IN THE SUPREME COURT OF FLORIDA



IAN LIGHTBOURNE,

Petitioner,

vs.

CASE NO. 73609

RICHARD L. DUGGER, Secretary
Department of Corrections,
State of Florida,

Respondent.

_____/

RESPONSE TO PETITION FOR EXTRAORDINARY RELIEF AND PETITION FOR WRIT OF HABEAS CORPUS, ETC.

COMES NOW respondent, Richard L. Dugger, by and through the undersigned counsel, pursuant to Florida Rule of Appellate Procedure 9.100(h), and files the instant response to Lightbourne's Petition for Extraordinary Relief, Petition for Writ of Habeas Corpus, Request For Stay of Execution, And Application For Stay of Execution Pending Disposition of Petition For Writ of Certiorari, filed on or about January 27, 1989, and moves this honorable court to deny all requested relief for the reasons set forth in the instant pleading.

**PRELIMINARY STATEMENT**

Lightbourne was convicted of one count of first degree murder on April 21, 1981, in the Circuit Court of the Fifth Judicial Circuit, in and for Marion County, Florida, following a trial by jury; following a separate sentencing proceeding on May 1, 1981, he was sentenced to death. Lightbourne appealed such judgment and sentence to this court, in an appeal styled Lightbourne v. State, FSC Case No. 60,871, and in his initial brief filed December 24, 1981, raised ten (10) claims, including an attack upon the sentence of death; Lightbourne expressly attacked the finding of all five aggravating circumstances and further contended that a third mitigating circumstance should have been found and that life was the appropriate sentence. This court affirmed Lightbourne's conviction and sentence in all

respects on September 25, 1983. See, Lightbourne v. State, 438 So.2d 380 (Fla. 1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984).

Following the signing of his first death warrant, Lightbourne filed what was construed as a motion for post-conviction relief, pursuant to Florida Rule of Criminal Procedure 3.850, in the circuit court on May 31, 1985, in which he raised seven (7) claims for relief, including an allegation of ineffective assistance of counsel for failing to investigate and present background information in mitigation. The motion was summarily denied by the circuit court and, on June 3, 1985, this court affirmed such ruling. See, Lightbourne v. State, 471 So.2d 27 (1985). In the course of doing so, inter alia, this court found that the allegedly - unpresented evidence in mitigation had in fact been before the sentencing judge in the form of the presentence investigation; accordingly, there was no prejudicial ineffective assistance of counsel. Lightbourne then filed a petition for writ of habeas corpus in the federal district court, and such petition was denied in 1986. The next year, the Eleventh Circuit Court of Appeals affirmed such ruling, finding, inter alia, that ineffective assistance of counsel had not been demonstrated, because, through the presentence investigation report, the sentencing judge had been aware of much of the evidence in mitigation allegedly not presented. See, Lightbourne v. Dugger, 829 F.2d 1012, 1026-7 (11th Cir. 1987), cert. denied, ___ U.S. ___, 109 S.Ct. 329 (1988).

On January 6, 1989, Governor Martinez signed a second death warrant for Lightbourne, such warrant effective between **noon, January 31, 1989 and noon, February 7, 1989, with execution scheduled for 7:00 a.m. on February 1, 1989.** On January 27, 1989, Lightbourne filed the instant petition in this court which raises the following claims for relief: (1) ineffective assistance of appellate counsel for failing to brief a claim that the sentencing court allegedly failed to allow Lightbourne to present evidence in mitigation, as well as an alternative allegation on the merits based upon Hitchcock v. Dugger, 481 U.S.

393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); (2) ineffective assistance of appellate counsel for failing to brief a claim that the judge had failed to independently weigh aggravating and mitigating circumstances before imposing sentence; (3) a claim that Lightbourne's sentence must be vacated because the jury was instructed on "duplicitous" aggravating circumstances; (4) a claim that Lightbourne's sentence must be vacated because the heinous, atrocious or cruel aggravating circumstance has been applied arbitrarily, in violation of Maynard v. Cartwright, ___ U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); (5) a claim that Lightbourne's sentence must be vacated because the cold, calculated and premeditated aggravating circumstance has been applied arbitrarily, in violation of Maynard v. Cartwright, ___ U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); (6) a claim that Lightbourne's sentence must be vacated because through argument, instruction and comment, his jury was misled as to its role in sentencing, in violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985); (7) a claim that Lightbourne's sentence must be vacated because the penalty phase instructions could have been read as requiring the mitigating circumstances to be proven beyond a reasonable doubt, in violation of Hitchcock and Mills v. Maryland, ___ U.S. ___, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988); (8) a claim that Lightbourne's sentence must be vacated because the jury instructions unconstitutionally shifted the burden of proof to the defense to prove mitigationin violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) and Mills v. Maryland, ___ U.S. ___, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988) and (9) a claim that Lightbourne's sentence must be vacated because the jury instructions did not expressly state that only six votes were required for a life recommendation, in violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) and Mills v. Maryland, ___ U.S. ___, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988).

