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THE FLORIDA SUPREME COURT

WILLIAM EUTZY,

Appellant,

v. CASE NO. 69,004

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM A JUDGMENT OF THE CIRCUIT COURT IN AND FOR ESCAMBIA COUNTY

ANSWER BRIEF OF APPELLEE

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OTHER AUTHORITIES

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ANSWER BRIEF OF APPELLEE

PRELIMINARY STATEMENT

William Eutzy was the defendant and petitioner in the Circuit Court and will be referred to as appellant for the purposes of this appeal. The State was the prosecuting authority in the Circuit Court and will be referred to as appellee on appeal. Citations to the record on appeal and the trial transcript will b made by the use of the symbols "R" and "TT" respectively followed by the appropriate page number in parenthesis. Citations to the appellant's brief on appeal in the instant case and the appendix thereto will be made by use of the symbols "AB" and (APP.) respectively followed by the

appropriate page numbers in parenthesis. Citations to the evidentuary hearing held May 22, 1987, will be made by the symbol "EH" followed by the appropriate page number in parenthesis. This unorthodix procedure for citing the record is necessary because of appellant's failure to comply with Florida Rule of Appellate Procedure 9.200(l)(e).

STATEMENT OF THE CASE

The appellant's statement of the case contained on pages 2-3 of his brief is acceptable to the appellee.

STATEMENT OF THE FACTS

The appellee adopts the statement of facts contained in the original appellate brief filed by the appellee in this court.

EVIDENCE AT SENTENCING

During the sentencing phase of the trial, the state introduced a 1958 judgment from the State of Nebraska indicating that Mr. Eutzy had been convicted of robbery.

The appellant presented no evidence during the sentencing phase of the trial. Trial counsel explained that he presented no evidence based upon Mr. Eutzy's instructions with regard to his family and Mr. Eutzy's failure to supply him with any information which would lead to mitigating circumstances. (EH 408).

Following the sentencing hearing, the jury returned with a recommendation that the appellant be sentenced to life in prison. The trial court overrode the jury's recommendation and sentenced the appellant to death. In support of the sentence, the court determined the following:

> The murder was committed during the course of a robbery;
>
> Mr. Eutzy had previously been convicted of a crime of violence. The crime was committed in a cold, calculated premediated manner . No mitigating circumstances had been presented. (APP. 352-354).

On direct appeal, the trial court sentence was upheld by this court. See **Eutzy v. State** 458 So.2d 758, (Fla.1984)

SUMMARY OF ARGUMENT

The appellant was not deprived of his constitutional right to effective assistance of counsel. Trial counsel did not contact witnesses either because Mr. Eutzy instructed him not to or did not fully inform him as to his social background.

The evidence which the appellant contends would have been potentially mitigating, would also have contained damaging information which could have been used by the state to rebutt any mitigating value.

Trail counsel was obligated to follow Mr. Eutzy's instruction not to contact his family concerning the case.

The appellant's trial counsel was not ineffective because he did not file the claim on the basis of **Miranda v. Arizona**, 384 U.S. 436 (1966).

The appellant also raised issues in regard to this courts opinion on the issues raised in his direct appeal. Rule 3.850, Florida Rules of Criminal Procedure, does not grant jurisdiction upon a circuit court to review a decision of the Florida Supreme Court. Consequently, appellant's claim dealing with the application of the Florida death penalty statute and this court's finding in regard to the aggravating factors should not be addressed by this court.

ARGUMENT

ISSUE I

WHETHER APPELLANT WAS DENIED HIS CONSTITUTIONALLY GUARANTEED RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE OF HIS TRIAL.

A. WHETHER THE APPELLANT'S TRIAL COUNSEL FAILED TO RENDER EFFECTIVE ASSISTANCE IN HIS PREPARATION FOR THE SENTENCING PHASE OF THE TRIAL.

B. WHETHER, IN ORDER TO RENDER EFFECTIVE ASSISTANCE OF COUNSEL, TRIAL COUNSEL WAS REQUIRED TO RAISE A **MIRANDA** OBJECTION TO THE INTRODUCTION OF APPELLANT'S 1958 CRIMINAL CONVICTION. (RESTATED)

The appellant contends that his trial counsel, Edward Brian Lang, was ineffective in his representation of appellant during the sentencing phase of appellant's trial. Appellant's brief contains a lengthy dissertation of his trial counsel's shortcomings. Specifically, he alleges the following ommissions as examples of his counsel's poor performance:

1. He failed to properly prepare for sentencing by not investigating potential sources of mitigating evidence concerning appellant's psychiatric history, drug and alochol abuse, family background, academic background, employment history and prison conduct.

2. Trial counsel's failure to raise a **Miranda** objection to the introduction of a statement concerning the appellant's 1958 conviction for robbery.

Pursuant to the standard set forth in **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 Ld.E.2d 674 (1984), a defendant challenging the effectivness of his lawyers representation has the burden of demonstrating both that (1) counsel's preformance was so difficient as to deprive the defendant of the "counsel" guaranteed the defendant by the Sixth Amendment and that (2) this difficient performance so prejudiced the defense as to deprive the defendant of "a fair trial whose result is reliable." Id., 466 U.S. at 687, 80 Ld.E.2d 693. **King v. Strickland**, 748 F.2d. 1462 (11th Cir. 1984), **cert denied,** _____ **U.S.** _____, 105 S.Ct. 2020, 85 Ld.E.2d 301 (1985). As to the first prong of this standard, the defendant has the burden of proving by the ponderence of the evidence that the representation was unreasonable under professional norms and, in so doing, the defendant must overcome the "strong presumption that counsel's preformance falls within the wide range of reasonable professional assistance", Id., 466 at 689, 80 Ld.E.2d 694. Accordingly, the standard of review to be applied is "highly differential", and a "fair assessment of attorney preformance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances

of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id., as to the second half of the **Strickland v. Washington** test, the prejudice prong, a defendant must demonstrate that there was a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Id. 466 U.S. at 694; 80 L.Ed.2d. at 698. **King**, 748 F.2d 1463. Of course, if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the Supreme Court expressly allows reviewing courts, where appropriate, to dispose of such claims on that ground along, without regard to the deficiency. Id. 466 U.S. at 697, 80 L.Ed.2d.699; **Tafero v. Wainwright**, 796, F.2d. 1314, (11th Cir. 1986). This standard of effectiveness applies equally to both the guilt and sentence phase of the trial. **Washington**, 104 S.Ct. at 2068; **King**, 748 Fed. 2d.at 1463.

