IN THE SUPREME COURT OF FLORIDA

GREGORY MILLS,

Appellant,

v.

RICHARD L. DUGGER, ET AL.,

Appellee.

CASE NO. 75,253

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

As Appellee is filing this brief in anticipation of appellant's brief, appellee is unable to accept appellant's statement of facts so will rely upon the following facts. (R) refers to the original record on direct appeal.

Gregory Mills and his accomplice Vincent Ashley broke into the home of James and Margaret Wright in Sanford between two and three o'clock in the morning, intending to find something to steal. When James Wright woke up and left his bedroom to investigate, Mills shot him with a shotgun. Margaret Wright awakened in time to see one of the intrudere run across her front yard to a bicycle lying under a tree, Mr. Wright died from loss of blood caused by multiple shotgun pellet wounds.

Ashley, seen riding his bicycle a few blocks from the Wright home, was stopped and detained by an officer on his way to the crime scene. Another officer saw a bicycle at the entrance to a nearby hospital emergency room, found Mills inside, and arrested him. At police headquarters officers questioned both men and conducted gunshot residue tests on them and they were then released. The tests were performed about two hours after the estimated time of the shooting, by which time, according to the state's expert, approximately 99% of the residues the test detects would have been dissipated. Ashley's test result was negative. Mills' test was positive in that it revealed the presence of antimony in an amount not to be expected on a person who had not fired a gun, although it was not enough to prove conclusively that he had done so. Mills was indicted for the

first degree murder of James Wright on June 29, 1979. He entered a plea of not guilty and a trial was held on August 16-17, 1979, before a twelve-person jury in Seminole County, Florida, before the Honorable J. William Woodson. Mills was represented by Thomas Greene and Bennett Ford.

At trial Mills' roommate testified that he and his girlfriend hid some shotgun shells that Mills had given them, that Mills had been carrying a firearm when he left the house the night of the murder, and that Mills had said he had shot someone. He also stated that Mills told him that a city worker had found a shotgun later shown to have fired an expended shell found near the victim's home.

After the murder, Ashley was arrested on some unrelated charges. He then learned that Mills had told his roommate and his girlfriend about the murder and that they in turn had told the police, so he decided to tell the police about the incident, Ashley testified that Mills entered the house first through a window, that he, Ashley, then handed the shotgun in to him, and that he then entered the house himself. Ashley saw that the man in the house had awakened and was getting up, so he exited the house and ran to his bicycle. Then he heard the shot and ran back to the house, where he saw Mills. They both departed the scene on their bicycles, taking separate routes. Ashley was granted immunity from prosecution for these crimes and also for several unrelated charges pending against him at the time he decided to confess and cooperate.

Mills testified in his defense, He said that he arrived home from work on May 24 at about 9:30 p.m. Then he went out, first to one bar, then another, playing pool and socializing. He went home afterwards but could not sleep, he said, because of a toothache and a headache, so he went to the hospital emergency room. There police officers took him into custody, Mills v. State, 476 So.2d 172, 174-176 (Fla. 1985). Mills was convicted of the first degree murder of James Wright.

At the penalty phase Mills was represented by Joan Bickerstaff. The state established that Mills was under sentence of imprisonment, having the status of both parolee and probationer (R 55), and that he had previously been convicted of a violent felony. Id. at 177.

Mills' supervisor at Food Barn testified in his behalf, indicating that Mills worked the night shift, putting up stock, cleaning floors and bagging groceries and that Mills was an average employee who could have continued working there (R 58-60).

Mills' grandfather, Arlington Mills, testified that Mills' family was poor and that Mills grew up in low income black neighborhoods. Mills' father was murdered in 1968 when Mills was eleven years old. His mother became a laborer on a celery farm and his older sister looked after him. Mills finished his education while in prison (R 65-70).

Mills' older sister Dinetta Alexander was seventeen years old when their father was killed and she testified that she was like a mother to him. Mills went to regular school through the

seventh grade, then was sent to a corrections center where he obtained his equivalency diploma. When he waa released from prison he came to live with her and got a job as. a stock boy at Food Barn in Sanford and worked there up until the time of his arrest. She observed him handling money at work, She did not know Vincent Ashley and he had never been in her home (R 72-78).

At the conclusion of the penalty phase the jury recommended that Mills be sentenced *to* life in prison and the trial judge ordered a P.S.I. (Tr. Penalty Phase p. 123). Sentencing took place on April 18, 1980. Mills was again represented by Thomas C. Greene. Counsel was again allowed to offer evidence in mitigation (R 894). Dinetta Alexander again testified, indicating that she counselled Mills after his release from prison and that he had changed, helping around the house, and had secured a job on his own initiative. She believed that Mills should have been sentenced to life imprisonment because "some of the thing8 that have occurred and some of the things that have been said were not true" (R 898) and she believec : wa8 innocent (R 900); he had a hard life and and she was only a child herself when she becames responsible for him; and that he could make a contribution to society in prison because he had obtained his G.E.D. while in prison before, had tried to change, was intelligent and could help others and had indicated to her "if he gets out of here he wants to prove his innocence." (R 900) (R 895-900).

Mills took the stand and testified in hi8 own behalf to clarify matters contained in the P.S.I. (R 903). He admitted

that he had served a prison term for aggravated assault and was released in March 1979. That charge had to do with an auto theft (R 903). An officer was performing a moving roadblock in his car, cutting Mills off on the highway during a high speed chase and Mills ran into him (R 904). Mills also explained the circumstances surrounding an allegation that he had attempted to assault a worker and escape while he was in a juvenile detention center. A white resident broke off a leg of the chair and attempted to hit an officer with the chair. Mills grabbed the table leg from him and they all pushed through the door. Mills still contended that he was innocent -- "they wanted to get me so bad they'll do anything" (R 905) and plans to work on his case in prison. He further testified that self-preservation is the first law of nature when you're locked up and, while he could do things to benefit himself while incarcerated, he could not say that he could contribute something *to* society while in prison, except, perhaps, indirectly. He planned on taking college courses in prison (R 903-907).

To rebut Mills' contention that he would improve himself while in prison, the state called Lieutenant Donald A. McCullough of the Seminole County Sheriff's Department who testified that Mills was in his custody in Seminole County jail during July and August of 1979. Mills was upset about the trial being continued and he visited his cell. He found something resembling a straight razor in Mills' coat pocket. The coat would have been brought in for him to wear (R 911-920). After considering the evidence the court sentenced Mills to death (R 937).

This court per curiam affirmed the conviction and sentence of death on direct appeal. Mills supra. It struck the aggravating factor of great risk of death to many as inapplicable; struck the aggravating factor of pecuniary gain as duplicative; and determined that the crime was not heinous, atrocious or cruel. Id. at 177-178. Thus, the remaining aggravating factors present in this case are 1) under sentence of imprisonment; 2) previous conviction of violent felony and 3) felony murder and no mitigating factors. Id. at 177-179. Certiorari was denied by the United States Supreme Court on February 24, 1986. Mills v. Florida, 475 U.S. 1031 (1985).

