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IN THE SUPREME COURT OF FLORIDA

ROGER LEE CHERRY,

Appellant,

v. CASE NO. 83,773

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT FROM THE DENIAL OF POST-CONVICTION RELIEF

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The Appellee accepts Cherry's cursory statement of the facts with the following corrections.

On direct appeal, this Court summarized the evidence in the following way: Cherry burglarized a small two-bedroom house in DeLand belonging to an elderly couple, Leonard Wayne and Esther Wayne, during the late evening of June 27 or the early morning of June 28, 1986. When their son arrived for a visit about noon on the 28th, he noticed that their car was gone and a door to the house ajar. Upon entering the bedroom, he discovered his parents lying two feet apart on the bedroom floor, dead. Autopsies revealed that Mrs. Wayne died of multiple blows to the head and that Mr. Wayne died of cardiac arrest. At the trial, the state's chief witness, Lorraine Neloms, testified that Cherry left the apartment which they had shared between 11 and 11:30 p.m. on June 27, 1986, explaining that "he needed some money." He returned about an hour later with two or three rifles and a wallet which contained a bank card and a license identifying a man named Wayne. She asked where he had been and he responded that he went inside a house by the armory. The prosecutor then asked:

> Q. Did he tell you what happened inside the house?
>
> A. Yeah. When he went in there, the people was awoke and saw him and the lady tried to fight him or something and he hit her and pushed the man and he grabbed his chest and he found their car keys and took their car.

Ms. Neloms further testified that Cherry bled from a cut on his right thumb which he stated was the result of having cut a line. Cherry left the apartment twice more that evening. The

first time he went to a bank and on his return stated that a card was stuck in the machine. The second time, about fifteen minutes later, he left "to ditch the car he stole." The following night, Cherry had Ms. Neloms drive by the car he had "ditched." She identified it as a light blue Ford Fairmount. They saw several police officers around the car and did not stop. After returning home, Ms. Neloms then learned of the murders. As she and Cherry watched the eleven o'clock news, television footage showed the car and house by the armory. She described Cherry as acting "[r]eal strange." Ms. Nelmons later went to the police and Cherry was arrested. A Sun Bank supervisor then testified that the automatic teller machine three blocks from the Wayne residence captured a Master Card and a Sun Bank card belonging to the Waynes on June 28, 1986. Bank audit slips revealed that five or six transactions were unsuccessfully attempted between 1:55 and 2 a.m. Police testimony indicated that the telephone wire outside the house had been cut at the junction box and that blood had been discovered on a piece of discarded paper near the box, on the walkway leading to the back porch, and on at least one of the three jalousie panes found in a wooded thicket to the rear of the house. Those panes had been removed from the porch window. Cherry's blood was consistent with the blood found on the paper and the jalousie. Cherry's left palm print was found on the door frame at the entrance to the Waynes' bedroom and his left thumbprint appeared on one of the jalousie panes. However, a hair fragment was collected from the bedroom wardrobe and determined to be dissimilar to Cherry's known hair sample.

Cherry was arrested on July 2 at his home, approximately three blocks from the Wayne's house. Police noted at that time that Cherry had a cut on this thumb, which he remarked was the result of having cut the head off a fish. Finally, evidence was presented that the Waynes' Fairmount had been discovered abandoned in a wooded area within a mile of their house. Inside its locked trunk, police found a metal tray bearing Cherry's left thumbprint. Cherry's blood was consistent with blood identified on a towel recovered from the front seat of the car. A jury convicted Cherry of the four crimes charged in the indictment. During the penalty phase, the state offered no additional evidence. The defense evidence was limited to a September 10, 1987 psychiatric evaluation by George W. Barnard, M.D.[1]. The jury recommended the imposition of the death penalty by a 7-5 vote for the murder of Leonard Wayne and by a 9-3 vote for the murder of Esther Wayne. The trial judge sentenced Cherry to death on both capital counts in accordance with the jury's recommendation, finding that the aggravating circumstances[2] far outweighed any mitigating circumstances. On the burglary count, he sentenced Cherry to a life term of imprisonment, and on the grand theft

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[1] Dr. Barnard reported that Cherry's father beat him severely and that his mother had alcohol problems. In the year before his arrest, Cherry smoked marijuana daily and smoked approximately $700 worth of "crack," the last time being on June 28, 1986.

[2] The court found that Cherry had been previously convicted of another felony involving the use and threat of violence, that is robbery, that the murders were committed while he was engaged in the commission of a burglary; that the murders were committed for pecuniary gain; and that the murders were "especially wicked, evil, atrocious or cruel."

count, to a five-year term, with each to run concurrent with the other. Cherry v. State, **544 So.** 2d **184,** 185-6 (Fla. **1989).**

On direct appeal, Cherry raised the following nine (9) issues, taken verbatim from his brief: the trial court denied Cherry due process and a fair trial by preventing a defense witness from testifying due to late disclosure of the witness by the defense; the trial court erred by imposing sentences for non-capital offenses without complying with F. R. Crim. P. 3.701; the trial court erred in considering as separate aggravating circumstances murder for pecuniary gain and murder during commission of a felony (burglary); the trial court erred in finding the murders to be especially heinous, atrocious, or cruel, in that the finding is speculative, duplicitous, and otherwise unsupported by the verdict; the death penalty is disproportionate to the facts of this case; the Florida death penalty statutes violate the Sixth, Eighth and Fourteenth Amendments in that the statutory aggravating and mitigating circumstances, as applied by the trial and appellate courts, do not genuinely limit the class of persons that are eligible for the death penalty, thereby rendering the death penalty susceptible to undue arbitrary and capricious application; the death penalty was imposed in contravention of the rights to due process and a jury trial guaranteed by the Constitutions of Florida and the United States, in that in rendering its verdict the jury did not consider the elements that statutorily defined the crime for which the death penalty may be imposed; the trial court erred in failing to consider a psychiatric report

introduced into evidence by defense counsel during the penalty phase of trial; imposition of sanctions for both burglary with an assault and first degree felony murder is unconstitutional, in that the defendant is twice being punished for the same offense. **See,** Initial Brief, Cherry v. State, F. S. C. No. 77,062 filed March 2, **1988.**

This Court upheld the trial court's finding of the heinous, atrocious, or cruel aggravating circumstance as to the murder of Mrs. Wayne, but found it inapplicable to the murder of Mr. Wayne. Cherry v. State, **544** So. 2d at **188.** This court also found that the trial court improperly "considered murder for pecuniary gain and murder during the commission of a burglary as separate aggravating factors." **Id.,** at 187. This court upheld the death sentence as to Mrs. Wayne, finding that three aggravating factors were present: the prior conviction of a violent felony; murder for pecuniary gain; and that the murder was heinous, atrocious, or cruel. **Id.,** at 188. The death sentence imposed for the murder of Mr. Wayne was reversed on proportionality grounds. Id.

On April 16, **1992,** Cherry filed a motion to vacate conviction and sentence pursuant to Florida Rule of Criminal Procedure **3.850.** That motion contains the following twenty claims, taken verbatim from the motion:

I. Race discrimination permeates the justice system in Volusia County and affected the preparation and prosecution of this case at every stage: as a result Mr. Cherry's conviction and death sentence violate his rights of equal protection of the laws

and to be free from cruel or unusual punishments, as guaranteed by Article I, §2, 9, 16, 17 and 21 of the Florida Constitution and the Sixth, Eighth and Fourteenth Amendments to the United States Constitution (PR 54-78);[3]

II. Trial counsel's failure to investigate for readily available mitigating evidence, and his failure to present such evidence at penalty phase, deprived Mr. Cherry of his right to the effective assistance of counsel, as guaranteed by Article I, 816 and 17 of the Florida Constitution, and the Sixth, Eighth and Fourteenth Amendments to the United States Constitution (PR 79-188);

111. Roger Cherry, who is mentally retarded and suffers from organic brain damage and other psychiatric disorders, was denied a competent mental health examination and counsel was ineffective for failing to investigate and arrange for such an examination, in violation of his rights under Article I, §9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution (PR 189-205);

IV. Roger Cherry was denied due process of law under the State and Federal Constitutions when the trial court denied Mr. Cherry's motion for the appointment of a forensic pathologist, a serologist, and a microanalyst. (PR 206-211);

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[3] The citation form "PR ________ " refers to the record on appeal from the denial of Cherry's 3.850 motion. The citation form "R ________ " refers to the record on direct appeal.

V. Mr. Cherry was denied the effective assistance of counsel at the guilt-innocence phase of his trial, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 16 of the Florida Constitution (PR 212-284);

VI. The state's failure to turn over exculpatory information in its possession before trial violated Mr. Cherry's rights under Article I, §9, 16 and 17 of the Florida Constitution, Fla. R. Crim. P. 3.220, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution (PR 285-293);

VII. Mr. Cherry was denied a trial before an impartial jury when jurors were exposed to improper and prejudicial information during the course of his trial in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments (PR 294-303);

VIII. The trial court's decision to exclude a defense witness without conducting a Richardson hearing was based on bias against Mr. Cherry and consideration of impermissible factors, thus depriving Mr. Cherry of due process (PR 304-309);

IX. Mr. Cherry's two first-degree murder convictions and his death sentence for the murder of Esther Wayne violate the due process clause and Eighth Amendment to the United States Constitution as well as Article I, Sections 9 and 17 of the Florida Constitution (PR 310-315);

X. A new trial is required because of a lack of record of the bench conferences and rulings on certain defense motions (PR 316-322);

XI. The prejudicial atmosphere surrounding the trial proceedings focused the jury's attention on the victims and the effect of their deaths on the community, creating a risk that the death penalty was imposed in an arbitrary and capricious manner and depriving Mr. Cherry of a fair trial (PR 323-329);

XII. The prosecutor's egregiously improper closing argument at penalty phase rendered Mr. Cherry's death sentence unreliable, in violation of his rights under Article I, §9 and 17 of the Florida Constitution and the Eighth and Fourteenth Amendments to the United States Constitution (PR 330-343);

XIII. Trial counsel's failures at penalty phase to object to constitutionally impermissible instructions by the court and argument by the prosecutor, and to argue that the evidence supported a life sentence, deprived Roger Cherry of his right to the effective assistance of counsel, in violation of Article I, §9, 16, 17, and 21 of the Florida Constitution, and the Sixth, Eighth and Fourteenth Amendments to the United States Constitution (PR 344-367);

XIV. The trial court instructed the jury that it could consider, and the trial court itself considered, Mr. Cherry's prior criminal record as a nonstatutory aggravating circumstance, despite the fact that Mr. Cherry waived reliance on the mitigating circumstance of no significant prior criminal history, in violation of Maggard v. State, and in violation of Article I, §9, 16, and 17 of the Florida Constitution and the Eighth and Fourteenth Amendments to the United States Constitution (PR 368-375);

XV. Mr. Cherry was denied a fundamentally fair and reliable sentencing determination because the state and the court misled the jury into believing that its sentencing verdict was merely advisory, in violation of Article I, Sections 9 and 17 of the Florida Constitution and the Eighth and Fourteenth Amendments to the United States Constitution (PR 376-381);

XVI. Mr. Cherry's sentence of death was obtained based upon one or more unconstitutionally obtained prior convictions and therefore violates his rights under Article I, §9 and 17 of the Florida Constitution and the Eighth and Fourteenth Amendments to the United States Constitution (PR 382-391);

XVII. The penalty phase jury instructions improperly shifted the burden to Mr. Cherry to prove that death was inappropriate, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Article I, §9, 16 and 17 of the Florida Constitution (PR 392-396);

XVIII. During the course of Mr. Cherry's trial and sentencing proceedings the court and prosecutor improperly asserted that sympathy and mercy were improper considerations for the jury, depriving Mr. Cherry of a reliable and individualized sentencing determination, in violation of the Eighth and Fourteenth Amendments of the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution (PR 397-404);

XIX. Mr. Cherry's death sentence violates Article I, §9 and 17 of the Florida Constitution and the Eighth and Fourteenth Amendments to the United States Constitution because it is based

on a verdict of death from a sentencing jury that was instructed only in the bare terms of Florida's facially vague "heinous, atrocious, or cruel" aggravating factor, in direct violation of the United States Supreme Court's decision in Godfrey v. Georgia, 466 U.S. 420 (1980), and its progeny (PR 405-412);

XX. The trial court failed to conduct an independent evaluation of the mitigating evidence offered by Mr. Cherry, thereby depriving him of his right to an individualized sentencing determination, in violation of Article I, Sections 9 and 17 of the Florida Constitution and the 8th and 14th amendments to the United States Constitution (PR 413-426).