The Florida Supreme Court adopted the two prong test from **Strickland v. Washington**, 466 U.S. 668 (1984), for determining ineffective assistance of counsel. **Stone v. State**, 481 So.2d. 478 (Fla. 1985); **Card v. State**, 497 So.2d. 1169 (Fla. 1986); **Lusk v. State**, 498 So.2d. 902 (Fla. 1986).

Appellant first raised this ineffectiveness claim in his motion for post conviction relief. The trial court conducted an evidentiary hearing on the claim on May 22, 1987, at which time, Edward B. Lang was called to testify. (APP. 365-368) Based upon

Mr. Lang's testimony, the trial court made extensive findings of fact in determining that Mr. Lang rendered effective respresentation. The appellee contends that the trial court's finding of fact should be afforded a presumption of correctness. 466 So.2d. 1066 (Fla. 1985); **Shapiro v. State**, 390 So.2d. 344 (Fla. 1981); **Savage v. State**, 156 So.2d. 566 (1st DCA 1963). The appellant first contends that his trial counsel failed to undertake any investigation of facts that could be presented in mitigation.

It is axiomatic that prior to any inquiry into the effectiveness of trial counsel it must first be determined that the party alleging ineffective representation was totally cooperative with his attorney or did not restrict his attorney's efforts to represent him. Mr. Lang's testimony at the evidentuary hearing clearly indicates that Mr. Eutzy restricted his representation by instructing him not to contact certain people. Mr. Eutzy either did this because he did not want to cooperate with his attorney, or as is more likely, out of a sense of self-preservation since he know full-well that members of his family, his prior employers, and other individuals would possess damaging or derogatory information about him in conjunction with any favorable information. (APP. 376-427).

Specifically, Mr. Lang testified that upon his initial visit with appellant, Mr. Eutzy informed him that he had shot the man

and he wanted to get it over with as soon as possible. (APP. 372). Mr. Lang further testified that Mr. Eutzy more or less took over the conversation and informed him that he had shot the man and he did not want Laura Eutzy or anybody to be involved in it. Mr. Eutzy even wanted to invoke speedy trial so that he could get the thing over with. (APP. 374). The attorney also testified that Mr. Eutzy instructed him not to contact his mother because she was ill and that he had not seen her in 10-12 years. (APP. 375). Mr. Lang testified that Eutzy instructed him not to converse with her. (APP. 376). Further evidence of either Mr. Eutzy's decision not to cooperate, or his fear of what family members would say about him, is evidenced by the fact that he did not inform his attorney about his ex-wife, his daughter, or his former employment as a newspaper reporter in Nebraska. (APP. 376).

Although the appellant's assertion that his trial counsel never contacted family members, former employers, prison officials, or anyone else is admittedly true. It is fully explained by Mr. Lang's testimony. When he asked some general questions as to whether there was anybody who could assist in the preparation of a defense, Mr. Eutzy informed him that he didn't want anybody involved, that he didn't want Laura involved, that he had been in prison for fifteen (15) years or thereabouts, that he just wanted to get it over with. (APP. 401). The attorney testified Mr. Eutzy gave him no information about his family at

all. (APP. 402). Mr. Lang testified that Mr. Eutzy informed him that he had been in prison since the age of fifteen (15) and in the opinion of the attorney, it precluded a lot of references to contact with family members. This testimony also explains why none of Mr. Eutzy's school, medical, or prison records were ever reviewed, or why no associates or former employers of Mr. Eutzy were ever contacted. It would be nearly impossible for counsel to have obtained any of this information without Mr. Eutzy first giving him names, dates and locations as to where he could begin his investigation. In his brief, the appellant alleges his attorney never discussed the question of potential mitigating evidence with him. That this allegation is not supported by the record is evidenced by questions and answers contained in the transcript of the evidentuary hearing:

Q: Did you every ask Mr. Eutzy whether there were positive attributes of his past that could be presented at sentencing?

A: I didn't ask him in those words, no, I ask him if there was anything that he could help me with to, you know, present him in a better light.

Q: Did you ask him that with respect to his defense as to guilt?

A: Oh, yes, when we first talked, we got into whether or not there was anybody we could call in behalf.

Q: At the guilt phase?

A: At the guilt phase, as well as later on. In fact, it just poured over. There wasn't anybody during the guilt

> or innocent phase that could be called, in my opinion, to help him, and it has been born out by the affidavits nor if there wasn't anybody there that--then it continued through, there wasn't anybody in mitigation as well. (APP. 407).

Mr. Lang testified that he did not feel there was any employer that could help since Mr. Eutzy informed him he had been in prison for the last fifteen (15) years.

