IN THE SUPREME COURT OF FLORIDA

THEODORE BASSETT,

Appellant,

v.

CASE NO.

THE STATE OF FLORIDA,

Appellee.

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE FACTS

Appellant's statement of the facts, in many parts are slanted and not complete. Appellee, therefore, will add the following:

A. **Penalty phase.**

The first state's witness, Connie Christy, aged 16, met appellant two years from the date of the penalty hearing (T 691).[1] She lived with him for about a month or two (T 692). When the prosecutor asked her if she had seen appellant with illegal firearms, the defense attorney objected (T 692-693). She did testify that she saw appellant with a sawed-off shotgun, but the defense attorney objected once again to relevancy and to the fact that the witness might not understand the term "shotgun" (T 695). The witness also testified about threats made to kill the people who stole appellant's motorcycle (T 694). She also revealed that appellant told her that there was a brawl and some person ended up in the trunk of a car (T 695). She started to testify that she saw some luggage in her apartment while appellant was living there. Again, the defense attorney successfully objected, and stopped the prosecutor from having a statement admitted which would have apparently demonstrated that the luggage was stolen (T 695-696). On cross-examination, the witness indicated that she was not sure of the length of the shotgun. She also explained that the incident regarding the person being placed in a car trunk was only told to her by appellant (T 698).

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[1] "T" refers to the record of the trial and penalty phase.

Officer Wilkinson testified that he ticketed appellant for riding a motorcycle with no helmet, but that he had to chase appellant at speeds of up to 100 mph before he could issue the ticket. Appellant told the officer that he was aged 22 (T 699-700).

Appellant testified on his own behalf. He admitted that he lied to the police officer about his age because he borrowed a license to show that he was old enough to purchase alcohol. He told the jury that he did have a shotgun, but that it was 19 inches (T 701). Appellant also explained that he only found out about a person being in a car trunk after he was riding with a friend, and that he had no idea how that person originally got into the trunk (T 703). He explained that he was 18 at the time of the crime (T 704). He had three prior convictions (T 706).

Two corrections officers testified as to appellant's good character and cooperative manner while he was incarcerated at the Volusia County Jail (T 706-709).

The defense called Prosecutor Gene White (T 711). It was disclosed to the jury that both appellants were offered pleas of guilty in exchange for life sentences (T 713). Co-defendant Cox received two concurrent life sentences (T 714). The prosecutor explained the plea agreement and indicated that he thought it was a death penalty case, but he wanted the defendants to plead because it was the first step in rehabilitation. He also wanted to spare the family the ordeal of a trial. When the prosecutor stated that going to trial showed the appellant's inability to be rehabilitated, defense counsel objected. The objection was

sustained (T 716-717). The prosecutor then noted, pursuant to re-cross-examination: "He certainly has that right. And I think the jury can take that into consideration also" (T 717).

Defense counsel, during closing argument, argued to the jury that they should not find both the aggravating factor of robbery and pecuniary gain because those factors only equaled one aggravating circumstance (T 745). He also informed the jury that there was no evidence of other violent felonies (T 746). He explained that he was shocked by the testimony of Connie Christy. He noted that anyone could own a short barrelled shotgun (T 747-748). Referring to Connie's testimony about appellant's threats to the person who stole his motorcycle, defense counsel commented that the characterization of conspiracy to murder was absurd, and that any other person would have made a similar comment under the circumstances (T 749). Defense counsel noted that there were only three unknown criminal convictions, and, in light of all the other testimony, there would be no significant criminal history (T 749).

Defense counsel argued that appellant was only an accomplice (T 750). He explained that the co-defendant was the actual trigger man. He emphasized that the co-defendant would live merely because he chose to forego exercising his constitutional rights while his client would be electrocuted merely for exercising those rights (T 751). He asked rhetorically where the deterrent effect would be in such a result (T 751). He argued that capital punishment is not "an eye for an eye", but for deterrent's sake (T 752).

He argued that his client was under the duress of the co-defendant. He emphasized that the co-defendant was only feigning smoking marijuana and was planning the ultimate murders, and not his client (T 753).

He argued that his client was aged 17 at the time of the offense and 20 at the time of trial, and that his client would be aged 70 if he served a 50 year imprisonment sentence (T 754).

In conclusion, defense counsel reiterated that his client had no significant criminal history, that he was under the influence of marijuana and liquor, that he was aged 17, that the co-defendant was the main perpetrator, and that the killing of the appellant would not bring the victims back nor help the grieving parents (T 756). Defense counsel then gave an emotional plea to the jury with religious overtones (T 758). He noted that he had seen the electric chair and read accounts of John Spenkelink's death (T 758). He described the elaborate preparations for one who is executed (T 760). He noted that Jesus Christ spared the thief on the cross next to him as he was being crucified. Defense counsel implored: "In His name in God's name suffer yourselves to commit one final act of mercy" (T 760-761).

B. Evidentiary hearing.

Deputy Murray Ziegler testified that he worked for the Volusia County Sheriff's Office in 1978, and was in contact with Detective Brown, the detective who was hired by the victim's

parents to determine what happened to their son (R 22-26).[2] He did contact Detective Brown to exchange information (R 27). He and Brown visited appellant in jail in December of 1978. The witness did not feel the conversation between himself, Brown and appellant was important (R 28, 31). Brown, however, informed the witness of other discussions with appellant (R 29). Brown did discuss the possibility of a reward (not immunity but perhaps a lesser sentence) with the appellant in exchange for assistance (R 33-34). Ziegler then asked Assistant State Attorney Jack Watson if the state could offer some type of immunity, if not total immunity (R 34). Ziegler, however, stopped all contact with Detective Brown when the bodies were actually discovered (R 37-38). After Mr. Ziegler left the Volusia Sheriff's Office, he did obtain a loan from Detective Brown for $250. The loan was made in December of 1978 (R 38-39).

Next, Detective Charles Brown testified and confirmed that he was hired by the parents to investigate of disappearance of one of the victims (R 43-45). He was asked if he discussed religion with appellant and replied in the affirmative (R 46). He indicated that he talked with everyone about religion, and he did not use religion as a guise to obtain information. In addition, religion came into play only at the end of the conversations with appellant. He indicated that he would "back off" religious discussions if "they got turned off" (R 46-49). When Detective Brown talked to appellant about the crimes, he did

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2 "R" denotes the post-conviction record.

not know if appellant was actually involved, but he did talk about obtaining an attorney for appellant (R 47).

He did visit Assistant State Attorney Watson with Murray Ziegler. The prosecutor indicated that there would be no immunity granted unless appellant had something to offer (R 50, 62). Detective Brown explained that the prosecutor did not direct him to ask appellant a series of questions (R 52). The prosecutor did indicate that if appellant gave Brown information that Brown should inform the state attorney's office ". . . and they'd come in and handle it" (R 52-53). After that conversation with the prosecutor, Brown did not discuss immunity with appellant anymore (R 53-54). Brown explained that Murray Ziegler did not work for him (R 55-56). He admitted that he loaned Ziegler $250 for business purposes, but after Ziegler left the employment of the sheriff's office (R 56).

Brown explained that appellant did not confuse him with an employee of the sheriff's office or the state attorney's office. Appellant knew that Brown was a private investigator (R 61). Brown told appellant that he was unsuccessful in obtaining any type of immunity agreement (R 62). The prosecutor told Brown that Brown was not an agent either of the state attorney or the sheriff's office. The witness admitted that he had conflicts with the sheriff's office and that the sheriff's office "got in the way" (R 63).

Agent Robert Darnell of the FDLE testified that appellant signed Miranda waivers twice. He also noted that Detective Brown was not an agent for the FDLE, and that he was many times "at

odds" with Brown (R 79). Darnell tried to prevent Brown from doing certain things but was unsuccessful. During the interviews when the confessions were obtained from appellant, neither appellant nor Darnell discussed Brown or any potential "deals" (R 80).

Tom Bevis testified next (R 874). (Appellee has combined Mr. Bevis' deposition and evidentiary testimony.) Mr. Bevis discussed the case with co-counsel, Mr. Pearl (who represented co-defendant Cox). Both agreed that if the confession were admitted, the defendants would be convicted. The strategy of both was to attack the corpus delicti because the bones of the victims had been discovered very late (R 914). Mr. Bevis was aware that Detective Brown had interviewed his client (R 970). He explained, however, if his client indicated that he gave a confession based upon the interviews with Brown, then such a fact would have been important (R 972). During trial, Mr. Bevis made a motion to suppress the confession based upon the fact that the confession was obtained just after law personnel discovered that appellant's specially appointed attorney had withdrawn (T 435-440). The attorney explained that he did not make this motion before trial because if a ruling were in his favor, the state would not be able to appeal it (R 985-986). The plea offer of life imprisonment was available even after the court had denied the pre-trial motion to suppress the confession based upon a lack of corpus delicti, but appellant refused (R 988).

Mr. Bevis was questioned about his investigation for the penalty phase (R 989). He reviewed appellant's previous record

and was quite certain that he had discussed aspects of appellant's childhood with his client (R 992-993). His basic strategy was to make an emotional appeal to the jury, emphasize the co-defendant's greater participation, and his client's age (R 993-994). He specifically wanted to highlight the fact that the co-defendant Cox was the "trigger man." Such a fact was already in testimony based upon the trial phase (R 995). Mr. Bevis indicated that he did talk at length with his client (R 995-996). He did try but was unable to get a copy of his client's birth certificate, but he could not remember why at the time (R 996).

His client did seem above average in intelligence and very matter of fact in his discussions. There was no bizarre behavior that the attorney noticed. Appellant did not want to talk about things that happened in his past (R 999).

At the evidentiary hearing itself, Mr. Bevis testified that appellant was known both as Earl Smith and as Theodore Bassett (R 84). The attorney was confronted with the fact that during trial, the jury heard that Agent Darnell informed appellant that the co-defendant said everything was appellant's idea (R 88). Mr. Bevis explained that he did not object to the testimony so he could argue that as justification for the reason why his client made the confession. He also believed that this testimony was not offered to prove the truth of the matter asserted, but to show the context of the confession (R 89, 95).

Mr. Bevis was asked why he had called the prosecutor as a witness to establish that the co-defendant had pled guilty and

received a life sentence (R 120, T 711). Mr. Bevis answered that he did not put Howard Pearl on the stand because his testimony would be hearsay (R 121). The defense attorney was also confronted with the prosecutor's closing argument regarding ministers who believed in the death penalty (R 123-124, T 726). Mr. Bevis indicated that he had deliberately let the prosecutor argue that so that he could use religion as a theme in his rebuttal argument (R 124). Mr. Bevis wanted a highly emotional hearing (R 125).

Mr. Bevis explained that he did not feel bound to argue only the list of statutory mitigating circumstances in section 921.141, Florida Statutes (1979) (R 145). Although Mr. Bevis did number the mitigating factors, he did not even imply to the jury that they were limited to the statutory mitigating circumstances (R 143; T 754).

It was also his strategy not to alienate the jurors with a lot of objections (R 161). Mr. Bevis deliberately chose not to go into the family history (R 167). He did not obtain a psychological evaluation, in part, because it would open up the door for more grisly facts. He was aware of one or more facts known to him that did not appear in his client's confession (R 168, 176). Appellant did not inform his attorney about his family problems, his schooling or his conversations with a psychologist (R 179). If the attorney had been told of this information he would have investigated further (R 179-180). Appellant never told his attorney that he was scared of Cox (R 180). Mr. Bevis concluded by noting that he did have some

discussion with his client before the penalty phase on what type of evidence would be presented (R 188).

Next, appellee will present highlights of the witnesses who testified about appellant's background. Father McDonald, who worked at Mount St. John's Residential Treatment Center for Pre-Teens, testified that this school was not for delinquents (R 222-223). Moreover, appellant did not stand out as a serious problem. Appellant was aged eleven when he entered the school (R 224). Appellant ardently sought friendship, but was "provocative" of other boys (R 225-226). The public school that referred him described him as aggressive, destructive, uncooperative and one who needed constant supervision (R 229-230). He would project the responsibilities for his failures onto others (R 229-230). He was disobediant to teachers and would often come home from school as late as eight or nine p.m. (R 230-231). In April, 1970, it was reported that he was associated with the Apaches Motorcycle Gang (R 231). He was also involved in several fights (R 233).

The next witnesses, Dr. Steven Bank, was the child and family resident psychologist at the school when appellant attended (R 236-238). Appellant was aged 12 at the time Dr. Bank tested him (R 239). The doctor's initial impression was that the child did "a lot of things" that boys do when they want to be liked and appellant was extremely cooperative (R 240). His deeper impression, however, was that appellant would be "organized" by whatever the situation was that surrounded him. If he was around a well-spoken psychologist, he would be well

spoken. But the doctor was aware that appellant could be a "pain in the neck." He would bother a child enough to provoke a fight (R 241). The test showed that appellant was disorganized (R 242-243). Nevertheless, appellant did not lack intelligence; he tested around the normal range (R 246). Appellant was not psychotic (R 248).

