IN THE SUPREME COURT OF FLORIDA

ERNESTO SUAREZ, Appellant, v. STATE OF FLORIDA, Appellee.	)	Case No.

APPEAL FROM THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR COLLIER COUNTY

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

ERNESTO SUAREZ will be referred to as the "Appellant" in this brief and the STATE OF FLORIDA will be referred to as the "Appellee". The Record on Appeal developed for use in the direct appeal will be referenced by the symbol "R" followed by the appropriate page number.[1]

STATEMENT OF THE CASE

The defendant was charged by indictment filed on March 19, 1983, with the offense of first-degree murder (R.11-14). An information was subsequently filed charging the defendant with the additional offense of armed robbery (R.136). At arraignment, Suarez pled not guilty.

Trial by jury was held before the Honorable Hugh D. Hayes, Judge of the Circuit Court of the Twentieth Judicial Circuit of Florida, in and for Collier County. The jury found Suarez guilty of first-degree murder and armed robbery as charged (R.225). Following the penalty phase of the trial, an 8-4 majority of the

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1/ The record of the 3.850 proceedings was unavailable to counsel when this Brief of Appellee was prepared. Therefore, no record references can be made to those proceedings and facts adduced at the evidentiary hearing pertaining to specific claims will be discussed in the Argument portion of this brief as they relate to those claims. In fact, this Brief of Appellee is being filed in anticipation of those issues which may be raised by Appellant. In order to comply with the Order of this Honorable Court that the state's brief be filed by Friday, June 10, 1988, it was necessary to prepare this brief prior to receipt of the Brief of Appellant.

jury recommended the death penalty (R.1456). On March 29, 1984, a sentencing proceeding was held during which the court filed written findings in support of the death sentence (R.240). The court also sentenced Suarez to a consecutive term of 4 1/2 years imprisonment upon the armed robbery conviction (R.232A).

On December 19, 1985, the Florida Supreme Court affirmed the judgment and sentence of death, Suarez v. State, 481 So.2d 1201 (Fla. 1985), and the United States Supreme Court thereafter denied certiorari on June 9, 1986. The issues raised by Suarez in his direct appeal to the Florida Supreme Court were as follows:

> ISSUE I. BECAUSE HE DID NOT UNDERSTAND ENGLISH, ERNESTO SUAREZ WAS DENIED HIS RIGHTS TO CONFRONTATION AND DUE PROCESS WHERE HE DID NOT RECEIVE CONTEMPORANEOUS TRANSLATION OF THE TESTIMONY GIVEN IN ENGLISH AT HIS TRIAL.
>
> ISSUE II. THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS STATEMENTS WHERE IT WAS ESTABLISHED THAT ASSISTANT STATE ATTORNEYS HAD CONDUCTED INTERVIEWS WITH APPELLANT WITHOUT NOTIFYING APPELLANT'S DEFENSE COUNSEL, THEREBY VIOLATING THE ETHICAL CANONS OF THE FLORIDA CODE OF PROFESSIONAL RESPONSIBILITY.
>
> ISSUE III. THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING CO-DEFENDANTS REYES AND SORY TO REFUSE TO TESTIFY ON GROUNDS OF SELF-INCRIMINATION WITHOUT FIRST DETERMINING THE EXTENT AND VALIDITY OF THEIR FIFTH AMENDMENT CLAIMS.
>
> ISSUE IV. THE TRIAL COURT ERRED BY INSTRUCTING THE ADVISORY JURY ON AGGRAVATING CIRCUMSTANCES WHICH REFERRED TO THE SAME ASPECT OF APPELLANT'S CRIME, THEREBY ALLOWING THE JURY TO IMPROPERLY DOUBLE AGGRAVATING FACTORS DURING THEIR DELIBERATIONS ON THE PROPRIETY OF THE DEATH PENALTY IN THIS CASE.
>
> ISSUE V. THE TRIAL COURT ERRED BY SENTENCING ERNESTO SUAREZ TO DEATH BECAUSE THE PENALTY WEIGHING PROCESS INCLUDED INAPPLICABLE AGGRA-

VATING CIRCUMSTANCES AND EXCLUDED APPLICABLE MITIGATING CIRCUMSTANCES THEREBY RENDERING APPELLANT'S DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In his petition for writ of certiorari filed with the United States Supreme Court, the following question was presented:

> When a court appoints an interpreter to assist a non-English speaking defendant in preparing his defense to a capital charge, does the court also have an affirmative duty to ensure that absent the defendant's personal waiver, the interpreter provides contemporaneous translation of the proceedings to the defendant at trial?

Suarez sought clemency and a hearing was held in late 1987, said request for clemency being apparently denied when Governor Bob Martinez signed a death warrant in Suarez' case on April 21, 1988. The warrant is in effect from Tuesday, June 21, 1988 until 12:00 noon on Tuesday, June 28, 1988, with the execution presently scheduled for Wednesday, June 22, 1988, at 7:00 a.m.

On or about May 23, 1988, the defendant filed an emergency motion to vacate judgment and sentence pursuant to Rule 3.850, Fla. R. Crim. P., and a consolidated emergency application for stay of execution and special request for leave to amend. The state filed its responsive pleading on or about May 27, 1988. A hearing, which included the taking of evidence as to certain claims, was held before the Honorable Hugh Hayes, Circuit Judge for the Twentieth Judicial Circuit in and for Collier County, Florida, commencing on June 1, 1988, and concluding on June 5, 1988. After hearing the evidence and argument of counsel, Judge

Hayes denied the 3.850 motion to vacate judgment and sentence and denied the request for a stay of execution.

STATEMENT OF THE FACTS

The State of Florida will rely on the Florida Supreme Court opinion (cited at Suarez v. State, 481 So.2d 1201 (Fla. 1985)) for a statement of the facts:

> The state's evidence at trial showed that Suarez drove a car with four accomplices to a convenience store in Immokalee. Suarez waited in the car while the four accomplices went into the store and robbed the clerk at gunpoint. During the robbery an off-duty detective pulled into the parking lot of the store and observed the robbery in progress. He left the parking lot and called in marked units to aid in capturing the perpetrators. The accomplices got into the car and Suarez drove away from the store followed by the off-duty officer. When a marked sheriff's deputy's car pulled in behind Suarez, Suarez attempted to evade by speeding up. A high-speed chase ensued during which Suarez forced several oncoming cars off the road and also went through two attempted roadblocks. The chase ended when Suarez pulled into a driveway at a migrant labor camp, his car coming to rest at the rear of a parked bus. Four deputies by this time were close behind the getaway car, and they pulled into the area and stopped. Suarez got out of the car taking with him his .22 caliber semi-automatic rifle. He fired more than a dozen rounds from the rifle before it apparently jammed. One of those bullets found its way into the chest of one of the deputies as he was exiting his vehicle. The shot killed him instantly, a fact not discovered until a short while later after two suspects had been captured and Suarez and two other accomplices had fled the scene.
>
> Suarez testified he didn't know of the robbery until he was driving away from the convenience store. He claimed he fired the

> rifle only after he saw the flash of muzzle fire from the direction of the sheriff's deputies, and that he had merely fired the rifle blindly. He claimed that this was an automatic reaction resulting from his military experience as a Cuban soldier.

The opinion of the Florida Supreme Court also delineated the evidence which was presented by Suarez at the penalty phase:

> . . . In the penalty phase, Suarez's psychiatrist testified that the defendant had suffered a series of struggles since a child. He was expelled from his home for striking his stepfather and joined the Cuban military. He went AWOL and served time in prison before he was released to serve as a soldier in Angola. There he was wounded three times, once almost fatally. He emigrated to Miami during the Mariel boatlift where he became involved in the paramilitary group, Alpha 66. The psychiatrist testified that, although Suarez was not mentally ill at the time of the killing, when under great stress, "instincts for survival take over."

As noted in the Florida Supreme Court opinion, the jury recommended death by an 8-4 majority. This court found no mitigating circumstances and three aggravating circumstances, to wit: (1) the murder was committed during flight from a robbery; (2) the murder was committed to avoid arrest; and (3) the defendant knowingly created the great risk of death to many persons.

SUMMARY OF THE ARGUMENTS

As to the Argument in Opposition to Stay of Execution: The state submits that there is no reasons for entering a stay of execution. The claims advanced by appellant have been litigated in the 3.850 forum and this Honorable Court has ample time prior to the commencement of the warrant within which to review these

claims.

As to the Argument as to Procedural Bars: Many issues raised on 3.850 by appellant were not cognizable on collateral review. Florida law is clear that issues which could have been, should have been, or were raised on direct appeal are unavailable for collateral review. See e.g., Blanco v. State, 507 So.2d 1377 (Fla. 1987). Specifically, the following claims raised in the 3.850 motion are barred by virtue of the fact that they were raised on direct appeal to this Honorable Court: III, VI, XII, XXIV. The following issues raised in the appellant's 3.850 motion were barred because they could have been and should have been raised on direct appeal: II, V, VII, IX, X, XI, XIII, XIV, XVII, XVIII, XX, XXI, and XXII. Your appellee will not make reference to any of these claims below in our summary of the argument pertaining to the specific 3.850 issues. However, in the argument portion of this brief, your appellee has addressed each of the issues that was raised in the 3.850 motion.

As to Argument as to Specific 3.850 Claims:

As to Issue I: Rule 3.851, Fla. R. Crim. P., does not operate as a denial of due process and equal protection rights. The time limit prescribed in the rule does not deny the opportunity to present arguments but rather requires that arguments be presented within a reasonable time. The rule does not result in this capital defendant having less time for filing collateral relief pleadings than any other classes of defendants.

As to Issue IV: The trial court correctly summarily denied

appellant's claim that the trial court should have questioned appellant's competency to stand trial where that claim was not raised on direct appeal. With respect to appellant's claim of ineffective assistance of counsel as to the handling of the competency issue, it is clear that appellant is entitled to no relief. The evidence adduced at the evidentiary hearing showed that defense counsel consulted with a qualified mental health professional concerning the question of competency. Two of the defense attorneys testified at the evidentiary hearing that after consulting with Dr. Lombillo there was no question concerning appellant's competency.

As to Issue VIII: The record of the original trial proceedings and, indeed, the evidence adduced at the evidentiary hearing, supports the trial court's rejection of appellant's claim that he was erroneously stripped of a defense by the failure to call an expert mental health professional during the guilt/innocence phase of trial. Appellant took the stand in his own behalf at trial and after that testimony it would have been unreasonable to present the testimony of a mental health professional which would have been inconsistent with appellant's testimony. Thus, the failure to present mental health evidence at the guilt phase was not an omission of ineffective counsel, but rather was the proper decision which was forced upon reasonably effective counsel by his client's testimony.

As to Issue XV: Appellant failed to show how he was denied the effective assistance of counsel at either the guilt or

penalty phases of his capital trial. The state submits that appellant has failed to show how counsel acted deficiently in that performance was outside the wide range of reasonable professional assistance. Even more clear, the state submits, is that appellant failed to show how, assuming arguendo, that counsel was deficient in his performance, appellant has been prejudiced. There has been no showing that but for the acts or omissions of counsel the result of the proceedings would have been different. There is no question as to the reliability of the determination of appellant's guilt and there is no showing that the sentence of death would not have been imposed but for acts or omission of defense counsel.

