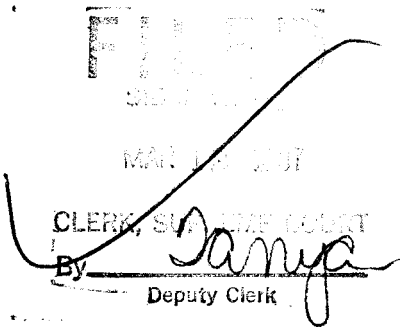

IN THE SUPREME COURT OF FLORIDA

RUFUS E. STEVENS,

Appellant,

vs. CASE NO. **68,581 & 69,112**

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT,
FOURTH JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

The appellant, Rufus Stevens, appeals the denial of his motion for post-conviction relief. The judge who heard that motion, Judge John E. Santora, was also the trial judge in the original proceeding. That conviction and ensuing death sentence were upheld in Stevens v. State, 419 So.2d 1058 (Fla. 1982).

References to documents filed in the record of the hearing below will be to "R" with the appropriate page numbers. References to the transcript will be to **"T"** with the appropriate page numbers. References to the record of the direct will be "RDA" for documents and "TT" for the trial transcript, with the appropriate page numbers.

The statement of facts is principally based on this Court's opinion in Stevens v. State, supra, and references will be made the record only where a particular point is not contained in that opinion.

There are sharp divergences between the parties on some matters of fact. To dispositively resolve those controversies, in a departure from the usual practice before this Court, the appellee has at several points made substantial quotations from the record,

STATEMENT OF THE CASE AND FACTS

During the early morning hours of March 13, 1979, Eleanor Kathy Tolin, while working as a cashier at a convenience store, was robbed and abducted of **$67.00** by Rufus Stevens and Gregory Scott Engle. Using Stevens' car, they took Kathy Tolin to a secluded wooded area. She was raped by both men. Then Kathy Tolin was taken deeper into the woods where she was strangled with a rope and stabled in the back, either injury having been capable of causing her death. As she was dying, her vagina suffered a four inch laceration from a bottle or man's hand. Kathy Tolin's body was dragged into the underbrush and discarded. It was discovered a day and a half later (RDA 101).

Rufus Stevens was arrested at his home at about 3:30 a.m. on March 20, 1979, based on information provided by a friend, Nathan Hamilton. Later that morning Stevens confessed to participation in the robbery, abduction, and rape, but placed the blame for the murder on Engle. Stevens and Engle were indicted for first-degree murder. They were tried separately. Mr. Forbes was appointed to represent Stevens.

Mr. Forbes unsucessfully sought suppression of Stevens' confession on the basis that he had been intoxicated at the time of his confession. On appeal, this Court upheld the admission of Stevens' confession. Based on Stevens' confession, the State indicated a willingness to bargain for a life sentence. However,

shortly before a stipulated-to polygraph examination intended to validate Stevens' lack of participation of the murder, Stevens made spontaneous statements admitting to the murder. These statement were ruled inadmissible for the State's case in chief but held to be admissible for rebuttal purposes.

At trial, the State presented testimony from Nathan Hamilton that Stevens had solicited him to participate in the robbery. Hamilton declined, and Stevens and Engle left him, driving off together in Stevens car with the stated purpose of committing the robbery together. Hamilton also testified that Stevens later told him that "we got to get rid of Scott's knife because that's what it was done with." Engle later declined to give up the knife and assured Hamilton that it could not be connected to the murder. It was shown at trial that a minute trace of blood on the knife was the same type as Kathy Tolin's but different from Engle's and Stevens' blood types. Wounds on her body matched the knife. Blood of Kathy Tolin's type was also found in the trunk of Stevens' car, and hairs similar to hers were found there and on the back seat as well.

Hamilton also testified:

> I asked him why they did it and he said that they took her out of the store to get her away from a phone. They took her out into the country and Rufus went crazy and started saying she's going to identify us. And I asked him, I said, man, was it worth killing a little gal

> over a lousy fifty-dollar robbery and he said no, it wasn't.

Stevens v. State, supra, at **1061.**

Stevens was convicted at trial of first degree murder. In the penalty phase, testimony was heard from a young teen-aged runaway, September Jinks, that Stevens had once raped her at knifepoint (TT **1021-34).** Jerry Plummer, a friend of hers, testified that she had confided the rape allegation to him before the arrest of Stevens and police involement (TT 1036-41). The jury recommended life imprisonment. The trial judge reveiwed the **PSI** and a psychiatric examination report. He found four aggravating and no mitigating factors, and imposed the death penalty. This Court affirmed on direct appeal. Stevens v. State, supra.

In his motion for post-conviction releif, Stevens raised a host of issues. For the sake of brevity, they will not be stated here. He also moved for the disqualification of Judge Santora (R 217-39).

Stevens' motion originally relied on three affidavits, one from Stevens, and one each from his present counsel, Oren Root, Jr. and Patrick Wall. Mr. Root's affidavit was argumentative in nature, urging the same grounds as the motion (R **223-7).** The only non-record facts directly known by Mr. Root that his affidavit recounted was his version of telephone conversations he had with Mr. Forbes. **As** stated by Mr. Root, Mr. Forbes had told

him that they were "adversaries" and that Judge Santora "was a good buddy of mine." Stevens' affidavit alleged, in polished and professional language, that Judge Santora was prejudiced against him, as evidenced by his opposition to clemency, that Mr. Forbes had spoken of his friendship with Judge Santora, that Mr. Root had told him Mr. Forbes was opposing his motion, and that "it is only logical Judge Santora will protect his friend, regardless of the merits of my claims" (R **228-30**). Mr. Wall's affidavit opined that Judge Santora could not be impartial in light of his friendship with Mr. Forbes, his opposition to clemency, and his reliance on allegedly improper material at sentencing. Mr. Wall went on to aver that Judge Santora would be called as a material witness at the hearing, but Mr. Root later withdrew that assertion (R **231-2**).

Stevens' motion for disqualification was denied by Judge Santora by written order dated November 6, **1985**, but that did not end the matter. On November **8, 1984**, Mr. Root asked for and received an emergency "informal discussion" off the record with Mr. Shafer, the prosecutor, and Judge Santora. As was immediately afterward recounted on the record by the participants, Mr. Root related more allegations which did not result in any rehearing of the disqualification denial.

Whereupon, on December **5, 1985**, Stevens filed a "Supplement to Motion to Disqualify Judge Santora," which was certified by

Mr. Root as being in "total good faith" (R 497). This "Supplement" alleged that Judge Santora had addressed the merits of the allegations of Stevens' original motion when he denied it, therefore requiring disqualification. The "Supplement" also renewed the allegation of a disqualifying friendship between Judge Santora and Mr. Forbes and, through an attached affidavit, added further details. Mr. Root's affidavit recounted how an attorney whom he declined to identify had told him that Judge Santora and Mr. Forbes used to meet weekly for drinks at the end of the day and once went with friends to a ranch for a weekend (R 501-2). Mr. Root also named an attorney who told him that several years before that he had seen Judge Santora at a social function at Mr. Forbes' house and had otherwise several times seem them having drinks together.

John Forbes, Stevens' trial counsel, was deposed before the post-conviction relief hearing (R 1-145). Mr. Forbes was also the main witness at the hearing, which began November 9, 1984 and also continued at the end of that day to January 23 to 25, 1985. Testifying for Stevens were: Cecil Snellgrove, the author of the PSI report; Robert Dillinger, Stevens' expert witness in criminal law; Martha Sue Register, a former secretary for Mr. Forbes; Henry Coxe, an Assistant State Attorney on the Stevens case at trial; Derrick Wayne Dedmon, the polygraph examiner; James Lester Parmenter, a detective in the original case; Rufus Stevens; and, as mitigation witnesses, Elizabeth Netherby, Stevens aunt, and

Jeanne Allen, a neighborhood friend. James Lester Parmenter, and Henry Coxe also testified as State witnesses. The testimony will not be described here but will be discussed at pertinent points of argument.

Judge Santora found that Stevens had received a fair trial with a just result and had not shown that trial counsel's representation was below the standards of Strickland v. Washington, **466** U.S. **1267, 82** L.Ed.2d **864, 104** S.Ct. **2052 (1984).** He found John Forbes' testimony to have been credible against the conflicting testimony of Stevens. Judge Santora found that Mr. Forbes had exhibited a very high level of advocacy, substantially higher than that constitutionally required. He also found that the evidence supporting Stevens conviction was overwhelming and no prejudice to him was shown, his attacks being essentially hindsight and second guessing (R **629-38).**

Judge Santora made additional findings addressing the specific legal and factual claims by Stevens. For the sake of brevity and clairty, those will be omitted here and referred to in the course of argument,

SUMMARY OF ARGUMENT

ISSUE I

The appellant's motion for disqualification was prompted by a desire to judge-shop. It is pursued vigorously here on appeal in order to discredit the trial counsel, John Forbes, and undermine confidence in Judge Santora's findings and decision. However, the motion had no merit whatever.

Stevens' motion fails on procedural and substantive grounds Contrary to case law, it relies on hearsay allegations and the truth of those allegations is not sworn to. The affidavits raising those allegations are from the defendant and his counsel. Traditionally, affidavits were barred from the defendant and his kin or counsel, but that principle is of uncertain standing today due to a statutory repeal. It may still be in effect though as a matter of case law. The ethical principle against attorneys testifying as witnesses and the certification of good faith requirement both support the traditional principle as well.

Even at that, the allegations of the motion are insufficient as a matter of law to prompt disqualification. Neither friendship between a judge and an attorney nor clemency opposition are valid cause for disqualification. Judge Santora's treatment of the motion was proper and he did not address its factual merits when he denied it. The other allegations against Mr. Forbes and

Judge Santora that are made in Stevens' argument on this issue are also without merit.

ISSUE II

Mr. Forbes provided effective assistance of counsel at trial in the six particulars challenged by Stevens.

The admission of Nathan Hamilton's testimony was a well-reasoned choice based on trial strategy within the range of effective assistance of counsel. There can not have been any prejudice either because the evidence of guilt was so strong.

The Payton claim urged by Stevens could not have been raised at the time of trial. Counsel is not ineffective for failing to anticipate changes in law.

Mr. Forbes impeached Hamilton's testimony, but did so selectively in order to use Hamilton to diminish Stevens' culpability by shifting blame to Engle. Mr. Forbes' tactics were a choice based on his goal of trying to save Stevens life at sentencing even if the chances of conviction were marginally increased by Hamilton's testimony. Mr. Forbes' tactics are not error because they were a reasoned choice of counsel as a matter of trial strategy.

The jury instruction disputed by Stevens were not objected to by Mr. Forbes in the hope that it would confuse the jury to Stevens' benefit. The instructions could have had that effect so

that choice was reasonable. Since the instructions, when viewed on the facts of this case, could not have been read to presume premeditation, there can not have been prejudice either,

There was no discovery violation in Stevens' claims. There can be no error by counsel where the purported objection would have been spurious.

Stevens does not show Mr. Forbes' to have been deficient in any particular.

ISSUE III

Stevens does not demonstrate any error by counsel.

Mr. Forbes had no basis on which to argue again immediately before formal sentencing. Neither did he have any basis on which to reply to the State's penalty phase brief, which was in effect a reply to the jury life recommendation.

Stevens' asserted Bruton objection could not have been raised at sentencing. Bruton would not have blocked the Hamilton testimony then due to its indicia of reliability.

The psychiatric report was constitutionally admissible then at sentencing and would be now because it was prepared pursuant to a defense claim of an insanity defense. Stevens had no right to a preliminary defense psychiatric exam. There was no basis on which to object to the psychiatric exam report.

The mitigating evidence claimed now would have been of little aid to Stevens and could have hurt him. Mr. Forbes' strategy exploiting jury sympathy was sucessful in getting a life recommendation even though that recommendation was overridden and affirmed.

Mr. Forbes made effective use of September Jinks' testimony to develop sympathy for Stevens. Again, his strategy was successful and is not subject to reproach,

The claimed **PSI** report inaccuracies were minor and of no consequence. Mr. Forbes also feared the discovery of new evidence of criminal activity by Stevens if the minor inaccuracies were pressed for correction.

ISSUE IV

Stevens was made aware of his **PSI** and psychiatric exam reports, according to Mr. Forbes' testimony and Judge Santora's finding. His claim is now procedurally barred and barred as a change in law not of retroactive application,

ISSUE V

The origin of the dull knife that Stevens apparently used during the murder was disclosed to Mr. Forbes, Judge Santora found that, and the evidence is conclusive that Mr. Forbes was informed as the trial transcript shows he knew of its origin. Moreover, no Brady violation can be shown even under Stevens' assumed facts.

ISSUE VI

No error was committed in refusing payment for the claimed expenses and fees. There was no colorable claim presented, and hence no right to even reimbursement for expenses. Volunteer counsel also in effect ousted State-provided counsel. The supposed additional mitigation witnesses would have been of no aid and their travel expenses were therefore properly denied. Stevens' legal expert was of no aid either. Moreover, he was really there to assist Stevens' counsel in the hearing rather than as a genuine expert.

ISSUES VII, VIII, IX, AND X

These issues are all barred by procedural default.

ARGUMENT

ISSUE I

JUDGE SANTORA PROPERLY DENIED THE MOTION TO DISQUALIFY AND WAS NOT BIASED IN HIS CONDUCT OF THE HEARING OR IN HIS DECISION (Restated).

A. Introduction

The foundation of Stevens' argument on this point is two of the initial grounds which were stated in his pre-hearing motion for disqualification: Judge Santora and Stevens' trial counsel were friends, and Judge Santora wrote a letter opposing Stevens' clemency request. Not only are those original contentions fiercely argued here, but Stevens has also added new allegations against Judge Santora which were not properly raised in the trial court. Stevens argues that Judge Santora, through his opposition to clemency and his description of Stevens' first ground of disqualification (friendship) as "rubbish", created an intolerable adversary atmosphere between Stevens and himself, requiring disqualification on that basis if no other. Finally, Stevens attacks Judge Santora's rulings throughout the post-conviction relief hearing and his decision itself as demonstrating an adversarial and prejudicial desire to aid Forbes, whom Stevens depicts not just as Judge Santora's friend, but also as a drunken, perjurous, incompetent.

