IN THE SUPREME COURT OF FLORIDA

WILLIAM THOMAS ZEIGLER, JR.,

Petitioner,

v. CASE NO. 71,463

RICHARD L. DUGGER, etc.,

Respondent.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

THE RESPONDENT, by and through undersigned counsel, and pursuant to this Court's November 24, 1987, Order to Show Cause hereby submits this response to the Petition for Writ of Habeas Corpus, and respectfully requests this Honorable Court to deny said petition, and in support thereof, states:

PRELIMINARY STATEMENT AND COURSE OF PRIOR PROCEEDINGS

This case involves the brutal, calculated murder of four unsuspecting and innocent victims by the petitioner for pecuniary gain, i.e., $500,000 in insurance money. For purposes of this proceeding, the facts surrounding Zeigler's original 1976 murder convictions and sentences are adequately detailed in this court's decision affirming the judgments and sentences (two first-degree murder judgments, two second degree judgments, two death sentences and two sentences of life imprisonment) in Zeigler v. State, 402 So.2d 365, 367-368 (Fla. 1981), cert. denied, 455 U.S. 1035 (1982).

More fully condensed, the evidence adduced demonstrated that Zeigler planned to murder his wife Eunice on Christmas Eve, 1975, to collect the proceeds of insurance he had placed on her life, and to implicate three black men (two of whom Zeigler had known for some time) by luring them to the murder scene (Zeigler's furniture store) at which time he would kill them, making his wife's murder look like a robbery attempt. Unfortunately for his wife's parents, they were also at the scene and were also murdered by Zeigler (resulting in the two second degree murder counts and sentences). Zeigler did succeed in killing one of the "robbers", Charles Mays, after luring him into the store once he had killed his wife and in-laws, but a second man who had

accompanied Mays, Felton Thomas, refused to enter the store, left the scene, and lived to testify against Zeigler. The third "robber", Edward Williams, testified that he lived only because appellant's gun did not fire the three times Zeigler pulled the trigger after Williams was also lured into the store, at which point he fled to the police.

Zeigler's claim in this proceeding focuses upon sentencing and the alleged restriction of non-statutory mitigating evidence as well as the trial judge's alleged refusal to consider such evidence.

At sentencing, the state put on no additional evidence, and the defense offered the testimony of Reverend Dushay and Doctor Zimmer, a psychiatrist, in mitigation (R 2779-2802). This testimony consisted virtually in toto of evidence that was of a non-statutory mitigating nature.

Reverend Dushay, the pastor of the First Baptist Church of Winter Garden, testified that Zeigler and his murdered wife were regular members of the church and its choir, and that the Reverend had in fact married the two in 1967 (R 2779-2780). He noted that the Zeiglers were active in church services and that the appellant would often volunteer his services to aid the church as well as others in the community (R 2781-2784). Zeigler, he said, had a "good rapport with the black community", and assisted the Reverend in his work in that community, and also independently assisted blacks in the area (R 2783-2784). When specifically questioned by defense counsel as to his "impression" of Zeigler as a person and a "human being", Reverend Dushay provided a list of positive attributes asserting that the now convicted mass murderer was "cordial, gracious, polite, coorperative, dependable" and "usually calm, cool, and collected." (R 2781) The Reverend ended his testimony with his personal assessment of Zeigler's character, asserting that he had found that Zeigler was "not a bad person", and that in his frequent church committee work, his wife Eunice had always been at his side (R 2785).

Doctor Zimmer's testimony was likewise of no import vis-a-

vis statutory mitigating circumstances; indeed, in his testimony, Zimmer specifically conceded that none of the non-statutory mitigating mental health factors were applicable to Zeigler (R 2800). Zimmer's testimony, based upon his psychiatric testing of Zeigler, included his opinion that the petitioner was an extremely disciplined individual with tremendous self-control, who was also "extremely compassionate" with a "tremendous feeling for people and peoples" (R 2792-2793). Zimmer further opined that Zeigler was a loyal individual who respected "members of his family including his wife and in-laws and people close to him" (R 2793). Finally, based upon his evaluation, Zimmer concluded that Zeigler evinced none of the characteristics of a "psychopath", and if permitted to live and go to jail, petitioner would present no future threat to society (R 2798).

