IN THE SUPREME COURT OF FLORIDA

ROBERT DAVID HEINEY,

Appellant,

v.

RICHARD L. DUGGER,

Appellee.

CASE NO. 74,~~899~~ 204

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

Robert David Heiney murdered Francis May sometime on the night of June 5-6, 1978. Heiney was indicted on August 24, 1978. (R 1,2). His trial was held in February of 1979. Heiney served as co-counsel.

Heiney was found guilty, as charged, of murder and robbery with a deadly weapon. (R 1291).

After a three day recess, the penalty phase commenced. The State introduced evidence of Mr. Heiney's prior convictions and his personal status ("currently under sentence"). (R 1301). No evidence was presented by the defense. (R 1310). The defense relied solely upon argument of non-statutory mitigating factors. (R 1312-1319).

Judge Wells overrode the jury's recommendation after rejecting the non-statutory mitigating factor of "residual doubt about guilt" which Judge Wells felt prompted the decision. (R 220-237). The sentencer found three aggravating factors: to-wit:

> (1) Mr. Heiney was under sentence at the time of the murder.
>
> (2) Mr. Heiney committed the murder during the course of a robbery.
>
> (3) The murder was especially heinous, atrocious and cruel.

No mitigating factors were found.

Mr. Heiney took a direct appeal to the Florida Supreme Court, raising these issues:

> I. The trial court's denial of his motion for judgment of acquittal.
>
> 11. The trial court's denial of his motion in limine regarding the Texas shooting.

III. The trial court's denial of his motion for mistrial (alleging that the jury saw him in chains).

IV. The denial of his motion to recuse Judge Wells.

V. The giving of an incorrect jury instruction on circumstantial evidence.

VI. The trial court's refusal to give a "justifiable homicide" instruction.

VII. A double-jeopardy challenge.

VIII. A **Lockett** v. **Ohio,** 438 U.S. 586 (1978), based challenge to the override sentence. [This issue conceded petit jury consideration and acceptance of non-statutory mitigating evidence. (Brief, pp. 58-60)].

The Florida Supreme Court denied relief. **Heiney** v. **State,** 447 So.2d 210 (Fla. 1984), and certiorari was denied. **Heiney** v. **Florida,** ____ U.S. ____, 105 S.Ct. 303 (1984).

The case became dormant. Finally, confronted with the two year limitations period of Fla.R.Crim.P. 3.850, Mr. Heiney filed a collateral attack on January 2, 1987.

The petition raised the following claims:

(1) The use of a jailhouse informant (Tom Tuszynski) in violation of Mr. Heiney's constitutional rights.

(2) Prosecutorial abuse of discretion in seeking an indictment.

(3) The constitutionality of a jury override in the face of pretrial plea negotiations.

(4) The violation of Heiney's "Miranda" rights by the police.

(5) Ineffective assistance of counsel (by allowing unrecorded bench conferences).

(6) Ineffective assistance of guilt phase counsel.

(7) Ineffective assistance of counsel (due to his failure to hire independent expert witnesses).

(8) Miscellaneous errors by counsel.

(9) "Hitchcock" error by the Court.

(10) The constitutionality of the death penalty.

The Circuit Court did not direct the State Attorney's Office to respond.

In April of 1987, a so-called "amendment" was filed raising these claims:

(11) The informant (Claim I) lied to the Grand Jury.

(12) The existence of "Williams Rule" error at trial.

(13) Ineffective penalty phase counsel.

No further amendments were offered from April of 1987 to April of 1989. No response was requested from the State.

On March 30, 1989, Governor Martinez signed a death warrant, setting Mr. Heiney's execution for the week of June 6, 1989.

On April 12, 1989, Judge Wells entered an order summarily denying relief as to all counts. The order found that the petition (and amendment) would be allowed. ("B" The allegations, however, were legally insufficient to warrant relief. ("C"). The order itself relates that Mr. Heiney's claims failed for the following reasons:

(1) The issue could and should have been raised on appeal.

(2) Heiney was his own attorney (co-counsel) and was present at every critical stage of the proceedings.

(3) That the "informant" (Tuszynski) did not testify at trial.

