IN THE SUPREME COURT OF FLORIDA

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| ROBERT BRIAN WATERHOUSE | ) | |
| | ) | |
| Appellant, | ) | FILED |
| | ) | SID J. WHITE |
| v. | ) | Case No. 69,557 |
| | ) | |
| STATE OF FLORIDA, | ) | MAY 21 1987 |
| | ) | |
| Appellee. | ) | CLERK, SUPREME COURT |
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APPEAL FROM THE CIRCUIT COURT
OF THE JUDICIAL CIRCUIT
IN AND FOR COUNTY

**BRIEF OF APPELLEE**

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COUNSELS FOR APPELLEE

/sas

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## PRELIMINARY STATEMENT

ROBERT BRIAN WATERHOUSE will be referred to as the "Appellant" in this brief and the STATE OF FLORIDA will be referred to as the "Appellee". The Record on Appeal will be referenced by the symbol "R" followed by the appropriate page number.

## STATEMENT OF THE CASE AND FACTS

Robert Brian Waterhouse was indicted for the first degree murder of Deborah Kammerer. He was found guilty by a jury, and a separate sentencing hearing was held. The jury recommended death, and the trial judge entered an order sentencing appellant to death. On appeal, this Court affirmed both the judgment and sentence. See, Waterhouse v. State, 429 So.2d 301 (Fla. 1983). Certiorari to the United States Supreme Court was denied. Waterhouse v. Florida, 78 L.Ed.2d 352 (1983).

On February 22, 1985, the governor of the State of Florida signed a death warrant on appellant. On March 15, 1985 a motion to stay execution was filed and the trial judge granted a stay. A Petition for Writ of Prohibition and a Motion to Vacate Stay were filed by the State in the Florida Supreme Court asking the court to prohibit the trial judge from entering a stay without the filing of an appropriate pleading, such as a 3.850 motion, to invoke the trial court's jurisdiction. This Court denied relief in State v. Beach, 466 So.2d 218 (Fla. 1985).

Subsequently, a motion pursuant to Rule 3.850, Fla. R. Crim. P. was filed and an evidentiary hearing was conducted. The trial judge entered an order denying relief, and this appeal was initiated by the defendant.

The facts from appellant's trial can be found in this Court's direct appeal opinion. Waterhouse v. State, 429 So.2d at 302-304. At the evidentiary hearing on the 3.850 motion a number of witnesses were examined including both of appellant's trial

counsels and the prosecutor. Paul Scherer, one of the trial attorneys, testified he was appointed to represent appellant in April, 1980 (Tr.863). All of counsel's experience had been in criminal law (Tr.937). Counsel had tried eight or nine capital cases before this one (Tr.938). Prior to his appointment appellant had been represented by the Office of the Public Defender and William Patterson. Later the witness asked for and was granted appointment of additional counsel (Tr.864). Counsel testified that on the day of trial or the Friday before, the prosecutor provided him with the names of two possible exculpatory witnesses (Tr.869-870, 930). These two witnesses were going to testify that appellant did not leave the bar with the victim that night. However, they could not get the dates straight when counsel talked with them (Tr.871-872).

Mr. Scherer recalled there had been an allegation of sexual assault in jail, and appellant had made some incriminating admissions (Tr.878). The witness stated certain other inmates were interviewed, some of whom said they didn't see anything happen (Tr.879). Counsel indicated a witness, another jail inmate, testified against appellant; counsel had attempted to question him about an extortion plan (Tr.881-882). Scherer further stated he never saw a police report connecting Young to such a plan (Tr.884-885).

Counsel recalled the state used a number of expert witnesses (Tr.887-888). In addition to taking depositions of these experts, he actually watched some tests being performed (Tr.888-

889). Mr. Scherer testified he talked with a pathologist concerning this case (Tr.812, 890). Counsel also stated he did research in the areas covered by the expert witnesses (Tr.912, 935-936).

Mr. Scherer testified other counsel was primarily responsible for the penalty phase (Tr.865, 916). He stated he did not visit appellant's hometown of Greenport, New York (Tr.916). He did not talk with appellant's teachers or get his school records (Tr.916). From information obtained from the public defender the defense knew of Dr. Musseldon. The defense then talked with the defendant's aunt, mother and Mr. Norwood (Tr.917, 926). Counsel could recall reading portions of a transcript of appellant's New York murder conviction (Tr.918-919). Counsel talked with Dr. Musseldon concerning an insanity defense and possible mitigating evidence, but he was not helpful (Tr.925-926).

