IN THE SUPREME COURT OF FLORIDA

JAMES ARMANDO CARD,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 82,435

ON APPEAL FROM THE CIRCUIT COURT,
FOR THE FOURTEENTH JUDICIAL CIRCUIT
IN AND FOR BAY COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee does not generally accept Appellant's Statement of the Case, which is cursory and argumentative. Accordingly, the state would set forth the following:

James Armando Card was indicted for first-degree murder, robbery and kidnapping, and tried in Bay County Circuit Court on January 18-22, 1982. Prior to trial, Card's counsel filed a motion to dismiss the indictment, on the grounds, inter alia, that §§782.04 and 921.141 were unconstitutionally vague and indefinite, such motion later amended several times (OR 25, 34-5, 42).[1] Defense counsel later filed two other motions, one of which specifically contended, inter alia, that the aggravating circumstances were impermissibly vague and overbroad; as to the heinous, atrocious or cruel aggravating circumstance, the motion contended that, "[A]lmost any capital felony would seem cruel, heinous and atrocious to a layman", and that, "[E]xamination of the widespread application" of the circumstances indicated that "reasonable and consistent application is impossible." (OR 65). The motions were subsequently denied (OR 83-5).

The stated called nineteen witnesses at Card's trial, including the medical examiner. Dr. Kielman testified that the victim, Janis Franklin, had "classical defensive wounds", in that she had cuts on her hands, where she had tried to ward off the knife blows (OR 785-6). Ms. Franklin had a "very, very severe

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[1] (OR ____) represents a citation to the original record on appeal, prepared in Card v. State, Florida Supreme Court Case No. 61,715, whereas (2PCR ___) represents a citation to the instant case, Card v. State, Florida Supreme Court Case No. 82,435, representing Card's second state postconviction appeal.

bruise" on the back of the neck, which had begun to hemorrhage (OR 787). The victim's throat had been slit with substantial force, and, apparently, from side to side, in that the wound was six to seven inches long, two to two and one half inches deep, and the neck bone itself had been slashed (OR 781-3). The state also called Vicky Elrod, who testified that Card had admitted committing the murder (OR 801). She stated that Card had told her that he had gone to the Western Union Officer where the victim worked, had "scuffled" with her, torn her blouse and "cut her a little bit" with the knife, before taking the money and placing Ms. Franklin in his car (OR 802); Card had then driven to a wooded area, about five miles away, and, after assuring Ms. Franklin that he would not hurt her, had come up behind the victim, grabbed her by the hair, and slit her throat (OR 802-3). As the victim bled to death, Card had said, "Die, die, die," (OR 804). Card told Ms. Elrod that he had worn gloves during the robbery, and had thrown the knife "where no cop could find it" (OR 804).

On January 22, 1982, the jury convicted Card on all counts, as charged, and the penalty phase commenced later that day. During the charge conference, defense counsel objected to the court instructing the jury on the cold, calculated and premeditated factor, and stated that the jury should be told that the fact that Card had been convicted of premeditated murder was

not, in and of itself, an aggravating circumstance (OR 1134-5; 2SR 101-2).[2] Subsequently, defense counsel stated the following for the record:

> INGLES: I object to the requested instruction by the State that the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious, or cruel based on the evidence presented, and if the Court is going to give the aggravation on No. 8, wicked, evil, atrocious, or cruel, I would request the following additional instruction to be given to the jury. These are basically a definition of heinous, atrocious, and cruel as defined under the decision State v. Dixon, 283 So.2d 1. The definition reads as follows: 'Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile, and cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies, the conscienceless or pitiless crime which is unnecessarily torturous to the victim.' That is the definition in 283 So.2d 1, 1973 Supreme Court. (2PCR 107).

The prosecutor then indicated that he had no objection to the court defining the terms of this aggravating circumstance, and a discussion was had as to the instruction to be utilized (2PCR 108-111); defense counsel indicated apparent agreement with an instruction utilizing phraseology from Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978) (2PCR 110).

At the penalty phase itself, the state presented no additional evidence, whereas the defense called a psychologist,

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[2] Excerpts of the original proceedings, as well as portions of the appellate briefs filed in Card's direct appeal, were attached to the state's response below, and, where appropriate, citation will be made to the postconviction record.

Dr. Hord (OR 1159-1205). In his closing argument, the prosecutor argued that five aggravating circumstances applied, including that in regard to the homicide being especially heinous, atrocious or cruel, and that in regard to it being cold, calculated and premeditated (OR 401-3). In the defense closing argument, Attorney Ingles contested the application of the former aggravating circumstance, on the basis, inter alia, that there had been no evidence of unnecessary pain or torture or that Card "enjoyed" the homicide (OR 421-4); as to the latter aggravating circumstance, defense counsel contended, without objection, that the fact that Card had committed a premeditated murder "was not an aggravating circumstance" and that "something more" was required (OR 424-6). In his instructions, the judge instructed the jury upon five aggravating circumstances; in pertinent part, these instructions read:

> Fourth, the crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means design to inflict a high degree of pain without utter indifference to, or even enjoyment of, the suffering of others. The crime for which the defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (OR 439-440; 2SR 125-6).

Defense counsel stated that he had no objection to the instructions "other than as stated" (OR 442-3; 2SR 130). The jury subsequently returned an advisory sentence of death.

