IN THE SUPREME COURT OF FLORIDA

JESSIE JOSEPH TAFERO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 66,156

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

The Appellant was the defendant and the Appellee was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida. In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

"PR"	Record on Appeal from Denial of Post-Conviction Relief;
"T"	Transcript of Evidentiary Hearing on 3.850 Motion;
"R"	Followed by a volume and page number refers to a part of the nine-volume Record on Appeal filed in the Appellant's direct appeal, Case No. 49,535. It consists of documents and pleadings filed in the case and the transcript of trial proceedings;
"SR"	Followed by a volume number denotes a reference to the four-volume Supplemental Record filed in the direct appeal; while
"S"	Describes the one-volume Supplemental Record consisting of seventy-two (72) pages, which also was filed in the direct appeal.

Due to the expedited nature of these proceedings with the Appellant's brief being due at noon on November 19

and the Appellee's at noon on November 20, the majority of this brief has been prepared in advance of receipt of the Appellant's brief, so although it does not address the issues in the same order as the Appellant's brief, all of the issues have been discussed.

STATEMENT OF THE CASE AND FACTS

The Appellant was tried and convicted in May 1976 for the murder of two police officers as well as robbery and kidnapping. He was sentenced to death for the two murders and accordingly, the convictions were appealed to this Court. The judgments and sentences were affirmed. Tafero v. State, 403 So.2d 353 (Fla. 1981), cert. denied, Tafero v. Florida, 455 U.S. 983 (1982). In November 1982 the Petitioner filed a Petition for Writ of Error Coram Nobis which, after receiving a response from the State, this Court denied. Tafero v. State, 440 So.2d 350 (Fla. 1983), cert. denied, Tafero v. Florida, 104 S.Ct. 1456 (1984). The Governor signed a death warrant on November 2, 1984, and the execution has been scheduled for November 29.

The Petitioner filed a Motion for Post-Conviction Relief on November 6, 1984 (PR 10-40). The motion set forth the following grounds for relief:

A. Ineffective counsel at trial (PR 18)

B. Unconstitutional imposition of the death penalty contrary to Enmund v. Florida, 458 U.S. 782 (1982) (PR 20)

C. Arbitrary and capricious imposition of the death penalty because co-defendant Linder received a life sentence (PR 32)

D. Newly-discovered evidence pertaining to the 1967 convictions upon which an aggravating factor was based (PR 34)

E. Newly-discovered evidence pertaining to the instant convictions (PR 34)

F. Unconstitutional imposition of the death penalty because the trial judge did not consider non-statutory mitigating factors (PR 36)

G. Discriminatory application of the death penalty based on race of the victim, sex of the offender and limitation of mitigating circumstances (PR 37)

H. Imposition of the death penalty based on jury instructions contrary to Enmund v. Florida, 458 U.S. 782 (1982) (PR 38)

Following the filing of the motion, three amendments were submitted. In the first, the Appellant asserted he was denied his right to participate in his trial (PR 58-62). In the second, he asserted additional reasons why trial counsel was ineffective at the penalty phase and also further argued the Enmund claim. In the third (PR 63-66) he alleged a denial of due process caused by destruction of his personal records in 1980 (PR 770-771).

The Appellee filed two responsive pleadings, a Motion to Strike (PR 51-55) and a Response on the merits (PR 394-555). The grounds for the Motion to Strike were

(1) the grounds numbered B, C, F and H raised in the Motion for Post-Conviction Relief with the exception of ineffective counsel either were or could have been raised on appeal; and (2) the claims of newly-discovered evidence had been determined in prior coram nobis proceedings. The trial court denied the Motion to Strike (T 335).

The trial court held a full evidentiary hearing on the motion on November 13 and 14, 1984. The Appellee will discuss the evidence as it pertains to the issue of trial counsel's effectiveness.[1]

Robert McCain, who served as the Appellant's trial counsel, testified he was admitted to the Indiana Bar in 1954 (T 91) and to the Florida Bar in 1971 or 1972 (T 26). At the time of his appointment to represent the Appellant (T 27) he had tried hundreds of murder cases, including many capital cases (T 91). In preparing for trial, Mr. McCain visited the Appellant at the Broward County Jail (T 31). They consulted frequently and the Appellant made suggestions (T 36). Mr. McCain deposed most of the State's witnesses (T 37). Mr. McCain testified that prior to trial he advised the Appellant about the sentencing phase of a capital case (T 38) and they went over

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[1]Walter Rhodes reaffirmed his trial testimony and stated his recantation statements were untrue (T 117). Thus, the claim of newly-discovered evidence was not only barred by having previously been determined in the coram nobis proceeding; it was without support.

possible character witnesses; the only name Appellant gave Mr. McCain was his mother's (T 40).

With regard to the guilt/innocence phase of the trial, Mr. McCain testified he did not recall the Appellant giving him the names of any witnesses he wanted called (T 41). They did discuss the possibility of calling the co-defendant Sonia Jacobs' parents, but Appellant said they were unfriendly towards him (T 42). Mr. McCain talked to the Appellant's parents, mostly his mother, because the father was ill (T 43). The Appellant himself did not want to testify (T 43) because he did not want to incriminate Sonia (T 45). Furthermore, he did not think the Appellant would be a good witness (T 100), and it would be better to make Rhodes the focus of the entire case (T 101). The Appellant wanted the defense to be that Walter Rhodes did the shooting (T 93) and this was the line of defense that was pursued (T 94, 99).

Mr. McCain discussed the possibility of recusing the trial judge with the Appellant (T 45). Although he knew the judge had been a state trooper he did not see that as a legal basis for recusal (T 45-46). Additionally, being familiar with Judge Futch from past experience, Mr. McCain thought he would get a fair trial because the judge would rule based on the law and not on personal prejudice (T 46).

The decision was made, after Mr. McCain spoke

with the Appellant, not to seek a change of venue unless the voir dire of the jury showed there would not be a fair trial (T 50). The subject of pretrial publicity was discussed during the jury selection (T 51).

Mr. McCain stated he was aware the first degree murder charge could be proved either as felony or premeditated murder, and he had discussed this with the Appellant (T 52).

Mr. McCain testified during voir dire and throughout the trial, he discussed each stage with the Appellant (T 55-57).

Turning to the penalty phase, Mr. McCain testified he reviewed the entire matter with the Appellant, realizing the mitigating circumstances were not limited to those in the statute, and the decision was made not to put on evidence (T 60). His closing argument in the penalty phase had been approved by the Appellant and it was what he wanted to have said (T 67-68). The Appellant wanted to go out like a man and not beg (T 110). Mr. McCain's contemporaneous notes of the discussion with the Appellant regarding the argument state:

> Discussed with my client, feels he did not receive a fair trial, nor a fair consideration by the jury. Consideration by the jury of sentence is a charade and will not crawl or beg for his life.

(T 70). The basic strategy for the penalty phase was to

de-emphasize it so the State would not bring in derogatory information (T 72, 73). Mr. McCain did not think it was necessary to re-argue that Rhodes did the shooting because the jury had just heard that in his final argument at the conclusion of the guilt phase (T 75).

