IN THE SUPREME COURT OF FLORIDA

GREGORY MILLS,

Appellant,

v. CASE NO. 77,367

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The facts found by this court on direct appeal are:

> The evidence at the trial showed that 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 intruders 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. They were then released.
>
> 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 body.
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> 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 (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. 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 form 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, 174-175 (Fla. 1985).

The state also presented evidence of the gunshot residue test performed on Mills the morning of the murder.

> 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.

Id. at 176.

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 the Honorable J. William Woodson. Mills was represented at trial by Thomas Greene and Bennett Ford. 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 (ROA[1] Penalty Phase 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 (ROA Penalty Phase 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. The family was very poor and had little money (ROA Penalty Phase 65-70).

Mills' older sister, Dianetta Alexander, had four children, a B.A. in education and was married to an elementary school coach. Mills was the youngest of four brothers, two sisters, three stepbrothers and one stepsister. Dianetta was seventeen years old when their father was killed and she testified that she tried to raise Mills. They lived in a poor section. Mills went to regular school through the seventh grade, then was sent to a corrections center where he obtained his equivalency diploma.

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[1] The record cites are consistent with those used by Appellant: "R" for post-conviction record and "ROA" for record on direct appeal.

When he was 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 (ROA Penalty Phase 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 pre-sentence investigation (ROA Penalty Phase 123).

Sentencing took place on April 18, 1980. Mills was represented by Mr. Greene at sentencing. Counsel was allowed to offer evidence in mitigation (ROA 894). Dianetta 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 be sentenced to life imprisonment because "some of the things that have occurred and some of the things that have been said were not true" (ROA 898) and she believed he was innocent (ROA 900); he had a hard life and she was only a child herself when she became 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." (ROA 895-900).

Mills took the stand and testified in his own behalf to clarify matters contained in the P.S.I. (ROA 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

(ROA 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 (ROA 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" (ROA 905) and planned 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 (ROA 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 (ROA 911-920). The state also proffered the February 6, 1980 conviction for burglary and theft of the shotgun that killed Mr. Wright (ROA 921), and the April 1, 1980 conviction for armed robbery with a firearm and false

imprisonment (ROA 921). The shotgun was stolen May 8 or 9, 1979, (fifteen or sixteen days before the murder) and the armed robbery was May 9, 1979 (R 1095, 1084). After considering the evidence the court sentenced Mills to death (ROA 937).

This court per curiam affirmed the conviction and sentence of death on direct appeal. Mills v. State, 476 So.2d 172 (Fla. 1985). It struck the aggravating factor of great risk of death to many as inapplicable; and the aggravating factor of pecuniary gain as duplicative; and determined that the crime was not heinous, atrocious or cruel. Id. at 177-178. The remaining aggravating factors present in this case are 1) under sentence of imprisonment; 2) previous conviction of violent felony and 3) during the commission of a felony. There were 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 February 24, 1988, Mills filed a motion for post-conviction 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 Mills appealed. This court remanded for an evidentiary hearing in regard to counsel's failure to develop and present evidence that would tend to establish statutory or nonstatutory mental mitigating circumstances. Mills v. Dugger, 559 So.2d 578 (Fla. 1990). An

evidentiary hearing was held November 2, 1990. The trial court denied relief on January 3, 1991.

The trial court found:

> 1. The Court in applying the holding in Strickland v. Washington, 466 So.2d 668, 80 L.Ed.2d 674 (1984), finds that the defendant has failed to show counsel's performance was deficient such that the defendant's attorneys did not function as "counsel" for Sixth Amendment purposes. The Court finds that notwithstanding an earlier report pertaining to the defendant that recommended testing to rule out minimal brain dysfunction, there was nothing to indicate to reasonably competent counsel, the existence of any mental mitigating factors. The facts of the case did not suggest it, and conversations with the defendant at no time prior to sentencing, suggested it. In fact, the defendant, as indicated in the Pre-Sentence Investigation, indicated an absence of any past serious injuries or illnesses. Indeed, the presentation of mental mitigating factors would have been inconsistent with the defense raised at trial.
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> 2. The defendant having failed to demonstrate counsel's deficiency as required in the first prong of the test as set forth in Strickland, it is unnecessary to address the argument advanced by the defendant regarding any prejudice claimed as a result of the alleged ineffectiveness of counsel.

