IN THE SUPREME COURT OF FLORIDA

RAYMOND ROBERT CLARK,

Appellant,

v.

STATE OF FLORIDA,

Appellee

Case No. 68859

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This pleading is being filed in conjunction with Appellee's response in opposition to Appellant's application for a stay of execution. Both pleadings are being drafted on an anticipatory basis, due to the abbreviated time schedule. Appellee has not yet received any of Appellant's pleadings. Therefore, both responses have been drafted based upon what counsel anticipate will be raised in the pleadings to be filed by Appellant.[1]

STATEMENT OF THE CASE

Appellant was charged by indictment filed on May 24, 1977, with the offenses of first degree murder, kidnapping, and extortion. (R 5-6) At arraignment, Appellant plead not guilty.

Trial by jury was held before the Honorable Robert E. Beach, Judge of the Circuit Court of the Sixth Judicial Circuit of Florida, in and for Pinellas County. Respondent will rely on this Court's opinion (cited at Clark v. State, 379 So.2d 97 (Fla. 1979) for a statement of the facts.

Following the denials of defense motions for judgments of acquittal, the jury found Appellant guilty of first degree murder, kidnapping with intent to commit a felony, and extortion, as charged. (R 1471-1473) Following the penalty phase of the trial, the majority of the jury recommended the death penalty.

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[1] The record of the proceedings in Appellant's direct appeal will be referred to by the symbol "R" followed by the appropriate page number. The record of the proceedings in Appellant's first Rule 3.850 motion will be referred to by the symbol "TR" followed by the appropriate page number.

(R 1474) The trial judge immediately adjudicated the Appellant guilty and imposed the death penalty on the Appellant for the first degree murder. (R 1477, 1513, 1523-1524) The court also sentenced the Appellant to life imprisonment on the kidnapping conviction and fifteen years on the extortion conviction, sentences to run consecutively. (R 1478-1479, 1513)

On appeal to this Court, Appellant raised the following issues for this court's consideration:

> POINT I - THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL'S MOTION FOR A NEW TRIAL ON THE GROUND THAT THE VERDICT WAS CONTRARY TO THE WEIGHT OF THE EVIDENCE SINCE THE SOLE EVIDENCE AGAINST THE APPELLANT ON THE MURDER AND KIDNAPPING CHARGES WAS TOTALLY UNRELIABLE AND UNWORTHY OF BELIEF.
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> POINT II - THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL'S MOTION FOR A NEW TRIAL ON THE GROUND OF NEWLY DISCOVERED EVIDENCE THAT THE CHIEF STATE'S WITNESS, AN ADMITTED PERPETRATOR OF THE CRIMES, MADE A STATEMENT TO A THIRD PARTY EXCULPATING THE APPELLANT AND INCULPATING HIMSELF AS THE ACTUAL "TRIGGERMAN."
>
> POINT III - THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING THE APPELLANT'S MOTIONS TO ALLOW THE JURY TO RETIRE FROM ITS DELIBERATION, WHICH MOTIONS WERE MADE IN THE EARLY HOURS OF THE MORNING WHEN THE JURY HAD BEEN DELIBERATING WITHOUT A BREAK FOR AN EXCESSIVE AMOUNT OF TIME.
>
> POINT IV - THE TRIAL COURT ERRED IN LIMITING CROSS-EXAMINATION OF THE STATE'S KEY WITNESS REGARDING THE WITNESS' MENTAL HISTORY WHEN SUCH TESTIMONY WAS RELEVANT TO SHOW CREDIBILITY OF THE WITNESS.
>
> POINT V - THE TRIAL COURT ERRED IN ALLOWING THE STATE TO ELICIT TESTIMONY REGARDING THE APPELLANT'S REFUSAL TO GIVE VOICE EXEMPLARS AND FURTHER ERRED IN INSTRUCTING THE JURY THAT THEY COULD INFER GUILT FROM THIS REFUSAL.

POINT VI - THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO EXCLUDE THE ENTIRE JURY VENIRE WHERE THE JURY LIST IS CHOSEN IMPROPERLY SINCE SOME PROSPECTIVE MEMBERS ARE AUTOMATICALLY EXCLUDED BY THE CLERK FOR ILLNESSES OR DISABILITIES WHICH DO NOT CONSTITUTE PHYSICAL INFIRMITIES AS REQUIRED BY THE STAUTE.

POINT VII - THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL'S MOTION TO EXCLUDE TELEVISION CAMERAS FROM THE COURTROOM DURING TRIAL DUE TO THEIR DISTRACTIVE EFFECT ON THE ATTORNEYS AND JURORS ESPECIALLY WHERE THE CAMERAS WERE FACING THE JURORS AND THE JURORS WERE IN FACT TELEVISED.

POINT VIII - THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL'S MOTION TO SEVER THE EXTORTION CHARGE FROM THE MURDER AND KIDNAPPING CHARGES WHERE THE OFFENSES WERE NOT PART OF THE SAME TRANSACTION AND WHERE A SEVERENCE WAS NECESSARY FOR A FAIR DETERMINATION OF THE DEFENDANT'S GUILT OR INNOCENCE ON THE CHARGES.

POINT IX - THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR A STATEMENT OF PARTICULARS OF THE AGGRAVATING CIRCUMSTANCES ON WHICH THE STATE WOULD RELY, INFRINGING ON THE APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND NOTICE OF THE CHARGES AGAINST HIM.

POINT X - THE TRIAL COURT ERRED IN DENYING THE INDIGENT APPELLANT'S MOTION FOR APPOINTMENT OF AN EXPERT PSYCHIATRIST TO AID THE DEFENSE IN THE PREPARATION OF ITS CASE REGARDING THE APPELLANT'S GUILT AND REGARDING POTENTIAL MITIGATING CIRCUMSTANCES, THEREBY DENYING THE APPELLANT'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION.

POINT XI - SECTION 921.141, FLORIDA STATUTES RESTRICTS THE MITIGATING CIRCUMSTANCES TO BE CONSIDERED TO THOSE ENUMERATED IN THE STATUTE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

POINT XII - THE SENTENCE OF DEATH IMPOSED UPON THE APPELLANT IS NOT JUSTIFIED WHERE THAT PENALTY WAS BASED ON IMPROPER AGGRAVATING CIRCUMSTANCE WHERE MITIGATING CIRCUMSTANCES SHOULD HAVE BEEN FOUND, WHERE THE MITIGATING FACTORS OUTWEIGH PROPER AGGRAVATING CIRCUMSTANCES, AND WHERE EXISTS THE STRONG POSSIBILITY THAT THE APPELLANT DID NOT FIRE THE FATAL SHOT.

