IN THE SUPREME COURT OF FLORIDA

PAUL EDWARD MAGILL,

APPELLANT,

-VS- CASE NO. 64,997

STATE OF FLORIDA,

APPELLEE.
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BRIEF OF APPELLEE

PRELIMINARY STATEMENT

The Appellant, Paul Edward Magill, will be referred to as "the Defendant" in this brief. The Appellee, the State of Florida, will be referred to as the "State."

The symbol (R) refers to the original record of appellant's trial.

The Symbol (TR Evid. Hearing) specifically references the page number of the transcript of the hearing on the defendant's motion for post conviction relief.

STATEMENT OF THE FACTS

The State accepts the Statement of the Facts contained in the initial brief of the appellant, but wishes to invite the Court's attention to the following factual background as well as areas of disagreement.

At approximately 8:00 p.m. on December 23, 1976, Danny Hall, age seventeen, rode his bicycle to the Jiffy Food Store located on Highway 27 south of Belleview, Florida. He testified that he was halfway in the door of the convenience store when the Defendant, whom he had seen before, turned around and pointed a gun and told him to leave (R 254-257). Danny Hall then left the store and rode his bike to the top of the hill where he watched the Defendant take a woman, known to him as Karen Young, from the store (R 258-259).

Hall stated that he observed the Defendant and Young getting into a Mustang automobile which proceeded toward Belleview. Several other customers testified that they observed a young man and woman in a Mustang just prior to the time they entered the store and found it to be unattended (R 306-309). The customers were greeted by Danny Hall who came running back to the store to call the Belleview police (R 263,306).

Officer John Harrison, of the Belleview Police Department received a radio call at approximately 8:17 p.m. alerting him of the robbery and abduction and advising him of the description of the vehicle (R 286-287). Harrison ultimately encountered the

Mustang described in the radio call and turned on his blue light in an attempt to stop the driver (R 292-294). The driver of the Mustang, however, increased the speed of the vehicle and headed back toward the Jiffy Food Store. After a brief chase, Officer Harrison forced the Mustang off the road approximately two tenths of a mile north of the store (R 294). The driver of the vehicle, later identified as the Defendant, got out of the car and ran to the rear where he was stopped by the officer (R 295).

Deputy Eddie Wright, Jr., of the Marion County Sheriff's Department, was at the Jiffy Food Store and had watched Officer Harrison stop the vehicle and pat down the Defendant (R 315-316). Deputy Wright proceeded to the area and advised the Defendant of his Miranda rights. After Wright told the Defendant that his car matched the description of a vehicle involved in a robbery and that he had run from a police vehicle, the Defendant started to sob and said that he did it (R 318). Wright asked what he had done and testified that the Defendant said that he had robbed, raped and killed her (R 318). He then placed the Defendant in his vehicle and called for an ambulance. Wright said that he requested the Defendant to take him to where the girl was in hopes that she might not be dead but reported that the Defendant told him he was sure she was dead; that he had taken care of that (R 318). Following the Defendant's directions, Deputy Wright then drove to a secluded woody spot near Jaybird Point at Smith Lake where he found the body of Karen Sue Young (R 318-319).

Later that evening, the Defendant gave a tape recorded statement to Captain Gerard King of the Marion County Sheriff's Office. The Defendant admitted to the statement that he robbed Ms. Young of an undetermined amount of money, and that he had intercourse with her (R 346-348). The Defendant told Captain King that he shot the victim three times with a .44 caliber pistol when he realized she could identify him (R 315-352). According to the statement, he then tried to drag the body into the bushes and put the gun in the trunk of his car (R 354).

A search of the vehicle, based upon consent, produced a .44 caliber pistol (R 359,366), identified by the firearms expert as the weapon which discharged five spent .44 caliber cartridge cases found at the scene of the crime (R 406).

The State accepts appellant's Statement of the Facts subject to any areas of disagreement set forth herein and any areas discussed at oral argument as the dire time constraints of this case do not provide the State the opportunity or time to set forth its version of the facts in an explicit manner.

ISSUES ON APPEAL

THE DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL IN ACCORD WITH HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS.

ISSUE II

THE DEFENDANT WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS.

ISSUE III

THE IMPOSITION OF THE DEATH PENALTY UPON THE DEFENDANT WHO WAS TWO MONTHS UNDER AGE 18 AT THE TIME OF THE OFFENSE IS NOT EXCESSIVE AND DISPROPORTIONATE PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS NOR IS IT A DENIAL OF THE DEFENDANT'S EQUAL PROTECTION RIGHTS AS HE IS THE ONLY JUVENILE OFFENDER AGAINST WHOM A DEATH WARRANT HAS BEEN SIGNED IN THE ENTIRE CLASS OF JUVENILE OFFENDERS; THE ISSUE OF THE APPROPRIATENESS OF THE PENALTY HAS PREVIOUSLY BEEN APPROVED BY THE FLORIDA SUPREME COURT.

ISSUE IV

THE IMPOSITION OF THE DEATH PENALTY DOES NOT CONSTITUTE A DENIAL OF THE DEFENDANT'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS DUE TO THE FINDING OF A NON-STATUTORY AGGRAVATING CIRCUMSTANCE AS THE PENALTY OF DEATH WAS BASED ON FINDINGS PREVIOUSLY APPROVED BY THE FLORIDA SUPREME COURT AND SUCH AN ISSUE IS NOT NOW COGNIZABLE IN A POST CONVICTION PROCEEDING.

ISSUE V

THE EXCLUSION FOR CAUSE OF A JUROR WHO EXPRESSED A BELIEF THAT SHE WOULD AUTOMATICALLY VOTE AGAINST THE IMPOSITION OF CAPITAL PUNISHMENT WITHOUT REGARD TO EVIDENCE AND COULD NOT MAKE AN IMPARTIAL DECISION AS TO THE DEFENDANT'S GUILT AND EXHIBITED A RESOLVE TO VOTE AGAINST THE IMPOSITION BLINDLY AND IN ALL CIRCUMSTANCES WAS PROPER AND DID NOT VIOLATE THE DEFENDANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS, AND WAS AN ISSUE PROPERLY DISPOSED OF ON DIRECT APPEAL TO THE FLORIDA SUPREME COURT.

ISSUE VI

A MOTION UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.850 CANNOT BE TUILIZED FOR A SECOND APPEAL TO CONSIDER ISSUES THAT COULD HAVE BEEN RAISED IN THE INITIAL APPEAL; THE TRIAL COURT PROPERLY DENIED THE APPELLANT RELIEF ON HIS CLAIM THAT THE DEFENDANT'S PLEA OF GUILTY OF SECOND DEGREE MURDER, MADE DIRECTLY TO THE JURY BY TRIAL COUNSEL, WAS ACCEPTED BY THE COURT IN THE ABSENCE OF A DETERMINATION OF VOLUNTARINESS.

ISSUE VII

THE DEFENDANT WAS NOT DENIED HIS RIGHT TO A FAIR SENTENCING HEARING IN VIOLATION OF HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS BY THE ALLEGED APPROVAL OF THE USE OF CERTAIN AGGRAVATING CIRCUMSTANCES PRIOR TO THE SENTENCING ON REMAND; SUCH ISSUE COULD HAVE AND SHOULD HAVE BEEN RAISED ON DIRECT APPEAL AND IS ALSO MOOT AS

DEFENDANT APPEALED FINDINGS OF AGGRAVATING CIRCUMSTANCES IN HIS SECOND DIRECT APPEAL AFTER RESENTENCING.

ISSUE VIII

THE DEFENDANT WAS NOT DENIED HIS SIXTH AMENDMENT RIGHT TO CONFRONTATION AND HIS RIGHT TO A FAIR SENTENCING REVIEW REQUIRED IN CAPITAL CASES BY THE EIGHTH AND FOURTEENTH AMENDMENTS BY A CONSIDERATION BY THE SUPREME COURT OF AN EX PARTE PSYCHOLOGICAL REPORT; SUCH ISSUE COULD HAVE AND SHOULD HAVE BEEN PRESENTED TO THE FLORIDA SUPREME COURT.

ISSUE IX

THE PROCEDURES SET FORTH IN FLORIDA STATUTE 39.111(6) WERE NOT MANDATORY AT THE TIME OF DEFENDANT'S ARREST AND DEFENDANT WAIVED THE BENEFIT OF SAID PROCEDURES; SUCH ISSUE SHOULD HAVE BEEN RAISED ON DIRECT APPEAL TO THE FLORIDA SUPREME COURT.

ISSUE X

IN VIEW OF THE AGGRAVATING AND MITIGATING CIRCUMSTANCES IN THE CASE SUB JUDICE AND A PRIOR REVIEW OF THE SAME BY THE FLORIDA SUPREME COURT, THE EXECUTION OF THE DEFENDANT DOES NOT CONSTITUTE EXCESSIVE PUNISHMENT FORBIDDEN BY THE EIGHTH AND FOURTEENTH AMENDMENTS.

ISSUE I

THE DEFENDANT RECEIVED EFFECTIVE ASSISTANT OF COUNSEL AT TRIAL IN ACCORD WITH HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS.

