IN THE SUPREME COURT OF FLORIDA

RAYMOND ROBERT CLARK,

Appellant,

v.

Case No. 64,012

STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT
FOR PINELLAS COUNTY, FLORIDA

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

RAYMOND ROBERT CLARK was the defendant and the STATE OF FLORIDA was the prosecutor in the trial court. These parties will be referred to as "Appellant" and "Appellee" in this brief. The record of the proceedings in Appellent's 3.850 motion will be referred to by the symbol "TR" followed by the appropriate page number.

STATEMENT OF THE FACTS

On March 23, 1983, a hearing was held on Appellant's Motion to Vacate, Set Aside or Correct Conviction and Sentence. (TR60) The first witness to testify on behalf of Appellant was his trial counsel, Circuit Court Judge Susan Shaeffer. (TR66) In April of 1977, Judge Shaeffer was employed as an Assistant Public Defender for the Sixth Judicial Circuit. (TR67) During this employment, she represented Appellant in a case in which he was charged with murder and the State was seeking the death penalty. (TR67-68)

Judge Shaeffer began practicing law in 1971. (TR83) Prior to handling Appellant's trial, she had been with the Public Defender's Office for approximately two years and had only handled felony cases. (TR83) This was her first capital case that reached the penalty phase, although she had handled capital cases prior to this. (TR84) She had won the others or the jury had returned verdicts on lesser offenses. (TR84)

At one point in time Judge Shaeffer was handling all of the capital cases in the Public Defender's Office. In Appellant's case, she had the assistance of ten lawyers on the public defender's staff, including Martin Murry who was appointed as co-counsel. (TR85-86,99) She also utilized the services of investigators on the staff. This included one major investigator and three minor investigators. (TR85)

In preparing Appellant's defense, Judge Shaeffer supervised the filing of Motion for Change of Venue. (TR68) One of the other assistants in the office, Murry, prepared this motion. Actually, every felony lawyer in the publc defender's office was involved in some fashion in Appellant's case. (R84) The

assistant handling the hearing not only introduced newspaper articles into the record, he called various media people from the newspaper, radio and television. (TR68-69) There were also two affidavits filed by local attorneys expressing their opinion on the issue. (TR68) The trial judge denied the initial motion without prejudice to renew it at the voir dire selections. (TR69-70) The motion was never renewed, however, because they had a very large panel of jurors and Judge Beach had excused any member who had any knowledge of the case. (TR70)

Judge Shaeffer and Assistant Public Defender Martin Murry carefully discussed whether it would be wise to use their last peremptory challenge, excuse the tenth juror and request additional panel members. (TR71-72) As best as Judge Shaeffer could recall, they decided not to exercise their last challenge because they were satisfied that they had the best panel they could get. (TR72) They had also discussed the possibility that they would waive the venue motion by not exercising their last challenge, but decided the motion was probably not well founded. (TR72)

Judge Shaeffer discussed Appellant's appearance with him prior to trial and the necessity to appear a certain way. (TR74) She informed him that he would be facing a rather conservative jury in Pinellas County and she was afraid that his appearance would not only shock them, but would also be very detrimental to his case. (TR75) Appellant told her that he believed he would be found guilty and sentenced to death, and he wanted to do it his own way. (TR75)

At trial Appellant chose to wear slacks or jeans and a sport shirt. (TR96) Judge Shaeffer attempted to have Appellant modify his hair and beard which were very noticeable, however, he did not wish to do that. (TR97)

Judge Shaeffer filed a Motion for the psychiatric evaluation of Appellant. (TR75) She requested that she be allowed to have a doctor appointed to assist her in this regard and asked that his evaluation be confidential. (TR75) Her request was contrary to the rule in effect at the time, which provided that the psychiatrist's report would be furnished to the Court, the State and defense counsel. (TR75-76) Shaeffer asked for the psychiatric evaluation after she had received information that Appellant had committed a homicide in California ten years earlier. The doctor that had examined him believed Appellant was incompetent at the time of the offense. (TR76, 80) Judge Shaeffer felt that this alone raised an obligation on her part to inquire into his present status to stand trial and any possible insanity defense. (TR76) The trial judge informed her that if she wished to have a psychiatrist appointed under the rules, he would grant their request, however, he would not provide a confidential expert. (TR76) Based on the judge's ruling, Shaeffer decided that she did not wish to have Appellant examined. (TR77) She renewed her motion when Judge Beach was about to impose sentence, however, she did not feel that she had any theory of defense which would have required the use of a psychologist or psychiatrist. (TR77-78)

Judge Shaeffer was aware that there were two persons in holding cells with the co-defendant, Ty Johnston, who

allegedly heard him make statements regarding his participation in this offense. (TR78,101) She did not put them on in the defense case because when she followed up these leads, she discovered that these witnesses were equivocating on the content of their statements. She was not certain that their testimony would have even been admissible and even if they were to say what she hoped they would, she did not think in all candor that it would have been worth giving up closing argument for. (TR79) There were no other witnesses to call. (TR101)

During the penalty phase, Judge Shaeffer entered into a stipulation with the prosecutor whereby it was announced to the jury that the defense would waive the presentation of live testimony of Dr. Heninger from California. The jury was told that if the doctor had been called to testify, he would have said it was his opinion that at the time of the previous offense Mr. Clark was insane and should not have been held accountable for his actions. (TR79) There was a further stipulation as to the age of Appellant. (TR79)

Appellant's trial was held prior to the United States Supreme Court decision in Lockett. At the time of the trial, it was Judge Shaeffer's opinion that the defense was limited to the mitigating factors enunciated in the Statute. (TR81)

Judge Shaeffer did not seek a sanity inquisition after Judge Beach denied her request for a confidential psychiatrist. (TR86) Her reasoning was as follows:

> ". . .I knew this was a case where the State was actively seeking the death penalty. I thought that the State had enough ammunition

> without having further ammunition that could further be made to the Court and to the State regarding the occurrences of this particular offense.
>
> It was my candid opinion, having talked with Mr. Clark, that he was quite competent. In fact, I found him to be, and still do, to be an intelligent man. He was, in my candid opinion, having dealt with numerous defendants, some of whom, I believe, to be competent, some of whom, I believe to be not competent, I believed he was competent to stand trial. I did not believe, after discussing this with him, there was any issue as to his competency at the time of the offense at all, and I felt that to pursue this in a fashion that would allow the State to know the facts of the case as related to me by Mr. Clark, which is the only way that the evaluation could have been done, would have been detrimental to his case."
>
> (TR90-91)

Other than the report issued by Dr. Heninger ten years earlier, there were no facts that developed during discovery or in conversations with Appellant, that indicated that a sanity inquisition was warranted. (TR91) It was everyone's recollection that Appellant would not allow his attorneys in California to put forth an insanity defense. (TR104) Even in the California case in which Dr. Heninger testified, Appellant was found guilty. (TR91-92) Judge Shaeffer explained that she did not discuss a potential insanity defense with Appellant because she did not believe that any lawyer discusses pertinent defenses that do not exist. (TR92) She simply had no reason to believe this defense was possible. (TR92-93) Appellant never indicated that he did not know what was happening. (TR92) He was able to relate coherently at the time and there was nothing to indicate a derangement. She found, and still finds, Appellant to be an extremely intelligent and coherent individual. (TR93) Judge

