IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,507
65,637

CHARLES WILLIAM PROFFITT,

APPELLANT/CROSS APPELLEE,

vs.

STATE OF FLORIDA,

APPELLEE/CROSS APPELLANT

APPEAL FROM THE CIRCUIT COURT IN
AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE AND INITIAL BRIEF OF CROSS/APPELLANT

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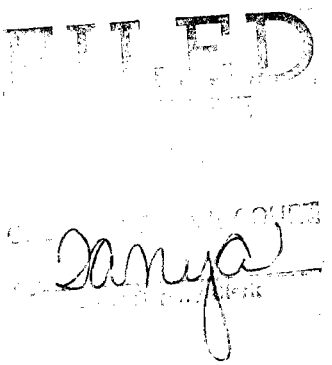

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PRELIMINARY STATEMENT

The record from the 1974 trial will be referred to by the symbol "TR." The record of the 1984 sentencing will be referred to as "R". The Appellant/cross Appellee will be referred throughout interchangable as Proffitt and the Appellee/cross Appellant as the state.

STATEMENT OF THE CASE

Appellee/cross Appellant accepts Appellant's "History of the Proceedings" except to deny:

1. That in Proffitt v. Florida, 428 U.S. 242 (Fla. 1976) the Court did not address application of Florida's death penalty statute to the facts of Proffitt's case. We submit that the Court did.

2. That the Eleventh Circuit in Proffitt v. Wainwright, 685 F.2d 1227, (11th Cir. 1982). reh. denied, 706 F.2d 311 (11th Cir. 1983) set aside the death sentence because, among other grounds, Proffitt was not present at the sentencing hearing. Proffitt was present at the sentencing hearing. The only time Proffitt was not present was during the testimony of a psychiatrist (Coffer) who testified after the trial and after the jury had recommended the death sentence. Proffitt was absent during his testimony because his counsel stipulated to his absence. The Eleventh Circuit held, essentially, that counsel could not so stipulate. See 706 F.2d 311.

3. The assertion made a footnote "1" of Appellant's brief to the effect that in Jones v. State, 440 So.2d 570 (Fla. 1983) this Court approved of the Eleventh Circuit's decision. This court did not.

STATEMENT OF THE FACTS

The state accepts Appellant's "Statement of the Facts" except

in the following particulars.

1. The state denies there were " . . . no witnesses to the homicide" (Appellant's brief p. 3). The victim's wife was a witness.

2. The state would agree that Proffitt's 1967 burglarly conviction in Stamford, Connecticut was set aside prior to his resentencing hearing. Conveniently, this occurred 17 years after the conviction and only a few days before the resentencing hearing.

3. That Proffitt's 1974 counsel failed to present character evidence because he believed such information was excluded from consideration by Florida's death penalty statute. Counsel did not present character evidence because of a tactical decision not to do so. See Proffitt v. Wainwright, supra at 1240 - 1241. Proffitt's counsel also testified he could have fitted mitigating character evidence within the statutory factors if he wanted to and that, in any event, Proffitt had instructed him not to introduce any mitigating evidence. Id. 1238 - 1239.

STATEMENT OF FACTS PERTAINING TO CROSS APPEAL

At the penalty stage of Proffitt's 1974 trial, the defense attorney waived Proffitt's doctor-client privilege and allowed the prosecutor to introduce Dr. Crumbley's testimony. Proffitt v. Wainwright, at 1243 - 1244. This was a tactical decision on the part of trial counsel. He so testified at the federal habeas corpus hearing. Id. 1244. His purpose, as can be gleaned from reading Id 1243 - 1244 was to establish two statutory mitigating circumstances. The specific waiver, made when Dr. Crumbley was called to testify is

as follows:

> MR. LEVINSON: Your Honor, at this point, I would like to place something in the record.
>
> Your Honor, the defendant has requested me to waive his confidential privilege which he had between the Doctor and himself concerning any communications. However, this waiver is only for purposes of this particular proceeding and is not to be construed in any manner as a waiver for any other purpose.
>
> THE COURT: Let the record so reflect. You may proceed.
>
> (TR. 497)

Dr. Crumbly then proceeded to testify before the jury at the penalty stage of the trial. The jury recommended the death penalty. (R 535).

On May 21, 1984 (R - 11), the day Proffitt was brought before the trial court for resentencing, Proffitt filed a motion to exclude the testimony of Dr. James Crumbley. (R - 8) Arguments were heard on this motion. (R 119 - 135)

The court reserved ruling until after it read Dr. Crumbley's testimony. (R 135) The next day, Proffitt testified that he did not personally know he had a Sixth Amendment right with respect to Dr. Crumbley's testimony, that had he known in 1974 that he had a Fifth and Sixth Amendment right and that the state would use Dr. Crumbley's testimony to prove the new factor (cold calculated factor) he would have instructed his 1974 counsel to block Dr. Crumbley's testimony. (R 219) After further arguments (R 225 - 228) the court ruled that there was a psychiatric-patient privilege and that the waiver of Proffitt's counsel ten (10) years prior was not an effective waiver for the present proceedings. (R 230 - 231)

The court then granted the motion to exclude this testimony. (R 231, 287) The state filed a timely cross appeal.

ARGUMENT WITH RESPECT TO PROFFITT'S APPEAL

ISSUE I

THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING FACTOR WAS SUPPORTED BY THE EVIDENCE AND WAS PROPERLY APPLIED TO PROFFITT IN THIS CASE.

(Appellant's Issue A re-stated)

In imposing the sentence of death the lower court found two statutory aggravating circumstances: (a) That the murder was committed while Proffitt was engaged in the commission of a felony, to wit: burglary and (b) that the homicide was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (R 27)

First, Proffitt cites Rembert v. State, 445 So.2d 337 (Fla. 1984) and argues that the felony-murder factor alone is insufficient to support a sentence of death. (Appellant's brief p. 12) This Court's decision in Rembert did not so hold. In Rembert this Court had rejected three statutory aggravating circumstances: avoiding or preventing arrest, heinous, atrocious or cruel, and cold, calculated and premeditated. Id. 340. The felony murder factor was left intact. Nevertheless, in its proportionality review this court determined that under the circumstances of that case death was not warranted. Rembert does not stand for the proposition that the felony murder factor alone can never suffice to support a sentence of death.

Nevertheless, there were two proper factors in this case, each supported by the evidence.

