IN THE SUPREME COURT OF FLORIDA

MILFORD WADE BYRD,

Petitioner,

vs.

HARRY K. SINGLETARY,
Secretary of the
Florida Department of
Corrections,

Respondent.
_____/

CASE NO. 83,~~613~~ 163

RESPONSE TO PETITION
FOR WRIT OF HABEAS CORPUS

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TABLE OF CONTENTS

TABLE OF CONTENTS
(Continued)

The Respondent, **HARRY K. SINGLETARY**, pursuant to this Court's order hereby responds to the petition for Writ of Habeas Corpus, as follows:

I. INTRODUCTION

The Petitioner, **MILFORD WADE BYRD**, was the defendant in the original action herein and will be referred to by name or as he stands before this Court. The Respondent, **THE STATE OF FLORIDA**, will be referred to as the State or as it stands before this Court.

The record on direct appeal of this case, Byrd v. State, Florida Supreme Court Case No. 62,545, will be referred to as "DR. ___". The briefs on direct appeal will be referred to herein by the name and date of each pleading. The record and supplemental record on appeal of the denial of Fla.R.Crim.P. 3.850 relief, Byrd v. State, Florida Supreme Court Case No. 74,691, will be referred to as "PR.___" and "PSR. ___", respectively. The briefs of the parties on appeal of said post conviction proceeding will be referred to herein by the name and case number of each pleading. The State respectfully requests that this Court take judicial notice of its own records in these prior actions, pursuant to Fla. Stat. 90.202.

II. PROCEDURAL HISTORY AND FACTS

A. Historical Facts of the Trial

This Court found the following historical facts of the 1982 trial in its direct appeal decision:

> Appellant and his wife, Debra, managed a motel in Tampa. Debra's body was found on the floor of the motel office at approximately 7:00 a.m. on October 13, 1981. An autopsy revealed that Debra had suffered four non-fatal scalp lacerations, four non-fatal gunshot wounds, and scratches and bruises on the neck. The pathologist determined that the cause of death was strangulation and that death had occurred between 9:00 p.m. on October 12 and 3:00 a.m. on October 13.
>
> During interrogation on the morning of October 13, appellant told police that, on the night of the murder, he had gone to a gym and then to two bars. He stated that he returned home to the motel around 6:45 a.m., found his wife's body and called the police. Later that morning appellant requested that a desk clerk at the motel contact a life insurance company with reference to an insurance policy on Debra's life. Appellant was the sole beneficiary of the $100,000 policy. Five days later, on October 19, appellant personally carried a copy of Debra's death certificate to the insurance company and twice inquired as to how long settlement of the policy claim would take.
>
> Ronald Sullivan, a resident of the motel, was arrested for violation of parole on October 27 and was subsequently charged with Debra's murder. After interviewing Sullivan the police decided that they had probable cause to arrest appellant. At 2:30 a.m. on October 28, the police arrived at the appellant's residence at the motel where they awoke appellant and arrested him for the first-degree murder of his wife.

. . .

In the motel room with appellant was his girlfriend, who was asked by the officers to accompany them to the police station. The woman voluntarily accompanied the officers.

At the police station appellant was again advised of his rights. He signed a written waiver of his rights at 2:55 a.m. Appellant neither admitted nor denied involvement in the crime until approximately 4:40 a.m. when he told the police he would tell them the truth if he could speak privately with his girlfriend. The detectives allowed appellant to spend some time alone with his girlfriend and, when questioning resumed, appellant's girlfriend re-entered the interrogation room and appellant gave a confession.

Appellant testified at trial that, at the time of his arrest, the arresting detectives said they had an arrest warrant. He stated that he opened the door and backed up as the detective stepped forward and arrested him.

When questioned about the murder, appellant stated that he had fallen in love with his girlfriend and that his wife had denied his request for a divorce. He confessed that he had offered Sullivan and Endress, Sullivan's roommate at the motel, five thousand dollars apiece to murder his wife. He also stated that the murder was planned to look like a robbery. Appellant denied, however, that he was present when the murder occurred. After his initial confession, appellant requested permission to use the telephone in the homicide squad room to call his father. Three police officers overheard this conversation and testified that appellant informed his father that, although he had *not committed the murder*, he had it done.

. . .

Appellant retracted his initial confession two days after having given it and moved to suppress both the confession and the

consent to search. The trial court, finding that the confession was voluntarily given and that the consent was valid, denied the motions.

In exchange for a negotiated plea, Sullivan testified against appellant on behalf of the state. Sullivan, who was charged with first-degree murder, testified that the state had offered him a term of probation in exchange for his truthful testimony. Sullivan stated that appellant had approached Endress and himself about having Debra killed. He also testified that he, Endress, and appellant were present when Debra was murdered; that Endress shot Debra several times and hit her with the gun; and that the three, in turn, had choked her.

. . .

Appellant testified on his own behalf and denied complicity in the crime. He stated that he had been at two bars the night of the murder. Appellant also testified that his initial confession was given only because of concern for his girlfriend. Attempts to expedite the insurance policy on Debra's life, he explained, were only to enable him to pay the funeral expenses.

At the conclusion of the guilt phase of the trial, the jury returned a verdict of guilty of first-degree murder.

. . .

...The judge found three aggravating circumstances and one mitigating circumstance. The judge specifically found that the crime was committed for pecuniary gain in that appellant murdered his wife so that he could collect the proceeds of the $100,000 life insurance policy; that the murder was especially heinous, atrocious, and cruel; and that the acts of appellant exhibited the highest degree of calculation and premeditation. As a mitigating circumstance, the judge found that appellant had no significant history of criminal activity.

See Byrd v. State, 481 So. 2d 468, 469-71 (Fla. 1985).

B. Issues on Direct Appeal

On direct appeal, the petitioner raised the following eleven (11) issues, as quoted from the Petitioner's initial and supplemental briefs: (1) The trial court erred in admitting testimony relating to Byrd's initial confession to detectives Newcomb and Reynolds since the state failed to prove the confession was voluntarily given. (See initial Brief of Appellant, Florida Supreme Court Case No. 62,545, dated March 1, 1983, at p. i), (2) The trial court erred in admitting testimony relating to Byrd's initial confession to detectives Newcomb and Reynolds since the confession was the fruit of an unlawful arrest made upon intrusion into Byrd's home without warrant Id., (3) The trial court erred in admitting testimony relating to Byrd's initial confession to Detectives Newcomb and Reynolds since the confession was the fruit of an unlawful arrest made upon intrusion into Byrd's home without compliance with Florida's knock and announce statute Id., (4) The trial court erred in admitting testimony relating to Byrd's second confession Id., (5) The trial court erred in admitting the fruit of a warrantless search of a storage room located at the motel managed by Bryd since consent to search was not voluntarily and freely given Id., (6) Constitutional error occurred when the state allowed to go uncorrected the false testimony of its key witness regarding the consideration promsied him by the state in exchange for his

testimony Id., (7) The trial court erred in denying a mistrial after the prosecutor improperly impeached a key defense witness by insinuating impeaching facts, the proof of which was nonexistent, and by insinuating facts which, although said to exist, were not later proved Id. at p. ii, (8) The trial court erred in giving jury instructions on only those aggravating circumstances which were supported by the evidence Id., (9) The trial court erred in sentencing Byrd to death because the sentencing weighing process included inapplicable aggravating circumstances and excluded existing mitigating circumstances, rendering the sentence unconstitutional under the eighth and fourteenth amendments to the United States Constitution Id,. (10) The trial court erred in limiting cross-examination of the state's chief witness for the purpose of showing bias, prejudice, or interest (See Supplemental Brief of Appellant, Florida Supreme Court Case No. 62,545, dated May 20, 1983, at p. i), (11) The trial court erred in permitting the prosecutor to elicit the fact that his own witness had made a prior inconsistent statement and in allowing the witness to explain the reason for the statement before it was used to cross-examine and impeach the witness (See Supplemental Brief of Appellant, Case No. 62,545, dated September 20, 1985, at p. i).

With respect to issue I, partially raised in the instant petition for writ of habeas corpus, concerning the petitioner's confessions, it should be noted that pursuant to trial counsel's

motion to suppress, the trial court held extensive hearings and made exhaustive findings of fact as to the legality of the petitioner's arrest and the voluntariness of his confessions. Prior to trial, petitioner filed motions to suppress his initial confessions on the grounds that the confession was involuntary and the fruit of an unlawful arrest. (DR. 1758-61, 1778-80).

