

648 So.2d 100  
Supreme Court of Florida.

John Gary **HARDWICK**, Jr., Petitioner,

v.

Richard L. DUGGER, Respondent.

John Gary **HARDWICK**, Jr., Appellant,

v.

STATE of Florida, Appellee.

Nos. 75556, 78024. | Sept. 8, 1994.

| Rehearing Denied Jan. 17, 1995.

Defendant was convicted in the Circuit Court for Duval County, *L. Page Haddock*, J., of first-degree murder and sentenced to death. Defendant appealed. The Supreme Court, *Barkett*, J., *521 So.2d 1071*, affirmed. Defendant moved to vacate conviction and sentence. The Circuit Court denied motion. Defendant appealed and also filed petition for writ of habeas corpus. The Supreme Court held that: (1) defendant was not denied due process; (2) defense counsel was effective; and (3) death sentence was imposed based on permissible factors.

Circuit Court affirmed; petition denied.

West Headnotes (23)

[1] **Criminal Law**

🔑 [Presentation of Issue in Prior Proceedings](#)

Postconviction claim of prisoner sentenced to death challenging sufficiency of jury instructions on aggravating factors was procedurally barred where trial counsel raised no objections to wording or instructions and objections went only to applicability of factors in prisoner's case. *West's F.S.A. RCrP Rule 3.850*.

[3 Cases that cite this headnote](#)

[2] **Courts**

🔑 [Highest Appellate Court](#)

**Criminal Law**

🔑 [Sentence and Punishment](#)

Postconviction claim of prisoner sentenced to death of failure to remand for resentencing was properly denied as trial court had no authority to review actions of Supreme Court. *West's F.S.A. RCrP Rule 3.850*.

[3 Cases that cite this headnote](#)

[3] **Constitutional Law**

🔑 [Removal; Recusal](#)

**Judges**

🔑 [Determination of Objections](#)

Postconviction movant was not denied due process, despite judge's failure to recuse himself upon motion to disqualify by movant, where motion to disqualify judge failed to set forth legally sufficient basis to warrant disqualification. *U.S.C.A. Const.Amends. 5, 14*.

[4] **Constitutional Law**

🔑 [Post-Conviction Relief](#)

**Criminal Law**

🔑 [Costs; Transcripts](#)

Prisoner under sentence of death who moved for postconviction relief was not denied due process based on alleged failure to provide prisoner with copy of motion to vacate conviction and sentence hearing transcript where state purchased its own transcript and prisoner received transcripts and full record after he filed appeal of denial of postconviction relief. *West's F.S.A. RCrP Rule 3.850; U.S.C.A. Const.Amends. 5, 14*.

[5] **Constitutional Law**

🔑 [Post-Conviction Relief](#)

**Criminal Law**

🔑 [Decision or Order](#)

Postconviction movant was not denied due process based on alleged improper ex parte communications when trial judge requested that state change date on order's last page where proposed order was submitted by state over six months before identical order denying relief was signed by trial judge, defense counsel received proposed order months before trial

judge signed same order, and defense counsel filed extensive response to proposed order. U.S.C.A. Const.Amend. 5, 14.

4 Cases that cite this headnote

[6] **Criminal Law**

🔑 Deficient Representation and Prejudice in General

In order to prevail on claim of ineffective assistance of counsel, defendant must demonstrate that, first, counsel's performance was deficient and, second, there is reasonable probability that outcome of proceeding would have been different. U.S.C.A. Const.Amend. 6.

[7] **Criminal Law**

🔑 Capacity to Commit Crime; Insanity or Intoxication

**Criminal Law**

🔑 Multiple Particular Grounds

Capital murder defendant failed to establish ineffective assistance of counsel, based on counsel's alleged failure to investigate and present defense of voluntary intoxication, to investigate and present available mitigating evidence during penalty phase and to ensure adequate mental health evaluations where, despite uncooperative defendant who disagreed about trial strategy and ordered counsel to present no mitigation evidence at penalty phase, trial counsel took extensive depositions, interviewed numerous witnesses, obtained psychiatric evaluation by mental health expert and conducted investigation of defendant's background. U.S.C.A. Const.Amend. 6.

