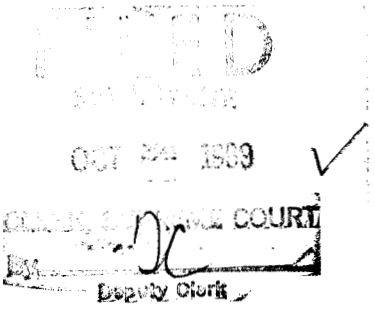
IN THE SUPREME COURT OF FLORIDA

CASE NO. 74888



J. B PARKER,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

****

AN APPEAL FROM THE TRIAL COURT'S DENIAL OF A MOTION FOR POST CONVICTION RELIEF

****

APPELLEE'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CONTENTS (CONT'D)

TABLE OF CITATIONS

PRELIMINARY STATEMENT

This answer brief is being filed pursuant to Appellant's appeal of the denial of his latest motion for post-conviction relief.

Appellee will rely on the symbols used in the State's response to Appellant's pending habeas petition. "PE" will refer to Appellant's exhibits attached to his habeas petition. "R" to Record on Appeal, "RE" to Appellee's Exhibits attached to the State's habeas response, "P" will refer to the Record on Appeal of Petitioner's first Rule 3.850 in Parker v. State Case No. 72,374. "SR" will refer to the Record on Appeal for this pending appeal.

STATEMENT OF THE CASE

Appellant is presently in the lawful custody of the State of Florida, pursuant to a valid judgment and sentence of death, imposed upon appellant by the Honorable Phillip Nourse presiding. (R, 1706-1711;). Petitioner was convicted on January 7, 1983, of the first degree murder, robbery with a firearm, and kidnapping of Frances Julia Slater, on April 27, 1982. (R, 1547, 1692). On January 11, 1983, after a jury advisory recommendation of 8-4 for the death penalty (R, 1704), Judge Nourse sentenced Appellant to death, for the murder conviction. (R,1706-1711). On January 4, 1984, upon remand from the Florida Supreme Court, the trial court entered its written factual findings, basing its imposition of the death penalty, on evidence supporting four aggravating circumstances and three mitigating factors (PE-G). A description of these findings, is contained in the Florida Supreme Court's opinion, on direct appeal. Parker v. State, 476 So.2d 134, 136-137 (Fla. 1985).

On direct appeal, Petitioner raised seven grounds, challenging his conviction and sentence, as follows (restated by the State):

> 1) The trial court erred in admitting the testimony of two relatives of Georgeann Williams, a codefendant's girlfriend, showing that Williams' statements to them were consistent with her trial testimony;
>
> 2) The trial court erred in denying a requested jury

instruction on "independent acts of others";

3) The trial court erroneously restricted the cross-examination of State witness Georgeann Williams, regarding her arrest for petty larceny;

4) The trial court improperly denied Defendant's motion to suppress his admission and/or statement;

5) The trial court erred in allowing the State, over defense objections, to present evidence of Defendant's prior criminal history, after Defendant expressly waived any reliance on the statutory mitigating circumstance of "no significant prior criminal history";

6) The trial court erred, in instructing the jury on three aggravating circumstances (heinous, atrocious and cruel; cold, calculated and premeditated; crime committed for financial gain), unsupported by evidence; and

7) The trial court reversibly erred, in denying a mistrial during the State's closing argument, referring to codefendant John Bush's statement, from which the jury could infer that Parker had shot the victim.

Defendant filed a supplemental brief, in which he raised the following additional issue:

1) The Court erred, in overruling defense objections that the State systematically

> excluded blacks from the jury, by peremptory challenges, and in failing to ask the State about motives for such challenges.

After review, this Court unanimously affirmed Defendant's conviction and death sentence. Parker v. State, **476** So.2d **134** (Fla. **1985).** Defendant did not seek certiorari review with the United States Supreme Court.

On or about December **3, 1987,** Defendant filed his first post-conviction motion to vacate his conviction, and sentence of death, in the Circuit Court, in and for Martin County, Florida. In this motion, Defendant raised four alleged grounds for relief, pursuant to Rule **3.850,** Fla.Crim.Pro.:

> 1) Defense counsel (now-Circuit Judge Robert Makemson) provided ineffective assistance of counsel, by allegedly failing to challenge the admission of Parker's pre-trial statements, on different grounds, than those actually argued by counsel in suppression motions and hearing; (See Defendant's first Rule **3.850** motion, at **3-16);**
>
> 2) Defense counsel provided ineffective assistance, by allegedly failing to properly investigate and/or present additional background and/or character evidence, at Defendant's sentencing phase (Defendant'sfirst Rule **3.850** motion, at **16-28);**
>
> 3)The State violated Parker's due process and Eighth

Amendment rights, by allegedly failing to inform Parker's jury, of the State's position, as to the identity of the "triggerman", taken at the trial of John Earl Bush and Alphonso Cave, Parker's codefendants (Motion, at 29-33); and

4) Parker's death sentence was imposed, in violation of his Eighth Amendment rights, because of the alleged absence of evidence that Parker had major participation in the crimes, and exhibited reckless disregard for life, based on Tison v. Arizona, 107 S.Ct. 1676 (1987).

(P 625-661) An evidentiary hearing was held in February, 1988, before the Honorable Judge Dwight L. Geiger. (P1-359) The parties submitted post-hearing legal memoranda. On April 5, 1988, Judge Geiger denied Defendant's motion (P 1599-1600).

Defendant appealed this ruling to the Florida Supreme Court, and additionally filed an original habeas corpus petition, contending that appellate counsel was ineffective, in failing to challenge the trial court's suppression ruling, on different grounds, than actually raised in Defendant's direct appeal. Parker v. Duqger, Case No. 72,951. After review, the Florida Supreme Court affirmed the denial of rule 3.850 relief, and denied Parker's habeas corpus petition, on March 23, 1989. Parker v. State, 542 So.2d 356 (Fla. 1989). Rehearing on this ruling, was denied on May 26, 1989. Parker, 542 So.2d, supra, at 356.

