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IN THE SUPREME COURT OF FLORIDA

CLARENCE EDWARD HILL,

Appellant,

v.

CASE NO. 68,706

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR ESCAMBIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

| | <u>PAGE(S)</u> |
|---|----------------|
| STATEMENT OF THE CASE AND FACTS | 1-15 |
| SUMMARY OF ARGUMENT | 16 |
| ARGUMENT | |
| <u>POINT I</u> | |
| WHETHER ARGUMENTS I-X1 OF HILL'S INITIAL BRIEF ARE PROPERLY BEFORE THE COURT | 17-31 |
| <u>POINT II</u> | |
| WHEN THE FLORIDA SUPREME COURT INVALIDATED THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING FACTOR AND THEN CONDUCTED A HARMLESS ERROR REVIEW, DID THE COURT IN FINDING THE ERROR HARMLESS CONSIDER NON- STATUTORY MITIGATING CIRCUMSTANCES IN THE SENTENCING BALANCE | 31-39 |
| CONCLUSION | 40 |
| CERTIFICATE OF SERVICE | 40 |

TABLE OF AUTHORITIES

| <u>CASES</u> | <u>PAGE(S)</u> |
|--|----------------|
| <u>Caldwell v. Mississippi</u> , 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 23 (1985) | 29 |
| <u>Campbell v. State</u> , 571 So.2d 415 (Fla. 1990) | 19 |
| <u>Clemons v. Mississippi</u> , 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990) | 1,33 |
| <u>Davis v. State</u> , 589 So.2d 896 (Fla. 1991) | 17 |
| <u>Eddings v. Oklahoma</u> , 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) | 26 |
| <u>Funchess v. State</u> , 399 So.2d 356 (Fla. 1981) | 17 |
| <u>Gardner v. Florida</u> , 430 U.S. 349 (1977) | 17 |
| <u>Hamblen v. Dugger</u> , 546 So.2d 1039 (Fla. 1989) | 38 |
| <u>Hill v. State</u> , 477 So.2d 553 (Fla. 1985) | 7,18,21 |
| <u>Hill v. State</u> , 515 So.2d 176 (Fla. 1987), <u>cert. denied</u> , 485 U.S. 993 (1988) | 7,11,16,18,20 |
| <u>Hill v. Dugger</u> , 556 So.2d 1385 (Fla. 1990) | 12,20,28 |
| <u>Hitchcock v. Dugger</u> , 481 U.S. 393, 107 S.Ct. 1321, 95 L.Ed.2d 346 (1987) | 26 |
| <u>Lockett v. Ohio</u> , 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) | 26 |

TABLE OF AUTHORITIES
(Continued)

| <u>CASES</u> | <u>PAGE(S)</u> |
|---|----------------|
| <u>Mullaney v. Wilbur,</u> 421 U.S. 684 (1975) | 28 |
| <u>Osborne v. Wainwright,</u> 720 F.2d 1237 (11th Cir. 1983) | 22 |
| <u>Parker v. Dugger,</u> 498 U.S. —, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991) | 1 |
| <u>Singer v. State,</u> 109 So.2d 7 (Fla. 1959) | 27 |
| <u>Sochor v. Florida,</u> 504 U.S. —, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992) | 3 |
| <u>State v. Neil,</u> 457 So.2d 481 (Fla. 1984) | 23 |
| <u>Strickland v. Washington,</u> 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) | 13 |
| <u>Suarez v. Dugger,</u> 527 So.2d 190 (Fla. 1988) | 21 |
| <u>United States v. Cronin,</u> 446 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) | 14 |

OTHER AUTHORITIES

| | |
|---------------------|----|
| Fla.R.Crim.P. 3.851 | 11 |
|---------------------|----|

STATEMENT OF THE CASE AND FACTS

(A) Preliminary Statement

On August 31, 1992, Judge Stafford granted Hill's federal Petition for Writ of Habeas Corpus based on Parker v. Dugger, 498 U.S. ____, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991), and Clemons v. Mississippi, 494 U.S. 738, 755, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), violations.

The federal district court concluded that a Parker v. Dugger, supra, violation occurred because:

In Hill's case, the trial court found that nonstatutory mitigating circumstances did not exist despite a record containing uncontroverted evidence of nonstatutory mitigating circumstances. The Florida Supreme Court, without discussion, deferred to the trial judge's finding of no nonstatutory mitigation. As a result, when the Supreme Court invalidated the cold, calculated and premeditated aggravating factor, it conducted a harmless error review without placing any nonstatutory mitigating circumstances in the sentencing balance. Because the record belies both the judge's findings as well as the Supreme Court's reliance on that finding, this Court concludes that a violation of constitutional magnitude occurred. By totally excluding the unrefuted evidence of nonstatutory mitigating factors from the weighing process, the Florida courts placed a thumb on the death side of the scale and thus created a risk of randomness in the sentencing process.

One might argue that the error by the Florida courts was harmless. After all, eleven of twelve jurors found little enough value in Hill's mitigating evidence to satisfy them that death was an appropriate sentence. Clearly influenced by the jurors' death sentence recommendation, the judge was entitled to find that the mitigating evidence was outweighed by the evidence in aggravation. Thus, the sentence could well have been the same had the judge properly placed the uncontroverted evidence of

mitigating circumstances in the sentencing balance. Perhaps even the decision of the Florida Supreme Court would have been the same had it conducted harmless error review based on aggravating and mitigating factors supported by the record, although -- as recently noted by the United States Supreme Court -- the Florida Supreme Court's usual practice is to remand for a new sentencing hearing when, as in this case, it strikes one or more aggravating circumstances relied on by the trial judge and mitigating circumstances are present. Parker v. Dugger, 498 U.S. ____, 111 S.Ct. 731, 112 L.Ed.2d 812, 825 (1991). Whether the state courts' decisions would be the same absent their reliance on an unsupported finding, however, is not for this Court to decide. Any such decision would necessarily be based upon speculation and speculation cannot support a finding of harmless error.

Having found that Hill was sentenced to death based on an unsupported finding of fact, without proper attention to the capital sentencing standards required by the United States Constitution, this Court must grant conditional relief to Hill. Accordingly, Hill's Petition for Writ of Habeas Corpus shall be granted unless the State of Florida, within a reasonable period of time, initiates proceedings in state court so that Hill's death sentence may be appropriately reconsidered. This Court expresses no opinion as to whether the Florida courts must order a new sentencing hearing.

(Order dated August 31, 1992, pps. 72-74).

With regard to the "second" error identified by the district court, to-wit: the Clemons issue, the federal district court concluded:

. . . Although it does not independently reweigh aggravating and mitigating factors, the Florida Supreme Court may nonetheless affirm a death sentence if it decides the trial court's reliance on an invalid aggravating circumstance was harmless error. Clemons, 494 U.S. at 752. The State in this case contends that the Supreme Court engaged in just such harmless error analysis. The

State relies on the following language from the Supreme Court's opinion on direct appeal:

Appellant does not take issue with the finding that four of the aggravating circumstances were proven beyond a reasonable doubt. Given these four remaining aggravating circumstances, and the one mitigating circumstance, we find the erroneous consideration of the aggravating circumstance that the murder was committed in a cold, calculated and premeditated manner is not such a change under the circumstances of this sentencing proceeding that its elimination could possibly compromise the weighing process of either the jury or the judge.

Hill v. State, 515 So.2d at 179.

(Order dated August 31, 1992, pps. 77-78).

The Court, after referencing the United States Supreme Court's decision in Sochor v. Florida, 504 U.S. ___, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992), and pointing to the criticism in Sochor that the Florida Supreme Court did not do a proper harmless error analysis, ruled:

In Hill's case, as in Sochor's case, the jury was instructed that it could consider -- if established by the evidence -- any of a number of aggravating factors, including whether the crime was committed in a cold, calculated and premeditated manner. As in Sochor's case, Hill's jury was not instructed about the heightened premeditation necessary to support a finding of the coldness factor. As in the Sochor case, the Florida Supreme Court in Hill's case determined that there was insufficient evidence to support the heightened premeditation necessary to apply the coldness factor. In Sochor's case, the United States Supreme Court refused to assume that the jury weighed the invalid coldness factor in the sentencing balance. It thus found no constitutional flaw in the jury's weighing process. Finding no reason to distinguish the jury's treatment of the

coldness factor in Hill's case from that in the Sochor case, this Court must likewise decline to presume jury error.

As to the error committed by Hill's sentencing judge, however, there can be no doubt. The coldness factor was clearly 'invalid' for Clemons purposes. See Parker v. Dugger, 112 L.Ed.2d at 824 (applying the Clemons rule where a trial judge weighed two aggravating factors that were 'invalid' in the sense that the Supreme Court of Florida found them to be unsupported by the evidence); and the judge expressly said that he weighed the coldness factor. It follows that Eighth Amendment error did indeed occur.

While the Florida Supreme Court in Hill's case did not explicitly state that it performed harmless error analysis, and while it did not give a principled explanation of how it reached its conclusion, it nonetheless appears that the Supreme Court engaged in harmless error review, finding beyond a reasonable doubt that Hill's sentence would have been the same absent the erroneous consideration of the coldness factor. The Supreme Court said, '[T]he erroneous consideration of the aggravating circumstance that the murder was committed in a cold, calculated and premeditated manner is not such a change under the circumstances of this sentencing proceeding that its elimination could possibly compromise the weighing process of either the jury or the judge.' Hill v. State, 515 So.2d at 179. Such verbiage is consistent with the Chapman beyond a reasonable doubt standard.

Whether this 'cryptic' conclusion satisfies the Florida Supreme Court's obligations to Clemons is another matter. It is a matter, however, that need not be decided here, because the Supreme Court's harmless error analysis was otherwise flawed by the exclusion of unrelated nonstatutory mitigating evidence from the sentencing balance. Without such evidence in the balance, meaningful harmless error analysis was impossible; and without meaningful harmless error analysis, the Florida Supreme

Court's affirmance of Hill's death sentence is invalid. Accordingly, Hill is entitled to conditional relief on his Clemons claim.

(Order dated August 31, 1992, pps. 77-78, 81-83).

As a result of the aforementioned findings, the federal district court conditionally granted the Petition for Writ of Habeas Corpus. Hill did not prevail on all other issues raised before the court, which included direct appeal issues and collateral issues which had been exhausted in the state court system. As a result, both Hill and the State filed their respective notices of appeal to the Eleventh Circuit Court of Appeals. Upon further reflection of the issues upon which the State did not prevail in the federal district court, the State elected to dismiss its appeal and return to the state appellate courts for further appellate review of the complained-of Parker, supra, and Clemons, supra, violations. In the interim, Hill has continued to prosecute his appeal in the Eleventh Circuit Court of Appeals, however, when time came for filing his Initial Brief, he filed a motion in the Eleventh Circuit Court of Appeals to have the matter held in abeyance in federal court until such time as the issues upon which he prevailed were resolved by the state courts. The Eleventh Circuit Court of Appeals, on March 22, 1994, granted Hill's motion to hold proceedings in abeyance pending resolution of his reopened direct appeal in the Florida Supreme Court in Hill v. Singletary, Case No. 93-2616.

The case before the Florida Supreme Court is on limited remand for the purpose of ascertaining whether the striking of one of the statutory aggravating factors (CCP) and factoring in

"unrebutted" nonstatutory mitigating evidence would have resulted in the imposition of the death penalty. In essence, the sole issue before this Court is what effect the "unrebutted nonstatutory mitigation" tendered by Hill would have had if four, rather than five, statutory aggravating factors were presented to the trial court and whether, the aforementioned omissions constituted harmless error. As to all other issues raised by Hill in his Initial Brief, the State would submit they are not properly before the Court for review since (a) review is based on a limited remand, and (b) Hill is attempting to circumvent procedural bars by rearguing issues which were either resolved adversely to him on the merits or were barred from appellate review initially.

(B) Statement of the Case and Facts

Clarence Hill and his accomplice, Cliff Jackson, robbed a Savings and Loan Association in Pensacola, Florida, on October 1982. In Hill's attempt to escape and prevent the immediate apprehension of his codefendant, Hill stealthily approached the police officers attempting to handcuff Cliff Jackson, drew his gun and shot both officers, killing one and wounding the other. Hill was indicted on November 2, 1982, in and for the Circuit Court of Escambia County, Florida, for the first degree murder of Officer Stephen Taylor, attempted first degree murder of Officer Larry Bailly, three counts of armed robbery and possession of a firearm during the commission of a felony. Hill's trial began on April 25, 1982, and concluded on April 29, 1982, with the jury finding, inter alia, Hill guilty of both first degree

premeditated murder and felony murder as alleged in Count I. The sentencing phase began on April 29, 1983, and as a result thereof, the jury returned a death recommendation by a 10-2 vote. On May 17, 1983, the trial court concurred with the recommendation of death in a written sentencing order.

In Hill v. State, 477 So.2d 553 (Fla. 1985), the Florida Supreme Court affirmed Hill's convictions, but reversed the death sentence and remanded for a new sentencing proceeding with a newly-empaneled jury. Resentencing proceedings were held on March 24-27, 1986. The record reflects that most of the witnesses presented at the trial were called at the resentencing proceeding and they testified with regard to what occurred the day of the robbery. A number of witnesses testified in behalf of Hill in mitigation. Following all of the testimony, the jury rendered an advisory sentence of death. The trial judge, on April 2, 1986, resentedenced Hill to death, finding five statutory aggravating factors: (1) that Hill had previously been convicted of another capital offense or violent felony; (2) Hill knowingly created a great risk of harm or danger to many persons; (3) the murder was committed while Hill was engaged in the commission of a robbery; (4) the murder was committed for the purpose of avoiding or preventing a lawful arrest or escaping from custody, and (5) the murder was cold, calculated and premeditated. The trial court found one mitigating factor that Hill was twenty-three years old at the time the crime was committed. On appeal from remand in Hill v. State, 515 So.2d 176 (Fla. 1987), cert. denied, 485 U.S. 993 (1988), the Florida Supreme Court affirmed

the imposition of the death penalty albeit the Court found one aggravating factor, that the murder was committed in a cold, calculated and premeditated manner, was not proven beyond a reasonable doubt. 515 So.2d at 179. The Court observed:

. . . Given these four remaining aggravating circumstances, and the one mitigating circumstance, we find that the erroneous consideration of the aggravating circumstance that the murder was committed in a cold, calculated and premeditated manner is not such a change under the circumstances of this sentencing proceeding that its elimination could possibly compromise the weighing process of either the jury or the judge. (cites omitted).

515 So.2d at 179.

At the resentencing, the State tendered, over the objection of defense counsel, that Hill and Jackson had stolen the 1978 Buick Regal automobile from Janet Pearce in Mobile, Alabama, at gunpoint earlier on the day the robbery occurred. Hill and his codefendant drove Mrs. Pearce's car to the Freedom Savings and Loan Association in Pensacola on the early afternoon of October 19, 1982. They entered the bank at approximately 1:30 p.m., wearing sunglasses as a disguise. Hill alone was armed with a .22 caliber pistol (the same weapon used to steal Ms. Pearce's car).

Inside the bank, with his pistol drawn, Hill did most of the talking for the pair, demanding money from the tellers and threatening to blow the heads off of anyone who made a false move. After they obtained some four thousand (\$4,000.00) dollars in cash, Jackson, unarmed, left the bank through the front door where he was immediately apprehended by Officer Larry Bailly of

the Pensacola Police Department. Hill left the bank through the back door undetected. Hill saw Officer Bailly and Officer Taylor apprehend Jackson near the front of the business. Hill casually and stealthily moved up behind the trio, and without warning began firing his pistol at the officers. Officer Taylor, who was struck in the back and chest from a distance of one foot, staggered a short distance to the curb, fell, and died. Officer Bailly, who was hit in the neck, returned fire, striking Hill five times as he ran away. Jackson then began grappling with Bailly and tried to get free, only to be shot by Officer Muller. Hill was apprehended by Officer Muller, after traveling a short distance on foot.

The State rested following its presentation of the facts and circumstances surrounding the robbery and shoot-out on October 19, 1982.

The defense called Cliff Jackson, Hill's codefendant, who testified that in return for a guilty plea, he received a life sentence for these crimes. Jackson testified that he was eighteen years old at the time of the offense and that it was Hill who handled the gun during the Pearce auto theft earlier that day. Jackson testified that the two had used cocaine around that time, and although he, Jackson, had made the decision to rob the bank, it was Hill who handled the gun throughout the robbery/murder and it was Hill who shot and killed Officer Taylor.

Hill testified in his own defense and stated that he and Jackson did the robbery together. He stated that neither he nor

Jackson was the leader. Hill admitted coming back to help his friend get away from the police, but denied that he intended to shoot the police. He could not explain why there was aspirin, not cocaine, found in his blood drawn shortly after the incident.

The defense also presented five character witnesses besides Hill's parents in mitigation. This testimony in sum reflects that Hill, at various points in his life, was nice boy or nice man and real pleasant. He was helpful to his parents and others and none of the witnesses believed he committed the murder. The State's objections were sustained with regard to efforts by defense counsel to permit Hill's mother to testify concerning how she cared for children when Hill was growing up. The State's objection was also sustained as to the testimony of Hill's father regarding his disability from a recent heart attack.

Dr. James Larson, a psychologist, examined Hill on December 22, 1982, to ascertain whether Hill suffered from any mental disability, whether there was any need for involuntary hospitalization and for purposes of discovering any evidence in mitigation. Dr. Larson's testimony reflects that following a number of tests to discern mental acumen and possible mental disease, he concluded that Hill was of average intelligence but scored borderline retarded when it came to verbal ability. Dr. Larson saw no evidence of mental disorder or psychosis and opined there was no basis upon which to involuntarily hospitalize Hill based on the tests performed. Dr. Larson reviewed a plethora of school and medical records and used these documents to draw the aforementioned conclusions. None of the records contained evidence that Hill suffered from any mental dysfunction.

The trial court, without objection, indicated that the jury would be instructed as to the cold, calculated and premeditated aggravating factor. The defense did not request any augmentation of the aforementioned instruction to the effect - that the mere fact that a murder was premeditated - would not automatically translate into a finding of this aggravating factor. Defense counsel did, however, argue during closing this distinction to the jury. Following jury instructions, the jury deliberated and returned with an 11-1 vote recommending the imposition of the death penalty. Said recommendation was followed by the trial court on April 2, 1986. An appeal was filed and in Hill v. State, 515 So.2d 176 (Fla. 1987), cert. denied, 485 U.S. 993 (1988), the Florida Supreme Court affirmed the imposition of the death penalty after striking the cold, calculated and premeditated aggravating factor, finding it was not proven beyond a reasonable doubt. 515 So.2d at 179.

Hill filed his Rule 3.850 motion on December 11, 1989, pursuant to Fla.R.Crim.P. 3.851. The trial court summarily denied all relief with regard to those claims that could have been and should have been raised on direct appeal. As to the challenge to trial counsel's effectiveness at trial and at the penalty phase, the trial court concluded that the record conclusively demonstrated that trial strategy existed which negated the allegations contained in the petition. On rehearing following the denial of his motion for post-conviction relief, Hill filed an affidavit prepared by defense counsel dated January 19, 1990, stating that trial counsel's failures were not due to tactics or trial strategy.

