). Those experts contacted could not help him because of the lack of experience or expertise in the PCP area so Kutsche utilized Dr. Vaughn, the expert presented at trial, as his best expert on the matter and in fact met with him before trial, discussed the nature of this case, presented his testimony at trial, and did his best to obtain an insanity instruction based upon that testimony which the trial court ultimately refused (PCR 425-429). To the best of his recollection Dr. Vaughn, whom he had procured for the defense, did talk to both the appellant and his mother for purposes of his investigation and although he was unsure as to the nature of their communications he believed that Dr. Vaughn was concerned about further developing a history with regard to the appellant (PCR 431).

Kutsche also noted that he asked Dr. Mussenden to become involved with psychological testing of the appellant and that prior to trial he did recall talking to some of Preston's friends and that he had an investigator assist him in general investigative duties in the case (PCR 432-434). Kutsche explained that in preparation for the case and in an attempt to obtain an expert familiar with PCP abuse he talked with both the local medical examiner as well as others, in and out of state, in attempting to procure an expert for trial, particularly a psychiatrist with clinical personal experience with PCP abusers; however, despite his best efforts under the circumstances Kutsche he could not find anybody in the psychiatric field of PCP. He further opined that while he was certain there was someone in the

United States or the world who might have had more knowledge or been more assistance he was just not able to, within the confines of time restraints and the other strictures of production of witnesses, procure such an expert for this case (PCR 440-443). Kutsche talked with as many experienced trial lawyers and medical people as he could contact in seeking their advice and assistance on the matter and it resulted in obtaining Doctors Vaughn and Mussenden as his best available experts (PCR 443).

On cross-examination, Kutsche more fully explained the nature of his defense by pointing out that since the case was virtually entirely circumstantial in nature he attempted to both pursue an attack the weight of the circumstantial evidence presented while at the same time pursuing this PCP/insanity defense (thus arguing that even if Preston perpetrated the crime be, an assertion that he otherwise rejected, there was still a defense because of his diminished mental capacity/insanity from the PCP use). However, Kutsche also noted that because of the potentially inconsistent nature of these two he was called upon to make certain tactical decisions as to balancing the two defenses so as to not overwhelm the jury with psychiatric testimony and thereby virtually admit that Preston had in fact perpetrated the crime (PCR 446-448). It was his best strategy, however, to pursue both defenses and to call the best available psychiatrist or psychologist in support of the PCP defense at the same time challenging the adequacy of the evidence. This assertion is clearly borne out by the trial record and Kutsche's argument to the jury. To that end after discussion with Dr.

Vaughn Dr. Mussenden was brought into the case to present to the court and to the jury his psychological evaluations from testing, in combination with Vaughn's testimony, for purposes of the penalty phase to produce anything that might assist the jury for mitigation purposes in explaining the brutal conduct at issue (PCR 452).

A. Failure to Develop and Present Evidence of Mr. Preston's Innocence

As previously asserted in Points I, IV and V herein, this issue was not timely presented to nor determined by the trial court under the guise of ineffective assistance or otherwise and Preston's effort to belatedly raise this issue which could and should have been raised within the exceedingly lenient time limits set by the trial court should be rejected.

B. Alleged Failure to Adequately Develop More Fully Preston's PCP-Insanity Defense

The issue in this case, obviously lost on the appellant, is reasonableness: i.e., whether trial counsel at the time and under the circumstances presented acted outside the "wide range of reasonable professional assistance" in not locating the particular doctor that Preston located years after the fact when the PCP/drug dependency defense was clearly much more established than at the time of Preston's trial. In any event Kutsche's testimony clearly demonstrates a valiant effort on his part to locate just such an expert and his failure to do so despite these efforts and under the limitations in time and resources that are necessarily faced in any such case hardly renders his representation unreasonable. Indeed, given the "high measure of deference" which must be afforded to the judgments of counsel

Kutsche's decision to end his quest for experts and utilize the best available tool to him should not be second-guessed by this tribunal and Preston's effort to have this Court engage in distorting effects of hindsight should be rejected as it was by the trial court.

Despite the appellant's assertion to the contrary his counsel did in fact present through the testimony of Preston and his brother a history of drug abuse, particularly involving PCP, as well as the fact that Preston had injected that drug on the night in question and suffered its ill effects, with supporting expert testimony from Dr. Vaughn to that effect. That Preston's counsel, looking back years later after the defense failed, would have had trial counsel do more (apparently through presentation of other testimony as to Preston's drug history or from syringes discovered in Preston's room) is baseless given the clearly tactical nature of that type of decision and the virtually unchallengeable nature of that type of tactical decision in the ineffective assistance context. Furthermore, much of the "evidence" that Preston attempts to rely upon in his argument was never admitted at trial nor presented to the trial court for consideration, i.e., there was no testimony that PCP would have been locatable within the syringes at issue even if they had been tested or that investigation of Preston's urine, at a time unidentified by the appellant, would have revealed the alleged PCP use on the night in question (AB 45).

Similarly, the allegations that Preston draws from certain literature appended to his motion vis-a-vis PCP and its impacts

of no consequence in this case inasmuch as those materials were never admitted as evidence for review purposes or accepted as of evidentiary significance (AB 46). Preston also did not present, at the evidentiary hearing, any testimony to support his claim that the psychiatrists (whose efficiency he apparently attacks) were not provided with an adequate medical or social history of Mr. Preston or that that alleged failure was somehow attributable to his trial attorney; indeed, to the contrary, Dr. Vaughn's trial testimony does in fact indicate reliance upon a finding of Preston's historical drug abuse and social history as was Dr. Mussendens (R 1572-1586, 1942-1955). While Dr. Macaluso might have been a better expert if he could in fact provide the testimony that he did at the evidentiary hearing at the time of the trial (an assertion the state must reject) that does not render counsel ineffective for using the best experts available to him after reasonable investigation.

C. Failure to Adequately Challenge the State's Circumstantial Evidence Case

Preston's allegation vis-a-vis Diana Bass' expert testimony with reference to hair sample identification is properly rejectable under either of the Strickland prongs, i.e., Preston cannot show that his counsel acted unreasonably in failing to challenge the testimony when the appellant's new "experts" cannot even challenge Bass' conclusions in this case. Alternatively, as more fully addressed in Point III herein Bass' mere conclusion that there was a simple "possibility" the pubic hairs discovered on Preston's clothing could have come from the victim when challenged in light of the alleged deficiency in counsel's

representation now raised by Preston, would not support a finding within a reasonable probability that but for these alleged errors the outcome of the proceeding would have been different. Indeed, as noted in Point III herein the evidence against Preston was otherwise overwhelming and included other expert testimony specifically matching his fingerprints to the victim's vehicle and the stolen food coupons discovered in Preston's possession to the store from which the victim was kidnapped.

