IN THE SUPREME COURT OF FLORIDA

FRANK LEE SMITH,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

_____/

Case No. 75208

EMERGENCY BRIEF: DEATH WARRANT SIGNED; EXECUTION IMMINENT.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

The defendant was charged by indictment filed on May 9, 1985, with the first degree murder of Shandra Whitehead (R 1446). The defendant was also charged with capital sexual battery and with burglary (R 1446). At arraignment, Smith pled not guilty. Trial by jury commenced on January 21, 1986. The trial was held before the Honorable Robert W. Tyson, Jr., Circuit Judge. After deliberations, the jury found the defendant guilty as charged in the indictment as to all counts (R 1505-1507). Following the penalty phase of the trial, a 12-0 unanimous jury recommended the death penalty. On May 2, 1986, Judge Tyson entered his written order containing findings of fact in support of the death sentence imposed (R 1552-1561).

On October 22, 1987, the Florida Supreme Court affirmed the judgment and sentence of death. Smith v. State, 515 So.2d 182 (Fla. 1987). The issues raised by Smith in his direct appeal to the Florida Supreme Court were as follows:

POINT I

THE TRIAL COURT ERRED BY FAILING TO CONDUCT A FORMAL INQUIRY INTO THE DISCOVERY VIOLATION OF THE STATE, ACCORDING TO RICHARDSON V. STATE.

POINT II

APPELLANT'S RIGHT TO A FAIR TRIAL WAS DESTROYED BY REPEATED INSTANCES OF PROSECUTORIAL MISCONDUCT.

POINT III

THE TRIAL COURT ERRED BY CALLING GERALD DAVIS AS A COURT WITNESS AND BY ALLOWING THE PROSECUTOR TO CROSS EXAMINE AND IMPEACH DAVIS.

POINT IV

THE EVIDENCE PRODUCED AT TRIAL WAS INSUFFICIENT TO SUPPORT A CONVICTION, AND A NEW TRIAL IS REQUIRED IN THE INTEREST OF JUSTICE.

POINT V

THE CUMULATIVE EFFECT OF VARIOUS COURT RULINGS REQUIRES A NEW TRIAL TO BE GRANTED.

POINT VI

THE TRIAL COURT ERRED IN IMPOSING A DEPARTURE SENTENCE REGARDING COUNT III OF THE INDICTMENT.

POINT VII

THE TRIAL COURT ERRED IN IMPOSING THE DEATH SENTENCE ON APPELLANT.

Subsequently, the defendant sought certiorari review in the United States Supreme Court, but on March 21, 1988, the petition for a writ of certiorari was denied.

A request by Smith for clemency was apparently denied when Governor Bob Martinez signed a death warrant in Smith's case on October 18, 1989. The warrant is in effect from noon on Monday, January 15, 1990, until noon on Monday, January 22, 1990, with the execution presently scheduled for Tuesday, January 16, 1990, at 7:00 a.m.

On or about November 17, 1989, the defendant filed an emergency motion to vacate judgment of conviction and sentence pursuant to **Rule 3.850, Florida Rules of Criminal Procedure** and on December 13, 1989, that motion was summarily denied by the Honorable Robert W. Tyson, Jr., Circuit Judge. The state anticipates that Smith will also be asking this Honorable Court to stay his execution.

STATEMENT OF THE FACTS

The State of Florida will rely on the Florida Supreme Court opinion (cited at Smith v. State, 515 So.2d 182 (Fla. 1987)) for a statement of the facts:

> The victim, an eight-year-old female, was raped, sodomized, and beaten severely by a blunt instrument in her home at approximately 11 p.m. on April 14, 1985. She later died from the injuries. A rock used in the beating was found outside the room where the beating occurred. Two witnesses identified appellant as a man they had encountered in the street outside the home approximately thirty minutes before the crime. One of the witnesses testified that appellant made a homosexual solicitation to him and, when rebuffed, stated he would have to masturbate. The mother of the victim identified appellant as a man she saw leaning into the window when she returned home at approximately 11:30 p.m. and discovered the crime. Apparently as part of a burglary, a television set had been moved to the window where the appellant was seen. Appellant was arrested based on a composite drawing and identification by one of the witnesses after he returned to the neighborhood attempting to sell a television set. He waived his rights to remain silent and to have a lawyer present and denied he committed the crimes or had been in the neighborhood for months. However, when falsely told that the victim's young brother had seen him commit the crimes, appellant replied that the brother could not have seen him because it was too dark. The identifications were strenuously challenged by the defense, but the jury returned guilty verdicts on first-degree murder, sexual battery by a person eighteen years of age or older on a person eleven years of age or younger, and burglary with an assault. The jury recommended death by a vote of twelve to zero. The trial judge imposed a death sentence on the murder count, a life sentence with a twenty-five year minimum mandatory on the sexual battery conviction, and life imprisonment on the burglary charge. All sentences were consecutive.

As aforementioned, the jury recommended a death sentence unanimously by a 12-0 vote and the trial court followed that unanimous recommendation.