On January 26, 1990, the Florida Supreme Court denied all relief in Hill v. Dugger, 556 So.2d 1385 (Fla. 1990). Contained therein the Court listed every claim that was raised in both the Rule 3.850 and the Petition for Writ of Habeas Corpus filed before the Court. In summary fashion, the following claims were raised and reviewed by the Court:

(1) The prosecutor peremptorily excused black prospective jurors solely based on their race and appellate counsel was ineffective for not arguing this issue on direct appeal; (2) the trial court erred in responding to questions from the jury and refused to disclose said questions to Hill and his counsel; (3) Hill's capital trial and sentencing proceedings were rendered fundamentally unfair and unreliable because the prosecution deliberately and knowingly presented and used false evidence and arguments and it intentionally deceived the jury, the court and defense counsel; (4) Hill was denied effective assistance of counsel at the guilt/innocence phase of his trial; (5) Hill was denied the effective assistance of counsel at the sentencing phase of his trial; (6) Hill's rights were violated because his counsel unreasonably failed to present critical mitigating evidence and failed to adequately develop and employ expert medical health assistance or employ experts to conduct a professionally adequate mental health evaluation; (7) the cold, calculated and premeditated aggravating circumstance was applied to Hill's case in violation of the United States Constitution; (8) the Florida Supreme Court failed to remand for resentencing after striking of the cold, calculated and premeditated aggravating factor on direct appeal; (9) the jury was not properly instructed concerning the improper doubling of aggravating factors; (10) the jury and the trial judge were prevented from giving appropriate consideration to tendered mitigation in light of Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1321, 95 L.Ed.2d 346 (1987); (11) the trial court disallowed consideration of sympathy and mercy towards Hill; (12) Hill's sentence of death was based upon an unconstitutionally obtained prior

conviction and therefore upon misinformation of constitutional magnitude; (13) Hill's jury was improperly instructed, resulting in fundamentally unfair convictions and sentences; (14) the burden of proof was shifted to Hill to prove that death was an inappropriate sentence, and (15) the application of Rule 3.851 violated Hill's rights to due process and equal protection and denied him reasonable access to the courts.

556 So.2d at 1387.

In agreeing with the trial court's disposition of the Rule 3.850 motion, this Court affirmed the denial on procedural grounds of Issues 1, 2, 3, 7, 8, 9, 10, 11, 12, 13 and 14. With regard to Issues 4, 5 and 6, pertaining to trial counsel's failure to investigate and present evidence of Hill's mental condition and drug intoxication, "causing an ineffective presentation by his mental health experts, which resulted in his inability to present three substantial mitigating factors, specifically: (a) that Hill was under extreme mental duress at the time of the offense; (b) that he lacked the substantial capacity to conform his conduct to the requirements of law at the time of the offense; and (c) that at the time of the offense he was under the substantial domination of his codefendant, Clifford Jackson", 556 So.2d 1388, this Court concluded under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), counsel did not render ineffective assistance of counsel. 556 So.2d at 1389.

In Hill's Petition for Writ of Habeas Corpus filed in the Florida Supreme Court, the following issues were raised either under the guise that appellate counsel rendered ineffective

assistance or that the issues asserted constituted fundamental error. Those issues were: (1) the prosecutor peremptorily excused black prospective jurors solely based on race and appellate counsel was ineffective for not asserting this issue on direct appeal; (2) the trial court erred when it refused to turn over questions asked by the jury to defense counsel, thus causing counsel to be ineffective under United States v. Cronin, 466 U.S. 648 (1984); (3) the cold, calculated and premeditated aggravating factor was improperly applied to Hill's case; (4) the Florida Supreme Court improperly failed to remand the case to the trial court after it determined an aggravating factor was struck; (5) the death sentence was improperly imposed because the jury was prevented from giving appropriate consideration to and the trial court refused to consider evidence proffered in mitigation; (6) the trial court improperly asserted that sympathy and mercy towards Hill was an improper consideration; (7) the jury received an improper instruction that the first sentencing jury found Hill guilty of premeditated murder; (8) the death sentence was improper due to an instruction at the penalty phase that shifted the burden to Hill to prove death was appropriate, and (9) Hill's resentencing jury was improperly instructed concerning the doubling of two aggravating factors. This Court found:

Hill also seeks habeas corpus relief in this Court on the identical grounds contained in the Rule 3.850 motion and on the claim that appellate counsel was ineffective for failing to raise on appeal the alleged improper peremptory excusal by the State of black prospective jurors, pursuant to our decision in State v. Neil, 457 So.2d 481 (1984), and the United States Supreme Court's decision in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct.

1712, 90 L.Ed.2d 69 (1986). Given the state of law on the Neil issue at the time of this appeal, as well as the record in this case on the inquiry and the reasons given by the prosecution for the excusal of the prospective jurors, we find that appellate counsel was not ineffective under the Strickland test. Accordingly, we deny Petitioner's request for habeas corpus relief.

556 So.2d at 1389.

On or about January 27, 1990, Hill filed his petition for writ of habeas corpus before the federal district court, asserting eighteen claims upon which he sought relief. The federal district court denied all relief with the exception of two issues, the Parker v. Dugger, supra, issue (Order dated August 31, 1992, pps. 72-74), and the Clemons v. Mississippi, supra, issue (Order dated August 31, 1992, pps. 75-83).

As a result of the federal district court conditionally granting the petition for writ of habeas corpus, the case is presently back before this Court to consider whether the striking of the cold, calculated, premeditated aggravating factor on appeal, when viewed in light of the "unrebutted" mitigating evidence presented by Hill, was harmless error and as a result the death penalty is still the appropriate sentence.

SUMMARY OF ARGUMENT

Point I

The eleven issues raised in Hill's brief are procedurally barred claims because they were either addressed previously on the merits or they were not raised on appeal albeit known and available for timely appellate review.

Point II

The unrebutted nonstatutory mitigation found by the federal court to be not considered by the trial court or on appeal, was not such as to change the sentencing balance even though the Florida Supreme Court, in Hill v. State, 515 So.2d 176, 179 (Fla. 1987), struck the CCP aggravating factor. In essence, striking this factor and considering the unrebutted nonstatutory mitigation, would still result in any error being harmless beyond a reasonable doubt.

ARGUMENT

POINT I

WHETHER ARGUMENTS I-XI OF HILL'S INITIAL BRIEF ARE PROPERLY BEFORE THE COURT

Hill raises eleven points for appellate review, raising claims that have been previously asserted but found to be procedurally barred or decided on direct appeal adversely to him. Presumably, he has raised these eleven issues with the understanding that the limited remand from the federal district court with regard to Parker and Clemons errors permits him to revisit and reargue claims previously adjudicated on the merits or found to be procedurally barred. Such a conclusion is erroneous. See Davis v. State, 589 So.2d 896 (Fla. 1991), and Funchess v. State, 399 So.2d 356 (Fla. 1981), wherein this Court, following a Gardner v. Florida, 430 U.S. 349 (1977), remand, held:

Funchess makes a number of legal attacks on the propriety of instructions given to the jury at the sentencing proceeding of his first trial, arguing that the order remanding for so-called "Gardner relief" should have included a mandate for reconvening an advisory jury. We reject all of these contentions. The purpose for our remand was to comply with the dictates of the United States Supreme Court in Gardner v. Florida; it was not to provide an entirely new sentencing proceeding at which a new advisory jury could be reconvened. (cite omitted). Complying with our mandate, the trial court properly rejected all legal points raised by Funchess' counsel.

399 So.2d at 356.

Likewise, in Davis v. State, this Court reviewed a Hitchcock, supra, claim pursuant to a federal district court's

remand and concluded that with the exception of the Hitchcock claim, all other issues raised were procedurally barred. 589 So.2d at 898.

In light of the foregoing, only a cursory review of the eleven issues raised will be addressed sub judice.

(1) Application of the Cold, Calculated and Premeditated Aggravating Circumstance is Contrary to this Court's Precedents Limiting the Application of this Vague and Overbroad Aggravating Factor, and the Jury and Judge's Application of this Factor was not Harmless

The crux of Hill's argument as to this issue is that "the error in applying the 'cold, calculated and premeditated' aggravating factor requires resentencing, for the State cannot establish that the error was harmless beyond a reasonable doubt." (Appellant's Brief, pps. 23-24). The record reflects, however, that this Court, in Hill v. State, 515 So.2d 176, at 179, concluded that the application of the cold, calculated and premeditated aggravating factor was not supported by the evidence. This Court further opined that even striking the cold, calculated and premeditated factor, four statutory aggravating factors remained,

We find erroneous consideration of the aggravating circumstance that the murder was committed in a cold, calculated and premeditated manner is not such a change under the circumstances of this sentencing proceeding that its elimination could possibly compromise the weighing processes of either the jury or the judge.

515 So.2d at 179.

Moreover and more importantly, this Court held, in Hill v. State, 556 So.2d at 1387, in particular reviewing Claims VII and

VIII; to-wit: the cold, calculated and premeditated aggravating circumstance was applied to Hill's case, in violation of the Eighth and Fourteenth Amendments; this Court's failure to remand for resentencing after striking an aggravating circumstance on direct appeal denied Hill the protection afforded under Florida's capital sentencing statute, in violation of due process, equal protection, and the Eighth and Fourteenth Amendments and of "were found to be procedurally barred."

In fact, the federal district court found this claim procedurally barred when it was raised as Claim VII, that the "cold, calculated and premeditated aggravating circumstance was applied to Mr. Hill's case in violation of the Eighth and Fourteenth Amendments." (Order dated August 31, 1992, pg. 21) (Attached hereto as Appendix A is the Order in Hill v. Singletary, Dated August 31, 1992). Hill's first issue is procedurally barred.

(2) Whether the Trial Court Erred in Failing to Weigh the Numerous Unrebutted Nonstatutory Mitigating Factors Established By the Evidence in Violation of the Eighth and Fourteenth Amendments

Hill argues that the, "evidence of nonstatutory mitigating factors presented by Mr. Hill was uncontroverted, and the evidence established recognized, valid mitigating factors. The trial court thus erred in failing to find mitigating factors and in failing to give those factors any weight." (Appellant's Brief, pps. 31-32, citing Campbell v. State, 571 So.2d 415 (Fla. 1990)). First and foremost, any suggestion that Campbell v.

State controls sub judice is error since Campbell is not a change of law and the trial court's consideration of mitigation at resentencing occurred long before Campbell was decided. Second, on direct appeal from the resentencing in Hill v. State, 515 So.2d 176 (Fla. 1987), no claim was raised the trial court failed to consider tendered mitigating evidence, nor did Hill argue this claim in his appeal from the denial of his 3.850 and consideration of his petition for writ of habeas corpus. See Hill v. Dugger, 556 So.2d 1385 (Fla. 1990). As such, said claim is procedurally barred.¹

(3) Hill's Constitutional Rights were not Denied Because the Jury was not Properly Instructed Concerning the Improper Doubling of Aggravating Factors

A review of the direct appeal (on resentencing) reflects Hill did not raise this issue for appellate review. In his appeal from the denial of his Rule 3.850 motion, Hill raised this issue as Claim IX. The Florida Supreme Court found said claim to be procedurally barred. 556 So.2d at 1388. Moreover, the federal district court similarly concluded that this issue raised as Claim XVI was similarly procedurally barred for federal habeas corpus review.

The record reflects that the jury was instructed at the resentencing that they could consider these two aggravating circumstances proven - that the murder was committed to hinder

¹ With regard to the consideration of "unrebutted" nonstatutory mitigating circumstances that the federal district court found to have existed but not considered by the trial court or factored in by the Florida Supreme Court in its harmless error analysis, that issue will be separately addressed in Point II.

law enforcement and to perfect an escape. Although trial counsel objected to said instruction, the record further demonstrates that the trial court, in his sentencing order, did not find these two separate factors but rather concluded that they were subsumed into one another. Having failed to raise this claim on appeal, it is procedurally barred at this point. Suarez v. Dugger, 527 So.2d 190, at 192, n.3 (Fla. 1988).

(4) The Introduction of Irrelevant and Inflammatory Evidence so Perverted the Sentencing Phase of Mr. Hill's Trial that it Resulted in the Totally Arbitrary and Capricious Imposition of the Death Penalty in Violation of the Eighth and Fourteenth Amendments of the United States Constitution

Hill's complaint centers around the testimony of Janet Pearce, who testified at the guilt phase of Hill's trial and whose testimony was introduced at the resentencing proceeding. The record reflects that the State introduced evidence that Hill and his codefendant stole, at gunpoint, Janet Pearce's automobile in Mobile, Alabama, and drove it to the Freedom Savings and Loan Association in Pensacola, Florida, in the early afternoon of October 19, 1982. The car was parked within a block of the bank which Hill and his cohort robbed and where Hill subsequently shot and killed Officer Taylor. This issue, specifically whether the State was allowed to introduce the evidence concerning irrelevant collateral crimes, was raised as Point VII in Hill's original appeal in Hill v. State, 477 So.2d 553, 554 (Fla. 1985). This Court found no merit to the trial errors asserted [however the Court did vacate the death sentence and remanded for a new sentencing proceeding before a new sentencing jury].

On appeal from resentencing, this Court held:

With regard to the first contention, Hill asserts that evidence of the theft of the car and pistol in Mobile, Alabama, was irrelevant collateral crime evidence to the robbery/murder at the Savings and Loan Association in Pensacola. We note that both the car and pistol were utilized in this offense and their acquisition was part of a series of events culminating in the crimes for which Appellant has been convicted. We reject this claim in Appellant's prior appeal and refuse to address it in these proceedings.

515 So.2d at 177.

Likewise, the federal district court observed that state court evidentiary rulings are not reviewable by federal courts unless said claim rises to such a magnitude as to deny a defendant his right to a fair trial. Osborne v. Wainwright, 720 F.2d 1237 (11th Cir. 1983). The court concluded:

In this case, the court finds that evidence of the Alabama automobile theft, whether wrongfully admitted or not, was not so crucial, either at the guilt or the sentencing phases of Hill's trial, that it rendered the state criminal proceedings fundamentally unfair. Thus, Hill is not entitled to relief on his final claim to habeas corpus relief.

(Order dated August 31, 1992, pg. 84).

The instant claim is procedurally barred since it has been reviewed on the merits with regard to the guilt portion of Hill's trial in his first appeal and, the court similarly found Hill's assertion on resentencing said admissions were harmful, to be wanting. 515 So.2d at 177. As such, Hill is not entitled to reopen this long-decided claim based on the limited remand presently before the court.

(5) The Prosecutor Peremptorily Excused
Black Prospective Jurors Solely Based Upon
Their Race

Citing State v. Neil, 457 So.2d 481 (Fla. 1984), Hill next argues that the State "failed to establish nondiscriminatory exercise of its peremptory challenges and relief is therefore proper", because the State used peremptory challenges to exclude black prospective jurors solely on the basis of race. The record reflects that Hill did not raise this claim on direct appeal and when he asserted this issue as Claim I in his Rule 3.850 motion, this Court, on appeal, found the claim to be procedurally barred. 556 So.2d at 1388-1389. With regard to Hill's assertion that appellate counsel rendered ineffective assistance of counsel for failing to raise on appeal the alleged improper peremptory excusal of black prospective jurors, this Court held:

. . . Given the state of the law on the Neil issue at the time of this appeal, as well as the record in this case on the inquiry and reasons given by the prosecution for the excusal of the prospective jurors, we find that appellate counsel was not ineffective under the Strickland test. Accordingly, we deny Petitioner's request for habeas corpus relief.

556 So.2d at 1389.

The federal district court, in reviewing this claim as Claim VII, found it to be procedurally barred. As to whether appellate counsel rendered ineffective assistance of counsel for not raising this claim, the federal district court found no merit to Hill's contention.

The instant claim is procedurally barred. As previously noted, reopening the instant appeal for the limited purpose of

determining Parker/Clemons violations, does not open the door and permit reargument with regard to claims either ruled on the merits or found to be procedurally barred for failure to timely raise on appeal.

(6) The Trial Court Erred when it Responded to Questions from the Jury and Refused to Disclose to Hill and his Counsel the Questions Asked

During the resentencing proceeding and before deliberations commenced, the trial court received two questions from the jury. The record shows that the trial court informed both counsel for the State and the defense in open court that no comment would be made with regard to the questions, at which time defense counsel asked to see the questions. The court said no, "because I am not commenting on them." The questions were never disclosed to counsel nor made part of the record. This issue was not raised on direct appeal to the Florida Supreme Court and was ultimately found to be procedurally barred on appeal from the denial of a Rule 3.850 motion. Hill v. Dugger, 556 So.2d at 1388-1389. The federal district court similarly concluded that the issue was procedurally barred when raised as Claim IX in his federal petition for writ of habeas corpus.

Having failed to raise this claim on appeal, the issue is procedurally barred at this point.

(7) The Sentencing Court Violated the Principles of Hitchcock v. Dugger, 107 S.Ct. 1821 (1987), and Lockett v. Ohio, 438 U.S. 586 (1978), when it Precluded Mr. Hill from Presenting, and the Jury from Considering, Evidence of Mitigation, and when it Refused to Instruct on the Substantial Domination Mitigating Factor, in Derogation of Hill's Rights to an Individualized and Reliable Capital Sentencing Determination, and to the Effective Assistance of Counsel

Hill argues that the "sentencing jurors were never allowed to hear compelling nonstatutory mitigation which would have demonstrated that a sentence less than death was proper." In particular, Hill points to the fact that the State objected to Hill's lawyer presenting evidence concerning how his mother "was completely overwhelmed by the responsibilities attendant to raising fourteen children leading to a complete lack of parental supervision, care, or affection ever being expressed in the home." (Appellant's Brief, pg. 62). Hill also attempted to present testimony regarding his father recovering from a heart attack about a month ago and explaining why he was not enthusiastic regarding his testimony. (Appellant's Brief, pg. 63). Lastly, Hill argues that he was entitled to an instruction regarding whether Cliff Jackson, Hill's codefendant, substantially dominated Hill. Specifically, Hill argues, ". . . the trial court did not refuse the defense's requested instruction on the ground that there was no view of the evidence from which the jury could lawfully find or infer that Mr. Hill was substantially dominated by Cliff Jackson during the course of the robbery which culminated in the killing of Officer Taylor . . .", rather, "the court refused to instruct the jury on this

contested issue of fact, essentially because he did not believe Cliff Jackson's testimony." (Appellant's Brief, pg. 66).

With regard to the issue of whether Hill's mother and father should have been permitted to testify with regard to their circumstances, this Court found no showing that the trial court abused its discretion, in excluding the testimony, citing Hitchcock v. Dugger, supra, and Lockett v. Ohio, supra. 515 So.2d at 178.

With regard to whether Hill was entitled to a jury instruction concerning the substantial domination of another person when he shot the arresting officer, this Court opined:

. . . In support of the claim, Hill argues that his codefendant Jackson, suggested the bank robbery, purchase the sunglasses for disguise, and directed actions during the crime. According to Hill, Jackson was the leader in the bungled robbery. We disagree. The unrefuted facts in this record establish that, when twenty-three year old Hill and the eighteen year old Jackson entered the bank, Hill was armed and Jackson was not. Hill did most of the talking, demanding money, and threatened that he would 'blow some brains out.' Hill also physically abused a bank teller by kicking him and pulling him by the hair while he lay on the floor. Finally, Hill chose to help Jackson rather than utilize his opportunity to escape, and later testified that neither he nor Jackson was a leader, claiming 'we did it together.' Clearly, under these circumstances, we find the 'substantial domination' mitigating factor does not apply.

515 So.2d at 178.

On appeal from the denial of his Rule 3.850 motion, Hill raised as Claim X, a Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1321, 95 L.Ed.2d 346 (1987), and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), violation. This Court,

on appeal, found said claim to be procedurally barred. 556 So.2d at 1388-1389. The record reflects Hill attempted to embellish his Hitchcock claim in his Rule 3.850 motion, by arguing that mitigating evidence regarding his "drug abuse" or "intoxication" was not properly considered by either the trial court or the jury. A review of the instant claim as presented before the Court today reveals that Hill has abandoned any Hitchcock claim with regard to whether the trial court did not fully consider his drug abuse or intoxication.

Because this claim was previously addressed on the merits, Hill is procedurally barred from reraising said claim on this limited remand.²

(8) The Trial Court's Refusal to Excuse for Cause Jurors who had Expressed a Clear and Unequivocal Bias in Favor of the Imposition of a Sentence of Death Deprived Hill of his Right to a Fair and Impartial Jury

The record reflects that this Court, in Hill's original appeal in Hill v. State, 477 So.2d at 556, granted a new sentencing hearing because the trial court erred in not granting a cause challenge pursuant to Singer v. State, 109 So.2d 7 (Fla. 1959). As a result, Hill's death sentence was vacated and the matter remanded for a new sentencing hearing.