On November 21, 1979, this Court affirmed Appellant's judgments and sentences.

Appellant next filed a Petition for Writ of Certiorari in the Supreme Court of the United States. Appellant raised the following issues:

A) WHETHER THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION FOR A STATEMENT OF PARTICULARS OF THE AGGRAVATING CIRCUMSTANCES ON WHICH THE STATE WOULD RELY, INFRINGING UPON PETITIONER'S CONSTITUTIONALLY GUARANTEED RIGHTS OF DUE PROCESS OF LAW AND NOTICE OF THE CHARGES AGAINST HIM.

B) WHETHER THE TRIAL COURT CAN DEFINE AND CONTROL THE PETITIONER'S SIXTH AMENDMENT RIGHT TO A PUBLIC TRIAL AT THE EXPENSE OF HIS SIXTH AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AND AN IMPARTIAL JURY BY PERMITTING, OVER OBJECTION, THE PRESENCE OF THE ELECTRONIC MEDIA AT HIS TRIAL.

* C) WHETHER THE TRIAL COURT ERRED IN DENYING THE INDIGENT PETITIONER'S MOTION FOR APPOINTMENT OF AN EXPERT PSYCHIATRIST TO AID THE DEFENSE IN THE PREPARATION OF ITS CASE REGARDING THE PETITIONER'S GUILT AND REGARDING POTENTIAL MITIGATING CIRCUMSTANCES, THEREBY DENYING THE PETITIONER'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION.

On February 23, 1981, the Supreme Court of the United States denied the petition for writ of certiorari.

On or about November 10, 1982, Appellant filed a Motion to Vacate, Set Aside, Or Correct Conviction and Sentence, pursuant to Rule 3.850, Fla.R.Crim.P. A hearing was held before the trial court on March 23, 1983.

At the hearing held on Appellant's Motion to Vacate, Set Aside or Correct Conviction and Sentence, the first witness to testify was Appellant's trial counsel, Circuit Court Judge Susan Schaeffer (TR 66). In April of 1977, Judge Schaeffer was employed as an Assistant Public Defender for the Sixth Judicial Circuit. (TR 67) During this employment, she represented Appellant in a case in which he was charged with murder and the State was seeking the dealth penalty. (TR 67-68)

Judge Schaeffer began practicing law in 1971. (TR 83) Prior to handling Appellant's trial, she had been with the Public Defender's Office for approximately two years and had handled only felony cases. (TR 83) This was her first capital case that reached the penalty phase, although she had handled capital cases prior to this. (TR 84) She had won the others or the jury had returned verdicts on lesser offenses. (TR 84)

At one point in time Judge Schaeffer was handling all of the capital cases in the Public Defender's Office. In Appellant's case, she had the assistance of ten lawyers on the public defender's staff, including Martin Murry who was appointed as co-counsel. (TR 85-86, 99) She also utilized the services of investigators on the staff. This included one major investigator and three minor investigators. (TR 85)

Judge Schaeffer discussed Appellant's appearance with him prior to trial and the necessity to appear a certain way. (TR 74) She informed him that he would be facing a rather conservative jury in Pinellas County and she was afraid that his appearance would not only shock them, but would also be very detrimental to his case. (TR 75) Appellant told her that he believed he would be found guilty and sentenced to death, and he wanted to do it his own way. (TR 75)

At trial Appellant chose to wear slacks or jeans and a sport shirt. (TR 96) Judge Schaeffer attempted to have him modify his hair and beard which were very noticeable, however, he did not wish to do that. (TR 97)

Judge Schaeffer filed a Motion for the psychiatric evaluation of Appellant. (TR 75) She requested that she be allowed to have a doctor appointed to assist her in this regard and asked that his evaluation be confidential. (TR 75) Her request was contrary to the rule in effect at the time, which provided that the psychiatrist's report would be furnished to the Court, the State and defense counsel. (TR 75-76) Schaeffer asked for the psychiatric evaluation after she had received information that Appellant had committed a homicide in California ten years earlier. The doctor that had examined him believed Appellant was incompetent at the time of the offense. (TR 76-80) Judge Schaeffer felt that this alone raised an obligation on her part to inquire into his present status to stand trial and any possible insanity defense. (TR 76) The trial judge informed her

that if she wished to have a psychiatrist appointed under the rules, he would grant their request, however, he would not provide a confidential expert. (TR 76) Based on the judge's ruling, Schaeffer decided that she did not wish to have Appellant examined. (TR 77) She renewed her motion when Judge Beach was about to impose sentence. However, she did not feel that she had any theory of defense which would have required the use of a psychologist or psychiatrist. (TR 77-78)

During the penalty phase, Judge Schaeffer entered into a stipulation with the prosecutor whereby it was announced to the jury that the defense would waive the presentation of live testimony of Dr. Heninger from California. The jury was told that if the doctor had been called to testify, he would have said it was his opinion that at the time of the previous offense Mr. Clark was insane and should not have been held accountable for his actions. (TR 79)

Judge Schaeffer did not seek a sanity inquisition after Judge Beach denied her request for a confidential psychiatrist. (TR 86) Her reasoning was as follows:

> "... I knew this was a case where the State was actively seeking the death penalty. I thought that the State had enough ammunition without having further ammunition that could further be made to the Court and to the State regarding the occurrences of this particular offense.
>
> It was my candid opinion, having talked with Mr. Clark, that he was quite competent. In fact, I found him to be, and still do, to be an intelligent man. He was, in my candid opinion, having dealt with numerous defendants, some of whom, I believe, to be competent, some of whom, I believe, to be not competent, I believed he was competent to

> stand trial. I did not believe, after discussing this with him, there was any issue as to his competency at the time of the offense at all, and I felt that to pursue this in a fashion that would allow the State to know the facts of the case as related to me by Mr. Clark, which is the only way that the evaluation could have been done, would have been detrimental to his case."
>
> (TR 90-91)