ARGUMENT

The Sixth Amendment guarantees a criminal defendant the right to counsel reasonable likely to, render and rendering, reasonable effective assistance, Baty v. Balkcom, 661 F.2d 391, 394 (5th Cir.1981), cert.denied, 456 U.S. 1011, 102 S.Ct. 2307, 73 L.Ed.2d 1308 (1982); Washington v. Estelle, 648 F.2d 276, 278-79 (5th Cir.), cert.denied, 454 U.S. 899, 102 S.Ct. 402, 70 L. Ed.2d 216 (1981); Washington v. Strickland, 693 F.2d 1243 (5th Cir.1981), Unit B; en banc, cert.granted, ___ U.S. ___, 103 S.Ct. 2451, 77 L.Ed.2d ___ (1983). In judging whether this standard has been met, the totality of circumstances and the entire record must be considered, Goodwin v. Balkcom, 684 F.2d 794, 804 (11th Cir.1982), cert.denied, ___ U.S. ___, 103 S.Ct. 1798, 76 L.Ed.ed 364 (1983); Nelson v. Estelle, 642 F.2d 903, 906 (5th Cir.1981). The burden is on the petitioner to establish ineffectiveness and prejudice. Washington v. Strickland, supra.

Whether ineffective assistance has been afforded is a mixed question of law and fact. Cuyler v. Sullivan, 446 U.S. 335, 341-42, 100 S.Ct. 1708, 1714-15, 64 L.Ed.2d 333 (1980); Harris v. Oliver, 645 F.2d 327, 330 n. 3 (5th Cir.), cert.denied, 454 U.S. 1109, 102 S.Ct. 687, 70 L.Ed.2d 650 (o981); King v. Strickland,

714 F.2d 1481 (11th Cir. 1983); Washington v. Watkins 655 F.2d 1346 (5th Cir.1981), cert.denied, 456 U.S. 949, 102 S. Ct. 2021, 72 L.Ed.2d 474 (1982).

In a motion to vacate judgment and sentence, the issue is whether the alleged error or errors constituted a fundamental defect which resulted in a miscarriage of justice, United States v. Johnson, 615 F.2d 1125, 1127 (5th Cir.1980). In the Eleventh and Fifth Circuits constitutionally effective assistance of counsel is not counsel without error and not counsel judged ineffective by hindsight, but counsel reasonably likely to render, and rendering, reasonable effective assistance, Herring v. Estelle, 491 F.2d 125, 127 (5th Cir.1974). "[T]he methodology for applying the 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."

In Kinght v. State, 394 So.2d 997 (Fla.1981), the Supreme Court of Florida adopted a four-pronged analysis to determine whether an attorney has provided reasonably effective assistance of counsel:

> 1. The specific act or omission of counsel must be detailed in an appropriate pleading.
>
> 2. The petitioner must show that the act or omission was a substantial and serious deficiency measurably below that of competent counsel.
>
> 3. The petitioner has the burden of showing the specific serious deficiency under the circumstances of the case was substantial

> enough to demonstrate prejudice to the defendant to the extent that the complained conduct likely affected the outcome of the court proceedings.
>
> 4. The state may rebut a prima facie showing of prejudice by proof beyond a reasonable doubt of no prejudice in fact, Armstrong v. State, 429 So.2d 287 (Fla.1983), at 290. See also, Messer v. State, ___ So.2d ___, Nos. 64,346 and 64,347 (Fla. 10-12-83).

Under Washington v. Strickland, supra, a defendant must first prove a violation of the Fifth Circuit's "reasonably likely to render, and rendering, reasonable effective assistance" standard.

Prejudice flowing from any counsel ineffectiveness must be shown. Prejudice measured under the test enunciated in Washington v. Strickland, supra, requires a petitioner to demonstrate that counsel's ineffectiveness "resulted in actual and substantial disadvantage to the course of his defense" but need not show that this "disadvantage determined the outcome of the entire case" 693 F.2d at 1262.

The Florida Supreme Court is not obliged to follow decisions of intermediate Federal Courts so the law in Florida is as set forth in Knight, supra; however, under either standard ineffectiveness of counsel has not been shown and there were no substantial and prejudicial deficiencies in counsel's performance during the guilt phase of the trial. There is no need therefore to await the United States Supreme Court's decision in Strickland v. Washington as defendant contends.

A. ALLEGED FAILURE TO DEPOSE WITNESSES

The Defendant contends that his trial attorney failed to investigate the case properly in that he deposed only three witnesses out of approximately twenty prospective witnesses listed in the State's discovery material.

Mr. Pierce consulted almost daily with his Assistant Public Defenders (TR Evid.Hearing 95). When an assistant was assigned a particular case, the assistant would be the one that took the depositions (TR Evid.Hearing 96). Mr. Pierce testified that if it was not in his best interest to take the testimony of a witness, he would not take the witness' testimony as a matter of trial tactics (TR Evid.Hearing 96). Mr. Stancil, at that time the Assistant Public Defender, testified that to his knowledge Mr. Pierce did not take part in the discovery process, and didn't take depositions. There were three depositions taken, although many of those witnesses whose depositions weren't taken were contacted or talked to and their statements were taken (TR Evid. Hearing 118). Testimony further established that the Public Defender's Office employed an investigator at that time who would investigate cases and interview witnesses (TR Evid.Hearing 177-178). Also, at that time the policy of the State Attorney's Office was to present their file to the defense and the defense would have received all reports and statements, lists of evidence, etc., except for perhaps the work product (TR Evid.Hearing 179).

The State would submit that the decision whether to depose a witness listed in the State's discovery material is a matter

of strategy. Investigative interviews of witnesses listed by the State on the answer to demand for discovery may be beneficial in that they can identify areas of emphasis and avoidance at the deposition. Some of the witnesses listed on the answer may be favorable to the defense and the defense may elect not to depose these witnesses so as to avoid providing the prosecutor with an impeachment tool. The defense lawyer needs to avoid preparing the State's case at deposition. By thorough prior preparation the defense lawyer should be able to avoid areas of which the prosecutor may be unaware, or, perhaps, eliminate the necessity for deposing state witnesses.

In any event, that counsel for a criminal defendant has not pursued every conceivable line of inquiry in the case does not constitute ineffective assistance of counsel. Ford v. Strickland, 696 F.2d 804 (11th Cir.1983); Lovett v. Florida, 627 F.2d 706, 708 (5th Cir.198). In reviewing ineffective assistance of counsel claims, the court does not sit to second guess considered professional judgments with the benefit of 20/20 hindsight. Counsel will not be regarded as 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). Even where an attorney's strategy may appear wrong in retrospect, a finding of constitutionally ineffective representation is not automatically mandated. Baty v. Balkcom, supra; Baldwin v. Blackburn, 653 F.2d 942, 946 (5th Cir.1981).

Effectiveness of counsel simply cannot be predicated upon the number of depositions contained in a court file.

Moreover, to warrant Rule 3.850 relief, the defendant would have to prove that the assistance, even if ineffective, created not only a possibility of prejudice, but that it worked to his actual and substantial disadvantage. Washington v. Strickland, supra. Defendant has failed to show how this has prejudiced him in any manner.

There was no proffer of the prospective testimony by affidavit or evidence, not even any factual allegations as to what this exculpatory testimony might be. There is nothing in the motion or in the record to show admissible evidence that would be forthcoming from the witnesses or what material may have been brought out in cross-examination. Hence, there is no showing before this Court of a casual relationship between the failure to obtain the testimony at trial of these witnesses or failure to extract favorable testimony to the defendant upon cross-examination and the defendant's conviction. The trial court should not have to speculate as to the nature of this testimony when it is asked to grant an evidentiary hearing. Clements v. State, 340 So.2d 1182 (Fla.4th DCA 1976). Nor should the State be so unenlightened.

In order to characterize the lack of depositions as a specific omission, the Defendant would have to identify a specific evidentiary matter to which the failure to depose witnesses would relate. But the simple assertion that there were no depositions

taken (or few) does not qualify as an identification of a specific omission, therefore, the Defendant's reliance on the lack of discovery depositions affords him no relief. Messer v. State, 439 So.2d 875 (Fla.1983).

Moreover, the Defendant having presented no evidence at the evidentiary hearing to indicate what information would have been elicited in taking depositions which would have effected the outcome of the trial or even hampered the Defendant in his defense, the defendant has failed to show the requisite prejudice. See Aldridge v. State, 425 So.2d 1132 (Fla.1982).

The Defendant's own expert testified that he could not say someone was ineffective because he took one or twenty-five depositions as long as he was familiar with the case (TR Evid. Hearing 252).

B. ALLEGED CLAIM TRIAL COUNSEL FAILED TO INTERVIEW DEFENDANT AT ANY TIME PRIOR TO TRIAL.

Testimony at the evidentiary hearing shows this claim to be utterly fictitious.The record at trial reflects three defense attorneys, Robert Pierce, Hale Stancil and Michael Hatfield. Hale Stancil, at that time was an Assistant Public Defender, who Robert Pierce considered competent (TR Evid.Hearing 94). Pierce testified that Hale Stancil in that capacity would have interviewed the Defendant (TR Evid.Hearing 96). Hale Stancil testified that he sopke to the Defendant one to two times a week for a total of a dozen times (TR Evid.Hearing 179). They discussed with the Defendant the facts of the trial, trial procedure and tried to get as many of the facts that he had, what went through his mind at the time (TR Evid.Hearing 180). The Defendant himself admitted that he met Mr. Pierce prior to trial for what he claims to be a period of fifteen minutes (TR Evid.Hearing 223). Pierce testified that he would have consulted with Hale Stancil as to strategy as to how to best represent the Defendant (TR Evid.Hearing 99).

It is well settled that counsel may be effective even if he spends only a short period of time with his client, King v. Strickland, 714 F.2d 1481 (11th Cir.1983). In the instant case more than a short period of time was devoted to the Defendant by his attorneys.

