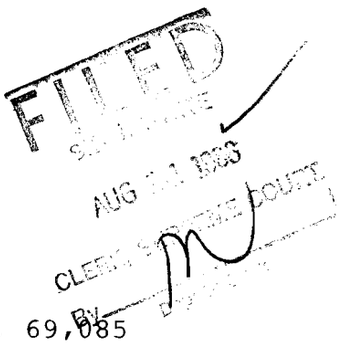
OA 12-1-86

IN THE SUPREME COURT OF FLORIDA



FREDDIE LEE WILLIAMS,
Petitioner,

vs.

CASE NO. 69,085

LOUIE L. WAINWRIGHT, ETC.
Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, the respondent, Louie L. Wainwright, by and through the undersigned counsel, pursuant to the order to show cause issued by this honorable court on July 29, 1986, and requests this honorable court to deny all requested relief, and in support thereof states as follows.

I JURISDICTION

Jurisdiction is vested in this court pursuant to article V, subsections 3(b)(7) and (9), Florida Constitution.

II. FACTS

The victim was Mary Robinson, Williams' longtime girlfriend. On the night of the murder, the victim went to her sister's house and there received a number of upsetting telephone calls from Williams. After these calls, the victim and her sister went to jai alai and returned to the Williams-Robinson apartment around eleven o'clock. The sister left. Williams soon arrived and shortly thereafter called the sister to report that something had happened to the victim. When the sister returned, the police were already present.

Earlier that evening, Williams had borrowed a neighbor's handgun, telling him that he was going gambling. He testified that he left the gun on the dresser in a bedroom at home when he went out and that upon his return, the victim staggered toward him, already shot. He called the police and an ambulance. He also testified he did not want the police to find the weapon in his possession since he was on parole; he thus went into the bed-

room and took the pistol from the dresser and threw it outside under a bush.

The state's case revolved around longstanding domestic arguments between Williams and the victim and in particular Williams' anger over the victim's supposedly taking a shower that night, a sign he took to mean that the victim was cleaning up after being with a boyfriend.

At trial, the sole theory of defense was that the crime was committed by an unknown assailant. According to Williams, the victim was already wounded when he entered the apartment and he claimed he tried to help her. The state established by ballistics tests that the pistol Williams had borrowed was the murder weapon. The physical evidence presented at trial showed that Williams' story about an unknown murderer as well as the circumstances surrounding the disposal of the gun was clearly unreasonable. Since Williams did not present any reasonable hypothesis of innocence, the jury properly concluded that Williams was not telling the truth, and, given the evidence, that Williams' act represented premeditated murder.

Defense counsel in closing argument suggested that the evidence showed, at most, second-degree murder and that this killing could have been a domestic heat-of-passion murder. The jury properly found otherwise based on what the evidence did not show. There was no evidence of any struggle or commotion or any facts which might suggest a confrontation of any physical or violent nature between the victim and Williams. Given the location of the victim crouching on the corner of the bed when she was shot, the presence of toothpaste and a toothbrush on the bed, and the fact that the gunshot wound was not suffered at close range, the jury could well have found that Williams confronted the victim while she was brushing her teeth, causing her to move to the bedroom. He then shot her once in the side of the neck while her head was turned away from him and while her arm was raised in a defensive posture. The fact that the victim was only shot once is not dispositive of lack of premeditation since, in this case, the

wound was in the neck region and immediately caused massive and visible loss of spurting blood. Thus, the evidence, including the physical facts, was such that the jury was not precluded from finding first-degree murder.

Freddie Lee Williams was properly convicted of first-degree murder. The jury recommended death. The trial court found two aggravating circumstances: (1) that the capital felony was committed while Williams was under sentence of imprisonment and (2) that Williams had been previously convicted of a felony involving the use or threat of violence to another. The court found nothing in mitigation, and imposed a sentence of death. On direct appeal, this court affirmed the judgment of guilty of first-degree murder and the sentence of death. Williams v. State, 437 So.2d 133 (Fla. 1983). The facts set out herein, are taken from this court's opinion. In an order entered without opinion on September 9, 1985, this court denied Williams' further request for leave to file a petition for writ of error coram nobis, in case number 66,883.

