IN THE SUPREME COURT OF FLORIDA

WILLIAM M. WHITE,

Appellant,

vs. **CASE NO. 88,686**

STATE OF FLORIDA,

Appellee.

_______________________/

APPEAL FROM DENIAL OF RULE 3.850 MOTION
CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
ORANGE COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

The State of Florida submits the following additions to the statement of the case and facts furnished by the appellant/defendant, William White.

Trial

White's jury trial was held on November 27 to November 30, 1978 (R 1582). A sentencing memorandum signed by attorneys Abrams and Kaplan on December 18, 1978, confirms that the defense was aware *at the time of trial* that "the mitigating circumstances are not limited to those enumerated in the statute." (R 1814, e.s.).

In imposing a death sentence, the trial court found the following aggravating factors: (1) the murder was committed during the commission of a kidnaping; (2) the murder was committed to disrupt or hinder the enforcement of laws; and (3) the murder was especially heinous, wicked and cruel. Although no additional testimony was presented during the penalty phase, the trial judge found the statutory mitigating circumstance of no previous felony convictions (R 1645-1650).

At trial, Richard DiMarino agreed that his "deal" with the State included serving additional sentences on his outstanding charges to run concurrent with the 15 year sentence he received for his third degree murder conviction (R. 469-470). DiMarino had been arrested 40-50 times (R. 657-658, 667) and could remember being

convicted of felonies 5 to 10 times, including crimes involving rape, robbery, burglary, drugs, weapons, resisting arrest (R. 674-675).

Officer James Holloman testified for the defense that Richard DiMarino was a confidential informant, (R. 574) DiMarino talked to him six times about this offense and gave four different statements in which he tried to get a deal for himself. In his first statement DiMarino said that he had left while Gracie was still alive (R. 577-578). Then DiMarino said the man who killed Gracie was from Fort Lauderdale (R. 584). Later, DiMarino said that White took her outside and that she was killed in the driveway of the house (R. 589).

Richard DiMarino testified that he was not a confidential informant for Holloman, but rather he ran a scam on him (R. 510, 513-515, 662), and said he gave only two statements to Holloman (R. 666). DiMarino had been arrested 40-50 times (R. 657-658), and had been convicted of 5 - 10 felonies that he could remember, including rape, robbery, kidnapping, resisting arrest, drugs and carrying concealed weapons (R. 674-675).

John DiMarino, who had never been convicted of a crime, testified for the defense that his brother, Richard, admitted that he had killed Gracie and had slit her throat an stabbed her.

Hitchcock Claim

At the beginning of voir dire, the judge told the jurors about the second part of the trial where the jury would be called upon to hear aggravating or mitigating circumstances (R 10). The judge explained that in the event a verdict of guilty was rendered, "as soon as practicable, evidence is presented to the same jury as to any matter relevant to the sentence, including aggravating or mitigating circumstances." (R 11). The prosecutor then informed the jury that there would be certain guidelines in the second phase: ". . . There is a statute listing aggravating circumstances and **some** mitigating circumstances and you would follow those in the second phase in making your recommendation to the court." (R 16-17) The jury was not advised that the statute was inclusive of all mitigating circumstances. While ascertaining whether the prospective jurors could base their sentencing decision on the law and the evidence, the prosecutor later stated that "the law . . . covers aggravating circumstances that you could consider and mitigating circumstances which you could consider. (R 28)

At the penalty phase, the judge told the jurors that "this is the part in which we will talk about the aggravating and mitigating circumstances." (R 803). The state relied on the evidence adduced at the guilt phase and summed up the evidence for the jury. The prosecutor told the jury:

> And again, you are going to be given jury instructions outlining in detail exactly what

> the aggravating circumstances are that you're to consider. And they will outline in detail those mitigating circumstances that you're to consider. So you'll be told by the judge what they are. You'll have a written copy of them to take back with you and read verbatim as to what he will tell you.
>
> * * *
>
> I have prepared for the purpose of our discussion here an outline of the aggravating and mitigating circumstances. And I would like to go through these with you one at a time to show you what we're talking about and what applies and what doesn't.
>
> I don't know is you can see this or not, but, anyway, you'll have these instructions with you. What we've done is prepared just an outline. And don't go by this verbatim, but go by the instructions. But this is an outline to essentially what they are, with the aggravating circumstances in this column and the mitigating circumstances in this column.

(R 805-806)

The prosecutor indicated that he would be going over the mitigating circumstances to demonstrate why they were applicable or inapplicable (R 805). He indicated, however, that he would be covering them from the **"prosecution's standpoint"** and that **"I expect that counsel will also want to cover those for the defense."** (R 805). The prosecutor discussed the applicability of the statutory aggravating and mitigating factors and indicated that the only mitigating circumstances that might be applicable would be the lack of a significant history of criminal activity since there was no evidence of prior criminal activity (R 806-815).

No limitations were put upon the defense by the trial judge.[1] In rebuttal of the state's argument, the defense argued that DiMarino was the only witness to testify that White murdered the victim and that in order for the jury to agree with the prosecutor they must believe DiMarino who only faced a minimum of fifteen years imprisonment, although, if his statement was true, he was equally guilty, yet the prosecutor sought the death penalty only for White (R 817). Counsel then argued against the applicability of the aggravating factors that the murder was committed during a kidnaping; to avoid a lawful arrest; and the murder was heinous, atrocious and cruel (R 817-819).

In mitigation, the defense argued that a person who had just consumed a quart of whiskey could not have the necessary mental capacity to formulate ideas and future thoughts and that there was evidence that White acted under the domination of DiMarino, recounting that DiMarino allegedly said "you kill her and then you can't testify against me." (R 819).

The jury was instructed by the judge that it was their duty to follow the law as given by the court and to render an advisory sentence based upon their determination as to whether sufficient aggravating circumstances existed to justify the imposition of the

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[1]Contrary to trial counsel's recollection, it was Judge Maurice Paul, and not Judge Pfeiffer, who presided in Hitchcock.

death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist (R 820). The jury was further instructed that their verdict should be based upon the evidence which they heard while trying the guilt or innocence of the defendant and the evidence that had been received (R 821). When the court inquired as to whether anyone wished to offer any testimony or make any statement before pronouncement of sentence, defense counsel declined the offer and the defendant responded, "No, I ain't got nothing to say on the record." (R 832).

In his written "finding of fact" in support of the death sentence, the judge stated: "In determining whether the Defendant should be sentenced to death or life imprisonment; the Court is mandated by Section 921.141(5), Florida Statutes (1977), to apply the facts to certain enumerated aggravating circumstances and **such mitigating circumstances as one applicable in this case.**" (R 1648). The sentencing order reflects the recital of statutorily enumerated mitigating circumstances with only circumstance (a) being found applicable; that the defendant was not previously convicted of any felonies (R 1649). The sentencing order later recites, however:

> The sentence to be imposed is not to be determined simply by subtracting the number of mitigating circumstances from the number of aggravating circumstances. The sentence to be

> pronounced must be based on the **totality of the evidence**, as applied to the enumerated "aggravating" circumstances and **such "mitigating" circumstances are applicable.** The "aggravating" circumstances have been proven beyond and to the exclusion of every reasonable doubt. One "mitigating" circumstance is present, however, it is not sufficient to outweigh the "aggravating" circumstances (R 1650). (Emphasis supplied.)

On direct appeal, White attacked his sentence on the basis that the statutory mitigating factors of age and domination by a co-defendant were not found and that there was a disparity in White's and DiMarino's sentences. This Court affirmed both the conviction and sentence. White v. State, 415 So.2d 719 (Fla.), cert. denied, 59 U.S. 1055, 103 S.Ct. 474, 74 L.Ed.2d 622 (1982).

1988 Habeas / Hitchcock Claim

In 1988, White filed a habeas petition in this Court alleging that the standard jury instructions in use at the time of his trial, and given in his case, restricted mitigating circumstances to those set forth in the sentencing statute. White v. Dugger, 523 So.2d 140 (Fla. 1988). White presented three areas of nonstatutory mitigating evidence: (1) alleged residual doubt as to his guilt; (2) the complicity of his co-defendant, Richard DiMarino; and (3) White's use and consumption of alcohol. In denying habeas relief, this court "unhesitatingly" found that the "evidence of nonstatutory mitigating circumstances, if in fact not considered by the jury and/or the judge, would conclusively have had no effect

upon the recommendation of the death sentence imposed in this case. The charge which may have limited the jury to a consideration of statutory mitigating circumstance was clearly harmless."

Evidentiary Hearing

Attorney Lehn Abrams admitted that the defense received a fairly voluminous number of materials from the State Attorney's Office; they would usually just xerox everything in their files. (R.78) Abrams admitted that he may not have used Hicks' hearsay statement, because the statements of the murder victim were probably inadmissible. (R.78-81)

Had the defense provided caselaw to the trial judge, he probably would have let in additional evidence. According to Abrams, "the Judge, he follows the law." (R.82-83). As to the prayers from American revolutionary heroes, Abrams did not recall the day the Judge read a prayer extolling or calling for vengeance. (R.87).

David Kaplan, a member of the Kentucky Bar, the U.S. District Court, and the United States Supreme Court, was admitted to practice in 1959. (R.98) In 1978, 75% of his practice was in the field of criminal law. (R.99) Kaplan had tried capital cases before 1978 and he knew defendant on personal level before trial. Kaplan received information, including depositions, from the public defender and had discussed the case with other members of the Outlaws. Kaplan also conducted an independent investigation, going

to the clubhouse and locating "Patches," who was Richard DiMarino's brother, to testify at trial. DiMarino's surprise testimony didn't change Kaplan's approach, because Kaplan could still pursue a "state of mind" defense and point the finger at DiMarino. (R.105). The defense couldn't deny White was there with DiMarino, because the Sea World employees could identify him. (R105). The written agreement was just a "little more fire" to attack DiMarino, who was a prolific liar. (R.111). Kaplan thought it would be useless to depose DiMarino, because he had admittedly given multiple stories anyway. (R.119). Although Kaplan could not recall why he had abandoned the intoxication defense instruction, Kaplan agreed that the three eyewitnesses (Sami Nestle, Richard DiMarino, and Robert Granac) who contradicted this theory may have influenced his decision at trial. (R.121).

Judge Pfeiffer, who presided over DiMarino's trial first, testified that the prosecutor was so angry with the jury's verdict of third degree murder, that the prosecutor asked that DiMarino be sentenced "right then and there." (R.136). When the defense counsel cleverly agreed to immediate sentencing, this eliminated the possibility of giving DiMarino an enhanced sentence, much to the prosecutor's regret that he "moved so fast." (R. 136).

The 2 ½ page order submitted by the prosecutor was signed by Judge Pfeiffer only "when I made up my mind as to what I was going to do." (R.139). Judge Pfeiffer denied making any electrical

buzzing sound at trial, and Judge Pfeiffer still believes White deserves the death penalty. (R. 140-141) The judge's decision to sentence White was "based only "upon the law and evidence that was presented in court." (R. 153). As to the prayers of famous American patriots, Judge Pfeiffer agreed that there was a strong possibility he used on of the prayers, beginning with Washington's Prayer at West Point disbanding the Continental Army. (R.150-151).

Pertinent portions of the trial court's order denying White's motion for post-conviction relief are set forth in the argument section of the instant brief.

SUMMARY OF THE ARGUMENT

Issue I

At the time of White's trial in 1978, the defense did present and argue multiple mitigating circumstances, both statutory and non-statutory, including (1) alleged residual doubt as to white's culpability; (2) the complicity and disparate sentence of DiMarino, and (3) White's use and consumption of alcohol. White's postconviction reliance on unpresented evidence does not constitute a credible Hitchcock claim. Moreover, error, if any, was harmless.

Issues II and III

After conducting an extensive evidentiary hearing, the trial court found White was not entitled to relief because he failed to demonstrate prejudice under Strickland. The additional "mitigating" evidence now offered by White of his troubled youth and years of alcohol abuse would not have demonstrated the probability of a different outcome.

Issue IV

It does not appear from the instant record that his 1989 motion for grand jury testimony was ever ruled on by the trial court. Since there is no showing that the court below denied this motion, there is no claim which has been preserved for appeal. Moreover, if an order has been entered, it is clear that White's motion is nothing more than a speculative "fishing expedition."

Issue V

White failed to establish any Brady violation or the materiality of any purportedly undisclosed information.

Issue VI

There were two separate sentencing orders which were filed in this case. The trial judge testified that he signed the 2½ page proposed order only "when I made up my mind as to what I was going to do" and it was the trial judge who prepared the six-page order setting forth the explicit "findings of fact" supporting the imposition of the death penalty in 1978. Under the facts of this case, and the law in effect at the time of White's trial and sentencing, postconviction relief was properly denied.

Issue VII

White's claim of "disparate" treatment in sentencing is merely a resurrection of arguments which were raised and rejected on direct appeal and White's prior habeas corpus proceeding.

Issue VIII

All of White's remaining claims were procedurally barred, therefore, the trial court did not err in striking these issues.

ARGUMENT

ISSUE I

WHETHER HITCHCOCK ERROR OCCURRED AT WHITE'S SENTENCING AND, IF SO, WHETHER ANY HITCHCOCK ERROR WAS HARMLESS.

In 1978, White was convicted of first-degree murder, and the jury unanimously recommended death, which the trial judge imposed. In 1982, this Court affirmed White's first-degree murder conviction and death sentence. White v. State, 415 So.2d 719 (Fla.), cert. denied, 459 U.S. 1055, 103 S.Ct. 474, 74 L.Ed.2d 622 (1982). On direct appeal, this Court unanimously stated that it was "...satisfied that the trial judge weighed the [three] aggravating circumstances against the one mitigating circumstance found *and any other mitigating circumstances* in pronouncing sentence." 415 So.2d at 721 (e.s.).

Five years after White's conviction and sentence were affirmed on direct appeal, the United States Supreme Court decided Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), in which it vacated Hitchcock's death sentence because "the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances." As this court subsequently noted in Bolender v. Dugger, 564 So.2d 1057 (Fla. 1990), a Hitchcock violation is based upon a violation of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954,

57 L.Ed.2d 973 (1978)[Death penalty statute which did not permit consideration of all aspects of a defendant's character, record or circumstances of the offense violated the Eighth Amendment.]