Mr. McCain did not want to go into the facts of the 1967 convictions relied on as an aggravating factor and the purported Sheely letter confessing to them (T 81-82), because it would have opened "a Pandora's box" (T 83), i.e., the State could have gone into the facts more rather than just introducing copies of the convictions (T 88). Likewise, Mr. McCain did not want to call Eric, Sonia Jacobs Linder's ten-year-old son, who had witnessed the shootings, because he was a difficult child (T 105). The Appellant had trained Eric to use firearms, and Mr. McCain concluded Eric would not be a helpful witness and in fact might give the prosecutor "something else to jump at" (T 106). Mr. McCain also did not want to call people who had known the Appellant in person because he did not want to belabor the fact that the Appellant had been in prison (T 106, 113).

After the trial, the Appellant corresponded with Mr. McCain and never indicated any dissatisfaction with his representation; in fact, he was pleased with the assignments of error that Mr. McCain filed on his behalf (T 109).

The Appellant testified he and Mr. McCain conferred frequently in the weeks prior to the trial (T 132). The Appellant claimed he had witnesses who were willing to testify but Mr. McCain never interviewed them (T 133). He felt Mr. McCain was unwilling to "put on a defense" (T 135). According to the Appellant, Mr. McCain never discussed the penalty phase with him (T 136). The Appellant testified he wanted Mr. McCain to seek recusal of the trial judge and to move for a change of venue but he refused (T 138-139). In the Appellant's opinion, Mr. McCain was distraught, apathetic, and did not seem to want to do anything (T 141), although he argued that the Appellant did not fire shots (T 186-187). The Appellant said he had wanted to testify at his trial (T 142). In regard to the sentencing, the Appellant said he was not consulted; Mr. McCain just asked him if he had had a fair trial and then made an argument to the jury (T 147). The Appellant stated he had not authorized the argument that was made (T 149).

The Appellant said there were several matters he wanted raised in his defense. He wanted it shown he had wiped off his hands because they were dirty and not to remove powder burns (T 158). He thought there should have been a motion to suppress his statement to Robert Rios (T 159). A witness, Marlowe Haskew, should have been impeached (T 159-160). Another witness, Ellen Eisenberg, could have discredited Haskew's testimony (T 160).

The Appellant acknowledged he had continued to write to Mr. McCain after the trial and did not express any displeasure with his services (T 165).

Peter Raben, an attorney in private practice in Miami, Florida (T 202), testified he had an opinion based on his experience as a former Assistant Public Defender handling major felony cases as to the effectiveness of Mr. McCain's representation at the sentencing phase of the trial (T 209-210). Mr. Raben testified he would for a penalty phase prepare a parade of people to "humanize" his client (T 210). However, the basis for his opinion that Mr. McCain was ineffective was his failure to make an argument (T 213-214). Mr. Raben suggested an argument could have been made that the Appellant should not be executed because he was not the triggerman (T 215) or at least a moral argument against the death penalty (T 216). He also thought the Sheely letter regarding the 1967 convictions could have been introduced (T 217-218). Even if his client directed the course that was taken, Mr. Raben thought Mr. McCain still had a responsibility not to follow it (T 219).

On cross-examination, Mr. Raben acknowledged the case against the Appellant, even based on his partial reading of the transcript, "seemed strong" (T 224). He also conceded that any character witnesses called at the penalty phase would be subject to cross-examination, so there could be strategic reasons for not calling such witnesses (T 225).

Mr. Raben was unaware the same sort of argument was made in Sonia Jacobs Linder's case with a resulting life recommendation from the jury and when informed of this fact his response was "Both of them [Sonia and her attorney] are very lucky" (T 228-229). Finally, he recognized the facts of the 1967 convictions were "heinous" (T 230), although he did not agree that the prosecutor could have brought in the victims to testify (T 231).

Kathleen Tafero, the Appellant's mother (T 233-234), testified the Appellant had worked to support the family and he is an artist (T 235). She characterized her son as "a lover not a fighter" (T 236), and was available to testify as to his character at the trial (T 239).

Renee Siebert, a family friend (T 244), testified to her knowledge the Appellant was good to his parents, grandparents, and the family dog (T 245). She did not think the Appellant capable of murder, and she would have been available to testify (T 246). On cross-examination, Mrs. Siebert stated she knew the Appellant was in prison on other charges, paroled, and then had violated his parole (T 251).

After Mrs. Siebert's testimony, defense counsel made a proffer regarding other witnesses who were not available to testify. Some were deceased since the time of the trial: the Appellant's father and grandmother; Irving Settler, an employer; Mr. and Mrs. Jacobs, Sonia's

parents; and Judge Baker who had heard evidence regarding the 1967 convictions (T 264-265). Others simply were not in court: Lucy Bachelor, a woman who knew the Appellant from a prison program (T 266); McGregor Smith, a man who worked with the Appellant in a prison program (T 270); James Beckett, a Belle Glade teacher (T 271); an art teacher named Mrs. Lowenstein (T 271); Bernard Phillips, an employer (T 271); and Esther Cauliflower, whose deposition was taken and who had worked with the Appellant in a prison educational program (T 271-272). Finally, Barry Crown, a psychologist, had given a statement that in his opinion Mr. McCain's closing argument at the sentencing phase was a plea for the death penalty (T 274-275). The State's objection to the proffer was sustained as to Dr. Crown's deposition (T 288).

The Appellee recalled Mr. McCain to the stand. He testified the only monies he received from the Appellant's mother were payment for copies of pleadings which the Appellant wanted (T 290-291), as this was not a taxable cost to the county (T 291).

The trial court then agreed to take judicial notice of the entire transcript from the Appellant's trial (T 299) as well as the transcript of the co-defendant, Sonia Jacobs Linder's, trial (T 302). After entertaining legal argument (T 303-335), the trial court took the matter

under advisement (T 335-336). The court subsequently entered a written order denying the Motion for Post-Conviction Relief (PR 773).

In the Appellant's brief, he discusses the trial testimony of witnesses Rhodes, Hyman and Pierce. This recitation of the evidence is incomplete, particularly since it ignores the physical evidence. Appellee will rely on its Statement of the Facts contained in the answer brief it filed on direct appeal, Florida Supreme Court No. 49,535. A copy of the statement is excerpted from the brief and included in the appendix.

POINTS INVOLVED

POINT I

WHETHER THE IMPOSITION OF THE DEATH PENALTY IN THIS CASE VIOLATES THE EIGHTH AMENDMENT, WHERE THE JURY WAS INSTRUCTED THAT BEFORE FINDING APPELLANT GUILTY OF FIRST DEGREE MURDER, THEY HAD TO FIND THAT APPELLANT, HIMSELF, KILLED, ATTEMPTED TO KILL, OR INTENDED THAT A KILLING TAKE PLACE, AND BY THEIR VERDICT OF GUILTY, SUCH A FINDING WAS MADE?

POINT II

WHETHER THE APPELLANT RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL? (Appellant's Points II and III)

POINT III

WHETHER THE ALLEGED CONFESSION OF A THIRD PARTY TO THE 1967 CRIMES FOR WHICH THE APPELLANT WAS CONVICTED AND UPON WHICH AN AGGRAVATING FACTOR WAS BASED ENTITLES THE APPELLANT TO RESENTENCING?

