IN THE SUPREME COURT OF FLORIDA

EDWARD D. KENNEDY,

Appellant,

v. CASE NO. 71,678

STATE OF FLORIDA,

Appellee.

_____/

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Edward Kennedy was the defendant in the trial court and will be referred to herein as Kennedy. The State of Florida was the prosecution below and will be referred to herein as the State. Kennedy is appealing the denial of a Rule 3.850 motion for post conviction relief. The record on appeal includes a transcript of a hearing conducted before Judge Charles Mitchell on May 20, 1987 and eight (8) volumes of pleadings and appendix and will be designated by the symbol "R" followed by the appropriate page number in parentheses. References to the original trial transcript will be designated by the symbol "T" followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE

Edward Kennedy was convicted and sentenced to death for the murder of Floyd H. Cone, Jr. and Robert P. McDermon on December 4, 1981. The judgments and sentences were reviewed by this Court on direct appeal and affirmed. **Kennedy v. State,** 455 So.2d 351 (Fla. 1984). The United States Supreme Court denied certiorari on January 21, 1985. **Kennedy v. Florida,** _____ U.S. _____, 105 S.Ct. 981 (1985). Governor Bob Graham signed Mr. Kennedy's death warrant on January 16, 1986 and execution was scheduled for 7:00 a.m., February 18, 1986. On February 3, 1986, Mr. Kennedy filed an application for writ of habeas corpus in this Court alleging an issue which had previously been litigated at trial and on direct appeal. This Court denied Mr. Kennedy's application for writ of habeas corpus on February 12, 1986. **Kennedy v. Wainwright,** 483 So.2d 424 (Fla. 1986). Mr. Kennedy then filed an application for stay of execution pending review of a petition for writ of certiorari in the United States Supreme Court on February 13, 1986. **Kennedy v. Wainwright,** Case No. A-622, on February 14, 1986, Mr. Kennedy served undersigned counsel with a motion to vacate judgment and sentence as provided in Rule 3.850, Fla.R.Crim.P., to be filed in the Circuit Court of Florida, Fourth Judicial Circuit in and for Duval County, Florida. A hearing was scheduled for 10:00 a.m., Saturday, February 15, 1986, before retired Circuit Court Judge John McNatt. On February 14, 1986, the United States Supreme Court granted Mr.

Kennedy a stay of execution until such time as a petition for writ of certiorari is considered and denied. Mr. Kennedy then withdrew his original motion to vacate judgment and sentence. Mr. Kennedy then filed a petition for writ of certiorari in the United States Supreme Court on June 11, 1986. The United States Supreme Court denied this second petition on October 14, 1986. **Kennedy v. Wainwright,** ____ U.S. ____, 107 S.Ct. 291 (1986). Mr. Kennedy then filed his motion to vacate judgment and sentence on January 2, 1987. Circuit Court Judge Charles Mitchell entered an order directing the State to show cause why the relief requested should not be granted on April 17, 1987, and scheduled a hearing on this matter for 1:00 p.m., May 20, 1987. On September 4, 1987, the Circuit Court denied Kennedy's motion for post conviction relief. (R 1474-82). Kennedy filed a motion for rehearing on September 15, 1987 (R 1483), which was denied on November 18, 1987. (R 1492). Kennedy filed his notice of appeal on December 17, 1987.

STATEMENT OF THE FACTS

Kennedy notes that the trial judge told the jury during **voir dire** that they would render an advisory sentence to the court which was not binding. (T 121). However, the Court then reminded the jurors that their very qualification to sit as jurors in this case would depend on their capability of recommending a death sentence. The Court instructed them to "please examine your own conscience if you are called to the jury box and tell the attorneys and me if, measured by that standard, you feel that you are not qualified to serve as a juror in this case". (R 122-123). Later, the prosecutor reminded the venire that the penalty recommendation would not be binding on Judge Mitchell. However, the prosecutor went on to say that:

> "It's a recommendation and it's important, but it's a recommendation. Now, the reason it's important is that you understand that is because if you vote for guilty of murder in the first degree, you must understand that **you** in a very real sense subject this defendant to the possibility of him going to the electric chair, no matter what you do later on; do you understand that question?"
>
> "If you convict him, it is within your power to control the sentence **totally.** You can recommend; do you understand that?"

