IN THE SUPREME COURT OF FLORIDA

DOUGLAS RAY MEEKS,

Petitioner,

v. CASE NO. 71,947

RICHARD L. DUGGER, Secretary,
Florida Department of Corrections,

Respondent.

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RESPONSE IN OPPOSITION TO PETITION
FOR WRIT OF HABEAS CORPUS

Pursuant to the "show cause" order entered in this case the Respondent makes the following response in opposition to granting a writ of habeas corpus unto Douglas Ray Meeks. In support of its position the Respondent contends:

I.

INTRODUCTION

On June 28, 1985, the Honorable Maurice M. Paul, United States District Court Judge, in and for the Northern District of Florida, denied a petition for writ of habeas corpus filed by Douglas Ray Meeks pursuant to 28 U.S.C. §2254. On July 19, 1985, Judge Paul denied a motion to alter or amend judgment or for rehearing in this matter. On July 19, 1985, a notice of appeal to the United States Court of Appeals, Eleventh Circuit, was

filed. On April 21, 1987, Florida Governor Bob Martinez signed a warrant scheduling the execution of Douglas Ray Meeks. The warrant was to run from June 24 to July 1, 1987. On May 28, 1987, a panel of the United States Court of Appeals, Eleventh Circuit, stayed the execution and ordered the parties to brief the issues previously litigated before Judge Paul. The parties complied with this order and the case was fully briefed. On November 9, 1987, Douglas Meeks moved to hold the proceedings in the Eleventh Circuit Court of Appeals in abeyance pending resubmission of the "Hitchcock-Lockett issue" to this Court. The Respondent did not object to this motion, and in fact had argued in its Eleventh Circuit brief that the so called "Hitchcock-Lockett" issue had not been exhausted by proper submission to this Court. On November 19, 1987, the Eleventh Circuit Court of Appeals granted the motion. On February 19, 1988, Mr. Meeks filed a petition for writ of habeas corpus in this Court. This response follows.

In this pleading, the Respondent will make reference to certain records and transcripts in the possession of this Court due to the prior litigation of this case. The symbols "R" and "T" refer to the records and transcripts of the Florida Circuit Court, Case No. 74-299-CF. (Florida Supreme Court Case No. 47,533) The symbols "R2" and "T2" refer to Florida Circuit Court Case No. 74-300-CF. (Florida Supreme Court Case No. 48,080) The symbol "G" indicates the transcript of the evidentiary hearing

ordered by this Court in Case No. 74-299-CF, pursuant to Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). (Florida Supreme Court Case No. 47,533) The symbol "E" refers to the four volumes of state court record of the evidentiary hearing held in both cases pursuant to Rule 3.850, Fla.R.Crim.P. (Florida Supreme Court Case No. 59,958) (All emphasis is supplied unless otherwise noted.)

II.

STATEMENT OF THE CASE AND FACTS

The Appellant murdered two people in separate incidents of mini-market robbery in the city of Perry, Florida. He was sentenced to death for both crimes. Meeks v. State, 336 So.2d 1142 (Fla. 1976) and Meeks v. State, 339 So.2d 186 (Fla. 1976).

A. THE CRIMES

The first murder occurred on October 24, 1974. Ms. Chevis Thompson, manager of the Magic Market in Perry, was viciously knifed to death around 11:00 a.m.. (T 2: 178) The crime was discovered by local youths who saw a lone black male walk out of the market. The boys went inside to discover the gagging and gasping victim in the last moments of life. (T 2: 85-90, 106)[1] The police discovered bloody fingerprints on the cash register. (T 2: 115) Expert analysis concluded the prints were those of Douglas Ray Meeks. (T 2: 140, 141, 148--150, 152-164) Meeks later made incriminating statements to his friends Hardwick and Tensley in which he admitted to killing Ms. Thompson. (T 2: 185-188, 190-192)

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[1] The witnesses said Meeks exited just seconds ahead of their entry (T 2: 98, 105, 124). As an additional point of identification these young men pointed out the fleeing man had braided hair, an unusual sight in Perry at that time. (T 2: 91,105,129).

Meeks took the witness stand in his own defense. (T 2: 198) He claimed, as alibi, that he "...was out at the Ninety Eight Bar at the time." (T 2: 198) Furthermore, he denied admitting to the murder to Hardwick (T 2: 205) and denied leaving his bloody fingerprints on the cash register. (T 2: 209) To bolster his alibi Meeks called three witnesses. Unfortunately for Meeks, Mr. White had no alibi evidence. (T 2: 215) Neither did Mr. Hayes. (T 2: 116-228) Witness Marshall did indicate he saw Meeks at the bar around 11:00 a.m., but could not state with particularity that he saw Meeks on the day of the crime. (T 2: 222)

In the sentencing phase of trial the prosecutor used Meek's prior conviction for first degree murder in the previously tried case 74-299-CF as aggravating circumstance evidence. (T 2: 299-304) The prosecution did not present any other evidence in the penalty phase. The defense also declined the chance to put on evidence and instead argued for mercy. (T 2: 318-319) The jury recommended the death penalty. (T 2: 325) In sentencing the Appellant to death the trial court found the following aggravating factors existed: (1) The defendant had previously been convicted of a capital felony (the Walker murder); (2) The murder was committed during the course of a statutorily enumerated violent felony (robbery); (3) The murder was accomplished with the motive of avoiding arrest; (4) The murder was done for pecuniary gain; and (5) The murder was committed

to hinder the enforcement of laws. In mitigation the court found the defendant to be of youthful age and low intelligence. On these factors the trial court imposed the death penalty. Meeks v. State, 336 So.2d 1142 (Fla. 1976).

