

IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,039

FILED

SID J. WHITE

LLOYD DUEST

Petitioner,

v.

RICHARD L. DUGGER, Secretary,
Department of corrections, State of Florida,

Respondent.

JAN 4 1990

CLERK, SUPREME COURT
Deputy Clerk

RESPONSE TO
PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF
HABEAS CORPUS, REQUEST FOR STAY OF EXECUTION,
AND APPLICATION FOR STAY OF EXECUTION PENDING
DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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COMES NOW Respondent, Richard L. Dugger, by and through undersigned counsel, and files this Response to show cause why the pending Petition for Writ of Habeas Corpus should be DENIED.

PROCEDURAL HISTORY

Petitioner is presently in Respondent's lawful custody under a valid judgment and sentence of death imposed by the Honorable Patricia W. Cocalis on April 14, 1983 (R. 1690-1698). Petitioner appealed his conviction and sentence to this Court raising the following issues:

WHETHER THE TRIAL COURT ERRED IN ALLOWING STATE WITNESSES TO TESTIFY DUE TO AN ALLEGED RICHARDSON VIOLATION?

WHETHER THE TRIAL COURT PROPERLY DENIED A MOTION FOR MISTRIAL BASED ON ALLEGED PROSECUTORIAL MISCONDUCT?

WHETHER OR NOT THERE WAS SUFFICIENT EVIDENCE OF PREMEDITATION.

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE INTRODUCTION OF A CERTAIN PHOTOGRAPH.

WHETHER THERE WAS SUFFICIENT EVIDENCE TO ESTABLISH THE FOLLOWING TWO AGGRAVATING FACTORS: 1) THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL AND 2) COLD CALCULATED AND PREMEDITATED.

This Court unanimously upheld Petitioner's conviction and sentence. Duest v. State, 462 So.2d 446 (Fla. 1985).

On February 18, 1987 Petitioner filed a motion for post-conviction relief in the Circuit Court, Broward County. Petitioner has since filed two "amendments" to that motion, one on April 14, 1987 and one on November 17, 1989. That motion and subsequent amendments are still pending in the trial court. The issues raised on that motion will not be reproduced here but will be addressed in a separate pleading provided Petitioner is unable to seek relief in the trial court.

Petitioner has filed this present Petition on November 17, 1989.

STATEMENT OF THE FACTS

Respondent relies on the facts detailed in this Court's opinion of Petitioner's direct appeal with the following additions:

Michael Demizio rode down to Fort Lauderdale with Petitioner on the weekend in question (R. 647). On the day of the murder, Demizio saw Petitioner drive up in a brown Camaro (R. 665). Rather than have his hands touch the steering wheel or gear shift, Petitioner placed rags on the steering wheel and gear shift (R. 665). The victim owned a Camaro which was missing from the victim's home when the body was discovered (R. 484). Demizio had an antique knife which was last seen on Saturday evening (R. 712).

Joann Wioneck saw Petitioner on the day of the murder around 3:00 accompanied by the victim (R. 940-942). Petitioner

walked into the apartment, went into the closet, closed the door and then left again (R. 940). Approximately one and a half (1 1/2) hours later Petitioner came back to the apartment in the gold Camaro, retrieved his belongings and left (R. 944-947).

Neil O'Donnell testified that he saw the victim and Petitioner at a gay bar called Lefty's the afternoon of the murder (R. 567, 576, 580). The two men left together (R. 576).

The victim died of multiple stab wounds (R. 905). The victim received eleven such wounds covering the front and back of the body (R. 905, 908). The victim was also stabbed in the eye and received lacerations in the head (R. 909). Large amounts of blood were found in the victim's bed and in the bathroom where he ultimately was found (R. 442, 915).

Various State witnesses testified to Petitioner's presence in Fort Lauderdale that weekend (R. 771, 811, 733, 771, 776, 1303). Numerous defense witnesses testified that Petitioner was in Massachusetts that same weekend (R. 1195, 1232, 1018, 1078, 1095, 1914, 1992).

POINT I

PETITIONER'S SENTENCE WAS BASED
ON A CONSTITUTIONALLY OBTAINED
PRIOR CONVICTION WHICH
SUFFICIENTLY ESTABLISHED AN
AGGRAVATING FACTOR.

Petitioner claims that the trial court relies on an unconstitutional prior conviction to establish an aggravating factor. Petitioner's reliance on Johnson v. Mississippi, 108 S.Ct. 1981 (1988) as the basis for this claim incorrectly characterizes this case as a change of law which would warrant habeas corpus review. Respondent strongly asserts that this claim is not based on new law and therefore should have been raised on direct appeal; Bundy v. State, 538 So.2d 445 (Fla. 1989). Eutzy v. State, 541 So.2d 1143 (Fla. 1989). Respondent would urge this Court to issue a plain statement concerning this valid procedural bar which will then preclude subsequent federal review. Johnson v. Mississippi, 100 L.Ed.2d at 585-586; Harris v. Reed, 489 U.S. _____, 103 L.Ed.2d 21, 308 (1989). The fact one of Petitioner's prior convictions was ultimately overturned does not invalidate the aggravating factor of Section 921.141 (5)(b) Florida Statute (1985). Petitioner's prior conviction for armed robbery is still a valid basis for reliance on § 921.141 (5)(b). Consequently, there is no error irrespective of invalidity of his other prior violent felony. Daugherty v. State, 533 So.2d 287 (Fla. 1988).

Lastly even if this aggravating factor was held to be invalid there are still three valid aggravating circumstances in

conjunction with no mitigating circumstances. As such Petitioner is not entitled to relief. Bundy, 538 So.2d at 447.

POINT II

EVIDENCE OF PETITIONER'S FLIGHT
WAS PROPERLY ADMITTED BY THE
TRIAL COURT.

Petitioner argues that his constitutional rights were violated by the admission of evidence of Petitioner's flight and use of an alias. Specifically, Petitioner claims that the State failed to establish that he fled to avoid prosecution for the murder for which he was on trial as opposed to other unrelated charges pending against him in Massachusetts. Petitioner claims to have received ineffective assistance of appellate counsel for failure to raise this on direct appeal. The State disagrees.

Prior to trial, Petitioner's defense counsel made a motion to exclude the alias of Danny from the indictment (R. 31-32). Defense counsel's motion to exclude the "A/K/A Danny" from the indictment was granted (R. 33); however, at no time did Petitioner move to exclude the name of Robert Brigida, and in fact, the Petitioner readily admitted that he used the name of Robert Brigida (R. 33, 425). Thus, as the issue was not preserved for appellate review and was essentially invited by the Petitioner, his appellate counsel cannot be deemed ineffective for failing to raise same. Pope v. Wainwright, 496 So.2d 798 (Fla. 1986); Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989). This Court has stated that the test for ineffectiveness announced in Strickland v Washington, 466 U.S. 668 (1984), is applicable to the same claim made against appellate counsel, Downs v Wainwright, 476 So. 2d 654 (Fla 1985). Petitioner must

demonstrate both deficient performance and that such performance prejudiced the defense, Id. at 655 citing Strickland v Washington, supra. Nonetheless, on the merits, Petitioner's use of an alias was relevant to the identification of Petitioner as the man picked up and identified by police Parker v. State, 456 So.2d 436, 442-443 (Fla. 1984).