Hill now argues that he was denied an impartial jury on resentencing because jurors expressed a predisposition towards the death penalty and/or an unwillingness to recommend a life

² The federal district court reviewed Hill's Hitchcock/Eddings claims and found any error to be harmless beyond a reasonable doubt. (Order dated August 31, 1992, pps. 61, 63).

sentence. The record reflects Hill did not raise this issue on direct appeal, nor did he raise this claim as part of his Rule 3.850 appeal in Hill v. Dugger, 556 So.2d 1385 (Fla. 1990).

It would appear Hill is raising for the first time this issue. As such, he is procedurally barred from doing so since he did not raise this issue on appeal in a timely fashion. As previously argued in Davis and Funchess, the limited remand for the purpose of ascertaining a Parker/Clemons error does not open the door to either reargue claims that were previously addressed on the merits or raise new claims that could have been raised in a timely fashion had Hill elected to so do. The instant issue is procedurally barred.

(9) Hill's Sentence of Death Does Not Violate the Fifth, Sixth, Eighth and Fourteenth Amendments Because the Penalty Phase Jury Instruction Shifted the Burden to Hill to Prove that Death was Inappropriate and Because the Sentencing Judge Employed an Improper Standard in Sentencing Hill to Death

Hill argues that, "shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), and Dixon, for such instructions unconstitutionally shift to the defendant the burden with regard to the ultimate question of whether he should live or die." (Appellant's Brief, pg. 73). This claim is procedurally barred. Albeit, the issue was cognizable at the time of Hill's direct appeal from resentencing, he did not raise this issue on direct appeal and when he ultimately attempted to raise the claim in his motion for post-conviction relief, the trial court, as well as

this Court, found it to be procedurally barred as Claim XIV. Hill v. Dugger, 556 So.2d at 1387-1389. The federal district court, in its August 31, 1992, Order, similarly determined that this issue was procedurally barred when raised as Claim X.

Hill has presented neither case authority nor a legal basis to overcome the procedural bar which was previously found to exist by this Court.

(10) Hill's Sentencing Jury was Misled by Comments and Instructions Which Unconstitutionally and Inaccurately Diluted its Sense of Responsibility for Sentencing

Hill next argues that the jury's sense of responsibility was diminished by the misleading comments and instructions regarding the jury's role pursuant to Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 23 (1985). Again, like many of the other issues raised before the Court, this issue was not preserved on appeal and was rejected by this Court in Hill v. Dugger, as being procedurally barred as part of a general assault with regard to the propriety of jury instructions.

Moreover, Hill could have raised his Caldwell issue on direct appeal since the legal principles set forth in Caldwell were available at the time of his resentencing. Moreover, the record reflects that at no point did Hill preserve this point for appeal since he did not raise an objection to statements made at trial regarding "the role of the jury and that of the trial judge." Even if this Court were to provide a second plenary review, this issue was not preserved for appellate review since it was not objected to at trial.

(11) Hill's Jury Received Improper
Instructions Resulting in Fundamentally
Unfair Convictions and Sentences

Lastly, Hill argues that "notwithstanding the fact that only one individual was killed, Mr. Hill's jury was instructed and returned verdict of guilt on two counts of murder." (Appellant's Brief, pg. 76). In explanation of this issue, Hill finally argues:

By informing the jury, through an instruction and through testimony, that the finding of premeditation had already been made, and by further instructing them that they were not to concern themselves with a question, the trial court prevented this critical issue of fact and credibility from being resolved by an impartial and fairly selected jury.

(Appellant's Brief, pg. 79).

This issue was raised on direct appeal and resolved adversely to Hill at 515 So.2d 178, wherein the court held:

We summarily reject Hill's fourth claim that the trial judge impermissibly disclosed to the new penalty jury the original jury's finding that the homicide was premeditated. We previously affirmed Appellant's premeditated first degree murder conviction against the various challenges presented in that proceeding, and its introduction during the resentencing phase was essential for the jury to carry out its responsibility.

Having reviewed this claim on the merits, Hill is procedurally barred from attempting to revisit it as a issue on this limited remand. Moreover, he has provided neither case authority nor legal argument which would demonstrate (1) error, and (2) that some significant change of law which would allow the revisiting of this issue on the merits thus overcoming the procedural bar.

Based on the foregoing, it is clear that all eleven issues raised by Hill in his Initial Brief are procedurally barred because they were either raised previously and decided on the merits or they were not raised and could have timely been raised in his prior direct appeals. As such, all issues are procedurally barred.

POINT II

WHEN THE FLORIDA SUPREME COURT INVALIDATED THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING FACTOR AND THEN CONDUCTED A HARMLESS ERROR REVIEW, DID THE COURT IN FINDING THE ERROR HARMLESS CONSIDER NONSTATUTORY MITIGATING CIRCUMSTANCES IN THE SENTENCING BALANCE

The federal district court granted Hill's petition for writ of habeas corpus because it concluded that when the Florida Supreme Court did a harmless error analysis following the invalidation of the cold, calculated and premeditated aggravating factor in Hill's case, it totally excluded "the unrefuted evidence of nonstatutory mitigating factors from the weighing process, the Florida courts placed a thumb on the death side of the scale and thus created a risk of randomness in the sentencing process." (Order dated August 31, 1992, pg. 72). The court observed:

In Hill's case, the trial court found that nonstatutory mitigating circumstances did not exist despite a record containing uncontroverted evidence of nonstatutory mitigating circumstances. The Florida Supreme Court, without discussion, deferred to the trial judge's finding of no nonstatutory mitigation. As a result, when the Supreme Court invalidated the cold, calculated and premeditated aggravating factor, it conducted harmless error review

without placing any nonstatutory mitigating circumstances in the sentencing balance. Because the record belies both the judge's finding as well as the Supreme Court's reliance on that finding, this Court concludes a violation of constitutional magnitude occurred. By totally excluding the unrefuted evidence of nonstatutory mitigating factors from the weighing process, the Florida courts placed a thumb on death's side of the scale and thus created a risk of randomness in the sentencing process.

One might argue that the error by the Florida courts was harmless. After all, eleven of twelve jurors found little enough value in Hill's mitigating evidence to satisfy them that death was an appropriate sentence. Surely influenced by the jury's death sentence recommendation, the judge was entitled to find that the mitigating evidence was outweighed by the evidence in aggravation. Thus, the sentence could well have been the same had the judge properly placed the uncontroverted evidence of mitigating circumstances in the sentencing balance. Perhaps even the decision of the Florida Supreme Court would have been the same had it conducted harmless error review based on aggravating and mitigating factors supported by the record, although -- as recently noted by the United States Supreme Court -- the Florida Supreme Court's usual practice is to remand for a new sentencing hearing when, as in this case, it strikes one or more aggravating circumstances relied on by the trial judge and mitigating circumstances are present. Parker v. Dugger, 498 U.S. ___, 111 S.Ct. 731, 112 L.Ed.2d 812, 825 (1991). Whether the state courts' decisions would be the same absent their reliance on an unsupported finding, however, is not for this Court to decide. Any such decision would necessarily be based upon speculation, and speculation cannot support a finding of harmless error.

Having found that Hill was sentenced to death based on an unsupported finding of fact, without proper attention to the capital sentencing standards required by the United States Constitution, this Court must grant conditional relief to Hill. Accordingly, Hill's petition for writ of habeas corpus

shall be granted unless the State of Florida, within a reasonable period of time, initiates proceedings in state court so that Hill's death sentence may be appropriately reconsidered. This Court expresses no opinion as to whether the Florida courts must order a new sentencing hearing.

(Order dated August 31, 1992, pps. 72-74).

The federal district court, in conjunction with finding the aforementioned error, questioned whether Clemons v. Mississippi, 494 U.S. 738, 755, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), error also occurred with regard to whether the Florida Supreme Court did a proper harmless error analysis. Citing to the fact that this Court held that the erroneous consideration of the cold, calculated and premeditated aggravator was not "such a change under the circumstances of this sentencing proceeding that its elimination could possibly compromise the weighing process of either the jury or the judge", Hill v. State, 515 So.2d at 179, and concluding that this "verbiage is consistent with the Chapman beyond a reasonable doubt standard," the court opined:

Whether this 'cryptic' conclusion satisfies the Florida Supreme Court's obligation under Clemons is another matter. It is a matter, however, that need not be decided here, because the Supreme Court's harmless error analysis was otherwise flawed by the exclusion of unrefuted nonstatutory mitigating evidence from the sentencing balance. Without such evidence in the balance, meaningful harmless error analysis was impossible; and without meaningful harmless error analysis, the Florida Supreme Court's affirmance of Hill's death sentence is invalid. . . .

(Order dated August 31, 1992, pps. 82-83).

From the aforementioned, the problem is clear, the federal district court did not believe this Court did a proper harmless

error analysis following this Court's determination an aggravating factor found by the trial court was not supported by sufficient evidence and was therefore invalid. Specifically, the federal district court found that there existed un rebutted nonstatutory mitigating evidence that neither trial court nor this Court gave any weight to in ascertaining the appropriateness of the death penalty. This is in spite of the fact that this Court, in Hill v. State, 515 So.2d 179, in doing its balancing analysis, acknowledged that four remaining aggravating factors existed and one mitigating circumstance existed.

The federal district court found the following unrefuted nonstatutory mitigating factors that should have been "factored into the sentencing balance":

Without question, Hill presented evidence of nonstatutory mitigating circumstances. In fact, with the exception of the testimony regarding Hill's drug use and domination by Jackson, Hill presented uncontroverted evidence of nonstatutory mitigating factors.

. . .

(Order dated August 31, 1992, pg. 65).

The court specifically cited a number of "mitigating circumstances" in Hill's case: (1) Hill was known by his neighbors and family to be a caring and nonviolent person; (2) while a teenager, Hill volunteered to spend time with a brain-damaged child of a family friend and helped a disabled seventy-nine year old neighbor by taking her to church and running errands for her; (3) Hill had a troubled-free history in school, at home and in his neighborhood which "made his involvement to crimes at the age of twenty-three very surprising to people who

had known him through his youth"; (4) Hill had steady employment as a cook when he was in ninth grade until he turned to drugs and crime at age twenty-three; (5) Hill consistently helped his parents doing chores around the house and contributing some of his earnings towards his support of his large family, and (6) Hill attended school until the twelfth grade but never accomplished reading or verbal abilities beyond the fourth or fifth grade. (See Order dated August 31, 1992, pps. 65-67).

In contrast to the aforementioned uncontroverted evidence presented in "mitigation", the trial court, at resentencing, found in his sentencing order as mitigation:

(1) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. There was testimony of a psychologist who conducted psychological evaluations on the defendant that he gave IQ tests as to the psychological age. He had furnished to him the school records of the defendant from ninth to twelfth grade and had the benefit of the consultations with the defendant himself. As the verbal IQ test showed that the defendant had 76 which was borderline normal. His performance was 101, 52 being the average; and that the defendant was well within the range of average. He was at 84 in another category which was low-average. He had no mental illness or disorder. He would not be appropriate for involuntary hospitalization under the Baker Act. On cross-examination, he testified that he mental health was consistent with the chronological age. Along with this, there was the benefit of the defendant's testimony at trial and the court's observation was that his testimony did not appear to be unusual, slow or dim-witted. He testified in a manner that indicated that he understood the nature of the questions and responded appropriately. He did not testify that he had been sniffing cocaine and presented the testimony of his accomplices who indicated that they had had

some cocaine, but there was expert testimony by Dr. Reid Leonard as a result of the blood samples of the defendant furnished by examination by way of a chemical analysis showing only a residue of aspirin. The court had the benefit of the defendant's testimony to weigh with this testimony. The court is of the opinion based upon the evidence that the defendant has not sustained this mitigating circumstance.

(2) The age of the defendant at the time of the crime. The court is of the opinion based upon the psychological tests and again the defendant's testimony by way of his defense and the testimony of other witnesses of defendant's activities that the evidence does not substantiate that there is any difference in the chronological or actual mental age of the defendant. The age of the defendant at the time of the offense would have been younger than it was at his hearing so it is possible it could have been a factor but the court is of the opinion it would not be that significant.

(3) The defendant was an accomplice in the offense for which he is to be sentenced but the actual offense was committed by another person and the defendant's participation was relatively minor. As to the record in this instance, the codefendant did testify to the jury that he was the leader and that he gave directions tending to indicate he was the prime mover; for the testimony of other witnesses show it was the defendant, Hill, who was the armed participant and that defendant's own testimony shows he was the one that was armed and that the accomplice, Jackson, testified he did not have a weapon. All the testimony from the witnesses shows that it was the defendant who did the threatening of the bank employees, but he abused other employees. He was the one demanding that the vault be opened or he would blow one of the tellers' brains out. It was the defendant who actually had taken flight and made good his flight or escape and it was he who had returned and that it was he who had made the decision to assist his accomplice Jackson and that it was he who had the firearm and it was he who fired the shot that killed Officer Taylor and wounded Officer Bailly. It is the Court's opinion

based upon this evidence that the defendant has failed to support this mitigating circumstance.

(4) Any other aspect of the defendant's character or record and any other circumstance of the offense -- several witnesses, James Wilson, knew the defendant for nineteen years and was a schoolmate; Lucille Tilley knew the defendant and his family for nineteen years; Mrs. Petway knew the defendant and his family for a number of years in Mobile since 1968; Grace Singleton, seventy-nine years old, knew the defendant when he was a little boy; Patsy McCaskill, his sister-in-law, knew him about six years; and the father and mother of the defendant testified as to the particulars of his character when he was a boy for honesty and peacefulness. On cross-examination, Tilley did not know that the defendant had been arrested for robbery in Mobile, as did Petway; Singleton was not aware of the robbery; Mrs. McCaskill did not know about the robbery. The Court is of the opinion that the evidence is insufficient to support this mitigating circumstance.

The Court is of the opinion that the age of the defendant may have been a factor, but it has not been established sufficient mitigating factors to outweigh the aggravating factors.

(TR at 839-842).

Contrary to the federal district court's finding, the state trial court did not fail to consider submitted mitigating evidence, rather the trial court in summarizing the evidence, concluded that, "mitigating evidence did not outweigh the aggravating circumstances." It is clear that the trial court did consider nonstatutory mitigating factors of the genre listed by the federal district court, however, he found it did not outweigh the aggravating circumstances that were proven beyond a reasonable doubt. More importantly, because the trial court did

not articulate each piece of mitigation that went "unrebutted", does not mean that the trial court failed to conduct a proper weighing analysis of the aggravation versus the mitigating circumstances. The instant order resulted long before the guidelines set forth in Campbell, supra.

More importantly, however, there is nothing in this Court's opinion on direct appeal at 515 So.2d at 176, to suggest that this Court did not factor in the aforecited pieces of evidence in evaluating whether after striking the cold, calculated and premeditated aggravating factor on sufficiency grounds, that death was still the appropriate sentence.

Even assuming this Court factors in what the federal district court characterized as unrebutted nonstatutory mitigating evidence, in doing a new harmless error analysis, the facts remain that, beyond a reasonable doubt, any error at trial was harmless beyond a reasonable doubt. Indeed, the federal district court all but recognized that even factoring in the unrefuted nonstatutory mitigating factors that have now been identified, when added to the sentencing balance, would "still" make the error in considering the cold, calculated and premeditated factor in the sentencing equation, harmless error beyond a reasonable doubt. This Court, on a number of occasions, has found harmless error where an aggravating factor is found to be invalid, but valid statutory aggravating circumstances remained and mitigation existed. See Hamblen v. Dugger, 546 So.2d 1039, 1041 (Fla. 1989), wherein this Court held:

. . . It is contended that when this Court eliminated the aggravating factor that the

homicide was committed in a cold, calculated and premeditated manner, we were required to remand the case for resentencing under the rationale of Elledge v. State, 346 So.2d 998 (Fla. 1977). Elledge is inapplicable to this case. The Elledge error was in allowing the introduction of nonstatutory aggravating evidence that the defendant had admitted committing a murder for which a conviction had not yet been obtained. Subsequent cases have made it clear that a death sentence may be affirmed when an aggravating circumstance is eliminated if the court is convinced that such elimination would not have resulted in a life sentence. Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). This is so even if mitigating circumstances have been found. Bassett v. State, 449 So.2d 803 (Fla. 1984); Brown v. State, 381 So.2d 690 (Fla. 1980, cert. denied, 449 U.S. 1118, 101 S.Ct. 931, 66 L.Ed.2d 847 (1981)).

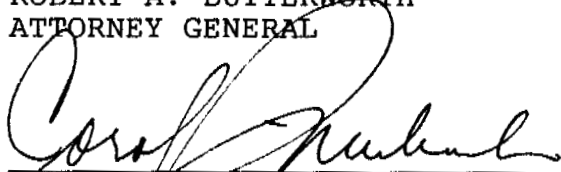
Terminally, all concerns registered by the federal district court with regard to whether this Court did a proper harmless error analysis, will dissipate upon this Court's reconsideration of whether, after finding one statutory aggravating factor invalid, it concludes that based on the remaining four statutory aggravating factors and the mitigation presented, any error with regard to considering that invalid aggravating factor, was harmless beyond a reasonable doubt.

CONCLUSION

Based on the foregoing, the State would urge this Court to find on remand that Hill's death sentence for the first degree murder of Officer Stephen Taylor was and is appropriate.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Ms. Gail Anderson, Esq., Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 14th day of April, 1994.



CAROLYN M. SNURKOWSKI
Assistant Attorney General

C

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CLARENCE EDWARD HILL,
Petitioner,

v.

HARRY K. SINGLETARY, JR.,
Respondent.

TCA 90-40023-WS

DEATH PENALTY

ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS

Before the court is Clarence Edward Hill's Petition for Writ of Habeas Corpus by a Person in State Custody (document 1). Hill was convicted in state court of first-degree murder and was sentenced to death. This court has carefully considered each of Hill's eighteen claims for relief and has determined that the petition for writ of habeas corpus must be granted unless the State, within a reasonable period of time, initiates appropriate proceedings so that Hill's death sentence may be reconsidered in light of the entire record of aggravating and mitigating circumstances.

ENTERED ON DOCKET

8/31/92

BY *Ber*

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FILED

I. BACKGROUND

A. Facts

On October 19, 1982, Hill and an accomplice, Cliff Jackson, robbed a savings and loan association in Pensacola, Florida. When police arrived during the robbery, Hill escaped unobserved from the rear of the building. Jackson, on the other hand, was immediately apprehended when he exited the front door. As two police officers attempted to handcuff Jackson, Hill circled around to the front of the building, drew his gun, and shot both police officers, killing one and wounding the other.

B. Procedural History

Hill was convicted in state court of first-degree murder, attempted first-degree murder, three counts of armed robbery, and possession of a firearm during the commission of a felony. The trial court sentenced Hill to death for the first-degree murder conviction and to consecutive life sentences for the attempted murder and robbery convictions. On appeal, the Supreme Court of Florida affirmed Hill's convictions but vacated his death sentence and remanded the case for a new sentencing hearing before a newly empaneled jury. Hill v. State, 477 So. 2d 553 (Fla. 1985).

Upon remand, the trial court reimposed the death sentence in accordance with the second jury's recommendation. The sentencing judge found and weighed one mitigating factor -- that Hill was

twenty-three (23) years old when the crime was committed --
against the following five aggravating factors:

- (1) that the defendant had previously been convicted of another capital offense or violent felony,
- (2) that the defendant knowingly created a great risk of harm or danger to many persons,
- (3) that the murder was committed while the defendant was engaged in the commission of a robbery,
- (4) that the murder was committed for the purpose of avoiding or preventing a lawful arrest or escaping from custody, and
- (5) that the murder was cold, calculated, and premeditated.