The second murder occurred thirteen days after Ms. Thompson died, on November 6, 1974. This time the Appellant had an accomplice, his old friend and confessor, Homer Hardwick. They entered a Junior Food Store in Perry and held the store clerk, Diane Allen, and a customer, Lloyd Walker, at gunpoint. (T 124-127) Meeks had Ms. Allen empty the cash from her register and give it to him. Then he and Hardwick marched the victims into a back storage room. Meeks ordered the victims to lie on the ground. Ms. Allen and Mr. Walker were then shot repeatedly. (T 129-133) Ms. Allen survived. Lloyd Walker died six days later. (T 133-135) Meeks v. State, 339 So.2d 186, 187 (Fla. 1976).

Ms. Allen knew Homer Hardwick from high school and later identified him to the police from her high school yearbook. (T 137-139)[2] She identified Meeks in a line-up (T 142), and told the jury she was positive beyond any doubt that Meeks was the killer. (T 159)

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[2] Hardwick was tried separately, convicted and given a sentence of life imprisonment by the trial court. Hardwick v. State, 335 So.2d 307 (Fla. 1st DCA 1976).

Meeks presented no affirmative defense in the trial. Instead, his lawyer focused on the possible mis-identification of Meeks as the killer. (T 301-306, 332-334) The jury rejected this theory and convicted Meeks as charged.

At the sentencing phase of trial the State did not present evidence and the defense only presented evidence of statutory mitigation. (T 416) The jury recommended the death penalty. (T 422) The trial court found four aggravating factors: (1) The murder was committed as a part of another dangerous felony; (2) The crime was committed for pecuniary gain; (3) The crime was committed to avoid arrest and (4) The crime was committed to hinder the enforcement of law. In mitigation the court found a lack of significant criminal history. On this evidence the trial court concluded death was the appropriate penalty. Meeks, 339 So.2d at 190-191.

B. THE REMAND FOR RESENTENCING CONSIDERATION UNDER GARDNER V. FLORIDA

On September 23, 1977, the trial court held an evidentiary hearing to decide what impact, if any, Gardner v. Florida, 430 U.S. 349 (1977) would have on the death sentence imposed in case 74-299-CF (the murder of Lloyd Walker). Case 74-300-CF was not reviewed because this Court knew the trial court had not utilized any unknown information in that sentencing deliberation.

At the hearing the prosecution deferred to Appellant's trial counsel and presented no evidence. (G 3) After consulting with counsel, Meeks took the stand and testified that, although he and Homer Hardwick had conspired to rob the market and kill the clerk to avoid identification of Hardwick, he had not fired the gun with the intent to shoot either victim. (G 4-16) With this additional testimony defense counsel argued an early version of Enmund v. Florida, 478 U.S. 782 (1982) to the trial court. In counsel's view the lack of any intent to kill should have justified the reduction of the sentence to life imprisonment. (G 16-19) The trial court was not swayed and concluded the hearing by ruling:

> Having received evidence in accordance with the remand of the Supreme Court of the State of Florida, which was filed in the trial court, Third Judicial Circuit, in and for Taylor County, Florida, on August 1, 1977, and having considered the evidence presented and the argument of counsel made, it is

> this Court's finding that the defendant Douglas Ray Meeks, has not been given an opportunity to consider all the information available to the trial judge in this case, at the time of the original sentencing, and furher finds that he agrees with the statements made in the report of Dr. Carrerra, he, the defendant having been present and himself giving the history which Dr. Carrerra summarized in his report, the court futher considers and finds that nothing has been shown in this evidentiary hearing to change in any way the conclusions arrived at the time of the sentencing and the court adhered to the decision previously made for the reasons stated in the written findings upon which the death sentence was imposed.

(G 20) (Emphasis added)

This Court affirmed the trial court's ruling. Meeks v. State, 364 So.2d 461 (Fla. 1978).

Florida Governor Bob Graham signed a warrant for Meeks' execution in both cases on January 9, 1980. Meeks filed motions for post-conviction relief pursuant to Rule 3.850, Florida Rules of Criminal Procedure, in the circuit court for both his cases. The trial court summary denied both motions. On appeal this Court stayed the execution and remanded the consolidated claims back to the circuit court for an evidentiary hearing. Meeks v. State, 382 So.2d 673 (Fla. 1980).

Specifically alleged in the motions were claims that trial counsel was unprepared to handle the sentncing phase of each

trial and therefore ineffective in his representation. Although given the chance to call his trial attorney, John Howard, to the stand to explain his conduct, Meeks passed. (E Vol. I, p. 37-39). After the trial court denied the motions Meeks only filed a notice of appeal in case 74-299-CF. (E. Vol. I, p. 40) Thus, any collateral attack on case 74-300-CF was abandoned. Meeks v. State, 418 So.2d 987 n.1 (Fla. 1982).

