IN THE SUPREME COURT OF FLORIDA

71,523

RONALD WOODS,

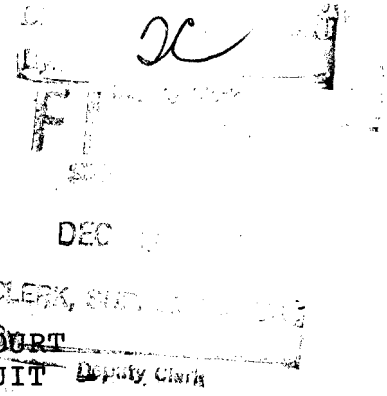
Appellant,

v. CASE NO.

STATE OF FLORIDA,

Appellee.

_____/



ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR UNION COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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COUNSELS FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CONTENTS
(CONT)

TABLE OF CITATIONS

TABLE OF CITATIONS (CONT)

TABLE OF CITATIONS
(CONT)

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PRELIMINARY STATEMENT

Appellee was the prosecutor in the trial court. References to the Record will be by "R" followed by the appropriate page number. References to the Record on the Motion to Vacate and for other post-conviction relief will be by "MVR" followed by the page number.

STATEMENT OF THE CASE

An indictment filed in the Circuit Court for Union County on June 7, 1983, charged Leonard Bean and Ronald Woods with one count of first degree murder and one count each of possession of contraband in a state correctional institution (R 1-6).

Both men pled not guilty to the charges (R 11-12) and filed numerous pretrial motions.

Bean and Woods proceeded to trial on September 26, 1983, before Judge R. A. Green. Woods was found guilty of the crimes charged, and Bean was found guilty of the murder and possession charges and one count of attempted murder (R 592-597).

Accordingly, Bean and Woods proceeded to the sentencing phase of the trial, and after hearing the evidence, argument, and instructions, the jury recommended by a vote of nine to three for life for Bean, and seven to five for death of Woods (R 600-601).

The court following these recommendations, sentenced Bean to life (R 681) for the murder followed by a consecutive sentence of thirty years for the attempted first degree murder (R 682) and fifteen years for the possession of contraband conviction (R 683). The sentences are to be served consecutively (R 683).

The court sentenced Woods to death for the murder (R 653-657) and sentenced him to consecutive thirty year terms for the

attempted first degree murder convictions (R 660-663) and fifteen years for the possession of contraband conviction (R 663).

In sentencing Woods to death, the court found in aggravation that : (1) Woods was under sentence of imprisonment at the time of the murder; (2) the murder was committed to disrupt or hinder the lawful exercise of any government function or the enforcement of laws (R-654).

The court found in mitigation that Woods was eighteen years old (R 655).

The judgment and sentence were affirmed by the Florida Supreme Court. Woods v. State, 490 So.2d 24 (Fla. 1986). Certorari was denied by the United States Supreme Court.

After completion of clemency review, a death warrant was signed on October 5, 1987 by Governor Martinez. The warrant set the execution date for December 10, 1987.

On November 4, 1987, Appellant filed his motion for post-conviction relief and stay of execution. The motion was denied as to three grounds in an Order dated November 24, 1987. The remaining ground was denied after a hearing held on December 1, 1987.

This appeal followed.

STATEMENT OF THE FACTS

Prior to the trial in this case, trial counsel filed numerous pretrial motions. At a hearing on September 12, 1983, trial counsel obtained permission from the court to expend funds to travel to Jacksonville in order to depose a potential state witness who would testify about blood that had been sent to the Florida Department of Law Enforcement for analysis (R 1722). This motion was granted (R 1723). A similar motion concerning a potential witness in Tallahassee who would testify about hair samples was also granted (R 1723). The court also granted Appellant's motion to allow a witness to be deposed in Delray Beach, Florida (R 1724). The trial court stated that he had no problem with allowing such an investigation, but he was concerned that some limitation be placed on the expenses. Trial counsel agreed and argued that his motion to have an investigator appointed would cost the county less money than if the lawyer went (at a greater daily rate) (R 1725). Trial counsel's original suggestion was for the court to place a $500 limit on the use of the investigator (R 1725), although the order found in the record on appeal reveals that this was later changed to $1,000 (R 703).

At the same hearing, trial counsel asked that his motion for inspection of the prison files of all the inmate witnesses be granted (R 1726). The motion was granted on the condition that

further continuances would not be allowed if the various inmate files were no longer available (R 1729). During argument on that motion, trial counsel admitted that he had reason to believe that "my client is going to be treated as being a great deal more culpable than the co-defendant in the cause." (R 1727).

Trial counsel then moved for a change of venue based upon pretrial publicity (R 1731). This motion was denied (R 1732), as was a motion for additional peremptory challenges (unless the cases were tried separately) (R 1733). Trial counsel's motion to sever the case from that of co-defendant Bean on the ground of antagonistic defenses was taken under advisement (R 1738). Also denied was Appellant's motion to limit impeachment by use of prior convictions (R 1738). In addition to other motions which had been denied for the co-defendant, the trial court also denied motions declaring the death penalty to be improper in this case (R 1741). Concerning his motion to continue, trial counsel argued that he needed more time, but he admitted that what he had before him had been prepared fully (R 1745). He also stated that he could "be effective with what I have." After the prosecutor argued that most of the discovery had already been completed, the trial court stated that he thought this case was extraordinary and he authorized "any reasonable amount of additional investigative personnel for either of you, I will authorize a professional colleague for Mr. Vipperman, if he--you need it, because of time constraints; I will authorize a separate special

assistant public defender to assist you at your need and only as you need him." (R 1746). The trial court did grant, however, counsel's motion to obtain a list of prospective jurors prior to trial (R 1747).

In addition to adopting all motions filed by co-defendant Bean (R 513), trial counsel filed on his own the motions listed below (some of which have been discussed already):

1. Motion to Continue, August 3, 1983 (R 106)
2. Motion to Continue, August 8, 1983 (R 108)
3. Motion for Psychiatric Examination, August 29, 1983 (R 154)
4. Motion for Appointment of Psychiatric Expert, August 29, 1983 (R 156)
5. Motion to Declare that Death is not a Possible Penalty, Sptember 8, 1983 (R 260)
6. Motion for Statement of Aggravating Circumstances, September 8, 1983 (R 271)
7. Motion to Declare Section 922.10, Florida Statutes, Unconstitutional, September 8, 1983 (R 273)
8. Motion for Individual Voir Dire and Sequestration of Jurors During Voir Dire, September 8, 1983 (R 276)
9. Motion to Prohibit Impeachment of Defendant by Prior Criminal Convictions, September 8, 1983 (R 278)
10. Motion to Continue, September 8, 1983 (R 281)
11. Motion for Costs for Community Survey Regrading Predisposition of Public Opinion by Prospective Jurors, September 8, 1983 (R 284)
12. Motion for Additional Preemptory Challenges or to Declare Florida Statutes 921.141, Unconstitutional, September 8, 1983 (R 286)
13. Motion to Declare Florida Statutes 921.141, Unconstitutional as Failing to Provide Procedure of Sufficient Reliability to Determine Whether Death is an Appropriate Penalty, September 8, 1983 (R 288)
14. Motion to Declare Florida Statutes, Section 921.141, Unconstitutional Under Article V. Section 2(a) of the Florida Constitution, September 8, 1983 (R 291)
15. Motion to Declare Florida Statutes 921.141 Unconstitutional, September 8, 1983 (R 294)
16. Motion to Prohibit Questions Regarding