Appellant would make up stories that always had unhappy endings. Every story had a theme of doom (R 248). One story related to two men who planned to rob a bank. When they robbed this bank, they were pursued, but the older perpetrator escaped. The younger one, however, was electrocuted because he had killed a girl on a prior occasion (R 249-250). The doctor noted that there were repeated stories about robberies which failed and where the perpetrators were caught and punished (R 250). Appellant was described as anti-social, but not a sociopath because he did not enjoy beating the law and because he usually was "caught" (R 251).

As he stayed at the school, his relationships with the boys and the staff improved (R 252, 256). Appellant's personality was very typical of one who came from a home without an adequate male model. Such a home environment, however, evokes a wide range of reactions (R 253).

Dr. Bank described Mount St. John's as a good school with a good reputation (R 256). In his opinion, the school had helped every child, although the benefits varied as to the length of their longevity (R 256-257). Most schools of this nature, however, only had a 30 to 40 percent success rate. Improvement,

according to the doctor, meant better grades and improved family living (R 257). There were others in the school with far more difficult situations vis-a-vis background than appellant's situation. Appellant's case was not the worse (R 258). Nevertheless, appellant was disruptive with his peers and had to be moved a number of times (R 263). The records also indicated that while appellant was at home, he "pushed around" his brothers and sisters (R 264). There were incident reports of thefts and running away from home (R 269).

The prosecutor asked the doctor about other stories that appellant divulged. A mother and son died of an overdose of LSD. The supplier of the LSD likewise died of an overdose (R 272). Two burglars broke into a tool oil factory to "get drunk on oil." One of the perpetrators lowered the rope into the vats where the oil was contained, but the person fell and the oil spilled all over (R 274). A wife was waiting for her husband, but unbeknownst to her, her husband died. The husband hired a killer to kill the wife and all his children, because if he could not have his wife, he did not want anyone else to have her (R 275).

At this point, the prosecutor read appellant's confession to the doctor and presented it as a "story" (R 275-281; T 517-548). The doctor commented that the confession and the other stories were similar in themes of violence. The confession, however, was more detailed and showed more "planfulness." The doctor noted ". . . the almost perfection of the sequence is quite striking" (R 282). Dr. Bank noted that this story

demonstrated a higher level of sophistication and was much more intricate (R 284).

The doctor referred to one of his reports and noted that appellant was exclusively preoccupied with thoughts of death, violence and revenge (R 285). The tests indicated that appellant virtually believed that he was going to die violently, that he could live violently and that perhaps he could only live with himself if he were severely punished. Although his heroes defied the law, they were punished. Life was hopeless, that one lived for the moment regardless of the consequences (R 286). But appellant knew the difference between right and wrong (R 287). Nevertheless, appellant was pliable; he would repeatedly make the same mistake in social situations. If he were offered love he would take love, but if he was offered a chance to be in a fight, he would be involved in a fight (R 298).

The next witness was David Merry, a social worker who was employed by Mount St. John's (R 301). He also noted that appellant would provoke his fellow schoolmates (R 307-308). Nevertheless, appellant made improvement while at the school (R 308). Appellant, however, convinced his mother to withdraw him from the school in January of 1973 against the advice of the school (R 308). Mr. Merry noted that appellant's mother was very supportive of appellant's placement and was very caring. The home situation was improving for the mother. Appellant was progressing as well, but the school still recommended that he remain (R 309). Mr. Merry was referred to a Meriden School report which noted that appellant brought a heavy chain to

school, and that there was some connection between this incident and the Apache Motorcycle Gang (R 312).

Next, appellant's sister, Tammy, testified. Appellant spent a lot of time with his grandparents (R 315). The grandparents lived right above the apartment where the appellant and his mother lived. The grandfather often would not let the mother discipline appellant (R 316).

Appellant's mother remarried Leon Sherris; they got along very well, although Mr. Sherris did have a drinking problem. This man, however, treated the children very well and, according to Tammy, "treated us like we were his own." Appellant spent a lot of time with Mr. Sherris (R 317). Tammy described their childhood as cheerful (R 319). Appellant also spent a lot of time with his grandparents because he "got to do what he wanted to do" (R 319-320). Appellant, in fact, thought of his grandparents as parents (R 320).

Next, appellant's mother testified. She confirmed that there was friction between her and her parents regarding appellant's upbringing. The grandparents would often give appellant gifts (R 411). Her first husband, Mr. Bassett, would take money from her paycheck and there would not be enough food. But the mother would sacrifice her food so the children could eat (R 415). She remarried Leon Sherris and described him as a good provider. Although Mr. Sherris did strike appellant's mother at times, it was not nearly as bad as what had occurred with Mr. Bassett (R 420-421). About one year later, she divorced Mr. Sherris because he was "running around" and because of his

drinking problem. In any event, appellant stayed with his grandparents. Appellant's grandfather was a significant male figure, although appellant also "thought alot" of Leon Sherris (R 421). Appellant was very attached to his grandfather and he often went fishing and hunting together (R 429). His grandparents would bring appellant gifts and buy anything that appellant wanted, according to his mother (R 429-430). Appellant received counseling not only from the staff at Mount St. John's but also from neighbors (R 424).

Nevertheless, his mother did divulge that at one point, he was incarcerated in the New Haven Correctional Institute (R 425). His mother also admitted that while she was staying with him, he stole two automobiles (R 437). His mother did testify, however, that he "behaved allright" after he withdrew from Mount St. John's and returned home for a short while, but he also stayed with his grandparents a good portion of the time (R 433). At age 16 or 17, appellant left home for California (R 426, 434).

SUMMARY OF ARGUMENT

TRIAL COUNSEL PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT AND PENALTY PHASES.

A. GUILT PHASE.

The trial counsel's decision not to file a motion to suppress based upon prior discussions between a detective and the appellant was strategically proper since the discussions had no nexus to the actual confession and since the record conclusively shows that the detective was not an agent of the state.

The record shows that the trial counsel did file a motion to suppress, during the trial, on the basis that the police obtained the confession from appellant after learning that his counsel had withdrawn. The record conclusively shows that the appellant was informed of his right to counsel and the police started to leave when the appellant initiated the discussion by asking the police what they wanted and by volunteering another statement about the co-defendant.

The alleged failure to object to the co-defendant's hearsay statement was harmless because such a statement was very cursory as compared to the appellant's confession; such a statement was admissible to show the appellant's state of mind at the time prior to the confession; any error would obviously be harmless in light of the overwhelming evidence of guilt and in light of the high standard required in a collateral proceeding.

Since appellant's counsel introduced evidence during trial, there was no failure to request a closing/rebuttal argument. In any event, even if the defense did not submit evidence, the error

would be harmless for purposes of collateral proceedings.

Any failure to object to the prosecutor's argument to the jury that the trial court had already determined that appellant's confession was voluntary was harmless because of the overwhelming evidence of guilt, because the jury was told that closing arguments were not evidence or instructions, and because of the instructions actually given.

B. PENALTY PHASE.

1. Alleged omission and errors during the penalty phase

The evidence presented by the state at the penalty phase either was **De Minimis** and non-prejudicial, or rebutted the statutory mitigating factor that appellant had no significant prior criminal history.

Pertaining to the evidence and arguments presented at the penalty phase, this court has already reviewed the issues on direct appeal. Hence, it is the law of the case and appellant is not entitled to relitigate these issues even under the guise of ineffective assistance of counsel. On the merits, subsequent cases emanating from the Eleventh Circuit and the United States Supreme Court reinforce the conclusion that the penalty phase argument had no probable effect on the outcome of the proceedings.

The fact that trial counsel represented appellant's age as 17 instead of 18 is another trivial error which could have no possible effect on the outcome of the proceedings and may have even helped the appellant. The fact that defense counsel used appellant's alias is in part attributable to the appellant

himself when he responded to a question at the penalty phase that his name was "Earl Smith", the alias. Again, such an error is a trivial one.

Appellant has failed to show that his defense counsel was ineffective in the manner that he presented the mitigating factor that appellant was under the substantial domination of the co-defendant. First of all, appellant's confession was the only version of the events that the jury heard; hence, it is the strongest of evidence that defense counsel could use. The jury knew from that confession that the co-defendant was older than appellant because the confession revealed that the co-defendant was a Vietnam veteran who had killed once before. Also, this confession revealed that the co-defendant was the main perpetrator in the actual killing.

The evidence adduced from appellant's girlfriend that appellant feared the co-defendant, was negated by the fact that it was appellant who brought the victims to the co-defendant, and it was appellant who first produced the gun and robbed the victims.

Counsel vigorously argued that his client should not be executed because the co-defendant, who was the main perpetrator received a life sentence. It is clear from the record that counsel explicitly told the jury that this was a mitigating factor.

There was no violation of Enmund v. Florida, 458 U.S. 782 (1982); hence, defense counsel was not ineffective for arguing the theory of that case, especially when one considers

appellant's substantial and continuing participation in these double homicides.

2. The proffered mitigating evidence describing appellant's background would have prejudiced his case.

The background information adduced at the evidentiary hearing demonstrated that appellant had a supportive family, a supportive school and had no significant mental problems. His intelligence was average and he knew the difference between right and wrong. His psychological profile, rather than being a mitigating circumstance, foreshadowed the life of violence and doom that came to be. Furthermore, the evidentiary hearing revealed appellant's chronic misbehavior and thefts. It also demonstrated that this appellant, at a very young age, demonstrated independence by leaving the rehabilitation school where he matriculated originally against the advice of the school, and leaving home to go to California. The latter evidence would also be damaging because it hurts the theme that appellant was substantially dominated by the co-defendant.

The evidence relating to the co-defendant's background is irrelevant, would confuse the issues and just mislead the jury. The jury was informed about the co-defendant's sentence, and his background in Vietnam and the fact that he had killed in Vietnam. Any evidence regarding Cox's experience in Vietnam either would be cumulative or misleading, or both. In addition, such evidence would "open the door" to Cox's conflicting version of the events. Moreover, Cox's statements to the police reemphasized the fact that it was appellant who initially planned

to rob the victims, it was appellant who stole the firearm to rob the victims, and it was appellant who introduced those victims to Cox.

Even if there were a new penalty phase, the state would be entitled to introduce evidence that appellant was previously convicted of another capital felony. In addition, the state proffered evidence to show that appellant was convicted of sexual battery after the first penalty phase was completed. That evidence would, likewise, be admissible.

POINT II: The jury and trial court did consider non-statutory mitigating evidence, and even if one assumes for the sake of argument that they did not, any error would be harmless.

The trial court did not believe that it was limited to only considering statutory mitigating evidence. This conclusion is based not only on the explicit language in the post-conviction order, but also on the penalty phase, where such evidence was presented and argued without objection and where the trial court explicitly sustained an objection **not** on the basis that such argument did not relate to statutory mitigating or aggravating circumstances.

Assuming for the sake of argument that there was error, it would be harmless. Appellant's argument that the "non-statutory" mitigating evidence of the co-defendant's dominance over the appellant is covered by the statutory mitigating factors. § § 921.141(6)(d) and (e), Fla. Stat. (1979). The disparate treatment of the co-defendant was due solely to the fact that both were offered pleas to life sentences, and the co-defendant took advantage of it while appellant did not. In light of

appellant's explicit confession detailing his participation in the robbery and homicides, his testimony about his level of intoxication would be insignificant.

POINT III: The prosecutor did not use false or misleading testimony.

First of all, the prosecutor was only eliciting what the police told the co-defendant and was not trying to establish a detailed story of the co-defendant's version of events. There is no claim that this evidence was deliberately withheld from the defense or that the defense attorney did not know about it. This argument, in reality, is merely a dispute about the interpretation of evidence. In any event, this evidence certainly cannot be deemed material since the jury merely heard that the co-defendant made appellant the "heavy" and since the jury never heard the co-defendant's version of the murders.

ARGUMENT

POINT I

THE TRIAL COUNSEL PROVIDED EFFECTIVE ASSISTANCE AT THE GUILT AND PENALTY PHASES.

A. **GUILT PHASE**

1. Alleged failure to investigate and move to suppress a confession based upon appellant's prior contact with the detective.

Appellant alleges that his counsel should have investigated appellant's prior contact with a Detective Brown who was hired to investigate the disappearance of the victims by that victim's family. Although appellant's attorney did file a pre-trial motion to suppress the confession because the corpus delecti was allegedly insufficient, appellant now claims that the attorney should have asserted these grounds.