On August 29, 1989, Governor Bob Martinez signed a death warrant, ordering Parker's execution. (PE-A). The warrant is effective, from noon, October 26, 1989, to noon, November 2, 1989. Parker's execution has been presently set for Friday, October 27, 1989, at 7:00 A.M.

On or about September 21, 1989, Defendant filed a second habeas corpus petition, in the Florida Supreme Court. In said petition, Defendant raised four claims:

> 1) The Circuit Court's alleged failure to timely and/or adequately make factual findings, in imposing the death penalty upon Parker, allegedly violated Parker's due process and Eighth Amendment rights;
>
> 2) The Florida Supreme Court did not meaningfully review Parker's death sentence, in the course of Parker's direct appeal;
>
> 3) Parker's counsel provided ineffective assistance of counsel, during direct appeal, by failing to address or challenge the trial court's sentencing order; and
>
> 4) Closing arguments, made by the State at sentencing phase, improperly emphasized the effect of the victim's death on her family, in alleged violation of Defendant's Eighth and Fourteenth Amendment claims, under Booth v. Maryland, 482 U.S. (1987).

This petition remains pending. On September 28, 1989 Appellant filed his second motion for post-conviction relief raising the following seven claims: (SR 1-304 , 307-605)

> 1. The State used peremptory challenges to impermissibly strike black jurors and the State failed to conduct an adequate inquiry under State v. Slappy.
>
> 2. Prosecutorial comments mandated a death sentence thereby depriving him of an individualized and reliable sentencing.
>
> 3. Prosecutors comments created an inpermissible burden shift to Appellant requiring that he prove that life should be the appropriate sentence.
>
> 4. Appellant was denied the right to a unanimous jury verdict on the elements of capital murder.
>
> 5. Prosecutorial comments improperly informed the jury that the jury should not consider sympathy for the Appellant.
>
> 6. The State Attorney's Office has failed to provide Appellant with access to its files and records.
>
> 7. Appellant was denied the effective assistance of a mental health expert.

All seven claims were dismissed as procedurally barred on various grounds. (SR **665-667)** This appeal follows.

STATEMENT OF THE FACTS

Appellee will rely on the Statement *of* the Facts as detailed in the State's response to Appellant's Motion for Post-Conviction relief (SR 609-626) as well as the facts stated in this Court's opinion on Appellant's direct appeal. Parker v. State 476 So.2d 134 (Fla. 1985).

SUMMARY OF THE ARGUMENT

1. Appellant is not entited to a stay of execution as he has not established that any claim entitled him to relief.

2. The trial court properly found this claim to be procedurally barred as it was resolved on direct appeal and because Appellant should have raised this claim in his prior Rule 3.850.The trial court properly found this claim to be procedurally barred as Appellant should have raised it in his prior rule 3.850.

3. The trial court properly found this claim to be procedurally barred on various grounds. Furthermore Appellant was afforded the expertise of a mental health expert.

4. Appellant's claim that both prosecutorial comments and jury instructions created a mandatory presumption of death is procedurally barred. These claims should have been raised on either direct appeal or Appellant's prior motion for post-conviction relief. Furthermore the challenged statements were a proper explanation and instruction of the capital-sentencing scheme.

5. The trial court properly denied relief on the grounds that this claim should have been sought on direct appeal and on the Appellant's motion prior to post-conviction. The court also properly found that this claim is without merit as there is no right to a jury trial at capital sentencing. As such there is also no right to an unanimous jury verdict for each aggravating factor found to exist.

6. Appellant's claim that the prosecutor's statement amounted to impermissible anti-sympathy comments is procedurally barred. Appellant could and should have raised this error on either direct appeal or in his prior motion for post-conviction relief.

7, Appellant is procedurally barred from raising this claim at this time as it should have been raised in his prior Rule 3.850. Furthermore the claim has no merit as Appellant has been given access to the State' files.

ISSUE I

APPELLANT IS NOT ENTITLED TO A STAY OF EXECUTION

Appellant's claims lacks merit both procedurally and substantively. This Court should deny his motion for a stay of execution and affirm the trial court's order denying relief. A stay of execution...should not be regarded as an automatic remedy granted simply upon request," Mulligan v. Zant, **531** F.Supp. **459, 460** (M.D. Ga. **1984),** inasmuch as the State has a legitimate interest in the finality of all litigation, including capital ligitation. Witt v. State, **387** So.2d **922, 925** (Fla. 1980), cert. denied, **449** U..S. **1067 (1981).** In otherwords "justice, though due to the accused, is due to the accuser also," Snyder v. Massachusetts, **291** U.S. **97, 122 (1934),** and "justice delayed is justice denied," United States ex rel. Geislerv. Walters, **510** F.2d **887, 893** (3rd Cir. **1975).**

Appellant has failed to establish that he "might be" entitled to relief on any of his claims. Appellant's claims lack any merit whatsoever. More importantly all of Appellant's claims are procedurally barred, precluding any determination of their merits.

Appellant claims a stay is further warranted because of the United States Supreme Court's acceptance of certiorari review in People v. Boyle, **758** P.2d **25** (Cal. **1988)** (en banc) and Commonwealth v. Blystone, **540** A. 2d **81** (Pa. **1988).**

Appellee relies on the argument under those issues in this brief to urge denial of a stay by this Court.

ISSUE II

THE TRIAL COURT PROPERLY DENIED RELIEF ON VARIOUS PROCEDURAL GROUNDS, IN THE ALTERNATIVE THERE IS NO "NEIL VIOLATION"

Defendant has initially challenged the State's exercise of peremptory challenges to strike black jurors, in violation of alleged "new" Florida case law. This claim is procedurally barred and without substantive merit. It amounts to no more than deliberate re-litigation, under the pretense of "new law", of claims already resolved against Parker.