Numerous exhibits were attached to the 3.850 motion. See, e.g., PR 433-1797. The State filed its response on June 30, 1992. (PR 1809-1928). On December 14, 1992, the case was reassigned from the original circuit judge to Senior Judge Uriel Blount, Jr. (PR 2050). On January 22, 1993, Cherry filed a motion to disqualify Judge Blount (PR 2051-2114). On February 23, 1993, the trial court denied Cherry's January 22, 1993 motion for disqualification of Judge Blount. (PR 2115). The basis for the denial of the motion for disqualification was that the motion was not brought pursuant to the proper rule of judicial administration; that the motion was not joined in by the defendant; that the motion was not sworn to by signing the motion under oath or by separate affidavit; and that there was no certification by Cherry's attorney that the motion and the client's statements in the motion were made in good faith. (PR 2115-2116). Consequently, the motion was found to be legally

insufficient. Id. The court further found, in the alternative, that even if the motion was accepted as filed, it was still legally insufficient. Id. Cherry filed a motion for rehearing of the motion for disqualification on March 5, 1993. (PR 2128). That motion was denied as legally insufficient on March 10, 1993. (PR 2203).

On March 12, 1993, the 3.850 trial court entered its order denying Cherry's motion to vacate judgement of conviction and sentence. (PR 2205). The collateral proceeding court found that claims 1, 4, 7, 8, 9, 11, 12, 14, 15, 16, 17, 18, 19, and 20 were all procedurally barred because they either were raised on direct appeal or could have been raised but were not. (PR 2211). The court found that claims 3, 10 and 13, insofar as they stated substantive issues, were procedurally barred because they either were or could have been raised on direct appeal. The court found that the claims of ineffective assistance of counsel contained in claims 2 and 5 did not present grounds for collateral attack. (PR 2212). As to claims 2 and 5 the court further found that there was no showing of a reasonable probability of a different result, and denied relief. Id. The court found that claim 6, which alleged a Brady violation, was not a basis for relief on either ineffectiveness grounds or on Brady grounds. Id. The trial court summarily rejected this claim, and found, in the alternative, that Cherry had established neither materiality nor prejudice. Id. This appeal follows.

SUMMARY OF ARGUMENT

Cherry presents nineteen points on appeal from the circuit court's denial of his motion for post-conviction relief. The court below properly found all of those claims to be procedurally barred, with the exception of the ineffective assistance of counsel claims, which were denied without an evidentiary hearing. The first "issue" contained in Cherry's brief concerns the denial of his motion to disqualify the 3.850 trial court. That motion was properly denied because it was legally insufficient and did not state a well-grounded fear that Cherry would not receive a fair trial. That motion was also properly denied because it was not filed in a timely manner in accordance with the Rules of Judicial Administration.

The principal issue on appeal is whether Cherry was entitled to an evidentiary hearing on his claims of ineffective assistance of counsel at the guilt and penalty phases of his capital trial. Under the facts of this case, Cherry's claims of ineffective assistance are either insufficient to warrant an evidentiary hearing, or are conclusively rebutted by the record. In summarily denying Cherry's claims of ineffectiveness, the circuit court stated a sufficient rationale based upon the record which complies with this Court's prior decisions.

In this case, summary denial was proper because trial counsel either did what Cherry now claims he did not do, or because the recently developed "evidence" is wholly cumulative of the evidence which was put on at Cherry's capital trial in 1987. Cherry also raises other specifications of ineffective assistance

of counsel which were proper for summary denial because those "claims" are without any legal basis and can be decided purely as issues of law.

At the guilt phase of his capital trial, Cherry's trial counsel vigorously attacked the state's case and the forensic evidence which linked Cherry to the murders. Moreover, counsel challenged the state's key witness, Neloms, and presented evidence in the defense case-in-chief which was further directed toward the defense theory of innocence. Cherry's new claim that the case should have been defended based upon a voluntary intoxication theory is no more than his new attorneys' conclusion that the case should have been tried differently. That is not the standard to be applied in judging ineffective assistance of counsel claims. Cherry has failed to establish a reasonable probability of a different result even if the case had been tried in the manner which his new attorneys have deemed "appropriate" and, moreover, has failed to demonstrate either deficient performance on the part of trial counsel, or prejudice. That is the standard which Cherry must meet, and he has not done so.

Cherry's new mental state experts have, according to Cherry's attorneys, reached conclusions which differ from the conclusion reached by the psychiatrist who examined Cherry contemporaneously with his trial, and whose report was introduced into evidence at the penalty phase by the defense. Those new experts have reached opinions which differ from the original expert, but the inescapable fact remains that all of the experts

have relied upon substantially the same evidence. The prior decisions of this court hold that this showing fails to establish ineffective assistance of counsel, and the state suggests that convening an evidentiary hearing would have been a waste of judicial time and effort. Under the facts of this case, Cherry has utterly failed to demonstrate any prejudice. Moreover, many of Cherry's claims of ineffective assistance of counsel are no more than collateral counsel's attempts to avoid the preclusive effect of the procedural bar to claims which are not cognizable in post-conviction proceedings. The circuit court's summary denial of Cherry's motion for post-conviction relief should be affirmed in all respects.

PRELIMINARY STATEMENT

On pp. 3-4 of his brief, Cherry asserts that the 3.850 court should have held an evidentiary hearing on many of the claims contained in the 3.850 motion. The state's response to this "issue" is set out in the argument section of the Answer Brief in conjunction with the specific claims upon which Cherry asserts that a hearing should have been conducted. To the extent that Cherry argues that he is entitled to an evidentiary hearing on any of the procedurally barred claims, the procedural bar is apparent from the face of the record, and the collateral proceeding trial court properly ruled on those grounds. To the extent that Cherry argues that there should be an evidentiary hearing on the ineffective assistance claims, those claims are likewise properly disposed of based on the record.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED CHERRY'S MOTION FOR RECUSAL

On pp. 4-8 of his brief, Cherry complains at length about the denial of his motion to disqualify the 3.850 trial court. This contention is not set out in the argument portion of Cherry's brief except for a passing reference on p. 49 of the Initial Brief. While Cherry's brief does not comply with Florida Rule of Appellate Procedure 9.210 (b) and even though the disqualification issue is not mentioned in the summary of argument section of the initial brief, the state responds as follows to Cherry's "argument".

In the motion to disqualify, Cherry asserted that recusal of Judge Blount was required because was to be a "material witness" in the case and because the Judge is prejudiced against the defendant. (PR 2054). Cherry alleged that these facts established a "well-grounded fear" that Judge Blount would not be fair and impartial in deciding the 3.850 motion. (PR 2055). This motion was denied on February 23, 1993, as legally insufficient because (1) it was not brought under Florida Rule of Judicial Administration 2.160; (2) it was not signed by the defendant; (3) it was not "sworn to by the party by signing the motion under oath or by separate affidavit" as required by the rules; and (4) no certificate of good faith was filed along with the motion. (PR 2115-2116). The court found, in the alternative, that the motion was legally insufficient even if it was treated as having been properly filed. (PR 2116). While

Cherry suggests, in footnote 4 to his brief, that the motion was in the proper form, he cannot dispute the fact that the motion was filed under the wrong rule (Rule 3.230 of the Florida Rules of Criminal Procedure) and that the required certificate of good faith was not signed. This motion was not in the required legal form, did not contain the required certification, and was therefore properly denied.

On March 5, 1993, Cherry filed a motion for rehearing of his motion for disqualification which was sworn to by the defendant and which contained a certificate of good faith. (PR 2128-2202). The grounds for that motion were identical to those which had been set out in the first motion for recusal and which had been found to be legally insufficient. (PR 2203-2204). That motion was denied. **Id.**

Florida law is settled that a motion for recusal "must be well-founded and contain facts germane to the judge's undue bias, prejudice, or sympathy." Jackson v. State, 599 So. 2d 103, 107 (Fla. 1992); Gilliam v. State, 582 So. 2d 610, 611 (Fla. 1991); Dragovich v. State, 492 So. 2d 350, 352 (Fla. 1986). The fact that the Judge has previously heard the evidence or that the Judge has previously made rulings adverse to the movant does not rise to the level of a legally sufficient basis for recusal. Jackson, supra at 107. In fact, even a claim that the Judge has a fixed opinion as to guilt and has discussed that opinion does not state a legally sufficient basis for disqualification. Dragovich v. State, 492 So. 2d at 352; Nickels v. State, 86 Fla. 208, 98 So. 497 (1923). A motion to disqualify is properly

dismissed as legally insufficient if it does not establish a well-grounded fear on the part of the moving party that he will not receive a fair hearing. Quince v. State, 592 So. 2d 669, 670 (Fla. 1992); Dragovich, supra; See also, Jones v. State, 446 So. 2d 1059, 1061 (Fla. 1984) (Recusal not required when same Judge presides at trial and 3.850 proceedings). The standard the trial court must apply in determining the legal sufficiency of a motion to disqualify is "whether the facts alleged would place a reasonably prudent person in the fear of not receiving a fair and impartial trial." Livingston v. State, 441 So. 2d 1083, 1087 (Fla. 1983). In Cherry's case, the motion to disqualify was properly denied for two independently adequate reasons.

