IN THE SUPREME COURT OF FLORIDA

WAYNE TOMPKINS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 73,235

EMERGENCY BRIEF: DEATH WARRANT SIGNED; EXECUTION IMMINENT.

ON APPEAL FROM THE DENIAL OF 3.850 RELIEF
IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

The defendant was charged by indictment filed on September 26, 1984, with the first degree murder of Lisa DeCarr (R 489-490. At arraignment, Tompkins pled not guilty.

Trial by jury commenced on September 16, 1985. The trial was held before the Honorable Harry Lee Coe, 111, Circuit Judge. After deliberations, the jury found the defendant guilty as charged in the indictment (R 401). Following the penalty phase of the trial, a 12-0 unanimous jury recommended the death penalty. On September 19, 1985, Judge Coe entered his written order containing findings of fact in support of the death sentence imposed (R 678-681).

On December 30, 1986, the Florida Supreme Court affirmed the judgment and sentence of death. Tompkins v. State, 502 So.2d 415 (Fla. 1986). The issues raised by Tompkins in his direct appeal to the Florida Supreme Court are as follows:

> ISSUE I: THE TRIAL COURT ERRED IN ADMITTING WAYNE TOMPKINS' CONFESSION INTO EVIDENCE, AS THE STATE FAILED TO PROVE THE CORPUS DELICTI FOR A HOMICIDE BY INDEPENDENT PROOF.
>
> ISSUE 11: THE TRIAL COURT ERRED IN UNDULY RESTRICTING WAYNE TOMPKINS' CROSS-EXAMINATION OF TWO IMPORTANT STATE WITNESSES, DEPRIVING HIM OF HIS CONSTITUTIONAL RIGHT TO CONFRONT HIS ACCUSERS.
>
> ISSUE 111: THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO ELICIT PREJUDICIAL HEARSAY TESTIMONY ON RE-DIRECT EXAMINATION OF BARBARA DECARR.
>
> ISSUE IV: THE TRIAL COURT ERRED IN EXCLUDING SIX PROSPECTIVE JURORS FROM WAYNE TOMPKINS'

TRIAL BECAUSE OF THEIR RESERVATIONS CONCERNING CAPITAL PUNISHMENT, AS A JURY SELECTED IN SUCH A MANNER IS NOT REPRESENTATIVE OF A CROSS-SECTION OF THE COMMUNITY, AND IS ALSO MORE PRONE TO CONVICT, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

ISSUE V: THE TRIAL COURT ERRED IN ADMITTING HEARSAY TESTIMONY DURING THE PENALTY PHASE OF WAYNE TOMPKINS' TRIAL WHICH COULD NOT BE CONFRONTED OR REBUTTED.

ISSUE VI: THE TRIAL COURT ERRED IN SENTENCING WAYNE TOMPKINS TO DEATH BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, AND THE COURT GAVE UNDUE WEIGHT TO THE JURY'S DEATH RECOMMENDATION, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A request by Tompkins for clemency was apparently denied when Governor Bob Martinez signed a death warrant in Tompkins' case on March 30, 1989. The warrant is in effect from noon on Monday, June 5, 1989, until noon on Monday, June 12, 1989, with the execution presently scheduled for Tuesday, June 6, 1989, at 7:00 a.m.

On or about May 1, 1989, the defendant filed an emergency motion to vacate judgment and sentence pursuant to **Rule 3.850, Florida Rules of Criminal Procedure,** and a consolidated emergency application for stay of execution and special request to amend and supplement. An evidentiary hearing was held before the Honorable Harry Lee Coe, 111, Circuit Judge, on May 19-20, 1989, after which the defendant's 3.850 motion was denied and the

application for stay of execution was denied. On or about May 23, 1989, the defendant filed a motion for rehearing and a stay of execution pending appeal. Those requests were denied on Friday, May 26, 1989, and this appeal follows.

STATEMENT OF THE FACTS

The State of Florida will rely on the Florida Supreme Court opinion (cited at Tompkins v. State, 502 So.2d 415 (Fla. 1986)) for a statement of the facts:

> The victim, Lisa DeCarr, aged 15, disappeared from her home in Tampa on March 24, 1983. In June 1984, the victim's skeletal remains were found in a shallow grave under the house along with her pink bathrobe and jewelry. Based upon a ligature (apparently the sash of her bathrobe) that was found tied tightly around her neck bones, the medical examiner determined that Lisa had been strangled to death. In September 1984, Wayne Tompkins, the victim's mother's boyfriend, was charged with the murder.
>
> At trial, the state's three key witnesses testified as follows. Barbara DeCarr, the victim's mother, testified that she left the house on the morning of March 24, 1983, at approximately 9 a.m., leaving Lisa alone in the house. Lisa was dressed in her pink bathrobe. Barbara met Wayne Tompkins at his mother's house a few blocks away. Some time that morning, she sent Tompkins back to her house to get some newspapers for packing. When Tompkins returned, he told Barbara that Lisa was watching television in her robe. Tompkins then left his mother's house again, and Barbara did not see or speak to him again until approximately 3 o'clock that afternoon. At that time, Tompkins told Barbara that Lisa had run away. He said the last time he saw Lisa, she was going to the store and was wearing jeans and a blouse. Barbara returned to the Osborne Street house where she found

Lisa's pocketbook and robe missing but not the clothes described by Tompkins. Barbara then called the police.

