IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,498

ROY ALLEN STEWART,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

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INTRODUCTION

The symbol "R" refers to the eighteen (18) volume record on appeal herein. "R1" refers to the record on direct appeal, Fla. S. Ct. Case No. 57,971. The symbol "T1." refers to the trial transcripts in said case. The symbol "R2" refers to the record on appeal of the denial of the defendant's first motion for post conviction relief, Fla. S. Ct. Case No. 66,005. The symbol "R3" refers to the record on appeal of the defendant's second motion for post conviction relief, Fla. S. Ct. Case No. 69,387. The Appellee has also filed a motion to Supplement the record with the lower Court's order denying some of the claims herein, and with the pretrial deposition of Vanessa Brown, relied upon in the lower court. These documents were attached to the Appellee's motion and are referred to herein as "SR. __".

STATEMENT OF THE CASE AND FACTS

The Defendant, Roy Allen Stewart, was charged by indictment with one count of first degree murder; one count of robbery with a weapon; one count of sexual battery with force likely to cause serious injury; and burglary of an automobile with a weapon. See, Stewart v. State, 420 So. 2d 862 (Fla. 1982). After a trial by jury, the Defendant was convicted as charged. The jury recommended a sentence of death and the trial judge sentenced Stewart to death on July 26, 1979. (R1. 1182-88).

The trial judge found five aggravating circumstances and no mitigating circumstances. (Id.). The aggravating factors were: 1) the defendant was under sentence of imprisonment when he committed the murder; 2) the defendant had previously been convicted of a felony involving the use or threat of violence to a person (attempted armed robbery); 3) the murder was committed during the commission of a sexual battery; 4) the murder was committed for pecuniary gain; and, 5) the murder was especially heinous, atrocious and cruel.

The historical facts of the murder are detailed in the trial court's sentencing order as follows:

> The victim, Margaret Haizlip, a woman of small physical stature, in her late seventies, was a pioneer of South Florida living in a small home across from Stewart's temporary residence. About 10:00 p.m. Mrs. Haizlip was out on her porch and saw Stewart. She waived (sic) to him invited him into her home and fixed him a sandwich. Shortly thereafter he went into her bathroom and stole a gold watch from the medicine cabinet. Mrs. Haizlip, after going into the bathroom confronted the defendant, apparently about the stolen watch, whereupon Stewart beat and pummeled Mrs. Haizlip unmercifully about her ribs, face and head. While so doing, the defendant was tearing the clothing and ultimately the underwear from her body. As she lay on the floor, bleeding from her face, moaning and making noises, the defendant forcibly had sexual intercourse with her in a manner so vicious so as to tear her vagina. The defendant thereupon fastened a cord with an iron attached to it around her neck, pulled tightly on the cord and thereby strangled her leaving a ligature mark on her neck.

> The medical examiner testified the victim suffered eight broken ribs, multiple contusions, and her larynx was broken. A bite mark was identified on her thigh, and what appeared to be a bite mark was on her breast. There was blood stains and disarray in the living room and bedroom area of her house, indicating the victim was fighting and running for her life. The defendant left the victim at the scene with blood on his hands.
>
> (R1.1184-5).

A. DIRECT APPEAL

On direct appeal to this Court, Stewart raised the following issues:

I.

> THE LOWER COURT ERRED WHEN, IN RESPONSE TO A QUESTION OF A PROSPECTIVE JUROR AS TO WHETHER IT IS "UNUSUAL FOR THE STATE TO ASK FOR THE DEATH PENALTY" IT REPLIED "YOU WILL ASSUME THAT ALL THE PROPER EVIDENCE AND THE PROPER LAW WILL BE PRESENTED TO YOU" AND IN COMMENTING TO A MEMBER OF THE PROSPECTIVE JURY THAT "THIS IS ONE OF THOSE CASES WHERE THE LEGISLATURE HAS SAID THAT DEATH IS THE APPROPRIATE PENALTY", THEREBY DENYING DEFENDANT HIS RIGHTS TO A FAIR TRIAL AND TRIAL BY JURY, AS GUARANTEED BY ARTICLE I, SECTIONS 9 AND 16 OF THE CONSTITUTION OF THE STATE OF FLORIDA, AND THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

II.

> THE LOWER COURT COMMITTED FUNDAMENTAL ERROR IN FAILING TO INSTRUCT THE JURY AS TO AN ESSENTIAL ELEMENT OF THE OFFENSE OF ARMED ROBBERY, TO-WIT: THE ELEMENT OF INTENT TO PERMANENTLY DEPRIVE ANOTHER OF

PROPERTY, THEREBY DEPRIVING THE DEFENDANT OF HIS RIGHT TO DUE PROCESS AND TO TRIAL BY JURY , AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTIONS 9 AND 16 OF THE CONSTITUTION OF THE STATE OF FLORIDA.

III.

THE APPLICATION OF SECTION 921.141, FLORIDA STATUTES (1977) TO DEFENDANT VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

A. The Refusal of the Trial Court To Continue The Sentencing Hearing, To Order A Proper Psychological Evaluation, Or To Order A Presentence Investigation Prevented Defendant From Bringing Before The Jury And The Court All Evidence Relevant To The Imposition Of Sentence, Rendering The Death Sentencing Process In This Case Unreliable, And Denying Defendant Equal Protection Of The Law And Effective Assistance Of Counsel, Thereby Necessitating A New Sentencing Proceeding.

B. The Improper Exclusion Of A Prospective Juror in Violation Of Witherspoon v. Illinois, 391 U.S. 510 (1968), Requires That The Death Sentence Be Vacated.

C. The Comment By The Court Upon The Propriety Of Imposing The Death Penalty Upon Defendant, The Introduction Of Inadmissible Evidence And The Exclusion Of Proper Evidence At The Sentencing Hearing And Argument Relative Thereto, The Deficient And Improper Instructions Given To The Jury In The Sentencing Phase, And Improper Finding And Weighing Of Aggravating And Mitigating Circumstances By The Court Render The Death Penalty Unconstitutional As Applied To Defendant And Require That He Be Granted A New Jury Sentencing Hearing.

1. The Trial Court Improperly Commented To The Jury That Death Was The Appropriate Penalty For Defendant.

2. The Trial Court Improperly Allowed The State To Present Evidence Of And/Or Argue The Application Of Non-Statutory Aggravating Circumstances.

3. The Trial Court Erred In Precluding Defendant From Introducing Evidence Of The Mitigating Circumstance Of Remorse.

4. The Trial Court Erred In Refusing To Instruct The Jury As Requested By Defense.

5. The Trial Court Erred In Finding Five Aggravating Circumstances And No Mitigating Circumstances.

(See Initial Brief of Appellant, Florida Supreme Court Case No. 57,971).

This Court concluded, "Finding no error in this well-prepared and well-tried case, we affirm both the conviction and sentence." Stewart v. State, 420 So. 2d 862, 865 (Fla. 1982).

On April 18, 1983, the United States Supreme Court denied certiorari. See Stewart v. Florida, 460 U.S. 1103, 103 S.Ct. 1802, 76 L.Ed.2d 366 (1983).

B. FIRST STATE COLLATERAL PROCEEDINGS

After a death warrant was signed by the Governor, on March 16, 1984, the Defendant filed his first motion for post conviction relief under Rule 3.850, Florida Rules of Criminal

Procedure. The only issue raised was ineffective assistance of counsel at the penalty phase. The trial court granted a stay of execution and subsequently denied the defendant's motion, after an evidentiary hearing. This court summarized the substance of the defendant's claim, evidence presented at the evidentiary hearing and the trial court's conclusion as follows:

> Before the trial court Stewart claimed that his two appointed counsel had spent too much time preparing for the guilt phase of his trial and too little time preparing for the penalty proceeding. Moreover, Stewart alleged that, because of the evidence the state had against him, counsel erred in believing that the jury could be convinced that Stewart did not murder the victim and should have defended him differently. Finally, Stewart claimed that counsel failed completely to investigate his background and develop mitigating evidence. To this end, at the evidentiary hearing he introduced the testimony and reports of numerous psychologists, relatives, and friends that he had had mental and emotional problems throughout his life, marital difficulties, and a history of drug and alcohol abuse. After the evidentiary hearing, the trial court concluded that "defense counsel should have come to the inescapable conclusion that all hope of obtaining a verdict of not guilty should have been abandoned and substantial time should have been expended preparing for the penalty phase."

Stewart v. State, 481 So. 2d 1210, 1211 (Fla. 1985).

The trial court, however, also found that the evidence presented at the evidentiary hearing was merely cumulative of that presented at trial, and that the defendant had therefore not

demonstrated prejudice. Id. On appeal, this Court affirmed the lower court's denial of Stewart's post conviction motion. Id. This Court also rejected the State's argument that Stewart, in addition to having failed to demonstrate prejudice, had also not met the burden of proving that his trial counsel's performance was deficient. Id. This Court specifically stated:

> It is difficult to fault an attorney for zealously trying to convince a jury of his client's innocence. Here, however, due to the strength and amount of the evidence against Stewart, it appears that his counsel made an ill-advised choice of the theory of defense.
>
> Stewart v. State, 481 So. 2d at 1212.

C. SECOND STATE COLLATERAL PROCEEDINGS

On September 19, 1986, the Governor signed a second death warrant. On the same date, the Defendant filed a Petition For A Writ of Habeas Corpus and Other Relief in this Court, contending for the first time that the death penalty was arbitrarily and therefore improperly applied, based on the race of the victim. On September 25, 1986, this Court rejected the Defendant's claim, finding that it was improperly filed in the Florida Supreme Court. Stewart v. Wainwright, 494 So. 2d 489 (Fla. 1986).

The Defendant then refiled his claim of racial discrimination in the application of the death penalty, as a second motion for post conviction relief under Fla. R. Crim. P.

3.850. The trial court summarily rejected the claim as procedurally barred and as an abuse of the writ under state law. This Court affirmed the lower court's judgment in Stewart v. State, 495 So. 2d 164 (Fla. 1986).

The Defendant then sought to stay his execution pending his application for a writ of certiorari in the United States Supreme Court based upon the foregoing claim of racial discrimination. That Court rejected the Defendant's application and denied any stay of execution. See Stewart v. Wainwright, ___ U.S. ___, 107 S.Ct. ___, 92 L.Ed.2d 789 (1986).

D. FEDERAL HABEAS CORPUS PROCEEDINGS

The Defendant subsequently filed a federal petition for a writ of habeas corpus in the United States District Court in and for the Southern District of Florida. He raised the following issues:

> A. Comments made by the trial court during jury selection deprived Roy Allen Stewart of his fundamental right to a fair capital trial, in violation of the sixth, eighth and fourteenth amendments to the Constitution of the United States.
>
> B. The improper exclusion for cause of a prospective juror deprived Stewart of his right to an impartial jury in violation of the sixth and fourteenth amendments to the Constitution of the United States under the principles established in Witherspoon v. Illinois, 391 U.S. 510 (1968) and Wainwright v. Witt, 469 U.S. ___ (1985).

> C. Trial counsel's failure to investigate and prepare for sentencing and actual performance at the penalty phase deprived Stewart of his right to effective assistance of counsel.
>
> D. The State has applied its capital sentencing statute in an arbitrary and capricious manner by allowing race to determine, in significant part, who will receive the death penalty, in violation of the eighth and fourteenth amendments to the Constitution of the United States.
>
> See Stewart v. Dugger, 877 F.2d 851 (11th Cir. 1989).