Sentencing did not take place until January 28, 1982 (OR 450-463). At this time, Judge Turner formally sentenced Card to death, finding five (5) aggravating circumstances, and no

mitigation; the court found in aggravation; that Card had committed the murder during an kidnapping, §921.141(5)(d), Fla. Stat. (1979); that Card had committed the murder for purposes of avoiding arrest, §921.141(5)(e), Fla. Stat. (1979); that Card had committed the murder for pecuniary gain, §921.141(5)(f), Fla. Stat. (1979); that the murder had been especially heinous, atrocious or cruel, §921.141(5)(h), Fla. Stat. (1979) and that the murder had been committed in a cold, calculated and premeditated manner, §921.141(5)(i), Fla. Stat. (1979) (OR 168-173). The detailed findings as to the last two aggravating circumstances, quoted in this court's opinion, Card v. State, 453 So.2d 17, 22-3 (Fla.), cert. denied, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984), read as follows:

> 4. The murder was especially heinous, atrocious or cruel. (F.S. 921.145(5)(h)). The acts of this defendant and the obvious torture and suffering of the victim set this crime apart from the norm of capital felonies. This defendant entered the Western Union, a family business, in Panama City, Florida. He removed a knife from his pants and attacked the clerk, Janis Franklin. She made a valiant effort to fend off her attacker; and, as a result of his initial attack, Janis' fingers on both hands were severely cut. Some fingers were almost completely severed from the hands. The Defendant ordered Janis out of the Western Union with that same knife to her back. In this severely injured condition she was taken on a death ride for approximately eight miles to an indistinct dirt road in an isolated, secluded area of Bay County. She was told to exit the vehicle and was promised she would not be harmed further. The Defendant then exited from the driver's side, came around the vehicle and silently approached Janis from behind. He grabbed her by the hair of the head, pulled her head back, and slit her throat. He then stood over her watching her bleed and uttered his final words to her, "die, die, die."

The evidence established that the wound was vicious, that it completely severed the windpipe and right side jugular vein, and that the defendant's knife actually left its mark on the neck bone itself.

The suffering of Janis Franklin prior to her death can barely be comprehended by those of us among the living. Those minutes before her death, while she was nursing her almost severed fingers and while she was being driven to this isolated area, was a time of complete and total terror. Then, for a few seconds, Janis Franklin had that slight ray of hope when she was told she would not be harmed further, only to be grabbed from behind and to realize that her life was ended.

This Court can think of no crime more wicked or vile. The evidence is clear that this defendant committed this heinous and atrocious crime upon Janis Franklin with no feelings for her suffering and even with a degree of enjoyment in slashing her throat.

5. The murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (F.S. 921.145(5)(i)). As early as 6:30 on the morning of June 3, 1981 the Defendant telephone Vicky Elrod in Pensacola and related that he would repay her a sum of $50.00 or $60.00 that he owed her. His course for that fatal day was then chartered. The evidence reflects that he was a regular customer of the Western Union, that he knew the location of the money and the volume of business conducted there. He prepared for his crime by wearing surgical gloves and hiding his knife inside his pants. After completion of the Robbery he kidnapped the victim and murdered her, thus disposing of the only witness to his crime. He proceeded to dispose of the gloves, the knife, the victim's wallet, and, at a later time, a silver coin, all of which could have connected him to the crime. The evidence established that he knew the tire tracks could connect him to the crime scene. He even attempted to get a witness to trade tires with him. There was much time for the Defendant to reflect on the seriousness of his acts, to plan his acts, and to realize

> the penalty for his acts. The evidence leaves no doubt that the crime was planned and premeditated and that the murder was carried out on cold and calculated manner. (OR 170-2).

Card appealed his convictions and sentence of death to this court, and, in his 1982 direct appeal, raised two issues for review: (1) that the trial court had erred in excluding the proffered testimony of Camille Cardwell and (2) that his death sentence should be reversed; in the second claim, Card specifically contended that the trial court had erred in finding the cold, calculated and premeditated aggravating circumstance, that it had erred in finding both the avoid arrest and pecuniary gain aggravating circumstances, in that they overlapped, and that it had erred in not finding that Dr. Hord's testimony established mitigation (2PCR 88-93). No attack was made upon the jury instruction on the cold, calculated and premeditated aggravating factor, and, as this court noted on appeal, no attack of any kind was made upon the heinous, atrocious or cruel aggravating circumstance. Card, 453 So.2d at 23 ("Appellant does not contest the . . . fourth aggravating circumstance [] found."). In affirming the finding of the cold, calculated and premeditated aggravating circumstance, this court found that, under Florida law, the premeditation necessary to support this factor "must rise to a level beyond that which is required for a first-degree murder conviction." Id. This court further held:

> In the instant case, the appellant took the victim from the Western Union office, after having cut her fingers, transported her in his car to a secluded area eight miles away, had her get out of the car, and then cut her throat. The appellant had ample time during this series of events to reflect on his

> actions and their attendant consequences. We find that the facts of this case demonstrate the heightened level of premeditation required by Jent.
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> Id. at 23-4.

