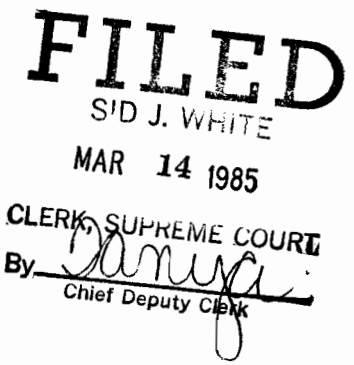
IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,005



ROY ALLEN STEWART,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

* *

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

* *

BRIEF OF APPELLEE

JIM SMITH
Attorney General
Tallahassee, Florida

CALVIN L. FOX, ESQUIRE
Assistant Attorney General
401 N.W. 2nd Avenue, Suite 820
Miami, Florida 33128

(305) 377-5441

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PREFACE

The Appellee, The State of Florida, was the prosecution in the trial court below. The Appellant, Roy Allen Stewart, was the defendant and the applicant upon a Rule 3.850 motion in the court below. In this brief, the parties will be referred to as they appeared before the trial court.

The following symbols are used in this brief:

(R) For the Record-on-Appeal bound under separate cover, previously transmitted herein and consisting of pages R1-R900.

(T) For the Transcript of Proceedings in Stewart v. State, 420 So.2d 862 (Fla. 1982), bound under separate cover and consisting of pages T1-T2492.

(SR) For the Record-on-Appeal in Stewart v. State, supra, previously transmitted under separate cover and consisting of pages SR1-SR1209.

I

STATEMENT OF THE CASE

The Defendant's "Statement of Facts" is riddled with argument and unwarranted editorial remarks and omits substantial portions of the proceedings below.

The Defendant, Roy Allen Stewart, was charged by indictment with one count of First Degree Murder; one count of robbery with a weapon; one count of sexual battery with force likely to cause serious injury and burglary of an automobile with a weapon. See, R507-R509. After a trial by jury the Defendant was convicted as charged. See, Stewart v. State, 420 So.2d 862 (Fla. 1982). Subsequently the jury recommended a death sentence and the trial court sentenced the Defendant to death. See, Id.

Relative to this appeal, part of the facts surrounding the present killing are detailed the present trial court's final judgment, denying relief under Rule 3.850 Florida Rules of Criminal Procedure:

> "The victim, Margaret Haizlip, a woman of small physical stature, in her late seventies, was a pioneer of South Florida living in a small home across from Stewart's temporary residence. About 10:00 p.m. Mrs. Haizlip was out on her porch and saw Stewart. She waived to him, invited him into her home and fixed him a sandwich. Shortly

> thereafter he went into her bathroom and stole a gold watch from the medicine cabinet. Mrs. Haizlip, after going into the bathroom confronted the defendant, apparently about the stolen watch, whereupon Stewart beat and pummelled Mrs. Haizlip unmercifully about her ribs, face and head. While so doing, the defendant was tearing the clothing and ulitimately the underwear from her body. As she lay on the floor, bleeding from her face, moaning and making noises, the defendant forcibly had sexual intercourse with her in a manner so vicious so as to tear her vagina. The defendant thereupon fastened a cord with an iron attached to it around her neck, pulled tightly on the cord and thereby strangled her leaving a ligature mark on her neck.
>
> "The medical examiner testified the victim suffered eight broken ribs, multiple contusions, and her larynx was broken. A bite mark was identified on her thigh, and what appeared to be a bite mark was on her breast. There was blood stains and disarray in the living room and bedroom area of her house, indicating the victim was fighting and running for her life. The defendant left the victim at the scene with blood on his hands."
>
> R892-R893.

The foregoing account of the crime was essentially based upon the Defendant's principal confession[1]. See, SR889-

[1]Despite the statement in the Defendant's confession about blood on his hands and the apparently bloody violence at the scene, the Defendant's clothes had no blood in them and the victim's car which he attempted to steal had no blood in it. See T2434. Additionally, the victim's keys to her car were stolen by the killer(s) but the Defendant tried to steal the victim's car by placing a knife in the ignition.

SR893; SR873-SR886. In the Defendant's confession he states that he began having vaginal intercourse with the victim, while the victim was on her back. See, SR881. The Defendant states in his confession that during said intercourse he wrapped a cord, "once around her neck, I reckon," and pulled the cord with both hands, strangling the victim. See, SR882.

During the course of the cross-examination of the medical examiner defense counsel, however, elicited the medical examiner's opinion that some of the victim's injuries could have been done from a woman's high heel shoe, see, T1262, and that the "ligature" marks around the victim's throat were consistent with an iron cord found at the scene, see, T1264-T1265. The medical examiner also testified that the ligature marks from the ironing cord were only on the front and sides of the victim's neck. See, T1266. Siezing upon this, defense counsel had the medical examiner admit that if the cord was wrapped completely around the victim's neck it would have made "a complete circle (mark)" on the neck. See, T1270. Realizing what defense counsel was getting at, the medical examiner explained that the relationship of the series of ligature marks on the victim's neck, besides indicating the direction from which a ligature was applied, also indicates that something may have interfered with the ligature at the back of the victim's neck. See, T1270, T1267; T1269-T1270.

However, the medical examiner then admitted that there was nothing on the victim's neck that stopped the cord from going all the way around her neck. See, T1272, lines 15-18. After considerable effort by defense counsel, the medical examiner also admitted that the ligature marks on the victim's neck were more consistent with the cord being drawn around her neck from the back of the victim rather than encircling her neck and then pulling:

> "[By defense counsel]:
>
> Q: What stopped it from making the mark on the back of the neck?
>
> A: Apparently, a couple of things involved--as I explained before--the position it was placed on her is one thing. The other thing is that sometimes a cord might not leave a contusion mark in certain areas.
>
> Q: Let me put it this way. Is it more consistent with the cord having been placed around her neck from the back and pulled?
>
> A: (No Response).
>
> Q: --then, with it encircling her neck and being pulled?
>
> A: Well, let's put it this way. It is more consistent but I'm not necessarily saying that that is what happened.
>
> Q: What happened?
>
> A: I wasn't there.
>
> Q: You wasn't there?
>
> A: No."