III ARGUMENT

Before addressing each individual issue raised in the petition filed herein, the undersigned will first respond to the issues collectively.

In Evitts v. Lucey, 105 S.Ct. 830 (1985), the United States Supreme Court recognized the right to effective assistance of counsel on a first appeal as of right but stopped short of devising a standard for resolving claims of ineffectiveness. The standard for ineffective assistance of trial counsel is a two-pronged test that looks at an attorney's performance as judged by professional standards and the prejudice suffered by the defendant from counsel's deficiencies. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

Appellate advocacy, however, is quite different than trial advocacy and counsel's abilities are not so important in an appellate context since even the cursory raising of an issue leads to a thorough examination of the record by an appellate court. Moreover, "[T]he defendant needs an attorney on appeal not as a shield to protect him against being 'haled into court' by the State and stripped of his presumption of innocence, but rather as a

sword to upset the prior determination of guilt." Ross v. Moffitt, 417 U.S. 600, 610-11, 94 S.Ct. 2437, 2443, 41 L.Ed 2d 341 (1974).

Ineffective trial counsel may forfeit a defense to all but the weakest prosecution. On the other hand, it is the most exceptional appeal whose outcome is dependent upon the artfulness of appellate counsel, because even a poor appellate argument is met with incisive consideration by a court in the rendering of a considered decision. Once an appellate court is directed toward asserted error, it examines the merits of the issue and a court will recognize prejudicial error when a contention of this gravity is brought to its attention. Moreover, this court has imposed upon itself the duty to independently examine each death penalty case. See, Wilson v. Wainwright, 474 So.2d 1162, 1165 (Fla. 1985). Thus, two cognitive levels of review obtain to guard against letting the unjust conviction or sentence stand. Added to these safety valves is the fact that fundamental error can not be waived and may be raised at any time, so that appellate counsel on direct appeal is not the last advocate to raise the sword to upset the prior determination of guilt. Thus, the respondent would respectfully suggest that the standard enunciated in Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985), that a deficient performance need only "undermine confidence in the fairness and correctness of the appellate result" be revisited, for it views the process of direct appeal as conclusive and the result the handiwork of counsel. A defendant is always at liberty to search the record and raise fundamental error. Chapter 85-332, Laws of Florida, creating the office of Capital Collateral Representative represents a state policy of providing legal assistance for collateral representation on behalf of indigent persons under sentence of death for just such purpose. Williams should, by all rights, be before the court addressing the fundamental nature of his asserted claims rather than expressing his disenchantment with counsel. It seems the one who actually suffers prejudice by such proceedings is appellate counsel alone.

> ...Now lawfully convicted criminals who have no meritorious bases for attacking the conduct of their trials will be able to tie up the courts with habeas petitions alleging defective performance by appellate counsel. The result is akin to the effect created when a mirror is held facing another mirror, the image repeating itself to infinity.

Evitts v. Lucey, 105 S.Ct. at 844 (Justice Rehnquist, dissenting).

Moreover, referring to its holdings in several equal protection cases, the Lucey Court stated: "[T]he attorney need not advance every argument, regardless of the merit, urged by the appellant..." 105 S.Ct. at 835. In Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed 2d 987 (1983), the Court held that counsel was under no constitutional duty to raise every nonfrivolous issue and could, "as a matter of professional judgment" decide not to present certain points.

In view of the above, the right to bring ineffective assistance of appellate counsel claims should be limited to those cases in which an appeal has not been decided on the merits, as in Lucey, and the instant petition summarily disposed of.

Respondent addresses the individual issues herein only as alternative arguments in the event this court should reject the above argument.

