IN THE SUPREME COURT OF FLORIDA

ED CLIFFORD THOMAS,

Petitioner,

v. CASE NO. 68,573

LOUIE L. WAINWRIGHT, Secretary, Department of Corrections, State of Florida, and R.L. DUGGER, Superintendent, Florida State Prison, at Starke, Florida,

Respondents.

RESPONSE TO PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF HABEAS CORPUS, REQUEST FOR STAY OF EXECUTION AND APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

COMES NOW Respondents, LOUIE L. WAINWRIGHT, and R. L. DUGGER, by and through undersigned counsel, and file this response to the petition for extraordinary relief, for a writ of habeas corpus, request for stay of execution and applicaiton for stay of execution pending disposition of petition for writ of certiorari, and in opposition thereto, state as follows:

PROCEDURAL HISTORY

Petitioner is presently in custody of Louie L. Wainwright, Secretary, Florida Department of Corrections, and R. L. Dugger, Superintendent, Florida State Prison, at Starke, Florida, pursuant to valid judgments of guilty entered by the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. The Petitioner, after a trial by jury was convicted on June 24, 1981 of two counts of first degree murder, pursuant to section 782.04(1)(a), Florida Statutes (1981). (R. 1526, 1527).[1/] After jury recommendations of life, (R. 1537, 1538), on August 24, 1981, Petitioner was

[1/] In this response, "R" will refer to the record on Petitioner's direct appeal, Thomas v. State, case no. 61,170.

sentenced to death by electrocution on the second count of first degree murder. (R. 1545-1548), and to a sentence of life imprisonment with a mandatory minimum of twenty-five (25) years imprisonment, on the first count of first degree murder. (R. 1545-1548).

The Petitioner appealed his convictions to the Florida Supreme Court, raising the following five (5) issues:

I. THE DEATH PENALTY IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

II. THE COURT ERRED BY IMPROPERLY ADMITTING EVIDENCE OVER THE DEFENDANT'S OBJECTION.

III. THE COURT ERRED BY PREJUDICIAL CONDUCT PRECLUDING A FAIR AND IMPARTIAL TRIAL FOR DEFENDANT.

IV. THE WEIGHT OF THE EVIDENCE DOES NOT SUPPORT A CONVICTION OF FIRST DEGREE MURDER ON COUNT II IN THE INDICTMENT OF THE DEFENDANT.

V. THE COURT ERRED BY IMPOSING THE DEATH SENTENCE FOR THE DEFENDANT'S CONVICTION ON COUNT II.

See brief of Petitioner on direct appeal. After addressing each issue this Court affirmed the convictions and sentences. Thomas v. State, 456 So.2d 454 (Fla. 1984). The Petitioner did not seek review in the United States Supreme Court.

On March 11, 1986, the Governor signed a warrant for Petitioner's execution. Said execution is scheduled for April 15, 1986 at 7:00 a.m. The warrant expires on April 16, 1986 at 12:00 p.m. The present petition was filed on April 9, 1986 at approximately 2:00 p.m. This response follows.

FACTS

Due to the slanted method in which Petitioner has set out the facts in his petition, Respondents cannot accept them as written. Rather, in the discussion of each issue raised, Respondents will set out the pertinent facts which concern that issue.

GROUNDS RAISED IN PETITION

The Petitioner raises two grounds in his present petition, one, that he did not receive effective assistance of appellate counsel on his direct appeal, and two, the "Lockhart claim." In support of the first ground, Petitioner alleges that appellate counsel was ineffective for failing to insure that a complete record was before this Court, i.e., counsel failed to supplement the record with the pre-sentence investigation, as well as ineffective for failing to raise and argue before this Court a violation of Gardner v. Florida, 430 U.S. 349; a Lockett v. Ohio, 438 U.S. 583 (1978) violation; the failure of the trial court to specify why it believed the jury's recommendation of life to be unreasonable; the trial court's prohibition against "backstricking" during voir dire; that one juror was not sworn in; and that the trial judge left the courtroom during voir dire.

ARGUMENT

1. Ineffective Assistance of Appellate Counsel

In the present habeas corpus petition, Petitioner alleges that his appellate counsel rendered ineffective assistance by not raising various issues on his direct appeal. As with a claim of ineffective assistance of trial counsel, this claim regarding appellate counsel's performance must be judged in light of the standards enunciated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Johnson v. Wainwright, 463 So.2d 207, 209 (Fla. 1985).

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 reviewing the Strickland standard as it applies to ineffectiveness of counsel on appeal, this Court has held that a Petitioner in a habeas corpus proceeding must show:

> . . . first, that there were specific errors or omissions of such magnitude that it can be said that they deviated from the norm or fell outside the range of professionally acceptable performance; and second, that the failure or deficiency caused prejudicial impact on the appellant by compromising the appellate process to such a degree as to undermine confidence in the fairness and correctness of the outcome under the governing standards of decision.
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> Johnson v. Wainwright, supra, 463 So.2d at 209.

See also Wilson v. Wainwright, 474 So.2d 1162, 1163 (Fla. 1985).

Specifically, in reviewing claims of ineffective assistance of appellate counsel, it is recognized that a habeas corpus petitioner's allegations of ineffective assistance of counsel should not be allowed to serve as a means for circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal. Steinhorst v. Wainwright, 477 So.2d 537, 539 (Fla. 1985); Harris v. Wainwright, 473 So.2d 1246, 1247 (Fla. 1985); McCrae v. Wainwright, 439 So.2d 868, 870 (Fla. 1983). See also Smith v. State, 457 So.2d 1380, 1384 (Fla. 1984). Appellate counsel is not required to press every conceivable claim upon appeal. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). The Supreme Court recognized that experienced advocates "have emphasized the importance of winnowing out weaker arguments

on appeal and focusing on one control issue if possible, or at most on a few key issues..." A brief that raises every colorable issue runs the risk of burying good arguments ... in a verbal mound made up of strong and weak contentions." 77 L.Ed.2d at 994. Thus, the Court held that "for judges to second guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy that underlies Anders."[2/] 77 L.Ed.2d at 995. See also Johnson v. Wainwright, supra; Cave v. State , 476 So.2d 180, 183 n. 1 (Fla. 1985).

