IN THE SUPREME COURT OF FLORIDA

Case No. 64,012

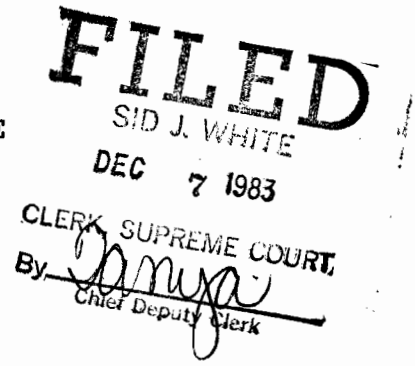
RAYMOND ROBERT CLARK,

Appellant,

-v-

STATE OF FLORIDA,

Appellee.



APPEAL FROM THE CIRCUIT COURT OF THE
SIXTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR PINELLAS COUNTY
CRIMINAL DIVISION

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

The appellant, RAYMOND ROBERT CLARK, was the defendant in the trial court and was prosecuted by the appellee, the State of Florida. These parties will be referred to as the appellant and the appellee respectively. The record of the trial will be designated by the symbol "O.R." and the record of the proceedings on appellant's 3.850 motion by the symbol "R". All emphasis is added unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Appellant and co-defendant, Ty Johnston, were charged with the kidnapping and murder of David G. Drake on April 27, 1977. At trial, Johnston's testimony formed the basis of the appellee's case. Johnston had previously entered into plea negotiations with the appellee allowing him to plead guilty to second degree murder in order to avoid the possibility of a death sentence and twenty-five year minimum mandatory sentence. (O.R. 1366) In exchange for his plea, Johnston agreed to testify on behalf of the appellee and against Raymond Clark. (O.R. 1367)

Johnston's testimony related that he and Clark sought to obtain funds for their return to California on April 27, 1977. (O.R. 1367-69) They drove into several bank parking lots in search of a potential victim, eventually abducting a bank patron. (O.R. 1373) Johnston testified that he drove Clark's Blazer while Clark directed the victim to drive to several secluded areas. (O.R. 1375-6) It was at one of these areas that the victim's body was eventually found.

While evidence was presented that Raymond Clark made efforts to cash a check drawn on the victim's bank account and that Clark attempted to extort money from the victim's family, the only evidence bearing directly on the events immediately preceding the victim's death came from Ty Johnston. Raymond Clark presented no defense at trial, nor was any evidence offered in the sentencing phase of the proceedings.

Although Johnston's testimony was that Raymond Clark fired the fatal shots, Mr. Clark, at sentencing, stated to the court that, in fact, it was Johnson who killed the victim. The killing was not planned, intended or contemplated by Raymond Robert Clark, nor did he expect Johnston to use lethal force.

Trial commenced on September 20, 1977, after jury selection. On September 25, 1977, appellant Raymond Robert Clark was convicted in the Circuit Court on one count of murder in the first degree, kidnapping and extortion in violation of §782.04(1), §787.01, and §836.05, Florida Statutes respectively. Following the jury's verdict, on the 26th day of September, 1977, the court conducted a separate sentencing proceeding before the trial jury as required by §921.141, Florida Statutes, Appointed counsel's trial partner, Martin Murry, presented an allocution to the court in support of mitigation, however, no witnesses were called during this phase of the proceedings. The jury recommended that appellant Raymond Robert Clark be sentenced to death. Following the jury's recommendation, the court sentenced appellant Raymond Robert Clark to death on the first degree murder count. (O.R. 1477) Mr. Clark was sentenced

to life on the kidnapping count and 15 years on the extortion count. The extortion and kidnapping sentences were to run consecutively. (O.R. 1478-9)

A motion for new trial was timely filed and the same was denied by the trial judge on October 24, 1977. Appeal was taken to the Supreme Court of Florida, pursuant to Florida Rules of Appellate Procedure, 9.030(a)(1)(A)(i). The judgment and sentence were affirmed by the Supreme Court of Florida on November 21, 1979. (379 So.2d 97). A petition for rehearing was denied February 18, 1980.

