a.

IN THE SUPREME COURT OF FLORIDA

NO. 75,037

GREGORY MILLS,

Petitioner,

v.

RICHARD L. DUGGER, Secretary,
Department of Corrections, State of Florida,

Respondent.

RESPONSE TO A PETITION FOR EXTRAORDINARY RELIEF, FOR WRIT OF HABEAS CORPUS, REQUEST FOR STAY OF EXECUTION, AND APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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I. FACTUAL AND PROCEDURAL HISTORY

Gregory Mills and his accomplice Vincent Ashley broke into the home of James and Margaret Wright in Sanford between two and three o'clock in the morning, intending to find something to steal. When James Wright woke up and left his bedroom to investigate, Mills shot him with a shotgun. Margaret Wright awakened in time to see one of the intruders run across her front yard to a bicycle lying under a tree. Mr. Wright died from loss of blood caused by multiple shotgun pellet wounds.

Ashley, seen riding his bicycle a few blocks from the Wright home, was stopped and detained by an officer on his way to the crime scene. Another officer saw a bicycle at the entrance to a nearby hospital emergency room, found Mills inside, and arrested him. At police headquarters officers questioned both men and conducted gunshot residue tests on them and they were then released. The tests were performed about two hours after the estimated time of the shooting, by which time, according to the state's expert, approximately 99% of the residues the test detects would have been dissipated. Ashley's test result was negative. Mills' test was positive in that it revealed the presence of antimony in an amount not to be expected on a person who had not fired a gun, although it was not enough to prove conclusively that he had done so. Mills was indicted for the first degree murder of James Wright on June 29, 1979. He entered a plea of not guilty and a trial was held on August 16-17, 1979, before a twelve-person jury in Seminole County, Florida, before the Honorable J. William Woodson. Mills was represented by Thomas Greene and Bennett Ford.

At trial Mills' roommate testified that he and his girlfriend hid some shotgun shells that Mills had given them, that Mills had been carrying a firearm when he left the house the night of the murder, and that Mills had said he had shot someone. He also stated that Mills told him that a city worker had found a shotgun later shown to have fired an expended shell found near the victim's home.

After the murder, Ashley was arrested on some unrelated charges. He then learned that Mills had told his roommate and his girlfriend about the murder and that they in turn had told the police, so he decided to tell the police about the incident. Ashley testified that Mills entered the house first through a window, that he, Ashley, then handed the shotgun in to him, and that he then entered the house himself. Ashley saw that the man in the house had awakened and was getting up, so he exited the house and ran to his bicycle. Then he heard the shot and ran back to the house, where he saw Mills. They both departed the scene on their bicycles, taking separate routes. Ashley was granted immunity from prosecution for these crimes and also for several unrelated charges pending against him at the time he decided to confess and cooperate.

Mills testified in his defense. He said that he arrived home from work on May 24 at about 9:30 p.m. Then he went out, first to one bar, then another, playing pool and socializing. He went home afterwards but could not sleep, he said, because of a toothache and a headache, so he went to the hospital emergency room. There police officers took him into custody. Mills v. State, 476 So.2d 172, 174-176 (Fla. 1985). Mills was convicted of the first degree murder of James Wright.

At the penalty phase Mills was represented by Joan Bickerstaff. The state established that Mills was under sentence of imprisonment, having the status of both parolee and probationer (R 55), and that he had previously been convicted of a violent felony. 476 So.2d at 177.

Mills' supervisor at Food Barn testified in his behalf, indicating that Mills worked the night shift, putting up stock, cleaning floors and bagging groceries and that Mills was an average employee who could have continued working there (R 58-60).

Mills' grandfather, Arlington Mills, testified that Mills' family was poor and that Mills grew up in low income black neighborhoods. Mills' father was murdered in 1968 when Mills was eleven years old. His mother became a laborer on a celery farm

and his older sister looked after him. Mills finished his education while in prison (R 65-70).

