65,354

IN THE SUPREME COURT OF FLORIDA

JOHN O'CALLAGHAN,	)	
	)	
Appellant,	)	CASE NO.
	)	
v.	)	
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	
	)	

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, John O'Callaghan, was the defendant at trial, and the Petitioner at the post-conviction hearing held May 24, 1984, before the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida. Appellee, Louie L. Wainwright, was the Respondent at the aforementioned post-conviction hearing.

"R" refers to the Record-On-Appeal, of the trial and sentencing proceedings. "T" refers to the transcript of the proceedings held on May 24, 1984, on Appellant's Motions for post-conviction relief; "e.a." means emphasis added.

Appellee notes that there is no formal Record-On-Appeal of the proceedings from which Appellant seeks review herein, based on the shortness of time occasioned by this Court's briefing schedule, requiring the filing of simultaneous briefs by the parties with this Court by noon, Monday, May 28, 1984. Due to the nature of these circumstances, those pleadings and documents which were filed and addressed by the trial court in this proceeding, will be referred to by the title of heading of each such pleading, and each such pleading's own pagination.

It is further noted that this Answer Brief is of an anticipatory nature, and Appellee will be prepared to address any point in Appellant's Initial Brief, that is not specifically addressed herein, at oral argument, presently set for 9:00 A.M., Tuesday, May 29, 1984.

STATEMENT OF THE CASE

Appellant was indicted on November 6, 1980, and charged with having committed the first-degree murder of Gerald Leon Vick, on August 20, 1980, in a premeditated manner, by shooting Vick with a handgun (R. 1201). After jury trial on this charge, Appellant was found guilty of first-degree murder, and adjudicated guilty by the trial court (R. 1290-91). Pursuant to Florida law, the jury was reconvened for the sentencing phase and rendered an advisory sentence, by majority, that the death penalty be imposed upon Appellant (R. 1298). On May 12, 1981, the trial court made specific findings of fact, at a sentencing hearing, and imposed the death penalty upon Appellant, citing the existence of evidence to support a finding of four (4) aggravating circumstances, and no mitigating circumstances, under Section 921.141 of the Florida Statutes (R. 1306-1309).

On direct appeal of his conviction and sentence, the Florida Supreme Court affirmed the judgment and sentence of the trial court. O'Callaghan v. State, 429 So. 2d 695 (Fla. 1983). Other than a slight modification of the dissenting opinion, the Supreme Court denied Appellant's Motion for Rehearing on April 27, 1983.

Appellant was subsequently denied executive clemency by the Governor of the State of Florida, in 1983.

On April 30, 1984, the Governor of Florida issued a death warrant, authorizing the Superintendent of the Florida State Prison to carry out the execution of Appellant between noon on May 25, 1984, and noon on June 1, 1984. The Superintedent has scheduled

said execution for May 31, 1984, at 7:00 A.M.

On May 23, 1984, counsel for Appellant served undersigned counsel with a Motion for Post-Conviction Relief, pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. Appellant also served Appellee on said date with a Brief in Support of Application for Stay of Execution. On May 24, 1984, Appellee was served with a Supplemental Motion for Relief under Rule 3.850; and Application for Stay of Execution; a Motion for an Evidentiary Hearing; and affidavit purporting to be executed by Dr. Dorothy Lewis; Doris O'Callaghan, Appellant's mother; and Walter "Beau" Tucker, Appellant's co-defendant at trial. Said Appellant further purported to be executed by the aforementioned affiants on May 22, 1984.

In response to same, Appellee filed a Response to Appellant's Motion for relief under Rule 3.850; a Motion to Strike said Appellant's Motion; and a Response opposing Appellant's Brief in support of a stay of execution.

Upon the serving and filing of said pleadings, the Circuit Court in and for Broward County, Florida, the Honorable Judge Arthur Franza presiding, scheduled and held a hearing on Appellant's Motions on May 24, 1984, at 4:00 P.M. Pursuant to an Order for Transport, Appellant was brought to, and was present at said hearing.

Having reviewed all the aforementioned pleadings, the trial transcript, and heard argument on said pleadings, the Circuit Court denied Appellant's motions to vacate his sentence, and his request for a stay of execution, and determined that

Appellant had not shown the necessary requirement for entitlement to an evidentiary hearing on any ground alleged in his motions.

The Order of May 24, 1984, being appealed and Appellee anticipates that Appellant intends to and will be filing a petition for habeas corpus, and a petition seeking a writ of error coram nobis, and will attempt to invoke the original jurisdiction of this Court, regarding these latter two actions.

STATEMENT OF THE FACTS

Appellant, along with co-defendant Walter "Beau" Tucker, was charged by indictment on November 6, 1980 with having premeditatedly killed Gerald Leon Vick on August 20, 1980 in alleged violation of §782.04 Florida Statutes (R. 1201). Pursuant to an arrest warrant, issued against Appellant, charging him with murder and kidnapping, Appellant was apprehended in San Diego, California on December 9, 1980 and returned to Florida for trial on said charges. The victim, Gerald Leon Vick was found, approximately seven eighths of a mile west of the Pembroke Road extension in Hallandale, Florida, on September 15, 1980 at approximately 5:30 P.M. by Rock Underwood. The area in which the body was found was a dirt road, and the body was located in a ditch three feet below the level of the road (R. 427-428). A set of keys were taken from the pockets of the body, to the Pembroke Pines Police Station (R. 430). Identification of the body, as that of Gerald Leon Vick, was made by Lewis Huey (R. 499), and by Vick's brother and stepdaughter (R. 692-693). Mr. Huey further identified the keys taken from the pocket of the body by the fact that one of the keys fit an office compound located at 1708 South 31st Avenue, Hallandale, Florida, and that Mr. Vick and Mr. Huey were the only ones who had possession of such a key (R. 485, 506).

