IN THE SUPREME COURT OF FLORIDA

JOHN O'CALLAGHAN, Appellant,	)	
v.	)	CASE NO. 70,112
STATE OF FLORIDA, Appellee.	)	

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, FL 32399-1050

RICHARD G. BARTMON
Assistant Attorney General
111 Georgia Avenue - Suite 204
West Palm Beach, FL 33401
Telephone (407) 837-5062

Counsel for Appellee

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PRELIMINARY STATEMENT

In this brief, JOHN O'CALLAGHAN will be referred to as "Appellant"; the STATE OF FLORIDA, as "Appellee."

In the interest of convenience and clarity for this Court, Appellee's Record references will correspond with those symbols used by Appellant. Thus, "RI" refers to the Record of Appellant's trial and sentencing, as compiled on direct appeal, O'Callaghan v. State, Case No. 60,704; "RIII" and "SR", to the Record of Appellant's Rule 3.850 hearing, held in January, 1985 before the Circuit Court, Broward County, and the Record of proceedings, concerning consideration of William Seidel's bar disciplinary proceedings, respectively; "Def Exh" to those exhibits introduced by Appellant at the Rule 3.850 hearing, and "St Exh" to those introduced by the State; and "A" to Appellant's appendix, as attached to his brief. The symbol "e.a." means emphasis added.

STATEMENT OF THE CASE

Appellee accepts Appellant's Statement of the procedural history of this case, Initial Brief, at 1-4.

STATEMENT OF THE FACTS

Appellee files its own Statement, as follows:

A. TRIAL AND DIRECT APPEAL

The State's evidence against O'Callaghan, for the first-degree murder of Gerald Vick, was substantial and overwhelming. The State established that O'Callaghan and Walter "Beau" Tucker planned to "get" Vick, as the result of a feud arising from money owed from a card game involving Tucker and James Long, Vick's employer. (RI, 548, 643, 791). Tucker believed Vick or Long had shot his windows out one night. (RI, 548, 550, 659, 776, 777, 789). O'Callaghan was employed as the night manager, at the Finish Line Bar, co-owned by Allen Wheatley, and Long, Wheatley's stepfather. (RI, 526-529).

On August 20, 1980, at about 1 P.M., O'Callaghan ordered Wheatley to take him and Tucker and others, to Vick's house, because O'Callaghan and Tucker were looking for him. (RI, 528-530). Wheatley drove them in Long's white van, and intentionally took them to a trailer, that was not Vick's residence. (RI, 528-530, 535). Upon discovering this, O'Callaghan told Wheatley that he "better show home where it is at," and that "they were going to get" Vick. (RI, 535-536, 548). When O'Callaghan did not find Vick, he checked the area, to insure that it was Vick's house, and left a note, to get Vick to come to the

bar that day. (RI, 537, 538). During this episode, O'Callaghan was armed with a gun, and checked it. (RI, 538-539).

When Vick came to the bar, O'Callaghan and Tucker eventually sat with him at a table, with O'Callaghan pointing a gun at him, from underneath. (RI, 610-612). Mark Petitpas, the day manager, saw Tucker point a gun at Vick's head, and threaten to "blow your fucking head off." (RI, 610-611). O'Callaghan went with Vick, Tucker and Anthony Cox, who O'Callaghan had summoned to the bar, to the kitchen area. (RI, 612, 669, 730, 735). Before going back to the kitchen, O'Callaghan ordered Cox to get a gun from Petitpas, and told Petitpas to give Cox the gun. (RI, 644, 645, 669, 730). O'Callaghan told Cox, to get Vick's gun, while O'Callaghan pointed the gun at Vick. (RI, 733-735).

O'Callaghan later came from the kitchen, angrily demanding the keys to the van, from Wheatley, (RI, 543-544, 613-614), and left the bar with Tucker, Anthony Cox, and Cyndia Lapointe, Tucker's girlfriend. (RI, 544, 545, 614). O'Callaghan pulled the van, around to the back of the kitchen, put plastic down inside the van, and put Vick in the van, helped by Cox. (RI, 737). O'Callaghan drove the van, to a remote area, on Pembroke Road in Ft. Lauderdale, where Vick was thrown from the van. (RI, 738, 739). On the way out, Lapointe testified that she saw Vick's leg move, and

that he seemed to be breathing. (RI, 783-784). Cox, Lapointe and Tucker identified O'Callaghan, as having shot Vick twice. (RI, 736, 739, 755, 785-786, 912, 913). O'Callaghan had ordered Vick to be thrown from the van, and was in control, giving orders, waving a gun around. (RI, 811, 814). Appellant took the body in the bushes, wiped the gun clean of prints, and disposed of it in a canal. (RI, 741, 788). Upon returning to the bar, O'Callaghan participated and/or made arrangements for the cleaning of blood from the kitchen, and the disposal of the mop and rags used to do this, as well as Vick's car. (RI, 546-547, 615-617, 676-683). O'Callaghan told several people to keep quiet, about these circumstances. (RI, 593).

Dr. Shashi Gore, the medical examiner, testified that the cause of death was the gunshot wounds to the head and chest. (RI, 724). Gore called the prospects that death was caused by the beating, a "remote possibility." (RI, 709, 723-724).

From the outset, O'Callaghan's counsel advanced defense theories that 1) Vick was already dead from the beating administered to him, which O'Callaghan did not participate in, and 2) Tucker, not O'Callaghan, did the shooting. At voir dire, counsel attempted to discover, whether jurors could return an acquittal, if the State did not prove that the death of Vick, was by shooting. (RI, 149, 150). Counsel also sought to elicit the sentiments

of potential jurors, about State witnesses being granted immunity, for their testimony. (RI, 326-330). Counsel also sought severance of O'Callaghan's trial, several times, from that of Tucker. (RI, 21-22, 822, 916-917). Counsel cross-examined witnesses at the scene of the shooting, concering Vick's movement, or lack of movement, while being transported from the bar in the van, and O'Callaghan's participation in the beating. (RI, 742-755; 790-803; 917-933). Counsel cross-examined Dr. Gore, the State's medical expert, about the possibility that the beating caused Vick's death. (RI, 703-722). Mr. Seidel's motions for directed verdict, and his opening statement, further reflected these theories. (RI, 864, 865, 871-873, 899, 1016-1017). Counsel presented his own medical expert, Dr. Abdullah Fateh, to support the theory, that the beating caused the victim's death. (RI, 873-887). Counsel presented Appellant (as a rebuttal witness to Tucker), who testified that, inter alia, Vick was not moving in the van, and that Tucker shot him. (RI, 951-962). Seidel's closing argument, reviewed all witness testimony, and pointed to Tucker's involvement, motivation and participation, and argued the "death by beating" scenario. (RI, 1028-1041).

At sentencing, Seidel introduced, and read to the jury, Leslie Knuck's testimony, given at Tucker's parole revocation hearing, that Tucker made an armed

threat against Vick, to "blow his head off." (RI, 1141-1148). Counsel argued against certain aggravating circumstances, and that Tucker had directed and dominated the events of the murder, and that O'Callaghan had been disturbed and placed under duress by these events. (RI, 1156-1162). Seidel further argued to the judge, after the jury's advisory sentence, to prevent imposition of the death penalty, based on Vick's alleged death by beating, the jury's lenthy deliberations at sentencing, and the inapplicability of various aggravating factors. (RI,1303-1305).

On direct appeal, the Florida Supreme Court affirmed Appellant's conviction and sentence, by a 5-1 majority. O'Callaghan v. State, 429 So.2d 691 (Fla. 1983). In so doing, this Court approved the Circuit Court's application of four aggravating factors (felony-murder; prior violent felony; "heinous, atrocious and cruel"; "cold, calculated and premeditated"), and that the death sentence was justified. O'Callaghan, supra, at 696-697. This Court further found that the jury had a reasonable basis, to allocate different degrees of guilt to O'Callaghan and Tucker, based on the evidence. O'Callaghan, at 697. Justice McDonald dissented, based on his conclusion that the evidence was not sufficient to prove that O'Callaghan shot and killed Vick, since Vick was dead already, and that the prosecutor's conduct and argument deprived Appellant of a fair trial. O'Callaghan,

supra, at 697 (McDonald, J, dissenting).

B. COLLATERAL REVIEW

After this Court granted a stay of execution, in 1984, on Appellant's appeal, of the denial of his Rule 3.850 motion, this Court remanded proceedings to the Circuit Court, Broward County, for the purpose of an evidentiary hearing on Appellant's claims of ineffective assistance of counsel. O'Callaghan v. State, 461 So.2d 1354, 1355-1356 (Fla. 1984). Said motion alleged, inter alia, that counsel provided ineffective assistance of counsel, in the following ways:

(1) Inadequate cross-examination and impeachment of State witnesses; (RIII, 524-527)

(2) Lack of investigation and/or presentation of background or character witnesses, at the sentencing phase; (RIII, 527-529)

see also, O'Callaghan, 461 So.2d, supra, at 1355-1356.

