IN THE SUPREME COURT OF FLORIDA

FRANK ELIJAH SMITH,

Appellant,

v.

CASE NO. 75,450

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR WAKULLA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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IN THE SUPREME COURT OF FLORIDA

FRANK ELIJAH SMITH,

Appellant,

v. CASE NO. 75,450

STATE OF FLORIDA,

Appellee.

_____/

PRELIMINARY STATEMENT

Frank Elijah Smith was the defendant below and will be referred to herein as Smith or Appellant. The State of Florida was the prosecution below and will be referred to herein as the State or Appellee. References to the Record on Appeal will be designated by the symbol "R" followed by the appropriate page number in parentheses. References to any transcripts will be designated by the symbol "TR" followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

On the evening of December 12, 1978, Frank Smith and two codefendants robbed, kidnapped, raped and murdered Sheila Porter. The details of the crime are adequately detailed in **Smith** v. **State, 424** So.2d **726** (Fla.), **cert. denied, 462** U.S. **1145 (1983),** and **Smith** v. **Dugger, 840** F.2d **787** (11th Cir. **1988).**

Smith was tried and convicted on all four counts in August **1979.** Smith was subsequently sentenced to death in keeping with the recommendation of the advisory jury.

The sentencer found six **(6)** aggravating factors:

> **(1)** That the defendant had prior convictions for violent felonies. (Two robberies).
>
> (2) That this murder was committed in the course of an enumerated felony. (Kidnapping).
>
> **(3)** That this murder was committed to avoid arrest.
>
> **(4)** That this murder was committed for pecuniary gain.
>
> **(5)** That this murder was heinous, atrocious and cruel.
>
> **(6)** That this murder was cold, calculated and premeditated.

(R 549-551).

Only one mitigating factor, Smith's age of nineteen (19), was found. **(R 552).**

Smith took an appeal to the Florida Supreme Court, raising these issues:

> (1) The validity **of** his "amended indictment".
>
> (2) The timeliness of any amendment indictment.

(3) The admissibility of his pretrial statements.

(4) The State's use of collateral crime evidence.

(5) The admissibility of his exculpatory statements.

(6) The court's failure to instruct the jury on the "withdrawal" defense.

(7) The applicability of **Enmund** to this crime.

(8) The factual basis supporting the court's findings in aggravation.

As noted above, Smith lost his appeal and certiorari review was subsequently denied. **Smith v. State, 424 So.2d 726** (Fla.), **cert. denied, 462 U.S. 1145 (1983).**

Smith's filed a petition for collateral relief pursuant to Fla.R.Crim.P. **3.850,** in **1984,** raising these claims:

(1) A "Witherspoon" claim.

(2) Error in instructing the advisory jury in a manner that "shifted the burden of proof" to Smith.

(3) Error in permitting the State to bolster the credibility of its witness.

(4) Reargument of the "jury instruction on withdrawal" claim.

(5) Error in instructing the guilt phase jury on all lesser degrees of murder.

(6) Error in instructing the advisory jury on all statutory aggravating factors.

(7) Error in advising the jury that a "majority vote" for "death" or "life" was necessary.

(8) Instructions as to mitigation were restricted **(Eddings v. Oklahoma; Lockett v. Ohio).**

(9) Ineffective assistance of counsel.

(10) Racial bias in the imposition of capital punishment.

Relief was denied after an evidentiary hearing (on the effectiveness of counsel issue), and Smith appealed. The Florida Supreme Court found issues (1)-(8) procedurally barred, and rejected claims (9) and (10) on their lack of merit. **Smith** v. **State,** 457 So.2d 1380 (Fla. 1984).

A petition for writ of habeas corpus alleging ineffective assistance of appellate counsel was similarly denied. **Smith** v. **State, supra.**

Smith then went to federal court seeking relief pursuant to 28 U.S.C. §2254. Smith raised eighteen (18) claims:

(1) Improper admission of Smith's pretrial statements.

(2) Jury instructions allowing for a death sentence to be imposed without a finding that Smith killed or intended to kill.

(3) Refusal to instruct on the defense of withdrawal.

(4) Excusal of death-scrupled jurors.

(5) Violation of Smith's right to a jury composed of a "cross section" of the community.

(6) State "bolstering" of its witness.

(7) Incorrect application of aggravating factors.

(8) Improper rendition of instructions on lesser degrees of murder (as affecting the later penalty phase).

(9) Improper instruction on all aggravating factors.

(10) Lockett error and **Hitchcock** error.

(11) "Burden shifting" jury instructions.

(12) Improper instruction on the need for a "majority vote".

(13) Racism as a factor in sentencing.

(14) Denial of an evidentiary hearing on the racism issue.

(15) Ineffective assistance of trial counsel.

(16) Ineffective assistance of appellate counsel.

(17) Improper consideration of **ex parte** evidence by the state supreme court.

(18) Inadequate notice of amended indictment.

Relief was denied without further evidentiary proceedings, and Smith took an appeal to the Eleventh Circuit raising only six (6) issues; to wit:

(1) The denial of his jury instruction on withdrawal.

(2 The **Enmund** individual guilt issue.

(3 The admission of pretrial statements.

(4 Ineffective assistance of trial counsel.

(5) The "unreliable" nature of the sentencing proceedings.

(6) The need for an evidentiary hearing on the "race" issue.

Relief was denied, **Smith** v. **Dugger,** 840 F.2d 787 (11th Cir. 1988), **reh'g denied,** (October 5, 1989). He petitioned for certiorari on December 27, 1989. The petition is pending.

Smith subsequently filed a second motion for post-conviction relief pursuant to Fla.R.Crim.P. 3.850 in the state trial court, raising the following claims:

(1) A claim of **Booth** v. **Maryland** error.

(2) A claim of **Hitchcock** v. **Dugger** error.

(3) "Burden shifting instruction" claim.

(4) A claim of improper preclusion of the jury's use of "mercy" as a mitigating factor.

(5) A challenge to the "heinous, atrocious and cruel" aggravating factor under **Maynard** v. **Cartwright.**

(6) A renewal of his challenge to the "cold, calculated and premeditated" aggravating factor.

(7) A claim of improper argument by the prosecutor on the "mercy" issue.

(8) A claim that felony-murder creates an "automatic" aggravating factor.

(9) **Johnson v. Mississippi** issue.

(10) **Gardner v. Florida** issue.

(11) Ake **v. Oklahoma** - denial of competent mental health expert.

(12) Misleading jury instruction at penalty phase.

Oral argument was held on January 26, 1990, on the successive motion. The trial court denied all relief, finding all claims except the **Hitchcock** claim to be procedurally barred. As to the **Hitchcock** claim, the trial court found the error to be harmless beyond a reasonable doubt. The instant appeal follows.