In addition, defense counsel did not move to suppress any evidence pertaining to the evidence of flight. While the admission of flight evidence was discussed pretrial, the basis for defense counsel's motion was to preclude any mention that escape charges were pending against the Petitioner in Massachusetts on unrelated charges, and in Broward County, arising out of the instant offense (R. 33-41, 1751-1752). In fact during opening statements, defense counsel openly tells the jury about the escape incident, indicating that Petitioner left because he panicked (R. 425-428). Consequently, Petitioner's appellate counsel was not ineffective for not raising on direct appeal the issue pertaining to flight evidence. Id.

Notwithstanding Petitioner's failure to preserve the issue, the flight evidence was properly admitted. In Bundy v. State, 471 So.2d 9 (Fla. 1985) cert. denied, ___ U.S. , 107 S.Ct. 295, 93 L.Ed. 2d 269 (1986), this Court held that the State was not required to prove beyond a reasonable doubt that a defendant's flight was due to his guilty knowledge of the crime for which he was on trial. When discussing the admissibility of flight evidence, the Bundy court noted that the probative value of flight evidence was weakened:

- "1. If the suspect was unaware at the time of the flight that he was the subject of a criminal investigation for the particular crime charged, (Citations omitted).
2. Where there are not clear indications that the defendant in fact fled, (Citations omitted), or
3. Where there was a significant time delay from the commission of the crime to the time of flight. (Citations omitted)."

471 So.2d at 21.

Indeed, the presence of a significant time delay between the commission of the crime and the time of flight was what rendered the evidence of flight irrelevant and inadmissible in Merritt v. State, 523 So.2d 573 (Fla. 1988) where the murder was committed in 1982 and the defendant escaped in 1985.

Sub judice, the victim was murdered on February 15, 1982 and Petitioner was apprehended by police on April 18, 1982. Petitioner was notified that he was a suspect in a homicide and voluntarily went with police for questioning (R. 844); at this time Petitioner was known to police as Robert Brigida (R. 875). Petitioner was then questioned by Detective John Feltgen about the instant offense (R. 877-878). It was subsequently discovered that misdemeanor traffic warrants were pending in Massachusetts for Robert Brigida, and Petitioner was arrested based on the misdemeanor warrants (R. 881-882). Thereafter, when Detective Feltgen momentarily left the room where Petitioner was being questioned, and returned, Petitioner was missing (R. 883).

Based on the foregoing, it was reasonable to conclude that Petitioner fled to avoid prosecution for the instant homicide, and not for outstanding misdemeanor warrants. At the time of flight, Petitioner was aware that he was under investigation for the homicide charged, and there was no question that Petitioner in fact fled. Also, at the time of Petitioner's escape, his true identity was not known to the police. Thus, where Petitioner's flight occurred only two months after the commission of the instant offense, it was a reasonable inference that Petitioner fled as a result of his consciousness of guilt for John Pope's murder. Bundy, supra.

Furthermore, even if it was error to introduce evidence of Petitioner's flight, the error was harmless beyond a reasonable doubt. Rhodes v. State, 547 So.2d 1201 (Fla. 1989). Unlike Merritt, supra, the jury at bar was not instructed that an attempt to avoid prosecution through flight was a circumstance which could be considered in determining guilt. Rather, the jury was instructed that, in regards to circumstantial evidence,

"If the circumstances are susceptible of two reasonable constructions, one indicating guilt and the other innocence, you must accept the construction indicating innocence."

(R. 1523).

Consequently, the trial court's instruction did not necessitate a finding that Petitioner's flight was the result of his consciousness of guilt for the homicide.

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Accordingly, Petitioner's appellate counsel was not ineffective for failing to raise this claim, and Petitioner's writ must be denied, Downs v Wainwright, supra.

Although this claim lacks merit Respondent urges this Court to deny review of this claim due to procedural default. Harris v. Reed, 489 U.S. ____, 103 L.Ed.2d 308 (1989).

POINT III

THE STATE PROPERLY INTRODUCED
RELEVANT EVIDENCE WHICH DID NOT
INVOLVE EVIDENCE OF A COLLATERAL
CRIME.

Petitioner claims that he received ineffective assistance of appellate counsel for his failure to argue on direct appeal that impermissible collateral crime evidence was admitted at trial. In his petition, Petitioner mentions four separate incidents of improper William's Rule evidence (Petition pg. 25). The only incident even objected to was that involving the Petitioner's use of a razor blade (R. 633-636). Petitioner's reference to other collateral crimes i.e. statutory rape, orgies and physical force used against someone other than the victim were not preserved for appeal. Appellate counsel cannot be held ineffective for failing to raise this on direct appeal. Tompkins v. Dugger, 14 F.L.W. 455 (Fla. September 14, 1989). Furthermore, this claim is procedurally barred. Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989).

With respect to the admissibility of the "razor blade incident" the trial court properly admitted it at trial. Petitioner's sole defense at trial was that he was in Massachusetts at the time of the murder. State witness, Mike Demizio, testified that he met Petitioner on a bus coming to Fort Lauderdale (R. 643). Demizio testified to the facts surrounding the time he spent with Petitioner during the weekend in question (R. 641-730). Demizio testified about their activities and

about the others who were present with Petitioner and him (R. 652-660). Petitioner attempted to discredit the State's witness by challenging his memory (R. 694, 636, 703). Since Demizio's memory was being put in question the State properly elicited testimony concerning the details of that weekend (R. 634).

Petitioner also claims that the State then impermissibly referred to the incident in his closing argument. Mr. Garfield's reference to that incident was not designed to impugn Petitioner's character as suggested in the petition. A reading of the complete statement made by Mr. Garfield reveals the following:

I don't hold that against him and you shouldn't hold that against him but the reason I mentioned that is because that is why he left...

You are going to see, if you don't already, how this ties right in with the testimony of Mr. Long. You recall 2:30 in the morning or so on one of these days he leaves. He didn't stay at that orgy the whole time like everybody else did. He is gone. Mr. Long told you that he sees- he meets this gentleman at about 2:30 in the morning at Lefty's. You recall a statement from Joanne Wioncek. She said to you - well, I don't remember exactly what she said. I tried to get her to be more specific but she couldn't. She just said, "I remember him saying something like I'm going to Lefty's."