Following the Supreme Court's decision in Hitchcock, White filed a petition for writ of habeas corpus in this Court based upon the alleged restriction of mitigating circumstances disapproved by Hitchcock. White v. Dugger, 523 So.2d 140 (Fla.), cert. denied, 488 U.S. 871, 109 S.Ct. 184, 102 L.Ed.2d 153 (1988). At that time, White complained that three areas of nonstatutory mitigating evidence should have been presented and considered during the penalty phase of trial: (1) residual doubt concerning guilt, (2) the complicity and disparate treatment of a co-defendant [DiMarino], and (3) White's use and consumption of alcohol. After dismissing White's residual doubt claim as a matter of law and finding that it is "absolutely clear that White mercilessly killed the victim," this Court also found that White was not entitled to any relief under Hitchcock based on either of his remaining claims of disparate treatment and intoxication. As this Court explained,

> White's co-perpetrator, Richard DiMarino, was convicted of only third-degree murder. In White's original appeal we noted this fact and stated: "While this is fortunate for him [DiMarino], it does not require the reduction of White's sentence." 415 So.2d at 721. The two juries found different culpabilities. It is permissible to impose different sentences on capital co-defendants where their various degrees of participation and culpability are different from one another. Hoffman v. State,

> 474 So.2d 1178 (Fla.1985). Incidentally, trial counsel argued the disparate treatment, and we fail to see how the absence of an instruction on nonstatutory mitigating circumstances could have affected the jury's handling of this issue. The same is true of White's use and consumption of alcohol. Although counsel argued this primarily in reference to one of the statutory mitigating circumstances, **it is plain that the jury and the judge, and this Court on review, considered intoxication as a potential mitigating circumstance. On the totality of the circumstances of this case we can, and do, unhesitatingly find that the instant evidence of nonstatutory mitigating circumstances, if in fact not considered by the jury and/or the judge, would conclusively have had no effect upon the recommendation of the death sentence imposed in this case. The charge which may have limited the jury to a consideration of statutory mitigating circumstance was clearly harmless.**

White v. Dugger, 523 So.2d at 141 (e.s.).

The following year, this Court issued its opinion in Hall v. State, 541 So.2d 1125 (Fla. 1989), finding that a Hitchcock claim should be presented to the trial court in a rule 3.850 proceeding. Consequently, White resurrected his Hitchcock claim before the trial court in his rule 3.850 motion. Following an evidentiary hearing, the trial court denied relief on White's Hitchcock/Lockett claim and related ineffective assistance of trial counsel claim premised on Songer v. State, 365 So.2d 696 (Fla.), cert. denied, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979), finding the White was not entitled to relief because,

[4.] * * *

Here, **Defendant cannot demonstrate prejudice. Defendant would still have received the death penalty even if all proffered mitigation now submitted by Defendant had been presented to the jury and the court at the time of trial.** The trial court found three aggravating factors: the murder was committed while Defendant was engaged in the commission of a kidnaping; the murder was committed to disrupt or hinder the enforcement of laws; and the murder was especially heinous, wicked and cruel. One statutory mitigating factor was found, i.e. no previous felonies. **Additional evidence concerning White's alcoholism, memory lapses and abusive childhood would not have outweighed the aggravating circumstances especially in light of the brutality and indifference demonstrated by Defendant in the commission of this murder.**

* * *

Concerning counsel's failure to object to the jury instructions which allegedly violated Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L. Ed. 2d 973 (1978), White again cannot demonstrate prejudice. The Florida Supreme Court previously considered this specific matter via a habeas corpus action filed by Defendant and stated that "[t]he [jury] charge which may have limited the jury to a consideration of statutory mitigating circumstance was clearly harmless." White v. Dugger, 523 So. 2d 140, 141 (Fla.), cert. denied, 488 U. S. 871, 109 S.Ct. 184, 102 L. Ed. 2d 153 (1988). Hence, White is not entitled to relief pursuant to Strickland.

(R.1071-1072)

* * *

[12.] In violation of Songer v. State, 365 So. 2d 696 (Fla. 1978), cert. denied, 441 U. S. 956, 99 S.Ct. 2185, 60 L.Ed. 2d 1060 (1979), non-statutory mitigation was not considered during the penalty phase and counsel failed to present such mitigation based on the belief that mitigation was limited to the statutory factors.

* * *

White notes that Songer was filed one day after his penalty trial. He opines that the prosecutor and the court both gave the jury the impression that it could not consider non-statutory mitigation. More importantly,

> Defendant complains that his trial counsel believed that only the statutory mitigation could be presented and therefore, counsel limited himself to such mitigation. Defendant avows that a wealth of other mitigation existed which would have swayed the jury and the court in favor of a life sentence.
>
> The claims of ineffective assistance in relation to this matter were discussed in paragraph 4 above. As to the remainder of the assertion, Defendant is procedurally barred from now raising this claim because he previously brought **essentially this same issue before the Florida Supreme Court with adverse results.** White v. Dugger, 523 So. 2d 140 (Fla.), cert. denied, 488 U. S. 871, 109 S. Ct. 184, 102 L. Ed. 2d 153 (1988). (e.s.)
> (R.1075-1076)

For the following reasons, the trial court's denial of postconviction relief on White's Hitchcock claim should be affirmed.

1978 Defense Memorandum

White contends that trial counsel felt constrained in developing and presenting nonstatutory mitigating evidence, in violation of Hitchcock. Admittedly, both of White's trial attorneys, Abrams and Kaplan, testified in 1992 that they believed they were limited from presenting non-statutory mitigating evidence in 1978. However, as the original trial record shows, counsel's postconviction recollection of limitation is refuted by the defense memorandum which was signed by both counsel and filed in the trial court on December 18, 1978. (R 1613-1615).

According to this defense memorandum, submitted prior to the penalty phase in 1978,

> **The mitigating circumstances *are not* limited to those enumerated in the statute.** See Ellidge [sic] v. State, 346 So. 2d 998 (Fla. 1977) and Proffitt v. Florida, 428 U. S. 242 (1976). (e.s.)

(R.1614).

In Elledge v. State, 346 So.2d 998 (Fla. 1977), issued one year before White's trial and relied upon by the defense in 1978, this Court, quoting Proffitt, agreed that Florida's capital sentencing statute explicitly provided "that '[a]ggravating circumstances shall be *limited* to the following [eight specified factors].' §921.141(5)(Supp. 1976-1977). . . There is no such limiting language introducing the list of statutory mitigating factors. See §921.141(6) (Supp. 1976-1977)." Elledge, 346 So.2d at 1002. The sentencing memorandum submitted by the defense attorneys in 1978 outlined, *inter alia*, the reasons why the enumerated statutory aggravating circumstances did not apply and also argued that a sentence of death was not appropriate because there were *several* mitigating circumstances, including (1) White's lack of significant history of prior criminal activity, (2) the defendant's age [33], (3) White's potential for rehabilitation, and (4) a death sentence would be disproportionate in light of the imposition of a life sentence in other multiple-stabbing murder cases, including Provence v. State, 337 So.2d 783 (Fla. 1976). (R 1614). More importantly, the defense did present and argue

multiple mitigating circumstances, statutory and non-statutory, at trial. Although residual doubts about a defendant's guilt is not to be considered as a mitigating circumstance, Buford v. State, 403 So.2d 943, 953 (Fla. 1981); Burr v. State, 466 So.2d 1051, 1054 (Fla. 1985); King v. State, 514 So.2d 354 (Fla.), cert. denied, 487 U.S. 1241 (1988); Franklin v. Lynaugh, 487 U.S. 164 (1988), defense counsel nevertheless was allowed to emphasize this theme in closing argument at sentencing (R 817-819). The jury was told that before they apply the aggravating circumstances and reject the mitigating circumstances, as argued by the prosecutor, they must first believe that everything DiMarino testified to was true (R 816). Consequently, trial counsel used residual doubt about White's guilt to attack the entire statutory sentencing scheme, rather than present it as a weaker nonstatutory factor.

At trial, the jury and the trial judge were fully aware of not only DiMarino's role in the murder, but of the lesser sentence that DiMarino received. As this court pointed out on direct appeal, "DiMarino escaped with a conviction of a third-degree murder. While this is fortunate for him, it does not require the reduction of White's sentence. White was the executioner, and his sentence is warranted." White v. State, 415 So.2d 719, 721 (Fla. 1982).

Moreover, on direct appeal, this Court confirmed its satisfaction "that the trial judge weighed the aggravating

circumstances against this and any other mitigating circumstances in pronouncing sentence." 415 So.2d at 721. Because the trial court did not preclude consideration of nonstatutory mitigating circumstances, a Hitchcock claim is not fairly presented here. In the sentencing order, the trial judge did not refer to "insufficient mitigating circumstances as enumerated in Florida Statute 921.141(6) to outweigh the aggravating circumstances." Instead, in "determining whether the Defendant should be sentenced to death or life imprisonment, the Court is mandated by Section 921.141(5) Florida Statutes (1977), to apply the facts to certain enumerated aggravating circumstances *and such mitigating circumstances* as are applicable to this case." (R1648). The sentencing order further recites: "The sentence to be pronounced must be based on the totality of the evidence, as applied to the enumerated 'aggravating' circumstances and 'such mitigating circumstances are applicable'. (R 1650). Despite his reference to enumerated mitigating circumstances in the oral pronouncement, the written findings signed by the trial court do not indicate that consideration of mitigating circumstances was statutorily proscribed. Reversible error is not present where the final word of the ultimate sentencer does not reflect restricted consideration of mitigating circumstances. Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987).

The areas of nonstatutory mitigating evidence presented by White at trial related to (1) alleged residual doubt as to White's culpability; (2) the complicity and disparate sentence of White's co-defendant, Richard DiMarino and (3) White's use and consumption of alcohol. From the testimony presented at trial, the trial court found that although White had been drinking, "he knew what he was doing" at the time he murdered the victim (R 1649). Thus, White's consumption of alcohol was considered by the trial judge in determining the application of mitigating circumstances. Further, on direct appeal, this court expressly addressed the appropriateness of the instant death sentence when contrasted with the sentence received by Richard DiMarino. White at 722. In denying White's prior Hitchcock claim, this Court found that on "the totality of the circumstances of this case we can, and do, unhesitatingly find that the instant evidence of nonstatutory mitigating circumstances, if in fact not considered by the jury and/or the judge, would conclusively have had no effect upon the recommendation of the death sentence imposed in this case. The charge which may have limited the jury to a consideration of statutory mitigating circumstance was clearly harmless." White, 523 So.2d at 141. Although White offered additional evidence during his postconviction hearing of his turbulent childhood and adverse effects of years of alcohol abuse, the trial court found that these additional mitigating circumstances would not outweigh

the aggravating circumstances of this murder. See also, Bottoson v. State, 674 So.2d 621 (Fla. 1996). In addition, during the postconviction evidentiary hearing, the original trial judge testified that he still believed a death sentence was appropriate and White's sentence was based "only upon the law and evidence presented in court." (R.142;153). In this case, unlike Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985), there is no support for a claim that the trial judge believed he did not have the authority to consider all mitigating factors which were presented and argued at the time of trial. Under the facts of this case, White is not entitled to any relief on the basis of Hitchcock.

Procedural Bar

White argues that the trial court erred in applying a procedural bar to his Hitchcock claim. According to White, the trial court rejected the Hitchcock claim *solely* on the basis of this Court's denial of appellant's habeas petition in White v. Dugger, 523 So.2d 140 (Fla. 1988). However, as evidenced by the trial court's written order, the trial court's application of a procedural bar to White's hybrid Songer/Lockett/Hitchcock claim both cross-referenced and relied upon the simultaneous finding of harmless error in connection with White's related claim of ineffective assistance of counsel. (See, R.1076). As the trial court's order provides, "*[a]s to the remainder of the assertion,*

White is procedurally barred because "he previously brought *essentially this same issue* before the Florida Supreme Court with adverse results." (R.1076). As evidenced by the trial court's comprehensive written order, the trial court, on postconviction review, specifically considered White's additional mitigation evidence of "alcoholism, memory lapses and abusive childhood" and found that the *remainder* of White's assertions were procedurally barred in light of the presentation of "essentially the same issues" in White's prior habeas petition.

In Alvord v. State, 694 So.2d 704 (Fla.), cert. denied, 1998 WL 244715 (May 18, 1998), this Court affirmed the trial court's summary denial of postconviction relief and upheld a procedural bar in a case involving a similar Hitchcock litigation chronology. In 1989, this Court decided Alvord v. Dugger, 541 So.2d 598 (Fla.), cert. denied, 494 U.S. 1090, 110 S.Ct. 1834, 108 L.Ed.2d 963 (1990), in which this Court acknowledged that Hitchcock error had occurred, but the error was harmless. The following month, Hall v. State, 541 So.2d 1125 (Fla. 1989) was decided. Consequently, Alvord, like White, filed a Rule 3.850 motion in the trial court, again seeking relief based upon Hitchcock. Although the trial court initially granted an evidentiary hearing to allow Alvord to present additional nonstatutory mitigating evidence, the trial court subsequently found Alvord's Hitchcock claim to be

procedurally barred. On appeal, Alvord argued that an evidentiary hearing was necessary to allow him to present nonrecord, nonstatutory evidence that purportedly had never been considered by any court. Alvord also argued that this Court's prior habeas decision, finding the Hitchcock error to be harmless, did not preclude consideration of his postconviction claim because this Court only considered evidence that was "on-the-record." On appeal, this Court affirmed the finding of a procedural bar and rejected Alvord's successive Hitchcock claim after finding that the nonrecord, nonstatutory evidence which Alvord outlined was "very similar to that which [the Court] considered in his previously rejected habeas corpus petition." Alvord, 694 So.2d at 705. In distinguishing Hall, this Court noted that the trial court's express orders in Hall's trial effectively precluded trial counsel from investigating, developing, and presenting possible nonstatutory mitigating circumstances. However, in this case, White has not alleged nor demonstrated the existence of any similar restrictions.

Moreover, in the instant case, White did receive an evidentiary hearing in the trial court. Thus, White cannot credibly claim any error under Hall. During the 1992 postconviction hearing, White did introduce an additional category of mitigating circumstances based on White's turbulent childhood and the residual effects of his long-term use of alcohol. However,

the trial court specifically found that additional mitigation evidence of "alcoholism, memory lapses and abusive childhood" would not have outweighed the mitigating circumstances and the *remainder* of White's assertions were procedurally barred in light of the presentation of "essentially the same issues" in White's prior habeas petition. Here, as in Alvord, the *remainder* of White's mitigating evidence is not substantially different from that previously raised and rejected in White's habeas petition. This court's harmless error determination in 1988 is not altered by the evidence adduced during the evidentiary hearing in 1992.