POINTS INVOLVED
(Continued)

POINT IV

WHETHER CONSIDERATION OF THE MITIGATING FACTORS WAS LIMITED TO THOSE IN THE STATUTE?

(Appellant's Points V and VI)

POINT V

WHETHER APPELLANT'S SENTENCE OF DEATH IS PROPER AND NOT ARBITRARY AND CAPRICIOUS, WHERE THERE IS A RATIONAL BASIS FOR HIS SENTENCE OF DEATH AS COMPARED TO THE LIFE SENTENCES RECEIVED BY HIS CO-DEFENDANTS?

POINT VI

WHETHER FLORIDA'S DEATH PENALTY IS UNCONSTITUTIONAL ON THE BASIS THAT IT DISCRIMINATES BASED ON THE RACE OF THE VICTIM OR SEX OF THE OFFENDER?

ARGUMENT

POINT I

THE IMPOSITION OF THE DEATH PENALTY IN THIS CASE DOES NOT VIOLATE THE EIGHTH AMENDMENT, WHERE THE JURY WAS INSTRUCTED THAT BEFORE FINDING APPELLANT GUILTY OF FIRST DEGREE MURDER, THEY HAD TO FIND THAT APPELLANT, HIMSELF, KILLED, ATTEMPTED TO KILL, OR INTENDED THAT A KILLING TAKE PLACE, AND BY THEIR VERDICT OF GUILTY, SUCH A FINDING WAS MADE.

The Appellant alleges that the imposition of the death penalty in this case is unconstitutional in light of Enmund v. Florida, 458 U.S. 782 (1982), where the jury returned a general verdict, making no finding that Appellant, himself, killed anyone, attempted to kill anyone or intended that a killing take place. In conjunction with that allegation, the Appellant asserts that the death penalty was unconstitutionally imposed because the standard jury instructions allowed the jury to consider imposition of the death penalty under the circumstances prohibited by Enmund. Appellee submits that Appellant's contentions are clearly without support and merit.

a. The guilt phase instructions, as carried into the penalty phase, required the jury to find that Appellant, himself, killed, attempted to kill or intended that a killing take place.

In Enmund v. Florida, supra, the United States Supreme Court held that the Eighth and Fourteenth Amendments were violated by the imposition of the death penalty on the defendant, who aided and abetted a felony in the course of which a murder was committed by others but who did not himself kill, attempt to

kill, intend to kill, or contemplate that life would be taken. The facts of the instant case makes Enmund totally inapplicable. In Enmund, the defendant was the driver of a getaway car to be used after a robbery. During the course of the robbery of an elderly couple at their farmhouse, the wife came out of the house when her husband cried for help and shot one of the robbers. Both the husband and wife were then shot by the robbers. Enmund was sentenced to death for his role as a principal of the second degree, constructively present aiding and abetting the commission of the crime of robbery. This Court affirmed. In reversing, the Supreme Court stated that "(i)t was thus irrelevant to Enmund's challenge to the death sentence that he did not himself kill and was not present at the killings; also beside the point was whether he intended that the Kerseys [the victims] be killed or anticipated that lethal force would or might be used if necessary to effectuate the robbery or a safe escape." 458 U.S. at 788. The Court concluded that imposition of the death penalty in these circumstances was inconsistent with the Eighth and Fourteenth Amendments. Id. at 801. Enmund does not stand for the proposition that only a "triggerman" may receive the death penalty and/or that a special jury finding is required.

Initially, the Appellee would point out that contrary to Appellant's assertions, the prosecutor did not argue that Appellant should be found guilty of first degree murder regardless of who did the shooting. For this Court's convenience, Appellee has set out in context, the prosecutor's argument in

which he refers to the felony murder rule:

> Rhodes didn't do it. What does he have to gain by telling you that Tafero and Linder did it? He has three life sentences to serve.
>
> Do you know why he has three life sentences to serve? Because what he told you from that witness stand makes him guilty of murder and kidnapping, and I am going to tell you why.
>
> You will remember, in the beginning on voir dire, I asked several of you, 'Have you ever heard of the felony murder rule?' The felony murder rule, as his Honor, Judge Futch, is going to instruct you, is that when there is a felony being committed, or attempting to be committed, all parties involved in that felony are guilty of murder, even if an innocent bystander, or an innocent person, is killed during the commission of that felony.
>
> So, if a person is killed during the commission of a felony, or one of the eight numerated felonies -- of which robbery is one -- all parties are guilty of first degree murder, no matter whether they pull the trigger, or stood there.
>
> (R. VIII 3.90)

Thus, when reviewed in context, it is obvious that the prosecutor was referring to the felony murder rule as it related to Rhodes' culpability, not the Appellant's.[2]

In addition, the statement referred to by Appellant at p. 24 of his brief, is also taken out of context. In context, the statement appears as follows:

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[2] This further reinforced by the prosecutor's argument at R. IX 412.

> Maybe I am belaboring these points, because it took me five days to present all that evidence to you. You listened, and at times, maybe you were getting annoyed at me introducing all that evidence; but it's so important for you to take that back, and look at it.
>
> It doesn't matter, ladies and gentlemen, who first put the gun on Mr. Levinson. It doesn't matter at all.
>
> If two guys go into a 7-11, and one blows the store clerk away, if he shoots the store clerk, they are both guilty of felony murder. It doesn't matter who fired the weapon, they are both responsible.
>
> If two guys go into another 7-11, and they don't shoot him, but they hold him up; the one who goes to the register is just as guilty as the one who holds the gun on the clerk, if there is a gun. (R. IX 417)[3]

Again, when reviewed in context, the prosecutor was referring to the kidnapping of Mr. Levinson, after the murders, and not the murders themselves. The kidnapping charge was not the predicate felony for the felony-murder charge. A review of the prosecutor's argument in its entirety shows that the prosecutor was arguing that Appellant's liability for the murders was based on Appellant, himself, being the shooter (whether from a premeditated state or in conjunction with the robbery), and not on the basis of vicarious liability for any co-defendant's actions.

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[3]Appellant's reference to T-X 419 must be an inadvertent error, as there are only nine volumes of record, not including the sentencing phase.

Secondly, and most importantly, Appellant has completely ignored the actual instructions to the jury, in making his allegations that the jury was not instructed that they had to find that the Appellant actually killed or intended to kill the victim. Again, for this Court's convenience, Appellee has set out the trial court's instructions to the jury in the guilt phase on the issue of Appellant's liability for first degree murder. The Court instructed the jury as follows:

> I instruct you that Murder in the First Degree is the unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being; or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, involuntary sexual battery, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the proximate cause of death of the user.
>
> A 'premeditated design' to kill is a fully-formed conscious purpose to take human life, formed upon reflection and present in the mind at the time of the killing. The law does not fix the exact period of time which must pass between the formation of the intent to kill, and the carrying out of the intent. It may only be a short time, and yet make the killing premeditated, if the fixed intent to kill was formed long enough before the actual killing to permit some reflection on the part of the person forming it; and that person was, at the time of carrying out that intent, fully conscious of a settled and fixed purpose to kill, and

of the results which would follow such killing.