The appellee agrees that a defense attorney has a duty to investigate facts relevant to his client's case. In the instant case, Mr. Lang did exactly that. Mr. Lang testified that a psychiatric evaluation had been done on the defendant and that evaluation gave no indication that there was anything wrong with Mr. Eutzy. Moreover, Mr. Eutzy himself informed the attorney that nothing was mentally wrong with him. (APP. 381). He also informed his attorney that he had had some prior psychiatric evaluation and treatment that were of no consequence and that he was fine. (APP. 381). It is obvious that the defense attorney had knowledge of psychiatric evaluations which would have revealed that the defendant was in prison most of his life and that he did not want that information entered into the sentencing phase of the trial. (R 381-382). Moreover, based upon Mr. Lang's contact with the appellant, and his evaluation of the circumstances and the background of his client the record clearly indicates that the strategy during the sentencing phase was to keep the client's background out of evidence. (APP. 379-380,

377-379, 378, 383).

Any further investigation of Eutzy's background was restricted by Mr. Eutzy's attitude and instructions to his attorney. The United States Supreme Court in **Strickland** has made note that it is important to view a defendant's communication with his lawyer when scrutinizing the attorney's decision whether to investigate. 104 S.Ct. at 2066. The court stated:

> When a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challanged as unreasonable.

And although a defense attorney is not justified in failing to conduct any type of investigation of a clients background, **Thompson v. Wainwright**, 787 F.2d. 1447 (11th Cir. 1986), in the instant case, any shortcomings in the attorney's investigation are excused by the appellant's instructions. The attorney was bound to follow his client's instruction. **Foster v. Strickland**, 707 F.2d. 1339, 1343 (11th Cir. 1983). The appellee submits that in light of Mr. Eutzy's instructions Mr. Lang was under an ethical obligation to comply with his clients wishes. Ethical consideration 7-7 of the American Bar Association Code of Professional Responsibility provides:

> In certain areas of legal

> representation not effecting the merits of the cause or substantially prejudicing the rights of the client, a lawyer is entitled to make decisions on his own. But otherwise, the authority to make decisions is exclusively that of the client and if made within the framework of the law, are binding on his lawyer . . . .

Ethical consideration 7-8 provides in pertainent part:

> in the final analysis, however, the lawyer should always remember that the decisions to forego legally available objectives in methods because of non-legal factors is ultimately for the client and not for himself.

In the instant case it is clear that Mr. Lang conducted enough of an investigation to enable him to make an informed decision that the best way to handle the sentencing phase was to, as much as possible, keep derogatory information out of evidence and downplay the significance of his client's prior conviction for robbery.

The appellant next argues that Florida's procedure for imposition of the death penalty makes it incumbent on competent counsel to develop and present evidence not only with the jury's recommendtion in mind, but also with the possibility of judge override in mind. The appellant's contention is not supported by the law. His allegation that his trial counsel rendered ineffective assistance during the penalty phase of the trial is totally without merit since the jury recommened life in his

case. **Lewis v. State**, 398 So.2d. 432 (Fla. 1981); **Douglas v. State**, 373 So.2d. 895 (Fla. 1979). Moreover, the Florida Supreme Court has determined that trial counsel is not ineffective when he relies upon the jury recommendation of life and presents no further mitigating evidence to the judge. **Buford v. State**, 492 So.2d. 355 (Fla. 1986). In support of his argument, the appellant cites **Porter v. Wainwright**, 805 F.2d. 930, 935-36 (11th Cir. 1986). The court's decision in **Porter** isn't controlling since in that case no evidentiary hearing had been held on the defendant's claim of ineffective assistance of counsel. The 11th Circuit Court of Appeals merely remanded the case to the trial court so that an evidentiary hearing could be conducted concerning ineffective assistance of counsel at the penalty phase of his trial.

The appellant asserts that his trial counsel failed to investigate mitigating evidence and that his alleged failure cannot be excused by his instructions to his attorney that he didn't want family members involved.

Mr. Lang didn't fail to investigate Mr. Eutzy's background. Through interviews with Mr. Eutzy and other investiations, he learned enough about Mr. Eutzy to realize that a great deal of derogatory damaging information was available which would jeopardise Mr. Eutzy's chances of receiving a favorable recommendation from the jury.(APP. 374-376, 379-381).

Mr. Lang's investigation was also hindered by Mr. Eutzy's lack of openness about his past and his instruction that he did not want any of his family contacted. Mr. Lang was obligated to follow his client's instructions and limit his investigation. **Foster v. Strickland**, 707 F.2d. 1339 (11th Cir 1983).

Contrary to the appellant's argument, the circuit court's finding that Mr. Lang acted reasonably under the circumstances, is supported by the record. The appellant argues that trial counsel's testimony concerning Mr. Eutzy's instructions about his mother were contradicted by three letters written between appellant and his mother. Mr. Eutzy's interpretation of his mothers letter (APP. 564) is subject to dispute. The letter rather then indicating that Mr. Eutzy wants his mother involved, merely indicates that his mother was interested in the case. In fact the very wording of the letter indicates that Mr. Eutzy had not fully informed her as to the predicament he was in. Moreover, the appellant's affidavit concerning his dicussion with Mr. Lang which he attached to his motion is not contradictory evidence since it was not introduced at the evidentiary hearing and was not subject to cross-exmination by the state. Mr. Eutzy also cites a statement made by his counsel in August, 1986, that he had not presented any witnesses at sentencing because he had not known of anything he could present on Mr. Eutzy's behalf as being a statement in contradiction of his testimony. Rather then being contradictory this is supportive of evidentiary hearing

testimony. The appellant's assertion that trial counsel testified that he had never discussed potential mitigating evidence with Mr. Eutzy is incorrect. APP 411, a place cited in the record by the appellant more accurately reflects that an attempt was made to discuss mitigating evidence with the appellant but he indicated to his attorney that he did not want family members contacted. At the place in the record cited by the appellant, there is no indication that trial counsel testified that he hadn't discussed mitigating evidence with Mr. Eutzy. The appellee contends that effective representation does not require an attorney to beg, conjole, pursuade or otherwise brow beat a client into giving him sufficient information by which he can begin to investigate his background. In support of his argument on this point, the appellant cites **Douglas v. Wainwright**, 714 F.2d. 1532, (11th Cir. 1983). The **Douglas** decision does not apply in the instant case since in **Douglas** the trial attorney was totally unfamilar with the sentencing proceedings in a death case. Moreover, he had actually made remarks to the judge that the court found damaging to his client's case. Based upon those facts, the **Douglas** case is totally distinguishable from the instant case.