Harmless Error

Assuming, *arguendo*, White demonstrated a Hitchcock violation, the remedy under Meeks v. Dugger, 576 So.2d 713 (Fla. 1991) is to remand for an evidentiary hearing to decide whether the Hitchcock error was harmless. White has already received this remedy. Following the evidentiary hearing, the trial court determined that White would still have received the death penalty even if **all** proffered mitigation now submitted had been presented to the jury and the court at the time of trial. Gracie Crawford was ruthlessly beaten, deliberately discarded in a remote locale, and savagely butchered at the hands of White. White's childhood of abuse and years of alcoholism do not remotely mitigate the circumstances of this brutal murder. The additional evidence of nonstatutory mitigation would conclusively have had no effect upon the

reliability of the death sentence imposed in this case. With the exception of White's troubled childhood and opinion of his hand-picked mental health expert, who, although he could not determine the specific degree of White's intoxication, still "very much" doubted that White had the capacity to form specific intent due to his state of intoxication, (T353;355), the matters now asserted in mitigation were argued by defense counsel to the jury as a basis for acquitting White during his trial (R 716-747); the closing argument of defense counsel at the sentencing phase consisted solely of arguments that death was not appropriate due to the fact that (1) the state's prime witness, Richard DiMarino, who had only received a fifteen-year term, was unworthy of belief (R 817) and (2) White was too intoxicated to have fully contemplated the offense (R 819).

White's death sentence is premised upon a unanimous advisory verdict of death and the sentencing judge's finding of three unassailable aggravating circumstances. Although one statutory mitigating circumstance was found, the additional "mitigating" evidence could have had no effect upon the weighing process. The trial judge expressly found White's consumption of alcohol to have been insufficient to have had any effect upon his conduct at the time of the offense. This Court has previously found the instant sentence appropriate, in light of that imposed upon DiMarino. And

finally, residual doubt as to guilt is not a proper factor to be considered in mitigation.

In Bottoson v. State, 674 So.2d 621 (Fla. 1996), this Court found beyond a reasonable doubt that the Hitchcock error was harmless in light of four strong aggravating circumstances which outweighed the mitigating evidence that Bottoson had become a devout church member, had counseled other prisoners, and was a good son to his mother. In Bottoson, this Court also denied relief on Bottoson's related claim that trial counsel was ineffective in failing to present any evidence of mental illness during the penalty phase. Agreeing that this type of evidence would have been incongruous with the defense asserted, i.e, that Bottoson had not committed the crime, this was a valid strategy. Furthermore, even if trial counsel's performance may have been deficient, any failure was not prejudicial under Strickland because the "mitigating evidence now presented would not outweigh or overcome the aggravating circumstances of the murder." Bottoson, 674 So.2d at 624. Here, as in Bottoson, White is not entitled to postconviction relief on the basis of either his Hitchcock claim or related claim of ineffective assistance of counsel (See Issue II, infra). Hitchcock error, if any, is harmless.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN REJECTING THE POSTCONVICTION CLAIM THAT COUNSEL WAS INEFFECTIVE AT PENALTY PHASE.

Legal Standard

The test for judging claims of ineffective assistance of counsel was set forth by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984):

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

To satisfy this test, the defendant must show both deficient performance *and* that the deficient performance prejudiced the defense. Strickland; Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). A claim of ineffective assistance fails if either prong is not proven. Kennedy v. State, 547 So.2d 912 (Fla. 1989). The prejudice prong is not established merely by a showing that the outcome of the proceeding would have been different had counsel's performance been better. Rather, prejudice is established *only* with a showing that the result of the

proceeding was fundamentally unfair or unreliable. Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993); Gorham v. State, 521 So.2d 1067, 1069 (Fla. 1988).

Penalty Phase/Prejudice

White initially alleges that the trial court employed an incorrect standard of reviewing the aggravators in concluding that "additional evidence concerning White's alcoholism, memory lapses and abusive childhood would not have outweighed the aggravating circumstances especially in light of the brutality and indifference demonstrated by Defendant in the commission of this murder." (R.1072, e.s.) The trial court did not misapply Strickland to the facts of this case. In the context of the penalty phase of a capital trial, prejudice focuses on whether the "sentencer... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Bolender v. Singletary, 16 F.3d 1547, 1561 (11th Cir. 1994), quoting Strickland, 466 U.S. at 695; Hildwin v. Dugger, 654 So.2d 107, 109 (Fla. 1995)[Test for ineffectiveness of counsel during the penalty phase requires that the defendant "must demonstrate that but for counsel's errors he would have probably received a life sentence."] It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Buenoano v. Singletary, 74 F.3d 1078, 1084 (11th Cir. 1996).

In the instant case, the trial court's order denying postconviction relief on White's claim of ineffective assistance during the sentencing phase states, in pertinent part:

> [4. Counsel was ineffective during the sentencing phase of the trial.]
>
> White asserts that counsel failed to investigate or present any mitigation evidence during the sentencing phase of the trial. White submits that counsel should have delved deeper into the intoxication issue and that he should have objected to the jury instructions which seemed to limit consideration of nonstatutory mitigating factors in violation of Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L.Ed. 2d 973 (1978).
>
> Defendant further supplemented this claim in September of 1989, by adding that counsel was ineffective by failing:
>
> h. (original lettering in supplement) to inform the jury that life imprisonment meant life without the possibility of parole for twenty-five years;
>
> I. To object to the court's directing the jury's attention to appellate review prior to the penalty phase;
>
> I. (Sic) to object to the Judge's informing the jury that Defendant had been in custody before trial;
>
> j. to object to jury instructions which told the jury that in order to return a life verdict mitigating circumstances must outweigh aggravating circumstances;
>
> k. to object to jury instructions which improperly restricted the jury's consideration of mitigating evidence;
>
> l. to object to argument and instructions which denigrated the jury's role in sentencing;
>
> n. (Sic - There is no "m") that all these cumulative errors deprived Defendant of effective assistance of counsel.

Again, as in the discussion earlier concerning the guilt-innocence phase representation, evaluating defense counsel's conduct by today's standards is improper. Also importantly, many of these claims seem to be an attempt to relitigate issues which should have been raised on appeal. White attempts to circumvent this procedural requirement by adding a claim of ineffective assistance of counsel based on the alleged impropriety. However, "a procedural bar cannot be avoided by simply couching otherwise-barred claims in terms of ineffective assistance of counsel." Kight v. Dugger, 574 So. 2d 1066, 0173 (Fla. 1990). Also see Medina v. State, 573 So. 2d 293 (Fla. 1990). Hence, the two claims labeled I, and claims j, k, and l are barred.

As in the discussion above concerning counsel's conduct during the guilt-innocence phase of the trial, in deciding whether counsel's action were deficient during the penalty phase, the two-part standard set forth in Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 693 (1984) must be utilized. Again though, a court need not determine whether an attorney was ineffective if no prejudice can be shown. **Here, Defendant cannot demonstrate prejudice. Defendant would still have received the death penalty even if all proffered mitigation now submitted by Defendant had been presented to the jury and the court at the time of trial. The trial court found three aggravating factors: the murder was committed while Defendant was engaged in the commission of a kidnaping; the murder was committed to disrupt or hinder the enforcement of laws; and the murder was especially heinous, wicked and cruel. One statutory mitigating factor was found, i.e. no previous felonies. Additional evidence concerning White's alcoholism, memory lapses and abusive childhood would not have outweighed the aggravating circumstances especially in light of the brutality and indifference demonstrated by Defendant in the commission of this murder.** See Mendyk v. State, 592 So. 2d 1076 (Fla.. 1992), receded from on other grounds, Hoffman v. State, 613 So. 2d 405 (Fla. 1992); Tompkins v. Dugger, 549 So. 2d 1370 (Fla. 1989), cert. denied, 493 U. S. 1093, 110 S. Ct. 1170, 107 L. Ed. 2d 1073 (1990); Lambrix v. State, 534 So. 2d 1151 (Fla.. 1988). Also see generally Foster v. State, 654 So. 2d 112 (Fla..), cert. denied, _____ U. S. _____, 116 S. Ct. 314, 133 L. Ed. 2d 217 (1995); Rose v. State, 472 So. 2d 115 (Fla. 1985).

> Concerning counsel's failure to object to the jury instructions which allegedly violated Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L. Ed. 2d 973 (1978), White again cannot demonstrate prejudice. The Florida Supreme Court previously considered this specific matter via a habeas corpus action filed by Defendant and stated that "[t]he [jury] charge which may have limited the jury to a consideration of statutory mitigating circumstance was clearly harmless." White v. Dugger, 523 So. 2d 140, 141 (Fla.), cert. denied, 488 U. S. 871, 109 S.Ct. 184, 102 L. Ed. 2d 153 (1988). Hence, White is not entitled to relief pursuant to Strickland.

(R. 1072, e.s.)

For the following reasons, the trial court's order denying postconviction relief on White's claim of ineffective assistance of counsel during the sentencing phase should be affirmed.

White's trial counsel, David Kaplan, was admitted to practice in 1959. He was a member of the Kentucky Bar, the federal district court, and the United States Supreme Court. At the time of White's trial in 1978, Kaplan was a veteran criminal defense attorney with prior capital trial experience; 75% of his practice was devoted to criminal law. (R.99) Moreover, this defendant was no stranger to Kaplan. Kaplan knew White on a personal level before trial, and had seen White on many occasions. (R. 100). Kaplan also had represented members of the Outlaw club for a number of years. (R.99-100). Consequently, it was not necessary for Kaplan to investigate what he already knew -- that White was an alcoholic member of the Outlaws in Kentucky. See also, Gates v. Zant, 863 F.2d 1492, 1498 (11th Cir. 1989) (The more experienced the attorney, the more deference owed to his judgment about how much

investigation is sufficient and what defenses to pursue.)

White claims that Kaplan rendered ineffective assistance during the penalty phase by failing to investigate and present evidence of White's abusive childhood and the residual effects of White's long-term use of alcohol. In the instant case, the State did not present a case in rebuttal and no additional evidence was argued by the State in aggravation during the penalty phase. Instead, all of the guilt phase evidence set the stage for the penalty phase proceedings. The failure to present mitigating evidence during the penalty phase of a capital trial is not ineffectiveness per se. Burger v. Kemp, 483 U.S. 776 (1987); Stevens v. Zant, 968 F.2d 1076 (11th Cir.), cert. denied, 507 U.S. 929 (1993). Consistent with the most-viable chosen defense of placing the blame on DiMarino, Kaplan emphasized not only DiMarino's eagerness to lie, but also the fact that DiMarino, by his own admission at trial, was equally guilty of first degree murder, yet he received only a 15-year prison term. Even now, White concedes that he has no argument with the chosen defense of placing the blame on DiMarino. (R.404). During the evidentiary hearing, White's own legal expert witness admitted that Kaplan, in impeaching DiMarino, had done a "very good job" of establishing the "utter deceitfulness that [DiMarino] demonstrated on the witness stand." (R.255). White's postconviction counsel also conceded that attorney Kaplan knew how to cross examine "snitches." (R.416; 420)

In the instant case, the jury voted 12-0 in favor of the death penalty. Therefore, at least six members of the jury would have had to change their vote to result in a recommendation of life imprisonment. Rose v. State, 425 So.2d 521 (Fla. 1983). To determine whether Kaplan's failure to present the now-argued mitigating evidence prejudiced White, this Court must weigh the mitigating evidence against the aggravating factors that were presented at the penalty phase proceedings. Buenoano v. Singletary, 74 F.3d 1078 (11th Cir. 1996). In imposing the death penalty in 1978, the trial court found three aggravating factors: the murder was committed while the defendant was engaged in the commission of a kidnaping; the murder was committed to disrupt or hinder the enforcement of laws; and the murder was especially heinous, wicked and cruel. In light of the gravity of the aggravating factors presented at trial, there is no reasonable probability that the additional mitigating evidence which White alleges that trial counsel should have presented would have resulted in six members of the unanimous jury being swayed to recommend a life sentence *and* that the trial judge would have had no legally sufficient basis to reject the life recommendation for White, the cold-blooded killer who unhesitatingly carried out Smith's command. See, Smith v. State, 403 So.2d 933 (Fla. 1981).

Contrary to White's assertions, Kaplan did perform a level of independent investigation in this case. Kaplan drove down from Kentucky "...with one of the other members of the club" several weeks prior to the commencement of guilt phase (R.101). At that time, he discussed the case with other club members, located a critical defense witness who testified in the guilt phase, and talked to various "members of the club and those people who were down here." (R.102) Kaplan cannot fairly be faulted for failing to begin preparation for the penalty phase any sooner, given the testimony of attorney Abrams that he was likewise primarily engaged in preparation for the guilt phase at the time Kaplan was substituted as White's counsel. (R.65-66)

During the postconviction evidentiary hearing, the original trial judge, who presided over the three separate trials of DiMarino, White, and Smith in 1978, confirmed his belief that death was still the appropriate penalty. In evaluating this postconviction claim, the successor trial judge correctly analyzed whether the mitigating evidence that White asserts, by a reasonable probability, would have compelled a different result when considered against the aggravating factors presented during the penalty phase. As the trial court below recognized, the test is not how present counsel would have proceeded to represent the defendant. Cherry v. State, 659 So.2d 1069, 1073 (Fla. 1995). Instead, the appropriate inquiry is whether any reasonable attorney

could have proceeded as trial counsel did. Rogers v. Zant, 13 F.3d 384, 386 (11th Cir. 1994). Regardless of Kaplan's performance, White is only entitled to a new penalty phase if this Court determines that the unpresented evidence of White's turbulent childhood and the long-term use and residual effects of alcohol would have changed the unanimous recommendation of death to a recommendation of life, and that the trial judge would have had no legally sufficient basis to reject the life recommendation. See e.g., Smith v. State, 403 So.2d 933 (Fla. 1981).

Attorney Kaplan knew White's fellow Kentucky Outlaws, and White faults Kaplan for not presenting this collection of misfits during the penalty phase in 1978. However, none of these witnesses were present at the time or scene of the crime. Although this band of rogues would leave no doubt that their fellow Outlaw had chosen a lawless lifestyle filled with drugs and alcohol, any arguable benefit derived from this "mitigating" evidence pales in comparison to the evidence of the deliberate and horrific slaughter of Gracie Crawford.