(R 1057-58).

SUMMARY OF ARGUMENT

Neither penalty phase counsel nor sentencing counsel was deficient in failing to pursue mental health issues. There was nothing from Mills' behavior or the circumstances of the crime to indicate psychological problems. Prior evaluations contained only negative information which would have prejudiced the jury against Mills rather than persuade them to recommend life. Mills received a life recommendation as a result of an argument which appealed to the jurors' emotions. If the jury had been given evidence that Mills had organic brain damage and was unable to control his behavior they would not have recommended life. Furthermore, the State would have been able to present testimony regarding Mills' crimes two weeks prior to the murder which were not impulsive or uncontrollable. Penalty phase counsel presented Mills as redeemable and as having a potential for rehabilitation, not as a violent brain-damaged criminal. The trial judge had evidence of Mills' psychiatric problems and family history when Mills was sentenced, although in a different form. The presently proffered testimony would not have persuaded the trial judge to follow the jury recommendation.

ARGUMENT

NEITHER PENALTY PHASE NOR SENTENCING COUNSEL WAS INEFFECTIVE IN FAILING TO INVESTIGATE MENTAL HEALTH ISSUES.

A claim of ineffective assistance of counsel, to be considered meritorious, must include two general components. First, a claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined. Kennedy v. State, 547 So.2d 912, 913-14 (Fla. 1989), citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1986).

A claimant asserting ineffective counsel bears a heavy burden. He must first identify the specific omission and show that counsel's performance falls outside the wide range of reasonable assistance. In determining whether this has occurred, courts must eliminate the distorting effects of hindsight by evaluating the performance from counsel's perspective at the time and must grant a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. The burden is on the claimant to show that counsel was ineffective. Having demonstrated inadequate performance, the claimant must then show an adverse effect so severe that there is a reasonable probability that the results would have been different except for

the inadequate performance. Cave v. State, 529 So.2d 293, 297 (Fla. 1988). Thus, the two components Mills must prove are 1) deficient performance and 2) prejudice.

1. Deficient performance. Mills claims Mr. Greene and Ms. Bickerstaff were deficient in failing to investigate mental health issues since "facts were available upon which reasonable counsel would investigate and develop such evidence" (Initial Brief at 3). Mills claims there was no tactical or strategic reason for failing to investigate. According to Mills, both Ms. Bickerstaff (who obtained a life recommendation from the jury), and Mr. Greene (who conducted sentencing) were ineffective for failing to obtain Mills' juvenile records, prior mental health evaluations or presentence investigation reports, or ask Mills' family members about prior mental health problems.

The evidence presented at the evidentiary hearing to support these claims was self-serving testimony from Ms. Bickerstaff, Mr. Ford and Mr. Greene, prior reports by Dr. Austin and Dr. Fumero attached to a pre-sentence investigation, a scar on Mills' head, MMPI test results from Mills' juvenile record, and testimony by Dr. Dee and Dr. Carbonell that, according to recent evaluations, Mills had organic brain damage (R 120, 235). Mills also presented a speedy trial motion filed in another case which argued he was prejudiced by the eight to nine month delay in prosecution since he could not remember where he was at the time of the crime (R 142). Family members testified about two childhood accidents during which Mills hit his head diving into the St. Johns River and ran into a concrete post at a stadium.