ARGUMENT IN OPPOSITION TO REQUEST FOR A STAY OF EXECUTION

Although this Honorable Court has the power to grant the stay of execution, the State of Florida submits that the instant cause is not one which should be stayed. In **Barefoot v. Estelle**, **463** U.S. **880, 103** S.Ct. **3383, 77** L.Ed.2d **1090** (1983), **rehearing denied**, **104** S.Ct. *209,* **78** L.Ed.2d **185** (1983), the Court addressed the issue of stays of execution and said:

> . . . It must remembered that direct appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception. When the process of direct review -- which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari -- comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, it secondary and limited. Federal courts are not forums in which to relitigate state trials. Even less is federal habeas a means by which a defendant is entitled to delay an execution indefinitely.

77 L.Ed.2d at **1100;** emphasis supplied. The State of Florida submits that **3.850** proceedings, like the federal habeas proceedings discussed in **Barefoot v. Estelle**, are not vehicles to relitigate state trials. As will be demonstrated below, Smith is unable to show that any issue is likely to succeed on the merits. See **White v. Florida, 458 U.S. 1301, 103** S.Ct. **1, 73** L.Ed.2d **1385 (1982); O'Bryan v. Estelle, 691** F.2d **706, 708** (5th Cir. **1982).**

In **Autry v. Estelle, 464** U.S. **1, 104** S.Ct. 20, **78** L.Ed.2d 1 (1983), the United States Supreme Court declined to implement a rule calling for an automatic stay of execution where a petitioner's first habeas corpus petition had been involved.

Similarly, the State of Florida submits that there is no justification for an automatic stay of execution merely because a 3.850 motion has been filed. The state further submits that the instant case is not one which calls for the granting of a stay of execution.

ARGUMENT CONCERNING PROCEDURAL BARS

It has long been the law in this state that a defendant may not raise via a motion pursuant to **Rule 3.850, Florida Rules of Criminal Procedure,** claims which were raised or should have been raised on direct appeal. See, e.g., **Christopher** v. **State,** 416 So.2d 450 (Fla. 1982); **Raulerson** v. **State,** 420 So.2d 517 (Fla. 1982); **Meeks** v. **State,** 382 So.2d 673 (Fla. 1980); **Alvord** v. **State,** 396 So.2d 194 (Fla. 1981). The purpose of motions pursuant to **Rule 3.850** is to provide a means of addressing alleged constitutional errors in a judgment or sentence, not to review errors which are cognizable on direct appeal. **McCrae** v. **State,** 437 So.2d 1388 (Fla. 1983). For example, in **Blanco v. State,** 507 So.2d 1377, 1380 (Fla. 1987), the Supreme Court held that many of the issues raised had been procedurally barred because they either were or should have been presented on direct appeal. The state submits that many of Smith's issues are not cognizable in this 3.850 proceeding. Recently, the Florida Supreme Court had occasion to consider a capital case very similar to the instant case. In **Atkins** v. **State,** 541 So.2d 1165 (Fla. 1989), the Court held that with the exception of issues relating to ineffective assistance of counsel, all issues raised by Atkins were procedurally barred because they were either

raised, or should have been raised, on direct appeal. Footnote one of the Atkins opinion sets forth the issues raised by the defendant in his **3.850** motion which were procedurally barred. The claims barred are as follows, with those that are identical or nearly identical to those raised in the instant **3.850** motion underscored:

> **(1)** the conviction was based on an impermissible consideration of sexual battery as an underlying felony for a felony murder theory;
>
> **(2)** there was no knowing waiver of *Miranda* rights;
>
> **(3)** the trial court improper9 shifted ~~to the~~ defendant the burden of proving that ~~life~~ was ~~the appropriate~~ penalty;
>
> (4) the trial court failed to convene a new sentencing jury upon resentencing;
>
> **(5)** the aqgravating circumstance ~~of~~ "heinous, atrocious, or cruel" is unconstitutional as applied in this case, *Maynard v. Cartwright*, __ U.S. __, **108** S.Ct. **1853, 100** L.Ed.2d **372 (1988);**
>
> *(6)* Atkins' sentencing jury was misled by the trial court's instructions diluting the jury's responsibility in sentencing recommendations, *Caldwell v. Mississippi* **, 472 U.S. 320, 105** S.Ct. **2633, 86** L.Ed.2d **231 (1985).** ***See Dugger v. Adams,*** **U.S. __, 109** S.Ct. **1211, 103** L.Ed.2d **43571989);**
>
> (7) the jury instruction that a sentence recommendation of life must be made by a majority vote misled the jury;
>
> **(8)** the prosecution improperly asserted that sympathy toward Atkins may not be considered by the jury;
>
> (9) Atkins' death sentence rests on unconstitutional automatic aqgravating circumstances;

(10) the corpus delecti of kidnapping was not proved by substantial evidence;

(11) Nonstatutory aggravating factors were introduced into the sentencing proceeding;

(12) the sentencing court refused to find mitigating circumstances clearly supported by the record;

(13) the prosecutor made improper statements during closing argument of both the guilt and penalty phases of the trial;

(14) the state's attempt to try Atkins on two counts of sexual battery despite a total lack of evidence deprived Atkins of a fair trial on the murder charge.