Now, I said, "Did he say he was coming from Lefty's?" I was trying to get her -- I was leading her a little bit. I wanted to get her to be a little more specific. Mr. Baron objected at that point if it serves your recollection. That is the way we left it. All we have is her testimony on that point which was, "I am going to

Lefty's.' ' Now, you recall the next time she saw the defendant in this case which was at about **5:00** in the morning or so. That would be quite consistent with what Mr. Long told you.

(R. 1407-1408).

Respondent submits that the testimony and prosecutorial comments were therefore relevant to contradict Petitioner's alibi defense and to put the evidence in its proper context. Bryan v. State, 533 So.2d 744 (Fla. 1988). Lastly there was no objection to Mr. Garfield's comments. Consequently, Appellate counsel cannot be held ineffective for failing to raise it on direct appeal. Tompkins v. Dugger, supra. Failure to preserve this claim for appellate review bars its consideration now. Atkins v. Dugger, 541 So.2d at 1166.

In summation, Petitioner has failed to establish deficient performance of appellate counsel. Furthermore, none of the alleged inadmissible evidence affected the outcome of the trial. Downs v Wainwright, supra.

POINT IV

THE TRIAL COURT'S IMPOSITION OF
ESPECIALLY HEINOUS ATROCIOUS AND
CRUEL WAS CONSTITUTIONALLY
PROPER.

Petitioner claims that the aggravating factor of especially heinous atrocious and cruel was improperly imposed in the instant case. This claim lacks merits both procedurally and substantively.

Petitioner is precluded from raising this issue as it should have been raised on direct appeal. Parker v. Dugger, 14 FLW 557, 558 (Fla. October 25, 1989). On direct appeal Petitioner challenged the sufficiency of the evidence used to establish the aggravating factor but no challenge was made to the constitutional application of this factor in terms of vagueness. Duest v. State, 462 So.2d 446 (Fla. 1985).

Petitioner's relies on Maynard v. Cartwright. 486 U.S. _____, 100 L.Ed.2d 372, 108 S.Ct. _____ (1988) and Hitchcock v. Dugger, 107 S.Ct. 1821 (1987) as fundamental changes in law which warrant a second review by this Court. Hitchcock v. Dugger, supra, is simply irrelevant to this issue and Maynard v. Carwright, supra is not a fundamental change in the law, but merely and application of Furman v. Georgia, 408 U.S. 238 (1972). Maynard v. Carwright, 100 L.Ed.2d at 380. The basic premise of channeling and limiting a sentencer's discretion was reiterated in Proffit v. Florida, 428 U.S. 242 (1976) and Godfrey v. Georgia, 446 U.S. 420 (1980). Petitioner's claim that Maynard v.

Cartwright, supra invalidates Florida's application of this aggravating circumstance has recently been rejected in Bertolotti v. Dugger, 3 FLW 1281, 1290-1291 (11th Cir. August 31, 1989).

Petitioner's reliance on Rhodes v. State, 547 So.2d 1201 (Fla. 1989) is unavailing as the issue there concerned the sufficiency of the evidence used to establish heinous, atrocious and cruel which has already been adversely decided against Petitioner on direct appeal. Duest v. State, 462 So.2d at 449.

If this Court determines that Petitioner has in fact raised this issue on direct appeal he is still not entitled to relief as he has not demonstrated any fundamental changes in the law which would warrant retroactive application of Rhodes, supra; Eutzy v. State, 541 So.2d 1143, 1147 (Fla. 1989).

In conclusion Petitioner's claim is procedurally barred as it either was or could have been raised on direct appeal Parker v. Dugger, 14 F.L.W. at 558. Furthermore, the claim lacks any merit. Bertolotti v. Dugger, 3 F.L.W. at 1290-1291; Proffit v. Florida, supra. Respondent urges this Court to issue a plain statement concerning Petitioner's irrevocable procedural default upon this claim so as to prevent its subsequent unjustified litigation on the merits in a federal habeas corpus proceeding in the event of a favorable decision here. Harris v. Reid, supra.

POINT V

THE AGGRAVATING FACTOR OF COLD
CALCULATED AND PREMEDITATED WAS
CONSTITUTIONALLY APPLIED IN THE
INSTANT CASE.

Petitioner challenges the constitutional application of the aggravating factor of cold, calculated and premeditated. Petitioner is procedurally barred from raising this claim as it should have been raised on direct appeal. Parker v. Dugger, 14 F.L.W. 557, 558 (Fla. October 25, 1989). On direct appeal, Petitioner challenged the sufficiency of the evidence used to establish this aggravating factor. Duest v. State, 462 So.2d 446 (Fla. 1985).

Petitioner has not established any fundamental change in the law which would warrants review. In the alternative, if this Court determines that this issue was raised on direct appeal Petitioner has failed to establish why this claim deserves further review. Petitioner's reliance on Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, U.S. ___, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988) as a fundamental change in the law has been rejected by this Court in Eutzy v. State, 541 So.2d 1143 (Fla. 1989) and in Harich v. Dugger, 542 So.2d 980 (Fla. 1989). Likewise Maynard v. Carwright, 108 S.Ct. 1853 (1988) does not constitute a fundamental change as it is an application of Constitutional standards already in place. Proffitt v. Florida, 428 U.S. 242 (1976). Respondent urges this Court to deny review of this claim due to Petitioner's procedural default. Harris v. Reed, supra.

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POINT VI

THE TRIAL COURT PROPERLY
CONSIDERED ALL MITIGATING
EVIDENCE, APPELLATE COUNSEL WAS
NOT INEFFECTIVE FOR FAILURE TO
RAISE UNPRESERVED UNMERITORIOUS
CLAIM ON DIRECT APPEAL.

Petitioner claims that the trial court erred in failing to find both statutory and non statutory mitigating evidence. Petitioner claims that he received ineffective assistance of appellate counsel as well for failure to pursue this issue on direct appeal. This claim has no merit. Consequently, appellate counsel cannot be faulted for not raising it on appeal.

Petitioner claims that the trial court improperly found no statutory mitigating evidence. This Court has repeatedly stated that the finding or not finding a specific mitigating circumstance is within the trial court's domain. Perry v. State, 522 So.2d 817 (Fla. 1988) quoting Stano v. State, 460 So.2d 890, 894 (Fla. 1984), cert, denied 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985). Petitioner has failed to establish any abuse of the trial court's discretion in this regard.

Although Petitioner's father stated that Petitioner had a drug problem there was never any evidence brought forth to even suggest that Petitioner was under the influence of any emotional or mental duress at the time of the crime (R. 1607, 1577-78). The same deficiency appears in Petitioner's claim that he has a lengthy psychiatric history. No evidence was presented to relate this information to Petitioner's behavior during the crime (R.