After presentation of the evidence in mitigation, the trial counsel in his sentencing argument told the jurors that, "You can consider whatever mitigating circumstances you think you should in arriving at your decision" (R 2804). Counsel then specifically noted the testimony of the two witnesses presented in mitigation, and asserted to the jurors that he in fact had thought about not calling any witnesses at the sentencing phase before launching into his mercy argument, which itself incorporated an obvious theme of doubt as to guilt as a potential mitigating factor (R 2804-2809). The prosecutor in his closing argument did reference only the statutory aggravating and mitigating factors; however, the clear focus of his argument was the brutal and calculated nature of this mass killing on Christmas Eve, 1975 (R 2809-2813). Upon the circumstances presented, the prosecutor urged that if there was ever a man who had "earned" the death penalty or a case where death was the appropriate punishment, this was the case (R 2812-2813). In final argument, defense counsel himself conceded the horrible nature of the crime, again focusing upon a reasonable doubt argument, although purporting to argue it only based upon aggravating circumstances presented (R 2813-2815).

After penalty phase instruction which included enumeration

of only the statutory aggravating and mitigating circumstances, tempered by an assertion that the jurors' verdict "should be based upon the evidence which you have heard while trying the guilt or innocence of the defendant and the evidence which has been presented to you in these proceedings", the jury after only 25 minutes of deliberation recommended life imprisonment upon the two capital felony counts (R 2815-2825).

The legal propriety of the multi-murder judgments and sentences has been litigated in three separate appearances in this Court after the initial direct appeal. Zeigler v. State, 452 So.2d 537 (Fla. 1984); Zeigler v. State, 473 So.2d 203 (Fla. 1985); State v. Zeigler, 494 So.2d 957 (Fla. 1986). In fact, challenges to the adequacy of non-statutory mitigating evidence and consideration thereof were presented to this Court in both the 1984 and 1986 cases where virtually identical allegations were rejected on procedural default grounds. The state again urges this Court to deny relief based upon that claim which has again risen like the Phoenix from the ashes.

ARGUMENT

PETITIONER'S HITCHCOCK CLAIM SHOULD AGAIN BE REJECTED UPON A PROCEDURAL DEFAULT BASIS; ALTERNATIVELY, ZEIGLER HAS FAILED TO DEMONSTRATE THROUGH RECORD EVIDENCE (1) THAT NON-STATUTORY MITIGATING EVIDENCE WAS IN FACT LIMITED BY THE TRIAL JUDGE; (2) THAT THE TRIAL COURT REFUSED TO CONSIDER THE OBVIOUS NON-STATUTORY MITIGATING EVIDENCE ADMITTED DESPITE THE ALLEGED LIMITATION; OR (3) THAT THE ALLEGED LIMITATION AND PRESENTATION OR CONSIDERATION OF THE NON-STATUTORY MITIGATING "EVIDENCE PROFFERED" WOULD NOT HAVE BEEN HARMLESS IN EFFECT UNDER THE EGREGIOUS CIRCUMSTANCES OF THIS COLD AND CALCULATED MASS MURDER FOR PECUNIARY GAIN.

Zeigler again claims that he is entitled to a new sentencing hearing based upon inconsistent bases: first, he claims that the trial judge did not allow the presentation of non-statutory mitigating evidence; however, in the face of the presentation without objection or limitation of obvious non-statutory mitigating evidence at the sentencing proceeding, he alternatively claims that the trial court did not consider the evidence presented in violation of the dictates of Hitchcock v. Dugger, ___ U.S. ___, 107 S.Ct. 1821 (1987); Lockett v. Ohio, 438

U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); and Skipper v. South Carolina, 476 U.S. 1 (1986).

