IN THE SUPREME COURT OF FLORIDA

ROBERT ANTHONY PRESTON,

Petitioner,

v. NO. 73667

RICHARD L. DUGGER,

Respondent.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

Respondent, Richard L. Dugger, by and through the undersigned counsel, pursuant to Florida Rule of Appellate Procedure 9.100(h), responds to Preston's Petition for Writ of Habeas Corpus, filed on or about September 19, 1988, and moves this court to deny all requested relief for the reasons set forth in the instant pleading.

I. PRELIMINARY STATEMENT

Preston was sentenced to death on one count of premeditated first-degree murder on November 6, 1981. He appealed the judgment and sentence to this court. He raised five issues, including: (1) admission into evidence of items obtained in violation of the fourth amendment; (2) insufficient evidence of premeditation; (3) error in the trial court's refusal to give an insanity instruction; (4) improper application of aggravating and mitigating circumstances by the trial court; and (5) unconstitutionality of section 921.141. This court rejected these contentions, and affirmed the conviction and sentence. Preston v. State, 444 So.2d 939 (Fla. 1984).

On October 5, 1985, Governor Bob Graham signed a death warrant, and Preston's execution was scheduled for November 4, 1985. On October 31, 1985, Preston filed a motion for post-conviction relief, pursuant to Florida Rule of Criminal Procedure 3.850. The trial court entered a stay of execution, and permitted Preston to substantially amend his original motion[1].

---

[1] In its opinion affirming the trial court's order denying

The amended motion raised fourteen grounds for relief, including: (1) The state violated the dictates of Brady v. Maryland, 373 U.S. 83 (1963), by failing to notify Preston's counsel that the police had discovered keys bearing the name "Marcus A. Morales" in the victim's automobile; (2) the state committed a Brady violation by failing to disclose to the defense an unfavorable personnel evaluation of a hair analysis expert who testified at trial; (3) the conviction and sentence should be reversed on a theory of a conflict of interest as several years before the murder involved in this case, Preston was represented on a misdemeanor charge by Don Marblestone, who subsequently became an assistant state attorney: (4) the trial judge did not properly consider all of the nonstaturoy mitigating evidence; (5) the judge's instructions to the jurors misled them with respect to the significance to be attached to their sentencing verdict; (6) Estelle v. Smith, 451 U.S. 454 (1981) violation; (7) ineffective assistance of counsel at the guilt-innocence and penalty phases; (8) the sentencing court found an aggravating circumstance on the basis of a prior conviction resulting from proceedings during the course of which Preston received ineffective assistance of counsel; (9) the trial court erroneously aggravated the offense and rebutted mitigating evidence on the basis of unconstitutional misinformation; (10) the sentence of death violated the Eighth and Fourteenth Amendements because the trial court directed the jury to find an aggravating circumstance; (11) the erroneous jury instruction that a verdict of life imprisonment must be made by a majority of the jury misled the jury as to its role at sentencing and created a risk that death may have been imposed despite factors calling for life and the sentence of death violates the Eighth and Fourteenth Amendments.

An evidentiary hearing was held in state court October 21-23, 1986 on all timely non-barred claims. The trial court denied the motion on February 12, 1987. This court affirmed the trial

relief, this court noted all pleadings filed subsequent to the amended motion. Preston v. State, 528 So.2d 896, 897-898 (Fla. 1988).

court's order, Preston v. State, 528 So.2d 896 (Fla. 1988), noting that Preston had raised a myriad of issues in the appeal, some of which were predicated upon the motions filed after the evidentiary hearing and which sought to inject new issues into the case. This court determined that the trial court properly declined to rule on those issues, and did not address them in its opinion. Id. at 989.

A second death warrant was signed by Governor Bob Martinez on August 25, 1988. Execution has been scheduled for September 27, 1988. On or about September 19, 1988, Preston filed with this court a Petition for Writ of Error Coram Nobis, as well as the instant petition. Preston raises numerous claims for relief, several of which he perceives as involving ineffective assistance of appellate counsel. As of this writing, the specific claims and arguments are unknown to Respondents. Based on conversations with Preston's counsel, Billy Nolas, the following claims are anticipated:

I - Unconstitutional shifting of burden of proof in penalty phase; II - Booth v. Maryland claim; III - Error in the direct appeal opinion of this court; IV - Caldwell claim; and V - Ineffective assistance of appellate counsel for failing to assert as error (1) that one of the aggravating factors was a prior conviction resulting from proceedings in which Preston received ineffective assistance of trial counsel, (2) that Preston was sentenced to death based on misinformation, (3) that the trial court directed the jury to find an aggravating circumstance, (4) the trial court's instruction that a recommendation of life imprisonment must be made by a majority, and (5) the state committed a Brady violation.