(SR. 9-10)

* * *

To summarize: The essential elements of an unlawful homicide which must be proved beyond a reasonable doubt in this case before there can be a conviction of any offense are that: Number one, that Phillip A. Black and/or Donald Robert Irwin, are, in fact, dead; and in this homicide instruction, I am taking the first two counts together, because there is no sense in my going back and saying the same thing as to Count II, as I say as to Count I; number two, the death was caused by the act of the defendant; number three, the killing was wrongful and by the means stated in the indictment; and number four, the killing was neither justifiable nor excusable homicide, as these terms have been defined for you.

If these elements are established, then it will be necessary for you to determine the degree of the unlawful homicide.

As to first degree, if the defendant, in killing the deceased, acted from a premeditated design to effect the death of the deceased, or was engaged in the perpetration of, or in the attempt to perpetrate, any arson, involuntary sexual battery, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing placing or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of eighteen years, when such drug is proven to be the proximate cause of the death of the user, he should be found guilty of Murder in the First Degree.

(SR. 14-15) (emphasis added)

* * *

The trial court then gave the most important instruction, which is pertinent to this issue:

> I instruct you, ladies and gentlemen, that a person may commit a crime by his own personal act, or through the act or acts of another person. Any person who knowingly aids, abets, counsels, hires, or otherwise procures the commission of a crime, is equally guilty with the one who actually performs a criminal act, whether he is or is not present at the commission of the offense.
>
> However, for one person to be guilty of a crime physically committed by another, it is necessary that he have a conscious intent that the criminal act shall be done; and pursuant to that intent, he do some act or say some word which was intended to, and which did, incite, cause, encourage, assist or induce another person to actually commit the crime.
>
> (SR. 17) (emphasis added)

There were thus, only three ways under which the jury could have returned verdicts of guilty of first degree murder. Under the instructions, the jury could have found that the Appellant, himself, committed the murders in a premeditated fashion. Secondly, the jury could have found that the Appellant, himself, committed the murders while engaged in the pertetration of the robbery. Thirdly, the jury could have found that someone else had actually done the shooting, but that Appellant had a conscious intent that the killing be done, and pursuant to that intent, he did some act or said some word which was intended to, and which did incite, cause, encourage, assist or induce such other person to actually commit the crime. Therefore, contrary

to the Appellant's assertions, the jury by its verdict, made a finding that Appellant himself, killed the officers, attempted to kill the officers, or intended that a killing take place.

It is these jury instructions, specifically the instruction requiring the jury to find that if the acts were committed by another person, that Appellant have the conscious intent that the act be done, and pursuant to that act he did something to aide or assist the other person, that differentiates the instant case from those Fifth Circuit cases which have vacated the death penalty on the basis of Enmund v. Florida, supra. See, e.g., Bullock v. Lucas, 743 So.2d 244 (5th Cir. 1984); Jones v. Thigpen, 741 So. 2d 805 (5th Cir. 1984); Reddix v. Thigpen, 728 So.2d 705 (5th Cir.) on rehearing 732 So.2d 494 (5th Cir. 1984); Clark v. Louisiana State Penitentiary, 694 So.2d 75 (5th Cir. 1982); Bell v. Watkins, 692 So. 2d 999 (5th Cir. 1982).[4] The instant case is more akin to that of Skillern v. Estelle, 720 So.2d 839 (5th Cir. 1983), in which the Fifth Circuit found no violation of the principles enunciated by Enmund where the jury was instructed during the sentencing phase that it had to find whether the

[4] In each of these cases, the court held that where the jury instructions, which did not require a finding of personal intent to kill, might have led the jury to believe it could impute the intent of the defendant's accomplice, who actually committed the murder to the defendant, in violation of Enmund v. Florida, supra, the death sentences could not stand. As stated supra, this is not the case sub judice.

defendants' conduct caused the death of the deceased deliberately and with reasonable expectation that the death of the deceased or another would result. 720 So.2d at 847-848.

The fact that the jury returned a "general verdict" does not mean that Appellant cannot lawfully receive a death sentence under Enmund. See Drake v. Francis, 727 So.2d 990, 997 (11th Cir. 1984). Thus, where, as in the instant case, the jury was properly instructed and there is abundant evidence to establish that Appellant was, unlike Enmund, a present, and active participant in the murders, death is an appropriate penalty.[5] Here, not only did Rhodes testify that Appellant fired shots, but as this Court stated on direct appeal:

> Tafero challenges the sufficiency of the evidence to convict him of murder, but the evidence against him is overwhelming. In addition to the eyewitness' testimony, bullets removed from the victims match the gun in Tafero's possession at his arrest. We do not accept Tafero's contention that Rhodes' testimony was unbelievable in that Rhodes' testimony is corroborated by both the physical evidence and the other eyewitnesses' testimony. Additionally, both truck drivers noticed Rhodes' hands in the air when the first shots were fired. The evidence shows beyond a reasonable doubt that Tafero is guilty of the premeditated murder of both Irwin and Black.

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[5] Thus, Appellant's reliance on Zant v. Stephens, ___U.S. ___, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) is without support.

Tafero v. State, 403 So.2d 355, 359 (Fla. 1981). Thus, there was overwhelming evidence to show not only that Appellant actually committed the acts, but contemplated that lives would be taken when he acted as an aider and abetter. See Smith v. State, 424 So.2d 726, 733 (Fla. 1982); Hall v. State, 420 So.2d 872, 874 (Fla. 1982); Ruffin v. State, 420 So.2d 591, 594 (Fla. 1982). See also Hall v. Wainwright, 733 So.2d 766 (11th Cir. 1984); Ross v. Hopper, 716 So.2d 1528 (11th Cir. 1983).

b. The penalty phase instructions were not wrong in allowing the jury to recommend the death penalty under circumstance prohibited by Enmund v. Florida, supra.

Appellant alleges that the jury instructions which were given to the jury were wrong as they allowed the jury to recommend the death penalty in violation of the circumstances prohibited by Enmund v. Florida, supra. Appellee submits that Appellant's contentions are without merit.

First, it must be reiterated that in the instant case, before the jury could even find the Appellant guilty of first degree murder, pursuant to the Court's jury instructions, it had to find that Appellant, himself, killed, attempted to kill, or intended that a killing take place. Secondly, allowing the

jury to consider the degree of a defendant's participation in the offense as a mitigating circumstance is not only proper, but under the dictates of Lockett v. Ohio, 438 U.S. 586 (1978), it is required.

Thirdly, in Enmund v. Florida, supra, the Supreme Court itself implicitely approved jury instructions which, allowed as a mitigating circumstance that the defendant was an accomplice in the offense committed by another person and his participation was relatively minor. In Enmund, the Supreme Court in its review of state death penalty statutes, discussed these circumstances. The Court noted that six states made it a statutory mitigating circumstance that the defendant was an accomplice in a capital felony committed by another person and his participation was relatively minor. The Supreme Court recognized that by making mininal participation in a capital felony committed by another person a mitigating circumstance, these sentencing statutes reduced the likelihood that a person will be executed for vicarious felony murder. The Court noted that in these states, a nontriggerman guilty of felony murder cannot be sentenced to death for the felony murder absent aggravating circumstances above and beyond the felony murder itself. 458 U.S. at 792.

