IN THE SUPREME COURT OF FLORIDA

ROBERT IKE COMBS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 68,477

APPEAL FROM THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY

BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES A. YOUNG
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR APPELLEE

/sas

TABLE OF CONTENTS

TABLE OF CITATIONS

PAGE NO.

PAGE NO.

PAGE NO.

Statutes and Rules:

Other Authorities:

PRELIMINARY STATEMENT

This case is on appeal to the Florida Supreme Court from the Circuit Court, Twentieth Judicial Circuit, Florida upon denial of Appellant's Motion to Vacate, Set Aside or Correct Conviction and Sentence filed pursuant to Fla. R. Crim. P. 3.850.

In this brief, the parties will be referred to by their proper names or as they stand before this Court. References to the record on appeal are indicated by the letter "R" followed by the appropriate page number. References to the supplemental record on appeal are indicated by the letters "SR" followed by the appropriate page number. References to the record on appeal from Appellant's conviction, F.S.C. Case No. 59,425, adopted as part of this record by order of this Court dated July 11, 1986, are indicated by the letters "CR" followed by the appropriate page number. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Appellant's conviction for first degree murder and sentence of death was affirmed by this Court on July 30, 1981. Combs v. State, 403 So.2d 418 (Fla. 1981), cert. den., 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed.2d 862 (1982). With regard to Appellant's trial and conviction, the State adopts the statement of the case and facts set forth by this Court in that opinion, but would add the following additional facts.

At Appellant's trial, the State presented expert testimony in an effort to identify Appellant as the person who wrote the note found in the van. The expert, however, testified that the results of his examination of the note and known samples of Appellant's handwriting were inconclusive. (CR. 818, 820-822) Similarly, the State's ballistics expert testified that results of the examination of the gunshot residue swabs taken of Appellant's hands were inconclusive. (CR. 813)

In closing argument during the penalty phase of trial, counsel argued to the jury that Appellant should not recieve the death penalty. In mitigation, he emphasized Appellant's age and the fact that on the night of the murder Appellant had been drinking and using drugs, and urged the jury to consider Appellant's diminished capacity to control his actions. (CR. 1127) Counsel, in conjunction with reading a pamphlet describing an electrocution, argued that the victim's death in this case does not warrant the execution of Robert Ike Combs. (CR. 1130)

With regard to the post-conviction proceedings upon

Appellant's motion to vacate, the State accepts the facts set forth in Appellant's brief with the following exceptions or objections. The State disagrees with Appellant's conclusion that further analysis of the gunshot residue swab would have been exculpatory. The State also disagrees with Appellant's conclusions that Perry's testimony was not truthful and that Appellant did not write the note. Accordingly, the State calls the court's attention to the following additional testimony presented at the evidentiary hearing upon Appellant's motion to vacate.

The victim's sister, Cindy Parks Truski, testified that she left the state within hours after the crime and remained in Michigan until after the trial. (R.39-40) Parks' mother was also living in Michigan. (R.74,81) Parks' Aunt moved to North Carolina before the trial. (R.52-53) Turski testified she had no actual knowledge of whether Parks broke up with Perry on the night of her death. (R.47) She had no other evidence about who killed Parks. (R.40-43) Parks' mother did not like Perry and testified that Parks and Perry had broken up several times before and gotten back together. (R.78-80,83) She also had no evidence that Perry was responsible for Parks' death. (R.79-80). Appellant's trial counsel testified that he made a tactial decision not to pursue investigation into the relationship between Parks and Perry. (R.315-316) His decision was based on the information available to him at that time including the report in the public defender's file and the polygraph examiner's

report. (R.308-316)

Dr. Spil's testimony included discussion of various types of head trauma resulting in varying degrees of unconsciousness, retrograde memory loss, shock to the reticular activating system, and temporal global amnesia. (R.109-118) He did conclude that true unconsciousness is accompanied by some degree of retrograde memory loss. (R.111-114) However, whether Perry was ever unconscious in the medical use of the term is unknown. (R.123-125) According to Dr. Spil, the term unconscious is often used by laymen interchangeably with such terms as stunned and dazed. (R.122, 127)

Counsel testified that he made a tactical decision to rely upon the inconclusive results of the State's expert testimony regarding the composition of Appellant's known handwriting samples with the note. (R.267-268, 273, 302-303) Counsel stated he did not want to engage in a battle of the experts or risk making the State's case by obtaining an expert who might conclude Appellant did write the note. (R.302-303) Pearl Tytell, the expert whose testimony was presented by stipulation below, was unable to conclude that Appellant did not write the note. (R.1168-1169) The trial court, upon the State's objection, excluded Tytell's testimony regarding whether Parks wrote the note. (R.352-358) Had this evidence been admitted it would only have shown that in Tytell's opinion Parks probably wrote the note, but her analysis was not conclusive. (R.1173-1174)

Appellant's trial counsel also testified that in view of the

inconclusive results of the State's expert's examination of the gunshot residue swabs, he would not pursue the matter, but rely upon the State's failure of proof. (R.273-277, 308-315) Counsel stated his decision was based upon the information available to him at the time and that he did not want to risk proving the State's case by further analysis. (R.309, 313-314)

Professor Nichol, the gunshot residue analysis expert, stated he did not examine the swabs in this case, had no knowledge of how the swabs had been taken, maintained and stored. (R.197-198) He testified a person can use a gun and not be found to have residue, that residue may be washed off, and that over a period of time intervening acts could result in an absence of residue. (R.200-203)

Trial counsel testified that he knew character witnesses were available to testify at the sentencing phase of Appellant's trial, but that he made a tactical decision not to use the testimony because he felt it would dilute his presentation to the jury of a pamphlet describing in vivid detail an electrocution. He stated he felt in his experience this would be a more effective strategy in this case. (R.279-280, 300-302) Counsel also testified regarding his years of experience as a criminal defense lawyer and his experience in capital cases. (R.294-296)

Several character witnesses were presented below to show what their testimony would have been had they been called at trial. Mary J. Bishop testified Appellant used to date her daughter and that Appellant worked for her six to eight weeks.

(R.142,148) She was not aware of Appellant's criminal and drug activities. (R.149) Had she been aware of them she would not have let him date her daughter or work for her. (R.149-150) Mrs. Carpenter did not know Appellant very well and did not know of his criminal and drug activities. (R.157, 162-164) Robert Floyd a former employer of Appellant also did not know of Appellant's drug use and criminal history. (R.211, 214-216) Christine Sansmark testified Appellant used to date her daughter ten years earlier. (R.220) She also did not know of Appellant's criminal or drug history. (R.221-222) Sophie Guptill, Appellant's former girlfriend also knew only one side of Appellant, but stated nothing, even murder, would affect her opinion of him. (R.227-228) Appellant's mother, Marcella Combs, testified, but she was also not aware of all of her son's activities. (R.242, 243)

Based upon the testimony and argument presented, the lower court denied Appellant's motion to vacate or set aside the conviction and sentence. (R.1404)

SUMMARY OF THE ARGUMENT

In order to establish a claim of ineffective assistance of trial counsel Appellant must show that counsel's performance was deficient in that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. Appellant must also show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. Appellant fails to meet this standard.