The Supreme Court of Florida affirmed the second sentence based on a finding that four of the five aggravating circumstances were proven beyond a reasonable doubt and that consideration of the one erroneous aggravating factor -- that the murder was cold, calculated, and premeditated -- did not compromise the weighing process of either the judge or the jury. Hill v. State, 515 So. 2d 176 (Fla. 1987), cert. denied, 485 U.S. 993, 108 S.Ct. 1302, 99 L.Ed.2d 512 (1988).

On November 9, 1989, the Governor of the State of Florida signed a death warrant scheduling Hill's execution for January 25, 1990. On December 11, 1989, pursuant to Rule 3.851 of the Florida Rules of Criminal Procedure, Hill filed an expedited Rule 3.850 motion for post-conviction relief. The trial court denied the motion, finding that eleven of Hill's fifteen claims were

procedurally barred. Of the remaining four claims, three challenged trial counsel's effectiveness at both the guilt and penalty phases of trial. Without conducting an evidentiary hearing, the trial court denied relief, finding that defense counsel's "record of conduct and performance did not fail or fall below any adequate, effective representation of his client which operated to his client's detriment." TrA¹ (3.850), Vol. III at 358. As to his final claim challenging the constitutionality of Rule 3.851, the trial court summarily denied relief.

On the same day that he filed his motion for post-conviction relief with the trial court, Hill filed a state habeas corpus petition in the Supreme Court of Florida. He raised nine claims, each of which had previously been raised in his Rule 3.850 motion. On January 25, 1990, the Supreme Court of Florida heard oral argument on both the habeas petition and Hill's appeal of the denial of his Rule 3.850 motion. The next day, the supreme court denied all relief. Hill v. Dugger, 556 So. 2d 1385 (Fla. 1990). In doing so, the court limited its discussion on the merits to those claims involving ineffective assistance of counsel.

On Saturday, January 27, 1990, with execution scheduled to occur at 7:01 a.m. on Monday, January 29, 1990, Hill filed with

¹ Hereafter, portions of the record shall be designated as follows: (1) Transcript of Resentencing Proceedings = TrR; (2) Transcript of Original Trial = TrT; (3) Transcript of Record on Appeal = TrA.

this court a motion for stay of execution and a petition for writ of habeas corpus. With but a few short hours before the scheduled execution, and needing time to give proper consideration to Hill's 329-page petition as well as the state's response, this court granted Hill's request for a stay. A complete record has now been compiled, and Hill's claims are ripe for review.

II. DISCUSSION

A. Procedural Default

In this court, Hill raises eighteen claims in his petition for writ of habeas corpus. The State argues that the following eight claims have been procedurally defaulted:

CLAIM VII -- The prosecutor peremptorily excused black prospective jurors solely based upon their race in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article One, Section Sixteen of the Florida Constitution. Moreover appellate counsel was ineffective in not arguing this issue on direct appeal.

CLAIM IX -- The trial court erred when it responded to questions from the jury and refused to disclose to Mr. Hill and his counsel the questions asked, in violation of Mr. Hill's Fifth, Sixth, Eighth, and Fourteenth Amendment rights.

CLAIM X -- Mr. Hill's sentence of death violates the Fifth, Sixth, Eighth, and Fourteenth Amendments because the penalty phase jury instructions shifted the burden to Mr. Hill to prove that death was inappropriate and because the sentencing judge himself employed this improper standard in sentencing Mr. Hill to death.

CLAIM XII -- The cold, calculated, and premeditated aggravating circumstance was applied to Mr. Hill's case in violation of the Eighth and Fourteenth Amendments.

barred
CLAIM XIII -- During the course of Mr. Hill's trial the court improperly asserted that sympathy and mercy towards Mr. Hill was an improper consideration, in violation of the Eighth and Fourteenth Amendments.

CLAIM XV -- Mr. Hill's death sentence was imposed in violation of the Eighth and Fourteenth Amendments because his jury was prevented from giving appropriate consideration to, and his trial judge refused to consider, all evidence proffered in mitigation of punishment contrary to Eddings v. Oklahoma, Mills v. Maryland, and Hitchcock v. Florida.

barred
CLAIM XVI -- Mr. Hill was denied his Eighth and Fourteenth Amendment rights because the jury was not properly instructed concerning the improper doubling of aggravating factors.

barred
CLAIM XVII -- Mr. Hill's sentence of death was based upon an unconstitutionally obtained prior conviction and therefore also upon misinformation of constitutional magnitude in violation of the Eighth and Fourteenth amendments.

Each of these eight claims was raised before the trial court in Hill's motion for post-conviction relief. The trial court denied Hill's motion, finding these claims, among others, to be procedurally barred because they could have been or should have been raised on direct appeal. The Florida Supreme Court summarily affirmed the trial court's decision as to all eight claims. Hill v. State, 556 So. 2d 1385 (Fla. 1990).

Petitioner contends that each of the eight claims is properly before this court. Citing Harris v. Reed, 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989) (holding that a procedural default does not bar consideration of a federal claim unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural

bar), Hill emphasizes that the Florida Supreme Court did not explicitly state its reliance on procedural default but rather denied relief on these claims without comment. Although he does not expressly so state, Hill evidently thinks that the supreme court's summary denial of his claims on habeas corpus review lifts the procedural bar arising from the trial court's earlier decision on collateral review.

Examination of the supreme court's order, coupled with review of relevant caselaw, reveals that Hill's contention lacks merit. Admittedly, in affirming the trial court's denial of post-conviction relief, the supreme court said only that the trial court's decision was correct. In ruling on Hill's petition for habeas corpus, the supreme court was equally terse, denying relief without explanation. That the supreme court failed to plainly state the basis for its decision, however, does not mean that the procedural bar imposed by the trial court was lifted. Instead, because the supreme court's order followed an order that did explicitly impose a procedural default, there is a presumption to the contrary. As the United States Supreme Court held in Ylst v. Nunnemaker, 501 U.S. _____, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991), "where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claims rest upon the same ground." Ylst, 115 L.Ed.2d at 716. So where the last reasoned opinion on a claim explicitly imposes a procedural bar,

it is presumed that a later decision rejecting the claim does not silently disregard that bar. The Supreme Court explained as follows:

The maxim is that silence implies consent, not the opposite -- and courts generally behave accordingly, affirming without further discussion when they agree, not when they disagree, with the reasons given below. The essence of unexplained orders is that they say nothing. We think that a presumption which gives them no effect -- which simply "looks through" them to the last reasoned decision -- most nearly reflects the role they are ordinarily intended to play.

Ylst, 115 L.Ed.2d at 717 (emphasis in original). Because the trial court in Hill's case explained that it was denying relief on the basis of procedural default, it can be presumed -- consistent with the holding in Ylst -- that the supreme court's later summary denial of relief likewise rested on procedural default.

Reliance on procedural default so presumed, there can be no federal habeas review unless Hill can show either that: (1) there was a fundamental miscarriage of justice, Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986); or (2) there was "cause" for the default and "prejudice attributable thereto." Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Under Murray v. Carrier, "where a constitutional violation has probably resulted in the conviction of one who is actually innocent," 477 U.S. at 495-96, a federal court may consider an issue notwithstanding the existence of a procedural

default. Alternatively known as the fundamental miscarriage of justice exception, this "actually innocent" exception applies not only to guilt-phase errors but to penalty-phase errors as well. Smith v. Murray, 477 U.S. 527, 537-38, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986).

Elaborating on this exception as it applies to a death sentence, the Eleventh Circuit recently adopted an "eligibility" test for determining actual innocence. Johnson v. Singletary, 938 F.2d 1166 (11th Cir. 1991) (emphasis in original), petition for cert. filed, (U.S. Dec. 3, 1991) (No. 91-6576). The Eleventh Circuit said:

[A] petitioner may make a colorable showing that he is actually innocent of the death penalty by presenting evidence that an alleged constitutional error implicates all of the aggravating factors found to be present by the sentencing body. That is, but for the alleged constitutional error, the sentencing body could not have found any aggravating factors and thus the petitioner was ineligible for the death penalty. In other words, the petitioner must show that absent the alleged constitutional error, the jury would have lacked the discretion to impose the death penalty; that is, that he is ineligible for the death penalty.

Johnson, 938 F.2d at 1183 (emphasis in original). The United States Supreme Court has since approved the "eligibility" test adopted by the Eleventh Circuit in Johnson. Sawyer v. Whitley, 112 S.Ct. 2514 (1992). In Sawyer, after stating that it agreed with the position of the Eleventh Circuit, the Supreme Court held that a petitioner must show "actual innocence" either by negating

an essential element of the crime itself or by demonstrating that there was no aggravating circumstance upon which the sentencer could have based a sentence of death. The Supreme Court rejected the idea that a showing of "actual innocence" could be based on additional mitigating evidence that was not introduced as a result of an alleged constitutional error.

Without explicitly arguing the "actually innocent" exception, Hill suggests that the alleged errors raised in Claims XIII and XVI of his petition were so egregious as to result in a fundamentally unfair sentence. In no way, however, does he demonstrate that "but for the alleged constitutional error, the sentencing body could not have found any aggravating factors." Johnson, 938 F.2d at 1183. Thus, he does not demonstrate that he is "actually innocent" of the death penalty under the test enunciated by the Eleventh Circuit in Johnson and approved by the Supreme Court in Sawyer. Consequently, Hill's procedural default of Claims XIII and XVI cannot be excused under the "actual innocence" exception.

As to most of his defaulted claims, Hill claims there was cause for his default. To demonstrate cause sufficient to excuse a procedural default, a petitioner ordinarily must establish that some objective factor external to the defense impeded counsel's efforts to comply with a state's procedural rule. Murray v. Carrier, 477 U.S. at 488. Cause can be demonstrated, for example, by a showing that the factual or legal basis for a claim

was not reasonably available to counsel or that counsel was constitutionally ineffective under the standard enunciated in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Of course, counsel cannot be labelled ineffective for failing to raise issues which have no merit. Cross v. United States, 893 F.2d 1287 (11th Cir.), cert. denied, 111 S.Ct. 138, 112 L.Ed.2d 105 (1990).

In a feeble effort to demonstrate cause, Hill suggests that his appellate counsel was ineffective for failing to urge four of his defaulted claims on direct appeal. Although trial counsel preserved all but one of the four issues for appeal, appellate counsel did not raise Hill's claims that: (1) the prosecutor improperly excused black prospective jurors (Claim VII);² (2) the court's instructions improperly shifted the burden to Hill to prove that death was an inappropriate sentence (Claim X); (3) the court erred when it instructed the jurors to disregard sympathy

² In Claim VII, Hill raises two issues: he claims that the prosecutor peremptorily excused black prospective jurors based solely upon their race in violation of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); and he claims that his appellate counsel was ineffective for not arguing such issue on appeal. Without elaboration, the state trial court denied relief on these same two issues on the basis of procedural default. The Florida Supreme Court summarily affirmed the trial court's decision as to the Batson issue but addressed -- and rejected -- the ineffective assistance of appellate counsel claim. Thus, the Batson issue was procedurally defaulted and will be barred from federal court review unless Hill is able to convince this court that the Florida Supreme Court was wrong in rejecting his ineffective assistance of counsel claim.

and mercy (Claim XIII); and (4) the court improperly instructed the jury about the doubling of aggravating factors (Claim XVI). Hill contends -- without explanation or support -- that counsel's failure to raise these claims was the result of ignorance.

Hill's reliance on ignorance is misplaced. As the Supreme Court said in Murray v. Carrier, 477 U.S. at 486, "the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default." The Court recalled such language when, in Smith v. Murray, 477 U.S. at 527, it squarely rejected an argument that a petitioner's procedural default should be excused because his appellate counsel, through ignorance, decided not to pursue an arguably meritorious claim on appeal.

Notwithstanding Hill's unsupported suggestion that his counsel's alleged ignorance should excuse his procedural default, the court notes that the record is otherwise silent about whether counsel's decisions on appeal should be attributed to ignorance or to reasoned professional judgment. Importantly, it has long been established that a lawyer has no constitutional duty to raise every nonfrivolous issue on direct appeal. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) (recognizing that appellate counsel need latitude in selecting issues to raise on appeal). In finding no such duty, the Supreme Court observed: "Experienced advocates since time beyond memory

have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Barnes, 77 L.Ed.2d at 994. The Court concluded: "There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review." Barnes, 77 L.Ed.2d at 994.

In this case, aside from providing a conclusory statement that counsel's choice must be attributed to ignorance, Hill has utterly failed to establish that counsel's decision to forego various issues on appeal was anything other than a deliberate tactical judgment based on a good faith evaluation of the merit of the issues. Mindful that it is Hill's burden to demonstrate the deficiency of his counsel's performance, see Strickland, 466 U.S. at 689-90 (emphasizing that a defendant must overcome a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance), and not satisfied with Hill's unsupported suggestions of inadequate advocacy, this court cannot conclude that Hill's counsel was constitutionally ineffective for failing to argue on appeal the issues raised in Claims VII, X, XIII, and XVI. No other cause for default having been demonstrated, these claims are barred from federal habeas review.

Furthermore, the court notes the admonition in Murray v. Carrier that "the exhaustion doctrine... generally requires that

a claim of ineffective assistance be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." Carrier, 477 U.S. at 489 (citations omitted). Hill only challenged, and the state courts only addressed, his appellate counsel's ineffectiveness for failing to raise the Batson issue. Consequently, he should not be allowed to rely on an ineffectiveness of counsel claim as cause for his failure to raise other issues on appeal.

In Claim XII, Hill argues that the cold, calculated, and premeditated aggravating circumstance was overbroadly applied by the judge and jury in violation his Eighth Amendment rights under the teaching of Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) (holding that an aggravating circumstance that is vague and imprecise invites arbitrary and capricious application of the death penalty in violation of the Eighth Amendment). He claims that the jury did not apply -- and was not told that it should apply -- the "heightened premeditation" limiting construction which the Florida Supreme Court has given to the cold, calculated and premeditated factor set out in section 921.141(5)(i), Florida Statutes. According to Hill, the jury was thus permitted to rely upon an aggravating circumstance that was imprecise and unconstitutionally overbroad. Hill also claims that section 921.141(5)(i) is unconstitutional on its face because it fails to sufficiently define the coldness

factor and, therefore, to narrow the class of persons eligible for the death penalty.

Before Hill's first trial, defense counsel filed a motion challenging section 921.141(5)(i) as being so vague and overbroad that the jury would have no guidance in deciding what facts would establish that a murder was "cold, calculated and premeditated" without any pretense of moral or legal justification." TrA, Vol. IX at 1470-71. The trial judge denied the motion. Defense counsel later objected to having the jury instructed as to the coldness factor, but his objection was overruled. On direct appeal, defense counsel argued that there was insufficient evidence to support the coldness factor, but he did not raise a federal constitutional challenge either to the instruction or to the statute. Unfortunately, the Florida Supreme Court declined to address Hill's insufficiency of the evidence argument, having determined that resentencing was necessary for other reasons.

At Hill's resentencing hearing several years later, the trial judge instructed the jury that Hill had been found guilty of first degree premeditated murder. He also instructed the jury that it could consider, if established by the evidence, that the "crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification." TrR, Vol. IV at 705. Hill's counsel filed a motion in limine before trial requesting the judge not to tell the jury that the killing was done with a

premeditated design. He correctly explained that a finding of premeditation with regard to guilt or innocence is not analogous to a finding of premeditation for the purposes of aggravation in the penalty phase. The motion was denied. On direct appeal, Hill did not challenge either the statute or the coldness instruction. Instead, he argued that (1) the resentencing judge impermissibly disclosed to the new penalty jury the original jury's finding that the homicide was premeditated, and (2) the evidence was insufficient to support the trial court's finding that the homicide was committed in a cold, calculated, and premeditated manner. Summarily rejecting Hill's challenge regarding disclosure of the original jury's finding as to premeditated homicide, the Florida Supreme Court invalidated the cold, calculated, and premeditated aggravating circumstance based on Hill's second argument that there was insufficient evidence to support the heightened premeditation necessary under Florida law to apply such aggravating circumstance. In a motion for post-conviction relief, Hill raised the claims he now argues: that neither the statute nor the jury instruction regarding the cold, calculated, and premeditated statutory aggravating circumstance was sufficiently defined under Maynard v. Cartwright to withstand constitutional scrutiny. The trial court rejected the claim on the basis that it was procedurally barred. The Florida Supreme Court affirmed the trial court's decision. Hill v. State, 556 So. 2d at 1385.

Based on the state courts' finding of procedural default, the State argues that Hill's overbreadth and vagueness claims are barred from consideration in this court. Because Maynard v. Cartwright was decided after his conviction became final, and because -- according to Hill -- the Supreme Court's decision in Maynard represented a fundamental change in the law, Hill contends that there was cause for his previous failure to raise the overbreadth and vagueness claims. Hill's attempt to demonstrate cause for his default fails, however, because the Supreme Court has clearly said that Maynard did not break new ground. Stringer v. Black, 503 U.S. ___, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992). Rather, Maynard merely extended the vagueness ruling of Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), a case decided long before Hill went to trial. In addition, Hill's reliance on a "novel claim" argument is particularly unmerited in view of the fact that Hill's counsel filed a motion challenging the constitutionality of the coldness factor on overbreadth and vagueness grounds as early as November of 1982. Counsel's failure to renew that claim at trial or on appeal surely cannot be attributed to a fundamental change in the law. In sum, Hill cannot rely on a "novel claim" argument to excuse his counsel's failure to follow through on an overbreadth/vagueness claim before the Florida courts. Having argued no other cause for his default, Hill cannot obtain federal habeas review of Claim XII now.

In Claim XV, Hill raises a claim under Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), a case decided approximately one year after Hill was resentenced in 1986, more than four months after all briefing on Hill's appeal was completed, but five months before his appeal was finally decided. In Hitchcock, the United States Supreme Court reversed a death sentence where the advisory jury was instructed not to consider, and the judge refused to consider, evidence of nonstatutory mitigating circumstances. Hill now argues that his jury was likewise prevented from giving appropriate consideration to, and his trial judge refused to consider, all evidence that was proffered in mitigation of punishment. Hill raised this precise claim before the state courts when he sought post-conviction relief. The claim was denied on the basis of procedural default. Not unexpectedly, the State argues that Claim XV is barred from federal review.

Although he did not have the benefit of the Hitchcock decision when he filed his appeal in 1986, Hill nonetheless argued that the trial judge committed error of constitutional magnitude when he (1) excluded evidence regarding Hill's family background, and (2) failed to give an instruction on a statutory mitigating factor -- the substantial domination factor -- that Hill maintained was supported by the evidence. In his appellate brief, Hill outlined the nonstatutory mitigating factors that were presented at trial; he explained that the record evidence

was intended to demonstrate different aspects of Hill's character and background; he argued that the judge disallowed testimony that was intended to demonstrate still different aspects of Hill's background; and he suggested that the trial judge's decision to exclude relevant testimony evidenced a fundamental misconception about the nature and function of mitigating circumstances. The Florida Supreme Court rejected his arguments, specifically stating that it found no violation of Hitchcock, 481 U.S. at 393, or Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (holding that a sentencer may not, as a matter of law, refuse to consider a defendant's evidence in mitigation), or Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (holding that a sentencer may not be precluded from considering, in mitigation of sentence, any aspect of a defendant's character, record, or circumstances of the offense). Of course, by referring to the Hitchcock/Eddings/Lockett trilogy of cases, the supreme court left no doubt that it considered the merits of a Hitchcock claim, albeit a less-inclusive Hitchcock claim than the one Hill now asserts in Claim XV. Because the substance of a Hitchcock claim was then addressed, it is at least arguable now that Hill's expanded Hitchcock claim is properly before this court. See Aldridge v. Dugger, 925 F.2d 1320 (11th Cir. 1991) (holding that petitioner's Hitchcock claim with respect to instructions on nonstatutory mitigating factors was subject to federal court review even though petitioner premised

his claim in state court on a more narrow ground, specifically the failure of the trial court to instruct the jury on whimsical doubt as a mitigating factor).

