IN THE SUPREME COURT OF FLORIDA

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STATE OF FLORIDA,

Appellant/Cross Appellee,

v. CASE NO. 70,658

JOHN MICHAEL,

Appellee/Cross Appellant.

_______________________________/

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY

Reply.
BRIEF OF APPELLANT/CROSS APPELLEE

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SUMMARY OF THE ARGUMENT

Issues on the Cross Appeal:

I. Beginning with issue IV in his brief, Appellee/Cross Appellant raises issues that are not properly before this court. The issues either were or could have been raised on direct appeal. Some of the claims advanced here were not presented to the circuit court and are not properly before this court. Appellant/Cross Appellant fais to demonstrate that those issues that have been proceedurally defaulted should be adressed at this time. The court has already ruled adversely to his position on the Caldwell claim. And, it is clear that his Booth claim is neither supported by the record or a change of law for Witt purposes. Even if the claims were before the court properly, it is clear that there is no merit to them. The record does not support Appellee/Cross Appellant's that he demonstrated that he was not competent to stand trial, that there were any improprieties in the arguments the state advanced, appellant's statements should have been suppressed, that Morin changed his testimony from his pre hypnosis account of the facts or that there waas a real conflict of interest arising from his short representation by a member of the public defender's office.

II. Hewetson did all he could do in investigating the facts relevant to the guilt phase of the trial. Neither Appellee/Cross Appellant nor any member of his family revealed either a previous psychiatric hospitalization of a childhood of abuse to Hewetson or any of the mental health professionals. He never even proved that any of the opinions would ahve changed with the new

material. There was no basis for the objections to the Ohio witnesses on either hearsay or confrontation grounds. the prosecutorial argument that he claims should have drawn objection was fair comment on the evidence, accurate statements of the law or fair response to arguments advanced by Hewetson.

III. Appellee did not claim that he was incompetent to stand trial to the trial court. He failed to pursue his calim that the professional's who examined him pre-trial did a constitutionally deficient job.

Reply to Issues on Appeal

IV. Appellee/Cross Appellant is in error in urging the court to treat the circuit court's ruling on ineffectivenes of counsel at the penalty phase. It is a mixed question of law and fact. The state's attack is on the trial court's legal conclusions not its factual findings. He also urges the court to give an overbroad reading to the factual finding by the trial court. Hewetson conducted a constitutionally sufficient investigation and made reasonable choices based on that investigation.

V. Appellee/Cross Appellant has reversed the position he advocated in the trial court that the evidence of his troubled childhood was not reasonably avbailable at the time of trial.

THE ISSUES PRESENTED BY
THE CROSS APPEAL

I.

WHETHER THIS COURT SHOULD ANY OF THE ISSUES PRESENTED IN APPELLANT/CROSS APPELLEE'S BRIEF THAT WERE, SHOULD HAVE OR COULD HAVE BEEN RAISED ON DIRECT APPEAL FROM HIS JUDGMENT AND SENTENCE?

Appellee/Cross Appellant raises a number of issues that either were or could have been raised on direct appeal from his conviction. These issues are whether there was any error in the trial court's refusal to appoint additional experts to examine Appellee/Cross Appellant immediately after the claims of prosecutorial misconduct (Appellee/Cross Appellant's Issues IV.C), all claims of presecutorial misconduct (Appellee/Cross Appellant's Issue V), whether his statements to police should have been suppressed (Appellee/Cross Appellant's Issue VI) whether the witness Morin's testimony should have been suppressed on the ground, that it had been hyponotically induced (Appellee/Cross Appellant's Issue VIII) and whether he was denied the right to confront his accusers (Appellee/Cross Appellant's Issue IX). All of these issues could have been raised on direct appeal as they are all grounded in the direct appeal record or were other wise already procedurally defaulted. Accordingly, they are all procedurally defaulted. Demps v. State, No. 71,402 (Fla. Nov. 4, 1977) [12 F.L.W. 56]. The Circuit Court so found, R. 437-440, And, this court should affirm that ruling.