> I. THE INSTANT PETITION FOR WRIT OF HABEAS CORPUS SHOULD BE DENIED BECAUSE PRESTON HAS FAILED TO DEMONSTRATE THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL, AND AS TO THE OTHER CLAIMS, HAS IMPROPERLY RAISED ISSUES THAT EITHER COULD HAVE BEEN RAISED ON APPEAL OR HAVE ALREADY BEEN RESOLVED AGAINST HIM BY THIS COURT.

A. PROCEDURALLY BARRED CLAIMS:

Of the claims presented, all but those involving ineffective

assistance of appellate counsel are improperly raised. This court has consistently held that habeas corpus cannot be used as a vehicle for presenting issues which should have been raised at trial, on direct appeal, or motions for post-conviction relief; or for relitigating issues already actually decided on direct appeal. See, McCrae v. Wainwright, 439 So.2d 868 (Fla. 1983); Messer v. Wainwright, 439 So.2d 875 (Fla. 1983); Ford v. Wainwright , 451 So.2d 471 (Fla. 1984); Witt v. State, 465 So.2d 510 (Fla. 1985); Adams v. Wainwright, 484 So.2d 1211 (Fla. 1986); Kennedy v. Wainwright, 483 So.2d 424 (Fla. 1987); James v. Wainwright, 484 So.2d 1235 (Fla. 1986); Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987); Suarez v. Dugger, 13 F.L.W. 386 (June 14, 1986); accordingly, the state maintains that claims not alleging ineffectivenes of appellate counsel should be stricken or summarily denied. Each claim will be briefly addressed.

CLAIM I

The trial court unconstitutionally shifted the burden of proof in its instructions at sentencing by putting the burden on the defendant to show that the mitigating circumstances outweighed the aggravating circumstances.

An issue raised in a petition for writ of habeas corpus will be barred where the issue should have been raised, if at all, at trial or on direct appeal. Darden v. State, 521 So.2d 1103 (Fla. 1988). Such burden-shifting claims have been specifically found to be improper on collateral attack by this court. Henderson v. Dugger, 522 So.2d 835, 836 (Fla. 1988). See also, McCrae v. State, 437 So.2d 1388 (Fla. 1983), Zeigler v. State, 452 So.2d 537 (Fla. 1984). In the present case there was no objection at trial to the judge's instruction (R 2007) and the issue was not raised on direct appeal. Nor should the issue now be considered in the guise of ineffective assistance of counsel. To the extent petitioner may seek to bootstrap onto recent decisions of the United States Supreme Court, respondents would point out that they are not the types of changes in law contemplated by Witt v. State, 387 So.2d 922 (Fla. 1980) and even if novelty could be established for Preston's default, the essence of a novelty claim is that a new rule has been fashioned, but new rules are never applicable on collateral review. See, Griffith v. Kentucky, 107

S.Ct. 708, 716 (1987); Yates v. Darden, 56 U.S.L.W. 4065, 4066 (U.S. 1988).

Miles v. Maryland, No. 87-5367, 2 F.L.W. Fed S378 (June 6, 1988) is simply inapposite and represents an effort to bootstrap onto recent high court pronouncements for the sole purpose of prompting a stay of execution. In Mills, the jurors, upon receiving the judge's intsructions and in attempting to complete their verdict form, may have thought they were precluded from considering any mitigating evidence unless all twelve jurors agreed on the existence of a particular circumstance. In fact, under Maryland's statute, if the sentencer finds that any mitigating circumstances have been proved to exist, it then proceeds to decide whether those circumstances outweigh the aggravating circumstances. Caldwell v. Mississippi, 472 U.S. 320 (1985) is likwise inapposite and this court on numerous occasions has held that it is not a sufficient change in law. See, Combs v. State, 13 F.L.W. 142 (Fla. Feb. 18, 1988); Grossman v. State, 13 F.L.W. 127 (Fla. Feb. 18, 1988); Demps v. State, 515 So.2d 196 (Fla. 1987); Card v. Dugger, 512 So.2d 829 (Fla. 1987); Blanco v. Wainwright, 507 So.2d 1377, 1380 (Fla. 1987). This is the height of bootstrapping. There simply exists no change of law in this case that would receive retroactive application

