IN THE SUPREME COURT OF FLORIDA

KENNETH DARCELL QUINCE,

Petitioner

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 65,407

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY

ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

To keep the appeal consistent, Respondent will use the same abbreviations that Petitioner has used. Respondent will also add other abbreviations throughout the record as follows:

PTR. - refers to the transcript of the guilty plea entered on August 11, 1980.

R.App. - refers to the record on appeal from the conviction and sentence in 1980.

STR - refers to the transcript of the sentencing hearing conducted on October 20, 1980.

PCR. - refers to the record on appeal from the denial of Appellant's conviction relief on April 30, 1984.

PIB. - refers to Petitioner's Initial Brief from the post-conviction hearing and order denying relief on April 30, 1984.

App. - refers to Respondent's appendix.

STATEMENT OF FACTS

Prior to the evidentiary hearing for post-conviction relief defense counsel moved for a second continuance. The trial court denied the second continuance and reminded defense counsel that the first continuance had been granted upon the contingency that no more continuances would be sought. Defense counsel acknowledged as much but indicated to the court that they needed more time for investigation and to seek other witnesses. There was no indication as to specifically what investigation or what witnesses were sought (PCR 6-7).

Just before the testimony commenced, the state attorney supplemented the record with copies of depositions which had been taken by Petitioner's defense counsel. The record shows that Larry Lewis, the lead investigator in the case, as well as the one who analyized fingerprints at the scene and obtained Petitioner's confession, had his depositions taken by Mr. Pearl. Aida Murphy, a fingerprint expert, also had her deposition taken. Mr. Pearl also deposed Arthur Botting, M.D., who was the medical examiner who conducted the autospy of the murder. (PCR 9). The court then commented that reports of five psychiatrists had been considered at the sentencing hearing (PCR 16-17). At this point, again prior to testimony, defense counsel announced that Petitioner was not contesting the crime itself (PCR 19). Defense counsel for Petitioner announced that it would not rely on the ineffective assistance allegation regarding Petitioner's potential alibi (PCR 19-20).

Mary Quince, the mother of Petitioner, was the first person to testify on behalf of the defense (PCR 29). She maintained that the family was close, that they went to church together and that there were no fights in the family. She said she got along well with Petitioner

and he had not been violent to her (PCR 31). She testified Petitioner was quiet at home and was a slow learner. Although Petitioner had been contacted by the police because he was fighting with his brother in their front yard Petitioner generally got along well with his brother (PCR 33). Mary Quince could not testify if Petitioner's religious beliefs were sincere (PCR 34). Although Petitioner was not violent with others outside of the family and had not set fires nor been cruel to their pet dog, the witness maintained that the death of Petitioner's father in 1964 affected him in that there was no one to discipline Petitioner (PCR 34-36). She maintained that she had no contact whatsoever with Mr. Pearl (PCR 38). She maintained she was available to testify (PCR 41). According to her Appellant had remorse for the crime (PCR 42).

On cross-examination Mary Quince did not recall being interviewed by the pre-sentence investigation officer, Mr. McLiverty (PCR 44). She admitted that she had attended a number of juvenile proceedings with the Petitioner (PCR 45).[1] The witness identified her signature on a waiver of rights form at the juvenile proceedings and such juvenile record was admitted into evidence (PTR Vo. 2) (App. 1-8).

Clara Edwards, Petitioner's older sister testified Petitioner was a hard worker and a non-violent person who had expressed remorse for the crime. On cross-examination she maintained Petitioner was non-violent despite the record of his juvenile history (PCR 49-57). Gregg

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1 The juvenile record of Petitioner (PTR Vol. 2) (App. 9-10) reveals that Petitioner got into a fight while at a jevenile facility (App. 10) and Petitioner acknowledged that he had a communication problem with his mother (App 9).

Quince, another brother of Petitioner, testified he was very close to his brother (PCR 60). He testified Petitioner was a slow learner in school. He also told the court that Petitioner worked at Howard Johnsons, was a landscaper, and even sold girl scout cookies (PCR 67-71). He also testified that Petitioner did use drugs and alcohol but only moderately (PCR 72). A witness testified he and Petitioner were very close and had, "always been around each other." (PCR 74). On cross-examination Gregg Quince again asserted that Petitioner did not abuse drugs and alcohol (PCR 79). He had no comment regarding whether or not Petitioner actually committed the crime (PCR 78), although he maintained that he did not believe that Petitioner did it when he first heard the news (PCR 73).

The younger sister of Petitioner, Valerie Quince, testified that Petitioner would "keep me in line." (PCR 84). She maintained that Petitioner would guide her and help her know right from wrong (PCR 88).

Jean Smith was a teacher of Petitioner in elementary school. She testified that at school Petitioner was very lively and vital (PCR 94). He "ruled the roost with the other children" and was very bossy. She believed that, despite testscores, Peititioner was intelligent (PCR 95). Petitioner was not relatively violent compared to the class she taught but she maintained that all the children in that class were ready to fight (PCR 96). She also testified that Petitioner asked her to adopt him (PCR 97). Other relatives testified regarding Petitioner's alleged non-violent behavior (PCR 108-116, 128).

Linda Stovel, another sister, testified similarly (PCR 141-145). She admitted on cross-examination, however, that Petitioner told her that he did not do the crime but pled guilty because Mr. Pearl told him to. (PCR 155). She also admitted that on a prior affidavit she had sworn that

Petitioner was not the type to get drunk (PCR 154). A neighbor, Victoria Robinson, also testified that Petitioner did not abuse drugs or alcohol (PCR 170).

A Dr. Mootry was called on behalf of Appellant as an expert in social sciences (PCR 178). He qualified his expertise to the extent that he was not a psychologist or a psychiatrists (PCR (183) or an expert on criminal behavior (PCR 185). He detailed the social and economic deprivations of Petitioner's early years (PCR 185-190). When asked why Petitioner's siblings still lead trouble free lives despite the same environment Dr. Mootry replied Petitioner's problems were also a result of his mental disabilities (PCR 193-194). The doctor alluded to Petitioner's heavy drug and alcohol use before the crime (PCR 197). He testified that Petitioner told him he did not hallucinate from the use of drugs or alcohol on the day of the crime (PCR 201).

Earl Miller, a teacher at a juvenile facility which Petitioner attended, testified that Petitioner was removed from that facility due to a vandalizing incident (PCR 223).

Petitioner testified on his own behalf (PCR 228). Again he reiterated the theme of a close and loving family. He submitted that he was a non-violent good hearted person (PCR 244). He did admit to pleading guilty to juvenile robberies (PCR 245). He considered himself to be a pretty honest fellow, although he admitted that he lied to detective Lewis initially in his confessions (PCR 252). He did admit to using drugs starting at age sixteen (16) which included PCP and marijuanna (PCR 263). In fact just before the crime he testified that he used a lot of PCP, smoked ten to fifteen "joints" a day and drank about two quarts of beer a day (PCR 268). He also admitted that he was not employed at this time

(PCR 269) and that he bought drugs on credit and was in debt to a drug dealer. He had to find a new dealer who would not get violent if he was not paid back and this is the reason that he had to burglarize the victim's house (PCR 270-271). He could not understand why he raped and murdered the victim during this burglary (PCR 272) but Petitioner admitted all crimes (PCR 273). The reason for these crimes was due to "pressure" and "drug use". (PCR 277).

Petitioner testified that Mr. Pearl did not show him the pre-sentence investigation, nor explain the bifurcated system in a capital case, nor that a jury could participate at the penalty phase (PCR 282-285). Mr. Pearl did not have Petitioner testify at the sentencing hearing although Petitioner stated that he could have testified but he left it up to his attorney (PCR 88-89). Then Petitioner stated he did not understand that he could testify at the sentencing hearing. He wanted to testify regarding his remorse (PCR 290). He did not know that his family could testify. (PCR 290-292).