T1273-T1274.

The medical examiner's testimony as to the time of death was similarly helpful to the Defendant. As indicated in the Defendant's "confession" the alleged time of the confrontation and time of death was well before 1:00 a.m. See, SR873-SR876. In discussing the time of death the medical examiner initially said that the time of death was sometime between 9:00 p.m. and 8:00 a.m. See, T1299-T1301. After admitting on cross-examination to the several ways in which a body's time of death may be checked he admitted that he only checked the body with two methods, and only one, the degree of rigor mortis in the body was useful. See, T1300-T1301; T1304; T1310; T1317. The medical examiner had seen the body at 9 or 10 o'clock in the morning after the killing. See, T1312. After first stating variously that he could not determine the time of death and saying only that it occurred within twenty-four (24) hours, the medical examiner also said that if rigor mortis was present in the body, when he examined it and, "[t]hat indicates that [the victim] died, generally, sometime at least four hours prior to the time that [the medical examiner] saw her." T1303-T1304, see, T1314-T1318. The victim's time of death could therefore have been between 5 and 6 o'clock in the morning rather than between 11:30 p.m. and 1:00 a.m. as indicated in the Defendant's "confession." See, Id.

In addition to the foregoing testimony, on cross-examination defense counsel elicited from the crime scene

technician, who had gathered evidence at the scene, that the death scene was littered with used kleenex type tissue paper. See, T1160-T1162. At the same time, the victim was known to be very neat. See, T1009. The police failed to submit this tissue paper to the chemistry lab for analysis. See, T1162. The crime scene technician also testified that he did not know whether a person who uses cocaine has a runny nose. See, T1164-T1165. When the victim was discovered, the door of the premises was closed but unlocked. See, T1009.

The Defendant also testified on his own behalf, denying that he had killed the old lady and disputing the validity of his confession(s). The Defendant testified that he was from Florence, South Carolina and had been in Dade County about a year at the time of the trial. T1919. The Defendant thereupon testified that he had two sisters and one brother and that he did not come from a wealthy family. T1919-T1920. He indicated that his father became ill and was unable to work and that his mother then had to support the family as a seamstress. Id. He said that he had to quit school at the age of fourteen and that eventually his father died from his illness. T1921-T1922. He said that his family attended the Church of God and Pentecostal Holiness Church and that he was raised in that religious belief. T1922.

The Defendant said that he came to Dade County and stayed in Perrine, Miami, Florida a year before the trial. T1922-T1923. During that period of time, he generally corroborated the fact that he became friendly with the victim. T1923-T1925. The Defendant testified that he dranked a lot of beer in his job as a roofer. T1927-T1928. He said that he dranked about as much beer as the other roofers. Id. He said that he had tried cocaine but did not like it and that he preferred "downs". T1928.

On the day of the crime, he testified that he was at the "Perrine Pub" and dranked beer from about 7:30 p.m. to around 11:30 p.m. T1929. He said that on his way over to his aunt and uncles house, he met the victim who was standing on her front porch. T1930. He sat across the street from the victim's house, he saw a man walk into the front door of a duplex there. T1931. He also noticed that at a vacant house next door, there was some sort of party going on. Id. After about fifteen minutes the victim asked the Defendant to come inside since there were a lot of mosquitos outside. T1932. After he went inside she fixed sandwiches. T1932-1933.

Subsequently he went into the bathroom and found a man's gold pocketwatch with a chain, which he picked up and put in his pocket. T1934. The Defendant testified that

about thirty to thirty-five minutes had passed since he first met the victim up to this point. See T1935.

Subsequently, the victim got up and went to the bedroom and then the restroom. Id. She returned from the restroom and raised her voice to the Defendant and said, "What do you mean? T1935-T1936. The victim came right up to the Defendant hollering at him and then punched him in the mouth. Id. The Defendant said based upon "reflexes" he hit her hard enough to knock her down. T1936-T1937. He said that the victim then got back up, came at him and was "still swinging." T1937. He said that he hit her again and she fell again near the door of the bedroom and began "moaning". T1937-T1938.

The Defendant said that he became scared and started to leave but the saw the victim's pocketbook sitting on a chair and thereupon he opened the pocketbook took a few dollars out of a wallet in the pocketbook and dropped the wallet at the chair. T1938-T1939. The Defendant admitted that he tried to take the victim's car and the tip of the knife broke off in the ignition. See, T1940-T1941. He said thereupon he shut the door of the car, and went to the Perrine Pub. T1941-T1942. He said that it was about 12:30 to 12:40 a.m. Id. He reiterated that when he left the victim's house she was alive. See T1942.

The next day the Defendant heard that the victim had died and thought that he had killed her because he knew he had hit her. T1944. He said that on the following Monday morning he went to his aunt's house where he took a bath and Linda Dennis washed his clothes. T1945. He said that while he was at Linda Dennis' house he stole a $100 from her and he also got into a fight with Frank Dennis over the stolen money. T1947-T1948.

The Defendant was subsequently arrested in South Carolina. He testified that the South Carolina police asked him if he had committed the murder and he told them yes. T1954. When the Miami police arrived, they said that they had enough evidence to convict him of first degree murder. T1958-T1959. He said that the officers told him that they had strong evidence against the Defendant and that it would be better if he told them what happened and they would be on his side when he came back to Florida and they would try to keep him out of the electric chair. T1961-T1962. The Defendant testified that thereupon he described the same events as indicated above to the detectives. T1963. When the detectives asked him whether he had raped the victim he told them no. T1963. Whereupon the detectives told the Defendant that the Defendant had killed her so therefore he must have raped and strangled her. T1964. The Defendant told the detectives that he had no explanation as to how the victim

had been strangled or raped. See T1965. In fact he told them that he didn't think that he could have done it. T1965. The Defendant said that with regard to his statement, the detectives were advising him as to what could have happened as he gave his statement. See T1966.