1660-63, 1811). In fact the record evidence refutes any such claim as Petitioner was commended for his active participation in therapy sessions and his positive effect on other inmates (R. 1577, 1811). Furthermore no clinical diagnosis was ever made even though Petitioner received therapeutic intervention while in prison (R. 1811). Lastly, Petitioner's mother testified at sentencing that her son did not suffer from any psychiatric problems in the past (R. 1585-86). Based on the record evidence the trial court properly found no statutory mitigating factors applied. Roberts v. State, 510 So.2d 885, 894 (Fla. 1987). Petitioner has failed to establish any deficient performance by appellate counsel as well, especially in light of trial counsel's emphasis on nonstatutory mitigating evidence (R. 1619-1620). Downs v. Wainwright, 476 So.2d 654 (Fla. 1985); Ruffin, supra.

Petitioner's claim based on the existence of nonstatutory mitigating evidence is equally without merit. This Court's concern in Lamb v. State, 532 So.2d 1051 (Fla. 1988) was whether or not the trial court refused for whatever reason to consider the nonstatutory evidence. The United States Supreme Court had similar concerns in Eddings v. Oklahoma, 455 U.S. 104 (1982). In Lamb the trial court's order stated that he was not going to weigh the mitigating evidence in the penalty decision. There is no such language in the *trial* court's order in the case sub judice. The trial court found no applicable statutory mitigating circumstances (R. 1835). In a separate paragraph the court found that the mitigating did not outweigh the aggravating

circumstances (R. 1806). As stated previously by this Court mitigating evidence isn't rejected but it is simply found to be insufficient to overcome the aggravating factors. Echols v. State, 484 So.2d 568 (Fla. 1985).

The trial court heard all the evidence presented in mitigation and sua sponte ordered a presentence investigation (R. 1576-1588, 1638, 1649, 1805-1831). All the evidence relied on for nonstatutory mitigation appears in the presentence report (R. 1805, 1831, 1811, 1816). The contents of the presentence investigation report were fully discussed (R. 1640-1691). The trial court instructed the jury on the applicability and appropriateness of nonstatutory mitigating evidence (R. 1627-1628). There is simply no evidence that the trial court refused to consider nonstatutory mitigating evidence. Palmes v. Wainwright, 725 F.2d 1511, 1523 (11th Cir. 1984). Petitioner is merely attacking the force applied to the mitigation evidence which is not a sufficient basis for review Echols, 484 So.2d at 576 citing to Porter v. State, 492 So.2d 293 cert. denied 464 U.S. 865, 104 S.Ct. 202, 78 L.Ed.2d 176 91983).

Petitioner also alleges that the jury's recommendation was somehow "perverted." The jury was repeatedly told to consider nonstatutory evidence and to give it the weight it deemed appropriate (R. 1607, 1615, 1619, 1620, 1627-1628). The jury heard testimony relating to nonstatutory mitigation (R. 1576-1588). There was not even the slightest suggestion that the jury was instructed not to consider nonstatutory mitigating

evidence. Petitioner's assertions otherwise are simply not established by the record.

In any event any error must be considered harmless as evidence of Petitioner's prior drug history, therapeutic interventions and status as a good father, husband, son and brother do not outweigh the gravity of the four applicable aggravating circumstances. Rogers v. State, 511 So.2d 526, 535 (Fla. 1987).

POINT VII

BOTH PROSECUTORIAL COMMENTS AND
JURY INSTRUCTIONS CORRECTLY
ADVISED THE JURY OF FLORIDA'S
CAPITAL SENTENCING SCHEME.

Petitioner claims he received ineffective assistance of appellate counsel for counsel's failure to raise on direct appeal a challenge to the penalty phase jury instructions. Specifically Petitioner claims that both prosecutorial comments and jury instructions impermissibly shifted the burden to him to prove that death was not the appropriate penalty. This claim lacks merit both procedurally and substantively as the challenged remarks or instructions were never objected to at trial; consequently, Petitioner is in procedural default. Atkins v. Dugger, 541 So.2d 1165, 1166 (Fla. 1989)

To begin with appellate counsel cannot be held ineffective for failure to raise a claim that has not been preserved for appeal. Tompkins v. Dugger, 14 F.L.W. 455 (Fla. September 14, 1989).

Secondly, the alleged basis for Petitioner's argument is based on Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) and Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). Decisions of an intermediate federal court are not susceptible to retroactive application under this Court's decision in Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980). Eutzy v. State, 541 So.2d 1143 (Fla. 1989). The actual basis for this claims is based on

Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) which was available to Petitioner at the time of trial. Presnell v. Kemp, 835 F.2d 1567 (11th Cir. 1982) and Jackson v. Dugger, supra, 837 F.2d at 1474. Petitioner's characterization of this claim as one based on new law is simply without merit.

Petitioner is further barred from raising this claim at this late juncture as he has failed to raise it within two years of either Sandstrom v. Montana, supra or Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985). Adams v. State, 543 So.2d 1244 (Fla. 1989).

With respect to the merits, Petitioner is not entitled to relief. The remarks and instructions referred to are a correct explanation of Florida's sentencing scheme (R. 1572 lines 4-12, 1590 lines 6-19, 1626 lines 20-25, 1627 lines 1-2). Proffit v. Florida, 428 U.S. 242 (1976); Bertolotti v. Dugger, 3 FLW 1281 (11th Cir. August 31, 1989); Section 921.141(1)(2)(3) Florida Statutes (1985).

Although Petitioner is not entitled to relief on the merits, Respondent urges this Court to issue a plain statement that Petitioner is in irrevocable procedural default of this claim so as to prevent its subsequent unjustified litigation on the merits in a federal habeas corpus proceeding in the event of a favorable decision here. Harris v. Reed, 489 U.S. , 103 L.Ed.2d 308 (1989).

POINT VIII

RESPONDENT'S EIGHTH AND
FOURTEENTH AMENDMENT RIGHTS WERE
NOT VIOLATED BY THE INTRODUCTION
OF VICTIM IMPACT EVIDENCE AND
THUS PETITIONER WAS NOT DENIED
EFFECTIVE ASSISTANCE OF
APPELLATE COUNSEL.

Petitioner claims that certain victim impact evidence and prosecutorial comments rendered his trial fundamentally unfair pursuant to Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987).