Inasmuch as this order summarily denied relief on a claim arising under **Hitchcock** v. **Dugger,** 481 U.S. ____, 95 L.Ed.2d 347 (1978), the State of Florida moved for correction of Judge Wells' order.

Mr. Heiney, at the same time, obtained a recusal from Judge Wells and filed a second successive Rule 3.850 petition, attempting to avoid the time bar by entitling the document a "consolidated" request for rehearing and Rule 3.850 relief.

The State moved for dismissal of the new petition. After written and oral argument, as well as review of the trial transcripts, Judge Gordon granted the State's motion to dismiss. The issues affected by this order were:

(1) A state **"Brady"** violation regarding one Phillip Cook.

(2) State use of perjured Grand Jury testimony.

(3) A **Hitchcock** claim.

(4) The propriety of the jury override under **Hitchcock.**

(5) Ineffective assistance of mental health experts.

(6) Ineffective assistance of co-counsel.

(7) The constitutionality of "Heinous, Atrocious and Cruel" as an aggravating factor.

(8) Court "preclusion" of cross-examination of David Benson.

(9) Court interference with Mr. Heiney's **Faretta** rights.

(10) Court reliance upon an "automatic aggravating factor".

(11) Court reliance upon a non-statutory aggravating factor.

(12) Court use of a "burden-shifting" penalty phase instruction.

Judge Gordon also granted the State's motion to rehear the **Hitchcock** issue and review it for harmless error. After careful review of the record, the court determined that any **Hitchcock** error was harmless.

STATEMENT OF THE FACTS

The details of this incredibly gruesome murder are sufficiently set forth in Heiney v. **State,** 447 So.2d 210 (Fla. 1984), and will not be repeated.

The facts relevant to each claim set forth in Mr. Heiney's various Rule 3.850 petitions will be set forth in order:

Petition I

Facts: Claim I
(State Use of Jailhouse "Snitch")

Mr. Heiney, as noted in his petition, was arrested on June 26, 1978. While in jail, Mr. Heiney spoke with an inmate named Tom Tuszynski, whom Mr. Heiney has dubbed variously as a government agent and a "snitch". (See 3.850 petition).

Mr. Heiney, of course, knew he had spoken to Tuszynski before trial and filed numerous pretrial motions attacking Tuszynski and the veracity of Tuszynski's testimony before the Grand Jury. (See R 28, 43, 100).

At a pretrial hearing on June 12, 1978, the defense represented that it had interviewed Tuszynski by telephone (R 450), that is, was concerned that Tuszynski was told to lie (R 450) and that the Indictment was fatally flawed. (R 451). Mr. Pascoe then asked for leave to proffer Tuszynski's testimony for appellate purposes. (R 455). Mr. Pascoe then stated that he had already deposed Tuszynski. (R 456).

At trial, defense counsel sought a continuance to pursue the issue of whether Tuszynski lied or was paid for his testimony. (R 684-693).

Mr. Tuszynski did not testify at trial.

The issue of Mr. Tuszynski's conduct was not appealed. The court correctly noted that the issue could and should have been raised on direct appeal and denied Rule 3.850 relief.

Facts: Claim II
(Prosecutorial Vindictiveness)

Mr. Heiney was originally arrested on charges of second-degree murder but was later, properly, indicted for first-degree murder. This issue could have been raised on direct appeal but was not.

Facts: Claim III
(The Constitutionality of Jury Overrides)

Mr. Heiney contends that the State, pretrial, offered him a plea bargain and was forever estopped from seeking a capital sentence. This issue was known but not raised on direct appeal.

Facts: Claim IV
(Miranda Violation)

The police ceased questioning Mr. Heiney once he invoked Miranda. (App. "I" to 3.850 petition). The police obtained a search warrant for Heiney's car, however, and merely advised him of that fact. (App. "I"). The police, in presenting the warrant, asked Heiney that which they were about to discover anyway: to-wit: Whether he had property in the car.

Heiney filed no motion to suppress. In fact, Heiney's theory of the case (trial strategy) incorporated an admission that he had Mr. May's car and credit cards. (See R 750-754). Thus, the issue was not raised on appeal.

Facts: Claim V
(Unrecorded Proceedings)

The record speaks for itself. This issue was not appeaed.

