IN THE SUPREME COURT OF FLORIDA

DAVID EUGENE JOHNSTON,

Appellant,

v. CASE NO. 74,743

STATE OF FLORIDA,

Appellee.

______________________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Because of the numerous claims raised by appellant and because a decision on the first four issues largely involves a factual resolution, the pertinent facts are set out therein and not duplicated in a preliminary statement thereof in order to avoid filing a brief of unwieldly length.

(R) refers to the record on direct appeal. (R1) refers to the record on the Florida Rule of Criminal Procedure 3.850 proceedings. (T) refers to the evidentiary hearing on the same.

SUMMARY OF ARGUMENT

I. The issue of competency to stand trial has been waived for failure to raise it on direct appeal.

II. This court should decline to review the specifics of the examinations by the court appointed psychiatrists as to competency to stand trial as such review would lead to a battle of experts and compel courts to engage in a form of psychiatric medical malpractice review as part of collateral review. Such review is not warranted simply because a new expert is willing to attach a different diagnostic label to a mental state.

III. Defense counsel timely provided the mental health experts with background information in the form of previous mental health evaluations which buttress the experts original conclusions rather than those of the new experts.

IV. Johnston always denied committing the crime and wanted no part of mental health defenses and refused to be examined by a third expert to prepare for the penalty phase. Counsel did not restrict their defense because of Johnston's wishes, however. Johnston's childhood treating physician was dead and could not be called. His hospital records contained negative information regarding incarcerations and diagnoses as a sociopath. A reasonable strategic decision was made by counsel to present evidence of Johnston's mental problems and abused background through the testimony of his step-mother, the relative closest to him, and the only one willing to help. Counsel did not conduct an inadequate background investigation or negligently fail to secure the services of an expert.

V. Trial counsel was not ineffective for failing to argue that there was no knowing and intelligent waiver of Miranda rights because of Johnston's mental impairments in the absence of police coercion.

VI. Counsel was not ineffective for not advancing a voluntary intoxication/diminished capacity defense where such is not recognized and Johnston proclaimed his innocence throughout.

VII. No prejudice has been demonstrated as to the potpourri of ineffective assistance of counsel claims. Moreover, such claims are an attempt to seek review of issues raised on direct appeal or omitted in the form of an ineffectiveness claim.

VIII. The claims that (1) the H.A.C. aggravating factor failed to narrow the class of people eligible for the death penalty; (2) the death sentence rests upon an unconstitutional automatic aggravating circumstance; (3) improper victim impact information was considered; (4) the sentencing court refused to find mitigating circumstances; (5) the jury instructions shifted the burden of proof at sentencing; (6) the jurors sense of responsibility for sentencing was diminished; and (7) that an improper prior conviction was improperly considered are all procedurally barred as they were either raised at trial and on direct appeal or should have been and cannot be resurrected in the guise of an ineffective assistance of counsel claim.

I. THE ISSUE OF COMPETENCY TO STAND TRIAL HAS BEEN WAIVED FOR FAILURE TO LITIGATE IT ON DIRECT APPEAL AND NO REASONABLE GROUNDS EXIST TO REOPEN SUCH ISSUE.

On January 3, 1984, Johnston's attorney filed a Motion for Psychiatric Evaluation to address competency to stand trial pursuant to Florida Rule of Criminal Procedure 3.210 (R 1950-51). Dr. Robert Pollack and Dr. J. Lloyd Wilder were appointed to evaluate Johnston (R 1953-54). On January 3, 1984 counsel also filed a Notice of Intent to Rely Upon the Defense of Insanity indicating that the nature of the insanity relied upon as a defense is schizophrenia (R 1949). Ten days later counsel filed a Motion for Appointment of Expert pursuant to Florida Rule of Criminal Procedure 3.216(a) indicating that the defendant's statements and conduct indicate that he might be suffering from mental and emotional disturbances (R 2006). A hearing on the issue of competency was held on March 2, 1984 (R 1031-64). Both experts found Johnston competent (R 1037 [Pollack], 1050-51 [Wilder]).

Johnston complains that neither expert spent more than an hour with him, did not conduct any neurological or psychological testing, were unaware that he was receiving social security benefits for his mental disability, did not review his statements to the police which contained indicia of delusions and did not talk to defense counsel regarding the problems they were having with Johnston. Dr. Pollack received Louisiana commitment reports after he conducted his examination and submitted his report the same day and did not consider Johnston's records from Louisiana in concluding Johnston was competent. (Dr. Pollack did not testify at the evidentiary hearing below) or discuss Johnston's self-destructive or suicidal activities or tendencies with any corrections officers (R 1046). Dr. Wilder didn't know Johnston had only known Mary Hammond for two weeks instead of the four years Johnston reported. Counsel felt Johnston was continually incompetent.

Dr. Pat Fleming conducted a competent evaluation of Johnston in 1988 and made a tri-part diagnosis of organic brain syndrome; schizophrenia undifferentiated with paranoid features; and substance abuse. In her opinion Johnston was not competent to stand trial at the time of the offense. Dr. James R. Merikangas diagnosed Johnston as psychotic from age seventeen with brain damage from early childhood. As a result of the brain damage and psychosis he's more susceptible to the effects of drugs, alcohol and emotional stress. In his opinion Johnston was not competent to stand trial at the time. The elected public defender Joe DuRocher thought Johnston was intellectually retarded and dull. Everyone who spent time with Johnston knew he was not rational (T 443).

As in State v. Sireci, 536 So.2d 231 (Fla. 1988), and Mason v. State, 489 So.2d 734 (Fla. 1986), there was significant evidence of mental retardation and brain dysfunction that was

ignored by mental health professionals and a history of psychotic behavior that was ignored when the evaluations were conducted. Neither of the evaluations were adequate.

The issue of competency is one for direct appeal. See, Bundy v. State, 538 So.2d 445 (Fla. 1989); Doyle v. State, 526 So.2d 909, 911 (Fla. 1988). In this particular case a hearing on competency was held prior to trial and there was a basis for challenging the court's determination of competency on direct appeal but such issue was not raised. The subsequent diagnoses by defense-hired experts years after the convictions do not present grounds to reopen the issue of competency.

The issue raised here, however, is not actually that of competency, for a determination has previously been made regarding that issue. What Johnston seeks is a de novo determination based on the alleged inadequacy of his evaluations by the court appointed psychiatrists. He basically urges this court to review the specifics of the particular examinations he received from Drs. Pollack and Wilder. This court should decline to embark on a course that would lead to a battle of experts in a competency review and compel courts to engage in a form of psychiatric medical malpractice review as part of the direct and collateral review of cases in which a claim is made pursuant to Ake v. Oklahoma, 470 U.S. 68 (1985). The ultimate result would be a never ending battle of psychiatrists appointed as experts for the sole purpose of discrediting a prior psychiatrist's diagnosis. See, Silagy v. Peters, 905 F.2d 986 (7th Cir. 1990). Federal courts are unwilling to engage in such review. "Because psychiatry deals with the intangibles of the human psyche and

human emotions, it is nearly always possible for a defendant to find one psychiatrist who will disagree with the opinion of another psychiatrist, and castigate the other as incompetent or as having performed an incompetent psychiatric examination. See, Waye v. Murray, 884 F.2d 765, 767 (4th Cir. 1989); Silagy v. Peters, 905 F.2d 986 (7th Cir. 1990). The Eleventh Circuit Court of Appeals recently held in Clisby v. Jones, 907 F.2d 1047, 1049-1050 (11th Cir. 1990), that nothing in Ake obligates the state to provide a psychiatrist who cannot commit malpractice and the state meets its obligation when it provides access to a neutral or independent psychiatrist who by education and training is able to practice psychiatry and who has been licensed or certified to practice psychiatry. The court stated:

> By provision of a properly qualified psychiatrist to a defendant, the state affords the defendant a reasonable chance of success and reduces the risk of inaccurate resolution of issues of insanity or of other mental health questions to a level acceptable in a fair-minded society. *Ake* was chiefly based on the idea that an indigent capital defendant as a matter of fairness ought to have the same kind of assistance available to him as wealthy defendants have: the wealthy can afford to pay for psychiatric assistance. But even the wealthy defendant may employ a psychiatrist who negligently examines him. The burden on the state to provide a properly qualified psychiatrist is not too high, but to burden the state with legal responsibility for the errors, even the negligent errors, of properly qualified psychiatrists seems too much. A competent psychiatrist may err, or even negligently err, but the Constitution protects neither the rich nor the poor against that risk. We distinguish psychiatrists from legal

> counsel when it comes to questions of negligence. Psychiatrists may be widely used nowadays in criminal proceedings, but they are not so fundamental as legal counsel to the adversarial process. And, unlike legal counsel, psychiatrists are not mentioned in the Constitution.

907 F.2d at 1050.

Neither the Constitution nor logic mandates the reopening of this issue.

Robert William Pollack is a physician specializing in psychiatry, duly licensed to practice in Florida (R 1036). In Dr. Pollack's opinion Johnston was competent to stand trial (R 1037) and was sane at the time of the offense (R 1038). At the competency hearing Dr. Pollack indicated that he had received reports from the Louisiana hospitals after examining Johnston and took such material into consideration in reaching his conclusions (R 1039-1040). The Louisiana records contained differing diagnoses including anti-social personality, substance abuse, and psychotic illnesses including schizophrenia (R 1039). Nothing in the reports changed Dr. Pollack's evaluation and he testified that such information actually substantiated many of the conclusions he drew (R 1041). Johnston did not exhibit any of those psychiatric problems when he examined him (R 1040). Dr. Pollack conducted a formal mental status examination by talking with Johnston and reviewing the observations of his behavior made by the jail staff (R 1040). He spent between 45 to 50 minutes with Johnston (R 1041). He felt that Johnston had a good deal of narcissism, grandiosity and an inflated sense of self-worth (R 1042). His impression of Johnston was that he was of average

intelligence, (R 1045) although he did not administer any I.Q. tests, (R 1046) but was exceptionally immature (R 1045). He further testified that if Johnston was transferred to a cell he didn't like he would threaten a self-destructive act to get out (R 1046).

Dr. T. Lloyd Wilder is also a psychiatrist, duly licensed to practice medicine in Florida (R 1049). He had examined Johnston on two previous occasions (R 1050) and examined him pursuant to a court order in this particular case (R 1050). Dr. Wilder found Johnston to be competent to stand trial (R 1051). He received reports from Louisiana hospitals after seeing Johnston (R 1051-1052). There was nothing in the reports which conflicted with what he had already observed (R 1052). The diagnoses would have reflected what seemed prominent at that time, as "a human being is not a statue" (R 1053). "Diagnoses are descriptive in the sense that the person making the diagnosis is observing the person at that time, possibly some longitudinal history, but the diagnosis is usually made to reflect the condition for which the person was admitted to the institution on that occasion and when a person is discharged the symptoms which brought him in may be largely incorrect and someone seeing him after he was discharged without the background history might either give a different diagnosis or no diagnosis at all." (R 1054). It wasn't Dr. Wilder's purpose to diagnose Johnston but to observe his ability to do certain things but he would describe Johnston as a sociopathic personality (R 1055). Dr. Wilder's contact with Johnston was about an hour (R 1056). He saw

Johnston previously in March of 1982 at which time Johnston was recalcitrant and rude. This did not occur on his second visit (R 1058). Johnston told him he had spent a lot of time in the law library and was planning to represent himself (R 1057). Dr. Wilder's written report indicates that Johnston tended to be a little unrealistic in his anger at the system and felt he could not get a fair trial by jury in Orange County because of the T.V. coverage of his arrest. In spite of a past history of mental illness Dr. Wilder concluded that Johnston did not presently suffer from such an illness to the extent that it would render him incapable of using his knowledge. Johnston told Dr. Wilder that "his is accused of killing Mary Woodville Hammond, an elderly lady who had befriended him from time to time over the past four years." Johnston discussed his own activities on the night of her death, and although he admitted he had been drinking and using drugs, his account did not suggest any period of amnesia or that he was laboring under the influence of delusions or hallucinations. Dr. Wilder felt he had the ability to tolerate incarceration. He has been a bit of a troublemaker in jail but admitted he has done so in an attempt to get his own way in such things as cell assignment. In Dr. Wilder's opinion Johnston was also sane at the time of the alleged offense (R 1961).

There is no basis to second-guess the opinions of these two experts, who satisfy the dictates of Clisby by virtue of their education, training and licensing in the state of Florida. Should this court, nevertheless, undertake such review, it should

be aware that there is no record basis for finding fault in the prior determination of competency. An evidentiary hearing on this issue was held below and Judge Powell indicated in his order denying relief that "I found after pre-trial hearing that defendant was competent to stand trial. Evidence offered at the evidentiary hearing does not persuade me that my pre-trial finding was incorrect and I affirm it here." (R1 1687).