The first reason that the motion to disqualify was properly denied is because the motion is legally insufficient under the decisions of this court. Cherry's claim that Judge Blount was to be a material witness in the 3.850 proceeding is connected to Cherry's claim, on direct appeal, that testimony to the effect that Mr. Wayne had not held a valid driver's license since 1970 was improperly precluded. Cherry v. State, 544 So. 2d at 186. This court upheld the trial court's ruling that the proffered testimony was immaterial because "there was no previous testimony that Mr. Wayne carried a current driver's license." Id. (Emphasis in original) (Footnote omitted). Further testimony established that Mr. Wayne was legally blind, did not drive, and did in fact possess a driver's license. Id., at n. 4. This court expressly found no abuse of discretion in the exclusion of that evidence. Id. Those facts, which have already been

litigated before this Court and found to establish no error, have not changed. Because this court found no error, and because this issue is now procedurally barred, Judge Blount cannot be a material witness in this proceeding. That testimony was properly excluded at trial as immaterial and, because this court upheld that ruling on direct appeal, Cherry cannot relitigate that matter on a different theory during his collateral attack proceeding. Cherry is merely attempting to relitigate an issue that has already been decided against him, and that attempted relitigation of claims is improper under the prior decisions of this Court. **See**, e.g., Turner v. Dugger, 614 So. 2d **1075** (Fla. **1992).**

To the extent that Cherry asserts that Judge Blount was biased against him and that that bias established a basis for recusal, that claim is also legally insufficient under the prior decisions of this court. Cherry has alleged no facts pertinent to Judge Blount's claimed bias and prejudice and, for that reason, his motion is legally insufficient. **See**, e.g., Dragovich v. State, 492 So. 2d at **352.** Moreover, the law is settled that previous adverse rulings, presiding over multiple trials of the same defendant, and comments that suggest a predisposition on the part of the Judge are not a sufficient basis for requiring disqualification. Jackson v. State, **599** So. 2d at **107.** Because that is the law, it would make no sense to require disqualification because the trial judge presided over a probate proceeding or, assuming the truth of the claim, told the defendant in connection with some prior sentencing hearing that

the next time that defendant appeared before that Judge he would be sent to prison for good. The prior decisions of this Court establish that Cherry's claims are legally insufficient, and the trial court properly denied the motion to disqualify. Cherry has not established a well-founded fear that he would not receive a fair trial, and the ruling of the trial court should not be disturbed.

To the extent that Cherry suggests that the trial court improperly considered the merits of the motion to disqualify, that claim is rebutted by the order, which clearly and properly denied the motion on the basis of legal insufficiency. To the extent that Cherry relies on Rogers v. State, 630 So. 2d 513 (Fla. 1993) and Bundy v. Rudd, 366 So. 2d 440 (Fla. 1978), those cases do not control the resolution of the issue in this case because Judge Blount did not exceed the proper scope of inquiry in denying Cherry's motion to disqualify.

The second reason that Cherry's motion was properly denied is that none of the reasons advanced for disqualification were brought in a timely manner as required by Rule 2.160 (e) of the Rules of Judicial Administration. Rule 2.160 requires that a motion to disqualify be made within 10 days of the discovery of the facts upon which the motion is based. Cherry completely failed to comply with those time requirements in two respects. First, every asserted basis for disqualification arose prior to or during Cherry's 1987 trial and is based upon knowledge that was either public record (the presiding Judge in the probate of the victims' will); based upon statements allegedly made directly

to trial counsel (offending the elderly); or based on statements allegedly made directly to Cherry (that he would be "sent to prison for good" the next time he appeared for sentencing). Each of those contentions could have been advanced in a timely manner in 1987.

Moreover, each of the claimed grounds for disqualification of Judge Blount was known to Cherry prior to the filing of his 3.850 motion and pleaded as claimed grounds for relief in Cherry's April 16, 1992 3.850 motion. Cherry's 3.850 motion was initially assigned to a Judge other than Judge Blount, but was reassigned to him on December 14, 1992. (PR 2064). Even giving Cherry the benefit of the doubt, he knew that Judge Blount would be presiding over this proceeding at least 30 days before he filed his motion to disqualify on January 22, 1993. (PR 2051). Cherry unquestionably knew the "facts" asserted as grounds for disqualification in time to comply with the ten day requirement of Rule 2.160 (e) of the Rules of Judicial Administration. He failed to comply with that rule, and should not be heard to complain. Even though the trial court did not rely on the Rule 2.160 (e) time bar as a basis for denial for the motion to disqualify, that is a proper basis for the lower court's ruling, and that decision should not be disturbed on appeal.

11. THE LOWER COURT PROPERLY FOUND CHERRY'S McCLESKEY CLAIM TO BE PROCEDURALLY BARRED

On pp. 8-10 of his brief, Cherry argues that he was entitled to an evidentiary hearing on his claim that racial discrimination "infected" his capital trial. This claim was a sub-claim of Claim I to the 3.850 motion. (PR 67-75). The 3.850 Court properly found this claim to be procedurally barred. (PR 2211). Cherry also argues, for the first time on collateral appeal, that this contention amounts to fundamental error and that the failure to raise this claim at trial (and presumably on direct appeal) was ineffective assistance of counsel. Cherry also argues that the "Radelet Study" constitutes newly discovered evidence. This argument is also raised for the first time on collateral appeal.

Florida law is settled that claims which could have been but were not raised at trial and on direct appeal are barred from consideration in a 3.850 motion. Kight v. Dugger, 574 So. 2d 10066 (Fla. 1990); Medina v. State, 573 So. 2d 293 (Fla. 1990); Mikenas v. State, 467 So. 2d 359 (Fla. 1984). Likewise, Florida law is well-settled that a procedural bar cannot be avoided by pleading a procedurally barred claim in the guise of a claim of ineffective assistance of counsel. **See,** Kennedy v. Singletary, 602 So. 2d 1285 (Fla. 1992); Kight v. Dugger, 574 So. 2d 1066 (Fla. 1990); Medina v. State, 573 So. 2d 293 (Fla. 1990); Finally, the claims of ineffective assistance of counsel, fundamental error, and newly discovered evidence are raised for the first time on collateral appeal and are therefore barred because they have never have been presented to the circuit court. See, Doyle v. State, 526 So. 2d 909 (Fla. 1988). The 3.850 trial

court properly found the components of this claim which were raised in that court to be procedurally barred and denied a hearing on the merits. That ruling should not be disturbed.

Alternatively and secondarily, while Cherry makes hyperbolic claims as to what his "evidence" will show, except for the "new" Radelet "study", that purported evidence appears nowhere in the record. Of course, it is undisputed that unsupported assertions made by counsel in brief do not establish anything. **See**, e.g., Duest v. Dugger, 555 So. 2d 849, 851-2 (Fla. 1990), rev'd on other grounds, Duest v. Singletary, 997 F. 2d 1336 (11th Cir. 1993). See also, Schneider v. Curry, 584 So. 2d 86, 87 (Fla. Fifth DCA 1991). The claims made by Cherry are no more than sheer speculation that is unsupported in any way. The Radelet study is the only "evidence" in the record relative to this claim, and that study suffers from at least two defects. First, that study (and indeed none of the other "evidence") does not suggest that the State Attorney's Office acted with purposeful discrimination in seeking the death penalty in this case. Foster v. State, 614 So. 2d 455, 463-464 (Fla. 1992). That is the burden on Cherry, and he has not made the showing required to even necessitate an evidentiary hearing. Id. Cherry has demonstrated nothing that has not already been rejected both by this Court and by the United States Supreme Court. See, McCleskey v. Zant, 481 U.S. 279 (1987). In Foster, this Court specifically held that no evidentiary hearing was required, even though Foster had not procedurally defaulted on his claim. Foster v. State, 614 So. 2d at 464. Because Foster was not

entitled to a hearing even though his claim was properly preserved, it makes no sense to suggest that Cherry should be allowed an evidentiary hearing on a claim that is clearly procedurally barred.

The second reason that the Radelet "study" should be given no weight is the bias that permeates that document. If any attempt was made to compensate for the numerous variables that exist in the process that leads up to a capital trial, that effort cannot be discerned from the document itself. That glaring omission, in and of itself, is enough to raise serious questions as to the probative value of that "study". Moreover, Radelet is a long-time, outspoken opponent of capital punishment. See, Markman and Cassell, Protecting The Innocent: A Response to the Bedau-Radelet Study, 41 Stan. L.R. 121, 156-7 n. 218 (1988). In fact, in at least one article, Radelet relied upon a novel, which was specifically identified as a work of fiction, to support the proposition that an innocent man was executed. **Id.,** at 138-9 n. 90. Radelet is not credible, and his "study" must be viewed with extreme suspicion. Cherry has not even approached the showing required to entitle him to an evidentiary hearing, and has utterly failed to support his claim with any credible evidence. The trial court's denial of this claim on procedural bar grounds should be affirmed.

III. THE TRIAL COURT PROPERLY DENIED THE PENALTY PHASE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS WITHOUT AN EVIDENTIARY HEARING BECAUSE EACH OF THOSE CLAIMS IS PROPERLY DECIDED BASED ON THE RECORD

On pp. 10-25 of his initial brief, Cherry argues that he received ineffective assistance of counsel at the penalty phase of his capital trial. This issue is claim II (PR 79-188) of the 3.850 motion. In addition to his claim that trial counsel failed to properly investigate mitigating evidence, Cherry also argues that counsel was ineffective for failure to object to the matters raised in claims 12, 13, 14, 16, 17 and 18 of the initial brief. (Initial brief at pp. 12-13). Insofar as claims 14 and 17 are concerned, those specifications of ineffective assistance were not raised in the 3.850 motion and, because they are raised for the first time on collateral appeal, they are procedurally barred. See, Doyle v. State, 526 So. 2d 909, 911 (Fla. 1988). Moreover, because none of those claims are meritorious, they cannot support a finding of ineffective assistance of counsel. The merits of these claims are discussed, in the alternative, in connection with the respective claims in the State's Answer Brief. Because none of these claims have merit, trial counsel cannot have been ineffective for not raising them. Thus, the trial court's denial of relief on ineffective assistance grounds is based on matters in the record (or on purely legal issues) and should not be disturbed.

The standard for evaluating claims of ineffective assistance of counsel is the well-known standard established in Strickland v. Washington, 466 U. S. 668 (1984). In Maxwell v. Wainwright, 490 So. 2d 927 (Fla. 1986), this court stated the following:

> "A claim of ineffective assistance of counsel, to be considered meritorious, must include two general components. First, a claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably confident performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness of and the reliability of the proceeding that confidence in the outcome is undermined. [Citation Omitted].

Maxwell v. Wainwright, 490 *So.* 2d at 932. This court further noted that, when a claim of ineffectiveness of counsel is presented, a specific ruling on the performance component of the test is not required when it is clear that the petitioner cannot establish the second, or prejudice, component. Id. The Strickland v. Washington standard is stated in the conjunctive, and if a petitioner cannot establish both deficient performance and prejudice, he is not entitled to relief. In the instant case, the record is sufficient to allow an assessment of both the performance and prejudice prongs of Strickland. Because both performance and prejudice can be adequately from the record, there was no need for an evidentiary hearing. Moreover, even if this court should determine that the record is not sufficient to pass on the performance prong of the Strickland test, the record is clear that Cherry cannot meet the second (prejudice) prong of Stickland. Consequently, Cherry cannot establish a reasonable probability of a different result even if the case had been tried in the manner which he now claims was appropriate. Correll v.

Dugger, 558 So. 2d 422 (426) (Fla. 1990). Because Cherry cannot establish the prejudice component of Strickland for the reasons set out below, the 3.850 trial court properly ruled on the petition based upon the record. That decision should be affirmed in all respects.

Insofar as Cherry's claim regarding his newly-retained mental state experts is concerned, there are two defects in that claim which are, at least to some extent, intertwined. First, the most that Cherry has established is that, years after his trial, his volunteer lawyers have succeeded in locating experts who would testify favorably to Cherry. In the absence of proof that it was reasonably probable that such favorable experts could have been located at the time of trial, Cherry cannot establish prejudice under Strickland v. Washington, 466 U. S. 668 (1984). **See,** e.g., Elledge v. Dugger, 823 F. 2d 1439, 1446 (11th Cir. 1987). Cherry has not even alleged that the mental state testimony he claims should have been presented was reasonably likely to have been available at the time of trial.