On October 5, 1986, the United States District Court entered an order denying the petition for writ of habeas corpus. Stewart v. Dugger, supra at 853. The defendant appealed the denial of the petition to the Eleventh Circuit Court of Appeals. In that appeal, the Defendant asserted the same four issues as he presented in the petition in the United States District Court. On June 27, 1989, the Eleventh Circuit Court of Appeals issued an opinion affirming the district court's denial of the petition for writ of habeas corpus. Stewart v. Dugger, supra.

The Defendant then filed a petition for writ of certiorari in the United States Supreme Court. That Court denied the petition for writ of certiorari on May 29, 1990. Stewart v. Dugger, 495 U.S. 962, 109 L.Ed.2d 757, 110 S.Ct. 2575 (1990).

E. THIRD MOTION FOR POST CONVICTION RELIEF AND THE PROCEEDINGS AND ISSUE ON THIS APPEAL

On June 12, 1990, the Governor signed a third death warrant, and execution was scheduled for July 10, 1990. On Saturday evening, July 7, 1990, the defendant delivered a copy of his third motion for post conviction relief. (R. 2051). The defendant had raised the following six issues:

CLAIM I

THE STATE'S INTENTIONAL WITHHOLDING OF MATERIAL EXCULPATORY EVIDENCE, AND THE USE OF FALSE AND MISLEADING TESTIMONY, VIOLATED MR. STEWART'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM II

THE EXECUTION OF ROY STEWART PURSUANT TO THE STATE OF FLORIDA'S CURRENT PROCEDURES FOR THE CARRYING OUT OF THE EXECUTION OF A SENTENCE OF DEATH SHALL CONSTITUTE UNNECESSARY CRUEL AND UNUSUAL PUNISHMENT, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, AND BECAUSE THE FLORIDA DEPARTMENT OF CORRECTIOTNS CANNOT PROFESSIONALLY CARRY OUT THE EXECUTION OF A SENTENCE OF DEATH UNDER ITS CURRENT PROCEDURES WITHOUT UNNECESSARILY INFLICTING TORTURE AND PAIN UPON THE DEATH-SENTENCED PRISONER THE EXECUTION OF THIS DEATH SENTENCE SHOULD BE PROHIBITED AND STAYED.

CLAIM III

MR. STEWART'S CAPITAL CONVICTION AND SENTENCE OF DEATH WERE FOUNDED ON ARBITRARY, CAPRICIOUS, AND IMPERMISSIBLE EVIDENCE, EVIDENCE SPECIFICALLY PRESENTED AND ARGUED TO THE JURY AT TRIAL AND SENTENCING, AND EVIDENCE SPECIFICALLY RELIED UPON BY THE COURT ITSELF IN

SENTENCING MR. STEWART TO DEATH, IN VIOLATION OF THE SIXTH, EIGHT, AND FOURTEENTH AMENDMENTS.

CLAIM IV

MR. STEWART'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS AND THE SENTENCING COURT'S OWN CONSTRUCTION SHIFTED THE BURDEN TO MR. STEWART TO PROVE THAT DEATH WAS INAPPROPRIATE.

CLAIM V

THE SENTENCING COURT ERRED BY FAILING TO PROPERLY AND TIMELY IMPOSE A WRITTEN SENTENCE OF DEATH, IN DIRECT VIOLATION OF FLORIDA LAW AND MR. STEWART'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM VI

MR. STEWART'S SENTENCING JURY WAS IMPROPERLY INSTRUCTED ON THE "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING CIRCUMSTANCE, AND THE AGGRAVATOR WAS IMPROPERLY IMPOSED, IN VIOLATION OF MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

(R. 314-549).

E1. Preliminary Hearings and the Emergence Of New Claims

The lower Court conducted a hearing on this motion on Sunday, July 8, 1990. (R. 2051 et. seq.). With respect to claim I (Brady claim), raised as issue II in this appeal, the defendant argued that the State withheld exculpatory information

with respect to witness Vannessa Hambrick Brown, who did not testify at trial. The defendant argued that his trial counsel was unable to present witness Brown as a "hostile" witness, because the State did not produce reports reflecting that pretrial, the witness had made inconsistent statements. (R. 2065-6). The defendant also argued that because of Brown's statements, the State did not pursue other "suspects", such as Carl Johnson, who had lived two blocks away and had previously been arrested for loitering the victims' property. (R. 2071). The defense then represented that the latent fingerprints, lifted from the scene of the crime, were missing, and that the defense had thus been unable to conduct its own examination to eliminate the other "suspects". (R. 2089; 374).

The State argued that this claim was one which the defendant should have included in one of his two prior motions to vacate as the facts upon which it was based, had been readily available at those times. (R. 2095-98; 898-9). Additionally, the record reflected that all of the original latent finger prints, which the defense asserted were missing, were in fact contained in the trial court's file, and could have been accessed at any time! (R.2089-90; 2094). The defense then requested a "24 hours Stay of Execution" in order to have their own "fingerprint latent examiner down here tonight, ... have those prints examined." (R. 2154-55). The lower court deferred ruling until the next day. (R. 2155).

A hearing was then conducted on July 9, 1990, where defense counsel argued that the trial transcripts reflected yet another, suspect, "a Mr. Delaney or a Mr. Delancy," who may not have been eliminated pretrial by a thorough fingerprint check. (R.1077). The lower court granted "a temporary stay" in order "to go into the fingerprints," as requested by the defense. (R. 1101). The lower court stated that it wished to ascertain the veracity of the State witnesses' trial testimony reflecting that the "suspects" mentioned by the defense were in fact eliminated through fingerprint comparisons. (R. 1105). The defense again represented that it would have its own fingerprint examiner "examine all the prints in this case." (R. 1103).

The defense then requested and obtained all of the relevant State files, so that "I can bring my man here and we can get away from all these allegations." (R. 1104-1105).

On July 10, prior to presentation of evidence on fingerprints, the defense announced that, "within the past twelve (12) hours there is an extremely strong factual claim of innocence that can now be raised on Mr. Stewart's behalf." (R. 2174). The defense stated that it had "not had the time to put all the documents together," and thus would be asking for an "indefinite stay" based upon a "proffer" of Mr. Fox's testimony. (Id). Mr. Fox was a former Assistant Attorney General, who

represented the State in the direct appeal proceedings, and assisted in the initial post conviction proceedings in the instant case, from 1979 until June, 1987. (R. 2279). The defense proffered that, "Mr. Fox will testify that he, in fact, believes that Mr. Stewart is innocent and that he is prepared to fly to Tallahassee and speak with the governor and ask for clemency on Mr. Stewart's behalf because of these reasons." (R. 2176).

E.2. The Evidentiary Hearing With Respect To Fingerprints

With respect to the hearing and presentation of evidence on the fingerprints, the State offered to accept the burden of producing evidence to resolve the lower court's concerns. (R. 2182). The defense declined the offer on the grounds that, "We have the right to present our evidence as we see fit." (R. 2182).

Five Metro-Dade Police Officers, Brewer, Laite, Cooner, Singleton, and Simmons, and trial counsel, Stanley Goldstein, testified with respect to fingerprints and elimination of other alleged suspects.

Richard Laite testified that from February through April 1979, he was involved in the investigation of the instant case. (R. 2226). It was his duty to receive and evaluate "latent

lifts" from the scene of the crime for comparison value, and then compare the latents of value with a subject's standard fingerprints. Id. In the instant case there were eighty-two (82) latents from the house of the victim, and three (3) latent prints from the body of the victim. (R. 2243). Of these eighty-five (85) latent prints, eight (8) were of comparison value. Id. Two of the latent prints of value were matched to the defendant's fingerprints. (R. 2244). The remaining six latents of comparison value were unidentified. Id.

The Metro-Dade investigative file in the instant case reflected that written requests, not verbal requests, for eighty-six (86) comparisons of the latents with various subjects' prints were documented at the time of the investigation. (R. 2232). Both officers Brewer and Laite testified that at the time there were two methods of documenting fingerprint comparison requests. (R. 2228, 2248, 2210). The homicide detectives could submit a written request of comparison which would mean the examiner would have to find the previous "case prints" of the subject for comparison. The request would thus be documented in the investigation file. Id. The other method would be a verbal request when a subject had been arrested, and the detective was in possession of the subject's fingerprints pursuant to the arrest, and submitted these to the crime laboratory. Id. In the latter case there would be no reason for a written request and thus no written notations in the investigation file. Id.

In the instant case, the major case prints of the alleged "suspect," Carl Johnson, were contained in the investigation file, thus reflecting that a verbal request for comparison of fingerprints was made, and the subject was eliminated as a suspect. (R. 2206, 2211, 2232). The Metro-Dade investigation file and Officer Cooner's testimony established that this suspect, a white juvenile[1] male, was arrested by Officer Cooner on a loitering and prowling charge on March 2, 1979 (more than a week after the crime), in the vicinity of the victim's house. (R. 2353, 2214, 2223). Although a loitering and prowling charge is a misdemeanor not requiring the taking of fingerprints, Officer Cooner did in fact obtain Carl Johnson's "major case fingerprints" and shoe prints, and submitted these to the crime lab. (R. 2223, 2246, 2248, 2359). The written reports in the investigative files, and the testimony of Officers Brewer and Laite, established that both the fingerprints and shoe prints were examined, and Carl Johnson was thus eliminated as a suspect. (R. 2206, 2211, 2223, 2232, 2246).

Likewise, the Metro Dade investigative file contained a written report with respect to the other alleged "suspect," Alfred Delaney. (R. 2255). This adult, black male (R. 2263),

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1 Since a juvenile does not have an adult criminal file, a juvenile's fingerprints can not be transferred to such a file, and thus remain in the investigative file for which they were examined. (R. 2251).

was arrested on February 26, 1979 for loitering and prowling in Northern Dade County. (R. 2261, 2357, 2391). The arrest was made by a South Dade Detective who was familiar with the investigation of the instant case and knew Mr. Delaney to be a robber and a burglar who lived close to the victim herein. (R. 2391). The homicide detectives at this time, by virtue of examination of human hairs collected from the body and clothing of the victim, knew that their suspect was a white male. (R.2370-1). Nevertheless, Mr. Delaney's fingerprints and shoe impressions were obtained, compared to the unidentified latents from the scene, and eliminated. (R. 2262-2357, 2375). All of the above information with respect to these suspects and their fingerprints was provided to trial counsel at pretrial depositions. (R. 2383, 2359, 2468-70; see also R. 255-275; 199-206).

Moreover, Officer Laite testified that on the day of the evidentiary hearing, he had again compared both the fingerprints of Carl Johnson and Alfred Delaney, against the unidentified latents from the crime scene, and there was no match. (R. 2233, 2240, 2253, 2261). Mr. Laite testified that fingerprints do not change with time, and if the comparisons were negative on the day of the evidentiary hearing, they would have been negative eleven years ago at the time of trial. (R. 2262).

Detectives Singleton and Simmons also testified that no suspect by the name of "Charles Johnson" was ever mentioned or existed during the course of the investigation of this case. (R. 2380, 2414). Detective Simmons stated that when, during cross examination at trial, defense counsel had asked him questions about "Carl Johnson, Charles Johnson," (R1. 1802-5), he understood the questions to refer to Carl Johnson. (R. 2409-10). Detective Simmons explained that trial counsel "had a habit of incorrectly stating names," such as referring to the names "Delaney and Delancey" as being the same person. (R. 2412).