The mental status examination is commonly accepted as an accurate forensic examination by psychiatrists. None of the journals or publications indicate that in order to do a minimally competent psychiatric evaluation it is necessary to do psychological or neurological testing (T 483-484). The opinion that is generally held by psychiatrists is that such tests are a helpful diagnostic tool but are no replacement for the examination (T 483). Dr. Wilder testified at the evidentiary hearing below that he saw no need to perform psychological tests or neurological examinations. He would have to see something that made him suspect there was neurological damage such as a history of seizures or a severe enough injury that there may be lingering effect, or some physical evidence. Psychological tests may be useful if a diagnosis is on the line as it may tip the scales (T 482) but this was not in any way a close case where psychological tests might have been necessary (T 483).

Johnston's complaint that neither expert was aware that he was receiving social security benefits for his mental disability is not well taken considering the fact that it was never established below that Johnston did, in fact, receive such

benefits on account of an actual mental disability. C.C.R. did not secure the social security records and based on hospital records it is more than likely Johnston was receiving benefits on account of curvature of the spine, as he indicated (T 549; 356).

Dr. Wilder does not recall having any of Johnston's statements to the police when evaluating him (T 518). While outside information is sometimes helpful to sort out fiction or fantasy from lies it is not absolutely essential (T 493). All experts are in agreement that Johnston's statements to the police were intended to be self-serving. That they may have lacked coherence is some small aspect bears no relation to Johnston's actual ability to understand the proceedings against him and to assist his attorney.

As Dr. Wilder cogently pointed out, a personality conflict with a specific lawyer is something that happens from time to time with people who have no impairment and it's handled in the legal system (T 517). Seeking out counsel to ascertain the presence or absence of conflict over legal decisions is hardly the required duty of a forensic psychiatrist.

Johnston's assertion that Dr. Pollack did not consider his records from Louisiana in concluding Johnston was competent is simply false as Dr. Pollack actually testified at the competency hearing that he had taken such material into consideration in reaching his conclusions (R 1039-1040). Dr. Wilder also took such records into account, although both psychiatrists received the records after examining Johnston (R 1052).

Not having established suicidal tendencies on the part of Johnston below Dr. Pollack can hardly be faulted for not discussing this topic with corrections officers. Johnston, himself, admitted to threatening self-destructive acts to get his way (T 1046; 1961) and this is borne out in the hospital records from Louisiana.

Johnston reported to Dr. Wilder that he and the victim had befriended each other over a period of four years. No reference is made to any evidence presented below conclusively demonstrating that Johnston had, in fact, only known the victim for a period of two weeks before the homicide. If this were, in fact, true, Dr. Wilder concluded that Johnston's statement would be delusional or lying (R 522). Since Johnston was not delusional about his own identity and knew he gave a false name to the police when he reported finding his "grandmother" dead (T 344) this is a likely variation of his various and varied but consistent statements. Again, this would have little to do with his ability to understand the proceedings against him and to assist his attorney.

Johnston makes the blanket statement that counsel felt he was continually incompetent. Such statement is inaccurate. Counsel's recitations of Johnston's actual abilities and behaviors support the conclusion that he acted competently during the proceedings against him, leaving no reason at all to reopen the issue of competency.

Clyde Wolfe testified that he was not surprised when Johnston was found to be competent to stand trial (T 47).

Johnston understood the information the state had as counsel would give it to him and understood what looked "real bad and didn't look so bad." (T 116). In fact, against the advice of counsel, he made self-serving statements to the police to explain away the evidence against him (T 116; 118). He appeared to be able to follow the flow of evidence and understand its significance throughout discovery and trial (T 118). He never claimed to be acting upon any auditory hallucination (T 119). He appreciated the nature of the charges and allegations against him and knew the potential punishment was death. He knew Wolfe was his attorney and that the police and prosecutors were on the other side (T 121). He gave a complete, fairly rational version of the facts, which was fairly consistent and was willing to disclose all pertinent facts to counsel. He had no trouble communicating (T 123). He manifested appropriate courtroom behavior at trial and sentencing and there were no outbursts. He had a pad and wrote things on it for counsel (T 124). They discussed how the trial was going during breaks and Johnston understood and was willing to help in planning strategy. He would have been able to testify relevantly had counsel not felt he would have "manifested some negative aspects that the jury might have taken badly." (T 124-125).

Although co-counsel Christine Warren felt that Johnston was "superficially competent" (T 150) she acknowledged that his continual excuses demonstrated that he knew he was being accused of killing Mary Hammond, that he knew what the crime was, who he was accused of killing and when it was done (T 205). His

thinking would be focused when she talked to him, although he would ramble, but he never became so bad his sentences didn't make sense. He was able to come before the judge and speak rationally and logically and control himself (T 187). He demonstrated appropriate courtroom behavior (T 188). During trial they discussed the way the evidence was going and he was able to understand and follow it and discuss it with her rationally. He knew what was being said, what the witnesses were saying, understood the legal arguments, spoke logically during the trial and was able to sit still (T 188-189). His statements to the police indicate he knew that death was a potential penalty (T 204).

It would appear that Ms. Warren's uncertainty as to competency is largely based on her client's arrogance in wanting to control the case. If incompetence can be found by virtue of mistrust of attorneys a large segment of the population would be unable to ever stand trial. This "incompetent" defendant was able to represent himself in a civil suit in federal court against correctional officers (T 155; 467).

By all accounts of those who were present at the time, Johnston fulfilled the competency requirements of Florida Rule of Criminal Procedure 3.211(a) and acted competently at trial by (1) appreciating the charges or allegations against him; (2) the range and nature of possible penalties; (3) understanding the adversary nature of the legal process; (4) disclosing to his attorney the facts pertinent to the proceedings at issue; (5) manifesting appropriate courtroom behavior; and (6) having the

capacity to testify relevantly. Thus, Johnston certainly evidenced the ability to consult with his lawyer with a reasonable degree of rational understanding and had a rational as well as factual understanding of the proceedings against him that is the hallmark of competency pursuant to Dusky v. United States, 362 U.S. 402 (1960) (per curiam).

Dr. Wilder testified that he didn't think much of diagnoses. They are a source of a great many problems. The psychiatrists themselves can't even agree (T 490). Such testimony would seem to be borne out by the Louisiana records and their differing diagnoses. Johnston now asks this court to retrospectively find that he was incompetent to stand trial on the basis of newer yet still differing diagnoses. Simply because a defendant has found new experts to give a more favorable evaluation does not entitle him to relief. Stano v. State, 520 So.2d 278 (Fla. 1988). This is particularly so in this case where the opinions of two highly qualified psychiatrists are being challenged by a Johnny-come-lately psychologist, imported from Wyoming: Dr. Patricia Fleming (T 214). See, Clisby v. Jones, 907 F.2d 1047, 1050 n.8 (11th Cir. 1990).

On cross-examination Dr. Fleming admitted that at the time of trial Johnston knew he was charged with murdering Mary Hammond, as reflected in his statements to the police (T 326-327). Prior to trial he realized that death was a possible penalty (T 330). His behavior during trial was consistent and appropriate and he didn't become hostile (T 332). He could relate his version of the facts to the attorneys and always

contended that he did not commit the murder but walked in the house and found the woman dead (T 342). He was able to discuss his decisions about trial strategy with his attorneys and relate his desire not to pursue certain defenses and opt instead to pursue others (T 339). In essence, Johnston more than met the criteria for a finding of competence.

Competency to stand trial has little to do with the fact that a new expert is willing to attach a different diagnostic label to Johnston's mental condition, or to define competency in a manner different than the standard criteria. A client is not incompetent by virtue of the fact that he views himself as superior to his attorneys. This intellectually damaged client had the wherewithal to manufacture a letter of confession from another person (T 337) and attempted to explain away facts against him to the police, upon learning of them (T 26-27), although upon advice of counsel he stopped calling them (T 331).

Dr. James R. Merikangas is in agreement with Dr. Wilder that a medical diagnosis is a subjective opinion on which doctors may disagree (T 406), which makes sense, since his diagnosis does not parallel that of Dr. Fleming or any other diagnoses, heretofore. When Dr. Merikangas conducts evaluations he subjectively finds most people to be insane (T 399). At least one Florida judge has found his theories to be preposterous. See, Bertolotti v. State, 534 So.2d 386 (Fla. 1988). He was forced to admit that he never spoke to anyone who dealt with Johnston during the trial and had no idea how Johnston actually behaved (T 423). He concluded that he would have to defer to

those who had observed Johnston during trial as to his condition at that time (T 424).

II. DEFENSE COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE BY FAILING TO TIMELY PROVIDE THE MENTAL HEALTH EXPERTS WITH NECESSARY BACKGROUND INFORMATION.

Johnston argues that defense counsel failed to render effective assistance and timely provide the mental health experts with necessary background information which rendered their evaluation for competency and insanity inadequate. Counsel did not adequately investigate the area because of Johnston's opposition. The failure to investigate precluded presentation of materials to mental health experts that were critical to a competent evaluation. Johnston's delusional statements to the police were not provided to the examiners and they could not consider whether such statements were voluntary or whether his schizophrenia was actively interfering with his sanity at the time of the offense or his competency to stand trial. Neither doctor knew of his low I.Q. and assumed he had a normal I.Q. There were matters that appeared in the record that were red flags of which Dr. Wilder was unaware and either trial counsel failed to provide Dr. Wilder with this information or Dr. Wilder failed to use it. Such red flags are an I.Q. of 57 at age seven and a half; organic brain damage; strained relationship with his attorneys; statements to police he had seen an image of Christ in the newspaper and saw himself as the devil in the mirror; statements he and the victim were friends for four years; and a statement to the doctor that Johnston's mother was married to a prominent Orlando businessman. Dr. Wilder relied only upon conversation with Johnston to determine his competency and failed to learn that Johnston's self-reporting was delusional.

Counsel failed to obtain the services of an expert to test for deficits based on Johnston's chaotic background and the experts failed to learn of the organic brain damage which existed in conjunction with schizophrenia. The standard mental status examination cannot be relied upon in isolation and is unreliable in detecting cognitive loss associated with organic impairment or major mental illness.

Expert witness Dr. Fleming evaluated Johnston by conducting a clinical interview, having him complete psychological tests and reviewing extensive background materials such as records of hospitalizations and affidavits, which is essential to an evaluation. Information regarding his abusive upbringing was the basis for her later finding of organic brain damage. In her opinion an interview of forty-five minutes would not yield the information needed for an evaluation. She believes that Drs. Wilder and Pollock would have reached the same conclusions she and Dr. Merikangas did had they had access to the same materials, as Johnston is variable in his functioning over time.

Johnston's claim that counsel rendered ineffective assistance by failing to timely provide the mental health experts

with necessary background information fails in the absence of an inadequate evaluation as to competency or sanity. Judge Powell properly found that no prejudice had been demonstrated as Johnston was competent to stand trial (R1 1687). Such issue is fully discussed in Point I herein and little need be said in addition thereto.

As previously argued counsel did provide the experts with the majority of Johnston's hospital records and they considered the same in holding fast to their conclusions. In fact the records supported their conclusions. The trial court also had such records before it in determining competency (R 436).

The records show little more than great disagreement in the past as to his condition. They do not buttress at all Dr. Fleming's most recent diagnosis. Dr. Anderson of the psychiatric ward at Conway Memorial Hospital was of the opinion that Johnston was schizophrenic but the Central Louisiana State Hospital, where Johnston was sent for <u>intensive</u> monitoring, ruled out schizophrenia in all but one case (T 292-293). There were specific findings in records that there were no delusions (T 292). Even a person labelled a schizophrenic can be competent to stand trial (T 326). Schizophrenia may also go into remission (T 309). The summary of his recent hospital stay dated June 19, 1980 indicates "anti-social personality; alcohol and drug abuse." (T 294-295). The majority of the records reflect a dull normal I.Q. (T 298; 301). Dr. Wilder was aware of the fact that Johnston was slow or dull and knowledge of the results of an I.Q. test when Johnston was seven and a half years old, aside from not

being reliable, would not have changed Dr. Wilder's opinion (T 514-515). The unauthenticated records of Larnard State Hospital in Kansas show little more than another differing diagnosis, this time of atypical organic brain syndrome; borderline intellectual functioning; adjustment disorder with mixed disturbance of emotions and conduct and; passive-aggressive schizoid traits (T 351). This is inconsistent with Dr. Fleming's diagnosis of schizophrenia. Counsel can hardly be faulted for not securing such record when it would not have changed the experts' opinions and counsel had a problem getting permission to get any psychiatric records at all from Johnston (T 145). The Louisiana medical records did indicate that Johnston was abused. Ex. A, History and psychiatric evaluation conducted 6/19/80 at Central Louisiana State Hospital; Ex C, 4/13/77 Discharge summary of E.A. Conway Memorial Hospital. Such records were provided to the experts. No testimony was elicited at the evidentiary hearing below substantiating such abuse, in any event, and counsel can hardly be faulted for not procuring affidavits as CCR has done when at the time of trial Johnston wanted nothing to do with mental health defenses and his family wanted nothing to do with Johnston (T 25; 101; 120) and his stepmother testified extensively as to his background and abused childhood at the penalty phase (T 99-101).

