IN THE SUPREME COURT OF FLORIDA

No. 71234

CHARLES LEWIS BURR,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

Petitioner was indicted by the Leon County grand jury on October 29, 1981, and was charged with murder in the first degree and robbery with a firearm. (R 1-2). The State subsequently filed a notice of intent to rely on similar fact evidence on April 6, 1982. (R 37-38). In response thereto, petitioner filed a motion in limine on May 26, 1982. (R 43-52).

The motion in limine was denied by Judge J. Lewis Hall after a pre-trial hearing. (R 355-394). Judge Hall found sufficient basis to allow the similar fact evidence to be presented at trial, but made it clear that the ultimate decision regarding the admissibility of the evidence would rest with the trial judge. (R 391-394).

During the trial, no reference to the similar fact evidence was allowed during opening statement (the State agreed to refrain from mentioning it) or the first phases of the trial. (R 481-484). After a number of witnesses had testified on behalf of the State, the similar fact evidence was proffered to the court (R 975-1014) and after argument by counsel (R 1015-1040), the evidence was deemed relevant and admissible. (R 1040-1042).

Petitioner also filed a motion to dismiss the indictment on May 28, 1982, alleging racial discrimination in the selection of grand jury foremen in Leon County. (R 53-54). Counsel thereafter

entered into a stipulation with regard to various facets of the selection of grand jury foremen in Leon County since 1955. (R 72). The motion to dismiss was ruled upon by Judge J. Lewis Hall, Jr., prior to trial. The motion was denied without argument or testimony beyond that contained in the supplemental record on appeal. (R 269, 355-358).

Following the close of the State's case-in-chief, petitioner moved for a judgment of acquittal which was denied. (R 1077). The jury found petitioner guilty as charged on both counts. (R 290-292). During the sentencing phase of the trial, the State presented no additional evidence. Petitioner presented several witnesses in mitigation. (R 435-451). After arguments and instructions, the jury returned a recommendation of life imprisonment. (R 292). The court, however, sentenced petitioner to death on the first degree murder charge, as well as to 99 years imprisonment for the armed robbery, retaining jurisdiction over the first third of that sentence. (R 321-322). In so doing, the trial judge found three statutory aggravation factors and nothing in mitigation. (R 311-320).

There followed a direct appeal to the Supreme Court of Florida, which court affirmed both the judgment of conviction and the sentence of death. Burr v. State, 466 So.2d 1051 (Fla. 1985). This Court's mandate issued June 3, 1985. A subsequent petition for writ of certiorari to the Supreme Court of the

United States was denied on October 7, 1985.

Burr was denied clemency and a warrant of execution was signed against him on August 24, 1987.[1] The warrant runs from October 22 through 29, 1987.

On October 1, 1987, the Honorable Charles Miner, Circuit Court Judge of the Second Judicial Circuit held a hearing on the motion for post-conviction relief filed by Burr and on the Answer and Motion for Summary Dismissal filed by the State. (Copies of these pleadings were previously lodged with this Court). A transcript of this proceeding should be available to this Court at this time.

On October 6, 1987, Judge Miner rendered a written order dneying all relief to Mr. Burr.

Judge Miner held the motion was outside the time limits of Rule 3.850 and therefore subject to summary dismissal. In an abundance of caution, Judge Miner made an alternative ruling on the merits of each claim so as to allow this Court and future Courts the opportunity to review the matter in a timely fashion given the need to expedite this active death warrant case.

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[1] In as the warrant covers a sixty day period Rule 3.851 precludes any new filing of petitions or appeals in state court at this time.

Burr has timely filed his notice of appeal. Rule 3.851, Florida Rules of Criminal Procedure.

STATEMENT OF THE FACTS

The following testimony was adduced at the trial held June 9 and 10, 1982:

Domita Williams identified petitioner as the man who picked her up at her house at about 6:30 a.m. in order to take her to work on August 20, 1981. (R 830). By that date, Williams and petitioner, Charlie Burr, had been going together for two or three weeks and were talking of marriage. (R 832, 856). Petitioner went inside Williams's house and 15 or 20 minutes later, or shortly before 7:00 a.m., the couple left the house on Mount Sinai Road, heading towards Tallahassee on Highway 27. (R 833-834). About 7:00 a.m. or a little earlier or later, petitioner pulled into the parking lot of a Suwannee Swifty convenience store and waited while Williams went inside. (R 834). Williams knew the victim, who was the store clerk, as "Steve" because she had stopped at this convenience store before. (R 834). No one besides the clerk was in the convenience store while she and petitioner were there and no one was in the parking lot area. (R 835). About five or ten minutes later, Williams came out of the store with a cheeseburger and Kit-Kat candy bar she had purchased. (R 834, 850). Petitioner then got out of the car and went inside the store. (R 835). Williams began eating her sandwich. She could see the upper part of petitioner and the victim from the car. (R 836). After hearing a gunshot, she

looked up again and saw petitioner but not the victim. (R 836, 837, 852, 853). Petitioner then returned to the car, smiling. Williams was crying because "he [petitioner] had shot Steve" and she had "never witnessed anything like that before. . ." (R 837). Petitioner asked Williams what was wrong. Williams testified that petitioner was wearing blue jeans and a "Master Red" shirt at the time (R 838), and further identified State's exhibit number one as being petitioner's shirt. (R 839). Williams noticed a pistol-type handgun imprint in petitioner's pocket. (R 838).

