IN THE SUPREME COURT OF FLORIDA

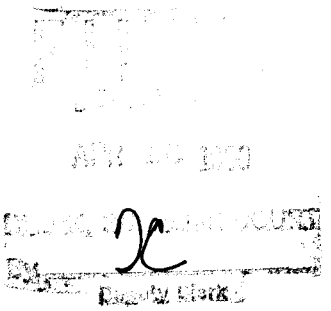
LARRY DONNELL BROWN,

Appellant,

v. Case No. 74,172

STATE OF FLORIDA,

Appellee.



BRIEF OF THE APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. KRAUSS
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

OF COUNSEL FOR APPELLEE

TABLE OF CONTENTS

PAGE NO.

TABLE OF CITATIONS

PAGE NO.

OTHER AUTHORITIES CITED

STATEMENT OF THE CASE

The defendant was charged by two count indictment filed on June 10, 1981, with the premeditated murder of Anna Jordan and for burglary of Ms. Jordan's dwelling. At arraignment, Brown pled not guilty. Trial by jury commenced on October 26, 1982, before the Honorable Crockett Farnell, Circuit Judge. After deliberations, the jury found the defendant guilty as charged in both counts of the indictment on October 28, 1982. On October 29, 1982, the jury returned a recommendation that the trial court impose a sentence of life imprisonment that a possibility of parole for twenty-five (25) years. On November 15, 1982, a sentencing hearing was held before Judge Farnell and he orally sentenced the defendant to death for the first degree murder of Anna Jordan. On December 17, 1982, the trial court filed his written findings as to why the death penalty should be imposed.

On June 27, 1985, the Florida Supreme Court affirmed the judgment and sentence of death. Brown v. State, 473 So.2d 1260 (Fla. 1985). The issues raised by Brown in his direct appeal to the Florida Supreme Court were as follows:

ISSUE I

> THE COURT BELOW ERRED IN OVERRULING LARRY BROWN'S OBJECTION TO THE PROSECUTOR'S ASSERTION DURING CLOSING ARGUMENT THAT BROWN AND HIS COUNSEL DELIBERATELY INTIMIDATED KEY STATE WITNESS GEORGE DUDLEY, AND IN REFUSING TO INSTRUCT THE JURY TO DISREGARD THE PROSECUTOR'S REMARKS.

ISSUE II

THE COURT BELOW ERRED IN FAILING TO GRANT LARRY BROWN MEANINGFUL RELIEF DUE TO THE STATE'S FAILURE TO COMPLY WITH FLORIDA'S DISCOVERY RULES, AND IN ALLOWING THE STATE TO INTRODUCE THE HEARSAY TESTIMONY OF GEORGE DUDLEY.

ISSUE III

THE COURT BELOW ERRED IN DENYING BROWN'S MOTION TO DISMISS COUNT II OF THE INDICTMENT, WHICH FAILED TO ALLEGE THE FACTUAL ELEMENTS OF THE ASSAULT MADE UPON ANNA JORDAN.

ISSUE IV

THE COURT BELOW ERRED IN REFUSING TO GRANT IN THEIR ENTIRETY BROWN'S MOTIONS TO REQUIRE THE STATE TO PROVIDE PARTICULARS CONCERNING THE CHARGED OFFENSE.

ISSUE V

THE COURT BELOW ERRED IN REFUSING BROWN'S REQUEST TO PROVIDE THE JURY WITH VERDICT FORMS WHICH WOULD INDICATE, IF THE JURY FOUND BROWN GUILTY OF FIRST-DEGREE MURDER, WHETHER THE VERDICT WAS BASED UPON A FINDING OF PREMEDITATION OR FELONY-MURDER.

ISSUE VI

THE COURT ERRED IN IMPOSING A LIFE SENTENCE FOR BURGLARY UPON LARRY BROWN AFTER FAILING TO IMPOSE ANY SENTENCE AT THE SENTENCING HEARING, AND BECAUSE THE BURGLARY WAS THE OFFENSE USED TO SUPPORT BROWN'S CONVICTION FOR FELONY-MURDER.

ISSUE VII

THE COURT BELOW ERRED IN SENTENCING LARRY DONNELL BROWN TO DEATH BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCES UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

ISSUE VIII

THE COURT BELOW ERRED IN SENTENCING LARRY DONNELL BROWN TO DEATH WHEN HIS CO-PERPETRATOR, GEORGE DUDLEY, HAD NEGOTIATED A LIFE SENTENCE FOR HIS PART IN THE SAME OFFENSE.

ISSUE IX

SENTENCING LARRY DONNELL BROWN TO DEATH WHEN IT WAS NOT PROVEN THAT HE INTENDED TO KILL ANNA JORDAN CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

ISSUE X

THE TRIAL COURT ERRED IN SENTENCING LARRY DONNELL BROWN TO DEATH OVER THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT, BECAUSE THE FACTS SUGGESTING DEATH AS AN APPROPRIATE PENALTY WERE NOT SO CLEAR AND CONVINCING THAT VIRTUALLY NO REASONABLE PERSON COULD DIFFER.

ISSUE XI

THE TRIAL COURT ERRED IN IMPOSING A DEATH SENTENCE UPON BROWN AFTER THE JURY RECOMMENDED LIFE IMPRISONMENT BECAUSE SUCH A SENTENCE PLACED BROWN IN DOUBLE JEOPARDY, VIOLATED HIS RIGHT TO DUE PROCESS AND CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

Subsequently, the defendant sought certiorari review in the United States Supreme Court, but on December 16, 1985, the petition was denied. Brown v. Florida, 474 U.S. 1038, 106 S.Ct. 607, 88 L.Ed.2d 585 (1985).