(T 168).

During closing argument in the penalty phase, prosecutor's stated to the jury:

> "It's been a long week; it started off Monday morning on what we call **voir dire** examination of the jury, and, we started off talking about death, death.
>
> And, I know you've had your fill of death this week, talking about death.
>
> And, I questioned you about could you do this, and, I saw yesterday -- I watched you all come out yesterday; I saw the expressions on your faces. I saw the hurt, dissappointment, sadness in your faces that you were involved and had to be involved in such an **awesome duty, awesome responsibility**".

(R 1163, 1164).

The prosecutor later argued that:

> "Ladies and gentlemen, I submit to you if you listen to the judge's instructions on aggravation and mitigation, you're not going to have any choice. You're going to have to come back in here and recommend death.
>
> And I know it's an **awesome responsibility**, but that judge up there is going to have to make the decision in this case before to long, and, that's an **awesome responsibility.**
>
> And, the legislature in our government says that the jury should help him, should help him share that responsibility. And I'm going to ask you to help him make that decision and recommend death".

(T 1187).

Mr. Kennedy's lawyer, Thomas Treece, reinforced the prosecutor's argument about the jury's awesome responsibility stating:

> "You're recommendation to the judge is not binding on the judge, but, it's to be given **great weight by the judge.** So, in effect and in a way, you're saying, "Yes, sir, you shall live or die at my whim and upon my vote".

(T 1198).

The trial judge instructed the jury that:

> "The fact that the determination of whether a majority of you recommends sentences of death or sentences of life imprisonment in these cases can be reached by a single ballot should not influence you to act hastily or without due regard to the **gravity** of these proceedings.
>
> Before you ballot, you should carefully weigh, shift, and consider the evidence and all of it, realizing that human life is at stake and bring to bear your best judgment in reaching your advisory sentences".

(T 1214).

This reminder that human life is at stake came after the standard instruction that the jury would render an advisory sentence. (T 1211).

The jury was correctly instructed that they were required to "weigh the aggravating circumstances against mitigating circumstances" and base their sentence on these considerations. (T 1214).

The jury unanimously recommended death on each count of first degree murder. (R 1217-18).

SUMMARY OF ARGUMENT

I

Mr. Kennedy's Rule 3.850 motion raised constitutional and other claims which were either legally insufficient because they could have and should have been raised at trial or on direct appeal or they were refuted by the record below. A hearing is not required to dismiss a claim of ineffective assistance of counsel where the record refutes any allegation of actual prejudice.

II

Unfair bias in the selection of the grand jury foreman in Duval County is a claim which could have and should have been raised at trial, and if properly preserved, on direct appeal. In any event, this Court has rejected the same evidence when it was properly presented on direct appeal in another capital case. There is no need for an evidentiary hearing and the trial court properly dismissed this claim.

III

Mr. Kennedy was sentenced to death by a jury which was repeatedly informed of their awesome duty in sentencing. There is no objection to the instructions given or the comments of the prosecutor which Mr. Kennedy complains about. Mr. Kennedy was

aware that his counsel reminded the jury that their recommendation would be given great weight. Mr. Kennedy is therefore unable to demonstrate cause for his failure to object.

IV

Mr. Kennedy is attempting to relitigate the closing argument of the prosecutor. Some of the claims were objected to at trial and rejected on appeal by this Court. Other aspects of this claim were not objected to at trial and precluded from appellate review. Rule 3.850 does not lie to relitigate claims as a second appeal or to relitigate claims which could have and should have been raised at trial or on direct appeal. The trial court correctly denied these legally insufficient claims without an evidentiary hearing.

V

Mr. Kennedy is unable to demonstrate that he did not receive effective assistance of counsel in the guilt or penalty phase of his trial. It is proper for a trial court to deny an evidentiary hearing where the record refutes the defendant's allegation of prejudice. An evidentiary hearing is therefore not necessary to establish whether counsel's actions were strategic or not.

VI

The selection of the jury pool in Mr. Kennedy's case is a matter which could have and should have been raised at trial or on direct appeal. In any event, Mr. Kennedy is unable to show that any other jury would have returned a different outcome for this escaped first degree murderer who killed two more people.