Shaeffer noted that she had tried first degree murder cases where the insanity defense was presented and she had never lost one. (TR93) She had also tried one hundred to one hundred and fifty cases, of which forty to fifty of these were felony jury trials and she had won a very high percentage. (TR100-111) She had tried between ten and fifteen capital cases and she had assisted in close to one hundred capital cases. (TR171)

To develop mitigating evidence, Judge Shaeffer and an investigator went to California to speak with friends of Appellant. (TR94) She located some of these people and had conversations with them. (TR94) They all liked Appellant and thought he was a fine fellow, but the problem was he had told them he had gone to prison the first time for killing his wife. (TR94) They were not aware that he had actually killed a 14 year old boy. (TR94) Once this story became public, the people in Appellant's home town were no longer well-disposed toward him. (TR94-95) Even if they would have been willing to testify that they liked Clark and thought he was a nice man, Shaeffer did not feel that this type of testimony would have been relevant to the penalty phase. (TR95) In any event, Judge Shaeffer said that if this kind of testimony would have been available, she would have pursued it. (TR95)

Judge Shaeffer considered calling Mrs. Jean Dupree as a potential witness. (TR95) Mrs. Dupree would have testified that in her opinion Ty was more dangerous than Appellant (TR95), however, she had no first hand knowledge of this offense. (TR108) Other than this witness, Judge Shaeffer did not discover anything even post-Lockett that she would have put on. (TR95,109)

While Judge Shaeffer was never able to locate Clark's family, Appellant did not want any of them notified of his difficulties. Appellant would not assist her in this regard. (TR96,107) Even if Judge Shaeffer did not put Appellant's family on the stand, she would have preferred to have his family present and standing behind him at trial. (TR96,107)

With regard to the allegation that Martin Murry handled the penalty phase without Appellant's approval, Judge Shaeffer noted that Mr. Murry was co-counsel throughout the entire case. He communicated with Appellant during the entire trial. (TR97) Judge Shaeffer decided that Mr. Murry would better handle the penalty phase because she was going to have to make certain statements to the jury during the closing statement that would probably cause her to lose her credibility if Appellant were convicted. (TR98-99) During the course of their representation, Mr. Murry had contact with Appellant on numerous occasions. They would both visit Appellant at the jail and spent countless hours with him. (TR179) Mr. Murry and Appellant would oftentimes exchange ideas on books, their likes and their dislikes. (TR179) On several occasions Mr. Murry, Appellant and Judge Shaeffer met for extended periods of time at night and talked about Appellant's background and his life. (TR180) Mr. Murry spent countless hours in his representation of Appellant (TR180) Mr. Murry always appeared to be available for Appellant. (TR180)

Judge Shaeffer discussed the facts of this case with Appellant throughout each investigation she conducted. (TR101)

She took extensive depositions of all State witnesses, including potential witnesses in California in the hope of finding anything to indicate Appellant was in error in his recitation of the facts. (TR101) She could not find anything that was helpful. (TR101)

Judge Shaeffer never talked with Appellant about him testifying, because if he would have done so, he would have convicted himself. (TR109-110)

On direct examination by the State, Judge Shaeffer acknowledged that she had not objected to several statements made by the prosecutor during his closing argument. (TR171) She believed that there were two ways to try a case, with few objections or with every objection possible. (TR171-172) In the instant case, she felt that she would be far more effective giving an uninterrupted closing. She had found that the way you obtain this is to allow the other side the same courtesy. (TR172-173) There were several prosecutorial comments that warranted an objection, however, she felt it was always a lawyer's decision whether or not to object. (TR172) She had also found that there can be a negative effect upon the defense case by raising objections at certain times. (TR173) In her opinion, anyone who would object to a prosecutor commenting on the tragedy that the killing had on the victim's family would turn the jury off so far your head would spin. (TR173)

Judge Shaeffer acknowledged that she did not present the facts of the California case (homosexual suicide pact), however she explained that she had spent at least three (3) days in

California taking depositions; interviewing all potential defense witnesses; speaking with Appellant's prior defense counsel and doctor; and reviewing the California appellate decision. She believed that to have presented these witnesses at trial would have had a devastating effect on Appellant's trial. (TR174) The California opinion indicated this was one of the most brutal and aggravated homicides ever committed. It also refuted the idea that this was a legitimate suicide attempt. (TR174) While she did not agree with this conclusion, there was no way to rebut it through the witnesses who were available to her. (TR175) Since the prosecutor gave her the option of either staying away from the crime or going into all the facts, they decided after much consideration, that they would be better off sticking to the bare record. (TR175) She reached an agreement with the prosecutor in which he agreed that he would not call any of the California witnesses if the defense would simply stipulate to the prior conviction. (TR175) The prosecutor also agreed to stipulate that the doctor in California believed Appellant was insane at the time of the commission of the offense. (TR176) Judge Shaeffer felt that it was in Appellant's best interest to avoid the California testimony. (TR176)

As previously noted, Judge Shaeffer considered having Mrs. Jean Dupree testify. There was a possibility that her testimony might have lent itself to a mitigating factor, to wit: the substantial domination of one person over another. (TR176, 185-186) This course of action was ruled out. First of all, this testimony would not have been accurate as Judge Shaeffer knew the

facts to be. (TR175-176) Second, there was some concern because there were taped conversations between Appellant and Mr. Johnston in which they conspired to kill Mrs. Dupree's daughter. (TR178) If she put Mrs. Dupree on the stand to testify what a fine fellow Appellant was, the judge might allow the State to play the tapes and then inquire as to whether her opinion had changed. (TR178-179) She believed that these tapes would have been devastating to their case at the sentencing phase. (TR179,185-186) The trial judge agreed with her:

> THE COURT: Yes. To me, in my judgment, as the trial lawyer in this case, it was a major victory for them to keep the tapes out for the defense. That's how bad they were. Now, I heard the tapes personally from beginning to end and to me, to keep these tapes out was half the case, quite frankly. Now, that's how bad they were.
>
> (TR190)
>
> * * * *
>
> THE COURT: You didn't try to put them in, but I say for them to even -- if I had been you, I probably would have tried to put them in.
>
> MR. McCABE: You do things the way you feel like you've got to do them.
>
> THE COURT: Well, I understand. I mean it's all a matter of technique but they were just terribly incriminating. There was one part in the tape that you could take either way and I think that under the circumstances, the jury would have taken it in the light most unfavorable for the Defendant. You know the one I'm talking about?
>
> (TR190-191)

It was suggested by one of Appellant's experts that when their motion for confidential report was denied, they should have proceeded with the court's offer for a sanity inquisition as then they could properly evaluate what the Appellant told them. (TR181) Judge Shaeffer, however, felt that they were not having any trouble in evaluating what their client told them. (TR181) She did not feel that they needed the assistance of a psychiatrist, because they had a lengthy discussion with Appellant about the facts of the case and he appeared to be very clear and honest with her about what happened. (TR182,185) She also checked out his honesty through extensive depositions of every witness and in particular the medical examiner. (TR182) After conducting this research, she had no reason to believe that anything he had told her was untrue. (TR182) She also felt that Appellant would have told a psychiatrist the same things he told her, and she was not willing to allow this. Judge Shaeffer added that she did not think any other defense counsel in her position would have been willing to expose the sentencing court and the prosecutor to the knowledge she had, unless the evaluation would have been done confidentially. (TR183)

Michael Van Zamft, a Miami attorney was called as an expert witness for the defense to testify on the issue of ineffective assistance of counsel. (TR115-122) It was Mr. Van Zamft's opinion that trial counsel was ineffective for failing to have a private psychiatrist appointed in the penalty phase for investigation and information. (TR126-127) His conclusion was based on the Third District Court of Appeal decision in Pouncy

v. State, 353 So.2d 640 (Fla. 3d DCA 1977). This decision was issued three months after Appellant's trial. (TR150,151)

