IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
OCT 24 1989
CLERK, SUPREME COURT
By
Deputy Clerk

GREGORY SCOTT ENGLE,

Appellant,

v.

CASE NO. 74,902

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Rufus Stevens and Gregory Engle brutally murdered Eleanor Tolin on or about March 13, 1979. The details of the crime are set forth in the opinion of the Florida Supreme Court in Engle v. State, 438 So.2d 803 (Fla. 1983), and need not be repeated.

On direct appeal to this Court, Engle raised these issues:

(A) Whether the Court erred in excusing "Witherspoon" biased veniremen.

(B) Whether the trial court should have sequestered the petit jury during deliberations.

(C) Whether the trial court erred in admitting certain photographs of the defendant's handiwork into evidence.

(D) Whether the court incorrectly readvised the jury following a question from the jury during its deliberations.

(E) Whether the court provided an incorrect written instruction.

(F) Whether the court erred in overriding the jury's life recommendation under Tedder v. State, 322 So.2d 908 (Fla. 1975).

(G) Whether the trial judge erred in considering the co-defendant's statement (to the police) during sentencing.

Relief was granted on the last claim but denied as to all others.

Engle was resentenced over the course of two hearings held on October 4, 1984, and March 28, 1986. Engle was again sentenced to death.

Engle's second appeal to this Court raised these issues:

(1) Whether he, as a "non-triggerman", could be sentenced to death under **Enmund** v. **Florida, 458 U.S. 782 (1982).**

(2) Whether the trial judge erred in again overriding the jury, under **Tedder** v. **State, 322** So.2d **908** (Fla. **1975).**

Relief was denied for a second time. **Engle** v. **State, 510** So.2d **881** (Fla. **1987).**

Mr. Engle took no action on his case until the Governor signed his death warrant.

Engle filed a motion for post-conviction relief on September **28, 1989.** (R __). The motion did not include the usual massive appendix.

At a special hearing on October **10, 1989,** Judge Santora recused himself. The Honorable Hudson Olliff succeeded him.

On October 15, **1989,** Judge Olliff, who had read the transcripts and appellate records, held a special hearing on the issues of whether an evidentiary hearing was necessary and the merits of Engle's claims for which no hearing was necessary.

Five minutes before the hearing, Engle served the State with a huge "appendix" he had withheld since September 28th. (TR **17).**[1]

At the hearing, Mr. Engle's counsel was forced to concede that his claim "I" (the challenge to Fla.R.Crim.P. **3.851),** had been resolved against him by this Court, a fact he had withheld from his written motion. (TR **33).** As for claim II (Brady), Engle confessed he had no supporting facts to plead. (TR **33-34).**

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[1] At (TR **44),** CCR alleged it "lacked resources" to provide timely service. A new twist to the usual "inadequate funding" argument.

As for claim III (perjury), Engle rested upon his petition. (TR **36**).

The court requested specific arguments on Issues IV, V, VI and VII to see if an evidentiary hearing was necessary. (TR **43**).

After a brief statement, Mr. Engle deferred to his written arguments as to all of these issues, thus waiving argument. (TR **44-45, 54, 55**).

Claims VIII and XX were procedurally barred and were dismissed outright.

Each party was allowed to submit a proposed order. In addition, Engle was able to file objections to the State's proposed order. Mr. Engle never offered corrections to the State's proposed order, nor did he file a proposed order even though the court - which intended to rule on Monday - waited on CCR until Wednesday before entering its decision.

During the oral argument on October **15, 1989**, CCR orally requested "enforcement" of its idle Chapter **119** demands. CCR never attempted to utilize the enforcement provisions of the statute at any time.

SUMMARY OF ARGUMENT

The circuit court did not err in summarily denying relief on a collection of twenty claims which were procedurally barred, or which confessed an absence of supporting facts, or which were clearly refuted by the record.

The State objects to the brief served on it by Mr. Engle and does not accept any factual or legal contentions therein unless specifically acknowledged. Due to the form of the brief, the State is unsure whether it has discovered all of Engle's claims. The State does not waive argument on any claim raised by Engle.

ARGUMENT

THE APPELLANT IS NOT ENTITLED TO RELIEF

The Appellant's brief has no table of contents, non-sequentially numbered and lettered claims (with duplicate letters assigned to some claims), is oversized and in an unusually small type. The State will attempt to answer Mr. Engle's arguments.