Initially, the state again notes that this claim has been already twice presented to this Court and rejected upon procedural default grounds, such that there is no basis for this Court to now re-address the issue. The state is well aware that this Court has previously rejected procedural default arguments in cases raising Hitchcock claims based upon a finding that a "substantial change in law" was affected by the decision justifying review. Demps v. Dugger, 12 F.L.W. 547 (Fla. Oct. 30, 1987); Martin v. State, 12 F.L.W. 543 (Fla. Oct. 28, 1987). However, it is respectfully urged that the "substantial change in law" holding is without legal basis, and that this Court should recede from it and again find this claim procedurally barred. Zeigler v. State, 452 U.S. 537, 539 (Fla. 1984); State v. Zeigler, 494 So.2d 957, 958 (Fla. 1986). In State v. Zeigler, the petitioner made virtually identical allegations by affidavits re-raised in his habeas petition, i.e., that his trial attorneys were told in a non-record conference by the trial judge that "the sentencing phase would be limited to evidence related exclusively to statutory [aggravating] and mitigating circumstances". 494 So.2d at 958. Of course, there is no record evidence before this Court to support those allegations inasmuch as they were never developed in any evidentiary hearing upon Zeigler's post-conviction motions at the trial court level[1].

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[1]The state submits that the affidavits attached to the petition are clearly **not evidence**, and that in the absence of any testimony at an evidentiary proceeding at which the state would be free to challenge the allegations by cross-examination or otherwise, they can present no basis for relief in a state habeas corpus proceeding. See, McCrae v. State, 510 So.2d 874(Fla. 1987). In any event, as fully set forth hereafter, these allegations are refuted by the sentencing hearing itself, as determined by this Court in State v. Zeigler, which clearly demonstrates that defense counsel were **not** limited in the presentation of non-statutory mitigating evidence since in fact

> ...non-statutory mitigating evidence was presented by Zeigler to the jury through two witnesses, a church pastor and a psychiatrist.

Id. at 958.

Petitioner's attempt to have this Court redetermine again an issue already resolved on two separate occasions based upon an intervening decision by the United States Supreme Court in Hitchcock should be rejected. The respondent does not regard this Court's decisions as voidable on the basis of each year's docket of cases in the United States Supreme Court, and respectfully suggests that the principles of finality and of the law of the case should be accorded greater respect. See, Strazzula v. Hendrick, 177 So.2d 1 (Fla. 1965); Card v. Dugger, 12 F.L.W. 475 (Fla. Sept. 15, 1987). The state submits that Hitchcock does not represent a fundamental change of law; indeed, it must be noted that the proposition that a sentencer must consider all relevant evidence pertaining to the character and propensities of the defender is one of long standing. See, Proffitt v. Florida, 428 U.S. 242 (1976); McGautha v. California, 402 U.S. 183 (1971); Pennsylvania v. Ashe, 302 U.S. 51 (1937). If the Supreme Court's recent pronouncement in Booth v. Maryland, ___ U.S. ___, 107 S.Ct. 2529 (1987), also addressing the impropriety of a capital sentencing situation (in that case, evaluating the propriety of the introduction of evidence of victim impact for purposes of sentencing), did not amount to a change of law so as to excuse procedural default as determined by the court in Thompson v. Lynaugh, 821 F.2d 1080 (5th Cir. 1987), the state fails to perceive why Hitchcock should be so elevated.

It must be noted that procedural default was never raised in any of the Hitchcock cases, and inasmuch as Zeigler had every "tool" available to him to fashion a constitutional claim long before the disposition of his direct appeal (both Lockett and Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956 (1979), having already been decided), there is no excuse for failure to raise the claim. This Court should, accordingly, stand by its previous decisions applying the procedural bar to consideration of this issue. See also, Aldridge v. State, 503 So.2d 1257 (Fla. 1987). Certainly, the federal courts have refused to entertain defaulted claims based upon Lockett in

instances where executions were not only imminent, but actually carried out. See, Antone v. Strickland, 706 F.2d 1534 (11th Cir. 1983), cert. denied, 464 U.S. 1003 (1983), stay of execution denied, Antone v. Dugger, 465 U.S. 200 (1984); Straight v. Wainwright, 772 F.2d 674 (11th Cir. 1985), cert. and stay denied, 106 S.Ct. 2004 (1986).