This exact issue was raised by supplemental brief during Appellant's direct appeal, involving the same jurors that Appellant addresses in his present motion. The Florida Supreme Court specifically concluded after examination of the Record, that Appellant did not meet the threshold requirement under State v. Neil, 457 So.2d 481 (Fla. 1989), of a prima facie demonstration that the State's exercise of peremptory challenges was purely racially motivated and was designed to systematically exclude blacks from Parker's jury. Parker v. State, 476 So.2d 134, 137, 138 (Fla. 1985). Since this issue was already raised and resolved against Appellant during his direct appeal, the trial court properly determined that it is barred from merits consideration at this time. Woods v. State, 531 So.2d 79 (Fla. 1980); Johnson v. State, 522 So.2d 356 (Fla. 1988); Gorham v. State, 521 So.2d 1067 (Fla. 1988). Jefferson

Defendant's peremptory challenge claim, is further barred because it was not raised in Appellant's initial Rule 3.850 motion, filed in December, 1987. The governing language of Rule 3.850, supra, states in relevant part:

> A second or successive motion may be dismissed...if new and different grounds are alleged, the judge finds that the failure of the movant or his attorney to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

Under this aspect of the rule, new claims in second post-conviction relief motions are barred, unless such grounds were not known or conceivably discoverable at the time the first post-conviction motion was filed, @ there was demonstrated "cause", for the failure to make the claims in the initial motion. Harich v. State, 542 So.2d 980 (Fla. 1988); Tafero v. State, 524 So.2d 987 (Fla. 1987); Hathcock v. State, 505 So.2d 649 (Fla. 4th DCA 1987); Stewart v. State, 495 So.2d 164, 165 (Fla. 1986); Christopher v. State, 488 So.2d 22, 24 (Fla. 1986); Witt v. State, 465 So.2d 510, 512 (Fla. 1985).

These considerations clearly operate to bar Appellant's peremptory challenge claim here. The facts, including references to the State's conducting of pretrial voir dire were clearly known in December 1987, when the initial post-conviction motion was filed before this Court. Furthermore, the basis for the Florida Supreme Court's decision in State v. Slappy, 522 So.2d 18

(Fla. 1988), on both a State and Federal level, had been issued well before the filing of the first motion. Batson v. Kentucky, 476 U.S. 79 (1986) (decided April 30, 1986); State v. Neil, 457 So.2d 481 (Fla. 1984) (decided September 27, 1984). Appellant can not legitimately maintain that he was unaware of the legal or factual basis for his peremptory challenge claims at the time of his first motion. His decision to omit such a claim then bars its consideration on the merits now. Stewart, supra; Christopher, supra; Witt, supra. Further Appellant's failure to raise this claim within two years of the Batson decision provides an additional procedural bar, to consideration of the merits of the claim. Adams v. State, 543 So.2d 1244, 1247; 1247, n.3 (Fla. 1989).

Appellant attempts to circumvent the procedural bar triggered under Stewart, supra, and successive motions by claiming that Slappy, supra represents a constitutional and fundamental change in the law. This argument is without merit as this court has already held in Neil itself that the change represented in Neil would be prospective under Witt v. State, 387 So.2d 922 (Fla.) cert. denied, 449 U.S. 1067, 101 S.Ct 796, 66 LEd. 2162 (1980). ~~Neil~~, 457 So.2d at 488. The United States Supreme Court has held that Batson, supra would also be applied prospectively based on the identical factors announced in Witt, supra. Allen v. Hardy, 478 U.S. 255, 259 (1986); Teaque v. Lane, 103 LEd. 2d 334, 336 (1989). Prospective application of Neil was reiterated by this Court in State v. Safford, 484 So.2d 1244

(Fla. 1986). The logical conclusion is that if Neil was applied prospectively then Slappy must be prospective as well. Slappy cannot in any conceivable way be viewed as a constitutional and fundamental change from the Neil test. This court has characterized Slappy as 1) a clarification of Neil, Roundtree v. State, 546 So.2d 1042 (Fla. 1989); 2) an affirmance of the spirit and intent of Neil, Slappy, 522 So.2d at 21; and 3) further definition of the procedure to be utilized when a challenge is made to use of peremptories, Tillman v. State, 522 So.2d 14, 16 (Fla. 1988). The change (not of a constitutional nature) took place when this Court abandoned Swain v. Alabama, 380 U.S. 202 (1965). Neil, 457 So.2d at 485-486. This Court in Slappy viewed favorably the Third District's results as being in harmony with Batson and Neil. Slappy, 522 So.2d at 23. Slappy offers further guidance to trial courts in making a determination as to the existence vel non of racially motivated challenges. Contrary to Appellant's assertion otherwise a Defendant must still make a prima facie showing that a likelihood of discrimination exists. Slappy, 522 So.2d 22. The fact that the Defendant is given the benefit of the doubt in this determination can hardly be characterized as a major change of constitutional impact. Witt, 3837 So.2d at 929.

Retroactive application of Slappy would result in the same incredible hardships that would have resulted if Neil were to be applied retroactively:

> The difficulty of trying to second-guess records that do not meet the standards set out here in as well as the extensive reliance on the previous statements make retroactive application a virtual impossible

Id at **488.** Appellant's claim was already made on direct appeal. Parker, **476** So.2d at **138.** Appellant has not advanced any credible argument to warrant a reversal of this Court's earlier conclusions:

> Although Parker has shown that the challenged prospective jurors belonged to a 'distinct racial group', it is clear from this record that he failed to demonstrate 'a strong likelihood' that these prospective jurors were challenged solely on the basis of their race. This record does not reveal the requisite likelihood of discrimination to require an injury by the trial court and a shifting of the burden to the State. In fact, we find this record reflects nothing more than a normal jury selection process.