Guilt Phase

Appellant did not establish proof that counsel's failure to investigate and present evidence of the relationship between Gaye Lynn Parks and Leighton Perry probably affected the jury's verdict. Appellant also failed to establish that counsel's decision not to pursue such investigation was not a reasonable professional judgment. Counsel's failure to vigorously cross examine Dr. Spil at trial regarding Perry's injury was also not shown to have been prejudicial to Appellant's case.

Counsel was not ineffective in making a tactical decision to rely, at trial, upon the inconclusive results of the examinations of the handwritten note and gunshot residue swabs by the state experts, rather than seeking to obtain other experts who could potentially prove more harmful to Appellant's case. Moreover, Appellant was unable below to show that there is a reasonable probability that, but for counsel's decision not to obtain other expert testimony, he would have been acquitted.

Penalty Phase

Counsel made a reasonable tactical decision not to present weak character evidence at the sentencing phase as a mitigating factor. Instead, counsel argued in mitigation Appellant's age and the fact that on the night of the murder Appellant had been drinking and using drugs raising a question as to Appellant's capacity to control his own actions. Counsel also read a pamphlet to the jury describing in detail an electrocution. Counsel stated he did not want weak character evidence to dilute the powerful impact he believed the reading would have on the jury. Counsel's strategic choice was not constitutionally deficient conduct. Nor did Appellant establish actual prejudice. It cannot be said that counsel's decision not to present the character witnesses probably affected the balance of aggravating and mitigating circumstances so as to have caused a different result.

Because Appellant could not meet the two part test for establishing ineffective assistance of counsel at either the guilt or penalty phase of trial, Appellant's motion to vacate was properly denied.

ARGUMENT

ISSUE

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR POST-CONVICTION RELIEF ALLEGING COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE AT BOTH THE GUILT PHASE AND SENTENCING PHASE OF APPELLANT'S TRIAL.

The criteria for proving ineffective assistance of trial counsel were enunciated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The defendant must show (1) that counsel's performance was deficient in that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. 466 U.S. at 688, 694, 80 L.Ed.2d at 693-694, 698.

The performance inquiry must be whether counsel's assistance was reasonable, considering all of the circumstances. 466 U.S. at 688, 80 L.Ed.2d at 694. However, even if a defendant shows that counsel's acts or omissions were unreasonable, he still must show that such errors had an actual adverse effect on the defense. It is not enough that the defendant just show that the errors

had some conceivable effect on the outcome of the proceeding. 466 U.S. at 693, 80 L.Ed.2d at 697. With respect to the prejudice prong of the two-part Strickland test, the Supreme Court defines "a reasonable probability" as a probability sufficient to undermine confidence in the outcome of the proceeding. 466 U.S. at 694, 80 L.Ed. 2d at 698.

In applying this two-prong test, a reviewing court must indulge in a strong presumption that counsel's representation was effective. 466 U.S. at 689, 80 L.Ed.2d at 694. Moreover, (1) a defendant alleging ineffective assistance of counsel must identify acts or omissions of counsel that are supposedly not to have been a result of reasonable professional judgment; (2) the reviewing court must determine whether, in light of all the circumstances, that the identified acts or omissions are outside the range of effective assistance; and (3) a reviewing court should recognize the strong presumption of effective assistance of counsel. 466 U.S. at 689-690, 80 L.Ed.2d at 695.

Finally, the United States Supreme Court stated that a reviewing court need not determine whether counsel's performance was deficient before examining prejudice. In other words, if it is easier to dispose of the claim because prejudice is lacking, the reviewing court may do so without determining first whether counsel's performance was ineffective or deficient. 466 U.S. at 697, 80 L.Ed.2d at 699.

A. Guilt Phase

1. Failure to investigate and present evidence of relationship between State's witness Robert Leighton Perry and victim Gaye Lynn Parks.

Appellant contends that counsel was ineffective for failing to investigate and present evidence of the stormy relationship between Leighton Perry and Gaye Lynn Parks. Appellant asserts that such evidence could have been obtained, presented at trial, and would have almost assured acquittal by establishing that Perry had both a possible motive and an opportunity to kill Parks.

The State first contends that Appellant's bold conclusions regarding what the jury "would probably have concluded" (Appellant's brief at 16) and that "acquittal would have been almost assured" (Appellant's brief at 17) had additional evidence been presented are pure speculation and wholly fail to establish prejudice under the two-prong test of Strickland.

Appellant argues that Perry was an obvious suspect in the killing of Parks and that investigation into the relationship between Perry and Parks would have adduced facts casting serious doubt on Perry's version by establishing that he had both motive and opportunity for killing Parks.

At the outset, it does not appear that counsel, using reasonable dilligence, would have been able prior to trial to

discover the information to which Appellant refers concerning Parks' intent to break off her relationship with Perry. Though Parks' sister, Cindy Parks Turski, knew about Gaye Lynn's relationship with Perry, she left town shortly after the murder. Turski stated she never talked to a lawyer, went to the trial, or volunteered information after the trial. (R. 35, 36). It appears in fact that she left the state within hours of the crime and remained in Michigan until after the trial (R. 39-40). Gaye Lynn's mother, Sharon Parks, was also living in Michigan, only visiting Florida briefly. (R. 74, 81). She claims that she would have been available to assist trial counsel, but the record shows that attempts to contact her were unsuccessful. (R. 85). Gaye Lynn's aunt, Patricia Nelson, moved to North Carolina and was not present at the trial and never gave any information. (R. 52-53). Gaye Lynn's other aunt, Donna Buchin, stated that she never talked to an attorney or even felt she had valuable information. (R. 60). Counsel cannot be expected to speculate about the existence of the information Appellant now claims would have been useful, and to have guessed who and where the recipient of such information was.

Even if counsel had been able to track down these witnesses much of their testimony presented at the evidentiary hearing to show what counsel could have learned from them would not have

been admissible at trial to support an argument that Perry had a motive to kill Parks.[1]

Appellant cannot establish that he was prejudiced by the failure of counsel to obtain and introduce evidence that Parks intended to break up with Perry on the night of her death, and was seen yelling at Perry that night. (R.30-31) Although such testimony could be offered to prove that, in conformity with her expressed intentions Parks broke up with Perry, this testimony does not undermine confidence in the outcome of the trial. At most, this testimony would tend to establish a possible motive for Perry to kill Parks, but does not tend to refute Perry's story.