The experts were in agreement that Johnston's various statements could simply be lying rather than delusional (T 522; 335). By and large, when he spoke to the police his thinking was focused (T 186) and despite a few oblique or incomprehensible

references, his statements were self-serving (T 117), thus rational.

It is highly unlikely, no matter what counsel did, that Drs. Wilder and Pollack would have reached the same conclusions as Dr. Fleming and Dr. Merikangas since these two doctors' opinions are differing. The psychologist, Dr. Fleming found organic brain syndrome, schizophrenia and substance abuse. Dr. Merikangas offered only a general diagnosis of psychosis (T 368). It is his opinion as a psychiatrist that a CAT scan or MRI is needed to show demonstrable brain damage (T 414) which is inconsistent with schizophrenia, (T 414-415) although Dr. Fleming found both.

Having provided sufficient background material counsel cannot be deemed ineffective under the standards of Strickland v. Washington, 466 U.S. 668 (1984), for relying on pretrial psychiatric evaluations. State v. Sireci, 502 So.2d 1221, 1223 (Fla. 1987). As argued in Point I, Dr. Wilder saw no reason to suspect organic brain damage and the Louisiana records reflect no history of seizures, brain trauma or physical problems. An MMPI was administered in 1979 which indicated he was non-psychotic and no brain damage was reported. EX C, Discharge summary 2/23/79, Central Louisiana State Hospital. Even if there was organic brain damage Dr. Wilder found that it did not impair his functioning upon evaluation and noted he spent time in the law library and discussed his case in legal terms (T 516).

The determination that Johnston was sane at the time of the offense is not seriously challenged and counsel cannot be deemed

ineffective in that regard. The likelihood of a successful insanity defense in this case was nil. Johnston recalled many facts earlier in the evening, the night of the murder, and was very specific as to time and who he was with (T 43). The room had deliberately been made to look like there was a struggle (T 198). Christine Warren testified that even if she was given permission to pursue an insanity defense she probably would not have anyway (T 198).

III. JOHNSTON WAS PROVIDED EFFECTIVE REPRESENTATION OF COUNSEL DURING THE PENALTY PHASE.

Johnston argues that he was denied effective representation of counsel during the penalty phase as counsel only conducted a limited investigation into his background and did not have him evaluated by a mental health expert for penalty phase mitigation. At the penalty phase counsel presented the testimony of two witnesses, Ken Cotter, an attorney who had represented Johnston on occasion and Corinne Johnston, Johnston's stepmother. No effort was made to produce the compelling mental health evidence of which counsel was aware or have an expert explain the importance of this evidence to the jury because Johnston did not want anything to do with mental health defenses. Counsel "blindly followed a crazy client's demands and failed to pursue the only plausible defense at the penalty phase." Dr. Fleming felt that Johnston was under the influence of extreme mental or emotional disturbance and under duress at the time of the murder, that his mental illness had gone untreated and that there is a pattern of schizophrenic symptoms beginning in adolescence and a consistent pattern of organic brain syndrome beginning at age two or three. Dr. Merikangas found Johnston to be psychotic since age seventeen, with brain damage from early childhood making him more susceptible to the effects of drugs, alcohol and stress. He felt that Johnston was under the influence of extreme mental or emotional disturbance at the time of the murder and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired because of delusional thinking and hallucinations. Also mitigating was the physical, emotional and sexual abuse throughout his childhood, lack of an education, brain damage, age, as he does not have the mind of an adult, and a family history of mental illness and incest. Johnston relies on family historical information provided by his aunt Charlene Benoit (T 1284-87) and his uncle Harvey Johnston (R 1290-92).

Johnston further complains that counsel made no objection to the introduction of evidence by the state in violation of Estelle v. Smith, 451 U.S. 454 (1981), and neglected due to ignorance to make an objection pursuant to Pait v. State, 112 So.2d 3809 (Fla. 1959) (T 104, 178).

At the penalty phase hearing counsel presented the testimony of an attorney, Kenneth J. Cotter, who had represented Johnston (R 1120). He disbursed Johnston's social security disability checks to him from an escrow account since Johnston was unable to administer his money (R 1124). He testified that

Johnston had tremendous mood swings and at times would seem relatively cheerful then be very depressed and cry (R 1124). He has had conversations with Johnston on the telephone in which Johnston started talking about things that didn't make sense (R 1129). Johnston left a message on his answering machine prior to his arrest and he seemed upset and wanted him to come down there right away (R 1127; 1130).

Counsel further presented the testimony of Johnston's step-mother, Corinne D. Johnston detailing the family background and the history of Johnston's mental problems (R 1131; 1132). She indicated that she had been married before and had four children (R 1132). Johnston comes from a family of six children (R 1133). About five and a half months after she and Mr. Johnston were married his children came to live with them, making ten children in the family (R 1132-1133). Johnston was the fourth child and, at that time, would be twenty-nine years old on his birthday (R 1134).

She further indicated that Johnston's real mother kept the children dirty, left them home alone, kept very little food in the house and the children sold coke bottles and things to take care of themselves (R 1134-1135). She described Johnston as a very nervous child who did not know how to play with other children. His mother would force him to sit for hours in front of a T.V. that was not on. She inflicted cuts and scratches on him and on one occasion slammed his head against a dresser causing an injury requiring several stitches (R 1136). She would feed the other children and not him (R 1137). His mother didn't

care about seeing him and would send him back when his father brought him over to visit with the other children (R 1142). When he was a year and a half old she held his head under water in the bathtub until he turned blue. His father also beat him during the period of a couple of years (R 1143-1144). On one occasion Johnston reported the abuse to the police but his father was actually in New Orleans at the time Johnston had inflicted the scratches on himself (R 1145). On another occasion Johnston told the neighbors that his father was dead and there was no food in the house, although the father was very much alive (R 1145-1146).

She described Johnston as a very disturbed child who could not function well. He was treated at the Monroe Health Center and seemed to improve when he took his medication (R 1137-1138), although his father thought that the medication was not helping, and Johnston eventually discontinued taking it (R 1140). She saw strange behavior. Johnston beat the stereo and tried to glue it back together with toothpaste. He cut a hole in his mattress and urinated in it. He would eat until he got sick and put food in his dressers (R 1138). He would dribble food when he ate and laugh for no reason (R 1139). His intellectual level was very low and he was sent to a special education school (R 1139-1140). He was admitted to Alexandria Mental Hospital a couple of times and the psychiatric unit at Conway Hospital seven or eight times. He would stay about a month and be released with the understanding that he would take medication but he never continued it. Dr. "Edison" at Conway Memorial Hospital felt that Johnston had a very bad mental disorder. Johnston also spent

time in the Leesville State Boys School where they tried medication and different things to help him (R 1141). Johnston receives a social security check on account of his mental disability (R 1146). Johnston had a very bad reaction to his father's death and blamed her for not giving him medication. He drank rat poison and almost died. Johnston used to tell her "I just need some help," even when he was small. His siblings are also troubled except for the youngest. In her opinion Johnston definitely has a mental disorder (R 1148). His mother wants no part of Johnston or the proceedings against him (R 1149).

She further testified that Johnston went to her mother's house every day. He would always help rake leaves, mow the yard and clean. He was always very nice to her mother. He was also very nice to his grandmother and older people in general (R 1147).

Dr. Pollack testified at the penalty phase in rebuttal that in his opinion Johnston was sane at the time of the offense, (R 1169) not suffering from an extreme mental or emotional disturbance and could appreciate the criminality of his conduct and conform his conduct to the requirements of the law (R 1170). He took into consideration the previous hospitalizations in Louisiana for mental disturbance (R 1170).

On the basis of the testimony presented at the penalty phase defense counsel was able to make compelling closing arguments that Johnston was acting under an emotional disturbance and couldn't appreciate the criminality of his conduct. Dr. Pollack's mental status examination and lack of testing were attacked as insufficient (R 118-129).

At the recent evidentiary hearing below counsel testified as to their strategy in penalty phase proceedings. Clyde Wolfe testified that Johnston maintained that he did not commit the offense and remembered where he was that evening until the time the police took him in for questioning (T 42). Johnston claimed that he came in after the offense had been committed by someone else and saw someone running away. This was consistent with the lack of blood spatter on Johnston's clothing. A line of defense was to try to persuade the jury that the victim's granddaughter in the next apartment had gotten someone to commit the offense for a possible inheritance (T 48). Christine Warren testified that there was a very real defense in terms of identification (T 182).

Counsel obtained the appointment of a third expert, a psychologist, Dr. Tell, who would have given Johnston psychological tests (T 37). They felt that they might have been able to persuade the two psychiatrists to change their opinions (T 149) and also wanted to secure a favorable opinion for the penalty phase (T 149; 161). Johnston, however, was defensive about his mental health history and did not want to reveal it (T 25). He did not even want counsel to put on evidence of his mental problems in the penalty phase as there was a defense as to identity (T 159). He did not want anything to do with a defense that would admit committing the offense in any way (T 45). Johnston refused to see Dr. Tell, although Dr. Tell attempted to see him on more than one occasion to discuss his circumstances with him and to administer tests (T 46).

Johnston's treating psychologist as a child could not appear in the penalty phase and testify as to Johnston's mental condition because he was dead (T 160). Johnston did not want his medical records to come into evidence (T 100) and counsel concurred in this decision since many of his hospital or psychiatric commitments were the result of arrests for various offenses for which he was not convicted and there was no need for the jury to learn that he had been in jail for most of his teenage years and early twenties (T 128; 160). Johnston had also been diagnosed in such records as an anti-social personality, which has a negative connotation that counsel did not want conveyed to the jury (T 129). A decision was made that in order to "maintain" Johnston and get this evidence in it would be best to rely on a family member to testify as to Johnston's family history and mental problems (T 100; 160).

Johnston's family, including his natural mother, did not want anything to do with him and were not inclined to assist in penalty phase proceedings (T 101; 120). Clyde Wolfe spoke on the telephone with Johnston's aunt, Charlene Benoit on November 29, 1983 and she refused to become involved in the penalty phase (T 120). Only Johnston's step-mother, Corinne Johnston, felt sorry for him and was concerned enough to want to help out (T 120). She testified as to Johnston's family background and mental health problems (T 99-100). She was the person most involved in the raising of Johnston, in any event, and had maintained contact with him over the years (T 119-120).

After hearing the testimony on this issue at the evidentiary hearing below, Judge Powell ruled as follows:

> It should be noted that trial counsel did call two witnesses, Ken Cotter, defendant's former attorney, and Corinne Johnston, his foster mother, to testify as to defendant's mental problems. The Court charged the jury on the two statutory mental health mitigating factors, and trial counsel argued them to the jury.
>
> Trial counsel were not asked at the evidentiary hearing why they did not present the Louisiana State Hospital records which had been in their possession. Given the negative aspects of those records, the fact that trial counsel were faced with the adverse reports of Drs. Wilder and Pollock, defendant's refusal to cooperate with Dr. Tell and the refusal of other members of defendant's family to assist at the time, I find their performance was reasonable and did not rise to the level of ineffective assistance of counsel.
>
> Further, I find that there is no reasonable possibility that the jury would have changed its vote to life imprisonment based upon the opinions of Dr. Marikangas and Dr. Fleming and the Louisiana State Hospital records together with the other hospital records obtained by CCR counsel. This is so because of the derogatory aspects of those records. The records are replete with references to defendant's arrest and convictions; his suicidal, homicidal and abnormal sexual tendencies; his combative, threatening and antisocial acts; his past drug and alcohol abuse; his dangerousness; and his psychiatric diagnoses ranging from schizophrenia to organic brain damage to antisocial personality. CCR counsel fails to make a distinction between admissibility and probative value. To the contrary, the negative aspects of the hospital records would explain why defendant was capable of committing such heinous crime, and would tend to show that he would be

> incapable of rehabilitation and might kill again. If anything, this evidence would have increased the jury's majority vote of death.
>
> Finally, I can unequivocally state that this evidence would not have changed the death sentence I imposed.