Attitudes of Prospective Jurors Towards the Death Penalty, September 8, 1983 (R 299)

17. Motion for Severance of Defendant Ronald Woods from Co-Defendant Leonard Bean, September 8, 1983 (R 304)
18. Memorandum of Law in Support of Defendant's Motion to Prohibit Questions Regarding Attitudes of Prospective Jurors Towards the Death Penalty and Motion for Individual Voir Dire and Sequestration of Jurors During Voir Dire, September 9, 1983 (R 310)
19. Momorandum of Law in Support of Motion to Declare Florida Statute Section 921-141 Unconstitutional Under Article V, Section 2(a) of the Florida Constitution, September 9, 1983 (R 322)
20. Motion for Prior Authorization of Expenditure of Funds, September 9, 1983 (R 331)
21. Motion for Prior Authorization of Expenditure of Funds, September 9, 1983 (R 333)
22. Motion for Prior Authorization of Expenditure of Funds, September 9, 1983 (R 335)
23. Motion to Appointment for Investigator, September 9, 1983 (R 337)
24. Motion for Inspection of Prison Files of all Inmates Witnesses, the Defendant, and the Co-Defendant, September 9, 1983 (R 339)
25. Motion for Prior Authorization of Expenditure of Funds, September 9, 1983 (R 341)
26. Motion for Sanctions, September 23, 1983 (R 474)
27. Motion to Continue, September 23, 1983 (R 480)

During voir dire, defense counsel on numerous occasions, informed the jury that there would be evidence that the murder and other crimes were committed by a member of an inmate group called the Dixie Playboys or by an inmate who was under the domination or control of the Dixie Playboys. See, e.g., R 1110, 1130, 1154. Mention of the Dixie Playboys was made by lawyers for both defendants during their opening arguments (R 1308, 1324).

The following is a summary of the evidence which was

presented at the trial. The State's first witness was Mitchell Anderson, a Corrections Officer at Union Correctional Institution, who was one of the assault victims. According to Anderson, on the morning of the incident, he and Officer Dennard (the officer who was murdered) observed co-defendant Bean in an area near the school and that Bean should not have been there because he did not have a pass (R 1333). Bean was instructed by the officers to go to the movement center, however, Bean did not go. the officers went looking for Bean, and they found him coming through the east gate at which time they took him to the movement center and counseled him about being in an unauthorized area and about disobeying a verbal order from an officer (R 1334-1335).

Anderson testified that he also had seen Appellant earlier that day. Appellant was on the back of a dump truck, and Anderson hollered at him not to fall off the truck (R 1335).

Approximately 2:00 p.m. on May 5, 1983, that same day, Anderson and Dennard went to the main housing unit in order to locate an inmate who was wanted at the investigator's office (R 1335). According to Anderson, he and Sergeant Dennard went through the west gate and were heading to the office when Anderson felt something hit him in the back. He immediately turned around and observed Appellant with a homemade weapon, which was approximately 12 to 14 inches long, and Appellant was "coming down again and I then threw my arm up and at that time he hit me in my

arm." (R 1336) Anderson pushed Appellant back and yelled for Sergeant Dennard to go to the office. He then turned and started for the office, and although there were several inmates between him and the door, he was able to get through the inmates and get the door opened. However, as his head and shoulders were going through the door, the inmates pushed the door closed on him. Sergeant Rogers and Lieutenant Wilkerson then pulled Anderson into the office to safety (R 1336). Anderson looked for Dennard, however, other officers informed him that Dennard couldn't get to the door.

Anderson then turned around and saw co-defendant Bean with a weapon making stabbing motions in the area where Dennard was located. Anderson testified that Appellant ran up and also made a couple of stabbing motions. Dennard then was able to get to the door and the officers began to help him inside when Appellant ran up again and hit Dennard "between the shoulder blades with the shank." (R 1337) Anderson testified that when he saw Appellant stab Dennard the last time, Dennard was at the door and that the door was open (R 1338). Anderson also testified that the wound inflicted upon Anderson by Appellant went in his neck and down six or seven inches towards his spine and then about six inches up into his arm and up into his shoulder (R 1338). Anderson then exposed his wounds to the jury (R 1339).

Anderson further testified that there was sufficient lighting

in the area where the stabbings occurred to enable him to see his assailants (R 1342). When Appellant stabbed him, they were approximately one foot apart. After Anderson reached the safety of the office, the distance between him and Bean was approximately five to seven feet. When the door opened and Appellant made his last stab wound on Dennard, Appellant and Anderson were approximately five feet apart (R 1343). When asked whether there was any doubt about whether it was Appellant and Bean who stabbed him and Dennard, the officer replied that there was "[n]o doubt at all." (R 1343).

On cross-examination, de ense counsel established that there was no way the inmates could have known that Anderson and Dennard were going to be in the area at that time (R 1351). Bean's counsel established that the initial attack came from Appellant (R 1352).

Appellant's trial counsel established that Anderson knew Appellant prior to the indicident--"and Woods had had some disciplinary problems with some of the officers and stuff around there and I just knew his name when I seen him." (R 1362). According to Anderson, he "knew him [Appellant] by face." (R 1363). In response to further questioning by Appellant's trial counsel, Anderson described how the last stab would occurred:

> When the door was opened, Sergeant Dennard was on his knees. He fell toward the door. At the time he fell toward the door, that is when

> Lieutenant Wilkerson and them grabbed him by his shoulders and started to pull him in and, when they were pulling him in, that is when Woods hit him the last time. He was on his knees trying to crawl to the door. (R-1371).

At the time of this last stab wound, Anderson was no longer able to see Bean (R 1373). On redirect examination, the witness testified that although he was unable to state how long it took for the incident to transpire, Appellant and co-defendant Bean were the ones who did it to him (R 1375).

The State's next witness was pathologist William Hamilton, who was the medical examiner for the Eighth Judicial Circuit. After being qualified as an expert in the field of pathology, he testified that he performed an autopsy on the body of the murder victim, Sergeant Dennard (R 1409). He observed seven stab wounds on the victim's body--one in the left temporal region of the head, four in the back and two on the left forearm (R 1411). He discussed in detail the various wounds (R 1411-1414), and he described how one of the wounds had passed through the skull into the soft tissues of the neck. "It completely went through the head." (R 1414). The doctor further testified that because of the "multiplicity and the depth of penetration and the tissues that it passed through, whoever stabbed Dennard must have expended a very determined effort . . ." (R 1416).