---

[1] As Appellant notes, the trial court ruled that the testimony of some of Parks' relatives would have been inadmissible at Appellant's trial as hearsay. (R.21-25)

Because Parks' state of mind was not an issue at trial hearsay statements offered to prove her state of mind would not be admissible under Fla. Stat. §90.803(3)(a)1. Therefore, testimony by Parks' relatives that she intended to break up with Perry on the night of her death could only be admissible to prove or explain that Gaye Lynn's subsequent acts were in conformity with her expressed intention. Fla. Stat. §90.803(3)(a)2. Also, testimony that Parks was seen yelling at Perry on the night of her death is not hearsay. (R.31) (Footnote continued)

However, testimony that Parks had told others she was in love with Timmy Sines (R. 29, 47, 65) is not testimony which proves subsequent conduct. It merely proves state of mind, not an issue at trial, and thus, not admissible under Fla. Stat. §90.803(3)(a). Also, any testimony by Parks' relatives that she told them about prior acts of violence by Perry is inadmissible hearsay. (R. 25-27, 48, 56, 63-64). An after-the-fact statement of memory to prove the fact remembered is not admissible under the state of mind exception. Fla. Stat. §90.803(3)(b). See, Ehrhardt, Florida Evidence §803.3b(2d Ed. 1984).

For the same reason, testimony that Parks' father told her sister that he saw Parks on the morning of her death crying and hysterical is inadmissible hearsay of a prior event offered to prove that the event occurred. (R. 33). Moreover, the witness's statement of what her father told her Parks said is double hearsay.

Appellant's argument that the hearsay evidence to which he refers would have been admissible at trial under the reasoning in Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) is without merit. Chambers is clearly distinguishable in that the hearsay there was a statement against penal interest, an exception to the hearsay rule not then recognized under Mississippi's narrow evidence code. Also in Chambers, the declarant was available to testify. The Court reasoned that in view of the critical nature of the evidence and the strong indicia of reliability attending the testimony, its exclusion would have deprived the defendant of a fair trial. No such indicia of reliability attach to the hearsay sub judice; nor is the declarant available; nor is the testimony of such a critical nature that its exclusion would be fundamentally unfair to Appellant's right to a fair trial and due process of law.

Appellant ignores the cross-examination testimony of the witnesses he charged should have testified against Perry. Turski testified she had no knowledge of whether Parks ever told Perry she wanted to break up with him the night of her death. (R. 47). Turski admitted that she assumed Perry would want Parks to move to Avon Park with him, and that she had no such actual knowledge. (R. 38). Turski stated she was not present at trial, and had no evidence other than her feelings or opinions about who killed Parks. (R. 40-43).

Parks' mother testified she did not like Perry. (R. 78-79). She also admitted she had not been at the trial and had no evidence other than her gut feeling that Perry was responsible for Parks' death. (R. 79-80). She stated Parks and Perry had broken up several times before and gotten back together. (R. 83). This was confirmed by Parks' aunt Patricia Nelson. (R. 50-51).

The fact that the testimony of Parks' relatives was not obtained and presented at trial (if admissible) does not establish prejudice. The evidence, viewed in a light most favorable to Appellant, would only have tended to establish that Perry might have had a motive to kill Parks. The evidence is not so convincing that there is a reasonable probability that its omission affected the outcome of the trial. Appellant's assertion of prejudice in this regard is pure speculation. As this Court noted on direct appeal of this case, the evidence is not only sufficient but overwhelming for the conviction of Appellant of first-degree murder. Combs v. State, 403 So.2d 418, 422 (Fla. 1981).

Moreover, counsel's failure to obtain this information considering counsel's representation as a whole, has not been shown to constitute a serious deficiency below an objective standard of reasonableness under prevailing professional norms. The Supreme Court reminds us that:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, the court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . .
>
> 466 U.S. at 689,
> 80 L.Ed.2d at 694

Sub judice, counsel made a tactical decision not to pursue investigation into the relationship between Parks and Perry. (R. 315-316). Appellant's defense at trial was an alibi defense. The fact that another person might be shown to have had a motive to commit the crime is not a defense to the charge of murder. It is not counsel's obligation to develop a theory of another's motive in order to present an alibi defense, particularly where, as here, counsel believes investigation of such a theory will not

be productive based upon the information available to counsel at that time. Counsel had available the report in the public defender's file that Appellant admitted to shooting Parks and Perry, specifically stating the type of ammunition used before confirmed by ballistics reports, but claimed the shooting was in self-defense. (R. 308-310, 314-316). Counsel also had the polygraph examiner's report which was consistent with the conclusion that Appellant shot Parks and Perry (R. 311-315), and inconsistent with an alibi defense.

In Strickland, the Court stated:

> . . . counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.
>
> 466 U.S. at 691, 80 L.Ed.2d at 695. See also, Mitchell v. Kemp, 762 F.2d 886, 888 (11th Cir. 1985).

Counsel's decision here was reasonable under the circumstances. Counsel stated that although the information he had affected his tactical decisions, they did not affect the vigor with

which he conducted Appellant's defense. The fact that counsel believed further investigation into the relationship of Parks and Perry would not be productive does not mean that reference to Perry at trial as a possible suspect makes the failure to investigate a deficiency. In arguing to the jury that the State failed to meet its burden, counsel could suggest that police overlooked another suspect. However, this does not mean counsel was obligated to undertake an investigation he reasonably believed would be fruitless in order to permit such a comment to the jury. As in Strickland, although counsel had doubts about his client's prospects, nothing in the record indicates that counsel's beliefs distorted his professional judgment. 466 U.S. at 699, 80 L.Ed.2d at 701.

2. Failure to Investigate and Present Further Evidence of Perry's Likely Fabrication.

Appellant contends that counsel failed to adequately investigate Perry's version of the events which led to Parks' death and failed to present evidence which would have cast doubt on the veracity of Perry's testimony. Specifically, Appellant asserts that examination at trial of Dr. Samuel Spil, the neurosurgeon who examined and treated Perry's gunshot wound on the night of the shooting, would have revealed testimony

arguably inconsistent with Perry's testimony.

At trial, Perry testified to being shot, being unconscious, and waking up with his face in the mud. (CR. 438). He also testified to the events preceeding the shooting (CR. 429-440), and the events after the shooting, including waking up and playing dead until Appellant left. (CR. 438-449). Based upon Dr. Spil's testimony at the evidentiary hearing, Appellant argues that Perry's testimony was "probably" untrue, because if Perry was unconscious as he testified, he would not have remembered the events preceding the shooting, would not have known to "play dead" when he awoke, and probably would not recall his actions after the shooting. Appellant, therefore, reasons that Perry's story must have been fabricated.

Dr. Spil's testimony, however, is not necessarily inconsistent with Perry's. Spil's testimony included discussion of various types of head trauma resulting in varying degrees of unconsciousness, retrograde memory loss, shock to the reticular activating system, and temporal global amnesia. (R. 109-118). Spil's testimony based upon hypotheticals posed was largely inconclusive with respect to degree of memory loss. He did conclude that true unconsciousness is accompanied by some degree of retrograde memory loss. (R. 111-114).