White is the man that immediately climbed out of bed, got dressed, and went into the kitchen to beat the 110 pound victim. White is the man who cautioned "Sami" Nestle that she didn't deserve to see what was about to happen. White was the one who was observed by eye-witnesses as he smacked Gracie Crawford's face, knocked her down, and pulled her back up by her hair. White was

the one who returned to the bedroom after the beating, and retrieved the keys to Sami's car in order to take Gracie Crawford away to be murdered. White was the one who told Sami, "You didn't see anything." Sami obeyed White because she had previously suffered beatings from him.[2]

White was the one who helped put Gracie Crawford into the car. White was the man who initially drove away from the house on Surfside, not en route to her home, but rather toward an isolated locale where she would be murdered. White was the man next to Smith when Smith ordered the execution. White was the one who helped drag Gracie Crawford away from the car with DiMarino. White was the one that helped throw her over the fence. White was the one who climbed over the fence, pulled out his knife, straddled her, stabbed her 14 times and, finally, slit her throat. After White's *coup de gras*, he turned the knife over to DiMarino, where DiMarino repeated the deathblow.

White was the man observed at Sea World with blood on his elbow at 3:22 a.m. White was the one who realized that his wallet was missing. White was the one driving the car as he and DiMarino left Sea World at 4:30 a.m. White was the one who drove back to the site where they'd left Gracie Crawford. White was the one who

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[2]During the postconviction evidentiary hearing, the defense expert, Dr. Caddy, confirmed that White would likely exhibit a "macho" role with women. (R.387) This illuminating admission diminishes White's claim that he only participated in the crime because of his subservience.

immediately headed back to the site where they'd dumped her body, in order to retrieve his identification and move her to another location, away from Sea World.

White was the one who assisted DiMarino in picking up Gracie Crawford's mutilated body and loading her body into the trunk. White was the one who assisted DiMarino after the murder, who climbed over the fence once again, and helped hoist her body back over the 5' fence. White was the one who helped stuff her lifeless body in the trunk. White was the one who helped to drag her limp body from the car, who helped carry her body along the muddy path, and helped heave her body along the side of the railroad tracks. White was the one who later washed off the knife used to butcher Gracie Crawford. White was the one who drove Sami and DiMarino from Surfside to the house on Hillcrest just hours after the murder. White was the one who stopped the car when DiMarino signaled toward the back seat. White knew what exactly was going on, and he was the one who got out of the car and put the wheel cover down on the hatchback. When they arrived at Hillcrest, White was the one who told Sami to go inside the house, so that she wouldn't see what they were doing. White was the one who helped wash the car. And, finally, White is the one who removed the plug from the drain, to let out the bloody water from the body of the girl that he'd just murdered.

Family and fellow Outlaws

During the postconviction hearing, the trial court had the opportunity to observe White[3] and the numerous postconviction witnesses who testified on his behalf. Undoubtedly, White's childhood acquaintances and law-abiding family members, who had not even seen White since 1965, were heartbroken by his lawless descent in 1978. However, White's confederates in 1978, a sinister cast of unemployed, alcoholic ne'er-do-wells who knew him best at the time of the crimes, likely would have unwittingly sealed his fate. Evidence of the defendant's character, as it existed in 1978, was hardly beneficial.

According to Mark Merrill, a fellow Kentucky Outlaw who knew White from 1976 until his trial in 1978, White fell down a lot when he was real drunk. (R.167, 182). If White began his day with a beer for breakfast and switched to whiskey after lunch, he would be falling down by 4:00 p.m. or 5:00 p.m. or 6:00 p.m. (R.187). Rosie Merrill, Mark's wife, testified that she was a recovering alcoholic who has only been sober since 1990, some twelve years after White's trial. (R.183-184). White did what other club members told him to do "if he was sober enough." (R.188). However, according to Rosie Merrill, if somebody else told White to beat up a woman, he would not have done so. (R. 188). Similarly, Jim Carpenter, a fellow Kentucky Outlaw, testified that White hit the bars as soon as they

[3]Attorney Marc Lubet recalled that White, at the time of trial, bore a striking resemblance to Charles Manson. (R.164).

opened at 7:00 a.m. (R.190) and White often denied having done things which he simply did not recall. (R.191). Carpenter admitted having his own drinking problem and his own memory would have been clearer "...quite a few *drunks* ago." (R.192). According to Carpenter, White usually stumbled when drunk and would generally do what he was told to do when sober. (R.195, 199). Carpenter also offered an "amusing" anecdote about the Outlaw's threat to burn down a veterinarian supply business if it continued to sell prescription drugs to White. (R.197). George McMahon confirmed that by noon, "we would *both* be drunk." (R.195). When asked if White would do something another member told him to do, McMahon replied, "not generally." (R. 199). Dillard Eigel and White became good friends because of their similar situations; they were both alcoholics. (R.201).

The notion that White was not deserving of the death penalty because White had an abusive childhood some 15-20 years earlier, had committed some good deeds for fellow Outlaws, and often had no memory of his actions due to his voluntary, excessive use of alcohol, is a distinction which was undoubtedly lost on the 5'1", 110 pound victim as her desperate pleas for help went unanswered, as she was mercilessly pummeled by White and his confederates, as she was taken to the isolated site of her execution, as she was discarded on the ground while White savagely and repeatedly thrust the knife into her chest, penetrating her heart and lungs, and as

White callously slit her throat, thereafter relinquishing the blade so that DiMarino could repeat the throat-slitting death ritual.

Postconviction witness John Mahon was the striking exception to the cavalcade of postconviction "character" witnesses. Although a contemporary of White from a similar socioeconomic background, their chosen lifestyles were dramatically different. Both Mahon and White were originally placed on probation, along with two other juveniles, for shooting into the homes of neighboring blacks. (T172-173). After White and Mahon violated their probation, they were sent to reform school. (T173). Mahon was released after eight months and, shortly thereafter, he turned his life over to Christ and became an evangelist. (T162, 176). White, on the other hand, escaped from Marianna, stole an automobile with the help of some associates and had served time in a federal penitentiary by the time he was seventeen. (T295). In other words, two underprivileged boys from Sorrento took diametrically divergent paths. Mahon chose to become a preacher, while White chose to become a criminal. The stark contrast between these two men, whose young lives shared so many similarities, undoubtedly would have had a devastating effect upon White's jury as the following testimony so graphically illustrates:

> Q: If you had been asked, would you have come to court for Bill and asked the jury to spare his life?
>
> A. Yes, sir, I would. I would. I've had mixed feelings through my life about the

> death penalty, and this situation, when I really give it deep sole [sic] searching thoughts, I'd have to ask that because the words just come to me, Billy didn't stand a chance in that environment. None of us did. It's a miracle that none [sic] of us got out of there. We came through it.

(T177-178, emphasis supplied).

Mahon was partially correct. Unlike White, Mahon rose above his circumstances. Had White's jury been presented with such compelling proof of the strength of the human spirit, Mahon would have unwittingly pounded the final nail in White's coffin.

Although his family members knew of White's arrest and trial, they did not come forward on his behalf at that time. Nadine Starbird, White's oldest sister, did not come forward on his behalf in 1978, even though Starbird knew of White's arrest by seeing him on television. (T245-246). According to his other sister, Carmelita, White had had no contact with his immediate family since 1965. (T256) Carmelita had been "...left out in the cold" after the defendant's birth when their father "...started doting on Billy because he wanted a son" (T248).[4] However, Carmelita, who was raised in the same tragic environment, did not perceive her own misfortune to confer upon her a license to commit murder. The remaining testimony of those who knew White as a teenager was

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[4]Although the defense witnesses focused on White's abusive teenage years, it is clear from the testimony of these witnesses that there were some good times. Nadine Starbird testified that White's father frequently planned Sunday outings, such as horseback rides for White and the other children, which conflicted with White's mother's good intentions to take the children to church (T239).

simply too remote to be truly mitigating when compared to the deliberate and cold-blooded cruelty of his acts, committed at age 33, against his pathetically defenseless victim.

Mental Health Expert

Dr. Caddy also testified on White's behalf[5] during the postconviction hearing. According to Dr. Caddy, White's major difficulty is with his memory. (R.330). Although White's family recalled a decade of abuse, White lacked a sense of awareness of how bad his circumstances were, concluding that he deserved to be beaten by his father. (R.335). When interviewed by Dr. Caddy for the postconviction proceedings, White did recall having good times as a child, times spent going fishing and taking trail rides. (R.339). White also recalled stories about his adult life on the road, going from place to place and hanging out with the gang, stories typical to many unemployed alcoholics. (R.346).

Although Dr. Caddy could not determine the specific degree of White's intoxication, he "very much doubted" that White had the specific intent necessary to commit the crime. (R.353;355;363) Dr. Caddy also believed that it was "very likely" that White did not have the capacity of appreciate the criminality of his conduct or the capacity to conform his conduct to the requirements of the

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[5]Dr. Caddy, a clinical forensic psychologist, has testified on behalf of criminal defendants in numerous death penalty cases. See, Morgan v. State, 639 So.2d 6 (Fla. 1994); Caruso v. State, 645 So.2d 389 (Fla. 1994); Elledge v. State, 1997 WL 574744 (Fla. 1997); Hegwood v. State, 575 So.2d 170 (Fla. 1991).

law was substantially impaired. (R.360;363-364). On cross-examination, Dr. Caddy admitted that amnesia was not a defense to White's crime. (R.367). Dr. Caddy also conceded that although White might not remember what he had done afterwards, he still may have had the capacity to commit the crime at the time. (R.367). Dr. Caddy agreed that a person with White's tolerance and history would have to ingest more alcohol than an average person in order to reach the level where they no longer have the ability to form specific intent. (R. 383-384).

Even if the failure to call a mental health expert at trial could fairly be deemed deficient performance, inasmuch as little or nothing would have been gained by the presentation of his testimony, no prejudice occasioned by its absence at trial has been demonstrated. Undoubtedly, much to White's dismay, Dr. Caddy testified that it would be "clearly impossible ... to accurately offer the court a concise convincing statement" concerning the specific degree of White's alleged intoxication on the night of the murder (T 304). The explanation offered for such a circumstance is that White allegedly is and has been unable to provide details about his routine drinking practices due to the fact that he would lose the ability to recall events "... somewhere early in the stage of his drinking comportment" (T 304).

It is clear from the totality of Dr. Caddy's testimony that White's reasoning with respect to this claim contains the fatal

flaw of confusing the alleged absence of any memory of the murder with the absence of any intent on his part to commit it. As explained by Dr. Caddy, as a result of White's lifelong pattern of substance abuse, White has lost the ability to remember even those events which have occurred when he was relatively (or even completely) sober (T 329). The expert's explanation for such a phenomenon is that White would not be able to place remembered events in any context due to the void left by information which was never processed as a result of White's habitual state of intoxication (T 332).

The probative value of Dr. Caddy's testimony is further diminished by the fact that the tests administered to White by Dr. Caddy in 1992 were not even available in 1978[6] (T 278, 316); that Dr. Caddy did not even review the entire trial transcript prior to reaching his expert opinions (T 285, 321); that Dr. Caddy first testified he had not discounted DiMarino's testimony in reaching his opinion that White was intoxicated at the time of the murder (T 322) but later testified that he "... would likely discount the co-defendant's testimony, for reasons that would seem to be obvious" and still later denied saying that he would not discount such testimony (T 325); that Dr. Caddy admitted that the trial testimony of Sami Nestle if taken "at face value" would certainly "call ...

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[6]Dr. Caddy testified that a somewhat "... more rudimentary methodology..." would have been available at the time of White's trial (T 316).

into question" his opinion concerning White's ability to formulate specific intent (T 324) and that he lacked any basis to discount such testimony (T 326); and that, given his experience with law enforcement, he "would likely discount" the testimony of the security guard at Sea World[7] (T 322-323, 325). Dr. Caddy further admitted that White, as a practiced drunk, would have to ingest more alcohol than a normal person in order to reach a level where he would no longer have the ability to formulate a specific intent (T 334-335), that White's degree of tolerance would have been "extreme" (T 333), and that it was possible for a "relatively substantially intoxicated" individual to stab his victim fourteen times, as did White. (T 335-336).

In Buenoano v. Dugger, 559 So.2d 1116 (Fla. 1990), trial counsel failed to present mitigating evidence that Buenoano had an impoverished childhood and was psychologically dysfunctional. Buenoano's mother had died when Buenoano was young, she had frequently been moved between foster homes and orphanages where there were reports of sexual abuse, and there was available evidence of psychological problems. Without determining whether Buenoano's counsel had been deficient, this Court held that there

[7]Sea World Security Guard Robert Granec testified at trial that he had previously been employed as a police officer for twelve years (R 365) and that he had administered in excess of 500 breath tests as a breathalyzer operator (R 371). Granec testified that White's attitude just moments following the murder was "very good," that he "did not appear to be intoxicated, did not stagger, stumble, fall," that his speech was not slurred and that White's glassy eyes "could have been from anything, lack of sleep, tired" (R 371-372)

could be no prejudice in the failure to present this evidence in light of the aggravated nature of the crime. The mitigation suggested in the instant case is much less compelling than that described in Buenoano, and this case is every bit as aggravated. See also, Mendyk v. State, 592 So.2d 1076, 1080 (Fla. 1992) (asserted failure to investigate and present evidence of mental deficiencies, intoxication at time of offense, history of substance abuse, deprived childhood, and lack of significant prior criminal activity "simply does not constitute the quantum capable of persuading us that it would have made a difference in this case," given three strong aggravators, and did not even warrant a postconviction evidentiary hearing); Routly, 590 So.2d at 401-402 (additional evidence as to defendant's difficult childhood and significant educational/behavioral problems did not provide reasonable probability of life sentence if evidence had been presented); Provenzano v. Dugger, 561 So.2d 541, 546 (Fla. 1990) (cumulative background witnesses would not have changed result of penalty proceeding). Under the facts of this case, there is no reasonable probability that the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. See also, Buenoano, 74 F.3d at 1084 [Failure to introduce evidence of defendant's mental illness and childhood characterized by physical, mental, and sexual abuse at penalty phase did not satisfy the prejudice prong of Strickland. The

presentation of such potentially mitigating evidence would not have produced a different result.]; Daugherty v. Dugger, 839 F.2d 1426, 1432 (11th Cir. 1988)[Concluding that "given the severity of the aggravating circumstances in this case, we cannot conclude that the absence of psychiatric testimony in the sentencing phase creates a reasonable probability that the jury would have recommended life."]