The appellant contends that he merely expressed his preference that his family not be involved in the case and that this preference did not forbid defense counsel from contacting his family. The record contains unrefuted testimony that Mr.

Eutzy did more then merely express a preference, he directly instructed his attorney not to contact his family. (APP. 375,401,411). An attorney does have a degree of independent responsibility to act in the best interest of his client, however, "the reasonableness of counsel's actions may be determined or substaintially influenced by the defendant's own statements or actions". **Strickland, supra.** 466 U.S. at 691, 104 S.Ct. at 2066. **Blanco v. Wainwright,** 507 So.2d. 1377 (Fla. 1987). Under the circumstances of the restrictions imposed upon him by the appellant, Mr. Lang did exercise independent responsibility and act in the best interest of his client. The appellant also suggests that trial counsel could have pursued other avenues of investigation other then family members. Any lack of investigation into Mr. Eutzy's prior employment can again be explained by Mr. Eutzy's failure to inform his attorney concerning his prior employment. Mr. Eutzy informed his attorney that he had been in prison for the past fifteen (15) years and gave him no indication that he ever was employed. Before any attorney can undertake to investigate employment, he must have some place to start. In the instant case, Mr. Eutzy never provided that starting place. As for Mr. Eutzy's employment in Nebraska, it certainly would have been of little use since it was so remote in time, having taken place several years prior to the offense. Moreover, Mr. Eutzy's employer would have been subject to cross-examination which would have revealed that Mr. Eutzy

worked at the newspaper after confinement in prison. Additionally, the cross-examination would have revealed the reasons why Mr. Eutzy left, which are unexplained in the affidavit from the former employer. The appellant also contends that trial counsel should have presented psychiatric testimony in mitigation of sentence. Mr. Eutzy's trial counsel explained that presenting any psychiatric testimony would merely have highlighted Mr. Eutzy's problems with drugs, alcohol, and the fact that he had been in and out of prison since he was approximately 15 years old. (APP. 423) Clearly, any rebuttal evidence in this regard would also have been admitted from the psychiatric reports, generated for the trial phase, which indicated that Mr. Eutzy had no mental problems. Mr. Eutzy's trial counsel also testified that Mr. Eutzy indicated that he had no mental problems.

Next the appellant contends that even a rudimentary investigation by his attorney would have discovered family members and former employers who would have given favorable information about the appellant. Affidavits from the former employer and several members of his family were presented at the evidentiary hearing to support appellant's position. Close examination of each one of those affidavits clearly indicates that along with any possible favorable information there was also just as much unfavorable information which would have been made available to the prosecution for rebuttal of the mitiagation

circumstances. Included among appellant's allegedly potential mitigating evidence is an affidavit from Walter Switzer, News Editor for the Lincoln Star of Lincoln, Nebraska. Unfortunately, Mr. Switzer's affidavit is a two-edged sword. Although it does contain information which shows that many years prior to the murder the appellant was a good worker, it also cuts the other direction and demonstrates that Mr. Eutzy came to his employment directly out of prison. The jury could also infer, that the lack of reference to any other employment, indicates many years of unemployment, and that apparently he had not held gainful employment since 1973 when he left his job at the newspaper. Clearly the remoteness of this information would be of little value to a jury several years later in making an evaluation of the appellant. Moreover, the affidavit from Earl Dyer, Executive Director of the Lincoln Star indicated that he left the job due to "outside troubles". That statement alone would have opened the door for a wide range of cross-examination as to the reasons Mr. Eutzy had to leave such a good job when he was such a good employee. The jury may well have inferred from those affidavits that, at one time, Mr. Eutzy was a great person and somewhere along the line, something went wrong and he became a murderer. Moreover, the fact that Mr. Lang did not know about the employment is again due to Mr. Eutzy's own actions. Mr. Lang asked him what he had been doing for the past many years and he was informed by the appellant that he had been in state prison.

(APP. 408). The appellant directs the court's attention to the affidavit from his mother as showing that mitigating evidence existed which she would have been glad to have presented. He contends that Shirley Ogaard, Mr. Eutzy's mother, could have testified that she had a warm and loving relationship with her son, that the appellant still continued to express affection and devotion to her; that he was a decent and loving man, and had never been a violent person. Even if trial counsel had accepted all of Mrs. Ogaard's accolades concerning her son as true, he would still have been faced with opening the door to rebuttal information from the state and from conflicting inferences from the mother's own testimony. Although her affidavit, and we assume her testimony, would have contained very positive information about Mr. Eutzy, her testimony would also, as indicated by her affidavit, have subjected her to cross-examination concerning appellant's alcohol abuse as a teenager, his trouble in high school, his stay at Boys Town in Nebraska. Her testimony would also reveal that something happened in Mr. Eutzy's life in the 1970's which changed him and resulted in less frequent contact with his mother. Moreover, Mr. Eutzy's infrequent contact with his mother following 1973 would not have presented the jury with a picture of a devoted son. Moreover, the state attorney certainly could have delved into why there was no contact which may have opened up damaging testimony concerning imprisonment or other institutionalization. Mr. Lang would have

been faced with the same situation had he contacted and had available testimony from Ann Williams, Mr. Eutzy's first wife. Again, Ms. Williams' affidavit clearly contains favorable information, but it too cuts both ways and demonstrates that during the marriage, Mr. Eutzy was in trouble spending a lot of time in jail. (APP. 573). The affidavit also indicates that his wife left him because he was in prison.