Appellee/Cross Appellant apparently recognizes that at least some of his claims are procedurally barred as he urges the court to reach his "prosecutorial misconduct" issues on the grounds

that both Booth v. Maryland, ____ U.S. ____, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987) and Caldwell v. Mississippi, 472 U.S. 320 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) represent a change of law for Witt v. State, 387 So.2d 922 (Fla. 1980) purposes.

Appellee/Cross Appellant also urges the court to reach the merits of these claims in the interests of justice as prosecutor's arguments "prevented" the sentencing process citing to Smith v. Murray, ___ U.S. ___, 106 S.Ct. 2661, 2668, 91 L.Ed.2d 434 (1986).

As Appellee/Cross Appellant's argument correctly recognizes with his citation to Copeland v. State, 505 So.2d 425 (Fla. 1987) and Aldrige v. State, 503 So.2d 1257 (Fla. 1987) on the Caldwell issue is against him this court's position His attempt at distinguishing his case from the jury instruction cases is without merit as well. The foremost reason it is without merit is that it reasons from the erroneous premise that the Florida sentencing scheme gives the same role to the jury as did the sentencing scheme at issue in Caldwell. It does not. The jurisprudence of this state does not accord a jury recommendation of death any weight. In fact, this court reversed the death sentence Ross v. State, 386 So.2d 1191, 1197 (Fla. 1980) (reversing death sentence predicated in part on trial court's finding that there was no compelling reason to override jury recommendation) for giving too much weight to a death recommendation. In this regard, it is worth noting that Appellee/Cross Appellant mis cites LeDuc v. State, 365 So.2d 149, 151 (Fla. 1978) as supporting a proposition different from but

sufficiently analogous to the proposition that a jury recommendation of death is entitled to deference to lend support to it. LeDuc addresses the standard that this court uses in reviewing death sentences predicated on jury recommendations. For a sentencing judge to give deference to a jury recommendation of death, would convert such a recommendation into a non statutory aggravating factor. But see Smith v. State, No. 68,834 (Fla. Oct. 22, 1987) [12 F.L.W. 541, 542 (observing in dicta that a jury recommendation of death is entitled to great weight in situation controlled by the presumption established in State v. Dixon, 283 So.2d 1 (1973) that where there are valid aggravating and no mitigating circumstances death is the appropriate sentence).

Booth can not be classified as a change of law for Witt purposes either. Rather, it represents part of the many "evolutionary refinements" that have come in Eighth Amendment jurisprudence as a result of the Stewart plurality opinion in Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); Thompson v. Lynaugh, 821 F.2d 1080, 1082 (5th Cir. 1987) (applying procedural default and finding that claim not sufficiently novel to excuse procedural default) And, to the extend a Booth type claim can be characterized non statutory aggravating evidence this court has already found it subject to procedural default for failure to raise on direct appeal. McCrae v. State, 510 So.2d 874, 879 (Fla. 1978) (post Booth decision).

Neither claim is properly before this court as

Appellee/Cross Appellant failed to present either of these claims to the court below. Dozier v. State, 192 So.2d 506 (Fla. 2d DCA 1966) Cf. State v. Liptak, 277 So.2d 19 (Fla. 1973) (claim of entrapment not available on appeal to defendant who had not asserted it in trial court despite assertion of the defense by co-defendant in the trial court). The application for relief in the trial court did not raise the constitutional concerns articulated in either Caldwell or Booth. In fact, Appellee/Cross Appellant called the circuit court's attention to only a part of the passage quoted in his brief at 55 and most of the passage appearing at page 58 of the brief. (R. 224, 225) (passage at 58) 228 (passage at 55). Appellee/Cross Appellant called attention to the material at (R. 224, 225) in connection with his claim that it erroneously suggested the existence of additional evidence and because it discussed matters outside of the record. (R. 225) The claim in circuit court with respect to that portion of the passage appearing on page 55 of Appellee/Cross Appellant's brief was that the comment was objectionable because it involved highly inflammating non record material and encouraged the use of non statutory aggravating circumstances. (R. 228, 229)

Assuming, arguendo, that the claims had not been procedurally defaulted and were properly before the court, this court would have to find both to be without merit. None of the comments about which Appellee/Cross Appellant makes his Caldwell type argument misinformed the jury about their role in the Florida sentencing scheme. Nor, does the record support Appellee/Cross Appellant's conclusion that the prosecutor asked

the jury to compare the worth of the victim and Appellee/Cross Appellant.