1. The cold, calculated factor is supported by the evidence.

Without question, if Dr. Crumbley's testimony is accepted, this factor would be clearly supported by the evidence because Dr. Crumbley testified that Proffitt had told him that he entered the apartment with the express purpose of killing a man or some party therein. (TR 498 - 499) Since his testimony was excluded by the lower court, and not considered by it, in order to avoid any Presnell v. Georgia, 439 U.S. 14 (1978) problems, we are not asking this court to consider Dr. Crumbley's testimony.[1]

Nevertheless, even absent Dr. Crumbley's testimony, the evidence supports this finding.

If Proffitt surreptitiously entered the darkened bedroom in the middle of the night and stabbed Medgebow in the chest with a butcher knife while Medgebow lay in bed asleep, then the murder was cold and calculated, without any pretense of moral or legal justification.

The evidence supports such a finding.

Mrs. Medgebow testified she was in bed with her husband, in a one bedroom apartment. They had gone to bed at 10:00 p.m. (TR 249) She had to be up by 6:00 a.m. (R 250) Because she was afraid of sleeping through the alarm, she kept waking up throughout the night. (TR 249 - 250) On her husband's side of the bed was a clock radio. (TR 250) She awoke at 3:00 a.m. and again at 4:00 a.m. (TR 250) At 4:00 a.m. she asked her husband for his watch so that she would not have to be leaning over him to look at the clock radio. (TR-50)

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[1] Although on cross-appeal we are asking this court to reverse the exclusion ruling of the lower court. Florida Rule of Criminal Procedure (9.140(c)(H) allows the state to cross appeal questions of law.

At 4:43 am. she awoke again to look at the watch which was now at her night table. (TR 250 - 251) " . . . thinking that she had another hour to sleep" (TR 250) As she lay back down drifting off to sleep, she was awakened by a loud moaning. She turned around and saw her husband up on one elbow with what she thought was a ruler in his hand. (TR 251) At that point a man jumped her, began hitting her and fled. (TR 231)

The autopsy revealed a wound more than three inches deep through the pericardium (a membrane which completely encircles the heart)[2] and into the heart itself. (TR 228) The entrance wound was about one inch to the left of the chest bone. (R 226 - 227) There were no other injuries on the body. (TR 229)

Mary Bassett, the woman living in the trailer with the Proffitt's testified she was awakened at about 5:30 a.m. by some conversations. (TR 375) She overheard Proffitt tell his wife that he had stabbed a man and killed him with a butcher knife while " . . . burglarizing the place." (TR 376)

By forcing himself, one can invent, imagine, fancy, speculate or hypothesize other scenarios, but the only reasonable hypothesis that can be deduced from this evidence is that while Medgebow lay sleeping in bed, Proffitt plunged the butcher knife into his chest and heart. Since the knife penetrated the rib cage more than three inches into the body, it had to have been plunged with considerable force. Since there were no other injuries to Medgebow, such as cuts on his arms or hands indicating defensive wounds, it cannot be hypothesized that there was even a momentary struggle.

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[2] Stedman's Medical Dictonary, 24th Edition.

As trier of the facts, the judge in making his cold and calculated findings, accepted the hypothesis that Proffitt stabbed Medgebow through the heart in the middle of the night, while Medgebow lay asleep in his bed. This aggravating factor may be established by circumstantial evidence, Johnson v. State, 442 So.2d 193 (Fla. 1983) and should not be disturbed as long as there is substantial evidence to support it. Heiney v. State, 447 So.2d 210 (Fla. 1984), Rose v. State, 425 So.2d 521 (Fla. 1982).

This Honorable Court may hold that, as a matter of law, stabbing a man through the heart while he lays asleep in the comfort of his bed is not a cold, calculated crime, but, under the totality of the circumstances of this case, factually, it cannot be disputed. There is not one iota of evidence in this record to indicate that there was any moral or legal justification[3] for this act. The judge found, and the evidence supported the finding, that Proffitt was not under any extreme duress, or mental or emotional disturbance. (R-21, 181 - 182, 196 - 197). Consequently, since Proffitt stealthily entered this apartment,[4] since the Medgebows were asleep, since there was no struggle, since Proffitt was not suffering mentally or emotionally, since there was no pretense of moral or legal justification, the plunging of this knife into the

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[3] We recognize the aggravating circumstances must be established beyond a reasonable doubt, Gorham v. State, 454 So.2d 556 (Fla. 1984). The act of plunging a knife into a sleeping person, without more, negates a moral or legal justification beyond a reasonable doubt.

[4] We recognize that premeditation of the burglary may not automatically be transferred to the murder, Gorham v. State, 454 So.2d 556 (Fla. 1984) but it can serve to fortify other evidence of heightened premeditation.

body of his victim was, without any doubt committed with such a heightened degree of premeditation that it could only have been committed by a cold and calculated mind.

Referring to TR 309 and 313, Appellant, in an attempt to negate this factor, suggests that he " . . . had been drinking for over seven hours on the night of the crime." (Appellant's brief p. 13) Neither TR 309 or 313 suggests that Proffitt had been drinking for over seven hours, that Proffitt was drunk or even under the influence of alcohol. All that the record establishes is that Proffitt had been at Ceasar's Palace for this length of time. While he may have drank some (TR 311) the record does not establish its extent. Certainly he was not so intoxicated that he could not immediately flee, arrive at his trailer by 5:15 a.m. (TR 325), pull out a suit case, pack some clothes, change his clothes and depart (TR 326) in his automobile. (TR 328) Moreover, Proffitt has yet to testify he was intoxicated.[5] He had a chance to testify in 1974 at the penalty phase of the trial and did not. He had a chance, again in 1984 to testify that he was intoxicated and did not. Not once, but twice, has Proffitt been afforded the opportunity of telling the court the circumstances surrounding those events, his emotional and mental state, or the extent, if any, of his intoxication, and has totally failed to do so. The fact is he has scrupulously guarded against being asked anything as to what occurred that night.

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[5] In Jennings v. State, 453 So.2d 1109 (Fla. 1984) the defendant had introduced evidence which showed he had been drinking heavily. Nevertheless this Court said the crime was cold, calculated.

In Russell v. State, 269 So.2d 437, 439 (Fla. 2 DCA 1972), the Second District stated that while a defendant's failure to deny an accusation could not be commented on trial it could be on appeal ". . and we do it". As in Russell we can and do comment herein on the fact that Proffitt has not in any way denied that he committed this offense in a cold and calculated fashion.