After completion of this Court's review of the collateral attack in case 74-299-CF, Meeks filed the federal petition for writ of habeas corpus which has lead the parties back into this Court nearly fourteen years after he callously left Ms. Thompson to die on the mini-market floor, gagging in her own blood.

II.

ARGUMENT

I. THE UNITED STATES SUPREME COURT'S PRONOUNCEMENT OF A CHANGE IN SENTENCING LAW CONSIDERATIONS IN HITCHCOCK V. DUGGER, 107 S.CT. 1821 (1987) DOES NOT REQUIRE A REVERSAL OF EITHER OF THE TWO DEATH SENTENCES IMPOSED ON THE PETITIONER.

A. THE BURDEN OF PROOF BELONGS WITH THE PETITONER

At the outset of this response, the Attorney General wishes to make it clear that he continues to disagree with the notion that Hitchcock v. Dugger, 107 S.Ct. 1821 (1987) amounts to a "change in law" from the United States Supreme Court. However, the Attorney General recognizes and respects this Court's contrary view, as expressed in Riley v. Dugger, 517 So.2d 656 (Fla. 1987) and Thompson v. Dugger, 515 So.2d 173 (Fla. 1987), petition for certiorari filed, January 15, 1988.

The perception of Hitchcock as a change in law has led this Court to re-examine approximately thirty capital cases to date. In many of these cases the Hitchcock claim had been waived by a failure to object at trial to the original standard jury instructions or to any improperly limiting arguments of the prosecutor or the narrow sentencing considerations of the trial judge. Notwithstanding these waivers, this Court now sets aside the procedural bar rule and allows appellate review of these

complaints by finding the ruling in Hitchcock meets the criteria set out in Witt v. State, 387 So.2d 922 (Fla. 1980):

> We emphasize at this point that only major constitutional changes in law will be cognizable in capital cases under Rule 3.850.

To date the court has found nearly all pre-1981 cases include a violation of the Hitchcock rule. However, following dicta in that opinion, the court has utilized a "harmless error" analysis to uphold some sentences. The standard for finding harmless error seems to be the rule of Tedder v. State, 322 So.2d 908 (Fla. 1975), See e.g., Ford v. Dugger, 13 F.L.W. 150 (February 18, 1988).

The problem with utilizing Tedder to judge these cases is that it was an opinion crafted out of whole cloth by the members of this Court in an attempt to standardize direct review of jury override cases. It was never meant for reviewing procedurally defaulted jury instruction or sentencing claims ten or more years after trial has ended.

The time to change this and reject the collateral attack application of the Tedder test is now. As Justice Shaw stated in his dissenting opinion in Burch v. State, 13 F.L.W. 152 (Feb. 18, 1988):

> The basic difficulty we face here, and it can only become more acute, is that the Tedder rule is inconsistent with

> Furman v. Georgia, 408 U.S. 238 (1972), as that decision has been amplified and applied by Caldwell v. Mississippi, 472 U.S. 320 (1985) and Wainwright v. Witt, 469 U.S. 412 (1985). My views on why we must recede from Tedder in order to preserve the constitutionality of our capital punishment system have been set forth in my special concurrences to Combs and Grossman and I will not repeat them at length here. It is enough to say that here, unlike the Tedder case itself where the judge's sentencing order standing alone and notwithstanding the jury recommendation could not have supported the death penalty, we would unquestionably affirm the judge's sentencing order except for the jury recommendation. Thus, our decision to vacate the death sentence rests entirely on the advisory recommendation of the jury which has rendered no factual findings on which to base our review. This treatment of an advisory recommendation as virtually determinative cannot be reconciled with, e.g., Combs, and our death penalty statute. Moreover, this situation of largely unfettered jury discretion is disturbingly similar to that which led the Furman Court to hold that the death penalty was being arbitrarily and capriciously imposed by juries with no method of rationally distinguishing between those instances where death was the appropriate penalty and those where it was not. Absent factual findings in the advisory recommendation, any distinctions we might draw between cases where the jury recommends death and those where it recommends life must, of necessity, be based on pure speculation. This is not a rational system of imposing the death penalty as Furman requires. EHRLICH and GRIMES, JJ., Concur.

Id, 13 F.L.W. at 153.

This Court should review Hitchcock based claims of sentencing error in a manner identical to the manner in which ineffective assistance of counsel due to failure to present or argue non-statutory mitigation was reviewed. Such a standard would be consistent with United States Supreme Court precedent. Reed v. Ross, 468 U.S. 1 (1984) and insure against unwarranted federal reversal.