As to Issue XVI: The evidence adduced at the evidentiary hearing in this cause negates beyond any doubt appellant's Brady claim. The allegation that two spent casings were found in the victim's car was totally belied by both the record of this case on direct appeal and by the evidence adduced at the hearing. There has been absolutely no showing that the state withheld from the defense team any material, exculpatory evidence.

As to Issue XIX: The trial court properly summarily denied appellant's claim of ineffective assistance of counsel because of the failure to introduce a portion of a polygraph examination during the penalty phase. A polygraph examination is akin to the "lingering doubt" evidence which this Court fails to recognize as a valid nonstatutory mitigating circumstance. In any event, because a polygraph has no probative value as to the

circumstances of the offense or the character of the defendant, it is clear that it would not be admissible at a penalty phase. Therefore, defense counsel could not be ineffective for failing to introduce material which should not be admitted in a penalty phase.

As to Issue XXIII: Appellant's claim that the trial court erred by failing to instruct on the mitigating circumstance of no significant history of prior criminal activity was correctly summarily denied by the trial court because that claim had not been presented on direct appeal. With respect to the claim that defense counsel was ineffective by failing to request the instruction on the mitigating circumstance or to offer evidence at trial that appellant had no prior criminal convictions, it is clear that the trial court correctly denied this claim. The evidentiary hearing revealed that appellant had committed armed robberies in Fort Myers shortly before the commission of the homicide in this case. Therefore, had defense counsel sought to introduce any purported mitigating evidence concerning lack of prior criminal conviction, the evidence of those robberies would have been placed before the jury. Effective representation in this situation required the action actually taken by defense counsel, that is, keeping that information from the jury.

As to Argument as to Denial of Motions to Disqualify:

The trial court correctly denied the motions to disqulify both himself and the office of the State Attorney in and for Collier County, Florida. To the extent the motions to disqualify

were predicated upon the need to take testimony from the judge or the State Attorney's office, it is clear that this testimony would not have been needed because the underlying claims were not cognizable for 3.850 review. To the extent that the motion to disqualify the trial court alleged a predisposition against appellant, it is clear that the facts as alleged were insufficient to demonstrate the extrajudicial bias or prejudice required.

ARGUMENT IN OPPOSITION TO STAY OF EXECUTION

Although this Honorable Court has the power to grant a stay of execution, the State of Florida submits that the instant cause is not one which should be stayed. In Barefoot v. Estelle, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983), rehearing denied, 104 S.Ct. 209, 78 L.Ed.2d 185 (1983), the Court addressed the issue of stays of execution and said:

> . . . It must be remembered that direct appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are not exception. When the process of direct review -- which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari -- comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials. Even less is federal habeas a means by which a defendant is entitled to delay an execution indefinitely.

77 L.Ed.2d at 1100. The State of Florida submits that 3.850 proceedings, like the federal habeas proceedings discussed in Bare-

foot v. Estelle, are not vehicles to relitigate state trials. As will be demonstrated below, Suarez is unable to show that any issue is likely to succeed on the merits. See O'Bryan v. Estelle, 691 F.2d 706, 708 (5th Cir. 1982), and White v. Florida, 458 U.S. 1301, 103 S.Ct. 1, 73 L.Ed.2d 1385 (1982).

In Autry v. Estelle, 464 U.S. 1, 104 S.Ct. 20, 78 L.Ed.2d 1 (1983), the United States Supreme Court declined to implement a rule calling for an automatic stay of execution where a petitioner's first habeas corpus petition had been involved. Similarly, the State of Florida submits that there is no justification for an automatic stay of execution merely because a 3.850 motion has been filed. The state further submits that the instant case is not one which calls for the granting of a stay of execution.

ARGUMENT AS TO PROCEDURAL BARS

It has long been the law in this state that a defendant may not raise via a motion pursuant to Rule 3.850, Fla. R. Crim. P., claims which were raised or should have been raised on direct appeal. See, e.g., Christopher v. State, 416 So.2d 450 (Fla. 1982); Raulerson v. State, 420 So.2d 517 (Fla. 1982); Meeks v. State, 382 So.2d 673 (Fla. 1980); and Alvord v. State, 396 So.2d 194 (Fla. 1981). The purpose of motions pursuant to Rule 3.850 is to provide a means of addressing alleged constitutional errors in a judgment or sentence, not to review errors which are cognizable on a direct appeal. McCrae v. State, 437 So.2d 1388 (Fla.

1983). For example, in Blanco v. State, 507 So.2d 1377, 1380 (Fla. 1987), the Supreme Court held the following issues had been procedurally barred because they either were or should have been presented on direct appeal:

> 1. Did the trial court err in permitting appellant to call witnesses against the advice of counsel;
>
> 2. Did the trial court conduct critical stages of the trial in the absence of appellant or an interpreter;
>
> 3. Did the trial court err in questioning appellant concerning the presentation of his defense;
>
> 4. Did the instructions to the jury unconstitutionally denegrate the jury's role in recommending life or death;
>
> 5. Did the trial court improperly instruct the jury on the number of jurors required to return a life recommendation;
>
> 6. Did the trial court improperly rely on the conviction for armed burglary as an aggravating factor;
>
> 7. Did the trial court improperly rely on a previous conviction for armed robbery as an aggravating factor; and
>
> 8. Did the prosecutor use inflammatory closing arguments.

These issues were not cognizable in post-conviction relief. As can be observed from the underlined issues above, Suarez presented the same or similar type of issues to the trial court in his 3.850 motion and, as in Blanco, were properly summarily denied by the trial court.

As aforestated, we have the same situation presented as in

Blanco. In his motion for 3.850 relief, the defendant alleges 24 grounds for relief; of these issues, only issues 1, 4, 8, 15, 16, 19, and 23 are appropriate for a 3.850 proceeding. All other issues were raised or should have been raised on direct appeal. See, Blanco v. State, Id. The issues procedurally defaulted include:

> 2. The security measures at trial (should have been raised on direct appeal);
>
> 3. The trial court's failure to assure the defendant's actual and constructive presence during critical stages of the proceedings (was raised on direct appeal and was raised before the U.S. Supreme Court on a different theory, and any new theory now espoused should have been raised on direct appeal);
>
> 5. The use of a handwriting exemplar (should have been raised on direct appeal);
>
> 6. The use of statements made by the defendant (was raised and determined on direct appeal);
>
> 7. The defendant's testimony required as a condition precedent to the use of an expert witness (should have been raised on direct appeal);
>
> 9. Proper instructions on the claim of self-defense (should have been raised on direct appeal);
>
> 10. Conflict of interest (should have been raised on direct appeal);
>
> 11. Failure to order a mistrial when severence was granted (should have been raised on direct appeal);
>
> 12. The trial court's refusal to make an inquiry on the record as to the co-defendant's willingness to testify on behalf of the defendant (was raised and determined on direct appeal);

13. Failure to sequester the jury during trial (should have been raised on direct appeal);

14. Refusal to grant a motion for a change of venue (should have been raised on direct appeal);

17. A Caldwell v. Mississippi claim (should have been raised on direct appeal);

18. A Booth v. Maryland claim (should have been raised on direct appeal);

20. Instructions which shifted the burden of proof (should have been raised on direct appeal);

21. Instructions concerning the recommendation by a majority of the jury (should have been raised on direct appeal);

22. The trial court's failure to independently weigh the aggravating and mitigating circumstances (should have been raised on direct appeal); and

24. Instructions to the jury as to the applicable aggravating circumstances (was raised and determined on direct appeal).

The issues discussed above which should have been or were raised on direct appeal were correctly summarily denied by the trial court.

ARGUMENT AS TO SPECIFIC 3.850 CLAIMS

ISSUE I

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM THAT RULE 3.851, F.R.Cr.P., OPERATES AS A DENIAL OF DUE PROCESS AND EQUAL PROTECTION RIGHTS.

As his first claim for relief before the trial court, the defendant alleged that Rule 3.851, Fla. R. Crim. P., denies him

equal protection in that he has to pursue his claims for relief prior to the expiration of the two-year limitation period specified in Rule 3.850, Fla. R. Crim. P. The trial court's denial of this claim was correct.

The state submits that Rule 3.851 does not deny a defendant any of his constitutional rights. Time limitations for the filing of claims for post-conviction relief have been upheld. United States ex rel. Caruso v. Zelinsky, 689 F.2d 435 (3d Cir. 1982). Such limitations serve the purpose of permitting cases to be resolved by the judiciary in a timely manner without the pressures of eleventh hour filings. They also serve the purpose of terminating litigation before cases become too difficult to retry, due to the passage of time, loss of evidence, relocation or death of witnesses, etc.

Equal protection analysis, in the context of criminal proceedings, requires only that the defendant have "an adequate opportunity to present his claims fairly . . ." Ross v. Moffitt, 417 U.S. 600, 616 (1974); United States v. MacCollom, 426 U.S. 317, 328-329 (1976). Under the applicable rules of procedure, Suarez has such an adequate opportunity. The 30-day provision under rule 3.851 does not shorten the time which would have existed under the old 30-day warrants. Rule 3.851 is predicated upon the condition that the warrant set the execution for at least sixty days from the date of signing, as does the warrant in this case. Prior to the adoption of Rule 3.851, warrants, typically set executions for approximately 30 days after the date of sign-

ing. As death penalty defendants, prior to Rule 3.851's adoption, would obviously have no more than the 30 days provided by the warrant in which to take action, the current rule does not shorten any previously existing filing period.

General principles regarding the due process clause permit the state to regulate procedures under which its laws are carried out, and the state's action is not proscribed unless "it offends some principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental." Patterson v. New York, 432 U.S. 197, 201-202 (1977), quoting from Speiser v. Randall, 357 U.S. 513, 523 (1958). Limitations on the time for filing motions for post-conviction relief have never been deemed to have such an effect. See, Zelinsky, supra; Diggs v. United States, 740 F.2d 239 (3d Cir. 1984). Due process claims can also entail arguments that the right of access to the courts has been denied. The right of access to the courts, which is founded in the due process clause, "assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." Wolff v. McDonnell, 418 U.S. 539, 579 (1974), Mitchum v. Purvis, 650 F.2d 647 (5th Cir. 1981). A time limit such as that in Rule 3.851 does not deny the opportunity to present arguments in court; it requires only that the arguments be presented in a reasonable time. This is especially true as Rule 3.851 provides an exception for cases in which it is alleged "that the facts upon which the claim is predicated were unknown to the movant and

could not have been ascertained by the exercise of due diligence prior to the end of the thirty-day period."

There is no right under the due process clause to any state court collateral relief. In United States v. MacCollom, 426 U.S. 317, 323 (1976), Justice Rehnquist, in his plurality opinion, stated:

> The Due Process Clause of the Fifth Amendment does not establish any right to an appeal, see **Griffin v. Illinois**, 351 U.S. 12, 18, 100 L.Ed.2d 891, 76 S.Ct. 585, 55 A.L.R. 2d 1055 (1956) (plurality opinion), and certainly does not establish any right to collaterally attack a final judgment of conviction.