A. PETITIONER WAS NOT DEPRIVED OF A FULL AND MEANINGFUL APPEAL AS TO THE DEATH SENTENCE BY VIRTUE OF COUNSEL'S CONDUCT, AS COUNSEL PROPERLY REPRESENTED AND ARGUED ON DIRECT APPEAL THE FINDINGS OF THE SENTENCING JUDGE IN AGGRAVATION AND MITIGATION AND THE PROPRIETY OF THE SAME.

At the penalty phase, petitioner presented testimony reflecting that he was very young when his father died and his mother never remarried and raised her children as best she could (R. 794, 798, 800,801). Williams went as far as the ninth grade in school, then left school to help support his mother and siblings (R. 801). Testimony further reflected that Williams had two sons, by a woman other than the victim, who lived with Williams' mother, and that Williams lived there also as the boys were growing up (R. 792,796,801). Williams helped his mother financially and otherwise to raise his two sons (R. 784,789,793,796,799,801). From all accounts, it appeared that Williams had a good relationship with his blood relatives. Testimony also reflected that he was respectful toward friends or acquaintances, (R. 786, 788) and got along with co-workers for the three or four months he worked on Wilbur Johnson's citrus farming crew (R. 780). Williams, himself, further testified that he was innocent and wouldn't have killed Robinson because he loved her, and although he had shot her on a previous occasion, it was an accident caused by dropping the gun and that Robinson had wanted to drop the charge and they lived together afterward (R. 803-805). He also testi-

fied that he had accepted Christ into his life and was working toward becoming an evangelist (R. 803).

Sentencing was held on December 18, 1981. Judge Kirkland stated in regard to this testimony that "at the penalty phase of trial, the defendant presented evidence from relatives and friends that he is a good person and that he was kind to them. This evidence does not rise to a non-statutory mitigating circumstance which could offset the aggravating circumstances." (R. 859). This same statement is found in the findings of fact in the written sentencing order (R. 1371).

In the initial brief on direct appeal counsel stated as follows, in discussing the appropriateness of the death penalty: "After a jury recommendation, by 8 to 4, of death, the lower court imposed the death penalty. In doing so, the court found two aggravating circumstances and no mitigating circumstances." (Initial Brief of Appellant p. 27).

Counsel neglects, however, to bring to the attention of the court further argument made on behalf of Williams on direct appeal:

> ...There are some matters in the instant case that could be said to be mitigating. Various witnesses testified that Appellant loves people and loves his family, he cares for people, he is nice, he takes care of his children, and he got along with fellow workers and was a good worker. The Appellant's father died when Appellant was six or seven years of age, when the family was living in Alabama. The Appellant's mother did not remarry and she raised the family "the best way I can." The Appellant helped in the raising of the family and quit school to help support them. The Appellant's mother, son and sister testified that they do love him. The Appellant's son said his father was a good father and supported him.
>
> These features were merely dismissed without any explanation. These types of factors can, however, be considered mitigating. Peek v. State, 395 So.2d 492 (Fla. 1980) said that a defendant's character can be considered as a mitigating factor. Jacobs v. State, 396 So.2d 713,718 (Fla. 1981) indicated that a valid mitigating factor was that the accused was "the mother of two children for whom she cared." That the defendant voluntarily surrendered can also be a mitigating circumstance. Washington v. State, 362 So.2d 658 (Fla. 1978). In the instant case the Appellant made no effort to flee and in fact had ample opportunity to do so because he was not arrested until three days after the incident.

(Initial Brief of Appellant pgs. 35-36).

Counsel also neglects to bring to the attention of this court a discussion of such testimony that occurred during oral argument before this court on November 1, 1982, a copy of which the undersigned has taken the liberty of securing and would refer the court to the same.

> Mr. Prospect: There were two factors in aggravation and as the decisions from this court have stated so often, the existence of but one gives rise to the presumption that the death penalty is correct. The trial court found nothing in mitigation, nothing was presented and although one might conclude that this involved a simple shooting in a domestic context, I think its very important

that the man had, and perhaps does have a propensity to shoot people and he had very definitely the propensity to shoot this victim on a previous occasion.