With regard to the cord around the victim's neck, the detectives told the defendant that if he killed the victim, he had to strangle her. See T1967. The detectives explained to the Defendant that the victim was strangled and that the cord was wrapped around her neck. T1967. The Defendant testified, however, at trial that he did not wrap the cord around the victim's neck. T1968. The Defendant denied taking the victim's wallet; denied taking the victim's credit cards and denied taking the victim's car keys. See T1971. The Defendant said that he admitted to the detectives that he took the watch. T1972.

The Defendant testified that subsequently he began to have doubts as to whether or not he had killed the victim. See T1980. When he viewed the photographs in court of the position of the victim's body, he testified that the victim was not lying in the position that he left her. See T1980-T1981. In one photograph additional the Defendant said that a picture which had been on top of the television was sitting in a chair. T1982. The Defendant also indicated that

the strap on the victim's purse was broken off and it was not broken off when the Defendant opened the victim's pocketbook. See T1983-T1984. The Defendant also said that the victim's clothes were not strung all over the living room, including her underclothes and that the victim's bed was not "messed up" but was "made up." T1984. The Defendant told the jury that someone else had to go to the victim's house after he left. See T1985-T1986. The Defendant's specifically denied putting anything around the victim's neck; he denied raping her; he denied bitting her; he denied taking her wallet or her keys and he denied killing the victim. See T1986-T1987.

On cross-examination, the Defendant admitted that in his religious training he learned that it was wrong to kill. T1993-T1994. The Defendant again admitted on cross-examination that he had four felony convictions. T1995. The Defendant admitted that he had told "the doctors" that he did not remember the present incident. See T1999-T2000. On cross-examination, the Defendant further indicated that he may lie to the police if it would help him but that he would not lie to a jury under oath. T2002.

In preparation for the trial of this matter, certain samples were taken of the Defendant's hair, the Defendant's blood, the victim's blood, the victim's hair and samples

were taken from the bit marks on the victim's body and the vaginal contents of the victim's body. See, T1395-T1455. The State's witness, a laboratory technician, testified that the hair samples found in and around the victim's body; the sperm samples taken from the victim's vaginal and the saliva samples taken from the bit marks on the victim were all consistent with the Defendant's blood type "A" and the secretors, therein. See, Id. However, the technician admitted, of course, that he could not make a statement that the sperm found in the victim and the saliva found on the victim was the Defendant's. See, T1445. Similarly, the technician admitted that he could not make a determination that a certain hair belonged to a certain person. See, T1446. On cross-examination, the laboratory technician further admitted that the "A" secretor which he used to say that the samples were consistent with the Defendant's blood, occurs in almost one-third of any given population as for examination in Dade County. See, T1464-T1468. In other words, almost one-third of the male population of Dade County has the "A type" secretors in their blood. See, Id.

Based upon the foregoing, the Defendant's theory of the case was that someone else had entered the house and murdered the victim subsequent to his altercation with the victim. See, T2004; T2044; T2048-T2049; T2063-T2064; T2124-T2126; T2190-T2144. Defense counsel throughout his closing

argument admitted to the jury that the Defendant in fact had beaten and robbed the victim but that his blows to the victim were not sufficient to kill her and that he left her alive early in the evening. See, Id. During the penalty phase, Defense counsel continued to argue to the jury the various inconsistencies in the evidence which tended to point towards the fact that the Defendant may not have killed the victim. See T2424-T2439. Defense counsel's theory was that if there was any doubt in the jurors minds that the Defendant committed the crime, because of the finality of the penalty the jury should not recommend the death penalty. See T2437-T2439.

During the penalty phase, the State produced additional evidence concerning prior convictions of the Defendant and a medical description of the suffering which the victim underwent as a result of her injuries and murder. See T2283-T2323. On cross-examination, the State's witness, the medical examiner, admitted that the witness could have been knocked out with the first blow and remained unconscious and thus felt no pain during her murder. See, T2324-T2326.

The Defendant produced several witnesses in support of his claim for mitigation. Outside of the presence of the jury but in front of the trial court, the Defendant produced Don Reid who testified that he had witnessed 189 executions

by electrocution. See, T2336-T2337. Mr. Reid testified as the execution of a young man for committing a murder during a hold-up. See T2340-T2341. He described in detail an execution for the trial court. See T2342-T2343. Reid also testified that upon examining all of the records of the Texas Department of Corrections, of individuals who had their sentences commuted to life imprisonment from death, the records reveal that of 500 people sent to death row 87 of those cases were not executed. See T2344-T2345. Of that 87, 35 were granted parole and only two were returned to prison as parole violators. T2345. The two that were returned to prison for violating their parole were sent there for driving while intoxicated. See Id. Defense counsel further offered the testimony of Mr. Reid that if the Defendant was given a life sentence he could be given an opportunity to learn and go to school and therefore rehabilitate himself and for example could tell children not to make the same mistakes he did. See T2354.

The Defendant produced four (4) other witnesses who testified generally as to his background. Barbara Ann Hodge, the Defendant's mother, testified that the sickness and death of the Defendant's father had a severe affect upon the Defendant. See, T2359-T2361. When the Defendant's father became sick she had to quit working and wait upon him hand and foot because he became a complete invalid. T2361.

During this period of time, the Defendant spent most of his time around the house. T2361. The Defendant worked at night and in the day time helped his mother. See T2361-T2362. When the Defendant's father died he eventually died in the Defendant's arms and Defendant actually tried to give him artificial resuscitation. See T2362-T2363. His mother testified that the Defendant had a change in personality and turned to drugs. Id. She said that the Defendant passed out one time and was taken to a hospital and the Defendant tried to commit suicide a couple of times. T2363. She also testified that for several months he met a girl and was doing real good and then one night he blew a tire and was knocked unconscious in an accident. See T2363-T2364 She said that the Defendant had to stay in bed for a while after that and then he married the girl but she turned to philandering. See T2364. At this time the Defendant was arrested for the first time. Id. She said that prior to the Defendant's father's death he had never been in any "real trouble" of any kind with the police and never used drugs before his father died. See T2364-T2365.