C. ALLEGED CLAIM TRIAL COUNSEL FAILED TO FILE EVEN THE MOST BASIC PRETRIAL MOTIONS IN A CAPITAL CASE SUCH AS A MOTION TO DISMISS THE INDICTMENT, A MOTION FOR STATEMENT OF PARTICULARS, A MOTION FOR CHANGE OF VENUE OR A CHALLENGE TO THE JURY VENIRE.

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 its lack of merit. Palmes v. State, 425 So.2d 4 (Fla.1983). The Defendant's right to reasonably competent counsel does not entitle him to have every conceivable challenge pressed upon the court. Scott v. Wainwright, 433 So.2d 974 (Fla.1983). The Defendant put on no evidence at the evidentiary hearing to show that the pressing of the claims in the trial court was either necessary or warranted and how failure to do so would have prejudiced the Defendant's case.

D. ALLEGED CLAIM DEFENSE COUNSEL FAILED TO FILE ANY TYPE OF MOTION CHALLENGING THE CONSTITUTIONALITY OF THE DEATH PENALTY AS APPLIED TO THE CASE.

The Defendant's own expert witness in capital cases testified that failure to file such a motion would not render a lawyer not reasonably effective. Robert Link stated specifically:

> . . . I would like to think so. I would not say that...I'm not going to say that a lawyer was not reasonably effective because he did not challenge the constitutionality of a statute that had been affirmed by the Supreme Court. I wouldn't say that (TR Evid.Hearing 270).

The Defendant's right to reasonably competent counsel does not entitle him to have every conceivable challenge pressed upon the Court. Scott v. Wainwright, supra. There is no evidence to support the contention that counsel's actions were ineffective in this regard.

E. ALLEGED CLAIM THAT TRIAL COUNSEL PREPARED ONLY A BOILERPLATE MOTION TO SUPPRESS THE CONFESSION AND THEN MADE ONLY A PERFUNCTORY ARGUMENT WHICH SEEMED TO BE DESIGNED TO ADMIT VOLUNTARINESS AND WHICH DID NOT MENTION THE DEFENDANT'S AGE OR MENTAL PROBLEMS.

The Defendant has completely failed to show how the failure to pursue the motion to suppress could have harmed him or affected his case in any manner. Hale Stancil, the attorney who filed the motion testified essentially that the motion was filed to protect the record and sometimes in view of such motions, the State is more accepting of negotiations but that the facts were against the Defendant on that motion (TR Evid.Hearing 137).

Indeed, the facts were against the Defendant. The Defendant was advised of his Miranda rights immediately upon being apprehended and admitted he had robbed, raped and killed the victim (R 318). The Defendant later gave a tape recorded statement admitting the crime and giving details thereof (R 346-348; 315-352; 354). He consented to a search of the vehicle and the death weapon was discovered (R 406). The taped confession was made in the presence of the Defendant's mother (R 345). It was never shown to be anything but freely and voluntarily made. There was evidence apart from the confession to put him at the scene and even disregarding the confession there was overwhelming evidence of guilt. The Defendant has failed to show why failure to pursue a groundless motion to suppress was warranted or how it could have affected the case.

A similar case is Ford v. State, 407 So.2d 907 (Fla.1981), in which the petitioner claimed ineffective assistance of counsel for failure to adequately present the motion to suppress petitioner's statements made to law enforcement officers. This Court held that insofar as the petitioner's statement is concerned, it is far from clear that the statement was inadmissible under the state of the law existing at the time of trial. Furthermore, petitioner's statement only admitted his presence and participation in the robbery, and it denied participation in the shooting. There was abundant evidence apart from the confession, some by eyewitnesses, to place him at the scene as a participant. Even disregarding petitioner's confession there was overwhelming evidence of guilt. To establish prejudice there must be serious doubt of the defendant's guilt.

The State would submit that this is just such a case and no prejudice can be shown.

F. ALLEGED CLAIM TRIAL COUNSEL FAILED TO FILE A MOTION TO SUPPRESS THE WEAPON ACCESSED TO HAVE BEEN PROCURED BY THE DEFENDANT'S CONSENT, IN THE FACE OF KNOWN EVIDENCE OF THE DEFENDANT'S MENTAL AND EMOTIONAL PROBLEMS.

The Defendant consented to the search of his vehicle which uncovered the weapon and the Defendant was never shown to be insane or uncompetent at the time or operating under duress or mental disturbance. Such a motion would have been groundless. An attorney should raise any honestly debatable issue that may aid in his client's position, but he is not obligated to raise every conceivable issue, and is not obligated to raise an issue when he regards the argument as futile because of its lack of merit. Palmes v. State, supra.

G. ALLEGED CLAIM TRIAL COUNSEL FAILED TO SETTLE ON A SPECIFIC DEFENSE AND ASSERT IT.

This contention is completely belied by the record. Testimony at the evidentiary hearing firmly established that the defense of insanity was initially a considered possibility, but when medical examinations of the Defendant revealed this was out of the question, the goal was clearly to obtain a conviction based on a lesser offense of first degree murder to save the Defendant's life and to obtain mercy from the jury (TR Evid. Hearing 70; 100; 114; 117).

H. ALLEGED CLAIM TRIAL COUNSEL FAILED TO CONTEST GUILT AT ALL DURING GUILT PHASE.

As discussed in the last point, counsel's strategy in view of the overwhelming evidence of guilt against the Defendant was to obtain a conviction for second degree murder and to put forth a plea of mercy to the jury. This issue is adequately discussed elsewhere in this brief in answer to Defendant's claim that his "plea" of guilty of second degree murder, made directly to the jury by trial counsel, was accepted by the court in the absence of a determiation of voluntariness and the State would direct this Court to that section of its answer brief, specifically referencing the case of McNeal v. Wainwright, 722 F.2d 674 (11th Cir.1984) in which just such trial strategy was not found to be improper or ineffective on the part of cousel.

I. ALLEGED CLAIM TRIAL COUNSEL FAILED TO CROSS-EXAMINE CRUCIAL WITNESSES SUCH AS THE MEDICAL EXAMINER AND CHIEF INVESTIGATING OFFICER.

This argument is simply a restatement of the Defendant's claim that he was denied the effective assistance of counsel at sentencing in violation of the Sixth and Fourteenth Amendments and has been exhaustively treated by the State in its corresponding answer to the same elsewhere in this brief.

J. ALLEGED CLAIM TRIAL COUNSEL ENGAGED IN POINTLESS EXTENDED CROSS-EXAMINATION OF INCONSEQUENTIAL WITNESSES SUCH AS THE CHAIN OF CUSTODY WITNESSES.

It is well settled that cross-examination is a trial tactic choice properly within counsel's discretion. Washington v. State, 397 So.2d 285 (Fla.1981). There has been absolutely no showing of how the outcome might have been effected had counsel acted differently. See Armstrong v. State, 429 So.2d 287 (Fla.1983). No prejudice has been shown under the Knight or Washington standard.

K. ALLEGED CLAIM THAT TRIAL COUNSEL FAILED TO ESTABLISH ANY MITIGATING CIRCUMSTANCES DURING THE CROSS-EXAMINATION OF ANY OF THE WITNESSES, THOUGH THE MEDICAL EXAMINAER WOULD HAVE ESTABLISHED THAT THE MURDER WAS NOT HEINOUS.

This is a rehash of the Defendant's later argument that he was denied effective assistance of counsel and is treated exhaustively in the State's corresponding answer elsewhere in this brief.

L. ALLEGED CLAIM TRIAL COUNSEL ALLOWED THE DEFENDANT TO TAKE THE WITNESS STAND CONFESS HIS GUILT DURING THE GUILT PHASE OF THE TRIAL FOR NO APPARENT PURPOSE.

This issue is adequately discussed elsewhere in this brief. As previously pointed out, the Defendant made some halfway concessions to the truth to gain credibility with the jury and obtain a conviction for only second degree murder.

As previously discussed in this brief, the Defendant was interviewed by both attorneys, Pierce and Stancil prior to trial. Attorney Pierce cannot "vouch" for the Defendant, who on cross-examination impulsively admits to first degree murder. That was not an answer counsel could be held to have expected in view of the fact that Defendant's entire testimony revolved around recanting his original taped confession in which he stated he murdered the victim because she could identify him. The Defendant's entire testimony recanting elements of his prior confession was designed to negate intent, premeditation and deliberation and the Defendant could not have not known the purpose for the recantation. Counsel had no reason to expect the Defendant would not deny he had committed first degree murder in view of the testimony that was prepared. Counsel did subsequently object. These actions cannot be said to be below the standard of reasonably effective counsel.

M. ALLEGED CLAIM TRIAL COUNSEL MADE ONLY A PERFUNCTORY CLOSING ARGUMENT AND EVEN THEN DID NOT STATE ANY FACTS IN SUPPORT OF THE ARGUMENT THAT THE OFFENSE WAS MERELY A SECOND DEGREE MURDER.

In the defense's first closing argument, counsel clearly advised the jury to listen to the trial court's instructions on lesser degrees of homicide (R 448). He specifically referenced the Defendant's state of mind at the time of the offense (R 448). In his second closing argument counsel clearly made a mercy plea to the jury for the Defendant's life and specifically discussed that the murder was second degree and not premediated and the thought process of the Defendant all the way down the line was not to kill the woman. He specifically asked the jury to reconsider testimony and the Defendant's state of mind. Such argument was not shown to be measurably deficient.

In conclusion, the Defendant has failed to show that any single act of omission or commission, or any series or combination thereof was a substantial and serious deficiency measurable below that of competent counsel. Nor was any acts or combination of acts substantial enough to demonstrate prejudice to the Defendant.

