IN THE SUPREME COURT OF FLORIDA

CASE NO. 75254

LLOYD DUEST

Appellant,

v.

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

Appellee.

ANSWER BRIEF
FROM DENIAL OF A MOTION
FOR POST CONVICTION RELIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Appellant was the Defendant and Appellee was the Prosecution in the criminal trial and in the subsequent hearing on the motion for post conviction relief. Appellee may also be referred to as the State. The symbol "R" will denote record on appeal. The symbol "SR" will denote record on appeal for the motion for post conviction relief.

PROCEDURAL HISTORY

Appellant is presently in Appellee's lawful custody under a valid judgment and sentence of death imposed by the Honorable Patricia W. Cocalis on April 14, 1983 (R. 1690-1698). Appellant appealed his conviction and sentence to this Court raising the following issues:

> WHETHER THE TRIAL COURT ERRED IN ALLOWING STATE WITNESSES TO TESTIFY DUE TO AN ALLEGED RICHARDSON VIOLATION?
>
> WHETHER THE TRIAL COURT PROPERLY DENIED A MOTION FOR MISTRIAL BASED ON ALLEGED PROSECUTORIAL MISCONDUCT?
>
> WHETHER OR NOT THERE WAS SUFFICIENT EVIDENCE OF PREMEDITATION.
>
> WHETHER THE TRIAL COURT ERRED IN ALLOWING THE INTRODUCTION OF A CERTAIN PHOTOGRAPH.
>
> WHETHER THERE WAS SUFFICIENT EVIDENCE TO ESTABLISH THE FOLLOWING TWO AGGRAVATING FACTORS: 1) THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL AND 2) COLD CALCULATED AND PREMEDITATED.

This Court unanimously upheld Appellant's conviction and sentence. Duest v. State, 462 So.2d 446 (Fla. 1985).

On February 18, 1987 Appellant filed a motion for post-conviction relief in the Circuit Court, Broward County. Appellant has since filed two "amendments" to that motion, one on April 14, 1987 and one on November 17, 1989. The trial court denied relief on all grounds (R. 679-681). Appellant

simultaneously filed a habeas petition in this Court which is still pending. The pending habeas petition and this appeal are presently before this Court.

STATEMENT OF THE FACTS

Appellee relies on the facts detailed in this Court's opinion of Appellant's direct appeal with the following additions:

Michael Demizio rode down to Fort Lauderdale with Appellant on the weekend in question (R. 647). On the day of the murder, Demizio saw Appellant drive up in a brown Camaro (R. 665). Rather than have his hands touch the steering wheel or gear shift, Appellant placed rags on the steering wheel and gear shift (R. 665). The victim owned a Camaro which was missing from the victim's home when the body was discovered (R. 484). Demizio had an antique knife which was last seen on Saturday evening (R. 712).

Joann Wioneck saw Appellant on the day of the murder around 3:00 accompanied by the victim (R. 940-942). Appellant walked into the apartment, went into the closet, closed the door and then left again (R. 940). Approximately one and a half (1 1/2) hours later Appellant came back to the apartment in the gold Camaro, retrieved his belongings and left (R. 944-947).

Neil O'Donnell testified that he saw the victim and Appellant at a gay bar called Lefty's the afternoon of the murder (R. 567, 576, 580). The two men left together (R. 576).

The victim died of multiple stab wounds (R. 905). The victim received eleven such wounds covering the front and back of the body (R. 905, 908). The victim was also stabbed in the eye and received lacerations in the head (R. 909). Large amounts of blood were found in the victim's bed and in the bathroom where he ultimately was found (R. 442, 915).

Various State witnesses testified to Appellant's presence in Fort Lauderdale that weekend (R. 771, 811, 733, 771, 776, 1303). Numerous defense witnesses testified that, Appellant was in Massachusetts that same weekend (R. 1195, 1232, 1018, 1078, 1095, 1914, 1992).

POINT I

THE STATE PROPERLY INTRODUCED RELEVANT EVIDENCE WHICH DID NOT INVOLVE EVIDENCE OF A COLLATERAL CRIME.

Appellant claims that the State without objection improperly relied on collateral crime impermissible evidence at his trial. Appellant claims that the State introduced evidence of his escape, participation in an orgy, theft of jewelry, taking of illegal drugs and his use of a razor blade to cut a woman's blouse off her body. The only incident objected to was Appellant's use of razor blade (R. **633-636**).

The trial court properly ruled that this claim is procedurally barred as it could have been raised on direct appeal. (SR **679**). Preston **v.** State, **528** So.2d **896** (Fla. **1988**); O'Callaghan v. State, **461** So.2d **1354** (Fla. **1985**).

With respect to the merits, Appellee would make the following argument: As to the admissibility of the "razor blade incident" the trial court properly admitted it at trial. Peetitioner's sole defense at trial was that he was in Massachusettes at the time of the murder. State witness, Mike Demizio, testified that he met Appellant on a bus coming to Fort Lauderdale (R. **643**). Demizio testified to the facts surrounding the time he spent with Appellant during the weekend in question (R. **641-730**). Demizio testified about their activities and about the others who were present with Appellant and him (R. **652-660**). Appellant attempted to discredit the State's witness by

challenging his memory (R. 694, 636, 703). Since Demizio's memory was being put in question the State properly elicited testimony concerning the details of that weekend (R. 634).

Appellant also claims that the State then impermissibly referred to the incident in his closing argument. Mr. Garfield's reference to that incident was not designed to impugn Appellant's character as suggested. A reading of the complete statement made by Mr. Garfield reveals the following:

> I don't hold that against him and you shouldn't hold that against him but the reason I mentioned that is because that is why he left...
>
> You are going to see, if you don't already, how this ties right in with the testimony of Mr. Long. You recall 2:30 in the morning or so on one of these days he leaves. He didn't stay at that orgy the whole time like everybody else did. He is gone. Mr. Long told you that he sees- he meets this gentleman at about 2:30 in the morning at Lefty's. You recall a statement from Joanne Wioncek. She said to you - well, I don't remember exactly what she said. I tried to get her to be more specific but she couldn't. She just said, "I remember him saying something like I'm going to Lefty's."
>
> Now, I said, "Did he say he was coming from Lefty's?'' I was trying to get her -- I was leading her a little bit. I wanted to get her to be a little more specific. Mr. Baron objected at that point if it serves your recollection. That is the way we left it. All we have is her testimony on that point which was, "I am going to Lefty's." Now, you recall the next time she saw the defendant in this case which was at about 5:00 in the morning or so. That would be quite consistent with what Mr. Long told you.

(R. 1407-1408).

Appellee submits that the testimony and prosecutorial comments were therefore relevant to contradict Appellant's alibi defense and to put the evidence in its proper context. Bryan v. State, 533 So.2d 744 (Fla. 1988).

Appellant has failed to establish ineffective assistance of trial counsel with respect to this issue. He has not demonstrated either deficient performance or prejudicial error as required under Strickland v. Washington, 466 U.S. 688 (1984).

In his first motion Appellant raises a separate claim concerning the issue of escape (SR. 270-271). In his second amended motion Appellant elaborates on the alleged improper reference to escape/flight and use of alias (SR. 11, 523-534). The trial court denied this claim as procedurally barred (SR. 679 paragraph 6). Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989). As for the merits of this claim Appellee would make the following argument:

Appellant argues that his constitutional rights were violated by the admission of evidence of Appellant's flight and use of an alias. Specifically, Appellant claims that the State failed to establish that he fled to avoid prosecution for the murder for which he was on trial as opposed to other unrelated charges pending against him in Massachusetts. The State disagrees.

Prior to trial, Appellant's defense counsel made a motion to exclude the alias of Danny from the indictment (R. 31-32). Defense counsel's motion to exclude the "A/K/A Danny" from the indictment was granted (R. 33); however, at no time did Appellant move to exclude the name of Robert Brigida, and in fact, the Appellant readily admitted that he used the name of Robert Brigida (R. 33, 425). Nonetheless, on the merits, Appellant's use of an alias was relevant to the identification of Appellant as the man picked up and identified by police Parker v. State, 456 So.2d 436, 442-443 (Fla. 1984).