On October 18, 1989 Governor Martinez signed a death warrant for Mills running from January 15, 1990 to January 22, 1990. The Superintendent of the Florida State Prison has selected 7:00 a.m., Tuesday, January 16, 1990, as the precise ~~time~~ of the execution.

On February 24, 1988, Mills filed a motion for post-confiction relief pursuant to Florida Rule of Criminal Procedure 3.850. On November 14, 1989, Mills filed a consolidated proffer in support of request for evidentiary hearing, application for stay of execution and motion for Fla.R.Crim.P. 3.850 relief. The motion was denied, without a hearing, on December 20, 1989. Rehearing was denied on January 3, 1990, and this appeal follows.

SUMMARY OE ARGUMENT

I. The trial court properly determined this claim is procedurally barred 8s it could and should have been raised on direct appeal, Even if this issue could be entertained, it would

form no basis for relief, since the evidence demonstrated Mills was the actual killer.

11. The trial court properly determined that this claim is procedurally barred as this court's prior affirmance of the jury override is the law of the case.

III. The trial court properly determined that this claim is procedurally barred as it was rejected on direct appeal.

IV. The trial court properly determined that this claim is procedurally barred as there was no objection at trial and it was not presented on direct appeal. Relief could not be granted in any event, because the death sentence was not the product of such information but the product of lack of mitigation and the presence of several aggravating factors.

V. The trial court properly determined that this claim was procedurally barred as it was not raised at trial or on direct appeal, Relief is not warranted in any event, as none of these factors were considered by the trial judge in sentencing Mills.

VI. The trial court properly determined that this claim is procedurally barred for failure to present it at trial and on dfrect appeal. Relief cannot be granted in any event as there has been no demonetration of prejudice.

VII. The trial court properly determined that this claim is proceduxally barred for failure to raise it on direct appeal, Relief cannot be granted in any event as error,' if any, was harmless in light of the other evidence against Mills, and there has been no demonstration of prejudice.

VIII. The trial court properly determined Mills received effective assistance of counsel at the guilt and penalty phases. Mills' conclusory allegations warranted neither an evidentiary hearing nor relief, as they are refuted by the record. The jury's recommendation of life is a strong indication of counsel's effectiveness.

IX. The trial court properly determined that Mills received effective assistance of counsel at sentencing. Counsel did not rest upon the jury recommendation and hope for the best, but presented additional mitigating evidence and forcefully argued for a life sentence. Mills failed to demonstrate deficient performance or prejudice.

X. The trial court properly determined that any new grounds set forth in Mills' unverified proffer should be dismissed/denied for lack of an oath. Even if the additional allegations were considered, relief is not warranted.

POINT I

THE TRIAL COURT PROPERLY DETERMINED THAT MILLS' CLAIM THAT THE DEATH PENALTY IS CRUEL AND UNUSUAL PUNISHMENT FOR FELONY-MURDER SIMPLICITER, AND UNDER THE FACTS OF THIS CASE, WAS PROCEDURALLY BARRED AND EVEN IF IT IS NOT, MILLS IS NOT ENTITLED TO RELIEF.

Mills contended that the very most the evidence at trial revealed is that he committed a burglary with an accomplice and while he was on the premises, an occupant was shot one time and died, as no evidence was introduced at trial or capital sentencing to indicate how the shooting occurred. He argued that

his state of mind at the time of the offense was not proven at all and it cannot be said beyond a reasonable doubt that he intentionally fired a weapon at a person. Thus, he concluded, there could not be any finding of intent other than intent to commit a felony, and his execution for intent to steal violates the evolving standards of decency in an enlightened society and violates the Eighth and Fourteenth Amendments. Mills argued that armed burglary does not ipso facto reflect the necessary "reckless indifference to human life" that is necessary for a sentence of death under Tison v. Arizona, 107 S.Ct. 1676, 1688 (1987), and that armed burglary is an offense for which the death penalty is excessive.

On direct appeal Mills argued only that the sole evidence against him was the testimony of co-perpetrator Vincent Ashley, which was unreliable, and that the indirect evidence provided by Sylvester Davis should have been discounted because of the benefits he received from the state, in view of contradictory evidence. Initial Brief of Appellant pp. 32-35. Mills further argued that the jury's action in recommending life imprisonment was reasonable because of conflict in the evidence as to who was the actual perpetrator and because of the plea bargains of the accomplices. Id at p. 51. Nowhere did Mills present the specific argument now advanced at trial or on direct appeal.

It is clear that issues which could have been raised on direct appeal are not cognizable in a collateral attack pursuant to Florida Rule of Criminal Procedure 3.850. Mikenas v. State, 460 So.2d 359 (Fla. 1984). Since Mills argued essentially that

there was a complete lack of intent, he had no need to await the decision in Tison but could have raised this claim on the basis of Enmund v. .Florida, 458 U.S. 782 (1982), which held that the death penalty is unconstitutional For one who does not kill, or intend that a killing take place or that lethal force be employed. Tison actually limited the holding in Enmund, and held constitutional the imposition of the death penalty on a felony murderer who, while not intending to kill, exhibits a reckless disregard for human life. 107 S.Ct. at 1688. Emund was decided in 1982. This court did not affirm the conviction and sentence in this case until October 14, 1985. Mills, supra. Supplemental briefing could have been requested an the basis of Enmund. Tison is simply not a change in the law as to Mills so as to allow belated consideration of this issue,

Even if this issue could be entertained, it would form no basis for relief. Enmund explicitly permits the death penalty in cases where a defendant kills or where the felony murderer intended to kill and forbids it only in the case of a minor actor not shown to have had any culpable mental state. Tison, 107 S.Ct. at 1687. In Enmund, while the trial court concluded that Enmund was a major participant in the robbery, this court rejected such finding, holding that the only supportable inference with respect to Enmund's participation was that he drove the getaway car. It held that driving the escape cur was enough to warrant conviction and the death penalty, whether or not Enmund intended that life be taken or anticipated that lethal force be used. Enmund, 102 S.Ct. at 3371 n.2.

In the present case, however, *this* court found the evidence sufficient to demonstrate that Mills was not simply a major participant but the actual triggerman. The court stated: "sufficient evidence supports the verdict that Mills committed the murder. It was within the province of the jury to believe Ashley, who was at the scene, and Mills' roommate, to whom Mills made an admission of guilt. Moreover, a significant amount of corroboration, including expert firearms examination evidence, existed. Mills, supra at 175. (Emphasis added); See also Statement of Case and Facts. Thus, even under the more rigid Enmund standard the death penalty may be imposed on Mills. The weaker Tison standard is inapposite, since Mills was the actual killer, and provides no basis for relief. Mills simply quarrels with the outcome, as he did on direct appeal.