An evidentiary hearing was conducted, on Appellant's claims of ineffective assistance of counsel, on January 9 and 10, 1985. (RIII, 1-501). Some thirteen witnesses were called, and approximately sixty items of documentary evidence was introduced. (See, RIII, Vol. VI, at p. 3, 4). These witnesses included Jeffrey Smith and William Seidel, counsel for Appellant (RIII, 33; 94); Drs. Krop, Perlswig and Zager, as to Appellant's psychological profile and background (RIII, 253; 330; 360);

Rick Garfield, the prosecutor of O'Callaghan and Tucker at trial (RIII, 308); Robert Wills and Evan Baron, co-counsel for co-defendant Tucker (RIII, 298; 390), and Appellant himself (RIII, 407). After permitting the filing of post-hearing memoranda by both parties, e.g. RIII, 719-720, the Circuit Court entered a detailed Order, denying relief. (RIII, 745-749).

In its Order, the Circuit Court initially noted that Beau Tucker, who had earlier submitted an affidavit, recanting his trial testimony, admitted at the hearing, that his trial testimony was truthful. (RIII, 745-746; 326). The court specifically observed that Seidel was a "competent and experienced capital litigator"; that the Record of the hearing, including Seidel's own testimony, demonstrated Seidel was prepared for trial, and that O'Callaghan understood the nature and consequences of Seidel's late entry into the case; and that Seidel understood capital sentencing logistics and law. (RIII, 746). The Circuit Court concluded that on the Record, Seidel had extensively and vigorously cross-examined witnesses; that other witnesses, including the prosecutor, and predecessor counsel concluded that Seidel was well prepared, and that Appellant received effective assistance of counsel at the guilt phase. (RIII, 746-747). The Court discounted the testimony of Appellant's offered experts, as inadequate to support a finding of ineffective assistance.

(RIII, 746-747). The Court further discounted Appellant's testimony, since Appellant had admitted to, and had told contrary versions of the crime and circumstances to different people. (RIII, 747).

As to sentencing phase representation, the Circuit Court recounted evidence at the hearing, that Seidel had sought to use various mental and/or psychological defect-type mitigating evidence, had investigated these possibilities and discussed this with Appellant, and had determined that the facts, and Appellant's recall of information, prevented use of such a strategy. (RIII, 747). Judge Coker noted that Jeffrey Smith, predecessor and co-counsel for O'Callaghan, agreed with this assessment. (RIII, 747). The Court specifically concluded that, on the Record, Appellant did not want to involve his parents in the sentencing process; that his father's testimony would have undermined Appellant's version of his childhood and background, and would have introduced damaging information about O'Callaghan, including his alienation from family, and arrest record. (RIII, 747-748). The Court found that Seidel tried to obtain witnesses who would testify favorably for Appellant, but could not locate anyone. (RIII, 748). The Court further concluded that the psychologists' conclusions were "based on inadequate and frequently inaccurate factual materials," including Appellant's version of events, and that evidence of Appellant's drug abuse, and sociopathic

nature, would have hurt Appellant at sentencing. (RIII, 748). Overall, the Court found that, based on the Record, and the factual findings made, Appellant had not established ineffective assistance of counsel, under Strickland v. Washington, 466 U.S. 668 (1984). (RIII, 749). The Court further rejected Appellant's claim, under Caldwell v. Mississippi, 472 U.S. 320 (1985), concluding that the Florida capital sentencing scheme differed from the procedure in Caldwell, and that the Record showed that the jury was not mislead, as to the importance of its role in O'Callaghan's sentencing phase. (RIII, 747).

Subsequent to this ruling, this Court, on defense request, remanded the proceedings to the Circuit Court, for consideration of bar disciplinary proceedings involving defense counsel, William Seidel, in terms of Appellant's claims of ineffective assistance. (SR, 1). The Circuit Court entered an order, denying post-conviction relief and/or a further evidentiary hearing. (SR, 5). The Court found that said bar disciplinary proceedings concerned matters subsequent to Seidel's representation of O'Callaghan; that the Record, and Judge Coker's recollection of the trial, "refuted" any claim that Seidel was intoxicated or alcohol-impaired during trial on the Rule 3.850 proceeding, and that the Record supported the court's prior finding that Seidel "vigorously and effectively" represented O'Callaghan.

(SR, 5-6). On rehearing, Appellant attached affidavits, including an attorney who did not even know or associate with Seidel, until after the O'Callaghan trial and sentencing concluded. (SR, 7-14, 27-31). The Court denied rehearing. (SR, 36).

Any and all other facts not specifically referred to herein, are included and discussed in the Argument portions of this brief.

POINTS ON APPEAL

POINT I

WHETHER THE TRIAL COURT APPROPRIATELY DENIED APPELLANT'S CLAIM THAT HE RECEIVED INAFFECTIVE ASSISTANCE OF COUNCEL AT TRIAL OR SENTENCING PHASE, BASED ON FACTUAL AND LEGAL CONCLUSIONS, CLEARLY SUPPORTED BY RECORD, THAT APPELLANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL, UNDER STRICKLAND v. WASHINGTON, 466 U.S. 668 (1984)?

POINT II

WHETHER THE CIRCUIT COURT APPROPRIATELY DENIED APPELLANT'S RENEWED MOTIONS FOR POST-CONVICTION RELIEF, BASED ON SUBSEQUENT BAR DISCIPLINARY PROCEEDINGS AGAINST DEFENSE COUNSEL?

POINT III

WHETHER THE TRIAL COURT'S STATEMENTS AND INSTRUCTIONS AFFIRMATIVELY MISLED JURY, AS TO NATURE OF JURY'S CAPITAL SENTENCING ROLE, AND VIOLATED APPELLANT'S EIGHTH AMENDMENT RIGHTS UNDER CALDWELL v. MISSISSIPPI, 472 U.S. 320 (1985)?

SUMMARY OF ARGUMENT

The Circuit Court's Order, denying Appellant's claims of ineffective assistance of counsel, consisted of adequate factual and legal findings, fully substantiated by the Record of Appellant's trial, and post-conviction hearing. The Record demonstrates that defense counsel, inter alia, vigorously and effectively cross-examined witnesses, investigated possible defenses and mitigation, and provided assistance of counsel in a Constitutionally competent manner. The Record further demonstrates that, assuming arguendo counsel's performance was deficient, the outcome of Appellant's guilt and sentencing phases would have been substantiated, not altered to Appellant's benefit. (Appellant's Points 1, 2).

The Circuit Court appropriately denied relief and/or an evidentiary hearing, based on review of defense counsel's bar disciplinary proceedings. There was no evidence or indication that counsel was impaired during Appellant's trial or post-conviction proceeding, and no demonstration that impairment from drinking produced specific acts or omissions of counsel, that were both deficient and prejudicial. The subsequent and unrelated nature of said bar disciplinary proceedings, without more, did not alter the Circuit Court's previous ruling, denying post-conviction relief. (Appellant's Point 3).

Appellant's claim of error, based on Caldwell

v. Mississippi, 472 U.S. 320 (1985), is barred, because of the failure to object at trial, or raise such a challenge on appeal. In any event, the court's statements and instructions to the jury, advising them of their statutory "advisory" role in capital sentencing, did not improperly diminish their sense of capital sentencing responsibility. (Appellant's Point 4).

ARGUMENT

POINT I

TRIAL COURT APPROPRIATELY DENIED APPELLANT'S CLAIM THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL OR SENTENCING PHASE, BASED ON FACTUAL AND LEGAL CONCLUSIONS, CLEARLY SUPPORTED BY RECORD, THAT APPELLANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL, UNDER STRICKLAND v. WASHINGTON, 466 U.S. 668 (1984)(APPELLANT'S POINTS 1, 2).

Appellant's first two points on appeal have challenged the trial court's factual and legal conclusions, and sufficiency of the evidence, supporting said court's rejection of the claims that William Seidel provided ineffective assistance of counsel, at Appellant's guilt and sentencing phases. However, it is apparent that Appellant's selective interpretation and editing of the Circuit Court's order denying relief, (RIII, 745-749), and accompanying supporting Record, reveal Appellant's mere disagreement with the outcome. Bush v. State, 505 SO.2d 409, 411 (Fla. 1987). Appellant's criticisms of counsel, and hindsight "second-guessing" of counsel's actions, from the perspective of nearly seven years (at present) beyond Appellant's 1981 trial and sentencing, demonstrate the appropriateness of the Circuit Court's ruling that O'Callaghan failed to sustain his burden of proof, in challenging counsel's performance. (RIII, 745-749); Strickland v. Washington, 466 U.S. 668 (1984).