Facts: Claims VI, VII, VIII and IX
(Ineffective Assistance of Counsel)

Mr. Heiney, an extremely bright fellow, was allowed to serve as his own attorney pursuant to Heiney's **Faretta** motion.

Facts: Claim IX
(Lockett/Hitchcock Error)

Claim IX also contained a claim of **Lockett/Hitchcock** error. The record shows:

> (1) Counsel (Mr. Pascoe) specifically told the court he did not feel restricted in any way as to what he could tell the advisory jury. (R 1315).
>
> (2) Mr. Pascoe argued non-statutory mitigating factors. (R 1312-1319).
>
> (3) The jury recommended a life sentence.
>
> (4) On appeal, Heiney challenged the override by conceding that the jury considered non-statutory mitigating evidence.
>
> (5) On appeal, this Court found no **Lockett** error by the sentencer in overriding the life vote.

Facts: Claim X
(The Death Penalty)

None of these issues were raised on direct appeal.

Amended Petition

Facts: Claim XI
(Tom Tuszynski)

This issue was raised by Mr. Heiney pretrial (R 100) but was never appealed.

Facts: Claim XII
("Williams Rule" Error)

This issue was a variation of the "motion in limine" issue argued on direct appeal. It was not, therefore, raised on appeal.

The issue of whether Heiney shot someone in Texas was never disputed at trial.

Facts: Claim XIII
(Ineffective Counsel During Penalty Phase)

Again, Heiney was his own lawyer.

The facts relevant to the issues raised in Mr. Heiney's second successive Rule 3.850 petition are as follows:

On May 1, 1989, Mr. Heiney filed a "consolidated motion" which was touted as a combined motion for rehearing and a new motion for post-conviction relief. Mr. Heiney intended to violate the two-year time bar and the prohibition on successive petitions by tacking eight new issues onto a pleading that renumbered and reargued four of his (denied) earlier claims. Due to the renumbering of the four issues and the inclusion of eight new issues, the document was determined to be a successive Rule 3.850 petition barred by the two-year time bar.

The twelve claims involve the following relevant facts:

Facts: Claim I
(Brady: Phillip Cook)

No issue of new law is involved. Mr. Cook's name surfaced at trial but Heiney did not pursue or appeal the issue. The record shows that Mr. Cook may have been with the victim a few days prior to the murder. There is no evidence linking Cook to

the murder or to the victim at the time of the murder. More to the point, Mr. Heiney's opening statement to the jury (setting forth his version of the crime) made no mention of Cook, (R 750-754) yet, **conceded** that Heiney and May were alone when they went from Texas to Mississippi. (R 750-754). Heiney's opening statement also conceded that Heiney stole May's car and credit cards. (R 750-754).

Facts: Claim II
(Tuszynski)

Again, Heiney was aware of this issue prior to trial. It was never raised on appeal and was rejected on procedural grounds in his first petition.

Facts: Claim III
(Hitchcock)

This issue was examined and rejected based upon the trial court's finding of harmless error.

Facts: Claim IV
(Override)

The jury override was examined and upheld on appeal.

Facts: Claim V
(Psychologist)

Mr. Heiney, who is not mentally ill, (R 90-91) was examined by a competent psychologist at the Okaloosa Guidance Clinic. (R 90-91). No challenge to his evaluation surfaced until Heiney's second successive petition for 3.850 relief was filed.

Facts: Claim VI
(Ineffective Counsel)

Again, Heiney was allowed to represent himself and served as co-counsel.

Facts: Claim VII
(Heinous, Atrocious and Cruel)

This issue was never raised at trial, on appeal, or in Heiney's first "3.850" petition.

Facts: Claim VIII
(Preclusion of Cross Examination)

This issue was not raised on appeal or in Heiney's first petition.

Facts: Claim IX
(Faretta Violation)

This issue was never raised at trial or on appeal.

Facts: Claim X
("Automatic Aggravating Factor")

This issue was not raised at trial or on appeal.

Facts: Claim XI
(Non-Statutory Aggravating Factors)

This issue was not raised at trial or on appeal.

Facts: Claim XII
(Burden Shifting)

This issue was not raised at trial or on appeal.