John Thor White, co-counsel, testified he was admitted to the bar in 1973 (Tr.940). He has practiced criminal law all of his career (Tr.953). Prior to this case counsel had tried two other capital cases (Tr.954). Mr. White indicated he did not go to New York nor did he talk with appellant's brother or sister (Tr.945). Counsel testified there was a different relationship each attorney had with the defendant. He believed this developed because the defendant had made incriminating statements to Mr. Scherer. To alleviate any ethical problems, this witness never discussed whether or not the defendant committed the crime

(Tr.947-949). Counsel testified Mr. Norwood was not called during the penalty phase because he was suspected as the anonymous tipster and was potentially adverse (Tr.951-952). Mr. White also testified it was a tactical decision not to call the other inmate witnesses because they were beginning to recant their testimony, etc. (Tr.808-809).

U.S. Attorney, Robert Merkle, who was the prosecutor in this case, was called as a witness for the state. Mr. Merkle testified Kenneth Young was called as a witness by the state (Tr.742). He further stated no deals had been made with Mr. Young (Tr.743). Merkle stated it was his practice if he made a deal with a witness to inform defense counsel (Tr.744-745). Jack Helinger, who also prosecuted this case, also testified there had been no deal with Kenneth Young (Tr.754).

## SUMMARY OF THE ARGUMENT

The record before this Court demonstrates there was no violation of Brady v. Maryland, 373 U.S. 87 (1963). While the names of Stephen Spitzig and Leon Vazquez was not disclosed until the Friday before trial, it was as soon as the prosecutors learned of the exculpatory nature of their testimony. While a specific report may not have been disclosed, the information was otherwise known to the defense.

Appellant has failed to demonstrate deficiency by trial counsel or prejudice as required by Strickland v. Washington. The evidence from trial and the evidentiary hearing indicates counsel took the deposition of the expert witnesses, watched tests, spoke with an independent expert and reached the expert areas. They were therefore prepared to cross-examine these witnesses. Counsel explained there were tactical reasons for not calling various witnesses.

Appellee submits the Florida courts are not the proper place to challenge the constitutionality of a New York conviction. The correctness of the New York adjudication should be presented to the appropriate courts of New York.

## ARGUMENT

### ISSUE I

WHETHER THE STATE WITHHELD EXCULPATORY EVIDENCE.

Appellant contends that the record below makes it clear that prosecutor Robert Merkle breached his duty to disclose evidence to the defense in several material respects. Appellant claims that the state withheld the names of two witness who could provide exculpatory evidence until the eve of trial and that he failed to disclose that a witness against Waterhouse had sought favorable treatment on his pending charges in exchange for testimony against Mr. Waterhouse. Appellant also claims that the prosecution failed to provide a police report disclosing that the witness had been engaged in extortion and that the state successfully blocked any cross-examination by defense counsel about the extortion. Appellant claims the prosecution's actions violated Mr. Waterhouse's constitutional and statutory rights and require a new trial.

In Brady v. Maryland, 373 U.S. 87, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963), the United States Supreme Court dealt with the issue of the state's burden to disclose exculpatory evidence to the defense. The holding in Brady requires disclosure only of "evidence that is both favorable to the accused" and "material either to guilt or punishment." See also, Moore v. Illinois, 408 U.S. 786, 33 L.Ed.2d 706, 92 S.Ct. 2562 (1972). As the Court explained in United States v. Agurs, 427 U.S. 97, 49 L.Ed.2d 342,

96 S.Ct. 2392 (1976), the Brady rule is based on the requirement of due process. Its purpose is not to displace the advisary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial:

> "For unless the omission deprives the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose . . .
>
> But to reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial."
>
> United States v. Agurs, 427 U.S., at 108.

Impeachment evidence, as well as exculpatory evidence, falls within the Brady rule. See, United States v. Bagley, 473 U.S. 87 L.Ed.2d 481, 105 S.Ct. __ (1985).

> "Such evidence is 'evidence favorable to an accused,' (cite omitted), so that, if disclosed and used effectively, it may make the difference between conviction and acquittal. The jury's estimate of the truthfulness and reliability of a given witness may be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."
>
> Bagley, at 87 L.Ed.2d 490.

The court went on to hold that the standard of review in the other Brady type situations ("no request", "general request", and

"specific request" cases of failure to disclose favorable evidence) is that the evidence is material only if there is a reasonable probability that the result would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. See, Bagley, supra. There is no reasonable probability here that the outcome would have been different.

In the instant case, the evidence at issue was not material or tending to negate the guilt of the accused. The names of Stephen Spitzig and Leon Vazquez were disclosed to defense counsel just prior to trial, but it was as soon as the prosecutors learned of the potential exculpatory nature of their testimony. The disclosure was not "knowingly withheld" as defendant alleges, but was well within an ambit of reasonableness that can be attributed to diligent prosecutors acting with an abundance of caution. Even if a matter allegedly withheld from the defense becomes known in the middle of trial, it will not support a collateral attack. State v. Matera, 266 So.2d 661, 666 (Fla. 1972); Carillo v. State, 382 So.2d 429, 430 (Fla. 3d DCA 1980). The testimony of Stephen Spitzig and Leon Vazquez did not show that the defendant was not the perpetrator of the crime. Their testimony did not dispute the theory of the state's case, and there was no testimony that even if defendant left the bar with Spitzig that the defendant did not return. In fact, the record is very clear that from the vantage point Vazquez had at the front door, he could not see the rear door. Even if the

defendant did not return, he would not have had to return to the bar to have committed the crime. Vazquez testified that it was possible that the defendant walked back into the bar through other doors (R.1966).