Oral argument has been set for February 6, 1990. Smith's execution has been set for February 9, 1990, at 7:00 a.m. The warrant week commences noon, Thursday, February 8, 1990, and ends noon, Thursday, February 15, 1990.

SUMMARY OF ARGUMENT

ISSUE I: The trial court did not err in finding Claims I, II-XII, procedurally barred from consideration in this successive Rule 3.850 motion. These claims could have or should have or were previously raised in earlier pleadings. The two year time bar contained in Rule 3.850, Fla.R.Crim.P., also applied because Smith's case fell within the class of cases that require all collateral litigation be filed by January 1, 1987.

ISSUE 11: The trial court did not err in determining that the **Hitchcock** error **sub judice** was harmless error beyond a reasonable doubt. Trial counsel had previously been determined to be effective and the record conclusively reveals the prosecutor, the defense counsel and the court were not under any limitation or misimpression with regard to consideration of non-statutory mitigating evidence.

ARGUMENT

ISSUE I

THE TRIAL, COURT **DID** NOT ERR IN SUMMARILY DENYING, ON PROCEDURAL BAR GROUNDS, SMITH'S SUCCESSIVE PETITION CLAIMS I, III-XII

Frank Smith, in his successive motion for post-conviction relief, raised twelve (12) issues for review. The trial court, following a hearing on January 26, 1990, concluded that with the exception of Claim II, each claim was procedurally barred in that they either could have or should have been raised on direct appeal or the first 3.850 motion, or they were raised on direct appeal or in the first 3.850 motion or the issue was time barred because the claim could have and should have been raised pursuant to the two year dictates of Rule 3.850, Fla.R.Crim.P.

It is axiomatic that in a successive Rule 3.850 motion, limited claims may "properly" be raised. As to the eleven (11) claims hereinafter discussed, summary affirmance of the trial court's denial based on a procedural default or bar, is mandated.

CLAIM I: BOOTH V. MARYLAND, 107 S.Ct. 2529 (1987)

Frank Smith first argues that he is entitled to relief pursuant to Booth v. Maryland, 482 U.S. 496 (1987), because during various times during argument, the prosecutor referred to the victim, Sheila Porter, as an "innocent nineteen-year-old girl". The trial record demonstrates that Smith never objected to the prosecutor's referring to the victim as a nineteen-year-old innocent girl and in fact, during defense counsel's arguments, he referred to the victim as ". . . poor Sheila

Porter, an innocent victim, and there's nothing in the world I can say." (TR 2655). He also referred to Ms. Porter as a "nice teenage girl" (TR 2664), and told the jury, "I'm sure that there's some friends and family of Sheila Porter out there. I wish there was something I could say." (TR 2666). During the penalty phase, defense counsel also addressed this point when he indicated that Sheila Porter "was innocent, you know that". (TR 2750). He further expounded "whatever sympathy you have for the victim -- and I know you have some; any human being would; I do -- has no part and cannot play a part -- cannot play any part in a rational application of these facts [aggravating and mitigating circumstances] you are going to have to apply." (TR 2750). He repeated this plea to the jury when he told them "Don't let you sympathy for the victim in this case interfere with a rational decision" (TR 2751), referring to the penalty to be imposed.

The trial court, in denying relief on this claim, did so on alternative grounds. The court found that the issue was procedurally barred (Hearing, January 26, 1990, page 208), and also found:

> THE COURT: Okay. As to Point I, I'm going to dismiss Point I. I would deny the Motion to Vacate the Judgment on Point I because I believe that there was no harmful error at that point and that both defense counsel and the State mentioned things that were -- the age of the deceased, which was in evidence. It is a comment on the evidence and I find that not a point on which this matter should go any further. Okay.

Hearing, dated January 26, 1990, page 9-10.

The trial court, in a "plain statement" as to intent, found that this claim was procedurally barred. He also noted for the record that the issue was not even a **Booth** v. **Maryland** claim because references to Sheila Porter as a innocent nineteen-year-old girl, was part of the evidence presented and relied on by both the prosecution and defense counsel in reference to the victim.

The issue is procedurally barred pursuant to **Witt** v. **State,** 387 So.2d 922 (Fla. 1980), in that is was not objected to at trial, nor raised on direct appeal. The claim was not the subject matter of a Rule 3.850 motion in 1984 nor was the claim raised prior to the two year deadline applicable to Smith. See **Johnson** v. **State,** 536 So.2d 1009 (Fla. 1989), and **Bundy** v. **State,** 538 So.2d 445 (Fla. 1989).

As observed in **Grossman** v. **State,** 525 So.2d 833 (Fla. 1988), **Booth** v. **Maryland, supra,** does not constitute new law and as such an objection was required at trial. Absent such an objection, the claim is procedurally barred. See especially **Clark** v. **Dugger,** ____ So.2d ____, Case No. 74,468 (Decided February 1, 1990), ____ F.L.W. ____, Slip opinion page 2-4.

Even assuming for the moment this Court reviews the trial court's alternative holding with regard to whether there was error pursuant to **Booth** v. **Maryland, supra,** Appellee would submit that the instant assertion does not constitute **Booth** prohibited material. Sheila Porter's age and her "innocence" was part of the facts and circumstances developed at trial. As such, the reference by both the defense and the prosecution to her age and

non-complicity in this crime is certainly not a victim-impact statement nor in violation of **South Carolina** v. **Gathers,** 109 S.Ct. 2207 (1989).

This Court should find Claim I was properly found to be procedurally barred from further review in Smith's successive petition for post-conviction relief.

CLAIM 111: BURDEN SHIFTING

Smith also argues in this successive petition that his penalty phase jury was instructed wrongfully based on the standard instruction which shifted the burden of proof to Smith to prove that death was an inappropriate sentence. The trial court found this claim to be procedurally barred not only because it could have been raised in previous pleadings **but because** it was raised in Smith's first Rule 3.850 motion and found procedurally barred at that time. See **Smith** v. **State,** 457 So.2d 1380, 1381 (Fla. 1984), and **Smith** v. **Dugger,** 840 F.2d 787 (11th Cir. 1988). On a successive Rule 3.850 motion, a defendant is not committed to rearguing claims previously raised and rejected. The claim is procedurally barred from further consideration. **Parker** v. **Dugger,** 550 So.2d 459, 460 (Fla. 1989); **Harich** v. **State,** 542 So.2d 980 (Fla. 1989); **Henderson** v. **Dugger,** 522 So.2d 835, 836 (Fla. 1988); **Tompkins** v. **Dugger,** 549 So.2d 1370 (Fla. 1989); **Atkins** v. **Dugger,** 541 So.2d 1165 (Fla. 1989), and **Preston** v. **State,** 531 So.2d 154 (Fla. 1988).