POINT II

THE TRIAL COURT PROPERLY DETERMINED THAT MILLS' CLAIM AS TO THE PROPRIETY OF THE JURY OVERRIDE WAS PROCEDURALLY BARRED AND THIS COURT'S AFFIRMANCE OF THE OVERRIDE IS THE LAW OF THE CASE.

Mills first contended that the trial court did not follow the procedure required by Tedder v. State, 322 So.2d 908 (Fla. 1975), and explain in the sentencing order why the jury was unreasonable in recommending as it did and the override was thus lacking in procedural rectitude. He *next* argued that the override was arbitrary as the jury had a rational basis for recommending life as there wae no evidence of premeditation similar to the situation in DuBoise v. State, 520 So.2d 260 (Fla.

1987) and that disparate codefendant treatment could have been the basis for a life recommendation.

This claim is not cognizable. Although a trial court's override of a jury's recommendation of a sentence of life imprisonment and imposition of the death sentence might not be sustained today, this court's previous affirmance of the death sentence is the law of the case. Johnson v. Dugger, 523 So.2d 161, 162 (Fla. 1988). It is quite clear that this is a direct appeal issue, Zeigler v. State, 452 So.2d 537 (Fla. 1984); Buford v. State, 492 So.2d 355 (Fla. 1986), settled irrevocably by appellate affirmance. Johnson, supra.

Moreover, relief could not be granted, in any event. There is no requirement in Tedder that the trial judge explain in the sentencing order why the jury was unreasonable in recommending as it did. Under Tedder, to validly override a jury recommendation "the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." 322 So.2d at 910. The trial judge's only obligation is to comply with section 921.141(3), Florida Statutes (1975) by listing applicable aggravating and mitigating circumstances, from which facts suggesting a sentence of death, (or the absence of such facts) can be gleaned by the appellate court in upholding or invalidating such jury override.

The present case is wholly distinguishable from DuBoise. Unlike Mills, who was the actual killer, DuBoise did not actually commit the subject homicide. 520 So.2d at 265, In DuBoise the three aggravating factors found were that (1) the murder was

committed during the course of a felony; (2) the murder was committed to avoid arrest; and (3) the murder was especially heinous, atrocious and cruel. No mitigating circumstances were found. 520 So.2d at 260. The jury had been instructed on the statutory mitigating circumstances and had been told that the statutory list was not all inclusive. The jury could have been influenced by one of DuBoise's companions being his older brother, a person who might well have had an influence on his behavior and conduct. Moreover, the two people who actually killed the victim had not been apprehended, leaving DuBoise alone to account for these crimes, The jury also knew that DuBoise has an IQ only of 79 and heard his father's testimony as to DuBoise's deprived family background. 520 So.2d at 266.

In the present case there are, likewise, three valid aggravating circumetances: (1) under sentence of imprisonment; (2) previous conviction of violent felony; and (3) felony murder and no mitigating circumstances. The evidence adduced at the penalty phase and guilt phase did not indicate that Mills was under the domination of anyone. In fact, in the guilt phase Mills contended that he was elsewhere during the commission of the murder. Unlike the case in DuBoise, the evidence in this case reflects that Mills was *the actual* killer. The jury recommendation was certainly not based on the notion that he was somehow led astray.

POINT III

THE TRIAL COURT PROPERLY DETERMINED MILLS' CLAIM THAT HIS DEATH SENTENCE IS PREDICATED UPON THE FINDING OF *AN* AUTOMATIC AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, WAS PROCEDURALLY BARRED AS IT WAS RAISED ON DIRECT APPEAL.

Mills contended that every felony murder would involve, by necessity, the finding of a statutory aggravating circumstance under the particulars of Florida's statute in that the sentencer would be entitled automatically to return a death sentence upon a finding of guilt of first degree felony murder, in violation of the Eighth Amendment, Mills further contended that the decision in Sumner v. Shuman, 107 U.S. 2716 (1987), constitutes new law which makes this claim cognizable in post conviction proceedings. Mills admits that the issue was addressed on direct appeal but contends that: such new law requires revisitation of the issue.[1]

This claim has previously been rejected. Lowenfield v. Phelps, 484 U.S. 231 (1968); Bertolotti v. State, 534 So.2d 386, 387 n.3 (Fla. 1988). Sumner is inapposite and breathes no new

[1] On direct appeal. Mills argued that the factor of the murder having been committed in the course of a burglary should not have been considered in his case since it was submitted to the jury on the theory of felony murder. He contended that to submit this aggravating circumstance to the jury in a felony-murder case renders a finding of aggravation automatic. This, *he* argued, violates eighth amendment principles of proportionality because under this practice a person found guilty of felony murder is more likely to receive a death sentence than a person found guilty *of* premeditated murder, This court found this contention to be without merit, holding: "The legislative determination that a first degree murder that occurs in the course of another dangerous felony is an aggravated capital felony is reasonable. Mills v. State, 476 So.2d 172, 178 (Fla. 1985).

vitality into this claim. Sumner simply held that a statute imposing a mandatory death penalty for a prison inmate who is convicted of murder while serving a life sentence violates the Eighth and Fourteenth Amendments. Post conviction relief is not authorized far issues which were initially raised on direct appeal. See, Clark v. State, 460 So.2d 886, 888 (Fla. 1984). It is only in the case of error that prejudicially denies fundamental constitutional rights that this court will revisit a matter previously settled by the affirmance of a conviction or sentence. Kennedy v. Wainwright, 483 So.2d 424, 426 (Fla. 1986). Such is not the case here.

POINT IV

THE TRIAL COURT PROPERLY DETERMINED MILLS' CLAIM THAT IT ERRED IN CONSIDERING AN IRRELEVANT AND PREJUDICIAL VICTIM IMPACT STATEMENT, AND STATEMENTS FROM COURT OFFICIALS THAT WERE INCLUDED IN THE PRESENTENCE INVESTIGATION REPORT, WAS PROCEDURALLY BARRED FOR LACK OF OBJECTION BELOW AND FAILURE TO RAISE ON DIRECT APPEAL, AND THAT RELIEF COULD NOT BE GRANTED IN ANY EVENT.

Mills contended that the trial court erred in considering evidence of victim impact contained in the PSI, to wit: 1) the statement of the victim's spouse indicating that it was a traumatic experience to testify at trial; that she was emotionally drained and trying to put her life back together after the terrible loss of her husband; that she believed capital punishment acts as a deterrent and that Mills deserved it as she felt he had it in mind to kill whoever interfered with him or he would not have armed himself with a gun, could have run rather

than shot and that her husband never saw Mills, was speaking to Ashley who was hiding just outside another window on the side of the houee and Mills, believing he was talking *to* him, shot him (R 661); and 2) the personal opinions of the prosecutor and police investigator that Mills was a cold-blooded murderer who would kill again and deserved the death penalty (R 661). Mills argued that such statements constitute a nonstatutory aggravating circumstance which is not an appropriate circumstance on which to base a death sentence and that this *is* the type of information found to be inadmissible in Booth v. ~~Maryland~~, 107 S.Ct. 2529 (1987), which wag not available to Mills at the time of his trial and direct appeal.