In the same vein, Smith's failure to properly raise issues at trial and/or on appeal constitutes procedural default precluding collateral review. **Wainwright** v. Sykes, 433 U.S. 72 (1977); **Murray v. Carrier,** 477 **U.S.** 478 (1986); **Smith v. Murray,** 477 **U.S.** 527 (1986); **Enqle v. Isaac,** 456 **U.S.** 107 (1982).

Thus, Smith is precluded from litigating most of the issues now urged in his motion for post-conviction relief and this Honorable Court should affirm the summary denial of all issues which are clearly barred from collateral review because they either were or should have been raised on direct appeal, to wit: claims V, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XIX, XX, XXI, XXII, XXIII, and XXIV.

SUMMARY OF THE ARGUMENT

Most of the claims raised by appellant are not cognizable in **3.850** proceedings and were, therefore, properly summarily denied by the trial court. Those claims which were clearly barred because they either were or could have and should have been raised on direct appeal are as follows: V, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XIX, XX, XXI, XXII, XXIII, and XXIV.

Claims I, 11, 111, IV, VI, VII, and VIII were correctly summarily denied where the allegations were insufficient or there was no factual basis to support the claims. These claims include the ineffective assistance of counsel claims, the **Brady** claim, and the mental health claims. Appellant failed to allege facts which show the prejudice required to support an ineffective assistance claim or a **Brady** claim. Appellant also failed to allege sufficient facts to support his speculative claims concerning mental health issues.

Claim XVIII was properly summarily denied where it was not cognizable in **3.850** proceedings. Appellant requested the trial court to, in effect, overrule the decision of this Honorable Court rendered on direct appeal.

Claim XXV was also correctly summarily denied. Appellant's contention that Rule **3.851** denies him equal protection in that he has to pursue his **3.850** claims prior to the termination of the two years rule has been authoritatively rejected by this Honorable Court.

ARGUMENT IN OPPOSITION TO 3.850 CLAIMS

The State of Florida will respond to the allegations of the 3.850 motion in the order presented by the defendant. However, as to those claims previously identified as being precluded from collateral review, the response will be extremely brief.

CLAIM I: Smith alleges that he was deprived of the effective assistance of counsel at the guilt phase of his capital trial. As our courts have consistently pointed out since 1984, claims of ineffective assistance of counsel are controlled by the standards set forth in **Strickland v. Washinqton,** 466 **U.S.** 668, 104 S.Ct. 2052, 89 L.Ed.2d 674 (1984). The Florida Supreme Court in **Blanco v. Wainwriqht,** 507 So.2d 1377, 1381 (Fla. 1987), explained **Strickland** thusly:

> A claimant who asserts ineffective assistance of counsel faces a heavy burden. First, he must identify the specific omissions and show that counsel's performance falls outside the wide range of reasonable professional assistance. In evaluating this prong, courts are required to (a) make every effort to eliminate the distorting effects of hindsight by evaluating the performance from counsel's perspective at the time, and (b) indulge a strong presumption that counsel has rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment with the burden on the claimant to show otherwise. Second, the claimant must show that the inadequate performance actually had an adverse affect so severe that there is a reasonable probability that the results of the proceedings would have been different but for the inadequate performance.

The defendant has failed to carry this heavy burden even via his allegations in the 3.850 motion. Not only has he failed to show that trial counsel's conduct fell outside that wide range of

reasonable professional assistance, but he has also failed to show that the results of the trial would have been different.

The state submits that when reviewing allegations of ineffective assistance of counsel, the general presumption is that defense counsel is presumed to have performed competently and effectively within the meaning of the sixth amendment. **Strickland** v. **Washington**, supra. Furthermore, the defense is required to prove prejudice. **Strickland** v. **Washington**, supra. A defendant presumpting a claim of ineffectiveness must sufficiently plead deficiency and prejudice. **Hill** v. **Lockhart**, **474 U.S. 52 (1985).** The absence of sufficiently pleading deficiency or prejudice results in the claim being subject to dismissal. **Hill** v. **Lockhart**, ~~id~~. Absent a denial of counsel or counsel who entirely failed to subject the state's case to adversarial testing, there must be both a pleading of specific deficiency and a resulting prejudice. See **United States v. Cronic**, **466** U.S. **648 (1984).** An examination of the entire transcript of the instant case reveals that Smith's counsel acted as an advocate. Therefore, the claim of ineffective assistance of counsel is ripe for denial.

