IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JUL 18 1988
CLERK, SUPREME COURT
By ____ Deputy Clerk

JERRY WHITE,

Appellant,

vs.

CASE NO. 71,679

STATE OF FLORIDA,

Appellee.

______________________/

FILED
SID J. WHITE
JUL 18 1988
CLERK, SUPREME COURT
By ____ Deputy Clerk

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

RICHARD B. MARTELL
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, FL 32014
(904) 252-2005

COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee generally accepts appellant's Statement of the Case and Facts, and, due to limitations of space, would set forth specific additions and/or clarifications, as necessary, in the subsequent points on appeal to follow.

SUMMARY OF ARGUMENT

Appellant raises seven points on appeal in regard to the denial of his motion for post-conviction relief below. The trial court found six of these claims to have been improperly presented in a collateral proceeding, and, accordingly, refused to address them on the merits. This ruling was correct, and in accordance with this court's precedents. Thus, appellee suggests that appellant is entitled to no relief as to his claim that the jury was misled as to its responsibility to sentencing, in violation of Caldwell v. Mississippi, 472 U.S.320, 105 S.Ct. 2633, 85 L.Ed.2d 231 (1985), by virtue of Florida's standard jury instructions at sentencing. Similarily, appellant's claim relating to the excusal of black prospective jurors is not cognizable on post-conviction motion, and would additionally seem premised upon a misapprehension of fact. Appellant's claim in regard to the allegedly erroneous excusal of prospective jurors, who stated that they could never vote to impose capital punishment, is simply a "rerun" of a claim presented on direct appeal: while this court noted at such time that the issue was not preserved, it also addressed the claim on the merits in the alternative, and appellant is not entitled to have this claim relitigated.

Appellant's claim in regard to the alleged withholding of evidence by the state, while ordinarily constituting an issue proper on post-conviction relief, is not properly raised in this case, in that the allegedly withheld evidence was known to appellant at the time of trial and, in any event, was not

material. The claim in regard to an alleged lack of finding of intent to kill on appellant's part is without merit, even if properly presented, given the fact that appellant was the sole perpetrator of this crime and this court, in affirming the instant conviction, noted the evidence of premeditation. Appellant's claim, in regard to electrocution being cruel and unusual punishment, is improperly presented and has repeatedly been rejected by this court.

The only claim properly presented below was appellant's claim of ineffective assistance of counsel, both at the guilt phase and the sentencing. After receiving a full and fair evidentiary hearing on this matter, the trial court denied relief, making certain credibility determinations and specific findings of fact, which, appellee suggests, are adequately supported by the record. This claim is obviously appellant's primary basis for relief, and it is fair to say that even in the field of capital litigation, it is one of the most broad-based and all-inclusive ever. Appellant devotes the majority of his one hundred thirty-one (131) page initial brief to this issue and, in the interest of expediency, it would certainly have been simpler if he had just listed the things that counsel had done right. In its answer brief, the state has identified ten primary allegations of ineffectiveness as to the guilt phase and five as to the penalty phase, addressing each. Many of the claims represent issues which appellant unsuccessfully sought to raise on appeal, but which have been "recycled" in terms of ineffective assistance of counsel.

It is essentially the state's position that appellant has failed to satisfy either "prong" of Strickland v. Washington, **466 U.S. 668, 104** S.Ct. 2052, **80** L.Ed.2d **674 (1984)** as to any of his allegations. The most significant claim relates to counsel's failure to present a defense of voluntary intoxication at trial. Defense counsel testified below that he decided not to present this defense due to its incompatibility with the facts of the case, as well as with appellant's own claim of self-defense, presented at trial; this conclusion of defense counsel is supported by the record. Although appellant also faults defense counsel for failing to more fully investigate this claim and to obtain expert testimony as to intoxication, the testimony of the experts actually presented at the evidentiary hearing underscores the correctness of defense counsel's opinion, inasmuch as appellant's actions do not conform with those of an "intoxicated" person. In affirming appellant's conviction of first-degree murder, this court noted the evidence of pre-meditation, and there is no reasonable probability that, had the jury been provided with the defense of voluntary intoxication, they would have concluded that appellant had lacked the requisite intent to kill or rob, given the overwhelming evidence of guilt.

Appellant's primary allegation of ineffective assistance of counsel as to the penalty phase relates to counsel's alleged failure to investigate and present testimony as to appellant's background, as well as his alleged intoxication at the time of the offense. The record indicates that defense counsel called appellant's uncle, mother and fiance' at the sentencing phase,

and questioned them as to appellant's background and as to his problems with alcohol, arguing these matters in mitigation to the jury. The allegedly "undiscovered evidence" presented at the evidentiary hearing, related primarily to appellant's poverty-stricken upbringing twenty years prior to the offense and, appellee would respectfully suggests, its omission from the sentencing phase casts no doubt upon the reliability of the sentence of death in this case. Appellant's other claims in regard to sentencing, like many of those in the relation to the conviction, relate to defense counsel's failure to object to the admission of certain evidence, arguments of counsel or instuctions to the jury, and relate primarily to either tactical decisions of counsel or nonprejudicial deficiencies of counsel, at most.

The final assertion of ineffective assistance of counsel relates to a claim that appellant's attorney was himself intoxicated at the time of trial; the court below simply chose to disbelieve this testimony. All in all, appellant presented a withering attack upon trial counsel and, in certain instances, identified actions or omissions which can correctly be the subject of criticism. Appellant merits no relief, however, because, under the facts of this case, he was not prejudiced. When all is said and done, and when all the dust has settled as far as the alleged deficiencies of counsel, the result of the proceedings below, both trial and sentencing, remain reliable, and denial of appellant's motion for post-conviction relief should be affirmed in all respects.

POINT I

APPELLANT'S CLAIM, IN REGARD TO ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL AT BOTH TRIAL AND SENTENCING, WAS PROPERLY DENIED BELOW, FOLLOWING EVIDENTIARY HEARING; APPELLANT HAS FAILED TO DEMONSTRATE DEFICIENT PERFORMANCE ON THE PART OF HIS COUNSEL AND RESULTANT PREJUDICE SUFFICIENT TO UNDERMINE CONFIDENCE IN THE RESULT BELOW.

In his motion for post-conviction relief, appellant argued that his trial counsel, Emmett Moran, Esquire, had rendered ineffective assistance of counsel, setting forth in considerable detail the alleged deficiencies of counsel (R 442-489). While the state moved to strike a number of the other claims presented by appellant on the basis of improper presentation, all parties agreed that an evidentiary hearing was warranted on this matter, and such hearing was held on July 28 and 29, 1986 (R 1-440). After taking the matter under advisement, Judge Kirkwood denied the motion on April 8, 1987, in an order containing findings of fact (R 1021-1024). The judge concluded that appellant had failed to demonstrate either deficient performance or resultant prejudice sufficient to undermine confidence in the result; in the course of his order, the judge expressly found that the evidence against appellant "could be correctly characterized as overwhelming.'' (R 1023) Judge Kirkwood also specifically found, in response to some of appellant's allegations, that: (1) there was no credible evidence to the effect that Attorney Moran had been intoxicated or under the influence of alcohol, cocaine,

morphine, methaqualone or mar juana at the time of his representation of appellant: (2) that certain of the alleged deficiencies of counsel related to matters of "style" or intentional strategy and (3) that Moran's failure to present a defense based upon voluntary intoxication was not ineffective assistance of counsel, in that such defense was "rebutted by the defendant's detailed account of the facts of the incident" ahd "incompatible with the defendant's testimony" **(R 1023);** in reference to this last claim, Judge Kirkwood also expressly found that appellant had "wanted to take the stand, to tell his story", and that, accordingly, Moran's decision that appellant's detailed story would be inconsistent with the presentation of the intoxication defense was a reasonable tactical decision under the circumstances **(R 1023).** Appellee suggests that the trial court's denial of all relief was proper, and should be affirmed.

It is obvious, given the procedural default of the other claims raised, as will be argued infra, that this claim represents appellant's only real chance for relief, and one must also recognize the vigor, if not the venom, with which appellant has pursued this claim. After study of the pleadings and testimony below, as well as the instant initial brief, one could be well confused as to the person on trial - Jerry White or Emmett Moran. It is fair to say that the allegations against Attorney Moran, that his acts were outside the wide range of reasonable professional assistance, are themselves outside what has become the wide range of allegations of ineffective assistance of counsel. There would seem to be little precedent,

in regard to claims of ineffective assistance, for any contention that an attorney was distracted from representation of his client by his own physical illness, intoxication through alcohol, and intoxication through the use of such illegal drugs as cocaine, marijuana, speed, quaaludes and morphine; obviously, an individual under the above "influences'' would have trouble drawing breath, let alone functioning as an advocate. Similarly, the allegations against Attorney Moran go beyond his representation of appellant and involve incidents totally unrelated to this case and matters relating to his overall character and decency. Such allegations are totally unnecessary, inasmuch as it is clear from appellant's brief that, during the course of appellant's trial and sentencing proceeding, counsel, literally, did nothing right, at least in present counsel's view. While the state well recognizes the importance of the constitutional guarantee of effective representation, it questions the purpose served by this vitriolic overkill.

Having said the above, appellee would state at this juncture that, at times, the state will find itself in agreement with appellant, at least as far as whether certain acts or inactions of counsel can be the subject of criticism. For instance, the state shares appellant's distaste for what can be characterized as unthinkingly racist remarks made by defense counsel during the deposition of certain witnesses. It is not the state's position that Attorney Moran rendered ''perfect'' assistance of counsel, nor, of course, is the state required to make such showing. In order to merit relief, appellant must demonstrate not only that

his counsel's performance was deficient, outside the wide range of reasonable professional assistance, but also that any such deficiencies prejudiced him, to the extent that a reasonable probability exists that, but for such errors, the result of the proceeding would have been different. See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Downs v. State, 453 So.2d 1101 (Fla. 1984). While appellant has, perhaps predictably, placed a primary emphasis upon the "performance" prong, an area in which a certain amount of disagreement is certainly possible, the state suggests that, even if appellant were correct in most of his allegations, denial of relief would still be warranted, given appellant's inability to demonstrate prejudice. As the judge below correctly noted, the evidence against appellant was truly overwhelming. Inasmuch as the court below reviewed the transcript of the original trial in making this decision, appellee suggests that a brief overview of the evidence against appellant is worthwhile.

This account is largely derived from this court's recitation of the facts in its opinion affirming appellant's conviction and sentence of death. See, White v. State, 446 So.2d 1031 (Fla. 1984). This case involved the armed robbery of a grocery and convenience store and the murder of one of the customers therein on March 8, 1981. At approximately 11:00 a.m. on that morning, appellant was seen in the store by a witness, Judith Rayburn, who had come into the store to buy groceries. At that time, she stated that the proprietor, Alex Alexander, was behind the counter by the cash register in the front of the store and that

another customer, James Melson, was also present: she testified that she saw money, including paper currency, in the cash register at this time. As Mrs. Rayburn proceeded home, she noted appellant's vehicle parked in some proximity to the store and also stated that she heard what sounded to be like three gunshots.

