IN THE SUPREME COURT OF FLORIDA

ENRIQUE GARCIA,

Appellant,

v.

Case No. 75,961

STATE OF FLORIDA,

Appellee.

# BRIEF OF THE APPELLEE

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## PRELIMINARY STATEMENT

As a preliminary matter, the state first calls the court's attention to the fact that many of Garcia's asserted bases for relief may not be considered via collateral motion because they are matters which either were considered or could have been raised on direct appeal. Since 3.850 is not a substitute for, nor does it constitute a second appeal, consideration of such issues is now precluded. See Raulerson v. State, 420 So.2d 567 (Fla. 1982); Booker v. State, 441 So.2d 148 (Fla. 1983); Palmes v. State, 425 So.2d 4 (Fla. 1983); Hall v. State, 420 So.2d 872 (Fla. 1982); Bundy v. State, 490 So.2d 1258 (Fla. 1986).

Moreover, Garcia's failure to properly raise the issue at trial and on appeal constitutes a procedural default precluding collateral review. Wainwright v. Sykes, 433 U.S. 72, 53 L.Ed.2d 495 (1977); Murray v. Carrier, 477 U.S. 478, 91 L.Ed.2d 397 (1986); Smith v. Murray, 477 U.S. 527, 91 L.Ed.2d 434 (1986); Engle v. Isaac, 456 U.S. 107, 71 L.Ed.2d 783 (1982).

Thus, petitioner is precluded from litigating most of the issues now urged in his motion for post-conviction relief and the trial court correctly refused to grant relief.

See also Francis v. Barton, ___ So.2d ___, 16 F.L.W. S461 (Fla. June 15, 1991); Jennings v. State, ___ So.2d ___, 16 F.L.W. S452 (June 13, 1991); Wright v. State, ___ So.2d ___, 16 F.L.W. S311 (May 9, 1991); Engle v. Dugger, 576 So.2d 696 (Fla. 1991); Swafford v. State, 596 So.2d 1264 (Fla. 1990); Medina v. State, 573 So.2d 293 (Fla. 1990); Kight v. Dugger, 574 So.2d 1066 (Fla.

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Appellant has not briefed and therefore has abandoned Claim XIII, below (a Booth claim) and Claim XX below) (a claim that executing the mentally retarded violates the Constitution). See Duest v. Dugger, 555 So.2d 849 (Fla. 1990); Porter v. Wainwright, 805 F.2d 930, 942, n. 14 (11th Cir. 1986).

Appellant has additionally abandoned by failing to brief claims V and VI below, relating to attacks made on the admissions of statements into evidence made by appellant Garcia (PC-R 684 - 694).

## STATEMENT OF THE CASE AND FACTS

Following this Court's affirmance of appellant's judgment and sentence - Garcia v. State, 492 So.2d 360 (Fla. 1986), cert. denied, 479 U.S. 1022, 93 L.Ed.2d 730 (1986) -- Garcia filed a motion to vacate pursuant to Rule 3.850, R.Cr.P. (PC-R 656 - 795), asserting twenty-three (23) claims. Appellant was then given a sixty day extension to amend his motion (PC-R 813). Thereafter Garcia filed a supplement to motion to vacate (PC-R 1035 - 1079), the state filed a Response to Motion to Vacate (PC-R 1087 - 1097) and a supplemental response (PC-R 1101 - 1102).

On October 6, 1989, counsel for appellant requested a sixty day continuance from the scheduled October 19, 1989, evidentiary hearing (PC-R 1119 - 1122) and the motion was granted in part; the hearing was rescheduled for November 29 and 30, 1989 (PC-R 1123 - 24).

At the beginning of the hearing on November 29, 1989, appellant's attorney McClain (along with co-counsel Strand, Dougherty and Rivera) orally requested a continuance which was denied (PC-R 1 - 3).

Trial attorney Roger Bone testified that he was appointed to represent Garcia (PC-R 25) Bone had prior experience in a capital trial (PC-R 26). He conversed with his client and decided to depose the witnesses (PC-R 33). Bone stated that he had received the statement of Grover Yancy (PC-R 35 - 36) and that of Johnny Hewitt. Bone stated that he did not consider offering the Yancey statement because of the hearsay problem (PC-

R 59). Bone asked for and received the assistance of a mental health expert Dr. Ritt (PC-R 63); he was a confidential expert. He talked to Ritt both prior to and subsequent to Ritt's examination of Garcia (PC-R 65). Bone considered using the doctor to explain Garcia's background but concluded the use of appellant or his mother would be much more effective (PC-R 70 - 71). He used investigator Chuck Chambers to get in touch with family members (PC-R 72).

Bone further explained that two of Garcia's statements were subject to a motion to suppress and that if they were suppressed the only admissible statement would have been Garcia's statement to his brother-in-law that he shot one person which was not suppressible at all and his statement that he shot both victims (PC-R 76). Bone decided not to suppress the statements where Garcia denied being triggerman because they tended to show lack of culpability and to impeach his subsequent statements. Bone did file a motion to suppress the later statement Garcia made to the officer in part to evaluate how Garcia would perform as a witness and he learned he could not use Garcia as a witness (PC-R 76 - 77)

On cross-examination Mr. Bone acknowledged that Garcia admitted to him that he in fact had killed Willie and Martha West and that Benny Torres had wounded surviving witness Rosena Welch and that Torres did not want to shoot Ms. Welch but did so only at the urging of appellant Garcia. Bone was aware of the ethical dilemma in presenting evidence he knew to be perjured (PC-R 117 -

118). Garcia decided not to testify at trial. Bone repeated that two of the statements he chose not to challenge were at least semi-exculpatory. He added that Garcia gave unexpected testimony at the suppression hearing on the one statement that was challenged (the statement to Deputy McCrosson) which was one of the factor considered in not having Garcia testify (PC-R 120). There was no problem communicating with client Garcia (PC-R 123). There was no reason to believe appellant was retarded (PC-R 123) He has represented people with learning disabilities and nothing in his dealings with Garcia led him to believe he was one of them (PC-R 124) Some ninety to one hundred people were deposed (PC-R 125). In the Yancey statement, Benny Torres admitted to shooting Rosena Welch and his friend (unnamed) shot the husband and wife (PC-R 127). Bone knew when Hewitt admitted in deposition that he got a year for shoplifting that it wasn't a misdemeanor (PC-R 129).

Bone discussed with Dr. Ritt the possibility of his testifying in penalty phase but he didn't' feel like Ritt should be present because of a concern about admissions Garcia had made to Ritt about the crime and Garcia had not really waived the confidentiality he had with Dr. Ritt (PC-R 131).

Ritt could give damaging testimony (PC-R 132) and Bone thought family members were more effective for emotion and sympathy (PC-R 132). He was concerned about using Santos Garcia because she might elicit testimony regarding the premeditated nature of the crime and he had succeeded in keeping her from

eliciting it during guilt phase (PC-R 133 - 135). Some of appellant's family he didn't want near the courthouse because of the risk of damaging testimony (PC-R 135 - 136). He discussed with appellant his wife Laura Garcia. Appellant didn't know where she was and they decided not to try and locate her (PC-R 137). The testimony Hewitt gave at trial was consistent with the information Garcia had given to him (PC-R 139). Testimony of other relatives would have been cumulative to what he put on and appellant was satisfied with what they presented (PC-R 147).