Claim "A": Stay of Execution

Mr. Engle's first point protests the sufficiency of his Rule **3.850** hearing and the accuracy of the Court's order.

We respectfully reject the assertion at page (1) that Engle ever "vehemently and strenuously" objected to anything or that Engle was denied any opportunity to present his case.

The transcript shows us that the circuit court gave Engle a full opportunity to argue on behalf of an evidentiary hearing and that counsel **waived** argument and rested on their pleadings.

The transcript also shows that the court deferred its ruling so that CCR could provide its own written proposed order in addition to its critique of the State's order. If Judge Olliff had only one proposed order, it is not because of a "one-sided presentation" but rather because CCR never availed itself of the opportunity to file its own proposed order.

The only "error" pointed out in Engle's brief has to do with the identity of counsel of record in Tompkins **v. State, 14** F.L.W. **455** (Fla. **1989)** - which is not relevant to any issue before the court and does not affect any of Engle's twenty claims.

Since even Mr. Engle's massive brief cannot point to a single error in the Court's order, and since Engle declined to submit his own order, this essentially frivolous complaint need not be discussed.

What is important, and what Mr. Engle's cited cases recognize, see **E.E.O.C. v. Federal Reserve Bank,** 698 F.2d 633 (4th Cir. 1983), Golf **City v. Wilson Sporting Goods,** 555 F.2d 426 (5th Cir. 1980), is that courts **may** accept proposed orders and, if the orders are adopted, the orders are entitled to the same standard of acceptance as any other order.[2]

Mr. Engle's massive brief concedes by omission the adequacy of the procedural bars attending his (Rule 3.850) claims IX through XX. Thus, the State's "grossly inaccurate" order is right over fifty percent of the time.

Mr. Engle's massive brief concedes the totally speculative and unsupported nature of Claim II of his petition, so the order is not "grossly inaccurate" there either.

Mr. Engle's brief fails to support the quantum leap of faith it makes between mere "inconsistent testimony" and

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[2] The federal standard of **Anderson v. Bessemer City,** 470 **U.S.** 564 (1984), is similar to our own. The order will be upheld - even if the reviewing court might have ruled differently - so long as it has some record support and is not "clearly erroneous", which is defined as "unsupported" by any record facts at all. In Florida, lower court orders are presumed correct and will be affirmed if "right for any reason". **Savage** v. **State,** 156 So.2d 566 (Fla. 1st DCA 1963). Lower court findings of fact cannot be replaced by appellate findings unless they are wholly unsupported by the record. **Shapiro v. State,** 390 So.2d 344 (Fla. 1980); **Gilvin v. State,** 418 So.2d 996 (Fla. 1982); Tibbs v. **State,** 397 So.2d 1120 (Fla. 1981).

"subornation of perjury". Thus, the "grossly inaccurate" order is correct again.

Mr. Engle's brief concedes Point I of his petition - so the "grossly inaccurate" order is correct on this issue too.

Mr. Engle's massive brief does not address or contradict the court's specific record citations regarding the strategic pronouncements of counsel, pretrial preparations, the absence of any discovery violations or counsel's procurement of three separate psychiatric evaluations. The State's proposed order is not - by Engle's admissions - "grossly inaccurate" on these issues either.

As we shall see below, the trial court signed a proposed order which specifically cited to the record and transcripts and which is fully sustainable.

Claim "B": Jury Override

This Honorable Court, in **1987**, declared that the death penalty in this case was *so* fully supported by the record that no reasonable person could question its imposition. Indeed, this Court even alluded to Engle's "**Tedder**"[3] claim as being "not serious". See Engle v. State, **510** So.2d **881** (Fla. **1987**).

Engle, alleging that Judge Santora was biased, wants to use this Rule **3.850** proceeding as a "second appeal" *so* he can reargue the "Tedder" issue. Factually, even if Santora was biased in **1984**, this Court was not biased in **1987** when it said "no

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[3] Tedder v. State, 322 So.2d **908** (Fla. **1975**).

reasonable person" (biased or not) could disagree with this death sentence.

More to the point, however, is Engle's poorly disguised effort to abuse Rule 3.850 as a vehicle for a second appeal. This abuse of process was procedurally barred - as found by the trial court - and should not be entertained on appeal. **Tafero** v. **State,** 459 So.2d 1034 (Fla. 1984); **Adams** v. **State,** 484 So.2d 1216 (Fla. 1986); **Jones** v. **State,** 446 So.2d 1059 (Fla. 1988); **Zeigler** v. **State,** 452 So.2d 537 (Fla. 1984); **Clark** v. **State,** 533 So.2d 1144 (Fla. 1988).