On cross-examination Petitioner acknowledged his signature on a number of waiver of right forms from a juvenile record (PCR Vo. 2) (App. 1-9). He then admitted that he hid his drug and alcohol problem from his family (PCR 307-308). He admitted that during the years of 1978 through 1980 drugs took a majority of his time (PCR 310-311). He also admitted a statement at the clemency hearing that the time between his last job and his arrest had been four or five years but Petitioner said that he in fact did have other jobs (PCR 313). He maintained that he was not fired because of drug abuse (PCR 318). Later he explained to the court that he quit the job as result of his drug behavior at the job as opposed to being fired (PCR 359-361). Petitioner said that he did interview with

the PSI officer McLiverty but he answered to the questions quickly to get it over with (PCR 318). He did acknowledge that his statement, "its too late to say anything" regarding his feelings toward the crime was a statement made to Mr. McLiverty and that it was possible that it was accurate (PCR 321). Petitioner testified that his first conversation with Mr. Pearl related to the confessions. His second conversations was about pleading and his third conversation was about throwing himself at the mercy of the court (PCR 322-324).

The prosecutor established that the plea colloquy revealed that no deals were offered in exchange for the plea (PCR 325-326). The prosecutor revealed that the plea colloquy contained Petitioners right to have a jury at the penalty phase (PCR 327). Petitioner remembered that the court asked him if he had any questions to "please stop and ask or ask how." (PCR 332). Petitioner acknowledged that he answered no to the question if anyone had threatened or promised to or forced him to plead guilty (PCR 326). During the cross-examination Petitioner revealed that he had signed his motion for post-conviction relief pursuant to Fla. R. Crim. P. 3.850 without reading it (PCR 341-343, 345, 352). The prosecutor referred to Dr. Carrera's psychiatric report and asked if the doctor's facts that Petitioner set fires, was cruel to animals and forced himself on his girlfriend was incorrect (PCR 356). Petitioner said that report was untrue. Then Petitioner testified that everything that he told the psychiatrist was true (PCR 357).

The last witness to be called at the hearing was William McLiverty, the pre-sentence investigation officer. He interviewed Petitioner (PCR 370). He confirmed that Petitioner had stated that he had feelings about the crime but that it was too late to say anything (which

was reflected in the pre-sentence investigation) (PCr 373). He also asked family members for comments (PCR 374). McLiverty also testified that Petitioner told him that he left the King Arthur's employment because he did not want to work (PCR 375). McLiverty characterized Petitioner as lazy based upon his statement that he did not want to work (PCR 394). Finally Mr. McLiverty testified that there was no confidential portion of the pre-sentence investigation (PCR 375).

Howard Pearl was the last witness to testify for the State. He testified he had extensive criminal trial and appellate experience and had been doing capital cases exclusively since 1979 (PCR 406-408). Regarding Petitioner's case he testified that public defender Woolbright saw Appellant first after his arrest and gave him the Miranda rights and told him not to talk to anyone. The public defender investigator also saw Petitioner and had a brief discussion with him about the case (PCR 413).

Mr. Pearl explained that there was an "open file policy" whereby he was allowed to xerox the entire state attorney's file (PCR 415). He had continuing access to this file (PCR 416). Mr. Pearl's file was admitted into evidence and it contained depositions, mental health reports, and the pre-sentence investigation (PCR 420). Mr. Pearl told the judge that he knew the medical examiner, Dr. Botting, as well as Detective Lewis. He had been involved with these two in many prior cases. He also knew the people at the Sanford Crime Lab and was able to talk informally with them (PCR 421).

Mr. Pearl saw the Petitioner after the arraignment when he had already obtained copies of the offense reports, waiver of Petitioner's rights, and Petitioner's hand written confessions. He filed a motion to determine Petitioner's compentency as well as his sanity at the time of

the crime (PCR 422). He talked to Petitioner to see if both confessions (in the first confession Petitioner denied the sexual battery in the second he admitted that also) were voluntary (PCR 423). Petitioner told Mr. Pearl that his statements were indeed voluntary and that he understood and waived his rights. Petitioner also acknowledged that he wrote and signed the statement (PCR 428).

Mr. Pearl told the court that his impression was that his client was impaired and that communication with him was not "getting through" (PCR 430). He told Petitioner that the mental health experts would examine him to see if he was mentally ill or otherwise impaired and that their exams would be helpful to the defense (PCR 432). He also testified that he examined the evidence to see if it was genuine, admissible, and relevant (PCR 434). As the record shows, Mr. Pearl took depositions of a number of witnesses, including Detective Lewis, Dr. Botting, and Aida Murphy (PCR 435-436).

Mr. Pearl then acknowledged that he received the reports of Drs. Barnard, Carrera and Rossario and all three determined that Petitioner was competent to stand trial and assist his counsel and was sane at the time of the commission of the offense (PCR 438). Mr. Pearl testified that the reports did not state but implied that Petitioner could be impaired pursuant to § 921.141, Fla. Stat, although the motion did not ask the doctors to determine this issue (PCR 439). The attorney then acknowledged that the reports did refer to Petitioner's drug and alcohol abuse. (PCR 440). Mr. Pearl obtained Dr. Ann McMillen, a psychologists, to testify on behalf of Petitioner at the sentencing hearing. The same facts were brought out in her report. Mr. Pearl did try to obtain a plea bargain wherein Petitioner would receive a life sentence but the state attorney

consistently and adamantly rejected that offer (PCR 441). Mr. Pearl took Dr. Botting's deposition to see if the victim was dead at the time of the sexual battery and to see if he could negate the heinous, atrocious and cruel aggravating factor pursuant to § 921.141, (F.S.) (PCR442-443). He also took the deposition of Aida Murphy, the fingerprint expert, and would have challenged her if she had been the only one involved in obtaining the print from the crime but knew that Detective Lewis was a competent fingerprint expert based on his prior experience with him and when he heard that the F.B.I. would also augment the fingerprint testimony he no longer decided to challenge that (PCR 445). He did, however, concentrate on taking the testimony of Detective Lewis because he was the lead officer (PCR 446). He also talked to a serologist at the Sanford Crime Lab, a Mr. Baer, in lieu of taking his deposition (PCR 447). Mr. Pearl gave a long explanation as to why he believed the serologist's testimony was not needed because there was other substantial proof against Petitioner (PCR 448). It was established that Mr. Pearl was successful on a pre-trial motion to have the sexual battery count dismissed (PCR 449).

Petitioner asked Mr. Pearl to "get him a deal" (PCR 450). Petitioner was informed by his counsel that he had a right to a jury trial and an advisory jury at the penalty phase. He could plead guilty and even waive the jury at sentencing (PCR 451).

Mr. Pearl explained his strategy in pleading and waiving the sentencing advisory jury. Judge Foxman (the presiding judge) was new on the bench and this was only his third capital case. In a prior case with Judge Foxman, a co-defendant went to trial and upon an advisory sentence of death from a jury was convicted to death. The other defendant in that case plead no contest and received a life sentence (PCR 452-453). A Mr.

Teffeteller had refused a plea, went to trial, the jury recommended death, and Judge Foxman sentenced him to death (PCR 454). Mr. Pearl had extensive experience with juries. He knew that in this jurisdiction there would be a lack of blacks on the juries and that the community was conservative (PCR 455-457). He also believed that judges (and Judge Foxman) would most often follow jury recommendations of death. These determinations were based on his experience in cases in Volusia County. Mr. Pearl believed that there was unspoken racial prejudice even though all the veniremen would deny unequivocally any racial prejudice (PCR 458). In Mr. Pearl's judgement the jury would consist mostly of white people, many of whom were retirees. Because the victim in the case at bar was white and elderly Mr. Pearl determined that there would be a great chance of a jury recommendation of death. Mr. Pearl also testified that he was absolutely confident that Judge Foxman was not racially prejudice (PCR 459). Mr. Pearl had Dr. Ann McMillen interview and test Petitioner to determine if he was impaired pursuant to § 921.141 for sentencing purposes (PCR 461). Her report concluded that Mr. Quince's low intelligence impaired his reasoning and judgment abilities. Further, his influence under drugs or alcohol would likewise impair his reasoning and judgment. His behavior would be impulsive. Although some knowledge of right and wrong could have been intact it is doubtful that he could have controlled himself while under the influence of alcohol (R.App. 57). Likewise the report concluded that neurological damage was implied due to borderline intelligence. At the hearing the doctor confirmed that Petitioner had a permanent learning and judgment disability and limited ability to perceive the consequences of his actions. She also confirmed the neurological damage and that the alcohol intake would greatly induce his already impaired abilities to

reason and make appropriate judgments (S.T.R. 144). Mr. Pearl asked if Mr. Quince was impaired to the extent that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law affected him. The doctor answered that with his low intelligence score and his alcohol intake she would be of the opinion that Petitioner would indeed have such an impairment (S.T.R. 145).