We have established that, factually, this was a cold and calculated murder. The question remains whether this court's decisions, as a matter of law remove that factor from consideration. This court has said that this aggravating circumstance ordinarily applies to those murders which are characterized as executions or contract murders, although that description is not all inclusive. King v. State, 436 So.2d 50, 55 (Fla. 1983). We would not categorize this as a contract murder inasmuch as there is no evidence establishing that this was a murder for hire. But, we do insist this was an execution type murder, at least, one evincing a heightened premeditation.

This case is practically identical to Mason v. State, 438 So.2d 374 (Fla. 1983). In that case the defendant broke into the home of the victim and stabbed her while she lay sleeping. It was argued that the evidence introduced at trial failed to show any extraordinary coldness, calculation or that the killer acted with no moral or legal justification. In rejecting this argument, this court said:

> The record shows that appellant broke into Mrs. Chapman's home, armed himself in her kitchen, and attacked her as she lay sleeping in bed. Nothing indicates that she provoked the attack in any way or that appellant had any reason for committing the murder. There was sufficient evidence for the trial court to find this circumstance applicable.

(text at 379)

Perhaps appellant can distinguish Mason from the instant case. Appellee certainly cannot.

Nor can Mason be considered an anomaly. While most of the execution or heightened premeditation type murders justifying a cold calculated finding have involved firearms, the factual element underlying them all is a helpless or unaware victim, who is not provoking the attack. Routly v. State, 440 So.d 1257 (Fla. 1983) (victim lying helpless in trunk of vehicle), Johnson v. State, 442 So.2d 193 (Fla. 1983) (victim having been shot during robbery lay helpless, shot at close range), Jones v. State, 440 So.2d 570 (Fla. 1983) (officer shot in squad car by high powered rifle.), Jennings v. State, supra, (victim kidnapped from home, skull fractured and drowned). Card v. State, 453 So.2d 17 (Fla. 1984) (victim kidnapped and throat cut).

In Card the Court observed that the defendant had ample time to reflect on his action prior to cutting his victim's throat. Similarly, here, Proffitt had ample time to reflect on his actions before stabbing his sleeping victim.

Appellant cites four cases, which, he argues, support his contention that evidence of a murder during a residential burglary does not warrant a finding of cold, calculated and premeditated murder. Peavy v. State, 442 So.2d 200 (Fla. 1983), Blanco v. State, 452 So.2d 520 (Fla. 1984), Richardson v. State, 437 So.2d 1091 (Fla. 1983), Harris v. State, 438 So.2d 787 (Fla. 1983).

We do not quarrel with the assertion that evidence of a burglary and a murder therein, without more, does not justify a finding of cold, calculated murder. That is because the premeditation for

the burglary may not automatically be transferred to the murder. Gorham, supra, footnote 4 of this brief.

In each of the above-cited cases the only evidence supporting heightened premeditation was a burglary. In some it could not be determined whether the defendant killed after being surprised, or in a fit of rage during a scuffle. In others, the defendant's view of evidence was unrebutted. For instance in Harris, the defendant, in his confession claimed the victim cut him first. He had in fact gone to a hospital with a cut hand. In Blanco, the evidence was susceptible of a scuffle wherein the defendant had no time to reflect. In Richardson, the murder was " . . . extemporaneously committed . . . " Id. 1094, during the course of a burglary, during a scuffle. In Peavy, there was no evidence of premeditation other than for the burglary. In none of these cases was there any evidence that the defendant had time to reflect.

Here, as in Mason, we have a sleeping, helpless victim, which did not provoke an attack and a murder committed under circumstances wherein the assailant did have time to reflect.

2. Retroactive application of the factor is not barred by the Ex Post Facto. Due Process, Right to Counsel, Privilege against self-incrimination, Equal protection and cruel and unusual punishment provisions of the Florida or United States Constitutions.

This court has consistently held that the cold and calculated factor could be retroactively applied since it did not change the substance of the sentencing law to the detriment of capital offenders. Combs v. State, 403 So.2d 418 (Fla. 1981), Justus v. State, 438 So.2d 358 (Fla. 1983), Smith v. State 424 So.2d 726 (Fla.

1982), and Justus v. Florida, 79 L.Ed 2d 726 (1984). Justus petitioned the Supreme Court of the United States for a writ of certiorari claiming that application of this factor, retroactively, violated the Ex Post Facto clause of the United States Constitution. That the Court rejected this contention is manifest because Justice Marshall, joined by Justice Brennan filed a lengthy dissent, arguing that it did. Obviously seven members of the Court disagreed. Concededly, the denial of a petition for writ of certiorari, generally, imports no expression of opinion upon the merits of the case, but some Justices have, on occassion emphasized that it should be given such weight as a court feels the record justifies. Brown v. Allen 344 U.S. 443, 489-497, 97 L.Ed 469, 505-510 (1953). Justice Frankfurter and 344 U.S. 542-543, 97 L.Ed 533-534, Justice Jackson, concurring.

a. The Inure Argument

Proffitt argues that while this Court's "...holding in Combs rests on its finding that application of the cold, calculated and premeditated factor inured to Comb's benefit" (Appellant's Brief Pg. 32) here it disadvantaged rather than benefited Proffitt.

His argument, that in his case he has been disadvantaged, is premised on his contention that Rembert supra, and Menendez v. State, 419 So.2d 312 (Fla. 1981) have held that a sentence of death is inappropriate where the only aggravating factor is felony-murder. He argues that, since the felony-murder (burglary) factor is the only valid one in this case, inclusion of the cold, calculated factor prejudices him because without it he could not be sentenced to death.

His premise is incorrect. In the first place if he would read Justus, 438 So.2d, supra, he would find that the only other aggravating, factor was a felony-murder one. If his premises is correct then either this court would have set aside the sentence of death in Justus or the United States Supreme Court would have granted certiorari.

Moreover this court did not hold in either Rembert or Menendez that, the sentence of death is inappropriate, where the only aggravating factor is a felony-murder. Both cases involved this court's proportionality review (thought at the time to be constitutionally mandated) wherein this court determined that under the circumstances of those cases the death penalty was inappropriate. Even assuming that the cold, calculated factor is invalid, the felony-murder (burglary) factor would, under the circumstances of this case, justify the sentence of death. This is not a case where a burglar is surprised in his act and kills in the spur of the moment, or one where he was first attacked by the occupant. It is one where he killed unnecessarily.

Furthermore Menendez rejects the argument that the felony-murder factor alone is inappropriate to justify the death penalty because, therein, this court refused to declare the felony-murder factor unconstitutional as applied to him.

Consequently, since the felony-murder (burglary) factor, under the circumstances of this case would justify composition of a death sentence, appellant's argument fails.

