IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,691

MILFORD WADE BYRD,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT, IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

BRIEF OF APPELLEE

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INTRODUCTION

This is an appeal from the denial of a motion for post-conviction relief by the trial court. The Appellant, Milford Wade Byrd, was the defendant in the original action herein and will be referred to by name or as he stands before this Court. The Appellee, the State of Florida, will be referred to as the State. In the trial court, the State filed and that court reviewed the record on direct appeal of this cause, Byrd v. State, Fla. S.Ct. Case No. 62,545, in addition to the briefs of the parties therein. The Appellee thus adopts the record and briefs of the parties on direct appeal, and requests that this Court take judicial notice of its own files. The record on direct appeal will be referred to as "DR. ___." The record on appeal of the post-conviction action herein will be referred to as "R. ___." The State has also filed a motion to supplement the record herein with the Motion for Post-Conviction Relief, Supplement thereto, and two (2) depositions which were part of the original circuit court file and were expressly relied upon by the court below in its order denying post-conviction relief. The State has attached a copy of all the documents with which the record should be supplemented to its motion. Said attachments have been consecutively paginated and labelled as "SR. 1 through ___." The symbol "SR. ___" thus refers to the attachments in the State's motion to supplement the record on appeal.

STATEMENT OF THE CASE AND FACTS

The historical facts of this case were noted by this Court in its decision on direct appeal. Byrd v. State, 481 So.2d 468 (Fla. 1985).

The Appellant's motion for post-conviction relief and supplement thereto raised nineteen (19) claims, seventeen (17) of which have been raised on appeal herein. (SR. 1-114). The State filed a written response along with the record of the Appellant's direct appeal proceedings. (R. 361-407). The trial court after consideration of the Appellant's claims, the State's response thereto, the trial transcripts and the trial court files held a preliminary hearing. (R. 252-328, 408). After hearing arguments from the parties at this hearing, the trial court summarily denied sixteen (16) of the Appellant's claims as procedurally barred because they should have been or were in fact raised on direct appeal. (R. 408-416). These claims found to be barred were designated as Claims I, III, IV through VIII, inclusive, and XI through XIX inclusive in the trial court (R. 408-416), and have been raised as issues IV through XVII in this appeal.

The trial court also granted an evidentiary hearing as to three claims, designated as Claims II, IX and X in the trial court. (R. 408, 409, 411, 412, 416). These claims have been raised on this appeal as Issues I, II and III, respectively.

The substance of these claims, the evidence presented and the factual finding of the lower court as to each claim are as follows:

A. Alleged Interest of the Prosecutor

With respect to the first issue for evidentiary hearing, the Appellant had alleged that he was denied the right to due process and a fair trial because he was prosecuted by an assistant state attorney who had a financial interest in obtaining his conviction. (SR. 71). The Appellant had alleged that the victim's sister, Linda Latham, contacted one of the two prosecutors in this case, Mark Ober, and sought his advice as to how to obtain the benefits of a life insurance policy issued on the victim. (Id). The Appellant was the primary beneficiary under the policy. (Id.). The Appellant alleged that prosecutor Ober referred Ms. Latham to his brother-in-law, Mr. LaRussa. According to the Appellant, Mr. LaRussa undertook the case, was ultimately successful in the insurance action and paid the prosecutor "$1,600 as a referral fee." (S.R. 71). The Appellant claimed that the "referral fee" gave prosecutor Ober a financial interest in obtaining a conviction. (Id.). The Appellant also alleged that Ober abused his prosecutorial discretion, due to his financial interest, by allowing codefendant Sullivan to plead to second degree murder in return for testifying against the Appellant. (SR. 71-72). Mr. LaRussa and prosecutor Ober both testified at the evidentiary hearing.

James LaRussa testified that he used to be related to Mr. Ober; the latter was married to Mr. LaRussa's wife's sister. (R. 80). Mr. LaRussa stated that he represented Linda Latham, the Appellant's sister-in-law, in an action over insurance proceeds. (R. 75). LaRussa testified, "I initiated the lawsuit." (R. 78). He explained that this meant that the insurance carrier had already "interpleader (sic) the money, put the money that was due on the insurance policy in the registry of the Court." (R. 78). LaRussa continued:

> Then it was our job to try to get it [the insurance proceeds] out and then into Ms. Latham. . . . Mr. Byrd was the primary beneficiary. So, and our claim was that he shouldn't receive the money because we claim he had caused the death of his wife.
>
> (R. 78).

Consistent with the above testimony, the federal court pleadings in the insurance action showed that the insurance company filed a "Complaint for Interpleader" on May 14, 1982, tendering the insurance proceeds for deposit in the court's registry. (R. 488-490). The docket sheet shows that a check in the amount of the tendered insurance proceeds was in fact deposited into the court's registry on May 17, 1982. (R. 485). The summons for the interpleader complaint against Linda Latham was returned on June 8, 1982. Id. The federal file reflected that Ms. Latham's "claim" was filed, simultaneously with the Answer to interpleader complaint, on June 21, 1982, by Mr. LaRussa. (R. 525-528).

Mr. LaRussa testified that the insurance suit was finally settled in June 1983 (R. 79), approximately a year after the Appellant's criminal trial in August 1982. Mr. LaRussa obtained a contingent fee of approximately $16,000 from the insurance suit. (R. 77). LaRussa added that he never paid Ober a "referral fee" or any other "benefit" as a result of the insurance suit. (R. 76).

Mr. Ober testified that he became involved in the instant case "after Mr. Byrd's indictment." (R. 129).[1] Ober, at the time, was the chief of the major crimes division and assigned the case to prosecutor Lopez. (R. 82, 132). Lopez was "lead counsel" and Ober was "second chair." (Id.). Approximately a month prior to the trial of Appellant, "in June of 1982," Ober received a telephone call from Linda Latham. (R. 133). Ms. Latham, at that time, resided in Georgia. Id. Latham told Ober that:

> She had been served process on an interpleader suit in Tampa, in Federal Court here in Tampa. She had twenty days to respond to it. She was somewhat concerned about this lawsuit, and that lawsuit involved the insurance proceeds which Mr. Byrd and herself were beneficiaries of. The insurance company had, I suppose by the nature of that lawsuit denied that they owed the money to somebody and they put it in the registry of the Court.

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[1] The record reflects that a completely uninvolved assistant state attorney, Tom Davidson, obtained the grand jury's indictment against Byrd, in 1981. (R. 130; DR. 1702).

> She asked me to give her the name of an attorney in Tampa that could help her. She didn't know any attorneys. . . .
>
> At the time of Ms. Latham's call I told her that I had a brother-in-law named James La Russa that I had known probably since 1969 or earlier, and that I trusted him. I felt he was very ethical. And I thought that he would do a good job. So I gave her Mr. LaRussa's name and told her to call him, and if she had any problems with him. . . Let me know and I will give you another name. But she was desperate at that time, I felt, because twenty days response time was ticking away.
>
> So I gave her LaRussa's number. Told her to call him. And I then called him [LaRussa] at home, because of our relationship he was family to me. I told him to expect a call from her. And that was the end of the conversation, ...
>
> (R. 133-135).

Mr. Ober testified that he did not "in any way" receive a referral fee for the federal court insurance proceedings. (R. 135).

Ober added that during his tenure at the State Attorney's Office, he had taught at the Hillsborough Community College. (R. 136). A lot of people with legal problems would thus approach him. Id. He had previously sent these people to Mr. LaRussa and other colleagues in private practice on "numerous occasions." (R. 136, 147). He had never received any type of referral fee on these cases. (R. 147). He therefore had no "expectation of receiving any money or other compensation" from sending Ms. Latham to see Mr. LaRussa. (R. 148). Ober also stated that he did not know that the judgment of conviction of the Appellant had been utilized in the federal court proceedings. (R. 135).

Ober also explained that he had received a check from LaRussa in the amount of fifteen hundred and fifty dollars (R. 136) in September of 1983. (R. 137). LaRussa had previously helped out Ober and his family by, for example, helping Ober get into law school, etc. (R. 150). Ober was getting ready to leave on vacation (T. 136) and the check was a "gift." (T. 137). In fact, Mr. Ober's 1983 financial disclosure form reported this gift from Mr. LaRussa. (R. 149, 146-147, 694-695).

Finally, the record reflected that the plea negotiations with co-defendant Sullivan were completed and approved by the trial judge on April 19, 1982, approximately two months prior to Ober's first telephone conversation with Latham and LaRussa in June 1982. (DR. 1606-1627; R. 103, 133). Moreover, both prosecutors, Ober and Lopez, testified that the decision to offer Sullivan a plea was jointly made, after negotiations with another co-defendant failed, and, was in addition approved by the State Attorney, Mr. Salcides. (R. 106-108, 148).

In light of the above testimony and evidence, the lower court made the following detailed findings of fact:

> This Court conclusively finds from the evidence presented in support of this most serious allegation that there is no merit to this claim. Although it is undisputed that one of the Assistant State Attorneys involved in the prosecution of the defendant referred the victim's sister to his brother-in-law for legal representation in connection with a federal interpleader action directed to the proceeds of a

life insurance policy on the victim of which the defendant was the primary beneficiary, it is also undisputed that:

1. He made the referral out of his concern for the victim's family. (E.H.T., V.I, Pg. 136)[2]

2. He referred the case to his brother-in-law because he trusted him, knew him to be a very ethical attorney and knew he would render competent legal services. (E.H.T., V.I, Pg. 134) Moreover, because of his relationship with his brother-in-law, this Assistant State Attorney had referred other prospective clients to him for which he never received a referral fee. (E.H.T., V.I, Pg. 147)

3. He made it clear to the victim's sister that if she had a problem with his brother-in-law to advise him and he would supply her with the name of another lawyer. (E.H.T., V.I, pp. 134-135)

4. He never discussed, expected or received any referral fee or benefit from his brother-in-law in connection with the civil case. (E.H.T., V.I, pp. 76, 135-136, 147-148)

5. One of the main reasons the victim's sister prevailed in the interpleader action on a Motion for Summary Judgment was because the Defendant filed no objection even though he was served with a copy of the motion through counsel. (See "Motion for Summary Judgment" filed August 23, 1982 and "Order" filed June 8, 1983 both of which are included in Appendix A to Petitioner's Post-Hearing Memorandum.)

6. The check given to the Assistant State Attorney by his brother-in-law after the conviction of the Defendant and the resolution of the civil action was nothing more than a gift from one close family member to another and the Assistant State Attorney reported this gift on his financial disclosure form for the year ending December 31, 1983. (E.H.T., V.I, pp. 148-149, 156 and State's Exhibit III)

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[2] The symbol E.H.T. refers to the transcript of the Evidentiary hearing, included on the record on appeal herein, at R. 1-251.

7. At no time did the Assistant State Attorney conduct himself in the prosecution of the Defendant in any manner which manifested a desire or objective on his part to accomplish a result that was unreasonable. (E.H.T., V.I, pp. 108-109)

8. There were no decisions made in the prosecution of the Defendant which were based upon what transpired between the Assistant State Attorney and his brother-in-law. (E.H.T., V.I, Pg. 11)

(R. 345-346).

The lower court thus denied the Appellant's first claim, stating that, "Accordingly this Court concludes that there is absolutely no evidence that this Assistant State Attorney had any pecuniary interest or financial motive in obtaining a conviction of murder in the first degree as to this defendant." (R. 346-47).

B. Alleged Withholding of Material Exculpatory Evidence

With respect to the second issue at the evidentiary hearing, the appellant had alleged that the State, prior to trial, failed to disclose to the defense: a) numerous police reports; b) a 1979 psychological screening report done on co-defendant Sullivan by the Department of Corrections indicating that Sullivan had "weak social mores" and was manipulative; c) that the State "was taking care of Mr. Sullivan's parole violation and dropping other uncharged crimes attributed to Mr. Sullivan," d) the reasons why charges were dropped against another witness, Regina Schinelfining, e) evidence that linked

other individuals to the crime and established them as suspects; f) the failure to the State's crime scene investigators to conduct examinations of evidence, such as performing x-rays of the victim's skull and testing on bullets removed from the scene of the homicide to determine whether a silencer had been utilized; and, g) the previously alleged financial interest of the prosecutor. (SR. 101-104).

At the preliminary hearing on this issue, counsel for the Appellant admitted that the claim of non-disclosure of police reports was based merely upon the fact that the trial defense files could not be located at the time of these post-conviction proceedings and counsel for Appellant thus "cannot find that police report in Mr. Johnson's [defense counsel] possession." (R. 292-293, 296-298). Counsel for the Appellant also stated that he had obtained all of the allegedly non-disclosed police reports from the State Attorney's files pursuant to a public records request under Fla. Stat. 119. (R. 87). However, the trial transcripts reflected that at trial, prosecutor Lopez, without objection from the defense, had stated to the trial court that: "I gave him [trial defense counsel] my whole working file, everything that I had as far as police reports ...." (DR. 1529-1530). At the evidentiary hearing, the trial defense counsel, who was present when this statement was made at trial, acknowledged that if the statement by Lopez was not true at the time, he would have objected. (R. 231). Moreover, at the evidentiary hearing, prosecutor Lopez reiterated his statements

at trial and repeated, "We gave the defense everything we had. All police reports, all depositions, every piece of tangible evidence we had in the way of discovery we gave the defense." (R. 83, 112).