The state's next witness, Kathy Stevens, a close friend of the victim, testified that she had gone to Lisa DeCarr's house at approximately **9** a.m. on the morning of March 24, **1983.** After hearing a loud crash, Stevens opened the front door and saw Lisa on the couch struggling and hitting Tompkins who was on top of her attempting to remove her clothing. Lisa asked her to call the police. At that point, Stevens left the house but did not call the police. When Stevens returned later to retrieve her purse, Tompkins answered the door and told her that Lisa had left with her mother. Stevens also testified that Tompkins had made sexual advances towards Lisa on two prior occasions.

Kenneth Turco, the final key state's witness, testified that Tompkins confided details of the murder to him while they were cellmates in June **1985.** Turco testified that Tompkins told him that Lisa was on the sofa when he returned to the house to get some newspapers for packing. When Tompkins tried to force himself on her, Lisa kicked him in the groin. Tompkins then strangled her and buried her under the house along with her pocketbook and some clothing (jeans and a top) to make it appear as if she had run away.

* * *

At the penalty phase, the state presented evidence from three witnesses to show that Tompkins had been convicted of kidnapping and rape stemming from two separate incidents in Pasco County which occurred after Lisa DeCarr's disappearance. The defense presented testimony from three witnesses regarding Tompkins' good work record, shy and nonviolent personality, and honesty.

The trial judge, finding three aggravating circumstances (previous conviction of felonies involving the use or threat of violence to the person; murder committed

> while the defendant was engaged in an attempt to commit sexual battery; murder was especially heinous, atrocious, or cruel) and one statutory mitigating circumstance (defendant's age at the time of the crime), followed the jury's recommendation and sentenced Tompkins to death.

As aforementioned, the jury recommended a death sentence unanimously by a 12-0 vote and the trial court followed that unanimous recommendation.

At the **3.850** evidentiary hearing held in this cause on May **19-20, 1989**, evidence was adduced which pertained to two issues, to wit: a Brady claim and an ineffective assistance of counsel claim. Your appellee will refer to the transcript of the **3.850** evidentiary hearing by the symbol "T" followed by the appropriate page number. These references will be made in the body of the argument section as to the issues to which they pertain.

SUMMARY OF THE ARGUMENT

Most of the claims raised in the **3.850** motion were procedurally barred because they could have been, should have been or were raised on direct appeal. With respect to those issues cognizable in the **3.850** proceedings below, an evidentiary hearing was held and it is clear from the evidence adduced that the defendant did not satisfy his burden of proving his **3.850** allegations. With respect either the Brady or ineffective assistance of counsel claims, the defendant failed to show that confidence in the outcome of the original trial proceedings was undermined.

ARGUMENT IN OPPOSITION TO STAY OF EXECUTION

Although this Honorable Court has the power to grant a stay of execution, the State of Florida submits that the instant cause is not one which should be stayed. In Barefoot v. Estelle, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983), reh. denied, 104 S.Ct. 209, 78 L.Ed.2d 185 (1983), the Court addressed the issue of stays of execution and said:

> . . . It must be remembered that direct appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception. When the process of direct review -- which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari -- comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials. Even less is federal habeas a means by which a defendant is entitled to delay an execution indefinitely.

77 L.Ed.2d at 1100. The State of Florida submits that 3.850 proceedings, like the federal habeas proceedings discussed in Barefoot v. Estelle, are not vehicles to relitigate state trials. As will be demonstrated below, King is unable to show that any issue is likely to succeed on the merits. See O'Bryan v. Estelle, 691 F.2d 706, 708 (5th Cir. 1982), and White v. Florida, 458 U.S. 1301, 103 S.Ct. 1, 73 L.Ed.2d 1385 (1982).

In Autry v. Estelle, 464 U.S. 1, 104 S.Ct. 20, 78 L.Ed.2d 1 (1983), the United States Supreme Court declined to implement a

rule calling for an automatic stay of execution where a petitioner's first habeas corpus petition had been involved. Similarly, the State of Florida submits that there is no justification for an automatic stay of execution merely because a 3.850 motion has been filed. The state further submits that the instant case is not one which calls for the granting of a stay of execution.

