IN THE SUPREME COURT OF FLORIDA

ALLEN LEE DAVIS,

Appellant,

v. CASE NO. 76,640

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

(a) Procedural History

On May 11, 1982, Allen Davis brutally murdered a woman and her two young daughters. Davis was tried from January 31, 1983, to February 3, 1983, and, following conviction, received three sentences of death.

Mr. Davis appealed five "guilt phase" issues but not his sentence of death. The Florida Supreme Court, **sua sponte**, reviewed his death sentence for error under **Lockett v. Ohio**, 438 U.S. 586 (1978), and found none. **Davis v. State**, 461 So.2d 67, 72 (Fla. 1984).

In response to a death warrant, Davis filed a motion for post-conviction relief pursuant to Fla.R.Crim.P. 3.850. The petition was denied without opinion by the circuit court, which, in turn, was upheld without opinion (but not per curiam), by this Court. **Davis v. State**, 496 So.2d 142 (Fla. 1986).

Davis also filed a petition for "extraordinary relief", which was denied, **Davis v. Wainwright**, 498 So.2d 857 (Fla. 1986).

Davis filed a petition for federal habeas corpus relief pursuant to 28 U.S.C. §2254. The petition raised a **Lockett v. Ohio, supra**, claim but pre-dated **Hitchcock v. Dugger**, 481 U.S. 393 (1987). The federal court, on remand from the Eleventh Circuit, noted the appearance of **Hitchcock** and directed Davis to either drop the claim from his petition or exhaust the issue in state court. Davis elected to petition anew for Rule 3.850 relief. When relief was denied, this action followed.

(b) Facts

The facts relevant to Mr. Davis' claims will be discussed in order.

Facts: Argument I

Mr. Davis was represented by four different attorneys, at least two of whom were aware of **Lockett, supra** and cited it to the court in pretrial motions. (R 122, 155). It is undisputed, in fact, that counsel and the trial court were aware of **Lockett** by 1983.

Mr. Davis was not constrained in his presentation of evidence and, on appeal, this Court found no **Lockett** error. **Davis v. State, supra.**

The record is devoid of any **Lockett** objection and Davis did not raise the issue on direct appeal. The record also shows that the jury instruction condemned by **Hitchcock** was not given in this 1983 case.

Five valid aggravating factors applied to these murders. Davis had many prior convictions for violent crimes including armed robbery and involuntary manslaughter. Davis was on parole at the time of these murders. Davis committed these murders during a burglary or a robbery. These murders were both heinous, atrocious and cruel, and cold, calculated and premeditated.

Davis' proffered "mitigation" is as follows:

(1) Davis alleges he cooperated with the police. (Brief, page 7). In fact, Davis told Deputy Terry he would cooperate so long as cooperation was to his advantage. (R 1223).

(2) Davis took a neutron test and a polygraph, as he contends in his brief. In fact, Davis took the neutron test so long after the shooting that the "inclusive" result was to be expected. Polygraph tests are not evidence, but it is interesting to note that Davis failed the test (and does not note this failure in his brief).

(3) Davis offers a conflicting mental health evaluation, and evidence of passivity to offset his violent criminal record. These matters will be discussed later.

Facts: Argument II

Mr. Davis' current petition renews a challenge to the competence of his original psychiatrist that was raised and denied in his first Rule 3.850 petition.

Facts: Argument III

Mr. Davis never challenged his competence to stand trial during the trial, or on direct appeal. The issue was raised and denied in Davis' prior Rule 3.850 petition.

Facts: Argument IV

Mr. Davis never raised a "victim impact" objection at trial, or on appeal, or in his first Rule 3.850 petition. In the proceedings below, Davis tried to represent that he had raised the issue on direct appeal (TR 15-17) by misstating the nature of a "Golden Rule" argument actually raised on appeal. (This Court, in fact, recognized the actual argument as a "Golden Rule" argument in **Davis v. State, supra**).