Mr. Pearl was very familiar with Dr. Stern who examined Petitioner because Mr. Pearl believed that this doctor would give Petitioner "the benefit of the doubt" (PCR 462).

The attorney explained that he did not tell Petitioner what answers to give during the plea colloquy. He recommended to Petitioner that he plea but told him he still could have a jury trial if he so desired and advised him not to testify. He told Petitioner to answer the judges questions regarding his satisfaction with his attorney the way he actually believed (PCR 466-467).

Mr. Pearl did talk to Petitioner's mother once over the phone. Mr. Pearl elected not to use the family testimony because he did not believe that the family would be credible. He explained family members expressed incredulity regarding the crime and would often go off on tangents when answering questions. Mr. Pearl explained that he believed his best defense was to advance the impairment factor for sentencing purposes (PCR 468-470). He then explained that relatives who testify that Petitioner would be non-violent would contradict or weaken this impairment defense (PCR 469). He did not want Mrs. Quince cross-examined regarding Petitioner's juvenile record. Mr. Pearl testified that he also objected to the use of petitioner's juvenile record (PCR 470-471).

Mr. Pearl reiterated that he was convinced to a moral certainty

that Petitioner understood the nature of his plea and the possible consequences of his plea. Mr. Pearl did not threaten, promise, or direct Petitioner to plea (PCR 473).

Mr. Pearl then answered specific allegations addressed in the "3.850" motion. He did not file discovery because he had access to the State's file and obtained probably more than he would have under the discovery rule. Mr. Pearl did take depositions as revealed by the record (PCR 478). He maintained that it was strategy to waive the jury trial and did not order Petitioner to waive the jury trial. He did investigate the confession by talking with his client and interviewing the officers who obtained the confession. Mr. Pearl reiterated that he did not have the family testify that Petitioner was non-violent because he failed to see how that would impress anyone in view of the murder and rape as well as the past juvenile record (PCR 42-43). Mr. Pearl wanted to use a single theme defense and utilize the doctor as well as the pre-sentence investigation to reenforce the impairment defense (PCR 44). He did not object to comments in the PSI because they would have no effect on the sentencing determination. (PCR 44-45). It was also Mr. Pearl's judgment that the PSI comment, "I do have feelings about what happened but it's too late now" was an expression of remorse (PCR 488). Mr. Pearl did explain that he did go over the pre-sentence investigation with Appellant but not exhaustibly because his client did not evince a lot of interest in the case.[2] The attorney explained that at least objectively Petitioner appeared to

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[2] Petitioner, himself, testified that he answered Mr. McLiverty's questions for the pre-sentence investigation quickly because he wanted to get it over with (PCR 318).

understand the conseequences of his plea (PCR 498, 499, 500).

Mr. Pearl explained that it was a deliberate choice not to pursue scientific and forensic experts or fingerprints, serology, and pathology. He did talk to but did not take the deposition of a serologist and a microanalysist (PCR 503).

The attorney explained that before the hearing he talked to Dr. Stern (one of the examining psychiatrists). The doctor stated, off the record to Mr. Pearl, that he would modify his written report to the extent that Mr. Quince was unable to appreciate the criminality of his conduct. Yet when Dr. Stern was on the stand and Mr. Pearl questioned him, the doctor did not modify his written report but indeed did reiterate his conclusion of the report that Mr. Quince was not unable to appreciate the criminality of his conduct (PCR 504-505).

The attorney had Mr. Quince interview the psychiatrist without informing Mr. Quince that he had a right not to testify. He did this deliberately because he wanted Mr. Quince to give the information to the doctors to develop his defense (PCR 505-506).

On cross-examination the attorney stated that Mr. Quince did not furnish him any facts to work with (PCR 523). He did not believe that Mr. Quince's lack of communication was due to a personality conflict. (PCR 525). The mental health reports did indicate that the Petitioner was cooperative, pleasant and spoke freely to the doctors (PCR 533). Mr. Pearl also testified that he remembered that Judge Foxman had stated that he gave no weight to PSI comments for capital sentencing purposes. Mr. Pearl did not remember if this was prior or subsequent to the sentencing in the case at bar (PCR 541). Petitioner's defense counsel, at the sentencing hearing did cross-examine Detective Lewis to the extent that the

Detective admitted that he had not specifically asked Mr. Quince whether he felt any remorse about the crime (PCR 542). Mr. Pearl also testified it was his belief that many of the facts of Petitioner's life (his performance in school, and his non-violent behavior), were revealed in Dr. McMillen's report (PCR 547) (R.App. 57). He felt no need to challenge Dr. Botting's findings as the body had already been disposed of and he did not see the need to check the doctors protocol (PCR 550-551). Mr. Pearl revealed that the file regarding his notes might not have been complete (PCR 561). He also told the judge that Petitioner did not tell him about his hobbies (PCR 562). He reiterated that he talked to Petitioner about five or six times regarding the case. He had twelve (12) pages of notes at the sentencing hearing, two pages of legal research notes, and notes regarding phone conversations with Drs. Stern and McMillen (PCR 563, 564). He obtained a continuance for the case (PCR 565).

When Mr. Pearl talked to Dr. Stern prior to Dr. Stern's testimony he did remind Dr. Stern about Petitioner's drugs, and his lack of communication with the attorney. Upon receiveing Dr. Stern's answer it was then Mr. Pearl got the impression that Mr. Stern would modify his report and indicate that Mr. Quince was somewhat impaired. (PCR 573-574). Mr. Pearl explained that Dr. Stern would sometimes modify his position upon cross-examination. The lawyer then explained, based on his past experience with Dr. Stern, the doctor would sometimes modify his position under pressure from cross-examination so that Mr. Pearl felt that it was appropriate to continue the examination of Dr. Stern even when the doctor had suprised Mr. Pearl by not testifying to what he explained to Mr. Pearl just before the hearing (PCR 577).

On re-direct, Mr. Pearl explained that he had extensive felony

trial practice and had represented many black clients. His experience also included work with Florida's Baker act and quite a bit of contact with mental health experts (PCR 579, 581). At the conclusion of the hearing the State proffered expert attorney testimony. The Court explained:

> But, it's frankly, like the recommendation of the PSI. I'm not going to accord it that much weight at all. I'll reach my own decision on it (PCR 588).

Thereafter the State elected not to call any attorney expert.

POINT I

PETITIONER WAS NOT DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO KNOW OF THE CONTENTS OF THE PRE-SENTENCE INVESTIGATION REPORT AND EVEN IF THERE WERE ANY SUCH VIOLATION THE ISSUE HAS NOT BEEN PRESERVED FOR POST-CONVICTION REVIEW

ARGUMENT

Petitioner submits under Gardner v. Florida, 97 S.Ct. 1197, 430 U.S. 349, 51 L.Ed.2d 393 (1977), he was deprived of his constitutional right to be aware of the pre-sentence report to his detriment. Respondent would initially suggest two facts; (1). William McLiverty testified that no part of this pre-sentence investigation was confidential (PCR 373). (2). This report was disclosed to Petitioner's counsel and his attorney reviewed this report with Petitioner (PCR 553). Petitioner has not specifically disclosed what parts of this pre-sentence investigation were not shown to him. Rather Petitioner denied being shown the report (PCR 285, 553).

In Gardner the trial court specifically relied on pre-sentence information which was not disclosed to Gardner nor his counsel. The Supreme Court explained that there was no opportunity for Gardner's counsel to challenge the accuracy or materiality of this information. Id at 1204. The Supreme Court also pointed out that there was no waiver nor any tactical decision by Gardner's attorney regarding this information. Id. at 1206. Likewise, Petitioner's reliance on Raulerson v. Wainwright, 508 F. Supp. 381 (Fla. M.D. 1980) is misplaced bacause the record failed to show in Raulerson that the Petitioner or his counsel received the undisclosed pre-sentence information.