Initially it should be pointed out that this is not the proper forum for this claim as Petitioner should have raised it in a motion for post-conviction relief. Parker v. Dugger, 14 FLW 557 (Fla. October 25, 1989); Jackson v. Dugger, 547 So.2d 1197, n. 2 (Fla. 1989). Furthermore this Court has determined that absent a timely objection Petitioner is procedurally barred from raising this claim at this juncture. Grossman v. State, 525 So.2d 833, 842 (Fla. 1988). Jones v. State, 533 So.2d 290 (Fla. 1988). Petitioner's reliance on Jackson v. Dugger, supra is unavailing as the issue there was preserved for appeal. In that case Petitioner made a timely objection, moved for a mistrial and raised the issue on direct appeal. Id. at 355-356. Although defense counsel did timely object to the photograph admitted into evidence (R. 459-461), there was no objection made to the various prosecutorial comments and presentence investigation report which Petitioner alleges was improper victim impact evidence. Consequently, this issue has not been properly preserved and

should not be considered by this Court. Parker v. Dugger, *supra*; Hamblen v. State, 14 FLW 347 (Fla. July 6, 1989). Respondent urges this Court to issue a plain statement that appellant is in irrevocable procedural default upon this claim so as to prevent its subsequent unjustified litigation on the merits in a federal habeas corpus proceeding in the event of a favorable decision here, see Harris v. Reed, 489 U.S. —, 103 L.Ed 2d 308 (1989). Additionally, the lack of objection to the alleged victim impact evidence (except the photograph) and the prosecutor's arguments, does not render Petitioner's appellate counsel ineffective. Jacobs v. Wainwright, 450 So.2d 200 (Fla. 1984); Tompkins v. Dugger, 14 F.L.W. 455 (Fla. September 14, 1989).

Notwithstanding Petitioner's failure to preserve the instant issue, Petitioner's claim lacks merit.

The photograph Petitioner claims was improperly admitted into evidence and which was objected to during the guilt phase of trial depicted the victim's dresser on which several photographs were displayed. The photograph was properly admitted into evidence as it was relevant to show that the victim's black jewelry box, which the victim kept on the dresser, was missing and was taken in the robbery (R. 464); thus, the photograph corroborated David Schifflet's testimony regarding the missing jewelry box (R. 486, 495). Consequently, there was no error in admitting the photographs into evidence.

Furthermore, Petitioner's claim that the photograph in evidence depicted photographs of the victim's family is

unsupported by the record. The nature of the photographs displayed on the dresser is amorphous, at best, and even the Prosecutor could not verify to the trial court who was in the pictures (R. 460). As a result, no argument was ever made during the entire trial regarding the people depicted in the photograph.

Similarly without basis is Petitioner's contention that the victim's family was very much in evidence by their mere presence in the courtroom during the trial. The victim's family was never pointed out to the jurors, nor did they even testify at trial. Additionally, Petitioner's assertion that the victim's family was admonished by the trial judge is unsupported by the record. Indeed, the trial court states:

I have not noticed anything because I cautioned Mr. Harris.

(R. 1064).

Even the court clerk did not see anything:

THE COURT: I didn't say anything for the record but my clerk watched and she didn't see anything, either. I watched. Okay.

(R. 1065).

Contrary to Petitioner's assertions, the State never attempted to develop a theme of sympathy for the victim. The Prosecutor's statement during voir dire, "what about the person who is dead" (R. 122) was merely meant to reinforce to the jury the seriousness of the offense and the importance of having an attentive jury. In fact, the Prosecutor continued his statement with the following explanation:

MR. GARFIELD: There is nobody here - there is nobody here to help out or not -- I mean, we could get philosophical. This isn't the time or place to do it. Someone is dead or at least presumably we can perhaps prove that one is dead.

The question is, someone murdered him. The question is, is it this person here or not and if he did murder him, was it a premeditated murder? That is basically what we are here for. We are not here to help anybody or hurt anybody. It is a question of that is the law; that is the way our system works.

Given that frame work, can you function that way in this case and make a decision?

(R. 122).

Based on the foregoing, it is evident that the Prosecutor's statements were not meant to inflame the jury or evoke sympathy for the victim.

The same holds true of the statements made by the Prosecutor during the penalty phase arguments. The Prosecutor's statements were made in direct response to Petitioner's mitigating evidence which was an attempt to elicit sympathy from the jury. Petitioner's parents, sister and wife testified during the penalty phase of trial, and essentially stated that Petitioner was good to his family and was greatly loved by them all (R. 1577, 1582, 1583-1584, 1587). The Prosecutor's statements were merely a reminder that the victim, too, had a family.

Overall, the statements complained of lack the impact and magnitude of those found impermissible in either Booth or

South Carolina v. Gathers, ___ U.S. ___, 57 U.S. L.W. 4629 (June 23, 1989). The statements in Booth contained information regarding the personal characteristics of the victim, the emotional impact of the crime on the family, a family member's comments and opinion regarding the positive qualities of the victim and the serious emotional problems suffered by the family. Id. 96 L.Ed. 2d 448-452. The impermissible statements found in Gathers are extensive portions of a religious poem/prayer found in the victim's possession. References were also made to the victim's registration card in an effort to characterize him as a patriotic American.

Reference during the sentencing phase to the pain and loss suffered by the victim's family does not violate Booth or Gathers. The statements here and the likely effect of that information on the jury is materially different in scope from the situation presented in Booth and Gathers. The extensive and emotionally charged details of the family's loss in Booth are not present here. The prayer-like invocations found in Gathers are also missing from the facts of the instant case. The jury was already fully aware that Mr. Pope was a "young" 64 year old who had retired and had moved to Florida to enjoy his retirement. (R. 483, 550-551). Nothing said by the prosecutor added to these already known facts; nothing was said to compare the victim's worth to that of the Petitioner; the jury was not informed about any relevant facts about the victim's accomplishments nor was anything read to the jury concerning specific statements made by

family members. In conclusion nothing said created any risk that the Petitioner's death sentence was based on constitutionality impermissible or irrelevant consideration. The statements fall far short of the emotional pleas and sermons found in Booth or Gathers.

Furthermore, even if the Prosecutor's statements were in error, the error was harmless beyond a reasonable doubt. Grossman v. State, 525 So.2d 833 (Fla. 1988). When read in its entirety, the Prosecutor's closing penalty phase arguments consisted of explaining to the jury the aggravating circumstances and which ones possibly applied sub judice (R. 1589-1616). Since impact of the murder on the family is not an aggravating circumstance in Florida §921.141(5), Fla. Stat. and in light of the trial court's instructions regarding sentencing, it is doubtful that impact of the murder on the family was considered by the jury. Therefore, Petitioner was not prejudiced by the Prosecutor's statements.

Likewise, Petitioner was not prejudiced by the statements in the presentence investigation (PSI). The PSI was ordered after the jury had made the recommendation of death (R. 1638) and thus the jury clearly did not have access to the report.

Furthermore, a review of the trial court's findings indicates that the statements in the PSI had no bearing on the imposition of the death penalty. A sentencing judge is required to give great weight to the jury's recommendation of death, Id.

at 845. Additionally, the court found that four aggravating factors and no mitigating factors applied to Petitioner (R. 1697). As a result, it is evident from the record that Petitioner's sentence was based on the recommendation of the jury and the overriding weight of the aggravating circumstances. See Lightbourne v. Dugger, 829 F.2d 1012 (11th Cir. 1987). Thus, Petitioner was not prejudiced by the information in the PSI.