At the pretrial suppression hearings, Detective Newcomb testified that after interviewing co-defendant Sullivan on the night of October 27, 1981, police investigators decided that they had probable cause to arrest Byrd. (DR. 1416-17, 1428). Both the State and the petitioner agreed that probable cause to arrest had been established and was not at issue. (DR. 1444-5). Detective Newcomb, his supervisor, Sergeant Price, and an Assistant State Attorney, D. Farash, all in civilian clothing, thus proceeded to the petitioner's home, a room in the Econo Travel Lodge, at approximately 2:30 a.m., October 28, 1981. (DR. 1419). Petitioner was placed under arrest for the murder of his wife, and immediately advised of his rights pursuant to Miranda v. Arizona.[1] Petitioner acknowledged that he understood these rights and stated: "I didn't hurt anyone." (DR. 1421). Mr. Byrd was then transported to the police station. Id.

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[1] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

At the police station, Mr. Byrd was again advised of his Miranda rights. (DR. 1424). At 2:55 a.m., approximately thirty minutes after his arrest, Byrd executed a consent-to-be-interviewed form and questioning began. (DR. 1418, 1424). Petitioner was not under the influence of any narcotics and/or alcoholic beverages. (DR. 1428; 709-10). He was lucid during the interview. (DR. 1425). He was responsive to questions asked. (DR. 709). During questioning, which took place between 2:55 a.m. and 4:45 a.m., Byrd was given coffee and cigarettes and was allowed to go to the restroom. (DR. 1426). He never invoked his right to remain silent, never stated he did not want to talk, and did not mention any desire to see an attorney. (DR. 1425).

During the above questioning, the detectives recounted other witness' statements obtained during their investigation for approximately half of the time. (DR. 715). The remainder of the time, the detectives "talked" with petitioner about himself. (DR. 715, 1428). During this time, Mr. Byrd neither admitted nor denied his participation in this offense. (DR. 1433). The petitioner then asked to speak with Ms. Clymer, alone. (DR. 1428). He was told that this was against standard operating procedure. Id. At that point the petitioner stated that he would "tell the truth" if he was allowed a few minutes alone with Ms. Clymer. (DR. 1428, 684). Petitioner was then allowed to speak with Ms. Clymer alone, for approximately ten minutes. (DR. 1428, 1435, 685). Mr. Byrd then gave a statement admitting his

involvement in the murder. (DR. 1426). Ms. Clymer was present during this statement by the petitioner, at the latter's request. (DR. 1427).

Ms. Clymer had not been known to the police until Mr. Byrd's arrest. (DR. 1437). She was in no way a suspect. (DR. 1436, 1437). No one ever threatened to charge her with any crimes, because there was no basis for any charges. (DR. 1435). She had been requested to accompany the police to the station in order to find out her role in petitioner's life. (DR. 1435, 1436).

With respect to the suppression issue raised in the instant petition, the parties then argued as to the "voluntariness" of the confession. (DR. 1514-1522). The defense specifically argued that the confession was "coerced", and that petitioner, "for an hour and a half, approximately he remained silent, demonstrating that he does wish to remain silent and exercised that right." (DR. 1512). The State responded:

> Defense counsel would like the Court, I believe, to bootstrap the fact I stipulated to his subparagraph 2 [sic] Byrd neither denied or confirmed his guilt. He would like to bootstrap into silence, that that constitutes silence. I do not believe Detective Newcomb testified yesterday, and of course, the record speaks for itself, that he was silent for an hour or hour and a half.
>
> In fact, I believe, he did say a difficult interview ensued. They talked to

> him, but he simply would not confirm or deny his guilt.
>
> Your Honor, I do not think that is silence. I think there was a discussion going on. He simply would not admit or deny the crime.
>
> (DR. 1519-1520).

The trial court denied the motion to suppress on this ground and found, "Mr. Byrd did voluntarily give the statement to Detective Newcomb and Detective Reynolds." (DR. 1523). The trial court added:

> . . .I think at that time [of signing the waiver of rights form] if there was any question in Mr. Byrd's mind that he wanted to remain silent, I think at that point in time -- let's face it, gentlemen, we heard Mr. Byrd testify yesterday. He was a manager at Air Travel Lodge. The man is not a buffoon. He's not an idiot. He's not an imbecile. He appeared to me to be a very intelligent man, spoke very well. I don't think the police officers took any advantage of Mr. Byrd.
>
> (DR. 1522).

The issue of the alleged invocation of the right to silence was not raised on direct appeal, although the confessions were challenged on other grounds, as noted above. See initial and supplemental briefs on direct appeal, Florida Supreme Court Case No. 62,545. Specifically, appellate counsel argued that Mr. Byrd's initial confession was involuntary due to a number of "coercive" factors, such as, inter alia, his concern about his

girlfriend. Id. at pp. 13-14. Appellate counsel added that, "the absence of spontaneity in Byrd's confession made it untrustworthy," and was one of the "factors indicating involuntariness." Id. at p. 14. This Court, having specifically noted that Byrd "neither admitted nor denied his involvement in the crimes until approximately 4:00 a.m.,"[2] then, in relevant part, addressed the voluntariness of petitioner's confessions as follows:

> Although we find that appellant's arrest was proper under the factual circumstances of this case, we note that, even if the arrest was improper, the confession was not so tainted as to be inadmissible. We reach this conclusion because appellant knew the officers, had talked to them before his arrest, was advised of his rights at his residence and at the police station, and also signed a "consent to be interviewed" form and indicated to police that he wanted to give a statement. In addition, appellant was afforded time alone with his girlfriend to discuss his predicament before he actually gave the confession.
>
> . . .
>
> From our complete review of the record, we find there is sufficient evidence to sustain the trial court's finding that all of the statements made by appellant were voluntarily given.
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> Byrd v. State, at 481 So. 2d 472-3.

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[2] See Byrd v.State, 481 So.2d at 470.

C. Prior Post Conviction Proceedings

On May 27, 1988, the petitioner filed a "Motion to Vacate the Judgment and Sentence with Special Request For Leave to Amend, pursuant to Fla. R. Crim.P. 3.850, raising nineteen (19) claims. (PR. 738-802). Petitioner's counsel, Mr. McClain, detailed CCR's difficulties at the time, in support of his request for time to amend said pleading. Petitioner was allowed to, and on September 6, 1988 did amend the first ten claims raised in his previous motion, by filing a "Supplement to Motion to Vacate Judgment and Sentence. (PR. 818-866). The trial court found sixteen of the claims presented to be procedurally barred, and granted an evidentiary hearing as to three claims: (1) ineffective assistance of counsel at both guilt and penalty phases of trial; (2) withholding of material exculpatory evidence; and (3) personal interest of the prosecutor. (PR. 408-16). The evidentiary hearing was held more than six (6) months after petitioner's amended pleadings, on March 22 and 23, 1989. Petitioner's counsel, Mr. McClain, assisted by another assistant CCR, did not state any difficulties with respect to preparation at the outset of the evidentiary hearing; nor were any such problems alluded to thereafter, on appeal to this Court. On appeal of the denial of relief by the post-conviction court, this Court affirmed, and found the following claims presented to it to have correctly been procedurally barred:

> . . . On appeal, Byrd has presented seventeen claims for our consideration. We find that eleven of these claims are procedurally barred because they either were or could have

> been raised in the direct appeal. To the extent that the claims also suggest ineffective assistance of counsel, they are denied on the merits. The claims so disposed of include: (1) whether Byrd was convicted on the basis of evidence obtained in violation of his constitutional rights and his invocation of his right to silence was ignored and a confession was coerced from him and used against him because his counsel failed to present the proper facts; (2) whether Byrd was convicted and sentenced on the basis of statements obtained in violation of his constitutional rights; (3) whether Byrd's constitutional rights were violated when law enforcement officers entered his home without a warrant to effectuate his arrest; (4) whether the exclusion of critical evidence rendered Byrd's sentence of death fundamentally unreliable; (5) whether Byrd was improperly denied his right to cross-examine key State witnesses on matters that would have undermined their credibility; (6) whether the trial court unconstitutionally shifted the burden of proof by its sentencing instructions; (7) whether the jury's sense of responsibility for sentencing was diluted by the court's instructions and counsel's arguments; (8) whether the jury instructions regarding aggravating factors perverted the sentencing phase, resulting in the arbitrary and capricious imposition of the death penalty; (9) whether the jury instructions regarding nonstatutory aggravating factors perverted the sentencing phase resulting in the arbitrary and capricious imposition of the death penalty; (10) whether the presentation of victim-impact testimony denied Byrd's rights to a fundamentally fair and reliable capital sentencing; and (11) whether failure to consider nonstatutory mitigating factors violated Byrd's rights.