CLAIM IV: IMPROPER ASSERTION OF SYMPATHY AND MERCY TOWARDS SMITH WAS AN INAPPROPRIATE CONSIDERATION

Smith argues that the trial judge's instructions to the jury that "the State and the court informed the jury that sympathy and mercy were improper factors for their consideration" was improper citing **Penry** v. **Lynaugh,** 109 S.Ct. 2934 (1989). This issue was not objected to at trial nor was it raised on direct appeal or as a claim in Smith's first Rule 3.850 motion. As such, the trial court found it to be a procedurally barred claim in this successive motion for post-conviction relief. This Court should also so find. See **Atkins** v. **Dugger,** 541 So.2d 1166, n.1 (Fla. 1989); **Bertolotti** v. **Dugger,** 883 F.2d 1503, 1525-1526 (11th Cir. 1989), and **Parker** v. **Dugger,** 550 So.2d 459, 460 (Fla. 1989).

The record reflects that neither the prosecution nor the trial court told the jury that **they could not consider** sympathy **or** mercy in deciding the sentencing issue. Defense counsel, Mr. Padovano, although urging the jury not to "let sympathy for the victim interfere" with their decision, appealed to the jury sympathy for Smith by telling them that Smith was only nineteen years old at the time of the crime and that "he'll be one of the youngest people on death row" (TR 2758).

Based on the foregoing, this claim is also procedurally barred from further consideration.

CLAIM V: H.A.C./MAYNARD v. **CARTWRIGHT,** 108 S.Ct. 1853 (1988)

Relying on **Maynard** v. **Cartwright,** 108 S.Ct. 1853 (1988), and **Adamson** v. **Ricketts,** 865 F.2d 1011 (9th Cir. 1988), Smith next

argues that the application of the aggravating circumstance of heinous, atrocious or cruel was inadequately instructed to the jury and therefore violates **Maynard** v. **Cartwright, supra.** In particular, Smith argued to the trial court and continues to argue herein that **Maynard** v. **Cartwright, supra,** constitutes new law pursuant to **Witt** v. **State,** 387 So.2d 922 (Fla. 1980). As such, "in the interests of fairness", retroactive application should be given in his case.

The Florida Supreme Court, in **Smalley** v. **State,** 546 So.2d 720 (Fla. 1989), distinguished Florida's sentencing scheme with regard to the applicability of the aggravating circumstance and found that the Florida sentencing scheme does not violate **Maynard** v. **Cartwright, supra,** nor does **Maynard** v. **Cartwright, supra,** constitute new law. This claim, in Smith's case, is procedurally barred because the basis upon which **Maynard** v. **Cartwright, supra,** was decided, in particular **Godfrey** v. **Georgia,** 446 **U.S.** 420 (1980), was available and could have been argued as the basis for further review by the Florida Supreme Court on direct appeal. The record reflects (TR 2763) that no objection was rendered with regard to the instruction as given, and although counsel raised this claim on direct appeal, the thrust of the assertion therein was that the evidence was insufficient to support said aggravating factor. **Smith** v. **State,** 424 So.2d 726, 733 (Fla. 1982). The instant claim constitutes an abuse of process in that a challenge to the correctness of the instruction given was neither objected to at trial nor raised as a basis for review on direct appeal. As such, its procedurally barred. **Atkins** v.

Dugger, 541 So.2d at 1166, n.1; **Bertolotti** v. **Dugger,** 883 F.2d 1503, 1526-1527 (11th Cir. 1989); **Lindsey** v. **Thigpen,** 875 F.2d 1509 (11th Cir. 1989). See also **Clark** v. **Dugger,** ____ **So.**2d ____, Case No. 74,468 (Decided February 1, 1990), ____ F.L.W. ____, Slip opinion page 4-5.

CLAIM VI: AGGRAVATING FACTOR OF COLD, CALCULATED AND PREMEDITATED MURDER, (A) RETROACTIVE APPLICATION AND (B) AGGRAVATING FACTOR OVERBROAD

Smith argues that he is entitled to relief because the trial jury and trial judge were allowed to consider whether the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Specifically, he points to the fact that this particular statutory aggravating factor was enacted after the crime in this case was committed but was in effect at the time of his trial. He asserts that the aggravating factor was improperly applied retroactively to his case. This claim was known to Smith since the pendency of his direct appeal and in fact was raised by Smith on direct appeal. This Court, in **Smith** v. **State,** 424 So.2d 726, at 733 (Fla. 1982), held:

> Finally, Appellant challenges the court's application of the factor that the capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. §921.141(5)(i), Fla.Stat. (1979). This statutory aggravating circumstance was added to the capital felony sentencing statute by the 1979 Legislature. Chapter 79-353, Laws of Florida. Thus, it was enacted after the commission of the offense in this case. Appellant argues that this new provision is unconstitutionally vague and invalid in that it does not require the proof of any

> additional facts not already required to establish the offense itself.
>
> We reject the contention that paragraph (5)(i) is void for vagueness. The new aggravating circumstance was enacted to limit the use of premeditation as an aggravating circumstances in cases of first degree murder. Premeditation is only to be relied upon as an aggravating factor when the capital felony was committed in a cold and calculated manner without any pretense of moral or legal justification. See Combs v. **State, 403** So.2d **418** (Fla. 1981), **cert. denied,** ____ U.S. ____, **102** S.Ct. **2258, 72** L.Ed.2d **862 (1982).** Paragraph (5)(i) may be applied to murders committed before its effective date. **Id.** We conclude that there was an ample basis for the judge to follow the jury's recommendation of a sentence of death.

Where the claim was raised on direct appeal and disposed of by the Florida Supreme Court, rearguing of said claim in a successive Rule **3.850** motion constitutes an abuse of the process. The trial court was correct in finding that this claim was procedurally barred because it was raised on direct appeal and Rule **3.850** is not a vehicle to reargue claims previously raised. Note **Eutzy** v. **State, 541** So.2d **1143** (Fla. **1989); Parker** v. **Dugger, 537** So.2d **969** (Fla. 1989), and **Justus v. State, 438** So.2d **358** (Fla. **1983).**

CLAIM VII: PROSECUTOR'S ARGUMENT DISALLOWED CONSIDERATION OF MERCY IN MAKING A SENTENCING DETERMINATION

Smith seems to reargue a claim previously raised in his Rule **3.850** motion, that being that both the prosecution and the trial court did not allow the jury to consider sympathy and mercy with regard to its deliberations as to the proper penalty to be imposed. The claim was found to be procedurally barred by the

trial court and as such should be herein denied. See **Tompkins** v. **State,** 549 So.2d 1370 (Fla. 1989); **Eutzy** v. **State,** 541 So.2d 1143 (Fla. 1989); **Parker** v. **Dugger,** 550 So.2d at 460 (Fla. ____), and **Atkins** v. **Dugger,** 541 So.2d at 1166, n.1 (Fla. 1989).