In ~~Jackson v.~~ Dugger, 547 So.2d 1197 (Fla. 1989), this court held that under Witt v. ~~State~~, 387 So.2d 922 (Fla. 1980), Booth represents a fundamental change in the constitutional law of capital sentencing that, in the interests of fairness, requires the decision to be given retroactive application. In ~~Parker~~ v. Dugger, 14 F.L.W. 557 (Fla. Oct. 25, 1989), the court distinguished ~~Jackson~~ in that Jackson actually objected to the use of victim impact evidence at trial and *the* issue was raised and expressly addressed on appeal, The court reaffirmed the principle that such issue is procedurally barred when there is no objection at trial, Id. at 558. Accord, Adams v. State, 543 So.2d 1244 (Fla. 1989); Eutzy v. State, 541 So.2d 1143 (Fla. 1989); ~~Grossman v. State~~, 525 So.2d 833 (Fla. 1988).

In the present case no objection was made at sentencing to the contents of the PSI and, in fact, the PSI was used by defense

counsel to support allegedly mitigating factors and to rebut aggravating factors (R 922-931). The issue was not *raised* on direct appeal. Mills is, therefore, barred under Jackson and Parker from raising this issue in a post conviction motion,

Even if this claim could be considered no relief could be granted. The trial court judge specifically stated in his order denying post-conviction relief that he did not consider this information in sentencing Mills to death. Indeed, who better than the judge who sentenced Mills could determine whether this information was considered in sentencing? Cf. Francis v. State, 529 So.2d 670 (Fla. 1988). As this court stated in Scull v. State, 533 So.2d 1137 (Fla. 1989), when the trial court does not rely on such information, there is no error. Id. at 1143. Further, the sentencing order reflects that the death sentence was not the product of such information but the product of lack of mitigation and the presence of several aggravating factors and if there was error, it was harmless. See, Parker v. Dugger, 537 So.2d 969, 972 (Fla. 1989).

Counsel cannot be deemed ineffective for failing *to* predict the decision in Booth. Stevens v. State, 14 F.L.W. 513, 514 (Fla. Oct. 5, 1989). Prejudice cannot be demonstrated since the sentence was not based on such information.

POINT V

THE TRIAL COURT PROPFRLY DETERMINED MILLS CLAIM THAT THE STATE'S TACTICS, EVIDENCE AND ARGUMENT AT THE SENTENCING HEARING, WITHOUT THE JURY, VIOLATED HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WAS

PROCEDURALLY BARRED AND THAT MILLS WOULD NOT BE ENTITLED TO RELIEF IN *ANY* EVENT, AND CORRECTLY DETERMINED THAT MILLS RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

At the sentencing hearing the prosecutor cross-examined Dinetta Alexander as to whether Mills expressed remorse over the victim's death and over other past crimes (R 901-02). Mills testified in his own behalf ostensibly to ameliorate other cases contained in the PSI, He now contends that the prosecutor improperly cross-examined him as to his unwillingness to admit guilt and lack of remorse as reflecting on his capacity to be rehabilitated and infringed upon his constitutional right to testify (R 901-05; 924-25). Mills also contends that his propensity for future dangerousness was improperly considered by virtue of evidence that while in custody in jail something resembling a straight razor was found in his suit pocket (R 914-916). Finally, Mills contends that counsel was ineffective for failing *to* object to such tactics, should the issue be deemed procedurally barred.

It is clear that this issue was never raised on direct appeal. While Mills complained that additional evidence had been reserved for the judge alone, after the jury's life recommendation, he did not complain of the nature of such evidence. Appellant's Initial Brief, p.46. This is an issue that could certainly have been raised at trial and on direct appeal. This court has long held that aggravating circumstances must be limited to those provided for by statute. See, Miller v.

State, 373 So.2d 882 (Fla. 1979); Purdy v. State, 343 So.2d 4 (Fla. 1977), and has refused to allow such issues to be brought in a post conviction motion. Goode v. State, 403 So.2d 932 (Fla. 1981); Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989) (claim sentence was based on non-statutory aggravating factors).

During the pendency of appeal in this case there was clear authority for raising the issue that failure to acknowledge guilt or demonstrate remorse are invalid sentencing considerations. See, McCampbell v. State, 421 So.2d 1072, 1075 (Fla. 1982); Pope v. State, 441 So.2d 1073 (Fla. 1983). Arguments as to future dangerousness have long been held impermissible in this state. See, e.g. Grant v. State, 194 So.2d 612 (Fla. 1967); Singer v. State, 109 So.2d 7 (Fla. 1959); Williams v. State, 68 So.2d 583 (Fla. 1953); Stewart v. State, 51 So.2d 494 (Fla. 1951); Sims v. State, 371 So.2d 211 (Fla. 3d DCA 1979). There has Long been a state law basis for raising the instant claim at trial and on direct appeal. See, Dugger v. Adams, 109 S.Ct. 1211 (1989). This claim is procedurally barred.

Even if this claim could be entertained relief is not warranted, Mills' sister testified at the sentencing hearing, before the judge alone, that Mills was capable of rehabilitation --" He ha8 been in trouble before. I know that Greg does want to make a change..," (R 900). Mills testified he would better himself while in prison (R 906-907). The state is entitled to rebut such evidence by showing that: Mills never accepts responsibility for his acts and has exhibited less than exemplory conduct while incarcerated in the past and is not a

likely candidate far rehabilitation. If there was error in this regard it was harmless as none of these factors *were* considered in aggravation by the judge in his sentencing order and were accorded no weight in the sentencing process. Quince v. State, 414 So.2d 185, 188 (Fla. 1982) (R 639-642). For these same reasons Mills was not prejudiced by counsel's failure to object to every statement at issue.

POINT VI

THE TRIAL COURT PROPERLY DETERMINED MILLS' CLAIM THAT HE WAS DENIED HIS RIGHT TO MEANINGFUL REVIEW IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS SINCE BENCH CONFERENCES AND PORTIONS OF TESTIMONY THAT WERE READ BACK TO THE JURY WERE NOT RECORDED, IS PROCEDURALLY BARRED, AND THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR NOT HAVING THESE CONFERENCES RECORDED AND APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR NOT CAUSING THE RECORD TO BE RECONSTRUCTED.

Mills complained that bench conferences throughout the trial went unreported and that portions of testimony that were read back to the jury in response to their question were not reported. Mills concluded that a new trial and sentencing is warranted since significant portions of the record are missing and that trial counsel was ineffective for not having these conferences recorded and without recourse to a complete and accurate transcript appellate counsel was precluded from diecovering substantial errors and was rendered ineffective.

This court has held that issues which could have been raised on direct appeal are not cognizable in a collateral attack

pursuant to Florida Rule of Criminal Procedure 3.850. Mikenas, supra. *This* is clearly an issue that could have been complained of on direct appeal since it is record-based, It is, thus, procedurally barred from consideration in post conviction proceedings.