The petitioner attempts to sidestep the procedural bar imposed by this Court for failure to raise his Lockett/Songer challenge on direct appeal by now challenging the effectiveness of his appellate counsel for failing to raise that issue[2]. Zeigler's claim is submitted without legal support or argument other than to boldly assert that it is "inescapable that appellate counsel was ineffective for not raising the Lockett/Hitchcock issue on direct appeal" and that "prejudice is obvious" (P 12). The respondent disagrees.

Under Strickland v. Washington, 466 U.S. 668 (1984), counsel's representation must be evaluated without resorting to the distorting effects of 20-20 hindsight based upon evaluation of circumstances existing at that time. Accord, Downs v. State, 453 So.2d 1102 (Fla. 1984). After the fact evaluation of an attorney's alleged deficient conduct must be highly deferential, and a strong presumption must be applied that counsel's conduct falls within the wide range of reasonable, professional assistance. Furthermore, in the direct appeal context, the failure to raise an issue unpreserved for appellate review by timely objection does not constitute conduct outside the wide range of reasonable, professional conduct. Thomas v. Wainwright, 495 So.2d 172 (Fla. 1986); Downs v. Wainwright, 476 So.2d 654 (Fla. 1985); Ruffin v. Wainwright, 461 So.2d 109 (Fla. 1984).

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[2]It was because of Zeigler's failure to previously raise his new found appellate ineffectiveness claim that the state sought dismissal of the petitioner's federal habeas corpus petition as "mixed" or, in the alternative, the striking of that claim for failure to meet a deadline established by the federal district court for exhausting state claims. (See, petitioner's appendix no. 1). The respondent did not of course suggest that the substantive Hitchcock claim was not procedurally barred as twice previously determined by this Court, but did note the "state of flux" generated by recent Hitchcock related decisions.

Since trial counsel had the tools to present a challenge to any perceived impropriety in limitation of character evidence under Florida sentencing scheme based upon Proffitt v. Florida, McGautha v. California and Pennsylvania Ashe, the failure to challenge that error by objection or jury instruction request necessarily bars an appellate ineffectiveness claim.

In any event, Zeigler cannot show prejudice from the alleged ineffectiveness of his appellate counsel for the same reason that his substantive Hitchcock claim would not merit relief even if not procedurally barred, i.e., the record does not support his claim of a limitation of the presentation of non-statutory mitigating evidence, nor is there any demonstration of a failure to consider the non-statutory evidence of mitigation clearly presented at trial. Furthermore, even assuming such a limitation, any error is necessarily harmless under the peculiar and egregious circumstances of this case so as to bar any ineffectiveness claim for failure to satisfy the prejudice prong.

How can it be said that appellate counsel was ineffective in failing to raise a claim of limitation of non-statutory mitigating evidence when sentencing phase testimony unequivocally reveals the presentation of two witnesses by the defense - Reverend Dushay and Doctor Zimmer - who presented nothing but non-statutory mitigating evidence totally inapplicable to any statutory aggravating or mitigating circumstance? Reverend Dushay's previously noted testimony that Zeigler was a regular chuchgoer and choir member; a volunteer in church projects and a church committee member; that the petitioner was a "cordial, gracious, polite, cooperative, dependable" and "calm, cool and collected" individual; that Zeigler had "good rapport with the black community" and tried to help black people; and finally that the petitioner was "not a bad person" was clearly of no significance to any statutory sentencing circumstance (R 2779-2789). It is incredible that a trial judge who allegedly limited, only moments before, defense counsel's presentation of evidence beyond the statutory aggravating and mitigating factors yet allowed the admission of such **obviously** statutory mitigating

evidence or that defense counsel would attempt to introduce it despite the purported court order. Indeed, of what possible relevance to any statutory mitigating factor would Zeigler's church pastor's response to defense counsel's broad inquiry as to Dushay's "impression of ... of Tommy Zeigler as a human being" have been? Just what statutory mitigating factor was defense counsel seeking evidence on when he asked Reverend Dushay:

> Q. Do you have anything, Reverend Dushay, that you would like this Jury to consider as to the death penalty or life imprisonment and that and that alone is at issue in this case. Do you have anything that you wish to say to the Jury about Tommy Zeigler?

(R 2781).