Byrd v. State, 597 So.2d 252, 254 (Fla. 1992).

As noted above, this Court denied the suggestion of ineffective assistance of trial counsel, on the merits, with respect to the above claims. The Appellant had suggested

ineffective assistance of counsel with respect to claims 1 through 5, inclusive, above. Thereafter, this Court also denied the "numerous" other claims of ineffectiveness at both the guilt and penalty phases of trial, in accordance with the trial court's findings. Byrd v. State, 597 So.2d at 256.

The petitioner has now sought relief in the instant petition for writ of habeas corpus, contending retroactive change of law, ineffective assistance of appellate counsel, and newly discovered evidence. The petitioner is not entitled to any relief as set forth below.

III. ARGUMENT

CLAIM I. WHETHER THIS COURT'S ANALYSIS OF THE ADMISSIBILITY OF PETITIONER'S CONFESSION WAS ERRONEOUS.

The petitioner contends that his right to remain silent was violated when he gave his initial confession, and this Court's "analysis" of the issue, on direct appeal, was "erroneous," pursuant to Jacobs v. Singletary, 952 F.2d 1282 (11th Cir. 1992), and United States v. Ramsey, 992 F.2d 301 (11th Cir. 1993). See petition at pp. 10-14. The petitioner has also argued that to the extent that appellate counsel failed to adequately brief this issue on direct appeal, said counsel was ineffective. See petition at p. 19.

The Respondent first submits that the decisions of intermediate federal courts are neither binding nor retroactively applicable to the decisions of this Court. Eutzy v. State, 541 So.2d 1143 (Fla. 1989); Clark v. Dugger, 559 So.2d 192, 194 (Fla. 1990). Moreover, the factual circumstances herein reflect that neither Jacobs nor Ramsey, supra, are applicable to the instant case. The testimony presented at trial, arguments of counsel, the trial judge's ruling, appellate counsel's arguments, and this Court's holding, have been detailed herein, at pp. 7-11.

The record demonstrates that the police read the petitioner his Miranda rights at his residence. Petitioner did not remain silent, and instead promptly stated that he had not "hurt anyone." Petitioner was then transported to the police station and read his Miranda rights again, and waived same in writing, expressly stating his desire to be interviewed by the police. (DR. 1418, 1424). Thereafter, for a period of approximately less than two hours, including frequent breaks for coffee and cigarettes, etc., the police "talked" with the petitioner about himself and the circumstances of the crime. The majority of the time was spent with the detectives recounting other witness' statements during their investigation. During this time, petitioner neither admitted nor denied his participation in this offense. However, the petitioner himself testified, for example, that after the interview began, he had asked the detectives to allow him to hear a tape of Sullivan's statement to the police.

(DR. 934). Detective Newcomb, for example, testified, that at the beginning of the interview, Byrd had commented that he had not hurt anyone. (DR. 827). Petitioner then asked to speak with Ms. Clymer alone, and stated he "would tell the truth" if allowed to do so. It is thus clear that Petitioner was in fact speaking and did not remain "silent" after the express waiver of his Miranda rights. Petitioner then spoke to Ms. Clymer alone and gave a statement admitting his involvement in the murder. Ms. Clymer was present during this statement at petitioner's request.

In light of the above evidence, trial counsel argued that after waiving his Miranda rights, petitioner had invoked his right to silence, because, "for an hour and a half, approximately he remained silent, demonstrating that he does wish to remain silent and exercised the right." (DR. 1512). The State responded that the defense was "bootstrap[ping]" its stipulation that petitioner had initially "neither denied or confirmed his guilt" into "silence." (DR. 1519). In reliance upon the detectives' testimony that during the initial interview they had "talked" with the petitioner, the State argued:

> Your Honor, I do not think that is silence. I think there was a discussion going on. He [petitioner] simply would not admit or deny the crime. (DR. 1520).

The trial court thus rejected trial counsel's argument of "silence." See p. 11 herein.

This issue of the alleged invocation of right to silence was not raised on direct appeal, although the confession was challenged on other grounds, such as coercion due to Ms. Clymer's presence, and petitioner's concern for her, as well as petitioner's lack of "spontaneity."

There is no support for petitioner's seeming proposition herein, that the Fifth Amendment right to silence is violated when a defendant, who has expressly acknowledged and waived his right to silence and further expressly stated his desire to talk with the police, does not immediately confess, but rather listens to the evidence garnered by the police and converses with them without expressly confirming or denying his guilt, prior to deciding whether or not to admit his involvement in a crime.

The petitioner's reliance upon Jacobs v. Singletary, 952 F.2d 1282 (11th Cir. 1992), is entirely unwarranted. In Jacobs, 952 F.2d at 1292, the defendant was read her Miranda rights and said "nothing else." She was then placed in a patrol car and the police "repeatedly asked Jacobs her name," but she "refused to respond." Id. The police then read Jacobs her Miranda rights from a card and asked her to sign the card. Id. "Jacobs simply returned the card unsigned." Id. The police then asked Jacobs to write her name on the card. "She again said nothing, and refused to comply." Id. Later at the police station, Jacobs again

"repeatedly refused to respond" when the police persisted to "get her name out of her." Id. Under these circumstances, where Jacobs had not waived her Miranda rights, the Court held: "Although Jacobs had not expressly invoked her right to remain silent, by repeatedly refusing to speak at all to [detective] Hill, even to the point of not giving her name, Jacobs provided at least an unequivocal or ambiguous indication that she wished to remain silent." Id.

Likewise, in Ramsey, supra, the defendant was read his Miranda rights. However, in response to the question of whether he wished to make a statement, Ramsey remained silent, and looked away from the interrogating officer. The officer acknowledged Ramsey's reaction to be an equivocal invocation of his right to silence, and ceased questioning him. However, instead of subsequently trying to clarify Ramsey's actions, another officer proceeded to warn him that he should cooperate, that he "should not do someone else's time," that he would face ten to forty years incarceration if convicted, but that the officer would explain his cooperation to the US attorney's office, if Ramsey answered questions." 992 F.2d at 303-04. Ramsey then began to speak and the second officer, upon further questioning, extracted a confession from him. Id.

In the instant case, by contrast, the petitioner expressly waived his right to silence and expressly indicated his desire to

talk to the police by verbally acknowledging and then signing statements to this effect on a printed consent-to-interview form. Thereafter, far from "refusing to speak at all," "even to the point of not giving [his] name," he did in fact speak to the police. The petitioner then merely chose to find out what evidence the police had against him, and to speak to his girlfriend prior to deciding to expressly admit his guilt. These circumstances do not constitute an invocation of right to silence pursuant to Jacobs or Ramsey.

Thus, not only are Jacobs and Ramsey not applicable herein, but the petitioner's contentions of ineffective assistance of appellate counsel for failure to raise this issue are also without merit. "A person convicted of a crime, whose conviction has been affirmed on appeal and who seeks relief from the conviction or sentence on the ground of ineffectiveness of counsel on appeal must show, first, that there were specific errors or omissions of such magnitude that it can be said that they deviated from the norm or fell outside the range of professionally acceptable performance; and second, that the failure or deficiency caused prejudicial impact on the Appellant by compromising the appellate process to such a degree as to undermine confidence in the fairness and correctness of the outcome under the governing standards of decision." Johnson v. Wainwright, 463 So.2d 207, 209 (Fla. 1985). Appellate counsel can not be deemed deficient for failing to raise a claim not

supported by the record, even if same was argued by trial counsel and rejected at trial. See, Atkins v. Dugger, 541 So.2d 1165, 1167 (Fla. 1989) ("Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points."); Scott v. Dugger, 604 So.2d 465, 469 (Fla. 1992) ("If there is no chance of convincingly arguing a particular issue, then appellate counsel's failure to raise that issue is not a substantive and serious deficiency and the first prong of Strickland is not met.").

Finally, to the extent that the petitioner has relied upon and argued involuntariness of his confession based upon his concern for his girlfriend, Ms. Clymer, the Respondent would note that this issue was raised on direct appeal and rejected by this Court. Reargument of said claim herein, is thus procedurally barred. "Although claims of ineffective assistance by appellate counsel are cognizable in habeas corpus petitioner, 'using a different argument to relitigate an issue in post conviction proceedings is not appropriate.' [citations omitted]. Furthermore, 'an allegation of ineffective counsel will not be permitted to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal.' [citations omitted]. Therefore, the ineffectiveness subclaim in the first issue is procedurally barred." Medina v. Dugger, 586 So.2d 317, 318 (Fla. 1991).

