IN THE SUPREME COURT OF FLORIDA

JERRY WHITE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 86,900

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

ANSWER BRIEF OF APPELLEE

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PROCEDURAL HISTORY

On April 7, 1981, Jerry White was indicted on one count of first-degree murder, in regard to the March 8, 1981, shooting of James Melson, and on one count of armed robbery, in regard to the robbery of Alexander Alexander on such date. He was tried before a jury in Orange County Circuit Court on April 20-27, 1982, and was found guilty as charged on both offenses. The defense was afforded a short continuance, and the penalty phase was conducted on April 30, 1982; at such proceeding, the defense called five (5) witnesses, including White's mother, uncle and fiance'. The jury, by a vote of eleven (11) to one (1), returned an advisory sentence of death, and, on May 4, 1982, Judge Stroker formally sentenced White to death on the murder charge. In his sentencing order, the judge found four (4) statutory aggravating factors - that White had previously been convicted of a felony involving violence, §921.141(5)(b), that the homicide had been committed during the course of a felony - to-wit: robbery, §921.141(5)(d), that the homicide had been committed for pecuniary gain, §921.141(5)(f), and that the homicide had been committed in a cold, calculated and premeditated manner, §921.141(5)(i). Judge Stroker expressly found that no statutory mitigating circumstances existed; in eliminating that mitigating factor involving White's capacity to conform his conduct to the requirements of the law, §921.141(6)(f), the judge found,

> Although there was evidence that the Defendant had been drinking alcoholic beverages before the crime there is no evidence that he was substantially impaired in his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

(R 1995).

The sentencing order also contained the following language,

> The advisory jury is entitled to consider any other mitigating circumstance found in the evidence or the Defendant's character. The Court has also searched the record and has found that none exists.

(R 1995).

Jerry White appealed his convictions and sentence of death to the Supreme Court of Florida, and, in his Initial Brief, filed December 8, 1982, raised eleven (11) points on appeal: (1) error in imposition of the death penalty; (2) error in separate sentences on robbery and murder; (3) error in the fact that Judge Stroker, as a county judge, had allegedly lacked jurisdiction to preside over the trial; (4) error in admission of evidence concerning Alexander's injuries; (5) alleged insufficiency of evidence; (6) error in denial of White's motion to suppress statement; (7) error in the trial court's instruction to the jury at the guilt phase; (8) error in excusal of prospective jurors opposed to the death penalty; (9) error in regard to allegedly improper prosecutorial argument; (10) error in the trial court's failure to dismiss the indictment, and (11) error in admission of the State's exhibits. In the point involving the death penalty, White specifically contended: (a) that the finding of both the robbery and the pecuniary gain aggravating circumstances represented impermissible doubling; (b) that the cold, calculated and premeditated aggravating circumstance had been improperly found; (c) that the court had erred in failing to find mitigation; (d) that the court had

allegedly impermissibly considered non-statutory aggravating circumstances; (e) that the court had erred in instructing the jury on all of the statutory aggravators; (f) that allegedly improper prosecutorial comments had been made; (g) that the court erred in allowing a chart to go back to the jury; (h) that the court erred in admitting into evidence the charging documents in regard to White's prior convictions, and (i) that §921.141 was unconstitutional. In its Answer Brief, filed January 31, 1983, the State specifically questioned the preservation of many of these points on appeal, and contended that such were procedurally barred.

The Florida Supreme Court affirmed White's convictions and sentence of death on January 19, 1984. See White v. State, 446 So.2d 1031 (Fla. 1984). The court discussed the points on appeal in some detail. As to the issue involving the trial judge's authority to preside, the court held:

> This issue was waived by failure to object below. Moreover, Appellant's position is erroneous on the merits. A county judge who is qualified to serve as a circuit judge may be assigned as a temporary circuit judge to perform any judicial service a circuit judge can perform. (citations omitted).

White, 446 So.2d at 1034.

As to the claim involving the admission into evidence of details concerning Alexander's injuries, the Florida Supreme Court found the issue not to be preserved, given the lack of objection, but also found no fundamental error. Id. at 1034-35. The court found sufficient evidence to exist to support the convictions, and further found no error in the denial of White's motion to

suppress a statement; in support of the latter finding, the court stated,

> Upon Appellant's objection, the court excused the jury and held a hearing on the motion. The issue before the court was whether the statement was voluntary. Although the court in ruling on the motion did not again use the specific word 'voluntary,' the evidence supports a finding that the Defendant was alert at the time and that the statement was voluntarily given. (citation omitted).

White, 446 So.2d at 1035.

The Florida Supreme Court found that White had failed to preserve any claim of error in regard to the trial court's failure to instruct the jury on attempted first-degree murder and on third degree murder, given the lack of objection; the court found no error in the trial court's denial of a requested jury instruction on circumstantial evidence. Id. at 1035. The Florida Supreme Court found that White's claim in regard to the excusal of certain prospective jurors was waived, due to failure to object. In the alternative, however, the court found,

> The excused jurors stated that they could not vote for the death penalty. Two of them indicated their opposition to the death penalty might influence their choice of verdict.

Id. at 1035.

The court found White's claim involving allegedly improper prosecutorial comments and the failure of the circuit court to dismiss the indictment to be waived due to lack of objection. Id. at 1035-36. As to the claim of error involving admission of exhibits at trial, the court held,

> He [White] does not specify which or how many exhibits belong in this category, and he did

> not object at trial. The record offers no basis for reversal.

White, 446 So.2d at 1036.

The Florida Supreme Court similarly discussed in some detail White's claims in regard to his sentence of death. The court noted that White raised nine claims in regard to his sentence, four of them not preserved for appellate review due to lack of objection. Id. Thus, the court found the following claims procedurally barred - that the court had erroneously instructed the jury, that the prosecutor had made improper comments and that exhibits had been wrongfully admitted; the court also found that any claim of error in regard to the fact that a chart had gone back to the jury room was waived, inasmuch as White had agreed to such procedure. Id. The court then noted that White's contention that §921.141 was unconstitutional had already been resolved against him. Id. The Florida Supreme Court considered White's claim that Judge Stroker had impermissibly considered non-statutory aggravating factors. The court found that White was simply misreading the sentencing order, noting,

> We find that in context these statements were considered not as aggravating factors, but rather as observations in connection with a search of the record for possible non-statutory mitigating factors.

Id. at 1036.

