IN THE SUPREME COURT OF FLORIDA

LINROY BOTTOSON,

Appellant,

v. CASE NO: 81,411

STATE OF FLORIDA,

Appellee.
_____/

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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STATEMENT OF THE CASE AND FACTS

This is an appeal from the denial of Bottoson's Rule 3.850 motion to vacate judgment and sentence. (R.P. 3597). That collateral attack proceeding was filed on December 23, 1985 (R.P. 1756-1810), and supplemented or amended four times, with the final supplement being filed on April 8, 1991. (R.P. 3204-3216). An evidentiary hearing consuming ten days was held in April and November, 1991, after which all relief was denied in an order issued on February 5, 1993.

A. The prior proceedings and the evidence against Bottoson.

In affirming Bottoson's conviction and death sentence on direct appeal, this Court summarized the evidence against Bottoson in the following way:

> Linroy Bottoson was convicted for the first-degree murder of Catherine Alexander, the post mistress at Eatonville, in Orange County. The victim was last seen alive leaving the post office at around noon on October 26, 1979, with a tall black man. As she was leaving, she whispered to two bystanders to call the police and tell them that the man was stealing. United States Postal Inspectors were called, and they discovered that some postal money orders were missing. They began to suspect appellant and his wife when they learned that appellant's wife had tried to cash one of the missing postal money orders at her bank that very afternoon. Appellant's residence was placed under surveilance on Monday evening, October 29, as the postal inspectors applied to a United States Magistrate for an arrest warrant. The Magistrate granted the application but the actual preparation of the warrant was postponed until the following day because there was no one available to draft and type it. Upon learning of the

granting of the application, several postal inspectors entered appellant's home around 10:30 p.m. and arrested appellant and his wife. The next day the postal investigators searched appellant's home pursuant to a search warrant and found the missing money orders and the victim's shoes. In all the confusion the arrest warrant was never drafted and formally issued. The victim's body was found on the side of a dirt road the same night appellant was arrested.

At the trial three persons who were present at the abduction testified. Though none of them could identify appellant as the man with whom the victim was seen leaving the post office, they all identified from a photograph the car in which she was taken away. It was later shown that the car was rented to appellant at the time of the abduction. A postal official identified the money orders found in appellant's home and could trace them to the machine at the Eatonville Post Office. There was also evidence of appellant's having deposited some of the stolen money orders in his bank account.

The medical examiner testified that the victim had been stabbed fourteen times in the back and once in the abdomen. He said that she died from crushing injuries to the chest and abdomen which were consistent with being run over by an automobile. There was expert testimony that hair samples and clothing impressions found on the undercarriage of appellant's car, a brown 1973 Chevelle, were consistent with having come from the victim's body and clothing. There was also expert evidence that clothing fibers similar to those in the victim's clothes and a tip of the victim's fingernail were found inside the car. Furthermore, a dog handler testified that one of his dogs who was familarized with the victim's scent found the victim's scent inside the car rented by appellant and underneath the length of the brown

> Chevelle owned by appellant. He also testified that another dog familarized to appellant's scent indicated where appellant's scent was present at the location where the victim's body was found.
>
> Appellant's former wife, who was married to him at the time of the murder, testified that on October 26, appellant was away from home in the rented car at around noon. When he returned he gave her a postal money order which she deposited at the bank that afternoon. She testified that on the following day, Monday, October 29, she did not see appellant from 1:30 p.m. to 10:00 p.m. and that during that time he had the brown Chevelle.
>
> A minister who visited appellant in jail testified that appellant admitted killing the victim. Also, during the trial the prosecuting attorney announced that the state had just learned from appellant's cellmate of some incriminating statements made by appellant. The cellmate was called as a witness and he testified that appellant admitted to killing Mrs. Alexander and that appellant had said "the best witness is a dead witness."

Bottoson v. State, 443 So. 2d 962, 963-964 (Fla. 1983). Bottoson was sentenced to death in accordance with the jury's sentencing recommendation. Id., at 964. This Court found that the following aggravating circumstances were established beyond a reasonable doubt: "that appellant had been convicted of a crime involving the threat of violence; that the crime was committed during the commission of a felony; that it was committed for the purpose of avoiding arrest; and that it was especially heinous, atrocious, or cruel." Id. at 966. This court further approved the sentencing court's finding that no mitigating circumstances existed. Id.

B. The evidence from the evidentiary hearing

The statement of the facts set out at pp. 2-11 of Bottoson's brief is an argumentative and one-sided recitation of the evidence adduced at the evidentiary hearing. In the interest of brevity and clarity, the state adopts and incorporates herein by reference the additional facts set out in the state's brief in connection with specific issues raised on appeal rather than repeating those facts here. Disagreements with Bottoson's version of the facts are specifically identified in connection with the appropriate issue on appeal.

SUMMARY OF ARGUMENT

I. The 3.850 court properly found a waiver of the attorney-client privilege because of the ineffective assistance component to this proceeding which was injected into the case by Bottoson. Moreover, the prior decisions of this Court allow discovery in Rule 3.850 proceedings.

II. Bottoson was not deprived of Constitutionally effective assistance of counsel at the penalty phase of his capital trial because he has failed to demonstrate not only deficient performance on the part of his trial attorney, but also that that alleged deficient performance resulted in prejudice to the defense. The evidence elicited at the Rule 3.850 proceeding establishes that trial counsel's performance was not deficient, and that, even if there is some arguable deficiency, under the facts and circumstances of this case, Bottoson cannot demonstrate prejudice as required by Strickland v. Washington.

III. Bottoson did not raise his claim that he was deprived of a competent mental health examination at trial or on direct appeal and, consequently, that claim is procedurally barred. Moreover, Bottoson's claim is nothing more than an "ineffective assistance of psychiatrist" claim in the nature of an ineffective assistance of counsel claim. Such a claim has no Constitutional basis.

IV. The trial court correctly resolved the "false testimony" claim based upon ore tenus testimony received at the 3.850 hearing. That credibility determination should not be disturbed. Moreover, to the extent that Bottoson claims that the dog tracking evidence was false, there is nothing to support that claim other than speculation.

V. Bottoson received effective assistance of counsel at the guilt phase of his capital trial and he has failed to demonstrate both deficient performance and prejudice as required by Strickland v. Washington.

VI. Bottoson was not denied effective assistance of counsel due to any sort of "state interference." Bottoson has presented no Constitutional basis for any of his constructive ineffective assistance claims, and, even if he had, he would not be entitled to relief because those claims are procedurally barred.

VII. The Hitchcock claim is foreclosed by binding precedent because there was no restriction upon the non-statutory mitigating evidence presented and considered by the advisory jury and by the judge. Moreover, even if there was a Hitchcock error, that error was harmless beyond a reasonable doubt.

VIII. The Caldwell claim is procedurally barred because it could have been but was not raised on direct appeal. Further, even if this claim was properly preserved for review, Bottoson would not be entitled to relief on it because Caldwell v. Mississippi is not applicable to Florida's Capital Sentencing Structure.

IX. Bottoson's claim that three invalid aggravating circumstances were applied to his case is procedurally barred because it could have been but was not raised at trial or on direct appeal. Alternatively and secondarily, there is ample evidence to support the finding of each of the three aggravating circumstances at issue, and Bottoson would not be entitled to relief on this claim even if it were properly preserved.