White further argued that the trial court erred in failing to inform the jury that life imprisonment meant life without the possibility of parole for 25 years. To whatever extent this claim could fairly be considered fundamental error, it could have been raised on direct appeal even in the absence of objection by defense counsel. On postconviction review, the trial court found this underlying claim should have been raised on direct appeal and, therefore, was procedurally barred.

White also claims defense counsel was ineffective by failing to inform the jury that life imprisonment meant life without the possibility of parole for twenty-five years. White has not, and cannot, demonstrate any prejudice in this case. If White's jury even considered the possibility of his early release on parole, a supposition for which there is absolutely no record support, the knowledge that the 33-year old murderer (TR814) would have been eligible for parole at age of 58 if sentenced to life would hardly have favorably influenced the necessary one-half of the members of White's jury whose recommendation of a sentence of death was

unanimous. See also, King v. Dugger, 555 So. 2d 355 (Fla. 1990)[Testimony that King would have to serve at least 25 years of a life sentence is irrelevant to his character, prior record, or the circumstances of the crime. Excluding that testimony was within the trial court's discretion. Id. at 359]

As to White's claim that the State's arguments minimized the jury's role in sentencing in violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), this claim was also stricken at the 1987 hearing. In denying postconviction relief, the trial court found this issue was not raised on direct appeal and is, therefore, procedurally barred. Bertolotti v. State, 534 So.2d 386, 387 n.2 (Fla. 1988); Jones v. Dugger, 533 So.2d 290, 292 (Fla. 1988); see also, Johnson v. State, 593 So.2d 206 (Fla. 1992); Mendyk v. State, 592 So.2d 1076 (Fla. 1992); Medina v. State, 573 So.2d 293 (Fla. 1990); Roberts v. State, 568 So.2d 1255 (Fla. 1990). Furthermore, White's Caldwell claim is without merit as a matter of law. Combs v. State, 525 So.2d 853 (Fla. 1988); Turner v. Dugger, 614 So.2d 1075 (Fla. 1992); see also, Davis v. Singletary, 119 F.3d 1471 (11th Cir. 1997).

Finally, the trial court did not err in applying a procedural bar to White's remaining claims, presented under the guise of ineffective assistance of trial counsel, that the trial court erred in discussing, in the jury's presence, the defendant's right to appeal, that the defendant was in jail, and the use of jury

instructions which purportedly restricted the consideration of mitigation. As this Court has consistently recognized, "[a]llegations of ineffective assistance cannot be used to circumvent the rule that post-conviction proceedings cannot serve as a second appeal." Medina v. State, 573 So.2d 293, 295 (Fla. 1990); Cherry v. State, 659 So.2d 1069, 1072 (Fla. 1995).

ISSUE III

WHETHER APPELLANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AS TO THE GUILT PHASE.

White has conceded that he has no dispute with the chosen defense of placing the blame on DiMarino and White's own legal expert admitted that Kaplan thoroughly impeached DiMarino at trial. During the defense case, Kaplan called Officer James Holloman, John DiMarino, Detective John Harrielson, and White's codefendant, Richard DiMarino. Kaplan succeeded in establishing that DiMarino had been arrested 40-50 times (R. 657-658, 667) and had been convicted of five to ten felonies, including crimes involving rape, robbery, burglary, drugs, weapons, and resisting arrest (R. 674-675). Kaplan also succeeded in establishing that DiMarino would readily lie to benefit himself and that DiMarino had admitted killing Gracie Crawford.

Kaplan introduced evidence that DiMarino gave four different statements to Officer Holloman in an effort to get a favorable deal for himself. According to Holloman, DiMarino had been a confidential informant for the police. (R. 574). DiMarino initially said that he had left while Gracie was still alive. (R. 577-578). Then, DiMarino said the man who killed Gracie was from Fort Lauderdale. (R. 584). Later, DiMarino said that White took her outside and that she was killed in the driveway of the house. (R. 589). When DiMarino was told that the officer would only

believe him if he took a polygraph test, DiMarino declined to take the polygraph because he thought he would fail the test. (R. 586; 599). Richard DiMarino denied that he was a confidential informant for Holloman, but admitted that he ran a "scam" on the officer. (R. 510, 513-515, 662). Richard's brother, John DiMarino, who had never been convicted of a crime, testified for the defense that Richard admitted that he was the one who had killed Gracie and had slit her throat and stabbed her. (R. 605; 615).

During closing argument at the guilt phase, Kaplan emphasized (1) there was no murder weapon found because DiMarino hid it so well, (2) there was no blood on the knife belonging to White, and the knife was examined by the State's experts,(3) although there were 15 to 20 Outlaw members at the clubhouse, none of them were called by the State to testify, (4) Sami admitted that she is an alcoholic and had consumed one quart of alcohol that day, along with White, who had consumed one quart of alcohol that day, (5) it was the defense who called John DiMarino, "Patches," and John testified that it was his own brother, Richard DiMarino, who admitted killing Gracie Crawford, (6) although there were three people in the car at 3:00 a.m. and two people in the car at 3:22 a.m., the coroner's best guess as to the victim's time of death could be as late as 6:00 a.m., (7) Gracie was a hooker, not frightened of anything, and she often wandered the streets and could have been picked up by anyone, and (8), the State Attorney's

office was trying morality, trying the Orlando Chapter of the Outlaws, but morality was not on trial. Kaplan described DiMarino as a "Judas, a liar, cheat, fink, CI, a man eating cheese for the rest of his life because he is a rat. He rats on his friends and his family." According to Kaplan, the only true thing DiMarino said was that sometimes he tells a lie. DiMarino made a sucker out of the cops; he is an admitted con artist who was out for himself. T 738. According to Kaplan, other than Richard DiMarino, there was no evidence against White. Although the State Attorney's Office had tried the case one time before [against DiMarino], they needed an "ace in the hole" and so they found the rapist-kidnapper-robber-murderer, and convicted dope peddler as their prime witness. The possibility of 20 more years in prison, for a total of 35 years, showed that DiMarino was working his scam again. When faced with substantial prison time, DiMarino called and offered the State to "Come on down, I'm ready to do a deal again." (TR.719-739)

Despite the tenacious defense pursued by Kaplan at trial, White nevertheless alleges that Kaplan was ineffective during the guilt phase in failing to (1) object to the State's amended statement of particulars, (2) obtain an instruction on an intoxication defense and present evidence of White's alcoholic history, and (3) obtain a ruling on his objection to collateral acts testimony and object to bad character evidence and evidence creating sympathy for the victim. For the following reasons, the

trial court, after conducting an extensive evidentiary hearing, properly denied postconviction relief on White's claim of ineffective assistance of trial counsel during the guilt phase.

The trial court's order denying relief on this claim of ineffective assistance of counsel states, in pertinent part:

> Defendant alleges that counsel did not investigate the only two plausible defenses: insanity or that DiMarino was lying. Allegedly, the State did not notify counsel that DiMarino would testify until shortly before trial. The crux of Defendant's claim is that counsel was ineffective because he failed to request a continuance of the trial in order to fully prepare for this "new" circumstance. Defendant avers that had counsel investigated DiMarino, he would have discovered that DiMarino's account of the murder was false and that DiMarino was offered incentives by the State for his testimony.
>
> Also, in September of 1989, Defendant filed a supplement asserting additional claims of ineffective assistance of counsel. He says that counsel was ineffective by:
>
> a. failing to attempt to rehabilitate any jurors who indicated opposition to the death penalty;
>
> b. failing to conduct an effective voir dire;
>
> c. failing to object to numerous evidentiary errors;
>
> d. failing to challenge the State's amendment of the Statement of Particulars during trial;
>
> e. waiving an intoxication defense;
>
> f. failing to obtain a ruling on his objection to collateral bad act testimony;
>
> g. failing to object to numerous theories of felony murder which had no support in the evidence.
>
> In order to find counsel was ineffective, counsel's

performance must be deficient and the deficient performance must prejudice the defense. In reviewing counsel's performance, the court must be highly deferential to counsel, and in assessing the performance, every effort must "be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of the counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Rivera v. Dugger, 629 So. 2d 105, 107 (Fla. 1993)(quoting Strickland v. Washington, 466 U. S. 668, 689, 104 S. Ct. 2052, 2065, 80 L.Ed. 2d 674, 693 (1984)). Hindsight is especially critical in this case because of the long amount of time which has passed between trial and the resolution of Defendant's postconviction motion. Defendant's trial was held in 1978. Shortly thereafter and continuing until today, representation of defendants facing charges of first-degree murder has become much more sophisticated. Evaluating defense counsel's conduct by today's standards is improper. "A defendant is assured of a fair trial, not a perfect one." Hall v. State, 420 So. 2d 872, 874 (Fla. 1982). The test as set forth in Strickland consists of two parts. A court need not determine if counsel's actions are deficient if prejudice cannot be shown. Consequently, the critical question here is -- if Defendant had received perfect representation by counsel, would Defendant still have been found guilty of first-degree murder and sentenced to death?[8]

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A great many of the alleged questionable deficiencies listed by Defendant are simply without basis. For instance, Defendant contends counsel should have investigated DiMarino more thoroughly. However, even though counsel may not have investigated DiMarino as exhaustively as possible, counsel was able to vigorously and (according to the defense expert at the evidentiary hearing) superbly cross-examine DiMarino. On cross, DiMarino admitted that he was a liar and ran "scams" when it suited him. He also admitted that his motivation to testify was to gain a better deal for himself and to protect his girlfriend and child. Counsel further discredited DiMarino during the defense case on direct. On whole, counsel's actions were not below the standard of performance expected of an attorney representing a defendant on charges of first-degree murder.

As another example, White decries counsel's waiver

This court finds that the answer to that question is yes; even if defense counsel's representation was deficient, Defendant cannot demonstrate prejudice during the guilt-innocence phase of the trial and the result would have been the same even if counsel's conduct was perfect. The co-defendant, DiMarino, testified at length that White beat the victim prior to the murder, accompanied DiMarino to kill the victim at a remote spot, assisted the victim over a fence, then repeatedly stabbed her and finally slit the victim's throat.

Even without DiMarino's testimony, the cumulative circumstantial evidence presented at trial leaves no doubt of White's guilt. Eyewitnesses testified, inter alia, that DiMarino awoke White to assist him in beating the victim. White, along with DiMarino, beat the victim prior to the murder. After the beating, White returned to the bedroom in which he had been sleeping and obtained the keys to his girlfriend's car. He did not return to the bedroom other than to get the keys and he was not observed in the house until much later in the morning. An eyewitness testified that DiMarino and White left with the victim in White's girlfriend's car. Shortly thereafter, around the time of death, White and DiMarino were observed in the girlfriend's car in a remote location without the victim. It was proven that the body

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of the intoxication defense. At the evidentiary hearing, defense counsel testified that he recognized the availability of the intoxication defense but specifically abandoned it for some reason which reason he could not now remember. An examination of the testimony at trial gives the most likely explanation for abandoning the intoxication defense. Several witnesses, including a former breathalyzer operator, testified that Defendant had consumed alcohol but was not so drunk as to reach the level of intoxication required under the intoxication defense. Further, Defendant's actions at the time of the murder belied the theory that Defendant was so inebriated that he could not form specific intent in that he awoke and readily dressed himself when DiMarino asked him to help in the beating of the victim; he initially drove the car taking the victim to her death; he assisted her over a barbed wire fence; he spoke coherently to the security guards at Sea World; and he had enough presence of mind to discover that his wallet was missing and that he might have left it with the body. Accordingly, counsel was not ineffective for waiving the intoxication defense.

of the victim had been transported in that car.

> Counsel capably attacked the evidence and testimony through cross-examination and nothing counsel did or did not do would have changed the resulting guilty verdict. Therefore, under the test set forth in Strickland, Defendant cannot demonstrate prejudice and hence, this claim is without merit.
>
> (R.1064-1067).

In an effort to defeat the foregoing fact-specific and comprehensive analysis set forth by the trial court in denying postconviction relief, White once again alleges that the trial court employed an incorrect legal standard in ruling that "nothing counsel did nor did not do would have changed the resulting guilty verdict." (R.1067). As discussed in the preceding issue, Strickland requires a showing that the *result* of the proceeding was *fundamentally unfair or unreliable*. Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993); see also, Rose v. State, 675 So.2d 567, 570 (Fla. 1996)(finding that defendant failed to demonstrate "the probability of a different outcome based on the alleged deficiencies.") The trial court's order also states,

> Consequently, the critical question here is -- if Defendant had received perfect representation by counsel, would Defendant still have been found guilty of first-degree murder and sentenced to death? (footnote omitted)
>
> (R. 1066)

Although the trial court's rhetorical question somewhat recharacterizes the applicable standard, it is clear that the trial court's analysis is in no way derogation of the requirements of Strickland. The trial court evaluated White's claims of

ineffectiveness by comparing the effect of the legal representation actually received by White in the instant case to that which would have been obtained had counsel's performance not been merely "reasonably effective", but instead "perfect" and found:

> ...the result would have been the same even if counsel's conduct was perfect.

(R. 1066-1067).

As a consequence, the trial court's decision in effect actually exceeds the requirements of Strickland, affording White greater protection than that provided by the lesser standard of no reasonable probability that the outcome would have been affected by the *reasonably effective* assistance of counsel.

Statement of Particulars

White contends that trial counsel was ineffective in failing to challenge the State's amendment to the statement of particulars which expanded the situs of the offense charged from "In Orange County, Florida, in the vicinity [of] 3209 Surfside Way" to "In Orange County, in the vicinity [of] 3209 Surfside Way, Sea World, Land Street Road and various places in route to and from said location a more exact location known only to the Defendant." (TR.1536). According to White, trial counsel could have successfully objected to the amendment on the basis of Stang v. State, 421 So. 2d 147 (Fla. 1982), and the prosecution would have been left without a case. White places far too great a reliance on Stang to reach this conclusion.