In Raulerson the Court noted that the State did not argue

procedural default pursuant to Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 94 (1977). In the case at bar, Respondent does argue that there is procedural default and the issue has not been preserved for review in a post-conviction motion. In Songer v. State, 419 So.2d 1044, 1047 (Fla. 1982) it was held that whether a defendant saw his pre-sentence investigation is a question that is directly appealable. Respondent notes that Petitioner's attorney at the trial and sentencing phase never posted any objection regarding any Gardner violation. Respondent also notes that this issue could have been raised on direct appeal but was not. Consequently it cannot be brought up for the first time on a post-conviction motion. Irby v. State, 454 So.2d 757 (Fla. 1st DCA). But indeed, this could not have been brought up on direct appeal in any event because the attorney at trial for Petitioner had waived such an objection. See, United States v. Leonard, 589 F.2d. 470 (9th Cir. 1977) where defendant's attorney failed to bring up alleged inaccuracies in a pre-sentence investigation at sentencing and the court held that there was a waiver and that no evidentiary hearing would be granted pursuant to Leonard's post-conviction motion.

Although Respondent perceives no error in this point, if there were any error it certainly would be harmless. Much of the contested information in the pre-sentence report (Petitioner forcing himself on a girlfriend, starting fires, and being cruel to animals) was revealed to Dr. Carrera who examined Petitioner pursuant to defense motion to determine his competency to stand trial and a possible sanity defense. Inasmuch as this report (R.App. 56) discloses such details there could be no possible harm in any potential Gardner violation. Additionally this Court held in the direct appeal of this cause that it did not appear that

the trial court limited his consideration to only statutory mitigating circumstances. Quince v. State, 414 So.2d 185 (Fla. 1982). The trial court commented after the post-conviction hearing that he did not accord the pre-sentence investigation recommendations much weight (PCR 588). The judge's sentencing order (R.App. 18-28) revealed that he did not find any aggravating circumstances based upon pre-sentence investigation. The trial court may have been aware of such contested information in the pre-sentence investigation but that does not mean that he necessarily considered it a part of the order and sentencing petitioner. See, Adams v. State, 355 So.2d 1205 (Fla. 1978) and Alford v. State, 355 So.2d 108 (Fla. 1977). To the extent that this Court has held that the record does not disclose that the trial court considered only statutory mitigating circumstances, Petitioner cannot be heard now to complain that the deprivation alleged in this point precluded the trial court from considering non-statutory mitigating circumstances. In essence, this "Gardner" violation would be harmless error if there indeed was a substantive error of this nature and it had been preserved for appellate (and a post-conviction) review.

POINT II

THE STATE WAS ENTITLED TO INTRODUCE PETITIONER'S PRIOR JUVENILE ADJUDICATIONS AT THE SENTENCING HEARING AND ANY ALLEGED ERROR THEREBY IS NOT COGNIZABLE FOR POST-CONVICTION RELIEF.

ARGUMENT

Petitioner next argues that the consideration of his juvenile record was improper because the juvenile adjudications were "uncounseled" (or there had not been a knowing and voluntary waiver thereof). In Quince v. State, 414 So.2d at 188, on direct appeal this Court held that the juvenile record could be used to disspell the mitigating circumstance that Quince had not significant prior criminal history. The argument on direct appeal was that the juvenile convictions were too remote and a juvenile record should not be considered. The appeal did not argue that the convictions were uncounseled. Moreover, defense counsel below at trial never objected to the juvenile record on the grounds that the convictions were "uncounseled." (R.App. 7). See, Steinhurst v. State, 412 So.2d 332 (Fla. 1982) where it was held that an attorney at trial must give the ground for his objection in order to preserve the issue for appellate review.

Dobbert v. State, ___ So.2d ___ (Fla. 1984) [9 FLW 326, August 28, 1984] held that an issue which could have been raised on direct appeal would not be cognizable in a motion pursuant to Fla. R. Crim. P. 3.850. Further the fact that a defendant may raise somewhat different facts to support his legal claim does not compel a different result. Petitioner is using somewhat different facts to relitigate the issue that his juvenile record should not be admissible. This is clearly procedurally improper under Dobbert. In Adams v. State, 449 So.2d 819, 822 (Fla. 1984) the

defendant attached the finding of an aggravating circumstance in a death sentence based upon a collateral Tennessee conviction. This Court held that the issue should have been raised on direct appeal and could not be heard on a post-conviction matter.

In any event the record belies the assertion that there was no knowing and voluntary waiver of counsel for these juvenile convictions (R.App. Vo. 2) (App. 1-9).[3] This record reveals that the Petitioner was notified of his rights and acknowledged these rights by his signature. This record also reveals that there were orders by the judge which show that the Petitioner waived his right to an attorney. These acknowledgments and waiver of rights were not mere court minutes which were condemned in C.G.H. v. State, 404 So.2d 400 (Fla. 5th DCA 1981). During the hearing pursuant to the post-conviction motion Petitioner acknowledged his signature on the notification of rights form (PCR 299-306).

In Adams, supra this Court expressed doubts that it would seek to declare the out-of-state conviction unconstitutional. In any event this issue certainly cannot be raised for the first time on a motion pursuant to Fla. R. Crim. P. 3.850.

[3] Respondent has made an appendix from the record of the direct appeal in order to avoid delay because the juvenile record is not numbered.

POINT III

THE STATE'S INTRODUCTION OF PSYCHIATRIC EVIDENCE AT MR QUINCE'S CAPITAL SENTENCING DID NOT VIOLATE HIS CONSTITUTIONAL RIGHTS.

ARGUMENT

Petitioner asserts that under Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981)[4] and Estelle v.Smith, 451 U.S. 454 101 S.Ct. 1866, 68 L.Ed.2d 359 (1980) that Petitioner should have been given Miranda warnings and waived his Fifth Amendment right prior to conducting an interview with Dr. Barnard, the psychiatrist who testified on behalf of the State at the sentencing hearing. The United States Supreme Court in Estelle v. Smith, specifically acknowledged that introduction by the defense of psychiatric testimony constituted a waiver of that defendant's Fifth Amendment privilege just as when a defendant elects to testify in his own behalf he waives that privilege. See, United States v. Cohen, 530 F.2d 43 (5th Cir. 1976). A defendant can invoke this protection only when he does not introduce mental health expert testimony. It is irrefutable that Petitioner's counsel at trial initiated the motions to have Petitioner examined for competency and a possible insanity defense. More importantly, Mr. Quince had Dr. Ann McMillen testify on his behalf regarding his mental status as well as Dr. Fernando Stern (S.T.R. 132-146, 150-165). At the post-conviction hearing Mr. Pearl testified that to the extent that the reports referred to Petitioner's drug and alcohol abuse, these findings would be helpful to his defense of impairment at the time

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4 This Court announced in Hargrave v. State, 427 So.2d 713,715, footnote 8 (Fla. 1983) that this case was not persuasive nor was it of any precedential value

of the crime for sentencing purposes (PCR 440). To that extent Dr. Barnard's report would indeed be helpful to Petitioner's case (R.App. 54). In Estelle v. Smith, the doctor's testimony was used specifically to establish an aggravating factor and the defense was totally suprised. In the case at bar the defense was not suprised and some of the doctor's testimony could indeed be used to augment the impairment defense at the sentencing phase. Dr. Barnard's testimony was more in the way of rebuttal of Petitioner's mental health experts'. In any event this issue has already been addressed and decided against Petitioner in Hargrave, supra where this Court held that when a defendant initiated a psychiatric exam and introduced such testimony, the defendant waived any rights under Estelle v. Smith, supra.

POINT IV

PETITIONER'S COUNSEL WAS NOT INEFFECTIVE AND AS SUCH PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION WERE NOT VIOLATED.

ARGUMENT

Any issue revolving around a trial attorney's performance must commence with the standards utilized to judge that performance in post-conviction proceedings. In Ford v. State, 407 So.2d 907, 909 (Fla. 1981) the four standards were reiterated as follows:

> (1) The specific act or omission must be alleged in the pleading.
>
> (2) It is the Petitioner's burden to show that there was a substantial and serious deficiency on the part of his attorney below.
>
> (3) Petitioner must show that but for the ineffective assistance there was a likelihood that the conduct affected the outcome of the court proceedings.
>
> (4) The State still can rebutt any ineffective assistance of counsel showing based on the latter three conditions if there was no prejudice in fact even if this constitutional violation was involved.