During Mr. Greene's testimony it was brought out that he was aware of Mills' prior record (R 14), had no reason to suspect insanity or incompetency (R 26, 31), and consulted Mills regarding strategy (R 31). The trial strategy was that Mills was innocent. Mills, supra, 476 So.2d at 175. He did not recall a scar on Mill's head (R 14).[2] If he saw the PSI, it was at sentencing (R 21). He did argue impaired capacity to the trial judge based on Mill's prior record and deprived environment (ROA 930, R 27). Mr. Greene testified at the evidentiary hearing the mental health evaluations could have meshed the two theories together as far as why his record was so bad (R 28). Although, with the benefit of hindsight, he now proclaims the information attached to the PSI should have triggered an evaluation, hindsight vision is not the test for ineffectiveness. Routly v. State, 16 F.L.W. S676, 679 n.4 (Fla. Oct. 17, 1991); Kelley v. State, 569 So.2d 754, 761 (Fla. 1990). Furthermore, the evaluations of Dr. Austin and Dr. Fumero contained only negative information. Dr. Austin's report states that Mills had no interest in rehabilitation, was in complete contact with reality, realizes the seriousness of his situation but had no motivation to work toward helping himself. The biggest motivating force in his life was anger (R 1131)[3]. Dr. Austin's impression was that:

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[2]Neither Ms. Bickerstaff nor Mr. Ford noticed a scar (R 54, 445). The trial judge had difficulty seeing the scar (R 55).

[3] Although there were three PSI's introduced at the evidentiary hearing, the one which Mr. Greene would have had at sentencing and the one the prosecutor introduced at sentencing is the one in the present from pages 1124-1132 (ROA 921, 648-666). The supplement to the PSI which was attached to the original PSI and introduced at sentencing was not introduced at the evidentiary hearing (ROA 665-666).

> It is my impression that an intensive rehabilitation and treatment program in a controlled environment could help this boy. However, as far as is known, no such environment exists in this State. A more realistic prognosis is that he will become a fairly permanent or frequent resident of this State's Prisons.

(R 1131). This would hardly indicate to an attorney that Mills might have an extreme emotional disturbance. Mills, himself, denied any history of personal or family history of mental or emotional illness (R 1129). Dr. Fumero's report is even less helpful since he diagnosed Mills as Unsocialized Aggressive Reaction to Childhood and Adolescence (R 1132). As the defense expert told the court, this diagnosis in children is the same as antisocial personality in adults which is a condititon that cannot be considered in mitigation. Carter v. State, 576 So.2d 1291, 1292-93 (Fla. 1989). Antisocial personality and brain damage are mutually exclusive (R 140). Dr. Fumero recommended an EEG to rule out minimal brain dysfunction. Whether a psychologist recommends an EEG to rule out minimal brain dysfunction would not raise a red flag. In fact, no EEG has been done to date so even present counsel have disregarded this supposedly critical bit of information.

The behavioral problems Mills might have as outlined in the MMPI are not the type that would scream out "brain damage." As Dr. Dee told the court, not all juveniles have brain damage, they are simply antisocial or disturbed (R 128). Even though the MMPI computer analysis says to "consider psychiatric evaluation" the

succeeding information would not raise a red flag (R 1102). In fact, the analysis states to "interpret profile with caution". That Mills was somewhat tense and restless, tended to give socially approved answers regarding self-control and moral values, may have poor self-concept, has internal conflicts, is immature, egocentric, suggestible and demanding, moderately depressed, touchy, inclined to blame others for his difficulties, has the capacity to maintain adequate social relationships and has a normal male interest pattern for work, hobbies, etc. would hardly point to brain damage. Mr. Greene and the trial judge had information Mills may be antisocial. Further information he "may have significant psychiatric problems" and "is aware of and concerned about asocial attitudes and emotional impulses but unable to control them" was quite obvious from his criminal history. See, Routly v. State, 16 FLW S676, 677 (Fla. October 17, 1991).

The scar was not noticed by any attorney or even the trial judge. Looking at the circumstances of the crime (which have no indicia of mental disturbance), the fact Mills exhibited no signs of mental illness and would deny any emotional or mental history, the negative implications of the juvenile reports, Mill's continued insistence he was innocent, and the life recommendation by the jury, Mr. Greene was not deficient in failing to pursue further mental health evaluations. The trial judge had the information of Mill's possible mental disturbance before him and further information would not have availed Mills. This court has refused to find counsel ineffective in relying on the jury

recommendation and failing to present further mitigating evidence to the judge. See, Buford v. State,[4] 492 So.2d 355, 359 (Fla. 1986), citing Lewis v. State, 398 So.2d 432 (Fla. 1981). Mr. Greene was not deficient.