[8] **Criminal Law**

🔑 Presentation of Issue in Prior Proceedings

*Booth* claims, grounded on the premise that there was an impermissible reliance upon victim impact evidence, are procedurally barred in postconviction proceedings if not objected to at trial or raised on direct appeal.

2 Cases that cite this headnote

[9] **Criminal Law**

🔑 Objections to Argument or Conduct of Counsel

Even if trial counsel's failing to object to prosecutor's statements regarding victim and to move for mistrial after emotional outbursts by victim's cousin in capital murder trial was deficient, there was no prejudice and, thus, defendant failed to establish ineffective assistance of counsel where most of evidence at issue did not constitute improper victim impact evidence. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[10] **Criminal Law**

🔑 Presence and Conduct of Bystanders

**Criminal Law**

🔑 Public or Open Trial; Spectators; Publicity

Outbursts by victim's cousin regarding crime and defendant's guilt were improper in capital murder trial, but reversal was not warranted where jury was not present when remarks were made.

[11] **Criminal Law**

🔑 Presence and Conduct of Bystanders

**Criminal Law**

🔑 Public or Open Trial; Spectators; Publicity

Reversal was not warranted in capital murder prosecution despite fact that victim's cousin made obscene gesture toward defendant while jury was present where judge removed jury from courtroom, reprimanded cousin and barred him from trial.

[12] **Criminal Law**

🔑 During Preliminary Proceedings and on Hearing of Motions

Defendant has no constitutional right to be present at bench during conferences that involve purely legal matters.

[14 Cases that cite this headnote](#)

[13] **Criminal Law**

[🔑 Proceedings at Trial in General](#)

Absence of recorded bench conferences does not constitute constitutional deprivation unless it renders review impossible.

[5 Cases that cite this headnote](#)

[14] **Habeas Corpus**

[🔑 Post-Conviction Motions or Proceedings](#)

**Habeas Corpus**

[🔑 Appeal, Error, or Other Direct Review of Conviction](#)

Habeas corpus petitions are not to be used for additional appeals on questions which could have been, and should have been, or were raised on appeal or in motion to vacate conviction and sentence. *West's F.S.A. RCrP Rule 3.850*.

[10 Cases that cite this headnote](#)

[15] **Habeas Corpus**

[🔑 Trial](#)

**Habeas Corpus**

[🔑 Verdict, Sentence, and Punishment](#)

Habeas corpus petitioner's claims of violation of witness sequestration rule and prejudicial conduct of spectator, improper application of cold, calculated, and premeditated aggravating factor and that prosecutor and court asserted that sympathy and mercy toward defendant were not proper considerations were procedurally barred where they were either raised on direct appeal or should have been raised on direct appeal.

[9 Cases that cite this headnote](#)

[16] **Habeas Corpus**

[🔑 Particular Issues and Problems](#)

Habeas petitioner's claim that improper instructions on heinous, atrocious, or cruel aggravating factor were given was procedurally barred where no objection was made at trial to wording of instruction.

[1 Cases that cite this headnote](#)

[17] **Habeas Corpus**

[🔑 Post-Conviction Motions or Proceedings](#)

Even when properly preserved for postconviction review, *Booth* claims, grounded on premise that there was an impermissible reliance upon victim impact evidence, are not generally cognizable in habeas corpus proceedings and should be raised by motion to vacate conviction and sentence. *West's F.S.A. RCrP Rule 3.850*.

[2 Cases that cite this headnote](#)

[18] **Criminal Law**

[🔑 Sentence](#)

Federal law does not require state appellate court to remand for resentencing when it determines that an invalid aggravating factor has been weighed by sentencer, but appellate court must either itself reweigh without the invalid aggravating factor or determine that weighing the invalid factor was harmless error.

