IN THE SUPREME COURT OF FLORIDA

ED CLIFFORD THOMAS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 72,154

ANSWER BRIEF OF APPELLEE

On Appeal from the Seventeenth Judicial Circuit Court In and For Broward County, State of Florida

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PRELIMINARY STATEMENT

Appellee was the prosecution and Appellant the defendant in the Criminal Division of the Circuit of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court except that Appellee may also be referred to as the State.

The following symbols will be used:

"R" Record on Appeal

"AB" Appellant's Initial Brief

All emphasis has been added by Appellee unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Appellee adopts the statement of the case and facts as enunciated by this Court in Thomas v. State, 456 So.2d 454, 456-57 (Fla. 1984), verbatim, with the additional information that Appellant's State Petition for Writ of Habeas Corpus was denied, and this Court stayed the execution, as the Governor signed a warrant on March 11, 1986; Thomas v. Wainwright, 495 So.2d 172 (Fla. 1986).

Appellant Edward Clifford Thomas stands convicted of the premeditated murders of

James Walsworth, an elementary school principal, and Russell Bettis. On the night of December 2, 1980, James Walsworth's body was found lying beside his car in a parking lot. He had been stabbed in the chest. The next morning Russell Bettis was discovered lying unconscious in an alley near the parking lot. Bettis had been severely beaten. He never regained consciousness and died several months later. Appellant was sentenced to life imprisonment for the murder of Walsworth and to death for the murder of Bettis. For the reasons that follow, we affirm the convictions and the sentence of death.

A few days after the discovery of the Walsworth homicide, the police received a call from a citizen informant who said that appellant Thomas had killed the school principal and attacked Bettis, and told the police where Thomas worked. On December 8, 1980, several detectives went to appellant's place of work and asked him to accompany them to their offices for questioning. Appellant agreed and on the

way to the police station said, "I know what this is all about. I beat up Russell, but I didn't kill the principal." At police headquarters, the officers advised appellant of his constitutional rights and appellant signed a form giving his consent to be questioned.

At first appellant told the police that he had been in a fight with Bettis several weeks prior to when the injured Bettis was found. Then he admitted giving Bettis a beating on the night of December 2. The officers had him repeat his statement and they recorded it on tape. After a short interval, the officers again advised appellant of his rights and he again agreed to be questioned. This time they asked him about the murder of Walsworth. At first appellant denied knowing anything about it, but later admitted that he killed Walsworth. After questioning appellant about the details, the police took the second confession in tape-recorded form.

Appellant was initially charged with first-degree murder for the killing of

Walsworth and the attempted murder of Bettis. After Bettis died, however, the latter charge was amended so as to charge a second count of murder in the first degree. In addition to his confessions, the evidence at trial included the testimony of two other persons -- appellant's father and the citizen who initially notified the police -- who testified to incriminating admissions on the part of the appellant. The jury found appellant guilty of first-degree murder on both counts.

After the sentencing hearing, the jury recommended life sentences for both murders. The judge followed the recommendation with regard to the murder of Walsworth but, finding additional aggravating circumstances associated with the subsequent murder of Bettis, imposed a sentence of death for the second murder.

Appellant contends that there is insufficient evidence to support his conviction for the premeditated murder of Russell Bettis; that the trial court erred in refusing to exclude appellant's

confessions from evidence; that the trial court erred in allowing testimony about blood found on appellant's shirt; and that the trial judge made an improper and prejudicial comment concerning a defense witness. Appellant also contends that the sentence of death is improper and that the death penalty law is unconstitutional.

Thomas v. State, **456** So.2d **454, 456-57** (Fla. **1984).**

Appellee would specifically take umbrage with Appellant's characterization of the jury's initial return "without a verdict ... ." (Appellant's Brief at p. 1). The jury noted the difficult situation, but was at no point deadlocked.

SUMMARY OF ARGUMENT

CLAIM I

The evidence presented to the trial court and the allegations raised in Appellant's **3.850** Motion did not warrant an evidentiary hearing as the record conclusively demonstrates that Appellant is not entitled to relief.

CLAIM II

The trial court permitted extensive argument and testimony as to nonstatutory mitigating factors. The fact that his sentencing order was non-specific as to the nonstatutory

factors does not translate to nonconsideration. The jury was properly instructed; and the trial court properly determined that the aggravating factors far outweighed all factors in mitigation.

CLAIM III

Trial counsel was not ineffective. Any evidence not before the jury was before the judge. The jury recommended life imprisonment which is a strong indication he was effective. The jury override is not an indication of ineffective assistance of counsel, but rather, that the facts warrant the capital sentence.

CLAIM IV

Trial counsel was not denied an opportunity to rebut the findings in the PSI. He had notice of the report prior to sentencing. Any actual error or deficiency did not result in prejudice to Appellant as the trial court was aware of P.S.I. deficiencies. Further the PSI information was cumulative to other evidence before the court.

CLAIM V

The trial court properly overrode the jury's recommended life sentence for the murder of Russell Bettis. The four aggravating factors far outweighed the two factors in mitigation.

CLAIM VI

Appellant was not subjected to improper cross examination. Questions asked were in direct response to direct or redirect examination and did not delve into protected areas.

CLAIM VII

The trial court did not give the jury a "dynamite" charge as alleged. The jury was never deadlocked. Whatever concern jurors had, inheres to the verdict.

CLAIM VIII

Appellant did have the benefit of competent psychiatric evaluation. Dr. Zager did have access to Appellant's past psychiatric history. Evidence presented by Dr. Smith, in a post-sentencing evaluation, is cumulative to Dr. Zager's report and other P.S.I. data.

CLAIM IX

The United States Supreme Court mandates that residual doubt is not a mitigating factor.

CLAIM I

THE TRIAL COURT APPROPRIATELY DENIED APPELLANT'S MOTION FOR POST-CONVICTION RELIEF, WITHOUT THE NECESSITY OF AN EVIDENTIARY HEARING, SINCE THE RECORD DEMONSTRATES CONCLUSIVELY THAT APPELLANT WAS NOT ENTITLED TO RELIEF ON ANY CLAIM.

Appellant maintains that the trial court erred in denying claims in his post-conviction relief motion, without an evidentiary hearing. It is clear from the nature of such claims, and the Record of Appellant's trial and sentencing proceedings, that five (5) of these were inappropriately brought on a collateral basis, and were, along with the remaining claims,

conclusively rebutted by the Record so as to mandate affirmance of the trial court's denial of relief. Appellant, on December 8, 1980, confessed to having murdered James Walsworth and Russell Bettis.

This Court has consistently held that in a capital case, where both the motion and Record conclusively demonstrate no entitlement to relief, a capital defendant is not entitled to an evidentiary hearing.

> A motion to vacate judgment may be denied without an evidentiary hearing where the motion and the record of the case conclusively demonstrate that the movant is entitled to no relief. Lightbourne v. State, 471 So.2d 27 (Fla. 1985). Here the trial judge, who was the same judge who presided at the proceedings when appellant ... was sentenced, could reasonably and properly have determined that appellant was conclusively shown to be entitled to no relief.

Agan v. State, 503 So.2d 1254, 1256 (Fla. 1987) (emphasis added); Herring v. State, 501 So.2d 1279 (Fla. 1987); Harich v. State, 484 So.2d 1239 (Fla. 1986); Mann v. State, 482 So.2d 1360, 1361-62 (Fla. 1986); Troedel v. State, 479 So.2d 736, 737-738 (Fla. 1985); Porter v. State, 478 So.2d 33 (Fla. 1985); Middleton v. State, 465 So.2d 1218 (Fla. 1985). Appellant's motion, when viewed in light of a Record that he selectively ignores in his brief, clearly demonstrates that the trial court correctly determined that all claims could be denied, without resort to an evidentiary hearing. Agan, supra; Herring, supra; Harich, supra; Porter, supra; Middleton, supra.

It should initially be noted that the trial court correctly and appropriately determined that several of Appellant's claims were improvidently raised on a motion for collateral relief. Specifically, the trial court's conclusions that Appellant's instant claim V (the alleged unconstitutionality of Florida's override procedure, both factually and as applied); II (alleged failure of trial court to consider nonstatutory mitigating factors; VII (the alleged impropriety of the jury's verdict); VIII (the alleged denial of access to a mental health expert); VI (improper cross examination by the prosecution); was appropriately based on the fact that such claims were, (trial court order of denial), should or could have been raised by objection at trial, and direct appeal. Stone v. State, **481** So.2d **478** (Fla. **1985**); Sireci v. State, **469** So.2d **119** (Fla. **1985**); Middleton, supra; O'Callaghan v. State, **461** So.2d **1354** (Fla. **1984**); Meeks v. State, **382** So.2d **673** (Fla. **1980**). Because this Court has consistently held such claims to be non-cognizable on a motion for post-conviction relief, Appellant's arguments to the contrary are totally without merit. Id.

Appellant raised ten claims in his Motion to Vacate Judgment and Sentence, and in this instant claim on appeal alleges impropriety in the trial court's denial of an evidentiary hearing on these issues. His main claim is that his trial counsel was ineffective at sentencing. Appellee posits that the fact that the jury recommended a life sentence **(R. 1315)** belies this allegation as Appellant was convicted of two first degree

murder charges (R. **1246).** This claim cannot be appropriately analyzed without specific and careful reference to the standard and relevant criteria as set forth in Strickland v. Washington, **466** U.S. **668, 104** S.Ct. **2052, 80** L.Ed.2d **674 (1984).** In Strickland the Court announced the appropriate two-part test to be met by a defendant claiming that trial counsel was ineffective:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable, Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland at **687.** It is Appellee's contention that allegations of ineffective assistance of counsel, addressed more fully, infra, claim 111, before the sentencing judge, notwithstanding a claim of unpreparedness, are without merit as the trial court reviewed the PSI report which contains the purportedly omitted information that allegedly would have lead the trial court to validate the jury's life sentence by finding life imprisonment to be appropriate. Allegations of ineffectiveness at sentencing has, as to the jury, not proven to result in prejudice; and as to the trial judge, to be harmless as the same information, was before the judge in the PSI report.

The ultimate question then, is in denying the Appellant an evidentiary hearing were the claims raised in his **3.850** motion conclusively without merit? To answer that question, Appellee posits that the evidence before the trial court required his override of the jury's recommendation. Where the jury's advisory recommendation is a life sentence which the court deems inappropriate under the law, the court "not only may, but must overrule the jury **...** ." Brookings v. State, **495** So.2d **135, 145** (Fla. **1986).** The override will be sustained where the facts are so "clear and convincing that virtually no reasonable person differ," Tedder v. State, 322 So.2d 908, **910** (Fla. **1975).** Clearly, in the case at bar the trial court properly considered all evidence in mitigation of Appellant's sentence, but properly found the weight of the evidence to support death. The trial court's decision is supported by competent substantial evidence. No reasonable person could differ as to the necessity of the death sentence, notwithstanding Appellant's repudiation of his confession.

Appellant's Motion alleged the omission of evidence of Appellant's negative childhood -- his mother left the family, an abusive and alcoholic father, learning disabilities, and Appellant's life on the streets. The trial court had this evidence before him prior to imposition of sentence. The trial judge specifically waited for the P.S.I. wherein aspects of Appellant's childhood were presented for review.