Mills' older sister Dinetta Alexander was seventeen years old when their father was killed and she testified that she was like a mother to him. Mills went to regular school through the seventh grade, then was sent to a corrections center where he obtained his equivalency diploma. When he was released from prison he came to live with her and got a job as a stock boy at Food Barn in Sanford and worked there up until the time of his arrest. She observed him handling money at work. She did not know Vincent Ashley and he had never been in her home (R 72-78).

At the conclusion of the penalty phase the jury recommended that Mills be sentenced to life in prison. The trial judge then ordered a P.S.I. (Tr. Penalty Phase p. 123). A copy of said PSI is attached hereto as Appendix I.

Sentencing took place on April 18, 1980. Mills was again represented by Thomas C. Greene. Counsel was again allowed to offer evidence in mitigation (R 894). Dinetta Alexander again testified, indicating that she counselled Mills after his release from prison and that he had changed, helping around the house, and had secured a job on his own initiative. She believed that Mills should have been sentenced to life imprisonment because "some of the things that have occurred and some of the things that have been said were not true" (R 898) and she believed he was innocent (R 900); he had a hard life and she was only a child herself when she became responsible for him; and that he could make a contribution to society in prison because he had obtained his G.E.D. while in prison before, had tried to change, was intelligent and could help others and had indicated to her "if he gets out of here he wants to prove his innocence." (R 900) (R 895-900).

Mills took the stand and testified in his own behalf to clarify matters contained in the P.S.I. (R 903). He admitted that he had served a prison term for aggravated assault and was released in March 1979. That charge had to do with an auto theft (R 903). An officer was performing a moving roadblock in his

car, cutting Mills off on the highway during a high speed chase and Mills ran into him (R 904). Mills also explained the circumstances surrounding an allegation that he had attempted to assault a worker and escape while he was in a juvenile detention center. A white resident broke off a leg of the chair and attempted to hit an officer with the chair. Mills grabbed the table leg from him and they all pushed through the door. Mills still contended that he was innocent -- "they wanted to get me so bad they'll do anything" (R 905) and plans to work on his case in prison. He further testified that self-preservation is the first law of nature when you're locked up and, while he could do things to benefit himself while incarcerated, he could not say that he could contribute something to society while in prison, except, perhaps, indirectly. He planned on taking college courses in prison (R 903-907).

To rebut Mills' contention that he would improve himself while in prison, the state called Lieutenant Donald A. McCullough of the Seminole County Sheriff's Department who testified that Mills was in his custody in Seminole County jail during July and August of 1979. Mills was upset about the trial being continued and he visited his cell. He found something resembling a straight razor in Mills' coat pocket. The coat would have been brought in for him to wear (R 911-920).

After considering the evidence the court sentenced Mills to death (R 937). The findings of fact in support of the death sentence have been attached hereto as an appendix 11. (R 639-642).

The Supreme Court of Florida per curiam affirmed the conviction and sentence of death on direct appeal. Mills v. State, 476 So.2d 172 (1985). The court struck the aggravating factor of great risk of death to many as inapplicable; struck the aggravating factor of pecuniary gain as duplicative; and determined that the crime was not heinous, atrocious or cruel. 476 So.2d at 177-178. Thus, the remaining aggravating factors present in this case are 1) under sentence of imprisonment; 2) previous conviction of violent felony and 3) felony murder and no

mitigating factors. 476 So.2d 177-179. Certiorari was denied by the United States Supreme Court on February 24, 1986. Mills v. Florida, 475 U.S. 1031, 106 S.Ct. 1241, 89 L.Ed.2d 349 (1986).

On October 18, 1989 Governor Martinez signed a death warrant for Mills running from January 15, 1990 to January 22, 1990. The Superintendent of the Florida State Prison has selected **7:00 a.m., Tuesday, January 16, 1990, as the precise time of the execution.**