However, whether Perry was ever unconscious in the medical use of the term is unknown. (R. 123-125). According to Dr. Spil, the term unconscious is often used by laymen interchangeably

with such terms as stunned and dazed. (R. 122, 127). Because it is impossible to know whether the gunshot wound suffered by Perry ever rendered him unconscious in the medical use of the word, and if so, the period of unconsciousness, and the degree to which memory loss would have resulted from such unconsciousness, it is folly to suggest that Dr. Spil's testimony is so inconsistent with Perry's testimony that its omission renders counsel ineffective.

Appellant again improperly seeks to show the error in counsel's way on the basis of hindsight, by arguing that a better result would have been achieved had counsel acted differently. Appellant ignores the fact that had Dr. Spil's testimony at the evidentiary hearing been presented at trial, it likely would have been met by conflicting testimony from State experts. Appellant's assertion of prejudice with respect to this claim necessarily calls for enormous speculation as to what effect such testimony might have had on the jury. Whatever effect, it is clear that Appellant has not shown that there is a reasonable probability that he would not have been convicted had Dr. Spil testified at trial as he did below.

3. Failure to Investigate And Present Evidence That Would Show Appellant Did Not Write The Note.

Appellant contends counsel was ineffective for failing to consult with a handwriting expert which he alleges would have

enabled counsel to effectively present testimony at trial to show that the note found in the abandoned truck had not been written by Appellant. Appellant argues that such a showing would be consistent with Appellant's alibi defense and would conflict with Perry's testimony. On that basis, Appellant charges that the jury surely would have returned a not guilty verdict.

In several cases, the failure to investigate and present expert testimony has been found to be an unreasonable decision constituting ineffective assistance of counsel, See, Davis v. Alabama, 596 F.2d 1214, 1221 (5th Cir. 1979), vacated as moot, 446 U.S. 903, 100 S.Ct. 1827, 64 L.Ed.2d 256 (1980)(counsel made no effort to have defendant examined by physician where counsel knew of defendant's history of mental problems and only line of defense was insanity); Mauldin v. Wainwright, 723 F.2d 799, 800-801 (11th Cir. 1984)(counsel failed to consult with or have client examined by psychiatric expert even though sole line of defense was insanity); Rogers v. Israel, 746 F.2d 1288, 1294-1295 (7th Cir. 1984); cf. Williams v. Martin, 618 F.2d 1021, 1027 (4th Cir. 1980)(where substantial question requiring expert testimony arose over the cause of the victim's death, trial judge's refusal to provide expert testimony deprived defendant of effective assistance of counsel).

However, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances,

applying a heavy measure of deference to counsel's judgment. Strickland, 466 U.S. at 961, 80 L.Ed.2d at 695. Each case must be evaluated individually. As the Court noted in Knott v. Mabry, 671 F.2d 1208 (8th Cir. 1982):

> Trial of law suits is peculiarly susceptible to hindsight appraisal of another lawyer's endeavors. When trial counsel exercise their judgment in making strategic decisions, third party post-trial construction of strategic alternatives cannot be the sole basis for finding constitutional deficiency. United States v. Weir, 657 F.2d 1005 (8th Cir. 1981); Robinson v. United States, 448 F.2d 1255 (8th Cir. 1971).
>
> 671 F.2d at 1212.

In Knott, trial cousnel was alleged to have been ineffective for failing to adequately prepare for and conduct the cross-examination of State toxicologist who testified he found traces of a petroleum product on the defendant's hands and metal traces on his hands and pants consistent with the composition of a bucket found in the burned house. Defendant was charged and convicted of the murder of his former wife and another who died in a fire which consumed her house.

Trial counsel in Knott testified that as a matter of strategy, he decided to attack the weaknesses of the State's expert witness by inquiring into the presentation and meaning of his findings rather than engage him in a dialogue concerning the scientific bases of his techniques. Counsel felt this would

be more effective and persuasive to a lay jury than technical cross-examination. The appellate court concluded that although different from what other lawyers might have done, and although counsel would have been better prepared had he studied the literature or consulted an expert, counsel's preparation and cross-examination of the State's expert fell well within the permissible boundaries of constitutionally adequate representation. Knott, 671 F.2d at 1213.

In other cases, the failure to investigate and present expert testimony has also been found to be a matter of trial tactics within the range of reasonable performance. See, United States v. Krohn, 560 F.2d 293, 297 (7th Cir. 1977); Hall v. Sumner, 512 F.Supp. 1014 (N.D. Cal. 1981), aff'd 682 F.2d 786 (9th Cir. 1982).

Sub judice, counsel made a reasonable tactical decision to rely at trial upon the inconclusiveness of the State's expert testimony. (R. 267-268, 273, 302-303). The State's witness was not able to conclude that Appellant had written the note based upon his examination of the note and known samples of Appellant's handwriting. (CR. 818, 820-822). 2/ Counsel was aware of the expert's inability to render a conclusion (R. 267), and

---

2/ Appellant argues that the jury probably understood this testimony to mean Appellant did write the note. (Appellant's Brief at 32). This conclusion is pure speculation, is contrary to the witness's testimony, and is wholly without record support.

testified that he did not want to risk renewing the State's interest in the matter by seeking to obtain an expert who would conclude that Appellant did not write the note, and thus, be forced into a battle of the experts. (R. 302-303). Indeed, counsel expressed a concern that such efforts might backfire and an expert conclude that Appellant did write the note. (R. 302-303). Counsel reasonably determined that because the State's evidence did not link Appellant to the note, and because in any case the note was not crucial to the defense, he would not pursue the point. He chose to rely upon the State's absence of evidence.

Under the circumstances, this was a reasonable tactic. Although counsel could have consulted an expert in order to prepare for a technical cross-examination of Mr. Dick, counsel's strategy was not to engage in such an examination, making such consultation unnecessary, as in Knott, supra.

This case is easily distinguishable from those relied upon by Appellant. In Davis, supra and Mauldin, supra, the failure to consult with an expert was crucial to the defense. Counsel there could not effectively establish an insanity defense without expert evidence to support it. In State v. Peek, Case No. CF 78-0445, slip op. (Fla. 10th Cir. Ct. Nov. 2, 1983)(annexed to Appellant's Brief), the testimony, counsel failed to challenge, conclusively tied the defendant to the crime. Counsel was thus obligated to attack the testimony by informed cross-examination or by presenting contrary expert testimony. That is not the

situation sub judice. Because Mr. Dick's testimony was inconclusive and unable to tie Appellant to the crime, counsel was not obligated to do more.

