IN THE SUPREME COURT OF FLORIDA

DANIEL LEE DOYLE,

Appellant/Petitioner,

vs.

STATE OF FLORIDA,

Appellee/Respondent.

CASE NOS. 72,529
72,462

ANSWER BRIEF OF APPELLEE/ RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Appellant, Daniel Lee Doyle, the capital criminal defendant and appellant in Doyle v. State, 460 So.2d 353 (Fla. 1984), the unsuccessful movant for Fla.R.Crim.P. 3.850 post-conviction relief below, and the movant for habeas corpus relief here, will be referred to as "appellant." Appellee, the State of Florida, appellant's opponent throughout these proceedings, will be referred to as "the State."

References to the ten-volume original direct appellate record will be designated "(DR:)." References to particular papers filed with this Court in that proceeding will be designated in appropriately descriptive terms. References to the three volume collateral appellate record will be designated "(CR:)." References to the various appendices consisting of medical reports received below collaterally (CR 8, 35-36, 65) will be designated in appropriately descriptive terms.

All emphasis will be supplied by the State.

STATEMENT OF THE CASE AND FACTS

The State emphatically rejects all of appellant's factual assertions because they are slanted and because they improperly refer to an affidavit which was objected to (CR 109-110) and never received below, see Preston v. State, 13 F.L.W. 341 (Fla. May 26, 1988); Hill v. State, 471 So.2d 561 (Fla. 1st DCA 1985). The State accordingly substitutes its own statement of the case and facts, as follows:

Appellant was indicted on September 23, 1981 in the Broward County Circuit Court for committing the September 5 first-degree murder and rape of Pamela Kipp (DR 1415). The facts surrounding these crimes were later summarized by this Court as follows:

> Doyle was a neighbor and relative of the Kipp family, including Pamela Kipp, the victim. On September 5, 1981, he was doing yard work in the Kipp's yard and later drove his truck which was full of branches and leaves to a nearby area to unload the debris. Witnesses reported seeing Pamela Kipp jogging in the same area at the same time. The victim never returned home. After a search, a skeleton later identified as that of Monica Ruddick was discovered in the area where the defendant had been dumping leaves. Shortly thereafter, the victim's body was discovered about 200 yards from the area where Doyle had been dumping leaves. Found near the victim's nude body were a beige carpet and fresh tree clippings as well as ruts in the mud where a vehicle had been stuck. Doyle's truck had been stuck in the mud in the area the day of the murder and another individual had helped him

pull his truck out of the mud.

> Before the discovery of the victim's body, Doyle had been questioned by police since he reportedly was the last person to see the victim. Later, Doyle and his girlfriend went to the police station where he was given his rights and where he gave a tape-recorded statement. Doyle was then confronted with inconsistencies in his story concerning freshness of certain grass clippings at a different location and the date of the presence of a front-end loader at the dump site, after which he made a non-recorded inculpatory statement to the police, with such statement being repeated with modifications in subsequent tape-recorded statements at the county jail. Doyle admitted having sex with the victim and killing her, claiming, however, that he was intoxicated at the time and had no recollection of details of the incident. The victim was found to have been killed by strangulation and to have been sexually battered while still alive. Doyle claimed, in one statement, that he had asked the victim to help him get his truck out of the mud and he attacked her, she fought back, and he then strangled her and had intercourse with her on the carpet in the grass. He also admitted telling his girlfriend on a number of occasions subsequent to the murder that he had killed the victim.

Doyle v. State, 460 So.2d 353, 355. Following trial, appellant was found guilty as charged on April 2, 1982 (DR 1301-1303). His jury recommended a sentence of death for the murder by an 8 to 4 vote on April 5 (DR 1395-1396), and such was imposed by the Honorable Leroy H. Moe on May 13 (DR 1412-1413; 1575-1580).

In appealing his capital adjudication and sentence to this Court, appellant urged essentially the following points

as reversible error:

I

THE [TRIAL] COURT ERRED IN FAILING TO DISMISS THE INDICTMENT DUE TO THE LOSS OR DESTRUCTION OF TAPE-RECORDED STATEMENTS OF THE APPELLANT.

II

THE TRIAL COURT ERRED IN ADMITTING VARIOUS STATEMENTS OF THE APPELLANT INTO EVIDENCE BEFORE THE JURY.

A.

The warnings given appellant regarding his constitutional rights under the Fifth Amendment were inadequate.

B.

The evidence elicited at the motion to suppress and at the trial was insufficient to demonstrate a knowing and intelligent waiver of appellant's constitutional rights under the Fifth Amendment.

C.