Betty Cutgagon, testified that she is sister of the Defendant and that she too noticed changes in his personality after his father died. See, T2365-T2366. She said that the Defendant and his father were very close and corroborated the fact the Defendant began using drugs and

had tried to commit suicide. See T2366. She said that the family sought help for the Defendant but there was nothing that anyone could do because he was over the age of 18 and the family was not wealthy. See T2366-T2367. She said that her mother tried talking with psychiatrist to rehabilitate the Defendant but the psychiatrist said that there was nothing they could do unless the Defendant got into trouble. See T2367. She also corroborated the fact that when the Defendant caught his wife with another man things went "down hill". T2367-T2368. She said that the Defendant did not have a lot of friends. T2368. She said that after a brief prison sentence he was given a job but that each time she saw him she felt that he was on drugs or drinking. See T2369. Cutgagon also testified that she learned that the Defendant had moved in with her uncle [in Florida] and that he seemed to be doing well. See T2369-T2370.

The Defendant also produced Linda Dennis who testified that she was the aunt of the Defendant. See T2371. She testified that the Defendant did in fact come down to Miami to live with her and her husband and looked for work. See T2371-T2372. She said that he seemed to be behaving himself and did not get into any kind of trouble. See T2372-T2373. She said that he moved into a duplex across the street from the victim's house and lived there about six or seven months. See T2373. She said that she never observed the

Defendant with drugs during these periods of times. See 2372-T2374. She said that the Defendant came to her house the Monday morning after the victim had been murdered. See T2374-T2375. She testified that the Defendant came to her house because he was going back to South Carolina and wanted to wash his clothes. See 2374-T2375. She said that she knew what blood looks like and there was no blood at all on the Defendant's clothing. See T2375. Subsequently, however, she noticed after the Defendant had left that $100 in cash was missing from a desk drawer. See T2375-T2376. Her husband "Frank" went and found the Defendant and had a fight about the money. See T2376-T2377.

The Defendant also called James Beckworth who testified that he had known the Defendant for approximately fifteen years and knew the Defendant in South Carolina. See T2380. He said that the Defendant was working for him in a roofing company when he got fired. See T2381. He said that the Defendant did not make many friends and did not get along well with his fellow employees. T2381-T2382. He said that at the time that the Defendant left his aunt and uncles house and moved into the duplex across the street from the victim, he noticed a change in the Defendant's attitude. See T2382. He attributed the change to abuse of drugs and alcohol. See T2382. He said that the Defendant was using marijuana and quaaludes. See Id. He testified that the

Defendant was not using heroin or cocaine. See T2383. Beckworth said that the Defendant was "malajusted" and was not the type of person who could make friends easily and socialize. See T2383.

As noted above, the jury convicted the Defendant as charged and a majority of the jurors recommended a sentence of death. See T2450-T2454. In addition to the foregoing the trial court, the ultimate sentencer in this case had and considered all psychiatric reports filed concerning the Defendant. See T2356. The record contained three extensive psychiatric reports of the Defendant. See, SR1145-1153; (Jacobson); SR1154-SR158; (Corwin); SR1159-SR1162; (Jaslow). These psychiatric reports contain substantial recitations of the Defendant's childhood and background. However, they also contain descriptions of the crime by the Defendant up to the point where he struck the victim and then a statement by the Defendant that he blacked out and only remembers having blood on his hands and washing the blood off of his hands later. See, SR1147-SR1148; (Jacobson); SR1155-SR1156; (Corwin); SR1160-SR1161; (Jaslow).

As indicated above, the trial court sentenced the Defendant to death, finding five statutory aggravating circumstances and no statutory mitigation. See SR1188. Relative to the present petition, Defense counsel, Goldstein, filed a motion for attorneys fees indicating

that he had spent more than two hundred and thirty-three hours on the present case. See SR1164-SR1165. Similarly, the Defendant's co-counsel, Sherman, filed a motion for attorneys fees indicating that he had spent more than two-hundred and fifteen hours on the present case. Thus, the Defendant received the benefit of more than four hundred and forty-eight hours of attorney time in preparation for this rather uncomplicated and straight forward first degree murder case. As noted above, on August 26, 1982, this Honorable Court affirmed the judgment and convictions below. See Stewart v. State, supra. On April 18, 1983, the United States Supreme Court denied certiorari. See Stewart v. Florida, ___U.S.___, 103 S.Ct. 1802 (1983).

On March 16, 1984, the Defendant filed a motion for post-conviction relief under Rule 3.850, Fla.R.Crim.P. See R707-R714. The trial court in its order in this matter recites the essential grounds contained in the Defendant's motion for collateral relief:

> "By his motion, the Defendant claims that he was denied effective assistance of counsel with respect to the death penalty phase of trial. Many reasons have been advanced. The principal reasons advanced are: counsel spent all their time and effort preparing for the guilt or innocence phase of the trial; counsel were totally unprepared to present evidence of mitigating circumstances or to contest

> the aggravating circumstances; conduct which he claims falls below the required standard, and which he claims resulted in prejudice to him. The claim of prejudice is that if counsel had prepared for the penalty phase they would have discovered and presented evidence of mitigating circumstances; including that the Defendant, at the time of the crime and possibly throughout his lifetime, was mentally impaired to a degree which, if made known to the jury and judge, would have resulted in findings that would have resulted in the imposition of a sentence of life imprisonment.
>
> The other reasons advanced were: the lawyers did not adequately prepare the few witnesses they did have available to testify at the penalty phase; they used other lawyers motions and instructions; and the closing argument was mostly that portion of the guilt phase argument not use during the guilt phase portion of the trial, basically an argument that the Defendant was not guilty beyond a reasonable doubt and a plea for compassion."
>
> R39-R40.

Through counsel, the Defendant also requested and got a court appointed neurological examination. See, R719-R720A. Pursuant to that examination a court appointed Doctor, Duchowny, testified that he could find no evidence of neurological disease[2]. See, R480-487.

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[2]State's exhibit 1, from the examination of Dr. Duchowny has been omitted from the record. See, R482.