SUMMARY OF ARGUMENT

Inasmuch as Mr. Heiney's brief apparently will not be filed until late Tuesday, May 30, 1989, the State is submitting this anticipatory brief for the convenience of the Court. The State does not want to be in a position of having its arguments filed on Thursday for a Friday morning argument. Due to the nature of this brief, we have addressed every issue presented by Heiney to the lower court. We request leave to supplement the brief to respond to any new issues Heiney might raise.

Pursuant to **Harris** v. **Reed,** ____ U.S. **57** U.S.L.W. 4225 (1989), state courts must clearly and unequivocally enforce their procedural default rules in collateral proceedings.

Mr. Heiney filed two successive Rule 3.850 petitions. The latter, raising twelve issues, was time-barred. The former, raising thirteen claims, raised procedurally barred issues except for a **Hitchcock** claim that was correctly resolved under a harmless error analysis.

The record fully supports the Circuit Court's findings on all counts.

ARGUMENT

I

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR POST CONVICTION RELIEF

Robert David Heiney's first motion for post-conviction relief (as amended) raised thirteen assorted claims, all of which were properly denied.

Motions for post-conviction relief are not substitutes for direct appeal, **Clark** v. **State,** 533 So.2d 1144 (Fla. 1988); **Bundy** v. **State,** 14 F.L.W. 43 (Fla. 1989); nor are they a vehicle for a second appeal (or rehearing of a prior appeal). **Francis** v. **State,** 529 So.2d 670 (Fla. 1988); **Straight** v. **State,** 488 So.2d 530 (Fla. 1986); **Adams** v. **State,** 484 So.2d 1216 (Fla. 1986); **Tafero** v. **State,** 459 So.2d 1034 (Fla. 1984); **Jones** v. **State,** 446 So.2d 1059 (Fla. 1984); **Zeigler** v. **State,** 452 So.2d 537 (Fla. 1984).

Summary denial of a post-conviction motion based upon a careful review of the relevant record is, of course, allowed. **Runyon** v. **State,** 460 So.2d 494 (Fla. 1st DCA 1984); **Glock** v. **State,** 14 F.L.W. 29 (Fla. 1989).

Mr. Heiney's thirteen claims from his first (3.850) petition may be disposed of as follows:

Claim I
(Informant)

Mr. Heiney contended that his Sixth Amendment rights under **Massiah** v. **United States,** 377 U.S. 201 (1964), were violated when the State allegedly directed a jailhouse "snitch", Tom Tuszynski, to speak to him.

Mr. Tuszynski testified before the Grand Jury but did not testify at trial.[1] The trial court, addressing a pretrial challenge to the indictment predicated upon Tuszynski's veracity, ruled that Heiney would have been indicted even without Tuszynski's testimony. (R 455).

The Appellant's motion for post-conviction relief was summarily denied. The court cited to the fact that Tuszynski did not testify, but the trial court's primary ruling was that the complaint should have been raised on direct appeal.

Since Mr. Heiney was keenly aware of the Tuszynski issue prior to trial, and since Massiah was already fifteen years old at the time of trial, the finding that this issue could and should have been raised on direct appeal is clearly correct and should be affirmed. See Harris v. Reed, ____ U.S. ____, 57 **U.S.L.W.** 4225 (1989).

Even using the test of "harmless error", however, summary denial was proper on this record.

First, the record shows that Tuszynski's testimony was unrecorded, so we do not have proof for Heiney's claim that this provoked his indictment.

Second, the Court felt that the strong circumstantial evidence in this case would have provoked an indictment even without Tuszynski.

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[1] Curiously, according to later affidavits and pleadings filed by Heiney, Tuszynski lied to the jury and did not, therefore, relate the actual conversations anyway.

Third, Tuszynski did not testify at trial, yet Heiney was still found guilty beyond a reasonable doubt: a significantly greater standard of proof than that required for a mere indictment.

Thus, any error attributable to the use of Mr. Tuszynski centers upon Heiney's indictment, not his conviction. The Supreme Court has already held that errors relating to the Grand Jury may be rendered harmless by a subsequent conviction. **United States** v. **Mechanik, 475 U.S.** 66 (1986); **Costello v. United States, 350 U.S. 359** (1956).

Still, the State notes that this issue was, and is, procedurally barred and, pursuant to **Harris** v. **Reed, supra,** urges affirmance on that basis.