The flight evidence was properly admitted. In Bundy v. State, 471 So.2d 9 (Fla. 1985) cert. denied, ___ U.S. ___, 107 S.Ct. 295, 93 L.Ed. 2d 269 (1986), this Court held that the State was not required to prove beyond a reasonable doubt that a defendant's flight was due to his guilty knowledge of the crime for which he was on trial. When discussing the admissibility of flight evidence, the Bundy court noted that the probative value of flight evidence was weakened:

> "1. If the suspect was unaware at the time of the flight that he was the subject of a criminal investigation for the particular crime charged, (Citations omitted).
>
> 2. Where there are not clear indications that the defendant in fact fled, (Citations omitted), or
>
> 3. Where there was a significant time delay from the commission of the crime to the time of flight. (Citations omitted).''

471 So.2d at 21.

Indeed, the presence of a significant time delay between the commission of the crime and the time of flight was what rendered the evidence of flight irrelevant and inadmissible in Merritt v. State, 523 So.2d 573 (Fla. 1988) where the murder was committed in 1982 and the defendant escaped in 1985.

Sub judice, the victim was murdered on February 15, 1982 and Appellant was apprehended by police on April 18, 1982. Appellant was notified that he was a suspect in a homicide and voluntarily went with police for questioning (R. 844); at this time Appellant was known to police as Robert Brigida (R. 875). Appellant was then questioned by Detective John Feltgen about the instant offense (R. 877-878). It was subsequently discovered that misdemeanor traffic warrants were pending in Massachusetts for Robert Brigida, and Appellant was arrested based on the misdemeanor warrants (R. 881-882). Thereafter, when Detective Feltgen momentarily left the room where Appellant was being questioned, and returned, Appellant was missing (R. 883).

Based on the foregoing, it was reasonable to conclude that Appellant fled to avoid prosecution for the instant homicide, and not for outstanding misdemeanor warrants. At the time of flight, Appellant was aware that he was under investigation for the homicide charged, and there was no question that Appellant in fact fled. Also, at the time of Appellant's escape, his true identity was not known to the police. Thus, where Appellant's flight occurred only two months after the

commission of the instant offense, it was a reasonable inference that Appellant fled as a result of his consciousness of guilt for John Pope's murder. Bundy, supra.

Furthermore, even if it was error to introduce evidence of Appellant's flight, the error was harmless beyond a reasonable doubt. Rhodes v. State, 547 So.2d 1201 (Fla. **1989**). Unlike Merritt, supra, the jury at bar was not instructed that an attempt to avoid prosecution through flight was a circumstance which could be considered in determining guilt. Rather, the jury was instructed that, in regards to circumstantial evidence,

> "If the circumstances are susceptible of two reasonable constructions, one indicating guilt and the other innocence, you must accept the construction indicating innocence."
>
> (R. 1523).

Consequently, the trial court's instruction did not necessitate a finding that Appellant's flight was the result of his consciousness of guilt for the homicide.

Although this claim lacks merit Appellee urges this Court to deny review of this claim due to procedural default. Harris v. Reed, 489 U.S. , 103 L.Ed.2d 308 **(1989)**.

POINT II

THERE WAS NO CONFLICT OF INTEREST BETWEEN DEFENSE WITNESSES AND TRIAL COUNSEL.

Appellant claims that both defense counsel and the prosecutor threatened various alibi witnesses. He further alleges that defense counsel hade a conflict of interest with respect to these alibi witnesses. The trial court properly found this issue to be procedurally barred as it could have been raised on direct appeal. Blanco v. Wainwright, **507** So.2d **1377** (Fla. **1987).**

As to the merits Appellee would argue the following: At no time did defense counsel engage in dual representation as alleged by Appellant, and therefore his entire premise is faulty. Both defense counsel and the State urged these witnesses to consult with attorneys concerning any potential liability that may have incurred because of the possibility that they may have harbored a fugitive. These witnesses included five immediate family members, two uncles, a future brother-in-law, two friends, and a local Massachusetts merchant who testified that he sold the Defendant a fan belt on the date of the Crime. (R. **1021-22, 1074, 1096, 1116, 1195, 1234-1236).** By advising these individuals of their rights to avoid self-incrimination and to the assistance of counsel, both defense counsel and the State operated in the highest tradition of their profession, in order to alert these lay witnesses to potential problems they may be encountering by their testimony. Appellant contends that these

purported threats effectively drove witnesses from the stand. What witnesses were "driven from the stand" is not apparent from the record as all of the witnesses referred to in fact testified at the Appellant's trial. They all testified that the Appellant was in Massachusetts at the time of the crime, but most indicated that they did not know where the Appellant had been living previously, and had been surprised to see him briefly on the date of the crime. The Appellant's present contentions seem to imply that these family members, in fact, lied or perjured themselves at the trial when giving this testimony. He seems to imply that the "threats" of the State and defense counsel (which were in reality advising these lay witnesses of their rights against self-incrimination) somehow altered their testimony at trial. Absent *any* indication that these witnesses, the Appellant's principal alibi witnesses, perjured themselves at the Appellant's trial in this regard, the Appellant's contention herein must fail. The fact that several of these witnesses invoked their fifth amendment rights at their depositions was not used against them or the Appellant at trial, and none of them invoked their fifth amendment right on the stand at the Appellant's trial. Thus, unless the Appellant is now stating that all of his family and the other witnesses who testified on his behalf committed perjury at his trial (which claim could hardly be supportive of his post-conviction claim for relief at this juncture) this entire argument must fail due to the total lack of effect that these purported "threats" and conflicts" occurring at the

witness' depositions had on the outcome of the Appellant's trial. In short, then, this contention simply does not withstand close scrutiny. Burger v. Kemp, 483 U.S. 776 (1987). Appellee urges this Court to deny relief based on Appellant's procedural default. Harris v. Reed, 489 US , 103 L.Ed.2d 308 (1989).

POINT III

THE JURY WAS PROPERLY INSTRUCTED AS TO THE BURDEN OF PROOF APPLICABLE TO THE ALIBI DEFENSE.

Appellant claims that the jury was improperly instructed concerning the applicable burden of proof. The trial court found this claim to be procedurally barred as it could have been raised on direct appeal. (SR. **679**). Atkins v. Dugger, **541** So.2d **1165** (Fla. **1989**).

Appellant's claim excerpts certain words used by defense counsel during the jury selection process, and then makes the conclusion that defense counsel misinformed the jury regarding the applicable burden of proof with regard to his alibi defense. The isolated words referred to on page **18** of the Appellant's original Motion are taken entirely out of context, and that when the jury selection process is taken in its entirety, especially when viewed with regard to the jury instructions actually given to the jury, which jury instructions properly advised them of the burden of proof, this contention has absolutely no substance. (R. **1518-1519**). This is especially true not only in light of the jury instructions given, but in light of the alibi defense actually presented by the Appellant at trial. Given the numerous witnesses called by the Appellant at his trial who stated that he was in Massachusetts at the time of the crime, the jury obviously felt that, even with all this evidence, there was no reasonable doubt of his guilt. Accordingly, considering the entire transcript, the instructions

given, and the evidence presented to the jury, there is absolutely no basis to the Appellant's claim.

POINT IV

APPELLANT'S APPELLATE COUNSEL WAS EFFECTIVE WHERE APPELLANT DID NOT EXERCISE HIS RIGHT TO SILENCE.

Appellant contends that his trial counsel was ineffective for not attempting to suppress his statements. Furthermore, Appellant argues that there was an impermissible comment on Appellant's right to silence and that this evidence was used as evidence that a death sentence be imposed. Appellant's claim is totally unfounded both procedurally and on the merits.

The trial court properly denied relief as this is a claim that could have or should have been raised on direct appeal. Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989). (SR. 679).

Secondly, there was no error in presenting evidence that Appellant "refused to make a statement." The State submits that Appellant has taken the above quoted testimony completely out of context since a full reading of Detective Feltgen's testimony reveals that Appellant did in fact make a statement to police, but refused to put his statement on tape (R. 891-893). Where the Appellant clearly did not exercise his right to silence, there was no way that Officer Feltgen's testimony could have been taken as improper evidence of Appellant's exercis'e of that right. Donovan v. State, 417 So.2d 674 (Fla. 1982); State v. Thornton, 491 So.2d 1143, 1144 (Fla. 1986). Consequently, Appellant's claim is without merit.