Mrs. William's affidavit attempts to paint a picture of a good father, any jury would have to wonder as to what type of father Mr. Eutzy was since he was in prison during the years that his daughter was growing up. The affidavit indicates that for the daughter to see her loving father, she had to visit him in prison. Next, the appellant would have had his attorney introduce testimony from his daughter Shirley Comer. (APP. 571-572). Certainly it is laudable that Shirley expresses affection for her father, however, her testimony would have been more damaging than helpful to Mr. Eutzy. That is evident by the fact that she states that she never knew her real father but that she had a wonderful step-father who cared for her and her brothers and sisters while they were growing up. Clearly, the contrast between the fulfillmemt of paternal obligations by the step-father, and Mr. Eutzy's shiftless irresponsible stays in prison would not have been missed by the jury or the trial judge. Again, introduction of this evidence would have left Mr. Eutzy open to rebuttal evidence from the state attorney. The supposed

mitigating evidence which would have been presented by Mr. Eutzy's family and employers was damnation by faint praise. Here is a person, who all of these people speak so highly of, however, he abandoned his family, didn't support his children, and spent most of his adult life in prison. Clearly, this would not have been mitigating evidence but may very well have turned the jury from a recommendation of mercy to a recommendation of death. It is not ineffective assistance of counsel to not call family members where their testimony would be damaging. **Adams v. State**, 380 So.2d 423 (Fla. 1980). A defense attorney is also not required to present mitigating evidence where presenting that evidence would open the door for rebuttal evidence. **Darden v. Wainwright**, 477 U.S. ___, 91 L.Ed.2d 144, 106 S.Ct. ___ (1986). Assuredly the appellant would not have wanted a different result from the jury and he has failed to establish with his proffered evidence a reasonable probability that the trial judge's decision would have been different had the evidence been presented. **Strickland v. Washington**, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984); **Harich v. State**, 484 So.2d 1239 (Fla. 1986). The appellant also argues that his trial counsel should have introduced psychiatric evidence that Mr. Eutzy would have made a good prisoner if he were to be incarcerated for the rest of his life. In support of this contention, he has included an affidavit from Dr. Alan B. Zients, a clinical psychiatrist. The appellee submits that it is highly unlikely that this testimony

from the psychiatrist would have influenced the judge in his decision to override the jury. This type of testimony would mainly appeal to the emotions of the jury. In that regard it was totally unnecessary since the jury found that Mr. Eutzy should be spared.

The appellant also chides his trial counsel for not obtaining prison, school or medical records. There is indication that had school records had been obtained, they would have revealed that Mr. Eutzy did well in school until he went into high school when things began to deteriorate. (APP.560). Here again it's arguable whether the evidence would have made any difference in the outcome of the jury or the trial judge's decision. Mr. Eutzy specifically cites the information concerning how well he did in prison. This evidence would merely have accentuated in the jury's mind the fact that Mr. Eutzy had spent a great deal of time in prison and may very well have worked against him. In support of his argument, the appellant cites **Skipper v. South Carolina**, 106 S.Ct. 1669, 1671 (1986). The facts in **Skipper**, however, can be distinguished because the mitigating evidence discussed in **Skipper** dealt with the appellant's behavior in jail between the time of the offense and his trial, not with past prison behavior or predicated prison behavior.

The trial court has vindicated Mr. Lang's performance by

essentially finding that not presenting exhaustive documentary evidence of appellant's background at sentencing did not prejudice him. (APP. 2). The documentary evidence certainly did not give rise to a "reasonable probability that the appellant would have otherwise avoided his sentence of death." **Strickland v. Washington**, 466 U.S. at 668, 695. It was recognized by the 11th Circuit Court of Appeals in **Martin v. Wainwright**, 770 F.2d 918, 938 (11th Cir. 1985), **modified on other grounds on rehearing en banc, denied**, 781 F.2d 87 (11th Cir. 1986), that a capital defendant in presenting "mitigating evidence" is not entitled "to pick and choose between portions of documents and records in an attempt to mislead the sentence." (See §90.108, Fla. Stat.). The appellee is confident that there is no reasonable probability that the trial judge would have changed his decision based upon the now proffered materials concerning appellant's conduct in prison and his remote past. The appellee is equally convinced that had this information been introduced before the jury, they would have changed their recommendation to that of death. He would have received the same sentence and would now be claiming that his counsel should not have introduced the evidence which painted him in a bad light. In any event, "mitigation may be in the eye of the beholder." **Stanley v. Zant**, 697 F.2d 955, 969 (11th Cir. 1983). In **Thompson v. Wainwright**, 787 F.2d 1447, 1453 (11th Cir. 1986), the 11th Circuit Court found that trial counsel's failure to present very similar evidence on that

defendant's behalf was not prejudicial:

> the evidence of **Thompson's** background presented to the District Court consisted mostly of his Marine Corps and school records. The Marine Corps records indicated that **Thompson** was dishonorably discharged for a misrepresentation on his enlistment papers: he stated that he had not committed homosexual acts when in actuality he had a significant history of homosexual conduct. **Thompson's** elementry school records include grade, teacher comments, evaluations by the school psychologist and intelligence tests scores. They indicate that he was mildly retarded, had poor motor skills and great difficulty in basic subjects of reading, writing, and arithmatic, was hyperactive and difficult. **Thompson** also proffered the psychiatric evaluation prepared in 1976 and ignored by Solomon; these exhibits further documented **Thompson's** troubled early years. They indicate **Thompson** left school in the 9th grade at the age of 18, that he had had difficulty getting along with his parents, and that he had been a drug abuser. All four psychologist who examined **Thompson** in 1976 concluded that he was sane at the time of the offense and that he was capable of assisting in his defense. This does not mean, however, that no psychiatric mitigating factors statutory or non statutory, were indicated in the reports. Three of the psychiatrists diagnoised **Thompson** as having a personality disorder; the fourth questioned the extent of **Thompson's** participation in the crime due to possible intoxication and drug use.