Mr. Van Zamft determined that trial counsel was deficient in failing to explain or put on evidence to explain the killing Appellant was involved in in California. (TR151) However, he was not aware that counsel had entered into a stipulation with the State not to go into the facts of this homicide. (TR152) Even Van Zamft acknowledged that the reason for such a stipulation would have been to avoid going into the facts of a very brutal killing. (TR156) While Mr. Van Zamft agreed there may have been valid reasons why defense lawyers would not want the fact known that this victim was 14 years old and involved in a homosexual affair with Appellant, it was still his opinion that it would have been more favorable to present the reason why there was a killing. (TR153) The trial judge found that he was simply attempting to second guess defense counsel's trial strategy:

> THE COURT: Well, I think that is what he is doing, because these are not omissions that slipped by. These are things that they considered and didn't do. I mean, it's, you know, you do it or you don't do it. It isn't like they didn't know they had a problem. They recognized the problem and then they decided not to go into the facts of it, and that -- so now we're second-guessing their judgment as to whether or not they should have put on the facts of the first killing. (TR153-154)

Mr. Van Zamft opined that counsel never spoke with Appellant about his life, background, or the California killing. (TR140) This opinion, however, was not based on fact. He

acknowledged that he really could not say whether or not they talked. (TR140)

Mr. Van Zamft criticized Mr. Murry's use of the term "California cuckoo or weirdo" which the State Attorney had used in describing Appellant. (TR 155-156) However, he had never seen pictures of Appellant as he looked at the time of the trial. (TR155) He had been told that Appellant looked similar to Charles Manson. (TR155)

Michael Zelman was also called by the defense to testify on the issue of ineffective assistance of counsel at the pre-trial stage. (TR158159,162) Mr. Zelman testified that he had been lead counsel in a capital case on only one occasion. (TR161) He also acknowledged that he had not reviewed the entire court file in Appellant's case, only select documents and parts of the transcript. (TR162) He had not even received all the transcripts of the motion hearings. (TR163) The court still allowed Mr. Zelman to testify, noting that his knowledge of the case did not affect the admissibility of his testimony, but rather its weight and sufficiency. (TR163)

With regard to the Motion for Change of Venue, Mr. Zelman had reviewed portions of this motion and was aware that there were many articles as well as radio and television broadcasts that were made a part of it. (TR164) It was his opinion, however, that community witnesses such as newspaper, TV and radio personalities should have also been brought in to discuss their effect on the community. (TR165)

At the conclusion of the Rule 3.850 hearing, the trial judge made the following findings of fact:

> ". . .So we are talking about effective or ineffective counsel. There are just some cases that you hear where the most effective counsel is ineffective not because he is ineffective on that particular day, it's just because the facts of the case are so overwhelming against his client that regardless of how effective, how experienced and well trained and well prepared he is for the case, the facts can't be changed, and I believe this is one of those cases.
>
> The law is quite clear he is not entitled to a perfect trial but a fair trial. I think he received a fair trial in this case. In the 16 years I've been on the bench, I've seen a lot of criminal trials, a lot of criminal lawyers from around the state and outside the state, and I think, in Judge Shaeffer we had one of the best criminal defense lawyers in the state if not in the south. I have seen her try a number of cases before me where they either were found not guilty in cases I thought they were guilty of something or where she walked them out with a lesser included crime. I feel tht the quality and the thoroughness and the vigor of this case from appointed counsel, that is, the Public Defender, if another person, a wealthy man, were charged with the same crime and had to hire outside counsel, it would bankrupt him.
>
> In this particular case, since I presided over most of it, I know that a number of depositions were taken inside the State and California, that everybody in the Public Defender's office at some point had worked on certain phases of the case, that most of the people in the Public Defender's office had

been there for quite some time and had handled first degree murder cases, that the Public Defender himself took a personal interest in this case to make sure that the defendant received adequate and competent representation. As a matter of fact, the case went six days. The jury went out at two o'clock on Saturday afternoon and didn't come back until two o'clock Sunday morning. They were out for twelve hours without, I think without dinner; that the closing argument that Judge Schaeffer made at that time was, in my opinion, brilliant. This was concurred by a full courtroom of spectators. It was concurred by the State Attorney's staff. It was concurred by the television media which, there was - all three networks were present through the local news commentators, and they all agreed that that was probably one of the most stirring closing arguments that they had ever heard made, and I think the proof of that was the fact that the jury was out for twelve hours in a case where the evidence was overwhelming of the defendant's guilt of the cold-blooded brutal execution for profit, and that included extortion after the death of the victim.

Insofar as the venue was concerned, we approached that from the standpoint of advising the full panel of what the case was about and then questioning the full panel as a group if anybody knew anything about the case. I think five or six people said they did. I immediately excluded them from the panel before we even called the prospective jurors to the bench so that we would have as little a tainted panel to draw from as possible.

The motion for change of venue was quite thorough with all the major news media, the electronic media, and the printed media as having testified as to coverage they gave the case. So I felt that not only was the motion thorough, but everybody was scrupulously attempting to exclude anybody that had any prior knowledge which I think we successfully did in the case.

Insofar as the psychiatrist is concerned, there was nothing in the record to suggest

that he was either incompetent to stand trial or that the insanity plea would be afforded to him. There was no showing that a psychiatrist would be of any useful purpose. The law did not permit a psychiatrist at that time, and there has been no prejudice shown by the lack of a psychiatrist.

Insofar as the witnesses at sentencing were concerned, or the lack of a psychiatrist at the sentencing, there was very little you could say in mitigation of the crime or in mitigation of the person. He was a paroled first degree murderer from California, had not been out from his incarceration in California for a very long period of time. The only local witnesses you had here were people who had not known him for a long period of time. There were certain types of conversations between the defendant and his co-conspirator Ty, which were damning to say the least and particularly as they affected the very people that you now suggest you should have called as character witnesses. To have either presented those witnesses or suggested those people might be called to testify in mitigation would possibly have subjected the defendant to having those tapes exposed at least to the witnesses and possibly to the jury to show in fact he was not the person he was painted to be by these witnesses, that they did not have the ability to know really what Mr. Clark was like.

I think all in all it was probably one of the best tried first degree murder cases that I've tried, and I've probably tried at least 15 capital cases in 16 years on the bench. I have imposed the death penalty on four different occasions, and I can't think of a case that was a better tried case from the prosecutor's standpoint and from the defense standpoint, and I don't think there has been a sufficient -- any showing of prejudice in the way in which the case was prepared, in the quality of counsel, or in the way in which this case was tried. Motion denied."

(TR223-227)

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT'S REFUSAL TO ALLOW APPELLANT A CONFIDENTIAL PSYCHIATRIC EXPERT VIOLATED APPELLANT'S RIGHT TO EFFECTIVE COUNSEL AND EQUAL PROTECTION.