CLAIM VIII: AUTOMATIC AGGRAVATING CIRCUMSTANCE

Smith also argues that it was improper in his case that the death sentence be imposed because it rested on an automatic aggravating circumstance in that the same felony supporting the felony murder conviction was found as a statutory aggravating circumstance. This claim could have been and should have been raised on direct appeal. As such, it is procedurally barred from further consideration and the trial court was correct in so holding. **Bertolotti** v. **State,** 534 So.2d 386, 387, n.3 (Fla. 1988); **Tompkins** v. **Dugger,** 549 So.2d 1370 (Fla. 1989); note especially **Bertolotti** v. **Dugger,** 883 F.2d 1503, 1527-1528 (11th Cir. 1989), and **Lowenfield** v. **Phelps,** 484 **U.S.** 231 (1988) (no violation).

CLAIM IX: JOHNSON v. **MISSISSIPPI,** 108 S.Ct. 1981 (1988) ISSUE

The trial court found that Smith's **Johnson** v. **Mississippi,** 108 S.Ct. 1981 (1988), issue was procedurally barred. This claim was a known claim and could have been raised at every point previous to the instant litigation. Certainly, it could have been the subject matter of his first Rule 3.850 motion. Pursuant to **Bundy** v. **State,** 538 So.2d 445, 447 (Fla. 1989), and **Eutzy** v. **State,** 541 So.2d 1143, 1145 (Fla. 1989), this issue is

procedurally barred. (The underlying convictions are still valid albeit under challenge).

CLAIM X: **GARDNER** v. **FLORIDA,** 430 U.S. 349 (1977) ISSUE

Smith also argues that the sentencing judge wrongfully considered evidence introduced in his codefendant's trial when imposing the death penalty and this rendered the entire sentencing process "patently unfair and plainly unconstitutional" under **Gardner** v. **Florida,** 430 U.S. 349 (1977). This issue is not something new since **Gardner** v. **Florida, supra,** was around long before Smith's trial and the "wrongdoing" could have been objected to at trial and raised on direct appeal. As such, the claim is procedurally barred and as such, constitutes an abuse of the process in that a **Gardner** claim was known and available at the time of trial and could have been raised. See **Suarez** v. **Dugger,** 527 So.2d 190 (Fla. 1988), and **Eutzy** v. **State,** 541 So.2d 1143 (Fla. 1989). Moreover, Smith's **Gardner** claim is suspect since no specifics as to what was unknown or non-rebutted has been set forth during all this time.

CLAIM XI: COMPETENCY OF MENTAL HEALTH EXPERTS PURSUANT TO **AKE v. OKLAHOMA,** 470 U.S. 68 (1985)

Smith contends that his constitutional rights were violated because the mental health experts retained by Phil Padovano to assist him in preparing a defense "failed to conduct a professionally appropriate evaluation" and therefore cause Mr. Padovano to render ineffective assistance of counsel, citing **Ake** v. **Oklahoma,** 470 **U.S.** 68 (1985). The trial court found this

claim to be procedurally barred on two grounds. First, Smith cannot use this issue as an excuse to reargue or reassert ineffective assistance of counsel in his successive motion for post-conviction relief. See **Tafero** v. **Dugger,** 520 So.2d 287 (Fla. 1988). Note **Smith** v. **State,** 457 So.2d 1380 (Fla. 1984) (effectiveness of counsel claim reviewed and rejected). The trial court also found that the independent claim that the mental health expert employed rendered deficient performance is also procedurally barred because it was a claim that could have been raised in the first motion for post-conviction relief by present counsel but was not. **Eutzy** v. **State,** 541 So.2d 1143 (Fla. 1989). Moreover, even assuming that in 1984, collateral counsel, Mr. Nolas, could not have fashioned this claim because **Ake** v. **Oklahoma, supra,** had not been decided, the claim is also procedurally barred pursuant to **Johnson** v. **State, supra,** because it was not raised prior to January 1, 1987. See **Bundy** v. **State,** 538 So.2d 445 (Fla. 1989). The instant case is procedurally barred and this Court should so find.

CLAIM XII: INCORRECT INSTRUCTIONS REGARDING WHETHER THE JURY WAS MISLED WHEN IT WAS INSTRUCTED THAT SEVEN OR MORE OF THE MEMBERS HAD TO AGREE ON A RECOMMENDATION OF LIFE BEFORE LIFE COULD BE IMPOSED AND THAT A MAJORITY VOTE WAS REQUIRED ONLY FOR A DEATH RECOMMENDATION

The record reflects that Smith raised the majority vote issue in his Rule 3.850 motion filed in 1984. The court at that time found pursuant to **Booker** v. **State,** 441 So.2d 148 (Fla. 1983), that the claim was procedurally barred in that it could have been raised on direct appeal. Reraising it in a successive

3.850 motion constitutes an abuse of the process sub judice. With regard to an incorrect instruction that the jury by seven or more of its members had to agree on a recommendation of life, pursuant to Rose V. State, 425 So.2d 521 (Fla. 1983), that claim also could have been raised in Smith's first Rule 3.850 motion. As such, it is equally procedurally barred from further consideration.

None of the foregoing claims fall within the exceptions noted in Witt V. State, supra, and as such, the trial court was correct in finding each (individually) to be procedurally barred. Smith cannot overcome said bar. This Court should affirm the denial of all relief based on procedural bar grounds as well as finding that this successive Rule 3.850 motion constitutes an abuse of process as to all claims other than Claim 11, the Hitchcock claim.