Certainly, the pastor's rambling, unobjected to, and **unlimited** response was just the type of character-based non-statutory mitigating evidence of church and community involvement that any attorney would seek to admit now as non-statutory mitigating evidence (R 2782-2784).

Similarly, Doctor Zimmer's testimony on direct examination by Zeigler's trial counsel related in no way to any statutory mitigating factor; to the contrary, on cross-examination, the psychiatrist specifically found that **none** of the statutory mental health factors were applicable to Zeigler (R 2792-2798, 2800). Doctor Zimmer's opinion of Zeigler as: "an extremely disciplined" individual with "tremendous self-control"; an "extremely compassionate" man with a "tremendous feeling for people and peoples"; and a loyal person with "respect for members of his family including his wife and in-laws and people close to him"; was of no significance vis-a-vis **statutory** aggravating or mitigating factors. The doctor's conclusions were clearly injected by defense counsel to undermine jury confidence in their verdict by asserting that Zeigler was not the kind of man who would commit these crimes; in fact at one point Dr. Zimmer asserted his own specific opinion that "it was absolutely impossible that [Zeigler] could have created or done these murders" before the judge stopped him and reminded defense counsel that he had previously made it clear that a conclusion on

guilt or innocence was not to be admitted, and instructed the jury to disregard it (R 2795-2796). Why would the judge interject at that stage to thwart the admission of sentencing phase evidence that he had previously barred but not do so when any of the other obvious non-statutory mitigating evidence was adduced if it was barred as alleged by Zeigler?

Doctor Zimmer's evaluation of Zeigler including his finding that he had no characteristics of a "psychopath" and that if permitted to live and go to jail the petitioner would present no future threat to society are conclusions likewise irrelevant to any statutory mitigating evidence, Thus, Zeigler's claim of specific trial court limitation rings untrue when evaluated in the context of the sentencing hearing (R 2798).

If there was no record evidence of limitation on the record it cannot be said that appellate counsel was ineffective for asserting such a claim.

Nor does the fact that the trial judge did not specifically address the non-statutory mitigating evidence admitted by Zeigler necessarily mean that he did not consider all matters presented; in fact, inasmuch as there is no record evidence to demonstrate that the defense was not "freely allowed" to present evidence and argument[3] on non-statutory mitigating factors, and given the clear evidence (through the testimony of Reverend Dushay and Doctor Zimmer) to the contrary, there is in fact clear indication that the trial judge **did not** exclude non-statutory mitigating factors from his consideration. Thomas v. Wainwright, 495 So.2d 172, 174 (Fla. 1986); Middleton v. State, 465 So.2d 1218, 1226 (Fla. 1985). While the standard jury instruction at issue in Hitchcock is equivalent to the one given in this case, and the sentencing order does not specifically refer to non-statutory mitigating factors, the lack of record limitation by the trial court and the actual presentation of **substantial** testimony **all of**

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[3]As previously noted, defense counsel did specifically argue without objection by the prosecutor or rebuke by the trial court that the jury was free to "consider whatever mitigating circumstances you feel you should in arriving at your decision" (R 2804).

which was of a non-statutory mitigating nature in concert with defense counsel's argument that such mitigating evidence could be considered, is equally noteworthy. Furthermore, in his sentencing order the judge did note the language in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), that "all evidence of mitigating circumstances may be considered by the judge or jury", also providing an indication that the judge did not refuse to consider the clearly non-statutory mitigating evidence that the defense was allowed to present at the sentencing phase. Accordingly, there is no basis for concluding that an impropriety in sentencing occurred requiring reversal notwithstanding this Court's decisions in Riley v. Wainwright, 12 F.L.W. 457 (Fla. Sept. 3, 1987) and McCrae v. State, 510 So.2d 874 (1987), which are necessarily factually distinguishable from this case based upon the extent of non-statutory mitigating evidence presented, the judge's reference that all evidence and mitigating circumstances may be considered; and the equivalent unobjected to argument by defense counsel that the jury was free to consider any mitigating evidence.

Harmless Error

Finally, this court has made clear that even if a Hitchcock error is alleged and demonstrated, the error will be evaluated under a harmless error analysis to determine if reversal is necessary. Demps v. Dugger, 12 F.L.W. 547 (Fla. Oct. 30, 1987); Delap v. Dugger, 513 So.2d 659 (Fla. 1987).