Additionally in Downs v. State, 453 So.2d 1102 (Fla. 1984) this Court held that the alleged deficiency must, under the circumstances, be substantial so as to probably affect the outcome of the proceedings. An attorney's choice will be given great deference. It was also held in Downs that this type of proceeding would not be appropriate in every case but relief would be granted only in extraordinary circumstances. In Meeks v. State, 382 So.2d 673,675 (Fla. 1980) this Court held that a defendant was not entitled to errorless counsel nor will a counsel's performance be based on a standard of hindsight. In Adams v. Wainwright, 709 So.2d 1443 (11th DCA

1983), it was held that the conduct in order to afford a Petitioner relief on this type of claim must be so patently unreasonable that no competent attorney would have chosen the course of conduct.[5]

Initially Petitioner complains that his attorney contacted him only on four or five occasions and did not advise him thoroughly about his options and thus restricted Petitioner's participation in the case. In Walker v. Wainwright, 350 F.Supp. 916 (D.C. Fla. 1972), the Petitioner complained that his counsel was ineffective because he only talked to him right before the trial and ignored Petitioner's alibi defense. The district court denied relief because Walker did not demonstrate that his counsel was ineffective because his counsel relied upon a confession. Respondent submits that this allegation does not demonstrate a substantial and serious deficiency by the attorney below in and of itself. As such, Petitioner has not and cannot demonstrate tht there would be a likelihood that the omission affected the outcome of the court proceedings. Additionally this is not a specific omission. Petitioner has not alleged, at this juncture, any specific omissions (e.g., such as failing to talk to the Petitioner about the circumstances of his confession PCR 423).

Next, Petitioner argues that there was little independant investigation. Even assuming this allegation to be correct, the same

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[5] In Mikenas v. State, ___ Som2d ___ (Fla. 1984) [9 FLW 473, November 1, 1984] this Court held that the standard announced in Strickland v. Washington, 104 S.Ct. 2052 (1984) (wherein counsel's performance pursuant to a guilty plea and a death penalty imposition was held not to be ineffective) had a standard which did not differ significantly with the precepts announced in Knight v. State, 394 So.2d 997 (Fla. 1981).

objections interposed above to the first alleged error would likewise be applicable to this objection.[6] The record belies this contention in any event. Mr. Pearl took the depositions of the key witnesses in the case, including Detective Larry Lewis who was the lead Detective, obtained both confessions, and did fingerprint analysis (PCR 435-436). Likewise Mr. Pearl took the deposition of the pathologist, Dr. Arthur Botting, as well as talked to another fingerprint expert in relation to this case, Aida Murphy. Additionally Mr. Pearl secured the services of Dr. Ann McMillen, a psychologist, to aid his client for the sentence (R.App. 57). Mr. Pearl also talked to the serologist, Mr. Baer, at the Sanford Crime Lab (PCR 447). Mr. Pearl explained at the hearing that there were tactical reasons why he did not feel it necessary to challenge the serologists. (PCR 448). Indeed, in view of the overwhelming evidence against Appellant (see the deposition of Detective Larry Lewis) (PCR 729-730) which included fingerprint evidence inside and outside a window ledge, two confessions obtained after Miranda rights were administered to the Petitioner, and the fact that property taken from the victim was traced and found based upon Petitioner's confessions and identification by relatives, there would appear to be no tactical advantage gained by formally deposing the serologist or obtaining an independant expert.

In United States v. Fratus, 530 F.2d 644 (5th Cir. 1976) it was held that defense counsel was not incompetent by not seeking to appoint an additional psychiatrist for his client's insanity defense. The court appointed psychiatrist were of the opinion that the defendant was legally insane. In the case at bar there is no reason to challenge

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[6] Please refer to Point VI of this brief, infra.

the experts testimony and Petitioner has alleged no reason to do so.

In Reynolds v. Mabry, 574 F.2d 978 (8th Cir. 1978) the review court held in a proceeding of this nature, that a choice to rely on an insanity defense excuses a failure to investigate defenses relating to the circumstances of the arrest. Again in State v. Laley, 517 F.2d 1190 (9th Ct. of Appeal 1975) the review court held that a strategic choice not to pursue certain lines of investigation excused defense counsel from presenting another forceful defense. Petitioner has not alleged any independant investigation which Mr. Pearl could have done which would have been fruitful or seriously affected the outcome of the proceedings. If an attorney (as in Mabry and Laley) is excused from examining other defenses when he relies on one defense, certainly Mr. Pearl should not be deemed incompetent for not pursuing futile defenses. See, Owens v. Wainwright, 698 F.2d 1111 (11th Cir. C.A. 1983) where an alleged failure by counsel to investigate a possible insanity defense and not file a motion to suppress a confession were held not ineffective because there was a signed confession and it was not necessary for the counsel to present a defense not likely to succeed.

Petitioner asserts that his counsel should have contacted friends, family, and educators for testimony. For purposes of the trial, Petitioner has not alleged any specific information which these witnesses could have supplied in order to help in the defense. In view of the overwhelming evidence Petitioner has not and cannot demonstrate any substantial and serious deficiency regarding the plea of guilty vis a vis the failure to call or contact these witnesses. As such no prejudice has been demonstrated pertaining to the trial phase of the proceedings. At this juncture Respondent will address the alleged ineffectiveness regarding the

failure to contact friends, family and educators vis a vis the sentencing phase. At the evidentiary hearing for the post-conviction motion, Mr. Pearl testified that he would not generally call family and friends because they were not good witnesses. He also wanted to concentrate on one defense and not open the door for any impeachment or contradiction of his defense.[7] (PCR 469-471). Additionally Mr. Pearl did not want Petitioner's juvenile record disclosed at the sentencing phase. (Mr. Pearl did object to the juvenile record being introduced into the sentencing phase on the grounds of relevancy and remoteness, STR 7). Respondent would admit that the decision not to utilize friends and families was a strategic decision which cannot be attacked from hindsight at this juncture.

The evidentiary hearing revealed that certain family members would have certainly damaged Mr. Pearl's defense of lack of capacity to appreciate the criminality of his acts and thereby vindicates Mr. Pearl's strategy. Gregg Quince, the brother of Petitioner, testified that Petitioner did not abuse drugs and alcohol (PCR 79). Gregg Quince testified that, "basically we (Petitioner and the witness) just always been around each other." (PCR 73). Inasmuch as the defense was predicated upon Petitioner's drug and alcohol abuse (and such abuse was confirmed by the mental health experts who examined Petitioner) such testimony would be damaging to Mr. Pearl's strategic defense. Valerie Quince, a younger sister of Petitioner, testified that Petitioner had helped her know right from wrong and that Petitioner, himself, knew the difference (PCR 88). Jean

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[7] Mr. Pearl focused his defense on §921.141(b)(f) which states: "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired."

Smith, a former teacher of Petitioner, testified that Mr. Quince was bossy, and was "ready to fight." She also felt that the Petitioner was intelligent despite the tests (PCR 95-96). Another sister testified Petitioner was not the type to get drunk (PCR 154). She also testified that Petitioner told her that he did not do the crime but that he only pled guilty because his attorney told him to do so (PCR 155). Earl Miller, a teacher who was Petitioner's math instructor at a juvenile center, on cross-examination admitted that he was aware Petitioner was transferred from that center due to a burglary and vandalizing incident. (PCR 224).