Pursuant to Rule 3.850, Fla.R.Cr.P., motion was filed with the trial judge to vacate the sentence imposed. Hearing on the motion was held on March 23, 1983. This motion was denied by order dated July 8, 1983. This appeal to the Supreme Court of Florida, pursuant to Rule 9.030(a)(1)(A)(i) was filed on July 13, 1983.

Other than the instant motion and the direct appeal to the Supreme Court of Florida, supra, and a Motion for Writ of Habeas Corpus, filed on behalf of a class of inmates including appellant Raymond Robert Clark, Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), no other post conviction motions have been filed.

A timely Notice of Appeal was filed and the instant proceedings ensued.

ARGUMENT

I.

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

The lower court's denial of Defendant's request for appointment of a psychiatrist to aid counsel in the preparation of the defense violated his Sixth Amendment rights to effective assistance of counsel. The facts giving rise to this issue are as follows: During pretrial proceedings, defense counsel requested the appointment of an independent psychiatrist to aid her in the preparation of an insanity defense.(R.75). This request was based on the finding of Dr. O.E. Heninger, a noted California psychiatrist, that at the time of a prior incident, the Defendant was insane and unable to determine right from wrong.(R.76). The lower court denied this request on the ground that the report of such a psychiatrist must be given to the prosecution as per Florida Rules of Criminal Procedure 3.210.(R. 76). Defense counsel elected to forego the evaluation under these conditions.(O.R.3222-3229 and R.77). This violated the Defendant's right to effective assistance of counsel, as will be shown below. Additionally, trial counsel's failure to request psychiatric evaluations to aid her in the sentencing phase inured to the actual and substantial detriment of the Defendant.

At the hearing on the 3.850 Motion, Susan Schaeffer, original defense counsel, testified consistently with the above statement of facts. (R.75-77). She also testified that in her

opinion as an attorney, Raymond Clark was competent. (R.91-103). The lower court relied in part on this unsubstantiated opinion in holding that its denial of counsel Schaeffer's motion for appointment of an "independent confidential psychiatric expert" did not deprive Clark of effective assistance of counsel. The lower court further found that this prior ruling was not a denial of effective assistance because "defense counsel is not charged with anticipating changes in the law." (R.51).

There can be no doubt that an effective defense sometimes requires the assistance of an expert witness. The commentary to the American Bar Association Standards on providing defense services notes that:

> [t]he quality of representation at trial may be excellent and yet valueless to the defendant if his defense requires...the services of a[n]...expert and no such services are available. ABA Standards, Providing Defense Service, 22-23 (App. Draft 1968). Similarly, a distinguished committee of lawyers, state and federal judges, and acamedicians reported to the Attorney General that adequate representation of criminal defendants requires in some cases provision for engaging experts in addition to appointment of counsel.

Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice, 45-46 (1963); Williams v. Martin, 618 F.2d 1021, 1025 (4th Cir. 1980). Further, it has been recognized that the obligation of the government to provide an indigent defendant with the assistance of an expert is firmly based on the Equal Protection Clause of the Constitution. Jacobs v. United States, 350 F.2d 571 (4th Cir. 1965) relying on Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585 100 L.Ed. 891 (1956). This obligation arises because the assignment of a lawyer to an indigent must not be made "under

such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." Powell v. Alabama, 287 U.S. 45, 71, 53 S.Ct. 55, 65, 77 L.Ed. 158 (1932).

In the cause at bar, it is clear that defense counsel could not adequately prepare, much less present, a viable insanity defense without the aid of an expert psychiatric witness and that if the defendant Clark, could afford such an expert, he would have hired one. While defense attorneys and officers of the court familiar with the criminal justice system often feel they are capable of identifying psychological and psychiatric problems, a defendant is entitled to have all possible defenses examined. Washington v. Strickland, 693 F.2d 1243 (11th Cir. 1982). This is especially true where a prior psychiatric evaluation found that Clark was insane and unable to determine right from wrong. Because Clark's defense could not be fully developed without professional assistance that would have been available to a person who could afford his own defense, Clark has established he was denied equal protection of the law. Further, the refusal of the court to provide and expert, deprived him of the effective assistance of counsel and due process of law in violation the the Sixth and Fourteenth Amendments. See, Williams, supra (where the Fourth Circuit held that a defendant was denied effective assistance of counsel when the Trial Court refused to appoint a forensic pathologist to aid the preparation of his defense).