Moreover, Appellant is wholly unable to establish prejudice on the basis of counsel's failure to present expert testimony concerning handwriting analysis of the note. Pearl Tytell, the expert whose testimony was presented by Appellant through stipulation of the parties in the Rule 3.850 proceeding below (R. 1149 et seq.) was unable to conclude that Appellant did not write the note. (R. 1168-1169). Also, her analysis did not take into account conditions under which the note or the known samples were written. She did not testify as to when the note was written. Appellant also again assumes that, if presented at trial, Tytell's testimony would go unchallenged by the State. It is speculation to suggest that her inconclusive testimony would have swayed the jury.

Finally, and most importantly, even if it could have been shown at trial that Appellant might not have or probably did not write the note, as Appellant argues, he is still unable to show how this probably would have resulted in his acquittal. Authorship of the note is a very collateral issue which does not directly impact upon Appellant's guilt or innocence. Because the evidence does not establish when the note was written, even if written by Parks or someone else days, weeks or months before that night, it could have been found in the truck by Appellant and placed

on the wheel where it was found. The fact that Appellant did not write the note, even if proven at trial, would not have been exculpatory. The test for establishing prejudice is not whether counsel's acts or omissions might conceivably have affected the jury's consideration of a collateral issue, but whether there is a reasonable probability that the outcome of the trial would have been different. Appellant has failed to meet its burden here.

4. Failure To Obtain And Have Analyzed The Handwriting Of The Victim Gaye Lynn Parks.

Below, Appellant sought to offer new evidence from handwriting comparison expert Pearl Tytell of her conclusion that, based upon her comparison of the note and known samples of Gaye Lynn Parks' handwriting, there is a high probability that the note was written by Parks. (R. 1170-1174). The State objected and argued that this evidence was unrelated to an ineffective assistance of counsel claim and was an attempt to have the trial court consider new evidence which should properly be presented to the appellate court in a petition for writ of error coram nobis. (R. 352-355). The trial court agreed, permitted the proffer, but limited the admission of Tytell's evidence to assistance she would have rendered trial counsel and a comparison of the similarities and dissimilarities between Appellant's handwriting samples and the note. (R. 356-358).

Appellant claimed trial counsel rendered ineffective assistance by failing to obtain an expert to challenge the trial testimony of the State's expert. However, the proffered evidence which shows Gaye Lynn wrote the note is in the nature of new evidence which should be considered under the test applicable to new evidence set forth in Hallman v. State, 371 So.2d 482 (Fla. 1979). The proffered evidence does not meet this standard in that the evidence, if available at trial, would not have precluded entry of the judgment.

However, even if Tytell's conclusion regarding Parks' handwriting is related to Appellant's ineffectiveness claim, Appellant is still not entitled to relief. As discussed in Section 3, supra, counsel made a reasonable strategic choice with respect to how he should proceed regarding the note. Tytell's conclusions do not show that choice to have been irresponsible. Furthermore, Tytell was not able to conclude that Parks did write the note. (R. 1173-1174). Because her testimony was inconclusive, as was that of the expert who testified at trial, it cannot be said that there is a reasonable probability that the outcome of the trial would have been different had she testified. Authorship of the note simply is not a crucial issue which would have been exculpatory. See Section 3, supra.

5. Failure to Investigate and Present Exculpatory Evidence Related to Gunshot Residue Analysis.

Appellant contends counsel was ineffective for failing to consult with a ballistics expert who might have examined the gunshot residue swabs taken of Appellant's hands and for failing to present at trial any exculpatory evidence which might have been revealed therefrom.

As with the handwriting issue, trial counsel stated that in view of the inconclusive results of the State's expert's examination and analysis of the swabs, he made a tactical decision to rely upon the State's failure of proof in this regard. (R. 273-277, 308-315). Counsel stated that the evidence in the file, including Appellant's statements to Walker, showed a strong possibility that Appellant did shoot Parks. (R. 308-309). Counsel stated in view of this and State's inconclusive evidence, he did not want to run the risk of obtaining an expert who might prove up the State's case. (R. 309, 313-314). The failure to which Appellant refers might very well amount to a constitutional deficiency if the State's expert had connected Appellant to the shooting based upon the GSR swab analysis. However, that was not the situation here. Accordingly, based upon the reasoning and authorities discussed in Section 3, supra, the State contends that counsel's tactical decision regarding the GSR analysis

was reasonable under the facts of this case and the information available to counsel at the time.

With respect to the prejudice prong of the Strickland test, the State contends that again Appellant is unable to meet his burden. Professor Nicol, the gunshot residue analysis expert who testified at the evidentiary hearing below, stated that he did not examine the GSR swabs in this case. (R. 197). He also testified that the manner in which swabs are taken, stored, and maintained may result in contamination of the swabs which would affect analysis. (R. 198). He stated that he had no knowledge of how the swabs in this case were taken, stored, and maintained. (R. 198). Nicol stated that a person could use a firearm and not be found to have residue in certain circumstances, for example, where the hand is shielded as by a glove, or where the gun is "extremely tight" and there is no escape of a gas cloud. (R. 200). Also, he indicated that residue could be removed from the hands after firing a gun by washing the hands. (R. 201). Nicol further testified that over a period of time between firing a gun and taking the swabs intervening acts might result in an absence of residue. (R. 203).

From Nicol's testimony, it is clear that Appellant has not established actual prejudice in that Nicol did not examine the swabs in this case.

His testimony was based upon hypothetical situations. He was not able to testify what the results would have been had the swabs in this case been further analyzed. Moreover, even if the swabs revealed an absence of gunshot residue upon Appellant's hands and the presence of beach environment elements such as sodium, magnesium and calcium, such evidence would not be exculpatory. Nicol testified that the absence of gunshot residue could be the result of shielding the hands by use of a glove. (R. 200). Therefore, in order to establish prejudice, Appellant seeks to rely upon a presumption or inference that the swabs would have yielded a favorable analysis.

Appellant recognizes that because the gunshot residue swabs are no longer available, he cannot establish what further analysis of them would have revealed. This point, however, was correctly excluded from evidence by the lower court as irrelevant. (R. 352). The fact that the swabs are no longer available is irrelevant to the ineffective assistance of counsel claim, and does not excuse Appellant from his obligation to show that he was actually prejudiced by trial counsel's failure to have them analyzed before trial. Appellant argues that destruction of the swabs is relevant to his showing of prejudice in that it creates a presumption that the evidence destroyed by the State was favorable to the Appellant.

Although the State is obligated to preserve evidence to permit a defendant to prepare his defense, [3] the State should not be required to preserve evidence forever in anticipation that it might someday become useful in a collateral post-conviction proceeding. Post-conviction destruction of evidence does not implicate the due process concerns about a defendant's ability to prepare for trial which were the subject of cases involving pretrial destruction of evidence.[4]

Taylor v. Hilton, 563 F.Supp. 913 (D.N.J. 1982), relied upon by Appellant did involve an ineffective assistance of counsel claim

---

3/ State v. Counce, 392 So.2d 1029, 1030 (Fla. 4th DCA 1981) (impairment of right to prepare defense was violation of due process right); Budman v. State, 362 So.2d 1022, 1026 (Fla. 3rd DCA 1978)(pretrial destruction of evidence not shown to have prejudiced defendant in preparing for trial, therefore, no denial of due process); United States v. Bryant, 439 F.2d 642, 648 (D.C. Cir. 1971)(due process requirement of disclosure by prosecution of evidence to defense applies to all evidence which might have been favorable to accused); Kelley v. State, 486 So.2d 578 (Fla. 1986)(destruction of evidence did not prejudice defendant and thus did not violate due process).