Dr. Daniel Knauf, a physician at the Shands Hospital in Gainesville, after being qualified as an expert, testified that

he performed emergency surgery upon the victim (R 1433). As part of the emergency measures, Dennard's right lung was removed, however, this was only temporarily successful in stopping the bleeding and the heart kept stopping (R 1435).

The next witness was Steven Platt, the Bureau Chief of the Florida Department of Law Enforcement Jacksonville Crime Laboratory, and he testified that he had examined Bean's shirt and had found human blood stains which were inconsistent with Bean's blood type (R 1464). He also examined another inmate's shirt, number 064857, and he found a homemade knife with an ace bandage which was wrapped around it, and he concluded that human blood stains were on these items and that the stains were consistent with Anderson's blood type (R 1465)

Florida Department of Law Enforcement Forensic Serologist James Pollack testified that he had examined some white trousers with number 64857 in the waist band and had found human blood stains on them (R 1500). One of the larger stains contained O type blood. Steve Platt had previously testified that Anderson had type O blood, and that Dennard also had type O blood (R-1458-1460). Both defendants had type A blood (R 1461).

Union Correctional Institution Investigator R.T. Lee testified that the shirt marked 078935 was issued to co-defendant Bean (R 1152). He also testified that the other shirt (number 064857) belonged to Appellant (R 1154).

Sergeant Max Denson, the Assistant Institutional Investigator at Union Correctional Institution, testified that he found Appellant's trousers on the roof of the restroom inside the main housing unit (R 1623). Bean's trousers were found the same day behind the restroom on G floor (R 1626). Denson explained that he found in the same general area the gloves from which the blood samples previously discussed were taken (R 1628-1630).

Sterling Esford testified that he was the inside Security Supervisor on the day of the murder (R 1699). Woods had been brought to him by another correctional officer that morning, and Esford counseled Woods about Woods' refusal to work (R 1701). Woods volunteered to work for Esford, however, and he was placed on a work detail unloading weights at the confinement barracks. Woods began doing that job, but he then refused to work. Esford then escorted Appellant back to the movement center and informed him that if he refused to work, he would get a disciplinary report (R 1072). Esford advised Appellant to get his property and go back to his housing area and Appellant then left. The time was approximately 1:20 p.m.

Approximately 12:30 p.m. that same day, Officers Dennard and Anderson had brought co-defendant Bean to Esford's office and explained to Esford that they earlier caught Bean in an area without a pass and that Bean had failed to follow their verbal orders (R 1703). Esford advised Bean that if he was caught again

walking all over the plae, he would have his job changed. Bean was then released to go to his housing area (R 1703).

Wesley Taylor, an inmate at Union Correctional Institution, testified that on the day of the murder he was an "outside runner" which meant that he was authorized to go to the various floors in the main housing unit (R 1719). He saw Woods and Bean together on the afternoon of the murder and they were discussing in general terms "getting those crackers back, things like that, like threatening remarks and hollering back and forth to each other." (R 1721). He specifically testified that he heard the defendants making statements about how they were tired of being pushed around. Taylor saw two weapons--knives which were in possession of Bean and Woods (R 1722). On cross-examination, the inmate testified that all of the inmates in the group with Bean and Woods were black (R 1728).

Richard Harvey testified that he was a Correctional Officer and that he observed the assault. Specifically, he observed two inmates trying to drag Dennard from the office, and he grabbed one of the inmates but that inmate pulled away (R 1764). The officer turned to look in the office at which time the inmate stabbed him and cut his ear. "He appeared to be going for my throat." (R 1765). He identified the inmate who had stabbed him as Appellant (R 1766). As Woods was leaving the area, the officer saw him pass and stab Officer Barker. However, before he

stabbed Barker, he went to the gate and ascertained that there were no officers present, and he then returned and stabbed Barker (R 1766).

Correctional Officer Thomas Barker testified that he answered a call over the intercom for all officers to come to the office and he ran face to face into Appellant. "He struck me in the neck. I thought he hit me with his fist. I reached up there to grab his hand and he jerked his hand back and cut me on my fingers when the shank came out of my neck." (R 1788). Although Woods initially fled, he returned and attempted to stab Barker again (R 1788).

Sergeant Joseph Lazenby tstified that he went to Bean's and Appellant's cell after the incident, and observed Woods hand a weapon to Bean who stuck it under a blanket (R 1805). On cross-examination, the sergeant testified that Woods was wearing "a brand-new, clean pair . . . of coveralls." (R 1810). Also recovered from the same general area were some trousers, some gloves, and a knife found over the bathroom (R 1813).

Inmate Sammy Taylor testified that he was lying in his cell when Woods came to the door along with Bean and asked to "be allowed to come in the cell for a little while because he had got involved in something." (R 1889). Woods explained to the witness that "they had stabbed some officers and he thought one of them was going to die." (R 1890). Bean acknowledged Woods'

statement with a nod (R 1891). The inmate's testimony corroborated the previous testimony about how Woods had passed a knife to Bean while they were in the cell (R 1892). On cross-examination, Taylor stated that it was obvious to him that Bean had an additional weapon located under his t-shirt (R1896). Bean also stuck this object up under the same blanket.

The State's next witness was Jack Thomas, another inmate at Union Correctional Institution, who testified that he witnessed the assault which occurred approximately 2:00 p.m. on May 5, 1983 (R 1920). Specifically, he saw Woods stab Dennard, and he heard Dennard say to Woods "don't kill me." (R 1922). The inmate further testified that when Dennard asked Woods please not to kill him, Woods replied, "cracker, you dying." (R 1924). According to Thomas, Woods then kicked Sergeant Dennard again and said, "you are dying today." And he stabbed Dennard several more times (R 1925). On cross-examination, the witness testified that after Bean had stabbed Officer Anderson and Officer Anderson had made it into the office, Bean turned and fled. Woods, however, "kicked the door shut and commence[d] to stabbing Officer Dennard." (R 1937). When asked whether a group of black inmates named the Dixie Playboys was after him, he stated that he had no knowledge (R 1962).

Correctional Officer Shirley Gilbert testified that she was in the office on the day of the murder and that she heard someone

shout to open the door, at which time Lieutennt Wilkerson and Sergeant Rogers opened the door and pulled Officer Anderson inside the office. The door was then slammed shut. They had difficulty opening the door and when they finally did so they pulled Sergeant Dennard into the office (R 1795). She then turned and looked out the window and saw Appellant running away. However, Appellant stopped and then stabbed Officer Barker in the throat--Appellant came at Officer Barker again but then changed his mind and ran away (R 1976). Her testimony was corroborated by Correctional Officer Wilber Rogers who was also present in the office at the time of the murder (R 1996). He specifically testified that he saw both Appellant and co-defendant Bean with knives while they were running away (R 1998).