Meanwhile, at approximately 11:15 that morning, Henry Tehani and his twelve-year-old daughter, Pamela, entered the store, which was empty except for appellant. Upon seeing them, appellant brandished his gun and ordered them to get into the freezer, telling him that he allegedly did not want their money at the time. When they did not immediately comply, appellant pulled the trigger twice, but the gun failed to go off. As appellant "did something with the gun", the two made their escape. As he was getting into his vehicle, Tehani saw appellant running from the side door of the store.

Two brothers working in a shed toward the rear of the store heard the three gunshots, two together and then a third, and went to investigate. Frankie Walker saw appellant running, literally, through the screen door at the side of the store at a high rate of speed, and set off after him. As one brother pursued appellant, the other went into the store to investigate, and came upon the bodies of Alexander and Melson in the back room. Appellant succeeded in reaching his car and took off at a high rate of speed. The authorities were contacted, and appellant was later found in a wooded area. At such time, $388.00, mainly in five and one dollar bills, was found scattered around the area,

as were a number of bloodstained items of clothing. t is apparent that, despite his gunshot wound, appellant had been able to change out of the bloody pants which he had been wearing and throw them into a canal (OR 263-514, 560, 571, 586).[1]

Subsequent investigation indicated that each victim had been shot once in the back of the head, with Alexander also sustaining a gunshot wound to the arm: Melson died, whereas Alexander remained paralyzed. The cash register was empty of all currency, and a spent projectile and bloodstain consistent with appellant's blood type were found in the front of the store: bloodstains consistent with the blood types of the victims were found in the back room (OR 593-597, 592, 700-701). Appellant was later taken to a hospital for treatment, and, while there, stated that a black man had shot him while he was in the store.

Having set forth the above, it is now necessary to turn to appellant's specific allegations. As in the initial brief, appellee will divide its argument as between alleged errors committed in the guilt and penalty phases of the trial. While, as noted, it is apparently appellant's position that defense counsel did absolutely nothing right, appellant's primary contention is that defense counsel was ineffective for failing to pursue a defense of voluntary intoxication. In addition, appellant raises, in essence, nine (9) more specific allegations of deficient conduct at the guilt phase. Each will now be

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[1](OR) represents a citation to the original record on appeal in White v. State, FSC Case No. 62,144.

addressed.

A. APPELLANT'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL IN REGARD TO COUNSEL'S HANDLING OF THE GUILT PHASE.

1. COUNSEL'S FAILURE TO PRESENT THE DEFENSE OF VOLUNTARY INTOXICATION.

As noted above, appellant's primary claim is that Attorney Moran rendered ineffective assistance of counsel for failing to present a defense based upon voluntary intoxication. Citing to such precedents of this court as Jacobs v. State, 396 So.2d 1113 (Fla. 1981) and Garner v. State, 23 Fla. 113, 9 SO. 835 (1891), appellant argues that voluntary intoxication can be a defense to first degree premeditated murder, as well to felony murder where robbery is the underlying felony. Appellant also cites to this court's decision in Gardner v. State, 480 So.2d 91 (Fla. 1985) for the proposition that any evidence of voluntary intoxication at the time of the alleged offense is sufficient to support a defendant's request for a jury instruction to such effect. Because, in appellant's view, there is at least some evidence of such intoxication in the record, it then follows, according to appellant, that defense counsel was ipso facto ineffective for failing to request an instruction on intoxication and/or present such defense. In support of such proposition, he cites Bridges v. State, 466 So.2d 348 (Fla. 4th DCA 1985), Presley v. State, 388 So.2d 1385 (Fla. 2d DCA 1980) and Price v. State, 487 So.2d 34 (Fla. 4th DCA 1986). Additionally, citing to Mellins v. State, 395 So.2d 1207 (Fla. 4th DCA 1981), appellant also seems

to argue that an instruction on voluntary intoxication must be requested by competent counsel even if inconsistent with other defenses presented (Brief of Appellant at 50-51).

Appellee is not impressed with this rather circular reasoning. While the state has no quarrel with the fact that, under the law, voluntary intoxication could be considered a defense to the charges facing appellant, it must still be recognized that such defense is premised upon intoxication, and not simply the use of intoxicants, see, Linehan v. State, 476 So.2d 1262 (Fla. 1985), Jacobs, supra: further, in order to constitute a defense to a specific intent crime, the intoxication must rise to the level of precluding a defendant from forming the requisite intent, more than simply being "under the influence." See, Garner, supra. Additionally, the state finds the "issue" of whether or not the evidence actually adduced at trial might have supported a jury instruction on this defense to be rather a misleading inquiry. As Washington recognizes, even the best criminal defense attorneys would not defend a particular client in the same way. The issue, when properly stated, is not, as appellant alleges, whether any evidence existed to support a defense of voluntary intoxication (Brief of Appellant at 45), but rather, whether, given the facts and circumstances of this case, including the availability of alternative defenses, no reasonable competent attorney would have failed to request such instruction and/or present such defense. This court has previously recognized that counsel may decline to pursue a defense of intoxication, based upon strategic reasons, and not be deemed

ineffective thereby, presumably in instances in which, objectively speaking, an instruction to such effect could have been justified. Cf. Buford v. State, 492 So.2d 355 (Fla. 1986) (counsel not ineffective for declining jury instruction on voluntary intoxication); Groover v. State, 489 So.2d 15 (Fla. 1986); Songer v. State, 419 So.2d 1044 (Fla. 1982).

Appellant's citations to the contrary are not persuasive. Mellins did not involve a claim of ineffective assistance of counsel, and Presley and Price simply held that a claim of such nature required an evidentiary hearing. Bridges is an extremely brief district court opinion, in which the Fourth District reversed for a new trial on grounds of ineffective assistance, where counsel testified that he had not pursued a defense of voluntary intoxication, in that he did not feel that the evidence was sufficient to justify an instruction. The court noted that there had been testimony that the defendant had been drinking for several hours, that the offense stemmed from a "bar fight" and that witnesses had described the defendant as "beserk", "unstable", "half there" and "a whole lot strung out"; significantly, it would not appear that defense counsel rejected the defense because of its incompatibility with any other defense actually presented. Appellee suggests that the evidence of intoxication in Bridges was quite strong, as compared with the situation sub judice, and further finds Bridges distinguishable, inasmuch as defense counel here rejected an intoxication defense for another reason.

From the testimony presented at the evidentiary hearing, it

is clear that defense counsel was aware of the availability of a defense based upon intoxication, but that he chose to present the defense favored by appellant himself, in which self-defense was argued: defense counsel was certainly not unaware of the potential use for evidence of intoxication, inasmuch as he argued such at the penalty phase as a mitigating factor, as will be seen <u>infra</u> (OR 1089-1091, 1095). Attorney Moran testified that he had sent then - employee Shadrick Martin to the jail to talk with appellant prior to trial, and that Martin had returned with appellant's version of events, i.e., that presented at trial (R 154-156); Moran presented at the evidentiary hearing written notes which appellant had provided him in which he set forth what had occurred in the store (R 261). Moran stated that he had used intoxication defenses in the past, and that he had concluded that such defense would have been inconsistent with the facts of this case as well as with appellant's own story (R 157, 223, 253). When pressed on this matter, the attorney stated that he felt intoxication to have been inconsistent with several of appellant's own actions (R 158, 225), and similarly noted that the prior testimony of a defense expert, who had speculated as to what appellant's actions would have been like at the time of the incident, given his blood alcohol level, was equally inconsistent with what it is known that appellant actually did (R 248).

While appellant's present counsel and his recently-acquired experts, unsurprisingly, disagree with Moran as to the inconsistency of these defenses, it should be noted that the prosecutor's testimony at the evidentiary hearing was in

conformity with appellant's past attorney. Attorney Blackner stated that appellant's own testimony was inconsistent with any defense of intoxication, and that trying to present the two defenses in tandem would have been like riding "two horses" (R 60); the witness later explained,

> What was inconsistent with an intoxication defense was Mr. White's detailed statement of what he did point by point, with full memory of what occurred. What would be inconsistent is that he knew that he was acting in self-defense and the action -- and that his actions were taken reasonably under the circumstances in that he felt that he was threatened by these people and made that statement (R 63).

Similarly, Blackner emphasized that voluntary intoxication was not a defense "unless it is to such an extent that it overcomes your ability to premeditate your acts", and that, under the facts of this case, there was no possibility that such showing could have been made, certainly as to the robbery (R 64-65). The witness also stated that, in his experience as a prosecutor, he had seen intoxication defenses presented, and had found such not to have been successful unless it could be shown that the defendant was a complete alcoholic (R 72). Blackner had been practicing law for approximately ten years, with eight and one-half years spent as a prosecutor, the remainder spent as a defense attorney, practicing criminal law. He stated that, in his experience, voluntary intoxication was simply not a successful defense with juries, in that it was extremely

difficult to convince them, rightly or wrongly, "that a person who voluntarily puts themselves (sic) under the influence doesn't know what he or she is doing" (R **88).** He described one armed robbery trial in which the defense had been tried, and in which the jury had only been out for twenty minutes before returning with a guilty verdict (R **87).** Blackner reiterated his opinion that intoxication was inconsistent with the facts of the case, and further noted a defense counsel's obligation to put his client on the stand and/or to present the defense advanced by his client (R **88-89).**

Thus, when one examines counsel's conduct in light of the circumstances surrounding it, and evaluates it from his own perspective at the time, as required by Strickland v. Washington, it is clear that Attorney Moran did not render ineffective assistance in declining to present a defense based upon voluntary intoxication. The testimony below indicated that appellant himself never told his attorney that he had been so intoxicated at the time of the incident, so as not to be able to form the requisite intent and, to the contrary, supplied his attorney with a completely detailed version of events. Under these circumstances, it was not deficient performance for Attorney Moran not to have sought out further evidence of intoxication, despite the fact that there was, as will be noted infra, testimony regarding appellant's use of intoxicants. Further, although appellant, through later-acquired expert testimony has now come forward with "scientific" testimony as to appellant's alleged state of intoxication at the time of the incident, such

showing hurts, rather than helps, his cause. It is clear that, despite the witnesses' hypotheses, appellant's actions on March 8, 1981 did not square with what an "intoxicated" person would have done or would have been precluded from doing. Because the intoxication defense, had it been presented, would not have succeeded, inasmuch as there is no reasonable probability that the jury would have acquitted appellant on such basis, given the defense's inconsistency with the other evidence in the case, there can be no prejudice in this cause.