If there is no due process right to any form of state court collateral relief, how can any gratuitous granting of such a procedure by the state, with time limitations, violate the due process clause? Whatever time limits are imposed, the state has already furnished greater rights than those required by the due process clause. The only limitation is that if the state furnishes procedures which are not constitutionally required, those procedures must be furnished in a nondiscriminatory manner. Thus, the plurality opinion in Griffin v. Illinois, 351 U.S. 12, 18 (1956), provided:

> It is true that a state is not required by the federal constitution to provide appellate courts or a right to appellate review at all. See, e.g., **McKane v. Durston**, 153 U.S. 684, 687, 688, 38 L.Ed. 867-869, 14 S.Ct. 913. But that is not to say that a state that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty . . . Consequently, at all stages of the proceedings the due process and equal protection clauses protect persons like petitioners from invi-

dious discrimination.

As noted above, the applicable rules have not resulted in this defendant having less time for filing collateral relief pleadings than any other classes of defendants. Therefore, no constitutional rights have been violated.

It should also be noted that Rule 3.850 and Rule 3.851 are rules of procedure, not matters of substance. See, Doran v. Compton, 645 F.2d 440 (5th Cir. 1980). When the Supreme Court promulgates rules dealing with the same subject matter, they should be construed together and in light of each other. Dibble v. Dibble, 377 So.2d 1001 (Fla. 3d DCA 1979). Additionally, in construction of court rules, specific rules will prevail over the general rule. Adams v. Culver, 111 So.2d 665 (Fla. 1959) and Abrahams v. Mimosa Co., 174 So.2d 82 (Fla. 3d DCA 1965).

ISSUE II

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM CONCERNING THE SECURITY MEASURES UNDERTAKEN DURING TRIAL.

As his second claim, Suarez contended that the "intense security measures" undertaken during trial served to violate constitutional rights. As aforestated, this issue is not cognizable in a 3.850 proceeding inasmuch as it is an issue which should have been raised on direct appeal. Additionally, no objection appears in the record as to any of the "intense" security measures. Thus, it is clear that this claim is procedurally defaulted.

In any event, it is significant to observe that Suarez cites no authority to support his proposition that the security measures undertaken in the instant case were of a level sufficient to invoke constitutional guarantees. His description of the security measures taken could be a description of the measures taken in any capital trial. It is not surprising, therefore, that no precedent has been cited to support his proposition.

To the extent that testimony adduced at the 3.850 evidentiary hearing concerning the shackling of appellant's feet at voir dire was permitted by the trial court, it is clear that this claim could have been raised on direct appeal. The record of the original trial proceedings contained reference to this matter (R.489) and the failure to raise this issue on direct appeal or to allege this claim as a basis for post-conviction relief results in a clear procedural bar. In any event, at trial the court observed that it did not appear that the venirepersons had been able to see the shackles and the shackles were removed after voir dire was completed and the trial of the two co-defendants was severed from appellant's trial.

ISSUE III

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM THAT THE TRIAL COURT FAILED TO ASSURE APPELLANT'S ACTUAL AND CONSTRUCTIVE PRESENCE DURING CRITICAL STAGES OF HIS CAPITAL PROCEEDINGS.

As his third claim, Suarez contended that the trial court's failure to assure the defendant's actual and constructive pre-

sence during critical stages of the capital proceedings violated Suarez's constitutional rights. It is clear that a variation of this claim was, indeed, raised on direct appeal and was decided adversely to the defendant. On direct appeal, Suarez contended that he had a constitutional right to have the judge provide instantaneous verbatim translation of all court proceedings. In his 3.850 motion, the defendant now attempts to raise the same issue under the guise of a new denomination. He is now rephrasing his "word-for-word translation" issue into a "constructive presence" issue. No matter how denominated, the issue is still the same and it was determined on direct appeal. On that direct appeal, this Honorable Court had the opportunity to review the types of matters asserted in the 3.850 petition in that the policy arguments concerning the presence of the defendant were made in this Court.

Inasmuch as this issue was previously entertained by this Court, this claim was not properly before the trial court in its consideration of the 3.850 claims. This is true even if new facts are adduced in support of the previous claim. Cf. Sullivan v. State, 441 So.2d 609 (Fla. 1983). In any event, it is clear that the allegations are not sufficient to support relief inasmuch as the trial court found that an interpreter was present during the entire trial for the benefit of the defendant (R.1465). Additionally, the defendant's assertions in his 3.850 motion concerning the failure to raise the "presence" issue by trial counsel is belied by the record. At the motion for new

trial hearing, defense counsel specifically moved that the defendant be awarded a new trial "because for all practical purposes he was not present during the proceedings here" (R.1465). Nevertheless, it is clear that this issue was raised on direct appeal or should have been raised in the context now asserted.

ISSUE IV

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM THAT THE TRIAL COURT SHOULD HAVE QUESTIONED APPELLANT'S COMPETENCY TO STAND TRIAL, AND WHETHER THE TRIAL COURT ERRED BY DENYING, AFTER AN EVIDENTIARY HEARING, APPELLANT'S CLAIM THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE OF THE PURPORTED FAILURE TO ADEQUATELY INVESTIGATE THE QUESTION OF APPELLANT'S COMPETENCY.

As his fourth claim, appellant claimed that he was not legally competent to stand trial and defense counsel was ineffective by allowing an incompetent client to stand trial. In a general fashion, appellant alleged that defense counsel failed to "recognize obvious signs and symptoms of Mr. Suarez' mental deficiencies and emotional disturbance". This contention is highly suspect in light of the concession in his 3.850 motion that a request by defense counsel was made to have Suarez evaluated and treated following a suicide attempt. The facts adduced at the 3.850 evidentiary hearing reveal that trial counsel, after consulting with a qualified mental health professional, Dr. Lombillo, determined that there was no doubt that appellant was competent to stand trial.

The trial court has the responsibility to conduct a hearing

on competency to stand trial whenever it reasonably appears necessary, whether requested or not, to ensure that a defendant meets the standard of competency set forth in Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960); Christopher v. State, 416 So.2d 450 (Fla. 1982). The questions to be decided in a competency determination are:

> (1) Whether the defendant has a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and (2) whether he has a rational as well as a factual understanding of the proceedings against him. See Lane v. State, 388 So.2d 1022 (Fla. 1980).

Christopher, at 452. In the instant case, as in Christopher, there is nothing in the trial record which made it reasonably necessary to inquire into the competency of the defendant to stand trial. Thus, the trial court did not have any responsibility to conduct a hearing for this purpose. Nevertheless, it is clear that any claim concerning the trial court's duty to question appellant's competency could have and should have been raised on direct appeal. The failure to do so precludes collateral review.

In a similar vein, it is clear that defense counsel is under no obligation to seek a competency determination for the record when there is no indication of incompetency. Although appellant made conclusory allegations in his 3.850 motion that he was unable to, for example, confer with counsel, aid in his defense, or testify rationally, no facts were adduced at the evidentiary hearing which support these bald assertions.

It is significant to observe that Dr. Lombillo evaluated and

treated Suarez after Suarez' suicide attempt. A review of Dr. Lombillo's testimony contravenes the assertion of a competency issue. Specifically, Dr. Lombillo testified that Suarez appeared to be intelligent, articulate, pleasant, and could be very cooperative (R.1418). Additionally, Dr. Lombillo encouraged Suarez to talk with his lawyer and to have open communications (R.1419). Surely, a defendant who is not competent would not be advised by a mental health professional to confer with counsel because that defendant would not have the ability to do so, and this lack of ability to communicate would most assuredly be noted by a mental health professional.

It is also significant to observe that Suarez took the stand in his own behalf and effectively communicated his testimony to the jury (R.1190-1277). The entire record of this trial also reveals that the state's witnesses were effectively cross-examined by defense counsel leading to the inescapable conclusion that they were adequately assisted by Suarez in that endeavor. Most indicative of the ability of the defendant to assist in his defense was the assertion of the self-defense theory espoused by defense counsel. This defense cannot be raised without the cooperation and assistance of a mentally competent defendant who supplies the background information and factual basis upon which that defense is predicated. Thus, Suarez' post-conviction contention that "He could not relate to his attorney because he did not understand the process" (3.850 motion at p. 33) is totally belied by the entire record of the trial proceedings. Suarez

testified at trial in extensive detail as to the events which occurred on the day of the murder and otherwise exhibited the ability to testify rationally.

As do many capital collateral litigants, Suarez relies, in part, on Hill v. State, 473 So.2d 1253 (Fla. 1985). In Hill, this Honorable Court held that the trial court must conduct a pre-trial hearing on the issue of whether a defendant is competent to stand trial when reasonable grounds exist to support a finding of incompetence. Not only was the trial court not put on notice in the instant case as to any possible claim of incompetency, but defense counsel was also not aware of any competency issue after conferring with Dr. Lombillo. Although Suarez may have been "depressed", or even though Suarez may have had a history of deprivation, there is no indication that these conditions render a capital defendant incompetent to stand trial. In other words, there were no reasonable grounds which existed to support a finding of incompetence and, as demonstrated above, the record affirmatively indicates that Suarez was competent to stand trial. In addition, at the evidentiary hearing, testimony was adduced from trial counsel that no "formal" request was made to evaluate appellant's competency because he did not want to place the state on notice as to any possible mental health issues. This tactical decision is not a basis to support a claim of ineffectiveness.

ISSUE V

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM CONCERNING A HANDWRITING SAMPLE.

Suarez next claimed that he was denied his constitutional rights when the state introduced a handwriting exemplar which was allegedly obtained unconstitutionally. As to the merits of this claim, it is clear that this issue should have been raised on direct appeal and the failure to do so precludes post-conviction relief.

In any event, Suarez now attempts, presumably because of the unavailability of this claim on its merits, to construct an ineffective assistance of counsel claim based upon the handwriting exemplar. This attempt must fail inasmuch as it is clear that Suarez can show no prejudice whatsoever in the admission of the handwriting exemplar. To the contrary, the admission of the exemplar to prove Suarez wrote a letter to a co-defendant only inured to the defendant's benefit. In the letter to his co-defendant, Suarez acknowledged that he had shot the officer, a fact not disputed by anyone, because he had seen the police officer shoot first. The introduction of this letter only served to bolster Suarez' theory of self-defense, a position steadfastly maintained throughout the proceedings. Hence, trial counsel could not have been ineffective by failing to challenge the admission of evidence which ultimately supported the defendant's position. Additionally, it is clear that had defense counsel sought the suppression of the exemplar and was successful there-

in, the state would have been able to obtain a handwriting exemplar under the ordinary rules of criminal procedure. **Rule 3.220 (b)(1)(viii), Fla. R. Crim. P.** Thus, it is absolutely clear for the several reasons discussed above that Suarez was not improperly prejudiced by the admission of the handwriting exemplar. Therefore, his ineffective assistance of counsel claim must fail. See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

ISSUE VI

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM CONCERNING STATEMENTS MADE TO PROSECUTING AUTHORITIES.

As his sixth claim, Suarez contended that he was convicted of capital murder and sentenced to death on the basis of statements obtained unconstitutionally. This claim was specifically raised and determined on direct appeal. The Florida Supreme Court found that the statements given by Suarez were done so after being advised of his Miranda rights and his right specifically to have an attorney present during the interviews. The Florida Supreme Court also held that the record of this case shows clear waiver by Suarez of those rights. The record of the instant case also reflects that the trial court made a specific finding of voluntariness (R.1234), a finding which was subsequently upheld by this Honorable Court. Inasmuch as Suarez is now arguing with the holding of the Florida Supreme Court on this point, it is clear that this claim was correctly summarily denied.