In regard to the claim that the sentencing judge had failed to consider certain mitigating circumstances, the court found,

> The record reflects that the court expressly considered the evidence that Appellant had been drinking alcoholic beverages before the crime. Furthermore, the court expressly stated that it 'carefully considered the

> evidence presented at both phases of the trial . . . weighed and applied the total evidence to the legislatively mandated criteria of aggravating and mitigating circumstances,' and that it searched the record and found no other mitigating circumstances to exist.

Id. at 1036

As to the attacks upon the aggravating circumstances, the Florida Supreme Court agreed with White that the aggravating circumstances involving robbery and pecuniary gain had been impermissibly doubled, stating, "The finding embraces but one aggravating factor." Id. at 1037. The court also agreed that the cold, calculated and premeditated aggravating circumstance had been improperly found. Id. The court found, however, that, given the absence of mitigation, the two remaining aggravating circumstances - in regard to White's prior convictions for crimes of violence and the fact that the murder had been committed during the course of a robbery - were sufficient to support the death penalty. Id. Finally, the court concluded that the separate sentence for robbery had been proper, in that "sufficient evidence existed to support a jury finding of premeditation." Id. at 1037. White filed a motion for rehearing, which was denied on April 11, 1984. No petition for writ of certiorari was ever filed in the United States Supreme Court.

A death warrant was signed for Jerry White on September 30, 1985, such warrant effective between October 22-29, 1985. On October 23, 1985, White, represented by volunteer counsel and the Office of the Capital Collateral Representative, filed an

application for stay of execution and a motion for postconviction relief, pursuant to Fla.R.Crim.P. 3.850, in the state circuit court; the circuit court granted a stay of execution the next day. The motion for postconviction relief raised nine (9) basic claims for relief - (1) ineffective assistance of counsel at both the trial and sentencing phases; (2) the alleged withholding of evidence by the State; (3) the alleged destruction of evidence by the State; (4) the allegedly wrongful exclusion of jurors on the basis of race; (5) alleged violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). (6) an allegation that the death penalty was imposed due to racially-related factors; (7) an allegation that prospective jurors had been improperly excused for cause; (8) an allegation that there was an insufficient finding of White's intent to kill, and (9) a contention that electrocution constitutes cruel and unusual punishment (PC 441-533). The claims of ineffective assistance were extremely broad, White arguing that counsel had been intoxicated at the time of the trial, that he was racist and disloyal, that he had insufficiently voir dired prospective jurors, that he had failed to object to the prosecutor's opening statement, that counsel's cross-examination of witnesses had been bumbling and inept, that counsel had failed to prepare for trial, that counsel had failed to raise a defense of intoxication on behalf of White, that counsel had delivered a poor closing argument at the guilt phase, that counsel had failed to request certain jury instructions, that counsel failed to object to the admission of evidence concerning Alexander's physical condition,

that counsel failed to properly litigate the motion to suppress, that counsel failed to object to allegedly improper collateral crime evidence, that counsel failed to prepare for the penalty phase and present evidence in mitigation, that counsel failed to object to allegedly improper closing argument by the prosecutor, that counsel's closing argument had been unfocused, that counsel should have objected to an exhibit going back to the jury and that counsel should have objected to the jury instructions at the penalty phase. (PC 442-489).

On May 5, 1986, the state filed a motion to strike all claims except that of ineffective assistance of counsel, on the grounds that such were improperly presented and procedurally barred (PC 948-953); such motion was granted on May 29, 1986 (PC 962). An evidentiary hearing was held on the claim of ineffective assistance of counsel on July 28-29, 1986 (PC 1-440). At such hearing, the defense counsel presented nineteen (19) witnesses, including White's former trial counsel, Emmett Moran. On April 8, 1987, the state court judge rendered his order, denying the postconviction motion in all respects (PC 1021-1024). In such order, the judge made detailed findings as to the facts giving rise to White's conviction, and further made factual findings as to the issue of ineffective assistance of counsel. The court specifically found, based upon the testimony of former prosecutor Blanker, that defense counsel had not, in fact, been intoxicated at the time of the trial (PC 1022). The court found that the evidence against White had been overwhelming, and further noted that any defense of intoxication "is incompatible

with the defendant's testimony." (PC 1023). Specifically, Judge Kirkwood found,

> But the facts are clear, the Defendant wanted to take the stand, to tell his story. Trial counsel, Emmett Moran, testified that the Defendant told him that he testified truthfully at the trial and even provided Moran with a hand written statement consistent with his trial testimony. Trial counsel had to fashion a defense compatible with Defendant's testimony which did not include raising intoxication defense.

(PC 1023).

The circuit court then concluded that White has failed to demonstrate either deficient performance of counsel or prejudice under Strickland v. Washington, 466 U.S. 668 (1984) (PC 1023-24).

White appealed such ruling to the Supreme Court of Florida, and raised the denial of all of his claims for relief on appeal, except that relating to the allegedly racially discriminatory manner in which the death penalty was imposed. On March 15, 1990, the court affirmed the circuit court's ruling in all respects. See White v. State, 559 So.2d 1097 (Fla. 1990). As to the claim of ineffective assistance of counsel, the appellate court likewise found that White had failed to demonstrate relief under Strickland v. Washington. In pertinent part, the court held,

> The finding that the intoxication defense would have been incompatible with the deliberateness of White's actions is borne out by the evidence; White took a loaded gun into the store; the victims both were shot in the back of the head; White took the money from the store; he ran to his car steadily after the shooting and drove away capably; he had a change of clothes ready in the car and was able to change and discard his old clothes; he was able to dispose of

> the murder weapon in such a way that it has never been found. The prosecutor testified that White's own testimony was inconsistent with an intoxication defense and that trying to present this defense in tandem with White's theory of self-defense would have been like 'riding two horses.' The fact that counsel did not prevent White from testifying can hardly be termed a deficiency; White exercised his basic right to testify in his own behalf.

White, 559 So.2d at 1099.

The court stated that the other claims "were either addressed on direct appeal or are without merit." Id. at 1098. The court denied motions for rehearing and clarification on May 24, 1990.

On June 12, 1990, the Governor signed a second death warrant for White, effective between noon, July 16, 1990, and noon, July 23, 1990. On July 10, 1990, White filed a second state postconviction motion, pursuant to Fla.R.Crim.P. 3.850. In such pleading, White presented two (2) claims for relief: (1) a contention that White's scheduled execution would constitute cruel and unusual punishment, given the fact that Jesse Tafero's May 4, 1990, electrocution had allegedly been "botched", and (2) a contention that White's prior convictions should not have been used in aggravation at the state court penalty phase, given their alleged invalidity. The State filed a response the next day, and, on such date, the state circuit court summarily denied the motion. The court expressly found that the claim involving prior convictions was procedurally barred, and made an alternative finding of procedural bar as to that claim involving electrocution. White immediately appealed such ruling to the Supreme Court of Florida.