CLAIMS II A & B. WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILURE TO RAISE CONSTITUTIONAL INVALIDITY OF JURY INSTRUCTIONS ON AGGRAVATING CIRCUMSTANCES AND FLORIDA'S DEATH PENALTY STATUTE.

The petitioner contends that his appellate counsel was ineffective for failing to argue that the three aggravating factors herein, heinous, atrocious and cruel (HAC), cold, calculated and premeditated (CCP), and pecuniary gain, were vague and overbroad, and the jury was erroneously instructed upon these factors, without any narrowing limitation and in violation of Furman v. Georgia, 408 U.S. 258 (1972); Gregg v. Georgia, 428 U.S. 153 (1976); Stringer v. Black, 112 S.Ct. 1130 (1992); Sochor v. Florida, 112 S.Ct. 2114 (1992); Espinosa v. Florida, 112 S.Ct. 2926 (1992); and Richmond v. Lewis, 113 S.Ct. 528 (1993). In a similar vein, petitioner has also argued that appellate counsel was ineffective for failing to raise facial invalidity and unconstitutionality of Florida's death penalty statute.

The Respondent would note that petitioner, at trial, did not raise any argument as to the vagueness or constitutional invalidity of the aggravating factors or Florida's death penalty statute. Likewise, there were no objections to the jury instructions on the aggravating factors herein, either before or after the jury was instructed at the penalty phase. The petitioner did not request any expanded instructions either.

This Court has repeatedly held that in the absence of an objection to the constitutional infirmity of jury instructions, at trial, such claims are procedurally barred and will not be addressed on direct appeal. See, Vaught v. State, 410 So.2d 147, 150 (Fla. 1982); Kennedy v. Singletary, 602 So.2d 1285 (Fla. 1992) (unconstitutionality of HAC jury instruction claim, based upon Espinosa, was procedurally barred, where only objection to jury instruction was to applicability and not constitutionality); Jackson v. State, 19 Fla. L. Weekly S215 (Fla. April 21, 1994) (holding CCP instruction unconstitutionally vague, but concluding, as with Espinosa claims, that the issue is viable only for those defendants who properly preserved the issue in the trial and appellate court through a specific objection); Hodges v. State, 619 So.2d 272, 273 (Fla. 1993) (claim of unconstitutionality of CCP instruction was not addressed on appeal where no objections raised at trial); James v. State, 615 So.2d 668, 669, n. 3 (Fla. 1993) (claim of unconstitutionality of CCP jury instruction procedurally barred where no objection on said ground was made at trial); Johnson v. Singletary, 612 So.2d 575, 576, n. 1 (Fla. 1993) (claim that Florida's statute setting forth aggravating factors is unconstitutionally vague, is procedurally barred where not raised at trial). This Court has also specifically held that claims based upon Espinosa do not constitute fundamental error. Henderson v. Singletary, 617 So. 2d 313, 317 (Fla. 1993) ("Finally, we reject Henderson's apparent claim of fundamental error based on Espinosa"); Hodges, supra, at

273 ("the contemporaneous objection rule applies to Espinosa error, i.e., a specific objection on the form of the instruction must be made to the trial court to preserve the issue for appeal"); see also, Sochor v. Florida, 504 U.S. ___, 112 S.Ct. ___, 119 L.Ed.2d 326, 338 (1992).

Appellate counsel's conduct was therefore not deficient for failure to raise the unconstitutionality of the jury instructions on the aggravating factors or the invalidity of Florida's death penalty statute, as trial counsel had not objected to or argued said grounds at trial. Johnson v. Wainwright, supra; Clark v. Dugger, 559 So.2d 192, 194 (Fla. 1990) (appellate counsel's conduct not deficient for failure to raise improper HAC instruction, where trial counsel had not objected to same); Henderson v. Singletary, 617 So.2d 313, 317 (Fla. 1993) ("the failure to raise a claim that would have been rejected at the time of appeal does not amount to deficient performance.").

Moreover, the petitioner has also failed to demonstrate any prejudice. The Respondent would note that no court to date has declared Florida's death penalty statute to be unconstitutionally vague and overbroad, pursuant to Furman, and Gregg, supra. Likewise, no court has, to date, declared the jury instruction on pecuniary gain to be unconstitutional. Indeed, at the time of the trial and appeal herein, the United States Supreme Court had specifically upheld Florida's capital sentencing statute against

such challenges. See, Proffit v. Florida, 428 U.S. 292, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983).[3] Petitioner's contention that appellate counsel should have challenged the facial invalidity of the statute pursuant to Furman, Gregg, and Godfrey, supra, see petition at p. 23, is without merit. If appellate counsel had made such a challenge, same would have been rejected under Proffit and Barclay, supra. Petitioner has thus not established any prejudice either. See, Henderson v. Singletary, supra, at 317. ("Moreover, even if we were to find [appellate] counsel's performance deficient, the failure to raise this claim [unconstitutionality of HAC and CCP instructions] clearly did not result in prejudice because the claim likely would have been rejected on direct appeal.").

Finally, the petitioner has not demonstrated any prejudice as to the HAC instructions read to the jury, either. This is because the error in the HAC instruction herein was harmless beyond a reasonable doubt, as the result of the proceedings against the petitioner would have been the same, had this factor been properly defined in the jury instructions. See, Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1141, 108 L.Ed.2d 725

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[3] See also, Arave v. Creech, ___ U.S. ___, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993). If the United States Supreme Court had intended Espinosa to do more than invalidate a jury instruction, the Court missed a perfect opportunity to say so. The Court's subsequent citation to Proffit v. Florida, supra, in which Florida's capital sentencing statute was found constitutional, in Arave v. Creech, hardly supports any contention that Florida's death penalty statute is facially unconstitutional.

(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 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. ___, 110 S.Ct. ___, 111 L.Ed.2d 606, 622 (1990) ("if a State has adopted a constitutionally narrow 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 independently reviewed the evidence, and consistent with the narrowing construction of the

HAC factor as approved by the United States Supreme Court,[4] found evidence of this factor to be established beyond a reasonable doubt:

> With regard to appellant's third contention, we find that the record supports the finding that this murder was heinous, atrocious, and cruel. Sullivan, appellant's codefendant, testified that the appellant participated in the murder, and the record is unrefuted[5] that the victim sustained four gunshot wounds and four deep scalp lacerations, none of which were fatal. After suffering these wounds, the victim ultimately died from strangulation. All of these circumstances justify the finding that this murder was heinous, atrocious and cruel.
>
> We also find that the court's conclusion that the aggravating circumstances outweigh the mitigating circumstances is justified by this record.

Byrd v. State, 481 So.2d at 474.

Thus, because this Court has adopted a constitutionally narrow construction of HAC 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. Considering the undisputed evidence noted above, had the jury been properly

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[4] See, Proffit, supra; Sochor, supra, 119 L.Ed.2d at 339-40 ("our review of Florida law indicates that the State Supreme Court has consistently held that heinousness is properly found if the defendant strangled a conscious victim").

[5] The undisputed evidence presented with respect to this factor, was the medical examiner's testimony that the victim was first shot four times, while moving and during a struggle (DR. 768), and was then strangulated with "considerable injuries to the neck." (DR. 763). The medical examiner testified that the victim was conscious at this time (DR. 765) and suffered a great deal of pain. (DR. 769). The prosecutor's focus was upon the above testimony in his argument of HAC to the jury. (DR. 1328-29).

instructed with the narrowing construction of this factor, they would have still found this aggravating factor. Any error in the instructions was thus harmless beyond a reasonable doubt. Clemons, supra; Walton, supra; Richmond, supra; Lewis, supra.

Similarly, the findings regarding the CCP aggravating factor are such that any error in the instruction would have to be deemed harmless. This Court, in the direct appeal, noted that "this was a preplanned homicide of a family member." Byrd v. State, 481 So.2d at 474. The evidence clearly reflected that this was a contract killing, with the defendant hiring two others to assist him in committing the murder. The narrowing factors which have consistently been applied to this aggravator have been summarized in this Court's recent decision in Jackson, supra, 19 Fla. L. Weekly at S215-216. Those narrowing factors are fully and clearly satisfied by the evidence herein. The killing was clearly "the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage." Id. Furthermore, the defendant "had a careful plan or prearranged design to commit murder before the fatal incident," and he "exhibited heightened premeditation," and he "had no pretense of moral or legal justification." Id. In the context of a prearranged contract killing, findings regarding this factor could not conceivably have been altered by a more detailed instruction.[6]

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[6] As to the pecuniary gain factor, while no court has ever held

In sum, the petitioner has not demonstrated any deficient conduct by appellate counsel, nor any prejudice with respect to his claims of unconstitutionality of the jury instructions or the aggravating factors and Florida's death penalty statute. He is thus not entitled to relief. Johnson v. Wainwright, supra.