Neil **476** So.2d at **138-139.**

Trial counsel's conclusory objection to the State's exclusion of Fielding, Johnson and Williams does not demonstrate a prima facie likelihood of discrimination. Parker **476** So.2d at **138.** Appellant's initial objection was to the exclusion of Mrs. Fielding (R 335). Appellant did not advance any other reason to meet his burden other than she was black. None of this Court's

decisions has ever held that to be sufficient to shift the burden to the State. [During questioning Mrs. Fielding stated that her son-in-law was a fruit picker (R 279)]. When Appellant objected to the excusal of Mrs. Johnson the trial court stated that he noticed a very definite hesitancy in her answers to questions concerning capital punishment (R **444**). Parker **476** So.2d at **138**. The trial court's stated observations were appropriate in light of the fact that counsel asked the court to find a systematic exclusion of blacks (R **444**). In other words the trial court was explaining why he found no systematic exclusion of blacks which would warrant a shifting of the burden to the State. He further stated since Appellant's last motion the trial court was observing the interrogation of Miss Johnson (R **443-444**). It's also important to note that counsel acknowledged Johnson's hesitancy although he characterized it differently then the trial court (R **444**). The Assistant State Attorney confirmed that all challenges were based on the way people answered, their attitude, demeanor and many many things (R **456-457**). Prospective juror Williams was also properly excused due to the hardship jury relief would cause, her indecisiveness on issues of capital punishment and her children (R **455**). Furthermore she had asked to be excused. Parker **476** So.2d at **138**.

Appellant has not put forth any legal reason to distribute this Court's previous findings on direct appeal.

ISSUE III

TRIAL COURT PROPERLY DENIED APPELLANT'S "AKE CLAIM" ON PROCEDURAL GROUNDS, FURTHER-MORE APPELLANT RECEIVED ASSISTANCE OF *AN* EFFECTIVE MENTAL HEALTH EXPERT

Appellant claims that he was denied the effective assistance of a mental health expert. This claim is based, on the allegedly deficient performance, of Dr. Paul Eddy. Dr. Eddy was appointed, and testified on Appellant's behalf at the sentencing phase. This claim is procedurally barred, has no merit, and appears to be designed merely to delay the enforcement of Parker's death sentence.

This claim should or could have been raised on direct appeal, and is initially barred, because it was not *so* raised (R 666). Bush; Blanco, supra. Doyle, 526 So.2d 909 (1988) Additionally, the essence of this claim, **was** raised in Appellant's prior Rule 3.850 proceeding, under the label of Challenges to the effectiveness of Parker's trial counsel. (P 640-653) There was considerable testimony on the issue of whether counsel Robert Makemson, had effectively represented Parker, in his preparation and presentation of Dr. Eddy at sentencing, (R; 64, 68, 69-80, 95-97, 155-156, 252-254, 285, 288). This Court, in affirming this Court's prior denial of Rule 3.850 relief, specifically found that defense counsel's representation at sentencing, amply met the effectiveness test in Strickland, supra. Parker, 542 So.2d, supra, at 357. Thus, because this

claim was raised and rejected on the merits at the prior Rule **3.850** motion, in a different form, it is barred from present consideration. Darden v. State, **496** So.2d **136** (Fla. **1986);** Adams v. State, **484** So.2d **1216, 1218** (Fla. **1986);** Christopher, **489** So.2d, at **24, 25;** Rule **3.850,** supra. Appellanmt claims that Dr. Eddy failed to fully investigate his character. This deficiency lead to an incomplete analysis of Appellant's mental health. Appellant relies heavily on Dr. Eddy's "failure" to investigate potential character witnesses including neighbors and teachers. This is the same claim leveled against Mr. Makemson in the prior motion for post-conviction relief. At the evidentiary hearing on Appellant's prior Rule **3.850** Mr. Makemson explained that he wanted Dr. Eddy to humanize Appellant and avoid an evaluation based on sociological factors (P **95-96).** Makemson wanted to avoid reference to Appellant's past behavior in order to keep his prior record from the jury (P **68-69).** Since this Court found such strategy to be sound, Parker, Dr. Eddy's performance was also competent as it was consistent with Makemson's strategy.

Assuming arquendo that Appellant's claim is a "new one", it clearly could or should have been raised, in the prior Rule **3.850** motion, and is barred on this basis as well. Darden; Harich, supra. Rule **3.850,** supra, Stewart v. State, 495 So.2d 164 (Fla. **1986).** Appellant was clearly aware of the factual premise for this claim at time of trial. Furthermore, the issuance of Ake v. Oklahoma, **470,** U.S. **68 (1986),** (upon which Appellant bases his claim), a full two years before Appellant's first motion,

completely bars this claim, as an abuse of Rule 3.850. Adams v. State, 543 So.2d 1244, 1249 (Fla. 1989). Appellant claims the procedural bar should be waived due to the failure of the State's Attorneys Office to provide access to their files. Appellant's request did not come until December 8, 1987, which is five days after he was to file his Rule 3.850 motion (R 195-207). Appellant fails to explain why he waited till then to seek access to the files. In any event Appellant had access to the transcripts including Dr. Eddy's testimony at least one month prior to his rule 3.850 deadline. Appellant's procedural bar is a direct result of his own doing or lack of and cannot be attributed to the State.