On August 20, 1980, Allen Wheatley, owner of the Finish Line Bar, 270 North Federal Highway, Hallandale, Florida was called

by Appellant (who was also known as Jack McCarthy), and was asked by Appellant, (the night manager of the Finish Line Bar), to come to the bar to assist him (R. 528-530). Upon arriving at the bar, Appellant met Wheatley outside the bar, and ordered Wheatley to take Appellant and Beau Tucker, among others, to Vick's residence (R. 530-532). After Wheatley attempted to drive past the residence he knew to be that of Gerald Vick, and Appellant discovered Wheatley's attempt to protect Vick, Appellant again told Wheatley that he "better show him where it [Vick's house] is at." (R. 535). Appellant informed Wheatley that he and Tucker were "going to get" Gerald Vick (R. 536). Upon being taken to Vick's residence, Appellant left a note on the door of said residence, in an attempt to induce Vick to come down to the Finish Line Bar (R. 538).

Subsequently, at approximately 7:00 P.M., Gerald Vick arrived at the Finish Line Bar, where Appellant had already arrived (R. 539). According to the testimony of Wheatley and Mark Petitpas, a day manager at said bar, Appellant called Vick to sit with him, over a plate of clams, at a booth in the bar (R. 607). After a brief discussion between the two, Appellant left the bar for a number of minutes (R. 540, 608). Upon returning, Appellant returned to the same booth, and pursued his conversation with Vick (R. 540, 609). Tucker came into the bar, approximately one to three minutes after Appellant returned (R. 557), followed by Cyndi Lapointe and Anthony Cox (R. 611). Appellant ordered Cox to seat himself next to Vick at the booth, and then proceeded to point a gun at Vick under the table, pointed at his guts (R.

612). Appellant then ordered Cox to disarm Vick of a gun he had in his possession, and Vick was taken at gunpoint, by Appellant and Tucker, back into the kitchen area of the bar (R. 734-735).

After at least a period of approximately twenty minutes (R. 636), Appellant emerged from the kitchen area, and demanded that Allen Wheatley give him the keys to a white van owned by Wheatley. When Wheatley initially refused, Appellant grew angry and told Wheatley to "give me the fucking keys." (R. 543, 613). After pulling the van around to the back door of the kitchen, Appellant and Anthony Cox placed plastic down in the back portion of the van, and placed Vick in the van, on top of the plastic (R. 737).

With Appellant driving, and giving instructions, to Tucker, Cox, and Cyndi Lapointe, they proceeded west on Pembroke Road, in Hallandale, Florida (R. 738-782). During the course of the trip, Cyndi Lapointe saw Vick's leg move, while laying in the back of the van, and, to Lapointe, Vick appeared to be breathing (R. 783-784). Upon arriving near the location where the body was found, Appellant ordered the body be taken out of the van (R. 814), and the body was thrown to the ground. Appellant then proceeded to fire two shots into Vick's body, at least one of which was observed to be in Vick's head (R. 738-739, 785, 913). Appellant then handed the weapon to Tucker, who attempted to shoot Vick, but could not, because the gun jammed (R.740, 768, 913). Appellant and Cox then took the body approximately 25 feet away, and threw it in the bushes. Two roses were placed on the body, having been

bought on the way from the bar, to where Appellant shot and killed Vick, by Appellant (R. 788-789). Tucker, Cox and Lapointe got back into the van, and after approximately a mile, Appellant and Tucker disposed of the gun by throwing it in a nearby canal (R. 741, 786). Before that, Appellant applied baby oil to the gun to remove fingerprints (R. 788).

Besides the testimony as to these facts, the state presented the testimony of Dr. Shashi Gore, and associate medical examiner employed by Orange County (R. 685). Dr. Shashi testified, after being qualified as an expert (R. 687) that he performed an autopsy on September 16, 1980 of Gerald Vick (R. 688-695). Dr. Gore's conclusions were that the body had been dead at least 15 to 20 days; that there was a "through and through" gunshot wound in the head, and that there was absolutely no doubt" about the nature of this wound; and that, within reasonable medical certainty, the cause of death of Gerald Vick, was due to gunshot wounds to the head and chest (R. 695-698). Dr. Gore further testified that there was nothing else on Vick's body that would suggest any other cause of death (R. 699).

Thereafter, Appellant presented the testimony of Dr. Abdullah T. Fateh, a former deputy medical examiner for Broward County (R. 873). On cross-examination, Dr. Fateh conceded that he relied solely entirely upon depositions given in the case, for his conclusion that Vick's death was the result of beating (R. 892-894). Dr. Fateh further conceded that he did not base his opinion on any positive medical evidence of the beating death,

and that he did not conduct an autopsy of the body (R. 890). Dr. Fateh also made some factual errors concerning the age of Gerald Vick (R. 892).

At the conclusion of the State's case, "Beau" Tucker testified in his own behalf (R. 902). He stated his belief that there was a "contract" out on him (R. 919-920). Tucker further acknowledged that
the individual who was shooting into his house, and breaking his windows (R. 940-941). Tucker's belief as to O'Callaghan's purpose in driving Vick, in the van, away from the bar, was to dump Vick, and make Vick walk back into town (R. 944).