On July 13, 1990, White filed a petition for writ of habeas corpus in the Florida Supreme Court, presenting seven (7) claims for relief: (1) a renewed claim of ineffective assistance of trial counsel; (2) another renewed claim of ineffective assistance of trial counsel; (3) a claim allegedly premised upon Clemons v. Mississippi, 449 U.S. 738, 755, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990); (4) a re-argument of the same claim, allegedly premised upon jury instruction error; (5) a contention that the sentencer failed to find mitigation "clearly set forth in the record"; (6) a contention that the jury instructions at the penalty phase had allegedly shifted the burden of proof onto the defense, and (7) a claim that the indictment was invalid, because more than the statutory number of grand jurors had allegedly been present. White alleged sub-claims of ineffective assistance of appellate counsel as to Claims (1), (2) and (7). In its response, the State contended that all claims were procedurally barred.

On July 17, 1990, the Florida Supreme Court rendered two opinions, resolving all of White's pending claims and denying all relief. In White v. State, 565 So.2d 322 (Fla. 1990), the court considered White's successive postconviction appeal. The court found that White's claim concerning the electric chair was without merit, and that White had essentially abandoned his claim regarding the prior convictions, "White now contends that the prior convictions underlying [the aggravating] circumstance were unlawfully obtained but he does not argue this point as grounds for appeal in the present case." White, 565 So.2d at 323.

In White v. Dugger, 565 So.2d 700 (Fla. 1990), the court likewise denied White's petition for habeas corpus. The state supreme court expressly found White's renewed claims of ineffective assistance of trial counsel to be procedurally barred, and likewise made express findings of procedural bar as to Claims (4), (5) and (6), involving alleged improper jury instructions, failure to find mitigation and alleged burden-shifting. White, 565 So.2d at 701-3. The court addressed White's claim regarding the grand jury, and found no fundamental constitutional error or ineffectiveness of appellate counsel for failing to assert such claim on appeal. Id. at 703. As to White's claim under Clemons v. Mississippi, the state supreme court held:

> In Clemons v. Mississippi, 449 U.S. 738, 755, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), the United States Supreme Court reviewed a decision of the Mississippi Supreme Court, which upheld Clemons' death sentence and also recognized that the state's "especially heinous" aggravating factor had been unconstitutional until given a proper limiting construction. The federal court remanded the case for resentencing because it could not tell (1) whether the state court in reweighing the aggravating and mitigating factors had considered the invalid factor in its unlimited form, (2) whether the court had created a automatic rule that whenever an aggravating factor has been invalidated the sentence may be affirmed as long as one valid aggravating factor remains, and (3) whether the court had properly applied harmless error analysis.
>
> White claims that this Court violated Clemons when it affirmed his death sentence after invalidating two out of four aggravating factors. In affirming White's sentence on direct appeal, we stated:

> When there are one or more valid aggravating factors which support a death sentence, in the absence of any mitigating factors(s) which might override the aggravating factors, death is presumed to be the appropriate penalty.
>
> White, 446 So.2d at 1037. Regardless of this language, we are convinced that this Court properly applied a harmless error analysis on direct appeal. To remove any doubt, we again apply this analysis and conclude that the trial court's ruling would have been the same beyond a reasonable doubt even in the absence of the invalid aggravating factors. Id. at 702.

White then proceeded to the United States District Court for the Middle District of Florida, Orlando Division, where, on July 17, 1990, he filed a petition for writ of habeas corpus, raising fifteen (15) primary claims for relief: (1) a lengthy claim of ineffective assistance of counsel at the guilt and penalty phases of the trial; (2) a claim of error under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), in regard to the existence of a "fourth bullet" and the presence of money on the victim's person; (3) a claim of error under Clemons v. Mississippi, alleging that the harmless error analysis employed by the Supreme Court of Florida on direct appeal had been constitutionally deficient; (4) an attack upon the electric chair; (5) a claim that the Florida Supreme Court had failed to consider the effect of jury instruction error in regard to the stricken aggravators; (6) a claim that the sentencer had refused to find mitigation clearly set out in the record; (7) a claim that nonstatutory aggravation had been considered; (8) a claim of ineffective assistance of appellate counsel; (9) a claim that

White's statement had been improperly admitted; (10) a claim that the felony murder aggravator constitutes an "unconstitutional automatic aggravator"; (11) a claim of "burden-shifting" in the penalty phase jury instructions; (12) a claim that White's indictment had been invalid, because of an "extra large" grand jury; (13) an alleged violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985); (14) an alleged violation of Batson v. Kentucky, 476 U.S. 79, 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986) and (15) a claim of error in regard to the denial of a jury instruction on circumstantial evidence.

On the same date, Judge Fawsett rendered an order denying all relief. As to the grand jury point, the federal district court found that no federal constitutional right was implicated. As to the Batson claim, the district court said that White was estopped under Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), from claiming relief under such precedent; the court also found that even under Swain v. Alabama, 380 U.S. 202 (1965), White had made an insufficient showing for relief. Judge Fawsett found that White's Brady claim failed on lack of materiality, but also questioned whether in fact any true claim existed, given the fact that the allegedly undisclosed evidence had been disclosed at trial. As to White's claim relating to the admission of his statement (which had been used as impeachment by the State), Judge Fawsett conducted an independent review of the record, and found White's statement to be voluntary (Order, White v. Dugger, U.S. District Court Case No. 90-531-CIV-ORL-19, July

17, 1990, at pgs. 20-22). As to the final guilt phase issue, the federal district court found that any error in denial of a jury instruction as to circumstantial evidence did not rise to the level of fundamental fairness.