ISSUE VII

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM CONCERNING THE ALLEGED REQUIREMENT OF HIS TESTIMONY AS A CONDITION PRECEDENT TO THE USE OF EXPERT TESTIMONY REGARDING STATE OF MIND.

As his seventh claim, Suarez contended that he was required to testify as a condition precedent to being allowed to call an expert regarding his state of mind at the time of the offense. This is clearly a claim that should have been raised on direct appeal and the failure to do so precludes post-conviction relief.

It should especially be noted that the record of the instant case refutes Suarez' claim. The trial court did not rule that Suarez had to testify as a condition precedent to the expert testimony. Rather, the record reflects that the judge made no ruling with respect to this matter and this issue died a natural death.

ISSUE VIII

WHETHER THE TRIAL COURT ERRED BY DENYING APPELLANT'S CLAIM THAT HE WAS STRIPPED OF A DEFENSE BECAUSE OF THE PURPORTED INEFFECTIVENESS OF COUNSEL.

As his eighth claim, the defendant contended that he was erroneously stripped of an insanity defense. The record, however, clearly refutes any such assertion. When Suarez took the stand and testified in his own behalf, he told the jury that he thought he was being pursued by a communist at first (R.1208).

After he got over the notion that he was being chased by a communist and knew he was being chased by the police, Suarez explained his actions claiming that his shooting of the rifle was intentional and that it was a matter of self-defense (R.1215-1216). He said:

> When I stopped the car, Sory jumps out over there, and the first patrol car stops right there and another car came and tried to get behind me to block my case because Sory was running.
>
> The car went on the other side of the street, so he went to the other side of the street. Understand? So, I got up -- I got up like that, and the car that I see, and then I see a pistol coming out directly at me.
>
> I see the pistol pointing right at my chest, and when I see that pistol, I don't understand, how can that lawyer say that the pistol didn't go off, because I saw the muzzle fire. I saw the fire.
>
> And, that's when I got my rifle and I opened fire. And, I didn't -- I did not aim at anyone. I just fired to get them away from me.
>
> Q. How many times did you fire?
>
> A. Two or three times only. Then I threw the rifle and I started to run. And, I went between the bus and the car, and I started to run. Then I went into the little bathrooms that were there.

He reiterated this story in the Tico letter in addition to stating that it had been his intent to kill (R.1086-1088). The account of the homicide the defendant gave to the jury is inconsistent with the claim of insanity and inconsistent with the claim that he lacked requisite intent. He told the jury what his

intent was when he fired the weapon. He said he fired it just to "get them away from me" (R.1215-1216). He elaborated on his intent a little later saying that he never shot to kill, that he just shot to protect himself so they wouldn't shoot at him again. He told the jury that he wasn't going to shoot at anybody except in self-defense (R.1217). To have put on Dr. Lombillo to testify either that he was insane in the classic McNaughton sense or that he was unable to form the requisite intent to kill would have directly contradicted the testimony that defendant had already given to the jury.

The circumstances of the defendant's testimony illustrate very clearly why Lombillo was not called and why he was not pressured into testifying. He was not pressured into testifying as a predicate for Lombillo's testimony. Had counsel elected to present the testimony of Dr. Lombillo after Suarez' testimony, Lombillo could have said either that he lacked the ability to form the intent or that he was insane, he would have contradicted the defense that he had already put on. And, he would have lost opening and closing as well. See **Rule 3.250, Fla. R. Crim. P.** In short, the elaborate argument fashioned by collateral counsel to establish that there was a grave constitutional deprivation of a defense simply does not stand up in the light of the record. It affirmatively contradicts the claim. There is nothing to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland v. Washington, 80 L.Ed.2d 694, 695 (citing Michael v. Louisiana, 350 U.S. 91, 101, 100 L.Ed. 83, 76 S.Ct. 158 (19__).

Ineffective assistance of counsel is not shown where an inconsistent defense is omitted. In Funchess v. Wainwright, 772 F.2d 683 (11th Cir. 1985), the court noted that it is not ineffective assistance of counsel to maintain a consistent posture even when moving from guilt phase into penalty phase. Certainly in the case at bar it cannot be reasonably maintained that failure to present inconsistent defenses during the guilt phase alone renders counsel ineffective.

Lastly, it should be observed that post-traumatic stress syndrome is not necessarily inconsistent with the ability to form a specific intent. In State v. Mathews, 38 Wash. App. 180, 685 P.2d 605 (Wash. Ct. App. 1984), the court held that opinion testimony of a psychiatrist and psychologist concerning post-traumatic stress syndrome was properly excluded on the ground that PTSS was not causally related to lack of specific intent.

ISSUE IX

WHETHER THE TRIAL COURT ERRED BY DENYING APPELLANT'S CLAIM CONCERNING THE JURY INSTRUCTIONS GIVEN DURING THE GUILT PHASE OF TRIAL.

Under his ninth point, defendant claimed that the jury should have been given an instruction on accessory after the fact, a jury instruction on self-defense like that subsequently adopted in Florida Bar Re Standard Jury Instruction (Criminal Cases), 477 So.2d 985, 1000 (Fla. 1985), should have ben given, and that counsel was not effective in apparently failing to request these instructions. And, he faults the instruction given

on a police officer's right to use force in effecting an arrest citing to Tennessee v. Gardner, ___ U.S. ___, 105 S.Ct. 1694, 9 L.Ed.2d ___ (1985).

Appellant has procedurally defaulted these claims. The record furnished to the Florida Supreme Court shows no written request for either instruction he now claims should have been given. Nor, was there an objection to the instruction given on a police officer's use of force. **Rule 3.390, Fla. R. Crim. P.;** Engle v. Issac, 456 U.S. 307 (1982); Wainwright v. Sykes, 43 U.S. 72 (1977). Further, this claim was not presented on direct appeal.

The police use of force instruction given in this case was not at issue. And, Gardner represents a change of law which does not merit retroactive application, particularly as to a jury instruction in a criminal case, a situation removed from the context in which the high court created the rule, a case involving a claim for damages in a civil rights action. The instruction certainly did not harm the defendant. In fact, it was helpful in that it is consistent with appellant's claim that the police fired at him first. An objection to the instruction would not have been in defendant's best interest. An objection arguably might have been deficient performance for the purposes of Strickland v. Washington.

Appellant's attempt to read the principal instruction as encompassing conduct that would only support a finding that he was an accessory after the fact is without merit. He ignores the

plain words of the principal statute. It clearly limits itself to a situation in which ". . . the defendant knew what was going to happen . . ." (R.1282-83). That requirement must be met in conjunction with doing something to help. The principal instruction was a correct statement of the law at the time and remains a correct statement of the law today. The instruction as given meets the objection advanced in paragraph 7 at p.74 of the defendant's 3.850 motion. It is clear that not all help or assistance to a criminal meets the definition of a principal. There was no need for an instruction on accessory after the fact to clarify the principal instruction just as there was no need for it because it was not a lesser included offense to either of the offenses charged.

While the statement in the self-defense instruction that a person is ". . . never justified in the use of any force to resist an arrest" (R.1384) was subject to objection on the basis of Allen v. State, 424 So.2d 101 (Fla. 1st DCA 1981), review denied, 436 So.2d 97 (1983) and Ivester v. State, 398 So.2d 926 (1981), review denied, 412 So.2d 470 (1982), counsel's failure to push for such an instruction did not prejudice the defendant. The evidence against him was overwhelming as to the absence of evidence to establish either that the officer was using excessive force to arrest him or that the force he used to resist was of such an extent for him to see it as necessary. See **Fla. Std.**

Jury Inst. 3.04(d), 477 So.2d at 1000.[2]

It is not at all clear that the absence of this instruction constitutes reversible error except in a case involving a prosecution for resisting arrest with violence. For example, in State v. Holley, 480 So.2d 94 (Fla. 1985), the Florida Supreme Court case adopting the Ivester and Allen analysis, the Court only reversed the resisting conviction and did not reverse the robbery and grand larceny charges that were integrally tied to the resisting where there had been a proper request for the instruction.

With the exception of the defendant, there was no testimony as to any firing of a high powered cartridge like a .38 caliber cartridge or larger, the caliber of the weapons carried by the police at the scene. Defendant was the only person to report the existence of a muzzle flash originating from the police positions. There was no physical evidence to suggest that the officers fired at him. The physical evidence associated with Deputy Howell's body, his unfired gun, and the fact that he never made it outside of the car, directly contradicts defendant's

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2/ The text of the proper instruction is as follows:

> A person is not justified in using force to resist an arrest by a law enforcement officer who is known, or reasonably appears to be a law enforcement officer.
>
> However, if an officer uses excessive force to make an arrest, then a person is justified in the use of reasonable force to defend himself (or another), but only to the extent he reasonably believes such force is necessary.

testimony about the necessity of the use of force. Even his explanation is inconsistent with the physical evidence. There were more than a dozen empty shell casings associated with his weapon and he said that he only fired two or three times and then only in the general direction (R.1215, 1216). It was so clear from the evidence that the prosecutor did not even find it necessary to address the self-defense claim. It is also abundantly clear from the verdict that the jury rejected defendant's account of the murder. The jury found him guilty of intentional premeditated murder. And, they rejected his claim that he did not know about the robbery until after it happened by finding him guilty of the robbery.

The absence of jury instructions, even crucial ones like the one at issue here, is subject to a harmless error analysis if it can be reached. It is the state's position that review on direct appeal was barred by the procedural default in the trial court occasioned by defendant's absence of a written request for an accurate instruction. Rose v. Clark, 478 U.S. ___, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986) (burden shifting instruction on malice in malice murder case subject to harmless beyond a reasonable doubt analysis); Martin v. Wainwright, 497 So.2d 872, 874 n.2 (Fla. 1986) (burden shifting instruction on insanity not reachable on appeal absent objection and not reviewable on habeas as ineffective assistance of counsel). To the extent that it is reachable at all, it is reachable as an ineffective assistance of trial counsel claim. The claimed error did not prejudice him. It does

not call into question the reliability of the result of his trial.

ISSUE X

WHETHER THE TRIAL COURT ERRED BY DENYING APPELLANT'S CLAIM CONCERNING AN ALLEGED CONFLICT OF INTEREST.

As his tenth claim, Suarez asserted that he was deprived of certain constitutional rights by virtue of the alleged conflict of interest which arose when Daniel Monaco undertook representation of Suarez and co-defendants Sory and Reyes and subsequently withdrew from representation of Suarez and continued representing Sory and Reyes. The allegations of this claim do not form a basis for relief and, therefore, this claim was properly summarily denied.