Any error in this case was clearly harmless given the egregious nature of the this well-planned, execution style mass murder for profit, which necessarily implicated a number of statutory aggravating factors all of which were more than sufficient in the mind of the trial court to overcome any mitigating factors presented, even in light of the elevated review standard for jury overrides adopted in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). This court, in a direct appeal resolved long after Lockett and Songer, affirmed the jury override despite the obvious non-statutory evidence presented by Reverend Dushay and Doctor Zimmer, finding that:

> The trial judge obviously concluded that the facts surrounding this mass murder and suggesting a sentence of death were so clear and convincing that virtually no reasonable person could differ. Although the physical act of killing Eunice by shooting her from behind did not fall within this Court's definition of the statutory factor, "especially heinous, atrocious, and cruel," the fact that she was murdered for pecuniary gain and defendant knowingly created a risk of death to others by virtue of the overall scheme of a planned mass homicide could certainly be given consideration by the judge. This court has affirmed the trial court's override of a jury recommendation of life based on facts showing equal or even less aggravating factors...
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> * * *
>
> The facts supporting the sentence of death are clear, convincing, and are established beyond a reasonable doubt.

Zeigler v. State, 402 So.2d 365, 375-377 (Fla. 1981).

This court's conclusion after independent review pursuant to Florida law affirming the trial judge's jury override, necessarily evaluated the significance of the non-statutory mitigating evidence presented against the pitiless nature of the multiple murders and the egregious surrounding circumstances, and determined that a jury override was nevertheless proper. That conclusion should not be altered even if it is now assumed that the trial court after allowing all of the aforementioned non-statutory evidence to be admitted did not consider it. As noted by the trial judge in one post-conviction hearing, the major motivating factor for the death sentence imposed was Zeigler's brutal murder of **four people** (see, petitioner's appendix no. 8). The state submits that the non-statutory mitigating evidence presented through Reverend Dushay and Doctor Zimmer and basically echoed in the various affidavits now proffered by Zeigler, could not have changed the sentencing outcome, i.e., they could not alter the fact that the man whose character each of these individuals sought to vouch for had so brutally murdered loved ones and acquaintances simply for his own selfish, monetary gain, thereby necessarily undermining those glowing character evaluations.

For example, when viewed in light of the circumstances of

this case, Reverend Dushay's evaluation as a good church member seems meaningless in light of his very un-Christianlike conduct, especially on Christmas Eve. Similarly, Zeigler's purported "good rapport with the black community" and his help to black people within that community must be considered a preposterous basis for mitigation in light of the fact that he brutally murdered one black man and would clearly have murdered two more as part of his plan to implicate them in a "robbery" and murder of the other victims. Likewise, the Reverend's evaluation of Zeigler as "calm, cool and collected" would necesarily cut both ways, given the obviously premeditated and planned nature of the mass execution perpetrated for pecuniary gain.

Doctor Zimmer's testimony as to Zeigler's "extremely compassionate" nature and his "tremendous feeling for people and peoples" would also necessarily fallen on deaf ears given the evidence in this case. Where was the "respect" that Zeigler had for his wife and in-laws and people close to him when he was gunning them down in his darkened furniture store pursuant to his plan?

Nor would the content of the affidavits proffered by Zeigler have changed the sentencing outcome. Much of that material is clearly irrelevant for sentencing purposes, e.g., every one of the affidavits contains as its underlying premise the assertion or belief (some more certain than others) that Zeigler did not, would not, or could not have committed the heinous killing at issue, a contention that is not only irrelevant at sentencing, but is necessarily logically undermined by the jury's holding that Zeigler did in fact do just that. See, King v. State, 12 F.L.W. 502 (Fla. Sept. 24, 1987) - residual doubt of guilt not a proper mitigating factor. Similarly, the fact that Zeigler was a good furniture salesman; that he good table manners; that he could fix televisions or plumbing; or that he liked Persian cats; even if somehow relevant in the sentencing scheme (an assertion that the state rejects), could hardly have affected the outcome of a sentencing proceeding before this judge given his clear disdain for the abominal nature of this mass murder, nor would it

have affected this court's affirmance of that jury override. The other "character" factors contained within the affidavits would likewise not have affected the sentencing outcome inasmuch as their significance was necessarily undermined by Zeigler's actions in coldly planning and executing his murder for profit scheme, enlarging it whenever necessary to include an ever increasing number of victims.