Defendant cannot allege any prejudice from the late disclosure because he had an ample opportunity prior to trial to interview these witnesses regarding their expected testimony and actually had Vazquez testify at trial, while Spitzig was in the hall under subpoena in the event the defendant decided to call him as a witness. (R.1938-44) And, in fact, defense counsel, John White, testified at the evidentiary hearing that Spitzig was not used because defense counsel felt he was not a viable witness. (Tr. 808)

Appellant further alleges that his constitutional rights were violated by the state's nondisclosure of a police report prepared by Detective Bolle at the Pinellas County Sheriff's Office describing an attempted rape that allegedly occurred in defendant's cell. The report discloses the name of Kenneth Young, a witness used by the state during defendant's trial and describes circumstances under which Young would testify against Waterhouse. Although the report itself was not disclosed to defense counsel, the name of the witness was, in fact, divulged on July 29th, 1980 within sufficient time for defense to depose Young (R.1769). See deposition of Kenneth Young, taken August 12, 1980). Prejudice does not result where the defendant obtains the information through other means. State v. Banks, 418 So.2d

1059 (Fla. 2d DCA 1981); Sirecci v. State, 399 So.2d 964 (Fla. 1981), cert. denied, 456 U.S. 984 (1982). The evidence taken at the 3.850 hearing conclusively dispelled any indication of an agreement by the state for Young's testimony and is in accord with Kenneth Young's pre-trial deposition (at page 16-17). See, Testimony of Evidentiary Hearing of Robert Merkle (Tr.743-745); Jack Helinger (Tr.754); and, Joe Donahey (Tr.791, 793, 794, 805) and Transcript of Plea and Sentencing of Kenneth Young. All these sworn statements indicate there was absolutely no agreement whatsoever.

There is no question that trial defense counsel had knowledge of the attempted rape and Young's extortion plot, as he conducted interviews of several inmates at the jail who were supposedly there when the incident occurred, had deposed Kenneth Young, and had cross-examined Young regarding the extortion plot (R.1800). Appellant's contention to the contrary, there is no evidence in the record that he was precluded from inquiring into the extortion plot or that the state attempted to hide this information from him (R.1800-1811).

Thus, despite appellant's attempt to color the facts, the record speaks for itself and clearly shows no discovery violations that warrant reversal under Brady v. Maryland, supra. There is nothing here to support a claim that there was a reasonable probability that the outcome would have been different had the names of Stephen Spitzig and Leon Vazquez or the report of Detective Bolle supplied at the outset of the case. Nor is

there any evidence that would support a claim that Kenneth Young was cut a deal and, in fact, the record negates that contention.

## ISSUE II

APPELLANT RECEIVED REASONABLY EFFECTIVE ASSISTANCE OF COUNSEL.

Appellant's claim of ineffective counsel must be addressed in light of the United States Supreme Court's legal standard for reviewing ineffective assistance of counsel claims as outlined in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The determination of whether the assistance rendered by counsel is reasonably effective is not to be based solely upon his performance at trial; ineffectiveness must be based on the totality of circumstances. Corn v. Zant, 708 F.2d 549 (11th Cir. 1983); United States v. Gibbs, 662 F.2d 728 (11th Cir. 1981). This Court has on numerous occasions adopted and applied the Strickland standard. See, i.e., Sireci v. State, 469 So.2d 119 (Fla. 1985); Witt v. Wainwright, 465 So.2d 510 (Fla. 1985); Jackson v. State, 452 So.2d 533 (Fla. 1984); Shriner v. State, 452 So.2d 929 (Fla. 1984); Downs v. State, 453 So.2d 1102 (Fla. 1984); Dobbert v. State, 456 So.2d 424 (Fla. 1984); Adams v. State, 456 So.2d 888 (Fla. 1984); Smith v. State, 456 So.2d 1380 (Fla. 1984); Clark v. State, 460 So.2d 886 (Fla. 1984); Mikenas v. State, 460 So.2d 359 (Fla. 1984); Tafero v. State, 459 So.2d 1034 (Fla. 1984).

The benchmark for judging claims of ineffectiveness is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington,

U.S. ___, 104 S.Ct. 2052, 2064 (1984). In order for a defendant to succeed on a claim of constitutionally deficient representation so as to obtain a reversal of conviction on death sentence, the United States Supreme Court held that he must first show both that counsel's performance was deficient; that is, a showing that the attorney was not functioning as the 'counsel' guaranteed by the Sixth Amendment. Second, the defendant must show that there is a reasonable probability that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial the result of which is reliable. 1045 S.Ct. 2064, 2068. Prejudice does not embrace errors which are merely detrimental to defendant's case. Corn v. Zant, supra, at 561; Adams v. Balkcom, supra, 739; Washington v. Watkins, 655 F.2d 1346, 1360 (5th Cir. 1981), cert. denied, 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982).