In order to establish a showing of ineffective assistance of counsel based on conflict, a defendant must demonstrate that both an actual conflict of interest existed and that such conflict adversely affected the adequacy of representation. Strickland v. Washington, supra; Cuyler v. Sullivan, 446 U.S. 335 (1980); Smith v. White, 815 F.2d 1401 (11th Cir. 1987); Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986). Because Suarez failed to demonstrate an actual conflict of interest, even by allegation, this point was correctly summarily denied. A mere possibility of conflict of interest does not rise to the level of a Sixth Amendment violation. Cuyler v. Sullivan, supra. In Smith v. White, the Eleventh Circuit cited the test adopted to distinguish actual

from potential conflict as previously stated in Barham v. United States, 724 F.2d 1529 (11th Cir.), cert. denied, 467 U.S. 1230 (1984):

> We will not find an actual conflict [of interest] unless appellants can point to specific instances in the record to suggest an actual conflict or impairment of their interests . . . . Appellants must make a factual showing of inconsistent interests and must demonstrate that the attorney made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client, harmful to the other. If he did not make such a choice, the conflict remained hypothetical. (815 F.2d at 1404).

Cf. Burger v. Kemp, 483 U.S. ___, 107 S.Ct. ___, 97 L.Ed.2d 638 (1987) (requiring or permitting a "single attorney" i.e. law partners to represent co-defendants is not per se violative of constitutional guarantees of effective assistance of counsel; any overlap of counsel did not so infect the attorney's representation as to constitute an active representation of competing interests.) See also Lightbourne v. Dugger, 829 F.2d 1012 (11th Cir. 1987). Significantly, here, as in Burger v. Kemp, the claimant (Suarez) was not tried with his co-defendants. The Burger court observed:

> . . . In addition, petitioner and Stevens were tried in separate proceedings; as we noted in Cuyler, the provision of separate murder trials for the three coindictees "significantly reduced the potential for a divergence in their interests." Ibid.

There is no doubt that the allegations alleging a conflict of interest were insufficient on their face to warrant relief. No actual conflict of interest has even been alleged. Again, this claim was properly summarily denied.

ISSUE XI

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM THAT THE TRIAL COURT SHOULD HAVE, SUA SPONTE, DECLARED A MISTRIAL FOLLOWING THE GRANTING OF A SEVERANCE.

As his eleventh point, the defendant contended that the trial court should have, on its own motion, granted a mistrial when severence was granted to the co-defendants. Even if this claim was properly before the court it is clear that there is no authority for the proposition that a mistrial is automatically warranted upon severence. Indeed, collateral counsel offers no authority in support of his proposition. In any event, it is clear that this is an issue which could have and should have been raised on direct appeal. The failure to do so precludes collateral review and the summary rejection of this claim by the trial court should be affirmed.

ISSUE XII

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM CONCERNING THE EXERCISE BY THE CO-DEFENDANTS OF THEIR RIGHT TO REMAIN SILENT.

As his twelfth claim, appellant reasserts an issue raised on direct appeal, to wit: The refusal of the trial court to make an inquiry on the record as to the co-defendants' willingness to testify on behalf of Suarez. This issue was raised and determined by the Supreme Court of Florida in its opinion in this cause. Suarez v. State, 481 So.2d 1201 (Fla. 1985). Disagree-

ment with resolution of the issue by the Florida Supreme Court is not a ground for 3.850 relief. Because this claim was raised and determined on direct appeal, the trial court correctly summarily denied this issue.

ISSUE XIII

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM CONCERNING JUDICIAL ADMONISHMENT OF THE JURY AND SEQUESTRATION OF THE JURY DURING TRIAL.

Suarez next contended, in his thirteenth claim, that the trial court erred by failing to properly admonish the jury after recesses in the trial. Suarez also contended that he was denied the effective assistance of counsel due to the failure of trial counsel to object to separation of the jury during trial and the failure of the trial court to properly caution the jury. To the extent that Suarez is now raising a substantive claim as to the failure of the trial court to properly admonish the jury, it is clear that this claim is barred from consideration on collateral review. Again, this is an issue which could and should have been raised on direct appeal. The failure to do so precludes 3.850 relief and the trial court correctly so found.

It is also clear that the facts alleged did not support an ineffective assistance of counsel claim based on the failure to sequester the jury during trial. There is no requirement that the jury be sequestered, other than during deliberations, during the trial of a capital case. In order to support an ineffective

assistance claim, Suarez would need to show how he has been prejudiced by the failure of defense counsel to move for sequestration during the trial. This he cannot do. The allegations of the 3.850 motion do not allege that the jurors were unable to render a just and reliable verdict untainted by outside sources. There is no allegation that the jury was exposed to improper influences but rather a conclusory allegation that they could have been (3.850 motion at p. 89). The filing of a 3.850 motion does not result in a license to conduct a "fishing expedition" to uncover or seek out errors which may or may not exist. Thus, where there is no allegation or even an indication that the jurors were improperly influenced, Suarez cannot meet the prejudice prong of the Strickland v. Washington test. Nor can Suarez demonstrate how trial counsel was deficient where there is nothing to indicate that counsel should have been placed on notice that sequestration was required. This claim was properly summarily denied.

ISSUE XIV

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM AS TO THE DENIAL OF A MOTION FOR CHANGE OF VENUE.

As his fourteenth claim, Suarez raised a matter which is a classic issue for presentation on direct appeal. He contended in his 3.850 motion that the trial court erred by denying a motion for a change of venue. As set forth above and as supported by the authorities cited above, issues which could have and should

have been raised on direct appeal are not available collaterally. Thus, the trial court correctly summarily denied this issue which is properly presentable only on appeal.

ISSUE XV

WHETHER THE TRIAL COURT ERRED BY DENYING, AFTER CONDUCTING AN EVIDENTIARY HEARING, APPELLANT'S CLAIM THAT HE WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL.

As his fifteenth claim, Suarez alleged that he was deprived of the effective assistance of counsel at the guilt and penalty phases of this capital trial. As our courts have consistently pointed out since 1984, claims of ineffective assistance of counsel are controlled by the standards set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 890 L.Ed.2d 674 (1984). In Blanco v. Wainwright, 507 So.2d at 1381, this Court said:

> A claimant who asserts ineffective assistance of counsel faces a heavy burden. First, he must identify the specific omission and show that counsel's performance falls outside the wide range of reasonable professional assistance. In evaluating this prong, courts are required to (a) make every effort to eliminate the distorting effects of hindsight by evaluating the performance from counsel's perspective at the time, and (b) indulge a strong presumption that counsel has rendered adequate assistance and made all signifcant decisions in the exercise of reasonable professional judgment with the burden on claimant to show otherwise. Second, the claimant must show that the inadequate performance actually had an adverse effect so severe that there is a reasonable probability that the results of the proceedings would have been different but for the inadequate performance.

The defendant has failed to carry this heavy burden. Not only has he failed to show that trial counsel's conduct fell outside that wide range of reasonable professional assistance, but he has also failed to show that the results of the trial or penalty phase would have been different.

A. Effective Representation at Guilt/Innocence Phase:

Suarez first contended that his defense team somehow breached their duty of loyalty during their representation. Under this general claim, Suarez attacks the competence of Mr. Paul Erickson, a member of the defense team who handled a portion of the voir dire. The allegations in the 3.850 motion with respect to Mr. Erickson's voir dire are clearly insufficient to support relief. Other than an unwarranted attack upon attorney Erickson, Suarez does not offer any clue as to how this allegedly deficient performance prejudiced the defense - there is no indication that the outcome of the proceeding would have been different but for this particular voir dire examination. This is especially true considering that, as adduced at the evidentiary hearing, voir dire was conducted by several defense attorneys and the jury selected was as good as could have been obtained.

The gist of Suarez' complaint concerning the purported breach of the duty of loyalty concerns statements made by Mr. Martin, lead counsel, during opening statement in the trial. Suarez now opines that certain isolated statements within that opening statement were so egregious as to result in the denial of the Sixth Amendment right to effective counsel. Nothing could be

further from the truth! The state does not deny that Mr. Martin advised the jury that he was present because he was appointed, but we also wish to note that he advised the jury that it was his function to "ensure that Ernesto Suarez is properly represented and to be sure that he received a fair trial." (R.512). The state further submits that a minor reference to the fact that lawyers engage in public service by representing indigent defendants is not the type of egregious conduct which will support an ineffective assistance of counsel claim.

As authority in support of his proposition, Suarez relies on the decision rendered in King v. Strickland, 714 F.2d 1481 (11th Cir. 1983), vacated and remanded, 104 S.Ct. 2651, opinion on remand, 748 F.2d 1462 (11th Cir. 1984), cert. denied, 471 U.S. 1016 (1985). The differences between King and the instant case are so marked as to render the holding in King totally inapplicable sub judice. In King, the complained-of statements occurred during closing argument during the penalty phase. Here, the statements occurred in the opening statement of defense counsel at the guilt/innocence phase of trial. In this case, the statements could not have any effect upon the sentence prospectively to be imposed since guilt or innocence had not yet been determined. In King, according to the Eleventh Circuit, "counsel separated himself from his client, conveying to the jury that he had reluctantly represented a defendant who had committed a reprehensible crime." King, 714 F.2d at 1491. Statements of this ilk were not made in the case at bar. Most importantly,

ineffective assistance of counsel at penalty phase was found in King because of the combination of the closing argument and the failure to present available mitigating evidence. This is also not the situation presented sub judice. Hence, Suarez cannot show that counsel was ineffective by virtue of the statements made in opening statement in this trial. The effects of the statements sub judice, rather than supporting a theory of distancing oneself from one's client, could support a finding of sympathy for the client by the jury and could negate any inference that Suarez was possessed of sufficient funds to retain counsel, funds which could have been obtained via drug trade. There were no egregious statements in the instant case comparable to those in King.

Suarez also makes various complaints concerning the absence of Mr. Martin from portions of the trial. He tries to assert that this absence somehow deprived Suarez of his constitutional right to effective counsel. However, it is most significant to observe that the allegations, and the evidence adduced at the evidentiary hearing, are insufficient to support a showing of prejudice to the defendant. Merely because lead counsel was absent from portions of the trial does not inevitably lead to the conclusion that the defendant was without counsel. To the contrary, even Suarez acknowledges at page 107 of his motion that "[g]ranted Mr. Suarez was not without representation while Mr. Martin was absent." It is also significant to note that no allegations are made, other than with respect to a minor portion

of the voir dire examination, that either attorney Smith or attorney Erickson was deficient in his performance. For example, with respect to the necessity of attorney Erickson cross-examining a foundational witness because Mr. Martin was unavailable, the only allegation is that the cross-examination was "very brief" (Motion at page 105). Brevity does not equate with deficient performance. What is clear from the record is that Suarez was vigorously represented by three attorneys who worked in the same law firm. It is also clear that Mr. Martin was apprised of the evidence throughout the trial. At least one time during the trial, the defense team was able to obtain a transcript of testimony taken during the course of trial (R.982). Additionally, it cannot be contended that Mr. Martin was not aware of what was occurring during the trial. During his closing argument, Mr. Martin stated:

> . . . But I can assure you that I have been briefed on the evidence by Mr. Smith and Mr. Erickson, [and] that I was present during pretrial discovery in this case . . . (R.1369)

This assurance by Mr. Martin that he had followed the case during its pendency obviates any claim that mere absence during portions of the trial court by one of three attorneys renders the representation of the defendant ineffective.

The allegations concerning the alleged breach of a duty of loyalty are clearly insufficient to show that defense counsel was unconstitutionally deficient. It is just as, if not more, clear that the allegations are insufficient to demonstrate that Suarez had been prejudiced.