In 1986, a death warrant was signed for Card, and he filed his initial postconviction motion, under Fla.R.Crim.P. 3.850, in the state circuit court, presenting four (4) primary grounds for relief: (1) that the trial court had lacked jurisdiction to preside over the trial after an unauthorized change of venue; (2) that Card had been deprived of a pretrial competency hearing; (3) that Card had been deprived of a competent psychological evaluation and (4) that Card had been deprived of effective assistance of counsel at trial and penalty phase. Card also filed a petition for writ of habeas corpus in this court, re-presenting the issue in regard to jurisdiction, and raising a related claim of ineffective assistance of appellate counsel. Following the stay of execution, all relief was denied. Card v. State, 497 So.2d 1169 (Fla. 1986), cert. denied, 481 U.S. 1059, 107 S.Ct. 2203, 95 L.Ed.2d 858 (1987). Another death warrant was signed and Card filed a successive petition for writ of habeas corpus in this court, presenting an additional five claims for relief: (1) an alleged violation of Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1321, 95 L.Ed.2d 346 (1987); (2) an alleged violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 23 (1985); (3) a renewed claim in regard to the denial of a pretrial competency hearing; (4) a renewed claim in regard to the exclusion of the proffered testimony of Camille Cardwell and (5) another claim of ineffective assistance

of appellate counsel, on different grounds. This court found no merit as to the Hitchcock claim, and found that all the other claims were procedurally barred. Card. v. Dugger, 512 So.2d 829 (Fla. 1987).

Card then filed a petition for writ of habeas corpus in the federal district court, and received a stay of execution and an evidentiary hearing on his claim of ineffective assistance of trial counsel. Following the denial of relief in 1988, Card appealed to the United States Court of Appeals for the Eleventh Circuit, presenting seven (7) claims for relief: (1) denial of effective assistance of counsel at the guilt and penalty phases; (2) exclusion of the proffered testimony of Camille Cardwell; (3) alleged lack of trial court jurisdiction; (4) alleged denial of pretrial competency hearing and alleged incompetency during trial; (5) alleged ineffective assistance of counsel on appeal; (6) alleged violation of Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1321, 95 L.Ed.2d 346 (1987) and (7) alleged violation of Caldwell v. Mississippi 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). The Eleventh Circuit affirmed the district court's denial of relief in all respects, except that it remanded to the district court for a fuller explanation as to why no hearing had been afforded on the claim of trial competency. Card v. Dugger, 911 F.2d 1494 (11th Cir. 1990). Following the entry of the district court's order on remand, the Eleventh Circuit affirmed the denial of any evidentiary hearing on this issue, as well. Card v. Singletary, 981 F.2d 481 (11th Cir. 1992), cert. denied, ___ U.S. ___, 114 S.Ct. 121, 126 L.Ed.2d 86 (1993).

During the pendency of the federal proceedings, Card filed a second motion for postconviction of relief in the state circuit court, on or about March 11, 1992; because the pleading contains an incorrect case number, it is unclear when it was formally docketed. In this pleading, Card presented four primary claims: (1) that the sentencing court failed to independently weigh aggravating and mitigating circumstances, given Judge Turner's testimony at the Kayle Bates evidentiary hearing in 1990; (2) a claim that the penalty phase jury instructions had impermissibly shifted the burden of proof onto the defense; (3) a claim that the cold, calculated and premeditated aggravating circumstance had been unconstitutionally applied to Card, in violation of Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 371 (1988) and (4) a claim that the heinous, atrocious or cruel aggravating circumstance had likewise been unconstitutionally applied to Card, in violation Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 371 (1988) (2PCR 1-32). On December 30, 1992, Card amended this pleading, and added allegations under Espinosa v. Florida, ___ U.S.___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), as to Claims III and IV; in regard to Claim I, collateral counsel also proffered an affidavit, executed by Judge Turner on October 30, 1992 (2PCR 33-69).

The state responded to Card's motion on February 26, 1993, and contended, inter alia, that all of the claims presented were procedurally barred; the state also proffered an affidavit from Judge Turner, executed on November 9, 1992 (2PCR 70-133). On April 20, 1993, Judge Sirmons rendered an order, denying Card's successive motion for postconviction relief (2PCR 134-6). As to

the first claim, the judge found that, under caselaw involving similar circumstances, the issue was procedurally barred; the court further found that Card had failed to demonstrate why such claim had not been raised until eight years after his conviction and sentence had become final (2PCR 134-5). As to the burden-shifting claim, the court found that such claim was not cognizable on postconviction motion (2PCR 135). As to the Espinosa claim involving the cold, calculated and premeditated factor, the court found that this claim was procedurally barred, because there had been no objection to the wording of the instruction at trial or comparable claim asserted on appeal (2PCR 135); the court made identical findings as to the Espinosa claim regarding the heinous, atrocious or cruel aggravating factor (2PCR 135-6). In the alternative, Judge Sirmons found that any jury instruction error was harmless, because the sentencing judge and the state appellate court had made specific findings of fact in support of these aggravating circumstances, such findings "cur[ing] any vagueness and indicat[ing] a proper constitutionally narrow construction." (2PCR 136). Collateral counsel subsequently moved for rehearing, which was denied on August 11, 1993 (2PCR 186-192; 206); collateral counsel attached an affidavit from one of Card's original trial counsel to the rehearing motion (2PCR 191-2).

SUMMARY OF ARGUMENT

Card raises three claims in this appeal from the denial of his successive motion for postconviction relief. The trial judge found all of the claims presented to be procedurally barred, and such ruling was correct, and should be affirmed; Card's conviction and sentence have been final since 1984, and he has already litigated in every level of state and federal court. Of the claims presented, that in regard to alleged "burden-shifting" in the penalty phase jury instructions is obviously procedurally barred, based upon this court's precedents. Similarly, Card's claim under Espinosa v. Florida, ___ U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), in regard to the jury instructions on both the heinous, atrocious or cruel and cold, calculated and premeditated aggravating circumstances is procedurally barred. No claim of this sort was presented in Card's direct appeal to this court, and the state further questions any trial court preservation, as well; assuming that any claim is preserved, any error was harmless beyond a reasonable doubt, as the instant homicide qualifies for both aggravating circumstances, "under any definition." The remaining claim, in regard to the fact that the prosecution allegedly drafted the sentencing order, at the request of the judge, is procedurally barred under this court's precedents involving identical claims of error; there has been no showing either why this claim was not raised earlier or, as to the merits, that, in fact, the sentencer did not consider all of the evidence presented. The circuit court's denial of relief as to all of these procedurally barred claims should be affirmed in all respects.