In Stephens v. Kemp, 721 F.2d 1300 (11th Cir. 1983) it was held that counsel was not ineffective by failing to have family members testify on his behalf at the sentencing phase. In Adams v. Wainwright, 709 F.2d 1443 (11th Cir. 1983) it was pointed out that defendant's counsel was not incompetent by failing to utilize family and friends as witnesses where the State could have refuted their testimony with damaging examples of the defendant's lifestyle. Likewise, in the case at bar, the record from the evidentiary hearing as demonstrated above is replete with examples of how their testimony would have damaged the defense asserted by Mr. Pearl. In Mauldin v. State, 382 So.2d 844 (Fla. 1st DCA 1980) it was held that an attorney was not incompetent because he did not call certain defense witnesses. The First District held that calling defense witnesses is ordinarily a matter of personal judgment. This issue is not proper for a collateral attack unless the decision was so irresponsibly exercised as to equal inadequate representation. See, also Armstrong v. State, 429 So.2d 287, 290-291 (Fla. 1983) where this Court held that the failure to call family members at the sentencing phase did not amount to incompetence of counsel when it was a tactical decision. See, also Magill v. State,

___ So.2d ___ (Fla. 1984) [9 FLW 399, September 20, 1984] where it was held that an alleged failure to depose or cross-examine witnesses or potential witnesses or even interview those witnesses were tactical choices. During the evidentiary hearing Mr. Pearl testified that his client did not evince a lot of interest in the case (PCR 496-497). Although Mr. Pearl did think that his client was impaired and had psychiatrist appointed to examine his competency to stand trial and to investigate a possible insanity defense, Mr. Pearl did state that Petitioner objectively understood the proceedings and the consequences of his guilty plea (PCR 498-500). The inference could be made that Petitioner, himself, did not aid his counsel and give him the information required. In Thomas v. State, 421 So.2d 160,164 (Fla. 1982) this Court held that a defendant cannot be allowed to refuse to cooperate with his attorney and then attempt to create an issue of ineffective counsel on the basis of that refusal to cooperate.[8]

Next Petitioner contends his counsel was ineffective because he did not file a demand for discovery. Mr. Pearl explained at the evidentiary hearing that he had access to the State file and obtained probably more information that he would have been entitled to under the discovery rule. He did take depositions and talked to the serologist at the Sanford Crime Lab (PCR 478). In Reed v. State, 447 So.2d 933 (Fla.

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[8] Dr. Frank Carrera in examining Petitioner to determine his competency and a possible insanity defense (before the pre-sentence investigation was done) presumably obtained information from Mr. Quince to the effect that he did set fires as a child and was cruel to animals. (R.App. 56). Dr. Barnard interviewed Petitioner in the same capacity and about the same time as did Dr. Carrera. His report indicated that Petitioner forced himself on one of his girlfriends (R.App. 54).

3d DCA 1984) it was held an attorney did not need to take depositions for all witnesses where witness statements were available. In Aldridge v. State, 425 So.2d 1132 (Fla. 1983) this Court held that an attorney would not necessarily be ineffective if he did not take depositions especially when the defense counsel had sworn statements available from the witnesses. This Court in Aldridge pointed out that the defendant made no showing as to what other information would have been provided through the use of depositions. Likewise, in the case at bar, Petitioner has made no showing and indeed cannot do so. See, also Brown v. State, supra which held that a petitioner must allege why depositions not taken would hurt his case (i.e., a specific ommision).

Petitioner also faults his counsel because he failed to file a motion to suppress his two confessions. Mr. Pearl explained that although he believed subjectively that the Petitioner was impaired, it was apparent that Petitioner had an objective understanding of the proceedings (PCR 498-500). Mr. Pearl also testified that Petitioner acknowledged to him (Mr. Pearl) that he waived his rights and understood the confession and even signed a statement (PCR 428). The deposition of Detective Larry Lewis (PCR 729-730) reveals that Mr. Howard asked Larry Lewis if the Petitioner was on drugs or intoxicated at the time of the confession. Additionally Mr. Pearl inquired about Petitioner's Miranda rights and whether he waived those rights and understood the proceedings. Petitioner alleged that his counsel was incompetent because the confession should have been suppressed under the rule of Edwards v. Arizona 451 U.S. 477 (1981). A perusal of Detective Lewis' depostion would belie this contention. There is not indication that Petitioner invoked his rights at any time to have an attorney present or to not answer questions.

Additionally there is nothing in the evidentiary proceeding to reenforce this allegation. In Reed, supra, the Petitioner alleged ineffectiveness of counsel because of a failure to suppress a breathalizer test. This Court in Reed cited McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) to refute this allegation. In McMann it was held that a guilty plea was valid and that the attorney need not move to suppress the confession, thus vitiating the guilty plea. In Owens v. Wainwright, supra it was held that it was not necessary for counsel to present a defense not likely to succeed. Based on the record in the case at bar it was very unlikely that a suppression motion would succeed. In Palmes v State, 425 So.2d 4,6 (Fla. 1983) counsel failed to raise a suppression motion based on an alleged illegality of an arrest. This Court held that there was no requirement to do a futile motion to suppress.

Next, Petitioner asserts ineffective counsel due to the fact that there was no determination that he was competent to plead guilty (as opposed to competency to stand trial). Initially Respondent submits that this particular ground of ineffectiveness was never alleged below. Although Mr. Pearl's conduct was attacked regarding the plea this specific ground was not utilized. Therefore under Steinhurst, supra this issue has not been preserved for review. Westbrook v. Arizona, 384 U.S. 150 86 S.Ct. 1320 (1966) can be distinguished because the trial court had to make a separate determination whether the defendant could totally waive counsel and conduct his own defense as opposed to merely pleading guilty with the assistance of counsel. Petitioner relies on the case of Sieling v. Eyman, 478 So.2d 211 (9th DCA 1973). In Sieling it was held that where there was a question of competency "lurking in the background" then the trial court must make a further determination that the defendant is

competent to plead guilty (even though the defendant was found competent to stand trial). In Bryant v. State, 373 So.2d 380 (Fla. 1st DCA 1975) the same issue arose. Yet Bryant distinguished Sieling and denied post-conviction relief. In Bryant there was no evidence that the Petitioner was insane at the time of the offense and no evidence that he ever was adjudged incompetent or decalred insane although he had received psychiatric treatment prior to the offense. Mr. Bryant was of low intelligence (an imbecile or low moron according to the psychiatric exams with a mild degree of mental illness). But all the psychiatrists reported that the Petitioner was sane and competent in Bryant. See, also Ippolito v. State, 214 So.2d 637 (Fla. 2d DCA 1968) where it was held that the defendant was competent to plead despite his being adjudged incompetent several years ago but had been restored to competency. In the case at bar there is no issue "lurking in the background" of Petitioner's competency. He had no prior psychiatric history. All the mental health experts who examined Petitioner unanimously concurred that he was competent and not insane at the time of the crime. Any subjective "impairment" of Petitioner even as viewed by his counsel could be evidence of his non-interest in the case (PCR 496-497). In any event the record shows even less reason than in the Bryant case to have a separate determination of Petitioner's competency to plea.

Petitioner continues with his complaint by alleging that his counsel misperceived the significance of the aggravating factor pursuant to § 921.141(5)(f), Fla. Stat. (1979) (pecuniary gain). Respondent submits no prejudice whatsoever can be perceived from this misconception.

Petitioner addresses this issue regarding the sentencing hearing by alleging ineffectiveness because the experts were not appointed

until three weeks before the hearing. In addition the reports were not done until just before the hearing. Again, (just like the answer to the allegation that Mr. Pearl did not spend enough time with his client) Petitioner has not alleged any consequence flowing from these alleged deficiencies. Petitioner has failed in his burden to show any substantial and serious deficiency resulting from these acts. Likewise, there is no showing that this particular conduct affected the outcome of the court proceedings.

That counsel conferred just once with his client before the sentencing hearing would again not even show a prima facie case of ineffective assistance. See, Walker v. Wainwright, supra.

Petitioner also alleges that the character witnesses of his family and friends should have been called because they would have underscored the aberational nature of Petitioner's conduct (PIB 42). As discussed, supra the decision not to call the family and friends was tactical. (PCR 469,470). Again as discussed, supra the evidentiary hearing revealed that this testimony would be contrary to Mr. Pearl's strategy. Gregg Quince, testified that he believed that his brother did not do the crime. (PCR 73). Other family members testified similarly (PCR 155,176). In view of the overwhelming evidence that Petitioner did commit the crime, these witness' credibility would have been severely questioned. Valerie Quince, a younger sister, testified Mr. Quince helped her know right from wrong and knew the difference. (PCR 88). It must be remembered that when Petitioner, himself, testified he stated that the burglary was intentional because he needed to pay off his drug dealer (PCR 271-273). It can be seen that the testimony of the family members would not only be unhelpful but could actually harm Petitioner's case based upon Mr. Pearl's strategy.