ISSUE II

THE DEFENDANT WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS.

Defendant contends that defendant's counsel was ineffective at the penalty phase of the trial because he failed to present available mitigating evidence which would likely have changed the advisory verdict and because he failed to use existing favorable evidence to rebut the aggravating circumstances. The lower court properly denied relief on the basis of this claim after allowing the defendant to present the testimony of numerous witnesses.

The choice by counsel to present or not present evidence in mitigation at the sentencing phase of trial is a tactical decision properly within counsel's discretion. Brown v. State, 439 So.2d 872 (Fla. 1983). It cannot be said that the further presentation of mitigating evidence would have been beneficial to the defendant or that such mitigating evidence even existed.

Calling the chief investigating officer would hardly have established that the offense was spontaneous. The chief investigating officer was not present at the time of the crime and furthermore, the taped statement given to the chief investigating officer Captain Gererd T. King, Sr., by the defendant expressly states that the Defendant realized the victim had seen him and would be able to identify him when questioned, so he shot her three times, twice in the head and once in the chest (R-352). This hardly evidences spontaneity and there is no

basis to believe from the testimony adduced at trial and sentencing that any officers would have the least reason to conclude that the offense was spontaneous and such testimony would conflict with their prior testimony. Reliance by the Defendant on a presentence investigation which contains allusions that Captain King may have believed the murder to be spontaneous is misplaced as the report was prepared by another and such a reference is in the nature of hearsay. Captain King was never called to testify at the evidentiary hearing to substantiate this claim and hence it is speculative and baseless. The record shows that the victim was shot in the head and fell to the ground, after which the Defendant deliberately shot twice more, once in the head and once in the chest. The chest shot was at such close range that it left powder burns. The record is clear that defendant had a cold, calculated design to effect the death of the helpless victim. This is evidenced from the number of times the Defendant shot the victim with his .44 caliber pistol, the proximity of the muzzle of the pistol to the victim's chest, and defendant's statement to the police that he shot her to avoid identification and made sure that she was dead. Magill v. State, 386 So.2d 1190, 1191 (Fla. 1980). In view of the Defendant's own confession and the physical evidence, the investigating officer could not possibly have established that the offense was spontaneous.

The Defendant further contends that counsel failed to contest the ruling of the court restricting the penalty proceeding to the statutory mitigating circumstances and that counsel

failed to assert any non-statutory mitigating circumstances. These assertions are belied by the record. The transcript of the penalty phase proceedings upon remand does not show any limitations imposed upon the presentation of mitigating circumstances and the trial court did in fact find a non-statutory mitigating cricumstance, i.e., that the Defendant's father passed away on December 28, 1975. See transcript of resentencing; Magill v. State, 428 So.2d 649 (Fla. 1983) at 652. In any event, if the Defendant wanted to claim that the trial court unduly restricted the introduction of evidence relevant to non-statutory mitigating circumstances he should have raised this claim on direct appeal. Cooper v. State, 437 So.2d 1070 (Fla. 1983).

The Defendant further contends counsel failed to call any witnesses or present argument negating aggravating circumstances. However, the medical examiner and other unknown witnesses were never called to testify at the evidentiary hearing and it is not known what the substance of such testimony might be. Such a claim is speculative and is not supported by affidavit or evidence. Robert Link, an expert in capital cases testified that in such cases the medical examiner could testify that after the gunshot wound to the head the victim was rendered unconscious so as to show that the crime was not heinous, atrocious or cruel and a test could have explained the appearance of the victim in a place other than where the Defendant said she was shot (Tr. Evid. Hearing 256-258). While this may be true in some capital cases, there is no reason to believe it holds true in this case for this medical

examiner simply because she was not called to the stand. The Defendant cannot establish ineffectiveness by putting words into the mouth of phantom witnesses.

In any event, the medical examiner, if called, could not have rebutted the conclusion that the homicide was heinous, atrocious and cruel. "It is not merely the specific and narrow method in which a victim is killed which makes a murder heinous, atrocious and cruel, rather it is the entire set of circumstances surround-the killing." Magill v. State, 428 So.2d 679 (Fla. 1983). In the instant case the victim was forced to submit to intercourse with the Defendant prior to her death, and while pleading for her life, the Defendant shot her senselessly to avoid identification, even though a young boy who knew him witnessed the robbery and could identify him (T 254-258). See Lightbourne v. State, 438 So.2d 380 (Fla. 1983); Smith v. State, 424 So.2d 726 (Fla. 1982); Griffin v. State, 414 So.2d 1025 (Fla. 1982); Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Adams v. State, 412 So.2d 850 (Fla), cert.denied ___U.S.___, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982); White v. State, 403 So.2d 331 (Fla. 1981); Knight v. State, 338 So.2d 201 (Fla. 1976). The record shows the victim was shot in the head and fell to the ground, after which the Defendant deliberately shot her twice more, once in the head and once in the chest. The chest shot was at such close range it left powder burns Magill 386 So.2d at 1190. The testimony of the medical examiner could not obliterate the entire set of circumstances in which a young girl was senselessly killed after pleading for

her life and being raped, no doubt with an impending sense of doom and case law cited above supports the position that this murder was unduly torturous.

The Defendant contends that the testimony of Martinez Montfort, a psychologist who had treated the Defendant could have provided a mitigating explanation for his behavior. Dr. Montfort was not last treating physician and not qualified to testify as to Defendant's emotional and mental condition. It was established at the evidentiary hearing on cross-examination that the last time Dr. Montfort saw the Defendant was in 1973 or 1974 and not at the time of the crimes so as to establish a mitigating factor of emotional disturbance (Tr. Evid. Hearing 54). In fact at the time Dr. Montfort saw the Defendant, he was not suffering from extreme mental disturbance (Tr. Evid. Hearing 47). Dr. Montfort's fears for the Defendant were more in regard to his breaking-down rather than not being able to conform himself to the requirements of the law (Tr. Evid. Hearing 51). Dr. Montfort predicted in 1973 the Defendant would get worse without further treatment (Tr. Evid. Hearing 51). The record shows that the Defendant did get further treatment (T-539). Dr. Montfort could have had no useful information as to Defendant's mental condition at the time of the crime. In fact, the Defendant's own mother testified at the presentencing hearing that Dr. Montfort never realized the seriousness of her son's problem - evidencing a good reason why Dr. Montfort was not called to testify in the first place (Tr Resentencing Hearing - 6). Aside from setting out a diagnosis of the Defendant at 13 and his future predictions

for the Defendant, Dr. Montfort never did set out what the substance of his testimony would have been had he been called as a mitigation witness in regard to a convicted murdered who was now 18 years old.

With respect to effectiveness of counsel at a sentencing hearing, there is no requirement to call any set number of character witnesses, particularly where testimony of additional character witnesses would merely be cumulative. Raulerson v. State, 437 So.2d 1105 (Fla. 1983). Nor can witnesses in mitigation be called when they do not, in fact, exist - in that their possible testimony may be more harmful than beneficial. In the instant case, all possible mitigating evidence was presented in a clear manner. It is always possible to conjure up additional witnesses in retrospect.

The finality of the judicial process would be nil if a new proceeding was required everytime a party found an expert who reached a conclusion, with regard to information available at the time of trial, that differed from the opinions and conclusions presented at that trial. See Booker v. State, 413 So.2d 756 (Fla. 1982). Even so, in the interest of justice the lower court heard the testimony of Dr. Montfort and properly determined it was not of sufficient import to have changed the outcome.

The purported deficiencies at the sentencing phase can be readily attributed to the tactics of counsel under the circumstances of the case. In any event, the overwhelming nature of the aggravating circumstances precludes any likelihood that counsel's alleged omissions could have been prejudicial to the defendant. A confession plus numerous aggravating factors limits the alternatives of the most zealous of advocates.

ISSUE III

THE IMPOSITION OF THE DEATH PENALTY UPON THE DEFENDANT WHO WAS TWO MONTHS UNDER AGE 18 AT THE TIME OF THE OFFENSE IS NOT EXCESSIVE AND DISPROPORTIONATE PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS NOR IS IT A DENIAL OF THE DEFENDANT'S EQUAL PROTECTION RIGHTS AS HE IS THE ONLY JUVENILE OFFENDER AGAINST WHOM A DEATH WARRANT HAS BEEN SIGNED IN THE ENTIRE CLASS OF JUVENILE OFFENDERS; THE ISSUE OF THE APPROPRIATENESS OF THE PENALTY HAS PREVIOUSLY BEEN APPROVED BY THE FLORIDA SUPREME COURT.

This Court has previously passed on the issue of the appropriateness of the penalty of death for Defendant and approved the mitigating factor of the Defendant's age at the time of the commission of the crime in Magill (I) and (II). The issue of age has previously been raised by the Defendant on his first initial direct appeal to this Court in Point VIII of his brief, in which the issue of the Defendant's age and the appropriateness of the penalty were discussed. This argument is a variation or rehash of issues previously presented to this Court and at the time of said presentation the Defendant could have more exhaustively raised this topic before this Court and it should not now be cognizable on a Rule 3.850 motion for post-conviction relief. As previously stated, issues that were or could have been disposed of on direct appeal are not appropriate in Rule 3.850 proceedings.