Ms. Bickerstaff testified she felt in hindsight she should have developed mental health issues (R 43). Hindsight vision is not the test for ineffectiveness. Routly v. State, 16 F.L.W. S676, 679 n.4 (Fla. Oct. 17, 1991); Kelley v. State, 569 So.2d 754, 761 (Fla. 1990). Neither Mr. Ford (who sat through the trial and briefed Ms. Bickerstaff) nor Mr. Greene indicated Mills had any kind of mental impairment (R 44, 49). At the penalty phase she tried to humanize Mills (R 48). She felt the mental health information would have explained Mills' criminal history (R 60)[5]. The trial judge observed that Ms. Bickerstaff had been very successful in the penalty phase and did an excellent job (R 65). Mill's contention that counsel rendered ineffective assistance during the penalty phase is repudiated by the fact that the jury recommended life. Buford v. State, 492 So.2d 355

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[4] This case was later remanded pursuant to Hitchcock v. Dugger, 481 U.S. 393 (1987) and Lockett v. Ohio, 438 U.S. 586 (1978), and Buford was given a life sentence. Ineffective assistance claims were not the basis for reversal.

[5] Mills was released from the Department of Corrections on March 16, 1979. On May 8, 1979, he stole the murder weapon (a shotgun) during a burglary. On May 9, 1979, he abducted and robbed a convenience store clerk. The jury was precluded from hearing the prior crimes information (ROA Penalty Phase 27). The only prior conviction that was before the jury was the aggravated assault conviction and the state was precluded from presenting testimony regarding details of the assault (ROA Penalty Phase 29), and that Mills was released on March 16th and was on parole at the time of the murder (ROA Penalty Phase 54).

(Fla. 1986), citing Lewis v. State, 398 So.2d 432 (Fla. 1981); Douglas v. State, 373 So.2d 895 (Fla. 1979).

The crux of the penalty phase argument was residual doubt. Ms. Bickerstaff argued that there were no eyewitnesses and many unknowns (ROA Penalty Phase 95). Although she said she did not intend to suggest the jury was mistaken in its verdict, they should consider the weaknesses in the state's case (ROA Penalty Phase 92, 96). She told the jury that the standard for imposing the death penalty was much higher than reasonable doubt (ROA Penalty Phase 96). Two critical state witnesses received immunity, and the most critical witness, Ashley, participated in all the events (ROA Penalty Phase 97). She argued Ashley had every opportunity to fabricate and the jury really didn't know who pulled the trigger (ROA Penalty Phase 98). Counsel argued there were no fingerprints and the jury could consider any doubt even if not reasonable (ROA Penalty Phase 110). Ms. Bickerstaff also argued that the mitigating circumstances were not limited, but the jury could only consider the aggravating circumstances in the statute (ROA Penalty Phase 100). She also made a plea for mercy that the jury not take another life (ROA Penalty Phase 100, 108).

Ms. Bickerstaff argued over objection there were only certain crimes for which the death penalty could be imposed and that since 1972 only a tiny percentage of homicide defendants had been sentenced to death (ROA Penalty Phase 101-103). Death should be imposed "only in the narrowest most clearly defined horrifying cruel beastical killings known to man" (ROA Penalty

Phase 103). She then argued there were only certain classes of murders for which a death sentence could be imposed: a cold, calculated murder, murder of a police or correctional officer, slaying of a child, a torture murder, sex crimes against the victim, a murder for hire "mafioso" murder or the abduction of a convenience store clerk/witness elimination murder (ROA Penalty Phase 104-107). The jury was told to compare this case to the other Florida death sentences to determine whether the crime was so shocking and so horrible and so cruel and vicious and vile that only death can satisfy the ends of justice (ROA Penalty Phase 107). She did not argue that the circumstances of Mills' life were mitigating circumstances, but rather that they showed a potential for rehabilitation (ROA Penalty Phase 109).

