IN THE SUPREME COURT OF FLORIDA

DAVIDSON JOEL JAMES,

Appellant,

v. Case No. 78,161

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

In his second, successive Rule **3.850** motion below, appellant James raised the following nine issues (R **1 - 34):**

I. The trial court erred by failing to consider nonstatutory mitigating circumstance in violation of the Sixth, Eighth and Fourteenth Amendments.

11. It was improper for the state to urge and for the jury and court to consider matters concerning "victim impact" as a basis for the imposition of a death sentence, as such evidence and arguments resulted in the sentencers' unbridled consideration of unconstitutional factors, facts not in evidence, and irrelevant and inflammatory factors in violation of the Sixth, Eighth and Fourteenth Amendments.

111. Mr. James' sentence of death resting on the "Heinous, Atrocious and Cruel" aggravating factor is in direct and irreconcilable conflict with and contrary to Maynard v. Cartwright, 108 S.Ct. **1853 (1988),** in conflict with Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. **1988)** (en banc) and violates the Eighth and Fourteenth Amendments.

IV. The cold, calculated and premeditated aggravating circumstance was applied to Mr. James' case in violation of the Eighth and Fourteenth Amendments.

V. Prosecutorial Argument, Penalty Phase Jury Instructions and the trial court's sentencing process shifted the burden to Mr. James to prove that death was inappropriate in violation of Mullaney v. Wilbur, 421 U.S. 684 (1975) and Mills v. Maryland,

108 S.Ct. 1860 (1988) and the Fifth, Sixth, Eighth , and Fourteenth Amendments.

VI. Mr. James' death sentence rests upon an unconstitutional automatic aggravating circumstance in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

VII. During the course of Mr. James' trial, the prosecution and the court improperly asserted that sympathy towards Mr. James was an improper consideration in violation of the Eighth and Fourteenth Amendments. Counsel's failure to litigate this claim deprived Mr. James of his right to the effective assistance of counsel.

VIII. Prosecutorial argument and insufficient jury instructions concerning the jury's ability to exercise mercy deprived Mr. James of a reliable and individualized capital sentencing determination, in violation of the Eighth and Fourteenth Amendments.

IX. The jury was misled and incorrectly informed about its function at capital sentencing in violation of the Eighth and Fourteenth Amendments.

A listing of the issues raised on appellant James' direct appeal and in his prior Rule 3.850 motion to vacate can be found in the state's response to motion to vacate at R 47 - 51 of the instant record and rather than repeat them here appellee will simply incorporate them by reference.[1]

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[1] In this appeal, appellee will use they symbol "R" and the page number to refer to the instant record on appeal and the symbol

STATEMENT OF THE CASE AND FACTS

Appellee will adopt the facts as recounted in this Honorable Court's opinion on James' direct appeal. James v. State, 453 So.2d 786 (Fla. 1984):

> A grand jury indicted James for the first degree premeditated murder of Dorothy Satey, the attempted first-degree murder of her husband, Felix Satey, and the armed robbery of Mr. Satey. At trial the jury convicted James on all counts as charged and recommended the death penalty. The court sentenced James to death for the murder and to consecutive life sentences for the other crimes.
>
> The crimes occurred on October 30, 1981 when Larry Clark and James entered a sign shop owned and operated by the Sateys. After Clark shot Satey twice and robbed him, he and James entered the office/residential portion of the premises. Satey pleaded with them not to harm his wife who was incapacitated due to a physical disability, but then heard a gunshot followed by his wife's moaning. She died from a single gunshot wound to the head. (In a separate trial Clark received the death penalty for her murder. *Clark v. State,* 443 So.2d 973 (Fla. 1984)).

(text at *789)*

This Court affirmed the judgment and sentence.

Thereafter, James sought post conviction relief via Rule 3.850; relief was denied and this Court again affirmed. James v. State, 489 So.2d 737 (Fla. 1986).[2]

"OR" when referring to the original record or the direct appeal record on appeal.

[2] James also sought habeas corpus relief in this Court which was denied. James v. Wainwright, 484 So.2d 1235 (Fla. 1986

Three years later appellant filed a second and successive motion to vacate (R 1 - 36). After the state filed its responses (R 37 - 46, 47 - 62) and after supplemental memoranda (R 63 - 76), the trial court entered its order denying relief on November 28, 1990 (R 72 - 76). James now appeals.

