FILED
SID J. WHITE
OCT 27 1986
CLERK, SUPREME COURT
By [signature] Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

FLOYD MORGAN,

Appellant,

v.

CASE NO. 69,104

STATE OF FLORIDA,

Appellee.

______________________________/

ON APPEAL FROM THE EIGHTH
JUDICIAL CIRCUIT, IN AND FOR
UNION COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

JIM SMITH
ATTORNEY GENERAL

MARK C. MENSER
ASSISTANT ATTORNEY GENERAL
DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii,iii,iv
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARUGMENT	11
ARGUMENT	
THE TRIAL COURT DID NOT ERR IN DETERMINING THAT FLOYD MORGAN RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL	12
CONCLUSION	32
CERTIFICATE OF SERVICE	32

TABLE OF CITATIONS

CASE	PAGE
Adams v. Balkcom, 688 F.2d 734 (11th Cir. 198)	16
Barfield v. Harris, 540 F.Supp. 451 (1982)	16
Beckham v. Wainwright, 639 F.2d 262 (5th Cir. 1981)	22
Booker v. State, 441 So.2d 148 (Fla. 1983)	15
Downs v. State, 453 So.2d 1102 (Fla. 1984)	22
Engle v. Isaac, 456 U.S. 107	13
Foster v. Strickland, 707 F.2d 1339 (11th Cir. 1983)	24,16
Francois v. Wainwright, 763 F.2d 1188 (11th Cir. 1985)	24
Fulford v. Smith, 432 F.2d 1225 (5th Cir. 1970)	30
Gregg v. Georgia, 428 U.S. 153 (1976)	26
James v. State, __So.2d__ (Fla. 1986) 11 F.L.W. 268	19,22,23
Johnson v. Wainwright, 463 So.2d 207, 211 (Fla. 1985)	20,21
Lockett v. Ohio, 438 U.S. 586 (1978)	26
Lovett v. Florida, 627 F.2d 706, 708 (5th Cir. 1980)	16
Maxwell v. State, __So.2d__ (Fla. 1986) 11 F.L.W. 219	23
Morgan v. State, 415 So.2d 6 (Fla. 1982)	1

-(continued)-

CASE	PAGE
Morgan v. State, 475 So.2d 681 (Fla. 1985)	2
Porter v. State, 478 So.2d 33 (Fla. 1985)	23
Skipper v. Sourt Carolina, __U.S.__ 106 S.Ct. 1669 (1986)	27
Songer v. Wainwright, 733 F.2d 788 (11th Cir. 1984)	22
Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983)	22,24
Stephens v. Kemp, 721 F.2d 1300 (11th Cir. 1983)	23
Strickland v. Francis, 738 F.2d 1542 (11th Cir. 1984)	19,22,25,28,31
Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674 (1984)	11,12,13,14
Tibbs v. Florida, 457 U.S. 31 (1982)	28
Tibbs v. State, 397 So.2d 1120 (Fla. 1981) affd.	28
United States v. Cronic, __U.S.__ 80 L.Ed.2d 657, 666 (1984)	14
United States v. Makris, 535 F.2d 904 (5th Cir. 1976)	19
United States v. Mota, 598 F.2d 995 (5th Cir.) cert. denied 444 U.S. 1084 (1979)	19
Winfrey v. Maggio, 664 F.2d 550 (5th Cir. 1981)	22
Woodson v. North Carolina, (1976)	26

OTHER AUTHORITIES

CASE	PAGE
On Being Sane In Insane Places, Science, Vol. 179 (1973)	17

STATEMENT OF THE CASE AND FACTS

At 2:00 a.m. on the morning of July 16, 1977, Floyd Morgan stabbed Joe Saylor to death simply because Saylor owed him money.

Morgan was found guilty after a full and fair trial and the jury suggested a death sentence. The Court sentenced Morgan to death. The judgment and sentence were affirmed on direct appeal. Morgan v. State, 415 So.2d 6 (Fla. 1982). The appeal raised eleven claims; to wit:

(1) The trial court's failure to preserve the entire record.

(2) The denial of a pretrial motion to exclude D.O.C. workers from jury service.

(3) The denial of Morgan's *pro se* motion to dismiss.

(4) The denial of defendant's claim regarding "involuntary" statements.

(5) The "restriction" of cross examination.

(6) Another "restriction" claim.

(7) An "abuse of discretion" claim relating to defense counsel's request to reopen his closing argument (so he could comment on "missing witness" Robitaille).

(8) The constitutionality of 921.141 as applied to consideration of non-statutory mitigating evidence.