11. GROUNDS ALLEGED FOR HABEAS CORPUS RELIEF

Of the claims presented, all but those involving ineffective assistance of appellate counsel are improperly raised. This court has consistently held that habeas corpus cannot be used as a vehicle for presenting issues which should have been raised at trial, on direct appeal, or motions for post-conviction relief; or for relitigating issues already actually decided on direct appeal. **See,** McCrae v. Wainwright, 439 So.2d 868 (Fla. 1983); Messer v. Wainwright, 439 So.2d 875 (Fla. 1983); Ford v. Wainwright, 451 So.2d 471 (Fla. 1984); Witt v. State, 465 So.2d 510 (Fla. 1985); Adams v. Wainwright, 484 So.2d 1211 (Fla. 1986); Kennedy v. Wainwright, 483 So.2d 424 (Fla. 1987); James v. Wainwright, 484 So.2d 1235 (Fla. 1986); Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987); Suarez v. Dugger, 527 So.2d 190 (Fla. 1988). Accordingly, the state maintains that claims not alleging ineffectiveness of appellate counsel should be stricken or summarily denied. Each claim will be briefly addressed.

CLAIM I

At trial, defense counsel attempted to impeach Mills' codefendant, Vincent Ashley, with a statement Ashley had made to his prior attorney's investigator. The trial court precluded this impeachment, holding that Ashley's attorney-client privilege was paramount to Mills' right to confrontation (R 269-75). On appeal this court held that Davis v. Alaska, 415 U.S. 308 (1974) " does not require the result for which Mills argues." "...the attorney-client privilege weighs much more heavily against a defendant's cross-examination right than did the statutory

exclusion at issue in Davis." Mills v. State, 476 So.2d 172, 176 (Fla. 1985).

Mills now contends that this court failed to address the impact that Ashley's total immunity, for this and other crimes, had on his attorney-client privilege, and that the sole reason for withholding the disclosure is missing, since Ashley could no longer be charged with any crime. Mills further contends that Delaware v. Fensterer, 474 U.S. 15 (1985) and Pennsylvania v. Ritchie, 107 S.Ct. 989 (1987) are recent changes in the law requiring this court to revisit the issue and grant relief.

Collateral attacks on trial court judgments or sentences may only be brought by motion for post conviction relief under Florida Rule of Criminal Procedure 3.850, unless such remedy is inadequate or ineffective to test the legality of a defendant's detention. Rose v. Dugger, 508 So.2d 321, 323 (Fla. 1987); Fla.R.Crim.P. 3.850; See also, Davis v. Wainwright, 498 So.2d 857 (Fla. 1986); Stewart v. Wainwright, 494 So.2d 489 (Fla. 1986). The express provisions of Florida Rule of Criminal Procedure 3.850 provide for the filing of a motion to vacate sentence where the fundamental constitutional right asserted was not established within the period provided for filing such motion, which is two years after judgment and sentence become final, and has been held to apply retroactively. It has also been held that habeas corpus is not a vehicle for obtaining a second appeal of issues which were raised on direct appeal. Blanco v. Wainwright, 507 So.2d 1377, 1384 (Fla. 1987). It would, thus, appear, from the previous decisions of this court, that the instant claim should have been brought pursuant to Rule 3.850 motion in the trial court. The narrow exception was carved out by this court in Parker v. Dugger, 14 F.L.W. 557, 558 (Fla. Oct. 25, 1989). The issue was objected to at trial and raised on direct appeal and expressly addressed by the court, as in this case, because all the pertinent facts were contained in the original record on appeal the court allowed the claim to be raised on habeas. 14 F.L.W. at 558. That case, unlike the present case, however, involved a claim brought under Booth v. Maryland, 482 U.S. 496

(1987). The court had previously determined that Booth was to be applied retroactively to cases in which there was an objection at trial. Jackson v. Dugger, 14 F.L.W. 355, 356 (Fla. July 6, 1989). In the present case there is no antecedent ruling by this court that decisions in Fensterer and Ritchie, are to be applied retroactively. Such determination of retroactivity could well be decided in the first instance by the trial court and the trial judge who made the original ruling, subject to review by this court. Since the instant claim should properly have been raised by Rule 3.850 motion, it is procedurally barred from being heard in this proceeding and in a Rule 3.850 proceeding for failure to bring such claim to the attention of the trial court within the two year period of such rule. Moreover, such claim is procedurally barred from being heard in either forum, be at the trial court or this court, since such claims should have been brought to the attention of such courts within two years of the date the change of law was announced pursuant to Adams v. State, 543 So.2d 1244 (Fla. 1989). (The decision in Fensterer, was rendered on November 4, 1985 and the decision in Ritchie, was rendered on February 24, 1987). Thus, if such claims were so compelling, Mills need not have waited until the near expiration of the two year rule to file his 3.850 motion or until on or about November 17, 1989 to file this habeas petition. This claim is barred, as well, for failure to bring the instant petition within two years pursuant to Florida Rule of Criminal Procedure 3.850.