[2 Cases that cite this headnote](#)

[19] **Habeas Corpus**

[🔑 Habeas Corpus as Substitute Remedy](#)

An allegation of ineffective counsel will not be permitted as means of circumventing rule that habeas corpus proceedings do not provide second or substitute appeal. *U.S.C.A. Const.Amend. 6*.

[1 Cases that cite this headnote](#)

[20] **Criminal Law**

[🔑 Preservation of Error for Appeal](#)

Appellate counsel is not ineffective for failing to raise issues not preserved for appeal. *U.S.C.A. Const.Amend. 6*.

[4 Cases that cite this headnote](#)

[21] **Criminal Law**

🔑 [Raising Issues on Appeal; Briefs](#)

Appellate counsel need not raise every conceivable claim.

[1 Cases that cite this headnote](#)

[22] **Criminal Law**

🔑 [Raising Issues on Appeal; Briefs](#)

Failing to raise issue of admission of hearsay evidence that capital murder defendant's wife yelled at defendant for being out all night on night of offense did not render appellate counsel's assistance ineffective where, given totality of evidence against defendant, counsel could have reasonably concluded that the point had no merit. [U.S.C.A. Const.Amend. 6](#).

[4 Cases that cite this headnote](#)

[23] **Criminal Law**

🔑 [Other Offenses and Character of Accused](#)

Failure to object at time collateral crimes evidence is introduced waives issue for appellate review, even where prior motion in limine relating to that evidence has been denied.

[2 Cases that cite this headnote](#)

### Attorneys and Law Firms

\***102** Michael J. Minerva, Capital Collateral Representative, [Martin J. McClain](#), Chief Asst. CCR, and [Fred Parker Bingham II](#), Asst. CCR, Office of the Capital Collateral Representative, Tallahassee, for petitioner/appellant.

[Robert A. Butterworth](#), Atty. Gen., and [Mark C. Menser](#), Asst. Atty. Gen., Tallahassee, for respondent/appellee.

### Opinion

PER CURIAM.

John Gary [Hardwick](#), Jr., a prisoner under sentence of death, appeals the trial court's denial of his motion to vacate his conviction and sentence pursuant to [Florida Rule of Criminal Procedure 3.850](#). We also have before us a petition for writ of habeas corpus. We have jurisdiction pursuant to [article V](#), sections 3(b)(1) and (9) of the Florida Constitution.

[Hardwick](#) was convicted of first-degree murder for shooting and stabbing a man in Jacksonville in 1984. The jury recommended and the trial judge imposed the death sentence. On appeal, this Court affirmed both the conviction and sentence. [Hardwick v. State](#), 521 So.2d 1071 (Fla.), cert. denied, 488 U.S. 871, 109 S.Ct. 185, 102 L.Ed.2d 154 (1988). After the Governor issued a death warrant in 1990, [Hardwick](#) filed a 3.850 motion in circuit court and a petition for habeas relief with this Court. In February 1990, the circuit court conducted a [rule 3.850](#) evidentiary hearing. The Office of the Capital Collateral Representative (CCR) protested the hearing and requested a continuance on the grounds that [Hardwick's](#) collateral counsel was unavailable for the hearing. The circuit court denied the continuance and conducted an evidentiary hearing relating to the claims of ineffectiveness of trial counsel. On March 6, 1990, the circuit court entered an order denying [Hardwick](#) all relief. On appeal, this Court issued an order staying [Hardwick's](#) execution until further order and remanding the matter to the circuit court "for a complete evidentiary hearing on [Hardwick's](#) claims under [Florida Rule of Criminal Procedure 3.850](#)." The circuit court conducted a bifurcated hearing in May and August 1990. On March 21, 1991, the circuit court issued a supplemental order denying all relief on [Hardwick's](#) 3.850 claims.