The treatment as a juvenile is not an inherent right but one granted by the state legislature, therefore the legislature may restrict or qualify that right as it sees fit, as long as no arbitrary or discriminatory classification is involved. Chapter 39

Florida Statutes, grants to certain persons age 18 or younger the right to be charged and tried as juveniles. The section does not grant that right to persons indicted by the grand jury for crimes punishable by life imprisonment or death. This is a legislative classification entitled to a strong presumption of validity which may be set aside only if no grounds can be conceived to justify it. The Defendant has made no showing that the classification is arbitrary or discriminatory. Doubtless the Florida legislature considered carefully the rise and number of crimes committed by juveniles as well as the growing recidivist rate among this group. The legislature was entitled to conclude that the parens patriae function of the juvenile system would not work for certain juveniles, or that society demanded greater protection from these offenders than that provided by that system. The courts cannot second guess this legislative conclusion. Woodard v. Wainwright, 556 F.2d 781 (Fla. 5th Cir. 1977). A child of any age charged with a violation of Florida law punishable by death or life imprisonment shall be tried as an adult if an indictment on such charges is returned by the grand jury. Section 39.02(5)(c) Fla.State. (1975).

The Defendant contends that the determination by the Florida courts that he should be treated as an adult was not made upon a reasoned analysis or upon any evidentiary finding that he was capable of assuming the responsibility of an adult. This issue was settled in Woodard, supra, which in essence determined that juveniles are not given a right to juvenile treatment in

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any realistic sense and that due process is not violated as the system of adult justice in Florida is well appointed in the accoutrements of due process. 556 F.2d at 786. The Woodward court stated:

> ". . . it is true that these same petitioners might have been treated as juveniles in previous encounters with the law, but everyone outgrows juvenile treatment sooner or later; these petitioner, through acts alleged or admitted, have just outgrown it sooner." (emphasis added)

556 F.2d at 785.

In the instant case, Defendant had prior encounters with the juvenile court system and in essence had outgrown it and had not benefited from it. The age of the trigger finger was unimportant to the victim. State would submit that the Defendant is within that class of persons for whom society demands greater protection than provided by the juvenile justice system and we should not second guess such a legislative distinction.

In Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), the United States Supreme Court approved Georgia's capital sentencing procedure in which the jury's attention is focused on the characteristics of the person who committed the crime in regard to prior convictions for capital offenses and any other special facts about the Defendant that might mitigate against imposing capital punishment. In passing, the court particularily referred to the Defendant's youth as one mitigating fact. 428 U.S. at 197. The court concluded that

"as a result, while some jury discretion still exists, the discretion to be exercised is controlled by a clear and objective standard so as to produce nondiscriminatory application." 428 U.S. at 198. Similarily, the discretion to be exercised by the jury under the Florida sentencing procedure is also controlled by clear and objective standards and specifically sets forth the age of Defendant as a mitigating circumstance against imposing capital punishment. This mitigating circumstance was found by the jury and the court to be applicable to the Defendant. The age of the Defendant was well considered not only by the lower court but by this Court upon appeal. This Court specifically found that in weighing this mitigating factor along with two others against the aggravating factors, that the trial court used a reason judgment. See Magill (II), supra. The lower court properly denied relief on this basis as such factors have previously been considered by this Court and under the circumstances the Defendant's argument was hypothical and unsupported. There is no per se rule which pinpoints a particular age as an automatic factor in mitigation. The propriety of a finding with respect to this circumstance depends on the evidence adduced at trial and at the sentencing hearing. Peek v State, 395 So.2d 492 (Fla. 1980), cert.denied 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981).

The fact that the Defendant is the only juvenile offender against whom a death warrant has been signed is irrelevant as said warrant flows from the fact of the imposition of the death

penalty initially, and a signing of such a warrant cannot deny the Defendant equal protection where the penalty has been appropriately imposed. This Court has previously reviewed the case in terms of proportionality and alleged disparities in defendants facing the death penalty and are not appropriate on a Rule 3.850 proceeding. See Christopher v. State, 416 So.2d 450, 453 (Fla. 1982). Moreover, the defendant's allegations were inadequantly supported and did not constitute a sufficient preliminary basis to state a cognizable claim.

ISSUE IV

THE IMPOSITION OF THE DEATH PENALTY DOES NOT CONSTITUTE A DENIAL OF THE DEFENDANT'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS DUT TO THE FINDING OF A NON-STATUTORY AGGRAVATING CRICUMSTANCE AS THE PENALTY OF DEATH WAS BASED ON FINDINGS PREVIOUSLY APPROVED BY THE FLORIDA SUPREME COURT AND SUCH AN ISSUE IS NOT NOW COGNIZABLE IN A POST CONVICTION PROCEEDING.

The Defendant contends that the sentence of death must be vacated because of the application of a nonstatutory aggravating circumstance that "that three felonies, namely, murder in the first degree involuntary sexual battery and used or threatened to use in the process thereof a deadly weapon, and robbery and in the course thereof carried a firearm, were committed by the Defendant Paul Edward Magill."

The State respectfully submits that the Defendant's argument has been exhaustively addressed in two distinct opinions, to-wit: Magill v. State, 386 So.2d 1188 (Fla. 1980) cert. denied, 450 U.S. 927, 101 S.Ct. 1384, 67 L.Ed.2d 359 (1981), (Magill I) and Magill v. State, 428 So.2d 649 (Fla. 1983) cert.denied, ___U.S.___, (U.S. No. 82-6733, October 3, 1983) and cannot be raised anew in the trial court. Dobbert v State, 409 So.2d 1053 (Fla. 1982).

Nevertheless, even though an improper aggravating circumstance may have been included in the findings of the trial judge's sentence decision and there were identified three mitigating circumstances, Barclay v. Florida, ___U.S.))), 77 L.Ed.2d 1134 (July 6, 1983), would not compel reversal of the sentence

judgment in this case. It is apparant on the face of the findings by the trial judge that the result of the weighing process would not have been different had the allegedly impermissible factor not been present. See Jackson v. Wainwright, 421 So.2d 1385 (Fla. 1982). The trial court was equally as liberal in finging questionable mitigating circumstances i.e., that the Defendant lacked a significant prior criminal record and that his father died one year earlier. It is for that reason this Court did not question the factors considered in sentencing. To limit in appropriate aggravating factors is to also limit inappropriate mitigating ones and at the conclusion of such a process, the result is still the death penalty. See Magill (II), 428 So. 2d at 652.

The trial court correctly denied relief on the basis of this claim. Even if the Florida trial court, in imposing the death sentence for murder relied on a factor unavailable to it under statute, the procedure followed did not produce an arbitrary or freakish sentence forbidden by the Eighth Amendment as a properly instructed jury recommended the death sentence. On direct appeal, the Florida Supreme Court stated that a comparison of aggravating and mitigating circumstances and weighing of evidence warranted capital punishment. There was no claim that in conducting its independent reweighing of the circumstances the Florida Surpeme Court considered the improper factor. Wainwright v. Goode, ___U.S.___, 104 S.Ct. 378 (1983).

ISSUE V

THE EXCLUSION FOR CAUSE OF A JUROR WHO EXPRESSED A BELIEF THAT SHE WOULD AUTOMATICALLY VOTE AGAINST THE IMPOSITION OF CAPITAL PUNISHMENT WITHOUT REGARD TO EVIDENCE AND COULD NOT MAKE AN IMPARTIAL DECISION AS TO THE DEFENDANT'S GUILT AND EXHIBITED A RESOLVE TO VOTE AGAINST THE IMPOSITION BLINDLY AND IN ALL CIRCUMSTANCES WAS PROPER AND DID NOT VIOLATE THE DEFENDANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS, AND WAS AN ISSUE PROPERLY DISPOSED OF ON DIRECT APPEAL TO THE FLORIDA SUPREME COURT.

A cardinal rule of law is that a lower tribunal is without power to overrule a supreme court's decision. E.g., Hernandez v. Garwood, 390 S.2d 357 (Fla. 1980); Gilliam v. Stewart, 291 S.2d 593 (Fla. 1974); Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). The Defendant was requesting, through his Rule 3.850 motion that the trial court overrule the Florida Supreme Court's decision in the instant case. This issue was presented to this Court and decided unfavorably to the defendant in Magill v. State, 386 So.2d 1188 (Fla. 1980). The state respectfully submits that a trial court is without authority and power to overrule the Florida Supreme Court's decision in the instant case, regardless of the trial court's views as to the appropriateness of the decision, as the decision of the Florida Supreme Court is the law of the case and must be conformed with by the trial court. Only the Supreme Court may overrule its own decision. Gilliam v. Stewart, supra. The Defendant requested

what could not be done, and the lower court correctly denied this claim for relief.

It is also well-settled that a motion under Rule 3.850 cannot be utilized for a second appeal to consider issues that were raised in the initial appeal or could have been raised in that appeal. Meeks v. State, 382 So.2d 673 (Fla. 1980); Demps v. State, 416 So.2d 808 (Fla. 1982); Christopher v. State, 416 So.2d 450 (Fla. 1982); Foster v. State, 400 So.2d 1 (Fla. 1981); Sullivan v. State, 372 So.2d 938 (Fla. 1979); Spenkelink v. State, 350 So.2d 85 (Fla., cert. denied, 434 U.S. 960 (1977). In this cause, the instant claim made under this motion falls under the category.

Citing Witt v. State, 387 So.2d 922 (Fla. 1980), the Defendant contends that it is permissible to reargue this issue on post-conviction proceedings since there has been a change in the law since the time the issue was considered on direct appeal because of the Eleventh Circuit Court of Appeals' decision in Darden v. Wainwright, ___F.2d___ (11th Cir. No. 81-5590, February 27, 1984). The state would point out that Witt does not condone such a result. The Florida Supreme Court in Witt explicitly stated:

> [T]o 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.