At the hearing below the Defendant put on twelve friends, relatives and a former teacher and former employers who testified generally to the Defendant's background. He also produced two psychologists whom had recently examined the Defendant at the request of his attorney, who said that he had organic brain damage and that he was and has been mentally ill all his life. See, R419-R480; R274-R310. The psychologist who had diagnosed "mental illness" admitted that he had been a "finder" of mental illness for the army. See, R479-R480.

The Defendant also produced Stanley Goldstein the lead attorney during his trial. See, R139-R140. At the time of the present trial Goldstein had been an attorney for about ten years, including practicing as a prosecutor and supervising prosecutor. See, R140-R141. He had represented three to five previous defendants charged with capital offenses. See, R142. None of the previous cases got to the penalty phase. See, R143.

Goldstein said that in the present cause he approached the prosecutor, but the prosecution was not going to plea bargain and wanted the death penalty. R147-R148. Goldstein said that there was, "[m]ore physical evidence than [he] had ever seen in any case, "but, "[n]othing that proved that [the Defendant] murdered her." R148. Based on conversations

with a sister about a car accident and the Defendant's relationship with his father, psychiatric exams were requested and ordered. R149. The Defendant was also given an investigator. R150-R151. The investigator could find no "good things" about the Defendant. R152.

Relative to the present appeal, Goldstein said that when he first met the Defendant, he was convinced that he had committed the crime. See, R153. The Defendant did not actually remember what happened, but rather assumed that she died because he hit her. R153. Goldstein said that based on Goldstein's examination of the evidence, Goldstein also thought that there was somebody else at the scene. See, R154. Goldstein said that he confronted the Defendant and asked if he was trying to cover-up for somebody and he denied it. R154. When the Defendant was shown a portion of the evidence the Defendant, "pointed out a couple of things which didn't make any sense." R154. In particular, the victim's purse had been moved and the strap broken. R155-R156. The Defendant vehemently denied speaking with a witness, Brown, who lived across the street from the killing with her boyfriend, Hamrick. See, T156; T160. Goldstein found out that the witness and her boyfriend were cocaine addicts. See, R157. Goldstein was aware that the crime scene was littered with kleenex, which the police had simply

thrown away[3]. See, R157-R158. Goldstein also said that the medical examiners description of the ligature marks on the victim's neck was more consistent with an assault by two persons with one person strangling the victim from behind rather than the rape and strangulation, which the Defendant "guessed at" in his confession. See, R157-R159. Goldstein said Brown and Hamrick "disappeared" after the killing. See, R161. Goldstein testified that one of the main issues in the case was the bite mark evidence relating to the bite marks on the victim. See, R161-R163. The defense bite mark expert unfortunately also concluded that the bite mark on the victim's thigh was consistent with a space in the Defendant's teeth, which defense counsel also had. See R163-R165. Goldstein testified that he concluded however that he still could "win" the case. See, R166.

With respect to the penalty phase, Goldstein spoke with his client and had, "a couple of conversations" with members of the Defendant's family and concluded that sending an investigator to South Carolina would not have accomplished much. See, R169. He was aware that the Defendant had had some prior convictions and psychiatric treatment. See, R168-R169. After receiving the psychiatric reports he saw nothing useful therein for trial. R170-R172. He said that

[3]Defense counsel was a former policeman and believed that any good lab man should have properly investigated the kleenex. See, R160.

he needed a week to prepare for sentencing and the trial court only gave a couple of days. See, R172-R173. Goldstein said that he met with the Defendant's family 15 to 20 minutes on the morning of the sentencing hearing. See, R174-R175. He also submitted a motion for further psychiatric evaluation based on the previous reports. See, R176-R177; R170.

Goldstein testified that even on the date of the present Rule 3.850 hearing he is still convinced that the Defendant did not do the murder. See, R183-R184. He said that he believed the "confession" was fed to the Defendant by the police and that the physical evidence did not fit the crime described. See, R182-R184. Goldstein suggested that he did not believe that the jury would be at all sympathetic to an admission of the present crime. See, R184-R185; R185-R186. He also said his client believed throughout the trial that he would not get the death because of his co-operation with the police. See, R185. He also was of the opinion that any drug abuse problems his client may have had before or during the crime would not have produced any sympathy from the jury. See, R186-R187. Goldstein said that he also did not think that any childhood problems the Defendant may have had would be at all persuasive with the jury in this case. See, R187-R188. With respect to witnesses in mitigation, from South Carolina, Goldstein said that he was lead

to believe that their attendance was prevented by financial constraints. See, R189-R190. Based upon all of the foregoing, Goldstein described his basic tactical approach at the sentencing phase thus:

> "What I was trying to convince the jury during the sentencing phase, was if I couldn't convince the jury in the trial that he didn't do it, then at least let me put in the idea that maybe he didn't do it, give me that, and then don't kill him because sometime in the future you may find out that somebody else did it and if we electrocute him it would be too late.
>
> [By the Prosecutor]:
>
> Q: So, would it be fair to say that you thought if you could try to convince the jury if there was just a scintilla of a thought--
>
> A: That is all I wanted, a little doubt. That at some time maybe something would happen and they would come in and show that he didn't do it and you got him here and let him loose.
>
> Q: You felt that the State's case was not proved beyond a reasonable doubt?
>
> A: Right.
>
> Q: Is that the truth?
>
> A: Right.
>
> Q: Do you still feel that way today?
>
> A: Right."
>
> R188-R189.

Defense counsel said with respect to the State's bite mark expert, that in his judgment everyone in the courtroom felt that evidence was absurd. See, R191-R192. Goldstein indicated that in his judgment the hair, saliva and semen evidence was adequately "explained". See, R192.

The Defendant's witness, Raben, a former colleague of the Defendant's present counsel, and who had never conducted a death penalty hearing, testified at length to what a terrible job he felt Goldstein had done. See, R196-R236.