As the Circuit Court consistently observed,

(RIII, 747, 749), Appellant's allegations and evidence were considered under the well-established Strickland criteria. Strickland, supra; Burger v. Kemp, 483 U.S.___, 107 S.Ct___, 97 L.Ed.2d 638 (1987). As is well-settled under Federal and Florida law, a capital defendant has the "heavy" burden of establishing that counsel's acts or omissions fell below the wide range of reasonable competent assistance, under prevailing norms, to such a severe degree, that confidence in the reliability and outcome of the proceedings is undermined. Strickland, 466 U.S., supra, at 689-690; Cave v. Dugger, Case No. 72,637 (Fla., July 1, 1988), slip. op., at 5; Francis v. State, 13 F.L.W. 368, 370 (Fla., June 2, 1988); Bertolotti v. State, 13 F.L.W. 253 (Fla., April 17, 1988); Blanco v. Wainwright, 507 So.2d 1377, 1381 (Fla. 1987); Bush, supra; Downs v. State, 453 So.2d 1102 (Fla. 1984). The importance of this test, is that it is not to be applied, in evaluating counsel's performance, in the theoretical abstract, or in a vacuum, but involves application, under reasonableness standards, in light of all facts and circumstances, from counsel's perspective and knowledge at the time of trial and/or sentencing. Strickland, 466 U.S., at 689; Burger, 97 L.Ed.2d, supra, at 654; Cave, slip. op., supra, at 5; Blanco, supra; Bertolotti, supra; Downs, supra. This Court must further indulge a presumption that counsel's performance was reasonable and effective, and strong deference to counsel's actions, as being

within "the wide range of professionally competent assistance." Strickland, 466 U.S., at 689, 690; Cave, at 5; Blanco. Perhaps most significantly, evaluation of counsel's conduct must be undertaken, without the inappropriate perspective of hindsight. Strickland; Burger; Cave; Blanco.

Having established that counsel's performance was deficient, Appellant is charged with establishing that counsel's performance "actually had an adverse effect so severe that there is a reasonable probability that the result of the proceeding would have been different but for the inadequate performance." Strickland; Burger; Francis, 13 F.L.W., at 370, quoting Blanco, 507 So.2d, supra, at 1381; Cave, slip op., at 5-6; State v. Bucherie, 468 So.2d 229, 231 (Fla. 1985). As applied to the guilt phase, this requires a showing that without the deficient performance, the jury would have had reasonable doubts as to guilt; as applied to sentencing, the inquiry focuses upon "... whether there is a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S., at 695. Under Strickland, speculative conjecture, and/or the potential impact of arguments and evidence presented at the post-conviction hearing, (RIII, 1-501), does

not establish prejudicial impact, warranting relief under Strickland.

Appellant has initially alleged various claims, that counsel failed to adequately develop and/or present evidence, in support of his defense theories. O'Callaghan has attacked the alleged failure of defense counsel to more effectively impeach a major State witness, based on her pre-trial statements; and more effectively present available evidence, to support defense claims that Appellant shot the victim when the victim was already dead, and that Tucker was actually the main actor and killer of the victim. The Record of the evidentiary hearing does not support these contentions.

From the outset, defense counsel William Seidel clearly based part of his defense on creating a reasonable doubt, as to whether Gerald Vick had already been killed, prior to the time Vick was shot by O'Callaghan. (RIII, 43, 66, 68, 128-129, 132-135, 195, 196). This was clearly conveyed to the jury, by Seidel's voir dire (RI, 149, 150); Seidel's opening statement (RI, 872-873); his stated basis for a judgment of acquittal, at the close of the State's case (RI, 864); his presentation of an expert witness, Dr. Abdullah Fateh, to establish that Vick died as a result of being beaten in the kitchen of the Finish Line bar, well before the shooting. (RI, 873-887); and his vigorous cross-examination of witnesses, including the

State's medical examiner, Dr. Shashi Gore. (RI, 709-719, 725). To prepare this defense, counsel Seidel, inter alia, read and reviewed pre-trial depositions; read police reports; discussed the case and obtained files and information from prior counsel, Michael Gelety and Jeffrey Smith; and visited the scene of the shooting. (RIII, 37, 52, 56-57, 65, 66, 71, 192-194.[1]

a) Impeachment of State witness Cyndi Lapointe

Against this background, Appellant has maintained that Seidel was ineffective for not more effectively impeaching the testimony of Cyndi Lapointem by using Lapointe's deposition during his cross-examination of her, to establish the "beating cause of death, Tucker's intent and involvement in the murder, and Lapointe's fear of Tucker, due to his prior threats against her. Initial Brief, at 30-33. It is apparent from the Record, that Seidel significantly, vigorously and somewhat successfully

[1] Jeffrey Smith testified that despite Seidel's protestations, and request for continuance of trial, Seidel knew all about the case, before he bacame counsel of record; that Smith was informed by O'Callaghan, from the outset of Smith's involvement as counsel (and later co-counsel), that Seidel would be employed as counsel; that Seidel was aware of information that Smith was not; and that Seidel presented nothing different from what Smith would have presented. (RIII, 40, 41, 65, 67, 71, 73-77). Smith also provided Seidel with all of the information and files about the case, that Smith had received from prior counsel Gelety, and helped Seidel prepare and review the case. (RIII, 37, 49-50, 52, 56-57, 75).

impeached Lapointe's reliability and credibility as a witness.

On direct examination, Lapointe established that, prior to the day of the murder, she was sleeping at Tucker's house, when gunshots were fired, breaking the windows. (RI, 776). Tucker believed Vick was responsible. (RI, 784). Lapointe related that she brought an order of clams, to the Finish Line bar, on the day of the murder (RI, 778); that Tucker told her to come back into the bar's kitchen (RI, 780), and that she left the bar in a van, with Appellant driving, with Vick's body in the back, wrapped in plastic. (RI, 782, 783). A major aspect of Lapointe's testimony was her statement that she saw Vick move, while in the van, and that he looked to be breathing. (RI, 783, 784). Lapointe also testified to the shooting of Vick by O'Callaghan, the attempted shooting by Tucker, the disposal of the body and gun, and the buying and placement of roses, on Vick's body. (RI, 784-789).

Thus, Seidel was faced with Lapointe's implication of Appellant as the actual killer of Vick, and her representations that Vick was alive prior to the shooting. Seidel aggressively questioned Lapointe, often interrupting her answers, with more questions. (RI, 790-803). Seidel initially established the fact that Lapointe and Tucker were then "lovers," indicating Lapointe's possible bias and stake in a particular outcome. (RI, 790).

Seidel elicited that Lapointe was heavily drinking the day of the murder, having a bottle of beer every forty-five minutes, from 11 A.M. on. (RI, 799). Lapointe further claimed that the killing at the scene, occurred during daylight hours. (RI, 795-796). In light of other evidence, establishing that the actual murder occurred at night, Lapointe's reliability was quite significantly impeached, by evidence of her drinking, and contradictory testimony, as to the timing of the murder.

Seidel elicited more damaging admissions from Lapointe, that sought to benefit his client, at Tucker's expense. Seidel established that Tucker was armed with a handgun, on the night of the murder (RI, 751-752); that Tucker had threatened to "get even" with Vick (RI, 791); that Tucker had admitted that Tucker might have killed Vick, upon striking Vick in the kitchen (RI, 796, 799); that Tucker had warned Lapointe to keep quiet about the killing and circumstances, and had called her from jail, threatening her and demanding to know what Lapointe had told the grand jury about the case; and that Lapointe was afraid of Tucker. (RI, 800, 801, 803).

The cross-examination of witnesses is particularly regarded as a subject of tactical considerations. Magill v. State, 457 So.2d 1387 (Fla. 1984); Dobbert v. State, 456 So.2d 424 (Fla. 1984). It is apparent that Seidel established Tucker's involvement and intent in the

crime, his possession of a gun, and his threats against Lapointe, as well as severely damaging her credibility, by inter alia, her admission of such intense alcohol consumption, prior to her identification of Vick, as being alive in the van. Thus, Seidel's cross-examination effectively brought out the same facts and circumstances, that Appellant has maintained should have been established, by impeachment. Adams v. Wainwright, 804 F.2d 1526, 1536 (11th Cir. 1986); Scott v. Dugger, 2 F.L.W. Fed 261, 275 (SD Fla., May 26, 1988); Scott v. State, 513 So.2d 653, 655 (Fla. 1987); Card v. State, 497 So.2d 1169, 1176 (Fla. 1986); Lightbourne v. State, 471 So.2d 27, 29 (Fla. 1985). Appellant's suggested use of the Lapointe deposition, to establish matters of impeachment, clearly cumulative to those facts and circumstances actually revealed by Seidel's cross-examination of Lapointe, did not establish deficient performance during such cross-examination. Lightbourne, supra; Jones v. State, 13 F.L.W. 403, 404 (Fla., June 23, 1988); Stone v. State, 481 So.2d 478 (Fla. 1985); Middleton v. State, 465 So.2d 1218, 1223-1224 (Fla. 1985).