Finally, trial counsel, Stanley Goldstein, testified that at the time of trial he had been concerned with two other suspects. (R. 2472). He stated that prior to trial he was provided with information that the two subjects, Carl Johnson and Alfred Delancey, were eliminated as suspects based on fingerprint comparison. (R. 2462, 2468-73). Mr. Goldstein also stated that he signed a contrary affidavit attached to the defendant's third motion for post conviction relief, with respect to suspects and fingerprints, because CCR representatives had informed him that fingerprint elimination had not in fact taken place. (R. 2462).

E.3. Mr. Fox's Proffer

The lower court had announced that it would "hear" Mr. Fox's proffer after the presentation of evidence on the fingerprints. (R. 2183).

Mr. Fox thus commenced his "proffer," by first seeking guidance from the court as to his ethical "dilemma". (R. 2282). Mr. Fox did not "want to be in a position of being in violation of the Code of Ethics in any fashion." (R. 2283). The defense then requested that the State "waive" any rights it may have had with respect to "confidentiality". (R. 2286). The State promptly waived. Id.

Mr. Fox then proffered that during his representation of the State in post conviction proceedings, involving claims of ineffective assistance of counsel, he met with trial counsel, Goldstein, and "discussed with him why he defended the case in the manner which he had." (R. 2288). Mr. Goldstein brought to his attention matters which the police had failed to "properly" investigate. (R. 2291) Mr. Fox stated that in his experience from reviewing capital cases, the police investigation of the scene was "evidently very hastily done." (R.2292). As examples, Mr. Fox stated that "kleenex" were scattered in the victim's house, and were not tested by the police. (R.2295). Mr. Fox theorized that since the victim kept a neat house, kleenex would

have had to have been left on the scene at the time of the murder. (R. 2295). Mr. Fox also stated that the confession did not fit the crime at all. (R. 2296). When prompted by the lower court to relate the specific inconsistencies (R. 2310-11), Mr. Fox also stated, "one of the things that I remember distinctly is, there's something in his confession that says that he took her pocket book and took her keys and everything. But the person who committed the crime obviously tried to start her car with a knife. I think the blade broke off in the ignition. It doesn't make sense that he would confess to taking her keys and pocketbook and, at the same time, would start the car with a knife." (R. 2311). Finally, Mr. Fox added that the description of the strangulation in the confession did not "fit the marks on the body." (R. 2324).

Based upon the above alleged inconsistencies, Mr. Fox stated that he believed that the defendant had been inside the victim's house, and had committed other crimes, such as beating the victim, but that he did not "strangle" her; another intruder must have been present after the defendant. (R. 2323, 2310, 2298). Mr. Fox had based his belief, that the victim "died as a result of strangulation," on his recollection of the trial transcripts. (R. 2324). Mr. Fox's "recollection" was proven wrong, because the record reflected the cause of death as "multiple injuries" due to "blunt trauma," and as being "beaten to death". (R. 2326). Mr. Fox was then asked specifically what

action - i.e., beating, raping - was committed by the defendant as opposed to the alleged intruder. (R. 2327). Mr. Fox declined to answer and stated, "my opinion, counsel, is based upon discussions with Mr. Goldstein. He is the one you want here to discuss this." Id.

Finally, Mr. Fox was asked by the court why he had come forward at the last minute. (R. 2313). Mr. Fox stated that upon leaving State employment in 1987, he had informed previous collateral counsel, Robin Greene, that he wanted her "to call me because I want to come forward on this case." Id. Mr. Fox stated that he then did not hear anything further on the case until he found out that the defendant was scheduled for execution. Id. Mr. Fox stated that he never expressed his concerns to the Attorney General's or State Attorney's Office. Instead he "attempted to convey them to the Supreme Court of Florida, to indicate that the case had a lot of problems with the proof of first degree murder." Id. Mr. Fox added that when he was handling this case, "there was an atmosphere" in which he was required to pursue capital cases until the defendants were executed. (R. 2328).

Mr. Fox stated that he "knew Mr. Stewart would not be executed on his first warrant." (R. 2328). However, his "position" was that, if the defendant "came to a warrant again, I would have to tell the Attorney General and Governor what I thought about this case, but it never came to that." (R. 2329).

Mr. Fox's stated purpose for coming forward was: "I think that my belief and testimony is confined to whether or not the man should be executed. I do not -- believe that he should be executed, sir. That's why I'm here." (R. 2323). Mr. Fox concluded, "my opinion is, he should not die in the electric chair because it's enough doubt in the case that the man committed a capital felony." (R. 2327).

The State presented Richard Shiffrin in rebuttal. (R. 2333). Mr. Shiffrin testified that he is an Assistant State Attorney, and that he represented the State in the prior post conviction proceedings herein, with respect to the ineffective assistance of counsel claim. (R. 2335). Mr. Shiffrin had conferred with Mr. Fox with respect to said proceedings. There had never been any mention of any concerns with respect to the defendant's guilt by Mr. Fox. (R. 2336). Instead, Mr. Shiffrin's impression at the time was that Mr. Fox felt that the State had a "strong case." (R. 2336). Mr. Shiffrin had known Mr. Fox since 1982 and was familiar with the latter's reputation for truth and veracity in the community. (R. 2337). He testified that Mr. Fox "is basically incredible. Not worthy of any credibility." Id.

With respect to Mr. Fox's "proffer," the defense then asked for time to "re-investigate the case." (R. 2301). The

defense argued that while Mr. Fox's opinion "may not help" in "resolving the issues," his opinion, "should cause all of us enough hesitation and enough doubt to give us a reasonable time to reinvestigate the case, to talk to Mr. Fox, . . . for us to present whatever evidence we have . . . . That's what I proffered Mr. Fox's testimony for." (R. 2301). The lower court granted this request, and temporarily stayed this action for forty-five (45) days. The Court stated that it was "going to require that formal pleadings be filed within forty-five (45) days from today." (R. 2523). The claims in the original third motion for post conviction relief were then denied. The Court found that all claims, except claim two (operation of the electric chair), were procedurally barred as they could and should have been raised on direct appeal or first or second motions for post-conviction relief. (R. 2522; SR. 1).

The State then filed an "Application for Writ of Prohibition and Motion to Vacate Stay and Memorandum of Law in Support" (Application) with this Court. See State of Florida v. Michael H. Salmon, FSCt. Case No. 76,304. Pursuant to this Court's Order to Show Cause, the lower court responded that Mr. Fox's proffered testimony established a "colorable showing of innocence sufficient to warrant further development." See Response, Case No. 76,304, at p.7. The lower Court added that, "[I]f nothing is filed within the established time limit, then the stay will be lifted and a final order entered." Id. at p.4. This Court thus denied the State's Application.

E.4 The Amendments to the Third Rule 3.850 Motion

No pleadings with respect to developing the factual innocence claim were filed within the forty-five (45) day period set by the lower court. Nevertheless, on August 29, 1990, the lower court accepted a belated "Amendment/Supplement" to the defendant's Third Rule 3.850 Motion. (R. 1833-57).

With respect to the factual innocence claim, the "Amendment" added no facts, but merely stated that the previous proffer by Mr. Fox, "makes more than a colorable showing of innocence," and warranted the lower court to "vacate his [defendant's] unconstitutional conviction." (R. 1845-6). The Amendment also added another claim requesting the lower court to "revisit" the prejudice prong of the ineffective assistance of counsel claim, which had previously been raised and denied in the first motion for post conviction relief. (R. 1833-4, 1838-43). In support of the latter claim the defendant proffered two letters from former prosecutors, Messrs. Godwin and Stelzer, written to the Governor in clemency proceedings in 1983 and 1986, respectively, concerning their views that the death penalty was no longer appropriate. (R. 1851, 1853). The defendant also proffered an affidavit by his former collateral counsel, Robin Greene, which reflects that she represented the defendant from 1982 to 1987, and knew about the aforementioned letters written by Messrs. Godwin and Stelzer. (R. 1854-7).

In its Response to the Amendment, the State argued that the defendant's claims were untimely, successive, and not predicated on any previously unknown facts. (R. 1862-4). Nevertheless, the lower court ordered an evidentiary hearing with respect to both claims in the defendant's "Amendment." (R. 1976).

E.5 The Second Evidentiary Hearing On the Defendant's Amendment

On February 11, 1991, the evidentiary hearing with respect to factual innocence and ineffective assistance of counsel commenced. (R. 2525 et. seq.). With respect to the first claim, the defense then announced that it would present the testimony of a pathologist, "as it relates to the concerns that Mr. Fox had as to the innocence of Mr. Stewart." (R. 2533). The State objected that neither the Amendment nor any other pleadings filed by the defense gave any notice of the factual basis for this claim, and that the State was thus being "forced to defend" the claim "in the dark," without an opportunity for "effective cross examination." (R. 2535-6, 2538). The court overruled the objection and asked the defense instead to provide a "road map outline" to the evidence to be presented. (R. 2538).

The defense then stated that its pathologist was viewing "just-discovered" sealed photographs of ligature marks on the

victim, which photographs were contained in the court file. (R. 2543). The defense stated that the pathologist would testify as to the "inconsistencies" between the confession and the autopsy report done at the time of trial. (R. 2543-5). The State's subsequent objections as to lack of notice with respect to this testimony were overruled, and the State was given a forty-five (45) minute recess, in between witnesses, to prepare for cross-examination. (R. 2634-5).

Evidence as to the ineffective assistance of counsel claim was presented first.

Robert Godwin testified that he has been an Assistant Public Defender from 1982 until the present time. (R. 2585). He was previously an Assistant State Attorney from 1974 through 1980. (R. 2583). In 1979, Mr. Godwin assisted in the prosecution of this case with Mr. Stelzer. (R. 2600). Mr. Stelzer was the "lead counsel," and was also "in charge of the penalty phase." (R. 2583, 2600). Mr. Godwin testified that after the trial herein, but prior to the initial post-conviction proceedings, he developed a personal "problem" with the State Attorney's Office in Dade County. (R. 2594, 2601). After he left the State Attorney's Office, his "ideas about the death penalty began to change." (R. 2592). Mr. Godwin explained that, "I don't think our system for sentencing the death penalty is fair."

Mr. Godwin stated that when he first joined the Public Defender's Office, his office was "right across from" that of Ms. Greene, who was handling the case for the defendant. (R. 2585). He thus developed an "interest" in the case and would speak to Ms. Greene about it. Id. In the course of their discussions, he became aware of the mitigation case being prepared, for the ineffective assistance of counsel claim, by the public defender's office. (R. 2586). Mr. Godwin thus "offered to write a letter to the governor in essence stating that I thought he should be given life in prison and not the death penalty." (R. 2586). The letter to the Governor concluded that, "I also recognize that Mr. Stewart committed a terrible, brutal crime. While I believe his life should be spared, I also firmly believe that under no circumstances should he ever be released from prison." (R. 1852).

Mr. Godwin characterized his reasons for writing the letter as follows:

> And I think that after I left the State Attorney's Office at some point my ideas about the death penalty began to change. My opinion has certainly changed substantially since the day I was a prosecutor, and I felt a responsibility about it, and I learned information about his background that we had not been aware of and, frankly, I never felt that there was much mitigation put on in Mr. Stewart's case.

> This was just a personal opinion, but I felt that the evidence against him was overwhelming and possibly his attorney should have concentrated more on phase two of the case.
>
> And when I became aware of the situation, it was probably a matter of personal feelings of the case, my attitude of the death penalty, which was evolving and my feelings as an attorney, he hadn't been represented the way I thought was proper in phase two.
>
> So for all those reasons I decided to write the letter.
>
> (R. 2592).