(9) The state's use of improper, inflammatory evidence.

(10) The denial of Morgan's motion to preclude the death penalty.

(11) The court's assesment of aggravating and mitigating factors.

After appellate relief was denied, Morgan petitioned for post-conviction relief pursuant to Fla.R.Cr.P. 3.850. (R 638) The motion was an extensive complaint, alleging in minute detail every perceived "error" of counsel in an effort to paint trial counsel with "ineffectiveness". A hearing on point was ordered by this Honorable Court. Morgan v. State, 475 So.2d 681 (Fla. 1985).

On December 30, 1985, Morgan received a full and fair evidentiary hearing. Every desired defense witness was called and full oral and written arguments were presented. Both the state and defense submitted proposed orders. No challenge has been raised to either the fairness of said hearing or the "completeness" thereof.

The Court entered an extensive order denying the motion for post-conviction relief. (R 803-814)

The order specifically notes that no evidence at all was offered in support of the following claims:

(1) That additional grounds for suppression of Morgan's non-incriminating statement existed. (R 805)

(2) That trial counsel failed to properly prepare and present his closing argument. (R 805)

(3) That prejudice as a result of pre-indictment delay was existent but never argued by counsel. (R 806)

(4) That counsel prejudiced Morgan's defense by not arguing the "prejudicial" loss of witnesses. (R 806)

(5) That counsel failed to assert his inability to locate witnesses who could establish "provocation". (R 806)

Several additional claims were deemed both unsupported and previously disposed of in this Court's decision on direct appeal. (R 804-807) These included the state's "failure" to provide counsel and various allegations of prejudice from "delay" in the appointment of counsel and certain "due process" claims.

Testimony was received from four live witnesses while letters were introduced on behalf of five others. (Ironically, letters were introduced in lieu of live testimony in a proceding accusing trial counsel of incompetence for using letters in lieu of live testimony).

Dale Harden testified first. (R 514-517) Harden said that he knew Morgan only from 1971-1973. (R 516) He had no contact from 1973 to 1977. (R 517) Harden was familiar with the gruesome details of Morgan's first murder and, if called at trial, would have told them to the jury if asked. (R 518) This fact was noted by the lower court. (R 808)

At no time did Harden proffer the testimony he "would have given" regarding Morgan's heroics, so as to demonstrate why it would have had greater impact than Governor Askew's letter.

The Court found that Harden's testimony, if given, would not have necessarily been stronger than Askew's letter given the prospect of cross examination. (R 809) No ineffectiveness claim was tenable under the totality of the circumstances. (R 809)

The next witness was defense counsel himself, William Salmon. Curiously, Salmon seemed hostile to the State and willing to be found "ineffective". As the Court observed:

> "In the same context, the Court has carefully considered the testimony of defendant's trial counsel, but finds that such cannot be taken in full measure due to an apparent lingering fealty to the defendant and those in his situation as evidenced by trial counsel's strong personal anti-death penalty feelings, contributions to that cause, and, in many instances, equivocal testimony concerning the events of some eight to nine years ago." (R 812)

This finding regarding Salmon's overall credibility was supported fully by the record.

Salmon contended he felt "limited" in his ability to argue non-statutory mitigating circumstances during the penalty phase of Morgan's trial. (R 527-528) The trial record shows

that Salmon argued, on the basis of [sic] "United States v. Gregg"[1] a right to unlimited argument in mitigation. (R 1396) Counsel, of course, presented a great deal of evidence relevant to non-statutory mitigating factors. (see R 1400-1419) Thus, Salmon did not feel restricted at all.

Salmon made "choices" regarding the presentation of sentencing phase evidence (R 809) as opposed to taking no action on Morgan's behalf. Mr. Salmon, however, carefully testified that he made no "tactical decisions". (R 530-545)

On cross examination, Salmon's active opposition to capital punishment was brought out. (R 552-554) Salmon had consulted with other attorneys in capital cases and collateral proceedings (R 554) but, curiously, Salmon denied that his capital work had provided him with any insight at all into the construction of an "ineffective counsel" claim. (R 554)

To counter Salmon's testimony regarding "inexperience", cross examination revealed that despite having handled no capital cases, Salmon had tried thirty to fifty trials involving legal and evidentiary issues similar to those at issue in the capital case. (R 554) Cross also revealed that Salmon ap-

---

[1] Actually, Gregg v. Georgia, 428 U.S. 153 (1976).

portioned his time to devote sufficient time to this case. (R 557)