SUMMARY OF THE ARGUMENT

The trial court did not refuse to consider proffered nonstatutory mitigating circumstances in violation of Hitchcock v. Dugger, 481 U.S. 393 (1987). The court considered all that was presented and found no mitigating. No claim can be made that trial counsel was not aware that nonstatutory mitigating evidence could be presented since he referred to Lockett v. Ohio, 438 U.S. 586 (1978) in a pretrial motion and in a requested penalty phase instruction (OR 900, 917). The instruction given sub judice adequately apprised the jury to consider "any other aspect of the defendant's character or record and any other circumstances of the offense" (OR 625) and satisfies Davis v. State, 589 So.2d 896 (Fla. 1991).

Appellant may not alter his claim on appeal from that presented below. Steinhorst v. State, 412 So.2d 332 (Fla. 1982). Thus, he may urge here only the argument advanced below that the court refused to consider proffered nonstatutory mitigating circumstances. He may not claim here, ab initio, and not presented below a suggestion that there was additional mitigating evidence not presented to the judge and jury, which has been discovered years after trial.

Any attempt to relitigate the prior 3.850 motion constitutes an abuse of the writ. See McCleskey v. Zant, 499 U.S. ___, 113 L.Ed.2d 517 (1991).

Appellant may not misuse Hitchcock to seek a second appeal when no Hitchcock error is present.

11. This appears to be a totally new issue and was not presented below and for that reason alone the court should decline to consider it. To the **extent** that appellant may be reframing an issue presented below, any such claim is procedurally barred since it should have been raised on direct appeal if properly preserved by objection. **Any** attempt to urge again a claim of trial counsel's ineffectiveness, the abuse of the writ doctrine precludes relief.

III. This claim **is** procedurally barred since it was an issue for direct appeal.

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V. This claim is procedurally barred **since** it was an issue for direct appeal.

VI. This claim is procedurally barred since it was an issue for direct appeal.

VII. This claim is procedurally barred since it was an issue for direct appeal.

VIII. This claim **is** procedurally barred since it was an issue for direct appeal.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT LIMITED ITS CONSIDERATION TO STATUTORY MITIGATING FACTORS IN VIOLATION OF HITCHCOCK V. DUGGER, 481 U.S. 393, 95 L.Ed.2d 374 (1987).

Appellant is not entitled to relief for his having abused the post-conviction relief vehicle. In McCleskey v. Zant, 499 U.S. ___, 113 L.Ed.2d 517 (1991), the Supreme Court extensively reviewed the abuse of the writ doctrine. The Court noted that abuse of the writ was not confined to instances of deliberate abandonment; abuse of the result may occur by failure to raise a claim through inexcusable neglect. 113 L.Ed.2d at 541.

> "The doctrines of procedural default and abuse of the writ implicate nearly identical concerns flowing from the significant costs of federal habeas corpus review. To begin with, the writ strikes at finality. . . . ."
>
> (text at 542)
>
> * * *
>
> "Habeas review extracts further costs. Federal collateral litigation places a heavy burden on scarce federal judicial resources, and threatens the capacity of the system to resolve primary disputes. . . ."
>
> (text at 543)
>
> * * *
>
> "Finally, habeas corpus review may give litigants incentives to withhold claims for manipulative purposes and may establish disincentives to present claims when evidence is fresh. Far more severe are the disruptions when a claim is presented for the first time in a second or subsequent federal habeas petition . . . Perpetual disrespect

> for the finality of convictions disparages the entire criminal justice system."
>
> (text at 543)

The Court then adopted the cause and prejudice analysis of procedural default cases to the abuse of the writ context. Id. at 545. This Court has applied McCleskey, supra, to successive post-conviction filings. See Francis v. Barton, 581 So.2d 583, 585 (Fla. 1991).

The instant claim constitutes an abuse of the writ because appellant could have asserted in his prior 3.850 motion to vacate that the trial court improperly refused to consider whatever nonstatutory mitigating evidence he deemed not to have been considered -- and he failed to do so.

We now examine appellant's post-trial sojourns. On his direct appeal, James contended (in Issue VIII F of his brief) that the trial court had erred in failing to consider the mitigating evidence presented by him. This Court affirmed James v. State, 453 So.2d 786 (Fla. 1984).

Thereafter, appellant filed a Rule 3.850 motion to vacate in March of 1986 urging seven claims including an ineffective assistance of counsel issue (R 49 - 51). The trial court denied relief and this Court affirmed. James v. State, 489 So.2d 737 (Fla. 1986). No claim was made in that motion that the sentencer had failed to consider appropriate mitigating factors. Appellant also sought habeas corpus relief in this Court and it was denied. James v. Wainwright, 484 So.2d 1235 (Fla. 1986).