Counsel is also not required to raise issues which are not properly preserved by trial counsel for appellate review, Jackson v. State, 452 So.2d 533, 536 (Fla. 1984), or raise issues reasonably considered to be without merit. Francois v. Wainwright, 741 F.2d 1275, 1285 (11th Cir. 1984); Funchess v. State, 449 So.2d 1283, 1286 (Fla. 1984). Because of the presumption of competence and the required deference to counsel's strategic choices, where appellate counsel's failure to raise certain issues on direct appeal could have been a tactical choice based on the need to concentrate the arguments on those issues likely to achieve success, counsel's performance will not be deemed ineffective. See Smith v. State, supra; McCrae v. Wainwright, supra; Demps v. State, 416 So.2d 808, 809 (Fla. 1982).

[2/] Anders v. California, 386 U.S. 738 (1967).

a. APPELLATE COUNSEL WAS NOT INEFFECTIVE IN HIS FAILURE TO INCLUDE THE P.S.I. IN THE RECORD ON APPEAL BEFORE THIS COURT.

Petitioner contends that his appellate counsel was ineffective in failing to include in the record on appeal to this Court, on direct appeal, the presentence investigation reports (P.S.I.). Respondents maintain, however, that in the case sub judice, the failure to so include the P.S.I. in the record on appeal was not ipso facto indicative of ineffectiveness, pursuant to the standards enunciated in Strickland v. Washington, 466 U.S.___, 104 S.Ct 2052, 80 L.Ed.2d 674 (1984). See also Johnson v. Wainwright, 463 So.2d 207, 209 (Fla. 1985).

Assuming, arguendo, that appellate counsel's performance, relative to the record on appeal, could in any way be deemed deficient, Respondents maintain herein that, in light of those portions of the P.S.I. relied upon by the Petitioner (Petitioner's Petition pp. 17-22; Petitioner's Appendix 2),[3] said performance did not prejudice Petitioner's defense on appeal to this Court. It is evident that much of the P.S.I., as represented by Petitioner, was either cumulative in nature to testimony adduced at trial and already in the record, or irrelevant to the murder for which the Petitioner was sentenced to death.

Initially, the P.S.I. information relative to the Petitioner's family and personal background, education, interests and activities, and physical status, was merely cumulative to that information supplied by the Petitioner in his testimony at trial, and in testimony as supplied by other witnesses. This is particularly true regarding information pertaining to the Petitioner's mother and father (R 1281, 1287-1288), brothers and sisters (R 1281-1282), father's drinking problem (R 1052, 1086, 1281), father's abusiveness (R 1052-3, 1086, 1255, 1285), father hitting Petitioner with

[3] Said Appendix was not made available to Respondents at the time this response was drafted.

wooden mallet (R 1281), Petitioner's education (R 78-80, 1008, 1044-5, 1280, 1288), Petitioner running away (R 1053, 1086-7, 1284, 1286), Petitioner's alcohol consumption (R 81-82, 981, 985-990, 1032-1033), Petitioner's sexual orientation (R 1050, 1054-1055), and Petitioner's epileptic seizures (R 1288-1289),

Regarding the P.S.I. assessment by Dr. Arnold Zager, much of the preliminary "mental" assessment was repetitive of the previous P.S.I. findings relative to Petitioner's family life, personal life, and alleged abuse - which, as Respondents maintain, was cumulative to information adduced in trial testimony. Regarding Dr. Zager's "impressions", it is striking that they relate exclusively to the Petitioner's killing of Mr. Walsworth - the crime for which Petitioner was sentenced to life imprisonment - and not in any fashion to the killing of Russell Bettis - the crime for which Petitioner was sentenced to death.

Regarding the P.S.I. information relative to Petitioner's employment (R 1018), and Bill Ayers (R 973-1009, 1254-1257), said information was, as well, essentially cumulative to that adduced at trial.

As such, Respondents maintain herein that the Petitioner was not prejudiced by the failure of appellate counsel to provide this Court with the P.S.I. for consideration on direct appeal. The portions of the P.S.I. now relied upon by Petitioner were either cumulative in nature to that already in the record, or irrelevant to the murder of Russell Bettis. In that respect, nothing in the P.S.I. could have effected this Court's review, on direct appeal, under its Tedder analysis. See Thomas v. State, 456 So.2d 454, 460-461 (Fla. 1984)("... there does not appear to be any reasonable basis discernible from the record to support the jury's recommendation.") Under Tedder, this Court looks to what the jury considered in making its recommendation. Since the P.S.I.

was not considered by the jurors, it was not material to this Court's analysis of the jury recommendation of life. As such, the fact that the P.S.I. even existed would be irrelevant to this Court's Tedder analysis on direct appeal. Therefore, Petitioner has failed to demonstrate the requisite prejudice required under Strickland, and, as such, does not warrant habeas corpus relief. See Johnson, supra.

b. FAILURE TO PRESENT THE GARDNER ISSUE

On Thursday, August 20, 1981, the trial court heard the Petitioner's motion for a new trial. At the conclusion of the hearing, the court with counsel discussed the date for sentencing. (R. 1356). Defense counsel initially requested that the date be moved from August 26, 1981 to August 31, 1981. (R. 1356). The trial judge commented that he anticipated receiving the P.S.I. the next morning and that he was not going to do anything until he received the P.S.I. (R. 1356). Defense counsel stated that he had wanted to go out of town for the weekend, and asked if the court could have the sentencing the next day. (R. 1357). The trial judge stated that he would have to stay to go over the P.S.I. Defense counsel then stated he would like to leave the sentencing as scheduled, Monday, August 26. (R. 1357).