The defendant evaluates his present health as "excellent."

Mental: Subject related he has never suffered from any mental or emotional problems. It is this Officer's opinion that the subject does not suffer from any delusional thinking and displays an attitude that he can discern right from wrong.

According to Arnold S. Zager, M.D. P.A. "there is rather significant past psychiatric history which apparently has a most direct bearing upon the present crimes. The subject was born in Marion, Illinois, and raised primarily in Detroit, Michigan. He was initially raised by his father and mother but apparently his mother deserted the family when the subject was only age 7. He was thereafter raised by his father and future stepmother. The subject additionally had an older brother, age 23, and a younger sister, age 19. He recalls his father being an alcoholic and an apparent child abuser. He described a rather stormy and tumultuous and conflictual childhood, wherein he was frequently savagely beaten by his father on only limited provacation. [sic]" He specifically recalls that at age 6, he was whipped by his father with a dog chain and later on by a broom handle. He recalls that he was primarily the child who was physically abused and punished by the father in contrast to the other two siblings. He states that he always had an angry and stormy relationship with his father, whom he pictures as a rather brutal, sadistic individual. He parenthetically adds that he thought more of a science teacher in his school than of the relationship that he had with his father. He alluded to feelings of depravation and isolation which were prominent feelings and features of his growing years.

In order to gain social acceptance by his family and the world, he became the class clown. In fourth grade and thereafter, he

went to great lengths to make his fellow school children laugh at his humor. He was also accused of being the bully of the neighborhood, specifically by his father. He impulsively quit school in the 9th grade and apparently engaged in various run-a-way behavior. At age 14, he ran away to California and on his way there hitchhiking, had his first homosexual experience. The subject describes himself basically as a bi-sexual individual who is physically attracted to women but feels out of place and extremely self conscious engaging in relationships with them. He notes that any homosexual relationships are typically associated with older men. Indeed when he meets a homosexual of his own age, he thinks of him more as a competitor for "clients" rather than a possible sexual object itself. His particular attraction and involvement in homosexual relationships only with older men may have a direct baring upon his rather stormy and sadistic relationship that he experienced with his natural father.

Mental status examination discloses a husky, muscular well built young white male who was quite cooperative to the interview setting and related in reasonable and positive fashion to this particular physician. His nails were bitten down and he was dressed in a t-shirt and pants. As the interview progressed, he appeared to pick at pimples present on his face. There was no over [sic] evidence of a psychotic thought disorder during the interview nor did he manifest evidence of a schizophrenic process. His associative processes for the most part were in tact, although self image and self esteem were significantly impaired. He did not manifest evidence of delusions, halucinations [sic] nor ideas of reference. Sensorium was in tact as judged by orientation to time, person and place; and memory for recent and past events appeared to be fair. General finding of information was in the below average range, although patient was

competent and aware of the present charges facing him.

His judgement and insight at times are impulsive and likewise impaired.

It is also noteworthy that the subject is quite aware that he may very well be given the death penalty if he is convicted of these charges. He adds, "I want to die on my terms. I don't care if I die, but I want to be crucified. He states that he would like such a crucifixion to be placed on national television and feels that it would be quite reasonable that the Pope of the catholic church would make a special trip to this country to witness such a crucifixion. [sic] He states this with a rather calm and quite demeanor.

Impression:

While Ed appears to know the difference between right and wrong at the time of the committment [sic] of the alleged crime, there appear to be rather definite and significant factors which have a direct bearing upon his carrying out such an act. His apparent history of being physically and perhaps sadistically abused by his father, may have provoked the intensive anger and rage expressed at the victim (Mr. Walsworth). He again felt abused and perhaps ridiculed by Mr. Walsworth and, indeed may have transferred the rage that he felt for many years at his father for his constant physical harrassments [sic], to the victim, who may have been comparable in age to his father. The very act of getting even with Mr. Walsworth may have been his unconscious attempt to get even for the evils that he felt may have directly impaired his ability to conduct himself in a reasonable degree and to reasonably appreciate the criminality of his acts. That is not to say that he was psychotic at the time, but he was under significant emotional diress [sic]. I would likewise add that when he was interrogated by the Detectives and Police Officers one week later, the stress of

that environment may have again rekindled his interrogation and abuse by his father of many years ago and he may very well have admitted to any and all acts to be again free of such harrassments [sic].

Employment: The defendant's only employment record in the Ft. Lauderdale area is a sporatic [sic] one as a Laborer for the Labor Poll located at 101 SW 2nd Street, Ft. Lauderdale, Florida. The subject stated he has no specific trades or years of experience and his preferred employment would be that of a Laborer.

Subject related that he had managed financially by residing in a paramour relationship with Bill Ayers and therefore did not contribute financially for his room and board.

Economic status: The subject stated he has absolutely no assets nor any liabilities. The subject estimates his net worth to be zero.

STATEMENTS OF COURT OFFICIALS AND OTHERS:

. . . . .

Defense Attorney: Norman Kent, stated that he would reserve comment until the time of sentencing however stated that life imprisonment would be an appropriate sentence.

Law Enforcement: Detectives Jones and Fuch never responded to this Officer's request for comments.

Bill Ayers, the defendant's past lover and adoptive father stated "as of July 6, 1981 we have changed our relationship to that of father-son. I know he didn't do it. He told the police that he did it because he was drunk. He lived with me since November, 1978. I trusted him to take care of my grandmother and she's 81 years old. I would stake my life on him. Ed says Tom Woods did it. I know that there is no way that the kid could ever hurt

anyone. I've never seen him show any signs of violent behavior. He used to stay with me three or four days and then go visit his friends. He's not a drifter. We were separated from June til [sic] the end of October. He went up North and I went to California. I don't think we'll have any problems with the father-son relationship even though we had a sexual one in the past. We both have the same religious beliefs. I'm glad it's changed now because we never really either one of us wanted a sexual relationship. Ed's 20 years old going on 15 and he's got the education of a 12 year old. He belongs at home with me getting the rest of his education so he can become the man I know he can be instead of sitting in jail convicted of 2 murders that I know he didn't commit."

Mrs. Bonnie Thomas, the defendant's step-mother stated, Ed was a good kid until he turned 16 and then he turned into a Jyckle [sic] and Hyde type character. Anything anyone told him to do he would do it. He started running around with a bad bunch. We had suspicions that he used drugs before. I think that's what he was doing when he went to the hospital in Texas. I tried to get him to see a Psychiatrist. He'd steal things from the house and just come back a couple of weeks later like nothing had happened. He did this so many times. He's a person with no conscience. He'd like a little baby at times that didn't know the difference between right and wrong. Anytime he had a problem he always used other people as an excuse. He may be wanting pity so he's telling these stories about being beat. I begged him to see a Psychiatrist but he said wasn't nothing wrong with him, that it was everybody around him. I don't know anything about him being a homosexual but I think maybe it's just another excuse. Do all you can for a kid but the choices are still up to them in the end."

Mr. William Thomas, the defendant's father stated, "I kept telling him he would get

> into trouble. He wouldn't listen. He felt he knew every thing. Sure I punished him when he did wrong and I'd do it again. But the stuff he's been saying about me hitting him with a lead pipe that never did happen. I treated him like anyone else. The court will have to make the decision of what to do with him. Whatever they give him he'll just have to go along with."

(P.S.I. Report at pages 6-8). The trial court heard the evidence at trial where evidence of Appellant's abused childhood was put on record (R. 1279-90). The court additionally heard evidence sufficient to repudiate Appellant's contentions -- specifically regarding his potential for rehabilitation (R. 1254-1270).

Appellee respectfully regards this Court's holding in Agan, supra and Harich v. State, 484 So.2d 1239 (Fla. 1986) to be the proper precedent warranting affirmation of the trial court's opinion.

> With regard to the claim of ineffective assistance of counsel for failure to present the testimony of Harich's family members at his sentencing hearing, we have reviewed the proffered evidence and concluded that there is no reasonable probability that the result of this trial would have been different had the evidence been presented.
>
> Accordingly, we affirm the trial court's order denying appellant's motion for post conviction relief ...

Id. at 1241. Appllee respectfully requests this court's affirmation of the trial court's denial of Appellant's 3.850 Motion.

CLAIM II

THE TRIAL COURT CONSIDERED ALL FACTORS IN MITIGATION OF APPELLANT'S SENTENCE.

The jury's recommended sentence was life imprisonment. Any allegation that the trial judge failed to consider or instruct on nonstatutory mitigating factors as it relates to the jury is without prejudice to Appellant.

> Despite the fact that this evidence was [allegedly] not presented, Eutzy received a life recommendation from the jury. There is no indication that the trial judge would have followed the jury's recommendation had counsel presented evidence of these factors during sentencing.

Eutzy v. State, 13 FLW 712, 713 (Fla. December 8, 1988). The trial judge, in overriding the jury's **life** recommendation, had at his disposal both statutory mitigating and nonstatutory mitigating factors. The judge's instruction did not preclude nonstatutory factors. The judge instructed on the statutory factors (R. 1310) and then stated, "You should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion **...** ." (R. 1311). Preliminarily, it is Appellee's position that this argument could and should have been brought up on direct appeal. Eutzy v. State, 13 F.L.W. 712 (Fla. December 8, 1986). Further, this claim was considered by this Court in Appellant's habeas corpus proceedings.

> It is not lightly to be concluded that the trial court disregarded the law, under which he was required to consider any matters presented that were relevant to any reasonable ground of mitigation, statutory or nonstatutory. Indeed, an appellate court presumes that a trial court judge followed the law. The fact that in his sentencing findings the trial judge does not specifically address the defendant's evidence and arguments presented in support of mitigating factors does not mean he did not consider all the matters presented. Brown v. State, 473 So.2d 1260, 1268 (Fla.), cert. denied, ___ U.S. ___, 106 S.Ct. 607, 88 L.Ed.2d 585 (1985). The defense was freely allowed to present evidence and argument to the judge and the jury based on both statutory and nonstatutory mitigating circumstances. This indicates that the judge did not exclude nonstatutory mitigating factors from his consideration Middleton v. State, 465 So.2d 1218, 1226 (Fla. 1985).

Thomas v. Wainwright, 495 So.2d 172, 174 (Fla. 1986) (emphasis added). This claim is therefore improperly before this Court.

Appellant claims that had the judge considered his potential for rehabilitation -- a nonstatutory mitigating factor, evidence of which was presented during the penalty phase (R. 1254-1273) -- that that would have rendered imposition of the death penalty erroneous. Further evidence of rehabilitation and testimony that Appellant was a model prisoner would not have been sufficient to negate imposition of the death penalty. In Francis v. Dugger, 2 FLW Fed. D529, 530 (S.D. Fla. October 7, 1988) the Court, considering the jury override, found that evidence of being a model prisoner and no significant history of prior criminal activity were insufficient "because it would not be

reasonable for a jury to recommend sentence of life based only upon the mitigating factors presented. See Harmon v. State, 527 So.2d 182, 189 (Fla. 1988). ... This conclusion is reinforced when weighed against the strong aggravating factors in this case ... ." Id. Sub judice there were four factors in aggravation affirmed. Thomas v. State, 456 So.2d 454, 459 (Fla. 1984). Appellant also alleges (Initial Brief at 8) that the trial judge relied on a PSI where the preparer misconceived the law. Such allegation is swiftly negated by the simple fact that while the PSI preparer found Appellant's age not to be a mitigating factor, the trial judge found age a factor in mitigation (R. 1366).