Claim II
(State Vindictiveness)

Mr. Heiney contends that initial charges of a lesser degree of homicide and/or plea negotiations estop the State from ever seeking an indictment for capital murder.

This issue was recognized as one capable of being heard on direct appeal in **Francis** v. **State,** 529 So.2d **670** (Fla. 1988). (In fact, a similar claim was raised on direct appeal in **Francis** while a related, unappealed issue was noted as being procedurally barred). The issue, if not wholly fanciful (there being no right of estoppel as alleged), could and should have been raised on direct appeal. It is procedurally barred.

Claim III
(Constitutionality of "Enhanced Penalty")

Here, again, Heiney alleged that some pretrial plea discussions bound the court not to sentence him to death, therefore, he believes that the jury override was unconstitutional. This issue, like II above, clearly could and should have been raised on direct appeal along with Heiney's other challenges to the jury override. It is procedurally barred.

Claim IV
(**Miranda** Violation)

Mr. Heiney alleged that his rights under **Miranda** v. **Arizona,** 384 U.S. 436 (966), were violated when the police presented him with a search warrant for his vehicle and asked him, prior to searching, if he had property in the car. Mr. Heiney also alleges that this issue was "known" and available and that trial counsel was ineffective for not raising it. (Petition, pg. 28).

Heiney has conceded that this claim was available in 1978-1979 and could, if preserved, have been raised on appeal. See e.g. **Michigan** v. **Mosley,** 423 **U.S.** 96 (1975). The trial court's finding of a procedural bar is clearly correct.

Claim V
(Ineffective Counsel: Failure
to Record Every Proceeding)

Robert Heiney was allowed to represent himself on his own motion. Mr. Pascoe merely assisted Mr. Heiney as co-counsel. In **Faretta** v. **California,** 422 U.S. 806 (1975), the Supreme Court held that no person who serves as his or her own lawyer will be

heard on any post-trial claim of ineffective assistance of counsel. This standard has been followed by this Honorable Court. **Bundy** v. **State,** 497 So.2d 1209 (Fla. 1986). It has also been followed where the defendant was not pro **se** but still directed his lawyer's activities. **LoConte** v. **Dugger,** 847 F.2d 745 (11th Cir. 1988); **Foster** v. **Strickland,** 707 F.2d 1339 (11th Cir. 1983); **Foster** v. **Dugger,** 823 F.2d 402 (11th Cir. 1987).

For this reason Mr. Heiney's claim of ineffective assistance of counsel (himself) or co-counsel cannot be considered.

Claims VI, VII and VIII
(Ineffective Counsel)

The State, again, relies upon **Faretta** and **Bundy.**

Claim IX
(Hitchcock)

To the extent Mr. Heiney argued a claim of ineffective assistance of counsel, **Faretta** and **Bundy** control.

The actual issue here is one of **"Hitchcock"** error.[2] It is undisputed that **Hitchcock** error can be harmless, **Clark** v. **State,** 533 So.2d 1144 (Fla. 1988); **Tafero** v. **Dugger,** 520 So.2d 287 (Fla. 1988); **Johnson** v. **Dugger,** 520 So.2d 565 (Fla. 1988); **Demps** v. **Dugger,** 514 So.2d 1092 (Fla. 1987), so the only issue on appeal - since trial courts can now review **Hitchcock** claims, **Hall v. State,** 14 F.L.W. 101 (Fla. 1989) - is whether the trial judge was clearly erroneous in his decision. If the judge's decision is

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[2] **Hitchcock v. Dugger,** 481 **U.S.** ____, 95 L.Ed.2d 347 (1987). Although this petition was filed a few months prior to publication of **Hitchcock,** it raises the same issues and Heiney, like **Straight** and other Florida cases, shows that the "working tools" for **Hitchcock** claims existed prior to April of 1987.

supported by the record - even if some facts are disputed - it is still presumptively correct and the evidence will not be reweighed on appeal. **Tibbs** v. **State,** 397 So.2d 1120 (Fla. 1981).