Engle is not entitled to a second **Tedder** appeal. The lower court's order is correct, and relief must be denied.

Claim "C": Prosecutorial Misconduct

Engle's petition takes two inconsistent statements (over two trials) from a medical examiner, "assumes" that the testimony at his trial was the incorrect testimony and feverishly constructs some grand conspiracy theory between the prosecutor's office and the medical examiner's office. The motive, Engle reveals, was to "get" an innocent man.

This curious mindset regarding the doctor and the attorneys in this case will not be dignified by discussion.

Clinically analyzed - the quantum leap into a conspiracy theory was facially deficient because no supporting facts were alleged.

As noted before Judge Olliff, CCR's massive appendix contains no statement from Dr. Floro that anyone pressured him to lie, or that he lied, or that he had any reason to lie. Engle's

paranoid pleading blithely accuses the doctor and respected members of the Florida Bar of **felony conduct** with nothing more than a hunch.

The circuit court's rejection of this issue is fully supported by the record.

Claim "D": **Brady** Violations

CCR confessed that it had no facts to support this claim. The court's order is correct.

Chapter **119** carries enforcement provisions not utilized by CCR. Their complaint that the criminal court did not order the State to surrender its files even though no case (as required by Chapter **119)** had been filed is absurd. Courts cannot create litigation or jurisdiction by oral command.

Claim "E" and "I":
Ineffective Assistance of Counsel

(A) Standard of Review

Mr. Engle's next point was the **de rigeur** attack upon trial counsel used to obstruct justice in every capital case. The issue is popular since the courts, especially the federal courts, have been historically concerned with this issue and often stay executions in order to conduct evidentiary hearings. This concern has provoked a flood of bad faith petitions in this area. **Burger** v. **Kemp, 483 U.S. , 97** L.Ed.2d **638 (1987); Strickland v. Washington, 466 U.S. 668, 80** L.Ed.2d **674 (1984)** sets forth the duties of the defendant and the standard of review:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence

> has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. The requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless, a defendant makes both the showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

80 L.Ed.2d at **693.**

Strickland goes on to state that counsel must be judged from "his shoes at the time" and not by hindsight. Also, since no two lawyers would ever try a case the exact same way, the "expert" opinions of some reviewing lawyer are irrelevant. **Strickland** also clearly states that the conduct of counsel may be affected by the conduct and demands of the client, while concluding:

> An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had not effect on the judgments.

Id. at **696**

These passages clearly show that Mr. Engle's claim that he only has to show "unreasonable" attorney performance and (undefined) "prejudice" is an egregious misstatement of his duty.

(B) Evidentiary Hearing

Strickland, supra, notes that the issue of ineffective assistance of counsel is a mixed question of law and fact that, as a result, is subject to **de novo** federal review. Although the Eleventh Circuit, has opined that Florida "ought" to have

evidentiary hearings on this issue, the Court has also made it clear that it will not be bound by our conclusions no matter what the state courts do. See **LoConte** v. **Dugger,** 847 F.2d 745 (11th Cir. 1988).

Due to the proliferation of frivolous claims, the Eleventh Circuit has begun to recognize that this issue may in fact be resolved **without** an evidentiary hearing where the record suffices to defeat it. See **Bertolotti** v. **Dugger, 883** F.2d **1503** (11th Cir. 1989) Case No. 89-3104; **Bundy** v. **Dugger,** 850 F.2d 1402 (11th Cir. 1988).

Strickland, recognizes that the legal principles gov rning Florida and federal "ineffectiveness" claims **are** so similar as to be nearly identical. Thus, if the record can resolve factual issues, if the allegations fail to establish error or prejudice, or if the law does not support Engle, then relief may me summarily denied.

The strategic decisions of Mr. Engle and his capable trial attorney, Mr. Shorestein, were carefully laid out in the record. In his opening statement, Shorestein (R 292, et seq) said:

> . . . let me tell you from the outset that the defense will not question under any circumstances that Mrs. Tolin was in the store in the early hours on the morning in question. (R 293-94)

and

> The identification of the body won't be questioned . Generally, the Medical Examiner's report will not be questioned. In fact, there's little or no disagreement but almost a total agreement in what the prosecutor's indicated is the first half of the case. (R 294).