Defense counsel then stated that the state had not told him if the P.S.I. was ready. The court responded that defense counsel could check with the court's office in the morning. (R. 1357). The state also replied that it was their understanding that the report was or had been typed up. (R. 1358).

On Monday, August 24, 1981, at approximately 1:35 P.M., the hearing on the Petitioner's sentence commenced. The trial court stated that it had deferred imposition of sentence until it had received a presentence report. (R. 1361). The court then inquired of defense counsel if there was any legal or other cause why sentence should not be pronounced. Defense counsel replied "None at this time, Your Honor." (R. 1362). The trial court asked defense counsel if he had seen the P.S.I. Counsel replied that he had not. The court stated that the P.S.I. had been made available to counsel on Friday, and it had been there all morning. (R. 1362). The court again asked if there was legal cause to show why sentence should not be imposed. The defense counsel then stated:

> Your Honor, the legal cause that I have to oppose the sentencing at this time was articulated on Thursday afternoon at the motion for new trial, and I would hope to reassert those grounds and reemphasize them today incorporating into the

> record anything that I said on Thursday, the 3rd of August.
> (R. 1362)

Defense counsel then went on to argue to the trial court that it should follow the jury's recommendation of life. (R. 1363-1364). At no time did defense counsel object to the court imposing sentence without his first having an opportunity to review the P.S.I.

On September 4, 1981, for the first time in a motion for rehearing (R. 1549-1554), defense counsel alleged that he was not prepared for sentencing because he had not been notified that the presentence investigation was available to him on Friday, August 21, 1981. Defense counsel further alleged that because of another hearing on the morning of sentencing, he did not have the time to review the P.S.I. and to make comments with respect to the same. (R. 1549-1550).

Defense counsel then asserted that because the trial court placed great credence on the P.S.I., it was necessary to permit rehearing to allow counsel to contest certain matters contained in the report. Specifically, defense counsel contested the probation officer's recommendation that the contemporaneous second murder could be used as an aggravating factor, that the aggravating factor of avoiding or preventing a lawful arrest was applicable, that the aggravating factor that the murder was committed in a cold, calculated manner was applicable, (R. 1550-1551), and the failure to find that the murder was committed while the Petitioner was under the influence of extreme mental, or emotional disturbance, especially by ignoring portions of Dr. Zager's report. (R. 1553).

On September 17, 1981, a hearing was held on the Petitioner's motion for rehearing. Defense counsel argued that the P.S.I. did not correctly analyze the aggravating and mitigating circumstances. (R. 1376). The trial court agreed and stated that it did not agree with the probation officer on all of her recommendations. (R. 1376). After further argument about the trial court's overriding of the jury recommendation (R. 1377-1378), defense counsel stated that he had completed his argument.

(R. 1378). The trial court stated that it would read the motions and the cited cases and defer ruling on the motion for rehearing. (R. 1379). Although the record does not contain an order by the trial court, it can be presumed that the motion for rehearing was denied.

The Respondents do not quarrel with the proposition that defense counsel must have an opportunity to be heard on matters contained in a presentence investigation report which the trial judge has considered in his sentencing order. Gardner v. Plonde, 430 U.S. 349 (1977). Respondents submit however that appellate counsel was not ineffective for failing to raise an alleged Gardner violation, as the record clearly does not support such a claim.

The record reflects that the presentence investigation was available for counsel's review the Friday before the Monday sentencing. The trial judge had specifically told counsel to call his office on Friday to find out when the report was available. What is apparent from the record is that defense counsel, for whatever reasons failed to do so. It is preposterous for Petitioner to state that three days over the weekend was not sufficient time to allow counsel to react to or refute the P.S.I. allegations. It certainly would not have been unreasonable for defense counsel to have foregone his plans to go away for the weekend and work instead.

Even more important is that at the sentencing hearing, defense counsel did not state as cause for not imposing sentence, his failure to review the P.S.I. Instead, he renewed his objections made at the motion for new trial, which were unrelated to the P.S.I. Defense counsel was obviously satisfied to proceed with the sentencing without having reviewed the P.S.I. His words certainly indicated that he was ready to proceed. In Gugliemo v. State, 318 So.2d 526 (Fla. 1st DCA 1975), the court held that although the day of sentencing was not a reasonable time prior to sentencing for disclosing a presentence investigation report to the accused, it was not error, where the defense counsel did not request that sentencing be deferred,

but indicated he was ready to proceed. Thus, based on the record it was certainly reasonable for appellate counsel to not have raised the Gardner issue.

As Petitioner has pointed out after the United States Supreme Court's decision in Gardner, this Court ordered numerous "Gardner" remands. This Court ordered on those remands that counsel have an meaningful opportunity to be heard on any of the matters contained in the presentence investigation. See Dougan v. State, 398 So.2d 439 (Fla. 1981). Respondents submit that appellate counsel was not ineffective for failing to raise the Gardner issue, because in effect, through defense counsel's written motion for rehearing and his later argument on the motion, he was given the opportunity to respond to the P.S.I. as would have been required on any Gardner remand.

Defense counsel's main concern with the P.S.I. was the probation officer's recommendation as to what was mitigating or aggravating circumstances. The trial court stated that it did not agree with all of the probation officer's recommendations. Neither in his written motion for rehearing or at the argument did defense counsel assert that there were any factual matters which were untrue or needed to be rebutted or explained.

Petitioner now complains that the assertion by the probation officer that Petitioner was an habitual offender was wrong. However, the trial court obviously discounted that when it found the mitigating circumstance of no significant prior criminal history to be present. Furthermore, as pointed out by Petitioner, besides the testimony at the sentencing hearing that Petitioner was a prospect for rehabilitation and a compassionate person, there was evidence of the same in the P.S.I., through the statement of Bill Ayers. Thus, the probation officer's observations were rebutted within the report. Petitioner also now complains about the probation officer's recommendation that there were no statutory mental mitigating circumstances. However, again the P.S.I. contains portions of Dr. Zager's report which could be read to rebut the officer's

recommendation. If there was an error in the excerpts from Dr. Zager's report, defense had an opportunity when he filed his motion for rehearing and at his argument on that to bring those errors to the trial court's attention. However, that was not done.