Even in the event such issue could be entertained, no relief is warranted. Mills had no constitutional right to be present at the bench during conferences that involved purely legal matters, nor does the absence of recorded bench conferences constitute a constitutional deprivation unless it renders review impossible, In re Shriner, 735 F.2d 1236, 1241 (11th Cir. 1984), which it certainly did not in this case, The untranscribed testimony read back to the jury did not render review impossible since the colloquy itself reveals which portions were read. Mills has, further, not shown that he suffered any prejudice nor has he proffered what he believes transpired in these various bench conferences. Thus, an ineffective assistance of counsel claim cannot be sustained. See, Shriner v. State, 452 So.2d 929 (Fla. 1984).

POINT VII

THE TRIAL COURT PROPERLY DETERMINED MILLS' CLAIM THAT REVERSIBLE ERROR OCCURRED IN VIOLATION *OF* THE FOURTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 12 OF THE FLORIDA CONSTITUTION WHEN THE COURT ADMITTED INTO EVIDENCE AS REBUTTAL, THE RESULTS OF A GUN RESIDUE TEST PERFORMED ON MILLS, WAS PROCEDURALLY BARRED, AND THAT COUNSEL RENDERED EFFECTIVE ASSISTANCE.

The result of a gunshot reside test conducted on Mills was suppressed during the state's case-in-chief, the court having ruled that it was illegally obtained without probable cause and exigent circumstances since Mills had been detained because of a dragnet for people on bicycles (R 163-174). Mills contended that introduction of this evidence on rebuttal was error and a perversion of Harris v. New York, 401 U.S. 222 (1971), and the suppressed evidence does not disprove Mills' assertions that he did not fire a gun during the time in question as the results were inconclusive and were as consistent with Mills not having fired a gun as they were with the converse.

It is clear that a claim that illegally *seized* evidence was introduced should be raised on direct appeal. Zeigler, supra, This contention is, thus, procedurally barred. Mills actually did argue on direct appeal that the test results should not have been admitted into evidence because they were inconclusive and unreliable. Appellant's Initial Brief, p. 20-28. Mills could certainly have argued, as well, that such evidence should not have been introduced because it was illegally seized.

Further, this court held that the test had attained sufficient standing among scientists to be accepted as reliable evidence in the courts and that the majority of American jurisdictions have held the results *of* such *testes to* be admissible. While the neutron activation analysis does not conclusively establish whether a subject has recently fired a gun, the test result is admissible in evidence because it is relevant because it shows a probability that the subject did or

did not fire a gun, and *its* probative value is for the jury to determine. Mills, supra at 176. Post conviction relief is not authorized for issues which *were* initially raised on direct appeal. Clark, supra; Kennedy, supra, Thus, this contention is, likewise, procedurally barred.

Even if the issue was cognizable, relief could not be granted. The testimony satisfied legal standards to be used for impeachment purposes to attack the credibility of the defendant's trial testimony pursuant to Harris v. New York, 401 U.S. 222 (1971), and no ineffectiveness of counsel can be demonstrated.

Even if this could be construed as error it was harmless considering the other evidence against him -- Mills' roommate testified that he and his girlfriend hid some shotgun shells that Mills had given them, that Mills had been carrying a firearm when he left the house the night *of* the murder, and that Mills had said he had shot someone. He also stated that Mills told him that a city worker had found a shotgun later show to have fired an expended shell found near the victim's home. Ashley testified that Mills entered the house through a window first, that he, Ashley, then handed the shotgun in to him, and that he then entered the house himself, Ashley saw that the man in the house had awakened and was getting up, so he exited the house and ran to his bicycle. Then he heard the shot and ran back to the house, where he saw Mills. Mills, supra at 175.

Mills simply cannot demonstrate prejudice, As this court held, the probative value of the gun residue test was for the jury to determine. Id.at 176. According to the defendant's own

argument, the results of the test were "as consistent with Mills not having fired a gun as they were with the converse."

POINT VITT

THE TRIAL COURT PROPERLY DETERMINED THAT MILLS RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT AND PENALTY PHASES.

Mills contended that counsel was ineffective for failing to move for a change of venue as the events leading up to and the trial itself were widely reported by the news media throughout the area in and around Seminole County and that Sanford was a small and extremely racially segregated community while Brevard County, to which the trial could have been moved, was more cosmopolitan with a larger population of blacks, Mills concluded that the dissemination of information so prejudiced the prospective pool of jurors that it was impossible for him to have called a fair and impartial jury from those who were summoned to serve. Mills also contended that counsel was ineffective far failing to inquire as to racial animus in voir dire, which he was entitled to do under Turner v. Murray, 106 S.Ct. 1683 (1986).

In regard to the penalty phase, which was handled by different counsel, Mills contended that counsel was ineffective as "substitute" counsel was not summoned to assist until the day after the verdict and had only a single day to prepare for the sentencing hearing and did not do the appropriate pretrial, presentencing investigation and preparation 'into Mills' background and life history. At actual sentencing Mills was, again, represented by original trial counsel. Mills contended

that, although eight months elapsed from the time of trial and sentencing, trial counsel still did no preparation or investigation. Mills alleged that counsel's performance in examining Mills' oldest sister was superficial in that she testified that even though she was only six years older than Mills, due to "circumstances" the responsibility fell on her to rear him and defense counsel never elicited what those circumstances were and she was the one person who was most capable of recounting Mills' hard life.

According to Mills, counsel's efforts at presenting him in his most favorable light were no better. Mills concludes that had a thorough review taken place, admissible nonstatutory and statutory mitigating circumstances could have been discovered and presented. Such allegedly mitigating evidence is contained in affidavits in the appendix to Mills' motion to vacate judgment and sentence, The affidavits contain much of the testimony actually presented at the penalty phase with only the additional information being that the reason the family was poor was due to the gambling of Mills' father; that Mills' mother had left him for a period of time and had another man's baby; that the father beat the mother; that the father had actually been shot and killed by Mills' aunt in an argument over a loan and the father had previously been shot; and the hearsay statement that Viola Mae Stafford (now dead) admitted she had lied at trial to Mills' mother.

The affidavit of Donorena Harris, CCR investigator, is likewise hearsay, attributing various statements to Mills' sister

Dinetta Williams. The only additional information attributed to her is that upon Mills' father's death his mother started dating various men, which was upsetting to the children.

Mills further contended that counsel was ineffective as the defense may waive the mitigating circumstance of no prior criminal history, which counsel failed to do in this case with the result that the state was able to introduce prejudicial nonstatutory aggravating circumstances at sentencing relating to Mills' prior criminal conduct,

A defendant may not simply file a motion for post conviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing. The defendant must allege specific fact8 that, when considering the totality of the circumstances, are not conclusively rebutted by the record and that demonstrate a deficiency on the part of counsel which is detrimental to the defendant. Kennedy v. State, 547 So.2d 912 (Fla. 1989). Mills did not meet that standard in the present case and the trial court properly denied this claim without an evidentiary hearing.