Furthermore, the State never used Appellant's invocation of silence to urge that Appellant be sentenced to death. Although several references were made to the Appellant's lack of remorse (R. 1596, 1605) none of those statements were "fairly susceptible" of being interpreted as a comment on Appellant's right to silence. In the first instance, the Prosecutor merely stated that:

> The defendant in this case has taken the position that he did not do this. Therefore he has no remorse in this case.
>
> (R. 1596).

Consequently, the Prosecutor's statement was merely a fair comment on the evidence as remorse becomes irrelevant since Appellant maintained his innocence.

Another reference to Appellant's lack of remorse was made to substantiate the fact that the killing sub judice was premeditated, and that Appellant continued to pursue his intention of killing John Pope despite several opportunities to renunciate that plan (R. 1600-1603). Thus, the reference to Appellant's lack of remorse was not a comment on Appellant's right to silence, and were proper. See Pope v. Wainwright, 496 So.2d at 802.

Based on Appellant's failure to exercise his right to silence, Appellant was not prejudiced by the statements indicating his "refusal to give a statement" or his lack of remorse. Accordingly, Appellant was not denied effective assistance of counsel. Strickland v. Washington, 466 U.S. 688 (1984).

Although, this claim lacks merit Appellee urges this Court to issue a plain statement regarding Appellant's irrevocable procedural default. Harris v. Reed, 489 U.S. ___, 103 L.Ed.2d 308 (1989).

POINT V

THE TRIAL COURT AND JURY WERE PRESENTED ONLY WITH STATUTORY AGGRAVATING FACTORS.

Appellant alleges that nonstatutory aggravating factors were improperly considered during the sentencing phase. Appellant further contends that counsel was ineffective for failing to object to this practice during the trial. The trial court properly determined that Appellant is procedurally barred from raising this issue at this late date. (SR. 679). Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989).

Appellant attempts to create error by taking certain comments and remarks out of context. The trial court properly told the jury to consider any evidence brought out during trial but it must be considered in light of the following limited aggravating circumstances. (R. 1625)

During closing argument the prosecutor's reference to "fag" and "loving Lloydy" were simply comments on the evidence (R. 1431, 1437). Appellant's family called him Lloydy and they all tried to present him as a loving member of the family. The prosecutor's reference to the State witnesses' dislike for Appellant was said in reference to their lack of interest in the outcome of the case as opposed to the defense witnesses motivation to lie for him (R. 1450). The prosecutor's remarks concerning Appellant's lack of military history etc. were made to rebut Appellant's claims that he served in Viet Nam and that he was a model father, husband and son. The comments were not made

in the context of supporting an aggravating factor but rather to negate the existence of alleged mitigation (R. **1614** line **4-25, 1616).**

Appellant further alleges improper prosecutorial comments were'made to the court after the jury's advisory sentence was rendered (R. **1687-1689).** These comments were made in reference to defense counsel's earlier argument (R. **1676, 1677, 1687** line **25 - 1689).** Furthermore, these were remarks made to the trial court who knew what the appropriate aggravating circumstances were (R. **1833-1836).**

The prosecutor's comments to the jury regarding lack of remorse were made in reference to the applicability of aggravating circumstances (R. **1595-1596, 1601** lines **14-18).**

Taken in the context of the entire proceedings none of the alleged remarks were reference to nonstatutory agravating factors nor were they improper. However, even if improper, they do not constitute fundamental error. Pope v. Wainwright, **496** So.2d **798, 803** (Fla. **1986).** This is especially so in light of the aggravating circumstances found to exist in this case. Bertolotti v. State, **376** So.2d **130** (Fla. **1985).** Appellant has failed to establish any deficient performance by trial counsel let alone any prejudicial error. Strickland v. Washington, **466** U.S. **688 (1984).**

Appellant alleges that certain victim impact evidence and prosecutorial comments rendered his trial fundamentally unfair pursuant to Booth v. Maryland, **482** U.S. **496, 107** S.Ct. **2529, 96** L.Ed.2d **440 (1987).**

This Court has determined that absent a timely objection Appellant is procedurally barred from raising this claim at this junc'ture. Grossman v. State, 525 So.2d 833, 842 (Fla. 1988). Jones v. State, 533 So.2d 290 (Fla. 1988). The trial court found Appellant to be in procedural default (R. 679).

Appellant's reliance on Jackson v. Dugger, 547 L.3d 1197 (Fla. 1989) is unavailing as the issue there was preserved for appeal. In that case Appellant made a timely objection, moved for a mistrial and raised the issue on direct appeal. Id. at 355-356. Although defense counsel did object to the photograph admitted into evidence it is not at all clear if the pictures were actually of the victim's family (R. 459-461). The objection was not based on victim impact. (R. 459 lines 1-8, 14 R. 460 line 25, R. 461 lines 1-2). There was no objection made to the various prosecutorial comments and presentence investigation report which Appellant alleges was improper victim impact evidence. Consequently, this issue has not been properly preserved and should not be considered by this Court. Parker v. Dugger, supra; Hamblen v. State, 14 FLW 347 (Fla. July 6, 1989). Appellee urges this Court to issue a plain statement that appellant is in irrevocable procedural default upon this claim so as to prevent its subsequent unjustified litigation on the merits in a federal habeas corpus proceeding in the event of a favorable decision here, see Harris v. Reed, 489 U.S. ___, 103 L.Ed 2d 308 (1989).

Notwithstanding Appellant's failure to preserve the instant issue, Appellant's claim lacks merit.

The photograph Appellant claims was improperly admitted into evidence and which was objected to during the guilt phase of trial depicted the victim's dresser on which several photographs were displayed. The photograph was properly admitted into evidence as it was relevant to show that the victim's black jewelry box, which the victim kept on the dresser, was missing and was taken in the robbery (R. 464); thus, the photograph corroborated David Schifflet's testimony regarding the missing jewelry box (R. 486, 495). Consequently, there was no error in admitting the photographs into evidence.

Furthermore, Appellant's claim that the photograph in evidence depicted photographs of the victim's family is unsupported by the record. The nature of the photographs displayed on the dresser is amorphous, at best, and even the Prosecutor could not verify to the trial court who was in the pictures (R. 460). As a result, no argument was ever made during the entire trial regarding the people depicted in the photograph.

Similarly without basis is Appellant's contention that the victim's family was very much in evidence by their mere presence in the courtroom during the trial. The victim's family was never pointed out to the jurors, nor did they even testify at trial. Additionally, Appellant's assertion that the victim's family was admonished by the trial judge is unsupported by the record. Indeed, the trial court states:

I have not noticed anything because I cautioned Mr. Harris.

(R. 1064).

Even the court clerk did not see anything:

THE COURT: I didn't say anything for the record but my clerk watched and she didn't see anything, either. I watched. Okay.

(R. 1065).

Contrary to Appellant's assertions, the State never attempted to develop a theme of sympathy for the victim. The Prosecutor's statement during voir dire, "what about the person who is dead" (R. 122) was merely meant to reinforce to the jury the seriousness of the offense and the importance of having an attentive jury. In fact, the Prosecutor continued his statement with the following explanation:

MR. GARFIELD: There is nobody here - there is nobody here to help out or not -- I mean, we could get philosophical. This isn't the time or place to do it. Someone is dead or at least presumably we can perhaps prove that one is dead.

The question is, someone murdered him. The question is, is it this person here or not and if he did murder him, was it a premeditated murder? That is basically what we are here for. We are not here to help anybody or hurt anybody. It is a question of that is the law; that is the way our system works.

Given that frame work, can you function that way in this case and make a decision?

(R. 122).

Based on the foregoing, it is evident that the Prosecutor's statements were not meant to inflame the jury or evoke sympathy for the victim.