Justice: Counsel, you didn't mean to say nothing was presented in mitigation, you meant to say there were no statutory mitigating factors, they put on a lot of character evidence, this was a pretty good fellow, etc.

Mr. Prospect: Yes sir. But nothing that was found by the trial court, and even if anything....

Justice: Albeit, that they,they were all,did go to the contrary testimony to the character and things of that which, although not statutorily mitigating, but it would come under the Lockett decision.

Mr. Prospect: Yes sir. But I don't believe even the testimony that was offered in his behalf was really relevant other than that he was a fairly good guy. That's the sum of it.

In its opinion, this court construed the sentencing judge's findings of fact as not encompassing any mitigating factors, stating: "[A]fter the conviction, the jury voted to recommend the death penalty. Upon finding two aggravating circumstances and nothing in mitigation, the trial court imposed a sentence of death." 437 So.2d at 134. This court then concluded that "[T]he trial court correctly found two aggravating circumstances and nothing in mitigation." 437 So.2d at 137.

The petitioner's entire argument rises and falls upon his own peculiar interpretation of the sentencing judge's statement in regard to non-statutory mitigating evidence that "This evidence does not rise to a non-statutory mitigating circumstance which could offset the aggravating circumstances." Although the phrase "which could offset the aggravating circumstances" is merely descriptive of the function of a non-statutory mitigating circumstance and implicitly finds a lack of relevance in the evidence presented, the petitioner, years later offers this court a new strained interpretation of the statement and claims a non-statutory mitigating factor actually was found by the sentencing judge. Taken on its face, this statement clearly reflects a rejection of the defendant's showing as having no valid mitigating weight. See, Brown v. State, 473 So.2d 1260 (Fla. 1985). Conspicuously absent is record support for petitioner's argument as well as any statement from the sentencing judge to indicate that all parties have heretofore misconstrued his action. This claim, therefore, is fatally flawed. See, Spaziano v. State, 489 So.2d 720,721 (Fla. 1986).

It is clear that whether a particular mitigating circumstance is proven, and the weight to be given it, is a decision that rested with the judge below.

Aside from lack of record support for petitioner's argument, logic alone, militates against petitioner's offered grammatical construction. The mitigating evidence presented at the penalty phase,at best, reflects that petitioner had some satisfactory relationships with blood relatives and a few others, but does little to diminish the demonstrated murderous intent he had for his victim and the manner of her death. In the absence of something more concrete than a new grammatical interpretation, it must be assumed that the trial judge did not believe that the petitioner's mitigating evidence, in its totality, rose to the level of mitigation with respect to sentencing for murder.

When the death sentence is imposed, this court has taken upon itself the duty of evaluating anew the aggravating and mitigating factors of the case, as well as making a proportionality determination to decide how the case compares with other cases, to ultimately ascertain whether the sentence of death is appropriate. Williams v. State, 437 So.2d 133 (Fla. 1983). As previously discussed, appellate counsel pointed out to the court in his brief those factors that he considered to be mitigating and complained that they were dismissed by the sentencing judge. From the colloquy set out herein of oral argument, it is clear that this court was aware of the evidence presented by petitioner at sentencing, and that it went toward the possible finding of a non-statutory mitigating factor. Thus, this court was fully informed in rendering its decision. It really matters not whether this court believed or did not believe such factor was found as long as such facts were before it on appeal. The petitioner equates numerical balance or equivalency with appropriate proportionality review. This court reviews a case in light of other decisions, based on a reasoned judgment by the sentencing judge as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present, as opposed to a mere counting process of x number of aggravating circumstances and y number of mitigating circumstances. State v. Dixon, 283 So.2d 1 (Fla. 1973). Armed with all the relevant facts, it is highly unlikely that this court itself would do what is forbidden to the trial judge and simply engage in a mere counting process in undertaking its proportionality review. Aside from the fact that petitioner has failed to demonstrate a deficient performance on the part of appellate counsel, even

accepting that counsel misconstrued the findings does not result in an undermined confidence in the fairness and correctness of the appellate result. But for the fact that this claim is couched in terms of "ineffective assistance of appellate counsel," it would not even be reviewable. See, Foster v. Wainwright, 457 So.2d 1372 (Fla. 1984). Its presentation at this point in time merely constitutes a second-bite at the proportionality apple.