During voir dire the court inquired of the prospective jurors as to whether they had knowledge of the case, then ascertained that they could be impartial (R 683; 686). Further questioning was conducted by the attorneys. Mr. Bingham, who had knowledge of the case never even served on the jury (R 724). Juror Arndt had no recollection of reading about' the case (R 729). Juror Riddle had no recall of what he read (R 708-709). Thus, it is clear that the jurors who served on this case were not at all contaminated by any pretrial publicity.

Juror Westenburger travelled all over the world and has lived in many places, including Belgium (R 792-793). Juror Riddle spent fifty years in Akron, Ohio (R 819). Juror Reinke came from Chicago (R 852-853). Juror Bernstein lived in upstate New York for twenty-three years (R 826-827). Juror Meyer is from Missouri (R 842). Juror Pettit is from Williamsville, New York (R 816). Juror Williams was born in Alabama an4 lived in Key West for five and a half years (R $31). Juror. Arndt was born in Germany and grew up in northern New Jersey (R 838). Juror Mickle lived in Atlanta and *is* originally from Nashville, Tennessee (R 846). Juror Sexton was born in Indiana and moved to Seminole County from Akron, Ohio (R 849). Thus, the contention that a more cosmopolitan jury could have been obtained if venue had been changed *to* Brevard County is certainly not based on a reading of this record.

Defense counsel inquired extensively of the jurors as to whether there was anything about the defendant, including his appearance, that bothered them or would have prevented them from being fair and impartial jurors. The jurors indicated that they could be fair and impartial (R 824; 821; 852-853; 842; 831; 836; 839; 845). Having found an extremely well-educated and well-travelled jury to his liking, not comprised of native residents, who found nothing to their dislike about the defendant, counsel was under no obligation to perform extensive questioning and analysis as to racial animus.

That counsel was extremely effective in selecting a jury and in not electing to change venue is best evidenced by the fact

that this jury recommended that Mills be sentenced to life imprisonment (Tr. Penalty Phase p. 123). A jury's recommendation of life imprisonment *is* a strong indication of counsel's effectiveness. Francis, supra at 672.

Nothing has been demonstrated under the facts of this case to show that counsel should have moved for a change of venue and that Mills was prejudiced by the failure to do so. Thus, ineffectiveness and prejudice not being demonstrated counsel was wholly effective under the standards of Strickland v. Washington, 466 U.S. 668 (1984).

Ineffectiveness has hardly been demonstrated as to the penalty phase simply because there was "substitute" counsel. Mills did not allege that there was no investigation and preparation and the record itself reflects otherwise.

Contrary *to* Mills' assertions counsel had no duty to present any evidence or testimony at the sentencing hearing - that is what the penalty phase itself is for and the judge heard evidence in mitigation at that point in time. Counsel went beyond his duty and offered additional evidence to clarify matters contained in the PSI and to minimize Mills' criminal background. Contrary *to* Mills' further contentions the "circumstances" which caused Mills' older sister to rear him were elicited -- at the penalty phase testimony revealed that the Mills family was poor and that his father had been murdered when Mills was eleven years old and his mother became a 'farm laborer, while his older sister cared for him (R 65-70; 72-78). The judge would have been well aware of this information at sentencing.

In regard to the additional information contained in the affidavits, either one of two things must have happened, neither of which mandates either an evidentiary hearing or relief. Both Mills and his sister, who testified on his behalf, were well aware of their family background. Either they did not reveal the additional information to counsel or counsel made a strategic decision not to use it. Mills was sympathetically portrayed as a youngster who was basically good, who came from a poor background, who had a hardworking mother and who had lost his father at an early age and was trying to overcome the circumstances in his life. Mills had a significant criminal history, was previously convicted of a violent felony and, in this case, shot and killed an old man he could certainly have simply physically overpowered, during the course of a burglary.

Under such circumstances little would have been gained in terms of sympathy for Mills or in attempting to show he could be rehabilitated by eliciting testimony showing that Mills was carrying on the family tradition for violence by apprising the judge and jury that his father gambled, beat his mother and was killed by Mills' aunt in an argument over a loan, or by portraying his mother as less than virtuous. The substance of Mills' background was presented to the judge and jury in the most favorable light and the jury recommended life. The trial judge would hardly have been pereuaded to follow that recommendation by the additional knowledge that Mills' family, as well, was violent, and specifically stated such in the instant order denying relief. See, Eutzy v. State, 536 So.2d 1014, 1016 (Fla.

1988); Tompkins v. State, 549 So.2d 1370 (Fla. 1989). Either Mills and his family withheld information, for which counsel cannot be deemed ineffective, see, Eutzy v. State, 536 So.2d 1014, 1016 (Fla. 1988), or counsel did not use the additional information, which decision was properly within counsel's discretion. Gorham v. State, 521 So.2d 1067, 1070 (Fla. *1988);* Magill v. State, 457 So.2d 1367 (Fla. 1984).

Further, Mills and his sister both maintained that he was innocent at the penalty phase and during sentencing. Eliciting testimony of a family penchant for violence would hardly have been consistent with this position. Additionally, Mills felt close to his father and felt that his troubles started after his death due to the family poverty - which was all brought out *by* counsel. Counsel, furthermore, is not ineffective for failing to investigate and present what would amount to inadmissible hearsay. Combs v. State, 525 So.2d 853, 855 (Fla. 1988).

Mills' criminal history was revealed in the PSI and counsel, at sentencing, not the penalty phase, merely sought to minimize such history. It is clear from the sentencing order and the instant order denying relief that this information was not considered or used as nonstatutory aggravation. Counsel was not ineffective and Mills was not prejudiced in this regard under Strickland.

POINT IX

THE TRIAL COURT CORRECTLY DETERMINED THAT MILLS RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING.

Mills contended that trial counsel conducted no investigation into his background, based on the affidavit of Thomas C. Greene indicating "that his duties in this case consisted of preparing and trying the above-styled case" and "that he did not assist or participate in the sentencing aspect of this case in any material way." Mills concluded that a reasonably adequate investigation would have presented the jury with a reasonable basis for a recommendation of life, which would have withstood any override. Mills recounted the same additional information raised in Claim VIII and contained in the affidavits tendered to the trial court. Mills further alleged that at age twelve he was sent to the Dozier School for Boys and the school at Okeechobee, where "flogging" was allegedly administered as a means of discipline, although Mills does not allege that he, himself, was ever flogged.

Mills also complained that as an adult there was no environment with an intensive rehabilitation and treatment program which would have helped him. In another breath Mills claimed he actually did make a sincere and concerted effort to change himself upon his release from incarceration. Lastly, Mills complained that trial counsel failed to challenge the failure by the trial judge to justify his improper override of the jury recommendation of life or that counsel failed to provide the trial court with facts and law that would have rendered the override invalid.