X. Bottoson's claims of error concerning the penalty phase jury instructions are procedurally defaulted because they could have been raised at trial or on appeal but were not. Alternatively, each of those claims is without merit under binding precedent.

XI. The Neil claim is procedurally barred because it could have been but was not raised on direct appeal.

XII. The Johnson v. Mississippi claim is not ripe for review because Bottoson's allegedly invalid prior conviction has never been set aside or, in fact, ever challenged directly or collaterally.

XIII. The inadequate transcription claim is procedurally barred because it could have been but was not raised on direct appeal. Insofar as Bottoson pleads an ineffective assistance of counsel component to this claim, that claim does not entitle him to relief because he can demonstrate neither deficient performance nor prejudice.

XIV. The absence of the defendant claim is not cognizable in this proceeding. Moreover, insofar as there is an ineffective assistance component to this claim, that claim is not a sufficient basis for relief because Bottoson can demonstrate neither deficient performance nor prejudice.

XV. The improperly constituted grand jury claim is procedurally barred because it is raised for the first time in the 3.850 proceeding. Assuming arguendo that there was some error, that error is not fundamental and does not allow Bottoson to evade the preclusive effect of his procedural default.

XVI. The grand jury foreman discrimination claim is procedurally barred because it could have been raised at trial and on direct appeal but was not. Alternatively and secondarily, that claim is without merit because of the minimal role of the grand jury foreman in Florida's criminal justice system.

ARGUMENT

I. THE 3.850 TRIAL COURT PROPERLY FOUND A WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE.

Bottoson argues that the court below committed error when it allowed the state to obtain the file of Bottoson's trial attorney and to take the deposition of that attorney. Bottoson claims that certain privileged, but irrelevant, information was therefore made available to the state. Bottoson further argues that this unspecified information should not be considered by this court. Bottoson's argument is without merit, and is easily disposed of through the application of binding precedent.

Florida law is settled that "a lawyer who represents a client in any criminal proceeding may reveal communications between him and his client when accused of wrongful conduct by his client concerning his representation where such revelation is necessary to establish whether his conduct was wrongful as accused." Wilson v. Wainwright, 248 So. 2d 249, 259 (Fla. 1st DCA 1971). This principle was restated by this court most recently in Turner v. State, 537 So. 2d 45, 46 (Fla. 1987), but the legal principle that a former client cannot accuse his lawyer of some impropriety in connection with the representation and then invoke the attorney-client privilege to prevent the accused lawyer from defending himself is not a new rule of law. See, e.g., Laughner v. United States, 373 F.2d 326, (5th Cir. 1967). Bottoson has cited no case law from any jurisdiction which holds to the contrary because no such rule of law exists. Any such rule would approve the offensive use of the attorney-client

privilege as a sword rather than as the shield it is intended to be.

The second reason that the law should not be as Bottoson suggests is because such a rule carries with it the potential that a fraud will be perpetrated on the court. A post-conviction petitioner simply is not the person best situated to determine what confidential communications with his former lawyer are no longer protected by the attorney-client privilege. The reasons are obvious and need not be set out. Likewise, the trial (or direct appeal) lawyer is not well-equipped to resolve that question. That lawyer, who is placed in the unpleasant position of having to defend himself against a claim of ineffective assistance of counsel by his former client, is not likely to be familiar with what the 3.850 evidence will be, and certainly should not be required to determine what is and is not relevant to the issues contained in the 3.850 pleadings. Another even more compelling reason why the determination of the scope of the waiver should not be the responsibility of the trial lawyer is well-illustrated by the proceedings in this case.

During the proceedings below, a substantial amount of time was expended in litigating the scope of the waiver of the attorney-client privilege. Contained within that portion of the transcript are threats by Bottoson's attorney to report the trial lawyer to the bar grievance committee if he violates the attorney-client privilege (R.P. 516). Under those circumstances, it is hardly surprising that further orders of the court were necessary to enable the state to engage in even the most

elemental trial preparation. Until the matter was finally resolved by court order, the trial lawyer was left with no way to defend himself against Bottoson's claims, and was unfairly placed in the position of having to choose between defending himself (as the law says he may) or finding himself on the receiving end of a disciplinary complaint. His decision to seek an explicit clarification of the court's order is not surprising, but the fact that such action was necessary only delayed the proceedings and interfered with the state's trial preparation. If it is possible for a collateral petitioner to place his trial attorney in such a no-win situation, the truth-finding function of the court is jeopardized because presentation of the true facts may be restricted and the trial attorney is naturally going to resolve any questionable material in favor of deciding that no waiver has occurred. That result, and its potential ramifications, stands reason on its head.

To the extent that Bottoson argues that he is somehow entitled to relief because no discovery is provided for in Rule 3.850 proceedings, that argument is inconsistent with his position in the collateral trial court. In the court below, Bottoson contended that 3.850 proceedings are civil in nature. (R.P. 521). He now asks this court to place the court below in error by contending that 3.850 proceedings are criminal in nature. Bottoson must not be allowed to benefit from a multiple-choice approach to litigation which switches back and forth between diametrically opposed and hopelessly irreconcilable positions. Regardless of the label applied to 3.850 proceedings,

Bottoson cannot argue one way at trial and, when unsuccessful, adopt the contrary position before this court.

Contrary to Bottoson's claim, Davis v. State, 624 So. 2d 282 (Fla. 3rd DCA 1993), does not stand for the proposition that the state is not allowed to engage in discovery in 3.850 proceedings. While the specific facts in Davis dealt with discovery by the defendant, the holding of the Third District Court of Appeals is not limited in its scope. Discovery in criminal cases is, and has been, a two-way street. That is the law as it relates to pre-trial discovery, and no rational argument can be made that the law should be different in collateral attack proceedings when the defendant has the burden of proof in attacking a conviction and sentence that is presumptively valid.

Despite Bottoson's protestations, he has nothing about which to complain. Bottoson injected the ineffective assistance of counsel claim into this proceeding, and failed to carry his burden of proof as to that claim. It makes no sense to suggest that the attorney-client privilege in any way operates to prevent the state from discovering and presenting the true facts concerning trial counsel's defense of this case. To the extent that this issue seeks relief, Bottoson is entitled to nothing. To the extent that this claim is set out for any other reason, it is mere surplusage.

II. BOTTOSON RECEIVED CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL.

Bottoson argues that his attorney was constitutionally ineffective at the penalty phase of his capital trial. Further, Bottoson argues that not only was the performance of his attorney deficient, but also that that deficient performance prejudiced the defense. When the facts are considered objectively, it is readily apparent that Bottoson has failed to satisfy either prong of the Strickland v. Washington inquiry.

A. The legal standard

The standard for evaluating a claim of ineffective assistance of counsel is found in Strickland v. Washington, 466 U.S. 668 (1984), and has been stated in the following terms by this court:

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

Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986). In other words, the Washington test is in the conjunctive, and a petitioner is not entitled to relief unless he satisfies his burden of proof as to both the performance and prejudice components.