> Finally, **Thompson** contends that reasonable investigation of Surace would have revealed that Surace was involved with violent motorcycle gangs, had been convicted of intimidating a government witness, and at age 14 had killed a playmate. In some, reasonable investigation would have yielded evidence of **Thompson's** low intelligence and

> troubled past and the violent reputation of his co-defendant.
>
> Even had the jury heard this evidence, however, we are confident that **Thompson's** sentence would have been the same. The jury's determination was strongly supported by the aggrevating circumstances introduced in the record. Nothing Solomon could have presented would have rebutted the testimony concerning **Thompson's** participation in the brutal torture murder. With respect to **Thompson's** mental condition, which was not touched upon at the sentencing hearing, although the psychiatric report suggested a personality disorder, and the school records indicated low intelligence, none of the material indicated that **Thompson** was suffering any specific disturbance at the time of the crime which would have mitigated his participation."

The 11th Circuit Court's holding in **Francois v. Wainwright**, 763 F.2d 1188, 1191 (11th Cir. 1985) wherein the court determined that admission of the following non statutory mitigating evidence for the jury's consideration would not have materially altered their conclusion:

> the proffered evidence shows that **Francois** was the product of a sordid and impoverished childhood environment. His parents were not married. His father was a habitual heroin addict who never worked, who brought other addicts into the home for injection of heroin in front of **Francois** when a child and who beat **Francois** because he would not fight the other children when he was a boy. **Francois'** mother often worked as a prostitute and was of little benefit to

> **Francois'** during his childhood. She married, but **Francois** step-father abused him. **Francois** grew up as a child of the street. At the same time he was smart although not finishing high school he obtained a G.E.D.
>
> The behavioral scientists in their affidavits state that ". . . some offenders, like Marvin **Francois** are themselves victims of circumstances that shape their lives beyond their deliberate control." They suggest that given **Francois's** chaotic anti social upbringing, "clear mitigation of punishment compelling mercy surfaces." At the time of the crime, **Francois** was 31 years of age, he had been convicted of two felonies involving violence. We conclude that granting a stay would serve no justifiable purpose. We can conceive of death penalty cases where the non statutory mitigating evidence proffered here might affect the sentencing outcome. This is not one of those case. We conclude that the appellant has no chance of changing the outcome of the five death sentences in this case, even if he prevailed on appeal and received a new sentencing hearing.

As pointed out by Judge Rawley in his order, trial counsel's strategy was to prevent the past of the defendant from becoming known and material. They opted to preserve the right to opening and closing argument in the guilt and penalty phase and he was successful. (APP. 2). It is well established that a lawyer's election not to present mitigating evidence is a strategic decision which the court should avoid second guessing. **Tafero v. Wainwright**, 796 F.2d 1314 (11th Cir. 1986), **cert. denied**, 107 S.Ct. 3277 (1987). It it likewise well settled however, that a lawyer must first evaluate the potential avenues of

investigation. **Tafero; Foster v. Strickland,** 707 F.2d 1339 (11th Cir. 1983). A strategy of silence may be adopted after a reasonable investigation for mitigating evidence or a reasonable decision that an investigation would be fruitless. **Tafero,**citing **Strickland v. Washington,** 460 U.S. 690-91, 104 S.Ct. 2052, 80 L.Ed.2d. 674 (1984). See also, **Kimmelman v. Morrison,** 477 U.S. _____, 106 S.Ct. 2574, 91 L.Ed.2d. 305 (1986). In the instant case, appellant's attorney made such an exploration and determined that a strategy of silence would be the most effective . The jury's recommendation proved him correct.

In any event, once trial counsel had reviewed the profferd evidence, he testified that he still would not have used the evidence from the family and employer because it would have revealed all of the defendant's problems and the psychiatric evidence would have revealed that defendant had spent most of his life in prison. The jury's verdict verifies that no competent trial counsel would use such evidence.

The appellant next contends that his trial counsel failed to investigate any mitigating evidence and that this failure cannot be justified as being the result of tactical judgment since he was unaware of the evidence at the time of the trial. On the contrary, the appellee submits that trial counsel did make an investigation of his client's background to the extent possible under the restrictions imposed on him by his client. He made

enough of an investigation to come to the correct conclusion that appellant's background should remain a secret to the jury. Again, the jury's decision justifies Mr. Lang's strategy.

Next, the appellant alleges that the circuit court dismissed the affidavit of Ann Williams (APP. 573-575), Mr. Eutzy's first wife with the conclusiary observation that "an ex-wife indicated he was a drug addict, an alcoholic and was in prison the whole time they were married. They were only married one year." (APP. 2) The appellant is mistaken about the trial court's observation. In making that statement, the trial court was not referring to Ann William's affidavit, but was rather referring to Mr. Lang's testimony contained on (EH 378).

> "He testified he would not have used the witness because it would have revealed all the defendant's problems; and that he had no contact for the past ten years. A daughter had only seen him once and that was while he was in prison. An ex-wife indicated that he was a drug addict, and alcoholic, was in prison the whole time they were married. They were married one year."

Trial counsel may have been mistaken about Ann William's affidavit, or he may have been referring to some independent information he had but in either event, his testimony was not challanged in the trial court by the appellant. Any objection that he had concerning the testimony is now waived.