Facts: Argument V
(Heinous-Atrocious-Cruel)

Mr. Davis did not raise any appellate challenges to his death sentence or to the court's findings, nor did he raise this issue in his first Rule 3.850 petition. The claim was denied as procedurally barred (R 134-135).

Facts: Argument VI
(Cold-Calculated-Premeditated)

Again, this procedurally barred claim appeared for the first time in Davis' successive Rule 3.850 petition and was properly denied (R 134-135).

Facts: Argument VII
("Burden Shifting")

This issue, too, appeared for the first time in Davis' second Rule 3.850 petition and was denied as procedurally barred (R 134-135).

Facts: Argument VIII
("Mercy" Argument)

Again, this issue was denied as procedurally barred since it was not preserved by objection at trial and had no place in a successive petition (R 134-135).

Facts: Argument IX
(Automatic Death Penalty)

This issue again, again, was procedurally barred (R 134-135).

SUMMARY OF ARGUMENT

The Appellant has filed an original brief belaboring the alleged "merits" of nine procedurally barred claims. Nowhere in his brief does Mr. Davis justify his filing of an untimely, successive, Rule 3.850 petition. Mr. Davis is not entitled to either merits review or relief on any claim.

ARGUMENT

POINT I

THE APPELLANT IS NOT ENTITLED TO RELIEF ON HIS "HITCHCOCK" CLAIM

A trial court order must be upheld if it is correct for any reason. **Savage v. State**, 156 So.2d 566 (Fla. 1st DCA 1966). While Judge Harding's order correctly denied relief "on the merits" on Mr. Davis' **Hitchcock** claim, the court could and should have found the issue procedurally barred. We submit that this Court should correct this error in affirming the lower court. **See Harris v. Reed**, 481 U.S. ____, 103 L.Ed.2d 308 (1989).

Judge Harding's order is supported by the law of the case inasmuch as this Court has already determined that the principles of **Lockett v. Ohio, supra**, were not violated.

Additional record support stems from the fact that the instruction condemned in **Hitchcock v. Dugger, supra**, was not given in this case. Indeed, the Capital Collateral Representative Office, after thorough review of the record, reported (in its first Rule 3.850 petition, at page 91), that the advisory jury was not constrained in any way from considering **Lockett** evidence.

Since the record shows us that the defense and the court were all aware of **Lockett** and that the **Hitchcock** instruction was not given, the absence of **Lockett** error by the sentencer is not only the law of this case, it is presumed. **Adams v. State**, 543 So.2d 1244 (Fla. 1989); **Card v. Dugger**, 512 So.2d 829 (Fla. 1987); **Harich v. State**, 542 So.2d 980 (Fla. 1989); **Spaziano v. Dugger**, 557 So.2d 1372 (Fla. 1990).

Capital litigants such as Mr. Davis have attempted to avoid the procedural bars attending Fla.R.Crim.P. 3.850, by invoking the name "**Hitchcock**" as a talisman from reopening their cases for the presentation of newly obtained evidence. We submit that the **Hitchcock** decision did not reopen every Florida capital case and it is time that this Court, in the interests of finality and judicial economy, addressed this abuse of procedure.

Mr. Davis contends that **Hitchcock** was "new law" that universally subjects every capital case to perpetual review whenever the defendant unearths or hires a new witness, who, potentially, could offer nonstatutory mitigating (**Lockett**) evidence.

In **Saffle v. Parks**, ____ U.S. ____, 108 L.Ed.2d 415, 425 (1990), the United States Supreme Court discussed the differences between "new law" and mere "evolutionary changes" in the law, illustrating its point with **Lockett, supra**, and **Hitchcock, supra**. In doing so, the Supreme Court essentially agreed with the state of Florida's contention that **Hitchcock** was not "new law" but was, indeed, merely an evolutionary outgrowth of **Lockett, supra**, and **Eddings v. Oklahoma**, 455 U.S. 104 (1982). Nothing in **Hitchcock** changes the basic holdings in **Eddings** and **Lockett**, two cases which themselves flowed from **Pennsylvania v. Ashe**, 302 U.S. 151 (1937).