Essential to the Washington holding is the recognition that counsel's performance must be judged by an objective standard of reasonableness without the distortion of hindsight. As the Fifth Circuit has noted, "... second-guessing is not the test for ineffective assistance of counsel." King v. Lynaugh, 868 F.2d 1400, 1405 (5th Cir. 1989). Moreover, while Bottoson's present counsel has left no doubt that he would have handled the case differently had he been trial counsel, that is not the standard this court must apply. See, e.g., Card v. Dugger, 911 F.2d 1494, 1507 (11th Cir. 1990). Washington recognizes, to state the obvious, that there is no single "correct" way to try a case. Strickland v. Washington, 466 U.S. at 689-690; see also, Harris v. Vasquez, 913 F.2d 606, 628 (9th Cir. 1990). Moreover, Bottoson is not entitled to a perfect trial, only a fair one. Waterhouse v. State, 522 So. 2d 341, 343 (Fla. 1988); Alvord v. Wainwright, 725 F.2d 1282, 1291 (11th Cir.), modified, 731 F.2d 1486, cert. denied, 469 U.S. 956 (1984); see also, Simmons v. Lockhart, 915 F.2d 372, 275 (8th Cir. 1990).

Of course, trial counsel is not required to anticipate changes in the law to render effective assistance of counsel. Stevens v. State, 552 So.2d 1092 (Fla. 1989). Likewise, counsel is not required to raise every conceivable trial objection to

avoid being deemed ineffective. White v. State, 559 So. 2d 1097 (Fla. 1990); Muhammad v. State, 426 So. 2d 533, 538 (Fla. 1982). Finally, Bottoson's trial counsel faced an extraordinarily difficult task: making a jury plea for mercy for his client before the jury which had found Bottoson guilty of a brutal murder. See e.g., McDougall v. Dixon, 921 F.2d 518, 537 (4th Cir. 1990). Trial counsel was not ineffective just because he did not succeed. See, e.g., Zettlemoyer v. Fulcomer, 923 F.2d 284, 296 (3rd Cir. 1991); Fleming v. Kemp, 748 F.2d 1435, 1452 (11th Cir. 1984); cert. denied, 475 U.S. 1058 (1986).

B. Bottoson received effective assistance of counsel at the penalty phase.

The theory of defense at trial was that Bottoson was not involved in the crime, but that someone else had used his car in the commission of the offense and then planted the incriminating evidence on Bottoson. (R.P. 126). Under the defense theory, Bottoson had no prior knowledge of the murder. (R.P. 128). As Bottoson's own "expert" conceded, that theory is not consistent with a defense of insanity. (R.P. 405--testimony of Dennis Balske). While it is theoretically possible to maintain both a defense of insanity and a defense based on innocence, the practicalities of trial, and the attendant need to maintain credibility with the jury, cut against such a strategy. The same concerns apply in connection with any argument for a finding of guilt of lesser-included offenses.

Insofar as Bottoson's claim that his attorney did not adequately pursue mental state mitigating evidence is concerned,

the record is clear that trial counsel had questions in his own mind as to the defendant's competence, and, because of those concerns, secured two evaluations of his client's mental state. (R.P. 313-314). Only after receiving those reports did Bottoson's trial lawyer decide not to pursue a mental state theory. (R.P. 314). As the court below found, trial counsel met with the examining psychiatrists and received no information that indicated prior mental problems or that would support a mental state defense at the guilt or penalty phase. (R.P. 3609). Trial counsel further testified that he was unable to obtain any records pertaining to mental health treatment in Ohio, and that he did not pursue records of any mental health treatment rendered in California based upon information conveyed to him by his client. (R.P. 309-310). Moreover, trial counsel did not expect the mental health testimony of the psychiatrists to be favorable if it were presented at the penalty phase of the trial. (R.P. 321).

Trial counsel testified that he discussed the penalty phase with Bottoson, and was given the names of three potential witnesses. (R.P. 315-316). Those witnesses were contacted, and refused to testify. (id.). Bottoson offered little assistance at the penalty phase, did not want his mother to testify, and did not want his family involved. (R.P. 318-319). In fact, Bottoson's family was unwilling to become involved. (R.P. 319). Finally, after the verdict of guilt was returned, Bottoson confessed his guilt to his trial attorney. (R.P. 360).

When the prevailing legal standard is applied to the facts of this case, it is clear that the performance of Bottoson's trial attorney was not deficient. Obviously, the actions of an attorney are substantially influenced by what his client tells him. Strickland v. Washington, 466 U.S. at 691.

Moreover, counsel is not required to "shop" for a mental state expert who will render an opinion favorable to his client. See, e.g., Ake v. Oklahoma, 470 U.S. 68 (1985). In the preparation for any trial, the point comes when the lawyer has done enough. Something more can always be done, but that is not what the Constitution requires. Adkins v. Singletary, 965 F.2d 952 (11th Cir. 1992). In this case, Bottoson's lawyer pursued the development of mental state evidence until he was satisfied that further inquiry would only consume time better spent elsewhere. Merely because Bottoson has found mental state experts who disagree some eleven years after trial does not mean that trial counsel was ineffective. Likewise, the fact that the post-conviction investigation, which consumed five years, was able to put on five additional witnesses does not require a finding of ineffectiveness. Of course, "... it is not unusual for witnesses to emerge once a defendant has been convicted." High v. Kemp, 819 F.2d 988, 994 (11th Cir. 1987), cert. granted, 108 S.Ct. 2896 (1988), order vacated and cert. denied, 109 S.Ct. 3264 (1989). Counsel cannot be faulted for being unable to locate and secure the testimony of such witnesses. Rather than the bleak picture of performance painted by Bottoson's post-conviction counsel, the more likely explanation for the non-

appearance of these witnesses at trial is that their knowledge was not particularly significant. See, e.g., Henry v. Wainwright, 743 F.2d 761, 762 (11th Cir. 1984). Bottoson's trial counsel adequately represented his client at the penalty phase of the trial.

To the extent that Bottoson argues that he was "abandoned by counsel" at the penalty phase of his capital trial, that argument is predicated upon an out-of-context quotation lifted from trial counsel's penalty phase argument. (R.P. 190-193). When taken in context, counsel's closing argument did not amount to "abandonment of his client," but was in fact a plea for mercy in the face of an overwhelming prosecution case. Counsel did not abandon his client: he made the best of a situation that bordered on hopeless. Closing argument was not deficient, and, when fairly read, was not prejudicial, either.

C. Bottoson has failed to meet the prejudice prong of Strickland v. Washington.

In addition to failing to establish that the performance of his attorney was "outside the wide range" of reasonable performance, Bottoson has failed to establish that but for his attorney's performance, the result of the proceeding would have been different. Bottoson has failed to meet either prong of the Strickland v. Washington test.

Obviously, the circumstances of the particular case can operate to reduce the effectiveness of any type of mitigating evidence. That fact is operative in this case, where the elderly victim was kidnapped, confined in the trunk of a car for three

days, and ultimately killed by being run over by a car after being stabbed some fifteen times. Bottoson v. State, 453 So. 2d 962, 963-964 (Fla. 1983). In the face of these facts, it is obvious that it was difficult for Bottoson to present anything in mitigation that would alter the result. See, e.g., Elledge v. Dugger, 823 F.2d 1439, 1447 (11th Cir.), modified, 823 F.2d 250 (11th Cir. 1987), cert. denied, 108 S.Ct. 1487 (1988).