Even if the claim was cognizable a careful reading of the transcript reveals that the burden of proof simply never shifted. The jurors were instructed that each aggravating circumstance must be established beyond a reasonable doubt (R 2028), and that the advisory sentence should be life imprisonemnt if such aggravating factors alone do not warrant the death penalty (R 2027). This hardly puts a burden on the defendant to outweigh the aggravating circumstances with mitigating ones. See, e.g., Arango v. State, 411 So.2d 172 (Fla. 1982). This is especially true since the jury was further instructed to give the mitigating circumstances "such weight as you feel it should receive". (R 2028). Such instructions were correct and involved no burden-shifting. See also, Peek v. Kemp, 784 F.2d 1479 (11th Cir. 1986). Moreover, the prosecutor explained that in reaching

a verdict the jury weighs the aggravating circumstances against the mitigating (R 2008). Nor can it be said that any possible omission in these instructions deprived Preston of due process at sentencing, see, Henderson v. Kibbe, 434 U.S. 145 (1977), Adams v. Wainwright, 764 F.2d 1356 (11th Cir. 1985), or that his sentencing proceeding was rendered fundamentally unfair. Cf., Carrizales v. Wainwright, 699 F.2d 1053 (11th Cir. 1983) or that it was not harmless under Rose v. Clark, 106 S.Ct. 3101 (1986) as the evidence in aggravation was extremely strong and no mitigating factors were found.

Should this claim also be raised in the context of ineffective assistance of appellate counsel, respondents submit that since the issue was not preserved, appellate counsel could not have raised it on direct appeal. McCrae, supra.

CLAIM II

Booth v. Maryland Claim.

Petitioner contends that remarks by the prosecutor in opening and closing argument in the guilt/innocence phase and the closing argument in the penalty phase violate the dictates of Booth v. Maryland, 107 S.Ct. 2529 (1987) by interjecting evidence of the impact of the crime upon the victim or victim's family in violation of the Eighth Amendment. As of this writing petitioner has not precisely identified the specific statements so the respondents are forced to guess as to what language in these sections petitioner finds objectionable.

STATE'S OPENING - GUILT/INNOCENCE PHASE (R 477-493).

The state's opening statement does nothing more than outline the circumstances of the murder and subsequent investigation and contains no untoward references to the victim or her family.

STATE'S CLOSING ARGUMENT - GUILT/INNOCENCE PHASE (R 1784-1827).

The murder is described as being done in a "savage" fashion (R 1785) but this goes to aggravating factors - not victim impact, as does details of the actual slaying (R 1796-1798). The slashing and dismemberment after death had no impact on the

victim but demonstrated premeditation (R 1798). Her good spirits and ministry work established that she herself did not leave the store with proceeds but was robbed (R 1803). Her terror at being removed from the store supported a kidnapping (R 1804-1805).

STATE'S FINAL CLOSING ARGUMENT - GUILT/INNOCENCE PHASE.

The victim's religious background was brought out only in response to defense counsel's reference to True Detective Magazines in the store and various books in her car to show such was evidence of nothing (R 1886-1887). A remark was made that "Earline Walker will never go home and based on the evidence in this lawsuit, before she can be free ever again, the Defendant must be found guilty of first-degree murder." (R 1892). This was responsive to the defense argument that if Preston were found guilty of first-degree murder it did not mean he would be going home and bespeaks of literary license not victim impact.

STATE'S CLOSING ARGUMENT - PENALTY PHASE.

The prosecutor stated "We need to bring Earline Walker into this case at this point in time. She has not been in this case for three-and-a-half years. This lady, who was operating a Little Champ Store on Spring Oaks Boulevard, a cheerful lady, concerned about her customers when they came in, in the ministry and youth ministry, just going through life giving pleasure, having sad moments." (R 1988). This is not a victim impact statement.