On or about December 15, 1987, volunteer counsel for the defendant filed a motion to vacate judgment and sentence. Subsequently, the Office of the Capital Collateral Representative was substituted as counsel and amended 3.850 pleadings were filed. Thereafter, the state, in response to the motion to

vacate, filed a motion for summary denial of amended motion to vacate judgment and sentence. On February 24, 1989, Judge Farnell granted the state's motion and summarily denied the amended motion to vacate judgment and sentence. (R 383 - 390)

STATEMENT OF THE FACTS

The State of Florida will rely on the Florida Supreme Court opinion (cited at Brown v. State, 473 So.2d 1260 (Fla. 1985)) for a statement of the facts:

> On February 5, 1981, workers from a social service agency found eighty-one-year-old Anna Jordan dead in her St. Petersburg home. The victim had been bound and sexually battered before she died of asphyxiation. The police found that the victim's house had been ransacked and a portable television taken. While in jail on an unrelated charge, Larry Brown implicated George Dudley in the crimes and led the police to the purchaser of the stolen television. The police confronted Dudley with Brown's accusations. Dudley admitted his presence during the crimes, but informed the police that Brown planned the burglary, bound and sexually battered the victim, and sold the television set in a bar for $20. The buyer of the television corroborated Dudley's story. Dudley was allowed to plead guilty to burglary and second-degree murder and became the main witness against Brown, who was indicted or first-degree murder and burglary with an assault.
>
> At trial, Dudley testified that Brown bound the victim and struck her once. Dudley also stated that Brown's step-son, Ricky, who had not been located by the date of the trial, committed the sexual battery while Brown ransacked the house. Dudley claimed to have just stood around during the commission of the crimes. The medical examiner testified that certain physical evidence found at the scene indicated that the perpetrators had gagged the victim in addition to binding her arms and neck. The medical examiner stated clearly that the victim died of asphyxiation, but could not state with certainty whether the airway obstruction resulted from the binding, from a gag, or from manual strangulation.

The jury found Brown guilty as charged on both counts. At the conclusion of the penalty phase of the trial, the jury recommended that Brown be sentenced to life imprisonment for the murder. The trial court overrode the jury recommendation and proceeded to impose the death penalty after finding the aggravating circumstances far outweighed any mitigating circumstances.[1] Brown was also sentenced to a consecutive life sentence for the offense of burglary during which an assault was committed.

---

[1] In his order of December 16, 1982, the trial court found six (6) aggravating circumstances and no mitigating circumstances. On direct appeal, the Florida Supreme Court found that none of the aggravating circumstances found i.e., the murder was committed in a cold, calculated, and premeditated manner, was not supported by the evidence. Thus, five valid, aggravating factors exist in this case.

STATEMENT AND ARGUMENT CONCERNING PROCEDURAL BARS

The amended motion to vacate judgment and sentence filed in this cause contained fifteen (15) claims for relief. The trial court ruled that many of those claims were barred by virtue of the two year provision of *Rule 3.850*. In the argument portion of this brief, your appellee will identify those claims which were correctly ruled barred by the trial court where they had not been filed within two years of the defendant's judgment and sentence becoming final and where there is no excuse for the failure to allege these grounds during the two year period prescribed by *Rule 3.850.*

Similarly, other issues raised by the defendant were claims which are not cognizable in post-conviction relief. It has long been the law in this state that a defendant may not raise via motion pursuant to *Rule 3.850, Florida Rules of Criminal Procedure*, claims which were raised or should have been raised on direct appeal. See. e.g., McCrae v. State, 510 So.2d 874 (Fla. 1987), citing Middleton v. State, 465 So.2d 1218 (Fla. 1985); Demps v. State, 416 So.2d 808 (Fla. 1982); Christopher v. State, 416 So.2d 450 (Fla. 1982); Raulerson v. State, 420 So.2d 517 (Fla. 1982); Meeks v. State, 382 So.2d 673 (Fla. 1980); Alvord v. State, 396 So.2d 194 (Fla. 1981); and Adams v. State, 380 So.2d 423 (Fla. 1980). The purpose of motions pursuant to *Rule 3.850* is to provide a means of addressing alleged constitutional errors in a judgment or sentence, not to review errors which are cognizable on a direct appeal. McCrae v. State, 437 So.2d 1388 (Fla. 1983). As

in Blanco v. State, 507 So.2d 1377 (Fla. 1987), several of the claims raised by the defendant below in the 3.850 motion should be summarily denied where these issues are not cognizable in post-conviction relief. In Atkins v. State, 541 So.2d 1165 (Fla. 1989), this Court held that with the exception of issues relating to ineffective assistance of counsel, all issues raised by Atkins were procedurally barred because they were either raised, or should have been raised, on direct appeal. In the same vein, Brown's failure to properly raise issues at trial and/or on appeal, constitutes a procedural default precluding collateral review. Wainwright v. Sykes, 433 U.S. 72 (1977); Murray v. Carrier, 477 U.S. 478 (1986); Smith v. Murray, 477 U.S. 527 (1986); Engle v. Isaac, 456 U.S. 107 (1982). The claims that are procedurally barred will be identified in the argument portion of this brief.

SUMMARY OF THE ARGUMENT

Most of the claims raised by appellant are not cognizable in 3.850 proceedings and were, therefore, properly summarily denied by the trial court. Those issues which were clearly barred because they either were or could have and should have been raised at trial and/or on direct appeal or were not filed within the two year limitation of *Rule 3.850* are as follows: IV, V, VI, VII, IX, X, XI, XII, XII, XIV and XV.

Issues I, II and III were correctly summarily denied where the allegations were insufficient or there was no factual basis to support the claim. These issues include the ineffective assistance of counsel claims wherein appellant failed to allege facts which show the prejudice required to support such a claim.

Claim VIII was correctly denied by the trial court. The motion to disqualify filed by appellant below was insufficient on its face to warrant relief where there were no material issues of fact to be tried. Therefore, Judge Farnell was not to be a witness in this case.

ARGUMENT IN OPPOSITION TO 3.850 CLAIMS

ISSUE I

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS TRIAL.