As found by the collateral trial court, Bottoson's background and childhood experiences lose their significance when the defendant's age of 41 at the time of the murder is considered. While Bottoson makes much of the background information developed during the five-year pendency of the 3.850 proceeding, that information pales to insignificance in light of the facts of the crime. While Bottoson's childhood was certainly not one of privilege, the record is devoid of anything which suggests mistreatment, deprivation, or abuse. See, (R.P. 91). Likewise, the fact that Bottoson's views of religion can be viewed as arguably eccentric does not mean that his religious philosophy can be viewed as mitigating. In fact, it is difficult to imagine how Bottoson's religious beliefs could be presented in the guise of mitigation without that tactic backfiring. In fact, as psychiatrist Dr. Robert Kirkland testified, Bottoson was not psychotic (R.P. 412), not hallucinating (R.P. 411), and was sincere in his religious beliefs. (R.P. 414). Dr. Kirkland's evaluation was conducted at the time of trial, and is the best indicator as to Bottoson's mental state at the relevant time.

In connection with this proceeding, Bottoson was examined by Dr. Robert Phillips, a psychiatrist hand-picked by the defense. Even though Dr. Phillips did not examine Bottoson until years after the murder, and even though Dr. Phillips testified that none of the other four evaluations done of the defendant met the "standard of care," Phillips had no reluctance in testifying about his retrospective determination of Bottoson's mental state at the time of the offense. (R.P. 650). In fact, Dr. Phillips reached the diagnosis of schizo-affective disorder and schizotypal personality without ever speaking to any individual who was in contact with Bottoson at the time of the murder. (R.P. 690-691). [1]

Moreover, Bottoson has not demonstrated how, assuming the presence of a mental disorder, it is connected to the murder for which he was convicted and sentenced to death. There is nothing to suggest that the murder was the product of anything other than Bottoson's criminality and, consequently, Bottoson cannot demonstrate prejudice. Even if Bottoson is diagnosed as schizophrenic, there is no evidence that this disorder was in its active phase at the time of the murder, much less that any mental disorder led to the commission of the murder itself. In short, because there is no causal connection between the murder and any claimed mental disorder, Bottoson cannot demonstrate the prejudice prong of Washington. Under the facts of this crime, Bottoson simply cannot demonstrate how any claimed mental

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[1] On page 30 of his brief, Bottoson affirmatively states that Phillips diagnosed bipolar disorder as well as schizophrenia. That claim is incorrect.

disorder had anything at all to do with Mrs. Alexander's abduction and murder. This was not an impulsive crime, but was instead one that proceeded over a course of three days and concluded with a witness-elimination murder. Even if Bottoson suffers from some mental disorder, there is no causal connection between any disorder and the murder. Consequently, Bottoson cannot demonstrate prejudice and is not entitled to relief.

Of course, there is no "checklist" of required mitigating evidence, and this court should decline the suggestion that such a list be established. See, Evans v. Cabana, 821 F.2d 1065, 1071 (5th Cir. 1987), cert. denied, 108 S.Ct. 5 (1987). The evidence which Bottoson claims should have been presented in no way mitigates the crime for which he was convicted and would, at most, amount to an attempt to appeal solely to sympathy, which is not a valid mitigating factor. Saffle v. Parks, 110 S.Ct. 1257 (1990). As the Tenth Circuit Court of Appeals stated, "[t]he attitude of the killer is best evidenced by what he has done." Cartwright v. Maynard, 822 F.2d 1477, 1490 (10th Cir. 1987)(en banc), affirmed, 108 S.Ct. 1853 (1988). Under the facts of this case, there is no reasonable probability of a different result. Buenoano v. State, 559 So.2d 1116 (Fla. 1990); Harris v. State, 528 So. 2d 361 (Fla. 1988); see also, Cave v. State, 529 So. 2d 293, 298 (Fla. 1988); Atkins v. Dugger, 541 So. 2d 1165 (Fla. 1989).

III. BOTTOSON'S CLAIM THAT HE WAS DENIED A COMPETENT MENTAL HEALTH EXAMINATION IS PROCEDURALLY BARRED.

Bottoson claims that he was denied a competent mental health examination and that his federal constitutional rights were thereby violated. This claim could have been raised on direct appeal but was not. Consequently, this claim is barred from review. Moreover, even if this claim was not procedurally barred, Bottoson would be entitled to no relief because this claim is meritless.

Bottoson attempts to frame this issue in terms of ineffective assistance of counsel. However, the claim is, in actuality, that the mental state examiners were incompetent. This attempt to cast a merits claim as a claim of ineffective assistance of counsel is not proper, and does not allow Bottoson to avoid the procedural bar. See, e.g., Medina v. State, 573 So. 2d 293 (Fla. 1990); Kight v. Dugger, 574 So. 2d 1066 (Fla. 1990); Johnson v. Wainwright, 463 So. 2d 207 (Fla. 1985); Park v. State, 467 So. 2d 886 (Fla. 1984). While the court below did not address the procedural bar component, this court should apply the appropriate procedural bar and deny relief.

Florida law is settled that a claim of an inadequate mental state examination is properly raised on direct appeal and, if not so raised, is procedurally defaulted. Johnston v. Dugger, 583 So. 2d 657 (Fla. 1991); Engle v. Dugger, 576 So. 2d 696 (Fla. 1991); Doyle v. State, 526 So. 2d 909 (Fla. 1988). There is no suggestion by Bottoson that he raised this issue on direct appeal, and, consequently, this claim is procedurally barred.

Alternatively, Bottoson would not be entitled to relief even if this claim was properly before the court. The linchpin of Bottoson's argument is that trial counsel failed to provide certain information to the examining psychiatrists. However, that argument falls in the face of the record. Dr. Robert Kirkland, who examined Bottoson at the time of trial in 1981, did not retreat from his opinion that Bottoson was competent to stand trial (R.P. 418), and further maintained that none of the "new" information about Bottoson altered that opinion (R.P. 434). Finally, as Dr. Kirkland pointed out, Bottoson's new expert has elected to ignore information about Bottoson's functioning in 1981 in order to reach a finding of incompetence. (R.P. 448).

In the final analysis, Bottoson's claim is a claim of "ineffective assistance of psychiatrist" similar in form to an ineffective assistance of counsel claim. The due process clause of the Fourteenth Amendment is the cornerstone of such an argument, and is the fatal defect in Bottoson's claim. Bottoson simply cannot identify any ruling by the trial court which purportedly denied him a fair trial. When Bottoson's claim is "[s]tripped of its due process pretensions," it is nothing more than a Sixth Amendment claim. See, e.g., Clisby v. Jones, 960 F.2d 925, 934 (11th Cir. 1992). However, as in Clisby, Bottoson's claim is based on Ake v. Oklahoma, 470 U.S. 68 (1985), which was decided solely upon due process grounds. Because Bottoson cannot state a due process claim, this issue fails.