Even if the supreme court's consideration of a less-inclusive Hitchcock claim does not preserve Claim XV for federal court review, this court nevertheless rejects the State's procedural bar argument because a review of Florida cases reveals that Florida courts have not consistently applied a procedural bar to Hitchcock claims. See Messer v. Florida, 834 F.2d 890, 893 (11th Cir. 1987) (explaining that a procedural default in state court does not bar consideration of an issue in federal court when the state court has either declined to rely upon a procedural default or has applied a procedural rule in an inconsistent manner). Recognizing that Hitchcock effected a significant change in the law, the Florida Supreme Court announced soon after Hitchcock was decided that defendants could raise otherwise procedurally defaulted Hitchcock claims in post-conviction proceedings. Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987), cert. denied, 485 U.S. 960, 108 S.Ct. 1224, 99 L.Ed.2d 424 (1988). Since the supreme court's announcement, a number of Florida defendants have done just that. See, e.g., Meeks v. Dugger, 576 So. 2d 713 (Fla. 1991); O'Callaghan v. State, 542 So. 2d 1324 (Fla. 1989). In similar fashion, the Eleventh Circuit has on various occasions considered the merits of a Hitchcock claim despite a defendant's failure to raise the claim at trial

or on direct appeal. See, e.g., Armstrong v. Dugger, 833 F.2d 1430 (11th Cir. 1987) (no procedural bar applied in federal court where, prior to Hitchcock decision, Lockett claim was presented to state courts in post-conviction proceedings and was there found to be procedurally barred). Finding no reason to treat Hill differently from the many defendants who have had a procedural bar excused as to their Hitchcock claims, this court finds that review of Claim XV is appropriate.

In sum, this court declines to impose procedural bar as to Claim XV. As to Claims VII, IX, X, XII, XIII, XVI, and XVII, however, the court finds that Hill has failed to demonstrate either that there was a fundamental miscarriage of justice or that there was cause for his procedural default. Consequently, Hill's request for relief as to these seven claims must be denied.

B. Ineffective Assistance of Trial Counsel

In Claims I and II³ of his petition, Hill challenges the effectiveness of his trial counsel's assistance at both the guilt-innocence and the sentencing phases of his trial.

³ Claim I -- Mr. Hill was denied the effective assistance of counsel in violation of the Sixth, Eighth and Fourteenth Amendments.

Claim II -- Mr. Hill's Sixth, Eighth and Fourteenth Amendment Rights were violated because counsel unreasonably failed to present critical mitigating evidence and failed to adequately develop and employ expert mental health assistance, and because the experts retained at the time of trial failed to conduct professionally adequate mental health evaluations.

Specifically, he argues that counsel was ineffective because: (1) he failed to investigate and develop a voluntary intoxication defense; and (2) he failed to investigate and present available mitigating evidence, including evidence of Hill's mental health. Hill raised these issues in state court by motion for post-conviction relief. Without holding an evidentiary hearing, the trial court denied relief and the Florida Supreme Court affirmed.

Hill contends that he was -- and is -- entitled to an evidentiary hearing on the issue of ineffective assistance of counsel. In fact, Hill is entitled to such a hearing only if he alleges facts which, if true, would entitle him to relief. Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963); Kennedy v. Dugger, 933 F.2d 905 (11th Cir. 1991), cert. denied, 112 S.Ct. 957, 117 L.Ed.2d 124 (1992). On an ineffective assistance claim, Hill is entitled to relief if he shows both that his lawyer's performance was deficient and that there is a reasonable probability the result of the proceedings would have been different absent the deficiency. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Because each prong must be satisfied, making one a threshold to the other, there is no requirement that a court address both components of the inquiry if the defendant makes an insufficient showing on one or the other. Strickland, 466 U.S. at 697.

The Florida Supreme Court accepted as true the alleged failures of counsel but nevertheless concluded that none of the

failures was "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" or "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 80 L.Ed.2d at 693. This court likewise assumes the truth of the proffered evidence and comes to the same conclusion. Thus, as explained below, Hill is entitled neither to relief nor to an evidentiary hearing on his claim of ineffective assistance of counsel.

As a preliminary matter, the court notes that counsel's representation is measured against an objective standard of reasonableness. Strickland, 80 L.Ed.2d at 693. The court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and must make every effort to eliminate the distorting effects of hindsight. Strickland, 80 L.Ed.2d at 694. After-the-fact admissions of deficient performance by an attorney whose client faces execution are not decisive in determining whether effective assistance has been rendered. Harris v. Dugger, 874 F.2d 756, 761 n.4 (11th Cir.), cert. denied, 493 U.S. 1011, 110 S.Ct. 573, 107 L.Ed.2d 568 (1989). This court is accordingly persuaded little by the confession of ineffectiveness made by Hill's counsel long after his client learned that he was sentenced to death.

Hill first argues that his counsel failed to adequately investigate and present a voluntary intoxication defense in the

guilt-innocence phase of his trial. Hill testified at trial that he used cocaine during the hours before the 2:00 p.m. robbery took place. In rebuttal, the State called a chemist, Dr. Reid Leonard, who testified that the presence of cocaine was not detected in a blood sample taken from Hill forty-five minutes after the robbery occurred. No other evidence in regard to Hill's alleged use of cocaine was presented by either party during the guilt phase of Hill's trial. Significantly, the many witnesses who described Hill's conduct during the robbery gave no indication whatever that Hill was intoxicated or otherwise incapable of understanding the probable consequences of his actions. Because good memory is not often associated with extreme intoxication, it is also significant that the psychologist who examined Hill two months after the robbery testified that Hill remembered well the events that occurred the day of the crime.

Hill now proffers the following evidence which he claims would establish a voluntary intoxication defense: (1) Cliff Jackson, Hill's codefendant, would testify that Hill had been using cocaine throughout the morning of the crime; (2) Ms. Veria Green would testify that when she saw Hill roughly six hours before the robbery, he had a bag of powder cocaine and he was acting strangely, perhaps because he was high on drugs; (3) Paul Wilson, a friend of Hill's, would testify that Cliff Jackson was supplying Hill with cocaine and other drugs during the time

period just prior to the crime; (4) a number of witnesses, including family members, would testify that Hill had a prior history of alcohol and drug use; (5) an expert chemist, Dr. William Manders, would testify that the ultraviolet analysis used by Dr. Leonard to screen Hill's blood sample would not detect recreational doses of cocaine and that Hill's blood specimen could very well have contained cocaine; and (6) three different psychologists, including the one appointed by the court to examine Hill prior to trial, would opine that Hill's ability to appreciate the criminality of his conduct could have been impaired by his use of drugs.

Assuming the truth of this proffered testimony, the court nevertheless finds the evidence insufficient to support Hill's claim of ineffective assistance of counsel. Under Florida law, the mere use of intoxicants does not excuse the commission of a crime. Jacobs v. State, 396 So. 2d 1113 (Fla.), cert. denied, 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981). Intoxication which impairs a person's mental faculties, or arouses the passions, or reduces the power of conscience is not enough to diminish the gravity of an offense. Voluntary intoxication is an excuse only when a defendant is so highly intoxicated that he is incapable of forming the intent which is an essential element of a crime. Wiley v. Wainwright, 793 F.2d 1190, 1194 (11th Cir. 1986) (citing Leon v. State, 186 So. 2d 93 (Fla. 3d DCA 1966)); see also Gardner v. State, 480 So. 2d 91 (Fla. 1985) (holding

that an instruction on voluntary intoxication is not required when there is no evidence of the amount of intoxicant consumed during the hours preceding the crime and no evidence that the defendant was in fact intoxicated). The evidence proffered by Hill does not demonstrate intoxication to this degree. Indeed, Hill's proffer includes no evidence as to the amount of drugs he consumed during the hours preceding the crime and no evidence to corroborate his self-serving statements that he was so high on drugs at the time of the crime that he knew not what he was doing. The proffered evidence reveals only that Hill was a cocaine user and that he may have used some amount of cocaine the day of the robbery. Such evidence is insufficient to demonstrate that Hill was even entitled to an instruction on voluntary intoxication let alone that the result of Hill's trial would have been different had counsel raised an intoxication defense. A showing of prejudice thus lacking, this court rejects Hill's claim that his counsel was ineffective for failing to establish a voluntary intoxication defense.

This court likewise rejects Hill's claim that his counsel was ineffective for failing to discredit the blood test results -- negative for cocaine -- put into evidence by the State's rebuttal witness, Dr. Reid Leonard, during both the guilt and penalty phases of Hill's trials. Admittedly, defense counsel did not challenge Dr. Leonard's analytic procedures, which this court shall assume were inadequate to detect anything but massive doses

of cocaine in Hill's blood. Defense counsel did, however, impeach the credibility of Dr. Leonard by eliciting information about the chemist's lack of knowledge about cocaine, particularly cocaine's expected longevity in the bloodstream. At Hill's resentencing hearing, defense counsel further impeached the testimony of Dr. Leonard by asking the chemist about his failure to pass three proficiency examinations and about the resulting revocation of his state certification to conduct certain blood testing. Such impeachment surely lessened whatever effect Dr. Leonard's brief rebuttal testimony had on the jurors. Furthermore, the jurors had ample record support -- without the testimony of Dr. Leonard -- for their conclusion that, at the time of the crime, the purported use of cocaine caused no serious interference with Hill's thought processes. While he now proffers evidence to suggest that he could have been "high" on cocaine, Hill offers no evidence that his blood, in fact, contained any measurable quantities of cocaine, let alone quantities sufficient to render him incapable of forming the requisite intent for the crimes charged. This court thus finds no basis for concluding that the result of Hill's trial -- either the guilt phase or the penalty phase -- would have been different but for counsel's failure to discredit Dr. Leonard's test results.

Hill also claims that his counsel should have presented evidence of Hill's "serious" and "longstanding" drug abuse to

support the theory that Hill's criminal conduct was aberrational in nature and primarily a function of his being intoxicated. Hill now demonstrates that a number of friends and family members could have testified, had they been asked, that Hill had a drug and alcohol problem. Again assuming the truth of Hill's proffer, the court notes that evidence of drug or alcohol abuse at indefinite times in an individual's past does little to support a voluntary intoxication defense, particularly where, as here, there is little, if any, evidence of extreme intoxication at the time of the offense. While evidence of drug and alcohol abuse may be considered by the judge and jury as a mitigating factor at sentencing, the jurors in this case would have been asked to consider -- along with the proffered evidence -- the following:

(1) Hill's mother, with whom he lived, never saw her son use drugs, although other people told her he used cocaine; (2) James Wilson, one of Hill's closest friends, denied knowing that Hill used "drugs" but said he smoked a little marijuana and drank a little beer; and (3) Hill himself said that he had taken drugs, not over a long period of time, but only since he lost his job just a few months before the crime occurred. In sum, the court does not find the proffered evidence so compelling that it would have changed the result of the proceedings in this case. Accordingly, defense counsel was not ineffective for failing to present evidence of Hill's history of alcohol and drug abuse.

See Demps v. Dugger, 874 F.2d 1385 (11th Cir. 1989) (defense

counsel not ineffective for failing to present evidence of defendant's drug abuse history where court was convinced beyond a reasonable doubt that the evidence would not have influenced the jury to mitigate the defendant's sentence), cert. denied, 494 U.S. 1090, 110 S.Ct. 1834, 108 L.Ed.2d 963 (1990).

To support his claim that counsel was ineffective for failing to present evidence of child abuse and neglect, Hill has proffered affidavits from a number of family members and acquaintances who would testify that: (1) Hill's father was rarely at home when his children were young because he worked seven days a week at two or more jobs to support nine children of his own plus six whom he raised for relatives; (2) Hill's mother, always at home, whipped the children when they misbehaved; and (3) Hill's many siblings teased him and were physically rough with him during play. Importantly, this evidence would be coupled with evidence that Hill was part of a close-knit family, that Hill's father loved his children, that Hill's mother did her best to care for her large family, that the Hills were nice, hard-working people who were well-liked in their neighborhood, and that Hill chose to live at home even after he was old enough to support himself. Assuming that the conduct described in the proffered affidavits can be called abusive or neglectful, Hill falls far short of convincing this court that the result of the resentencing would have been different had counsel presented such evidence to his sentencers. This aspect of Hill's claim

concerning counsel ineffectiveness thus fails for lack of prejudice.

Hill has proffered the affidavits of numerous people who would testify that Hill was a withdrawn and unassertive person who would follow along with what his more dominating and manipulative codefendant wanted to do. Hill argues that his counsel was ineffective for failing to uncover this evidence. According to Hill, such evidence would have supported his counsel's attempts at resentencing to show that it was Jackson who masterminded the robbery and who dominated Hill. See Fla. Stat. § 921.141(6)(e) (a mitigating circumstance exists when a defendant acts under the substantial domination of another person). That the proffered evidence would have bolstered counsel's arguments, however, does not mean that the additional evidence would have changed the outcome of the case. Indeed, there was ample evidence in the record to weaken any mitigating effect of the proffered evidence. For example, Hill testified that neither he nor Jackson played a leadership role in the events that occurred that fateful day. Many witnesses related that Hill played an active rather than a passive role during the robbery. The evidence clearly indicated that Hill -- not Jackson -- had sole control over use of the murder weapon and was alone responsible for shooting the victim. Given the amount of record evidence which undermined Hill's "substantial domination" theory, this court is unable to conclude either that counsel's

performance was deficient or that the result of the sentencing would have been different had counsel presented the proffered evidence. Thus Hill is not entitled to relief on his claim that counsel was ineffective for failing to discover and present evidence about Hill's passive nature.

Hill also contends that his counsel was ineffective because he failed to provide the appointed mental health expert, Dr. James Larson, with the background information needed to demonstrate Hill's alleged mental dysfunction. He argues that had Dr. Larson been provided with additional information regarding Hill's history of substance abuse, physical abuse, poverty, and mental slowness, significant statutory as well as nonstatutory mitigating evidence could have been presented to his sentencers. He also suggests that defense counsel was ineffective because he failed to recognize the alleged inadequacies of Dr. Larson's evaluation, most notably Dr. Larson's failure to recognize clear indications of brain damage.

Assuming arguendo that the proffered background information would have led Dr. Larson to provide additional mitigating evidence at sentencing, this court finds that counsel's failure to provide such information does not amount to deficient performance within the meaning of Strickland v. Washington, 466 U.S. at 668. Dr. Larson was ordered by the court to examine Hill for multiple purposes, not the least of which was to learn whether any of the statutory mitigating factors applied to Hill's

case and whether any other factors affected Hill's culpability for the charged offenses. Before he examined Hill, Dr. Larson learned from Hill's counsel that both Hill and Jackson had reported being intoxicated at the time of the offense. In addition, he learned that Hill had reported a history of substance abuse. See Document 1, Appendix 22. Before he testified, Dr. Larson (1) reviewed Hill's school and jail records, (2) conducted his own two-hour mental status examination of Hill, (3) interviewed Hill's father, mother, and three of his sisters, (4) reviewed the results of the Minnesota Multiphasic Personality Inventory completed by Hill, and (5) administered various tests to Hill, including a one-hour individualized intelligence examination. Dr. Larson knew that he was looking for the presence of mitigating circumstances, knew that drug use both before and during the crime was a possibility, knew that Hill struggled academically throughout his school years, and knew that he could ask Hill and several of Hill's family members whatever questions he deemed relevant. There is no reason to believe that defense counsel -- the non-expert -- was deficient for failing to provide Dr. Larson -- the expert -- with information that Dr. Larson was in a very good position to discover himself.

To test Hill's intelligence, Dr. Larson administered the Wechsler Adult Intelligence Scale -- Revised ("WAIS-R"). The WAIS-R yielded a verbal intelligence quotient ("IQ") of 76, a

performance IQ of 101, and a full scale IQ of 84. Dr. Larson testified that the verbal IQ placed Hill in the seventh percentile of the population in terms of his ability to use and communicate verbal matter. He testified that the performance IQ, which measures nonverbal skills, placed Hill in the fifty-second percentile. Although Hill now proffers the affidavits of two psychologists who claim that a twenty-five-point difference between verbal and nonverbal skills is an indication of brain damage, Dr. Larson attributed no such meaning to the scores either in 1983 when he testified at Hill's first sentencing or in 1986 when he testified at Hill's resentencing. Hill now argues that his counsel was ineffective for not recognizing the significance of the discrepancy in the scores.

Realizing that Hill's counsel has not professed to be an expert in psychological evaluation, this court rejects Hill's claim that defense counsel's performance was deficient because he failed to challenge the doctor's assessment of the intelligence test. That two psychologists, in hindsight, have questioned Dr. Larson's conclusions does not persuade the court otherwise. See Card v. Dugger, 911 F.2d 1494, 1513 (11th Cir. 1990) (a psychologist's assessment in hindsight that another expert's conclusions were inadequate does not, standing alone, demonstrate that counsel's performance was deficient within the meaning of Strickland). Defense counsel recognized the need for psychological testing; he successfully applied to the court for

an order appointing an expert; he provided reasonable, if not complete, information from which Dr. Larson could perform the required evaluation of Hill; and he elicited testimony about Hill's low intelligence, his failure to progress beyond a fourth or fifth grade ability in rudimentary skills, and his inability to understand and to communicate anything but the simplest of verbal information. Defense counsel's failure to elicit additional testimony about the possibility of brain damage simply does not rise to the level of deficient performance under Strickland. In sum, Hill's claims regarding ineffective assistance of counsel are rejected.

C. Inadequacy of Mental Health Evaluation

Relying on Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), Hill argues in Claim II of his petition that he was denied due process of law when his appointed mental health expert, Dr. Larson, allegedly failed to perform a professionally competent evaluation for sentencing purposes. Under Ake, when an indigent defendant places his mental state at issue, a state "must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." 470 U.S. at 83. As applied to sentencing, Ake requires a state to provide a capital defendant with an appropriate evaluation by a competent mental health expert whenever the defendant shows that his mental status is to be a significant

factor at sentencing. Clisby v. Jones, 960 F.2d 925 (11th Cir. 1992).

Because a clinical psychologist was appointed to evaluate Hill for multiple purposes, including sentencing purposes, Hill does not allege a denial of mental health assistance. Rather, he alleges that he was denied a competent evaluation by a mental health expert. More particularly, Hill contends that:

By relying on scant information almost entirely from personal reporting during a one hour interview, by having almost no information from independent sources, and by using inadequate testing procedures, Dr. Larson reached conclusions about Mr. Hill's mental condition which were at stark odds with the reality of how mentally ill Mr. Hill truly was.

Document 1 at 74.

To evaluate Hill's due process claim, this court must first examine the information that was before the trial judge at the time of sentencing. It must then determine whether that information should have indicated to the trial judge that the mental health expert who examined Hill provided incompetent assistance. Clisby v. Jones, 960 F.2d at 930. If the information before the trial judge did not demonstrate that Hill received incompetent assistance from his mental health expert, Hill's due process claim collapses. See Clisby, 960 F.2d at 934 (due process claim regarding a psychiatrist's failure to provide competent assistance collapsed where trial court was given no information that assistance was incompetent and where petitioner

could point to no ruling that rendered his trial fundamentally unfair).

The trial court in this instance learned that defense counsel was concerned about Hill's having some kind of mental impairment or deficiency when a motion for appointment of a consultant was filed several months before Hill's 1983 trial. In response to the motion, the judge immediately appointed Dr. James Larson to determine whether Hill was competent to stand trial, whether Hill was mentally impaired at the time of the alleged offenses, and whether there were any mitigating factors that might affect Hill's culpability for the charged offenses. No other motions were filed concerning Hill's mental capacity, either in 1983 or in 1986 when Hill was resentenced.