In any event, counsel for Appellant at the evidentiary hearing only inquired as to the alleged non-disclosure of two police reports as opposed to the myriad cited in his motion for post-conviction relief. (R. 709, 735-736; S.R. 101-103). The trial defense counsel specifically recalled that he had in fact received one of these police reports. (R. 180-181). This police report, dated November 17, 1981, indicated that the police had a conversation with a "Debra Williams" regarding the latter's conversation with co-defendant Endress.[3] (R. 181, 735-736). The other police report, which trial defense counsel had no specific recollection of during the evidentiary hearing,[4] was dated December 17, 1981 and reflected that co-defendant Sullivan had told the police that he "could give Wade [Byrd] and Endress really good." (R. 88-89, 709). With respect to this police report, the State presented the pretrial deposition of Detective Carter, taken by the trial defense counsel. This deposition reflected that defense counsel, prior to trial, knew of a December 17, 1981 conversation between Sullivan and the police, where Sullivan had stated that he could assist the Tampa police

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[3] Neither Williams nor Endress testified at trial.

[4] Trial counsel stated that he could not say that he had not received this report, but merely had no recollection of whether he did or not. (R. 232).

with respect to this case. (R. 233, 236-237; 684-693). Defense counsel at the evidentiary hearing after reading this deposition, testified that, "I guess if I knew about the date and conversation, I apparently must have seen the report or --." (R. 235).

Counsel for Appellant also limited his presentation of evidence as to other claims of non-disclosure. With respect to co-defendant Sullivan, the Appellant did not present any evidence of "other uncharged crimes" [burglaries] being dropped. (See S.R. 102). A police report reflecting that the police were investigating burglaries was presented; however, that report did not indicate any involvement by Sullivan, or that he was ever charged, or that these alleged charges were dropped. (R. 94-95). Both prosecutors testified that they were unaware of any alleged burglary charges against Sullivan. (R. 95, 143). With respect to allegations that the State "had taken care of" Sullivan's parole, Appellant presented two letters by prosecutor Lopez and Mr. Sullivan to the parole board, both of which were dated in September and October, 1982, after the completion of Mr. Byrd's trial in August of 1982. (R. 717-723). At the evidentiary hearing, prosecutor Lopez testified that there was no agreement with Sullivan as to any help with the latter's parole proceedings, prior to or during Mr. Byrd's trial. (R. 99-102, 118). Prosecutor Ober explained that after Mr. Byrd's trial, the State had to renegotiate with Sullivan in exchange for the latter's testimony in the subsequent trial of another co-defendant, Endress. (R. 144).

Finally, the Appellant presented a 1979 psychological report on Sullivan from the Department of Corrections (DOC) which reflected that Sullivan was manipulative and had weak social mores. (R. 721). With respect to this report, both prosecutors testified that they did not have possession of any DOC files. (R. 97, 145). Trial defense counsel testified that he did not even recall asking the State to provide any DOC files. (R. 191). Moreover, the trial defense counsel testified that it was "obvious" to him that Sullivan had weak social mores and was manipulative, without the benefit of the psychological report presented by the Appellant. (R. 239-240). Defense counsel testified that:

> Mr. Johnson: It [psychological report] didn't tell one a whole lot. I mean I talked to my client who knew Sullivan. We talked about it. We both anticipated he was going to do exactly what he did do. I was not surprised by that.
>
> Q. You knew he was a manipulator, you knew he wasn't a good guy, right?
>
> A. That is correct.
>
> Q. And you knew he would take advantage of people if he could.
>
> A. Yes.
>
> Q. That was clear to you, wasn't it?
>
> A. Obvious to me.
>
> Q. You attempted to demonstrate that in your cross-examination of him at trial?

A. Yes sir.

(R. 240-241).

The trial transcript of the cross-examination of Sullivan at trial corroborated defense counsel's above testimony, reflecting a thorough impeachment of Sullivan at trial with respect to previous inconsistent statements, lies and motives for testifying. (DR. 441-460).

In light of the above testimony and evidence, the trial court denied the Appellant's claim of withholding of material exculpatory evidence as follows:

> While it is true that the defendant's case was initially plagued with discovery problems (E.H.T., V.I, Pg. 84 and V.II, pp. 163-164), it is also clear from the evidence that after Assistant State Attorney Manuel Lopez was assigned the case the State of Florida gave the defense everything that it had in its possession (E.H.T., V.I, pp. 83, 85, 87, 103, 105 and V.II, pp. 163-164), including the November 17, 1981 and December 17, 1981 police reports. (E.H.T., V.I, pp. 112, 117 and V.II, pp. 180-181)
>
> The Court also finds no merit to the Defendant's claim that the State of Florida should have disclosed to the Defendant a record from the Department of Corrections relating to the alleged lack of trustworthiness of one of the State's key witnesses, Mr. Sullivan. First, the report was unknown to the prosecutor (E.H.T., V.I, pp. 97, 145). Second, even if the Defendant had access to this report he had failed to show that there is a reasonable probability that the utilization of its contents on cross-examination would have produced a different result in terms of the jury's verdict. That is, after carefully considering the totality of the evidence at the Defendant's trial, there is no proof that the lack of availability of this report was sufficient to undermine the confidence in the outcome of the Defendant's case. United

States v. Bagley, 105 S.Ct. 3373 (1985) and Waterhouse v. State, 522 So.2d 341, 343 (Fla. 1988).

> This Court is also convinced that at the time of the Defendant's trial the State of Florida had no agreement to assist Mr. Sullivan with regard to his parole violation status and that the decision to send a letter on his behalf came only after the trial of the Defendant when Mr. Sullivan's attorney requested such a letter. (E.H.T., V.I, pp. 98-100 and 118) Moreover, any effort on the part of the State of Florida to assist Mr. Sullivan as to his parole status occurred after the Defendant's trial and prior to co-defendant Endress' trial as part of a plea negotiation for Sullivan's testimony against this co-defendant. (E.H.T., V.I, Pg. 144)
>
> Finally, the Court finds absolutely no merit to the assertion that the State of Florida failed to divulge an alleged personal interest of one of the prosecutors. The Court has already resolved this issue against the Defendant (See Claim II of this Order). There being no such personal interest, it follows there was nothing to disclose in that regard.

(R. 347-348).

With respect to police reports and other alleged non-disclosures, as to which the Appellant did not present any testimony or evidence at the evidentiary hearing, the trial judge specifically ruled those claims to have been abandoned:

> 1. The Defendant offered no evidence at the evidentiary hearing to substantiate the claims set forth in paragraphs 2A-B-C-F, 4A-B-C-F, 5, 6 and 7 of his "Supplement to Motion to Vacate Judgement and Sentence." [See S.R. 101-104]. Thus the issues raised in these paragraphs are deemed abandoned. ...

(R. 353).

C. Ineffective Assistance of Counsel

1. Guilt Phase

In the lower court the Appellant had alleged that his counsel was ineffective during the guilt phase of trial because he had, inter alia, a) failed to properly impeach co-defendant Sullivan at trial by, among other things, using the previously noted police report where Sullivan had stated he "would give Wade and Endress really good;" b) failed to pursue another co-defendant's, Endress's, statements that he and Sullivan had committed the crime together in the course of a robbery; and, c) failed to properly impeach a state witness, Shad, who allegedly had a motive for testifying against Byrd because he had raped Byrd's sister.

The trial transcripts of this cause reflect that defense counsel established that co-defendant Sullivan had given two previous sworn statements to the police which contained a number of inconsistencies and which were in turn inconsistent with his trial testimony. (DR. 433-453). Trial counsel argued that after lying to the police, Sullivan had waited "six months and six days" to come up with another untruthful version (his trial testimony), this time to the State Attorney's Office, solely in order to avoid a number of charges and going to prison. (DR. 61-67, 459-60).

At the evidentiary hearing below, trial counsel testified that, "my view [at trial] was, still is now, that you know, we sufficiently battered and bloodied Sullivan with respect to his credibility." (R. 170, 172). Defense counsel added that he did not view Sullivan's statements in the December 17, police report to "have been that significant in that one, Sullivan had, I guess, and for lack of a better word, had lied back and forth on this matter. ... Whether or not that [police report] would have placed another straw on the back of that credibility I don't know. I think we had ample enough ammunition, I think we used all we had, in throwing it at him." (R. 174).

The Appellant also argued that trial counsel should have utilized another police report, where a police officer had noted that co-defendant Endress had told a Debra Williams that he and Endress had murdered the victim in a robbery. (R. 181). This police report did not reflect that anybody "murdered" or killed the victim. (R. 188). Moreover, the State presented the pretrial depositions of another witness, Clarence Love, who had also spoken to Endress. Mr. Love had stated that Endress had given him the following account of the murder:

> A. . . . He [Endress] said that they went in --
>
> Q. Who's "they"?
>
> A. Him -- he said that he went in, Wade Byrd went in and Ronnie Sullivan. He said that he was a little scared, so he was standing by the window. He said that Wade went in, took the money out of the cash register and called her and told her to get up here; that he had been robbed. He said when he came up to the front room he fired a

couple of shots. I did remember the exact amount that he said, but now vaguely, although I have read that, it's still vague.

Q. Who fired the shots?

A. He said Wade Byrd fired the shots.

Q. Okay.

A. And he said that when she fell that Wade Byrd got over her and started choking her and Endress said that Ronnie started beating her with a pair of num-chucks (phonetic) and said that she was still gasping for breath, and she wasn't dead, and he said they were choking here and acting like maniacs. Blood was getting all over them, and so then Wade Byrd called him and said, "Get over here." And so he got over there and started choking her, too.

Q. Endress said that?

A. Yes. He got over there and started choking here.

Q. Did he say he got any blood all over him?

A. Yes, he did. He said they were all bloody. He said that Wade Byrd was hollering, "Die, bitch, die," and she was still trying to get air. He said Ronnie and them were still taking turns choking her. He said each time Wade Byrd would stop choking Ronnie would take over. From the pressure their hands were cramping when they brought them from around her neck.

(See deposition of Clarence Love, dated April 27, 1982, taken by defense counsel, at pp. 18-19, SR. 132-133)

Endress had also spoken to Detective Pinkerton. In this conversation, Endress had stated that he did not kill the victim, but that Mr. Byrd had done so, in addition to another murder in Virginia. (See deposition of Detective L.J. Pinkerton, dated February, 1982, at p. 7, SR. 167). Endress had added that Mr. Byrd had killed his wife because "she knew about the murder

he did in Virginia." (Id. at p. 8). Endress at the time of Appellant's trial had informed all parties that he would invoke his privilege against self incrimination if called upon to testify. (DR. 1752)

Defense counsel, at the evidentiary hearing, testified that his strategy at trial was "to control the damage that we were going to suffer." (R. 184). He testified that he wouldn't have used Endress's statement to Debra Williams in the police report,

> . . . because the potential for it to blow up in our face is greater than the potential of getting us out of it.
>
> I don't care what Endress knows. Endress is not a witness at this time. What I did know is that Endress could not afford to come forward. He had made a decision to go to trial. So I don't want to have to deal with Endress in absentia, and Sullivan. I would prefer to deal with Sullivan than him.
>
> (R. 184).

Finally, with regard to witness Shad, the trial transcripts reflect that the latter was one of several witnesses to whom the Appellant had given an inconsistent account of his activities on the night of the murder. (DR. 318-319). In an attempt to discredit this witness, defense counsel at trial asked whether the appellant's sister had come back with bruises after a date with Shad, accusing the latter of rape. (DR. 329). Shad's reply at trial was, "That is a complete lie sir." (Id.). Appellant's counsel at the post-conviction proceedings argued that trial

counsel was deficient because he did not put the Appellant's sister on the stand so that she would testify that Shad had in fact raped her. At the evidentiary hearing, trial counsel testified that he did not call the Appellant's sister and pursue detailed evidence of the rape, because:

> I could not afford to talk about Shad's making these sexual overtures, forceful sexual overtures, towards Byrd's sister without raising the risk of . . . some other employees at the hotel that told us, made some references to the fact she had been molested sexually by my client prior to the homicide.
>
> So it was one of those things I think I was deliberately and intentionally trying to avoid. . . .
>
> I think I did [bring up the question of the rape charge] in my cross examination. I think he may have denied it, as I recall. . . . But it still, in my view, I did what I wanted to do, that is, give the jury another motive to disbelieve what Shad was saying. . . . My object was to cause reason to doubt his testimony. I didn't care how he answered the question. The question was there. Shad wasn't a very articulate witness. . . .
>
> . . . I didn't want to bring the [defendant's] sister in and we get into a bidding whether or not Shad was correct when he said he didn't do it or she is correct. . . . [Shad] himself is an unsteady witness, does not have command of the language or fact . . . . I think it was enough in terms of what we wanted to do, cast aspirations (sic) and lack of credibility on his testimony.
>
> (R. 179-180).