Appellant testified that, at first, Tucker suspected him of being responsible for shooting at his house windows (R. 952). Appellant admitted taking Vick inside the kitchen, and being present inside while Vick was struck (R. 952-954). His version of the events involved an admission that he intended to shoot Vick, but that the gun was out of bullets when he made such an attempt (R. 961-962, 972). The plan was to involve every individual in the van in the shooting of Vick, so that "everyone's guilty...that way." (R. 961-962). Appellant additionally admitted four prior convictions (R. 965).

After due deliberations, the jury returned the verdict of guilty of first degree murder against O'Callaghan (R. 1135). At sentencing, the State presented three certified copies of Appellant's three prior convictions (R. 1140). The trial court found the presence of three aggravating circumstances under the

death penalty statute, and no mitigating circumstances, and therefore imposed the death penalty (R. 1151-1154). The jury's advisory sentence also recommended the death penalty (R. 1170). The judge entered a written order, pursuant to § 921.141 of the Florida Statutes, justifying his imposition of the death penalty (R. 1186-1190).

At the conclusion of sentencing, Appellant specifically requested that William Seidel, one of his two trial attorneys, be appointed as his appellate attorney (R. 1191).

On direct appeal, Mr. Seidel raised four issues: (a) the denial of his request for severance of his trial, from that of Tucker; (b), the alleged failure of the indictment to charge Appellant with felony murder; (c), allegedly improper and prejudicial remarks by the prosecutor; and (d), improper imposition of the aggravating circumstances found by the trial court. In addition to rejecting all four arguments, this Court found there was "overwhelming evidence" of Appellant's guilt, and that such evidence required affirmance on all points, on their face, and on the basis of the "harmless error doctrine." O'Callaghan v. State, 429 So. 2d 691 (Fla. 1983), at 696. This Court further found that under its proportionality review, the jury "could reasonably determine" Tucker guilty of second degree murder, and Appellant herein guilty of first-degree murder which warranted application of the death penalty. O'Callaghan, at 696.

Appellant raised eleven issues in his initial and Supplemental Motions for relief under Rule 3.850, Florida Rules of Criminal Procedure. The trial court based its denial of

relief, in all respects, on its finding that the transcript conclusively demonstrated that Appellant was not entitled to relief. Order, May 25, 1984, at 1. The trial court further specifically found that Appellant had not met the threshold requirements to demonstrate ineffective assistance of counsel under the United States Supreme Court decision in Strickland v. Washington, ___ U.S. ___, (Case # 82-1554), 35 Cr. L. Rptr 3066 (opinion filed May 14, 1984). Order, at 1. The trial judge made additional specific findings that Appellant's pleadings were speculative in nature, and that such pleadings did not in any way show that there was a reasonable probability that the outcome of the trial was affected by the alleged acts of ineffectiveness by trial counsel, William Seidel. Order at 1-2.

POINT ON APPEAL

WHETHER TRIAL COURT APPROPRIATELY DETERMINED THAT APPELLANT'S MOTION TO VACATE SENTENCE SHOULD BE SUMMARILY DENIED?

ARGUMENT

POINT ON APPEAL

TRIAL COURT APPROPRIATELY DETERMINED THAT APPELLANT'S MOTION TO VACATE SENTENCE SHOULD BE SUMMARILY DENIED.

The standard of review, as stated by this Court on numerous occasions, in an appeal from an order denying post-conviction relief under Rule 3.850, Florida Rules of Criminal Procedure, is whether the relevant records and motion for post-conviction relief conclusively demonstrate that Appellant has no entitlement to relief. Arango v. State, 437 So. 2d 1099 (Fla. 1983); Riley v. State, 433 So. 2d 977 (Fla. 1983); Francois v. State, 423 So. 2d 357 (Fla. 1982); State v. Weeks, 166 So. 2d 892 (Fla. 1964). It is submitted and maintained by Appellee that the subject motion, record and pleadings conclusively demonstrate a lack of merit on all issues raised by Appellant in his Rule 3.850 motion.

The argument made by Appellant, in his Motion, as "Points" A, C, D, F, G, and H, raise issues which could or should have been raised on direct appeal. Points B and E were in fact presented on direct appeal, argued and resolved by this Court. O'Callaghan v. State, 429 So. 2d 691 (Fla. 1983). Therefore, the summary rejection of those claims by the trial court was entirely appropriate. Armstrong v. State, 429 So. 2d 287 (Fla. 1983), and cases cited therein.

A. Alleged Brady Violation

Assuming arguendo that this Court seeks to address those issues which could have or were addressed on direct appeal, as to

their substantive merit, Appellee so addresses these points.

Appellant initially maintained that the inadvertent destruction of the T-shirt found on the victim's remains constituted a violation of Brady v. Maryland, 373 U.S. 83 (1963). The essence of this claim, as stated at trial, was that all testimony derived from the T-shirt, for which the T-shirt would be "useful in direct or impeachment testimony," should be suppressed, since the State allegedly caused its destruction (R. 81-82). The United States Supreme Court specifically rejected the type of conclusory approach by defense counsel at the post-conviction hearing, and at trial:

> The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' [necessary under Brady].

United States v. Agurs, 427 U.S. 97, 109-110, 96 S. Ct. 2392, 49 L. Ed. 2d 342, 353 (1976). Appellant's argument, in his motion under review herein, merely spoke to the possible results of examination of the T-shirt, thus constitutes the classic deficiency addressed in Agurs, supra.