Other than the report issued by Dr. Heninger ten years earlier, there were no facts that developed during discovery or in conversations with Petitioner, that indicated that a sanity inquisition was warranted. (TR 91) It was everyone's recollection that Appellant would not allow his attorneys in California to put forth an insanity defense. (TR 104) Even in the California case in which Dr. Heninger testified, Appellant was found guilty. (TR 91-92) Judge Schaeffer explained that she did not discuss a potential insanity defense with Appellant because she did not believe that a lawyer discusses pertinent defenses that do not exist. (TR 92) She simply had no reason to believe this defense was possible. (TR 92-93) Appellant never indicated that he did not know what was happening. (TR 92) He was able to relate coherently at the time and there was nothing to indicate a derangement. She found, and still finds, Appellant to be an extremely intelligent and coherent individual. (TR 93) Judge Schaeffer noted that she had tried first degree murder cases where the insanity defense was presented and she had never lost one. (TR 93) She had also tried one hundred to one hundred and fifty cases, of which forty to fifty of these were felony

jury trials and she had won a very high percentage. (TR 100-111) She had tried between ten and fifteen capital cases and she had assisted in close to one hundred capital cases. (TR 171)

To develop mitigating evidence, Judge Schaeffer and an investigator went to California to speak with friends of Appellant. (TR 94) She located some of these people and had conversations with them. (TR 94) They all liked Appellant and thought he was a fine fellow, but the problem was he had told them he had gone to prison the first time for killing his wife. (TR 94) They were not aware that he had actually killed a 14 year old boy. (TR 94) Once this story became public, the people in Appellant's home town were no longer well-disposed toward him. (TR 94-95) Even if they would have been willing to testify that they liked Clark and thought he was a nice man, Schaeffer did not feel that this type of testimony would have been relevant to the penalty phase. (TR 95) In any event, Judge Schaeffer said that if this kind of testimony would have been available, she would have pursued it. (TR 95)

Judge Schaeffer considered calling Mrs. Jean Dupree as a potential witness. (TR 95) Mrs. Dupree would have testified that in her opinion Ty was more dangerous than Appellant (TR 95), however, she had no first hand knowledge of this offense. (TR 108) Other than this witness, Judge Schaeffer did not discover anything even post-Lockett that she would have put on. (TR 95, 109) While Judge Schaeffer was never able to locate Clark's family, Appellant did not want any of them notified of his

difficulties. Appellant would not assist her in this regard. (TR 96, 107) Even if Judge Schaeffer did not put Appellant's family on the stand, she would have preferred to have his family present and standing behind him at trial. (TR 96, 107)

Judge Schaeffer noted that Mr. Murry was co-counsel throughout the entire case. He communicated with Appellant all during the entire trial. (TR 97) Judge Schaeffer decided that Mr. Murry would better handle the penalty phase because she was going to have to make certain statements to the jury during the closing statement that would probably cause her to lose her credibility if Appellant were convicted. (TR 98-99) During the course of their representation, Mr. Murry had contact with Appellant on numerous occasions. They would both visit Appellant at the jail and spent countless hours with him. (TR 179) Mr. Murry and Appellant would oftentimes exchange ideas on books, their likes and their dislikes. (TR 179) On several occasions Mr. Murry, Appellant and Judge Schaeffer met for extended periods of time at night and talked about Appellant's background and his life. (TR 180) Mr. Murry spent countless hours in his representation of Appellant and always appeared to be available for him. (TR 180)

Judge Schaeffer discussed the facts of this case with Appellant throughout each investigation she conducted. (TR 101) She took extensive depositions of all State witnesses, including potential witnesses in California in the hope of finding anything to indicate Appellant was in error in his recitation of the

facts. (TR 101) She could not find anything that was helpful. (TR 101)

Judge Schaeffer acknowledged that she did not present the facts of the California case (homosexual suicide pact). However she explained that she had spent at least three days (3) in California taking depositions; interviewing all potential defense witnesses; speaking with Appellant's prior defense counsel and doctor; and reviewing the California appellate decision. She believed that to have presented these witnesses at trial would have had a devastating effect on Appellant's trial. (TR 174) The California opinion indicated this was one of the most brutal and aggravated homicides ever committed. It also refuted the idea that this was a legitimate suicide attempt. (TR 174) Since the prosecutor gave her the option of either staying away from the crime or going into all the facts, they decided after much consideration, that they would be better off sticking to the bare record. (TR 175) She reached an agreement with the prosecutor in which he agreed that he would not call any of the California witnesses if the defense would simply stipulate to the prior conviction. (Tr 175) The prosecutor also agreed to stipulate that the doctor in California believed Petitioner was insane at the time of the commission of the offense. (Tr 176) Judge Schaeffer felt that it was in Appellant's best interest to avoid the California testimony. (TR 176)

As previously noted, Judge Schaeffer considered having Mrs. Jean Dupree testify. There was a possibility that her testimony

might have lent itself to a mitigating factor, to wit: the substantial domination of one person over another. (TR 176, 185-186) This course of action was ruled out. First of all, this testimony would not have been accurate as Judge Schaeffer knew the facts to be. (TR 175-176) Second, there was some concern because there were taped conversations between Appellant and Mr. Johnston in which they conspired to kill Mrs. Dupree's daughter. (TR 178) If she put Mrs. Dupree on the stand to testify what a fine fellow Appellant was, the judge might have allowed the State to play the tapes and then inquire as to whether her opinion had changed. (TR 178-179) She believed that these tapes would have been devastating to their case at the sentencing phase. (TR 179, 185-186) The trial judge agreed with her:

> THE COURT: Yes. To me, in my judgment, as the trial lawyer in this case, it was a major victory for them to keep the tapes out for the defense. That's how bad they were. Now, I heard the tapes personally from beginning to end and to me, to keep these tapes out was half the case, quite frankly. Now, that's how bad they were.
>
> (TR 190)
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> * * *
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> THE COURT: You didn't try to put them in, but I say for them to even -- if I had been you, I probably would have tried to put them in.
>
> MR. McCABE: You do things the way you feel like you've got to do them.
>
> THE COURT: Well, I understand. I mean it's all a matter of technique but they were just terribly incriminating. There was one part in the tape that you could take either way and I think that under the circumstances, the jury would have taken it in the light most unfavorable for the Defendant. You know the one I'm talking about?