The same holds true of the statements made by the Prosecutor during the penalty phase arguments. The Prosecutor's statements were made in direct response to Appellant's mitigating evidence which was an attempt to elicit sympathy from the jury. Appellant's parents, sister and wife testified during the penalty phase of trial, and essentially stated that Appellantwas good to his family and was greatly loved by them all (R. 1577, 1582, 1583-1584, 1587). The Prosecutor's statements were merely a reminder that the victim, too, had a family.

Overall, the statements complained of lack the impact and magnitude of those found impermissible in either Booth or South Carolina v. Gathers, U.S. ___, 57 U.S. L.W. 4629 (June 23, 1989). The statements in Booth contained information regarding the personal characteristics of the victim, the emotional impact of the crime on the family, a family member's comments and opinion regarding the positive qualities of the victim and the serious emotional problems suffered by the family. Id. 96 L.Ed. 2d 448-452. The impermissible statements found in Gathers are extensive portions of a religious poem/prayer found in the victim's possession. References were also made to the victim's registration card in an effort to characterize him as a patriotic American.

Reference during the sentencing phase to the pain and loss suffered by the victim's family does not violate Booth or Gathers. The statements here and the likely effect of that information on the jury is materially different in scope from the situation presented in Booth and Gathers. The extensive and emotionally charged details of the family's loss in Booth are not present here. The prayer-like invocations found in Gathers are also missing from the facts of the instant case. The jury was already fully aware that Mr. Pope was a "young" **64** year old who had retired and had moved to Florida to enjoy his retirement. (R. **483, 550-551).** Nothing said by the prosecutor added to these already known facts; nothing was said to compare the victim's worth to that of the Appellant; the jury was not informed about any relevant facts about the victim's accomplishments nor was anything read to the jury concerning specific statements made by family members. In conclusion nothing said created any risk that the Appellant's death sentence was based on constitutionality impermissible or irrelevant consideration. The statements fall far short of the emotional pleas and sermons found in Booth or Gathers.

Furthermore, even if the Prosecutor's statements were in error, the error was harmless beyond a reasonable doubt. Grossman v. State, **525** So.2d **833** (Fla. **1988).** When read in its entirety, the Prosecutor's closing penalty phase arguments consisted of explaining to the jury the aggravating circumstances and which ones possibly applied sub judice (R. **1589-1616).** Since

impact of the murder on the family is not an aggravating circumstance in Florida §921.141(5), Fla. Stat. and in light of the trial court's instructions regarding sentencing, it is doubtful that impact of the murder on the family was considered by the jury. Therefore, Appellant was not prejudiced by the Prosecutor's statements.

Likewise, Appellant was not prejudiced by the statements in the presentence investigation (PSI). The **PSI** was ordered after the jury had made the recommendation of death (R. 1638) and thus the jury clearly did not have access to the report.

Furthermore, a review of the trial court's findings indicates that the statements in the **PSI** had no bearing on the imposition of the death penalty. A sentencing judge is required to give great weight to the jury's recommendation of death, Id. at 845. Additionally, the court found that four aggravating factors and no mitigating factors applied to Appellant (R. 1697). As a result, it is evident from the record that Appellant's sentence was based on the recommendation of the jury and the overriding weight of the aggravating circumstances. See Lightbourne v. Dugger, 829 F.2d 1012 (11th Cir. 1987). Thus, Appellant was not prejudiced by the information in the **PSI.**

Appellant's claim lacks merit both procedurally and substantively; as a result, this Court should deny relief.

POINT VI

THE JURY WAS PROPERLY INFORMED OF THEIR ROLE IN FLORIDA'S SENTENCING SCHEME.

Appellant's claim that the jury was misinformed as to their duty during the sentencing phase of his trial in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). The trial court properly denied relief based on Appellant's procedural bar. (R. 680). This claim is procedurally barred as it could have or should have been raised on direct appeal. Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989); Dugger v. Adams, U.S. ___, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989).

With respect to the merits this Court has repeatedly stated that a "Caldwell claim" is not applicable in Florida. Combs v. State, 525 So.2d 853 (Fla. 1988); Grossman v. State, 525 So.2d 833 (Fla. 1988); Pope v. Wainwright, 496 So.2d 798, 804-805 (Fla. 1986). Furthermore, when viewed in this entirety the Court's instructions properly explained the jury's role under Florida's sentencing scheme (R. 1624-1625, 1629). Combs, 525 So.2d at 857-858.

POINT VII

APPELLANT RECEIVED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

Appellant claims to have received ineffective assistance of trial counsel for his failure to present additional mitigation evidence. Appellant has failed to establish his burden under Strickland v. Washington, 466 U.S. 668 (1984) that Mr. Baron's performance was both reasonably deficient and the deficient performance affected the outcome of the trial proceedings. Strickland, supra. Stevens v. State, 14 FLW 513 (Fla. October 5, 1989).

At the evidentiary hearing Mr. Baron testified that he elicited the services of Dr. Ceros-Livingston and impressed upon her the need to know everything about Appellant's background (SR. 175). She was told to explore any possible mitigation that could be found in his background (SR 175). Family members were told to tell Mr. Baron everything about Appellant's background (SR. 174). Based on all the information presented by Appellant and his family, Dr. Livingston's report did not uncover this alleged child abuse. Mr. Baron's performance in this regard cannot be deemed ineffective. Jackson v. Dugger, 547 So.2d 1197, 1200 (Fla. 1989); Mitchell v. Kemp, 762 F.2d 886 (11th Cir. 1985).

Dr. Livingston's report was more damaging than helpful (SR. 155). Mr. Baron did not want the jury to hear about Appellant's prior escapes, and potential future escapes, his lack of remorse for prior crimes, his prior twenty eight felonies, to

mention a few (SR. 175, 178). Mr. Baron made a reasonable strategic decision not to utilize Dr. Livingston's report. James v. State, 489 So.2d 737 (Fla. 1986). Mr. Baron's strategy was to present Appellant's positive and human qualities (SR. 176, 146). Parts of Dr. Livingston's report would have undermined that valid strategy.

Appellant relies on a report by a Dr. Fleming who interviewed him on December 8, 1989 (SR. 54). The report discussed Appellant's drug abuse, his physica and psychological abuse and the fact that he was sent to prison at an early age. (SR. 77, 64). As already indicated, the phys cal and psychological abuse was not known to Mr. Baron through no fault of his own. (SR. 148). The drug addiction was merely cumulative as such evidence was presented at sentencing phase. Dr. Fleming's emphasis on Appellant's placement in prison at such a young age would have opened the door to damaging evidence. This would have opened the door to Appellant's prior escapes and his prior twenty eight felony convictions (SR. 157-158, 170). This would have also opened the door to the fact that Appellant was caught with a weapon in prison (SR. 90). Consequently, Dr. Fleming's report and demonstration of mitigation would have opened the door to some very damaging material. Appellant has failed to establish any deficient performance.

Appellant cannot establish any prejudicial error as well. Even if the jury heard about Appellant's child abuse and further elaboration of drug use that in no way would have

undermined the sentence imposed. Bertolotti v. State, 534 So.2d 386 (Fla. 1988).

POINT VIII

APPELLANT RECEIVED A FAIR SENTENCING HEARING.

Appellant contends that the jury's recommendation of death was tainted by impermissible evidence contained in the presentence investigation report.

There was no error. The mandate of Gardner v. Florida, 430 US 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) was met where Appellant was afforded a complete copy of the PSI prior to sentencing and was given an opportunity to rebut or explain the information contained therein. Cf Barclay v. State, 362 So.2d 657 (Fla. 1978). Indeed, portions of the PSI which were challenged by defense counsel were amended at the sentencing hearing (R. 1649-1662, 1662-1665, 1682-1683).

Information contained in the PSI did not undermine the reliability of the jury's sentencing determination because the jury never had access to the information contained in the PSI. The jury's recommendation that Appellant be sentenced to death was rendered on March 18, 1983. Thereafter the PSI was ordered by the trial judge (R. 1638). Thus, it is inconceivable how the information in the PSI could have had any effect on the jury's advisory sentence of death.

Notwithstanding, information which Appellant complains of related to "facts" established during the guilt phase of trial, by witnesses who were subject to confrontation and cross-examination. See Eutsey v. State, 383 So.2d 219, 225-226 (Fla. 1980).