The only distinguishing feature to be found in **Hitchcock** is its criticism of a standard jury instruction used in this state until July of 1979. Since **Hitchcock** did not alter or amend **Lockett** and **Eddings**, it can only be considered "new law" to the

extent that it identified this jury instruction as evidence of a **Lockett** error by the sentencer.

Florida responded to **Lockett** by abolishing the **Hitchcock** instruction in 1979. Under Davis' theory, this curative action meant nothing and, in turn, **Hitchcock** reopened for **Lockett** review every capital case decided in this state "before or since" the year 1979. This view, we submit, is untenable.

Hitchcock only relates to those cases in which the "**Hitchcock** instruction" was given. Other capital cases are subject to review solely under **Lockett**, and once that review is completed the cases are not subject to perpetual Rule 3.850 reargument. **See Francis v. State**, 529 So.2d 670 (Fla. 1988); **Clark v. State**, 533 So.2d 1144 (Fla. 1988); **Straight v. State**, 488 So.2d 530 (Fla. 1986); **Tafero v. State**, 459 So.2d 1034 (Fla. 1984). Since Davis had **Lockett** review on direct appeal and argued **Lockett** in his first Rule 3.850 petition (where it was procedurally barred as well), he was not entitled to a third review under the facade of **Hitchcock, supra**. Given the continuing abuse of **Hitchcock** as a tool to reopen non-**Hitchcock** cases, we would ask the Court to address this issue and, in accordance with **Harris v. Reed**, 489 U.S. ____, 103 L.Ed.2d 308 (1989), apply that procedural bar in this case.

Without waiving this point, we would briefly note that Mr. Davis' purported mitigating evidence was insignificant if, in fact, it existed at all.

Mr. Davis did not cooperate with the police. Instead, as he confessed to Officer Terry, he played along with them only so

long as it seemed to be to his advantage. The neutron test was given too long after the murders to hurt Davis. Davis, however, failed his polygraph (indicating, by inference, an effort to deceive the police rather than cooperate).[1]

Mr. Davis has hired Dr. Krop to offer a favorable mental health evaluation. In **Adams v. State**, 543 So.2d 1244 (Fla. 1989), this Court rejected a similar ploy, especially when the defense failed to show that its new expert (a) was available prior to trial, or (b) would have been able to given the same testimony. Mr. Davis has apparently cooperated with Dr. Krop to a greater degree than he did with the psychiatrist and the neurologist who saw him in 1982-1983. Davis has not shown that Dr. Krop was available then, or that his testimony would have been the same as it is now.

Finally, the prospective mitigation offered in this case is as insignificant as that proffered, and rejected, in **Hall v. State**, 531 So.2d 76 (Fla. 1988). Hall contended that the aggravating factors in his case would have been offset by such mitigating evidence as his effort to dissuade the triggerman, his mental problems (stemming from substance abuse), his cooperation with the police and his peaceful surrender. These factors did not outweigh the aggravating factors (described as the presence of a victim who, while pregnant, begged for her life). We submit that our mass-murder case has even stronger aggravating factors

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[1] Polygraphs are not evidence and the test in this case is being discussed only because Davis has presented it in mitigation. We note that prior to this time, Davis objected to any mention of the same polygraph test. Now, Davis wants to reinterpret this objectionable test and use it for mitigation.

than **Hall** and much weaker mitigation. **See Tafero v. Dugger**, 520 So.2d 287 (Fla. 1988); **Ford v. State**, 522 So.2d 345 (Fla. 1988); **Booker v. Dugger**, 520 So.2d 246 (Fla. 1988).