To the extent that petitioner attempts to reargue the dissenting opinion, it must be noted that in the salient cases he relies on this court found that aggravating factors were improperly found and that compelling mitigating factors were present, unlike the present case.

Petitioner further seeks to expand the limits of proportionality review. "[P]roportionality review does not mean the reopening of every prior death case when a new one is decided to determine whether the previous decision is consistent with a later one." Sullivan v. State, 441 So.2d 609 (Fla. 1983). Petitioner's attempt at securing a second-bite at the apple is nowhere more obvious than in his reliance on Ross v. State, 474 So.2d 1170 (Fla. 1985), a case decided two years after his own.

B. APPELLATE COUNSEL WAS NOT INEFFECTIVE IN FAILING TO ADVANCE ALLEGED IMPROPER PROSECUTORIAL ARGUMENT AS AN ISSUE ON APPEAL.

In arguing that counsel was ineffective on appeal for not arguing prosecutorial misconduct in several different contexts, petitioner first ignores the fact that an attorney need not advance every argument, regardless of merit, in the first place. Evitts v. Lucey, 105 S.Ct. at 835.

Petitioner first complains that informations were introduced at sentencing charging a prior assault on the same victim and on another. This was not error, however, because the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for, and it is not improper to admit testimony concerning events which resulted in a prior conviction. Elledge v. State, 346 So.2d 998 (Fla. 1977); Elledge v. State, 408 So.2d 1021 (Fla.1981); See, also, Ruffin v. State, 397 So.2d 277 (Fla. 1981). Moreover, the prosecutor had every right to cross-examine Williams as to the prior assault on Robinson in view of Williams opening the door to such by taking the stand at sentencing and testifying that he was innocent and wouldn't have killed Robinson because he loved her, and although he had shot her on a previous occasion, it was an

accident and that they lived together after the incident (R. 803-805). After williams opened the door, the issue of his prior convictions became the subject of fair comment in closing argument. Defense counsel availed himself of fully discussing the details of such prior convictions himself (R. 830). The prosecutor's argument, likewise, was only a fair comment on the evidence adduced at sentencing and not at all an inference that Williams would shoot people again, especially women, if he did not receive the death penalty. Moreover, contrary to petitioner's assertions, no objection to such argument was made (R. 819) and the issue waived. Riley v. State, 433 So.2d 976 (Fla. 1983).

Aside from failing to demonstrate that the jury was misled, petitioner has failed to demonstrate that the ultimate sentencer found a non-statutory aggravating factor and that this court considered the same in its independent reweighing of the circumstances. See, Wainwright v. Goode, 464 U.S. 78, 104 S.Ct. 378, 78 L.Ed. 2d 187 (1983). In view of the above, as a matter of professional judgment appellate counsel could properly decide to forego the presentation of this argument on appeal and concentrate more heavily on the circumstances of the crime and the impropriety of the conviction and sentence. See, Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed 2d 987 (1983), without at all compromising the appellate result.

Although petitioner makes much of the fact that the jury sent a written question inquiring as to the sex of Winman Esters, he neglects to inform the court that the jury was not advised of the sex of Esters but was told to rely on the contents of the documents in evidence, with the agreement of defense counsel (R. 842).