In any event, trial counsel obtained a mental state evaluation of his client and utilized the report of that evaluation as mitigation at the penalty phase. (R 1037-8). That report set out Cherry's background and childhood; his prior drug and alcohol use; his prior "suicide" attempt; and his mental status at the time of the offense and at the time of trial. (R 1166-1168). Moreover, that report specifically detailed incidents of child abuse perpetrated on the defendant by his father. (R 1167). The evidence which Cherry now claims should

have been presented is cumulative because that evidence is qualitatively little different from the evidence presented at sentencing. Despite Cherry's hyperbolic discussion of his abuse as a child, that evidence is cumulative; evidence of Cherry's childhood was presented at sentencing. See, e.g., Spaziano v. State, 545 So. 2d 843 (Fla. 1989). See also, Harris v. State, 528 So. 2d 361 (Fla. 1988); Buenoano v. State, 559 So. 2d 1116 (Fla. 1990) (No reasonable probability of a different result had child abuse evidence been introduced, given the aggravating circumstances present). Likewise, the fact that Cherry's new lawyers purport to have located experts who will testify that Cherry is mentally retarded and brain impaired (whatever that means) is of no consequence because those conclusory statements by counsel establish nothing. See, Schneider v. Currey, supra. In any event, Cherry is not entitled to a favorable psychiatric opinion, nor is counsel required to shop for an expert who will render such opinion. Ake v. Oklahoma, 470 U.S. 58 (1985); Elledge v. Dugger, 823 F. 2d at 1447 n. 17; Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990); Turner v. Dugger, 614 So. 2d 1075 (Fla. 1992).

Counsel's penalty phase investigation was reasonable, and can be adequately assessed based upon the record. Likewise, no hearing was required to determine that there was no reasonable probability of a different result had the new experts testified. The "new" evidence is cumulative as to the non-statutory mitigators, and, as to Cherry's mental status, is directly contrary to the findings of the psychiatrist who evaluated Cherry

at trial and found him to be of average intelligence based upon that evaluation. (R 1166-1168). Of course, it is not uncommon for experts to disagree, Engle v. Dugger, 576 So. 2d 696, 702 (Fla. 1991), but the fact that Cherry cannot change is that the experts reached different results based upon substantially identical information. Trial counsel cannot be faulted for proceeding as he did; moreover, it is not possible to conclude that no attorney would have proceeded as trial counsel did. Spaziano, supra; Harich, supra. Under the particular circumstances of this case, and in view of the heavy aggravation present, there is no reasonable probability of a different result even if the case had been handled in the manner that Cherry's new lawyers assert would have been "correct". What Cherry attempts to present as an issue of fact is, in reality, an issue of law which was properly resolved based on the record without the need for an evidentiary hearing. Trial counsel's decisions are entitled to great deference, and, under the circumstances of this case, counsel's performance was not "outside the wide range of professionally component assistance." Strickland v. Washington, 466 U.S. 668, 690 (1984). Moreover, by relying upon the report of the mental state expert, rather than presenting a live witness, the defense was able to maintain complete control over the evidence placed before the jury, as well as avoiding any attempt by the state to rebut that evidence. In other words, through his strategy at the penalty phase, trial counsel was able to leave the state saddled with mental state evidence that the prosecution could not rebut. That strategy is

far from unreasonable, and the summary denial of this claim should be affirmed.

On p. 20 of his brief, Cherry's collateral counsel argue that Cherry is "basically a sweet, good natured child in a man's body." However, that "good natured child" has at least eight prior felony convictions, including two convictions for robbery. Initial Brief at 61, 64. Cherry's present counsel apparently recognize no inconsistency in their argument. That selective interpretation of the case fails to account for the reality of the situation. While the state does not suggest that an outright denial of guilt at the guilt phase of a capital trial cannot be followed by a penalty phase defense which is inconsistent with innocence, the strategy which Cherry's present attorneys advocate is internally inconsistent to the point that its presentation would be doomed to failure.

Insofar as the penalty phase is concerned, it stands reason on its head to suggest that there could be any hope of success in arguing that Cherry is "a sweet good-natured child". That argument would be contrary to the facts, which demonstrate that whatever Cherry may be, he is neither "sweet" nor "good-natured". Of course, "[t]he attitude of the killer is best evidenced by what the killer has done". Cartwright v. Maynard, 822 F. 2d 1477, 1490 (10th Cir. 1987) (en banc), aff'd, 108 S. Ct. 1853 (1988). Cherry's claim collapses because the facts simply do not support his assertions.[4] Moreover, Cherry fails to recognize

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[4] Dr. Barnard was provided with material from Cherry's trial counsel. (R 1168). The court order at R 1093 is a form order, and any assertion or suggestion to the contrary is rebutted by

"that, in reality, some cases almost certainly cannot be won by defendants". Clisby v. Alabama, 26 F. 3d 1054, 1057 (11th Cir. 1994). As the Clisby court noted, "sometimes the best lawyering, not just reasonable lawyering, cannot convince the sentencer to overlook the facts of a brutal murder ...". Id. That observation is particularly relevant here. Even if the performance of trial counsel was deficient, and the state emphatically contends that it was not deficient in any way, Cherry has utterly failed to establish prejudice. **Id.** Cherry cannot prevail on his ineffectiveness of counsel claim because he cannot demonstrate a reasonable probability of a different result. Nothing that trial counsel could have presented could have rebutted the Cherry's participation in the brutal murder for which he has been convicted and sentenced to death. See e.g., Thompson v. Wainwright, 787 F. 2d 1447, 1453 (11th Cir. 1986); Daughtery v. Dugger, 839 F. 2d 1426, 1432 (11th Cir. 1988).

In his brief, Cherry asserts that his present counsel have retained three mental health experts who will testify to various matters concerning mitigating evidence. Initial Brief at 23. However, in an incredible omission, Cherry offered no affidavits from those individuals as attachments to the 3.850 motion, even though he submitted affidavits from numerous other individuals.[5] Those mental health experts were never identified by name in

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the record. Moreover, Dr. Barnard was not a confidential defense expert, and the state suggests that it could well be improvident for the defense to turn over too much information to that witness.

[5] The appendix to the 3.850 motion consists of approximately 90 documentary exhibits and affidavits.

Cherry's 3.850 motion. Moreover, the 3.850 motion presents only conclusory statements as to the "legal conclusions" reached by a psychiatrist and a psychologist (PR 184-185).[6] Those assertions by counsel as to what legal conclusions would be the subject of expert mental state testimony are no more than conclusory allegations which are unsupported by facts as required by Rule 3.850. Cherry has not established the need for an evidentiary hearing, and the 3.850 trial court's summary denial was proper. Turner v. Dugger, 614 So. 2d 1075, 1078 (Fla. 1992); Engle v. Dugger, 576 So. 2d 696 (Fla. 1991); Kight v. Dugger, 574 So. 2d 1066 (Fla. 1990); Swafford v. Dugger, 569 So. 2d 1264 (Fla. 1990).

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[6] The matters which Cherry claims would be the subject of the testimony of a social worker are set out in the mental state report introduced at trial. (R 1166-1168). That testimony would be cumulative.

IV. THE 3.850 TRIAL COURT PROPERLY DENIED CHERRY'S CLAIM OF AN INSUFFICIENT MENTAL STATE EXAMINATION AS BEING PROCEDURALLY BARRED

On pp. 25-30 of his brief, Cherry argues that he was entitled to an evidentiary hearing on his claim that he was denied a competent mental state examination and that trial counsel was ineffective for not arranging such an examination. This claim was set out as claim III in Cherry's 3.850 motion. (PR 189-205). The trial court found this claim procedurally barred, (PR 2211), and that finding should not be disturbed.

Florida law is settled that a claim of an inadequate mental state examination is procedurally barred if it is not preserved at trial and raised on direct appeal. **See**, e.g., Doyle v. State, 526 So. 2d 909, 911 (Fla. 1988). This claim was not raised at trial, nor was it raised and addressed on direct appeal. Cherry v. State, supra; See pp. 5-6, above. The lower court's denial of relief on procedural bar grounds should be affirmed.

To the extent that Cherry argues an ineffective assistance of counsel component in connection with this claim, that claim is not properly presented under controlling precedent. Even though Cherry has never acknowledged that this claim is procedurally barred, he has clearly attempted to avoid the procedural bar by pleading this claim in the guise of ineffective assistance of counsel. This Court has repeatedly held that that practice is not appropriate and does not avoid the effect of a procedural bar. See, e.g., Kight v. Dugger, 574 So. 2d 1066 (Fla. 1990); Johnson v. Wainwright, 463 So. 2d 207 (Fla. 1985); Clark v. State, 460 So. 2d 886 (Fla. 1984); See also, Medina v. State, 573

So. 2d 293 (Fla. 1990). The 3.850 trial court followed well-settled precedent in finding this claim to be procedurally barred, and that decision is due to be affirmed.

To the extent that Cherry suggests, in Footnote 14 to his brief, that Dusky v. United States, 392 U.S. 402 (1960) and Pate v. Robinson, 383 U.S. 375 (1966) issues may be implicated, that assertion provides no basis for relief because no Dusky or Pate issue was raised at trial and pursued on appeal. **See**, pp. 5-6, above. That is a procedural bar which precludes relief. Moreover, Cherry has relegated his cursory reference to Dusky and Pate to a footnote. The practice of burying an issue in a footnote (as Cherry also does in Footnote 15 to his brief) does not comply with the rules of appellate procedure, and does not suffice to properly raise an appellate issue. **See**, e.g., Duest v. Dugger, 555 So. 2d 849, 851-2 (Fla. 1990), rev'd on other grounds, Duest v. Singletary, 997 F. 2d 1336 (11th Cir. 1993).

To the extent that Cherry's present counsel argue that he was incompetent to stand trial, and that, had counsel properly investigated his client's mental state, Cherry would have been found incompetent, that assertion requires a view of the evidence that is totally impractical. To reach any contrary result, this Court would have to determine that defense counsel, the prosecutor, and the Judge sat through a 6-day trial and penalty phase and never noticed any deficiency in the defendant's conduct. The record establishes that Cherry appreciates the nature of the charges and the possible penalty; is aware of the adversary nature of the proceedings; is able to disclose

pertinent facts and testify relevantly; and is able to manifest appropriate courtroom behavior. That is the standard for determining competency, (F. R. Crim P. 3.211), and there is no doubt that Cherry met that standard. (R 1168). Moreover, Cherry was able to present coherent testimony that, if believed, established an alibi. **See**, e.g., R. 820-889. That testimony was clearly in Cherry's best interest, and the nature and content of that testimony undermines Cherry's claim of mental retardation and brain impairment. This issue was properly resolved without an evidentiary hearing. **See**, e.g., Spaziano v. State, 545 So. 2d 843, 845 (Fla. 1989).