Appellant suggests that he was denied effective assistance of counsel due to the failure of the trial court to appoint a particular psychologist to report to defense counsel. This issue is not properly raised by motion made pursuant to Rule 3.850, Fla. R. Crim. P. but, is one that can be and therefore had to be raised on direct appeal. The doctrines of bypass and waiver do apply and anything known to Appellant at the time of trial is not a proper subject for a motion to vacate. Tyner v. State, 363 So.2d 1165 (Fla. 1st DCA 1978); Thompson v. State, 410 So.2d 500 (Fla. 1982); Armstrong v. State, 429 So.2d 287 (Fla. 1983); Sullivan v. State, 372 So.2d 938 (Fla. 1979); Meeks v. State, 382 So.2d 673 (Fla. 1980); Smith v. State, 400 So.2d 956 (Fla. 1981); Ford v. State, 407 So.2d 907 (Fla. 1981); Burau v. State, 353 So.2d 1183 (Fla. 3d DCA 1977); Clements v. State, 320 So.2d 44 (Fla. 3d DCA 1975); Battle v. State, 388 So.2d 1323 (Fla. 5th DCA 1980). In any event, this issue had already been considered by this Court in Appellant's direct appeal. See Clark v. State, 379 So.2d 97 (Fla. 1980):

> ". . .the trial court did not err in denying Clark's request for appointment of a psychologist. Although refusing to move for a sanity inquisition and to comply with the requirements of Florida Rule of Criminal

> Procedure 3.210, Clark requested that the court appoint a particular psychologist to examine Clark and to test him to determine whether a possible defense of not guilty by reason of insanity exists and to make his report confidential and solely to Clark's counsel for his determination of whether or not to make sanity an issue at trial. By his motion, Clark was attempting to circumvent Florida Rule of Crimial Procedure 3.210.
>
> In addition to reviewing the record in light of these alleged errors asserted by Clark, which we have determined to be without merit, we also have reviewed the evidence pursuant to Florida Appellate Rule 6.16 to determine whether the interests of justice require a new trial and conclude that no new trial is required. Accordingly, the conviction is affirmed."

This Court's opinion is clear. The trial court did not err in denying Appellant's request for the appointment of a confidential psychiatrist. The State would now assert that Appellant cannot relitigate this issue by somehow relating it to ineffective assistance of counsel.

Insofar as the question of the psychiatric expert relates to the sentencing phase, defense cousel's failure to separately request an evaluation for the sentencing phase can quite simply be addressed as a tactical decision to forego evaluation when such evaluation would have been discoverable to the prosecution. While the law has changed due to this Court's adoption of Rule 3.216, Fla. R. Crim. P. (1980), defense counsel is not charged with anticipating such changes in the law. See Witt v. State, 387 So.2d 922 (Fla. 1980); Parker v. North Carolina, 397 U.S. 790, 90 S.Ct. 1458, 25 L.Ed.2d 785 (1970); Davis v. Wainwight, 547 F.2d 261 (5th Cir. 1977); Meeks v. State, 382 So.2d 673 (Fla. 1980).

Appellant relies heavily on Pouncy v. State, 353 So.2d 640 (Fla. 3d DCA 1977) despite the fact that Pouncy was not decided until December 27, 1977. The trial in this cause took place in September, 1977, therefore, the decision in Pouncy should have no bearing on this case. Contrary to Appellant's assertion on Page 9 of his brief, there is no such thing as a "constitutional rule of criminal procedure", as used in this context. To the contrary, rules are procedural not substantive. State v. Garcia 229 So.2d 236 (Fla. 1969). Therefore, there can be no suggestion that this rule should somehow be retroactively applied to the Appellant in this case. In Witt v. State, supra, this Court noted that law changes that are unconstitutional, evolutionary developments in the law, arising from a case application, may not be raised in a collateral proceeding:

> [7] We emphasize at this point that only major constitutonal changes of law will be cognizable in capital cases under Rule 3.850. Although specific determinations regarding the significance of various legal developments must be made on a case by case basis, history shows that most major constitutonal changes are likely to fall within two broad categories. The first are those changes of law which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties. This category is exemplified by Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) which held that the imposition of the death penalty for the crime of rape of an adult woman is forbidden by the eighth amendment as cruel and unusual punishment. The second are those changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of Stovall and Linkletter. Gideon v.

> Wainwright, of course, is the prime example of a law change included within this category.
>
> [8] In contrast to these jurisprudential upheavals are evolutionary refinements in the criminal law, affording new or different standards for the admissibility of evidence, for procedural fairness, for proportionality review of capital cases, and for other like matters. Emergent rights in these categories, or the retraction of former rights of this genre, do not compel an abridgement of the finality of judgments. To allow them that impact would, we are convinced, destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectualy beyond any tolerable limit. (footnotes omitted)

Clearly, this is a situation of emergent rights.

In any event, the testimony adduced at the evidentiary hearing on Appellant's motion, established that trial counsel was experienced in the trial of capital cases and likewise experienced in the representation of defendants with alleged mental infirmities. (TR93) Further, the testimony of trial counsel was that Appellant gave no objective signs or indications of mental infirmities. (TR77-78; 90-91; 92-93; 104) This conclusion was reached only after spending three days in California, taking depositions of several of Appellant's friends; interviewing all potential defense witnesses; taking extensive depositions of all state witnesses; speaking with Appellant's prior defense counsel and doctor; and reviewing the California appellate decison in Appellant's first murder. (TR 101, 174) She could not find anything helpful that would have supported an insanity defense. (TR90-92,101)

It is absolutely clear that the request for the appointment of a confidential expert in derogation of the Rules of Criminal Procedure, as they then existed, was merely an attempt at an exploratory expedition in the hopes of finding something that would be beneficial to the defense. Judge Shaeffer's efforts disclosed nothing. Additionally, the testimony was that there were no objective signs or indications that any of the statutory mitigating factors relating to mental condition would have been disclosed by a psychiatric or psychological examination.

Appellant's argument is totally without merit.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING THE MOTION TO VACATE WITH RESPECT TO PROPORTIONALITY REVIEW OF FLORIDA'S SENTENCING SCHEME. 1/

Appellant alleges that legal proportionality review was required and was absent on direct review by this Court. Appellee would submit, however, that this is an issue which is not properly raised by way of a Rule 3.850 Motion. The trial court was not in any position to review the actions or inactions of this Court. If Appellant was concerned that this Court would deny his proportionality review, he should have raised this issue on his direct appeal. Appellant could have attacked the sentencing scheme under Section 921.14, Fla. Stat. Appellant also could have attempted to demonstrate that the death penalty was unwarranted by comparing the facts of his case to those of other death row inmates. Appellant did not pursue either course of action. Since this issue could and should have been raised on direct appeal from his conviction, and Appellant failed to do so, Appellee would submit that the doctrine of bypass and waiver are also applicable to this issue. Armstrong v. State, supra. (See also Issue I).

In any event, a review of the following case law reveals that Appellant is not constitutionally entitled to "proportionality review". In Proffitt v. Florida, 428 U.S. 242, 96 S.Ct.

1/ Proportionality review is not a constitutional requirement. Gregg v. Georgia, 428 U.S. 153, 165 (1976); Jurek v. Texas, 428 U.S. 262 (1976).