### *Rule 3.850 Motion*

[Hardwick](#) seeks review of the trial court's rejection of the following fifteen claims: 1) denial of due process and a full and fair hearing of his postconviction claims; 2) denial of the effective assistance of trial counsel \***103** based upon several failures by counsel; 3) denial of effective assistance of counsel based upon denial of motion to discharge counsel; 4) no knowing waiver of *Miranda*<sup>1</sup> rights; 5) vague instructions as to the "cold, calculated and premeditated" (CCP) and "heinous, atrocious or cruel" (HAC) aggravating factors; 6) this Court's failure to remand for resentencing after striking two aggravating circumstances on direct appeal; 7) death sentence imposed on the basis of impermissible victim impact evidence in violation of *Booth*<sup>2</sup> and trial counsel was ineffective in failing to object; 8) [Hardwick's](#) absence during critical stages of the proceedings; 9) jury told that sympathy and mercy toward [Hardwick](#) could not be considered; 10) trial court's instructions and prosecutor's argument violated *Caldwell*; <sup>3</sup> 11) admission of unduly inflammatory and

prejudicial photographs; 12) introduction of evidence of other crimes and bad character without proper jury instruction; 13) violation of the witness sequestration rule and prejudicial conduct by a spectator; 14) burden shifted to **Hardwick** to prove that life was the appropriate penalty; and 15) jury misled that a recommendation of life must be by a majority vote.

[1] [2] With the exception of claims 1 and 6 and the claims that allege ineffective assistance of counsel, all of the issues raised by **Hardwick** are procedurally barred. Claims 3 (denial of motion to discharge counsel) and 13 (violation of witness sequestration rule) were resolved on direct appeal when this Court concluded that the trial court did not err as to either matter. *Hardwick*, 521 So.2d at 1074, 1075. The remaining claims are procedurally barred because they either could or should have been raised on direct appeal. *Smith v. State*, 445 So.2d 323 (Fla.1983), cert. denied, 467 U.S. 1220, 104 S.Ct. 2671, 81 L.Ed.2d 375 (1984). Claim 5, which challenges the sufficiency of the jury instructions on the CCP and HAC aggravating factors, is procedurally barred because trial counsel raised no objections to the wording of the instructions. The objections went only to the applicability of the factors in this case. See *Kennedy v. Singletary*, 602 So.2d 1285 (Fla.), cert. denied, 505 U.S. 1233, 113 S.Ct. 2, 120 L.Ed.2d 931 (1992). Claim 6 (failure to remand for resentencing) was properly denied as the trial court has no authority to review the actions of this Court.

[3] [4] As his first claim, **Hardwick** argues that he was denied due process below because the judge failed to recuse himself upon motion to disqualify by the defendant, signed verbatim an order prepared by the State denying all relief, initiated ex parte communication with the State, and failed to provide **Hardwick** with a copy of the 3.850 hearing transcript which was available to the State. We find no merit to any of these claims. **Hardwick's** motion to disqualify the judge failed to set forth a legally sufficient basis to warrant disqualification. See *Tafero v. State*, 403 So.2d 355, 361 (Fla.1981) (rule providing for disqualification of judge is not intended as a vehicle to oust judge who has made adverse rulings), cert. denied, 455 U.S. 983, 102 S.Ct. 1492, 71 L.Ed.2d 694 (1982). Similarly, we find no evidence that the trial court engaged in any improper conduct regarding the transcript of the 3.850 proceeding. **Hardwick** does not dispute that the State purchased its own transcript in order to prepare its proposed order. Nor does **Hardwick** dispute that, as provided by law, he received the transcripts and full record after he filed an appeal of the denial of postconviction relief.

[5] In addition, we find no impropriety relating to the proposed order submitted by the State. The State submitted a draft order in September 1990 that was identical to the order denying relief signed by the judge on March 21, 1991. **Hardwick** argues that the judge engaged in improper ex parte communication by requesting that the State change the date on the last page of the proposed order. **Hardwick** cites *Rose v. State*, 601 So.2d 1181 (Fla.1992), to support his contention that this issue warrants reversal of the \*104 trial court's order. However, this case is unlike *Rose* where the trial court adopted the State's proposed order denying postconviction relief without providing the defendant's counsel notice of receipt of the order, a chance to review the order, or an opportunity to object to its contents. *Id.* at 1182. In the instant case, both parties stipulated to the filing of post-hearing memoranda, the State's proposed order was served on **Hardwick's** collateral counsel months before the trial judge signed the same order, and **Hardwick's** counsel filed an extensive response to the proposed order. Under these circumstances, we will not assume that the judge engaged in improper ex parte communication based upon a date change on the order's last page. We also find no merit to **Hardwick's** contention that the findings in the order are "plain error and not substantially supported by the evidence." To the contrary, the record supports the court's findings regarding the availability of witnesses and strategic decisions made by counsel.