VII

The presence of uniformed troopers, press and television cameras in the courtroom is a matter which could have and should have been raised at trial or on direct appeal. However, Mr. Kennedy is not able to demonstrate the outcome of the proceeding would have been different absent the above factors. There is no need for an evidentiary hearing on this claim.

VIII

The claim that Mr. Kennedy was entit ed to a jury instruction on self defense under the circumstances of this case, clearly is a matter which could have and should have been raised during the charge conference and on direct appeal. Even if Mr. Kennedy established error, he is unable to demonstrate that killing of the unarmed Mr. Cone was in self defense or that the charge given was fundamental error. The trial court was correct in denying the claim without an evidentiary hearing.

VIX

There is no need for an evidentiary hearing to determine whether the trial counsel's failure to play a videotape of Mr. Kennedy's surrender was strategic or not. This same evidence was presented through the testimony of a state witness regarding Mr. Kennedy's confession. The playing of the videotape would have been no more than cumulative evidence. Mr. Kennedy is therefore unable to demonstrate any prejudice resulting from this omission of alleged deficiency of defense counsel.

ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ERR IN SUMMARILY DENYING APPELLANT'S 3.850 MOTION WITHOUT AN EVIDENTIARY HEARING.

Kennedy argues that **O'Callahan v. State,** 461 So.2d 1354 (Fla. 1984), requires this case be remanded for an evidentiary hearing to dispose of his ineffective assistance of counsel claim. Kennedy also relies on **Vaught v. State,** 442 So.2d 217 (Fla. 1983), for the proposition that the presumption of correctness afforded state findings of fact in **Sumner v. Mata,** 449 U.S. 539 (1981), leaves the factual findings to federal courts. Kennedy then cites several cases where an evidentiary hearing was ordered on remand by this Court.

The flipside of this argument is that this Court has also recognized their are many cases where no evidentiary hearing is required. In **Harich v. State,** 484 So.2d 1239 (Fla. 1986), this Court upheld the denial of a Rule 3.850 motion during the pendancy of a death warrant even though the trial court did not conduct an evidentiary hearing. Justices Barkett and McDonald dissented, stating:

> "In all likelihood a death sentence could only have been avoided by a careful and clear showing of a previously untainted character of the defendant and that the commission of those crimes were so out of character that it must have been the

handmaiden of some unusual force visited upon him".

It is rather unlikely that thirty-five year old Edward Kennedy, an escaped convict serving a life sentence for first degree murder who had previously enjoyed a life of criminal activity in another state, could demonstrate this double murder was the "handmaiden of some unusual force visited upon him". Mr. Kennedy has demonstrated he will always kill whoever gets in his way. Therefore, there is no need for an evidentiary hearing to determine if defense counsel, Thomas Treece, made deliberate, strategic choices not to call the two witnesses appellant complains of or play the videotape to the jury. The record below demonstrates that Mr. Kennedy took the stand and offered to the jury his view of his character and the mitigating circumstances surrounding the commission of every murder he has committed. The evidence that Mr. Kennedy would now put to a jury is cumulative and of no weight whatsoever. It is extremely doubtful that the testimony of two friends that he's a nice, gentle man who had never hurt a fly is not going to carry the day for this three time murderer. Moreover, additional evidence of Mr. Kennedy's past life could have opened the door to his lengthy criminal record from out of state.

The significant aspect of **Harich v. State, supra,** as it relates to this case, is that the Eleventh Circuit has affirmed the denial of the ineffective assistance claim raised therein

even though there has never been an evidentiary hearing. See **Harich v. Dugger,** _____ F.2d _____, Case No. 86-3167 (11th Cir. April 21, 1988). The court noted that:

> "It is not err to decline to hold an evidentiary hearing on a habeas corpus petition alleging ineffective assistance of counsel where the allegations fail to satisfy the "prejudice" requirement necessary under **Strickland v. Washington. Hill v. Lockhart,** 474 U.S. 52, 60 (1985)".

Id.

No evidentiary hearing was held or required.

ARGUMENT

ISSUE II

THE SYSTEM USED TO SELECT A GRAND JURY FOREMAN IN DUVAL COUNTY WAS NOT CONDUCTED IN A RACIALLY DISCRIMINATORY MANNER.