Additionally, appellant, as did the defendant in Johnson v. State, 438 So.2d 774 (Fla. 1983), misses the point as to the inure discussion in Combs. What this court said in Combs was that the cold calculated factor "... in effect adds nothing new to the elements of the crimes for which petitioner stands convicted, but rather adds limitations to those elements for use in aggravation, limitations which inure to the benefit of a defendant" Id 421. It inures to a defendant's benefit because the elements of first degree murder are part of the circumstances which must be taken into consideration when imposing sentence in a capital case. One of those elements is premeditation, and this factor limits this element to those in which there is a heightened premeditation.

Even should the cold, calculated factor operate to Proffitt's disadvantage it is not an ex post facto law. When Proffitt premeditatedly murdered Medgebow he was on notice that death was a possible sentence. He may not have been on notice as to all of the factors that might be considered in determining whether he would be executed, such as statutory aggravating factors, mitigating factors or possible clemency, but he was on notice that the quantum of punishment was death. A law is not ex post facto unless (a) it punishes an act as a crime which was innocent when committed (b) makes more burdensome the punishment for an act after it was committed or (c) deprives one charged with a crime of a defense available according to the law at the time it was committed. Dobbert v. Florida, 432 U.S. 282, 53 L.Ed.2d 344, 97 S.Ct. 2290 (1977).

In Dobbert the Court considered whether changes in the Florida death penalty statute subjected Dobbert to trial under an ex post facto law. The crime had been committed under the old capital sentencing procedures in existence prior to Furman v. Georgia, 408 U.S. 238 (1972), but Dobbert was tried under the new sentencing procedures. In rejecting the contention that Dobbert's trial, under the new procedures violated the ex post facto clause, the Court pointed out that the ex post facto clause does not give a criminal defendant a right to be tried, in all respects, by the law in force at the crime was committed. It was not intended to control procedural changes. A procedural change which does not change the quantum of punishment attached to the crime but which "... simply alter[s] the methods employed in determining whether the death penalty [is] to be imposed..." is not ex post facto 58 L.Ed at 356.

While the Court in Dobbert pointed out the new statute was not only procedural, but ameliorative, it did not say that the procedural change must also be ameliorative, or inure to the benefit of the defendant. This is clear because the Court stated:

> "Even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto."
>
> 53 L.Ed2d at 356

It then proceeded to cite two cases wherein procedural changes worked to the disadvantage of a defendant because they allowed consideration of evidence not previously allowed, yet were held not to be ex post facto; viz: Hopt v. Utah 110 U.S. 574 (1884), Thompson v. Missouri, 171 U.S. 380 (1898). Additionally, in foote 6 of Dobbert the court points out that the ameliorative aspect was an independant basis for its decision.

Appellant cites Weaver v. Graham, 450 U.S. 24, 67 L.Ed 2d 17, 101 S.Ct. 960 (1981) and State v. Williams, 397 So.2d 663 (1981), but neither of those cases avail him. In each the change in the law "... substantially alter[ed] the consequences attached to a crime completed, and therefore change[d] 'the quantum of punishment'." Weaver 67 L.Ed2d at 25. In Weaver the consequences were increased because the time which a defendant had to serve before being eligible for "automatic" parole were increased and in Williams because the defendant had to serve one third of his sentence before being eligible for parole, absent the trial judge's approval.

b. The factor can be applied even though not considered by the jury.

The fact that the lower court did not err in refusing to impanel a jury for resentencing will be discussed infra under issue IV.

In this subsection (Appellant's Brief p. 27) appellant suggests that a trial judge may not consider an aggravating factor that was not considered by the jury. He is mistaken. This court has held that a judge may consider aggravating circumstances not presented to a jury. White v. State, 403 So.2d 331 (Fla. 1981), Engle v. State, 438 So.2d 803 (Fla. 1983), Spaziano v. State, 433 So.2d 508 (Fla. 1983).

c. Application of the factor did not violate Proffitt's right to due process of law, the effective assistance of counsel, privilege against self incrimination and prohibition against cruel and unusual punishment.

Due Process

Appellant argues that he was denied due process because in 1974 he was not put on notice that in 1984 he would face the cold, calculated factor. This is no different than saying that when a defendant commits a crime he must not only be on notice as to the possible maximum punishment, but the factors that the sentencing authority will take into consideration in imposing sentence. According to him any factor of which he was not on notice at the time of the offense, or at least at the time of trial, cannot be considered, whether they relate to the circumstances of the offense or the character of the defendant. If he is correct, then Barclay v. Florida, 77 L.Ed2d 1134 (1983) was wrongly decided, because, therein, the Supreme Court of the United States held that, constitutionally, it was permissible to consider non-statutory aggravating factors in imposing sentence. Since non-statutory aggravating factors are not listed in the statute a defendant is never on notice as to them. Yet, that does not violate due process.

The fact is that Proffitt was well aware, prior to the resentencing proceedings, that the cold and calculated aggravating circumstance was going to be a consideration. This is evident because he filed a motion in limine to bar its application (R 44-47).

Ineffective Assistance Argument

Next Proffitt argues that he was denied effective counsel because his counsel had no opportunity to prepare or defend against this factor or advise him as to the law. He ignores the fact that

his present counsel had ample opportunity to call him as a witness and explain why his murder of Medgebow was not cold and calculated.

Exactly what liabilities or options his 1974 counsel could have advised him of, Proffitt does not, with one exception, attempt to explain. Once a murder is committed under the circumstances in which it is committed there is little counsel can do to change those circumstances or advise with respect to them. The one exception is his contention that counsel could not properly advise him with respect a plea agreement. This assumes that the state would have been amenable to a plea agreement. Finally, ineffectiveness claims are properly matters for post conviction relief.

Equal Protection

As with the due process argument this is basically a rehash of the ex post facto argument. It should be observed that in Dobbert, supra, the petitioner had also claimed it constituted an equal protection violation and the court rejected this contention with little comment.

Nevertheless, appellant argues that he was denied equal protection because "... no other defendant convicted in 1974 could receive a death sentence because of heightened premeditation." (Appellant's brief p. 30) This brings to mind Goode v. Wainwright, 704 F.2d 593 (11th Cir 1983) wherein the Eleventh Circuit held that Goode's death sentence would be unique and freakish because he would be executed in reliance upon the recurrence factor when all others in Florida have not been. Id 608 The United States Supreme Court promptly and summarily quashed that decision. Wainwright v. Goode, 78 L.Ed 2d 187 (1983).