ARGUMENT AS TO PROCEDURAL BARS

It has long been the law in this state that a defendant may not raise via a motion pursuant to Rule **3.850,** Florida Rules **of** Criminal Procedure, claims which were raised or should have been raised on direct appeal. See, e.g., Christopher v. State, 416 So.2d 450 (Fla. 1982); Raulerson v. State, 420 So.2d 517 (Fla. 1982); Meeks v. State, 382 So.2d 673 (Fla. 1980); Alvord v. State, 396 So.2d 194 (Fla. 1981). The purpose of motions pursuant to Rule **3.850** is to provide a means of addressing alleged constitutional errors in a judgment or sentence, not to review errors which are cognizable on a direct appeal. McCrae v. State, 437 So.2d 1388 (Fla. 1983). For example, in Blanco v. State, 507 So.2d 1377, 1380 (Fla. 1987), the Supreme Court held that many of the issues raised had been procedurally barred because they either were or should have been presented on direct appeal. The state submits that many of Tompkins' issues are not cognizable in this 3.850 proceeding. Recently, the Florida Supreme Court had occasion to consider a capital case very similar to the instant case. In Atkins v. State, 14 F.L.W. 207 (Fla. April 13, 1989), the Court held that with the exception of issues relating to ineffective assistance of counsel, all issues raised by Atkins were procedurally barred because they were either raised, or should have been raised, on direct appeal. Footnote 1 of the Atkins opinion sets forth the issues raised by the defendant in his 3.850 motion which were procedurally barred. The claims barred are as follows, with those that are identical to those raised in the instant 3.850 motion underscored:

(1) the conviction was based on an impermissible consideration of sexual battery as an underlying felony for a felony murder theory;

(2) there was no knowing waiver of *Miranda* rights;

(3) the trial court improperly shifted to the defendant the burden of proving that life was the appropriate penalty;

(4) the trial court failed to convene a new sentencing jury upon resentencing;

(5) the aggravating circumstance of "heinous, atrocious, or cruel" is unconstitutional as applied in this case. *Maynard u. Cartwright*, **108** S.Ct. **1853** (**1988**);

(6) Atkins sentencing jury was misled by the trial court's instructions during the jury's responsibility in sentencing recommendations, *Caldwell v. Mississippi,* **105** S.Ct. **2633 (1985). See** *Dugger u. Adams*, *57* **U.S.L.W. 4276 (1989);**

(7) the jury instruction that a sentence recommendation of life must be made bv a majority vote misled the jury;

(8) the prosecution improperly asserted that sympathy toward Atkins may not be considered by the jury;

(9) Atkins' death sentence rests on unconstitutional automatic aqqravating circumstances;

(10) the corpus delicti of kidnapping was not proved by substantial evidence;

(11) Nonstatutory aqqravating factors were introduced into the sentencing proceeding;

(12) the sentencing court refused to find mitigating circumstances clearly supported by the record:

(13) the prosecutor made improper statements during closing argument of both the guilt and penalty phases of the trial;

(14) the state's attempt to try Atkins on two counts of sexual battery despite a total lack of evidence deprived Atkins of a fair trial on the murder charge.

In the same vein, Tompkins' failure to properly raise issues at trial or on appeal constitutes a procedural default precluding collateral review. Wainwright v. Sykes, 433 U.S. 72, 53 L.Ed.2d 594 (1977); Murray v. Carrier, 477 U.S. 478, 91 L.Ed.2d 397 (1986); Smith v. Murray, 477 U.S. 527, 91 L.Ed.2d 434 (1986); Engle v. Isaac, 456 U.S. 107, 71 L.Ed.2d 783 (1982).

Thus, Tompkins is precluded from litigating most of the issues now urged in his motion for post-conviction relief and this Honorable Court should affirm the denial of all issues which are clearly barred from collateral review, to wit: Claims II, 111, IV, V, x, XI, XII, XIII, XIV, xv, XVI, XVII, XIX.

ARGUMENT IN RESPONSE TO **3.850** CLAIMS

The State of Florida will respond to the allegations of the **3.850** motion in the order presented by the defendant in that motion. However, as to those claims previously identified as being precluded from collateral review, the response will be extremely brief.

Claim I: The defendant alleges that **Rule** 3.851, **Florida Rules of Criminal Procedure,** denies him equal protection in that he has to pursue his claims for relief prior to the expiration of the two-year limitation period specified in **Rule** 3.850, **Florida Rules of Criminal Procedure.** The defendant presents as Claim I a claim which he knows has been rejected by the Florida Supreme Court, as are many of the claims presented in the Rule **3.850** motion. This identical claim was authoritatively rejected by the Florida Supreme Court in Cave v. State, **529** So.2d **293** (Fla. **1988).** In Cave, the Court held:

> Essentially, appellant is claiming that procedural Rule **3.850** prohibits the Governor of Florida from signing a death warrant until two years after a death sentence becomes final. This issue was not presented below and is procedurally barred. Moreover, this Court has no constitutional authority to abrogate the Governor's authority to issue death warrants on death sentenced prisoners whose convictions are final. Unless there is a petition for post-conviction relief, the affirmance of a final conviction ends the role of the courts. Rule **3.850** merely provides a time period *after* which petitions may not be filed. It does not act as a bar to execution of sentences immediately after they become final. (text at **299)**

Inasmuch as this claim has been considered and rejected by the highest court in this state, this Honorable Court should affirm the denial of Claim I.