CLAIM II C. WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILURE TO RAISE THE TIMELINESS OF THE WRITTEN SENTENCING ORDER.

The sentencing hearing before the trial judge in the instant case, took place on August 13, 1982. (DR. 1663-96). Two doctors testified before the court on this date, that petitioner (a) was not under the influence of any extreme mental or emotional disturbances; (b) was not acting under extreme duress or substantial domination of another person; and (c) could appreciate the criminality of his conduct at the time of the offense herein. (DR. 1667, 1670). On the same date, after argument of the parties as to the aggravating and mitigating circumstances, the trial judge, prior to announcing sentence, stated that he had "prepared findings of facts," but that he would file said written findings at a later date, so as to include the doctors' testimony recounted above. (DR. 1691).

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the instructions on this factor to be unconstitutional, it should also be noted that the evidence of this factor is so clear that even if there were any error in the instruction, such error would have to be deemed harmless. As detailed in the direct appeal opinion, "[t]he record reflects that there was sufficient evidence to establish this aggravating factor beyond a reasonable doubt." 481 So.2d at 474. The murder was committed so that the defendant could obtain the benefits of a life insurance policy.

Trial counsel did not object. The trial judge then announced his sentence of death, his findings of the three aggravating circumstances herein (HAC, CCP and pecuniary gain), and his conclusion that the aggravators outweighed the mitigation.

The written sentencing order was then filed on November 17, 1982, prior to the certification of the record on appeal and ensuing surrender of jurisdiction to this Court. See, Fla.R.App.P. 9.140(b)(4) (trial court retains concurrent jurisdiction for preparation of complete record for filing in this Court); Van Royal v. State, 497 So.2d 625, 628 (Fla. 1986) (trial court surrenders jurisdiction to the Florida Supreme Court at the time when record on appeal has been certified and transmitted to the Supreme Court of Florida). The record on appeal was certified and transmitted to this Court on December 6, 1982, and included the written sentencing order and findings of fact. (See DR. 1982-91).

In light of the above, the petitioner contends that his appellate counsel was deficient because through "ignorance," counsel failed to "read" Florida's capital sentencing statute, which requires "contemporaneous" written findings. See, petition at p. 42. Petitioner further argues that he was prejudiced, because had counsel raised this issue of untimeliness, he would have been sentenced to life.

Petitioner has not demonstrated any deficient performance nor any prejudice. See, Johnson v. Wainwright, supra. First, contrary to the petitioner's argument, Fla. Stat. 921.141(3) (1981) did not, at the time of the petitioner's trial and direct appeal, mention or require "contemporaneous" written findings of facts:

> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

In accordance with the above, this Court, at the time of trial and direct appeal herein, had repeatedly held that the statutory requirement of written findings was fulfilled when the record on appeal contained the written sentencing order, or, if the trial judge had orally dictated his findings into the record at the time of sentencing. See, Ferguson v. State, 417 So.2d 639, 641 (Fla. 1982) ("A second issue raised by defendant is that the trial court had failed to provide written findings in support of the sentence of death. s. 921.141(3), Fla. Stat. (1977). Inasmuch as the supplemental record includes the trial judge's written findings this issue is now moot."); Thompson v. State, 328 So.2d 1, 4 (Fla. 1976) ("Appellant alleges that the trial court failed to comply with the requirements of Section 921.141, Florida Statutes in that it failed to make specific written findings of fact concerning aggravating or mitigating

circumstances. . . . In this case, the trial court, . . ., dictated into the record his findings of fact for imposing a sentence of death. Such dictation, when transcribed, becomes a finding of fact in writing and provides the opportunity for meaningful review, as required by 921.141, Florida Statutes."); Cave v. State, 445 So.2d 341 (Fla. 1984) (Death sentence would not be vacated, although no separate written findings of fact were contained in the record on appeal, where trial judge dictated findings in support of the sentence into the record. Case was relinquished to the lower court instead, in order for the written findings to be entered as a supplement to the record on appeal); see also, Van Royal v. State, 497 So.2d 625, 628 (Fla. 1986) ("We appreciate that the press of trial judge duties is such that written sentencing orders are often entered into the record after oral sentence has been pronounced. Provided this is done on a timely basis before the trial court loses jurisdiction, we see no problem."). This Court, in Van Royal, reduced the sentence to life imprisonment, however, because there were no sentencing findings whatsoever, until after the record on appeal had been transmitted and the trial court had lost jurisdiction to prepare findings.) (emphasis added).

In the instant case, as noted above, the 1982 written sentencing order was entered prior to the transmission of the record on appeal to this Court, and was in fact contained in said record. There was no statutory violation at the time. See,

Ferguson, supra; Van Royal, supra. The Respondent would note that years after the conclusion of the direct appeal proceedings herein, this Court, in 1988, in Grossman v. State, 525 So.2d 833, 841 (Fla. 1988), established "a procedural rule that all written orders imposing a death sentence be prepared prior to the oral pronouncement of sentence for filing concurrent with the pronouncement. . . . [Effective] thirty days after this decision becomes final, we so order." Clearly, appellate counsel can not be deemed deficient for failing to anticipate and raise a procedural rule promulgated and made effective at least six years after the trial herein and more than two years after the conclusion of the direct appeal proceedings herein. See, Knight v. State, 395 So.2d 994, 1003 (Fla. 1981) (appellate counsel can not be deemed deficient for failure to "anticipate changes in the law."). Moreover, petitioner has not demonstrated any prejudice either, as even if said claim had been raised at the time of the appeal herein, the issue would have been considered "moot," because the written order was contained in the record on appeal. See, Ferguson, supra, 417 So.2d at 641; Henderson, supra, (no prejudice where a claim would have no success at the time of the appeal).

CLAIM II D. WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A CLAIM OF NEWLY DISCOVERED EVIDENCE IMPEACHING A GOVERNMENT WITNESS.

Petitioner has argued that appellate counsel was ineffective for having failed to raise a claim of newly

discovered evidence for impeachment, with respect to state witness and co-defendant, Sullivan. The petitioner has stated that, a few days after trial, Sullivan gave a deposition in a separate civil action, where he denied having been hired by petitioner to kill his wife. See, petition at p. 45. Petitioner has stated that his "trial counsel moved for a new trial on the basis of this deposition." Id. He has argued that appellate counsel should have thus included the claim on direct appeal.

The record on direct appeal does not support petitioner's contentions. Said record reflects that, after trial, on August 13, 1982, trial counsel filed a motion for new trial. (DR. 1924-26). Said motion for new trial does not mention or otherwise refer to any civil deposition by Sullivan or any other newly discovered evidence. At argument on said motion, again, trial counsel did not mention a deposition or newly discovered evidence. (DR. 1672-77). The trial court then denied the motion for new trial. (DR. 1678). Thereafter, prior to the pronouncement of sentence, and as part of the sentencing argument, trial counsel stated that he had "some matter that I did not raise up in my motion for new trial that I intended to file in an amended motion of new trial." (DR. 1688). Trial counsel then stated that, although he had not been present, he had been informed that witness Sullivan, at a deposition in a separate civil action, had denied that he was hired by petitioner to commit the crimes herein." (DR. 1688-9). Upon objection by

the State that it could not respond or rebut without the deposition, trial counsel again stated that he would have the deposition "transcribed" and attach same to an "amended motion for a new trial." (DR. 1690). The record on direct appeal reflects that no amended motion for new trial was ever filed, nor was the alleged deposition of Sullivan transcribed or placed in the record. No further arguments or reasons are contained in the record either.

The record on direct appeal is thus abundantly clear that this issue of newly discovered evidence was entirely based upon hearsay statements of counsel (who had not been present during the alleged deposition), and was in no way preserved in any motion for new trial, as now contended by petitioner. Appellate counsel can not be deemed deficient for failing to raise unpreserved issues. See, Medina v. Dugger, 586 So.2d 317, 318 (Fla. 1991) ("Appellate counsel is not ineffective for failing to raise issues not preserved for appeal); Roberts v. State, 568 So.2d 1255 (Fla. 1990); Kelly v. Dugger, supra, 597 So.2d at 263; Clark v. Dugger, supra.

The petitioner has not demonstrated any prejudice either. Even if appellate counsel had raised this claim, petitioner would not have automatically been entitled to a new trial, as the evidence relied upon would not have probably produced an acquittal. In the instant case, after all, petitioner's own

statements, to both his father and the police, that he had in fact hired Sullivan to commit the murder, had been admitted at trial. As even noted by the petitioner, he, at best, may have been entitled to an evidentiary hearing on the matter.

