IN THE SUPREME COURT OF FLORIDA

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| ROBERT ANTHONY PRESTON, JR.<br><br>Appellant,<br><br>v.<br><br>JAMES McDONOUGH,<br>Interim Secretary,<br>Florida Department of<br>Corrections.<br><br>Appellee. | CASE NO. SC05- |

**RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS**

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## PROCEDURAL HISTORY

Earline Walker was murdered on January 9, 1978. She was found, nude and mutilated, in an open field approximately one-quarter mile from Preston=s home. She had been abducted from a convenience store in the early hours of the morning. Preston was convicted of premeditated murder, felony murder committed in the course of a robbery, felony murder committed in the course of a kidnapping, robbery, and kidnapping. The jury recommended a sentence of death by a margin of 7-5. The trial judge followed the jury recommendation and found three aggravating circumstances:

1. Prior violent felony (throwing deadly missile);
2. Committed during a felony (robbery and kidnap);
3. Heinous, atrocious and cruel (victim kidnapped, driven 1.5 miles, walked at knife point 500 yards cut throat, numerous stab wounds, cross on forehead);
4. Cold, calculated and premeditated.

The trial judge found no mitigating circumstances, even though Preston had argued he was under the influence of extreme mental or emotional disturbance, did not have the capacity to appreciate criminality and was substantially impaired, and his age should be considered statutory mitigation. This Court affirmed the death sentence, but struck the aggravating circumstance of cold, calculated and premeditated. *Preston v.*

*State*, 444 So. 2d 939 (Fla. 1984). In affirming, the Court made the following fact findings:

> Early in the afternoon on January 9, 1978, the nude and mutilated body of Earline Walker was discovered in an open field in Seminole County by a detective of the Altamonte Springs Police Department. The victim's body had sustained multiple stab wounds and lacerations resulting in near decapitation.
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> Earline Walker was employed as a night clerk at a convenience store and had been discovered missing from the store at approximately 3:30 A.M. when an officer of the Altamonte Springs Police Department made his regular patrol. The officer also found that the sum of $574.41 was missing from the store. The appellant, Preston, was arrested on the following day on an unrelated charge. While he was in the custody of the Seminole County Sheriff, a deputy recovered a light brown pubic hair from Preston's belt buckle. Police also found a jacket of Preston's and several detached food stamp coupons in Preston's bedroom at his mother's house the day after his arrest during a search conducted after the police had received Preston's mother's consent. Comparison of the serial numbers on the food stamps recovered from the wastebasket in Preston's bedroom with those on two coupon booklets turned over to the police by an employee of the convenience store showed four matching coupons. In addition, fracture pattern analysis confirmed the coupons had been used at the convenience store to make purchases several days before the murder. No latent fingerprints were obtained from these sources.
>
> Analysis revealed that the pubic hair recovered from Preston's belt and another discovered on his jacket could have originated from the victim. Blood samples taken from the victim and Preston were compared with two stains found on Preston's jacket. The stains proved to be of the same blood type and same enzyme group as those of the victim. In processing the victim's automobile, which had been found abandoned on the day of the murder, several usable latent fingerprints were obtained. One was identified as being Preston's.

*Preston*, 444 So. 2d at 941-942.

Preston filed a Rule 3.850 motion to vacate during his first death warrant. After an evidentiary hearing, relief was denied. Denial of the motion was affirmed by this Court. *Preston v. State*, 528 So. 2d 896 (Fla. 1988).

After a second death warrant was signed, Preston filed a habeas petition/coram nobis based on Anewly discovered evidence@ that Preston=s brother, Scott, actually murdered Earline Walker. The trial court denied relief and this Court affirmed. *Preston v. State*, 531 So. 2d 154 (Fla. 1988); *cert. denied* 489 U.S 1072. (1989). In affirming, this Court made the following additional findings of fact:

> Earline Walker, who was working as a night clerk at the Li'l Champ convenience store in Forest City, was noticed missing at approximately 3:30 a.m. on the morning of January 9, 1978. All bills had been removed from the cash register and the safe, and it was subsequently determined that $574.41 had been taken. Walker's automobile was found later that day parked on the wrong side of the road approximately one and a half miles from the Li'l Champ store. Thereafter, at about 1:45 p.m. of the same day, Walker's nude and mutilated body was discovered in an open field adjacent to her abandoned automobile.
>
> Preston lived with his brothers, Scott and Todd, at his mother's home which was located about one-quarter of a mile from the field in which Walker's body was found. Scott Preston testified that he spent the evening of January 8, 1978, at the house with his brothers and his girlfriend, Donna Maxwell. At about 11:30 p.m., he retired to the bedroom with Donna. About an hour later, Robert knocked on the door,

asking Scott to go with him to the Parliament House "to get some money." When Scott declined, Robert asked one of them to help him inject some PCP. After Scott and Donna refused to do so, they heard the door slam as Robert left the house. At about 4:30 a.m., Robert returned and asked them to come to the living room where he was attempting to count some money. Because he "wasn't acting normal," they counted the money for him, which came to $325. Robert told them that he and a friend, Crazy Kenny, had gone to a gay bar called the Parliament House where they had hit two people on the head and taken their money. Scott and Donna went back to bed. Donna gave similar testimony concerning Robert's actions. She also said that shortly before 9:00 a.m., Robert returned and told her that he had heard that a body of a woman who worked in a store near their house had been discovered in a field.

The head security guard at the Parliament House testified that he observed no disturbance nor was any disturbance reported to him at that establishment during his shift which began in the early evening on January 8 and ended at 5:00 a.m. on January 9. There was no police report of any incident at the Parliament House on January 9, 1978.
A woman returning home from her late night job at about 2:20 a.m. saw Preston wearing a plaid CPO jacket at a location near the vacant lot where Walker's body was found.

Preston was arrested the day following the murder on an unrelated charge. As part of the booking process, his personal effects, including his belt, were removed, and his fingerprints were taken. A pubic hair was discovered entangled in Robert's belt buckle. A microscopic analysis of the hair together with another one discovered on his jacket indicated that they could have originated from Walker's body.

Blood samples were taken from the victim and from Preston and compared with two blood stains found on Preston's CPO jacket. The blood samples were compared as to eight separate factors, including type, Rh factor, and enzyme content. The sample from the coat and the victim matched in all eight tests, while Preston's blood did not match in three. An expert opined that the blood on the coat could not have been

> Preston's but could have been the victim's. He also testified that only one percent of the population would have all eight factors in their blood.
> Several detached food stamps were also found in Preston's bedroom pursuant to a consent search authorized by his mother. As a result of a fracture pattern analysis, an expert witness testified that these coupons had been torn from a booklet used by Virginia Vaughn to make purchases at the Li'l Champ food store several days before the murder. Vaughn testified that at the time of her purchase the coupons had been placed either in the cash register or the safe.
>
> Five usable latent fingerprints and palm impressions were obtained from Walker's automobile and were identified as having been made by Preston. One of these was from a cellophane wrapper of a Marlboro cigarette pack found on the front console. The other prints were located on the doorpost and the roof of the car. Preston took the stand in his own behalf. He agreed that he was at his mother's house in the company of his brothers and Donna Maxwell the night of January 8. However, he said he had injected PCP and had no recollection of what occurred during the middle portion of the night. He did recall trying to count some money and had some recollection of going to the Parliament House in a car driven by Crazy Kenny. Preston denied having touched Walker's abandoned automobile. He also said that he had not been in the vicinity of the Li'l Champ store for approximately six months before the murder. He testified that the food stamps discovered in his room were found by him on a path behind the Li'l Champ store on the morning of the murder when he went there to purchase cigarettes. He admitted talking to Donna Maxwell regarding the discovery of the store clerk's body but said that the conversation did not occur until about 3:30 to 4:30 p.m.

*Preston v. State*, 531 So. 2d at 155 -157 (Fla. 1988).

Preston filed a second Rule 3.850 motion for postconviction relief because the underlying felony for the Aprior violent@ aggravating circumstance had been vacated. Pursuant to *Johnson*

*v. Mississippi*, 486 U.S. 578 (1988), this Court vacated Preston=s death sentence and remanded for re-sentencing. *Preston v. State*, 564 So. 2d 120 (Fla. 1990). After a re-sentencing hearing on January 28, 1991, the jury recommended the death penalty by a margin of 9-3. The trial judge granted a new sentencing hearing when it was discovered one of the jurors had not accurately responded in *voir dire*. On April 15, 1991, the jury recommended the death sentence by a vote of 12-0 after the third penalty phase. The trial judge followed the jury=s recommendation and sentenced Preston to death on May 8, 1991. The trial court found four aggravating circumstances:

1. During commission of kidnapping;
2. Committed to avoid arrest;
3. Pecuniary gain;
4. Heinous, atrocious and cruel.

The trial judge held there was no extreme emotional disturbance and Preston=s capacity to appreciate the criminality of his conduct was not impaired. The trial court gave minimal weight to Preston=s age of 20 and found he was not a mere accomplice. As non-statutory mitigation, the trial court found Preston had a difficult childhood, a good prison record, and a good potential for rehabilitation. This Court affirmed the death sentence. *Preston v. State*, 607 So.2d 404 (Fla. 1992), *cert. denied,* 507 U.S. 999 (1993).