Mr. Godwin then advised Mr. Stelzer that he had written the clemency letter to the Governor (R. 2590), and recommended that Mr. Stelzer write a similar letter. (R. 2591). Mr. Godwin did not recall showing Mr. Stelzer any subsequently developed documentation in the case. (R. 2591). He did, however, recall that Mr. Stelzer had stated that, "the death penalty just didn't make any sense anymore." Id. Finally, Mr. Godwin stated that had he known about the subsequently developed mitigation, at the time of trial he would have recommended to Mr. Stelzer to not seek the death penalty. (R. 2590). Mr. Godwin could not say how this recommendation would have affected either Mr. Stelzer or the State with respect to seeking the death penalty in the instant case. Id.

Mr. Lance Stelzer testified that he has been in the private practice of law since 1980. (R. 2550). He had previously been an Assistant State Attorney from 1975 to 1980. Id. In 1979 he had been assigned the prosecution of the instant case and sought the death penalty. (R. 2550-1). In 1986 Mr. Stelzer wrote a letter to the Governor (R. 2552), and stated that he "no longer actively favor[s] the death penalty for Mr. Stewart." (R. 1853).

Mr. Stelzer explained that he and Mr. Godwin were "very close friends" when working at the State Attorney's Office. (R. 2554). Mr. Godwin came to him and as "as a favor to him [Godwin]" and in the interest of "what he apparently genuinely believed to be new evidence," asked Mr. Stelzer to write the letter to the Governor. (R. 2554). Mr. Stelzer did not review the evidence relied upon by Mr. Godwin and wrote the letter, because he had "no reason to believe that Robert would ever willingly lie to me." (R. 2554, 2567). Moreover, Mr. Stelzer stated that his "personal feelings" were that "deterrence" is the "main reason to have the death penalty", and the deterrent effect is lost with the current system where the sentence has not been carried out even after a decade. (R. 2581-2).

Prior to the instant hearing, however, Mr. Stelzer was provided with the reports and transcripts of testimony presented at the initial post conviction proceedings on behalf of Mr. Stewart. (R. 2556, 2559; 2570-1). He had also again reviewed the

information available to him at the time of trial. Id. Having reviewed and compared the above information, Mr. Stelzer concluded that the mitigation presented at the initial post conviction proceedings was not "earth shattering new evidence." (R. 2560).

Mr. Stelzer concluded: "If you are asking me whether that was the type of evidence that would have made me change my mind about asking for the death penalty, the answer is no." Id. Mr. Stelzer stated that he knew the defense experts who testified at the initial post conviction proceedings, but did not agree with their views. (R. 2559). He explained that defense expert, Dr. Marquit, for example, "tends to feel that many people are insane who I really don't think are." Id. He added that having reviewed all of the information with respect to mitigation, both from the time of trial and from the initial post conviction proceedings, he would again seek the death penalty, if he were the prosecutor and the trial were being held today. (R. 2572, 2564, 2581). Mr. Godwin's change of recommendation would not change this opinion. (R. 2564). Mr. Stelzer added that:

> . . . to be perfectly candid with everybody, I don't think Mr. Godwin's opinion would have been changed back then by the reports of Dr. Marquit or Dr. Crown.

> The Robert Godwin of 1979/1978 is very different from the Robert Godwin today in terms of the overall criminal justice system because it's affected by his unfortunate involvement in it.
>
> (R. 2564-5).

Finally, Mr. Stelzer also testified that he after he left the State Attorney's Office in 1980, he would "constantly see Calvin Fox." (R. 2573). He discussed with Mr. Fox the cases that he (Stelzer) prosecuted and Mr. Fox was handling on appeal, on "numerous occasions." (R. 2574). During the course of these discussions, Mr. Fox never indicated any problems whatsoever with respect to the instant case. (R. 2574). Quite to the contrary, "Mr. Fox consistently told [Stelzer] he had never seen a case where there was more evidence than the Stewart case." (R. 2574). Whenever Mr. Stelzer would inquire as to the progress of this case, Mr. Fox would respond, "no problem with that case. It's air tight." (R. 2575).

Ms. Robin Greene testified that she represented the defendant from late 1982, through the first two post conviction proceedings. (R. 2637). At the time she was working in the Dade Public Defender's Office. Id. During the preparation of the first Rule 3.850 motion, she brought Mr. Godwin "up to date" with the "mitigation" she had investigated. (R.2639). Ms. Greene testified that she obtained a copy of Mr. Godwin's letter to the

Governor, prior to the clemency hearing in Tallahassee and prior to the hearing on the first motion for post conviction relief. (R. 2639-40). She did not present the letter or Mr. Godwin's opinion at the latter hearings, because Mr. Godwin "had strong personal reasons for not testifying." (R. 2640). The nature of said personal reasons was Mr. Godwin's arrest pursuant to an investigation by the State Attorney's Office, prior to the letter to the governor. (R. 2643, 2645-6). Ms. Greene also stated that she became familiar with Mr. Stelzer's letter to the Governor during the course of the second warrant in 1986. (R. 2641). Finally, this witness stated that she felt she was incompetent for not having presented Mr. Godwin as a witness during the initial post conviction proceedings. (R. 2649).

The defense then presented Dr. Arden, a medical examiner from New York City who received his medical degree in 1980, after the trial of this cause, in support of the factual innocence claim. (R. 2607). Dr. Arden completed his training as a pathologist in 1983. (R. 2608). This witness stated that his testimony was based upon reading and viewing selected portions of the trial transcripts, photographs and police reports, in addition to the autopsy report on the victim, which gave "a brief and insufficient description" of the victim's injuries. He stated that the autopsy report did not allow him "to arrive at the best possible conclusion." (R. 2613, 2615-6; 2662-5). Dr. Arden stated that he did not attempt to contact or speak to the

medical examiner, Dr. Diggs, who had viewed the victim at the scene of the crime and performed the autopsy on her. (R. 2660). Likewise, Dr. Arden did not review the medical examiner's files, nor did he examine Dr. Diggs' notes in said file. (R. 2662).

From the above sources of information, Dr. Arden stated that there were inconsistencies between the physical evidence and the defendant's confession. (R. 2618). First, Dr. Arden testified that the "ligature mark," on the victim's neck, which did not completely encircle it, was inconsistent with the defendant's confession that he had wrapped a cord "all the way" around the victim's neck. (R. 2618-2619). Dr. Arden stated there are "several reasonable explanations" for a ligature around the neck causing strangulation injuries, yet only leaving marks on part of the neck. (R. 2623). Dr. Arden said that one explanation was that the ligature was pressed against only part of the neck. Id. Another explanation was "some intervening material that would pad that part of the neck, preventing the ligature from leaving its mark," (R. 2624), such as hair, clothing, etc. Id.

On cross examination, Dr. Arden noted that in his confession, the defendant had expressed uncertainty to how he applied the ligature to the victim's neck; the defendant had stated that he had wrapped the ligature "once around her neck I reckon." (R. 2670-1; see also R. 1958). A photograph in evidence at the time of trial also reflected that there was clothing and

"a throw rug" with a "fold" underneath the body of the victim, which was found "face up on her back." (R. 2682-3; 1917). The victim's torn dress and slip were also found around the shoulder and left arm of the victim. (R. 2685). Dr. Arden acknowledged that the clothing and the rug could have prevented a ligature mark from appearing on the back of the head, if they were thick enough to cause cushioning. (R. 2682). Dr. Arden also noted that defense counsel at trial had fully explored the location of the ligature marks and even asked for a demonstration of how it could have happened. (R. 2663-2665; see also T1. 1265).

Dr Arden also testified that the victim's fractured larynx was not a "common" result of ligature strangulation. (R. 2621). He stated that from the photographs it "appeared" that "the ligature mark was rather low on the neck so it was likely to be beneath or below the larynx itself." (R. 2622). He thus opined that the ligature was not the cause of the fracturing of the larynx. Id. On cross examination, Dr. Arden acknowledged that at trial, the medical examiner herein, Dr. Diggs, had in fact stated that in his opinion the fracture of the larynx was "a result of blunt trauma," although acknowledging that it could also be "consistent" with the neck being constricted with a ligature. (R. 2667, see also, T1. 1251). Dr. Arden agreed that the fracture of the larynx was caused by "blunt trauma" (R. 2668), and that "petechia" in the membranes around the victim's eyes were "indicative of strangulation." (R. 2677).

Dr. Arden then testified that the defendant's confession stated that the victim bad fallen "near" the bedroom, which was inconsistent with the body having been found inside the bedroom. (R. 2617). The defendant's confession in fact states that during the altercation he and the victim moved into the bedroom. (R. 1958, 1959; T1. 1619). It should also he noted that the defendant's fingerprints were on the door to the bedroom and on a chair inside the bedroom. (T1. 1373-4).

Dr. Arden also testified that there "was much more injury on the body" as described in the autopsy report than was accounted for in the defendant's confession. (R. 2617). On cross examination, however, Dr. Arden acknowledged that the defendant in his confession had not specified the number of times he had hit the victim. (R. 2676). In his confession, the defendant had described the "brutal beating of the victim," which even Dr. Arden admitted was a "fair characterization," as follows:

> She fell down on her knees [after being hit in the chest two or three times] and got back up and she kept swinging a little bit and I kept on hitting her.
>
> . . .
>
> Well, I beat her and then she fell again.
>
> (R. 2675-6).

Finally, Dr. Arden stated that the defendant's statement that the victim had eaten a bologna sandwich was inconsistent with the autopsy report, which did not contain any findings as to the victim's stomach contents. (R.2630). Dr. Arden stated that this was a "noteworthy omission" because Dr. Digg's trial testimony described the stomach's contents as consisting of a small amount of liquid. Id. Dr. Arden opined that if the confession was true, he would "expect that the food material would still be present in the stomach at the time of the autopsy." Id. However, Dr. Arden acknowledged that there are no "hard and fast rules for how long it takes for the stomach to empty or not empty. There are wide differences among people depending or who they are, what diseases they have, what they have eaten and so forth." (R. 2631).

The defendant next presented the testimony of trial counsel, Stanley M. Goldstein. (R. 2689 et seq.). Trial counsel testified that the ligature mark on the victim's neck and the manner of its infliction were "an issue" at trial. (R. 2691). He stated that he perceived that the description given in the defendant's confession "did not match" the evidence reflected in the autopsy report and the photograph. (R. 2691-2). Trial counsel also stated that at trial he asked the medical examiner to "demonstrate," on him, how the ligature was inflicted, and he further argued the alleged inconsistency to the jury. (R. 2696-7).

The hearing was then recessed in order to locate Mr. Fox, who had been scheduled to appear at 8:30 a.m. that day. (R. 2698-9). Mr. Fox was the last defense witness at ths hearing. (R. 2700).

Mr. Fox finally appeared with his attorney. Id. Mr. Fox's attorney stated that his position was that he had previously "testified fully" and had "nothing further to add in this case." Id. He thus moved for a protective order. Id. The lower court denied the motion. Id.

Mr. Fox was then questioned as to his "concerns about Mr. Stewart's guilt." (R. 2702). However, at this juncture, Mr. Fox denied any concern as to the defendant's guilt. Id. Instead, he responded: "Not his guilt, but that he should not die in the electric chair because there was a doubt as to whether or not he should die in the electric chair and as I understand United States Supreme Court decisions, if there is a doubt, not that the defendant is not guilty, but if there is a doubt, he should not die in the electric chair." (Id., see also, R. 2725, 2731).