It was suggested by one of Appellant's experts that when their motion for confidential report was denied, they should have proceeded with the court's offer for a sanity inquisition so that they could properly evaluate what the Appellant told them. (TR 181) Judge Schaeffer, however, felt that they were not having any trouble in evaluating what their client told them. (TR 181) She did not feel that they needed the assistance of a psychiatrist, because they had a lengthy discussion with Appellant about the facts of the case and he appeared to be very clear and honest with her about what happened. (TR 182, 185) She also checked out his honesty through extensive depositions of every witness and in particular the medical examiner. (TR 182) After conducting this research, she had no reason to believe that anything he had told her was untrue. (TR 182)

At the conclusion of the Rule 3.850 hearing, the trial judge made the following findings of fact:

> "...So we are talking about effective or ineffective counsel. There are just some cases that you hear where the most effective counsel is ineffective not because he is ineffective on that particular day, it's just because the facts of the case are so overwhelming against his client that regardless of how effective, how experienced and well trained and well prepared he is for the case, the facts can't be changed, and I believe this is one of those cases.
>
> The law is quite clear he is not entitled to a perfect trial but a fair trial. I think he received a fair trial in this case. In the 16 years I've been on the bench, I've seen a lot of criminal trials, a lot of criminal lawyers from around the state and outside the state, and I think, in Judge Schaeffer we had one of the best criminal defense lawyers in

the state if not in the south. I have seen her try a number of cases before me where they either were found not guilty in cases I thought they were guilty of something or where she walked them out with a lesser included crime. I feel that the quality and the thoroughness and the vigor of this case from appointed counsel, that is, the Public Defender, if another person, a wealthy man, were charged with the same crime and had to hire outside counsel, it would bankrupt him. In this particular case, since I presided over most of it, I know that a number of depositions were taken inside the State and California, that everybody in the Public Defender's office at some point had worked on certain phases of the case, that most of the people in the Public Defender's office had been there for quite some time and had handled first degree murder cases, that the Public Defender himself took a personal interest in this case to make sure that the defendant received adequate and competent representation. As a matter of fact, the case went six days. The jury went out at two o'clock on Saturday afternoon and didn't come back until two o'clock Sunday morning. They were out for twelve hours without, I think without dinner; that the closing argument that Judge Schaeffer made at that time was, in my opinion, brilliant. This was concurred by a full courtroom of spectators. It was concurred by the State Attorney's staff. It was concurred by the television media which, there was - all three networks were present through the local news commentators, and they all agreed that that was probably one of the most stirring closing arguments that they had ever heard make, and I think the proof of that was the fact that the jury was out for twelve hours in a case where the evidence was overwhelming of the defendant's guilt of the cold-blooded brutal execution for profit, and that included extortion after the death of the victim.

Insofar as the venue was concerned, we approached that from the standpoint of advising the full panel of what the case was about and then questioning the full panel as a group if anybody knew anything about the

case. I think five or six people said they did. I immediately excluded them from the panel before we even called the prospective jurors to the bench so that we would have as little a tainted panel to draw from as possible.

The motion for change of venue was quite thorough with all the major news media, the electronic media, and the printed media as having testified as to coverage they gave the case. So I felt that not only was the motion thorough, but everybody was scrupulously attempting to exclude anybody that had any prior knowledge which I think we successfully did in the case.

Insofar as the psychiatrist is concerned, there was nothing in the record to suggest that he was either incompetent to stand trial or that the insanity plea would be afforded to him. There was no showing that a psychiatrist would be of any useful purpose. The law did not permit a psychiatrist at that time, and there has been no prejudice shown by the lack of a psychiatrist.

Insofar as the witnesses at sentencing were concerned, or the lack of a psychiatrist at the sentencing, there was very little you could say in mitigation of the crime or in mitigation of the person. He was a paroled first degree murderer from California, had not been out from his incarceration in California for a very long period of time. The only local witnesses you had here were people who had not known him for a long period of time. There were certain types of conversations between the defendant and his co-conspirator Ty, which were damning to say the least and particularly as they affected the very people that you now suggest you should have called as character witnesses. To have either presented those witnesses or suggested those people might be called to testifiy in mitigation would possibly have subjected the defendant to having those tapes exposed at least to the witnesses and possibly to the jury to show in fact he was not the person he was painted to be by these witnesses, that they did not have the ability to know really what Mr. Clark was like.

> I think all in all it was probably one of the best tried first degree murder cases that I've tried, and I've probably tried at least 15 capital cases in 16 years on the bench. I have imposed the death penalty on four different occasions, and I can't think of a case that was a better tried case from the prosecutor's standpoint and from the defense standpoint, and I don't think there has been a sufficient -- any showing of prejudice in the way in which the case was prepared, in the quality of counsel, or in the way in which this case was tried. Motion denied."

On April 27, 1983, the Trial Court denied Appellant's Rule 3.850 Motion.

Appellant appealed the denial of the Rule 3.850 motion to the Supreme Court of Florida. Appellant raised the following issues for the Court's consideration:

> ISSUE I
>
> WHETHER THE TRIAL COURT'S REFUSAL TO ALLOW APPELLANT A CONFIDENTIAL PSYCHIATRIC EXPERT VIOLATED APPELLANT'S RIGHT TO EFFECTIVE COUNSEL AND EQUAL PROTECTION.
>
> ISSUE II
>
> WHETHER THE TRIAL COURT ERRED IN DENYING THE MOTION TO VACATE WITH RESPECT TO PROPORTIONALITY REVIEW OF FLORIDA'S SENTENCING SCHEME.
>
> ISSUE III
>
> WHETHER THE EFFECTIVENESS OF TRIAL COUNSEL FAILED TO MEET MINIMUM STANDARDS AND DENIED THE DEFENDANT HIS SIXTH AMENDMENT CONSTITUTIONAL RIGHT.
>
> (A) Ineffectiveness of Counsel at Pretrial Stage
>
> (B) Trial Phase
>
> (C) Penalty Phase

On October 18, 1984, this Court issued an opinion affirming the denial of Appellant's Rule 3.850 Motion. Clark v. State, 460 So.2d 886 (Fla. 1985)

On March 13, 1985, Florida Governor Bob Graham signed Appellant's death warrant. Appellant's execution has been set for April 16, 1985. Appellant waited until April 8, 1985 to file a second Rule 3.850 Motion to Vacate and Set Aside Sentence. Appellant raised two issues for the court's consideration.

> 1) This Court's refusal to allow Appellant a confidential psychiatric expert violated Clark's right to due process and equal protection.
> 2) The defendant was denied his rights under the Sixth, Eighth and Fourteenth Amendments due to the operation of State law where his counsel justifiably labored under the assumption that she was precluded from presenting any mitigating circumstances outside of those enumerated in Florida Statutes 921.141(6) at sentencing.

A hearing was held in the Circuit Court of the Sixth Judicial Circuit in and for Pinellas County, Florida, Honorable Robert E. Beach presiding on April 10, 1985. The trial court entered an Order denying the requested relief. This appeal follows.

STATEMENT OF THE FACTS

Appellee will rely on this Courts' opinion rendered in Appellant's direct appeal. See Clark v. State, 379 So.2d 97 (Fla. 1979).