Appellant's request for an attorney to be present during questioning was not honored as his interrogation was not terminated until an attorney was present.

III

THE [TRIAL] COURT ERRED IN FAILING TO GRANT A NEW TRIAL DUE TO PREJUDICIAL COMMENTS BY THE TRIAL COURT.

IV

THE TRIAL COURT ERRED IN NOT GRANTING A NEW TRIAL FOR JUROR MISCONDUCT.

V

THE TRIAL COURT ERRED IN IMPOSING THE DEATH SENTENCE ON THE APPELLANT.

A.

> The trial court found that there were three aggravating circumstances present: murder committed during or after sexual battery; murder committed to avoid or prevent a lawful arrest or effecting an escape; and particularly heinous, atrocious, or cruel.... Of these aggravating circumstances, only the circumstance of a murder committed during or after sexual battery was properly considered in favor of the death penalty.

B.

> The facts and circumstances of the instant case do not warrant the death sentence when the instant matter is reviewed [by this Court] to insure the relative proportionality of death sentences which have been approved statewide.

C.

> The death sentence was wrongly imposed on appellant due to the [trial] court's failure to consider various mitigating circumstances, particularly dealing with the appellant's mental and emotional abilities, his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, the appellant acting under extreme duress, or the murder being committed while the appellant was under the influence of extreme mental or emotional disturbance.

("Brief of Appellant" on direct appeal, p. i,8,11,15,26-27,36, 39-40). The State, of course, disagreed with appellant's positions ("Answer Brief of Appellee" on direct appeal). This Court found that appellant was in procedural default on one of the two components of his juror misconduct claim, but otherwise rejected appellant's points on the merits, Doyle v. State, 460 So.2d 353. Appellant's perfunctory motion for rehearing was denied on January 3, 1985. Id. Appellant did not file for certiorari to the United States Supreme Court.

On February 6, 1987, appellant filed his motion for post-conviction relief with Judge Moe, urging the following essential points:

I

> THE JURORS' UNDERSTANDING OF THE IMPORTANCE OF THEIR ROLE AND RESPONSIBILITY IN THE SENTENCING PHASE WAS UNCONSTITUTIONALLY DIMINISHED, PARTICULARLY IN LIGHT OF CALDWELL V. MISSISSIPPI, 472 U.S. 320 (1985) AND ADAMS V. WAINWRIGHT, 804 F.2d 1526 (11TH CIR. 1986), [MODIFIED, 816 F.2d 1495 (11TH CIR. 1987), CERT. GRANTED, 56 U.S.L.W. 3601 (MARCH 8, 1988)] ...

II

FLA.R.CRIM.P. 3.800(b) DENIES THE FEDERAL AND STATE CONSTITUTIONAL RIGHTS OF DUE PROCESS AND EQUAL PROTECTION BY ALLOWING THE TRIAL COURT TO REDUCE OR MODIFY CRIMINAL SENTENCES EXCEPT THE DEATH PENALTY. BY FAILURE OF COUNSEL TO RAISE DEFENDANT'S GOOD BEHAVIOR AS A MITIGATING CIRCUMSTANCE UNDER SECTION 921.141(6), FLA. STAT. (1985); APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, PARTICULARLY IN LIGHT OF SKIPPER V. SOUTH CAROLINA, 476 U.S. ___ , 90 L.ED.2d (1986) ....

III

APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHTS BY THE REFUSAL OF POLICE TO HONOR HIS REQUEST FOR COUNSEL, PARTICULARLY IN LIGHT OF SMITH V. ILLINOIS, 469 U.S. 91 (1984) AND SMITH V. STATE, 492 So.2d 1063 (FLA. 1986) ....

IV

APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL BY THE FAILURE OF COUNSEL TO PRESENT COMPETENT MENTAL HEALTH EXPERTS, IN LIGHT OF AKE V. OKLAHOMA, 470 U.S. 68 (1985)....

V

APPELLANT'S RIGHT TO AN ATTORNEY ATTACHED AT THE TIME OF FIRST APPEARANCE. HIS INTERROGATIONS OF SEPTEMBER 6, 8 AND 11 WERE ILLEGAL BECAUSE HE WAS DENIED ACCESS TO AN ATTORNEY AND HAD NOT AFFIRMATIVELY WAIVED HIS RIGHT TO COUNSEL,... WITT V. WAINWRIGHT, 714 F.2D 1069 (11TH CIR. 1983), [MODIFIED, 723 F.2D 769 (11TH CIR. 1984), REVERSED, 469 U.S. 412 (1985)]; AND STATE V. DOUSE, 448 SO.2D 1184 (FLA. 4TH DCA 1984)....