The trial court considered the PSI report. It cannot, therefore, be assumed that the judge did not consider Appellee's abused childhood, his good behavior in jail, friendliness to others, and his potential for rehabilitation. Brown v. State, 473 So.2d 1260, 1268 (Fla. 1985). As in Daughterty v. State, 419 So.2d 1067, 1071 (Fla. 1982), the Appellant does not allege that the trial court prevented introduction of nonstatutory mitigation facts. "The Court expressly stated that it considered and weighed all the testimony and evidence." Id. at 1071. Sub judice the trial court liberally gave defense counsel rein to introduce nonstatutory, mitigating evidence as well as having asserted that "after weighing the aggravating and mitigating circumstances, being of the additional opinion that no sufficient mitigating circumstances exist to outweigh the aggravating

..... ." (R. 1368) (emphasis added). By no means did the trial judge indicate that he did not consider all factors in mitigation.

> As we have previously stated, it is within the province of the trial court to decide whether a particular mitigating circumstance in sentencing has been proven and the weight to be given it.

Daugherty at 1071. See also Johnson v. Wainwright, 806 F.2d 1479, 1484 (11th Cir. 1986).

The discussion in Martin v. Dugger, 2 FLW Fed. D233 (S.D. Fla. June 1, 1988) indicates that "District Courts facing Lockett challenges must now look closely at the jury instructions, in the context of the entire trial, to determine whether to issue the writ on that claim." Id. at 238. The jury instruction at the guilt phase indicates the judge instructed the jury to consider all the evidence. "You are impaneled and sworn only to find a verdict based upon the law and the evidence." (R. 1230). A claim similar to that presented sub judice, was presented in Scott v. Dugger, 2 FLW Fed. D260 (S.D. Fla. May 26, 1988).

> It is clear that while a Florida trial court has an obligation to hear all potentially relevant mitigating evidence, it does not actually have to regard the proffered evidence as mitigating against the death sentence. Harich, 813 F.2d at 1101, aff'd on this issue, ___ F.2d ___, (11th Cir. April 21, 1988); Raulerson, 732 F.2d at 808. The trial court therefore committed no error by not identifying Scott's sister's and mother's testimony as providing mitigating evidence.

Id. at D270. The Court in Harich v. Wainwright, 813 F.2d 1081 (11th Cir. 1987) provides further grounds upon which this Court may rely in denying the instant claim.

> Petitioner argues that the trial court's analysis violates the rule that a capital defendant is permitted to present all relevant mitigating evidence to the sentencing body. See Skipper v. South Carolina, U.S. ___, 106 S.Ct. 1669, 90 L.Ed.2d 1 — 86); Eddings v. Oklahoma, 455 U.S. 104, 110, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978). Petitioner misconstrues these cases. Skipper, Eddings, and Lockett require that the defendant be allowed to present all relevant mitigating evidence to the sentencing jury or court. In this case, petitioner was given the opportunity to present such evidence. These cases do not require that the sentencing body accept the conclusion that the evidence constitutes a mitigating circumstance or that the mitigating circumstances outweigh the aggravating circumstances.

Harich at 1101. The mere fact that a trial court's order discusses only statutory mitigating factors does not warrant a conclusion that the other evidence in mitigation was not considered. Straight v. Wainwright, 772 F.2d 674, 678 (11th Cir. 1985); Funchess v. Wainwright, 772 F.2d 683, 691 (11th Cir. 1985); Palmes v. Wainwright, 725 F.2d 1511, 1523 (11th Cir. 1985). Sub judice there is no indication that the trial court in any way limited its consideration to only statutory mitigating factors. See Johnson v. Wainwright, 778 F.2d 623, 629 (11th Cir. 1985). At this penalty phase, trial counsel was allowed to argue from the Bible (R. 1297), talked at length about the Appellant's

confused and troubled past (R. 1298), how his family had abandoned him and forced him to live on the streets (R. 1299-1300), that the Defendant was a victim of society (R. 1300), that the Appellant's homosexuality should not be a reason to give him the death sentence (R. 1302), and finally counsel began to describe an actual electrocution (R. 1303). None of these factors are within the statutory mitigating, yet were allowed by the trial court at sentencing phase.

Appellant misinterprets the trial court's comments at the motion for rehearing. (Initial Brief at 7). The discussion was based on defense counsel's opinion of which factors in mitigation the jury considered. Mention of hope for rehabilitation (R. 1375) elicited the judge's response that such factor was not in the mitigating -- the judge did not state that this was not considered by him. This comment merely establishes only the trial court's finding that the testimony about Petitioner's rehabilitation did not rise to the level of mitigation in the instant case. So long as the testimony and evidence is reviewed, it may be given little, some or no weight at all. Eddings v. Oklahoma, 455 U.S. 104, 114-115 (1982).

Appellee asserts there was no showing of nonstatutory mitigating circumstances which, viewed from the judicial bench and stripped of emotionalism, should be reasonably found to exist. Petitioner asserts his living the life of the "street world" and being "preyed upon" by "older, experienced and moneyed men" is a nonstatutory mitigating factor. Yet the evidence shows

Appellant lived in a home, caring for his friends infirm mother, and was loved almost as a son by his lover **(R. 1254-55).** As to being "preyed upon" by moneyed men, Appellee must protest that this case stems from Appellant's murder of a man because of a **$150.00** debt. Appellant next asserts his broken home upbringing produced emotional distress. This could arguably approach a statutory mitigating circumstance, but the trial court rejected the circumstance of extreme mental or emotional disturbance. **(R. 1366, 1547).** The next assertion combines an addition to the above two assertions with an assertion that Appellant was at a "fifth grade level." Appellant was, in fact, at the sixth and seventh grade level. He completed eighth or ninth grade **(R. 671),** a grade in school not even reached by 20% of the United States population. (1980 United States Census). Appellant's next assertion also merges with his home life problems. The assertion that Appellant was nonviolent, was certainly rebutted by his conviction for two first-degree murders, as is the next allegation, that he was never angry and was kind. The next alleged nonstatutory mitigating factor, that he was no problem in jail, could be expected of a prisoner kept isolated as was Appellant. **(R. 1276).** The next alleged nonstatutory mitigation factor argued by Appellant is that one man who was sexually attracted to Appellant, and who did not think he was guilty, despite the jury's verdict, thought he had a prospect for rehabilitation. (R. **1266).** Another man who had an intimate relationship with Appellant, who believed Appellant would "give

you the shirt off his back" (although he beat up Bettis for taking a pair of socks), said Appellant "has a prospect for rehabilitation" because of his youth. (R. 1268). The trial court did find Appellant's youth was a mitigating factor. (R. 1367, 1547).

The amount of evidence is not a proper factor for consideration as a mitigating circumstance. Buford v. State, 403 So.2d 943 (Fla. 1981), cert. denied 454 U.S. 1163.

Appellee takes exception to Appellant's allegation that Herzog v. State, 439 So.2d 1372 (Fla. 1983) was reversed upon the basis that no nonstatutory mitigating circumstances were considered. In fact, that case was reversed because three of four aggravating circumstances were held invalid by this Court. Appellant has taken similar liberties in his implication that the trial court "ignored" nonstatutory mitigating circumstances in Jackson v. State, 464 So.2d 1181 (Fla. 1985), Livingston v. State, 429 So.2d 235 (Fla. 1984), and O'Callaghan v. State, 429 So.2d 691 (Fla. 1984) where appellant conceded that there were no mitigating circumstances. Appellant asserts that based upon these and other cases appellate defense counsel was ineffective for not raising this issue on appeal. Appellee would point out that the issue of whether the trial court did or did not consider evidence of nonstatutory mitigating circumstances was not raised on direct appeal in Jackson, Livingston or O'Callaghan, supra, and there is no proof in the Appellant's pleadings that the issue has been raised to any greater extent than in the instant case on

direct appeal in any other cases arising in Judge Coker's court, or that appellate counsel have been found ineffective for not raising the issue.

In fact in the "Rule 3" action in O'Callaghan, at 461 So.2d 1354, this Court did not find appellate counsel to be ineffective.

At the time of sentencing the trial court was well aware of the decision in Lockett v. Ohio, 438 US 586 (1978). It cannot be presumed that the Court disregarded its mandate. See Baldwin v. Alabama, 472 US 372, 385 (1985) (Court presumed that trial judge knew the Alabama system).

> [T]he general rule is that as long as the evidence is evaluated, it properly may be given little or no weight at all. [citation omitted].
>
> In this case, the trial court explicitly demonstrated that it had met its constitutional burden. It heard extensive evidence in mitigation ... .
>
> In summary, Lockett stands for the proposition that the sentencer must consider all mitigating evidence. After so doing, it then is generally free to accord that evidence such weight in mitigation that it deems fit.

Raulerson v. Wainwright, 732 F.2d 803 (11th Cir. 1984).

Finally, Appellant's attempt to bootstrap (Initial Brief at 10) his argument by citing other cases involving the same trial judge are totally without merit or support. In Herzog v. State, 439 So.2d 1372 (Fla. 1983), the case was reversed on the basis that three of four aggravating circumstances were held

invalid, not on the basis of nonstatutory mitigating circumstances not being considered. It should also be noted that in the instant case, unlike in Herzog, the trial court made in effect a finding that the jury's recommendation was based on emotions. (R. 1379). In Jackson v. State, 458 So.2d 1181 (Fla. 1985) and Livingston v. State, 458 So.2d 235 (Fla. 1984), both cases were reversed on errors during the trial stage, and sentencing issues were not discussed. In fact, the issue of nonstatutory mitigating evidence was not raised. The same is true in O'Callaghan v. State, 461 So.2d 1354 (Fla. 1984) and Wilson v. State, 436 So.2d 908 (Fla. 1983). Any new sentencing orders used by the trial judge in State v. Thompson, 84-148CF, reflect only an attempt by the Court to finally end meritless litigation on this issue.

The trial court considered all factors in mitigation. Although stated for another purpose, Appellant's references to trial testimony regarding his life in an "under world of degradation and anarchy, where ... drugs alcohol, crime, abject poverty, and illicit homosexual prostitution were pervasive'' (Appellant's brief at 11); of his broken and abusive home, his abandonment and emotional problems, Id. at 12, clearly indicate that nonstatutory evidence was before the judge. Appellant received an individualized sentencing which mandates this Court's affirmation.

CLAIM III

TRIAL COUNSEL PROVIDED EFFECTIVE ASSISTANCE AT ALL PHASES.