Salmon confessed to asking Drs. Barnard and McMahon to examine Morgan for "any psychiatric or psychological dysfunction favorable to the defendant". (R 559) Salmon also confessed that these doctors had the same access to Morgan's prison records as he did. (R 564)

On cross, Salmon conceded that Dr. McMahon's letter was substituted for live testimony because the state would be deprived of cross examination. (R 561) Counsel personally selected McMahon and Barnard because they would be "best" for the defense (R 562) but then, after selecting them, allegedly failed to discuss Morgan's service related "problems". (R 562) Counsel was afraid Dr. McMahon would testify that Morgan suffered from no mental problems. (R 564)

While counsel alleged he never contacted Morgan's family, his courtroom testimony revealed he procured a letter from Morgan's mother and contacted "the family" to get Morgan decent clothes for trial. (R 531-532, 564-565) Counsel evasively denied being "directed" by Morgan (not to contact the family) but later said he felt like "an extension" of Mr. Morgan, so he acceded to Morgan's demand. (R 565-566)

Salmon was also evasive on the issue of whether witnesses

who were not called could have given damaging testimony (on cross from the state). (R 567-568)

Counsel confessed that there was nothing from the doctors' reports that gave him cause to suspect post traumatic stress disorder (PTSD). (R 572)

The third witness was defense expert Dr. Joyce Carbonell. (R 580) Dr. Carbonell testified to the scholastic history of PTSD which she, as an intern working with military veterans, was familiar with in 1978. (R 584-597) She testified that "PTSD" was only recognized by the "DSM-3" as a separate mental disorder in 1980. (R 586) Despite its limited acceptance in any definite form in 1978 (see R 586) Dr. Carbonell stated that Drs. Barnard and McMahon "should have" checked for PTSD. (R 588-589)

Dr. Carbonell <u>never</u> examined Morgan himself, <u>nor</u> did she ever ascertain that Barnard and McMahon "actually failed" to consider any kind of stress disorder. She merely testified that they "should have". (R 600)

Dr. Carbonell gave compelling testimony on the issue of counsel's obligations. Dr. Carbonell testified that, as a professional, it is <u>her</u> duty to locate and procure a patient's records. She is not entitled to sit back and wait for counsel to deliver records to her. (R 607) She stated that she is

hired for her time, not her opinion, and does not render particular opinions because she is told to. (R 600) As a professional, Carbonell expects lawyers to rely on her expert opinion. (R 600-601) She further testified that she would not expect a lawyer to substitute his (non-expert) medical opinion for hers. (R 602)

Finally, Dr. Carbonell, in examining Morgan's record, could have provided gory details (surrounding his first murder) to the jury. (R 603-604)

The fourth and final live witness was Baya Harrison, esq. The Court summarized Harrison's testimony as follows:

> "The Court has considered and is mindful of the testimony of attorney Baya Harrison, but concludes that such testimony is merely that of an attorney who, in retrospect and with the advantage of reviewing the developing law since this case was tried, would have presented the case differently". (R 811-182)

Mr. Harrison allegedly analyzed the record and reviewed the conduct of counsel in light of Strickland and Knight. (R 618) His expert opinion (under the accepted standards of these cases) was then offered.

On cross, however, Harrison revealed that he did not utilize the Strickland test. Instead, he substituted his personal standards of conduct, brazenly exclaiming he "did not care what the Supreme Court said", (R 641) an incredible remark.

Harrison stated that lawyers had no right to rely upon the expert opinions of doctors on medical questions. (R 652-653) (This is contrary to established law.) Harrison stated that lawyers must go from doctor to doctor, as long as it takes, until a favorable medical opinion is obtained (again contrary to actual law). (R 640) Harrison said that an attorney is not to permit a client to make ultimate decisions in a criminal case, (R 641) again ignoring the law.

Finally, Harrison had tried only one capital case, that being in Pinellas County. Harrison refused to admit that different tactics might be necessary when trying a case in rural north Florida as opposed to urban south Florida. (R 632 _et seq._) Harrison also admitted he personally would rely upon a psychiatric (expert) opinion. (R 639)

Harrison's testimony, therefore, was not an expert legal analysis grounded on the facts and the law. It was merely his private, unfounded, opinion.

As noted above, letters were introduced in lieu of live testimony from Morgan's family. The irony of this cannot be ignored, since Mr. Salmon's competence was challenged for using letters in lieu of live testimony.

The actual text of any "live testimony" from John Sapp was never proferred. It must be noted, however, that Mr. Morgan was not a "model prisoner" given the fact that he drew two

subsequent disciplinary actions, one of which involved possession of a knife. (R 256-257) Had Sapp or Harden been questioned about Morgan's prison record, this damaging evidence could have surfaced.