D. Failure to Advise Preston of his Rights Regarding State - Directed Psychiatric Evaluations

This issue was not specifically argued in the evidentiary hearing as Preston's counsel made no attempt to discern from counsel why no objection was raised. It seems likely, however, that a learned and experienced trial counsel such as Mr. Kutsche would in fact have given Preston an answer he did not want to hear, i.e., that once Preston sought to raise the defense Kutsche reasonably determined that he waived any right to object to investigation of that defense by independent psychiatrists for whom the state sought appointment. In Point XII herein the well-founded legal basis for such a conclusion is presented.

E. Other Alleged Failings

The state urges this court to reject Preston's catchall ineffectivenes/guilt phase claims (whatever they are) wherever they appear.

F. Sentencing phase

Preston raises a hodge podge of sentencing phase ineffectiveness claims some of which merely repeat guilt phase

ineffectiveness allegations (PCP/insanity/diminished capacity) already rejected. It is clear, however, that Kutsche did rely upon the PCP/mental health defense both at guilt and penalty phases especially given Dr. Mussenden's specific presentation at that phase for that purpose. Adequate instructions were already given on mitigation vis-a-vis mental health aspects through the standard jury instructions to allow the jury to make that determination if they felt it necessary. As conceded by Preston, the jury was made aware of the potential applicability of the statutory mitigating factors vis-a-vis the mental health defense presented through Dr. Mussenden's testimony. The psychological report "appended to Mr. Preston's Rule 3.850 motion" but never admitted into evidence is of no import and in any event could not support an ineffectiveness finding given the clearly reasonable conduct of defense counsel.

Similarly, the appellant's claim that his trial counsel failed to develop his "social and family history" so as to deprive him of humanizing information which might have affected the outcome of his case is preposterous. Such testimony was clearly provided at trial by defense counsel through the appellant who detailed, over the state's objection, not only his immense drug history but also his own family history. Included were: the fact that his father left the household when he was only seven or eight; and he had only contacted his father twice in the interim period; that there was no other male figurehead in the household since then; and that he had suffered certain head injuries with accompanying headaches as a child (including being

hit in the head with a baseball bat) (PCR 1446-1466). Preston also noted, upon his counsel's questioning, that he had never done anything violent while under the influence of drugs and had in fact had never been violent (prior to going to prison in 1978) except once in the alleged bottle throwing incident at issue where he claimed to have defended his younger brother (PCR 1467-1470).

Obviously defense counsel was presented with a difficult situation since Preston's life to that point had hardly been exemplary; it is clear that Kutsche worked with what he had in attempting to present some potential mitigation to explain away what was otherwise clearly a brutal murder in this case. The seven-five jury recommendation is indicative of the great measure of trial counsel's success in making "a silk purse out of a sow's ear" in defending an individual who was an admitted drug abuser, consistent violator of the law, and would hardly be viewed by the normal juror in a positive light.

POINT VII

THE TRIAL COURT DID NOT ERR IN APPLYING THIS COURT'S CLEAR PRECEDENTS AND REFUSING TO ADDRESS IN THIS CASE PRESTON'S PENDING CHALLENGE TO A COLLATERAL CONVICTION AS A BASIS FOR UNDERMINING HIS DEATH SENTENCE; ALTERNATIVELY, EVEN IF THE COLLATERAL CONVICTION WHICH SUPPORTS ONE OF THE AGGRAVATING FACTORS FOR PURPOSES OF THE DEATH PENALTY IN THIS CASE WERE LATER INVALIDATED UPON INEFFECTIVE ASSISTANCE GROUNDS IT WOULD HAVE NO EFFECT UPON THE DEATH PENALTY HERE GIVEN THE ABSENCE OF ANY MITIGATING CIRCUMSTANCES AND THE PRESENCE OF OTHER VALID AGGRAVATING FACTORS.

Preston alleges that because he received ineffective assistance of trial counsel in his nine year old conviction for throwing a deadly missile at an occupied vehicle in violation of Section 790.19, Florida Statutes, the trial court erred in refusing to invalidate his death sentence based in part upon that conviction (R 2813-2814).

In rejecting collateral attack on a presumptively valid conviction in another case before another court as a basis for granting relief in this case the trial court properly relied upon this court's decision in Mann v. State, 482 So.2d 1360, 1361 (Fla. 1986), wherein this court rejected as improper the collateral attack of a prior out of state conviction in an effort to obtain relief and/or a stay of execution:

> We see no need or benefit in discussing in detail the remainder of Mann's claims in his 3.850 motion. We do reject his contention that it is appropriate in a collateral attack on his sentence of

> death to attempt to collaterally attack Mann's prior conviction of a crime of violence in Mississippi; neither is it error to fail to delay the execution of his sentence prior to a ruling in Mississippi on any collateral attack in that state.

The trial court's reliance upon the decision in Mann in this case is clearly not misplaced. Indeed, Preston virtually concedes, as he did before the trial court that the trial court's reliance upon Mann was proper in his footnote argument that Mann should be reconsidered with which the state vehemently disagrees. The logic behind the Mann rule is readily apparent: many murderers have serious prior criminal histories and it is unreasonable to wait until all direct appeal, collateral attack and federal habeas corpus proceedings have been fully litigated before the sentence for the murder is enforced. Here, the certified copies of the judgment and sentence are alone enough to establish the aggravating circumstance of a prior violent felony conviction. § 921.141(5)(a), Fla. Stat. (1983); Tompkins v. State, 502 So.2d 415 (Fla. 1986). Having undergone the appellate process that collateral conviction is presumed valid for purposes of judicial finality such that a mere pending challenge to the propriety of that conviction belatedly initiated only because of a scheduled execution should be rejected as of no import prior to an actual judicial determination of impropriety in that prior conviction. This is not a case, for example, where the defendant was never afforded or appointed counsel so as to render his conviction immediately and presumptively suspect and violative of constitutional protections. See, Mann v. Dugger, 817 F.2d 1471,

1486 (dissenting opinion) (11th Cir. 1987) (Fay, J. concurring and dissenting). Here, Preston was provided counsel in his collateral conviction case and his allegation that that counsel was ineffective, raised only after execution became imminent, was properly rejected as a merely speculative basis for reversal, This Court has made it clear that reversal will not be based upon mere speculation or conjecture. Ford v. Wainwright, 451 So.2d 471 (Fla. 1984); Sullivan v. State, 303 So.2d 632 (Fla. 1974).