SUMMARY OF THE ARGUMENT

The Circuit Court properly denied Appellant's successive 3.850 motion as an abuse of the procedure since these issues had been decided previously. See State v. Washington, 453 So.2d 389 (Fla. 1984); Witt v. State, ___So.2d___, (Fla. 1985) (Case No. 66,626; opinion filed March 4, 1985); Songer v. State, ___So.2d__ (Fla. 1985) (Case No. 66,472; opinion filed January 31, 1985); Smith v. State, 453 So.2d 388 (Fla. 1984). The lengthy case history demonstrates that this Court has denied Appellant relief on these same claims.

Even if this Court were to determine that Appellant has not abused the 3.850 procedure, Appellee would maintain that Appellant is entitled to no relief under Ake v. Oklahoma, __ U.S.) (1985 Case No. 83-5424)[36 Cr.L. 3159], as there was no showing that his sanity would have been a significant factor at trial.

With regard to the Lockett issue,[2] Appellee would point out that this Court has already reviewed this issue on direct appeal and found it to be without merit.

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[2] Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 295, 57 L.Ed.2d 973 (1978).

ISSUE I

WHETHER THE TRIAL COURT CORRECTLY FOUND THE INSTANT PETITION TO BE AN ABUSE OF THE 3.850 PROCESS.

It is well settled that a movant may not raise via 3.850 motion claims which were raised or should have been raised on direct appeal. See e.g. Christopher v. State, 416 So.2d 450 (Fla. 1982); Raulerson v. State, 420 So.2d 517 (Fla. 1982); Meeks v. State, 382 So.2d 673 (Fla. 1980); Alvord v. State, 396 So.2d 194 (Fla. 1981).

Likewise, the trial court is not obligated to entertain a successive 3.850 motion which raises grounds previously raised and disposed of on the merits in a prior 3.850 proceeding. McCrae v. State, 437 So.2d 1388 (Fla. 1983); Sullivan v. State, 441 So.2d 609 (Fla. 1983); State v. Washington, 453 So.2d 389 (Fla. 1984); Dobbert v. State, 456 So.2d 424 (Fla. 1984). This is true even if new fact are adduced in support of a previously raised claim. Cf. Sullivan, supra; Dobbert, supra.

Rule 3.850, Fla. R. Crim. P., as amended December 28, 1984 provides in pertinent part:

> "A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant or his attorney to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules."
>
> In re: Amendment to Rules of Criminal Procedure (Rule 3.850), ___ So.2d ___ (Florida, Case No. 65,277, December 28, 1984) [10 FLW 22, 23]

This amended rule became effective on January 1, 1985 at 12:01 a.m. Id. To the extent that the rule provides a trial court need not entertain successive 3.850 motions raising grounds previously presented on a motion for post-conviction relief, it represents no change in the law. See e.g. McCrae, supra; Sullivan, supra; Dobbert, supra; Washington, supra.

The crucial change is that a trial judge may also dismiss a successive 3.850 motion which raises new grounds if he finds that failure to raise the new claim in a prior motion constituted an abuse of the writ.

Appellant was convicted in 1977, almost eight years ago. A review of the procedural history of this cause reflects that Clark has had an exhaustive review of his conviction and sentence. There has been no rush to judgment in this cause.

The committee notes to Rule 3.850, as amended, reflect that the purpose of the amendments was to bring Rule 3.850 into conformity with subrule 9(b) of Rule 35, Federal Rules of Criminal Procedure.[3] Id. at 10 FLW 23. Thus, it may be useful to examine the manner in which abuse of the writ has been treated in the federal courts.

Where new grounds are raised in a second successive petition the burden is on the government to specifically allege that the Petitioner is abusing the writ by having omitted these grounds in

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[3] The citation in the committee note appears to be in error. See Rule 9(b), Rules governing §2254 Cases in the United States District Court, 28 U.S.C. §2254.

his earlier petition. Price v. Johnston, 334 U.S. 266, 292 (1948). As the Fifth Circuit Court of Appeals recently explained in Jones v. Estelle, 722 F.2d 159, 164 (5th Cir. 1983) (en banc), the initial pleading burden is met if the government "notes Appellant's prior writ history, indicates the claims appearing for the first time in the successive petition, and affirms its belief that Appellant is abusing the writ in a matter proscribed by Rule 9(b)." Once the government has met its burden of pleading abuse of the writ, the Appellant has the "burden of answering the allegation and of proving by a preponderance of the evidence that he has not abused the writ," Jones v. Estelle, supra 722 F.2d at 164 quoting Price v. Johnston, supra 334 U.S. at 292. (emphasis original).

The court in Jones further explained that the governing principles:

> boil down to the idea that a Appellant can excuse his omission of a claim from an earlier writ if he proves he did not know of the "new" claims when the earlier writ was filed. The inquiry is easily answered when the claim has been made possible by a change in the law since the last writ or a development in facts which was not reasonably knowable before. 722 F.2d at 165.

As the court noted, the objection of the procedural rules is to

> preserve the proper use of the writ of habeas corpus to win review of unlawful action, while recognizing that 'the advancing of grounds for habeas corpus relief in a one-at-a-time fashion when the evidence is available which would allow all grounds to be heard and disposed of in one proceeding, is an intolerable abuse of the Great Writ.' Id. at 164 - 165 (citations omitted).

In Jones the Fifth Circuit held that abuse of the writ may properly be found where a defendant was represented by competent counsel in a prior federal habeas corpus proceedings. In such a proceeding the Appellant himself does not have to deliberately and knowingly withhold a claim. Rather,

> the inquiry into excuse for omitting a claim from an earlier writ will differ depending upon whether Appellant was respresented by counsel in the earlier writ prosecution. Representation by competent counsel has an immediate impact upon the quality of proof necessary to prove an excuse for omitting a prior claim. With counsel the inquiry is not solely the awareness of a Petitioner, a layman, but must include that of his competent counsel. When Appellant was represented by competent counsel in a fully prosecuted writ he cannot by testimony of personal ingorance justify the omission of claims when awareness of those claims is chargeable to his competent counsel. 722 F.2d at 167.