In summarily denying appellant's claim of ineffective assistance of counsel at the penalty phase of trial, the trial court ruled that the allegations of ineffectiveness were inadequately pled to afford relief or that the files and records conclusively show that the defendant is unable to demonstrate the constitutional prejudice required to support this claim. The court also found that trial counsel rendered reasonably effective assistance with regards to the investigation and conduct of the penalty phase. For the reasons expressed below, the trial court did not err in its ruling.

When reviewing allegations of ineffective assistance of counsel, the general presumption is that defense counsel was presumed to have performed competently and effectively within the meaning of the Sixth Amendment. Strickland v. Washington, 466 U.S. 668 (1984). Furthermore, the defense is required to prove prejudice. Strickland v. Washington, Id. A defendant presenting a claim of ineffectiveness must sufficiently plead deficiency and prejudice. Hill v. Lockhart, 474 U.S. 52 (1985). The absence of sufficiently pleading deficiency or prejudice results in the claim being subject to dismissal. Hill v. Lockhart, Id. Absent a denial of counsel or counsel who entirely failed to subject the

state's case to adversarial tests, there must be both a pleading of specific deficiency and a resulting prejudice. See, United States v. Cronic, 466 U.S. 648 (1984). The trial court correctly found after a review of the entire transcript of the instant case that Brown's counsel acted as advocates.

The pleadings filed by the defendant failed to demonstrate that trial defense counsel were constitutionally deficient as required under Strickland v. Washington, supra. A claim of ineffective assistance of counsel must be viewed in light of the decision in Strickland where the United States Supreme Court has set forth a two-prong test: (1) the burden is upon the defendant to show that counsel's performance was deficient (i.e., counsel made errors so serious that he did not function as "counsel" within the meaning of the Sixth Amendment); (2) the defendant must also show that the deficient performance prejudiced the defense in so far as there is a high probability that the outcome of the proceeding would have been different, but for the actions of defense counsel. In applying the two-pronged test, a reviewing court must indulge in a strong presumption that counsel's representation was effective. Further, effective assistance does not mean errorless assistance and an attorney's performance is to be judged on the totality of the circumstances in the entire record rather than on specific actions. With respect to the first prong of the Strickland v. Washington test, it is clear that trial counsel were able to obtain a life recommendation from the jury, and such recommendation was the

best defense counsel could have hoped for. It is clear that no deficiency has been shown.

However, without delving into the question of trial counsel's deficiency, it is clear that Brown was unable to allege facts which would support a finding that he was prejudiced by the alleged deficiencies of trial counsel. As stated above, the defendant must show that there is a high probability that the outcome of the proceeding would have been different but for the omissions of defense counsel. Your appellee submits that no such showing was made even via allegations submitted by Brown in his motion to vacate and his amended motion to vacate. In those motions, Brown set forth the statements of several family members and friends which allegedly could have been submitted during the penalty phase.[2] Basically, these witnesses would have testified as to Brown's "deprived and destitute" childhood, his attachment to his mother, the effect Brown's mother's death had upon him, Brown's mother's heavy drinking, and alleged epileptic seizure suffered by Brown, and physical abuse of Brown and his mother at the hands of Brown's step-father. The state submits that this additional, nonstatutory mitigating evidence of a general nature, i.e., Brown's circumstances when he was a youngster, would not have affected the sentencing outcome. Your appellee submits that evidence of Brown's childhood background has no mitigating effect

---

[2] One of these witnesses, Ruby Turner, did testify during the penalty phase.

upon a crime committed when Brown was 27 years old. See, Buenoano v. State, __ So.2d __ (Fla. 1990), Case No 75,346, slip opinion filed April 5, 1990. In any event, evidence of Brown's character and background was submitted to the jury for its consideration by defense counsel during the penalty phase. Detective Gary Hitchcock testified that Brown supplied reliable information concerning crimes within the jurisdiction. Sandra Cooper, Brown's first cousin, testified that appellant was depressed after his mother had died. She further testified that Brown attempted to keep his brothers out of trouble, that Brown had one child whom he loved and cared for, and that Brown picked tomatoes in order to get rent money or in order to support his mother. Ruby Turner, Brown's aunt, testified that Brown sang in church choires and was generally involved with church activity. These matters were not found as mitigating circumstances by the trial court. Your appellee submits that, as the trial judge found in his order denying relief on this point (R 387), considerations of the matters alleged in the motions to vacate would not have been found to be mitigating factors or, at best, would have been considered cumulative to the evidence which was presented during the penalty phase.

Appellant also raises the now-familiar collateral contentions concerning failure to adequately investigate and present mental health mitigating evidence. The motions to vacate presented to the trial court below were classic examples of an attempt to raise a claim where no factual support exists. In the

original 3.850 motion filed by the defendant's predecessor collateral counsel, allegations were made concerning the findings of Doctor Harry Krop, a psychologist who is no stranger to capital collateral proceedings. In the amended motion to vacate filed by the Office of the Capital Collateral Representative, no allegations were included concerning Dr. Krop's report and findings. However, in his brief appellant gratuitously asserts a paragraph concerning Dr. Krop's findings. (Appellant's brief at page 21) Therefore, the allegations of the amended 3.850 motion with respect to the alleged mental deficiency of the defendant were wholly inadequate in that they were only conclusory in nature. No support was offered even via allegation as to the mental health mitigating evidence which may have been available. Presumably, this his because Dr. Krop's findings as set forth in the original 3.850 motion and appendix thereto were insufficient to support the allegations. As will be demonstrated below, your appellee submits that the defendant failed to allege facts sufficient to support a claim of ineffective assistance of counsel due to the alleged failure to investigate or present a mental health expert in mitigation.

Nothing in Dr. Krop's report (included within the record at R 44 - 47) supports any mental health mitigating circumstance. To the contrary, the report of Dr. Krop conclusively shows that Brown has not been prejudiced by the failure to call mental health professionals, nor was defense counsel deficient for failure to present this type of evidence. In his summary and

conclusion, Dr. Krop states that at the time of the offense Brown was suffering from an Adjustment Disorder with Depressed Mood (DSM III - 309.00). The specific disorder as set forth in DSM III is as follows:

> **309.00 Adjustment Disorder with Depressed Mood** - This category should be used when the predominant manifestation is symptoms such as depressed mood, tearfulness, and feelings of hopelessness.