Directly on point is United States v. Frady, 456 U.S. 152, 71 L.Ed.2d 816 (1982). Frady dealt with a jury instruction that allegedly shifted the burden of proof onto the defendant in a premeditated murder case tried under federal law in a United States District Court. The defense (as here) failed to object to the instruction in the trial court and therefore waived his direct appeal. On collateral attack under 28 U.S.C. §2255, the defendant raised the claim. The federal appellate court found "plain error" under Rule 52(b) of the Federal Rules of Criminal Procedure and reversed the conviction.[3] Frady v. United States, 636 F.2d 506 (1980). The government petitioned for certiorari

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[3] The "plain error" standard of Rule 52(b) is that:

> Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

The scope of the Rule is outlined in note 13 of Frady, 71 L.Ed.2d at 827.

and the United States Supreme Court reversed, holding in part:

> In addition, a federal prisoner like Frady, unlike his state counterparts, has already had an opportunity to present his federal claims in federal trial and appellate forums. On balance, we see no basis for affording federal prisoners a preferred status when they seek post-conviction relief.
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> In sum, the lower court's use of the "plain error" standard to review Frady's §2255 motion was contrary to long-established law from which we find no reason to depart. We reaffirm the well-settled principle that to obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal.
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> [1c] We believe the proper standard for review for Frady's motion is the "cause and actual prejudice" standard enunciated in Davis v. United States, 411 U.S. 233, 36 L.Ed.2d 216, 93 S.Ct. 1577 (1973), and later confirmed and extended in Francis v. Henderson, 425 U.S. 536, 48 L.Ed.2d 149, 96 S.Ct. 1708 Wainwright v. Sykes, 433 U.S. 72, 53 L.Ed.2d 594, 97 S.Ct. 2497 (1977). Under this standard, to obtain collateral relief based on trial errors to which no contemporaneous objection was made, a convicted defendant must show both (1) "cause" excusing his double procedural default, and (2) "actual prejudice" resulting from the errors of which he complains. In applying this dual standard to the case before us, we find it unnecessary to determine whether Frady has shown cause, because we are confident he suffered no actual prejudice of a degree sufficient to justify collateral relief 19 years after his crime.

Id. at 456 U.S. 167-168, 71 L.Ed.2d 829-830.

Adoption of the cause and actual prejudice standard would solve the dilemma of never ending litigation foreseen by Justice England in his specially concurring opinion in Witt v. State, 387 So.2d at 931-932. Furthermore, the use of cause and actual prejudice standards would allow the Eleventh Circuit Court of Appeals to utilize state court findings of fact in its review of Hitchcock claims, a factor sure to speed up decisions on the federal level. Likewise, any conflicts of the type now boiling over Caldwell v. Mississippi, 472 U.S. 320 (1985) could be assessed in the United States Supreme Court from the vantage point of knowing express conflict existed between co-equal courts of final appellate review. In short, the proposed system puts the burden of proof back on the murders where the Constitution and the Supreme Court say it should be and allows a potential for ending the current system of endless appeals.

Such a standard would not be inconsistent with Hitchcock itself, in that the Hitchcock argument over Lockett v. Ohio, 438 U.S. 586 (1978) was not resolved in the context of a procedurally defaulted claim. Thus, while this Court's "mere presentation" standard in direct appeal cases such as Hitchcock v. State, 438 So.2d 741 (1982) is now recognized as erroneous, that standard has no role in the collateral attack litigation of procedurally defaulted claims.[4] Compare, Hargrave v. Dugger 832 F.2d 1528

(11th Cir. 1987) En Banc (Tjoflat J., specially concurring) If it did the United States Supreme Court would not have allowed 3 men who raised this claim to be executed. Straight v. Wainwright, 90 L.Ed.2d 683 (1986); Antone v. Wainwright, 465 U.S. 200, 104 S.Ct. 962, 79 L.Ed.2d 147 (1984). See also, Darden v. Dugger, 477 U.S. ___, 106 S.Ct. 91 L.Ed.2d 144, 160 (1987) This Court should not forget that Wainwright v. Witt, 469 U.S. 412 (1985) was a vindication of this Court's view in Witt v. State or that it requires application of an actual prejudice test in federal court to excuse a procedural bar. Id. at 469 U.S. 431, n.11.

In summary, the current use of Tedder v. State, in the context of procedurally defaulted claim analysis is inconsistent with this court's opinion in Witt and with a long line of Supreme Court precedent.[5] Respondent suggests this Court consider our argument and direct the petitioner to supplement this claim with argument supporting a showing of actual prejudice.

In the meantime, Respondent will address merits.

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[4] One should note that Riley v. State, 517 So.2d 656 (Fla. 1987) cites mostly direct appeal cases in support of its ruling.

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[5] The signs are that even the normally unpredictable Eleventh Circuit Court of Appeals would have accepted a "no change in law" ruling from this Court as binding on their own work. See Hargrave v. Dugger, 832 F.2d 1528, 1530 (11th Cir. 1987) En Banc.

B. THIS CASE WOULD JUSTIFY A JURY OVERRIDE

It is conceded that the trial court's giving of the old standard jury instruction: "The mitigating circumstances shall be the following" followed by the statutory list of seven factors violates Hitchcock. (T 439) (T 2: 322) However, as evidenced by recent decisions such as Delap v. Dugger, 513 So.2d 659 (Fla. 1987); Demps v. Dugger, 514 So.2d 1095 (Fla. 1987); Ford v. State, 13 F.L.W. 150 (Fla. Feb. 18, 1988); and Tafero v. Dugger, 13 F.L.W. 161 (Fla. Feb. 26, 1988), the inquiry does not end with this acknowledgement. Rather, the inquiry becomes whether the court is "...able to say beyond a reasonable doubt that, after weighing the aggravating factors against the statutory and non-statutory mitigating factors, the judge would have properly imposed death, regardless of a life recommendation." Demps v. Dugger, at 1094.