Appellant's attempt to satisfy both the "performance" and "prejudice" prongs of Washington, on the basis of the evidence of use of intoxicants actually in the record, as well as that which counsel was allegedly ineffective for failing to discover, must fail, as must his alternative suggestion that counsel should have somehow precluded appellant from testifying in his own defense and/or presented intoxication as an accompaniment thereto. It has to be recognized that all putative claims of intoxication conflicted with not only appellant's account of the incident, but also with certain undeniable physical evidence and/or testimony as to appellant's own actions. It should be noted that while appellant testified that he had had two glasses of gin on the morning of the murder, and that he had "partyed" the night before, having three or four drinks, such latter testimony corroborated by two other witnesses, appellant has never stated that he was so drunk or intoxicated at the time that he would have been unable to form the intent to kill or to rob (OR 881, 809, 795, 660-661). While there was additional testimony in the

record r garding appellant's use of intoxicants, from such witnesses as Judith Rayburn and Henry Tehani - Rayburn stating that, in her opinion, appellant seemed intoxicated, in that his eyes "looked funny", and Tehani stating that, in his opinion, appellant had seemed "droggy", or on drugs (OR 433, **473)**[2] and while the state does not dismiss this testimony as irrelevant, it does not find, on the basis of such largely conclusory subjective testimony, that a jury could reasonably be expected to have concluded that appellant was so intoxicated that he could not form the requisite intent.

Appellant does not, however, rely so much on the testimony actually adduced, as he does upon that which he claims should have been brought forward, most specifically, expert testimony as to appellant's blood alcohol level. Between three and four hours after the homicide, appellant's blood alcohol level was .174 deciliters (R 25). At the evidentiary hearing below, an expert witness testified that at the time of the actual incident the level would have been higher and that, accordingly, in her opinion, appellant would have been "drunk", and "loud and

[2]**As** appellant correctly notes, witness Tehani provided somewhat more detailed testimony at deposition, at which time he stated that, at the time that he had confronted appellant, he had felt that appellant was drunk or on drugs, because he was "kind of a little leaning and swaying'' and had been "staggering" out of the back door (OR 1427-1428, 1431, 1436, 1445); Tehani acknowledged, however, that some of this behavior could have been attributed to loss of blood on the part of appellant (OR 1428). Obviously, by the time appellant exited the store, he had already shot himself in the penis. Tehani**'s** twelve-year-old daughter had similarly stated at deposition that she had felt that appellant had been drowsy, drunk or doped up (OR 1463), although she provided no such testimony at trial.

boisterous" (R **105);** it should be noted, however, that this expert testimony was predicated upon an assumption that appellant was not in fact a chronic alcoholic, because if he were, a greater absorption rate would have existed, such that the level of alcohol at the time of the incident would, apparently, have been substantially lower (R **114-116).** Additionally, Dr. Rice hypothesized that one with appellant's blood alcohol level would have been unable to "plan for any particular kind of event in a thoughtful manner", and would respond "spontaneously" and be incapable of "deliberate goal-seeking behavior" (R **125).** Rice, confronted with the detailed version of events to which appellant had testified at trial, opined that one in appellant's alleged state would have been unable to have as detailed a recall of the incident and would have had to "fill in the gaps" from information provided by others (R **126).** The witness categorically stated that appellant would have been unable to premeditate either robbery or murder.

The problem with all this is that it cannot be squared with what appellant unquestionably did. Appellant brought a loaded gun into the grocery and convenience store on the Sunday morning in question, after having previously parked his car at a convenient location, pointed in the direction for a fast getaway. He shot each one of the victims in the back of the head and, before doing so, somehow managed to manuever them into the back room, out of sight of the rest of the store. Despite the obviously - unanticipated handicap of shooting himself in the penis, appellant was able to help himself to the contents of the

cash register and, despite their surprise entry, to fend off two persons who came into the store after the murder. Appellant was also able to escape from the immediate vicinity of the crime, despite the above handicaps, and drive as far as his ailing vehicle would allow. After the car stalled, appellant ran into the nearby woods, having the foresight to bring with him the stolen money and a change of clothes: he also discarded the murder weapon in such a way that it would never be found. Finally, and perhaps most probative of appellant's mental state, is the fact that he actually changed his clothes out in the bush, discarding his bloody and recognizable clothing into a nearby canal.

These are not the **"spontaneous"** actions or reactions of a man incapable of forming a specific intent. For a man allegedly incapable of "deliberate goal-seeking behavior", appellant achieved a good number of his goals and, in all likelihood, would have progressed further, but for the unexpected entrance of the Tehanis and his own self-inflicted wound. In affirming appellant**'s** conviction on appeal, this court noted the evidence of premeditation in the record, see, White, 446 So.2d at 1037, and appellee suggests that this evidence, which owes nothing to appellant's in-court testimony was obviously incompatible with any defense premised upon intoxication. Accordingly, appellant has failed to satisfy either prong of Strickland v. Washington, in regard to counsel's decision not to present this defense. The state would note that in Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988) (in banc), the Eleventh Circuit rejected a claim of

ineffective assistance of counsel, based on counsel's failure to present an intoxication defense, where it noted, _inter alia_, that the acts committed by the defendant had required "a significant degree of physical and intellectual skill." Such observation is obviously applicable _sub judice_.

Further, counsel cannot be deemed ineffective for "allowing" appellant to present his own defense or for not presenting both defenses in tandem. While it is clear that some degree of intoxication is not inconsistent with appellant's version of events, appellee suggests that it would have been unnecessarily confusing to the jury for the defense to have asked them not only to believe that appellant had acted in self-defense but also that, at the same time, he had been so intoxicated that he literally had not known what he was doing. _See, Harich_, _supra_, at 1470 (although inconsistent and alternative defenses may be raised, competent trial counsel know that reasonableness is absolutely mandatory if one hopes to achieve credibility with the jury). Appellant's own defense was not simply alternative to one of intoxication, it was largely antagonistic, and, given the testimony below as to the infrequency with which defenses of intoxication have been successful, it was not a prejudicial defect of counsel not to have raised the latter defense. _See Harich v. State_, 484 So.2d 1239 (Fla. 1986) (counsel not ineffective for failing to present defense of voluntary intoxication where such contradicted defendant's own version of events): _Harich v. Dugger_, _supra_: _Wiley v. Wainwright_, 793 F.2d 1190 (11th Cir. 1986).

Thus, while recognizing that some evidence of use of intoxicants was present in the record below, as well as the fact that additional testimony regarding the blood alcohol level could have been presented at trial, appellee still suggests that appellant has failed to sustain his burden of proof in this regard. No version of events could ever describe the homicide in this case as "spontaneous". The victim was shot once in the back of the head. Had he been found slumped over, the cash register open underneath him, an argument could be made that a "spontaneous" felony murder had occurred. Similarly, had the victims been found in appellant's own home, where his access to a firearm would have been more readily explainable, a "spontaneous" homicide might have been possible. Here, it is clear that no reasonable probability exists that any reasonable jury would have concluded that voluntary intoxication could excuse appellant's actions. The trial court's denial of relief as to this claim was proper and should be affirmed.

2. APPELLANT'S OTHER ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL IN REGARD TO THE GUILT PHASE.

As noted, appellant raises a plethora of allegations in regard to counsel's performance at trial, including: (1) counsel's own alleged state of intoxication: (2) counsel's alleged failure to investigate: (3) counsel's conduct at deposition: (4) counsel's conduct of voir dire: (5) counsel's failure to object to the argument and testimony in regard to victim Alexander's condition: (6) counsel's failure to object to

the alleged "collateral crime" evidence regarding the Tehanis; (7) counsel's handling of the motion to suppress a statement of appellant's; (8) counsel's failure to object to the prosecutor's remarks in closing argument as to appellant's prior felony convictions and (9) counsel's failure to object to alleged error in the jury instructions. From the initial brief, however, it is clear that appellant includes many more allegations of ineffectiveness, including counsel's waiver of opening statement, counsel's "bumbling'' cross-examination, counsel's "stupidity" in dealing with physical evidence and counsel's "incoherent and offensive" closing argument. It should also be clear that a number of these matters pertain to matters of style, subjective after-the- fact opinions by present counsel and/or matters which are essentially per se nonprejudicial; because neither prong of Strickland v. Washington could be satisfied, appellee presents no further argument as to the immediately preceding.

As to the first matter, as to counsel's own alleged intoxication at the time of trial, allegedly the result of consumption and/or utilization of alcohol, cocaine, speed, marijuana, methaqualone and morphine, it is clear that Judge Kirkwood, as was his prerogative, simply chose to disbelieve the testimony to this effect. See, Booker v. State, 441 So.2d 148 (Fla. 1983). Much of this testimony, in support of these allegations, was provided by either family members of appellant or Shadrick Martin, a convicted felon whom Attorney Moran had successfully defended in a number of proceedings, and whom the attorney later retained as a helper. Attorney Moran expressly

denied these allegations at the evidentiary hearing below (R 229-230), and appellant's assertion that Moran "was willing to stipulate" to his own alcoholism is misleading: from the context, it is clear that counsel at most was willing to concede that he had had an alcohol problem approximately one year after the trial (R 190). The prosecutor at appellant's trial testified that Moran was not intoxicated at the time (R 57-58). While defense counsel did state that at the time of the trial he had been having various health problems, later being diagnosed as diabetic and hypoglycemic (R 145-1471, a tired lawyer is not necessarily an ineffective one. See, King v. Strickland, 714 F.2d 1481 (11th Cir. 1983): Young v. Zant, 727 F.2d 1489 (11th Cir. 1984).

In Kelly v. United States, 820 F.2d 1173 (11th Cir. 1987), the Eleventh Circuit held that even where the defendant had demonstrated that his counsel had smoked marijuana during his trial and had used cocaine both before and after the trial, there had still been an insufficient showing of either deficient performance or prejudice. Obviously, appellant sub judice has not even come forward with the evidentiary showing that existed in Kelly, but, in any event, the holding of such case still applies. Even assuming some incapacity on the part of defense counsel, appellant has failed to demonstrate that any such incapacity rendered counsel ineffective, so as to throw into doubt the reliability of the result of the proceeding. Appellant's primary allegation of ineffective assistance relates to the defense which "should have" been presented, see, section 1, supra. Because that argument is without merit, and because

appellant has failed to otherwise demonstrate what it is that counsel "should have" done in order to create a reasonable probability of acquittal, he is entitled to no relief on the basis of this less than credible claim.

As to the next claim, counsel's alleged failure to investigate, such claim is in large part premised upon contentions that counsel failed to investigate evidence of intoxication; because, as already argued, such defense had no reasonable probability of success, any omission in this regard cannot be considered prejudicial. As to counsel's alleged misconduct at deposition, this is an area, as noted earlier, in which the state has some agreement with appellant, and indeed, the state would express great distaste for the remarks at issue (OR 1198, 1199, 1201-1202, 1208-1209, 1232). While defense counsel sought subsequently to explain such as attempts at humor (R 210-2111, these types of comments, regardless of their intention or origin, obviously have no place in our judicial system. The remarks, however, were not made in open court, but rather were made in deposition to two witnesses. Accordingly, their impact would seem limited, and while deserving of censure and criticism, they cannot serve as a basis for the vacation of appellant's conviction and sentence. Cf. Washington.