(CR 116-147). The State again disagreed with appellant's positions (CR 155-162). An evidentiary hearing was held on September 3, 1987 (CR 1-107). Judge Moe, following the denial of executive clemency and the signing of a warrant for appellant's execution the second week of July, denied all relief on May 16, 1988, finding that all of appellant's collateral claims except the second and fourth were procedurally barred because they either were or could have been litigated upon direct appeal, and alternatively finding that all were uncompelling on the merits (CR 170-173). This timely appeal followed (CR 175-176), as did an original petition for writ of habeas corpus alleging ineffective assistance of direct appellate counsel wherein appellant reiterated his Ake and Douse claims and premiered a claim that he should allegedly be spared from execution as "mentally retarded."

SUMMARY OF ARGUMENTS

Judge Moe properly denied appellant's motion for post-conviction relief, and this Court should both affirm this denial and deny habeas corpus relief, because all five of appellant's claims are uncompelling.

Appellant's Caldwell v. Mississippi claim should be rejected since it could have been litigated upon direct appeal if it had been properly preserved; since Caldwell claims are legally inappropriate in Florida; and since appellant's jurors were told their advisory sentence was very important.

Appellant's Ake v. Oklahoma claim should be rejected because the defense availed itself of the competent if ultimately uncompelling assistance of mental health experts at both the guilt and penalty phases of trial. Moreover, an Ake claim may not be premiered collaterally.

Appellant's Smith v. Illinois claim should be rejected since this Court's decision on direct appeal that appellant never invoked his Fifth Amendment right to counsel in response to police interrogation is the inviolable law of this case; since there was no error; or since any error was harmless.

Appellant's State v. Douse claim must be rejected since it could have been litigated upon direct appeal if it had been properly preserved; since appellant did not have either a federal or a state right to counsel from the time for his

first appearance which he could not have waived; or since any error was harmless.

Appellant's new claim that he cannot be executed because he is supposedly "mentally retarded" should be rejected because it could have been litigated upon direct appeal if it had been properly preserved; because it was not contained in appellant's 3.850 motion; and because regardless of whether the retarded may be executed, appellant is not retarded.

ISSUE

THE TRIAL JUDGE PROPERLY DENIED APPELLANT'S MOTION FOR POST-CONVICTION RELIEF, AND THIS COURT SHOULD NOT GRANT HABEAS CORPUS RELIEF.

ARGUMENT

Appellant essentially alleges that Judge Moe reversibly erred by denying his motion for post-conviction relief, and that he is entitled to a new trial and/or sentencing proceeding as a result. He further alleges that the same result[s] should obtain on his original petition for writ of habeas corpus to this Court because he was victimized by the ineffective assistance of direct appellate counsel. The State disagrees.

Preliminarily, the State would note that generally under Florida law, "issues [which either] were or could have been raised on direct appeal ... are foreclosed [from consideration] in ... proceeding[s] for collateral review." Meeks v. State, 382 So.2d 673, 675 (Fla. 1980). This procedural bar becomes inoperative only where "major constitutional changes of law, ... in contrast to evolutionary refinements," have been announced by either this Court or the United States Supreme Court since the finalization of a capital defendant's adjudication and sentence. Witt v. State, 387 So.2d 922, 924-930 (Fla. 1980), cert. denied, 449 U.S. 1067 (1981). Allegations of ineffective assistance of counsel under the totality of the circumstances may generally be premiered collaterally,

see e.g. Meeks v. State, 382 So.2d 673, 675; however, the courts must be wary of litigating the merits of particular unpreserved claims collaterally under the guise of evaluating counsel's overall effectiveness, see Smith v. Murray, 477 U.S. ___, 91 L.Ed.2d 434 (1986). Moreover, direct appellate defense counsel may not be declared ineffective for failing to present unpreserved and/or unmeritorious issues, Jacobs v. Wainwright, 450 So.2d 200 (Fla. 1984), cert. denied, 469 U.S. 1067 (1985), or even every arguably meritorious issue, Jones v. Barnes, 463 U.S. 745 (1983).

Under the foregoing standards, the State would submit that none of appellant's five essential claims for collateral relief are cognizable collaterally. Appellant's Caldwell, Smith, and Douse claims are not presented for resolution here because they either were (Smith) or could have been (Caldwell and Douse) disposed of upon direct appeal if properly preserved at trial. The Ake claim, while masquerading as an incompetency of trial counsel claim, is similarly not presented for resolution here given appellant's inexcusable failure to present it as a substantive claim upon direct appeal. Appellant's "retardation" claim obviously cannot be fruitfully premiered here. The State will elaborate, where necessary, upon these contentions in the following individualized treatments of appellant's five claims.