This impeachment of Lapointe takes on added significance, when examined in the light of Seidel's contradiction and corroboration of Lapointe's cross-examination testimony, through other witnesses. Allen Wheatley and Mark Petitpas confirmed the existence of a feud between Tucker and Vick, stemming from a dispute over a card game

between Tucker and William Long, Vick's employer. (RI, 548, 550, 643). Wheatley and Petitpas confirmed Lapointe's testimony that Tucker believed Vick was responsible for the "shooting of Tucker's windows" incident. (RI, 548, 550, 659). Petitpas related, on cross-examination, that Tucker told him that, if Petitpas talked, he could meet the same fate as Vick. (RI, 635). Petitpas further stated that there was a large amount of blood on the floor of the kitchen, from the beating of Vick. (RI, 633). Anthony Cox contradicted Lapointe's belief that Vick was alive in the van, and further testified that he had seen Tucker, not O'Callaghan, hit Vick in the kitchen. (RI, 738-739, 746, 751-754). Furthermore, Seidel gave Dr. Fateh a copy of Lapointe's deposition, which Fateh reviewed and used, in part, to draw his conclusions.[2] (RI, 877, 878, 882-887). Seidel used his cross-examination of Mark Keitz, establishing the distance between the flow, and blood splatters found on the icebox and walls in the kitchen where the beating occurred, (RI, 831), to bolster Dr. Fateh's conclusions. Through cross-examination of Tucker, Seidel re-emphasized heavy intake of drinking, over a period of approximately 10 hours,[3] as well as her simultaneous use of

[2] This clearly establishes that Seidel did have Lapointe's deposition for use at trial, and did use it.

[3] Tucker testified that the actual shooting-murder occurred about 9 P.M.; combining this with Lapointe's drinking one beer, every forty-five minutes, from 11 A.M., Seidel gave the jury the opportunity to conclude that Lapointe could

Percodan, every four hours, on the day of the murder.[4] Seidel reiterated Lapointe's intake of beers and Percodan, in his closing argument, to destroy her reliability, as a witness. (RI, 1038-1039).

Under these circumstances, counsel's conduct, in cross-examining Lapointe, was neither deficient or prejudicial under Strickland. Appellant's complaint is essentially an argument that Seidel should have used different methods or sources, to bring out circumstances cumulative to those otherwise established, through Lapointe and other witnesses. Card v. State, 497 So.2d, supra, at 1176. The Record supports the Circuit Court's characterization of Seidel's cross-examination of Lapointe as detailed, skillful and extensive, evincing Seidel's preparedness for trial. (RIII, 746). Henderson v. State, 522 So.2d 835 (Fla. 1988); Doyle v. State, 13 F.L.W. 409 (Fla., June 23, 1988); Francis, 13 F.L.W., supra, at 371, n. 9.

b) Introduction of evidence, co-defendant's threats against victim

Appellant has also challenged Seidel's effective-

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have had 10-15 beers, when she saw Vick move. The import of this cross-examination, and attempted impeachment, is staggering, for Strickland purposes, demonstrating Seidel's complete effectiveness in this area.

[4] This fact was originally elicited by Tucker's attorneys, in their independent cross-examination of Lapointe. (RI, 806).

ness, in failing to introduce a prior statement of Leslie Knuch, a barmaid at the Finish Line bar, that Tucker had pointed a gun at Vick, on the day of the murder, and threatened to "blow his head off." Initial Brief, at 34-35. Assuming arguendo that Knuck's statement was admissible at the guilt phase, this exact statement, relating Tucker's pointing of a gun, at Vick's head, and threat to kill Vick, was admitted, on direct examination of Mark Petitpas. (RI, 610, 611). In fact, Seidel relied on this aspect of Petitpas' testimony, in closing argument, (RI, 1028), to emphasize Tucker's involvement in the murder. Knuch's testimony was thus completely cumulative to Petitpas' description of Tucker's armed threat to Vick, and does not show ineffective assistance, based on any alleged failure to effectively impeach or cross-examine. Jones; Stone; Lightbourne; Middleton; Card. Additionally, such evidence, reflecting the state of mind and intentions of co-defendant Tucker,[5] was clearly collateral to Appellant's culpability for the murder, at the guilt phase. The absence of Knuck's testimony was thus not a prejudicial omission, under Strickland.

[5] Tucker's motivation, intent and participation, in Vick's murder, was clearly established by direct and cross-examination testimony of several trial witnesses.

c) Introduction of evidence, crime scene technician, regarding condition of victim's body

Appellant further maintains that defense counsel should have elicited or introduced the statement of a crime scene technician, who claimed that Vick's jaw was broken, and that much blood had been cleaned up, where Vick's beating took place. The presence of large amounts of blood, and particular blood splatters in the kitchen area, was certainly established through other witnesses. (RI, 562, 615-619, 633, 831). Furthermore, the crime technician, when asked at deposition (Defendant's Exhibit 13), about the cause of death, stated that "That would be up to the medical examiner." (Defendant's Exhibit 13, at 27). Bieger's statement that the medical examiner found Vick's jaw to be broken, would clearly have been inadmissible hearsay. §90.801, Fla. Stat. (1986). Most significantly, Dr. Gore's rejection of Vick's beating, as a cause of death, was primarily based on skull and/or head fractures (RI, 709, 710, 712-715, 717, 719, 724, 725); assuming arguendo a jaw fracture existed, Dr. Gore's opinion would clearly not have been impeached or altered by Bieger's statements. Finally, Appellant's own expert witness, Dr. Fateh, also based his findings, on the premise that Vick suffered no fractures. (RI, 886). Thus, because much of Bieger's statements were cumulative, Lewis; Stone; Middleton, were inadmisslbe and/or contradicted by both medical experts for State and defense, Seidel's

failure to use Bieger was neither a deficient or prejudicial omission.[6] Strickland.

d) Closing argument -- State's characterizations of defense witness

Appellant's final challenge, to Seidel's effectiveness at the guilt phase, was to counsel's failure to object to the State's closing argument characterization of Appellant's medical expert, Dr. Fateh as a "prostitute." (RI, 1048). While this Court did procedurally bar this claim on direct appeal, O'Callaghan, 429 So.2d, at 696, this Court's majority further concluded that none of Appellant's claims (including the challenge to prosecutorial comment) had merit, and were harmless, if error at all. Id. Clearly, this Court's conclusions, not to consider this claim because not preserved at trial, signifies a conclusion that such a comment was not fundamental error.

While the State's comment about Dr. Fateh was clearly inappropriate, it did not deprive Appellant of a fundamentally fair trial. Darden v. Wainwright, 477 U.S. 187, ___S.Ct___, 91 L.Ed.2d 144 (1987); Bush v. State, 461 So.2d 936, 941-942 (Fla. 1984); Teffeteller v. State, 439 So.2d 840, 845 (Fla. 1983); see also, Brooks v. Kemp,

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[6] Appellant has also implied that Bieger's view of Vick's body at the morgue, "in pieces," (Defendant's Exhibit 13, at 28), substantiates that Vick was killed by the beating. This excerpt selectively misinterprets Bieger's actual reference to the decomposed nature of Vick's body, when found, (Defendant's Exhibit 13, at 28, 29), which was clearly established by the State's evidence at trial. (RI, 410, 427, 692-693).

762 F.2d 1383, 1413-1415 (11th Cir. 1985)(en banc). The prosecutor prefaced his "prostitute" characterization of the defense witness, by telling the jury "you can reject what I am about to say because it is just a statement of an attorney and it is not evidence ...". (RI, 1048). Further, there was overwhelming evidence of Appellant's guilt. Darden, supra. Because said comment did not constitute reversible and prejudicial error, counsel cannot be deemed to have been ineffective for failing to object to it at trial. Harich v. Dugger, 844 F.2d, supra, at 1471; Mills v. State, 507 So.2d 602, 605 (Fla. 1987); Muhammed v. State, 426 So.2d 533 (Fla. 1982).

e) Investigation/presentation of Appellant's character, penalty phase

Appellant has initially challenged counsel's failure to pursue or investigate psychiatric evaluations, for possible mitigating value, even in the face of the trial court's authorization. The Record demonstrates that counsel had no obligation to pursue psychiatric evaluations, in the face of no indications that such examinations would be warranted or useful.