Petitioner's claim lacks merit both procedurally and substantively; as a result, Petitioner was not denied effective assistance of appellate counsel. Accordingly, this Court should deny relief.

POINT IX

THERE WERE NO IMPERMISSIBLE
ANTI-SYMPATHY COMMENTS OR JURY
INSTRUCTIONS GIVEN AT
PETITIONER'S TRIAL.

Petitioner claims that the certain prosecutorial comments and jury instructions impermissibly led the jury to believe that sympathy was not a proper consideration. Petitioner claims to have received ineffective assistance of appellate counsel with respect to this claim. This claim lacks merit procedurally and substantially.

Initially, Respondent would point out that none of the challenged remarks or instructions were even objected to, consequently, they were not preserved for appeal. Appellate counsel cannot be faulted for failing to raise an unpreserved claim. Tompkins v. Dugger, 14 FLW 455 (Fla. September 14, 1989). Consequently, this Court is precluded from reviewing this claim at this time. Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989).

The basis for this claim was first announced in Lockett v. Ohio, 438 U.S. 586 (1978) and again in California v. Brown, 479 U.S. 538 (1987), consequently Petitioner cannot claim that there has been any significant change in the law which would warrant review by this Court at this untimely juncture. At the very least this claim should have been brought within two years of California v. Brown, supra which was decided in January of 1987. Adams v. State, 543 So.2d 1244 (Fla. 1989). Petitioner's attempts to circumvent the time requirements of Rule 3.850

motions by raising this claim in a habeas petition rather than in a rule 3.850 motion should be dismissed by this Court. Parker v. Dugger, 14 FLW 557 (Fla. October 23, 1989) Respondent urges this Court to issue a plain statement that Petitioner is in procedural default so as to prevent subsequent unjustified litigation on the merits in a federal habeas proceeding. Harris v. Reed, 489 US.

103 L.Ed.2d 308 (1989).

As to the merits Petitioner has failed to established any error. Most of the challenged statements were either prosecutorial comments or jury instructions made during the quilt phase of trial (R. 1258-1259, 1525-1526, 1589). Furthermore, the prosecutor's comments made with respect to someone having cancer were made in response to Petitioner's father's statement that he was upset over his daughter-in-law-'s medical condition (R. 1258). Respondent submits that such was proper. In no way can that exchange between Petitioner's father and the prosecutor be construed as an anti-sympathy instruction.

The actual relevant jury instructions given contained the following:

The sentence that you recommend to the Court must be based upon the facts as you find them from the evidence and the law.

(R. 1628).

Before your ballot you should carefully weight, sift and consider the evidence, and all of it, realizing that a human life is at stake . . .

During the sentencing phase, Petitioner presented evidence from his family stating that he has been a good son, brother, father and husband (R. 1577, 1582, 1587). Testimony was also presented concerning his good deeds in prison and his past drug problems (R. 1577-1579).

The instructions given after Petitioner presented several witnesses simply cannot be construed as informing the jury that sympathy is not to be considered. California v. Brown, 93 L.Ed.2d at 940.

Furthermore Respondent asserts that mere sympathy not premised on the defendant's character, background or circumstances of the crime is irrelevant. Mitigating evidence must be meet the traditional list of relevancy. Lockett v. Ohio, 43 U.S. at 604 f.n. 12. Hill v. State, 515 So.2d 176 (Fla. 1987). Sentencing procedure should aspire towards nonarbitrary and noncapricious results. In efforts to reach this goal the United States Supreme Court reemphasized in California v. Brown, supra that arbitrariness may be limited by prohibiting reliance on "extraneous factors" and ignore factors not presented at trial and irrelevant to issues at trial." Id. 479 U.S. at 543. See also Coleman v. Saffle, 869 F.2d 1377, 1392 (10th Cir. 1989).

The fact that the United States Court is reviewing Parks in Saffle v. Parks, 109 S.Ct. 1930 (1989) does not warrant a stay of execution as Parks deals with jury instructions and not prosecutorial comments. Furthermore, there was no actual anti-sympathy instruction given at the sentencing phase in the case

sub judice as was done in Parks. Petitioner has failed to establish any reason why a stay should be granted or why relief should be granted.

POINT X

THE JURY WAS PROPERLY INFORMED
OF THEIR ROLE IN FLORIDA'S
SENTENCING SCHEME.

Petitioner's claim that the jury was misinformed as to their duty during the sentencing phase of his trial in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). Petitioner also claims to have received ineffective assistance of appellate counsel for failure to raise this issue on direct appeal. Petitioner's argument lacks merit both procedurally and substantially.

Initially this issue was not preserved for appeal, Consequently, it is procedurally barred Tompkins v. Dugger, 14 FLW 455 (Fla. September 14, 1989); Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989). Furthermore, appellate counsel is not ineffective for failure to raise a non preserved for issue on appeal. Tompkins, supra; Atkins, supra; Dugger v. Adams, 489 U.S. ____, 103 L.Ed.2d 435, 109 S.Ct. ____ (1989).

With respect to the merits this Court has repeatedly stated that a "Caldwell claim" is not applicable in Florida. Combs v. State, 525 So.2d 853 (Fla. 1988); Grossman v. State, 525 So.2d 833 (Fla. 1988); Pope v. Wainwright, 496 So.2d 798, 804-805 (Fla. 1986). Furthermore, when viewed in this entirety the Court's instructions properly explained the jury's role under Florida's sentencing scheme (R. 1624-1625, 1629). Combs, 525 So.2d at 857-858.

POINT XI

THE TRIAL COURT AND JURY WERE
PRESENTED ONLY WITH STATUTORY
AGGRAVATING FACTORS.

Petitioner alleges that nonstatutory aggravating factors were improperly considered during the sentencing phase. Petitioner further contends that appellate counsel was ineffective for failing to raise this on direct appeal.

None of the alleged nonstatutory aggravating factors were objected to. Consequently, this was not preserved for appellate review and is thus procedurally barred. Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989). Furthermore, appellate counsel cannot be ineffective for failure to raise unpreserved issues. Tompkins v. State, 14 FLW 455 (Fla. September 14, 1989); Ruffin v. Wainwright, 461 So.2d 109 (Fla. 1984). As such, Petitioner has failed to establish any deficient performance as required under Strickland v Washington, 466 U.S. 668 (1984).