Petitioner Meeks' first crime, the knife-murder of Chevis Thompson, was tried after Meeks was convicted for his second murder, the shooting of Lloyd Walker by Meeks and Homer Hardwick. The killing of Ms. Thompson was not clouded by potential complicity by another. Meeks acted alone. His confession, the bloody fingerprints, and his identification by disinterested witnesses leaves no room for doubt (reasonable or lingering) as to his guilt. The aggravating factors are

undisputable on this record and show that, beyond a willingness to kill for the money this time, Meeks would, and did, kill for it again. As noted by the majority in Demps, and three justices in Burch, the fact that a convicted murderer is a multiple convicted murderer merits great weight in the overall sentencing mix. See also Thomas v. State, 465 So.2d 454 (Fla. 1984); Burr v. State, 466 So.2d 1051 (Fla. 1985) and Demps v. Dugger, 514 So.2d at 1093-1094.

In opposition, defense counsel made a non-statutory plea for mercy with no objection from the prosecutor or limitation by the trial court. It was a reasonable tactic. Darden, supra at 91 L.Ed.2d 144 (1987) Respondent contends that on such evidence a "jury-override" would be sustainable. Compare Francis v. State, 473 So.2d 672 (Fla. 1985). (Emotional plea for mercy outweighed beyond a reasonable doubt by aggravating factors of crime); Thomas v. State, supra (Young age and jury sympathy no basis for reversing trial court override and imposition of death sentence on second of two murders.) Accordingly, Case 74-300-CF falls into that group of cases recently affirmed by this Court in which a tactical choice was made not to place evidence of mitigation before the jury. Tafero v. Dugger, supra, Booker v. Dugger, 13 F.L.W. 33 (1988).

Interestingly enough, the trial court found both statuory and non-statutory mitigating evidence based on information known

to him but not the jury:

> Finally, the age of the defendant has been considered as required by Fla. Stat. 921.141(7)[6](g). The defendant is 21. The report of Dr. Barnard contained his medical judgment that the defendant was of dull-normal intelligence. The court finds the combination of the defendant's youthful age and his intelligence to be a mitigating factor.

Meeks, 336 So.2d at 1143.

Thus, Petitioner cannot complain that the trial court limited its view to the stringent mandate of the statute in assessing the totality of the evidence bearing on whether Meeks should live or die, or that if faced with a life recommendation from the jury the court would have violated Tedder v. State, by imposing a death sentence.

As for case 74-299-CF, the scenerio is much the same. Excepting the finding of no significant prior criminal history, case 74-299-CF is devoid of mitigation. The trial court heard from Meeks in the Gardner hearing that he had no intent to kill. This contention was rejected mostly because Meeks also admitted to the trial judge that he and Hardwick planned the killing in advance. In similar circumstances this Court has affirmed jury overrides. Craig v. State, 510 So.2d 857 (Fla. 1987); Engle v. State, 510 So.2d 881 (Fla. 1987) and Eutzy v. State, 458 So.2d 755 (Fla. 1984).

Meeks admitted the robbery was planned, the shooting of the clerk was planned and that both he and Hardwick possessed and fired a gun. His lawyer had argued the lack of a prior criminal record to the jury in combination with the motion that Meeks might not be guilty. (T 434-435) Thus, it is clear the jury was not swayed by the sole mitigating factor or by "whimsical doubt". To suggest now that a correction of the jury instruction would sway them to another view is to endorse speculation and ignore reality. Eutzy, supra at 760; and State v. Bolander, 503 So.2d 1247 (Fla. 1987). Both crimes merit death.

II. MEEKS WAS NOT DENIED HIS CONSTITUTIONAL RIGHTS DUE TO ANY INEFFECTIVE REPRESENTATION BY COUNSEL.

The standard for reviewing the effectiveness of the trial counsel is well known. Strickland v. Washington, 466 U.S. 668 (1984).The standard for appellate effectiveness is the same as that for trial. Downs v. Wainwright, 476 So.2d 654, 655 (Fla. 1985).

Challenging the competency of trial or appellate counsel has become almost a rote exercise by condemned inmates from Florida. What is consistently ignored by complaining inmates, including Meeks, is that fact that the Constitution requires only that the defendant in a criminal trial be represented by an attorney of ordinary skill and ordinary zeal operating within recognized time constraints and financial constraints. Downs at 655.

In Sullivan v. Wainwright, 695 F.2d at 1306, (11th Cir. 1983), cert. denied, 464 U.S. 992 (1983), the court noted that the failure of Sullivan's counsel to advance certain arguments on appeal was not ineffective although those arguments later gained judicial recognition as appropriate statements of the law. Sullivan, like Meeks, was one of the first defendants tried under Florida's reconstituted death penalty statute. As was so aply noted in Sullivan's case, "Counsel's failure to divine judicial development of Florida's capital sentencing does not constitute

ineffective assistance of counsel. Accord, Proffitt v. Washington, supra." Id. at 1309. See also, Francois v. Wainwright, 741 F.2d 1275, 1285 (11th Cir. 1984). This Court has shared the federal court's view. Compare Downs, supra; and Adams v. Wainwright, 456 So.2d 888 (Fla. 1984). See also State v. Bolander, 503 So.2d 1247 (Fla. 1987) (strategic decisions not ineffective).