2960, 49 L.Ed.2d 913 (1976), the defendant attacked this Court's appellate review process in death sentence cases, arguing that it was subjective and unpredictable. The United States Supreme Court rejected Proffitt's argument as follows:

> "Finally, the Florida statute has a provision designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants. The Supreme Court of Florida reviews each death sentence to ensure that similar results are reached in similar cases.
>
> Nonetheless, the petitioner attacks the Florida appellate review process because the role of the Supreme Court of Florida in reviewing death sentences is necessarily subjective and unpredictable. While it may be true that that court has not chosen to formulate a rigid objective test as its standard of review for all cases, it does not follow that the appellate review process is ineffective or arbitrary. In fact, it is apparent that the Florida court has undertaken responsibly to perform its function of death sentence review with a maximum of rationality and consistency.
>
> For example, it has several times compared the circumstances of a case under review with those of previous cases in which it has assessed the imposition of death sentences. See, e.g. Alford v. State, 307 So.2d at 445; Alvord v. State, 322 So.2d at 540-541. By following this procedure, the Florida court has, in effect, adopted the type of proportionality review mandated by the Georgia statute. Cf. Gregg v. Georgia, at 204-206, 49 L.Ed.2d 859, 96 S.Ct. 2909. And any suggestion that the Florida court engages in only cursory or rubber-stamp review of death penalty cases is totally controverted by the fact that it has vacated over one-third of the death sentences that have come before it. See supra, at 253, 49 L.Ed. 923.
>
> (1b) Florida, like Georgia has responded to Furman by enacting legislation that passes constitutional muster. That legislation

> provides that after a person is convicted of first-degree murder, there shall be an informed, focused, guided, and objective inquiry into the question whether he should be sentenced to death. If a death sentence is imposed, the sentencing authority articulates in writing the statutory reasons that led to the decision. Those reasons, and the evidence supporting them, are conscientiously reviewed by a court which, because of its statewide jurisdiction, can assure consistency, fairness and rationality in the evenhanded operation of the state law. As in Georgia, this system serves to assure that sentences of death will not be "wantonly" or "freakishly" imposed. See Furman v. Georgia, 408 U.S. at 310, 33 L.Ed.2d 346, 92 S. Ct. 2726 (Stewart, J. concurring). Accordingly, the judgment before us is affirmed.

In another case from Florida, Sullivan v. Wainwright, ___ U. S. ___, 78 L.Ed.2d 210, 104 S.Ct. ____(1983), the United States Supreme Court again rejected the notion that this Court denied defendants proportionality review:

> ". . . Applicant's claim that he was entitled to proportionality review was addressed and found meritless by the Florida Supreme Court. Id. at ____. His case was one of the earliest to be decided under Florida's current death penalty statute. The state supreme court has used it as a reference point, comparing all subsequent capital cases to applicant's case to ensure proportionalty. It therefore cannot be alleged that the State has failed to compare this sentence with others decided under this statute to ensure proportionality. Whatever our decision in Pulley v. Harris, No. 82-1095, ___ US ___, 75 L.Ed.2d 787, 103 S.Ct. 1425 (cert. granted March 21, 1983), may be, it will not disturb the Florida Supreme Court's ruling."

Finally, in Pulley v. Harris, ___ U.S. ___ (34 Cr. L. 3027, Case No. 82-1095, opinion decided January 23, 1984), the United

States Supreme Court recently held that State appellate courts are not constitutionally required to provide "proportionality review" of death sentences in which the Court would have to compare the sentence in the case before it with penalties in similar cases. 34 Cr. L. 3029:

> "The proportionalty review sought by Harris, required by the Court of Appeals, and provided for in numerous state statutes is of a different sort. This sort of proportionality review presumes that the death sentence is not disproportionate to the crime in the traditional sense. It purports to inquire instead whether the penalty is nonetheless unacceptable in a particular case because disproportionate to the punishment imposed on others convicted of the same crime. The issue in this case, therefore, is whether the Eighth Amendment applicable to the States through the Fourteenth Amendment, requires a state appellate court, before it affirms a death sentence, to compare the sentence in the case before it with the penalties imposed in similar cases if requested to do so by the prisoner. Harris insists that it does and that this is the invariable rule in every case. Apparently, the Court of Appeals was of the same view. We do not agree."
>
> (emphasis added)

The Court then went on to note that the defendant had no basis on which to rely on its decison in Proffitt v. Florida, supra:

> "There is even less basis for reliance on Proffitt v. Florida, supra. The Florida statute provides for a bifurcated procedure and forecloses the death penalty unless the sentencing authority finds that at least one of eight statutory aggravating circumstances is present and is not outweighed by any mitigating circumstances. The joint opinion of Justices Stewart, Powell, and Stevens observed that the Florida scheme, like its

> Georgia counterpart, requires the sentencer to focus on the individual circumstances of each homicide and each defendant. Id. at 251. Also, by vesting ultimate sentencing authority in the judge rather than the jury, the statute was expected to yield more consistent sentencing at the trial court level. Id. at 252. Only after concluding that trial judges are given specific and detailed guidance to assist them in deciding whether to impose the death penalty did the opinion observe that death sentences are reviewed to ensure that they are consistent with the sentences imposed in similar cases. Id. at 250-251. The concurring opinion filed by three other Justices approved the Florida statute without even mentioning appellate review. Id. at 260-261.
>
> That Gregg and Proffitt did not establih a constitutional requirement of proportionality review is made clearer by Jurek v. Texas, 428 U.S. 262 (1976) decided the same day. In Jurek, we upheld a death sentence even though neither the statute, as in Georgia, nor state case-law, as in Florida, provided for comparative proportionality review.

A review of this Court's opinion on Appellant's direct appeal in no way, shape or form supports his allegations that he was denied "proportionality review." Clark v. State, 379 So.2d 97 (Fla. 1979). Furthermore, the United States Supreme Court has unequivocally stated that such review is not constitutionally required to be provided to a defendant. Clearly, Appellant's argument is totally without merit.

ISSUE III

WHETHER THE EFFECTIVENESS OF TRIAL COUNSEL FAILED TO MEET MINIMUM STANDARDS AND DENIED THE DEFENDANT HIS SIXTH AMENDMENT CONSTITUTIONAL RIGHT.

In Knight v. State, 394 So.2d 997 (Fla. 1981), this Court adopted the following principles as a standard to determine whether an attorney had provided reasonably effective assistance of counsel:

> First, the specific commission or overt act upon which the claim of ineffective assistance of counsel is based must be detailed in the appropriate pleading.
>
> Second, the defendant has the burden to show that the specific omission or overt act was a substantial and serious deficiency, measurably below that of a competent counsel. As was explained by Judge Leventhal in Decoster III, "To be 'below average' is not enough, for that is self evidently the case half the time. The standard of shortfall is necessarily subjective, but it cannot be established merely by showing that counsel's acts or commissions deviated from a checklist of standards." §24 F.2d at 215. We recognize that in applying the standard, death penalty cases are different and consequently the performance of counsel must be judged in light of these circumstances.
>
> Third, the defendant has the burden to show that the specific, serious deficiency, when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings. In the case of appellate counsel, this means the deficiency must concern an issue which is error affecting the outcome, not simply harmless error. This requirement that a defendant has the burden to show prejudice is the rule in the majority of other jurisdictions.

> Fourth, in the event a defendant does show a substantial deficiency and presents a prima facie showing of prejudice,the state still has an opportunity to rebut these assertions by showing beyond a reasonable doubt that there was no prejudice in fact. This opportunity to rebut applies even if a constitutional violation has been established. Chapman v. California, 386 U.S. 18 (1967); Decoster III.