The court in Strickland v. Washington, supra, rejected the notion that rigid guidelines are to be utilized when assessing such a claim and instead held that the measure of an attorney's performance should be predicated upon reasonableness under prevailing professional norms. The court provided clear direction to lower federal and state courts requiring that judicial scrutiny of counsel's performance must be highly deferential. The lower courts were clearly directed that every effort must be made to eliminate the distorting effects of hindsight and to try and reconstruct circumstances and evaluate conduct based on those circumstances as they existed at the

time. Requirements were imposed that strong presumptions be afforded to the idea that counsel acted reasonably and thus effectively. Emphasis was placed on strategic choices made after thorough investigation and that those choices were virtually unchallengable, and a particular decision not to investigate must be assessed for reasonableness considering all the circumstances and applying a heavy measure of deference to the attorney's judgments.

Most importantly, it was stated that when a defendant challenges a death sentence, the question is whether there is a reasonable probability that, absent the errors the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. In this context, to the extent that an appellate court independently reweighs the evidence, it too was bound by that process. "[A] court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." 104 S.Ct. 2069.

In Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983) (en banc), the Eleventh Circuit Court of Appeals addressed the issue as follows:

> In reviewing ineffective assistance of counsel claims, we do not sit to second guess considered professional judgments with the benefit of 20/20 hindsight. **Washington v. Watkins**, 655 F.2d at 1355; **Easter v. Estelle**, 609 F.2d 756 (5th Cir. 1980). We have consistently held that counsel will not be regarded constitutionally deficient merely because of tactical decisions. See **United States v. Guerra**, 628 F.2d 410 (5th Cir.

> 1980), **cert. denied**, 450 U.S. 934, 101 S.Ct. 1398, 67 L.Ed.2d 369 (1981); **Buckelew v. United States**, 575 F.2d 515 (5th Cir. 1978); **United States v. Beasley**, 479 F.2d 1124, 1129 (5th Cir.), **cert. denied**, 414 U.S. 924, 94 S.Ct. 252, 38 L.Ed.2d 158 (1973); **Williams v. Beto**, 354 F.2d 698 (5th Cir. 1965). Even where an attorney's strategy may appear wrong in retrospect, a finding of constitutionally ineffective representation is not automatically mandated. **Baty v. Balkcom**, 661 F.2d 391, 395 n.8 (5th Cir. 1981), **cert. denied**, __ U.S. __, 102 S.Ct. 2307, 73 L.Ed.2d 1308 (1982); **Baldwin v. Blackburn**, 653 F.2d 942, 946 (5th Cir. 1981).
>
> (22,23) That counsel for a criminal defendant has not pursued every conceivable line of inquiry in a case does not constitute ineffective assistance of counsel. **Lovett v. Florida**, 627 F.2d 706, 708 (5th Cir. 1980). This is not a case in which counsel allegedly failed to prepare and investigate adequately. Ford's counsel was reasonably likely to render and did render reasonable effective assistance. See, **Herring v. Estelle**, 491 F.2d 125, 127 (5th Cir. 1974). Because the record reveals Ford received constitutionally adequate representation and no prejudice resulted to him by any action or inaction of counsel, see **Washington v. Watkins**, 655 F.2d at 1362. Ford has not carried his burden of proving ineffective assistance of counsel. See **United States v. Killian**, 639 F.2d 206, 210 (5th Cir.), **cert. denied**, 451 U.S. 1021, 101 S.Ct. 3014, 69 L.Ed.2d 394 (1981).
>
> (Ford v. Strickland, supra at 820).

See also Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983), in which the Eleventh Circuit Court of Appeals again emphasized that a defendant must demonstrate prejudice:

> (1) The framework for analyzing claims of constitutionally ineffective assistance of counsel in this circuit was set forth in the en banc opinion in **Washington v. Strickland**, 693 F.2d 1243 (5th Cir. 1982) (Unit B en banc). Under **Washington v. Strickland**, a petitioner asserting that counsel failed to

> conduct an adequate pretrial investigation has the intital burden of making a dual showing. As a threshold requirement, he must show that his counsel was in fact, ineffective, that counsel's conduct was not within the "range of competence demanded of attorneys in criminal cases." **McMann v. Richardson**, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970); **Mylar v. State**, 671 F.2d 1299, 1301 (11th Cir. 1982) pet for cert. filed, U.S. ___, 103 S.Ct. ___, 74 L.Ed.2d ___, 50 U.,S.L.W. 3984 (U.S. June 7, 1982) (No. 81-2240). This is an objective assessment of whether trial counsel fell below acceptable professional standards in not advocating the underlying claim. This portion of the analysis may ask, for example, whether counsel conducted a reasonable pretrial investigation and whether counsel's failure to investigate certain lines of defense was part of a strategy based on reasonable assumptions. A petitioner has the additional burden of proving that his counsel's ineffectiveness caused "actual and substantial prejudice" to his case. Because we hold that Stanley has failed to prove that his trial counsel was ineffective, we need not reach the issue of prejudice.