I Caldwell v. Mississippi Claim

Appellant's first claim for 3.850 relief below was that events at his trial unconstitutionally diminished his jurors' sense of responsibility in rendering their advisory sentence contrary to Caldwell v. Mississippi, necessitating resentencing. This claim is doomed to rejection for three reasons.

First, appellant irrevocably procedurally defaulted upon this claim by not preserving it at trial and presenting it upon direct appeal, see Jackson v. State, 13 F.L.W. 146, 149 (Fla. February 18, 1988) and Bertolotti v. State, 13 F.L.W. 253 (Fla. April 7, 1988). Second, the Caldwell holding is inapplicable to Florida capital sentence proceedings as a matter of law in any event since in Florida, unlike Mississippi, the judge is the ultimate sentencer, see Combs v. State, 13 F.L.W. 142, 143-144 (Fla. February 18, 1988) and Grossman v. State, 13 F.L.W. 127, 129-130 (Fla. February 18, 1988). Third, assuming arguendo that the Caldwell holding is applicable to Florida capital sentencing proceedings, the following comments from trial defense counsel and Judge Moe to the jurors immediately before they retired to consider their sentencing recommendation totally ameliorated any possible juror flippancy as to the significance of their role:

> [DEFENSE COUNSEL:] The decision you are about to to make is probably the most important decision you will ever make. You don't have the final sentence in your hand. His Honor, Judge Moe has that, but your recomendation is very

> heavy weight and I ask you to think about the case carefully ....
>
> [JUDGE MOE:] You...should not...act hastily and without due regard to the gravity of these proceedings.... You should carefully weigh, sift and consider the evidence and all of it realizing that a human life is at stake and bring to bear your best judgment in reaching your advisory sentence.

(DR 1383; 1390). Compare Harich v. Wainwright, 2 F.L.W. Fed. C 535 (11th Cir. April 21, 1988) (en banc). Thus, appellant's motion for a stay of execution due to his Caldwell claim must also be denied (see CR 166-169).

II Ake v. Oklahoma Claim

Appellant's fourth claim for 3.850 relief below was that counsel's ineffective assistance at trial and sentencing unconstitutionally deprived him of his purported right to present favorable psychological evidence to the jury and Judge Moe concerning the alleged involuntariness of his confessions and the alleged inappropriateness of a death sentence contrary to Ake v. Oklahoma, necessitating retrial and/or resentencing. He recasts this claim on habeas corpus under the guise of appellate ineffectiveness. The State disagrees.

Ake establishes:

> When the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

Id., 470 U.S. 68,80,83. The record here shows that appellant, through counsel, freely availed himself of this constitutional right of access to mental health professionals in the preparation and the presentation of both his guilt and penalty phase defenses. Counsel moved Judge Moe that a psychiatric expert be appointed to examine appellant prior to trial (DR 1416-1417). Judge Moe complied, ordering an expert evaluation of appellant's sanity at the time of the murder, his competency to stand trial, his capacity to appreciate the criminality of his conduct or conform this conduct to the requirements of the law, and whether he was under the influence of extreme mental or emotional disturbance (DR 1457-1458). Unfortunately for appellant, psychiatrist Arnold Eichert and psychologists John McClure and Seth Krieger all evidently concluded that appellant was both sane at the time of the murder and competent to stand trial, so Judge Moe ordered trial to proceed (DR 235; 260-269; 1325-1326; 1349; 1471).

At the pretrial hearing of February 25, 1982 held on appellant's motion to suppress his many confessions to law enforcement personnel, psychiatrist Robert Wylan testified for the defense that based upon his school tests, appellant was "borderline retarded" (DR 198-207). Dr. Krieger, also called by the defense, testified that while appellant was of "borderline intellectual endowment" he was not "functionally retarded" (DR 225, 228). Krieger added, however, that appellant would not fully understand his Miranda rights (DR 230). Dr. Eichert

testified in rebuttal for the State that appellant was actually "brighter than average," but could not fully employ this intelligence due to a degree of "organic brain ... damage" (DR 269-270). Eichert added, however, that appellant would comprehend his Miranda rights (DR 270-271). Upon this and other evidence that appellant's confessions were in no way coerced, Judge Moe ruled that these confessions were voluntary and admissible (DR 294), a conclusion this Court later affirmed, Doyle v. State, 460 So.2d 353, 356.