Preston filed a third Rule 3.850 motion for postconviction relief on May 23, 1994. The motion was amended March 22, 1995, and February 28, 2000. By order dated September 20, 2000, the trial judge granted an evidentiary hearing on selected claims. Preston filed an amended Claim 41 and a new Claim 42 based on *Ring v. Arizona,* 536 U.S. 584 (2002). The evidentiary hearing on the Rule 3.851 took place on January 7 and 27, 2004. The trial judge denied relief on all claims in a comprehensive order dated March 31, 2005. The denial of the Rule 3.851 claims is currently pending appeal in this Court. Case No. SC05-781.

## CLAIMS

**Claim 1. *RING V. ARIZONA* DID NOT RENDER FLORIDA'S DEATH PENALTY STATUTE UNCONSTITUTIONAL.**

This claim was raised as Claim 42 of the Rule 3.850 motion for postconviction relief and is raised as Argument 6 in the appeal presently pending before this court. Case No. SC05-781. Habeas corpus petitions are not to be used for additional appeals on questions which could have been or were raised on appeal or in a rule 3.850 motion. *See Hardwick v. Dugger*, 648 So. 2d 100, 105 (Fla. 1994); *Rodriguez v. State*, 31 Fla.L. Weekly S39, 49 (Fla. May 26, 2005).

Furthermore, the trial court found the aggravating circumstance of during-a-kidnapping, thus taking Preston outside the application of *Ring.* A unanimous jury found Preston guilty

beyond a reasonable doubt of kidnapping, thereby satisfying the mandates of the United States and Florida Constitutions. *See Kimbrough v. State*, 886 So. 2d 965, 984 (Fla. 2004); *Doorbal v. State*, 837 So. 2d 940, 963 (Fla.), cert. denied, 539 U.S. 962 (2003).

The United States Supreme Court's recent decision in *Schriro v. Summerlin*, 542 U.S. 348 (2004), held that the decision in *Ring* is not retroactive. A majority of this Court has also concluded that Ring does not apply retroactively in Florida to cases that are final, under the test of *Witt v. State*, 387 So. 2d 922 (Fla. 1980). *See Johnson v. State*, 904 So. 2d 400, 412 (Fla. 2005). Accordingly, Preston's *Ring* claims are procedurally barred in these postconviction proceedings.

Further, this Court has rejected similar claims that *Ring* requires aggravating circumstances be alleged in the indictment or to be individually found by a unanimous jury verdict. See *Blackwelder v. State*, 851 So. 2d 650, 654 (Fla. 2003); *Porter v. Crosby*, 840 So. 2d 981, 986 (Fla. 2003). Thus, Preston is not entitled to postconviction relief on his *Ring* claims. *Walls v. State,* 31 Fla. L. Weekly S101 (Fla. Feb. 9, 2006).

**Claim 2. *CALDWELL V. MISSISSIPPI* DOES NOT RENDER FLORIDA'S DEATH PENALTY STATUTE UNCONSTITIONAL.**

This issue was not raised at trial is procedurally barred.

*Dufour v. Crosby*, 905 So.2d 42 (Fla. 2005). Appellate counsel is not ineffective for failing to raise issues not preserved for appeal. *See Medina v. Dugger*, 586 So. 2d 317, 318 (Fla. 1991); *Roberts v. State*, 568 So. 2d 1255, 1261 (Fla. 1990). This issue was raised in the first Rule 3.850 appeal, and this Court held:

> Relying upon the rationale of *Caldwell v. Mississippi*, 472 U.S. 320, 86 L. Ed. 2d 231, 105 S. Ct. 2633 (1985), appellant further asserts that the judge's instructions to the jurors misled them with respect to the significance to be attached to their sentencing verdict. Appellant cannot now raise this claim, not only because there was no objection interposed at the trial but because the issue was not raised in his direct appeal. Moreover, even if the claim were not procedurally barred, it could not be sustained on the merits. *See Combs v. State*, 525 So.2d 853 (Fla. 1988); *Grossman v. State*, 525 So.2d 833 (Fla. 1988).