See Adams v. Wainwright, supra. In Reynolds v. Mabry, 574 F.2d 978 (8th Cir. 1978) and State v. Laley, 517 F.2d 1190 (9th Cir. 1975) it was held that a lawyer's conduct was not ineffective where he chose to rely on one valid defense and not to pursue other lines of investigations. Respondent submits that Mr. Pearl's line of defense at the sentencing hearing was a valid defense and was not a substantial and serious deficiency below the standard of a competent attorney.

Counsel is alleged to be deficient because he did not object to the juvenile record based upon alleged uncounseled convictions. The record belies this contention (R.App. Vo. 2) (App. 1-9). At the very least, certainly, the record would be sufficient enough so that an attorney could rely on it to the extent that he reasonably believed that Appellant knowingly and intelligently waived counsel.

Mr. Pearl was also allegedly ineffective because he failed to object to the comments and other portions of the pre-sentence investigation. The trial court indicated at the evidentiary hearing that he would place very little value on the comments of the pre-sentence investigation (PCR 588). It must also be remembered, as stated previously, that the reports of Dr. Barnard and Dr. Carrera (R.App. 54,56) contain some of the contested factual information of the pre-sentence investigation report. Since these examinations were taken pursuant to determine Petitioner's competency to stand trial (as well as a possible insanity defense) these reports could not have been based on the pre-sentence investigation. Petitioner may assert that the consideration of the pre-sentence investigation, by the trial court, could have precluded him from considering some non-mitigating factors in the sentence. Yet this Court in Quince, supra determined on direct appeal that the record did not show that the trial

court did not consider non-mitigating factors. Mr. Pearl testified that he felt the pre-sentence investigation comment by Petitioner ("I do have feelings about what happened but it's too late now") was an expression of remorse (PCR 488). Respondent submits that this was not an incompetent nor unreasonable belief. In any event in Straight v. Wainwright, 422 So. 2d 827, 832 (Fla. 1982) this Court held that a counsel was not ineffective for failing to argue remorse especially when the trial defense had been that the defendant was innocent. It was held proper for the attorney not to argue this factor because he believed it would be inconsistent. Likewise, in the case at bar, it is also proper for Mr. Pearl not to address this if he believed it was inconsistent with his defense of lack of capacity to appreciate the criminality of the act due to a combination of drug and alcohol use and a low intelligence level.

Next, Petitioner asserts that his counsel was ineffective for failing to advise his client pursuant to Estelle v. Smith, 451 U.S. 454 (1981) and Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981). In Hargrave v. State, 427 So.2d 713 (Fla. 1983) this Court found that Battie was neither persuasive nor of precedential value. Id. at 715 footnote 8. An attorney is not ineffective because he does not anticipate changes in the law Thomas v. State, 421 So.2d 160,165 (Fla. 1982). Since Estelle v. Smith, supra was not the law at the time of the sentencing hearing it cannot be said that Mr. Pearl was incompetent. Yet there is a more compelling reason to deny this claim. At the hearing Mr. Pearl testified that these psychiatrists reports were consistent with his impairment defense (PCR 439). Looking at these reports it appears these assessments are very reasonable (R.App. 54,56). In fact the same facts regarding Petitioner's drug and alcohol abuse were brought out when Dr. McMillen

testified on behalf of Petitioner at the sentencing phase (PCR 431) (R.App. 57). This tactic was partially successful in that the trial court did find that Petitioner was impaired pursuant to § 921.141(6)(f) (R.App. 18-28). Respondent submits that this was proper trial strategy. See, Straight v. Wainwright, supra. See, also Respondent's Answer Brief Point 3, supra.

Next, Petitioner alleges that the State psychiatric examinations were objectionable at the sentencing phase because these exams were done for the purposes of determining sanity at the time of crime and competency to stand trial. Inasmuch as these reports do contain relevent evidence regarding Petitioner's drug and alcohol problem (R.App. 54,55,56), this broad objection would only go to the weight and not the admissibility of the testimony. Petitioner has demonstrated no prejudice on this claim.

Petitioner faults his attorney because of the damaging testimony of his own witness, Dr. Stern at the sentencing hearing. Mr. Pearl explained that based upon a conversation just before the sentencing hearing with Dr. Stern he believed that Dr. Stern would modify his report. Mr. Pearl also explained that under cross-examination Dr. Stern would at times modify his findings (PCR 569-577). Additionally Dr. Stern testified favorably for Petitioner to the extent that he believed that Petitioner could be rehabilitated (STR 165). Petitioner is not entitled to an error free counsel. Respondent submits that this tactic, although unsuccessful, certainly would be reasonable. In any event such conduct would unlikely affect the outcome of the proceedings.

Next, Petitioner submits it was incompetent to illicit testimony from Dr. McMillen (Petitioner's mental health expert who testified at the sentencing phase) that Petitioner was not acting under extreme

emotional disturbance pursuant to § 921.141(6)(b), Fla. Stat. (1979). Yet Dr. McMillen did testify favorably for Petitioner in that she opined that he was impaired pursuant to § 921.141(6)(f), Fla. Stat. (1979). She based this finding on Petitioner's alcohol use and the fact that it was exacerbated by his low intelligence. Respondent fails to see how such an alleged deficiency would have likely affected the outcome of the proceedings. If Dr. McMillen had not testified at all regarding any emotional disturbance pursuant to § 921.141(6)(b), Fla. Stat. (1979) the trial court still would have found no mitigating circumstance.

In Adams v. Wainwright, supra the defendant claimed his counsel was ineffective because the counsel did not present mitigating circumstances but relied exclusively on the plea of mercy at the sentencing phase. This was held to be a reasonable tactical decision. Looking at the totality of the circumstances in the case at bar, every challenged decision of Petitioner's counsel can be attributed to a tactical decision. All the alleged errors or deficiencies certainly would not have affected the outcome of the proceedings. Respondent would submit that due to the overwhelming evidence both at the trial and sentencing phase, even if the Petitioner had proved ineffective assistance and that it would affect the likelihood of the proceedings outcome the record rebutts that there was any prejudice in fact to Petitioner.

POINT V

THE DEATH PENALTY IS BASED ON A NEUTRAL STATUTE AND THE DEATH PENALTY IN FLORIDA IS NOT IMPOSED IN AN ARBITRARY AND DISCRIMINATORY MANNER.

ARGUMENT

Petitioner submitted a number of statistical studies based upon the race of the victim, geography and other such factors. Petitioner submits that these studies provide a legal sufficient basis to provide post-conviction relief. Respondent notes that this claim was initially rejected in Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978). The court held that even if the defendant's statistics were accurate his contention had to fail as a matter of law. In Spinkellink the court held that the statute was neutral on its face so that race discrimnation had been removed. The Petitioner in Spinkellink was required to show some specific act or acts evidencing intentional or purposeful racial discrimination against him. Mere conclusory allegations were held insufficient as a matter of law to upset the sentence. This was true for both the Eighth as well as the Fourteenth Amendments to the United States Constitution. In Adams v. Wainwright, 709 F.2d 1443, 1449-1450 (11th Cir. 1983) the court held that it need not decide whether these statistics provided by the defendant suggested a disparate impact based upon race and geography. Disparate impact alone would be insufficient. The defendant in Adams was required to show an intent to discriminate similar to Spinkellink. See, also McCleskey v. Zant, 580 F.Supp. 338 (GA.N.D. 1984) where it was held that intentional discrimination cannot be shown by statistics alone.

Respondent notes that this claim (that the death penalty was

arbitrarily imposed based upon the victim's race, location of the crime, and sex of the defendant) was summarily rejected in Martin v. State, 455 So.2d 370 (Fla. 1984). This Court also rejected the claim in State v. Washington, 453 So.2d 389 (Fla. 1984). In rejecting this argument this Court reiterated the limited role of post-conviction relief. This Court held that only major changes in constitutional law which constitute a development of fundamental significance may be raised for the first time under Fla. R. Crim. P. 3.850. Evolutionary changes in the law do not compel abridgment of a judgments's finality. This Court has also noted in State v. Washington, ___ So.2d ___ (Fla. 1984) [9 FLW 296, July 10, 1984] that a State case will not be stayed pending an Eleventh Circuit Court of Appeals decision. Only the Supreme Court of Florida and the United States Supreme Court can declare law in which such a fundamental change will entail an attack on a final judgment pursuant to post-conviction relief.