The lower court's statement that it would provide such an expert if his reports would be made available to the prosecution

did not comply with the dictates of either the Sixth or Fourteenth Amendments. It is the majority position that where an accused or his counsel hires a psychiatrist for the sole purpose of aiding the accuses and his counsel in the preparation of his defense, any information obtained by the psychiatrist is protected by the attorney-client privilege. United States v. Alvarez, 519 F.2d 1036 (3d Cir. 1975); United States v. Smith, 425 F.Supp. 1038 (E.D.N.Y. 1976); State v. Toste, 424 A.2d 293 (Conn. 1979); People v. Lines, 531 P.2d 793 (Cal. 1975); People v. Hilliker, 185 N.W.2d 831 (Mich.App. 1971); State v. Kociolek, 129 A.2d 417 (N.J. 1957); City and County of San Francisco v. Superior Court, 231 P.2d 26 (Cal. 1951).

The Florida courts have also adopted this position. Pouncy v. State, 353 So.2d 640 (Fla. 3d DCA 1977). The Third District excerpted the following language from Alvarez, supra, as the basis for its holding:

> [T]he effective assistance of counsel with respect to the preparation of an insanity defense demands recognition that a defendant be as free to communicate with a psychiatric expert as with the attorney he is assisting. If the expert is later used as a witness on behalf of the defendant, obviously the cloak of the privilege ends. But when, as here, the defendant does not call the expert the same privilege applies with respect to communications from the defendant as applies to such communications to the attorney himself.
>
> * * * *
>
> The issue here is whether a defense counsel on a case involving a potential of insanity must run the risk that a psychiatric expert whom he hires to advise him with respect to the defendant's mental condition may be forced to be an involuntary government witness. The effect of such a rule would, we think, have the inevitable effect of depriving defendants of the effective assistance of counsel in such cases. A psychiatrist will of necessity make inquiry about the facts surrounding the alleged crime, just as the

> attorney will. Disclosures made to the attorney cannot be used to furnish proof in the government's case. Disclosures made to the attorney's expert should be equally unavailable, at least until he is placed on the witness stand. The attorney must be free to make an informed judgment with respect to the best course of the defense without the inhibition of creating a potential government witness.

353 So.2d at 691 quoting Alvarez, 519 F.2d at 1046-1047.

Alvarez specifically tied together the attorney/client privilege and the Sixth Amendment right to effective counsel. See also, Toste, supra (Sixth Amendment violated where prosecution calls as witness psychiatric expert appointed by court for indigent defendant for sole purpose of aiding in the preparation of the defense: "The fact that the psychiatric expert was appointed by the court rather than employed by the defense is irrelevant: the law affords no lesser protection for a defendant who is indigent than for one with means to retain his own psychiatrist to prepare a defense.")

Thus, the conditioning of the appointment of a psychiatric expert on defendant's waiving his attorney-client privilege, deprived the defendant of his right to equal protection and effective assistance of counsel. Florida recognized this by adopting Fla.R.Cr.P. 3.216 in 1980. The pertinent provision of this rule reads as follows:

> (a) When in any criminal case counsel for a defendant adjudged to be indigent or partially indigent, whether public defender or court appointed, shall have reason to believe that the defendant may be incompetent to stand trial or that he may have been insane at the time of the offense, he may so inform the court who shall appoint one expert to examine the defendant in order to assist his attorney in the preparation of his defense. Such expert shall report only to the attorney for the defendant and matters related to the expert shall be deemed to fall under the lawyer-client privilege.

This rule, being a constitutional rule of criminal procedure, should be given retroactive effect.

In Witt v. State, 387 So.2d 922, 931 (Fla.1982) this Court set forth the standard for retroactive application of law changes on post conviction relief:

> To summarize, we today hold that an alleged change of law will not be considered in a capital case under Rule 3.850 unless the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance.

This Court then went on to state that most of the law changes of "fundamental significance" will 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.

Id. at 929.