Dr. Larson first testified at the sentencing phase of Hill's 1983 trial. Through the doctor's testimony, the trial judge learned that Dr. Larson was a clinical psychologist, who spent four years each in undergraduate and graduate school, who had a doctoral degree in psychology, who completed a one year internship in psychology, who received two additional years of supervised training before being licensed by the State of Florida, who was experienced in the area of forensic psychology, and who had many times provided expert assistance in criminal cases. No one challenged the doctor's qualifications as an expert. The judge listened as Dr. Larson testified that, in evaluating Hill, he had (1) administered to Hill a one-hour

individualized intelligence examination, (2) interviewed five of Hill's family members, (3) reviewed Hill's school records, (4) reviewed the results of the Minnesota Multiphasic Personality Inventory completed by Hill, and (5) conducted a mental status exam and psychological diagnostic interview. No one complained that Dr. Larson's procedures were inadequate. Finally, the judge heard Dr. Larson state that Hill was a man of low intelligence and poor impulse control but he was otherwise free of any major mental illness or psychosis. No one objected to the doctor's testimony.

Three years later, despite ample opportunity to question and investigate Dr. Larson's 1983 evaluation of Hill, defense counsel called upon Dr. Larson to testify at Hill's resentencing. Again, there was no objection to what was essentially the same testimony that had been introduced at trial in 1983. As he had at his first sentencing, Hill testified at his resentencing. Hill's presence and speech provided no clue to the court that Dr. Larson's evaluation was less than adequate. The judge wrote in his sentencing order that Hill's testimony did not appear to be unusual, slow, or dim-witted. The judge also wrote that during his testimony, Hill appeared to understand the nature of the questions asked and he responded appropriately. At no time and in no way was the trial judge given any indication that Dr. Larson failed to provide Hill with anything other than competent mental health assistance. To the contrary, the trial judge had

much information to demonstrate the competency of Dr. Larson's evaluation and no information from which to conclude that Dr. Larson's assistance was so inadequate as to render Hill's trial unfair. In sum, this court concludes that under Ake and Clisby, the trial court cannot be faulted for failing to provide Hill with due process of law.

Hill also raises a Sixth Amendment claim based on the alleged denial of competent psychiatric assistance. Of course, the Sixth Amendment guarantees a right to the effective assistance of counsel; it does not guarantee a right to the effective assistance of a psychiatrist. Nonetheless, as Hill correctly suggests, a defendant's right to competent mental health assistance may be enforced through the Sixth Amendment. If, for example, defense counsel unreasonably fails to properly investigate and develop available evidence regarding his client's mental health, or if defense counsel fails to recognize the manifest inadequacy of an expert's psychiatric assistance, he may be found guilty of providing ineffective assistance under the Sixth Amendment.

In this case, Hill contends that Dr. Larson could have presented significant mitigating evidence at sentencing had he not missed clear signs of Hill's serious brain damage. Because Hill's counsel failed to recognize the alleged inadequacies in Dr. Larson's evaluation of Hill, Hill claims that he is entitled

to relief under the Sixth Amendment.⁴ This court disagrees. Assuming the truth of Hill's recently-procured evidence of brain damage, this court finds no colorable basis upon which to conclude that counsel was ineffective for failing to recognize that Dr. Larson -- an experienced psychologist -- may have missed signs of brain damage. Remembering that defense counsel did not profess to be an expert in psychology, that effective counsel need not be errorless counsel, and that hindsight cannot be the myopic measure of defense counsel's ineffectiveness, the court finds that counsel's performance in this case was reasonable under the circumstances. Defense counsel ensured that Hill was examined by a court-appointed psychologist; he provided the psychologist with school records, jail records, and the names of family members who could be interviewed; he familiarized the doctor with information about the crime, including the fact that Hill reported drug use the day of the crime; and he called upon the doctor to testify about Hill's serious mental impairments if not his brain damage. Such performance is not rendered constitutionally deficient just because it now appears that the use of different experts could have resulted in the admission of

⁴ Hill also raises a mental assistance claim under the Eighth Amendment, but he neither discusses the merits of such claim nor provides any authority upon which such claim might be based. With so little help from petitioner, this court shall not address the Eighth Amendment claim.

additional mitigating evidence. Hill's mental assistance claim under the Sixth Amendment is rejected.

D. Venue

In Claim III⁵ of his petition, Hill challenges the trial court's refusal to grant his motion for a change of venue. Based on allegations of prejudicial pretrial publicity, Hill's motion was taken under advisement prior to trial and was renewed twice during jury selection. The judge denied the motion at the end of the second day of voir dire, apparently content that an impartial jury could be seated. On direct appeal, the Florida Supreme Court concluded that Hill's conviction was unaffected by the trial court's denial of Hill's motion for a change of venue. Hill v. State, 477 So. 2d 553 (Fla. 1985). The supreme court nonetheless vacated Hill's death sentence because the trial judge erred in refusing to excuse for cause a juror who exhibited a strong bias in favor of imposing the death penalty. Upon remand, Hill was once again sentenced to death by a new sentencing jury. Hill asserts no claim of error as to the venue of his 1986 resentencing proceeding.

⁵ Claim III -- The refusal to grant Mr. Hill's motion for a change of venue deprived him of his right to a fair and impartial jury trial on the issues of guilt-innocence and punishment in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. See Petition at 126.

The Eleventh Circuit has articulated two standards for evaluating change of venue claims based on allegations of pretrial publicity -- presumed prejudice and actual prejudice. Coleman v. Zant, 708 F.2d 541, 544 (11th Cir. 1983). Prejudice is presumed when a defendant demonstrates both that the pretrial publicity was sufficiently prejudicial and inflammatory and that the publicity saturated the community where the trial was held. Coleman, 708 F.2d at 544 (citing Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963)). Actual prejudice is indicated when a defendant demonstrates that: (1) one or more jurors who decided the case entertained an opinion, before hearing the evidence adduced at trial, that the defendant was guilty; and (2) these jurors could not have laid aside these preformed opinions to render a verdict based on the evidence presented in court. Coleman, 708 F.2d at 544 (citing Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961)).

Mindful that prejudice is presumed only in extreme situations, this court finds Hill's evidence of pretrial publicity insufficient to support a presumption of prejudice. The newspaper articles and the transcripts of television and radio news broadcasts reveal that, with few exceptions, the publicity was largely factual in nature. See Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975) (news articles that were largely factual in nature did not create either a

presumption of prejudice or an inference of actual prejudice). While the news accounts were numerous, see document 1, Appendix 33, the majority of the reports were published or broadcast within days of the October murder, months before Hill's trial began the following April. Significantly, the record of publicity in the four months preceding trial reveals only a few very brief factual reports that were clearly not intended to inflame or prejudice the public. Furthermore, voir dire did not reveal a venire that was overwhelmed and saturated with information -- inflammatory or otherwise -- about the defendant and his alleged crime. In sum, the evidence falls far short of convincing this court that there was prejudicial pretrial publicity that "so pervaded the community as to render virtually impossible a fair trial before an impartial jury." Coleman v. Kemp, 778 F.2d 1487, 1540 (11th Cir. 1985), cert. denied, 476 U.S. 1164, 106 S.Ct. 2289, 90 L.Ed.2d 730 (1986).

Certainly the publicity challenged by Hill did not saturate the community with the type of virulent press reports that were described at length in Coleman v. Kemp, 778 F.2d at 1487. In that case, prejudice was presumed where, among other things, the record established that: (1) a local newspaper, reaching eighty-five percent of the households in a rural community, repeatedly published inflammatory front-page articles and editorials regarding the sensational murders of six local family members;

(2) editorials and articles -- many of which were calculated to provoke hostility -- continued to be published regularly for eight months prior to trial: and (3) details of the testimony of a codefendant who pleaded guilty before trial, describing explicitly the horrible manner in which the family was killed, were widely and repeatedly reported through the media immediately prior to Coleman's trial.

The pretrial publicity challenged by Hill was also far less extensive than the pretrial publicity unsuccessfully challenged by Theodore Bundy in Bundy v. Dugger, 850 F.2d 1402 (11th Cir. 1988), cert. denied, 488 U.S. 1034, 109 S.Ct 849, 102 L.Ed.2d 980 (1989). In that case, several months before Bundy was tried for the murder of a Lake City school girl, a public television station broadcast half-hour summaries of Bundy's trial for the brutal murders of two Tallahassee college students. Commercial television stations likewise provided extensive coverage of the earlier -- perhaps one would say sensational -- trial, and an opinion poll suggested that thirty-one percent of the county's residents believed that Bundy's earlier conviction strongly indicated that he was guilty in the later case. The Eleventh Circuit rejected Bundy's argument that his jury was presumptively prejudiced, noting that prejudice should not be presumed "simply because the defendant's criminal record is well publicized." Bundy, 850 F.2d at 1425. Convinced that the publicity challenged by Hill was far less troublesome than that challenged by Bundy,

this court finds that Hill has not shown that he was constitutionally entitled to a change of venue under the presumed prejudice standard.

Under Irvin v. Dowd, 366 U.S. at 723, Hill can prevail under the actual prejudice standard if he can demonstrate both that one or more of the jurors who decided his case entertained a pretrial opinion that Hill was guilty and that these jurors could not lay aside their preconceived opinions when deciding the case. As the Supreme Court said in Patton v. Yount, 467 U.S. 1025, 1035, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984): "The relevant question is not whether the community remembered the case, but whether the jurors...had such fixed opinions that they could not judge impartially the guilt of the defendant." Such question is one of historical fact entitled to a presumption of correctness. If there is fair support in the record for the state court's finding that the jurors were impartial, Hill cannot prevail under the actual prejudice standard. See Irvin v. Dowd, 366 U.S. at 723 (trial court's findings of impartiality are overturned only for manifest error).

Support for the trial judge's decision regarding juror impartiality is evident from the record in Hill's case. With approximately five hundred venirepersons available, the trial judge began voir dire by asking two separate groups of thirty prospective jurors whether any of them had heard about the case, whether they had formed opinions about the case, whether they

could put any such opinions aside, whether they could listen to the evidence with an open mind, and whether they could follow the instructions given to them by the court. The prosecutor and defense counsel were permitted to ask additional questions of the prospective jurors before the court entertained counsels' challenges. Out of the sixty people questioned, only twenty were excused for cause. Peremptory challenges, ten by defense counsel and seven by the prosecutor, resulted in seventeen additional excusals. The court was thus able to empanel a jury consisting of twelve jurors and two alternates after questioning only sixty of the many people who were summoned and available for jury duty.

Although everyone who was questioned indicated some awareness of the pretrial publicity, the exposure of most of the prospective jurors was limited to news accounts released at the time of the murder, some six months before trial began. Each of the jurors who decided the case indicated that he or she could render a verdict based on the evidence presented in court. Ten out of the twelve jurors said that they had formed no opinion about the case based on the pretrial publicity they may have seen or heard. No challenge for cause was specifically argued as to these ten jurors. The remaining two jurors said they could set aside their preconceived opinions and could base their decision on the evidence presented at trial. Finding no reason to doubt the jurors' statements, the trial judge rejected challenges for cause as to these two jurors.

Had the evidence revealed a community poisoned with deep and bitter prejudice for Hill, there might have been little justification for the trial court's reliance on the jurors' declarations of impartiality. See Irvin v. Dowd, 366 U.S. at 727-28 (juror statements of impartiality are to be given little weight where pretrial publicity has fostered a strong prejudice in the community). In Hill's case, however, the record of publicity does not reveal a barrage of inflammatory publicity immediately prior to trial. Nor does the voir dire testimony suggest that there was a "wave of public passion" such as would make a fair trial unlikely. See Irvin, 366 U.S. at 728. Without such indicia of community prejudice, this court cannot say that the trial judge erred either in relying on the jurors' statements of impartiality or in denying Hill's motion for change of venue.

E. Voir Dire

As part of Claim III, Hill also argues that the trial judge erred by refusing to grant his request for individual voir dire. He maintains that group voir dire was inadequate to reveal potential prejudice on the part of the jurors who decided his case. To be sure, there were no searching inquiries regarding the jurors' knowledge and thoughts about Hill. During his initial questioning of the venire, the trial judge asked the prospective jurors to respond without discussing any specific information they may have learned from pretrial news accounts. The lawyers, like the judge, did not elicit specific details

about the jurors' knowledge of the case. Hill now argues that his lawyer could have demonstrated -- had the questioning not been limited -- that the Escambia County venire was so infected by the pretrial publicity that the seating of a fair and impartial jury was precluded.

Although Hill suggests that the trial court placed severe limitations on the scope of the questioning, the record suggests otherwise. The judge instructed the lawyers during voir dire to question the prospective jurors in the "area of the media coverage and matters of knowledge they have already gained." TrT, Volume I at 29. Prior to trial, the judge indicated that he would question the venire in small groups -- even if there were courtroom space to do otherwise -- because he did not want the entire venire infected if and when individual venirepersons discussed specifics about their knowledge of the case. He thus anticipated the possibility of infection, and he was prepared to adjust his procedures had problems arisen. As he said to the lawyers before trial,

I will address problems of prejudice being created from the remarks as we handle each segment of the venire. So, I am not going to at the outset order sequestration of all jurors in individual voir dire.

....
...And, so, we will conduct the voir dire in increments of about thirty. If that begins to present a problem, I can also change the procedure during the course of the voir dire examination.

TrA, Vol. IX, p. 1532-33. Obviously satisfied with the results of group voir dire, the trial judge ultimately found no adjustments to be necessary.

While the conduct of voir dire is a matter entrusted to the broad discretion of the trial judge, United States v. Tegzes, 715 F.2d 505, 507 (11th Cir. 1983), such discretion is bounded by concern for the defendant's right to a fair and impartial jury. In cases involving extensive pretrial publicity, this concern may lead to the need to examine each juror separately and out of the presence of the other jurors. United States v. Davis, 583 F.2d 190 (5th Cir. 1978) (holding that it was an abuse of discretion to refuse the defendant's request for individual voir dire where extensive pretrial publicity raised a significant possibility of prejudice); see also Jordan v. Lippman, 763 F.2d 1265, 1275 (11th Cir. 1985) (recognizing that relief is required where there is a significant possibility of prejudice plus inadequate voir dire to detect such prejudice). As the Eleventh Circuit recognized in Cummings v. Dugger, 862 F.2d 1504 (11th Cir.), cert. denied, 490 U.S. 1111, 109 S.Ct. 3169, 104 L.Ed.2d 1031 (1989), "[i]ndividual voir dire allows the trial court to probe the effect of any adverse publicity on the juror and insulates the jurors from one another's prejudicial comments." 862 F.2d at 1508.

That individual voir dire is demanded in some situations is not to say that individual voir dire is required in all cases in which pretrial publicity presents the possibility of prejudice.

Id. at 1508. The trial court's need for flexibility in conducting voir dire cannot be ignored. In the case at bar, the trial judge refused to grant Hill's motion for individual voir dire with one important caveat: he agreed to adjust the voir dire procedure when and if the need for adjustment arose. He then permitted both the prosecutor and the defense counsel to question the individual jurors about the media coverage and the knowledge those jurors may have gleaned therefrom. When neither the lawyers' questions nor the jurors' responses demonstrated the need for individual voir dire, no change in the group voir dire procedure was made. Given the record of publicity about Hill and his alleged crime, this court cannot conclude that the trial judge so abused his discretion in conducting voir dire as to render the process of jury selection constitutionally deficient. Hill's request for relief on the basis of inadequate voir dire, must be denied.

F. Improper Prosecutorial Comment

In Claim IV⁶ of his petition, Hill seeks relief on the basis of improper prosecutorial comment. Hill challenges (1) the prosecutor's references during voir dire to the "war" between policemen and criminals; (2) the prosecutor's voir dire

⁶ Claim IV -- The prosecutor's inflammatory, emotional, and thoroughly improper comment and argument to the jury at voir dire, closing argument and resentencing argument, rendered Mr. Hill's conviction and resultant death sentence fundamentally unfair and unreliable in violation of the Sixth, Eighth, and Fourteenth Amendment.

comparisons between the oath taken by jurors and the oath that he, as a prosecutor, took to uphold the laws of the State of Florida; (3) the prosecutor's voir dire questions about whether the prospective jurors were emotionally capable of telling Hill he ought to die; (4) the prosecutor's invitation to the jurors to consider him a thirteenth juror; (5) the prosecutor's references at resentencing to matters outside the record; (6) the prosecutor's comments that allegedly cast aspersions upon Hill's decision to go to trial; and (7) the prosecutor's closing remarks about the immediate lynching that would have occurred had a defendant shot a deputy a hundred and fifty years ago.

The State does not argue that the prosecutor's remarks were proper. The State instead argues that relief should be denied under a harmless error standard. Such standard was employed by the Florida Supreme Court when it denied relief on Hill's claims of prosecutorial misconduct. On direct appeal of Hill's original trial, the supreme court wrote:

Appellant has also alleged several instances of improper prosecutorial comment during the trial. We find the prosecutor acted improperly by asking the jury to consider him a "thirteenth juror" when it retired to deliberate its verdict in the guilt phase, but find the error harmless under the circumstances of this cause. Had the case involved substantial factual disputes, this "inexcusable prosecutorial overkill" would have resulted in harmful error requiring reversal of each of appellant's convictions.

Hill v. State, 477 So. 2d at 556-57 (cites omitted). On direct appeal of Hill's resentencing hearing, the supreme court said:

[W]e must again, as we did in his first appeal, address the claim of prosecutorial misconduct in the final argument to the jury...We conclude, given the total circumstances of this case, that these comments did not deprive the appellant of a fair sentencing hearing, and that they constitute harmless error. The comments were, in our view, ill-advised, and, in another context and factual situation, could result in harmful error.

Hill v. State, 515 So. 2d at 178.

Generally, a habeas court engages in a two-step process when determining whether a petitioner is entitled to relief based upon a prosecutor's comments. First, the court considers whether the prosecutor's remarks were improper. Second, the court considers whether any comments found improper were so prejudicial as to render the trial fundamentally unfair. Davis v. Kemp, 829 F.2d 1522 (11th Cir. 1987), cert. denied, 485 U.S. 929, 108 S.Ct. 1099, 99 L.Ed. 2d 262 (1988). A court, however, need not determine whether specific arguments are proper or improper if, taken as a whole, they do not require relief. Brooks v. Kemp, 762 F.2d 1383, 1403 n.31 (11th Cir. 1985) (en banc), vacated and remanded, 478 U.S. 1016, 106 S.Ct. 3325, 92 L.Ed.2d 732 (1986), reinstated on remand, 809 F.2d 700 (11th Cir. 1987) (en banc).

In this case, assuming -- without deciding -- that each of the challenged prosecutorial comments was improper, the court finds relief unwarranted. Like the Florida Supreme Court, this

court is satisfied that none of the comments so infected the proceedings with unfairness as to make the resulting conviction and sentence a denial of Hill's constitutional rights. Both juries were instructed that their decision was to be made on the basis of the evidence alone. More importantly, the record is replete with evidence from which the jurors could have concluded that Hill was both guilty of the crimes charged and deserving of the penalty imposed. Under such circumstances, there is little likelihood that the assumed prosecutorial misconduct changed the outcome of the case. There being no reasonable probability that, but for the prosecutor's improper remarks, the verdict or sentence would have been different, Hill's request for habeas corpus relief on the basis of improper prosecutorial comment must be denied.

G. Use of False Evidence

In Claim V⁷ of his petition, Hill argues that the State deliberately presented false evidence, through Dr. Leonard, in violation of Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). Specifically, Hill contends that the State elicited Dr. Leonard's testimony that Hill's blood, sampled

⁷ Claim V -- Mr. Hill's capital trial and sentencing proceedings were rendered fundamentally unfair and unreliable, and violated the Fifth, Sixth, Eighth, and Fourteenth Amendments, due to the prosecution's deliberate and knowing presentation and use of false evidence and arguments and its intentional deception of the jury, the court, and defense counsel.

shortly after the robbery, contained no traces of cocaine, all the while knowing that Dr. Leonard employed testing procedures incapable of detecting recreational doses of cocaine. Hill raised this same claim in his Rule 3.850 motion before the state trial court. When Hill proffered no evidence to support his Giglio allegations, the trial judge granted the State's motion to strike all references to the State's alleged deliberate use of inaccurate or misleading evidence. Stripped of its Giglio language, Hill's claim amounted to nothing more than an objection to the testimony of Dr. Leonard -- an objection that was made neither at Hill's original trial nor at his resentencing.