Respondent notes that this argument based upon the race of the victim was rejected as a ground for a collateral attack in Meeks v. State, 382 So.2d 673 (Fla. 1980). See, also Dobbert v. State, ___ So.2d ___ (Fla. 1984) [9 FLW 326, August 28, 1984], Ford v. Wainwright, 451 So.2d 471, 475 (Fla. 1984), Sullivan v. State, 441 So.2d 609, 614 (Fla. 1983) (holding defendant's allegations of discrimination do not constitute a sufficient preliminary factual basis to state a cognizable claim), Griffin v. State, 447 So.2d 875 (Fla. 1984) (affirming a summarily dismissed motion based upon this claim), and Smith v. State, ___ So.2d ___ (Fla. 1984) [9 FLW 442, October 11, 1984] which is the latest case rejecting this claim.

Petitioner submits that the burden is on the State to disspell

the presumption of discrimination. Respondent replies that there has been no presumption established by Petitioner by introducing such studies into evidence. In State v. Henry, ___ So.2d ___ (Fla. 1984) [9 FLW 395, September 17, 1984] this Court rejected this issue and overruled a trial court's finding that an evidentiary hearing must be conducted. This Court should take judicial notice that in the Henry case, the Petitioners proffered the same Gross-Mauro studies that Petitioner in the case at bar has proffered.

In any event the State (albeit inadvertantly) did offer testimony at the post-conviction hearing which would disspell the notion of any race discrimination in the case at bar. Mr. Pearl testified that it was his trial strategy to waive a sentencing jury and have a sentencing hearing before Judge Foxman. This strategy was based in part on the fact that Judge Foxman had imposed only two prior death sentences that were based upon jury recommendations. Mr. Pearl noted that a defendant had plead guilty and received a life sentence whereas his co-defendant went to trial, was convicted, and upon a jury recommendation of death was sentenced to death by Judge Foxman. Mr. Pearl then explained that there was unspoken race prejudice in the community but that he was confident that Judge Foxman was not racially prejudice (PCR 455-459). It is now ironic in lieu of Mr. Pearl's strategy that the Petitioner is asserting racial discrimination. In Adams v. State, 380 So.2d 423 (Fla. 1980) the defendant asserted that the death penalty was arbitrarily applied in St. Lucie County. The period encompassed in defendant's allegations was from 1973 through 1977. Only four death sentences have been imposed at that time. This Court held that there was not a sufficient preliminary factual basis to show that the death penalty was applied in a arbitrary, capricious,

or a irrational manner. Inasmuch as the testimony irrefutably shows that Judge Foxman had only three or four death sentence cases prior to the case sub judice and imposed only two death penalties, Respondent submits that there is a paucity of information by which to infer through statistics that the neutral sentencing statute of Florida was applied in a discriminatory manner.

POINT VI

THE TRIAL COURT DID NOT ABUSE HIS DISCRETION IN REFUSING TO APPOINT EXPERTS FOR THE POST-CONVICTION HEARING NOR WAS THERE ANY ABUSE OR PREJUDICE TO PETITIONER IN DENYING A SECOND MOTION FOR CONTINUANCE.

ARGUMENT

Petitioner desires to have experts appointed in serology, neurology, pathology, fingerprint analysis, additional mental health experts, as well as experts to testify on statistical impact of race vis a vis the death penalty statute.

It should be noted initially that Mr. Pearl secured Dr. Ann McMillen to testify on behalf of Petitioner at the sentencing phase pursuant to § 921.141(6)(f), Fla. Stat. (1979). (Additionally Dr. Stern testified on behalf of Petitioner). Based mainly upon her testimony, Mr. Pearl was successful in having the court make a finding in mitigation that Petitioner lacked the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law because it was substantially impaired. [§ 921.141(6)(f), Fla. Stat. (1979)]. (R.App. 707-708). There has been no showing that Mr. Pearl's reliance on Dr. McMillen's or Dr. Stern's testimony was misplaced.

Presumably this motion was predicated upon an allegation that Mr. Pearl was ineffective in his reliance upon these experts. In Martin v. State, 455 So.2d 370 (Fla. 1984) the defendant asserted an insanity defense. Seven experts in mental health were appointed and testified (for by the court). Their opinions differed. The defendant at trial, wanted one more expert to testify. The trial court refused and was upheld on appeal. This Court found no abuse of discretion because the appointment

of experts was discretionary pursuant to § 914.06, Fla. Stat. (1983). Additionally the court pointed out that the proffered testimony was only speculation. Respondent asserts that there is not even any statutory right much less a constitutional right to have these experts appointed. This contention is especially true since Petitioner never proffered who these experts were or what they would say (except the experts regarding discriminatory impact of the death sentence statute). There has been no proffer whatsoever.

In Moore v. Zant, 722 F.2d 640, 648-649 (11th Cir. 1983) the defendant again asserted that a trial court's denial to appoint an expert for his defense (and to provide the funds) violated constitutional rights. The court rejected his claim and upheld the trial court's denial of that motion. The court stated that there had been no showing that the State or court appointed experts were less than forthright. There were no allegations that the experts were incompetent or biased. In the case at bar, likewise, there has been no allegations or showing that any of the experts, that either were deposed or testified, were biased or incompetent. As stated above, Petitioner's mental health experts were crucial in obtaining a finding by the trial court that Petitioner was impaired at the time of the crime pursuant to § 921.141(6)(f), Fla. Stat. (1979). Dr. Botting, the pathologist, as well as Mr. Baer, the serologist, were never shown to be biased or incompetent. Likewise there was no testimony that Detective Lewis was incompetent as a fingerprint analysis. Rather the testimony was to the contrary. (PCR 445).

It is conceivable that the trial court could keep appointing experts in serology, mental health, fingerprint analysis and pathology until an expert disagreed with the findings of the experts that were

deposed, interviewed by Mr. Pearl, and actually testify. But no such constitutional right exists at the trial level and expecially not for a collateral proceeding.

Respondent submits that the State would not be required to provide an expert to testify on the statistical impact regarding the application of the death penalty statute based upon the arguments in Point V, supra and based upon the argument that these types of claims have been summarily dismissed. Petitioner has candidly admitted that states are not required to provide counsel for discretionary appeals pursuant to Ross v. Moffitt, 417 U.S. 600 (1973). Respondent would submit afortiori that the Petitioner would not have a constitutional right in such a discretionary, collateral hearing to have court appointed experts.

Petitioner also alleges that the trial court abused his discretion at the post-conviction hearing in not granting a second continuance. Respondent notes that three defense counsels participated in this hearing. An exhaustive three and a half day evidentiary hearing was conducted in which many witnesses for Petitioner were called. In addition there was exhaustive and extensive cross-examination conducted by two of Mr. Quince's attorneys. The totality of the record certainly discloses that there was no prejudice whatsoever to the Petitioner by way of the denial of the motion for a second continuance. The court specifically granted the first continuance on the condition that no more continuances would be granted (PCR 6-7). In any event Petitioner has not demonstrated any prejudice or shown what evidence could have been discovered or what would have been done differently had the second continuance been granted. See, Aldridge v. State, 425 So.2d 1132, 1135 (Fla. 1982).

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully prays this Honorable Court affirm the order denying post-conviction relief in all respects.

Respectfully submitted,

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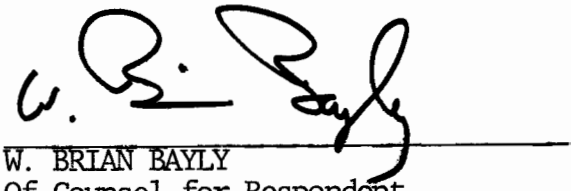
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Answer Brief has been furnished, by mail, to Russell F. Canan, Counsel for Petitioner at 511 E. Street, N.W., Washington, D.C. 20001 and Robert F. Udell, 310 Denver Avenue, Stuart, Florida, 33494 this 9th day of November, 1984.



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