On the merits, this claim is clear "forum-shopping", because of Appellant's mere dissatisfaction with the results of his sentencing phase. Appellant's allegations of incompetency levelled against Dr. Paul Eddy are no more than an expression of dissatisfaction with Dr. Eddy's performance as a witness, at the sentencing phase. These claims are no more than a dilatory tactic aimed at endless delay of Parker's execution, until some doctor can be located who will produce results more favorable to Parker. Contrary to Appellant's contentions, a criminal defendant's entitlement to "competent" mental health experts does not mean entitlement to assistance of choice, or to assistance that is favorable to a particular defense, or particular mitigating factors. Ake, supra; Elledge v. Dugger, 283 F.2d 1439, 1447, n-17, and cases cited (11th Cir. 1987), modified on

other grounds, 833 F.2d 200 (11th Cir. 1988); Martin v. Wainwright, 770 F.2d 918, 934-935 (11th Cir. 1985); James v. State, 489 So.2d 737 (Fla. 1986). Ake was not violated in this case, merely because a defense oriented doctor, provides a more favorable conclusion almost seven years after Parker's trial and sentencing.

The mental health expert has essentially concluded that Parker had a "passive" personality, a low IQ, a hard life as a child, and alcohol problems. This diagnosis is merely cumulative of the nature of Dr. Eddy's diagnosis and sentencing testimony, and of counsel Makemson's defense theories, and testimony and argument at sentencing. (R, 1225-1229; 1249-1260; 1288; 1360; 1467-1480; 1484-1486). These issues have already been resolved, against Parker, on his prior claim of ineffective assistance of counsel. Since merely cumulative, it is impossible for Appellant to allege that Dr. Eddy, armed with the same or similar information, could have more meaningfully helped defense counsel at sentencing. It is clearly obvious that much of this information as alleged by the State back in 1988, would have stressed and emphasized Parker's criminal past, and would have "opened the door" to admission of the Bush and Cave statements, which highly implicate Parker as a major player in the kidnapping, robbery and murder of Frances Slater. Burger v. Kemp, 483 U.S. _____, 107 S. Ct. ____, 97 LEd. 2d L38 (1987). Furthermore, it is apparent that the facts and circumstances of the crime---that Appellant was an active participant and leader

of the crimes who knew exactly what he was doing, comprehended the nature and significance of his acts, and was highly capable of deception, as he continuously attempted to conceal and/or lie about his involvement (SR 609-626); Parker, 476 So.2d, at 139, 140. Appellant has already had an evidentiary hearing, and the trial and appellate court have rejected these claims. There is absolutely no merit, to Appellant's "eleventh hour" desperation claims.

ISSUE IV

BOTH PROSECUTORIAL COMMENTS AND JURY INSTRUCTIONS CORRECTLY ADVISED THE JURY OF FLORIDA'S CAPITAL-SENTENCING SCHEME (APPELLANT'S CLAIMS 4 & 5 Restated)

Appellant claims that prosecutorial comments and certain jury instructions created an impermissible presumption that mandated an advisory sentence of death. Appellant bases his claim on Jackson v. Dugger, 837 F.2d 1469 (11th Cir.), cert. denied, 108 S.Ct 2005 (1988) and Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc), petition for certiorari filed, 57 U.S.L.W. 3655 (Docket No. 88-1553, March 20, 1989).

The trial court properly ruled that these claims should have been raised on direct appeal. (SR 665). Gorham v. State, 521 So.2d 1067 (Fla. 1988). Furthermore none of the challenged remarks were ever objected to at trial. (R 49-335, 1404-1417). Preston v. State, 528 So.2d 896 (Fla. 1988, Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987). They are also barred as an abuse of Rule 3.850 procedure as they should have been raised in Appellant's first motion for post-conviction relief. (SR 665) Christopher v. State, 489 So.2d 22 (Fla. 1986); Darden v. State, 496 So.2d 136 (Fla. 1986). The factual basis of these claims were obviously known at the time of trial. More importantly the legal basis for these claims was initially announced in Sandstrom v. Montana, 442 U.S. 510 (1979) and Francis v. Franklin, 471 U.S. ___ 105 S.Ct 85 LEd. 2d 344 (1985) which were in existence, years before the crime occurred and or the filing of the first

motion in December of 1987. The issuance of Jackson v. Dugger, supra does not constitute a justified excuse for the failure to timely file this collateral claim since such decisions as Francis, supra and others issued after Sandstrom, have been expressly characterized as evolutionary refinements of Sandstrom. Yates v. Aiken, 484 U.S. 108 S Ct. ___, 98 LEd. 2d 546, 554 (1989); Smith v. State, 521 So.2d 106 (Fla. 1988). Since Jackson, supra is not a fundamental change in the law under Witt v. State, 465 So.2d 510 (Fla. 1985); Witt v. State, 387 So. 2nd 922 (Fla. 1980), Appellant's claim is procedurally barred as an abuse of State post-convicti n rules. In addition, Appellant failed to raise this claim within two years of the issuance of the legal basis for the claim in Sandstrom and/or Francis and is therefore precluded from raising this now. Adams v. State, 543 So.2d 1244 (Fla. 1989).

Assuming arquendo this Court examines the merits, Appellant has not demonstrated any support for his claims. Appellant relies on various voir dire and closing arguments by the State and the trial court's instructions to argue that the jury was obligated to recommend the death penalty. This "obligation" remains unless and until the jury found the existence of mitigating circumstances, thus improperly requiring the Appellant to prove mitigation. The flaw in this argument is that in reality the Florida capital sentencing scheme involving the weighing of aggravating and mitigating circumstances is not the same as placing the burden of proof on a Defendant, with respect

to an element of the crime charged. Francis, supra; Sandstrom, supra.