It is well settled that a capital defendant's mental state, need not be at issue in every criminal proceeding. Bush, 505 So.2d, at 410; Blanco, supra; Ake v. Oklahoma, 470 U.S. 68 (1985). Counsel is clearly not required to seek psychiatric evaluations, or investigate

the possible existence of psychological mitigation, until such favorable information is found. Elledge v. Dugger, 823 F.2d 1439, 1447, n. 1 (11th Cir. 1987), modified on rehearing, 833 F.2d 250 (11th Cir. 1987); Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985); Lovett v. Florida, 627 F.2d 706 (5th Cir. 1980). It is axiomatic that limits placed by counsel on investigations, do not constitute ineffective assistance, to the extent they are supported by reasonable professional judgments. Strickland.

Counsel Seidel clearly anticipated the State's reliance, on potential aggravating circumstances of felony-murder; Appellant's prior violent felony; and that the murder was both "heinous, atrocious and cruel," and committed in a "cold, calculated and premeditated manner." (RIII, 159-162).[7] Seidel searched for the existence of mitigating circumstances, particularly in the area of "extreme mental or emotional distress," §921.141(6)(b), Fla. Stat. (1981), and impaired capacity to appreciate the criminality of conduct or conform behavior, §921.141(6)(f). (RIII, 165-166). To this end, Seidel questioned O'Callaghan, and found no indication that he fit these categories. (RIII, 166-167). Seidel

[7] These aggravating circumstances, anticipated by counsel, were precisely those circumstances used by the Circuit Court, to ultimately impose the death penalty as approved by this Court on direct appeal. O'Callaghan, 429 So.2d, at 696, 697.

did not consider Appellant's use of drugs or alcohol to be serious enough, to be convincing mitigation. (RIII, 172-174, 191). Additionally, Seidel concluded that Appellant's specific recollection of events demonstrated mental impairment, by substance abuse or otherwise, or supported any suspicions of insanity, or incompetence to stand trial. (RIII, 190-191). Seidel additionally felt, from a tactical standpoint, that evidence of drug use or abuse, would result in a negative jury response. (RIII, 191-192).

These conclusions were completely substantiated by Jeffrey Smith's testimony. Smith noted that O'Callaghan recalled events in great detail, (RIII, 68, 69); that there was no basis to believe that Appellant was insane or otherwise mentally impaired (RIII, 47, 70-71); that prior counsel had investigated the possibilities of mental mitigation, and found nothing positive (RIII, 47); and that a free (court-appointed) psychological exam, should not be pursued, if there was no good faith basis to believe there were existing mental problems. (RIII, 87-88). Smith reported no mention of drug use by O'Callaghan. (RIII, 69-70).

The testimony of Seidel and Smith, completely supports the Circuit Court's conclusions that counsel considered mental and/or psychological mitigation, pursued it, and concluded that such circumstances were not compatible with the facts and circumstances before them (R. III, 747). Clearly, counsel were not obligated to pursue a strategy of presenting psychological or mental mitigation, when the facts did not support it. Bush; Blanco. O'Callaghan's recall of detailed facts, as demonstrated by his trial testimony, R. I, 950-963, belies any suggestion of mental or psychological impairment, or impairment by drugs or alcohol. Bertolotti, 13 F.LW., supar, at 253; Henderson, 522 So.2d, supra, at 838; Buford v. State, 403 So.2d 943, 953 (Fla. 1981); Cirack v. State, 201 So.2d 706, 709-710 (Fla. 1967). Furthermore, given the dual defense theories that Appellant did not commit the murder, and/or that the victim was dead prior to the shooting, it would have been entirely inconsistent with such reasonable strategy[8], to put forth evidence admitting culpability for the act, but blaming or explaining it, on or by mental or psychological impairment. Combs, supra; Blanco; Burger v. Kemp, supra; Middleton, supra; Funchess v. Wainwright, 772 F.2d 683, 689-690 (11th Cir. 1985). Counsel's decision not to investigate or present such testimony, was clearly reasonable, proper, and effective assistance, under the circumstances. Strickland;

[8] The reasonableness of these defense theories are unchallenged by Appellant, in this proceedings.

Burger; Blanco; Bush; Elledge v. Dugger, supra; James v. State, 489 So.2d 737 (Fla. 1986).

An examination of Appellant's offered evidence, in support of posible mental and psychological mitigating circumstances, firmly demonstrates that Seidel's failure to present such mitigation, did not prejudice Appellant. All three doctors, relied on by Appellant (Dr. Perslwig, Krop and Zager) concluded that Appellant was a sociopath, and highly drug-addicted. R. III, 266, 297, 344, 342, 356, 365, 387. This evidence of Appellant's consistent pattern of anti-social criminal acts, and status as drug-addicted, having tried drugs such as heroin and cocaine, Def. Exh 42, at 13, would clearly have devastated his prospects for a life sentence. Strickland; Burger; Elledge; Whitley v. Bair, 802 F.2d 1487 (4th Cir. 1986); Combs, supra; Middleton, supra. Such psychological evidence would have only served to emphasize the extremely negative aspects of the crime, and its attendant aggravating circumstances. Id. This psychological portrait, far from providing benefit to Appellant, would have portrayed his participation in the Vick murder, as the culmination of a lifetime of anti-social personality and drug use, if used to exonerate and/or explain his conduct, to mitigate his possible sentence to life imprisonment, would have been highly inconsistent with his "denial of involvement" strategy at the guilt phase. Burger; Blanco; Combs; Middleton; see also, Harich,

844 F.2d, supra, at 1471; Smith v. Dugger, 840 F.2d 787, 795 (11th Cir. 1988).

This psychological testimony was also substantially undermined, at the post-conviction hearing, because based on false or contradictory data, supplied by Appellant. O'Callaghan reported to Dr. Perswig, and Dr. Krop, that he had been physically abused by his father, and that his parents withdrew from and abandoned him. Def. Exh. 42, at 2, 4; Def. Exh. 35, at 1. This version is contradicted by Appellant's statements, in a July 29, 1981 admission summary report, State's Exh. 2, at 9, that he had a "satisfactory relationship" with his father which was then "continuing". Appellant further confirmed, in his Rule 3.850 hearing testimony, that he had left home, by his own choice, and that his parents had not abandoned or neglected him, R. III, 461, 462, and that the physical abuse consisted of "spanking". R. III, 466. Even more pointedly contradictory, was his father's deposition testimony, admitted at the hearing, Def. Exh. 28B, in which O'Callaghan's father insisted he had never abused or beaten Appellant, because "my father believed in beatings . . . . and when I was young I said if I ever have any children . . . I would never beat them or mistreat them. Well, we haven't . . . ." Deposition, John O'Callaghan, Sr., at 12.[9]

[9] Dr. Krop admitted, at the Rule 3.850 hearing, that O'Callaghan's description of his relationship with his father, in the 1981 admission summary was "not indicative" of what O'Callaghan told Krop, four years later. R. III, 284, 285.

O'Callaghan also informed the doctors, that, on the day of the crime, Appellant was free basing cocaine and heavily drinking, prior to the murder. Def. Exh. 28 (Zager's report), at 3, 5; R. III, 290, 346, 368, 382-383. Appellant himself acknowledged, to Dr. Perlswig, RIII, 383, and in his own Rule 3.850 testimony, that he had not previously said anything about abusing drugs or alcohol, on the day of the crime. R. III, 468-469. Appellant acknowledged that he told Seidel he had a "couple of beers" on the day of the crime, R. III, 468, and that he had told others, including the PSI report officer and a Starke prison personnel, of such limited consumption of a "couple of beers". R. III, 468, 469; PSI Report[10], at 5; Classification and Admission Summary, July 12, 1981 (State's Exh. 2), at 2 ("Subject stated he had one or two beers prior to the crime and he was full[y] aware of what was happening"); Psychological Screening Report, Dave J. Hutto, Florida State Prison Psychologist (State's Exh. 2, at 6) ("subject denies any drug addition of dependency").

These two significant contradictions, between what Appellant told the defense witness-psychologists, and what Appellant reported to others, at a time contemporaneous with his trial and sentencing, would have severely undermined Appellant's credibility, as well as the credibility and reliability of said

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[10] The PSI report was attached to the State's response, already filed herein, relating to Appellant's habeas corpus action, and was considered by the Circuit Court, in determining Appellant's sentence. (R. I, 1186).

defense witnesses and their reports, before a sentencing jury. This misinformation clearly would not possibly have positively altered Appellant's sentencing outcome. Strickland. Such discrepancies in Appellant's self-report, would have stressed negative aspects of prior criminal record and school and prison disciplinary problems, contained in the PSI report, and in the psychologists' reports. Def. Exh. 42, at 23; Exh. 28, at 3, 4, 5. Strickland; Burger; James, supra; Elledge, supra; Porter v. State, 478 So.2d 33, 35 (Fla. 1985). Obviously, references in Appellant's PSI report, and admission summary, relating to Appellant's extensive criminal conviction record, would have been highlighted, for the sentencing jury to evaluate, in the context of the utterly heinous circumstances of Vick's murder. Strickland; Burger.