Claim II: Claim II concerns the allegedly erroneous sustaining of objections by the trial court pertaining to hearsay questions asked during cross-examination of state witnesses. This claim, like so many of the others raised in the 3.850 motion, is not cognizable on collateral review because it is one which should have been and could have been raised on direct appeal. This claim is premised only by references to the record and, therefore, an evidentiary hearing is not needed to dispose of this claim. The failure to raise this claim on direct appeal absolutely precludes collateral review and, therefore, this Honorable Court should affirm the denial of this claim.

Claim III: The defendant's Claim III concerns the purported conflict of interest arising where Cass Castillo withdrew from representation of the defendant to accept a position with the State Attorney's Office. In his Claim III, the defendant also makes specious arguments concerning the role played by the prosecutor in this case, Michael Benito. This Honorable Court should affirm the denial of this claim.

Initially, the state asserts that this claim is barred from 3.850 review because it is one which could have been raised on direct appeal. The matters now complained-of appear in the record. The 3.850 motion is fatally defective where it does not allege that there was an actual conflict of interest. Cf. Cuyler

v. Sullivan, 446 U.S. 335 (1980) (a mere possibility of conflict of interest does not rise to the level of a sixth amendment violation). Where no actual conflict of interest has even been alleged, this Honorable Court should affirm the denial of this claim.

For some unknown reason, defendant cites to State v. Fitzpatrick, 464 So.2d 1185 (Fla. 1985). In Fitzpatrick, our Supreme Court determined that the entire State Attorney's Office is not disqualified from prosecuting a defendant who had related confidential communications to his attorney who later became a member of that State Attorney's Office. In the instant case, there is no allegation that Mr. Castillo provided prejudicial information or that he had anything to do with the prosecution of Tompkins' case in any capacity. Indeed, it is clear from the evidence adduced at the evidentiary hearing that Mr. Castillo, upon becoming associated with the State Attorney's Office of the Thirteenth Judicial Circuit, never had any conversations with Mr. Benito concerning the Tompkins case (T 138-139). Therefore, this Honorable Court should affirm the denial of this claim where the allegations and evidence are insufficient to support even a hint of a conflict of interest.

The allegations concerning Mr. Benito are ridiculous. According to collateral counsel's theory, any time a State Attorney talks with a witness prior to trial the entire State Attorney's Office should be disqualified because the interviewer has become a material witness. Such a result is so absurd as to

obviate the need for further response. There has been no conflict of interest alleged sufficient to warrant disqualification of the State Attorney's Office for the Thirteenth Judicial Circuit either at the time of trial or now during these collateral proceedings.

Claim IV: As his next claim, the defendant contends that the state violated the defendant's right to counsel where the testimony of cellmate Kenneth Turco was introduced at trial. In the direct appeal of this cause, the Florida Supreme Court in footnote 5 noted that this claim was procedurally barred. Thus, it is also not cognizable on collateral review.

Additionally, the defendant's unsubstantiated claim of ineffective assistance of counsel with respect to this claim should be summarily denied. The defendant argues that because defense counsel did not object to the introduction of Mr. Turco's testimony on the basis that the incriminating statements were made to a jailhouse informant who was acting as a state's agent, defense trial counsel rendered prejudicially ineffective assistance of counsel. There simply is nothing in the record, nor anything even via allegation in the 3.850 motion, that indicates that any agency relationship existed. Incriminating statements obtained by a jailhouse informant are not per se inadmissible. Rather, it is only where the jailhouse informant is acting as an agent of the state that constitutional guarantees are implicated. In the instant case, therefore, where there is no evidence of an agency relationship, the denial of this claim should be affirmed.

Claim V: The defendant's next claim is again one that is classically available to raise on direct appeal. The failure to do so absolutely precludes collateral review. There is also no basis for an ineffective assistance of counsel claim based on the identification made by Kathy Stevens in the instant case. In order for defense trial counsel to attack the identification of Tompkins by Ms. Stevens, it had to be shown that first, the identification procedure was unnecessarily suggestive, and secondly, whether that impermissible suggestiveness created a substantial risk of misidentification. Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); Allen v. Estelle, 568 F.2d 1108 (5th Cir. 1978). There is no allegation in the 3.850 motion that the pretrial procedures employed were unnecessarily suggestive, see Grant v. State, 390 So.2d 341 (Fla. 1980); Johnson v. State, 438 So.2d 774 (Fla. 1983). Where collateral counsel cannot even allege how the pretrial identification procedures may have been unnecessarily suggestive, it is unreasonable to even suggest that trial counsel had the basis to attack the pretrial identification. Thus, the defendant's ineffective assistance claim must fail as does the claim on its merits due to the fact that this claim was not raised on direct appeal.

Claim VI: The defendant next presents a claim under Brady v. Maryland, 373 U.S. 83 (1963), a claim which is cognizable in post-conviction relief. However, analysis of the 3.850 motion shows that it is deficient to establish any of the criteria for

gaining relief, suppression, favorableness or materiality. See United States v. Stewart, 820 F.2d 370, 374 (11th Cir. 1987); United States v. Bent-Santana, 774 F.2d 1545, 1551 (11th Cir. 1985). Apparently, because of the availability of a Brady claim on 3.850, collateral counsel has engaged in a fishing expedition attempting to stir the waters hoping to churn up a constitutional violation. These efforts have been fruitless and, therefore, denial of this claim should be affirmed.