Based upon the foregoing, the trial court summarized the evidence presented thus:

> "At the hearing before this Court, Defendant presented testimony of a lawyer who stated his opinion regarding the ways that Defendant's trial counsel fell below the acceptable standards. He claimed among other things: that counsel who tries the guilt phase and relies on a denial defense cannot present the penalty phase because his credibility has been lost; that counsel had not presented any evidence assisting the Defendant and some was harmful; and that the argument about reasonable doubt was wrong. Without detailing the testimony, the lawyer agreed with trial counsels' contention that he was unprepared for the penalty phase. The main deficiency pointed to was the failure to obtain evidence of Stewarts' mental impairment, which the Defendant contends was suggested in the reports of the court appointed doctors.

> Other witnesses at the hearing before this Court testified about the Defendant's childhood, relationship with his father, the effect upon him of his father's death, his work habits, his prior parole activity, his use of drugs and alcohol and his mental status. Two of the witnesses are psychologists.
>
> The psychologist conferred with the Defendant, administered batteries of tests to him, reviewed his prior records. They expressed their opinion that the Defendant was mentally ill; Dr. Marguit concluded that the Defendant was not only mentally ill at the time he murdered Ms. Haizlip, but throughout his life. The Defendant was also subjected to a number of tests at Jackson Memorial Hospital. Those tests did not disclose any evidence of neurological disease."
>
> R894.-R895.

Consistent with the analysis in Strickland v. Washington, __ U.S.___, 104 S.Ct. 2052 (1984) the trial court concluded that even if counsel had been ineffective the Defendant could not establish the requisite prejudice:

> "At an early stage of the representation, defense counsel should have come to the inescapable conclusion that all hope of obtaining a verdict of not guilty should hav been abandoned and substantial time should have been expended preparing for the penalty phase.
>
> The question, however, is: was the failure to do so prejudice as defined in Strickland? Assuming that counsel would have presented

> the evidence and made the arguments that were made in support of the Motion, is there a reasonable probability that the outcome would have been different. Would the sentencer, giving due consideration the evidence and arguments presented at the hearing upon the Motions, have concluded that the sentence warranted was life imprisonment rather than death.
>
> The aggravating circumstance found by the sentencing judge were undoubtedly considered by the sentencer to be of varying importance. However, it is not reasonably probable that the sentencer would have concluded that the totality of the evidence was such as to outweigh two of the aggravating circumstances: the fact that the crime was committed during the commission of a sexual battery and the way the killing was done.
>
> This Court has determined that regardless of the conduct of the Defendant's counsel there is no reasonable probability that the sentence would have been different evenl if what was presented to this Court had been presented during the penalty phase of the Defendant's trial."
>
> R896-R897.

After some delay, the Defendant has pursued the present appeal from the foregoing order denying his Rule 3.850 Motion.

II

POINT ON APPEAL

WHETHER THE TRIAL COURT HAS ERRED IN DENYING THE DEFENDANT'S MOTION PURSUANT TO RULE 3.850?

III

SUMMARY OF ARGUMENT

1) Counsel's conduct did not so undermine the proper functioning of the adversarial process such that the penalty phase proceedings herein cannot be relied upon as having produced a just result.

2) Even assuming arguendo, that counsel's alleged errors rose to the proper level of constitutional error there is no probability that the sentencing result would have been different in this case.

III

ARGUMENT

THE TRIAL COURT HAS NOT ERRED IN DENYING THE DEFENDANT'S MOTION PURSUANT TO RULE 3.850.

The Defendant rambles on for sixty pages in his brief claiming essentially that defense counsel was ineffective only at the sentencing phase of the present trial in that his selection of tactics was unreasonable and that the outcome of the result below was reasonably affected. As an afterthought the Defendant then argues that the representation of his attorney was so bad that it was tantamount to no counsel at all and therefore no showing of prejudice is required. Essentially the Defendant attempts to assassinate his counsels efforts without properly analyzing or presenting what trial counsel did or considered.

The standard for review of ineffective assistance of counsel claims is contained in Strickland v. Washington, __ U.S.___, 104 SCt. 2052 (1984). In Strickland, the court delineated a two-part test for claims of ineffective assistance of counsel. First of all, the court determined that a defendant must make a showing that his counsel's conduct was so far removed from the norm that:

> "[C]ounsel's conduct so undermined the proper functioning of the

> adversarial process that the trial cannot be relied on as having produced a just result."
>
> 104 S.Ct. at 2064.

See, also, Knight v. State, 394 So.2d 997 (Fla. 1981), affirmed sub nom, Strickland v. Washington, supra. Secondly, a defendant must show that even with his counsel's deficient conduct that there was a "reasonable" probability that the outcome was affected by counsel's deficient conduct:

> "Defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome."
>
> Id. at 2068.

Accord, Knight v. State, supra. Decisions as to which witnesses to present; what evidence is worthwhile and what arguments to make, are proper tactical choices within the standard of expected competency of counsel. See, Middleton v. State, Case Nos. 66,629 and 66,652 (Fla. March 4, 1985); Tafero v. State, 459 So.2d 1034 (Fla. 1984); Magill v. State, 457 So.2d 1367 (Fla. 1984); Funchess v. State, 449 So.2d 1283 (Fla. 1984); Straight v. Wainwright, 422 So.2d 827 (Fla. 1982). Where there is any reasonable basis for

counsel's tactical decisions they will not support a claim of ineffective assistance of counsel. See, Id. The claim that counsel failed to interview childhood relatives and friends will not support a claim of ineffective assistance of counsel in the face of a tactical decision by counsel to proceed otherwise. See, Strickland v. Washington; Magill v. State, supra; see also, Stephens v. Kemp, 721 F.2d 1300, at 1304 (11th Cir. 1983); Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983). In the present case, there is not the remotest possibility that the Defendant can show either requirement of Strickland, consistent with the foregoing authority.

The Defendant's position as stated by his present counsel is recited at page 34 of his brief:

> "If counsel, here, had made a realistic assessment of this case, he would have known that a finding of guilt was inevitable. That inevitability, however, is never the case at a sentencing hearing. At that stage, there is no set of facts and no set of legal principles that require a juror to vote for the death penalty. Given the vast spectrum of individual feelings about the appropriateness of the death penalty, given the basis humanity of the defendant no matter how heinous the crime, and given the availability of facts establishing mitigating circumstances and contesting aggravating circumstances that a reasonable investigation would have uncovered, there was in this case a rational basis for the jury to advise and the trial judge to impose a sentence of life imprisonment." [Emphasis added].