Petitioner, further, incorrectly argues that the "trial court", during the penalty phase, was allowed to improperly argue that the petitioner was himself a "cold, calculated type of person" to whom this aggravating circumstance should apply (Petition for Writ of Habeas Corpus p.18). The trial court did not "argue" anything at all, least of all improperly. The prosecutor suggested that Williams was a cold, calculated type of person to whom this aggravating circumstance should apply, based on the evidence, in particular the absence of any sudden domestic flare-up (R. 822-823). This was argued without objection (R. 822-823). The sentencing judge did not find that the murder was committed in a cold, calculated and premeditated

manner, in any event. Appellate counsel could well have decided under such circumstances to present more compelling argument and forego a "shotgun" approach, which appellate courts are said to frown upon.

C. APPELLATE COUNSEL WAS NOT INEFFECTIVE IN FAILING TO RAISE AND ARGUE AS AN APPELLATE ISSUE THE CONSIDERATION OF RESIDUAL, "UNREASONABLE BUT POSSIBLE" DOUBT AS TO GUILT AND THIS COURT NEED NOT GRANT HABEAS CORPUS RELIEF TO CONSIDER THE SAME.

In regard to the "ineffective assistance of appellate counsel" aspect of this two-pronged issue, petitioner has, in essence, answered his own claim in his citation of dispositive cases, i.e., Buford v. State, 403 So.2d 943, 954 (Fla. 1981), which was the law at the time of this appeal, and Burr v. State, 466 So.2d 1051 (Fla. 1985). Both cases preclude the consideration of doubt as to guilt in the penalty phase, in view of a preceding guilty verdict.

Thus, petitioner's contention finds only arguable support in the 1986 case of Lockhart v. McCree, 106 S.Ct. 1758, 90 L.Ed 2d 137 (1986). Petitioner fails to divulge what, if anything, presaged the Lockhart decision to hold appellate counsel responsible for a lack of clairvoyance. It is clear that counsel for the accused need not be expected to anticipate developments in the law which make possible the raising of novel issues. Thomas v. State, 421 So.2d 160 (Fla. 1982). The ineffectiveness prong of this claim can be summarily disposed of.

Residual doubt about guilt is, in any event, a doubt harbored in the minds of jurors when defense counsel has properly done his job, and the evidence allows him to make such arguments. Such doubt is occasioned by the persuasiveness of trial and not appellate counsel. It is not an argument properly presented to an appellate court, but is in nature, a jury argument or one made to the sentencer. Appellate counsel strenuously argued on appeal that the circumstantial evidence in the case could only support a conviction for second-degree murder and that under the facts of the case, the death penalty was inappropriate (Initial Brief of Appellant). He need not have jeopardized this position and possible relief by insisting upon an unreasonable factual innocence, when the record reflects otherwise. Lockhart demands only that reasonable doubt of guilt be allowed to be argued and considered. It has little application to the appellate area. Moreover, this court independently reviews the legal sufficiency of convictions and

sentences in capital cases. Le Duc v. State, 365 So.2d 149 (Fla. 1978). In the present case, this court properly found that "the physical evidence presented at trial shows that Williams' story about an unknown murderer as well as the circumstances surrounding the disposal of the gun is clearly unreasonable." Williams v. State, 437 So.2d 133, 135 (Fla. 1983). While the jury may be entitled to its "whimsical" doubts, Lockhart hardly commands whimsical appellate review, and the evidence presented below was properly found sufficient to support the judgment and sentence.

Respondent is at a loss as to what argument is actually being advanced in the petition in regard to this issue. It would seem that petitioner actually complains that the jury and the judge, on the mere proclamation of his innocence at sentencing, did not entertain whimsical doubts as to his guilt. The dictates of Lockhart were complied with, for petitioner was allowed to testify to his innocence, to the extent desired, and the judge considered the same, but found strong evidence of guilt. Defense counsel put him on the stand for that express purpose, and it matters little what counsel's view was as far as what evidence could be presented. Petitioner complains not of a violation of the dictates of Lockhart, but merely of the result.