After the State rested, co-defendant Bean called Edward Sands, the Prison Inspector and Investigator for the Florida Department of Corrections (R 2038), and asked him whether they had investigated a group of persons known as the Dixie Playboys. The inspector replied that this group had not been investigated during this case (R 2039). On cross-examination by the State, the inspector testified that there had been absolutely no evidence to tie Woods and Bean to a group called the Dixie Playboys (R 2051).

After co-defendant Bean presented several other witnesses, he rested his case. Appellant's counsel then rested (R 2100).

Earlier in the trial, when asked by the trial court how long his case would take, Appellant's trial counsel replied, "Mr. Woods doesn't have a case. We will be resting shortly after Mr. Replogle finishes. We will not be putting on any evidence in the trial until the mitigation phase of the trial." (R 1523).

Just prior to the closing arguments, Appellant's trial counsel moved to have the corrrectional officers in the spectator gallery removed from the courtroom. The grounds for his motion was that his client was denied a fair and impartial trial of this cause (R 2127). However, the trial court disagreed--the court first stated that he did not find that the gallery was filled and he stated that there was an even distribution of correctional officers and non-uniformed people in the courtroom (R 2130). The court also noted that many of the correctional officers in the spectator gallery were officers who had testified at the trial. The motion was denied.

After closing arguments and the instructions to the jury, co-defendant Bean was found guilty of first degree murder of Dennard, attempted first degree murder of Anderson, and guilty of possession of contraband in a state penal institution (R 2281-2282). He was found not guilty of attempted murder of Officer Harvey and not guilty of attempted murder of Officer Barker (R 2282). Appellant, on the other hand, was found guilty as charged in all five counts, i.e., guilty of first degree murder of

Dennard, guilty of attempted first degree murder of Anderson, guilty of attempted first degree murder of Harvey, guilty of attempted first degree murder of Barker, and guilty of possession of contraband in a state penal institution (R 2282-2283). The verdicts can be found on pages 594-599 of the record on apeal.

Prior to the penalty phase, counsel for Appellant stipulated that mitigating circumstances would not be considered and that "the state would not be required to rebut it." (R 2289). At the beginning of the penalty phase, the court granted the State's motion to consider the guilt/innocence phase of the trial as evidence in the penalty phase (R 2325). The court also took judicial notice that it had adjudicated Bean guilty of attempted murder of Officers Anderson, Harvey, and Barker (R 2326).

Appellant's first witness at the penalty phase was his mother Eloise Woods. She testified that her son was eighteen years old (R 2329) and that Appellant's father had left home when Appellant was four years old (R 2330). She also testified that Appellant had a history of seizures and that he had mental problems and that he had been under medication and had been admitted to a mental health hospital at one time when he was eight years old (R 2330). According to her, when Apellant was small, his father would beat him (R 2331). She testified that Appellant was a follower and that he did not do well in school and that he had been in a special class for mentally retarded children (R 2332).

Appellant's next witness was Dr. Harry Krop, who testified that he was a clinical psychologist and that he had examined Appellant and had conferred with Appellant's mother and sister (R 1337). The only test which he gave Appellant was the adult intelligence sale, and Appellant scored 69 on this test, which would mean that Appellant was mentally defective (R 2338). Beause of his defective intelligence, it was the doctor's opinion that Appellant would have difficulty in terms of judgment and that he would not be able to plan ahead to consider the consequences of his acts (R 2329). The doctor did not feel that Appellant was a leader but rather that Appellant would typically be a follower (R 2342). The doctor also testified that Appellant's intelligence would be considered only mild mental retardation which would mean that Appellant would be educable (R 2342). It was also the doctor's opinion that based upon Appellant's medical history, Appellant suffered from a chemical imbalance which caused the seizures that had occurred up until Appellant was four years old (R 2344). The doctor qualified his testimony with his observation that Appellant no longer seemed to be suffering from a hyperactive syndrome and that he had grown out of it.

However, on cross-examination by the State, the doctor admitted that Appellant's intelligence score put him at the very top of the moderately retarded classification. He also admitted that he had been appointed in this case for the purpose of

assisting the defense in raising the defense of insanity at the time of the offense (R 2348). In that regard, the doctor testified that he had not found Appellant insane at the time of the offense. The doctor admitted that he had found that Appellant was competent to stand trial and to assist his attorneys (R 2348). The doctor also admitted that he was not contending that when Appellant murdered Dennard Appellant had acted "under extreme duress or under substantial domination of another." (R 2349). Moreover, the doctor also admitted that he was not even aware of the facts of the case. The doctor also admitted that he did not have any facts to support a conclusion that Appellant had been under the domination of another person when he committed the murder (R 2349). Finally, the doctor admitted that he was not saying that Appellant did not have the capacity to appreciate the criminality of his conduct or to conform his conduct to law.

The doctor stated that he would not expect Appellant's personality or emotional state to change if he remained within the penal system (R 2350). On redirect examination, the doctor claimed that a person of lower intelligence would find it more difficult than a person of normal intelligence to conform his conduct to that of the law (R 2358). On recross-examination by the State, the doctor admitted that a person's intelligence quotient (IQ) did not measure criminality and that it was certainly possible for a person with a low IQ to be honest (R

2360). The doctor admitted that the test he gave Appellant had a validity factor in the 60's, which meant that the test could be invalid more than one-third of the time (R 2363). Appellant then rested.

After closing arguments by the lawyers and instructions by the trial court, the jury returned an advisory verdict of death (7-5) in Appellant's case and an advisory verdict of life (9-3) in Bean's case (R 2497-2498).

The trial court sentenced Appellant to death (R 2590). In his written sentence, the trial court found the aggravating circumstances of §921.141(5)(a) and (g). Specifically, the trial court found that the victim was performing his duties as a correctional (law enforcement) officer at the time he was killed and thus the murder was committed to hinder or disrupt the lawful exercise of governmental functions or the enforcement of laws. The court also specifically found that Appellant was serving a sentence of imprisonment for the felony of first degree arson at the time of the killing (R 654). The only mitigating circumstance found was Appellant's age. Section 921.141(6)(g), Florida Statutes. The trial court specifically rejected Appellant's low intelligence as a basis to find that Appellant was unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law (R 655). The court noted in his sentencing order that Appellant had received

competent counsel who had filed numerous timely motions in the case. The court also noted that the record reflected that the attorneys went to great lengths to investigate adequately and prepare the case prior to trial: "The court also notes that the record reflects the ends these attorneys went to to adequately investigate and prepare the case prior to trial. The record reflects a great number of depositions of witnesses--including potential defense witnesses--taken on behalf of the defendant by his attorneys throughout the State of Florida." (R 656-657).