**THE INSTANT PETITION FOR WRIT OF HABEAS CORPUS SHOULD BE DENIED, IN THAT LIGHTBOURNE HAS FAILED TO DEMONSTRATE THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL; ALL OTHER CLAIMS ARE IMPROPERLY PRESENTED AND ARE PROCEDURALLY BARRED**

Of the nine (9) claims presented, all except the first two raising ineffective assistance of appellate counsel are improperly raised, in that they represent matters which could and should have been raised on direct appeal, or which were not preserved through objection at trial. This court has consistently held that a petition for writ of habeas corpus is not a substitute for appeal or an opportunity to relitigate issues previously raised, and rejected, therein. See, e.g., Suarez v. Dugger, 527 So.2d 190 (Fla. 1988); Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987); Copeland v. Wainwright, 505 So.2d 425 (Fla. 1987). Apparently, the admonition which this court delivered in White v. Dugger, 511 So.2d 554, 555 (Fla. 1987), has fallen upon deaf ears,

> **We point again to the office of the collateral counsel that habeas corpus is not a vehicle for obtaining additional appeals of issues which were raised, or should have been raised, on direct appeal or which were waived at trial or which could have, should have, or have been raised in Rule 3.850 proceedings.**

Just as in White, the instant "eleventh hour petition is an abuse of process." This court recently again reminded petitioners that applications for writ of habeas corpus would not be entertained if it appeared that the applicant had failed to apply for relief by motion to the court which had sentenced him. See, Parker v. Dugger, 13 F.L.W. 695 (Fla. December 1, 1988). The instant petition was filed in direct contravention of the above precedents, and, as in White, would seem to represent an impermissible attempt to "end-run" the bar against successive post-conviction motions filed under Rule 3.850. This seems especially true, given the fact that all of Lightbourne's "change

in law" arguments clearly should have been presented in accordance with Witt v. State, 387 So.2d 922 (Fla. 1980). The state respectfully suggests that this court utilize the instant case to condemn this flagrant abuse of the writ. In any event, the state will briefly address all claims raised:

> **CLAIM I:** LIGHTBOURNE'S CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IN REGARD TO COUNSEL'S FAILURE TO RAISE AN ALLEGED VIOLATION OF LOCKETT V. OHIO, 438 U.S 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) ON APPEAL.

In this claim, Lightbourne argues that he is entitled to relief because his appellate counsel failed to brief an issue on appeal concerning the trial court's refusal to allow defense counsel to formally introduce the presentence investigation report into evidence at the penalty phase. Lightbourne contends that his appellate counsel should have argued that this ruling violated Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Lightbourne also contends that this claim is properly presented as a "merits" issue, because such ruling also violated Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), which has been held to constitute a change in law.

Lightbourne merits no relief on this claim, and the state respectfully questions the extent to which a true Hitchcock claim is presented. The record reflects that after the defense had rested and after the jury had been instructed, defense counsel asked the judge if the "factual portion" of the presentence investigation report could "go back" to the jury (R 1495). The prosecutor pointed out that this report was "not subject to evidence in court", and Judge Swigert denied the request on the grounds that the report was hearsay; he subsequently denied Lightbourne's subsequent request to allow all of the presentence investigation report, including the confidential section, to "go back" to the jury (R 1495-6). Appellate counsel did not render ineffective assistance in failing to raise any "point" in this regard in Lightbourne's appeal in this court. There exists no likelihood that this court would have afforded relief on this

basis or any reasonable probability that the result of the appeal would have been different had he chosen to do so, a showing which Lightbourne must make in order to merit relief under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). See also, Thomas v. Wainwright, 495 So.2d 172 (Fla. 1986) (no deficient performance of appellate counsel where counsel omits particular legal argument which would, in all probability have been found to be without merit).

First of all, there remain a number of problems with Lightbourne's potential point on appeal. He cites no precedent for his position that a presentence investigation report is admissible at a penalty phase proceeding. Obviously, all legislative intent in this area would seem to be directly to the contrary, in that such document is intended solely for the judge and accessible solely to others with specific authorization. See, e.g., Fla. R. Crim. P. 3.712, 3.713. Secondly, even if such report were admissible, it is questionable whether defense counsel at Lightbourne's sentencing did a proper job in moving its admission. Defense counsel never moved to admit the report as a defense exhibit during the defense case and rested without making any reference to it (R 1453-6). It was only after both counsel had given their closing arguments and the jury had been instructed that defense counsel made his request. No doubt the judge would have been authorized in denying Lightbourne's motion on the basis of untimeliness alone, and it would appear that in raising the point on appeal, appellate counsel would have to demonstrate an abuse of discretion, something which would not be likely given this court's precedents. See, e.g., Stewart v. State, 420 So.2d 862 (Fla. 1982) (no abuse of discretion in denying defense request to reopen case at penalty phase with evidence which would allegedly have shown defendant's remorse). In any event, given the untimeliness of the request, it would seem that appellate counsel would have a potential procedural bar to overcome in this regard. Cf. Routly v. Wainwright, 502 So.2d 901 (Fla. 1987) (appellate counsel not ineffective for failing to raise procedurally barred issue).

One must note that appellate counsel would also have been at something of a disadvantage in seeking to raise this claim. As this court noted in Thomas v. Wainwright, 495 So.2d 172 (Fla. 1986), presentence investigation reports are typically not contained in the court file for inclusion in the record on appeal; in Thomas, this court expressly held that it was not appellate counsel's responsibility to furnish this court with such document. The records in this case indicate that the presentence investigation report was not transmitted to this court until after March 18, 1982, the date that appellate counsel filed his reply brief, and there is nothing in the record to indicate that appellate counsel ever had possession of such document. Thus, present counsel is essentially arguing that Lightbourne's prior counsel should have relied upon extra-record information.