Nowhere in the allegations of the 3.850 motion under this claim is there a delineation of those things that defense counsel actually did prior to or at trial. There is no mention of the numerous pretrial motions, the evident preparation based upon the cross-examination of state witnesses, and other actions which demonstrate effectiveness of trial counsel. Rather, the defendant now engages in the type of second-guessing condemned by

the United States Supreme Court in **Strickland v. Washington** by attempting to pick at portions of the trial and opining that a better job could have been done. Even if collateral counsel believes that he could have conducted a "better" trial on behalf of Smith, this is not the relevant inquiry. What is clear is that Mr. Washor afforded the defendant his Sixth Amendment right to effective assistance of counsel.

The state submits that it is not necessary to discuss each and every allegation of ineffectiveness set forth by the defendant in his **3.850** motion. What is clear is that no matter what is alleged, the allegations do not show that defense counsel was deficient and, most importantly, even if we were to assume that defense counsel was deficient, there is absolutely no showing how the defendant has been prejudiced in the constitutional sense. In his **3.850** motion, the defendant concentrates on what might have been done differently but does not make mention of the evidence indicating that Smith killed Shandra Whitehead, to wit: the clear, unequivocal identifications and the defendant's confession. The evidence adduced at trial indicates that there is no reasonable probability that the outcome of the trial would have been different even had the case been tried as collateral counsel now would.

Inasmuch as the defendant has failed to allege facts which show the prejudice (or deficiency) required to support an ineffective assistance claim, this claim should be denied.

CLAIM 11: The petitioner next presents a claim under **Brady v. Maryland**, **373** U.S. **83** (1963), a claim which is cognizable in

post-conviction proceedings. However, analysis of the 3.850 motion shows that it is deficient to establish any of the criteria for gaining relief, suppression, favorableness or materiality. See **United States v. Stewart,** 820 F.2d 370, 374 (11th Cir. 1987); **United States v. Bent-Santana,** 774 F.2d 1545, 1551 (11th Cir. 1985). Apparently because of the availability of a **Brady** claim on 3.850, collateral counsel has engaged in a fishing expedition attempting to stir the waters hoping to turn up a constitutional violation. These efforts have been fruitless and, therefore, the summary denial of this claim should be affirmed. It is clear that petitioner has failed to allege facts which could form the basis for collateral relief. Rather, he engages in pure speculation by opining that even though he can't find it, certain evidence must exist somewhere which was never turned over to the defense. This type of pleading is fatally defective for it fails to allege facts upon which relief could be granted. See **Rule** 3.850. What petitioner is attempting to do is merely shotgun a claim into his 3.850 pleading even where there is clearly an insufficient basis for doing so.

There are no facts pled under this claim which would show that the alleged nondisclosure of the phantom evidence discussed in this claim created a reasonable probability that had it been known of at the time the results of the trial would have been different. A reasonable probability is understood to mean a probability sufficient to undermine confidence in the outcome of the case. **United States v. Bagley,** 473 **U.S.** 667 (1985); Arango v. **State,** 497 So.2d 1161 (Fla. 1986). Therefore, the summary denial of this claim should be affirmed.

CLAIM 111: As his next claim, petitioner again engages in speculation and innuendo rather than upon a clear factual basis upon which relief may be predicated. He speculates that the prosecutor knowingly and deliberately used false evidence and arguments in order to intentionally deceive the jury. These allegations are so speculative as to require the briefest of responses from the state.

As an example of the inadequacy of the pleadings under this claim, the petitioner contends that somehow the State Attorney effectively forced Mr. Gallagher to withdraw. There is simply no factual basis for this contention. Even more importantly, this type of claim could have been raised on direct appeal and the failure to do so absolutely precludes collateral review.

As a further example of the inadequacy of the pleading under this claim, it should be noted that petitioner attempts to raise the question of improper coaching by the prosecutor of a state witness. In his 3.850 motion, as he did on direct appeal, petitioner contends that state witness Gerald Davis was improperly coached by the prosecutor with respect to the identification of Smith. On direct appeal to the Florida Supreme Court, the Court held that the trial judge adequately inquired into the matter and found these allegations incredible. Thus, this claim has already been determined on direct appeal and is not cognizable in these collateral proceedings. Moreover, raising this type of claim again is a clear abuse of the purposes of Rule 3.850 and this Honorable Court should affirm the summary denial of this claim.

CLAIM IV: As his next claim, petitioner contends that there is "newly discovered evidence" which establishes that Smith's conviction and sentence are constitutional unreliable. This is another example of a capital collateral defendant making much ado about nothing. There simply has not been, even via the allegations in the 3.850 motion, any "newly discovered evidence" which creates doubt upon the validity of Smith's conviction and death sentence. Rather, collateral counsel attempts to create the impression that someone else committed the crime even when there is absolutely no evidence linking Eddie Lee Mosley to the murder of Shandra Whitehead. Although Mr. Mosley confessed to numerous other sex crimes, none were of small children, none were the result of Mosley breaking into homes, and none reflected the type of murder committed by Smith in the instant case. Mosley was not identified as the perpetrator of the Shandra Whitehead murder, petitioner was. Mosley did not confess to being in the victim's house, petitioner did when he stated that Shandra's brother could not have seen petitioner do the murder because it was too dark in the house. The instant claim is another attempt to set up a smoke-screen in order to shield the convicted perpetrator of the Shandra Whitehead murder, Frank Lee Smith. There simply is no newly discovered evidence which has any bearing upon that particular murder. This Honorable Court should affirm the summary denial of this claim.