Subsequent to the evidentiary hearing, Dr. Ritt was deposed on December 21, 1989 (PC-R 561 - 608). In his report following his examination of Mr. Garcia, he found Garcia cooperative, oriented as to time, place and person (PC-R 583). Garcia did not display any behavior suggestive of a thought disorder or psychotic process. He discussed his background, life-style ad family. He made a comment to the effect "that if you don't give me respect I'll cut your throat without thinking about it" (PC-R 584 - 585). Garcia reported that codefendant Louis Pina was a dumb Mexican and "does whatever I tell him to" and that he slaps Pina around when necessary (PC-R 585) Garcia denied using alcohol (PC-R 585) He claimed he was angry with the world; admitting obtaining a gun when he was seventeen years of age; admitted beating his wife; admitted working so that the police wouldn't know that what he was really doing for money was stealing (PC-R 586). Garcia admitted doing armed robberies and said he never got caught because he planned them so he wouldn't

get caught (PC-R 586 - 87). He reported other acts of violence "maintaining control and letting people know you don't mess with me." He admitted shooting and killing the two victims (PC-R 587). He admitted becoming more involved in the Wests' killing "because the codefendants were fools." He stepped in because they bungled it (PC-R 587). He expressed anger toward his associates (PC-R 588). He expressed no remorse for the crime (PC-R 588). Ritt opined that Garcia can behave violently unpredictably with little provocation and he tries to rationalize and justify his behavior on the basis of a perception no one cared for him (PC-R 589) He was competent at the time of the offense and competent to stand trial; he could clearly assist his lawyer (PC-R 590) Ritt talked to attorney Bone and discussed this report (PC-R 591). Garcia's statements to him, he thought, would be damaging in front of a jury (PC-R 593). Much of what has been furnished to him by CCR is cumulative (PC-R 595).

Psychologist Harry Krop testified that he evaluated appellant in December of 1988 at the Florida State Prison (PC-R 156) and opined that appellant had not "bonded" closely with others (PC-R 164) Krop was contacted by CCR to do the evaluation to try to find mitigating factors (PC-R 175 - 176). He did not examine Garcia in 1983 (PC-R 176). Krop did not personally speak to appellant's family members; the background information was furnished by CCR (PC-R 177). He did not contact the prosecutor's office to request materials he felt might be relevant (PC-R 178). Krop was not sure whether he had been furnished other statements

made by Louis Pina regarding this offense (PC-R 179). Krop described Garcia's version of the offense to him as a "soft denial" (PC-R 182) -- "He's not sure what really happened in terms of his involvement" (PC-R 183). Garcia avoided the subject. Garcia was competent, sane and does not suffer from any personality disorder (PC-R 186). Krop has testified for CCR about ten times (PC-R 188).

Trial investigator Charles Chambers was retained by attorney Bone to get family background information on Garcia (PC-R 195) and to locate cellmate-witnesses (PC-R 202). He did not presently have the list of witnesses Bone requested him to look for (PC-R 203). He got Garcia's high school records and took statements from family members (PC-R 204).

The court recessed when counsel for appellant announced that he only had eight more witnesses who would take twenty to thirty minutes each (PC-R 206).

Louis Pina, one of the codefendants in the double homicide, testified that he was serving life imprisonment (PC-R 209). He described their lives.

Geraldo Gaona, appellant's brother-in-law, also testified about Garcia's home life (PC-R 222 - 226). Gaona admitted telling the police the truth and he testified truthfully at trial (PC-R 229).

Appellant's sister Maria Garcia testified at the 1983 trial (PC-R 234 - 243). She testified at trial about appellant and his brothers and sisters and how loving and helpful he was -- giving

money he earned in the fields as migrant worker to his mother (PC-R 245). She was not living with the family at the time of the double murder and not in a position to know what was going on with appellant (PC-R 247).

Steve Garcia, younger brother of appellant, admitted that he didn't know what was going on at the time of appellant's trial (PC-R 255). Concepcion Gaona, appellant's sister, left the home environment and married at age fifteen (PC-R 271). She never broke any laws or adopted a criminal life-style (PC-R 271).

Santos Garcia, sister of appellant, gave a deposition prior to trial (PC-R 273). She didn't recall trial attorney Bone asking her questions at deposition (PC-R 279 - 280), even when shown the deposition.

At the conclusion of his case, counsel for appellant announced he had no further witnesses (PC-R 301).

The state called Gregory Stout, formerly a detective with the Manatee County Sheriff's Office in 1982 and 1983. Stout took a statement from Gaona and denied threatening him (PC-R 305). He promised Hewitt nothing when he took his statement (PC-R 307).

Deputy Sheriff James Foy, Chief Investigator for the State Attorney's Office in 1983, made several trips to the Garcia's residence and there were family members who could not be located (PC-R 318 - 319).

He denied ever hearing that Torres could be murder suspect in California (PC-R 320).

State Attorney James Gardner testified that he had not "scripted" Johnny Hewitt for his testimony but had prepared a question and answer outline and listed anticipated answers (PC-R 330 - 331). There were no deals with Hewitt (PC-R 332). There were no deals with Torres. Torres entered a plea to life imprisonment after the prosecutor got Dr. Miller's report (PC-R 333). There were no threats to Gaona (PC-R 334). He knew nothing about Torres being a murder suspect in California but things came up in the Torres' case after Garcia's case was over (PC-R 335).

Counsel for appellant announced at PC-R 367 that he had no other witnesses aside from Dr. Ritt (who was subsequently deposed).

The trial court denied the motion for post-conviction relief (PC-R 1136 - 40). Garcia now appeals.

## ARGUMENT

### ISSUE I

**WHETHER THE LOWER COURT ERRED IN THE MANNER IT CONDUCTED THE EVIDENTIARY HEARING.**

### Argument

Appellant contends that an evidentiary hearing was required, an evidentiary hearing was ordered, but that the circuit court refused to allow him to fully present and examine witnesses. Appellant is not kind enough to inform us where in the record there is support for the baseless claim that he was not provided a full and complete evidentiary hearing. The record, in fact, shows that a hearing was conducted and the lower court heard over a three day period the testimony of over a dozen witnesses: Roger Bone, James Gardner, Harry Krop, Charles Chambers, Louis Pina, Geraldo Gaona, Maria Garcia, Steve Garcia, Concepcion Gaona Santos Garcia, Paul Harvill, Gregory Stout, James Foy (PC-R 1 - 367).

In this argument section, appellant points to no specific point in the hearing that the trial court refused to allow evidence to be presented. Appellee vigorously denies the contention that Garcia was not given a fair opportunity to present his claims.