Appellant's reliance on Lee v. State, 340 So.2d 474 (Fla 1976) is misplaced. In that case Lee had been convicted and sentenced under the old capital sentencing statute, but his sentence was reduced to life by the trial judge. The state appealed. While the appeal was pending, this court reduced all death sentences imposed under the old statute, but Lee's was unaffected because of the pending appeal. Although the District Court thereafter held he could be resentenced under the new statute, this court held it would be unfair to treat him differently. Proffitt, on the other hand committed his crime and was tried after the new capital sentencing statute went into effect. He is not being treated differently. He was sentenced to death because he qualified for that sentence by having committed his murder during the course of a burglary, if for no other reason. Neither state appellate inconsistenies nor lack of uniformity in judicial decisions, generally, violate the equal protection or due process clause of the "Fourteenth Amendment. Beck v. Washington 369 U.S. 541 (1962), Bishop v. Mazurkiewicz 634 F.2d 724 (3rd Cir 1980), Short v. Garrison 678 F.2d 364 (4th Cir. 1982).

Self Incrimination

Finally, in footnote 26 of his brief Proffitt argues that utilization of the cold, calculated factor violates Estelle v. Smith, 451 U.S. 454 (1981) because when his 1974 counsel agreed to let the psychiatrists examine him after the jury had recommended death he did not know that examination would be utilized, years later, to establish this circumstance. This is a blatant

misrepresentation of the record because their testimony was not utilized to establish this factor. The factor was established by the facts surrounding the crime. Moreover, any attorney knows that when he subjects his client to a psychiatric examination the results may well produce unfavorable results. As will hereinafter be more fully discussed in the cross appeal, a waiver is not like a spigot which may be turned on and off at the pleasure of a defendant. Whatever we say, with respect to waiver in the cross appeal, is incorporated herein by reference.

ISSUE II

PROFFITT'S DEATH SENTENCE IS NOT EXCESSIVE AND DISPROPORTIONATE

(Appellant's Issue B re-stated)

Appellant argues, and we concede, that this court can review his death sentence and determine that it is excessive under the circumstances of this case. We submit, however, that the sentence is not disproportionate or excessive.

In the first place it is important to remember that not only a jury, but two different trial judges, ten years apart, found the death sentence appropriate and that the first time the sentence was imposed it was approved by this court and the Supreme Court of the United States.

Proffitt has had the best of two worlds. In 1974 his then counsel made the tactical decision not to present character witnesses but to rely on Dr. Crumbley's testimony which established two statutory mitigating circumstances. Proffitt v. Wainwright 685 F.2d at 1240-1241, 1243-1244. He was, as we know, unsuccessful and his present attorney criticized and attacked his competency for this decision. In 1984 they decided to exclude Dr. Crumbley's testimony and opted for character evidence instead, and, as we know, have not been any more successful. Perhaps it is because, as the Eleventh Circuit observed in Stanley v. Zant, 697 F.2d 955, 969 (11th Cir 1983), such character evidence "... may well have no effect, or no good effect, on a jury [judge here]." The lower court, in the instant case, patiently considered all of the mitigating character evidence presented and stated:

> That the Court has weighed carefully the testimony of the Defendant, CHARLES WILLIAM PROFFITT'S family, former co-workers, religious advisor and others in a search for mitigating factors, and has accorded that testimony the weight the court feels is appropriate.
> (R-28)

which seems to fortify the observation made in Stanley.

In his brief counsel points a picture of a warm, kind, industrious, caring, religious family man who would not hurt a fly. Little would be gained by engaging in a factual dispute with this character evidence. Suffice it to point out that there are some discrepancies because his 1974 counsel testified at the federal habeas evidentiary hearing as to the reasons why he did not call the half brother, wife and his sister as a witness:

> "...that he had not called appellant's sister as a mitigating witness because she had a criminal record; that he had not called appellant's half-brother because he and appellant "had not had a relationship for some time",
> * * * * *
> that he had not called appellant's wife because he did not feel she would make a good witness since she was unhappy with appellant's lifestyle and because he was concerned that calling her to testify might constitute waiver of the marital privilege, which appellant had asserted to prevent her from testifying at the guilt phase of trial."
> Proffitt v. Wainwright 685 F.2d at 1240

Significantly, his half brother corroborated at the 1984 hearing that they had been separated (R 273) and his wife that he left her once without supporting her (R 282). Moreover, Proffitt did not call his sister, although she was at the 1984 hearing (R 306-307); and his mother admitted he had been dishonorably discharged from the service (R 300).

The point is, there were ample reasons why the lower court gave the character evidence the weight that it did. The judge personally heard and observed the witnesses and gave their testimony the weight he thought it merited.

Appellant asks this court to compare Rembert, supra, Copeland v. State, 435 So.2d 842 (Fla. 2d DCA 1983), Garmon v. State, 434 So.2d 1036 (Fla. 3d DCA 1983), Mainor v. State, 415 So.2d 827 (Fla. 3d DCA 1982), Williams v. State, 397 So.2d 1049 (Fla. 4th DCA 1981) and Menendez v. State, 419 So.2d 312 (Fla. 1982). Casual observation will disclose that all, except Rembert and Menendez were District Court cases not involving the death penalty. Rembert is distinguishable because (1) the defendant and victim knew each other, (2) it was a robbery of the business during business hours, not a night time burglary, (3) there was no evidence as to how the murder actually occurred and (4) there was only one valid aggravating factor. Menendez involved a day time robbery without any evidence of premeditation, heightened or otherwise.

ISSUE III

THE SENTENCING AUTHORITY DID NOT IMPROPERLY EXCLUDE RELEVANT EVIDENCE IN MITIGATION.

(Appellant's Issue C re-stated)

Appellant presented seven character mitigating witnesses who testified at the hearing: a co-worker (R 233-242), the woman who lived in the trailer with him and his wife (R 242-243), his father-in-law (R 250-254), his half-brother (R 261-277), his wife (R 277-284), a catholic priest who has had contacts with Proffitt in prison (R 284-294), and his mother (R 296-301). In addition he presented to the court two sisters which he chose not to call, representing to the court they would only be cumulative (R 306-307).

As can be seen by reading pages 32 through 34 of Appellant's brief counsel presents a glowing picture of Mr. Proffitt. To be sure they squeezed the towel dry.

Nevertheless, he now claims that the trial court excluded relevant evidence of his character and background proffered by him. Nothing could be further from the truth. The trial judge allowed him to present all relevant evidence which he properly presented.