After Appellant's Notice of Appeal was filed, this Court entered an order remanding the case to the trial court to allow the trial court to rule on several post-trial motions and to hold a hearing to determine "how many of the black veniremen were peremptorily challenged and excused by the State." (SR 8). This hearing was held on January 4, 1985. At the beginning of the hearing, the State objectd for the record the consideration of the racial discrimination issue in this case since this Court has specifically held in State v. Neil, 457 So.2d 481 (Fla. 1984), that Neil was not to be applied retroactively.

The prosecutor explained that prior to the hearing he and defense counsel had agreed upon every juror which had been peremptorily excused. The prosecutor contacted the supervisor of elections and then determined the race of everybody who had been excused. Both the State and the defense agreed that these

figures were correct--at the time the jury was selected, the court had excused 14 people for cause, the State had excused 13 people peremptorily, and the defendants had excused 15 people peremptorily between them. Appellant had excused eight, and his co-defendant Bean had excused seven. Nine blacks were called from the venire pool into the jury box. Of those nine jurors, six were excused by the State, two were excused by the defense and one was selected as an alternate juror.

At the time that the objection was made during the trial, five blacks had been excused. Of those five, the State had excused four, and the defense had excused one. Of the two blacks who were in the jury box at that time, the State had excused one and the defense excused the other.

Based upon those figures, the prosecutor argued that the first part of the Neil test had not been met, i.e., that there was not "a strong likelihood that they have been challenged solely because of their race." Neil, supra at 457 So.2d 486. However, in an abundance of caution, the prosecution decided to offer his testimony as to why the jurors had been excused in the event that this Court found that the stipulated figures indicated a strong likelihood of discrimination (SR 13-16).

The prosecutor began his testimony by explaining that jury selection was extremely important in death penalty cases. The prosecutor testified that between the time of the murder (May) and the time of the trial (September) another prison guard had

been stabbed literally within five feet of where Dennard had been murdered (SR 20). Because of his investigation into both incidents, he believed that there would be allegations of improper conduct on the part of the inside security squad (known among the inmates as the Goon Squad), and that retaliation might be an aspect of the defense in this case. Because of this knowledge, and because the prosecutor knew that an inmate was going to testify that the murder was committed by someone else, the prosecutor was looking for a specific type of juror (SR 20).

The prosecutor explained that he did not want a juror who had had an adverse reaction with law enforcement, either as an individual or as a member of a family in which someone else had had an adverse experience with law enforcement (SR 21). The prosecutor specifically testified that the race of the juror did not enter into his decision whether a juror would be good for the prosecution (SR 24). The prosecutor explained that prior to the trial he had attempted to find out as much as possible about the jurors he expected to be called to serve (SR 25). He evaluated all of the potential jurors and prioritize them whether they would be favorable to the State's case, one being a good juror and three being someone who probably would by unacceptable because of a problem with law enforcement (SR 26). The prosecutor categorized jurors as two's if no information was known about the potential juror or if it was not possible to tell whether the juror should be a one or a three. The prosecutor

testified that no juror was given less than a one based solely on his race, and he gave examples of white jurors who were given three ratings (SR 27). The prosecutor gave an example about how a juror who was rejected in this case because of his feelings about the death penalty was actually selected in a non-death penalty case. Although the prosecutor could not remember whether he had either 20 or 24 peremptory challenges, he used only 13 (SR 28). At the time the objection was made at trial, the prosecutor had used eight of his peremptory challenges--four for whites and four for blacks. The defense had used 13 challenges at that time--12 for whites and one for a black (SR 29). The prosecutor also explained that his jury selection was not based solely on his numbering system beause if a juror that he had determined prior to voir dire was a one was revealed to be less than that on voir dire, the juror would not be selected (SR 31). Of the 13 peremptory challenges exercised in this case by the State, six were for blacks and seven were for whites (SR 31). The prosecutor specifically testified that those six black persons were not excused solely on the basis of their race (SR 32).

On cross-examination, the prosecutor testified that he had peremptorily excused one of the black jurors because he had prosecuted members of her family (SR 37). Another black juror (Harvey Thomas) was excused because he had a problem with law enforcement. One of the unrated jurors (Cathy Watkins) was excused once he realized he had prosecuted a member of her family

(SR 40). The prosecutor was unable to recall why he peremptorily excused the two jurors which had been unrated (SR 40).

The defense presented the testimony of Appellant's trial counsel, Stephen Bernstein. It was his belief at the time his objection was made that there was no reach other than race for the State to have excused the black jurors which has been excused (SR 51). However, on cross-examination by the State, Mr. Bernstein admitted that at the time the objection had been made, he had miscounted and also one of the black jurors which had been excused had been excused by the defense (co-defendant) (SR 53). Mr. Bernstein admitted that he could not say on what basis the prosecutor had mae the decision to exercise his preemptory challenges. Mr. Bernstein also admitted that he had excused a black juror, too (SR 54).

The trial court then stated that he didn't believe this Court's instructions on remand were for him to make a determination of racial discrimination under Neil. However, the trial court then stated that the "record speaks for itself for the testimony of the two witnesses and the stipulation of counsel. Were I called upon to make a finding, it would be one of no discrimination." (SR 54).

During argument on the motion for new trial, Appellant's other trial counsel argued that he had needed more time to present his defense. However, trial counsel admitted "[t]he case

was a devastating case." (SR 61). He also admitted that he had never been able to determine why the murder occurred. Trial counsel continued: "My motion for new trial is based on the fact that though it may not have changed the outcome of the guilt phase of this trial, it may well have changed the outcome of the penalty phase . . ." (SR 62).

In response, the prosecutor explained that of the witnesses whom the defense had not been able to interview, most had merely informed the State that they had not seen anything (SR 63). Thus, the prosecutor argued that there was no reason to grant a motion for new trial because witnesses had not been able to be deposed when those witnesses would not be able to testify to anything other than they had not seen anything on the day of the crime (SR 64). The prosecutor also pointed out that trial counsel's arguments were based upon conjecture since even to that date no information had been found, although the defense certainly had ample time to discover such information if it in fact existed (SR 65).

The trial court then commented that no death case was ever easy and that most advocates never felt a death case was ready for trial (SR 69). The court explained that trial counsel had done "yeoman's work" preparing the case and the court had made available unusual "access to resources for preparation in the case . . ." (SR 69). The motion for new trial was denied (SR 70).

SUMMARY OF ARGUMENT

The majority of the issues raised in Appellant's motion for post-conviction relief were properly denied as said claims were claims which could have and should have been raised on direct appeal (and were not) or were raised and decided by this tribunal. As to Issue IV in his motion, an evidentiary hearing was held thereon which unequivocally demonstrates that the proper instruction was read to the jury by the trial judge.

The amended 3.850 motion was properly denied as the grounds therein were known or discoverable to Appellant at the time he filed his original motion, and therefore, no further evidentiary hearing is necessary.