Another factor which must be considered by this Court in determining whether there has been an abuse of the writ is the timing of the presentation of the claim. Autry v. Estelle, 719 F.2d 1247, 1250 (5th Cir. 1983). As Justice Powell stated in Woodard v. Hutchins, ___U.S.___, 104 S.Ct. 752, 78 L.Ed.2d 541, 543 (1984) "this is another capital case in which a last minute application for a stay of execution and a new petition for writ of habeas corpus relief having been filed with no explanation as to why the claims were not raised earlier or why they were not

all raised in one petition. It is another example of abuse of the writ." Cf. Washington v. Wainwright, 737 F.2d 922 (11th Cir. 1984); Sullivan v. Wainwright, 721 F.2d 316 (11th Cir. 1983); Antone v. Duggar, ___U.S.___, 104 S.Ct. ___, 79 L.Ed.2d 147 (1984); Shriner v. Wainwright, 735 F.2d 1236 (11th Cir. 1984).

In the instant case, the issues raised on this appeal have already been considered by this Court either in the direct appeal or the first Rule 3.850 appeal. Under the circumstances, Appellee would submit that Appellant's action must be deemed an abuse of the 3.850 process.

ISSUE II

WHETHER THIS COURT'S REFUSAL TO ALLOW APPELLANT A CONFIDENTIAL PSYCHIATRIC EXPERT VIOLATED CLARKS RIGHT TO DUE PROCESS AND EQUAL PROTECTION.

Appellant contends that the trial court erred in failing to appoint a confidential psychiatrist to assist him in preparing an insanity defense at trial. In support of this claim, Appellant seeks to rely on the recent United States Supreme Court decision in Ake v. Oklahoma, ___U.S.___ (1985 Case No. 83-5424)[36 Cr.L. 3159]. In Ake, the Court held:

> ...when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a state provide access to a psychiatrist's assistance on this issue, if the defendant cannot otherwise afford one.
>
> (emphasis added)

However, the Court limited the applicability of their holding as follows:

> A defendant's mental condition is not necessarily at issue in every criminal proceeding, however, and it is unlikely that psychiatric assistance of the kind we have described would be of probable value in cases where it is not. The risk of error from denial of such assistance, as well as its probable value, are most predictably at their height when the defendant's mental condition is seriously in question. When the defendant is able to make an ex parte threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent...
>
> ...when a defendant demonstrates to the trial

> judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation and presentation of the defense. This is not to say, of course that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. (emphasis added)

A review of the record before this Court reveals that Appellant's claim is totally lacking in merit. Appellant was properly denied relief by the lower court.

First a successive motion to vacate may be dismissed, if new and different grounds are alleged from those presented in the first motion. The failure of the movant or his attorney to raise those grounds in a prior motion constitutes an abuse of the procedure. The Florida Bar, Re: Amendment to Rules of Criminal Procedure (Rule 3.850), ___So.2d___, 10 F.L.W. 22, 23 Cf. Rule 9(b), Rules Governing Section 2254 Cases which provides:

> (b) Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

The federal courts have not been hesitant to enforce the abuse of the writ doctrine when additional claims are raised belatedly without adequate justification for the failure to present them earlier. See Woodard v. Hutchins, ___U.S.___, 78 L.Ed.2d 541

(1984); Shriner v. Wainwright, 735 F.2d 1236 (11th Cir. 1984); Goode v. Wainwright, 731 F.2d 1482 (11th Cir. 1984) cert. denied, ___U.S., 80 L.Ed.2d 192.

Moreover, the Florida Supreme Court, even before the adoption of the amendment to Rule 3.850, had recognized and applied the doctrine of abuse of the procedure. In Smith v. State, 453 So.2d 388 (Fla. 1984) the Florida Supreme Court agreed with the trial court's findings that Smith's second, successive 3.850 motion was an abuse of the post-conviction process. 453 So.2d at 389; see also State v. Washington, 453 So.2d 389 (Fla. 1984); Witt v. State, ___So.2d___ (Fla. 1985) (Case No. 66,626; opinion filed March 4, 1985); Songer v. State, ___So.2d___ (Fla. 1985) (Case No. 66,472; opinion filed January 31, 1985).

Here, Appellant has not presented sufficient grounds to justify the filing of the successive petition.[4] The motion and record conclusively demonstrate that Clark is entitled to no relief and that the court properly denied an evidentiary hearing in this case. See Jackson v. State, 438 So.2d 4 (Fla. 1983) and Riley v. State, 433 So.2d 97 (Fla. 1983).

Even if this Court were to determine that Appellant has not abused the 3.850 procedure by filing a successive motion to vacate, Appellee would submit the holding of Ake v. Oklahoma,

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[4] The instant claim has been reviewed by the Florida Supreme Court on direct appeal, Clark v. State, 379 So.2d 97 (Fla. 1979) and collateral appeal Clark v. State, 460 So.2d 886 (Fla. 1985). The United States Supreme Court has also reviewed the issue on a Petition for Writ of Certiorari. See the petition was denied on February 21, 1981. Raymond Robert Clark v. Florida, Case No. 79-6309.

supra, insures to Appellant no further assistance than Fla. R. Crim. P. 3.210 already provided him. In Ake, the Court's concern was that an indigent defendant have access to a competent psychiatrist to evaluate, prepare and present an insanity defense when applicable. However, the Court left to the States the decision on how to implement this right. 36 Crim.L 3163. Former Rule 3.210, Fla.R.Crim.P. is the "basic tool of an adequate defense or appeal" that Ake contemplates. It was sufficient to enable him to evaluate an asserted insanity defense and to satisfy constitutional demands of fundamental fairness.[5]

Petitioner may argue that a decision to avail himself of the psychological examination provided by Rule 3.210 comes only at the cost of the surrender of Fifth Amendment protection. This argument is without merit. Parkins v. State, 222 So.2d 457 (Fla. 1st DCA 1969), orders a strict safeguard as to the overt act of the crime. If the defendant elects to defend on the ground of insanity, the basis for this claim should also be available to the court's appointed expert witnesses. However, these experts must limit their testimony to matters of conduct of the defendant at or near the time of the alleged offense that do not bear directly upon the overt act itself.

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[5] Nothing in the Ake decision acords a privilege to defendant psychiatric communications: "I would limit the rule to capital cases, and make clear tht the entitlement is to as independent psychiatric evaluation, not to a defense consultant." Ake, supra, Rehnquest disseting [36 Cr.L. 3164].

> It is to be remembered that the psychiatrists appointed by the court are not appointed for the purpose of helping obtain a conviction, but are for the purposes of preventing a miscarriage of justice. These experts are appointed for and interested in only one question: the sanity or insanity of the accused at the time of commission of the crime. This can only logically be determined after examination of the accused. The experts are precluded from supplying any link in the chain of evidence to establish the conclusion that he committed the act of which he is accused. In fact, when the issue of insanity is tendered, it invites an inquiry into the mental condition of the accused at the time of the commission of the act. His mental responsibility becomes a separate and distinct issue from that of guilt or innocence.