Further, neither Fensterer nor Ritchie established a fundamental constitutional right that was not available before. Fensterer involved the application of the confrontation clause to a situation where a witness was unable to recall the basis for his expert opinion, and the Court held that under its previous cases, a witness's inability to recall the basis for his opinion presented none of the perils form which the confrontation clause protects defendants in a criminal proceeding. 474 U.S. at 21, 106 S.Ct. at 295. Ritchie involved a claim that failure to disclose privileged information that might have made cross-

examination more effective undermines the confrontation clause's purpose of increasing the accuracy of the truth finding process at trial. The Court declined to transform the confrontation clause into a constitutionally-compelled rule of pre-trial discovery, noted that it had recently affirmed its interpretation of the confrontation clause the previous term in Fensterer, and that Fensterer was in full accord with its prior decisions. 107 S.Ct. at 990-91. In sum, both cases rejected attempts to expand the Court's previous interpretation of the confrontation clause.

Even in the event this claim could be considered, no relief would be warranted. On direct appeal Mills argued that the court abridged his right to cross-examine the witnesses against him by refusing to allow the defense to impeach Ashley with statements he had made to a public defender's investigator. When the defense attempted to impeach by using the statements, the state objected, Ashley's own attorney was summoned, and on the advice of counsel Ashley invoked the attorney-client privilege. Mills contended that this violated his sixth amendment cross-examination right, relying on Davis v. Alaska, 415 U.S. 308 (1974).

This court held that the trial court did not abridge Mills' right to confront the witnesses against him. In Davis a statute requiring confidentiality in juvenile delinquency records prevented the defendant from bringing out the juvenile record and probationary status of a key state's witness for the purpose of showing possible bias. The Supreme Court held the sixth amendment had been violated and reversed the conviction. The Court reasoned that the right to confront an adverse witness outweighed the state's interests in preserving the confidentiality of adjudications of juvenile delinquency. This court held that Davis does not require the result for which Mills argued. This court noted that the United States Supreme Court in Davis did not hold that the right to cross-examination always outweighs considerations of confidentiality. This court found the attorney-client privilege to be of broader and even deeper significance than the statute in Davis relating to the

confidentiality of juvenile records as the attorney-client privilege reserves the confidentiality of private communications and was not based on a mere policy as was the statute in Davis in favor of confidentiality for certain officially recorded adjudications. This court stated that the attorney-client privilege arises in the context of a relationship having great significance for the protection of fundamental personal rights, for example, the ability to speak freely to ones attorney, which helps to preserve rights protected by the fifth amendment privilege against self incrimination and the sixth amendment right to legal representation. Therefore, this court, found that the attorney-client privilege weighs much more heavily against defendant's cross-examination right than the statutory exclusion at issue in Davis.

This court further held that this case does not involve a total preclusion of the opportunity to show possible bias on the part of the witnesses as Davis did. In the present case, the disallowed impeachment was an attempt to bring out a prior inconsistent statement Ashley made to his former counsel's investigator. However, Mills' counsel was able to confront Ashley with several prior inconsistent statements he made to police officers. Defense counsel also cross-examined Ashley about the bargain he made with the authorities whereby Ashley gained immunity not only for the crimes Mills now stands convicted of but also other, unrelated crimes. Mills, supra at 176.