To the extent that Cherry argues that he was incompetent to stand trial in 1987, he presented no evidence to the 3.850 court to suggest that Cherry was incapable of meeting the Dusky standard. To the extent that Cherry asserts, in his brief, that his hand-picked mental state experts have now concluded that he was not competent to stand trial, those unsupported assertions of counsel do not raise any question as to Cherry's competence, especially in view of the contemporaneous mental state evaluation. **See**, e.g., Card v. Singletary, 963 F. 2d 1440, 1447 (11th Cir. 1992). Because Cherry has presented absolutely no evidence concerning his mental state, he has completely failed to meet the standard of proof which, as noted by the 11th Circuit, is high. Card v. Singletary, 963 F. 2d at 1444. Cherry is clearly not entitled to an evidentiary hearing on this claim because he has failed to present any evidence which would create "a real, substantial and legitimate doubt as to [his] mental

capacity...to meaningfully participate and cooperate with counsel...". Adams v. Wainwright, 764 F. 2d 1356, 1360 (11th Cir. 1985), cert. denied, 474 U.S. 1073 (1986).[7]

Finally, Cherry asserts that because he has now located mental state experts who (he claims) disagree with the original examining psychiatrist, he was therefore denied a competent mental evaluation. There is no evidence before this court as to this claim because Cherry has not deigned to attach affidavits from any of those individuals.[8] Consequently, there is nothing before this court other than the conclusory assertions of counsel. Such conclusory statements should not be regarded by this Court as sufficient for any purpose. **See**, e.g., Schneider v. Currey, 584 So. 2d 86, 87 (Fla. 2d DCA 1991); see also, Lanahan Lumber Company Inc. v. McDevitt & Street Company, 611 So. 2d 591, 592 (Fla. 4th DCA 1993). Cherry has placed nothing before this Court (or the 3.850 trial court) except the legal conclusions reached by his present attorneys. Even if Cherry's allegations are taken as true, and they should not be, they do not establish that the original evaluation was in any way deficient. Turner v. Dugger, supra; Provenzano v. Dugger, supra. As this Court has recognized, it is not uncommon for mental state experts to reach differing conclusions. **See**, e.g., Engle v. Dugger, 576 So. 2d

[7] Of course, claims based upon Pate v. Robinson, 383 U.S. 375 (1996) are procedurally barred if not raised on appeal. James v. Singletary, 957 F. 2d 1562, 1572 (11th Cir. 1992).

[8] This omission is particularly noteworthy because Cherry filed a lengthly appendix along with his 3.850 motion. Cherry obviously has no reluctance to rely upon affidavits, and the conspicuous absence of any affidavit from any mental state expert is, at least, curious.

696, 702 (Fla. 1991). Finally, to the extent that Footnote 15 to Cherry's brief suggests that Cherry's "impaired mental functioning" (of which there is no evidence) rebuts the heinous, atrocious, or cruel aggravating circumstances, the evidence as to the mode of killing speaks for itself. To the extent that Cherry relies upon Spencer v. State, No. 80, 987 (Fla. Sept. 22, 1994), that case dealt with the CCP aggravator, and Cherry is attempting to put a square peg into a round hole. Even if this contention was not procedurally barred, and even if it were properly briefed, Duest, supra, it would not provide a basis for reversal. The 3.850 trial court's disposition of this claim on procedural bar grounds should be affirmed.

V. THE 3.850 TRIAL COURT PROPERLY FOUND CHERRY'S CLAIM CONCERNING THE DENIAL OF HIS MOTION FOR APPOINTMENT OF A FORENSIC PATHOLOGIST, A SEROLOGIST, AND A MICROANALYST TO BE PROCEDURALLY BARRED.

On pp. 30-31 of his brief, Cherry argues that the 3.850 trial court should not have summarily denied his claim regarding the denial of his motion for the appointment of non-mental state expert witnesses. This claim was set out as Claim IV in the 3.850 motion. (PR 206-211). The 3.850 trial court found this claim to be procedurally barred. (PR 2211).

This claim was not raised in the direct appeal proceedings in this case. Cherry v. State, supra; pp. 5-6, above. Florida law is settled that claims which could have been but were not raised on direct appeal are procedurally barred from consideration in 3.850 proceedings. See p. 22, above. The lower court properly followed settled Florida law in summarily

denying relief on this claim. Cherry has consistently failed to recognize the existence of a procedural bar to this claim, and he has not suggested why that procedural bar is not applicable. To the extent that Cherry suggests that this claim presents a claim of fundamental error, he has not demonstrated that this claim falls within the narrow confines of the fundamental error exception. See, e.g., Clark v. State, supra; Muhammad v. State, 426 So. 2d 533 (Fla. 1982). When stripped of its pretensions, this claim is no different in substance than Cherry's complaint about the adequacy of his mental state examination. See pp. 31-35, above. If that claim can be procedurally barred, and the law is clear that the procedural bar is applicable, then there is no rational basis for excusing Cherry's fault as this claim. This issue does not implicate "fundamental fairness", and the procedural bar holding of the lower court is due to be affirmed in all respects.

VI. THE 3.850 TRIAL COURT PROPERLY DENIED CHERRY'S GUILT PHASE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

On pp. 32-44 of his brief, Cherry argues that the 3.850 trial court erred in denying his claim of ineffective assistance of counsel at the guilt phase of his capital trial. This claim was set out as claim V in the 3.850 motion. (PR 212-284). The 3.850 court denied relief. (PR 2211-2212). While Cherry argues that the claims require evidentiary development, that is not the case. The specifications of ineffective assistance of counsel set out in Cherry's brief are properly decided based on the record.

Under the two-part test of Strickland v. Washington, 466 U.S. 668 (1984), the petitioner must establish both deficient performance and prejudice in order to prevail on a claim of ineffective assistance of counsel. See pp. 25-27, above. The standard of review is highly deferential, and intensive scrutiny and second-guessing of lawyer performance is forbidden. **Id.,** at 689-90; Atkins v. Singletary, 965 F. 2d 952, 958 (11th Cir. 1992); White v. Singletary, 972 F. 2d 1218, 1220 (11th Cir. 1992) ("Courts also should at the start presume effectiveness and should always avoid second-guessing with the benefit of hindsight"). Just because defense counsel could have conducted a more comprehensive investigation that might have been productive does not establish that counsel's performance was "outside the wide range of reasonably effective assistance". Burger v. Kemp, 483 U.S. 776, 794 (1987). While Cherry attempts to paint a bleak picture of trial counsel's performance, that disingenuous description of what counsel actually did do at trial collapses when the trial record is examined.

To the extent that Cherry's new lawyers claim that a defense of voluntary intoxication should have been pursued, that argument is nothing more than the sort of second-guessing that is flatly prohibited by Strickland v. Washington and its progeny. The claims of intoxication are rebutted by Cherry's own testimony as well as by the circumstances of the crime itself. Cherry was convicted of felony murder, and, prior to leaving his residence, told Lorraine Neloms that he was going out to get money. (R 431). The records of the private investigator retained by trial

counsel clearly reflect that the investigator interviewed Neloms, and, moreover, the record of her testimony indicates that trial counsel vigorously and effectively cross-examined her. (See, e.g., R 444). In any event, the theory of defense at trial was that Cherry was not present, and was not involved in this offense. In furtherance of that defense theory, Cherry testified unequivocally that he was not using drugs on the day of the murder, and that he was only using alcohol. (R 833; 835). An intoxication defense would have been directly contrary to Cherry's own testimony, and, in short, would have been a disaster. See, e.g., Harich v. State, 484 So. 2d 1239, 1241 (Fla. 1986). Any attempt by Cherry to present a voluntary intoxication defense would have required him to admit involvement in the murder, a tactic which is, at best, of marginal usefulness. A defense of innocence is flatly inconsistent with a defense of voluntary intoxication, Combs v. State, 525 So. 2d 853 (Fla. 1988), and counsel cannot be deemed ineffective for pursuing a defense based upon a reasonable doubt. **See**, e.g., Jennings v. State, 583 So. 2d 316 (Fla. 1991); Engle v. Dugger, 576 So. 2d 696 (Fla. 1991); Bertolotti v. State, 534 So. 2d 386 (Fla. 1988). Counsel's decision to pursue a defense based upon reasonable doubt is not outside the "wide range of professional competence" and cannot support a finding of deficient performance.

The same argument applies to Cherry's claim that corroborating testimony should have been presented in support of Cherry's own trial testimony. Trial counsel explained, in closing argument, that he did not bring in alibi witnesses

because to have done so would have required those "alibi witnesses" to admit to having been involved in the commission of a crime themselves. That tactic avoided the risk of exposing those witnesses to cross-examination, and counsel's closing argument successfully explained away the absence of corroborating alibi testimony. What counsel did present as a defense was testimony from Priscilla Daniels, who testified that she observed James Terry (one of the individuals whom Cherry now claims should be a suspect) in the vicinity of the victims' abandoned automobile. (R **752-755).** Ronnie Chamberlain testified that he had been involved in a relationship with Lorraine Neloms, and, when they had a disagreement, she initiated criminal charges against him. (R **761).** Elizabeth Frederick testified regarding a dispute that Baumgartner (another of Cherry's "suspects") had with the victims. (R **765).** Baumgartner was called to testify about that dispute. (R **776).** Mary Ann Hildreth, an employee of the Florida Department of Law Enforcement, testified concerning the fingernail scrappings taken from Mrs. Wayne, and further testified that the hair found in the house did not come from Cherry. (R **800-803).** Counsel **also** admitted the sheet, knife and shoes through Ms. Hildreth. (R **818).** Moreover, trial counsel attacked the serological evidence (R **657-661),** the palm print identification (R **706-34, 985),** and vigorously crossed-examined Lorraine Neloms. (R **444-445).** Trial counsel presented testimony that Cherry's fingerprints were not found inside the victims' car or on the automatic teller card, and also presented testimony that blood found on **a** sheet inside the victims' home was not

Cherry's blood or the blood of the victims. (R. 702, 661). Trial counsel further questioned the shoe print found on Mrs. Wayne's nightgown (R. 543); who actually collected the print inside the house (R. 577-578); whether the deteriorating paint in the area where the fingerprint was found was examined (R. 579); why no blood was found on the fingerprint inside the house (R. 581); the state's processing of the fingernail scrapings (R. 585); the testing of the cut telephone line (R. 525); and the failure of the state to test the cut window screen (R. 530), the sheet on the bed (R. 531, 583), and the pants and shirt found in the parking lot. (R. 589). Trial counsel was far from the passive observer that Cherry tries to portray.

Insofar as Cherry's claim that some error (of some sort) occurred when the prosecution impeached Cherry with his prior criminal convictions, trial counsel turned that situation to his advantage as well as anyone could have done. Specifically, trial counsel argued persuasively that Cherry had pled guilty in each of his prior convictions, and that, while Cherry may be a thief, he is not a killer given the substantial number of items of value which were left at the scene of this murder. (R. 983-984). Moreover, trial counsel argued that determining that Cherry was not credible because he made a mistake in the number of times that he had been convicted was "like asking Liz Taylor how many times she's been married." (R. 983). Trial counsel effectively countered the state's argument, and there is no ineffectiveness on counsel's part.