(R1 1683-1684).

It is clear that the choice by counsel to present or not to present evidence in mitigation at the sentencing phase of trial is a tactical decision properly within counsel's discretion. Gorham v. State, 521 So.2d 1067, 1070 (Fla. 1988). Here counsel could well have chosen to comply with Johnston's wishes and simply argued residual doubt of guilt to the jury at the penalty phase. See, Harich v. State, 484 So.2d 1239, 1240 (Fla. 1986). Counsel instead timely sought and scheduled examinations with Dr. Tell. By refusing to be examined by him Johnston effectively waived the presentation of mental health mitigating evidence at sentencing. See, Bertolotti v. State, 534 So.2d 386, 390 (Fla. 1988).

Counsel were undaunted in their representation of Johnston and were able to present evidence of his abused background and mental health problems to the jury without exposing his many incarcerations. His family history of abuse and lack of mental acumen were before the jury. Sexual abuse and a family history of mental illness and incest have hardly been established through the tendering below of affidavits from the same relatives who refused to involve themselves in the penalty phase and did not later appear at the evidentiary hearing. Such additional information would have had little persuasive power in view of the

horribly deprived background already painted for the jury. The Louisiana records contained accounts of Johnston's dull intelligence and possible organicity and such records did not change the opinions of the court-appointed psychiatrists. This is not a case such as Mason v. State, 489 So.2d 734 (Fla. 1986), or State v. Sireci, 536 So.2d 231 (Fla. 1988), which entailed psychiatric examinations so grossly insufficient that they ignored clear indications of either mental retardation or organic brain damage. Adding new and differing diagnoses of new experts to the hodge podge of existing diagnoses does not render prior evaluations incompetent.

It was never demonstrated below that an expert could have been found at the time of the penalty phase who would produce the internally inconsistent diagnosis that psychologist Fleming did in contradiction to the newly hypothesized theories of Dr. Merikangas and counsel is hardly required to shop around for the same, Elledge v. Dugger, 823 F.2d 1439 n.17 (11th Cir. 1987), although counsel attempted to do so in the form of Dr. Tell.

The facts of the case itself would preclude the finding of statutory mental health mitigators as someone with the mental acumen to arrange the room where the murder took place to look like there had been a struggle, report the murder, then continually attempt to explain away incriminating facts isn't acting out of emotional disturbance and appreciates the criminality of his actions.

Even had counsel undertaken the strategies now suggested in retrospect no demonstration has been made that they would have

been successful so as to demonstrate prejudice under Strickland v. Washington, 466 U.S. 668 (Fla. 1984).

Johnston opened the door by putting his mental health in issue and cannot complain of a violation of Estelle v. Smith, 451 U.S. 454 (1981), and counsel had no obligation to do so either.

As argued in Point XII herein the jurors were well aware of their responsibility in the penalty phase. Counsel was not ineffective for not objecting or requesting instructions not required under case law.

IV. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ARGUE THAT THERE WAS NO KNOWING AND INTELLIGENT WAIVER OF MIRANDA RIGHTS BECAUSE JOHNSTON'S MENTAL IMPAIRMENTS PRECLUDED HIM FROM COMPREHENDING AND VALIDLY WAIVING THOSE RIGHTS.

Johnston argues that there was no knowing and intelligent waiver of Miranda rights because his mental impairments precluded him from comprehending and validly waiving those rights and trial counsel was ineffective in not litigating this issue. Dr. Merikangas opined that Johnston was not competent to understand and voluntarily waive his Miranda rights based on his review of psychiatric records, court records reflecting Johnston's behavior at the time of the offense, and consultation with Dr. Fleming. Dr. Fleming reached the same conclusion. Johnston was upset and intoxicated during his initial encounter with law enforcement at the victim's home (R 492). He reported the murder of his grandmother but he had known Mary Hammond for less than two weeks. He was under increasing stress the longer he was incarcerated and during this time made other statements to the police. The statements reflect delusional thought processes and ignorance of his rights (TR of 1-25-84 statement at 19). Johnston was not afraid of getting electrocuted because "I done died before." (TR of 12-6-83 statement at 8). He had flashbacks and saw the devil when he looked in the mirror (TR of 1-25-84 statement at 2). The trial judge found Johnston incompetent to waive his sixth amendment right to counsel (T 69). Dr. Fleming found, based on testing, that Johnston would not understand the context of conversations and would misinterpret nuances. Counsel failed to obtain the assistance of a mental health expert in order to object to the admissibility of these statements and failed to know the law. A new trial must be ordered.

No police coercion or deception having been demonstrated below, Johnston's mental condition at the time of his statements to the police is not at issue. Colorado v. Connelly, 479 U.S. 157 (1986). Moreover, purely voluntary statements are not subject to Miranda safeguards. Miranda v. Arizona, 384 U.S. 436, 478 (1966). Johnston's free will was hardly interfered with by his mental condition when the statements given were all self-serving. Counsel had no duty to file a frivolous motion to suppress.

V. DEFENSE COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE BY FAILING TO INVESTIGATE JOHNSTON'S ALCOHOL, DRUG ABUSE AND ABNORMAL MENTAL CONDITION WHICH IS ALLEGED TO HAVE RENDERED HIM INCAPABLE OF FORMING SPECIFIC INTENT.

Johnston argues that defense counsel rendered ineffective assistance by failing to investigate his alcohol and drug abuse and abnormal mental condition which rendered him incapable of forming the requisite specific intent. Officer Kleir testified on cross-examination that when he spoke to Johnston at the scene of the crime Johnston was hysterical and exuded a strong odor of alcohol (R 566). Officer Mann corroborated that Johnston reeked of alcohol (R 576). Farron Martin, a former roommate of Johnston's testified that Johnston had drunk two pitchers of beer and fourteen six ounce bottles of champagne (R 699, 704). Jose Mena confirmed that he and Johnston had consumed both beer and champagne that evening (R 753, 756-57). Johnston told investigator Mundy that he was high on drugs at the time of the murder, apparently having ingested LSD, Blotter Acid, Blue Star and other arcane illegal substances (R 821). Martin testified that he had found a bag of pot in the clothes Johnston had been wearing a few hours before the incident occurred (R 710). The state argued in closing that Johnston stabbed the victim in the midst of a rage while he was hallucinating --all of which was induced by his illegal substance abuse (R 957, 973, 987, 988). The sentencing order acknowledged that Johnston had been drinking alcoholic beverages and taking LSD prior to the killing (R 1250). This court acknowledged that Johnston had been drinking that night and "testimony was forthcoming about appellant's heavy drug usage on the evening in question." Johnston v. State, 497 So.2d at 868. Records indicate Johnston was frequently diagnosed as abusing drugs and alcohol. Defense counsel never argued that Johnston could not have formed specific intent as a result of his alcohol or drug abuse although to convict an individual of premeditated murder there must be a specific intent to kill at the time of the offense. See, Gurganus v. State, 451 So.2d 817, 822-23 (Fla. 1984). Johnston was entitled to a defense built around his inability to form the requisite specific intent due to his intoxication. See, Cirack v. State, 201 So.2d 706 (Fla. 1967); Garner v. State, 28 Fla. 113, 9 So. 835 (1981). It is appropriate for mental health experts to testify in regard to the affects of substance abuse on a defendant's inability to form a specific intent. Defense counsel failed to develop and present this material as an exculpatory defense, if only to reduce the degree of culpability, or in mitigation. Brain damage and psychological deficiencies aggravated the effects of drugs and alcohol on Johnston's state of mind. In the opinion of Dr. Pat Fleming, Johnston was in a psychotic state at the time of the homicide and the alcohol and drug use that night would further intensify the behavior and thought process that were already present. Dr. Merikangas also felt that he was psychotic at the time of the offense which would

render him incapable of forming the required specific intent and the interplay of drugs and alcohol upon his damaged brain may have rendered him incapable of knowing right from wrong. An expert's testimony would have established that Johnston could not entertain the specific intent or state of mind essential to proof of first degree premeditated murder or felony murder due to an abnormal mental condition. Information from family members as to his abused background coupled with hospitalization records and expert testimony would have been compelling evidence to present to the jury. Such evidence would have given the jury a basis form which to find that at the time of the offense Johnston's mental incapacity precluded him from forming the specific intent to commit the crime of murder. Even if the jury had returned a verdict of murder in the first degree they would have returned a recommendation for a life sentence.

Judge Powell found that trial counsel's decision not to pursue a voluntary intoxication or diminished capacity defense was a reasonable trial strategy.

> I find that trial counsel's decision not to pursue defenses of insanity and voluntary intoxication in favor of the more plausible defense of reasonable doubt/identity of the killer was reasonable trial strategy and did not amount to ineffective assistance of counsel for the following reasons: (1) Counsel felt these other defenses were inconsistent with the more plausible defense; (2) defendant insisted he was innocent and that someone else committed the crime see, Harich v. State, 484 So.2d 1239, 1241 (Fla. 1986); (3) trial counsel was faced with the findings of the two court-appointed psychiatrists that defendant was sane at the time of the crime; (4) defendant refused to co-operate in or allow the presentation of the insanity defense because he feared placement in a mental hospital and thought he would be acquitted; (5) defendant refused to be evaluated by Dr. William Tell, a psychologist appointed by the Court to assist trial counsel in the defense; (6) trial counsel felt that the tactical advantage of having opening and closing arguments would be more beneficial; and (7) these other defenses were greatly contradicted by the other evidence, e.g., the unlawful entry, theft, the stolen items secreted on a

> nearby construction site where defendant had worked; defendant's reporting the finding of victim's body; and his making statements and sending the bogus "Sissy" confession in an attempt to focus police investigation on some other unidentified suspect. See Songer v. Wainwright, 733 F.2d 788 (11th Cir. 1986), rehearing denied en banc, 792 F.2d 1126; Thompson v. Wainwright, 784 F.2d 1103 (11th Cir. 1986); Foster v. Strickland, 517 F.Supp. 597 (N.D. Fla. 1981); Alvord v. Wainwright, 564 F.Supp. 459 (M.D. Fla. 1983). (citations included and added).

(R1 1682-1683).

The state cannot improve upon the reasoning of Judge Powell as to this issue.

VI. JOHNSTON WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE PHASE OF HIS TRIAL.

Johnston alleges a plethora of alleged instances where counsel rendered ineffective assistance. His allegations include the following.

Defense counsel failed to object to the admission of William's Rule testimony and failed to ask for curative instructions when such evidence was admitted. Counsel was also ineffective for having failed to move for a new trial concerning the specific testimony of a state's purported witness as to a Luminol test he performed. Defense counsel was totally ineffective in failing to be prepared to argue the Motion for New Trial at the sentencing hearing. Defense counsel did not even bring with them to court the material necessary to argue the motion on the date the hearing was scheduled. Defense counsel conceded that he was "not prepared to go forward with it." The court consequently summarily denied the motion (R 1037, 1235-37).

In preparing and presenting an appropriate defense, counsel was ineffective for having failed to request court appointed experts to aid them. Counsel knew the evidence would involve considerable forensic testimony and knew, or should have known, that experts would be needed to contest that testimony. A particularly controverted issue concerned blood spatter evidence and whether Johnston would have been covered with the victim's blood, if in fact he had killed her. Defense counsel tried to show through cross examination of the state's expert that if he had been the assailant he would have had blood plainly visible on him. Competent counsel would have retained an expert to present evidence which would have borne out their theory.

Another critical point was whether the assailant was right or left-handed. Dr. Hegert, the state's pathologist, opined that the assailant was left-handed (R 730). The police observed Johnston write and sign a waiver form using his right hand (R 500). Competent counsel would have obtained expert assistance relating to pathology, the phenomena of blood spatter and human motor activity in order to unravel the several pieces of conflicting circumstantial evidence. Defense counsel was also ineffective for failing to obtain the services of a serologist. Blood was found on several items and in several places in the home, including on Mr. Johnston himself (See R 507, 526, 532, 548, 639, 678). None of this blood was tested for blood type. A serologist could have examined the evidence containing blood, typed it. A forensics expert on footprint analysis and comparison was also needed for Johnston's defense. Footprints were found outside the broken kitchen window and in the adjacent lot. Casts were made of these footprints and photographs taken of them as well (R 508, 581, 629, 680, 682, 742). The one officer who made plaster casts did not compare them with Mr. Johnston's shoes (R 631). Another officer did compare his shoes to the photographs and the casts. His opinion was that based on "tread design, size and shape one track could have been made by the left shoe" (R 746) (emphasis added). The state later argued

the "seem[ing]" match to the jury. Defense counsel needed its own expert to rebut this damning piece of circumstantial evidence. Fourteen sets of fingerprints were found at the scene (R 691-92). None of these matched Mr. Johnston's prints. Defense counsel was ineffective for failing to obtain a fingerprint specialist to develop this exculpatory evidence, namely to determine to whom these prints matched. Finally, counsel was ineffective for not obtaining a forensics expert to examine and compare skin samples found under the fingernails of the victim as Johnston's flesh.