Under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984), an appellate court will indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Appellee submits a decision not to pursue this ground was a proper, strategic one. At the evidentiary hearing, counsel testified that if his client indicated he made the confession based upon the interviews with Detective Brown, then such information would be material (R 972). Strickland noted that an inquiry into counsel's conversations with the defendant could be critical to a proper assessment of counsel's investigative decisions. Id. 104 S.Ct. at 2066. In any event, the attorney noted that the conversations with Detective Brown occurred a

number of days before the actual confession was obtained (R 932). The attorney was also aware that there were no statements offered into evidence as a result of any conversations with Detective Brown (R 953). Since there was absolutely no nexus between the conversations and the actual obtaining of the confession, the attorney made a proper strategic decision not to pursue such a futile remedy. See, Leon v. State, 410 So.2d 201 (Fla. 3d DCA 1982) (where it was held that initial threats of physical violence at the time of the arrest to induce a defendant to tell the police where a kidnapped victim was located did not vitiate a subsequent confession where proper Miranda warnings were given and different police officers obtained the confession). An attorney is not duty bound to move to suppress a confession on grounds not likely to succeed. Owens v. Wainwright, 698 F.2d 1111, 1114 (11th Cir. 1983); State v. Eby, 342 So.2d 1087 (Fla. 2d DCA 1977) (holding that a decision not to raise certain possible defenses or call certain witnesses is ordinarily a matter of personal judgment and strategy within the prerogative of the defense counsel); State v. Ladley, 517 F.2d 1190 (9th Cir. 1975), (holding that a strategic choice not to pursue certain lines of investigation were excused where counsel presented another forceful defense) It should be remembered that the attorney moved to suppress the confession based upon an alleged lack of corpus dilecti. Palmes v. State, 425 So.2d 4, 7 (Fla. 1983) (no need to raise additional ground to suppress a confession).

Appellant's analogy to Detective Brown being a state agent

pursuant to United States v. Henry, 447 U.S. 264, 100 S.Ct. 283, 65 L.Ed.2d 115 (1980), fails for a number of reasons. First of all, Detective Brown was not an inmate acting under instructions as a paid informant. The deputy who communicated with Brown, Murray Ziegler, did note that he exchanged information with the detective (R 27). Brown talked with appellant about possibly receiving a lesser sentence in exchange for his assistance (R 33-34). Brown then conveyed this potential offer to Assistant State Attorney Jack Watson (R 34). There is nothing in the record whatsoever to indicate that any of this was done at the direction of Mr. Ziegler or anyone else in law enforcement. In fact, Mr. Ziegler noted that he stopped all contact with Detective Brown when the bodies were actually discovered (R 37-38). Detective Brown indicated that the state attorney did not direct him to ask any series of questions (R 52). The assistant state attorney did convey to Brown that if appellant gave him any information to inform the attorney and that "...they'd come in and handle it." (R 52-53). Yet the assistant state attorney told Brown he was not an agent either of the state attorney's office or of the sheriff's office (R 63). Brown noted that he had conflicts with the sheriff's office and that the sheriff's office "got in the way." (R 63). Moreover, Brown's testimony was unequivocal that Ziegler did not work for him (R 55-56). Moreover, Robert Darnell, the officer who obtained the confession, did not work for the sheriff's office but worked for FDLE. He informed the court that Detective Brown was not an agent of the FDLE and that Brown was "at odds" with the investigators (R 79-80).

The second requirement for a person to be a state agent under Henry, is that the person must act in a surreptitious capacity, as the inmate did in Henry. Detective Brown stated quite clearly that appellant did not confuse him with either the sheriff's office or the state attorney's office. Appellant knew that Brown was a private investigator (R 61). During the actual confession, Agent Darnell testified that neither he nor appellant discussed Detective Brown's potential "deals" (R 80). Of course, as noted above, the attorney testified that if appellant mentioned that he gave his confession based upon what occurred with Detective Brown, that such a fact would have been significant (R 972). Even the attorney noted that his client did not confuse Detective Brown from the police (R 171-172).

The third requirement under Henry is that the defendant was in custody under indictment. First of all, Detective Brown visited appellant in jail on unrelated charges (R 44). Brown's initial meeting with appellant was based merely on the fact that appellant may have had knowledge about the missing victims and not necessarily that he was a prime suspect in the murders (R 43). In fact, no charges could have been brought until the bodies were discovered. Ziegler indicated that he broke off all contact with Detective Brown when the bodies were found (R 37-38). Hence, appellant was not in custody under the case in question. Maine v. Moulton, 474 U.S. 159, 106 S.Ct. 477, 490 n. 16, 80 L.Ed.2d 481 (1985); Kuhlman v. Wilson, 477 U.S. 436, 106 S.Ct. 2616, 2630 n. 30, 91 L.Ed.2d 364 (1986).

Appellant argues that the suggestion of immunity by

Detective Brown, the promise of possibly obtaining a counsel for him, religious discussion and "other emotional persuasions" were all indications of an invalid waiver (IB 47)[3] Notwithstanding that these considerations are not relevant under Henry, the record belies this argument in any event. Detective Brown did not use religion as a guise to obtain information (R 49). Religion came into play only at the end of the conversation and the detective indicated he would "back off" from discussing religion if "they got turned off" (R 47). In regard to the discussion about immunity or making a "deal", Detective Brown indicated that when he went to see the state attorney, the prosecutor indicated that no immunity would be granted unless Bassett "had something to offer " (R 50). Brown then informed the appellant that he was unsuccessful in obtaining any deals for immunity (R 62). Obviously, this promise of a deal or immunity had no bearing whatsoever on the subsequent confession. Nor did any suggestion by Detective Brown that the victim's family would pay for an attorney have any bearing on the subsequent confession when one realizes that appellant had Richard Cane appointed on his behalf as a special defense attorney (R 208-209).

The evidentiary hearing only highlights the conclusion that the attorney's decision not to pursue this issue was strategically sound. In any event, the record certainly establishes that there was no prejudice suffered. Strickland,

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[3] The symbol "IB" will be used to denote portions of petitioner's initial brief.

104 S.Ct. at 2067. Appellant's attempt to establish Detective Brown as an Henry agent is totally unsuccesful. See, Kuhlmann v. Wilson, supra. In any event, there is no nexus whatsoever between the confession and any conversations between appellant and Detective Brown.

2. Alleged failure to move to suppress the confession based upon appellant's attorney's prior withdrawal.

First of all it should be noted that the attorney did actually make such a motion although it was not pre-trial but made during trial (T 435-500). The attorney explained that the purpose of making this motion during trial was to "sandbag" the state, i.e., if the motion was granted the state would be unable to appeal such a ruling because jeopardy would have attached. (R 985-986). The order denying post-conviction relief round that the latter decision was strategic (R 1213). The trial court noted it had the discretion to deny the motion based upon procedure but ruled on the merits (T 439). The trial court ultimately found that the statements were admissible (T 500-501). See, Gomez v. State, 437 So.2d 206 (Fla. 3d DCA 1983), holding that it was not ineffective assistance of counsel to insure that a motion to dismiss was sworn where the trial court dismissed it on the merits.

Appellant maintains that the trial court was ineffective for not asserting suppression of the confession based upon Edwards v. Arizona, 451 U.S. 476, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). Again, the record belies such an allegation. Agent Darnell testified that initially appellant asked for his appointed attorney, Mr. Kane. Darnell responded that Kane had withdrawn

but that the police could obtain another attorney or obtain a public defender for the appellant. Appellant, in turn, replied, "Well, what do you want?" (T 441, 443-444). At the time the agents were explaining to appellant about his right to an attorney, and they actually started to leave when appellant made the latter statement (T 445). In addition, appellant, without being questioned, noted that "Snake" (the co-defendant) had served in Vietnam and had killed, and that it was easy for the co-defendant to kill again (T 446). Edwards held that when a defendant invokes his right to have counsel present no further interrogation is allowed unless the accused initiates further communication. Obviously, that is what happened in the case at bar. See, Walker v. State, 484 So.2d 1322 (Fla. 3d DCA 1986), holding no Edwards violation where the defendant re-initiated the discussion.

In any event, this court considered and found no violation of Edwards on direct appeal. Bassett v. State, 449 So.2d 803, 806 (Fla. 1984). Claims disposed of on direct appeal may not be re-raised under the guise of ineffective assistance of counsel. Sireci v. State, 469 So.2d 119, 120 (Fla. 1985).

Furthermore, attorney Kane testified that he was appointed as a special defense attorney because of the possibility of appellant wanting to communicate with the police. He had not been charged with the homicides at that time (R 208-209). When attorney Kane was asked whether he informed his client not to talk to the police, he asserted the attorney-client privilege (R

210-211).[4] Attorney Kane indicated that the sheriff's office and the state attorney's office had nothing to do with his withdrawal and he only withdrew because his mission had been accomplished and he was leaving on vacation (R 211, 216-218). Attorney Kane never received any immunity offers from the state attorney's Office (R 219). Appellant makes much of the fact that he did not attend the withdrawal hearing. Yet when attorney Kane was asked if he told his client of the withdrawal, the attorney asserted the privilege once again (R 218). In any event, the attorney indicated that he normally and consistently would inform his clients when he withdrew from their cases (R 222). Although it would not be significant if Kane failed to inform Bassett of the withdrawal, since Agent Darnell informed Bassett of Kane's withdrawal prior to the confession, it should be emphasized that it is appellant's burden to sustain his allegations.

Thus, the record conclusively rebuts appellant's argument that the state purposely engineered the custodial questioning to deprive Bassett of the right to counsel. Appellant cites Haliburton v. State, 514 So.2d 1088 (Fla. 1987) to support his position. The case is distinguishable because the police in Haliburton actually prohibited the attorney from seeing his client while in the case at bar Agent Darnell specifically informed appellant that his attorney had withdrawn, but he had the right to an attorney being appointed (T 441, 443-444). In

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[4] Petitioner refused to waive the attorney-client privilege for this purpose (R 215).

any event, this attorney should not be held to the standard of a case that was decided by this court in 1987. An attorney does not have a duty to anticipate changes in the law. Cook v. State, 481 So.2d 1285 (Fla. 4th DCA 1987); Sullivan v. Wainwright, 695 F.2d 1306, 1309 (11th Cir. 1983).

3. Alleged failure to object to the co-defendant's out-of-court statement.

Appellant maintains that his attorney was ineffective because he did not object to the co-defendant's version of the crime, that is that appellant, as opposed to the co-defendant, was the dominant force in the offenses. Appellant speculates that if the attorney made an objection to this statement of the co-defendant and to the argument pertaining to this statement by the prosecutor that the jury would have returned a verdict of acquittal or of a necessary lesser-included offense (T 551-552, 545-546). Addressing the argument portion first, appellee notes that this court specifically held in Bassett, supra at 807, that the prosecutor's closing remarks in the guilt phase did not constitute fundamental error. Such a decision forecloses appellant's argument that there could be a prejudice; if the comments did not constitute fundamental error for purposes of the direct appeal a fortiari such comments would not have undermined that trial to such an extent that one could say the trial did not produce a just result. Strickland, 104 S.Ct. at 2064. Additionally, the law of the case precludes this point from being relitigated once again. Greene v. Massey, 384 So.2d 24 (Fla. 1980); Johnson v. State, 13 F.L.W. 261 (Fla. April 11, 1988). Moreover, matters settled by the appeal are not proper grounds

for a collateral challenge. Johnson v. Wainwright, 463 So.2d 207, 213 (Fla. 1985); Messer v. State, 439 So.2d 875, 879 (Fla. 1985).

Turning to the testimony concerning the co-defendant's statement, appellant argues that the attorney should have either moved for a mistrial or at least moved to have the judge read a cautionary instruction (IB 49). Appellant's characterization of the co-defendant's statement can hardly be justified. The contested testimony was merely preliminary statements made by the police to the appellant prior to soliciting his confession (T 514, 544). Basically, these statements indicated that the co-defendant implicated the appellant quite heavily and tried to lay most of the blame onto the appellant. In contrast to these very terse and conclusorary remarks, the court should compare the very detailed confession that appellant divulged (T 514-534). As the defense counsel noted during trial, the state mainly relied on the confession of his client because, essentially, the jury heard nothing about the crime from the co-defendant (T 624-625). In essence, this is true because there is nothing to base what happened during the robbery and murders on except the detailed confession of appellant. Indeed, when this court viewed this case on direct appeal, this court relied upon and cited the details provided the appellant. Bassett, supra.

In any event, appellee submits that these statements were admissible as a predicate to the confesssion to show the appellant's state of mind. United States v. Perry, 649 F.2d 292, 295 (5th Cir. 1981); Coxwell v. State, 397 So.2d 335 (Fla. 1st

Moreover, when one considers the cursory comment alluding to the co-defendant's statement, it is readily apparent that such error would certainly have been harmless, even if the defense attorney had objected. See, Brownlee v. State, 478 So.2d 467, 470 (Fla. 4th DCA 1985), holding that an error pursuant to Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), would be harmless error where the evidence of guilt was overwhelming. Since the confessions do not contradict each other, any error in the confesion of a non-testifying co-defendant would be harmless. Puiatti v. State, 521 So.2d 1106 (Fla. 1988). Obviously in this case, when one considers appellant's detailed confession and the massive evidence to corroborate it, this error would certainly be harmless. A fortiari, the prejudice necessary to sustain a collateral attack under Strickland, supra, would not exist.