ISSUE I

THE TRIAL COURT DID NOT ERR IN HOLDING AN EVIDENTIARY HEARING TO DETERMINE THE RELIABILITY OF THE RECORD ON APPEAL, SPECIFICALLY AN ALLEGED ERROR IN THE JURY INSTRUCTIONS AS READ.

The Appellant alleged (without checking) that a fundamental critical error occurred at the trial of the Appellant--an error which mandated post-conviction relief.

The trial court properly considered the motion and found that there was no procedural bar to that issue and granted a hearing on it.

At hearing, the State presented testimony that the court reporter's stenographic tape and his audio tape (which was played) established that the transcript was in error. Based on the evidence , the court found that Judge R. A. Green read the correct jury instructions. Therefore, he denied relief.

Appellant asserts that he was trying to prove the rest of the record inaccurate, yet has cited no other example of incorrect recording or transcription.

Not having alleged any other error, it was proper for the trial court to deny further relief as Appellant was merely speculating at what the results of a fishing expedition might locate. Johnson v. State, 442 So.2d 193 (Fla. 1983).

The cases cited by Appellant do not stand for the proposition he claims. It is true that the Appellant is entitled to effective assistance of counsel on direct appeal. Evitts v. Lucey, 469 U.S. 387, 83 L.Ed.2d 82 (1985) and that he is entitled to a transcript sufficient to provide full review. Griffen v. Illinois, 351 U.S. 12, 100 L.Ed 891 (1956); Entsminger v. Iowa, 386 U.S. 748, 18 L.Ed2d 501 (1967).

However, nowhere in any of those cases does it provide that one single trancript error is ground to challenge the accuracy of the whole record or inherently violates due process guarantees.

In fact, in this case the error, even if fundamental, did not occur. The evidence shows the proper instruction was read. Therefore, an incorrect transcript if error, was harmless as the jury heard the correct instruction.

Further, unlike in Johnson, this case was not on direct appeal at the time of the discovery of the problem. Therefore, remand pursuant to Rule 9.200 Fla.R.Crim.P. was not necessary. Nor was extensive hearings necessary as the transcript was not incomprehensible as in Johnson, supra.

ISSUE II

NO STAY SHOULD BE GRANTED IN THIS CASE AS THE RECORD CONCLUSIVELY DEMONSTRATES THAT WOODS IS ENTITLED TO NO RELIEF.

No stay should be granted based on the record before this court, as the proper motions to supplement have been filed and no matters critical to the resolution of these issues is involved. A stay should be denied.

As to counsel's motion filed in open court, the motion for rehearing included in the record argues the same grounds.

Further, the State stipulates to the supplementing of the record.

Counsel's argument regarding rule 3.850 Fla.R.Crim.P. are not founded upon the requirement of the rule. The rule provides that:

> "In those instances when such a denial is not predicated on the legal insufficiency of the motion on its face a copy of that portion of the record... shall be attached."

As to the first three issues in Appellant's motion to vacate, they were denied on procedural grounds and attachment is not necessary. As the the final issue, the record of the evidentiary hearing is included in the record on appeal and clearly supports the trial court's denial of post-conviction relief.

ISSUE III

MR. WOODS SIXTH, EIGHTH AND FOURTEENTH AMENDEMENT RIGHTS WERE NOT VIOLATED WHEN THE COURT REFUSED TO CONTINUE THE PROCEEDING AND/OR WHEN COUNSEL FAILED TO DISCOVER AND PRESENT CRITICAL MITIGATING EVIDENCE.

Appellant, aware that he cannot obtain review of the denial of the motion for continuance, attempts to obtain review in the guise of ineffective assistance of counsel. This is clearly improper. In this regard this case is controlled by Sireci v. State, 469 So.2d 119 (Fla. 1985). In Sireci, the Florida Supreme Court expressly stated "claims previously raised on direct appeal will not be heard on a motion for post-conviction relief simply because these claims are raised under the guise of ineffective assistance of counsel". Id. at 120. Appellant raised this claim on direct appeal and was rejected.

The Appellant raises allegations of new information regarding the defendant's mental state and the inadequate amount of time in which defense counsel had to investigate such. Yet what he presents is different only in volume from what was presented at trial. It is cumulative and corroborative of matters which were not disputed by the State.

Counsel for Appellant put on evidence relative to the defendant's past and his current low IQ and mental state. The fact that he did not get the volume of evidence he would have liked of the exact type of expert does not make counsel

ineffective as he is not entitled to a specific expert or a specific number of experts. Martin v. State, 455 So.2d 370 (Fla. 1984); Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985).

The allegations in this case are similar to those raised in Witt v. Washington, 465 So.2d 510, 511 (Fla. 1985), where the Florida Supreme Court rejected an allegation of ineffective assistance of counsel which was predicated upon the failure of counsel to obtain additional mental testimony relative to Witt's organic brain damage.. Like in Witt, this Court should find that there is no showing Woods was denied effective assistance of counsel under the Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674 (1984) standard.

Counsel's reliance upon Mason v. State, 489 So.2d 734 (Fla. 1986) is misplaced. Mason involved a question of the defendant's competency to stand trial. Woods' case is controlled by James v. State, 489 So.2d 737 (Fla. 1986). In James the ineffective assistance of counsel allegation based on diminished mental capacity and the failure of counsel to develop family history was raised and rejected as there is no showing of incompetence to stand trial and the raising of the family history would have allowed the State to develop aggravating circumstances surrounding the prior criminal convictions.

Nevertheless, the record on direct appeal clearly establishes that there was no showing of palpable abuse of

discretion in denying the motion for continuance as required by Magill v. State, 386 So.2d 1188, 1189 (Fla. 1980), cert. denied, 450 U.S. 927, 101 S.Ct. 1384, 67 L.Ed.2d 359 (1981). The trial court did in fact grant Appellant's first motion for a continuance (R 110) and subsequently appointed an additional attorney and an investigator to assist Appellant's trial counsel. Moreover, defense counsel candidly recognized that the denial of the motion for continuance had not effected the guilt phase of the trial (SR 62). Appellant is entitled to no relief on this ground as a matter of law.

Appellant claims that this "specific" issue was not raised on direct appeal and therefore he is entitled to an evidentiary hearing regarding the sworn allegations (Brief at 28). The State submits that although the trial court properly ruled that the claim had been raised and decided, the claim should have been raised on direct appeal and, if not, it is not cognizable in a collateral proceeding. Rule 3.850, Fla.R.Crim.P.; Witt v. State, 387 So.2d 922 (Fla. 1980); Porter v. State, 478 So.2d 33 (Fla. 1985).

ISSUE IV

MR. WOODS' DEATH SENTENCE WAS NOT IMPOSED IN VIOLATION OF THE EIGHTH AMENDMENT - EXECUTION OF AN EIGHTEEN YEAR OLD OFFENDER WITH THE MENTAL AGE OF A TWELVE YEAR OLD IS NOT CRUEL AND UNUSUAL PUNISHMENT.