As to the penalty phase issues, the court found that White's Caldwell claim was procedurally barred, and, in the alternative, that it would be without merit under Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988) (en banc). Judge Fawsett likewise made an express finding of procedural bar as to White's claim relating to the "automatic aggravator" of felony murder, and also noted, in the alternative, that the claim had been rejected in Bertolotti v. Dugger, 883 F.2d 1503 (11th Cir. 1989). As to the claim involving White's prior convictions, Judge Fawsett found the claim procedurally barred; she also noted that White "has failed to allege with any specificity the particular error which allegedly infected his prior felony convictions." (Order of July 17, 1990 at 33). As to the claim involving nonstatutory aggravating circumstances, Judge Fawsett agreed with the state supreme court's conclusion that no nonstatutory aggravation had been considered; in the alternative, the court found no constitutional violation. Judge Fawsett likewise found White's claim relating to the sentencer's failure to find mitigating circumstances to be without merit, and that the record established that the trial judge had a proper view of the law. The court found the "burden-shifting" claim to be procedurally barred, and also noted that the claim had been rejected in Bertolotti. As to White's claim relating to "lack of proper jury

instructions on aggravating circumstances," the district court found no merit to this claim (Order of July 17, 1990 at 40-42). As to the claim involving the electric chair, the court noted that an identical claim for relief had been rejected in the Buenoano case. As to the claim based upon Clemons v. Mississippi, the district court addressed such at length, and concluded that the state supreme court "properly determined that [White] would have been sentenced to death even if the improper aggravating factors had been excluded from consideration"; the district court also noted that, in its 1990 opinion, the Florida Supreme Court "specifically stated that it employed the harmless error analysis as contemplated by Clemons." (Order at 45).

As to the claim of ineffective assistance of counsel, the court summarily resolved those relating to appellate counsel, but addressed in detail those involving trial counsel (Order at 46-77). Judge Fawsett made an initial finding of lack of prejudice under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), in regard to all of the claims asserted (Order at 47). She also specifically credited, as a state court finding of fact under 28 U.S.C. §2254(d), the finding that defense counsel had not been under the influence of drugs or alcohol at the time of the trial (Id. at 48-51). The district court found to be without merit any contention that Attorney Moran had been "racist", "disloyal" or "indifferent to his client's fate" (Id. at 51-3); the court also found that defense counsel's closing argument at the penalty phase had been reasonable. As to the primary guilt phase allegation, Judge

Fawsett found that Moran's decision not to present a defense of intoxication was "a tactical decision reasonably based on the fact that such defense would be inconsistent with the irrefutable evidence presented to the jury and with petitioner's own testimony and claim of self-defense." (Order at 54). The court also found no prejudice to White:

> This Court further finds that Petitioner was not prejudiced by the failure to present an intoxication defense because such defense would have been outweighed and discredited by the unambiguous facts of the case and may well have diminished the credibility of Petitioner's own version of the facts. It is undisputed that Petitioner entered the store with a loaded gun and that he parked his car near the store in a position and facing a direction which would facilitate a quick getaway. The victims were in the back room when they were each shot in the head. Petitioner was thinking clearly enough and functioning well enough to drive his car, to change his clothes and discard them in a canal, and to dispose of the gun. As in Harich v. Dugger, 844 F.2d 1464, 1471 (11th Cir. 1988), cert. denied, 109 S.Ct. 1355 (1989) (finding that counsel was not ineffective for failing to present a defense of intoxication), the acts committed by Petitioner required "a significant degree of physical and intellectual skill." See also Wiley v. Wainwright, 793 F.2d 1190 (11th Cir. 1986). Furthermore, in an attempt to prove that he acted in self-defense, Petitioner recounted a detailed version of the sequence of events which would be inconsistent with the position that he was so intoxicated as to be incapable of deliberate goal-seeking behavior. Id. at 55-56.

Judge Fawsett also addressed a contention that had been raised for the first time on federal habeas corpus - that, as per a report of Dr. Peter Macaluso, White had been under the influence of cocaine at the time of the murder; the district court found such matter to be procedurally barred and, in the alternative, without merit. (Order at 54, n.15).

As to the penalty phase, Judge Fawsett found that Moran had not rendered ineffective assistance at such proceeding, and that he had "had a strategy to present [White] in the best light possible and to avoid directly contradicting petitioner's testimony at trial." (Order at 59). The district court examined, in detail, the allegations relating to counsel's failure to object to certain matters, and "preserve error for purposes of appellate review," and in all instances found either strategic reasons for the omission, lack of prejudice or both (Order at 59-67). The court also found no basis for relief in counsel's failure to request jury instructions on certain lesser offenses at the guilt phase, as well as in regard to counsel's handling of certain penalty phase exhibits and instructions (Order at 67-76). In addition to denying the petition for writ of habeas corpus, Judge Fawsett also denied any certificate of probable cause or stay of execution.

White immediately appealed to the United States Court of Appeals for the Eleventh Circuit, and, on July 18, 1990, the court granted a stay and a certificate of probable cause, noting that the issue relating to Florida's electric chair was presently pending in another case in which a stay had been entered. In his federal appeal, White presented only three (3) primary claims for relief: (1) the all-encompassing claim of ineffective assistance of counsel at both guilt and penalty phases; (2) the claim of error under Clemons v. Mississippi, challenging the harmless error analysis employed by the Supreme Court of Florida when it had "stricken" two of the aggravating circumstances on direct

appeal and (3) the claim of "burden-shifting" in the penalty phase jury instructions. On September 3, 1992, the court affirmed Judge Fawsett's order in all respects. See White v. Singletary, 972 F.2d 1218 (11th Cir. 1992), cert. denied, ___ U.S. ___, 115 S.Ct. 2008 (1995).

As had the district court, the court of appeals reviewed the claim of ineffective assistance of counsel in detail, and concluded that all such claims were without merit, White, 972 F.2d at 1220-1226. As to the claim relating to counsel's failure to put on a defense of intoxication, the court, as had all prior courts, noted how "purposeful" White's actions had been at the time of the murder:

> In the present case, White's trial counsel testified at the evidentiary hearing that he rejected intoxication as a defense because it was inconsistent with the deliberateness of White's actions during the shooting. White had the presence of mind before the robbery to park his car in a direction which accessed a speedy getaway. White brought a gun with him into the store. Once inside the store, White escorted both his victims into the freezer in the back of the store and shot them in the back of their heads. White evidently brought along a set of clothes to change into after the robbery. These acts are hardly consistent with a person so impaired as to be unable to form the intent required for committing the crime charged. White, 972 F.2d at 1221.

The court of appeals specifically affirmed the district court's presumption of correctness in regard to the state court finding that defense counsel had not himself been "under the influence of any intoxicant" at the time of White's trial. Id. at 1222. As to the claims in regard to the guilt phase, the Eleventh Circuit concluded that neither deficient performance of counsel nor

prejudice had been established under Strickland, in regard to the challenges to counsel's handling of voir dire, the trial itself, or the suppression motion. Id. at 1222-4.