Defense counsel was also ineffective at voir dire. Counsel failed to question eight of the twelve petite jurors on any matter other than their views as to the death penalty. The trial court rendered counsel ineffective when it limited general voir dire to single day, curtailed any questioning in areas relating to lesser-included offenses restricted the time and scope of voir dire examination and when it precluded backstriking (R 152-53, 163, 167). Defense counsel was ineffective in failing to challenge certain jurors. For instance, Juror Gande clearly did not comprehend or agree with the presumption of innocence since she was concerned that Mr. Johnston might be released too soon, i.e. even before he had been tried and convicted. Juror Gande displayed confusion as to the burden of proof and as to the sentencing process (R 165). Juror Evett also did not understand the sentencing process (R 369-371). Juror Woods felt that the death penalty should apply to more crimes than just murder (R 223-235). And Woods and Wiggle indicated their opposition to alcohol (R 147, 150). Similarly counsel did not question or challenge Juror Blakely who had watched two news reports on television concerning this case. These broadcasts contained extensive details about the case as well as police and prosecutorial comments regarding Johnston's guilt. Blakely should have been either challenged for cause or peremptorily struck (R 26). Lastly, Juror Everhart, the victim of an extensive burglary with the case still pending, should have been challenged or struck as well (R 49-50). Defense counsel failed to even question eight jurors.

On direct appeal this court determined that the remark by Johnston's friend that he found a bag of marijuana in Johnston's clothes was not prejudicial in light of subsequent evidence regarding his drug usage on the evening in question. Johnston v. State, 497 So.2d 863, 868 (Fla. 1986). Any alleged prejudice which may have resulted from prior incarcerations was alleviated by curative instructions. 497 So.2d at 869. There is no need to revisit this issue in the guise of an ineffective assistance of

counsel claim when the prejudice prong of Strickland v. Washington, 466 U.S. 668 (1984), can not be met.

No prejudice can be demonstrated as to counsel's lack of preparation in arguing a motion for a new trial when direct review has been had by this court and no grounds for reversal found. This is a claim that never should have been raised.

Considering the scratches on Johnston's face; (R 706; 477; 780) household items found at the demolition site where Johnston claimed he worked; (R 673) his butterfly pendant entangled in the victim's hair; (R 726) his bloodstained watch found on the bathroom countertop; (R 745) and his various statements to the police, it is doubtful that forensic experts could have turned this case around. Since Johnston claimed to have found the victim there was no controversy as to the fact that he was in the house or had blood on him as to require the services of a serologist or fingerprint expert. The marks on the victim's throat were consistent with a left-handed assailant. One of Johnston's statements indicated he was right handed. Counsel felt that it was not necessary to put an expert on the stand as he could get that information out on cross examination without giving up opening and closing final argument (T 102). Testimony revealed, in any event, that the murderer could have been holding and strangling the victim with his right hand leaving the left hand free to produce stab wounds (T 729-730). Counsel's actions were not unreasonable under the circumstances of this case and no prejudice has been demonstrated. Cf. Adams v. Wainwright, 804 F.2d 1526, 1536 (11th Cir. 1986).

Counsel should have considerable leeway in voir dire in the picking and questioning of jurors since a cold record cannot reflect the empathy counsel may feel toward a particular juror. To the extent counsel is criticized for not asking enough questions, the court should be aware that counsel had already been provided background information about each juror (R 41). No prejudice has been demonstrated as to any actions during voir dire.

VII. THE CLAIM THAT THE "HEINOUS, ATROCIOUS OR CRUEL" STATUTORY AGGRAVATING CIRCUMSTANCE WAS APPLIED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS IS PROCEDURALLY BARRED.

Johnston next argues that the manner in which the jury and judge were allowed to consider the aggravating factor that the murder was "heinous, atrocious or cruel" provided for no genuine narrowing of the class of people eligible for the death penalty, because the terms were not defined in any fashion, and a reasonable juror could believe any murder to be heinous, atrocious or cruel. Johnston cites Maynard v. Cartwright, 108 U.S. 1853 (1988), for the proposition that jurors must be given adequate guidance as to what constitutes "especially heinous, atrocious, or cruel." Johnston further argues that the facts of this case are not controlled by Walton v. Arizona, 110 S.Ct. 3047 (1990), in which the Court held that the "especially heinous, cruel or depraved" aggravating circumstance, as construed by the Arizona Supreme Court, furnished sufficient guidance to the sentencer to satisfy the Eighth and Fourteenth Amendments, because Arizona's capital scheme did not provide for a jury in the penalty phase, whereas in Florida a jury in the penalty phase returns a verdict recommending a sentence, which verdict is binding unless no reasonable person could have reached the jury's conclusion. Analogizing Florida's jury override standard to the standard of review applicable to federal court habeas review of a state court's finding as to the application of its own aggravating circumstance articulated in Lewis v. Jeffers, 110 S.Ct. 3092 (1990), which is the "rational factfinder" standard,

under which a federal court must view evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found elements of the crime beyond a reasonable doubt, Johnston deduces that Florida reviewing courts cannot "replace" the jury as "sentencers." Johnston cites Hitchcock v. Dugger, 481 U.S. 393 (1987), Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988), Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) (in banc), and Hall v. State, 541 So.2d 1125 (Fla. 1989), in support of his argument that the jury in Florida actually is the sentencer, as long as a reasonable basis exists for its factual determinations.

The record in the penalty phase in this case reflects that no definition of "especially wicked, evil, atrocious or cruel" was given to the jury (R 1215-1221). The record does not reflect a request for the same or an objection to the instruction as given. On direct appeal Johnston contested the application of this aggravating circumstance but did not complain of the lack of a narrowing construction or definition although he did complain that the statute, section 921.141, Florida Statutes (1983), is unconstitutional on its face as the aggravating circumstances, including this particular one, are impermissibly vague and overbroad (Initial Brief of Appellant, p.15). This court found that the heinous, atrocious or cruel aggravating circumstance was properly applied in this instance in view of the medical examiner's testimony that the victim, an 84-year-old woman who had retired to bed for the evening, was strangled and stabbed three times completely through the neck and twice in the upper

chest and that it took the helpless victim three to five minutes to die after the knife wound severed the jugular vein and that the victim was in terror and experienced considerable pain during the murderous attack. In affirming the death sentence the court summarily rejected the challenge to the statute, as well. Johnston v. State, 497 So.2d 863, 865 (Fla. 1986). The claim that this aggravating circumstance is invalid under Maynard v. Cartwright, 108 U.S. 1853 (1988), as actually applied due to lack of limiting definitions, was first raised in the motion to vacate judgment and sentence. The trial court found this claim to be procedurally barred as one which could and should have been raised on direct appeal (R1 1679; 1687).

Applying past precedents of this court, to wit, Adams v. State, 543 So.2d 1244 (Fla. 1989), Harich v. State, 542 So.2d 980 (Fla. 1989), Henderson v. Dugger, 522 So.2d 835 (Fla. 1988), Squires v. Dugger, 564 So.2d 1074 (Fla. 1990) and Roberts v. State, 15 F.L.W. S450 (Fla. Sept. 6, 1990), it is clear that the trial court correctly found this claim to be procedurally barred as one that should have been raised on direct appeal. Perceiving the statute to be vague and overbroad, it is clear that a challenge could have been made at trial or on direct appeal to the lack of instruction or to this court's limiting construction of this aggravating factor. Any new basis for a challenge to this factor which was not raised on direct appeal should be procedurally barred. Roberts v. State, 15 F.L.W. S450, S451 (Fla. Sept. 6, 1990); Squires v. Dugger, 564 So.2d 1074, 1076 (Fla. 1990). Such instruction as in the present case does not

amount to fundamental error so as to obviate the need for objection at trial, Clark v. Dugger, 559 So.2d 192, 194 (Fla. 1990), and such claim is not susceptible to post conviction relief under Witt v. State, 387 So.2d 922 (Fla. 1980). 559 So.2d at 194; Porter v. Dugger, 559 So.2d 201 (Fla. 1990).

Moreover, Maynard, does not affect Florida's death sentencing procedures. Clark v. Dugger, 559 So.2d 192 (Fla. 1990). In Oklahoma the jury is the sentencer, while in Florida the jury gives an advisory opinion to the trial judge, who then passes sentence. The trial judge must make findings that support the determination of all aggravating and mitigating circumstances. Thus, it is possible to discern upon what facts the sentencer relied in deciding that a certain killing was heinous, atrocious, or cruel. Smalley v. State, 546 So.2d 720, 722 (Fla. 1989). When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facts of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face. That is the import of the holdings in Maynard and Godfrey v. Georgia, 446 U.S. 420 (1980). But the logic of those cases has no place in the context of sentencing by a trial judge. Trial judges are presumed to know the law and to apply it in making their decisions. Walton v. Arizona, 110 S.Ct. 3047, 3057 (1990). Even when the jury is not given a constitutional limiting definition of the challenged aggravating factor a state appellate court can apply a limiting definition of the aggravating circumstance to the facts

presented. This was not done in Maynard, which was crucial to the conclusion reached. Walton, 110 S.Ct. at 3057. The Supreme Court of Florida has restricted this circumstance to include only "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). It was because of this narrowing construction that the Supreme Court of the United States upheld the aggravating circumstance of heinous, atrocious or cruel against a specific eighth amendment vagueness challenge in Proffitt v. Florida, 428 U.S. 242 (1976). That Proffitt continues to be good law today is evident from Maynard, wherein the majority distinguished Florida's sentencing scheme from those of Georgia and Oklahoma, see, Maynard, 108 S.Ct. at 1859, and from Walton, wherein the majority noted that Arizona's construction is similar to the construction of Florida's "especially heinous, atrocious, or cruel" aggravating circumstance approved in Proffitt. See, Walton, 110 S.Ct. at 3058. This court recently indicated in Smalley v. State, 546 So.2d 720, 722 (Fla. 1989), that it has continued to limit the finding of heinous, atrocious or cruel to those conscienceless or pitiless crimes which are unnecessarily torturous to the victim. Since this court has narrowed the definition of the "especially heinous, atrocious or cruel" aggravating circumstance, it must be presumed that Florida trial judges are applying the narrower definition. It is irrelevant that the statute itself may not narrow the construction of the factor. Moreover, even if a trial judge fails to apply the narrowing construction or applies an improper construction, the

Constitution does not require that an appellate court vacate a death sentence. Such court may itself determine whether the evidence supports the existence of the aggravating circumstance as properly defined or may eliminate consideration of the factor altogether and determine whether any remaining aggravating circumstances are sufficient to warrant the death penalty. Walton, 110 S.Ct. at 3057. On direct appeal this court properly determined that this aggravating factor, as defined by limiting caselaw, was supported by the evidence. Johnston, 497 So.2d at 871.

There is no problem, as Johnston suggests, with Florida reviewing courts "replacing" the jury as "sentencer" because the jury is not the sentencer simply because their recommendation should be followed unless unreasonable. Cases recognizing the judge, not jury as sentencer in Florida are legion. See, Hildwin v. Florida, 109 S.Ct. 2055 (1989); Spaziano v. Florida, 468 U.S. 447 (1984); Proffitt v. Florida, 428 U.S. 242 (1976). Moreover, even if the jury was the sentencer, an appellate court could still determine whether the evidence supports the existence of the aggravating circumstance as properly defined. The jury is the sentencer in Oklahoma and in Maynard the judgment of the Court was without prejudice to further proceedings in the state courts for redetermination of the appropriate sentence since the Oklahoma reviewing courts had recently restricted the heinous, atrocious or cruel aggravating factor and decided that it would not necessarily set aside a death penalty where one of several aggravating factors was invalidated. Maynard, 108 S.Ct. at 1860.