Appellee/Cross Appellant's argument simply lifts segments of the prosecutor's arguments out of both the guilt and sentencing phase arguments which indicate the apparent comparative worth of the individuals out of context and then adds his conclusion, given without benefit of a citation to the record, that the prosecutor was asking for both a conviction and a death sentence on the basis of comparative worth.

What Appellee/Cross Appellant characterizes as an invitation to convict and sentence on the basis of comparative worth looks to the state as argument based on the evidence which established Appellee/Cross Appellant's motive in the guilt phase and both the cold, calculated and premeditated as well as for pecuniary gain aggravating circumstances in the penalty phase. This is proper argument.

> The rule is that considerable latitude is allowed in arguments on the merits of the case. Logical inferences from the evidence are permissible. Public prosecutors are allowed to advance to the jury all legitimate arguments within the limits of their forensic talents in order to effectuate their enforcement of the criminal laws. Their discussion of the evidence, so long as they remain within the limits of the record, is not to be confermed merely because they appeal to the jury to "perform their public duty" by bringing in a verdict of guilty. Spencer v. State, 133 So.2d 729, 731 (Fla. 1961).

This is a case like Mann v. State, 482 So.2d 1360, 1361 (Fla. 1986) where examination of the "record belies the claim of prosecutorial misbehavior."

Appellee/Cross Appellant also contends that the court

should reach the merits of his claim that there were unconstitutional attacks on defense counsel. Apparently, Appellee/Cross Appellant concedes that these issues; that constitutional protections afforded Appellee/Cross Appellant were used to request a conviction and death sentence, that the indictment was used as affirmative evidence, and that the prosecution urged his conviction or the basis of his sexual preference, the exercise his right to trial by jury, because he did not come forward with evidence, because he had constitutional rights and because of who the victim was; have been procedurally defaulted or are being raised for the first time in this appeal.

Appellee/Cross Appellant does not specify what these arguments were, his argument just gives record citations for his conclusions. A review of a couple show why. Examination of the record belies the extravagant conclusions he attachs to his record citations. At DR. 2028, the prosecutor rebutted Appellee/Cross Appellant counsel's suggestion that the jury showed acquit because the state had not produced the murder weapon. The other passages are, likewise, attacks on defense counsel's argument in favor of acquittal. These can not even arguably be characterized as suggestions that defense counsel did not believe in his client's case, the position that Appellee/Cross Appellant's brief asserts at 70.

Appellee/Cross Appellant suggests no reason for rejecting the trial court's decision for finding that his claim that he has procedurally defaulted the right to attack the voluntariness of the statements he made to police. (R. 439) There is no reason.

Counsel made a sound tactical decision not to seek supression of these statements because they allowed him to put on the Appellee/Cross Appellant's version of the facts without having to subject him to cross examination. (R. 1287) And, it allowed him to make the point that his client had been consistent in his story. "from day one." (R. 1287)

Appellee/Cross Appellant contends this court should remand for an evidentiary hearing on his claim that there was a conflict of interest on the part of his attorney at preliminay hearing. Appellee/Cross Appellant is mistaken. The circuit court, erroneously in the state's view, gave him an opportunity to put on evidence with respect to this claim: It ruled:

> Issue VI - Denial of Withdrawn Counsel Due to Conflict - As soon as the Public Defender's Office realized a potential conflict existed, it moved to withdraw. That motion was ultimately granted. Any impropriety in the way this was handled could have been raised on appeal. If this relates in any way to an ineffective assistance of counsel claim, it can be further addressed at the evidentiary hearing. (R. 439) (emphasis supplied)

Appellee/Cross Appellant did not put on any evidence despite having some eleven months between the filing of his application for post conviction relief and the evidentiary hearing to investigate it. Even the belated claim of prejudice advanced here is frivolous on its face. Appellee/Cross Appellant suggest no plausible reason why a conflict of interest in the public defender's office would have impeded Mr. Hewetson's investigation of a possible U.S. v. Henry, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980) claim, a claim which he did pursue. Mr.