More recently, in Armstrong v. State, 429 So.2d 287 (Fla. 1983), this Court reaffirmed the use of the Knight standard in analyzing a claim of ineffective assistance of counsel in this State:

> (3) The only contention raised by appellant's motion that is proper for consideration by collateral attack is the argument that he received ineffective assistance of counsel at both the guilt phase and the sentencing phase of the trial. We will therefore proceed to evaluate this claim, using the principles developed in Knight v. State, 394 So.2d 997 (Fla. 1981). We are aware of the different and more elaborate analysis set forth in Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982), but we believe the Knight test reaches the legally and constitutionally correct result in this case. (emphasis added)

The federal standard in this circuit for constitutionally effective assisance of counsel is not errorless counsel and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance. Herring v. Estelle, 491 F.2d 125, 127 (5th Cir. 1974); Washington v. Wainwright, 655 F.2d 1346 (5th Cir. 1981). This standard involves an inquiry into the actual performance of counsel conducting the defense and a determination of whether

reasonably effective assistance was rendered based upon the totality of circumstances in the entire record. Washington v. Estelle, 648 F.2d 276, 279 (5th Cir. 1981).

In Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983) (en banc), the Eleventh Circuit Court of Appeal addressed the issue as follows:

> In reviewing ineffective assistance of counsel claims, we do not sit to second guess considered professional judgments with the benefit of 20/20 hindsight. Washington v. Watkins, 655 F.2d at 1355; Easter v. Estelle, 609 F.2d 756 (5th Cir. 1980). We have consistently held that counsel will not be regarded constitutionally deficient merely because of tactical decisions. See United States v. Guerra, 628 F.2d 410 (5th Cir. 1980), cert. denied, 450 U.S. 934, 101 S.Ct. 1398, 67 L.Ed.2d 369 (1981); Buckelew v. United States, 575 F.2d 515 (5th Cir. 1978); United States v. Beasley, 479 F.2d 1124, 1129 (5th Cir.), cert. denied 414 U.S. 924, 94 S.Ct. 252, 38 L.Ed.2d 158 (1973); Williams v. Beto, 354 F.2d 698 (5th Cir. 1965) Even where an attorney's strategy may appear wrong in retrospect, a finding of constitutionally ineffective representation is not automatically mandated. Baty v. Balkcom, 661 F.2d 391, 395 n.8 (5th Cir. 1981), cert. denied ___ U.S. ___, 102 S.Ct. 2307, 73 L.Ed.2d 1308 (1982); Baldwin v. Blackburn, 653 F.2d 942, 946 (5th Cir. 1981).
>
> (22,23) That counsel for a criminal defendant has not pursued every conceivable line of inquiry in a case does not constitute ineffective assistace of counsel. Lovett v. Florida, 627 F.2d 706, 708 (5th Cir. 1980). This is not a case in which counsel allegedly failed to prepare and investigate adequately. Ford's counsel was reasonably likely to render and did render reasonably effective assistance. See Herring v. Estelle, 491 F.2d 125, 127 (5th Cir. 1974). Because the record reveals Ford received constitutionally adequate representation and no prejudice resulted to him by any action or inaction of

> counsel, see Washington v. Watkins, 655 F.2d at 1362. Ford has not carried his burden of proving ineffective assistance of counsel. See United States v. Killian, 639 F.2d 206, 210 (5th Cir.), cert. denied, 451 U.S. 1021, 101 S.Ct. 3014, 69 L.Ed.2d 394 (1981).
> (Ford v. Strickland, supra at 820)

See also Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983), in which the Eleventh Circuit Court of Appeals again emphasized that a defendant must demonstrate prejudice:

> (1) The framework for analyzing claims of constitutionally ineffective assistance of counsel in this circuit was set forth in the en banc opinion in Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982) (Unit B en banc). Under Washington v. Strickland, a petitioner asserting that counsel failed to conduct an adequate pretrial investigation has the initial burden of making a dual showing. As a threshold requirement, he must show that his counsel was in fact, ineffective, that counsel's conduct was not within the "range of competence demanded of attorneys in criminal cases," McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970); Mylar v. State, 671 F.2d 1299, 1301 (11th Cir. 1982), petition for cert. filed, ___ U.S. ___, 103 S.Ct. ____, 74 L.Ed.2d ____, 50 U.S.L.W. 3984 (U.S. June 7, 1982) (No. 81-2240). This is an objective assessment of whether trial counsel fell below acceptable professional standards in not advocating the underlying claim. This portion of the analysis may ask, for example, whether counsel conducted a reasonable pretrial investigation and whether counsel's failure to investigate certain lines of defense was part of a strategy based on reasonable assumptions. A petitioner has the additional burden of proving that his counsel's ineffectiveness caused "actual and substantial prejudice" to his case. Because we hold that Stanley has failed to prove that his trial counsel was ineffective, we need not reach the issue of prejudice.

See also United States v. Valenzuela-Bernal, 102 S.Ct. 3440 (1982).

In Florida, the burden of proof on one petitioning to set aside a judgment of conviction is to prove the facts relied upon by strong and convincing evidence. Meeks v. State, 382 So.2d 673 (Fla. 1980); Foxworth v. State, 267 So.2d 647 (Fla. 1972), cert. denied, 41 U.S. 987, 93 S.Ct. 2276, 36 L.Ed.2d 965 (1975); Russ v. State, 95 So.2d 594 (Fla. 1957). Likewise, the federal courts have also placed a heavy burden of proof on the petitioner. Hill v. Linahan, 697 F. 2d 1032 (11th Cir. 1983); Henson v. Estelle, 641 F.2d 250 (5th Cir. 1981), cert. denied 454 U.S. 1056, 102 S.Ct. 603, 70 L.Ed.2d 593 (1981); Stanley v. Zant, supra. Applying either of the above standards to the instant facts it is clear to the State that Appellant's claim of ineffective assistance of counsel must ultimately fail.

A. Ineffectiveness of Counsel at Pretrial Stage

Appellant attacks trial counsel's failure to properly follow through on the Motion for Change of Venue. Appellant's attack is totally without foundation.

Judge Shaeffer testified that in support of the Motion for Change of Venue, the assistant handling the hearing introduced into evidence several newspaper articles concerning the case. (TR68-69) In addition, he called various media people from the newspaper, radio and television. (TR68-69) There were also two affidavits filed by local attorneys expressing their opinions on the issue. (TR68)

While the trial judge denied defense counsel's initial motion, the denial was without prejudice to renew it at the voir dire selections. (TR69-70) Counsel, however, made a tactical decision not to renew the motion. They had a very large panel of jurors, and Judge Beach had excused any member who had any knowledge of the case. (TR70) Clearly, counsel's action was not the result of ineffective assistance but, rather, the result of trial tactics, c.f. Armstrong v. State, 429 So.2d 287 (Fla. 1983). Supporting counsel's decision not to renew the Motion for Change of Venue is the fact that they did not find it necessary to use their last peremptory challenge and request additional panel members. (TR71-72) Judge Shaeffer explained her actions as follows:

> ". . .As I recall, we decided not to exercise our last challenge because we were satisfied that we had the best panel we could get, and so we did not exercise our last challenge. So, therefore, there was no reason for us to ask for additional challenges which could have been permitted under the rules within the Court's discretion.
>
> * * * *
>
> Q. And you proceeded not to use your tenth challenge?
>
> A. Not necessarily just based on a quick judgment call. As I say, I thought that the judge had been fair in excluding jurors who had read about it and because he had done that we felt that probably the action was not as well-founded as it would have been had we been stuck with many jurors who indeed had read about the case, who had heard extensive radio or what-have-you, but indicated they could be fair. Had we had a panel consisting of some of those people, then I think we would have elected to go ahead and preserve the issue." (TR72)

In Palmes v. State, 425 So.2d 4,6 (Fla. 1983), this Court stated:

> "An attorney should raise any honestly debatable issue that may aid his client's position, but he is not obligated to raise every conceivable issue and certainly not when he regards the argument as futile because of the lack of merit."