Preliminarily, Appellee agrees with Appellant's preface regarding an unspecified defendant's right to an evidentiary hearing where ineffectiveness of counsel is shown. However, Appellee strongly disagrees with the applicability of those cases to the facts sub judice

PENALTY PHASE

Appellant's allegations of his counsel's ineffectiveness at the penalty phase are without merit. The jury recommended life imprisonment (R. 1315). Trial counsel did prepare mitigating evidence. (R. 1254-1290). Appellant's reference to Tyler v. Kemp, 755 F.2d 741, 745 (11th Cir. 1985) is therefore misplaced as no evidence of mitigation was presented in Tyler.

Appellant's reference to expert psychiatric assistance is addressed, infra, Claim VII. The propriety of the trial court's override is addressed infra Claim V, the Gardner issue is addressed, infra, claim IV, as was the issue regarding presentation of nonstatutory mitigating factors, Claim 11, supra.

Sub judice, the trial court overrode the jury recommendation of life. Trial counsel was not ineffective for failing to convince the judge that life imprisonment was

appropriate. The judge found two mitigating factors, Thomas v. State, 456 So.2d 454 (Fla. 1984), and ultimately four aggravating factors applied to Count 11, for which the death penalty was imposed. The judge had access to more mitigating evidence then did the jury, yet determined the life sentence to be unreasonable; Appellant confessed to both murders (R. 626, 631). Although trial counsel claimed to be unprepared for sentencing, he did call nine (9) witnesses at the penalty phase. Further evidence garnered by Appellant post-sentencing, is cumulative to the evidence that was presented. Testimony from Appellant's family duplicates Appellant's testimony (R. 1017-55, 1279-90) and the information in the P.S.I. Dr. Smith's evaluation contains much of the same information as does Dr. Zager's report (P.S.I. p. 6).

Appellant's allegation (Initial Brief at 24-41) that trial counsel failed to convince the trial judge of factors in mitigation to support the life recommendation is contrary to the record. See Dr. Zager's report and the P.S.I. Evidence of Appellant's childhood was before the Court. Appellant's father tied him up, hit him on the head with a wooden mallet. (R. 1281). Appellant is duplicitous in that he wants Dr. Zager's alleged finding of emotional distress to be considered, but fails to highlight Dr. Smith's report, which is referenced for other evidence of mitigation, that " ... the prisoner was not under the influence of 'extreme mental or emotional disturbance' when the felonies were committed ... ." (Initial brief at 40). Given

the penalty phase witnesses, notwithstanding trial counsel's purported unpreparedness, it cannot be legitimately said that trial counsel was ineffective. Prior holdings, on this issue, reflect an absence of penalty phase witnesses or a defense prior to a determination of ineffectiveness. Tyler, supra. In Thomas v. Kemp, 796 F.2d 1322 (11th Cir. 1986), defense counsel "made little effort to investigate possible sources of mitigation evidence." Id. at 1324. The Court determined that "the jurors were given no information to aid them in making such an individualized determination." Id. at 1325. So too, in Jones v. Thigpen, 788 F.2d 1101 (5th Cir. 1986), defense counsel "presented no mitigating circumstances at all. When the prosecution rested, he rested." Id. at 1103.

Given the presentation of nine sentencing phase witnesses, it cannot be said that trial counsel was so unprepared as to vitiate the trial court's override. Notably, trial counsel called the prison Director of Operations (R. 1273), who testified as to Appellant's good behavior. (R. 1275). Investigation had to have taken place. Counsel cannot be held ineffective for the trial court's ruling that sentencing would occur twelve hours after the conclusion of the guilt phase. Counsel objected to the short period in which to prepare. Trial counsel cannot be faulted for his unsuccessful attempt to contact Appellant's brother (R. 1250-52), as he obviously did "an investigation of the defendant's background, for possible mitigating evidence." Middleton v. Dugger, 2 F.L.W. Fed. C919, C920 (11th Cir. June 22, 1988).

Appellant contends that his counsel was ineffective by failing to include in the record on appeal the presentence investigation report. Appellee maintains, however, that in the case sub judice, the failure to so include the P.S.I. in the record on appeal was not ipso facto indicative of ineffectiveness, pursuant to the standards enunciated in Strickland v. Washington, **466** U.S. **668 (1984).**

Assuming arquendo, that counsel's performance relative to the record on appeal, could in any way be deemed deficient, Appellee maintains herein that, in light of those portions of the P.S.I. relied upon by Appellant and the trial court, said performance did not prejudice Appellant's defense on appeal to this Court. It is evident that much of the P.S.I. as represented by Appellant, was either cumulative in nature to testimony adduced at trial and already in the record, or irrelevant to the murder for which Appellant was sentenced to death.

Initially, the P.S.I. information relative to Appellant's family and personal background, education, interests and activities, and physical status, was merely cumulative to that information supplied by the Appellant in his trial testimony and in testimony as supplied by other witnesses. This is particularly true regarding information pertaining to Appellant's parents (R. **1281-82),** the father's drinking problem **(R. 1052, 1086,** 1281), the father's abusiveness (R. **1052-53, 1086, 1255,** 1285), father hitting Appellant with a wooden mallet (R. 1281), Appellant's education **(R. 78-80, 1008, 1044-45, 1280,** 1288),

Appellant running away (R. 1053, 1086-87, 1284, 1286), Appellant's alcohol consumption (R. 81-82, 981, 985-90, 1032-33), Appellant's sexual orientation (R. 1050, 1054-55), and Appellant's epileptic seizures (R. 1288-89). Regarding the P.S.I. assessment by Dr. Zager, much of the preliminary "mental" assessment was repetitive of the previous P.S.I. finding relative to Appellant's family life, personal life, and alleged abuse -- which was cumulative to information adduced at trial. As such, Appellee maintains that the Appellant was not prejudiced by the failure of counsel to provide this Court with the P.S.I. for consideration on direct appeal.

Appellant alleges ineffective assistance of counsel in that trial counsel did not correct the trial court's alleged non-reliance on the jury's recommended sentence. However, "[a]dvising the jury that its sentencing recommendation is advisory only is an accurate statement of Florida law." Cave v. State, 13 FLW 455, 456 (Fla. July 1, 1988). Trial counsel is not required to argue non-meritorious claims.

> It is not lightly to be concluded that the trial court disregarded the law, under which he was required to consider any matters presented that were relevant ... . Indeed, an appellate court presumes that a trial court judge followed the law.

Thomas v. Wainwright, 495 So.2d 172, 174 (Fla. 1986).

GUILT/INNOCENCE PHASE

Alleged ineffective assistance of trial counsel relative to the trial court's alleged "contempt" for homosexuals is out of context and without merit. Throughout the trial, the trial judge referred to people on a first name basis (R. i.e., 9, **1237, 1240, 1341, 1343),** in fact the judge told the jury:

> All right. I am going to introduce you to the attorneys and let them talk to you. First, we will hear from Mr. Hancock and then from Mr. Kent. Let me just bring up one other thing. I have a propensity to call people by their first names.

(R. 25) (emphasis added). Specifically, Appellant alleges that "[o]ther witnesses were not so referred to by first names or nicknames by the Court." (Appellant'sbrief at **46).** The judge did refer to witnesses by their first name: "Let me ask you this, Nancy, and make it easier." (R. **1343).** Facially, Appellant's instant claim is without merit.

Appellant's next allegation of ineffectiveness is essentially an allegation that only a clairvoyant could have avoided. "Counsel was not even aware that the juror had heard the statement, much less that all the jurors had." (Appellant's brief at **46)** (emphasis omitted).

> Appellant contends that the trial judge uttered an improper and prejudicial remark about one of the defense witnesses within the hearing of the jury. The defense witness in question was an admitted homosexual prostitute whose testimony about typical amounts paid for sexual services of male prostitutes was intended to undermine the state's evidence pertaining to the motive for the killing of one of the victims. After the witness had testified, the judge said, "Get him

> out of here." Defense counsel immediately approached the bench, objected, and moved for a mistrial. The judge denied the motion on the ground that the tone and expression of the remark were such that it was not likely to have been interpreted as a comment on the credibility of the witness. The judge also instructed the jury to disregard his remark and not to interpret it as reflecting on the character or credibility of the witness. We conclude that the curative instruction was sufficient to correct any negative inference the jury may have drawn from the comment. There is no basis for reversal on this point. Mayan v. State, 325 So.2d 442 (Fla. 3d DCA), cert. denied, 339 So.2d 1170 (Fla. 1976); Rembert v. State, 311 So.2d 199 (Fla. 3d DCA 1975). Even though the judge admitted at the bench that he found the defense witness disgusting, the words, "Get him out of here," may be seen as the judge's way of ordering that the trial should proceed with the calling of the next witness. The judge must supervise the trial so that it proceeds in an orderly fashion. See Hamilton v. State, 366 So.2d 8 (Fla. 1978).

Thomas v. State, 456 So.2d 454, 458-9 (Fla. 1984) (emphasis added). Clearly this issue has been litigated before this Court. Trial counsel is not deemed ineffective for failing to mind read. Trial counsel's objection and motion for mistrial were denied. (R. 966-69).

Appellant alleges that the trial judge's comment that alcohol makes him feel affectionate (R. 225) was worthy of an objection, as was his simplified version of the hearsay rule. (R. 382). Trial counsel was not ineffective for not objecting to these remarks, Strickland, as Appellant has not demonstrated error nor prejudice. "We agree with the state that appellate

counsel was not deficient for failing to raise this unpreserved meritless claim." Doyle v. State, 526 So.2d 909, 912 (Fla. 1988) (emphasis added).

Appellant contends that counsel was ineffective for failing to preserve the issue of backstriking. The record is clear that subsequent to the trial judge's backstriking prohibition, and objection thereto denied, defense counsel had no reason to backstrike any juror (R. 193-255). Appellant's allegations as to the possibilities of defense counsel backstriking, if he had not been prohibited from doing *so*, constitute nothing more than speculation. Conjecture is an improper basis for reversal. Jacobs v. Wainwright, 450 So.2d 2200, 201 (Fla. 1984); Ford v. Wainwright, 451 So.2d 471, 474 (Fla. 1984). The record of the voir dire is devoid of any indications of defense counsel's disapproval of the panel. Further, Appellant, pursuant to Strickland, has not demonstrated prejudice.

Appellant contends next that defense counsel was ineffective for failing to suppress statements made over the telephone to his father. Absolutely no valid reasons for suppression existed at the time, nor now, which would exclude a conversation between the Appellant and his father from jail. Appellant does not allege that his counsel knew of any purported illegality by the police which would have formed the basis of a motion to suppress; and thus counsel cannot reasonably be said to have been ineffective for failing to *so* move. Moreover, the very

brief testimony given by Appellant's father at trial (R. 671-82), did not affect the outcome given Appellant's own lengthy and detailed confession to the police (R. 807-823, 839-52). As the evidence of Appellant's confession was admitted, the father's statement that Appellant admitted having committed the murder did not prejudice Appellant. Strickland.

Lastly, Appellant argues that the alibi instruction was unconstitutional.

> One of the defenses in this case is an alibi, that is to say that at the time of the alleged crime the defendant was not at the place of the crime and that he was so far away that he could not have been at the place where the crime was committed.
>
> Where an alibi is claimed as a defense, it is not necessary that the alibi be proven beyond a reasonable doubt. It is sufficient as a defense if you have a reasonable doubt as to the presence of the defendant at the scene of the alleged crime. If there is such a reasonable doubt it is your duty to find the defendant not guilty.