Williams further testified that after the incident at the convenience store she and petitioner drove to an apartment where petitioner was staying with Katrine Jackson and her family. (R 840). Williams sat down and told Katrine Jackson and Tammy Footman, a cousin of Williams, who were present in the apartment, what had happened at the store and what she had seen. (R 840.

Subsequent to the apartment visit, Williams was taken to work at Sunland by petitioner and once there, she told her supervisor, Katherine Haygood, about the incident at the store, but she did not tell her the truth about what happened. (R 841). Williams never contacted the police. (R 842). Williams worked at Sunland August 20 and 21. (R 842). On August 21 she and petitioner drove to Melbourne in his car. (R 843). Before they left, petitioner picked up a cardboard box containing about 25

handguns. (R 844). Williams was present when petitioner subsequently sold these handguns in Melbourne. (R 844).

Williams specifically stated that she did not drive her mother to work on August 20, 1981, and that her mother had driven her own car to work that day. (R 845). She also testified that someone, not named at the time, had tried to get her to change her testimony, but that her testimony before the jury was true. (R 845).

On cross-examination it was established that Williams was afraid of petitioner and apparently feared for her baby. (R 856, 857). Williams denied telling her mother or anyone else that she had lied in her statement to Sgt. Charlie Ash, an investigator with the Sheriff's Department, and that her mother was lying about August 20, 1981. (R 858-861).

On re-direct examination Williams explained her fear of petitioner and testified that he did not run out of the store after the shooting, nor did he drive away rapidly from the store. (R 863).

Kim Miller, a regular customer, testified next. He stopped at the Suwannee Swifty at about 7:00 a.m. on August 20, 1981, and found the body of Steve Hardy, the clerk, lying over an open safe. (R 866, 871). He dialed the 911 emergency number at 7:09 or 7:10 a.m. (R 868). He identified State's exhibit number two

as being a photo of the victim in the condition he found him. The crime scene was not disturbed prior to the authorities arriving. (R 867).

Robert Bailey, a paramedic, responded to Kim Miller's 911 call and discovered the victim to have a bullet wound behind his left ear and determined him to be dead. The victim appeared to be on his knees. (R 871). Miller's call came in at 7:09 a.m. (R 870).

Deputy Ray Wood secured the area thereafter and did not allow the area to be disturbed. (R 874).

Johnny McCord, a supervisor for Suwannee Swifty, testified that $252.75 was missing from the store's register and safe. (R 877, 878).

Bill Gunter, a crime scene technician, described the store for the jury via photographs. (R 881, 882). He also identified State's exhibit number five as being bullet fragments removed from the victim's head. He received those from Dr. Wood during the autopsy. (R 887-889).

Charlie Ash, Jr., an investigator with the Leon County Sheriff's Office, testified that he arrested petitioner on September 29, 1981, after conducting an investigation. He also recovered petitioner's "Master Red" shirt from Domita Williams. (R 903).

Sam Bruce, another sheriff's investigator, recovered two .22 caliber bullets from the apartment were petitioner was staying prior to his arrest. (R 905-906). Petitioner's counsel stipulated to the admissibility of the bullets. (R 908, 909). Donna Cormier testified only in order to prove the chain of custody of the "Master Red" shirt and it was admitted into evidence. (R 910).

Don Champagne, a firearms examiner for the Florida Department of Law Enforcement, testified that the fragments removed from the victim's head were the remains of a .22 caliber bullet. (R 913). The fragments were entered into evidence. (R 914).

Katrine Jackson verified Domita Williams's prior testimony. On August 20, 1981 Williams came to the apartment and was tense and nervous. Petitioner acted abnormally later in the day. Williams told her about what she had seen happen at the store earlier that morning. (R 921-922). Jackson allowed officers to search petitioner's room on September 29, 1981. (R 921, 922). On cross-examination, however, Jackson testified that Williams had not told her that she had been at the convenience store with petitioner. (R 923). The first indication that the trial would take unexpected paths occurred at this point; Jackson's testimony surprised the prosecutor. (R 924-956). Jackson eventually took the stand again and admitted she lied on cross-examination.

(R 956-957). Jackson then testified that Williams did tell her about what petitioner did at the convenience store the morning of August 20, 1981. (R 957-958).

Dr. Thomas Wood's deposition was read to the jury by agreement. Dr. Wood performed the autopsy on Steve Hardy, the victim. (R 964). He found a bullet wound behind the left ear. (R 965). The autopsy revealed that the shot was fired from close range and that the gun's relative position to the victim's head would have been behind the victim's head, slightly to the left, and probably pointed downward somewhat. (R 966). Death was rapid and no purposeful motion on the part of the victim would have been likely after the shot was fired. (R 967-968). Dr. Wood's findings were consistent with the victim being shot while on the floor. (R 969).

At this point in the trial the similar fact evidence was proffered and deemed admissible by the trial court. (R 975-1042).

Emil Farrell worked at a Majik Market convenience store in Palm Bay, which is in the vicinity of Melbourne. (R 1050). On Saturday evening, August 22, 1981, he got a phone call at home from someone asking him who was working at the store the next morning. (R 978). Farrell replied that he was. The next morning, Sunday, August 23, Farrell received another phone call asking who was working. He again said he was. (R 1051).

At about 8:00 a.m. petitioner came into Farrell's store and stood by the microwave oven until the store was empty. He then approached Farrell and asked him if his name was Farrell. When Farrell said yes, petitioner asked him if he had ever seen him. Farrell said no. Petitioner then pulled out a gun and said, "I'm going to kill you. Open the register." (R 1051, 1052). Petitioner had brought several items to the register area prior to pulling the gun. (R 1052). Petitioner told Farrell two more times to open the register. Without getting any money and without any provocation on Farrell's part, petitioner shot Farrell twice with a small caliber gun. (R 1052-1053, 1060).