Alternatively, the state submits that this claim should have been rejected by the trial court for want of jurisdiction in that any challenge Preston had to the use of his prior felony conviction as a basis for finding the aggravating circumstance at issue could and should have been raised at trial and on direct appeal and is thus now procedurally barred under the clear language of Florida Rule of Criminal Procedure 3.850. Failure to recognize and apply this jurisdictional procedural bar is to risk undermining the state's right to seek application enforcement and enforcement of its procedural rules in later federal habeas corpus proceedings. See, Mann v. Dugger, 817 F.2d 1471, 1483-1484 (11th Cir. 1987), opinion vacated and rehearing in banc granted, 828 F.2d 1498 (11th Cir. 1987). As argued by the state in their response to the rule 3.850 motion (PCR 1304) Preston's collateral attack upon the conviction could have been raised on direct appeal and this court should reject the trial court's apparent merits determination insofar as it attempts to confer jurisdiction which does not exist.

Alternatively, should this court reach the merits of

Preston's collateral attack and retreat from the well reasoned decision in Mann, there is nevertheless no basis for reversal in this cause given the wealth of other aggravating circumstances clearly presented by the record and the trial court's proper finding, as affirmed by this court on appeal, that "no mitigating factors are applicable". Preston v. State, 444 So.2d 939, 947 (Fla. 1984). The trial court originally determined that four aggravating circumstances were proven in this cause; however, this court on direct appeal rejected one of those aggravating factors but nevertheless determined that given the lack of any mitigating circumstance the sentence of death was proper. Rejection of the aggravating circumstance now challenged by Preston would necessarily result in the same conclusion.

Indeed, the state notes, as it did in its answer brief on direct appeal in this case (page 37), that the trial court could and should have also found one more aggravating factor in that it had been demonstrated that the capital felony was committed for pecuniary gain. § 921.141(5)(f), Fla. Stat. (R 2815). This factor was erroneously rejected by the trial court on the understanding, urged by the prosecutor, that if found it would constitute an improper doubling of the robbery factor already found to exist, Section 921.141(5)(d) under Province v. State, 337 So.2d 783 (Fla. 1986) (R 2079-2080). However, there would have been no doubling in the case since the kidnapping also found to exist alone would satisfy the aggravating factor outlined in (5)(d) allowing the robbery to serve as the basis for finding that the crime involved pecuniary gain under (5)(f). See, Brown

v. State, 381 So.2d 690 (Fla. 1980). Here, the harmless nature of any error in finding the prior violent felony aggravating circumstance is apparent given the wealth of other aggravating factors, both listed and unlisted, and the absence of any mitigating circumstances as correctly determined by the trial court and affirmed by this tribunal on direct appeal.

POINT VIII

THE TRIAL COURT PROPERLY REJECTED PRESTON'S JURY INSTRUCTION CLAIM AS ONE WHICH COULD AND SHOULD HAVE BEEN RAISED AT TRIAL AND ON DIRECT APPEAL SO AS TO PRECLUDE ITS CONSIDERATION BY MOTION FOR POST-CONVICTION RELIEF.

As more fully explained in the response to Point XI herein, Preston's claim that the trial court's instructions misled the jury as to the significance to be attached to their sentencing verdict in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985), does not constitute a change in law sufficient to overcome the procedural bar of Florida Rule of Criminal Procedure 3.850. Demps v. State, 12 F.L.W. 561 (Fla. Nov. 4, 1987); Copeland v. Wainwright, 505 So.2d 425 (Fla. 1987); Aldridge v. State, 503 So.2d 1257 (Fla. 1987); Middleton v. State, 465 So.2d 1218 (Fla. 1985). Obviously, Preston did have the "tools" available to him to challenge the jury instruction at issue if he deemed it inappropriate or prejudicial by simply drawing upon this Court's well known decision in Tedder v. State, 322 So.2d 908 (Fla. 1975). Indeed, despite Preston's misleading assertion that the juror's were "given no information or instructions concerning the great weight" that the trial court would give their recommendation, trial counsel for Preston did in fact in closing argument at the penalty phase explain to the jury, without objection by the prosecutor, that their recommendation although advisory in nature "would be weighed heavily, and when the final decision is made by Judge Davis, he is going to take into account your opinions on the matter and give great weight to

it." (R 2009). Counsel was obviously aware of Tedder and of the "great weight" that a trial court should afford a jury recommendation such that he certainly could have sought an instruction to that affect or challenge the instructions actually given by the trial court if he deemed it necessary to do so, as he clearly did not.

The state notes that in at least one other pre-Caldwell state court case defense counsel utilizing Tedder did in fact seek and receive a penalty phase jury instruction underscoring their responsibility in recommending a sentence, to-wit:

> The fact that your recommendation is advisory does not relieve you of your solemn responsibility, for the court is required to and will give great weight and serious consideration to your verdict in imposing sentence.

That instruction was given in the case of Bertolotti v. State, Fla. Sup. Ct. Case No. 71,432 (Fla. 1987), which is presently pending before this court upon direct appeal from the denial of Bertolotti's Rule 3.850 motion after this court granted a stay of execution. Bertolotti is represented by the same office - Capital Collateral Representative - as Preston and attempted to raise the same Caldwell based claim in his Rule 3.850 motion; however, that claim was correctly rejected by the trial court on a procedural bar basis. Relevant portions of the penalty phase jury charge conference as well as the actual jury instructions from Bertolotti are included as an appendix hereto as clear indication that the "tools" for presenting a Caldwell-like claim

were clearly available during Bertolotti's 1984 trial just as they were available to Preston in this case, despite the fact that the Caldwell decision itself had not yet surfaced.

Alternatively, as is also set forth in Point XI, even assuming that this Court were to determine this issue not procedurally barred it is nevertheless without merit inasmuch as the jury instruction given correctly explains the jury's advisory role under Florida law. There is no legal support in statute or case law for Preston's assertion, without citation, that "The jury...has the primary responsibility for sentencing under Florida's Capital Sentencing Scheme." (AB 60). That is simply not the law in this state and there was no impropriety in the instructions given which, inter alia correctly informed the jury that their recommendation was advisory and that the ultimate sentencing decision was the responsibility of the trial judge, and also specifically informed them that it was their "duty to follow the law" and render a sentencing recommendation based upon the evidence presented and proof of the aggravating and mitigating circumstances as well as their weighing of those aggravating and mitigating factors (R 2025-2026). Pope v. Wainwright, 496 So.2d 798, 804-805 (Fla. 1986); see also, Downs v. State, 453 So.2d 1102, 1108 (Fla. 1984) (in deciding prejudice a court should presume that the judge or jury acted according to the law). The jurors were not misled as to the importance of their role in the sentencing scheme and their duty to follow the law was clearly explained in the instructions given. This in concert with defense counsel's previous

unchallenged argument that the court would give great weight to that advisory recommendation clearly refutes the appellant's baseless assertion that the jury "was led to believe that it's determination as to the appropriate sentence meant nothing..." (AB 61). See, Card v. Dugger, 12 F.L.W. 475, 476 (Fla. Sept. 15, 1987).