Suarez also reiterates certain claims in his ineffective assistance of counsel issue which were previously raised in other portions of his motion. He again asserts that counsel was ineffective by failing to secure a judicial ruling that statements obtained from Suarez were done so in an unconstitutional manner. However, this point was raised on direct appeal and decided adversely by the Florida Supreme Court when that court held that the record of this case shows a clear waiver by Suarez of his constitutional rights. It is clear that where Suarez had no right to suppression of his statements, counsel could not have been ineffective in their efforts to have those statements suppressed.

Suarez next contends that he was deprived the effective assistance of counsel by virtue of the failure to move for a mistrial based upon the court's severence of Suarez' trial from the co-defendants'. The allegations to support this claim are totally insufficient in that they fail to allege prejudice in any manner whatsoever. The lack of a request for a mistrial may signify that defendant was prepared to proceed to trial and was satisfied with the composition of the jury. Suarez fails to allege in any manner how he was prejudiced by proceeding to trial at the time of severence. It should be noted that counsel for Suarez also had a part in selecting the composition of the jury.

Suarez again claims that he was denied the effective assistance of counsel by virtue of the purported failure to object to the state's attempt to humanize the victim of this

murder. This claim is totally belied by the record. During the testimony of a fellow officer, testimony which was used to identify the murder victim, the state attempted to have introduced into evidence the badge and the billfold of Officer Howell. Defense counsel objected as to the relevancy of these matters and as to the prejudicial effect of that evidence. This objection was sustained by the trial court and was, therefore, not introduced into evidence (R.798-800). The other testimony of Officer Bucholtz was relevant and unobjectionable as testimony used to identify the murder victim. Also, as will be discussed infra, the allegations of the instant 3.850 motion are insufficient to properly allege a Booth violation. In any event, it is clear that counsel rendered effective assistance concerning the attempt to keep the state from humanizing the victim.

Suarez next contends that he was denied the effective assistance of counsel based upon the failure of defense counsel to object to certain opinion testimony adduced at trial by the state. He first complains that defense counsel should have required a foundation that the medical examiner needed expertise in physics in order to discuss the direction and manner that the victim would have fallen after being shot. This is incorrect. "In a criminal case expert medical opinion as to cause of death does not need to be stated with reasonable medical certainty. Such testimony is competent if the expert can show that, in his opinion, the occurrence could cause death or that the occurrence might have or probably did cause death." Delap v. State, 440

So.2d 1242 (Fla. 1983), and authorities cited therein at page 1253. In the instant case, the testimony of the medical examiner related solely to cause of death and as to the effects of the wounds which was inflicted resulting in death. This testimony was within a medical examiner's field of expertise. See also, Endress v. State, 462 So.2d 872, 873 (Fla. 2d DCA 1985). The discussion by the medical examiner as to the body position was based on the nature, location and effect of the wound and was, therefore, permissible expert testimony relating to the cause of death. Suarez also complains that defense counsel failed to object to Deputy Connie Beaird's testimony concerning bullet holes found in palm fronds, bullet pass and trajectories and the location of the gunman when the fatal bullet was fired. Deputy Beaird was not offered as an expert witness, but rather was a crime scene investigator who was called to describe the scene of the crime at the time of the murder. The matters testified to by Deputy Beaird are those matters which are commonly and ordinarily related to the jury by a crime scene technician. Therefore, his testimony was not objectionable and the failure to raise an objection does not render counsel ineffective.

Suarez also now finds counsel to have been ineffective where counsel failed to object that the playing of a police tape was cumulative evidence. Suarez fails to offer any basis upon which an objection as to this testimony could have been sustained. The evidence was not cumulative inasmuch as it was replayed for a different purpose each time. There is no justification for

alleging ineffective assistance of counsel based on this highly speculative "cumulative" theory.

Suarez again complains that counsel was ineffective by failing to have a handwriting sample suppressed. As discussed in Issue V, above, inasmuch as this evidence would have been obtained under the ordinary rules of criminal procedure, counsel could not have been ineffective by failing to move for suppression. It is beyond peradventure that Suarez was not prejudiced by defense counsel's failure to move for suppression.

As he does elsewhere in his motion, Suarez again complains that counsel was ineffective by failure to object to the procedures employed by the trial court with respect to jury communication about the case. As discussed above in our Issue XIII, Suarez can show neither the deficiency nor the prejudice required to support an inefffective assistance of counsel claim.

Suarez next claims that he was deprived of the effective assistance of counsel by virtue of the failure to object to testimony adduced from the ballistics expert concerning the type of rifle Mr. Suarez had in his possession when he committed the murder. Contrary to his assertions in his 3.850 motion, this testimony was relevant to establish the nature and type of murder weapon employed by Suarez. Thus, counsel cannot be ineffective by failing to object to clearly admissible testimony.

The defendant faults counsel's handling of the testimony of Alberto Montoya. The allegations in the motion and the testimony adduced at the evidentiary hearing are deficient to show either

any deficiency in counsel's performance with regard to Montoya or that he suffered any prejudice as a result of counsel's actions with regard to the Montoya testimony. The motion complains that the declining of voir dire was improper. Yet, it fails to state any beneficial purpose that voir dire would have served. Collateral counsel is simply filling paper. Anyone who has taken the time to read the passage can understand very clearly what is going on. As soon as the state approached the subject of witness Montoya's conversation with the defendant on the previous evening, counsel immediately moved for an objection on discovery grounds (R.1098). The court explored the matter related to discovery in an off-the-record hearing commencing at R.1098. During the proffer, it was clear that the witness would testify that the defendant had told him not to give any testimony (R.1099). He also said that the defendant had told Jorge Rodriguez that he was going to kill him (R.1099). When questioned as to whether Suarez had told him, the witness, that he was going to kill him, the witness responded that he didn't say it because he, the witness, had not yet come to court (R.1099, 1100). At that point, when the court inquired as to whether counsels wanted to voir dire the witness, counsel declined and stated his objection instead. Counsel was effective in precluding the state from offering any hearsay testimony with his objection (R.1100). The court limited the witness testimony to what the defendant had told him and matters that had spoken by the defendant in his presence (R.1101). At the close of the

bench conference and prior to the testimony commencing again, counsel conferred with the defendant through the services of the interpreter (R.1102). After the jury was back in the courtroom, the witness simply related the following in response to a question about what Suarez had said:

> He asked me if -- what he made me understand that if I was going to testify because Geroge had already done it, but I didn't answer him, and then he told George when we came back from church that he was going to kill him because with him you don't play.

The collateral motion or the evidence presented at the evidentiary hearing fails utterly to state how the defendant was prejudiced by counsel's handling of the matter. At page 113 of the motion, collateral counsel simply speculates that there was material left undeveloped. Significantly, he fails to say what this material was or how it would have conceivably been beneficial to Suarez.

The collateral motion then renews complaints about counsel's handling of Suarez' competency and alleged failure to provide word-for-word translation and client-counsel communication during trial. Significantly, there is no claim any prejudice as a result therefrom. Counsel is simply filling paper and speculating. It is, however, worth mentioning with regard to the competency issue that the record affirmatively establishes that Mr. Suarez had a rational and factual understanding of what was going on and was able to assist his counsel. The Alberto Tico letter which is translated at R.1086-1088 clearly establishes

that Suarez was in sufficient possession of his faculties so that there wasn't even a hint of doubt with regard to his competency to stand trial. The letter discusses his lawyer, his military experience, the police, his decision to kill and his claim of self-defense as well as his speculations about what he thought might have prompted his claim that he was fired at. The collateral pleading faults counsel's proffering of instructions on the theory of the case in two regards. First it faults counsel for not proffering an insanity instruction in calling Dr. Lombillo. It is, however, abundantly clear that Lombillo could not testify that the defendant was insane at the time. Despite the previous examinations of two other mental health professionals, Dr. Wald and Dr. Collins, results of which were available to collateral counsel. There is no claim that either of these doctors could have said he was insane. Nor, does the collateral pleading have documents from the doctors who examined him at the time saying that he was incapable of premeditation. Collateral counsel simply faults trial counsel on the basis of speculation. That does not make a claim of either deficiency or prejudice for the purposes of Strickland v. Washington.

The collateral pleading also faults counsel's handling of the self-defense issue and the failure to seek an Ivester-type self-defense instruction. Counsel's not seeking an Ivester-type instruction has already been discussed under that Issue dealing with whether the defendant was improperly stripped of defenses. The overwhelming evidence in the case clearly establishes that

the defendant suffered no prejudice. It's not like an actually innocent defendant has been convicted. The defendant is entitled to no relief. Kimmelman v. Morrison, 477 U.S. ___, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1985) (Powell, J., concurring).

The collateral pleading also faults trial counsel for not impeaching Deputy McDaniel. Collateral counsel's claim that different versions of the same event where one has more detail than another are inconsistent and appropriate for impeachment is simply wrong. That one statement contains more detail than another does not make the statements inconsistent. In any event, there was an abundance of testimony about the defendant's driving and the danger than he caused others on the road. Quibbling with McDaniel over his various versions of the event would not have made any difference at all. The real issue in this trial focused around the events that transpired after the cars came to a halt and the defendant opened fire. Arguably, trial counsel would have been ineffective in quibbling with the witness McDaniel over this because it would tend to focus the jury's attention away from what was really at issue.

B. Penalty Phase:

As his final claim of counsel ineffectiveness, Suarez claimed that defense counsel failed to investigate and develop mitigating circumstances. He also alleges that counsel somehow failed to use the available evidence to argue against the presence of aggravating circumstances. These claims do not

warrant a finding of counsel ineffectiveness at the penalty phase.

As a background to this claim, it is helpful to refer to this Court's opinion which set forth those matters which Suarez actually introduced at the penalty phase. The portion of this Honorable Court's opinion pertaining to these matters can be found supra at page 6 of this brief. It is significant to observe that the matters now alleged which might have been presented do not significantly add to those matters actually asserted at the penalty phase. It can be said that these matters are merely amplifications of those matters actually presented. The question for this Court to determine is, if these now-asserted matters were introduced during penalty phase, whether there is a reasonable probability that the outcome of the proceedings would have been different, that is, a probability sufficient to undermine the confidence in the reliability of the decision to impose death? The state submits that the answer to this query is an unequivocal "No!". The jury recommended death and the trial court in its weighing of aggravating and mitigating circumstances found three aggravating circumstances and no mitigating circumstances. There is no reasonable probability that the now-asserted matters would have changed the result of this weighing process.

Basically, Suarez now states that a more thorough history of his "problems" in Cuba whenhe was a youth could have been set forth. The state, on the other hand, posits that this

information could not be weighed heavily, if at all, in mitigation of a murder committed by Suarez when he was 28 years old. Based upon the allegations of the motion and the evidence adduced at the evidentiary hearing, Suarez is unable to show how counsel was deficient and, even more clearly, Suarez cannot demonstrate the prejudice necessary to support an ineffective assistance of counsel claim. Cf. Stano v. State, 520 So.2d 278 (Fla. 1988).

ISSUE XVI

WHETHER THE TRIAL COURT ERRED BY DENYING, AFTER AN EVIDENTIARY HEARING, APPELLANT'S CLAIM THAT THE STATE WITHHELD MATERIAL, EXCULPATORY EVIDENCE.