SUMMARY OF ARGUMENT

The Appellant, after a full and fair evidentiary hearing on his motion for post-conviciton relief, failed to establish any "ineffective assistance of counsel" under the standards created by Strickland v. Washington.

To the contrary, counsel conducted a vigorous defense, strategically manipulated character evidence to avoid damaging cross examinations, and anticipated future decisions of the Supreme Court of the United States. Thus, counsel was both able and astute, even if not successful.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN DETERMINING THAT FLOYD MORGAN RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL

The Appellant's somewhat rambling brief attacks the Circuit Court's decision (on the issue of competency of counsel) on a myriad of grounds. Inasmuch as the brief drifts back and forth from "penalty phase" errors to "guilt phase" errors, with some contentions comprising no more than a single sentence, the state would submit at the onset that it rejects each and every contention of the defense. If some obscure point is not specifically denied, or contested, elsewhere in this brief it is rejected here.

(A) Legal Standards Relating To Effective Assistance of Counsel.

The starting place for any discussion of counsel is Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674 (1984). The petitioner must satisfy a two-pronged test under Strickland; demonstrating:

(1) Errors by counsel so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment, and

(2) Prejudice to the defense so serious as to render the outcome of the trial unreliable.

Strickland goes on to discuss just how these assessments

are to be made; to wit:

> "Judicial scruting of counsel's performance must be highly deferential. It is all too tempting for a defendant to secondguess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf Engle v. Isaac, 456 U.S. 107..."
> id, at 689

> "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." id, 689

> "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged on the facts of the particular case, viewed as of the time of counsel's conduct."
> (emphasis added) id, 690

> "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." id, 691

> "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." id, 691

> "It is not enough...to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, [citation] and not every error that conceivably could have influenced the outcome undermines the reliability of the result." id, 693

From these passages we can see that the conclusion that

counsel was ineffective is not one entered into lightly. Indeed, Strickland goes on to warn us that it may become impossible for defendants such as Morgan to obtain effective counsel if the legal system degenerates into one where we "try the case and then the lawyer".

Perhaps this explains the contemporaneous, clarifying language of United States v. Cronic, __U.S.__, 80 L.Ed.2d 657, 666 (1984):

> "When a true adversarial criminal trial has been conducted, even if defense counsel made demonstrable errors, the kind of testing envisioned by the Sixth Amendment has occured."

It is from this foundation that we shall dismantle the accusations of ineffectiveness.

(B) Preparation Of Mental Mitigating Evidence

The predominant feature of the case at bar appears to be the claim that Mr. Salmon failed to adequately prepare "mental mitigating evidence" on behalf of Mr. Morgan. Counsel's "errors" break down as follows:

(a) An alleged failure to go from psychiatrist to psychiatrist until a desired result was obtained.

(b) Unwarranted reliance upon the opinions of his experts.

(c) An alleged failure to provide extensive background material on Morgan to the experts.

Morgan contends that his so-called "uncontradicted" testimonial evidence renders the lower court's findings a nullity. The State respectfully disputes the Appellant's claims.

While the State called no witnesses, Morgan's own witnesses provided evasive and oftimes contradictory testimony on this issue, as well as some testimony that seemed to flatly contradict established law.

The record shows, for example, that Mr. Salmon obtained the services of two psychiatrists known by him to be valuable to the defense. (Although this was Salmon's first murder case he had experience in possibly 50 felony trials.) Salmon asked Drs. Barnard and McMahon to fully evaluate Mr. Morgan for any possible mental mitigating factor useful to his trial defense. Both doctors independently concurred that Morgan suffered from no significant mental disorder.

Baya Harrison testified that in his personal opinion counsel was obliged to keep soliciting doctors until someone found something wrong. When this "expert" was reminded that this was not "the law", he cavalierly exclaimed he "does not care what the Supreme Court says". (R 641) Thus, his opinion was hardly credible or "expert".[2] The fact is, once counsel

---

[2] Harrison's testimony illustrates why "expert testimony" is not binding, even if "uncontradicted". Strickland v. Francis, 738 F.2d 1542 (11th Cir. 1984); Booker v. State, 441 So.2d 148 (Fla. 1983).

has received expert opinions from doctors of his own choosing to the effect that his client suffers from no mental deficiency, he is not required to keep going "until all hope withers". Lovett v. Florida, 627 F.2d 706, 708 (5th Cir. 1980); Adams v. Balkcom, 688 F.2d 734 (11th Cir. 1982), see also Barfield v. Harris, 540 F.Supp. 451 (1982) (lawyer not required to shop around for psychiatrist).