In Stang, citing Hoffman v. State, 397 So.2d 288 (Fla. 1981), this Court qualified State v. Beamon, 298 So.2d 376 (Fla. 1974), to allow amendment to a statement of particulars even after trial has commenced in the absence of prejudice to the defendant. During opening statements at trial, Stang's counsel advised the jury that the State would be unable to prove that the crimes occurred on the date specified in the information and bill of particulars. After several witnesses testified, the State moved to change the date to a day seven days earlier than the date cited in the statement of particulars. Over the defense objection that his sole defense hinged on the State's inability to prove the proper date, the amendment was allowed at trial. This Court in Stang concluded that, under the "unique facts" of this case, in which the defendant was "stripped of the only defense" he had claimed at trial, the mid-trial amendment prejudiced the defense and was reversible error. In this case, White's trial counsel did not present an opening statement at the commencement of trial which might have bound the defense to a particular theory. More importantly, the requisite prejudice has not and cannot be demonstrated at the time of trial, inasmuch as the amendment did not affect the proper venue of the case, which, unlike the essential elements of the crime, need not be proved beyond a reasonable doubt. It is sufficient if "the jury can reasonably infer from the evidence that the crime was committed in the alleged jurisdiction." Ball v. State, 204 So.2d

523, 524 (Fla. 3d DCA 1967). Furthermore, the original theory of both parties that the victim was alive as she left the house after the beating at 3209 Surfside Way and the murder was, in fact, committed in Orange County, and in the vicinity of Surfside Way. Even now, White has not demonstrated that the amendment to include the "vicinity of 3209 Surfside Way, Sea World, Land Street Road and various places in route to and from said location a more exact location known only to the Defendant" affirmatively misled or prejudiced the defense at trial. White has failed to demonstrate any deficiency of counsel and resulting prejudice under Strickland.

Voluntary Intoxication

It is undisputed that attorney Kaplan deliberately abandoned the voluntary intoxication instruction at the conclusion of the trial and attorney Abrams presented the defense argument regarding the remaining jury instructions. (TR.677-679). Trial counsel's strategic decision at the time of trial is not subject to being second-guessed in a postconviction proceeding. Strickland, 466 U.S. at 689; Rose, 675 So.2d at 569. Obviously disagreeing with trial counsel's assessment and decision at the time of trial, White now argues that Kaplan was ineffective in failing to obtain a jury instruction on the intoxication defense and to develop evidence of White's alcoholic history. For the following reasons, White is not entitled to any relief on this ground.

Voluntary intoxication is defense to first-degree murder only

if the intoxication renders the defendant incapable of forming the intent to commit the crime. Gardner v. State, 480 So.2d 9 (Fla. 1985). Although there was some testimony at trial that White had been drinking an unspecified amount of alcohol several hours before the murder, the deliberate nature of White's actions both before, during, and after the murder refute any suggestion of intoxication to the point of impairment at the time of the crime. The three witnesses who most closely observed White at the time of the crime -- Sami Nestle, DiMarino, and Robert Granec -- discredited White's claim of intoxication.

Sami Nestle, White's girlfriend, testified that she did not know how many drinks White consumed on the night of the murder (R 286), but that she knew from the way White talked and walked that he knew what he was doing (R 286), that he drove when they left the Inferno for the clubhouse (R 320), that prior to the victim's beating White told her "You don't deserve to see this, go to sleep" (R 298), that after the beating White told her that she had not heard anything, took her car keys and told her he would be back in a while (R 300), that he was able to dress quickly (R 306), and that he had no trouble driving. Richard DiMarino testified that White initially drove from the clubhouse as he and White left with Gracie Crawford (R 484), and that White took the victim out of the car, passed her to DiMarino over a five-foot, barbed-wire fence, climbed the fence himself, straddled the victim's body, and then

stabbed her repeatedly before slitting her throat. (R 487-491). White had the presence of mind to realize his wallet was missing and to return directly to the site where the victim's body had been left behind. White helped throw the victim's body over the fence, loaded her in the car, discarded her along the side of the road in another location (R 496-499), and, upon returning home, White helped clean the car in an attempt to get rid of any incriminating evidence after the murder. (R 502).

Sea World Security Guard Robert Granec testified at trial that he had previously been employed as a police officer for twelve years (R 365) and that he had administered in excess of 500 breath tests as a breathalyzer operator (R 371). Granec observed White within minutes of the murder. Granec testified that White's attitude just moments following the murder was "very good," that he "did not appear to be intoxicated, did not stagger, stumble, fall," that his speech was not slurred and that White's glassy eyes "could have been from anything, lack of sleep, tired" (R 371-372). Mere evidence of alcohol consumption is insufficient to justify an instruction on voluntary intoxication. Bertolotti v. State, 534 So.2d 386 (Fla. 1988); Lambrix v. State, 534 So.2d 1151 (Fla. 1988); Gardner v. State, 480 So.2d 91 (Fla. 1985); Linehan v. State, 476 So.2d 1262 (Fla. 1985). Therefore, White's prior history of alcohol use would not have been relevant to an intoxication claim and supporting instruction in the guilt phase.

White also faults trial counsel for failing to utilize expert testimony to support an intoxication defense. Nevertheless, as stated in Atkins v. Dugger, 541 So.2d 1165, 1166 (Fla. 1989), "[o]ne tactic available to counsel is to present expert testimony. However, it is by no means the only tactic; nor is it required." Moreover, as demonstrated through the expert testimony of Dr. Caddy at the evidentiary hearing, even if the failure to call an expert at trial could fairly be deemed deficient performance, inasmuch as little or nothing would have been gained by virtue of the presentation of such testimony, no prejudice has been demonstrated. As addressed in Issue II herein, Dr. Caddy found that it would be "clearly impossible ... to accurately offer the court a concise convincing statement" concerning the specific degree of White's alleged intoxication on the night of the murder (T 304). White, as a practiced drunk, would have to ingest more alcohol than a normal person in order to reach a level where he would no longer have the ability to formulate a specific intent (T 334-335), that White's degree of tolerance would have been "extreme" (T 333), and that it was possible for a "relatively substantially intoxicated" individual to stab his victim fourteen times, as did White (T 335-336).

In order to prove that Kaplan's performance was outside the wide range of professional assistance, White must establish that "the approach taken by defense counsel would not have been used by

professionally competent counsel." Harich v. Dugger, 844 F.2d 1464, 1470 (11th Cir. 1989). In the instant case, all of the evidence of White's deliberate actions at the time of the murder and immediately thereafter were inconsistent with any credible defense of intoxication, and would have caused any reasonable fact finder to reject an expert's opinion that White was too intoxicated to form an intent to kill. White v. State, 559 So.2d 1097, 1099 (Fla.), cert. denied, 116 S.Ct. 591 (1995). At some point in time, during the beating -- during the discussion with Smith -- during the drive from the house on Surfside -- during the trip to the execution site -- during the 14 deliberate and forceful thrusts of the knife into Gracie Crawford's heart and lungs -- during the slitting of Gracie Crawford's throat, White consciously formed an intent to take the victim's life. As in White v. Singletary, 972 F.2d 1218, 1221 (11th Cir. 1992), no prejudice arose from the failure to pursue the defense of voluntary intoxication where the facts of the crime were not "consistent with a person so impaired as to be unable to form the intent required for committing the crime charged."

Moreover, the affirmative defense of intoxication would have been inconsistent with White's defense predicated upon a reasonable doubt that he did not commit the murder. As a practical matter, the defense of voluntary intoxication is no more than confession and avoidance, which was inconsistent with White's claims at trial.

During closing argument, defense counsel implored the jury to acquit if there was any reasonable doubt in their minds, arguing that White was merely guilty of assault and battery (R 747). It is not ineffective assistance to argue a "reasonable doubt" theory. See, Jennings v. State, 583 So.2d 316 (Fla. 1991); Johnston v. State, 583 So.2d 657 (Fla. 1991); Engle v. Dugger, 576 So.2d 696 (Fla. 1991); Lambrix v. State, 534 So.2d 1151 (Fla. 1988); Bertolotti v. State, 534 So.2d 386 (Fla. 1988). Trial counsel is not ineffective in failing to present inconsistent theories of defense. See, Morgan v. State, 639 So.2d 6 (Fla. 1994); Caruso v. State, 645 So.2d 389 (Fla. 1994); Elledge v. State, 1997 WL 574744 (Fla. 1997); Hegwood v. State, 575 So.2d 170 (Fla. 1991). Combs v. State, 525 So.2d 853 (Fla. 1988). White has failed to demonstrate and deficiency and resulting prejudice arising from trial counsel's tactical decisions.

In White's final claim of ineffective assistance of counsel, he sets forth one paragraph complaining about trial counsel's failure to object to purported bad act evidence and evidence creating sympathy for the victim. Decisions whether to object are "a matter of trial tactics which are left to the discretion of the attorney so long as his performance is within the range of what is expected of reasonably competent counsel." Muhammed v. State, 426 So. 2d 533, 538 (Fla. 1982). In the instant case, Kaplan's decision not to object at trial was not "so patently unreasonable

that no competent attorney would have chosen it." Haliburton v. State, 691 So. 2d 466, 471 (Fla. 1997). Moreover, White has not, and cannot, demonstrate prejudice under the facts of this case.

As to the Outlaws "guilt-by-association" theory, it is clear from the trial transcript that trial counsel used this theme to his advantage in undermining the credibility of White's co-defendant, DiMarino (TR519) (cross-examination of DiMarino that, contrary to unwritten code of Outlaws, DiMarino was only looking out for himself by testifying against his fellow Outlaw and co-defendant); (TR602) (defense direct examination testimony of John DiMarino that his brother, Richard, was the "enforcer" in the Outlaw organization); (TR730-731)(closing argument of defense counsel that the prosecutor was attempting to put the Orlando Chapter of the Outlaws on trial). As to the evidence that Sami asked to be taken home to her children, any defense objection would have been futile in light of the underlying charge of kidnaping, i.e., to refute any claim that Sami would have gone willingly to the site of her execution, and would have merely focused the jury's attention on this testimony. White has not demonstrated any deficiency and resulting prejudice under Strickland.

ISSUE IV

WHETHER THE COURT ERRED IN DENYING THE MOTION FOR TRANSCRIPTION AND REVIEW OF GRAND JURY PROCEEDINGS.

White next asserts that the trial court erred in denying his motion for transcription and review of his grand jury proceedings. It is important to put this issue in the context in which it was argued below. In White's postconviction motion, he alleged that the judge *at the time of his trial* erred in denying a motion to disclose the grand jury proceedings, and that the issue was subject to review in the postconviction stage because the intervening United States Supreme Court decision of Pennsylvania v. Ritchie, 480 U.S. 39 (1997), was a fundamental change in the law which must be applied retroactively in his case pursuant to the principles of Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067 (1980) (R. 808-809, 815). The trial court properly rejected this postconviction claim, citing this Court's ruling in Roberts v. State, 568 So.2d 1255, 1258 (Fla. 1990), which held Ritchie does not satisfy the Witt standard for retroactivity.

On appeal, however, White references the Motion for Transcription and Review of Grand Jury Testimony which he filed on September 26, 1989, eleven years after his trial (R. 814-823). White fails to mention that he had previously requested this action prior to trial, or that the trial court in fact *granted* his request as to some of the grand jury testimony, that of witness Linda

Altizer. (R. 815). Moreover, it does not appear from the instant record that his 1989 motion was ever ruled on by the trial court. Since there is no showing that the court below denied this motion, there is no claim in this regard which has been preserved for appeal.

Even if this claim is considered, White has failed to demonstrate that he is entitled to disclosure of the grand jury testimony. In order to obtain such testimony, a defendant "must show a particularized need sufficient to justify the revelation of the generally secret grand jury proceedings." Keen v. State, 639 So.2d 597, 600 (Fla. 1994). Although White has noted facts suggesting that the grand jury testimony may have been helpful at the time of trial to impeach some state witnesses, he has not shown any justification for disclosure for postconviction purposes. In addition, he has not identified with any specificity the testimony he is seeking, or shown that particular witnesses even testified before the grand jury, which indicates his request is nothing more than a speculative fishing expedition.

The cases cited by White are distinguishable and do not compel the disclosure of the grand jury testimony. In Hopkinson v. Schillinger, 866 F.2d 1185 (10th Cir. 1989), the defendant was convicted of procuring a murder, although the actual killers had not been caught. A grand jury continued to investigate the murder even after Hopkinson had been tried and convicted. In the instant

case, however, all of the targets of the original grand jury investigation had been tried and their respective roles assessed at the time of White's trial.

In Miller v. Dugger, 820 F.2d 1135 (11th Cir. 1987), the court determined that an *in camera* review was warranted by the fact that key eyewitnesses to the crime had given conflicting testimony under oath. Although White has alleged that inconsistent statements were made by Richard DiMarino and Sami Nestle, he has not identified material, sworn inconsistencies such as those in Miller. For example, he claims that Nestle made inconsistent statements about Frank Marasa's presence (R. 820), but the presence or absence of Marara is not shown to be related to White's culpability. Thus, the allegations herein do not even warrant an *in camera* review.

On these facts, White has failed to demonstrate any error in the trial court's actions regarding this claim. Therefore, he is not entitled to any relief.

ISSUE V

WHETHER THE COURT ERRED IN DENYING APPELLANT'S CLAIMS THAT THE STATE FAILED TO PROVIDE THE DEFENSE EXCULPATORY OR IMPEACHING EVIDENCE AND PRESENTED FALSE EVIDENCE.

In this issue, White alleges that the State violated Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) because the State allegedly failed to disclose evidence which would have further impeached the credibility of the chief state witness, Richard DiMarino, and failed to disclose that, shortly before her death, the victim identified several other Outlaws that she feared.

Legal Standards - Brady / Giglio

To substantiate a Brady claim, the defendant must prove: (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. Hegwood v. State, 575 So.2d 170, 172 (Fla.1991) (quoting United States v. Meros, 866 F.2d 1304, 1308 (11th Cir.1989)), Robinson v. State, 1998 WL 54134, (Fla. 1998).

To establish a Giglio violation, the defendant must show, "(1) that the testimony was false; (2) that the prosecutor knew the testimony was false; and (3) that the statement was material." Craig v. State, 685 So.2d 1224, 1226 (Fla. 1996). The prejudice prong of the Strickland standard is the same as the standard for proving materiality of evidence favorable to the accused. See Mills v. State, 684 So.2d 801, 805 n.4 (Fla. 1996); citing Bagley, 473 U.S. at 682. As previously noted, to establish a claim of ineffective assistance of counsel under Strickland, a defendant must demonstrate that counsel's performance was deficient, and that there was a *reasonable probability that but for the deficient performance, the outcome of the proceeding would have been different.*

After conducting an evidentiary hearing, the trial court found that even if White could establish a Brady violation, he failed to satisfy the requisite showing of materiality. The trial court's order denying postconviction relief on this claim provides, in pertinent part:

> **2. The State failed to disclose evidence which would have impeached the credibility of the chief state witness.**
>
> Defendant complains that the State did not inform defense counsel of all the consideration given to DiMarino in exchange for his testimony at trial in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct.1194, 10 L.Ed. 2d 215 (1963).
>
> In the 1987 Supplement, Defendant adds that the State failed to disclose a statement made by Ann Hicks

which trial counsel could have allegedly used to show that Defendant was an unwitting and drunken bystander to the murder and that he was "set up" to take the blame for the murder.