Appellant's speaking suppression motion suggested that there was "reason to believe" that the T-shirt was material to the existence and number of gunshot wounds (R. 81-82). However, the identity of the victim was ascertained through other means, by Louis Huey, and by Vick's family (R. 499-500, 692-693). As the prosecution argued, there were available photographs of the T-shirt, with full front and back views displayed (R. 83-84). Thus, on the Record, Appellant was not prejudiced by the non-availability of the actual shirt itself.

Furthermore, the gist of a Brady violation, and the Constitutional principles such a violation involves, are not present here. The Court made clear in Agurs, supra, that the essence of a Brady violation "...involves the discovery, after trial, of information which had been known to the prosecution but unknown to the defense." Agurs, 427 U.S., at 103 (e.a.); see also, Arango v. State, 437 So.2d 1099 (Fla. 1983), at 1102. Since such a scenario did not exist in this cause, and since the State did not suppress or withhold evidence from the defense, that was shown to "tend to exculpate" Appellant, the allegations of Constitutional violations have no application. United States v. Walker, 720 F.2d 1527 (11th Cir. 1983), at 1535; Agurs, supra; Brady, supra; Arango, supra.

Appellant has further suggested that the failure of trial counsel to adequately address or pursue a defense was caused by the failure of said T-shirt to be available. This Court has specifically addressed and rejected such a claim in Arango, supra, by observing that the effective method for challenging such evidence, when known, is to file pre-trial motions. Arango, supra, at 1102. Trial counsel's reliance on the tactic of suppression at trial was therefore not inappropriate. The suggestion that trial counsel could not conduct his defense without such evidence, is conclusory and specious, and is not at all borne out by the Record. Arango, supra.

B. Alleged Prosecutorial Comments and Misconduct

Appellant's post-conviction claim, charging prejudicial prosecutorial comment, has already been directly and expressly rejected by this Court. According to the majority, on direct appeal, the complained of comments by the prosecutor were either related to collateral matters which did not impinge upon the determination of Appellant's guilt or innocence at trial, or were rendered completely non-prejudicial by the "overwhelming evidence of [Appellant's] guilt." O'Callaghan, supra, at 696.

In addition to the aforementioned comments, Appellant characterized the prosecutor's closing statements as a combination of distortion and improper bolstering of the credibility of certain witnesses. However, the prosecutor's closing argument consisted of proper comments on the evidence, including the potential bias of the defense medical expert, the lack of any "positive medical evidence" relied upon by the defense expert in reaching his conclusion, in as much as the basis of Dr. Fateh's testimony was his reading of depositions of the witnesses at trial. (R, 1043-1051). All of the alleged improper statements by the prosecutor can be characterized as proper and appropriate comments on the evidence presented. White v. State, 377 So.2d 1149, cert. denied, 449 U.S. 845, 101 S.Ct 129, 66 L.Ed.2d 54 (1980).

In fact, Appellant's reliance on Hance v. Zant, 696 F.2d 940 (11th Cir. 1983), in his post-conviction Motion, sup-

ports Appellee's posture on this issue. The comments made by the prosecutor therein were of a more serious nature, (expression of personal opinion to the voluntary nature of the confession, recitation of his personal background, and expression of credit to law enforcement agents who testified at trial). Hance, at 951. Of greater significance is the Eleventh Circuit's express recognition of the overwhelming nature of the evidence, as a factor in evaluating alleged prosecutorial misconduct. The Court applied this criterion in Hance to uphold the verdict, despite the "improper" nature of the prosecutor's acts and statements. Hance, supra, at 950, n. 7, and 951. The State's closing argument as to Appellant's specific acts and statements throughout the criminal episode were wholly proper, White, supra, and the effect of the substantive proof of Appellant's guilt has been completely ignored herein by Appellant. Hance, supra; Tacoronte v. State, 419 So.2d 789 (Fla. 3rd DCA 1982); also, see Schneble v. Florida, 405 U.S. 427, 92 S.Ct 1056, 31 L.Ed.2d 340 (Fla. 1972); Chapman v. California, 386 U.S. 18, 87 S.Ct 824, 17 L.Ed. 705 (1967).

C. Jury's Request for Re-reading of Expert Testimony

Petitioner's argument that the request by the

jury for the rereading of the medical expert's testimony, also lacks substantive merit. Florida courts have recognized a trial court's extremely broad discretion, in considering requests by a jury, for the rereading of trial testimony. Green v. State, 414 So.2d 1171 (Fla. 5th DCA 1982); De Castro v. State, 360 So.2d 474 (Fla. 3rd DCA 1978); see also, United States v. Luesada-Rosadal, 685 F.2d 1281 . In De Castro, supra, the trial court rejected a request for rereading of testimony, for the reason that "it was not practical" to do so, and that if any rereading was in order, it would have to consist of the entire trial testimony. De Castro, supra, at 475. In view of the trial court's similar reaction to such a request herein, (R 1130-1131), it cannot be said that such a decision was anything but an appropriate exercise of discretion, and cannot be interpreted as insidious or arbitrary. De Castro, supra; Matire v. State, 232 So.2d 209 (Fla. 4th DCA 1970).

D. Jury's Advisory Sentence

Petitioner asserts that the trial court, by informing the jury that its sentence decision was advisory, depreciated the gravity of the jury's decision making process and therefore rendered their recommendation of the death penalty unreliable.