Mr. Fox stated that he had "not had an opportunity to review anything" since his last proffer. Id. Mr. Fox testified that the defendant's confession was "critical" to the prosecution, and then he repeated the substance of his previous proffer. (R. 2703-2712).

Mr. Fox explained his behavior in signing his briefs to the various courts in the instant case, written on behalf of the State despite his beliefs, as being due to having been "instructed not to confess error under any circumstances," "not just in capital cases, okay, even criminal little ones." (R. 2720-1). Mr. Fox stated that at the time of the initial post conviction proceedings herein, Mr. Joel Rosenblatt was his supervisor at the Attorney General's Office. (R. 2718). Thereafter, Mr. Michael Neimand became the head of the office. Id. The lower court then sustained the defense's objection to the State's question as to whether Mr. Fox was asked to leave the Attorney General's Office in 1987. (R. 2736). The lower court stated that it was aware of the State's position that this witness has "bias and prejudice." Id. The proffered documentary evidence reflecting that the witness was terminated from his employment was also ordered to be "sealed", at Mr. Fox's request. (R. 2736-7).

In rebuttal, the State presented the testimony of Messrs. Joel Rosenblatt and Michael Neimand. Mr. Rosenblatt testified that he was with the Attorney General's Office from May, 1971 until February, 1982. (R. 2739). He was the head of the Attorney General's Office in Dade County, where Mr. Fox was working at the time, from 1977 until 1980, and he hired Mr. Fox. Id. Mr. Rosenblatt testified that he encouraged all assistants to

constantly confer with him, and never forced anybody to sign a brief that they didn't believe in. (R. 2741). If an assistant came to him with a problem on any case, he would personally evaluate the case, and either confess error, or assign the case to another assistant, if it had merit and the original assistant voiced objections to handling it. (R. 2741-2). In 1985, during the pendency of the post conviction proceedings herein, Mr. Rosenblatt was with the State Attorney's Office. (R. 2743). Mr. Fox would frequently come to the State Attorney's Office and discuss problems that he was having with various cases. Id. Mr. Rosenblatt had not been made aware of any problems with the instant case by Mr. Fox. (R. 2742).

Mr. Michael Neimand testified that he had been in service with the Attorney General's Office since April, 1983. (R. 2746). He became the head of the Dade branch office in November, 1985. (R. 2747). About a year earlier, Mr. Neimand had become the assistant supervising attorney or the assistant bureau chief. (R. 2747). He was Mr. Fox's supervisor in 1985. Id. Mr. Fox never approached him with respect to any problems involving the instant case. Id. Mr. Neimand stated that during that time period, no assistant was ever forced to sign a brief, if he did not wish to do so because of any problems he may have perceived. (R. 2748).

Mr. Neimand testified that he did recall an instance where Mr. Fox in fact approached him about a case he had an "ethical problem with." Id. The case was reassigned. (R. 2749). However, Mr. Fox never approached anybody with respect to any problems in the instant case. (R.2749-50).

The parties then filed post hearing memoranda. (R. 1977-2096; 2097-2022). On July 2, 1991, the trial court entered an order denying the defendant's claims in the "Amendment" as without merit. (R. 2032-2033). The defendant's motion for rehearing was denied on July 25, 1991. (R. 2041). This appeal has ensued.

SUMMARY OF THE ARGUMENT

1. The Appellant's claim of innocence was based upon evidence presented, considered and rejected at the trial of this cause. The claim was thus untimely and procedurally barred. Moreover, after an evidentiary hearing below, the Appellant was unable to support this claim.

2. The Appellant's Brady claim was based upon facts known and available to the defense in the prior post conviction proceedings. This claim was thus untimely and procedurally barred. Moreover, after an evidentiary hearing below, the Appellant was unable to demonstrate a reasonable probability that the outcome would be different.

3. The Appellant's claim of ineffective assistance of counsel was successive, untimely and procedurally barred. Moreover, after an evidentiary hearing below, the Appellant was unable to support this claim.

4. The Appellant's claim of improper HAC jury instructions was not preserved at trial, was not raised on direct appeal, and is procedurally barred. The Appellant's arguments as to the alleged impropriety of other instructions were not raised below and can not be raised for the first time in this appeal.

5. Appellant's claim based upon non-statutory aggravation and other impermissible factors was untimely and procedurally barred.

ARGUMENT

I.

THE FACTUAL INNOCENCE CLAIM IS PROCEDURALLY BARRED AND WITHOUT MERIT.

The Appellant, relying upon "United States Supreme Court's case law" and Jones v. State, 591 So. 2d 911 (Fla. 1991), has argued that he is entitled to a new trial, because he has demonstrated his "innocence", and he "may at any time present a 'colorable' showing of innocence." See brief of Appellant at p.9. The lower Court denied this claim after an evidentiary hearing, and found:

> The claim of the former Attorney General is essentially that the police did a poor job of investigation and destroyed or hid evidence, and that the physical evidence does not support the facts contained in the defendant's confessions; all of which led him to conclude that the defendant left the scene of the crime while the victim was still alive, and someone else came in and strangled her to death. This claim embodies the line of defense employed by the defense at trial, unsuccessfully. ... The claim of factual innocence is not supported by the record.
>
> (R.2032-3).

The Appellee respectfully submits that this claim was based entirely upon evidence presented, evaluated and rejected at the trial for this cause. The Appellant should thus have raised this issue during prior proceedings, if at all. Moreover, as will be shown below, this claim is utterly devoid of merit.

The Appellant has first argued that Mr. Fox, the Assistant Attorney General who handled this case for the State from direct appeal in 1981 through habeas corpus appeal in the Eleventh Circuit Court of Appeals in 1987, "concluded that the evidence of guilt was insufficient to support the judgment and sentence." See brief of Appellant at p.10. The State would first note that Mr. Fox testified that he had related his "concerns" to the defendant's prior collateral counsel, in 1987. (R. 2313). Thus, Mr. Fox's concerns, if at all relevant, should have been raised prior to the third post conviction proceedings below in July, 1990. See Jones, supra at 916 n.2 (evidence which was known at the time of prior post conviction proceedings does not qualify as newly discovered evidence at subsequent Rule 3.850 proceedings); Adams v. State, 543 So. 2d 1244 (Fla. 1989) (all post conviction relief motions filed after June 30, 1989, and based on new facts, must be made within two years from date facts became known).

Second, contrary to the Appellant's representation herein, at the evidentiary hearing in the instant case, Mr. Fox stated that he did not have any "concerns" with respect to the defendant's guilt:

> [Defense Counsel] Q. I also, as I recall the testimony was that you called CCR the day before, two days before you *testified indicating your concerns about Mr. Stewart's guilt?*

> [Mr. Fox] A. *Not his guilt* but that he should not die in the electric chair because there was a doubt as to whether or not he should die in the electric chair and as I understand U.S. Supreme Court decisions, if there is a doubt, *not that the defendant is not guilty but if there is a doubt,* he should not die in the electric chair.

(R. 2702; [emphasis added]; also see R. 2725) (Mr. Fox: "It [Fox's testimony] wasn't a doubt about his guilt, Mr. Rosenberg, it was a doubt that the State should not execute this man.").

Third, whatever Mr. Fox's concerns, they were all based upon his recollection of trial transcripts, exhibits, and discussions with trial counsel. (R. 2311-12, 2327). Mr. Fox explicitly testified that he was not aware of any Brady[2] evidence in the instant case or of any non-record evidence. (R. 2311-12, 2327, 2710-11). Likewise there were no allegations, testimony, or other proof of Mr. Fox having found newly discovered expertise in evaluating crime scenes, autopsies, etc., since the time of the trial herein. Thus, Mr. Fox's opinion, even if considered "competent" evidence, can not be deemed "newly discovered" evidence. Jones; Adams; supra.

This claim was thus untimely and should be found to be procedurally barred. Contrary to the Appellant's arguments herein based upon United States Supreme Court cases, a defendant,

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2 Brady v. Maryland, 373 U.S. 83 (1967).

even in federal court may not at "any time" present a merely "colorable" claim of innocence, standing alone. Herrera v. Collins, 6 F.L.W. Fed. S882 (USSCt., January 25, 1993). The cases relied upon by the Appellant, Smith v. Murray, 477 U.S. 527 (1986); Murray v. Carrier, 477 U.S. 478 (1986); and Kuhlmann v. Wilson, 477 U.S. 43 (1986) all involve legal cause for avoiding various procedural defaults of federal constitutional claims in federal habeas corpus proceedings. None of said cases recognizes a claim of "colorable" innocence as a claim in and of itself.

In any event, as noted by the lower court, this claim is without record support. Mr. Fox testified that the crime scene investigation in the instant case was not proper, because, first, there were photographs showing kleenex in the victim's residence, which kleenex were never tested. The significance of this opinion, according to the Appellant, was that since the victim kept a neat house, the kleenex had to have been left by someone present at the time of the murder. The State would note that at trial, on cross examination of the crime scene technician, defense counsel, in front of the jury, did in fact establish the presence of used kleenex scattered around the neat home and outside of it. (Tl. 1160-65). Defense counsel also established that the kleenex were not submitted to the chemistry lab[3] for further testing. Id. Defense counsel then argued the

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[3] Two tissues were collected and tested for fingerprints. (Tl. 1163, 1193-94).

significance of the kleenex in his closing argument to the jury. (T1. 2124-25).

The next example of improper investigation, according to Mr. Fox, related to his recollection that the defendant's confession reflected that he had taken the victim's car keys, while the physical evidence reflected that "the person who committed the crime tried to start her car with a knife." See brief of Appellant at p.12. Contrary to Mr. Fox's recollection, the defendant's confessions herein did not state that he had taken the victim's car keys. (R. 1949-62; T1. 1610-1752). At trial of this cause, the defendant testified, and after recanting his confession, stated that after beating the victim he picked up her purse and saw a set of keys, which fell back into the purse. He said he did not take the keys. He testified that instead, he attempted to use his knife to start the car, but the car would not start! (T1. 1939-40, 1979). The "inconsistency" testified to by Mr. Fox thus did not exist and was refuted by the evidence. Moreover, the above facts were emphasized by defense counsel in closing argument to the jury. (T1. 2134-35).

The Appellant then relies upon Mr. Fox's conclusions and the allegedly "corroborating" testimony of Dr. Arden for the proposition that the defendant's confession and the physical evidence of "ligature marks" on the victim's body were inconsistent. The victim's cause of death was "multiple injuries

due to blunt trauma," consistent with a "severe beating." (Tl. 1250-1253). A contributing cause of death was asphyxia; the victim was "unable to get her breath as a result of a fractured larynx. . . .[And] [M]ultiple fractures of ribs." (Tl. 1253). The victim's neck also had ligature marks in front and on the sides, but not the back. (Tl. 1265-66).

The alleged "inconsistency" herein arises from the defendant's confessions, wherein he had stated that he fastened a cord "once around her [victim] neck, I reckon" and pulled with "both" hands, with an unknown degree of strength. (R. 1958; Tl. 1622-3). Both Mr. Fox and Dr. Arden stated that if the defendant's confession was true, the cord should have left a mark on the back of the victim's neck. However, at the evidentiary hearing herein, Dr. Arden admitted that a reasonable explanation for the absence of the mark in the back of the neck was possible, depending on the amount and location of the pressure exerted on the cord, and the existence of any obstruction on the back of the neck, such as clothing, hair, a throw rug, etc.