VIII. THE CLAIM THAT JOHNSTON'S DEATH SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE IS PROCEDURALLY BARRED.

Johnston was indicted for first-degree premeditated murder, which also charges felony murder. He speculates that he was likely convicted of felony murder since the state argued for a conviction based on the felonies charged and argued that the victim was killed in the course of a felony and the jury received instructions on premeditated and felony murder and returned a verdict of first degree murder. Johnston argues that if felony murder was the basis of the conviction, then the subsequent death sentence is unlawful because it is predicated upon an unreliable automatic finding of a statutory aggravating circumstance -- the felony murder finding that formed the basis for conviction. According to Johnston, the sentencing jury was erroneously instructed that it was entitled automatically to return a death sentence upon its finding of guilt of first degree felony murder because the underlying felony justified a death sentence and the prosecutor erroneously argued to the jury that it should find Johnston guilty of felony murder and that, if so, the aggravation is automatic. Such instruction and argument is also erroneous because the jury did not receive an instruction explaining the limitation contained in Rembert v. State, 445 So.2d 337, 340 (Fla. 1984), and Proffitt v. State, 510 So.2d 896, 898 (Fla. 1987), that the aggravating circumstance of "in the course of a felony" is not sufficient by itself to justify a death sentence in a felony murder case. Johnston argues alternatively that

trial counsel rendered ineffective assistance because he did not object to the state's argument and did not request that the jury be instructed that if only the two automatic aggravating factors are found that an advisory opinion of life was required and that the automatic aggravating circumstance alone would render a death sentence violative of the Eighth Amendment.

The record reflects that in closing argument the prosecutor admonished the jury that "Again, the evidence as to the aggravating and mitigating circumstances was the testimony and physical pieces of evidence that were introduced during the hearing, and not my argument, and not the defense attorney's argument. Again, we are advocates at this point, and we're not introducing evidence." (R 1187). Addressing the aggravating factor in question, the prosecutor simply stated:

> The next aggravating circumstance, number three, is that the crime for which the defendant is to be sentenced was committed while he was engaged in the crime -- in the commission of the crime of burglary. And I would submit to you that if you recall the evidence that was presented during the trial, there was ample evidence to prove beyond every reasonable doubt that at the time the defendant committed the homicide in this case, he was engaged in the commission of a burglary. And I would submit to you that that aggravating factor has been proven beyond every reasonable doubt, and that it does exist in this case.

(R 1190).

After discussing the applicability of certain aggravating factors, the prosecutor told the jury "Now if you find that the aggravating circumstances exist, the state has proven them beyond

a reasonable doubt, then your next duty is to determine if mitigating factors exist. And if they do exist, then you must determine if these mitigating factors outweigh the aggravating factors in the case" (R 1195). After arguing against the applicability of mitigating factors, the prosecutor concluded:

> Now, the Court is going to tell you, and you need to understand that you don't just add the aggravating factors on one side and the mitigating on one side and see who has the most, and then make your recommendation in this case. The Court is going to instruct you as to how to consider these things. And I believe the Court is going to tell you that the first thing you must do is you must look to see if the State has proven the existence of any of the aggravating factors beyond a reasonable doubt. And if the State has, then you must see if there has been evidence presented to you to your satisfaction, that mitigating circumstances exist, and that they outweigh the aggravating circumstances. And I submit to you the important part of that definition is the mitigators have to outweigh the aggravators.

(R 1201).

Nowhere in the penalty phase transcript did the prosecutor exhort the jury to find Johnston guilty of felony murder or argue that aggravation is automatic, as Johnston states, while conveniently omitting record references. In fact, the prosecutor told the jury that this factor may not even be applicable as they cannot properly consider both factors that the murder was committed during a burglary and was committed for pecuniary gains, as it would be an improper doubling (R 1191).

The jury was first instructed in the penalty phase as follows:

> However, it is your duty to follow the law that will now be given to you, and to render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

(R 1215).

In regard to the aggravating circumstances in general and this aggravating factor in particular the jury was further instructed:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence. One, the defendant has been previously convicted of a felony involving the use or threat of violence to some person.
>
> ...Three, the crime for which the defendant is to be sentenced, was committed while he was engaged in the crime of burglary.

(R 1216).

The jury was further instructed "If you find the aggravating circumstances don't justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole for twenty-five years. Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances ..." (R 1217). Mitigating circumstances were then explained to the jury (R 1217-1218). The jury's recommendation to the court was explained as follows:

> The sentence that you recommend to the Court must be based upon the facts as you find them, from the evidence and

> the law. You should weigh the aggravating circumstances against the mitigating circumstances. And your advisory sentence must be based on these considerations.
>
> The procedure to be followed by the jury isn't a mere counting process of the number of aggravating circumstances and the number of mitigating circumstances, but rather a reasonable judgment as to which factual situation requires the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.

(R 1218-1219).

Nowhere in the penalty phase transcript was the jury ever instructed that it was entitled automatically to return a death sentence upon its finding of guilt of first degree (felony) murder because the underlying felony justified a death sentence. There was no reason for trial counsel to object to these instructions. The record does not reflect trial counsel asking the jury to be instructed that if only the two automatic aggravating factors are found that an advisory opinion of life was required or that the automatic aggravating circumstance alone would render a death sentence violative of the Eighth Amendment. From the absence of these particular instructions CCR seems to conclude that the instructions actually given are somehow flawed and do not really mean what they say.

On direct appeal Johnston argued that "Section 921.141(5)(d), Florida Statutes (1983), states that an aggravating circumstance may result if the person is involved in a felony murder. This circumstance is factually overbroad in that a capital felony committed during the enumerated felonies

contained within this section automatically produces an aggravating circumstance and thus carries with it a presumption of death without regard to the individual facts surrounding each case." (Initial Brief of Appellant, p.16). This court disagreed, finding a sentence of death appropriate, and summarily rejected this claim, which was raised on appeal only in a shotgun fashion. Johnston, 497 So.2d at 865.

The issue was raised anew in the motion to vacate below. The court below rejected the claim because it "fails to state a claim upon which relief can be granted because the contention is without legal merit." (R2 1687). This claim should have been rejected as either one which was raised and rejected on direct appeal, Roberts v. State, 15 F.L.W. S450 (Fla. Sept. 6, 1990); Squires v. Dugger, 564 So.2d 1074, 1077 (Fla. 1990), or preferably as one which should have been raised on direct appeal, see, Parker v. Dugger, 537 So.2d 969, 973 (Fla. 1989) and Bertolotti v. State, 534 So.2d 386, 387 n.3 (Fla. 1988), since the argument that the jury was improperly instructed could certainly have been raised in conjunction with the attack on the statute itself on direct appeal.

The claim is, furthermore, without legal merit, as Judge Powell noted. In Clark v. State, 443 So.2d 973, 978 (Fla. 1983), this court rejected the argument that the aggravating circumstance that the homicide occurred during the commission or attempted commission of a felony is unconstitutional in that it automatically mandates the death penalty upon conviction of felony murder in the absence of mitigating circumstances. The

court stated "We take this opportunity, however, to make abundantly clear our view that §921.141, Fla. Stat. does not unconstitutionally mandate the death penalty for felony murder and that it comports fully with the constitutional requirements of equal protection and due process, as well as the prohibition against cruel and unusual punishment. 443 So.2d at 978 n.2. See, also, Squires v. State, 450 So.2d 208 (Fla. 1984); White v. State, 403 So.2d 331 (Fla. 1981); Bertolotti v. State, 534 So.2d 386, 387 n.3 (Fla. 1988). The Supreme Court has recently rejected nearly identical claims in Lowenfield v. Phelps, 484 U.S. 231 (1988) and Blystone v. Pennsylvania, 110 S.Ct. 1078 (1990). Florida may narrow the class of death-eligible defendants at either the guilt phase or the penalty phase of capital trials. Moreover, consistently with the judge's instructions, the jury could have found Johnston guilty of felony murder and yet still not have concluded that the parallel aggravating circumstance justified the imposition of capital punishment; nor need the sentencing judge have agreed with the jury's determination that felony murder had been proven beyond a reasonable doubt. In no sense would a hypothesized jury verdict of felony murder automatically predestine the judge's imposition of Florida's highest penalty. See, Bertolotti v. Dugger, 883 F.2d 1503, 1527-28 (11th Cir. 1989).

In Rembert v. State, 445 So.2d 337, 340 (Fla. 1984), a considerable amount of nonstatutory mitigating evidence was introduced, although no mitigating circumstances were found by the trial judge. On appeal three aggravating factors were

stricken by this court, leaving only the aggravating factor that the murder occurred during the commission of a felony. At oral argument the state conceded that in similar circumstances many people receive a less severe sentence. Undertaking a proportionality analysis based on the facts and circumstances of the case, as compared with other first-degree murder cases, this court found the death penalty to be unwarranted. The death sentence in Proffitt v. State, 510 So.2d 896, 898 (Fla. 1987) was also vacated based solely on the conclusion that its imposition would be disproportionate. While the homicide in Proffitt occurred during a burglary, it was unaccompanied by any additional acts of abuse or torture to the victim and the defendant had no prior record of criminal or violent behavior. No blanket rule was adopted by this court in either of the two cases precluding the imposition of the death penalty upon a finding of this one aggravating factor alone. Moreover, the facts of both cases are clearly distinguishable from the present case as Johnston was previously convicted of felonies involving the use or threat of violence to the person and abused or tortured the victim to the point that the murder was heinous, atrocious or cruel and nothing was found in mitigation. Counsel can hardly be deemed ineffective in not seeking instructions based on these precedents. Johnston is actually seeking a second, hopeless, and improper proportionality analysis in the guise of an ineffective assistance of counsel claim.

IX. THE CLAIM THAT JOHNSTON'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS WERE DENIED BY IMPROPER CONSIDERATION OF THE VICTIM'S CHARACTER AND VICTIM IMPACT INFORMATION IS PROCEDURALLY BARRED.

During voir dire the court inquired of the jurors whether they knew anything about the case (R 18). Jurors Croft and Branch answered affirmatively (R 18; 21). These jurors were furthered questioned at the bench, <u>out of the hearing of the jury panel</u> (R 18). Juror Croft indicated that she learned of the case through the Orlando Sentinel (R 20) and knew that the woman was old, was stabbed and that her neighbor found her a day or so later (R 19). She formed an undesirable opinion because of the fact that she was "such an old lady" and indicated that she would have difficulty in any case where there was a woman of that age being killed. She was challenged and excused for cause (R 21). Juror Branch also read about the case in the newspaper. The crime happened two blocks from a women's club she belonged to (R 22). She was not sure she could put aside such information and decide a verdict on the basis of the evidence and the law particularly because of the proximity of her club to the scene of the murder because "just reading what has happened to the lady and that it was such a terrible thing that happened. I was real upset, you know, and I was emotional, and I hoped that they would catch him and do something with him." (R 23). She tended to feel that Johnston was guilty from the information she had (R 24). She was excused for cause (R 25). Juror Winslow read only one article in the newspaper indicating that "he was staying

there or something" although the article did not mention who was arrested and charged (R 29). Nevertheless, she was excused for cause on the basis that she had formed an opinion that Johnston was guilty (R 30-32). Juror Blakely saw coverage of the case twice on the T.V. news but formed no opinions about guilt or innocence (R 26). On the basis of a voir dire colloquy not heard by the remaining jurors pursuant to which all jurors with preconceived notions were excused, Johnston perceives an after-the-fact problem pursuant to Booth v. Maryland, 107 S.Ct. 2529 (1987).

Johnston further accused the prosecutor of setting up the jury's sympathy in the guilt phase by establishing that the victim was old and disabled. The record actually reflects, however, that "She was in pretty good condition. She used a cane most of the time to get around, but she was pretty good and could walk adequately." (R 469). The record reflects the lack of an objection. Based on this setting up of sympathy in the guilt phase the prosecutor allegedly honed in on the penalty phase pointing out that the victim was an eighty-six year old lady that couldn't defend herself, and asked the jury to examine the look in the victim's eyes in a photo introduced in the guilt phase in an effort to show terrible suffering and establish the aggravating factor that the murder was heinous, atrocious or cruel (R 1193-1194). The record reflects the lack of an objection. In closing the prosecutor stated "And one thing that we shouldn't forget is that Mary Hammond (the victim) had some rights, too." (R 1201). The court instructed the jury to

disregard this comment (R 1202). The prosecutor then asked the jurors to "do justice for everyone." (R 1202). Johnston cites Booth v. Maryland, 107 S.Ct. 2529 (1987), and South Carolina v. Gathers, 109 S.Ct. 2207 (1989), as mandating reversal as the sentencer was contaminated by victim impact evidence and argument. Further citing Caldwell v. Mississippi, 472 U.S. 320 (1985), Johnston argues that reversal is required because it cannot be said that this effort had no effect on the sentencing decision.

On direct appeal Johnston argued that the prosecutor's remark "And one thing you shouldn't forget is that Mary Hammond had some rights too" was an improper appeal to the jury for sympathy entitling Johnston to a new sentencing procedure with a different jury. (Initial Brief of Appellant, p.92). No argument was made concerning the excused jurors or the further argument of the prosecutor. This court in its opinion found this issue to be one which the record clearly reveals did not entitle Johnston to relief. Johnston v. State, 497 So.2d 863, 866 (Fla. 1986).