POINT IX

THE TRIAL COURT DID NOT ERR IN REJECTING APPELLANT'S CHALLENGE TO THE PROPRIETY OF THE TRIAL JUDGE'S SENTENCING ORDER AS IMPROPERLY AND BELATEDLY RAISED IN A RULE 3.850 MOTION.

Preston claims that he was sentenced to death by the trial judge (the same judge who considered his Rule 3.850 motion in this case and rejected this claim) because in the judge's sentencing order in rejecting one of the potential statutory mitigating factors (that the defendant has no significant history of prior criminal activity) the court improperly referred to a prior juvenile offense as a felony when in fact it was only a misdemeanor (R 2816). Again, the trial court properly rejected this claim as unauthorized in the Rule 3.850 context in that it could and should have been raised at trial and on direct appeal (PCR 1311). Fla. R. Crim. P. 3.850; see also, Harvard v. State, 486 So.2d 537 (Fla. 1986); Francois v. State, 470 So.2d 687 (Fla. 1985). No fundamental error has been demonstrated and the case law cited by appellant is clearly irrelevant and unpersuasive in this particular context.

To label the error alleged as "substantial and fundamental" is to fantasize given the other serious criminal activity listed by the trial court in rejecting that particular mitigating factor (R 2816). The court focused initially upon the second-degree felony conviction for throwing a deadly missile into an occupied vehicle for which Preston was sentenced to six years imprisonment and upon the appellant's own concessions at trial that he had

dealt and sold drugs and had been a user of drugs for many years (R 2816). The statement at issue does not in fact indicate a trial court perception that the resisting an officer charge for which Preston was placed on probation as a juvenile in 1974 was in fact a felony. To the contrary, the statement begins by asserting that Preston had a prior felony "arrest record for possession of marijuana pariphernalia" and only then continues on to state that as a juvenile Preston was placed on probation in 1974 for two years on the charge of resisting an officer with violence. Id.

Nowhere in the order does the judge specifically state that he evaluated the resisting an officer offense as a felony; indeed, to reach that conclusion Preston must overlook, as he conveniently did, the prosecutor's clear revelation to the trial judge prior to rendering of the sentencing order at issue that the resisting an officer offense was one without violence and was in fact a misdemeanor and not a felony such that it could not be considered as an aggravating circumstance but could be considered to negate the mitigating circumstance that the defendant did not have a history of prior criminal activity (R 2053-2054). The trial judge specifically acknowledged the prosecutor's statement that the offense was not a felony and was in fact a misdemeanor (R 2054).

The error in the sentencing order in this case must therefore be considered typographical as opposed to substantive in nature and Preston's argument notwithstanding, this is hardly the "type of judicial error in the capital sentencing process"

that must be recognized and corrected in Rule 3.850 proceedings (AB 65). In any event even if this court were somehow to reach the conclusion that the trial court did misinterpret the resisting an officer offense as a felony there is no indication that it would have affected his rejection of the mitigating circumstance at issue since it is the fact and timing of the offense as indicative of Preston's continuous history of criminal conduct that, in context with the other offenses listed, justified rejection of that mitigating circumstance.

POINT X

APPELLANT'S ALLEGATION THAT THE TRIAL COURT "DIRECTED" THE JURY TO FIND AN AGGRAVATING CIRCUMSTANCE IN THE JURY INSTRUCTIONS AT THE PENALTY PHASE WAS PROPERLY REJECTED BY THE TRIAL COURT UNDER A PROCEDURAL BAR ANALYSIS.

As previously noted the unequivocal language of Florida Rule of Criminal Procedure 3.850 precludes review of issues that could and should have been raised on direct appeal. Again, Preston disregards this obvious procedural bar and relying upon case law which provides no support for his allegation he simply asserts that the error is fundamental in nature such that he is not precluded from review by the failure to raise it at the trial court level by contemporaneous objection or the failure to present it on direct appeal.

There is nothing erroneous, fundamentally or otherwise, in the jury instruction at issue. In the instruction the trial court, without objection, stated that it was the jury's role to factually determine whether certain aggravating circumstances were proven to exist and if so whether those circumstances sufficiently outweighed the mitigating circumstances established so as to justify a death sentence (R 2026-2028). They were also instructed that their determination was to be based solely upon the evidence presented at the guilt and penalty phases and that each aggravating circumstance must be established beyond a reasonable doubt before it could be considered in arriving at their decision (R 2026-2028, 2729-2730). The jury was then instructed that the aggravating circumstances which they might

consider were "limited to any of the following that are established by the evidence" (R 2026, 2729); and immediately thereafter the jury was told that one of the potential aggravating factors was that the defendant had been previously convicted of another capital offense or of a felony involving the use of violence to some person followed by a later instruction that the crime of throwing a deadly missile into an occupied vehicle is a felony involving the use of violence to another person (R 2026, 2729).

There is nothing improper about these instructions in that they do not relieve the jury from the factual burden of first determining whether sufficient evidence had been adduced that Preston had been convicted of a felony involving the use of violence to some person, i.e., the crime of throwing a deadly missile into an occupied vehicle. The trial court's matter of law determination and instruction that that crime would in fact constitute a felony involving the use of violence to another person was not improper and once the jury in fact determined that Preston had been previously convicted of that offense they could properly utilize that fact and the judge's matter of law determination to find that that aggravating circumstance had been proven beyond a reasonable doubt.

The question as to whether the felony offense at issue constitutes a felony involving the use of violence to some person is a correct matter of law determination and not subject to determination by a fact-finder. In any event, no prejudicial error has been demonstrated given trial counsel's concession that

this aggravating factor was proven through presentation of evidence as to the "deadly missile" conviction (R 2011-2012) and this court's direct appeal decision finding that appellate counsel also conceded the introduction of the "deadly missile" conviction at trial supported the finding of that aggravating factor. Preston v. State, 444 So.2d 939, 945 (Fla. 1984).

The state is at a loss to explain how this allegedly fundamental impropriety in the instruction could have "resulted in a jury penalty verdict which was simply not reliable." (AB 56). To the contrary, in light of the total lack of mitigating circumstances and the obvious propriety of the sentencing judge's findings as to the three aggravating circumstances ultimately upheld on appeal, as well as the fourth aggravating factor not found but nevertheless proper in this case (See, Point VII herein), including the prior violent felony finding, the only unreasonable or unreliable penalty verdict in this case would have been life imprisonment. Contrary to appellant's suggestion, there is no doubt that this jury would have recommended death irrespective of this allegedly improper jury instruction. See, (AB 66). Indeed, the concession by trial counsel, long before the jury instruction at issue was given, that the violent felony aggravating circumstance was in fact proven through the "deadly missile" conviction in and of itself demonstrates the preposterous nature of Preston's claim that had the jury instruction been changed and the jury "properly instructed on this question, a life verdict would have been highly probable, if not certain." (AB 66).