The record does reflect that counsel for appellant twice stated on the record that he had no other evidence to present (aside from Dr. Ritt who was subsequently deposed at PC-R 561 - 608). (PC-R 301, 367)

No serious comparison can be made to Hoffman v. State, 571 So.2d 449 (Fla. 1990) which involved a summary denial of the motion for post-conviction relief with no statement of the reason for rejection. Here there was a two and one-half day hearing and an articulated order explaining the denial of relief (PC-R 1136 - 1139).[1]

Appellee vigorously denies that appellant did not have an opportunity to present his claims.

## ISSUE II

**WHETHER APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE.**

**(Claim IX, below)**

### Argument

Appellant claims that he was denied effective assistance of counsel at the penalty phase in three respects:

(a) the failure to present the testimony of Grover Yancy;

(b) the failure to investigate, prepare and present available mitigating evidence;

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[1] In appellant's statement of facts (Brief, pp. 5 - 7) he alludes to a colloquy at PC-R 86 - 88 and another at PC-R 95 - 96. There is certainly nothing wrong in the trial court's effort to establish some time parameters in the questioning, to avoid confusing the witness. The remark at PC-R 95 followed counsel for appellant's admission that had no case law for his position interpreting a discovery rule (PC-R 93). The hearing may have simply been made more difficult by counsel for appellant making faces at the judge (PC-R 108, 110).

(c) the failure to present available expert evidence of mental health mitigation.

Appellant suggests that trial counsel indicated that he did not prepare for penalty phase. The testimony of Mr. Bone was:

> "Q. In terms of preparing the case then, you basically had a little over two weeks notice that you were going?
>
> A. Yes, sir. We had already taken depositions in the case.
>
> Q. Right.
>
> A. And I felt that we were essentially prepared in that area. But as far as witness coordination and tying up as to the extenuation of mitigation into Ricky's background, I wanted to have the witnesses coordinated through Mr. Chambers, take some pictures of his background and present that, and Dr. Ritt's also, evaluations."

(PC-R 67 - 68)

Mr. Bone also explained that he did not want to introduce evidence of low average intelligence because the evidence would show how well he understood things and how knowledgeable he was (PC-R 69)

Bone testified that he furnished to Dr. Ritt what was requested (PC-R 69). He had family background information form the mother and a couple of sisters. He considered and rejected using Dr. Ritt because he felt the more descriptive life history from his mother would be most impressive with the jury (PC-R 71). Bone wanted the investigator Chambers to speak with all the members of the family (he taped their statements as best he recalled) (PC-R 72). Investigator Chambers did get appellant's

high school records and took statements from family members (PC-R 204). Mental health expert Dr. Ritt was "comfortable with" his report and much of the family history is cumulative (PC-R 594 - 95).[2]

(a) The Failure to Present Grover Yancey Testimony at Penalty Phase

Grover Yancey gave a statement to law enforcement authorities concerning a conversation he had in jail with Benito Torres, a codefendant of Garcia. This statement was provided to defense attorney Bone (PC-R 954 - 962, PC-R 35). In that statement Torres admitted that he and some friends got together and planned a robbery and killed some people. According to Yancey, Torres admitted shooting the lady who survived and "his friend" shot the man and woman (PC-R 956). Torres did not identify who "his friend" was by name (PC-R 127). When prosecutor Singer asked Yancey if he (Yancey) knew who was doing the shooting, Yancey answered:

> "I think that guy's name was . . . 17 year old kid. Yea, 17 year old kid."
>
> (PC-R 957)

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[2] Of course, additional time can make better advocates of us all. Counsel for appellant served his brief in the instant case one year after filing of the appellate record. Counsel for appellee might well have done a better job on this brief if more than twenty-five days from receipt of the corrected appellant's brief were taken.

Note that Yancey did not say that Torres said the seventeen year old was the shooter; rather Yancey apparently is simply drawing that inference.

Trial counsel Bone regarded Yancey's statement as inadmissible hearsay (PC-R 59 - 61). Trial counsel was correct. Torres' statement to Yancey constitutes hearsay, is not admissible as a statement against penal interest as to him since he did not admit shooting the Wests and there is no indicia of reliability in the comments. Unlike Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed.2d 297 (1973), state law herein does not prohibit the introduction of a hearsay statement against penal interest. Cf. Hill v. State, 549 So.2d 179 (Fla. 1989); Card v. State, 453 So.2d 17 (Fla. 1984).

Even assuming (only arguendo, of course) that trial counsel was deficient in failing to attempt to introduce the Yancey statement, the second prong of Strickland must remain unsatisfied in light of the fact that Hewitt testified to appellant's admission of being the triggerman (OR 1778 - 79). Moreover, appellant admitted to both his trial attorney and mental health expert that he in fact killed both murder victims (PC-R 117 - 118; PC-R 587). As stated in Strickland v. Washington:

> "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."
>
> (80 L.Ed.2d at 698)

See also Strickland, supra at 693, where the Court declares:

> "Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's error were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

We know that the result obtained is reliable; our confidence in the outcome is not undermined. The second prong of Strickland remains unsatisfied. This Court must reject appellant's claim.

(b) Appellant now second guesses trial counsel with the now familiar tactic of urging that what counsel did was wrong or not enough or both wrong and not enough. He relies primarily on the testimony at evidentiary hearing of witnesses Concepcion Gaona (appellant's sister), Maria Garcia (another sister), Steve Garcia and Santos Garcia.[3]

Trial attorney Bone explained his concern and fear at using Santos Garcia who might inadvertently or otherwise elicit testimony that she overheard an admission concerning the premeditated nature of the crime, testimony he successfully kept out in guilt phase and some members of the family he did not want near the courthouse because of damaging testimony (PC-R 133 - 136). See Squires v. State, 558 So.2d 401 (Fla. 1990). He explained that the testimony of other relatives would have been

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[3] Appellee strongly objects to appellant's attempt now to rely on the alleged evidence of one Carmen Barajas (Brief, p. 30) since appellant had an opportunity to present the testimony of all his witnesses on November 29, and 30 and December 1, 1989 -- subject to cross examination -- and apparently chose not to call Barajas.

cumulative to that which was presented and appellant was satisfied with the case they put on (PC-R 147). The record reflects that trial counsel did present to the jury witnesses Maria Garcia who testified that appellant was a loving brother -- one of eight children who tried to help care for members of the family; that he would work as a migrant picking tomatoes and providing earned money to his mother. She added that their father left the family and contributed nothing. Appellant was good to his son (OR 2214 - 2219). Appellant's mother Josephine Garcia also testified as to the hardships of raising a large family while working in the fields, the desire of appellant to help with money he earned to help raise the other members of the family, and her description of what a good son he was who caused no problems (OR 2220 - 2224).