In his brief, Bottoson sets out a disingenuous mischaracterization of the Ake v. Oklahoma holding. Bottoson

argues, incorrectly, that Ake applies in his case because Florida law provides that a defendant's mental state is relevant to issues such as competency to stand trial. However, the fact that mental status is a potential issue under Florida law is not relevant to any analysis under Ake. Ake held merely that an indigent defendant has a due process right to an appointed psychiatrist when his sanity is an issue at trial. Ake v. Oklahoma, 470 U.S. 68 (1985). Bottoson's argument that the statutory mention of mental state issues somehow invokes "state action" that triggers the Ake requirement is specious. Finally, the state put on no mental state evidence in an effort to establish any aggravating factors. Consequently, Bottoson would not have been deprived of a fair trial even if he had not been psychiatrically evaluated. See, e.g., Clisby v. Jones, 960 F.2d at 929 n.7 and cases cited therein.

As discussed above, Bottoson seeks to come within the holding in Ake v. Oklahoma. However, Bottoson's case on direct appeal was final the year before Ake was decided and, therefore, Ake is not retroactively applicable to his case. See, e.g., Clisby v. Jones, 960 F.2d at 928 n.6.

IV. THE STATE DID NOT PRESENT FALSE TESTIMONY AT BOTTOSON'S CAPITAL TRIAL.

Bottoson claims that the state presented false testimony through an expert in dog tracking and also through a witness whom Bottoson alleges benefitted from an agreement with the state in exchange for his testimony. Neither of those claims is meritorious.

A. The "agreement for testimony"

Bottoson claims that the state failed to disclose an agreement with the witness Kuniara which allegedly provided that, in return for his testimony, Kuniara would be incarcerated in the federal prison system. (e.g., R.P. 3603). This claim is meritless for two reasons.

First, the court below found Kuniara's testimony concerning such an "agreement" to be "totally unbelievable" and further found as a fact that no such agreement existed. Those findings, which were made following ore tenus testimony during which the trial court had the opportunity to observe the demeanor and assess the credibility of the witnesses, should not be disturbed. The trial court was best situated to make the necessary credibility determination, and that court's resolution of that issue should not be second-guessed.

The second reason that the Kuniara claim does not entitle Bottoson to relief is because Bottoson cannot demonstrate the "materiality" component of United States v. Bagley, 473 U.S. 667 (1985). There is no dispute that Bottoson was convicted of various federal offenses predicated upon the operative facts

underlying the state court murder conviction. There is also no dispute that Kuniara did not testify at the federal trial. United States v. Bottoson, 644 F.2d 1174, 1175 (5th Cir., Unit B, 1981); R.P. 1489. Because Bottoson was convicted in federal court without Kuniara's testimony, no serious argument can be advanced that his testimony was "material" in any sense, constitutional or otherwise. See, Breedlove v. State, 580 So. 2d 605 (Fla. 1991).

B. The dog tracking evidence.

A substantial portion of the hearing below was devoted to the presentation of testimony critical of John Preston and his tracking dogs. Most of that information came to light after Bottoson's trial, and not one shred of that evidence even remotely suggests that Preston's work in this case was not accurate.

In fact, when the other facts of the offense are considered, it is apparent that Preston's testimony was consistent with the defendant's own testimony at trial. (R.P. 323; 3601-3602). Moreover, Preston's testimony was consistent with the other scientific evidence, thereby rendering Preston's testimony cumulative. (R.P. 3602). In addition, Bottoson's confession was entered into evidence and, again, that confession is consistent with Preston's testimony. (R.P. 3601).

To the extent that Bottoson argues that the state withheld information about Preston, that claim is tenuous at best. Bottoson relies upon the 3.850 testimony of an Orange County Sheriff's Deputy to conclude that the state had imputable

knowledge of claimed defects in Preston's work. While couched in absolute terms, the facts do not support Bottoson's argument. Instead, the facts indicate no more than a difference of opinion between two dog handlers as to an isolated incident during the course of the investigation. Of course, differences of opinion are in every day part of life, and, in the context of an on-going murder investigation, certainly do not rise to the level of exculpatory material which must be disclosed under Brady. In reality, what Bottoson claims was a Brady violation was no more than the opinion of an Orange County canine officer that a dog brought in from outside might not be able to perform as claimed. While that may be professional jealousy at work, it is not exculpatory evidence, and most certainly is not a matter that the state would have been compelled to reveal. In fact, given the evidence corroborating Preston's testimony, the most plausible interpretation is that Preston's findings were accurate.

To the extent that Bottoson claims that Preston's testimony was perjured, that claim is not supported by the record. Bottoson has produced nothing but innuendo to support that claim, and consequently has failed to carry his burden of proof. In view of the evidence which is consistent with Preston's testimony, no colorable argument can be made that Preston perjured himself.

To the extent that Bottoson argues that the state would have had little evidence against him without Preston's testimony and that, had Preston not testified, Bottoson would not have needed to testify in his own defense, that argument overlooks the

reality of the situation. Bottoson had confessed to the crime, and scientific evidence placed the victim in Bottoson's car as well as establishing that that car had been used to run over the victim. Even without the testimony of both Preston and Kuniara, the state had a strong case. Under the state's evidence (excluding Preston and Kuniara for the sake of argument), it was virtually inevitable that Bottoson would have to testify if he was to have any hope of avoiding conviction. His only hope lay in convincing the jury that the confession was not the truth and to explain away the other incriminating evidence. There is no credible way that Bottoson could hope to accomplish this in the absence of his own testimony. If Bottoson had not testified, conviction was all but certain. Bottoson is entitled to no relief on this claim.

V. BOTTOSON RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS TRIAL.

Bottoson argues that he received ineffective assistance of counsel at the guilt phase of his capital trial. The legal standard for evaluating such a claim is set out on pp. 13-15, above, and is incorporated herein by reference. When that standard is applied to the guilt phase of Bottoson's trial, it is clear that he is entitled to no relief.

A. The Preston Issue

A majority of the facts relevant to trial counsel's effectiveness in regard to the dog handler Preston are set out at pp. 26-28, above. The 3.850 court found that at the time of Bottoson's trial, Preston was "a nationally recognized expert in dog tracking." (R.P. 3600). That finding is supported by the record and should not be disturbed. Bottoson has presented no evidence to suggest that Preston could have been successfully challenged at the time of Bottoson's trial. Moreover, Bottoson has not established that the work done by Preston was not accurate. See, pp. 26-28, above. Bottoson has failed to satisfy either inquiry. In light of the other evidence, which was consistent with Preston's testimony, Bottoson cannot demonstrate how he was prejudiced. Bottoson has not satisfied either prong of the Washington test and is therefore not entitled to relief.

Moreover, trial counsel discussed Preston's testimony with the attorneys who represented Bottoson in his Federal trial (R.P. 221; 323), and consulted with other dog handlers. (R.P. 222). Based upon that investigation, which was clearly reasonable,

trial counsel made an informed tactical decision to stipulate to Preston's qualifications in order to lessen his impact on the jury. (R.P. 216). Moreover, as discussed above, Preston's testimony was consistent with Bottoson's theory of the case. See pp. 26-28, above. Bottoson is not entitled to relief.

B. The Trial Preparation Component

Bottoson further alleges that trial counsel was ineffective at the guilt phase because he did not obtain a transcript of Bottoson's federal trial. Bottoson is not entitled to relief on this claim for three independently adequate reasons.