The Respondent would note that petitioner was in fact granted an evidentiary hearing in the trial court, during his 1988 Rule 3.850 proceedings. The petitioner raised, and was given, an evidentiary hearing on various claims of withholding of exculpatory information with respect to Sullivan and ineffective assistance of trial counsel at the guilt phase, for, inter alia, failure to effectively investigate and impeach said witness. Petitioner had also raised other claims with respect to the separate civil action, and was again allowed to delve into the details thereof at the 1989 evidentiary hearing. Yet, despite being cognizant of the potential claim, which has been reflected in the record on appeal since 1982, the petitioner failed to present any transcript of the alleged deposition now relied upon, or otherwise present any evidence as to this matter. The petitioner has thus already received all that he may have been entitled to receive, i.e., an evidentiary hearing during a Rule 3.850 proceeding, and failed to present any evidence to substantiate this claim. He has thus failed to demonstrate any prejudice, and is now procedurally barred from raising this claim in any forum in the state courts. See, Jones v. State, 591 So.2d 911, 916, n. 2 (Fla. 1991) (reliance upon newly discovered

evidence, which could not have been known at trial, but was or could have been obtained with the exercise of due diligence during the first Rule 3.850 motion for post-conviction relief, is procedurally barred).

CLAIM II E. WHETHER APPELLATE COUNSEL WAS INEVVECTIVE FOR FAILURE TO RAISE CLAIM OF EXCLUSION OF CRITICAL EVIDENCE.

The petitioner has argued that his appellate counsel was ineffective for failing to argue that he was precluded from the right to present a defense due to the trial court's evidentiary rulings as to: a) precluding admission of Sullivan's October 28, 1981 taped statement; b) preventing defense counsel from "adequately" showing to the jury the oppressive circumstances surrounding Mr. Byrd's confession; c) preventing defense counsel's questioning of Officer Newcomb about two unrelated suspects with machine guns; d) preventing defense counsel from introducing evidence of the defendant's letters to Jody Clymer; and, e) preventing defense counsel's questioning of a witness about her purchase of marijuana from the victim.

Previously, on appeal of the denial of his Fla.R.Crim.P. 3.850 motion to this Court, the Petitioner presented this claim, and argued that his trial counsel was ineffective for having "failed to argue that the trial court's rulings were precluding the defendant from presenting evidence in his favor. . . ." See, Initial Brief of Appellant, Fla. S.Ct. Case No. 74,691, argument

IX, at p. 78. As trial counsel failed to preserve this issue for appeal, appellate counsel can not be deemed deficient for failing to raise same. See, Medina, supra, 586 So.2d at 318; Roberts, supra; Kelly, supra; Clark, supra.

Moreover, the State would note that as the petitioner, in his prior appeal of the denial of the rule 3.850 motion, couched this claim in terms of ineffective assistance of trial counsel, the State fully argued and established the lack of any merit and prejudice to the petitioner with respect to this issue. See Brief of Appellee, case no. 74,691, at pp. 74-77.[7] This Court, in turn, although finding the claim to be procedurally barred, also held that, "[t]o the extent that the claims also suggest ineffective assistance of counsel, they are denied on the merits." See, Byrd, 597 So.2d at 254. "Habeas corpus is not to be used for additional appeals on issues that could have been, should have been or were raised on direct appeal or in motions filed under Florida Rules of Criminal Procedure 3.850 or which were not objected to at trial." Clark v. Dugger, 559 So.2d 192, 193 (Fla. 1990), citing Suarez v. Dugger, 527 So.2d 190 (Fla. 1988); White v. Dugger, 511 So.2d 554 (Fla. 1987); Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987), (emphasis added). Where the merits of a claim have been raised in a prior motion for

[7] In accordance with Fla. Stat. 90.202, the State requests that in the event this Court proceeds to the merits, despite the State's arguments of lack of deficiency and procedural bar, that this Court take judicial notice of the State's argument on the merits, with respect to this issue, as reflected in its Answer Brief, Fla. S.Ct. case no. 74,691, at pp. 74-77.

post-conviction relief, mere resubmission of the claim under the guise of ineffective assistance of appellate counsel is unavailing and the claim is procedurally barred. See, Medina, supra, 586 So.2d at 318 ("Medina raised the merits of those issues . . . in his motion for post conviction relief. Merely clothing those issues in the guise of appellate counsel's ineffectiveness is unavailing. Thus, the fifth issue is also procedurally barred."). This claim is thus also procedurally barred.

CLAIM II F. WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE TRIAL COURT'S DENIAL OF THE RIGHT OF CROSS EXAMINATION OF STATE WITNESSES ON MATTERS OF CREDIBILITY.

As with the last issue, claim II E herein, the Respondent would note that petitioner raised the substance of this claim, almost verbatim, in his prior appeal of the denial of his motion for post-conviction relief, to this Court. See, Initial Brief of Appellant, Fla. S. Ct. case no. 74,691, Argument X, at pp. 78-82. Again, petitioner had couched this claim in terms of ineffective assistance of trial counsel for failure to object and preserve the claim. Id. at pp. 78, 82. The State therefore argued and established the lack of merit and any prejudice to the petitioner. See Answer Brief of Appellee, F.S.Ct. Case No. 74,691, at pp. 77-78. This Court, in turn, although finding the claim procedurally barred, also held that, "[t]o the extent that the claims also suggest ineffective assistance of counsel, they are denied on the merits." See, Byrd, 597 So.2d at 254.

As petitioner has previously noted that his trial counsel did not preserve this claim for appeal, appellate counsel can not be deemed deficient for failing to raise this claim on appeal. See, Medina, supra; Kelly v. Dugger, supra; Roberts v. State, supra; Clark v. Dugger, supra.

Moreover, again, the State respectfully submits that as the substance of this claim was previously raised in the post-conviction appeal to this Court, petitioner's couching of this claim in terms of ineffective assistance of appellate counsel is unavailing. This claim is also procedurally barred.[8] See, Clark v. Dugger, supra; Medina, supra.

CLAIM II G. WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILURE TO RAISE CONSTITUTIONALITY OF BURDEN SHIFTING INSTRUCTION AT TRIAL.

The petitioner has argued that his appellate counsel was ineffective, because he should have argued that the jury instructions improperly shifted the burden of proof to petitioner to prove that life was the appropriate punishment. As noted previously, none of the penalty phase jury instructions, including those complained of in this claim, were objected to at

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[8] In accordance with Fla. Stat. 90.202, the State requests that in the event that this Court proceeds to the merits, despite the State's arguments of lack of deficiency and procedural bar, that this Court take judicial notice of the State's argument on the merits, with respect to this issue, as reflected in its Answer Brief, F.S.Ct. Case No. 74,691, at pp. 77-78.

trial. Appellate counsel can not be ineffective for failing to raise the claim of burden shifting jury instructions where same has not been preserved by an objection at trial. See, Kelly v. Dugger, supra, 597 So.2d at 264; Engle v. Dugger, 576 So.2d 696, 704 (Fla. 1991); Atkins v. Dugger, 541 So.2d 1165, 1166-67, n. 2 (Fla. 1989).

The Respondent would note that petitioner has claimed that no objection at trial was necessary to preserve this claim, because the trial (and direct appeal) herein took place after Hitchcock v. Dugger, 481 U.S. 393 (1987). Petitioner has argued that the latter case lifted the procedural bar with respect to the instructions at issue herein. The Respondent would first note that if petitioner is relying on a case decided after the conclusion of his direct appeal, his appellate counsel can hardly be deemed ineffective for failing to rely on said case. See, Knight v. State, supra, at 394 So. 2d. 1003 (appellate counsel not deficient for failure to anticipate changes of law). Moreover, petitioner's contention has been specifically rejected by this Court, in James v. State, supra, 615 So.2d at 669, n. 2, which noted that Hitchcock is not broad enough to lift the procedural bar of non-Hitchcock claims, such as allegedly improper shifting of the burden to show life imprisonment to be the appropriate sentence. Finally, the Respondent would note that petitioner's reliance upon Hitchcock is also time barred, as any such claim should have been brought prior to August 1, 1989.

See, Davis v. State, 589 So.2d 896, 898 (Fla. 1991) ("We reiterate, however, that Hitchcock claims filed after August 1, 1989 are time barred."). In sum, petitioner is not entitled to any relief based upon this claim.