The prosecutor's questions and comments, and the jury instructions referred to by Appellant (R, **206, 292-293, 396-397, 480-487, 1489-1490),** merely reflected a statutory scheme that does not place the burden of proof, as to aggravating and mitigating circumstances on either the State or defendant. Section **921.141(1);(2);(3),** Fla.Stat; Harper v. Grammer, **654** F.Supp. **515, 536-537** (D Neb **1987).** Under **921.141** et.seq. supra, either party may submit evidence of aggravation and/or mitigation, and subsequent advisory and actual sentences are to be based on whether aggravation exists, whether mitigation exists to outweigh aggravation, and whether, based on these circumstances, the appropriate penalty is life or death. Id. This procedure does not obligate a defendant to prove that there are contervailing and outweighing mitigating circumstances, and does not compel a jury to impose the death penalty in the absence of mitigation. Thus, no mandatory presumption was suggested by the prosecution.

The Florida death penalty statute, completely separates the weighing process of aggravation and mitigation. from considerations of the determinations of guilt or innocence. Ford v. Strickland, **696** F.2d **804, 818** (11th Cir. **1984)** (en banc). The weighing process is not a "fact" or an "element of the immediate charge" to be proven or a "series of mini-trials", establishing or requiring proof of particularized elements of a charged crime.

Ford, 696 F. 2d, supra, at 818; Poland v. Arizona, 476 U.S. 147 (1986); Bullington v. Missouri, 451 U.S. 430, 438 (1981). Aggravating and mitigating factors are guides to "channel and restrict the sentencers discretion...after guilt has been fixed." Ford, supra (e.a.); Poland, supra.

> At the conclusion of the hearing the jury is directed to consider whether sufficient mitigating circumstances exist...which outweigh the aggravating circumstances found to exist; and based on these considerations whether the defendant should be sentenced to life or death.

Proffitt v. Florida, 428 U.S. 242, 248 (1976) (upholding Florida death penalty statute). While the existence of aggravating and mitigating factors can be proved, the weighing process itself is not susceptible of proof, by any party. Ford, 696 F.2d at 818-819. Capital sentencers, whether judge or jury, are not Constitutionally required to apply a set formula to the weighing process, and the State can not Constitutionally require this. Zant v. Stephens, 462 U.S. 862, 875; 875, n-13 (1983); Gray v. Lucas, 677 F.2d 1086, 106 (5th Cir 1982).

The prosecutor's comments did not mandate that the jury presume to find the death penalty, but argued that the presence of aggravating circumstances outweighed any mitigation, thus supporting the death penalty. (R, 1443-1465).[1] The State also

[1] In fact, the State consistently informed the jury, that the sentencing decision was up to them to make:

informed the jury that if they concluded that mitigation had been established outweighing aggravation, "to your satisfaction", a life sentence should be imposed. (R, **1443).** The trial court's instructions informed the jury that a life recommendation should be returned if insufficient aggravation existed to justify the death penalty (R, **1489).** They were also told that it was up to them to weigh aggravating and mitigating circumstances. (R, **1489-1490).** The jury was further told that if aggravation existed "you should consider all the evidence tending to establish one or more mitigating circumstances", and to "give that evidence such weight as you feel it should receive" in reaching the appropriate sentence. (R, **1490).** There is no comparison between the comments and instructions herein, and the jury instructions given in Jackson v. Dugger, **837 F. 2d 1469,** (11th Cir. 1988), which informed the jury that death was the presumed appropriate penalty if one or more aggravating circumstances were shown. The same instructions challenged here were recently upheld under a similar challenge. Bertolotti v. Dugger, **3 F.L.W. 1281** (August **31, 1989)** (11th Cir.). That the Eleventh Circuit Court of Appeals found the instructions to be distinguishable from those in Jackson v. Dugger, supra; and Adamson; supra. Bertolotti, **3 F.L.W.** at **1290.**

> You decide whether or not sufficicent aggravating circumstances or circumstances exist and whether or not the mitigating circumstances outweigh the aggravating circumstances. (R, **1444);** see also **(R, 1443, 1442-1443).**

There is simply no evidence that the State's argument somehow led the jury to presume, that death was the appropriate penalty.

There simply is no comparison between the comments and instructions herein and either Jackson or Adamson. The capital sentencing scheme under attack in Adamson is completely contrary to Florida statutory scheme which does not mandate any particular penalty but leaves the discretionary decision to an advisory jury and a sentencing judge. Section 921.141(1);(2);(3) Proffitt v. Florida, 428 U.S. 242 (1976). The instructions given here as in Bertolotti are a correct statement of Florida's capital-sentencing statute, consequently, Appellant's reliance on Adamson is unavailing.

Besides reliance on Adamson Appellant has urged this Court to stay his execution and grant relief based on two cases, which have been accepted for certiorari by the U.S. Supreme Court. Clearly, the mere fact that a case has been accepted for certiorari, does not automatically warrant relief, or a stay of execution. Evan v. McCotter, 805 F.2d 1210, 1215 (5th Cir. 1986). It is readily apparent on review of these decisions, that they have no factual or legal application to Appellant's benefit.

Appellant can draw no legitimate support from People v. Boyde, 758 P. 2d 25 (Cal. 1988) (en banc), or Commonwealth v. Blystone, 549 A 2d. 81 (Pa. 1988), which have been accepted for certiorari by the U.S. Supreme Court. The California instruction telling jurors that "if you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death", Boyde, 758 P 2d, at 47-48,

directly contrast with Florida's statute,[2] and the instructions given here. (R, 1487-1494). Additionally, the en banc California Supreme Court found no error in this instruction in light of the prosecution and defense comments, and further instructions that clearly defined and emphasized the jury's weighing process and discretion in determining the appropriate penalty. Boyde, 758 P. 2d, at 48. Because of precisely similar arguments and comments by the prosecution herein, (R, 1443, 1462-1463), and defense counsel, (R, 1468, 1469, 1470, 1477, 1487, Boyde offer no basis for stay or merits relief to Parker.