As his sixteenth claim, the defendant urged that he is entitled to relief pursuant to Brady v.Maryland, 373 U.S. 83, 83 S.Ct.1194, 10 L.Ed.2d 215 (1963). The basis for the claim is the assertion that Technician Gant of the Collier County Sheriff's Office testified at the subsequent trial of the co-defendants (Sory and Reyes) to the existence of two spent casings removed from the front seat of Deputy Howell's car. Analysis of the pleading shows that it is deficient to establish any of the criteria for gaining relief, suppression, favorableness or materiality. See United States v. Stewart, 820 F.2d 370, 374 (11th Cir. 1987); United States v. Bent-Santana, 774 F.2d 1545, 1551 (11th Cir. 1985). In any event, the evidence presented at the evidentiary hearing completely vitiates any perceived Brady claim.

Appellant's motion misrepresents Gant's testimony in the Sory/Reyes trial. He did not say that there were "two spent casings." The testimony was that "[t]here appeared to be two empty casings in the front seat of Deputy Howells' patrol car. . ." Sory/Reyes record on appeal at p.1160[3] Counsel immediately moved to strike the comment that he could only testify to what he saw, not what something appeared to be. The court granted the motion and struck it (R.1160). Thus, it is not clear at all that the alleged spent casings ever existed. The state cannot suppress or fail to dislcose that which does not exist. The evidence adduced at the evidentiary hearing supports the notion that the technician simply misspoke or that his testimony was inaccurately transcribed. His testimony could not be more clear, and was corroborated by Deputy Beaird's testimony, that no casings were found in the victim's vehicle.

There were no facts pled which show that, even if they did exist, the alleged casings were material, i.e., that the nondisclosure of the evidence created a reasonable probability that had they been known of at the time, that the result of the trial would have been different where a reasonable probability is understood to mean a probability sufficient to undermine confidence in the outcome of the case. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); Arango v.

3/ A copy of that page is attached as an exhibit and the state asks the court to take judicial notice of the same. §90.202(6) and 203 (1987), Fla. Stat. The state will produce a copy of the record for the court's and counsel's inspection at the hearing.

State, 497 So.2d 1161 (Fla. 1986). Defendant would have to show more than the simple existence of two objects that appeared to be shell casings to cast doubt on the state's proof that policemen had not fired their weapons at defendant in the events surrounding the murder.

ISSUE XVII

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM CONCERNING THE PURPORTED DENIGRATION OF THE JURY'S ROLE IN VIOLATION OF CALDWELL V. MISSISSIPPI.

Based upon Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 251 (1985), Suarez claimed he is entitled to relief. For the reasons expressed below, the defendant's point must fail. Suarez' argument that the judge's and prosecutor's statements diminished the jurors' sense of responsibility has not been preserved for appellate review. There was no objection made before the trial court to any of these comments and, indeed, no argument has been raised in any court previous to the submission of this claim in the instant 3.850 motion. The state therefore submits that the procedural default doctrine as enunciated by the Supreme Court in Wainwright v. Sykes, 433 U.S. 72 (1977), is applicable to this claim. It has long been the law in the State of Florida that a party cannot raise on appeal an issue he has not presented to the trial court. See, e.g., Lucas v. State, 376 So.2d 1149 (Fla. 1979), and Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

Recently, this Honorable Court has had occasion to consider a Caldwell claim which had not been raised before the trial court. In ruling, this Court opined that the tools were available to construct a Caldwell-type claim for many years. With respect to the defendant's claim that he could raise a Caldwell claim where no objection had been made at trial, this Honorable Court in Copeland v. Wainwright, 505 So.2d 425 (Fla. 1987), held:

> [4] Appellant argues that the lack of objection at trial and argument on appeal does not preclude consideration of the issue now because **Caldwell v. Mississippi** was a fundamental change in the constitutional law of capital sentencing thus creating a new legal right that may form the basis for post-conviction litigation. We find that this contention is without merit. The extreme importance of the jury's sentencing recommendation under our capital felony sentencing law has long been recognized, having emerged from early judicial construction of the statute. **McCaskill v. State**, 344 So.2d 1276 (Fla. 1977); **Chambers v. State**, 339 So.2d 204 (Fla. 1976); **Thompson v. State**, 328 So.2d 1 (Fla. 1976); **Tedder v. State**, 322 So.2d 908 (Fla. 1975); **Taylor v. State**, 294 So.2d 648 (Fla. 1974). Thus if defense counsel at trial had believed that the prosecutor and judge were denigrating the jury's role to his client's prejudice he could have objected and received corrective action based on the well known **Tedder** rule. The matter could then have been argued on appeal in the absence of adequate corrective action by the trial court. The lack of objection at trial followed by argument on appeal constitutes a waiver of the objection. The trial court was correct in summarily denying this ground of the motion as procedurally barred. (text at 4327-428).

It is clear, therefore, that the claim now raised by Suarez is one which the State of Florida regularly and consistently bars

based upon failure to in some form to object to the purported denigration of the jury's role in the sentencing process. Thus, the procedural default should be given credence by this Honorable Court. See Jackson v. State, 13 F.L.W. 146 (Fla. Feb. 18, 1988); Ford v. State, 522 So.2d 345 (Fla. 1988); Aldridge v. State, 503 So.2d 1257 (Fla. 1987); Foster v. State, 518 So.2d 901 (Fla. 1988); Phillips v. Dugger, 515 So.2d 227 (Fla. 1987).

Even if the merits of this claim could be reached, it is clear that Suarez would be entitled to no relief. The law in the State of Florida is clear -- when a Florida jury is told its sentencing function is to advise the court of the appropriate sentence, this is a correct statement of the law. The Florida Supreme Court has indicated that it is not error to inform the jury of the limits of its sentencing responsibility. Darden v. State, 475 So.2d 217, 221 (Fla. 1985); Pope v. Wainwright, 496 So.2d 798, 805 (Fla. 1986). Thus, the defendant's reliance upon decisions of the Eleventh Circuit Court of Appeals is misplaced. Courts of this State are mandated to follow the law of this State rather than the conflicting opinions of an inferior federal court. The Eleventh Circuit decisions in Mann and Adams conflict irreconcilably with every decision of the Florida Supreme Court on this point. See Grossman v. State, 13 F.L.W. 127 (Fla. Feb. 18, 1988); Combs v. State, 13 F.L.W. 142 (Fla. Feb. 18, 1988); Jackson v. State, supra; Ford v. State, supra; Aldridge v. State, supra; Pope v. Wainwright, supra; Smith v. State, 515 So.2d 182 (Fla. 1987). Also, factually this case is more akin to Harich v.

Dugger, 844 F.2d 1464 (11th Cir. 1988) (en banc), than to Mann or Adams. In Harich, the Eleventh Circuit is consistent with Florida law by holding that comments by the prosecutor and instructions of the trial court did not mislead the jury as to its role in violation of the Eighth Amendment. Suarez' Caldwell claim was correctly summarily denied by the trial court. See e.g., Aldridge, supra; Copeland, supra; Ford, supra.

ISSUE XVIII

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM CONCERNING PURPORTED "VICTIM IMPACT" ARGUMENT OF THE PROSECUTOR IN HIS OPENING STATEMENT MADE DURING THE GUILT PHASE OF TRIAL.

As his eighteenth claim, Suarez contended that the precepts of Booth v. Maryland, 482 U.S. __, 107 S.Ct. 2527, 96 L.Ed.2d 440 (1987), were violated where the prosecutor made allegedly improper comments concerning the personal characteristics of the victim. Because it is clear that this claim is procedurally barred, a stay of execution is not warranted and this point should be summarily dismissed.

This Honorable Court has had the recent occasion to consider a claim under Booth as is now asserted. In Grossman v. State, 13 F.L.W. 127 (Fla. Feb. 18, 1988), the Court ordered that supplemental briefs be submitted concerning the Booth issue. The Court noted that, "The state correctly points out that appellant made no objection, whereas in Booth there was an objection to such evidence." 13 F.L.W. at 131. The state submits that in the

instant case no objection was made as to the introduction of any of the "victim impact" evidence. In finding a procedural bar in Grossman, the Court observed that victim impact is not one of the aggravating factors enumerated in our capital sentencing statute upon which a death sentence may be predicated, citing Blair v. State, 406 So.2d 1103 (Fla. 1981); Miller v. State, 373 So.2d 882 (Fla. 1979); and Riley v. State, 366 So.2d 19 (Fla. 1978). Thus, a criminal defendant should object to evidence of a non-statutory aggravating factor and, consequently, the Court held that in the absence of a timely objection to the use of "victim impact" evidence, a defendant is procedurally barred from claiming relief under Booth. On this basis alone, defendant is entitled to no relief on this point. See also Thompson v. Lynaugh, 821 F.12d 1080 (5th Cir. 1987).

Even if this claim could be addressed on its merits, it is clear that the defendant is entitled to no relief. Factually, this case does not present a Booth claim. In Booth, the United States Supreme Court was concerned with victim impact evidence presented at the sentencing hearing which might focus the sentencer's attention to factors which are not relevant to the sentencing decision in a capital case. Here, no claim is made that impermissible aggravating factors seeped into the sentencing process. Rather, Suarez argues that references to the victim during opening argument of the guilt/innocence phase somehow infected the sentencing process. This untenable claim was properly summarily rejected by the trial court. An ineffective claim can

likewise not be supported where the underlying issue is without merit.

ISSUE XIX

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM THAT HE WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE TRIAL COUNSEL FAILED TO INTRODUCE A PORTION OF A POLYGRAPH EXAMINATION DURING THE PENALTY PHASE.

Under appellant's issue nineteen in his 3.850 motion, he claimed that counsel was ineffective in failing to introduce the results of a polygraph examination during the penalty phase in mitigation of the death penalty. Counsel cannot be found ineffective in failing to introduce evidence that was not admissible. Even the broad sweep of Lockett v. Ohio, 438 U.S. 586 (1978), which mandate that a sentencer not be precluded from considering any aspect of a defendant's character or record or any of the circumstances of the offense that the defendant proffers as a basis for mitigation. Results of the polygraph examination simply do not fit into any of these categories. Significantly, the defendant's motion fails to identify why this evidence would be proper under any of the categories enumerated in Lockett.

The extensive discussion of the Hitchcock claims, Hitchcock v. Dugger, 107 S.Ct. 1821 (1987), is simply filler attempting to to disguise the lack of substance to the defendant's argument. It has absolutely nothing to do with whether counsel's performance was deficient and whether the client suffered any prejudice therefrom.

Counsel's performance was not deficient. It has long been the law in this state that polygraph evidence is not admissible. Kaminski v. State, 63 So.2d 339 (Fla. 1952); Clark v. State, 379 So.2d 372, 374 (Fla. 1980) (collecting cases). The results of polygraph examinations and even offers to take polygraph examinations are so devoid of probative value that both are routinely excluded. In United States Bursten, 560 F.2d 779 (7th Cir. 1977), the court clearly demonstrated why polygraph examinations have no place in the decision making process of the law. The use of such evidence threatens the integrity of the jury process by creating the possibility the jurors will advocate their responsibility for determining credibility and instead rely on a machine as accuracy and reliability are subject to substantial doubt. The results of a polygraph examination, the evidence proposed here is the very antithesis of the evidence contemplated in Lockett. Lockett very clearly contemplates giving counsel wide discretion to humanize the defendant and place him in the human context from which he comes. Defendant's proposed evidence is dehumanizing and invites attention away from the man and his context, the very essence of the defense presentation of penalty phase evidence and argument to the jury in this case.[4]

4/ To the extent that the proffered evidence is akin to the so-called whimsical doubt evidence, this state has authoritatively objected to the use of such evidence. King v. state, 514 So.2d 354 (Fla. 1987), pet. for cert. pending, No. 87-6436.