Matter is not suppressible for Brady purposes if the defense had access to it. Halliwell v. Strickland, 747 F.2d 607 (11th Cir. 1984). In the instant case, nothing was suppressed from the defendant. All police reports were turned over to defense counsel prior to trial in compliance with the Florida rules of discovery (T 33, 78). The cross-examination by defense counsel of state witnesses reveals that the defense knew about the alleged appearance of the victim at a time subsequent to her murder. Defense counsel was able to artfully bring this matter to the jury's attention via his questioning (even if the answers were not permitted because of hearsay). Matters known to the defense are not matters within the parameters of the Brady decision.

The defendant now alleges that jail records revealed that the defendant may have had a psychiatric evaluation while in jail and was thereafter prescribed Sinequan. There is no suggestion, even via the allegations of the 3.850 motion, that defense counsel could not have obtained these alleged records. In any

event, the allegations fail to set forth a basis for relief. Sinequan is used as a sedative and it is not unreasonable to believe that any person in jail pending trial in a capital case would need to use a sedative. In any event, collateral counsel now speculates that because of these jail records defense counsel would have wanted to consult with a mental health professional concerning Tompkins' competency. Yet, defense counsel never questioned his client's competency and collateral counsel has not even raised competency as an issue in these post-conviction proceedings. Competency was simply not an issue in this case.

Probably the most serious allegations under Claim VI concern the alleged withholding of exculpatory evidence concerning Kenneth Turco, the jailhouse informant. The defendant now alleges that the state withheld evidence of a "deal" which was not revealed to the jury during trial. This assertion is a blatant falsehood unsupported by anything but speculation and innuendo. This allegation is not unlike some of the language employed under Claim IV where the defendant now asserts that Kenneth Turco was a "known" informant. The Tompkins trial was the first time Mr. Benito had ever used Kenneth Turco as a witness who testified as to incriminating statements made by a defendant. The only "deal" given to Mr. Turco at the time of the Tompkins trial was that "deal" testified to by Mr. Turco that the State Attorney was to guarantee Mr. Turco's safety in the jail and that the state would vouch for Mr. Turco's cooperation at his sentencing hearing. Subsequent to trial, however, Mr. Benito did

in fact nolle prosse the escape charge. When this occurred, Mr. Turco was pleasantly surprised and stunned by the actions of the prosecutor. The prosecutor believed that anyone who could come forward to aid in the prosecution of a child murderer warranted consideration. However, this consideration was not discussed with Mr. Turco prior to or during his testimony in the Tompkins trial (T 235-236).

There are no facts pled under this claim which show that the alleged nondisclosure of the evidence discussed herein created a reasonable probability that had they been known of at the time the result of the trial would have been different. A reasonable probability is understood to mean a probability sufficient to undermine confidence in the outcome of the case. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); Arango v. State, 497 So.2d 1161 (Fla. 1986). Therefore, this claim was correctly denied by the trial court.

Claim VII: Tompkins next alleges that he was deprived of the effective assistance of counsel at the guilt phase of his capital trial. As our courts have consistently pointed out since 1984, claims of ineffective assistance of counsel are controlled by the standards set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 89 L.Ed.2d 674 (1984). This Honorable Court in Blanco v. Wainwright, 507 So.2d 1377, 1381 (Fla. 1987), explained Strickland thusly:

> A claimant who asserts ineffective assistance of counsel faces a heavy burden. First, he must identify the specific omissions and show

> that counsel's performance falls outside the wide range of reasonable professional assistance. In evaluating this prong, courts are required to (a) make every effort to eliminate the distorting effects of hindsight by evaluating the performance from counsel's perspective at the time, and (b) indulge a strong presumption that counsel has rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment with the burden on the claimant to show otherwise. Second, the claimant must show that the inadequate performance actually had an adverse effect so severe that there is a reasonable probability that the results of the proceedings would have been different but for the inadequate performance.

The defendant has failed to carry this heavy burden even via his allegations in the 3.850 motion. Not only has he failed to show that trial counsel's conduct fell outside that wide range of reasonable professional assistance, but he has also failed to show that the results of the trial would have been different.

The state submits that when reviewing allegations of ineffective assistance of counsel, the general presumption is that defense counsel is presumed to have performed competently and effectively within the meaning of the Sixth Amendment. Strickland v. Washington, supra. Furthermore, the defense is required to prove prejudice. Strickland v. Washington, supra. A defendant presenting a claim of ineffectiveness must sufficiently plead deficiency and prejudice. Hill v. Lockhart, 474 U.S. 52 (1985). The absence of sufficiently pleading deficiency or prejudice results in the claim being subject to dismissal. Hill v. Lockhart, id. Absent a denial of counsel or counsel who

entirely failed to subject the state's case to adversarial testing, there must be both a pleading of specific deficiency and a resulting prejudice. See United States v. Cronic, 466 U.S. 648 (1984). An examination of the entire transcript of the instant case reveals that Tompkins' counsel acted as an advocate. Therefore, the claim of ineffective assistance of counsel is ripe for summary denial.