As to the next claim, relating to defense counsel's handling of voir dire, appellant has again failed to demonstrate that he merits relief, despite his broad-based attack. Appellant attacks the brevity of counsel's voir dire, his failure to seek to "rehabilitate" those jurors who stated that they could not vote

to impose death, his failure to move to strike all those jurors who indicated some knowledge of the case, no matter how peripheral, his failure to strike an alternate juror who had an opinion about the case, his failure to object to the prosecutor's possession of rap sheets for all prospective jurors and his failure to question the jurors as to the issue of race. This court's observation in Meeks v. State, 418 So.2d 987, 988 (Fla. 1982), is applicable:

> It must be recognized that the methods of jury voir dire are subjective and individualistic. Many experienced trial lawyers have a strong belief in short voir dire examinations. Conversely, others conduct as extensive an examination as the trial judge will allow. The views of what constitutes the best tactical approach are divergent, and the manner of the examination varies from community to community. What might be appropriate in Palm Beach or Fort Lauderdale may be unacceptable in Pensacola or Marianna.

Attorney Moran is an experienced attorney, and his conclusion that the instant voir dire was sufficient for his purposes would not seem to have been unreasonable under the circumstances. Appellee disagrees with the notion that any of the prospective jurors who indicated inability to vote for death could have been "rehabilitated" or that their excusal for cause should have been the subject of objection. See, Maxwell v. Wainwright, 490 So.2d 927 (Fla. 1986) (see, Point IV, infra). A number of counsel's actions or inactions are obviously explainable by his subjective impressions of the prospective

jurors, something which cannot come across from a cold record. Cf. Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). Thus, the present hindsight utilized by appellant's present counsel would hardly seem a proper basis to fault trial counsel, as it is impossible to determine the demeanor of the prospective jurors at the time that they provided the answers, which appellant now finds objectionable or providing a basis for excusal; obviously, however, counsel's failure to strike an alternative juror who never served would hardly seem prejudicial. Cf. Washington.

Appellee does not find appellant's argument relating to the "rap sheets" probative, and notes that Turner v. Murray, 476 U.S. ______, 106 S.Ct. 1683 (1986), did not mandate that every competent defense counsel use a portion of his voir dire to inquire into race: obviously, counsel can have a good number of tactical reasons for choosing not to bring such a touchy subject up, and appellant has failed to demonstrate that, in this case and under these facts, an inquiry of this sort was mandated. Finally, appellee suggests that this claim can be resolved in accordance with this court's decision in Jackson v. State, 437 So.2d 147 (Fla. 1983), wherein this court resolved a claim of ineffective assistance of counsel in regard to counsel's handling of voir dire. This court concluded that counsel's voir dire examination as to pretrial publicity, racial bias and capital punishment had not been so lacking as to be considered incompetent, but further noted that even if there were deficient performance, prejudice had not been shown, in that:

> The record shows that appellant's guilt was clearly and convincingly demonstrated by more than adequate evidence. Any shortcomings in voir dire were not the conclusive and decisive factors in his conviction. Id. at 150.

Such holding is applicable sub judice, and this portion of appellant's argument does not merit relief.

As to the next claim, that relating to counsel's failure to object to testimony regarding victim Alexander's medical condition, the state would note that an attempt was made to raise this issue on direct appeal. This court noted that the issue had not been preserved for appeal, given the lack of objection, but further noted, "We do not feel this error to be of the magnitude that would have precluded the jury from reaching a fair and impartial verdict so as to render the error fundamental". White, 446 So.2d at 1034. Appellant now contends, pursuant to such cases as Vaczek v. State, 477 So.2d 1034 (Fla. 5th DCA 1985) and Aho v. State, 393 So.2d 30 (Fla. 2d DCA 1981), that had counsel objected and preserved the point, "reversal would have resulted." (Brief of Appellant at 63.) Initially, the state would express some skepticism as to the proposition that relief can be had, on post-conviction motion, in regard to an error already found not to be of such magnitude as to have precluded the jury from reaching a fair verdict. Be that as it may, and while maintaining its position that the instant evidence was largely irrelevant, the state suggests that reversal is still not mandated.

Had defense counsel objected below, the trial court would have either sustained or overruled the objection; had the objection been overruled and the point preserved on appeal, no reasonable probability exists that this court would have reversed appellant's conviction and sentence. Cf. Washington. Likewise, the inclusion of this evidence in the record contributed nothing to the jury's verdict of guilt in the first instance, and no motion for mistrial would have been granted in the circuit court. Cf. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). The jury in this case did not convict appellant because they had heard some of the details of Alex Alexander's subsequent condition; rather, they convicted appellant on the basis of the testimony placing him at the scene both before and after the murder, as well as upon a great amount of other evidence. Vazcek and Aho are easily distinguishable, in that, in the former case, reversal was predicated upon the less than overwhelming evidence of guilt, as well as upon the fact that the prosecutor had deliberately violated a prior court ruling in adducing evidence of the victim's pregnancy and the fact that the defendant's actions had caused her to lose the baby, obviously matters more inflammatory than those at issue sub judice; in Aho, reversal was predicated upon the admission of evidence relating to the victim's subsequent suicide attempt, such evidence admitted in a sexual battery prosecution, wherein the victim's state of mind had been the critical issue in the case. No relief is warranted as to this portion of appellant's claim.

Appellant's next claim is similarly in relation to an issue

which he attempted to raise on appeal. On appeal, appellant argued that the prosecutor had improperly commented upon appellant's intent to kill the Tehanis, inasmuch as such was allegedly improper "collateral crime evidence"; this court noted that appellant had made no objection in regard to the argument, but also stated, "here again, we find no error.'' White, 446 So.2d at 1035. Appellant now argues that had counsel objected at the time of the comment and/or to any other remarks as to appellant's aggravated assault of the Tehanis, this court would have reversed his conviction, on the basis of Townsend v. State, 426 So.2d 615 (Fla. 4th DCA 1982) and Rivers v. State, 425 So.2d 101 (Fla. 1st DCA 1982). This argument is entirely without merit.

First of all, this court's determination that "no error'' existed would seem at least to be an alternative address of the merits, thus precluding appellant from relitigating this issue in the guise of ineffective assistance of counsel. See, Hitchcock v. State, 432 So.2d 42 (Fla. 1983): Sireci v. State, 469 So.2d 119 (Fla. 1985). Additionally, even though the state did file a notice of intention to utilize collateral crime evidence, pursuant to section 90.404(2)(b), Florida Statutes (1981) (OR 1801), such was unnecessary, in that testimony relating to the Tehanis was not collateral, but rather was an inseparable part of the res gestae of the offenses at issue, and was so inextricably intertwined with the crime at issue that an intelligent account of the entire criminal enterprise could not be had without it. It is clear that the Tehanis arrived at the scene either during

or immediately after appellant's commission of a murder and armed robbery, and appellant pointed the gun at them so as to either facilitate his completion of these offenses or a successful escape. On the basis of this court's prior precedents, it is clear that there was one interconnected criminal episode and that admission of this testimony was neither erroneous nor such as to require a limiting instruction. See, Smith v. State, 365 So.2d 704 (Fla. 1978) (admission of evidence of second murder proper to establish " entire context out of which criminal conduct arose"): Malloy v. State, 382 So.2d 1190 (Fla. 1979) (admission of evidence regarding defendant's threat of force to unrelated victim relevant in prosecution for later murder, where such prior incident was ''one . . . in a chain of chronological events" culminating in murder): Medina v. State, 466 So.2d 1046 (Fla. 1985) (admission of evidence regarding defendant's resisting arrest with violence and attempt to escape proper): Austin v. State, 500 So.2d 262 (Fla. 1st DCA 1986). Townsend and Rivers, both of which concern testimony regarding totally unrelated offenses, are obviously distinguishable. No relief is warranted as to this portion of the appellant's claim.

Appellant's next claim relates to another matter litigated on direct appeal. In his direct appeal in 1982, appellant argued that the trial court had erred in denying his motion to suppress a statement made by him on the night of the incident, while he was hospitalized. This court found no error, finding that the evidence supported the judge's finding that appellant was alert at the time of the statement and that the statement was

voluntarily given. White, 446 So.2d at 1035. Appellant now argues that had defense counsel done a better job, by adducing expert testimony as to the effects of a pain-killer allegedly given appellant at the time, either the trial court would have granted a suppression motion or this court would have reversed on appeal. Appellee disagrees.

At the original suppression hearing in March of 1982, Detective Harrielson testified that he and his partner had come to see appellant in the hospital at approximately 10:30 on the night of the homicide (OR 2073). At such time, Harrielson testified that, prior to talking with appellant, he had asked the nurse whether she had given appellent any injections of any type and she had replied in the negative (OR 2079, 2082). He had then asked appellant if he knew who they wer'e, whereupon appellant replied that they were the police (OR 2074). According to Harrielson, appellant seemed coherent (OR 2074). When the officers asked him if he knew why they were there, appellant replied, "Yes, you're here about the store in Taft." (OR 2074) Appellant then volunteered that he had gone into the store and had not seen anyone until someone had shot him (OR 2074). Appellant was then advised of his rights pursuant to Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966), and stated that he did not wish to make a statement, whereupon the interview concluded (OR 2074-2075). On cross-examination, defense counsel, reading from the medical records, questioned the officer as to his knowledge of appellant's blood alcohol level earlier in the day and the fact that, allegedly at 10:30 that evening appellant

had received an injection of demerol (OR **2079).** The officer reiterated that appellant had seemed coherent and that, at the time that he was there, he had not seen appellant receive any injection of any type (OR **2080-2081).** Defense counsel moved the medical records and notes into evidence (OR **2082-2084).**

No ruling was made on this motion at the time, and defense counsel renewed it when the state sought to impeach appellant with this statement on cross-examination at the trial (OR **843-844).** A hearing was held outside the presence of the jury, at which appellant and Detective Harrielson testified. The latter again testified that he had gone to see appellant at the hospital on the night of March **8, 1981,** and that the officer had asked appellant if he knew why the police were there, whereupon appellant had responded, "Yes, it's about the store in Taft." (OR **849).** Appellant had then stated that when he had gone into the store, he had found no one there, until he had been shot by a black man (OR **849).** Appellant was advised of his rights and stated that he wished to make no statement without an attorney (OR **840).** The officer again testified that appellant had seemed alert and coherent and that he had not seen him receive any injection (OR **850, 855, 858).** Appellant then took the stand, and testified that he had no recollection of this conversation (OR **863-864);** the medical records were again moved into evidence (OR **854).** The judge then denied the motion, and appellant resumed the stand. When questioned by the prosecutor, he remembered making the statement, admitted that such was inconsistent with his present testimony and offered an explanation for the

discrepancy, claiming that he thought that the police would have not believed the real story (OR 873-874, 888-889, 890, 897).