CLAIM V: As his fifth claim, petitioner contends that the identification procedures employed pretrial were impermissibly suggestive. There is no need to even discuss the merits of this

claim where it is clear that it was procedurally barred. This is the type of claim which always is raised, if raisable at all, on direct appeal. The matters now complained-of appear of record and the failure to raise this claim on direct appeal absolutely precludes collateral relief.

CLAIM VI: Smith next alleges that he was deprived of the effective assistance of counsel at the penalty phase of trial. This claim is premised upon the notion that defense counsel could have obtained additional witnesses to testify as to the defendant's childhood and background. This claim totally ignores the witnesses called at the penalty phase by defense counsel. The witnesses testified to basically the same types of matters now alleged in the **3.850** motion. The additional evidence as now alleged in the **3.850** motion is, at best, merely cumulative to that evidence presented at the penalty phase. There is no basis in law for relief based upon the allegations of the 3.850 motion.

As in Strickland v. Washington where the defendant therein did not obtain an evidentiary hearing where it was not necessary, the defendant in the instant case is not entitled to an evidentiary hearing on this claim. In order to prevail, a defendant must show both a deficient performance and prejudice sufficient to show that there is a reasonable probability that the outcome of the proceeding would have been different. In the instant case, even without discussing the deficiency prong, it can be determined on the face of this record that the defendant has suffered no prejudice by the alleged ineffective omission of additional evidence concerning the defendant's background at the

penalty phase of trial. The aggravating factors in this case were significant and they clearly outweigh any mitigating circumstances which can now be proposed by the defendant. There is no reasonable probability that the defendant would have received a life sentence had the evidence now submitted collaterally been offered at the penalty phase. There was a unanimous recommendation of death by the jury in the instant case and the addition of this evidence simply would not have made a difference!

CLAIM VII & CLAIM VIII: Under his next two claims, the petitioner raises the now-familiar mental health issues which are pled in nearly every capital collateral 3.850 motion. These claims seem to be pled whether there is a factual basis for them or not. The state submits that the allegations of the instant 3.850 motion are insufficient to warrant relief on this point and, hence, this Honorable Court should affirm the summary denial of these claims.

There is simply no indication that the experts who examined Smith prior to trial rendered incompetent evaluations. The three experts who examined Smith unanimously concluded that Smith was, indeed, competent to stand trial. Significantly, the petitioner has not provided, even via allegation, the opinion of a "new" expert concluding that the original evaluations were incorrect. In any event, Ake v. Oklahoma, 470 U.S. 68 (1985), merely requires the state to provide psychiatric assistance where there is a demonstrated need therefor and the defendant cannot afford to hire his own experts. See Clark v. Dugger, 834 F.2d 1561

(11th Cir. 1987). Thus, there is no violation of ***Ake*** v. **Oklahoma**. Especially in a case, as here, where there are no allegations that a different result would have been obtained, there is a failure of the allegations to support even the theory that the original three evaluations were not competently performed.

With respect to petitioner's contention that defense counsel was ineffective by failing to provide the mental health expert with background information, etc., the state denies these allegations and submits that there has been absolutely no showing of the prejudice needed to support the ineffective claim. In order to prevail, the defendant must show that the results would have been different and, here, as aforestated, there is no indication that different conclusions would have been reached by the mental health experts.

The opinion of the Florida Supreme Court in **Card** v. **State**, 497 So.2d 1169 (Fla. 1986), is particularly instructive when these type of mental health issues are raised collaterally:

> . . . At the outset, we find it necessary to warn that we review reports filed by psychologists hours before a scheduled execution with great suspicion, particularly in a case such as this when three experts have previously determined ~~that~~ ~~the~~ defendant was competent ~~to stand trial~~. (text at 1175)

In the instant case, there is not even an allegation that a "new" expert has been obtained whose conclusions are different from the three mental health experts who have previously examined petitioner. Those three mental health experts are well recognized and respected in this area. There is simply nothing

to indicate that these experts rendered incompetent evaluations. In the instant case, the petitioner was afforded protection at all stages of the proceedings with respect to the mental health issues now presented in his **3.850** motion. Three well respected mental health professionals examined petitioner, and two of those experts testified at the penalty on behalf of petitioner. Prior to sentencing, the experts again examined petitioner in order to determine whether he was sane to be sentenced. Significantly, during the penalty phase, petitioner took the stand and communicated, very effectively, his position to the jury. His testimony was lucid and well constructed and there is no indication of any mental deficiencies which would have rendered petitioner incompetent to stand trial.