Three years later James returned to the circuit court on his second successive motion -- pursuant to Adams v. State, 543 So.2d 1244 (Fla. 1989) -- and contended that the trial court had failed to consider the mitigating evidence presented at sentencing. Specifically, he alluded to James' non-triggerman status and alleged minor participation in the offense. He also argued that the trial court's sentencing order did not reflect the nonstatutory mitigating evidence presented (R 4 - 8). No allegation was made pertaining to a claim that other nonstatutory mitigating evidence subsequently discovered but was not presented should have been. Until now.

Apparently choosing to regard an appeal from the denial of Rule 3.850 relief as an original proceeding, appellant makes great effort to paint to appendices apparently submitted in the first 3.850 motion in 1986. Since appellant was not complaining below about unpresented mitigating evidence which should have been offered, appellee declines the invitation of James to address the merits of an argument altered from that presented below. Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Occhicone v. State, 570 So.2d 902 (Fla. 1990); Bertolotti v. Duqqer, 514 So.2d 1095 (Fla. 1987); Bertolotti v. State, 565 So.2d 1343 (Fla. 1990).

To the extent that appellant reasserts in this appeal the contentions presented below to the trial court[3] (i.e. that James

[3] It is indeed odd that appellant argues that the sentencing judge should have found appellant's lie detector test results to

was a non-triggerman whose participation was relatively minor), there was nothing wrong with the trial court's rejection of such mitigating evidence at sentencing for as this Court observed on direct appeal:

> "We next observe that it is clear that this entire episode was a joint operation by James and Clark.
>
> The jury found that James met the *Enmund* test although Clark did the actual killing, James was present and actively participated in the events. In such a situation we have held that who is the actual killer is not determinative because each participant is responsible for the acts of the other.
>
> . . . Under these circumstances we find that the aggravating circumstances which arose because of the motive and method of the killing are equally applicable to the two participants.
>
> * * *
>
> In the instant case James presented a considerable amount of evidence in an attempt to mitigate his sentence. The trial judge, however, found that no mitigating circumstances existed."
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> (453 So.2d at 792)

The claim presented below sub judice that the trial court's sentencing order did not specifically list the non-mitigating

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be mitigating when, not only are lie detectors inadmissible in evidence, but also the proffered lie detector test demonstrates James was being untruthful in half of his responses (OR 732 - 733). No error occurred.

factors considered was answered by Harich v. State, 542 So.2d 980, 981 (Fla. 1989).

> [2] With regard to the *Hitchcock* claim, we find no violation. At trial, the jurors were instructed that they could consider the enumerated statutory mitigating factors and "any other aspect of defendant's character or record and any other circumstances of the offense." In this cause, nonstatutory mitigating evidence was presented to both the jury and the judge. It should be noted that the trial judge's failure to articulate in his sentencing order what weight he was giving to the nonstatutory evidence does not constitute a *Hitchcock* violation.

The trial court's sentencing order does not reflect an understanding or belief that the law prohibited it from considering nonstatutory mitigating factors as had been the case in Hitchcock v. Dugger, 481 U.S. 393, 95 L.Ed.2d 347 (1987) and we know that the trial judge felt no such constraint because he instructed the jury to consider "any other aspect of the defendant's character or record and any other circumstance of the offense (OR 625) and the sentencing order recites that the court considered "the testimony, evidence and other matters presented by the parties" (OR *957).* The trial court's finding in this regard must be accepted (R 74).

The instant case is not dissimilar to Davis v. State, *589* So.2d 896 (Fla. 1991):

> In *Hitchcock* the United States Supreme Court invalidated Florida's pre-*Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), standard jury instruction which limited mitigating circumstances to those listed in the death penalty statute. By the time of Davis' trial, however, the standard