Initially Respondent asserts that the language of

§§921.141(2) and (3) clearly indicates the jury's sentence is advisory. Sections 921.141(2) and (3) state in pertinent parts:

> (2) ADVISORY SENTENCE BY THE JURY. - After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court,...
>
> (3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH. - Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death,... (e.a.)

The language of F.S. 921.141 is clear and unambiguous and the trial court's instructions were no more than a reiteration of statutory language; thus there was no error in giving them.

Petitioner cites Tedder v. State, 322 So.2d 908 (Fla. 1975) and Richardson v. State, 437 So.2d 1091 (Fla. 1983), in support of his contention that a jury's recommendation is more than advisory and entitled to great weight by the trial court, yet he seeks to avoid the jury's recommendation sub judice.

Respondent further asserts that the trial court not only instructed the jury regarding the advisory nature of their opinion, it also instructed them as to the seriousness of their deliberations. Just prior to excusing the jury for deliberation, the trial court instructed the

jury as follows:

> The fact that the determination of whether or not a majority of you recommend the sentence of death or sentence of life imprisonment in this case can be reached by a single ballot, should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and to bring to bear your best judgment upon the sole issue which is submitted to you at this time: whether a majority of your number recommend that the Defendant be sentenced to death or to life imprisonment. (R. 1167). (e.a.)

The respondent asserts that not only was the jury instructed in accordance with §921.141 Fla.Stats., they were instructed that their decision would affect a human life; therefore petitioner's argument that the jury may have been influenced is without merit.

(E) Denial of Notice of Criminal Charges

Petitioner asserts that he was denied due process because he may have been convicted of felony murder, a crime with which he was never charged.

This Court has previously addressed this issue and stated:

> We have previously expressly stated that "the state does not have to charge felony murder in the indictment but may prosecute the charge of first-degree murder under a theory of felony murder when the indictment charges premeditated murder." State v. Pinder, 375 So.2d 837, 839 (Fla. 1979). See also Knight v. State, 338 So.2d 201 (Fla. 1976).[1/] Appellant, because of our reciprocal discovery rules, had full knowledge of both the charges and the evidence that the State would submit at trial. This is much more information than he would have received in almost any other jurisdiction, federal or state. We conclude that Appellant was not prejudiced by the manner in which he was charged in the indictment or by the instructions given to the jury on the crime as charged in the indictment.

O'Callaghan v. State, 429 So.2d 691 (Fla. 1983).

This was not a case where proof of an underlying felony was indispensible to the murder conviction. Pinder, at 839. Nor was this a case where the defendant was convicted of a crime never charged. Presnell v. Georgia, 439 U.S. 14 (1978).

1/ Both Pinder and Knight have been modified on other grounds by State v. Hegstrom, 401 So.2d 1343 (Fla. 1981).

Furthermore, there was in the record overwhelming evidence that O'Callaghan committed the murder with premeditation. Premeditation requires that a perpetrator be

> ...conscious of the nature of the deed he is about to commit and the probable result to flow from it.

Spenkellink v. State, 313 So.2d 666, 670 (Fla. 1975). In the instant case, O'Callaghan deliberately transported Gerald Vick out to a vacant area of western Pembroke Road, and fired two shots in the back of his head and body. There was no evidence showing a lack of conscious intent to commit this homicide. Therefore, felony murder instructions were harmless as the State could prove alternative theories of first degree murder.

(F) Sufficiency of the Evidence

Petitioner asserts that his conviction is based on evidence insufficient to establish guilt beyond a reasonable doubt.

During trial Dr. Gore, the medical examiner, testified that the cause of death was gunshot wounds of the head and the chest (R 698). He further stated that he found no other fractures present in the body of the victim and that the chance that the victim was killed by the beating was very remote (R 702, 717, 724). Cyndi LaPointe testified that she saw the victim's leg move and that she thought he was breathing after the beating (R 783-784). Co-defendant Tucker testified that he thought he saw the victim move after the beating (R 923).

While Dr. Fateh testified that he believed the victim was dead after the beating, his testimony was not based upon an examination of the body. Rather he testified that he based the opinion he had upon his reading of the autopsy report and the depositions of some of the witnesses (R 877-878).

The respondent asserts that there is evidence sufficient to establish beyond a reasonable doubt that the victim was alive at the time of the shooting and that the gunshot wounds were indeed the cause of death.

Florida Rules of Appellate Procedure 9.140(f) provides in relevant part: "In capital cases, the court shall review the evidence to determine if the interest of justice requires a new trial, whether or not insufficiency of the evidence is an issue presented for review." See also Tibbs v. State, 397 So.2d 1120, 1126 (Fla. 1981).

The respondent asserts that, in fact, this Court did find sufficient evidence to support the conviction of the petitioner. In O'Callaghan v. State, 429 So.2d 696 (Fla. 1983), this court stated:

> Further, we conclude that the evidence is sufficiently overwhelming to properly apply the harmless-error rule of Schneble v. Florida, 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972), and Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969). Id. at 696.

Clearly petitioner's conviction is supported by evidence sufficient to establish his guilt beyond a reasonable doubt.

G. Application of the Statutory Aggravating Circumstance that the Murder was Especially Heinous, Atrocious, or Cruel.

The instant issue was first raised on direct appeal wherein this Court found that application of the aggravating circumstance was correct. Since this issue had been considered by the Court on direct review the trial court properly refused to consider the issue via the motion for post-conviction relief. It is well established that a defendant may not use a 3.850 motion to retry issues previously litigated. Thompson v. State, 410 So.2d 500 (Fla. 1982).