These strenuously argued allegations are so much sound and fury but are of no substance. Judge Santora's denial of Stevens'

motion for disqualification was correct. The motion and its three initial supporting affidavits, one by Stevens and one each from his two counsel, as well as the supplemental affidavit by his counsel, were all invalid and raised no allegations sufficient to prompt disqualification. Worse, the terms of the motion and the irregular and self-serving nature of the supporting affidavits suggest a motive of judge-shopping with ouster of the incumbent, Judge Santora, as the first step. Even at that, Judge Santora did not create an adversary atmosphere with Stevens or express any bias or prejudice toward his cause. Finally, the new attacks that Stevens has fashioned for this appeal--essentially that Judge Santora's conduct of the post-conviction relief hearing and his decision itself demonstrated actual prejudice--are utterly without merit in law or fact. Stevens' argument on this issue requires a comprehensive reply lest it in any sense undermine confidence in the integrity of Judge Santora's decision.

STEVENS' MOTION FOR DISQUALIFICATION

In his motion for disqualification, Stevens originally raised four grounds for disqualification: that Judge Santora had urged denial of executive clemency for Stevens; that in 1979, in Stevens' original sentencing, Judge Santora had considered impermissible information and could not now rule fairly on Stevens' motion for post-conviction relief; that due to friendship with

John Forbes, Stevens' trial counsel, Judge Santora could not rule fairly on Stevens' impending attack on Mr. Forbes' conduct of Stevens' defense; and, finally, that Judge Santora would be a material witness at the hearing on the motion for post-conviction relief. The motion was certified by Stevens' counsel as being in "total good faith." Fortunately, before the hearing, Stevens abandoned his improper plans to call Judge Santora as a material witness and has here abandoned the meritless argument that he could not disregard supposedly impermissible information.

Motions to disqualify can sometimes be close and troubling questions for the courts. In Caleffe v. Vitale, 488 So.2d 627 (Fla. 4th DCA 1986), the court observed that:

> The tough cases approach the fine line between a party's attempt to "judge shop," and a party's genuine concern that his or her case may not be fairly heard.

Id. at 628.

Stevens' motion for disqualification was not one of those tough cases. It was a blatant attempt at judge-shopping though the use of irregular defendant and counsel affidavits, swearing to adverse opinions about Judge Santora's fairness and to hearsay but not to the truth of the allegations, and on grounds that were completely without merit as a matter of law.

The motion also sought intervention into the prospective re-assignment process because Stevens' counsel had been told that:

> a motion to disqualify would probably

> cause Stevens to go from "the frying pan into the fire" with respect to the judge who would then hear his case. What was astounding was that each of the lawyers Root spoke to <u>independently</u> told him that Stevens' case would almost definitely be reassigned to one of two other Circuit judges: Chief Judge Clifford B. Shepard or Judge R. Hudson Olliff. Root was told that Stevens would be worse off with either of those two judges.

(R 219).

Judge Olliff was also criticized for his jury overrides, and the motion remarked that his "pronounced unfairness" had been commented on in <u>Barclay v. Florida</u>, **463** U.S. **939, 77** L.Ed.2d **1134, 103** S.Ct. **3418 (1983).** What Stevens' motion neglected to mention was that in <u>Barclay</u> the Supreme Court actually upheld Florida's jury override in general on Judge Olliff's override in that case. The criticism of Judge Olliff came only in Justice Marshall's dissenting opinion.

Stevens called for random assignment because:

> The need for a random re-selection is particularly great in this situation. First, the disqualification of Judge Santora upon the motion of Stevens' New York lawyer may well cause a desire for retaliation by Judge Santora and/or other Circuit Judges. (For instance, judges might well say something like the following: "Who do these bleeding heart New York lawyers think they are coming down here claiming that one of our finest judges is prejudiced?") Second, this case has had great notoriety in Jacksonville, arousing the ire of the community including Judge Santora (see, e.g.,

> Exhibit A) [the clemency letter]. If the substituted judge is selected by the Chief Judge or by any other non-random system, the selection is subject to the influence of Judge Santora, the other Circuit Judges and anyone else who has the ear of the selector. The potential for unfairness is tremendous. At the very least, the appearance of unfairness and partiality cannot be avoided if any non-random selection process is employed.

(R 219-20).

Stevens also suggested that he would be willing to consider the exclusion of particular judges "upon being informed of the reasons they should not be included in the pool" (R 221).

Stevens' bombast and invidious attacks on Judge Santora should not be allowed to obscure the real purpose of his motion for disqualification: judge shopping. Let us turn though to the legal merits of his motion and arguments.

Motions to disqualify under the statutory procedure can be tricky creatures. They are founded on allegations against the trial judge raised by way of supporting affidavits. The affidavit must swear to direct knowledge and to the truth of facts, based upon which the affiant believes that the movant would not receive a fair hearing at the hands of the particular judge. The motion is not resolved on the truth of the allegations but on the legal sufficiency of the motion. Legal sufficiency has two aspects: the procedure or form of the motion and its supporting affidavits, and whether the substance of the

allegations requires disqualification. A failing on either count leads to denial of the motion as legally insufficient.

Cases in which disqualification or recusal is ordered but the statutory procedure was not followed must be distinquished. The statutory disqualification procedure and its attendant case law provide the method for proving an off-the-record reason for disqualification, When the reason for disqualification appears on the record, the formal requirements born of statute need not be met, See, e.g., Irwin v. Marko, 417 So.2d 1108 (Fla. 4th DCA 1982); Pistorino v. Ferguson, 386 So.2d 65 (Fla. 3d DCA 1980); State v. Steele, 348 So.2d 398 (Fla. 3d DCA 1977). In this case, Stevens relied on the statutory procedure for establishing two off-the-record grounds for disqualification and must be held to the requirements of that procedure as to those two grounds and any others that are not on the record. Livingston v. State, 441 So.2d 1083 (Fla. 1983).

There are special proprieties in the trial court's handling of motions to disqualify. A trial judge that addresses the truth of the allegations against him disqualifies himself by doing so. E.g., Bundy v. Rudd, 366 So.2d 440 (Fla. 1978). The sense of that principle is that in addressing the allegations, the trial judge descends to become an adversary of the moving party. However, judges who do not have valid cause for disqualification are obliged not to disqualify themselves even if they risk per-

sonal embarrassment in remaining on the case; similarily, judge-shopping is disapproved, and apparent judge-shopping has in years past been suggested by this Court as a reason for denial of a motion for disqualification. State v. Atkinson, 156 So. 726 (Fla. 1934), at 729-30.

With the truth of the allegations in support of disqualification not a proper subject for inquiry, the procedural requirements become especially important in guarding the integrity of such motions. As this Court observed, a primary purpose of the traditional statutory disqualification procedure is:

> . . . to prevent the disqualification process from being abused for the purposes of judge-shopping, delay, or some other reason not related to providing for the fairness and impartiality of the proceeding.

Livingston v. State, supra, at 1086.

In practice, it is the procedural requirements that safeguard against those abuses.

Stevens' motion to disqualify is defective in form and inadequate in substance. In blunt terms, what Stevens asked in his original motion was that Judge Santora disqualify himself due to the opinions of the defendant and his counsel that Judge Santora was prejudiced and biased due to his opposition to clemency and a supposed friendship with Mr. Forbes, a friendship that they know of only by hearsay and do not even swear to as

true. As to the friendship allegation, the affidavits supporting the motion suffer three fatal defects in form: they are not sworn to direct knowledge of the friendship and to the truth of its existence, only to hearsay information about it, and the affidavits are from the defendant and his counsel. As for Judge Santora's opposition to clemency, the affidavits do swear to direct knowledge and truth, but again, they are fatally defective as they are from the defendant and his counsel. After discussing these defects and their importance, we will turn to the legal adequacy of the original allegations.

Although the formal irregularities of the affidavits were not argued in the trial court, they are valid grounds on which to uphold its ruling against the disqualification motion. Discussion of these formal defects is also appropriate because of their magnitude and the risk that silence could be seen as judicial approval or indifference. There is also uncertainty in the law whether, due to change in statute, affidavits are still barred from the defendant and his kin or counsel. After discussing these aspects, we will examine the other allegations Stevens raised in the trial court and here on appeal.

To begin with, the affidavits are invalid to support the allegation of a friendship between Judge Santora and Mr. Forbes because none of the affidavits state that the affiant has direct knowledge of that friendship and knows it to exit. The affiants

supporting Stevens' motion simply related what they had been told of the supposed friendship. This Court has ruled that such "information and belief" affidavits are legally insufficient to support disqualification; affidavits in support of a motion for qualification must be sworn to direct knowledge of facts demonstrating the allegation and to the allegation itself as true. Hahn v. Frederick, 66 So.2d 823 (Fla. 1953). The affidavits relied on as the foundation of Stevens' motion do not meet those requirements and are correspondingly invalid. The motion is therefore legally insufficient as to friendship as a basis for disqualification. As to clemency opposition, the affidavits are correct in this particular as they do swear to direct knowledge and the truth of the matter.

The rule against information and belief affidavits as the foundation for judicial disqualification is a sound and essential one and should be applied here. Swearing that one has heard certain gossip does not mean the gossip is true. In most any other proceeding, such affidavits would be laughed out of court: and such testimony by a witness in court would almost always be stricken as rank hearsay. However, in a judicial disqualification proceeding, the truth of the allegations may not be contested or even addressed, and such affidavits are therefore virtually immune to inquiry. Absent the principle of Hahn v. Frederick, supra, courthouse gossip against a judge could be solemny sworn to as having been heard and then form the basis for

disqualification.

The hearing below gives a clear example of the unreliability of courthouse gossip. At one point Stevens' counsel confronted Mr. Forbes with allegations that he had resigned as an Assistant Public Defender due an affair with the wife of a defendant. To Mr. Forbes' denial was later added the denial and thundering indignation of State Attorney Austin, who had been the Public Defender at the time of Mr. Fobes' service as an Assistant. As Mr. Austin recalled, Mr. Forbes was not the target of those allegations and had served without any complaint. Another Assistant Public Defender was accused of soliciting sexual favors from the wife of a defendant, but investigation proved the accusation baseless. Stevens' counsel retreated, saying that he had only asked the question based on information from someone who had heard such an accusation against Mr. Forbes (T 366-75). We are left to wonder whether the informant for that accusation was the same informant for the accusations against Judge Santora. Certainly he is accused on no sounder basis than was Mr. Forbes but has the handicap of not being able to respond to the truth of Stevens' allegations.

That Mr. Forbes is quoted as asserting a friendship with Judge Santora, or an unnamed source is repeated as knowing of incidents of such a friendship, or a named source is recounted as saying that Judge Santora went to a party at Mr. Forbes' house,

does not mean such hearsay upon hearsay allegations are true. If we are to take them as true, they should at least be sworn to as true by someone with direct knowledge of the friendship and who swears that the friendship exists. Judges have enough burdens as it is without accepting as true all the friendships, failings, and prejudices that gossip, braggodoccio, and suspicion attribute to them. But there is even more at fault with the affidavits to Stevens' motion.

There is a traditional rule of long-standing in Florida law that disqualification affidavits are prohibited from the defendant and his kin and counsel. Livingston v. State, supra, at 1087; Kah v. Clark, 419 So.2d 1189 (Fla. 1st DCA 1982). Their opinion of a judge's neutrality and account of the facts against it can only be suspect and self-serving. Disqualification affidavits have therefore traditionally been barred from those most likely to abuse the legal force and virtual immunity from truth-testing that such affidavits enjoy.

Absent such a rule, with the difficulties inherent in perjury prosecutions and the shield of the Fifth Amendment, it seems unlikely that even perjury in counsel or defendant and kin disqualification affidavits can be exposed and punished, let alone that exaggeration or bad faith would suffer much risk. Indeed, unscrupulous counsel and defendants would have an advantage, being able to use self-made, self-serving affidavits

to oust incumbent judges whom they appraise as philosophically unfavorable compared to the likely replacement judge. And what of the judge who is the target of such an attack on his fitness for a case? Even where bad faith is indicated, a judge would have no recourse that would not seem retaliatory and cast doubt on his own fitness for that reason if no other.

Conversely, the traditional rule is the better course of practice for the sake of the defendant and his counsel. When the defendant or his kin or counsel put their own affidavits forward for purposes of disqualification, they become virtual accusers of the trial judge and risk developing an antagonism with the court. Notably, by a judge-made exception not in the original statute, the traditional procedure allowed counsel or defendant affidavits in the compelling circumstance when they were virtually the only witnesses to a private, off-record expression of prejudice or bias by the judge. Layne v. Grossman, 430 So.2d 525 (Fla. 3d DCA 1983). The traditional disqualification rule thus both shielded against abuses and made mandatory the more prudent course of action for defendants and their counsel. Based on statute and refined by case law, it represented an intelligent and tested balance.

As much wisdom as there is in the traditional rule barring disqualification affidavits of the defendant or his kin or counsel, it is of uncertain validity today. Although of long-

standing and with much expression in the case law, the principle originated in statutory law, and in **1983,** it was amended out of the relevant statute. Ch. **83-260,** Laws of Florida. However, that need not settle the question, at least not in this Court. Judicial disqualification is fundamentally of judicial, not legislative provenance, as courts have a direct and independent obligation and power to assure due process and due appearances. It is ultimately for this Court to say whether the traditional rule against disqualification affidavits by defendants and their kin and counsel remains viable as a matter of case law and judicial rule notwithstanding statutory repeal. As the matter has not been addressed before, this case may be a good occasion to do so. The traditional ban on disqualification affidavits by defendants and their kin or counsel should be endorsed again and applied here.

Ethical principles lend further support to a ban on affidavits by counsel. Due to the inconsistent obligations, in only rare instances--and usually not in contested matters--may an attorney ethically be both a witness and advocate. Fla. Code P. Res. EC 5-9, 5-10; DR 5-102, 5-105. Does an attorney making an affidavit as a witness in support of *a* motion to disqualify state the facts in a neutral and objective fashion, thereby infringing his obligation as an advocate to zealously represent his client, or does he swear to the best account he can for his client with much argument and, if need be, a generous veiw of the boundary

between truth and perjury? Moreover, since the opinion of the affiant that the movant will not receive a neutral hearing is also required, counsel who wish to judge-shop are virtually invited to indulge their fears and suspicious, to believe whatever is in their client's interest to believe no matter how ill-founded their information is. Even where, as here, we ought not to suspect that counsel have been anything less than truthful as to both their information and opinions, we can surmise that their opinion of Judge Santora's fairness is based on their perception of their client's interest.