He says that the trial court prohibited the priest from testifying as to Proffitt's feelings of remorse over the crime, referring to R 289. If one reads R 289 one finds that what the court sustained was an objection calling for his opinion, but allowed the priest to testify to facts indicating remorse. (R 289) In Magill v. State, 386 So.2d 1188 (Fla. 1980) this court pointed out that evidence of remorse three or four months later, when the defendant is facing the death penalty is probably not relevant. Moreover Proffitt's half brother testified that Proffitt was remorseful when he turned himself in (R 271). Consequently, they

they were able to introduce remorse at a point in time when it was relevant.

Proffitt complains that his brother was prevented from testifying as to his impoverished upbringing. The fact is his brother so testified:

> A. Family was a poor family. The father was an alcoholic; my mother worked most of the time.
>
> Q. Where did you live at first?
>
> A. New York City.
>
> Q. What kind of housing did you live in in New York City?
>
> A. It was a railroad tenement house, you might say, an apartment.
>
> Q. What was your economic situation as you recall it?
>
> A. Extremely poor.
>
> (R 264)

Later he testified that the family did not have electricity or running water (R 266), that the family lived together because of economic reasons, with no place to go, (R 266), that they live in federal low income housing with 7 people living in a two bedroom apartment (R 267), that their mother had two jobs (R 268), and that Proffitt was forced to go quit school and go to work when he was sixteen. (R 268).

If such testimony did not establish what counsel sought to establish, he cannot now complain because he did not proffer what additional evidence of economic conditions he wished to establish. An Appellant cannot complain about the exclusion of mitigating evidence if he did not proffer what the evidence would be. Francois v. State, 407 So.2d 885 (Fla. 1982) at 890., Armstrong v. State, 399 So.2d 953 (Fla. 1981) at 960.

Proffitt also complains that the court erroneously refused to admit a letter from a former correctional officer, affidavits from two teenage nephews and another letter from his school principal. The court refused to accept them because they were not subject to cross examination (R 302-305).

We fully recognize that in capital sentencing proceedings the strict rules of evidence should not be observed, but in addition to the documents being hearsay and not subject to cross examination there are several reasons why the court did not err. In the first place, the letter from the correctional officer was not under oath. We recognize that this court has said that if a defendant is given a fair opportunity to rebut it, hearsay evidence is admissible. Perri v. State, 441 So.2d 606 (Fla. 1983). We assume this applies to the state, but here the state could not rebut or impeach this evidence because the officer was deceased. (R 304) Moreover, the letter suffers from the same relevancy problems as evidence of remorse. Magill, supra. The letter may establish that appellant was a model prisoner, but, then, that would hardly be unusual for someone in death row. In a practical sense it adds little more than the testimony of the catholic priest who testified he has known Proffitt since 1979 (R 287), visiting with him in death row about twice a week (R 294) and who found Proffitt to have concern for other people (R 291), and to have genuinely turned religious (R 292). The statement appearing therein that the family has been supportive adds nothing that was not testified to by the family. In footnote 29 of

his brief Proffitt points out that the letter was submitted to the Governor in 1979 in connection with clemency. In view of the fact that clemency was not granted, it can be assumed it had little weight with the Governor and cabinet.

The affidavits from his teenaged nephews and from his school principal are, to say the least, in addition to being hearsay, and not subject to cross examination, by virtue of their remoteness, irrelevant. As stated, this court has indicated that mitigating evidence may be irrelevant by virtue of its remoteness. Magill, supra. In his brief Proffitt says he is now 38 years old. (Appellant's brief Pg. 33). The school principal's letter disclosed that he had not been in contact with Proffitt since 1955, some 18 years prior to the offense. Moreover, that letter adds nothing to the evidence that had already been presented relative Proffitt's character.

The affidavits from the teenaged nephews suffer from the same irrelevancy and cumulative problems. They relate to matters occurring years before the offense was committed and even more years before the sentence was imposed.

While Fla. Stat. 921.141 (1983) relaxes the rules of admissibility at the sentencing phase, such rules should not be relaxed to the point of requiring a trial judge to accept all kinds hearsay exhibits which, at best, are marginally relevant and cumulative.

Finally, even to the extent that the failure to allow any of these exhibits in evidence constituted error, it was harmless.

In view of the character evidence which was presented and to which the judge, in his province gave little weight, Teffeteller v. State, 439 So.2d 840 (Fla. 1983), can any one seriously say that there is a reasonable doubt that had the judge considered the two letters and two affidavits it would have made a difference in his sentence? Chapman v. California, 386 U.S. 18 (1967), Schneble v. Florida, 405 U.S. 427 (1972).

Moreover, even if this court feels that the court erred, and has doubts as to whether the error is harmless beyond a reasonable doubt, it does not call for a reversal or remand. All that is needed is a simple order requiring the lower court to respond as to whether, if it had considered the proffered exhibits, it would have made any difference in its decision. Compare State ex rel Fox v. Maroney, 385 F.2d 839 (3rd DCA 1967), Grandison v. Warden, Maryland House of Corrections, 580 F.2d 1231 (4th Cir 1978), Hampton v. Wyrick, 588 F.2d 632 (8th Cir 1978).

ISSUE IV

THE TRIAL COURT DID NOT ERR IN DENYING PROFFITT'S MOTION FOR IMPANELING A JURY.

(Appellant's Issue D re-stated)

Appellant argues that the lower court erred in denying him a new jury sentencing proceeding. We disagree. In the first place neither this nor any Florida Court has held that Appellant's sentence was deficient in any respects. Appellant was resentenced because the Court of Appeals for the Eleventh Circuit determined that certain constitutional deficiencies had occurred after the jury had rendered its recommendation of death. Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982). Interestingly, another panel of that same Eleventh Circuit has stated that Proffitt v. Wainwright has no precedential value ----- at least with respect to its analysis of the aggravating circumstances. See Alvord v. Wainwright, 725 F.2d 1282 (11th Cir. 1984).

Aside from the constitutional error it found to exist with respect to aggravating factors the Eleventh Circuit found two other constitutional errors, but neither involved the jury, both having occurred after the jury had made its recommendation. One of these two alleged constitutional errors concerned the testimony of Dr. Coffer who testified while appellant was absent from the court room at the post trial ad hoc proceedings. The Eleventh Circuit held that although the trial had terminated, the hearing was a critical state of the sentencing proceedings and that counsel could not waive his presence. Proffitt v. Wainwright, 685 F.2d at 1256-1261 and 706 F.2d 311 (1983) (on petition for rehearing). The second concerned

consideration of Dr. Sprehe's report by the trial judge in imposing sentence without allowing appellant to cross examine Dr. Sprehe. Proffitt v. Wainwright, 685 F.2d at 1251-1255. Since Dr. Sprehe examined Proffitt and rendered his report to the trial judge after the jury had rendered its recommendation the jury never had this report and any error with respect to this report cannot be deemed to have implicated the jury.