Hewetson was not from the public defender's office and owed no duty to their clients. He represented Appellee/Cross Appellant from September 19, 1980. DR. 33 And, the preliminary hearing at which the conflict appeared was rescheduled to October 3, 1980. DR. 32 There has been plenty of time for lawyers to explore this issue both before trial and before the evidentiary hearing. Appellee/Cross Appellant never advanced this claim to the cricuit court. This court should reject Appellee/Cross Appellant conflict of interest claim.

Appellee/Cross Appellant also alleges that he should have had a hearing in the circuit court so he could establish the alleged unreliability of the witness Morin's testimony.

To the extend that the claim is that hypnotically refreshed testimony should have been excluded that could have been raised on direct appeal. Because there was no objection at trial and because Appellee/Cross Appellant did not raise the issue on direct appeal it has been procedurally defaulted. McCrae, supra.

The circuit court gave Appellee/Cross Appellant the opportunity to present evidence on this claim in connection with his ineffective assistance of counsel claim. (R. 440) The evidentiary hearing revealed that there was no differences between the witness' pre-hypnosis recollection and his post hypnosis recollection of the events surrounding the victim's death. (R. 1264). Appellee/Cross Appellant had his opportunity. He did not produce any facts. The issue has been procedurally defaulted. It was and is without merit.

The claim that he was denied the right to confront his

accusers is another one of those claims which have been procedurally defaulted because it could have been raised on direct appeal. The trial court correctly found it to be procedurally barred

II.

WHETHER THE TRIAL COURT ERRED IN REJECTING THE APPELLEE/CROSS APPELLANT'S CLAIM THAT HE HAD NO RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT PHASE OR HIS TRIAL.

Appellee/Cross Appellant urges this court to reject the circuit court's conclusion reached in the wake of a reading the direct appeal record and presiding over all the post conviction relief proceedings including the evidentiary hearing that he failed to show that he had not received the effective assistance of counsel at the guilt phase of his trial. The circuit court did not address the particular claims of deficient performance on counsel's part. Rather, it ruled on the prejudice prong of the Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1974); standard adopted by this court in Johnson v. Wainwright, 463 So.2d 207 (1985) for assessing the effectiveness of counsel finding that the court's confidence in the reliability of the outcome was not undermined. (R. 649-650) In light of the overwhelming evidence, R. 580-583, against Appellee/Cross Appellant this court can and should affirm the circuit court on this issue. The Supreme Court specifically invited this approach. Strickland v. Washington, at 697 This court endorses that approach. Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986).

In evaluating counsel's performance it is incumbent on the reviewing court to remember that:

> A fair assessment of attorney performance 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. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See Michel v. Louisina, supra, at 101, 100 L.Ed. 83, 76 S.Ct. 158 Strickland v. Washington, 466 U.S. at 687

And, a reviewing court should also keep in mind the importance of what the client told counsel in assessing the adequacy of counsel'sperformance.

The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own satements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And 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 challenged as unreasonable. Id. at 691

With these principles in mind, it is appropriate to turn to the particular claims of deficiencies urged and the prejudice claimed to flow from them.

THE INVESTIGATION OF APPELLEE/CROSS APPELLANT'S MENTAL HEALTH:

Appellee/Cross Appellant's trial counsel, Mr. Hewetson, clearly recognized that he was dealing with a client whose mental health was subject to question. Hewetson, moved the court for the appointment of an expert invoking the provisions of Fla. R. Crim. P. 3.216(a). (DR. 416) The circuit court granted Hewetson's motion and appointed Dr. Joseph B. Mitchell to examine Appellee/Cross Appellant and report to Hewetson. (DR. 423-425) [1] Dr. Mitchell's report to Mr. Hewetson (DR. 2176-2184) suggested that Appellee/Cross Appellant might not be competent to stand trial but did not go so far as to say that he was not competent to stand trial DR. 488-494, 2186-2193.