POINT XI

APPELLANT'S BELATED CHALLENGES TO THE PROPRIETY OF THE JURY INSTRUCTIONS GIVEN AT THE PENALTY PHASE ARE PROCEDURALLY BARRED AND THE TRIAL COURT PROPERLY REFUSED TO CONSIDER THEM ON MOTION FOR POST-CONVICTION RELIEF; NEITHER THE "MAJORITY" SENTENCING VERDICT INSTRUCTION NOR THE ALLEGEDLY IMPROPER INSTRUCTION AS TO THE JURY ROLE IN SENTENCING JUSTIFY RELIEF.

It is well established that jury instruction challenges must be raised by objection at the trial court level so as to preserve them for appellate review even in the death penalty context. Fla. R. Crim. P. 3.390(d); Darden v. State, 475 So.2d 214, 217 (Fla. 1985); Dougan v. State, 470 So.2d 697, 700 (Fla. 1985). Here, no objection was made to the jury instructions at issue and even assuming the "fundamental" nature of the alleged improprieties (an assertion specifically and unequivocally rejected by the state) the appellant's failure to challenge the instructions on direct appeal also necessarily constitutes a procedural default under the clear and unequivocal language of Florida Rule of Criminal Procedure 3.850 since it could have been raised on direct appeal.

Preston first argues that the penalty phase instructions improperly communicated to the jurors that a majority of them was necessary to recommend a sentence of life and that despite the lack of objection to the instruction at trial or on direct appeal a new sentencing hearing must be ordered because of the fundamental nature of this error. The state disagrees and initially notes that in Harich v. State, 437 So.2d 1082, 1086

(Fla. 1983) this court in addressing a similar contention specifically noted that there was no "objection nor a suggested modification". The court, however, also stated that in view of the 9-3 jury vote there was no prejudice demonstrated in the case. In this case there has likewise been no objection nor, other than Preston's mere speculation, has there been any showing that the jury was confused by the instruction or in any way deadlocked so as to demonstrate that their ultimate seven-five vote for death was not in fact the result of their initial and only ballot on the matter. In any event, even if the issue were to be addressed by this court on the merits despite the obvious strictures of the contemporaneous objection rule and Rule 3.850 the state submits that the instructions, when read in their entirety and in context with another, did not prejudicially mislead the sentencing jury.

The most specific instructions relating to the voting procedure in recommending death or life imprisonment clearly provided that while a "majority" of the jurors was necessary to impose a death sentence a life recommendation was justified by a vote of "six or more" jurors (R 2029-2030, 2730-2731). Thus, it is clear that the jury was made aware that a vote of six or more jurors should result in a life recommendation. This in concert with the total lack of any record evidence to demonstrate juror confusion (through question or otherwise) as well as the total lack of any objection at trial or on appeal requires rejection of this claim and affirmance of the trial court order denying Rule 3.850 relief. Harich v. State, supra. The only questions from

the jurors were tendered to the trial court almost immediately after the jury initially retired to consider its advisory sentence and those questions had absolutely nothing to do with the majority/non-majority jury instruction issue presented (R 2031-2035). No deadlock in the jury room, lengthy or otherwise, is demonstrated of record and each of the jurors specifically polled after the advisory recommendation noted that a majority had in fact joined in the advisory sentence of death (R 2036-2037). Obviously trial counsel perceived no prejudicial difficulty with the "majority" jury instruction as much as he did not seek the court's intervention to determine whether in fact there had ever been a jury deadlock and a jury vote where six jurors recommended life imprisonment. Preston's mere speculation should not serve to invalidate a death penalty recommendation clearly valid on its face where there is no record evidence of actual error. Ford v. Wainwright, 451 So.2d 471 (Fla. 1984); Salvatore v. State, 366 So.2d 745 (Fla. 1978); Sullivan v. State, 303 S.2d 632 (Fla. 1974). No fundamental error justifying rejection of the state contemporaneous objection rule and the specific limitations of Rule 3.850 has been demonstrated.

Similarly, Preston's claim of an alleged jury instruction error under Caldwell v. Mississippi, 472 U.S. 320 (1985) is also easily rejected on procedural as well as substantive grounds. For example, conspicous by its absence is any reference by Preston to repeated decisions by this court rejecting the contention that a Caldwell error is fundamental in nature in the Florida death penalty context. Phillips v. Dugger, 12 F.L.W.

585 (Fla. Nov. 19, 1987); Demps v. State, 12 F.L.W. 561 (Fla. Nov. 4, 1987); Copeland v. Wainwright, 505 So.2d 425 (Fla. 1987); Aldridge v. State, 503 So.2d 1257 (Fla. 1987); State v. Sireci, 502 So.2d 1221, 1223-1224 (Fla. 1987); Middleton v. State, 465 So.2d 1218, 1226 (Fla. 1985); see also, Pope v. Wainwright, 496 So.2d 798, 804-805 (Fla. 1986). It is difficult to understand how the appellant could have overlooked each of these decisions which share as a common thread the rejection of Caldwell claims as fundamental in nature so as to overlook obvious procedural bars to their post-conviction presentation.

Despite Preston's outrageous assertion that "It is hard to imagine an error whose results are more egregious" no Caldwell error occurred in this case. Indeed, the state is at a loss to explain upon just what basis the Caldwell claim has been raised since, as previously noted, there is no impropriety in the standard jury instruction which correctly informs the jury that under Florida law the ultimate sentencing decision does rest solely with the trial judge (R 1928, 2025). Indeed, this court has specifically rejected Caldwell claims based upon that same instruction. Card v. Dugger, 12 F.L.W. 475, 476 (Fla. Sept. 15, 1987); Pope v. Wainwright, 496 So.2d 798, 804-805 (Fla. 1986).

The appellant's gift for unsupported hyperbole is adequately evinced by his assertion, without record citation, that the jurors in this case were "repeatedly informed" that the judge would ultimately sentence and even were the statement supported by the record, the state fails to perceive what is erroneous or prejudicial about that correct information since Preston has

failed to demonstrate that the context in which it was presented in any way diminished or misled the jurors as to their role in sentencing. In addition, as previously noted and despite Preston's incorrect and misleading assertion to the contrary, defense counsel in his argument to the jury did in fact specifically inform the jury, without objection by the prosecutor, that they were not to take their advisory opinion role lightly because it "would be weighed heavily" by the trial judge who would "give great weight" to their recommendation (R 2008-2009). Aside from underscoring the appellant's misrepresentation as to what the jury was told vis-a-vis their role in sentencing, this statement by defense counsel obviously evinced his understanding of the proper juror role in the sentencing scheme as long ago announced in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975) and thereby afforded defense counsel the opportunity to object to any perceived improper instruction by the jury if he felt it necessary to do so; clearly, he did not and the issue has therefore been waived. The "tools" for raising this claim at trial and on direct appeal were obviously available and the failure to raise the issue at trial and on direct appeal precludes consideration in post-conviction proceedings. Demps v. State, 12 F.L.W. 561 (Fla. Nov. 4, 1987).