At trial, Dr. McClure testified for the defense that based upon his review of appellant's "entire academic file" and personal examination, appellant was indeed "borderline ... retard[ed]" but had no "brain damage" (DR 1210-1214). McClure opined that appellant would react to an authority figure (presumably including a police interrogator) either very respectfully or very hostily (DR 1215). Unfortunately for appellant, the jury inferentially rejected appellant's implicit theory that his low intelligence level and his deference to authority made him confess to a murder he didn't commit, by finding him guilty as charged (DR 1301-1303).

At sentencing, Drs. McClure and Krieger again testified for the defense that appellant was of limited intellect, Dr. McClure adding that appellant had a cronic problem in conforming his conduct to the requirements of the law (DR 1345-1346), and Dr. Krieger adding that appellant had been so

"depressed" by his brother's recent death purportedly in a hunting accident that he had abused intoxicants (DR 1337). The State nullified this statutory and nonstatutory mitigating evidence by representing the testimony of Dr. Eichert (DR 1323-1331), and further by inducing Drs. McClure and Krieger to concede on cross-examination, as McClure had during trial, that appellant was not mentally ill but rather was violently antisocial (DR 1217-1220); 1340-1341; 1348). McClure even conceded that appellant had attempted to feign mental illness (DR 1350-1351). Unfortunately for appellant, the jury implicitly accepted the State's position that appellant was wicked rather than dumb or sick as urged by defense counsel (DR 1384), by recommending a death sentence (DR 1395-1396).

Before imposing sentence, Judge Moe availed himself of appellant's presentence investigation, wherein the foregoing expert psychiatric and psychological opinions that appellant was basically a bad rather than impaired person were squarely presented (DR 1403; 1553-1554). Despite defense counsel's reassertions of appellant's purported stupidity and impulsiveness (DR 1406-1410), Judge Moe in imposing the ultimate sanction rejected appellant's mental history as mitigation (DR 1575-1580), a conclusion this Court implicitly affirmed, see Doyle v. State, 460 So.2d 353, 358-359 (Overton, J., dissenting as to sentence).

Appellant's current essential claim that defense counsel was ineffective at trial for not having his mental

health experts plumb deeper into the possibility that he untruthfully confessed to please the police ignores several dispositive factors. First, as noted, Dr. McClure did briefly testify for the defense on this score. Second, the fact that a defendant waives his Miranda rights and confesses a crime to the police due to a mental weakness has since been held not to render the confession involuntary and hence inadmissible unless the police have knowingly exploited this weakness, Colorado v. Connelly, 479 U.S. ___, 93 L.Ed.2d 473 (1986), which the instant police clearly did not do. Third, to this day appellant has not brought forth any mental health expert whose testimony would have been markedly more favorable than that actually presented by trial defense counsel. Appellant's attempt to do so at the Rule 3.850 evidentiary hearing fell apart when psychologist Russell Bauer conceded on cross-examination that appellant was sociopathic rather than mentally ill, was capable of great violence, and was not brain damaged (CR 24-29). Appellant has woefully failed to establish either "cause" or "prejudice" under Strickland v. Washington concerning counsel's performance during the guilt phase of his trial. Compare Bush v. Wainwright, 505 So.2d 409, 411 (Fla. 1987).

Similar considerations warrant the rejection of appellant's current claim that defense counsel was ineffective at sentencing for not having presented more convincing mental health experts to paint his frankly evil personage as more pitiably troubled instead. Counsel testified at the Rule

3.850 hearing that he presented as pathetic a picture of appellant's mental state as respect for the truth would allow (CR 36-47; 60-71). That the jury and judge to whom this portrait was presented exercised their prerogative to credit instead the contrary evidence offered by the State, Roberts v. State, 510 So.2d 885, 894-895 (Fla. 1987) and Palmes v. Wainwright, 725 F.2d 1511, 1523 (11th Cir. 1984), cert. denied, 469 U.S. 873 (1984), obviously does not render counsel ineffective under Strickland.

Moreover, as Judge Moe forcefully stated (CR 101-103), a defendant is simply not constitutionally entitled to the appointment of an expert who would agree to make a favorable psychiatric evaluation in accordance with his wishes, Martin v. Wainwright, 770 F.2d 918, 934-935 (11th Cir. 1985), modified, 781 F.2d 185 (11th Cir. 1986), cert. denied, ___U.S.___, 107 S.Ct. 307 (1987); Finney v. Zant, 709 F.2d 643, 645 (11th Cir. 1983), contrary to appellant's apparent belief. Direct appellate defense counsel cannot be faulted for failing to present this unpreserved and strained argument to this Court earlier.