See also, United States v. Valenzuela-Barnal, 102 S.Ct. 3440 (1982).

Appellant asserts that his trial counsel rendered ineffective assistance in both the guilt and penalty phases of the trial. We turn to these contentions.

Appellant alleges ineffectiveness of counsel in a number of ways. In his brief he alleges that trial defense counsel allowed the introduction of evidence harmful to the defendant by either bringing out such evidence or failing to object when the State brought it out. The record indicates, however, that trial defense counsel both objected quite frequently and also successfully kept out pieces of damaging evidence. For example,

the trial counsel kept out an admission that defendant had made to his girlfriend, Sherry Rivens, which the judge had stated was the most damaging evidence yet. (R. 1284-1303). As to trial defense counsel's failing to object, defense counsel has not enumerated any specific instances when trial counsel's failure prejudiced the defendant.

Appellant further asserts that defense counsel rendered ineffective assistance by failing to investigate sources of evidence which might have been helpful to the defendant. This is only a bare allegation which has no basis either in the trial record or testimony adduced at the 3.850 evidentiary hearing. Contrary to appellant's assertions, the record and 3.850 testimony prove that trial defense counsel in fact investigated every source of evidence which may have been helpful to the defense.

Counsel relies upon the cases of Nelson v. Estelle, 642 F.2d 903 (5th Cir. 1981), and Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1978), for the proposition that "under certain circumstances" a single error of constitutional dimension may cause the attorney's performance to fall below the Sixth Amendment standard. These cases are factually distinguishable from the present case. Nero, interpreting Louisiana Law, holds that when remarks reveal inadmissible prior convictions to the jury, mistrial must be granted. Should a defense attorney not move for mistrial under those circumstances, it is a ground for finding of ineffective assistance of counsel. No similar comment

on inadmissible prior convictions came out during the guilt phase of the instant trial nor the penalty phase. Both Nero and Nelson state, as required by Washington v. Strickland, that the proper application of the "ineffective assistance" standard involves an inquiry into the actual performance of counsel and a determination based upon a totality of the circumstances. Nero at 994. Nelson at 906. (emphasis in originals). There is no question that, in application of this standard, the instant trial defense counsel rendered effective assistance.

Defendant, in his brief, relies upon Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985), and Little v. Streater, 452 U.S. 1 (1981), to infer that Ake v. Oklahoma, 470 U.S. ___, 105 S.Ct. 1087 (1985), should be read to require the state to provide blood grouping tests to a defendant. Nothing in Ake indicates that the state has to provide anything more than a competent psychiatrist to the defendant. To the contrary, Ake expressly limited itself (S.Ct. at 1095) to the provision of one competent psychiatrist. The Blake opinion also dealt with a psychiatrist being provided and does no more than reiterate Ake. The Little opinion, however, does address Connecticut's obligation to provide a blood grouping test, but not an expert, when a defendant cannot otherwise afford one. The Little case can be easily distinguished from the case at bar in two respects: (a) the blood grouping test was necessary to defend against civil action arising from paternity, when Connecticut law made the father's testimony alone insufficient to overcome the prima facie case

established on the word of the mother, and more importantly, (b) the defendant's request for the blood test was denied. In the case at bar, there was no demand for a blood grouping analysis and nothing in the record indicates one would have been denied had one been requested. Moreover, trial defense counsel requested and got $100 upon his own motion to enlist the aid of an expert. Nothing has been adduced that shows he would not have gotten more if he had requested it.

Trial defense counsel's testimony at the 3.850 hearing was very clear that he only wanted the money to consult an expert, and had no intention of calling those experts as his witnesses.

Defense counsel of the 3.850 Motion states that the "proper" way to defend Waterhouse would have been to impeach the State's experts on their results, or explain the results in a way consisent with innocence. It is readily apparent from the record that defense counsel did an effective job impeaching the State's experts on cross-examination. The record is replete with tests, terms and phrases that defense counsel uses in cross-examining the State experts that were not brought out on direct. It is obvious in the record that trial counsel had done extensive research in the areas of expertise for preparation of cross-examination.