In this respect, Mills is unable to demonstrate how permitting the cross-examination would have materially aided his defense, and is thus unable to demonstrate prejudice. "The sixth amendment confrontation clause is satisfied where sufficient information is elicited from the witness from which the jury can adequately gauge the witness' credibility.'' United States v. Burke, 738 F.2d 1225, 1227 (11th Cir. 1984). Such was done in the instant case. It must be remembered that the testimony went solely to impeachment, and not substantive matters, which is particularly important in light of the fact that Mills' defense

was that he was not even there. Consequently, Mills cannot demonstrate how the cross-examination would have materially aided his defense, particularly in the absence of a proffer of the allegedly inconsistent statement to the investigator.

CLAIM II

Mills contends that the override was arbitrary and capricious as: A) the aggravating factors are insufficient to support a sentence of death; B) his trial judge refused to consider all evidence proffered in mitigation; and C) recent decisions of the court make manifest that the jury override resulted in an arbitrarily, capriciously and unreliably imposed sentence of death. This claim is not cognizable. The jury override was thoroughly addressed in Mills' direct appeal, and any attempt to relitigate it in the instant petition is improper. Blanco, supra; White v. Duqqer, 511 So.2d 554 (Fla. 1987). Further, even where a trial court's override of a jury's recommendation of a sentence of life imprisonment and imposition of the death sentence might not be sustained today, the Florida Supreme Court's previous affirmance of the death sentence is the law of the case. Johnson v. Duqqer, 523 So.2d 161, 162 (Fla. 1988). It is quite clear that this is a direct appeal issue, Zeigler v. State, 452 So.2d 537 (Fla. 1984); Buford v. State, 492 So.2d 355 (Fla. 1986), settled irrevocably by appellate affirmance. Johnson, supra.

Relief could not be granted in any event. Mills' contention that the aggravating factors are insufficient to support a sentence of death is meritless, and the cases relied upon by him are wholly distinguishable. Mills has done nothing more than attack each individual factor as being insufficient to support the death sentence. As to the murder being committed in the coarse of a burglary, while this court has in cases vacated a death sentence based solely on such factor, Rembert v. State, 445 So.2d 337 (Fla. 1984), it has not hesitated to affirm where, as in the instant case, this factor is coupled with others. See e.g. Mitchell v. State, 527 So.2d 179 (Fla. 1988).

As to his prior crime of violence, Mills states that the jury was entitled to know the facts of that prior conviction. This bald assertion overlooks the fact that defense counsel strenuously argued that the facts of the prior conviction should not be presented to the jury (Penalty Phase 28-29). Mills also states that it was improper for the trial judge to consider aggravating factors not submitted to the jury, which included great risk of death to many persons and pecuniary gain. Mills certainly cannot demonstrate any prejudice in the jury not considering additional aggravating factors. In addition, this court found those two factors inapplicable, so they are not even a factor in Mills' death sentence.

Mills' reliance on Songer v. State, 544 So.2d 1010 (Fla. 1989), for the proposition that his "only" being in parole and probation is entitled to little weight, is also misplaced, as that case involved almost a total lack of aggravation and the trial court had found significant mitigation. Mills' sentence of death is based upon three valid aggravating factors and there is nothing in mitigation.

Mills next contends that the trial judge refused to consider all evidence proffered in mitigation and that appellate counsel was ineffective for not adequately arguing this on direct appeal. As previously stated and implicit within this contention, whether or not the trial judge improperly limited consideration of mitigating circumstances is an issue which could have been, and in fact was, raised on direct appeal. Consequently, Mills is procedurally barred from further litigation of this issue. Zeigler, supra; Buford, supra. The record demonstrates that the trial court was well-aware of the fact that any matter could be considered in mitigation, as defense counsel stated such and the jury was instructed accordingly (Penalty Phase 4-5, 119). This is further evidenced by the fact that the trial court permitted the introduction of non-statutory mitigating evidence and it was argued to the jury, and to the judge again at sentencing. The trial judge is not required to make specific reference in his sentencing order to

non-statutory mitigating factors introduced by the defendant, Johnson v. Dugger, 520 So.2d 565, 566 (Fla. 1987), nor is the trial court required to articulate in a sentencing order what weight was given to non-statutory mitigating evidence. Harich v. State, 542 So.2d 980, 981 (Fla. 1989).