Appellant's reliance on Rhodes v. State, 547 So.2d 1201 is misplaced since the hearsay testimony in Rhodes came from a tape recording pertaining to the defendant's prior convictions, and had no relevance to the offense for which the defendant was being sentenced. Sub judice, the hearsay contained in the PSI was based on information gathered from witnesses who testified in the courtroom during the guilt phase of Appellant's trial. By the same token, the hearsay Appellant complains of was merely a repetition of ingredient facts of the offense for which Appellant was being sentenced. Since Appellant was able to confront and cross-examine those witnesses during the guilt phase of his trial, Appellant's sixth, eighth, and fourteenth amendment rights were not violated.

Appellant also claims that the aggravating factor of especially heinous atrocious and cruel was improperly imposed in the instant case. This claim lacks merits both procedurally and substantively.

Appellant is precluded from raising this issue as it either was or should have been raised on direct appeal. Atkins v. Duqqer, 541 So.2d 1165 (Fla. 1989). On direct appeal Appellant challenged the sufficiency of the evidence used to establish the aggravating factor Duest v. State, 462 So.2d 446 (Fla. 1985). Now Appellant challenges the constitutional application of this factor in terms of vagueness. The trial court properly found this claim to be in procedural default. Atkins, supra. (SR 680).

Appellant's relies on Maynard v. Cartwright, 486 U.S. _____, 100 L.Ed.2d 372, 108 S.Ct. _____ (1988) and Hitchcock v. Dugger, 107 S.Ct. 1821 (1987) as fundamental changes in law which warrant a second review by this Court. Hitchcock v. Dugger, supra, is simply irrelevant to this issue and Maynard v. Carwright, supra is not a fundamental change in the law, but merely and application of Furman v. Georgia, 408 U.S. 238 (1972). Maynard v. Carwright, 100 L.Ed.2d at 380. Eutzy v. State, 541 So.2d 1143, 1147 (Fla. 1989). The basic premise of channeling and limiting a sentencer's discretion was reiterated in Proffit v. Florida, 428 U.S. 242 (1976) and Godfrey v. Georgia, 446 U.S. 420 (1980). Appellant's claim that Maynard v. Cartwright, supra invalidates Florida's application of this aggravating circumstance has recently been rejected in Bertolotti v. Dugger, 3 FLW 1281, 1290-1291 (11th Cir. August 31, 1989).

Appellant's reliance on Rhodes v. State, 547 So.2d 1201 (Fla. 1989) is unavailing as the issue there concerned the sufficiency of the evidence used to establish heinous, atrocious and cruel which has already been adversely decided against Appellant on direct appeal. Duest v. State, 462 So.2d at 449.

In conclusion Appellant's claim is procedurally barred as it either was or could have been raised on direct appeal Parker v. Dugger, 550 So.2d 459 (Fla. 1989). Furthermore, the claim lacks any merit. Bertolloti v. Dugger, 3 F.L.W. at 1290-1291; Proffit v. Florida, supra.

Appellant also challenges the constitutional application of the aggravating factor of cold, calculated and premeditated. On direct apeal, Appellant challenged the sufficiency of the evidence used to establish this aggravating factor. Duest v. State, 462 So.2d 446 (Fla. 1985). The trial court therefor properly found this claim to be in procedural default. Atkins, supra. (SR 680).

Appellant's reliance on Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, ___ U.S. , 108 S.Ct. 733, 98 L.Ed.2d 681 (1988) as a fundamental change in the law warranting further review has been rejected by this Court in Butzy v. State, 541 So.2d 1143 (Fla. 1989) and in Harich v. Dugger, 542 So.2d 980 (Fla. 1989). Likewise Maynard v. Cartwright, 108 S.Ct. 1853 (1988) does not constitute a fundamental change as it is an application of Constitutional standards already in place. Proffit v. Florida, 428 U.S. 242 (1976).

Lastly Appellant's claim lacks merit. There was sufficient evidence of heightened premeditation which illustrates calculation and sets this crime apart from the norm. Duest v. State, 462 So.2d at 449-450; Koon v. State, 513 So.2d 1253 (Fla. 1987).

Next Appellant claims that the trial court erred in failing to find both statutory and non-statutory mitigating. evidence. The trial court properly found this claim to be procedurally defaulted. Adams v. State, 543 So.2d 1244 (Fla. 1989); Preston v. State, 528 So.2d 896 (Fla. 1988). (SR 680).

Appellant claims that the trial court improperly found no statutory mitigating evidence. This Court has repeatedly stated that the finding or not finding of a specific mitigating circumstance is within the trial court's domain. Perry v. State, 522 So.2d 817 (Fla. 1988) quoting Stano v. State, 460 So.2d 890, 894 (Fla. 1984), cert, denied 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985). Appellant has failed to establish any abuse of the trial court's discretion in this regard.

Although Appellant's father stated that Appellant had a drug problem there was never any evidence brought forth to even suggest that Appellant was under the influence of any emotional or mental duress at the time of the crime (R. 1607, 1577-78). The same deficiency appears in Appellant's claim that he has a lengthy psychiatric history. No evidence was presented to relate this information to Appellant's behavior during the crime (R. 1660-63, 1811). In fact the record evidence refutes any such claim as Appellant was commended for his active participation in therapy sessions and his positive effect on other inmates (R. 1577, 1811). Furthermore no clinical diagnosis was ever made even though Appellant received therapeutic intervention while in prison (R. 1811). Lastly, Appellant's mother testified at sentencing that her son did not suffer from any psychiatric problems in the past (R. 1585-86). Based on the record evidence the trial court properly found no statutory mitigating factors applied. Roberts v. State, 510 So.2d 885, 894 (Fla. 1987). Appellant's own witness at the evidentiary hearing stated that

she was searching for non-statutory mitigation only as Apellant maintained his innocence rendering statutory mitigation inapplicable. (SR. 77).

Appellant's claim based on the existence of nonstatutory mitigating evidence is equally without merit. This Court's concern in Lamb v. State, 532 So.2d 1051 (Fla. 1988) was whether or not the trial court refused for whatever reason to consider the nonstatutory evidence. The United States Supreme Court had similar concerns in Eddings v. Oklahoma, 455 U.S. 104 (1982). In Lamb the trial court's order stated that he was not going to weigh the mitigating evidence in the penalty decision. There is no such language in the trial court's order in the case sub judice. The trial court found no applicable statutory mitigating circumstances (R. 1835). In a separate paragraph the court found that the mitigating did not outweigh the aggravating circumstances (R. 1806). As stated previously by this Court mitigating evidence isn't rejected but it is simply found to be insufficient to overcome the aggravating factors. Echols v. State, 484 So.2d 568 (Fla. 1985).

The trial court heard all the evidence presented in mitigation and sua sponte ordered a presentence investigation (R. 1576-1588, 1638, 1649, 1805-1831). All the evidence relied on for nonstatutory mitigation appears in the presentence report (R. 1805, 1831, 1811, 1816). The contents of the presentence investigation report were fully discussed (R. 1640-1691). The trial court instructed the jury on the applicability and

appropriateness of nonstatutory mitigating evidence (R. 1627-1628). There is simply no evidence that the trial court refused to consider nonstatutory mitigating evidence. Palmes v. Wainwright, 725 F.2d 1511, 1523 (11th Cir. 1984). The Court stated that it did consider all mitigation presented. (SR. 122). Furthermore, the trial court's order denying relief stated that it did in fact consider all mitigation presented (R. 680). Appellant is merely attacking the force applied to the mitigation evidence which is not a sufficient basis for review Echols, 484 So.2d at 576 citing to Porter v. State, 492 So.2d 293 cert. denied 464 U.S. 865, 104 S.Ct. 202, 78 L.Ed.2d 176 (1983).

Appellant also alleges that the jury's recommendation was somehow "perverted." The jury was repeatedly told to consider nonstatutory evidence and to give it the weight it deemed appropriate (R. 1607, 1615, 1619, 1620, 1627-1628). The jury heard testimony relating to nonstatutory mitigation (R. 1576-1588). There was not even the slightest suggestion that the jury was instructed not to consider nonstatutory mitigating evidence. Appellant's assertions otherwise are simply not established by the record.