The argument was <u>not</u> that the mitigating circumstances outweighed the aggravating circumstances but that the circumstances of this crime, residual doubt, the fact this murder could not be classified a death sentence, and mercy required a life recommendation. The jury bought the argument hook, line and sinker and was out only one-half hour before they recommended life (ROA Penalty Phase 123). She argued mercy, the unfairness that Ashley was free when he may have committed the crime and that Mills would be incarcerated at least twenty-five years (ROA Penalty Phase 112). Because the crime was not heinous, atrocious and cruel, death was inappropriate (ROA Penalty Phase 114). Although Ms. Bickerstaff now claims she would have presented mental health mitigation, the focus of her argument and the jury's recommendation was <u>not</u> that there were mitigating

circumstances that outweighed the aggravating circumstances but was an emotional response to an impassioned plea that Mills was innocent and this was not a death penalty case - not because the aggravating circumstances outweighed the mitigating circumstances, but because it did not fit into Ms. Bickerstaff's contrived "classes" of cases. In fact, the trial judge remembered Ms. Bickerstaff could "turn on the tears" (R 453). Ms. Bickerstaff was not deficient in failing to present negative evidence of mental health problems, but rather presented testimony to show Mills was redeemable, had a sister who cared for him and could help him find work, and had obtained a GED while in prison. It is purely speculative the judge or jury would have considered the mental health problems as mitigating. See, Routly v. State, 16 F.L.W. S676, 678 (Fla. Oct. 17, 1991); McCrae v. State, 510 So.2d 874, 879 (Fla. 1987); Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987).

Although Ms. Bickerstaff testified that she had inadequate time to prepare (R 41), the record shows she did not move for a continuance to further investigate Mill's background. If she had, and mental health experts had been appointed, it would have delayed the penalty phase in order for them to conduct adequate evaluations. This is exactly what Mills did not want since he had several other crimes waiting to be tried. If convicted, these prior crimes could be used to aggravate his death sentence.[6] Only Mills benefitted by the penalty phase taking

[6] The trial court found the aggravating circumstance of prior violent felony based on an aggravated assault, but refused to let the jury hear about the burglary and theft of the shotgun and the

place before the state could obtain convictions (which they ultimately did obtain) on his other crimes.

Bennett Ford, Supervisor for the Public Defender's Office at the time, testified that looking back a mental health expert should have been contacted (R 434). He said that the reason they were there was because ten or twelve years later new counsel come in to say prior counsel failed to dot all the I's and cross all the T's (R 435). That current counsel, through hindsight, would now do things differently is not the test for ineffectiveness. Stano v. State, 520 So.2d 278 (Fla. 1988). Ms. Bickerstaff was specially hired to conduct the penalty phase (R 438). Mr. Ford could not say whether back then, he would have looked into mitigation (R 440). If the facts of the case lead him to conclude there was some kind of mental disfunction, he would ask for a mental evaluation, but that was not the case in Mills' case (R 447). Nothing ever lead him to believe Mills had any mental problem (R 448). With 20/20 hindsight he could say mental health evidence may have convinced the judge not to override the jury recommendation, but back at the time case law was evolving (R 449). He also felt that trial lawyers and appellate lawyers viewed the issue differently. The trial lawyer was trying to convince the jury (R 449). Obviously the jury accepted Ms. Bickerstaff's argument (R 449). In determining whether counsel

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armed robbery with a firearm and false imprisonment cases since there had not yet been a conviction. Had there been a conviction, these prior crimes would have been admissible. To know Mills stole the murder weapon two weeks prior during a burglary and abducted and robbed a convenience store clerk would have been extremely prejudicial.

rendered constitutionally adequate representation, a court must evaluate challenged conduct from counsel's perspective at that time. Lusk v. State, 498 So.2d 902 (Fla. 1986).

Neither Ms. Bickerstaff nor Mr. Greene was deficient under Strickland.

2. Prejudice. Mills claims evidence at the evidentiary hearing established statutory and nonstatutory mental health mitigation that would have provided "more than a reasonable basis" for the jury's life recommendation (Initial Brief at 4).