POINT II

THE APPELLANT'S RENEWED CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL WAS CORRECTLY DENIED ON PROCEDURAL GROUNDS BY THE TRIAL COURT

Mr. Davis' second claim is essentially identical to Claim I of his first Rule 3.850 petition. This issue is clearly barred (procedurally) by the prohibition against successive Rule 3.850 petitions arguing (or rearguing) previously litigated claims. **Bundy v. State**, 538 So.2d 445 (Fla. 1989); **Clark v. State**, 533 So.2d 1144 (Fla. 1988); **Demps v. State**, 515 So.2d 196 (Fla. 1987); **Straight v. State**, 488 So.2d 530 (Fla. 1986). No exception to this rule exists in capital cases. **White v. State**, 511 So.2d 984, 987 (Fla. 1987).

The Appellant offers absolutely no argument supporting any reason to waive the procedural bar confronting his claim. While Davis alleged that the federal court "told him" to file this claim, that representation is incorrect. As noted above, Davis was told to either exhaust available state remedies or proceed in federal court without any unexhausted claims. At no time was Davis told to violate Florida's procedures or to abuse process. Indeed, even if the federal court had so ordered Mr. Davis, such an order would not create an exception to our valid, state law, rules. Since there is no constitutional right to collateral attack, **see Murray v. Giarratano**, ____ U.S. ____, 106 L.Ed.2d 1 (1989), there is no federal authority to compel or regulate state court collateral proceedings.

Without waiving this defense, we nevertheless reject Mr. Davis' representations (on page 11 of his brief), that Dr. Miller received no assistance from trial counsel, performed no sanity evaluation and no competency evaluation. The record on appeal from Davis' last Rule 3.850 appeal, at (R 820, et seq.), reveals extensive pretrial testing of Mr. Davis both as to sanity and competence. The report also indicates that defense counsel attended the testing including an "Amytal" interview (R 823-824). Davis, of course, also underwent additional neurological testing. (R 262).

On page (12), Davis tries to argue that defense counsel were subsequently surprised by the trial court's use of non-record, "secret", evaluations (again, Dr. Miller's report to defense counsel), in violation of **Gardner v. Florida**, 430 U.S. 349 (1977). Mr. Davis makes these bald assertions against Judge Harding and defense counsel without mentioning that that factual averment was rejected, on its merits,[2] by this Court, in **Davis v. Wainwright**, 498 So.2d 857 (Fla. 1986). Davis' brief fails to cite to the Court's controlling decision, nor does it justify Davis' failure to raise this issue in its present form in 1986 (to the extent it now differs with his former "Claim I").

No matter how many record facts Mr. Davis fails to mention, the record is immutable. Davis was thoroughly examined by competent doctors prior to his trial. Davis is not entitled to relief just because, years after trial, he has hired a new doctor

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[2] Of course, Davis was active in his own defense, filing **pro se** venue motions and actively assisting trial counsel. (See R 1775-1777).

who disagrees with the original doctors. **Jackson v. State**, 547 So.2d 1197 (Fla. 1989); **Card v. State**, 497 So.2d 1169 (Fla. 1986); **Glock v. State**, 537 So.2d 99 (Fla. 1989). Furthermore, the Court is not obliged to turn criminal or collateral proceedings over to the control of expert medical witnesses for the sake of perpetual psychiatric debate. **See Chestnut v. State**, 538 So.2d 820 (Fla. 1989).

Still, the bottom line remains that Davis is not entitled to merits review of this issue since it was litigated and resolved in his first Rule 3.850 petition. Even if the issue could be considered "novel", it would still be time-barred under the two year limitations period. By not confronting these facts in his brief, Davis has waived any defense to these procedural bars.