Further, although Lightbourne nowhere acknowledges this fact, the nonconfidential factual portion of the presentence investigation report contains a great deal of less than mitigating or helpful information, including that relating to Lightbourne's suspensions from school, his early and persistent use of drugs (which a jury might well have not have found to be mitigating), his contraction of gonorrhea, his spotty employment history which included a recent dismissal from a horse farm for being drunk on the job and not showing up for work, as well as the recommendations of the prosecutor and other law enforcement officials. These latter recommendations include the prosecutor's observation of Lightbourne's lack of remorse and "haughty and cavalier attitude", as well as his suggestion that the jury should return a recommendation of death. The police officers' comments likewise touched upon such substantial nonmitigating matters as conjecture that Lightbourne would "do it again", if given the chance and, indeed, a reference to the fact that he had allegedly already threatened one of the officers. The confidential section to the presentence investigation report included information concerning Lightbourne's arrest and charge for the offense of carrying a concealed firearm, as well as the

conclusions of the appointed psychiatrist, Dr. Barnard, to the effect that no substantial or emotional defect seemed to exist. Further, this confidential section included statements by the surviving members of the victim's family in which various family members expressed the fervent hope that Lightbourne would receive the death penalty, as well as discussions of Lightbourne's activities while working for the stud farm, including a remark by Lightbourne to the effect that he would pull a gun on Michael O'Farrell if the latter ever yelled at him again.

The failure of Lightbourne's present counsel to acknowledge these less-than-positive aspects of the presentence investigation report is particularly puzzling, given the fact that Lightbourne has previously argued that his sentence of death must be vacated because the judge was exposed to certain contents of the presentence investigation report, to-wit: statements by the victim's family; the Eleventh Circuit had addressed the potential application of Booth v. Maryland, 482 U.S. 486, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987) to this claim. See, Lightbourne v. Dugger, 829 F.2d 1012, 1027, n.16 (11th Cir. 1987). Lightbourne's present position, thus, would seem to be that appellate counsel should have argued that this document, which Lightbourne has previously argued had "tainted" the judge, should have been seen by the jury as well. See, Lightbourne v. State, 471 So.2d 27, 28 (Fla. 1985).

The state respectfully suggests that this argument is without merit and that no viable claim of ineffective assistance of appellate counsel, under Strickland v. Washington, has been presented. It was not outside the range of competent counsel for Attorney Lockett on appeal not to have asserted as error the trial court's refusal to allow the presentence investigation report to "go back" to the jury. As noted, no precedent has been cited for the proposition that such document is admissible at all or that, under the circumstances of this case, a timely request for such admission was made. It is further clear that the contents of this report were never meant to be seen by a jury, especially without limiting instructions. Had counsel asserted

this claim on appeal, no reasonable probability of a different result exists and, accordingly, no relief is warranted.

To the extent that Lightbourne is seeking to assert a "merits" issue, the state respectfully suggests that no true Hitchcock claim is presented. Both the judge and jury were aware of the fact that nonstatutory mitigating evidence could be considered (R 1441-2, 1491). There have already been findings both by this court and the federal courts that the sentencer in this case considered the mitigating evidence contained in the presentence investigation report. Lightbourne, 471 So.2d at 28; 839 F.2d at 1026. Indeed, both of these findings were made in the course of rejecting Lightbourne's prior claim of ineffective assistance of counsel, relating to the fact that defense counsel had failed to investigate and present mitigating evidence at sentencing. The state suggests that Lightbourne is now impermissibly seeking to "recycle" this claim under the cloak of Hitchcock. Cf. Daugherty v. State, 533 So.2d 287 (Fla. 1988) (no need to relitigate issue of consideration of mitigating circumstances under Hitchcock, where issue already properly resolved in previous proceeding). If in 1985 Lightbourne's sentence did not have to be vacated due to counsel's failure to present to the jury live witness testimony as to Lightbourne's background, then it would hardly seem to follow that such sentence must be vacated in 1989 due to counsel's failure to present the same evidence in documentary form. Such documentary evidence, of course, as noted earlier, also contained a great deal of information which would have been prejudicial to the defense. The state suggests that this claim is procedurally barred and/or otherwise deserving of summary denial.

**CLAIM II:** LIGHTBOURNE'S CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IN REGARD TO COUNSEL'S FAILURE TO RAISE A CLAIM ON APPEAL CONCERNING THE SENTENCING JUDGE'S ALLEGED FAILURE TO INDEPENDENTLY WEIGH AGGRAVATING AND MITIGATION CIRCUMSTANCES.

In this claim, Lightbourne argues that he is entitled to relief because his appellate attorney did not argue on appeal that Judge Swigert had failed to independently weigh the aggravating and mitigating circumstances. As in the prior claim of ineffective assistance of appellate counsel, the state would suggest that no relief is warranted under Strickland v. Washington, supra, in that neither deficient performance of counsel nor resultant prejudice has been demonstrated. Further given this claim's utter lack of potential merit, it was not ineffective assistance for counsel to have omitted it. See, Thomas v. Wainwright, 495 So.2d 172 (Fla. 1986).