Petitioner attempts to create error by taking certain comments and remarks out of context. The trial court properly told the jury to consider any evidence brought out during trial but it must be considered in light of the following limited aggravating circumstances. (R. 1625)

During closing argument the prosecutor's reference to "fag" and "loving Lloyd" were simply comments on the evidence (R. 1431, 1437). Petitioner's family called him Lloyd and they all tried to present him as a loving member of the family. The prosecutor's reference to the State witnesses' dislike for

Petitioner was said in reference to their lack of interest in the outcome of the case as opposed to the defense witnesses motivation to lie for him (R. 1450). The prosecutor's remarks concerning Petitioner's lack of military history etc. were made to rebut Petitioner's claims that he served in Viet Nam and that he was a model father, husband and son. The comments were not made in the context of supporting an aggravating factor but rather to negate the existence of alleged mitigation (R. 1614 line 4-25, 1616).

Petitioner further alleges improper prosecutorial comments were made to the court after the jury's advisory sentence was rendered (R. 1687-1689). These comments were made in reference to defense counsel's earlier argument (R. 1676, 1677, 1687 line 25 - 1689). Furthermore, these were remarks made to the trial court who knew what the appropriate aggravating circumstances were (R. 1833-1836).

The Prosecutor's comments to the jury regarding lack of remorse were made in reference to the applicability of aggravating circumstances (R. 1595-1596, 1601 lines 14-18).

Taken in the context of the entire proceedings none of the alleged remarks were reference to nonstatutory agravating factors nor were they improper. However, even if improper, they do not constitute fundamental error. Pope v. Wainwright, 496 So.2d 798, 803 (Fla. 1986). This is especially so in light of the aggravating circumstances found to exist in this case. Bertolotti v. State, 376 So.2d 130 (Fla. 1985). Petitioner has

failed to establish any prejudice. Downs v. Wainwright, 476 So.2d 654 (Fla. 1985).

POINT XII

PETITIONER'S DEATH SENTENCE WAS
NOT UNCONSTITUTIONAL MERELY
BECAUSE AN AGGRAVATING FACTOR
DUPLICATED AN ELEMENT OF THE
CRIME.

Petitioner claims his sentence was the result of an automatic aggravating circumstance and appellate counsel was ineffective for failure to raise this on direct appeal. This issue was not preserved for appeal, therefore appellate counsel cannot be deemed ineffective. Tompkins v. Dugger, 14 FLW 455 f.n. 2 (Fla. September 14, 1989). Petitioner is procedurally barred from raising this claim at this untimely juncture. Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989). Appellate counsel cannot be deemed ineffective for failure to raise this claim. Downs v. Wainwright, 476 So.2d 654 (Fla. 1985).

As for the merits Petitioner has failed to establish any error. Petitioner's argument that he was convicted under a felony murder theory is merely self serving conjecture as there was ample evidence of premeditation. Duest v. State, 462 So.2d 446, 448-449 (Fla. 1985). Furthermore the United States Supreme Court has stated that the fact that an aggravating circumstance found to support a death sentence duplicates one of the elements of the crime does not render a subsequent sentence of death unconstitutional. Lowenfield v. Phelps, 108 S.Ct. 546 (1988).

The rationale of Lowenfield, supra was first established in Proffitt v. Florida, 428 U.S. 242 (1976) and Gregg v. Georgia, 428 U.S. 153 (1976). Florida's sentencing scheme has

already passed Constitutional muster with regards to the task of narrowing the class of persons eligible for the death penalty. Proffit v. Florida, supra. The fact that Petitioner may have been convicted under a felony murder theory does not mean that the parallel aggravating circumstance would justify the death penalty. Bertolotti v. Dugger, 3 FLW 1281 (11th Cir. August 31, 1989). Rembert v. State, 445 So.2d 337, 340-341 (Fla. 1984).

Although Petitioner's claim lacks merit Respondent urges this Court to deny relief based on the irrevocable procedural default. Harris v. Reed, 489 U.S. ____, 103 L.Ed.2d 308 (1989).

POINT XIII

PETITIONER'S APPELLATE COUNSEL
WAS EFFECTIVE WHERE PETITIONER
DID NOT EXERCISE HIS RIGHT TO
SILENCE.

Petitioner contends that his appellate counsel was ineffective for failing to raise a claim regarding the use of Petitioner's post-arrest silence. Specifically, Petitioner argues that there was an impermissible comment on Petitioner's right to silence and that this evidence was used as evidence that a death sentence be imposed. Petitioner's claim is totally unfounded both procedurally and on the merits.

First, no objections were raised at trial regarding the allegedly improper comments. As a result, Petitioner's appellate counsel cannot be considered ineffective for failing to raise an issue which was not preserved. Pope v. Wainwright, 496 So.2d 798 (Fla. 1986); Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989); Downs v. Wainwright, 476 So.2d 654 (Fla. 1985).

Secondly, there was no error in presenting evidence that Petitioner "refused to make a statement." The State submits that Petitioner has taken the above quoted testimony completely out of context since a full reading of Detective Feltgen's testimony reveals that Petitioner did in fact make a statement to police, but refused to put his statement on tape (R. 891-893). Where the Petitioner clearly did not exercise his right to silence, there was no way that Officer Feltgen's testimony could have been taken as improper evidence of Petitioner's exercise of

that right. Donovan v. State, 417 So.2d 674 (Fla. 1982); State v. Thornton, 491 So.2d 1143, 1144 (Fla. 1986). Consequently, Petitioner's claim is without merit.

Furthermore, the State never used Petitioner's invocation of silence to urge that Petitioner be sentenced to death. Although several references were made to the Petitioner's lack of remorse (R. 1596, 1605) none of those statements were "fairly susceptible" of being interpreted as a comment on Petitioner's right to silence. In the first instance, the Prosecutor merely stated that:

The defendant in this case has taken the position that he did not do this. Therefore he has no remorse in this case.

(R. 1596).

Consequently, the Prosecutor's statement was merely a fair comment on the evidence.

Another reference to Petitioner's lack of remorse was made to substantiate the fact that the killing sub judice was premeditated, and that Petitioner continued to pursue his intention of killing John Pope despite several opportunities to renunciate that plan (R. 1600-1603). Thus, the reference to Petitioner's lack of remorse was not a comment on Petitioner's right to silence, and were proper. See Pope v. Wainwright, 496 So.2d at 802.

Based on Petitioner's failure to exercise his right to silence, Petitioner was not prejudiced by the statements indicating his "refusal to give a statement" or his lack of

remorse. Accordingly, Petitioner was not denied effective assistance of counsel, and his petition for writ of habeas corpus must be denied. Downs v. Wainwright, supra.

Although, this claim lacks merit Respondent urges this Court to issue a plain statement regarding Petitioner's irrevocable procedural default. Harris v. Reed, 489 U.S. ___, 103 L.Ed.2d 308 (1989).

POINT XIV

PETITIONER'S SIXTH, EIGHT AND FOURTEENTH AMENDMENT RIGHTS WERE NOT VIOLATED WHERE THE HEARSAY CONTAINED IN THE PSI RELATED TO FACTS ADDUCED DURING THE GUILT PHASE OF TRIAL BY WITNESSES WHO WERE SUBJECT TO CONFRONTATION AND CROSS-EXAMINATION.