As to the claims relating to the penalty phase, the court of appeals rejected White's contention that expert testimony should have been presented as to intoxication as a mitigating factor, noting that lay witnesses had instead offered such testimony, and, that an expert "would have been subject to cross-examination and forced to explain how White's alleged intoxication was consistent with White's story about his crime and his thoughtful actions surrounding the crime." White, 972 F.2d at 1225, n.9. The appellate court likewise held that counsel had performed reasonably in calling White's family to testify at the penalty phase, and specifically, "White's counsel in this case investigated White's background and presented at the penalty phase that evidence which he thought would be most helpful." Id. at 1225; the court specifically found that White had not been prejudiced due to the omission of testimony concerning his early life in poverty, given the fact that White had been thirty-three (33) when he had committed this crime. White, 972 F.2d at 1225 n.8. The court of appeals found no merit in White's contention that counsel had "mishandled" his prior convictions, holding:

> White does not specify the constitutional errors, but merely states that several guilty pleas which were used in part to support the prior violent felony aggravating factors were not knowingly and voluntarily entered. The district court correctly held that this claim is procedurally barred and that White has alleged neither cause nor prejudice. Even on the merits, the district court concluded that White failed to allege with specificity the

particular error which allegedly infected his prior felony convictions. White, 972 F.2d at 1226.

The court of appeals likewise discussed White's claim based upon Clemons, as well as the intervening decision of Sochor v. Florida, ___ U.S. ___, 112 S.Ct. 2114, 2119-2120, 119 L.Ed.2d 326 (1992) in some detail. White, 972 F.2d at 1226-7. The court noted that two valid aggravating circumstances existed to be weighed against no mitigation; in a footnote, the court specifically declined to "second guess state courts on questions of facts such as whether the evidence showed enough intoxication to justify mitigation." White, 972 F.2d at 1226, n.10. After reviewing both the direct appeal and 1990 collateral opinions, the court of appeals concluded that the state supreme court had "done enough," holding:

> In the present case, when White first contested the faulty aggravating factors, the Florida Supreme Court found that the record supported the finding that defendant was engaged in the commission of a robbery when the murder occurred and found that defendant had never even disputed that he was previously convicted of a felony involving the use of threat of violence to the person. White, 446 So.2d at 1037. The Florida Supreme Court then specifically noted that the death penalty was appropriate given the existence of these two aggravating factors and the absence of mitigating factors. Id. When White presented this claim to the Florida Supreme Court in his later 1990 habeas corpus petition, that court wrote this:
>
> > White claims that this Court violated Clemons when it affirmed his death sentence after invalidating two of four aggravating factors. In affirming White's sentence on direct appeal, we stated:

> When there are one or more valid aggravating factors which will support a death sentence, in the absence of any mitigating factor(s) which might override the aggravating factors, death is presumed to be the appropriate penalty.
>
> White, 446 So.2d at 1037. Regardless of this language, we are convinced that this Court properly applied a harmless error analysis on direct appeal. To remove any doubt, we again apply this analysis and conclude that the trial court's ruling would have been the same beyond a reasonable doubt even in the absence of the invalid aggravating factors.
>
> White, 565 So.2d at 702. The Florida Supreme Court was cautious, and it has expressly engaged in harmless error analysis. The Florida Supreme Court concluded, beyond a reasonable doubt, that White would not have escaped the death sentence.
>
> Especially given the absence of mitigating factors here, the Florida Supreme Court has written enough and has acted on the question of harmless error in accord with Sochor and Clemons. Having looked at the record, we accept Florida's judgment and affirm the district court's denial of relief for this claim.
>
> White, 972 F.2d at 1227.

As the final claim relating to "burden-shifting", the court of appeals expressly found such matter procedurally barred, and that neither cause nor prejudice had been demonstrated. Id. at 1227-8. Judge Kravitch dissented as to the panel's disposition of the Clemons claim.

White filed a petition for rehearing relating to the Clemons claim, which was denied on December 23, 1994. White then petitioned the Supreme Court of the United States for certiorari,

presenting the Clemons issue as his sole basis for review. On May 22, 1995, the court, without dissent, denied the petition, White v. Singletary, ___ U.S. ___, 115 S.Ct. 2008 (1995), and on June 1, 1995, the court of appeals issued its mandate. On June 9, 1995, White filed for rehearing in the Supreme Court of the United States, which was denied on June 26, 1995. White v. Singletary, ___ U.S. ___, 115 S.Ct. 2636 (1995).

On October 13, 1995, Governor Chiles signed White's third death warrant, such warrant effective between noon on Tuesday, November 28, 1995, and noon on Tuesday, December 5, 1995, with execution presently scheduled for 7:00 A.M. on Friday, December 1, 1995.

On November 27, 1995, White filed a third motion for postconvicton relief in the state circuit court, pursuant to Fla.R.Crim.P. 3.850, raising three (3) claims for relief: (1) a claim that White had been deprived of a fair adversarial testing due to either state suppression of evidence or ineffective assistance of counsel; (2) a claim that White's execution would constitute cruel and unusual punishment, in that he allegedly is mentally retarded and brain damaged and (3) a claim that White was denied equal protection because he had been without counsel for another clemency presentation to the Governor. On the same date, the state circuit judge rendered an order denying all relief, and finding, inter alia, the matters procedurally barred. The next day, White filed a motion for rehearing, presenting some additional allegations as to the first claim, including another affidavit from an addictionalogist regarding mitigation and

further allegations of ineffective assistance of counsel at the penalty phase; the circuit court denied the motion the same day.

STATEMENT OF THE FACTS

The State suggests that the most accurate statement of the facts is that set forth by the Supreme Court of Florida in its opinion affirming White's convictions and sentence of death, White v. State, 446 So.2d 1031, 1033-1034 (Fla. 1984), such recitation set forth below:

> Around 11:00 on the morning of March 8, 1981, Appellant was seen in a small grocery store in Taft, Florida, by a customer, Judith Rayburn. Mrs. Rayburn bought a few items from the proprietor of the store, Alexander H. Alexander, and observed that there was money in the cash register and another customer in the store, James Melson. Shortly after Mrs. Rayburn left the store she heard three shots which were also heard by Frankie Allen Walker and Johnny Glenn Walker, brothers who were in a garage behind the store.
>
> Mr. Henry Tehani and his daughter came into the store shortly after 11:15 a.m. They saw no one besides appellant, who ordered them at gunpoint to get into a freezer. When they refused to comply, appellant pulled the trigger twice. The gun misfired, and the Tehanis fled. Mr. Tehani saw appellant run out the back, and reported the incident to a deputy sheriff. The Walker brothers also saw appellant running away from the store. Frankie Walker looked in the back door of the store and saw Alexander lying on the floor. Frankie told his brother to get an ambulance, and he pursued appellant, who escaped in a car. The deputy sheriff who subsequently arrived at the scene found only some change and food stamps in the cash register, but no currency. Melson was dead with a bullet wound in the back of his head. Alexander had bullet wounds in the back of his head and in his arm and was paralyzed from the neck down.