To determine whether a Brady violation has occurred sufficient to warrant a new trial, a court must decide whether the allegedly withheld evidence is material. "Evidence is material only if 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Cruse v. State, 588 So. 2d 983, 987 (Fla. 1991), cert. denied, 504 U. S. 976, 111 S.Ct. 2949, 119 L.Ed. 2d 572 (1992)(quoting United States v. Bagley, 473 U. S. 667, 682, 105 S.Ct. 3375, 3383-84, 87 L.Ed. 2d 481, 494 (1985)).

In the case at bar, White submits that, at the time of trial, counsel did not know the full detail of the agreement between the State and DiMarino in exchange for DiMarino's trial testimony including that DiMarino's girlfriend was paid a sum of money for moving expenses, that certain charges were dropped against DiMarino and that the State agreed not to pursue habitual offender penalties among other things. As discussed in footnote 2, defense counsel conducted an excellent cross-examination of DiMarino. White's attorney showed the jury that DiMarino had much to gain by his testimony. Defense counsel brought out that DiMarino lied when it was to his benefit, that he obtained a better sentencing deal via his testimony, that he would be kept safe from the Outlaws and that his girlfriend and child would be taken care of. Even though some of the details of the agreement were not presented to the jury, counsel more than sufficiently acquainted the jury with the fact that there was an agreement between DiMarino and the State and counsel introduced most of the agreement's major components. **The additional material of which Defendant now complains would not have added to DiMarino's impeachment. Consequently, this court finds there is no reasonable probability that this evidence, if it had been presented at trial, would have changed the outcome.**

Defendant also contends that the statement by Ann Hicks was improperly withheld from trial counsel. Ms. Hicks, though, was listed as witness by the State prior

to trial. Nevertheless, even if the court found a Brady violation, this evidence does not meet the test for materiality. Ms. Hicks's statement indicated that the victim was afraid of certain members of the Outlaws, which she listed by name. Allegedly Defendant's name was not on that list. Merely because the victim was allegedly unafraid of Defendant, does not mean that he did not kill her. There is simply no possibility that this evidence would have altered the outcome of the trial, especially in light of DiMarino's testimony.

For the following reasons, the trial court's well-reasoned order denying postconviction relief on White's Brady claim must be affirmed.

Co-defendant DiMarino

The written memorandum, which is now the subject of White's Brady claim, was purportedly signed by DiMarino on 11/24/78, and was filed on March 27, 1979. This memorandum states,

> Reference telephone conversation this date, Marc Lubet, attorney of record for Richard Charles DiMarino, the following items were discussed:
>
> 1- The Defendant, Richard C. DiMarino, now wishes to give a sworn statement concerning the entire involvement of all parties with respect to the murder of Gracie Mae Crawford on June 6, 1978.
>
> 2- The undersigned Assistant State Attorney explained that the State would require a complete taped statement, reduced to writing, and signed by the Defendant concerning the above facts.
>
> 3- That the State would subpoena the Defendant, Richard C. DiMarino as a State witness against the co-defendants, White and Smith, and would require further that the Defendant testify truthfully in all further court proceedings concerning the above-stated matter.

4- That the Defendant would not be given immunity for perjury, *but that immunity against further prosecution would be given for the murder of Gracie Mae Crawford.*

5- Mr. Lubet indicated that Richard C. DiMarino wishes to plead guilty to both counts in CR78-2785 and understands that he would be sentenced on each to the maximum sentence to run concurrent with CR78-1840.

6- Mr. Lubet requested further, that in return for his plea in CR78-2785, the State would not seek the enhanced punishment, to which the State agreed.

7- Mr. Lubet as indicated further that the Defendant, Richard C. DiMarino would not pursue an appeal in his murder conviction.

8- That the State would recommend that Richard C. DiMarino serve his sentence in another state.

(Def.Ex.2)

During the postconviction hearing, Kaplan agreed that the first learned DiMarino would testify at trial when Judge said all deals off, therefore knew must have been a deal. (R.109) Kaplan thought a deposition would be worthless because DiMarino gave half a dozen different statements anyway. Therefore, another statement from DiMarino would be just another piece of paper. As to the written agreement, Kaplan thought it might be just "a little more fire to attack Richard." (R.110) DiMarino was overjoyed with his sentence. Although the written agreement might assist with cross, most of time DiMarino was not telling the truth anyway; he was a prolific liar. When asked about the check to DiMarino's girlfriend, Kaplan recalled that DiMarino testified that the reason

he testified against Sniffle [sic] [White] was because he was in fear for his life and her life and, obviously, they had cut a deal. If she's not living in town, the "obviously, that statement is not worth the paper it was written on." (R.113).

During trial, DiMarino admitted that he was offered

> . . . to be sent somewhere else, away from the Outlaws. And, immunity or safekeeping for my fiancee and little boy.
> (R. 467-468)

DiMarino not only told White's jury that the State had promised not only to protect him (as well as his fiancé and their little boy) but also that the State had offered to send them "somewhere else, away from the Outlaws" (R 468), and to be "shipped out of state" to do his time (R 517). The jury was also informed that part of the arrangement included concurrent prison time on additional offenses (R. 469-470). At trial, the defense also introduced the testimony of Officer Holloman to establish that Richard DiMarino had given multiple versions of the crime and DiMarino refused to take a polygraph because he thought he might fail the test. (R. 598-599). Under the facts of this case, the jury was adequately informed of any agreement and motive for DiMarino's testimony.

DiMarino was thoroughly impeached at the time of trial. DiMarino admitted that he had been arrested 40-50 times (R. 657-658, 667) and could remember being convicted of felonies 5 to 10

times, including rape, robbery, burglary, drugs, weapons, resisting arrest (R. 674-675). DiMarino gave four different statements to Officer Holloman in which he tried to get a deal for himself. (R577-589). DiMarino admitted that he ran a scam on the officer (R. 510, 513-515, 662). At trial, Richard's brother, John DiMarino, who had never been convicted of a crime, testified that Richard was the one who admitted that he had killed Gracie and had slit her throat and stabbed her. (R. 605; 615).

There is no reasonable probability that any additional information to impeach DiMarino was material to such an extent that confidence in the reliability of White's conviction has been undermined. See, United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

Hicks' Statement

White failed to demonstrate that the Hicks' statement was withheld by the State.[9] Attorney Lehn Abrams testified that, although he had no recollection of having seen the statement during the course of his investigation of the case, it was possible that he did in fact receive it (T 29). If that is the case, then Kaplan had it, despite his lack of recollection of it (T 65), in view of Abrams' testimony that he made White's entire file available to

[9]According to the testimony of Detective Martin, the green copy of the statement which he provided to White's collateral counsel was an extra copy of the five or seven different-colored copies which would have existed in 1978 (T 45).

Kaplan at the time Judge Pfeiffer authorized the substitution of counsel (T 19).

In any event, Abrams was officially relieved of responsibility for White's case on October 24, 1978, when Judge Pfeiffer entered the Order allowing his withdrawal as counsel. At the time Abrams was relieved of responsibility for the case, a transcription of the Hicks interview had only been in existence for four days, hardly enough time for the Sheriff's Office to have provided the statement to the prosecutor so as to enable the prosecutor to have provided the statement to opposing counsel during discovery prior to Kaplan's substitution as White's counsel (T 46). Therefore, the probative value of the fact that Abrams had no recollection of the subject statement is tenuous at best. Moreover, even if Kaplan is correct in his recollection that he was never provided a copy of the statement (T 65), according to his testimony at the hearing he would not have attempted to introduce the statement in any event (T 76).[10] In addition, even if the Hicks' statement was not disclosed,[11] an allegation which the State maintains has not been proven, such evidence was neither material nor admissible. After acknowledging that the admission of the Hicks' statement "would

[10]Abrams also testified that he may not have even attempted to use the statement and that its admission would have posed a "problem" (T 30-32).

[11]As conceded by White, the existence of the subject statement could have been discovered independently by the defense as a result of the State's disclosure of Hicks as a potential witness in a supplemental witness list.

have been a problem," Lehn Abrams went on to testify that the statement might possibly have been used to discover other discoverable evidence (T 32). Kaplan also recognized the marginal utility of the statement in his retrospective assessment that he did not believe the statement "...would have been used...," irrespective of the issue of its admissibility (T 76).

Moreover, Hicks was a resident of Georgia at the time according to a supplemental witness list which was supplied to the defense prior to trial. As a consequence, her attendance at White's trial could only have been compelled following a judicial determination that her testimony was "material" to the case. Section 942.03(a), Fla. Stat. (1977). Because her hearsay testimony would have been inadmissible under Florida law, the requisite showing could not have been made in this case.

> ...[A] homicide victim's state of mind prior to the fatal incident generally is neither at issue nor probative of any material issue raised in a murder prosecution (citations omitted). Moreover, even if the victim's state of mind is relevant under the particular facts of the case, the prejudice inherent in developing such evidence frequently outweighs the need for its introduction (citation omitted).

Fleming v. State, 457 So.2d 499, 501 (Fla. 2d DCA 1984). Indeed, a homicide victim's purported statements to a third party have been deemed admissible in only three types of circumstances, i.e. where the defendant claims self defense, that the victim committed suicide, or that the victim's death was accidental, and

where the probative value of the evidence appears to overcome the possible prejudice to a defendant. Kingery v. State, 523 So.2d 1199, 1202 (Fla. 1st DCA 1988). In Selver v. State, 568 So.2d 1331, 1334 (Fla. 4th DCA 1990), the District Court recognized that:

> Statements of a murder victim that express general fear of the defendant or a concern that defendant may intend to kill the victim are generally inadmissible hearsay. Correll v. State, 523 So. 2d 562 (Fla. 1988); Kennedy v. State, 385 So. 2d 1020 (Fla. 5th DCA 1980).

The Selver decision distinguished this Court's holding in Peede v. State, 474 So.2d 808 (Fla. 1985), wherein the state of mind of the victim (her intent not to voluntarily be with the defendant) at the time the statements were made was at issue in a felony murder prosecution predicated upon an underlying felony of kidnapping. According to the statement of Ann Hicks, Gracie Crawford feared for her life because the Outlaws were aware that she knew they had recently killed another woman. Although White relies on the absence of his own name from the list of Outlaws identified by the victim, Guy Ennis Smith ("Wolf"), the club enforcer who issued the order to DiMarino and White for the execution, was specifically mentioned in the Hicks' statement. Assuming, the hearsay statement to be reliable, Gracie Crawford correctly predicted her own death at the hands of the Outlaws. In retrospect, the only inaccuracy was her failure to identify the two Outlaws who carried out Smith's orders. However, the admission of the Hicks' statement would have harmed White, not helped him.

Under the facts of this case, there is no reasonable probability that the undisclosed information was material to such an extent that confidence in the reliability of White's conviction has been undermined. See, United State v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Hence this claim was properly denied. In Kyles v. Whitley, 514 U.S. 419, 435 (1995), the Court concluded that a Brady violation is established by showing that the favorable evidence suppressed by the State "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." See Jones v. State, 23 Fla. L. Weekly S137 (Fla. Mar. 17, 1998). Considering all the evidence presented to the jury, the written agreement signed by DiMarino and the Hicks' hearsay statement cannot reasonably be taken to put the entire Orange County case in such a different light as to undermine confidence in the jury's verdict or recommendation of death. Kyles, 514 U.S. at 435; Jones, 23 Fla. L. Weekly S137.

ISSUE VI

WHETHER THE COURT PREJUDGED THE SENTENCE AND COMMUNICATED THAT DECISION TO THE STATE AND HAD THE STATE PREPARE THE ORDER SENTENCING APPELLANT TO DEATH.

White next argues that he is entitled to a new sentencing because the trial court relied on a proposed sentencing order which was submitted by the prosecutor in 1978. For the following reasons, the trial court properly denied postconviction relief on this claim.

There are actually two separate orders which were rendered by the trial court in conjunction with the imposition of White's death sentence. (TR.1638-1640 and TR.1645-1650). White alleges that he is entitled to a new penalty phase proceeding because the prosecutor drafted one of these written orders. The first order, which was apparently drafted by the prosecutor in 1978, and which is cited at pages 89-90 of White's initial brief, consists of a 2½ page document entitled "Sentence." Among other things, this written order, filed on December 20, 1978, contains a single paragraph summarizing the heinous facts of the crime, a sentence stating "I (concur in) (~~hereby overrule~~) the recommendation of the jury in this case," and a statement that the facts of this case require imposition of the death penalty. (See, TR. 1638-1640). According to the original trial judge, this 2½ page order was prepared by the State and "then I signed it when I made up my mind as to what I was going to do." (R.139).

The second written order, which is not subject to any postconviction challenge by White, is a six-page document entitled "Finding of Fact." (TR.1645-1650). In this written order, filed on December 28, 1978, it was the trial court, and *not* the prosecutor, who set forth, *inter alia*, (1) a detailed chronology of the crime, (2) an acknowledgment that the Court "is mandated by Section 921.141(5) Florida Statutes (1977) to apply the facts to certain enumerated "aggravating" circumstances and such "mitigating" circumstances as one [are] applicable in this case, (3) a listing of aggravating circumstances and a finding of three aggravating factors, (4) a delineation of mitigating circumstances, reasons why certain mitigating factors were rejected, and a recognition that the "sentence to be pronounced must be based on the totality of the evidence, as applied to the enumerated "aggravating" circumstances and such "mitigating" circumstances [as] are applicable," and, (5) in conclusion, a finding, "based on the aggravating circumstance far outweighing the mitigating circumstances" that the death sentence is the only appropriate penalty. (TR.1645-1650).