In any event any error must be considered harmless as evidence of Appellant's prior drug history, therapeutic interventions and status as a good father, husband, son and brother do not outweigh the gravity of the four applicable aggravating circumstances. Rogers v. State, 511 So.2d 526, 535 (Fla. 1987).

Lastly, Appellant claims his sentence was the result of an automatic aggravating circumstance. Appellant is procedurally barred from raising this claim at this untimely juncture. Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989). (SR. 680).

As €or the merits Appellant has failed to establish any error. Appellant's argument that he was convicted under a felony murder theory is merely self serving conjecture as there was ample evidence of premeditation. Duest v. State, 462 So.2d 446, 448-449 (Fla. 1985). Furthermore the United States Supreme Court has stated that the fact that an aggravating circumstance found to support a death sentence duplicates one of the elements of the crime does not render a subsequent sentence of death unconstitutional. Lowenfield v. Phelps, 108 S.Ct. 546 (1988).

The rationale of Lowenfield, supra was first established in Proffit v. Florida, 428 U.S. 242 (1976) and Gregg v. Georgia, 428 U.S. 153 (1976). Florida's sentencing scheme has already passed Constitutional muster with regards to the task of narrowing the class of persons eligible for the death penalty. Proffit v. Florida, supra. The fact that Appellant may have been convicted under a felony murder theory does not mean that the parallel aggravating circumstance would justify the death penalty. Bertolotti v. Dugger, 3 FLW 1281 (11th Cir. August 31, 1989). Rembert v. State, 445 So.2d 337, 340-341 (Fla. 1984).

Appellee urges this Court to issue a plain statement concerning Appellant's irrevocable procedural default upon this claim so as to prevent its subsequent unjustified litigation on

the merits in a federal habeas corpus proceeding in the event of a favorable decision here. Harris v. Reed, 489 U.S. 103 L.Ed. 308 (1989).

POINT IX

APPELLANT WAS NOT DENIED THE ASSISTANCE OF A MENTAL HEALTH EXPERT.

Appellant claims to have been denied access to a mental health expert in violation of Ake v. Oklahoma, 470 U.S. 68 (1986). Following an evidentiary hearing on this claim the trial court denied relief (SR. 46-105, 680).

Initially there is no claim let alone showing that Appellant was either incompetent to stand trial or insane at the time of the crime (SR. 151, 168, 175). Consequently, the traditional application of Ake v. Oklahoma, supra is not an issue.

Secondly, Appellant did have access to a mental health expert. Dr. Ceros-Livingston spent six to eight hours with Appellant and provided a battery of tests (SR. 174). Dr. Livingston was employed by defense counsel due to his confidence in her ability (SR 174). She was instructed to explore the possibility of presenting mitigating evidence (SR. 175). Due to the damaging effect that Dr. Livingston's report would have had, defense counsel decided not to call her as witness. (SR. 155). Examples of this damaging evidence would be Appellant's homosexual tendencies, his lack of remorse for prior violent crimes he has committed, his chronic escape habits and his, inability to delay gratification as his functioning involves taking what he wants (SR. 155, 156, 175, 178).

Contrary to Appellant's contentions a criminal defendant is not entitled to assistance of choice or to assistance that is favorable to a particular defense. Ake; Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987) modified on other grounds; 833 F.2d 200 (11th Cir. 1988); James v. State, 489 So.2d 737 (Fla. 1986). The fact that Appellant introduces a psychological report seven years after the fact that may provide more favorable results does not establish his claim James.

Furthermore Dr. Fleming's report is either cumulative or is based on information deliberately withheld from Dr. Livingston and defense counsel by Appellant himself. (SR. 64, 143, 146, 147, 174, 177). The jury was made aware of Appellant's drug history and Appellant and his family members never came forward with this new information concerning Appellant's child abuse. There is simply no merit to this claim. James, supra.

POINT X

APPELLANT'S SENTENCE WAS BASED ON A CONSTITUTIONALLY OBTAINED PRIOR CONVICTION WHICH SUFFICIENTLY ESTABLISHED AN AGGRAVATING FACTOR.

Appellant claims that the trial court relies on an unconstitutional prior conviction to establish an aggravating factor. Appellant's reliance on Johnson v. Mississippi, 108 S.Ct. 1981 (1988) as the basis for this claim incorrectly characterizes this case as a change of law which would warrant habeas corpus review. Appellee strongly asserts that this claim is not based on new law and therefore should have been raised on direct appeal; Bundy v. State, 538 So.2d 445 (Fla. 1989). Eutzy v. State, 541 So.2d 1143 (Fla. 1989). Appellant did not even attempt to attack his prior conviction until four years after sentencing. (SR. 30). Sentencing occurred on April 14, 1983. This Court did not issue its opinion on direct appeal until January 10, 1985. Appellee would urge this Court to issue a plain statement concerning this valid procedural bar which will then preclude subsequent federal review. Johnson v. Mississippi, 100 L.Ed.2d at 585-586; Harris v. Reed, 489 U.S. ____, 103 L.Ed.2d 21, 308 (1989).

In any event the trial court properly denied relief for this alleged error. Although one of Petitioner's prior convictions was overturned that does not invalidate reliance on Section 921.141(5)(b) Florida Statutes (1985) as his prior conviction for armed robbery is still a valid basis for

satisfying the requirements of 3921.141 (5)(b). Dauqherty v. State, 533 So.2d 287 (Fla. 1988).

Lastly even if this aggravating factor was held to be invalid there are still three valid aggravating circumstances in conjunction with no mitigating circumstances. As such Appellant is not entitled to relief. Bundy, 538 So.2d at 447.

POINT XI

THE JURY'S VERDICT DEMONSTRATES THAT THE JURY WAS NOT MISLED AS SUCH APPELLANT CANNOT DEMONSTRATE PREJUDICE NOR WAS THIS ISSUE PRESERVED.

Appellant claims that the jury was misinformed as to the required number of notes needed for a recommendation of life. Appellant's claim is procedurally barred. The trial court properly denied this claim as this claim should have been raised on direct appeal; Blaco v. Wainwright, 507 So.2d 1377 (Fla. 1987); Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989).

Appellant's reliance on Rose v. State, 425 So.2d 521 (Fla. 1983) and Patton v. State, 467 So.2d 975 (Fla. 1985) is misplaced. In both cases the record demonstrates that the jury was dead locked at six to six in their sentencing recommendation. Contrary to Appellant's assertions otherwise, there is no such indication that the jury was ever deadlocked. The returned a recommendation by a majority note. Never was a note sent to the judge stating that they were deadlock. Appellant has failed to demonstrate any prejudice in that the jury erroneously believed a vote of seven was required for a life recommendation and that at some point the jury was in fact deadlocked at six. Harich v. State, 437 So.2d 1082 (Fla. 1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984); Maxwell v. Wainwright, supra; Henry v. Wainwright, 743 F.2d 761 (11th Cir. 1984).

Appellant's claim lacks merit both procedurally and substantively. Appellee urges this Court to make a plain

statement concerning Appellant's procedural default to avoid any subsequent federal review in the event Appellee receives a favorable decision before this Honorable Court. Harris v. Reed, 489 U.S. ____, 103 L.Ed.2d 308 (1989).

POINT XII

FLORIDA'S DEATH PENALTY IS NOT BASED ON IMPERMISSIBLE ARBITRARY AND DISCRIMINATORY FACTORS.

Appellant claims that Florida's death penalty has been imposed in an impermissible, arbitrary and discriminator manner. The trial court denied this claim on procedural grounds (SR. 680).

Appellee is well aware that this Court has stated in the past that this claim is cognizable in a motion for post conviction relief. Henry v. State, 377 So.2d 692 (Fla. 1979). However, this claim has been cognizable now for at least eleven years, well before Appellant's direct appeal. Stewart v. State, 495 So.2d 164 (Fla. 1986).

In any event the trial court's summary denial of relief was still proper as Appellant did not make a sufficient showing of discrimination. Smith v. State, 457 So.2d 1380 (Fla. 1984).