Appellant has maintained that the findings of these three doctors, would have supported mitigating circumstances of drug-induced mental or emotional disturbance, and that Appellant's passive, "follower" personality, would have demonstrated O'Callaghan's domination by Tucker during the crime. R. III, 270-272, 278; 336-340; 368-370. It should first be noted that, at the time of trial, and during the compilation, in 1981, of the PSI report and admission summary, Appellant did not suggest he was on drugs or abusing alcohol, at the time of the crime. Supra. Furthermore, Appellant's acknowledgement that he knew what he was doing, Admission Summary, State's Exh. 2, at

2, and his recall of details of the crime, demonstrated that his conduct during the crime, was not the result of being a "junkie", or emotional disturbance from drugs. Most significantly, the facts and evidence at trial, completely contradict such mitigation.

The murder of Gerald Vick, was the result of deliberate planning, and execution, over a very significant period of the day and night of August 20, 1980. O'Callaghan ordered Allen Wheatley to take him, Tucker and others, to Vick's house, to look for him, beginning in the early afternoon. R. I, 528-530. When Wheatley intentionally took Appellant to a different place, O'Callaghan found out, told Wheatley that he "better show him where it (Vick's house) is at", and that he was "going to get" Vick, and Vick's employer, Long. R. I, 535-536. When O'Callaghan did not find Vick, he checked the area, to make sure Vick lived there, then left a note, so Vick would come to the bar that day. R. I, 537, 538). O'Callaghan was then armed with a gun, and checked it, to see if loaded. (R. I, 538-539). When Vick came to the bar, O'Callaghan and others sat with him at a table, with O'Callaghan pointing a gun at him from underneath. R I, 610-612. O'Callaghan went with others, including Tucker, in taking Vick back to the kitchen, where he was severely beaten. (R I, 612. O'Callaghan returned from the kitchen angrily demanded the keys to a white van, from Allen Wheatly, R. I, 543-544, 613-614, and left with Tucker, Lapointe and Cox. R I, 544,

545, 614. O'Callaghan had "summoned" for Cox; and ordered Cox, to get a gun from Mark Petitipas, and ordered Petitipas to give Cox the gun. R. I, 644, 645, 669, 730, 731-732. Prior to taking Vick back to the kitchen O'Callaghan ordered Cox, while O'Callaghan pointed a gun at Vick, to get Vick's gun. R. I, 733-735.

O'Callaghan pulled the van around to the back, put plastic down, and along with Cox, put Vick inside. (R I, 737). O'Callaghan drove the van, to a remote area on Pembroke Road, where Vick's body was thrown out of the van. R. I, 738, 739. O'Callaghan was identified as the one who shot Vick, by Cox, Tucker and Lapointe. R. I, 738, 739, 755, 785-786, 812, 913. O'Callaghan drove to the area without his headlights on, (there were no lights at all), and did not ask for directions. R. I, 766-767. It was O'Callaghan that ordered the body thrown out of the van, and waved a gun around, giving orders. R. I, 811, 814. O'Callaghan took the body into the bushes, wiped the gun of prints, and threw the gun away in a canal. R. I, 741, 788. O'Callaghan bought roses, and placed them on Vick's body. R. I, 788-789, 914, 965. Upon returning to the bar, O'Callaghan supervised, made arrangements for and participated in the cleaning of blood from the kitchen, the disposal of Vick's car, the plastic from the van, and the mops and rags used to clean up the blood. R. I, 546-547; 615-617, 676-683. O'Callaghan himself admitted leaving the State, shortly thereafter, and going to

Connecticut and California. R I, 974. O'Callaghan ordered several times, that others keep quiet about the murder. (R. I, 577, 593, 657).

The facts contained, in the last two paragraphs, depict O'Callaghan as the leader and mastermind of the Vick beating, kidnapping and execution, and in control of these events, and the other participants. These circumstances completely eliminate any possible mitigation, that would have sought to prove O'Callaghan was a dominated junkie. Counsel was not ineffective, for failing to elicit or present professed psychological profiles of Appellant, that were completely contradicted by the circumstances of O'Callaghan's involvement in the crime. Strickland; Burger; Elledge; Combs; Middleton; James; Porter, supra; Harich v. Dugger, supra.

f.) Admission of Connecticut conviction, carnal knowledge of female, in support of prior violent felony aggravating circumstance.

Appellant has further argued that Seidel was ineffective for stipulating to the admission of Appellant's Connecticuit conviction for carnal knowledge of a female child, as a prior violent felony, because said crime did not involve violence. This argument is truly preposterous.

This contention can be rejected, on the basis of lack of prejudice alone.[11] Assuming arguendo that carnal knowledge of a female child, is not a violent crime, the State introduced two other unrelated convictions, for strong-arm robbery, to support the "prior violent felony" aggravating circumstance. R. I, 1140, 1151. This Court affirmed the appropriateness of the Circuit Court's finding of this aggravating circumstance, based on the strong-arm robbery conviction. O'Callaghan, 429 So.2d, at 697. Thus, this circumstance was supported by the Record, regardless of the violent nature of the carnal knowledge conviction.

Counsel can not be considered ineffective, for failing to challenge the admission of such a conviction, when other convictions existed to support this circumstance. Strickland; Burger. Furthermore, it is entirely inconceivable that raising an issue, as to the violent nature of the rape of a child, would have had anything but a highly negative impact on the jury and/or trial judge, in terms of Appellant's credibilitiy and prospects for a life sentence, and counsel's own credibility at the sentencing phase. Id.

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[11] The Connecticut statute in question, as reflected in the certified copy of the judgment, Def. Exh. 21; R. I, 1140-1141 (State's Exh 1, at sentencing), defines carnal knowledge of a female child as the act of "carnally know[ing] any female under the age of sixteen years", and classifies this as rape. Def. Exh. 24; former §53-238, (Conn. 1971). There is no question that rape, under Florida law, is considered a violent felony, and an appropriate basis for aggravation in a Florida capital sentencing phase, as such. Mason v. State, 438 So.2d 374, 378 (Fla. 1983).

g.) Failure to investiate/present family background, witnesses, in mitigation.

Appellant has asserted that counsel should have investigated and presented evidence, through his parents and the aforementioned psychologists, of his "troubled" childhood, including head injuries at birth, alleged mistreatment in reformatories and developing drug addiction. In order to be considered "effective" counsel, Seidel was not required to have explored every conceivable avenue, or present all available information, particularly if such information or testimony would have been inconsistent with known facts or strategy, or would have harmed O'Callaghan's sentencing prospects. Strickland; Burger; Elledge, 832 F.2d at 1447; Combs; Middleton; Cave, supra. The Record demonstrates that the Circuit Court was correct in rejecting this claim, in light of O'Callaghan's own instructions, the nature of Seidel's own investigation of these matters, and the lack of prejudice shown by Appellant.

Counsel's strategy, as aforementioned, was to rebut the anticipated aggravating circumstances, and develop evidence in mitigation. (R. III, 160-167; R. III, 1156-1162.). To this end, counsel introduced Knuck's statements, at the Tucker violation of probation hearing, in the hopes of depicting Tucker as the dominant player and actual killer of Vick. R. I, 1141-1148. Additionally, Seidel argued that this evidence demonstrated Tucker's direction and domination of O'Callaghan, and that the evidence showed O'Callaghan to be disturbed by the Vick

beating. R. I, 1160-1162. Furthermore, Seidel stressed hat Tucker commited the kidnapping of Vick; that no evidence showed O'Callaghan to have touched Vick, and that the victim suffered no conscious pain after the beating, even if the jury concluded O'Callaghan had shot and killed him. R. I, 1158, 1159.

Both Smith and Seidel testified that, when asked about mitigation witnesses, Appellant claimed here was no one to speak on his behalf. R. III, 72, 88-89, 187-188. Appellant confirmed this, in his own Rule 3.850 testimony, stating he was new in Florida at the time, and knew no one. (R. III, 445-446). Although he knew where his parents were, Appellant adamantly indicated to counsel, not to involve, contact or talk to his parents. R. III, 46, 47, 71, 87-89, 172, 187. O'Callaghan informed Seidel that his family life was a "bad situation", and that he had left home at an early age. R. III, 187, 445-446. Seidel's investigator, although he tried, came up with no mitigation witnesses. R. III, 187-188.