There are various theories and strategies which could have been used to defend Waterhouse, and it is obvious that defense counsel's theory was to impute sufficient reasonable doubt whether Waterhouse in fact committed the crime. Just because a

trial counsel's strategy was not successful does not mean the representation was inadequate. Sireci v. State, 469 So.2d 119 (Fla. 1985). Even the "expert attorney" that defense counsel called during the evidentiary hearing admitted that each case is unique; there are various strategies used to defend, and they do not always work regardless of defense counsel's expertise. (Tr. 788)

Defense counsel alleges that Dr. Joan Wood's testimony was subject to dispute and her findings were subject to demonstrable weaknesses which were not exploited by trial counsel. Counsel asserts that the level of acid phosphatase found in the victim's rectum could have been from the mixture of the salt water with the blood cells in the rectum, causing the blood cells to rupture and release their acid phosphatase. Defense counsel asserts that this was the cause of the acid phosphatase presence, rather than its being, as testified by Dr. Wood, "strongly suggestive of the presence of semen." Defense counsel relies on affidavits of Dr. Diane Juricek and Dr. Robert Stivers. However, Stivers' statement actually corroborates Dr. Wood's statement that "semen does indeed contain high levels of acid phosphatase." Affidavit at page 12. Dr. Juricek's affidavit qualifies the theory now relied on by 3.850 defense counsel by explaining that the rupturing will occur only when "certain concentrations of salt water are mixed with red blood cells," described as "hypotonic levels" needed to cause such a rupture. Had trial defense counsel brought in an expert to testify to this, it would have

led to the State producing an expert to testify to the toxicity level, resulting in the defense's own expert corroborating the State. Further, the affidavit does not address what level in units the acid phosphatase would reach if there was such a rupture of the red blood cells. Defense presented no evidence that a rupture would produce the same high reading of 100 units, the findings reported by Dr. Wood. (R. at 1037-1038).

3.850 counsel alleges that trial counsel was unaware of the significance of the absence of sperm in the rectum, and that the lack of any sexual activity should have been argued in cross-examination and closing argument. Defense counsel's own 3.850 expert, Dr. Stivers, admitted that the presence of semen and lack of sperm could have been the result of ejaculation by a male who had undergone a vasectomy. See affidavit of Dr. Robert Stivers, par. 12. Counsel further argues that by his failing to call his own expert, trial defense counsel could not elaborate upon the "false-B" reaction which Dr. Wood testified to finding in the rectum. A reading of the record proves that counsel effectively made this point on cross-examination (R.1064-1068), and stressed it's importance in his closing argument to the jury (R.2124-2125). Counsel alleges trial counsel was ineffective because he hadn't known about a book which Dr. Wood related as authority on false-B reactions. Defense counsel was, however, obviously attempting to impeach Dr. Wood, and his question to her of what book she recommended on the topic was not proof his his own ignorance.

It is 3.850 counsel who appears to be unaware of the significance of the "false-B" reaction and the absence of sperm. Evidence at the trial remained that, despite whether or not the defendant penetrated the murder victim's anus with his penis, she was anally assaulted with a large object, consistent with a coke bottle. There would have been no reason for trial defense counsel to argue a lack of sexual activity when the State could come back with the "large object" argument in rebuttal, an act just as much sexual activity as if committed with a penis.

Counsel alleges that the state, through Dr. Wood, was able to interpret the results of one test as conclusive while it omitted any explanation of factors which may have indicated a different conclusion or lack of reliability. The record is to the contrary, however, that Dr. Wood carefully qualified her statements in areas of doubt. Trial defense counsel argued to the jury Dr. Wood's own admissions of the limitations of her art. (R. at 2121).

Appellant attempts to relitigate the facts and circumstances of the case by alleging that the serology experts could have been impeached to a degree that would have rendered a different result in the trial. Defense alleges that trial defense counsel did an ineffective job in cross-examining expert Ted Yeshion, who should have been impeached from his own blood stain analysis articles, which emphasized the high rate of error related to "certain" blood analysis. Counsel makes no proffer that the tests Yeshion had written about were the same types of tests, or used in the

same manner, as those used for his own examinations. Contrary to present counsel's allegation, trial defense counsel did emphasize to the jury valid problems with Yeshions's blood testing. Trial defense counsel elicited testimony in both cross-examination (R.1531-2) and in closing argument (R.2154), about copper, copper alloys and chlorophyll giving false reactions to luminol and phenophtalein, used by Yeshion to test for the blood stains. In both cross-examination (R.1549) and in closing argument (R.2153), trial defense counsel pointed out to the jury that Yeshion couldn't tell if it was human blood. He further pointed out the fact that the police officers aiding Yeshion during the testing had themselves weeks earlier been applying the same series of three chemicals (R.1552). The jury became well aware of the fact that when Yeshion tested the same window with the same luminol and phenolphtalien ingredients the results were different (R.1572, 2154). Counsel alleges that there was no replicate testing, but the record proves otherwise (R.1553).

Trial defense counsel may well have achieved his intended goal by waving the pink filter paper in front of the jury's eyes. Yeshion testified that the filter paper in the test turns pink in the presence of blood but that the color disappears within seconds. Trial defense counsel's filter paper was still pink in color (R.1556). Although the jury was removed shortly thereafter, counsel even tried to qualify the pink filter papers while the jury was leaving the room and succeeded in making the prosecutor look like he was trying to hide something (R.1556-

1559). Trial defense counsel might well have put some doubt into the minds of the jury.