*Id.* at 899. This issue is procedurally barred and has no merit.

This Court has repeatedly rejected objections based on *Caldwell v. Mississippi*, 472 U.S. 320 (1985), to Florida's standard jury instructions. *See Sochor v. State*, 619 So. 2d 285, 291 (Fla. 1993); *Turner v. Dugger*, 614 So. 2d 1075, 1079 (Fla. 1992). *Mansfield v. State/Crosby*, 30 Fla. L. Weekly S598 (Fla. July 7, 2005). Since this issue has no merit, counsel cannot be ineffective. If a legal issue 'would in all probability have been found to be without merit' had counsel raised the issue on direct appeal, the failure of appellate counsel to present the meritless issue will not render appellate counsel's performance

ineffective." *Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000); (quoting *Williamson v. Dugger*, 651 So. 2d 84, 86 (Fla. 1994)). This is generally true with regard to issues that would have been found to be procedurally barred had they been presented on direct appeal. *See id.* Moreover, appellate counsel is not required to present every conceivable claim. *See Atkins v. Dugger*, 541 So. 2d 1165, 1167 (Fla. 1989).

**Claim 3. WHETHER PRESTON IS COMPETENT TO BE EXECUTED IS NOT REVIEWABLE AT THIS TIME SINCE THERE IS NO ACTIVE DEATH WARRANT.**

Preston alleges no facts in support of this allegation, nor did he offer any support of this claim at the trial court. In fact, he even concedes that this claim is not ripe for consideration at this time. (Habeas petition at p. 17). *See Thompson v. State*, 759 So. 2d 650, 668 (Fla. 2000); *Provenzano v. State*, 751 So. 2d 37 (Fla. 1999); Fla. R. Crim. P. 3.811(d). This claim has no merit. *Johnson v. State*, 804 So. 2d 1218, 1225-1226 (Fla. 2001).

**Claim 4. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ARGUE AN ISSUE WHICH WAS NOT PRESERVED TRIAL AND HAS NO MERIT.**

Preston claims appellate counsel was ineffective for failing to raise the issue that Florida's rule prohibiting counsel from interviewing jurors is unconstitutional. Preston acknowledges that he raised this claim in his Rule 3.850 motion as Claim 8, and the trial judge found the issue procedurally barred (Habeas Petition at 19). The issue is concurrently raised in the Rule 3.850 postconviction appeal pending in this court. Case No. SC05-781.

Habeas corpus petitions are not to be used for additional appeals on questions which could have been or were raised in a rule 3.850 motion. See *Hardwick v. Dugger*, 648 So. 2d 100, 105 (Fla. 1994); *Rodriguez v. State*, 31 Fla. L. Weekly S39, 49 (Fla. May 26, 2005).

Preston has alleged no suspicion of misconduct which would require interviews. Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar prohibits a lawyer from initiating communication with any juror regarding a trial with which the lawyer is connected, except to determine whether the verdict may be subject to legal challenge. The rule provides that the lawyer "may not interview the jurors for this purpose unless the lawyer has reason to believe that grounds for such challenge may

exist." R. Regulating Fla. Bar 4-3.5(d)(4)1. Before conducting such an interview, the lawyer must file a notice of intent to interview, setting forth the name of the juror to be interviewed. The lawyer must also deliver copies of the notice to the trial judge and opposing counsel a reasonable time before the interview. This Court has cautioned "against permitting jury interviews to support post-conviction relief" for allegations which focus upon jury deliberations. *Johnson v. State,* 593 So.2d 206, 210 (Fla. 1992) (stating that "it is a well settled rule that a verdict cannot be subsequently impeached by conduct which inheres in the verdict and relates to the jury's deliberations").

[1] Preston also challenges new Rule 3.575, Fla.R.Crim.P. which limits juror interviews. As stated in the court commentary, this rule does not abrogate the Florida Bar rule. Furthermore, even if this rule applied retroactively to Preston, he cannot meet the time limits in that rule.

## CONCLUSION

WHEREFORE, based upon the foregoing arguments and authorities, the Respondent respectfully requests that the petition for writ of habeas corpus be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. mail to **Robert T. Strain**, CCRC - Middle, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619, this _____ day of February, 2006.

_____
Assistant Attorney General

## CERTIFICATE OF FONT

I hereby certify that a true and correct copy of the foregoing Answer Brief was generated in Courier New, 12 point font, pursuant to Fla. R. App. 9.210.

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Assistant Attorney General