Appellee/Cross Appellant's argument faults counsel for not uncovering the evidence he presented to the trial court. But, a review of both the record on direct appeal and the evidence presented in the proceedings below shows that Hewetson conducted a reasonable investigation that was in keeping with the information that was available to him at the time.

1/ Apparently, Hewetson had also Dr. G. Mussenden examine Appellee/Cross Appellant as well as the record or direct appeal contains a letter to Hewetson declining to approve payment to a Dr. G. Mussenden for an evaluation of him. Dr. 431 The result of this examination has never been disclosed to any court.

In his interview with Dr. Mitchell Appellee/Cross Appellant revealed a pattern of revealing "almost nothing regarding personal matters in his life." DR. 2179 Dr. Chambers interview revealed that Appellee/Cross Appellant told him that no one in the family suffered a psychiatric illness and exploration of his childhood revealed that his childhood was" not remarkable psychiatrically." DR. 2192 Hewetson had sought leave of court to got to Ohio. But, the court had denied that motion. (DR. 1310 R. 97,98) The court had also appointed an investigation but limited expenditures to $500.00 subject to increase for good cause shown. (DR. 83, R. 1246).

Appellee/Cross Appellant never told Hewetson tht he had been physically, emotionally or sexually abused as a child or said anything to him that would had him to suspect that such had happened. (R. 1279) Although Hewetson did not specifically recall whether he had asked Appellee/Cross Appellant about prior psychiatric hospitalizations, he did recall that covering such matters was a matter of course in interviewing criminal defense clients and he would have discussed all of those matters with Appellee/Cross Appellant. (R. 1279) Appellee/Cross Appellant was admantly opposed to the pursuit of an insanity defense and there were not doctors then available who would testfy that he was insane. (R. 1280-1281) Appellee/Cross Appellant's mother testified in the penalty phase that he had had no significant psychological problems over the past 15 years. DR. 2101 In short, Hewetson did everything that was available to him to be done.

An attorney is not deemed ineffective under the Strickland standard when he relies upon a pretrial psychiatric examination, even if such examination may be less than complete. State v. Sirici, 502 So.2d 1221 (Fla. 1987). See also Bush v. State, 505 So.2d 409 (Fla. 1987) and McCrae v. State, 510 So.2d 847 (Fla. 1987).

But, here counsel relied on the opinion of three experts as well as his own experience in not pursuing the issues of competency to stand trial and insanity. Counsel can not be faulted for not having what was not reasonably available to him at the time.

Appellee/Cross Appellant is in no better position that the condemned in Card v. State, 497 So.2d 1169, 1175 (Fla. 1986) in coming forward with belated reports from mental health professionals challenging the adequacy of previous mental health professionals investigations into competency to stand trial and sanity. Appellee/Cross Appellant is just as much trying to second guess counsel with evidence he has turned up which was not reasonably available to counsel at the time as was the collateral attack based on failure to contact friends in Blanco v. State, 507 So.2d 1377, 1382 (Fla. 1987).

As both a component of the prejudice prong of his claim of ineffective assistance of trial counsel and as an independent claim, a portion of Appellee/Cross Appellant's Issue IV, he claims to this court that he was not competent to stand trial. Appellee/Cross Appellant did not make this claim before the circuit court either as a component of his ineffective assistance

of counsel claims or as an independent claim. It was not an issue below. And, the record does not support such a claim. Appellee/Cross Appellant's brief quotes Dr. Merin as saying that there was "now way he could have" effectively assisted counsel." Brief for Appellee/Cross Appellant at 35 This is a quotation out of context. The following is the context from which the argument life the quotation:

> Q. Doctor, having examined the man, having testified about him, knowing the background you do and knowing the diagnosis you have, complete with his symptom of denial, do you have an opinion as to whether or not John Michael could have effectively assisted his counsel at the time of trial?
>
> A. There's no way he could have. Understand, he could speak relevantly, he could understand what he was charged with, he could understand the penalties, he could behave himself in a courtroom, he could speak appropriately to his attorney. But what he had actually done, there is no way he could relate to it, so therefore not useful to him.