Moreover, Fla.R.Crim.P. 3.230(b) requires that a motion to disqualify include "a certificate of counsel of record that the motion is made in good faith." It makes no sense that, as here, counsel should certify their own affidavits as being in good faith, even "total good faith"; and the good faith of disqualification affidavits by counsel is inherently suspect. A certificate of good faith by counsel implies the exercise of independent professional judgment, an uncertain proposition where fundamental duties as adocate and witness are at odds. Thus, the implications of ethical principles and the present court rule are also that counsel can not put forward their own affidavits in support of a motion to disqualify.

The two original allegations are thus both legally insufficient due to the formal defects in the supporting affidavits. Formal, procedural, defects are alone enough to find

a motion to disqualify legally insufficient. Although such defects will be overlooked where they are minor or the truth and weight of the allegation is manifest, neither is the case here. Let us now summarize the defects of the supporting affidavits as they apply to each allegation.

The clemency opposition allegation was sworn to as true and on the basis of direct knowledge of it: indeed, Judge Santora's letter was attached to the motion (R **234**). Nevertheless, the clemency opposition allegation is legally insufficient because it is based on the affidavits of Stevens and his counsel. The affiant must state not just the facts in the proper fashion, but also his opinion that the judge is biased or prejudiced. Crosby v. State, **97** So.2d 181 (Fla. 1957), at 183-4. Even where, as with Judge Santora's clemency opposition, we do not doubt the facts of it, we still can not have confidence in the opinions of the defendant and his counsel that those facts mean the judge is biased or prejudiced. The clemency opposition allegation here out to be rejected as legally insufficient because it is based on affidavits from Stevens and his counsel.

The friendship allegation suffers even more serious defects. It is based on affidavits that do not swear to direct knowledge and to the truth of the allegation, both of which defects are fatal. Worse, the affiants who swear to this hearsay with no direct knowledge or assurance of its truth are Stevens

and his counsel, who are of the opinion that Judge Santora is biased and prejudiced because of his supposed friendship. In brief, the friendship allegation has three fatal defects in form: the affidavits are not sworn to direct knowledge; they are not sworn to the truth of the allegation; and they are from persons barred from giving such affidavits by a traditional rule of law, supported by ethical principles and the implications of the present court rule.

Having pointed out the formal defects of Stevens' motion for disqualification, let us now evaluate the substance of both allegations. The Court may be unpersuaded by the arguments as to form, may wish assurance that the allegations are without merit, or, like the trial court, may prefer the simpler approach of dealing only with the merits.

As to friendship, assuming, as we should at this juncture, that the particulars of the original allegation are true and Mr. Forbes called Judge Santora "my good buddy," it does not directly establish that there is a friendship between them. The comment could easily refer only to a smooth professional relationship. Even if, for purposes of convenience, we add in here all the particulars of the later "informal discussion" and "Supplement" and say that Stevens has shown that a friendship exits, it still does not suffice to prompt Judge Santora's disqualification. The rule of law is that friendship between an attorney and a judge

does not disqualify the judge. It is not a listed ground for disqualification under Fla. R.Crim.P. 3.230(a) and case law is of the same effect.

Dickenson v. Parks, **140** So. **459** (Fla. 1932), is the only authority relied on by Stevens in which disqualification was ordered in the context of friendship between a judge and lawyer, in that instance with the lawyer as a witness. More than friendship was involved, however. In Dickenson, the judge and attorney were not only close friends, but had been law partners for many years in practice under a firm name composed of their two last names. Law partnership is, among other things, a busines relationship, and hence more than even a close friendship.

Moreover, the same judge had previously disqualified himself in a separate case after a writ had issued against him from the Florida Supreme Court, the reason for that previous disqualification being the same judge's acknowledged prejudice against the brother of the petitioner in Dickenson. **As** it was, the Dickenson Court required disqualification but did not state which facts it relied upon. Consequently, that case must be limited to its facts and one must resort to other cases for an understanding of the general principle. Dispositive case law holds that friendship between a judge and an attorney does not work a disqualification upon the judge.

In Ervin v. Collins, 85 So.2d 833 (Fla. 1956), this Court

appraised the legal sufficiency of allegations that the Governor as a party in a case and a Justice were "'close, intimate, and personal friends and have been for many years'" and that two other Justices were likewise each a "strong personal and political friend of the Governor," Id. at 833. At a time when the procedure was for a panel of unaffected Justices to rule on the sufficiency of such allegations and resolve them as a matter of disqualification, this Court found that friendship was legally insufficient as a ground for disqualification.

Ruling on a similar argument for disqualification due to friendship, the court in Orlowitz v. Orlowitz, 121 So.2d 55 (Fla. 3d DCA 1960), rejected that position as "unfounded and unrealistic". More recently, in In Re Estate of Carlton, 378 So.2d 1212 (Fla. 1980), Justice Overton, guided by relevant opinions on judicial ethics, declined to voluntarily recuse himself due to friendship with an attorney connected to that case. Carlton has been applied to uphold denial of disqualification where the law partner of an expert witness had represented the judge. Kopplow and Flynn v. Trudell, 445 So.2d 1065 (Fla. 3d DCA 1984).

In short, binding precedents where the issue was squarely presented hold that friendship with an attorney does not disqualify a judge from hearing a case. Stevens does not even have a colorable argument on this point.

Stevens' other allegation from his original motion is that

Judge Santora was prejudiced against him as indicated by his opposition to clemency. Relying on United States v. Diaz, 797 F.2d 99 (2nd Cir. 1986), Stevens concludes that an extra-judicial expression of opinion is valid cause for disqualification, and, in this case, that Judge Santora's letter against clemency similarly disqualified him. Stevens' reading of Diaz is too exapnsive and his reliance on it ill-founded.

In Diaz, the defendant had won reversal of one of four drug law convictions, the dispositive issue having been the legality of the charge underlying that one conviction. The remand to the trial court for resentencing allowed latitute to increase the sentences on the three valid convictions. Within a few days of his reversal, the trial judge discussed the issue on appeal with the United States Attorney. He then wrote one of his Sentators about that point of law and included a copy of the adverse decision. Representing that the United States Attorney agreed, the judge urged that appropriate legislation he introduced to change the point of law relied on by the Court of Appeals. Derogatory comments about the defendant were included. The United States Attorney shortly afterward wrote the judge that the Senator had attempted legislative amendment but failed. Daiz was thereafter resentenced to more than double his original sentences. On appeal, he won a remand to another judge for resentencing because the impartiality of the original judge might reasonably be questioned in light of his correspondence with the

United States Attorney and with the Senator.

The Diaz court did not state a general principle or explain which particular facts it relied on. Therefore, the case must be limited to its particular facts: the involvement with the United States Attorney, derogatory comments about that particular defendant, the swiftness of the judge's reaction to reversal, the more than doubling of the sentence, and not just that the judge wrote a letter expressing his opinion. More important, in this case Judge Santora's letter and opinion on clemency was solicited by the Florida Parole and Probation Commission as part of its normal clemency process. In that sense, Judge Santora's opposition to clemency cannot be called extra-judicial because it was expressed as a direct adjunct to his judicial duties in this case. Diaz is therefore inapposite due to its radically different facts, let alone that it is under the federal disqualification rule.

Other considerations suggest further distinctions and lead directly to the conclusion that Judge Santora ought not to be disqualified for opposing clemency. Judge Santora's letter was but a reiteration of his original sentence of death. If, as this Court has ruled, it is proper, even preferred, that the same trial judge who presided over the trial also hear any 3.850 motion for post-conviction relief even in cases in which the judge has imposed the death sentence, it ought not to be objectionable that the judge also give his opinion as to

clemency, the usual intermediary step. Jones v. State, 411 So.2d 165 (Fla. 1982), at 167.

Moreover, as Judge Santora pointed out, clemency is an act of grace from the Executive branch of government. It is not a form of relief comparable to a 3.850 motion. To sentence a man to death and then say that he "deserved to die" when asked if he deserves clemency does not mean that a judge doing so will be prejudiced on a 3.850 motion. Judge Santora's opposition to clemency meant that he was opposed to clemency as a matter of Steven's deserts; it did not mean that he would have a bias or prejudice as to the legal claims Stevens might later raise when seeking post-conviction relief. A judge's duty often requires that those who are in truth guilty and deserve punishment will escape it through his rulings. There is no showing that Judge Santora is in any respect deficient in understanding that point. Judge Santora's opposition to clemency for Stevens therefore did not disqualify him from hearing Stevens' 3.850 motion.

In sum, Stevens' original motion for disqualification fails because of the irregularities of the supporting affidavits, and also fails on the merits. Stevens' original motion was legally insufficient to prompt disqualification and was properly rejected by the trial court.

STEVENS' FURTHER EFFORTS AT DISQUALIFICATION OF JUDGE SANTORA

The original motion was but the opening salvo on Judge Santora's fitness for this case. Two days after the original motion for disqualification was denied, Stevens renewed his motion via an emergency "informal discussion" with the judge and prosecutor (T 147-50). Fortunately, it was shortly afterward recounted for the record. Judge Santora declined to indulge in a rehearing of the motion. Stevens then filed a "Supplement to Motion To Disqualify" with another attached affidavit from counsel (R 497-502).

These efforts by Stevens were highly irregular. It is possible to draw conflicting inferences as to why Stevens chose this odd procedure. The "informal discussion" off the record can be viewed as a means to allow Judge Santora to withdraw gracefully without the embarrassment of disqualification, or as an effort to embrass or intimidate him into doing so without the effort showing on the record. The subsequent "Supplement" was apparently an elaboration for purposes of appellate review since whatever Stevens' strategy was, its goal of disqualification or recusal without a record of the means being made had failed. Since no definite conclusions as to Stevens' motive seem possible, let us pass to the question of whether his "informal discussion" and "Supplement" raised anything justiciable and preserved it for review here.

Even at best, if viewed as an effort at rehearing, the "informal discussion" and "Supplement" were improper as being essentially reargument. This Court disapproves of reargument in the masquerade of rehearing, especially so in motions for disqualification where there is a substantial risk that such efforts will in themselves create antagonism with the court. Department of Revenue v. Golder, 332 So.2d 1 (Fla. 1975); Department of Revenue v. Leadership Housing, 322 So.2d 7 (Fla. 1975). The procedure crafted by Stevens in this case is strikingly similar to that which helped lead the trial judge to disqualification in Bundy v. Rudd, supra, but in this instance, the judge did not allow himself to be compromised. Judge Santora's refusal to indulge Stevens with a rehearing was not only proper, but also indicates his understanding of that risk and determination to avoid being drawn into an adversarial role by Stevens.

Viewed even as a new motion for disqualification on new information, the "informal discussion" and "Supplement" were utterly inadequate as a procedure to raise new grounds. The "hearing" was under false colors ("informal discussion") and therefore was not a proper hearing. The "motion" (the "Supplment") was made and filed afterwards and never set for proper hearing. The "motion" (the "Supplement") also fails on its face as it had only one affidavit, not two as required by rule and statute--and again, the affidavit was of the invalid counsel-swears-to-gossip type. The substance of the allegations

was, as before, friendship, but new details were added: Judge Santora used to regularly have drinks with Mr. Forbes at his office, had been seen in a public place drinking together, and Judge Santora was seen at a party at Mr. Forbes' home. Judge Santora issued no comment or ruling on the "Supplement." Its allegations have already been shown to be legally insufficient.

However, one new argument for disqualification was raised in the "Supplement" which should be considered here, Stevens contended that Judge Santora improperly addressed the truth of the matter when he ruled that the friendship allegation was "Rubbish! Absolutely no merit" (R 250). Although that comment is likely also an accurate appraisal of the truth of Stevens' allegation, in context, it was clearly as to that allegation's legal merit and an expression of judical annoyance with an apparent effort at judge-shopping.

Judges are removed for violating the rule against addressing the factual merits of disqualification allegation only where it is clear they have done so. In Bundy v. Rudd, supra, by written order the trial judge explained and controverted the specific factual allegations of the motion for disqualification, doing so again when he denied a motion for reconsideration. In Gieseke v. Moriarty, 471 So.2d 80 (Fla. 4th DCA 1985), the judge also controverted the specific asserted grounds for recusal. In Management Corp. of America v. Grossman, 396 So.2d 1169 (Fla. 3d DCA 1981), at 1169, the judge "went to great lengths to refute

the charge that she was prejudiced against counsel for the petitioners." Here, Judge Santora did not controvert Stevens' factual allegations and devoted only a page to his findings against the original motion.

Granted, Judge Santora no doubt gave at least passing thought to the nature of his relationship with Mr. Forbes, but the rule of law at issue here does not proscribe that. What it prohibits is for the trial judge to address the truth of the allegations, the purpose being to prevent the Court from becoming an adversary to the moving party. Judge Santora kept to the rule and its purpose, not only in ruling on the original motion, but also under the greater provocation of Stevens' later efforts at disqualification through "informal discussion" arranged under false pretences so as to raise and re-argue the friendship allegation. Judge Santora refused to indulge this irregular and improper effort at rehearing an allegation that he had already emphatically rejected. Judge Santora also ignored Stevens' later written "Supplement" and did not rule or even comment on it.

Judge Santora was the target of a fierce assault on his fairness. Stevens and his counsel chose to rely on their own self serving affidavits in a transparent attempt to judge shop. They even tried to get a rehearing under false pretences. Yet Judge Santora kept to his proper role. His conduct under fire was impeccable.

OTHER ALLEGATIONS AGAINST JOHN FORBES AND JUDGE SANTORA

There are only three aspects of the disqualification issue which are genuinely available for review here: the two original allegations of friendship and opposition to clemency, and Judge Santora's handling of the motion. Stevens, however, has raised in his initial brief a plethora of other allegations against Mr. Forbes and Judge Santora. Some of these allegations were not preserved below, none are cognizable under this point on appeal, some are trivial, and all are without merit. The ones with any significance will be addressed now.

(a)

Mr. Forbes and Stevens' counsel as "adversaries"

Stevens represents that:

> Forbes for his part had made it clear to Stevens' post-conviction counsel that he would do everything in his power to have Stevens' motion on that ground denied.
>
> Forbes told Stevens' counsel that they were adversaries (R 226, T **240**). He refused to meet with defense counsel before the hearing on the post-conviction motion and stated that he would do nothing to assist the defense (Ibid).

App. Brief at 14.