Next the appellant asserts that the trial court erronously

discounted major portions of his proffered evidence because it would have indicated that Mr. Eutzy had been in prison. As an illustration of the trial court's first error, Mr. Eutzy cites the fact that the court brushed aside his highly successful employment as a newspaper reporter and editor. Mr. Eutzy apparently is claiming it would have been highly beneficial for the jury to have known that in twenty some odd years of adult life, he had held only one steady job for a period of three (3) years. Moreover, apparently he feels that it would have been beneficial for the jury to have known that he had been in prison just prior to the employment. The appellant also complains that the circuit court indicated that the psychiatric testimony would have revealed that Mr. Eutzy had been in prison most of his life. The appellant contends that the psychiatric testimony (APP. 592-93) does not indicate or suggest that he was in prison most of his life. The circuit court's conclusion was correct because it was not merely referring to the appellant's affidavit, but was referring to the testimony it had received during the hearing from Mr. Lang as to what the psychiatric information would reveal. Mr. Lang was referring to the psychiatric and physchological evaluations which had been completed prior to trail. In fact, in appellant's own brief, he alleges that his trial counsel knew he had been in a federal psychiatric facility. Therefore, the trial court's assessment is correct. The appellant also takes issue with the circuit court's

assessment that Mr. Eutzy left his employment with the Lincoln Star because he had to return to prison. The affidavit does merely contain information which states that Mr. Eutzy left the employment because of "outside trouble" although it does not specifically state in the affidavits that he in fact left his employemnt to return to prison. The appellee submits that the court could draw that inference based upon the evidence contained in the employer's affidavit and in the other affidavits submitted. It is also important to note that Mr. Eutzy's trial counsel testified that he had been in prison most of his life and this testimony was unchallanged by the appellant either by way of objection or rebuttal testimony.

Next the appellant suggests that his trial counsel could have excluded or limited the evidence concerning Mr. Eutzy's prison record by presenting carefully tailored testimony at sentencing that would have not opened the door to examination on this issue. This is patently absurd since one of the appellant's arguments is that his trial counsel should have introduced evidence from prison authorities that he was a model prisoner. These arguments seem to be inconsistent with each other. Moreover, once Mr. Eutzy's family began to testify, it is very likely that one of them would have accidentally mentioned that he had been in prison. This is particularly true of the proferred testimony of the daughter, Mrs. Comer. It seems that the appellant is trying to say that on the one hand, the trial

counsel should have done everything he could to have kept the jury from knowing that he had been in prison, but on the other hand, he should have introduced evidence showing how good a prisoner he was while in prison. Although true that the jury did hear about Mr. Eutzy's 1958 conviction, that is all they heard. Further testimony concerning his prison stay would simply have firmly established the conviction in the minds of the jurors and possably influenced them to recommend a death sentence. If more evidence concerning his prior record had been submited to the jury, even though evidence of nonviolent offenses, it may very well have lead the jury to the conclusion that Mr. Eutzy was a scofflaw and had merely started on a life of crime which began with property crimes and deteriotated to the ultimate evil. It is debatable that evidence Mr. Eutzy had been an exemplory, productive inmate it would have been beneficial to his cause. The appellant seems to think that society has a high regard for those who excel at prison life. It is ludicrous to suggest that information concerning his exemplory prison behavior would have been respected by the trial judge and been an influencing factor in his decision not to follow the jury's recommendation. In plain and simple terms, the appellant has failed to demonstrate that trial counsel's representation in regard to mitigating evidence fell below the standards of **Strickland v. Washington, supra.**

The appellant presents the court with an argument that Mr.

Lang rendered ineffective assistance of counsel by failing to raise a **Miranda** objection of appellant's statement concerning his 1958 conviction for robbery.

The trial record indicates that Mr. Eutzy was given his **Miranda** rights by Officer Shiver of the Pensacola Police Department. Neither the trial record nor the record in the eviendtiary hearing indicate that after he was given his **Miranda** rights he refused to answer questions and invoked his right to counsel. The appellant has attempted to fill this void in the record by submitting an affidavit executed by the appellant several months after the evidentiary hearing. The appellee submits that this improper method of introducing evidence was done in an effort to circumvent the state's right to cross-examine the appellant. The appellant had every opportunity to present evidence during the evidentiary hearing and failed to do so. This court should strike this issue from appellant's brief, or remand the case to the trial court to take further testimony from the appellant concerning the information contained in his affidavit and the execution of the affidavit. The appellee submitts that appellant's counsel knew the facts and circumstances surrounding the statments at the time of the evidentiary hearing but did not want his client cross-examined by the state.

The standard for assessing ineffective assistance of counsel

claims was established by the United States Supreme Court in **Strickland v. Washington, supra.** and is very similar to the standard adopted by the Florida Supreme Court. **Jackson v. State,** 452 So.2d. 533,(Fla. 1984); **Knight v. State, supra.** In order for an attorney to render competent, effective assistance at trial, it is not necessary that he raise every conceivable constitutional claim. **Jacobs v. Wainwright,** 450 So.2d. 200 (Fla. 1984). In the instant case, Mr. Lang objected to the introduction of the 1958 judgment on the grounds that there was no evidence to link Mr. Eutzy to that judgment. (APP. 334) Counsel did every thing he could to exclude the information concerning the 1958 judgement (APP.325-334) and although trial counsel did not raise a **Miranda** objection, it would have been futile to have done so since even had the objection been sustained, the state merely would have had to match Mr. Eutzy to the 1958 conviction by use of finger-print evidence. Moreover, had the state been put to the burden of doing that, they would also have been able to match Mr. Eutzy to fingerprint evidence demonstrating that he had been convicted of forgery and auto theft and was on escape status from those charges at the time he committed the murder. This would have added an aggrevating circumstance pursuant to 921.141(5)(e), Florida Statutes. The prosecutor attempted to introduce that information by way of a police officer who had been informed by Nebraska authorities that the appellant was on escape status. (APP. 330.) The introduction

of this additional aggrevating circumstance may very well have changed the jury's recommendations from mercy to death. It seems logical that if the state had been forced to bring records from Nebraska concerning the 1958 conviction they would have certainly killed two birds with one stone and brought in the records from the Nebraska Bureau of Prisons concerning the appellant's escape status. A **Miranda** objection would have been meritless and unsuccessful. Trial counsel, in order to be effective, is not required to raise meritless or fruitless arguments. **Songer v. Wainwright**, 572 F.Supp. 1384, **affirmed**, 733 F.2d., 788, **rehearing denied**, 738 F.2d. 451; **Owens v. Wainwright**, 698 F.2d. 1111 (11th Cir. 1983), **cert. denied** 104 S.Ct. 117,(11th Cir. 1983). Moreover, even if trial counsel's failure to raise the **Miranda** argument fell below reasonable standards for competent counsel, the deficiencies would still have to prejudice the defendant. **Downs v. State**, 453 So.2d. 1102 (Fla. 1984). See also **Palmes v. State**, 425 So.2d. 4 (Fla. 1983).