As he did in state court, Hill proffers no evidence here to substantiate his allegations that the State made deliberate use of false evidence. In fact, he proffers neither evidence to establish that Dr. Leonard's test results were false nor evidence that the State knew, or should have known, the evidence was false. Instead, he proffers the affidavit of Dr. William Manders, a forensic toxicologist, who would testify that Hill's blood specimen could have contained cocaine, given that Dr. Leonard's testing methods lacked the sensitivity and specificity to detect recreational doses of cocaine. Hill also proffers the results of the blood screen performed as part of the autopsy on the murder victim, Officer Steven Taylor. Because Officer Taylor's blood was tested at a laboratory where appropriate drug screens were used, Hill points out that his own blood could have

been tested in similar fashion. The State's decision to do otherwise, Hill suggests, is evidence of the State's deliberate attempt to procure misleading, if not false, evidence.

This court is unpersuaded by Hill's proffers. That Hill's blood could have contained cocaine is not to say that it did contain cocaine. That the State could have sent Hill's blood sample to a different laboratory to be tested differently does not mean that the State deliberately sought false evidence. In other words, the proffered evidence, assumed to be truthful, fails to establish the merit of Hill's claim. Furthermore, even if Hill were able to establish that the State deliberately presented false evidence, relief would be merited only "if the false testimony could...in any reasonable likelihood have affected the judgment of the jury." Giglio, 405 U.S. at 154 (quoting Napue v. Illinois, 360 U.S. 264, 271, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)). The court finds no such likelihood in this case. Hill's Giglio claim is therefore rejected.

This court also rejects the related argument raised in Claim VI⁸ of Hill's petition -- that the state courts improperly employed a procedural bar with regard to Hill's Giglio claim. As mentioned previously, the state courts applied the procedural bar

⁸ Claim VI -- The Florida state courts refused to review the merits of Mr. Hill's substantial claim on the basis of an unprecedented, unfounded, never-announced, and never-before-or-since-applied procedural bar, in violation of Mr. Hill's rights to due process and equal protection of law.

only after stripping Hill's claim of all Giglio allegations. So stripped, the claim was properly rejected on the basis of procedural bar because Hill's counsel failed to object to Dr. Leonard's testimony during trial. This court thus finds no error and no basis for relief.

H. The Hitchcock/Lockett/Eddings Issue

Relying on Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) and Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), Hill argues in Claim VIII⁹ of his petition that the sentencing judge violated his constitutional rights when he excluded evidence regarding Hill's family background and when he failed to give an instruction on the statutory mitigating factor of substantial domination. These issues were raised, and were rejected, on direct appeal of Hill's sentence.

As Hill correctly explains, Lockett and Hitchcock teach that a capital sentencer must not be precluded from considering, nor may he refuse to consider, any evidence that mitigates against the imposition of the death penalty. In Lockett, 438 U.S. at

⁹ Claim VIII -- The sentencing court violated the principles of Hitchcock v. Dugger, 107 S.Ct. 1821 (1987), and Lockett v. Ohio, 438 U.S. 586 (1978), when it precluded Mr. Hill from presenting, and the jury from considering, evidence of mitigation, and when it refused to instruct on the substantial domination mitigating factor, in derogation of Mr. Hill's rights to an individualized and reliable capital sentencing determination, and to the effective assistance of counsel, in violation of the Sixth, Eighth and Fourteenth Amendments.

586, the United States Supreme Court declared unconstitutional a death penalty statute that prevented the sentencer from considering mitigating evidence relating to the defendant's character, record, and circumstances of the offense. The Court determined that the statute precluded the kind of individualized sentencing determination that is required by the Constitution. In Hitchcock, 481 U.S. at 393, the Supreme Court concluded that a death sentence could not stand where the advisory jury was instructed not to consider, and the judge refused to consider, evidence of nonstatutory mitigating circumstances.

Unlike the jury in Hitchcock, the jury in Hill's case was not erroneously directed to consider only statutory factors in mitigation. Hill's trial judge instructed the resentencing jurors as follows:

Among the mitigating circumstances you may consider, if established by the evidence, are: the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law were substantially impaired; the age of the defendant at the time of the crime; the defendant was an accomplice in the offense for which he is to be sentenced; but the offense was committed by another person and the defendant's participation was relatively minor; any other aspect of the defendant's character or record and any other circumstance of the offense.

TrR, Volume IV at 706 (emphasis added). Clearly, the trial court's instructions, which permitted the jurors to consider "any other aspect of the defendant's character or record and any other

circumstance of the offense," conformed generally to the teachings of Hitchcock.

Hill nonetheless contends that the judge violated Hitchcock/Lockett by disallowing certain evidence that his counsel wished to present. For example, the judge refused to allow testimony demonstrating that Hill's mother was completely overwhelmed by the responsibilities attendant to raising not just her own nine children but six additional children as well. Similarly, the judge refused to allow testimony from Hill's father regarding his frequent and often extended absences from the family home, absences which required Hill to assume a role in the family's support. Hill argues that such testimony would have demonstrated that, as a child, he was not given the care, concern and parental attention that children deserve. In disallowing the testimony, the judge originally ruled that the evidence was irrelevant. Later, when Hill's counsel attempted to re-argue the matter, the judge explained that the evidence was disallowed because it was repetitive and redundant to character testimony already admitted into evidence. On appeal, the Florida Supreme Court concluded that the trial judge did not abuse his discretion in excluding the evidence, which -- according to the supreme court -- focused not on Hill's character but on his parents' character.

Review of the record convinces this court that the evidence in question was neither irrelevant nor repetitive. It is true

that a number of witnesses, including Hill's father and mother, provided character evidence when they testified that Hill was a nice, honest, and nonviolent person. Not one of the witnesses, however, testified about Hill's mother having to care for fifteen children, including six children of deceased relatives, or about Hill's father having to be absent from the home much of the time because of his heavy job responsibilities. Defense counsel intended such evidence to focus not so much on Hill's character as on Hill's family background, particularly on the poor, crowded, and chaotic living conditions experienced by Hill during his youth. Because both Supreme Court and Eleventh Circuit cases make clear that evidence of a defendant's home environment and childhood upbringing may be relevant to mitigation, this court finds that the trial judge violated Hill's constitutional rights when he disallowed the testimony that defense counsel wished to elicit from Hill's father and mother. See, e.g., Eddings v. Oklahoma, 455 U.S. at 104 (state trial judge's refusal to consider defendant's turbulent, neglectful family history held violative of the Eighth and Fourteenth Amendments); Armstrong v. Dugger, 833 F.2d 1430 (11th Cir. 1987) (writ of habeas corpus issued where counsel failed to investigate and present mitigating evidence of petitioner's childhood poverty and poor living conditions).

That the trial judge committed error under Hitchcock/Lockett does not end the matter, however, because Hitchcock/Lockett error

is subject to harmless error analysis. Demps v. Dugger, 874 F.2d 1385, 1389 n.12 (11th Cir. 1989), cert. denied, 494 U.S. 1090, 110 S.Ct. 1834, 108 L.Ed.2d 963 (1990). Such analysis is governed by the strict "harmless beyond a reasonable doubt" standard enunciated in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Under Chapman, the court must presume prejudice unless and until the state proves beyond a reasonable doubt that the sentence would have been the same absent the error.

A recent Eleventh Circuit case illustrates how strict the Chapman standard is. In Booker v. Dugger, 922 F.2d 633 (11th Cir.), cert. denied, 112 S.Ct. 277, 116 L.Ed.2d 228 (1991), the Eleventh Circuit affirmed the district court's determination that petitioner Stephen Todd Booker's death sentence was imposed in violation of Hitchcock. The Supreme Court of Florida had found Hitchcock error -- the jurors were instructed to consider only statutory mitigating circumstances -- but nonetheless decided that the error was harmless, noting that "[t]here was simply no nonstatutory mitigating evidence sufficient to offset the [five] aggravating circumstances." Booker v. Dugger, 520 So. 2d 246, 249 (Fla.), cert. denied, 486 U.S. 1061, 108 S.Ct. 2834, 100 L.Ed.2d 935 (1988). In fact, there was evidence in the record that Booker was hospitalized for psychiatric reasons nine times beginning at age thirteen, that he began drinking and using drugs

as a teenager, that he had little supervision as a child, and that he was honorably discharged from the Army.

In sharp contrast to the conclusion of the Florida Supreme Court, the Eleventh Circuit in Booker found that the error could not be harmless, regardless of the number of aggravating circumstances, because there was available nonstatutory mitigating evidence that could have been considered by the sentencing jury or judge but for the Hitchcock error. A reviewing court, the panel said, could only speculate as to the effect this additional evidence would have had on the sentencing body. In a concurring opinion, Chief Judge Tjoflat called the Florida Supreme Court's opinion a "judicial aberration." He said: "I cannot conceive of a situation in which a pure reviewing court would not be acting arbitrarily in affirming a death sentence after a sentencing error that relates, as the error does here, to the balancing of aggravating and mitigating circumstances." Booker, 922 F.2d at 644. Because speculation falls far short of the Chapman beyond-a-reasonable-doubt standard, the Eleventh Circuit affirmed the district court's decision to grant the writ.

In this case, the State argues that the disallowed mitigating testimony was "insignificant" when viewed in light of the other mitigating evidence tendered. Indeed, this court agrees that the disallowed testimony would not have added appreciably to the nonstatutory mitigating evidence already in

the record. Hill's sentencers may not have known that Hill shared a household with fourteen other children, but they did know that Mrs. Hill had nine children of her own. The jurors may not have known that Hill's father was largely absent from the household, but they knew that Hill had responsibility for helping with the care and support of his family. Significantly, defense counsel does not contend that he would have elicited additional testimony about Hill's background, either from his mother or father or from other witnesses, had it not been for the judge's erroneous ruling. This court is thus convinced, beyond a reasonable doubt, that the sentence would have been the same had the jurors been permitted to hear, and had the judge considered, the very limited testimony that was disallowed. Under the Chapman standard, as strict as it is, this court finds that the trial judge committed harmless error when he refused to admit what he thought was cumulative character evidence.

Hill also argues that the trial court precluded the jury's consideration of significant mitigating evidence by refusing to instruct on the statutory mitigating circumstance set forth in section 921.141(6)(e) of the Florida Statutes, which section states: "The defendant acted under extreme duress or under the substantial domination of another person." The judge's refusal to give a "substantial domination" instruction was based on his perception that the record did not support Hill's claim that he was dominated by his codefendant Cliff Jackson. According to

Hill, Jackson was the leader of the bungled robbery. Both the trial court as well as the Florida Supreme Court concluded that there was ample evidence to indicate otherwise. As was noted by the Supreme Court of Florida on direct appeal:

The unrefuted facts in this record establish that, when the twenty-three-year-old Hill and the eighteen-year-old Jackson entered the bank, Hill was armed and Jackson was not. Hill did most of the talking, demanded money, and threatened that he would "blow some brains out." Hill also physically abused a bank teller by kicking him and pulling him by the hair while he lay on the floor. Finally, Hill chose to help Jackson rather than utilize his opportunity to escape, and later testified that neither he nor Jackson was a leader, claiming, "We did it together." Clearly, under these circumstances, we find the "substantial domination" mitigating factor does not apply.

Hill v. State, 515 So. 2d at 178.

Whether or not the evidence supported Hill's requested instruction, this court is convinced that the sentence would have been the same absent the alleged error. Although he refused to give the "substantial domination" instruction, the trial judge did instruct the jury that it could consider, if established by the evidence, that "the defendant was an accomplice in the offense for which he is to be sentenced, but the offense was committed by another person and the defendant's participation was relatively minor." TrR, Vol. IV at 706. In addition, the jurors were instructed that they could consider any circumstance of the offense. Under the instructions that were given, if the jurors

had agreed with the version of the evidence pressed by defense counsel in his closing argument, that Hill acted under the substantial domination of Jackson, the jurors could have given that evidence whatever mitigating weight they felt it deserved. Thus, the judge's refusal to give an additional instruction, a "substantial domination" instruction, was harmless error, if it was error at all.

In Claim XV¹⁰ of his petition, Hill expands upon the Hitchcock issues raised in Claim VIII. He argues, for example, that the judge's instructions regarding statutory mitigating factors precluded the jury from considering -- as a nonstatutory mitigating factor -- evidence regarding Hill's mental deficits. While instructing the jury about mitigating factors, the trial court listed several statutory mitigating circumstances that the jurors could consider if such circumstances were established by the evidence. For instance, consistent with the statutory mitigating factor listed in section 921.141(6)(f) of the Florida Statutes, the judge told the jurors that they could consider whether Hill's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was "substantially" impaired. Hill maintains that the trial court

¹⁰ Claim XV -- Mr. Hill's death sentence was imposed in violation of the Eighth and Fourteenth Amendments because his jury was prevented from giving appropriate consideration to, and his trial judge refused to consider, all evidence proffered in mitigation of punishment contrary to Eddings v. Oklahoma, Mills v. Maryland, and Hitchcock v. Dugger.

precluded the jury's consideration of lesser degrees of mental impairment as a nonstatutory factor when it instructed about the statutory factor requiring "substantial" impairment. He says the instruction could have led reasonable jurors to believe that all of the evidence bearing upon Hill's mental condition was to be considered only in relation to the "substantial" impairment factor.

A similar argument was made and rejected in Blystone v. Pennsylvania, 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990). In that case, as in this case, the trial judge listed several non-exclusive statutory factors that the jury could consider in mitigation, including whether the petitioner was "substantially" impaired from appreciating his conduct. In that case, as in this case, the jury was also told that it could consider "any other mitigating matter concerning the character or record of the defendant, or the circumstances of his offense." Blystone, 494 U.S. at 308. The Supreme Court decided that the instructions given by the judge in Blystone fully complied with the requirements of Lockett, and the same decision is appropriate here.

Hill finally argues that the trial judge violated the rule of Eddings and Hitchcock by failing to consider the evidence he presented in mitigation of sentence. He points out that the court found no nonstatutory mitigating circumstances despite the presentation of considerable testimony supporting mitigation,

including testimony about his drug use, his below average intelligence, his role as a good family provider, and his domination by Jackson. In response, the State argues that the judge first considered the evidence as he was required to do and then -- as he was permitted to do -- he rejected the evidence as being outweighed by the aggravating circumstances.

Without question, Hill presented evidence of nonstatutory mitigating circumstances. In fact, with the exception of the testimony regarding his drug use and domination by Jackson, Hill presented uncontroverted evidence of nonstatutory mitigating factors. For example, Hill's sentencers learned of the following circumstances, each of which has been recognized under the law as a valid mitigating circumstance:

(1) Hill was known by his neighbors and family to be a caring and nonviolent person. TrR, Vol. III at 530, 535, 542, 553, 560. See Jones v. Dugger, 867 F.2d 1277, 1280 (11th Cir. 1989) (Hitchcock error was not harmless where jury was precluded from considering evidence that prior to his recent scrapes with the law, defendant was a "very nice person [who] got along well with people [and] was never no trouble").

(2) While he was a teenager, Hill volunteered to spend time on a couple of occasions with the brain-damaged child of a family friend, thereby giving relief to the child's mother. TrT, Vol. VIII at 1351. In addition, Hill frequently helped a disabled, seventy-nine-year-old neighbor by taking her to church, running

errands for her, and helping her around the house. TrR, Vol. III at 536. See Blake v. Kemp, 758 F.2d 523, 534 (11th Cir.) (counsel's failure to present valid mitigating evidence -- namely that defendant was "a man who was respectful toward others, who generally got along well with people and who gladly offered to help whenever anyone needed something" -- constituted ineffective assistance), cert. denied, 474 U.S. 998, 106 S.Ct. 374, 88 L.Ed.2d 367 (1985).

(3) Hill had a trouble-free history throughout his years in school, at home, and in his neighborhood, which made his involvement in two crimes at the age of twenty-three very surprising to people who had known him throughout his youth. TrR, Vol. III at 532, 560. See Proffitt v. State, 510 So. 2d 896,898 (Fla. 1987) (evidence of nonviolent history properly considered a mitigating circumstance).

(4) Hill held steady employment as a cook from the time he was in the ninth grade until he turned to drugs and crime at the age of twenty-three. TrR, Vol. III at 541 & Vol. IV at 604-06. See Hargrave v. Dugger, 832 F.2d 1528 (11th Cir. 1987) (Hitchcock error not harmless where there was record evidence of defendant's steady employment), cert. denied, 489 U.S. 1071, 109 S.Ct. 1353, 103 L.Ed.2d 821 (1989); Aldridge v. Dugger, 925 F.2d 1320 (11th Cir. 1991) (but for a Hitchcock error, defendant could have presented valid mitigating evidence that he worked long and hard before turning to a life of crime).

(6) Hill consistently helped his parents, doing chores around the house and contributing some of his earnings toward the support of his large family. TrR, Vol. III at 547, 558-59. Armstrong v. Dugger, 833 F.2d 1430 (11th Cir. 1987) (writ issued where defense counsel failed to present valid mitigating evidence that defendant worked hard during his early years to supplement his family's income); Rogers v. State, 511 So. 2d 526 (Fla. 1987) (recognizing that "evidence of contributions to family, community, or society reflects on character and provides evidence of positive character traits to be weighed in mitigation"), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988).

(7) Hill attended school into the twelfth grade but never progressed beyond a fourth or fifth grade level in reading and verbal ability. TrR, Vol. III at 513. See Hargrave, 832 F.2d at 1534 (Hitchcock error not harmless where there was evidence of petitioner's below-average intelligence and steady employment).

Despite the uncontroverted record evidence of nonstatutory mitigating circumstances, the trial judge found that there were no aspects of the defendant's character or record that would mitigate defendant's sentence. He made this finding clear in his sentencing order which included the following paragraph about nonstatutory mitigating circumstances:

Any other aspect of the Defendant's character or record and any other circumstances of the offense -- several witnesses, James Wilson knew the Defendant for 19 years and was a school mate; Lucille

Tilley knew the Defendant and his family for 19 years; Mrs. Petway knew the Defendant and his family for a number of years in Mobile since 1968; Grace Singleton, 79 years old, knew the Defendant when he was a little boy; Patsy McCaskill, his sister-in-law, knew him about six years; and the father and mother of the Defendant testified as to particulars of his character when he was a boy for honesty and peacefulness. On cross-examination, Tilley didn't know the Defendant had been arrested for robbery in Mobile as did Petway; Singleton was not aware of the robbery; McCaskill did know about the robbery. The court is of the opinion that this evidence is insufficient to support this mitigating circumstance.

TrA, Vol. V at 841-42. The judge did not say -- and there is nothing in the record to suggest -- that he rejected the evidence because he found the witnesses to be incredible. He also did not say that he first considered the evidence of nonstatutory mitigating factors but then found the evidence outweighed by the aggravating factors. Quite simply, the judge said that the evidence presented by Hill's "character" witnesses did not amount to evidence of nonstatutory mitigating circumstances at all. He thus placed no nonstatutory mitigating factors in the sentencing balance.