In sum, the record on appeal simply did not support an initial violation of Gardner as defense counsel was given the opportunity days in advance of sentencing to review the P.S.I. but chose not to. Instead he chose to proceed. Secondly, even if there was a violation, it was corrected by the motion for rehearing and argument thereon, where defense counsel was given an opportunity to present to the court any problems with the P.S.I. The trial court clearly indicated that although it had awaited imposition of sentence until after review of the P.S.I., it was not persuaded by the recommendations of the probation officer, but rather by its own independent judgment. Thus, based on the record, it was not unreasonable for appellate counsel to have raised the Gardner issue.

c. THE RECORD DOES NOT INDICATE THE TRIAL COURT REFUSED TO CONSIDER NON-STATUTORY MITIGATING CIRCUMSTANCES.

The Petitioner asserts that because the trial court's sentencing order lists the statutory mitigating circumstances and finds them inapplicable but does not refer to non-statutory mitigating evidence, the trial court failed to consider such evidence in mitigation. Petitioner also contends this is so because of the trial court's comment made during defense counsel's hypothetical inquiry into the jury's thought processes during the motion for rehearing "That is not in the mitigating." Also, Petitioner asserts the fact that the presentence investigation only analyzed statutory mitigating factors, shows the trial court did the same, even though the trial court stated: "I didn't agree with all of the probation officer's suggestions either. She recommended certain applied and certain didn't. I didn't agree with her on all of these." (R 1376). Respondent maintains the record establishes the trial court considered all the evidence presented.

First, Lockett v. Ohio, 438 U.S. 586 (1978), was decided three years before Petitioner's trial so it is reasonable to conclude the trial court followed its mandate. The trial judge did not restrict the presentation of mitigating evidence. In the sentencing order, the trial court stated, ". . . that of the nine aggravating circumstances, one is applicable to Count I and five were applicable as to Count II," and then "as to the mitigating circumstances, two applied in this case to each count." (R 1367, 1547).
The court went on to state its "additional opinion that no sufficient mitigating circumstances exist to outweigh the aggravating . . ." (R 1368, 1548). The trial court thus clearly referred to the nine statutory aggravating factors while making no such limiting references to mitigating factors.

In Straight v. Wainwright, 772 F.2d 674 (11th Cir. 1985); Funchess v. Wainwright, 772 F.2d 683 (11th Cir. 1985); and Palmes v. State, 725 F.2d 1511, 1523 (11th Cir.), cert. denied, ____U.S.____, 105 S.Ct. 227 (1984), the Eleventh Circuit Court of Appeal has held, and in Brown v. State, 473 So.2d 1260 (Fla. 1985), this court has also held that the fact that a trial court's sentencing order discusses only statutory mitigating factors does not warrant a conclusion that the other evidence in mitigation was not considered. This is especially true in view of the fact that the defense attorney was given an opportunity to present non-statutory mitigating evidnece.

In the present case the trial judge did not refuse to consider non-statutory mitigating evidence; rather, it is clear he decided the evidence presented obstensibly to prove such non-statutory factors did not rise to the level of mitigation. Brown v. State, supra, Lusk v. State, 446 So.2d 1038, 1043 (Fla. 1984). This is certainly permissible, for, "The trial court is not obliged to find mitigating circumstances." Suarez v. State, 481 So.2d 1201 (Fla. 1985); Porter v. State, 429 So.2d 293, 296 (Fla.) cert. denied 104 S.Ct. 202 (1983); Daugherty v. State, 419 So.2d 1067, 1071 (Fla. 1982); Lemon v. State, 456 So.2d 885, 887 (Fla. 1984).

Respondent asserts there was no showing of non-statutory mitigating circumstances which, viewed from the judicial bench and stripped of emotionalism, should be reasonably found to exist. Petitioner asserts his living the life of the "street world" and being "preyed upon" by "older, experienced and moneyed men" is a non-statutory mitigating factor. Yet the evidence shows petitioner lived in a home, caring for his friends infirm mother, and was loved almost as a son by his lover. As to being "preyed upon" by moneyed men, respondent must protest that this case stems from petitioner's murder of a man because of a $150.00 debt. Petitioner next asserts his broken home upbringing produced emotional distress. This could arguably approach statutory mitigating circumstance B., but the trial court rejected the circumstance of extreme mental or emotional disturbance. (R. 1366, 1547). Petitioner's third asserted factor merges with the second regarding his home life. The fourth assertion combines an addition to the above two assertions with an assertion that petitioner was at a "fifth grade level." Petitioner was, in fact, at the sixth and seventh grade level. (R. Vol. I, 73). He completed eighth or ninth grade (R. 671), a grade in school not even reached by 20% of the United States population. (1980 United States Census). Petitioner's fifth assertion also merges with his home life problems. The sixth assertion was that petitioner was non-violent, certainly rebutted by his conviction for two first-degree murders, as is the seventh, that he was never angry and was kind. The eighth reason also merges with the above. The ninth reason, that he was no problem in jail, could be expected of a prisoner kept isolated as was petitioner. (R 1276). The tenth reason argued by petitioner is that one man who was sexually attracted to petitioner, and who did not think he was guilty, despite the jury's verdict, thought he had a prospect for rehabilitation. (R 1266). Another man who had an intimate relationship with petitioner, who believed petitioner would "give you the shirt off his back" (although he beat up Bettis

for taking a pair of socks), said petitioner "has a prospect for rehabilitation" because of his youth. (R 1268). The trial court did find petitioner's youth was a mitigating factor. (R 1367, 1547).

The amount of evidence is not a proper factor for consideration as a mitigating circumstance. Buford v. State, 403 So.2d 943 (Fla. 1981), cert. denied 454 U.S. 1163.