This attack on Mr. Forbes was gratuitous in that it has no bearing on the issue of disqualification. It is answered here rather than leave a false impression undisturbed. Stevens has,

shall we say, mis-stated the matter. Here is what Mr. Forbes testified to, at the very record reference Stevens relies on:

> Q. [Mr. Root] Didn't you tell me in the course of that conversation that we were adversaries?
> A. [Mr. Forbes] That may have been one of the nicer words that I used.
>
> Q. Didn't you also tell me in that conversation, to the effect, I told you what I would do if you made this type of allegations, I don't intend to help you at all?
>
> A. I think you are taking things out of context there a little.
>
> Q. Could you put them in context for the Court.
>
> A. Absolutely. When you called me, and I don't remember when it was, but if you filed the motion back in March and that's whenever the first conversation call, I believe you called me and told me your name and you were an attorney in New York and you were representing my former client, Mr. Stevens, and began to presume that I would make certain admissions about my action or nonaction as a lawyer to help support you a motion alleging that I was incompetent, and I took great personal offense at that and I still do, so yes, sir, my comments were taken in that context.
>
> Q. And when we talked back in March when we first talked about this subject, you in fact told me that not only that you took personal offense but that you saw this as a matter of your reputation in the community in Jacksonville, did you not, and that you said that there might well be press on this which would hurt your reputation, both as an attorney and a citizen of Jacksonville?

A. Mr. Root, for you information, and I apologize if I am somewhat emotional about this, but I am hoping this is my last year of practicing law. I intend to retire, so my reputation as an attorney, although it is important to me, my reputation as a person is important to me.

What is important to me is that the truth of the matter be brought forth in this cause and only the truth, and I did not perceive from you, sir, an intent to arrive at the truth but at something other in order to accomplish a result, and that's been the basis of all my discussions with you, and if you try to imply something different, then you misunderstood my words, sir.

(T 240-1).

Mr. Forbes kept to this account under later questioning:

Q [by Mr. Root] Well, let me ask you when you say I said something to you about your working with us, you took that as a suggestion that I was asking you to lie?

[colloquy ommittedl

THE WITNESS: Mr. Root, you are an extremely intelligent man. I have known that from the very first moment I talked to you, and you were not un-clever enough to say things which are going to ever harm you I think perma-nently, but the gist in my opinion of what you said in that first telephone conversation was that we cooperate, that we work together to assist Rufus, and the way you said it and the drafting of the motions and complaints was that you assumed that I would cooperate with you, adhere and conform to my testimony to what was necessary

to accomplish the purpose of your motion.

(T 542-44).

Yes, Mr. Forbes saw Stevens' counsel as adversaries in that he would not make certain admissions they requested in order to aid Stevens' cause but would testify to the truth as he saw it. Mr. Forbes' response to this effort to coax untruthful admissions out of him to aid Stevens was sincere and correct. He had apparently been ignorant until then that collusive and untruthful admissions of error are often made by trial counsel in post-conviction proceedings. (T 537).

(b)

Appearance of partiality

Stevens contends that: "at the very least, Judge Santora's friendship created the appearance of partiality and thus required the judge's recusal. . . " App. Brief, at 18. Nonsense. Since friendship is not a basis for disqualification, the appearance of it, even to a suspicious and hostile party, does not create grounds for recusal. E.g., In Re Estate of Carlton, supra. Indeed, with Stevens' motion resting on spurious grounds and being such a blatant attempt at judge-shopping, Judge Santora was duty bound not to disqualify or recuse himself, even though to do so would have avoided the fierce attacks that have been made against him.

(c)

3.850 motion as reproach to Judge Santora's choice of Mr. Forbes as trial counsel

Stevens alleges:

> The judge stated during colloguy that he had handpicked orbes to defend Stevens (T 116-17, T 1002-03). He stated that he had deliberately picked Forbes because he thought that he would do a good job and Forbes' talents would avoid there being a subsequent contention of ineffective assistance of counsel. Judge Santora thereby demonstrated that he viewed Stevens' claims of ineffectiveness as a reproach to his own judgment in having chosen to appoint Forbes. The judge thus had an additional incentive to reject defendant's claims, as he later did.

App. Brief, at **19-20.**

When judges appoint counsel to represent indigents, they are obliged to choose competent counsel. For Judge Santora to say that he viewed Mr. Forbes as competent when he appointed him is only to say that he was conscious of his duty. Even when at the close of a trial the judge says that trial counsel "'did a remarkable job. . . the best you possibly could,'" the judge is not disqualified from hearing a subsequent **3.850** motion. Jones V. State, **446** So.2d **1059** (Fla. 1984). Stevens' allegation that Judge Santora "demonstrated" that he veiwed Stevens' claims against Mr. Forbes as a reproach to his judgement is pure invention.

(d)

Denial of proffer and introduction of drinking and malpractice evidence

Stevens attacks Judge Santora for prohibiting the introduction of evidence of a drinking problem by Mr. Forbes and of malpractice claims against him. In one instance, of what Stevens calls a proffer, his counsel admitted he did not have a witness who could testify under oath but wanted to repeat for the record as a proffer what counsel had been told by someone who was not even identified! More to the point, Stevens seems to believe, contrary to Strickland v. Washington, that an ineffectiveness of counsel claim means that the trial counsel is to be put on trial. That is not so. Counsel's personal life and professional or public failings in other contexts are not germane. Ineffective assistance of counsel claims are not like car wreck cases or d.u.i. prosecutions, the cases Stevens has relied on to try to introduce evidence of alcohol use at other times. The two central questions in an ineffective assistance of counsel claim are whether counsel erred and whether that error was prejudicial.

In Fowler v. Parratt, 682 F.2d 746 (11th Cir. 1982), counsel had been found by the Nebraska Supreme Court to be incompetent to practice law due to alcoholism, The trial counsel even admitted to alcoholic blackouts during the time he represented that client, but testified that his alcoholism nevertheless did not

affect his representation. The Court of Appeals upheld the District Court's ruling that a showing of alcoholism has no value to show counsel was ineffective due to his testimony that alcohol did not affect his representation. Id., at 750.

Similarly, in Clark v. Louisiana State Penitentiary, 520 F.Supp. 1046 (M.D. La. 1981), counsel's testimony that alcohol and marital problems did not affect his representation was accepted. The court also noted with approval that:

> The assistant district attorney who prosecuted the case and the experienced trial judge who presided at the trial confirmed Mr. Wilkinson's observations.

Id., at 1050.

This case is the same as Fowler and Clark. Mr. Forbes testified that alcohol did not affect his representation of Stevens (T 410; 538-9). It is pure bombast for Stevens to call Mr. Forbes' straightforward denial "weak". Mr. Forbes clearly, directly denied on two occasions that alcohol affected his representation of Stevens. He testified to moderate and controlled alcohol use. Confirmation by State Attorney Austin and Judge Santora that there was no sign of alcohol use by Mr. Forbes during the trial gives further assurance, as it did in Clark, that trial counsel was truthful in his denial. Similarly, evidence of malpractice claims against Mr. Forbes in other cases is irrelevant to Stevens' claim in this case that Mr. Forbes was ineffective.

Judge Santora was correct as a matter of law to deny admission to evidence of alcohol use and malpractice claims. Moreover, denial of the proffer of such evidence was not just not error, but it was the better course of action. There was no basis whatever for the introduction of such evidence, and denial of the proffers helped to spare Mr. Forbes the unjustified embarrassment they would cause. It is not that Mr. Forbes deserved or got protection as a supposed friend of Judge Santora; rather, trial counsel in general should--must--have protection against unwarranted attacks.

If trial counsel who represent criminal defendants are routinely worked over by post-conviction counsel on the basis of their private conduct and representation in other cases, then attorneys will avoid the grief of representing criminal defendants, especially indigents and in death cases. See Griffin v. State, **447** So.2d **875** (Fla. 1984), at **879.** The pool of attorneys available to represent criminal defendants will diminish in size and quality. As the United States Supreme Court has observed:

> The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to

> serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.
>
> * * *
>
> . . . . Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Strickland v. Washington, supra, at 2066, 2070.

Where, as here, the proffered evidence is legally irrelevant and embarrassing to trial counsel, the better course is to deny the proffer and thereby spare trial counsel unwarranted personal attacks. Denial of a proffer is not error where there would have been no basis on which to make an admission of such evidence. If proffer is generally denied in such circumstances, trial counsel can have some assurance that only the quality of their representation will be inquired into, not real or imagined personal failings and their conduct in other unrelated cases. Post-conviction counsel will also lose the ability to make such attacks for the bad faith purpose of intimidating trial counsel into false confessions of error, or punishing them if they do not confess error as suggested.

(e)

Judicial rulings as basis of disqualification

As a matter of law, Stevens can not use Judge Santora's rulings as a basis for disqualification. Judge Santora's rulings on the admission of evidence of alcohol use and malpractice in other cases were, as we have seen, entirely correct. His findings will be defended in the course of the discussion of other issues. But as a strict rule of law, Judge Santora's rulings can not be a basis for disqualification. Tafero v. State, 403 So.2d 355 (Fla. 1981), at 361; Suarey v. State, 115 So. 519 (Fla. 1928), at 525. Stevens resort to attacks on his rulings to help establish disqualification is in contravention of this principle.

The reason for the rule is obvious. If a judge's rulings could be the basis for disqualification, then few contested proceedings would ever be absent disqualification motions. There are times when a judge's conduct of a trial or hearing may be such as to indicate bias on prejudice, but the disqualification procedure is flexible enough to allow such conduct to be attacked. In Sikes v. Seaboard Coast Line Railroad Company, 429 So.2d 1216 (Fla. 1st DCA 1983), for example, the petitioner had an attorney and retired judge observe the conduct of the trial and then put forward their affidavits as the basis for a sucessful petition for disqualification. Stevens did not like Judge Santora, did not like his rulings, did not like his

findings, and did not like his decision, but Stevens' own interets and prejudice can not validate his effort at disqualification, Haddock v. State, 192 So. 87 (Fla. 1939), at 807. In addition to appealing specific rulings, Stevens had a procedure available to test Judge Santora's conduct of the hearing. Stevens failed to avail himself of the procedure and can not be heard now of Judge Santora's conduct of the hearing.

(f)

Comments by Judge Santora

Stevens also makes derogatory reference to Judge Santora's statement during the hearing that he had not seen any sign of a drinking problem by Mr. Forbes during the trial, and that if he had, he would have acted. Stevens has no cause for complaint.

Judge Santora's comment is validated by several considerations. First, it was a declaration that he was aware of his duty not to let a criminal trial proceed with a defense counsel impaired by alcohol. Second, as in Clark, supra, "unsworn" comments at hearing by the trial judge and even the prosecution can be given credence to help establish the truth of trial counsel's testimony that his representation was not impaired by alcohol. After all, they were there at the original trial, and often post-conviction counsel was not. There is little point in allowing, even encouraging the original trial judge to hear the post-conviction hearing if he must pretend that he is ignorant of

counsel's performance at the original trial. Third, Judge Santora's comment was a helpful warning to Stevens that he was making no progress toward establishing that alcohol had impaired Mr. Forbes' performance at trial. Such explanatory comments on the state of the evidence in a bench proceeding are not considered evidence or expressions of prejudice. City of Palatka v. Frederick, **174** So. 826 **(1937).**

CONCLUDING OBSERVATIONS ON DISQUALIFICATION

Stevens' strenuous attacks on Judge Santora are all baseless as to their legal merits but not without purpose. The ouster of Judge Santora was the necessary first step. The next was to have a random re-assignment within the entire pool of circuit judges rather than a normal re-assignment to one of the other criminal division judges. When Judge Santora ruled against disqualification, an improper rehearing was sought under the false pretenses of an "informal discussion." When that was rejected, an irregular "Supplement" to the original motion for disqualification was filed, but completely ignored by the Court.

Now, on appeal, Stevens has resurrected his old allegations and added a series of new ones. With the exception of the meritless attack on Judge Santora's disqualification order as addressing the merits, all the new allegations are procedurally barred on appeal for failure to raise them below. Some, like Judge Santora's evidentiary rulings could be raised as points on

appeal but not as arguments for disqualification,

Stevens seems to have three purposes in pursuing his meritless issue of disqualification so vigorously. First, lightning could strike, and as meritless as it is, his other issues are meritless as well, so it does not detract from them. After all, the more issues raised, the more hope of one of them suceeding in the confusion. Second, the disqualification issue is meritless, but it has potential for undermining the integrity of Judge Santora's findings and decision against Stevens. As a matter of law, judicial decisions and findings of fact come to the appellate courts with a presumption of correctness. The resolution of disputed factual issues and appraisal of the credibility of witnesses are uniquely the province of the trial courts and can not be overturned if they are supported by substantial competent evidence, Since Stevens has numerous claims in this appeal in which Judge Santora's findings of fact are against him and are supported by substantial competent evidence, he can not hope to overturn those findings so as to prevail on those issues. Third, the disqualification issue is Stevens' pretext for a vicious series of attacks on Mr. Forbes' character and truthfulness. Since his testimony was the largest part of the hearing below and his effectiveness is at issue, those attacks on him are a way of attacking his credibility, of arguing a trial court issue before this appellate court,

Although Stevens has not directly attacked the presumption of correctness that Judge Santora's decision and findings of fact in favor of Mr. Forbes' effectiveness carry, he apparently hopes to undermine the practical effect of that presumption through his unremitting attacks on Judge Santora and Mr. Forbes. This Court should adamantly reject Stevens effort. It is contrary to estblished principles of law and, if rewarded or indulged, would countenance an unhealthy new development in post-conviction practice.

The central inquiry in post-conviction proceedings is the effectiveness of trial counsel. In a few years we have seen bad faith confession of error by trial counsel become acceptable in some quarters. We now see trial counsel slammed again and again not for errors in representation but for alleged personal failings and supposed errors in other cases. Worse, we also see the trial judge who heard the 3.850 motion targeted as the first step in judge-shopping and, here, on appeal, virtually put on trial. Should Stevens' irregular procedures and vicious attacks meet with any encouragement or success, we will have crossed a dangerous new threshold.

Judge Santora's denial of the motion for disqualification should be affirmed.

ISSUE II

MR. FORBES PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL TO STEVENS AT TRIAL (Restated).

Stevens makes a series of six allegations against Mr. Forbes of particular deficiencies at trial that denied Stevens effective assistance of counsel. These allegations are all without merit.

Since this Court is already familiar with Strickland v. Washington, supra, only a brief reminder of its principles is necessary. An ineffective assistance of counsel claim requires a particularized showing of two elements: that counsel made errors so serious that counsel was not functioning as guaranteed by the Sixth Amendment; and that the deficient performance deprived the defendant of a fair trial, a trial whose result is reliable. Id, at 2064. Judicial scrutiny of counsel's performance is to be "highly deferential," his performance viewed in terms of the choices possible at the time and not by hindsight. Id., 2065. Counsel is "strongly persumed" to have rendered adequate assistance. Id., 2066. Prejudice must be shown in terms of a reasonable probability that but for counsel's unprofessional errors, the result would have been different. A reasonable probability is one sufficient to undermine confidence in the result. Id., 2068. Additional exposition of Strickland v. Washington, supra, will be made as appropriate. We shall now look at each of Stevens' allegations in detail.