Appellant also maintains that this alleged error could have been cured by a cautionary instruction. Again, pursuant to a direct appeal, if one does not make a motion for a curative instruction, then the conviction will be affirmed. McCall v. State, 463 So.2d 425 (Fla. 3d DCA 1985), holding that a defendant's failure to request such an instruction following a comment about the defendant's "rap sheet" precluded consideration that such a comment was prejudicial. Appellee submits that if such an error was not deemed fundamental as was the case in McCall, then certainly this alleged error by the attorney cannot pass muster under the Strickland standard.

4. Alleged failure to give opening and closing arguments.

Appellant claims his attorney failed to take advantage of Florida Rule of Criminal Procedure 3.250 by not giving a rebuttal argument. He argues that had counsel objected, the conviction would have been reversed pursuant to a direct appeal. Although appellant argues that the denial of the right to give a rebuttal closing argument can never be harmless error pursuant to Rayson v. State, 272 So.2d 864 (Fla. 4th DCA 1973), it should be noted that there was no such denial in this case. Furthermore, Rayson, requires an objection and there was no objection in the case at bar. (In any event defense counsel introduced evidence. See, infra). Appellant's cases in support of this conclusion do not stand for the proposition that such a right is a fundamental one. As such, it cannot be argued pursuant to Strickland, supra, that this alleged error so undermined the proper functioning of the adversarial process that the trial could not be relied on as having produced a just result. Id. at 2064.

In any event, appellant had no right to a rebuttal closing remark because his attorney introduced a defense exhibit during trial, i.e., an order noting that appellant's prior attorney, Richard Kane, had withdrawn from the case (R 61). Obviously, the rule is waived by the introduction of evidence. McAvoy v. State, 501 So.2d 642 (Fla. 5th DCA 1986). (Moreover, appellant, pursuant to this collateral appeal, has emphasized the fact that his trial counsel should have been more zealous in pursuing the motion to suppress based upon Kane's withdrawal. Therefore, such

evidence cannot be considered insignificant. (I.B. 47-48)[5] Trial counsel made a proper strategic decision in this regard.

5. Failure to object to the prosecutor's argument that the jury could not consider appellant's confession as involuntary.

Appellant highlights excerpts from the prosecutor's closing argument indicating that the jury should consider the appellant's confession valid because the trial court had ruled it admissible. In support, appellant cites Crane v. Kentucky, 476 U.S. ___, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986). Of course, that case dealt with the issue of excluding the evidence altogether as opposed to focusing on single excerpts from the prosecutor's argument. Moreover, the opinion noted that even the failure to allow the defense to put on evidence to show how such confession was secured could be harmless error. In fact, the case was remanded back to the state court's to determine if the error was harmless. Palmes v. State, 397 So.2d 648, 653-656 (Fla. 1981), reached the same conclusion by noting that even though evidence regarding the voluntariness of a confession was excluded, the error was harmless based upon other evidence admitted and the overwhelming evidence of guilt.

Any alleged error here certainly would not have any conceivable affect on the outcome of the proceedings. Strickland, 104 S.Ct. at 2064. First of all, the defense counsel specifically argued during closing argument that the jury should consider the specific features of the confession including the

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[5] "(I.B.)" denotes portions of appellant's initial brief.

statements he was confronted with by the police and other factors (R 635-636). Additionally, the trial court instructed the jury that they were the sole judges of the weight and the sufficiency of the evidence and the credibility of the witnesses (T 669). Just before the final arguments, the trial court informed the jury that such arguments could not be used by the jury as evidence or as instructions (T 585). More importantly, the jury was informed:

> A voluntary admission is one that is not improperly compelled or induced by promises or threats and must not result from either physical or psychological coercion directed against the Defendant.
>
> Any admission that you find that was not freely and voluntarily made by the person charged should be wholly disregarded.
>
> A statement voluntarily made should be given fair and unprejudiced consideration, with due regard to the time and circumstances under which it was made and its harmony or inconsistency with other evidence, as well as the motive shown by the evidence to have influenced the making of the statement.
>
> You may believe any part of such statement which you believe to be true and reject those parts which you find to be untrue.

(T 672-673).

When one considers defense counsel's closing remarks, the actual jury instructions, and the overwhelming evidence of guilt, it is readily apparent that this complaint is trivial at best. The harmless error standard pursuant to a direct appeal must be borne by the state. State v. Diguilio, 491 So.2d 1129 (Fla. 1986). In

collateral proceedings, however, it is appellant's burden to show that any error had a substantial effect on the trial. Obviously appellant has not met that burden.

Finally, it should be noted this court already reviewed the impropriety of any remarks made during closing argument at the guilt phase and found either no error or the error harmless pursuant to the direct appeal. Bassett, supra. Once again, the law of the case precludes this issue from being relitigated. Greene; Johnson [v. State]; Johnson [v. Wainwright]; Messer, supra.

B. PENALTY PHASE:

1. ALLEGED NON-STATUTORY AGGRAVATING EVIDENCE.

(a). Law of the case.

Appellant maintains his trial counsel should have precluded the evidence submitted by two witnesses at the penalty phase: Connie Christy and Officer Wilkinson. Appellant maintains that the only purpose of this testimony was to elicit a non-statutory aggravating circumstance, i.e., that appellant has a prior criminal history. First of all, the jury was instructed to limit their consideration to ony statutory aggravating factors (T 762). Furthermore, it is presemed that the trial court followed the law in regard to such penalty phase instructions. Thomas v. Wainwright, 495 So.2d 172, 174 (Fla. 1986).

This issue has been reviewed and decided pursuant to the direct appeal, it is the law of the case and may not be challenged a second time pursuant to a collateral proceeding. Greene, Johnson, supra. This court reviewed the aggravating circumstances;indeed this court explicitly noted it reviewed the entire record on appeal and found no error regarding the sentence. Bassett, supra at 808, 809. In McCrae v. State, 510 So.2d 874, 879 (Fla. 1987), this court held that whether certain evidence was considered non-statutory aggravating evidence was an issue for direct appeal and would not be cognizable pursuant to a post-conviction motion. The doctrine of law of the case precludes this issue from being reviewed once again.

(b). The evidence was admissible to establish the statutory mitigating factor of no significant prior criminal history.

The prosecution is allowed to negate the statutory mitigating factor of no significant prior criminal history by adducing evidence of prior criminal history even though a conviction may not have been obtained. Quince v. State, 477 So.2d 535 (Fla. 1985); Funchess v. Wainwright, 772 F.2d 683, 694 (11th Cir. 1985). Appellant cites Robinson v. State, 487 So.2d 1040, 1042 (Fla. 1986) as contrary authority. Yet, the latter case can be distinguished because the trial court specifically used this type of evidence to establish an aggravating factor pursuant to section 921.141(5)(b), Florida Statutes (1985). Another point of distinction is that the prosecutor was only establishing the evidence by innuendo in asking a defense witness if that witness was aware that the defendant had "committed another rape?" In any event, unlike Robinson, the trial court's sentencing order did not indicate that the trial court relied on these specific factors to establish an aggravating circumstance (T 24-26).[6]

(c). Review of Connie Christy's and Officer Wilkinson's testimony.

Appellant maintains that the trial counsel was ineffective during the penalty phase for not precluding the testimony of

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[6] Appellant argues that the state's expert, Howard Pearl, testified that the latter evidence could not be used to rebut the statutory mitigating factor of no prior criminal history. In fact, Mr. Pearl indicated that it was his opinion that such evidence should not be allowed for such purpose, but that the case law was against him (R 483-484, 489).

Connie Christy and Officer Wilkinson. Connie Christy did testify that she saw appellant in possession of a short-barrelled shotgun. Trial counsel, however, objected to the question if she ever saw appellant in possession of an illegal firearm (T 691-692) (emphasis supplied). When she was asked if she saw appellant with a sawed-off shotgun, trial counsel again objected, because the witness did not have any knowledge of what an illegal shotgun entailed (T 693). (Indeed, the jury had no knowledge of what constituted an illegal, sawed-off shotgun.) The witness indicated that the length of the shotgun was about a foot and one-half (T 693-694). But, upon cross-examination, she admitted that she was not sure of the shotgun's length (T 697-698).

Next, this witness was questioned on what appellant considers a "murder conspiracy" (T 694). Apparently, someone stole appellant's motorcycle. Connie testified that appellant exclaimed that he would "blow them away" (T 694). Yet, Connie also explained that this remark was made based upon the theft. She also explained that this remark was "... what any normal person would say if their motorcycle got ripped off" (T 694). She also testified that there was a brawl at a bar, and that appellant told her that somebody ended up in the trunk of a vehicle (T 694).

Defense counsel addressed some of this testimony during his closing argument. He indicated that Connie Christy did testify about a short-barrelled shotgun, but then exclaimed, "What does that tell you? Absolutely nothing" (T 748). Defense counsel, commenting about the remark made when appellant discovered his

motorcycle was stolen, indicated: "Conspiracy to murder? That's absurd. It's ludicrous" (T 749). Defense counsel explained that such a remark would be made by any person. Appellee submits that the closing argument was just as effective in negating this nebulous evidence as making an objection. Because this evidence is so weak on its face, it could not possibly have any effect on the outcome of the proceedings during the penalty phase. Strickland, supra.

Next, appellant complains that the testimony elicited from Christy implied that appellant possessed stolen goods; i.e., luggage that was in appellant's trailer. Yet, defense counsel did object to this testimony and successfully prohibited the prosecutor from eliciting a potentially inculpatory statement (T 696-697). The evidence about a "theft" was so weak that it could not even be considered an implication. The prosecutor also noted that Connie testified that she lived with appellant for one or two months. Because she would have been under age 16 at the time, the prosecutor noted the fact that appellant would be contributing to the delinquency of a minor at the time. (Perhaps, however, appellant was a juvenile himself at that time.) Although this evidence could have been explored further to establish that a misdemeanor had occurred, when one considers that the jury had just been told gruesome details about a double homicide, this testimony is just about meaningless.

Appellant complains that the defense attorney did not preclude the testimony of Officer Wilkinson. He testified explicitly that he gave chase to appellant on his motorcycle

because he was not wearing a motorcycle helmet. The officer testified that he used his blue lights to try to stop appellant, but that the appellant sped away instead (T 699-700). Certainly, this testimony establishes a violation of attempting to elude a police officer, contrary to section 316.1935, Florida Statutes (1979). Officer Wilkinson also testified that appellant gave him a false age when appellant was stopped. In Barclay v. State, 13 F.L.W. 634 (Fla. Mar. 10, 1988), it was held that when a defendant was stopped for a traffic violation and gave a police officer a false social security number and name, that the defendant could be charged and convicted with resisting arrest without violence, pursuant to section 843.03, Florida Statutes (1987). As such, this evidence was properly adduced and the statutory mitigating factor of no significant prior criminal history based upon section 843.03. was established properly. Quince, supra.

2. ALLEGED UNCONSTITUTIONAL EVIDENCE AND ARGUMENT.

1. **Procedural Arguments**

Once again appellant seeks to relitigate issues already resolved on the merits pursuant to the direct appeal, as noted by the following: "We invite this court to read the penalty phase in its entirety..." (IB 60). Since these issues pertaining to the evidence at the penalty phase and argument have been litigated pursuant to the direct appeal, appellant is precluded by the law of the case from relitigating this issue. Green, supra. In Johnson [v. State], supra, this court noted, in reviewing a collateral claim, that the case may very well have

been reversed on direct appeal if the proceeding had been a direct appeal. But since this court had rejected the defendant's claim on the previous direct appeal, the law of the case doctrine would preclude relitigation of the issue, notwithstanding that the issue concerned a death sentence.