Dr. Dee testified he felt Mills could have congenital brain damage and the head injury may be a red herring (R 105). Dr. Dee was not comfortable saying the head injury was what caused the crime (R 120). The diagnosis would be organic affective syndrome which includes impulsivity, explosive behavior and aggressive acting out (R 127). Dr. Dee felt the report of Dr. Fumero indicated he wasn't "sure what he's got there" (R 140). Dr. Dee did not talk to Mills about the details of the offense but assumed the Florida Supreme Court facts were true even though they contradicted Mills' version (R 151-52). Dr. Dee said Mills was in complete contact with reality and knew what was going on (R 158). Dr. Dee said the environment contributed to the brain damage, even though he realized Mills' sister had a master's in education (R 168).

Regarding the speedy trial motion, the trial judge observed he could not remember where he was six months ago (R 143, 146).

Dr. Carbonell did not run any tests on Mills to ascertain whether there was any injury to the skull (R 237). She thought

Mills had brain damage at birth (R 238, 239). The later head injuries compounded the problem (R 239). When Dr. Carbonell testified that hitting a stationary object causes severe head injury, the trial judge inquired whether all football players were brain damaged (R 250). The judge also wanted to know whether the robbery and abduction of the convenience store clerk showed impulsivity (R 260, 339). The trial judge observed that, although Dr. Carbonell said Mills had frequent somatic complaints, headaches and dizziness, the medical history signed by Mills contradicted her testimony (R 296, 298, 301, 302, 310). The trial judge also observed that going to the hospital for an alibi after the murder was not stupid (R 348), and shooting the victim because Mills thought he had a gun was not impulsive (R 341).

To assert today that, had counsel presented some evidence of brain damage, i.e., that Mills was unable to control his actions, was impulsive and uncontrollably violent, the jury would still recommend life is pure speculation. The jury did not base the recommendation on mitigation. They exercised a jury pardon based on residual doubt and sympathy. Had the mental health issue been presented it would have opened the door to the prior crimes of burglary, grand theft, armed robbery and false imprisonment to rebut the uncontrollable impulse testimony. See Medina v. State, 573 So.2d 293 (Fla. 1990); James v. State, 489 So.2d 737 (Fla. 1986). It is inconceivable that the evidence presented now would have swayed the jury or judge. Both the fact the jury was not presented with evidence Mills was brain damaged

and violent and the prior crimes would have destroyed any feelings of sympathy or residual doubt. The state was erroneously precluded from presenting the prior crimes which should have been allowed to rebut "no prior criminal history" on which the jury was instructed (ROA Penalty Phase 119).

An interesting anachronism was invented in Buford v. State, 570 So.2d 923 (Fla. 1990). In Buford, this Court somehow retroactively applied mitigation never presented to the jury to establish a reasonable basis for the recommendation. The present case illustrates how, when there was no reasonable basis for the jury recommendation, one cannot be pulled out of thin air eight years later. If the testimony now proffered had been presented at the penalty phase, the entire proceeding would have been different. Saying a defendant was extremely emotionally disturbed and substantially unable to appreciate the criminality at the time he committed the crime would destroy the residual doubt argument. It also would allow the state to present the burglary and robbery two weeks before the murder in which Mills faced a stressful situation and did not kill anyone.

If an override case is remanded for resentencing to determine whether there is a reasonable basis for a life recommendation, the evidence must be presented to the jury. By somehow providing the jury with a reasonable basis nunc pro tunc this court invades the province of the jury. The jury recommended life on the argument presented. This court determined in Mills, there was no reasonable basis. It cannot create a reasonable basis for the jury and it cannot prophesy

what the jury would have recommended had the evidence, both defense and state, been presented. To do so severely prejudices the state and denies equal justice under the law. The defendant is allowed to present any mitigation that he has accumulated in the past eight years and this can be used as a "reasonable basis" yet the state evidence rebutting the reasonable basis is never before the jury. The defendant receives the benefit of an inappropriate recommendation which is projected into the future and transformed into a recommendation with a reasonable basis. However, the state evidence is never weighed by the jury. The recommendation has become an amorphous velcro phantom to which only the defense evidence may stick.