(1)

Admission of Hamilton's testimony

Stevens contends that Mr. Forbes was ineffective in that he did not object to certain incriminating hearsay testimony at trial. The key testimony about which this argument is made is testimony by Nathan Hamilton, recalling an admission by Engle, Stevens' co-defendant. That statement, Stevens claims, was essential to the State's case against him but, along with other hearsay, was subject to exclusion under the rule of Bruton v. United States, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1672 (1968). Stevens finds Mr. Forbes' testimony that he chose not to object as a matter of trial strategy to be not only not credible, but a perjurous fabrication.

Stevens' argument here is ill-founded and unpersuasive. Bruton would not necessarily have barred Hamilton's testimony, although the Florida Evidence Code would have. Yet there was other strong evidence linking Stevens to the crime, so even the exclusion of Hamilton's testimony would not have been particularly helpful for Stevens in avoiding conviction. As it was, Hamilton's statement had aspects congruent with Mr. Forbes' declared trial strategy of emphasizing Engle's role so so as to diminish Stevens' culpability. Mr. Forbes testified that he made a decision not to contest the admission of Hamilton's testimony because he viewed it as aiding that strategy. Mr. Forbes' testimony is credible in itself and benefits from a strong presumption

in its favor. More significantly, his stated trial strategy is plausible and within the range of comptent representation. Neither is prejudice shown as there was evidence linking Stevens to the crime. Let us consider these points in detail.

In Bruton, a hearsay confession by a co-defendant was held inadmissible as violative of the confrontation clause. Bruton though does not absolutely bar hearsay admissions and confessions by other parties, only those which lack sufficient "indicia of reliability" so as to stand principally on the credibility of the witness offering the statement. See Ohio v. Roberts, **448** U.S. **56, 65** L.Ed.2d **597, 100** S.Ct. **2531 (1980);** Dutton v. Evans, **400** U.S. **74, 27** L.Ed.2d 213, 91 S.Ct. 210 **(1970).** Notwithstanding Bruton, the Federal Evidence Code allows the admission of inculpatory third party hearsay statements under certain well-defined circumstances. United States v. Harrell, **788** F.2d 1524 (11th Cir. 1986), at **1526-7.** Hamilton's testimony would most likely have been allowed under federal evidence law in spite of Bruton due to the indicia of reliability that it bears. Stevens' argument is therefore mistaken in its reliance on Bruton, and his hectoring of Mr. Forbes for less than instant and complete recall of that case was pointless and ill-informed.

As mentioned in the preliminary discussion of Strickland v. Washington, supra, there is a "strong presumption" in favor of the competency of counsel. In any particular instance of supposed ineffectiveness, counsel's testimony that he chose to act

in furtherance of a trial strategy virtually forecloses a finding of ineffectiveness. Stevens' effort to discredit Mr. Forbes' account of his strategy and so help rebut this presumption was fierce but misguided. Stevens urged that Bruton would have prevented the admission of Hamilton's account of Engle's statement: Mr. Forbes' recalled that Bruton would probably not have prevented admission of the statement. Stevens was wrong about Bruton; Mr. Forbes was right. Premised as it was on a misreading of Bruton, Stevens' effort at discrediting Mr. Forbes' testimony collapses. Stevens' shrill accusation of perjury is ridiculous.

Yet Stevens is correct that Hamilton's statement would not have been admissible if Mr. Forbes had objected. The Florida Evidence Code, which went into effect shortly before Stevens' trial, prohibits the admission against the accused of confessions and other inculpatory statements of co-defendants. Walker v. State, 426 So.2d 1180 (Fla. 5th DCA 1983); Sec. 90.804(2)(c), Fla. Ev. Code: In Re Florida Evidence Code, 372 So.2d 1369 (Fla. 1979). Stevens is wrong about Bruton but right that Hamilton's testimony would have been inadmissible if objection had been made, but right for the wrong reason. The rest of his argument here lacks even that consolation.

Granted that the Hamilton statement could have been barred by an objection relying on the Florida Evidence Code, was it an error for Mr. Forbes not to object? Is the strategy Mr. Forbes described a plausible one? His explanation was that in light of

Stevens' confession and other evidence linking him to the crime, Stevens was likely to be convicted (T 299-302 420-1; **526-8)**. At Stevens' direction, Mr. Forbes contested the State's case but put his principal effort toward keeping Stevens out of the electric chair by an acquittal based on noncapacity or nonpredemeditation, by a verdict of less than first degree murder, or by a jury recommendation of life,

Mr. Forbes viewed Hamilton's testimony as generally helpful toward that end. To the extent that it further inculpated Stevens in the crime, it was cumulative of Stevens' confession and other evidence, and so did not substantially aid the State's prospects of conviction, More important, Hamilton's retelling of Engle's admission corroborated the elements of Stevens' confession which portrayed him in a limited role. The compelling goal of reducing Stevens' chances of a death sentence was served because he was described as "crazy", not in control. The greater culpability thus accrued to Engle as the more rational actor, the one in charge.

Stevens characterizes Mr. Forbes' account of his trial strategy as a recent fabrication because at trial he tried to impeach Hamilton's testimony. Stevens' counsel never asked Mr. Forbes why he did so, and Stevens can not now fairly criticize Mr. Forbes on that point. It is also easy enough to see why Mr. Forbes would let Hamilton's testimony in but then try to impeach it. By letting Hamilton's testimony in, Stevens got the benefit

of its potential to help diminish his culpability and avoid a death sentence; by impeaching Hamilton selectively, Mr. Forbes diminished his benefit to the State toward gaining the conviction.

Mr. Forbes was skillful about it. In his cross-examination he established that: Hamilton's wife, who was also Stevens' sister, was leaving Hamilton for another man around the time he implicated Stevens to the police; Hamilton feared Engle more than Stevens; Engle had a love affair with his knife, which was a principal murder weapon; that Engle would not let anyone else but Hamilton ever handle the knife; that Engle claimed to extensive arson and robbery convictions and had committed two robberies in Jacksonville: and that Stevens was a heavy drinker, an alcoholic (TT 582-8). Hamilton's testimony was selectively impeached, and the other points tended to diminish Stevens' culpability while increasing Engle's. At the hearing below, Stevens' counsel criticized Mr. Forbes for not reading the trial transcript in preparation for his testimony. Yet how could Mr. Forbes' account of his trial strategy be a fabrication where it coincides so closely with his conduct at trial, but Mr. Forbes had not read the trail transcript in years? Forbes' credibilty in recalling his trial strategy easily withstands Stevens' attack.

Stevens' splenetic attacks on Mr. Forbes' credibility are beside the point in two senses. First, the trial judge appraised the credibility of the witnesses and found in favor of Mr. Forbes'

credibility, It is not the task of this Court to re-appraise Mr. Forbes' credibility. Only if the trial judge's findings can be shown to be without support in the evidence or based on an incorrect application of the law will they be overturned.

Second, even if trial counsel is not available to explain his conduct, can't recall what his strategy was, or his account is unclear, it does not mean that he should be thought to have erred. The heavy deference that counsel's trial stategy is entitled to may or may not be overcome in those circumstances. But even if it is, there is a broad range of representation that is considered effective, Often, we do not know why trial counsel chose a particular course, but if a plausible reason can be imputed for the course chosen, it can not be held that error was committed. Or, even if counsel's reasoning was poor, his choice, the action he took, may not have been an error if it was within the range of competent representation.

Indeed, even where, as Stevens says happended here, counsel "fabricates" a reason for poorly thought out action at trial, if the reason is a plausible strategy it may validate his choice in an objective sense. It would be quite possible for a court to find in a case that counsel's reason for his conduct was invented to make himself look better and so not entitled to heavy deference as a matter of trial strategy, but to then go on to find that the conduct was within the range of effective representation. Conversely, a court could find that counsel's

testimony about his trial strategy is believed but the choice was so poor that it is not entitled to deference and was beyond the range of effective representation,

The point as to Mr. Forbes is not that his trial choices are to be accepted as competent representation even if his account of his strategy is not believed. No, in this particular dispute and every other, his account of his trial choices was truthful and accepted as truthful by the trial court. Rather, Stevens' general approach to the post-conviction proceeding was misguided in that he attacked Mr. Forbes at every turn instead of intensively analyzing the choices he made in the context of the alternatives which were available at the time. Misguided, we must say, but also suggestive of Stevens' inability to demonstrate error and prejudice in the results.

In sum, Stevens' attack fails for three independantly sufficient reasons. First, the admission of Hamilton's testimony was a strategic decision by counsel. His explanation of that strategy was credible, and more important, found credible by the court, a finding supported by substantial evidence, Second, consent to the admission of Hamilton's testimony was within the range of competent representation. It served a discernable and plausible trial strategy. Third, no prejudice has been shown. Since the evidence linking Stevens to the murder was already compelling, Hamilton's testimony added little additional strength to the State's prospcts for conviction, Mr. Forbes' representation was effective in this particular.

(2)

Payton issue

Mr. Forbes, Stevens contends, should have objected to his arrest on Fourth Amendment grounds and sought suppression of his ensuing confession. Acknowledging that it was not until Payton v. New York, **445** U.S. 573, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980), that the point of law he relies on was established, Stevens nevertheless urges that Mr. Forbes should have raised the issue at trial as a logical extension of Coolidge v. New Hampshire, **403** U.S. **443,** 29 L.Ed.2d **564,** 91 S.Ct. 2022 (1971). Stevens also boldly asserts, de hors the record, that:

> . . . it was well-known among criminal defense attorneys in Duval County in 1979--and for several years previously --that the United States Constitution required a warrant before a person was arresting in his home in the absence of consent or exigent circumstances.

App. Brief, at **56.**

Stevens goes on to cite several cases to illustrate this assertion.

Stevens' argument here is, to use the term of art, rubbish. The criminal defense bar of Duval County does not determine what the law is. What Stevens is really saying is that Mr. Forbes should have raised the Fourth Amendment claim even though it was invalid under then-existing case law, that the argument should have been made on a speculative basis, validated now by hindsight.

The rule of law here is clear and of no escape: counsel is not ineffective for failing to raise every conceivable issue. E.g., Magill v. State, 457 So.2d 1367 (Fla. 1984), at 1370; Griffin v. Wainwright, 760 F.2d 1505 (11th Cir. 1985), at 1513; and Goins v. Lane, 787 F.2d 248 (7th Cir. 1986), at 254. Moreover,

> 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.

Strickland v. Washington, supra, at 2065.

The Florida case law prevailing at the time of Stevens' trail in 1979 held contrary to the Fourth Amendment argument aginst warrantless home arrests. In State v. Perez, 277 So.2d 778 (Fla. 1973), cert. denied, 414 U.S. 1064, 38 L.Ed.2d 468, 94 S.Ct. 570 (1973), this Court upheld an arrest in a defendant's home against a Fourth Amendment claim based on Coolidge. The very cases that Stevens has cited to show such claims were being raised in other cases at the time of his trial also show that such claims were being rejected until Payton was announced. In 1978, relying on Perez, the First District Court of Appeal upheld a warrantless arrest in a defendant's home. Bush v. State, 355 So.2d 488 (Fla. 1st DCA 1978). Only after Payton was announced did Florida case law reject such arrests. Brown v. State, 392 So.2d 280 (Fla. 1st DCA 1980).

Granted, the Fourth Amendment argument against such arrests was being made. In one instance even, a trial court acting before Payton disregarded then-binding case law and suppressed the results of a warrantless home arrest and was affirmed on a State appeal because Payton had been announced in the interim. State v. Santamaria, 385 So.2d 1130 (Fla. 1st DCA 1980). But Santamaria's good fortune due to a change of law does not mean that Mr. Forbes was ineffective for not anticipating the same change of law on behalf of Stevens. E.g., Muhammad v. State, 426 So.2d 533 (Fla. 1982), at 538; (". . . appellant's argument places upon defense lawyers the duty of anticipating changes in law and is without merit"). See also Steinhorst v. Wainwright, 477 So.2d 539 (Fla. 1985), at 540. In Antone v. State, 410 So.2d 157 (Fla. 1982), at 163, this Court rejected just such a claim of ineffective assistance of counsel premised on failure to raise a Payton claim before Payton was issued. Since a Payton argument would have been procedurally barred and Payton was not retroactive, neither was Mr. Forbes at fault for not raising it on the direct appeal, which came after Payton was announced.

Mr. Forbes simply can not be found to have erred in failing to anticipate the Payton decision by asserting a Fourth Amendment claim that was invalid under then-dispositive case law. Mr. Forbes is not to be judged by hindsight.

(3)

Impeachment of Hamilton's testimony

Stevens asserts that Mr. Forbes' explanation of his trial strategy in not objection to the introduction of Hamilton's testimony was an ad hoc fabrication to avoid embarrassment. The substance of this assertion has already been disposed of. The only new element Stevens adds here is an allegation that a $5,000 reward that Hamilton was supposedly seeking should have been used to impeach him. Mr. Forbes' testified that he did not wish to bar Hamilton's testimony but instead sought to use it to shift the principal blame to Engle and away from Stevens so as to get a life recommendation. Consequently, Mr. Forbes did not use the lure of reward as a basis for impeachment since it would not have served his broader purpose.

Moreover, we can readily see that use of the lure of reward to impeach Hamilton would have been positively harmful to Stevens since it would have contradicted the defense theory. The defense theory was that Engle killed Kathy Tolin. Hamilton's testimony was that Engle had admitted the murder. A general attack on Hamilton's credibility on the basis of lure of reward would thus have harmed the defense's own credibility because it would have been inconsistent with the defense theory that Engle had done the murder. The course pursued by Mr. Forbes was to impeach Hamilton only as his testimony bore against Stevens. Mr. Forbes developed the point that Hamilton was married to Stevens' sister and she

was on the verge of leaving him for another man at the time Hamilton first told the police Stevens was implicated in the crime. Mr. Forbes' account of his trial strategy is again vindicated on close examination and again, there is no room for argument here because the trial court's findings are supported by substantial evidence and not subject to being overturned

(4)

Jury instruction

Stevens urges that Mr. Forbes erred in allowing a jury instruction that presumed pre-meditation in violation of Sandstrom v. Montana, 442 U.S. 510 **(1979).**

The contested instruction was:

> As you have previously been informed, the Indictment specifically charges the defendant with killing the alleged victim with a premeditated design to effect the death of the alleged victim, even if you do not find the defendant had such a premeditated design but you find beyond a reasonable doubt that the defendant killed the victim while engaged in the perpetration or in the attempt to perpetrate the crime of arson, involuntry sexual battery, kidnapping, robbery, burglary, aircraft piracy or unlawful throwing, placing or discharging of a destructive device or bomb, the requisite premeditation is presumed to exist as a matter of law and you would be justified in returing a verdict of guilty of the degree of homicide proven beyond a reasonable doubt.