Certainly this "disorder" does not mitigate the unjustified homicide of an elderly woman. For some reason, Dr. Krop also concludes that Brown was exhibiting acute psychotic symptoms in the form of visual hallucinations. However, this conclusion is inconsistent with Dr. Krop's clinical impressions of Mr. Brown. Dr. Krop noted that Brown "was cooperative and responded to all questions posed. Affect was full range and he elaborated spontaneously. His speech was clear with no articulation defects or pressuring. Thinking was generally logical but concrete as abstract thinking is significantly limited. There were no unusual gestures or mannerisms suggesting a psychotic process. . . . " Dr. Krop then notes that it was solely upon Brown's self-assertions of visual hallucinations that reflects an aberrant perceptual process. Dr. Krop continued by noting that "there is no other evidence of a thought disorder, but Mr. Brown manifests an intermittent depressed stated, generally associated with his reflection of his mother." These findings simply do not support the finding of mitigating circumstances.

Significantly, especially with respect to the allegations of ineffective assistance of counsel, Dr. Krop noted in his clinical impressions nothing unusual when he interviewed Brown. His descriptions of Brown's affect, speech, and logical thinking would certainly not alert defense counsel to any possible psychiatric problems. Indeed, Dr. Krop notes that "there is no psychiatric history." Thus, there was no indication available to defense counsel that Brown was suffering from some mental infirmity sufficient to support a mitigating circumstance.

It is interesting to note also that Dr. Krop in conclusion states that individuals such as Mr. Brown with similar diagnostic patterns of limited intellectual ability generally have difficulty planning and organizing in any complex manner. This analysis flies in the face of the record where in the testimony was clear that Brown planned the burglary which led to Ms. Jordan's death.

It is clear from the above that the allegations with respect to defense counsel's alleged failure to present certain mitigating evidence were insufficient on their face to warrant relief. Where a life recommendation was obtained from the jury, certainly defense counsel cannot be found deficient. Additionally, the failure by defense counsel to present those matters now alleged as mitigating circumstances is insufficient on its face to warrant relief. Brown has not shown how the additional testimony relied upon in his motion to vacate would have created a reasonable probability that the sentencing

decision of the trial court would have been different. Therefore, the trial court correctly summarily denied this claim.

ISSUE II

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM THAT HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL DUE TO A CONFLICT OF INTEREST ON THE PART OF ONE OF HIS TRIAL COUNSEL.

As his next point on appeal, Brown alleges that Assistant Public Defender Michael McMillian (one of Brown's co-counsel) represented George Dudley, the chief witness against Mr. Brown at trial, in April of 1980 and, therefore, a fundamental conflict of interest arose which warranted 3.850 relief. Inasmuch as the allegations did not state a basis for relief, as will be demonstrated below, this claim was properly summarily denied by the trial court.

Appellant finds it unnecessary to show or even speculate as to what information Mr. McMillian possessed concerning Mr. Dudley by virtue of Mr. McMillian's previous representation of Mr. Dudley. This is not correct! In order to establish a showing of ineffective assistance of counsel, a defendant must demonstrate that both an actual conflict of interest existed and that such conflict adversely effected the adequacy of representation. Strickland v. Washington, supra; Cuyler v. Sullivan, 446 U.S. 335 (1980); Smith v. White, 815 F.2d 1401 (11th Cir. 1987); Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986). Because appellant failed to demonstrate an actual conflict of interest, even by allegation, the trial court correctly summarily denied the claim. A mere possibility of conflict of interest does not rise to the level of a Sixth Amendment violation. Cuyler v. Sullivan, supra.

In Smith v. White, supra, the Eleventh Circuit cited the test adopted to distinguish actual from potential conflict as previously stated in Barham v. United States, 724 F.2d 1529 (11th Cir.), cert. denied, 467 U.S. 1230 (1984);

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

Cf. Burger v. Kemp, 483 U.S. 776, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987) (requiring or permitting a "single attorney" i.e., law partners, to represent codefendants is not per se violative of constitutional guarantees of effective assistance of counsel; any overlap of counsel did not so infect the attorney's representation as to constitute an active representation of competing interests). See also, Lightbourne v. Dugger, 829 F.2d 1012 (11th Cir. 1987).

There is no doubt that the allegations as set forth in the amended motion to vacate pertaining to the purported conflict of interest were insufficient on their face to warrant relief. No actual conflict of interest was even alleged. Thus, the trial court correctly denied relief on this claim.

ISSUE III

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM THAT HE WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT/INNOCENCE PHASE OF HIS TRIAL.

Appellant next combines claims which originally appeared as claims IX and X in his amended 3.850 motion. (R 298 - 302). Initially, appellant asserts that trial counsel was ineffective where they should have attempted to impeach the testimony of several state witnesses with information defense counsel possessed. Specifically, Brown contends that defense counsel could have presented the testimony of Virgil Heywood and Rufus Brown to counter testimony adduced at trial by the state from Theresena Brown and Annette Heywood. As previously discussed, the dictates of Washington v. Strickland, supra, require that in order to prevail on a claim of ineffective assistance of counsel, the defendant must show (1) that his counsel's performance was deficient and, (2) that the deficient performance prejudiced the defense. Appellant made neither of these showings with respect to the allegations concerning this claim. Merely because neither Virgil Heywood nor Rufus Brown heard the defendant's statement that he had already killed "a white bitch" doesn't mean that the statement wasn't made. The failure of defense counsel to produce this "negative evidence" does not result in a deficient performance. This is especially true when the testimony of Annette Heywood is considered. It was clear from this testimony that Ms. Heywood heard the statement attributed to the defendant

and she further testified that the defendant asked her to say that the statement was never made. (Direct appeal record at 1031 - 1034) It is apparent that the defendant cannot establish how he has been prejudiced by the omission to call Virgil Heywood or Rufus Brown in light of Annette Heywood's testimony. The lack of prejudice to the defendant is even more evident when it is remembered that the conviction did not rest upon the testimony of Annette Heywood and Theresena Brown. Rather, a major component of the state's case was the testimony of George Dudley, Brown's codefendant who was present at the scene of the murder.