This rule in question (entitlement to an expert for preparation of the defense) was adopted by this Court, therefore the first qualification -- that the change in law emanate from this Court -- has not been met. The Florida Bar, In Re Rules of Criminal Procedure, 389 So.2d 610 (Fla. 1980). Second, this rule is based on a defendant's Sixth Amendment right to effective assistance of counsel, and Fourteenth Amendment right to equal protection. Therefore it is constitutional in nature

and meets the second requirement. The third requirement is that the change constitute a development of fundamental significance. The criteria to be used in determining whether this requirement is met are: d) "The purpose to be served by the new standard b) the extent of the reliance by law enforcement authorities on the old standards, and c) the effect on the administration of justice of a retroactive application of the old standards." Stovall v. Denno, 388 U.S. 293, 297, 87 S.Ct. 1967, 18 L.Ed.2d 1199, 1205 (1967).

The purpose of this rule and of the Sixth Amendment requirement of effective assistance at trial is to insure the truth finding function of the criminal trial and quell all questions about the accuracy of guilty verdicts. The denial of a defendant's right to use of an expert in the preparation of his case goes to the heart of this function of a trial for it is often only through the use of such experts that in this complex world can we arrive at the truth.

Second, there does not seem to have a great deal of reliance on this rule in the past, since there are few Florida cases on this point. In fact, Pouncy v. State, supra, is the only Florida case to deal with this issue and it foreshadowed this Court's adoption of the rule. Third, the effect of holding this rule retroactive would not be great. Trial counsel would have had to request that a confidential expert be appointed. Therefore, there would not be a flood of litigants raising this point on post-conviction relief motions. Thus, as in Hankerson v. North Carolina, infra, the purpose of this rule should be

given overriding weight and that purpose requires that this rule be given retroactive effect. Consequently, Raymond Robert Clark was denied effective assistance of counsel through the lower court's denial of his motion to appoint a confidential psychiatric expert.[1]

As the United States Supreme Court said in Hankerson v. North Carolina, 432 U.S. 233, 241, 97 S.Ct. 2339, 53 L.Ed.2d 306, 314 (1977):

> Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances. Williams v. United States, 401 U.S. 646, 653, 28 L.Ed.2d 388, 91 S.Ct. 1148 (1971); See Adams v. Illinois, 405 U.S. 278, 280, 31 L.Ed.2d 101, 92 S.Ct. 916 (1972); Roberts v. Russell, 392 U.S. 293, 295, 20 L.Ed.2d 1100, 88 S.Ct. 1921 (1968).

Therefore, it is apparent that Rule 3.216(a) which sets out one of the requirements of effective assistance of counsel as dictated by the Sixth Amendment, must be given retroactive effect.

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[1] The error was clearly that of the lower court, not of trial counsel, in failing to anticipate a change in the law as held by the lower court.

ARGUMENT

II.

THE LOWER COURT ERRED IN DENYING THE MOTION TO VACATE WITH RESPECT TO PROPORTIONALITY REVIEW OF FLORIDA SENTENCING SCHEME

Although the lower court rejected the issues raised in appellant's motion pursuant to Rule 3.850, Florida Rules of Criminal Procedure, the effects of that denial deal directly with the proportionality of the death sentence imposed and the factors which govern the imposition of the death penalty. In this respect, the issues raised concerning the right to prepare a meaningful defense, based on psychiatric evaluation as set forth in Pouncy v. Florida, supra, and subsequently adopted in Florida Rules of Criminal Procedure, Rule 3.216, adopted July 18, 1980, effective July 1, 1980 (389 So.2d 610), speak directly to a violation of due process and equal protection rights. Appellant was denied the proportionality review under Profitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 49 L.Ed.2d 913 (1976), as well as due process and equal protection required prior to "execution" of the sentence.

The right to this legal proportionality review was required and was absent on direct review to this Court. If the psychiatric evaluation was denied as a result of the trial court's ruling, that erroneous ruling creates reversible error. Had the inquiry into the psychological-psychiatric profile of Raymond Clark been waived by defense counsel, then, counsel was ineffective. As a direct result, however, of one or the other

of these errors, this Court was not presented with this issue resulting in the denial of Raymond Clark to his right to the legal proportionality review.

In failing to address the proportionality disparity as a result of these factors, appellant's death sentence runs afoul of Florida Case Law as well as the Eighth and Fourteenth Amendments to the United States Constitution.