ARGUMENT

POINT I

THE TRIAL COURT'S DENIAL OF RELIEF, AS TO CARD'S PROCEDURALLY-BARRED CLAIM REGARDING THE SENTENCING ORDER, WAS NOT ERROR

As the primary claim for relief, collateral counsel contend that Card's sentence of death must be vacated because, in 1992, they proffered evidence to suggest that the prosecution, rather than the sentencing judge, had actually drafted the 1982 sentencing order. The circuit court found this claim procedurally barred for two reasons: first, because, as a matter of law, the issue was not cognizable on collateral attack, under this court's precedents, and, secondly, because Card raised it, for the first time, in a successive motion, eight years after his conviction and sentence became final (2PCR 134-5). Despite the amount of verbiage expended by opposing counsel, neither of these holdings, which are fully in accord with this court's precedent, has been called into question. The circuit court's denial of relief as to this claim should be affirmed in all respects.

The operative facts are these. James Armando Card was sentenced to death in 1982. This court affirmed his convictions and sentence of death in 1984, and his petition for writ of certiorari was denied by the United States Supreme Court on November 5, 1984; accordingly, his conviction and sentence were "final" as of that date. See, Burr v. State, 518 So.2d 903, 905 (Fla. 1987). Card filed a motion for postconviction relief, pursuant to Fla.R.Crim.P. 3.850, in June of 1986 and raised no claim of this nature; likewise, Card filed two petitions for writ of habeas corpus in this court, in 1986 and 1987, and

likewise failed to raise any claim in this regard. Card filed a petition for writ of habeas corpus in the federal district court in 1987, receiving an evidentiary hearing thereon in 1988, and, again, omitted any reference to this claim.

During litigation of another capital case in Bay County, the same collateral counsel who represents Mr. Card called Judge Turner as a witness on March 13, 1990, in the case of State v. Bates. At that time, Judge Turner testified that, as a matter of customary practice, he allowed the prosecution to draft the sentencing orders in capital cases (2PCR 4-12).

Approximately seven hundred twenty-six (726) days after that event (or two years minus four days, cf. Adams v. State, 543 So.2d 1244 (Fla. 1989)), collateral counsel filed the instant motion for postconviction relief in this case, contending that, on the basis of Judge Turner's testimony in Bates, Card was entitled to relief on this ground.[3] Almost nine months later, collateral counsel, on November 30, 1992, supplied the circuit court with an October 30, 1992 affidavit from Judge Turner, since retired, in which it was averred that, in Card's case, the judge had directed the prosecution to draft the sentencing order (2PCR 68-9); according to the Initial Brief, this affidavit came about as a result of the meeting between Judge Turner and various attorneys from the Volunteer Lawyers' Resource Center (Initial Brief at 27). After Judge Sirmons denied relief, Card proffered in his May 4, 1993 motion for rehearing, yet another affidavit,

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[3] The time interval between the 1990 Bates hearing and the 1992 motion in this case is referred to in the Initial Brief as a "short time". (Initial Brief at 27).

this time from Card's surviving trial counsel, H. Guy Green, in which it was alleged that the defense in this case had no notice of this procedure; as this affiant noted therein, the attorney who actually handled Card's penalty phase, Tom Ingles, is deceased (2PCR 191-2).

(A) As A Matter Of Law, This Claim Is Procedurally Barred

As noted, Judge Sirmons found this claim procedurally barred on two grounds. The first was that, under such precedents of this court as Bates v. State, 604 So.2d 457 (Fla. 1992), claims of this nature are not cognizable on collateral attack (2PCR 134-5). In Bates, this court expressly held that a claim that "the trial court failed to make an independent weighing of the aggravators and mitigators", was procedurally barred in Bates' first 3.850, because it represented an issue "which could have been or should have been raised at trial and, if properly preserved, on direct appeal." Bates, 604 So.2d at 459. There can be little doubt that, in Bates, this court was referring to the identical claim presented sub judice; indeed, both claims are, in part, derived from the same factual predicate, i.e., Judge Turner's testimony at the 1990 hearing. Although opposing counsel seems to argue that the above language from this court is somehow dicta or that it means something other than its plain meaning would suggest (Initial Brief at 26-9), such argument is unconvincing in the extreme. This court has consistently held that claims of this nature, i.e., that the trial court failed to independently weigh the aggravating and mitigating factors, usually due to the fact that the state drafted the sentencing order, are not cognizable when raised for the first time on

collateral attack. See, Chandler v. Dugger, 19 Fla. L. Weekly S95 (Fla. February 24, 1994); Koon v. Dugger, 619 So.2d 246, 247 (Fla. 1993); Jennings v. State, 583 So.2d 317, 322 (Fla. 1991); Lightbourne v. Dugger, 549 So.2d 1364, 1366, n.2 (Fla. 1989). Card has offered no convincing reason why these precedents should not apply to his case, and the circuit court's finding of procedural bar should be affirmed.