The doctor had not been asked and was not purporting to answer whether Appellee/Cross Appellant met the constitutional standard for competency to stand trial. The same is true with respect to Dr. Krop's testimony:

> Q. Doctor, taking into consideration the denial that you have described, do you have an opinion as to whether or not John Michael could have effectively aided his counsel in his defense in the first trial?
> Based on that, I would say he would have had a real difficult time assisting counsel in providing background informantion and also relevant information as -- particularly as might be helpful in mitigation. (R.1214-1215)

And, when Dr. Mitchell was asked a similar question all he could offer was that his doubt about competency to stand trial would have been even stronger.

THE HEARSAY/CONFRONTATION CLAIM

Appellee/Cross Appellant now faults Mr. Hewetson for failure litigate the hearsay/confrontation clauses issues attendant to the information from the Ohio witnesses. The argument advanced fails to demonstrate that any particular passage to which Mr. Hewetson did not make an objection met the defination of hearsay, that the evidence was both an assertion and offered to prove the truth of the matter asserted. Fla. Stat. §90.801(c) (1985) The particular statements to which reference is made in Appellee/Cross Appellant's brief fall into categories which are not excludable as hearsay. For example, some are not assertions, e.g. the contents of the wills. See generally C. Eherhardt, Florida Evidence § 801.4(2d.ed 1984) Appellee/Cross Appellant's argument fails to show that any of the evidence he names as hearsay was also offended the values protected by the confrontation clauses. Hearsay and evidence offensive to the confrontation clauses are not co-extensive. And, Appellee/Cross Appellant's argument totally fails to show how any of the evidence that he suggests should not have come in does violence to the values protected by the confrontation clauses. It is simply not a deficiency to fail to make an unmeritorious objection. Card v. State, 479 So.2d at 1177.

Appellee/Cross Appellant faults Mr. Hewetson for not making an objection to Morin's testimony on the basis that it was excludable under this court's subsequent decision in Bundy v. State, 471 So.2d 9 (Fla. 1985). It is already settled that a failure to anticipate Bundy does not meet the deficiency prong.

Elleadge v. Dugger, 823 F.2d 1439, 1443 (11th Cir. 1987); Spaziano v. State, 489 So.2d 720, 721 (Fla. 1986) (failure to anticipate Bundy not ineffective). Even if Bundy had been available to counsel, it is not at all clear that it would have led to the exclusion of the Michael Morin evidence. It was Mr. Hewetson's recollection that there was no difference between the statements the witness made before and after hypnosis. The circuit court gave Appellee/Cross Appellant the opportunity to present evidence. (R. 440) But, he did not present any other than Hewetson's testimony.

APPELLEE/CROSS APPELLANT'S STATEMENTS

Appellee/Cross Appellant faults Mr. Hewetson's decision not to move to suppress his statements to police. As mentioned earlier, counsel did not want to suppress these statements. He had a good tactical reason. It showed that his client had maintained a consistent story of innocence even in the face of Herbine's raising his voice. And, it allowed counsel to present his client's story without subjecting him to cross-examination.

This was certainly reasonable professional judgment within counsel's discretion and does not meet the deficiency prong of the Strickland v. Washington, standard. State v. Bolender, 503 So.2d 1247 (Fla. 1987)

THE ARGUMENT ISSUE

Appellee/Cross Appellant challenges counsel's performance in not objecting to argument by the prosecutor that he now deems improper. As has been provіously demonstrated in the discussion of this as a separate issue, above the arguments he now wishes

counsel had objected to were either accurate statements of the law, fair comment on the evidence or proper rebuttal to arguments. Under such circumstances, counsel's performance can not be found deficient. Burr v. State, No. 71,234 (Fla. Dec. 10, 1987) [12 F.L.W. 604].

III.