In the instant petition, Meeks focuses on two points he claims show counsel was ineffective in briefing his appeals. The first is the "doubling-up" of the aggravating factors robbery/pecuniary gain and preventing arrest/hindering law enforcement. The second is the use of defense requested psychiatric reports by the trial court during sentencing.

As for "doubling-up" the aggravating factors, it is not a per se reversible error. Adams v. State, 449 So.2d 819, 820 (Fla. 1984) (Attack on allegedly improper finding of aggravating factor of prior conviction for violent felony should have been raised on direct appeal; collateral attack improper); Sullivan v. Wainwright, 422 So.2d 827, 830 (Fla. 1982) (No basis for reversing sentencing when appellate counsel failed to brief issue of improper doubling of aggravating factors).

Petitions for writs of habeas corpus are not mere substitutes for direct appeals. White v. Dugger, 511 So.2d 554 (Fla. 1987). Rather, Meeks must show deficient conduct and

actual prejudice. He has failed on both points.

As for deficient conduct, trial/appellant counsel cannot be faulted for not foreseeing the decision made in Provence v. State, 337 So.2d 783 (Fla. 1976). This Court's decision at 418 So.2d 987-989 (Fla. 1982) says exactly this, only in the framework of an attack on counsel's actions in the sentencing phase of trial in Case 74-299-CF. Petitioner's citation to a few direct appeal cases (Petition, p. 64) or the factually distinguishable Elledge v. State, 346 So.2d 998 (Fla. 1977) bear witness to the weakness of this allegation of deficient conduct.

Furthermore, Petitioner wholly fails to show that but for the striking of the allegedly doubled aggravating factors, the trial judge would probably rule in his favor and give him two life sentences. The actual prejudice standard is not a "harmless error" test and the existence of a single statutory mitigating factor in either case does not justify reversal. McCrae v. Wainwright, 442 So.2d 824 (1982).

Turning to the second alleged deficiency, it must again be stressed that the standard is cause and actual prejudice. Petitioner cites Parkin v. State, 238 So.2d 817 (Fla. 1970) in suport of an argument that this alleged error is per se reversible. Parkin says no such thing.

A review of this Court's prior decisions establishes the

trial court did not improperly use the reports in case CF-300. Thus, no error could exist as to the appeal of that conviction. As to case 74-299-CF, this Court remanded the matter to the trial court. In reviewing that Gardner v. Florida, hearing this Court found:

> ON JULY 28, 1977, following our receipt of the aforementioned response of the trial judge, this Court remanded the cause to him for an evidentiary hearing on resentecing only, pursuant to Gardner v. Florida, supra. During this evidentiary hearing appellant's counsel acknowledged that he had, in fact, been present at the psychiatric examination during which appellant made the aforementioned incriminating statements. Appellant was then afforded an opportunity to rebut this portion of the report of Dr. Carrera but, instead, his testimony confirmed the accuracy of its comments.

Id. at 462.

This scenario is analogous to Darden v. State, 475 So.2d 217 (Fla. 1985), wherein this Court rejected this same claim:

> [2] Darden next claim that use of the reports violated his fifth amendment privilege to remain silent. He argues that Estelle v. Smith, the trial court sua sponte ordered a pretrial psychiatric examination to determine competency to stand trial. Defense counsel had no notice of the examination, nor was the defendant apprised of his right to remain silent and the possible use of his statements against him at trial. In the penalty phase of the trial, the state introduced the report and placed the psychiatrist on the stand, and proceeded to elicit the psychiatrist's

> opinion that the defendant was likely to be dangerous in the future. The instant case differs significantly from Estelle v. Smith. Here counsel was aprised of the examinations, and in fact requested the pre-penalty phase evaluation to "determine if the Defendant, although competent, was subject to some personality disorder or emotional problem which in some way might explain or mitigate the atrocities committed." In addition the trial judge specifically used the reports to determine lack of mitigation rather than aggravation. We thus have before us an instance where defense counsel requested evaluations and where the evaluations were not used as an aggravating factor, two factual distinctions which set this case apart from Estelle v. Smith.

Id. at 219.

Compare the sentencing order in case 74-299-CF as set out in Meeks, 339 So.2d 186 (Fla. 1976). Meeks cannot show in this situation that he even has a claim to raise in either case much less a basis for obtaining relief.

In sum, neither of the detailed attacks on appellate counsel merit relief.[6] As for the catch-all inclusion of the matters

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[6] Meeks may conclude, at page 65 of his petition, that an evidentiary hearing is a viable alternative course for resolving this claim. We disagree. Meeks had such a hearing, with collateral counsel in 1980, and chose not to put Mr. Howard on the stand. This failure to call Howard, when coupled with the abandonment of an appeal of the 3.850 hearing in case 74-300, constitutes an abandonment of the claim. Darden v. Dugger, 825 F.2d 287, 294 (11th Cir. 1987) citing Wong Doo v. United States, 265 U.S. 239, 241 (1924).

raised in Claim V in this issue, Respondent will rely on the above-cited cases on the burden of proof and its response to Claim V, infra on any merits discussion.

III. PETITIONER HAS NO BASIS FOR ASSERTING THAT HIS DEATH SENTENCE SHOULD BE REVERSED DUE TO THE ALLEGED VIOLATION OF THE EIGHTH AMENDMENT IN THAT HIS CLAIM THAT THE AGGRAVATING FACTORS ARE IMPROPERLY "DOUBLED-UP" IS PROCEDURALLY BARRED.