The basis for Lightbourne's claim is his belief that the judge improperly delegated to the state attorney the responsibility of preparing the findings of fact in support of the death sentence, as well as his belief that the judge did not sufficiently consider the mitigating evidence contained in the presentence investigation report. The state suggests that these contentions are largely refuted by the record. While it may be true that the prosecutor presented a proposed sentencing order to the judge following the return of the jury with an advisory verdict of death (R 1500), Lightbourne has cited no precedent to the effect that the submission of a proposed sentencing order is per se erroneous. It was obviously up to Judge Swigert whether or not to reject the proposed findings, and the fact that he did accept them does not constitute an abdication of his duty to independently determine the presence of aggravating and mitigating circumstances. The primary case relied upon by Lightbourne, Patterson v. State, 513 So.2d 1257 (Fla. 1987), is distinguishable. In Patterson, the judge announced his sentence first, sentencing Patterson to death, and then, in essence, directed the prosecutor to prepare findings of fact in support of

it. As noted, in this case, Judge Swigert considered the proposed findings, before announcing or imposing sentence. Further, another case cited by Lightbourne, Nibert v. State, 508 So.2d 1 (Fla. 1987), would seem to indicate that it is not improper for the prosecutor to set forth the findings of fact in support of a sentence of death. Significantly, this court would seem to have also indicated in Nibert that a contemporaneous objection is necessary to preserve a claim of error in this regard. Nibert, 508 So.2d at 4. Accordingly, it cannot be said that Lightbourne's appellate attorney was ineffective for failing to present an unpreserved or procedurally barred issue on appeal. See, Routly v. Wainwright, 502 So.2d 901 (Fla. 1987).

The other cases cited by Lightbourne - Van Royal v. State, 497 So.2d 625 (Fla. 1986), Muehlman v. State, 503 So.2d 310 (Fla. 1987) - concern situations in which the court failed to provide any written findings of fact in support of the sentence of death until months after sentencing. Considering the fact that it is Lightbourne's position that if anything, the judge in this case acted too precipitously, his reliance upon these precedents would seem misplaced. Additionally, to the extent that the above cases represent an evolution in the law concerning the timing and manner in which sentencing orders are rendered, appellate counsel, of course, cannot be deemed ineffective for failing to anticipate changes in the law. Compare, Van Royal, supra, with Harvard v. State, 414 So.2d 1032 (Fla. 1982) (no error in nine month delay between sentencing and rendition of sentencing order). There has been no deficiency of appellate counsel. See, Thomas v. State, 421 So.2d 160 (Fla. 1982); Muhammad v. State, 426 So.2d 533 (Fla. 1982).

In any event, appellate counsel would have had no cause to present this claim on appeal, in that from all indications in the record it is clear that a proper weighing and sentencing process took place. It should be remembered that the sentencing proceeding did not occur until ten days after the end of the trial, thus allowing more than sufficient for deliberation and consideration. This court has previously refused to find error

when a judge announces his sentence and findings in support of a sentence of death immediately after return of the jury and where the judge has in fact prepared his findings during their deliberations. See, King v. State, 390 So.2d 315 (Fla. 1980); Thompson v. State, 456 So.2d 444 (Fla. 1984); Randolph v. State, 463 So.2d 186 (Fla. 1984). Further, at the commencement of the penalty phase, the defense took the unusual step of moving for a judgment of acquittal as to the aggravating circumstances which the state would allegedly be unable to prove (R 1443-1452); it was agreed that certain circumstances would simply be inapplicable, and this obviously had the effect of reducing the number which could potentially be found. The state announced that it would be presenting no additional evidence at the penalty phase, a fact already known to the defense (R 1442-3). Thus, the aggravating circumstances found by the judge were those which had been established by the evidence presented at trial. Yet, it must be noted that the sentencing order includes findings in mitigation which could only have come from the defendant's testimony at the penalty phase, as to his age and lack of significant criminal history (R 1453-6). While the prosecutor may have submitted a proposed sentencing order, it should also be noted that he argued to the jury that the mitigating circumstance of age, which was found by Judge Swigert, should not be found by them (R 1464). All in all, there is nothing in this record to indicate that Judge Swigert did not use his own independent reasoned judgment in not only sentencing Ian Lightbourne to death, but in rendering the findings of fact in support thereof.

Further, Lightbourne's subsidiary contention to the effect that one should essentially believe that Judge Swigert was lying when he said that he had read and/or considered the presentence investigation report (R 178, 1501, 1504), is simply insulting and inaccurate. The basis for this contention is apparently the fact that the presentence investigation report was not completed until the day before sentencing; as noted in the preceding section, appellate counsel's access to the report, and thus ability to make this "claim", would seem highly questionable. Cf. Thomas v.

Wainwright, supra. Assuming that there is any significance to this fact, it is clear that defense counsel had adequate opportunity to study the report, inasmuch as he stated so in open court (R 1495, 1504). There is no reason to believe that Judge Swigert could not likewise form an adequate impression of the presentence investigation report during this time, and the instant claim is devoid of merit.

Although Lightbourne asserts that this claim of error "leaps out upon even a casual reading of the transcript" (Petition at 20), the state would suggest instead that appellate counsel's failure to raise this "ingenious but invalid interpretation of the trial court's order", cf. Williams v. Wainwright, 503 So.2d 890, 891 (Fla. 1987), as well as of the events below, does not constitute ineffective assistance. This court's decision in Nibert seems to suggest that objection is necessary to preserve claims of this nature, and, as noted, counsel cannot be ineffective for failing to raise procedurally barred issues. Likewise, Lightbourne's claim requires a highly subjective and unrealistic reading of the record, with which the state would respectfully contend, not every reasonably competent attorney need concur. Because this particular legal argument, had it been presented, would in all probability have been found without merit, the instant claim for relief should be denied. See, Thomas v. Wainwright, supra; Strickland v. Washington, supra.