The Appellee submits that the jury instructions given in the instant case during the penalty phase did not violate the dictates of Enmund. Although, the instructions allow the jury to consider whether the aggravating circumstances present outweigh a defendant's minor participation in the offense, the instructions do not authorize the jury to recommend death solely

because the defendant somehow participated in the felony in which a murder was committed. When the penalty phase instructions are read in conjunction with the guilt phase instructions, it is obvious that even before the jury can get to the point where it recommends a sentence, it must have first found that defendant either himself, killed, attempted to kill, or intended that a killing take place or that lethal force will be employed.[6] See Florida Standard Jury Instructions in Criminal Cases (2d Ed.), 2.05 Principles, 2.06-2.07-Murder--First Degree. Thus, because the jury had to have made the necessary finding of intent in the instant case, the death penalty was constitutionally imposed.

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[6] Enmund does permit the imposition of the death penalty where a defendant, who aids and abets a felony in the course of which a murder is committed by others, intends that lethal force will be employed, 458 U.S. at 788, 797.

POINT II

THE APPELLANT RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL. (Appellant's Points II and III).

The Appellant alleged in his Motion for Post-Conviction Relief that his counsel was ineffective at both the guilt and penalty phases of his trial. After a full evidentiary hearing the trial court denied the motion. The Appellee maintains the trial court's ruling was correct, for it comports with the standards enunciated by the United States Supreme Court in Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and by this Court in Knight v. State, 394 So.2d 997 (Fla. 1981).

In Strickland v. Washington, supra, the United States Supreme Court held that there are two parts in determining a defendant's claim of ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.
>
> 80 L.Ed.2d at 693.

In explaining the appropriate test for proving prejudice the court held that "[t]he defendant must show that there

is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 80 L.Ed.2d at 698.

In Knight v. State, supra, 394 So.2d at 1011, the Florida Supreme Court adopted four principles as a standard to determine whether an attorney has provided reasonably effective assistance of counsel:

> First, the specific omission or overt act upon which the claim of ineffective assistance of counsel is based must be detailed in the appropriate pleading.
>
> Second, the defendant has the burden to show that this specific omission or overt act was a substantial and serious deficiency measurably below that of competent counsel . . . .
>
> Third, the defendant has the burden to show that the specific, serious deficiency, when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings . . . .
>
> Fourth, in the event a defendant does show a substantial deficiency and presents a prima facie showing of prejudice, the State still has an opportunity to rebut these assertions by showing beyond a reasonable doubt that there was no prejudice in fact.

In reviewing Strickland v. Washington, this Court has held that the Strickland test does not differ

significantly from the Knight standard. Jackson v. State, 452 So.2d 533 (Fla. 1984). See also Clark v. State, ___ So.2d ___, 9 FLW 455 (Fla. October 18, 1984); Downs v. State, 453 So.2d 1102 (Fla. 1984).

The Appellee will discuss each phase of the trial separately, in light of the foregoing principles.

A. Guilt Phase

At the hearing below, Mr. McCain and the Appellant both testified with respect to counsel's performance at trial. In some respects, their testimony conflicted; since this case is now in an appellate posture all conflicts in the evidence must be resolved in a light most favorable to sustaining the trial court's order denying the motion. Boone v. State, 183 So.2d 869 (1DCA Fla. 1966); Plymale v. State, 201 So.2d 85 (3DCA Fla. 1967).

It is evident from Mr. McCain's testimony that he rendered effective assistance. The Appellant acknowledged Mr. McCain consulted with him frequently in the course of his preparation for trial (T 130, 155). They agreed the defense at trial would be that Walter Rhodes fired the shots (T 93, 157). Mr. McCain determined the best way to present this defense would be through cross-examination of the State's witnesses, to focus the case on Rhodes, and have the Appellant keep a low profile (T 97).

The Appellant did not testify because he would not come across well to the jury, it would open him to cross-examination, and it would have required incriminating Sonia Jacobs Linder or her son Eric, which the Appellant did not want to do (T 98-99). There were no other witnesses suggested by the Appellant to Mr. McCain; the only name the Appellant ever gave him was his mother's, and he did speak to her (T 43).

Thus, the evidence presented below established that Mr. McCain presented the defense the Appellant wanted to have presented, and his manner of presenting it was based on strategic decisions made after an investigation. It is well settled that matters of trial tactics and strategy cannot serve as the predicate for a finding of ineffective assistance. United States v. Beasley, 479 F.2d 1124 (5th Cir.), cert. den., 414 U.S. 924 (1973); Williams v. Wainwright, 681 F.2d 732 (11th Cir. 1982). As this Court held in Songer v. State, 419 So.2d 1044 (Fla. 1982), "We will not use hindsight to second-guess counsel's strategy, and so long as it was reasonably effective based on the totality of the circumstances . . . it cannot be faulted." Id. at 1047.

The Appellant's specific criticisms of certain other portions of counsel's representation at the guilt phase are likewise without merit. With regard to counsel's failure to seek recusal of the trial judge, a pro se motion for

recusal was denied by the trial court and an appeal, this Court held no personal prejudice or bias had been demonstrated. Tafero v. State, 403 So.2d 355, 361 (Fla. 1981). Furthermore, Mr. McCain testified he had considered filing a motion for recusal but determined not to for two reasons. First, he did not feel there was any legal basis for it (T 45-46). Second, he had tried cases before Judge Futch previously and he knew the judge to be a fair judge who would base his rulings on the law and not his personal feelings (T 46). Thus again, the evidence shows the decision not to seek recusal was made for strategic reasons, and it certainly is not a substantial deficiency measurably below that of competent counsel. Thompson v. Wainwright, 447 So.2d 383 (4DCA Fla. 1984).

With regard to venue, Mr. McCain testified he decided to wait until jury selection and see if it was possible to get a fair trial in Broward County (T 50). The publicity in the case was not, in his mind, an indication that the Appellant could not get a fair trial, and the subject was covered on voir dire (R 50-51). There is no evidence in the record to show that the Appellant received anything less than a fair trial. See, Tafero v. State, 403 So.2d 355, 359-360 (Fla. 1981).

Mr. McCain was unable to specifically recall whether the flag was flown at half mast during trial and

speeches were made by the Attorney General on whether he had asked the court to voir dire the jury concerning these matters (T 48-49). However, the Appellee maintains counsel's failure to ask the trial court to question the jurors was clearly a tactical decision, for such an inquiry would have only served to emphasize or bring to the jury's attention a fact which was better left unnoticed.

Mr. McCain testified that based on the discovery material, he was aware the charges could be proved either through premeditation or felony-murder (T 52). Considering that the trial in this case took place in 1976, six years before the decision in Enmund v. Florida, 458 U.S. 782 (1982), the claim that counsel should have requested a special interrogatory verdict lacks merit. Counsel cannot be deemed ineffective for failing to foresee the Enmund decision. Proffitt v. Wainwright, 685 F.2d 1227, 1249, n. 34 (11th Cir. 1982). Furthermore, the Appellant has failed to demonstrate a reasonable probability that the results would have been different. In fact the evidence is to the contrary, since this Court concluded on direct appeal that the evidence against the Appellant as a present, active participant in the murder, was overwhelming. Tafero v. State, 403 So.2d 355, 359 (Fla. 1981). (See also the discussion of the Enmund issue in Point I of this brief.)