(TT 1178-9).

Since the instruction was not one which could have come into operation on the facts of this case, no prejudice can be shown.

The facts as consistently presented at trial through evidence and argument were that the murder of Kathy Tolin came after the robbery and rapes had been completed, the murder being done to eliminate her as a witness. Mr. Forbes testified and the trial court found that he allowed the instruction because of the possibility it might confuse the jury to Stevens' benefit. That is quite plausible, since if the jury had taken that instruction as the only basis for premeditation, it could not have found premeditation on the facts of the Stevens' case.

Stevens' claim here fails as the trial court found it to have been the deliberate choice of counsel as a matter of trial strategy. No error by counsel has been shown. The claim also fails because no prejudice can be shown either.

(5)

Failure to object to purported discovery violation

Stevens argues here that Mr. Forbes should have raised a Richardson claim at trial in contesting the introduction of a knife that was found underneath Stevens' trailer. That knife was dull and broken-pointed and corresponded to markings on Kathy Tolin's back. It tied Stevens directly to her murder.

Stevens' claim here is spurious. On what basis should Mr. Forbes be found to have erred? On April 9, 1979, Mr. Forbes filed his demand for discovery. It included a query for "any tangible papers or objects which were obtained from or belonged to the accused" (RDA 7). On May 5, 1979, the State amended its

initial response to include "One knife" (RDA 20).

Where is the State's supposed discovery violation? Stevens would have us believe now that the State was supposed to provide the details of how the knife was acquired by the State. Not so. The defense query did not ask for that and the State was not obliged to provide it in response. And, as Judge Santora found, there can not have been any prejudice which would have justified Richardson sanctions. The State's response disclosing the knife came on May 5, 1979, and trial was had begining July 19, 1979, ample time for the defense to investigate the origin and circumstances under which the knife was obtained by the State.

Stevens has no basis on which to claim ineffective assistance of counsel. There was no discovery violation at the time, and the circumstances were such that no sanctions would have been imposed had there been a violation, so no prejudice can be shown. Mr. Forbes can not be found to have erred where the objection he supposedly should have made would have been phony.

(6)

Mr. Forbes' preparation for trial

Stevens contends here that Mr. Forbes failed to adequately prepare for trial. His particulars are: objections at trial by the State and a chastisement from Judge Santora for exceeding the scope of direct examination of a State witness; that Mr. Forbes should have gotten a transcript of the Engle trial and, if he had, he would have made a Bruton objection to Hamilton's

testimony; and that Mr. Forbes' destruction of his handwritten notes on the case and "perjury" about the circumstances shows that he had something to hide.

Again, Stevens' arguments here are spurious. So what if Mr. Forbes exceeded the scope of direct examination and drew a not unusual trial-is-not-the-place-to-conduct-discovery admonition? That does not show he was lax in his discovery or otherwise erred. It shows he was admonished for exceeding the scope of direct examination. Judge Santora in the post-conviction proceeding knew well enough what he had meant at trial, and if he had meant then that Mr. Forbes was not prepared, there is no good reason to suppose he would not have given credence to Stevens' position. In fact, he rejected it.

More important, what did Mr. Forbes supposedly miss through inadequate preparation? As it is, Stevens does not even attempt to show that Mr. Forbes missed anything in his examination of that witness. In this instance, as in so many others, Stevens has not shown any particularized error by Mr. Forbes. Instead, Stevens has taken a minor admonition from the bench during trial and repeated it out of context in order to make Mr. Forbes "look bad", hoping to leave an impression of ineffectiveness even where, in truth, he has no basis on which to establish it.

Stevens' second contention here is that if Mr. Forbes was inadequate in preparation for not ordering a transcipt of the Engle trial. Again, Stevens does not show any particularized

failing. Mr. Forbes attended parts of Engle's trial and apparently consulted with his counsel. Stevens urges that if Mr. Forbes had ordered a transcipt of Engle's trial, he would have made a Bruton objection to Hamilton's testimony. This supposes that Mr. Forbes was unaware of what Hamilton would say. Yet Mr. Forbes was aware of Hamilton's impending testimony through a deposition of him. Although that deposition was not made part of the record, it was referred to in the hearing and Mr. Forbes' attendance at the deposition was remarked on.

Of course, Stevens is really just rearguing his advocacy of a Bruton objection to Hamilton's testimony. Mr. Forbes testified that he chose as a matter of trial strategy not to object to the introduction of Hamilton's testimony. That point has already been discussed. It adds nothing to Stevens' position for him to also urge that Stevens should have ordered a transcipt of Engle's trial. Stevens' argument is without merit.

Finally, Mr. Forbes' destruction of his notes is not a material issue. Yes, Mr. Forbes did contradict himself. At deposition, in the context of what began as a discussion of time records, Mr. Forbes said that he kept few notes at trial (T 15-18). Later, when pressed at hearing, Mr. Forbes elaborated that he took notes on his investigation and in preparation for trial, but that he purged and discarded them after the oral argument on direct appeal (T **261; 269-72).** It was his normal custom to discard his handwritten notes at the conclusion of a case. Judge

Santora explicitly noted the discrepancy, if any, with Mr. Forbes' prior testimony (T **264**). Asked by Stevens' counsel to explain the apparent contradiction with his deposition testimony, Mr. Forbes explained that his recollection had been strengthened by the questioning in deposition (T **265**).

Contrary to Stevens' view, not every contradiction in testimony which a witness attributes to a lapse in memory is proof of perjury. Judge Santora no doubt gave the matter whatever consideration he thought it deserved. His appraisal of Mr. Forbes' credibility is not subject to review here, More important, there is no material issue. So what if Mr. Forbes destroyed his notes and initially forgot what notes he had taken five years before? Where is Mr. Forbes' error in representation of Stevens? In destroying his notes? He was under no obligation to preserve them. Is it proof of error to have less than immediate recall of note-taking practices in a case five years before? Of course not.

What is really at work here is another example of Stevens' approach in regarding Mr. Forbes on trial and Judge Santora as his unindicated co-conspirator, Stevens takes flimsy material as the basis for the wildest charges he can imagine. Not satisfied with damning Mr. Forbes as a perjurer, he even tars Judge Santora: "Forbes' blatant perjury manifests just how much he thought he could get away with in front of Judge Santora" (App. Brief, at **73**). Stevens and his counsel may be so purblind as to believe Mr. Forbes committed perjury, but any prosecutor they

took this accusation to would laugh them out of his office. The real point of this wild perjury accusation is to again smear Mr. Forbes and get another shot in at Judge Santora.

ISSUE III

MR. FORBES' REPRESENTATION OF STEVENS AT THE SENTENCING HEARING WAS EFFECTIVE (Restated).

Again, Stevens argues ineffective assistance of counsel in a series of supposed particulars.

(1)

Mr. Forbes' silence at the formal sentencing and failure to reply to State's brief

Stevens urges here that Mr. Forbes was ineffective for not arguing again before Judge Santora imposed sentence. That conclusion is insupportable.

The judge was of course present during the penalty phase and had heard the new evidence and argument. The judge had already heard sufficient evidence and argument to make an informed decision. What was Mr. Forbes to add for Judge Santora's benefit that he had not yet presented to the jury? At the moment of formal sentencing, Mr. Forbes already knew that Judge Santora was going to impose the death sentence. Judge Santora had had the grace to inform Mr. Forbes of his intention shortly before, no doubt so as to lessen the cruel tension of the moment of sentencing.

What was Mr. Forbes supposed to have argued to Judge Santora on Stevens' behalf in the internal between when Judge Santora had privately informed Mr. Forbes of his decision and its imposition in the formal proceeding? Formal sentencing, especially in a death case, is seldom the occasion for further argument from

counsel. Argument has already been heard, the matter taken under advisement, and the formal sentencing proceeding is but the announcement in open court of a judicial decision already arrived at.

Mr. Forbes was in a position similar to that of counsel before this Court who are told that a stay of execution has been denied and a written order and opinion will follow. Counsel in those circumstances are not obliged to try to argue again so as to attempt to avert the formal expression of this Court's decision. Neither was Mr. Forbes obliged to argue again just before sentencing in the hope that somehow, something would be said that would change the outcome already decided. As discussed below, the additional mitigating evidence urged now by Stevens is of little moment and Mr. Forbes had good reasons not to try to bring it forward in the first place. In the circumstances, all Mr. Forbes could have done was to argue again to a decision maker who had already heard argument and evidence and had made up his mind. Judge Santora would no doubt have allowed Mr. Forbes to argue some more, but it is pure unsupported speculation that the outcome would have been changed.

As for the State's penalty phase brief urging the death sentence, what would Stevens have had Mr. Forbes say in opposition to it? He urges only that Mr. Forbes should have answered the brief but does not say how, other than again to urge that the supposed omitted mitigating evidence should have been

argued. Just because the State has written a brief does not mean Stevens should have had one as well. The State and defense are in different strategic positions. With the strong standards and painstaking analysis required to justify and uphold the death penalty, the State is always under a great burden when it calls for it to be imposed, especially so after a jury recommendation of life. The State's trial court brief urging the death penalty was an effort to meet that burden. A poor defense reply to the State's brief based on insubstantial mitigating evidence would have served no purpose for Stevens but would have detracted from the weight of the jury recommendation in his favor.

Again, Stevens has not shown what the alternative course was and that it would have been better, let alone that the choice was so compelling that Mr. Forbes was ineffective for not choosing the supposed alternative. No particularized error by counsel has been shown, nor any prejudice to Stevens.

(2)

Mr. Forbes' failure to make a supposed Bruton objection

Stevens' point here is really an elaboration of his criticism of Mr. Forbes' failure to object to the introduction of Hamilton's testimony recalling Engle's admission and inculpatory statement against Stevens. As already discussed, Mr. Forbes' decision not to object was a choice made in furtherance of his trial strategy and was not error. What Stevens does here is to return to the point to say, in effect, if Hamilton's testimony

had been barred at trial on Bruton grounds, it could have been barred at the penalty phase as well and would not have turned up in the judge's death sentence order.

This argument does not hold together because it is falsely premised. Mr. Forbes could have kept Hamilton's testimony out of the guilt phase based on an Evidence Code provision but not based on Bruton.

Stevens' Bruton argument is flawed by its misreading of Bruton and related cases. Co-defendant confessions and inculpatory statements are not constitutionally barred in all circumstances. Indeed, federal evidence law allows the admission of co-defendant confessions and inculpatory statements against a defendant where there are sufficient indicia of reliability.

Unfortunately, Stevens' misreading of Bruton coincides with this Court's similar misreading in Engle v. State, 438 So.2d 803 (Fla. 1983). (". . . statements or confessions made by a co-defendant are inadmissible as evidence against defedant at the guilt phase of the trial. "Id., at 8144). Although, under Florida law, normally inadmissible evidence is allowed to be introduced in the sentencing phase, that latitude can not exceed constitutional standards. Engle v. State, supra, at 813-4; Alvord v. State, 322 So.2d 533 (Fla. 1975), at 538-9, cert. denied., 428 U.S. 923, 49 L.Ed.2d 1226, 96 S.Ct. 3234 (1976). In Engle, this Court overstated Bruton as representing a solid constitutional barrier to the introduction of co-defendant confes-

sions and inculaptory statements. That is simply not true. Bruton represents a flexible standard.

Although this Court overstated Bruton as a general proposition in Engle, the particular point at issue in Engle may have been decided correctly in the circumstances of that case. In Engle, Stevens' confession to the police was held to have been incorrectly allowed into evidence against Engle at his sentencing. Notably, under Bruton, co-defendant confessions to the police are regarded with great suspicion. In Lee v. Illinois, 476 U.S. ___, 90 L.Ed.2d 514, 106 S.Ct. ___ (1986) for example, such a confession to the police was barred as lacking sufficient indicia of reliability. The Court observed:

> This record evidence documents a reality of the criminal process, namely that once partners in a crime recognize that the "jig is up," they tend to lose any identity of interest and immediately become antagonists, rather than accomplices.
>
> * * *
>
> . . . The true danger inherent in this type of hearsay is, in fact, its selective reliability. As we have consistently recognized, a codefendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another.

Id., at 528-9.
Inculpatory statements to a companion however are more favorably

Inculpatory statements to a companion however are more favorably regarded and hence are much more likely to meet the Bruton standard. Dutton v. Evans, supra.

Stevens' potential Bruton argument would therefore have been far weaker than Engle's was. Stevens' basic premise falls. A Bruton objection to Hamilton's testimony would have been plausible, but it would almost certainly have failed, and, in light of the validating circumstances of Engle's statement to Hamilton, it would have deserved to fail. Engle's statement to Hamilton bore several indicia of reliability. It was to a close friend, It was in conditions of privacy, between them alone. Moreover, it is corroborated by physical evidence. A dull, broken-pointed knife found under Stevens' trailer corresponded to a deep bruise in Kathy Tollin's back.

By contrast, Stevens' confession to the police likely did not have sufficient indicia of reliability to withstand a Bruton challenge. It was to the police, to whom Stevens had every reason to maximize Engle's role so as to diminish his own role, Unlike Engle's statement to Hamilton, which included an admission of murder by Engle, Stevens' confession denied any blame to himself for the murder and put it all on Engle. The different circumstances would have led to the failure of a Bruton objection to Hamilton's testimony at Steven's sentencing or trial even though a Bruton objection was correctly made and ultimatley successful on Engle's behalf. It is simple-minded and ignorant of

that if what Stevens said against Engle could not be used against him at sentencing due to Bruton, then what Engle said against Stevens could not have been used against him either.