In light of the above testimony and evidence, the trial judge denied the ineffective assistance of counsel at guilt phase claim and made the following findings:

GUILT-INNOCENCE PHASE

The Defendant complains that his trial counsel failed to use certain evidence to impeach Mr. Sullivan's testimony. However, from a careful review of the totality of the evidence, this Court finds that trial counsel was extremely effective during voir dire, opening statement, cross examination and closing argument in impeaching the credibility of Mr. Sullivan. (See for example TT., V.I, pp. 61-67, 77, 147, 157, 168-169, 191; V.II, pp. 233-240, 243-245, V.III, pp. 433-473, 487; V.VIII, pp. 1217-1254 Further, the trial counsel presented the testimony of several witnesses intended to discredit the testimony of Mr. Sullivan. (TT., V.VI, pp. 1017-1024, 1025-41 and 1053-1070) and to support the defense of the Defendant. (TT., V.VII, pp. 1075-1087)

Apparently, the Defendant is arguing that quantitatively the impeachment of Mr. Sullivan was ineffective in that trial counsel did not do more. But that is not the test under Strickland v. Washington, 104 S.Ct. 2052 (1984). The true test is whether trial counsel's performance was deficient and whether this deficiency prejudiced the Defendant so as to deprive the Defendant of a fair trial. See also Harris v. State, 528 So.2d 361 (Fla. 1988). Thus the test is a qualitative rather than a quantitative one. In the context of the totality of the evidence presented at the Defendant's trial, this Court is more than convinced that trial counsel was not deficient in his impeachment of Mr. Sullivan and that any failure to utilize additional impeaching information against Mr. Sullivan did not undermine the confidence and the outcome of the Defendant's trial.

Further, based on the totality of the record, it is ludicrous to accuse trial counsel of being ineffective for not using a police report that indicated that co-defendant Endress had told another witness that he and Mr. Sullivan had murdered the victim in a robbery. If trial counsel had utilized this police report it would have opened a Pandora's Box for the Defendant in terms of other statements Mr. Endress made about the Defendant's active involvement in the murder of the victim. (See deposition of Detective L.J. Pinkerton of February 25, 1982, pp. 7-8 and deposition of Willy Love of April 27, 1982, pp. 17-19) If trial counsel had utilized the

> information in this police report he would have truly been ineffective because to have done so would have afforded the State of Florida an opportunity to rebut this information with the extremely damaging testimony of Detective Pinkerton and Mr. Love. Indeed, trial counsel indicated at the evidentiary hearing that the potential of this information being devastating to the Defendant's position outweighed any positive impact it may have had. (E.H.T., V.II, Pg. 184)
>
> Finally, the Defendant complains that his trial counsel did not call the Defendant's sister to impeach a witness by the name of Shad that Shad had raped her. Trial counsel's explanation of why he did not do this was a reasonably strategic decision. (E.H.T., V.II, pp. 179-180) Moreover, even in the face of Mr. Shad's categorical denial that he raped the Defendant's sister (TT., V.II, Pg. 329), trial counsel was allowed to argue effectively to the jury that Shad had an interest and bias against the Defendant because the Defendant told his father that Shad had raped his sister. (TT., V.VIII, Pg. 1224).
>
> (R. 349-350).

With respect to other instances of alleged ineffectiveness, as to which the Appellant did not present any testimony or evidence at the evidentiary hearing, the lower court specifically ruled those claims to have been abandoned:

> The Defendant also offered no evidence at the evidentiary hearing to substantiate the claims set forth in Paragraphs 9, 10, 11, 13 and 14 of his "Supplement to Motion to Vacate Judgment and Sentence." Thus once again, the issues raised in these paragraphs are deemed abandoned. In that regard this Court cannot be expected to assess the effectiveness of trial counsel as to why he did or did not take certain actions during the course of the Defendant's trial when trial counsel is not questioned about his reasons for action or inaction in the overall context of his trial strategy.

2. Penalty Phase

The Appellant alleged that his counsel was also deficient in the penalty phase of his trial because he "conducted no adequate investigation." (SR. 109). Appellant added, "counsel failed to present evidence of Mr. Byrd's warm and likeable ways. He had many friends. He had business associates who respected and admired him and his work habits." (SR. 112).

At the evidentiary hearing on this claim, lead defense counsel, Johnson, testified that at the very beginning of his representation, the defendant, at counsel's request, had drawn "a list of names of persons" who could "perhaps assist us, should the trial proceed to the penalty phase." (R. 213). Defense counsel had told the defendant he was looking for "character" witnesses. Id. The investigation for the penalty phase began right after the defendant was arrested (R. 226); the penalty phase preparations were an ongoing process. (R. 227). Johnson stated that his understanding of the penalty phase was, "that I had a duty to explore all possible avenues." (R. 225). Johnson was assisted by two other attorneys and an investigator.

Mr. Johnson testified that he had known that the Defendant had been in the military but that he had received a "bad conduct discharge. . . for having committed some type of infraction with respect to funds."[5] Id. Defense counsel stated

[5] The defendant's father, at this hearing, confirmed that the defendant had in fact spent eleven months in a military jail.

that he knew that there was no one in the military that could offer any positive testimony because of the bad conduct. Id.

Johnson stated that he also knew that the Defendant and his wife had subsequently worked in the Virginia area, in the hotel industry. However, he stated that there had been "criminal problems" associated with that employment. (R. 219). Counsel had also investigated the Defendant's Florida employment. However, he had found that employees, co-managers, etc., in Florida, were not going to be helpful, due to previous sexual advances by the Defendant, and, also due to the witnesses' outrage at Defendant's involvement in his wife's death. Id.

Johnson also testified that he investigated and contacted the defendant's ex-wife who resided in the Virginia area. Id. She had initially agreed to offer some assistance, but refused to do so on the advice of her then new husband. (R. 214-215).

Defense counsel also investigated the Defendant's friends who exercised with him at a local gym. (R. 215). However, counsel testified that, "In terms of coming forward and offering anything remotely concrete and valuable to help us, they had nothing to offer." Id. Mr. Johnson also added that he had asked the Defendant, ". . . about some other relatives, the names of other people who could come forward and assist him. I was not given any. Those names I was given, I contacted." Id. Counsel

also explained that he was unable to approach any of Appellant's wife's family due to the Appellant's involvement in her killing. Id.

Under these circumstances, defense counsel testified that the only person who really knew the defendant intimately enough to offer the jury an insight into Wade Byrd, other than himself, was his father. (R. 215). Counsel testified that he therefore flew to the father's (Percy Byrd's) residence in North Carolina for a couple of days (R. 219), and:

> . . . sat down and talked with him about his son to try to get a feel, a better feel, for Wade Byrd. And I think we had spoken at this point in time about the fact it was a death case; would likely result in the death penalty. If it got to that point I would probably want to offer some testimony.
>
> And I think during the time he was here [the defendant's father flew in at the time of trial] we also spoke with him about what we expected him to say and try to assist us in what we were doing with the jury in terms of trying to spare the client from the chair.
>
> (R. 217).

Defense counsel added that during his conversations with the defendant's father, he was trying to understand "the defendant's background. To understand what kind of a person he was, what kind of man he was, what kind of child he had been during the time that he was in his father's house. Essentially, I [was] (sic) looking for anything and everything I can (sic) to try to assist me." (R. 218). Johnson stated, however, that he was

dealing with a situation "where the father has not really had any intimate contact, long term intimate contact, because of military and other jobs being removed from his son's nearby presence." (R. 219).

Nevertheless, the trial transcripts reflect that at the penalty phase of the trial, defense counsel successfully limited the evidence of prior convictions and bad conduct to a mere mention of two "worthless check" convictions. (DR. 1304). Trial counsel also successfully established through the Appellant's father that during the Appellant's development from "boyhood to manhood" he had never exhibited any violence, (b) that Defendant had been raised with "respect for the law and respect for other people," (c) that he had maintained a loving and stable relationship with his wife, (d) that he had been responsible and gainfully employed, (e) that he had denied being involved in the homicide and (f) that the police had told the father that the Defendant was not "personally involved" in the killing, and (g) that the Defendant had probably acted under the influence and pressure from Jody Clymer. (DR. 1304-1310).

In contrast, current counsel for Appellant presented extensive testimony by the Appellant's father of the Appellant's military experience, his dishonorable discharge, eleven months in military jail, the details of the Appellant's bad checks, and diversion of funds because he was eager to keep a new car purchased for him by his father. (R. 33-37). The only other

witness presented by the Appellant at the evidentiary hearing was his sister, Brenda. Brenda testified that she was only five years old when the Appellant left home to join the Marines. (R. 42). The Appellant once fetched her from school, when she was thirteen years old, took her for a drive and talked to her because their mother had passed away. (R. 43). Brenda added that when she and her husband and children did not have a place, Appellant gave them a place to stay. (R. 43). Brenda stayed with the Appellant and the victim for approximately three months, working at their motel for "spending money and stuff." (R. 44). She then moved to Virginia and was in North Carolina when the murder occurred. (Id.). Her father told Brenda that Wade had been charged with murder and that he was going to see Wade in Florida. (R. 45). She thus saw no reason for herself to come to Florida. (Id.).

In light of the above testimony, the lower court denied this claim of ineffective assistance of counsel, as well having made the following findings:

> PENALTY PHASE
>
> As to this issue, the Court must decide whether the failure of trial counsel to call the Defendant's sister and to elicit more testimony from the Defendant's father at the penalty phase of the Defendant's trial was an error of such magnitude that there is a reasonable probability that absent these erroneous omissions the sentencer, including the Appellate Court to the extent it independently reweighs the evidence, would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. Harris, Pg. 363. The Court finds that such a reasonable probability does not exist.

First, had the Defendant's father testified at the penalty phase of his son's trial to the extent he testified at the evidentiary hearing the jury, the sentencing judge and the Appellate Court would have known that the Defendant at one time was absent without leave from the military, suffered a bad conduct discharge form the military, and spent 11 months in a military prison for altering checks in an effort to prevent his father from repossessing the motor vehicle his father had bought for him. (E.H.T., V.I, pp. 33-37) This testimony, to say the least, would have been devastating to the Defendant and would have undermined the ultimate finding of the sentencing judge that the Defendant had no significant history of prior criminal activity. (TT., V.XII, Pg. 1988).

Second, the sketchy testimony that the Defendant's sister would have offered about her relationship with her brother (E.H.T., V.I, pp. 41-46) when weighed against the three aggravating circumstances of heinous, atrocious and cruel; cold, calculated and premeditated; and a capital felony committed for pecuniary gain found by the Trial Court would not have affected the ultimate sentencer of death recommended by the jury, imposed by the trial court and affirmed by the Florida Supreme Court at 481 So.2d 468 (Fla. 1985).

In this Court's view the Defendant received a fair trial with extremely competent counsel and now must accept and face the ultimate penalty for one of the most cruel and calculated acts known to society - the murder of his wife for pecuniary gain.

(R. 350-351)

The Appellant has appealed from the denial of his motion for post-conviction relief as above set forth.

POINTS ON APPEAL

I

WHETHER MR. BYRD WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL WHEN HE WAS PROSECUTED BY AN ASSISTANT STATE ATTORNEY WITH A PERSONAL, FAMILIAL, AND FINANCIAL INTEREST IN OBTAINING A CONVICTION.

II

WHETHER THE DETAILS OF MR. OBER'S PERSONAL, FAMILIAL, AND FINANCIAL INTEREST IN OBTAINING A CONVICTION OR THE FACT THAT MR. SULLIVAN HAD LONG BEFORE HIS DEAL WITH THE STATE REPRESENTED HE COULD GIVE THE STATE BYRD "REAL GOOD" WERE DISCLOSED.

III

WHETHER MR. BYRD WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE AND PENALTY PHASES OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

IV

WHETHER MR. BYRD WAS DENIED HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL BY IMPROPER PROSECUTORIAL COMMENTS DURING THE CROSS-EXAMINATION OF A DEFENSE WITNESS AND DURING CLOSING ARGUMENTS IN BOTH THE GUILT AND PENALTY PHASES. TRIAL COUNSEL'S FAILURE TO OBJECT AND COMBAT THE PROSECUTORIAL OVERREACHING WAS INEFFECTIVE ASSISTANCE.

V

WHETHER MR. BYRD WAS CONVICTED OF CAPITAL MURDER AND SENTENCED TO DEATH ON THE BASIS OF EVIDENCE OBTAINED IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. HIS INVOCATION OF HIS RIGHT OF SILENCE WAS IGNORED AND A CONFESSION WAS COERCED FROM HIS LIPS AND USED AGAINST HIM BECAUSE HIS COUNSEL FAILED TO PRESENT THE PROPER FACTS, ALONG WITH CASE LAW AND ARGUMENT, TO THE TRIAL COURT.

VI

WHETHER MR. BYRD WAS CONVICTED OF CAPITAL MURDER AND SENTENCED TO DEATH ON THE BASIS OF STATEMENTS OBTAINED IN VIOLATION OF THE SIXTH, EIGHTH, AND

FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. HIS COUNSEL'S FAILURE TO EVEN ASSERT THE SIXTH AMENDMENT VIOLATION WAS INEFFECTIVE ASSISTANCE.

VII

WHETHER MR. BYRD WAS DENIED HIS FOURTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS WHEN LAW ENFORCEMENT PERSONNEL AT THE DIRECTION OF AN ASSISTANT STATE ATTORNEY ENTERED MR. BYRD'S HOME WITHOUT A WARRANT TO EFFECTUATE HIS ARREST, AND COUNSEL PROVIDED CONSTITUTIONALLY INADEQUATE ASSISTANCE BY FAILING TO EFFECTIVELY LITIGATE THIS CLAIM.