**CLAIM III:** LIGHTBOURNE'S CLAIM THAT THE COURT INSTRUCTED THE JURY ON DUPLICITOUS AGGRAVATING CIRCUMSTANCES.

In this claim, Lightbourne argues that his sentence of death must be vacated because the court below instructed the jury on the aggravating circumstance of pecuniary gain, as well as that involving commission of the instant homicide during a burglary and, according to him, the finding of both of these aggravating circumstances would have been impermissible; Lightbourne also seems to suggest that a similar error was committed in the court's instruction of the jury on both the heinous, atrocious or

cruel aggravating circumstance and that relating to a homicide being to committed to avoid arrest. Lightbourne contends that the effect of these errors was compounded by the fact that the court did not tell the jury that the weighing of aggravating and mitigating circumstances was not a mere counting process, and further claims that this issue is cognizable under Mills v. Maryland, ___ U.S. ___, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988).

This claim is procedurally barred. In Suarez v. Dugger, 5276 So.2d 190, 192 n.3 (Fla. 1988) this court expressly held that a claim to the effect that the trial court had erred in instructing the jury "on aggravating factors which have been held to constitute 'improper doubling'" was not cognizable on habeas corpus. Such conclusion is additionally applicable here, in that, under White v. Dugger, 511 So.2d 554 (Fla. 1987), a claim which has not been preserved through contemporaneous objection cannot be raised in a petition for writ of habeas corpus, and no such objection was made to the jury instructions sub judice (R 1488-1496). Accordingly, this claim should be summarily denied.

The state would additionally note that Lightbourne did argue on appeal that the trial court had committed an impermissible doubling by finding both the pecuniary gain and the commission of a homicide during a burglary aggravating circumstances. This court ruled that there was no error, because the record likewise supported a finding of commission of the homicide during a sexual battery. See, Lightbourne, 438 So.2d at 391. Given this holding, Lightbourne cannot relitigate this matter in the context of a jury instruction issue. This court has also previously held that it is not error to instruct the jury on all aggravating circumstances. See, Straight v. Wainwright, 422 So.2d 827 (Fla. 1982). From this court's opinion, it is clear that no impermissible doubling took place as between the aggravating circumstances of heinous, atrocious or cruel and avoidance of arrest, and it is farfetched to assert that the prosecutor's argument led to any error by the jury in this regard. Lightbourne's reliance upon Mills would seem misplaced, although in any event, any claim that the decision constitutes a change in

law should be presented in a motion filed pursuant to Rule 3.850, as opposed to habeas corpus. See, Witt v. State, 387 So.2d 922 (Fla. 1980); White, supra. Further, even if the jury was not told by the judge that the weighing of the aggravating and mitigating circumstances was not a mere counting process, the defense attorney told them exactly that during closing argument (R 1469). No relief is warranted as to this claim.

**CLAIM IV:** LIGHTBOURNE'S CLAIM THAT THE "HEINOUS, ATROCIOUS OR CRUEL" AGGRAVATING CIRCUMSTANCE HAS BEEN APPLIED OVERBROADLY IN HIS CASE.

In this claim, Lightbourne argues that the aggravating circumstance of heinous, atrocious or cruel has been unconstitutionally applied in his case, and he specifically cites to the recent decision of Maynard v. Cartwright, ___ U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), which he contends constitutes "new law." This claim is procedurally barred. In Henderson v. Dugger, 522 So.2d 835 (Fla. 1988) this court held that an identical claim, to the effect that this aggravating circumstance had been applied overbroadly, was one which should have been raised on direct appeal, as opposed to habeas corpus or post-conviction motion. See also, Clark v. State, 533 So.2d 1144 (Fla. 1988); White v. Dugger, 511 So.2d 554 (Fla. 1987). To the extent that the argument can be made that Maynard is a change in law, it is obvious that such claim should be presented in a post-conviction motion pursuant to Florida Rule of Criminal Procedure 3.850. See, Witt v. State, 387 So.2d 922 (Fla. 1980); White, supra.

In any event, it should also be clear that Maynard is not a change in law, but rather a recent application of the principles set forth in Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), a case decided one year prior to Lightbourne's trial. Additionally, Lightbourne argued in his direct appeal that the finding of this aggravating circumstance had been disproportionate, given this court's prior precedents, and, indeed, Lightbourne expressly cited to Godfrey in his

initial brief (see, Initial Brief, Lightbourne v. State, FSC Case No. 60,871 at 56-8). Lightbourne cannot relitigate this claim on habeas corpus. See, e.g., Messer v. Wainwright, 439 So.2d 875 (Fla. 1983). Finally, this court has rejected allegations of overbreadth as to this aggravating circumstance, see, Dobbert v. State, 409 So.2d 1053 (Fla. 1982), Magill v. State, 428 So.2d 649 (Fla. 1983), and its finding in this case, and affirmance on appeal, is in conformity with other decisions. See, e.g., White v. State, 403 So.2d 331 (Fla. 1981) (victim's mental anguish and knowledge of impending death); Francois v. State, 407 So.2d 885 (Fla. 1981) (same); Mills v. State, 462 So.2d 1075 (Fla. 1985) (circumstance properly found even where victim died immediately from shotgun blast, given victim's knowledge of impending death); Hoy v. State, 353 So.2d 826 (Fla. 1977) (victim sexually battered and pled to be spared prior to murder). No relief is warranted as to this claim.

**CLAIM V:** LIGHTBOURNE'S CLAIM THAT THE "COLD, CALCULATED AND PREMEDITATED" AGGRAVATING CIRCUMSTANCE HAS BEEN APPLIED OVERBROADLY IN HIS CASE.