It is submitted that there is a profound difference between an "expert legal opinion" (an assessment based on the law) and the personal opinion of a legal expert. (without regard to actual law)

(C) Trial Counsel's Reliance On Expert Opinions

Mr. Morgan's attorney, Mr. Salmon, was not a medical doctor, psychiatrist or psychologist. As noted by the court and the state, the reason why experts are appointed in criminal cases is so the court can rely upon their specialized knowledge. If a court may rely upon medical testimony, why not counsel?

As noted in Foster v. Strickland, 707 F.2d 1339 (11th Cir. 1983), even when defense counsel has personal doubts regarding the mental health of his client, if expert medical opinions are rendered to the contrary, counsel is not ineffective for relying upon them.

Morgan's "PTSD" has never been established. Morgan served

in Vietnam, but this is not prima facie proof of mental disease. Morgan was tested by competent experts and revealed no disorders. Stress related mental problems, whether called "PTSD" or "delayed stress reaction" or "combat fatigue" are not unknown to the medical community. If it was present, or present in a significant manner, the doctors would have found it.

What Mr. Harrison and Mr. Morgan actually fault counsel for is his conduct regarding the third facet of this claim.

(D) Failure To Provide Materials

Mr. Harrison and Dr. Carbonell gave contradictory "expert" testimony regarding counsel's obligation to the examining doctors. Harrison stated counsel had to spoon-feed the desired diagnosis and relevant supporting data to the experts. Dr. Carbonell said that doctors, as professionals (just like lawyers) had an equal responsiblity to gather data whether the lawyer provides it or not.

No one has challenged the competence of Drs. McMahon and Barnard. No one has stated that Morgan has "PTSD"

Expert counsel's testimony reflects a recent criticism of the mental health community developed as a result of the Rosenhan Study. see Rosenhan, <u>On Being Sane In Insane Places</u>, Science, Vol. 179 (1973). Rosenhan, a professor of psychology and law at Stanford University, conducted an experiment wherein

"pseudopatients" were sent to mental hospitals with feigned "schizophrenia". Aside from claiming to hear "voices" at times, each pseudopatient was to act normally. Every pseudopatient sent out was able to gain admission to a mental hospital. Then, Rosenhan notified each hospital involved that "pseudopatients" would be sent to them "as a test". No pseudopatients were sent out, but the hospitals began rejecting applicants right and left, claiming they had detected the pseudopatients.

Rosenhan's study (which is more detailed than reported here) concluded that in many instances mental health experts deliver only "expected", or even "requested" diagnostic opinions rather than perform an impartial evaluation. This study corroborates the legal community's references to "defense" and "prosecution" doctors.

Mr. Salmon procured two doctors relied upon by his office and, if anything, known to be good for the defense. He did not "spoon feed" the desired diagnosis so as to possibly taint the outcome _a la_ Rosenhan. For this he is called "ineffective". The proper word would be "professional". It is not the function of counsel to alter the truth. His function is to help find it. By obtaining independent expert opinions, Salmon performed his duty professionally and ethically. He should not be faulted for it.

The speculative claim that Morgan "might have" PTSD,

though undetectable by independent and impartial testing (but detectable with the "right" doctor given the "right" information) does not support any claim for relief. Indeed, at this stage, a sudden outbreak of "PTSD" would not only be serendipitous, it would be highly suspicious. There is a strong presumption that defendants seeking to establish some mental deficiency will conform their conduct when before experts who will testify about them. Strickland v. Francis, 738 F.2d 1542 (11th Cir. 1984); United States v. Mota, 598 F.2d 995 (5th Cir.) cert. denied 444 U.S. 1084 (1979); United States v. Makris, 535 F.2d 904 (5th Cir. 1976).

One final note, recently in James v. State, __So.2d__ (Fla. 1986) 11 F.L.W. 268 this Honorable Court noted that even the proven existence of some "organic brain damage" does not establish incompetency or mental deficiency, thus making the claim at bar, where Morgan's "problem" (if any) eluded diagnosis by two doctors, even more speculative and untenable.

(E) The Alleged Failure Of Counsel To Procure Witnesses For The Sentencing Phase

Defense counsel was alleged to have been ineffective for failing to procure the live testimony of guards Sapp and Harden and the live testimony of Morgan's relatives.

Mr. Salmon, who has strong anti-capital punishment feelings, has offered to "fall on his sword" to save his client's life by denying that these "deficiencies" in his defense were not the result of any strategic or tactical move. The lower court chose not to believe Salmon, and for good cause.