ISSUES XX AND XXI

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING TWO CLAIMS MADE BY APPELLANT PERTAINING TO THE JURY INSTRUCTIONS GIVEN AT THE PENALTY PHASE OF TRIAL.

In his twentieth and twenty-first claims Suarez made two claims concerning the alleged impropriety of some of the jury instructions given in this case. Capital defendant Frank Smith has raised these types of claims in his collateral proceedings. In Smith v. Dugger, 2 F.L.W. Fed. C 278 (11th Cir. March 9, 1988), the Eleventh Circuit rejected these claims and noted that they were raised for the first time in Smith's 3.850 motion. The court noted that the Florida Supreme Court refused to address the merits of these arguments because they "could have been presented on appeal" and were not, citing Smith v. State, 457 So.2d 1380, 81 (Fla. 1981). As in Smith, the defendant in the instant case attempts to first raise these points in a 3.850 motion. In Smith, the defendant raised as two of his claims:

> . . . (2) that the jury instructions given on the process of weighing aggravating and mitigating circumstances placed the burden on the defendant to prove that death was not the appropriate penalty; [and] (7) that the trial court erroneously instructed the jury that its decision to recommend either life or death would have to be made by a majority vote; ....

These are the same claims being made by Suarez for the first time in his 3.850 motion. This Honorable Court held that these claims were properly summarily denied as improper grounds for a Rule 3.850 motion where they could have been raised on direct appeal. Smith v. State, 457 So.2d at 1381. The same result should obtain in the instant case.

ISSUE XXII

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM CONCERNING THE PURPORTED FAILURE OF THE TRIAL COURT TO INDEPENDENTLY WEIGH THE AGGRAVATING AND MITIGATING CIRCUMSTANCES.

As his twenty-second claim, Suarez again raised an issue that, like so many of the issues presented herein, could have been and should have been raised on direct appeal. He contends that the trial court failed to independently weigh the aggravating and mitigating circumstances. Thus, because this is an issue properly presentable on direct appeal, collateral review is precluded. Nevertheless, the precedent of the State of Florida indicates that had this issue been one susceptible to 3.850 relief, that relief would not be forthcoming. In King v. State, 390 So.2d 315 (Fla. 1980), cert. denied, 450 U.S. 989, 101 S.Ct. 1529, 67 L.Ed.2d 825 (1981), our Supreme Court held that there is no legal reason why the trial judge may not deliberate on sentencing concurrently with the jury. Here, as in King, the trial court entered its written findings specifically setting forth the aggravating and mitigating circumstances applicable in this case. See also Randolph v. State, 463 So.2d 186, 192 (Fla. 1984). This claim was correctly summarily denied.

ISSUE XXIII

WHETHER THE TRIAL COURT ERRED BY DENYING APPELLANT'S CLAIMS AS TO THE FAILURE TO REQUEST INSTRUCTION AND THE FAILURE TO INSTRUCT ON THE MITIGATING CIRCUMSTANCE OF "NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY".

As his twenty-third claim, Suarez alleged that he was denied effective assistance of counsel by the failure of trial counsel to argue and request instruction on the mitigating circumstance of no significant history of prior criminal activity. To the extent that Suarez is now arguing that the trial court erred by failing to instruct the jury on this statutory mitigating circumstance, it is clear that this court cannot address the merits thereof. This is a claim that could have and should have been raised on direct appeal and the failure to do so, again, precludes 3.850 review.

To the extent that this issue is cognizable with respect to the ineffective assistance of counsel claim, it is also clear that this claim can be summarily denied. Significantly, there is no allegation in the 3.850 motion that Suarez had no significant history of prior criminal activity. The fact that he had no prior convictions for violent felonies does not justify the use of this mitigating circumstance. To the contrary, the law in this state is clear that "the sentencing judge may consider criminal activity not resulting in convictions as negating the statutory mitigating circumstance of no significant history of prior criminal activity." Quince v. State, 414 So.2d 185 (Fla.), cert.

denied, 459 U.S. 895, 103 S.Ct. 192, 74 L.Ed.2d 155 (1982); Washington v. State, 362 So.2d 658 (Fla. 1978), cert. denied, 441 U.S. 937, 99 S.Ct. 2063, 60 L.Ed.2d 666 (1979). In the instant case, Suarez committed armed robberies shortly before the robbery episode which culminated in the murder of Deputy Howell. Therefore, it is clear under the precedent cited above that the state could have negated the assertion of the mitigating circumstance of no significant history of criminal activity. At the time of trial and as shown by the evidence presented at the evidentiary hearing, the state was prepared to offer evidence at penalty phase of the previously committed armed robbery. Inasmuch as defense counsel was aware that Suarez had committed a previous armed robbery, it is clear that the failure to argue the mitigating circumstance of no significant history of prior criminal activity cannot render counsel ineffective. To the contrary, effective counsel would not have asserted this mitigating circumstance inasmuch as the state would then be permitted to offer evidence of other crimes, a situation which only could have worked to the defendant's disadvantage.

Therefore, in the instant case, evidence could have been offered by the state to negative a specific mitigating circumstance offered by the defense. As in Washington v. State, supra, it is permissible for the state to rely on criminal activity rather than convictions. A contrary rule would permit a capital defendant to assert with impunity that he is a law abiding citizen regardless of the fact that the defendant had a significant history

of prior criminal activity. The mere absence of criminal convictions does not entitle a defendant to mitigate his commission of a murder where that defendant does have a prior history of criminal activity. By not asserting either this statutory mitigating circumstance or any nonstatutory mitigating argument concerning the lack of criminal convictions, defense counsel was able to keep from the jury the fact that Suarez had a prior history of criminal activity. An ineffectiveness claim will not lie in this circumstance. This claim was correctly summarily denied as to any facet of this issue which could have been raised on direct appeal, and this claim was properly denied, after an evidentiary hearing, as to the purported ineffectiveness of counsel.

ISSUE XXIV

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM CONCERNING THE JURY INSTRUCTION ISSUE PREVIOUSLY RAISED ON DIRECT APPEAL BEFORE THIS HONORABLE COURT.

Lastly, Suarez complained that the trial court ignored defense objections to instruction of the jury on "duplicitous" aggravating circumstances. This claim was specifically raised on direct appeal and, in rejecting this claim, the Florida Supreme Court held that it is not improper to give the jurors a list of arguably relevant aggravating factors from which to choose in making their assessment as to whether death is a proper sentence. The "doubling" of aggravating circumstances is not an issue related to the jury's consideration of the aggravating cir-

cumstances in a particular case. Rather, it is the trial judge's sentencing order which is subject to review concerning improper doubling. Therefore, this Honorable Court held that the trial court did not err in the instant case.

Inasmuch as this issue was specifically raised and determined on direct appeal, collateral review is unavailable and this claim was correctly summarily denied.

ARGUMENT AS TO DENIAL OF MOTIONS TO DISQUALIFY

Appellant contends that the trial court erred by denying motions to disqualify himself and the office of the State Attorney in and for Collier County, Florida. For the reasons expressed below, the trial court properly denied those motions to disqualify.

With respect to the motion to disqualify the Honorable Hugh D. Hayes, Circuit Judge, from hearing the motion to vacate judgment and sentence, it is clear that the trial court properly ruled that the allegations of the motion were legally insufficient. Two grounds were advanced in the motion to disqualify Judge Hayes. First, collateral counsel alleged that with respect to their claim XXII the judge would have been a material witness. However, it was determined that this claim concerning the purported failure of the trial court to independently weigh the aggravating and mitigating circumstances and argument of counsel, was procedurally barred by the failure to raise the claim on direct appeal. Thus, because the

underlying claim was not cognizable for post-conviction review, there was no claim calling for the testimony of the court. On this basis, the trial court properly denied the motion to disqualify.

Secondly, collateral counsel alleged that Judge Hayes "indicated a predisposition against Mr. Suarez". In particular, collateral counsel attached to his motion to disqualify a copy of a letter sent by Judge Hayes at the request of the Clemency Department of the Florida Parole and Probation Commission dated June 1, 1987. Collateral counsel asserted that this letter and statements attributed to Judge Hayes in the local press evidenced bias and prejudice sufficient to warrant disqualification. Your appellee submits otherwise and would observe that the comments of Judge Hayes did not reflect extrajudicial bias, prejudice or sympathy, but rather were statements generated by Judge Hayes' knowledge of the trial proceedings that he conducted. In Jones v. State, 446 So.2d 1059 (Fla. 1984), this Honorable Court rejected a claim very similar to that made in the instant case. In Jones, the trial court had complimented defense counsel on the quality of the work done at trial, yet that judge was the same judge who was to hear the defendant's 3.850 motion which alleged ineffective assistance of counsel. This Court held that merely because the judge had previously heard the evidence (i.e., counsel's performance at trial) and was to be the final arbiter of the 3.850 motion, those facts were not legally sufficient to require disqualification. With specific reference to the letter

sent by Judge Hayes to the Clemency Department, it must be observed that within that letter Judge Hayes offered the following: "This decision should not be disturbed absent some unequivocally clear misapplication of the criminal justice system." This language indicates that Judge Hayes recognized that Suarez had the right to seek post-conviction relief and that if Suarez could make a clear showing of error he could obtain relief. With respect to the statements attributed to Judge Hayes in the local press following the signing by the governor of a death warrant for Mr. Suarez, Judge Hayes observed at the hearing on the motion to disqualify that not all statements were properly attributable to him. In any event, it is clear that appellant offered no legally sufficient facts upon which to demonstrate the extrajudicial bias or prejudice to support a motion for disqualification. Therefore, the trial court properly denied that motion.

Collateral counsel also moved to disqualify the office of the State Attorney in and for Collier County, Florida, from participating in the 3.850 proceedings. The sole ground to support that motion was based upon claim VI of his 3.850 motion concerning statements which were obtained by the State Attorney pretrial. This claim was previously advanced before this Honorable Court in Mr. Suarez' direct appeal. Therefore, the trial court properly summarily denied the claim as being improper for collateral review. Again, inasmuch as the underlying issue was summarily denied without the necessity of taking evidence,

the State Attorney would not have been a material witness to any cognizable claim. Thus, the trial court properly denied the motion to disqualify the State Attorney's office.

CONCLUSION

Based upon the foregoing reasons, arguments and citations of authority, the Order of the trial court denying appellant's 3.850 motion to vacate should be affirmed and this Honorable Court should deny appellant's request for a stay of execution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the Capital Collateral Representative, Independent Life Building, 225 W. Jefferson Street, Tallahassee, Florida 32301, this 9th day of June, 1988.

OF COUNSEL FOR APPELLEE