In his motion to vacate judgment and sentence Johnson argued, as he now does, that his rights under the Eighth and Fourteenth Amendments were denied by improper consideration of the victim's character and victim impact information. He also contended that insofar as defense counsel failed to object to these improper statements, their performances were ineffective (R1 1435-1438). The trial judge determined that such statements were not true "victim impact" statements, Booth did not apply and any objection would have been without merit. Judge Powell

further reasoned that trial counsel cannot be held to be ineffective by failing to anticipate the holdings of Booth and Scull v. State, 533 So.2d 1137 (Fla. 1988).Since Johnston has not briefed this claim in the context of an ineffective assistance of counsel claim on appeal from the denial of post conviction relief, that particular argument is waived. Duest v. Dugger, 555 So.2d 849 (Fla. 1990).

This claim should be considered procedurally barred since the crux of it was raised on direct appeal. Clark v. State, 460 So.2d 886, 888 (Fla. 1984); Meek v. State, 382 So.2d 673 (Fla. 1980). All tangential arguments should have been voiced at trial and raised on direct appeal, as well, and are now procedurally barred. A Booth claim must be preserved by a timely objection before the claim will be considered in a collateral proceeding. Roberts v. State, 15 F.L.W. S450, S452 (Fla. Sept. 6, 1990); Jackson v. Dugger, 547 So.2d 1197 (Fla. 1989); Eutzy v. State, 541 So.2d 1143, 1145 (Fla. 1989).

No relief would be warranted even if this claim could be considered. A jury cannot be expected to make a decision in a vacuum, it must be made aware of the underlying facts. Chandler v. State, 534 So.2d 701, 703 (Fla. 1988). Booth, does not preclude the admission of evidence regarding a victim's personal characteristics when relevant to the defendant's personal responsibility and moral guilt. 482 U.S. 507 n.10. Gathers, allows admission of a victim's personal characteristics when relevant to the circumstances of the crime or the defendant's moral culpability. Id. at 2210. Booth and Gathers have little

applicability in the guilt phase, particularly in voir dire where jurors with knowledge of the case are dismissed. See, Smith v. State, 15 F.L.W. S81 (Fla. Feb. 15, 1990). That the victim was elderly or unable to defend herself would certainly be relevant in the penalty phase as demonstrating the heinous, atrocious and cruel nature of the crime and in upholding the finding of that aggravating factor this court considered such, even comparing other cases involving elderly or frail victims. Johnston, 497 So.2d at 871. Judge Powell was correct in finding that such statements were not true "victim impact" statements.

X. THE CLAIM THAT THE SENTENCING COURT'S REFUSAL TO FIND MITIGATING CIRCUMSTANCES VIOLATED THE EIGHTH AMENDMENT AND DEMONSTRATED THAT THE JURY'S CONSIDERATION WAS SIMILARLY CONSTRAINED IS PROCEDURALLY BARRED.

Johnston alleges that the sentencing judge in this case found that no mitigating circumstances should be considered because they were not of sufficient weight. Finding three aggravating circumstances the court imposed death. Johnston argues that the court's conclusion that no mitigating circumstances were to be considered is belied by the record as statutory and nonstatutory mitigating circumstances were reflected in the trial and sentencing record and the state did not contest the mitigating evidence. Johnston acknowledges having raised this issue on direct appeal but argues this court should reconsider its decision based on Hitchcock v. Dugger, 107 S.Ct. 1821 (1987). According to Johnston, the court unconstitutionally restricted its consideration of the mental health mitigating evidence because it was not reasonably convinced the evidence was sufficient to fit within the pertinent statutory category and did not consider such evidence as nonstatutory mitigation. The court is said to have implicitly found the same as to the remaining categories. The evidence offered in support of the statutory mitigating circumstance that the defendant was under the influence of extreme mental or emotional disturbance at the time of the murder was that he had an argument with his fiance and was angry with a person who had been arrested for shoplifting in the convenience store where she

was working an hour or two before the murder. Evidence offered in support of the statutory mitigating circumstance that the capacity to conform one's conduct to the requirements of law was substantially impaired at the time of the killing was that Johnston had earlier been diagnosed as schizophrenic; that he had been admitted to mental institutions on a great number of occasions as he was growing up; that he was given to tremendous mood swings on occasions and that he told one of the officers that he had been drinking alcoholic beverages and taking LSD prior to the killing. The sentencing order reflects that the judge also considered other evidence offered relating to the character of the defendant: Mrs. Corrine Johnston, his stepmother, testified that he was the product of a broken home; was abused, neglected and rejected by his natural mother; was physically abused by his father several times; his father's death when he was eighteen years old greatly affected him; he has a very low IQ, did not do well in school and was mentally disturbed despite the mental health treatment he had received (R 2413-14). Johnston complains that this nonstatutory mitigating evidence was ignored as well.

On direct appeal Johnston complained that the mitigating circumstances enumerated in section 921.141(6), Florida Statutes (1983), are vague and overbroad as the qualifying adjectives used to describe the circumstances unconstitutionally limit the mitigating factors to be considered and foster an arbitrary application. (Initial Brief of Appellant, p.17). He further complained that there were at least four mitigating circumstances

that should have been recognized by the court that supported a sentence of life imprisonment: extreme mental or emotional disturbance based on LSD usage, schizophrenia, child abuse; age based on immaturity; and abuse and institutionalizations as nonstatutory mitigation. (Id. Pgs. 99-103). This court specifically held:

> The trial court has broad discretion in determining the applicability of the various mitigating circumstances, so long as all of the evidence and all of the mitigating circumstances are properly considered. As indicated by the sentencing order and the complete record of this case, the trial court fulfilled its obligation to consider all of the evidence and all of the mitigating circumstances. Nevertheless, we choose to address appellant's contention that four mitigating circumstances apply to his case.
>
> Appellant cites several factors to support his contention that the capital felony was committed while he was under the influence of extreme mental and emotional disturbance, section 921.141(6)(b), Florida Statutes (1983), and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. §921.141(6)(f), Fla.Stat. (1983). In support of both of these mitigating circumstances, appellant cites to his own admission that he took L.S.D. on the night of the murder and that he suffered from mental disorders. The trial court did not err in refusing to find that the taking of L.S.D. warrants mitigation in light of the fact that Johnston gave numerous statements full of discrepancies, and, in short, his credibility was rightfully questioned. Although evidence does exist to support a finding of mitigation pursuant to section 921.141(6)(b) and (f), the trial court properly considered all of the

> evidence, including past mental disorders, and did not err in failing to find that Johnston's actions reached the level required to find mitigation under subsections (6)(b)and (f). The trial court's finding is supported by competent, substantial evidence.
>
> Johnston's age, twenty-three years at the time of the murder, does not warrant a finding of age as a mitigating factor. §921.141(6)(g). Additionally, the trial court did not err in failing to find that appellant's history of being abused by his parents rose to the level of a non-statutory mitigating circumstance.

Johnston, 497 So.2d at 871.

Johnston subsequently advanced the argument he now makes in his motion to vacate judgment and sentence below. Judge Powell properly decided that the issue was raised and determined adversely to Johnston on appeal. He indicated in, any event, that he did consider the mitigating evidence offered but found it insufficient to outweigh the aggravating factors. He further indicated that he considered all of the mental health and deprived background evidence in the record before sentencing Johnston. After reconsidering this evidence and further considering the evidence at the evidentiary hearing, which he felt was in the main derogatory and not beneficial, Judge Powell was still of the view that death was the appropriate sentence (R1 1688).

The claim that a sentencing court refused to find mitigating circumstances supported by the record is procedurally barred where it was raised on direct appeal and is not cognizable on Rule 3.850 when it was not so raised, as such claim should be

properly raised by 3.850 motion. Atkins v. Dugger, 541 So.2d 1165, 1166 n.1(12) (Fla. 1989). A pure Hitchcock claim has been described as one in which efforts to introduce nonstatutory mitigating evidence were thwarted or both the judge and the jury were under the impression that nonstatutory mitigating evidence could not be considered. Adams v. State, 543 So.2d 1244, 1247 (Fla. 1989). Where the jury is properly instructed concerning nonstatutory mitigating evidence and there is no indication that the judge did not properly consider the nonstatutory mitigating evidence in his decision there is no Hitchcock claim. Preston v. State, 528 So.2d 896, 899 (Fla. 1988). In the present case the jury was specifically instructed that they could consider in mitigation "Any aspect of Johnston's character or record or any circumstance of the offense." (R 1218). This instruction is sufficient under Hitchcock. Jackson v. State, 530 So.2d 269, 273 (Fla. 1988). Judge Powell's sentencing order clearly indicates that he did consider all of the evidence presented, statutory and nonstatutory, in mitigation, (R 2414) contrary to Johnston's distortion of Judge Powell's language in the sentencing order. No where in such order does Judge Powell indicate he would not consider something in mitigation because it did not outweigh the aggravating factors or that he only considered evidence in the context of statutory mitigators. There being no Hitchcock claim there is no reason for revisiting an issue fully litigated on appeal.

The claim that even though the evidence concerning Johnston's mental and emotional condition did not rise to the

level of statutory mitigating circumstances, had it again been considered in a nonstatutory context the jury would have found it sufficient to recommend against death and the judge would have accepted the jury's recommendation is absurd in an event. See Booker v. Dugger, 520 So.2d 246, 249 (Fla. 1988). Even the most horrible background does not call for a life sentence when it is not connected in a causal way to the crime and the statutory mental mitigating factors embody such causality. Factors outside of that pertaining to mental status have little mitigating force. Even upon reconsideration Judge Powell would sentence Johnston to death (R 1 1688). It is also clear that this court on direct review considered all potentially mitigating circumstances. See, White v. Dugger, 523 So.2d 140, 141 (Fla. 1988).

XI. THE CLAIM THAT THE SHIFTING OF THE BURDEN OF PROOF IN THE JURY INSTRUCTIONS AT SENTENCING DEPRIVED JOHNSTON OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS IS PROCEDURALLY BARRED.

Johnston cites State v. Dixon, 283 So.2d 1 (Fla. 1973), as demanding that a capital sentencing jury be told that the state must establish the existence of one or more aggravating circumstances before the death penalty can be imposed and that such sentence could be given if the state showed the aggravating circumstances outweighed the mitigating circumstances. He alleges that in this case the burden was shifted to him on the question of whether he should live or die in violation of Hitchcock v. Dugger, 107 S.Ct. 1821 (1987), and Maynard v. Cartwright, 108 S.Ct. 1853 (1988), which requires that a jury be instructed in accordance with eighth amendment principles which forbids a court from injecting misleading and irrelevant factors into the sentencing determination. Johnston further alleges that the judge's sentencing order reflects that he only considered mitigation to the extent that it outweighed aggravation, as does his order denying 3.850 relief. Johnston recognizes that the Supreme Court held in Walton v. Arizona, 110 S.Ct. 3047 (1990), that the Eighth Amendment does not preclude a state from placing the burden on the defendant to prove mitigation outweighs aggravation but argues that Florida law requires the aggravation to outweigh the mitigation, citing Arango v. State, 411 So.2d 172 (Fla. 1982). In the present case the jury was instructed as follows:

...However, it is your duty to follow the law that will now be given to you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist. (R 1215).

If you find the aggravating circumstances don't justify the death penalty, your advisory sentence should be one of life imprisonment without the possibility of parole for 25 years.

Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances. (R 1217).

Now, each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision. If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances, and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.

A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.

The sentence that you recommend to the Court must be based on the facts as you find them, from the evidence and from the law. You should weigh the aggravating circumstances against the mitigating circumstances. And your advisory sentence must be based on these considerations. (R 1218).

The procedure to be followed by the jury isn't a mere counting process of the number of aggravating circumstances and the number of mitigating circumstances, but rather a reasonable

> judgment as to which factual situation requires the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present. (R 1219).

At the conclusion of the Sentence of Death; Findings in Support Thereof and Advisement of Right to Appeal the trial judge concluded "In summary, I find that three aggravating factors exist and no mitigating factors exist which would outweigh them; consequently, under the evidence and the law of this State a sentence of death is mandated." (R 2414). No objection was made to the jury instructions as given (R 1161-1164; 1215-1222) or to the sentencing order. This claim was not raised on direct appeal.