With petitioner still inside the store, Farrell ran outside and asked a customer, who had just driven up, for help. (R 1055). The man fled and petitioner came out of the store, jumped into a rather small, old blue or green car, and left. (R 1058). This occurred three days after the Hardy murder. Farrell identified petitioner from among many photographs shown to him. (R 1056, 1057).

James Griffin worked in a Majik Market convenience store in Port Malabar, also near Melbourne, Florida. (R 1061). Griffin was preparing for clean-up late in the evening of August 28, 1981, and was by himself in he store when petitioner came in. (R 1061-1062). Petitioner pulled out a small caliber handgun and said, "Give me all your money and don't be no fool." (R 1063).

After Griffin had given him the money, petitioner stepped back and shot Griffin once in the abdomen. Griffin said he "would get him for this" and turned. Petitioner then shot him in the left elbow and left in a brown or maroon car. (R 1063, 1065). This occurred eight days after the Hardy murder and five days after the Farrell shooting.

Lloyd Lee worked in a 7-11 convenience store in Melbourne. About midnight on September 8, 1981, (twelve days after the Hardy murder) Lee was alone in the store. Petitioner came in, picked up some items, and came to the cash register. (R 1069-1070). As Lee rang up the items, petitioner pretended to reach for a wallet, but pulled a small caliber gun instead. (R 1069-1070). After getting the money, he told Lee to "be cool," then turned to leave. He turned back, however, and shot Lee twice. (R 1070). The shooting was without any provocation. (R 1071). Petitioner walked rapidly away. (R 1072). Lee identified him from hundreds of photographs. (R 1073). The State rested. (R 1076).

The defense's case began with testimony from a series of customers who arrived at the Suwannee Swifty store on August 20, 1981, from shortly before 7:00 a.m. until approximately 7:10 a.m. All saw Steve Hardy alive.

Clarence Lohman arrived about 6:50 a.m. and left right after 7:00 a.m. (R 1078). As he was leaving, two other cars drove up. (R 1078). Vincent Prichard drove up around 7:00 a.m. As he left

the store he saw a black man wearing glasses walk towards the store, stop, then walk away. (R 1082-1083). A tall, young man drove up as Prichard drove off. (R 1083). Although Prichard drove away, two minutes later he drove past the store, after he had picked up some men. (R 1086). As he drove by he saw Kim Miller, a friend of his, pull into the parking lot of the store. (R 1086).

John Thompson pulled into the store about six minutes after 7:00 a.m. and parked next to a blue Ford. (R 1102). When he went inside he saw Hardy, who was acting unusual, as if he had something else on his mind. (R 1106). Another man, not resembling petitioner, stood at the back of the store by the cooler. (R 1109). He acted suspiciously, like he was just passing the time. (R 1116).

Minnie Pom ey, Domita Williams's mother, testified that on August 20th, Williams drove her to work about 6:30 a.m. (R 1156). Pompey worked at a day care center about a 20 minute drive from where she lived, and that morning Pompey punched in at 6:56 a.m. (R 1157). Williams stayed for a few minutes to put her child into the center, and about five or ten minutes after 7:00, she started on the 20 minute trip back home. (R 1158).

Shortly after 7:00 a.m. Ruth Grant and her daughter Valerie were heading west toward Florida State University along Highway 27. They passed the Suwannee Swifty and saw several police cars

there. (R 1194). A short time later, they saw an ambulance heading towards the Suwannee Swifty and seconds later, Domita Williams, a relative of theirs, passed, also apparently heading home. (R 1195).

Domita Williams then took the stand for the defense and recanted her previous testimony. (R 1266-1286). She testified that August 20, 1981, was the first day she had to report to work at the Sunland Training Center in Tallahassee. (R 1269). Because she did not have a car of her own, she drove her mother to work so she could use her mother's car. (R 1269). As she returned home, she passed by the Suwannee Swifty store and saw several police cars there. (R 1270). She was at work by 9:00 a.m., and about 5:00 or 6:00 p.m., she saw petitioner and he stayed with her that evening. (R 1271-1272).

On cross-examination the following was revealed:

Williams disputed that she had ever told Katherine Haygood, her supervisor, that she had been in the Suwannee Swifty the morning of the robbery/murder (R 1136, 1137; compare to 1286-1288); she admitted her mother was pressuring her to change her testimony (R 1288); she never saw the ambulance Ruth and Valarie Grant claimed they saw at the same time they saw Domita in her mother's car (R 1289); she admitted that when she gave her original statement to Charlie Ash she knew Katrine Jackson and Tammy Footman had previously given statements, but did not know

the content of their statements (R 1290, 1291); she could not explain the "cheeseburger story" away. . . how it cropped up in everyone's statements (R 1292-1294); she was aware that "[m]urder, you can get the chair" and "[p]erjury, I don't know what you can get" (R 1294); she admitted saying no threats were made when she gave her statement (R 1295); she acknowledged that her deposition testimony (where no threats were made) was consistent with her statement (R 1296, 1297); she acknowledged that her grand jury testimony (where no threats were made) was the same (R 1297-1298); she acknowledged discussing her expected trial testimony with the prosecutor the Friday before trial (where no threats were made) and it was the same (R 1298-1299); she acknowledged that Mr. Meggs had never threatened her or acted mean to her (R 1299); she verified that although Mr. Modesitt used strong language, Mr. Meggs only emphasized "the importance of telling the truth" (R 1302); she stated that "after [she] found out that they didn't have any evidence against [petitioner]," that at that point she decided to "tell the truth" (R 1303-1304); that Mr. Meggs calmed her down and she agreed that her original statement was true (R 1304-1305); she told Mr. Meggs that she was scared and people were trying to persuade her to change her testimony and Mr. Modesitt apologized to her (R 1305); she acknowledged that she had received a call from defense counsel after her original trial testimony and but for that call she did not "think" she would have returned and recanted her