There is little indication in the record that the sentencing judge felt himself bound as a matter of law not to consider the mitigating circumstances offered by Hill. See Eddings, 455 U.S. at 114 (a sentencer violates the rule in Lockett if he refuses to consider as a matter of law any relevant mitigating evidence). Admittedly, the trial judge's treatment of nonstatutory

mitigating evidence suggests that he may have harbored a fundamental misconception about the nature and function of non-statutory mitigating circumstances. For example, the comments made by the judge when he disallowed what he thought was cumulative character evidence were troubling. See TrR, Vol. IV at 562-64. In essence, he said that "character is character" and a defendant is not entitled to introduce repetitive and cumulative evidence about his "character." Id. These comments, which reveal a perhaps-too-narrow view of the kinds of nonstatutory mitigating circumstances considered relevant under federal law, were given emphasis when the judge, in his sentencing order, treated evidence of "any other aspect of the defendant's character or record and any other circumstances of the offense" as though such evidence would potentially establish one, and only one, mitigating circumstance. See TrA, Vol. V at 841-42. The judge's troubling comments were given additional emphasis when, again in his sentencing order, the judge rejected Hill's evidence of nonstatutory mitigating evidence with little more than a sentence concerning the character witnesses' lack of knowledge about Hill's involvement in a robbery several months before the murder. By that sentence, the judge intimated that he thought evidence as to a defendant's character or background, if removed in time from the offense, was not relevant as a mitigating factor.

Notwithstanding these suggestions and intimations of misconception, the record does not support a finding of Eddings-type error in Hill's case. The judge explained during trial that he knew defense counsel was entitled to "get [his] punch in" about the defendant's character and record. TrR, Vol. IV at 562. He acknowledged during the charge conference that Hill was entitled to an instruction telling the jurors that they "may take into consideration any other...thing that was testified to as a mitigating circumstance." TrR, Vol. IV at 658. He then instructed the jury that any aspect of a defendant's character or record or circumstances of the offense could be considered in mitigation. He permitted defense counsel to introduce most all of the nonstatutory mitigating evidence that defense counsel wanted to introduce. His sentencing order indicates that he heard and considered the evidence presented by each of Hill's witnesses.

To be sure, the judge refused to accept Hill's evidence of nonstatutory mitigating factors, but a refusal to accept does not necessarily equate to a failure to consider. See Atkins v. Singletary, 965 F.2d 952 (11th Cir. 1992) (emphasizing that consideration and acceptance of mitigating factors are two separate things; the former is constitutionally required as a matter of law but the latter is not). The Eleventh Circuit has said that where, as here, defense counsel was given a fair opportunity to present mitigating evidence, the judge heard the

evidence, and the record does not reflect that the judge ignored what he heard, a court on habeas corpus review should assume that consideration of the evidence was not erroneously omitted.

Palmer v. Wainwright, 725 F.2d 1511, 1523 (11th Cir.), cert. denied, 469 U.S. 873, 105 S.Ct. 227, 83 L.Ed.2d 156 (1984).

Despite some misgivings, this court shall so assume in the instant case.

Having determined that the trial judge considered Hill's mitigating evidence as required by the Constitution, this court must defer to the trial court's factual findings in regard to mitigating factors, provided those findings are fairly supported by the record. See 28 U.S.C. § 2254(d) (establishing a presumption of correctness for a state court's factual determinations); see also 28 U.S.C. § 2254(d)(8) (making the presumption inapplicable where the state court's factual determinations are not fairly supported by the record). While this court cannot re-evaluate the weight accorded to particular mitigating factors, Magwood v. Smith, 791 F.2d 1438 (11th Cir. 1986), it can review a factual determination as to the very existence of mitigating factors. Magwood, 791 F.2d at 1449. If the record belies a judge's finding regarding the existence of nonstatutory mitigating circumstances, the inescapable conclusion is that a death sentence was imposed without proper attention to the capital sentencing standards required by the Constitution. Magwood, 791 F.2d at 1449. As the district court wrote in

Magwood, "[t]o find that mitigating circumstances do not exist where such mitigating circumstances clearly exist returns us to the state of affairs which were found by the Supreme Court in Furman v. Georgia to be prohibited by the Constitution." Magwood v. Smith, 608 F. Supp. 218, 228 (M.D. Ala. 1985) (granting, in part, Magwood's petition for writ of habeas corpus), aff'd, 791 F.2d 1438 (11th Cir. 1986).

In Hill's case, the trial court found that nonstatutory mitigating circumstances did not exist despite a record containing uncontroverted evidence of nonstatutory mitigating circumstances. The Florida Supreme Court, without discussion, deferred to the trial judge's finding of no nonstatutory mitigation. As a result, when the supreme court invalidated the cold, calculated and premeditated aggravating factor, it conducted harmless error review without placing any nonstatutory mitigating circumstances in the sentencing balance. Because the record belies both the judge's finding as well as the supreme court's reliance on that finding, this court concludes that a violation of constitutional magnitude occurred. By totally excluding the unrefuted evidence of nonstatutory mitigating factors from the weighing process, the Florida courts placed a thumb on death's side of the scale and thus created a risk of randomness in the sentencing process.

One might argue that the error by the Florida courts was harmless. After all, eleven of twelve jurors found little enough

value in Hill's mitigating evidence to satisfy them that death was an appropriate sentence.¹¹ Surely influenced by the jury's death sentence recommendation, the judge was entitled to find that the mitigating evidence was outweighed by the evidence in aggravation. Thus, the sentence could well have been the same had the judge properly placed the uncontroverted evidence of mitigating circumstances in the sentencing balance. Perhaps even the decision of the Florida Supreme Court would have been the same had it conducted harmless error review based on aggravating and mitigating factors supported by the record, although -- as recently noted by the United States Supreme Court -- the Florida Supreme Court's usual practice is to remand for a new sentencing hearing when, as in this case, it strikes one or more aggravating circumstances relied on by the trial judge and mitigating circumstances are present. Parker v. Dugger, 498 U.S. ___, 111 S.Ct. 731, 112 L.Ed.2d 812, 825 (1991). Whether the state courts' decisions would be the same absent their reliance on an unsupported finding, however, is not for this court to decide. Any such decision would necessarily be based upon speculation, and speculation cannot support a finding of harmless error.

Having found that Hill was sentenced to death based on an unsupported finding of fact, without proper attention to the

¹¹ It should perhaps be noted that the jurors were instructed that they could consider six factors in aggravation, only four of which were valid.

capital sentencing standards required by the United States Constitution, this court must grant conditional relief to Hill. Accordingly, Hill's petition for writ of habeas corpus shall be granted unless the State of Florida, within a reasonable period of time, initiates proceedings in state court so that Hill's death sentence may be appropriately reconsidered. This court expresses no opinion as to whether the Florida courts must order a new sentencing hearing.

I. The Witherspoon Issue

In Witherspoon v. Illinois, 391 U.S. 510, 521-22, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), the United States Supreme Court held that a death sentence was prohibited if imposed or recommended by a jury from which one or more venirepersons were excluded for cause "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." In Claim XI¹² of his petition, Hill alleges that two prospective jurors in his case, Mrs. Bonner and Mrs. Bondurant, were excused for cause in violation of the principles set forth in Witherspoon. Interestingly, neither Mrs. Bonner nor Mrs. Bondurant was a member of the 1986 venire from which Hill's

¹² Claim XI -- The trial court erred in excusing for cause prospective jurors Bonner and Bondurant, since neither juror made it unmistakably clear that she would automatically vote against the imposition of capital punishment regardless of the circumstances, and since the trial court employed an incorrect standard of law in determining whether the jurors should be excused, in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

resentencing jury was chosen. Rather, they were both part of the 1983 venire from which Hill's original jury was chosen. Because the Supreme Court has stated that a Witherspoon error will not "render invalid the conviction, as opposed to the sentence, in this or any other case," Witherspoon, 391 U.S. at 522 n.21 (emphasis in original), the Witherspoon issue was rendered moot as a result of Hill's 1986 resentencing. See Messer v. Florida, 834 F.2d 890 (11th Cir. 1987) (holding that a Witherspoon issue was rendered moot by petitioner's 1976 resentencing, where petitioner claimed that two jurors were improperly excluded from his 1974 trial). Consistent with the Eleventh Circuit's decision in Messer, Hill is not entitled to relief on his Witherspoon claim.

J. The Clemons Issue

In Claim XIV¹³ of his petition, Hill argues that his Eighth and Fourteenth Amendment rights were violated when the Supreme Court of Florida failed to remand for resentencing after striking one of the five aggravating circumstances relied upon by his sentencers. Suggesting that only the jury and trial judge are authorized to weigh aggravating against mitigating circumstances under Florida law, Hill contends that a case must be remanded for

¹³ Claim XIV -- The Florida Supreme Court's failure to remand for resentencing after striking an aggravating circumstance on direct appeal denied Mr. Hill the protections afforded under Florida's capital sentencing statute, in violation of due process, equal protection, and the Eighth and Fourteenth Amendments.

reweighing by the appropriate sentencers when, as here, the appellate court alters the balance.

Hill first raised this claim in a Rule 3.850 motion filed in state court. The trial court denied relief on grounds that the claim was procedurally barred because it could have been or should have been raised on direct appeal. Without comment, the Supreme Court of Florida affirmed. Perhaps because a claim that arose on appeal could not have been raised on appeal, the State of Florida -- in its response to Hill's petition -- did not argue that Hill's claim is barred from federal court review. Instead, addressing the merits, the State argued that the Supreme Court of Florida appropriately affirmed Hill's death sentence after engaging in a permissible harmless error analysis. This court finds that procedural default is not an issue and that Hill's Claim XIV is properly before this court.

In Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), the United States Supreme Court held that there is nothing in the federal constitution to prevent an appellate court, in a state such as Florida that requires the weighing of aggravating and mitigating circumstances, from reweighing the aggravating and mitigating evidence and upholding a death sentence that is based in part on one or more invalid aggravating circumstances. Appellate sentencing, the Court said, offends neither the Sixth Amendment, the Eighth Amendment, nor any other provision of the United States Constitution. Thus,

contrary to Hill's contention, the Florida Supreme Court would have been acting constitutionally if it had independently reweighed the aggravating and mitigating circumstances in Hill's case.

The Supreme Court of Florida, however, has stated on numerous occasions that it does not reweigh evidence when it reviews a death sentence. See, e.g., Hudson v. State, 538 So. 2d 829, 831 (Fla.), cert. denied, 493 U.S. 875, 110 S.Ct. 212, 107 L.Ed.2d 165 (1989). The supreme court has professed that its "role after a death sentence has been imposed is 'review,' a process qualitatively different from sentence 'imposition.'" Brown v. Wainwright, 392 So. 2d 1327 (Fla.) (per curiam), cert. denied, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981). Finding no reason to believe that the supreme court deviated in this instance from its usual process of review, this court shall assume that no appellate reweighing took place in Hill's case.

Although it does not independently reweigh aggravating and mitigating factors, the Florida Supreme Court may nonetheless affirm a death sentence if it decides the trial court's reliance on an invalid aggravating circumstance was harmless error. Clemons, 494 U.S. at 752. The State in this case contends that the supreme court engaged in just such harmless error analysis. The State relies on the following language from the supreme court's opinion on direct appeal:

Appellant does not take issue with the finding that four of the aggravating circumstances were proven beyond a reasonable doubt. Given these four remaining aggravating circumstances, and the one mitigating circumstance, we find the erroneous consideration of the aggravating circumstance that the murder was committed in a cold, calculated, and premeditated manner is not such a change under the circumstances of this sentencing proceeding that its elimination could possibly compromise the weighing process of either the jury or the judge.

Hill v. State, 515 So. 2d at 179.

Recently, the United States Supreme Court considered a case in which the Florida Supreme Court upheld a death sentence after it invalidated one of four aggravating factors allegedly relied upon by both the advisory jury and the sentencing judge. Sochor v. Florida, 504 U.S. ___, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992). In Sochor, the defendant argued that when his sentencers weighed the cold, calculated and premeditated aggravating factor, a factor that was invalidated on direct appeal because it was not supported by the evidence, there was Eighth Amendment error that went uncorrected in the Florida Supreme Court. The Supreme Court considered the defendant's argument first as it applied to the advisory jury and then as it applied to the sentencing judge.

In regard to the jury, the Supreme Court noted that a jury in Florida does not reveal the aggravating and mitigating factors on which it relies. Thus, in Sochor's case, there was no way for a reviewing court to know whether or not the jury relied on the

invalidated factor, the coldness factor, when it recommended a sentence of death. If the jury did not so rely, there was no Eighth Amendment violation. Rejecting Sochor's suggestion that a reviewing court should presume reliance on an infirm ground when the jury is allowed to rely on any of two or more independent grounds, one of which is infirm, the Court refused to presume jury error in Sochor's case. The Court reasoned that a jury is likely to disregard an option -- like the coldness factor in Sochor's case -- that is simply unsupported by the evidence.

Unlike the jury, which did not report specific findings as to aggravating and mitigating circumstances, the trial judge in Sochor's case clearly stated in his sentencing order that he weighed the coldness factor. There being no question that the coldness factor was invalid because it was unsupported by the evidence, the Court concluded that the trial judge committed Eighth Amendment error when he weighed the coldness factor in the sentencing balance.

Acknowledging that Eighth Amendment error did, in fact, occur, the State nonetheless argued that Sochor's death sentence could stand because the Florida Supreme Court allegedly cured the error by performing harmless error analysis. The State relied on the following excerpt from the state court's opinion:

The trial court carefully weighed the aggravating factors against the lack of any mitigating factors and concluded that death was warranted. Even after removing the aggravating factor of cold, calculated, and

premeditated there still remain three aggravating factors to be weighed against no mitigating circumstances. Striking one aggravating factor when there are no mitigating circumstances does not necessarily require resentencing....Under the circumstances of this case, and in comparison with other death cases, we find Sochor's sentence of death proportionate to his crime.

Sochor v. State, 580 So. 2d 595 (Fla. 1991) (cites omitted), vacated, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992). The Supreme Court rejected the State's harmless error argument, explaining that the Florida Supreme Court's opinion was anything but a model of clarity and that proportionality review is not an acceptable substitute for harmless error analysis. Because the Florida Supreme Court "did not explain or even 'declare a belief that' this error 'was harmless beyond a reasonable doubt,'" Sochor v. Florida, 119 L.Ed.2d at 342, the Court concluded that Sochor's sentence could not stand on the existing record of appellate review. In a concurring opinion, Justice O'Connor stressed that an "appellate court's bald assertion that an error of constitutional dimensions was 'harmless' cannot substitute for a principled explanation of how the court reached that conclusion." Sochor, 119 L.Ed.2d at 342. She noted that in Clemons, the Court "did not hesitate to remand a case for 'a detailed explanation based on the record' when the lower court failed to undertake an explicit analysis supporting its 'cryptic,' one-sentence conclusion of harmless error." Sochor, 119 L.Ed.2d at 342 (quoting Clemons, 494 U.S. at 753).

In Hill's case, as in Sochor's case, the jury was instructed that it could consider -- if established by the evidence -- any of a number of aggravating factors, including whether the crime was committed in a cold, calculated and premeditated manner. As in Sochor's case, Hill's jury was not instructed about the heightened premeditation necessary to support a finding of the coldness factor. As in Sochor's case, the Florida Supreme Court in Hill's case determined that there was insufficient evidence to support the heightened premeditation necessary to apply the coldness factor. In Sochor's case, the United States Supreme Court refused to assume that the jury weighed the invalid coldness factor in the sentencing balance. It thus found no constitutional flaw in the jury's weighing process. Finding no reason to distinguish the jury's treatment of the coldness factor in Hill's case from that in Sochor's case, this court must likewise decline to presume jury error.¹⁴

As to error committed by Hill's sentencing judge, however, there can be no doubt. The coldness factor was clearly "invalid" for Clemons purposes, see Parker v. Dugger, 112 L.Ed.2d at 824 (applying the Clemons rule where a trial judge weighed two

¹⁴ The court notes that a different presumption would apply if the coldness factor had been invalidated for being vague. See Espinosa v. Florida, 505 U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992) (presuming that the jury relied on an aggravating factor that was found to be vague). Whether the coldness factor was invalid because it was vague, however, has not been decided in this case because the issue was procedurally defaulted.

aggravating factors that were "invalid" in the sense that the Supreme Court of Florida found them to be unsupported by the evidence); and the judge expressly said that he weighed the coldness factor. It follows that Eighth Amendment error did indeed occur.

While the Florida Supreme Court in Hill's case did not explicitly state that it performed harmless error analysis, and while it did not give a principled explanation of how it reached its conclusion, it nonetheless appears that the supreme court engaged in harmless error review, finding beyond a reasonable doubt that Hill's sentence would have been the same absent the erroneous consideration of the coldness factor. The supreme court said: "[T]he erroneous consideration of the aggravating circumstance that the murder was committed in a cold, calculated, and premeditated manner is not such a change under the circumstances of this sentencing proceeding that its elimination could possibly compromise the weighing process of either the jury or the judge." Hill v. State, 515 So. 2d at 179. Such verbiage is consistent with the Chapman beyond-a-reasonable-doubt standard.

Whether this "cryptic" conclusion satisfies the Florida Supreme Court's obligation under Clemons is another matter. It is a matter, however, that need not be decided here, because the supreme court's harmless error analysis was otherwise flawed by the exclusion of unrefuted nonstatutory mitigating evidence from

the sentencing balance. Without such evidence in the balance, meaningful harmless error analysis was impossible; and without meaningful harmless error analysis, the Florida Supreme Court's affirmance of Hill's death sentence is invalid. Accordingly, Hill is entitled to conditional relief on his Clemons claim.

K. Other Crimes Evidence

In his final claim¹⁵, Hill alleges that the trial court erred when it admitted evidence that Hill stole an automobile in Mobile, Alabama, just hours before the robbery in Pensacola took place. Hill argues that such evidence was inadmissible because it served no purpose other than to show Hill's bad character and propensity to commit crimes. The State contends that the theft of the automobile in Alabama constituted part of the res gestae of the crimes charged, making the evidence admissible to show the entire context of the criminal episode.

The review of state court evidentiary rulings by a federal court on a petition for habeas corpus is "limited to a determination of whether the error, if any, was of such magnitude as to deny petitioner his right to a fair trial." Osborne v. Wainwright, 720 F.2d 1237, 1238 (11th Cir. 1983) (quoting Nettles v. Wainwright, 677 F.2d 410, 414 (5th Cir. Unit B 1982)). The

¹⁵ Claim XVIII -- The State introduced irrelevant prejudicial, and inflammatory evidence of "other crimes" and bad character, violating due process and undermining the reliability of the jury's guilt-innocence and sentencing determinations, contrary to the Fifth, Sixth, Eighth, and Fourteenth Amendments.

wrongfully admitted evidence must be so critical or crucial that its introduction denied the petitioner a fundamentally fair trial. Leverett v. Spears, 877 F.2d 921, 925 (11th Cir. 1989). When a state trial court has erred in admitting evidence of an extrinsic offense, but the other evidence of guilt is overwhelming, the defendant has not been deprived of a fundamentally fair trial and is not, therefore, entitled to federal habeas relief. Thigpen v. Thigpen, 926 F.2d 1003 (11th Cir. 1991).

In this case, the court finds that evidence of the Alabama automobile theft, whether wrongfully admitted or not, was not so crucial, either at the guilt or the sentencing phases of Hill's trial, that it rendered the state criminal proceedings fundamentally unfair. Thus, Hill is not entitled to relief on his final claim to habeas corpus relief.

III. CONCLUSION

The senseless murder of Steven Taylor was a horrible crime that completely justified the finding of several aggravating factors. Clarence Hill is responsible for that crime. Without intending to minimize the severity of the crime or the responsibility that Hill bears for that crime, this court must nonetheless grant Hill conditional relief because the record reveals that he was sentenced to death without proper attention to the capital sentencing standards required by the United States Constitution.


Accordingly, it is ORDERED:

1. Petitioner Hill's Petition for Writ of Habeas Corpus (document 1) is hereby GRANTED unless the State of Florida, within a reasonable period of time, initiates appropriate proceedings to reconsider Hill's death sentence. This court expresses no opinion about whether a new sentencing hearing is required.

2. The clerk shall enter judgment accordingly.

DONE AND ORDERED this 31st day of August,

1992.


WILLIAM STAFFORD
CHIEF JUDGE