The affidavit of Thomas C. Greene provides no basis for relief, Mills was represented by Joan Bickerstaff at the penalty

phase, where the circumstances of his life were not only investigated but offered to the judge and jury in mitigation, The penalty phase is the proper forum for this to take place. At sentencing, in an abundance of caution, the trial judge allowed Mr. Greene to offer further evidence in mitigation. The judge had already heard about Mills' upbringing and Mr. Greene offered further evidence of Mills' prospects for rehabilitation as well as offering testimony as to doubt about guilt (Mills' own and his sister's) in a further effort to convince the judge to follow the jury's life recommendation. Counsel certainly did not rest upon the jury recommendation and hope for the best. Cf. Stevens, supra.

Counsel argued to the judge that he should give the jury recommendation great weight and that the jury deliberated only thirty minutes in order to recommend life (R 922). He asked the court to consider Dinetta Alexander's earlier testimony (regarding Mills' upbringing) and her testimony at sentencing that Mills could make a contribution to society (R 923). Counsel attempted to refute the aggravating circumstance of previous conviction of a violent felony by informing the court that an aggravated assault case was not based on any physical confrontation but on Mills' driving into a police officer's car during a roadblock (R 924) and that the other incident occurred while Mills was a juvenile (R 925). Counsel argued that Mills' conduct did not create a great risk of death to any person (R 925); that Mills' intent, based on Ashley's testimony and Mills' previous history was only to commit a burglary, not murder (R

926). He further argued that the murder was one of surprise during a bungled burglary and was not heinous, atrocious or cruel (R 927); that the murder was not committed for pecuniary gain (R 928).

In regard to mitigation counsel referred the court to the PSI and the testimony of Dinetta Alexander as to conditions under which Mills was raised (R 929). Counsel argued that Mills could not conform his conduct to the law based on his past record; the PSI indicates Mills grew up in a violent atmosphere and that it affected him (R 930). In view of Mills two consecutive life sentences and the fact that Mills is intelligent and ha3 tried to continue his education, counsel. implored the court to give him an opportunity to do some good in prison rather than put him to death (R 931). It is clear that counsel at the penalty phase and at sentencing did everything possible to prevent a jury override.

Mills' alternative contention that counsel failed to provide the trial court with facts and law that would have rendered the override invalid is without merit, This point is fully argued herein in Claim VIII. It should also be noted that the fact Mills grew up in a violent atmosphere was before the court in the PSI (R 662). Since Mills maintained his innocence and claimed he had made a concerted effort to change it would not have helped his case or credibility to point out to the jury that juvenile institutions can worsen a juvenile's behavior. Such cannot be ascertained on the basis of an article, 'in any event, and Mills, himself, does not come forward to contend he was the recipient of mistreatment at such facility. Mills failed to

demonatrate under Strickland any deficiency on the part of counsel or prejudice to his case.

POINT X

THE TRIAL COURT PROPERLY DETERMINED THAT ANY NEW CLAIMS SET FORTH IN MILLS' CONSOLIDATED PROFFER IN SUPPORT OF REQUEST FOR EVIDENTIARY HEARING! APPLICATION FOR STAY OF EXECUTION AND MOTION FOR POST-CONVICTION RELIEF SHOULD BE DISMISSED.

On November 14, 1989, Mills filed the above-titled pleading. While it was not clear what the exact purpose of the pleading was, it states:

> Immediately below we present an analysis of several of the Rule 3.850 claims which undoubtedly require an evidentiary hearing. The factual analysis presented should be read alongside the analysis presented in the motion to vacate. Mr. Mills does not waive any issue raised in the Rule 3.850. He demonstrates herein and in the motion that an evidentiary hearing, stay of execution, and Rule 3.850 relief are appropriate. Given the time constraints, only some of the claims involved in the Rule 3.850 motion can be addressed in this proffer.

(pp.12-13).

The trial court correctly determined that to the extent that this pleading sought to inject, new factual allegations and issues into this proceeding,[2] any new claims must be summarily

[2] This later-filed pleading contains many of the same allegations and arguments contained in the 3.850 motion. Mills has added factual allegations and/or arguments to claims 11, IV, VII, VIII, and IX. Claim II, which pertains to the jury override, contains

dismissed or denied. Florida Rule of Criminal Procedure 3.850 requires that the motion shall be under oath. Scott v. State, 464 So.2d 1171 (Fla. 1985). The instant pleading contains no such oath.

Mills stated in his motion for rehearing that this pleading does not contain any new claims. However, a review of Mills' 3.850 motion demonstrates that there is no specific allegation that counsel was ineffective for failing to have Mills examined by a psychologist, nor any supporting facts. In order to allege a claim of ineffective assistance, a claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance. Maxwell v. Wainwright, 490 So.2d 927 (Flu. 1986). Further, where

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additional argument under Cochran v. State, 547 So.2d 928 (Fla. 1989) (pp. 15-17), allegations of additional bases for the life recommendation (pp. 19-21), and allegations of additional mitigating evidence that could have been presented, which is essentially an allegation that counsel was ineffective (pp. 21-24). Claim IV, which pertains to victim impact evidence, is supplemented with a reference to Jackson v. Dugger, 14 F.L.W. 355 (Fla. July 6, 1989) for the propoeition that Booth v. Maryland, 107 S.Ct. 2529 (1987) represents a change in the law, and a reference to Scull v. State, 533 So.2d 1137 (Fla. 1988), for the porposition that a sentencing judge may not rely upon victim impact evidence during the sentencing process (pp. 46-47), and a bald assertion that it would be "ludicrous" to have required counsel to object to this information prior to Booth. Claim VII, which pertains to the admission of rebuttal evidence, contains an additional allegation of ineffective assistance of counsel far failure to request a limiting instruction (p. 59). Claims VIII and IX, which pertain to ineffective assistance of counsel at the guilt and penalty phases, contains additional allegations of ineffectiveness, in that counsel was ineffective for failing to investigate and establish statutory and nonstatutory mental mitigating factors. Attached to this pleading are additional affidavits from guilt phase counsel Thomas Greens and penalty phase counsel Joan Bickerstaff claiming their lack of investigation. Also attached is a report from psychologist Henry Dee, who examined Mills thia past November.

the initial motion for post-conviction relief raises the claim of ineffective assistanace of counsel., a successive motion raising additional grounds for ineffectiveness may be summarily denied. Christopher v. State, 489 So.2d 22 (Fla. 1986).

It logically follows from these well-established principles that a claimant must not be permitted to raise additional grounds for ineffectiveness in an unverified proffer. Likewise, Mills should not be permitted to circumvent these well-established principles by attaching a verification to his for rehearing after the motion has been denied. Such action constitutes nothing more than a successive motion, with the grounds alleged being procedurally barred.