At the evidentiary hearing, herein, Dr. Arden further acknowledged that photographs of the scene of the crime reflected that the victim's body was found with clothing around the shoulders and on a "throw rug with a fold" on it. There was thus no inconsistency between the confession and the ligature marks. More importantly, however, the same alleged inconsistencies were

brought to the attention of the trial jury herein by defense counsel, during the cross-examination of the medical examiner at trial. (T1. 1265-1287). Defense counsel even coordinated a physical demonstration for the jury, to show how the ligature marks could have been inflicted. (T1. 1265-68). Defense counsel then emphasized the alleged inconsistencies in his closing arguments to the jurors. (T1. 2054).

As seen above, all of the "evidence" presented by the Appellant in the lower court proceedings was fully known at trial, considered and rejected by the jury and judge and this Court on direct appeal. There was thus no "newly discovered evidence." What the Appellant presented, and should have never been allowed to present, was the opinion of an attorney and an expert, who in effect sat as a "thirteenth juror", and expressed disagreement with the jury's verdict. As recently noted by the United States Supreme Court, "[i]n State criminal proceedings the trial is the paramount event for determining the guilt or innocence of the defendant." Herrera v. Collins, 6 F.L.W. Fed. S882, 889 (January 25, 1993). It is well established that trial attorneys cannot express their personal beliefs of guilt or innocence to a jury, and a jury cannot base its decisions on an attorney's personal opinion. See e.g., Singletary v. State, 483 So. 2d 8 (Fla. 2 DCA, 1985). See also Fla. Stat. §90.604 (witnesses are deemed competent only if they have personal knowledge of the facts of the case.). Similarly, lingering doubt

evidence is inadmissible in the penalty phase of a capital case. Franklin v. Lynaugh, 487 U.S. 164, (1988); Hitchcock v. State, 578 So. 2d 685 (1990, reversed on other grounds, 18 FLW S87 (Fla. Feb. 3, 1993); King v. State, 514 So. 2d 357 (Fla. 1987).

Moreover, as this Court affirmed the conviction in the direct appeal and thereby deemed the evidence sufficient, that became the law of the case, precluding the lower court from revisiting the same issue under the guise of Mr. Fox's opinion. "All points of law which have been adjudicated become the law of the case and are, except in exceptional circumstances, no longer open for discussion or consideration in subsequent proceedings in the case." Greene v. Massey, 384 So. 2d 24, 26 (Fla. 1980). The opinion of an attorney, based solely on existing and known transcripts, hardly constitutes such an exceptional circumstance, when a jury, trial judge, and appellate court have already come to differing conclusions as to the sufficiency of the evidence. This is especially so in the instant case where this Court and the lower court have previously considered the evidence as to the guilt of the defendant to be overwhelming. Stewart v. State, supra, 481 So. 2d at 1211, 1212. This case, after all, consists of not only the defendant's written and oral confessions to the crime, but also: (A) evidence of his fingerprints on the door to the bedroom where the victim was found, and on a chair within that room (T1. 1373-5); (B) evidence that his blood type was matched with, (1) the vaginal aspirate recovered from the

victim's body (T1. 1434-42), (2) the saliva on the bite marks on the victim's body (T1. 1444-45) and (3) a stain found on a bedspread inside the victim's bedroom (T1. 1438-9); (C) evidence that his hair matched that collected from the victim's body, and (D) evidence that his bite mark matched bite marks on the victim's body and pieces of bologna recovered at the victim's house (T1. 1534-39).

In sum the Appellant's claim of factual innocence should be denied because it was untimely, not based upon any new evidence and utterly devoid of merit.

II.

THE APPELLANT'S BRADY CLAIM WAS UNTIMELY AND WITHOUT MERIT.

In the third motion for post conviction relief and herein, the Appellant contends that "Mr. Stewart was arrested, indicted, and ultimately sentenced to death because of the information allegedly provided by Vannessa Brown to the State." See Brief of Appellant at p. 21. In reliance upon Ms. Brown's affidavit of July 2, 1990, the Appellant then argues that Ms. Brown's March 20, 1979 statement to the police implicating Mr. Stewart was "most[ly] . . . false," and that the State withheld evidence that: (1) her account and testimony were not reliable, (2) she had a "deal" whereby the homicide detectives would "work something out with the judge" so as to avoid jail time for her then pending charges; and (3) she had been paid a reward for her prior statements to the police, by the "Perrine Women's Club." See Brown's affidavit, quoted in the Appellant's brief at pp. 23-24. It should be noted that Ms. Brown did not testify at the trial of this cause. The Appellant, however, contends that the State's intentional withholding of the above information impaired trial counsel's efforts to "impeach Ms. Brown." See Appellant's Brief at p. 25. The Appellant also argues that "the secondary effect of Brown's lies," was that the State ended its "pursuit" of other "suspects." Id. at p. 26.

The lower court, after a limited evidentiary hearing, denied this claim as it could and should have been raised previously. Moreover, this claim is without merit.

The record below reflects that trial counsel knew the following with respect to Ms. Brown, prior to trial and according to his own proffer. Trial counsel stated that Ms. Brown's involvement with this case began when she was arrested for possession of marijuana. (T1. 1758). He added that there were also "outstanding warrants for her for forgery and other crimes." Id. When Ms. Brown was arrested, she told the police that she had information regarding the instant murder. Id. Ms. Brown was thus taken out of jail and her statement was taken on March 20, 1979. (T1. 1758, 1765). In her statement, Ms. Brown told the police that three weeks after the murder, Mr. Stewart came to her house, and made "statements to the effect that he was in the Haizlip [victim's] house." Id. That was the first time that the defendant's "name ever came up," according to trial counsel. (T1. 1757). The police then obtained the defendant's fingerprints, matched these to the prints from the scene of the crime, and thus obtained a warrant. Id. The police thus arrested Mr. Stewart, who then confessed. Id.

Trial counsel then stated that Ms. Brown's statement to the police was false, because, according to the police, three weeks after the murder, Mr. Stewart was in South Carolina and

could not have been at Ms. Brown's residence in Florida. (T1. 1760). Trial counsel stated that, according to a pretrial deposition that he took from Ms. Brown, the latter had admitted her error in the dates given in her statement, and also admitted that the prosecutor and police had "explained" to her that she was "probably wrong about the date." (T1. 1760-62). Trial counsel also stated that Ms. Brown could not pass a polygraph. (T1. 1765). He added that Ms. Brown had also made an "inconsistent statement," and was "wired up on coke." (T1. 1766).

Out of the presence of the jury, trial counsel then took a statement from Ms. Brown. (T1. 1773). Ms. Brown confirmed all of the above information related by trial counsel. (T1. 1773-80). Moreover, during her pretrial deposition, taken by trial counsel, Ms. Brown disclosed: (a) her extensive prior criminal history (SR. 11-15); (b) that she remained in jail only for a "couple of hours" after she gave her statement (SR. 19); (c) her expectation that she would receive probation on her pending charges (SR. 32); and (d) that with respect to her pending charges, the State had told her it would bring her cooperation in the instant case to the attention of the judge, but it could not guarantee what the judge in her case would do once he was told of her cooperation. (SR. 41).

Likewise, the Appendix to the Appellant's third motion for post conviction relief reflected that Ms. Brown's plea colloquy and her sentence of probation on her pending charges were public record and thus available on July 23, 1979. (See Appendix 46, R. 830 et seq.). Said Appendix also reflected that Ms. Brown's "monetary reward" by the Perrine Women's Club was the subject of a newspaper article dated August 20, 1979. See Appendix 449, R. 847, 553). This information was thus also available and a matter of public record since 1979.

The State submits that, as seen above, the facts on which this claim is based were all either known to the defendant at the time of trial, or were available to him prior to the previous motions to vacate, filed in 1984 and 1986, as well as January 1, 1987, the cutoff date for post-conviction relief. Furthermore, there was nothing contained in Vannessa Brown's affidavit, or prior collateral counsel's affidavit, reflecting that Ms. Brown had been previously contacted, or that her affidavit could not have been obtained prior to the previous motions to vacate, by January 1, 1987. See, Agan v. State, 560 So.2d 226 (Fla. 1990); Clark v. State, 533 So.2d 1144, 1145 (Fla. 1988); Jones, supra. "Rule 3.850 bars an untimely petition based on information previously ascertainable through the exercise of due diligence." Demps v. State, 575 So.2d 196, 198 (Fla. 1987).

More importantly, however, Ms. Brown did not testify as a state witness at the 1979 trial. Despite an opportunity to present her as a defense witness, the defense did not present her testimony at trial either. (T1. 1787-88). Since Ms. Brown did not testify at trial, the "impeachment evidence claimed by the Appellant would not have been admissible. Similarly, because she did not testify, there is no issue of the prosecutor having knowingly presented false or perjured testimony. Thus, even accepting the Appellant's allegations as true and timely, there is no reasonable probability that the outcome of the trial would have been different. United States v. Bagley, 473 U.S. 667 (1985). This is especially so, in light of the overwhelming evidence of guilt as recounted in the previous claim herein.

Moreover, the State would note that in Ms. Brown's pretrial, March 20, 1979, statement to the police, she stated that Mr. Stewart had approached her three weeks after the homicide and implicated himself. (R. 806; T1. 1758). Ms. Brown had stated that, "He [defendant] didn't say in exact words [that he had killed the victim] but he did indicate it the way he was talking." (R. 807; T1. 1779-80). In contrast to this pretrial statement, Ms. Brown's 1990 affidavit, relied upon by the Appellant, places the defendant at the scene of the crime in the victim's home, on the night of the murder! Ms. Brown, who at the time of the murder lived "across the street from" the victim (T1. 1766, R. 749), in her current affidavit states:

> I remember the night that she was killed because that was the night Roy Stewart came to my door and asked if he could sleep on my couch. I recall that my ex-husband Larry was staying at my house that night and recall hearing someone knock late during the night at my door. When I answered it, Roy Stewart was standing there and, as usual, he was messed up on drugs. Because my children and husband were there, I would not let Roy inside but spoke with him on the front step. Roy never said that he had killed Ms. Haizlip. In fact, Roy was so messed up that he could barely talk that night. He was in no condition to harm anyone. He could barely even stand up. I figured that he had been over to her place and she did not want him there because he was so messed up. I told this to my husband.

(See Appellant's brief at p. 23, R. 750-51) (emphasis added). As noted previously, the record below reflected that after Ms. Brown's statement, the police compared the defendant's fingerprints with those found at the scene of the crime, and after finding a match, were able to obtain a warrant. The State fails to see how Ms. Brown's current statement, which places the defendant at the scene of the crime on the night of the murder, would have prevented the police from comparing the defendant's fingerprints and arresting him. Thus, again, even assuming the allegations to be timely and true, the Appellant has failed to demonstrate any reasonable probability that the result of the proceedings would have been different. Bagley, supra.