Nowhere in the allegations of the 3.850 motion under this claim is there a delineation of those things that defense counsel actually did at trial. There is no mention of the numerous pretrial motions, the evident preparation based upon the cross-examination of state witnesses, and other actions which demonstrate effectiveness of trial counsel. Rather, the defendant now engages in the type of second-guessing condemned by the United States Supreme Court in Strickland v. Washington by attempting to pick at portions of the trial and opining that a better job could be done. Even if collateral counsel believes that he could have conducted a "better" trial on behalf of Tompkins, this is not the relevant inquiry. What is clear is that Mr. Hernandez afforded the defendant his Sixth Amendment right to effective assistance of counsel.

The gist of the defendant's complaint is that evidence was not presented to the tribunal concerning the alleged possibility that Lisa DeCarr was not murdered at 9:30 a.m. on March 24, 1983. The defendant ignores the effective cross-examination of the state's witnesses by Mr. Hernandez which attempted to place in

the minds of the jury the possibility that Lisa was seen alive at a time subsequent to the time of the murder (R 217-221).

The state submits that it is not necessary to discuss each and every allegation of ineffectiveness set forth by the defendant in his 3.850 motion. What is clear is that no matter what is alleged, the allegations do not show that defense counsel was deficient and, most importantly, even if we were to assume that defense counsel was deficient, there is absolutely no showing how the defendant has been prejudiced in the constitutional sense. In his 3.850 motion, the defendant concentrates on what might have been done differently but does not make mention of the wealth of evidence indicating that Tompkins killed Lisa DeCarr. The defendant ignores the fact that Kathy Stevens saw Tompkins immediately prior to the time of the murder physically attacking the victim in an attempt to satiate his sexual desires. Although the defendant alleges in his 3.850 motion that Kathy Stevens could have been impeached, he offers no allegations as to how this could be done. Besides making no mention of the eyewitness to the sexual attack upon Lisa by Tompkins, the defendant conveniently ignores the fact that the skeletal remains of Lisa DeCarr were found in a shallow grave beneath the house where she resided with her mother, siblings, and Tompkins. No mention is made of the fact that the skeletal remains were wrapped in Lisa DeCarr's bathrobe. No mention is made of the fact that Lisa's earrings and ring given to her by her boyfriend were found beside the skeletal remains in a

position indicating that they had been worn by the victim. No mention is made of the fact that Lisa DeCarr had a prominent dental feature identified by her mother at trial, to wit: a tooth growing in back of her normal row of teeth. Coupled with the unsolicited confession given to Kenneth Turco, the evidence as outlined above demonstrates that there is no reasonable probability that the outcome of the trial would have been different even had the case been tried as collateral counsel now would.

Inasmuch as the defendant has failed to show, by allegation or by proof adduced at the evidentiary hearing, the prejudice (or deficiency) required to support an ineffective assistance of counsel claim, the denial of this claim should be affirmed.

Claim VIII: Tompkins next asserts that he was denied the effective assistance of counsel when trial counsel failed to obtain the assistance of a mental health expert. The state submits that it is not constitutionally required that a capital defendant be examined by a mental health expert. There must be some indication given to defense counsel to require inquiry along these lines. The only possible indication cited by the defendant in his 3.850 motion is the reference to an examination done in the jail. However, the defendant does not obviate the probability that any person charged with a crime for which the penalty may be forfeiture of one's own life may show signs of depression requiring attention. Defense Exhibit 1 introduced at the 3.850 evidentiary hearing indicates that the defendant

requested medication "to calm nerves" (T **32**). There has been no showing that the defendant was taking medication to counteract a mental illness or deficiency. Mr. Tompkins had several attorneys representing him prior to trial and none of them saw the need to question Tompkins' competency (because he was clearly competent) or had any cause for concern about any of the issues now raised in the **3.850** motion.

Once again, however, rather than focus upon whether defense counsel was deficient in failing to obtain a mental health expert, the state submits that it is preferrable to focus upon the prejudice prong of the Strickland test. Even had a mental health expert been utilized by defense counsel, and even had that mental health expert testified consistently with the findings made by the defendant's lately acquired expert, there is no reasonable probability that the outcome of the proceedings would have been different. It is significant to note that the report of Dr. Pat Fleming, the expert recently obtained to examine Tompkins, would not result in a change of the trial or penalty results even if presented at that time. Dr. Fleming's neuropsychological testing as set forth at page 97 of the **3.850** motion does not suggest drug or alcohol dependence or extreme emotional disturbance. Rather, her report indicates that there are test results which may support a finding of brain damage. In any event, it is clear that even had these matters been presented

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None of the "family" witnesses testified at the evidentiary hearing that the defendant was dependent on alcohol or drugs.

to the jury and trial court, there is no reasonable probability that the outcome would have been different. The aggravating circumstances found in this case were significant and the presentation of the mental health testimony would not have resulted in six people of the unanimous jury being swayed to recommend a life sentence. Therefore, inasmuch as the defendant cannot satisfy the prejudice prong of Strickland, denial of this claim should be affirmed.