387 So.2d at 931.

The Defendant's alleged law change in the case sub judice emanates from an intermediate federal court and is ineligible for consideration in a 3.850 proceeding. 387 So.2d at 930. Darden is an intermediate federal court decision and such lack of finality underscores the Florida Supreme Court's rejection of the orders and decisions of lower courts in the state and federal court systems. The instant case does not meet the requirements of Witt, supra, so that it should be considered again under a Rule 3.850 motion. Moreover, the change in law is not of fundamental significance. Nevertheless, this claim fails upon consideration, in any event.

It is well-settled that a death sentence cannot be carried out if the jury that imposed or recommended it was chosen by excusing veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Under Witherspoon prospective jurors cannot be exucsed from jury service on the basis of their opposition to the death penalty unless they make it unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the Defendant's guilt.

Although the Defendant contends that Juror Bonner was

never advised that it would be proper to consider age as a mitigating circumstance, this is not entirely true. Juror Bonner was asked whether she had heard the questions posed by the state attorney to Juror Keith and she replied affirmatively (R 33-34). Prior to the questioning of Juror Bonner the court had instructed Juror Keith and the other members of the jury that age may be a mitigating factor. The court stated to the jury:

> (A)ge may be a mitigating factor when it comes to that point. Of course, you understand that, but what--he solely asking the question to make sure that in your mind just because a person is under the age of twenty-one would be an absolute bar to impose the death penalty. (R-33)

In essence Juror Bonner was not working under the misconception that age would play no part in punishment. Contrary to the Defendant's assertion, Juror Bonner did make it unmistakably clear that she would automatically vote against capital punishment in this case. She did not start out by saying that the Defendant's age would merely influence her as to the Defendant contended in his motion for relief. The colloquy the Defendant speaks of was as follows:

> BY MR. OLDHAM: The mere fact that this defendant may be under the age of twenty-one, would that create any bar where you could not vote to find him guilty or you could not vote for the maximum penalty of death?
>
> BY THE JUROR: Yes sir, it would.
>
> BY MR. OLDHAM: It would influence you?
>
> BY THE JUROR: Because of his age, yes sir. (R-34-35)

Juror Bonner went on to state that it would be a complete bar to her voting the Defendant guilty of murder in the first degree knowing that he was under the age of twenty-one, even though the evidence showed that he was guilty beyond and to the exclusion of a reasonable doubt (R-36). She stated that she could not vote to find the Defendant guilty or vote for the maximum penalty of death (R-35). She stated that in regard to anyone who was under twenty-one she could not convict them, despite the evidence, if death would result, and could not vote to find him guilty with the eleven other jurors (R-37). Juror Bonner, despite the Defendant's assertions to the contrary, had much more than mere "difficulty" voting for a conviction, as her answers show that it was entirely out of the question.

This issue was properly decided by the Florida Supreme Court in Magill v. State, 386 So.2d 1188, 1189 (Fla. 1980), in which the Court concluded:

> (T)he record discloses that juror Bonner would not vote for a conviction for first degree murder, regardless of the evidence, because of her objection to applying the death penalty to a defendant on the basis of age. It was apparent from the examination that she would be unable to follow the law because of her bias or prejudice toward inflicting the death penalty upon those under the age of twenty-one years. As juror Bonner was properly excused, this contention of this defendant is also without merit.

Even under the precepts of Darden, there is no reason to believe that the judge did not determine that Juror Bonner's

responses made it unmistakably clear her unbending opposition to capital punishment. She was individually questioned and her responses left no doubt that her beliefs would be a complete bar to her voting to find the Defendant guilty regardless of the evidence and would bar her also from voting for the maximum penalty of death.

ISSUE VI

A MOTION UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.850 CANNOT BE UTILIZED FOR A SECOND APPEAL TO CONSIDER ISSUES THAT COULD HAVE BEEN RAISED IN THE INITIAL APPEAL; THE TRIAL COURT PROPERLY DENIED THE APPELLANT RELIEF ON HIS CLAIM THAT THE DEFENDANT'S PLEA OF GUILTY OF SECOND DEGREE MURDER, MADE DIRECTLY TO THE JURY BY TRIAL COUNSEL, WAS ACCEPTED BY THE COURT IN THE ABSENCE OF A DETERMINATION OF VOLUNTARINESS.

The defendant contended in his motion to vacate judgment and sentence that from the commencement of the trial to the closing argument, the defendant's appointed attorney admitted that his client was guilty of murder and that the defendant's testimony before the jury that he killed the victim was no more than an in-court confession to the charge of murder and that said arguments of counsel and the defendant's testimony were tantamount to a plea of guilty and that the tacit approval of this procedure by the court without a determination of voluntariness constituted a violation of the defendant's Fifth, Sixth and Fourteenth Amendment rights. The lower court denied this claim for relief summarily without an evidentiary hearing on this issue.

A motion for post-conviction relief under Florida Rules of Criminal Procedure 3.850 is available if the judgment is rendered without jurisdiction, the sentence imposed is not authorized by law or otherwise open to a collateral attack,

a plea was given involuntarily or there has been such denial or infringement upon constitutional rights as to render the judgment vulnerable to collateral attack. Harper v. State, 168 So.2d 325 (Fla. 1st DCA 1964), cert. denied, 177 So.2d 15, cert. denied, 382 U.S. 867; Prangler v. State, 339 So.2d 1158 (Fla. 2d DCA 1976). The issue now set forth in the instant motion is not cognizable under a Rule 3.850 proceeding. In the case sub judice there has been no denial or infringement of constitutional rights so as to render the judgment vulnerable to collateral attack. Moreover, for purposes of a Rule 3.850 motion, the issue has been waived. The record herein conclusively shows that this issue was never presented in a direct appeal to the Florida Supreme Court. Magill v. State, 386 So.2d 1188 (Fla. 1980), cert. denied, 450 U.S. 927, 101 S.Ct. 1383, 67 L.Ed.2d 359 (1981). (Appellant's initial brief).

This Court has repeatedly stated that a motion under Rule 3.850 cannot be utilized for a second appeal to consider issues that could have been raised in the initial appeal. Demps v. State, 416 So.2d 808 (Fla. 1982); Christopher v. State, 416 So.2d 450 (Fla. 1982); Foster v. State, 400 So.2d 1 (Fla. 1981); Sullivan v. State, 372 So.2d 938 (Fla. 1979); Spenkellink v. State, 350 So.2d 85 (Fla.), cert. denied, 434 U.S. 960 (1977). In this cause, the instant claim made under this motion falls under that category. Rule 3.850 was not designed or intended to serve as a second appeal vehicle upon

which to bring before the trial and appellate courts unfounded charges as to the operation of the judicial process, as has occurred in this and many other cases with which our courts have been burdened. Such attempted abortive use is an ill-graced attempt to pollute the streams of justice. When lead-footed justice has come to an end of its long trail, society has a direct interest that these type of unfounded extractions of time-consuming judicial labor shall come to an end. Ashley v. State, 350 So.2d 839 (Fla. 1st DCA 1977). This contention was a matter which could have been raised on direct appeal and is thereby unassailable in a collateral attack on a judgment. The fact that the basis of the defendant's collateral attack is alleged to be one of constitutional dimension does not preclude a waiver by the failure to assert it on direct appeal. Clark v. State, 363 So.2d 331 (Fla. 1978); Sanford v. Rubin, 237 So.2d 134 (Fla. 1970). Further, the record conclusively shows the Appellant is entitled to no relief so there was no need for an evidentiary hearing nor is there need now of remanding for such a hearing. The lower court correctly denied relief on such a basis.

It is well settled that when faced with the duty of attempting to avoid the consequences of overwhelming evidence of the commission of an atrocious crime, such as a deliberate, considered killing without the remotest legal justification or excuse, it is commonly considered a good trial strategy for a defense counsel to make some halfway concessions to the truth

in order to give the appearance of reasonableness and candor and to thereby gain credibility and jury acceptance of some more important position. To be effectual, trial counsel should be able to do this without express approval of his client and without risk of being branded as professionally ineffective because others may have different judgments or less experience. McNeal v. State, 409 So.2d 528, 529 (Fla. 5th DCA 1982).

The decision to plead guilty or not guilty is a decision reserved solely for the accused based on his intelligent and voluntary choice. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). The defendant's decision to plead guilty cannot be presumed from the plea itself in the context of an otherwise silent record. Instead, the court must make an on-the-record inquiry of the defendant to ensure that the defendant's plea is voluntary and intelligent. Id. at 243-244, 89 S.Ct. at 1712-1713. Similarly, an attorney may not admit his client's guilt which is contrary to his client's earlier entered plea of not guilty unless the defendant unequivocally understands the consequences of the admission. Brookhart v. Janis, 384 U.S. 1, 8, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966). However, counsel may believe that it is tactically wise to stipulate to a particular element of a charge or to issues of proof. The action of trial counsel in this particular instance may have amounted to a tactical retreat but certainly it did not surrender the cause. The statements of trial counsel and the defendant in no way constituted a surrender of the sword. Trial counsel was engaged

in a strategic trial tactic to obtain leniency for his client. In no way did counsel waive his client's constitutional right to plead not guilty and have a trial in which he could confront and cross-examine the witnesses against him. Throughout the trial and argument, his attorney stressed Magill's emotional state and his impulsiveness in an attempt to negate premeditation and obtain a conviction on a lesser offense than first degree murder. In view of the overwhelming evidence against Magill, including a tape recording of his confession to the shooting, and corroborating physical evidence, the strategy of trial counsel was proper and would not amount to a constitutional violation. Counsel would have been ineffective had he not gone to trial with this weak case in view of the fact that the death penalty was involved.