Even if this court was to consider these additional allegations, they do not demonstrate that Mills is entitled to relief. As to Claim II, the jury override, as previously stated, it is law of the case. See p.12, supra, This court specifically found:

> that the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ, There are three valid statutory aggravating circumstances, and the trial judge has found that there are no valid mitigating circumstances, The purported mitigating circumstances claimed by Mills, but not found by the trial judge, are not sufficient to outweigh the aggravating circumstances nor do they establish a reasonable basis for the jury's recommendation,

Mills, supra at 179. The court's dicta in Cochran, supra, provides no basis for further review.

As to Claim IV, as previously stated, Jackson, supra, provides no basis for review of this claim, as there was no objection below. See p. 16, supra. As also stated, the sentencing order was not the product of such information, and even Scull, supra, upon which Mills relies, states that no error has been committed when a judge merely sees a victim impact statement but does not consider the statements for purposes of sentencing. Id. at 1143.

As to Claim VII, it is contended that even if the evidence was admissible, counsel was ineffective for failing to request a limiting instruction that the gunshot residue test was to be considered only as impeachment material and not as substantive evidence of guilt. There is not even an allegation of prejudice, pursuant to Strickland, supra, much less a demonstration of such. See pp. 22-24, supra. As such, Mills' conclusory allegations must fail.

As to Claims VIII and IX, there is an additional allegation that counsel was ineffective for failing to investigate and establish mental mitigating factors, It should first be noted that counsel secured a jury recommendation of life, so it is clear that this recommendation cannot be alleged to have been produced by counsel's ineffectiveness. See, Lusk v. State, 498 So.2d 902 (Fla. 1986). It must also be noted, in terms of counsel's performance, that there was nothing to put counsel on notice of mental mitigating factors. In fact, all indicators

were *to* the contrary. Mills testified in his own behalf at trial, claiming he was not involved *in* the offense, and testified in detail as to his whereabouts on the night of the offense, thus indicating his mental competence. Mills had indicated a desire to better himself, had earned his high school degree, and was employed at a job which entailed varying responsibilities. Mills stated to the person who conducted the presentence investigation that he never had any serious illnesses or accidents (R 660). The statement in the report relied upon by Mills that an EEG was recommended to rule out minimal brain dysfunction was not available to counsel at the penalty phase. Finally, this was not the bizarre type of offense that would put counsel on notice of potential mental problems - it was a murder committed during the course of a planned burglary.

Mills has now attached a psychologist's report from an examination done ten years after the offense and two months before his scheduled execution, stating that he "suffered from an extreme mental dysfunction and disturbance at the time of the offense." However, the only brain damage that the psychological testa revealed is an impaired memory. Dr. Dee then states "...it is also true that impulse control, ability to inhibit ones actions, and irritability are also some of the most frequent concomitants of head injury. This is particularly true of frontal injuries which [Mills] appears to have sustained," Dr. Dee then, based on these appearances and possibilities, as well as Mills' allegedly impaired memory, states that Mills suffered from an extreme mental dysfunction, Given these conclusions,

based on the "appearance" of an injury, and an impaired memory, the speculation that it would have mitigated the sentence is merely that, speculation. Cf. Porter v. State, 478 So.2d 33 (Fla. 1985). See also McCrae v. State, 510 So.2d 874 (Fla. 1987) (presentation made at sentencing phase achieved life recommendation and whether more detailed presentation would have persuaded judge to follow that recommendation totally matter of speculation; substantial deficiency not shown by mere fact that after jury recommendation returned counsel made no further Presentation prior to sentencing,)

The jury had already recommended life baaed on what counsel presented, which included Mills' poor upbringing, his efforts to better himself, his attempt at rehabilitation by getting a job and being trusted by his employer at a job which involved handling money, residual doubt, disparate treatment of his co-perpetrator, and an argument that this was not the type of offense that warranted the death penalty. Evidence of alleged extreme mental dysfunction is totally inconsistent with the mitigating evidence that was presented, inconsistent with Mills' theory of defense, as well as the other reports that never even hint at extreme mental dysfunction, and would no doubt have destroyed the credibility the defense had established with the jury. See Jones v. State, 528 So.2d 1171 (Fla. 1988).

Indeed, a side-by-side comparison of the evidence actually offered in mitigation with the evidence Mills now contends should have been offered demonstrates just how ludicrous a picture would have been presented to the jury:

- Greg obtained his GED in prison.

Greg made a sincere and concerted effort to effect change in his life,

Greg obtained employment, handled money, and his employer trusted him.

Greg is not beyond rehabilitation and has potential, which is a relevant consideration.

Greg did not commit this offense.

-"Such people" tend to act without sufficient deliberation ... and are frequently indifferent to the social desirability or acceptability of their conduct.

- "Such people" are easily led and influenced by others.

- Capacity to conform conduct to the law was substantially impaired and he suffered from an extreme mental dysfunction and disturbance,

- Impulse control, ability to inhibit one's actions and irritability are some of the more frequent concomitants af head injury.

Or, in short:

AND:

- Greg is not beyond rehabilitation and his potential, demonstrated by the fact he is intelligent and ambitious enough to earn his high school degree, dedicated enough to want to change his life, hard-working enough to obtain a job where he is trusted and an apartment.

If you don't like that, he's also nuts.

The jury recommendation clearly demonstrates that what counsel presented was sufficient,

This report likewise would have carried no weight with the sentencing judge due to these inconsistencies, as the trial court's order denying post-conviction relief demonstrates, Even assuming that Mills suffered from some type of brain dysfunction, such as impaired memory, and even if some of the frequent concomitants .of the "apparent" head injury were present, such as impulse control, inability to inhibit one's actions and irritability, the facts of this crime demonstrate it was not the

product of such dysfunction, Mills planned to burglarize a home and armed himself with a gun. This indicates a formulated plan and intent to commit the crime, as well as an awareness and willingness to take whatever steps were necessary to complete the job and avoid detection, Such deliberate actions are totally inconsistent with the type of brain damage alleged by Mills and demonstrate that it was not A contributing factor to this crime. As an earlier report states, Mills is in complete contact with reality and realizes the seriousness of his situation, but has no motivation to work toward helping himself (R 663).

Mills has failed to demonstrate that counsel was deficient in not presenting mental mitigating evidence, particularly where there was nothing to indicate to counsel the possibility of mental mitigating evidence and counsel was successful in obtaining a life recommendation. Mills has further failed to demonstrate that the outcome would have been different had counsel presented the now proffered evidence. The facts of this crime indicate it was deliberate and planned, and not the product of an inability to conform to the law, but rather a deliberate disregard therefor. Further, the now proffered evidence is also totally inconsistent with the mitigating evidence presented by Mills, such as his efforts to better himself and his prospect of rehabilitation as evidenced by his getting a job and being trusted by his employer. The now proffered report would have carried no weight in light of the circumstances of this crime and the other contrary evidence, as the trial court judge stated.

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully prays this honorable court affirm the trial court's order in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Brief has been furnished by Overnight Mail to Billy H. Nolas, Chief Assistant CCR, Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 11th day of January, 1990.

Kellie A. Nielan
Of Counsel