Nevertheless, appellant claims that the standard of review is the prejudice based upon the lack of objection by the defense attorney. ("With objection, this case would have been reversed. Without it, it wasn't." (IB 63)). This analysis is absolutely incorrect. First of all, this court decided in Bassett: "Even if appellant had properly preserved this point for appeal, we would not find reasonable error." Id. at 808.[7]

Even if this court had not made the latter holding in the direct appeal, appellant's standard of review would be in error. This issue was explained in United States v. Frady, 456 U.S. 152, 102 S.Ct. 1584, 1593-1595, 71 L.Ed.2d 816 (1982). Pursuant to a federal habeas attack, the Court indicated that it would not use a "plain error" standard of review because the proceedings were pursuant to collateral attack. The Court noted that there was a higher hurdle to overcome in proceedings of this nature then what would be required pursuant to a direct appeal when the defense counsel had not interposed objections. That standard was whether the alleged errors so infected the entire

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[7] This quotation refers both to the prosecutor's testimony and to the comments made by the prosecutor during closing argument because the dissent discussed the prosecutor's remarks when he cross-examined himself. Id. at 809-810.

trial that the resulting conviction violates due process. Strickland, supra. This standard was reiterated in Kimmelmann v. Morrison, ___ U.S. ___, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986), where Justice O'Connor explained that the prejudice that has to be demonstrated such that there would be a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. S.Ct. at 2583. Strickland, 104 S.Ct. at 1068. Justice O'Connor also noted that the defendant bears the burden of proving counsel's defective representation. The reviewing court must consider the totality of the circumstances. Kimmelmann explained that it would be unlikely that a defense attorney would deliberately forego an objection in hopes of obtaining collateral relief since the burden is much higher pursuant to the latter proceeding then it would be pursuant to the former. Moreover, pursuant to Strickland, appellant must affirmatively prove such prejudice. Id. 104 S.Ct. at 2067. Obviously, "prejudice" entails much much more than the mere failure to object as appellant argues. Applying the correct standards, there is no question that these issues have already been litigated and decided against appellant. Ergo, if these issues fail pursuant to a direct appeal, it follows that appellant could never prevail with these same issues pursuant to a collateral attack.[8]

Other capital defendants have attempted to relitigate issues

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[8] This court has adopted the standards promulgated in Strickland, supra. Jackson v. State, 452 So.2d 533 (Fla. 1984).

rejected on direct appeal without success. Burr v. State, 518 So.2d 903. 905 (Fla. 1987) (objection to inflammatory, improper argument of the prosecutor); Middleton v. State, 465 So.2d 1218, 1228 (Fla. 1985) (objection to comments of the prosecutor and trial court); Groover v. State, 489 So.2d 15 (Fla. 1986) (objection to improper prosecutorial statements at trial); Francois v. State, 470 So.2d 687, 689 (Fla. 1985) (objection to improper comment inflammatory arguments of the prosecutor). This court explained quite clearly in Johnson v. Wainwright, supra at 213 that, "Matters settled by the appeal are not proper grounds for collateral challenge." The fact that this ground is raised under the guise of ineffectiveness does not preclude this court from applying the law of the case and from applying the very high standard required for collateral proceedings. Hence, claims previously raised on direct appeal will not be heard in a proceeding of this nature, even though it is raised under the guise of ineffective counsel. Sireci v. State, 469 So.2d 119, 120 (Fla. 1985).

2. **Merits**.

Although appellee's argument primarily considers the latter procedural issues, out of an abundance of caution, appellee will address the comments. The first comments deal with the prosecutor's argument referring to appellant's constitutional right to trial. Although appellee does not condone such comment, appellee does note that the prosecutor did temper these remarks a great deal by noting that the appellant did have the right to exercise those rights (T 716-717, 729, 734). In any event, a

similar comment was held not to vitiate a penalty proceeding. Brooks v. Kemp, 762 F.2d 1383, 1396 (11th Cir. 1985), where the prosecutor indicated that the victim had no battery of lawyers, preemptory challenges, or a courtroom.

Appellant, once again, complains about the reference to the victims' families. Again, such comments do not constitute reversible error under these circumstances. Brooks at 1395; Jones v. Wainwright, 473 So.2d 1244 (Fla. 1985).

Appellant cites Booth v. Maryland, ___ U.S. ___, 107 S.Ct. 2529, ___ L.Ed.2d ___ (1987), in support. Booth, is distinguishable; it dealt with a specific statute in jury instruction which required the jury to focus in on the impact to the family. No such instruction existed in the case at bar. In any event, a trial lawyer in 1980 certainly had no duty to anticipate this 1987 decision. Cook, supra.

Appellant highlights the comment that the execution would serve as an example to a person on "main street." Such a general deterence argument is permissible. It would have no substantial effect on the outcome of the proceedings. Davis v. Kemp, F.2d 1522, 1538 (11th Cir. 1987). Appellant notes that the prosecutor argued the potential of him being released on parole and committing the same type of crime. In Brooks, supra, the prosecutor argued that the defendant might kill a prison guard. Id. at 1396. Again, such an argument does not constitute rever-

sible error.[9]

Appellant takes umbrage with prosecutorial remarks referring to matters allegedly outside the record, i.e., how long the victims were in the trunk, if the victims pleaded for their lives, and the fact that the jury may not have heard everything that took place.[10] In Davis, the prosecutor indicated: "We can't imagine what happened to her. No one in his wildest dreams can imagine what she went through." Id. at 1528. Again, such a comment did not call for a new trial. See also, Pope v. Wainwright, 496 So.2d 798, 802 (Fla. 1986), where the prosecutor told the jury that the defendant voiced a preference to be sentenced to death, but where such statement was outside of the record, and such a comment was not held to be fundamental error; Johnson, supra [463 So.2d 207], where the prosecutor argued matters outside of the record and where such argument was held not to constitute reversible error. Bertollotti v. State, 476 So.2d 130, 133 (Fla. 1985) (prosecutorial comments during the penalty phase regarding the defendant's right to remain silent, "golden rule" argument, and "send the community a message" held

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[9]Teffeteller v. State, 439 So.2d 840 (Fla. 1983), can be distinguished because the prosecutor indicated the defendant would be released on parole and kill the state witnesses. In any event, this court has considered the totality of the circumstances surrounding these comments on direct appeal.

[10]The defense attorney testified at the evidentiary hearing that the psychological evaluation was not conducted because it would have "opened up the door" for more grisly facts. Furthermore, the attorney was aware of one or more facts known to him that did not appear in appellant's confession (R 168, 176).

to be harmless error).

Appellant once again attacks the prosecutor's references to religion in his closing argument. Specifically, appellant comments: "Beyond that, such religious arguments are improper, for as in this case the jurors' duty became 'sacred' because Jesus told them 'render unto Caesar'" (IB 64). First of all, it should be noted that the defense attorney used the same religious arguments to his advantage (T 671). As the trial court noted in its order denying post-conviction relief, a large portion of the failure to object to these comments could also be attributed to strategy (R 1214). Furthermore, appellant's religious analysis is flawed. The comment "render unto Caesar" does not equate secular duties with religion; rather, this biblical comment distinguishes one's secular duties from one's religious beliefs. It should also be noted that the prosecutor indicated that the death penalty was advocated by a minority of religious leaders (T 727).

Appellant maintains that the comment: "...it's brought up before the advisory boards on a number of times that it's reviewed" violates the holding in Caldwell v. Mississippi, 472 U.S. 320 (1985) (IB 62). A violation of Caldwell occurs when the prosecutor repeatedly and dramatically downplays the jury's role in the sentencing procedure. This isolated comment can in no way be construed in such a manner. More importantly, the comment is not a Caldwell violation because it refers to a parole board and thus does not diminish the jury's role by misleading them to believe that their role is insignificant. Harich v. Wainwright,

Case No. 86-3167, pp. 15-22 (11th Cir. April 21, 1988). Moreover, it cannot be deemed ineffective counsel to fail to anticipate Caldwell. Cook, supra. In addition, this court has repeatedly held that Caldwell is not a fundamental change in the law and can be (and was) waived on direct appeal. State v. Sireci, 502 So.2d 1221, 1223-1224 (Fla. 1987); Card v. Dugger, 512 So.2d 829, 831 (Fla. 1987); Copeland v. Wainwright, 505 So.2d 425, 427-428 (Fla. 1987); Aldrich v. State, 503 So.2d 1257, 1259 (Fla. 1987); Demps v. State, 515 So.2d 196, 197 (Fla. 1987).

3. ALLEGED ERRORS AT THE SENTENCING PHASE

For some reason, appellant adamantly complains that his trial counsel informed the jury that he was aged 17 instead of 18. Appellant seems to argue that this was a deliberate miscalculation by the trial attorney. Such speculation is ludicrous. In any event, such an error on the part of defense counsel can hardly be regarded as awesome. Moreover, this argument totally lacks merit because the trial court did, indeed, find appellant's age of 18 as somewhat of a mitigating factor (T 25-26). Obviously, there is no prejudice under the Strickland standard. If anything, such an error would benefit appellant.

Appellant also highlights the fact that defense counsel used appellant's alias of Earl Smith. At the evidentiary hearing, defense counsel testified that his client told him that his name was Earl Smith (R 116). The defense attorney also noted that although the prosecutor cross-examined his client and found out that appellant's real name was Theodore Bassett, minutes before during direct examination, appellant replied that his name was

Earl Smith (R 118, T 701). Even the defense counsel who represented appellant at the evidentiary hearing used the name "Earl Smith" when he asked a question (R 853). Appellant should not benefit from trial counsel's "error" when he is the primary person who has caused such error. In any event, such an error certainly cannot be deemed to have a probable effect upon the outcome of the proceedings under Strickland, supra.

Although appellant does not challenge the strategy to demonstrate that appellant was substantially dominated by Cox, appellant maintains that his counsel improperly prepared such a defense because the trial counsel relied on appellant's confession. The confession was the only version of events submitted to the judge and jury and to this court. Indeed, this court, when it recited the facts in the direct appeal opinion, essentially used those facts from the confession. Bassett, supra.

Appellant complained that his trial counsel should have somehow demonstrated that the co-defendant was exactly eleven years older than the appellant. Yet, in the appellant's confession, it was divulged to the jury that the co-defendant was a Vietnam veteran who had combat experience (T 446). Obviously, a Vietnam veteran would certainly be older than appellant, because appellant was only aged 18 at the time of the murders which occurred in August of 1978 (T 3). Hence, such evidence would only be cumulative and not constitute harmful error. Witt v. State, 465 So.2d 510, 512-513 (Fla. 1985), holding that an attorney was not ineffective for failing to adduce additional

psychiatric evidence.

Next, appellant maintains that Connie Christy should have testified that appellant was afraid of the co-defendant. This information was gleaned from a statement made by Connie Christy to Agent Darnell. When and under what conditions appellant was afraid of the co-defendant was not explained at the evidentiary hearing. In any event, according to appellant's confession, it was appellant who initially met the victims and brought them to meet the co-defendant. According to both the co-defendant and appellant (by implication), it was appellant who initially produced and brandished the gun to rob the victims (T 447, 452; R 791, 793, 795, 808). Furthermore, there is absolutely nothing in any of appellant's statements to indicate he was under duress or in fear of reprisal from the co-defendant.

In any event, the jury was informed through appellant's confession that it was the co-defendant's idea to kill the perpetrators (T 453). The jury noted that tears welled up in appellant's eyes during his confession (T 522). The confession also divulged that the co-defendant was the actual killer (T 528, 533-534). The confession also noted that appellant's participation in the beating of the victims before their murders was only half-hearted (T 530). Not only would the jury have to accept this confession as the truth because it was the only account of the crime presented to them, this confession was corroborated by the fact that the policemen found a belt, a piece of a garden hose, and silver tape (T 565). The latter real evidence corroborated appellant's account.

Appellant argues that his counsel did not request a specific mitigating instruction that the jury could consider the co-defendant's life sentence a mitigating factor. Appellant even claimed: "... and himself (the defense attorney) arguing to the jury that it should consider itself limited to the list" (IB 72). Appellant provides no record cite. Such a conclusion is belied by the record as noted by the following quotes:

> Now, it's pretty obvious that when the prosecutor says that there are not any mitigating circumstances in this case it's totally untrue. There are several, and I will point them out to you. (T 746)

> The evidence is that John Cox was the prime motivator and the trigger man in this case. ... John Cox will live. Why will John Cox live? Because he chose to give up a basic constitutional right which you have and which I have and everybody in this Court has, that is to say, a right to a trial by a jury of your peers. (T 751).

> Where is the deterent effect if the man who actually pulled the trigger lives and is in prison? (T 751).

Still discussing the two perpetrators' participation, the defense counsel argued: "But this man should not die and John Cox live. That would have absolutely no deterent effect... It is another aggravating--I mean mitigating circumstance--I'm sorry--that the defendant acted under extreme duress" (T 751) (emphasis supplied). Then the defense counsel indicated that he had discussed three mitigating factors with the jury (T 753). Finally, he reiterated that the trigger man would be sentenced to imprisonment and would live while (he implied) his client would

not (T 757).

In the next claim, appellant claims that the prosecutor urged that the death penalty be imposed even though the appellant was only an "aider and abettor." Appellant also claims that this theory was not counteracted effectively by the defense counsel.