Appellant claims he was further denied the effective assistance of counsel by virtue of trial counsel's failure to engage an independent forensic pathologist. Appellant's theory is that the use of such pathologist could have aided in an attempt to rebut the evidence presented by Dr. Joan Wood, the state's medical examiner. Even a cursory review of the allegations in the amended 3.850 motion reveals that they are clearly insufficient to support 3.850 relief and, consequently, the trial court correctly summarily denied the claim.

In his amended 3.850 motion, the defendant did not advise as to how Dr. Wood could have been "countered" and the failure to allege facts sufficient to support this claim warranted summary denial. The defendant merely alleged that an independent pathologist may have been useful in rebutting the evidence of the state's medical examiner, yet, the defendant does not advise as to how the testimony of Dr. Wood could have been attacked.

Rather, the defendant engages in speculation unsupported by any factual allegations. *Rule 3.850* requires that a claim be supported by facts sufficient to show entitlement to relief. In the amended motion to vacate, the defendant did not allege any facts sufficient to show that an independent forensic pathologist was required. Mere speculation will not support 3.850 relief. Cf. Sullivan v. State, 303 So.2d 632 (Fla. 1974) (reversible error cannot be predicated on conjecture).

Your appellee submits that appellant failed, even via allegation, to support a claim that trial counsel was ineffective at the guilt phase of trial. To the contrary, the files and records of the instant case reveal that trial counsel acted as advocates on behalf of Mr. Brown. The trial court correctly summarily denied these claims.

ISSUE IV

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM THAT HE WAS ILLEGALLY SENTENCED IN VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WHERE THE SENTENCING JUDGE HAD BEEN SUSPENDED FROM THE PRACTICE OF LAW FOR FAILURE TO PAY THE ANNUAL BAR FEE.

Appellant next contends that he was deprived of constitutional rights by virtue of the fact that the trial judge had been temporarily suspended from the practice of law for failure to pay the annual bar fee. Your appellee submits that this matter was not raised on direct appeal of Brown's judgment and sentence, although the matters he now complains of could have been discovered at that time. In fact, Brown's appellate counsel made written inquiry to the Florida Bar concerning the matters now complained of. Florida law is clear that matters which could have been raised on direct appeal, but were not, are not matters cognizable in a *Rule 3.850*. McCrae v. State, 510 So.2d 874 (Fla. 1987), citing Middleton v. State, 465 So.2d 1218 (Fla. 1985); Demps v. State, 416 So.2d 808 (Fla. 1982); Meeks v. State, 382 So.2d 673 (Fla. 1980); Adams v. State, 380 So.2d 423 (Fla. 1980). On this basis alone, this claim was properly summarily denied by the trial court.

Alternatively, your appellee submits that the defendant failed to allege facts, which even if true, would support the granting of 3.850 relief. Merely because the trial judge may have failed to pay his annual bar fees does not necessitate the finding that that judge was disqualified from service or that the

defendant was deprived of any constitutional rights. In his motions to vacate, appellant relied on *Article V*, §8 of the Florida *Constitution*, which sets forth the qualifications of a judge in the State of Florida. That provision is inapplicable to the instant case where there is no challenge as to the trial court's eligibility as to the office of circuit judge. In an analogous situation, the Third District Court of Appeal was called upon to decide the question of whether an attorney is per se ineffective where that attorney represents the defendant while suspended from the right to engage in the practice of law because of his failure to pay bar dues. In Dolan v. State, 469 So.2d 142 (Fla. 3d DCA 1985), the court declined to adopt a per se ineffective rule. The court observed that an attorney who is suspended from the Florida Bar for failure to pay annual dues is automatically entitled to reinstatement upon filing a petition and the payment of the dues, citing The Florida Bar (in re Steinbach), 427 So.2d 733 (Fla. 1983); Thomson v. The Florida Bar, 260 So.2d 495 (Fla. 1972). The court held that where a suspension is unrelated to any disciplinary proceeding and the act of reinstatement is purely administerial, the suspended status of an attorney has no bearing on that attorney's ability to represent a criminal defendant. Similarly, in the instant case, the trial court may have been suspended due to failure to pay the bar dues, but he did not lose his ability to effectively preside as a circuit judge. In Dolan, the Third District Court of Appeal affirmed the trial court's order which denied the defendant's Rule 3.850

motion as facially insufficient. The same result occurred in the instant case and this Honorable Court should affirm the summary denial of this claim.

ISSUE V

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM THAT THE STANDARDS FOR A JURY OVERRIDE WERE NOT FOLLOWED IN THE INSTANT CASE.

As his fifth claim on appeal, appellant raises an issue which he knows is not cognizable in post-conviction review. In this claim, appellant is merely rearguing a matter which was raised and determined on direct appeal. In addition, this claim was not raised in the defendant's 3.850 motion within the two year period prescribed by *Rule 3.850*. On this basis alone, the trial court's summary rejection of this claim was proper. (R 386).

In Brown v. State, 473 So.2d 1260 (Fla. 1985), the direct appeal of this case, this Honorable Court considered the issue of whether the trial court validly imposed the sentence of death following a jury recommendation of life imprisonment. The defendant is simply quarreling with the result reached in the direct appeal of this case and such disagreement does not form the basis of a cognizable 3.850 claim for relief. Your appellee respectfully submits that this Court should not revisit a claim which was specifically determined by this Court merely because a defendant disagrees with a decision.

ISSUE VI

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM PREDICATED UPON BOOTH V. MARYLAND.