CLAIM II H. WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILURE TO RAISE CLAIM BASED UPON IMPROPER PROSECUTORIAL COMMENTS.

Once again, as in Claims II E and II F, pp. 36-39, herein, the petitioner has raised a claim, the substance of which was presented to this Court on appeal of the denial of his prior motion for post-conviction relief. See, Initial Brief of Appellant, case no. 74,691, Argument IV, at pp. 53-56. Again, the petitioner specifically premised this claim upon ineffective assistance of trial counsel, for "failure to object and combat the prosecutorial overreaching." Id. at pp. 52, 57. The State therefore argued and demonstrated the lack of any merit and prejudice to the petitioner. See Answer Brief, F.S.Ct. case no. 74,691, at pp. 60-64. This Court, in turn, affirmed the post-conviction court's finding that trial counsel was not ineffective. See, Byrd v. State, 597 So.2d at 256.

As petitioner has previously conceded that his trial counsel did not object or preserve this issue for appeal, appellate counsel can not be deemed deficient for failing to raise this claim herein. See, Kelly v. Dugger, supra, 597 So.2d at 263 (appellate counsel not ineffective for failure to argue

that the prosecution made improper closing arguments, as trial counsel did not preserve the claim).

Moreover, as noted in claims II E and II F herein, at pp. 36-39, this claim is also procedurally barred as it is, in effect, a relitigation of the argument raised in the post-conviction appeal, this time, under the guise of ineffective assistance of appellate counsel. See, Medina, supra; Kelly, supra; Clark v. Dugger, supra; Roberts v. State, supra.[9]

CLAIM II i. WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILURE TO ARGUE THAT PETITIONER'S THIRD STATEMENT TO THE POLICE WAS IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The petitioner has stated that after he confessed on October 28, 1981, to both his father and the police, the latter initiated an interrogation of him on October 30, 1981, in violation of his Sixth Amendment right to counsel. Petitioner has argued that appellate counsel was ineffective for failing to argue the alleged violation of petitioner's Sixth Amendment right to counsel,[10] on this date. As noted by this Court on direct

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[9] In accordance with Fla. Stat. 90.202, the State requests that in the event this Court proceeds to the merits, despite the State's arguments of lack of deficiency and procedural bar, that this Court take judicial notice of the State's argument on the merits, with respect to this issue, as reflected in its Answer Brief, F.S.Ct. case no. 74,691, at pp. 60-64.

[10] Petitioner has stated that his Sixth Amendment right to counsel had attached, because he appeared before a judicial officer for his first appearance within 24 hours of his arrest on October 28, 1981, and expressed a desire to be represented by

appeal, and as conceded by the petitioner, however, the only "statement" obtained by the police on October 30, 1981 was petitioner's denial of any involvement in the crimes herein. Petitioner, at this time, did not make any incriminating statements. See, Byrd, supra, 481 So.2d at 470 ("Appellant retracted his initial confession two days after having given it. . . ."); see also DR. 739-41 (testimony by Detective Reynolds that the October 30, 1981 statement of the defendant was a denial of his previous statements).

Appellate counsel thoroughly litigated the two October 28, 1981 confessions, which had fully incriminated the petitioner. The State fails to see how the admission of the October 30, 1981 retraction by the petitioner, after the admission of his two October 28, 1981 confessions, which were most damaging to him, was prejudicial. Even if appellate counsel had argued and established a Sixth Amendment violation on October 30, 1981, petitioner would not have been entitled to any relief or reversal on direct appeal, in light of the earlier confessions. Appellate counsel thus can not be faulted for failure to raise this claim. See, Atkins v. Dugger, supra, 541 So.2d at 1167 ("Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points.").

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counsel. The record on appeal does not reflect any such first appearance or request for counsel at that time.

Thus, petitioner has not demonstrated any deficient conduct or prejudice, as required in Johnson v. Wainwright, supra.

CLAIM II J. WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILURE TO ASSURE PETITIONER'S PRESENCE DURING CRITICAL STATES OF HIS CAPITAL PROCEEDINGS.

Petitioner has argued that his appellate counsel was ineffective for failing to argue that he was absent from an in camera proceeding on a motion for mistrial, a charge conference, and sidebar conferences. Once again, the petitioner raised the substance of this claim in his prior appeal of the denial of his post-conviction motion to this Court. See, Initial Brief of Appellant, F.S.Ct. Case No. 74,691, Argument VIII, pp. 70-75. Petitioner premised this claim upon ineffective assistance of trial counsel for failure to object and validly waive petitioner's presence at critical stages of trial. Id. As the trial court had rejected this claim of ineffectiveness based upon lack of prejudice,[11] the State on appeal presented argument and demonstrated that the instances of absence complained of, were not critical stages of trial and petitioner had thus not been prejudiced.[12] See Answer Brief, F.S.Ct. Case No. 74,691, at pp. 70-73. This Court, in turn, affirmed the post-conviction court's

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[11] See PR. 409.

[12] In accordance with Fla. Stat. 90.202, the State requests that in the event this Court proceeds to the merits, despite the State's arguemnts of lack of deficiency and procedural bar, that this Court take judicial notice of the State's argument on the merits, with respect to this issue, as reflected in its Answer Brief, F.S.Ct. case no. 74,691, at pp. 70-73.

order denying relief, based, in part, on lack of prejudice. See, Byrd v. State, supra, 597 So.2d at 256.

As trial counsel did not object to petitioner's absence, and petitioner did not express any desire to be present and could not have assisted at the proceedings, and the proceedings complained of were not critical stages of trial, appellate counsel can not be deemed deficient for failing to raise this claim on appeal. See, Provenzano v. Dugger, 561 So.2d 541, 547-8 (Fla. 1990) (appellate counsel not ineffective for failure to argue petitioner's absence from several pretrial motions, during the charge conference, and while a motion for mistrial was being made, because these occurrences were not critical stages of trial, and Provenzano could not have assisted trial counsel); Johnson v. Wainwright, supra (appellate counsel not deficient for failing to raise the issue of defendant's absence from the courtroom during a defense witness' testimony at sentencing, where, trial counsel represented that said absence was previously agreed upon and defendant did not object prior to leaving the courtroom); Lambrix v. Dugger, 529 So.2d 116 (Fla. 1988) (appellate counsel not deemed deficient for failure to raise defendant's absence from parties' stipulations, in the absence of objection by trial counsel); see also, United States v. Howell, 514 F.2d 710, 714 (5th Cir. 1975) ("in camera conferences were not critical stages in the proceedings and therefore no concomitant right to be present arose."); United States v.

Gagnon, 470 U.S. 522, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985) (Defendant does not have a right under the due process clause to personally attend an in camera discussion with a juror. Moreover, any right to presence under Federal Rule 43 is deemed waived where a defendant, who is given notice of the judge's intent to conduct an in camera proceeding, fails to object and request to be present).

Moreover, as noted in claims II E, F, and H, herein, at pp. 36-39, 41-42, this claim is a relitigation of an issue decided adversely to the petitioner in the prior appeal from the denial of the post-conviction motion, which has now been recast under the guise of ineffective assistance of appellate counsel. It is therefore procedurally barred. See, Kelly v. Dugger, supra; Medina v. Dugger, supra; Clark v. Dugger, supra.

CLAIM II K. WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILURE TO ARGUE THAT THE SENTENCING JURY WAS MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING.

The petitioner has argued that appellate counsel was ineffective because he should have argued that the sentencing jury instructions and the prosecutor's comments referring to the jury's sentencing verdict as a "recommendation," unconstitutionally diminished the jurors' sense of responsibility for sentencing, in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). Again, neither the jury instructions herein, nor the

prosecutor's arguments or comments with respect to this issue, were objected to at trial. This Court has repeatedly held that appellate counsel can not be deemed deficient for failure to argue a Caldwell violation in the absence of an objection on this basis at trial. See, Provenzano v. Dugger, supra, 561 So.2d at 549 ("Provenzano argues that his appellate counsel was ineffective for failing to argue that the jury's sentencing responsibility was diminished in violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). Counsel can not be deemed ineffective for failing to argue this point because no objections were made to the comments which are now said to violate Caldwell. The United States Supreme Court has recently held that in order to make this contention, an appropriate objection must be made. Dugger v. Adams, 489 U.S. 401, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989)."); see also, Squires v. Dugger, 564 So.2d 1074, 1077 (Fla. 1990).

CLAIM II L. WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILURE TO RAISE A CLAIM THAT THE WRITTEN JURY INSTRUCTIONS DID NOT CORRESPOND WITH THE VERBAL INSTRUCTIONS.