Appellant testified that he went into the grocery store to buy a beer and change several hundred-dollar bills. He became angry when Alexander shortchanged him, and he displayed a gun which, according to appellant, Melson grabbed. They scuffled with the gun and it fired, wounding appellant in the lower body. Appellant asserts that Alexander then took the gun and, in attempting to shoot appellant, accidentally shot Melson. Appellant claims that Alexander then said he was going to kill him and that he took the gun in self defense. According to appellant the gun went off twice, causing Alexander's wounds. Appellant claims that he then collected his change for the hundred-dollar bills and was about to leave through the front door when the Tehanis entered. When they left, appellant departed through the back door, escaped by car, and disposed of the gun. Shortly thereafter the car malfunctioned and was abandoned. Appellant removed some clothing from a traveling case and walked down a dirt side road. After changing and throwing the bloody clothing into the bushes, appellant, weakened from loss of blood, lay down. He was found by the sheriff's department with a large amount of cash nearby on the ground.

SUMMARY OF ARGUMENT/RESPONSE TO APPLICATION FOR STAY OF EXECUTION

This Court should affirm the circuit court's denial of White's third motion for postconviction relief, which raised three (3) primary claims for relief. In accordance with this Court's precedents, Judge Evans found all matters to be procedurally barred, and that the motion itself was time barred; to the extent that the judge modified his ruling on rehearing, he was incorrect, and this Court should impose the procedural bar. State v. Salmon, 636 So.2d 16 (Fla. 1994). This ruling is correct.

Out of an abundance of caution, however, the trial judge also addressed, in the alternative, the merits of White's primary claim, presenting alternative claims for relief under Brady and Strickland v. Washington. The court concluded that no relief was appropriate under any theory, and this finding should likewise be affirmed. It is highly debatable whether in fact any evidence was "suppressed" or "withheld", but even if it was, neither materiality nor prejudice has been demonstrated thereby. The location of the bloodstains in the store has always been known, and the trial court correctly noted that, at most, one witness gave an incomplete statement; this witness's testimony concerning White's attempts to murder him have always been consistent. It is likewise hard to find how the State could have "suppressed" White's own IQ, but such IQ (allegedly of 72) is insufficient to demonstrate retardation or brain damage; conversely, collateral counsel have always had the ability to have White examined by an expert, as they did in 1990 and 1995,

and any claim of brain damage or retardation is squarely refuted by the testimony as to White's own actions, as well as White's own testimony at the trial in this proceeding in 1982.

None of the matters asserted in the instant motion for postconviction relief, or in the rehearing thereto, change the overall complexion of this case or cast White's guilt or culpability for the death penalty into question. Although on rehearing White improperly sought to re-present claims of ineffective assistance of counsel at the penalty phase, both this Court and the United States Court of Appeals for the Eleventh Circuit had found, inter alia, no prejudice in response to counsel's alleged omissions, and that, in fact, White's sentence of death is reliable. There is no necessity to revisit this issue, especially when nothing new has been presented; these matters are unquestionably procedurally barred. Any suggestion that this sentence of death is at all weak is specious. Jerry White, with prior convictions for crimes of violence, shot two innocent people in the course of a grocery store robbery; one died immediately, the other lingered on, in paralysis and pain, before finally expiring. None of the matters proffered in mitigation either at trial, in the prior postconviction proceedings or in this proceeding call into question the reliability of this sentence. This case has withstood the crucible of repeated collateral attack, and it is now time for the sentence of death to be carried out.

ARGUMENT

ALL REQUESTED RELIEF SHOULD BE DENIED

This is White's third postconviction motion and all matters asserted herein are procedurally barred. White filed his first postconviction motion in 1985, and received an evidentiary hearing in July 1986; final relief was not denied until 1987. Following the affirmance of this order, White filed a second 3.850 in 1990, which was likewise denied, and whose denial was affirmed. During all of these time periods, White was represented by the same collateral counsel as he is now. White's conviction, and sentence of death, have been final since 1984, and, under Rule 3.850, White should have raised all postconviction challenges within two years of such date. All of the matters asserted herein should have been raised earlier, and no hearing is required, including any on the issue of "due diligence". See, Bolender v. State, 658 So.2d 82 (Fla. 1985); Zeigler v. State, 654 So.2d 1162 (Fla. 1995); Porter v. State, 653 So.2d 374 (Fla. 1995); Henderson v. Singletary, 617 So.2d 313 (Fla. 1993). The fact that the alleged basis for these new claims may have arisen through public records access does not excuse these procedural bars. See Zeigler v. State, 632 So.2d at 48 (Fla. 1993); Agan v. State, 560 So.2d 222 (Fla. 1990); Demps v. State, 515 So.2d 196 (Fla. 1987). Further, White was not entitled to a hearing below on the issue of "diligence." See Bolender, supra; Porter, supra; Zeigler, supra, Foster v. State, 614 So.2d 453 (Fla. 1992).

CLAIM I

As the most substantial claim, White contends that due to either state suppression of evidence, under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), or ineffective assistance of counsel, under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), he was denied a fair adversarial testing. In his first postconviction motion, White raised claims for relief under Brady and Strickland v. Washington, and it is inappropriate that he present further claims of this nature; accordingly, this claim is procedurally barred. See Spaziano v. State, 570 So.2d 289 (Fla. 1990); Jones v. State, 591 So.2d 911 (Fla. 1991); Porter v. State, 653 So.2d 374 (Fla. 1995); Kennedy v. State, 599 So.2d 991 (Fla. 1992). As best the State can determine, the composition of this claim would seem to be as follows: (1) an allegation concerning White's IQ of 72; (2) an allegation concerning bloodstains in the store and (3) an allegation concerning the Tehanis. Assuming procedural bar is not found, these claims fail under prejudice of Strickland or materiality under Brady, and make not a whit of difference to this case; the matters raised on rehearing will be discussed in a separate section.