[6] The remaining claims allege that **Hardwick** was denied effective assistance of counsel based upon deficient performance of trial counsel. In order to prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that 1) counsel's performance was deficient and 2) there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694, 104 S.Ct. 2052, 2064, 2068, 80 L.Ed.2d 674 (1984).

[7] In claim 2, **Hardwick** alleges that he was denied the effective assistance of counsel at trial based upon counsel's alleged failure to investigate and present a defense of voluntary intoxication, to investigate and present available mitigating evidence during the penalty phase, and to ensure adequate mental health evaluations. According to *Strickland*, "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." 466 U.S. at 690, 104 S.Ct. at 2066. As

discussed at length in the 3.850 order below, the record refutes **Hardwick's** claim that counsel's performance was deficient as to any of these issues. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691, 104 S.Ct. at 2066. In the instant case, despite an uncooperative client who disagreed about trial strategy and ordered counsel to present no mitigation evidence at the penalty phase, trial counsel took extensive depositions, interviewed a number of witnesses, obtained a psychiatric evaluation by a mental health expert, and conducted an investigation of **Hardwick's** background.

[8] [9] [10] [11] In claim 7, **Hardwick** argues that death sentence was imposed on the basis of impermissible factors in violation of *Booth* and that trial counsel rendered ineffective assistance by failing to object to the prosecutor's statements regarding the victim and to move for a mistrial after emotional outbursts by the victim's cousin. *Booth* claims are procedurally barred in postconviction proceedings if not objected to at trial or raised on direct appeal. *Adams v. State*, 543 So.2d 1244, 1249 (Fla.1989). Thus, we address only the ineffective assistance aspects of this claim. Even if counsel's performance was deficient in this regard, we find no prejudice. Most of the evidence at issue (prosecutor's emphasis of the victim's youth and argument that his life had been cut short) did not constitute improper victim impact evidence. See *Payne v. Tennessee*, 501 U.S. 808, 826, 111 S.Ct. 2597, 2609, 115 L.Ed.2d 720 (1991). While outbursts by the victim's cousin regarding the crime and **Hardwick's** guilt were improper,<sup>4</sup> the jury was not present when these remarks were made. The cousin made an obscene gesture toward **Hardwick** while the jury was present. The judge responded by removing the jury from the courtroom, reprimanding the cousin, and barring him from the trial. We find that the judge responded \*105 appropriately to this incident and that reversal is not warranted on this basis.

[12] [13] In claim 8, **Hardwick** argues that his absence during critical stages of the proceedings constituted fundamental error and that trial counsel was ineffective in failing to object to his absence. **Hardwick** claims that he was excluded from the depositions taken in his case, despite a request that counsel file a motion to allow his presence. He also claims that he was not a participant in bench conferences held during trial and that failure to record these conferences made it impossible for subsequent counsel to review them. However, a defendant has no constitutional right to be present at the bench during conferences that

involve purely legal matters. See *In re Shriner*, 735 F.2d 1236, 1241 (11th Cir.1984). Furthermore, the absence of recorded bench conferences does not constitute constitutional deprivation unless it renders review impossible. *Id.*; *Songer v. Wainwright*, 733 F.2d 788, 792 (11th Cir.1984). In the instant case, **Hardwick** failed to raise this issue on direct appeal and it is procedurally barred. However, to the extent that **Hardwick** argues fundamental error and counsel ineffectiveness, we find no merit to his claim. **Hardwick** was present throughout the trial and does not allege that he raised any objection to the bench conferences or expressed any desire to participate in those conferences. **Hardwick** has not shown nor attempted to show that any matter was determined at these conferences that required his consultation, nor has he demonstrated that any prejudice resulted from his absence during the depositions. Under these circumstances, **Hardwick** is not entitled to postconviction relief. See *Shriner v. State*, 452 So.2d 929, 930 (Fla.1984).