original testimony (R 1307); she emphasized once again that she was scared of petitioner, for herself, and for her baby (R 1307, 1308); and she denied ever discussing the Suwannee Swifty incident in the presence of petitioner and Darrell Footman. (R 1309; compare to R 1140-1144).

Leola Powell testified as the first rebuttal witness. She saw petitioner's car at Williams's house between 6:30 a.m. and 7:00 a.m. on August 20, 1981. (R 1335). At 7:45 a.m. the car was gone. (R 1336, 1337).

Tammy Footman's testimony was proffered because it was agreed that she had heard the previous day's testimony, but not Williams's recantation. (R 1320, 1322, 1323, 1324, 1325, 1342, 1352). Petitioner's counsel suggested the proffer and at its conclusion, admitted the testimony was "along the lines of her statement." (R 1325, 1351). Footman was allowed to testify and in the process verified Katrine Jackson's prior testimony and specifically stated that Williams told her the "cheeseburger story" the morning of the incident. (R 1357, 1358-1361).

Ray Wood testified that the ambulance was already at the Suwannee Swifty when he arrived at 7:21 a.m. on the morning of the robbery/murder and that no ropes were strung until at least 7:30 a.m. (R 1367-1369).

Charlie Ash was recalled and imparted the details of his investigation. (R 1370-1373). He knew Williams had information after talking to Katrine Jackson and Tammy Footman, but he never told Williams what they had stated. (R 1376-1378). Williams's mother was hostile (R 1374) and he got no response from her when he asked how she knew if her daughter knew something about the Suwannee Swifty incident. (R 1374, 1375). Ash denied ever threatening Domita Williams. (R 1375). The taped interview he conducted with Williams was played for the jury for the purpose of determining the atmosphere of that statement. (R 1382, 1386). The State rested and all testimony concluded.

SUMMARY OF ARGUMENT

The Motion for Post-Conviction Relief filed below sought to set aside the judgment and sentence of death imposed by this Court on June 21, 1982. (R 321-322) The aforementioned judgment and sentence was reviewed by the Supreme Court of Florida on direct appeal and was affirmed by said court on February 14, 1985. Burr v. State, 466 So.2d 1051 (Fla. 1985). Rehearing was denied on April 26, 1985 and the Florida Supreme Court issued its mandate on June 3, 1985. (Ex A) A petition for Writ of Certiorari in the United States Supreme Court was denied on October 7, 1985. Burr v. Florida, ____ U.S. ____, 106 S.Ct. 201 (1985).

The State urges that the instant motion is time barred and was properly dismissed because the motion filed pursuant to Rule 3.850, Fla.R.Crim.P. was not filed within the two years mandated by said rule. See also Rule 9.310(a), Fla.R.Crim.P. (Motion seeking a stay a mandatory prerequisite).

Additionally, none of the issues raised below (some concededly frivolous under 3.850, See Transcript of October 1, 1987 Hearing) were sufficient to justify any ruling on the merits. Even the true "collateral" issue of ineffective assistance of trial counsel is not pled with facts or allegations sufficient to require more than summary review and dismissal.

Thus, even assuming this Court holds the two year bar is not applicable, affirmance is merited.

I. THE PETITION WAS FILED OUTSIDE THE TIME LIMITS UNDER RULE 3.850 AND IS PROCEDURALLY BARRED.

The State urges that the instant motion is time barred and was properly dismissed because the motion filed pursuant to Rule 3.850, Fla.R.Crim.P. was not filed within the two years mandated by said rule.

Rule 3.850 provides in pertinent part that:

> "A motion to vacate a sentence which exceeds the limits provided by law may be filed at anytime. No other motion shall be filed or considered pursuant to this rule if filed more than two years after the judgment and sentence becomes final. . ."

This rule has been found mandatory by the Florida Supreme Court in the recent death case of White v. State, 12 F.L.W. 433 (Fla., August 25, 1987) wherein the Court affirmed an order denying relief because of the untimely filing of the 3.850 motion by collateral counsel. "We note also that by its terms, Rule 3.850 procedurally bars motion for relief where thejudgment and sentence, as here, have been final for more than two years. . .". Id.