As to the claim involving White's IQ, this matter was always discoverable by collateral counsel. Indeed, during his first postconviction appeal, CCR specifically contended that Attorney Moran had rendered ineffective assistance for failing "to introduce competent evidence of Mr. White's low IQ" (see Initial Brief, White v. State, Florida Supreme Court Case No. 62,144, filed April 3, 1988, at page 79); this allegation was pursued in

White's first federal habeas petition as well (see Petition, White v. Dugger, U.S. District Court Case No. 90-531-CIV-ORL-19, filed July 17, 1990, at page 97). The basis for this current allegation of an IQ of 72 is apparently the presentencing investigation report prepared in regard to some of White's prior convictions. CCR alleged that these prior convictions were invalid in the 1990 state postconviction proceedings, see White v. State, 565 So.2d 322 (Fla. 1990), and this matter was likewise pursued in federal court (see Order, White v. Dugger, July 17, 1990, page 33). Any claim of state suppression of a defendant's own IQ is, on its face, more than unlikely, see Smith v. State, 445 So.2d 323 (Fla. 1983), and, as noted, claims of ineffective assistance in his regard are barred. Further, CCR had White examined by Dr. Macaluso in 1990 (such report presented to the federal district court in White's first federal habeas), who, like Dr. Crown, is an addictionologist, and this matter likewise could have been raised then (see Appendix 22 to Motion, pgs. 21-27).

As to the "merits", White's IQ does not change the complexion of this case. White has previously asserted that he was intoxicated at the time of the murder; such claim was raised in White's first postconviction motion in state court and first federal habeas, as a claim of ineffective assistance of counsel. In rejecting this claim, all courts noted the "purposefulness" of White's actions at the time of the murder, especially his procurement and location of a getaway vehicle and his procurement of a change of clothes, see White, 559 So.2d at 1099; Order of

District Court, July 17, 1990 at pgs. 55-6; White, 972 F.2d at 1221; further, it must be noted that White offered an extremely coherent and comprehensive account of innocence or excusable homicide at trial (OR 808-842, 873-903), such testimony inconsistent with the present theory of defense. Regardless of whether White chooses to seek to mitigate his actions on the basis of intoxication by drugs or alcohol or mental retardation, the facts cannot be changed, and White's culpability of first-degree murder and eligibility for the death penalty remains the same. No relief is warranted as to this claim under Brady, Washington or Kyles v. Whitley, ___ U.S. ___, 115 S.Ct. 1555, 131 S.Ct. 490 (1995).

As to the allegations concerning the bloodstains in the store, it is difficult to appreciate the significance of White's allegations. If White is arguing that the state asserted at trial that blood was only located in the back room of the store and by the front counter, collateral counsel are misreading the transcript. At trial, Gregory Taylor specifically testified that bloodstains had been found in front of the checkout counter, in the back storage area, and "up one of the aisleways" (OR 592-3). Photographs were introduced to this effect, and Taylor specifically noted more "tracks" of blood (OR 600-1; State Exhibit's #58). Thus, the location of the blood has always been known, and was placed before the jury, and this claim is a red herring; conversely, any allegedly newly-discovered report in this vein is simply cummulative to everything which was already known. As to the amount of blood on White's pants or shoes,

White again did not need any diagrams unearthed in 1995 to demonstrate the location of blood on such objects, given the fact that the pants and shoes were actually introduced at trial and, thus, were before the jury (OR 704, 706). The issue of blood is peripheral in any event, as the amount of blood does not make White's claim that he was shot by the victims any more credible, and any contention that White was shot prior to the arrival of the Tehanis is rebutted by their testimony that they did not see him bleeding (OR 473-4). Because there was no suppression of evidence, and because defense counsel did as much as he could with the evidence in this regard, relief is not warranted under either Brady, Washington or Kyles v. Whitley.

As to the allegations concerning the Tehanis, this claim would seem to relate to an assertion that defense counsel did not possess a written statement by Henry Tehani on March 8, 1981, in which Tehani allegedly did not mention White's attempt to shoot him; according to the postconviction motion, this statement "completely transforms the tenor of the interaction with Jerry White in the store." This claim fails for a number of reasons. First of all, it is highly unlikely that defense counsel did not, in fact, possess this information earlier. When Attorney Moran deposed Henry Tehani on October 5, 1981, he specifically asked him whether he had given any other statements about the case "outside of what you said here today and what's in here, in this written, signed report" (OR 1450); subsequently, Tehani was specifically questioned about his prior statement, including the description of White set forth therein (OR 1454). Additionally,

as to materiality or prejudice, the state court correctly found that the statement of March 8, 1981 did not conflict with Tehani's trial testimony and was at most "not all inclusive." (Order of November 28, 1995 at 3).

The handwritten statement at issue was apparently executed within an hour of the murder. In it, Tehani relates that White had told him and his daughter to get into the freezer and that he had refused, offering his money; Tehani stated that White had seemed drunk at the time and that his gun looked to be a .38 short barrel. CCR claims that this statement is exculpatory because it contains the above language regarding White seeming drunk and does not expressly contain an allegation that White pointed the gun at Tehani. Neither of these contentions has merit. As to the first one, it must be noted that Tehani offered similar testimony during his deposition (OR 1428-9, 1431, 1436, 1445), and, accordingly, this testimony has always been of record and available to all of White's counsel, collateral and otherwise. Indeed, in the first postconviction motion, and first federal habeas petition, White argued that Attorney Moran was ineffective for failing to utilize this testimony in support of an intoxication defense (see Initial Brief, White v. State, Florida Supreme Court Case No. 62,144, filed May 3, 1988 at pages 46-7; Petition, White v. Dugger, filed July 17, 1990 at page 67). Accordingly, this allegation is unquestionably procedurally barred, and abuse of process. See Bolender, supra; Porter, supra; Kennedy, supra.