Under these circumstances, Seidel's conduct and investigation was reasonable, and he was not obligated to proceed to investiage or present witnesses, beyond this point. Seidel attempted to obtain information and witnesses, through O'Callaghan and by independent means. It is clearly recognized as reasonable investigation, into possible existing mitigation, to have relied on O'Callaghan. Strickland, 466 U.S., at 691; Burger, 97 L.Ed.2d, at 655, 656; Clark v. Dugger, 834 F.2d 1561,

1568 (11th Cir. 1987); Mitchell v. Kemp, 726 F.2d 886, 889 (11th Cir. 1985); Gray v. Lucas, 677 F.2d 1086, 1093 (5th Cir. 1982). It was equally reasonable for Seidel to do no further investigation, in light of the failure to uncover any fruitful information, and Appellant's expressed wish that his parents not be contacted or involved. Strickland, 466 U.S., at 672-673, 699 (after speaking with defendant, mother and wife, concluded character evidence would not help, no further investigation--held, reasonable conduct, not ineffective assistance); Mitchell, 762 F.2d, supra, at 888-889 (father was indifferent, and defendant told attorney not to contact family--reasonable not to conduct further investigation); Tafero v. Wainwright, 796 F.2d 1314, 1326 (11th Cir. 1986) (defendant wanted no mitigation presentation--reasonable not to conduct investigation, not contact witnesses); see also Singleton v. Thipgen, 847 F.2d 669, 670 (11th Cir. 1988) (attorney talked with defendant's mother and girlfriend, received no names, favorable witnesses--reasonable not to conduct further investigation).

Seidel's alleged failure to investigate or present character evidence or witnesses, was not in any way prejudicial to the outcome of Appellant's sentence. Strickland. It is virtually ludicrous to suggest that Appellant's "forceps" birth and/or vaguely described head injuries as a child, would be reasonably viewed as anything but highly remote, and of highly speculative mitigating impact. Strickland, 466 U.S., at 699-700;

Francis, supra; Blanco, 507 So.2d, at 1382-1383; Middleton, 465 So.2d, at 1224; Cave, supra. This is particularly true, in light of Appellant's clear lack of mental impairments and/or psychosis at the time of the crime, and his categorization as having "average" intelligence. R. III, 346; Def. Exh. 28, at 5; Def. Exh 35, at 2; Argument, Point II, supra. Any emphasis on Appellant's abuse in reformatories, would have "opened the door" to the anti-social conduct Appellant had committed (including car theft), to cause his placement there, Def. Exh. 28, at 3, which could have enhanced Appellant's status as a sociopath. Strickland; Burger. Defense references to Appellant's abuse, while in juvenile detention and/or reformatories, would have further permitted use of evidence of Appellant's drug use, not only as an adolescent, but even when confined in prison. Def. Exh. 28, at 4.[12] Moreover, Appellant's use of and/or addiction to drugs, such as heroin and cocaine, Dr. Perkswig's Report, November 11, 1986, at 3, and explusion from both parochial and public schools, due to disciplinary problems, would have merely enhanced negative aspects of character. Strickland; Burger; Combs; Middleton. Furthermore, an overall presentation of drug involvement, school abuse, and difficulty in childbirth, would

[12] Dr. Zager's report, contained references to O'Callaghan's drug use in prison, and "agressive and provocative" behavior therein. Def. Exh. 28, at 4. It would be particularly devastating, to have argued for life imprisonment, in the fact of evidence showing that Appellant's anti-social behavior and drug use could not be controlled or stopped, even in prison. Strickland; Burger.

have been entirely inconsistent with Seidel's strategy of denial of involvement, in Vick's killing. Burger; Combs; Middleton; Blanco. The impact of this evidence would have been made more damaging, by Appellant's lack of credible reports to doctors, and the inconsistencies between his testimony and statements in 1981, and those made to Perlswig, Zager and Krop years later, post-conviction. Supra; Strickland; Elledge; James; Porter, supra.

The admission of his partent's testimony, would have only served to demonstrate a lack of closeness, and a lack of knowledge by O'Callaghan's parents, about O'Callaghan. His father disputed O'Callaghan's reports of abuse; Def. Exh. 28B, at 12-13; expressed availability as a witness, confirming O'Callaghan's apparent lack of closeness with the family, in rejecting his parents' possible help, as witnesses, Def. Exh. 28B, at 6, 16, 17; described his son as " in a lot of trouble . . . with the police", with numerous arrests as he grew up, Def. Exh 28B, at 15; and his lack of knowledge of his son's alias of "Jack McCarthy", his residence, or his job. Def. Exh. 28B, at 11. Moveover, among other things, his mother's surprise at his murder arrest, and her statement that the family, as Catholics, "were taught to respect life", Affadavit, Doris O'Callaghan, at 5, paragraph 14, would have contributed to further devastating Appellant's prospects for leniency, from the sentencing jury or judge. Strickland; Burger; Cave; Blanco.

In addition to the graphically weak impact such family background and/or psychological mitigation testimony would have had at the penalty phase, such evidence was overwhelming outweighed by the aggravating aspects and circumstances of O'Callaghan's crime. Strickland. Appellant's commission of the murder during a felony; his prior strong-arm robbery conviction; and the cold calculated, premeditated and cruel manner of Vick's kidnapping and murder, unquestionably overwhelms this evidence, and might have produced an even stronger death recommendation or sentence. Strickland; Burger; Bush, supra; Francis.

Appellant's entire claim, largely focuses upon Seidel's inability to recall all exact specific information, of the events of his representation. Seidel constantly referred to the lapse of time, to explain his lack of exact memory; this does not translate into ineffective assistance of counsel. Seidel's representation, in all respects, demonstrates a knowledge and familiarity with Florida capital sentencing law, and death penalty case considerations. His clear preparation for trial and sentencing, although of relatively short duration (about three weeks, R. III, 103-107), is supported by his defense at trial and sentencing, and the testimony at the Rule 3.850 hearing. Davis v. Kemp, 829 F.2d 1522, 1537 (11th Cir. 1987) (although attorney had one week's preparation, talked to defendant visited crime scene, contacted witnesses--not ineffective, brevity of time); Harich, 844 F.2d at 1470 (attorney's alleged misunderstanding of

law does not warrant relief, unless defendant shows that approach actually used, "would not have been used by professionally competent counsel"). The trial court's denial of relief, after an evidentiary hearing featuring thirteen witnesses, including Appellant, was correct and supported by the Record. Strickland; Henderson, supra.

POINT II

CIRCUIT COURT APPROPRIATELY DENIED APPELLANT'S RENEWED MOTIONS FOR POST-CONVICTION RELIEF, BASED ON SUBSEQUENT BAR DISCIPLINARY PROCEEDINGS AGAINST DEFENSE COUNSEL (APPELLANT'S POINT 3).

Appellant has maintained that, based on bar disciplinary proceedings brought against William Seidel, on charges resulting from alcohol problems (Florida Bar v. Seidel, 510 So.2d 871 (Fla. 1987), the Circuit Court should have found counsel to be ineffective and granted post-conviction or evidentiary relief. However, Appellant has failed to demonstrate that Seidel abused alcohol, while conducting O'Callaghan's defense at trial and sentencing, and merely generally asserted that Appellant's alcohol problems, evidenced by his bar disciplinary proceedings, "cast doubt" upon Seidel's capabilities, in defending O'Callaghan. Initial Brief, at 60. These circumstances, under relevant case law, did not establish that Seidel's representation of O'Callaghan was deficient under Strickland.

In essence, Appellant has raised the spectre of Seidel's drinking problems, over a period from 1983 to 1986, see, Motion to Remand Appeal, Exhibit D, at 9, 18-22; Exhibit E, at 2, 3, as per se indications that Appellant must have been drunk during O'Callaghan's trial. Such an assumption of a necessarily existing connection, between subsequent unrelated bar proceedings, and the ef-

fectiveness of a prior representation in a capital case, is not supported in law. United States v. Mouzin, 785 F.2d 682, 696-697 (9th Cir. 1985); United States v. Sielaff, 542 F.2d 377, 380 (7th Cir. 1976); United States v. Messer, 647 F.Supp. 704, 707 (D Mont 1986); Hernandez v. Wainwright, 634 F.Supp. 241, 245 (SD Fla. 1986). The Record of Appellant's trial shows no indication or suggestion by any participant, that Seidel was intoxicated during any of the proceedings. None of Appellant's affiants witnessed or claimed to have observed Seidel's preparation and conduct of O'Callaghan's defense. (SR, 22-31). In fact, the only attorney to make a statement on this issue, did not even know or associate with Seidel, until a year after Appellant's trial and sentencing. (SR, 27-28). Stella's conjecture, as to how alcohol problems "could have affected" the defense of a capital murder case, and his suppositions based on "being told" of Seidel's "omissions and actions" (SR, 29-30), was pure speculation. Without any demonstrable nexus between the later disciplinary proceedings and attendant circumstances, with those presented at O'Callaghan's trial and sentencing, Appellant has utterly failed to show that Seidel was abusing alcohol, during O'Callaghan's trial. Hernandez, 634 F.Supp., supra, at 245, 246.