The fact that Zeigler had been a churchgoer and good family man **prior** to brutally murdering his wife and in-laws in cold blood, or that he had been a hard working, ambitious and responsible man who despite his family's wealth and success, decided to show his independence and quench his ambition for success by getting rich **quick** without hard work by murdering his wife, could hardly be viewed in a mitigating light. His allegedly industrious and resourceful nature was nowhere more clearly demonstrated than in his long deliberated plan to murder his wife and pin the murder post-humously on a long time employee and acquaintance. Is that the way he showed his purported **loyalty** to his friends? Is that the way he showed how much he cared for his wife and people in general? Is this the way he demonstrated his compassion and concern for others?

Did the "scrupulous honesty" allegedly observed by those so familiar with his character include defrauding insurance companies out of hundreds of thousands of dollars and luring friends and purported loved ones to their death by subterfuge? Of what possible mitigating value would the proffered character evidence extolling the virtues of Zeigler's **wife**, a victim of this atrocious murder for profit scheme, have been? Certainly the fact that she was a beautiful, well-loved, and admired woman and an excellent teacher would have done nothing more than to underscore the pitiless nature of the brutal, calculated killing, as well as the fact that Zeigler - the alleged county do-gooder - had in fact deprived the county of this great asset - his wife Eunice.

Simply put, the good character allegations within the affidavit which might in fact be relevant do not hold water in

light of the proven circumstances of this most egregious and heartless offense. The man who would perpetrate such a crime was clearly an animal and should be treated as such. As correctly determined by the trial judge and this Court, even evaluating non-statutory mitigating evidence of the like presented by the Reverend Dushay and Doctor Zimmer (and regurgitated in many of the affidavits now proffered), the result of this case would not and should not be different. The trial court and this Court had already rejected much of the same mitigation evidence, finding it insufficient to justify life. At best, these affidavits would have been merely cumulative in presentation of mitigating evidence, Lightbourne v. State, 471 So.2d 27, 28 (Fla. 1985), and at worst, this non-statutory character evidence would have just underscored the heinousness of Zeigler's crime. In any event, it would not have changed the outcome or the propriety of the death sentence appropriately imposed for a cold and calculated mass murder of innocent intended only to quickly fill the pockets of this "ambitious" but "loving family" man. See, Rogers v. State, 511 So.2d 526, 535 (Fla. 1987); Francois v. Wainwright, 763 F.2d 1188, 1190-1191 (11th Cir. 1985).

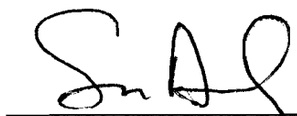
CONCLUSION

Even assuming no procedural bar, the petitioner has failed to demonstrate of record a Hitchcock error requiring reversal. The record itself indicates that the trial judge did not refuse to allow the admission of non-statutory mitigating evidence, and in fact, the only testimony admitted was of a clearly non-statutory mitigating nature. Nor is there any substantial basis for determining that the trial judge refused to consider the non-statutory mitigating evidence actually presented; to the contrary, it is much more reasonable to conclude that based upon the egregious nature and circumstances of Zeigler's multi-homicides, the evidence purporting to detail his good character was of no significance. In any event, however, analysis of the non-statutory mitigating "evidence" contained within Zeigler's proffered affidavits, reveals merely irrelevant or cumulative matters which would not have affected the sentencing outcome

under these particularly gruesome and egregious circumstances.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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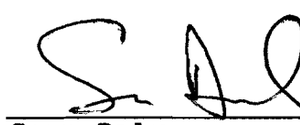
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished by mail to Steven L. Winter, University of Miami School of Law, 1311 Miller Drive, Coral Gables, FL 33124-8087, this 9th day of December, 1987.



Sean Daly
Of Counsel