Petitioner contends that the jury's recommendation of death was tainted by impermissible hearsay evidence contained in the presentence investigation report, and that his appellate counsel was ineffective for failing to present this claim on direct appeal. Petitioner's claim is without merit.

First, despite an opportunity to do so, defense counsel did not object or challenge any of the hearsay in the PSI which Petitioner now challenges. See Rhodes v. State, 547 So.2d 1201, n. 4 (Fla. 1989). As a result, Petitioner's appellate counsel was not ineffective for failing to raise an issue not preserved for appellate review. Pope v. Wainwright, 496 So.2d 798 (Fla. 1986); Thompkins v Dugger, 14 F.L.W. 455 (Fla. September 14, 1989); Atkins v Dugger, 541 So. 2d 1165 (Fla. 1989); Downs v Wainwright, 476 So. 2d 654 (Fla. 1985).

Secondly, the mandate of Gardner v. Florida, 430 US 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) was met where Petitioner was afforded a complete copy of the PSI prior to sentencing and was given an opportunity to rebut or explain the information contained therein. Cf Barclay v. State, 362 So.2d 657 (Fla. 1978). Indeed, portions of the PSI which were

challenged by defense counsel were amended at the sentencing hearing (R. 1649-1662, 1662-1665, 1682-1683).

Thirdly, the hearsay contained in the PSI did not undermine the reliability of the jury's sentencing determination because the jury never had access to the information contained in the PSI. The jury's recommendation that Petitioner be sentenced to death was rendered on March 18, 1983. Thereafter the PSI was ordered by the trial judge (R. 1638). Thus, it **is** inconceivable how the information in the PSI could have had any effect on the jury's advisory sentence of death.

Notwithstanding, hearsay evidence is admissible in the penalty phase of a capital case. **§921.141(1) Fla. Stat. (1983)**. Further, the hearsay evidence which Petitioner complains of related to "facts" established during the guilt phase of trial, by witnesses who were subject to confrontation and cross-examination. **— Eutsey v. State, 383 So.2d 219, 225-226 (Fla. 1980)**.

Petitioner's reliance on Rhodes v. State, 547 So.2d 1201 is misplaced since the hearsay testimony in Rhodes came from a tape recording pertaining to the defendant's prior convictions, and had no relevance to the offense for which the defendant was being sentenced. Sub judice, the hearsay contained in the PSI was based on information gathered from witnesses who testified in the courtroom during the guilt phase of Petitioner's trial. By the same token, the hearsay Petitioner complains of was merely a repetition of ingredient facts of the offense for which

Petitioner was being sentenced. Since Petitioner was able to confront and cross-examine those witnesses during the guilt phase of his trial, Petitioner's sixth, eighth, and fourteenth amendment rights were not violated.

Accordingly, Petitioner's sentence must be affirmed. This Court should issue a plain statement concerning Petitioner's procedural default of this claim. *Harris v Reed*, 489 U.S. ____', 103 L. Ed. 2d 308 (1989).

POINT XV

THE JURY'S VERDICT DEMONSTRATES
THAT THE JURY WAS NOT MISLED AS
SUCH PETITIONER CANNOT
DEMONSTRATE PREJUDICE NOR WAS
THIS ISSUE PRESERVED.

Petitioner claims that the jury was misinformed as to the required number of notes needed for a recommendation of life. Petitioner's claim is procedurally barred as no objection was made at trial. Maxwell v. Wainwright, 490 So.2d 927 (Fla. 1986); Lucas v. State, 376 So.2d 1149 (Fla. 1979). Furthermore, since the issue was not preserved for appeal, appellate counsel cannot be held ineffective for failure to raise the claim on direct appeal. Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989).

Petitioner's reliance on Rose v. State, 425 So.2d 521 (Fla. 1983) and Patton v. State, 467 So.2d 975 (Fla. 1985) is misplaced. In both cases the record demonstrates that the jury was dead locked at **six** to six in their sentencing recommendation. Contrary to Petitioner's assertions otherwise, there is no such indication that the jury was ever deadlocked. The returned a recommendation by a majority note. Never was a note sent to the judge stating that they were deadlock. Petitioner has failed to demonstrate any prejudice in that the jury erroneously believed a vote of seven was required for a life recommendation and that at some point the jury was in fact deadlocked at six. Harich v. State, 437 So.2d 1082 (Fla. 1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984); Maxwell v. Wainwright, supra; Henry v. Wainwright, 743 F.2d 761 (11th Cir. 1984).

Petitioner's claim lacks merit both procedurally and substantively. Respondent urges this Court to make a plain statement concerning Petitioner's procedural default to avoid any subsequent federal review in the event Respondent receives a favorable decision before this Honorable Court. Harris v. Reed, 489 U.S. _____, 103 L.Ed.2d 308 (1989).

APPELLANT IS NOT ENTITLED TO
A STAY OF EXECUTION.

Appellant's claims lacks merit both procedurally and substantively. This Court should deny his motion for a stay of execution and affirm the trial court's order denying relief. A stay of execution...should not be regarded as an automatic remedy granted simply upon request," Mulligan v. Zant, 531 F. Supp. 459, 460 (M.D. Ga. 1984), inasmuch as the State has a legitimate interest in the finality of all litigation, including capital litigation. Witt v. State, 387 So.2d 922, 925 (Fla. 1980), cert. denied, 449 U.S. 1067 (1981). In other words "justice, though due to the accused, is due to the accuser also," Snyder v. Massachusetts, 291 U.S. 97, 122 (1934), and "justice delayed is justice denied," United States ex rel. Geislerve Walters, 510 F.2d 887, 893 (3rd Cir. 1975).

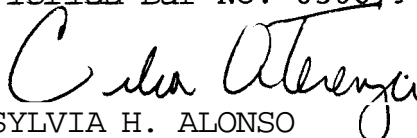
Appellant has failed to establish that he "might be" entitled to relief on any of his claims. Appellant's claims lack any merit whatsoever.

CONCLUSION

WHEREFORE, Respondent urges this Court to DENY this petition as all of Petitioner's claims are either procedurally barred or lack merit.

Respectfully submitted,

CELIA A. TERENCE
Capital Collateral Specialist
Florida Bar No. 656879

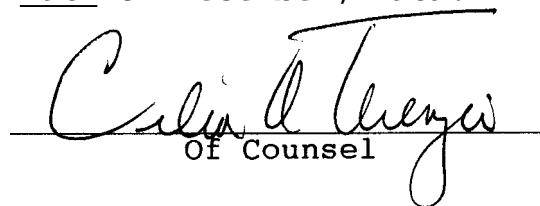


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States mail to MARTIN J. McCLAIN, Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, FL 32301 this 29th of December, 1989.



OF Counsel