In addition to Appellant's erroneous assumption of per se intoxication by Seidel during his trial,

O'Callaghan has further mistakenly assumed that the mere fact of proven intoxication during capital trial proceedings, demonstrates ineffective assistance of counsel. Assuming arguendo that the trial Record bears out such alcoholism, at time of O'Callaghan's trial and sentencing, this would not sustain Appellant's burden of proof, on ineffectiveness. Hernandez, 634 F.Supp., at 245; Young v. Zant, 727 F.2d 1489, 1492 (11th Cir. 1984)(taking of pills during trial does not automatically mean counsel was ineffective); Mouzin, supra (mere fact of subsequent bar discipline proceedings against counsel, does not mean counsel provided ineffective assistance at earlier trial); Smith v. Yist, 826 F.2d 872, 876 (9th Cir. 1987)(mere fact of mental illness, does not result in presumption of ineffective assistance); Berry v. King, 765 F.2d 451, 455 (5th Cir. 1985)(fact attorney used drugs, not automatic proof of ineffective assistance); King v. Strickland, 714 F.2d 1481, 1489 (11th Cir. 1983), vacated; ___U.S.___, 104 S.Ct 2651, 81 L.Ed.2d 358 (1984)("tired" attorney, not necessarily an ineffective one). As these decisions emphasize, reviewing courts must still examine the trial Record, on a claim of Strickland ineffectiveness of counsel, to determine if counsel violated the dictates of Strickland, regardless of cause or reason. Mouzin, supra; Berry, supra; Hernandez, supra.

Appellant has made no attempt to connect Seidel's

alcoholism with the nature and results of Seidel's defense of O'Callaghan, other than to suggest that such factors created doubt, over the Circuit Court's original conclusions, in its order denying relief. This general and conclusory approach has been specifically rejected by the courts, and was correctly rejected herein by the Circuit Court. Id.

Thus, Appellant's failure to demonstrate that Seidel was intoxicated during O'Callaghan's trial, and that such alcoholic problems rendered his performance deficient and prejudicial, in some specific manner, under Strickland, fully warranted the Circuit Court's order denying relief. This lack of relevance and/or probative value, of such disciplinary proceedings evidence, completely justified the Circuit Court's summary denial of relief.

POINT III

TRIAL COURT'S STATEMENTS AND INSTRUCTIONS DID NOT AFFIRMATIVELY MISLEAD JURY, AS TO NATURE OF JURY'S CAPITAL SENTENCING ROLE, AND DID NOT VIOLATE APPELLANT'S EIGHTH AMENDMENT RIGHTS UNDER CALDWELL v. MISSISSIPPI, 472 U.S. 320 (1985).

Appellant has maintained that certain voir dire comments, and jury instructions, conveyed by the trial court judge, Unconstitutionally diminished the jury's capital sentencing role, in violation of the requirements of Caldwell v. Mississippi, 472 U.S. 320 (1985). Without any independent analysis, Appellant has merely suggested that this Court's consistent rejection of Caldwell claims, on both procedural and substantive grounds, should not prevail or control. Appellant's conclusory reliance, on contrary and erroneous Federal precedent, warrants no basis for overruling the trial judge's rejection of this claim.

It is apparent that defense counsel did not challenge any of the trial court's voir dire comments or instructions, that he now asserts as error. (RI, 163, 1107, 1143, 1163). This Court has consistently concluded, that the failure to object at trial, or on direct appeal, to alleged Caldwell errors, procedurally bars merits consideration of subsequently brought Caldwell claims. Cave v. State, Case No. 72,383 (Fla, July 1, 1988), slip op., at 4-5; Doyle v. State, 13 F.L.W. 409 (Fla., June 21, 1988); ; Mitchell v. State,

13 F.L.W. 330, 331 (Fla., May 19, 1988); Tafero v. Dugger, 520 So.2d 287 (Fla. 1988); Darden v. Dugger, 515 So.2d 227 (Fla. 1987); Copeland v. Wainwright, 505 So.2d 425, 427 (Fla. 1987), vacated, other grounds, ___U.S.___, 108 S.Ct 55, 98 L.Ed.2d 19 (1987). Appellant has offered no reasons whatsoever, that mandate any conclusion, other than applying a procedural bar to his Caldwell claim. Id.

Assuming arguendo this Court considers the Caldwell claim, the Record demonstrates that the jury's capital sentencing role was not Unconstitutionally diminished. Appellant's references show proper advisements by the trial court, to the jury, of the appropriate division of responsibilities, under Florida law, between an "advisory" jury, and the trial judge as "ultimate sentencer." (RI, 163, 1107, 1143, 1163). Conveying to a Florida capital sentencing jury, that they are not responsible for the actual imposition of sentence, (RI, 163-165, 1143, 1162-1163), without more, is not a Caldwell violation. Cave, supra, slip op., at 4; Combs v. State, 13 F.L.W. 142 (Fla., Feb. 18, 1985); Ford v. Dugger, 522 So.2d 345, 346 (Fla. 1988); Rose v. Dugger, 508 So.2d 321, 324 (Fla. 1987); Pope v. Wainwright, 496 So.2d 798, 805 (Fla. 1987); Harich v. Dugger, 844 F.2d 1464, 1473; 1473-1474, , n. 13 (11th Cir., April 21, 1988)(en banc); Tafero v. Dugger, 681 F.Supp. 1531, 1538 (SD Fla. 1988).

This conclusion is substantiated by other aspects

of voir dire, and argument and comments of counsel and the Court, that clearly did not actively mislead the jury or diminish its responsibility. Cave; Harich, supra. The prosecution informed the jury that it would hear evidence and arguments "relating to what penalty would be the proper penalty," at the sentencing phase. (RI, 118). The State further advised the jury that, while the trial judge could override an advisory recommendation, the jurors were free to vote for either sentencing option, as they saw fit. (RI, 247, 248). Defense counsel stated that the jury had an "awesome responsibility to realize that you have the life of two young men in your hands" (Appellant and co-defendant) (RI, 157), and that the jury could potentially "pave the way" for the trial judge to impose a death sentence. (RI, 164; 278). The trial judge's advisements, besides merely conveying to the jury its statutory role, (RI, 163, 171-172, 245), further instructed the jury not to "act hastily," and to "carefully weigh, sift and consider the evidence, realizing a human life is at stake." (RI, 1167). Under circumstances where the jury's capital sentencing role was correctly disclosed by comment and instruction, and stressed as significant by all parties, there is no Caldwell error. (RIII, 749); Cave; Combs; Darden, 521 So.2d, supra, at 1105, n. 2; Grossman v. State, 13 F.L.W. 127 (Fla., Feb. 18, 1988); Harich, supra; Tafero, supra. The comments, statements and in-

structions contained no improper "denigation of the jury role," in any way resembling the circumstances in Appellant's cited authorities. Cave, supra, at 5; Mann v. Dugger, 844 F.2d 1446, 1455(11th Cir. 1988)(jury told capital sentencing not a burden on their shoulders); Adams v. Dugger, 804 F.2d 1526, 1528(11th Cir. 1986, modified on rehearing, 816 F.2d 1493 (11th Cir. 1987), cert. granted, Dugger v. Adams, 108 S.Ct 1106 (1988)(jury told, about nine to eleven times, not to worry about or be concerned with "conscience part" of the death penalty).

Assuming arguendo there exists Caldwell error, the existence and approval of four aggravating circumstances, and nothing in mitigation, as upheld by this Court on direct appeal, O'Callaghan, 429 So.2d, at 696, 697, as well as the nature of the crime, make it clear that "the only reasonable sentence would have been death." Adams, 804 F.2d, supra, at 1533.

CONCLUSION

Based on the foregoing arguments and circumstances, Appellee respectfully requests that this Court AFFIRM the ruling of the Circuit Court, Martin County, Florida, denying Appellant's motion to vacate his judgment and sentence and a stay of execution, and DENY any and all other relief, requested by Appellant.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida 32399-1050

Richard G. Bartmon

RICHARD G. BARTMON
Assistant Attorney General
111 Georgia Avenue - Suite 204
West Palm Beach, Florida 33401
Telephone (407) 837-5062

Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee has been mailed to JONATHAN J. LANG, ESQUIRE, Yeager & Lang, 888 Seventh Avenue, New York, NY 10106, this 27th day of July, 1988.

Richard G. Bartmon

Of Counsel