To the extent that the procedurally barred issues raise claims of ineffective assistance of counsel, we find no merit as **Hardwick** has failed to demonstrate deficient performance or prejudice as required by *Strickland*.

#### *Petition for Writ of Habeas Corpus*

**Hardwick** raises the following ten claims in his petition for a writ of habeas corpus: 1) denial of effective assistance of counsel at trial and appellate counsel was ineffective in failing to competently raise this issue; 2) this Court's failure to remand for resentencing after striking two aggravating circumstances on direct appeal; 3) *Caldwell* violation and appellate counsel was ineffective for failing to properly raise this issue on appeal; 4) *Booth* violation and appellate counsel rendered ineffective assistance in failing to raise this claim; 5) violation of the witness sequestration rule and prejudicial conduct by a spectator; 6) CCP improperly applied; 7) admission of hearsay evidence regarding statements made by **Hardwick's** wife; 8) admission of evidence of other crimes and bad character and the lack of a limiting instruction and appellate counsel was ineffective in failing to raise this error; 9) improper instruction on HAC; and 10) prosecutor and court asserted that sympathy and mercy toward **Hardwick** were not proper considerations.

[14] Most of the claims that **Hardwick** raises are repetitive of the issues raised in his rule 3.850 motion. We note that "habeas corpus petitions are not to be used for additional

appeals on questions which could have been, should have been, or were raised on appeal or in a [rule 3.850](#) motion, or on matters that were not objected to at trial.” *Parker v. Dugger*, 550 So.2d 459, 460 (Fla.1989).

[15] [16] [17] Claims 5, 6, and 10 are procedurally barred because they either were raised on direct appeal or should have been raised on direct appeal. Claim 9 (HAC instruction) is procedurally barred as no objection was made at trial to the wording of the instruction. *Kennedy*. The merits of claim 4 (*Booth* claim) are not cognizable in this habeas corpus proceeding. As discussed above, *Booth* claims are procedurally barred in postconviction proceedings if not objected to at trial or raised on direct appeal. *Adams*. Even when properly preserved for postconviction review, *Booth* claims are not generally cognizable in habeas corpus proceedings and should be raised by motion under [rule 3.850](#). *Parker*, 550 So.2d at 460. With the exception of claim 2, the merits of **Hardwick's** remaining claims are also procedurally barred in that they were either raised or **\*106** should have been raised on direct appeal. *Parker*.

[18] Claim 2 asserts that this Court committed constitutional error when it failed to remand for resentencing after striking two aggravating circumstances on direct appeal. We find no merit to this claim. As the United States Supreme Court explained in *Sochor v. Florida*, 504 U.S. 527, ----, 112 S.Ct. 2114, 2119, 119 L.Ed.2d 326 (1992), federal law does not require a state appellate court to remand for resentencing when it determines that an invalid aggravating factor has been weighed by the sentencer, but the appellate court must “either itself reweigh without the invalid aggravating factor or determine that weighing the invalid factor was harmless error.” This Court concluded that the error was harmless “in light of the *particular* valid aggravating factors remaining in this case and the absence of any mitigating factors.” *Hardwick*, 521 So.2d at 1077. Consequently, claim 2 is without merit.