Further, Mills has not demonstrated that appellate counsel was ineffective. This issue is limited to whether the alleged omission is of such magnitude as to constitute a serious error outside the range of professionally acceptable performance and whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. Pope v. Wainwright, 496 So.2d 798, 800 (Fla. 1986). Counsel's performance is not deficient simply for failing to convince enough members of the court in direct appeal of his argument. Herring v. Dugger, 528 So.2d 1176, 1177 (Fla. 1988).

A review of the brief submitted by appellate counsel demonstrates that this point was thoroughly argued, covering twenty pages of the brief. Appellate counsel argued that the death sentence was improper because the trial court, in overriding the jury, found improper aggravating circumstances, considered non-statutory evidence, and failed to consider highly relevant and appropriate mitigating factors, both statutory and non-statutory. As evidence of mitigation, appellate counsel argued a lack of significant prior criminal history, age, the role of the co-defendant, that Mills demonstrated he was trying to better himself by obtaining his GED, a job and a bank account, Mills' tough family and personal life, including his life of poverty, lack of a father due to his being murdered when Mills was young, and the fact that the was raised by his sister since his mother was employed as a farm laborer and away from home most of the day. See, Initial Brief, pp. 39-58. The majority of this court concluded that the purported mitigating circumstances claimed by Mills but not found by the judge are not sufficient to outweigh the aggravating circumstances. Mills, supra at 179. The dissent, however, noted the mitigating factors argued by

appellate counsel. Id at **180.** Mills has set forth no additional arguments that could have been made but were not, and thus has failed to demonstrate that appellate counsel's performance was deficient. Since this court's opinion demonstrates that this issue received thorough consideration, Mills is likewise unable to demonstrate prejudice. Mills is entitled to no relief.

Finally, Mills contends that recent decisions from this court make manifest that the jury override resulted in an arbitrarily, capriciously and unreliably imposed sentence of death. As already stated, the Florida Supreme Court's previous affirmance of the death sentence is the law of the case. Johnson, supra. This court has already determined that the purported mitigating circumstances claimed by Mills are not sufficient to outweigh the aggravating factors nor do they establish a reasonable basis for the jury's recommendation. Mills, supra at **179.**

CLAIM III

Mills contends that this court erred in failing to reverse his death sentence and remand for resentencing under Elledge v. State, **346** So.2d **998** (Fla. **1977),** upon the striking of three aggravating factors. As this court recently stated, the Elledge error was in allowing the introduction of nonstatutory aggravating evidence that the defendant had admitted committing a murder for which a conviction had not yet been obtained. Hamblen v. Dugger, **546** So.2d **1039** (Fla. **1989). As** in Hamblen, Elledge is inapplicable to the instant case.

In the instant case, this court found that the aggravating factors that the capital felony was committed in the course of a burglary and that it was committed for pecuniary gain should have been considered as a single aggravating circumstance. Mills, supra at **178.** This court also found that the finding that Mills knowingly created a great risk of death to many persons was erroneous, and that the finding of especially heinous, atrocious or cruel was improper as well. Id. This court then went on to find that the trial court's finding that there were no mitigating circumstances was correct, and that since there were no

mitigating circumstances, the trial court's erroneous finding of two statutory aggravating circumstances was harmless and did not impair the sentencing process. Id. at 179.

As the Hamblen court stated, subsequent cases have made it clear that a death sentence may be affirmed when an aggravating circumstance is eliminated if the court is convinced such elimination would not have resulted in a life sentence. Rogers v. State, 511 So.2d 526 (Fla. 1987); Rivera v. State, 545 So.2d 864 (Fla. 1989) (CCP and HAC eliminated - death sentence affirmed where four remaining aggravating circumstances); Jackson v. State, 530 So.2d 269 (Fla. 1988); Hamblen v. State, 527 So.2d 800 (Fla. 1988); Mitchell, supra. This is so even if mitigating circumstances have been found. Bassett v. State, 449 So.2d 803 (Fla. 1984); Brown v. State, 381 So.2d 690 (Fla. 1980).