First, Bottoson has not established that it would have been possible to obtain the transcript. In fact, the court reporter who was in attendance at that trial testified that it was not possible to have a transcript completed. (R.P. 36). To the extent that Bottoson claims that the pendency of a collateral attack on the federal conviction would have entitled him to a transcript, that is no more than an unsupported assertion of counsel that the Rules of Unit B of the former Fifth Circuit Court of Appeals required a transcript of the underlying trial when 28 U.S.C. §2255 proceedings were instituted. The fact that the Fifth Circuit decided the case without a sua sponte order for the completion of the transcript suggests that Bottoson's assertion is incorrect. United States v. Bottoson, 644 F.2d 1174, 1175 (5th Cir., Unit B, 1981). Obviously, an attorney cannot be ineffective for failing to obtain that which is unavailable, and, therefore, Bottoson has failed to satisfy the performance prong of Washington.

The second reason that Bottoson is not entitled to relief on this claim is that he has failed to demonstrate how his attorney's performance was deficient. Trial counsel clearly wanted to obtain the transcript, but was unable to do so. (R.P. 233-234). There is nothing to even suggest that trial counsel did anything other than diligently attempt to obtain the transcript, and it makes no sense to suggest that his inability to do so establishes deficient performance under Washington. Trial counsel had obtained all information about the federal trial from the federal public defender, and had a complete grasp of those proceedings. The performance of trial counsel was simply not deficient.

Third, even assuming that some as-yet undiscovered method of obtaining the federal transcript exists, Bottoson has not suggested how he was prejudiced because no transcript was prepared. Because no prejudice has been demonstrated, Bottoson is not entitled to any relief. See, pp. 13-15, above.

C. The Failure to Object Component

Bottoson argues that trial counsel was ineffective for not objecting to portions of the State's cross-examination of the defendant as well as to portions of the State's closing argument. This is no more than a merits claim cast as ineffective assistance of counsel. As such, the claim is procedurally barred. See, p. 22 above.

Moreover, even if Bottoson's ineffective assistance claim was proper, it would not entitle him to relief because he has not met the performance and prejudice prongs of Washington. Trial

counsel testified that his practice was to not object to every possible comment by the prosecution so as to avoid unnecessarily calling matters to the jury's attention. (R.P. 263). Trial counsel further testified that it was preferable to catch the State's Attorney in a misstatement rather than allowing him to immediately correct himself. (R.P. 264).[2] Those are legitimate tactical decisions which should not be second-guessed.

What Bottoson has attempted to cast as a claim of ineffective assistance of counsel is in fact a due process claim. However, none of the matters asserted in Bottoson's brief rise to the level of a due process violation. See, e.g., Davis v. Kemp, 829 F.2d 1522 (11th Cir. 1987); Kennedy v. Dugger, 933 F.2d 905 (11th Cir. 1991). Because no due process violation took place, Bottoson fails, by definition, to demonstrate the prejudice required under Washington.

D. The "Waiver" of Lesser Included Offenses

Bottoson argues that trial counsel improperly (and ineffectively) "waived" his "right" to be found guilty of a lesser included offense through closing argument at the guilt phase. Bottoson has failed to meet either prong of Washington with regard to this claim.

First, Bottoson has failed to demonstrate how trial counsel's performance was deficient. Trial counsel testified that he did not want to argue for lesser included offenses

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[2] To the extent that Bottoson argues that the prosecutor improperly argued that additional evidence existed, trial counsel testified that he regarded that argument as an error in completion rather than a misrepresentation. (R.P. 267).

because he did not want to concede Bottoson's involvement. (R.P. 307). Further, as trial counsel stated, there was no reason to believe that the jury would return a conviction of a lesser included offense. (R.P. 308). Under the facts of this case, counsel's decision was reasonable. As such, that decision should not be second-guessed by this court. See, pp. 13-15, above.

Bottoson has also failed to demonstrate that counsel's closing argument was prejudicial to the defense. Specifically, Bottoson has not suggested how a conviction for any lesser included charge would be proper. Moreover, because this court has already upheld the defendant's conviction for First Degree Murder, it makes no sense to suggest that that conviction is not fully supported by the evidence. The law of the case is that Bottoson's First Degree Murder conviction is supported by sufficient evidence and, because that is the case, Bottoson cannot, as a matter of law, demonstrate the prejudice required under Washington. Bottoson is not entitled to relief.

VI. THE CONSTRUCTIVE INEFFECTIVE ASSISTANCE CLAIM.

Bottoson argues that he was denied the effective assistance of counsel due to various forms of "state interference." Those claims are procedurally barred and, in the alternative, lack merit.

A. The Denial of a Continuance and of Co-counsel Claim

On pp. 58-63 of his brief, Bottoson argues that he received ineffective assistance of counsel due to various court rulings and State statutes. Specifically, Bottoson argues that the denial of a continuance by the trial court, and the court's refusal to appoint co-counsel rendered his trial attorney ineffective. Neither of those claims was raised on direct appeal and, consequently, both claims are procedurally barred. See, p. 22 above. Further, there is nothing in the record to suggest that the trial court abused its discretion in denying either motion. Because there was no abuse of discretion, this claim is without merit in addition to being procedurally barred.

There is no right to the appointment of co-counsel in a capital case. Likewise, the 1989 ABA guidelines referred to in Bottoson's brief are not binding on this court. However, Bottoson's trial attorney, who is portrayed as bumbling and incompetent, foresaw the promulgation of those guidelines some eight years before they came out. Beyond the obvious argument that two heads are better than one, Bottoson has not suggested how the denial of co-counsel deprived him of a fair trial. Bottoson received the effective assistance of counsel and is not entitled to relief.

B. The Compensation of Counsel Claim

Bottoson also argues that the §975.036 fee cap operated to deny him the effective representation of counsel. Bottoson points to nothing to support his claim that money had anything to do with the quality of defense he received. Moreover, Bottoson asks this court for relief based on a claim which is procedurally barred because it could have been raised at trial or on direct appeal but was not.

There is no question that challenges to the statutory fee cap provision were being brought at the time of Bottoson's trial. See, e.g., Metropolitan Dade County v. Bridges, 402 So. 2d 411 (Fla. 1981). Likewise, there is no dispute that those challenges were unsuccessful. Id. However, there be no no suggestion that Bottoson's attorney could not have raised the issue because it was novel. This claim is obviously one that could have been raised at trial and on appeal but was not. Consequently, this claim is procedurally barred. See p. 22, above.

Even if this claim were not procedurally barred, it would not entitle Bottoson to relief. There is nothing to suggest that trial counsel was in any way motivated by the compensation he would receive. In fact, a reading of trial counsel's testimony in this proceeding leaves little doubt that trial counsel did as well as possible given the facts of the case. To suggest, as Bottoson does, that any attorney would limit preparation time in a death penalty case because of how much he would be paid is an allegation that has certainly not been supported, at least in this case. Bottoson received the effective assistance of counsel, and is not entitled to relief.

VII. THE HITCHCOCK CLAIM.

Bottoson argues that his sentencing proceeding violated Hitchcock v. Dugger, 481 U.S. 393 (1987), because neither the jury nor the judge considered non-statutory mitigating evidence. This claim is foreclosed by binding precedent and, even if there was error, that error was harmless.

A. There was no Hitchcock Violation

Under the decisions of this court, this is not what is denominated a "pure" Hitchcock claim because Bottoson was not prevented from presenting non-statutory mitigating evidence, and both judge and jury were not under the impression that non-statutory mitigation could not be considered. Adams v. State, 543 So. 2d 1244, 1247 (Fla. 1989).