At the evidentiary hearing below, appellant's counsel presented the testimony of two experts as to the effects which demerol would have had upon appellant if administered fifteen minutes prior to his conversation with the police. The witnesses stated that appellant would have been drowsy, confused, especially suggestible and euphoric (R 111, 129-130); one doctor stated that appellant would have been extremely cooperative and have provided answers to any question put to him (R 130). The state correctly objected to this testimony on the grounds of relevance, inasmuch as the medical records, introduced both at trial and at the evidentiary hearing, indicated that the shot of demerol had not been administered until 10:45, rather than 10:15, at a time after the visit of the police (R 106-109, 112-113, 128); counsel also drew the court's attention to Harrielson's prior testimony, as to the fact that a nurse had assured him that appellant had not been given any injections prior to the conversation. Certainly, one reading of the medical records at issue supports the state's position that the demerol was not administered until 10:45 or after the police visit, and it is interesting to note, that, despite present counsel's disdain for Attorney Moran's failure to adequately litigate this issue, present counsel would seem to have been likewise unable to secure the testimony of the nurse in question; the fact that the journal entries list the arrival of the detectives, and their advising appellant of his rights, prior to any mention of demerol being

given, would seem to suggest that such was the correct order of events (Transcript of Evidence).

Accordingly, it certainly could not constitute ineffective assistance of counsel for Attorney Moran not to have presented similar medical testimony as to the effects of demerol, when it would seem that the drug was not administered to appellant until after his conversation with the police. Additionally, as with the expert testimony as to appellant's "intoxication", it must be noted that, from what the record reflects, appellant did not act at all like one under the influence of a powerful sedative or painkiller. Far from being overly cooperative and malleble, appellant told the officers that he would not talk to them without an attorney being present! Detective Harrielson was the best witness as to appellant's condition at the time of the interview, and he consistently maintained that appellant was alert and coherent. It should also be noted that appellant recalled making this statement, presumably voluntarily, after he took the stand and offered an explanation for it. Appellant has failed to demonstrate that he actually was under the influence of demerol at the time he made the statement, and it should further be noted that, even if he had been, a finding of involuntariness would not necessarily follow.

Appellant's citation to such cases as Reddish v. State, 167 So.2d 858 (Fla. 1964) and DeConingh v. State, 433 So.2d 501 (Fla. 1983) notwithstanding, it should be remembered that in Thomas v. State, 456 So.2d 454, 458 (Fla. 1984), this court held, in resolving a claim that a confession should have been suppressed

on the grounds of the defendant's intoxication,

> The mere fact that a suspect was under the influence of alcohol when questioned does not render his statements inadmissible as involuntary. 'The rule of law seems to be well settled that the drunken condition of an accused when making a confession, unless such drunkenness goes to the extent of mania, does not affect the admissibility in evidence of such confession but may affect its weight and credibility with the jury.' (citations omitted).

Especially given Harrielson's testimony, it must be recognized that appellant's condition never met the above, and it can hardly be said that any error by defense counsel as to the attempt to suppress this statement constituted a prejudicial one, considering the overwhelming evidence against appellant. The admission of this inconsistent statement, whose inconsistency appellant explained quite well on the stand, played absolutely no part in the jury's return of a verdict of guilt, and no reasonable probability exists that, had this matter been handled any differently, a different result would have obtained below. Cf. Washington. Relief is not warranted as to this portion of appellant's claim.

Appellant's next claim relates to defense counsel's failure to object, during the prosecutor's closing argument at trial, to references to appellant's status as a nine-time convicted felon. This argument represents yet another claim which appellant sought to present on direct appeal, and one which this court noted was not preserved: this court, did, however, also

hold that it found "no error." White, 446 So.2d at 1035. As argued previously, appellee suggests that this court's ruling is consistent with an alternative address on the merits, thus precluding appellant from relitigating this issue on 3.850. See, Hitchcock, supra: Sireci, supra. Additionally, the state maintains its position that appellant is misinterpreting the remarks at issue. From their context, the prosecutor was simply using appellant's prior convictions in the context of attacking his credibility as a witness, a practice found not to be objectionable. See, Wilkins v. State, 383 So.2d 742 (Fla. 4th DCA 1980); Patterson v. State, 512 So.2d 1109 (Fla. 1st DCA 1987). Appellee disagrees with appellant's suggestion that the prosecutor used the prior convictions as any sort of comment upon appellant's criminal propensity, the error condemned in Davis v. State, 397 So.2d 1005 (Fla. 1st DCA 1981), and suggests that appellant has failed to satisfy either "prong" of Strickland v. Washington as to this portion of this claim. Cf. Burr v. State, 518 So.2d 903 (Fla. 1987).

Appellant's final attack upon counsel's performance at trial relates to counsel's failure to object to alleged errors or omissions in the jury instructions. This argument is a claim which appellant attempted to present on direct appeal, and which this court noted was not preserved: this court likewise found "no fundamental error." White, 446 So.2d at 1035. Appellant now argues that had trial counsel seen to it that the omitted instructions were given, he would have been convicted of a lesser offense and/or had trial counsel been unsuccessful but preserved

the issue, this court would have reversed the conviction on appeal: appellant complains that the jury should have been instructed as to third degree murder and second degree felony murder and that the trial court failed to appropriately define robbery in its first degree murder charge. These claims are without merit. Third degree murder cannot constitute a lesser included offense of first degree murder, where the death occurs during a robbery, see, section **782.04(4),** Florida Statutes **(1979),** and second degree felony murder would seem totally inapplicable to the facts of this case: appellant's complaint relating to the robbery instruction presupposes the existence of a viable defense of voluntary intoxication, a point which has previously been considered. Appellant has failed to demonstrate either deficient performance or resultant prejudice in this regard, and relief is not warranted under Washington.

B. APPELLANT'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL IN REGARD TO COUNSEL'S HANDLING OF THE PENALTY PHASE.

Appellant contends that Attorney Moran also rendered ineffective assistance of counsel in his handling of the penalty phase, and while appellant again makes a broad-based attack, appellee suggests that six (6) basic contentions are involved: (1) counsel allegedly failed to investigate and present mitigating evidence relating to appellant's background, as well as relating to appellant's alleged intoxication at the time of the offense: **(2)** counsel failed to object to the introduction into evidence of exhibits relating to appellant's convictions:

(3) counsel failed to object to alleged improprieties in the prosecutor's closing argument: **(4)** counsel failed to object to alleged error in the jury instructions: (5) counsel failed to object to a chart going back to the jury for use in its deliberations and *(6)* counsel generally behaved disgracefully. As before, the state finds the latter type of allegation to be largely subjective in nature and unsuited to detailed discussion. The other claims, which again relate in large part to issues which appellant attempted to present on direct appeal, will all be addressed. In evaluating the prejudice resulting from any of these alleged deficiencies of counsel, the question is whether there is a reasonable probability that, but for these errors, the sentencer-including an appellate court, to the extent that it independantly reweighs the evidence-would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. Washington, supra. The state would again contend that appellant has failed to satisfy either "prong" of Washington, but would focus upon that relating to prejudice. In evaluating appellant's claims, it is necessary to review the evidence actually adduced at sentencing.

At the penalty phase, the state only called one witness, who identified appellant's fingerprints on the judgment and sentence forms relating to his prior convictions. Attorney Moran then called five defense witnesses, including appellant's mother, uncle, and appellant's fiance'. While their testimony was not lengthy, each provided testimony as to appellant's good character, hard-working nature, early loss of his father and

step-father and problems with alcohol (OR **1052-1059).** Appellant's mother generally testified as to the death of appellant's father and how appellant had been a good boy until he had fallen in with "the wrong crowd'' (OR **1055).** Appellant's fiance' testified how "giving'' appellant was, and as to appellant's heart condition, which required medication (OR **1058).** Counsel also called two witnesses in regard to the crime scene, and introduced judgments and sentences in regard to appellant's nonviolent convictions, to balance those introduced by the state. During his closing argument, defense counsel emphasized the nonviolence of appellant's prior convictions, to the extent that he could, and also argued against the prosecutor's contention that the murder in this case had been "execution-style", largely basing his argument upon the medical testimony (OR **1082-1088).** Counsel argued that the jury should find in mitigation that appellant had been intoxicated at the time of the incident or otherwise impaired and that, in accordance with appellant's testimony, the victim had precipitated the incident (OR **1089,1091).** Moran argued that a life sentence would be appropriate under the circumstances of this case and generally argued against capital punishment (OR **1094, 1096).**

The jury recommended death by a vote of eleven to one, and the judge imposed death, finding four aggravating circumstances and nothing in mitigation. The judge found that the homicide had been committed during a robbery, that it had been committed for pecuniary gain, that it had been cold, calculated and

premeditated and that it had been committed by one previously convicted of a crime of violence: from the judge's order it is clear that he considered not only the statutory mitigating circumstances, but also anything else in the record which would have been relevant (OR 1995). Appellant attacked his sentence of death on appeal, and this court found that the aggravating circumstances relating to robbery and pecuniary gain had merged and that the record did not support the finding that the homicide had been cold, calculated and premeditated. White, **446** So.2d at 1037. This court, however, found the remaining aggravating circumstances to have been properly found and affirmed the sentence of death, finding it appropriate. White, **446** So.2d at 1037.

Appellant's primary claim regarding sentencing is that defense counsel should have presented more background information. At the evidentiary hearing, various family members testified in detail as to appellant's upbringing, including his childhood in Quincy, Florida, at a time when his family had lived in great poverty: there was also testimony as to the poor conditions under which appellant had lived when he had first come to Orlando, and testimony concerning his problems with alcohol. Much of this evidence was either cumulative to that presented at the original penalty phase or, although not irrelevant, not such that its omission from such original penalty phase renders the result of that proceeding unreliable. Cf., Washington. As this court observed in Maxwell v. Wainwright, supra, in disposing of comparable claim of error,

> The record shows that defense counsel did present testimony of witnesses concerning the defendant's character and background. The testimony went beyond statutory mitigating factors to include also non-statutory factors. The fact that a more thorough and detailed presentation could have been made does not establish counsel's performance as deficient. It is almost always possible to imagine a more thorouuh iob beinq done than was actuallv done. Moreover. it is highly doubtful that more complete knowledae of appellant's childhood circumsfances, mental and emotional problems, school and prison records. etc. would have influenced the jury to recommend or the iudue to impose a sentence of life imprisonment rather than death. (emphasis supplied) Id. at 932.

Maxwell certainly applies sub judice.