In this claim, Lightbourne argues that the aggravating circumstance of cold, calculated and premeditated has been unconstitutionally applied in his case, and he again specifically cites to the recent decision of Maynard v. Cartrwright, ___ U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), which, he contends, constitutes "new law". This claim is procedurally barred. In Henderson v. Dugger, 522 So.2d 835 (Fla. 1988), this court held that an identical claim, to the effect that this aggravating circumstance had been applied overbroadly, was one which should have been raised on direct appeal, as opposed to habeas corpus or post-conviction motion. Cf. White v. Dugger, 511 So.2d 554 (Fla. 1987). To the extent that the argument can be made that Maynard is a change in law, it should be obvious that such claim should be presented in a post-conviction motion filed pursuant to Florida Rule of Criminal Procedure 3.850. See, Witt v. State, 387 So.2d 922 (Fla. 1980); White, supra.

In any event, it should be clear that Maynard is not a change in law, but rather a recent application of the principles set forth in Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 387 (1980), a case decided one year prior to Lightbourne's trial and, as noted in the preceding argument, cited by Lightbourne on appeal in support of his attack upon another aggravating circumstance. Maynard, of course, has nothing to do with the cold, calculated and premeditated aggravating circumstance. Cf. Jones v. Dugger, 533 So.2d 290 (Fla. 1988). While Lightbourne did not raise a specific "void for vagueness" argument on direct appeal in this court, he did attack the finding of this aggravating circumstance, an argument which this court rejected (see, Initial Brief, Lightbourne v. State, FSC Case No. 60,871 at 58-9). In affirming the finding of this aggravating circumstance, this court noted the fact that Lightbourne had cut the phone lines, entered the victim's home at a time when others would most likely not be present and had effected the execution-style killing by using a pillow placed between the murder weapon and the victim's head. See, Lightbourne, 438 So.2d at 391. This court has previously held that this aggravating circumstance is not void for vagueness, see, Smith v. State, 424 So.2d 726 (Fla. 1982), and the finding and affirmance of this aggravating circumstance is in accordance with this court's precedents. See, e.g., Mason v. State, 438 So.2d 374 (Fla. 1983) (circumstance properly found where defendant broke into victim's home and attacked her without provocation as she lay on bed); Parker v. State, 456 So.2d 436 (Fla. 1984) (circumstance properly found where victim shot while lying on bed with pillow used to muffle shot); Eutzy v. State, 458 So.2d 755 (Fla. 1984) (circumstance properly found where defendant procured gun in advance and shot victim once in the head, execution-style, with no sign of struggle). No relief is warranted as to this claim.

**CLAIM VI:** LIGHTBOURNE'S CLAIM THAT, THROUGH ARGUMENT, INSTRUCTION AND COMMENT, THE JURY IN THIS CASE WAS MISLED AS TO ITS ROLE IN SENTENCING, IN VIOLATION OF CALDWELL V. MISSISSIPPI, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

In this claim, Lightbourne argues that his death sentence must be vacated because through argument, instruction and comment, the jury was allegedly misled as to its role in sentencing, in violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). This claim, of course, is one of great familiarity to this court. This court has consistently held that this matter represents one which must be preserved through contemporaneous objection at trial and subsequently raised on direct appeal. This court has likewise specifically held that an alleged violation of Caldwell cannot be raised in a petition for writ of habeas corpus. See, e.g., Jones v. Dugger, 533 So.2d 290 (Fla. 1988); Tafero v. Dugger, 520 So.2d 287 (Fla. 1988); Phillips v. Dugger, 515 So.2d 227 (Fla. 1987). This claim is procedurally barred, given its improper presentation and the lack of contemporaneous objection. See, White v. Dugger, 511 So.2d 554 (Fla. 1987). Assuming that a claim could be made that Caldwell is a change in law, a position which this court has consistently rejected, see, e.g., Cave v. State, 529 So.2d 293 (Fla. 1988), Doyle v. State, 526 So.2d 909 (Fla. 1988), such matter should be presented in a motion for post-conviction relief, filed pursuant to Florida Rule of Criminal Procedure 3.850, the vehicle expressly created for such purpose. See, Witt v. State, 387 So.2d 922 (Fla. 1980); White, supra.

Because, no doubt, it is Lightbourne's fondest hope that this court will waive its procedural bar, the state has no intention of providing a lengthy argument on the merits. In fact, the state's only observation would be that Lightbourne has entirely failed to acknowledge the presence in the record of the repeated and expressed statements by the defense counsel below concerning the **importance** of the jury's recommended sentence, as

well as similar comments by the prosecutor. The prosecutor's closing argument included the following:

> This has been a -- probably a long six days for all of you and, as you know, you're gathered back here today to make a recommendation only to the Court as to what you, sitting as the voice and conscious (sic) of the community, have to say about this crime, our law, and what the facts and circumstances indicate to you ought to be the penalty. I'm sure this has been weighing on your minds the last six days and either today or if not today very shortly is going to be the longest day in that man's life because he alone is to decide what Ian Lightbourne's fate is to be. **That is not to say, Ladies and Gentlemen, that your recommendation is not very important; it is, because the State of Florida and Judge Swigert need and want to** know what Marion County has to say about these things. (emphasis supplied) (R 1456-7).