What Cherry must demonstrate in order to prove that the strategy pursued by defense counsel was unreasonable is that "the approach taken by defense counsel would not have been used by professionally competent counsel.'' Spaziano v. Singletary, No. 93-2049 (11th Cir. October 7, 1994); Harich v. Duqqer, 844 F. 2d. 1464, 1470 (11th Cir. 1988), cert. denied, 489 U.S. 1071 (1989). The most that Cherry has established is that his present counsel would have tried this case differently. That showing falls far short of the showing required to obtain relief. There is nothing in the record to establish that Cherry's present attorneys are wiser or more experienced than was trial counsel, but, even if they are, the fact that they would have tried this case differently is not enough. The Eleventh Circuit unequivocally held, in White v. Singletary, 972 F. 2d 1218, 1220-1221 (11th Cir. 1992), that the question is not what the best lawyer would have done, or even what a good lawyer would have done, but rather is only whether a competent attorney reasonably could have acted as trial counsel did given the same circumstances. Because a competent attorney could reasonably have handled this case in the way that Cherry's attorney handled the case at trial, Cherry is not entitled to relief on his ineffective assistance of counsel claim. There has been no showing of a reasonable probability of a different result, and denial of the petition without a hearing was proper because the sole question is a matter of law, which is based upon and properly decided from the record. Harich v. State, 484 So. 2d at 1241 (decision by counsel not to pursue intoxication defense

reasonable-no evidentiary hearing needed). The decision of the trial court should be affirmed.

Insofar as Cherry now asserts that trial counsel should have pursued a voluntary intoxication defense, the potential for disaster attendant to such a defense is readily apparent from the record. Cherry's own testimony was wholly inconsistent with a defense of intoxication, and trial counsel cannot have been ineffective for deciding to pursue a defense theory based upon a reasonable doubt. Cherry's present claim that the case should have been defended based upon a different theory is no more than second-guessing the strategy pursued at trial. In other words, Cherry now wants to attempt to defend this case on a theory of voluntary intoxication because his reasonable doubt defense did not work. However, the fact that Cherry was unsuccessful at trial does not mean that his counsel was ineffective for proceeding as he did. The decision to defend this case based upon a reasonable doubt theory is wholly consistent with the Constitutional requirements set out in Strickland v. Washington, and it cannot be said that no lawyer could determine that a reasonable doubt defense was not appropriate in this case. Spaziano v. Singletary, supra.

Insofar as Cherry contends that trial counsel failed to pursue a "viable defense", that claim collapses when the efforts trial counsel put forth are considered.[9] See pp. 26-30, above.

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[9] Cherry argues on p. 38-9 of his brief, that there are defects in the serological evidence. The affidavit in support of this assertion is conclusory in nature, and reflects the bias of the author. The affiant, who is not a lawyer, states legal conclusions wholly beyond her qualifications. (App. 46).

Moreover, trial counsel vigorously attacked the fingerprint identification, (R **706-34, 985)** and strenuously argued to the jury the defects he contended were present in the only unexplained fingerprint, which placed Cherry inside the victim's residence. (R **985).** Moreover, trial counsel successfully explained away the absence of witnesses to corroborate Cherry's alibi, explaining that to present alibi witnesses would have required those individuals to admit to the commission of a crime themselves. (R **990).** Insofar as Cherry's other claims concerning the guilt phase strategy are concerned, it is not possible to conclude that the way this case was tried fell below the expected level of competency. Likewise, it is not possible to conclude that there is a reasonable probability of a different result had the case been defended in the way that Cherry's new attorneys have determined is "proper". The **3.850** trial court**'s** summary denial of this component of the ineffectiveness claim is due to be affirmed. **See,** e.g., Spaziano v. Singletary, supra.

Cherry also argues that trial counsel failed to attack the state's evidence and show "that Mr. Cherry most likely was never in the Waynes' house".[10] (Initial Brief at **37).** However, what Cherry's trial counsel did do was vigorously challenge the fingerprint identification which was the only evidence placing Cherry inside the victim's residence. (R **706-734).** Moreover, trial counsel vigorously (and effectively) argued that because of

[10] Cherry claims, on p. **38** of his brief, that the affidavit of his hand-picked forensic expert states that the palm print could not have come from the victims' doorway. That is not what that affidavit says. **See,** App. **71.**

the deficiencies in the fingerprint identification, coupled with the presence of a hair that did not come from the defendant, the State had not proven its case beyond a reasonable doubt. (R **987).** With this component of the ineffectiveness claim, as with all of the others, Cherry has not established a reasonable probability of a different result, nor has he even established that the performance of trial counsel was in any way deficient. The only thing that Cherry has done is establish that his present lawyers would try the case differently. That is not the standard, and the summary denial should be affirmed.

To the extend that Cherry's present lawyers argue that the state's "key witness" should have been impeached, the record belies that claim. Trial counsel vigorously cross-examined Neloms, and Cherry has not demonstrated anything other than a disagreement as to the choice of trial tactics. See, pp. **26-30,** above. Cherry's own testimony established that Neloms was a heavy crack user (R **828),** and any further testimony in that regard would have been cumulative. To the extent that present counsel argues that Clodfelter should have been impeached as to his testimony that "the Waynes never allowed black people to mow their lawn because Mr. Wayne hated blacks", trial counsel turned that testimony to Cherry's advantage in closing argument by arguing that that indicated that the hair found inside the victims' residence (which indisputably was not Cherry's) was further evidence that Cherry was not the murderer. (R **987).** That is clearly a reasonable matter of trial tactics, and, merely because Cherry's present counsel would have tried the case differently does not establish anything.

To the extent that Cherry argues that trial counsel should have challenged the age and racial makeup of the venire, Cherry has proffered no facts to support this claim, nor has he demonstrated (or even argued) that the age and racial make up of the venire could have been successfully challenged at the time of trial (or even now). To the extent that Cherry claims that trial counsel was ineffective with regard to the state's impeachment of Cherry with his prior convictions, trial counsel successfully explained away that matter in closing argument. See p. 42, above. Insofar as the remaining specifications of ineffectiveness of counsel are concerned, those individual "claims" do not provide a basis for relief. Cherry complains that various statements made during closing argument were prejudicial, but, when closing argument is read in its entirety, without the intent to slant the argument to suit one's purpose, it is apparent that there was nothing improper about counsel's statements. To the extent that Cherry argues that claims 7, 10 and 11 establish a basis for relief on the basis of ineffectiveness of counsel, those claims provide no basis for relief on ineffectiveness grounds because the substantive claims are meritless. See, infra. To the extent that Cherry attempts to set out other specifications of ineffectiveness of counsel, those matters are not properly briefed, and are therefore not before this court. Duest v. Dugger, supra.

The basic premise underlying Cherry's claims of ineffective assistance of counsel is that trial counsel should have taken a different approach in the defense of this case. The standard is,

of course, not whether collateral counsel would have proceeded differently, but rather whether there is a reasonable probability of a different result. See, e.g., Turner v. Dugger, supra; Kennedy v. State, 547 So. 2d 912 (Fla. 1989). Likewise, even though collateral counsel has now obtained extensive information concerning Cherry's background, that does not establish deficient performance at trial because, as this court has observed, "[i]t is almost always possible to imagine a more thorough job being done than actually was done." Maxwell v. Wainwright, 497 So. 2d 927, 932 (1986). Summary denial of Cherry's ineffective assistance of counsel claims was in accord with the prior decisions of this court because the record in this case directly refutes Cherry's claims. See, e.g., Turner v. Dugger, supra.

VII. THE 3.850 TRIAL COURT PROPERLY DENIED CHERRY'S CLAIM OF A BRADY VIOLATION WITHOUT A HEARING

On pp. 44-46 of his brief, Cherry argues that the 3.850 trial court erred in summarily denying his claim of a Brady violation. This claim was set out in the 3.850 motion as claim VI. (PR 285-293). The 3.850 trial court summarily denied this claim based upon a "review of the records, trial transcript and the state's response to the motion". (PR 2212). Further, the 3.850 court found that Cherry had not established materiality or prejudice under Brady v. Maryland, 373 U.S. 83 (1967). When the matters referred to in Cherry's brief are considered, it is apparent that none of the allegations will withstand scrutiny, and, consequently, summary denial was appropriate.

Cherry first argues that a "lead sheet" from the DeLand Police Department would have "supported" his contention that Jack Baumgartner (the victims' former son-in-law) committed the crime. However, the "lead-sheet" only indicated that the declarant's "in-laws wanted to evict him". (Initial Brief at 44). Those statements are, at best, equivocal, and are classic hearsay. Moreover, whether or not Baumgartner made a statement that his in-laws wanted to evict him is neither inculpatory nor material. The jury heard evidence that Baumgartner had argued with the victims, and, at best, any testimony about a desired "eviction" is cumulative. (R 765-6). Moreover, trial counsel argued, in his opening statement, that he would establish that Baumgartner had been in the neighborhood of the victims' residence. (R 295). A witness testified that Baumgartner's van had been seen at the Handy Way store (R 791), while Cherry now claims that the lead-sheet placed Baumgartner at a Circle K store. If those two locations are not the same, the information can be hardly be considered exculpatory. Of course, the state need not actively assist the defense in its investigation, and the prosecution is not required to "make a complete and detailed accounting to the defense of all police investigatory work on a case." Spaziano v. State 570 So. 2d 289 (Fla. 1990); Heqwood v. State, 575 So. 2d 170 (Fla. 1991). Insofar as the "evidence" concerning Baumgartner is concerned, that evidence is not favorable to the defendant, and was not suppressed by the prosecution. There is no reasonable probability of a different result. Hegwood v. State, 575 So. 2d 170 (Fla. 1991). Cherry simply cannot

establish a Brady violation as a matter of law. Consequently, summary denial as to this claim was appropriate.

Cherry next claims that the state failed to turn over photographs of the soles of James Cherry's shoes. This claim is squarely rebutted by Cherry's own Appendix 80, which is the deposition of James Cherry. During the deposition of Terry, Cherry's lawyer clearly had a series of photographs obtained from the Florida Department of Law Enforcement which were Terry's shoe prints. This claim is meritless.

Cherry also argues that the state failed to disclose "that the state told [Lorraine Neloms] that her fingerprint was found on the victim's stolen bank card". (Initial Brief at 45). Whether or not Neloms was ever told that her fingerprint was on the bank card is purely speculative; the testimony at trial was unequivocal that that fingerprint could not be identified. (R 702). Even assuming that Neloms was in fact told what Cherry claims, that would have had no impact on the result of Cherry's trial. That "evidence" is certainly is not impeachment, and this component of the Brady claim was properly denied without an evidentiary hearing.

To the extent that Cherry argues that the state did not disclose information conveyed to the police by Neloms, none of those statements would have affected the outcome at trial. Whether or not Neloms told the police that she believed "someone else" was with Cherry at the victim's house is not material; the theory of defense was that Neloms was lying and that Cherry was not involved at all. See, e.g., R 820-818. Likewise, whether or

not Neloms believed that Cherry killed the victims is not material; her statements were inconsistent, and trial counsel effectively challenged Neloms' testimony. (R 444-445). Finally, to the extent that Cherry now argues that Neloms told the police that Cherry had been smoking crack and drinking beer and moonshine on the night of the murder, he again fails to demonstrate how that would have changed the outcome. Cherry had committed himself to the position that he was drinking only beer, and it would be inconceivable to present defense testimony inconsistent with the defendant's own testimony.[11] In other words, the only thing that this evidence would have proven was that Cherry is a liar. That is clearly not favorable or expulpatory evidence, nor is it material. This component of the Brady claim was also properly denied without a hearing.

Finally, Cherry argues that the state failed to disclose that Ronnie Chamberlain was a police informant. Trial counsel was clearly aware of that evidence (PR 1885), and, therefore, there can be no Brady violation. The 3.850 trial court properly denied relief on Cherry's Brady claim, and that finding should be affirmed.

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[11] If Cherry's assertion is true, it is virtually inconceivable that the State would have passed up such an opportunity to impeach the defendant.