In contrast to any number of other cases, it is clear that defense counsel did not entirely fail to investigate an entire "area" of mitigation i.e., such as psychiatric testimony, and appellant's present argument would seem to relate to quantity, as opposed to quality. The state would suggest that the judge and jury in this case were adequately apprised of appellant's background, and that appellant has failed to demonstrate that more detailed testimony in this regard would have created a reasonable probability of a different result at sentencing. See, Francis v. State, 13 F.L.W. 369 (Fla. June 2, 1988) (counsel not ineffective for failing to present family members in mitigation, where testimony went to "events remote in time from the instant homicide" and it was speculative that such evidence would have

been found in mitigation): State v. Bolender, 503 So.2d 1247 (Fla. 1987) (fact that mother and sister did not testify in mitigation at sentencing phase did not require vacation of death sentence, where, inter alia, testimony "nebulous"); Lusk v. State, 498 So.2d 902 (Fla. 1986) (counsel not ineffective for failing to adduce more evidence as to defendant's background, where such evidence unlikely to have affected ultimate sentence): Booker v. State, 441 So.2d 148 (Fla. 1983) (counsel not ineffective for failing to contact family members for use in penalty phase, where evidence later acquired unlikely to have changed outcome). On the basis of the above precedents, appellant has failed to demonstrate a basis for relief as to this portion of his claim, especially when one considers not only the strength of the evidence in aggravation, but also the fact that any extended testimony by appellant's family members would simply have rendered them even more vulnerable to cross-examination as to appellant's lengthy criminal history.

As to appellant's second claim, that counsel was ineffective for failing to investigate and present expert testimony as to intoxication, this claim has largely already been resolved. Initially, it should be remembered that appellant's family members presented specific testimony in this area. Thus, appellant's uncle, Walter Young, testified that when appellant drank, he "lost sight of things" and was subject to having memory losses (OR 1053-1054): appellant's mother testified that he "loved to drink" (OR 1056). The state suggests that expert testimony in this regard would have been unavailing and/or

unhelpful, in that such testimony would again have conflicted with the evidence of appellant's own actions, as well as with his version of events.

Defense counsel did argue, based upon testimony at both the guilt and penalty phases, that intoxication should have been found in mitigation, and appellee suggests that appellant has not demonstrated ineffective assistance of counsel in this regard. Cf. Bertolotti v. State, 13 F.L.W. 253 (Fla. April 7, 1988) (counsel not ineffective for failing to present expert psychiatric testimony at penalty phase, where such testimony unlikely to have convinced sentencer to have imposed life): Daugherty v. State, 505 So.2d 1323 (Fla. 1987) (counsel not ineffective for failing to present expert testimony, where lay witnesses offered similar testimony). Simply presenting "more" evidence of intoxication at sentencing would not have benefited appellant, in that there is no reasonable probabilty that the same jury which had convicted appellant of first-degree murder and robbery would have then concluded that, for purposes of mitigation, he had been too drunk to have appreciated the criminality of his conduct or to have conformed such conduct to the requirements of the law. The defense presented sufficient evidence and/or argument as to appellant's use of intoxicants, so as to permit the sentencer a sufficient opportunity for mitigation in this area. Given the expert testimony which appellant now proffers in this regard, which, as noted, remains inconsistent with the facts of the case and with appellant's own defense, there is no reasonable probability of a different

verdict, had such been presented in 1982. Appellant has failed to satisfy either prong of Strickland v. Washington in this regard, and relief is not warranted at to this portion of appellant's claim.

Appellant's next claim, that relating to counsel's failure to object to the state's introduction of exhibits relating to appellant's allegedly inadmissible prior convictions, is similarly without merit. On direct appeal, appellant argued that it had been error for the court to have admitted the charging documents which gave rise to appellant's prior convictions for crimes of violence; this court found the claim unpreserved, but noted the lack of fundamental error. See, White, 446 So.2d at 1036. Appellant now argues that had counsel objected to the admission of this evidence, he would have received relief either at trial or on appeal. The problem with this argument is that, pursuant to Morgan v. State, 415 So.2d 6 (Fla. 1982), it was entirely proper for the state to have introduced the charging documents at issue, as such "gave rise" to appellant's convictions of the violent felonies at issue, either directly or as lesser offenses of the offenses charged; this court held that admission of this type of evidence is proper, because the charging documents are relevant to apprise the jury of the background of the defendant's prior conviction, as well as relevant to rebutting any allegation of a history of non-significant criminal activity. Thus, it would not seem to have been deficient performance on the part of Attorney Moran not to have objected.

Further, the defense clearly had a tactical reason for wanting as much of appellant's criminal background before the jury as possible, as noted at the evidentiary hearing below (R 84-85, 235). During his testimony at trial, appellant had acknowledged nine prior felony convictions (OR 808), and, as noted, the prosecutor had made reference to these convictions during closing argument (OR 923, 928-929, 958). It was, thus, defense strategy to show that not all nine of these prior convictions were violent, so that the jury would not assume the very worst in this regard (OR 1031). The state suggests, thus, that appellant has failed to satisfy either "prong" of Strickland v. Washington in this regard. While there would seem little that counsel could do about the fact that appellant had prior convictions for robbery and aggravated assault,[3] appellee suggests that reasonable counsel could quite well have concluded, as did Attorney Moran, that bringing forth the factual context of the other non-violent prior convictions would be beneficial. The fact that the jury learned thereby that appellant had prior convictions for escape would simply seem to have been the lesser of two evils, and appellant's suggestion that the jury placed undue emphasis upon these escape convictions would seem to presuppose jury irrationality, something which Washington expressly forbids in any analysis of prejudice. No relief is warranted as to this portion of appellant's claim.

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[3] Of course, should it have **chosen** to do so, the state could have presented the full details of appellant's prior violent felonies. See, e.g., Perri v. State, 441 So.2d 606 (Fla. 1983).

Appellant's next claim relates to counsel's failure to object to the prosecutor's closing argument at the penalty phase. This also represents an issue which appellant presented on direct appeal. On appeal, appellant complained that reversible error had occurred in regard to counsel's reference to appellant's alleged attempt to kill the Tehanis, as proof of a plan to execute witnesses, as well as in regard to the fact that the prosecutor argued that appellant had "marched" the victims into the back room and killed them execution style, to the fact that the jury could consider the likelihood that appellant would "be back" if sentenced to life and to the fact that "this" was the jury's "community" (OR **1036, 1077, 1081,** 1082). In its opinion, this court noted that no objection had been interposed, and further found "no fundamental error". White, **446** So.2d at **1036.** Appellant now seems to argue that, had counsel objected at sentencing and preserved the error, this court would have reversed. Appellee disagrees. For the most part, the above remarks reflect either reasonable inferences from the record and/or good faith arguments as to debatable aggravating circumstances, or, given this court's prior precedents, remarks which would not be the subject of reversal, even if preserved. See, Gibson v. State, **351** So.2d **948** (Fla. **1977):** Breedlove v. State, **413** So.2d 1 (Fla. 1982): Paramore v. State, 229 So.2d **855** (Fla. **1969);** Harris v. State, **438** So.2d **787** (Fla. **1983)** (prosecutor's argument relating to defendant's "walking out of jail again", if given life, one which "should not have been made" but insufficient as basis for mistrial): Bertolotti v. State, **476**

So.2d **130** (Fla. **1985)**: Valle v. State, **474** So.2d **796** (Fla. **1985).** Appellant has failed to satisfy either "prong" of Washington, especially given the fact that defense counsel may have been concerned that objections to any of these remarks would simply have further drawn the jury's attention to them. No relief is warranted as to this portion of appellant's claim.

Appellant's next claim relates to counsel's failure to object to allegedly erroneous jury instructions at the penalty phase. Appellant presented this claim on direct appeal, and this court noted the lack of objection, further finding "no fundamental error". White, **446** So.2d at **1036.** Appellant now seems to argue that, had counsel objected, relief would have been granted either at trial or on appeal. Appellee finds this argument less than persuasive. The alleged "error" in jury instruct-on relates to the fact that, while the trial court instructed the jury as to all aggravating circumstances, it did note at times that no evidence had been presented as to a specific factor and that, accordingly, the jury should not consider it (OR **1097-1099).** The aggravating circumstances which the judge so described relate to whether appellant had been under a sentence of imprisonment at the time of the homicide, whether the homicide had been committed to disrupt government functions and whether the homicide was especially heinous, atrocious or cruel: defense counsel had previously objected to any instruction on this last aggravating circumstance **(R 1037-1038).**

Appellant has failed to satisfy either "prong" of Strickland v. Washington, especially in light of this court's decision in

Fitzpatrick v. State, **437** So.2d **1072** (Fla. **1983).** In such case, this court rejected a claim of error, relating to the fact that the judge, as here, had instructed the jury that they were not to consider certain aggravating circumstances. This court found such not to be error, as the two circumstances at issue, that relating to whether the defendant had been under sentence of imprisonment at the time of the homicide and that pertaining to whether the defendant had a prior conviction for a crime of violence, were "objective" in nature: this court also noted that the sentencing court had instructed the jury that every aggravating circumstance had to be found beyond a reasonable doubt and that, even if found, had to be weighed against the mitigating circumstances before any recommended sentence of death could be returned. This court expressly held that

> These additional instructions dispensed with **any** possible implication that the judge felt all the remaining aggravating circumstances were applicable. Id. at **1077.**

Fitzpatrick is obviously applicable sub judice. The three aggravating circumstances which the judge stated tha the jury should not consider were either "objective" or simply precluded as a matter of law. As in Fitzpatrick, the jury was adequately instructed as to what was required to find an aggravating circumstance and to recommend a sentence of death, thus "dispensing" with any possible implication regarding the judge's "true" feelings (OR 1101). No relief is warranted as to this portion of appellant's claim, inasmuch as appellant has failed to

satisfy either "prong" of Washington, especially, as to prejudice, given the fact that appellant again seems to rely upon a presumption of jury "irrationality" in order to establish such.

Appellant's last claim in regard to the penalty phase relates to counsel's failure to object to a chart listing all the aggravating and mitigating circumstances going back to the jury for use during their deliberations (OR 1105-1106). Appellant sought to present this claim on appeal, and this court refused to address it on the basis of invited error. White, 446 So.2d at 1036. Appellant now seemingly argues that had counsel conducted himself properly, this court would have granted relief. Appellee disagrees. The record indicates that both counsel stipulated that this exhibit, although not formally introduced, could go back to the jury, and such stipulation was made with appellant's concurrence on the record (OR 1105). It is difficult to see the prejudice suffered appellant in this regard. From all indications, the chart was complete, listing both aggravating and mitigating circumstances. It is also interesting to note that present counsel has failed to include the chart in the record on appeal, thus precluding any accurate assessment of its allegedly "prejudicial" nature: such omission on the part of counsel should obviously preclude any finding of prejudice by this court. Cf., Washington. Appellant has further failed to demonstrate that no reasonable competent counsel would have allowed this or any similar chart to have been used by the jury during their deliberations. Appellant has accordingly failed to satisfy either "prong" of Strickland v. Washington, and is entitled to no

relief as to this portion of his claim.