Apparently the Defendant's present counsel would have abandoned any hope of defending this cause on the merits and possibly obtaining a conviction for a reduced offense based upon the inherent pardoning authority of the jury. Ironically, it is essentially the present counsel's foregoing analysis as to, "feelings about the appropriateness of the death penalty," which motivated Stanley Goldstein to believe that if he consistently maintained a denial of the present crime that the jury would not recommend the death penalty, because of its finality and any lingering doubt they may have had as to the Defendant's guilt. Goldstein reasonably believed that to abandon his denial defense at the penalty phase would have plainly destroyed any hope of a recommendation of life, because of the overwhelming evidence warranting death for this terrible crime. In Middleton v. State, defense counsel had presented precisely the same theory in his defense of Middleton. Defense counsel also did not put on psychological evidence at the penalty phase because it was inconsistent with the denial defense at trial. In rejecting a claim that counsel's performance was constitutionally ineffective, this Court in Middleton endorsed the trial court's order, which provides that:

> "The court also notes that the matters which Defendant contends should have been presented to the jury were fundamentally inconsistent with the theory of defense offered in this case, that it was not Defendant who committed the crimes charged. To have tried to explain

> away Defendant's conduct in light of his deprived background would have certainly seemed incongruous in light of Defendant's own testimony denying the offense. Plainly, the decision not to present these matters to the jury but to argue them subsequently to the court was a valid strategic one. See Funchess v. State, 449 So.2d 1283 (Fla. 1984); Straight v. Wainwright, 422 So.2d 827 (Fla. 1982). Reasonable strategy will not be second guessed by the use of hindsight. See Songer v. State, 419 So.2d 1044 (Fla. 1982). Given the inconsistency between the psychological evidence and the defense at trial, the strategy here was not only reasonable, but was the only logical approach. Not only was the decision not to present the psychological matters to the jury appropriate, but so was the decision to argue the nature of the process of electrocution to the jury. See Alvord v. Wainwright, 725 F.2d 1282, 1290, n. 13. (11th Cir. 1984."
>
> Slip Opinion at p. 6.

Similarly, in Straight v. Wainwright, 422 So.2d 827 (Fla. 1982), the defendant was severely critical of defense counsel's efforts to maintain a central, credible position of innocence. In rejecting this complaint of constitutional ineffectiveness, the Straight court explained, thus:

> "Appellant contends that his trial counsel failed to investigate for the purpose of developing evidence of mitigating circumstances. Appellant asserts that his lawyer could have developed and presented evidence of an unstable mental

> condition at the time of the crime, and of appellant's feelings of remorse for the murder. The state responds that at the hearing below it was shown that defense counsel did not argue such mitigating circumstances because he believed them to be, even after the verdict of guilt, fundamentally inconsistent with the entire defense. For example, defense counsel could not offer evidence of remorse because appellant, from the beginning of the case right up to and during the sentencing phase, had always maintained his innocence of the murder to defense counsel. One of the purposes of a bifurcated trial and separate sentencing trial is to allow just such an inconsistent presentation on the question of sentence after guilt has been determined. See Model Penal Code, §201.6, Comment, at 74-75 (Tent. Draft No. 9, 1959).
>
> However, a defendant through counsel may waive the opportunity to make such an inconsistent presentation on the question of sentence after maintaining his innocence at the guilt phase of the trial. For an attorney to take such a position on behalf of his client does not establish that that representation was ineffective. Defense counsel viewed evidence of mitigating circumstances as fundamentally damaging to the integrity of his client's case. Therefore, we find this argument to be without merit.
>
> Id. at 832.

Accord, Funchess v. State, supra, (Fla. 1984)(Trial counsel not ineffective where he knew of the defendant's medical history, family problems, and use of drugs and determined

that, based on their trial strategy of maintaining his innocence, it would not be beneficial to bring this information to the attention of the sentencing jury). Songer v. State, 419 So.2d 1044 (Fla. 1982); see also, Songer v. Wainwright, 733 F.2d 788 (11th Cir. 1984), cert. denied, ___ U.S.___, 105 S.Ct. 817 (Fla. 1985)(Trial counsel not ineffective in failiong to offer character evidence in mitigation, where counsel knew of the evidence but chose not to use it).

First of all, in the present case the Defendant has already unsuccessfully claimed on direct appeal that his attorney was ineffective for not presenting more psychiatric testimony. See, Stewart v. State, 420 So.2d at 864. This Court rejected such a claim on the merits. See, Id. The Defendant's claims of ineffective assistance of counsel based on the lack of psychiatric reports should be therefore be rejected as res judicata. See, e.g., Muhammad v. State, 426 So.2d 533, at 535-536 (Fla. 1982); Barclay v. State, 411 So.2d 1310 (Fla. 1981).

Secondly, in the present cause as in Middleton the psychiatric testimony would have been devastating to the Defendant's denial defense, where he reported to the psychiatrists that he remembered leaving the scene with

blood on his hands[4]. As in Middleton, given the nature of the offense, defense counsel's strategy of maintaining innocence was not only a reasonable strategy, it was the only one, which had any chance of saving the Defendant from the electric chair. As in Funchess, Middleton, Straight and Magill, it was counsel's reasoned judgment that based upon the nature of the offense, these jurors were not about to be swayed from recommending death by a lengthy exhortation of the Defendant's drug abuse nor any more background information than was presented.