POINT III

THE "COMPETENCE TO STAND TRIAL" ISSUE IS PROCEDURALLY BARRED

Mr. Davis' third issue is a reargument of the "competency" claim rejected by this Court in his first Rule 3.850 appeal. Procedurally, we note that Davis (at counsel's request), was thoroughly evaluated prior to trial, did not challenge his competence at trial or on appeal, and lost this issue on collateral review. The claim is now procedurally barred both as successive and as untimely under the two year limitations period. **Bundy, supra; Clark, supra.**

Mr. Davis, without citing controlling caselaw, simply characterizes his claim as "fundamental" and asserts a right to perpetual reargument. He is wrong. In **Bundy v. State**, 538 So.2d

445, 447 (Fla. 1989), this Court was confronted with virtually identical procedural facts. The Court, in rejecting Bundy's claim as procedurally barred,[3] said:

> Bundy's claim is procedurally barred because he failed to raise the issue on direct appeal. **Alvord v. State**, 396 So.2d 184 (Fla. 1981). Furthermore, Bundy did raise the issue of his mental competence in his earlier unsuccessful motion for post-conviction relief. Thus, the reassertion of this claim constitutes an abuse of process. **Booker v. State**, 503 So.2d 888 (Fla. 1987).

In **Kennedy v. Wainwright**, 483 So.2d 424 (Fla. 1986), this Court indeed recognized an exception to procedural defaults and procedural bars in the presence of "fundamental error", but **Kennedy** does not abolish all concepts of finality or allow perpetual reargument of the same facts and the same evidence. **Kennedy** also defines "fundamental error" as being more than mere constitutional error. There must be a combination of constitutional error and prejudice going to the very foundation of the case.

Davis claims he has met this standard because:

> (1) He has hired new doctors who disagree with the doctors who saw him before trial.
>
> (2) He interprets the record as reflecting incompetence and a "sell-out" by trial counsel.

As noted above, the fact that Davis has procured helpful, post-conviction, mental health evaluations does not compel reconsideration of his case (particularly where they were

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[3] We would also refer the Court to **Wainwright v. Goode**, 731 F.2d 1482 (11th Cir. 1984), regarding withheld or strategically timed claims of post-conviction "insanity".

available in his earlier proceeding). **Bundy, supra; Card v. State**, 497 So.2d 1169 (Fla. 1986); **Provenzano v. State**, 15 F.L.W. S260 (Fla. 1990); **Jackson v. Dugger**, 547 So.2d 1197 (Fla. 1989). It is unfortunate, but true, that partisan medical testimony can readily be procured, **Bertolotti v. Dugger**, 883 F.2d 1503 (11th Cir. 1989), and that defendants frequently procure desired diagnoses by carefully presenting their symptoms and histories. **Mims v. United States**, 375 F.2d 135 (5th Cir. 1967); **United States v. Makris**, 535 F.2d 899 (5th Cir. 1976); **United States v. Mota**, 598 F.2d 995 (5th Cir. 1979). Even in the absence of fraud, experts may simply disagree on the existence or extent of any impairment. That, as noted above, is why this Court has sought to avoid "psychiatric shouting matches." **Chestnut v. State**, 538 So.2d 820 (Fla. 1989).

Davis' reargument of the competency issue is based on a defense-oriented view of the facts which, in turn, stands as nothing more than one alternative explanation of the events prior to and during trial.

The record is equally capable, if not more, of establishing Davis' competence. Prior to trial, Davis refused to make inculpatory statements and only "cooperated" with the police so long as it was to his strategic advantage to do so. Davis' cooperation did not seem to extend beyond failing his polygraph. Prior to trial, Davis was cognizant of the dangers of pretrial publicity and sought a change of venue. Davis also conferred with counsel and provided counsel with the names of potential witnesses. Davis was found both sane and competent by experts

who examined him prior to trial. (Those contemporary evaluations are of greater relevance than **post hoc** assessments, particularly since they are supported by the historical record).

Mr. Davis' complaints regarding his trial attorney do not merit discussion. The defense attorney merely took pains to put his client's positions into the record. While this may indicate some self-preservation by counsel, such conduct is the inevitable result of the **de rigeur**, and usually meritless, attacks on the competence of trial counsel in capital cases.