4/ See, n.3, supra.

similar to the one sub judice. The test of prejudice applied there was whether the evidence, if investigated, might have led to the defendant's acquittal. That is no longer the test for prejudice since the Supreme Court's decision in Strickland. Appellant must show a reasonable probability that further analysis of the swabs by another expert would have led to his acquittal.

Review of the decisions cited by Appellant, for the proposition that destruction of evidence permits an inference that the evidence was unfavorable to the destroying party, reveals that those cases are inapplicable sub judice. This inference is based upon the presumption that the party destroying the evidence did so out of fear that production of the evidence would be harmful to the destroying party. Knightsbridge Marketing Services, Inc. v. Promociones Y Proyectos, S.A., 728 F.2d 572, 575 (1st Cir. 1984). Also, the inference depends on a showing that the party had notice that the evidence was relevant at the time it failed to produce it or destroyed it. Id. Clearly, this reasoning does not apply to destruction of evidence after a defendant's conviction, where a defendant in a collateral proceeding wants to further examine that evidence. It must also be remembered that the evidence under consideration here is the gunshot residue swabs which were examined before trial by an expert who testified at trial that analysis of the swabs was inconclusive.

Despite his efforts and speculation, Appellant has failed to show that he was actually prejudiced by counsel's failure to further investigate the gunshot residue evidence.

6. Failure to Consult With Appellant Regarding Tactical Decisions About Obtaining Other Experts to Analyze the Gunshot Residue Swabs and the Note.

Appellant contends that counsel was ineffective for making tactical decisions without consulting with his client. The Court in Strickland recognized that counsel should consult with the defendant on important decisions and keep him informed of important developments in the course of the prosecution. 466 U.S. at 688, 80 L.Ed.2d at 694. Appellant relies upon Judge Adams dissenting opinion in United States v. Williams, 631 F.2d 198, 204 (3rd Cir. 1980) (Adams, J., dissenting). Judge Adams expressed an opinion that the Sixth Amendment recognizes a right of defendants to exercise final decision-making authority over certain basic questions of defense policy.

The decisions made by counsel sub judice were not related to basic questions of defense policy. The need for consultation with additional expert witnesses, where the State's witnesses had reached inconclusive results, was not crucial to the defense. Though counsel might have been wise to consult with Appellant about the decision and his reasons for believing that additional experts were unnecessary, his failure to do so is not an omission of constitutional magnitude.

Moreover, the record does not show that had trial counsel consulted with Appellant and explained to Appellant his reasons

for the decisions he wanted to make, that Appellant would not have acquiesced to counsel's strategy. Appellant presented no evidence at the hearing below, nor did he testify himself, that he would have insisted on another course of action if counsel had consulted him regarding the gunshot residue analysis and the note. Nor did Appellant demonstrate that another course of conduct by counsel would have resulted in a different outcome at trial. See Sections 3, 4, 5, supra. In United States v. Baynes, 687 F.2d 659 (3rd Cir. 1982), the Court assumed, absent evidence to the contrary, that had counsel consulted with his client, the client would have continued to acquiesce in counsel's strategy. 687 F.2d at 667, n.7.

It is easy for present counsel to speculate that Appellant surely would have wanted further expert analysis undertaken. (Appellant's Brief at 34-35, n. 27; 39). However, there is no evidence of this, and no evidence from which it could be inferred that Appellant would have disagreed with counsel's decision if fully informed of the reasons for counsel's decision. Thus, Appellant has not met either prong of the Strickland test with respect to this claim.

7. Other Failures

Appellant contends counsel was ineffective for failing to request a jury instruction that the jury could consider whether Appellant was too intoxicated to form the requisite intent to commit murder or robbery. Such an instruction, however, would have clearly been inconsistent with Appellant's defense at trial that he was not present at the time of the shooting. Counsel did not act irresponsibly in failing to request an instruction inconsistent with Appellant's theory of defense. Furthermore, Appellant fails to establish prejudice. Appellant asserts that had the instruction been given he "could well have" been acquitted. (Appellant's brief at 42) Appellant clearly has failed to present record evidence which meets the "reasonable probability" standard of prejudice under Strickland.[5] The State again reminds the court that on direct appeal of this case the evidence against Appellant of first-degree murder was found to be overwhelming. Combs, 403 So.2d at 422.

Appellant concedes that the trial court did not act on his motion for leave to amend his Rule 3.850 motion to include the allegations of ineffectiveness contained in the first two paragraphs of n.41 of his brief. He nevertheless presents those claims to this court. It is the burden of the moving party to obtain a ruling on his motions. Appellant's failure to do so constitutes an abandonment of the motion and those claims cannot

[5] Arrowood v. Clusen, 732 F.2d 1364 (7th Cir. 1984), relied upon by Appellant is a pre-Strickland case applying a different prejudice standard.

now be heard for the first time on appeal.

Even if considered, however, these claims are without merit. Appellant contends counsel was ineffective for failing to challenge the constitutionality of Florida's felony murder statute. Appellant does not establish a serious deficiency or prejudice. Section 782.04 has withstood constitutional attack previously. See, Alford v. State, 307 So.2d 433 (Fla. 1975), cert. den., 428 U.S. 912, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976); Dixon v. State, 283 So.2d 1 (Fla. 1973), cert. den.; Hunter v. Florida, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974); Alford v. State, 322 So.2d 533 (Fla. 1975), cert. den. 428 U.S. 923, 96 S.Ct. 23234, 49 L.Ed.2d 1226 (1976); Antone v. State, 382 So.2d 1205 (Fla. 1980), cert. den., 449 U.S. 913, 101 S.Ct. 287, 66 L.Ed.2d 141 (1980).

Appellant contends counsel was ineffective for failing to object to the trial court's failure to give a specific intent instruction as an element of robbery in its jury instruction. The court's instruction (CR. 976-978) was in compliance with the standard jury instruction on robbery, (Fla. Std. Jury Instr. (Crim.) p.155), and Fla. Stat. §812.13. The jury was also instructed on the lesser included offense of theft which included as an element "intent to permanently deprive." (CR. 978) There was no basis for an objection to the instruction given. Appellant also cannot show prejudice. The jury veredict did not specify whether conviction was based upon felony murder or premeditated murder. (CR. 1060) Because there was substantial

evidence of premeditation Appellant cannot show a reasonable probability that any error in the robbery instruction affected the murder conviction. Cf. Franklin v. State, 403 So.2d 975 (Fla. 1981).