Mr. McCain likewise did not have any specific

recollection of the excusal by the court of a potential juror, Mrs. Garretson (T 54-57). The trial record shows, however, she was not excused for cause on the basis of her views on capital punishment. Rather, she was excused with everyone's consent because she felt uncomfortable sitting on a capital murder case (RVII 24), much the same as if a juror felt uneasy or inadequate sitting on a rape or burglary case. In fact, the trial court's explanation immediately following Mrs. Garretson's excusal shows that the court was excusing Mrs. Garretson not because of her feelings under Witherspoon v. Illinois, 391 U.S. 510 (1968), but because her feelings about capital cases might cause her to not give the defendant a fair trial (RVII 25). In addition, counsel's failure to object may have been a tactical choice to save one of his limited number of peremptory challenges.

This case is distinguishable from Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982), cited by the Appellant, for in Goodwin the juror had given a preliminary indication of opposition to capital punishment by standing up as asked to by the court and in response to a question from the prosecutor, saying she could not vote. The defense attorney did not inquire further, so the juror's excusal was in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968), because she had indicated opposition to the death penalty but never stated her feelings would lead her to automatically

vote against the death penalty without regard to the evidence or prevent her from making an impartial guilt determination. By contrast, in this case, the Witherspoon issue never arose. Mrs. Garretson never stated what her feelings were with regard to capital punishment; she simply stated she did not want to be a juror in the case. Counsel's decision to agree to her excusal was not ineffective; he probably concluded that to require a juror to serve who did not want to would be detrimental to his client.

The foregoing discussion of counsel's effectiveness at the guilt phase of the trial covers the alleged instances of ineffectiveness referred to at the evidentiary hearing below. It should be noted that the defense expert witness, Peter Raben, did not have an opinion as to counsel's effectiveness at the guilt phase and this subject was not addressed in present counsel's concluding argument (T 303 ff.).

Accordingly, as to any other claims of ineffectiveness that may be raised in the Appellant's brief, Appellee will rely on its response to the Motion for Post-Conviction Relief (PR 400-405).

B. Sentencing

The Appellant contends with regard to the sentencing phase of his trial that his counsel was ineffective because he failed to perform a pretrial investigation into mitigating evidence and to discuss the sentencing proceedings with the Appellant, he failed to present evidence, and his closing argument to the jury amounted to asking for the death penalty. The Appellee maintains, based on the record below, that counsel's handling of the sentencing phase was reasonably effective.

First, as to preparation and presentation of evidence, Mr. McCain testified he went over the entire matter with the Appellant and the decision was made not to put on any evidence (T 60). The Appellant did not give him the names of any witnesses (T 66). They mutually agreed to "tone the sentencing portion down" (T 72), in order to foreclose the State from presenting information that would be detrimental to the Appellant (T 73). Counsel also decided not to use the alleged recantation of Robert Sheely in regard to the Appellant's 1967 convictions, because that would have opened the door for the State to bring in some of the details of these crimes (T 82). As it was, all the State did was advise the jury of the existence

of the convictions (T 83).[7]

Mr. Raben, the expert witness called by the defense below, conceded that there could be strategic reasons for not calling character witnesses at the penalty phase, such as if the witnesses could be severely impeached on cross-examination (T 225). He also acknowledged the facts underlying the Appellant's 1967 convictions were "heinous" (T 230).

The defense called two witnesses, the Appellant's mother and Renee Siebert, who allegedly could have testified as to the Appellant's character at the penalty phase. The prosecutor on cross-examination got Mrs. Siebert to acknowledge that the Appellant was jailed in 1967, paroled, and then in violation of his parole (T 251-252). This certainly counteracted whatever benefit her testimony that the Appellant was kind to the family dog (T 245) would have had.

As the foregoing discussion establishes, Mr. McCain, with the Appellant's concurrence, made a strategic decision not to present evidence at the penalty phase.

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[7]This was certainly a wise decision, since in 1979 a circuit court in Dade County held an evidentiary hearing on this matter and concluded Sheely's testimony was "unbelievable and incredible in light of actual trial testimony of eye witnesses and the victims and exhibits at the time of trial" (PR 764). See also Point III, infra.

Any character witnesses would have been subject to impeachment because the 1967 convictions, the Appellant's purchase of firearms while on parole, and his violation of parole would have been inquired into on cross-examination. Since that decision was made, Mr. McCain did not have a duty to go out and locate character witnesses. See, Strickland v. Washington, supra, 80 L.Ed.2d at 696; Washington v. Strickland, 693 F.2d 1243, 1256 (11th Cir. 1982) (en banc). Likewise, it was certainly reasonable for Mr. McCain not to pursue the 1967 convictions further because this would have led to the prosecutor's bringing out more details of the crimes, further showing the Appellant's bad character.

Thus, defense counsel's decision not to present evidence did not stem from ignorance or lack of preparedness; rather, it was a tactical choice. The decision was therefore one within counsel's discretion. Brown v. State, 439 So.2d 872 (Fla. 1983); Straight v. Wainwright, 422 So.2d 827 (Fla. 1982). See also Adams v. Wainwright, 769 F.2d 1443 (11th Cir. 1983); Songer v. Wainwright, 571 F.Supp. 1384 (M.D. Fla. 1983) affd. 733 F.2d 788 (11th Cir. 1984).

With respect to the jury instructions on mitigating factors, defense counsel did not have any basis for objecting to them since it has been definitively held the instructions that were given in this case do not

restrict consideration of the mitigating circumstances. Straight v. Wainwright, 422 So.2d 827, 831 (Fla. 1981); Alvord v. Wainwright, 725 F.2d 1282, 1299 (11th Cir. 1984) [same exact jury instructions upheld]. The Appellant has failed to show either a substantial deficiency or prejudice in this regard, since it is certainly effective representation not to object to instructions which correctly state the law.

Finally, Mr. McCain testified the closing statement he made to the jury had been discussed with the Appellant and it was the statement the Appellant wanted him to make (T 103). Again, the objective was to keep the State from coming up with any more material detrimental to the Appellant, to tone the sentencing proceeding down (T 72-73). He did not think it was necessary to reargue that the Appellant did not fire any shots, since the jury had just heard that in his final argument the day before (T 75), and by its verdict, the jury found either that the Appellant fired the shots or intended that deadly force be used. See Point I, supra. Mr. McCain's contemporaneous notes of his conversation with the Appellant indicate:

> Discussed with my client, feels he did not receive a fair trial, nor a fair consideration by the jury. Consideration by the jury of sentence is a charade and will not crawl or beg for his life.

(T 70)

Although, in the opinion of the defense expert, Mr. Raben, the closing argument amounted to asking for the death penalty (T 213), in fact the same type of argument was made in the co-defendant, Sonia Jacobs Linder's trial and the jury returned a life recommendation. [An excerpt from that trial transcript is attached as an appendix to this brief.] In view of this fact, the validity of the expert's opinion is questionable.