Mr. Salmon is an anti-death activist who testified to working as a consultant in many death penalty cases, including collateral attack. Then, however, Salmon testified he did "not know" about circumventing a claim of ineffective assistance of counsel by proving that tactical decisions were made. Since "tactics" is a nearly universal defense to "ineffectiveness", his testimony is not credible unless, after all his consulting and cooperation with esteemed counsel such as Baya Harrison, he was never, ever, exposed to the legal concepts of "ineffective assitance of counsel", the Sixth Amendment and assorted defenses, such as "tactics".

These belated confessions are not unknown to the Court. In Johnson v. Wainwright, 463 So.2d 207, 211 (Fla. 1985) this Court stated:

> "Attached to the habeas petition is the affidavit of one of the lawyers who represented Johnson on appeal. The lawyer states he did not omit the point in question for any tactical reason but simply "did not spot it." We do not find the lawyer's apparent willingness to confess incompetence on behalf of his former client, who faces execution, determinative or persuasive of the question of whether appellant received the effective assistance of counsel on appeal."

Even if we assume that Salmon never thought to use live testimony, a dubious proposition given his extensive use of pre-trial depositions and conduct at trial, that "oversight" would not establish ineffectiveness. Johnson, id.

(1) Failure to locate and call prison guards

Salmon failed to procure the attendance of either Mr. Sapp or Mr. Harden. Although no actual testimony regarding the "rescue" has ever been elicited from either man, even at the 3.850 hearing, it is assumed they would have corroborated Governor Askew's letter.

If the subject of Morgan's character was brought up, however, these guards would have testified to other facts detrimental to Morgan's case, such as his brutal murder which landed him in jail in the first place, or his subsequent disciplinary proceedings in the prison,[3] including one for possession of a knife. This would not be "Williams Rule" evidence, but rather

---

[3] These were noted by the actual sentencer. If Harden or Sapp could not testify, the records could come in from other sources, including prison personnel called in rebuttal or even the psychiatrists.

would be fair rebuttal to evidence of "character" placed in issue by Morgan himself. see James v. State, __So.2d__ (Fla. 1986) 11 F.L.W. 268.

The governor's letter, of course, was presented to the jury in lieu of the guards' testimony. Unlike the guards, the letter could not be cross examined. While we can speculate as to the value of "live" testimony from men who had no contact with Morgan from 1977 to 1978 as opposed to the letter, speculation will not support the Appellant's case.

"Poor strategy" will not support a finding of ineffectiveness, given the fact that Strickland noted that even experienced criminal defense lawyers will disagree over strategy. Strategic choices are "virtually unchallengeable". Downs v. State, 453 So.2d 1102 (Fla. 1984).

Counsel cannot be deemed ineffective merely on the grounds he failed to call witnesses. Indeed, there is no per se rule requiring him to call anyone at all! Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983); Songer v. Wainwright, 733 F.2d 788 (11th Cir. 1984).

Reviewing courts have consistently refused to secondguess counsel. Beckham v. Wainwright, 639 F.2d 262 (5th Cir. 1981). Even if counsel did "err" in not procuring these witnesses, errorless counsel is not guaranteed by the Constitution. Winfrey v. Maggio, 664 F.2d 550 (5th Cir. 1981). (This, of

course, presumes that the trial court found Salmon's "this was not tactical" comment credible.)

(2) Failure to locate family

Mr. Salmon allegedly never contacted Morgan's family, however:

(1) A letter from Morgan's mother was produced, and

(2) Salmon testified he contacted someone in the family to get clothing for Morgan to wear at trial.

These facts do not mesh with the "no contact" allegation.

The testimony of family members about alleged childhood injuries or mental problems is of speculative value, Stephens v. Kemp, 721 F.2d 1300 (11th Cir. 1983), thus the "failure" to produce said testimony is not an act of legal "incompetence". Porter v. State, 478 So.2d 33 (Fla. 1985); Maxwell v. State, __So.2d__ (Fla. 1986) 11 F.L.W. 219; Stephens v. Kemp, supra. Thus, even if we assume agruendo that Morgan's family was never contacted (and the letter, etc. just "appeared" out of nowhere), we cannot find ineffective representation.

Morgan's "character", once opened for examination, would yield the proverbial can of worms. James v. State, supra. This "nice, non-violent" fellow was the perpetrator of a horrible murder. He "served his country" by getting court martialled for

shooting at an NCO. He received only a "general discharge". This was his second murder, committed solely to punish a debtor who somehow came to owe Morgan $400 while they served together in prison.