Claim IX: The defendant next complains that he was deprived of the effective assistance of counsel at the penalty phase of trial. This claim is premised upon the notion that defense counsel could have obtained additional witnesses to testify as to defendant's childhood and background. This claim totally ignores the witnesses called at the penalty phase by defense counsel. Defense counsel called two of the defendant's sisters and the defendant's brother-in-law (who knew him for approximately 15 years). These witnesses testified that the defendant was shy when growing up and that he never displayed violent behavior and that he was always able to support himself. The testimony also indicated that the defendant was eager to learn and that he followed orders well.

As in Strickland v. Washington where the defendant therein did not obtain an evidentiary hearing where it was not necessary, the defendant in the instant case is not entitled to an evidentiary hearing on this claim. In order to prevail, a defendant must show both a deficient performance and prejudice

sufficient to show that there is a reasonable probability that the outcome of the proceeding would have been different. The trial court did determine that defense counsel's preparation for the penalty phase was deficient. The state submits that this conclusion was erroneous because, with the exception of Dr. Fleming's testimony, Mr. Hernandez did present testimony at penalty phase similar to the type of testimony presented by collateral counsel at the 3.850 evidentiary hearing. In fact, three of the "family" witnesses who testified at the evidentiary hearing had previously testified at the penalty phase of trial. Additionally, although her testimony wasn't offered at trial, Gladys Staley, the defendant's mother, was interviewed by Mr. Hernandez several times, as were other family witnesses (T 105-108). Merely because collateral counsel has now managed to elicit eleventh-hour self-serving statements never before mentioned to trial counsel (T 124), it does not follow that Mr. Hernandez was deficient in his preparation. However, even without discussing the deficiency prong, it can be determined on the face of this record that the defendant has suffered no prejudice by the alleged ineffective omission of additional evidence concerning the defendant's background at the penalty phase of trial. As aforementioned under the previous claim, the aggravating factors were significant and clearly outweigh any mitigating circumstances which can now be proposed by the defendant. There is no reasonable probability that the defendant would have received a life sentence had the evidence now

submitted collaterally been offered at the penalty phase. There was a unanimous recommendation of death by the jury in the instant case and the addition of this evidence simply would not have made a difference!

~~Claim X~~: The defendant's Claim X is another example of a claim which is not cognizable on collateral review. This is a claim which could have been raised on direct appeal where the facts needed to construct the claim were available at the time of trial and appear in the record.

Claim XI: Once again, collateral counsel fails to heed the admonitions of the Florida Supreme Court that claims which could have been raised on direct appeal are not cognizable in Rule **3.850** post-conviction proceedings. This claim is closely akin to a claim that the prosecutor made improper statements during closing argument of both the guilt and penalty phases of the trial, a claim which has recently been specifically held to be procedurally barred from **3.850** proceedings. Atkins v. State, supra, n. **1, (13).** Denial of this claim should be affirmed by this Honorable Court.

~~Claim~~ XII: Again, the defendant raises a claim which could have been and should have been raised on direct appeal. The Florida Supreme Court has recently ruled that this claim is procedurally barred from collateral review. Atkins v. State, supra, n. 1, (5). Denial of this claim should be affirmed by this Honorable Court.

Claim XIII: Although the State is getting redundant, again we assert that this is a claim which is procedurally barred from consideration by this Honorable Court on collateral review. In Atkins v. State, supra, the Florida Supreme Court specifcally held that this claim is procedurally barred. Atkins, n. 1, (3). See also, Eutzy v. State, 14 F.L.W. 176 (Fla. March 28, 1989) (a claim that Florida's death penalty statute is unconstitutional because it imposes an unlawful presumption that death is the appropriate penalty based upon the *Adamson v. Ricketts* decision is procedurally barred because it could have been raised on direct appeal). Therefore, this Honorable Court affirm the denial of this claim.

Claim XIV: The defendant's Claim XIV concerns the purportedly improper assertion that sympathy towards the defendant was an improper consideration. As to the merits of the claim, this Honorable Court is again precluded from considering same inasmuch as it could have been raised on appeal. Again, the Florida Surpeme Court in Atkins v. State, supra, specifically held this claim to be procedurally barred by failure to raise the claim on direct appeal. Atkins, n. 1, (8).

The defendant gratuitously asserts that the failure to litigate this claim deprived the defendant of his right to effective assistance of counsel. This claim is totally belied by the record. The instructions concerning sympathy occurred during the guilt phase of trial and not in the penalty phase. When deciding guilt or innocence, as our standard jury instructions

make clear, sympathy is not to be a factor in the determination of guilt or innocence. Therefore, the trial court properly instructed the jury on this matter and, therefore, defense counsel was not deficient by failing to object to those instructions.