> jury instruction had been amended to pravide for nonstatutory mitigation. The record of the original trial of Davis reveals that the judge and the parties were aware of the right and need to consider nonstatutory mitigating circumstances as decreed in *Lockett*. Instead of the erroneous ***Hitchcock*** instruction, the revised post *Lockett* instruction was given. We find no evidence of a ***Hitchcock*** violation, and the trial court correctly found this issue to have no merit. ***E.g., Engle v. Dugger, 576*** So.2d **696** (Fla. **1991)** ***Bolender v. Dugger, 564*** So.2d 1057 (Fla. 1990); ***Spaziano v. Dugger,*** 557 So.2d 1372 (Fla. 1990); ***Harich v. State,*** 542 So.2d 980 (Fla. 1989); ***Card v. Dugger,*** 512 So.2d 829 (Fla. 1987). Davis argues that the trial court violated ***Hitchcock*** by not addressing nonstatutory mitigating evidence in the sentencing order, but we considered that order on direct appeal and found no error. **461** So.2d at 72. *Cf.* ***Harich; see Engle; Spaziano.*** **The** cases Davis relies on are factually distinguishable. ***E.g., Way v. Dugger,*** 568 So.2d 1263 (Fla. 1990) (trial court instructed on only one statutory mitigator and did not instruct on or mention nonstatutory mitigating evidence)**;** ***Cheshire v. State, 568*** So.2d 908 (Fla. 1990) (trial court refused to consider mental mitigating evidence as relevant to anything but statutory mitigators)**;** ***Waterhouse v. State, 522*** So.2d 341 (Fla.) (even though trial occurred in 1980, trial court gave the instruction limiting consideration of mitigating evidence that ***Hitchcock*** condemned)**,** ***cert. denied, 488*** U.**S.** 846, 109 S.Ct. 123, 102 L.Ed.2d 97 (1988).
>
> (text at 898)

As in Davis, supra, **the** instruction given to the jury was the post-Lockett instruction and thus there was no error (OR **625). See** Engle v. Dugger, 576 So.2d **696** (Fla. 1991); Harich v. State, 542 So.2d **980** (Fla. **1989);** Card v. Dugger, 512 So.2d *829* **(Fla. 1987).**

Appellant is simply wrong in claiming that the trial court did not consider James' alleged minor participation in its sentencing order (OR 963). If appellant is arguing that the Constitution required the trial court to label separately the same factors as both statutory and nonstatutory elements, the law does not so require. Appellant relies on Messer v. State, 834 F.2d 890, 893 - 894 (11th Cir. 1987), where the court found "In the instant case, it is even clearer than in Hitchcock that the jury was instructed not to consider, and that the judge did not consider, nonstatutory mitigating circumstances." Id. at 893. There the jury received information from the prosecutor it should not consider the most significant nonstatutory mitigating evidence, his mental or emotional problems and the court did not instruct there -- as the court did instruct sub judice -- to consider "any other aspect of the defendant's character or record." Similarly in Hargrave v. Dugger, 832 F.2d 1528, 1535 (11th Cir. 1987), the record reflected affirmatively, the trial court's belief that statutory mitigating factors were exclusive, a condition not present in the instant case.

The trial court did consider appellant's non-triggerman status in its sentencing order, but correctly declined to award it any mitigating value because of his active participation in the venture and his failure to seek to withdraw when Satey begged to spare his wife.

And we know that trial counsel was well aware of Lockett v. Ohio, 438 U.S. 586 (1978) because he cited the case in a pretrial

motion seeking to have the Florida death penalty statute unconstitutional (OR 900) and in a requested penalty phase instruction (OR 917) so there can be no legitimate contention that trial counsel was unaware of Lockett.[4]

Appellant may not benefit from the extension to August 1, 1989 to raise claims pursuant to Hitchcock v. Dugger, 481 U.S. 393 (1987) -- see Adams v. State, 543 So.2d 1244 (Fla. 1989), since what he did urge below was not Hitchcock error.

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[4] Appellant has previously been unsuccessful in his efforts to position himself to obtain the "benefit" of Tison v. Arizona, 481 U.S. 137 (1987); James v. Wainwright, 484 So.2d 1235 (Fla. 1986). This need not be revisited and in any event James' active participation in the robbery-murder more than meets the criteria of Tison.

ISSUE II

APPELLANT WAS DENIED A RELIABLE CAPITAL SENTENCING BY THE STATE URGING NONSTATUTORY AGGRAVATING AND OTHER IMPERMISSIBLE FACTORS.

The trial court could not commit reversible error since this claim does not appear to be among the nine issues presented below. An appeal from the denial of a **3.850** motion to vacate is not an original proceeding whereby wholly new claims may be advanced.

To the extent that appellant may be attempting to reframe his Booth v. Maryland[5] claim urged below in Point II without citing Booth since it has been overruled by Payne v. Tennessee, 501 U.S. ___, 115 L.Ed.2d 720 (1991), he may not alter the basis of his objection on appeal from that urged below. Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Occhicone v. State, 570 So.2d 902 (Fla. 1990).