D. APPELLATE COUNSEL WAS NOT INEFFECTIVE IN FAILING TO ARGUE ON APPEAL THAT THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO ARGUE TO THE JURY THAT THE OFFENSE WAS ESPECIALLY WICKED, EVIL, ATROCIOUS OR CRUEL AND THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

Petitioner complains that the prosecutor argued the applicability of the above two aggravating factors, which the sentencing judge did not rely upon in sentencing the petitioner to death.

The jury was instructed that their advisory sentence should be based upon evidence heard at both stages of the proceedings (R. 834). All the aggravating and mitigating factors were read to them and it was clear that it was within their province to find or reject the same (R. 834-837). The petitioner has not demonstrated that the jury considered any improper factors in reaching its advisory sentence, especially in view of the fact that defense counsel, as well, urged the inapplicability of all aggravating factors and the applicability of all evidence proffered in mitigation, no matter how tenuous (R. 827-833).

It seems that petitioner would be happier had the judge also found these two factors, so he could urge that as error, as well. The judge,

however, did not find these factors in aggravation, and in Florida, the judge is the sentencer. No arbitrary or freakish sentence was imposed as a result of this system. See, Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed 2d 340 (1984).

It is clear that this is another issue with little hope for success that appellate counsel could have properly bypassed in order to present more compelling issues on appeal.

E. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ARGUE ON APPEAL THE EXISTENCE OF THE ALLEGEDLY ADDITIONAL NON-STATUTORY MITIGATING FACTOR THAT THE PETITIONER HAD BEEN DRINKING ALCOHOLIC BEVERAGES PRIOR TO THE MURDER.

While evidence at petitioner's trial showed that he had been drinking alcoholic beverages prior to the homocide, the evidence also reflected that he was not intoxicated. Appellate counsel pointed out this fact to the court on appeal (Initial Brief of Appellant p.4). Such argument was not presented at the penalty phase and it would have been inconsistent with the petitioner's testimony that he did not commit the crime at all. Appellate counsel has no duty to develop additional alternative theories in mitigation and offer them for the first time on appeal, when they were not offered to the court below. Unlike the situation in Ross v. State, 474 So.2d 1170 (Fla. 1985), the record does not even hint at a "possible intoxication" that may have had some causal relationship to the murder. Moreover, considering that Ross was not decided until 1985, counsel could hardly have looked to that case for guidance.

F PETITIONER WAS NOT DEPRIVED OF A FULL AND MEANINGFUL APPEAL ON THE ISSUE OF HIS SENTENCE DUE TO THE CUMULATIVE ERRORS OF APPELLATE COUNSEL

Because of the arguments set forth herein to show a lack of error in the first instance, there can be no cumulation of the same.

CONCLUDING ARGUMENT AS TO ALL CLAIMS

The claims raised herein involve what is alleged to be either fundamental error or involve a change in law. While the respondent recognizes that a claim may be presented on both the merits and couched, as well, in terms of ineffective assistance of counsel, such claims must be exhausted upon each tier of review. Should this court find that the ineffective assistance of counsel claims herein are cognizable, the instant petition should be dis-

missed or held in abeyance as a motion for post-conviction relief would be adequate and appropriate to test the legality of his sentence and the fundamental nature of his claims as well as the claims involving a change in law.

WHEREFORE, the respondent respectfully requests this honorable court to dismiss or deny the petition for writ of habeas corpus.

Respectfully submitted,

Jim Smith
Attorney General

Margene A Roper

Margene A. Roper
Assistant Attorney General
125 N. Ridgewood Avenue, 4th Floor
Daytona Beach, Florida 32014
(904) 252-1067

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to Chandler R. Muller, Attorney for Petitioner at Muller, Kirkconnell and Lindsey, P.A., 1150 Louisiana Avenue, Suite 1, Post Office Box 2728, Winter Park, Florida 32790, this 11th day of August, 1986.

Margene A Roper
Of Counsel