First, as noted above, only appellant's version of the events was known to the jury and only that version provided the details of this double homicide (T 511-538). Appellant maintains that the prosecutor's argument violated the principles of Enmund v. Forida,458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). Yet, as explained in State v. White, 470 So.2d 1377 (Fla. 1985), Enmund was only a "wheel man." In White, the defendant was one of three armed burglars. The occupants' hands were tied and forced to lie down. Since one of the victims saw a co-defendant, the co-defendant decided to kill the victims. White protested the killing. Nevertheless, Enmund did not apply to White, because White was a major participant in capturing, guarding and intimidating the victims. White was at the scene. Notwithstanding that White verbally opposed the shootings, he did nothing to disassociate himself from either the murders or the robbery. Given appellant's confession, he is in the same posture as Mr. White, only much more culpable. See also, James v. Wainwright, 484 So.2d 1235 (Fla. 1986), rejecting an Enmund claim. Moreover, when one considers Tison v. Arizona, ___ U.S. ___, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), it is abundantly clear that appellant's participation was more than sufficient to qualify him for a death sentence, notwithstanding that the jury

was informed through his confession that the co-denfendant was the one who actually placed the hose from the exhaust pipe into the closed trunk and sealed the trunk.

It must be remembered that the trial itself established three aggravating factors. Bassett at 808. As the trial court correctly noted the confession itself established three aggravating factors (R 1213). As will be discussed shortly, the fact that this crime entailed a double homicide establishes a fourth aggravating factor. § 921.141(5)(b), Fla. Stat. (1979).

The boys were robbed and subdued in the car with their hands tied with belts (T 521-522, 529). After they were robbed, they were forced to walk through a swamp and were forced to throw their shoes away because Cox explained: "Well, they're not going to need them anyway." (T 528). One of the boys was beaten with a branch both by Cox and appellant. Then Cox struck one of the boys with the revolver; as a result the trigger bent. Appellant guarded the captives while Cox retrieved the car. After driving with the two victims in the back seat, the car was stopped so that both Cox and appellant could put the boys in the trunk (T 530-531). Then they drove to the victims' motel; stole some more property and later removed one of the boys from the trunk temporarily to have him sign over traveler's checks (T 532). After both victims were placed in the trunk, Cox taped the trunk and put a piece of hose from the exhaust pipe into the trunk. When one of the victim's tried to push the hose out, Cox stuck a knife into the victim through the trunk slit (T 533-534). Appellant's participation was substantial. There is no doubt

that any comments by the prosecutor would pale in comparison with the grizzly facts.

C. THE MITIGATION EVIDENCE PRESENTED AT THE EVIDENTIARY HEARING WAS HIGHLY DAMAGING AND WOULD CERTAINLY HAVE NOT CHANGED THE OUTCOME OF THE PENALTY PHASE.

Appellant maintains that the evidence presented of his background emanating from family members and school personnel, would have changed the outcome of the penalty phase. To put this issue in its proper perspective, appellee will first set forth this evidence so that this court may review it in its totality before citing appropriate case law.

1. Appellant's childhood background.

Appellant's mother did testify that **she** suffered physical abuse by her first husband, Mr. Bassett. Appellant was a witness to this abuse (R 413). Because appellant saw and was upset by the abuse to his mother, this factor is relevant. Yet, his mother also indicated that appellant was conceived because she was raped. Mr. Bassett also tormented the mother by indicating that he could suffocate the two-month old appellant (R 411-412, 413). The latter two areas of testimony are completely irrelevant and have nothing to do with the appellant's character. § 921.141(1). Appellant introduced other irrelevant evidence. The mother testified that Mr. Bassett would take a good portion of her pay check and that there would not be enough money for food. However, the mother testified that it was **she** who gave up eating and not the children (R 415). Appellant forgets that the issue at hand is not the suffering of the mother, unless it effects or relates to the child. Appellant has failed completely to show any nexus between all of this testimony and the character of the child with the exception of the

appellant witnessing the abuse of the mother by Mr. Bassett, because the child had a negative reaction. Significantly however, no one ever testified that there was any physical abuse of the child other than seeing Mr. Bassett strike his mother. Moreover, it must be remembered that even this testimony is tenuous because it took place in appellant's early childhood.

The situation improved for appellant. The mother testified that she married Leon Sherris, who was a good provider. He was not nearly as bad as Mr. Bassett (R 420-421). Indeed, appellant thought "a lot" of Leon Sherris according to his mother (R 421). Appellant's sister, Tammy, confirmed that all the children "got along" with Leon Sherris. She explained that he "treated us like we were his own" (R 317). Indeed, she testified that appellant spent a lot of time with Mr. Sherris (R 317). She even described the children's life as "cheerful" (R 319).

2. Relationship with the grandparents.

Tammy testified that her brother (appellant) spent a lot of time with his grandparents because he "got to do what he wanted to do" (R 319-320). Appellant even thought of his grandparents as parents, according to Tammy (R 320). Appellant's mother testified that the grandfather was a significant male figure to appellant (R 421). Appellant was very attached to his grandfather; the two would often fish and hunt together (R 429). The grandfather would buy appellant gifts and, according to appellant's mother, he would buy anything that appellant wanted (R 429-430). Even after appellant withdrew from Mount St. John's School, he stayed with his grandparents quite a bit of the

time (R 433). Even the school records indicate that appellant preferred to stay at his grandparents because there was no supervision (R 1122). The record indicates that far from being deprived of a male role figure, appellant had the advantage not only of his grandfather who would, in effect, spoil him, but also had a good relationship with his mother's second husband, Mr. Sherris. Again it should be emphasized that the problems with the first husband occurred very early in appellant's life. His situation was improving.

3. Problems in school.

Despite the lack of a severely deprived or unhappy childhood, the evidentiary hearing revealed that appellant had many problems in school. He was referred to Mount St. John's School (a specialized treatment school for children who had emotional problems) from public school. He was described as an aggressive, destructive and uncooperative child who constantly needed supervision; he projected the responsibilities for his failures onto others (R 229-230). He was disobediant to teachers and often came home from school as late as 8 or 9 p.m. (R 230-231). In April of 1970, it was reported that he was involved with the Apaches Motorcycle Gang (R 231, 312). He was involved in several fights (R 233). David Merry, the social worker from Mount St. John's, testified that appellant would provoke other schoolsmates (R 307-308).

School records reveal that in the seventh grade, appellant was described as manipulative or a "con" (R 1078). He would cut class and smoke on school grounds (R 1081). He skipped

detentions, talked disrespectfully to teachers and was truant 61 out of 123 school days (R 1084). Other fighting incidents were reported (R 1082). In one fight, appellant even punched a student in the mouth and the resulting injury required stitches (R 1083). There were reports of appellant's running away in 1974 and 1975 (R 1101). A Mount St. John's report indicated that appellant would "show how brave he is in delinquent acts; he acts 'crazy' according to one peer" (R 1109).

4. Appellant's relative psychological status and rehabilitative efforts.

Every effort was made to address appellant's school problems. Not only did he receive counseling and treatment at Mount St. John's, but he also received counseling from neighbors (R 424). Father McDonald, of Mount St. John's, explained that the school was a residential treatment for pre-teens. This school, however, was not for delinquents. Moreover, appellant, even among these students, did not stand out as a serious problem (R 223). There were other children in the school with far more difficult situations vis-a-vis their background; appellant was certainly not the worst (R 258). Dr. Bank testified that appellant was not psychotic (R 248). He knew the difference between right and wrong (R 287). He was anti-social, but not sociopathic; he did not enjoy "beating" the law because he "gets caught" (R 251). Appellant's personality was very typical of one who came from a home without an adequate male model (R 253). Although appellee disputes this conclusion in light of the testimony about appellant's grandfather and Mr. Sherris, this conclusion certainly cannot evoke much sympathy for appellant.

Unfortunately, the number of young men who come from homes without an adequate male model figure (or any) is probably enormous. But when one considers that appellant's condition was not that serious relative to the other students in Mount St. John's, this factor is negligible. Appellee reiterates that Mount St. John's was not a school for the most serious delinquent cases. Moreover, there was testimony that the mother was supportive of appellant's placement in that school and very caring (R 309). Appellant's learning potential was average or even high average (R 1071, 1119, 1159). Dr. Bank testified that his tests confirmed that appellant's learning potential was around the normal range (R 246). This character sketch of appellant's background is relatively bland. Such testimony presented to a sentencing jury and judge would highlight the senselessness of the double homicide.

5. Rehabilitative progress.

Appellant's mother's efforts and the staff at Mount St. John's initially were successful. David Merry indicated that appellant's condition improved (R 308). Reports also indicated that appellant made progress, and that his family situation improved (R 1075, 1109, 1121). Dr. Bank testified that as appellant stayed at the school, he improved in his relationships with the other boys and staff (R 252, 266). The doctor also noted that St. Johns had a good program and a good reputation. The school had helped every child to some degree. Normally, this type of school would have 30% to 40% success rate, but Dr. Bank believed that this school helped every child in the sense of

social relationships as well as academic achievements (R 256-257).

Notwithstanding the efforts and success of the school, appellant convinced his mother to withdraw him from Mount St. Johns in January of 1973, against the advice of the school personnel (R 308-309). Appellant's mother testified that appellant behaved "allright" even after being withdrawn from the school, but he did stay with his grandparents (R 433). Then either at age 16 or 17, appellant left home in Connecticut for California (R 429, 434). The evidence of the support of appellant's family, the efforts of the Mount St. John's School, his progress and his independent decisions to leave Mount St. John's and then leave home for California are extremely damaging to appellant's contentions for two reasons. First of all, the jury would see that society has done all they could for appellant and that appellant even made progress in a specialized school; yet, appellant still inexplicably participates in a heinous, double homicide. Furthermore, such evidence would destroy appellant's other contention that he was substantially dominated by the co-defendant. The decisions to leave Mount St. John's and to leave home for California at an early age demonstrate appellant's independence, i.e., his independence from a supportive social structure and a caring mother.

6. Criminal record divulged.

Such mitigating testimony would also have divulged other criminal behavior. Dr. Bank testified that there was a report of appellant being involved in theft (R 269). Indeed, the school

records indicate that appellant committed auto theft (R 1123, 1128). Appellant's mother confirmed that appellant stole two cars while he was living at home (R 437). The co-defendant indicated that it was appellant's habit to steal from people (R 811). In fact, appellant stole one of the firearms used in the present offenses (R 812). Another report indicated that appellant's after-care was revoked (R 1132). This type of testimony obviously would not help appellant's cause.

7. Psychological profile.

Dr. Bank explained that every story told by appellant had a theme of doom (R 248). For example, appellant related a hypothetical story to the doctor about two men who robbed a bank. The older one was able to escape, but the younger one was electrocuted because he had killed a girl on a prior occasion (R 249-250). Another story told by this young appellant was about a mother and son dying of an overdose of LSD. The supplier also died from an overdose of this drug (R 272). Still another story was about two men who burglarized an oil factory who wanted to "get drunk" on the oil. They lowered the ropes into the oil drum, but one of the perpetrators fell and oil spilled all over (R 274). In another story, the child told about a wife waiting for her husband to come home, but the husband died. Before he died, however, he hired a killer to murder all of the children and wife because the husband did not want anyone else to have his wife (R 275).

After these stories were divulged, the prosecutor read appellant's confession and presented it to the doctor as a

hypothetical situation (R 275-281) (T 517-548). The doctor concluded that the events of the double homicide were similar in the themes of violence, but that the "hypothetical" story was more detailed and showed more "planfulness." The doctor commented: "... the almost perfection of the sequence is quite striking." He also noted that this story showed a higher level of sophistication and was much more intricate than the hypothetical stories that the doctor previously related (R 281-284). Indeed, Doctor Bank's report confirmed that appellant was exclusively preoccupied with thoughts of death, violence and revenge (R 285). Doctor Bank's tests were prophetic: these tests indicated that appellant virtually believed he was going to die violently, that he would live violently, and perhaps he could only live with himself if he were severely punished. Life was hopeless, that one lived for the moment regardless of the consequences (R 285).

The doctor further explained that appellant, although pliable, repeatedly would make the same mistake in social situations. In other words, if given similar circumstances, appellant would readily participate in another double homicide. Dr. Bank noted that if appellant was offered love he would take love, and if offered a chance to be in a fight he would "get in a fight" (R 298)[11]. Appellant was offered murder and he took murder--a double homicide.

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[11]The facts indicated that appellant was offered love by his home and by Mount St. John's, but he independently rejected the opportunities by leaving the school and home.

8. Given the totality of the mitigating evidence presented, such evidence would not have affected the outcome of the penalty phase.

In Echols v. State, 484 So.2d 568, 575 (Fla. 1985), this court explained:

> It should be recognized that age is simply a fact, every murderer has one, ... However, if it is to be accorded any significant weight, it must be linked with some other characteristics...