Thus far the federal courts have refused to require a new jury sentencing proceeding. Judge William Terrell Hodges, United States District Judge has refused to so order (R 3). It may be that the Eleventh Circuit Court of Appeals will eventually hold that one should have been ---- although in light of Spaziano v. Florida, 35 Cr. L. 3199 (1984) which held that, constitutionally, jury sentencing is not required, we doubt one could be ordered by the federal courts. Nevertheless, this Court, not having found any constitutional infirmities in appellant's original sentence, should not order a new jury sentencing proceeding predicated on the Eleventh Circuit's decision. If jury sentencing proceedings are deemed by this court to have been necessitative it should so order only on the basis of what it considers is the Florida law and not on what the Eleventh Circuit may think Florida law should be. Compare Witt v. State, 387 So.2d 922 (Fla. 1980).

This court has held that, where the error that had been committed had no effect on the jury, another jury proceeding was unnecessary. Funchers v. State, 399 So.2d 356 (Fla. 1982), Menendez v. State, 419 So.2d 312 (Fla. 1981).

Proffitt argues that he should have another jury because the original jury verdict was rendered on the basis of his 1974 counsel's misguided understanding of the death penalty statute. (Appellant's brief p. 40). As we have herein above pointed out, this is incorrect. Counsel then, as a counsel now, made a tactical decision as to how to proceed. As pointed out above, Proffitt's 1974 counsel gave many reasons why he did not present character evidence before the jury.

He also argues that since the present judge excluded Dr. Crumbley's testimony he should be allowed a new jury to consider character evidence, absent Dr. Crumbley's testimony. Suffice it to say that Proffitt in 1974 was found to have rendered effective representation, Proffitt v. Wainwright, supra, and that his present counsel is bound by his 1974 counsel's tactical decision to allow Dr. Crumbley's testimony. This will be more fully discussed in the cross appeal.

Next Proffitt argues that the jury was improperly instructed in several respects. (Appellant's brief p 43-45). That is a matter that should have been raised in his first direct appeal. Moreover, no objections to the instructions were interposed.

Understandably, Proffitt wants to try again with a jury.

Under his issue A (Appellant's brief p 27) and under this issue Appellant, relying on Tedder v. State, 322 So.2d 908 (Fla. 1975) and its progency suggests that a new jury proceeding is mandated. Essentially, Appellant argues that since a new sentence was required he should be allowed to present to a jury the same mitigating

evidence he presented to the sentencing judge, but which his 1974 counsel opted not to present. He reasons, of course, that if he is successful in getting the jury not to recommend death the trial judge would be precluded from overriding the jury, absent a showing of clear and convincing evidence justifying imposition of the death sentence.

There are several reasons why his argument is flawed.

The first is that, as we have seen, Proffitt v. Wainwright did not require new jury sentencing proceedings. All that was required was for the sentencing authority to give Proffitt an opportunity to cross examine Dr. Spehe before sentencing and to have Proffitt present during Dr. Coffer's testimony.

The second is that neither Tedder nor its essence require a new jury sentencing proceeding. As we have seen jury sentencing is not constitutionally required. Spaziano v. Florida, 35 Cr. L. 3199 (1984). Fla. Stat. 921.141(3) (1983) is silent as to any standard by which a trial judge may override a jury recommendation. The fact is section (3) appears to allow a trial judge to impose a death sentence, regardless what the jury recommends, as long as the judge finds the mitigating circumstances do not outweigh the aggravating. The Tedder standard was judicially created by this Court and should be limited to the factual setting in which it arose: one where a jury has recommended a sentence of life imprisonment and the judge, as the sentencing authority chooses to override the jury recommendation.

The jury does not sentence in Florida. The judge is the sentencing authority. The jury only recommends as the conscience

of the community. McCaskill v. State, 344 So.2d 1276 (Fla. 1977). While a jury recommendation may militate against the presumption that death is proper Williams v. State, 386 So.2d 538 (Fla. 1980) and, while the jury may be instructed as to aggravating and mitigating circumstances, it does not make specific findings as to what aggravating and mitigating circumstances exist. This is because its recommendation only echos whether the community would approve the death penalty in any particular case. But, regardless what the jury recommends, if the judge cannot find any aggravating circumstance which makes a defendant eligible for the death penalty he cannot impose the death sentence.

In the instant case the jury echoed the feelings of the community that the death sentence was appropriate. We do not know on what basis it did this, since the jury is not required to make specific findings. The point is, however, that the jury has already spoken and it is unnecessary for another jury to again voice the community's thoughts on this case.

Thirdly, In seeking another try at the jury, appellant argues that if he were now allowed to present his character and mitigating evidence the jury might not now recommend a death sentence. This is not a situation where appellant claims he has newly discovered mitigating evidence. It is manifestly clear that his previous counsel was well aware of this evidence and made a tactical decision not to use it, opting instead to utilize Dr. Crumbley's testimony to establish that appellant was under extreme mental or emotional distress and that his capacity to appreciate the criminality of his

conduct and to conform his conduct to the requirements of law was substantially impaired. Proffitt v. Wainwright, 685 F.2d at 1243-1244. One need only compare the witnesses that testified at the hearing below (R 232-307) with the witnesses discussed at id 1240 to see that they were the same.

Interestingly, present counsel criticized former counsel's tactical decision and contended it constituted ineffectiveness. Id. 1243-1245. (Failure to object to admission of Crumbley Testimony) and Id 1357-1248 (Failure to Present Character Witnesses). Succeeding in obtaining a new sentence, present counsel chose instead to move, successfully, to suppress Dr. Crumbley's testimony, thereby removing the statutory mental mitigating circumstances from consideration by the judge and opting for character evidence. This tactical decision, as we have seen, proved no more successful in convincing the judge against imposition of the death sentence. Were Appellant claiming to have "newly discovered evidence" to present at the penalty phase it would not qualify as such, not only because it is not newly discovered but because it is not such evidence that would preclude imposition of the death sentence. Hallman v. State, 371 So.2d 482 (Fla. 1979). Since no error or deficiency occurred with respect to the jury at the penalty phase and since such evidence could not even qualify under the newly discovered evidence rule we fail to see why appellant should now be entitled to try again via a new tack. As far as the jury is concerned Proffitt has had his day in court.