At the same time, counsel's judgment that there was some reasonable basis for a denial defense was clearly supported by the evidence. Counsel believed that the bite mark testimony was not credible and the blood secretors found in the semen and saliva on the victim only placed the Defendant in a category with almost one third of all males in Dade County. At the same time, if there was such a bloody fight at the scene, why did the Defendant's clothing which he wore at the alleged time of the crime have no evidence of blood in it. See, T2374. If the Defendant had blood on his clothes and hands, after the killing why was there no blood

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[4]At the same time defense counsel did argue to the jury the favorable feature of the reports that the Defendant had no conscious intent because he "blacked out." See, T2428. The trial court, the only sentencing authority in this cause, also considered the psychiatric reports with their extensive background information and had before it, evidence of possible rehabilitation, excluded from the jury's consideration. See, T2456; T2354-T2355.

in the victim's car? If the Defendant took the victim's keys, why did the Defendant try to start the victim's car with a knife? The evidence to the contrary showed the presence of a killer(s) after the Defendant left the scene. The medical examiner admitted that the victim could have died five or six hours after her altercation with the Defendant. See, T1299-T1239. A woman's green bracelet; a hypodermic syringe and spoon, numerous kleenex and footprints at the scene were wholly unexplained. Additionally, the ligature marks on the body were more consistent with a strangulation from behind rather than as described in the Defendant's "confession" and the missing wallet and broken purse strap silently speak of a violent struggle over the wallet and purse not mentioned anywhere in the State's case and indeed refuted by the Defendant's confession. Finally, the Defendant took the stand, hat-in-hand and admitted relatively minor crimes, but denied that he had killed the victim. Based upon this evidence and the circumstantial nature of the State's case, it was eminently reasonable for counsel to present a consistent denial defense in the hope that a majority of the jury would not recommend a death sentence, in the face of any possible doubt that the Defendant did it. Under Middleton and the foregoing authority the Defendant has failed in his burden to show that counsel was constitutionally ineffective

for having done so[5]. With regard to any claim of counsel's ineffectiveness, this court's remarks in Magill are most applicable herein:

> "An attorney should raise any honestly debatable issue that may aid his client's position, but he is not obligated to raise every conceivable issue, and certainly not when he regards the argument as futile because of its lack of merit. Palmes v. State, 425 So.2d 4 (Fla. 1983). The defendant's right to reasonably competent counsel doee not entitle him to have every conceivable challenge pressed upon the court. Scott v. Wainwright, 433 So.2d 974 (Fla. 1983).
>
> * * *
>
> Magill contends that his counsel was ineffective at the penalty phase of the trial because he failed to present available mitigating evidence which would likely have changed the advisory verdict and because he failed to use existing favorable evidence to rebut the aggravating circumstances. The lower court properly denied relief on the basis of this claim after allowing the defendant to present the testimony of numerous witnesses."
>
> 457 So.2d at 1370.

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[5]Counsel cannot reasonably be faulted for not producing the testimony of the two psychologists, where an eminently qualified court-appointed neurologist completely rejected any claim of neurological problems and three court appointed psychiatrists found no "mental illness' impairing the Defendant. There was also no showing on the record that either psychologist was reasonably available to defense counsel in 1979.

Under Magill, Middleton and the foregoing authority the Defendant's complaint of error should be rejected.

Indeed, the State submits that the Defendant could not reasonably have achieved any different result as to the penalty phase of this cause[6]. The Defendant's present attorney has represented him for more than a year prior to the present hearing. See, R847. Despite this, the Defendant only produced evidence which was largely cumulative and even redundant to the matters already present before the jury and especially the evidence known to the sentencing authority, the trial court. The Defendant's clemency interview offered as representative of what he might say adds nothing of substance and is cumulative and repetitious of matters already presented. In fact the Defendant's statement is harmful in that the Defendant once again suggests that in fact he may have done the crime. See, R874. Similarly, at least two of the Defendant's witnesses offered at

[6]This was no complete absence of counsel case. Contrary to the Defendant's allegation in his brief, the Defendant received the benefit of almost 450 billable attorney hours in this cause. There were also three extensive psychiatric examinations at the behest of trial counsel. See, SR91-SR91A. In the face of an admittedly strong State evidence, there were nevertheless substantial evidentiary faults in the State's theory of the case, which were ably elicited and reasonably argued by counsel. This theory was reasonably carried forward to the sentencing proceeding, while at the same time trial counsel still presented and argued substantially the same matters now raised by the Defendant's present counsel. The Defendant's complaint that the present circumstances were tantamount to no counsel at all is therefore frivolous.

the Rule 3.850 hearing, Mixon and Cox, would have probably harmed the Defendant's case testifying that the Defendant was apparently always a thief. It is again also not reasonable to suggest that reports of the Defendant's drug abuse would have any effect on the present state of facts and the imposition of the death penalty. The extensive psychiatric reports would also not have made any difference to the jury where they make reference to blood on the Defendant's hands and that the Defendant was able to appreciate the criminality of his ocnduct when he committed this heinous crime. As the trial court found there is no reasonable basis to conclude that based upon what the Defendant has presented, that the result of this cause would have been different. Under Strickland v. Washington the Defendant's complaint of error should be rejected for a lack of the required proof.

V

CONCLUSION

WHEREFORE, upon the foregoing, the Appellee, THE STATE OF FLORIDA, submits that the judgment should be affirmed.

RESPECTFULLY SUBMITTED, on this 11th day of March, 1985, at Miami, Dade County, Florida.

JIM SMITH
Attorney General

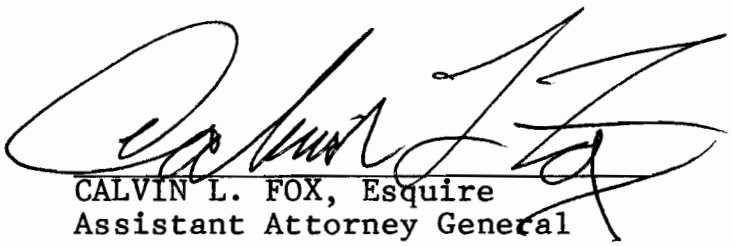
CALVIN L. FOX, Esquire
Assistant Attorney General
401 N. W. 2nd Avenue (Suite 820)
Miami, Florida 33128

(305) 377-5441

VI

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF APPELLEE was caused to served by mail upon ROBIN GREENE, Assistant Public Defender, 1351 N. W. 12th Street, Miami, Florida 33125, on this 11th day of March, 1985.



CALVIN L. FOX, Esquire
Assistant Attorney General

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