The State very strenuously agrees that Mr. Kennedy's position that "racial prejudice has no place in our system of justice and has long been condemned by this Court". **Robinson v. State,** 520 So.2d 1 (Fla. 1988). Unfortunately, that is where our agreement ends. The record below indicates that Edward Kennedy was indicted by the grand jury of Duval County. This procedure used to select a grand jury foreman in Duval County has been the subject of an evidentiary hearing properly filed pretrial via a motion to dismiss. See **Kight v. State,** 512 So.2d 922 (Fla. 1987). In **Kight,** this Court rejected the same claim as devoid of merit and did not even warrant discussion. See **Kight** at footnote 1, pages 924-925. The same evidence developed at the evidentiary hearing in the **Kight** proceeding was attached as part of the appendix in this proceeding. A claim which has been raised via a motion to dismiss and found to be devoid of merit by this Court on direct appeal cannot furnish a basis for post conviction relief where that claim was not presented at trial or on direct appeal. Kennedy has not demonstrated that an evidentiary hearing would yield any different result.

ARGUMENT

ISSUE III

THE TRIAL COURT AND PROSECUTOR'S INSTRUCTIONS AND COMMENTS DID NOT LESSEN THE JURY'S SENSE OF RESPONSIBILITY IN THE SENTENCING PHASE OF MR. KENNEDY'S TRIAL.

Mr. Kennedy devoted some sixteen (16) pages of his oversized brief to the argument that Florida's jury instructions caused the jury to feel less responsible for their recommendation than they should. This Court has always rejected this claim. Therefore, it is of no merit whether **Caldwell v. Mississippi,** 472 U.S. 320 (1985), is a change in law sufficient to justify relief under **Witt v. State,** 387 So.2d 922 (Fla. 1980). This Court has always rejected this claim. **Combs v. State,** 13 F.L.W. 142 (Fla. February 18, 1988). Mr. Kennedy now relies on **Adams v. Wainwright,** 804 F.2d 1526 (11th Cir. 1986), **modified,** 816 F.d 1493 (11th Cir. 1987), **cert. granted,** 56 U.S.L.W. 3608 (U.S. March 7, 1988), and the recent decision of **Mann v. Dugger,** F.2d _____ (11th Cir. April 21, 1988). Mr. Kennedy did not rely on **Harich v. Dugger, supra,** a case which came to the opposite conclusion based on the same facts presented herein. In **Harich,** the Eleventh Circuit explicitly upheld the standard jury instruction in Florida against the attack based on **Adams, supra.** In **Harich,** the court stated:

> "We agree with the Supreme Court of Florida that comments which accurately explain the respective functions of the

> judge and jury are permissible under **Caldwell** "as long as the significance of the [jury's] recommendation is adequately stressed". **Pope v. Wainwright,** 496 So.2d 798, 805 (Fla. 1986), **cert. denied,** 107 S.Ct. 1617 (1987). After examining the record, we concluded that the court and prosecutor adequately communicated the seriousness of the jury's advisory role. We cannot say that this jury felt anything but the full weight of this advisory responsibility. As a result, Petitioner's **Caldwell** claim failed".

Id., at page 22.

Here, the record demonstrates that State Attorney, Ed Austin, more than once reminded the jury of their awesome responsibility to decide whether Mr. Kennedy should live or die. (T 1163-64, 1187). Moreover, the defense counsel told the jury their recommendation was entitled to great weight. (T 1199). Mr. Kennedy's jury was repeatedly reminded of the gravity of the recommendation they were about to make.

The State would also note that the defense counsel's statement to the jury that their recommendation is entitled to great weight constitutes evidence that he was aware of the **Tedder** standard and did not object to the prosecutor's comments and the judge's instructions. This claim is procedurally barred and his failure to object is the best evidence that the claim never had any merit in any event. See **Tedder v. State,** 322 So.2d 908, 910 (Fla. 1975).

ARGUMENT

ISSUE IV

THE PROSECUTOR'S CLOSING ARGUMENT IN THE GUILT AND PENALTY PHASES OF THIS CAPITAL TRIAL COULD HAVE AND SHOULD HAVE BEEN RAISED ON DIRECT APPEAL.

