IN THE SUPREME COURT OF FLORIDA

APPEAL NUMBER 64,012

RAYMOND ROBERT CLARK,

Appellant,

-v-

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

NEAL R. LEWIS
1899 South Bayshore Drive
Miami, Florida 33133
(305) 854-0050

RICHARD HERSCH
5901 S.W. 74th Street
Suite 300
Miami, Florida 33143
(305) 667-1009

PATRICE TALISMAN
169 East Flagler Street
Suite 1414
Miami, Florida 33141

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF CITATIONS

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 will rely upon the statement of the case and facts as set forth in his Initial Brief.

As the State has skirted the issues raised within Appellant's Initial Brief, Appellant's Reply Brief will not serially rebut the three responses of the State, but rather will set forth rebuttal in response to those issues presented by appellee.

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

The appellee misperceives the facts and law as set forth in issue I. Appellant Clark, had a singular defense available to him and it was the duty and obligation of trial counsel to pursue this. In the area of psychiatry, where subtle differences in outward appearance, innate mental processes and learned behavior must be reviewed, dissected, and subsequently diagnosed by persons of competent ability, the legal practitioner cannot be said to be qualified to make this determination. Even trial counsel, Susan Shaeffer, though experienced in the law, is not qualified to rule upon the competency of any individual.

In light of the fact that appellant had been found incompetent prior to the trial in California, by a licensed expert, O.E. Henninger, an affirmative obligation to pursue this material fact was required on the part of counsel to reach even the minimum standards of effectiveness.

The fact that this Court made a determination that Clark was not entitled to a "particular psychologist," Clark v. State,

379 So.2d 97 (Fla. 1980) begs the question.

That which the State considers trial tactics still must meet the standards of effectiveness. Due process and equal protection guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution, cannot be cavalierly swept aside by the whim or caprice of any counsel. The failure to neither present a theory of defense nor to pursue avenues available in the preparation of such defense, strikes at the heart of due process and inures to the prejudice of the individual. Such was done in the instant case, and the labeling of the same as a tactical decision fails to address the prejudice to appellant in not having the benefit of an evaluation, to which he was entitled.

Although the law does not require a perfect trial, it does require a fair trial, and nothing less. United States v. Glasser, 86 L.Ed. 680 (1941). In denying the defendant his unequivocal constitutional rights to due process and the failure of counsel to ensure those rights, justice has not been served. The prejudice which appellant Clark suffered, is apparent not only in the trial phase, but in the fact that nothing affirmatively was put forth on his behalf in the penalty phase. Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982); United States v. Costa, 691 F.2d 1358 (11th Cir. 1982); United States v. French, 719 F.2d 387 (11th Cir. 1983).

The fact that trial counsel could find nothing helpful that would have supported an insanity defense, is the basis for the rule that experts are needed to assist in situations such as these. This failure requires reversal.

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

(A) Pre-trial Stage

The State has responded that trial counsel abandoned her claim that a fair trial could not be had and that a venue change was required. (Appellee's Brief, p. 33). Nowhere in the testimony does there appear that trial counsel "abandoned" this motion. What in fact did occur, was a failure to properly pursue what was -- and what is still believed to have been -- a viable and necessary motion which was required to be pursued. Again, appellee attempts to rebut appellant's position by the claim that strategy was the basis for the failure to properly and effectively pursue a viable and real concern that appellant would not get, and did not get, a fair trial in the venue in which he was charged.

(B) Trial Phase

Appellee's response to Appellant's Initial Brief again confuses tactics with ineffectiveness. When counsel fails to present a theory of defense by placing witnesses before the jury for their evaluation, no tactical advantage can be gained by having the opportunity to give closing argument first and last. In fact, the rules permitted the defendant to take the stand without waiving that "tactical decision." Even in Conyers v. Wainwright, 309 F.Supp. 1101 (S.D.Fla. 1970), the defendant himself offered testimony, unlike the case at bar. Again, it must be noted that trial counsel did not even discuss the possibility about appellant testifying (Appellee's Brief, p. 8).

CONCLUSION

It is apparent that appellee has assumed the position in its Brief that ineffectiveness of counsel may be neatly eliminated by stating that it was "trial strategy" and nothing more. Trial strategy is ineffective when it fails to meet minimal standards of competency. Here is such a case. Appellant relies on those issues raised in his Initial Brief as additional support for his position. Under the circumstances, justice can best be served by requiring trial counsel to meet the minimum standards which are mandated by the law. Based upon the briefs submitted by both appellant and appellee, the conviction must be reversed.

Respectfully submitted,

NEAL R. LEWIS
1899 South Bayshore Drive
Miami, Florida 33133
(305) 854-0050

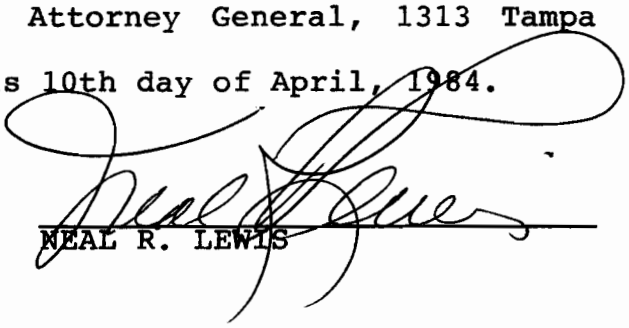
RICHARD HERSCH
5901 S.W. 74th Street
Suite 300
South Miami, Florida 33143

PATRICE TALISMAN
169 West Flagler Street
Suite 1414
Miami, Florida 33131

Counsel for Appellant Clark

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellant, was mailed to the offices of Michael Kotler, Esq., Assistant Attorney General, 1313 Tampa Street, Tampa, Florida 33602, this 10th day of April, 1984.



NEAL R. LEWIS