Again, Morgan's "mental problems" were so miniscule that two defense psychiatrists failed to detect them. This fact would dampen the impact of sibling testimony.

As noted before, counsel is not required to present any particular mitigating evidence. Francois v. Wainwright, 763 F.2d 1188 (11th Cir. 1985) (per curiam); Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983). This is especially true when the client directs counsel not to procure or introduce that evidence.

Mr. Salmon stated that Morgan specifically told him not to involve his family. Salmon tried to equivocate the meaning of this directive, but nevertheless confessed that he felt that he was "an extension of his client's wishes", (R 566) and that "unfortunately", he obeyed his client. (R 565)

Although neither Salmon or his alleged "expert" would admit to it, Salmon acted precisely as required by our Code of Professional Responsibility. As noted in Foster v. Strickland, 707 F.2d 1339 (11th Cir. 1983), the code of ethics under which we practice require counsel to comply with the wishes of his client, even if unsound tactically, because it is the client who

makes the ultimate decisions regarding the defense.

All that was accomplished by Mr. Harrison's non-expert opinion on this subject, or Mr. Salmon's equivocation, was the continued undermining of their credibility. Strickland v. Francis, 738 F.2d 1542 (11th Cir. 1984).

The Appellant, while indulging in conjecture as to how the testimony of Harden, Sapp or others might be received, cannot ignore the fact that, had defense counsel "escalated the battle", the state would have responded.

By using documentary evidence, defense counsel put substantial non-statutory mitigating evidence before the court without exposing his client to rebuttal testimony or the dangers of live-witness cross examination. Salmon now says the choice was not strategic. The record indicates sound strategy in an overwhelming case.

(F) Failure To Advise The Court Of Lockett v. Ohio, 438 U.S. 586 (1978)

The sentencing phase evidentiary hearing was conducted prior to the publication of the United States Supreme Court's decision in Lockett v. Ohio, 438 U.S. 586 (1978). Lockett, citing back to the cases of Gregg v. Georgia, 428 U.S. 153 (1976) and Woodson v. North Carolina, (1976), reinforced the legal proposition that sentencing phase juries are to be permitted to receive all mitigating evidence, statutory or not, regarding a convicted murderer.

Mr. Salmon's conduct as reflected in the trial and sentencing transcripts shows that prior to the publication of Lockett, Salmon argued the precise decision of Lockett, citing [sic] "U.S. v. Gregg" (Gregg v. Georgia).[4] In other words, Salmon did something he was not even expected to do, he anticipated a ruling of the Supreme Court.

While the Court was not quite in full agreement with Salmon on the right to present "any and all" evidence ab initio, the Court was persuaded to allow Salmon to use non-statutory mitigating evidence to offset or counter the State's "aggravating"

[4] Although he used the wrong name, he provided the correct citation. (R 1395-96).

evidence. Thus, no matter the announced legal basis for admitting this evidence, the evidence was nonetheless admitted. The jury was not advised of any "legal restriction" and had free reign to consider this evidence.

Counsel produced non-statutory mitigating evidence from the defendant's mother and, curiously, prison records showing positive adjustment, good behavior, qualification for "minimum security" and of course the governor's letter. Counsel, in fact, anticipated Skipper v. South Carolina, __U.S.__, 106 S.Ct. 1669 (1986) in getting this material before the court.

The only "error" attributable to counsel is an alleged failure, weeks after the hearing, to request a new hearing, rehashing the same evidence, on the basis of what was (in this case) merely cumulative case authority!

This claim is wholly without merit. There is absolutely no record evidence that the sentencer refused to consider the proffered non-statutory mitigating evidence, or that the jury, if presented the same evidence under a different "theory of admission" would react differently.

(G) Miscellaneous Concerns

While most of the controversy in this case centers on the penalty phase of Morgan's trial, certain alleged "errors" have been said to carry over into the guilt phase (particularly

counsel's "failure" to secondguess his own experts). It is submitted that the same defenses to counsel's actions apply.

At this time the state would respond to various contentions of the Appellant's which bear correction.

(1) The weight to be afforded evidence and questions of credibility (of witnesses) are the exclusive province of the trier of fact, not to be overturned on appeal. Tibbs v. State, 397 So.2d 1120 (Fla. 1981); affd. Tibbs v. Florida, 457 U.S. 31 (1982). Contrary to his assertion, Morgan is not entitled to "trial de novo" from cold transcripts.