CLAIM IX: As his next claim, petitioner contends that a statement obtained from him was done so in violation of his constitutional rights. This claim, as are many which have been raised in the instant **3.850** motion, is procedurally barred by the failure to previously raise this issue at trial or on appeal. In Atkins v. State, supra, the Court held that a claim that there was no knowing waiver of *Miranda* rights was procedurally barred. Atkins, supra, fn. **1** (2). **As** was this type of claim in Atkins, the denial of petitioner's claim IX should be affirmed.

CLAIM X: Petitioner next contends that the precepts of **Booth** v. Maryland, **482** U.S. **496** (1987), were violated where the victim's mother became emotionally distraught on the stand and where certain references were made in a presentence investigation allegedly implicating Booth-type statements. This claim should be summarily rejected by this Honorable Court.

With respect to the emotional distress of the victim's mother and the subsequent reference to same by the prosecutor in closing argument, it must be remembered that these matters occurred in the guilt phase of the trial and not in the sentencing phase. **Booth** and its progeny require that a sentence of death be imposed based upon permissible aggravating factors, and victim impact statements are not valid aggravating factors. There is simply no way to find that these matters now complained-of had any bearing on the weighing of the aggravating and mitigating circumstances as instructed by the trial judge at the penalty phase.

It should also be observed that objection was made to the victim's mother's testimony at trial as being unduly prejudicial due to the obvious emotional distress. Those matters were raised on appeal to the Florida Supreme Court and that Court held that this instance of prosecutorial misconduct was procedurally barred, but even if it was not procedurally barred it had no merit. **Smith v. State**, 515 So.2d at 183. No objection was made to the closing argument of the prosecutor concerning these statements and, hence, the Florida Supreme Court correctly ruled that this matter was procedurally barred. In any event, inasmuch as these matters which occurred in the guilt phase of trial had no bearing on the weighing of aggravating and mitigating circumstances, the summary denial of petitioner's claim with respect to these matters should be affirmed.

With respect to those matters contained within the pre-sentence investigation which may implicate **Booth**, it is clear

from this record that no objection was made and, hence, the summary denial of this claim must be affirmed. Petitioner's reliance upon **Jackson v. Duqqer,** 547 So.2d 1197 (Fla. 1989), is clearly misplaced. In **Jackson,** the Court noted that objection was made at trial to the use of victim impact evidence and the issue was raised on appeal and was expressly addressed on appeal by the Supreme Court. In the instant case, however, no objection as to Booth-type statements which were contained in the presentence investigation, or were otherwise presented in the penalty phase of trial, was made. Therefore, the Florida Supreme Court's recent decision in **Parker v. Duqqer,** 14 F.L.W. 557 (Fla. Oct. 25, 1989), controls. In **Parker,** the Court distinguished **Jackson** and held, in accordance with various other precedents, that the failure to object to Booth-type statements results in a clear procedural bar obviating collateral review. The same is true in the instant case and, therefore, this Honorable Court should affirm the summary denial of this claim.

CLAIM XI: Petitioner next contends that the jury was prevented from considering all evidence in mitigation. He opines that by instructing the jury to consider "any other aspect'' of the defendant's background or character, the instructions effectively precluded the jury from considering evidence of mental deficiencies separate and apart from the statutorily enumerated mitigating circumstances. At the outset, it must be noted that no objection was made to the standard jury instruction and, in fact, defense counsel made sure that the catch-all instruction was included (R 1266). Thus, contrary to

petitioner's assertion, this claim was not raised on direct appeal or objected to at trial. Therefore, on this basis alone, this Honorable Court should affirm the summary denial of the claim. The failure to object to standard jury instructions results in a clear procedural bar. **Smalley v. State, 546 So.2d 720** (Fla. 1989), citing **Sullivan v. State, 303** So.2d **632** (Fla. 1974), **cert. denied, 428** U.S. **911 (1976).**

In any event, petitioner's contention that somehow the dictates of **Hitchcock v. Dugger, 481** U.S. **393** (1987), were not adhered to is totally belied by the record. In fact, the addition of the "catch-all" portion to the standard jury instructions was in response to cases which held that the jury and trial judge must consider all mitigating evidence, either statutory or nonstatutory. In the instant case, petitioner was not precluded from presenting any mitigating evidence whatsoever, nor was the jury (or trial judge) constrained in its consideration of that evidence as mitigating circumstances. There simply was no error here and, in any event, as aforementioned, the failure to object to the grounds now asserted collaterally precludes **3.850** relief.

CLAIM XII: Petitioner next complains that the trial judge failed to consider or find certain mitigating circumstances. As petitioner acknowledges, this claim was raised on direct appeal and was squarely rejected by the Florida Supreme Court. **smith v. State, 515** So.2d at **185.** Thus, as was the case in **Atkins v. State,** supra, fn. 1 (12), this claim is clearly not cognizable in these **3.850** proceedings.