VIII

WHETHER TRIAL COUNSEL'S FAILURE TO ASSURE MR. BYRD'S PRESENCE DURING CRITICAL STAGES OF HIS CAPITAL PROCEEDINGS, AND THE PREJUDICE RESULTING THEREFROM, VIOLATED THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

IX

WHETHER THE EXCLUSION OF CRITICAL EVIDENCE RENDERED MR. BYRD'S SENTENCE OF DEATH FUNDAMENTALLY UNRELIABLE AND VIOLATED HIS RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

X

WHETHER MR. BYRD WAS IMPROPERLY DENIED HIS RIGHT TO CROSS-EXAMINE KEY STATE'S WITNESSES ON MATTERS THAT WOULD HAVE UNDERMINED THEIR CREDIBILITY, AND AS A RESULT HE WAS DENIED HIS RIGHT OF CONFRONTATION IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEEN AMENDMENTS TO THE UNITED STATES CONSTITUTION.

XI

WHETHER THE TRIAL COURT'S UNCONSTITUTIONAL SHIFTING OF THE BURDEN OF PROOF IN ITS INSTRUCTIONS AT SENTENCING DEPRIVED MR. BYRD OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

XII

WHETHER MR. BYRD'S SENTENCING JURY WAS REPEATEDLY MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

XIII

WHETHER THE JURY INSTRUCTIONS REGARDING AGGRAVATING FACTORS SO PERVERTED THE SENTENCING PHASE OF MR. BYRD'S TRIAL THAT IT RESULTED IN THE TOTALLY ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

XIV

WHETHER THE JURY WAS MISLED AND INCORRECTLY INFORMED ABOUT ITS FUNCTION AT CAPITAL SENTENCING, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

XV

WHETHER THE INTRODUCTION OF NONSTATUTORY AGGRAVATING FACTORS SO PERVERTED THE SENTENCING PHASE OF MR. BYRD'S TRIAL THAT IT RESULTED IN THE TOTALLY ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

XVI

WHETHER MR. BYRD WAS DENIED HIS RIGHTS TO AN INDIVIDUALIZED AND FUNDAMENTALLY FAIR AND RELIABLE CAPITAL SENTENCING DETERMINATION AS A RESULT OF THE PRESENTATION OF INFORMATION CONCERNING THE VICTIM'S FAMILY BACKGROUND AND OTHER CONSTITUTIONALLY IMPERMISSIBLE VICTIM IMPACT INFORMATION, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS.

XVII

WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS WERE VIOLATED BY FAILING TO CONSIDER NONSTATUTORY MITIGATING CIRCUMSTANCES.

SUMMARY OF THE ARGUMENT

Several points on appeal - issues IV, V, VII, IX, XV, XVII - were properly rejected by the lower court because this Court had already considered and rejected those issues in the prior direct appeal. Several other points on appeal - issues VI, VIII, IX, X, XI, XII, XIII, XIV- were properly found to be procedurally barred because they are claims which could have and should have been raised on direct appeal.

With respect to issue I, the testimony at the evidentiary hearing supported the lower court's conclusion that the prosecutor did not have any financial interest or conflict of interest arising out of civil litigation related to the life insurance policies of the deceased victim. With respect to issue II, the alleged discovery violations, the evidentiary hearing in the lower court supported the lower court's conclusions that the materials in question were in fact received by the Appellant's trial counsel. As to several other items, the Appellant failed to present any evidence indicating that they were not received by trial counsel.

Issue III presents a multitude of ineffective assistance of counsel claims. Briefly, the evidence at the hearing in the lower court supports the conclusions that trial counsel adequately investigated the sentencing phase of the trial, and that other decisions made by counsel throughout the trial were

sound trial strategies. Contrary decisions by counsel would routinely have been detrimental to the defense as they would have opened the door for the introduction of even more damaging evidence. Alternatively, the evidence failed to demonstrate any prejudice to the Appellant by virtue of the decisions made by trial counsel.

Issue XVI, alleging a Booth v. Maryland violation, was properly deemed procedurally barred pursuant to Grossman v. State, infra. Alternatively, the evidence in question did not violate Booth, or, if it did, it was properly deemed harmless by the lower court.

ARGUMENT

I

WHETHER MR. BYRD WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL WHEN HE WAS PROSECUTED BY AN ASSISTANT STATE ATTORNEY WITH A PERSONAL, FAMILIAL, AND FINANCIAL INTEREST IN OBTAINING A CONVICTION.

The post-conviction court made detailed findings of fact based upon undisputed testimony and evidence presented at the evidentiary hearing. These findings are binding upon the Appellant. Stewart v. State, 481 So.2d 1210 (Fla. 1986). However, the Appellant has entirely ignored these findings and has premised his claim on representations which have no basis in the record herein.

The Appellant has stated that Mr. Ober had a personal, familial, and financial interest in Mr. Byrd's conviction. The Appellant claims that Mr. Ober had a "personal", "familial" interest in the outcome of the criminal trial because "it is undisputed that his brother-in-law, to whom he was greatly indebted, stood to gain an easy sixteen thousand dollars from a criminal conviction of Mr. Byrd." See Brief of Appellant at p. 30. Ober testified that he did not know that the judgment of conviction of Mr. Byrd had been used in the Motion for Summary Judgment. This is not surprising since at the time of the commission of the crime in this case, as a matter of Florida law, a conviction for murder would not have precluded Byrd from

collecting as a beneficiary under any insurance policy. This is because Fla. Stat. §732.802 (1981), in relevant part provided:

> [a] person convicted of the murder of a decedent shall not be entitled to inherit from the decedent or to take any part of his estate as a devisee.

This statute "did not apply to insurance proceeds passing to a beneficiary who killed the insured." The Prudential Insurance Company of America, Inc. v. Baitingner, 452 So.2d 140, 142, n. 3 (Fla. 3d DCA 1984) (emphasis added). Instead of statutory law, the Supreme Court of Florida had resorted to the equitable principle that a wrongdoer will not be permitted to profit by his own wrong, in order to prevent a killer from recovering insurance proceeds. Carter v. Carter, 88 So.2d 153 (Fla. 1956). In Carter, the Supreme Court held that a party must prove that the insurance beneficiary "unlawfully and intentionally killed" the insured, in a civil proceeding, by a preponderance of evidence, before the beneficiary is precluded from the proceeds. The verdict and judgment of conviction or acquittal in a criminal proceeding would not be admissible at such a civil proceeding. Carter, supra, at 158.

On April 2, 1982, the legislature amended Fla. Stat. 732.802 and added subsections (3) and (5) which prevented a killer from benefitting as a named beneficiary of a life insurance policy and provided for the admissibility of a final judgment of conviction of murder, respectively. Fla. Stat.

732.802(3), (5) (Supp. 1982). However, this amended statute cannot be applied retroactively; the right to inherit is fixed by "the statute in effect on the decedent's date of death." Anderson v. Anderson, 468 So.2d 528, 530-531 (Fla. 3d DCA 1985) (emphasis added).

Thus, the Appellant's conclusions that Mr. Ober, contrary to his testimony, knew that "any attorney who was hired would stand to make a large fee if the criminal prosecution was successful" is completely without merit. Mr. La Russa, on April 26, 1983, did try to use amended §732.802 as a basis for summary judgment in the insurance proceedings. However, as noted by the post-conviction court based upon the federal pleadings, the order of summary judgment was entered partly because Mr. Byrd never filed an affidavit to dispute any of the facts alleged by Ms. Latham and in fact filed "no objection" to the motion for summary judgment. (See "Order" dated June 8, 1983, p. 4, R. 616).

To conclude as the Appellant has, that Mr. Ober had a "personal interest in the outcome of the criminal" trial because his brother-in-law "stood to gain an easy sixteen thousand dollars from a criminal conviction of Mr. Byrd" is totally without support when the record shows that the conviction (a) was used without Mr. Ober's knowledge, (b) was included in a motion for summary judgment contrary to the applicable law, and (c) was successfully used to obtain an order of summary judgment

only because no objections or factual disputes had been raised by Mr. Byrd.

Furthermore, as noted by the post-conviction court, the undisputed testimony in the record reflects that Mr. Ober "never discussed, expected or received any referral fee or benefit from his brother -in-law in connection with the civil case." (R. 346). The extent of Ober's involvement was giving Ms. Latham Mr. La Russa's name and number, and, calling the latter to let him know that Ms. Latham would be calling. Contrary to the Appellant's representation, there was no evidence that Mr. Ober "actually worked to make sure Mr. LaRussa knew of the facts of the case." See Appellant's Brief at p. 24. As Mr. Ober had previously sent other persons to Mr. La Russa (and other attorneys) and had never received any referral fee or other compensation, no inference of any expectation of financial benefit can be found either. Finally, Mr. Ober's explanation of the check as a gift from his brother-in-law is corroborated by his 1983 financial disclosure form which was signed years before the current allegations of wrongdoing. In sum, there was no evidence that Mr. Ober had any pecuniary interest in obtaining Mr. Byrd's conviction for murder. Accordingly the post-conviction court concluded that, "there is absolutely no evidence that this Assistant State Attorney [Ober] had any interest or financial motive in obtaining a conviction of murder in the first degree as to this defendant." (R. 346-347).

Finally, the post-conviction court also found, that "there were no decisions made in the prosecution of the defendant which were based upon what transpired between the Assistant State Attorney and his brother-in-law." (R. 346). Thus, the Appellant's conclusory claim that Ober "decided to make Mr. Byrd the prime target of the prosecution as opposed to either Mr. Sullivan or Mr. Endress", and, his speculations as to the plea negotiations with Sullivan, are entirely without merit. (See Brief of Appellant at pp. 24, 29). The undisputed record herein reflects that Ober became involved in the prosecution herein after the indictment of Mr. Byrd by another prosecutor. The plea negotiations with Sullivan were completed and approved by the Court approximately two months prior to Ms. Latham's call requesting the name of an attorney. Moreover, both prosecutors testified that the plea offer to Sullivan had been approved by the State Attorney of the Circuit. The State would also note that final approval and determination of the propriety of a plea and the ultimate sentence, rest with the court, not with a prosecutor. See, State ex rel. Wilhoit v. Wells, 356 So.2d 812, 822 (Fla. 1st DCA 1978).

In light of the factual circumstances of the instant case, Appellant's reliance on the cases cited in his brief for a conclusion of "conflict of interest" is misguided. See Appellant's Brief at p. 24. All of the cases cited by the Appellant involve situations where the prosecutor was simultaneously and in fact "representing" a client with adverse

interests to the criminal defendant being prosecuted. See, e.g., Commonwealth v. Tabor, 384 N.E.2d 190 (Mass. 1978) (during criminal trial prosecutor represented the victim's widow in a civil action based upon defendant's actions); People v. Zimmer, 414 N.E.2d 705 (N.Y. 1980) (prosecutor, who was counsel and stockholder in a corporation personally procured a multi-count indictment against a director for wrongdoing in connection with the corporation); Ganger v. Peyton, 379 F.2d 709 (4th Cir. 1967) (Ganger was being prosecuted for an assault on his wife. The prosecutor was representing Ganger's wife in a pending divorce action based on the same assault. The prosecutor had offered to drop the assault charge if Ganger would make a favorable property settlement in the divorce action.); State v. Basham, 170 N.W. 2d 238 S.D. 1969) (prosecutor was representing parties on civil claims arising out of an automobile accident which had given rise to manslaughter charges against defendant); Sinclair v. State, 363 A.2d 468 (Md. 1976) (prosecutor represented sellers and the defendant was the buyer in a civil suit; prosecutor informed defendant that if he filed an appeal from the civil suit he would indict him); State v. Hatfield, 356 N.W.2d 872 (Neb. 1984) (prosecutor not disqualified when one of five members of his firm represented defendant's wife in a dissolution action); State v. Knight, 285 S.E.2d 40 (W. Va. 1981) (prosecutor disqualified when defendant had victimized him in the past, had failed to make court-ordered restitution to him, and only witness for State was prosecutor's secretary); Hughes v. Bowers, 711 F.Supp. 1579 (N.D. Ga. 1989) (prosecutor

represented victim's family in its insurance claim); Cantrell v. Commonwealth, 329 S.E.2d 22 (Va. 1985) (prosecutor represented the defendant's father-in-law in a custody suit of the defendant's son). Compare, Dick v. Scroggy, 882 F.2d 192 (6th Cir. 1989) (prosecutor's representation of an automobile accident victim did not warrant collateral reversal of defendant's conviction of assault charges arising out of a motor vehicle accident).

Likewise, Fla. Stat. 112, does not aid Appellant either. See Appellant's Brief at pp. 22-25. Section 112.311(5) in part provides:

> no officer of a state agency or of a county. . . shall have any interest, financial or otherwise. . . which is in substantial conflict with the proper discharge of his duties in the public interest.

First, the Appellant has shown no "interest" by Mr. Ober. He also has not shown any conflict, let alone "substantial conflict." Moreover, Fla. Stat. 112 includes a section specifying the remedy for any perceived violation; reversal of a criminal trial is not among the remedies. See Fla. Stat. 112.324.[6] The Florida legislature has enacted Fla. Stat. 924.33 (1970), which provides:

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[6] Also see, Art. 2, §8(c) of Fla. Const.: ". . . Any public officer or employee who breaches the public trust for private gain. . . shall be liable to the State for all financial benefits obtained by such actions.

> No judgment shall be reversed unless the appellate court is of the opinion, after an examination of all the appeal papers, that error was committed that injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant.