This issue is not cognizable in a collateral proceeding because it is a matter which can and should be raised at trial and on direct appeal, Witt v. State, supra; Porter v. State, 478 So.2d 33 (Fla. 1985).

As Rule 3.850, Fla.R.Crim.P. 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."

This issue, which was not raised at trial or on appeal, is not recognized as a valid ground to set aside a death sentence by the Florida Supreme Court or the United States Supreme Court. In fact, in both Thompson v. Oklahoma, 724 P.2d 780 (Okla.Crim.App. 1986), and in High v. Kemp, 1 F.L.W. FED C 841, 843 (11th Cir. July 17, 1987), this argument was specifically rejected. In Magill v. Dugger, 1 F.L.W. FED C 1143, 1151 (11th Cir. September 4, 1987) the Eleventh Circuit Court of Appeals specifically refused to reach the issue of the constitutionality of imposing the death penalty on a juvenile. Thus, the cases cited by the movant do not support his position. Further, counsel through his pleading admits facts that show this claim is not applicable to

Woods, as he was 18 years old at the time of the offense. Moreover, he has been tried as an adult for criminal offenses since the age of 16 (R 670). Counsel cites no case holding that an adult of diminished capacity is entitled to juvenile treatment. In fact the issue of juvenile status is a matter of state statutory law not a constitutional right. Finally, counsel has attempted to again amend his position in violation of the rules by arguing that it is unconstitutional to execute a mentally retarded person. This was not raised in his 3.850 motion or his amended 3.850 motion and is barred.

ISSUE V

MR. WOODS RIGHTS TO A FAIR AND IMPARTIAL TRIAL WERE NOT VIOLATED BY THE PRESENCE OF UNIFORMED CORRECTIONAL OFFICERS IN THE SPECTATOR GALLERY.

It is a well-established rule of law that a post-conviction relief motion cannot be utilized for a second appeal to consider issues that were either raised in the initial appeal or could have been raised in that appeal. Jones v. State, 446 So.2d 1059 (Fla. 1984); Demps v. State, 416 So.2d 808 (Fla. 1982); Funchess v. State, 449 So.2d 1283 (Fla. 1984). Sub judice, the claim herein was raised on direct appeal to the Florida Supreme Court and this Court specifically found that there was no abuse of discretion in denying the Appellant's motion to exclude the uniformed correctional officers from the spectator gallery. Woods, supra at 27.

Appellant cites great animosity in the community, and outside the courtroom during the trial and argues for the existence of a new constitutional right. Yet he cites no constitutional basis for such a right to a fair and impartial gallery.

Appellant claims the jury had to be influenced by these outside occurences, but has not established any evidence of such jury prejudice. It is his burden to allege and establish grounds for relief and to establish prejudice. Funchess v. State, 449 So.2d 1284 (Fla. 1984). He has not done so.

The court, as counsel for the Appellant notes, took great care in preventing any outburst or comment from the gallery . Further, it took extra pains to avoid any confrontation by clearing the hallway (as noted by the Appellant) prior to moving the jury to avoid any potential problem. No allegation of actual improper juror contact has been made nor has any allegation of actual juror bias been alleged. It should be noted that a jury was selected without the exhaustion of peremptory challenges by the defense. From the cases cited by the Appellant, it is clear that abuse of discretion is the standard for review of the Courts' determination regarding exclusion of spectators and it is also clear that other rights are implicated, if spectators are excluded. United States v. Eisner, 533 F.2d 987 (5th Cir. 1976).

For example, if the judge removes people from the courtroom, the defendant is entitled to raise the issue of a denial of a public trial. If abuse of discretion in the removal is found, prejudice is presumed and a new trial mandated. Therefore, no matter which way a trial court rules, an issue is created for subsequent appellate reivew.

In this case, no motion was made to exclude until closing arguments. With regard to the motion, the trial court found thegallery to be about half full of correctional officers, and that many of those were officers who testified at the trial.

The Florida Supreme Court has recognized that Union County

is small and has a high population of correctional officers. Lusk v. State, 446 So.2d 1038 (Fla. 1984); Morgan v. State, 415 So.2d 6 (Fla.), cert. denied, ___ U.S. ___, 103 S.Ct. 473, 74 L.Ed.2d 621 (1982). Counsel assumes that the individuals in the courtroom were not there either on there way to or from work and had no right to be in uniform but has presented no evidence to support the assumption.

Appellant has not shown how the presence of officers at closing argument differed from their presence at other parts of the trial. He has not established the existence of any prejudicial effect on the jurors. He has not shown an abuse of the trial court's discretion.

Further, the Appellant cites Holbrook v. Flynn, 475 U.S. ___, 89 L.Ed.2d 525 (1986), to support his position. Such reliance is misplaced. In Holbrook, a procedure was employed by the State to insure security at the trial. The question was, did the procedure of using extra uniformed armed guards in the courtroom sitting behind the defendant so inherently prejudice the jury that a fair trial was impossible. The United States Supreme Court found it was not.

It should be recognized that the Holbrook case involved State action. This case does not involve such state action but involves a balancing of constitutional rights such as to a public trial and the right of persons to freely assemble.

As the Court noted in Holbrook, there are a wide range of inferences that a juror could reasonably draw from the presence of such people in the courtroom, if they drew any inference at all. As recognized in Lusk v. State and Morgan v. State, supra, uniformed correctional officers are an everyday part of life in Union County. So it would not be unusual or intimidating for a Union County resident to see them. Jurors could infer that they were friends or relatives of the deceased or injured, they could have inferred that they were part of the extra personnel needed to transfer the inmates who were testifying to the courthouse, or were there for security purposes because of the large number of inmates present at the trial. In fact, the Court found many of the spectators had been witnesses themselves. Counsel has alleged no facts to support his allegation and thus, has failed to meet his burden. Funchess, supra.

The State further submits that, as in Issue III herein, Appellant is once again attempting to obtain review of this issue in the guise of ineffective assistance of counsel, although such a claim was never raised in his motion for post-conviction relief. As stated above, this is clearly improper in light of Sireci v. State, supra.

In conclusion, Appellant did not object and ask for removal until closing argument and raised the issue on direct appeal. He is now barred from relitigating the issue and the Court should not allow a second appeal under the attempt to amend the 3.850 motion. Jones, supra.

ISSUE VI

AS DEMONSTRATED AT THE EVIDENTIARY HEARING, THE PROPER JURY INSTRUCTION WAS GIVEN BY THE TRIAL JUDGE TO THE JURY.

If the jury instruction was read as the original transcript states, it was error. However, it was not so read. At the hearing, the court reporter played the relevant portion of the tape. In it, Judge R. A. Green (identified by the court reporter and trial counsel) (MVR 392, 410), read the correct first aggravating factor as to Mr. Woods (MVR 382-383). The court reporter further testified that he checked the tape against his stenographic notes and the two were consistent. He further testified that the error was in his transcription. (MVR 391,394).