Finally, Appellant's assertion of ineffectiveness for counsel's failure to request additional peremptory challenges and individual sequestered voir dire is unaccompanied by any allegation or showing of prejudice. This claim is without merit.

B. Penalty Phase

Appellant first argues that counsel's purported errors in the guilt phase of the trial, even if not sufficient to require reversal of the conviction, are sufficient to require reversal of the sentence. Again, Appellant speculates wildly about what the jury might have considered in recommending the sentence to be imposed. This Court found the sentence imposed entirely appropriate under the facts of this case. Combs, 403 So.2d at 421-422.

Appellant also points out that this Court's decision on direct appeal was a close four to three vote, suggesting that little difference in the evidence would have been required to swing the majority the other way. However, Chief Justice Sundberg's concurring and dissenting opinion, in which Justices England and McDonald joined, pertained only to whether application of Fla. Stat. §921.141(5)(i) violated the prohibition against ex post facto laws. The issues under consideration sub judice, would obviously not have had any impact upon the decision

of the Justices in that regard.

Appellant contends that defense counsel's statement

> I would ask you to spare his life. I'm not begging, I'm simply asking to spare it, not because of any particular thing about Robert Ike Combs, but because I feel the death penalty is too gruesome a punishment.
>
> (CR. 1131)

is so prejudicial that Appellant was, by virtue of that statement, denied effective assistance of counsel. Viewed in the context in which it was made this comment does not render counsel ineffective. This case is clearly distinguishable from those cited by Appellant in which counsel continuously emphasized that there was no mitigating evidence. In King v. Strickland, 714 F.2d 1481 (11th Cir. 1983), on remand, 748 F.2d 1462 (11th Cir. 1984), counsel's statements to the jury dehumanized the defendant, emphasized the reprehensible nature of the offense, and separated counsel from his client suggesting his representation was a public service and not by choice. In Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), on remand, 739 F.2d 531 (11th Cir. 1984), counsel conceded to the trial court he had done nothing to prepare for the sentencing phase of the trial, that he was inexperienced in such proceedings and that he knew of no mitigating evidence he could present. Counsel emphasized to the court, the ultimate sentencer, that there was nothing good he could say about the defendant except that he was a human life.

Sub judice, the statement in question must be viewed in the

context of counsel's entire argument to the jury. (CR. 1125-1131) Counsel argued to the jury that Appellant should not receive the death penalty. He emphasized to the jury Appellant's age, 20 years. (CR. 1127) He suggested that although legally an adult, Appellant was not, by his actions, acting like an adult. (CR. 1127) He urged the jury to consider Appellant's mental and physiological condition on the night of the murder; that he had smoked marijuana, snorted cocaine, and had several beers. (CR. 1127) Counsel urged the jury to consider, as a result of these things, what ability Appellant had to control his actions. (CR. 1127) Counsel argued that the victim's death here does not warrant the execution of Robert Ike Combs. (CR. 1130) Viewed in its entirety counsel's summation to the jury was both appropriate and constitutionally sound. Counsel argued mitigating factors the jury should consider and urged a recommendation of life. Counsel was not required to rebut the State's argument for the finding of aggravating circumstances. Counsel chose not to revisit the facts of the case. (CR. 1126) A different decision might have placed undue emphasis on the heinous nature of the offense. Counsel chose instead to talk about Appellant's mitigating factors and the death penalty in general. Counsel's performance was not below objective standards of reasonableness, nor has Appellant established, beyond speculation and innuendo, the real probability that had counsel acted differently the outcome of the proceeding would have been different.

Appellant contends counsel was ineffective for failing to

present evidence of mitigating circumstances at the penalty phase of the trial. Appellant states counsel was under an obligation to present such circumstances to the jury. To the contrary, defense counsel has no absolute duty to present mitigating character evidence at a sentencing hearing. Mitchell v. Kemp, 762 F.2d 886, 889 (11th Cir. 1985).

Defense counsel testified that he knew Appellant's mother, brother, father, Sandy Porter, Pat Porter, and Debbie Ingersoll were available as possible character witnesses for the sentencing phase. (R.280) Counsel testified, however, that he made a tactical decision not to present potentially weak character evidence and instead to read to the jury a pamphlet describing in graphic detail an electrocution. He stated he felt, in his experience, that this would be a more effective strategy in seeking to persuade the jury to return a life recommendation. (R. 279-280, 300-302) He stated he did not want to dilute the impact of reading the pamphlet by calling character witnesses because he recognized that in so doing he would be opening the door to permit inpeachment of those character witnesses. (R.300-301) Counsel also testified he had several years of experience in the public defender's office, seven years of criminal law experience in total at the time he represented Appellant in this case. (R.294-296) He also stated that before this case he had handled seven to ten capital cases and had been to trial on two or three of those cases before Appellant's. (R.295) He also stated that in other capital trials, he had used character

evidence, but felt in this case he should not. (R.301)

In view of counsel's experience and under the facts known to him at the time counsel made a reasonable strategic decision not to proceed with character evidence at the sentencing phase of the trial. Counsel instead chose to persuade the jury based upon presentation of a vivid description of an execution along with the mitigating factors which were argued. (CR. 1125-1131) That Appellant's present counsel would not have chosen that tactic does not make it irresponsible. Indeed this court has recognized how powerful an emotional impact such a description can have. See, Porter v. State, 429 So.2d 293 (Fla. 1983).[6]

In many cases, counsel could reasonably conclude that character evidence would be of little persuasive value or that it would cause more harm than good by opening the door for harmful cross-examination or rebuttal evidence. Stanley v. Zant, 697 F.2d 955, 965 (11th Cir. 1983). This record shows that counsel explored and examined the possibility of using character evidence at the penalty stage and made an informed choice between reasonable alternatives. Counsel cannot be regarded as constitutionally deficient for such a tactical decision. See, Griffin v. Wainwright, 760 F.2d 1505 (11th Cir. 1985), vacated and remanded on other grounds, ___ U.S. ___, 90 L.Ed.2d 650 (1986); Mulligan v. Kemp, 771 F.2d 1436 (11th Cir. 1985); Mitchell v.

---

[6] Cf., Glass v. Louisiana, ___ U.S. ___, 85 L.Ed.2d 514 (1985) (Brennan, J., dissenting) (in which Justice Brennan makes a similarly vivid description of electrocution, the basis for his argument that that form of execution is unconstitutionally cruel and unusual).

Kemp, 762 F.2d 886 (11th Cir. 1985); Thomas v. Wainwright, 767 F.2d 738 (11th Cir. 1985).

This case is clearly distinguishable from those relied upon by Appellant. In Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985), counsel made no preparation whatsoever for the penalty phase of trial because he anticipated acquittal. There was thus clearly no valid tactical decision made. Counsel was similarly unprepared in King v. Strickland, supra.