Of course, the decision of this Court became final on June 3, 1985. Robbins v. Pfeiffer, 407 So.2d 1016 (Fla. 5th DCA 1982). In Robbins the court noted that "the judgment of an appellate court, when it issues a mandate, is a final judgment in

the cause and compliance therewith by the lower court is a purely ministerial act. . . [i]n the absence of a stay ordered by the appellate court, the issuance of a mandate affirming a judgment entitles the holder of that judgment to a writ of execution as a matter of right." 407 So.2d at 1017. (Emphasis added) As Robbins also points out, the fact that a discretionary writ of certiorari is being sought does not affect the finality of the appellate court's judgment. Accord, Paez v. State, 12 F.L.W. 2062 (Fla. 3d DCA, August 25, 1987); McCuiston v. State, 507 So.2d 1185, 1186 (Fla. 2nd DCA 1987) review granted; Ward v. Dugger, 508 So.2d 778, 779 (Fla. 1st DCA 1987); Vicknair v. State, 501 So.2d 775, 756 (Fla. 5th DCA 1987)

It is patently clear from the records and files in this Court that the instant motion is untimely because it was filed after the expiration of the two-year time limit provided for in Rule 3.850 and therefore this Court should dismiss said motion summarily. Paez, supra. The State would add that the imposition of reasonable time limits within which to litigate known claims serves a valid governmental interest of promoting finality of judgments and sentences. See: United States ex rel. Caruss v. Zelinsky, 689 F.2d 435 (3d Cir. 1982); Atlantic Coast Line Railroad Co. v. Mack, 64 So.2d 304, 307 (Fla. 1952):

Assuming this Court ignores the plain language of the rule and overrules Paez and McCuiston, the State of Florida urges

affirmance because the motion for relief fails to state grounds for relief; raises grounds not cognizable by motion pursuant to Rule 3.850 and/or refutable by the record. A copy of that record is on file with the Court, that record being the entire record on appeal filed in Case No. 62,365. Also attached to the states circuit court pleading are the defendant's Initial Brief; the Answer Brief of the State of Florida; and the defendant's Reply Brief from that direct appeal. They will be referred to hereinafter to demonstrate defendant is entitled to no further relief and that the State of Florida is entitled to a summary dismissal.

II. THE SUFFICIENCY OF THE EVIDENCE IS NOT REVIEWABLE IN COLLATERAL REVIEW.

Aside from the fact that the allegations in paragraphs 1-8 are refuted by the record, the law of this State is that the sufficiency of the evidence is not an issue which may be raised in a collateral proceeding pursuant to Rule 3.850. Glenn v. State, 271 So.2d 23 (Fla. 2d DCA 1972); Spencer v. State, 389 So.2d 652 (Fla. 1st DCA 1980). In Spencer the First District Court of Appeal flatly stated that "insufficiency of the evidence is not properly raised on a post-conviction motion." Id. at 652.

Even were this not the case, the trial court ruled the evidence was sufficient to support the verdict when it denied defendant's motion for judgment of acquittal at the close of all the evidence (R 1413) and that ruling was reviewed by this Court on direct appeal. Burr v. State, supra, at 1053. Citing to Tibbs v. State, 397 So.2d 1120 (Fla. 1981), aff'd 457 U.S. 31 (1982) this Court held; "The evidence was legally sufficient, and we do not find the interests of justice require a new trial in this case." Id. at 1053.

As the Eleventh Circuit Court of Appeals recently held in Rodriguez v. Wainwright, 740 F.2d 884 (11th Cir. 1984), Jackson does not permit review of the credibility of witnesses.

Since this Court reviewed the sufficiency of the evidence on direct appeal this ground is frivolous even if it was cognizable

under Rule 3.850. Copeland v. State, 505 So.2d 425, 426 (Fla. 1987); Carter v. State, 242 So.2d 737 (Fla. 1st DCA 1970); Clark v. State, 460 So.2d 886, 888 (Fla. 1984) and Quince v. State, 477 So.2d 535, 536 (Fla. 1985). As the decisions cited above hold, ". . .Questions which have been considered and disposed of on a direct appeal of a judgment of conviction and sentence will not be considered as grounds for post-conviction relief. . ." Carter, 242 So.2d at 738. Defendant is entitled to no relief on this ground as a matter of law.

III. APPELLANT'S CHALLENGE TO THE SELECTION OF GRAND JURY FOREMEN AND GRAND JURIES ON RACIAL DISCRIMINATION GROUNDS IS NOT COGNIZABLE IN COLLATERAL REVIEW.

This issue is not cognizable in a collateral proceeding because it is a matter which can and should be raised at trial and on appeal, Witt v. State, 387 So.2d 922 (Fla. 1980). The alleged discrimination in the selection of grand jury foreperson was raised in this Court prior to trial by Motion to Dismiss (R 53), was ruled on by Judge Hall (R 269), and made the subject of an issue on appeal. (State's motion for summary dimissal, Ex. C pp. 8-15; Ex. D pp. 12-17). This Court rejected the claim, citing to Andrews v. State, 443 So.2d 78 (Fla. 1983) and thus the matter cannot be relitigated in this collateral action. See cases cited herein above.

The Appellant's motion, pages 10 through 16, cites to the same cases relied upon in the direct appeal and the dissent in Andrews, supra. Moreover, he attempts to distinguish Hobby v. United States, 468 U.S. _____, 104 S.Ct. 3093 (1984) but neglects Jackson v. State, 498 So.2d 406 (Fla. 1986) wherein Andrews was reaffirmed.

The State of Florida in reading the allegations contained in Ground Two observes an allegation, obviously intended to avoid Hobby, to the effect that "the venire from which the grand jury was selected to hear Mr. Kennedy's case was not properly consti-

tuted and that contamination infected the selection of the foreperson." Paragraph 21, p. 15.

The State wishes to point out that this case does not involve a Mr. Kennedy. There is a death case involving an Edward Kennedy (Kennedy v. State, 455 So.2d 351 (Fla. 1984)) but this motion has been filed by Charles Burr: apparently the draftsman of the motion did not change the wordprocessor disk from which the claim was extracted.