The Bylstone decision offers even less applicability to Appellant. In Blystone, supra, the Pennsylvania Supreme Court in a 5-2 decision concluded that the process of weighing aggravating and mitigating circumstances and its application to the defendant therein, did not impermissibly mandate a death penalty presumption, noting that "a sentence of death is not merely the product of evidence which supports a particular aggravating circumstance". Blystone, 549 A 2d supra, at 92. This decision and/or its status before the U.S. Supreme Court does not benefit Appellant at all.

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[2] Section 921.141(2), which states that the jury, upon weighing of aggravating and mitigating circumstances, is left to determine the appropriate penalty:

> Based on these considerations [the jury shall determine and render an advisory sentence], Whether the defendant should be sentenced to life or death.

921.141(2)(c), Fla.Stat. (e.a.).

In sum, claims 4 and 5 are time and procedurally barred, are completely unfounded, and do not present a basis, to stay Appellant's execution. Appellant's transparent attempts to "hitch" claims to allegedly "new" legal decisions, in the hope that such cases have some speculative impact upon him should be summarily rejected.

ISSUE V

THE TRIAL COURT PROPERLY DENIED RELIEF ON THIS CLAIM ON PROCEDURAL GROUNDS, IN ANY EVENT APPELLANT IS NOT 9ENTITLED TO UNANIMOUS JURY DETERMINATION OF AGGRAVATING CIRCUMSTANCES AT SENTENCING PHASE

Defendant maintains that under Adamson v. Ricketts, 865 F 2d 1011 (9th Cir 1988), supra, he was denied a Sixth Amendment right, to a unanimous jury verdict, on the existence of aggravating circumstances at sentencing. This argument was properly rejected, by the trial court on both procedural and substantive grounds (SR 665).

This claim, challenging findings on aggravating circumstances, could or should have been raised on direct appeal.[3] The legal basis for this claim was apparent prior to Appellant's direct appeal. Ford v. Strickland, 696 F. 2d 804 (11th Cir. 1983); Bullington v. Missouri; 451 U.S. 430 (1981). Appellant is thus barred from raising this claim as a collateral challenge. Blanco, supra; Bush, supra. O'Callaghan v. State, 461 So.2d 1354 (Fla. 1985) Cave v. State, 529 So.2d 293 (Fla. 1988). Furthermore, the legal and factual basis for this claim, since known and not raised in defendant's December, 1987 post-conviction motion, is barred on this basis as well. Darden v. State, 496 So.2d 136 (Fla. 1986). Rule 3.850, supra. The

[3] Further, no objection was made, to the process of determining aggravating circumstances, at trial.

treatment of a claim, involving the right to a jury trial at capital sentencing, was raised in Spaziano v. Florida, 468 U.S. 447 (1984). This demonstrates that the legal basis for this claim was known, at least three years before defendant's first Rule 3.850 motion was filed. Spaziano, supra; Hildwin v. Florida, 104 LEd. 728, at 731, 732. (1989). Thus, without actual "cause" to excuse the omission of this claim in 1987, the claim is an abuse of Rule 3.850, and is barred as improperly successive. Darden; see also Adams (also barred, since brought more than two years after Spaziano issued).

This claim is completely unfounded on the merits as well. The reasoning underlying the Adamson opinion, that aggravating circumstances in capital sentencing proceedings are essentially elements of the crime charged, has been consistently rejected by the U.S. Supreme Court. Hildwin, supra; Poland, supra; As already discussed in Claims 4, and as most recently expressed in May of 1989, in Hildwin, aggravating circumstances are not "mini-trials", or elements of crimes, but are guides channelling sentencing discretion, and are completely separate from a determination of guilt. Poland, supra; Bullington,, 451 U.S., supra, at 438; Ford v. Strickland, 696 F.2d, supra, at 818. As stated in Hildwin, as an integral part of the 7-2 majority opinion, an aggravating circumstance is not an element of the offense, but is "a sentencing factor that comes into play only after the defendant has been found guilty"'. Hildwin, 104 LEd. 2d, at 732, quoting McMillan v . Pennsylvania , 477 U.S. 79, 86

(1986). In light of clear authority in Spaziano that there is no Sixth Amendment right to a jury trial in capital sentencing, and that "override" sentences are appropriate; there is clearly no right to a jury finding on aggravating circumstances. Hildwin, **104** Led. 2d, at **731.** Thus appellant is not entitled to relief on this ground. Any pending request for certiorari relief in Adamson, particularly in light of Spaziano, Poland, and Hildwin, affords no basis for stay relief.

ISSUE VI

THE TRIAL COURT PROPERLY DENIED RELIEF AS THIS CLAIM IS PROCEDURALLY BARRED; THE PROSECUTOR'S COMMENTS DID NOT AMOUNT TO IMPERMISSIBLE ANTI-SYMPATHY STATEMENTS

Appellant has alleged that various prosecutorial comments informed the jury to ignore sympathy for Parker. Appellant maintains that the decision in Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988) (en banc) and the subsequent acceptance of certiorari by the United States Supreme Court constitutes a change in the law requiring a new sentencing hearing. The trial court properly denied relief on procedural grounds. (SR 665) Furthermore the claim has no factual or legal merit.