H. Denial of Motion for Individual, Sequestered Voir Dire.

Once again this is a matter which could have been raised on direct review. A motion to vacate judgment and sentence cannot be used as a substitute for an appeal. Goode v. State, 403 So.2d 931 (Fla. 1981). Consequently, the trial judge quite correctly declined to consider this issue on motion for post-conviction relief.

But in any event, collective voir dire is completely proper. Rule 3.300(b) as amended July 18, 1980, effective January 1, 1981 (389 So.2d 610) sets forth that:

> The court may then examine each prospective juror individually or may examine the prospective jurors collectively. Counsel for both state and defendant shall have the right to examine jurors orally on their voir dire.

Consequently, it is clear that the trial judge did not abuse his discretion in determining that voir dire would be conducted collectively.[2/]

I. Ineffective Assistance of Counsel

The trial court's denial of petitioner's "ineffective assistance of counsel" claim, without a hearing, was equally appropriate. As noted by said court, in its Order, reflected in the transcript of the hearing, appellant failed to demonstrate, in his pleadings or argument, that his various allegations met the threshold requirements imposed upon him by the decision in Strickland v. Washington, ___ U.S. ___, (Case No. 82-1554), 35 Cr L Rptr. 3066 (opinion rendered May 14, 1984). As stated therein, appellant had the burden of showing "deficient performance by counsel," which "prejudiced the defense." Strickland,

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2/ To the extent that appellant is now supporting this claim with citation to the case of Grigsby v. Mabry, 569 F.Supp. 1273 1303-4 (E.D. Arkansas 1983), or plans to base his argument in future proceedings on the Grigsby v. Mabry case, it is clear that the Grigsby issue was never raised in the trial court. Sub judice, there was no objection to the use of the same jury at both guilt and penalty phases; nor was the validity of the Witherspoon inquiry ever questioned. Grigsby is an opinion by a federal district court in Arkansas which has yet to survive appellate review. Regardless, respondent maintains that Grigsby does not represent the kind of change in the law which can qualify for collateral relief under the rule of Witt v. State, 387 So.2d 922 (Fla.), cert.denied, 449 U.S. 1067 (1980). Cf. Ford v. Wainwright, Nos. 65,335 and 65,343, slip op. at 4 (Fla. May 25, 1984) (the rule of the Harich case regarding the margin of the jury's decision in the penalty phase is not the kind of change in the law which can qualify for collateral relief under rule of Witt.)

slip opinion at 19.[3/] Appellant was further required to show that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland, at 16. Further, under Strickland, it was incumbent upon appellant to demonstrate a level of prejudice resulting from the alleged deficient performance, such that "...there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, at 24.

Under state law, this and other Florida appellate courts have applied the four-prong standard of Knight v. State, 394 So.2d 997 (Fla. 1981), which, when combined with the subsequent interpretations of Knight, supra, by this Court, in Messer v. Wainwright, 439 So.2d 875 (Fla. 1983), and Ford v. State, 407 So.2d 907 (Fla. 1981), is remarkably similar in approach and effect to the test just announced in Strickland, supra.

3/ All references to language of Strickland will be made by citations to the slip opinion so attached.

4/ Since the trial court applied the Strickland test, and since a decision of the United States Supreme Court is binding on all state courts, see Smigiel v. State, 439 So.2d 239 (Fla. 5th DCA 1983), appellee will address appellant's anticipated argument in terms of Strickland.

Specifically, petitioner argues that, with more time available to defense counsel, certain aspects of the pre-trial testimony of Cyndi Lapointe could have been brought to light during defense cross-examination of her trial testimony, that would have "corroborated the version of events favorable to O'Callaghan's defense." Petitioner's Motion, at 24. There is nothing in the Record to suggest that defense counsel did not review Lapointe's deposition testimony despite the generalized contention by Seidel at trial that he did not have adequate preparation time (R 86, 87). Petitioner's counsel admitted at the hearing that he had not spoken with Seidel on this point (T 22). Furthermore, appellant's counsel conceded the speculative nature of this argument, by his further admission that he did not know whether Seidel had either "never read the deposition or at least having read the deposition and forgotten." The Strickland decision requires more definitive support, in order to substantiate the claims of ineffective assistance made.

The Record demonstrates that both Seidel and Smith (co-counsel) had all materials and files from the previous defense attorney, five days before trial (R 67-69). Additionally, all aspects of Lapointe's deposition testimony addressed by petitioner, refer to issues relating to the involvement of petitioner's co-defendant, "Beau" Ticker, in the crime, which were collateral to the substance of Lapointe's

trial testimony concerning petitioner's guilt of the murder of Gerald Vick. The elicitation of such deposition statements by Lapointe would not have served to address or contradict Lapointe's trial testimony and observations establishing that petitioner was armed with a gun in the kitchen of the Finish Line Bar (R 781); that petitioner participated in placing Vick into the back of the van, after the kitchen encounter (R 782, 783, 796); that petitioner was the individual who fired two shots into Vick's body, and then handed the murder weapon to Tucker (R 785); that petitioner took active steps after the murder to conceal the crime, by placing Vick in the bushes, and wiping the gun with baby oil to remove fingerprints, (R 788); and that, throughout the entire criminal episode, petitioner was the one in charge, giving orders in the van during the trip from the bar to the area of the murder, and gave further orders once the parties in the van (with Petitioner driving) arrived at such area (R 782, 788, 811, 814).