A similar case is that of McNeal v. Wainwright, 722 F.2d 674 (11th Cir. 1984) in which McNeal's attorney during final argument to the jury at the close of trial suggested that the defendant was at best guilty of manslaughter. The court found that defense counsel's argument was made as a tactical decision and did not amount to a guilty plea entered without the defendant's consent. The court stated:

> . . . McNeal's attorney's argument to the jury concerning manslaughter were tactical and strategic. Throughout the trial and argument, his attorneys stressed McNeal's emotional state in an attempt to negate premeditation. In view of the overwhelming evidence against McNeal, including a tape recording of his confession to the shooting, the

> strategy of trial counsel was proper and would not amount to a constitutional violation.

722 F.2d at 676.

In McNeal, the defendant was being tried for first degree murder and his attorney argued that at best the government had proven only manslaughter because they did not prove premeditation. The majority of his defense case centered around this proposition. During the trial, his attorney tried to establish a self-defense claim. In view of the tape recorded confession played at trial, however, such a defense did not play an essential role.

In the sub judice there was also overwhelming evidense against Magill especially the tape recording of his confession of the shooting which was introduced into evidence at trial and played for the jury. Magill took the stand for the express purpose of recanting his prior taped confession in several respects. On the tape he stated that he had been thinking of his mother the night of the murder (R-420). At trial he stated that that morning he woke up made because of an argument with her the previous night, but when he shot the woman, he had no thought of his mother in his mind and had no explanation for shooting the girl. He stated that he planned the robbery ten minutes before, but nothing else was planned and was on impulse and that things just started going out of control after he took the girl and they became stuck in the sand in his automobile. He testified that he didn't feel

that he had any control over his actions after that, and that a psychiatrist had suggested that he might have a mental block about that night (R-421). He testified that he felt remorse and felt very sorry that this had happened, that prior to the crime he spent part of his time working in volunteer organizations trying to help people and it was totally against his thinking to harm a person like that and he didn't know why he shot the victim and cannot give any explanation but that he does not think it was because he didn't want a witness (R-428). In the taped confession he had admitted to premeditatively shooting the girl stating that they were walking towards the car and she was pleading with him not to hurt her and he realized she had seen him and she would be able to identify him when questioned so he shot her three times, twice in the head and once in the chest using a .44 special (R-352). Magill's and his attorney's statements to the jury concerning lack of premeditation and that the murder was not committed for the purpose of eliminating a witness who could identify him were tactical and strategic to obtain a lesser conviction and obtain jury sympathy and in view of the overwhelming evidence against Magill were proper and would not amount to a constitutional violation. The testimony was not tantamount to a plea of guilty to second degree murder but was a matter of strategy to try and vitiate his prior damning confession, which was before the jury. Defendant could not entirely recant the confession and say "I didn't do it at all" in view of other overwhelming corroborating evidence.

ISSUE VII

THE DEFENDANT WAS NOT DENIED HIS RIGHT TO A FAIR SENTENCING HEARING IN VIOLATION OF HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS BY THE ALLEGED APPROVAL OF THE USE OF CERTAIN AGGRAVATING CIRCUMSTANCES PRIOR TO THE SENTENCING ON REMAND: SUCH ISSUE COULD HAVE AND SHOULD HAVE BEEN RAISED ON DIRECT APPEAL AND IS ALSO MOOT AS DEFENDANT APPEALED FINDINGS OF AGGRAVATING CIRCUMSTANCES IN HIS SECOND DIRECT APPEAL AFTER RESENTENCING.

This Court originally vacated the sentence of death because the trial court failed to render a specific analysis of the applicable mitigating circumstances. Magill v. State, 386 So.2d 1188 (Fla. 1980). In Magill (I), this Court stated that "It is apparent that the trial judge used a reasoned judgment, and in the absence of sufficient mitigating circumstances, the death penalty was justified." 386 So.2d at 1191. However, the trial court did not specifically list the mitigating circumstances which it may or may not have considered. The Florida Supreme Court further stated in regard to this "Even though the trial judge may have considered some mitigating circumstances, he is charged with the further responsibility of articulating them, so as to provide this Court with the opportunity of giving a meaningful review of the sentence of death." 386 So.2d at 1191. In essence, the Florida Supreme Court expressed the view that they were without the opportunity of giving a meaningful review of the sentence of death in the absence of a finding of the mitigating circumstances which the trial court may or may not have considered, even though the

findings of the trial court in regard to aggravating circumstances were appropriate. The case was remanded back to the trial judge for the purpose of making the proper findings of fact and then imposing an appropriate sentence. Simple approval by the Florida Supreme Court of the trial court's finding of aggravating circumstances, did not prevent the trial court from revisiting the issue of aggravating circumstances if it felt that it was appropriate to do so. The transcript of the sentencing hearing, in which the court found even a nonstatutory mitigating circumstance, reflects that the trial court was open to further argument in regard to the finding and weighing of aggravating and mitigating cricumstances. The weighing of such aggravating and mitigating cricumstances was the sole province of the trial court, and it would necessarily have to revisit its prior findings of aggravating circumstances in order to weigh the aggravating and mitigating circumstances, to reach the result that the death penalty was appropriate. Moreover, the case was remanded to the trial judge for the purpose of making <u>proper</u> findings of fact. The Supreme Court felt that it was unnecessary to impanel another jury. This is simply a case where findings of fact were initially made but improperly articulated so that the impanelment of another jury would be unnecessary in view of the fact that mitigating circumstances had been determined, but as yet were unwritten and not subject to appellate review. Even so, the trial court, upon resentencing, heard additional matters in mitigation from the Defendant's mother and others and did subsequently make

proper findings of fact and impose an appropriate sentence. Moreover, this issue is entirely moot, as on a direct appeal from resentencing the Defendant specifically appealed the finding that the murder was heinous, atrocious and cruel, and could have and should have appealed any other aggravating circumstances found by the trial court that it considered inappropriate. Magill v. State, 428 So.2d 649 (Fla. 1983). The lower court cannot consider matters that should have been raised on direct appeal to the Florida Surpeme Court, nor matters that were and appropriately denied relief on the basis of this claim.

Having had a full review on the issue of aggravating and mitigating circumstances to the Florida Supreme Court, review by the lower court on a Rule 3.850 motion would have been inappropriate.

ISSUE VIII

THE DEFENDANT WAS NOT DENIED HIS SIXTH AMENDMENT RIGHT TO CONFRONTATION AND HIS RIGHT TO A FAIR SENTENCING REVIEW REQUIRED IN CAPITAL CASES BY THE EIGHTH AND FOURTEENTH AMENDMENTS BY AN CONSIDERATION BY THE SUPREME COURT OF A EX PARTE PSYCHOLOGICAL REPORT: SUCH ISSUE COULD HAVE AND SHOULD HAVE BEEN PRESENTED TO THE FLORIDA SUPREME COURT.

The Defendant contends that the Florida Supreme Court considered a psychological screening report during the oral argument in the initial direct appeal from the defendant's conviction and sentence. The report was allegedly not provided to appellate counsel for the defendant, nor was she otherwise informed of its existence prior to the argument. The Defendant submits that such alleged ex parte consideration of the report constitutes a violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. The lower court properly refused to consider such a claim as it is without jurisdiction to review the actions of this Court in such a matter Christopher v. State, 416 So.2d 450 (Fla. 1982).

In Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), this Court held that the practice of receiving psychological screening reports such as the one allegedly prepared in the instant case does not require the court to vacate the sentence of death.

This issue has been adequately disposed of in Brown. Moreover, a motion under Rule 3.850 cannot be utilized for a second appeal, in this case, a third appeal to consider issues

that could have been raised in the initial, and in this case, the second appeal of the sentence. Demps v. State, 416 So.2d 808 (Fla. 1982); Christopher, supra; Foster v. State, 400 So.2d 1 (Fla. 1981); Sullivan v. State, 372 So.2d 938 (Fla. 1979); Spenkellink v. State, 350 So.2d 85 (Fla.1977), cert. denied, 434 U.S. 960 (1977). The appellant has never before presented this issue to the Florida Supreme Court, even though the decision in Brown was prior to the decision in the appellant's second direct appeal upon resentencing.

The crux of the defendant's assertion is that somehow non-record materials were used in connection with the review of his sentence and the use of such materials would run afoul of the principles of Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), which held that a death sentence may not be imposed to any extent on non-record, unchallengeable information. In Brown v. Wainwright, 392 So.2d 1327 (Fla., cert. denied, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981), this Court with a full opinion denied Brown and one hundred twenty-two other Florida death row inmates class relief on a direct petition for writ of habeas corpus alleging the Supreme Court of Florida had unconstitutionally received non-record materials concerning death row inmates during the pendency of appeals of capital cases. The defendant asserts basically the same issue here, specifically claiming that in his case the Florida Supreme Court reviewed ex parte psychological screening reports. The record herein, however, shows that counsel for the defendant,

Margaret Goode, filed a motion to inspect and copy the psychological screening report and pre-sentence investigation report, which motion was granted on June 23, 1978, after oral arguments had been heard in the case. (See motion to inspect and copy, and order on same, and letter from supreme court clerk setting oral argument in appendix of brief).

Therefore, prior to any decision in the case sub judice by the Florida Supreme Court, appellate counsel for the defendant had the opportunity to review said psychological screening report and said report cannot be considered an ex parte one. Were any improper reports being utilized in the case at that time counsel could have and should have moved to have them stricken upon her review of them or moved to file supplemental briefs, and by taking no further steps waived the issue.