(R. 1221, 1222). This instruction is in compliance with the Standard Jury Instruction 3.04(a) ALIBI.

> We think there are valid grounds for specifically instructing a jury that with respect to alibi the defendant must only elicit a reasonable doubt as to his presence at the scene of the crime ... .

Bolin v. State, 297 So.2d 317, 320 (Fla. 3rd DCA 1974). It is evident the jury instruction did not shift the burden. Further, the overwhelming evidence, the confession and testimony negate allegations of prejudice. Additionally, this is a claim that should and could have been raised on direct appeal, but was not.

Appellant has failed to demonstrate ineffective assistance of counsel. The unanimous life recommendation certainly vitiates a large part of Appellant's instant claim. The trial judge's override was determined notwithstanding trial counsel's strong argument recommending the life sentence. Trial counsel presented nine witnesses in mitigation. It is the Appellant's detailed confession and the other evidence at trial which mandated the capital sentence imposed. The trial court properly denied Appellant's 3.850 Motion and Appellee respectfully requests this Court's affirmance thereof.

CLAIM IV

APPELLANT WAS NOT DENIED AN OPPORTUNITY TO REBUT THE PSI BY THE TRIAL COURT. TRIAL COUNSEL RELIED ON ARGUMENTS MADE PRIOR TO P.S.I., YET INCORPORATED THEREIN.

Appellant claims, either as a matter of trial court error or ineffective assistance of counsel, that he was precluded from an opportunity to rebut the presentence investigation report. The State initially observes that the alleged trial court error could have been raised on direct appeal, and therefore is not properly raised in this proceeding. In fact, this position was presented to the Florida Supreme Court on the Appellant's Habeas Corpus petition, and again rejected.

> Petitioner says that his appellate counsel was ineffective in not arguing that the court had imposed the sentence of death based on information that defense

> counsel had no opportunity to explain, rebut, or deny in violation of Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). In this regard petitioner relies on the fact that defense counsel at trial did not review the presentence investigation report before sentence was imposed. However, there is no showing that defense counsel at trial did not have an opportunity to review and challenge the report before sentencing. While there is some suggestion that defense counsel at trial could have done more to prepare for the hearing at which sentences were imposed, this does not establish any ineffectiveness of appellate counsel as alleged in the petition. Because the defense had adequate notice of the final hearing on sentencing and of the availability of the report for review prior to that time, appellate counsel would not have been on firm ground in arguing that there was a Gardner violation. Where a particular legal argument, had it been argued, would in probability have been found without merit, the omission to raise it will not be deemed a deficiency. E.g., Jackson v. State, 452 So.2d 533 (Fla. 1984); Francois v. State, 423 So.2d 357 (Fla. 1982).
>
> Furthermore, it should be noted that trial counsel filed a motion for rehearing regarding the sentence. The trial court held a hearing on the motion, at which time the defense was given the opportunity to challenge the findings in the report. The trial judge addressed the objections orally but found no basis to revisit the matter of the death sentence. The judge indicated that he had considered the report, was aware of its deficiencies and had imposed sentence based on his independent judgment. Thus it is clear there was no Gardner-type infirmity and thus it would have been futile to argue the matter on appeal.

Thomas v. Wainwright, 495 So.2d 172, 173-74 (Fla. 1986). Thus, as a matter of law, this Court is precluded from considering this claim.

In order to successfully maintain this claim, the Appellant must demonstrate that the alleged inaccuracy of the presentence investigation report resulted in legal prejudice. Strickland v. Washington, **466** US **668 (1984).**

> Jones contends that his counsel's failure to show him the report or challenge inaccurate statements violated his right to effective assistance of counsel and requires that sentence be vacated.
>
> To prevail on such a claim a defendant must identify acts or omissions that are 'outside the wide range of professionally competent assistance.' Strickland ... . The defendant must show also that 'but for counsel's unprofessional errors, the result of the proceeding, would have been different.' Id. ....

Jones v. United States, **783** F.2d **1477**, **1482** (9th Cir. **1986).** Appellee maintains herein that Appellant has not made the required Strickland showing.

At the rehearing motion (R. **1371-82)** the trial judge indicated that the PSI was not his sole criteria for the override.

> THE COURT: Well, you will note, I am sure you have noted, that I didn't agree with all of the probation officer's suggestions, either. She recommended certain applied and certain didn't. I didn't agree with her on all of those.

(R. 1376). It is evident that much of the P.S.I., as represented by Appellant, was either cumulative in nature to the testimony adduced at trial and already in the record, or irrelevant to the murder for which the Appellant was sentenced to death.

Initially, the P.S.I. information relative to the Appellant's family and personal background, education, interests and activities, and physical status, was merely cumulative to that information supplied by the Appellant in his testimony at trial, and in the testimony of other trial witnesses. This is particularly true regarding information pertaining to the Appellant's mother and father (R. **1281, 1287-88),** brothers and sisters (R. 1281-82), father's drinking problem (R. **1052, 1086, 1281)** father's abusiveness (R. **1052-53, 1086, 1255,** 1285), father hitting Appellant with a wooden mallet (R. 1281), Appellant's education (R. **78-80, 1008, 1044-45, 1280,** 1288), Appellant running away from home (R. **1053, 1086-87, 1284,** 1286), Appellant's alcohol consumption (R. **81, 82, 981, 985-990,** 1032-33), Appellant's sexual orientation (R. **1050, 1054-55)** and Appellant's epileptic seizures (R. **1288-89).**

Regarding the P.S.I. assessment by Dr. Arnold Zager, much of the preliminary "mental" assessment was repetitive of the P.S.I. findings relative to Appellant's family life, personal life and alleged abuse -- which, as Appellee maintains, was cumulative to the information adduced in trial testimony. As to Dr. Zager's impressions, it is striking that they relate exclusively to Appellant's killing of Mr. Walsworth -- the crime for which Appellant was sentenced to life imprisonment -- and not in any fashion to the killing of Russell Bettis -- the crime for which Appellant was sentenced to death. Other cumulative information in the PSI relates to Appellant's employment (R. **1018)** and Bill Ayer's testimony. (R. **973-1009, 1254-1257).**

As such, Appellee maintains that the Appellant was not prejudiced by the alleged failure of counsel to review the P.S.I. report. The portions of the P.S.I. relied upon by Appellant are either cumulative to the information already in the record, or irrelevant to the murder of Russell Bettis.

On Thursday, August **20, 1981,** the trial court heard the Appellant's motion for a new trial. At the conclusion of the hearing, the court with counsel discussed the date for sentencing. **(R. 1356).** Defense counsel initially requested that the date be moved from August **26, 1981** to August **31, 1981.** (R. **1356).** The trial judge commented that he anticipated receiving the P.S.I. the next morning and that he was not going to do anything until he received the P.S.I. (R. **1356).** Defense counsel stated that he had wanted to go out of town for the weekend, and asked if the court could have the sentencing the next day. (R. **1357).** The trial judge stated that he would have to stay to go over the P.S.I. Defense counsel then stated he would like to leave the sentencing as scheduled, Monday, August **26.** (R. **1357).**

Defense counsel then stated that the state had not told him if the P.S.I. was ready. The court responded that defense counsel could check with the court's office in the morning. **(R. 1357).** The state also replied that it was their understanding that the report was being or had been typed up. (R. **1358).**

On Monday, August **24, 1981,** at approximately 1:35 P.M., the hearing on the Appellant's sentence commenced. The trial court stated that it had deferred imposition of sentence until it

had received a presentence report. (R. **1361).** The court then inquired of defense counsel if there was any legal or other cause why sentence should not be pronounced. Defense counsel replied "None at this time, Your Honor." (R. **1362).** The trial cohrt asked defense counsel if he had seen the **P.S.I.** Counsel replied that he had not. The court stated that the **P.S.I.** had been made available to counsel on Friday, and it had been there all morning. (R. **1362).** The court again asked if there was legal cause to show why sentence should not be imposed. The defense counsel then stated:

> Your Honor, the legal cause that **I** have to oppose the sentencing at this time was articulated on Thursday afternoon at the motion for new trial, and **I** would hope to reassert those grounds and reemphasize them today incorporating into the record anything that I said on Thursday **... .**
>
> **(R. 1362).**

Defense counsel then went on to argue to the trial court that it should follow the jury's recommendation of life. (R. **1363-1364).** At no time did defense counsel further object to the court imposing sentence without his first having an opportunity to review the **P.S.I.**

On September **4, 1981,** for the first time in a motion for rehearing (R. **1549-1554),** defense counsel alleged that he was not prepared for sentencing because he had not been notified that the presentence investigation was available to him on Friday, August **21, 1981.** Defense counsel further alleged that because of another hearing on the morning of sentencing, he did not have the

time to review the P.S.I. and to make comments with respect to the same. (R. 1549-1550).

Defense counsel then asserted that because the trial court placed great credence on the P.S.I., it was necessary to permit rehearing to allow counsel to contest certain matters contained in the report. Specifically, defense counsel contested the probation officer's recommendation that the contemporaneous second murder could be used as an aggravating factor, that the aggravating factor of avoiding or preventing a lawful arrest was applicable, that the aggravating factor that the murder was committed in a cold, calculated manner was applicable, (R. 1550-1551), and the failure to find that the murder was committed while the Appellant was under the influence of extreme mental, or emotional disturbance, especially by ignoring portions of Dr. Zager's report. (R. 1553).

On September 17, 1981, a hearing was held on the Appellant's motion for rehearing. Defense counsel argued that the P.S.I. did not correctly analyze the aggravating and mitigating circumstances. (R. 1376). The trial court agreed and stated that it did not agree with the probation officer on all of her recommendations. (R. 1376).

> We shall affirm a sentence where the trial judge disavows reliance on the challenged sentencing information.

Jones v. United States, 783 F.2d 1477 (9th Cir. 1986). After further argument about the trial court's overriding of the jury recommendation (R. 1377-1378), defense counsel stated that he had

completed his argument. (R. 1378). The trial court stated that it would read the motions and the cited cases and defer ruling on the motion for rehearing. (R. 1379). Although the record does not contain an order by the trial court, it can be presumed that the motion for rehearing was denied.

Appellee does not quarrel with the proposition that defense counsel must have an opportunity to be heard on matters contained in a presentence investigation report which the trial judge has considered in his sentencing order. Gardner v. Florida, 430 U.S. 349 (1977). Appellee submits, however, that Appellant was heard and further that Appellant was not prejudiced, as noted, by trial counsel's actions.

Even more important is that at the sentencing hearing, defense counsel did not state as cause for not imposing sentence, his failure to review the P.S.I. Instead, he renewed his objections made at the motion for new trial, which were unrelated to the P.S.I. Defense counsel was obviously satisfied to proceed with the sentencing without having reviewed the P.S.I. His words certainly indicated that he was read to proceed. In Guqliemo v. State, 318 So.2d 526 (Fla. 1st DCA 1975), the court held that although the day of sentencing was not a reasonable time prior to sentencing for disclosing a presentence investigation report to the accused, it was not error, where the defense counsel did not request that sentencing be deferred, but indicated he was ready to proceed.