CLAIM IV

Mills contends that his death sentence is predicated upon the finding of an automatic, non-discretion-channelling statutory aggravating circumstance. On direct appeal, Mills argued that the factor of the murder having been committed in the course of a burglary should not have been considered in his case since it was submitted to the jury on the theory of felony murder. He contended that to submit this aggravating factor to the jury in a felony-murder case renders a finding of aggravation automatic. This, he argued, violates eighth amendment principles of proportionality because under this practice a person found guilty of felony murder is more likely to receive a death sentence than a person found guilty of premeditated murder. This court held that the legislative determination that a first degree murder that occurs in the course of another dangerous felony is an aggravated felony is reasonable. Mills, supra at 178. Mills has also raised the identical issue in his 3.850 motion.

Consequently, this issue is improperly raised in a habeas petition, Parker v. Dugger, 537 So.2d 869 (Fla. 1988), and procedurally barred as well as it was either raised or should have been raised on direct appeal. Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989). Further, this claim has been previously

rejected. Lowenfeld v. Phelps, 484 U.S. 231 (1988); Bertolotti v. State, 534 So.2d 386, 387 n.3 (Fla. 1988); Atkins, supra.

CLAIM V

Mills contends that reversible error occurred when the trial court admitted into evidence as rebuttal the results of a gun residue test performed on him. Mills further states that the jury was never given a limiting instruction that the test was to be considered only as impeachment material, and while appellate counsel raised on direct appeal an issue directed to the reliability and thus admissibility of the test, he failed to raise the lack of a limiting instruction, so this claim is properly raised as it involves ineffective assistance of counsel on direct appeal.

As far as the admissibility of the test, this is an issue that could have been and was raised on direct appeal, so Mills is procedurally barred from further litigation of this issue. Clark v. State, 460 So.2d 886 (Fla. 1984). Mills also raised this issue in his 3.850 motion, so is further barred from relitigating this claim in the instant petition. Bundy v. State, 538 So.2d 445 (Fla. 1989). Consequently, the only cognizable claim is that appellate counsel was ineffective for failing to raise the issue of lack of an instruction in the proper use of the gunshot residue testimony.

In determining whether appellate counsel was ineffective, the issue is limited to "first, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." Pope, supra at 800. Further, appellate counsel cannot be ineffective for failing to raise claims on direct appeal which were not properly preserved. Suarez v. Dugger, 527 So.2d 190, 193 (Fla. 1988). Nor can appellate counsel be faulted for raising a claim that has little merit. Atkins, supra.

The record demonstrates that defense counsel never requested a limiting instruction, nor was there any objection to the instructions as given. After the charge conference, defense counsel stated he had no other requested instructions other than the standards that had been discussed (R 403). After the jury was charged, defense counsel requested additional instructions which were given (R 469). Defense counsel then stated he had no further requests (R 471).

Pursuant to Florida Rule of Criminal Procedure 3.390(d):

> No party may assign as error grounds of appeal the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects, and the grounds of his objection (emphasis supplied).

As the Author's Note states:

> No greater emphasis can be given to any rule than the requirement of objecting to the failure to give an instruction... The failure to object to the giving or refusal to give requested instructions precludes the issue from any proper appellate consideration, and counsel must be always alert to make his objection into the record with specific relation to the matter objected to and adequate grounds for the objection.

Since the issue of failure to give a limiting instruction was not preserved for appellate review, appellate counsel cannot be deemed ineffective for not raising it. Suarez, supra. As in Suarez, the gravamen of this issue, in effect, is ineffective assistance of trial counsel, which is generally not cognizable on direct appeal, with the more proper remedy being a claim of ineffective assistance of trial counsel pursuant to Rule 3.850, and appellate counsel cannot be faulted for preserving the more effective remedy and eschewing the less effective. **Id.** at 193.