Mr. Shorestein's strategy was to maintain his and his client's credibility by not contesting the fact or details of the murder. Shorestein's defense was simple; "there was a murder, but Engle was not involved in it." Shorestein relied heavily upon the circumstantial nature of the State's case and the State's difficulty in linking Engle to the killing. See closing, (R 820). "The relationship of my client Scott Engle, to the crime has not been [proven]."

In his closing, Shorestein noted that he had not cross-examined some witnesses (R 824) and turned this fact to his strategic advantage. Counsel did the same with the State's use of color photographs as evidence. (R 825).

It should also be noted that:

(1) Engle acknowledges, on the record, that he and his attorney reviewed the evidence and discussed it thoroughly. (R 756).

(2) Engle states that there was nothing that was not done on his behalf. (R 756).

(3) Engle acknowledged that Mr. Shorestein had hired or used a private investigator and took pretrial depositions. (R 756).

(4) Engle agreed that the decision not to cross-examine witnesses was based upon this investigation. (R 756).

Regarding the specific claims at bar, the State notes:

(i) Counsel's alleged "failure to raise Fourth Amendment issues.

To establish ineffective assistance of counsel under a "failure to litigate Fourth Amendment issue" claim, the defendant faces an especially difficult burden. First the defendant must prove that the Fourth Amendment claim would have prevailed and then he must satisfy the two part test of **Strickland v. Washington,** 466 **U.S.** 688 (1984). See **Kimmelman v. Morrison,** ____ U.S. ____, 91 L.Ed.2d 305 (1986).

In this case, a gratuitous summary of the evidence has been provided to support a **de novo** Fourth Amendment claim. We would note at the outset that this procedurally barred issue cannot be litigated "through the back door" under the rubric of a claim of "ineffective counsel." **Blanco v. State,** 507 So.2d 1377 (Fla. 1987).

Still, Engle cannot satisfy the double hurdle of **Kimmelman** and **Strickland.**

First, Engle's recitations regarding his arrest and the exigencies of the case are hopelessly egregious. The truth is, the police picked up Nathan Hamilton during the 3-11 shift on March 19, 1979. (R 390). Hamilton was known to have information on the murder, but he refused to speak until his family was protected from possible harm by Engle. This demand was conveyed after 11:25 p.m. on March 19th. (R 590-91). Between midnight and 1:00 a.m., on March 20, the police secured Hamilton's family. (R 592-93). Indeed, Rufus Stevens was encountered at the trailer. Hamilton then gave his statement implicating Engle and, by 3:25 a.m. that morning, Engle - an at-large murderer - was picked up at home.

Engle was living with a family named Wemmer. After the police saw Rufus Stevens at Hamilton's trailer, Stevens went to the Wemmer home and warned Engle that Hamilton could be turning them in. (R 592-93, 481, 498, 516, 526-27).

The police moved quickly to pick up this at-large murderer just because such a thing could happen and because flight from the jurisdiction could result. Thus, the exigencies needed to justify Engle's arrest were real.

Florida, in 1979, allowed warrantless arrests. See **State** v. **Perez,** 277 So.2d 778 (Fla. 1973). Counsel is not expected to have foreseen changes in law and cannot be said to have erred.

There was no reasonable basis for a challenge to the arrest, no guarantee of success on a Fourth Amendment claim, no error by counsel, and under the totality of the case, no prejudice.[4]

(B) "Statement of Co-Defendant"

The actual statements made by Rufus Stevens were not admitted in the guilt phase of the trial, as noted in **Engle** v. **State,** 438 So.2d 803 (Fla. 1983). Nevertheless, we note that Mr. Stevens raised this same issue (as to Mr. Hamilton and Engle's "statements") in his Rule 3.850 appeal and the Supreme Court denied relief, stating that "the decision to object" is a matter of trial tactics which would not be questioned.

Even if Engle's counsel "erred", we note that in **United States** v. **Cronic,** 466 **U.S.** 648, 666 (1984), the Supreme Court held:

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[4] This same issue was rejected by this Court in Rufus **Stevens** v. **State,** ____ **So.**2d ____ (Fla. October 5, 1989).