III Smith v. Illinois Claim

Appellant's third claim for 3.850 relief below was that the following exchange between Detective Robert Buzzo and himself at the beginning of his first, prearrest interrogation of September 6, 1981 constituted an unambiguous invocation of his Fifth Amendment right to counsel, requiring the suppression of all of his subsequent self-inculpations

to law enforcement officers under Smith v. Illinois and necessitating retrial:

> Q. If you want an attorney to be present at this time or at any time hereafter, you are entitled to such counsel. If you cannot afford to pay an attorney, the court will furnish you with one if you so desire. Do you understand?
>
> A. Yes.
>
> Q. Do you wish to have an attorney present at this time?
>
> A. Well, he's out of town right at the moment.
>
> Q. Well, do you wish to have an attorney here though, you know, while I talk to you now?
>
> A. If, you know, we'll talk about that later. I can, yes.
>
> Q. So what I am saying is, you're willing to talk to me now; right, without your attorney?
>
> A. Yes.
>
> Q. Okay. Knowing your rights as I have just related them to you, are you now willing to answer my questions without having your attorney present?
>
> A. Yes.

(DR 39-40; 1025-1026).

This Court will recall that appellant tendered the same claim to it upon direct appeal, albeit relying primarily upon Edwards v. Arizona, 451 U.S. 477 (1981) ("Brief of Appellant" on direct appeal, pgs. 15-20), see also Miranda v. Arizona, 384 U.S. 436 (1966), which this Court rejected thusly:

> Appellant's claim that he was denied access to an attorney during questioning is a personal one which must be invoked by the defendant in some unambiguous manner. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); State v. Craig, 237 So.2d 737 (Fla. 1970). The record indicates that Doyle's only mention of an attorney occurred early in the first interrogation session when he remarked that the attorney who had represented him in an earlier matter was currently out of town. Although his girlfriend later attempted to reach an attorney for Doyle, she was unable to testify that Doyle had asked her to do so. At no time in the questioning did Doyle indicate an unwillingness to answer questions in the absence of counsel. On these facts it is impossible to find any indication that appellant wished to deal with the police only through counsel, as is necessary to invoke the protection of Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

Doyle v. State, 460 So.2d 353, 356.

This Court's direct appellate finding that appellant never even ambiguously invoked his right to counsel during the aforequoted exchange with Detective Buzzo is simply and dispositively the "law of the case." Johnson v. State, 13 F.L.W. 261 (Fla. April 11, 1988). Appellant's implicit contention that Smith v. Illinois constitutes a "major constitutional change of law" as opposed to a mere "evolutionary refinement" (if that) permitting a revisitation of the law of this case collaterally under Witt v. State is belied by the simple juxtaposition of the relevant holdings of Miranda and Smith. Miranda holds that "if ... [a suspect] indicates in any manner and at any stage of the process that he wishes

to consult with an attorney before speaking there can be no questioning," 384 U.S. 436, 444-445, while Smith similarly holds that "where nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous, all questioning must cease," 469 U.S. 91, 98. Moreover, even if Smith could somehow be construed as a major constitutional change of law, such would not benefit this appellant, who never even ambiguously invoked his right to counsel, Doyle v. State, 460 So.2d 353, 356, as noted.

Assuming arguendo that appellant's statements in the aforequoted passage could somehow be construed as an ambiguous invocation of his right to counsel, the State would submit that Detective Buzzo's responses thereto were appropriately designed to clarify appellant's intentions, which they did: appellant simply did not want counsel present. Compare Martin v. Wainwright, 770 F.2d 918, 923-924. Alternatively assuming arguendo that appellant's statements could somehow be contorted into an unambiguous invocation of his right to counsel, the State would submit that any error in admitting his subsequent confessions to law enforcement personnel at interrogations they initiated would be offset by appellant's self-initiated confession to Officer Ronald Peluso later on September 6 (DR 1066-1068), compare Edwards and Martin,

and by appellant's several confessions of the Kipp murder to a private citizen, his girlfriend Karen Wentnick (DR 1160), Doyle v. State, 460 So.2d 353, 355, cf. Zamora v. Dugger, 834 F.2d 956, 958-959 (11th Cir. 1987).

IV State v. Douse Claim

Appellant's fifth and final claim for 3.850 relief below was that under Fla.R.Crim.P. 3.130 and Article I, Section 16 of the Constitution of the State of Florida, his state constitutional right to the assistance of counsel unwaivably attached 24 hours after his arrest in the early afternoon hours of September 6 (DR 1042-1045), requiring the suppression of all of his subsequent self-inculpations to law enforcement officers under State v. Douse, necessitating retrial. He recasts this claim here on habeas as one of direct appellate ineffectiveness. This claim is doomed to rejection for three reasons.