Kennedy argues that prosecutor's closing argument undermined the reliability of the death sentence imposed in a manner similar to that in **Caldwell v. Mississippi, supra,** and **Booth v. Maryland,** 107 S.Ct. 2529 (1987). Kennedy is arguing that **Caldwell** and **Booth** were not available at the time of his direct appeal and therefore this Court should re-examine the closing argument under the new law exception to post conviction procedural default.

Interestingly enough, Kennedy notes that defense counsel was "forced to object no less than five times to the prosecutor's penalty phase argument". Initial Brief, page 48. Apparently, Kennedy concedes that Mr. Treece, his defense counsel, was clearly a dedicated protector of his rights. Somehow this argument does not jive with the ineffectiveness claim raised below. Kennedy, in actuality, is asking for retroactive application of decisions which have no bearing on the facts below.

A. Mr. Kennedy's Fifth Amendment right to silence is not violated by prosecutor's remarks. This argument is clearly procedurally barred. Kennedy relies on **Griffin v. California,**

380 U.S. 609 (1965), and **David v. State,** 369 So.2d 943 (Fla. 1979). Both of these arguments were therefore available at the time of Mr. Kennedy's trial.

B. There was no testimony from the victims' family. **Booth v. Maryland, supra,** prohibits the introduction of testimony of victim's family members for consideration by the sentencer in a capital proceeding. Kennedy claims that prosecutor's reference to Bob McDermon, the man in a police uniform, is an improper victim impact statement. However, this ignores the fact that there is undisputed evidence that Bob McDermon was an officer and the court instructed the jury that the argument of counsel is not evidence. (T 952). Furthermore, Kennedy does not cite any portion of the sentencing order which demonstrates the trial court used evidence of victim impact in imposing the sentence of death. The sentencing order found statutory aggravating factors and weighed them against one demonstrated statutory mitigating factor. There is no need for an evidentiary hearing because this issue is not before the Court because it is procedurally barred.

C. The so-called Golden Rule argument claim has been presented and rejected by this Court. Moreover, Mr. Kennedy has not argued and cannot demonstrate that his trial was rendered fundamentally unfair by prosecutor's arguments. This is the test relied upon by this Court and the United States Supreme Court in **Darden v. State,** 329 So.2d 287 (Fla. 1976), and **Darden v.**

Wainwright, _____ U.S. _____ (1985). **Darden v. State,** 13 F.L.W. 196 (Fla. March 14, 1988).

D. Prosecutor's argument did not alter the discretionary nature of Florida's capital sentencing scheme. The jury below was properly instructed that they could consider any evidence presented as mitigation on behalf of a life sentence for the double murder of McDermon and Cone. (T 1213). **Hitchcock v. Dugger,** 107 S.Ct. 1821 (1987), has no application to the facts of this post-**Lockett** proceeding.

Kennedy argues that **Caldwell** and **Booth** are both claims involving new law emanating from the United States Supreme Court and therefore this Court must consider his argument in post conviction relief. The States agrees that this Court has said it will consider significant or fundamental changes in law emanating from the United States Supreme Court to previously decided capital cases. **Witt v. State, supra.** The fundamental problem is Mr. Kennedy has not demonstrated relief is justified under the so-called new law exception in any event. **Tafero v. Dugger,** 13 F.L.W. 161 (Fla. February 26, 1988). This Court has repeatedly rejected his argument concerning **Caldwell v. Mississippi, supra.** Kennedy could have presented his **Caldwell** claim in his first state habeas petition but did not. **Kennedy v. Wainwright, supra.** This application of **Caldwell** is barred on this ground as an abuse of process. **Card v. Dugger,** 512 So.2d 829 (Fla. 1987)

(federal appellate decision does not satisfy change in law rule of **Witt**). Likewise, **Booth v. Maryland, supra,** involves the actual presentation of a statement from the surviving victims (family or friends), in front of a sentencing jury. See **Grossman v. State,** 13 F.L.W. 127, 132 (Fla. February 18, 1988). The United States Supreme Court has never held **Booth** applies to prosecutorial comments where the State has presented no victim impact statement. **Stano v. State,** 13 F.L.W. 167 (Fla. February 25, 1988). Finally, there is no capital case where the death sentence is more reliable and more justified. It is ridiculous for Mr. Kennedy to argue that this jury felt that their sense of responsibility for the awesome task of deciding his fate was undermined. Moreover, there was no testimony presented to the judge or jury regarding the effect of this killing on the victims. However, **Booth** was a 5/4 opinion with the recently retired Justice Powell voting for the defendant. It would make sense to admit this evidence if retribution is a valid societal goal in retaining capital punishment. See concurring opinions of Justice Stewart in **Furman v. Georgia,** 408 U.S. 238, 308 (1972) and **Gregg v. Georgia,** 428 U.S. 153, 183 (1976).