Counsel's informed, well reasoned tactical decision, sub judice, cannot be considered constitutionally deficient simply because in hindsight it did not work. Counsel's choice of strategy, though different from that another attorney might take, is not a serious deficiency below objective standards of reasonableness.

Even if counsel's decision is determined to be a constitutional deficiency, Appellant has not demonstrated prejudice. To prevail on a claim of ineffective assistance of counsel at the sentencing phase of trial resulting in the imposition of the death sentence, a defendant must show that, absent counsel's unprofessional errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances did not warrant death. Funchess v. Wainwright, 772 F.2d 683 (11th Cir. 1985).

Appellant presented several character witnesses at the evidentiary hearing below in an effort to establish prejudice. Examination of their testimony reveals that failure of counsel to

offer weak evidence in mitigation did not make the difference in this case.

Mary J. Bishop testified she knew Appellant in 1976 or 1977 when he was dating her daughter. (R.142) Also, Appellant worked for her six to eight weeks. (R.148) She stated she was not aware that Appellant smoked marijuana, used cocaine and sold cocaine. (R.149) She said that had she been aware of these facts she would not have let her daughter date him, nor would she have let him work for her. (R.149-150)

Mrs. Carpenter, who testified, was an eighty year old woman who wintered in Florida part of the year. (R.156) She was basing her testimony on "what little I knew" of him. (R.157) She also was not aware of Appellant's criminal background and drug habits. (R.162-164)

Robert Floyd testified that Appellant worked for him one season two years before the trial. (R.211) He also did not know anything about Appellant's criminal activities and drug use. (R.214-216) Christine Sansmark knew Appellant ten years earlier as the boyfriend of her daughter. (R.220) She also did not know of Appellant's criminal record and drug activities. (R.221-222) Sophie Guptill had been his girlfriend. (R.223) She had known him eight years prior. (R.224) She was in California when the investigation and trial occurred. (R.225) She knew only one side of the defendant. (R.227) She stated that nothing, even murder would effect her opinion testimony. (R.228) Marcella Combs gave the sad testimony of a loving mother, yet the record shows that

even she was unaware of all aspects of her son. (R.242,243)

The type of innocuous mitigating testimony these witnesses would have given on direct examination, coupled with cross-examination testimony revealing how little the witnesses really knew about Appellant and his darker side clearly does not support the conclusion that this evidence would probably have tipped the balance of aggravating and mitigating circumstances in favor of a life sentence. Appellant's sentence of death was supported by three aggravating circumstances: (1) murder was committed while the defendant was engaged in, or was attempting to engage in, another violent felony, (2) murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, (3) murder was especially heinous and cruel. Combs, 403 So.2d at 420. In mitigation, the court found only (1) that defendant who was 20 years of age had no significant history of criminal activity despite a third degree burglary for which he served probation, and (2) that defendant on the day of the murder consumed alcoholic beverages and indulged in cocaine, but was not substantially impaired thereby, and could appreciate the criminality of his conduct and had the capacity to conform his conduct to the requirements of law. Id. The character evidence offered by Appellant is not so substantial that confidence in the sentence imposed is undermined by its omission. As the Court noted in Stanley v. Zant, supra.,

> We cannot say that this evidence would have had no impact on the jury, nor can we say that a tactial decision to use such evidence would have been unreasonable. It may be that often

> the best strategy in a capital case is to attempt to humanize the defendant by presenting evidence of his personal qualities. We are unable to hold, however, that any other strategy would be so unreasonable as to constitute ineffective assistance of counsel.
>
> 697 F.2d at 969.

Appellant next asserts that counsel was ineffective for failing to object to a jury instruction he alleges improperly limtied the jury's consideration of mitigating circumstances under Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2754, 57 L.Ed.2d 973 (1978). Appellant improperly seeks relitigation of a claim raised on direct appeal. Combs, 403 So.2d at 421. This claim was rejected on direct appeal. Appellant cannot show error in counsel's failure to object to an instruction which did not affect his sentence. The jury was instructed on every mitigating circumstance upon which Appellant sought to rely. Appellant has shown no errors and no prejudice.

Appellant makes broad reference to "other failures" which he asserts constitute ineffective assistance of counsel. (Appellant's brief at 56-59 and notes 55-58). Several of these claims were made in Appellant's motion for leave to amend motion to vacate upon which the trial court never ruled (Appellant's brief at 43, n.41). Appellant's failure to obtain a ruling on his motion for leave to amend constitutes an abandonment of the motion and waiver of the claims therein.

With respect to the remaining claims urged by Appellant as "other failures", Appellant presents no argument or record support for his conclusory allegations. Appellant merely cites

record references to his motion to vacate. Review of the motion reveals that Appellant is seeking review of claims which were or should have been raised on direct appeal and are foreclosed from consideration in a motion for post-conviction relief. McCrae v. State, 437 So.2d 1388 (Fla. 1983). With respect to those claims which might be viewed as asserting a failure of counsel, Appellant fails to identify any act or omission of counsel falling below an objective standard of reasonableness. Nor does Appellant offer any proof or even allegation of actual prejudice resulting from counsel's alleged failures. Appellant cannot obtain relief by standing on the unsupported allegations of his motion.

Finally, Appellant asks this Court to consider two grounds for relief other than ineffective assistance of counsel. Again, these claims were in the motion for leave to amend, and were never properly considered by the lower court. Appellant waived presentation of these claims to the trial court and cannot seek review of them here. Nevertheless, Appellant argues that imposition of the death penalty in this case without an appropriate finding of intent violates Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). (Appellant's brief at 59, n.58). This case did not involve co-felons. Because Appellant acted alone, Enmund does not apply here. Adams v. Wainwright, 709 F.2d 1443, 1446-1447 (11th Cir. 1983). Appellant also contends Florida's death penalty has a disproportionate impact on those who kill white victims. This

claim could and should have been raised on direct appeal and is thus not cognizable in a motion for post-conviction relief. McCrae v. State, supra.

Appellant has failed to establish that counsel's performance was below objective standards of reasonableness and that absent counsel's failure there is a reasonable probability that the outcome of the proceedings would have been different with respect to either the guilt phase or the penalty phase of Appellant's trial. Appellant has not met the test under Strickland v. Washington, for showing violation of his Sixth Amendment right to effective assistance of counsel. Accordingly, his motion for post-conviction relief was properly denied.

CONCLUSION

Based upon the foregoing reasons, argument and authorities, Appellee respectfully requests that this Court affirm the trial court's denial of Appellant's Rule 3.850 motion for post-conviction relief.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES A. YOUNG
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by overnight Express U.S. Mail to Marvin R. Lange, Esquire, Counsel for Appellant, 575 Madison Avenue, New York, New York 10022, this 23rd day of March, 1987.

OF COUNSEL FOR APPELLEE