Attorney Vipperman testified he was trial counsel for Mr. Woods. He further testified he was responsible for following along line by line to see that the jury instructions were given as agreed. Although he does not specifically recall the instruction, he would have objected if the instruction was read as originally transcribed. (MVR 408-410)

By these witnesses, the State established that the defendant, who has the burden of proving a claim for relief, failed to meet his burden.

It is clear that the trial court had inherent power to correct errors in its proceedings. Further, jurisdiction is granted by the Appellant's filing his motion for post-conviction relief. Such a motion begins a new proceeding. The Appellee finds it unusual that Appellant would assert that in an adversarial system no one is entitled to respond to his allegation.

He alleged the jury was instructed improperly and the Appellee proved that it was not.

ISSUE VII

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S AMENDED 3.850 MOTION AS THE CLAIMS THEREIN WERE KNOWN OR DISCOVERABLE AT THE TIME OF HIS ORIGINAL MOTION.

Appellant asserts that, with regard to the additional claims filed herein, he should have been afforded an evidentiary hearing to establish the presence of due diligence in attempting to discover said claims prior to the expiration of the thirty-day time period under Rule 3.851 Fla.R.Crim.P. It is the State's position that the record conclusively demonstrates that each of these claims were known or discoverable to Appellant prior to filing his original motion.

This Court affirmed the direct appeal of Ronald Woods' conviction in April, 1986. Woods v. State, 490 So.2d 24 (Fla. 1986). Woods has had over a year and a half to take some action but has done nothing. As stated in his motion for Extraordinary Relief filed in this Court, it was only upon the signing of the warrant that counsel "took the initial steps necessary for his representation." It is clear from Woods' motion and his brief that had the Governor not signed the warrant, substantial additional time would have past prior to the initiation of this action by the Appellant.

The law is clear that Mr. Woods has no right to counsel in collateral proceedings. Troedel v. State, 479 So.2d 736 (Fla.

1985). Daniels v. Blackburn, 763 F.2d 703 (5th Cir. 1985). Thus the premise behind this claim: that counsel needed more time to prepare additional pleadings, is not a legitimate basis upon which to grant relief.

The purpose behind the Rule 3.851 is to require the defendant to bring all issues to the court's attention at one time. It's goal is to avoid piecemeal litigation. The amended motion sought by the Appellant would create piecemeal litigation and diminish the meaningful and orderly access to the courts by reducing the time for: state response in the trial court, the Florida Supreme Court review, and movement into federal court. As the Florida Supreme Court noted it its opinion creating the rule, "such late filing leaves little time for judicial consideration and has resulted in many stays of execution simply because the courts, both state and federal, have had insufficient time to rule." 503 So.2d 320 (Fla. 1987). The amended motion may not prevent review, however, it would force all proceedings, trial court hearings, Florida Supreme Court review, and any Federal Court proceedings into the last few days of the warrant period. This would assist the Appellant in arguing to a federal court that a stay must be granted.

Further, the Appellant has failed to establish either of the exceptions to the rule, which are set forth in subsection (a) of Rule 3.851. Requests to set aside the time bar of these rules

have been previously rejected by this Court. White v. Dugger, 511 So.2d 554 (Fla. 1987). Burr v. State, Case Number 71,234. As concluded by the lower court, these claims are each based on information contained in the same record Appellant reviewed and cited when he filed his original motion. Appellant has failed to establish these claims could not have been raised within the time limits provided. Nevertheless, as will be argued below, these claims are matters which could have and should have been raised on direct appeal, and were not. Witt, supra; Porter, supra.

Mr. Woods has presented this Court with no legal reason to provide the relief requested. He is currently barred under 3.851 Fla.R.Crim.P. from filing further motions as the time bar prevents further filing once the allowed period of time has expired. It makes no difference whether the pleading is described as an amendment to a previous motion, or a new motion. When it is barred, your time for filing is over. Ferro v. State, 12 F.L.W. 1682 (Fla. 2nd DCA July 8, 1987).

ISSUE VIII

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING CLAIMS VIII - XII AS PROCEDURALLY BARRED.

In addition to its position stated in issue seven, Appellee states this issue is procedurally barred as the trial court found (MVR 338-340). This issue could have and should have been raised in the initial motion to vacate.

However, the issue raised is a ludicrous attempt to totally misapply Booth v. Maryland, 107 S.Ct. 2529 (1987), to the facts sub judice.

Booth involved a victim impact statement present to the jury in making its decision. No such statement was presented to the jury here.

ISSUE IX

In addition to its position stated in issue seven Appellee states this issue is barred as Appellant did not object at trial or raise it on direct appeal. It is axiomatic that a Rule 3.850 motion is not to be used as a second appeal and raising it in the form of ineffective assistance of counsel is also improper. Sireci v. State, supra.

Finally, it was not raised on his original petition and is therefore barred. Rule 3.851 Fla.R.Crim.P. (MVR 338-340).

ISSUE X

In addition to its position as stated in issue seven, this issue is barred as Appellant did not object at trial or raise it on direct appeal.

Further it is merely an attempt to reargue the mental condition issue raised on direct appeal.

ISSUE XI

In addition to its position as stated in issue seven, this issue is barred as Appellant did not object at trial or raise it on direct appeal.

ISSUE XII

In addition to its position as stated in issue seven, this issue is barred as Appellant did not object at trial or raise it on direct appeal.

Further, it is an attempt in another guise to reargue the severence issue raised on direct appeal.

CONCLUSION

The trial court's denial of appellant's motion for post-conviction relief should be affirmed.

Respectfully submitted,

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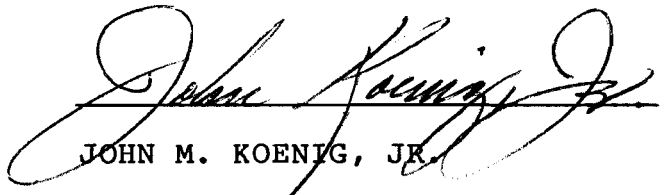
COUNSELS FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by hand delivery to Mr. Larry Helm Spalding, Office of Capital Collateral Representative, Mr. Mark Evan Olive, Chief Assistant Capital Collateral Representative, and Ms. Jane Rocamora, Staff Attorney, Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301 on this 8th day of December, 1987.



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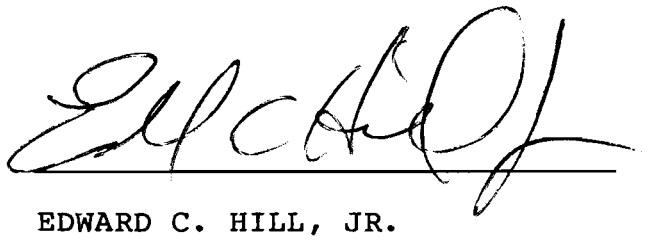

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