VIII. THE 3.850 TRIAL COURT PROPERLY FOUND CHERRY'S JUROR MISCONDUCT CLAIM TO BE PROCEDURALLY BARRED

On pp. 47-49 of his brief, Cherry argues that the 3.850 trial court's summary denial of his claim that he was denied his rights to meaningful voir dire and a trial before an impartial jury was error. This claim was set out as claim VII in the 3.850 motion. (PR 294-303). The 3.850 trial court properly found this claim procedurally barred, and, consequently, no evidentiary hearing was necessary. (PR 2211). Cherry also attempts to cast this claim as one of ineffective assistance of counsel. Settled Florida law precludes that tactic. Medina v. State, 573 So. 2d 293, 295 (Fla. 1990).

Cherry argues that two instances of juror misconduct occurred: first, he complains that one juror was apparently a customer at a bank where the victim's daughter-in-law had worked, and, second, that another juror "was asked about the case by a newspaper employee". Both of these instances of "misconduct" clearly appear on the face of the original record, and, just as clearly, were not raised on direct appeal. That is a procedural bar under controlling precedent. Lambrix v. State, 559 So. 2d 1137 (Fla. 1990). (Claim of juror misconduct). Lambrix is squarely on point with this case, and is dispositive of the issue. The 3.850 trial court properly applied a procedural bar, and that ruling should be affirmed in all respects. To the extent that Cherry attempts to avoid the procedural bar by pleading this claim as one of ineffectiveness of counsel, the law is settled that an allegation of ineffective assistance cannot be used to circumvent the rule that post-conviction proceedings do

not serve as a second appeal. See, e.g., Medina v. State, supra; Kight v. Dugger, supra.

IX. THE TRIAL COURT WAS CORRECT IN SUMMARILY DENYING CHERRY'S CLAIM REGARDING THE EXCLUSION OF EVIDENCE

On pp. 49-50 of his brief, Cherry argues that the 3.850 court erred in summarily denying his claim that "the trial court excluded a defense witness on the improper basis that the witness's testimony would be offensive to elderly citizens". (Initial Brief at 49). This claim was set out in the 3.850 motion as claim VIII. (PR 304-309). The trial court denied this claim as procedurally barred. (PR 2211). That ruling should not be disturbed.

This claim was raised on direct appeal, (albeit on a different basis) and this court denied relief. Cherry v. State, supra. Moreover, this Court specifically noted, contrary to Cherry's continued assertion, that an appropriate Richardson inquiry was conducted by the trial court. Id. Florida law is settled that issues which have been raised and decided on direct appeal may not be re-litigated in 3.850 proceedings. See, e.g., Turner v. Dugger, 614 So. 2d 1075, 1078 (Fla. 1992); Clark v. State, 460 So. 2d 886, 888 (Fla. 1984); Meeks v. State, 382 So. 2d 673 (Fla. 1980). Moreover, summary denial of attacks and criticisms of this Court's decision on direct appeal is appropriate. See, e.g., Eutzy v. State, 536 So. 2d 1014 (Fla. 1988). Cherry's claim was properly denied without an evidentiary hearing, and the 3.850 trial court's decision is due to be affirmed in all respects.

X. THE FELONY-MURDER ISSUE WAS PROPERLY FOUND TO BE PROCEDURALLY BARRED

On pp. 50-53 of the 3.850 motion, Cherry argues that his first-degree murder convictions and death sentence violate his right to due process. He further argues that his death sentence for the murder of Mrs. Wayne violates the Eighth Amendment's cruel and unusual punishment prohibition. (Initial Brief at 51). This claim was set out as claim IX in the 3.850 motion. (PR 310-315). The 3.850 trial court found this claim procedurally barred. (PR 2211). That finding is due to be affirmed.

The claim set out in Cherry's brief is not the same claim that was raised in the 3.850 trial court, nor did Cherry raise his "fundamental fairness" issue in that court. (PR 310-315). In fact, the principal issue in the lower court was the propriety of a jury instruction. Id. Coupled with his complaint about the jury instruction was Cherry's assertion that the felony murder rule does not support a death sentence. The state answered that claim as it was pleaded (PR 1850), and the 3.850 trial court properly found that claim to be procedurally barred.[12]

On appeal from the denial of 3.850 relief, Cherry does not complain about the jury instructions. Consequently, because the claim set out in Cherry's brief is raised for the first time on collateral appeal, it is procedurally barred. Doyle v. State, supra. Moreover, even if this Court construes the claim set out in Cherry's brief as being the same claim that was set out in his

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[12] Cherry raised no ineffectiveness of counsel component as to this claim in his 3.850 motion.

3.850 motion, that does not affect the result. Neither claim was raised at trial or on direct appeal, and, consequently, that claim is procedurally barred under settled Florida law. **See**, Medina v. State, 573 So. 2d 293 (Fla. 1990). To the extent that Cherry attempts to inject an ineffectiveness component into this claim, that issue was not raised below, and consequently is not properly before this court on appeal. The circuit court's summary denial of relief on this claim was correct and should not be disturbed.

XI. THE 3.850 COURT PROPERLY SUMMARILY DENIED CHERRY'S CLAIM CONCERNING *AN* INCOMPLETE RECORD ON APPEAL AS BEING PROCEDURALLY BARRED

On pp. 53-54 of his brief, Cherry argues that the trial court erred in summarily denying his claim for relief based upon the purported incompleteness of the direct appeal record. This claim was set out in the 3.850 motion as claim X. (PR 316-322). The trial court summarily dismissed this claim as procedurally barred because it could have been but was not raised on direct appeal. (PR 2211). That ruling is correct, and should not be disturbed. Florida law is well-settled that a claim that could have been but was not raised on direct appeal is properly found to be procedurally barred. Medina v. State, supra. It is undisputed that no claim was raised during the direct appeal proceeding regarding this issue, and it is likewise clear from the direct appeal that, unlike the situation in Delap v. State, 357 So. 2d 462 (Fla. 1977), Cherry never requested a transcript of the bench conferences. This claim was not raised at trial or

on direct appeal, and consequently, it is procedurally barred. Medina v. State, supra. Moreover, while Cherry seems to make a "presumptive prejudice" argument, he cites no authority for that position. Delap is not controlling, and the 3.850 court properly found this claim to be procedurally barred. See also, Turner v. State, 614 So. 2d at 1080 (Unrecorded bench conferences give rise to no basis for relief); Morgan v. State, 415 So. 2d 6, 8-9 (Fla. 1982); See also, In Re Shriner, 735 F. 2d 1236, 1241, (11th Cir. 1984). That finding is due to be affirmed.

XII. CHERRY'S CLAIM THAT THE "PREJUDICIAL ATMOSPHERE" AT TRIAL ENTITLED HIM TO RELIEF WAS PROPERLY FOUND TO BE PROCEDURALLY BARRED

On pp. 55-56 of his brief, Cherry argues that he is entitled to relief based upon "the prejudicial atmosphere that pervaded" his trial. This claim was set out in the 3.850 motion as claim XI. (PR 323-329). The 3.850 court found this claim to be procedurally barred. (PR 2211). Florida law is settled that a claim which could have been but was not raised at trial and pursued on appeal is procedurally barred from presentation in a collateral attack proceeding. See e.g., Medina v. State, supra. Cherry did not raise this claim at trial or on appeal, and the 3.850 trial court's summary dismissal of this claim on procedural bar grounds should be affirmed in all respects.

The cases relied upon by Cherry in support of his claim for relief are distinguishable from this case. In Woods v. Dugger, 923 F. 2d 1454 (11th Cir. 1991), and in Coleman v. Kemp, 778 F. 2d 1487 (11th Cir. 1985), the claim was preserved by timely

objection at trial. In this case, Cherry has utterly failed to demonstrate a "dominant presence" by the victims' family, nor has he even attempted to demonstrate that this case was tried in a small community as was the situation in Woods and Coleman. In contrast, this case was tried in Volusia county, which has a far greater population than Union County, Florida, or Seminole County, Georgia. Cherry has demonstrated no basis for overlooking the procedural bar that precludes consideration of this claim in a collateral proceeding, and the finding of the 3.850 trial court should be upheld.

XIII. THE 3.850 TRIAL COURT'S SUMMARY DENIAL OF THE IMPROPER CLOSING ARGUMENT CLAIM WAS PROPER

On pp. 56-59 of his brief, Cherry argues that various portions of the state's closing argument were improper and that he is therefore entitled to relief from his sentence of death. This claim was set out in the 3.850 motion as claim XII. (PR 303-343). The 3.850 trial court found this claim to be procedurally barred because it could have been but was not raised at trial or on direct appeal. (PR 2211). That finding of procedural bar is due to be affirmed in all respects.

Florida law is settled that claims that could have been but were not raised at trial or on direct appeal are procedurally barred in post-conviction proceedings. **See**, Medina v. State, supra; Atkins, supra; Blanco v. Wainwright, 507 So. 2d 1377, 1380 (Fla. 1987). The 3.850 trial court properly found this claim to be procedurally barred, and that ruling should not be disturbed.

Alternatively and secondarily to the procedural bar holding, none of the claimed instances of prosecutorial misconduct are, in fact, improper. Moreover, because none of the claimed instances of misconduct rise to the level of error, there can be no ineffectiveness on the part of trial counsel for not objecting to the complained-of argument.

To the extent that Cherry claims that the prosecution improperly argued that the jury should not consider sympathy, that claim fails on both a factual and a legal basis. Cherry claims that the prosecution's argument for justice, which was based upon the definition of justice as "the impartial adjustment of conflicting claims or the assignment of merited rewards or punishment" (R 1048), amounts to an anti-sympathy argument. Such an interpretation is possible only through a strained reading of the complained-of phrase. There is no factual basis for this claim, and it cannot amount to a basis for any relief. Moreover, there is no legal basis for this claim because an instruction to the jury that they should not consider sympathy is not improper. Saffle v. Parks, 494 U.S. 484 (1990).[13]

To the extent that Cherry argues that the prosecutor misstated the evidence while arguing in support of the heinous, atrocious, or cruel aggravator, the complained-of portion of the argument was legitimate rhetoric rather than an improper

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[13] Cherry's disingenuous assertion that Saffle v. Parks does not stand for the propriety of an anti-sympathy jury instruction is rebutted by the plain language of the opinion of the United States Supreme Court.

argument. In any event, had the defense objected, the most that he would have gotten was a correction by the prosecutor, which would have been equally unfavorable to him. To the extent that Cherry argues that the state committed error under Booth **v.** Maryland, 482 U.S. 496 (1987), that claim fails for two reasons. First, Cherry is once again overreaching in his interpretation of the prosecutor's closing argument. When fairly read, the state's argument was not improper because it did no more than argue facts that were in evidence, and the legitimate inferences flowing therefrom. That is not error under Booth. The second reason that this claim is meritless is because Booth was overruled by Payne v. Tennessee, 111 S. Ct. 2597 (1991). In any event, Booth is subject to a procedural bar, and is not retroactively applicable in the absence of a trial objection. **See**, e.g., Correll v. Dugger, 558 So. 2d 422 Fla. 1990).