Appellant's final "salvo" against defense counsel, apparently relating to his handling of both guilt and penalty phases, is that, pursuant to United States v. Cronic, **466 U.S. 648, 104** S.Ct. **2039, 80** L.Ed.2d **657 (1984),** there should be a presumption of ineffective assistance sub judice. Given the barrage of allegations against counsel, one must wonder why appellant wishes to have the benefit of a presumption, and, apparently, such presumption is to arise due to counsel's alleged physical condition and the fact that he has allegedly "confessed" his own incompetence (Brief of Appellant at p. **89).** Appellee must take issue with this latter assertion. It should be clear that Attorney Moran is given to sarcastic and self-deprecating remarks, and that, accordingly, not every word spoken by him, whether at deposition, trial or evidentiary hearing, should always be taken at face value. For instance, unlike appellant, appellee does not attach great importance to Moran's remark at trial that he was "too old" to file motions in limine (OR **534,** cited in Brief of Appellant at p. **93),** or remarks to the effect that he had "forgotten" something which he had said earlier. At the evidentiary hearing in **1986,** Moran was candid enough to admit that his health had not been the best at the time of trial in **1982** and that, like all human beings, he might have done things differently, given the chance **(R 226).**[4] Appellant, however,

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[4] Of course, as this court noted in Francis v. State, 13 F.L.W. **369, 370,** n. **4** (Fla. June **2, 1988),** any latter-day confession of ineffectiveness by defense counsel would have

seems to place great emphasis upon counsel's statements at the evidentiary hearing regarding the fact that he had concluded that the defense stood little chance (R 168). Appellee finds such reliance misplaced.

First of all, Strickland v. Washington makes it quite clear that "presumptively prejudicial" situations are extremely limited in number, largely confined to instances in which a conflict of interest has been shown. No reason exists in this case to exempt appellant sub judice from the required showing of prejudice. Such burden is justifiable, given the fact, as the United States Supreme Court noted, that errors by counsel, even if unreasonable, cannot, in and of themselves, justify vacating a judgment and sentence, especially given the fact that attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case, as they are to be prejudicial. Additionally, an act or omission that is unproffessional in one case may be seen as brilliant in another. As conceded earlier, Attorney Moran is hardly the "perfect" attorney. Looking simply at his **"performance",** one can say that, in hindsight, he probably "should" have preserved many of the various points which this court found defaulted on direct appeal: yet, his failure to do so is largely moot, given the fact that, as demonstrated, no different result would have obtained either at trial or on appeal. Moran's primary alleged failing, that relating to his failure to present a defense of intoxication, could quite possibly have constituted prejudicial

error, under other circumstances or in another case. The problem for appellant is that in this case, any alleged deficiency in this regard is simply not prejudicial, a conclusion which is only underscored by the testimony of the "experts" below.

Thus, the "undiscovered" experts, presented at the evidentiary hearing, would simply have been a complete disaster at trial, because, despite their charts, graphs and learned opinions, their "conclusions" simply could not be cut to match the facts of this case. A jury, having to choose between an eyewitness or an after-the-fact expert, would have little trouble opting for the former. Had this case been more circumstantial in nature, Moran's failure to present the instant defense of intoxication could quite well have been prejudicial. But, under these facts, there simply is no reasonable probability that the jury would have found that appellant was unable to form the intent to rob and kill. The allegations which appellant makes in this case are serious in the extreme, not only those that allege that a member of the bar has functioned so deficiently so as to, in essence, not exist for constitutional purposes, but also those allegations that the adversary system as a whole has broken down, to the extent that an unreliable result has been reached.

This latter conclusion simply cannot be reached in this case, because Jerry White is guilty of robbery and murder in the first degree, and death is the appropriate sentence under all of the circumstances of this case. This fact "just flows through this trial", and, in the final analysis, renders all others irrelevant. The court below was correct to deny appellant's

motion for post-conviction relief, and such order of denial should be affirmed in all respects.

POINT II

APPELLANT'S CLAIM, IN REGARD TO STATEMENTS MADE TO THE JURY WHICH ALLEGEDLY DIMINISHED THEIR SENSE OF RESPONSIBILITY, WAS PROPERLY STRICKEN AS ONE WHICH WAS NOT COGNIZABLE ON POST-CONVICTION MOTION; IN THE ALTERNATIVE, APPELLANT HAS FAILED TO DEMONSTRATE *ANY* BASIS FOR RELIEF, BASED UPON CALDWELL V. MISSISSIPPI, 472 U.S. 320, 105 S.CT. 2633, 85 L.ED.2D 231 (1985), IN REGARD TO FLORIDA'S STANDARD JURY INSTRUCTIONS AT SENTENCING.

In his motion for post-conviction relief, appellant argued, for the first time, that certain statements by the judge and prosecutor, to the effect that sentencing was the function of the court and not of the jury, and that the court was not obliged to follow the jury's recommendation, violated Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 85 L.Ed.2d 231 (1985), as "diluting" the jury's sense of responsibility (R 495). On May 6, 1986, the state moved to strike this claim as one which should have been raised on direct appeal, and Judge Kirkwood granted such motion, refusing to address the claim on the merits (R 950, 962, 1022).

On appeal, appellant contends that this ruling was error, but it is clear that the weight of authority is against him. No objection was interposed at the time of trial to any of these statements or instructions (OR 5, 6, 19, 116, 191, 1044), and this court has consistently held that this claim is one which must be raised on direct appeal and that Caldwell does not constitute a fundamental change in law, under Witt v. State, 387

So.2d 922 (Fla. 1980), so as to excuse procedural default. See, e.g., Ford v. State, 522 So.2d 345 (Fla. 1988): Phillips v. Dugger, 515 So.2d 227 (Fla. 1987); Demps v. State, 515 So.2d 196 (Fla. 1987); Copeland v. Wainwright, 505 So.2d 425 (Fla.), vacated on other grounds, ___ U.S. ___, 108 S.Ct. 55, 98 L.Ed.2d 19 (1987). Appellant has failed to offer this court any good cause to recede from the above precedents, and the pendency of Dugger v. Adams, ___ U.S. ___, 108 S.Ct. 1106 (1988), would seem to afford little solace.

In contrast to the situation in Adams, the prosecutor and judge in this case made no remark which could be construed as affirmatively misstating or minimizing the jury's role in sentencing. C.f., Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) (in banc). Rather, in this case, the jury was simply told, in accordance with Florida law, that their advisory verdict was a recommendation, that the judge was not bound to follow it and that the actual task of imposing sentence was the responsibility of the judge, and not of the jury. It is likely that even the Eleventh Circuit would find no basis for relief in regard to these comments, in light of its recent decision in Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988) (in banc), which recognized that there was nothing impermissible in a Florida sentencing jury being advised that they were making a "recommendation" and that "it was the judge's job to determine what a proper sentence would be." This claim was correctly found to be improperly presented on post-conviction motion, and the order below should be affirmed in all respects.

POINT III

APPELLANT'S CLAIM, IN REGARD TO THE ALLEGED EXCLUSION OF ALL BLACK PROSPECTIVE JURORS, WAS PROPERLY STRICKEN AS ONE WHICH WAS NOT COGNIZABLE ON POST-CONVICTION MOTION: IN THE ALTERNATIVE, APPELLANT HAS FAILED TO DEMONSTRATE ANY BASIS FOR RELIEF.

In his post-conviction motion, appellant argued, for the first time, that all black prospective jurors were allegedly improperly stricken from the jury, in violation of State v. Neil, 457 So.2d 481 (Fla. 1984) and Batson v. Kentucky, 476 U.S. ___, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (R 494). On May 6, 1986, the state moved to strike this claim as one which was improperly raised by means of post-conviction motion, and Judge Kirkwood granted such motion, failing to address this claim on the merits (R 949-950, 962, 1022).

On appeal, appellant seeks to argue that this ruling was erroneous, but fails to make a case for why this claim is cognizable on post-conviction motion. This court, in a number of other 3.850 appeals in capital cases, has held that this identical claim is one which must be raised on direct appeal. See, Johnson v. State, 463 So.2d 207 (Fla. 1985): Lightbourne v. State, 471 So.2d 27 (Fla. 1985): James v. State, 589 So.2d 737 (Fla. 1986). Additionally, in State v. Neil itself, this court held that such case would not be applied retroactively or "warrant relief in collateral proceedings." It should be noted that the Neil case was decided on September 17, 1984, and appellant's appeal was "final" on April 11, 1984, the date that

rehearing was denied; no petition for writ of certiorari was ever filed in the United States Supreme Court, so as to postpone finality. Such being the case, it is clear that neither Neil nor Batson itself can serve as a basis for relief. See, Allen v. Hardy, 478 U.S. ___, 106 S. Ct. 2878, 92 L.Ed.2d 199 (1986); Griffith v. Kentucky, ___ U.S. ___, 107 S.Ct. 208, 93 L.Ed.2d 649 (1987).

Additionally, the state challenges the reliability of appellant's "source material" as to the race of the prospective jurors. No objection was made to the excusal of any juror at the time of trial and, thus, no contemporaneous record was created in this regard. Rather, at the time the motion for post-conviction relief was filed, an investigation was made as to the voter lists, and an affidavit compiled which compared the prospective members of the venire with the voting lists, the author of such affidavit determining that of the forty-six (46) prospective jurors examined, eight (8) were allegedly black (R 729-730). Appellee questions the reliability of this data, because the "list" contains the notation that prospective juror Robert Brantly was white (R 729), whereas during voir dire, he was referred to as being black (OR 105); he was excused from service due to his failure to divulge his felony convictions (OR 105). Accordingly, the "integrity" of this entire claim would seem subject to question.

Further, it is clear from the record that, even without a "Neil" inquiry, permissible reasons existed to excuse those black jurors peremptorily excused by the state; as appellant concedes,

the defense itself peremptorily challegned a black prospective juror (OR **94-95;** R **729).** Further, it is clear that three black prospective jurors were excused for <u>cause</u> on the state's motion, due to their opposition to capital punishment (OR **93, 168, 169).** Another black prospective juror was excused due to knowledge of the case (OR **187).** Of those challenged peremptorily, it should be plain that all had expressed misgivings concerning capital punishments which simply did not rise to the level required for excusal for cause (OR **25,** 31-35, **144, 148-149).** The state had unsuccessfully sought to excuse prospective juror Cunningham for cause (OR **168).** While prospective juror Elloise Robinson was perhaps the least clear in her opinion as to capital punishment, it is interesting to note that defense counsel himself may not have wished her on the jury: at the time that initial challenges were made, he stated that he was worried "about her religious convictions", but decided at that time not to strike her (OR **95).** The state suggests that, in all likelihood, the defense was not upset by the state's challenge of this prospective juror. Appellant has entirely failed to allege a prima facia case under the principles of <u>Neil</u>, and this claim was properly found to be procedurally barred. The order below should be affirmed in all respects.