Trial counsel was neither deficient nor is there a reasonable probability of a different outcome in the proceeding by failing to call additional relatives to describe Garcia's sterling qualities. More is not necessarily better. Woods v. State, 531 So.2d 791 (Fla. 1988); Foster v. Dugger, 823 F.2d 402 (11th Cir. 1987); Francois v. Wainwright, 741 F.2d 1275 (11th Cir. 1984); Stewart v. Dugger, 877 F.2d 851 (11th Cir. 1989).; Wright v. State, ___ So.2d ___, 16 F.L.W. S311 (Fla. 1991); Engle v. Dugger, ___ So.2d ___, 16 F.L.W S123 (Fla. 1991); Jones v. State, 528 So.2d 1171 (Fla. 1988); Groover v. State, 489 So.2d 15 (Fla. 1986). Having failed to achieve a satisfactory result by utilizing a "he was a good boy" defense, appellant asserts in

twenty-twenty hindsight that instead perhaps trial counsel should have urged a "mom was bad" defense. Such a one hundred and eighty degree turn about need not be accepted as a more reasonable approach. Correll v. Dugger, 558 F.2d 422, 426, fn. 3 (Fla. 1990)[4]

The lower court correctly denied relief.

(c) Appellant goes to great pains to urge that trial counsel should have called Dr. Ritt at penalty phase to elicit all that he had to offer regarding mental health mitigation. In the seminal case of Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674 (1984) the Supreme Court instructed:

> "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, that is, the defendant must overcome the presumption that under the circumstances, the challenged action 'might be considered sound trial strategy' . . .
>
> * * *
>
> The availability of instrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved infavorably to the defendant would increasingly come to be followed by a second

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[4] It was indeed strange that trial counsel is alleged to be deficient for not eliciting a certain fact from witness Santos Garcia (Brief, p. 30) when post-conviction counsel did not even elicit such testimony from witness Garcia when she was called to testify at the evidentiary hearing (PC-R 273 - 281).

> trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client."
>
> (80 L.Ed.2d at 694 - 95)
> (emphasis supplied)

The Court added:

> " . . . strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable."
>
> (80 L.Ed.2d at 695)

The testimony of both trial attorney Bone and Dr. Ritt make it abundantly clear the sound tactical choice of not putting Dr. Ritt on the stand at penalty phase. Bone did not want Garcia's fatal admissions of being the triggerman introduced via Ritt on cross-examination at penalty phase and Garcia had not waived his personal privilege of confidentiality he had with Dr. Ritt (PC-R 131). Ritt would give damaging testimony and Bone thought family members would be more effective for urging emotion and sympathy (PC-R 132). Ritt also admitted that Garcia had made statements to him which would be damaging in front of a jury (PC-R 593) including the comments admitting killing the two victims (PC-R 587), his domination over Louis Pina whom he occasionally slapped around (PC-R 585), his admission to committing other armed robberies and fooling the police as to his manner of making money (PC-R 586 - 587). He killed the victims because his cohorts were bungling the matter (PC-R 587).

Appellee respectfully submits that had appellant followed the advice of second-guessing post-conviction counsel a good case of trial counsel ineffectiveness would have been established. The criteria of ineffectiveness established by Strickland have not been established. See Johnston v. Dugger, ___ So.2d ___, 16 F.L.W. S459 (Fla. 1991); Bertolotti v. State, 534 F.2d 386 (Fla. 1988); Wright v. State, ____ So.2d ___, 16 F.L.W. S311 (Fla. 1991).

## ISSUE III

**WHETHER APPELLANT WAS DENIED ADEQUATE MENTAL HEALTH ASSISTANCE CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS.**

### Argument

There are several reasons why appellant may not prevail on this point. First of all, appellant Garcia did not assert the issue of the denial of an Eighth Amendment right to the effective assistance of mental health experts anywhere in his twenty-three issue, one hundred and thirty-eight (138) page motion for post-conviction relief or his forty-five (45) page Supplement to Motion to Vacate. (PC-R 656 - 795, PC-R 1035 - 1079) Thus, Garcia may not as an appellate after-thought raise ab initio on this appeal a new Eighth Amendment claim. See Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Hill v. State, 549 So.2d 179 (Fla. 1989); Occhicone v. State, 570 So.2d 902 (Fla. 1990); Farinas v. State, 569 So.2d 425 (Fla. 1990); Bertolotti v. State, 565 So.2d 1343 (Fla. 1990).

Secondly, appellant cannot prevail because there is not yet an Eighth Amendment right to adequate mental health experts in the sense that minimal standards must be satisfied as in the case for an ineffective assistance of counsel claim. Even Justice Marshall, the author of Ake v. Oklahoma, 470 U.S. 68, 84 L.Ed.2d 53 (1985) has recognized this in his dissenting opinion to the denial of certiorari in Brown v. Dodd, 484 U.S. 874, 98 L.Ed.2d 164, 165 (1987) ("The instant case calls upon the Court to determine whether an expert appointed by the state to evaluate a defendant's competency to stand trial must meet similar minimal standards. Although we have never confronted the issue directly . . . .")

A number of federal courts have declined to open the habeas courts to a battle of experts on competence review, to engage in psychiatric medical malpractice as part of its collateral review of state court judgments. Silagy v. Peters, 905 F.2d 986, 1013 (7th Cir. 1990); Harris v. Vasquez, 913 F.2d 606, 619 - 625 (9th Cir. 1990); cert. denied, Wayne v. Murray, 884 F.2d 765, 766 - 67 (4th Cir. 1989), 110 S.Ct. 29. And if the United States Supreme Court would in the future decide that there is such a right, relief would still appropriately be denied under the principles of Teague v. Lane, 489 U.S. 288, 103 L.Ed.2d 334 (1989) and Butler v. McKellar, 494 U.S. ___, 108 L.Ed.2d 347 (1990), and Sawyer v. Smith, 497 U.S. ___, 111 L.Ed.2d 193 (1990).

Finally, even if this claim had been appropriately preserved for appellate review by timely assertion below and even if the

claim were cognizable as a recognized right by United States Supreme Court precedent -- it would have to be rejected as meritless. Dr. Ritt testified in his deposition that defense attorney Roger Bone was primarily seeking mitigating circumstances from Ritt's examination. (PC-R 563) Ritt was comfortable that appellate was competent. (PC-R 569 - 70) Defense counsel had presented some of the family history, a bit of appellant's school history; Garcia's father had left when he was very young. The mother and family said he was a good boy and that it was poor Mexican-American family. (PC-R 572) Dr. Ritt was aware that economic deprivation and abuse could be presented to a penalty phase jury. (PC-R 573) In addition to what defense counsel told him, Ritt's interview with Garcia revealed a deprived childhood. (PC-R 574) Garcia was protective of his mother. (PC-R 575) He acknowledged that getting any kids of records is difficult for one living a migrant life-style. (PC-R 580)

On cross-examination Dr. Ritt added that appellant Garcia was cooperative with him (PC-R 583), did not display behavior suggestive of a thought disorder or psychiatric process; and he was communicative about his family. (PC-R 584) The witness acknowledged that his report also reflected Garcia's comment that if he didn't get respect, he'd cut your throat without thinking about it. (PC-R 585)