CLAIM XIII: Petitioner's thirteenth claim concerns the trial court's denial of a requested defense instruction for the penalty phase informing the jury of its ability to exercise mercy. This is a claim that appears of record and, hence, could have and should have been raised on direct appeal. The failure to do so absolutely precludes collateral review. In any event, the denial of the jury instruction did not preclude defense counsel from arguing the point to the jury and, thus, have it considered under the "catch-all" portion of the jury instructions. Defense counsel was permitted to argue to the jury any of the matters contained within the special jury instructions denied by the court (R 1267), and in fact did *so.* There simply was no preclusion of the ability of defense counsel to argue anything in mitigation but, as aforementioned, the failure to raise on appeal the issue of the denial of the special jury instruction results in a clear procedural bar thereby rendering this claim ripe for summary denial.

CLAIM XIV: Once again, petitioner presents a claim which he fully knows is not cognizable in 3.850 proceedings. This claim is raised by capital collateral counsel in nearly every post-conviction pleading, yet the Florida Supreme Court has consistently rejected the claim. Initially, it must be observed that this claim is clearly procedurally barred. It is the type of claim which could have been raised on direct appeal. **Atkins v. State,** supra, fn. **1** (5). Also, the failure to object to the standard jury instruction results in a procedural default. In Smalley v. **State,** 546 So.2d **720** (Fla. 1989), the Court rejected,

on a direct appeal, the same claim now asserted by petitioner collaterally. The Court explained the failure to object results in a procedural bar obviating relief and went on to hold, for the benefit of the bench and bar in future cases, that the claim now asserted under claim XIV has no merit in the State of Florida. Based upon the clear procedural default, however, this Honorable Court should reject and affirm the summary denial of this claim.

CLAIM XV: Petitioner next presents a claim which was, at least in part, presented on direct appeal. The Florida Supreme Court ruled that the cold, calculated aggravating circumstance was invalid under the facts of the instant case. Nevertheless, the Florida Supreme Court approved the death sentence and petitioner cannot on collateral review attempt to argue with the finding of the state's highest court.

In any event, this claim is similar to that presented under claim XIV in that petitioner contends that limiting instructions are necessary when instructing the jury in the penalty phase of a capital trial. This argument has been squarely rejected with respect to the **Maynard v. Cartwright** line of reasoning. The standards championed by petitioner are those used by the appellate court in their review of death sentences. There is no requirement, as the Supreme Court has held, that the jury be instructed on the appellate standards in the penalty phase of a capital trial. The standard jury instructions have been upheld many times and, importantly, the failure to raise the claim in this context on direct appeal precludes collateral review. Although petitioner challenged the factual basis for the finding

of the cold, calculated aggravating circumstance on appeal, he did not, as he does in his collateral pleadings, challenge the alleged insufficiency of the jury instructions. This failure to object precludes collateral review. **Smalley v. State**, supra. The summary denial of this claim should be affirmed by this Honorable Court.

CLAIM XVI: Once again, petitioner presents a variation of his **Maynard v. Cartwright** claim and opines that the jury should have been given a limiting instruction as to the definition of pecuniary gain according to the appellate standards espoused by the Florida Supreme Court. As aforementioned with respect to claims XIV and XV, the Florida Supreme Court has rejected this claim both on direct appeals and collaterally. Once again, the failure to object to standard jury instructions results in a clear procedural bar. **Smalley v. State**, supra. Similarly, where no objection was made at trial or where this issue was not raised on direct appeal, Florida law is clear that the claim cannot be presented collaterally via a motion for 3.850 relief. Therefore, this Honorable Court should affirm the summary denial of this claim.

CLAIM XVII: Although the state is getting redundant, once again, it is clear that petitioner's claim concerning the failure to give a limiting instruction on the prior violent felony aggravating circumstance is procedurally barred from consideration by this Honorable Court in these collateral proceedings. Again, petitioner presents a claim predicated upon **Maynard v. Cartwright**, supra, a claim which has been consistently

rejected by the Florida Supreme Court. As is the case with claims XIV, XV and XVI, no objection was made to the standard jury instructions and, pursuant to **Smalley** v. **State**, supra, this claim is procedurally barred. The failure to raise this claim on direct appeal also results in procedural bar and this Honorable Court should affirm the summary denial of this claim.

CLAIM XVIII: Petitioner next contends that he is entitled to 3.850 relief by virtue of the Florida Supreme Court's failure to remand for resentencing after that Court struck one of the five aggravating circumstances found by the trial court. This claim is obviously not cognizable in a 3.850 proceeding. In essence, petitioner is asking the trial court to overrule the decision of the Florida Supreme Court. In the direct appeal of this cause, the Florida Supreme Court found the cold, calculated aggravating circumstances invalid but yet found that the remaining four aggravating circumstances were sufficient to sustain the death sentence in this case. That decision of the Florida Supreme Court is not reviewable in the circuit court. Thus, even if petitioner were entitled to relief under this claim, and the state does not concede as much, his application must be made to the Florida Supreme Court and not to the trial court. This Honorable Court should affirm the summary denial of this claim.