Likewise, appellant's background was simply a fact and every murderer has one. Although appellant has certainly been thorough in divulging appellant's background, the history of the appellant only highlights the senselessness of these murders. Appellant was given every opportunity to improve his status in life. Moreover, appellant's childhood certainly is not atypical or egregious. The total picture that has been painted in this evidentiary hearing hardly portrays appellant as a "sympathetic" figure. Appellant characterizes his background as "heart breaking." Appellee agrees that this story is heart breaking, but not in relation to appellant's background. The real tragedy is that Mr. Bassett had no real statutory or non-statutory mitigating excuses for his participation in this double homicide; he was given every opportunity to improve his lot which was not that bad to begin with.

Inexplicably, appellant analogizes his plight to the defendant in Livingston v. State, 13 F.L.W. 187 (Fla. Mar. 10, 1988). Livingston suffered severe beatings (unlike appellant) by his mother's boyfriend who took great pleasure in abusing the child. Livingston's mother neglected him, unlike appellant's

mother. Livingston's intelligence was marginal, unlike appellant. No amount of rationalization or manipulating the facts can overcome the conclusion that this portrayal of appellant excacerbates an already atrocious homicide. If this appellant's background is considered mitigating, precious few, if any, capital defendants would ever be executed.

Appellant argues that the state's "door opening" argument is implausible because the defense attorney was not aware of this "mitigating" information. This conclusion is not entirely supported by the record. First of all, the trial attorney testified that he talked at length with his client (R 995-996). He did have some discussion with his client before the penalty phase and was quite certain that he discussed aspects of appellant's childhood (R 188, 992). He did talk with appellant's mother, but she did not give the attorney any relevant information (R 169). Therefore, the attorney testified that he chose not to go into the family history (R 167). In any event, it is obvious under Strickland, supra, that an error may be found to be non-prejudicial. Id. at 2068.

Appellant argues that damaging information elicited from this "mitigating" evidence could not be used in aggravation. For every piece of non-statutory mitigating evidence presented, the state is absolutely entitled to rebut it. For every action, there is a reaction. Appellant's argument seeks to undermine the basic adversarial function of this system. This court in State v. Bolender, 503 So.2d 1247, 1250 (Fla. 1987), recognized that such testimony could be undermined through the state's ability to

cross-examine. If the state is allowed to cross-examine to elicit damaging rebuttal testimony, obviously, the state would be able to emphasize this testimony to the jury.

This court on many occasions has rejected a defendant's collateral attack on the basis of presenting new non-statutory mitigating evidence where such evidence would be unhelpful or actually hurt the appellant's case. Quince, supra; McCrae v. State, 510 So.2d 874 (Fla. 1987); Stewart v. State, 481 So.2d 1210 (Fla. 1985); Blanco v. Wainwright, 507 So.2d 1377, 1382-3 (Fla. 1987); Daugherty v. State, 505 So.2d 1323 (Fla. 1987); Harich v. State, 484 So.2d 1239 (Fla. 1986); Lightbourne v. State, 471 So.2d 27 (Fla. 1985). The Eleventh Circuit has reached the same conclusion. Elledge v. Dugger, 823 F.2d 1439, 1445-1448 (11th Cir. 1987).

Federal cases have come to the same conclusion. In Burger v. Kemp, ____ U.S. ____, 107 S.Ct. 31, 97 L.Ed.2d 638 (1987), the defendant presented evidence in a collateral proceeding which demonstrated he suffered an exceptionally unhappy and unstable childhood. These facts included divorces, beatings by the mother, substance abuse by the stepfather, and the fact that the stepfather introduced the defendant to marijuana. The Supreme Court noted that the testimony was rebutted by prior thefts and would reveal violence, which would be at odds with the strategy of showing substantial domination by the co-defendant. It is abundantly clear from this record as argued above, that much of this evidence would be at odds with showing that the co-defendant substantially dominated appellant. See also, Funchess v.

Wainwright, 772 F.2d 683, 689-690 (11th Cir. 1985); Francois v. Wainwright, 763 F.2d 1188 (11th Cir. 1985); Harich v. Waiwnright, supra.

During closing argument, appellant's collateral counsel argued that his client's background was generally extremely chaotic, splintered and emotionally abusive. The trial court asked "Didn't it cut both ways?" The court noted that there were hints of violence and doom (R 404-405). Collateral counsel responded: "I agree with that" (R 505).

D. ARGUMENT PERTAINING TO WHETHER THE CO-DEFENDANT'S BACKGROUND EVIDENCE WAS RELEVANT.

To be sure, it is reversible error not to let a capital defendant adduce evidence that the co-defendant pled guilty to a lesser offense. Messer v. State, 330 So.2d 137 (Fla. 1976). Of course, the jury in this case was well aware that the co-defendant, Mr. Cox, did plead and receive a life sentence for first-degree murder. It is also true that some hearsay testimony may be admissible under section 921.141(1). Yet, such a rule is not absolute. In Card v. State, 497 So.2d 1169, 1176 (Fla. 1986), the defense sought to show that the trial counsel was ineffective because he did not demonstrate through hearsay that people (other than the defendant) planned to do the robbery which resulted in the homicide. This court refused to find counsel ineffective for failing to proffer such previously excluded testimony. Appellee submits that it was a proper strategic choice not to present the records of Cox that appellant is now tendering, and that even if it were error on the defense counsel's part, such error would be non-prejudicial.

Specifically, appellant contends that the co-defendant's records that he enlisted in the Army should have been admitted. Appellant's confession, which was the only version presented to the jury, indicated that Cox had been in Vietnam (T 446, 514-515). Obviously, if the co-defendant was a Vietnam veteran, he would be older than appellant. Appellant also maintains that Cox's records would show that he had combat experience. Again, appellant in his confession noted that the co-defendant, while in Vietnam, had killed (T 446, 514-515). There would be no point in reiterating the evidence which had already been presented to the jury. Such cumulative evidence would not call for a reversal of the penalty phase. Witt v. State, 465 So.2d 510, 512-513 (Fla. 1985).

Petitioner maintains that Cox's educational record should have been admitted into evidence because it would show that he was a "high achiever" as compared to appellant being only of normal intelligence.[12] The evidentiary hearing divulged that it was Cox who was caught with the victim's car and with the traveler's checks (R 1012-1214). Cox noted that appellant did not cash the traveler's checks because he had stolen most of the cash (R 806-807).[13] This evidence certainly indicates that as far as being "street wise" or intelligent as to committing crimes, Mr. Bassett has a far superior intelligence.

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[12]Appellant does not give a record cite for this conclusion.

[13] Cox explained that it was appellant's habit to steal from people on the beach (R 791).

Appellant argues that Cox's many life experiences placed him clearly in the role of the leader of the two. This proposal would open up "Pandora's Box" with respect to the co-defendant's entire life. Such collateral evidence would certainly result in a great deal of character assassination of the co-defendant. But such evidence would not be relevant to show that the appellant was substantially dominated by Mr. Cox for this specific event. § § 90.401; 921.141(1). Furthermore, under section 90.403, Florida Statutes (1981), a judge has the authority to exclude relevant evidence if the probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence. The admissibility of Cox's records should be excluded under the latter evidence rule, because it certainly would mislead the jury and confuse the issues.

Furthermore, such evidence would "open the door" for more damaging evidence against appellant. One of Cox's statements re-emphasized the fact that it was appellant's initial idea to rob the two victims, and it was appellant who introduced them to Cox at a later time (R 791). Appellant stole the firearm that was used in the robbery the night before the offenses (R 793, 812). It was appellant who initially pulled the gun and robbed the victims (R 795-808). Cox indicated that he was intoxicated during the offenses (R 835). This is contrary to appellant's story told to the jury at trial that Cox feigned smoking marijuana while the appellant actually did (T 520). In the co-defendant's statement, when he was confronted with appellant's

version of the events, he exclaimed: "It's kind of a story book" (R 831-833). These records would open up all kinds of conflicts and bring into question the version of events as given by appellant even more so. Such evidence would be both irrelevant, misleading and prejudicial to appellant. This issue was similar to the issue rejected by this court in Cooper v. State, 336 So.2d 1133 (Fla. 1976). The appellant sought to offer evidence of the co-defendant's reputation for violence and evidence that the defendant attempted to avoid the co-defendant on prior occasions. This court held that such evidence was inadmissible because it was too tenuous to support the defendant's theory that the co-defendant fired the fatal shots. This court also found that such evidence was too tenuous to show substantial domination. Appellee submits that this evidence proffered by appellant herein is, likewise, much too tenuous to be admissible.

E. OTHER PREJUDICIAL EVIDENCE WHICH WOULD BE ADDUCED IF A NEW PENALTY PHASE WERE HELD.

The trial court found four aggravating factors (T 24-25). On direct appeal, three of these factors were upheld. Bassett, supra.

If a second penalty phase were granted, other statutory-aggravating factors would be brought forth.

The trial court did not account for the fact that appellant participated in a **double** homicide. Under section 921.141(5)(b), a court may find as an aggravating factor that the appellant has previously been convicted of another capital felony. One of the homicides may constitute this aggravating factor. In Wasko v. State, 505 So.2d 1314, 1317-1318 (Fla. 1987), this court held

that a contemporaneous conviction prior the sentencing could qualify as a previous conviction of a violent felony, and could be used as an aggravating factor where the crime involved multiple victims. As an example, this court cited Lucas v. State, 376 So.2d 1149 (Fla. 1979), where the defendant committed one murder and attempted murder of two others in a single incident. Likewise, in the case at bar, the trial court may find this as an additional aggravating factor because the events revolve around separate crimes, separate victims. Correll v. State, 13 F.L.W. 34 (Fla. Jan. 14, 1987).

Such a scenario is not unprecedented. In Teffeteller, supra, the trial court did **not** consider a subsequent Texas murder conviction or an aggravated assault conviction pursuant to section 921.141(5)(b). This court held that the term "prior" referred to a time before the sentencing hearing so that the trial court could have considered these convictions as aggravating factors. Indeed, pursuant to the second sentencing hearing in Teffeteller v. State, 495 So.2d 744, 747 (Fla. 1986), these two convictions were used to establish the aggravating factor under section 921.141(5)(b).

Nor is the prosecutor barred from asserting this ground if a second penalty phase is ordered. In Mann v. State, 453 So.2d 784, 786 (Fla. 1984), this court noted that the original sentence was vacated, and that the prosecutor unsuccessfully tried to establish a mere burglary as a previous violent burglary under section 921.141(5)(b). At the resentencing, the prosecutor proved that this burglary conviction was accompanied by a sexual

battery conviction. Hence, with this additional evidence, this court found that the aggravating factor of a prior violence felony had been established, notwithstanding that the prosecutor was unsuccessful in establishing it during the first penalty hearing.

Under the same reasoning, appellee submits that another sexual battery conviction (which was obtained after the penalty phase), may be admitted to establish an additional aggravating factor under section 921.141(5)(b). During the evidentiary hearing, the state proffered this evidence (R 181-182).

These additional aggravating factors would only reinforce the already foregone conclusion that another penalty phase hearing would be futile. Although appellee submits that the proffer mitigating evidence would work to appellant's disadvantage much more than to his advantage, appellee also feels compelled to apprise this court of additional aggravating factors which would be admitted at a new penalty phase to show the utter futility in ordering a second sentencing hearing. The trial reached the same conclusion in its order denying post-conviction relief (R 1214-1215).

POINT II

THE CAPITAL SENTENCE DID NOT VIOLATE THE EIGHTH AMENDMENT BECAUSE THE TRIAL COURT AND THE JURY DID CONSIDER NON-STATUTORY MITIGATING CONSIDERATION AND, ASSUMING FOR THE SAKE OF ARGUMENT THAT THE JURY INSTRUCTIONS PRECLUDED SUCH EVIDENCE, ANY ERROR WOULD BE HARMLESS.

Appellant steadfastly maintains that the jury as well as the judge totally failed to consider any non-statutory mitigating evidence, despite the fact that such evidence was presented and argued, and despite the fact that the trial court, in its post-conviction order, specifically acknowledged that it did consider such evidence. Appellee will first addres the merits of this contention and then, in the alternative, argue that even if there was any error, it would be harmless.