In summarily denying this claim, the trial court relied upon Grossman v. State, 525 So.2d 833 (Fla. 1988), and ruled that the failure to object to "Booth" comments resulted in a procedural bar. The trial court's rejection of this claim for reason of procedural default was correct.

In an effort to have this Honorable Court consider this claim, appellant relies upon (Andrea) Jackson v. Dugger, 547 So.2d 1197 (Fla. 1989). Reliance upon Jackson is clearly misplaced. In Jackson, this Court noted that objection was made at trial to the use of victim impact evidence and the issue was raised on appeal and was expressly addressed on appeal by this Court. In the instant case, however, no objection as to Booth-type statements which were contained in the presentence investigation or were otherwise presented in the penalty phase of trial was made. Therefore, this Honorable Court's recent decision in Parker v. Dugger, 550 So.2d 459 (Fla. 1989), controls. In Parker, this Court distinguished Jackson, and held, in accordance with various other precedents, that the failure to object to Booth-type statements results in a clear procedural bar obviating collateral review. In previously finding a procedural bar in Grossman, supra, this Court observed that victim impact is not one of the aggravating factors enumerated in our capital sentencing statute upon which a death sentence may be predicated,

citing Blair v. State, 406 So.2d 1103 (Fla. 1981); Miller v. State, 373 So.2d 882 (Fla. 1979); and Riley v. State, 366 So.2d 19 (Fla. 1978). Thus, a criminal defendant should object to evidence of a nonstatutory aggravating factor and, consequently, this Court held that in the absence of a timely objection to the use of "victim impact" evidence, a defendant is procedurally barred from claiming relief under Booth. On this basis alone, the trial court correctly summarily denied relief. See also, Thompson v. Lynaugh, 821 F.2d 1080 (5th Cir. 1987).

Even if this claim could be considered on its merits the defendant would be entitled to no relief. In the instant case, any statement by the prosecutor or contained in the PSI concerning the effect of the murder on the victim's family was mere surplusage and was not considered by the trial court when the court weighed valid aggravating factors enumerated in the statute with all mitigating evidence. Inasmuch as any "victim impact" evidence or statements by the prosecutor played no part in the weighing of aggravating and mitigating circumstances, the trial court did not improperly focus upon unacceptable aggravating factors. Summary denial of this claim should be affirmed.

ISSUE VII

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM THAT THE PROSECUTOR PURPORTEDLY INJECTED RACIAL PREJUDICE INTO THE TRIAL.

As his seventh point on appeal, the defendant complains of purportedly prejudicial comments which allegedly injected racial prejudice into his trial. This is another claim which was not raised prior to the expiration of the two year limitation of *Rule 3.850* and, therefore, on this basis alone, the trial court correctly summarily denied the claim (R 384). In the court below, appellant relied upon the decision rendered in Robinson v. State, 520 So.2d 1 (Fla. 1988), presumably in an attempt to show that this claim is based on law which is not available during the two year period prescribed by *Rule 3.850*. This assertion is clearly specious. To assert that this type of racial prejudice claim could not be asserted until the decision rendered in Robinson is clearly erroneous. Even in Robinson, this Honorable Court noted that "[R]acial prejudice has no place in our system of justice and has long been condemned by this Court. E.g. Cooper v. State, 136 Fla. 23, 186 So. 230 (1939); Huggins v. State, 129 Fla. 329, 176 So. 154 (1937)." Robinson, Id. at 7. Clearly, trial counsel for Mr. Robinson were able to object to the stirring of racial prejudice at trial if it indeed occurred. Thus, the trial court correctly summarily denied this claim on the basis of the two year limitation of *Rule 3.850.*

This claim was properly summarily denied on yet another basis pertaining to procedural default, to wit: the failure to object at trial or the failure to raise this claim on direct appeal. As demonstrated immediately above, this type of claim could have been raised at trial because the tools were certainly available for many years to construct the claim.

In any event, it appears clear that even had an objection been raised by trial counsel, that objection would be properly overruled. Thus, the defendant herein cannot support an ineffective assistance of counsel claim. The factual situation presented in Robinson is clearly and materially distinguishable from the facts in the instant case. In Robinson, the prosecutor cross-examined the defendant's medical expert concerning Mr. Robinson's (a black man) prejudice toward white people and deliberately attempted to insinuate that the defendant had a habit of preying on white women. The Florida Supreme Court found that this was an impermissible appeal to bias and prejudice. However, in the instant case, there is no pattern of racial bigotry brought out by the prosecutor in the instant trial. Rather, the only matter that was established was the particular victim of this particular crime. Most significantly, the jury in the instant case was certainly not influenced by the purported attempt to inject racial prejudice into the trial. The jury returned a life recommendation. It must also be presumed that the trial court followed the law when it imposed the death sentence and did not rely upon any racial factors when imposing

that sentence. There is no evidence in this record that the trial court relied on any racial factor when it weighed the aggravating circumstances with the mitigating circumstances. This claim was correctly denied by the trial court.

ISSUE VIII

WHETHER THE TRIAL COURT ERRED BY DENYING THE MOTION TO DISQUALITY HIMSELF FROM PRESIDING OVER THE 3.850 PROCEEDINGS.

As his next claim on appeal, appellant contends that the trial court erred by failing to disqualify himself from presiding over the 3.850 proceedings. For the reasons expressed below, the trial court correctly denied the motion to disqualify.

The basis of appellant's motion below was that Judge Farnell was a necessary material witness concerning the claim that Judge Farnell failed to pay his Bar dues on time. The motion to disqualify filed with the trial court so alleges (R 371). However, counsel for appellant now states in his brief that Judge Farnell was also a necessary material witness as to certain comments attributed to him in the local press. This allegation was not included within the motion to disqualify nor in the affidavits which accompanied that motion (R 371 - 374). Thus, appellant's reliance upon Suarez v. Dugger, 527 So.2d 190 (Fla. 1988), and the other cases cited in his brief pertaining to judicial remarks which indicate a defendant may not receive a fair hearing, is misplaced. The only issue before this Honorable Court, as it was before the trial court, was whether Judge Farnell was to be a material witness for or against one of the parties to the instant cause with respect to the late payment of Florida Bar dues.