First, appellant irrevocably procedurally defaulted upon this claim by not preserving it at trial and presenting it upon direct appeal, see e.g. Smith v. State, 445 So.2d 323, 324-325 (Fla. 1983), cert. denied, 467 U.S. 1220 (1984). As noted, appellate defense counsel should not be faulted for withholding unpreserved claims.

Second, in United States v. Gouveia, 467 U.S. 180, 187 (1984) the Supreme Court of the United States held that "[t]he Sixth Amendment right to counsel attaches only when

formal judicial proceedings are initiated against an individual by way of indictment, information, arraignment, or preliminary hearing." See also Michigan v. Jackson, 475 U.S. 625 (1986); Moran v. Burbine, 475 U.S. 412 (1986); Kirby v. Illinois, 406 U.S. 682, 688-689 (1972). This right simply does not attach when a Florida criminal defendant is brought before a judicial officer within 24 hours of his arrest for a nonadversarial determination of probable cause or "first appearance" pursuant to Rule 3.130, see Gerstein v. Pugh, 420 U.S. 103, 122 (1975); see also Kirby v. Illinois, 406 U.S. 682, 687; Baker v. State, 202 So.2d 563 (Fla. 1967); Waterhouse v. State, 429 So.2d 301 (Fla. 1938), cert. denied, 464 U.S. 977 (1983); Perkins v. State, 228 So.2d 382, 388-389 (Fla. 1969). For this Court to retroactively interpret our state constitution's version of the Sixth Amendment to afford those arrestees who have been "first appearanced" a right to counsel more expansive than that afforded to them under the federal constitution would be totally unwarranted considering that the police here not only faithfully followed the letter of the law as it existed at the time of appellant's post-September 7 interrogations, they also faithfully followed the spirit of that law, contrast Haliburton v. State, 514 So.2d 1088 (Fla. 1987) and State v. Douse. Appellant's Fifth Amendment right to counsel attached no later than the time of his arrest, see Caso v. State, 13 F.L.W. 249 (Fla. Apr1 7, 1988), and would have adequately protected him from all of the various

subsequent solo interrogations had he chosen to avail himself of it. Of course, appellant voluntarily waived this right for reasons of his own, Doyle v. State, 460 So.2d 353, 356, which was certainly his prerogative, Colorado v. Connelly.

Third, even if this Court were to accept appellant's position here, any error in admitting his post-September 7 confessions would be clearly harmless considering the undeniable admissibility of appellant's confessions of September 6 to Detective Buzzo (DR 1042-1045; 1079, 1095), Detective Richard Bellrose (DR 1110-1113), and Officer Ronald Peluso - the latter of which occurred as the result of a conversation appellant initiated (DR 1066-1068), as noted. Compare Caso v. State. The harmlessness of any error is further highlighted by the fact that the State introduced evidence that appellant several times confessed the Kipp murder to a private citizen, his girlfriend Karen Wentnick, as also noted (DR 1160), Doyle v. State, 460 So.2d 353, 355. Cf. Zamora v. Dugger, 834 F.2d 956, 958-959.

V "Mental Retardation" Claim

Appellant presents here for the first time the claim that his execution would constitute cruel and unusual punishment because he is supposedly "mentally retarded." Of course, under the authorities aforecited this claim is not cognizable collaterally because it could have been litigated upon direct appeal if it had been properly preserved at trial. Appellant's

attempt to excuse this procedural default by blaming original appellate defense counsel for not pressing this unpreserved claim is not only uncompelling as a matter of law, Jacobs v. Wainwright, but is particularly unconvincing given that he inexcusably did not include it in his 3.850 motion years later. Appellant's premiering of this claim at this late date evinces his lack of appreciation for the principles of finality so stressed by this Court in Witt. Cf. Cochran v. State, 476 So.2d 207, 208 (Fla. 1985).

Moreover, regardless of whether the retarded may be executed, appellant is not retarded, as the State has demonstrated in refuting his Ake claim. To elaborate, Drs. Arnold Eichert, John McClure and Seth Krieger all evidently concluded that appellant was not only sane at the time of the murder but was also competent to stand trial, a finding validated by Judge Moe (DR 235; 260-269; 1325-1326; 1349; 1471). The State would submit that no truly retarded person would be unanimously found competent to stand trial, and indeed Dr. Krieger testified at the pretrial suppression hearing that appellant was not "functionally retarded" (DR 225, 228), while Dr. Eichert testified that appellant was actually "brighter than average" (DR 269-270). Both jury and judge later rejected trial defense counsel's rather skillful attempt to parlay appellant's limited intellect into a dispositive mitigating factor at sentencing (DR 1384; 1406-1410) by recommending and ordering the death penalty (DR 1395-1396; 1575-1580),

and this Court validated these dispositions, Doyle v. State.