Finally, the Appellant has claimed that he is entitled to a per se reversal of his conviction as a result of a due process violation under the federal constitution. The Supreme Court of the United States' decision in Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982), is instructive. In Smith, the defendant moved to vacate the conviction on the grounds that during the trial, a juror submitted an employment application to the district attorney's office, and, the prosecutors in the case, upon being informed of the application, withheld this fact from the trial court and defense counsel until after the trial. At a post-trial evidentiary hearing where the juror was examined, the district court found "insufficient evidence to demonstrate that the juror was actually biased." 71 L.Ed.2d at 84. Nevertheless, that court imputed bias to the juror because "the average man in Smith's [juror] position would believe that the verdict of the jury would directly affect the evaluation of his job application." Id. The federal Court of Appeals "did not even reach the question of actual juror bias, holding that the prosecutor's failure to disclose Smith's application, without more, violated Respondent's right to due process of law." 71 L.Ed.2d at 87. The Supreme Court noted that the defendant, much

like the Appellant herein, argued that the Court of Appeals had "thereby correctly preserved the appearance of justice." Id. The Supreme Court held:

> Past decisions of this Court demonstrate that the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of trial, not the culpability of the prosecutor. . . . The Court thus recognized that the aim of due process is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused.
>
> 71 L.Ed.2d at 87-88 (emphasis added).

The Court also noted that:

> Even in cases of egregious prosecutorial misconduct, such as the knowing use of perjured testimony, we have required a new trial only when the tainted evidence was material to the case [citations omitted]. This materiality requirement implicitly recognizes that the misconduct's effect on the trial, not the blameworthiness of the prosecutor, is the crucial inquiry for due process purposes.

The Court then reversed the decisions below and held that the defendant was not entitled to have the verdict set aside on the ground that he was denied due process of the law either by virtue of implied juror bias as found by the district court, or because of prosecutorial misconduct as found by the Court of Appeals. The defendant had not shown any prejudice because of the post-trial finding of lack of actual bias of the affected juror. See also, Dick v. Scroggy, supra, at 197, where the court noted:

> It bears emphasis, we think, that although the prosecutor is an officer of the court, the role of the prosecutor is very different from that of the judge. A financial interest that would disqualify a judge, under cases such as Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927), and Ward v. Village of Monroeville, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972), may be "too remote and insubstantial to violate the constitutional constraints applicable to the decisions of [one] performing prosecutorial functions." Marshall v. Jerrico, Inc., 446 U.S. 238, 243-44, 100 S.Ct. 1610, 1614, 64 L.Ed.2d 182 (1980). Prosecutors, in an adversary system, "are necessarily permitted to be zealous in their enforcement of the law." Id. at 248, 100 S.Ct. at 1616. Prosecutors are supposed to be advocates; judges are not. Thus it is not without significance, in our view, that in the landmark case of Tumey v. Ohio, supra, where the mayor of the Village of North College Hill, Ohio, received significant sums from fines assessed in cases tried in the "mayor's court" over which he presided, it was the financial interest of the mayor, sitting as a judge, that led the Supreme Court to hold that convictions obtained in the mayor's court were constitutionally infirm; although the prosecutor received more than twice as much as the mayor out of the fines assessed, the prosecutor's financial interest evoked no critical comment from the Supreme Court.

In the instant case the Appellant has failed to show any conflict of interest or actual impropriety. The order of the lower court denying this claim should thus be affirmed.

II.

WHETHER THE DETAILS OF MR. OBER'S PERSONAL, FAMILIAL, AND FINANCIAL INTEREST IN OBTAINING A CONVICTION OR THE FACT THAT MR. SULLIVAN HAD LONG BEFORE HIS DEAL WITH THE STATE REPRESENTED HE COULD GIVE THE STATE BYRD "REAL GOOD" WERE DISCLOSED.

The Appellant has first claimed that police reports were not disclosed to the defense. As seen in the Statement of Facts herein, the testimony at the evidentiary hearing, completely refutes this claim. Counsel for the Appellant herein admitted that the police reports that he alleges were not disclosed, were all obtained from the State Attorney's files, pursuant to Fla. Stat. 119. Prosecutor Lopez, testified that: "We gave the defense everything we had. All police reports, all depositions, every piece of tangible evidence we had in the way of discovery we gave the defense." (R. 83). The trial transcript also reflects that at trial, Mr. Lopez stated to the Court that: "I gave him [trial defense counsel] my whole working file, everything that I had as far as police reports. . . ." (D.R. 1529-1530). The trial defense counsel, who was present when this statement was made, acknowledged at the evidentiary hearing that if the statement by Lopez was not true at the time, he would have objected. (R. 231). Moreover, trial counsel at the evidentiary hearing testified that he actually had received some of the reports. As to other reports, trial counsel acknowledged

that since he had taken depositions based upon the information in these reports, he must have been in possession of said police reports.

Counsel for the Appellant has presented no evidence that any police reports were in fact not disclosed. Instead the argument is apparently that since the defense counsel's files are now lost and defense counsel, seven years after the fact, does not have a specific recollection of having received each and every police report, it means that the State suppressed the police reports. There is no authority for such a "presumption" of non-disclosure by the State in these proceedings where the Appellant has the burden of proof. The post-conviction court's finding that the State gave the defense "everything that it had in its possession" is thus binding on the Appellant. (R. 347).

The Appellant's claim that the State did not disclose its "intervention" in Mr. Sullivan's parole violation is likewise without merit. With respect to this alleged intervention, the Appellant presented two letters by prosecutor Lopez and Mr. Sullivan, both of which were dated in September and October, 1982, after the completion of Mr. Byrd's trial. Lopez testified that there was no agreement with Sullivan as to any help with the latter's parole proceedings, prior to or during Mr. Byrd's trial. Mr. Ober explained that after Mr. Byrd's trial, the State had to renegotiate with Sullivan in exchange for the latter's testimony in the subsequent trial of codefendant

Endress. Since there was no agreement to assist and no letter of assistance with parole until after Mr. Byrd's conviction, there was nothing to disclose. The post-conviction court's findings on this issue are also binding on the Appellant.

The Appellant has also claimed that the State did not disclose a 1979 psychological report on Sullivan reflecting that the latter "had weak social mores" and was manipulative. Again, both prosecutors testified that they did not have possession of any DOC files. A violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1199, 10 L.Ed.2d 1215 (1963), "occurs only when the pertinent evidence is (1) suppressed, (2) favorable and (3) material." Lewis v. State, 497 So.2d 1162, 1163 (Fla. 3d DCA 1986) (Jorgenson, J., specially concurring). In any event, the trial defense counsel testified that it was "obvious" to him that Sullivan had weak social mores and was manipulative without the benefit of this psychological report. Defense counsel testified that:

> [defense counsel]: It [psychological report] didn't tell me a whole lot. I mean I talked to my client who knew Sullivan. We talked about it. We both anticipated he was going to do exactly what he did do. I was not surprised by that.
>
> Q. You knew he was a manipulator, you knew he wasn't a good guy, right?
>
> A. That is correct.
>
> Q. And you knew he would take advantage of people if he could.
>
> A. Yes.
>
> Q. That was clear to you, wasn't it?

A. Obvious to me.

Q. You attempted to demonstrate that in your cross-examination of him at trial?

A. Yes, sir.

(R. 240-241).

The record demonstrates that in fact, defense counsel at trial thoroughly impeached Sullivan with respect to previous inconsistent statements, lies and motives for testifying. (D.R. 441-460). The Appellant has not demonstrated how the psychological report could help impeach Sullivan more than he was at trial. There must be a "showing of reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 3384-3385, 87 L.Ed.2d 481, 494-495 (1985). Thus, this contention is also without merit.

Finally, the Appellant has cited a number of "other undisclosed Brady material" as to which he did not present any evidence at the evidentiary hearing. See Brief of Appellant at pp. 35-36. As noted in the Statement of the Facts herein, the post-conviction court specifically found these claims to have been waived due to the lack of presentation of evidence. (R. 353). As the Appellant failed to present any evidence to support the contention that these materials were not produced, the lower court properly rejected the claims. See, e.g., Arango v. State, 437 So.2d 1099, 1104 (Fla. 1983) (burden on defendant

to offer evidence in support of motion for post-conviction relief).

III.

WHETHER MR. BYRD WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE AND PENALTY PHASES OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

A. Guilt Phase

The Appellant has first argued that counsel was ineffective for having failed to use the December 17, 1981 police report to impeach Sullivan. Appellant claims that this report was inconsistent with Sullivan's trial testimony that he had given only two previous "statements" to the police. Appellant has continued that defense counsel should have also used this report to prevent the State's closing argument that it was not aware of the exact details of Sullivan's testimony at trial until April 19, 1982.

The post-conviction court found that trial counsel was "extremely effective during voir dire, opening statements, cross-examination and closing argument in impeaching Sullivan." Counsel also presented the testimony of several witnesses intended to discredit Sullivan. Appellant's argument that, "quantitatively, counsel should have presented more impeachment is not the test for deficient performance. Rather, as noted by

the Court below, the test of performance is qualitative." Given the totality of the evidence of impeachment presented herein, counsel cannot be deemed deficient. Moreover, the Appellant has not shown how further impeachment would have affected the outcome of the trial. Having failed to establish any deficient conduct or prejudice, this claim of ineffective assistance must be denied. Strickland v. Washington, 466 U.S. 668, 690-691, 104 S.Ct. 2052, 80 L.Ed.2d 674, 695 (1984).

As to the argument that defense counsel should have prevented the State's closing argument that they had made a deal with Sullivan before knowing what he had to say, again, this conduct was not deficient. First, the State's argument was based upon Sullivan's trial testimony and the record of the terms of the plea. (D.R. 483-484; see also, Sullivan's plea hearing, D.R. 1507, 1607-1614). In addition, the prosecutor had informed defense counsel that he would make this argument in light of comments made by the defense at opening. (D.R. 1176-1178). Defense counsel accepted this line of argument in exchange for being allowed to argue that if Sullivan knew nothing about the murder, he would never have been offered a plea in the first place. (D.R. 1177). Defense counsel did make such an argument. (D.R. 1226). Moreover, Sullivan's statement that he would give Byrd and Endress "really good" is not inconsistent with the prosecutor's argument that "the first time we knew of what happened here is April 19th . . . ." The comment "what happened here" obviously refers to the details of

the murder. In this context, Sullivan's statement in the police report, which does not go to the details of these murderous events, was not inconsistent. Counsel's conduct was a reasonable strategic choice and is not challengeable as deficient conduct. Strickland, supra. Furthermore, in view of the extensive impeachment of Sullivan, the Appellant has again not demonstrated any prejudice, i.e., reasonable probability that the outcome of trial would have been different. Thus, this claim of ineffective assistance must also be denied. Strickland, supra.

The Appellant has next claimed that defense counsel did not inform the jury of the extent of Sullivan's deal with the State and that he did not know how many other charges were dropped as a result of the deal. This claim is entirely without merit. This Court on direct appeal expressly noted:

> The agreement, of which defense counsel had full knowledge, allowed Sullivan to plead guilty to second degree murder and receive a term of probation. In addition, the agreement provided for the dismissal of unrelated grand theft and armed robbery charges. The latter part of the agreement concerning the dismissal of the unrelated charges, was, in fact, referred to by defense counsel during the voir dire examination of the jury . . . .Thus, the jury knew that he had received substantial consideration for his testimony and was able to judge Sullivan's credibility accordingly. We find no prejudicial error.
>
> Byrd v. State, supra, at 473.

There was no deficient conduct and no prejudice. Strickland, supra.

The Appellant next argues that Johnson did not obtain Sullivan's DOC file in order to learn how the State was handling Sullivan's parole as a result of the murder charge. As previously noted herein, the letters from Sullivan and Mr. Lopez in the DOC file with respect to the alleged parole assistance were written after Mr. Byrd's trial was concluded. It is axiomatic that counsel cannot be deficient for failing to obtain that which did not exist prior to or at the time of trial. As to the DOC psychological report on Sullivan, the State adopts its argument thereto in claim II herein. The findings of the report were known to Mr. Johnson at trial, through other avenues. Trial counsel in fact established what the Appellant currently argues would be established through the use of this report. Appellant has utterly failed to establish any deficient conduct or prejudice. Strickland, supra.

Appellant also argues that counsel failed to "properly impeach" witness Shad at trial because Appellant's sister would have allegedly testified that Shad had a motive for lying since he had previously raped her. Mr. Johnson testified that he did not call the defendant's sister and present detailed evidence of the rape because he did not want to get into a "bidding" as to who was correct. (R. 179-180). Counsel added that Shad was an unsteady witness who did not have command of the language or

facts. Thus he felt that just by asking the question, he had accomplished his object to cast doubt as to Shad's testimony. Moreover, even though Shad denied raping the sister, defense counsel was permitted to argue to the jury that Shad had an interest and bias against Byrd because Byrd told his father that Shad had raped his sister. (D.R. 1224, R. 349-350). The post-conviction court found counsel's explanation to be "a reasonably strategic decision." (R. 350).

Finally, the Appellant has argued that counsel should have utilized a police report which reflected that codefendant Endress had told Debra Williams that he and Sullivan had murdered the victim in a robbery situation. Appellant argues that the report was admissible pursuant to Chambers v. Mississippi, 410 U.S. 284 (1973).