Finally, the Appellant's allegations as to the "secondary effect" of Ms. Brown's statement - i.e., the elimination of other suspects - were the subject of an extensive evidentiary hearing below, as previously detailed in pp. 14-18, 11-13 herein. As noted, the Appellant, in the lower court, based upon representations that latent prints from the scene of the crime were "missing," was given an opportunity to present evidence as to whether the State had in fact pursued and eliminated other alleged suspects, prior to trial. The hearing below established that in fact all of the crime scene latent prints were and had always been contained in the court file. The entire Metro Dade investigations file herein, court file, and all other material requested, were provided to the Appellant. The Appellant was then given an opportunity to have his own examiners compare the crime scene prints with the fingerprints of the alleged suspects. At the evidentiary hearing below, the State conclusively established that the other "suspects" alleged by the defense, were in fact investigated. Their fingerprints and shoe impressions were taken and compared to those found at the crime scene, with negative results, prior to trial. In an abundance of caution, those prints were again compared, with negative results, during the evidentiary hearing below. Moreover, trial counsel at said hearing, testified that he had in fact, prior to trial, been provided with the information as to the investigation of "other suspects." Thereafter, the Appellant was given an opportunity to

"reinvestigate" this case, and, despite a second evidentiary hearing on "factual innocence," was unable to produce one iota of evidence reflecting any suspects not investigated by the State. The Appellant's argument with respect to this point is thus entirely devoid of merit.

III

THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM WAS UNTIMELY, SUCCESSIVE, AND WITHOUT MERIT.

In the first post-conviction proceeding herein, the defendant claimed ineffective assistance of counsel, because his trial counsel "had spent too much time preparing for the guilt phase of his trial and too litle time preparing for the penalty proceeding." Stewart v. State, supra, 481 So.2d at 1211. Both the lower court and this Court found trial counsel's conduct to be deficient,[4] because, "due to the strength and amount of the evidence against Stewart, it appears that his counsel made an ill-advised choice of his theory of defense," and, "substantial time should have been expended preparing for the penalty phase." Stewart, supra, at 1211, 1212. However, both the lower court and this Court agreed that there was no "reasonable probability that the jury and judge's recommendation and conclusions regarding this brutal murder would have been altered," even if the additional post-conviction testimony had been presented at trial. Id.

During the course of the third post-conviction proceedings below, the defendant, despite now claiming that his trial counsel's theory of defense was valid, sought the benefit

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[4] The Eleventh Circuit Court of Appeals disagreed with this conclusion. Stewart v. Dugger, supra.

of said "deficiency" finding, and requested the relitigation of the prejudice prong of this claim.

In support of his claim, the defendant proffered letters from former prosecutors Godwin and Stelzer, concerning their views to the Governor in clemency proceedings in 1983 and 1986, that the death sentence was no longer appropriate. The defendant's pleadings also reflected that prior collateral counsel knew of these letters at the time the defendant filed his previous two motions for post-conviction relief. (R. 1854-55). Thus, the claim was not predicated on facts previously unknown to defendant's counsel.[5]

The Appellee respectfully submits that this claim should be found to be procedurally barred. First, the claim was untimely, as it was raised in September 1990. See Fla. R.Crim. P. 3.850; Adams, supra; Eutzy v. State, 541 So.2d 1143, 1145 (Fla. 1989). Second, the claim was successive. The assertion

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5 The Appellant has claimed that prior collateral counsel did not present Mr. Godwin's letter, as a "favor" to the latter. There was no testimony to this effect. Rather, Ms. Greene stated that she had no strategy for not presenting the letter, and added that she was, in effect "incompetent." (R. 2640-41, 2649). Ms. Greene's statements as to her competency are not dispositive of this issue. See, Francis v. State, 529 So.2d 670, 672 n. 2 (Fla. 19880. Her decision not to have Mr. Godwin testify at the hearing in 1984 was clearly reasoned and not deficient, despite her protestations otherwise. Mr. Godwin did not want to testify because he had been arrested by the State Attorney's Office. The fact that Mr. Godwin had problems with the State and that he was an assistant public defender at the time would have severely undermined his credibility.

of a claim which has been raised in an earlier unsuccessful motion for post-conviction relief is an abuse of process. Bundy v. State, 536 So.2d 445 (Fla. 1989). This applies to relitigation of claims of ineffective assistance of counsel where there are no allegations that the defense was "precluded" from raising the issue in prior motions. Spaziano v. State, 545 So.2d 843, 844-45 (Fla. 1989); Tafero v. State, 529 So.2d 787 (Fla. 1987); Christopher v. State, 489 So.2d 22 (Fla. 1986); Clark v. State, 467 So.2d 699 (Fla. 1985). In addition, "law of the case" principles required the lower court to summarily deny this claim. Lower courts cannot change the law of the case as decided by this Court. Eutzy v. State, 536 So.2d 1014, 1015 (Fla. 1988); see also, Branner Enterprises, Inc. v. Department of Revenue, 452 So.2d 550, 552 (Fla. 1984).

The lower court, however, held an evidentiary hearing on this claim. After hearing the evidence presented, the lower court rejected this claim as insufficient[6] and without merit.

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[6] The State submits that the testimony of the individual former prosecutors is irrelevant to the analysis of the prejudice prong, for the determination of whether counsel provided effective assistance. In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court noted that the testimony of the original trial judge as to whether he/she would have still imposed the death penalty but for counsel's deficiencies was "irrelevant to the prejudice inquiry." 466 U.S. at 720. As noted by the Eleventh Circuit in Washington v. Strickland, 693 F. 2d 1243, 1263 (11th Cir. 1982), there are strong policy reasons behind this rule of admissibility. First, such testimony poses special risks of inaccuracy as it is given several years after the fact, and second the finality and integrity of judgments would be threatened by a rule that enables parties to attack a

(R. 2032-33). Although the State maintains that this claim was procedurally barred, it is also without merit. This is because the evidence below established that even if trial counsel had presented the mitigating evidence set forth during the initial post-conviction proceedings, to the prosecutors, the State would have still proceeded to ask for the death penalty.

As previously detailed in the Statement of the Facts herein, at pp. 26-32, Mr. Stelzer was the lead prosecutor. He was in charge of the penalty phase. Mr. Stelzer testified that he wrote the 1986 letter to the Governor, as a favor to Mr. Godwin, without having reviewed any of the mitigating evidence presented at the initial post-conviction proceedings.

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judgment by probing the mental processes of a judge.

These same policy reasons exist with respect to the testimony of former prosecutors. The prosecutors, like judges are asked to reconstruct thought processes several years after the fact. Furthermore, as with judges, the integrity of judgments would be threatened by a rule that allows defendants to attack their convictions or sentences by calling the prosecutors as witnesses to probe their mental processes. A prosecutor in using his/her discretion in charging or seeking a particular penalty for a defendant weighs in his/her mind the applicable facts against the applicable law, in much the same way as a judge or juror does when they make a decision as to the guilt or innocence of a defendant or what sentence may be appropriate. The determination of whether counsel provided effective assistance is an objective one under Strickland v. Washington, supra. There is no legal basis, nor has defendant cited one case, which has accepted the idea that either a defendant or a prosecutor can establish or not establish prejudice under Strickland, by having the prosecutor testify many years after the fact, that he or she would or would not have charged or sought the penalty against a defendant because of the actions or omissions of trial counsel.

After being provided with the mitigation presented by the defense in 1984, and having compared that evidence with information in his possession at the time of trial, Mr. Stelzer stated that the 1984 evidence was not "earth shattering." The prosecutors herein at the time of trial in 1979 had been aware of the defendant's alleged psychiatric or psychological problems through the reports of three court-appointed doctors. (R1. 1146-62). They had also been aware of the defendant's background, not only through the doctors' reports, but from the trial testimony of the defendant (T1. 1920-23, 1928); the defendant's sister (T1. 2365-69); the defendant's aunt (T1. 2371-73), and the defendant's friend, John Beckworth (T1. 2380-83). Indeed, both the lower court and this Court had found the 1984 mitigation evidence to be "merely cumulative of that presented at trial." Stewart v. State, supra, 481 So. 2d at 1211.

Mr. Stelzer unequivocably testified that at the time of trial in 1979, if he had been presented with the 1984 mitigating evidence, he would have still sought the death penalty in the instant case. Mr. Stelzer added that Mr. Godwin's contrary recommendations, based on the 1984 evidence, would not have affected his decision. Furthermore, Mr. Stelzer stated that, despite his personal feeling that after 12 years there is little deterrent effect to the death penalty and as such it would not be a miscarriage of justice for the defendant's sentence to be commuted to life, if he was

presenting the case currently, he would still seek the death penalty.

Finally, Mr. Godwin's testimony below, that he would have recommended against seeking the death penalty, was simply not credible. Mr. Stelzer testified that the Robert Godwin of 1979 was very different from the Robert Godwin of 1991. Mr. Godwin's views of the criminal justice system changed considerably after his own personal problems with it. Mr. Godwin himself admitted that after he left the State Attorney's Office in 1980, his opinion about the death penalty changed substantially. As noted by the court below, "It is not difficult to conceive that persons involved in this process, no matter what their role was, might reexamine their actions in the case and be troubled from time to time." (R. 2302). The State would also note that contrary to the Appellant's representations, there was no testimony that Mr. Godwin's views would have carried any weight with the Dade County prosecutor, Ms. Reno. Rather, witness Greene merely assumed that Ms. Reno would listen to her prosecutors. (R. 2651). The State does not challenge the fact that Ms. Reno would have listened to what Mr. Godwin had to say, but certainly there was no evidence presented by the defendant which indicated that she would have ordered her prosecutors not to pursue the death penalty. Indeed, Mr. Godwin himself acknowledged that he did not know what effect his changed recommendation would have. (R. 2590).

Thus, the State resepctfully submits that this claim should be found procedurally barred. In the alternative, the claim was insufficient and without merit.

IV.

APPELLANT'S CLAIM PURSUANT TO ESPINOSA V. FLORIDA, IS PROCEDURALLY BARRED.

The Appellant has argued that pursuant to Espinosa v. Florida, he is entitled to a new sentencing hearing, because the jury did not receive instructions on the narrowing constructions of the eight aggravating factors which it may have considered. In the lower court, however, the Appellant only alleged that the heinous, atrocious or cruel, aggravating factor and the instructions thereon were unconstitutionally vague pursuant to Maynard v. Cartwright, __ U.S. ___, 108 S.Ct. 1853 (1988). The lower court found said claim procedurally barred, because it "could have and should have been raised on direct appeal or first or second motions for post conviction relief." (SR. 1).

The State submits that the Appellant's claims with respect to aggravating factors and jury instructions, other than the heinous, atrocious and cruel argument presented below, are procedurally barred. This is because they were not presented to the lower court in Appellant's third rule 3.850 motion, and cannot be raised for the first time in this appeal. Doyle v. State, 526 So. 2d 909, 911 (Fla. 1988). Moreover, neither Espinosa, nor any other United States Supreme Court decision has ever held the remaining aggravating factors argued by the Appellant, to be vague or the jury instructions thereon to be deficient. The defendant never raised any objections, on

constitutionality grounds, to the jury instructions on these aggravating factors at trial. (R1. 1093-1103; T1. 2448). Likewise, he did not challenge the jury instructions on any aggravating factors on direct appeal. See initial Brief of Appellant, Case No. 57,971, at pp. 47-53. Thus, even if said claims had been raised in the Rule 3.850 motion below, they would still be procedurally barred. Johnson v. Singletary, 18 Fla. L. Weekly S90, at 92-93, n.1 (Fla. Jan. 29, 1993) ("The other issues raised are unquestionably procedurally barred. They are (1) that Florida's statute setting forth aggravating factors is unconstitutionally vague; (2) that the jury's recommendation was tainted by the consideration of other valid aggravating factors, including the 'witness elimination' factor, and (3) that Johnson's penalty was automatically aggravated in violation of the Constitution.")