Finally, in challenging the jury instructions at issue Preston conveniently overlooks that portion of the sentencing phase instructions wherein the jury was specifically informed that while the final decision as to punishment would be the responsibility of the trial judge it was nevertheless their

> ...duty to follow the law that will now be given you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

(R 2026, 2727).

There is no basis for assuming that the jurors did not in fact do their duty as explained to them and independently evaluate the appropriateness of the death penalty after weighing the aggravating and mitigating circumstances presented and no amount of factually and legally unsupported speculation that the jurors in fact shirked that specific responsibility can serve to undermine the obviously considered juror vote in this case; indeed, if the jurors role was so necessarily eroded by the allegedly improper instruction it is truly amazing that five jurors in fact nevertheless voted for a life recommendation.

POINT XII

THE TRIAL COURT DID NOT ERR IN REJECTING APPELLANT'S CHALLENGE TO THE PROPRIETY OF TESTIMONY BY COURT ORDERED PSYCHIATRIST AFTER EXAMINATION OF THE APPELLANT WITHOUT MIRANDA WARNING; THIS ISSUE COULD AND SHOULD HAVE BEEN RAISED AT TRIAL AND ON DIRECT APPEAL AND IS THEREFORE JURISDICTIONALLY BARRED IN A RULE 3.850 PROCEEDING AND EVEN IF APPROPRIATELY ADDRESSED CANNOT JUSTIFY RELIEF UNDER THE CIRCUMSTANCES OF THIS CASE.

Initially, although the trial court purports to reach the merits of Preston's claim under Estelle v. Smith, 451 U.S. 454 (1981) in denying relief "under the facts of this case" it is equally apparent that the trial court's denial could and should have been based upon the procedural/jurisdictional bar of Rule 3.850 which precludes the raising of issues that could and should have been raised at trial and on direct appeal.

As conceded by Preston the decision in Estelle v. Smith, upon which his argument is clearly based, was made after Preston was examined but prior to trial and sentencing and the actual introduction of the allegedly improper psychiatric testimony at issue. It is well established that the failure to object to the admission of evidence at trial usually bars appellate review. Teffeteller v. State, 495 So.2d 744 (Fla. 1986); Troedel v. State, 462 So.2d 392 (Fla. 1984); Routly v. State, 440 So.2d 1257 (Fla. 1983). The state's contemporaneous objection rule is no less applicable in precluding review of alleged constitutional violations comaparable to those raised herein. Parker v. State, 456 So.2d 436, 441 (Fla. 1984); Herzog v. State, 439 So.2d 1372,

1377 (Fla. 1983); see also, Simpson v. State, 418 So.2d 984 (Fla. 1982). If Preston would have been precluded from presenting this claim on direct appeal due to the lack of contemporaneous objection below the state is at a loss to explain why he should now be allowed to present it by motion for post-conviction relief inasmuch as that rule specifically states that it "Does not authorize relief based upon grounds which could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence." The trial court is without jurisdiction to grant relief under Rule 3.850 upon Preston's contention that certain trial testimony was improperly admitted since the matter could and should have been raised at trial and on direct appeal and notwithstanding the trial court's failure to deny relief upon that jurisdictional basis this court must do so inasmuch as a trial court cannot vest itself with jurisdiction. Alternatively, the state notes the well established principle that a trial court's decision (in this case denial of the motion) will be upheld if there is any basis for doing so evidenced in the record even if the trial judge recites the wrong reason. Stewart v. State, 367 So.2d 406 (Fla. 1978); Zirkle v. State, 410 So.2d 948 (Fla. 3d DCA 1982); Robinson v. State, 393 So.2d 33 (Fla. 1st DCA 1981).

Clearly, Preston had "tools" to allow him to present a perceived violation of his constitutional rights vis-a-vis the psychiatric testimony at issue yet did not do so. The failure to object at the state trial court level to such testimony has been both implicitly and explicitly recognized as an enforceable

procedural bar to presentation of this claim. Riles v. McCotter, 799 F.2d 947, 953 (5th Cir. 1986); see also, Estelle v. Smith, 451 U.S. 454, 468, n. 12 (1981). The failure of the state trial court and this appellate court to enforce the state's procedural bars clearly undermines their purpose and serves to allow unwarranted attacks upon their viability at the federal court level. See, Hargrave v. Wainwright, 804 F.2d 1182, 1192 n. 26 (11th Cir. 1986). The state's requirement of a contemporaneous objection at trial to preserve an issue for appellate review as well as the clear restriction of Rule 3.850 to matters which could not have been presented at trial and on direct appeal should be enforced in this case notwithstanding the trial court's failure to do so despite the state's objection (PCR 1304, 1310-1311).

Alternatively, even should this Court refuse to enforce the state's contemporaneous objection and procedural bar rules and reach the merits Preston presents no basis for relief. As correctly determined by the appellant Estelle v. Smith does not support Preston's claim of error in admitting the psychiatric testimony at issue inasmuch as that case only addressed the propriety of the admission of psychiatric testimony resulting from an evaluation ordered by the trial court "even though defense counsel had not put into issue Smith's competency to stand trial or his sanity at the time of the offense" and where the defendant was not given the prior opportunity to consult with counsel about his participation in that psychiatric examination. 451 U.S. 454, n. 1. Here, Preston did clearly place his sanity

at issue through pre-trial notice (R 2645) and statement of particulars (R 2659). It was only after Preston raised the issue that the state sought appointment of independent experts by the trial court as authorized by Florida Rule of Criminal Procedure 3.216 (R 2646). The court granted that request and pursuant to the rule ordered the appointment of "two disinterested and qualified examiners" at the same time detailing the time and place of the examination in conjunction with an order to transport Preston for examination purposes (R 2662, 2663-2664). Defense counsel was notified by copy of the state's request and the trial court's appointment of independent experts and likewise apprised of the time and place for examination of Preston. At trial it was Preston who initiated the mental health defense aspect of the case presenting through Preston's own testimony evidence of previous head trauma, headaches, and the appellant's history of drug use as well as drug use on the night of the murder (R 1448-1501). In his testimony Preston also specifcally recounted his rememberance of the circumstances of the evening of the murder. Id.