Meeks did not raise this objection at the sentencing hearings; he did not raise it on direct appeal; and he did not raise it by collateral attack under Rule 3.850, Florida Rules of Criminal Procedure.

In White v. Dugger, 511 So.2d 554, 555 (Fla. 1987) this Court repeated its admonition to Petitioner's counsel that this type of issue is not cognizable by habeas petition. Why the clear language of the White decision is still being ignored is beyond Respondent's understanding.

IV. MR. MEEKS' SENTENCES OF DEATH WERE NOT THE RESULT OF ANY VIOLATION OF THE RULE OF ESTELLE V. SMITH, 451 U.S. 454 (1981).

Claim IV focuses on the alleged violation of Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 886 (1981). In Smith, a trial court ordered the psychiatric examination of the defendant while he was in custody. The prisoner was not advised of his Miranda rights. The United States Supreme Court held that admission of the prisoner's statements into evidence at the sentecing phase of his trial violated his Fifth Amendment right to silence and his Sixth Amendment right to counsel.

Smith offers no relief to Appellant. First, no Sixth Amendment issue can exist because not only was trial counsel aware of the hearing, he had requested it and was present when the interview took place. Meeks, 364 So.2d at 462. Second, the Fifth Amendment claim was waived by lack of objection at trial.[7] Third, the reports were only used in case 74-299-CF to discuss mitigation. Fourth, Case 74-300-CF was not impacted to any degree.

The lack of merit of the claim is evidenced by a decision from the Fifth Circuit on similar facts:

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[7] As a point of back reference to Claim II on effectiveness of appellate counsel, there is no duty to raise a waived claim.

Riles first argues that the rights guaranteed him under the Fifth and Sixth Amendments were abridged under the standards set forth in Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981).

* * *

In any event, this case is distinguishable from Smith, where the prosecution introduced harmful psychiatric evidence during the punishment phase of the trial and the defendant had no clue, because he had never raised a defense of insanity, that such evidence would be introduced. The damaging testimony was based on an unrequested court-ordered psychiatric interview of the defendant conducted without the benfit of Miranda warnings. Because advance notice as to the purpose of the examination was not provided to the defendant's counsel, the Court in Smith held that the defendant was also denied assistance of counsel in making a decision of whether to submit to the examination. Here, the record reflects that Riles, represented by counsel, requested most (if not all) of the psychiatric examinations, the results of which he now finds objectionable. Moreover, unlike the defendant in Smith, Riles raises the insanity defense; the state, therefore, had every right to rebut that defense. By pursuing this avenue of defense, and by offering psychiatric evidence to support this defense, Riles opened the door to the state's evidence and waived his Fifth Amendment privilege against self-incrimination. Vardas v. Estelle, 715 F.2d 206, 208 (5th Cir. 1983), cert. denied, 465 U.S. 1104, 104 S.Ct. 1603, 80 L.Ed.2d 133 (1984). Neither was Riles' Sixth Amendment right to assistance of counsel abridged. Finally, a defendant has "no constitutional right to have his attorney present during the

> psychiatric examination." Vardas, 715 F.2d at 209 (citing United States v. Cohen, 530 F.2d 43, 48 (5th Cir. 1976), cert. denied, 429 U.S. 855, 97 S.Ct. 149, 50 L.Ed.2d 130 (1976). (Emphasis added).

Riles v. McCotter, 799 F.2d 947, 953 (5th Cir. 1986).

Another critical distinction with Estelle is that the judge utilized the doctor's report to find non-statutory mitigating evidence of "dull intelligence" which the court combined with Meeks' calendar age of 21 to establish the mitigation factor of age under Florida Statute §921.141(7((g). Meeks, 339 So.2d at 191. Without that report, Meeks would have no mitigation in case 74-299-CF!

Meeks subsequently took the witness stand and confirmed the truth of Carrera's report. Meeks, 364 So.2d at 462. He did this as part of a strategy to try and impress on the trial court his lack of intent to kill and his lesser complicity in the crime in an attempt to gain a life sentece. That his tactic failed is no justification for reversal given this clear distinction between case 74-299-CF and Estelle.[8]

Current complaints that use of the the psychiatric reports

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[8] The claim that the information promised to the doctors was privileged material was a matter not objected to at trial or raised on appeal. It is not a recognizable ground for collateral attack.

tainted case 74-300-CF are also meritless. Prosecutorial argument to the jury focused on the fact of the prior conviction not the medical reports. Furthermore, references to the reports in case 74-300-CF shows its only use was as a reference source for possible mitigation evidence. Given the trial court's finding of this non-statutory mitigation in case 74-299-CF, it cannot be said the record supports a finding that the court felt limited in its review of the second crime. Affirmance is merited.

V. MEEKS' FINAL COMPLAINT ABOUT ERROR IN BURDEN-SHIFTING, JURY VOTE, FAILURE TO INSTRUCT ON UNDERLYING FELONY, THE "GARDNER" REMAND, AND THE DIMINISHED SENSE OF JURY RESPONSIBILITY CONSTITUTES A COLLECTION OF COMPLAINTS WHICH ARE NOT COGNIZABLE BY PETITION FOR WRIT OF HABEAS CORPUS.