With respect to the HAC instructions herein, this Court has repeatedly applied Florida's procedural bar rule to such arguments premised on Espinosa. See Turner v. Dugger, 18 Fla. L. Weekly S30, S32 (Fla. Dec. 24, 1992), where this Court held:

> Finally, we note that although the jury was given an instruction on the aggravating circumstances of heinous, atrocious, or cruel similar to that which was recently ruled unconstitutionally vague by the United States Supreme Court in Espinosa v. State, 112 S.Ct. 2926 (1992), Turner failed to object on constitutional or vagueness grounds and thus deprived the trial court of an opportunity to rule on the issue. Turner

> thus waived the claim. See Kennedy v. Singletary, 602 So.2d 1285 (Fla. 1992).

See also Kennedy v. Singletary, 602 So. 2d 1285 (Fla. 1992), cert. denied, ___ U.S. ___, 120 L.Ed.2d 931 (1992) (claim based upon Espinosa procedurally barred, where only objection to jury instruction was to applicability, and not constitutionality; claim not presented on direct appeal); Melendez v. State, 17 Fla. L. Weekly S699 (Fla. November 12, 1992) (claim based upon Espinosa procedurally barred, where issue was waived on direct appeal due to lack of an objection at trial); Sochor v. Florida, ___ U.S. ___, 112 S.Ct. 2114, 2119-2120, 119 L.Ed.2d 326 (1992) (pretrial motion attacking constitutionality of aggravating circumstance was insufficient to preserve claim as to constitutionality of jury instruction to which no contemporaneous objection interposed); Johnson v. Singletary, supra.

In the instant case there were no objections, on constitutionality grounds, to the HAC jury instructions at trial, nor were the HAC instructions challenged on appeal. (R1. 1093-1103; T1. 2448); see also Initial Brief of Appellant, Case No. 57,971, at pp. 47-53. Contrary to the Appellant's representations, the only objection to HAC at trial, was that it was inapplicable under the facts. (T1. 2261, 2263). The claim is thus procedurally barred. Turner, Johnson, Kennedy, Melendez, Sochor v. Florida, supra.

The State would additionally note that Appellant's suggestion that Espinosa should be treated as a change of law comparable to Hitchcock v. Dugger, 481 U.S. 393 (1987), is without merit. Hitchcock does not represent this Court's most recent retroactive application of a precedent on collateral attack. In Jackson v. Dugger, 547 So. 2d 1197, 1199 (Fla. 1989), this Court concluded that Booth v. Maryland 482 U.S. 496 (1987) was entitled to such application, but limited the class of defendants who could secure relief based upon Booth to those who had interposed contemporaneous objections at the time of trial. The error in Booth and the alleged error in Espinosa are similar, i.e., the jury being allowed to consider an improper factor in aggravation, either extraneous to the statute or improperly defined. This similarity indictates that the two precedents should be treated alike for retroactivity purposes on collateral attack.

The error in Hitchcock is of an entirely different sort, implicating the entire capital sentencing scheme due to "the sentencer [having been] precluded from even considering certain types of mitigating evidence." See Graham v. Collins, 52 Cr. L. Rptr. 2114, 2118 (U.S. S.Ct. January 27, 1993). Whereas an allegation of Hitchcock error casts obvious doubt upon the reliability of any prior proceeding, "Espinosa error," at most, impacts upon one of eleven statutory aggravating factors which, under the facts of a given case, may or may not have played a

role of any importance.[7] Indeed, as specifically noted by the United States Supreme Court, such instructional error is not "fundamental". See Sochor v. Florida, supra, at 119 L.Ed.2d 338, where the Court specifically stated:

> . . .In any event, we know of no Florida authority supporting Justice Steven's suggestion that all federal constitutional error (or even that kind claimed by Sochor) would be automatically 'fundamental'. Indeed where, as here, valid aggravating factors would remain, instructional error involving another factor is not 'fundamental'. [cites omitted]" (emphasis added)[8].

Finally, assuming arguendo, that Espinosa, can be retroactively applied to the Appellant, the State respectfully submits that any error in the HAC instructions[9] herein was

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[7] It must be remembered that the respective roles of aggravating and mitigating circumstances are different. Those in aggravation are essentially limitations upon the sentencer's discretion, i.e., only those factors set forth in the statute can be considered in aggravation. Mitigation, of course, is not similarly limited, and a sentencer's failure to fully appreciate that fact casts serious doubt upon the reliability of any sentence.

[8] With respect to the HAC instructional error, Sochor had argued that, "this error goes to the ultimate sentence, ..., because a Florida jury is 'the sentencer' for Clemons purposes, or at the least one of 'the sentencer's' constituent elements... Hence, the argument runs, error at the jury stage taints a death sentence, even if the trial judge's decision is otherwise error free." Sochor v. Florida, supra, 119 L.Ed.2d 337.

[9] The Espinosa HAC instruction was not given herein. Instead, the jury was specifically advised that this aggravating circumstance contemplated a crime involving a design "to inflict a high degree of pain, utter indifference to or enjoyment of, the suffering of others, pitiless." (T1. 2444). Such definition is clearly comparable to the language from State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert. denied, sub nom, Hunter v. Florida, 416 U.S. 943 (1974), approved by the United States Supreme Court in

harmless beyond a reasonable doubt, because the result would been the same had this factor been properly defined in the jury instructions. See Clemons v. Mississippi, 494 U.S. 738, 108 L.Ed.2d 725, 110 S.Ct. 11441 (1990), where the United States Supreme Court expressly approved said standard:

> It is perhaps possible, however, that the Mississippi Supreme Court intended to ask whether beyond reasonable doubt the result would have been the same had the especially heinous aggravating circumstances been properly defined in the jury instructions; and perhaps on this basis it could have determined that the failure to instruct properly was harmless error.

The United States Supreme Court has added that the import of its holding in Clemons, supra, is that even if the sentencer applies an improper construction, "a State appellate court may itself determine whether the evidence supports the existence of the [HAC] aggravating circumstance as properly defined", and thus uphold the death sentence. Walton v. Arizona, 497 U.S. ___, 111 L.Ed.2d 511, 528, 110 S.Ct. ___ (1990), see also Richmond v. Lewis, 506 U.S. ___, 113 S.Ct. 528, 121 L.Ed.2d 411 (1992); Lewis v. Jeffers, 497 U.S. ___, 111 L.Ed.2d 606, 622, 110 S.Ct. ___ (1990) ("if a State has adopted a constitutionally narrow

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Profitt v. Florida, 428 U.S. 242, 256-7 (1976) (". . .The conscienceless or pitiless crime which is unnecessarily torturous to the victim"). Both phrases focus upon the same objective criteria, i.e., the suffering of the victim and the defendant's intention to inflict, or enjoyment of, such suffering. The State respectfully submits that it should not be of constitutional consequence which phrase is used in a given case.

construction of a facially vague aggravating circumstance, and if the State applied the construction to the facts of the particular case, then the 'fundamental constitutional requirement' of 'channeling and limiting . . . the sentencer's discretion in imposing the death penalty' Cartwright, 486 U.S. at 362 100 L.Ed.2d 372, 108 S.Ct. 1853, has been satisfied.")

In the instant case, this Court has already itself determined that the evidence herein supports the existence of the HAC factor. Stewart v. State, supra, at 420 So. 2d 865. Thus, because this Court has adopted a constitutionally narrow construction of HAC[10] and applied this construction to the facts of the instant case, any error in the HAC jury instructions would not have affected the result herein and was harmless beyond a reasonable doubt. Walton v. Arizona, Richard v. Lewis, Lewis v. Jeffers, supra.

The State would additionally note that due to the relevance of the evidence presented and the arguments of counsel on this factor, had the jurors been instructed as desired by the Appellant, their focus would not have changed. In determining the effect of an improper instruction it is presumed that the jurors took the entire record into account, including the evidence actually adduced. Yates v. Evatt, 500 U.S. ___, 111

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10 See Proffit v. Florida, 428 U.S. 242 (1976); Sochor, supra, at 119 L.Ed.2d 339; Johnson, supra.

S.Ct. 1884, 114 L.Ed.2d 432 (1992). Moreover the combined arguments of counsel can render an error harmless. See Johnson v. State, 17 FLW S603, 606-7 (Fla. October 1, 1992); United States v. Black, 843 F.2d 1456, 1462 (D.C. Cir. 1988); United States v. Linn, 889 F.2d 1369, 1373 (5th Cir. 1989) (failure to give an instruction harmless, where information in the instruction was itemized by defense counsel and government concurred in same).

In the instant case, during the penalty phase, the State presented the medical examiner who performed the autopsy on the victim. (T1. 2315-23). This witness detailed the pain and suffering of the victim, her struggle and defensive wounds, and the length of consciousness. Id. During the penalty phase arguments of counsel, the prosecutor's sole focus with respect to HAC, was the unnecessary pain inflicted upon and suffered by the victim. (R. 2416). Defense counsel's focus on this issue was the degree of pain actually suffered by the victim. (T1. 2431).

The jurors' focus was thus upon its proper object. Had they been instructed as now desired by the Appellant, their focus would not have changed. The jurors herein either weighed in the victim's unnecessary suffering, as they were entitled to do, or they did not, in which case the defendant certainly was not prejudiced in any way by the instructions given. In sum, instructional error herein, if any, was proven harmless beyond a reasonable doubt. Johnson, supra.

V.

THE CLAIM OF NON STATUTORY AGGRAVATION AND RELIANCE UPON OTHER IMPERMISSIBLE FACTORS IS PROCEDURALLY BARRED.

In the lower court the Appellant alleged that his rights to a fair and reliable capital trial and sentencing determination were violated, as there was an impermissible reliance upon victim impact evidence in violation of Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987) and South Carolina v. Gathers, 109 S.Ct. 2207 (1989). The lower court found this claim to be procedurally barred. The lower court was correct. This claim is procedurally barred because it was untimely, and there were no objections raised thereto at trial or on direct appeal. Eutzy v.State, 541 So.2d 1143, 1145 (Fla. 1989); Adams v. State, 543 So.2d 1244, 1249 (Fla. 1989); Grossman v. State, 525 So.2d 833 (Fla. 1988), cert. denied, ___ U.S. ___, 107 S.Ct. 1354, 103 L.Ed.2d 822 (1989).

CONCLUSION

On the basis of the arguments presented herein, the State respectfully requests that this court deny all relief requested, on the grounds that the claims herein were untimely and procedurally barred.

Respectfully submitted,

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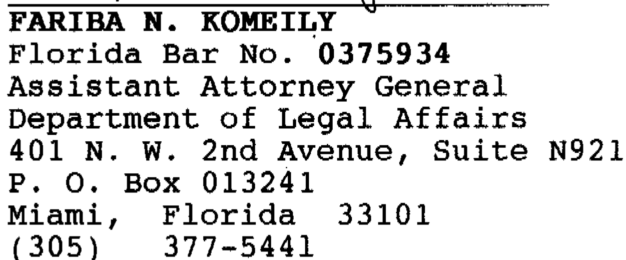

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by mail to **M. ELIZABETH WELLS**, Assistant CCR, OFFICE OF THE CAPITAL COLLATERAL REPRESENTATIVE, 1533 South Monroe Street, Tallahassee, Florida 32301 on this 23 day of February, 1993.

FARIBA N. KOMEILY
Assistant Attorney General

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