In Chambers v. Mississippi, the State court had allowed the defendant to present the testimony of a witness, McDonald, who had made a written confession of the crime for which the defendant was on trial. On cross-examination by the State, McDonald repudiated the confession and asserted an alibi. The State court precluded the defendant from further "cross examining" McDonald, as an adverse witness, as to his alibi, circumstances of repudiation and other oral confessions allegedly made by him to other witnesses. The state court also excluded, as inadmissible hearsay evidence, the testimony of three other witnesses to oral confessions by McDonald shortly

after the crime had occurred. The Supreme Court of the United States held that precluding the three witnesses was a denial of due process because the statements were against penal interest and:

> the hearsay statements involved in this case were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability. First, each of McDonald's confessions was made spontaneously to a close acquaintance shortly after the murder had occurred. Second, each one was corroborated by some other evidence in the case. . . . Finally, if there was any question about the truthfulness of the extrajudicial statements, McDonald was present in the courtroom and had been under oath. He could have been cross-examined by the State, and his demeanor and responses weighed by the jury.
>
> 410 U.S. at 300-301.

The Court's holding in Chambers was thus based on the reliability of the statements and the independent corroboration of those statements. The record in the instant case reveals that the statement by Endress to Debra Williams was neither reliable nor independently corroborated.

In the instant case, Endress had allegedly told Debra Williams that he and Sullivan had robbed the victim. However, another witness, Clarence Love, stated that Endress had given him a different account of the murder. (See Statement of Facts herein at pp. 17-19). In this account, Endress had stated that the Appellant was the instigtor of the plot to kill the victim. Endress related a gruesome account of the Appellant choking and

beating the victim, while hollering, "Die, bitch, die." Endress had also spoken to Detective Pinkerton and stated that it was Appellant and not he who had killed the victim. In this account, Endress also supplied information as to another murder committed by the Appellant in Virginia. In light of the multitude of the divergent statements given by Endress, it is unreasonable to conclude that trial counsel should have sought admission of his statement to Debra Williams as a reliable, independently corroborated statement under Chambers, supra. The State would also note that if the statement to Debra Williams had been admitted, it would have opened what the post-conviction court termed "a Pandora's Box" of Endress's extremely damaging statements to other witnesses, for impeachment purposes. See, Wingate v. New Deal Cab Co., 217 So.2d 612 (Fla. 1st DCA 1969); Williams v. State, 443 So.2d 1053 (Fla. 1st DCA 1984). As the defense counsel at the evidentiary hearing testified, the strategy at trial was "to control the damage that we were going to suffer." (R. 189). In this context, the post-conviction court found that, "it is ludicrous to accuse trial counsel of being ineffective for not using [the statement to Debra Williams]". (R. 349-350). As noted by the lower court, "If trial counsel had utilized the information in this police report he would have truly been ineffective. . . ." (R. 350).

B. Penalty Phase

The trial counsel's testimony of extensive preparation, conducted from the time of Appellant's arrest through trial, to uncover virtually everything in the Appellant's background, was presented at the evidentiary hearing. See pp. 23-27 herein. The Appellant, however, claims that "very little preparation" was done and "more" could have been presented. It should be noted that trial counsel had presented the Appellant's and his father's testimony at the penalty phase. Current counsel also presented the Appellant's father's testimony and that of his sister.

At the penalty phase at trial, defense counsel successfully limited the evidence of prior convictions and bad conduct to a mere mention of two "worthless check" convictions. (D.R. 1304). Trial counsel also successfully established, through Percy Byrd, that during the defendant's development from "boyhood to manhood" he had never exhibited any violence, (b) that defendant had been raised with "respect for the law and respect for other people," (c) that he had had maintained a loving and stable relationship with his wife, (d) that he had been responsible and gainfully employed, (e) that he had denied being involved in the homicide, (f) that the police had told Percy Byrd that the defendant was not "personally involved" in the killing, and (g) that the defendant had probably acted under the influence and pressure from Jody Clymer. (D.R. 1304-1310).

The post-conviction court found that current counsel's claim that "more" testimony could have been presented through the Appellant's father was without merit, as current counsel merely elicited damaging testimony:

> First, had the Defendant's father testified at the penalty phase of his son's trial to the extent he testified at the evidentiary hearing the jury, the sentencing judge and the Appellate Court would have known that the Defendant at one time was absent without leave from the military, suffered a bad conduct discharge from the military, and spent 11 months in a military prison for altering checks in an effort to prevent his father from repossessing the motor vehicle his father had bought for him. (E.H.T., V.I, pp.33-37) This testimony, to say the least, would have been devastating to the Defendant and would have undermined the ultimate finding of the sentencing judge that the Defendant had no significant history of prior criminal activity (T.T., V.XII, Pg.1988).
>
> (R. 351)

As to the testimony of Appellant's sister, the post-conviction court found same to be "sketchy." The Court held that this testimony, when weighed against the aggravating circumstances in this case, would not have affected the sentence of death imposed upon the Appellant. (R. 351). The record herein substantiates these findings. The Appellant's sister testified that she was only five years old when Appellant left home to join the Marines. (R. 42). The Appellant once brought her from

school, when she was thirteen years old, took her for a drive and talked to her because their mother had passed away. (R. 43). Brenda added that when she and her husband and children did not have a place, Appellant gave them a place to stay. (R. 43). Brenda stayed with the Appellant and the victim for approximately three months, working at their motel for spending money. (R. 44).

Strickland, supra, states that the "court making the prejudice inquiry must ask whether the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." 104 S.Ct. at 2069. The post-conviction court found that the evidence and arguments presented at the evidentiary hearing below would not have changed the outcome. The trial court's finding is supported by the record and should not be disturbed. See, Stewart v. State, 481 So.2d 1210, 1212 (Fla. 1986).

CLAIM IV

WHETHER MR. BYRD WAS DENIED HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL BY IMPROPER PROSECUTORIAL COMMENTS DURING THE CROSS-EXAMINATION OF A DEFENSE WITNESS AND DURING CLOSING ARGUMENTS IN BOTH THE GUILT AND PENALTY PHASES. TRIAL COUNSEL'S FAILURE TO OBJECT AND COMBAT THE PROSECUTORIAL OVERREACHING WAS INEFFECTIVE ASSISTANCE.

The State directs this Court to issue VII of the Appellant's brief on direct appeal:

> The trial court erred in denying a mistrial after the prosecutor improperly impeached a key defense witness by insinuating impeaching facts, the proof of which was non existent, and by insinuating facts which, although said to exist, were not later proved.
>
> See initial brief of Appellant, Case No. 62,545

Not only did the defendant raise this claim in his brief, but this Court explicitly rejected it in its opinion:

> . . . we find that the trial judge did not commit prejudicial error in denying a motion for mistrial after he had sustained a defense objection to an improper question during the cross-examination of one of the defendant's key witnesses. We find that the evidence sustains the trial judge's exercise of his discretionary authority to deny a mistrial under these circumstances. See Wilson v. State, 436 So.2d 908 (Fla. 1983); Salvatore v. State, 366 So.2d 745 (Fla. 1988), cert. denied, 444 U.S. 885 (1979).
>
> Byrd, supra, at 473.

As the Appellant raised the issue on direct appeal, the lower court properly foreclosed the Appellant from presenting it again as a basis for Rule 3.850 relief. Mikenas v. State, 460 So.2d 359 (Fla. 1984); Demps v. State, 416 So.2d 808 (Fla. 1982); and Meeks v. State, 382 So.2d 673 (Fla. 1980).

The Appellant has also claimed that trial counsel's alleged failure to combat the prosecutorial overreaching was ineffective assistance of counsel. In effect, the Appellant is endeavoring to relitigate this direct appeal issue by raising it in terms of ineffective assistance of counsel. This Court has expressly addressed and rejected such attempts:

Claims previously raised on direct appeal will not be heard on a motion for post-conviction relief simply because those claims are raised under the guise of ineffective assistance of counsel.

Sireci v. State, 469 So.2d 119, 120 (Fla. 1985). See also, Woods v. State, 531 So.2d 79, 80, 83 (Fla. 1988) (Rule 3.850 motion alleged that the prosecutor had made improper comments "and, alternatively, counsel's failure to object constituted ineffective assistance." This Court held that, "[T]he prosecutor's supposed comments on Woods' failure to produce evidence also should have been raised on appeal. Presenting that claim under the alternate guise of ineffective assistance of counsel is unavailing."). Thus, the lower court was also correct in ruling that, "presenting this claim under the alternative guise of ineffective assistance of counsel is unavailing." (R. 409).

In any event, as noted by the lower court, the prosecutorial comments complained of in this case are not improper. Darden v. State, 329 So.2d 287, 291 (Fla. 1976). Prosecutors' comments, which are relevant and based upon evidence which is properly before the Court, are proper. Kennedy v. State, 455 So.2d 351, 354 (Fla. 1984); Muehlemen v. State, 503 So.2d 310, 317 (Fla. 1987); Darden, supra. The prosecutor's statements complained of herein were proper:

a) Comments on witness Shad

Throughout the guilt phase, defense counsel was attempting to discredit the state's witnesses. He asked witness Shad whether the defendant's sister had come back with bruises after a date with Shad, accusing the latter of rape. (D.R. 329). Witness Shad replied: "That is a complete lie sir." Id. Defense counsel was allowed to further explore the alleged "bias" of this witness, but no bias was shown. (D.R. 329-330). Thus the prosecutor's statement at closing argument that Shad had "no motive to lie," was relevant, based upon evidence in the record, and therefore proper.

b) Comments on Ronald Sullivan

The prosecutor's statement with regard to the time sequence of Sullivan's plea bargain, the timing of his statements and promise of probation for truthful testimony were based upon Sullivan's testimony at trial. (D.R. 483-484). Furthermore, the prosecutor was describing the terms of the plea accurately. See Sullivan's plea hearing. (D.R. 1507, 1607-1614). In addition, the prosecutor had informed defense counsel that he would make this argument in light of comments made by the defense at opening. (D.R. 1176-1178). Defense counsel accepted this line of argument in exchange for being allowed to argue that if Sullivan knew nothing about the murder, he would

never have been offered a plea in the first place. (D.R. 1177). Defense counsel was in fact allowed to make this argument. (D.R. 1226). There was thus, no basis for an objection. Thus, the prosecutor's statement was relevant, based upon evidence before the Court, and therefore proper. The Appellant has argued that Sullivan's statement in a police report dated prior to plea negotiations, to the effect that he could give Byrd and Endress "really good" was inconsistent with the prosecutor's statement that, "the first time we knew of what happened here is April 19th, . . ." See Brief of Appellant, p. 53. The statement, "what happened here" obviously refers to the details of the murder. In this context, Sullivan's statement in the police report, which does not go to the description of the murderous events, is not inconsistent with the prosecutor's aforementioned comments.

c) Alleged comments of prosecutor vouching for himself

The record reflects that the prosecutor was discussing the testimony of witness Price and telling the jury that this witness knew both the victim and the defendant. (D.R. 1200-1201). The prosecutor then described the defendant's statements to this witness. (D.R. 1201). In this context, the prosecutor admonished the jury to remember Ms. Price's testimony and "reject what I am saying, but it won't happen because everything that I am telling you is what came from that witness stand." (D.R. 1201). In fact, all of what the prosecutor was describing

comported with Ms. Price's previous testimony. (D.R. 333-338). There was no "vouching" and the prosecutor's statements were entirely proper.

d) Comments allegedly injecting the prosecutor's personal belief

In addressing the question of whether a prosecutor's expression of personal opinion denies the defendant a fair trial, the Eleventh Circuit Court of Appeals has noted that "[A] prosecutor may say; 'I believe the evidence has shown the defendant's guilt. . . .'" United States v. Adams, 799 F.2d 665, 670 (11th Cir. 1986). The Court noted that "[W]hen a prosecutor voices a personal opinion but indicates this belief is based on evidence in the record, the comment does not require a new trial." Id.

In this case, the defendant testified that he had confessed because he "did not want anything to happen" to Ms. Clymer. (D.R. 937). However, on cross-examination, the defendant admitted that he knew that Jody Clymer was "not under arrest to my knowledge" and that she went to the police station voluntarily. (D.R. 991). Ms. Clymer too had testified that she went with the police voluntarily and that nobody had threatened to charge her before or during the defendant's confession. (D.R. 308). In this context, the prosecutor's statements to the effect that the defendant's explanations for his confession were unbelievable (D.R. 1212-1213) were a fair comment upon the evidence.

The comment "I believe as far as the elements go we have shown you a prima facie case" (D.R. 1190) is entirely proper under Adams, supra, at 670. Likewise, the comment on alibi complained of herein (D.R. 1292) accurately described the evidence and was fair rebuttal to defense counsel's earlier argument that: "The State wants you to believe that everything he [defendant] did was an alibi. No so." (D.R. 1222).

e) Penalty phase comments

In the penalty phase of a murder trial resulting in a recommendation which is advisory, prosecutorial misconduct must be "egregious" to warrant resentencing. Bertolotti v. State, 476 So.2d 130, 138 (1985). There were no "egregious" comments in the instant case. As to the first statement complained of, with regard to sympathy, the prosecutor was arguing that sympathy for the defendant's father, who testified in the penalty phase "as a parent," is not a proper mitigating factor. The prosecutor is correct and the defendant has not cited any authority that emotion and sympathy for the defendant's parents is a valid factor in mitigation. See, Saffle v. Parks, 108 L.Ed.2d 415 (1990).