To the extent that Cherry complains that the prosecutor improperly argued from the Bible, that argument was clearly the prosecutors's attempt to anticipate the defense closing argument, and was not improper. Moreover, defense counsel eloquently used the door opened by the state to argue, from the Bible, why the death penalty was inappropriate in a case of unpremeditated murder. (R 1050-1052). The defense clearly turned that situation to its advantage, and there is no basis for reversal. Finally, to the extent that Cherry claims that the prosecution called on the jury to vent its frustrations with the criminal justice system, that argument fails when the complained-of argument is read in context. When fairly considered, that

argument is not an invitation to the jury to vent their frustrations, but rather was an admonition to the jury to vote a "just" recommendation. Once again, that was not improper, and in fact emphasized to the jury their importance in the capital sentencing process. None of the complained-of instances of prosecutorial argument amount to error, and, in addition to being procedurally barred, this claim is utterly meritless. The finding of the 3.850 trial court should be affirmed in all respects.

XIV. THE 3.850 COURT PROPERLY SUMMARILY DENIED CHERRY'S CLAIM THAT NONSTATUTORY AGGRAVATING CIRCUMSTANCES WERE CONSIDERED

On pp. 59-61 of his brief, Cherry argues that the sentencing court improperly considered non-statutory aggravating circumstances. This claim was set out as claim XIV in the 3.850 motion. (PR 368-375). The 3.850 trial court found this claim to be procedurally barred (PR 2211), and that determination should be affirmed.

Florida law is settled that claims which could have been but were not raised on direct appeal are procedurally barred from consideration in post-conviction proceedings. **See**, *e.g.*, *Medina v. State*, *supra*. In this claim, as in all of the others, Cherry refuses to recognize the procedural bar, and offers no viable reason for ignoring the existence of that bar.

To the extent that Cherry argues that counsel was ineffective with regard to his claim that non-statutory aggravation was considered, that claim is clearly rebutted by the record (R 1034)

(no waiver of any statutory mitigator) and by the sentencing order itself, which clearly reflects that nothing was improperly considered as non-statutory aggravation. (R 1241-44). Cherry is not entitled to relief on this claim, and the 3.850 trial court should be affirmed.

XV. CHERRY'S CLAIM OF A VIOLATION OF CALDWELL V. MISSISSIPPI WAS PROPERLY SUMMARILY DENIED AS PROCEDURALLY BARRED

On pp. 61-62 of his brief, Cherry argues that he is entitled to relief based upon Caldwell v. Mississippi, 472 U.S. 320 (1985). This claim was raised as claim XV in the 3.850 motion. (PR 376-381). The 3.850 trial court denied this claim as procedurally barred. (PR 2211). That finding is due to be affirmed in all respects especially given that Caldwell has consistently been held inapplicable to Florida's capital sentencing scheme. **See**, e.g., Combs v. State, 525 So. 2d 853 (Fla. 1988); Daugherty v. State, 533 So. 2d 287, 288 (Fla. 1988). Moreover, a Caldwell claim is fully subject to a procedural bar. **See**, e.g., Bertolotti v. State, 534 So. 2d 386, 387 n. 2 (Fla. 1988). To the extent that Cherry argues that the United States Supreme Court decision in Espinosa v. Florida changes anything, that claim is unsupported by any precedent. To the extent that Cherry argues that counsel was ineffective for failing to raise a Caldwell v. Mississippi claim, that claim is no more than an improper attempt to avoid the application of Florida's consistently applied procedural bar rule. **See**, e.g., Medina v. State, supra; Kight v. State, supra; Swafford v. Dugger, 569 So. 2d 1264 (Fla. 1990); Roberts v. State, 568 So. 2d 1255 (Fla.

1990); Buenoano v. Dugger, 559 So. 2d 1116 (Fla. 1990); Correll v. Dugger, 558 So. 2d 422 (Fla. 1990). In any event, counsel cannot have been ineffective for not objecting based on Caldwell v. Mississippi, given that the law was, and is, settled that Caldwell does not apply in Florida. The 3.850 court is due to be affirmed in all respects.

XVI. THE 3.850 COURT WAS CORRECT IN SUMMARILY DENYING CHERRY'S CLAIM FOR RELIEF BASED UPON JOHNSON V. MISSISSIPPI

On pp. 63-65 of his brief, Cherry argues that he is entitled to relief based upon Johnson v. Mississippi, 486 U.S. 578 (1988), because, Cherry claims, his prior robbery convictions were invalid. This claim was raised in the 3.850 motion as claim XVI. (PR 382-392). The 3.850 trial court found this claim to be procedurally barred because it could have been but was not raised on direct appeal. (PR 2211). That application of Florida's regularly enforced procedural bar rule should not be disturbed.

Florida law is settled that a claim for relief based upon an invalid prior felony conviction is procedurally barred if not raised on direct appeal. See, e.g., Henderson v. Dugger, 522 So. 2d 835, 836 (Fla. 1988). Likewise, Florida law is settled that this issue does not become ripe for review unless and until the prior felony conviction is overturned. See, Buenoano v. State, 559 So. 2d 1116 (Fla. 1990). Notwithstanding Cherry's hyperbolic argument, this claim is properly subject to a procedural bar, and the lower court's imposition of that bar is due to be affirmed in all respects.

XVII. THE 3.850 COURT PROPERLY FOUND THE BURDEN SHIFTING JURY INSTRUCTION CLAIM TO BE PROCEDURALLY BARRED

On pp. 65-66 of his initial brief, Cherry argues that the penalty phase jury instructions regarding the weighing of aggravating and mitigating circumstances improperly shifted the burden him to prove that death was not the appropriate penalty. This claim was raised in the 3.850 motion as claim XVII. (PR

392-396). The 3.850 trial court found this claim to be procedurally barred because it could have been but was not raised on direct appeal. (PR 2211). That finding is due to be affirmed in all respects.

As discussed above, Florida law is settled that a claim which could have been but was not raised on direct appeal is procedurally barred from consideration in post-conviction proceedings. See, e.g., Turner v. Dugger, supra; Medina v. State, supra. As with the other procedurally defaulted claims, Cherry has not even attempted to explain why that procedural bar is not applicable to him. The 3.850 trial court applied settled Florida law, and should be affirmed in all respects.

Alternatively and secondarily, the precise claim raised by Cherry has been unequivocally rejected by the United Supreme Court. See, e.g., Blystone v. Pennsylvania, 110 S. Ct. 1078 (1990); Boyde v. California, 110 S. Ct. 1190 (1990). Of course, counsel cannot have been ineffective for not raising an issue which is meritless.

XVIII. THE 3.850 TRIAL COURT PROPERLY FOUND CHERRY'S CLAIM CONCERNING THE ANTI-SYMPATHY JURY INSTRUCTION TO BE PROCEDURALLY BARRED

On pp. 67-68 of his brief, Cherry argues that the anti-sympathy jury instruction should not have been given and that, therefore, he is entitled to relief. This claim was raised in the 3.850 motion as claim XVIII. (PR 397-404). The 3.850 trial court found this claim to be procedurally barred because it could have been but was not raised on direct appeal. (PR 2211). The

3.850 trial court properly found this claim to be procedurally barred, and is due to be affirmed. See, e.g., Medina v. State, supra.

As with all of the other procedurally barred claims, Cherry has ignored the existence of the procedural bar. Moreover, even if this claim was not procedurally barred, it would not entitle Cherry to relief because it has no merit. Saffle v. Parks, 494 U.S. 484, 492-494 (1990) ("it would be very difficult to reconcile a rule allowing the fate of a defendant to turn on the vagaries of particular jurors' emotional sensitivities with our long-standing recognition that, above all, capital sentencing must be reliable, accurate, and non-arbitrary"). See also, California v. Brown, 479 U.S. 538, 545 (it is proper for the state to require that "the individualized assessment of the appropriateness of the death penalty [be] a moral inquiry into the culpability of the defendant, and not an emotional response to the mitigating evidence"). (O'Connor, J., concurring). The 3.850 trial court properly applied settled Florida law in finding this claim to be procedurally barred, and that finding should be affirmed in all respects.

XIX. THE TRIAL COURT PROPERLY DENIED, AS PROCEDURALLY BARRED, CHERRY'S CLAIM CONCERNING THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE

On pp. 68-69 of his brief, Cherry argues that he is entitled to relief based upon the jury instruction given on the "especially heinous, atrocious, or cruel" aggravating circumstance. This claim was raised as claim XIX in the 3.850 motion. (PR 405-412). The 3.850 trial court found this claim to

be procedurally barred because it could have been but was not raised on appeal. (PR 2211). That determination of procedural bar is properly based on settled Florida law, and should not be disturbed on appeal. See, e.g., Medina v. State, supra; Engle v. Dugger, supra; Mills v. Dugger, 574 So. 2d 63 (Fla. 1990); Correll v. State, supra; Harich v. State, 542 So. 2d 980 (Fla. 1989). Moreover, as Cherry notes, James v. State, 615 So. 2d 668 (Fla. 1993), leaves no doubt that Espinosa v. Florida is not available to a defendant who did not preserve the claim by contemporaneous objection at trial. Cherry did not preserve this issue by timely objection, and the procedural bar holding is due to be affirmed.

To the extent that Cherry argues that counsel was ineffective for not objecting to the jury instruction given on the heinous, atrocious or cruel aggravator, trial counsel is not expected to be able to predict the development of the law, and there is no basis for a finding of ineffectiveness. See, e.g., Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989), (no ineffectiveness for failure to anticipate a change in the law); Thomas v. State, 421 So. 2d 160, 165 (Fla. 1982 ; Muhammad v. State, 426 So. 2d 537, 538 (Fla. 1982).

XX. THE TRIAL COURT PROPERLY FOUND THE CLAIM CONCERNING THE WEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES TO BE PROCEDURALLY BARRED

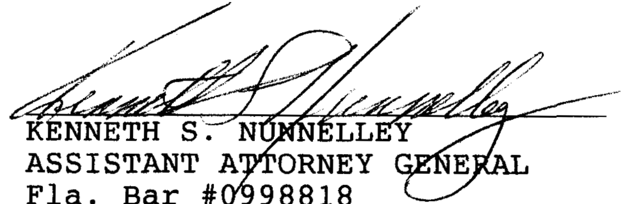
On pp. **70-73** of his brief, Cherry appears to argues that there was a defect in the weighing of the aggravating and mitigating circumstances. This claim was raised as claim XX in the **3.850** motion. (PR **413-422).** The **3.850** trial court found this claim to be procedurally barred. (PR 2211). Florida law is settled that claims that could have been but were not raised on direct appeal are procedurally barred in post-conviction proceedings. **See,** e.g., Engle v. Dugger, supra; Mills v. Dugger, supra; Correll v. State, supra; Harich v. State, supra. As with the other procedurally barred claims, Cherry has not suggested why the procedural bars are not applicable to him. The **3.850** trial court applied settled Florida law and found this claim to be procedurally barred. That ruling is correct and is due to be affirmed in all respects.

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully requests this court to affirm the circuit court's summary denial of post-conviction relief in all respects.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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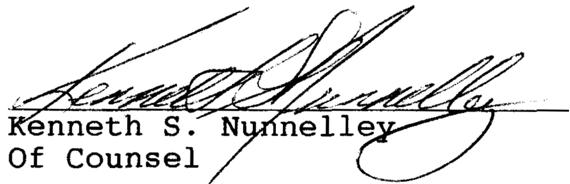
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of **the** above and foregoing has been furnished by U.S. Mail to Craig Stewart, Holland & Hart, 555 17th St., Suite 2900 P.O. Box 8749, Denver, Co. 80201-8749, this ____ day of November, 1994.



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