Respondent takes exception to petitioner's allegation that Herzog v. State, 439 So.2d 1372 (Fla. 1983) was reversed upon the basis that no non-statutory mitigating circumstances were considered. In fact, that case was reversed because three of four aggravating circumstances were held invalid by this Court. Petitioner has taken similar liberties in his implication that the trial court "ignored" non-statutory mitigating circumstances in Jackson v. State, 464 So.2d 1181 (Fla. 1985), Livingston v. State, 458 So.2d 235 (Fla. 1984), and O'Callaghan v. State, 429 So.2d 691 (Fla. 1984) where appellant conceded that there were no mitigating circumstances. Petitioner asserts that based upon these and other cases appellate defense counsel was ineffective for not raising this issue on appeal. Respondent would point out that the issue of whether the trial court did or did not consider evidence of non-statutory mitigating circumstances was not raised on direct appeal in Jackson, Livingston or O'Callaghan, supra, and there is no proof in the petitioner's pleadings that the issue has been raised to any greater extent than in the instant case on direct appeal in any other cases arising in Judge Coker's court, or that appellate counsel have been found ineffective for not raising the issue.

In fact in the "Rule 3" action in O'Callaghan cited by petitioner, at 461 So.2d 1354, this Court did not find appellate counsel to be ineffective.

d. FAILURE TO DEMONSTRATE THAT THERE WAS A RATIONAL BASIS FOR JURY RECOMMENDATION OF LIFE AND THAT THE TRIAL COURT FOLLOWED IMPROPER PROCEDURE WHEN OVERRIDING THE JURY'S RECOMMENDATION.

On his fifth issue on appeal, appellate counsel devoted three pages to his arguemnt that the trial court erred in imposing the death sentence over the jury's unanimous recommendation of life. Appellate counsel criticized the manner in which the trial court ignored the jury's recommendation and imposed death, i.e., by numerically balancing the factors instead of weighing them. Appellate counsel also referred to numerous mitigating circumstances which were present but not considered by the trial court, i.e., Petitioner's home background, his propensity to alcoholism, and his clean record. This is not a case such as Wilson v. Wainwright, supra, in which appellate counsel failed to address the propriety of the death penalty in his initial or reply brief, and when ordered to file a supplemental brief only cursory argued the issue. 474 So.2d at 1164. There is certainly no requirement that counsel must file an extended brief on the death penalty issue. The only requirement is that it be zealously presented. Id. Respondents submit that was done in the instant case by appellate counsel

Respondents submit that Petitioner is simply improperly attempting to reargue an issue raised on direct appeal in the guise of ineffective assistance of counsel. Steinhorst v. Wainwright, supra, 477 So.2d at 541, Harris v. Wainwright, supra, 473 So.2d at 1247. Petitioner complains that appellate counsel failed to argue the trial court's failure to specify that the jury had based its recommendation of a life sentence on an irrational basis. However, the record reflects otherwise. Prior to imposing sentence, the trial court stated "th Court is not generally afforded the luxury of emotionalism." The Court is obviously bound by the law." (R. 1364). At the motion for rehearing, the judge stated that he had sat through

the whole trial, heard all the testimony and looked at the people, and that his decision was based on more than reading the P.S.I. (R. 1377). The Judge reiterated that he followed the law, and not emotions. (R. 1379). Thus, unlike Herzog v. State, 439 So.2d 1372 (Fla. 1983), cited by the Petitioner, the trial court did in effect make a finding that the jury's recommendation was based upon emotions. It should be noted that the record supports that finding where the prosecutor commented in argument that some of the jurors were in tears. (R. 1291). In addition defense counsel argued emotionally to the jury, and in fact had stated that it was questionable as to who was the victim in hustling, that Walsworth had picked up the Petitioner. (R. 1300, 1302).

Petitioner has totally taken the trial court's order for a P.S.I. out of context, when he states incredibly that the trial court relied solely on the recommednations in the presentence investigation report. As stated supra, the trial court stated it did not rely only on the P.S.I., and in fact discounted some of the recommendations of the probation officer. Furthermore, Petitioner's statement that the trial judge's opinion of him was that he disgusted the judge is a total distortion of the record. The judge's comment that "he disgusts me" went only to Robert Redding, the male prostitute who testified about the practices and rates of hustling and male prostitution. There is absolutely nothing in the record which indicates that the judge's comment referred to male prostitutes in general or the Petitioner in particular. There is nothing in the record to support Petitioner's assertion that the override was produced by prejudice. Thus, appellate counsel cannot be ineffective for failing to argue the same on appeal.

The Respondents submits that appellate counsel adequately argued the propriety of the death sentence to this Court on direct appeal. Respondents would note that this Court has upheld death sentences where the jury recommended life and mitigating factors were found by the trial court.

See, e.g., Echols v. State, ___ So.2d ___, 10 FLW 526 (Fla. September 19, 1985) (four aggravating circumstances and various non-statutory mitigating circumstances); Buford v. State, 403 So.2d 943 (Fla. 1981) (two aggravating circumstances and two mitigating circumstances); Zeigler v. State, 402 So.2d 365 (Fla. 1981) (four aggravating circumstances and one mitigating circumstance); Hoy v. State, 353 So.2d 826 (Fla. 1977) (three aggravating circumstances and two mitigating circumstances). The death sentence for the murder of Russell Bettis, the man who had the unfortunate luck to witness the killing of James Walsworth, was clearly appropriate in the instant case. Despite, Petitioner's renewed attempt to show otherwise, any deficiencies by appellate counsel did not compromise the appellate process to such a degree as to undermine confidence in the fairness and correctness of the outcome under the governing standards of decision.

d(2). APPELLATE COUNSEL WAS NOT INEFFECTIVE IN HIS FAILURE TO RAISE THE BACKSTRIKE ISSUE ON DIRECT APPEAL.

Petitioner contends that his appellate counsel was ineffective for failing to raise on direct appeal to this Court the fact that the trial judge denied defense counsel the right to "backstrike" during voir dire. Respondents maintain herein that, contrary to Petitioner's assertions, this "backstriking" issue was not properly preserved for appellate review and, as such, appellate counsel was not unreasonable in failing to raise the issue on appeal.