After the United States Supreme Court's decision in Gardner, this Court ordered numerous "Gardner" remands. This Court ordered on those remands that counsel have an meaningful opportunity to be heard on any of the matters contained in the presentence investigation. See Douqan v. State, 398 So.2d 439 (Fla. 1981). Appellee submits that counsel was not ineffective because, in effect, through defense counsel's written motion for rehearing and his later argument on the motion, he was given the opportunity to respond to the P.S.I. as would have been required on any Gardner remand.

Defense counsel's main concern with the P.S.I. was the probation officer's recommendation as to what were mitigating or aggravating circumstances. The trial court stated that it did not agree with all of the probation officer's recommendations. Neither in his written motion for rehearing nor at the argument did defense counsel assert that there were any factual matters which were untrue or needed to be rebutted or explained.

Appellant now complains that the assertions by the probation officer were erroneous. However, the trial court obviously discounted that when it found the mitigating circumstance of no significant prior criminal history to be present. Furthermore, as pointed out by Appellant, besides the testimony at the sentencing hearing that Appellant was a prospect for rehabilitation and a compassionate person, there was evidence of the same in the P.S.I., through the statement of Bill Ayers. Thus, the probation officer's observations were rebutted within

the report. Appellant also states that the probation officer's recommendation contains no mitigating circumstances. However, again the P.S.I. contains portions of Dr. Zager's report which could be read to rebut the officer's recommendation. However, that was not done.

In sum, the record does not support an initial violation of Gardner as defense counsel was given the opportunity days in advance of sentencing to review the P.S.I. but chose not to. Instead he chose to proceed. Secondly, even if there was a violation, it was corrected by the motion for rehearing and argument thereon, where defense counsel was given an opportunity to present to the court any problems with the P.S.I. The trial court clearly indicated that although it had awaited imposition of sentence until after review of the P.S.I., it was not persuaded by the recommendations of the probation officer, but rather by its own independent judgment.

CLAIM V

THE TRIAL COURT'S OVERRIDE OF THE JURY'S RECOMMENDED SENTENCE WAS PROPER.

Subsequent to finding Appellant guilty of two counts of first degree murder, the jury returned an advisory sentence of life as to each conviction (R. 1315). The trial judge adjudicated Appellant guilty. (R. 1528-29). After carefully

considering and weighing all the evidence presented during the trial and sentencing procedure, the trial judge, pursuant to the safeguards afforded by 5921.141. Fla. Stat., entered written detailed findings of fact in support of the death penalty for count II (R. 1545-48). This Court affirmed four of the five factors in aggravation found by the trial court as to Count II -- the murder of Russell Bettis:

> The proven and properly considered aggravating circumstances are: (1) the previous murder of Walsworth; (2) that the murder of Bettis was committed to eliminate him as a possible witness to the murder of Walsworth; (3) that the method of the murder of Bettis rendered it especially heinous, atrocious, or cruel; and (4) that the murder was committed in a cold, calculated and premeditated manner without pretense of legal or moral justification. We conclude that the sentencing judge could properly determine that these factors outweighed the mitigating circumstances found even in view of the jury's recommendation of a life sentence. The sentence of death represents a reasoned judgment based on the circumstances of the capital felony and the character of the offender after giving due consideration to the recommendation of the jury.

Thomas v. State, 456 So.2d 454, 461 (Fla. 1984). The trial judge found two mitigating circumstances: that the defendant has no significant history of prior criminal activity and the age of the Appellant at the time of the crime.

The Appellee submits that the four aggravating circumstances far outweigh the two mitigating circumstances. The facts suggesting capital punishment are so clear and convincing

that virtually no reasonable person could differ. Tedder v. State, 322 So.2d 908 (Fla. 1975). The Appellant brutally murdered victim Walsworth because of a $150.00 debt allegedly owed to Appellant (R. 841). The Appellant stabbed Walsworth with a seven and a half inch kitchen type knife that he had expressly taken with him in order to murder the principle (R. 845-46). After Appellant murdered Walsworth, he pulled the victim from the victim's car and noticed that his second victim, Bettis, had witnessed the first murder (R. 842). Appellant disposed of the knife and in order to form a more perfect alibi, went to buy a hamburger (R. 847, 850).

At the moment the Appellant saw Bettis, he formed the specific intention of murder (R. 847). The Appellant effectuated his premeditated design by brutally and viciously beating the victim with his fists and kicking him with his feet until Bettis lapsed into a comatose state, to die some five months later (R. 345).

This Court has upheld the death sentence despite an Appellant's age and absence of prior criminal history. Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert. denied, 444 U.S. 919 (1979); Meeks v. State, 339 So.2d 186 (Fla. 1976). The trial judge has the ultimate decision as to whether the death penalty should be imposed, Hoy v. State, 353 So.2d 826, 832 (Fla. 1977). Where the jury's advisory recommendation is a life sentence which the court deems inappropriate under the law the court "not only may, but must overrule the jury," Brookings v. State, 495 So.2d

135, 145 (Fla. 1986). The override will be sustained where the facts are *so* "clear and convincing that virtually no reasonable person could differ", Tedder v. State, 322 So.2d 908, 910 (Fla. 1975).

"Mere disagreement with the force to be given [mitigating] evidence is an insufficient basis for challenging a sentence," Porter v. State, 429 So.2d 293, 296 (Fla. 1983); Quince v. State, 414 So.2d 185, 187 (Fla. 1982). The trial court within its discretion properly makes a determination of the weight to be applied to a mitigating factor and such discretion "will not be disturbed if supported by competent substantial evidence", State v. Bolender, 503 So.2d 1247, 1249 (Fla. 1987).

In the case at bar, no reasonable person could differ with the court's override. The facts adduced at trial proved extreme circumstances. The murder of Bettis was committed in an extremely cold and calculated manner, as noted supra. The murder was heinous, atrocious and cruel. Additionally, Appellant killed Bettis in order to escape detection as the murderer of Walsworth.

Contrary to Appellant's argument, and as the conflicting testimony indicates, the instant mitigating circumstances could not have influenced the jury to return a recommendation of life. As discussed, the aggravating circumstances were extreme and the two statutory mitigating factors, age of Appellant and no prior history of criminal activity, were accorded little weight by the court.

> In determining if death is an appropriate penalty, the sentencing judge must weigh any aggravating circumstances against any mitigating circumstances. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). A trial court must allow the presentation of nonstatutory mitigating evidence, Lockett v Ohio, 438 U.S. 586 (1978) and if introduced, must consider such evidence. Eddings v. Oklahoma, 455 U.S. 104 (1982). Finding or not finding that a mitigating circumstance has been established and determining the weight to be given such, however, is within the trial court's discretion and will not be disturbed if supported by competent substantial evidence, Stano v. State, 460 So.2d 890 (Fla. 1984), cert. denied, 105 S.Ct. 2347 91985).

Bolender at 1249.

Clearly, in the case at bar the trial court properly considered all evidence in mitigation of Defendant's sentence but properly found the weight of the evidence to support death. The trial court's decision is supported by competent substantial evidence. No reasonable person could differ as to the necessity of the death sentence based upon the weight assigned by the Court. Appellant is really asking this Court to reweigh the evidence which cannot be done. "Mere disagreement with the force to be given [mitigating evidence] is an insufficient basis for challenging a sentence," Porter v. State, 429 So.2d 293, 296 (Fla. 1983); Quince v. State, 414 So.2d 185, 187 (Fla. 1982).

In Hoy v. State, 353 So.2d 826 (Fla. 1977) a jury override was upheld where the trial court found three aggravating factors to exist and two mitigating. The Court found that the mitigating circumstances are "insufficient in the mind of [the

court], to outweigh the aforesaid aggravating circumstances" Id. at 833:

> Sub judice, we have the commission of capital crimes accompanied by such additional acts as to set them apart from the norm of capital felonies.

Id. at 833.

Again, in Miller v. State, 415 So.2d 1262 (Fla. 1982) this Court affirmed an override where there was one aggravating factor, one admitted mitigating factor and evidence "susceptible of a finding''that Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, see dissent at 1264. The override sub judice must be affirmed.

Additionally, the trial court had access to Appellant's Presentence Investigation which the jury did not see. The PSI revealed evidence of Appellant's childhood. The Officer ultimately rejected mitigating factors and found that the instant crime warranted the death penalty. The instant case is similar to Porter, supra. In Porter this Court upheld a jury override where the trial court had reviewed evidence which the jury did not see. The court's reviewing of the PSI which rejected evidence in mitigation, found the death penalty to be appropriate, certainly held great weight with the court. Additionally, as in Porter, the jury sub judice, may have been improperly influenced by defense counsel's having alluded to "What it is like to watch a person fry. I don't know if you know

what it is like to go into this closed room -- ... ." (R. 1303) (emphasis added).

Clearly the trial court's override of the recommended life sentence was appropriate, as well as legally mandated. Appellee respectfully requests this Court to once again reject Appellant's argument.

CLAIM VI

NEITHER THE PROSECUTOR, NOR THE COURT, ABUSED GUARANTEES PURSUANT TO THE ATTORNEY/CLIENT PRIVILEGE.

Appellant's claim herein concerns allegedly improper cross-examination conducted by the State and the court about matters purportedly covered by the attorney-client privilege. These matters are properly the subject matter of a direct appeal and are therefore improperly before this Court. The matters complained of were asked in response to questions and answers given on redirect testimony by Appellant (R. 1089). Further, appropriate objections were actually made by defense counsel, and where legally required, were sustained by the trial court.

> The ... claim raised by the Defendant concerns cross examination conducted by the State and the court which the Defendant asserts covered allegedly improper grounds. The Court is once again at a loss to understand how the Defendant can actually claim error in this regard, since the matters complained of were asked in response to questions and answers given

> on direct examination of both Defendant and his father. The record reveals that where objections were made by defense counsel the appropriate ones were sustained by this court.

(Trial court's Order Denying **3.850** Motion at **4).**

Specifically, the Prosecutor queried of Appellant as to the number of times he and his counsel went over his testimony (R. 1060). Such question is proper, defense objection was overruled, as it does not contravene the protections accorded Appellant pursuant to 890.502, Fla. Stat., as this information is not privileged. The prosecutor did not, contrary to Appellant's allegations, ask Appellant what the subject matter of those conversations were. (R. **1060).** Further, the trial court instructed the jury that an attorney has the right and duty to "interview witnesses for the purpose of learning what testimony they will give." (R. **1231).**

> The fact that a witness has talked to an attorney and may have told the attorney what he would testify to on the trial does not discredit the testimony of the witness.

(R. 1231). The allegations raised in this issue do not merit this Court's reversal of the trial court's denial of the **3.850** motion.

Appellant's next allegation of improper cross examination, also objected to by defense, was whether Appellant's second conversation with his father occurred subsequent to retention of counsel (R. 1084). The trial court sustained the objection (R. 1085), and more important, Appellant did not answer

the question. (R. 1084). Accordingly, Appellant has not demonstrated the requisite prejudice. As the objection was sustained and the question remained unanswered, trial counsel had no reason to request a jury instruction or move for a mistrial. As alleged errors of this ilk are subject to harmless error analysis, See, Williams v. State, 427 So.2d 331, 332 (Fla. 3rd DCA 1983), Appellant has, in this instance, raised a non-meritorious claim.