As to the comments with respect to Sullivan's case, the prosecutor was again describing the evidence. Until Sullivan gave a statement to the State Attorney's Office on April 11,

1982, in exchange for a plea, he had only admitted to having made a silencer. (D.R. 448-455). The prosecution could not find the murder weapon and therefore did not know if a silencer was used. Sullivan's plea agreement included a condition that if he violated his probation, he would be sentenced to life. Also, as defense counsel had repeatedly argued from the beginning of trial until the end, Sullivan was an ex-convict who was forever committing new crimes. The defendant's allegations, that the prosecutor knew that the case against Sullivan was not weak because Sullivan had confessed to almost everyone and that "the State could have used Mr. Byrd's and Mr. Endress' statements against Sullivan", are mere speculations after the fact. First, the alleged "confessions" were to other prisoners. (D.R. 456). Sullivan further testified that the prisoners whom the defense claimed he had confessed to had personal conflicts with him. (D.R. 479). Thus, using the alleged confessions from Mr. Sullivan's cellmates would not lead to a "strong" case against Sullivan. As to using Endress's and Byrd's statements against Sullivan, same is prohibited under Cruz v. New York, 107 S.Ct. 1714 (1987). (Admitting non-testifying codefendant's statements against a defendant at trial is prohibited as violating the defendant's right to confront witnesses against him).

Thus, even if the alleged prosecutorial misconduct could be raised in these post conviction proceedings, the Appellant has failed to show either prejudice or deficient conduct by counsel. Strickland, supra.

CLAIM V

WHETHER MR. BYRD WAS CONVICTED OF CAPITAL MURDER AND SENTENCED TO DEATH ON THE BASIS OF EVIDENCE OBTAINED IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. HIS INVOCATION OF HIS RIGHT OF SILENCE WAS IGNORED AND A CONFESSION WAS COERCED FROM HIS LIPS AND USED AGAINST HIM BECAUSE HIS COUNSEL FAILED TO PRESENT THE PROPER FACTS, ALONG WITH CASE LAW AND ARGUMENT, TO THE TRIAL COURT.

The State would request that this Court take notice of issue I of the Appellant's brief on direct appeal. Not only did the defendant raise this claim in his brief, but this Court explicitly rejected it in its opinion:

> From our complete review of the record, we find there is sufficient evidence to sustain the trial court's finding that all of the statements made by appellant were voluntarily given.
>
> Byrd, supra, at 473.

As the Appellant raised the issue on direct appeal, the lower court properly foreclosed the Appellant from presenting it as a basis for Rule 3.850 relief. Mikenas, Demps, and Meeks, supra. Again, the defendant cannot relitigate this issue under the guise of ineffective assistance of counsel. Sireci, supra, at 120; Woods, supra, at 83. The State would additionally note that the Appellant, contrary to the representations herein, was not "silent" during his interview. The Appellant, as noted by

this Court, "neither admitted nor denied involvement in the crime," during the initial phases of the interview. See, Byrd, sypra, at 470. See also, (D.R. 681-682). During this time, the officers were "talking" with the Appellant about his background. (D.R. 715).

CLAIM VI

WHETHER MR. BYRD WAS CONVICTED OF CAPITAL MURDER AND SENTENCED TO DEATH ON THE BASIS OF STATEMENTS OBTAINED IN VIOLATION OF THE SIXTH, EIGHT, AND FOURTEEN AMENDMENTS TO THE UNITED STATES CONSTITUTION. HIS COUNSEL'S FAILURE TO EVEN ASSERT THE SIXTH AMENDMENT VIOLATION WAS INEFFECTIVE ASSISTANCE.

The Appellant claims that after he confessed on October 28, 1981, and was jailed, the police officers "initiated an interrogation" of him on October 30, 1981, in violation of his right to counsel. The defendant has continued that his October 30, 1981 statement was therefore not admissible. Id. at 26. The admissibility of the defendant's statement is an issue which could have and should have been raised on direct appeal. Cave v. State, 529 So.2d 293, 295 (Fla. 1988) (claim that trial court improperly admitted a confession is cognizable only on direct appeal). Indeed, as seen previously herein, the defendant fully litigated the admissibility of his two other October 28, 1981 statements on direct appeal. The lower court thus properly found this claim to be procedurally barred. (R. 410-411). Moreover, contrary to the Appellant's claim, the

alleged violation of the Appellant's sixth amendment right to counsel, as a result of the October 30, 1981 interview, was argued by defense counsel at trial. (D.R. 692-698, 696). Thus, the claim of deficient conduct was refuted by the record. In any event, as noted by this Court, the October 30, 1981 statement complained of herein was merely a retraction of the defendant's previous October 28, 1981 confession. Byrd, supra, at 470. ("Appellant retracted his initial confession two days after having given it. . . ."). See also D.R. 739-741 (testimony by Detective Reynolds that the October 30, 1981 statement of the defendant was a denial of his previous statements). The State fails to see how the admission of this retraction, after the admission of the October 28, 1981 confession, which was most damaging to the defendant, was prejudicial to the Appellant.

CLAIM VII

> WHETHER MR. BYRD WAS DENIED HIS FOURTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS WHEN LAW ENFORCEMENT PERSONNEL AT THE DIRECTION OF AN ASSISTANT STATE ATTORNEY ENTERED MR. BYRD'S HOME WITHOUT A WARRANT TO EFFECTUATE HIS ARREST, AND COUNSEL PROVIDED CONSTITUTIONALLY INADEQUATE ASSISTANCE BY FAILING TO EFFECTIVELY LITIGATE THIS CLAIM.

The State would direct this Court to issues II and V of the defendant's brief on appeal:

> The trial court erred in admitting testimony relating to Byrd's initial confession to detectives Newcomb and Reynolds since the

> confession was the fruit of an unlawful arrest made upon intrusion into Byrd's home without a warrant.
>
> and
>
> The trial court erred in admitting the fruit of a warrantless search of a storage room located at the motel managed by Byrd since consent to search was not voluntarily and freely given.
>
> See Initial Brief of Appellant, Case No. 62,595.

Not only did the Appellant raise these claims in his brief on direct appeal, but this Court explicitly rejected same in its opinion:

> In our view, the appellant consented to the law enforcement officers' entry into the threshold area by voluntarily opening the door, stepping back, and standing in the threshold after knowing who was present; therefore, this was a valid warrantless arrest. In so holding, we choose to accept the view of those courts which have found entries to be consensual where there is no forced entry or deception, and when the defendant knows who is asking for admission and then opens the door. In our opinion, an entry under those circumstances is consensual, at least with respect to the area immediately surrounding the threshold or vestibule entrance of the residence, particularly where the defendant makes no objection.
>
> . . . .
>
> Although we find that appellant's arrest was proper under the factual circumstances of this case, we note that, even if the arrest was improper, the confession was not so tainted as to be inadmissible. We reach this conclusion because appellant knew the officers, had talked to them before his arrest, was advised of his rights at his residence and at the police station, and also signed a "consent to be interviewed" form and indicated to police that he wanted to give a statement. In addition, appellant was afforded time alone with his girlfriend to discuss his predicament before he actually gave the confession.

> . . . . From our complete review of the record, we find there is sufficient evidence to sustain the trial court's finding that all of the statements made by appellant were voluntarily given.
>
> With regard to appellant's consent to search the storeroom at the motel, we find that the record supports a finding that this consent was voluntarily given. We note that the voluntariness of the consent was never presented to the trial judge although there was a motion to suppress the results of the search on other grounds.
>
> Byrd, supra, at 472-473.

As the Appellant raised the issue on direct appeal, the lower court properly foreclosed the Appellant from presenting it as a basis for Rule 3.850 relief. Mikenas, Demps and Meeks, supra.

As noted previously herein, the defendant cannot relitigate an issue raised on appeal in the guise of ineffective assistance of counsel. Sireci, supra, at 120; Woods, supra, at 83.

CLAIM VIII

> WHETHER TRIAL COUNSEL'S FAILURE TO ASSURE MR. BYRD'S PRESENCE DURING CRITICAL STAGES OF HIS CAPITAL PROCEEDINGS, AND THE PREJUDICE RESULTING THEREFROM, VIOLATED THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The trial court correctly found this issue to be procedurally barred. Blanco v. Wainwright, 507 So.2d 1377 at 1380 (Fla. 1987) (claim that trial court conducted critical

stages of trial in absence of defendant barred when Rule 3.850, as it could and should have been raised on direct appeal).

Moreover, the State would note that the portions of trial from which the Appellant was allegedly absent are not "critical" or essential stages of trial which would either require the defendant's presence or deprive him of constitutional rights. For example Appellant has stated that he was excluded from the charge (jury instruction) conference and "numerous" side bar conferences. "There is no requirement, by statute or rule, that a defendant be present at a charge conference ... ." Randall v. State, 346 So.2d 1233 (Fla. 3DCA 1977). As to side bar conferences, the record reflects that the side bar conferences were for the purpose of legal arguments and explanations of objections which defendant could not have assisted defense counsel in arguing. Defendant has "no constitutional right to be present at the bench during conferences that involved purely legal matters." In re Shriner, 735 F.2d 1236, 1241 (11th Cir. 1988); see also, Roberts v. State, 510 So.2d 885, 891 (Fla. 1988) ("although a number of the rulings on these motions were adverse to Roberts, each of the motions heard during these sessions involved matters in which Roberts, if present could not have assisted defense counsel in arguing. Therefore . . . he was not prejudiced."). Moreover, the record herein shows that the conferences were held out of the jury's hearing but that the defendant was present. When "[N]othing in the record supports the notion that appellant was not permitted

to listen to these conferences, if either he or counsel so desires," the issue is not cognizable on collateral review. Blanco, supra, at 1381.

As to the defendant's absence from the "in camera proceeding", some background information is helpful. At the end of the testimony of all witnesses in the guilt phase, after the jury had left, and, in the defendant's presence, defense counsel made a motion for mistrial based upon alleged false "impeaching facts, or questions" used by the prosecutor during cross examination of defense witness Garcia. (D.R. 1108-1109). The "alleged falsity" and what the defense contended was the "true" version were both proffered in the defendant's presence. (D.R. 1109-1110). The proffered witness for the defense was Mr. Donnerly, who was witness Garcia's counsel. The prosecutors stated their recollection of the "true" version, again, in the presence of the defendant. (D.R. 1116, 1110-1111, 108901091). The court then indicated that it would have to take testimony from Mr. Donnerly and the prosecutor. (D.R. 1111). However, Mr. Donnerly's attorney stated that the latter should not testify because he would reveal and violate other defendants' privileges, and, there would be "a swearing match between him [Donnerly] and a State attorney" which might subject Donnerly to perjury charges. (D.R. 1112-1113).

In view of the above, defense counsel Johnson, in the Appellant's presence, stated that "as far as our client is

concerned, we are not the least concerned about the posture that may exist between Mr. Donnerly and Mr. Ober [prosecutor] in a matter that we are not involved in." (D.R. 1113). Mr. Donnerly's attorney then requested that if his client's testimony was necessary, that it be taken in camera. (D.R. 1117). The court then gave the defense an opportunity for comment. (D.R. 1117). Defense counsel and the defendant made no objection to the suggestion of an in camera proceeding. Id. The court then announced its intention to conduct an in camera proceeding. (D.R. 1118). Neither defense counsel nor the defendant expressed a desire to be present. (D.R. 1118).

The in camera proceeding was convened immediately thereafter and defense counsel Buckine was present. (D.R. 1118). At this proceeding, the earlier proffered statements were repeated. (D.R. 1120-21). The court denied the motion for mistrial because he found the prosecutor had not intentionally used false impeachment. (D.R. 1133). The court, however, also gave defense counsel the opportunity to prepare any curative instruction or to call Mr. Donnerly as a witness in front of the jury. (D.R. 1133, 1139). At the evidentiary hearing below, defense counsel Buckine stated that after the in camera proceeding, he came back to the defense table and explained what had transpired to both defense counsel Johnson and to the Appellant. (R. 57). The Appellant has not stated how he was prejudiced by his absence from the in camera proceeding. Thus, the lower court specifically noted that,

> Additionally, to the extent that the defendant attempts to raise a claim of ineffective assistance of counsel in this claim he has totally failed to demonstrate prejudice within the meaning of Strickland v. Washington, 104 S.Ct. 2052 (1984).
>
> (R. 409).

CLAIM IX

> WHETHER THE EXCLUSION OF CRITICAL EVIDENCE RENDERED MR. BYRD'S SENTENCE OF DEATH FUNDAMENTALLY UNRELIABLE AND VIOLATED HIS RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The Appellant has claimed that he was denied the right to present a defense because of the trial court's evidentiary rulings as to: a) precluding admission of Sullivan's October 28, 1981 taped statement; b) preventing defense counsel from "adequately" showing to the jury the oppressive circumstances surrounding Mr. Byrd's confession; c) preventing defense counsel's questioning of Officer Newcomb about two unrelated suspects with machine guns; d) preventing defense counsel from introducing evidence of the defendant's letters to Jody Clymer; and, e) preventing defense counsel's questioning of a witness about her purchase of marijuana from the victim.