The allegations of the motion to disqualify were insufficient on their face to require Judge Farnell to recuse

himself. There simply was no issue of fact to be determined whether Judge Farnell was tardy in the payment of his Florida Bar dues. Judge Farnell acknowledged that the local press "made sure everybody knew about [the failure to timely pay Bar dues]" (R 462). The argument concerning the motion to disqualify reveals that the only questions to be resolved were those of law, and not of fact (R 453 - 454). There was no reason, therefore, for Judge Farnell to recuse himself when the question was purely one of law. Where there were no reasons for Judge Farnell to become a witness in this cause because facts were not in dispute, the motion to disqualify was legally insufficient on its face and, therefore, denial of that motion was proper by the trial court.

ISSUE IX

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM THAT HIS SENTENCING WAS CONTAMINATED BY THE PRESENTATION OF IMPROPER AND INADMISSIBLE OPINION EVIDENCE.

In this claim, the defendant complains that the sentencing process was impermissibly contaminated by the contents of the presentence investigation. Specifically, the defendant complains that the trial court should not have had before it the opinions of a law enforcement officer, the defendant's former probation officer, and the author of the PSI when the court was considering the sentence to be imposed upon the defendant. It is clear that the trial court correctly summarily denied this claim inasmuch as it was not raised on direct appeal. This claim cannot be considered as a facet of an ineffective assistance of counsel claim inasmuch as defense counsel did object to the consideration by the trial court of the materials now complained of. Thus, the trial court correctly denied this claim where it could have been raised on direct appeal yet was not.

ISSUE X

WHETHER THE TRIAL COURT ERRED BY DENYING APPELLANT'S CLAIM CONCERNING THE INTRODUCTION OF PURPORTEDLY NONSTATUTORY AGGRAVATING FACTORS.

As his next claim, the defendant complains about the alleged use of nonstatutory aggravating factors as factors which influenced the trial court to override the jury's life recommendation. This claim was not raised within the two year time limitation of *Rule 3.850* and, on this basis alone, the trial court properly denied this claim (R 385). The trial court correctly found that this claim is also barred by virtue of the fact that it was not raised on direct appeal and it could have been (R 385).

This claim, even if it could be considered on its merits or as a facet of ineffective assistance of counsel claim, must fail. The defendant acknowledged in his amended 3.850 motion and acknowledges in his brief before this Court that objection was made to the statements now complained of. The objections to the prosecutor's questions were properly overruled inasmuch as the state was attempting to rebut mitigating circumstances. The matters now complained of by the defendant were not considered as aggravating circumstances in the weighing process conducted by the trial court. For example, the cross examination concerning the defendant's being a liar was specifically offered to negate or rebut the mitigating evidence introduced by the defense that the defendant was a reliable and confidential informant.

It is axiomatic that a trial judge is capable of disregarding that which must be disregarded. A trial judge is presumed to follow the law. In the instant case, the written order of the trial court reflects that the permissible aggravating circumstances were weighed against all possible mitigating circumstances when the trial court imposed the death sentence. The trial court did not rely on any of the so-called nonstatutory aggravating circumstances now brought forth by the defendant. Inasmuch as no nonstatutory aggravating circumstances were a part of the weighing process, the trial court did not improperly focus upon unacceptable aggravating factors. Thus, for the reasons discussed immediately above and because this claim could have been and should have been raised on direct appeal, the trial court correctly summarily denied this claim.

ISSUE XI

WHETHER THE TRIAL COURT ERRED BY DENYING APPELLANT'S CLAIM THAT HIS SENTENCING PROCEEDINGS WERE TAINTED BY THE ALLEGED INTRODUCTION OF POST-MIRANDA SILENCE.

As his eleventh claim on appeal, the defendant alleges that his penalty phase proceedings were tainted by the introduction of post-Miranda silence. This claim was properly summarily denied for two reasons, both relating to the procedural default doctrine. First, this is an issue which should have and could have been raised on direct appeal and the failure to do so obviates the possibility of 3.850 relief. Second, this claim was not raised in the original 3.850 motion filed herein and, therefore, this claim is barred by the two year time provisions proscribed by Rule 3.850. The trial court's rulings to this effect (R 389) should be affirmed.

ISSUE XII

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM THAT JURY INSTRUCTIONS AND PROSECUTORIAL COMMENTS PURPORTEDLY IMPROPERLY COMMENTED UPON THE DEFENDANT'S FAILURE TO TESTIFY.

In this claim, the defendant contends that jury instruction and prosecutorial comment concerning proof of unexplained possession of property recently stolen were impermissible comments upon the defendant's failure to testify. The trial court properly summarily denied this claim on its merits by virtue of the failure to raise this claim prior to the expiration of the two year limitation period prescribed by *Rule 3.850*. The trial court also denied this claim because it is one which could have and should have been raised both at trial and on direct appeal.

The defendant also raises this claim as a facet of an ineffective assistance of counsel claim where he contends that the failure of trial counsel to object to the jury instructions concerning proof of unexplained property recently stolen rendered counsel ineffective. The defendant's claim, if it could be considered on the merits, would clearly fail and, therefore, trial counsel could not have been ineffective for failing to object to an issue which is unmeritorious. The instruction now complained of is one clearly authorized by Florida law. In State v. Young, 217 So.2d 567 (Fla. 1968), this Honorable Court determined that the rule, and consequent jury instruction, that a jury has the right to infer guilt of larceny or of an underlying

breaking and entering with intent to steal from the defendant's unexplained possession of recently stolen goods does not create a presumption of law under which the burden is illegally shifted to the defendant to produce evidence to rebut the legal presumption. In Edwards v. State, 381 So.2d 696 (Fla. 1980), this Honorable Court further construed the jury instruction and presumption now under attack and held that this type of instruction does not violate the Fifth and Fourteenth Amendment right to remain silent. Finally, in Smith v. State, 394 So.2d 407 (Fla. 1980), this Honorable Court reaffirmed its position that a jury instruction which incorporates the rule concerning unexplained possession of recently stolen property does not impinge upon a defendant's Fifth Amendment privilege to remain silent. This Court specifically reaffirmed the holding in State v. Young, supra and cited cases decided by the United States Supreme Court on the same issue. State v. Smith, 394 So.2d at 407. Thus, where the precedent of this state conclusively establishes that had the defendant objected to the jury instruction and comments now under attack, that objection would have been properly overruled. Counsel cannot be ineffective for failing to object to a claim which is clearly without merit.