Let us suppose that Mr. Forbes had invoked the Florida Evidence Code to bar Hamilton's testimony at trial. Almost certainly, the State would have sought to introduce it in the sentencing hearing where such an objection would not have been available. Neither, as we have seen, ought Bruton to have barred that testimony. It would have been available to Judge Santora as an aggravating factor anyway. Considering Hamilton's testimony for the first time at sentencing, the jury could easily have been inclined to give it greater weight than if they had already considered it in the guilt phase, or they could have resented it having been withheld from them. Mr. Forbes' strategy of allowing Hamilton's testimony in at trial had the secondary advantage that it avoided that danger, Indeed, his strategy was sucessful in that although Stevens was convicted, the jury recommended life. Stevens' proposed alternative that he contends was the only conceivable choice would not only failed to keep Hamilton's testimony out but could well have brought him a death recommendation from the jury.

Stevens' argument here is spurious, No error has been shown, and no prejudice is possible because his Bruton objection would have failed to keep Engle's statement out of the penalty phase.

(3)

Mr. Forbes' failure to object to the psychiatric report

Stevens claims here that the psychiatric report was unconstitutional evidence in the penalty phase and should have been objected to by Mr. Forbes. Not doing so, Stevens contends, was ineffective assistance of counsel.

This argument fails because it is barred by procedural default and as a change of law. In addition, the new law does not even suggest his claim. The basic foundation for a claim here is not even present, let alone error and prejudice.

Stevens' point rests on a false proposition, that the psychiatric report was inadmissible under Estelle v. Smith, 451 U.S. 451 (1981). Not so. That case may have been retroactive, but counsel is still not ineffective for failing to anticipate changes in law; and procedural default would operate to bar such a claim if raised directly.

Moreover, Estelle v. Smith and the other cases relied on by Stevens do not bar the penalty phase use of a psychiatric exam obtained due to a guilt phase insantity defense that was abandoned before trial. Estelle v. Smith barred the penalty phase use on Fifth Amendment grounds of a psychiatric exam conducted without any waiver, request, or initiative by the defense, and without a Miranda warning before the exam. That is not the case here. The Court in Estelle v. Smith specifically distinguished those instances in which the defendant asserts an insanity

defense, and noted that several Courts of Appeal had found that in those instances a defendant could be compelled by the State to submit to an exam. Estelle v. Smith, at 370.

In Stevens' case, Mr. Forbes gave notice of intent to rely on an insanity defense. A psychiatric exam was conducted by court order and the results made available to both parties. In giving notice of that defense, Stevens waived his privilege against use of the psychiatric exam results. In Booker v. Wainwright, 703 F.2d 1251 (11th Cir. 1983), at 1257, the Court noted that Battle v. Estelle, 655 F.2d 692 (5th Cir. 1981), had left open the question whether a guilt phase waiver applied to penalty phase use of a psychiatric exam. More recently, in Riles v. McCotter, 799 F.2d 947 (5th Cir. 1986), at 953-4, the court ruled that it did. Under the facts of this case, a guilt phase waiver of privilege in a psychiatric exam, Stevens' psychiatric report could still be used against him in a penalty phase proceeding. As the Riles court observed, counsel can not be found ineffective where the underlying law does not show that a different course was possible.

As if to anticipate this reply, Stevens has represented that Mr. Forbes was ineffective for, in effect, even raising the insanity defense without first having an exclusively defense psychiatric exam first. That suggestion is not credible. Perhaps, some day, indigent defendants will have a constitutional right to a preliminary defense psychiatric exam that could be

kept confidential if it didn't prove out, but not today, and not at the time of Stevens' trial. Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985), at 528-33 (One, but only one, psychiatric exam constitutionally required),

Since the fundamental legal point is not established, Stevens has no possible argument. Mr. Forbes can not be found ineffective here on any basis and no scrutiny of his conduct on this point is necessary.

(4)

Limited mitigating evidence

Stevens maintains that Mr. Forbes failed to properly investigate mitigating evidence and prepare for the penalty phase of Stevens' trial. He alleges that Mr. Forbes took no action on Stevens' behalf, that certain additional mitigating evidence was available but not used, what was presented was not done well, and no nonstatutory mitigating evidence was developed. These assertions are not well-founded nor do they take account of Mr. Forbes' explanation, let alone rebut it.

Mr. Forbes testified that he sensed jury sympathy for Stevens and wished to move quickly to the penalty phase to take advantage of it. He did not wish to risk that reservoir of jury sympathy to diminish due to a delay between the guilt and penalty phases. Mr. Forbes choice was a matter of trial strategy based on what proved to be an accurate appraisal of the jury. That choice is not properly subject to criticism now,

Mr. Forbes considered but rejected the idea of using Stevens family as mitigation witnesses. Stevens and the family were consulted and concurred in that decision. As Mr. Forbes explained:

> Q. [By Mr. Shaferl All right. Had you spoken to members of Mr. Stevens' family?
>
> A. Yes, oh, definitely.
>
> Q. Why did you not call them at the sentencing hearing?
>
> A. In my judgment they would have been unhelpful to the--
>
> Q. Why was that?
>
> A. I rather not say.
>
> Q. Could you answer that generally perhaps if you would not rather answer specifically, answer generally. Feel comfortable answering that?
>
> A. They were--they were--there were threats made by their family towards the Court, towards the prosecutor, towards certain witnesses, and those threates were both of a verbal and a threatened physical nature, and in addition, one of them told me that they were going to go so far as to take care of the problem at the sentencing and I didn't know what the problem meant but if I recall correctly there was a discrete inquiry of members of the family and whether or not they voluntarily or what happened I don't recall, but some bullets and knives and other things were found in their possession before they were--and were taken away from them before they came in the courtroom. That and things like that and in talking to them I didn't think they would be very good witnesses.

I didn't think they could say anything that would help Rufus. I thought their testimony would have been harmful.

Q. You were asked?

A. I discussed that with the family as I recall and I think they concurred with me because I think I am right about that. I think we talked about that out in the hall in front of the courtroom number eight and there were some agreements--they all agreed with me I think at one time that--at that time that they shouldn't be called as witnesses.

Now, Rufus wasn't part of that out in the hall, of course, because he wasn't allowed out there. His family was.

Q. During the penalty phase, did you discuss with Mr. Stevens your strategy in proceeding on with the penalty phase at that point?

A. Yes, sir.

Q. And did he agree with you that that was the correct thing he wanted you to do?

A. At the time, yes, sir.

(T 531-3).

Although Stevens now urges a series of mitigating witnesses, Stevens' immediate family is not on the list, and he has not rebutted Mr. Forbes' explanation. As a reasoned choice of trial strategy, Mr. Forbes' decision is again not subject to criticism. As Strickland v. Washington points out, counsel must often make his choice at a preliminary level of investigation. More-

over, there is little point in pursuing friends and more distant relatives as mitigating witnesses where the family can not prudently be called as witnesses. Indeed, to have called such tangenital witnesses while Stevens and his family sat and watched were not called would have cast doubt on the entire mitigation enterprise. Counsel is not ineffective in calling some mitigating witnesses and not others, or none at all, where he has made a reasoned choice. Griffin v. Wainwright, **760** F.2d **1505** (11th Cir. **1985),** at **1513;** Stanley v. Zant, **697 F.2d 955** (11th Cir. **1983),** at **965.**

Let us examine the alternative elaborated by Stevens. It is to have called more distant family, friends, and a former employer in mitigating but apparently not to call the immediate family. These witnesses would then describe Stevens' harsh and poverty-stricken upbringing, and portray him as being in spite of that, of "generally kind and generous disposition" and having "a severe drinking problem." App. Brief, at **98.** Again, we are to imagine this portrayal as effective and credible to the jury in spite of Stevens' immediate family not being called but having been obviously present in the courtroom in the guilt phase, and perhaps also present in the penalty phase.

Even on its own terms, in isolation from those considerations, the supposed mitigating evidence would not have been credible and could have been dangerous to Stevens' prospects for a life recommendation. The bad childhood presentation would have

been good for sympathy but is not credible as mitigation. Stevens makes no connection between it and his brutal crime, let alone that it could excuse it, Imagine the prosecution reply: Stevens had a bad childhood like so many millions of Americans have suffered. But they are not criminals, not robbers, rapists, and murders. How does Stevens' bad childhood excuse his terrible crime? Was Kathy Tolin responsible? Her two young children have been left without a mother. Were they responsible for Stevens' bad childhood? The abused-and-troubled-but-basically-good-youth-who-went-astray theory of mitigation may be popular with college sociology departments but not with the public. A jury could readily be turned aganst a defendant who relies on such a theory of mitigation,

Neither would Stevens' supposed pleasant disposition or good deeds be very persuasive. Juries understand from their own experience that the line between good and evil runs through every human soul, that the best of us has done ill and the worst has at least some acts of kindness to his credit. Again, imagine the prosecution reply: Does Stevens say that these isolated acts of kindness excuse his brutal robbery, rape, and murder of a young mother? There would have been great risk in relying on such a flimsy theory of mitigation.

It is when we look to the particulars of testimony by Stevens' supposed mitigation witnesses that another risk becomes obvious: witnesses do not always work out as planned. Elizabith

Netherly, Stevens' aunt, testifed at the hearing that on one occasion Stevens physically fought with her son over a motorcycle, not exactly evidence of a kind and peacable disposition. Jeanne Allen, a convenience store clerk in Stevens' neighborhood, testified how he would loiter with her in the store at night giving her a sense of protection. The obvious counterpoint is that by such conduct Stevens also became familiar with the operation and traffic flow at a convenience store at night. Keeping the clerk company as an act of kindness--or a step in planning his robbery, rape, and murder of another convenience store clerk?

Jeanne Allen was also asked about Stevens drinking. She testified that Stevens was always sober when she saw him (T 220). He bought beer regularly "just like every working man does to take home" (T 222). And:

> I would say Rufus bought beer every day but did not drink and get rowdy and rough and everything like most of the fellows there in the park.

(T 223).

That is not conducive to Stevens' theory then or now that his drinking was so serious that it was a mitigating consideration. There is no reason to suppose that Stevens' other claimed witnesses who did not testify would do any better for him than those two who did testify at hearing.

Stevens' proposed alternative mitigation effort was fraught with danger for him: an unsound general theory of nonstatutory

mitigation and equivocal witnesses. Surely it was not a better choice than Mr. Forbes made.

Yet the penultimate vindication of Mr. Forbes' sentencing phase efforts on Stevens' behalf was that he got a life recommendation from the jury. With no statutory mitigating factors, and little mitigating evidence other than alcohol use, Mr. Forbes' persuaded the jury that Stevens crimes did not amount to a capital case. Judge Santora's override has already been reviewed by this Court and affirmed. That decision was correct but does not detract from Mr. Forbes' accomplishment. Without much to go on, his advocacy for Stevens persuaded the jury that Stevens did not deserve death for what ws indisputably a planned and brutal crime. Mr. Forbes was not just effective in the sense of the broad constitional standard, but he was damned effective as measured by the highest standards of the profession.

Stevens has made no showing of ineffectiveness in not calling additional mitigating witnesses. Even without them, he got a jury recommendation of life. Recently, in Porter v. State, 478 So.2d 33 (Fla. 1985), in strikingly similar circumstances, this Court rejected a claim of ineffectiveness. The post-conviction presentation of affidavits from family members and friends was found unpersuasive as mitigating evidence. This Court commented that:

> . . . Neither we nor the trial court, however, can overlook trial counsel's success in securing a jury recommenda-

> tion of life imprisonment without this material.

Id., at 35.

Indeed, so unpersuasive was such omitted mitigation evidence that this Court held such a claim was properly rejected on its face.

(5)

The testimony of September Jinks

Stevens represents that the testimony of September Jinks was inadmissible on several grounds. These supposed grounds are not persuasive and are beside the point: Mr. Forbes testified that he chose to allow that testimony in because it could be readily impeached and she could be used to build an impression of over-reaching by the State. Again, Stevens cries "fabrication."

September Jinks testified to a knifepoint rape by Stevens. Mr. Forbes did not object to her testimony but did develop through his cross-examination that she had apparently been told not to talk to him without the State being present and had been kept waiting in a courthouse law library for a time. Apparently, she had been sought for questioning by Mr. Forbes, but artfully placed out of the way by the State Attorney: not a discovery violation, but, especially to a jury, not open-handed either. She was a runaway, had slept with several other men, and had not reported the rape by Stevens except to mention it to one of the men she had slept with. She admitted to lying at first about her whereabouts the night of the rape. She described occasions when she and Stevens and others drank and smoked pot together. She

repeated Stevens' apology for the rape and his excuse that he had been drunk, The rape eventually came to police attention through a friend, not by her iniative (TT 1213-36).

At hearing, Mr. Forbes recalled how he did not find September Jinks a credible witness for the State and he believed the jury had not found her credible either (T 467-8). Mr. Forbes believed that the apparent discredit that her testimony brought to the State helped to persuade the jury to recommend life for Stevens.

Mr. Forbes' account is credible. Through September Jinks, he was able to make it seem that the State was trying to push Stevens into the electric chair on the testimony of a witness of doubtful credibility who had been hidden from the defense. In most any death case, the State has a severe burden to meet. Often the jury recommendation is finely balanced. Because of the terrible duty that a death recommendation represents even in the strongest of cases, jurors instinctively shrink from it. If the State appears too eager, too bloodthirsty, anything less than absolutely scrupulous, it can tip the balance against a death recommendation.

Mr. Forbes had defended in a number of capital murder cases and knew the psychology of juries (T 506-8). His cross-examination of September Jinks was skillful. His appraisal that it was in part responsible for the life recommendation is credible and not subject to attack here. The trial court conclusively found

in favor of Mr. Forbes' account. And again, his strategy was successful. Mr. Forbes was not ineffective.

(6)

PSI report inaccuracies

Stevens' attack here is on the **PSI** report. Mr. Forbes testified that he was aware of some inaccuracies due to his discussions with Stevens but did not see them as significant. There is no basis shown on which that assessment can be considered wrong. Stevens did work in a slaughterhouse, and the reference in the **PSI** is brief. The **PSI** was hardly a hatchet job. Law enforcement is routinely consulted in **PSI** reports, and, contrary to Stevens' assumption, they do not always thirst for the death penalty. Mr. Forbes was interviewed by the **PSI** author and spoke in Stevens' behalf. Had Mr, Forbes referred the **PSI** author to Stevens' family, it could have done Stevens great harm.