Garcia also stated that Louie Pina, one of his codefendants, was "okay because he's a dumb Mexican and does whatever I till

him to." Appellant also said "I'm number one with him and when I'm not, I slap him around and it's okay." Appellant indicated his dominant behavior. (PC-R 585) He didn't like alcohol. Garcia was angry with the entire world. (PC-R 586) Appellant admitted getting a gun at age seventeen, admitted beating his wife, admitted working so that the police wouldn't know, what he was really doing for money, was stealing. (PC-R 586) Garcia reported other acts of violence, shooting at people they didn't like in order to be in control. Garcia admitted to him that he shot and killed the two victims. (PC-R 587) He indicated the codefendants were fools; he stepped in because they bungled it. (PC-R 5870 He expressed no remorse over the shooting. (PC-R 588) He indicated that he should have also killed his companions. Dr. Ritt opined that Garcia could behave violently unpredictably with little apparent provocation he rationalizes and justifies his behavior on the basis that no one cared for him. (PC-R 589) He was competent at the time of the offense and competent to stand trial. (PC-R 590) Ritt talked to attorney Bone about his evaluation prior to Bone's conducting the penalty phase of the trial. (PC-R 591) Garcia was critical that the codefendants did not finish the job with the surviving victim. (PC-R 593)

Dr. Ritt agreed that the statements Garcia made to him concerning the events of the crime would be damaging if placed before a jury. (PC-R 593) After his evaluation of Garcia "I wouldn't have anticipated he would have called me." He did not

testify. (PC-R 594) Much of the information furnished to him about family history by CCR is cumulative. (PC-R 595)

Trial attorney Roger Bone admitted that his client had admitted to him that he in fact had killed Willie and Martha West. (PC-R 117) He testified that after talking to Dr. Ritt he didn't feel like he would want him present to testify; also, appellant had not waived the confidentiality privilege with Dr. Ritt. (PC-R 131) Attorney Bone feared the damaging testimony about Garcia that might emerge from Ritt's testimony. (PC-R 132) Bone thought that the most effective people were the family members he had. (PC-R 132) The testimony of other relatives would have been cumulative and appellant was also satisfied with the witnesses he presented. (PC-R 147)

Appellant may obtain no relief under Ake v. Oklahoma, 470 U.S. 68, 84 L.Ed.2d 53 (1984), which simply held that an indigent criminal defendant is entitled to the assistance of a psychiatrist when sanity at the time of the offense is seriously in question. Both Dr. Ritt and Dr. Krop are uniform in their thinking that appellant was sane. (PC-R 186). To the extent appellant seeks to urge entitlement to an expert who will provide favorable testimony he may not prevail. Martin v. Wainwright, 770 F.2d 981 (11th Cir. 1985). The court need not be detained long by Garcia's assertion that Dr. Krop who did not examine appellant at the time of trial, who did not interview family members but relied in documentation provided only by Garcia's post-conviction attorneys is a competent mental health expert

(he's testified ten times for CCR) and that Dr. Ritt who did examine Garcia and talked to trial attorney Bone and was aware of the economic deprivation and childhood filled with abuse (PC-R 572 - 73) was not. Moreover, appellant does not explain how Dr. Ritt can be blamed since he was not called to testify and that decision was based on the sound strategy not to disclose appellant's damaging admissions and Garcia's nonwaiver of the privilege.

## ISSUE IV

**WHETHER THE STATE'S ALLEGED INTENTIONAL WITHHOLDING OF MATERIAL AND EXCULPATORY EVIDENCE IN VIOLATION OF BRADY V. MARYLAND, 373 U.S. 83 (1963) AND ITS PROGENY VIOLATED THE CONSTITUTION.**

**(Claim VII, below)**

## Argument

On this score the lower court ruled that the evidence presented before the court did not show that the state failed to disclose exculpatory material or impeachment evidence; and that defendant failed completely to show that there is a reasonable probability that the result of defendant's trial would have been different if the allegedly withheld evidence had been disclosed (PC-R 1136).

Appellant complains that the state failed to provide impeachment evidence relating to state witness informant Johnny Huewitt. Trial attorney Bone testified that he recalled some felonies in Mr. Huewitt's record (PC-R 38). Bone was aware that Huewitt admitted to three felony convictions and he was aware

that the "shoplifting" offense with a year sentence was a felony (PC-R 128 - 129). Huewitt explained in his deposition that he did indeed have three convictions for grant theft (PC-R 876 - 877). The state was not required to offer any further explanation. Huewitt also testified at trial regarding his felony convictions (OR 1783 - 85).

Appellant alluded to a nolle proseque as to Mr. Huewitt (PC-R 895), which apparently occurred on December 16, 1982, several months prior to Huewitt ever meeting Enrique Garcia (PC-R 332).

Trial attorney Bone conceded in his testimony during cross-examination that it was impermissible to attempt to impeach a witness by asking how many arrests, as distinguished from convictions, a witness had (PC-R 128).

While attorney Bone stated that he had not seen a letter that Huewitt may have sent to D.O.C. in June of 1981 (PC-R 915), there has been no evidence presented (a) that such information was within the control of the Manatee County prosecuting authorities[5] or (b) that anything contained in that letter is exculpatory or impeaching under Brady v. Maryland, supra,. The

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[5] See United States v. Hsieh Hui Mei Chen, 754 F.2d 817 (CA9 1985) (prosecution not required to provide Brady material beyond that contained in government's files); United States v. Polizzi, 801 F.2d 1543 (CA9, 1986) (government has no duty to disclose impeachment or exculpatory material under Brady which prosecutor was neither aware of nor in possession of); United States v. Meros, 866 F.2d 1304 (11th Cir. 1989)(information in possession of government limited to that possessed by "prosecution team"); Demps v. Wainwright, 805 F.2d 1426 (11th Cir. 1986).

statement that he is being held in the Pinellas County Jail "as a state witness" does not contradict Huewitt's testimony that he was not previously a police informant or that he never testified against anyone in court.

Trial counsel Bone was only asked about the Grover Yancey statement (which he received) (PC-R 36), about Mr. Huewitt and the letter to D.O.C. (PC-R 52) about receiving information of alleged threats to Mr. Gaono (PC-R 54), about information that Torres may have been a murder suspect in California (PC-R 56), about information from 1982 - through 1983 that Torres' uncle was involved in planning the robbery (PC-R 86). Bone was not asked about receipt of other exhibits referred to in the brief at pp. 48 - 49 so it cannot be said with accuracy whether he was or was not furnished them and whether he might have used them for any purpose or not.