The prosecution in the instant case presented evidence and argued three aggravating circumstances: 1) HAC; 2) CCP; and 3) that the crime was committed for financial gain. (DR. 1327-30). The trial court verbally instructed the jury that the aggravating circumstances were limited to said three factors. (DR. 1345). The trial court found the existence of only those three factors. The written jury instructions, however, stated that the

aggravating circumstances were limited to, inter alia, an additional aggravating factor, "that the crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws." (DR. 1902); see Fla. Stat. 921.141(5)(g).

There was no objection at trial to these written instructions. Habeas corpus is not a vehicle for additional appeals of "matters that were not objected to at trial." Roberts v. State, 568 So.2d 1255, 1261 (Fla. 1990). Because no objections were made by trial counsel herein, appellate counsel was not deficient for failing to raise this point on appeal. Id. Moreover, the petitioner has also utterly failed to demonstrate any prejudice with respect to this claim. As no evidence and no arguments were presented to the jury on the aggravator complained of herein, there is no presumption that the jury relied upon said factor. Sochor v. Florida, supra, 119 L.Ed.2d at 340 (a jury is "indeed likely to disregard an option simply unsupported by evidence," citing Griffin v. United States, 502 U.S. ___, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991). The Court thus rejected Sochor's suggestion that the jury relied upon and "weighed" the CCP factor, even though they had been instructed on same, where the evidence did not support said factor). The petitioner has thus failed to show any deficient conduct or prejudice, with respect to this claim.

CLAIM III. WHETHER NEWLY DISCOVERED EVIDENCE HAS BEEN APPROPRIATELY RAISED IN THIS PETITION.

The petitioner has first stated that his co-defendant, Mr. Endress, was sentenced to life on October 20, 1983, after petitioner's 1982 trial. Mr. Endress' conviction for first-degree murder and sentence of life were affirmed on direct appeal in March, 1985, see, Endress v. State, 462 So.2d 872 (Fla. 2d DCA 1985), and have been public knowledge since at least that date. See, Henderson v. Singletary, supra, 617 So.2d at 316 (information contained in a court's published opinion is deemed public knowledge).

The petitioner has thus argued that Endress' life sentence was newly discovered evidence, pursuant to Jones v. State, supra. The petitioner then, in reliance upon Scott v. Dugger, 604 So.2d 465 (Fla. 1992), argues that Endress' life sentence constitutes the disparate treatment of a codefendant, which should have been considered in petitioner's sentence of death.

The Respondent respectfully submits that habeas corpus is not the proper vehicle for raising this claim, as specifically noted by this Court in Scott, supra, 604 So.2d at 469-70. This claim of disparate treatment of a codefendant, when same comes to light after a defendant is sentenced to death, must be raised in a Fla.R.Crim.P. 3.850 motion for post-conviction relief. Id. This claim is thus procedurally barred. Scott, supra.

The Respondent, however, is in no way suggesting that this claim may now be properly raised in a successive motion for post-conviction relief. Such a claim can not be raised, as it is time barred, pursuant to Jones v. State, supra; Adams v. State, 543 So.2d 1244, 1246-7 (Fla. 1989); and Henderson v. Singletary, supra, 617 So.2d at 316. As noted previously, Endress' life sentence has been a matter of public knowledge since the publication of the affirmance of his conviction and sentence, in 1985. The petitioner herein brought his first motion for post-conviction relief in 1988, and was granted an evidentiary hearing in 1989, more than at least four years after this claim became cognizable. Yet, petitioner failed to raise this claim in any way in the first post-conviction proceedings, or thereafter. "[A] defendant must raise any contentions based upon new facts within two years of the time such facts became known." Henderson v. Singletary, supra, 617 So.2d at 316, citing Adams v. State, supra, 543 So.2d at 1246-47; see also, Jones v. State, supra, 591 So.2d at 916, n. 2 (The use of "evidence which is newly discovered in the sense that it could not have been known at trial," in a successive motion for post-conviction relief is procedurally barred, where said evidence, although not known at trial was known at the time of the first motion for post-conviction relief.).

Although this claim is procedurally barred as argued above, the Respondent would note that the petitioner has also failed to demonstrate any prejudice. In Scott, supra, the defendant was granted relief based upon the disparate treatment of his codefendant, because they were both "equally culpable participants in the crime." See, Scott, supra, 604 So.2d at 468. The trial judge had expressly stated that if at the time of imposition of Scott's sentence of death, she had known of the codefendant's life sentence, she would have sentenced Scott to life. In the instant case, the petitioner has entirely ignored that he was far more culpable than the codefendants, because he planned the murder of his wife and hired the codefendants for this purpose, in addition to personally participating in the beating and strangulation of the conscious victim. See, e.g., Garcia v. State, 492 So.2d at 360 (argument of disparate treatment of three other codefendants, who received life sentences, was rejected because said codefendants were not equally culpable participants); Bolender v. State, 422 So.2d 833 (Fla. 1982) (same). This claim is thus procedurally barred and without merit.

The petitioner has also relied upon an unsigned letter, dated 1982, from the State Attorney's Office, with respect to trial witness Regina Schmelfining. Said letter recounts the circumstances of this witness' cooperation at the trial herein. The petitioner again contends that this was newly discovered

evidence, which would have "seriously undermined" the "credibility" of this witness. See petition at pp. 91-2. Again, a claim of newly discovered evidence must be raised in a motion for post-conviction relief and is not proper in a petition for writ of habeas corpus. See, Jones v. State, supra; Scott v. Dugger, supra. Again, the State is not suggesting that the petitioner is now entitled to a successive rule 3.850 proceeding on this basis. As noted previously, the letter is dated 1982, with no explanation as to why it was not raised in the prior post-conviction proceeding. The State would further note that in the prior proceedings, the petitioner specifically argued and was granted an evidentiary hearing, in 1989, as to alleged withholding of evidence of an agreement between the State and witness Schmielfining. See Initial Brief of Appellant, case no. 74,691, Argument II, at p. 35; see also Answer Brief of Appellee, at p. 47. The petitioner chose not to present or rely upon said letter at that time. This claim is thus barred for untimeliness as well. See, Jones v. State, supra; Adams v. State, supra; Henderson v. State, supra.

Finally, the petitioner has again failed to demonstrate any prejudice. Schmielfining's testimony at trial revealed that she was codefendant Sullivan's girlfriend but had nothing to do with the murder; she did not witness it and she was either watching television or asleep during the time of the murder. (DR. 529, 538, 544). At the evidentiary hearing in the prior post-

conviction proceedings, trial counsel reaffirmed that this witness was not a "major player," did not know a great deal, and did not offer any "hard evidence" against the petitioner. (PR. 193-5). In light of the negligible significance of Schmielfining's testimony, the State fails to see how the unsigned letter relied upon by the petitioner, would have probably resulted in an acquittal of the petitioner. See, Jones v. State, supra. This claim is thus also procedurally barred and without merit.

CLAIM IV. WHETHER PETITIONER'S RIGHTS WERE VIOLATED DUE TO COLLATERAL COUNSEL'S PRIOR LACK OF ADEQUATE TIME AND FUNDS.

The petitioner's collateral counsel, in reliance upon his case load between January and March, 1989, has argued that he did not have adequate time to "investigate and prepare" for petitioner's March, 1989 evidentiary hearing in the prior motion for post-conviction relief. As noted in the procedural history section herein, collateral counsel filed the motion for post-conviction relief from the 1982 trial herein, in May, 1988. Having detailed CCR's hardships at the time, counsel was allowed an additional three month period to amend said motion. Thereafter, collateral counsel was allowed another six month period prior to the evidentiary hearing complained of herein. Collateral counsel did not detail any difficulties at the outset of said hearing. No claim of inadequate time was raised on appeal to this Court either.

The State respectfully submits that the instant claim, if at all cognizable in any forum, should have been raised at the time of the 1989 evidentiary hearing and/or subsequent appeal to this Court. See, Spaulding v. Dugger, 526 So.2d 73 (Fla. 1988). The petitioner chose not to do so, and is now procedurally barred from revisiting and relitigating post-conviction proceedings in this habeas corpus petition. Roberts v. State, supra, 568 So.2d at 1258 ("Habeas corpus is not a vehicle for additional appeals of issues that could have been . . . raised on . . . other post conviction motions . . . .").

CONCLUSION

Based on the foregoing, the petition for writ of habeas corpus should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS** was furnished by mail to **MARTIN McCLAIN,** Chief Assistnat C.R., Office of Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, on this 9 day of May, 1994.

FARIBA N. KOMEILY
Assistant Attorney General

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