To the extent that Card argues that Spencer v. State, 615 So.2d 688 (Fla. 1993), constitutes "new law", such that relief would now be appropriate, the state must disagree. In Spencer, a direct appeal opinion, this court reversed the conviction at issue because the judge had improperly excused a prospective juror. This court also held that it had been improper for the sentencing judge to formulate his sentencing decision prior to giving the defendant an opportunity to be heard; in Spencer, the defense attorney had quite literally walked in upon the judge and prosecutor drafting the sentencing order prior to the sentencing proceeding. First of all, to the extent that Spencer is a change in law, there has been no showing that this court intended that it be entitled to retroactive application in collateral attacks, so as to overturn long final judgments and sentences. Cf. Ferguson v. Singletary, 19 Fla. L. Weekly S101 (Fla. February 24, 1994) (Corbett v. State, 602 So.2d 1240 (Fla. 1992), requiring that only the judge who had actually heard the evidence could sentence a defendant to death, not entitled to retroactive application); Turner v. Dugger, 614 So.2d 1075 (Fla. 1992) (Campbell v. State, 571 So.2d 415 (Fla. 1990), and related cases involving obligation of sentencer to find mitigation, not

entitled to retroactive application). Card's conviction and sentence have been final for almost ten years, and, at some point, litigation must end. See, e.g., Witt v. State, 387 So.2d 922 (Fla. 1980). Spencer cannot lift the procedural bar correctly imposed sub judice.

(B) This Claim Was Not Cognizable On A Successive Motion

Assuming arguendo that Card is correct in his reading of Bates, and that the above cases do not apply, he still faces another procedural hurdle. As Judge Sirmons correctly noted, Card filed a previous 3.850 motion in 1986, and did not include this claim. In order to obtain either review of this claim, or relief, Card must demonstrate that the facts upon which this claim is predicated were unknown to him or his attorneys and could not have been ascertained by the exercise of due diligence, either at the time that the prior motion was filed and/or prior to November 5, 1986, the expiration of the two year rule. See, Fla.R.Crim.P. 3.850; Witt v. State, 465 So.2d 510 (Fla. 1985). Judge Sirmons found that, under such precedents of this court as Spaziano v. State, 570 So.2d 289 (Fla. 1990) and Johnson v. State, 536 So.2d 1009 (Fla. 1988), Card had failed to make such showing (2PCR 135). As in the prior section, Card has failed to explain why these precedents do not apply, and the cases upon which he relies involving allegedly "newly-discovered evidence" - Harich v. State, 542 So.2d 980 (Fla. 1989), Jones v. State, 591 So.2d 911 (Fla. 1992) and Scott v. Dugger, 604 So.2d 465 (Fla. 1992) - are easily distinguishable; Scott, it must be noted, did not involve a successive postconviction motion, and, in any event, involved matters obviously unavailable to the defendant at

the time of trial - the later life sentence imposed upon an equally culpable co-defendant.

The factual "predicate" for this claim is the "testimony" of Judge Turner, either in open court or by affidavit. Inasmuch as it would appear that all that Card's attorneys had to do in order to secure this testimony was simply to ask Judge Turner for it, it has not been demonstrated why these matters could not have been raised in 1986.[4] This court has consistently affirmed the finding of procedural bar under circumstances comparable to those sub judice. See, e.g., Zeigler v. State, 18 Fla. L. Weekly S583 (Fla. November 4, 1993) (defendant's claim under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, (1963), procedurally barred when presented for the first time in Zeigler's third postconviction motion; no showing made that basis for claim was previously unavailable through due diligence); Foster v. State, 614 So.2d 455, 458-9 (Fla. 1992) (same, where court noted that defendant represented by same collateral counsel throughout prior postconviction proceedings; Francis v. Barton, 581 So.2d 583, 584-5 (Fla. 1991) (defendant's claim under State v. Neil, 457 So.2d 481 (Fla. 1984), procedurally barred when presented for the first time in successive collateral attack; issue could and should have been raised in prior collateral litigation); Spaziano, supra (defendant's Brady claim, raised in fourth postconviction motion procedurally barred, where no showing made that, through due

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[4] The suggestion that the prosecutor's files in this case were "purged of evidence about this procedure" (Initial Brief at 7, n.1) is fanciful in the extreme.

diligence, facts could not have been uncovered earlier); Agan v. State, 560 So.2d 222 (Fla. 1990) (same); Lightbourne, supra (defendant's claim that judge was not impartial, based upon information in financial disclosure forms, procedurally barred when raised for the first time in successive collateral motion); Johnson, supra (defendant's claim of ineffective assistance of counsel, raised for the first time in successive collateral motion more than two years after finality of conviction and sentence, procedurally barred, where evidence relied upon "could have been ascertained by the exercise of due diligence"). The cases relied upon by Card, Harich which involved "unusual factual allegations", and Jones, which truly involved evidence which the defense could not have obtained earlier, are inapposite. The trial court's finding of procedural bar should be affirmed.