See also Estelle v. Smith, 451 U.S. 454, 68 L.Ed.2d 359, at 370, 373, 101 S.Ct. 1866 (1981).

Assuming for argument only that Ake grants Appellant constitutional protection in excess of Fla.R.Crim.P. 3.210 and congruent with 3.216, Appellee would submit that Ake is not retroactive. This Court has recently rejected Appellant's attempt to invoke 3.216 by way of a Fla.R.Crim.P. 3.850 Motion for Post Conviction Relief. Clark v. State, 460 So.2d 886 (Fla. 1985). This Court found that the adoption of Fla.R.Crim.P. 3.216 was not a fundamental constitutional change in the law and thus did not meet the standards announced in Witt v. State, 387 So.2d 922 (Fla. 1980), cert. denied, 449 U.S. 1607, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980). This Court in turn based the standards it announced in Witt as to whether a new rule of law should apply retroactively on the essential considerations announced in

Linkletter v. Walker, 381 U.S. 618, 14 L.Ed.2d 601, 85 S.Ct. 1731 (1965) and Stovall v. Denno, 388 U.S. 293, 297, 87 S.Ct. 1967, 1970, 18 L.Ed.2d 1199 (1967).

> (a) the purpose to be served by the new rule.
> (b) the extent of reliance on the old rule.
> (c) the effect on the administration of justice of a retroactive application of the new rule.

Appellee would submit that the rationale advanced by this Court against retroactive application of 3.216 is the same reason that Ake is not retroactive. It is an evolutionary refinement in the criminal law affording a new, different standard for procedural fairness. An emergent right such as this one does not compel an abridgment of the finality of judgments. To allow it that impact would destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of the state, fiscally and judicially, beyond a tolerable limit. Clark, 460 So.2d at 889.

Alternatively, Appellee notes that prior U.S. Supreme Court cases have drawn the (non) retroactivity line in a variety of places. Some decisions have been applied only to defendants whose convictions were not yet final when the new rule was established. Solem v. Stumes, ___U.S.___, 79 L.Ed.2d 579, 104 S.Ct. ___ (1984); Linkletter, supra. Appellee urges that if Ake is to have retroactive application, that it apply only to defendants whose convictions were not yet final when the U.S. Supreme Court announced its decision. Appellee advances this argument on the same basis it argues against any retroactive

application.

Even if this Court were to apply the holding in Ake to the instant facts, Appellee would submit that Appellant is not entitled to any relief. There are several points which distinguish the Ake case from our own. First, Ake exhibited bizarre behavior prior to trial. His behavior was so bizarre, the trial judge sua sponte, ordered the defendant be examined by a psychiatrist. In the instant case, neither the trial judge nor defense counsel observed any objective signs that would indicate that a potential insanity defense was warranted. Second, Ake was found incompetent to stand trial. The examining psychiatrist suggested committment (Ake was diagnosed a probable paranoid schizophrenic). No such finding was made as to Clark. Third, when Ake was found to be competent to stand trial it was only on the condition that he was sedated with the antipsychotic drug Thorazine. Fourth, when Ake informed the court that he would raise an insanity defense he merely requested a psychiatric exam at State expense. He did not ask for the appointment of a particular psychiatrist, as did Clark. Finally, Ake's sole defense at the guilt phase was insanity. Clark never pursued an insanity defense at either phase of the trial.

As previously noted, Ake requires that a defendant make an ex parte showing to the trial court that his sanity is likely to be a significant factor of his defense, before the State became obligated to provide access to a competent psychiatrist. No such showing was made here. Clarks' trial counsel, Susan Schaeffer,

testified that the only reason she requested a psychiatric exam for Appellant, was because she received information that he had committed a homicide in California and discoverd that the doctor who examined him ten years earlier believed Clark was incompetent at the time of that offense. (TR 76-80). While Schaeffer renewed her request at sentencing, she did not feel that she had any theory of defense which would require the use of a psychologist or a psychiatrist. No facts were developed during discovery or in conversations with Appellant that indicated that a sanity inquisition was warranted. (TR 91)[6] This conclusion is supported by the following facts contained in the record:

A) Clark never indicated that he did not know what was happening at the time of the offense. (TR 92-93)

B) Clark was able to relate coherently at the time of the trial, and there was nothing to indicate a derangement (TR 93)

C) Schaeffer found and still finds Clark to be an extremely coherent and intelligent individual. (TR 93)

D) Schaeffer had tried first degree murder cases in the past, where an insanity defense was presented and she had never lost one (TR 93).

E) Schaeffer and Murry visited Clark at the jail and spent countless hours with him (TR 179). Mr. Murry and Appellant would oftentimes exchange ideas on books, likes, dislikes, etc. (TR 180)

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[6] Schaeffer did not discuss this defense with Appellant because she did not believe that lawyer discusses pertinent defenses that do not exist. (TR 92-93).

F) On several occasions Murry, Schaeffer and Clark met for extended periods of time and discussed Clark's life and background. They did not have any trouble in evaluating what Clark told them (TR 181).

G) Schaeffer did not feel that they needed the assistance of a psychiatrist because they had a lengthy discussion with Clark about the facts of the case and he appeared to be very honest and clear about what had happened (TR 182, 185). Schaeffer double checked Clark's honesty through extensive depositions and medical records and found no reason to believe that anything Clark had told them was untrue. (TR 182).

It is obvious that Appellant has failed to make any showing that sanity was likely to be a significant factor at trial. Therefore, the Ake decision has no bearing on the facts of our case.

ISSUE III

WHETHER APPELLANT WAS DENIED HIS RIGHTS UNDER THE SIXTH, EIGHT AND FOURTEENTH AMENDMENTS DUE TO THE OPERATION OF STATE LAW WHERE HIS COUNSEL JUSTIFIABLY LABORED UNDER THE ASSUMPTION THAT SHE WAS PRECLUDED FROM PRESENTING ANY MITIGATING CIRCUMSTANCES OUTSIDE THOSE ENUMERATED IN FLORIDA STATUTE 921.141(b) AT SENTENCING.[7]

In Songer v. State, 365 So.2d 696 (Fla. 1978), this Court first said the Florida sentencing statute, Section 921.141, Florida Statutes, does not violate the constitutional principle espoused in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). It was in Lockett the United States Supreme Court indicated a death penalty statute which limited the sentencer's consideration of mitigating evidence was unconstitutional.