CLAIM XIX: Petitioner next asserts that the trial judge, by virtue of his jury instructions, shifted the burden to the petitioner to prove that death was inappropriate. Once again, this is a claim which is procedurally barred from consideration

by this Honorable Court on collateral review. In **Atkins v. State**, supra, the Florida Supreme Court specifically held that this claim is procedurally barred. **Atkins**, fn. 1 *(3)*. See also **Eutzy v. State**, **541** So.2d 1143 (Fla. 1989) (a claim that Florida's death penalty statute is unconstitutional because it imposes an unlawful presumption that death is the appropriate penalty based upon the **Adamson v. Ricketts** decision is procedurally barred because it could have been raised on direct appeal). Therefore, this Honorable Court should affirm the summary denial of this claim.

CLAIM XX: The presentation of petitioner's next claim is an affront to this Court. Without any factual basis whatsoever, petitioner cavalierly claims that a prior conviction used as an aggravating circumstance and another prior conviction that was used to rebut the mitigating circumstance of no significant. criminal history were unconstitutionally obtained. Petitioner does not enlighten us as to what constitutional infirmities were present in the obtaining of the previous convictions. Coupled with the fact that this is a claim which could have been raised on direct appeal (i.e., petitioner himself would know whether or not the convictions were obtained, for example, without counsel, etc.), a clear procedural bar results and this Honorable Court should affirm the summary denial of this claim. This is especially true where the allegations are fatally defective as legal conclusions unsupported by any factual basis.

CLAIM XXI: Petitioner next contends that his death sentence is improper because it rests upon an unconstitutional automatic

aggravating circumstance. This claim has been rejected many times by many courts. In **Atkins v. State**, supra, the Florida Supreme Court has held that this claim is procedurally barred by virtue of the failure to object at trial or to raise the claim on appeal. **Atkins**, fn. **1 (9)**. In addition, recent case law indicates that the summary denial of this claim (as well as several others raised by petitioner in his **3.850** motion) should be affirmed by this Honorable Court. **Bertolotti v. Dugger, 883** F.2d **1503, 1527** (11th Cir. **1989)**.

CLAIM XXII: In his twenty-second claim, the petitioner attempts to resurrect a claim which has previously been decided adversely to him on direct appeal. In **Smith v. State, 515** So.2d **182, 183** (Fla. **1987), the** Court held that the discovery violation claim was without merit. Thus, petitioner is attempting to do what is strictly forbidden by Florida law, that is, to reargue an issue which has already been determined on direct appeal. Florida law is clear that claims previously raised on direct appeal cannot be raised under the guise of ineffective assistance of counsel in a collateral proceeding. **Sireci v. State, 469** So.2d **119** (Fla. **1985), cert. denied, 478 U.S. 1010 (1986)**. This is what petitioner is attempting to do in the instant case. This Honorable Court should affirm the summary denial of this claim.

CLAIM XXIII: In a claim similar to that set forth under claim XIX, petitioner contends that the burden of proof was shifted to petitioner, this time in the guilt phase of trial. However, this is a claim which clearly, because it is of record, could have been and should have been raised on direct appeal.

The failure to do so absolutely precludes collateral review. This Honorable Court should affirm the summary denial of this claim.

CLAIM XXIV: Once again, petitioner presents a claim which is not cognizable in these proceedings. He now complains that the state adduced certain irrelevant evidence at the guilt phase of trial thereby depriving petitioner of his constitutional rights. This is a claim, like so many others presented in this **3.850** motion, which should have been and could have been raised on direct appeal where it appears of record. The failure to do so precludes collateral review or relief. This Honorable Court should affirm the summary denial of this claim.

CLAIM XXV: As his final claim, petitioner presents an issue which he knows has been authoritatively determined adversely to him. The petitioner alleges that **Rule 3.851, Florida Rules of Criminal Procedure,** denies him equal protection in that he has to pursue his claims for relief prior to the expiration of the two year limitation period specified in **Rule 3.850, Florida Rules of Criminal Procedure.** This identical claim was rejected by the Florida Supreme Court in **Cave v. State,** 529 So.2d **293** (Fla. **1988).** In Cave, the Court held:

> Essentially, appellant is claiming that procedural Rule **3.850** prohibits the Governor of Florida from signing a death warrant until two years after a death sentence becomes final. This issue was not presented below and is procedurally barred. Moreover, this Court has no constitutional authority to abrogate the Governor's authority to issue death warrants on death sentence prisoners whose convictions are final. Unless there is a petition for post-conviction relief, the affirmance of a final conviction ends the

> role of the courts. Rule 3.850 merely provides a time period *after* which petitions may not be filed. It does not act as a bar to execution of sentences immediately after they become ~~final~~. (text at **299**; emphasis supplied).

Accord, Tompkins v. State, **14 F.L.W. 455** (Fla. Sept. **14, 1989**). Inasmuch as this claim has been considered and rejected by the highest court in this state, this Honorable Court should affirm the summary denial of petitioner's claim XXV.

CONCLUSION

Based upon the foregoing reasons, arguments and citations of authority, the summary denial of Rule 3.850 relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 22ND day of December, 1989.

OF COUNSEL FOR APPELLEE