Appellant's attack upon the death penalty is based upon the study done by Profess Gross and Mauro. Appellant relies in his Motion on the Eleventh Circuit opinion in McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985). As this court is now well aware, the United States Supreme Court has decided McCleskey adversely to the Defendant, McCleskey v. Kemp, 481 U.S. 279 (1987), and conclusively refuted the Gross and Mauro study and this particular claim in its entirety. Accordingly, as this claim has already previously been ruled upon by the United States Supreme Court as well as this Court, relief should be denied. State v. Washington, 453 So.2d 389 (Fla. 1984).

POINT XIII

BOTH PROSECUTORIAL COMMENTS AND JURY INSTRUCTIONS CORRECTLY ADVISED THE JURY OF FLORIDA'S CAPITAL SENTENCING SCHEME.

Appellant claims that both prosecutorial comments and jury instructions impermissibly shifted the burden to him to prove that death was not the appropriate penalty. This claim lacks merit both procedurally and substantively. The trial court properly found this claim to be procedurally barred as it could have or should have been raised on direct appeal. Adams v. State, 543 So.2d 1244, 1247 (Fla. 1989). (SR 680).

Secondly, the alleged basis for Appellant's argument is based on Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) and Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). Decisions of an intermediate federal court are not susceptible to retroactive application under this Court's decision in Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980). Eutzy v. State, 541 So.2d 1143 (Fla. 1989). The actual basis for this claims is based on Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) which was available to Appellant at the time of trial. Presnell v. Kemp, 835 F.2d 1567 (11th Cir. 1982) and Jackson v. Dugger, supra, 837 F.2d at 1474. Appellant's characterization of this claim as one based on new law is simply without merit.

With respect to the merits, Appellant is not entitled to relief. The remarks and instructions referred to are a

correct explanation of Florida's sentencing scheme (R. 1572 lines 4-12, 1590 lines 6-19, 1626 lines 20-25, 1627 lines 1-2). Proffit v. Florida, 428 U.S. 242 (1976); Bertolotti v. Dugger, 3 FLW 1281 (11th Cir. August 31, 1989); Section 921.141(1)(2)(3) Florida Statutes (1985).

Although Appellant is not entitled to relief on the merits, Appellee urges this Court to issue a plain statement that Appellant is in irrevocable procedural default of this claim so as to prevent its subsequent unjustified litigation on the merits in a federal habeas corpus proceeding in the event of a favorable decision here. Harris v. Reed, 489 U.S. , 103 L.Ed.2d 308 (1989).

POINT XIV

THERE WERE NO IMPERMISSIBLE ANTI-SYMPATHY COMMENTS OR JURY INSTRUCTIONS GIVEN AT APPELLANT'S TRIAL.

Appellant claims that the certain prosecutorial comments and jury instructions impermissibly led the jury to believe that sympathy was not a proper consideration. This claim lacks merit procedurally and substantially. The trial court properly found this claim to be in procedural default for various reasons (SR. 681). This should have been raised on direct appeal Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989). Furthermore, this issue should have been raised in Appellant's first motion for post-conviction relief (SR. 241-450). Parker v. Dugger, 550 So.2d 459 (Fla. 1989).

The basis for this claim was first announced in Lockett v. Ohio, 438 U.S. 586 (1978) and again in California v. Brown, 479 U.S. 538 (1987), consequently Appellant cannot claim that there has been any significant change in the law which would warrant review by this Court at this untimely juncture. At the very least this claim should have been brought within two years of California v. Brown, supra which was decided in January of 1987. Adams v. State, 543 So.2d 1244 (Fla. 1989). Appellee urges this Court to issue a plain statement that Appellant is in procedural default so as to prevent subsequent unjustified litigation on the merits in a federal habeas proceeding. Harris v. Reed, 489 US. 103 L.Ed.2d 308 (1989).

As to the merits Appellant has failed to established any error. Most of the challenged statements were either prosecutorial comments or jury instructions made during the guilt phase of trial (R. **1258-1259**, **1525-1526**, **1589**). Furthermore, the prosecutor's comments made with respect to someone having cancer were made in response to Appellant's father's statement that he was upset over his daughter-in-law-'s medical condition (R. **1258**). Appellee submits that such was proper. In no way can that exchange between Appellant's father and the prosecutor be construed as an anti-sympathy instruction.

The actual relevant jury instructions given contained the following:

> The sentence that you recommend to the Court must be based upon the facts as you find them from the evidence and the law.

(R. 1628).

> Before your ballot you should carefully weight, sift and consider the evidence, and all of it, realizing that a human life is at stake . . .

During the sentencing phase, Appellant presented evidence from his family stating that he has been a good son, brother, father and husband (R. **1577**, **1582**, **1587**). Testimony was also presented concerning his good deeds in prison and his past drug problems (R. **1577-1579**).

The instructions given after Appellant presented several witnesses simply cannot be construed as informing the jury that sympathy is not to be considered. California v. Brown, **93** L.Ed.2d at **940**.

Furthermore Appellee asserts that mere sympathy not premised on the defendant's character, background or circumstances of the crime is irrelevant. Mitigating evidence must be meet the traditional test of relevancy. Lockett v. Ohio, 43 U.S. at 604 f.n. 12. Hill v. State, 515 So.2d 176 (Fla. 1987). Rogers v. State, 511 So.2d 526, 535 (Fla. 1987). Sentencing procedure should aspire towards nonarbitrary and noncapricious results. In efforts to reach this goal the United States Supreme Court reemphasized in California v. Brown, supra that arbitrariness may be limited by prohibiting reliance on "extraneous factors"' and ignore factors not presented at trial and irrelevant to issues at trial." Id. 479 U.S. at 543. See also Coleman v. Saffle, 869 F.2d 1377, 1392 (10th Cir. 1989).

The fact that the United States Court is reviewing Parks in Saffle v. Parks, 109 S.Ct. 1930 (1989) does not warrant a stay of execution as Parks deals with jury instructions and not prosecutorial comments. Furthermore, there was no actual anti-sympathy instruction given at the sentencing phase in the case sub judice as was done in Parks. Appellant has failed to establish any reason why a stay should be granted or why relief should be granted.

POINT XV

NO CONFLICT EXISTED BETWEEN A POTENTIAL STATE WITNESS AND DEFENSE COUNSEL.

Appellant claims that a conflict of interest between defense counsel and a potential state witness rendered trial counsel's performance deficient. The trial court properly found this claim to be procedurally barred as it should have been raised on direct appeal. Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987). This claim is also barred as it could have or should have been raised in his first motion for post-conviction relief (R. 241-250). Parker v. Dugger, 550 So.2d 459 (Fla. 1989); Darden v. Wainwright, 496 So.2d 136 (Fla. 1986).

As to the merits Appellee would make the following argument:

This issue can be summarily denied without an evidentiary hearing as the record clearly illustrates that Appellant is not entitled to relief. This potential witness was never called by the state. Defense counsel was prepared to withdraw from Mr. Duest's case and file a motion for a mistrial if Mr. Proia had testified. (R. 1332-1334). Although Appellant claims that he was denied access to Proia's "exculpatory" statement concerning an alleged argument between the victim and himself, he fails to acknowledge that the rest of that statement would also have been admissible, i.e., "he said that he had witnesses up in Massachusetts who would lie for him and say that he was in Massachusetts at the time of the hearing, I mean at the

time of questioning and that he said that the person was going to lie for him at an auto parts store and they have receipts saying that he bought parts on that day." Appellant correctly points out that the jury already rejected his alibi defense. Proia's statement would reinforce the jury's opinion of Appellant as a liar as the statements were inconsistent with Appellant's alibi defense. Why on earth would the jury then believe that the killing took place during an argument justifying a conviction for something less than first degree murder!

Although this claim is totally without merit, Appellee urges this Court to deny relief based on Appellant's procedural default. Harris v. Reed, 489 U.S. , 103 L.Ed.2d 308 (1989).

POINT XVI

THE STATE DID NOT WITHHOLD ANY EXCULPATORY EVIDENCE.