The record reflects that no objection was ever interposed at trial to any of the state's argument. This issue was never raised on direct appeal. A petition for habeas corpus is not to be used as a vehicle for obtaining a second appeal. Steinhorst v. Wainwright, 477 So.2d 537 (Fla. 1985); McCrae v. Wainwright, 439 So.2d 868 (Fla. 1983). The issue was first raised in an amended Motion to Vacate Judgments and Sentences with Additional Leave to Amend, page 21 in the context of her cheerfulness and ministry being a comparison with the defendant. This issue was not appealed to this court from the denial of post-conviction relief. The issue is now waived. Moreover, Booth is not a change in law and merely reiterates what the Supreme Court has

previously held: The Eighth Amendment requires that sentencing in a capital murder case must focus on the individualized character of the defendant and the particular circumstances of the crime. Thompson v. Lynaugh, 821 F.2d 1080 (5th Cir. 1987).

Should Preston raise this issue in the context of ineffective assistance of appellate counsel, respondent's submit that since there were no objections, the issue has not been preserved, so counsel's performance was not deficient. McCrae, supra; Strickland, supra.

CLAIM III

Preston's claim that this court should revisit the trial court's refusal to instruct on insanity despite previous rejection of that claim on direct appeal.

This issue was previously raised and properly rejected by this court on direct appeal. Preston v. State, 444 So.2d 939, 944 (Fla. 1984). This court concluded that there was no record support for petitioner's contention that he suffered from a "fixed and settled frenzy or insanity either permanent or intermittent" [citing Cirack v. State, 201 So.2d 706, 709 (Fla. 1967)] so as to justify an insanity instruction under Florida law. This well-reasoned decision constitutes law of the case and should not be revisited. Greene v. Massey, 384 So.2d 24, 28 (Fla. 1980). There are no exceptional circumstances warranting further review, the issue having already been addressed on direct appeal and in post-conviction proceedings in the context of ineffective assistance of trial counsel.

At trial, as this court noted in its decision, the expert testimony did not support the contention that Preston's voluntary ingestion of PCP on the night of the murder and/or on previous occasions demonstrated a "permanent or intermittent" impairment of judgment or inability to distinguish between right and wrong. Preston v. State, supra, at 944. Nor did any lay testimony supply the factors necessary to justify the instruction under Florida law; the mere recounting of various episodes of narcotics usage while relevant to the related defense of intoxication are inadequate to justify an insanity instruction.

Furthermore, the jury's rejection of Preston's intoxication

defense (based upon the same alleged continual and voluntary drug use and PCP ingestion on the night of the offense), despite instruction on that alleged defense, amply demonstrates the lack of prejudice/harmless error (if any) in the trial court's well-reasoned decision to refuse an insanity instruction. If the jury was unconvinced that Preston was even intoxicated to the extent that his intent to murder was impaired his claim of PCP-induced insanity would certainly have been rejected. No fundamental error justifying rejection of the law of the case has been demonstrated.

CLAIM IV

Caldwell claim regarding jury question.

As previously argued herein this court has consistently held that Caldwell v. Mississippi is not a change of law and the issue must be raised at trial and on direct appeal. Defense counsel specifically acquisced at trial to the court's instruction after discussion, waiving any challenge (R 2032-2033). In any event, the trial court's announcement that concurrent sentences would result from multiple murder convictions was a correct statement of the law and could not diminish jury responsibility. Since there was only one victim under Florida law there could be only one sentence, i.e., there could be one consecutive "life" sentences in this case; indeed, the trial judge correctly failed to sentence on two of three of the murder counts. Houser v. State, 474 So.2d 1197 (Fla. 1985). Again, this issue was not preserved for appellate review so appellate counsel's performance was not deficient. Strickland, supra.

B. PRESTON'S CLAIMS OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Preston's anticipated claims are that he received ineffective assistance of appellate counsel on direct appeal in this court in the following respects: (1) appellate counsel was ineffective for failing to assert that one of the aggravating factors was a prior conviction resulting from proceedings in which Preston received ineffective assistance of counsel; (2) appellate counsel was ineffective for failing to assert that

Preston was sentenced to death on the basis of misinformation; (3) appellate counsel was ineffective for failing to assert that the trial court directed the jury to find an aggravating circumstance; (4) appellate counsel was ineffective for failing to assert as error the trial court's instruction that a recommendation of life imprisonment must be made by a majority of the jury; (5) appellate counsel was ineffective for failing to argue that the state violated the dictates of Brady v. Maryland, by failing to notify Preston's counsel that the police had discovered keys bearing the name "Marcus A. Morales" in the victim's car. Should Preston argue, in the alternative, that these claims can be considered on the merits, as they represent fundamental error and/or are predicated upon significant changes in the law, respondent's contend that because these issues would represent ones which could have been raised on appeal, it is improper to consider them on habeas corpus, except in the current context. See, McCrae, supra; Kennedy, supra.