The **PSI** has not been shown to be inaccurate in any significant respect. No prejudice is shown. No error is shown either, since the alternative course proposed of correcting a minor point and bringing other persons into the **PSI** report on Stevens behalf has not been shown to be better or even helpful, let alone that Mr. Forbes' was not effective. And again, Mr. Forbes was found effective on this point by the trial court, and there is no basis on which to overturn that finding,

As for Mr. Forbes' supposed failure to investigate Stevens' own criminal record, he was aware of some inacurracies in the **PSI** due to his discussion with Stevens. But he was also aware of

some derogatory criminal information that had not been picked up (T 452-3; 489-93). The misclassification of a prior criminal conviction as a felony was of a minor importance and no consequence. The crime had still occurred.

Similarly, Judge Santora's sentencing order does not manifest a rejection of what non-statutory mitigating evidence there was. The evidence was admitted in the sentencing phase and no doubt evaluated even though it did not fit the statutory framework. Judges are not to be viewed as having erred simply because they do not fully explain their thought processes. In any event, since Judge Santora heard this argument at hearing, he could have acted to correct any penalty-phase error on his part. His rejection of this argument directed at his own thought process in evaluating the mitigting evidence conclusively demonstrates the lack of any merit to Stevens' contention.

ISSUE IV

STEVENS WAS INFORMED OF THE CONTENTS OF THE PSI AND PSYCHIATRIC EXAM; AND STEVENS' CLAIM HAS NO BASIS IN LAW. (Restated).

Stevens was made aware of the contents of his PSI and psychiatric reports, and his claim here is barred as a subsequent change of law and as cognizable only through an ineffectiveness of counsel claim.

Stevens complains here that he did not have an opportunity to reveiw his presentence investigation and psychiatric reports, to the detriment of his constitutional rights. There is no merit to this claim.

At hearing, Mr. Forbes testified that he had discussed the contents of both reports with Stevens, whose testimony was to the contrary. This conflict was resolved by the judge in favor of Mr. Forbes. That determination of the credibility of witnesses was a finding of fact and is supported by substantial evidence. It is not subject to review here.

Moreover, the only genuine case authority for Stevens' claim is Raulerson v. Wainwright, 508 F. Supp. 381 (M.D. Fla. 1980)-- decided after Stevens' trial. In Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), the United States Supreme Court had held that presentence investigation and psychiatric reports had to be furnished to defense counsel. Relying on Gardner, in Raulerson v. State, 358 So.2d 826 (Fla.

1978), at 831-2, this Court rejected the argument that Gardner required that the defendant himself be furnished those reports, and held that they need only be furnished to defense counsel. In the ensuing federal habeas proceeding, Raulerson v. Wainwriqht, supra, the sentence was overturned and a new sentencing hearing was ordered.

Stevens' trial and sentencing was before the federal district court's Raulerson decision and after this court's Raulerson decision. The dispositive case law at the time of Stevens' trial and sentencing was thus that the reports need only be provided to defense counsel, not to the defendant directly. Since Raulerson v. Wainwright, supra, was not by its terms retroactive, it can not be applied retroactively on that basis. Neither was that decision a fundamental change in constitutional law entitled to retroactive application under the doctrine of Witt v. State, 387 So.2d 922 (Fla. 1980). Thus, even if one supposes that Stevens was not apprised of the reports, his claim here is barred as it is procedurally premised on a change of law that is not and can not be applied retroacitvely.

The trial court found that this claim had been procedurally barred since it could have been raised on appeal, as it had been in Raulerson v. State, supra. The trial court was correct. To the extent that Stevens would blame Mr. Forbes for not showing the reports to him at trial, the claim is one of ineffectiveness of counsel and was not properly raised in the trial court. If it

had been raised below, that argument would have failed as counsel can not be held ineffective for failing to anticipate a change in law. As for ineffectiveness in not raising the issue in the direct appeal, Mr. Forbes would have found his claim barred as a nonretroactive change in law and as an attempt to impeach his own effectiveness at trial.

There is perhaps a subtle strategen behind Stevens' argument. This Court was right in its reading of Gardner in Raulerson v. State, supra, and the federal court was wrong in Raulerson v. Wainwright, supra. One day that conflict in decisions may be resolved, to this Court's vindication, one hopes and expects. But this case is not a proper occassion to revisit the subject. A decision against Stevens on the grounds that this Court was right in Raulerson v. State, supra, would tempt and give the same federal court in Raulerson v. Wainwright, supra, cause to say again that it was right and grant Stevens relief on that basis. Since this point can and should properly be resolved solely on the other grounds stated above, the Court should do so in order to avoid opening the Gardner issue to unnecessry federal habeas litigation in this case. Stevens' issue here should be rejected as an attempt at applying a change in law retroactively and as procedurally barred.

ISSUE V

THERE WAS NO WITHOLDING OF EVIDENCE BY THE PROSECUTION AND NO BRADY VIOLATION CAN BE SHOWN (Restated).

Stevens alleges here that the dull knife owned by Stevens that the State introduced at trial had been impermissibly obtained, He alleges it was found in a search underneath Stevens' trailer based on information he provided in an illicit interrogation session after the stipulated polygraph session was aborted. In this particular instance, the trial judge found that Mr. Forbes had been properly informed of the origin of the knife by Henry Coxe, an assistant State Attorney who prosecuted Stevens. Stevens, for once, remarkably, believes Mr. Forbes' account that he had not been informed and disbelieves Mr. Coxe's account that he had been informed of the origin of the knife. Assuming, as he does, that Mr. Forbes recollection is to prevail against Mr. Coxe's, recollection and Judge Santora's finding in its favor, Stevens goes on to contend that the State's supposed witholding of the circumstances of the discovery of Stevens' knife was a Brady violation.

Stevens is wrong here for three reasons. First, the court's finding is supported by substantial competent evidence (Mr. Coxe's testimony) and is not subject to being overturned. Second, even a ~~de novo~~ review of ***the matter shows*** that Mr. Forbes' was aware at trial of the origin of the knife. Third, even assuming Stevens' account, no Brady violation is shown. The

first counterpoint has already been sufficiently stated, so let us look directly at the available evidence.

At the hearing, Mr, Forbes testified:

> Q. [By Mr Root] Mr. Forbes, can you tell the Court whether there was a reason at the time the dull knife recovered from under the Stevens' trailer was put into evidence that you did not object on the gounds that this was a--involved a search and seizure which you had not been told about pursuant to the State's continuing obligation under 3.220, the discovery section?
>
> A. I think I objected to it, but I wasn't aware of that. I guess the manner in which it was found is the reason is all I can speak to you,
>
> Q. Okay. So what you are saying you didn't know that it was the product of a search and seizure at that point?
>
> A. I am reaching back in my memory. My best recollection is that is accurate, yes.

(T 404).

Mr. Coxe's testimony on this issue was:

> Q. [Mr. Root] Did you ever tell John Forbes how that knife was found?
>
> A. Mr. Root, I don't independently recall telling Mr. Forbes how it was found. But I can say I couldn't tell you how many times I talked with Mr. Forbes about items of evidence, testimony in the different meetings we had.
>
> I just don't--I couldn't tell you --I don't independently recall wht it ws we talked about any of the times specifically, whether it was this time

about knives, this time about experts, whatever.

Q. And as to this specific piece of testimony, you just don't recall whether you told him or not?

A. I can say I am sure I must have but I couldn't tell you I independently recall that conversation right now.

Q. Why do you say you must have if you don't recall?

A. The reason I say that is because, well, two things.

One thing mainly is from looking over portions of transcripts of the trial which assisted me in recalling some of the things.

I recall Mr. Forbes making the argument that he knew where the knife came from and how it came about when he ws objecting to its admissibility.

Now, if it's not in discovery, he either got it from myself or somebody working with me prior to the trial.

Q. Is that the sole basis for your saying that you must have?

A. Yeah, right.

Q. and--

A. That and the fact--

Q. And you were told that Mr. Forbes--

MR. SHAFER: Excuse me, Your Honor. He was answering his question.

Q. I'm sorry. Did I interrup you?

A. I was just going to say that, my review of the transcript, and the fact I had untold discussions with Mr.

Forbes about every facet of this case, about the trial.

(T 806-8).

Based as it was on recollection after reading the trial transcript, Mr. Coxe's testimony sounds more credible even at this remove than Mr. Forbes' tentative account.

Recourse to the trial transcript leaves no doubt that Mr. Forbes' knew at trial that the knife was found as a result of Stevens' statement after the polygraph session:

> MR. FORBES: Your Honor, the evidence he is about to talk about is a product of a statement made, it was found after the statement was made by the defendant in the presence of the polygraph examiner, of which the Court is aware.
>
> MR. COXE: No, he's not going to say anything about the statement.
>
> MR. FORBES: I understand that the defendant during that same statement told him where to find that knife. I filed a Motion in Limine that anything tha was said in that statement not be used in the trial and the Court ruled that it couldn't be except if we put the defendant on the stand and then you can use it in impeachment.
>
> That knife was found as a direct result of that statement that the Court held could not be used against him and, therefore, is inadmissible.
>
> MR. COXE: I want to say a couple of things: the understanding was, the hearing about the statement, we put that knife on discovery. There's no legal basis, agreement or anything about this knife.
> THE COURT: The motion is denied.

(TT 680-1).

There is no basis whatever on which to doubt that Mr. Forbes was told of how the knife was found since he referred to those circumstances at the original trial.

Finally, Stevens' legal point here is phony even under his assumptions. Brady is concerned with the "suppression by the prosecution of evidence favorable toan accused . . . where the evidence is material either to guilt or to punishment" Brady, at 218. Moreover,

> We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case."

More v. Illinois, 408 U.S. 786, 33 L.Ed.2d 706, 92 S.Ct. 2562 (1972), at 713. Indeed:

> The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense.

United States v. Augurs, 427 U.S. 97, 49 L.Ed.2d 342, 96 S.Ct. 2392 (1976), at 353.

Stevens' Brady claim fails in two aspects even when considered under his own rationale. First, the supposedly undisclosed information was not material to the outcome as it would have been of only marginal benefit to the defense at best. Second, it was not evidence suppressed by a State discovery violation but at best information that might have helped the

defense suppress State evidence! Stevens' theory is a canard of what Brady actually speaks to, potentially exculpatory evidence suppressed by the State.

Stevens' claim here is without any foundation. The trial court's finding of fact against it can not be overturned as it is supported by substantial evidence, the facts show, even on a de novo examination, that there is nothing to the claim, and no Brady violation is shown even under Stevens' theory.

ISSUE VI

THE TRIAL COURT COMMITTED NO ERROR IN REFUSING COUNTY PAYMENT FOR (A) PRO BONO COUNSEL'S OUT OF DOCKET EXPENSES.- (B) TRAVEL EXPENSES FOR STEVENS' ADDITIONAL MITIGATION WITNESSES, AND (C) FEES AND EXPENSES FOR AN EXPERT WITNESS.

Stevens presents claims here for three items: Pro bono counsel's out of pocket expenses; travel expenses for additional mitigation witnesses; and fees and expenses of Robert Dillinger, Stevens' expert legal witness. There is no basis shown for payment of these items and payment was properly denied by the Court.

In cases where a colorable claim for post-conviction relief is shown, Florida Courts have the authority and duty to appoint counsel to investigate and present the claim, Graham v. State, **372** So.2d 1363 (Fla. **1979),** at 1366. However, that is not how present counsel entered the case. He entered as pro bono counsel without appointment, in substituion, as it were, of representation by Florida's Capital Collateral Review attorneys. Perhaps a distinction could be made if Stevens' claims were colorable and Florida Capital Collateral attorneys were somehow unavailable, but neither is the case here. Having assumed the burden of the time and expenses of representing Stevens on a pro bono basis in ouster of state-provided collateral counsel, counel can not fairly demand that the State now pick up the burden of his expenses.

Stevens claimed ineffectiveness by Mr. Forbes in not presenting certain non-statutory mitigation evidence. That claim was fundamentally unsound without regard to the witnesses being presented. Porter v. State, supra. Payment for any witnesses of the type Stevens relied on in that claim would have been improper. In fact, two mitigation witness were presented by Stevens, and both gave testimony that of no value to his claim and would have likely been harmful if used at trial. One witness testified that Stevens had been in a fight with her son, rebutting the defense characterization of Stevens as a good-natured soul; the other witness testified, contrary to the defense theory, that he did not have a drinking problem, and otherwise gave testimony that could have been used to show his planning of the convenience store robbery. The other witnesses were more limited and remote in their knowledge of Stevens, and there is no showing their testimony could have been helpful. The trial court properly denied payment for a parade of worthless additional mitigation witnesses in support of a fundamentally unsound claim.

As for Robert Dillinger's claim, it was also properly denied. Stevens never made a colorable claim of ineffectiveness of counsel. Mr. dillinger's testimony was nothing but the hindsight, second-guessing accout of how he would have done differently than Mr. Forbes. Mr. Dillinger's testimony was worthless even to Stevens. Most likely, Mr. Dillinger's "expert

testimony" was a sham, bringing him to the side of Stevens' counsel at the hearing so as to assist them, then putting him on the stand and claiming him as an expert so as to justify a reimbursement of expenses and a fee for his volunteer excursion. There is no basis for a fee and expenses for Mr. Dillinger, and the court properly denied his claim for them. The trial court's denial of the expense and fee claims should be upheld.

ISSUE VII

DEATH-SCRUPLED JURORS WERE IMPROPERLY EXCUSED.

ISSUE VIII

FLORIDA'S HOMICIDE AND DEATH PENALTY STATUTES ARE ADMINISTERED IN A DISCRIMINATORY MANNER.

ISSUE IX

THE LESSER INCLUDED OFFENSE JURY INSTRUCTIONS REQUIRED AT THE TIME OF TRIAL LED TO ARBITRARY RESULTS.

ISSUE X

BASED UPON HIS CONVICTION ON A FELONY MURDER THEORY, STEVENS' SENTENCE VIOLATED THE EIGHTH AMENDMENT.

These federal constitutional law claims could have been raised at trial. They were not, and hence were procedurally defaulted. They may not be raised in this post-conviction relief proceeding. Straight v. State, **488** So.2d **530** (Fla. **1986);** McRae v. State, **437** So.2d **1388** (Fla. **1983).** Neither has any fundamental change of constitutional law occured which could make these claims cognizable today. See Witt v. State, **387** So.2d 922 (Fla. **1980).** All these claims should be summarily rejected on the basis of procedural default.

CONCLUSION

Judge Santora's denial of the motion for disqualification was correct and should be affirmed. His denial of Stevens' motion for post-conviction relief was correct and should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foreging brief has been furnished by U. S. Mail to Patrick M. Wall, Esq., 36 West 44th Street, New York, New York 10036 on this 12th day of March, 1987.

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