The Appellant was professionally evaluated and found to be competent. His conduct in relation to his defense demonstrated goal-oriented behavior and an awareness of the charges, the adversary system and the consequences of his actions. If Davis did not fully cooperate for any reason, the blame falls upon him alone and not the court, the doctors or his lawyers. **See Funchess v. Wainwright**, 772 F.2d 683 (11th Cir. 1985); **Blanco v. State**, 507 So.2d 1377 (Fla. 1987).

Once the original doctors (below) found Davis both "sane" and "competent", there was no further duty of inquiry. **D'Oleo-Valdez v. State**, 531 So.2d 1347 (Fla. 1988); **Pardo v. State**, 15 F.L.W. S328 (Fla. 1990); **Scarborough v. United States**, 683 F.2d 1323 (11th Cir. 1982); **Fallada v. Wainwright**, 819 F.2d 1564 (11th Cir. 1987).

The "merits" of Davis' claim are not properly before the court and must not be reviewed. **Harris v. Reed, supra**. The simple fact remains that Davis did not preserve the "competency" issue at trial or on direct appeal. He raised and lost this

barred claim in his first Rule 3.850 petition, he has now renewed the claim in an untimely and unauthorized successive petition. Just like Bundy, Davis has abused process and should see his claim denied as procedurally barred.

POINT IV

THE APPELLANT'S BOOTH v. MARYLAND CLAIM IS PROCEDURALLY BARRED

Mr. Davis' fourth argument is a procedurally barred claim of error under **Booth v. Maryland**, 482 U.S. 496 (1987).[4]

We submit that, once again, Davis has offered a procedurally barred claim which was correctly identified and disposed of by the lower court.

First, we note that Davis did not raise a **Booth** claim at the time of his direct appeal. Since the issue could and should have been raised at that time, any subsequent **Booth** claim was, and is, barred. **Grossman v. State**, 525 So.2d 833 (Fla. 1988); **Mills v. Dugger**, 15 F.L.W. S589 (Fla. 1990); **Jones v. Dugger**, 533 So.2d 290 (Fla. 1988); **Eutzy v. State**, 541 So.2d 1143 (Fla. 1989).

Second, even if we could avoid the first bar, Davis failed to file the present **Booth** claim within the two year limitations period proscribed by Rule 3.850. **Booth** was published in 1987 and no extended filing deadline was created for **Booth** claims. Thus, as in **Bundy, supra**, the petitioner could and should have filed

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[4] Davis opens his argument by contending that the federal district court "ordered" him to violate Rule 3.850 and file this (barred) claim. The claim is not supported by Judge Black's order (appendixed) and is legally untenable, as we noted before.

this known claim. **See Johnson v. State**, 536 So.2d 1009 (Fla. 1988); **Adams v. Dugger, supra**.

Third, even if Davis had raised this issue in his first Rule 3.850 petition, it was procedurally barred at that time and its summary denial cannot be reargued in a second successive petition, **Straight v. State, supra; Demps v. State, supra**, and constitutes an abuse of process. **Bundy v. State, supra**.

The State, however, disagrees with the notion that Davis argued a **Booth** claim on appeal (as he contended at the Rule 3.850 hearing until the State introduced his actual appellate argument to the circuit court). On direct appeal, Davis complained about certain "Golden Rule" arguments made by the prosecutor but he did not allege that Judge Harding, as sentencer, relied upon "victim impact" evidence as a nonstatutory aggravating factor. This Court's opinion disposed of Davis' claim as a "Golden Rule" issue, not a **Booth** claim. **Davis v. State**, 461 So.2d 67 (Fla. 1984),[5] **see Preston v. Dugger**, 531 So.2d 154 (Fla. 1988).