Appellant claims that the State withheld evidence in violation of the Constitutional principles announced in Brady v. Maryland, *373* U.S. 83 (1967). The gravamen of a true Brady claim is that the prosecution deliberately or negligently withheld evidence which had been 1) properly requested and 2) which defense counsel could not have uncovered through due negligence and 3) which was of a materially exculpatory nature to the point of creating a reasonable doubt that the outcome of the proceeding at issue would have been different. Brady; United States v. Bagley, 105 S.Ct. *3375* (1985). Information which may have helped the defense or may have affected the outcome of the trial does not establish materiality in the constitutional sense. Smith v. State, 400 So.2d 956 (Fla. 1981). Appellant has failed to meet his burden.

Appellant's first claim involves a bus ticket which would have corroborated testimony from Appellant's mother that he was in Massachusetts on April 5, 1982. After an evidentiary hearing on this matter the trial court properly denied relief. (SR 681). Even if this ticket actually belonged to Appellant, a point is not established, it simply corroborates testimony about an irrelevant fact (SR. 234). The fact that Appellant may 'have been in Massachusetts on April 5, 1982 in no way negates the evidence that Appellant was in Florida the weekend of February

13-15, 1982. At best the bus ticket corroborates an irrelevant fact. This information can hardly be considered material. Smith, supra.

Appellant also claims that the State withheld critical evidence concerning a statement made by Octavois Priao. This claim is procedurally barred as the existence of Mr. Prioa was known during trial. (R. 1332-1334). Preston v. State, 528 So.2d 896 (Fla. 1988). [As to the materiality of Mr. Priao's statement phase see Point XV]. The fact that Appellant was aware of the existence of Mr. Priao underminds any claim that even with due diligence this information could not have been discovered.

Appellant also claims that the State withheld certain statements made by Mr. O'Donnel. First of all Appellant fails to indicate under what circumstances he has now obtained this information. This information is critical in establishing any claim that due diligence would not have uncovered the alleged exculpatory information. Secondly the information is hardly material as revealed by the following trial testimony of Mr. O'Donnel:

> Q: By any chance did you happen to ever hear him be referred to by name, he being the young man in the jogging suit?
>
> A: Conversation across the bar with him talking to people, I believe I heard the name of Danny, but I mean I'm not sure.
>
> I couldn't swear to that. That name sticks out in my mind that I heard him when he was talking with the other people.

(R. 576).

Appellee fails to see how this statement differs from Appellant's alleged exculpatory evidence. Furthermore in light of Mr. O'Donnel's complete testimony when he positively identifies Appellant and the victim (R. *569, 570, 586).* Appellant has failed to merit his burden of materiality. Smith, supra.

Appellant next alleges that an unnamed witness told police that Appellant had bushy hair and described several other physical characteristics. Appellant fails to explain how he came in contact with this information now. Furthermore, this information is hardly material in light of the overwhelming evidence presented which established Appellant's presence in Fort Lauderdale with the victim. Smith, supra.

Appellant claims that the statement failed to reveal evidence that he had voluntarily come into the police for question, this allegations is totally false and belied by the record (R. *890).* Likewise Mr. DiMizio's statement offered by Appellant as exculpatory Brady material is not different from what he stated at trial:

> Was he there, in other words?
>
> A: No.
>
> Q: Did you see him later on?
>
> A: Around 3:30, maybe; a little later.
>
> Q: Are you sure about the time or are you guessing?

A: I'm not sure.

Q: And what happened when he came back? How did he get back? You saw him after you came back from your job interview? What were the circumstances?

Tell us what happened?

A: He was in a car.

Q: What kind of a car?

A: A Camaro.

Q: What color?

A: Brown.

Q: Okay. *Go* ahead.

(R. 665).

Appellant also claims that the State withheld exculpatory evidence found in Tammy Dugan's statement. Appellant fails to state when he got this new evidence. Furthermore, it is not material. The reason why Appellant cut a girl's blouse is totally irrelevant to the real issue of whether Appellant was actually there. Dugan stated Appellant was there and that is why the statement was offered. Appellant fails to establish the exculpatory nature of this "new" statement. Smith, Brady, Bagley. [See also Point 1].

Likewise various statements by Robert Harris and the first Detective have not been shown to be material. Appellant has also failed to demonstrate that even with due diligence that could not have been discovered.

None of the statements presented by Appellant can be considered Brady material. In the context of the entire record none of the statements create a reasonable doubt as to Appellant's guilt. Smith, 400 So.2d at 964. This claim is totally without merit.

POINT XVII

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO DISQUALIFY JUDGE.

Appellant alleges that the trial court erred in denying his motion to disqualify judge. The trial court properly denied relief.

Appellant's motion to disqualify judge was properly denied since it is legally in sufficient.

Florida Rules of Criminal Procedure 3.230 specifically provides in part that a motion to disqualify shall be accompanied by two or more affidavits setting forth facts relied upon to show the grounds for disqualification. Rule 3.230 also provides that the judge presiding shall examine the motion and supporting affidavits to determine their legal sufficiency. If the motion and affidavits are legally in sufficient, the motion shall be denied. Heiney v. State, 447 So.2d 210 (Fla. 1984).

The test for legal sufficiency is whether the party making the motion "has a well-grounded fear that he will not receive a fair trial at the hands of the judge" Draqovich v. State, 492 So.2d 350 (Fla. 1986); State ex. rel Brown v. Dewell, 131 Fla. 566, 179 *So.* 695 (1938). The supporting affidavits must contain facts germane to the judge's undue bias or prejudice. Dragovich, supra at 351. The Supreme Court has noted that without a showing of some actual bias or prejudice so as to create a reasonable fear that a fair trial cannot be had, affidavits supporting a motion to disqualify are legally insufficient and the motion properly denied. Id.

Appellee submits that Duest's Motion to Disqualify is legally insufficient where the motion itself does not contain factual allegations in support thereof, but rather conclusions reached by opposing counsel and should therefore be denied on that basis alone. Wyman v. Reasbeck, 426 So.2d 1112 (Fla. 4th DCA 1983). Indeed, nowhere in the motion does Duest himself ever set forth any factual basis for the motion. Nor has he filed an affidavit in support of his motion. Clearly, Duest's motion must be denied where it is legally insufficient.

Likewise, the affidavits in support of the motion are also legally insufficient. Nowhere in the affidavits is the essential allegation of "fear" in the mind of the moving party. Mank v. Henderson, 195 So.2d 574 (Fla. 4th DCA 1967); Dragovich at 353. Furthermore, the affidavits are legally insufficient where they do not contain facts germane to this Court's alleged bias and prejudice. Id. at 351. Appellee thus submits that Duest's motion should also be denied on this basis.

Appellee would further submit that the fact that this same Court; which heard the evidence at trial and presided over Duest's capital sentencing proceeding, will also be the final arbiter of the 3.850 motion is not a legally sufficient reason for disqualification. Jones v. State, 446 So.2d 1059 (Fla. 1984).

With regard to the letter written by this Court to the Florida Parole and Probation Commission Clemency Department, the State would point out that this letter was solicited by the

Clemency Department and was not a gratuitous gesture on this Court's part, as this Court is well aware. In any event the mere allegation that this letter was sent to the Parole and Probation Commission is legally insufficient and does not warrant the disqualification of this Court. In Suarez v. Dugger, 527 So.2d 190 (Fla. 1988), the Florida Supreme Court rejected this specific allegation as made by assistant capital collateral counsel, Martin McClain in his motion to disqualify in that case. Although the Florida Supreme Court ultimately held that the motion to disqualify should have been granted and not denied, its holding was based on the fact that the trial court in that case had made comments to the news media after the appellant's death warrant had been signed. Id. at 192. Significantly, the Supreme Court held that allegations regarding the trial court's comments during the trial and in a letter to the Parole and Probation Commission were without merit and not grounds for disqualification. It should also be noted that this Court specifically found that allegations that the judge was a material witness were without merit and not a basis for disqualification. Id. Thus, the allegations made by Duest through collateral counsel Martin McClain have no more merit here than they did in Suarez. Relief should be denied.

CONCLUSION

WHEREFORE, Appellee urges this Court to AFFIRM the trial court's order as all of Appellant's claims are either procedurally barred or lack merit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States mail to MARTIN J. McCLAIN, Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, FL 32301 this 10th of January, 1990.

Of Counsel