Appellant complains that the state suppressed the fact that law enforcement officers threatened Mr. Gaona with a ten year sentence prior to his statement to the police. Appellee denies that there were any threats and consequently denies suppression of an alleged threat. Gaona could not testify as to who made the alleged threat (PC-R 305), State Attorney Gardner never heard about any threats and would have taken corrective action had anyone brought them to his attention (PC-R 334, 357). More significantly even Gaona admitted at the evidentiary hearing that he told the police the truth and that he testified truthfully at trial (PC-R 229). The trial court did not err in rejecting

Gaona's testimony and finding that the evidence "did not show that the state failed to disclose exculpatory material or impeachment evidence" (PC-R 1136).[6]

Appellant contends that the prosecutor improperly "scripted" witness Huewitt which was not revealed to the defense. There was no scripting. At deposition Huewitt merely answered that prior to his deposition he had reviewed the transcript of the taped statement he had given to the detective (PC-R 866). State Attorney Gardner explained that he had prepared a question and answer outline for trial preparation with notes as to what to pursue with various witnesses (PC-R 330 - 31). Mr. Gardner further explained that some of the directions in the outline were directed at himself -- he might want to avoid having a witness blurt out something that might cause a mistrial (PC-R 339 -340). He was adamant that he never advised a witness not to tell the truth or suggest the manner of testifying (PC-R 340). See Wright v. State, ___ So.2d ___, 16 F.L.W. S311 (Fla. 1991).

With respect to the handwritten notation in the State Attorney's file -- Torres -- murder suspect in California -- both chief investigator Foy and State Attorney Gardner vehemently

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[6] Appellant appears also to be arguing now that Huewitt should not be believed because Gissendanner's trial testimony was to the contrary. But the jury heard and resolved all of that. Post-conviction vehicles are not a retrial.

denied any knowledge having any information that Torres was (or is) a murder suspect in California (PC-R 320, 334 - 335).

See Breedlove v. State, 580 So.2d 605, 607 (Fla. 1991) (the mere possibility that an item of undisclosed information might have helped the defense or might have affected the outcome of the trial does not establish materiality in the constitutional sense. There must be a reasonable probability -- one sufficient to undermine confidence in the outcome -- that the result of the proceeding would have been different had the evidence been disclosed to the defense); Spaziano v. State, 570 So.2d 289 (Fla. 1990) (investigator's notes were inferences by the investigator, not admissible evidence).

In Duest v. Dugger, 555 So.2d 849, 851 (Fla. 1990), this Honorable Court explained:

> The test for measuring the effect of the failure to disclose exculpatory evidence, regardless of whether such failure constitutes a discovery violation, is whether there is a reasonable probability that "had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985).

The trial court correctly determined there was not a reasonable probability that had the materials complained of been furnished to the defense the result of the trial would have been different. Steinhorst v. State, 574 So.2d 1075 (Fla. 1991); Jennings v. State, ___ So.2d ___, 16 F.L.W. S452 (Fla. 1991); Kight v. Dugger, 574 So.2d 1066 (Fla. 1990). Our confidence in

the outcome has not been undermined, especially with Garcia's admissions to attorney Bone and mental health expert Ritt that he was the triggerman who murdered Mr. and Mrs. West.

## ISSUE V

**WHETHER THE STATE'S ALLEGED INTRODUCTION OF FALSE AND MISLEADING EVIDENCE VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS.**

**(Claim VII, Below)**

### Argument

Appellant here contends that the prosecutor knowingly used false or misleading evidence while material, exculpatory evidence was concealed by the state. Appellee denies the charge. He claims that the state in closing argument urged that there was no "Perez" and that Garcia when referring to Perez in his statements was referring to himself.

It is certainly true that in closing argument the prosecutor referred to appellant's use of Joe Perez as a straw man and that anything bad in Garcia's statements was blamed on Joe Perez and that Garcia was actually responsible (OR 2112 - 13).

Former State Attorney James Gardner was brought down from Buffalo, New York at the behest of appellant (PC-R 1126 - 29) and presented brief testimony for Garcia (PC-R 149 -153). Gardner was recalled by the state at the evidentiary hearing (PC-R 330 - 358) and was asked no questions about this matter. Appellant refers to a statement by one Lisa Smith but appellant did not produce any testimony or evidence by Lisa Smith.

Appellee submits that there is no constitutional error -- or other error -- in the prosecutor's argument asking the jury to disbelieve appellant.

## ISSUE VI

**WHETHER APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN THE GUILT PHASE.**

**(Claim IX, below)**

### Argument

In conclusory fashion appellant mentions that trial counsel failed to adequately argue in support of his motions to suppress Garcia's statements. (Brief, p. 63) The trial court's order denying relief recites:

> "a. Statements by Defendant to detectives on October 8, 1982, were approved by the Florida Supreme Court. Garcia v. State, 492 So.2d 360, 365 (Fla. 1986). Defendant's counsel chose not to move to suppress as a matter of strategy. The reasoning was based upon a belief that the statements were Defendant's version of the events showing him not to be the triggerman. Defendant's counsel wanted this version before the jury, but he wanted to avoid putting the Defendant on the stand. None of the evidence presented by the Defendant on the present motion shows a deficiency. Further, the evidence shows the statements were voluntarily made after Miranda warning. No prejudice is shown.
>
> b. On October 11, 1982, Defendant made statements to law enforcement officers after first appearance *and before indictment*. Trial counsel did not move to suppress these statements. A comparison of these statements to those of October 8, 1982, shows no substantive difference in what law enforcement learned. The Defendant talked freely to the officers, appeared to

> understand his rights, and did not invoke his Sixth Amendment right to counsel. Trial counsel was not deficient in failing to move against these statements. Further, no prejudice was shown.
>
> c. This Court does not understand what deficiency is alleged as to the December 30, 1982 statement. Trial counsel filed a motion to suppress, which was heard, and was denied. The denial was approved. Garcia v. State, 492 So.2d 360, 365 (Fla. 1986). No deficiency was shown." (R 1137 - 1138)

The lower court's ruling is supported by the evidence. Trial defense attorney Bone testified that the statements obtained from Garcia on the first two occasions were subject to a motion to suppress. He felt that the last statement made to a deputy in December was not suppressible. He decided not to suppress the earlier statement because they tended to show lack of culpability by Garcia (denial of shooting) and tended to impeach subsequent damaging statements. (PC-R 75 - 76) Defense counsel did file a motion to suppress on the last statement, in part to see how Garcia would react as a witness and appellant's performance there required a change of tactics. (PC-R 76 - 77)[7] That motion was denied by the court. (PC-R 77) Some of the statements admitted were semi-exculpatory and counsel tactically decided not to attempt to move to suppress items because he could present the matters before the jury without using Garcia, whose

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[7] The original record on appeal corroborates the testimony. Counsel filed a motion to suppress (OR 2722), an evidentiary hearing was held (OR 2468 - 2506) and the motion was denied (OR 2769).

many inconsistent statements could be exposed if subject to cross-examination as a live witness. (PC-R 119 - 120)

Finally, no prejudice is established since this Court upheld the admissibility of the statements on direct appeal. Garcia v. State, 492 So.2d 360, 365 (Fla. 1986).

Aside from announcing his disagreement with the conclusion reached by the lower court, appellant makes no effort to explain how the lower court erred.