On appeal, Davis now alleges that he raised a **Booth** claim in his first petition for Rule 3.850 relief. If he did, he is still barred, however, the State reads claim three of Davis' petition as an attack upon the prosecutor for improperly soliciting "**ex parte**" letters filled with inflammatory appeals to the trial judge. This would not be a **Booth** claim but rather is a prosecutorial misconduct claim. The "oral argument" held back at

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[5] A "Golden Rule" argument attempts to place the jury in the shoes of the victim in a "what if this happened to you" context. Since the argument relates to the jurors rather than the victims and focuses the jurors on the danger to **their** families, etc., the argument is not the same as a **Booth** claim.

the time (before Judge Harding) contains no **Booth** argument by either side (R Volume VI), and, of course, relief was denied without opinion from the trial court or this Court. If our reading of the record is correct, then Davis' **Booth** claim would also be procedurally barred as untimely and as appearing for the first time in a second successive Rule 3.850 petition. **Bundy, supra.**

The lower court correctly denied relief on procedural grounds.

Without waiving that point, the State submits that there was no **Booth** error in any court.

First, no **Booth** information went to the advisory jury, as Davis agrees (if he is relying on the letters to Judge Harding as indicated in his first Rule 3.850 petition).

Second, the "status" of the victims as a mother or young children was already established at trial. **Booth** does not state that murder is a victimless crime nor does it state that virtually no information about the victim can ever be related to the court.

Third, Florida judges are exposed to nonstatutory aggravating factors in every case. There is no "error", even if the court alludes to those factors in its sentencing order as long as those nonstatutory factors are not cited as the basis for sentencing the accused to death. (Though they may be cited to refute proffered mitigation such as "Davis was kind to women and children"). **Harvard v. State**, 414 So.2d 1032 (Fla. 1982); **Alford v. State**, 255 So.2d 108 (Fla. 1977); **Barclay v. Florida**, 463 U.S.

939 (Fla. 1983). Since Davis cannot show that either the jury recommendation or his sentence of death stemmed from the finding of a nonstatutory aggravating factor, his claim of error is meritless. However, pursuant to **Harris v. Reed, supra**, relief must be denied on procedural grounds.

Since no written response was filed to Davis' first petition and since claims which were clearly barred were raised and rejected (without opinion) therein, we would ask the Court to clarify the procedural basis (if any) for its summary denial of relief in the past. **Harris v. Reed, supra**. Such assistance would facilitate anticipated federal review, since Davis will be returning to federal court.

POINT V

THE APPELLANT IS NOT ENTITLED TO RELIEF ON HIS PROCEDURALLY BARRED MAYNARD v. CARTWRIGHT CLAIM

Davis' fifth point on appeal is a claim that the advisory jury, in violation of **Maynard v. Cartwright**, ____ U.S. ____, 108 S.Ct. 1853 (1988), was misled regarding the definition of the "heinous, atrocious or cruel" statutory aggravating factor. Inasmuch as the Appellant failed to preserve the issue at trial, on appeal or in his first Rule 3.850 petition this claim is subject to several procedural bars. **Atkins v. State**, 541 So.2d 1165 (Fla. 1989); **Harich v. State**, 542 So.2d 980 (Fla. 1989); **Mills v. Dugger**, 15 F.L.W. S589 (Fla. 1990). The issue, if preserved, could have been appealed. The issue is barred from **de novo** argument in a successive petition and the issue is time barred under the two year rule.

The Appellant contends that he is entitled to review of his **Maynard** claim under **Hitchcock, supra**, because **Hitchcock**, as "new law", abolished all procedural restrictions relative to any claim regarding advisory jury instructions. This baseless assertion, while creative, is instructive only to the extent it reflects upon the reliability of Mr. Davis' legal and factual assertions in general.