Limitation of cross-examination of witnesses and evidentiary rulings of the trial court can be raised on direct appeal. Coxwell v. State, 361 So.2d 148 (Fla. 1978). Indeed,

the Appellant in his supplemental brief on direct appeal did partially raise this issue:

Issue X

> THE TRIAL COURT ERRED IN LIMITING CROSS-EXAMINATION OF THE STATE'S CHIEF WITNESS FOR THE PURPOSE OF SHOWING BIAS, PREJUDICE OR INTEREST.
>
> See Supplement brief of Appellant, Case No. 62,545, at p. 2.

Likewise, the alleged restrictions on cross-examination of other witnesses and alleged exclusion of evidence could have and should have been raised on direct appeal. The lower court thus summarily denied this claim finding that it could have been raised on direct appeal. Relitigation of these issues in terms of ineffective assistance of counsel is, as previously noted, likewise prohibited. Sireci, supra, Woods, supra. In any event, the State would note that the claims herein are without merit as they are conclusively refuted by the record.

First, defense counsel made full use of Sullivan's October 28, 1981 statement and thoroughly impeached him with it. (DR. 448-452) Second, Defense counsel was allowed to and did, at length, question the alleged "oppressive" circumstances of the defendant's confession and its voluntariness. (DR. 710-725, 822, 825). (It should also be noted that this Court found that the arrest was not illegal, the Appellant had consented to the entry of police and that the Appellant's statements were all voluntary). See Byrd, supra at 472-473.

As to limiting questioning about two suspects with machine guns, it should be noted that defense counsel was questioning Detective Newcomb as to suspects who had been specifically involved in this murder. (DR. 837). Counsel then asked whether two suspects carrying machine guns and a large amount of cash "were arrested in the vicinity of this crime." Id. According to earlier proceedings, both the Court and defense counsel knew that two individuals had been arrested in the vicinity because of "an alleged dope deal" and because of shots being fired. (DR. 1552-1553). The police had confiscated these individuals' machine guns. The bullets recovered from the homicide victim were established to be ".32 caliber shells" which did not comport with the confiscated guns. (DR. 1553). The two suspects had thus been cleared several months prior to trial. (DR. 1552). In light of this knowledge, sustaining an objection to defense counsel's misleading inferences that other suspects were involved and arrested for this homicide was entirely proper. A criminal defendant has the right "to seek out the truth in the process of defending himself," Davis v. Alaska, 415 U.S. 308, 320, 94 S.Ct. 105, 39 L.Ed.2d 34 (1974), not mislead the court.

The Appellant has also claimed that defense counsel was precluded from introducing evidence that Mr. Byrd had written letters to Jody Clymer wherein he had maintained his innocence. The record conclusively refutes this claim as well. Defense counsel asked witness Clymer whether the Appellant had written

her letters. (DR. 306). She responded affirmatively. Id. Defense counsel then asked whether the defendant, in those letters, maintained that he was not involved. Id. The State objected on the grounds that the letters themselves would be the best evidence. (DR. 306-307). The Court responded, ". . . you can ask her the question . . . . I will let it in." (DR. 307). Defense counsel then was in fact allowed to introduce the following:

> Q. [By Mr. Johnson] My Clymer, since the time of Wade Byrd's arrest, hasn't he repeatedly denied his involvement in this crime to you?
>
> A. Yes.
>
> Q. And hasn't he done that on several occasions?
>
> A. (Witness replies affirmatively.)
>
> Q. I didn't hear you, ma'am?
>
> A. Yes.
>
> (DR. 307).

Thus, there was no "preclusion" in this matter.

Finally, Appellant has complained that an objection to defense counsel's question to a former employee of the defendant was sustained. The question was whether the witness "had purchased marijuana" from the victim that the victim had "allegedly purchased from Sullivan" (DR. 342). As is shown from the form of the question, sustaining an objection to this question was entirely proper. The Appellant has not shown how this had any relevancy to his defense either.

In short, not only was this claim procedurally barred, but it is also conclusively refuted by the record which reflects there was no denial of presentation of a defense.

CLAIM X

WHETHER MR. BYRD WAS IMPROPERLY DENIED HIS RIGHT TO CROSS-EXAMINE KEY STATE'S WITNESSES ON MATTERS THAT WOULD HAVE UNDERMINED THEIR CREDIBILITY, AND AS A RESULT HE WAS DENIED HIS RIGHT OF CONFRONTATION IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEEN AMENDMENTS TO THE UNITED STATES CONSTITUTION.

As in the previous issue, the trial court properly denied this claim because it could have been and was raised on direct appeal. Coxwell, Sireci, Woods, supra.

Alleged limitations on testing Sullivan's credibility were raised and addressed on direct appeal. See issue IX herein and Byrd, supra, at 473. Furthermore, the instances of limitation alleged by the Appellant are nonexistent in this claim as well. First, as to Regina Schimelfining, the passage quoted by the Appellant reflects that defense counsel himself withdrew his question of that witness prior to a ruling by the trial judge. See Appellant's brief at p. 79. There was thus no limitation of cross-examination. Moreover, Schimelfining's testimony at trial revealed that she was merely Sullivan's girlfriend but had had nothing to do with the murder; she did not witness it, she was either watching television or asleep during the time of the murder. At the evidentiary hearing,

trial counsel reaffirmed that this witness did not know a great deal and could not offer any "hard evidence" against the Appellant. (R. 193, 195). Counsel stated, "I never viewed Schimelfining as being a major player. I always viewed her as being around the fringes." (R. 194). In light of the negligible significance of the testimony of this witness, the State fails to see any prejudice to the Appellant. Finally, the Appellant has claimed that cross-examination of Sullivan regarding why he pled to second degree murder was limited. The State would note that Sullivan in fact answered this question several times. (DR. 442).

CLAIM XI

WHETHER THE TRIAL COURT'S UNCONSTITUTIONAL SHIFTING OF THE BURDEN OF PROOF IN ITS INSTRUCTIONS AT SENTENCING DID NOT DEPRIVE MR. BYRD OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

This Court has held that this issue must be raised on direct appeal and thus cannot be raised by way of Rule 3.850. Harvard v. State, 486 So.2d 537, 540 (Fla. 1987), and cases cited therein. The trial court correctly found this issue to be procedurally barred as it should have been raised on direct appeal. Jones v. Dugger, 533 So.2d 290, 293 (Fla. 1988); Henderson v. Dugger, 522 So.2d 835, 836 (Fla. 1988); Adams v. State, 543 So.2d 1244 (Fla. 1989).

CLAIM XII

WHETHER MR. BYRD'S SENTENCING JURY WAS MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

This Court has specifically ruled that violations of Caldwell v. Mississippi, 105 S.Ct. 2633 (1985) must be raised on direct appeal and are thus not cognizable under Rule 3.850. Ford v. State, 522 So.2d 345 (Fla. 1988); Demps v. State, 515 So.2d 196, 197 (Fla. 1987); Cave v. State, 529 So.2d 293, 296 (Fla. 1988) Thus the lower court properly found this claim to be procedurally barred. (R. 413).

CLAIM XIII

WHETHER THE JURY INSTRUCTIONS REGARDING AGGRAVATING FACTORS SO PERVERTED THE SENTENCING PHASE OF MR. BYRD'S TRIAL THAT IT RESULTED IN THE TOTALLY ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

In his motion for post-conviction relief, the Appellant only alleged that the trial judge had orally instructed the jury on three aggravating circumstances (pecuniary gain, heinous atrocious and cruel and cold calculated premeditated) whereas the written instructions included an additional aggravating circumstances, i.e., that the crime was committed to disrupt or hinder the lawful exercise of any governmental function or the

enforcement of laws. (SR. 61). The lower court summarily denied this claim, finding that it could have been raised on direct appeal. Blanco, supra; Harvard v. State, 486 So.2d 537 (Fla. 1986); Adams v. State, 456 So.2d 888, 890 (Fla. 1984). On appeal to this Court, however, the Appellant has added a claim that "no limiting instructions" as to the aggravating circumstances were given to the jury, relying upon Maynard v. Cartwright, 108 U.S. 1853 (1988). This issue was not raised below and is thus waived on appeal. Moreover, the validity of the aggravating circumstances herein was upheld on direct appeal. Byrd, supra, at 474. This claim too is thus procedurally barred. Also see Smalley v. State, 546 So.2d 720 (Fla. 1981).

CLAIM XIV

WHETHER THE JURY WAS MISLED AND INCORRECTLY INFORMED ABOUT ITS FUNCTION AT CAPITAL SENTENCING, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The lower court properly found this claim to be procedurally barred as it could have been raised on direct appeal. Blanco v. Wainwright, supra. Furthermore, as noted by the lower court, there was no erroneous jury instruction in this case. The jury was specifically informed that:

> . . . if by six or more votes the jury determines that the defendant should not be sentenced to death your advisory sentence will be: "the jury advises and recommends to the court that it impose a sentence of life imprisonment upon the defendant without possibility of parole for twenty five years.

(DR. 1348).

CLAIM XV

WHETHER THE INTRODUCTION OF NONSTATUTORY AGGRAVATING FACTORS SO PERVERTED THE SENTENCING PHASE OF MR. BYRD'S TRIAL THAT IT RESULTED IN THE TOTALLY ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

The State requests that this Court take judicial notice of issue IX of the Appellant's brief on direct appeal. Under this issue, the defendant raised the following subissue/heading:

C

THE TRIAL COURT ERRED IN CONSIDERING AS NONSTATUTORY AGGRAVATING CIRCUMSTANCES THAT BYRD SHOWED NO REMORSE AND THAT HE CONTINUES A DANGER AND MENACE TO SOCIETY.

See, Appellant's initial brief, Case No. 62,545, at p. 46.

This Court expressly addressed this issue and held:

> We summarily reject the assertion that the trial judge considered nonaggravating circumstances, specifically appellant's lack of remorse and continued danger to the community in imposing sentence. We do not find that these factors entered into the final determination made by the trial judge.

Byrd, supra, at 474.

As the Appellant raised this issue on direct appeal, the lower court properly foreclosed him from presenting it as a basis for Rule 3.850 relief. Mikenas, Demps, and Meeks, supra.

CLAIM XVI

WHETHER MR. BYRD WAS DENIED HIS RIGHTS TO AN INDIVIDUALIZED AND FUNDAMENTALLY FAIR AND RELIABLE CAPITAL SENTENCING DETERMINATION AS A RESULT OF THE PRESENTATION OF INFORMATION CONCERNING THE VICTIM'S FAMILY BACKGROUND AND OTHER CONSTITUTIONALLY IMPERMISSIBLE VICTIM IMPACT INFORMATION, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS.

The trial court properly found this claim to be procedurally barred. Grossman v. State, 525 So.2d 833 (Fla. 1988); Clark v. State, 533 So.2d 1144 (Fla. 1988). It should be noted that in Booth, supra, the State had introduced extensive evidence that the victims were kind and gentle persons and that their families were severely bereaved; the victims' family members also gave their opinion of the crimes and the defendant. In the instant case, no evidence with respect to the victim's characteristics was introduced by the State, nor was there any testimony with respect to her family, bereavement, etc. The Appellant is complaining of the prosecutor's single remark that the victim "had loved ones." (DR. 1321). Raising Booth in regard to the comment herein is a misapplication of that case to the claim. Thus, the lower court correctly noted that, "Finally this Court is convinced after a review of the totality of the evidence that the remark of the prosecutor even if deemed to be a violation of Booth, was harmless beyond a reasonable doubt. Grossman v. State, 525 So.2d 833 (Fla. 1988). Therefore, the Court finds that this prosecutorial remark was not so improper as to rise to the level of prejudice within the meaning of

Strickland and Downs [v. State, 453 So.2d 1102 (Fla. 1984)]." (R. 408-409).

CLAIM XVII

WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS WERE VIOLATED BY FAILING TO CONSIDER NONSTATUTORY MITIGATING CIRCUMSTANCES.

The State requests that this Court take notice of Appellant's issue IX in his initial brief on direct appeal. As part of this issue, the defendant raised the following sub-issue/heading:

D

> The trial court erred in failing to consider relevant nonstatutory mitigating circumstances proffered by Byrd at the sentencing hearing.
>
> See initial brief of Appellant, Case No. 62,545, at p. 47.

This Court explicitly addressed the above issue:

> With regard to the final assertion, which concerns alleged nonstatutory mitigating factors, we find that the evidence reflects that appellant had a full opportunity to present all mitigating circumstances. The trial judge did, in fact, consider the appellant's lack of a prior criminal history as a mitigating factor. We find that it was within the province of the court to decide, on the basis of the record, the appropriate aggravating and mitigating circumstances. We also find that the court's conclusion, that the aggravating circumstances outweigh the mitigating circumstances, is justified by this record.
>
> Byrd, supra, at 474.

As the Appellant raised this issue on direct appeal, the lower court properly foreclosed him from presenting it as a basis for Rule 3.850 relief. Mikenas, Demps, and Meeks, supra; See also Woods v. State, 490 So.2d 26, 27 (Fla. 1986) (claims of proportionality, alleged disparate treatment of co-defendants, could and should be raised on direct appeal).

CONCLUSION

Based on the foregoing, the order of the lower court denying the motion for post-conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Memorandum was mailed this 15 day of November, 1990 to MARTIN McCLAIN, Assistant Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301; JOHN SKY, Assistant State Attorney, Office of the State Attorney, Courthouse Annex, Fifth Floor, Tampa, Florida 33602.

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