Be that as it may, there has never been a claim that the grand jury that returned the indictment against defendant was the product of a systematic exclusion of blacks and/or women, and there are no facts alleged supporting such a claim in the instant motion.

If defendant is trying to insert a new issue for purposes of federal review in a subsequent proceeding that attempt must fail.

Clearly, the issue of systematic exclusion of blacks and/or women from the grand jury is an issue which can be raised at trial and on appeal. Indeed, Rule 3.300, Fla.R.Crim.P. and the case of State v. Silva, 259 So.2d 153 (Fla. 1972) require the defendant to move to quash the indictment or the issue is barred from review. See also: Francis v. Henderson, 425 U.S. 536, 48 L.Ed.2d 149 (1976) and Davis v. United States, 411 U.S. 233, 36 L.Ed.2d 216, 93 S.Ct. 1577 (1973) both of which hold such a claim

cannot be raised in a collateral proceeding where the claim was not properly raised at trial and on appeal.

Since the defendant did not raise any claim respecting the composition of the grand jury as required by the rules of procedure, the claim is procedurally defaulted and cannot now be raised. Mills v. State, 507 So.2d 602, 603 (Fla. 1987).

Defendant is entitled to no relief on this ground as a matter of law. Card v. Dugger, 12 F.L.W. 475, 476 (Fla. September 25, 1987).

IV. APPELLANT'S "COLLATERAL CRIMES EVIDENCE"/FAIR TRIAL CLAIM IS PROCEDURALLY BARRED.

The issue, as framed, to wit: that defendant's federal rights to a fair trial were violated, is procedurally barred because on appeal the defendant merely raised a state law claim that the evidence was not admissible under the Florida Evidence Code and Williams v. State, 110 So.2d 654 (Fla. 1959) (R 43-49; State's Ex. C pp. 25-32). Defendant cannot raise the admission of collateral crime evidence in a motion for post-conviction relief, Raulerson v. State, 462 So.2d 1085 (Fla. 1985) so as to create a federal claim not presented on appeal. See specifically Engle v. Isaac, 456 U.S. 107, 134, 71 L.Ed.2d 783, 102 S.Ct. 1558, 1570 n. 28 (1982) and Smith v. Murray, ____ U.S. ____, 91 L.Ed.2d 434, 106 S.Ct. 2661, 2665-2666 (1986). Defendant raised a denial of fair trial in his Motion for Limine (R 49) but did not press it on appeal and, instead, raised only state law grounds. His federal claim raised at this stage comes too late and cannot be litigated.

Of course, this Court correctly concluded the collateral crime evidence was admissible under the Florida Evidence Code and Williams and it progeny (R 1040-1042). Burr v. State, supra, at 1053. Accordingly, the propriety of admitting such evidence under Williams cannot be relitigated. White v. Dugger, supra; Card v. Dugger, supra.

Appellee notes the fact that Appellant asserts that subsequent to the trial of this cause he was found not guilty of the offense against Lloyd Thomas Lee and the charges for the offenses against Emil J. Farrell were nolle prossed. (Paragraph 7, p. 18). As a matter of law neither event rendered the admission of the evidence inadmissible. State v. Perkins, 349 So.2d 161 (Fla. 1977) and Holland v. State, 466 So.2d 207 (Fla. 1985). In Perkins, the Court held that only collateral crime evidence for which the defendant has been acquitted is inadmissible in a subsequent trial. Indeed, the defendant acknowledged Perkins in his brief submitted to this court on direct appeal. In Holland this court held that Williams rule evidence is admissible where the charges have been nolle prossed!

The defendant is not entitled to relief on this ground because the federal claim was not presented on direct appeal, resulting in an appellate procedural default Copeland, White, and Smith v. Murray. The Williams rule claim was disposed of on direct appeal and cannot be relitigated in these proceedings. Carter v. State, supra.

V. THE CLAIM OF PROSECUTORIAL MISCONDUCT IS NOT COGNIZABLE ON COLLATERAL REVIEW.

Appellant is attempting to raise a denial of his federally protected right to a "fair trial" because of actions which took place during the trial but which he did not object to on federal grounds. See Argument IV, infra. The obvious purpose is to obtain a ruling on the federal ground which has been procedurally defaulted under Engle and Smith v. Murray so he can attempt to raise the claim in the federal habeas corpus courts. Appellant is attempting to have this Court waive the State's procedural default defense in the federal system under Ulster County Court v. Allen, 442 U.S. 140, 60 L.Ed.2d 777, 99 S.Ct. 2213 (1979); Cf. Mann v. Dugger, 817 F.2d 1471, 1487 (11th Cir. 1987) (Clark J. concurring) rehearing en banc pending ("However, adoption of this waiver rule is unnecessary in light of the Florida Supreme Court's later consideration of the issue in its opinion denying post-conviction relief.").

Because allegedly improper prosecutorial argument may not be raised in a motion to vacate, Booker v. State, 441 So.2d 148 (Fla. 1983); Zeigler v. State, 452 So.2d 537 (Fla. 1984); State v. Washington, 453 So.2d 389 (Fla. 1984); Middleton v. State, 465 So.2d 1218 (Fla. 1985) and Sireci v. State, 469 So.2d 119 (Fla. 1985), the Appellant cannot obtain consideration of his federal claim on the merits. Recall that this Court specifically refused

to consider the allegedly inflammatory arguments of the prosecutor on direct appeal because only one comment was objected to at trial. Burr v. State, supra, at 1053. The one comment complained of was found not to warrant the granting of a mistrial.