**Hardwick's** remaining claims allege ineffective assistance of appellate counsel. “[W]hen entertaining a petition for writ of habeas corpus based on a challenge of ineffective assistance of appellate counsel, the issue before us is limited to ‘first, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the

result.’” *Suarez v. Dugger*, 527 So.2d 190, 192-93 (Fla.1988) (quoting *Pope v. Wainwright*, 496 So.2d 798, 800 (Fla.1986), *cert. denied*, 480 U.S. 951, 107 S.Ct. 1617, 94 L.Ed.2d 801 (1987)). We do not reach the second prong of that analysis, as we find that **Hardwick** has failed to demonstrate deficient performance by appellate counsel on any of the claims raised. Consequently, he is not entitled to habeas relief.

[19] **Hardwick** asserts that appellate counsel failed to raise issues regarding **Hardwick's** right to effective assistance of trial counsel. However, counsel argued these very issues on appeal, and this Court rejected them. *Hardwick*, 521 So.2d at 1074-75. Moreover, we note that “an allegation of ineffective counsel will not be permitted as a means of circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal.” *Blanco v. Wainwright*, 507 So.2d 1377, 1384 (Fla.1987).

[20] As to **Hardwick's** claim that appellate counsel was ineffective in failing to raise the *Caldwell* issue on direct appeal, we find that issue was not preserved as trial counsel did not interpose any objections to the instructions and arguments which are said to have offended *Caldwell*. Thus, appellate counsel was precluded from raising the issue on appeal. *Squires v. Dugger*, 564 So.2d 1074, 1077 (Fla.1990). Appellate counsel was also precluded from raising the *Booth* issue on direct appeal as it was not properly preserved below. Appellate counsel is not ineffective for failing to raise issues not preserved for appeal. *Medina v. Dugger*, 586 So.2d 317, 318 (Fla.1991).

[21] [22] **Hardwick** next claims that appellate counsel was ineffective in failing to raise the issue of the admission of certain hearsay evidence. The evidence at issue involved the testimony of Connie Wright that **Hardwick's** wife yelled at him for being out all night on the night of the offense. Trial counsel preserved this issue by objecting to the admission of the statement. Although appellate counsel could have argued this point on direct appeal, he cannot be deemed ineffective for failing to do so. As this Court has noted, appellate counsel need not raise every conceivable claim. *Davis v. Wainwright*, 498 So.2d 857, 859 (Fla.1986), *cert. denied*, 484 U.S. 873, 108 S.Ct. 208, 98 L.Ed.2d 159 (1987). Given the totality of evidence against **Hardwick**, including **Hardwick's** own admissions about “taking care” of the individual who took his drugs, appellate counsel could have reasonably concluded that the point had no merit.

[23] Finally, **Hardwick** claims that appellate counsel was ineffective in failing to argue that the court erred in admitting evidence that **Hardwick** possessed and sold drugs and in failing to give the jury a limiting instruction \*107 as to that evidence. We find that the issue was not preserved below.<sup>5</sup> Thus, appellate counsel was not ineffective for failing to raise this issue that was not preserved for appeal. *Medina*.

### Conclusion

Accordingly, we affirm the trial court's order denying **Hardwick's** rule 3.850 motion and deny the petition for writ of habeas corpus.

It is so ordered.

GRIMES, C.J., OVERTON, SHAW, KOGAN and HARDING, JJ., and McDONALD, Senior Justice, concur.

### Parallel Citations

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### Footnotes

- 1 *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).
- 2 *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), overruled by *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991).
- 3 *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).
- 4 *Payne* did not overrule that part of *Booth* finding “that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment.” *Payne v. Tennessee*, 501 U.S. 808, 830 n. 2, 111 S.Ct. 2597, 2611 n. 2, 115 L.Ed.2d 720 (1991).
- 5 Although trial counsel filed a motion in limine to preclude testimony relating to **Hardwick's** drug activities, the trial court denied that motion. Upon introduction of that testimony, trial counsel did not object and did not request that the jury be given a limiting instruction. Failure to object at the time collateral crimes evidence is introduced waives the issue for appellate review, even where a prior motion in limine relating to that evidence has been denied. *Correll v. State*, 523 So.2d 562, 566 (Fla.), cert. denied, 488 U.S. 871, 109 S.Ct. 183, 102 L.Ed.2d 152 (1988).