POINT IV

APPELLANT'S CLAIM, IN REGARD TO THE TRIAL COURT'S EXCUSAL OF CERTAIN PROSPECTIVE JURORS, WAS PROPERLY STRICKEN AS ONE NOT COGNIZABLE ON POST-CONVICTION MOTION; IN THE ALTERNATIVE, APPELLANT HAS FAILED TO DEMONSTRATE ANY BASIS FOR RELIEF.

In his motion for post-conviction relief, appellant complained of the exclusion from the jury of, inter alia, prospective jurors DePascale, Harris and Ferree (R 516-520). On May 6, 1986, the state moved to strike this claim, on the grounds that it had actually already been raised on direct appeal, and Judge Kirkwood granted such motion, refusing to address this claim on the merits (R 952, 962, 1022). In his initial brief, appellant re-raises his contention that these three prospective jurors were excused in violation of Wainwright v. Witt, 469 U.S. 810, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), in that they were allegedly not "unalterably" opposed to capital punishment: appellant focuses most of his attention upon prospective juror DePascale.

It should be clear, as the state correctly pointed out in its motion to strike, that appellant did raise this identical point on appeal, arguing that the excusal of these three prospective jurors had been error (Initial Brief of Appellant, White v. State, Florida Supreme Court Case Number 62,144 at pages 45-46). When this claim was presented on direct appeal, this court held as follows,

> Appellant contends it was error to

> exclude potential jurors because they expressed objections to the death penalty. He did not preserve this point by objecting below. Moreover, the argument is meritless. The excused jurors stated that they could not vote for the death penalty. Two of them indicated their opposition to the death sentence might influence their choice of verdict. Prospective jurors may be excused for cause if their opposition to the death penalty might interfere with their ability to decide guilt or innocence or would render them unable to consider the death penalty if a finding of guilt were reached. Steinhorst v. State, 412 So.2d at 335.

White at 1035.

Inasmuch as this court, in the alternative, denied appellant's claim on the merits on direct appeal, appellant has no right to have this claim re-litigated on 3.850. See, e.g., Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985): Christopher v. State, 416 So.2d 450 (Fla. 1982). Further, it is clear that, despite whatever new "vigor" appellant may now inject, excusal of these prosective jurors was proper, in that the clear and plain meaning of their statements during voir dire was that they would never vote to impose the death penalty under any circumstances (OR 29-31, 136-137, 140-142, 146-147). The trial court's order, refusing to address this claim on the merits, should be affirmed in all respects.

POINT V

APPELLANT'S CLAIM, IN REGARD TO THE STATE'S ALLEGED WITHHOLDING OF EVIDENCE, WAS PROPERLY STRICKEN BELOW: IN THE ALTERNATIVE, APPELLANT HAS FAILED TO DEMONSTRATE ANY BASIS FOR RELIEF.

In his motion for post-conviction relief, appellant, for the first time, made two allegations regarding the state's alleged failure to disclose exculpatory information, to-wit: the presence of a fourth bullet at the crime scene and the presence of some thirteen hundred and one dollars **($1301)** in the pocket of the victim (R **490-493).** On May **6, 1986,** the state moved to strike these claims, on the grounds that they were improperly presented on post-conviction motion, and Judge Kirkwood granted such motion, refusing to address them on the merits **(R 948-949, 962,** 1022). On appeal, appellant contends that this ruling was error, citing, to inter alia, Brady v. Maryland, **373** U.S. **83, 83** S.Ct. **1194, 10** L.Ed.2d 215 **(1963)** and United States v. Bagley, **473 U.S. 667, 105** S.Ct. **3375, 87** L.Ed.2d **481 (1985).**

Appellee, as did the state below, finds this argument without merit, given the fact, inter alia, that there was no "suppression" of evidence and that the above "facts" were made known to the defense, and to the jury, at the time of trial. As this court observed in Arango v. State, **437** So.2d **1099** (Fla. **1983),** a Brady violation is normally predicated upon a defendant's not knowing of the withheld evidence, and where a defendant is aware of the evidence before or during trial, the appropriate motion is one to compel discovery or to dismiss. See

also, Preston v. State, 13 FLW 341 (Fla. May 26, 1988) Inasmuch as there was testimony adduced at trial, regarding the "fourth" bullet and the presence of money in the victim's pockets, it is difficult to see how the state can be charged with having "suppressed" evidence (OR 304-307, 543-544), and the basis for appellant's assertion that this evidence was "withheld" is unclear. Similarly, the fact that this evidence was made known to the defense at the time of trial, would seem to mean that any claim in relation to its alleged withholding could have been raised on appeal, thus underscoring the correctness of the trial court's refusal to address this claim on the merits. See, Preston, supra.

Further, it should be noted that whether the state itself had any advance knowledge of this testimony, especially that relating to the fourth bullet, would seem highly debatable. Whereas one witness, Frankie Walker, did testify that he had found a projectile at the scene of the crime and had then thrown it away, only revealing this information to the state "a couple of days" prior to trial, his father testified that he had been the one to find the bullet and that he had never talked to the police at all (OR 304-307, 1060-1063). Similarly, there is no showing that the state had knowledge of the presence of the money in the pocket of the victim at any time prior to trial.

Additionally, it is clear that this evidence does not meet the "materiality" standard required under Bagley. Part of this result is compelled by the fact that this evidence was adduced at trial and placed before the jury, and yet was obviously

insufficient to change the result of the trial. Another part of this result is compelled by the fact that defense counsel utilized the existence of both of these items of evidence in support of the defense theory of the case - arguing that the fourth bullet was consistent with appellant's own story as to how the shootings had occurred in self-defense and that the presence of money in the pocket of the victim underscored the fact that appellant had not sought to rob the victims, but had merely sought to recover his own money which had allegedly been taken from him (OR **935, 937, 947).** Obviously, these arguments were unsuccessful.

Any suggestion as to how the defense would have "developed" this evidence with more prior knowledge is sheer speculation. Whereas appellant surmises that the money in the victim's pocket could have been subjected to fingerprint analysis, he fails to explain how such would have been beneficial to the defense. The money would most likely have had the victim's fingerprints upon it, which would have proved exactly nothing; obviously, had appellant's fingerprints been upon this money, such would hardly have helped his case. Similarly, ballistics testimony as to the bullet would have proved little, as all parties apparently assumed that it had been fired by appellant.

Additionally, as far as the existence of this ''fourth" bullet, such fact says little about appellant's intent to kill. The murder weapon was never recovered, and it was never made clear how many bullets were originally loaded into it. The state's theory of the case, that the murders had been committed

execution-style was based upon the presence of the wounds in the victims' bodies, and not upon the number of shots fired: additionally, given the fact that this court, on appeal, struck the finding of that aggravating circumstance relating to the homicide being especially cold, calculated or premeditated, while still affirming the death sentence, it is difficult to see how more emphasis on this "evidence" would have changed the result below. The trial court correctly struck this point and, even if properly presented, appellant has clearly failed to demonstrate any basis for relief. The order below should be affirmed in all respects.

POINT VI

APPELLANT'S CLAIM, IN REGARD TO THE ALLEGED LACK OF *ANY* FINDING THAT HE INTENDED TO KILL, WAS PROPERLY STRICKEN BELOW; IN THE ALTERNATIVE, APPELLANT HAS FAILED TO DEMONSTRATE ANY BASIS FOR RELIEF.

In his motion for post-conviction relief, appellant, for the first time, argued that his death sentence had to be vacated, because there had been no finding of any intent to kill on his part (R 521-522). The state moved to strike this issue as one which could and should have been raised on direct appeal, and Judge Kirkwood granted such motion, refusing to address this claim on the merits (R 948-949, 962, 1022). On appeal, appellant argues that this ruling was in error, relying upon, inter alia, Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), Cabana v. Bullock, 474 **U.S.** 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986) and Tison v. Arizona, ___ U.S. ___, 107 S.Ct. 1676 (1987). Appellee particularly questions appellant's reliance upon the latter case, but in any event, this point is without merit.

First of all, appellant acted alone, and without a co-defendant, and regardless of whatever his intent was, he actually killed the victim in this case, thus removing this case from the ambit of Enmund. See, Funchess v. State, 449 So.2d 1283 (Fla. 1984) (Enmund inapplicable where defendant acts alone). Additionally, whereas Enmund has been held to be a change in law, see, Tafero v. State, 459 So.2d 1034 (Fla. 1984), given the fact that such case had been decided prior to appellant's direct

appeal, there is no reason to find this issue cognizable on appellant's 3.850, given the fact that it could have been raised on direct appeal. Cf., McCrae v. State, 437 So.2d 1388 (Fla. 1983). Finally, Tafero itself also rejected appellant's "general" verdict theory. Appellant was charged with premeditated murder and found guilty as charged (OR 1576, 1975-1976); the prosecutor had argued below both theories of murder, premeditated and felony murder (OR 910-912, 921). In affirming appellant's conviction, this court found that "sufficient evidence existed to support a jury finding of premeditation." ~~See~~, White at 1037. This claim was improperly presented on post-conviction motion, and the order below should be affirmed in all respects.

POINT VII

APPELLANT'S CLAIM, IN REGARD TO THE FACT THAT ELECTROCUTION ALLEGEDLY CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT, WAS PROPERLY STRICKEN BELOW: IN THE ALTERNATIVE, APPELLANT HAS FAILED TO DEMONSTRATE ANY BASIS FOR RELIEF.

In his post-conviction motion, appellant argued for the first time that his sentence of death had to be vacated, because electrocution constitutes cruel and unusual punishment (R 523-532). On May 6, 1986, the state moved to strike this claim as one which could and should have been raised on direct appeal, and Judge Kirkwood granted such motion, refusing to address this claim on the merits (R 953, 962, 1022). On appeal, appellant contends that this ruling is error.

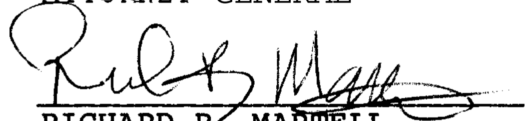
Appellant has failed to explain why this court should recede from its prior precedents, such as Porter v. State, 478 So.2d 33 (Fla. 1985) and Booker v. State, 441 So.2d 148 (Fla. 1983), both of which have held that this is a claim which must be raised on direct appeal and, therefore, is not cognizable on post-conviction motion. Additionally, it would seem that this matter was put to rest by the United States Supreme Court in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) and Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). The order below should be affirmed in all respects.

CONCLUSION

WHEREFORE, for the aforementioned reasons, the order below should be affirmed in all respects.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

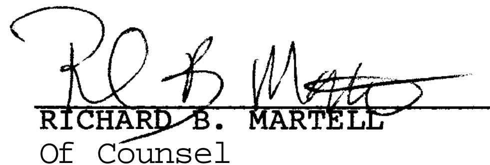


RICHARD B. MARTELL
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, FL **32014**
(904) 252-2005

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee has been furnished by mail to: Carlo Obligato, Capital Collateral Representative, **1533** South Monroe Street, Tallahassee, FL **32301** on this 15 day of July, **1988.**



RICHARD B. MARTELL
Of Counsel