The challenged remarks, which were never objected to, are issues that should or could have been raised at trial. Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987); Bush v. Wainwright, 505 So.2d 409 (Fla. 1987). The basis for this claim was first addressed in Lockett v Ohio, 438 U.S. 586 (1978), which prohibits restrictions on consideration of mitigating circumstances. Appellant is further barred from raising this issue in this his second Rule 3.850. Christopher v. State, 489 So.2d 22 (Fla. 1986). Subsequent to Lockett the United States Supreme Court decided California v. Brown, 479 U.S. 538 (1987) (eleven months prior to Appellant's first Rule 3.850) which again addressed the issue of sympathy as mitigating evidence. Appellant has not and cannot establish that this asserted ground

could not have been known prior to trial on his initial motion. Lastly this claim is barred under Adams v. State, **543** So.2d **1244** (Fla. **1989)** as Appellant should have raised this issue within two years of Lockett or Brown. Respondent urges this Court to issue a plain statement that Appellant is in unrevocable procedural default upon this claim so as to prevent its subsequent unjustified litigation on the merits in a federal habeas corpus preceeding in the event of a favorable decision here, see Harris v. Reed, **489** U.S. ___ **103** (LEd. 2d **308 (1989).**

On the merits Appellant has failed to establish any error. All of the challenged statements involve prosecutorial comments made during voir dire or closing argument and do not involve jury instructions as in Parks v. Brown, supra. Furthermore, Appellant's argument is based on the erroneous premise that a jury is permitted to consider mere sympathy for a defendant even if irrelevant to the defendant's character, background or circumstances of the crime. This argument is in total opposition to case law. Relevant mitigating evidence includes any aspect of a defendant's character, record or circumstances of the offense. Lockett, **438** U.S. at **604.** This evidence is limited under this traditional authority of relevant evidence. Id. **438** U.S. at **604** f.n. 12. See Hill v. State, **515** So.2d (Fla. **1987).** Sentencing procedures should aspire towards non arbitrary and non capricious results. Id. In efforts to reach this goal the Court reemphasized in California v. Brown, supra that arbitrariness may be limited by prohibiting reliance on "extranious factors'' and

ignore factors not presented at trial and irrelevant to issue at trial.'' Id **479 U.S.** at **543.** See also Coleman v. Saffle, **869** F.2d **1377, 1392** (10th Cir. **1989).**

The comments made at voir dire properly urged the jury to consider the issue of guilt based solely on the facts and evidence (R **99-10, 398).** Likewise additional voir dire comments **(R 297-298)** and those made at sentencing (R **1463-1464)** were also urges to the jury to decide the case on the evidence. Throughout voir dire both sides emphasized that the verdict must be based on the evidence (R **59, 79, 80-81, 92, 125-294, 480-481).** The prosecutor also requested that the jury base its advisory sentence on the evidence (R **297-298).** He later properly commented on the evidence stating that based on the evidence there is no sympathy for J.B. Parker (R **1463).** The jury was also told to follow the trial court's instructions (R **1464).** These challenged statements were a correct statement of what the jury was to consider (R **95).** Lockett **438 U.S.** at **595-596.** This in no way can be construed as an affirmative directive to the jury to ignore appropriate relevant mitigating circumstances.

The jury was instructed as follows:

> Your advisory sentence should be based upon the evidence that you heard while trying the guilt or innocence of the defendant and evidence that has been presented to you in these proceedings.

(R 1488). [The jury was instructed that the counsel's arguments were not evidence (R 1182-1200)]. The jury was also told to

consider any aspect of defendant's character, record or any other circumstances of the offense and base its sentencing recommendation upon the facts (R **1490, 1491).** These instructions were proper and would eliminate any possible erroneous effect of any impermissible comments. California v. Brown, **479** U.S. at **542.** Since Parks does not even address prosecutorial comments the acceptance of Parks for certiorari review will have no bearing on Appellant's case and does not warrant a stay of execution.

ISSUE VII

ALLEGED DENIAL OF ACCESS TO CASE FILES

Appellant's counsel has charged that the State Attorney's Office refused access to its files on the case, back in **1987**. Counsel maintains that this denial of access, has prevented Defendant from determining if there were any violations by the State, of its discovery and due process obligations, under Brady v. Maryland, **373** U.S. **83 (1963).** This claim is procedurally barred and additionally has no merit whatsoever.

Clearly, any claim that the State was withholding or denying access to information could and should have been made at the time of the first Rule **3.850** motion, and is therefore barred. Christopher, supra. In fact, defense counsel did complain about lack of time to prepare for the evidentiary hearing on February 11 & 12, **1988**, on Defendant's first post-conviction motion. (P, **3-9).** In response, this Court afforded defense counsel a recess, on the first day of the hearing so that counsel could review files, and interview and prepare witnesses, including the Defendant. (P, 5-11; **104-108).** The trial court further stated that if he needed additional time he would grant a sixty (60) day recess in order to bring forth any additional matters and witnesses (P 12). There is simply no evidence that counsel was either deprived of access to files, or complained of such a denial to the trial court, following the recess. Furthermore Appellant did not request access to the State's file until

December 8, 1987 which was after the filing period for his first Rule 3.850.

More significantly, since Parker's death warrant has been signed, Counsel has not only had access to the State's file, but has been provided with copies from those files, and opportunity to examine police and state attorney records. (Appendix I) Counsel has had every opportunity since February 1988 to examine or request anything he wanted to. He waited until September 14, 1989 to do so. That request was honored. Counsel then waited until October 17 to make another request which has also been honored (Appendix I). The contention that Brady violations would be uncovered, is not only complete speculation, but is an offensive accusation, without even a defense examination of such records. This claim should be summarily rejected as it was in the trial court.

In addition Appellant is not entitled to supplement his claim as he attempted to do.

CONCLUSION

WHEREFORE based on the above stated facts and case law Appellant is not entitlede to a stay of execution nor is he entitled to any relief on the merits. This Court should DENY the stay of execution and **AFFIRM** the trial court's order. In so doing Appellee urges this Court to issue a plain statement that appellant is in irrevocable procedural default upon this claim so as to prevent its subsequent uinjustified litigation on the merits in a federal habeas corpus proceeding in the event of a favorable decision here, see Harris v. Reed, 489 U.S. ___, 103 L.Ed 2d 308 (1989).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been sent Federal Express to: EDWARD F. WESTFIELD, ESQ., Governor's Inn Hotel, 209 South Adam Street, Tallahassee, Florida 32301, this 23rd day of October, 1989.

Of Counsel