In the present case, the state's evidence that Mills stole the murder shotgun, abducted and robbed a convenience store and possessed a straight-edged razor blade in jail would have rebutted and demolished any weight the new mental health testimony would have had. The jury recommendation would have been for death. The trial court properly determined that, after weighing all the evidence, both old and new, there was no reasonable basis for the jury's recommendation. See, Buford v. State, 570 So.2d at 924. Simply because Mills has come forward with some mitigation does not invalidate the override where the state has come forward with even more compelling evidence to rebut the mitigation. A judge's override is not improper simply because a defendant can point to some evidence established in mitigation. Zeigler v. State, 580 So.2d 127 (Fla. 1991).

The evidence presented by the family is cumulative to that presented at the penalty phase with the exception of the information about the head injuries which could be a "red herring" anyway. Counsel is nct ineffective for failing to call other family members to provide additional background. Engle v. Dugger, 576 So.2d 696 (Fla. 1991); Provenzano v. Dugger, 561 So.2d 541 (Fla. 1990).

The fact Mills' brother, who was not in prison at the time and has a lengthy criminal history, could testify would hardly "humanize" Mills or persuade a jury he is redeemable. Dianetta and the grandfather were the best family witnesses to present Mills in a positive light. Lusk v. State, 498 So.2d 902, 905 (Fla. 1986). Counsel was not ineffective for failing to inadequately investigate the defendant's background and related matters in preparation for penalty phase, where counsel did present testimony of witnesses concerning character and background, and such went beyond statutory mitigating factors to include nonstatutory mitigation. The fact that a more detailed and thorough and detailed investigation could have been done does not establish counsel's performance as deficient. It is almost always possible to imagine a more thorough job being done than was actually done. Maxwell v. Wainwright, 490 So.2d 927 (Fla. 1986).

The cases cited by Mills to support his argument are inapposite. In Stevens v. State, 552 So.2d 1082 (Fla. 1989), trial counsel learned the trial judge intended to override the jury's life recommendation but made no argument and presented no

mitigation on behalf of the defendant in support of the life recommendation. At sentencing, Mr. Greene did present further testimony of Dianetta, argued substantial impairment and argued for a life sentence. In Stevens, trial counsel presented no family background or employment history, Ms. Bickerstaff did. Stevens' trial counsel made prejudicial misrepresentations that the defendant was dishonorably discharged and had served time, neither of which was true. Stevens' counsel failed to provide the trial court with an answer brief in response to the State's request for the death penalty. There were blatant errors in the State's brief which trial counsel failed to correct. This court found that "trial counsel essentially abandoned the representation of his client during sentencing." Id. at 1087. In the present case, both Ms. Bickerstaff and Mr. Green zealously advanced the best interests of their client.

In Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989), defense counsel presented no witnesses at the guilt phase and no evidence at the penalty phase. Defense counsel failed to present Harris' good character and mistakenly told the jury the family had turned against the defendant. In the present case, Ms. Bickerstaff presented two credible family witnesses and explored Mills' background, good character, and potential for rehabilitation.

In Bassett v. State, 541 So.2d 596 (Fla. 1989), one of the primary issues was whether Cox, 29, dominated Bassett, 19. Cox plead guilty and received a life sentence. The trial judge found deficient performance and entered an equivocal order on whether Bassett was entitled to relief. In the present case, the trial court found there was no deficient performance.

In State v. Lara, 581 So.2d 1288 (Fla. 1991), trial counsel was overwhelmed and panicked in handling his first capital case and "virtually ignored the penalty phase." Id. at 1289. Lara was a state appeal, and this court found the record supported the trial court's order. This standard should be applied in the present case. In the case sub judice, the record supports the trial court's order which should be affirmed. State v. Michael, 530 So.2d 929 (Fla. 1988), again, was a state appeal and this court found the trial court's order was supported by competent substantial evidence. In the present case, the trial court's order is also supported by competent, substantial evidence.

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully requests this court affirm the judgment and sentence of the trial court 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 Answer Brief of Appellee has been furnished by U.S. Mail to Larry Helm Spalding, Gail E. Anderson, and Todd G. Scher, Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 10 day of December, 1991.

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