ISSUE II

THE TRIAL COURT DID NOT ERR IN FINDING SMITH'S HITCHCOCK V. DUGGER, 481 U.S. 393 (1987) CLAIM HARMLESS ERROR BEYOND A REASONABLE DOUBT

In Claim II of Smith's successive motion for post-conviction relief he raised his Hitchcock V. Dugger, 481 U.S. 393 (1987), claim. Specifically, he contends that the trial judge and the capital sentencing jury were led to believe that they could not consider non-statutory mitigating circumstances in reaching their respective judgments as to the appropriate sentence to be imposed. The trial court, in its order denying relief January 30, 1990, found Smith's Hitchcock claim properly before the court

but concluded that the error was harmless error beyond any reasonable doubt, citing **Clark v. Dugger,** 834 F.2d 1561 (11th Cir. 1987); **Clark v. State,** 533 So.2d 1146 (Fla. 1988); **Tafero v. Dugger,** 873 F.2d 249 (11th Cir. 1989), and **Tafero v. Dugger,** 520 So.2d 1081 (Fla. 1988). The court opined:

> . . . In determining the mere utilization of the incorrect standard jury instruction was harmless error in this case, the court considers it relevant that the prosecutor in this case did not argue to the jury that it was limited to the mitigating circumstances enumerated in §921.141, Fla.Stat. -- indeed, he informed them to the contrary -- and the record affirmatively demonstrated the trial judge was aware that he was required to consider non-enumerated mitigating circumstances by virtue of the State's sentencing memorandum, see **Booker v. Dugger,** 520 So.2d 246 (Fla. 1988), and counsel's argument on defendant's motion to dismiss. This is deemed relevant because in **Hitchcock,** the prosecutor apparently told the jury it could not consider mitigating factors outside those enumerated in the statute and the record in **Hitchcock** made it clear that the sentencing judge refused to consider the evidence pertaining to Hitchcock's character and childhood background which had been introduced by his attorney.
>
> In the instant case, as noted previously, Mr. Padovano did not introduce non-enumerated mitigating evidence for strategic reasons. That has been judicially determined in previous proceedings after a full and fair evidentiary hearing where Mr. Padovano testified extensively on this issue, and this record provides he was aware that he could introduce all relevant evidence under **Lockett** and **Songer.**
>
> It is clear from the prior proceedings that Mr. Padovano didn't fail to present the non-enumerated mitigating evidence because he was unaware of that evidence for he clearly was aware of that evidence. **Smith v. Dugger, supra,** at 795. The record also conclusively shows that he didn't abstain from presenting character evidence because of his

misunderstanding of the status of the law but because that was not his defense strategy. At the evidentiary hearing, Mr. Padovano testified his decision not to present the evidence in question in the following manner:

> [Smith's] degree of participation and his degree of responsibility was both a defense to the case and a reason to mitigate the penalty . . . I couldn't go into court and argue for four days that this man tried to withdraw from the felony; that he didn't want to do it; that he tried to stop Johnny Copeland. And then when the jury found him guilty, go up to the jury and say: Well, he did it, but he was a little sick. You can't do that. You can't have any credibility doing that kind of thing.

This is further supported by the previous ruling of this Court on the first motion to vacate that Mr. Padovano did not call character witnesses to testify at the penalty phase because he felt it could have been harmful rather than helpful and for that reason it was considered strategic judgment.

The Court concludes that light of the foregoing that the alleged **Hitchcock** error is harmless beyond a reasonable doubt under **Clark** v. **Dugger,** and **Clark v. State, supra.**

Order, dated January 30, 1990, pages 8 and 9.

The court, in relating this case to **Clark** v. **Dugger,** found the instant case to be very similar to the factual scenario set forth in **Clark.** Specifically:

> While it was improper for the prosecutor and trial judge to tell the jury that it could consider only statutory mitigating circumstances, we conclude that the error could not have affected Clark's sentence and thus was harmless beyond a reasonable doubt. In **Hitchcock,** the defendant had introduced evidence supporting the existence of several non-statutory mitigating circumstances. 107 S.Ct. at 1823-24. The supreme court concluded that this evidence had not been

> considered and that the defendant's death sentence was therefore invalid. Id., at 1824. Here, however, there simply were no non-statutory mitigating circumstances to consider. Clark did not introduce any evidence that would support the existence of a non-statutory mitigating circumstance. As explained, **supra,** Clark's counsel, after her investigation, made a tactical decision that any testimony at the penalty phase could only prove harmful. Thus, Clark failed to introduce any mitigating evidence whatever. Clark nonetheless argues that the trial court's instructions prevented the jury from considering mercy, its doubts about Clark's guilt and Clark's acts of kindness towards his codefendant. Even if these were relevant mitigating factors, a doubtful proposition, there is no indication that Clark attempted to raise them during the penalty phase. Having failed to produce evidence of any non-statutory mitigating factors, Clark can hardly explain that the trial court restricted the jury's ability to consider them. We therefore conclude that any **Hitchcock** error was harmless under **Chapman** v. **California,** 386 **U.S.** 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

Clark v. Dugger, 834 F.2d at 1569-70.

Judge McClure also observed:

> This court concludes that even if the alleged mitigating evidence had been introduced there is no reasonable probability the jury would have reached a different result given the aggravating circumstances which were proven beyond a reasonable doubt and the enormity of the crime committed by the defendant and the codefendant Copeland. Judge Cooksey, the original sentencing judge, in his order denying defendant's 1984 motion to vacate, affirmatively stated that "even if the court had been presented all of this alleged mitigating evidence now being offered by the defendant, it would in no way have altered my decision to impose the death penalty . . ." (Order at page 10-11). Therefore, the error is harmless beyond a reasonable doubt under **Tafero** v. **Dugger, supra. Booker v. State,** 520 So.2d 246 (Fla. 1989).

Order, dated January 30, 1990, page 11.

In **Heiney v. Dugger,** ____ So. 2d ____, Case No. 74,099 (Decided February 1, 1990), ____ F.L.W. ____, the Florida Supreme Court found therein **Hitchcock** error to be harmless. The court noted:

> The record reflects that the trial court in this case gave virtually the same jury instruction on the aggravating and mitigating that was given in **Hitchcock v. Dugger,** 481 U.S. 393 (1987). The **Hitchcock** court determined that this instruction was constitutionally defective because it failed to apprise the jury that it could consider any relevant mitigating evidence that did fall within the scope of seven "statutory mitigating factors" contained in 8921.141, Fla.Stat. (1975). **Hitchcock,** 481 U.S. at 395-96. The **Hitchcock** court further noted that the trial judge himself had restricted his consideration to these seven factors alone. **Id.,** at 398.
>
> In the present case, similar misstatements were made in the penalty phase. The trial judge instructed the jury that "the mitigating circumstances which you may consider, if established by the evidence, are these: [listing only the seven statutory mitigating factors]". Then, in his written sentencing order, the trial court made the following analysis:
>
> > The court has carefully reviewed **those seven mitigating circumstances contained in Fla.Stat. 921.141(6)(a)-(g).** Based on the court's consideration of these mitigating factors, the court specifically finds as to each: [listing and analyzing only the seven statutory mitigating factors].
>
> (emphasis added). The trial court then found that none of these mitigating factors were present. Under the rationale of **Hitchcock,** it is clear that error was committed. Pursuant to **Hitchcock,** we must now determine whether the error was harmless.