By corrected order, on rehearing, the trial court found:

> (1) The "**Hitchcock**" instruction was given.
>
> (2) The defense called no witnesses during either the guilt or penalty phases, but:
>
> (3) The defense relied solely upon the non-statutory mitigating factors or residual doubt about guilt, religion, the horror of electrocution and even a bit of golden rule argument. (R 1312-1319).
>
> (4) Defense counsel specifically **told** the court he was **not restricted** to the statutory or any other list relating to mitigation and could argue whatever he liked. (R 1315).
>
> (5) Defense counsel won a life recommendation from the jury.
>
> (6) The trial judge considered, though he rejected, the non-statutory mitigating factor of residual doubt.
>
> (7) On appeal, this Court rejected Heiney's **Lockett**[3] argument.

Thus, no **Hitchcock** or **Lockett** error is present and the trial court should be affirmed.

Heiney may allege that Judge Wells did not discuss every possible non-statutory mitigating factor. This, we know, is not required. **Eddings** v. **Oklahoma,** 455 **U.S.** 104 (1982); **Johnson** v. **Wainwright,** 806 F.2d 1479 (11th Cir. 1986); **Funchess** v. **Wainwright,** 772 F.2d 683 (11th Cir. 1985); **Raulerson** v.

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[3] **Lockett v. Ohio,** 438 U.S. 586 (1978). It is interesting that on direct appeal Heiney's brief alleges that the jury considered non-statutory mitigating evidence. Heiney's currect argument is merely a political shift to take advantage of the **Hitchcock** case. The claim is not serious.

Wainwright, *732* F.2d 803 (11th Cir. 1984); **Dobbert** v. **Strickland,** 718 F.2d 1518 (11th Cir. 1983). In fact, **Hitchcock** error is not to be presumed just because a record is silent. **Johnson** v. **Wainwright, supra.**

In addition to this wealth of record support, the court's findings are enhanced by Heiney's incredibly weak "mitigating circumstances".

(A) "Heiney's "non-violent" criminal record" (excluding the shooting and the murder at bar) is offset by its length and by his inability to be rehabilitated.

(B) "Heiney surrendered peacefully". That is to be expected. This is not mitigation.

(C) "Heiney drank beer in the past". This would no more "mitigate" Heiney's sentence than the proof of alcohol use did in **Lambrix** v. **State,** 534 So.2d 1151 (Fla. 1988). The victim, not Heiney, was drunk.

(D) "Heiney was bright (IQ 118) and his own lawyer". The State does not know if lawyers are that popular, but assuming this is *so,* the jury could well conclude that Heiney was too bright to be leading a life of crime and, as in **Bundy,** even react negatively.

(E) "Heiney was kind to the last person he shot". This evidence would not help. Clark v. *State,* **supra.**

Given the strong record support for the trial judge's decision and the absence of any realistic mitigation, the lower court's finding of harmless error must stand. **Tibbs, supra.**

Claim X
(Race of Victim: Death Penalty)

This issue is one of the race-motivated challenges to capital punishment that could have, if preserved, been raised on direct appeal. Of course, **McCleskey** v. **Kemp**, ____ U.S. ____, **95** L.Ed.2d 262 (1987), mooted the issue years ago.

Claim XI
("Tuszynski II")

Again, the record shows that the defense deposed Tuszynski prior to trial and specifically alleged that he lied to the Grand Jury. This issue could and should have been raised on appeal, but per **Mechanik, supra,** and **Costello, supra,** was meritless in any event.

Claim XII
(Williams Rule Error at Trial)

Again, a trial issue which was appealable and thus procedurally barred.

Claim XIII
(Ineffective Counsel)

See arguments re: **Faretta,** above. Heiney was a career criminal who did well in not calling his relatives - who we assume **he** knew even if his co-counsel did not. Since Heiney subpoenaed other witnesses for various hearings - are we to believe he could not produce his own "caring" sisters?

Clearly, all thirteen claims in Heiney's original petition, as amended, were correctly denied.

This brings us to Heiney's second successive Rule 3.850 petition.

Heiney sat on his case for over two years, making no move to further amend the case or move it along. But for Governor Martinez' warrant, the case would still be idle and the successive petition would not have been filed.

The signing of a death warrant is not the signal to begin researching a case. This, however, was Mr. Heiney's reaction. Mr. Heiney simply surveyed the current "chic" arguments and then sought to circumvent the two year time bar with a "consolidated" motion which purportedly combined eight new claims (a new petition) with four "reheard" claims (actually, just reargued).