As set out in Bottoson's brief, non-statutory mitigation was presented at trial. See, pp. 66-68, Appellant's Brief. The fact that the trial court allowed the presentation of such evidence clearly indicates that the court did not regard the statutory mitigators as an exclusive list of what mitigating evidence could be considered. C.f., Cooper v. Dugger, 526 So. 2d 900 (Fla. 1988)(non-statutory mitigating evidence excluded); Waterhouse v. State, 522 So. 2d 341 (Fla. 1988)(non-statutory mitigating evidence excluded). When the penalty phase proceedings are fairly considered, it is clear that neither the jury nor the judge were restricted in their consideration of mitigating evidence.

Under Florida law, there is no requirement that the sentencing judge specifically refer in the sentencing order to

non-statutory mitigation proffered by the defendant. Johnson v. Dugger, 520 So. 2d 565, 566 (Fla. 1980). Further, the sentencing court is not required to specify, in the sentencing order, the weight given to non-statutory mitigating evidence. Harich v. State, 542 So. 2d 980, 981 (Fla. 1989). In this case, it is apparent that the sentencing court considered the non-statutory mitigation and found it insufficient to outweigh the multiple aggravators which are indisputably established.

Moreover, this court has already reviewed this case on direct appeal and found the sentence of death to be proper. Bottoson v. State, 443 So. 2d 962 (Fla. 1983). The non-statutory mitigation which Bottoson claims should have been considered has, in fact, already been considered by this court and found insufficient to outweigh the aggravating factors. Id. That is the law of the case, and Bottoson has come forward with no reason for this court to change its holding except that he does not like the result.

B. Any Hitchcock Error Was Harmless

Assuming arguendo that a Hitchcock violation occurred, any error was harmless beyond a reasonable doubt. The non-statutory mitigation upon which Bottoson relies is set out on pp. 66-68 of his brief and will not be repeated. However, the internal inconsistency of Bottoson's brief is worthy of mention.

Throughout the first sixty-five pages of his brief, Bottoson has, at various points, argued that his trial counsel was so incompetent that he was no even functioning as a lawyer. However, on p. 68, Bottoson argues that "[t]his Court has

repeatedly held nonstatutory mitigation of the type presented in Mr. Bottoson's case, particularly when taken together, will support a jury recommendation of life imprisonment." Appellant's Brief at 68. Bottoson cannot have it both ways. If the non-statutory mitigation actually presented was sufficient to do what Bottoson claims, then the basis of his ineffective assistance claim collapses into no more than a claim of dissatisfaction with the result. Bottoson's ineffective assistance of counsel claim fails. Likewise, the Hitchcock claim fails because the error, if there was one, is harmless.

All of the non-statutory mitigation upon which Bottoson relies was introduced at his capital trial. In other Hitchcock cases, this court has found harmless error when the non-statutory mitigation was not introduced at trial. See, e.g., Steinhorst v. State, 574 So. 2d 1075 (Fla. 1991); see also, Clark v. State, 533 So. 2d 246 (Fla. 1988); Jackson v. Dugger, 529 So. 2d 1081 (Fla. 1988); White v. Dugger, 523 So. 2d 140 (Fla. 1988); Ford v. State, 522 So. 2d 345 (Fla. 1988). If the Hitchcock error in those cases was harmless, and that is the law, then any Hitchcock error in Bottoson's case is clearly harmless beyond a reasonable doubt because of the multiple aggravators which are present. Bottoson is not entitled to relief.

VIII. THE CALDWELL CLAIM.

Bottoson argues that the penalty phase jury instructions improperly diminished the jury's responsibility for its penalty phase advisory verdict in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). The 3.850 court properly found this claim to be procedurally barred.

Florida law is settled that a 3.850 petitioner is barred from litigating a claim that could have been but was not raised on direct appeal. See, Mikenas v. State, 460 So. 2d 359 (Fla. 1984). Likewise, claims based on matters contained in the original record must be raised on direct appeal. Lambrix v. State, 559 So. 2d 1137 (Fla. 1990). Finally, this court has repeatedly held that Caldwell claims are subject to the direct appeal procedural bar. See, e.g., Medina v. State, 573 So. 2d 293 (Fla. 1990); Swafford v. Dugger, 569 So. 2d 1264 (Fla. 1990); Roberts v. State, 568 So. 2d 1255 (Fla. 1990); see also, Dugger v. Adams, 109 S.Ct. 1211 (1989). The 3.850 trial court properly applied the state's regularly-enforced procedural rule, and that court's order should not be disturbed.

Moreover, even if this claim was not defaulted (or could properly be cast as ineffective assistance of counsel), it would not entitle Bottoson to relief because Caldwell is inapplicable to Florida's capital sentencing scheme. See, e.g., Combs v. State, 525 So. 2d 853 (Fla. 1988); Daugherty v. State, 533 So. 2d 287 (Fla. 1988). Likewise, trial counsel cannot have been ineffective for not raising a Caldwell objection for two reasons: first, Caldwell had not been decided at the time of Bottoson's

trial, and second, counsel cannot have been ineffective for not raising a claim that is inapplicable to Florida law. See, e.g., Tafero v. State, 561 So. 2d 557, 559 n.2 (Fla. 1990); King v. Dugger, 555 So. 2d 355 (Fla. 1990).

IX. THE INVALID AGGRAVATORS CLAIM.

Bottoson argues that the heinous, atrocious or cruel, "avoiding arrest," and felony murder aggravators were improperly applied in his case. The 3.850 court found these claims to be procedurally defaulted and alternatively, without merit. (R.P. 3607-8; 3611). Those findings are correct and should not be disturbed.

A. Heinous, Atrocious or Cruel

The victim in this case was killed by running over her with a car after stabbing her fifteen times. Bottoson v. State, 443 So. 2d 962 (Fla. 1983). Based upon the facts, which are not in dispute, this murder falls well within the most restrictive definition of HAC imaginable. Gaskin v. State, 591 So. 2d 917 (Fla. 1992), vacated on other grounds, Gaskin v. Florida, 112 S.Ct. 3022 (1992), aff'd, Gaskin v. State, 615 So. 2d 679 (Fla. 1993); Farinas v. State, 569 So. 2d 425 (Fla. 1990); Phillips v. State, 476 So. 2d 194 (Fla. 1985). As found by this court on direct appeal, this murder was heinous, atrocious or cruel and that aggravation was properly applied.

B. Avoiding Arrest

Likewise, there was ample proof that the sole or dominant motive for this murder was witness elimination. Bottoson v. State, 443 So. 2d 962 (Fla. 1983). The criteria for this aggravator were well-established. See, Kokal v. State, 492 So. 2d 1317 (Fla. 1986); Smith v. State, 424 So. 2d 726 (Fla. 1982).

C. The Felony-Murder Aggravator

Bottoson argues that the "during the course of" felony murder aggravator is unconstitutional. In a remarkably misleading piece of advocacy, Bottoson cites this court to the one-sentence opinion of the United States Supreme Court quashing certiorari in Tennessee v. Middlebrooks, 126 L.Ed.2d 555 (1993). The aggravating circumstance overlap claim has been rejected by the United States Supreme Court as well as by this court. Lowenfield v. Phelps, 484 U.S. 231 (1988); Bertolotti v. State, 534 So. 2d 386, 387 n.3 (Fla. 1988).