In assessing the credibility of Morgan's "experts", Strickland v. Francis, 738 F.2d 1542 (11th Cir. 1984) states that the trial court is entitled to consider these factors:

> (1) The correctness or adequacy of the factual assumptions on which the expert testimony is based.
>
> (2) Possible bias in the expert's appraisal of the defendant's condition.
>
> (3) Inconsistencies in the expert's testimony or material variations between experts, and
>
> (4) the relevance and strength of contrary lay testimony.

As noted above, despite the absence of "rebuttal" testimony, the Court had ample reasons to discount the testimony

of Morgan's experts. For example:

(1) Mr. Harrison and Dr. Carbonell clashed in testifying as to "who" was responsible for obtaining background records on Morgan. Mr. Salmon, meanwhile, testified that he and Drs. McMahon and Barnard had equal access to those records. (R 564). This conflict satisfied (3) and (4) above.

(2) Harrison is an anti-death activist and an ideologue who gives "expert" testimony on the basis of personal feelings rather than the actual law. This satisfies (2) above.

(3) Dr. Carbonell conducted no examination of Mr. Morgan herself and could not, despite her theory, question the diagnosis of Drs. McMahon and Barnard. This satisfies (1) above.

(2) Mr. Salmon's testimony required no rebuttal. He repeatedly contradicted himself in an effort to maximize his "errors" and minimize the defense "strategy". While denying steadfastly that he planned his case, Salmon let slip the following:

(1) Salmon elected to read Dr. McMahon's letter to avoid cross examination and a possible statement (by her) that Morgan was competent. (R 561, 564)

(2) Salmon read Morgan's service record and "may have" discussed it with someone, (R 562) but (of course) not the doctors.

(3) Salmon "did not recall what he put on" in the way of non-statutory mitigating evidence. (R 564) He conceded he "could have" put on Dr. Beyer's "brain damage" assessment. (R 565) (He did.)

(3) Contrary to the assertion in Morgan's brief, no one

testified that "PTSD" was a recognized defense in 1978. Dr. Carbonell said she saw PTSD in some medical literature (while interning in a veteran's hospital) but she was totally unaware of any legal literature on PTSD as a defense. (R 598) Baya Harrison referred the court to the Johnson case, wherein he argued that PTSD was different from battle fatigue and was not recognized prior to 1980! (In fact, the family of syndromes of which PTSD is a part have been classified and reclassified in various forms over the years as Dr. Carbonell stated. In 1978, counsel did not overlook PTSD, but he did not argue the existence of whatever psychiatrists were calling it based upon the DSM-2 manual, which did not recognize PTSD.) (R 598)

(4) The Appellant's brief carries a single-sentence request for yet another evidentiary hearing to further develop his petition. Given the fact that these petitions are usually followed by federal habeas corpus (§2254) proceedings, it is clear that Morgan wishes to salt this appeal with a claim that he can later expand to one that "he did not get a full and fair fact-finding hearing in state court, thus entitling him to a federal evidentiary haring".

Morgan, in fact, received a full and exhaustive 3.850 hearing during which he summoned every desired witness. Nothing was denied to him. If Morgan failed to introduce some evidence at his first hearing, he is not entitled to a second one. see Fulford v. Smith, 432 F.2d 1225 (5th Cir. 1970).

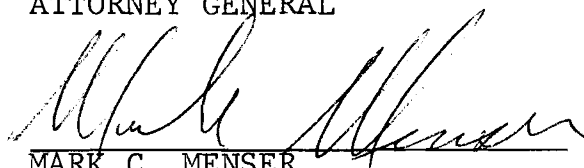
The record in this case clearly shows that Morgan has failed to satisfy Strickland. He has shown no actual error by his lawyer, much less error beyond the broad range of professional competence, and he has shown only speculative prejudice. He is not entitled to relief.

CONCLUSION

The decision of the trial court should be affirmed.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

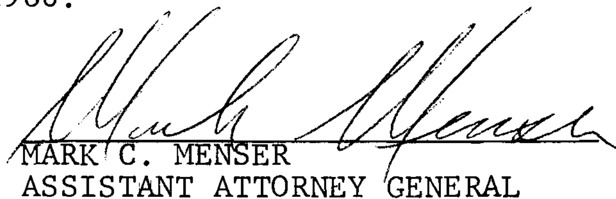


MARK C. MENSER
ASSISTANT ATTORNEY GENERAL
DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by U.S. Mail to Robert L. Weinberg and Dianne J. Smith, Williams & Connolly, 839-17th Street, N.W., Wahington, D.C. 20006, and Larry Helm Spalding, Capital Collateral Representative, 225 W. Jefferson St., Tallahassee, Florida 32301, on this 27th day of October, 1986.



MARK C. MENSER
ASSISTANT ATTORNEY GENERAL