The record in this case clearly reveals that subsequent to the trial judge's backstriking prohibition, defense counsel never attempted to thereafter backstrike any juror (R 193-255). As such, and despite the trial court's improper prohibition, the issue was not properly preserved for appellate review. See Rivers v. State, 458 So.2d 762 (Fla. 1984). As succintly held by this Court in Rivers, supra at 764:

> However, because defense counsel did not subsequently attempt to "backstrike" any prospective juror after the judge made this statement, this issue has not been properly preserved for appeal. (e.a.)

It is clear that appellate counsel is not required to raise issues which are not properly preserved by trial counsel for appellate review, Jackson v. State, 452 So.2d 533, 536 (Fla. 1984), and, in that respect, appellate counsel's performance cannot be deemed deficient under the Strickland analysis.

Of further note, Petitioner's allegations as to the possibilities of defense counsel backstriking, if he had not been prohibited from doing so, constitute nothing more than mere speculation. The record of voir dire and subsequent thereto is devoid of any indications of defense counsel's disapproval of the panel, and particularly with empaneled jurors

Sparti, Ziegler, Weisgood, and Harlan (R 194-255).

Petitioner's allegations that jurors Sparti, Ziegler, Weisgood, and Harlan were "avowedly ... pro-death penalty", is blatantly unfounded, and not supported by the record citations given. Each juror maintained that the imposition of the death penalty depended upon the circumstances of each individual case. Very interestingly, and in response to Petitioner's allegations that this was "a death-qualified jury", it was defense counsel who struck prospective jurors Muldoon, Chao, Lombard, and Waldren, who each expressed difficulty in imposing the death penalty (R 23, 32, 92, 73). Also, it was the prosecution who struck juror Hobbs, who was clearly prone to imposing the death sentence (R 204, 215). And further, regarding Petitioner's reliance upon Lockhart v. McCree, No. 84-1865, it is clear that this Court has rejected such Grigsby "conviction-prone" premise. See Adams v. Wainwright, 11 FLW 79 (Fla. Feb. 26, 1986).

Other inaccuracies in Petitioner's allegations include his representations of the juror Merolla. The record clearly reveals that she never expressed a belief post-trial "in the defendant's innocence", or "felt pressured" into voting for a guilty verdict (R 1340-1347). Her testimony merely reflected that she was troubled, and bothered, by "[t]he whole thing" (i.e. nightmares), while clearly conceding that she ultimately did vote the Petitioner guilty at the end of deliberations, and affirmed such as her verdict (R 1340-1347).

e. JUROR OATH - APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE AN ISSUE THAT A JUROR WAS NOT SWORN AS THAT ISSUE HAS NO MERIT.

The record of trial proceedings clearly states the jury was duly sworn. (R 1466).

This case record is unlike the records in the cases upon which Petitioner heavily relies, Brown v. State, 10 So. 736 (Fla. 1892), Zapt v. State, 17 So. 225 (Fla. 1895), where "From the record entries, as appears from the transcript before us, we find no mention made of the jury's having been sworn." Brown, supra, 736; and where "The record is fatally defective in not showing that the jury were sworn." Zapf, supra. In Brown, a "Bill of Exceptions" was made up and signed some time after trial and was the only place where it was indicated the jury had been sworn. The same occurred in Zapf. This court concluded "that the record proper should show in a case of felony that the jury was sworn, and an omission in this respect is fatal to a conviction, and cannot be supplied by the recitals in the preface of a bill of exceptions intended merely to connect the bill of exceptions with the case tried. Id., 738.

However, Petitioner has given no argument and clearly cannot prevail in his unsupported assertion that page 1466 of the record in this cause is not a part of "the record proper." The Record of Trial Proceedings (R 1466) was prepared as a part of the clerk's duties, as in every trial, and filed within five days of the conclusion of the trial, it was not prepared pursuant to a special order "sometime after the trial." cf. Brown, supra, 736.

Petitioner cites to page 157 of the record and argues on the basis of that citation that "it is apparent from the record that one of the jurors, Joy Wicker, was not sworn. However, on page 157, there is no indication that any jurors were sworn or not. In clear contrast, at R 256, the trial judge

specifically addressed each juror, including Mrs. Wicker, and then, in giving them instructions, stated: Ladies and gentlemen of the jury, you have been selected and sworn as a jury to try the case of ED CLIFFORD THOMAS."

Respondent also points to the record to show Mrs. Wicker was, in fact, sworn. Mrs. Wicker was called to the jury panel at R 157. She replaced Mr. Chao in juror seat number 11. (R 157). No more prospective jurors were excused until Mr. DeRose (10), Mrs. Lombard (3), Mr. Schultz (2A), Mr. Strauss (1) and Mr. Brown (1A) were excused at R 193. At this point the sitting jurors were Mrs. Sparti (2), Mr. Wolstein [or Goldstein] (it cannot be determined according to the transcript and record which is correct) (4), Mr. Ziegler [or Zeigler] (5) Mrs. Del Fave [Bertman] (6), Mrs. Weisgood [Swicegood] (7), Mrs. Konopko (8), Mrs. Harlan (9), Mrs. Loudy (12), and Joy Wicker (11). Everyone is accounted for by the obviously somewhat distracted court reporter at R 194 except Joy Wicker. But from the foregoing it is apparent she was present in her seat with the other sitting jurors who had not been excused. At that point the trial judge told the rest of the sitting jurors, Joy Wicker, juror number 11 included, to stand up and raise their right hands, whereupon they were sworn. (R 194).

From an exhaustive examination of the record it is clear there is no factual basis for Petitioner's claim VI. Counsel is not required to raise issues reasonably considered to be without merit. Francois v. Wainwright, Funchess v. State, supra.

f. TRIAL JUDGE MOMENTARILY LEAVING COURTROOM DURING VOIR DIRE DOES NOT RAISE REASONABLY MERITORIOUS ISSUE.