Appellant alludes to trial counsel's alleged failure to use impeachment evidence of Huewitt and Gaona, failure to interview Concepcion Gaona, failure to learn of Santos Garcia's exculpatory evidence and the failure to present Grover Yancy's testimony. The trial court ruled:

> "e. State's witness Santos Garcia was never fully presented to the jury. Beyond a few preliminary questions each time examination was begun, no evidence of any substance was elicited. There was no deprivation of Defendant's right to cross-examination.
>
> f. A State's witness Johnny Huewitt was offered to provide incriminating statements that Defendant allegedly made to Huewitt while in jail. Defendant's theories about Huewitt receiving preferred treatment or that Defendant's trial counsel somehow failed to adequately prepare for and cross-examine Huewitt were not shown. The evidence as to Huewitt is just the opposite. Trial counsel's cross-examination was thorough. Defendant now suggests that his trial counsel should have done something more. The evidence is not clear as to what should have been done. There was no deficiency as to Huewitt.
>
> g. Defendant asserts his trial counsel failed to adequately cross-examine Giraldo Gaona. This claim lacks merit." (R 1138)

Trial counsel Bone testified that the testimony given by Huewitt at trial was consistent with the version given by appellant Garcia to him. He cross-examined Huewitt. (PC-R 139) Bone also explained why he thought it important to limit the testimony of Santos Garcia; that person had information regarding appellant's premeditated intent and defense counsel did not want exposure to the jury to elicit it. (PC-R 133 - 135)[8]

Appellant has failed to establish, in the lower court or here, either a substantial deficiency by counsel or that there is a reasonable probability of a different result. Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674 (1984).

## ISSUE VII

**WHETHER APPELLANT WAS DENIED A FAIR TRIAL BY THE TRIAL COURT'S REFUSAL TO GRANT ADDITIONAL PEREMPTORY CHALLENGES.**

**(Claim I, below)**

### Argument

The trial court correctly denied relief for procedural reason; such a claim could be urged only on direct appeal, not collaterally. (R 1136) See Preliminary Statement, supra, and cases cited therein.

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[8] This is confirmed by original record on appeal where Garcia was called to testify and produced little of substance (OR 1278 - 1285, OR 1293, OR 1432 - 35).

## ISSUE VIII

**WHETHER APPELLANT WAS DENIED A FAIR TRIAL BY IMPROPER JURY CONDUCT AND THE TRIAL COURT'S FAILURE TO MAKE ADEQUATE INQUIRY.**

**(Claim II, below)**

### Argument

The trial court correctly denied relief for procedural reasons. (PC-R 1134) This issue should have been presented, if at all, on direct appeal; the substance of the claim is not now collaterally cognizable. See Preliminary Statement, supra, and cases cited therein.

Additionally, the record reflects that the trial court instructed the jury, as the defense wanted, not to burst out with questions. (PC-R 1435 - 38)

Appellant may not in a post-conviction setting invade the privacy and sanctity of the jury deliberations by inquiring into their mental process. See Songer v. State, 463 So.2d 229 (Fla. 1985); *Fla. Stat. 90.607(2)(b)*; Cave v. State, 476 So.2d 180 (Fla. 1985).

## ISSUE IX

**WHETHER APPELLANT WAS IMPROPERLY PRECLUDED FROM CROSS-EXAMINING SANTOS GARCIA.**

**(Claim III, below)**

### Argument

The trial court correctly denied relief for procedural reasons. (R 1136) This issue should have been raised if at all,

on direct appeal (if properly preserved for appellate review). See Preliminary Statement, supra, and cases cited therein.

Moreover, the claim is without merit.

Santos Garcia was called as a state witness and testified on direct examination. (OR 1278 - 1285) A break was called to allow the witness to compose herself and then she was recalled. (OR 1291 - 93) Defense counsel announced that he had no questions "at this time" and reserved the right for later cross-examination. (OR 1293)

Although the prosecutor attempted to recall Santos Garcia, she did not testify and the prosecutor opined that he might put her on later. (OR 1432 - 35) There was absolutely no preclusion of cross-examination.

As explained in Issue IV, supra, trial attorney Bone articulated that he wanted the testimony of Santos Garcia limited because she could elicit damaging testimony supporting a premeditated killing. Counsel was not ineffective in so acting.

## ISSUE X

**WHETHER APPELLANT WAS DENIED A FAIR TRIAL BY IMPROPER PROSECUTORIAL COMMENTS DURING VOIR DIRE, OPENING AND CLOSING ARGUMENTS IN THE GUILT AND PENALTY PHASES.**

**(Claim IV, below)**

### Argument

The trial court correctly denied relief for procedural reasons as such a contention of improper prosecutorial comments

must be urged on direct appeal. (PC-R 1136) See Preliminary Statement, supra, and cases cited therein.

## ISSUE XI

**WHETHER APPELLANT WAS DENIED HIS EIGHTH AMENDMENT RIGHTS BY AN ALLEGEDLY IMPROPER AND MISLEADING INSTRUCTION AS TO THE ELEMENTS OF ATTEMPTED MURDER.**

**(Claim VIII, below)**

### Argument

The trial court correctly concluded that post-conviction relief must be denied for procedural reasons. (PC-R 1136) Such an issue must be raised if at all on direct appeal following proper preservation by objection in the trial court. See Preliminary Statement, supra, and cases cited therein.

## ISSUE XII

**WHETHER THE JURY WAS REPEATEDLY MISLED BY ARGUMENTS AND INSTRUCTIONS WHICH DILUTED THEIR SENSE OF RESPONSIBILITY. (The Caldwell claim).**

**(Claim X, below)**

### Argument

The trial court correctly concluded that relief was denied for procedural reasons. This claim should have been preserved by appropriate objection in the trial court and then urged on direct appeal. See Dugger v. Adams, 489 U.S. 401, 103 L.Ed.2d 435 (1989); see also Preliminary Statement, supra, and cases cited therein.

## ISSUE XIII

**WHETHER THERE WAS AN IMPERMISSIBLE SHIFTING OF THE BURDEN OF PROOF IN THE JURY INSTRUCTIONS AT SENTENCING.**

**(Claim XI, below)**

### Argument

The trial court correctly denied relief for procedural reasons. (PC-R 1136) The issue was cognizable if at all on direct appeal not via collateral attack. See Preliminary Statement, supra, and cases cited therein.

## ISSUE XIV

**WHETHER, DURING VOIR DIRE AND PENALTY PHASE ARGUMENT, THE PROSECUTOR IMPROPERLY ASSERTED THAT SYMPATHY WAS AN IMPROPER FACTOR.**

**(Claim XII, below)**

### Argument

The trial court correctly ruled that this issue was procedurally barred. (PC-R 1136) This claim is one for review on direct appeal, if at all; not collaterally. See Preliminary Statement, supra, and cases cited therein.

Additionally, and alternatively, even if the claim had not been procedurally defaulted by the failure to object at trial and assert it on direct appeal; it is difficult to see what relief appellant could receive after Saffle v. Parks, 494 U.S. ___, 108 L.Ed.2d 415 (1990).

## ISSUE XV

**APPELLANT'S CLAIM THAT THE SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE.**

**(Claim XIV, below)**

### Argument

The trial court correctly resolved that that issue was procedurally barred. (PC-R 1136) The issue was cognizable on direct appeal, not collaterally. See Preliminary Statement, supra, and cases cited therein.