The appellant also contends that his trial counsel should have introduced mitigating evidence concerning his 1958 conviction. Any information concerning the 1958 conviction would simply have been an emotional appeal to the jury which, in light of the jury's recommendation was obviously unnecessary. It is highly unlikely that the trial court would have been influenced by any mitigating aspects concerning the conviction since the trial judge would have viewed the cold hard facts of the

conviction. Trial counsel's investigation of the case, his performance at trial, and his strategic decisions must be viewed from the perspective of trial counsel at the time and not by hindsight, nor should trial counsel be second guessed with the benefit of 20/20 hindsight. **Washington v. Strickland,** 673 F.2d. 879 (11th Cir. 1982); **Darden v. Wainwright,** 699 F.2d. 1031 (11th Cir. 1983); **Ford V. Strickland,** 696 F.2d. 804 (11th Cir. 1983), **cert denied** 104 S.Ct. 201; **Songer v. State** 419 So.2d. 1044 (Fla. 1982).

In viewing the totality of the circumstances, the appellant has failed to demonstrate that counsel's conduct was so unreasonable that it undermined the proper functioning of the adversarial process or that he was prejudiced by ineffecient representation on the part of counsel. Consequently, the trial court's denial of appellant's motion to vacate should be affirmed.

ISSUE II

The appellant's next two issues are issues which should be striken from his brief and not considered by this court since they are issues which should have been, or were raised in his direct appeal or they were raised on his petition for writ of habeas corpus to this court. A 3.850 motion cannot be utilized for a second appeal. Issues that either were raised, or could have been raised on direct appeal are foreclosed in a proceeding for post conviction relief. **Sireci v. State**, 469 So.2d. 119 (Fla. 1985); **Herring v. State**, 12 F.L.W. 44, Dec. 30, 1986, 501 So.2d. 1279 (Fla. 1986); **State v. Stacey**, 482 So.2d. 1350 (Fla. 1985). Moreover, matters which were raised on appeal and decided adversly to the movement are not cognizable by motion under Rule 3.850. **McCrae v. State**, 437 So.2d. 1388 (Fla. 1983); **Troedel v. State**, 479 So.2d. 736 (Fla. 1985). Comparison of the issues contained in Mr. Eutzy's original appellate brief and the issues and points raised in the current brief reveals that they are vertually the same. In his original appellate brief, as in the present brief, Mr. Eutzy discusses what mitigating circumstances should be considered. He includes in his discussion his age, as a mitigating factor, and Laura Eutzy's alleged involvment as a mitigating factor. The arguments in regard to Laura Eutzy were also raised , although in the guise of ineffective counsel, in the appellant's petition for writ of habeas corpus filed with this court in 1986 (copies of appellant's initial appellate brief

and petition for writ of habeas corpus attached hereto as appellee's Exhibits 1 & 2) In his initial brief, the appellant also advanced an argument concerning the trial court's finding that the murder was committed in a cold, calculated and premeditated manner. Likewise, in his initial appellate brief, Eutzy raised issues in regard to the principles established in **Tedder v. State**, 322 So.2d. 908 (Fla. 1975). The issues raised in the current brief were all dealt with by this court in its opinion on Mr. Eutzy's direct appeal. See **Eutzy v. State**, 458 So.2d. 755 (Fla. 1984). The appellee, much to his chagrin, agreed to allow the appellant to file an expanded brief. Appellee certainly would have objected had it known that the appellant would take advantage of the situation by inserting frivilous, meritless and inappropriate claims. Issues II and III are an inappropriate use of post-conviction preceedings to relitigate the same issues. **Quince v. State**, 477 So.2d. 535, **cert. denied**, 106 S.Ct. 1662, 980 L.Ed.2d. 204 (Fla. 1985). The court has previously held that refinements in criminal law which deal with the admissability of evidence, procedural fairness or proportionality punishment in capital cases are not retroactively cognizable in post-conviction proceedings. **Witt v. State**, 387 So.2d. 922, **cert. denied** 101 S.Ct. 796, 449 U.S. 1067, 66 L.Ed.2d. 612 (Fla. 1980). This court should either strike the arguments and issues contained in Issue II of appellant's brief or decline to address them.

ISSUE III

Issue III was also raised by the appellant in his initial brief and decided adversly to him. This court correctly dealt with the issue of the trial court's override of the jury's recommendation and affirmed it in its original opinion on appellant's direct appeal. The arguments and cases cited in support thereof contained in Issue II of appellee's brief, equally apply to Issue III of appellant's brief and are adopted hereto. Since the appellant has failed to establish any grounds for relief, trial court should be affirmed.

CONCLUSION

Based upon the foregoing arguments and citations of authority, the trial court's denial, the motion for post-conviction relief should be affirmed. Motion relief should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF APPELLEE has been furnished by U.S. Mail to Mr. Timothy C. Hester, Post Office Box 7566, Washington, D.C. 20044, this 29th day of January, 1988.

Kurt L. Barch

KURT L. BARCH