This record does not present facts similar to those recited in the Third District Court of Appeal opinion in Peri v. State, 426 So.2d 1021 (Fla. 3rd DCA 1983), pet. rev. den., 436 So.2d 100 (Fla. 1983).

At page 235 of the Record, petitioner's trial defense counsel remarked that it would be "inappropriate for the judge to leave the courtroom." The trial court on its own considered this an objection and the objection was overruled. Defense counsel then stated: "I won't proceed until the judge is back in the courtroom." Defense counsel then sua sponte stated: "Let the record reflect that I am proceeding with the voir dire per Judge Coker's instructions, over my objection." (R 235). There is nothing in the record to indicate whether the trial court heard this sua sponte statement, or whether he was aware defense counsel was, on counsel's own volition, subsequent to his initial declaration that he would wait for the judge's return, recommencing his examination of the venire.

It is clear the trial judge did not require defense counsel to proceed, as the judge made no response to counsel's stated refusal to continue. (R 235).

In Peri, supra, a quite different exchange occurred. There, the trial judge was clearly advised of the objection and it is also in the record that the defendant did not waive the Court's presence. Id., 1022. Despite this crystal clear objection and declaration that the defendant did not waive her presence, the trial judge in Peri ordered: "We are going to continue with jury selection." Thus it is also crystal clear that the defense counsel in Peri had no choice. He again objected and stated he did not acquiesce and would proceed in the judge's absence only because ordered to. He exercised a peremptory challenge and again noted his objection to the

judge's thirty-four minute absence. Id., 1023.

Instanter, from a reading of the transcript, the judge was absent for less than five minutes.

Both jurors examined during the judge's absence were stricken by the State. (R 244). Petitioner raised no objection upon the judge's return or later.

Respondent submits that this record clearly presents the type of situation addressed in Haith v. United States, 231 F.Supp. 495 (W.D.Pa. 1964), affirmed, 342 F.2d 158 (3rd Cir. 1965) (rejecting defendant's collateral attack on conviction, where trial judge's presence during vior dire and jury selection had been waived by defense counsel); Stirone v. United States, 341 F.2d 253 (3rd Cir. 1965) cert.denied 381 U.S. 902 (same) ; and State v. Eberhardt, 32 Ohio Misc. 39, 282 N.E. 2d 62 (1972).

There is no constitutional right to any particular manner of conducting the voir dire so long as impartial juries are secured, the defendant can confront and question the prospective jurors and the defendant is afforded challenges for cause and the requisite peremptory challenges. Pointer v. United States, 151 U.S. 396, 407-412, 14 S.Ct. 410, 38 L.Ed. 208 (1894). There was no absolute common law requirement that the trial judge be present during the selection of the jury. Haith, supra. Florida Rules of Criminal Procedure do not impose any greater requirement. Fla. R. Crim. P., Rule 3.300.

There is nothing in the record to establish that any of petitioner's substantial rights were injuriously affected by the trial judge's momentary absence. Such injury may not be presumed. Florida Statutes §924.33 (1981). Under these circumstances appellate defense counsel cannot be expected to raise a claim of error. Francois v. Wainwright, Funchess v. State, supra.

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). A review of the appellate briefs and the Record on Appeal in the instant case clearly establishes that appellate counsel's performance satisfied the Sixth Amendment. In conclusion, Respondents submit that 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.
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> 453 So.2d at 1107.

Respondents submit that based on the foregoing, Petitioner has failed to establish that appellate counsel was ineffective such that he is entitled to a new appeal.

2. THE LOCKHART[4/] CLAIM

Petitioner in a last minute attempt to have his execution stayed, has distorted the facts in an attempt to jump aboard the "Lockhart" bandwagon. Petitioner has alleged that the "death qualification" process during voir dire resulted in the peremptory exclusion of one veniremember who would have been fair and impartial in deciding guilt or innocence, thus denying him the right to a trial by a jury that is representative of a fair cross section of the community. Respondents submit that Petitioner's argument must fail for a number of reasons.

a. Waiver

Although, Petitioner filed pretrial motions for individual voir dire and to preclude challenges for cause, he never included in his motions, a challenge to the state's right to use peremptory challenges to strike jurors who could be impartial at the guilt phase but not at sentencing. Thus, the right to argue the objection to the state's use of its peremptory challenge was waived and the issue foreclosed from any subsequent consideration. This Court has continually held that "habeas corpus is not available for the purpose of reviewing arguments that could have been raised but were not raised by timely objection at trial and argument on appeal." Thomas v. Wainwright, ___ So.2d ___, Case No. 68,526, p. 2 (Fla. April 7, 1986) (copy attached as Appendix 2"). See also McCrae v. Wainwright, 439 So.2d 868 (Fla. 1983); Hargrave v. Wainwright, 388 So.2d 1021 (Fla. 1980).

Petitioner has also waived this claim by failing to offer or proffer any evidence at trial through any studies or expert witnesses, to show the effects of the death qualification voir dire process on jurors who serve on capital juries. In Witherspoon v. Illinois, 391 U.S. 510 (1968), the United States Supreme Court initially rejected the death qualification argument

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[4/] Lockhart v. McCree, United States Supreme Court Case No. 84-1865.

because based on the few studies before it, there was insufficient evidence to establish "that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. 391 U.S. at 518. Thus under Witherspoon, itself, Petitioner's failure to proffer any studies at trial, precludes him from now raising this issue.[5/] See Kennedy v. Wainwright, ___ So.2d ___, 11 FLW 65 (Fla. February 21, 1986).

b. Legal Merits

This Court, as acknowledged by Petitioner has continually rejected the merits of Petitioner's argument including as it pertains to peremptory challenges. Thomas v. Wainwright, supra; James v. Wainwright, ___ So.2d ___, 11 FLW 111 (Fla. March 14, 1986); Adams v. Wainwright, ___ So.2d ___, 11 FLW 79 (Fla. March 7, 1986). See also Dougan v. State, 470 So.2d 697 (Fla. 1985); Sims v. State, 444 So.2d 922 (Fla. 1983); Maggard v. State, 399 So.2d 973 (Fla. 1981).