ARGUMENT

ISSUE V

THERE IS NO NEED FOR AN EVIDENTIARY HEARING ON MR. KENNEDY'S ALLEGATION THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE SENTENCING PHASE.

Mr. Kennedy alleges that trial counsel unreasonably and prejudicially failed to conduct any investigation into Mr. Kennedy's life history including his family upbringing and prison experience.

The trial court below relied upon this Court's criteria for evaluating ineffective assistance of counsel claims as set forth in **Maxwell v. Wainwright,** 490 So.2d 927 (Fla. 1986):

> "A claim of ineffective assistance of counsel, to be considered meritorious, must include two general components. First, a claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, a clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined. **Strickland v. Washington,** 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); **Downs v. State,** 453 So.2d 1102 (Fla. 1984). A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear the prejudice component is not satisfied".

Maxwell, at page 932.

This is the same standard employed by the Eleventh Circuit Court of Appeals in upholding the denial of the ineffective assistance of counsel claim in **Harich** without an evidentiary hearing.

Mr. Kennedy testified in great length about his upbringing and his life in general. (T 1126-1150). Moreover, defense counsel called two fellow inmates, Henry Gray and Lawrence Cone, who testified to the peaceful nature of the defendant based on their personal knowledge of him. (T 1115-1125). It is noted by the trial court Mr. Gray described the defendant as a very intelligent person that really cared about other people, who is active in educational studies. (T 1118). Lawrence Cone also worked in the juvenile program and described Kennedy as a sensitive man who played the saxophone. (T 1122). Cone also described an instance where Kennedy broke up a fight between fellow inmates. Mr. Kennedy's testimony described a beautiful childhood which had deteriorated after enrollment in school. Kennedy told the jury of his stuttering problem and growing up black in a white environment. Kennedy personally related the details surrounding the 1979 conviction for first degree murder which formed the basis for the sentence he was serving at the time of his escape. (T 1126-1150). Counsel for the defendant was clearly presenting a view of Mr. Kennedy as the deserving candidate of life in prison based upon his adaptability to prison life. The trial judge below found this an acceptable defense

strategy given the United States Supreme Court ruling in **Skipper v. South Carolina,** 106 S.Ct. 1669 (1986). The trial court concluded that there was no reasonable probability that the admission of the newly proferred evidence would have altered their conclusion reached by the jury. Kennedy was unable to demonstrate sufficient prejudice to support an ineffectiveness claim. **Stone v. State,** 481 So.2d 478 (Fla. 1985).

The United States Supreme Court has also rejected an ineffectiveness of counsel claim for failure to present background information in the penalty phase upon a showing that counsel was aware of the information. **Burger v. Kemp,** 483 U.S. _____, 97 L.Ed.2d 638, 107 S.Ct. _____ (1987). Mr. Kennedy has failed to demonstrate that additional testimony regarding his family history would have altered the outcome of the proceedings.

Moreover, the motion for post conviction relief and Kennedy's initial brief rely heavily on information regarding the conditions which existed at U.C.I.. However, Mr. Kennedy admits that during his stay at U.C.I., he was neither a victim or a victimizer in that he was never a participant in violent behavior. This begs the question why did Mr. Kennedy feel he needed to escape? It would be another case entirely if evidence showed Mr. Kennedy was repeatedly victimized by violent sexual encounters and brutal harassement by corrections officers prior to his escape. However, Kennedy admits this was not the case.

See Initial Brief at page 107. The trial court found Mr. Kennedy was acting under extreme duress at the time of these murders but that this one statutory mitigating factor did not outweigh the overwhelming evidence of guilt and aggravation. Mr. Kennedy has not presented any evidence that would have altered the outcome of this proceeding.

ARGUMENT

ISSUE VI

MR. KENNEDY MAY NOT RAISE THE SELECTION PROCESS OF PETIT JURY IN POST CONVICTION RELIEF.