The trial court detected the ruse and rejected the improper successive petition under the two year time bar.[4] The trial court relied upon the two part test set out in **Eutzy** v. **State, 14** F.L.W. 76 (Fla. 1989); to-wit:

> (1) A successive claim must involve a newly recognized fundamental constitutional right that has been held to have retroactive application.
>
> (2) Or, a successive claim must be based upon newly discovered evidence which, by diligent search, could not have been uncovered before.

Applying this test to Heiney's successive petition, we find:

---

[4] While first petitions may be amended, Woods v. **State,** 531 So.2d 79 (Fla. 1988), the trial court did allow amendments for two years whenever Heiney wanted them. The ruse of using post-judgment rehearings or amendments to sneak new issues before the court is not permitted on appeal in this Court and should not be sanctioned in the lower courts. See Parker v. **Dugger,** 537 So.2d 969 (Fla. 1989).

Claim I
(Witholding Cook's Name)

(A) Brady is not (and was not) new law and could have been argued before.

(B) Heiney's opening statement at trial admitted that he and May traveled alone from Texas to Missouri, where they went, alone, to Mays' mother's home. Later, Heiney says a phantom hitchhiker killed May while he (Heiney) stole May's car and wallet (credit cards). This "Phillip Cook could have done it" issue is illusory and contrary to Heiney's trial defense. Heiney admits he was there for May's robbery, if not his death. If Cook "really" did the killing, Heiney (by diligent search or his touted "cooperation" with the police) could have developed the issue before now.

Claim II
(Tuszynski 11)

(A) No new law applies.

(B) Heiney deposed Tuszynski and called him a liar before trial, so (B) does not help him. Cumulative evidence is not "new" evidence.

Claim III
(Hitchcock)

Resolved above.

Claim IV
(Jury Override)

This is mere reargument, using **Hitchcock** of Heiney's **Lockett** claim on direct appeal.

Claim V
(Medical Incompetence)

The two year time bar has already been applied to this suddenly popular claim. Eutzy v. State, 14 F.L.W. 176 (1989).

Claim VI
(Ineffective Trial Counsel)

Another Faretta-based claim that clearly fails the Eutzy test.

Claim VII
(Heinous/Atrocious/Cruel)

This claim falls within the class of time-barred claims. Atkins v. Dugger, 14 F.L.W. 207, 208 (Fla. 1989).

Claim VIII
(Preclusion of Cross Examination)

(A) No new law applies.

(B) The issue was obviously known back at trial.

Claim IX
(Faretta Violation-

(A) No new law applies.

(B) Heiney, as co-counsel, knew what happened but registered no objections and did not raise the subject on appeal.

Claim X
("Automatic Aggravating Factor")

This issue was also noted as time barred in Atkins, supra.

Claim XI
(Non-Statutory Aggravating Factors)

(A) No "new law" is involved.

(B) This issue was raised on appeal so (B) does not apply.

Claim XII
(Burden of Proof)

This new bit of sophistry regarding "shifting" burdens of persuasion - not proof - during an equitable sentencing proceeding before a purely advisory jury has been recognized as subject to the two-year time bar in Atkins, supra.

It is clear that Heiney's twelve new claims would fail as procedurally barred even if they were not time barred as part of a second successive petition. They all involve claims that could have been developed and presented on direct appeal.

CONCLUSION

The trial court did not err in its summary denial of Heiney's two successive 3.850 petitions.

Respectfully submitted,

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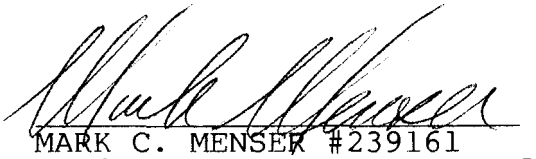
ATTORNEY GENERAL



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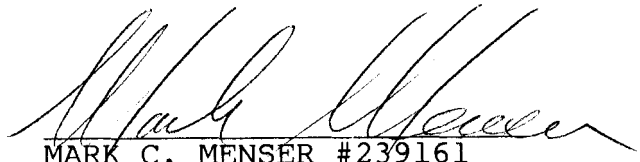
COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Ms. Judy Dougherty, Esq., Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, FL 32301, this 30th day of May, 1989.



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