(C) Card Is Entitled No Relief

Additionally, it must be recognized that, even accepting the factual allegations as set forth in the affidavits, it cannot be said that Card would be entitled to relief or that a life sentence probably would have been imposed. Cf. Jones, supra. At most, the affidavits indicate that Judge Turner allowed the prosecution to draft a sentencing order; whether the defense had notice of this, or the order itself, is not clear, as the judge's subsequent affidavit suggests that they did (2PCR 132-3), whereas the belatedly-presented affidavit of Guy Green, Card's surviving attorney who was not primarily responsible for the penalty phase, suggests that it did not (2PCR 191-2).[5] Contrary to the

[5] Interestingly, the transcript in this case can be read to suggest that, if anyone drafted the sentencing order in this

representations in the Initial Brief (Initial Brief at 10, 12-14, 21, 36), these affidavits neither allege nor demonstrate that the sentencing judge did not actually consider all the evidence presented, and the fact that the proposed order may have been provided to the court "prior to the sentencing hearing under Fla. Stat. §921.141" (2PCR 69), hardly means that it was drafted prior to the penalty phase itself.

In this case, the penalty phase occurred on January 22, 1982, while the sentencing occurred almost one week later, on January 28, 1992, at which time the order was formally read into the record. Inasmuch as the order discussed the evidence presented at the penalty proceeding, i.e., the testimony of Dr. Hord (OR 168-173), it is difficult to see how the order could have been prepared in advance of the penalty phase itself; additionally, during the guilt phase charge conference, which occurred earlier on the same day as the penalty phase, defense counsel had announced that he was considering calling Card's mother and sister as witnesses at the penalty phase (OR 1018-19). Further, the order was not final unless, and/or until, Judge Turner signed it, and the findings contained therein have consistently been upheld against those few attacks which have been levied upon it. The trial court's denial of relief as to

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case, it was Green himself. On January 22, 1982, Green asked Judge Turner if he planned to sentence Card that day. The judge answered, "No, because I have to ---", and Green stated, "I have written finding of facts" (OR 1156). At minimum, even if a scrivener's error occurred, this would certainly suggest that the defense has been on notice of this potential claim since 1982, thus reinforcing the correctness of the circuit court's procedural bar. Cf. Adams, supra.

this procedurally barred claim was correct, and should be affirmed.

POINT II

THE TRIAL COURT'S DENIAL OF RELIEF, AS TO CARD'S PROCEDURALLY-BARRED CLAIMS UNDER ESPINOSA v. FLORIDA, ___ U.S. ___, 112 S.CT. 2926, 120 L.ED.2D 854 (1992), WAS NOT ERROR

As his next claim, Card contends that his sentence of death must be vacated, under Espinosa v. Florida, ___ U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), because his sentencing jury received deficient instructions on the heinous, atrocious or cruel and cold, calculated and premeditated aggravating factors. Judge Sirmons found these matters procedurally barred, due to inadequate preservation at trial and presentation on appeal (2PCR 135-6); the judge also made an alternative finding of harmless error (2PCR 136). On appeal, collateral counsel do not discuss this court's precedent, James v. State, 615 So.2d 668 (Fla. 1993), which sets forth the procedural prerequisites for consideration of an Espinosa claim on collateral attack; likewise, collateral counsel for Card do not discuss such cases as Thompson v. State, 619 So.2d 261, 267 (Fla.), cert. denied, ___ U.S. ___, 114 S.Ct. 445, 126 L.Ed.2d 378 (1993), in which this court set forth its most often applied harmless error analysis, in regard to claims of this nature. The state would suggest that the trial court's finding of procedural bar and, alternatively, harmless error, was correct, and should be affirmed in all respects. Because Card raises this claim in regard to two aggravating circumstances, each will now be addressed.

(A) The Heinous, Atrocious Or Cruel Aggravating Factor

Card contends that his sentence of death must be vacated because the instructions given to his jury on this aggravating factor "were virtually identical to the instructions found unconstitutional by the Supreme Court in Espinosa v. Florida" (Initial Brief at 45). Collateral counsel further contend that this claim was preserved in the trial court, because trial counsel had filed a pretrial written motion attacking the aggravator "on the basis of overbreadth and vagueness", and had "orally renewed the objection at the instruction conference" (Initial Brief at 50). Counsel further argue that both the sentencing court and this court, on direct appeal, applied an unconstitutionally overbroad construction of this aggravating circumstance (Initial Brief at 37-8). Analogizing this situation to one involving error under Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1321, 95 L.Ed.2d 346 (1987), Card insists that he is entitled to relief. None of these contentions can withstand strict scrutiny.

As to whether this claim is cognizable on collateral attack, this court held in James that a claim that the instruction on the heinous, atrocious or cruel aggravating factor is unconstitutionally vague is procedurally barred, "unless a specific objection on that ground is made at trial and pursued on appeal." James, 615 So.2d at 669. Here, as this court noted in Card's 1982 direct appeal, absolutely no attack was made upon this aggravating circumstance on any basis. Card, 453 So.2d at 23. In the Initial Brief, collateral counsel make absolutely no representation that this matter was presented on direct appeal,

and due to the unquestionable appellate default, Card's Espinosa claim is procedurally barred. See, e.g., Chandler, supra (defendant's Espinosa claim procedurally barred on collateral attack, where, although counsel objected to jury instructions at trial, defendant failed to raise issue on direct appeal); Jackson v. Dugger, 18 Fla. L. Weekly S485, S486 (Fla. Sept. 9, 1993) (same); Henderson v. Singletary, 617 So.2d 313, 315 (Fla. 1993) ("Although defense counsel requested expanded instructions on both aggravating factors and objected when the standard instructions were given, this claim is procedurally barred because a specific challenge to the instructions was not raised on direct appeal"). On the basis of Henderson, Jackson and Chandler, this claim is procedurally barred.[6]

Additionally, the state would contend that any jury instruction error was harmless beyond a reasonable doubt under State v. DiGuilio, 491 So.2d 1129 (Fla. 1986) and Chapman v.