None of the five points raised in this claim raises fundamental error concerns. All five are procedurally barred and meritless.

A. Burden Shifting

This claim is procedurally barred. Smith v. State, 457 So.2d 1380, 1389 (Fla. 1985), holds squarely that the issue of burden shifting in the sentencing phase weighing process is a direct appeal issue not properly raised by collateral attack. The Eleventh Circuit adhered to this ruling just this week, Smith v. Dugger, ____F.2d____ (11th Cir. Case No. 86-3333, March 9, 1988). Accord, Jackson v. Wainwright, 438 So.2d 4, 6 (Fla. 1983). See also, Rule 3.390, Florida Rules of Criminal Procedure.

On the merits, Respondent suggests this Court review two cases from the Tenth Circuit Court of Appeals, Pierre v. Shulson, 802 F.2d 1282 (10th Cir. 1986), and Andrews v. Shulson, 802 F.2d 1256 (10th Cir. 1986). Pursuant to the mandate of California v. Ramos, 463 U.S. 922 n.21 (1983), the Tenth Circuit has recently rejected a Utah inmate's suggestion that Utah death penalty

sentencing phase (nearly identical to Florida's scheme) impermissibly shifts the burden of proof to the defendant to overcome any presumption that death is the appropriate penalty. In Pierre v, Shulson, supra, the court affirmed the district court's order in Selby v. Shulson, 600 F.Supp. 432 (D.C. Utah, 1984), wherein it held:

> The Utah system bifurcates the guilt and penalty phase of a capital trial. At the guilt phase, the prosecution must prove at least one statuory aggravating circumstance beyond a reasonable doubt as an element of first degree murder before defendant is eligible for the death penalty. At the penalty phase, the sentencing authority must find that the aggravating circumstances for the death sentence to be imposed. Petitioner argues that such a procedure placed an impossible burden on him to produce evidence in the penalty phase to rebutt evidence found beyond a reasonable doubt in the guilt phase. This court concluded in Andrews that the structure and application of the Utah statute and comports with the Constitution. The claim raised in Selby does not persuade the court to reach a different conclusion.
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> * * *
>
> Even if a defendant presents no evidence of mitigating circumstances, the sentencer must find at the penalty phase that he aggravating circumstances found at the guilt phase make the death penalty appropriate.
>
> * * *
>
> The fact that a reasonable doubt standard was not required at the

> penalty phase does not aid petitioner's argument. As noted in Andrews, supra, the process of weighing aggravating and mitigating circumstances is not susceptible to proof. Indeed, "sentencing decisons rest on a far reaching inquiry in the countless facts and circumstances not on the type of proof of a particular element that returning a conviction does.

600 F.Supp. 434.

Thus, assuming that Petitioner's counsel should have raised the issue pursuant to State v. Dixon, 283 So.2d 1 (Fla. 1973), it is clear under Ramos and under Selby v. Shulson, supra, that there was no error in this proceeding. Furthermore, Appellant's citation to Arango v. State, 411 So.2d 172 (Fla. 1982), is misleading. At page 174 of Arango this Court stated although portions of the jury instructions might suggest an improper shift of burden, a reading of the entire instruction indicates that no reversible error was committed in that case.

Petitioner's cursory argument that prejudice is obvious overlooks one critical factor. This Court recently reaffirmed its position that the sentencing jury in Florida's trifurcated capital scheme is merely advisory. The trial judge, alone, makes the ultimate decision as to sentencing in capital cases. Combs v. State, 13 F.L.W. 143 (Fla. Feb. 18, 1988) and Ford v. State, 13 F.L.W. 150 (Fla. Feb. 18, 1988).

Clearly, under this standard, Appellant has wholly failed to

establish fundamental error.

B. The Jury Vote

A complaint about the way a jury is instructed as to the required vote for life imprisonment is a matter for direct appeal. It is not cognizable by this type proceedng.

Assuming, arguendo, there was error, it was harmless. See Argument I, supra.

C. The Alleged Failure to Instruct On the Underlying Felony in a Capital Felony Murder Prosecution

This claim is barred due to failure to raise on direct appeal. It is not error, and certainly not fundamental error. McCrae v. State.

D. The Gardner Remand

This claim is procedurally barred. It is also frivilous. Defense counsel requested the report. There is no evidence on the record to suggest counsel was unaware of the reports.

E. Diminishing the Jury's Sense of Responsibility

This claim is barred. Phillips v. Dugger, 515 So.2d 227 (Fla. 1987).

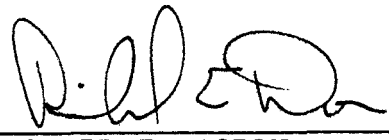
IV

CONCLUSION

Based on the above-cited legal authority, Respondent prays this Honorable Court deny the petition for writ of habeas corpus with prejudice.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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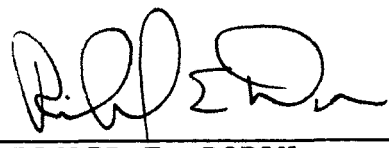
COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been forwarded by U.S. Mail to Billy H. Nolas, Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, on this 17th day of March, 1988.



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