Additionally, on the issue of whether Vick was alive when shot, petitioner's references to Lapointe's deposition testimony, as to what said deposition testimony would have shown, is equally unavailing. Defense counsel elicited testimony at trial, attempting to demonstrate that the shooting of Vick was not the legal cause of his death. During extensive cross-examination of Lapointe, Lapointe related a statement by Tucker that he "might have killed" Vick,

when he struck him in the bar's kitchen (R 796). Furthermore, defense counsel attempted to attack Lapointe's credibility by eliciting her admission to drinking during the day of the murder (R 815). Furthermore, petitioner has selectively ignored the testimony of the prosecution's medical expert, Dr. Gore, who testified and reiterated, within reasonable medical certainty, based on his autopsy, that Vick died as a result of gunshot wounds to the head and chest (R 695-699, 724; T 26).

It therefore strains the imagination to suggest, as petitioner does, that a particular decision not to use various isolated aspects of one witness' pre-trial testimony, on collateral issues, for impeachment purposes, even approaches counsel's performance below that of "reasonableness under prevailing professional norms," Strickland at 17. Nothing in the Record suggests that such failure to use such deposition testimony was anything other than a strategic and tactical decision. Indeed, such a decision would have accurately reflected the conclusion, evident from the record, that use of such impeachment testimony would not have addressed the crucial issue of petitioner's acts, involvement and guilt. Strickland, at 19. Such decisions by defense counsel, at most strategic ones, do not amount to ineffective assistance under the appropriate standard.

Petitioner's failure to demonstrate his ineffective assistance claim is even more pronounced and obvious, when examining the alleged omissions of trial counsel for any prejudicial effect. In view of the overwhelming weight of evidence against petitioner, and of the negligible effect Lapointe's deposition testimony could arguably be said to have on the issue of petitioner's guilt, it is obvious that such testimony would not have altered or affected the outcome in any meaningful way. Strickland, supra. Therefore, petitioner has not sustained his burden of demonstrating ineffective assistance of counsel in this regard.

The same analysis can be applied with equal effect on petitioner's reliance on the testimony of Leslie Knuck, as to Tucker's entrance into the bar, and alleged threats to Vick therein, with a gun held to his head. Petitioner's Motion, at 26. The prosecutor's purpose in offering such testimony, at a prior probation revocation hearing involving Tucker, was to demonstrate that Tucker had a weapon in his possession, on the date of the murder (R 820). The basis of the Court's refusal to allow this testimony at trial was that Tucker's counsel was limited at said hearing from going beyond the narrow issue of appellant's possession of a firearm (R 819, 821). Petitioner places great weight on the nature of Knuck's testimony, when there is no question

that, even if admitted at trial, such testimony was addressed to a totally collateral factual issue, with no bearing on petitioner's guilt or innocence. As in the case of Lapointe's deposition the absence of this testimony from the trial phase does not constitute deficient or ineffective assistance, and would not have altered or undermined the outcome. Strickland.

Petitioner finally maintains that the failure of trial counsel to present character or background evidence at the sentencing phase, constituted ineffective assistance. Specifically, petitioner suggests that petitioner's "youth and traumatic childhood," if considered by the trial court would somehow have "undermined the outcome" under the Strickland test. Petitioner's Motion, at 27.

Contrary to petitioner's assertion, the four aggravating circumstances found by the trial court to justify imposition of the death penalty, were supported by overwhelming evidence. The testimony throughout trial revealed the cold calculated and cruel manner of Vick's death, and the fact that Vick was kidnapped. At sentencing, the prosecutor produced three certified copies of petitioner's three prior felony convictions (R 1140). Defense counsel did present some evidence of mitigating circumstances, and argued for the existence of others based on the evidence at trial (R 1160-1162). Additionally, petitioner's counsel placed great weight on an affidavit submitted by a psychiatrist, both in

pleadings and at the hearing. However, it is clear that said doctor had not professionally examined, spoken or met with appellant (Affidavits, at 1-2; T 8). It was even more obviously demonstrated that Dr. Lewis merely represented, in her affidavit, that a psychiatric examination should be performed (Affidavit, at 5). Defense counsel confirmed this was the essence of her suggested testimony (R 50-51), and further reiterated that the relevance of such proffered expertise was that "there is possible evidence of brain damage, of psychosis in the family." (T 52). Furthermore, as the state maintained at hearing, petitioner's motions made no statements, allegations or argument, demonstrating that, at the time, trial counsel "had any reason to believe," or investigate, any potential mental deficiencies in appellant (T 7).

Appellant's allegations, proffer and arguments thus amounted to nothing more than an attempt to engage in a speculative and specious "fishing expedition," in the hope of ascertaining some evidence that would prove beneficial to appellant. Such a position ignores the Supreme Court's mandate that rejects the attempt to measure effectiveness of counsel as hindsight. Strickland, at 19. Furthermore, this argument, without any basis in the Record that such alleged failure to offer such "testimony" constitutes ineffective assistance, requires affirmance of the trial court's summary denial of relief. Arango, supra; Riley, supra; Strickland, supra.