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[6] Although not critical to resolution of this claim, the state also contends that Card failed to adequately preserve this issue at trial. It is clear that a pretrial motion attacking the aggravating factor itself is insufficient. See, Sochor v. Florida, ___ U.S. ___, 112 S.Ct. 2114, 2119-2120, 119 L.Ed.2d 326 (1992); Espinosa v. State, 626 So.2d 165 (Fla. 1993); Beltran-Lopez v. State, 626 So.2d 163 (Fla. 1993). Further, it is clear that the instruction actually given the jury was modified based upon defense counsel's objections; the original instruction contained no definition of the terms (2PCR 101-110). Although defense counsel originally proposed a more expansive definition than that ultimately given (2PCR 107), defense counsel never indicated any further objection to the instruction actually given, thus waiving the point, see Freeman v. State, 563 So.2d 73, 76 (Fla. 1990); further, counsel never expressly objected to the instruction given (which was, as noted, partly his own creation) on the grounds that it was unconstitutionally vague, such omission, again, waiving the point. See, e.g., Griffin v. State, 372 So.2d 991-2 (Fla. 1st DCA 1979); Kennedy v. Singletary, 602 So.2d 1285 (Fla.), cert. denied, ___ U.S. ___, 113 S.Ct.2, 120 L.Ed.2d 931 (1992).

California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). This court has consistently found Espinosa error of this type to be harmless, based upon a conclusion that the manner in which the victim was murdered was "heinous, atrocious or cruel under any definition of the terms." See, e.g., Thompson, supra; Henderson, supra; Foster, supra. In this case, Card slit the victim's throat with such force that the knife left an indentation on the bone of the neck, and, in the course of doing so, he completely severed the victim's windpipe and the right side jugular vein. As the victim bled to death, Card cried out to her, "Die, die, die"; Ms. Franklin had previously fought for life to such an extent that some of her fingers had practically been severed. The fact that the sentencing jury in this case did not receive a further explication on the meaning of the terms, "heinous, atrocious or cruel", was truly harmless because this crime was, inter alia, conscienceless, pitiless and unnecessarily torturous to the victim. See, e.g., Thompson, supra; Henderson, supra; Foster, supra; Davis v. State, 620 So.2d 152, 153 (Fla. 1993) (Espinosa error harmless where, given facts of case, jury would have recommended, and judge imposed, same sentence under any jury instruction). Additionally, the trial court, who, in his order, inter alia, expressly found that this crime was "set apart from the norm of capital felonies", given the "obvious torture and suffering of the victim", clearly applied the correct constitutionally narrowing construction of this factor, cf. Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), as did this court, when it affirmed the instant sentence of death, cf. Clemons v. Mississippi, 449 U.S. 738, 755, 110

S.Ct. 1441, 108 L.Ed.2d 725 (1990); Richmond v. Lewis, ___ U.S. ___, 113 S.Ct. 528, 121 L.Ed.2d 411 (Fla. 1992); of course, any contention that this aggravating circumstance has been unconstitutionally applied, or that the factor itself is unconstitutional, is procedurally barred. See Henderson, 617 So.2d at 315; Johnson v. Singletary, 612 So.2d 575, 576, n.1 (Fla. 1993); Chandler, supra. No relief is warranted as to this procedurally-barred claim.

(B) The Cold, Calculated And Premeditated Aggravating Factor

Assuming that Espinosa applies to this aggravating circumstance, see argument infra, Card's claims in regard to this factor fail for the same reasons as set forth in the above section. Under the standard set forth in James, no claim of this nature is cognizable for review. Although defense counsel at trial objected to the jury being instructed on this factor as a matter of law, and further complained that the standard instruction had no definitions of the terms, he never expressly contended that the instruction given was unconstitutionally vague (2PCR 98-117); as noted, the pretrial motion attacking the statute itself is insufficient to confer preservation. See Sochor v. Florida, ___ U.S. ___, 112 S.Ct. 2114, 2119-2120, 119 L.Ed.2d 326 (1992); Beltran-Lopez v. State, 626 So.2d 163 (Fla. 1993); Espinosa v. State, 626 So.2d 165 (Fla. 1993). On appeal, although Card attacked the finding of this aggravating circumstance, no attack of any kind was made in regard to the jury instructions (2PCR 87-93). Under this court's precedent, any Espinosa claim in this regard is procedurally barred. See, Kennedy v. Singletary, 602 So.2d 1285 (Fla.), cert. denied, ___

U.S. ___, 113 S.Ct.2, 120 L.Ed.2d 931 (1992); Chandler, supra; Remeta v. Dugger, 622 So.2d 452, 454 (Fla. 1993); Occhicone v. Singletary, 618 So.2d 730 (Fla. 1993); Henderson, supra; Rose v. State, 617 So.2d 291, 297 (Fla. 1993).

Additionally, as in Henderson, this murder was cold, calculated and premeditated, under any definition of the terms; it should be noted that in closing argument, defense counsel, without objection, told the jury that "something more" then the fact that Card had committed a premeditated murder was required (OR 424-6). Cf. Occhicone, supra. This crime was clearly the result of heightened premeditation, and bespeaks the existence of a careful plan and prearranged design. Cf. Rogers v. State, 511 So.2d 526 (Fla. 1987). Card knew the victim in this case and was familiar with the physical layout of the Western Union office. He called Vicky Elrod on the morning that the crime was to occur, and informed her that he would be paying her back the money which he owed her. He prepared for the crime by wearing gloves, and he took great pains to avoid to detection, such as transporting the victim to a remote location. Any vagueness in the jury instructions as to this aggravating circumstance was harmless beyond a reasonable doubt under DiGuilio and Chapman. See Henderson, supra.