In Songer, supra, this Court took the opportunity to point out that our statute does not restrict a sentencer's consideration to only those mitigating circumstances listed in

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[7] Appellant raised this issue on his original direct appeal and this Court found the issues to be without merit:

> "... Furthermore, Clark's argument that Florida's death penalty statute restricts the mitigating circumstances which may be considered was recently dealt with in our decision in Songer v. State, 365 So.2d 696 (Fla. 1978), wherein we held that Florida's death penalty statute does not violate the eighth and fourteenth amendments to the Constitution of the United States since it does not limit the trial judge to consideration of only the statutorily enumerated mitigating circumstances..."

the statute. The list of aggravating circumstances is prefaced by the language "shall be limited to." There is no such restrictive language preceding the list of mitigating factors. It was also pointed out that Cooper v. State, 336 So.2d 1133 (Fla. 1976) dealt not with the exclusivity of the statutory mitigating circumstances but rather with whether proffered evidence was probative.

Additionally, it was pointed out that this Court has approved of the trial court's consideration of non-statutory mitigating evidence in a number of cases decided before Lockett. See Songer v. State, 365 So.2d at 700. A close review of some of these cases reveals a number of the sentencing hearings occurred prior to the Cooper decision. See Halliwell v. State, 323 So.2d 557 (Fla. 1975); Messer v. State, 330 So.2d 137 (Fla. 1976); Meeks v. State, 336 So.2d 1142 (Fla. 1976); Chambers v. State, 339 So.2d 204 (Fla. 1976) and McCaskill v. State, 344 So.2d 1276 (Fla. 1977).

In the instant Rule 3.850 Motion, Appellant makes reference to following mitigating testimony which could have been presented:

> "... The jury did not hear any evidence of historical and familial background, the defendant's prior suicide attempt, his history of drug abuse and effects that such abuse may have had on his behavior. Friends of the petitioner, as well as petitioner's mother, were available to testify, yet were either not contacted or presented..."
>
> (Page 13 of Motion to Vacate, or Correct Conviction and Sentence)

A review of Judge Schaeffer's testimony at the first 3.850 hearing reveals that she pursued mitigating evidence in each of these areas. However, she made a tactical decision not to present this testimony. First, Appellant would not assist her in locating his family. In fact, Appellant specifically told counsel that he did not want his family notified. (TR 96, 107)

Schaeffer decided not to present evidence of Appellant's suicide attempt, because the California opinion indicated that this was not a legitimate suicide attempt. (TR 174) She believed that to have presented the facts of the California case (homosexual suicide pact) would have had a devastating effect on Appellant's trial. (TR 174)

Schaeffer considered calling Jean Dupree as a potential witness. Dupree would have testified that Ty Johnston was more dangerous than Appellant. (TR 95) Schaeffer rejected this course of action when it was learned that this testimony was not accurate as she knew the facts to be. (TR 175-176) There was also some concern, because there were taped conversations between Appellant and Johnston in which they conspired to kill Dupree's daughter. (TR 178) If Schaeffer put Dupree on the stand to testify what a fine fellow Appellant was, she was afraid that the judge may have allowed the State to play the tapes and then inquire as to whether her opinion had changed. (TR 178-179) She opined that these tapes would have been devastating to their case and the trial judge agreed with her. (TR 179, 185-186, 190) Other than this witness, Judge Schaeffer did not discover anything, even post-Lockett, that she would have put on. (TR 95, 109)

While Schaeffer spoke with some of Appellant's friends in California and they all liked Appellant, the problem was he had told them that he had gone to prison for killing his wife. (TR 94) They were not aware that he had killed a 14 year old boy. (TR 94) Once this story became public, the people in his home town were no longer well-disposed toward him. (TR 94-95) Even if they would have been willing to testify that they liked Clark and though he was a nice man, Schaeffer did not feel that this type of testimony would have been relevant to the penalty phase (TR 95) In any event, Judge Schaeffer said that if this testimony would have been available, she would have pursued it. (TR 95)

It is interesting to note that Appellant has not now nor in the past produced these witnesses he now claims might have given favorable testimony. Likewise we do not even know the substance of any such testimony. Could the testimony of these unknown witnesses have also been let in under the statutory mitigating? Would the testimony have been dissallowed at trial if offered?

In the final instructions to the jury the court indicated the jury should consider and weigh the aggravating and mitigating circumstances which they find exist. This is essentially the same thing a jury is now told. It is impossible to tell a jury how they should consider each factor or whether one factor should be given more weight than another. The jury process depends on a jury having the ability to decide the weight to give to a particular piece of evidence. There is not and cannot be an instruction to cover this mental process.

Appellee submits this eleventh hour rehashing of issues already previously disposed of under the guise of new evidence demonstrates the kind of abuse sought to be eliminated by the changes in the 3.850 procedure. We should not tolerate attempts to bring in other evidence which is tailored to counteract deficiencies in the proof in the previous proceedings as pointed out in appellate opinions. Appellant has had two prior opportunities to tell this court about the handling of this case. Lockett v. Ohio, supra, had been decided long before the evidentiary hearing in state court.

There must come a time, even in death cases when the appellate process comes to a close. Where, as here, issues have been presented and rejected by this court, the time for finality has come. Cf. Sullivan v. Wainwright, ___U.S.___, 104 S.Ct. ___, 78 L.Ed.2d 210 (1983).

Appellant argues that the trial court erred in denying his motion for stay of execution based on the pendency of Hitchcock v. Wainwright, 745 F.2d 1332 (11th Cir. 1984)(rehearing en banc pending) in the Eleventh Circuit Court of Appeals. The trial court acted properly. In State v. Washington, 453 So.2d 389 (Fla. 1984) this court reversed a trial court's stay of execution based on the pendency of an issue in the Eleventh Circuit which was similar to an issue raised by Washington on 3.850, and held that only this Court or the United States Supreme Court could adopt a change of law sufficient to justify a post-conviction challenge to a final judgment and sentence. See also Witt v. State, 387 So.2d 922 (Fla. 1980).

CONCLUSION

Based on the foregoing reasons, argument and authorities, Appellee respectfully urges that this Honorable Court affirm the denial of Appellant's 3.850 Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to Neal R. Lewis, Esquire, 1899 South Bayshore Drive, Miami, Florida 33133; Richard Hersch, Esquire, 5901 S.W. 74th Street, Suite 300, Miami, Florida 33143 on this 11th day of April, 1985.

OF COUNSEL FOR APPELLEE