Now, years later, appellant has produced the testimony of Dr. Russell Bauer that appellant is actually "at the cutting point between the mentally retarded range and borderline retarded range" in verbal skills (CR 10).[1] If this ambiguous, long after-the-fact testimony suffices to counteract the more proximate conclusions of other mental health experts as validated by appellant's jury and judges, no capital sentence will ever be carried out.

The recent decision of the Fifth Circuit in Brogdon v. Butler, 824 F.2d 338, 341 (5th Cir. 1987), cert. denied, ___U.S. ___, 97 L.Ed.2d 796 (1987) is almost uncannily on point here:

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[1] Yet remarkably, Dr. Bauer's 1987 conclusion that appellant's "full scale I.Q." was 75- 70 for verbal skills and 87 for performance skills (appellant's appendix 4, p. 2) - mirrors Dr. McClure's 1982 conclusion that appellant's "full scale I.Q." was 75- 71 for verbal skills and 85 for performance skills (appellant's App. 2, p. 2). According to the medical literature, for individuals such as appellant who evince "borderline intellectual functioning, which generally is in the I.Q. range of 71-84, ... the diagnosis of mental retardation is not warranted." Diagnostic and Statistical Manual of Medical Disorders, American Psychiatric Association (3rd Ed. 1987), p. 31.

> Petitioner's second claim is that the execution of a mentally retarded person constitutes cruel and unusual punishment, even though the claimed mental retardation was considered and rejected in the guilt phase of the trial. Petitioner cites no authority for his contention, and we can find none. Mental retardation does not constitute insantiy or incapacity to know the difference between right and wrong. It is only the latter disability, not the former, that serves as a defense to conviction and also to punishment. See DeAngelas v. Plaut, 503 F.Supp. 755, 782 (D.C. Conn. 1980).
>
> Petitioner raised the defense of diminished mental capacity both at trial and at the sentencing phase as a mitigating circumstance. State v. Brogdon, 457 So.2d [616, 627-628 (La. 1984), cert. denied, 471 U.S. 44 (1985)]. The jury rejected the claim as a defense in the guilt phase, and the claim was presented to the jury for its consideration in the sentencing phase. In spite of the claim, the jury recommended the death sentence. But petitioner now asserts that he cannot be executed because of his low mental capacity.
>
> Petitioner's mental health claim is based on his low I.Q., which is presumptively the same now as it was at trial, as well as at the time the crime was committed. Because petitioner does not now claim that the state court erred in its determination that his mental capacity was sufficient at the time of trial to hold him responsible for his actions in a capital case, we must reject petitioner's claim that his unchanged mental capacity does not permit execution. If he is mentally competent to be held guilty of a capital crime, and petitioner does not challenge this, he is competent to be punished for that crime.

The current claim of appellant's retardation is similarly unsubstantiated and uncompelling.

In Penry v. Lynaugh, 832 F.2d 915, 198 (5th Cir. 1987), the Fifth Circuit further stated:

> Penry argues that it would be cruel and unusual punishment to execute a mentally retarded person such as himself. He cites Ford v. Wainwright, 477 U.S. 399, ___, 106 S.Ct. 2595, 2600, 91 L. Ed.2d 335 (1986), for the proposition that 'idiots and lunatics are not chargeable for their own acts.' An identical claim has recently been rejected by this court. Brogdon v. Butler, 824 F.2d 338, 341 (5th Cir. 1987). Penry's claim is without merit.

Thus, even if this Court accepts appellant's problematic claim that he is mentally retarded at face value, such would not constitutionally bar his execution.

* * *

In summery, Judge Moe's denial of appellant's motion for post-conviction relief was proper in every respect; appellant has stated no basis for habeas corpus relief; and this Court must deny all relief.

CONCLUSION

WHEREFORE, the State respectfully urges this Honorable Court to deny all relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Answer Brief of Appellee/Reponse to Petition for Writ of Habeas Corpus" has been furnished, by overnight "Express Mail" to SANFORD L. BOHRER and R. MARCUS COBOURN, Thomson Zeder Bohrer Werth & Razook, 4900 Southeast Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131-2363 this 14th day of June, 1988.

Of Counsel