In the case of Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), the Supreme Court stated that:

> . . . to guard further against a situation comparable to that presently in Furman, the Supreme Court of Georgia compares each death sentence with the sentences imposed on similarly situated defendants to insure that the sentence of death in a particular case is not disproportionate.

(p. 198)

Differing from Gregg v. Georgia, supra, the Supreme Court in Profitt made a specific determination that the Florida Supreme Court:

> . . . may consider its function to (guarantee) that the (aggravating and mitigating) reasons present in one case will reach a similar result to that reached under the similar circumstances in another case. . . If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great. State v. Dixon, 283 So.2d 1, 10 (1973) (p. 251).

Appellant was denied these rights for the reasons below set forth.

One of the elements that, by definition, is required to be considered in a proportionality review is the psychotic/non-psychotic state of mind of the individual at the time of the commission of the offense. At the time of appellant's trial (September 20, 1977), the rules of Court did

not permit, except under circumstances which trial counsels rejected, this indigent appellant to have the benefit of an independent psychiatric evaluation and review.

Due to the circumstances of appellant's direct appeal in this Court, this issue was raised six months prior to the effective date of the rule change adopted by Florida Rule of Criminal Procedure, 3.216 (adopted July 1980). Thus, there never has been addressed by this Court the proportionality review of appellant's competency to stand trial, and as important, his ability to form the necessary criminal intent at the time of the commission of the offense.

Appellant has been denied the benefit of that which has now been made the law, endorsed by this Court (389 So.2d 610), and now deemed necessary to the proper and competent representation of an indigent defendant.

This specific rule was adopted to examine each defendant's full panoply of rights, and this denial of rights to this appellant has not been weighed into a proportionality review of his sentence. No other case before this Court has been reviewed for these proportionality grounds, nor has any other case in any other jurisdiction met this issue.

The review which is then required in the instant case requires due process applications and protections which insure appellant that his rights are not arbitrarily abrogated. Vitek v. Jones, 445 U.S. 480 (1980). To protect the individual against arbitrary government action is the touchstone of due process. Wolff v. McDonnell, 418 U.S. 539 (1974). In applying

these principles to appellant's case merely reiterates that when an individual's life hangs in the balance, a condemned person has a material right to appellate review of the fitness of that sentence. Such right may not be arbitrarily denied and continue to fall within that ambit.

The Supreme Court of the United States in Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), set forth these basic principles as standards to guide, regularize, and review rationally, the process for imposing the sentence to death. Obviously these standards could not and were not applied as appellant was unable to avail himself of the rule change (clearly encompassing the issues raised in appellant's direct appeal to this Court, Clark v. State, 379 So.2d 97 (1979)(rehearing den. Feb. 18, 1980).

The relief has been mandated in the recent opinion of Zant v. Stephens, 51 U.S.L.W. 489 (June 22, 1983). In setting forth its opinion, the Court noted:

> In Gregg, 428 U.S. at 204-205, we have also been assured that a death sentence will be vacated if it is excessive or substantially disproportionate to the penalties that have been imposed under similar circumstances. (p. 4989).

The Court also stated in Barclay v. Florida, 51 U.S.L.W. 5206, 5211 (U.S. July 6, 1983)(plurality opinion); id at 5211, 5215 (concurring opinion of Justice Stephens) that there is a "[c]onstitutionally mandated responsibility to perform meaningful review. These tenets all set forth to ensure "that sentencing discretion in capital cases is channelled so that capricious results are avoided." Hopper v. Evans, 456 U.S. 605, 611 (1982).

Since Rule 3.216 Florida Rules of Criminal Procedure, is the rule in all criminal cases, the bizarre results of its inapplicability prior to its enactment in a capitol case in which death is imposed flies in the face of all tests or standards of proportionality. For this Court to assert that meaningful proportionality review exists, the assurances in Gregg v. Georgia, supra, p. 206, must be met. ". . . if a time comes when juries generally do not impose the death sentence in a certain kind of murder case, . . . no defendant convicted under such circumstances will suffer a sentence of death." This standard made no reference to ante or post rule change. The express opinion of this Court need only facial review to determine that a change in rule or law to which a defendant is now entitled is the standard for proportionality review. Appellant, Raymond Clark, has not had the benefit of the Rule change which he requested and preserved. Such process has been denied him.