Rule 3.850, explicitly provides 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 of the judgment and sentence." The alleged comments complained of could have been objected to but were not and the grounds respecting those comments are unauthorized in this proceeding. The claims must be rejected as a matter of law for that reason. Card v. Dugger, supra.

VI. APPELLANT'S ATTEMPT TO RELITIGATE THE "JURY OVERRIDE" BY THE TRIAL COURT IS NOT COGNIZABLE BY COLLATERAL REVIEW.

The Appellant asserts that he is entitled to a vacation of his sentence of death because this Court improperly overrode the jury's recommendation of life which was predicated on its residual, or lingering doubt respecting the defendant's guilt.

First, this issue was presented and rejected by this Court Burr v. State, supra, at 1054. The issue cannot be relitigated. White v. Dugger, (same issue) Second, the Appellant presumes the jury recommended life because it had a whimsical or lingering doubt, which is sheer speculation. The more probable explanation for the recommendation was the emotionally charged plea of his kin that the defendant's life be spared. (R 437; 441; 443; and particularly 446). Compare, Francis v. State, 473 So.2d 672 (Fla. 1985). Of course, the jury never explains why it recommends life. The trial court must and did (R 311-320) and it found no mitigating circumstances from the evidence although it tried to find some. (R 320). Appellee notes the trial court reaffirmed his position as to the guilt of the defendant at the conclusion of the hearing on the post-conviction motion. (Order, p. 5-6) He obviously had no doubt lingering, residual or whimsical. Third, the Appellant relied below on DuBoise v. State, 12 F.L.W. 107 (Fla. February 19, 1987) and the special concurring opinion, in Melendez v. State, 498 So.2d 1258 (Fla. 1986).

Any question regarding the "lingering-doubt" mitigating factor was rejected in the case of Amos Lee King v. State, Case No. 68,631, Opinion filed September 24, 1987. In its 5-2 opinion this Court said:

> The lingering doubt theory has been used several times. Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984), cert.denied, 470 U.S. 1087 (1985); Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1984), cert.denied, 459 U.S. 882 (1982). This Court, however, has consistently held that residual, or lingering, doubt is not an appropriate nonstatutory mitigating circumstance. Aldridge v. State, 503 So.2d 1257 (Fla. 1987); Burr v. State, 466 So.2d 1051 (Fla.), cert.denied, 106 S.Ct. 201 (1985); Buford v. State, 403 So.2d 943 (Fla. 1981), cert.denied, 454 U.S. 1163 (1982).

Slip Opinion at p. 7.

Accordingly, this claim lacks merit as a matter of law if it were somehow not barred.

VII. TRIAL COUNSEL WAS NOT INEFFECTIVE IN HIS REPRESENTATION OF APPELLANT.

Appellant, realizing he cannot obtain review of the allegedly inflammatory argument of counsel because of the procedural default, attempts to obtain review in the guise of ineffective assistance of counsel. This he simply may not do. Sireci v. State, 469 So.2d 119 (Fla. 1985); Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985); Anderson v. State, 467 So.2d 781 (Fla. 3d DCA) review denied 475 So.2d 963 (Fla. 1985); State v. Stirrup, 469 So.2d 845 (Fla. 3d DCA 1985); Ferro v. State, 488 So.2d 179 (Fla. 3d DCA 1986); Washington v. Estelle, 648 F.2d 276 (5th Cir. 1981) and, Sullivan v. Wainwright, 695 F.2d 1306, 1311 (11th Cir. 1983).

In Sireci this Court expressly stated: "Claims previously raised on direct appeal will not be heard on a motion for post-conviction relief simply because those claims are raised under the guise of ineffective assistance of counsel" Id. at 120.

More to the point, in Anderson the defendant alleged counsel was ineffective because he did not object to certain allegedly inflammatory comments made by the prosecutor in closing argument - the identical claim pressed here. The Court in rejecting the argument said:

> [3,4] The sole basis in this case for concluding that counsel's representation of the defendant constituted "a substantial and serious deficiency

measurably below that of competent counsel," see Knight, supra at 1001, is that counsel failed to preserve for appellate review an otherwise reversible error, to wit: he failed to object and move for a mistrial based on the prosecutor's alleged improper comments made in opening statement and closing argument to the jury. Assuming without deciding that these comments would have constituted reversible error had the record been properly preserved below, we think counsel's failure to do so cannot, without more, satisfy this element of the aforesaid Knight-Strickland standard for ineffective assistance of counsel. We reach this conclusion for two reasons.

First, any different result would substantially undermine, if not utterly destroy, the preservation of error rule in Florida as applied to criminal cases. Compare Castor v. State, 365 So.2d 701, 703 (Fla. 1978). If counsel should fail, as here, to preserve for appellate review an otherwise reversible error, it would be of little moment as the conviction would still be subject to being vacated based on an ineffective assistance of counsel claim. The preservation of error rule would have no real consequence as it would apply only when counsel failed to preserve points which would not have merited a reversal in any event. In effect, a "wild card" exception to the preservation of error rule would be created allowing appellate courts to pass on the merits of unpreserved, non-fundamental errors in criminal cases, and to upset criminal convictions based thereon. See Cox v. State, 407 So.2d 633 (Fla. 3d DCA 1981). We cannot accept such a fatal undermining of our preservation of error rule.