To the extent that appellant is complaining about prosecutorial argument or jury instructions or anything cognizable on direct appeal, he is procedusally barred since Rule **3.850** is not a second appeal (nor is a 2nd Rule **3.850** a second appeal).

To the extent that he is making a claim that trial counsel rendered ineffective assistance he is also procedurally barred on that count since he earlier had resolved adversely to him on his first 3.850 motion the claim regarding counsel. James v. State,

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[5] **482 U.S. 496, 96 L.Ed.2d 440 (1987).**

489 So.2d 737 (Fla. 1986) and his second effort now constitutes an abuse of the writ. See Witt v. State, 465 So.2d 510 (Fla. 1985); Christopher v. State, 489 So.2d 22 (Fla. 1986).

ISSUE III

WHETHER THE HOMICIDE WAS COLD, CALCULATING AND PREMEDITATED.

Appellant presented this assertion in Claim IV below and the trial court correctly determined that it was procedurally barred since it was an issue to be advanced on direct appeal (R 74 - 75).[6]

Moreover, it would be improper to use different grounds to reargue the issue. Francis v. Barton, 581 So.2d 583 (Fla. 1991); Breedlove v. Sinqletary, ___ So.2d ___, 17 F.L.W. S67 (Fla. 1991).

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[6] Additionally, and alternatively, this Court has held that Rogers v. State, 511 So.2d 526 (Fla. 1987) is not a fundamental change in law. Eutzy v. State, 541 So.2d 1143 (Fla. 1989).

ISSUE IV

WHETHER THE PENALTY PHASE JURY INSTRUCTIONS IMPERMISSIBLY SHIFTED THE BURDEN TO APPELLANT.

Appellant argued this in Claim V below and the trial court correctly ruled the issue was procedurally barred as it was an issue to be urged on direct appeal, not collaterally (R 75). See also Atkins v. Dugger, 541 So.2d 1165, 1166 fn. 1 (Fla. 1989); Davis v. State, supra.

ISSUE V

WHETHER THE DEATH SENTENCE IS PREDICATED UPON *AN* **AUTOMATIC STATUTORY AGGRAVATING CIRCUMSTANCE.**

This contention was advanced in Issue VI below and **the trial court correctly determined that it was psocedurally barred; it was an issue to be urged on direct appeal (R 75). It may not be *either* relitigated or litigated for the first time.**

ISSUE VI

WHETHER THE PROSECUTORIAL ARGUMENT AND THE JURY INSTRUCTIONS MISLED THE JURY REGARDING ITS ABILITY TO EXERCISE MERCY AND SYMPATHY.

Appellant urged this in Claim VII below. The trial court correctly ruled this claim also to be procedurally barred (R 75). Claims may not be litigated anew or relitigated in a successive 3.850 motion to vacate. See Clark v. State, 533 So.2d 1144 (Fla. 1988); Clark v. Dugger, 559 So.2d 192 (Fla. 1990); Francis v. Barton, 581 So.2d 583 (Fla. 1991); Davis, supra.

ISSUE VII

WHETHER THE JURY WAS MISLED ABOUT ITS FUNCTION AT CAPITAL SENTENCING.

Appellant next complains that an incorrect instruction was given pertaining to majority vote on the penalty recommendation (this was Claim IX below) and the lower court ruled that it was procedurally barred; it was a claim that could have been urged on direct appeal and was consequently not cognizable on post conviction (R 76). The trial court was correct. See also Atkins v. Dugger, 541 So.2d 1165, **1166**, **fn. 1** (Fla. 1989); Davis, supra.[7]

[7] The state in its response below erroneously recited that there was an 11 to 1 death recommendation; actually the vote was 7 to 5 (**R** 630, 921). The claim remains procedurally barred,

ISSUE VIII

WHETHER THE TRIAL COURT FAILED TO GIVE A LIMITING CONSTRUCTION OF HAC IN THE INSTRUCTIONS TO THE JURY.

The trial court correctly ruled that the claim was procedurally barred (R 74). Any complaint that appellant may have had pertaining to penalty phase jury instructions must be raised on direct appeal (and also must be preserved for appellate review by appropriate objection at the time of trial). Atkins v. Dugger, 541 So.2d 165, 1166 fn. 1 (Fla. 1989); Davis v. State, 589 So.2d 896 (Fla. 1991); Francis v. Barton, 581 So.2d 853 (Fla. 1991). The issue may not be either relitigated or litigated anew now.

CONCLUSION

For the foregoing reasons, the lower court's order denying post-conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to the Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 2nd day of April, 1992.

OF COUNSEL FOR APPELLEE.