Claim XV: Again, the defendant raises a claim which is clearly procedurally barred by virtue of the failure to object at trial or to raise the claim on appeal. In Atkins v. State, supra, the Florida Supreme Court has held that this claim is procedurally barred. Atkins, n. 1, (9). Thus, this Honorable Court should affirm the denial of this claim.

Claim XVI: As his next claim raised in his motion to vacate judgment and sentence, the defendant alleges that the precepts of Booth v. Maryland, 482 U.S. 496 (1987), were violated by the mention that the victim was a 15 year-old girl. On its merits, this claim cannot be reached because it is clearly procedurally defaulted. In Eutzy v. State, supra, the Florida Supreme Court has recently held:

> . . . Even if the *Booth* decision could be read to apply in this case, appellant is procedurally barred from claiming relief. We recognized in *Grossman v. Stute,* 525 So.2d 833, 842 (Fla. 1988), *cert. denied,* 109 S.Ct. 1354 (1989), that there is nothing in *Booth* which suggests that that decision should be retroactively applied to cases in which the claim was not preserved by a timely objection. (14 F.L.W. at 177).

Therefore, the trial court correctly denied this claim.

Nor can an ineffective assistance of counsel claim be supported by this issue. It is clear from a review of the record in this case that the trial court did not consider impermissible factors when weighing the valid aggravating circumstances against the mitigating circumstances. Inasmuch as any "victim impact" statements played no part in the weighing of aggravating and mitigating circumstances, the trial court did not improperly focus upon unacceptible aggravating factors. Therefore, defense counsel was not ineffective for failing to object to this alleged "victim impact" information and he cannot be held as being ineffective.

In an effort to have the trial court consider the Booth claim on its merits, the defendant stated in a footnote in his 3.850 motion that the tools on which the claim is based were unavailable at the time of trial *so* **as** to permit objection by trial counsel. This contention has been squarely addressed and rejected by the Florida Supreme Court in Grossman. Therefore, based upon the procedural default which has occurred in this case, denial of this claim should be affirmed.

Claim XVII: The defendant next raises a claim under Caldwell v. Mississippi, 105 S.Ct. 2633 (1985). Again, this claim has been specifically ruled to be procedurally barred upon the failure to object at trial or raise the claim on direct appeal. Atkins **v.** State, n. 1, (6). Therefore, as to the merits of this claim, this Honorable Court should affirm the denial of the defendant's Caldwell claim.

Again, the defendant gratuitously asserts that defense counsel was ineffective by failing to object to the alleged Caldwell-type statements. Inasmuch as the defendant would have been entitled to no relief on this claim, it is not ineffective assistance of counsel to fail to object. In Banda v. State, 536 So.2d 221 (Fla. 1988), the Florida Supreme Court held:

> . . . Appellant essentially argues that the standard jury instructions violate *Caldwell* because they do not contain a complete instruction an the appellate standard of review established by *Tedder v. Stute*, 322 So.2d 908 (Fla. 1975). However, *Caldwell* stands only for the proposition that the constitution is violated if the jury receives *erroneous* information that denigrates its role. *See Caldwell*, 472 *U.S.* at 341, 105 S.Ct. at 2646 (O'Connor, J., concurring). The present standard instructions are not erroneous statements of the law. (text at 224).

Also, in Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988) (en banc), the Eleventh Circuit is consistent with Florida law by holding that comments by the prosecutor and instructions by the trial court which reflect an accurate assessment of Florida law did not mislead the jury as to its role in violation of the eighth amendment. In fact, the instant case is one which clearly shows that the role of the jury was not denigrated. Even the prosecutor stressed the importance of the jury's recommendation: "You are now facing an extremely solemn and serious decision; namely, whether you should recommend to Judge Coe that the defendant, Wayne Tompkins, should live or die" (R 439). Thus, counsel was not ineffective, nor should this claim be reached on

its merits due to the clear procedural default which has occurred in this case. This Honorable Court should affirm the denial of this claim.

Claim XVIII: The defendant next claims that his death sentence is unreliable because the sentencing jury and the court relied on misinformation during the sentencing process. This claim is totally specious where the Second District Court of Appeal's decision remanding for resentencing occurred several months after the conclusion of the capital trial. Therefore, there was no misinformation at the time of trial.

In any event, this claim is wholly without merit. The length of sentence is not the factor considered by the judge and jury when deciding whether a death sentence is proper. Rather, it is the nature of the crime itself for which the sentence was imposed. In other words, the aggravating circumstance is the violent nature of prior crimes, and not the sentence given therefor. Thus, this claim is totally without merit and this Court should affirm the denial of this claim.

Claim XIX: The defendant's final claim was correctly denied. This is a claim that should have been and could have been raised on direct appeal where all information necessary for the claim is contained within the record and occurred during trial.

CONCLUSION

Based on the foregoing reasons, arguments and citations of authority, this Honorable Court should affirm the denial of **3.850** relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Overnight Express Mail to the Office of the Capital Collateral Representative, **1533** South Monroe Street, Tallahassee, Florida **32301**, this 31st day of May, 1989.

OF COUNSEL FOR APPELLE