Before turning to the merits of the ineffective assistance of counsel claims, it is worthwhile to note that appellate counsel in the instant case, Joan Bickerstaff, was recently called upon to testify as an expert witness by the Office of the Capital Collateral Representative, in the case of Theodore Bassett (Volusia County Case No. 78-2704). As Bassett pointed out in his initial brief, her testimony was particularly significant because "[h]er unique perspective is that she was preparing and trying capital cases on a specific appointment in an adjoining circuit during the same time this case was prepared and tried." (Florida Supreme Court Case No. 71,130, p. 20, see, Exhibit 1). Coincidentally, that time frame corresponds quite closely with the time frame in the instant case.

The state submits that it is a somewhat anomalous position to assert counsel's expertise for that period of time, yet argue that counsel was also ineffective. Unless, of course, counsel was testifying from personal experience about ineffectiveness. However, a review of the transcript wherein the foundation for Ms. Bickerstaff's qualifcations was laid reveals that it was her

expertise that was to be utilized as opposed to her personal experience at being ineffective. (See, Exhibit 2).

The state will briefly examine the prevailing standards before turning to the merits of the ineffective assistance of appellate counsel claims. As this court noted in Steinhorst v. Wainwright, 477 So.2d 537 (Fla. 1985),

> When counsel makes a choice not to argue an issue due to his unfavorable evaluation of his chance for success comparing his set of facts with the principles of prevailing law, and his evaluation is reasonably accurate, reflecting reasonable competence, the omission cannot be characterized as ineffectiveness of counsel.

This holding is in accordance with those of the United States Supreme Court, to the effect that one of appellate counsel's primary duties is to "winnow out" weaker arguments on appeal and to focus on those most likely to prevail, given the fact that appellate counsel is not constitutionally required to raise on appeal every non-frivolous point arguably supported by the record, or even requested by his client. See, Jones v. Barnes, 463 U.S 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983); Smith v. Murray, 477 U.S. ___, 106 S.Ct. 2661 91 L.Ed.2d 454 (1986).

Additionally, in order to merit relief, a petitioner must demonstrate, under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L .Ed.2d 674 (1984) and Downs v. Wainwright, 476 So.2d 654 (Fla. 1985), not only that appellate counsel performed deficiently, acting as no reasonable attorney would have under the circumstances, but also that such deficient performance prejudiced him to the extent that it can be said that the result of his appeal has been rendered unreliable; as to the latter, Preston must show that there is reasonable probability that, absent these errors, this court would have reversed his convictions and sentences. Preston has failed to demonstrate his burden in this regard, and the instant petition for writ of habeas corpus should be denied.

CLAIM I

Preston argues that appellate counsel was ineffective for failing to assert that one of the aggravating factors was a prior conviction resulting from proceedings in which he received ineffective assistance of counsel. It is clear why appellate counsel did not raise this issue. At the time of Preston's sentencing, the prior conviction had been affirmed on appeal, Preston v. State, 397 So.2d 712 (Fla. 5th DCA 1981), and there was no motion pending to vacate that conviction. Preston stipulated to the prior conviction. This does not even amount to a meritless issue for which counsel could not be labeled as ineffective - this is no issue at all. Clearly the raising of this issue for the first time on direct appeal would have been untimely and rejected. Preston has not demonstrated deficient performance. Strickland, supra.

CLAIM II

Preston argues that appellate counsel was ineffective for failing to assert that he was sentenced to death on the basis of misinformation. The basis of this claim is that in rejecting one of the potential statutory mitigating factors (that the defendant has no significant history of prior criminal activity), the court improperly referred to a prior juvenile offense as a felony when it was in fact a misdemeanor (R 2816). Clearly this is one of the weaker arguments that counsel had a duty to "winnow out." Jones, supra; Steinhorst, supra.