The closing argument made by Mr. McCain was in furtherance of his strategy to de-emphasize the sentencing proceeding and it effectuated his client's wishes. The Appellant's argument that counsel had an obligation to act contrary to what his client wanted is without support. Just as a defendant may elect to waive his right to remain silent, Witt v. State, 342 So.2d 497 (Fla. 1977), or represent himself and forego the assistance of counsel, Faretta v. California, 422 U.S. 806 (1975); Goode v. State, 365 So.2d 381 (Fla. 1978), in this case, the Appellant's decision not to beg for mercy was not one defense counsel was required to ignore.

The instant case is not comparable to House v. Balkcom, 725 F.2d 608 (11th Cir. 1984), cited by Appellant, for there defense counsel had failed to investigate and prepare defense strategy, or to Douglas v. Wainwright, 714 F.2d 1545 (11th Cir. 1983), vacated, Wainwright v. Douglas, ___ U.S. ___, 104 S.Ct. 3575 (1984), on remand,

739 F.2d 531 (11th Cir. 1984), where there was no investigation of mitigating evidence and defense counsel lacked understanding of sentencing procedures. The decision in King v. Strickland, 714 F.2d 1481 (11th Cir. 1983), has been vacated at 104 S.Ct. 2651, but there, defense counsel made an argument which distanced himself from his client and indicated the attorney had reluctantly represented a defendant who had committed a reprehensible crime. In Smith v. Wainwright, 741 So.2d 1248 (11th Cir. 1984), the case was remanded for an evidentiary hearing, for the purpose of determining trial counsel's strategy.

Unlike the foregoing cases, the evidentiary hearing held before the trial court established defense counsel's performance at sentencing was the result of preparation and based on tactical decisions made by an experienced attorney after a full discussion with his client. The standards of effectiveness outlined in Strickland v. Washington, supra, and Knight v. State, supra, have been met.

Finally, the Appellant reargues the claim, determined adversely to him on direct appeal, Tafero v. State, 403 So.2d 355, 362 (Fla. 1981), that the trial judge should have inquired into the Appellant's waiver of presentation of evidence and argument in mitigation. The Appellee maintains the trial court properly accepted counsel's representations as binding on the Appellant.

United States v. Daniels, 572 F.2d 535, 540 (5th Cir. 1978). Ross v. Wainwright, 738 F.2d 1217 (11th Cir. 1984), deals with the issue of waiver of a claim of ineffective counsel. In this case, the trial court determined that counsel's representation was effective.

C. Conclusion

It is well settled that a defendant is entitled not to errorless or perfect counsel, but to counsel who was reasonably likely to render and rendered reasonably effective assistance. Meeks v. State, 382 So.2d 673 (Fla. 1980); Herring v. Estelle, 491 F.2d 125, 127 (5th Cir. 1974). A review of the trial record and the Record on Appeal in the instant case clearly establishes that defense counsel's performance satisfied the Sixth Amendment. In conclusion, Appellee submits this Court's remarks in Downs v. State, 453 So.2d 1102 (Fla. 1984), are particularly appropriate to the instant case:

> In Florida, there has been a recent proliferation of ineffectiveness of counsel challenges. Criminal trials resolved unfavorably to the defendant have increasingly come to be followed by a second trial of counsel's unsuccessful defense. Although courts have found most of these challenges to be without merit, defense counsel, in many of the cases, have been unjustly subjected to unfounded attacks upon their professional competence. A claim of ineffective assistance of counsel is extraordinary

and should be made only when the facts warrant it. It is not a claim that is appropriate in every case. It should be the exception rather than the rule.

453 So.2d at 1107.

POINT III

THE ALLEGED CONFESSION OF A THIRD PARTY TO THE 1967 CRIMES FOR WHICH THE APPELLANT WAS CONVICTED AND UPON WHICH AN AGGRAVATING FACTOR WAS BASED DOES NOT ENTITLE THE APPELLANT TO RESENTENCING.

The Appellant's claim of entitlement to re-sentencing because another party has allegedly confessed to committing the 1967 crimes upon which an aggravating factor was based should have been stricken by the trial court for the reasons set forth in the State's Motion to Strike (PR 51-55). Since the trial court's denial of post-conviction relief can be affirmed if it is correct for any reason, Stuart v. State, 360 So.2d 406, 408 (Fla. 1978), the Appellee again maintains the prior coram nobis litigation involving this claim is res judicata.

The 1967 convictions were first considered by the Third District in a coram nobis action and relief was denied. Tafero v. State, 406 So.2d 89 (3DCA Fla. 1981). Encouraged by dicta in the appellate court's opinion, the Appellant relitigated the issue in a Petition for Writ of Error Coram Nobis filed in this Court, where again, relief was denied. Tafero v. State, 440 So.2d 350 (Fla. 1983). These decisions are conclusive and binding in the present case. See, Jackson v. State, 452 So.2d 533 (Fla. 1984).

The case of Zeigler v. State, 452 So.2d 537 (Fla. 1984), upon which the Appellant relies as authority

for bringing the claim is distinguishable for there the trial judge had allegedly made a statement of bias prior to the trial which went to the fairness of his sentencing attitude. This was not the type of new fact generally asserted in a coram nobis proceeding, and coram nobis was an inappropriate remedy since if the allegation was true, the matter was known to the court at the time of trial. Unlike Zeigler, the instant case is controlled by Hallman v. State, 371 So.2d 482 (Fla. 1979), a coram nobis proceeding wherein this Court considered the impact newly-discovered evidence would have both on the trial and sentencing in a capital case. In Hallman, the court held where the trial court would not have been precluded from entering the death sentence, the defendant was not entitled to relief. Therefore, as in Hallman, the Appellant sub judice did not present a cognizable claim.

Assuming this Court does reach the merits, Appellee would first point out, as stated in its pleading filed in the prior coram nobis proceeding (PR 428-429), that the Circuit Court in Dade County which held a hearing on this matter rejected the confession of Sheley as unbelievable and incredible in light of the trial testimony identifying the Appellant and the fact that Sheley did not say he was guilty until eight years after the Appellant's conviction and then the Appellant waited four more years before taking action (PR 764-765).

Most importantly, it was established at the hearing below that defense counsel was aware of Sheley's purported confession at the time of the Appellant's sentencing. Mr. McCain testified he did not pursue it because the convictions existed and had he put on such testimony, the prosecutor also could have gone into great detail about the crimes (T 81-83). Thus, the Sheley confession is not new evidence, it has been rejected as unbelievable by a trier of fact, and it does not support the Appellant's claim of entitlement to resentencing.

POINT IV

CONSIDERATION OF THE MITIGATING FACTORS WAS NOT LIMITED TO THOSE IN THE STATUTE.
(Appellant's Points V and VI)

The Appellant contends the trial court failed to consider nonstatutory mitigating circumstances, and the jury instructions limited the mitigating factors to those enumerated in Fla. Stat. 921.141(6). This issue was raised in substance in the Appellant's initial brief on direct appeal as Point XIII(B) at pages 54-56. Accordingly, the Appellee filed a Motion to Strike it as a ground for post-conviction relief, since it had (or could have) been presented on direct appeal (PR 54). Adams v. State, 449 So.2d 891 (Fla. 1984); Jackson v. State, 452 So.2d 533 (Fla. 1984); McCrae v. State, 437 So.2d 1388 (Fla. 1983). Although the trial court denied the Motion to Strike (T 335), Appellee urges this Court to consider it and strike the claim. This Court has jurisdiction to do so, since the trial court's ruling denying the Motion for Post-Conviction Relief can be upheld if it is right for any reason. Stuart v. State, 360 So.2d 406, 408 (Fla. 1978).