Judge Rolles, in the opinion of McMunn v. State, 264 So.2d 868 (1st DCA 1972), addressed this issue squarely . . .:

> The defense of insanity is as fundamental a right on the part of a defendant as is a plea of not guilty. Scienter must be proved by the state and it is elementary that an insane person is incapable of formulating scienter. Procedural rules for filing the plea may be proscribed; however, such rules cannot be formed in such a manner as to require a defendant to sacrifice the constitutional guarantee against self-incrimination in order to avail himself of this defense.

page 870.[2]

It is apparent that non-indigent defendants in other Districts within the State of Florida, and based upon interpretation of the Rules, would necessarily have had the benefit of independent psychiatric evaluation without the need of Court appointment. The result then, would be that others similarly situate, though not indigent, would have the opportunity to raise the legal defense not available to appellant herein. The disparity thus resulting, would not be one of sentencing (cf. Sullivan v. State, Fla.S.Ct. opinion filed 11/25/83 [8 FLW, 456]), but one of legal proportionality. Denying appellant's request at the trial level has frustrated this Court's proportionality review. In not permitting the independent expert appointment as requested, the benefits of the sentencing guidelines as required in Proffit v. Florida, supra, were abridged in that the crucial factor of mental capacity was removed from the formula. The exclusion of this material factor from the trial, not only denied appellant due process under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, §9 Florida Constitution, that rendered this Court's proportionality review

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[2] Judge Rolle's reliance on Florida Constitutional Article I, §9, F.S.A. and United States Constitutional Amendment 14 was correct in that the Pouncy v. State decision, infra, encompasses these principles in being the polestar for the Rule of Criminal Procedure 3.216.

to be based upon a psychiatric impairment or insanity of the defendant as a factor contained within the formula.[3]

As a result of the inherent infirmities of the procedures in the trial court below, it is requested that this matter be reversed and remanded, and a hearing be held to determine whether it is inconsistent with the findings of this Court.

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[3] The error was clearly that of the lower court, not of trial counsel, in failing to anticipate a change in the law as held by the lower court.

ARGUMENT

III.

THE EFFECTIVENESS OF TRIAL COUNSEL FAILED TO MEET MINIMUM STANDARDS AND DENIED THE DEFENDANT HIS SIXTH AMENDMENT CONSTITUTIONAL RIGHT[4]

Although trial counsel endeavored to defend the allegations against the defendant with zeal and commitment, the failure to adequately prepare at all stages of the trial rendered her ineffective. From pretrial preparation (in attempting to have an expert appointed for a psychiatric evaluation), continuing through trial, to the subsequent imposition of the penalty of death (when the motion for the expert was not renewed), counsel was either ineffective for her actions or non-actions, or was rendered ineffective by the trial court rulings.

The standard for addressing an ineffective assistance of counsel claim appears in Knight v. State, 394 So.2d 997 (Fla. 1981):

> First, the specific omission or overt act upon which the claim of ineffective assistance of counsel is based must be detailed in the appropriate pleading.

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[4] At hearing on the appellant's 3.850 motion in the court below, the previously raised Witherspoon violations were expressly waived. (See R. at 4; 65) Similarly, allegations that trial counsel's failure to file motions to obtain investigators and experts constituted ineffective assistance of counsel (specifically paragraph 5a through 5d on page 6 of appellant's motion), was abandoned. (R. at 6; 40) Although the trial court stated that it "would entertain" a motion to strike other portions of the appellant's motion, the record does not reveal that such action was expressly sought by the state. Consequently, the trial court's Order (R. at 50), identifying grounds waived is incorrect. The arguments abandoned are only those which appear at page 4, paragraph 2 and page 6, paragraph

(Footnote Continued)

> Second, the defendant has the burden to show that this specific omission or overt act was a substantial and serious deficiency measurably below that of competent counsel . . .
>
> Third, the defendant has the burden to show that this 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. . .
>
> 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.