Even if the claim were cognizable, alternatively, it would be meritless. Porter v. Wainwright, 805 F.2d 930, 943, fn. 15 (11th Cir. 1985); Clark v. State, 443 So.2d 973 (Fla. 1983); Bertolotti v. Dugger, 883 F.2d 1503 (11th Cir. 1988).

## ISSUE XVI

**WHETHER THE IMPOSITION OF THE DEATH SENTENCE IS UNCONSTITUTIONAL UNDER ENMUND V. FLORIDA AND TISON V. ARIZONA.**

**(Claim XVII, below)**

### Argument

The trial court correctly denied relief on procedural grounds. (R 1136) The issue was cognizable on direct appeal and in fact specifically rejected on Garcia's prior direct appeal. Garcia v. State, 492 So.2d 360, 367 - 68 (Fla. 1986). See Preliminary Statement, supra, and cases cited therein.[9]

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[9] Appellant's claim that the jury verdict of felony murder constituted a finding of no premeditation is contradicted by this

## ISSUE XVII

**APPELLANT'S CLAIM THAT "HAC" AGGRAVATING FACTOR WAS ERRONEOUSLY APPLIED.**

**(Claim XV, below)**

**Argument**

The trial court correctly determined that the issue was barred for procedural reasons. (PC-R 1136) It is one cognizable on direct appeal not via Rule 3.850. See Preliminary Statement, supra, and cases cited therein.[10]

## ISSUE XVIII

**WHETHER THE EIGHTH AMENDMENT WAS VIOLATED BY THE TRIAL COURT'S ALLEGED REFUSAL TO FIND MITIGATING CIRCUMSTANCES AND ALLEGED REFUSAL TO PERMIT ADDITIONAL MITIGATING EVIDENCE.**

**(See Claim XVI, below)**

**Argument**

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Court's prior decision. Garcia v. State, 492 So.2d 360, 366 (Fla. 1986). This Court specifically considered and rejected Garcia's Enmund claim. 492 So.2d at 367 - 68. Tison v. Arizona, 481 U.S. 137 (1987) adds no greater protection to him. This Court's resolution satisfied Cabana v. Bullock, 474 U.S. 376, 88 L.Ed.2d 704 (1986).

[10] On direct appeal this Honorable Court considered and rejected a defense attack on the trial court's finding of "HAC". 492 So.2d at 367. Even if appellant's belated argument relying on Lankford v. Idaho, 500 U.S. ___, 114 L.Ed.2d 173 (1991) could be entertained -- he did not argue lack of notice, below in Claims XV (See Steinhorst, supra, Occhicone, supra) -- it is meritless as appellant knew throughout the proceeding that the state was seeking the death penalty.

The trial court correctly denied relief for procedural reasons; the issue was cognizable on direct appeal, not 3.850. (PC-R 1136) See Preliminary Statement, supra, and cases cited therein.

Moreover, appellant appears to be adding to the claim an argument not asserted in issue XVI, below, by inserting that the trial court refused to permit additional mitigating evidence. Appellant may not present on appeal a claim not advanced below. Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Occhicone v. State, 570 So.2d 902 (Fla. 1990). There is no need to reconsider this Court's prior ruling since trial counsel had told the sentencing judge the additional evidence on background was cumulative -- 492 So.2d at 367 -- trial counsel added nothing at the evidentiary hearing about additional desired evidence and explained that there was certain people he did not want to call.

## ISSUE XIX

**WHETHER THE JURY WAS DENIED THE RIGHT TO HEAR IMPORTANT TESTIMONY REGARDING THE AGE OF THE CO-DEFENDANTS.**

**(Claim XVIII, below)**

### Argument

The trial court correctly denied relief for procedural reasons. (PC-R 1136) The issue is one cognizable on direct appeal not by motion to vacate. See Preliminary Statement, supra, and cases cited therein.

Additionally, even if the claim were cognizable, it would be meritless since the trial court instructed the jury to rely on the testimony presented. (OR 1437 - 38). No one was precluded from offering evidence. Appellant had an evidentiary hearing and another one is not required now.

## ISSUE XX

**WHETHER APPELLANT'S DEATH SENTENCE MUST BE VACATED BECAUSE THE TRIAL COURT ALLEGEDLY FAILED TO PROVIDE A FACTUAL BASIS TO SUPPORT THE PENALTY.**

**(Claim XIX, below)**

### Argument

The trial court correctly denied relief on procedural reasons (PC-R 1136); the issue was cognizable on direct appeal and not via Rule 3.850.[11] See Preliminary Statement, supra, and cases cited therein.

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[11] On Garcia's direct appeal, counsel for appellant filed a motion to relinquish jurisdiction for preparation of a clarified sentencing order which motion was granted in this court's Order of October 2, 1984. The trial court entered an amended order on November 14, 1984 pursuant to this Court's order. Appellant attempts to create an issue that the sentence cannot stand because it is violative of Van Royal v. State, 497 So.2d 625 (Fla. 1986). He is mistaken. The trial judge entered its written findings of aggravation and mitigation on December 14, 1983 (OR 2926 - 2927) prior to the notice of appeal (OR 2930). See Stewart v. State, 549 So.2d 171 (Fla. 1989); Stewart v. State, ___ So.2d ___, ___ F.L.W. ___ (Case No. 75,337, opinion filed September 12, 1991); Grossman v. State, 525 So.2d 833 (Fla. 1988).

## ISSUE XXI

**APPELLANT'S CLAIM THAT THE INTRODUCTION OF NONSTATUTORY AGGRAVATING FACTORS SO PERVERTED THE SENTENCING PHASE AS TO RESULT IN ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY.**

**(Claim XXI, below)**

### Argument

The trial court correctly determined that relief should be denied for procedural reasons -- the claim is one that could have and should have been raised on direct appeal and if it was not it may not be asserted ab initio via Rule 3.850. (PC-R 1136) See Preliminary Statement, supra, and cases cited therein. Appellant also may not reargue that which was urged on direct appeal.[12]

## ISSUE XXII

**WHETHER THE PROSECUTOR IMPROPERLY INJECTED RACIAL, ETHNIC AND NATIONAL ORIGIN PREJUDICE INTO THE TRIAL.**

**(Claim XXII, below)**

### Argument

The trial court correctly ruled below that the claim was denied for procedural reasons; the issue was one that could have been raised on direct appeal if preserved by objection in the

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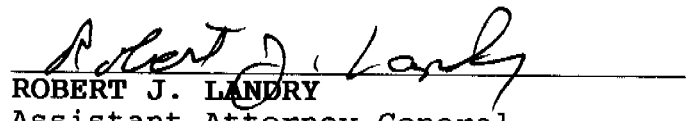
[12] The United States Constitution is not violated by consideration of nonstatutory aggravating factors (even if they were to be considered) relevant to the character of the defendant. See Barclay v. Florida, 463 U.S. 939, 77 L.Ed.2d 1134 (1983).

## CONCLUSION

The lower court's order should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to the Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 27th day of September, 1991.

OF COUNSEL FOR APPELLEE.