Counsel attacks trial counsel's method as ineffective when confronted with David Baer, who enzyme-typed the blood found in defendant's car. Counsel alleges that trial counsel failed to put on any evidence about other more reliable and elaborate testing techniques. Trial counsel testified at the 3.850 hearing that his strategy was to show that Baer's testing was not as thorough as the techniques used by the FBI. (See testimony of Paul Sherer.) This was effectively done by trial defense counsel when Baer testified under cross-examination that the FBI runs eight tests, but that his office ran only six separate exams (R.1505). Trial counsel further pointed out that Baer wanted to start a different, more elaborate testing procedure (obviously so that no further tests would be "illegible" or "smeared") but that the implementation of the new procedures came only after the testing that was done in defendant's case (R.2152). This cross-examination and closing argument fulfilled trial counsel's strategic goals. That a trial counsel's strategy is not successful doesn't necessarily mean that the representation is inadequate. Sireci v. State, 469 So.2d 119 (Fla. 1985).

Appellant further alleges now that Baer's conclusion that the defendant's blood was immediately excluded, was impeachable due to the high error rate of phosphoglucomutase testing and also because only one erythrocytic acid phosphatase test was performed on defendant's blood. There is however, no evidence whether Baer

ran only one test or whether he ran several tests with the same illegible results. Further, the testimony was not that the defendant's blood was excluded, just that it was inconsistent. This was all addressed by trial defense counsel in cross-examination and closing argument. He argued to the jury, based on his cross-examination, that the enzyme system Baer used is not stable (R.1484); that heat and bacteria kills enzymes (R.1496, 2151); and that different enzyme results are obtained when testing a dead body (R.1510, 2151). Although counsel was unable to impeach Baer using pages copied from Culling's book (R.1498-1501), he was more successful in using the L.E.A.A. study (R.1515). The record reveals this and other examples of trial defense counsel's preparation, knowledge and use of the various materials available in the relevant areas of expertise.

It is readily apparent from viewing trial counsel's argument that he was not ineffective for not discrediting "blood-spatter" testimony of Judith Bunker. The record reveals that trial defense counsel brought out the fact that Bunker didn't use a powerful enough microscope (R.1634); used a book on blood spatter analysis to impeach her (R.1638, 2156); pointed out the fact that two different graphs are used for the same principle and that the one that Bunker prepared was incorrect (R.1643); and discredited her by pointing out that there were no flat surfaces in the car upon which to base her findings (R.2156). Further, trial defense counsel elaborated upon the fact that this expert was being paid $300 daily to testify (R.1648), and stressed that she was selling

her testimony and that "she wouldn't bite the hand that feeds her" (R.2131, 2155).

Appellant alleges that trial counsel was ineffective in his cross-examination of Patricia Lasko, the micro analyst, who testified to the hair comparisons in defendant's car. Defense counsel now argues that the limitations of Lasko's expertise was not brought out. It was, however, brought out repeatedly by trial defense counsel that an identification cannot be made by hair comparison (R.1671, 1673, 1676, 1677, 1687). This was reiterated in front of the jury over and over, and 3.850 counsel does not here prove to the contrary that the jury wasn't shown the limitations and unreliability of hair comparisons. Defense counsel now further argues that trial cousnel did not sufficiently stress that of the many hairs found in defendant's car, only three tested consistent with the victim. Defense counsel admits that the general argument of "only three hairs" was cogently made but that it should have been stressed more heavily. Defense counsel conveniently ignores that the State countered the argument that "only three hairs" were found by evidence that defendant had cleaned his car the whole next day after the murder.

Defense counsel alleges that trial counsel was not effective based upon his cursory cross-examination of Mary Lynn Henson, the State's "fiber expert". Trial counsel was, however, as effective in his cross-examination and closing concerning this fiber expert as could be expected of reasonably competent counsel. He brought

out the fact that the fibers could be carried to various points by different people, that no replicate testing had been performed and that Henson couldn't tell how long the fibers had been in the seat, which was all consistent with the defense theory that the fibers were there from the earlier times the victim was in defendant's car.

In summary, 3.850 counsel is alleging ineffectiveness for trial counsel's failure to "forum-shop" for doctors and experts who would come to a conclusion consistent with the defense, rather than with the truth. The truth of the matter is that the circumstantial evidence was so overwhelming that even without the State's use of the experts in this case, the verdict would have been the same. 3.850 counsel's allegations regarding the ineffectiveness of counsel concerning the rebuttal of the State's expert witnesses, has no factual merit.