Judge Shaeffer's testimony was clear on this point. As long as there appeared to be a question as to whether Appellant could receive a fair trial, they pursued the Motion for Change of Venue. However, there came a point in time where she no longer believed that the motion was well-founded. Her decision to abandon that motion cannot be considered to be ineffectiveness.

In Stanley v. Zant, supra, the Eleventh Circuit Court of Appeals held that a petitioner asserting a claim of ineffective assistance of counsel must show that his counsel was in fact ineffective and that counsel's ineffectiveness caused "actual and substantial prejudice." It is clear from the transcript of proceedings in this case that jurors who had no prior knowledge at all of the case were permitted to be seated. Therefore, there could be no prejudice to Appellant. Counsel cannot be faulted for her course of action.

Appellant argues that trial counsel should have presented evidence through psychologists or sociologists as to the media exposure on the public. First of all, this argument is based on pure speculation. Second, the failure to call witnesses on behalf of the defense is a matter of personal judgment. United

States v. Rubin, 433 F.2d 442 (5th Cir. 1970), cert. denied 401 U.S. 945; Maulden v. State, 382 So.2d 844 (Fla. 1st DCA 1980); Bogan v. State, 211 So.2d 74 (Fla. 2d DCA 1968). See also Ferby v. State, 404 So.2d 407 (Fla. 5th DCA 1981), in which the court stated:

> "The defendant claims he was inadequately and ineffectually represented by his trial counsel of record because his counsel did not call his co-defendant and other witnesses to testify; failed to take depositions; failed to properly cross-examine witnesses; and failed to object to the admissibility of certain evidence. These matters are within the judgment and strategy of the trial counsel and are not a proper ground for complaint or relief. See, e.g., Fuller v. Wainwright, 238 So.2d 65 (Fla. 1970),(failure to call witnesses on behalf of defense is within discretion of trial counsel); Brown v. State, No. 81-982 (Fla. 5th DCA, Sept. 23, 1981), (1981 FLW 2070); Ables v. State, No. 81-997 (Fla. 5th DCA, Sept. 1, 1981), (1981 FLW 1944),(failure to talk to or subpoena alleged witnesses was facially insufficient where motion did not allege what prospective testimony would have been); Mauldin v. State, 382 So.2d 844 (Fla. 1st DCA 1980), (failure to have appellant see a psychiatrist and call the doctor as a witness was discretionary act of trial counsel); Powell v. State, 244 So.2d 746 (Fla. 1st DCA 1981), (number of witnesses called on behalf of defense and extent of examination and cross-examination are matters within the discretion of the attorney); Meinsen v. State, 240 So.2d 188 (Fla. 2d DCA 1970), cert. denied 245 So.2d 86 (Fla. 1971); Biggs v. State, 239 So.2d 281 (Fla. 2d DCA 1970); Solloa v. State, 227 So.2d 217 (Fla. 3d DCA 1969).

When an attorney makes a strategic choice after satisfying the vigorous and extensive duty to investigate, courts will seldom if ever find that the choice was the result of ineffective

assistance of counsel. Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982). The record before this Court fully supports Judge Shaeffer's decision to abandon the Motion for Change of Venue. This decision was made only after a full investigation into the issue. No error is present here.

B. Trial Phase

Appellant next contends that defense counsel failed to follow up investigative leads concerning admissions by co-defendant, Ty Johnston, that he was the perpetrator of the crime. Appellant's contention is based on pure speculation and is contrary to Judge Shaeffer's testimony at the Rule 3.850 hearing:

> Q. You became aware, did you not, that there were two witnesses or persons who were in holding cells or with the co-defendant, Ty Johnston, at some point that had heard equivocal statements made by Mr. Johnston concerning his participation in the case?
>
> A. I do recall that, yes.
>
> Q. Did you put them on in the defense case?
>
> A. No, I did not.
>
> Q. Was there any reason for not doing so?
>
> A. Probably the reason for it was, first of all, I was not certain of that. We had done a little bit of follow up investigation along that line and found that these witnesses were equivocating, that they were not particularly stating what I thought they might have stated, or as strongly as I thought they might have stated. I wasn't absolutely certain that their testimony would be admissible, and I din't think in all candor that the -- even if they were to state what I had hoped they would state in the light most favorable to Mr. Clark, that it wouldn't have been worth giving up closing argument for.
> (TR78-79)

As previously noted, the failure to call witneses on behalf of the defense is a matter of personal judgment and is not a ground for collateral relief. United States v. Rubin, supra. Furthermore, the tactical decision to offer no testimony in order to gain the right to closing argument cannot be deemed ineffective assistance of counsel. Conyers v. Wainwright, 309 F. Supp. 1101 (S.D. Fla. 1970).2/

C. Penalty Phase

In the present cause, Appellant has made numerous allegations concerning trial counsel's failure to properly prepare his case for sentencing. In Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), the defendant made similar claims. The court applied the following standard:

> "This duty to investigate and prepare is, however, far from limitless, and not every breach thereof will mean that counsel has failed to render reasonably effective assistance. "Counsel for a criminal defendant is not required to pursue every path until it bears fruit or until all conceivable hope withers." Lovett v. Florida, 627 F.2d 706, 708 (5th Cir. 1980).

2/ A review of this Court's opinion in Appellant's direct appeal establishes the rather limited value that this testimony would have had on his trial. This Court stated:

> "The evidence upon which Clark relied to support his motion for new trial in reality was not newly discovered evidence but rather was only a newly discovered witness. This evidence is of an inherently non credible nature and merely goes to impeach the credibility of a witness."

> Condemning the inevitable and understandable tendencies to the contrary, our cases uniformly command that counsel's effectiveness may not be assessed through the finely ground lenses of 20/20 hindsight -- and this command is especially compelling reviewing claims of ineffective assistance that are grounded in allegations of inadequate investigation and preparation. "Reasonably effective assistance" must be judged from the perspective of counsel taking into account all of the circumstances of the case, but only as those circumstances were known to him at the time in question. Further, even when counsel's investigation and preparation are determined to have been seriously inadequate, there must be a showing that the habeas petitioner was to some degree prejudiced thereby . . ."

While defense counsel had a duty to investigate sources of evidence that may have been helpful in Appellant's defense, there is nothing in the record to establish that trial counsel (Susan Shaeffer) did otherwise.

As if trial counsel could do nothing right, Appellant first argues that while Judge Shaeffer pressed the court for a confidential psychiatric examination, she should have renewed this request at the sentencing hearing. Appellee would first submit that counsel is not required to pursue every path until it bears fruit or until all hope withers. Lovett v. Florida, 627 F. 2d 706, 708 (5th Cir. 1980). Here, counsel asked for a confidential expert and the trial judge refused this request. There is nothing in the record to support that the court would have changed its mind. This is especially true in light of the state of the law at the time. See Fla. R. Crim. P. 3.216. Counsel cannot be judged ineffective by virtue of his

failure to anticipate future developments in the law. Parker v. North Carolina, 397 U. S. 790 (1970); Davis v. Wainwright, 547 F.2d 261 (5th Cir. 1977); Meeks v. State, 382 So.2d 673 (Fla. 1980). Clairvoyance is not a required attribute of effective representation. Cooks v. United States, 461 F.2d 530, 532 (5th Cir. 1972). Appellee would further point out that Appellant can only speculate as to what another expert might have testified to. He did not call a psychiatric expert to testify at the Rule 3.850 hearing.3/

In Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983), the Eleventh Circuit noted that Lockett v. Ohio, 438 U.S. 586 (1978), requires that defendants have an opportunity to present any evidence in mitigation, however, the court did not draw a corresponding duty on defense counsel to present general character evidence in every capital case:

> "Acknowledgment of the importance of character testimony and the right to have it considered by the sentencing body when presented do not of itself speak to the duty of counsel. As we discuss below, the posture of a given case may well justify, if not require, an effective attorney to refrain from presenting such evidence. . ."
>
> * * * *
>
> [9] The scope of counsel's duty to investigate character evidence in capital cases

3/ It should be remembered that expert testimony, even when it is uncontradicted is not binding on the finder of fact. United States v. Mota, 598 F.2d 995 (5th Cir. 1979); United States v. Hall, 583 F.2d 1288 (5th Cir. 1978).