The defendant also claims that the Florida Supreme Court actually used the reports in its deliberations on appeal alleging that during the course of oral argument then Chief Justice Overton referred to the psychological screening report prepared after the defendant had been sentenced to death and incarcerated on death row. The State would submit that it is irrelevant whether a tape recording of the oral argument demonstrates this, as a later letter addressed to Margaret Goode, appellate counsel for the defendant from Sid White, Clerk of the Supreme Court, shows conclusively that the post-judgment report was stricken from the above-styled cause and there is absolutely no reason to believe that any post-judgment repot played a part in the deliberations of

the Court. (See letter to Margaret Goode - Appendix) Ms. Goode referred to said letter in her testimony (Tr Evid. Hearing 212),

There was no necessity for any kind of an evidentiary hearing or other fact-determining inquiry of this Court to determine the truth of the allegations as this Court in Brown, supra, at 1331, assumed that it had received such information and that it was available to the members of the court. In Brown this Court held that state law does not permit the use of such non-record material in the appellate review of a capital case. In the case sub judice the material cannot be said to have been used in contravention of state law. There is a presumption of regularity in state proceedings, which would seem to rise to its highest level in considering the work of the highest court in the state. Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981). The lower court correctly presumed the state supreme court follows its own law and procedures. Secondly, this Court in Brown stated that non-record material was not used in the review of petitioner's cases and there has been no allegation that the defendant's case had been or would have been treated differently from all the others. Moreover, the Florida Surpeme Court in Brown determined that the simple reading of non-record documents would not so affect the members of the court that they could not properly perform their assigned appellate functions. Just as trial judges are aware of matters they do not consider in sentencing, so appellate judges are cognizant of information that they disregard in the performance

of their judicial tasks. 392 So.2d at 1333. That judges are capable of disregarding that which should be disregarded is a well-accepted precept in our judicial system. Harris v. Rivera, 454 U.S. 339, 345, 102 S.Ct. 460, 464, 70 L.Ed.2d 530, 536 (1981). In the case sub judice it must be assumed that the members of the Court, even if cognizant of the information, disregarded it in the performance of their judicial tasks in the case sub judice, especially in view of the letter to appellate counsel stating that said post-judgment report was stricken. Moreover, the avowed purpose of the Florida Supreme Court in even obtaining such information in the first instance was to avoid collateral applications for relief in reliance on Gardner. (See order of supreme court in Case No. 51,999).

Even if the members of the court solicited the material with the thought it should, would or might be used in the review of capital sentences, the decision of the Court in Brown, that it should not so be used, the statement that it was not used, and the rejection of the notion that it affected the judgment of the reviewing judges of the court ends the matter when addressed at the constitutional level.

Contrary to the defendant's assertion, it is clear in this case that the report was not used in connection with relevant deliberations by the appellate court. The en banc opinion of the Eleventh Circuit Court of Appeals in Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983), fully supports the conclusion reached by this Court in Brown.

ISSUE IX

THE PROCEDURES SET FORTH IN FLORIDA STATUTE 39.111(6) WERE NOT MANDATORY AT THE TIME OF DEFENDANT'S ARREST AND DEFENDANT WAIVED THE BENEFIT OF SAID PROCEDURES: SUCH ISSUE SHOULD HAVE BEEN RAISED ON DIRECT APPEAL TO THE FLORIDA SUPREME COURT.

The Defendant argues that §39.111(6) applies however, in order to do this, the court must be blinded to the provisions of §39.02(5)(c) which states in part,

1. "A child of any age charged with a violation of Florida law punishable by death or by life imprisonment shall be subject to the jurisdiction of the court as set forth in §39.06(7) unless and until an indictment on such charge is returned by the grand jury. When an indictment is returned, the petition for delinquency, if any, shall be dismissed. The child shall be tried and handled in every respect as if he were an adult:

   a. On the offense punishable by death or by life imprisonment; and

   b. On all other felonies or misdemeanors charged in the indictment which are based on the same act or transaction as the offense punishable by death or by life imprisonment.

2. No adjudicatory hearing shall be held within 21 days from the date that the child is taken into custody and charged with having committed an offense punishable by death or life imprisonment unless the state attorney advises the court in writing that he does not intend to present the case to the grand jury or that he has presented the case to the grand jury and the grand jury has returned a no true bill. If the court received such a notice from the state attorney, or if the grand jury fails to act within the 21-day period, the court may proceed as otherwise authorized under this chapter.

3. If the child is found to have committed the offense punishable by death or by life imprisonment, the child shall be sentenced as an adult.

> If the child is not found to have committed the indictable offense but is found to have committed a lesser included offense or any other offense for which he was indicted as a part of the criminal episode, the court may sentence as follows:
>
> a. Pursuant to the provision of §39.111(6);
> b. Pursuant to the provision of Chapter 958, notwithstanding any other provisions of that chaper to the contrary; or
> c. As an adult. (Emphasis added)

Once a child has been indicted pursuant to this paragraph and has been found to have committed any offense for which he was indicted as part of the criminal episode, the child shall thereafter be handled in every respect as if he were an adult for any subsequent violation of Florida law, unless the court pursuant to this paragraph imposes juvenile sanctions under §39.111(6). A reading of §39.111 shows the procedures not to be imperative or mandatory and were not obligatory upon the court at the time of Defendant's arrest. Moreover, the Defendant has waived the benefit of this provision by failing to object or move for such treatment at the time.

The date of the murder was December 23, 1976. The Marion County Grand Jury indicted the Defendant for Murder in the First Degree, Involuntary Sexula Battery, Kidnapping and Robbery on January 6, 1977, in case number 77-19.

This Court has addressed this section in Lisak v. State, 433 So.2d 487 (Fla. 1983). This was a proceeding where a juvenile sought to avoid adult sanctions by entering an admission to a petition in juvenile court. The court found the plea to be a nullity; and allowed the state to proceed in adult court on an

indictment. In the case at bar, the Defendant has been "tried and handled in every respect as if he were an adult." Therefore, the sentence imposed by the court was not in violation of §39.111(6), as §39.02(5)(c) is controlling.

Moreover, this is an issue that should have been raised on direct appeal rather than at post-conviction proceedings.

ISSUE X

IN VIEW OF THE AGGRAVATING AND MITIGATING CIRCUMSTANCES IN THE CASE SUB JUDICE AND A PRIOR REVIEW OF THE SAME BY THE FLORIDA SUPREME COURT, THE EXECUTION OF THE DEFENDANT DOES NOT CONSTITUTE EXCESSIVE PUNISHMENT FORBIDDEN BY THE EIGHTH AND FOURTEENTH AMENDMENTS.

The Florida Supreme Court having reviewed the death sentence of the Defendant for proportionality, the issue now raised was determined in the initial and second direct appeals and a motion under Rule 3.850 cannot be utilized for a third appeal to consider issues that were disposed of previously. Demps v. State, 416 So.2d 808 (Fla. 1982); Christopher v. State, 416 So.2d 450 (Fla. 1982); Foster v. State, 400 So.2d 1 (Fla. 1981); Sullivan v. State, 372 So.2d 938 (Fla. 1979); Spenkelink v. State, 350 So.2d 85 (Fla.), cert. denied, 434 U.S. 960 (1977). See Magill v. State, 438 So.2d 649, 652 (Fla. 1983) where the Supreme Court did not feel that the instant case warranted substituting the court's own judgment for that of the sentencing court and expressly determined that the three mitigating circumstances found applicable by the trial judge did not outweigh the aggravating circumstances so that the death sentence should be vacated and a sentence of life imprisonment imposed instead. A Rule 3.850 motion is not to be utilized to revisit such an issue previously determined by the highest court in this state.

The sentencing procedure is not merely a counting contest in which the number of agtravating factors is compared to

the number of mitigating factors with all factors having equal weight. State v. Dixon, 283 So.2d 1 (Fla. 1973). Rather the process involves a reasoned judgment as to what factual circumstances weigh heavily toward or against the imposition of the ultimate penalty. Lightbourne v. State, 438 So2d 380, 390 (Fla. 1983). On direct appeal from resentencing the Florida Supreme Court in the case sub judice explicitly found that the trial court used the required reasoned judgment stating "Regardless of that, the trial court used reasoned judgment, specified which factors it considered, and followed the jury's recommendation in sentencing. In such a case, we do not feel warranted to substitute our own judgment for that of the sentencing court." 428 So.2d at 652.

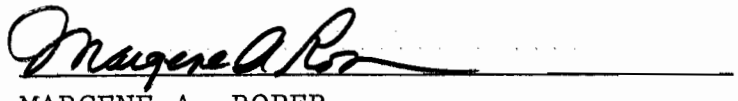
The Court clearly addressed the propriety of the aggravating and mitigating circumstances and the appropriateness of the death sentence in accordance with the law as it was established at the time of the decision of this case on the merits. The lower court correctly denied relief on the basis of this claim.

CONCLUSION

Based on the foregoing authorities, the order of the trial court denying post-conviction relief should be affirmed.

Respectfully submitted,

JIM SMITH
Attorney General



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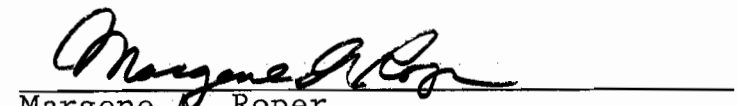
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellee has been forwarded to Mr. Philip J. Padovano, Post Office Box 873, Tallahassee, FL 32302; and Mr. Patrick D. Doherty, 619 Turner Street, Clearwater, FL 33516, via U. S. Mail, this 12th day of March 1984.



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