In addition, prejudice cannot be demonstrated, because even if there was error, it was harmless at worst considering the other evidence against Mills. Mills' roommate testified that he and his girlfriend hid some shotgun shells that Mills had given

them, that Mills had been carrying a firearm when he left the house the night of the murder, and that Mills said he shot someone. He also stated that Mills told him that a city worker had found a shotgun later shown to have fired an expended shell found near the victim's home. Ashley testified that Mills entered the house through a window first, that he, Ashley, then handed the shotgun in to him, and that he then entered the house himself. Ashley saw that the man in the house had awakened and was getting up, so he exited the house and ran to his bicycle. Then he heard the shot and ran back to the house where he saw Mills. Mills, supra at 174-75. In addition, according to the defendant's own argument, the results of the test were "as consistent with Mills not having fired the gun as they were with the converse." Accordingly, this claim is without merit.

CLAIM VI

Mills contends that the sentencing judge shifted the burden to him to prove that death was inappropriate. Mills states that any error in instructing the jury in this regard may be deemed harmless since it returned a life recommendation, but this alleged instructional error carries over onto the judge because it is presumed that a trial judge's perception of the correct law coincides with the manner in which the jury was instructed. This claim is procedurally barred because no objection to the instruction was made at trial and the point was not raised on direct appeal. Adams, supra; Harich, supra; Atkins, supra; Eutzy v. State, 541 So.2d 1143 (Fla. 1989). Respondent further contends that this issue is improperly raised on a petition for writ of habeas corpus. See Fla.R. Crim.P. 3.850; Harich, supra.

Even if this claim could be considered relief would not be warranted. Mills has pointed to nothing in the record which demonstrates that the trial court shifted the burden to him to prove that death was inappropriate other than an allegedly erroneous jury that the trial judge "presumably followed." The trial court stated in its order:

> It is the finding of the Court after weighing the aggravating and mitigating circumstances that there are sufficient aggravating

> circumstances as specified in 921-141 and insufficient mitigating circumstances therein that a sentence of death is appropriate.

There is nothing in this statement or in the record which reflects that the court applied an express presumption of death or required Mills to carry the burden of proving death was inappropriate. See Hamblen, supra.

CLAIM VII

Mills contends that the trial court erred in considering an irrelevant and prejudicial victim impact statement and statements from court officials contained in the presentence investigation report in sentencing him, in violation of Booth v. Maryland, 107 S.Ct. 2529 (1987), and South Carolina v. Gathers, 109 S.Ct. 2207 (1989). In the instant case there was no objection at sentencing to the contents of the presentence investigation report, and in fact it was used by defense counsel to support allegedly mitigating factors and to rebut aggravating factors (R 922-31). The issue was not raised on direct appeal.

This claim is cognizable only on a 3.850, and further, is procedurally barred for failure to object at trial or to present it on direct appeal. Parker, supra, at 972. In addition, Mills has already presented this claim on his 3.850, so it is also procedurally barred because habeas petitions are not to be used for additional appeals on questions which were raised in a Rule 3.850 motion. Id. Even if it could be considered relief would not be warranted as the sentencing order reflects that the death sentence was not the product of such information but the product of lack of mitigation and the presence of several aggravating facts. Id. This court has also stated that when a judge merely sees a victim impact statement contained in a presentence report, but does not consider the statements for purpose of sentence, no error has been committed. Scull v. State, 533 So.2d 1137, 1143 (Fla. 1988).

CONCLUSION

For the aforementioned reasons, respondent moves this court to deny the instant petition in all respects. Most of the claims

are barred due to their improper presentation, of the remaining claims, which raise ineffective assistance of appellate counsel, Mills has failed to demonstrate that he merits relief.

Respectfully submitted,

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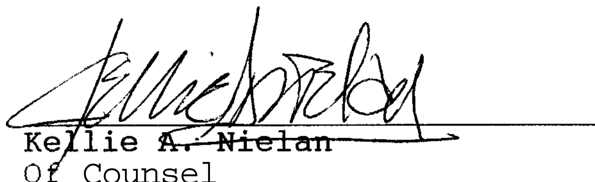
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Response has been furnished by U.S. Mail to Billy H. Nolas, Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 21st day of December, 1989.



Kellie A. Nielan
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