In rejecting this mitigating factor, the trial court focused initially on the felony conviction for throwing a deadly missile into an occupied vehicle, and in Prestons' own statements at trial that he had dealt and sold drugs and been a user of drugs for many years. The statement at issue does not indicate a trial court perception that the resisting charge was in fact a felony. To the contrary, the statement begins by asserting that Preston had a prior felony "arrest record for possession of marijuana pariphernalia," and only then continues on to state that as a juvenile Preston was placed on probation in 1974 for two years on the charge of resisting an officer with violence.

Nowhere in the order does the judge specifically state that he evaluated the resisting an officer offense as a felony; indeed, to reach that conclusion Preston must overlook the prosecutor's clear revelation to the trial judge prior to rendering of the sentencing order at issue that the resisting an officer offense was one without violence and was in fact a misdemeanor and not a felony such that it could not be considered as an aggravating circumstance, but could be considered to negate the mitigating circumstance that the defendant did not have a history of prior criminal activity (R 2053-2054). The trial judge specifically acknowledged the prosecutor's statement that the offense was not a felony and was in fact a misdemeanor (R 2054). Had the judge in fact perceived it as a felony, he would no doubt have found it to be an aggravating factor under § 921.141(5)(b).

The error in the sentencing order in this case would had to have been considered typographical as opposed to substantive in nature, and this is hardly the "type of judicial error in the capital sentencing process" that would constitute reversible error. As such, Preston has failed to demonstrate that counsel's performance was deficient, or that he was prejudiced. Strickland, surpa. Even if this court could somehow have reached the conclusion that the trial court misinterpreted the resisting an officer offense as a felony, there is no indication that it would have affected his rejection of the mitigating circumstance at issue. It is the fact and timing of the offense as indicative of Preston's continuous history of criminal conduct that, in conjunction with the other offenses listed, justified rejection of this mitigating circumstances. Clearly appellate counsel could not have been ineffective to raise this, particularly in light of her extensive expertise in the penalty phase of capital proceedings.

CLAIM III

Preston argues that appellate counsel was ineffective for failing to assert as error that the trial court directed the jury to find an aggravating circumstance. It is well established that

jury instruction challenges must be objected to at the trial court level so as to preserve them for appellate review, even in the death penalty context. Darden v. State, 475 So.2d 214, 217 (Fla. 1985); Dougan v. State, 470 So.2d 697, 700 (Fla. 1985); Fla. R. Crim. P. 3.390(d). Trial counsel did not object to the instruction, so the matter was not properly preserved, and appellate counsel could not have raised the issue on direct appeal. Ford, supra; McCrae, supra. As such, Preston has failed to demonstrate deficient performance. Strickland, supra.

Further, the issue is without merit. There is nothing erroneous, fundamental or otherwise, in the jury instruction at issue. The trial court, without objection, stated that it was the jury's role to factually determine whether certain aggravating circumstances were proven to exist, and if so whether those circumstances sufficiently outweighed the mitigating circumstances established so as to justify a death sentence (R 2026-2028). It was also instructed that its determination was to be based solely upon the evidence presented at the guilt and penalty phases, and that each aggravating circumstance must be established beyond a reasonable doubt before it could be considered in arriving at a decision (R 2026-2028, 2729-2730). The jury was then instructed that the aggravating circumstances which it might consider were "limited to any of the following that are established by the evidence" (R 2026, 2729); and immediately thereafter the jury was told that one of the potential aggravating factors was that the defendant had been previously convicted of another capital offense or of a felony involving the use of violence to some person, followed by a later instruction that the crime of throwing a deadly missile into an occupied vehicle is a felony involving the use of violence to another person (R 2026, 2729).

There is nothing improper about these instructions in that they do not relieve the jury from the factual burden of first determining whether suufficient evidence had been adduced that Preston had been convicted of a felony involving the use of violence to some person, i.e., the crime of throwing a deadly

missile into an occupied vehicle. The trial court's matter of law determination and instruction that that crime would in fact constitute a felony involving the use of violence to another person was not improper, and once the jury in fact determined that Preston had been previously convicted of that offense, it could properly utilize that fact and the judge's matter of law determination to find that that aggravating circumstance had been proven beyond a reasonable doubt.

The question as to whether the felony offense at issue constitutes a felony involving the use of violence to some person is a correct matter of law determination and not subject to determination by a fact-finder. In any event, no prejudical error could have been demonstrated given trial counsel's concession that this aggravating factor was proven through presentation of evidence as to the "deadly missile" conviction (R 2011-2012).