> When a true adversarial criminal trial has been conducted - even if defense counsel made demonstrable errors - the kind of testing envisioned by the Sixth Amendment has occurred.

Finally, counsel for Mr. Engle very effectively cross examined Hamilton, especially regarding his receipt of a $5,000 reward for turning in his friend.

(C) Failure to Request a "**Richardson** Hearing"

Engle alleges that his lawyer should have requested a "**Richardson**" hearing because the State produced a knife which Stevens, not Engle, used to stab the victim.

Engle's theory of the case was that Stevens stabbed the victim, and as counsel noted on the record, "I don't represent Rufus Stevens." (R 623).

The assertion that Engle's lawyer should have protected Stevens is baseless.

"**Richardson**" hearings are held to delve into discovery violations. As CCR confesses (pg. 25), the State revealed the existence of this knife to the defense during pretrial discovery.

There is no duty on the part of defense counsel to request frivolous hearings.

The petition is thus facially meritless.

(D) "Failure to Object to Jury Instruction

Defense lawyers are not expected to raise novel, illusory, fanciful objections to standard jury instructions, or to anticipate change in the law.

No court has **ever** upheld CCR's novel legal theory or struck the standard instruction in question. (In truth, the incredible assertion at bar is simply a new twist to the oft-rejected defense challenge to the concept of felony-murder as being punishable as first degree murder).

The contention is facially baseless and cannot satisfy **Strickland.**

(E) Failure to Raise Voluntary Intoxication

Engle's defense was innocence, not "guilty but drunk". It is well established that defense counsel cannot be faulted for strategic choices of this kind. **Harich v. Dugger,** ____ F.2d ____ (11th Cir. 1988) (counsel not ineffective for failure to put on intoxication defense); **Songer v. State,** 733 F.2d 788 (11th Cir. 1984); **Palmes v. Wainwright,** 725 F.2d 1511 (11th Cir. 1984).

Again, the petition is facially deficient. Indeed, on this point it does not even allege "error" or "prejudice" much less show it.

(F) Failure to Raise
Competency to Stand Trial

Engle was and is competent *so* this issue is moot. (Even CCR has vouched for Engle's competence by having him swear to this petition after he saw Dr. Fox and on the same day he saw Dr. Carbonell).

(G) Failure to Sequester Jury

The Supreme Court has already held that there was no error in not sequestering this jury. Thus, the petition does not allege or show "error" or "prejudice".

(H) Other Errors

No "other errors" are alleged by Mr. Engle.

(ii) Ineffective assistance of counsel - penalty phase

The attorney who handled Mr. Engle's penalty phase in 1979, Mr. Shorestein, won a life recommendation from the advisory jury and has been credited by CCR, in this petition, with putting on a good enough penalty phase defense to have won. (See Claims X, XIII).

Mr. Shorestein had extensive mental health evaluations performed by psychologist Yates and psychiatrist Miller. The expert conclusions were that Engle, despite some problems, did not suffer significant impairment.

In this action, (CCR) Mr. Engle has gone to the usual covey of anti-death "experts" (Dr. Merikangas, Lewis, Carbonell, Fox and Krop) to second-guess Dr. Miller and to suggest that counsel had some duty to go beyond the honest evaluations at bar and find a professional defense expert. This is not the law.

Strickland, supra, rejected this very kind of claim. See also **Strickland** v. **State,** 397 So.2d 285 (Fla. 1981). In **Foster** v. **Dugger,** ____ F.2d 402 (11th Cir. 1987), the court specifically held that counsel is not required to go from doctor to doctor until he gets the desired diagnosis.

Counsel is not required to seek an evaluation in every case, no matter the actual competence of the defendant. **Bertolotti** v. **Dugger,** 883 F.2d 1503 (11th Cir. 1989), Case No. 89-3104. Of

course, our Rules of Criminal Procedure do **not** permit the use of a request for an evaluation as matter of course, in every case.

Finally, given Engle's long and violent history, counsel was not required to develop or present this evidence to the court either directly or indirectly. **Blanco** v. Dugger, 507 So.2d 1377 (Fla. 1987).

(A) Failure to Effectively Cross-Examine Dr. Floro

This decision to minimize the gory nature of "Rufus Stevens'" crime has already been discussed.

(B) Failure to Minimize Engle's Criminal Record

Counsel's approach to the penalty phase did not include opening the door to extensive inquiry into Engle's past crimes. As noted in counsel's closing arguments to the advisory jury, the strategy was to take a "straightforward" approach. Counsel's plan worked.