394 So.2d at 1001.

However, the outcome-determinative standard has failed to withstand constitutional scrutiny. In Washington v. Strickland, 693 F.2d 1243 (11th Cir. 1982) (en banc), the Eleventh Circuit rejected the outcome determinative test stating:

> We believe that where the petitioner has shouldered the considerable burden of showing a violation of his Sixth Amendment rights that resulted in actual and substantial disadvantage to his case, it is inequitable to encumber him with the further responsibility of showing that the disadvantage determined the outcome of the entire case. [Citations omitted]

693 F.2d at 1262. Thus, the court found that a defendant seeking to assert a Sixth Amendment claim need only show that he suffered "actual and substantial detriment to the conduct of his defense." (Footnote omitted). 693 F.2d at 1263-64.

Under either standard the allegations forwarded and proof presented by Clark at the 3.850 hearing below, met the burden of

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(Footnote Continued)
5a through 5b in appellant's 3.850 motion. R. at 4; 6.

showing a denial of effective counsel. Set forth below are the numerous instances of the defendant's Sixth Amendment right to effective assistance of counsel.

A. Ineffectiveness of Counsel at Pretrial Stage

Counsel correctly perceived that the community attitude in Pinellas County was such that defendant could not empanel a jury from the community that would fair and impartial. To this end, a motion for change of venue was prepared and filed with the court. (O.R. 880-927) Counsel presented extensive evidence concerning the number and breadth of newspaper articles as well as television coverage centering upon the murder of the victim, Drake. This media coverage accented allegations of homosexuality on the part of defendant Clark, as well as the prior conviction of Clark for murder in California.

Affidavits, as required by Fla.R.Cr.P. 3.240(b)(1), were filed in supporting motions, and testimony was taken to determine the extent of the circulation of the stories published or broadcast. (O.R. 2939-3033) However, trial counsel presented half of the story. Trial counsel failed to present any evidence through psychologists or sociologists as to the effect of the media exposure on the public. United States v. Dillinger, 472 F.2d 340 (7th Cir. 1972). In a county the size of Pinellas, considering the newspaper articles and media coverage stated above, it is apparent that "saturation" of the community had occurred. The veniremen who appeared in court could scarely have escaped this pervasive influence.

Nonetheless, when trial counsel was questioned at the hearing on Clark's motion below, the following answers were elicited:

> Q: (by Mr. Lewis) Were you aware at the time of this hearing, no community witnesses were called: people from the community who may or may not have been aware of the case?
>
> A: I feel certain they were not.
>
> Q: And to the best of your recollection, no jury selection group such as National Jury Project or a group of that type, was involved in any aspect of it?
>
> A: That is true.

(R. 69).

In presenting supporting materials for the venue change, counsel gave little more than a cursory attempt to comply with required standards needed to effectuate full presentation of the issue. This conduct fell below the standard necessary to render effective assistance of counsel.

Although it has become somewhat of a legal cliche, the statement that a defendant is entitled to a fair, if not perfect trial, but nothing less, holds true for appellant herein. "In all cases constitutional safeguards are to be jealously preserved for the benefit of the accused. . ." United States v. Glasser, 86 L.Ed. 698 (1941). As a result of the failure of counsel to present the venue change motion based upon prevailing competency standards, appellant was denied this right, as encompassed by the Fifth Amendment to the United States Constitution.

Further, defense counsel failed to follow up investigative leads concerning admissions by the co-defendant, Ty Jeffrey Johnston, that he, in fact, was the perpetrator of the crime, deprived appellant of a defense for use at trial. Although a motion was filed post trial based on newly-discovered evidence, this motion was denied, due in part to the fact that the information was available during trial.

B. Trial Phase

Analagous to the instant case, is Enmund v. Florida, __U.S.__, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). As in the instant case, Enmund, supra, dealt directly with the issue of lack of intent on the part of a defendant to effect bodily harm or death upon the victim. Had the investigation proceeded in conformity with the standards of effectiveness set forth above, a viable defense could have been presented. This failure to present the witnesses who would testify as to Ty Johnston's admissions, constituted the ineffectiveness of assistance of counsel.

No investigators were utilized on behalf of the defendant to locate substantiating witnesses, even though counsel was aware of their existence and had received correspondence from them. Although this was raised after the imposition of the death penalty, by way of motion for new trial, no steps were taken to introduce this evidence when the same was readily available, and an apparent defense to the charges.

In reviewing the transcripts, the lack of a theory of defense, as well as the failure to follow up these leads, made the outcome of the trial a foregone conclusion.