On redirect examination, defense counsel asked Appellant the following:

> Q: Did I tell you what to say today?
>
> A: No.
>
> Q: Did I coach you in any way?
>
> A: No
>
> Q: Did I tell you in advance that I was even going to call you as a witness?
>
> A: You said you might, but you doubt it.
>
> Q: Did you retain me as a lawyer right after this occurred?
>
> A: No. March 1st.

(R. 1088, 1089). The Prosecution's recross examination amounted to a proper response:

> Q: Mr. Thomas, you are not saying you didn't have a lawyer before March lst, are you?
>
> A: A PD [public defender].
>
> Q: Roger Angel?

A: Yes.

Q: In fact you talked to him numerous times, hadn't you, immediately after your arrest?

A: A couple of days after arraignment.

(R. **1089**). "The prosecutor's comment fell within the bounds of a 'fair reply' which is permissible in this instance." Ferguson v. State, **417** So.2d **639, 642** (Fla. **1982**).

CLAIM VII

THE CONVICTION OF APPELLANT WAS THE RESULT OF A PROPER JURY VERDICT.

Appellant's allegation that the trial judge erroneously gave the jury a charge pursuant to Allen v. United States, **164** U.S. **492 (1896)** is repudiated by the record. So too, the record eviscerates Appellant's claim of ineffective assistance of counsel as defense counsel did raise this issue before the Court (R. **1341**). Further, this claim is improperly before this Court as it could and should have been raised on direct appeal but was not. Thomas v. State, **456** So.2d **454, 457** (Fla. **1984**); See ~~Rose~~ v. State, **425** So.2d **521** (Fla. **1983**);' Eutzy v. State, **13** F.L.W. **712** (Fla. December **8, 1988**).

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1 Appellant's reference to his issue being fundamental and therefore cognizable for the first time collaterally cites to cases that do not address questions of juror compromise.

The jury did not announce that it was deadlocked. (R. 1242-43). The juror, Mr. Hanna, told the court that a verdict had not been reached, and upon question, responded they were having a difficult time. Id. No mention of a deadlock was made at trial.

> [T]he giving of the 'Allen charge' by the trial court was not error. The jury had already deliberated seven hours at the time they were given this charge. We note further that the jury deliberated over an hour longer before reaching their verdicts of guilty of the kidnapping and first-degree murder ... . In State v. Bryan, 490 So.2d 482 (Fla. 1984), we found no error in the trial court's delivering an 'Allen charge' to the jury after five and one-half hours of deliberation.

Rose at 524. Sub judice, the record does not indicate the length of time between the jury retiring for deliberation (R. 1236) and the instant instruction (R. 1242-43), but it is crystalline that a minimum of two hours passed between the Allen charge and the rendition of the verdict (R. 1244-45). It cannot be said that counsel was ineffective for not objecting at this juncture (R. 1244, line 6), for counsel is not required, in order to rebut the hindsight ineffective claim, to object where no error is presented. Francois v. Wainwright, 741 F.2d 1275, 1285 (11th Cir. 1984); Funchess v. State, 449 So.2d 1283, 1286 (Fla. 1984).

The substance of Appellant's claim appears to be not an erroneous Allen charge, but rather a verdict improperly bargained for. Notwithstanding that the logic of Appellant's claim of a "dynamite charge'' is negated by the judge's calling the jury in

to tell them they had a choice of retiring for the night and returning the next or staying to continue deliberations, Appellee maintains the contention of bargaining, etc. actually inheres to the verdict, and is a hyperbole of the actually scenario;,:Juror Nancy Merolla testified during Appellant's hearing on his Motion for New Trial.

> Q [By defense counsel]: What were some of the things that you indicated to me about the jury's decision, over the phone?
>
> A [Juror]: Well, I first started out by telling you that I felt that it was a really hard responsibility that I was given. I realized that it was very important when I was called for jury duty, but then, again, I just -- it was a very, very hard thing to do.
>
> THE COURT: Sure. It is for anyone, Nancy. Did you tell him anything else?
>
> THE WITNESS: Well, I said I was one of a few that held out with not guilty until the very end.
>
> THE COURT: Uh-huh.
>
> THE WITNESS: That I was just, always never knowinq is what my problem was, and still what I feel it is. I guess, probably, you always hear comments, you -- like to decisions or something like this, how it really does come out. And even to this day, I am very confused about it. The whole thing is, personally, bothering me.
>
> THE COURT: What else did you tell him?
>
> Q (By Mr. Kent) Nancy, did you indicate --
>
> THE COURT: Don't lead her.

Q (By Mr. Kent) Well, let's do it just the way the Judge said. What were some of the other things you said with respect to some of the other jurors?

MR. HANCOCK: Judge, I am going to object with respect to the other jurors. I don't think that is proper.

THE COURT; Well, I don't know exactly --

THE WITNESS: I think what Mr. Kent is meaning, I mentioned to him that when I was asked, when I was questioned to be a juror, if I felt he was not guilty, would I keep to my verdict, and I said yes. And I feel if I was to have to go through the whole thing again, I would still be in question.

THE COURT: (Affirmative nod.)

THE WITNESS: Now, I had many questions in my mind like all the jurors did, and I guess, since, I mentioned it to Mr. Kent, that it was very difficult, because no one would account for where Mr. Thomas was when all this thing happened, and it made it, like, very bad for him.

THE COURT: Let me ask you this Nancy, and make it easier.

Now, I know it troubles you, distresses you, and every juror that takes part in this juror experience. Most of them come away feeling similar to the way that you feel, and it is understandable.

The jury came back and passed the verdicts over to the Clerk at my request, and she read the verdicts, and they said. "Guilty."

Did you vote "guilty'?

THE WITNESS: At the end.

THE COURT: At the end?

And when the trial was over with, and I asked Mr. Kent and Mr. Hancock if either side wished the jury to be polled, and Mr. Kent said yes, Mrs. Wilson here, got up, and she spoke to each juror, and she said, "Mrs. Merola, is this your verdict as to Count I?" And what did you say?

THE WITNESS: Guilty.

THE COURT: And is this your verdict as to Count II?

THE WITNESS: I said quilty.

THE COURT: That was your vote? That's what you affirmed as your verdict, right?

THE WITNESS: Uh-huh.

THE COURT: Than you.

Q (By Mr. Kent) Now -- but, you, apparently, have had some second thoughts about it since then?

A Well, I mentioned to you that it was troubling me.

Q Did the jury vote --

THE COURT: Wait a minute. She is still talking. Let the lady finish.

THE WITNESS: It was troubling me. I was having nightmares, having dreams, even having -- people coming up and talking about it.

Q (By Mr. Kent) Did other jurors have similar things?

A Yes.

Q Have you discussed the thing with other jurors?

A Yes.

Q Would you state the names of those you discussed it with?

A I don't know what his name -- it was one in particular.

Q What is her name?

A I think her name was Joy.

THE COURT: Joy? And she was troubled, too?

THE WITNESS: Un-huh.

THE COURT: She voted guilty, didn't she?

THE WITNESS: At the end.

THE COURT: Wasn't she polled, too, as to whether she voted guilty as to I, guilty as to --

THE WITNESS: Uh-huh.

THE COURT: I have got the right to ask the witness questions, don't I?

MR. KENT: Yes. You sure do.

THE COURT: I am asking direct questions.

Q (By Mr. Kent) What was the vote of the juror?

MR. HANCOCK: Judge, I think that is improper.

THE COURT: I sustain the objection.

MR. KENT: Judge, at this time, I am not sure what is proper. I am not sure that it is proper to have the juror here at this time, because I am saying -- I guess what I am saying is, I don't think that -- I may be on the tip of opening a Pandora's box, or I may have nothing. What I need is time to subpoena and depose all of the jurors to find out.

THE COURT: Your told me that two, three weeks ago. That was how long ago it was?

MR. KENT: It was two and a half weeks ago.

THE COURT: Do you have any more questions you want to ask of Nancy?

MR. HANCOCK: Judge, I have none from the lady. Thank you.

THE COURT: You may go back outside.

MR. KENT: Oh, there's one other.

THE COURT: Nancy.

(R. 1341-46) (emphasis added). Juror Merollo's contention inheres to the verdict. See McAllister Hotel, Inc. v. Porte, 123 So.2d 339, 344 (Fla. 1960). Clearly each juror was individually polled (R. 1246-49).

The trial court properly denied Appellant's Motion for New Trial based on improper verdict and his 3.850 motion. Appellant's specific allegation regarding Juror Wicker (Initial Brief at 62, Appellant's Appendix to 3.850 motion #4) is improperly before this Court as the juror's affidavit is unsigned. It appears, perhaps, that the affidavit was prepared by counsel and remained unsigned. As there was no oath or affirmation, there is no recorder Juror Wicker's actual allegations.

Regarding the testimony of the juror, the trial judge properly determined that it was not admissible under section 90.607(2)(b), Florida Statutes (1983), which provides:

> Upon an inquiry into the validity a verdict or indictment, a juror is not competent to testify as to any matter which essentially inheres in the verdict or indictment.

Songer v. State, 436 So.2d 229, 231 (Fla. 1985). What might have occurred had counsel called other jurors is speculation. Conjecture is an improper basis upon which to reverse the trial court's finding that there was no jury impropriety. Jacobs v. Wainwright, 450 So.2d 200, 201 (Fla. 1984); Ford v. Wainwriqht, 451 So.2d 471, 474 (Fla. 1984).

CLAIM VIII

APPELLANT WAS NOT DENIED CONSTITUTIONAL GUARANTEES OF PSYCHIATRIC EVALUATION.

Contradictions abound in Appellant's recitation of the implications of the mental evaluation conducted post sentencing. The report of Dr. Smith, and Appellant's counsel's interpretation thereof, are contradicted by trial testimony. The instant claim asserts that Appellant's right to access to a mental health expert, and most specifically as it pertained to his sentencing proceeding, was violated as it was denied by the trial court. Again, it should be noted that this claim could have been raised on direct appeal, and is therefore improperly before this Court.

Mental health is not necessarily an issue in every criminal proceeding. Blanco v. Wainwright, 507 So.2d 1377, 1383

(Fla. 1987). However, where there is evidence calling into question a defendant's sanity, defense counsel is bound to seek the assistance of a mental health expert. See Bush v. Wainwright, 505 So.2d 409 (Fla. **1986);** see also, Ake v. Oklahoma, 470 U.S. 68 (1985). In keeping with these principles, a defense counsel did have Dr. Zager evaluate Appellant (PSI at p. 6). Appellant is now, in essence, claiming that Dr. Smith's evaluation is better, and therefore Dr. Zager was incompetent.