X. THE PENALTY PHASE JURY INSTRUCTIONS.

On pages 84-87, Bottoson raises three claims of error as to the penalty phase jury instructions. Insofar as Bottoson argues that the jury was not properly instructed as to the number of votes required to recommend a life sentence, that claim is procedurally barred as found by the 3.850 court (R.P. 3605). See, e.g., Henderson v. Dugger, 522 So. 2d 835, 836 (Fla. 1988). Moreover, any error was harmless because the jury recommended death by a 10-2 margin. (R.P. 3605).

Bottoson also argues that the jury was improperly instructed that it must recommend death unless the mitigating circumstances outweighed the aggravating factors. The 3.850 court properly found this claim to be procedurally barred because it was addressed on direct appeal. (R.P. 3607). Even if this claim was not procedurally barred, it would entitle Bottoson to no relief. Blystone v. Pennsylvania, 110 S.Ct. 1078, 1082-1083 (1990); Boyde v. California, 110 S.Ct. 1190, 1196 (1990).

Finally, Bottoson argues that the anti-sympathy jury instruction was improper. That claim is foreclosed by binding precedent. Saffle v. Parks, 110 S.Ct. 1257, 1263 (1990); California v. Brown, 107 S.Ct. 837 (1987). Despite Bottoson's suggestion to the contrary, Parks and Brown expressly held that an anti-sympathy jury instruction, like the one at issue here, does not violate Eddings and Lockett.

XI. THE NEIL CLAIM.

Bottoson argues that his claim based upon the alleged discriminatory use of a peremptory challenge by the State was improperly found to be procedurally barred. This court has applied the procedural bars to Neil claims which were preserved by trial objection but abandoned on appeal. See, Roberts v. State, 568 So. 2d 1255 (Fla. 1990); see also, Hill v. Dugger, 556 So. 2d 1385 (Fla. 1990).[3] Bottoson's claim is procedurally barred for the same reasons.

Contrary to Bottoson's claim, this issue could have been raised on direct appeal. In fact, the existence of the Neil decision suggests that the claim was the subject of litigation at the time of Bottoson's direct appeal. Bottoson did not raise the claim at the first opportunity, and his failure to do so is a procedural default which bars him from relief.

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[3] Bottoson concedes that trial counsel was not ineffective for not raising a Neil issue three years before that case was decided. Likewise, Bottoson has never contended that appellate counsel was ineffective with regard to this (or any other) claim.

XII. THE JOHNSON V. MISSISSIPPI CLAIM.

Bottoson argues that his death sentence is partially based upon an invalid 1971 federal bank robbery conviction. Bottoson goes on to argue that his case is "essentially" squarely on point with Johnson. However, the critical distinction is that, in Johnson, the prior conviction had been set aside. Johnson v. Mississippi, 486 U.S. 578 (1988). Bottoson's prior conviction has not been set aside, and, from the record, it appears that that conviction has never even been challenged. Consequently, this claim is not ripe for review. Buenoano v. State, 559 So. 2d 1116 (Fla. 1990). The trial court properly found this claim to be improperly raised in this proceeding (R.P. 3612). Bottoson's suggestion that his court should grant relief when little evidence about the prior conviction is before it; when that conviction has never been directly or collaterally challenged; and when that conviction has never been set aside, is contrary to the prior decisions of this court as well as being contrary to common sense.

XIII. THE INADEQUATE TRANSCRIPTION CLAIM.

Bottoson argues that the record of his capital trial is deficient because the charge conferences and a number of bench conferences were not transcribed. Bottoson also includes an ineffective assistance of counsel component to this claim. Neither of those claims has merit, and, as far as the substantive claim is concerned, that claim is procedurally barred.

The 3.850 trial court found this claim to be procedurally barred because it could have been but was not raised on appeal. (R.P. 3604). The court below relied upon Delap v. State, 350 So. 2d 462 (Fla. 1977), in support of its procedural bar holding. That disposition of this issue is correct and should not be disturbed.

Insofar as the ineffective assistance component of this claim is concerned, the 3.850 court found that Bottoson had failed to demonstrate prejudice as required by Strickland v. Washington. (R.P. 3604). That finding, which was entered after hearing the ore tenus testimony of trial counsel, is supported by the evidence and should be upheld.

What Bottoson is asking this court to do is to presume prejudice to the defense in the face of no evidence to the contrary, and when the only testimony on this issue was the unequivocal testimony of trial counsel that nothing of substance occurred that is not in the record. (R.P. 205-208). In fact, a review of the Appendix B to Appellant's Brief reveals that the unrecorded conferences took place at times in the trial which are

consistent with trial counsel's testimony that these conferences dealt with scheduling matters. See, R.P. 205. Bottoson has cited no authority for his "presumptive prejudice" argument, and it stands reason on its head to suggest that this court should presume prejudice when the only evidence is squarely to the contrary. The result Bottoson seeks would be a windfall which has no place in a rational system of justice. Trial counsel's performance was not deficient, nor did it result in any prejudice to the defendant.

XIV. THE ABSENCE OF THE DEFENDANT CLAIM.

Bottoson claims that his conviction is due to be reversed because he was not present during portions of the jury selection process as well as during the charge conference. This claim is not cognizable under Rule 3.850, Middleton v. State, 465 So. 2d 1218, 1226 (Fla. 1985), and the court below correctly so found. Insofar as Bottoson raises an ineffective assistance of counsel component to this claim, the trial court found that the defendant was voluntarily absent from those proceedings. (R.P. 3605). As the 3.850 court found, trial counsel cannot be faulted for Bottoson's voluntary actions. (Id.). Contrary to Bottoson's assertion, his actions were voluntary and he should not be heard to complain.

XV. THE IMPROPERLY CONSTITUTED GRAND JURY CLAIM.

Bottoson argues that he is entitled to relief because he was indicted by a grand jury consisting of 23 rather than 18 members. This claim is raised for the first time in Bottoson's 3.850 proceeding and, consequently, is procedurally barred because it could have been but was not raised at trial or on direct appeal. See, pp. 39, above. The 3.850 court found this claim procedurally barred. (R.P. 3598). That finding is correct and should not be disturbed. Any error was not "fundamental" and, therefore, Bottoson cannot avoid the preclusive effect of his procedural default.

XVI. THE GRAND JURY FOREMAN DISCRIMINATION CLAIM.

Bottoson argues that Orange County's "historical discrimination" in the selection of grand jury foremen entitles him to relief. This claim is procedurally barred because it could have been raised at trial and on direct appeal but was not. See, p. 39, above. The trial court properly applied the procedural bar and declined to address the merits of this claim. (R.P. 3598). That decision should not be disturbed. Alternatively and secondarily, this claim is without merit because the foreman of a Florida grand jury does not play a significant role in the administration of justice. Andrews v. State, 443 So. 2d 78, 82-83 (Fla. 1983).

CONCLUSION

Based on the foregoing argumetns and authorities, appellee requests this court affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by U.S. Mail to James M. Russ, Law Offices of James M. Russ, P.A., Tinker Building, 18 West Pine Street, Orlando, Florida 32801, 19th day of April, 1994.

Margene A. Roper
Of Counsel