As to any materiality or prejudice, omission of this statement (if in fact it was omitted) did not prejudice White's defense. At most, Henry Tehani in his first report, did not expressly mention White pointing the gun at him and attempting to shoot him. This did not mean that such did not happen, especially given the fact that Tehani stated that White did have a gun and that he had ordered his daughter and himself into the freezer, prompting Tehani to offer White all of his money. It is interesting to note that Pamela Tehani's statement of March 8, 1981, which is likewise attached to White's latest 3.850 motion, contains her express statement that White had "pointed a gun at us and shot at us" (although the child stated that there were "no bullets" in the gun, this would most likely be her explanation for the fact that the gun clicked and did not fire). Further, Henry Tehani consistently testified at the preliminary hearing, in deposition and at trial - that White in fact had pointed the gun at him and attempted to shoot him and his daughter (OR 1135-42; 1147; 1419-1420; 1424-6; 1442; 447-55). Any impeachment value in regard to this original statement would have been minimal, and relief is not warranted as to this claim under Brady, Washington or Kyles, especially when one remembers, inter alia, that at the time White was found, he was in possession of money stolen from the store.[1]

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[1] It has also been suggested that a discovery violation occurred because Moran was not provided with a copy of Deputy Harrielson's report in which he had omitted to write down a statement from White concerning the fact that a black man had shot him (Motion at 13). This claim is refuted by the record. During the suppression hearing at trial, Attorney Moran specifically sought to impeach Harrielson with his notes and as

CLAIM II

As noted earlier, White's alleged retardation or brain damage could have been discovered long ago. After securing a stay of execution in 1985, White received a full evidentiary hearing and collateral counsel could have sought testing or examination of White at that time; in 1990, collateral counsel had White examined by an addictionologist, much like Dr. Crown, and could have proffered such matters at that time. This claim is procedurally barred, and not cognizable on postconviction attack. See, Scott v. State, 657 So.2d 1129 (Fla. 1995); Oats v. Dugger, 638 So.2d 20 (Fla. 1994); Woods v. State, 531 So.2d 79 (Fla. 1988). Further, White's alleged IQ of 72 would hardly seem to be so low as to cause an automatic presumption of retardation or brain damage, such that his culpability is lessened, especially in light of the record evidence as to the many purposeful actions which he committed at the crime of this murder. Cf. James v. State, 489 So.2d 737 (Fla. 1986); Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 166 L.Ed.2d 256 (1989) (IQ

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to why they had not contained White's statement (OR 85-2). No valid claim for relief exists under Brady or Washington.

Further, the fact that, in his order, Judge Evans may have chosen to analyze this claim under Jones v. State, as opposed to Brady per se, is not a basis for relief. If anything, the Jones standard is more generous to White, and it is clear that the judge literally gave White the benefit of every doubt below. This claim was denied because, in addition to any procedural bars, the newly-proffered evidence was simply insubstantial or cumulative to that known to the jury which convicted White and recommended death, and relief was not appropriate under any theory.

of 70 or lower is "cut off" for retardation; concept of "mental age" rejected as problematic.).

CLAIM III

In this claim, White contended that he was deprived of counsel to present a new clemency application in 1995. The circuit court correctly found this matter not to be cognizable on postconviction attack, given the fact that clemency is a matter of grace and the sole prerogative of the executive branch. See Herrera v. Collins, 113 S.Ct. 853 (1993); Bundy v. Dugger, 850 So.2d 1402 (11th Cir. 1988); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978); Christopher v. State, 416 So.2d 450 (Fla. 1982); Sullivan v. Askew, 348 So.2d 312 (Fla. 1977). Further, it should be noted that the vast majority of the matters which allegedly should have been considered in 1995 were, in fact, generated at the 1986 evidentiary hearing, and, thus, could have been presented in 1990 , prior to the second death warrant. Further, CCR has, as of this date, made a renewed clemency request to the Governor for Jerry White.

CLAIMS PRESENTED ON REHEARING

On rehearing, White sought to supplement Claim I with three matters pertaining to his sentence of death - an affidavit from the prosecutor to the effect that he now felt that the penalty phase had been "inadequate", another affidavit from Dr. Crown stating that White's alleged brain damage and retardation constituted both statutory and nonstatutory mitigation, in addition to his limited education and drug use, and an affidavit from Attorney Moran regarding his own physical health at the time of the trial. These matters are clearly restatements of White's prior claim of ineffective assistance of counsel, upon which he received an evidentiary hearing in 1986 (at which the former prosecutor testified). This Court found no error in the trial court's conclusion that White had received effective assistance of counsel at the penalty phase, noting that Moran had called five (5) witnesses to testify. White, 559 So.2d at 1100. When White sought to raise additional claims of ineffective assistance of counsel in his 1990 habeas, this Court found such to be procedurally barred. White, 565 So.2d at 701-2. The Eleventh Circuit, as had the federal district court, expressly rejected any contention that Moran's physical illness had rendered him ineffective, see White, 972 F.2d at 1221-2, and likewise found that Moran had done a constitutionally adequate job at the penalty phase, noting that counsel adduced evidence of White's unhappy upbringing, health problems, troubles with alcohol and hardships, and that no prejudice had been established by any omission. White, 972 F.2d at 1224-5.

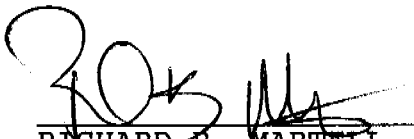
Because these matters should have been raised earlier, to the extent that they were not, they are unquestionably procedurally barred at this juncture. See Jones, supra; Kennedy, supra; Christopher v. State, 489 So.2d 22 (Fla. 1986); Francis v. Barton, 581 So.2d 583 (Fla. 1991). As noted, the matter of Moran's health has already been litigated, and the prosecutor's belated assessment of the penalty phase gives rise to no claim for relief. See Stewart v. State, 632 So.2d 59 (Fla. 1993). As has been previously argued, White's counsel have always had the ability to have White examined by a mental health expert (as they did in 1990), and the existence of Dr. Crown at this late date does not provide any basis for relief, see Engle v. Dugger, 576 So.2d 696 (Fla. 1991), Rose v. State, 617 So.2d 291 (Fla. 1993); again, as previously argued, the mere existence of brain damage or retardation per se is not mitigating, especially where, as here, White's actions have been so purposeful. See James, supra. The newly-proffered evidence does not create a reasonable probability of a different sentencing result under any theory, given the fact that the jury which recommended death in this case did have an accurate picture of Jerry White, by virtue of the testimony actually presented at the penalty phase and the argument of counsel. Moran presented the testimony of White's mother, uncle and fiance, and specifically argued to the jury that White's problem with alcohol rose to the level of statutory mitigation (OR 1091, 1095). The instant matters provide no basis for relief.

CONCLUSION

WHEREFORE, for the aforementioned reasons, the circuit court's order denying postconviction relief should be affirmed and no stay of execution should be entered.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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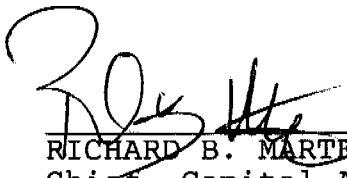
COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Martin J. McClain, Esquire, Office of the Capital Collateral Representative this 29 day of November 1995.



RICHARD B. MARTELL
Chief, Capital Appeals.