The state is at a loss to explain how this allegedly fundamental impropriety in the instruction could have resulted in a jury penalty verdict which was simply not reliable. To the contrary, in light of the total lack of mitigating circumstances and the obvious propriety of the sentencing judge's findings as to the three aggravating circumstances ultimately upheld on appeal, including the prior violent felony finding, the only unreasonable or unreliable penalty verdict in this case would have been life imprisonment. There is no doubt that this jury would have recommended death irrespective of this allegedly improper jury instruction.

Further, in light of trial counsel's concession of the issue, the more proper and effective vehicle for obtaining relief would have been a claim of ineffective assistance of trial counsel pursuant to Rule 3.850. Appellate counsel cannot be faulted for preserving the more effective remedy and eschewing the less effective. See, Suarez, supra; Blanco, supra. Further, the ineffective assistance of trial counsel issue has already been resolved against Preston, Preston, 528 So.2d at 899, and thus is not cognizable in the instant proceeding. Adams, supra.

CLAIM IV

Preston argues that appellate counsel was ineffective for failing to assert as error the trial court's instruction that recommendation of life imprisonment must be made by a majority of the jury. An alleged error in a jury instruction given during the sentencing phase of a habeas petitioner's trial, that the jury's advisory verdict of either life imprisonment or death must be reached by a majority vote of the jury, is waived by lack of a contemporaneous objection at trial. Ford, supra. There was no objection at the trial court, so the issue was not preserved and appellate counsel could not have raised the issue on direct appeal. Accordingly, Preston has failed to demonstrate deficient performance on the part of appellate counsel in this respect. Strickland, supra; Martin, supra.

This court rewrote the concluding portion of the instruction in 1983, Harich v. State, 437 So.2d 1082 (Fla. 1983), and subsequently held that there must be an objection at trial before the issue can be raised on appeal, Jackson v. State, 438 So.2d 4 (Fla. 1983), and that Harich does not constitute a change in the law that will merit relief in a collateral proceeding. Id. Further, other than Preston's current speculation, there is nothing in the record to demonstrate that the jury was confused by the instruction or in any way deadlocked so as to demonstrate that their ultimate vote for death was not in fact the result of their initial and only ballot in this matter. Reversible error cannot be predicated on conjecture. Cates, supra. Again, the proper vehicle for obtaining relief on this issue was a collateral attack regarding trial counsel's ineffectiveness for failure to object, which issue has already been resovled against Preston, Preston, 528 So.2d at 899, and thus is not cognizable in the instant proceedings. Adams, supra.

CLAIM V

Preston argues that appellate counsel was ineffective for failing to argue that the state violated the dictates of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1983), by failing to notify Preston's counsel that the police had

discovered keys bearing the name "Marcus A. Morales" in the victim's automobile. Preston asserted the Brady violation in his motion for new trial, which the court denied on the basis that Preston had failed to demonstrate the materiality of the keys. The motion for new trial was heard on August 31, 1981, more than two and one-half months after the trial was completed, and counsel was still unable to demonstrate any materiality as to the keys. Preston as much as conceded that this claim was without merit at the time of direct appeal, as it was only some later-alleged evidence, discovered after the 3.850 evidentiary hearing, which demonstrated the alleged materiality of the keys. (See, Preston's Motion for Rehearing, pp. 4-5, Supreme Court Case No. 70,835, attached hereto as Exhibit 3). Failure to raise a non-meritorious issue does not constitute substandard performance by counsel. Martin v. Wainwright, 497 So.2d 872 (Fla. 1986).

CONCLUSION

For the aforementioned reasons, respondent moves this honorable court to deny the instant petition in all respects. Several of the claims are procedurally barred due to their improper presentation. Of the remaining claims, which raise ineffective assistance of appellate counsel, Preston has failed to demonstrate that he merits relief.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KELLIE A. NIELAN
MARGENE A. ROPER
SEAN DALY
ASSISTANT ATTORNEYS GENERAL
125 N. Ridgewood Ave.
Fourth Floor
Daytona Beach, Fl. 32014
(904) 252-1067

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Response has been furnished, by delivery, to Billy Nolas, Capital Collateral Respresentative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 20th day of September, 1988.

Of counsel