> Because of the life recommendation of the jury, it is obvious that the error was harmless. **Zeigler v. Dugger,** 524 So.2d 419, 420 (Fla. 1988). Moreover, even assuming that the trial judge was not aware that he could consider non-statutory mitigating circumstances, we cannot see how this misunderstanding affected his imposition of the death sentence. Indeed, the only non-statutory mitigating evidence in this record is that (1) Heiney sometimes used alcohol, (2) he was courteous when arrested and cooperative with the police, (3) he did not fight extradition, and (4) he had not been violent in the past until he shot a man in Texas two days before the subject murder. The fact that the man Heiney killed became violent when he was drunk cannot be deemed a mitigating circumstance, and the evidence said to indicate remorse consistent with the fact that Heiney hugged his Texas victim after he shot him and helped him to an automobile to be taken to the hospital. The **Hitchcock** error involved in this case was harmless beyond a reasonable doubt. **Tafero v. Dugger, 520** So.2d 287 (Fla. 1988).

Slip opinion, page 3-5.

The **Heiney** decision is important because the court then went on to reverse and remand back to the trial court for further evidentiary consideration as to Heiney's ineffective assistance of counsel claim at sentencing. Specifically, the court noted that in view of the allegations, Heiney's claim of ineffectiveness of counsel during the sentencing phase for not presenting other non-statutory mitigating evidence required evidentiary development. Note: Chapter 79-353 (Smith's trial held several months after effective date and change per **Lockett** of statute).

In comparing Heiney's case to the instant case, a harmless error analysis mandates a finding that the **Hitchcock** error sub **judice** was harmless error beyond a reasonable doubt. In the

instant case, in 1984, Phil Padovano, defense counsel, was challenged as rendering ineffective assistance for failing to develop mitigating evidence. Specifically, in Claim VIII, starting at page 66-81, Smith asserted in his first Rule 3.850 motion that the now known to be a **Hitchcock** issue:

> . . . limited consideration of mitigating circumstances to those specifically enumerated in the Florida capital sentencing statute. See Fla.Stat. §921.141(6). It thereby violated Mr. Smith's Eighth Amendment rights under **Eddings** v. **Oklahoma,** 455 **U.S.** 1094 (1982), since it precluded consideration of non-statutory mitigating evidence. See also, **Goodwin** v. **Balkcom,** 684 F.2d 794 (11th Cir. 1982).
>
> The trial court's instructions on mitigating circumstances, in their entirety, fail to guide the jury's discretion respecting the application and use of mitigating circumstances. Similarly, the trial court limited itself to those circumstances enumerated in Fla.Stat. §921.141(6). (R 552). It thereby failed to consider non-statutory mitigating circumstances in violation of **Eddings, supra.**
>
> Sufficient mitigating circumstances were raised during the trial: Mr. Smith's status as an accomplice who did not actually kill Sheila Porter (R 2318-19, 2273), Mr. Smith's withdrawal from the offense before Sheila Porter was killed (R 2266-2268, 2273, 2314, 2318-19), Mr. Smith's diminished capacity due to the consumption of alcohol at the time of the offense (R 2255, 2761), Mr. Smith's lack of intent to kill (R 2266-68, 2272-73, 2314), and Mr. Smith's age (R 552). See also statement of facts respecting the August 27th trial, **supra,** of these, the trial court considered only one -- age (R 552).
>
> The trial court's findings failed to mention any consideration of non-statutory mitigating circumstances (R 552-3). Neither did the court's instructions identify such circumstances where the jury or indicate to the jury that non-statutory mitigating circumstances could be considered (R 2767).

> Thus, both the trial court and the jury were limited in the exercise of their discretion at sentencing.

First Motion for Post-Conviction Relief, page 66-67.

In the original 3.850 motion, Smith, through his current counsel, Mr. Nolas, presented summaries of potential witnesses who could have been called by Phil Padovano to present non-statutory mitigating evidence. At that point, Smith challenges the effectiveness of Phil Padovano with regard to the penalty phase as follows:

> . . . Finally, the evidence would have corroborated and enhanced mitigating circumstances of withdrawal and lack of intent to kill. The information counsel failed to discover, prepare and present would have rebutted Fla.Stat. §921.141(5)(b), (d), (e), (f), (h) and (i) aggravating circumstances. It also would have presented sufficient evidence of the Fla.Stat. §921.141(6 (b), (d), (e) and (f) statutory mitigating circumstances and would have heightened the emphasis placed on the 921.141(a) mitigating circumstance in sentencing deliberations. **Most importantly, this evidence presents a wealth of non-statutory mitigating factors which were not presented at sentencing. This evidence demonstrates that Frank Smith was not an individual for whom a sentence of death was appropriate.**

Motion for Post-Conviction Relief, page 77-78. (Emphasis added).

The aforenoted is just an example of the accusations made against Phil Padovano with regard to his failure to present witnesses who would have come forth with "other mitigating evidence". Pursuant to said allegations, an evidentiary hearing was held October 9, 1984, at which time Phil Padovano took the stand as a court witness and testified with regard to his strategy and handling of both the guilt and penalty phase of

Smith's trial. During the course of his testimony, he was asked whether he felt restricted with regard to the presentation of non-statutory mitigating evidence and replied:

> Because at the time, we were operating under a court decision in Florida which said that you had to stick to statutory mitigating circumstances. Since then -- and withdrawal was not one of them.
>
> Since then, the United States Supreme Court has held that that's unconstitutional. Then the Supreme Court of Florida wrote an opinion which said: Well, that's not what we really said anyway. But at the time I was following a law that was in existence then. I wasn't going to present another -- I guess I could have done it and had Judge Cooksey tell me: No, that's the law. You can't do it.''

Hearing, dated October 9, 1984, page 83-84.

While Phil Padovano was able to recall his strategy and tactics for calling and not calling certain witnesses, the record bears out that Phil Padovano's memory in 1984 was flawed as to what he actually knew or did at Smith's trial in 1979. The trial record from 1979 reflects that not only did Phil Padovano understand and "not feel limited'' by what non-statutory mitigating evidence he may present but he argued same and informed the trial court of the recent decision in **Songer** v. **State,** 365 So.2d 696 (Fla. 1978), pretrial.