WHETHER THE COURT SHOULD ADDRESS APPELLEE/CROSS APPELLANT'S CLAIM THAT HE DID NOT RECEIVE CONSTITUTIONALLY SUFFICIENT PRE TRIAL EVALUATIONS THAT RESULTED IN HIS GOING TO TRIAL WHILE NOT COMPETENT TO DO SO.

The state submits that Appellee/Cross Appellant failed to offer proof at the evidentiary hearing that the mental health evaluations were not professionally adequate and even assuming that there is a constitutional question it is not appropriate for resolution. The state also submits that it has already demonstrated that the question of competency to stand trial was not before the circuit court and that the record does not support Appellee/Cross Appellant's conclusion that he was incompetent to stand trial. Not even Dr. Mitchell would so testify. All he could say was that his doubt was stronger.

The court should treat these issues the same way it treated similar attempt to upset a capital conviction in Card v. State, supra and Jones v. State, 489 So.2d 737 (Fla. 1986), reject it as highly suspect.

IV.

REPLY TO ISSUE ON APPEAL

Appellee/Cross Appellant urges restate my issue this court to treat the circuit court's finding that he did not receive the effective assistance of counsel as a matter of fact. In so doing, the argument over looks and fails to consider that Strickland v. Washington, specifically teaches that the determination of whether a criminal defendant has received the effective assistance of counsel is a mixed question of law and fact. And, it is a mixed question as to both prongs of the test. 466 U.S. at 698 The courts of the state do not interfer with a trial court's factual findings where there is ample support in the record for them. Swarthout v. State, 165 So.2d 773, 774 (Fla. 3d DCA 1964). Appellee/Cross Appellant is simply in error to assert that the reasonableness of counsel's behavior is a matter of law. It is not. What counsel did an did not do are the only questions of fact. Whether what was done or not done was professionally reasonable is a question of law.

Appellee/Cross Appellant is also in error in asking the court to construe the circuit court's findings as supporting the conclusion that Hewetson did not think about or prepare for the penalty phase at all. Brief of Appellee/Cross Appellant at 9. This is broader thatn the circuit court's order. And, it is far more than the record will support.

In making its finding that counsel rendered a deficient and prejudicial performance at the penalty phase of the trial, the

circuit court's Order's focused on the absence of discussion of the statutory mitigating factors in the doctor's reports. (R. 654-653)

Hewetson met with Appellee/Cross Appellant's mother and sister prior to trial and explored his childhood and prepare for the 1273-1275, (R. 1288-1289) penalty phase. Hewetson also had Dr. Mitchell on telephone standby status for the penalty phase . (R. 1270) What the record and the circuit corut's order support is that counsel did not get a written report on the statutory mental mitigating factors. As mentioned previously, asking for a written report on statutory mitigating factors at the inception of the case is fraught with dangers. The investigation counsel did make and the way he chose to pursue the statutory as well as non statutory mitigating factors was not constitutionally deficient. Cf. Mitchell v. Kemp, 762 F.2d 886, 889 (11th Cir. 1985) cert. denied 41 Cr. L. 4084.

V.

ARGUMENT IN REPLY TO CLAIM THAT COUNSEL WAS DEFICIENT IN NOT INVESTIGATING NOW STATUTORY MITIGATING CIRCUMSTANCES.

Appellee/Cross Appellant faults counsel for not discovering what he offered as newly discoverd evidence to the court below. The issue is not properly before the court as it was not before the circuit court. In fact, Appellee/Cross Appellant takes a position in this court diametrically opposed to the position advanced in circuit court. (R. 270) And, it contradicts evidence that Appellee/Cross Appellant presented as his own to the circuit court as previously shown.

CONCLUSION

WHEREFORE appellant asks the court to reverse the decision of the circuit court setting aside appellant's death sentence and remand with instructions to reinstate that sentence on the basis of the above and foregoing reasons arguments and authorities.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Capital Collateral Representatiave, 225 West Jefferson Street, Tallahassee, Florida 32301 and Kevin H. O'Neill, Esq., Foley & Lardner, One Tampa City Center, Suite 2900, Tampa, Florida 33602 on this 15th day of ~~October~~ January 1989.

COUNSEL FOR APPELLANT/CROSS APPELLEE