Assuming arguendo that the court reaches the merits, the Florida statute has been definitively held not to limit the mitigating circumstances. Spinkellink v. Wainwright, 578 F.2d 582, 620-621 (5th Cir. 1978);

Songer v. State, 365 So.2d 969 (Fla. 1978); Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983) (en banc). The jury instructions given in this case (S 56-57), likewise have been held not to limit consideration to the statutory mitigating circumstances. Straight v. Wainwright, 422 So.2d 827, 831 (Fla. 1981); Alvord v. Wainwright, 725 F.2d 1282, 1299 (11th Cir. 1984) (exact jury instruction upheld). Therefore, the Appellant's jury was not limited to the mitigating factors in the statute in determining the appropriate penalty.[8]

As to the trial judge, the Appellant asserts, based on the decision in Jacobs v. State, 396 So.2d 713, 718 (Fla. 1981), that the trial judge did not believe he could consider any nonstatutory mitigating circumstances. However, the Appellant did not make any effort to present such evidence. To argue mitigating evidence was not considered when none was tendered can hardly establish prejudice. See, Shriner v. Wainwright, 715 F.2d 1452, 1457-58 (11th Cir. 1983). Moreover, the same trial judge, by denying the Motion for Post-Conviction Relief on its merits, has made it clear that there was no legal error in his imposition of the death penalty.

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[8] In fact, defense counsel testified he was aware he was not limited to the mitigating factors in the statute (T 60).

Finally, an appeal this Court did consider a non-statutory factor--Rhodes' plea to second degree murder--a fact which was clearly known to the trial court as well, but found it unpersuasive. Tafero v. State, 403 So.2d 355, 362 (Fla. 1981). This Court concluded, "The [death penalty] statute was not unconstitutionally applied in this case." Tafero v. State, supra, 403 So.2d at 363. Therefore, the Appellant has failed to demonstrate that any limitation of mitigating circumstances has rendered his death sentence illegal.

POINT V

APPELLANT'S SENTENCE OF DEATH IS PROPER AND NOT ARBITRARY AND CAPRICIOUS, WHERE THERE IS A RATIONAL BASIS FOR HIS SENTENCE OF DEATH AS COMPARED TO THE LIFE SENTENCES RECEIVED BY HIS CO-DEFENDANTS.

Appellant alleges that his sentence of death was arbitrarily imposed on him when compared to the life sentences received by his co-defendants, Linder and Rhodes. The Appellee submits that such a contention is without merit.

In Jacobs v. State, 396 So.2d 713, 718 (Fla. 1981), this Court reviewed Linder's sentence of death and reduced her sentence to life imprisonment. However, this was done because in Linder's case, the jury had recommended life, whereas in the instant case, the jury recommended death. Accordingly, in reviewing Linder's sentence, this Court, as well as the trial court, was bound by the standard set forth in Tedder v. State, 322 So.2d 908 (Fla. 1975), that is, whether the facts allowing imposition of a death sentence over a jury recommendation of life imprisonment should be so clear and convincing that virtually no reasonable person could differ.

This Court in its opinion in Jacobs v. State, supra, held that two of the three aggravating factors found by the trial court were valid. In mitigation, this Court

noted that the jury may have considered the fact that Jacobs was the mother of two children for whom she cared, her role was mostly passive and she was under Appellant's influence, she may have perceived her actions were necessary to protect her family and that she had no past history of violence. 396 So.2d at 718.

By contrast, in the Appellant's case, this Court upheld four of the six aggravating circumstances found by the trial court. The aggravating circumstances present in the instant case, and not in Jacobs' case were the facts that the murders were committed by the Appellant while he was on parole and while he was actually a fugitive from justice, and that the Appellant had a significant history of prior criminal activity involving the use or threat of violence to the person of another. Tafero v. State, supra, 403 So.2d at 362.

In regards to Rhodes' life sentence, this Court found no arbitrariness, where the evidence showed that Appellant did the shooting and was probably the leader of the group. Id.[9] Thus, there are clear differences between the cases of Appellant and that of his co-defendants. There is a rational basis for distinguishing between the

[9]Thus, this Court did consider the non-statutory mitigating factor of Rhodes' plea to second degree murder. This is also a fact known to the trial court. However, it was a fact obviously found not to be persuasive.

sentences imposed on Appellant and his co-defendants. See, e.g., Palmes v. Wainwright, ___ So.2d ___, 9 FLW 472, 473 (Fla. November 2, 1984); Palmes v. Wainwright, 725 F.2d 1511, 1524 (11th Cir. 1984) (Fact that immunity given to female participant is not so disproportionate as to vacate the principle of proportionality or to be so arbitrary or cruel and unusual under the Constitution). This Court having followed the appropriate statute and standards emanating from it, provided fair review to the Appellant on his direct appeal, and he has failed to establish otherwise, or that his constitutional rights were violated. See, Ford v. Strickland, 696 F.2d 804, 819 (11th Cir. 1983) (en banc).

POINT VI

FLORIDA'S DEATH PENALTY IS NOT UNCONSTITUTIONAL ON THE BASIS THAT IT DISCRIMINATES BASED ON THE RACE OF THE VICTIM OR SEX OF THE OFFENDER.

This claim is without merit and has been consistently rejected by this Court as well as the federal courts. Martin v. State, ___ So.2d ___, 9 FLW 325 (Fla. August 28, 1984); Dobbert v. State, ___ So.2d ___, 9 FLW 327 (Fla. August 28, 1984); Jackson v. State, 452 So.2d 533 (Fla. 1984); Ford v. Wainwright, 451 So.2d 471 (Fla. 1984); Adams v. State, 449 So.2d 819 (Fla. 1984); Sullivan v. State, 441 So.2d 609 (Fla. 1983). See also Henry v. Wainwright, 743 F.2d 761 (11th Cir. 1984); Ford v. Strickland, 734 F.2d 538, 540, app. to vacated denied, ___ U.S. ___, 104 S.Ct. 3498, 82 L.Ed.2d ___ (1984); Adams v. Wainwright, 734 F.2d 511 (11th Cir. 1984), vacated without opinion, ___ U.S. ___, 104 S.Ct. 2183, 80 L.Ed.2d 809 (1984); Sullivan v. Wainwright, 721 F.2d 316 (11th Cir. 1983), stay denied, ___ U.S. ___, 104 S.Ct. 450, 78 L.Ed.2d 210 (1983); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978).[10]

[10] Contrary to Appellant's assertions it is not an issue still pending in the federal appellate courts as it concerns the death penalty in Florida.

CONCLUSION

Wherefore, based on the foregoing reasons and authorities, the Appellee respectfully requests that this Court affirm the trial court's order denying the Motion for Post-Conviction Relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of Appellee has been furnished to WEINER, ROBBINS, TUNKEY, & ROSS, P.A., 2250 S.W. 3rd Avenue, Miami, FL 33129; and to GREENE & COOPER, P.A., 500 Roberts Building, 28 West Flagler Street, Miami, FL 33130, this 19th day of November, 1984.

Of Counsel