We discussed **Hitchcock** in our first argument. There, Davis was alleging that **Hitchcock** was new law because it "changed" **Lockett v. Ohio**, thus opening the issue for review even though no **Hitchcock** jury instruction was given in this case. Here and in circuit court, Davis said that the presence or absence of a "jury instruction" was irrelevant because the "real" issue was **Lockett** error. Now, however, Davis claims that **Hitchcock** is a "jury instruction case". If that is so, then Davis has confessed that his first issue is moot since no **Hitchcock** instruction was ever given.[6]

POINT VI

THE "COLD, CALCULATED AND PREMEDITATED" CLAIM IS PROCEDURALLY BARRED

Mr. Davis' **Hitchcock** argument has no bearing on the issue raised in claim six.

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[6] Our position remains the same. **Hitchcock** is merely an evolutionary extension of **Lockett** as described, finally, in **Saffle v. Parks, supra**. The case is "new law", if at all, only in that it struck one particular jury instruction that was capable of inducing **Lockett** error.

Again, we are dealing with an issue which was not raised on appeal, not raised in the first Rule 3.850 petition and not raised within the two year time period.

In **Eutzy v. Dugger**, 541 So.2d 1143 (Fla. 1989), this Court recognized that **Rogers v. State**, 511 So.2d 526 (Fla. 1987) (upon which Davis relies heavily) did not represent a change of law subject to retroactive application or sufficient to allow de novo collateral argument. Mr. Davis cannot raise a **Rogers** claim nor can he overcome any of the applicable procedual bars. **Harris v. Reed, supra.**

POINT VII

THE APPELLANT'S "BURDEN SHIFTING" CLAIM WAS PROPERLY DENIED AS PROCEDURALLY BARRED

The Appellant's cursory "burden shifting" argument was not raised at trial, on appeal or in his first Rule 3.850 petition. It is clearly procedurally barred. **Glock v. State**, 537 So.2d 99 (Fla. 1989); **Atkins v. State**, 541 So.2d 1165 (Fla. 1989); **Mills v. Dugger**, 15 F.L.W. S589 (Fla. 1990).

Hitchcock v. Dugger, supra, did not reopen this issue (as we argued above) and its filing constitutes an abuse of process. **Booker, supra.**

POINT VIII

THE TRIAL COURT DID NOT ERR IN DENYING RELIEF ON THE APPELLANT'S PROCEDURALLY BARRED "MERCY" ARGUMENT

Once again, Davis has sseen fit to argue an issue which was not raised at trial, on appeal or on collateral attack. The federal court did not order him to abuse state process (nor could

it) and **Hitchcock, supra,** did not open up this claim. The claim is procedurally barred, **Mills, supra; Atkins, supra;** and an abuse of process. **White v. State, supra; Booker v. State, supra.**

Mr. Davis also neglects to mention that Florida's "mercy" instruction has been recognized as constitutional. **Bertolotti v. Dugger,** 883 F.2d 1503 (11th Cir. 1989).

POINT IX

THE TRIAL COURT DID NOT ERR IN DENYING DAVIS' PROCEDURALLY BARRED "AUTOMATIC DEATH PENALTY" CLAIM

The Appellant's final point on appeal argues yet another claim that was not raised at trial, on appeal or in his first petition. It is procedurally barred and an abuse of process. **Woods v. State,** 531 So.2d 79 (Fla. 1988); **White v. State, supra; Bundy v. State, supra; Atkins, supra.**

Davis' brief also fails in its duty to inform the court that a death penalty is not unconstitutional or "automatic" just because the proof of guilt also establishes an aggravating factor. **Blystone v. Pennsylvania,** ____ U.S. ____, 108 S.Ct. 255 (1990); **Lowenfield v. Phelps,** ____ U.S. ____, 98 L.Ed.2d 568 (1988). Davis, of course, committed three premeditated murders so the point is moot.

What is important, however, is the affirmance of Florida's procedural bar. **Harris v. Reed, supra.**

CONCLUSION

The Appellant is not entitled to relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Martin J. McClain, Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 18th day of March, 1991.

MARK C. MENSER
Assistant Attorney General