In their case the defense also presented the testimony of Dr. Vaughn as a psychiatric expert (R 1563-1608). Vaughn testified as to two separate interviews with Preston for purposes of conducting a psychiatric evaluation which led to his opinion that Preston was under the effect of a mental infirmity, defect or disease at the time of the murder (R 1572-1580). Vaughn further opined that at that point in time Preston did not know what he was doing; was unable to differentiate between right or

wrong; and did not comprehend the natural consequences of his acts due to an acute organic brain syndrome (R 1582-1583). On cross-examination, however, Vaughn noted that his diagnosis was based upon Preston's alleged PCP ingestion and that otherwise Preston did not suffer from any mental infirmity disease or defect nor did he demonstrate any major thought disorder or neorosis (R 1586-1587). In fact, Preston's ability to know right from wrong and understand the consequences of his action depended solely upon the presence of drugs within his system (R 1587-1588). In examining the basis for Vaughn's diagnosis the prosecutor cross-examined him upon his own written report, the testimony presented at trial, and upon Preston's own interviews (R 1598-1606). It was on re-direct examination by Preston's trial counsel that Vaughn recounted that portion of his interviews with Preston wherein the appellant had made a "fairly clear denial of any recollections" of the evening of the murder and of his response to questioning by the prosecutor as to whether it was consistent for someone with an acute organic brain syndrome to make up another story (of robbing someone else) to cover for a more serious crime committed when allegedly under the influence of this mental infirmity (R 1606-1608).

It was only after the defense had opened the door that the state sought to introduce the court appointed independent experts - Dr. Kirkland and Dr. Wilder - as to Preston's mental health at the time of the offense (R 1609-1663). Defense counsel was certainly aware that Preston would be interviewed and was in fact interviewed by the court appointed experts and that their

testimony would be introduced at trial to rebut any mental health defense raised in the defense case. Here, Preston's statements to the court appointed psychiatrists were not "unwittingly made without an awareness that he was assisting the State's efforts to obtain the death penalty" as was the case in Estelle v. Smith; to the contrary the psychiatric testimony at issue was introduced to explain differing psychiatric views as to an insanity defense raised by Preston in an effort to controvert "proof on an issue that he interjected into the case." 451 U.S. at 465, 466.

In Buchanan v. Kentucky, ___ U.S. ___, 107 S.Ct. 2906, 2917 (1987), the Supreme Court again recognized the "distinct circumstances" of Estelle v. Smith and specifically acknowledged that in other situations the state might well have an interest in introducing psychiatric evidence to rebut a petitioner's defense. This Court and others have likewise distinguished Estelle v. Smith upon different factual circumstances including situations comparable to those presented here where the defendant first places his mental health in issue and first introduces psychiatric testimony. Hargrave v. State, 427 So.2d 713 (Fla. 1983); Hargrave v. Wainwright, 804 F.2d 1182, 1190-1192 (11th Cir. 1986); Riles v. McCotter, supra, at 953-954; Battie v. Estelle, 655 F.2d 692, 701-702 (5th Cir. 1981).

Finally, even assuming that this issue is preserved for review even absent timely objection and likewise assuming no "waiver" of the issue through Preston's initiation of the mental health defense issue, the appellant has failed to demonstrate any reversible error in the introduction of the psychiatrist

testimony at issue. In carefully dissecting piecemeal testimony from the independent experts appointed by the trial court - Doctors Kirkland and Wilder - Preston apparently claims that some information prejudicial to him given during interviews with those doctors requires reversal because he was not afforded counsel at the time of the examinations. This is clearly not the case as he was in fact represented by counsel who were well aware of the examinations and their purpose. In any event, there is no constitutional right to have counsel present during such a psychiatric examination. Riles v. McCotter, supra, at 954. Furthermore, the portions of the interviews recounted by the psychiatric expert were limited in length and context and were utilized only for purposes of evaluating the insanity/mental health issue raised by Preston vis-a-vis the propriety of each doctor's diagnosis and as explanation for the underlying basis therefore. Substantively, Doctor Kirkland on direct examination testified only that based upon his interview with Preston he detected no insanity (i.e., incapacity to determine right from wrong on the date of the murder) and when given further hypothetical questions by the prosecutor based upon evidence adduced Kirkland merely opined that his opinion of mental health would not be changed with knowledge of those circumstances (R 1614-1619). On cross-examination by defense counsel Kirkland for the first time discussed specifics vis-a-vis the offense in the context of Preston's history of drug abuse and alleged drug use on the evening of the murder (R 1627).

Doctor Wilder's testimony about his interview with Preston

and his psychiatric opinion drawn therefrom was likewise very limited and he noted that this information was specifically relied upon in rendering his opinion in the case (R 1646-1648). The fact that Preston related to Doctor Wilder that on the evening of the murder he had in fact been "cruising with a dude" and that the two of them had been using PCP and then went to the Parliament House where they committed a robbery was not only relevant to Wilder's explanation of his lack of opinion in this case but was also of no prejudicial significance given the previous testimony at trial that Preston had returned with money on the morning of the murder after claiming to have "rolled a fagot down at the Parliament House" with someone named Crazy Kenny (R 1419-1420). In fact, in his own testimony at trial Preston testified that while not positive he did in fact believe he had gone to the Parliament House that evening with Crazy Kenny to "roll a fagot" (R 1477-1478, 1546-1547). The fact that Preston confirmed this account to Dr. Wilder was therefore of no particular significance.

Similarly, Wilder's testimony that Preston had told him that he had declined to go near the murder scene because he had drugs on him and did not wish to expose himself to law enforcement officials was of no prejudicial import, since, as explained through questioning on cross-examination the doctor's impression of the time frame relating to that statement might well have been misunderstood (R 1661-1662). Preston had in fact already testified that the next day he became aware of the murder after seeing police in the field where the body was found (R 1482-1483,

1535). Doctor Wilder's opinion that Preston was "a little glib for the gravity" of the offense he was discussing does not of course relate any statement made at the interview and is most certainly relevant to his analysis and to the jury's evaluation of his opinion or lack thereof and is of no prejudicial import. Nor did Wilder's statement that Preston said something that Wilder was not sure that he should mention of any prejudicial impact in that it did not communicate the substance of any statements nor when read in context did it even refer to the offense at issue (R 1647).

Finally, there is no impropriety in Doctor Wilder's recitation of Preston's statements as to drug use on the night of the murder since this issue was clearly relevant to an evaluation of the mental health issue raised by the appellant which combined an analysis of Preston's thought processes with his alleged drug abuse on that evening. Obviously, all concerned must know upon what factual basis Doctor Wilder rendered his opinions in this case that drug use as related by Preston was a most basic component element of that analysis. Indeed, Preston's own expert, Doctor Vaughn, specifically relied upon Preston's statements as to his drug use on the night of the murder in reaching his conclusion that Preston wasn't legally sane at the time of the offense due to acute organic brain syndrome (R 1584-1590).

POINT XIII

THE TRIAL COURT DID NOT ERR IN REJECTING APPELLANT'S CLAIM THAT THE TRIAL COURT FAILED TO CONSIDER ALL AVAILABLE NON-STATUTORY AND STATUTORY MITIGATING EVIDENCE AS IMPROPERLY RAISED BY RULE 3.850 MOTION.