(C) Failure to Request a "Confidential" Expert

This point presupposed that a confidential expert would examine the "patient" and reach a different result or - upon finding nothing wrong with Engle - enable counsel to go shopping for "experts" who were more friendly.

Claims "J", "G" and "H": Failure to Request Confidential Expert

There is no logical nexus between the "non-confidential" vs. "confidential" nature of the appointments of Drs. Yates, Miller and Vallely and the results of their work.

Engle's real complaint is that honest evaluations led to honest results.

The fact that Engle, a decade after trial, has found new experts (the usual CCR experts, Drs. Carbonell and Fox) is unavailing. There is a presumption that Engle pled his case more eloquently to these experts as his legal situation worsened. **Mims v. United States,** 375 F.2d 135 (5th Cir. 1967); **United States v. Mota,** 598 F.2d 995 (5th Cir. 1979); **United States v. Makris,** 535 F.2d 899 (5th Cir. 1976). When, as here, the new experts have rendered opinions inconsistent with the trial record, their findings are not binding on the court. **Bundy v. Dugger,** 675 F.Supp. 622 (M.D. Fla. 1987), **affirmed,** 850 F.2d 1402 (11th Cir. 1988). Of course, partisan doctors have no credibility. **Bertolotti v. Dugger,** 883 F.2d 1503 (11th Cir. 1989).

The lower court's order enjoyed full record support and should be affirmed. The record showed three careful evaluations of Engle and Engle's **active** and **cogent** participation in his trial.

We do not accept appellate counsel's remarks regarding non-record conversations with any doctor. (Brief, pg. 124).

Claim "I": "**Booth**" Issue

The lower court correctly found that the **Booth** v. **Maryland,** 482 **U.S.** 96 (1987), issue was not preserved at trial or on appeal and is procedurally barred. **Jackson v. Dugger,** 14 F.L.W. 355 (Fla. 1989); **Jones v. Dugger,** 533 So.2d 290 (Fla. 1988); **Grossman v. State,** 525 So.2d 833 (Fla. 1988); **Eutzy** v. **State,** 541 So.2d 1143 (Fla. 1989).

Claim "H": "Hitchcock"

The circuit court found this issue both procedurally barred and meritless. Mr. Engle challenges the procedural bar but cannot contend that he was wrongfully sentenced since the trial judge stated - on the record - that he considered non-statutory mitigating evidence.

Mr. Engle contends that he had the right to sit on his "Hitchcock" claim and do nothing until the second anniversary of the denial of certiorari. While a two year limitations period does exist for filing Rule 3.850 petitions, the State notes that Engle, in fact, was aware of this issue and could have filed it any time after his direct appeal was decided on June 25, 1987, whether a certiorari petition had been filed or not. [Certiorari petitions do not vest jurisdiction in the United States Supreme Court and **do not preclude** the filing of a collateral attack in state court].

Since Engle has never been precluded from filing a **Hitchcock** claim it is unfair to state that a mere, pending, certiorari petition would extend his two year deadline as to this issue. The August 1, 1989, deadline gave Engle over 25 months to file this claim.

We recognize that **Bundy** v. **State,** 538 So.2d 445 (Fla. 1989), holds that the "two year" period does not commence with the discovery of an issue. **Bundy,** however, does not address what we have here, which is the **refusal** to file a known claim for over two years. Also, **Bundy** recognized that when a defendant had ten full months to file a known claim, he was not prejudiced by the court's "failure" to give him more time.

Under these circumstances, we cannot say the court erred on the procedural issue. However, since the court is right if right for **any** reason, **Savage, supra,** we rely upon its alternative finding on the merits.

Despite "**Hitchcock**" error at trial, Engle got a life recommendation. Engle won resentencing on appeal in **1984,** at which time the court stated for the record that it considered all non-statutory mitigating evidence. No **"Lockett" claim was raised on appeal.** The death sentence was affirmed under this Court's "new" approach to **Tedder** cases.

Any **Hitchcock** error was harmless and the circuit court should be affirmed.

Conclusion

Mr. Engle has failed to allege or show entitlement to relief.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy *of* the foregoing has been furnished by hand delivery to Mr. Billy H. Nolas, Esq., Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 24th day of October, 1989.

MARK C. MENSER
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COUNSEL OF RECORD