The court further concluded that appellant's argument in this regard could be conclusively said to not constitute prejudice to appellant, according to the dictates of Strickland. The record demonstrates, as this Court recognized on appellant's direct appeal, the overwhelming nature of the aggravating circumstances cited by the trial judge. O'Callaghan, supra, at 694-696. Assuming arguendo, as the court did at hearing, that the proffered psychiatric testimony, would produce a factor in mitigation, the record of aggravating circumstance evidence conclusively demonstrates that there was no reasonable possibility that, "absent the [alleged] error[s], the sentencer ...would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, at 25; see also Ford v. State, 407 So.2d 907 (Fla. 1981). Based on the presence of such overwhelming evidence, the post-conviction court's summary denial was as appropriate here, as the United States Supreme Court observed in upholding the state court's summary denial in Strickland, as "proper." Strickland, at 29-30. O'Callaghan's counsel attempted to assert at hearing that no psychiatric examination of appellant was conducted, although permission for same was granted by the trial court (T 55). Appellee can find no record evidence, in examing the trial and sentencing transcript, that would support this allegation. The record does indicate that Tucker's trial counsel expressly regarded

such an examination as privileged (R 801-802). Additionally, no reference to a psychiatric examination or results, was referred to or presented at Tucker's sentencing (R 1176, 1183). It is therefore entirely reasonable and much more probable than appellant's statement that no examination took place, that such examination results were not used as the result of a strategic decision. The decision not to use such testimony by petitioner's trial counsel could have been strategically and reasonably based upon trial counsel's knowledge that the state could have elicited testimony and posed questions as to damaging information on petitioner's criminal background, which would not have inured to petitioner's benefit. Strickland, at 19, 28, 29.

Decisions relating to the presentation of certain mitigation-type testimony has consistently been regarded as a strategic and tactical one, within counsel's discretion. Brown v. State, 439 So.2d 872 (Fla. 1983); Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983). Due to the conclusive demonstration of the non-meritorious nature of petitioner's allegations of ineffective assistance as to presentation of mitigating testimony at sentencing, the trial court's rejection of this claim, without an evidentiary hearing, was proper. Strickland, supra.

Petitioner's proffer of the alleged recantation of petitioner's co-defendant at trial, Walter Tucker, was essentially an allegation of newly discovered evidence. (Supplemental Motion, at 4: T, 14-15). As virtually conceded by appellant (T 15), such an alleged ground is not the proper subject of a Rule 3.850 motion, and can only be raised in the context of an action seeking a writ of error coram nobis. Riley, supra; Hallman v. State, 371 So.2d 482 (Fla. 1979).[5/] Thus, the trial court's denial of petitioner's "Point K" was correct.

Petitioner's claim that the death penalty is imposed in Florida in an arbitrary and discriminatory manner has been raised and disposed of by this court in Adams v. State, ___ So.2d ___ (Fla. 1984) [9 FLW 155]; and Sullivan v. State, 441 So.2d 609 (Fla. 1983). See also Sullivan v. Wainwright, 721 F.2d 316 (11th Cir. 1983), and Wainwright v. Adams, ___ U.S. ___ (Case #A-910) (opinion filed May 9, 1984).

The Gross and Mauro studies relied on herein are the exact same studies reviewed in Adams, supra, and Sullivan, supra. This court specifically held that "Sullivan's allegations of discrimination do not constitute a sufficient preliminary

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5/ The relative merits of Tucker's affidavit have been addressed by appellant in a separate pleading filed with this court in anticipation of appellant's stated intention to seek a writ of error coram nobis from this court (T 15).

factual basis to state a cognizable claim." Sullivan, supra, at 614. That conclusion survived federal review. In Sullivan v. Wainwright, 721 F.2d 316, 318 (11th Cir. 1983), the majority opinion stated the following:

> The petitioner presents nothing more than the statistical impact type case as presented in [Spenkellink v. Wainwright, 578 F.2d 582, 612, et seq. (5th Cir. 1978), cert.denied, 440 U.S. 976 (1979), and Adams v. Wainwright, 709 F.2d 1443, 1449-1450 (11th Cir. 1983)]. Although there are new studies, the thrust is the same as ones previously held not sufficient to show the Florida system to have intentionally discriminated against petitioner.

The United States Supreme Court found no reason to challenge the determination by the Florida Supreme Court and the Eleventh Circuit that this data was insufficient. See Sullivan v. Wainwright, ___ U.S. ___, 78 L.Ed.2d 210 (1983). Thus the respondent maintains there is no reason for review of petitioner's claims of arbitrariness and discrimination in this proceeding, and petitioner failed to address this issue at all at the motion to vacate hearing.

Because the court appropriately found that appellant was not entitled to relief, as conclusively evident from the record of the trial proceedings, affirmance of the court's summary denial of appellant's motions for relief should be issued. Arrango, supra; Riley, supra. Said court's specific findings reflect that summary denial can be considered

appropriate as to petitioner's failure to meet either requirement of ineffective assistance or resulting prejudice. Strickland, at 27.

In conclusion, appellant's challenge to the verdict and sentence were accurately characterized as a speculative attempt to "bootstrap" mere conclusory "possibilities" into substantive claims. In view of the frivolous abuse and lack of merit to appellant's claims, the trial court's denial of all motions and request for stay of execution should be upheld by this court. Francois v. State, 423 So.2d 357 (Fla. 1983); Douglas v. State, 393 So.2d 895 (Fla. 1979) (England, C.J., and Sundberg, specially concurring).

CONCLUSION

WHEREFORE, respondent, State of Florida, respectfully requests that this court enter an order affirming the trial court's denial of appellant's Rule 3.850 motion, his supplemental motion and his application for stay of execution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by hand delivery this 28th day of May, 1984 to DAVID LIPMAN, ESQUIRE, Lipman & Weisberg, P. A. 5901 S.W. 74th Street, Suite 304, Miami, Florida 33143 and STEVEN L. WINTER, ESQUIRE, 99 Hudson Street, 16th Floor, New York, New York 10013.

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