Mr. Kennedy attacks the use of voter registration lists as the source of prospective jurors in the selection of his petit jury. He relies on **Taylor v. Louisianna,** 419 U.S. 522 (1975) and **Duren v. Missouri,** 439 U.S. 357 (1979). Unfortunately for Mr. Kennedy, this was an issue that could have and should have been raised at trial and, if properly preserved, on direct appeal. Therefore, the trial court did not err in concluding that this claim was legally insufficient on its face. The claim was properly dismissed without an evidentiary hearing.

ARGUMENT

ISSUE VII

MR. KENNEDY MAY NOT CLAIM THAT HE WAS DEPRIVED OF A FAIR TRIAL DUE TO MASSIVE PRETRIAL PUBLICITY IN A MOTION FOR POST CONVICTION RELIEF.

Mr. Kennedy alleges that the presence of uniformed officers, the press and television media created an atmosphere which rendered a fair trial impossible. However, publicity at trial is an issue which could have and should have been raised at trial and, if properly preserved, on direct appeal. **Raulerson v. State,** 462 So.2d 1085 (Fla. 1985). The presence of uniformed officers is also procedurally barred and in any event, Kennedy would not have prevailed on direct appeal. **Wood v. State,** 490 So.2d 24 (Fla. 1986). The extensive media coverage also prompted the trial court to inquire of jurors if they have heard or seen anything through the media concerning the trial. (T 51, 52). (T 865).

Thomas Treece, defense counsel, also objected to presence of cameras in the courtroom. (T 431). This claim has been considered and rejected by the United States Supreme Court in **Chandler v. Florida,** 449 U.S. 560 (1981), but there was a possibility of showing prejudice. Mr. Treece asked the court to inquire of the jurors if they have received information from the media. (T 434, 435). Kennedy did not assert this issue on appeal and may not revive an abandoned claim. **Smith v. Murray,**

477 U.S. _____, 91 L.Ed.2d 434, 106 S.Ct. _____ (1986). Ultimately, Mr. Kennedy's record failed to demonstrate through inquiries to the jury whether there was unfair publicity or bias due to the presence of cameras or uniformed officers.

ARGUMENT

ISSUE VIII

MR. KENNEDY MAY NOT ATTACK THE JURY INSTRUCTIONS GIVEN AT HIS TRIAL.

Mr. Kennedy argues that an escaped convict who was armed and dangerous has the right to execute a policeman and an unarmed citizen in order to facilitate his escape. This issue could have and should have been raised at trial or on direct appeal. It was not and is therefore procedurally barred. The trial court did not err in concluding that it was procedurally barred. **Martin v. Wainwright,** 497 So.2d 872 (Fla. 1986) (challenge to insanity instruction must be raised at trial by objection and written request for alternative instruction).

ARGUMENT

ISSUE VIX

TRIAL COUNSEL'S FAILURE TO DISPLAY THE VIDEOTAPE OF KENNEDY'S SURRENDER WAS NEITHER AN UNREASONABLE OMISSION OF COUNSEL OR AN EVENT WHICH WOULD HAVE ALTERED THE OUTCOME OF THE PROCEEDINGS.

This issue is properly a sub issue of the ineffective claim advanced in Issue V regarding representation at sentencing. This evidence fails to provide a basis for relief for the reasons discussed, supra. In short, Kennedy's conduct during the surrender episode was presented at sentencing:

> "I know they died at my hands, you know, and I'm sorry for it.
>
> I apologized to the troopers out there in Templin's trailer; I said, "I'm sorry", and they know I said that. I said "I'm sorry".

(T 1146).

The evidence fails to establish the prejudice prong of **Strickland v. Washington, supra,** or **Maxwell v. State, supra.** The tape would only remind jurors of the hostage situation involving Mrs. Templin and her child and was self-serving. The trial court did not err in denying the ineffective assistance of counsel claim without an evidentiary hearing.

CONCLUSION

The State of Florida respectfully asks this Court to affirm the order denying post conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S Mail to Ms. Lissa Gardner, Esq., Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 20TH day of May, 1988.

Gary L Printy

GARY L. PRINTY
Assistant Attorney General

OF COUNSEL