The prosecutor also presciently predicted,

> That's pretty much what I've got to say to you, Ladies and Gentlemen. **Your decision is important**. I'm not going to advise you what you ought to do. I know what I would do if I were there and I won't tell you what that is but, remember this, in a few minutes the Defendant is going to be up here asking you to show mercy for mercy he would not give. He's going to ask you for consideration that he would not show. He's going to suggest to you that you are in a position to pull the switch, push the button. You're not; you're not, and don't let him convince you that you are going to be guilty of anything or that you should be paranoid for any decision you voice, because you shouldn't. **Your decision is very important**, but that's that man's job, and if any paranoia or guilt should ever fall on anyone's shoulders it would be his, not yours. (emphasis supplied) (R 1464).

The assistant state attorney was entirely accurate in anticipating defense counsel's argument. Lightbourne's counsel argued to the jury at the penalty phase,

> If your recommendation in this case is to be death, you must presume he will receive that penalty. That Judge may alter your decision; he may not. It's an important factor that goes into his consideration. You will live forever with your vote in this case. There's no doubt about that, and many time -- much time may pass before death sentence will be carried out. Perhaps as much as two, three, four, five years. Vote for death only if on the law and evidence you have no other choice, and be sure of that vote so five years from now when they shave the top of his head and his leg and they strap him in the chair and put a hood over his face you'll still be sure of your vote. (emphasis supplied) (R 1471).

Defense counsel likewise reminded the jurors that any recommendation of death would have "far-reaching consequences", and that they should not seek to pass their "responsibility" on to the judge (R 1475, 1478-9). After describing for the jurors the number of innocent people executed, as well as the alleged barbarity of execution, defense counsel closed with remarks which could have left absolutely no doubt in the jury's mind as to their role in sentencing,

> I ask you in the name of all that is sacred and holy, how can such a spectacle as this ever magnify the law or make it honorable or preserve the peace and dignity of the State. You, alone, can recommend the sentence in this case. You, alone, can recommend death. There can be no division of responsibility. You can never say that it was somebody else's decision or recommendation. It must be your deliberate, cold and premeditated act. It takes your vote. Thank you. (emphasis supplied) (R 1487-8).

The other comments at issue would seem to simply represent accurate statements of Florida's capital sentencing structure. This claim is procedurally barred, and no relief is warranted.

**CLAIM VII:** LIGHTBOURNE'S CLAIM THAT THE PENALTY PHASE JURY INSTRUCTIONS COULD HAVE BEEN READ AS REQUIRING THAT MITIGATING CIRCUMSTANCES BE ESTABLISHED BEYOND A REASONABLE DOUBT.

In this claim, Lightbourne argues that his sentence of death must be vacated because the instructions given his jury did not expressly advise them that mitigating circumstances did not have to be established beyond a reasonable doubt; Lightbourne claims that both Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) and Mills v. Maryland, ___ U.S. ___, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988) are implicated. This claim is procedurally barred. There was no contemporaneous objection to the penalty phase jury instructions (R 1488-1496), and this court expressly held in White v. Dugger, 511 So.2d 554 (Fla. 1987) that claims which have been waived through lack of objection at trial cannot be presented on habeas corpus. To the extent that any "change in law" argument is involved, the proper mechanism to raise such claim is clearly a motion for post-conviction relief, pursuant to Florida Rule of Criminal Procedure 3.850. See, Witt v. State, 387 So.2d 922 (Fla. 1980). This claim should be summarily denied.

Lightbourne's argument, in any event, represents a misreading of the instructions as a whole. The jury in this case was advised that it was the state's burden to establish aggravating circumstances beyond a reasonable doubt (R 1491-2); This instruction was consistent with that given during the guilt phase as to the state's burden of proof, and at such time the jury was likewise instructed that the defendant had no burden to prove his innocence (R 1413, 1422, 1424, 1427). Further, the jury in this case was told that the mitigating circumstances need only be "established by the evidence", and they were similarly told that they should consider all evidence "tending to establish one or more mitigating circumstance." (R 1490, 1492) The jury was instructed that they should afford that evidence such weight as they felt it should receive (R 1492). Looking to these instructions as a whole, cf. Mills, supra, the state suggests

that a reasonable juror could not have misunderstood the quantuum of proof for a mitigating circumstance. Cf. Preston v. State, 531 So.2d 154 (Fla. 1988). This claim is procedurally barred, and no relief is warranted.

**CLAIM VIII:** LIGHTBOURNE'S CLAIM THAT THE PENALTY PHASE JURY INSTRUCTIONS IMPERMISSIBLY SHIFTED THE BURDEN OF PROOF.

In this claim, Lightbourne argues that his sentence of death must be vacated because the penalty phase jury instructions allegedly shifted the burden of proof to the defense; Lightbourne cites to Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) and Mills v. Maryland, ___ U.S. ___, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988) in support of his position. This claim is procedurally barred. This court has expressly held that claims of this nature, concerning alleged "burden shifting" jury instructions in the penalty phase, cannot be raised on habeas corpus. See, Jones v. Dugger, 533 So.2d 290 (Fla. 1988). There was no contemporaneous objection to the jury instructions in this case (R 1488-1496), and, pursuant to White v. Dugger, 511 So.2d 554 (Fla. 1987), this claim is likewise barred due to its lack of preservation. To the extent that any "change in law" argument is involved, the proper mechanism to raise such claim is clearly a motion for post-conviction relief, pursuant to Florida Rule of Criminal Procedure 3.850. See, Witt v. State, 387 So.2d 922 (Fla. 1980). This claim should be summarily denied.