> Second, we cannot agree that, ipso facto, a failure to preserve an otherwise reversible error for appeal establishes that counsel has made a professional mistake in judgment, much less committed the serious type of error which the Knight-Strickland standard contemplates. In the context of this case, opinions by experienced trial lawyers differ widely as to whether it is wise to object and move for a mistrial in the midst of a prosecuting attorney's argument to the jury. Some advise against it, or suggest it be used sparingly, as they feel such objections tend to antagonize the judge or jury thus jeopardizing future court rulings or a favorable verdict. Accord R. Keeton, Trial Tactics and Methods §§ 4.2, 5.4 (1973). Moreover, they contend that inflammatory-type arguments often bommerang against the prosecutor in the eyes of the jury, and are best handled in rebuttal or by ignoring the arguments altogether. Others contend that objections only tend to emphasize the argument and generally ought not be made. In addition, counsel must weigh whether a mistrial at this point would be in the client's best interests given his assessment of the likelihood of an acquittal. Compare Nelson v. Reliable Insurance Co., 368 So.2d 361 (Fla. 4th DCA 1978). In sum, the decision to object and move for mistrial based on a prosecutor's improper argument is a complicated trial strategy decision in which reasonably competent criminal defense lawyers may and often do differ. Absent special circumstances, the failure to so object and move for a mistrial cannot amount to ineffective assistance of counsel. Collins v. State, 536 S.W.2d 928 (Mo.App.1976).

467 So.2d at 786-787.

The Third District has taken to summarily denying such claims under Rule 9.140(g), Fla.R.App.P. See Ferro, supra.

Of course, the judiciary is not permitted to second guess the strategy decisions of counsel. Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984); Burger v. Kemp, ___ U.S. ____, ____ L.Ed.2d ____, 107 S.Ct. 3114 (1987) and State v. Bolander, 503 So.2d 1247, 1250 (Fla. 1987). The record in this very case shows that trial counsel did not object because he "hate[s] to jump up and down during closing argument. I know that's a distraction for the attorney" (R 1159).

It must also be remembered that even if counsel did not act as he did for strategic reasons,[2] reasonably competent counsel does not require that counsel "recognize and raise any conceivable constitutional claim" Engle v. Isaac, supra, 102 S.Ct. at 1575. See also Mills v. State, 507 So.2d 602, 605-06 (Fla. 1987).

The Appellee contends that the conclusory allegations contained in paragraphs 1, 2 and 3 on page 26 of the motion for post-conviction relief fail to allege any facts whatsoever much

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[2] There can be no prejudice in this case ever shown because Judge Miner stated on the record during the post-conviction motion hearing that he would never have granted a mistrial. Ferguson v. State, 417 So.2d 639, 641-42 (Fla. 1982). See also, Judge Miner's written order, p. 6.

less that the act or omission probably affected the outcome of the proceedings. Indeed, if this jury was so carried away with the rhetoric of the public prosecutor why did it recommend life? It is difficult to find counsel ineffective when he obtained a recommendation of life imprisonment. Porter v. State, 478 So.2d 33, 35 (Fla. 1985); Bolander supra. Interestingly, the trial court, which observed counsel's performance throughout the entire proceeding, stated in its Findings of Fact for Sentence, "Lest it be later claimed that Charlie Burr received ineffective assistance of counsel, I should say that Mr. Thomas Keith made the very most with what he had to work with." (R 320). The trial court re-affirmed that view just days ago. (Order denying relief p. 6) The record affirmatively supports that conclusion and the defendant's motion on this ground should likewise be summarily denied. Foster v. State, 400 So.2d 1 (Fla. 1981); Muhammad v. State, 426 So.2d 533 (Fla. 1982); Smith v. State, 445 So.2d 323 (Fla. 1985); Middleton v. State, 465 So.2d 1218 (Fla. 1985) and Stone v. State, 481 So.2d (Fla. 1985).

VIII. CLAIMS OF PROSECUTORIAL MISCONDUCT ARE DIRECT APPEAL ISSUES NOT COGNIZABLE IN COLLATERAL REVIEW.

This claim is frivolous. It should be rejected because the issue was litigated on direct appeal and rejected by this Court.

Without referring to the record pages of Domita Williams' testimony, or the testimony of Sergeant Ash which contradicted Domita's testimony (R 1369-1332) the alleged threats and coercion were clearly laid before the jury by trial counsel and the prosecutor. Indeed, defense counsel argued at length that Domita Williams was coerced into testifying against the defendant. (R 1492-1496). It is obvious that the jury believed her initial testimony for if they thought she was coerced into lying for the State the jury would have acquitted Burr! On the direct appeal the defendant argued the alleged threats were such that he was entitled to a new trial in the interests of justice. (Ex. C pp. 20-25). The State responded thereto in detail (Ex. D pp. 41-48). This Court found Ms. Williams' testimony was not the product of "coercion or duress." 466 So.2d at 1053. If Appellant wished to present additional evidence regarding the alleged coercion he was free to do so at trial but he is most certainly not entitled to relitigate the issue in this proceeding. Card v. Dugger; Witt v. State, supra, and Carter v. State, supra.

CONCLUSION

Based upon the above stated argument and legal authority Appellee requests this Honorable Court affirm the Order of the trial court.

Respectfully submitted,

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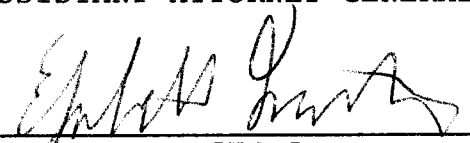

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief of Appellee has been furnished by U.S. Mail to Steven L. Seliger, Attorney at Law, 229 E. Washington Street, Quincy, Florida, 32351 this 9TH day of October, 1987.

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