C. Penalty Phase

Initially, trial counsel failed to renew her request for psychiatric experts to evaluate appellant Clark. Additionally, it must be recognized that trial counsel presented absolutely no evidence or testimony during the penalty phase of defendant Clark's trial. This action was taken despite the fact that counsel had available to testify Dr. O.E. Henninger, a noted California psychologist, and two civilian witnesses, friends of Clark. This absence of mitigating evidence occurred in the face of what trial counsel must have known was substantial aggravating evidence.

It is an important factor to understand, and to make the jury understand, that the penalty phase of the trial, is truly a life and death situation for the defendant. At the penalty phase, defense counsel's role shifts from that of defending the charges to that of exhibiting to the jury, a different side of defendant. In doing so, counsel is required to call upon any and all resources which would show to the jury any reason why mercy should be extended to the defendant. In the instant case, trial counsel brought to bear no evidence on this issue.

It was at this stage that failure of the trial court to allow the defendant a psychiatric expert, and the failure of trial counsel to renew her request for such an expert, became critical. No less than three mitigating circumstances present

in Florida Statute §921.141 involve factors concerning the mental or emotional condition of the defendant. F.S.§921.131(6)(b), (e), (f). At this stage of the trial it made little difference whether the state would be pertinent to the contents of a psychiatric report. The problem facing counsel was that of presenting a human side of the defendant in mitigation of sentence. (R. 69-73).

On direct appeal of defendant's conviction, this Court reviewed the trial court's finding of six separate aggravating factors. This court found that four of these factors had been doubled up, and that actually only four aggravating factors existed. While this ordinarly would have required a remand for re-sentencing, the absence of any mitigation presented by defendant obviated such a remand. Clark v. State, 379 So.2d 97, 104 (Fla. 1980), citing Hargrove v. State, 366 So.2d 1 (Fla. 1978) and Elledge v. State, 346 So.2d 998 (Fla. 1977). At the least, presentation of some evidence in mitigation would have required a re-sentencing after defendant's direct appeal.

In the penalty phase of a trial, the defendant's life is literally at stake. Failure to place before the jury those attributes of this appellant by "trading off" those mitigating factors, both by statute and by case law, removed from the jury's consideration critical factors resulting in the imposition of the death penalty. Trial counsel determined she was bound -- and incorrectly so -- by those mitigating factors embodied in Florida Statute 921.141. In relying on these factors, the only mitigating factor presented for the jury's

review was a stipulated statement of fact that Dr. Henninger had found the defendant insane at the time of the prior murder in California.

At the hearing on the 3.850 motion, Michael Von Zamft, Esq., who is qualified as an expert in death penalty cases, and specifically the handling of penalty phases, testified that based upon his expert opinion, at least three or more mitigating factors could have been presented. (R. 128-132)

At the hearing below, trial counsel suggested that her reasons for not putting forward this evidence was because she believed that it might have opened the door to additional evidence from the state in aggravation of the penalty. (R. 115-119) While facially this might appear to be a tactical decision of counsel, it was in essence, a non-decision. Appellant Clark is not asserting now that trial counsel made the wrong decision in the penalty phase, but rather that there was no choice but to present <u>whatever</u> evidence could be presented in mitigation. Subsequent events have shown that the total absence of mitigating evidence foreclosed any decision by the sentencing jury to that of death by electrocution.

It may be noted that in exacerbation of the state's substantial evidence of aggravating circumstances, trial counsel numerous times during the sentencing argument, referred to the defendant as a "California weirdo" setting the stage for the jury's recommendation of death. In sum, the actions of counsel in preparation for the penalty phase, and in execution of their duties during the penalty phase, fell woefully short of that

required by the Sixth and Fourteenth Amendments of the United States Constitution.

CONCLUSION

For the reasons presented above, it is respectfully urged that this Court reverse the trial court's denial of the defendant's Motion to Vacate, Set Aside, or Correct Judgment and Sentence, and remand this cause for further proceedings consistent therewith.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellant, was mailed to the offices of Michael Kotler, Esq., Assistant Attorney General, 1313 Tampa Street, Tampa, Florida 33602, this 5th day of December, 1983.

NEAL R. LEWIS