> cannot be separated from the rule, articulated above, that counsel is not required under Woodson, Lockett and Eddings to present to the jury any arguably mitigating character evidence that might exist. In many cases, counsel could reasonably conclude that such evidence would be of little persuasive value or that it would cause more harm than good by opening the door for harmful cross-examination or rebuttal evidence. See, e.g., Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 190) ("[w]hile counsel failed to interview and subpoena certain witnesses, this constituted trial strategy since to do so would have opened the door to introduction of Easter's prior conviction"). Having conducted a sufficient investigation, counsel may make a reasonable strategic judgment to present less than all possible available evidence in mitigation.

During the penalty phase, Judge Shaeffer entered into a stipulation with the prosecutor whereby it was announced to the jury that the defense would waive the presentation of live testimony of Dr. Henninger from California. The jury was then told that if the doctor had been called to testify, he would have said that it was his opinion that at the time of the previous offense, Appellant was insane and should not have been held accountable for his actions. (TR79) (R3169) Judge Shaeffer did not want the facts of the California case (homosexual suicide pact) presented. She had spent three (3) days in California taking depositions; interviewing all potential defense witnesses; speaking with Appellant's prior defense counsel and doctor; and reviewing the California appellate decision. She believed that to have presented these witnesses at trial would have had a devastating effect on Appellant's trial. (TR174) The California

opinion indicated that this was one of the most brutal and aggravated homicides ever committed. The opinion also refuted the idea that this was a legitimate suicide attempt. (TR175) Since the prosecutor gave her the option of either staying away from the crime or going into all the facts, they decided, after much consideration, that they would be better off sticking to the bare record.4/ There were no facts that developed to indicate a sanity inquisition was warranted other than the report issued by Dr. Henninger ten years earlier. (TR91)5/

To develop mitigating evidence, Judge Shaeffer and an investigator went to California and spoke with friends of Appellant. (TR94). While they all liked Appellant and thought he was a fine fellow, the problem was he had told them that he had gone to prison the first time for killing his wife. (TR94) They were not aware that he had actually killed a 14 year old boy. (TR94) Once this story became public, the people in Appellant's home town were no longer well-disposed towards him. (TR94-95) Even if these witnesses would have been willing to testify that they liked Clark and thought he was a nice man, Shaeffer did not feel that this type of testimony would have been relevant to the penalty phase. (TR95) She did note, however,

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4/ In the California case, Appellant refused to allow his attorney to assert the defense of insanity. (R3187)

5/ Judge Shaefer noted that she had tried first degree murder cases where the insanity defense had been presented. She had never lost one of these cases. (TR93)

that if this kind of testimony had been available, she would have pursued it. (TR95)

Judge Shaeffer also considered calling Jean Dupree as a witness. (TR95) There was a possibility that her testimony might have lent itself to a mitigating factor, to wit: the substantial domination of one person over another. (TR176, 185-186) This course of action was ruled out. First of all, this testimony would not have been accurate as she knew the facts to be. (TR175-176) Second, there were taped conversations between Appellant and Mr. Johnston in which they conspired to kill Mrs. Dupree's daughter. (TR178) If Shaeffer had put Mrs. Dupree on the stand to testify what a fine fellow Appellant was, she was afraid that the trial judge might then allow the State to play the tapes and then inquire as to whether her opinion had changed. (TR178-179) She believed that these tapes would have been devastating to their case at the sentencing phase and the trial judge agreed with her. (TR179; 185-186; 190-191).

Judge Shaeffer attempted to locate Appellant's family, however, she was unable to find them. Appellant did not want them notified of his difficulties anyway. Even if she did not put Appellant's family on the stand, Judge Shaeffer would have preferred to have the family present and standing behind Appellant at trial. (TR96,107) Appellant would not assist her in this regard. (TR96,107)

In Washington v. Strickland, supra, the court held that, ". . . an attorney who makes a strategic choice to channel his investigation into fewer than all possible lines of defense

is effective so long as the assumptions upon which he bases his strategy are reasonable and his choices on the basis of those assumptions are reasonable."

In United States v. Guerro, 628 F.2d 410, 413 (5th Cir. 1980), the court held that complaints concerning uncalled witnesses impose a heavy showing since the presentation of testimonial evidence is a matter of trial strategy and often allegations of what a witness would have testified to is very misleading. The record in the present case suggests that Clark's counsel did, in fact, contemplate the possibility of a character witness defense at the sentencing stage and explored that possibility thoroughly. Her decision not to present this evidence was both reasonable and unquestionably the better course of conduct, considering the alternatives.

Finally, appellate counsel faults co-counsel Murry for referring to Appellant as a "California weirdo." A review of defense counsel's sentencing argument reveals that Murry used this expression in response to a comment made by the prosecutor in closing. Murry was trying to avoid having the jury sentence Appellant based on his appearance.

> "I'm going to reiterate some of the things Miss Schaeffer said. I'm asking you to disregard his appearance and his background -- or basically his background from your decision. You can't recommend death because he looks like a California cuckoo or weirdo, or something like that." (R3196)
>
> (emphasis added)

Clearly, counsel's argument was not out of line.

The courts of this State have always placed a heavy burden on a defendant attempting to establish a claim of ineffective assistance of cousel. See Meeks v. State, 382 So.2d 673 (Fla. 1980); Foxworth v. State, 267 So.2d 647 (Fla. 1972): Dismuke v. State, 388 So.2d 1324 (Fla. 5th DCA 1980). In assessing whether defense counsel's performance constituted "reasonably effective assistance," assistance must be evaluated from the perspective of counsel, taking into account all of the circumstances of the case, but only as those circumstances are known to counsel at the time. Sullivan v. Wainwright, 695 F.2d 1306 (11th Cir. 1983).

In reviewing this case based on the standards as set forth by this Court, it is apparent that Appellant did indeed receive effective assistance of counsel during the preparation and execution of the penalty phase. In fact, Appellant received exceedingly effective assistance of counsel. As pointed out in Songer v. State, 419 So.2d 1044 (Fla. 1982), representation is not inadequate merely because strategy proves unsuccessful.

CONCLUSION

Based on the foregoing reasons, argument and authorities, Appellee respectfully urges that this Honorable Court affirm the denial of Appellant's 3.850 Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. Mail to Neal R. Lewis, Esquire, 1899 South Bayshore Drive, Miami, Florida 33133; Richard Hersch, Esquire, 5901 N.W. 74th Street, Suite 300, Miami, Florida 33143 and Patrice Talisman, Esquire, 169 East Flagler Street, Suite 1414, Miami, Florida 33141 on this the 1st day of March, 1984.

Of Counsel for Appellee