In denying postconviction relief on this issue, the trial court explained,

> White cites Patterson v. State, 513 So. 2d 1257 (Fla. 1987), in support of his allegation that this action was improper. This claim is without merit. Patterson was decided well after Defendant's sentencing herein and it is not such a change in the law under the standard applied in Witt v. State, 387 So. 2d 922 (Fla.), cert. denied, 499 U. S. 1067, 101 S.Ct. 796, 66 L.Ed. 2d 612 (1980), as to merit retroactive application. More

importantly, Patterson does not mandate that the court itself must prepare the order.

Decisions which constitute nothing more than evolutionary refinements in the law, as defined by the standard enunciated in Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 499 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980), should not be retroactively applied in post-conviction proceedings. Furthermore, the Patterson decision relied on Nibert v. State, 508 So.2d 1 (Fla. 1987), wherein this Court only

> ...*strongly urged* trial courts to prepare their own written statements of the findings in support of the death penalty, commenting that the failure to do so does not constitute reversible error so long as the record reflects that the trial judge made the requisite findings at the sentencing hearing (e.s.,citation omitted).

Patterson v. State, 513 So.2d at 1262.

In 1978, the trial court -- consistent with the practice at that time of trial and for years thereafter -- had a written order prepared at the time of orally pronouncing sentence. See Grossman v. State, 525 So.2d 833, 841 (Fla. 1988)(". . . we consider it desirable to establish a procedural rule that all written orders imposing a death sentence be prepared prior to the oral pronouncement of sentence for filing concurrent with the pronouncement")(e.s.). Indeed, in Palmes v. State, 397 So.2d 648, 656 (Fla. 1981), this Court found no error in the trial court's use of a prepared order, stating,

> Appellant contends that the record shows that the judge did not consider the evidence offered in mitigation. After adjudicating appellant guilty, the court set a time for the sentencing hearing and meanwhile ordered a presentence investigation. At the sentencing hearing, after hearing all the evidence and argument, the judge stated her findings, which she read from a pre-prepared order. Appellant argues this shows no consideration was given to his evidence and argument offered at that hearing. <u>The fact that the judge recited findings from an order prepared before the final sentencing hearing does not compel the conclusion that she did not give the required consideration to the evidence presented by the defense.</u> All of the court's findings of aggravating circumstances were based on evidence that was adduced at the trial proper. <u>Thus there was nothing wrong with her having these findings and considerations in mind at the start of the sentencing hearing. The fact that the pre-prepared order found that there were no mitigating circumstances does not show that the judge did not consider the evidence and argument offered in mitigation. The recitation and filing of the sentencing findings merely indicate that the court concluded that nothing presented by the defense at the hearing required her to add to or change her pre-prepared findings.</u>
>
> (e.s.) 397 So. 2d at 656.

Fifteen years <u>after</u> White's sentencing, this Court also promulgated <u>Spencer v. State</u>, 615 So.2d 688 (Fla. 1993), adding for the first time the requirement of an intervening recess after hearing evidence and argument for preparation of written findings. Subsequently, in <u>Armstrong v. State</u>, 642 So.2d 730 (Fla. 1994) this Court rejected a defense contention that preparation of an order before sentencing hearing constituted an impermissible

predetermination of sentence without hearing argument and evidence since the court allowed Armstrong to present additional evidence at sentencing, and Spencer was only a change in procedure to be applied prospectively. See also Card v. State, 652 So.2d 344, 345 (Fla. 1995); Layman v. State, 652 So.2d 373, 376 n 5 (Fla. 1995).

The original trial judge testified that he signed the 2½ page proposed order only "when I made up my mind as to what I was going to do" and it was the trial judge who prepared the six-page order setting forth the explicit "findings of fact" supporting the imposition of the death penalty in 1978. Under the facts of this case, and the law in effect at the time of White's trial and sentencing, postconviction relief was properly denied.

Lastly, as to White's complaints concerning a purported "buzzing" sound and the reading of prayers attributed to famous American patriots, White can demonstrate no entitlement to relief on either procedurally barred claim. At the time of trial, the defense neither objected to the actions of the trial judge, nor sought to recuse the trial judge on the basis of any perceived bias. Even in retrospect, defense counsel agreed that the judge's actions did not cause them to believe that their client would not receive a fair trial before Judge Pfeiffer.

During the evidentiary hearing, White established that prayers or famous quotations were read to the jury by Judge Pfeiffer during White's trial (T 24, 37-38). Marc Lubet testified that Judge

Pfeiffer read prayers during DiMarino's trial as well (T 118-119)

Based upon the authority of March v. State, 458 So. 2d 308 (Fla. 5th DCA 1984), it is clear that such judicial conduct does not necessarily constitute error,[12] that any impropriety is subject to harmless error analysis,[13] and, most importantly, that such a claim of error is properly raised on direct appeal rather than on collateral review.[14] Rule 3.850 "does not authorize relief based on grounds that could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence." Moreover, even if the issue were properly cognizable on collateral review and not procedurally barred, any error in this regard was harmless given the fact that there is no reasonable probability that the error, if any, contributed to the jury's 12-0 verdict.

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[12]"It should be clear that we do not criticize the proper use of prayers, including recognition of a supreme being, in the opening of judicial or legislative sessions." March v. State, 458 So. 2d at 310.

[13]March's judgments of convictions were affirmed on the basis of harmless error analysis. March v. State, 458 So. 2d at 311.

[14]Defendant March objected to the prayers read during his trial. March v. State, 458 So. 2d at 309.

ISSUE VII

WHETHER APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE.

White now argues that his sentence is disproportionate to the sentences received by his codefendants, Smith and DiMarino, and, therefore, he should be sentenced to life imprisonment. For the following reasons, this claim must be denied.

White's claim of "disparate" treatment in sentencing is merely a resurrection of arguments which were raised and rejected on direct appeal. White v. State, 415 So. 2d 719 (Fla. 1982). In 1981, this Court implicitly rejected any argument that Guy Smith was dominant in this murder when it reduced Smith's death sentence to life in prison. Smith v. State, 403 So.2d 933 (Fla. 1981). In affirming White's conviction and death sentence the following year, this Court specifically noted that "we are fully aware that DiMarino escaped with a conviction of a third-degree murder. While this is fortunate for him, it does not require the reduction ow White's sentence. White was the executioner, and his sentence is warranted." 415 So. 2d at 720. Matters that have been raised on direct appeal of the conviction and sentence cannot be relitigated in a postconviction motion. Harvey v. Dugger, 656 So.2d 1253 (Fla. 1995).

Furthermore, White does not identify where he raised this claim in his postconviction motion and the trial court's comprehensive order does not address this particular issue. Since there is no

showing that the court below denied this issue, there is no claim in this regard which has been preserved for appeal. Nevertheless, relying on Scott v. Dugger, 604 So. 2d 465 (Fla. 1992), White claims that this Court should now reduce his sentence to life imprisonment. This Court's decision in Scott is of no benefit to White. In Scott, this Court held that "in a death case involving *equally culpable* codefendants the death sentence of one codefendant is subject to collateral review under rule 3.850 when another equally culpable codefendant subsequently receives a life sentence." 604 So. 2d at 469. Scott received postconviction relief because this Court affirmed Scott's death sentence before his co-defendant was sentenced to life in prison. In this case, White's death sentence was affirmed on direct appeal after Smith's sentence was reduced to life and this Court specifically rejected White's argument that his sentence should be reduced in light of DiMarino's third-degree murder conviction and sentence. When co-defendants are not equally culpable, the death sentence of the more culpable co-defendant is not unequal justice when another co-defendant receives a life sentence. Steinhorst v. Singletary, 638 So. 2d 33, 35 (Fla. 1994).

ISSUE VIII

WHETHER THE COURT ERRED IN STRIKING PROCEDURALLY BARRED CLAIMS WITHOUT AN EVIDENTIARY HEARING.

In his final claim, White sets forth a volley of shotgun arguments, contending that the trial court erred in summarily denying his remaining grounds for postconviction relief. All of White's remaining claims were procedurally barred, therefore, the trial court's summary denial of postconviction relief on these remaining issues must be affirmed. See, Robinson v. State, 1998 WL 54134 (Fla., Feb. 12, 1998); Mills v. State, 684 So.2d 801 (Fla. 1996). In Mills, the defendant also contended that the trial court reversibly erred when it summarily denied relief without attaching those portions of the record conclusively showing that he was entitled to no relief. Fla. R.Crim. P. 3.850(d). Because the trial court specifically found the issues raised by Mills "procedurally barred as representing matters which were or could have been raised previously for the reasons contained [in] the State's Response," this Court found no reversible error. 684 So.2d at 804.

The trial court's order denying postconviction relief on White's remaining claims states, in pertinent part:

> 6. **Denial of right to counsel during the first day of trial.**
>
> White alleges that his trial counsel was not a member of the Florida Bar and that the Integration Rule of the Florida Bar, Article II, paragraph 2, was violated on the first day of trial. The Integration Rule provided that a non-Florida Bar member who appeared in Florida was required to be associated with an active member of the

Florida Bar. In recognition of this Rule, on the second day of trial, the court appointed White's original counsel, a member of the Public Defender's Office, to serve as advisory counsel to White's trial counsel. As a result, Defendant argues that because his counsel was not authorized to practice in Florida, Defendant was effectively without counsel during the first day of trial.

This issue should have been raised on initial appeal and hence, is not a proper matter for consideration under rule 3.850, Florida Rules of Criminal Procedure. Mikenas v. State, 460 So. 359 (Fla. 1984). This is not a claim of ineffective counsel which is cognizable in a 3.850 motion but rather a claim involving the right to counsel. Clearly, this is an issue that should have been raised on appeal.

7. **Defendant was deprived of the right to have his mental state considered as a mitigating circumstance because of the erroneous application of sanity-insanity legal principles.**

This claim was stricken at the 1987 hearing. This claim should have been raised on appeal.

8. **The trial court only considered statutory mitigation and failed to considered the non-statutory mitigation.**

This claim was also stricken at the 1987 hearing. It should have been raised on appeal.

9. **The sentencing proceedings were unreliable because of the residual doubt concerning Defendant's guilt.**

This claim was stricken at the 1987 hearing. It should have been raised on appeal.

10. **On its face and as systematically applied, the Florida death penalty statute violates the eight and fourteenth amendments.**

Again, this claim was stricken at the 1987 hearing. It should have been raised on appeal.

11. **Defendant was deprived of a fair and reliable sentencing determination because the prosecutor and judge diminished the jury's sense of responsibility for**

sentencing in violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985).

This claim was also stricken at the 1987 hearing. This issue must be raised on direct appeal. Berolotti v. State, 534 So. 2d 386, 387 n.2 (Fla. 1988); Jones v. Dugger, 533 So. 2d 290, 292 (Fla. 1988).

* * *

14. **The State improperly sought sympathy for the deceased because of her surviving children.**

Again, Defendant recognizes that this issue is procedurally barred but states that it should be considered because of fundamental error or a change in the law based on Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed. 2d 440 (1987), overruled by Payne v. Tennessee, 501 U. S. 808, 111 S.Ct. 2597, 115 L.Ed. 2d 720 (1991)(some victim impact evidence proper during the penalty phase).

Defendant is wrong. Prior to Payne, the Florida Supreme Court held that Booth should be applied retroactively; but even so, the error must still be preserved by objection. See Mills v. Dugger, 574 So. 2d 63 (Fla. 1990). Here, there was no objection to the allegedly improper comments made during the innocence-guilt phase of the trial. Further, the two statements which Defendant finds improper are not of such a magnitude as to be fundamental error. The statements neither became the focus of the trial nor rose to the level of error as found in Booth. Therefore, this claim is without merit.

15. **The trial court erred in accepting defense counsel's waiver of the intoxication defense without a personal inquiry of defendant.**

Once again, this issue is procedurally barred, but White avers he is entitled to raise this claim because it is based upon fundamental error or a change in the law citing Harris v. State, 438 So, 2d 787 (Fla. 1983), cert. denied, 466 U. S. 963, 104 S.Ct. 2181, 80 L.Ed. 2d 563 (1984)(requires a defendant's express waiver of jury instructions concerning lesser included offenses). This court finds that the waiver was not fundamental error. Moreover, Harris, even if applicable in the instant

situation, is not such a change in the law as to be retroactively applied under the analysis set forth in Witt v. State, 387 So. 2d 922 (Fla.), cert. denied, 449 U. S. 1067, 101 S. Ct. 796, 66 L.Ed. 2d 612 (1980).

16. **The trial court erred in allowing numerous theories of felony murder to go to the jury which were not defined and not supported by evidence.**

This issue should have been raised on initial appeal and accordingly, is not a proper matter for consideration under rule 3.850, Florida Rules of Criminal Procedure. Mikenas v. State, 460 So. 2d 359 (Fla. 1984).

17. **The trial court erred in failing to inform the jury that life imprisonment meant no possibility of parole for twenty-five years.**

This issue should have been raised on initial appeal and hence, is not a proper matter for consideration. Id.

18. **The trial court erred in discussing appellate review in the presence of the jury prior to the penalty phase.**

Again, this issue should have been raised on initial appeal and therefore, is procedurally barred.

19. **The trial court erred in instructing the jury that mitigating circumstances must outweigh aggravating circumstances in order to return a life sentence.**

Defendant argues that this is fundamental error or a change in the law based on inter alia, Adamson v. Ricketts, 865 F. 2d 1011 (9th Cir. 1988), cert. denied sub nom. Lewis v. Adamson, 497 U. S. 1031, 110 S.Ct 3287, 111 L.Ed 2d 795 (1990). Nevertheless, the supreme court has indicated otherwise and has stated that Adamson is not such a change in the law to require retroactive application. Roberts v. State, 568 So. 2d 1255, 1258 (Fla. 1990).

20. **The trial court erred in instructing the jury not to consider sympathy.**

And, once more, White attempts to avoid the procedural bar by contending that this is fundamental error or based on a change in the law, citing Parks v.

Brown, 860 F.2d 1545 (10th Cir. 1988), rev'd sub nom., Saffle v. Parks, 494 U. S. 484, 110 S.Ct. 1257, 108 L.Ed. 2d 415 (1990). And, once more, the Florida Supreme Court disagrees. Roberts v. State, 568 So. 2d 1255, 1258 (Fla. 1990).

Because all of these claims were procedurally barred, the trial court did not err in summarily denying postconviction relief. Mills, supra.

CONCLUSION

Based on the foregoing arguments and authorities, the trial court's order denying postconviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Steven H. Malone, Assistant Public Defender, Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Florida 33401, this 28th day of May, 1998.

COUNSEL FOR STATE OF FLORIDA