To the extent that Card also suggests that the sentencing judge in this court misapplied this aggravating circumstance, or that such circumstance is itself vague (Initial Brief at 38), such claims would be procedurally barred. See Chandler, supra; Henderson, supra; Johnson, supra. Furthermore, it is not only clear from the sentencing order that the judge applied the

correct constitutional narrow construction of this aggravating circumstance, cf. Walton, supra, but also that this court, in the direct appeal opinion, did as well. In affirming this aggravating circumstance, this court expressly found, pursuant to Jent v. State, 408 So.2d 1024 (Fla. 1982), that the facts of this crime demonstrated the requisite heightened level of premeditation. Card, 453 So.2d at 23-4. This court, in effect, cured any jury instruction error in 1984. See Clemons, supra; Richmond v. Lewis, ___ U.S. ___, 113 S.Ct. 528, 121 L.Ed.2d 411 (Fla. 1992) (". . . a state appellate court may rely upon an adequate narrowing construction of the factor in curing this error [the weighing of an unconstitutionally vague aggravating factor]"). It should be noted that this court has relied upon Card in affirming the finding of the cold, calculated and premeditated aggravating circumstance in other cases. See, e.g., Stano v. State, 460 So.2d 890, 893 (Fla. 1984) (Card cited with favor); Mills v. State, 462 So.2d 1075, 1081 (Fla. 1985) (same); Scott v. State, 494 So.2d 1134, 1138 (Fla. 1986) (same); Jackson v. State, 522 So.2d 802, 810 (Fla. 1988) (same).

In conclusion, however, the state would ask this court to recede from its holdings which suggest that the jury instruction on this factor is subject to attack under Espinosa. While it true that the United States Supreme Court vacated this court's opinion in Hodges v. State, 595 So.2d 929 (Fla. 1992), wherein it would appear that the only basis for such action was a jury instruction on this aggravating factor, that Court subsequently decided Arave v. Creech, ___ U.S. ___, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993), in which it was suggested that the phrase,

"cold-blooded" was not impermissibly vague, in that it did not "lack meaning" and went toward a definable matter, such as the defendant's state of mind. Arave, 113 S.Ct. at 1541-2. No court has ever expressly invalidated the jury instructions on this aggravating circumstance and it must be recognized that Espinosa, which, of course, misconstrues the true operation of Florida's capital sentencing process, see, e.g., Combs v. State, 525 So.2d 853, 857 (Fla. 1988) ("Clearly, under our process, the Court is the final decision-maker and sentencer - not the jury."), threatens literally to swallow §921.141 whole. For all of the above reasons, no relief is warranted as to this procedurally-barred claim, and the trial court's denial of relief as to this claim should be affirmed in all respects.

POINT III

THE CIRCUIT COURT'S DENIAL OF RELIEF, AS TO CARD'S PROCEDURALLY-BARRED CLAIM REGARDING "BURDEN-SHIFTING", WAS NOT ERROR

In his final claim, Card contends that his sentence of death must be vacated because the standard jury instructions at the penalty phase "shifted the burden" onto the defense to prove that life was the appropriate sentence. Judge Sirmons expressly found this claim procedurally barred, as an issue not cognizable on collateral attack, pursuant to such precedents of this court as Parker v. State, 611 So.2d 1224 (Fla. 1992) and Muhammad v. State, 603 So.2d 488 (Fla. 1992) (2PCR 135). Appellant, who neither acknowledges nor contests this finding of procedural bar, has failed to demonstrate error. See, e.g., Chandler, supra (claim that jury instructions "shifted the burden" procedurally barred on collateral attack, as matter which could have been

raised on appeal); Remeta v. Dugger, 622 So.2d 452, 454 (Fla. 1993) (same); Koon, supra (same); Rose v. State, 617 So.2d 291, 297 (Fla. 1993) (same); Turner, supra (same); Parker, supra (same); Muhammad, supra (same). The trial court's denial of relief as to this procedurally-barred claim, should be affirmed in all respects.[7]

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[7] It would not appear that Card asserts in this appeal that he was entitled to an evidentiary hearing below, on the basis of Huff v. State, 622 So.2d 982 (Fla. 1993); such omission is reasonable. In Huff, this court held that "henceforth", in every death penalty postconviction case, "the judge must allow the attorneys an opportunity to be heard on an initial 3.850 motion." Id. at 983. The state would contend that Huff would be inapplicable to this case for two reasons. First, this is a successive, rather an initial, 3.850 motion, in which all the claims presented were procedurally-barred. Secondly, the Huff decision was rendered on July 1, 1993, with rehearing being denied on September 3, 1993. Here, Judge Sirmons initially denied relief on April 20, 1993, and denied rehearing on August 11, 1993, both dates prior to the denial of rehearing in Huff. Huff was never presented to the court below, nor would it seem to be expressly cited in Card's Initial Brief in this court.

CONCLUSION

WHEREFORE, for the aforementioned reasons, the circuit court's denial of relief as to Card's successive motion for postconviction relief should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Billy Nolas, Esq., and Julie D. Naylor, Esq., P. O. Box 4905, Ocala, Florida 34478, this 13 day of April, 1994.

RICHARD B. MARTELL
Chief, Capital Appeals