On January 31, 1979, approximately seven months prior to trial, Phil Padovano filed a motion to dismiss asserting that pursuant to **Lockett** v. Ohio, 438 U.S. 586 (1978), the "failure to allow the presentation of non-statutory mitigating evidence renders the death penalty unconstitutional." (R 44). During the course of the hearing held on the motions held February 21, 1979,

approximately six months prior to trial, Phil Padovano presented an argument acknowledging the issuance of **Songer** v. **State, supra,** and proceeded forth with an assertion that Florida's death penalty statute was unconstitutional because it restricted the consideration of non-statutory mitigating evidence notwithstanding **Songer.** Mr. Padovano observed:

> Unfortunately for my argument, Your Honor, I will tell you this is all candor, the Florida Supreme Court ruled about two weeks ago in the case of **Sanger** v. **State,** [sic] that they really didn't say that in the previous case of **State** v. **Cooper,** and that the Florida Statutes doesn't preclude consideration of non-statutory mitigating circumstances. *So* again I would submit that argument. I want to let you know what it is but, I also want to let you know in all candor that several weeks ago the supreme court ruled against our position on that argument.

(R 137-138).

At the 1984 evidentiary hearing, Phil Padovano testified that he had a strategy at trial that he believed was valid at the penalty phase and likely to result in a life recommendation. Throughout trial, Padovano had asserted Smith did not kill Sheila Porter. In fact, he argued Smith withdrew from any criminal endeavour after the underlying felonies were committed. Padovano stated that his strategy was solidified when, before the jury rendered a verdict as to guilt, they returned and asked the question as to whether Smith had to personally pull the trigger (TR 39-40, October 9, 1984, hearing).

Padovano also secured the services of a Dr. Wallace Kennedy, a psychologist who examined Smith and returned with a report that Smith was a "secondary psychopath." Padovano indicated that he

thought about using Kennedy but after the explanation and his report, believed Kennedy would be more harmful than good as a witness. (TR 45-46, 102, October 9, 1984, hearing). With regard to calling other witnesses in behalf of Frank Smith, Padovano indicated that he talked with other family members and didn't feel that Smith's background, which was deprived and poor, would have mattered based on his strategy to go for at the penalty phase with a withdrawal defense (TR 44, 62, 64, 78, 95, 98, 103). In sum, Phil Padovano indicated that the jury question impacted on his decision whether to call witnesses at trial and "that if he thought it would have been helpful he would have done it." (TR 65, October 9, 1984, hearing).

The trial court as well as the Florida Supreme Court, in **Smith** v. **State,** 457 So.2d 1380 (Fla. 1984), found Phil Padovano's representation of Smith to fall within the standard set forth in the **Strickland** v. **Washington,** 466 **U.S.** 668 (1984). The Eleventh Circuit, in **Smith** v. **Dugger,** 840 F.2d 797 (11th Cir. 1988), moreover, found:

> The strategic decision made by Padovano in this case is precisely the sort of decision which should not be second-guessed by a court reviewing an ineffectiveness claim. **Tafero** v. **Wainwright,** 796 F.2d **1314,** 1320 (11th Cir. 1986), **cert. denied,** ____ U.S. ____, 107 S.Ct. 3277, 97 L.Ed.2d 782 (1987). As to Smith's charge that Padovano misapprehended the law as it pertained to the presentation of non-statutory mitigating factors, it is clear that Padovano's investigation went far beyond statutory mitigating factors, indicating his awareness of **Lockett** v. **Ohio,** 438 **U.S.** 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). See **Clark** v. **Dugger,** 834 F.2d 1561

(11th Cir. 1987). Padovano was not constitutionally ineffective in his handling of potential mitigating evidence during Smith's sentencing hearing.

840 F.2d at 795-796.

While the issue before the court on appeal and before the trial court on the successive 3.850 was whether there was a **Hitchcock** issue, it is important to put this case in perspective and to understand that the **Lockett** issue, which is the underpinnings for **Hitchcock,** was the basis for attacking Phil Padovano's representation.

In 1987, when the United States Supreme Court decided **Hitchcock** v. **Dugger,** supra, Smith's **Lockett** claim had long been over with and found to be wanting. The only thing left at this point was the impact the **Hitchcock** instructions had and whether said error was harmless error beyond a reasonable doubt.

Necessarily in finding Phil Padovano made tactical decisions in the presentation of mitigating evidence at the penalty phase of the 1979 trial, and finding no prejudice under **Strickland** v. **Washington,** supra, the harmless error analysis regarding **Hitchcock** is made much simpler. Clearly, the prosecution, at the 1979 trial, did not feel restricted (he provided the memorandum of law regarding **Hitchcock);** Padovano (contrary to his recent affidavit) did not believe he was restricted for he raised a **Lockett/Songer** claim pretrial; and the trial court, who had the benefit of both defense counsel and the prosecution's argument with regard to **Lockett,** did not feel restricted but rather, weighed the statutory aggravating circumstances against the mitigation presented (Smith's age). The error in this case only

became error when the United States Supreme Court, in 1987, decided it was so. Prior to that occasion, while the claim was percolating in the waters of litigation, collateral counsel, in 1984, complained about the limitations on the instructions and Phil Padovano's representation, but he did not connect the two. Smith's argument in 1984 (although the working tools were there), **was not** that Phil Padovano rendered ineffective assistance because he was restricted by the jury instructions rather, he accused Phil Padovano of being ineffective for **failing to develop non-statutory mitigating evidence.** The best evidence of this is the fact that the very affidavits attached to the current Rule 3.850 motion for the most part are the affidavits prepared and attached to the 1984 motion for post-conviction relief.

This court, on a number of occasions, has found that **Hitchcock** error can be harmless error. In the instant case, the trial court, after hearing argument of counsel, so found. That decision was bottomed on the record before the court and the testimony presented in 1984 by Phil Padovano as to his strategy and purpose in handling the case as he did. Although Phil Padovano testified at the 1984 hearing that he believed the law restricted him, said belief was a product of a faulty memory rather than actuality. Based on the fact that Phil Padovano presented no mitigating evidence at the penalty phase but rather, relied on "lingering doubt" that the jury would not return death against Smith because he might not have been the triggerman, see **Funchess v. Wainwright,** 772 F.2d 683, 689-690 (11th Cir. 1985) (valid strategy to not present evidence after investigation).