Unlike the scenario in Hitchcock v. Dugger, ___ U.S. ___, 107 S.Ct. 1821, ___ L.Ed.2d _____ (1987), where the trial court explicitly placed in his order that he only considered statutory mitigating evidence, no such offensive language appears in the sentencing order in the case at bar (T 24-26). In any event, unless a trial court explicitly states otherwise, an appellate court will presume that the trial court followed the law even if specific non-statutory mitigating evidence was never mentioned in the findings. Such conclusion is especially true where such evidence was presented and argued to the jury without objection. Thomas v. Wainwright, 495 So.2d 172, 174 (Fla. 1986). During the penalty phase, defense counsel had two jailors testify to appellant's good conduct while incarcerated. No objection was interposed to this evidence (T 706-709). Moreover,

defense counsel argued during the penalty phase closing statements that the jury could consider that the co-defendent (Cox) received a life sentence despite the fact that Cox was the actual trigger man. Defense counsel emphasized the fact that his client had smoked some marijuana and drank alcohol on the evening of the crimes, but that Cox was only feigning smoking marijuana and, hence, was the main planner and perpetrator of the murders (T 751-753, 756-757). Again, no objection was interposed to this argument. In fact, the prosecutor's rebuttal argument did not tell the jury that they were precluded by law from considering any of this evidence. Rather, the prosecutor argued the lack of merit of such evidence. Specifically, the prosecutor noted that the appellant's behavior in jail was not significant, and then he asked the jury retroactively to determine how minor appellant's participation in the offenses (T 741, 742). The prosecutor also acknowledged that the co-defendant did get life, but he argued to the jury that the co-defendant deserved the death penalty, but did not receive it only because he was remorseful (T 743). Hence, the scenario in the case at bar was far different from that which occurred in Mikenas v. Dugger, 519 So.2d 601 (1988), where both attorneys referred only to the statute in their closing argument.

Appellant also contends that the record demonstrates the trial court was unaware or believed that non-statutory mitigating evidence could not be introduced. Aside from the fact that this evidence was introduced and argued during the closing argument without the court interfering, appellee would highlight one other

colloquy which demonstrates that the trial court believed that non-statutory mitigating evidence was admissible. Defense counsel was describing the preparation for execution during the closing argument. The prosecutor objected because such argument did not pertain to any of the mitigating or aggravating circumstances. The trial court did sustain the objection, but not based upon what the prosecutor argued. The trial court explained that the defense counsel could not testify from his personal observations as to the circumstances surrounding the preparation of an execution. Significantly, however, the trial court did allow the attorney to argue that the execution procedure was gruesome (T 759-760). Had the trial court truly believed that non-statutory mitigating evidence was inadmissible, it would have sustained the prosecutor's objection. The scenario in the case at bar should be contrasted to another case, Thompson v. Dugger, 515 So.2d 173 (Fla. 1987), where a so-called Hitchcock violation was found. In the latter case, the prosecutor objected to the defendant's argument that the jury could consider non-statutory mitigating factors. The trial court sustained the objection. It should also be noted that the trial court in this case, toward the end of its sentencing order indicated the following: "These findings and the order of this court are based solely upon the testimony of the witnesses in this matter and other evidence properly introduced into evidence during trial of this cause" (T 26). Hence, the record fully supports the trial court's finding in its post-conviction order that the court specifically evaluated non-statutory mitigating factors (R

1215). The record does not clearly show that the trial court did not consider non-statutory mitigating evidence; in fact, it shows just the opposite. This case can be contrasted to Foster v. State, 518 So.2d 901 (Fla. 1987), where the record clearly demonstrated that the trial court did not consider such evidence. Moreover, the court noted that it allowed this type of evidence because the court specifically evaluated it (R 1215).

Assuming for the sake of argument that the jury and court did not consider such evidence, appellee submits any putative error would be harmless. Initially, appellee notes that even the appellant thought very little of the evidence and argument presented during the penalty phase as noted by the following comments:

> When the time came for counsel to present the case for life he had investigated, the result was a confused, obviously misleading, weak and also entirely defensive presentation of evidence and argument. Counsel's . . . performance probably resulted in more harm than good.
>
> * * *
>
> Counsel's representation at penalty phase was a joke, and the jury knew it.

I.B. 68, 69,

For purposes of this argument, appellant claims that the jury and judge did not consider the non-statutory mitigating factor of the co-defendant's dominate role. Id. 79. Yet a co-defendant's dominate role or the minor participation of the defendant are factors which are specifically considered under the

statute. See, White v. Dugger, 13 F.L.W. 59 (Fla. Jan. 28, 1988). Section 921.141(6)(d), Florida Statutes (1979), allows the jury to consider whether the defendant was an accomplice and whether his participation was relatively minor. This factor was argued by defense counsel (T 764). Section 921.141(6)(e), Florida Statutes (1979), also allows the jury to consider whether the defendant was under extreme duress or under the substantial domination of another. Again, such a factor was argued to the jury (T 765).

Next, appellant also claims that the treatment received by the co-defendant (he received a life sentence) was not considered by the jury. Yet, as explained during the penalty phase and argument, the reason for the disparate treatment was that both defendants were offered a plea to life and only Cox took advantage of the offer (T 713). Hence, such a disparity would have little effect on a jury's recommendation or the judge's ultimate order based upon the three aggravating factors and the totality of the evidence.

Finally, appellant argues that the jury or judge did not consider evidence of appellant's intoxication by alcohol or marijuana. § 921.141(f), Fla. Stat. (1979). Appellant argues that the statutory mitigating factor requires a high degree of intoxication or incapacity. In other words, this evidence was merely a "watered down" statutory mitigating factor. White, supra. Defense counsel did argue that his client had a few drinks and smoked seven to eight marijuana cigarettes on the night of the offenses (T 753). Yet it must be emphasized that

the marijuana cigarettes were shared by the two victims as well. In any event, considering appellant's detailed confession which amply details appellant's participation in the crime, such participation would belie any contention that intoxication impaired him to any degree whatsoever (T 514-548). In White v. State, 13 F.L.W. 270 (Fla. Apr. 13, 1988), this court found that a "Hitchcock" claim was harmless error, even though the defendant claimed the judge and jury did not consider the complicity of the co-defendant and the defendant's use of alcohol. The co-defendant was, likewise, sentenced less severely because he was only convicted of third degree murder. This court, in rejecting this claim, explained: ". . . and we fail to see how the absence of an instruction on non-statutory mitigating circumstances could have effected the jury's handling of this issue." Id. 270-271. The same reasoning applies to the case at bar. Likewise, this court rejected such a claim in Ford v. State, 13 F.L.W. 150 (Fla. Feb. 18, 1988), based upon harmless error because such evidence would be unpersuasive in light of the five aggravating circumstances presented. Appellee notes that not only were there three aggravating circumstances found pursuant to the direct appeal, but, as argued above, the fact that another capital murder was committed and the fact that appellant was subsequently convicted of a sexual battery, should also be considered in determining whether the alleged error would be harmless.

The trial court still remained unconvinced that the original capital sentence would not have been changed after listening to all the extra mitigating evidence presented at the evidentiary

hearing (R 1214-1215); appellee submits this reinforces the conclusion that any error would be harmless. See, Booker v. Dugger, 520 So.2d 246 (Fla. 1988), noting that the non-statutory mitigating evidence would not offset all the aggravating circumstances and where this court found that the trial court would have overridden any jury recommendation of life; Tafero v. Dugger, 13 F.L.W. 161 (Fla. Feb. 26, 1988); Delap v. Dugger, 513 So.2d 659 (Fla. 1987); Demps v. Dugger, 514 So.2d 1092 (Fla. 1987) (in Demps, harmless error was found also on the basis that the trial court knew the appellant was entitled to non-statutory mitigating evidence and that the trial court would have imposed the death sentence even if the jury had recommended life).

This court considers the facts surrounding the deaths that established the three aggravating factors. (See, p 53, supra.), but also the additional aggravating factors of prior violent felonies under section 921.141(5)(b) (see, pp. 68-70, supra). Any non-statutory mitigating circumstances would pale in comparison to the egregious circumstances of these crimes, and as such, any alleged error would be harmless.

POINT III

THE STATE DID NOT USE ANY FALSE NOR ANY MISLEADING TESTIMONY, AND THIS ARGUMENT IS MERELY AN ATTEMPT TO CIRCUMVENT PROPER PROCEDURE BECAUSE THIS ISSUE SHOULD HAVE BEEN LITIGATED, IF AT ALL, PURSUANT TO A DIRECT APPEAL.

Appellant emphasizes that the prosecutor elicited testimony from the police who obtained the confession from appellant that Cox (the co-defendent) made appellant the "heavy." From this testimony and argument, appellant maintains that the prosecutor used false or misleading testimony.

First of all, this testimony should be placed in its proper context. The prosecutor was merely asking if the FDLE agent had told appellant that the co-defendant had implicated or placed most all of the blame on the appellant. The agent answered in the affirmative (T 551-552). Hence, the jury was not lead to believe that it was appellant who was necessarily the main perpetrator, i.e., appellant was the one who actually attached the hose from the tail pipe of the car into the trunk and sealed the trunk.

Moreover, it is very **true** that Cox's statements heavily implicated appellant, as noted in the trial court's order denying this claim (R 675). Cox told the police that it was appellant who introduced the victims to Cox (R 791). Appellant had obtained a firearm the night before (R 793). It was appellant who initially pulled the gun and robbed the victims (R 790, 808). When the victims were robbed, their hands were tied with belts and they were put in the back of the car (R 797-798). They

were placed in the trunk (R 798). Cox did indicate that the victims suffocated in the trunk (R 799). Appellant's conclusion that this statement is an indication that the victims died "accidentally" is ludicrous. Cox also indicated that appellant kept most of the cash and that is why Cox was forced to cash the traveller's checks (R 806-807).

When Cox was confronted with appellant's versions of the murder, he told the police, "It's kind of storybook" (R 831-833). Cox claimed that he was the one that was intoxicated, contrary to appellant's story that Cox was feigning intoxication (T 520; R 835). In essence, appellant is disputing the interpretation of the evidence by the prosecutor, under the guise of the prosecutor using "false" testimony.

In any event, this claim fails on its face. This type of evidence was not withheld from the defense as was the case in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). In order for a claim like this to succeed, the evidence must have been unknown by the defense. It does not matter if the issue was litigated or not at trial. These conclusions were explained in State v. Matera, 266 So.2d 661, 663 (Fla. 1972).

As noted in United States v. Gibbs, 662 F.2d 728 (11th Cir. 1981), one of the elements of a claim of this nature is that there must a knowing use of perjured testimony. As argued above, this argument merely represents a disagreement over the interpretation of evidence. A claim of this nature is not sustained, even though the testimony is challenged by another witness or is inconsistent with prior statements. Gibbs. As

such, such an allegation is not a substitute to argue the credibility of testimony and claims conflicts for that testimony. Matera at 663. This claim should have been presented on direct appeal, as the trial court correctly ruled (R 675).

Additionally, such testimony must be an essential part of the case. Matera at 667. Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). Just because the jury heard that the co-defendant implicated the appellant to a great extent in the offense, does not mean that such a statement is material. Obviously, the jury did not hear the details of the co-defendant's version of the events. As such, this contested testimony can hardly be deemed material.

Appellant also features portions of the prosecutor's closing argument. Yet, this argument must be placed in its proper perspective. The prosecutor noted:

> . . . again we're having to work from his confession and the guy -- he puts the heavy on the other guy. You heard what the other guys did to him.

(T 742). Then the prosecutor explained that the jury had to rely on the confession even though the prosecutor indicated that appellant had lied on the stand. Yet such argument is very true, because no other details of the murder were provided except through the appellant's confession and what physical evidence there was to corroborate that confession.

The crux of the case was summarized very well by the prosecutor in his closing argument which is as follows:

> But even under his confession--and it's amazing that a person with that much cold blood could even admit to this much participation--he

> held a gun on them; he beat them with a limb; he helped put them in the trunk; he helped deliberate how to kill them.
>
> And he acted as the lookout. He dumped their bodies and he shared in the treasure.

(T 742). The jury was well apprised of appellant's participation and could only conclude that it was Cox who was the one who actually devised the plan to kill the victims and was the one who actually carried it out to the extent that he placed the hose in the exhaust pipe and into the trunk where the victims lay. The fact that the jury heard that Cox implicated appellant would have a negligable effect at best on their determination, when one considers the high level of participation by appellant in the crimes. It also must be remembered that appellant was the prime mover. Without appellant's plan to rob these victims, this double homicide would never have occurred. It was appellant who solicited Cox to help him. Appellant must now live with the consequences of soliciting such a confederate.

In Gissendanner v. Wainwright, 482 F.2d 1293, 1297 (5th Cir. 1973), a defendant's habeas claim was rejected where he tried to argue that an illegal confession of a co-defendant which revealed him as a perpetrator was the fruit of a poisonous tree. In this eloquent opinion, the district court concluded: "[The Defendant] cite us no cases where any court has adopted this palimpset theory, elongating an essentially rule into a new form of constitutionality immunity." Appellant's attempt to elongate this evidentiary dispute into a collateral claim that the prosecutor used false testimony must fail.

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully prays this honorable court affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Answer Brief of Appellee has been furnished by mail to Steven H. Malone, Special Appointed Representative, Office of the Capital Collateral Representative, 301 North Olive Avenue/9th Floor, West Palm Beach, Florida 33401, counsel for the appellant, this 16 day of May, 1988.

for W. BRIAN BAYLY
Of counsel