This court has consistently held that this claim is not cognizable in a Rule 3.850 proceeding. Roberts v. State, 15 F.L.W. S450 (Fla. Sept. 6, 1990); Bolender v. Dugger, 564 So.2d 1057 (Fla. 1990); Buenoano v. Dugger, 559 So.2d 1116 (Fla. 1990); Correll v. Dugger, 558 So.2d 422 (Fla. 1990); Hill v. Dugger, 556 So.2d 1385 (Fla. 1990); Parker v. Dugger, 550 So.2d 459 (Fla. 1989); Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989); and Henderson v. Dugger, 522 So.2d 835 (Fla. 1988). Roberts and Correll both involve situations in which the court found a claim involving the sentencing order to be procedurally barred. This claim is, clearly, procedurally barred. Since Walton authorizes the placing of the burden on the defendant to prove mitigation outweighs aggravation, no eighth amendment claim is present and the question is solely one of whether state law was followed. The issue could clearly have been raised at trial and on direct appeal on the basis of Arango.

Even in the event this claim is not procedurally barred, no relief is warranted. This claim has previously been rejected on its merits, Preston v. State, 531 So.2d 154, 160 (Fla. 1988), and properly so. The instructions given to the jury must be looked at as a whole and the focus must be upon the manner in which a reasonable juror could have interpreted the instructions. California v. Brown, 107 S.Ct. 837 (1987); Francis v. Franklin, 471 U.S. 307 (1985). The jury was first informed that sufficient aggravating circumstances must exist to impose death. The jury could certainly not have believed they could recommend death in the absence of at least one aggravating factor, and in fact were instructed that one or more aggravating factors need be established before even considering mitigating factors. They were then told that insufficient aggravating circumstances demand a life recommendation. Thus, the jury could (1) find no factors at all in aggravation and recommend life or (2) find factors in aggravation that they consider weak and recommend life without weighing factors in mitigation at all or (3) be inclined on the facts of the case toward a life recommendation and find even strong factors in aggravation insufficient.

This is the only view that can be taken of this instruction since the jury was also instructed that aggravating circumstances must be proven beyond a reasonable doubt, thus, the requirement of "sufficient" aggravating circumstances does not refer to an aggravating factor being proven or to the fact the circumstance is statutorily enumerated as aggravating but must necessarily speak to the jurors own subjective idea of what acts mandate

sentences of death and life. At this point in time, the onus is clearly on the state for the jurors are examining the sufficiency of the state's case in aggravation and can ab initio opt for a life recommendation without even undertaking a weighing process.

The jury was then instructed that even if they find sufficient aggravating circumstances, they may be outweighed by mitigating circumstances. This is no more than telling the jury that even sufficient aggravating factors may not be enough to impose death and the onus is still on the state. The jurors were then told to give the mitigating circumstance whatever weight they felt they deserved. If "weighing" may be equated with "burden of Proof", then under these circumstances the jury was given carte blanche to return a life recommendation and if any presumption at all was created, it was in favor of a life recommendation.

Johnston's argument is simply a semantic quarreling over where the word "outweigh" should be placed; which argument is baseless since the weight accorded each circumstance in aggravation and mitigation is predeterminative of the "weighing" outcome and the result would be no different if the jury was instructed that the "aggravating factors must outweigh the mitigating." Considering the fact that heavy weight may be placed on mitigating factors, the instruction is slanted toward a life recommendation. In this case the jury was last instructed: "You should weigh the aggravating circumstances against the mitigating circumstances" (R 2214) and no reference to "outweighing" was even made. This instruction is clearly not burden shifting under Arango.

XII. THE CLAIM THAT THE SENTENCING JURY WAS MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS IS PROCEDURALLY BARRED; THE CLAIM THAT COUNSEL WAS INEFFECTIVE IN FAILING TO LITIGATE THIS ISSUE IS WITHOUT MERIT.

Johnston contends that throughout his trial, the judge and prosecutor frequently made statements about the difference between the jurors' responsibility at the sentencing phase. In preliminary instructions to the jury in the penalty phase the judge is alleged to have emphatically told the jury that the decision as to punishment was his alone and after closing arguments reminded the jury of the instruction they had already received regarding their lack of responsibility for sentencing but that the formality of a recommendation was required. Johnston argues that these statements violate Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) (in banc), and Caldwell v. Mississippi, 472 U.S. 320 (1985), and that the failure to object should be excused as Hitchcock v. Dugger, 107 S.Ct. 1821 (1987), which held that instructions for the sentencing jury in Florida are governed by the Eighth Amendment is a retroactive change in law.

The record reflects that during voir dire the prosecutor explained, without objection, that the jury renders an advisory sentence to the court and the court then sentences the defendant to either life imprisonment or the death penalty and is not bound by the jury's recommendation (R 159; 187-188; 216-17; 235; 251;

320-323; 352-253; 370; 382; 409) and that it is the court, not the jury that imposes sentence. Defense counsel advised the jurors, however, that their recommendation carries a great deal of weight (R 190; 238; 246; 385; 413), as did the prosecutor on several occasions (R 251; 322), as well as the court itself (R 370). At the beginning of the penalty phase the jury was instructed "...as I said earlier, the final decision as to what punishment shall be imposed rests solely with me as the Judge of this court. However, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the defendant." (R 1099). In closing argument the prosecutor told the jury "And, also, remember that as we talked about at the beginning of the trial, the jury isn't responsible for the sentence that is ultimately imposed in this case or any other case. That's up to the Court. Also, remember the recommendation you make to Judge Powell will carry great weight and consideration. But the ultimate sentence in the case is up to the Court" (R 1188). Defense counsel in closing argument explained to the jury that "In the death penalty phase of the case, we are here to consider whether or not you should recommend to the Judge that David Johnston be sentenced to die. This is a serious burden that you have, a serious duty that you have. And it's serious, not only because it's difficult and serious to make that kind of decision about anyone, but also because whatever recommendations you make will carry great weight with the judge. The final decision will be his and his alone. But he will take into close consideration your recommendation in the case." (R 1203). The jury was lastly instructed by the judge as follows:

... All right. Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the defendant for his crime of murder in the first degree.

As you have been told, the final decision as to what punishment shall be imposed is the responsibility of myself as Judge of this court.

However, it is your duty to follow the law that will not be given to you, and to render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstance found to exist. (R 1215).

* * *

The sentence that you recommend to the Court must be based upon the facts as you find them, from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstance. And your advisory sentence must be based on these considerations. (R 1218).

* * *

The procedure to be followed by the jury isn't a mere counting process of the number of aggravating circumstances and the number of mitigating circumstances, but rather a reasonable judgment as to which factual situation requires the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present. (R 1219).

* * *

Before you ballot, you should carefully weigh, assist [sic] and consider the evidence, all of it, realizing that a human life is at stake and bring your best judgment to bear in reaching your advisory sentence. (R 1219).

No objection was interposed to the instructions as given (R 1222). No request for alternate instructions was made (R 2379-2380). The issue was not raised on direct appeal. The claim was raised for the first time in the Rule 3.850 motion below. Judge Powell found the claim procedurally barred for failure to raise it on appeal (R1 1686).

It is clear that the sort of claim is procedurally barred from consideration in a Rule 3.850 proceeding. Such claim should be objected to at trial and raised on direct appeal. Roberts v. State, 15 F.L.W. S450 (Fla. Sept. 6, 1990); Buenoano v. Dugger, 559 So.2d 1116 (Fla. 1990); Correll v. Dugger, 558 So.2d 422 (Fla. 1990).

Counsel can hardly be considered ineffective for not objecting to the prosecutor's comments during voir dire since addressing the issue on voir dire increased the probability that jurors opposed to the death penalty would be empaneled, see, Stewart v. Dugger, 847 F.2d 1486 (11th Cir. 1988), and counsel did inform the jurors, where she felt appropriate, that their recommendation was entitled to great weight. Moreover, there is no requirement that the jury receive a special instruction during the penalty phase stressing the extreme importance of the jury's advisory recommendation as the standard jury instructions accurately reflect Florida law. Owen v. State, 560 So.2d 207, 212 (Fla. 1990); Combs v. State, 525 So.2d 853 (Fla. 1988). See also, Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988). The judge is required to make an independent determination of the sentence based on the aggravating and mitigating factors

notwithstanding the jury's recommendation. Grossman v. State, 525 So.2d 833, 840 (Fla. 1988). Caldwell, stands only for the proposition that the constitution is violated if the jury receives erroneous information that denigrates its role. Banda v. State, 536 So.2d 221, 224 (Fla. 1988). Since the jury did not receive erroneous information counsel can hardly be considered ineffective in not objecting to the instructions. In Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988), the prosecutor told the jury in closing argument that the imposition of the death penalty was "not on your shoulders." In the present case the prosecutor told them their recommendation "would carry great weight," as did defense counsel. Counsel can hardly be deemed ineffective for not making a frivolous objection to the prosecutor's closing argument.

XIII. THE ARGUMENT THAT IMPROPER CONSIDERATION OF A PRIOR CONVICTION NOT ADEQUATELY TIED TO JOHNSTON DENIED HIM HIS RIGHT TO AN INDIVIDUALIZED SENTENCING IS PROCEDURALLY BARRED. THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IS WITHOUT MERIT.

The trial court used two convictions to find the aggravating factor of a prior violent felony, battery upon a corrections officer in Florida in 1982 and a terroristic threat in Kansas in 1986. Johnston argues, based on Forehand v. State, 537 So.2d 103 (Fla. 1989), that the terroristic threat could not be used in evidence at the penalty phase as a prior violent felony as there was no corresponding Florida statute and the situation involved only a communication of a threat to do violence with no inherent ability on Johnston's part to be able to carry out such threat. While it was a felony in Kansas, Johnston had only been placed on one year's unsupervised probation and in Florida such crime would most likely be only a first degree misdemeanor. Defense counsel objected to the introduction of this conviction and asked that it not be published to the jury, which objection was overruled. After speaking with her client, there was no question in counsel's mind that Johnston had been convicted of this crime and she stipulated to Johnston's identity for purposes of this conviction. Because officer Tony Higgins from Kansas who was brought by the state to testify to this incident was unable to identify Johnston in the courtroom it is argued that counsel should have objected or argued the point and was ineffective under Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989), and Lewis v. Lane, 832 F.2d 1446 (7th

Cir. 1987). Although Johnston admits that the court could still have found a prior violent felony existed, he argues that the weight given to that aggravating circumstance would have been lessened both in the jury's mind and the court's. On direct appeal Johnston admitted that the trial court was justified in finding, as an aggravating circumstance, that he was previously convicted of a felony involving the use or threat of violence to the person but contended that this factor, standing alone, was insufficient to support a sentence of death because neither of the two felony convictions resulted in harm to the intended victim. (Initial Brief of Appellant, P. 96). This court noted that this was not the only legitimate aggravating circumstance and held that resultant harm, or lack thereof, to the intended victim of a violent felony is an irrelevant consideration and that, in addition, the two prior felony convictions are both felonies involving the use or threat of violence to the person. Johnston v. State, 497 So.2d at 871. Nowhere was the argument made that such factor was invalid for lack of a corresponding Florida statute and appellate counsel joined trial counsel in acknowledging that Johnston had been convicted of such crime. The issue was first raised in this context below in the Rule 3.850 motion. Judge Powell determined that because Johnston admitted on appeal that he was properly convicted of a felony involving the threat of violence to a person he was procedurally barred and estopped from raising the claim in a Rule 3.850 motion (R1 168).

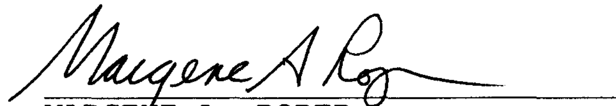
Judge Powell was correct in finding this issue procedurally barred. Such issue should be raised on direct appeal, see, Henderson v. Dugger, 522 So.2d 835, 836 (Fla. 1988). The prior felony conviction still stands and the issue is not even ripe for review. See, Buenoano v. Dugger, 559 So.2d 1116 (Fla. 1990). Forehand, is a sentencing guidelines case dealing only with the construction of parallel statutes for purposes of scoring a past conviction as a life felony. There is no requirement of an analogous Florida statute for purposes of finding this factor in aggravation. In any event Johnston is not entitled to relief where there is another valid prior violent felony. Bundy v. State, 538 So.2d 445, 447 (Fla. 1989). Johnston does not even now argue that he actually did not commit the prior felony, only that counsel should have so argued. Such argument is without merit.

CONCLUSION

For the above and foregoing reasons the appellee respectfully prays this honorable court affirm the order denying post conviction relief.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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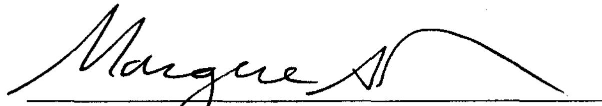
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has been furnished by U.S. Mail to Martin J. McClain, 28 East Broadway Village Drive, Columbia, Missouri 65201, this 5th day of November, 1990.



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