One of the jury instructions given by the trial court judge in this case immediately prior to sentencing specifically informed both judge and jury that in determining the appropriate sentence among the mitigating circumstances which may be considered if established by the evidence was: "Any other aspect of the defendant's character or record, and any other circumstance of the offense." (R 2028, 2730). Both counsel in their arguments to the jury at the sentencing phase specifically noted that non-statutory mitigating circumstances could be considered by the jurors in reaching their sentencing conclusion although counsel obviously disagreed upon the evidentiary sufficiency and worth of those non-statutory mitigating factors actually presented at the sentencing phase by the appellant (R 2004-2005, 2009-2011, 2021-2025). This specific instruction and the obvious realization by all parties concerned as to the unlimited nature of character based non-statutory mitigating evidence which could be presented and considered for sentencing purposes was based upon the holding in Lockett v. Ohio, 438 U.S. 104 (1978) of which all parties to this proceeding should have been well aware. Accordingly, any alleged deficiency in the instructions to the jury or in the "consideration" of non-statutory mitigating evidence by the judge or jury should have

been raised at trial and/or on direct appeal since the legal basis, (Lockett) for any of the spurious claims now presented, was clearly available. The unequivocal language of Rule 3.850 and case law interpreting the rule makes clear that a trial court may not even consider issues which were raised or could or should have been raised at the trial court level and on direct appeal in a motion for post-conviction relief. McCrae v. State, 510 So.2d 874 (Fla. 1987); Bundy v. State, 497 So.2d 1209 (Fla. 1986); Buford v. State, 492 So.2d 355 (Fla. 1986); Harich v. State, 484 So.2d 1239 (Fla. 1986).

The preposterous nature of Preston's effort to color the facts of this case as comparable to Hitchcock v. Dugger, ___ U.S. ___, 107 S.Ct. 1821 (1987), to thereby explain away his failure to timely raise these allegedly "fundamental" sentencing errors in an appropriate and timely manner is easily demonstrated by reference to the instructions and arguments previously noted as well as the sentencing hearing (before the same judge who rejected the instant motion for post-conviction relief) and sentencing order.

Most obviously, the trial court's factual finding that "No limit was placed on consideration of non-statutory mitigating factors by this court" demonstrates the frivolous nature of Preston's claim (PCR 1312). Preston's failure to mention this unequivocal and virtually dispositive factual conclusion, to which this court must afford due deference, is both inexplicable and inexcusable. That fact-finding is supported by the trial record and effectively determines the issue of the judge's

consideration of non-statutory mitigating evidence. See, Harvard v. State, 486 So.2d 537, 539 (Fla. 1986).

At the sentencing hearing both counsel specifically noted the non-statutory mitigating evidence adduced and the judge's duty to consider it while at the same time disagreeing as to its worth for sentencing purposes (R 2089-2090, 2098-2100). Immediately after hearing the argument of counsel, including those arguments with reference to non-statutory mitigating evidence, the court noted that it was specifically taking under consideration testimony adduced at trial and sentencing as well as the arguments of counsel vis-a-vis aggravating and mitigating circumstances (R 2102). The judge's sentencing order makes equally clear that he carefully weighed and considered all evidence presented at trial and at sentencing as well as the arguments of counsel and then carefully weighed the aggravating and mitigating circumstances in arriving at his sentencing decision (R 2813-2819). Nothing within the order even suggests that a Hitchcock problem exists in this case, i.e., that the trial court felt constrained by law or otherwise from considering non-statutory mitigating evidence presented; indeed, to the contrary the court noted in its order that: "After weighing the aggravating and mitigating circumstances ... there are sufficient aggravating circumstances as specified in § 921.141, Florida Statutes, to justify the sentence of death, and there are insufficient mitigating circumstances to outweigh the aggravating circumstances." (R 2818) (underscoring supplied).

Utilizing the same type of analysis as that performed in

Hitchcock it should be noted that while the court specifically limited its consideration of aggravating circumstances to those specified within the statute no such limiting language is incorporated in reference to mitigating circumstances thus adequately demonstrating, in concert with all of the other circumstances of this case, including the specific jury instruction given by the trial court authorizing consideration of non-statutory mitigating factors, that Preston was not denied an individualized sentencing determination. The simple failure to specifically include all non-statutory factors argued in the order presents no error. Demps v. Dugger, 12 F.L.W. 547 (Fla. Oct. 30, 1987).

It is enlightening to note the "non-statutory evidence" which the trial judge allegedly failed to "seriously" consider in this case; for example, Preston inexplicably urges that: "The court failed to consider even its own expressed doubts (R. 2067-69)" (AB 76). Appellee's review of the record cited reveals no doubts "expressed" or otherwise by the trial court indicative of this alleged "non-statutory" mitigating circumstance. Preston's claim that his "family" was not considered is likewise patently false in that the judge did specifically accept and consider a letter submitted by his mother seeking mercy for her son (R 2047, 2064-2065). Equally unsupported is the assertion is that the trial court did not consider Preston's alleged long-term PCP consumption, the seven-five jury vote for death, and the cicumstantial nature of the state's case. Indeed, each of these matters was specifically presented to the trial judge at

sentencing as was Preston's alleged mental health impairment (R 2095-2099). There is absolutely no indication of record that the court did not give these matters "serious consideration" as speculated by Preston even though Preston's trial counsel himself conceded the total absence of any case law supporting a non-statutory mitigating circumstance based upon a close jury vote to recommend death, and despite the fact that this court has itself rejected the "lingering doubt" rationale as a potential non-statutory mitigating circumstance (R 2098). King v. State, 12 F.L.W. 502 (Fla. Sept. 24, 1987); Aldridge v. State, 503 So.2d 1257 (Fla. 1987).

If for no other purpose the specific argument of defense counsel vis-a-vis the alleged non-statutory mitigating circumstances at issue and the trial court's unequivocal statements that he considered the evidence and arguments presented as to sentencing and mitigating circumstances again demonstrates the obvious, i.e., that these claims are not "new" and are not based upon any substantial change in law resulting from Hitchcock so as to allow Preston to sidestep the obvious procedural bar of Rule 3.850. Similarly, there is no logical or legal basis for Preston's claim that Hitchcock allows him to relitigate the sentencing court's refusal to find certain statutory mitigating circumstances previously addressed and affirmed by a unanimous court on direct appeal. Preston v. State, 444 So.2d 939, 947 (Fla. 1984).

CONCLUSION

WHEREFORE based upon the arguments and authorities presented the appellee respectfully requests that this Honorable Court affirm the trial court's denial of post-conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has been furnished by mail, to Billy H. Nolas, Capital Collateral Representative, at the Office of the Capital Collateral Representative, at 1533 South Monroe Street, Tallahassee, Florida 32301, this 4th day of December, 1987.

Sean Daly
Of Counsel