Additionally, as in the prior claim, Lightbourne's argument represents a misreading of the instructions as a whole. In this case, the jury was initially told that they should consider whether there were sufficient aggravating circumstances to justify the imposition of the death penalty and whether sufficient mitigating circumstances existed to outweigh them (R 1488). After being instructed on the specific aggravating circumstances, the jury was then told that if they did not find sufficient aggravating circumstances to exist, they should then return a recommended sentence of life imprisonment, without the

need for any further deliberation (R 1490). After instruction on the mitigating circumstances, the jury was then reminded that aggravating circumstances had to be proven beyond a reasonable doubt before they could be considered; if one or more aggravating circumstances was found, then the jury should consider all the evidence tending to establish one or more mitigating circumstances and then give that evidence such weight as they felt that it should receive (R 1492). The state suggests that a reasonable juror could not have misunderstood the burden of proof at sentencing. See, Preston v. State, 531 So.2d 154 (Fla. 1988) (penalty phase jury instructions as a whole do not shift the burden of proof). This claim is procedurally barred, and no relief is warranted.

**CLAIM IX:** LIGHTBOURNE'S CLAIM THAT THE PENALTY PHASE JURY INSTRUCTIONS MISLED THE JURY AS TO THE NUMBER OF VOTES NEEDED FOR A MAJORITY.

In this claim, Lightbourne argues that his sentence of death must be vacated because the penalty phase jury instructions did not sufficiently advise the jury as to the number of votes needed for a life recommendation; Lightbourne again claims that Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) and Mills v. Maryland, ___ U.S. ___, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988) are implicated. This claim is procedurally barred. This court has specifically held that this identical claim, that the jury was misadvised as to the number of votes necessary for a life recommendation, cannot be raised on habeas corpus. See, Ford v. Wainwright, 451 So.2d 471 (Fla. 1984); Jones v. Dugger, 533 So.2d 290 (Fla. 1988). Additionally, there was no contemporaneous objection to the jury instructions (R 1488-1496) and, under White v. Dugger, 511 So.2d 554 (Fla. 1987), a procedurally barred claim cannot be raised on habeas corpus. To the extent that Lightbourne is asserting a claim of "change in law" under Caldwell or Mills, the proper vehicle to do so is a motion for post-conviction relief, pursuant to Rule 3.850. See, Witt v. State, 387 So.2d 922 (Fla. 1980). Further, this court

held in Preston v. State, 531 So.2d 154, 159 (Fla. 1988) that the rationale of Mills is inapposite to this issue.

In any event, as the Eleventh Circuit observed in Henry v. Wainwright, 743 F.2d 761 (11th Cir. 1984), a claim of this nature is sheer speculation when there is nothing in the record to indicate that the jury was ever split six to six. Lightbourne has likewise failed to make such showing, let alone allegation. This claim is procedurally barred, and no relief is warranted.

## NO STAY OF EXECUTION IS WARRANTED IN THIS CASE

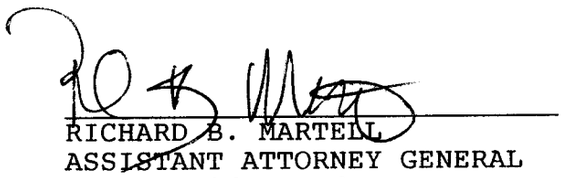
Lightbourne has requested a stay of execution, not only on the grounds that such is necessary for this court's resolution of the issues presented herein, but also so as to afford him an opportunity to seek review in the United States Supreme Court. Predictably, Lightbourne points to the pendency of Dugger v. Adams, cert. granted, ___ U.S. ___, 108 S.Ct. 1106, 99 L.Ed.2d 267 (1988). This application for stay should be denied in accordance with Cave v. State, 529 So.2d 293 (Fla. 1988). Lightbourne's claim allegedly premised upon Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) is procedurally barred; even if Lightbourne wishes to make the argument that Caldwell constitutes a change of law in Florida, he has chosen the wrong mechanism, i.e., petition for writ of habeas corpus, to do so. Additionally, six of the other claims raised herein are procedurally barred, and those properly presented, i.e., involving ineffective assistance of appellate counsel, are conclusively without merit. No stay of execution is warranted.

## CONCLUSION

WHEREFORE for the aforementioned reasons, the State of Florida moves this honorable court to deny the instant petition in all respects. Of the nine claims presented, seven are procedurally barred due to their improper presentation. As to the remaining two, which raise ineffective assistance of appellate counsel, Lightbourne has failed to demonstrate that he merits relief.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

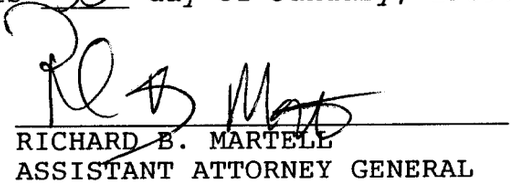


RICHARD B. MARTELL
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, FL 32014
(904) 252-1067

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Response to Petition for Extraordinary Relief and Petition for Writ of Habeas Corpus, Etc. has been furnished, by U.S. Mail/Hand Delivery/Telefax, to Billy H. Nolas/Martin J. McClain/ K. Leslie Delk, Office of the Capital Collateral Representative, counsel for petitioner, at 1533 South Monroe Street, Tallahassee, FL 32301, this 30 day of January, 1989.



RICHARD B. MARTELL
ASSISTANT ATTORNEY GENERAL