ARGUMENT ON CROSS APPEAL

ISSUE

THE LOWER COURT ERRED IN EXCLUDING THE TESTIMONY OF DR. CRUMBLEY FROM CONSIDERATION IN VIEW OF THE FACT THAT HIS PREVIOUS COUNSEL HAD WAIVED THE PSYCHIATRIST/PATIENT PRIVILEGE FOR SENTENCING PURPOSES.

As the statement of the facts pertaining to this cross appeal discloses, Proffitt's 1974 counsel specifically waived the psychiatrist/client privilege and allowed Dr. Crumbley to testify before the jury at the sentencing phase of the trial. This was, as we have seen, a tactical decision on the part of counsel because counsel felt that through Dr. Crumbley he could prove two statutory mitigating circumstances; viz: that Proffitt was under extreme mental or emotional stress when he committed the murder and that Proffitt's capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law was substantially impaired. Proffitt v. Wainwright, 685 F.2d at 1243-1244.

Whether one agrees or disagrees with the decision it was a reasonable one. His 1974 counsel has, in fact, been determined to have rendered effective representation. Proffitt v. Wainwright, supra. In Faretta v. California, 422 U.S. 806, 820 (1979) the Court was careful to point out that once a defendant accepts counsel's representation he allocates to counsel the power to make decisions:

> It is true that when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas.
>
> * * *
>
> This allocation can only be justified, however, by the defendant's consent at the outset, to accept counsel as his representative.
>
> Id at 820-821

Consequently, while an accused may reject the assistance of counsel, once he accepts counsel's representation it must be assumed that he does or will concur in counsel's tactical decisions in all but perhaps the most limited situations and it does not suffice for him to say years later that he was not aware of the consequences. The Justices of the Supreme Court of the United States have expressed it this way on numerous occasions:

> Although trial strategy adopted by counsel without prior consultation with an accused will not, where the circumstances are exceptional, preclude the accused from asserting constitutional claims, see Whitus v. Balkcom, 333 F2d 496 (CA 5th Cir 1964), we think that the deliberate bypassing by counsel of the contemporaneous-objection rule as a part of trial strategy would have that effect in this case.
>
> Henry v. Mississippi, 379 U.S. 443, 451-452 (1965)

> Under our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney. Any other approach would rewrite the duties of trial judges and counsel in our legal system.
>
> Estelle v. Williams, 425 U.S. 501, 512 (1976)

> Once counsel is appointed, the day-to-day conduct of the defense rests with the attorney. He, not the client, has the immediate --- and ultimate --- responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop. Not only do these decisions rest with the attorney, but such decisions must as a practical matter, be made without consulting the client.
>
> Wainwright v. Sykes, 433 U.S. 72, 93 (1977) Chief Justice Burger, concurring.

> "If counsel is to have the responsibility for conducting a contested criminal trial, quite obviously he must have the authority to make important tactical decisions promptly as a trial progresses. The very reasons why counsel's participation is of such critical importance in assuring a fair trial for the defendant, see Powell v. Alabama, 287 US 45, 68-69, [77 L.Ed 158, 53 S.Ct. 55, 84 ALR 527],... make it inappropriate to require that his tactical decisions always be personally approved, or even throughly understood, by this client. Unquestionably, assuming the lawyer's competence, the client must accept the consequences of his trial strategy. A rule which would require the client's participation in every decision to object, or not to object, to proffered evidence would make a shambles of orderly procedure."
>
> Wainwright v. Sykes, 433 U.S. 72 95 footnote 2 Mr. Justice Stevens, concurring.

We have quoted extensively from these cases because it is important to emphasize that counsel's decisions are binding on the client even where he does not consult with his client or even where not thoroughly understood by the client. Nevertheless in the instant case, Proffitt's 1974 counsel did consult with Proffitt. We know this because counsel so said while Proffitt was present (See quote p. 3 herein above).

Although Dr. Crumbley's testimony was considered by the jury and by the trial judge in 1974, and although the federal courts did not find any error whith respect to it, the lower court excluded it from consideration because Proffitt testified in 1984 he was not aware of the consequences of such waiver when he waived and because his counsel had waived only for "...for purposes this particular proceeding" (T.R. 497).

A waiver is an intentional relinguishment of a known right. Johnson v. Zerbst, 304 U.S. 458 (1938) For the waiver to be effective you have to be aware of the right and intentionally relinguish it. It is unnecessary, however, that it be intelligently made knowing all possible consequences that may result from it. Schneckloth v. Bustamonte, 412 U.S. 218 (1973) at 235. For instance in Murch v. Mottram, 409 U.S. 41 (1972) a defendant withdrew in state court a claim "...without prejudice..." Id. 42, in spite of the admonition by the court that it might constitute a waiver of the claim. Subsequently, he presented the claim in federal habeas and testified in federal district court that "...he did not intend to waive..." Id 46. The Supreme Court, in holding that his actions constituted a waiver binding on him, said:

> "... a state prisoner may not deliberately "elect" not to comply with the interpretation of the state procedural statute by the state court, and then assert in federal court that no rights were waived because he did not have the subjective intent to waive his constitutional claims.
>
> Id at 46

Consequently, regardless what Proffitt subjectively intended he was bound by his objective waiver. See also In Re Grand Jury Investigation of Ocean Transportation. 604 F.2d 672 (D.C. Cir 1979) (Intent to waive, not necessary for waiver, a privilege waived by first counsel, binding on second)

Moreover, he cannot claim, as the lower court erroneously ruled, that the waiver was limited to the 1974 proceedings. Once a privilege is waived it cannot be revoked. Hamilton v. Hamilton

Steel Corporation, 409 So.2d 1111 (Fla. 4th DCA 1982). There is no such thing as a limited waiver. In re Weiss 596 F.2d 1185 (4th Cir 1979), The Permian Corporation v. United States, 665 F.2d 1214 (1981).

CONCLUSION

Based on the above and foregoing arguments and authorities the sentence of death should be affirmed. Moreover, the lower court's ruling excluding Dr. Crumbley's testimony should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy fo the foregoing has been furnished by U.S. Regular Mail to Irwin J. Block, Fine Jacobson Block England Klein Colan and Simon, P.A., 2401 Douglas Rd, P.O. Box 140800, Miami, Florida 33134, and David S. Golub, Silver, Golub and Sandak, 184 Atlantic Street, Stamford, Connecticut 06904, this 4th day of December 1984.

OF COUNSEL FOR APPELLEE