In addition, Respondents would note that the state has shown substantial reasons for the exclusion of the veniremen. In Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), the Fifth Circuit held:

> Florida has reached the reasoned determination that the parties' right under the sixth and fourteenth amendments to an impartial jury and the state's interest in just and evenhanded application of its laws, including Florida's death penalty statute, are too fundamental to risk a defendant prone jury from the inclusion of such veniremen. As the petitioner in his brief concedes, a defendant would be unjustified in objecting, for instance, to the exclusion for clause of a class composed of veniremen who are related to him, even if the veniremen stated they

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[5/] Respondents as of the time of preparing this pleading has not received a copy of Petitioner's Appendix, nor does counsel have a copy of the pleadings filed by Petitioner in Daniel Morris Thomas v. State. Thus ,Respondents do not know what evidence Petitioner has proffered to establish this claim in this Court.

> could impartially judge his guilt or innocence, because the chance that such veniremen would be biased in favor of the defendant is too great. Petitioner's Brief at 57. Such danger is no less real when the excluded class is those veniremen properly struck under Witherspoon because of their conscientious scruples against capital punishment. The exclusion of such veniremen, therefore, does not violate the representative cross-section requirement of the Sixth and Fourteenth Amendments.
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> 578 F.2d at 597-598.

Thus, on its legal merits, Petitioner's claim must fail.

c. Factual Merits

Petitioner complains that one juror, Mr. Strauss, was peremptorily excluded by the state because of his views on capital punishment, even though he indicated he would be fair and impartial in deciding guilt or innocence. The record reveals however that Mr. Strauss was excluded for other reasons than his opposition to the death penalty, specifically the fact that the trial might interfere with his vacation plans, which might affect his decision in the case:

> MR. STRAUSS: You asked about a difficulty. I don't know. The week after, I will have difficulty. We are going up north for the month of June to July, as of Monday morning.
>
> MR. HANCOCK: This coming Monday?
>
> MR. STRAUSS: Yes.
>
> MR. HANCOCK: It looks like the trial may go through.
>
> MR. STRAUSS: When I called and asked would it be necessary for me to get a postponement, they told me no, it would only be one week. But I didn't realize that it would possibly happen.
>
> MR. HANCOCK: Would it be a real hardship? Do you have everything planned?
>
> MR. STRAUSS: I have got everything planned, and I have got airline reservations. If they don't go out on strike.

MR. HANCOCK: Do you think it would affect you, knowing that you were supposed to have left and didn't leave? Do you think you could still give your full attention to the evidence?

MR. STRAUSS: I couldn't honestly say. I really and truly couldn't honestly say. I might get fidgety on Friday, but I couldn't honestly say that.

MR. HANCOCK: Do you think it might affect you?

MR. STRAUSS: I think it might affect my decision, in all honesty.

THE COURT: I don't believe that. I don't think that a man that fought through Italy would be influenced by that to serve as a juror. Go ahead.

(R. 70-71).

Thus, the state could clearly show even under the standards of this Court's decision in State v. Neil, 457 So.2d 481 (Fla. 1984), that Mr. Strauss was excluded for reasons other than his feelings on capital punishment. Neil is not applicable, nor is the pending decision by the United States Supreme Court in Baston v. Kentucky, cert granted, 85 L.Ed.2d 476 (1985).

Respondents also submit that the decisions in Lockhart v. McCree and Baston v. Kentucky would have no bearing on the instant case because the Petitioner cannot show that the exclusion of the one juror resulted in the denial of a jury representative of a cross-section of the community. In Duren v. Missouri, 439 U.S. 357 (1979), the United States Supreme Court held that in order to establish a prima facie violation of the Sixth Amendment requirement that juries in criminal cases be drawn from a fair cross section of the community, the defendant must show that:

> (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.
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> 439 U.S. at 364.

In the present case, Petitioner cannot establish the second prong of the test. First, Petitioner has not established what the percentage of persons who could impartially judge the Petitioner's guilt, but not his penalty, are in the community of Broward County, Florida. Second, he has not established what percent of those persons were in the jury venire from which his jury was selected. It should be noted that there were jurors on the jury who expressed their feelings against capital punishment, and who stated that it would not affect their determination on guilt or innocence. See for example, Ms. Del Fave (Bertman) (R. 49), Ms. Loudy (R. 144). Interestingly the Petitioner struck a juror, Ms. Muldoon, who stated that she felt it was difficult to take a life, but could be impartial on the guilt or innocence phase. (R. 32, R. 156). Thus, how can Petitioner complain about the denial of a jury representing a fair cross-section of the community, when he struck a juror who represented the community.

Petitioner's efforts to hitch his wagon to the train of death penalty defendants who have sought to utilize Lockhart to stall the state's execution of a lawfully imposed punishment should be rejected. Petitioner received a fair trial from jurors carefully selected by both the prosecutor and defense counsel because of their stated desire and ability to render judgment on guilt and penalty soley upon the circumstances of the case as presented through the evidence and the law as explained to them by the judge. Petitioner had no objections to the jurors he chose at the time nor did he perceive any improprieties or inadequacies in their selection for the intervening years before Lockhart. His efforts to now magically transform a factually incomparable case to fit the Lockhart umbrella should be rejected as an eleventh hour grasping at straws.

CONCLUSION

Based on the foregoing, the Respondents submit that this Court should deny Petitioner's petition for extraordinary relief, for a writ of habeas corpus, request for stay of execution and application for stay of execution pending disposition of petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Response to Petition for Writ of Habeas Corpus has been furnished, by hand delivery, to LARRY HELM SPALDING, Capital Collateral Representative; MARK E. OLIVE, Litigation Coordinator; Office of the Capital Collateral Representative, Independent Life Building, 225 West Jefferson Street, Tallahassee, Florida 32301 this 11th day of April, 1986.

Of Counsel