Appellant also alleges trial defense counsel was ineffective for not calling certain witensses, i.e., the victim of the jailhouse rape, and other witnesses to the alleged rape. Trial counsel knew from discovery that this victim would have corroborated the State witness, Kenneth Young's testimony. The rape incident was brought into evidence only to show the circumstances surrounding defendant's admission about using the Coke bottle on the victim. Trial counsel testified at the evidentiary hearing that he knew from discovery that the other six inmates would have testified that they saw and heard nothing, but he testified at the 3.850 hearing that he didn't believe

their stories. (Tr. 878-879). Faced with the possibility that the State would call the rape victim in rebuttal (R.1731), it was a tactical move for trial defense counsel not to call them and then later to blame it on the State for not calling the victim (R.2162). A trial attorney's decision not to call certain witnesses that he feels would not be fruitful to the defense is a matter of trial tactic and strategy not open to attack. Washington v. State, 397 So.2d 385 (Fla. 1981).

In his brief appellant alleges that trial counsel was ineffective for not presenting the jury was a basis for finding a "whimsical doubt" at the sentencing stage. As authority for this "whimsical doubt", counsel cites Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981) and Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984). The term "whimsical doubt" originated in the Balkcom case, and was intended by Circuit Judge James C. Hill to refute appellant John Eldon Smith's contention that the Georgia procedure of the same jury sitting at both the guilt and penalty phase should be changed. Hill's opinion sets forth the benefit inherent in such a procedure; i.e., that whimsical doubt would be lost should separate juries determine guilt and penalty. According to Hill's opinion (at 580-581) this "whimsical doubt" is created during the guilt phase when defense counsel mounts a vigorous defense on the merits, and although a reasonable doubt sufficient to find the defendant not guilty is not created, there may in fact be some shred of doubt created. This shred may be a possible, speculative, imaginary or forced doubt, one which may

not be stable but wavers and vacillates. In Hill's opinion he expressed the value our present scheme serves to benefit the defendant by the jury's retaining at the penalty phase a "whimsical doubt" from the guilt phase. This doubt which may be carried over from the guilt stage to the penalty stage, may, according to Hill be sufficient to preclude a number of jurors from recommending the death penalty. In the case at bar, the penalty phase jury did have the opportunity to create such a "whimsical doubt" all through the guilt phase, and apply this shred of doubt when the time came to recommend death. Florida's sentencing procedure does not preclude the jury's finding a whimsical doubt at the sentencing phase, and trial defense counsel in the instant case was not ineffective in his presentation in the sentencing phase in this regard. The Smith cases do not demonstrate trial counsel's ineffectiveness.

## ISSUE III

USE IN THE PENALTY PHASE OF PRIOR MURDER CONVICTION.

Defendant asserts, that the use during the penalty phase of defendant's prior New York murder conviction was unconstitutional. The New York decree enjoys a presumption that it is absolute, final and irrevocable, unless the defendant proves otherwise. Edgar v. Edgar, 126 So.2d 585 (Fla. 2d DCA 1961). However, this court has no jurisdiction to decide constitutional issues depending upon factual disputes with New York as raised by the defendant. New York has jurisdiction over the subject matter and parties involved in the 1966 conviction and that jurisdiction is not lost even if an erroneous ruling was in fact made. The New York court has the jurisdiction to rule correctly as well as to make a mistake and the only remedy is to appeal to courts having New York jurisdiction. Hunter v. Hunter, 359 So.2d 500 (Fla. 4th DCA), cert. den. 365 So.2d 712 (Fla. 1978). To accept defendant's argument this court would first have to declare the New York conviction unconstitutional. This court has no jurisdiction to make such a ruling. Cf. Adams v. State, 449 So.2d 819 (Fla. 1984).

Even assuming the improper use of the prior conviction as an aggravating circumstance, there are at least two other valid statutory aggravating circumstances established in this record and no mitigating circumstances which will support the death sentence. Adams v. State, supra.

This issue could have been raised in the defendant's direct appeal to the Florida Supreme Court and it will not now support a collateral attack. Adams, supra; Adams v. State, 380 So.2d 423 (Fla. 1980); Sullivan v. State, 372 So.2d 938 (Fla. 1979); Spinkellink v. State, 350 So.2d 85 (Fla.), cert. den., 434 U.S. 960 (1977).

## CONCLUSION

Based upon the foregoing reasons, arguments and authorities, the judgment and sentence of death should be affirmed.

Respectfully submitted,

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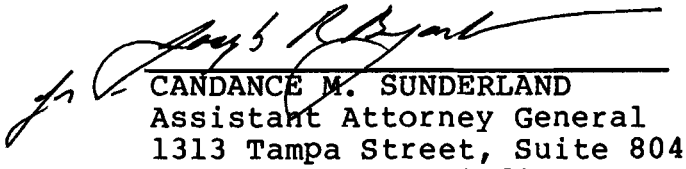

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Stephen B. Bright, Esquire and Julie Edelson, Esquire and Clive A. Stafford Smith, Esquire, 185 Walton Street, North West, Atlanta, GA 30303 this 19th day of May, 1987.

OF COUNSELS FOR APPELLEE