Appellant, referencing Mason v. State, 489 So.2d 734, 736 (Fla. 1986), states that a similarity exists, as in Mason the 'psychiatrists who evaluated Mr. Mason pretrial did not know about his 'extensive history of mental retardation, drug abuse and psychotic behavior' ... ." (Appellant's Initial Brief at 65). Appellee maintains that Dr. Zager's statement that "there is rather significant past psychiatric history which apparently has a most direct bearing upon the present crimes," (P.S.I. at p. 6), rebuts this aspect of Appellant's incompetency claim. Accordingly, it is clear Dr. Zager had reviewed Appellant's psychiatric history. It is important to note that that sort of evidence missing from evaluation in Mason -- early childhood background of an ill mother, inability to communicate, early childhood medication, early drug use, low level intelligence, suicidal tendencies -- was presented to, and reported by, Dr. Zager. Appellant's mother deserted the family when he was seven years old, his father was an alcoholic and a child abuser who savagely beat him; he remembers that he, more than his two

siblings, was the one who was beaten; his memories of his father are associated with brutality and sadistic behavior; he had feelings of depravation and isolation as a child; he was a class clown, bully and a 9th grade dropout who repeatedly ran away from home and resorted to homosexual prostitution to earn money. During the psychiatric interview Appellant bit his nails, but was cooperative. "There was no over [sic] evidence of a psychotic thought disorder during the interview nor did he manifest evidence of a schizophrenic process." (PSI at p. 6).

> His associative processes for the most part were intact, although self image and self esteem were significantly impaired. He did not manifest evidence of delusions, hallucinations nor ideas of reference. Sensorium was in tact as judged by orientation to time, person and place; and memory for recent and past events appeared to be fair. General finding of information was in the below average range, although patient was competent and aware of present charges facing him.

Id. Further evidence in the PSI clearly indicates the evidence received in court, and rejected as being mitigating.

> His apparent history of being physically and perhaps sadistically abused by his father, may have provoked the intensive anger and rage expressed at the victim (Mr. Walsworth) ... . This may have directly impaired his ability to conduct himself in a reasonable degree and to reasonably appreciate the criminality of his acts. That is not to say that he was psychotic at the time, but he was under significant emotion diress [sic]. I would likewise add that when he was interrogated ... the stress of that environment may have again rekindled his interrogation and abuse by his father ... and he may very well have admitted to any and all acts to be again free of such harassments.

Id. at p. 7.

As opposed to Mason, Appellee suggests that the facts sub judice are more appropriately analogized to James v. State, 489 So.2d 737 (Fla. 1986), wherein this Court affirmed the denial of James' 3.850 motion.

> [James] first contradicts the opinion of his original psychologist and then tries to equate a subsequent psychologist's opinion that he probably suffers an organic brain damage syndrome with his belated claim of incompetency.
>
> [W]e rejected a similar claim in Witt v. State, 465 So.2d 510 (Fla. 1985), because the motion and record conclusively demonstrated that Witt was not entitled to relief.

James at 738, 739. The James Court likewise declined to find counsel ineffective relying on Strickland v. Washington, 466 U.S. 668 (1984).

Sub judice, Appellee maintains that the report of Dr. Smith, albeit a slightly more detailed account, essentially contains evidence cumulative to the report of Dr. Zager, and Appellant's own testimony (R. 1281-82). Clearly, Dr. Zager considered Appellant's past psychiatric history as did Dr. Smith, so, although Zager's report is not detailed as to specific hospital reports as is Smith's, the information was considered. The affidavits of Appellant's family contain information related to Dr. Zager by Appellant himself, as well as being testified to in court (R. 1254-1290). The fact that Appellant functioned at a 5th grade level (but see R. 1284 where Appellant talks about

reading the bible) is cumulative to, and consistent with, Dr. Smith's conclusion that Appellant functions at a low intellectual level, "[h]is level of intellect ... is within the Borderline range ... ." (Dr. Smith Report at p. 2, Appellant's appendix to 3.850 #1).

> [A]lthough the prisoner was not under the influence of 'extreme mental or emotional disturbance' when the felonies were committed, it is apparent that his level of intellect is at a low level and there is evidence that he has cerebral dysfunction.

Id. at p. 3. This conclusion, while substantiating evidence of low intellect, renders Appellant's claim without merit. Appellant is claiming, not incompetency to stand trial, but rather "his mental status at the time of the offense.[2] The doctor's report rebuts the prejudice suffered by alleged denial of proper evaluation. Appellant likewise alleges denial of proper evidence of mitigating factors.[3] Dr. Smith recommends Appellant's age at the time of the offense as a factor in mitigation. Clearly, the trial court found age to be a mitigating factor. Thomas v. State, 456 So.2d 454, 459 (Fla. 1984). Appellant's claim of ineffectiveness of trial counsel's preparation cannot stand, as Appellant cannot demonstrate prejudice. Strickland. The fact, as alleged by Appellant, that

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[2] Appellant's brief at p. 65.

[3] Appellant's brief at p. 65

trial counsel did not personally provide for mental health evaluation is irrelevant, as prior counsel did.

> Initial counsel, Mr. Angel, engaged the services of Dr. Arnold S. Zager, M.D., on January 9, 1981, and requested a detailed evaluation regarding Mr. Thomas' personality, background, emotional status, and other pertinent psychiatric data, and regarding penalty phase issues (Letter dated January 9, 1981). In a follow-up letter dated January 13, 1981, Mr. Angel noted that Mr. Thomas had been treated for epilepsy recently and asked whether neurological testing was necessary. Hospital records reflecting an epileptic seizure episode were sent to Dr. Zager, but no neurological work-up was done.

Appellant's brief at 68. Trial counsel had no need to repeat prior counsel's efforts.

Allegations by Appellant that his case is analogous to Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985) is without merit. In Blake, evidence of his insanity was not put before the psychiatrist, by the government, in a timely fashion. Blake at 532. The question of ineffectiveness, as enunciated in Blake, pursuant to Strickland, is whether *any* defense was presented. Blake at 735. Sub judice, defense counsel did present mitigating witnesses at the penalty phase (R. 1254-1288), whereas in Blake, none were presented. *So* too the case of Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986) where the only penalty phase evidence was a brief questioning of Porter. Porter at 934. The Porter Court found that both dictates of Strickland's ineffectiveness test were met and consequently remanded for an evidentiary hearing. Sub judice, Appellant has proven neither

test and more specifically has not demonstrated prejudice as noted, supra.

> In order for Porter to show Constitutional ineffective assistance of counsel, he must also show that he was prejudiced by his attorney's performance. ... . Porter must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ... Thus, Porter must show enough to undermine our confidence in the trial judge's decision to reject the jury's recommendation of life.

Porter at 935. Sub judice the trial judge had benefit of the PSI report wherein Dr. Zager's report indicated the cumulative evidence noted in the report of Dr. Smith.

The evidence at trial and sentencing tends to negate Appellant's instant theory, as well as providing evidence of nonstatutory mitigating factors. Appellant's supervisor at the Labor Pool, Michael Liles, testified that Appellant was great on the job (R. 514). Appellant's lover, Bill Ayers (R. 974-1019), had Appellant help him out at the flea market. He testified that Appellant was a good worker (R. 977). "He has worked with me and proven out to be a very hard worker.'' (R. 1254). "I think that Ed, if he was given a chance to get his education, he could go on and become the man that I know him to be." (R. 1255). James Widdoes testified that Appellant worked regularly and he didn't consider him a drifter (R. 1258). "Well, he hoped that he could find a better job, and better himself in life.'' (R. 1259-60). Paul Girardin, who knew Appellant for approximately 3 1/2

years and was intimate with him, testified, that Appellant "is a very kind, thoughtful person. He is impulsive by nature, but this -- this is so trite, but it is true. He will give you the shirt off his back. He will do anything for his friends. He really would." (R. 1267). Major John Schinelli, Director of Operations Broward County Jail System, also testified during the penalty phase (R. 1273). He stated that there was no evidence of Appellant being a management problem in jail (R. 1274-74).

Appellant's reliance on Groover v. State, 489 So.2d 15 (Fla. 1986), in his prayer for relief, is misplaced. Groover was asserting incompetence to stand trial. Sub judice, Appellant is alleging error due to failure to evaluate "his mental status at the time of the offense ... ." (Appellant's brief at 65). This case is not the same as Groover as in that case appellant had been administered anti-psychotic drugs throughout his trial. Groover at 17. Noteworthy is this Court's conclusion in State v. Sireci, 502 So.2d 1221 (Fla. 1987) that counsel "cannot be deemed ineffective under the standards set forth in Strickland v. Washington, 466 U.S. 668 ... (1984), simply because he relied on what may have been less than complete pretrial psychiatric evaluations." Id. at 1223. Appellant's reliance on the granting of a limited evidentiary hearing in Sireci is misplaced. In Sireci the first two mental evaluations were done without benefit of past medical history, thereby giving logic to a different result by a third psychiatrist. Id. at 1224. Sub judice, as noted, Dr. Zager considered Appellant's past psychiatric history.

Appellee respectfully requests this Court's denial of relief, as prayed for by Appellant, as his claim is without merit. Appellant received competent mental evaluation by Dr. Zager. Further, post-sentencing evaluation by Dr. Smith revealed Appellant as competent at the time of the crime. -Appellant suffered no organic brain damage.

CLAIM IX

RESIDUAL DOUBT IS NOT A CONSTITUTIONAL NONSTATUTORY MITIGATING FACTOR WHICH WOULD RENDER APPELLANT'S CAPITAL SENTENCE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Again this issue should have been raised on direct appeal. As such the instant claim is not now properly before this Court.

However, should this Court consider this issue the United States Supreme Court has recently disposed of this issue. In Franklin v. Lynaugh, 2 F.L.W. Fed. 535 (June 22, 1988) the Supreme Court wrote as follows:

> Lockhart [Lockhart v. McCree, 476 US 162 (1986)] did not endorse capital sentencing schemes which permit such use of "residual doubts," let alone suggest that capital defendants have a right to demand jury consideration of "residual doubts" in the sentencing phase. Indeed, the Lockhart dissent recognized that there have been only a "few times in which any legitimacy has been given" to the notion that a convicted capital defendant has a right to

> argue his innocence during the sentencing phase. Lockhart v. McCree, supra, at 205-206 (MARSHALL, J., dissenting). The dissent also noted that this Court has not struck down the practice in some States of prohibiting the consideration of "residual doubts" during the punishment trial." Ibid.
>
> Our edict that, in a capital case, "' the sentencer . . . [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense,"' Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (quoting Lockett, 438 U.S., at 604), in no way mandates reconsideration by capital juries, in the sentencing phase, of their "residual doubts" over a defendant's guilt. Such lingering doubts are not over any aspect of petitioner's "character," "record," or a "circumstance of the offense." This Court's prior decisions, as we understand them, fail to recognize a constitutional right to have such doubts considered as a mitigating factor.

Franklin at 535.

CONLUSION

WHEREFORE, based upon the foregoing reasons and authorities cited herein, Appellee respectfully requests that the denial of Appellant's **3.850** Motion by the trial court be AFFIRMED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of Appellee has been furnished by United States mail to BILLY H. NOLAS, CARLO OBLIGATO, TIMOTHY D. SCHROEDER, OFFICE OF THE CAPITAL COLLATERAL REPRESENTATIVE, **1533** South Monroe Street, Tallahassee, Florida **32301** this 3rd day of January, **1988.**

Of Counsel