ISSUE XIII

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM BROUGHT PURSUANT TO BRADY V. MARYLAND.

As his thirteenth point on appeal, appellant raises a claim pursuant to the decision of the United States Supreme Court in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Brady requires that the state disclose material, exculpatory information that it has in its possession. However, as set forth by the United States Supreme Court in United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), " . . . The prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." 427 U.S. at 108. The Court in Agurs further stated that: "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." 427 U.S. at 109 - 110. The proper standard of materiality of undisclosed evidence is that if the omitted evidence creates a reasonable doubt of guilt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. 427 U.S. at 112.

The allegations of the amended 3.850 motion did not create a reasonable probability that had these "new matters" been known of at the time, the result of the trial would have been different

where a reasonable probability is understood to mean a probability sufficient to undermine confidence in the outcome of the case. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); Arango v. State, 497 So.2d 1161 (Fla. 1986).

Moreover, disclosure requirements for the prosecution principally concern those matters not accessible to the defense in the course of reasonably diligent preparation. Perry v. State, 395 So.2d 170 (Fla. 1980); Halliwell v. Strickland, 747 F.2d 607 (11th Cir. 1984). In light of the foregoing general principles of law concerning nondisclosure by the prosecution, an examination of the alleged Brady violations in the instant case leads to the conclusion that, for several reasons, the trial court correctly denied appellant's Brady claim.

The trial court specifically ruled that the Brady claim was barred from consideration because the claim was not filed within the two year period prescribed by *Rule 3.850*. The trial court found an even more compelling reason to summarily deny the Brady claim, to wit: The basis of the claim was litigated in the trial court and in the Florida Supreme Court on direct appeal. As noted above, if the defense has access to information, that information is not Brady material. Both this Honorable Court and the trial court have found that the defendant obviously knew about Ricky at the time of Dudley's statement. Brown v. State, 473 So.2d 1260, 1264 (Fla. 1985); (R 438 - 439). Thus, where this claim was raised at trial and considered on direct appeal

and, in any event, where it was not possible for the defendant not to know about Ricky, the trial court correctly summarily denied this claim.

ISSUE XIV

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM THAT THE TRIAL COURT IMPROPERLY REFUSED TO INSTRUCT THE JURY THAT THE LACK OF INTENT TO KILL COULD BE CONSIDERED AS A MITIGATING CIRCUMSTANCE.

As his fourteenth point, appellant claims that the trial court improperly refused to instruct the jury that it could consider the lack of intent to kill as a mitigating circumstance. This claim, like many of the others raised in the amended 3.850 motion, is barred by the two year limitation prescribed by *Rule 3.850*. Obviously, this claim cannot be considered as a facet of ineffective assistance of counsel where defense counsel proffered an instruction informing the jury that the absence of an intent to kill could constitute a mitigating circumstance (Direct appeal record at 1291). In an effort to circumvent the two year limitation, appellant now alleges that new case law on this point has been rendered since his direct appeal, to wit: Hitchcock v. Dugger, 107 S.Ct. 1021 (1987). This claim is untenable especially in light of the fact that defense counsel did request the instruction. Presumably, this was because the decision in Lockett v. Ohio, 438 U.S. 586 (1978), had been decided long before Mr. Brown's trial. Where defense counsel asks for an instruction based upon Lockett, appellant cannot claim that new case law has been rendered since his direct appeal which effects resolution of his claim.

Significantly, this claim was preserved by trial counsel but was not raised on direct appeal. This is the type of claim that

must be presented on direct appeal and the failure to do so precludes *3.850* relief.

ISSUE XV

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM AS TO THE SIMILARITY BETWEEN THE FINDINGS OF THE COURT IN ITS SENTENCING ORDER AND THE STATEMENTS CONTAINED WITHIN THE PRESENTENCE INVESTIGATION REPORT.

As his final point on appeal, appellant complains about the similarity between the trial court's findings as to aggravating and mitigating circumstances and the statements contained in the presentence investigation report. In this claim, appellant contends that he has been denied constitutional rights by virtue of the similarity between the court's order and the PSI. The trial court correctly summarily denied this claim inasmuch as it was not raised on direct appeal and it could have been. McCrae v. State, supra.

Additionally, your appellee submits that this claim fails to allege a basis for 3.850 relief. The trial court, both orally at the sentencing hearing and in its written findings in support of the death penalty pertaining to the aggravating and mitigating circumstances carefully considered all factors available in reaching a decision to impose a sentence of death. The written findings of the court are sufficiently more detailed than the report of the parole and probation officer and reflect an independent assessment of the aggravating and mitigating circumstances in the instant case. On the face of the instant record, it is clear that the trial court complied with the requirements of law independently of any other source. The bare

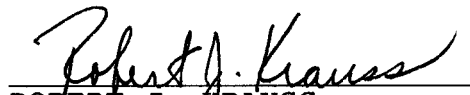
allegations of the amended motion to vacate were insufficient to warrant relief and this claim was properly summarily denied by the trial court.

CONCLUSION

Based upon the foregoing reasons, arguments and authorities, the denial of 3.850 relief by the trial court should be affirmed by this Honorable Court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



ROBERT J. KRAUSS
Assistant Attorney General
Florida Bar ID# 0238538
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to the Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 13th day of April, 1990.

OF COUNSEL FOR APPELLEE.