Funchess v. Wainwright, 788 F.2d 1443 (11th Cir. 1986), and based on the overwhelming evidence of guilt, the **Hitchcock** error is harmless beyond a reasonable doubt. See **Clark** v. **State,** 533 So.2d 1144 (Fla. 1989); **DeLap v. State,** 513 So.2d 659 (Fla. 1987); **Demps** v. **State,** 514 So.2d 1092 (Fla. 1987); **Alvord v. Dugger,** 541 So.2d 598 (Fla. 1989); **Ford v. State,** 522 So.2d 345 (Fla. 1988); **White v. State,** 523 So.2d 1040 (Fla. 1988); **Tafero v. State,** 520 So.2d 287 (Fla. 1988); **Smith** v. **Dugger,** 529 So.2d 679 (Fla. 1988); **Booker v. State,** 520 So.2d 246 (Fla. 1988), and **Heiney v. Dugger,** ____ **So.**2d ____**,** Case No. 74,099 (Decided February 1, 1990), ____ F.L.W. ____

In **Tafero v. Dugger,** 873 F.2d 249 (11th Cir. 1989), the court held **Hitchcock** to be harmless error because counsel for Tafero for strategic reasons did not present any evidence of non-statutory mitigating circumstances. The courts noted:

> **. . .** The district court held that the trial court committed error by failing to instruct the jury to consider, and by failing to consider, mitigating factors beyond those listed in Fla.Stat.Ann. 921.141(6) (West, 1985). **Tafero v. Dugger,** 681 F.Supp. 1535. See **Hitchcock,** 481 U.S. at 398-99, 107 S.Ct. at 1824-25 (sentencer must consider all relevant mitigating evidence) (citing **Lockett).** The district court, however, found the error harmless beyond a reasonable doubt when it weighed Tafero's alleged mitigating factors against the case's aggravating circumstances. Contrary to Tafero's contention, **Hitchcock** error can be harmless. **Clark v. Dugger,** (cite omitted). We agree with the district court that "[t]he mitigating circumstances in no manner ameliorate the enormity of Tafero's guilt." **Tafero v. Dugger,** 681 F.Supp. at 1536. We upheld as much before. **Tafero** v. **Wainwright,** 796 F.2d at 1320 ("because Tafero presented weak mitigating evidence and because of the overwhelming evidence of the aggravating

> circumstances surrounding the murders, we are convinced that no reasonable probability existed that the jury would have reached a different result had Tafero's counsel presented the mitigating evidence which was available, or had he presented a stronger closing argument.

Tafero v. Dugger, 873 F.2d at 252.

In **Tafero,** the court, in footnote 4, indicated that the mitigating evidence Tafero asserted should have been considered by the jury but was not because of the erroneous instructions.

> On appeal, Tafero discusses three non-statutory mitigating factors that the sentencing judge and jury should have considered: First, Tafero argues that evidence existed creating doubt about whether he shot the victims; second, Tafero argues that the jury may have had "residual doubts" about his guilt; and third, Tafero argues that the State gave disparate treatment to a codefendant who received a life sentence. The district court weighed these factors and a fourth factor (Tafero's parenthood) against the following aggravating circumstances: First, Tafero committed the murders while on parole; second, Tafero possessed a history of criminal activity that involved the use or threat of violence; third, Tafero committed the murders in an attempt to avoid a lawful arrest; and fourth, Tafero committed the murders to hinder law enforcement. **Tafero** v. **Dugger,** 681 F.Supp. at 1535-36. See **Tafero** v. **State, 403** So.2d 355, at 359 (Fla. 1981) (Florida Supreme Court affirmed finding that Tafero shot victims). The factors presented by Tafero contain little mitigating value. We agree with the district court that any **Hitchcock** error was harmless in light of the overwhelming aggravating circumstances involved in and evidence in support of, Tafero's conviction.

Tafero v. Dugger, 873 F.2d at 252.

In the instant case, the mitigating circumstances alluded to by Smith cannot in any manner ameliorate the enormity of his crime and the overwhelming evidence surrounding the murder of

Sheila Porter. There is no reasonable probability the jury would have reached a different result had the jury been explicitly instructed by the jury that it could consider any mitigating circumstances it deemed relevant. The record reflects that Phil Padovano argued to the jury in the penalty phase that the defendant did not personally kill Sheila Porter (TR 2749); that the defendant was fifteen years old when he committed his prior robberies (TR 2754); that he was only nineteen years old when the instant crime was committed (TR 2758); that he had been drinking and smoking pot at the time which impaired his ability to conform his conduct to the requirements of law (TR 2760-2761); that although Frank Smith committed the robbery and kidnapping and rape, he was a minor participant in the murder (TR 2760); and he further argued:

> Now, the final one that applies -- well this mitigating factor, that the defendant acted under the extreme duress or under the substantial domination of another person, could apply. I dispute Mr. McGee's analysis that it could not possibly apply. You consider the evidence.
>
> Now, I don't know whether they're talking in there about duress. I doubt that it's the kind of thing that -- that -- I doubt that is that strong. But I don't forcefully argue that mitigating circumstance. I **leave it to your consideration. Let me just say that I won't totally rule it out.**
>
> The next one is the capacity of the defendant to appreciate the criminality of his conduct and to conform his conduct to the requirements of law was substantially impaired. Well, **this is another one of that sort of comes in, I** think, **a marginal -- in a marginal respect. I** won't sit here and say that it's absolutely applies.

> **But, there was some testimony, and it conflicted, that they had quite a bit to drink the night that this occurred;** some testimony concerning some smoking of marijuana. Now, I don't know to what extent you consider that. Probably in -- probably with regard to the substantive defense you didn't consider it at all.
>
> **But it may have a bearing on the question of ultimate responsibility. A** person who is a cold-blooded murderer, who does that for deliberate gain, the hit man who gets paid to kill somebody, is certainly not -- when you're talking about the death penalty, it's certainly not in the same class as a delinquent youth who gets drunk and robs a store. I'm not saying that's right.
>
> But what I am saying is that when you're talking about the death penalty, you can't classify those people the same way. So what we have are the application of at least one known aggravating factor. **But I submit to you the mitigating factors, applied to this case, far outweigh the aggravating factors, both numerically and both from the standpoint of the qualitative application of those factors.**

(TR 2760-2761). (Emphasis added).

Clearly from the tone of the closing arguments presented while "within the outline" of the statutory mitigating, Phil Padovano **intended** those jurors to consider the minuteness of evidence in relationship to those mitigating factors. As Judge Cooksey stated in his order denying relief in 1984:

> . . . Even if the court had been presented all of this alleged mitigating evidence now being offered by the defendant, it would have in no way altered my decision to impose the death penalty . . .

Order, at page 10 and 11.

Based on the foregoing, Appellee would urge this Court to concur with the trial court and conclude that the **Hitchcock** error in this case is harmless error beyond a reasonable doubt.

CONCLUSION

Based on the foregoing, the State would urge this Court to affirm the denial of Smith's second motion for post-conviction relief finding Claims I, 111-XI1 procedurally barred and Claim 11, the **Hitchcock** claim to be harmless error beyond a reasonable doubt.

Respectfully submitted,

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(904) 488-0600

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Mr. Billy H. Nolas, Esq., Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 2nd day of February, 1990.

CAROLYN M. SNURKOWSKI
Assistant Attorney General