IN THE SUPREME COURT OF FLORIDA

J.B. PARKER,

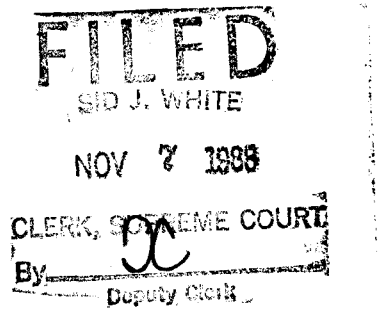
Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 72,374



ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

In this Brief, J. B. PARKER will be referred to, interchangeably, by name and as "Defendant" or "Appellant". The STATE OF FLORIDA, will be referred to, as "Appellee", or "State".

This case arises as an appeal from the ruling of the Circuit Court, of the Nineteenth Judicial Circuit, in and for Martin County, Florida, denying Appellant's post-conviction motion to vacate a judgment of first degree murder, and death sentence, imposed by said court.

In the interest of clarity and convenience, "R" will refer to the Record of Appellant's trial and sentencing proceedings' "SR", will refer to the Supplemental Record, of the pre-trial suppression proceedings; "P" will refer to the transcript and Record of post-conviction proceedings held before the trial court on February 11 & 12, 1988; and "ea" means emphasis added.

STATEMENT OF THE CASE AND FACTS

Appellee presents its own Statement, as follows:

A. TRIAL AND DIRECT APPEAL

Defendant is presently in the lawful custody of the State of Florida, pursuant to a valid judgment and sentence of death, imposed upon Defendant on January 11, 1983 by this Court, the Honorable Phillip Nourse presiding. (R, 1706-1711; SR, 2-3). Petitioner was convicted on January 7, 1983, of the first-degree murder, robbery with a firearm, and kidnapping of Frances Julia Slater, on April 27, 1982. (R, 1547, 1692). On January 11, 1983, after a jury advisory recommendation of 8-4 for the death penalty (R, 1704), Judge Nourse sentenced Defendant to death, for the murder conviction. (R, 1706-1711). On January 4, 1984, upon remand from the Florida Supreme Court, this Court entered its written factual findings, basing its imposition of the death penalty, on evidence supporting four aggravating circumstances and three mitigating factors. P. 569, 570. A description of these findings, is contained in the Florida Supreme Court's opinion, on direct appeal. Parker v. State, 476 So.2d 134, 136-137 (Fla. 1985).

On direct appeal, Petitioner raised seven grounds, challenging his conviction and sentence, as follows (restated by the State):

> 1) The trial court erred in admitting the testimony of two relatives of Georgeann Williams, a co-defendant's girlfriend,

showing that Williams' statements to them were consistent with her trial testimony;

2) The trial court erred in denying a requested jury instruction on "independent acts of others";

3) The trial court erroneously restricted the cross-examination of State witness Georgeann Williams, regarding her arrest for petty larceny;

4) The trial court improperly denied defendant's motion to suppress his admission and/or statement;

5) The trial court erred in allowing the State, over defense objections, to present evidence of defendant's prior criminal history, after defendant expressly waived any reliance on the statutory mitigating circumstance of "no significant prior criminal history";

6) The trial court erred, in instructing the jury on three aggravating circumstances (heinous, atrocious and cruel; cold, calculated and premeditated; crime committed for financial gain), unsupported by evidence; and

7) The trial court reversibly erred, in denying a mistrial during the State's closing argument, referring to co-defendant John Bush's statement, from which the jury could infer that Parker had shot the victim.

Defendant filed a supplemental brief, in which he raised the following additional issue:

1) The Court erred, in overruling defense objections that the State systematically excluded blacks from the jury, by peremptory challenges, and in failing to ask the State about motives for such challenges.

After review, the Florida Supreme Court unanimously affirmed Defendant's conviction and death sentence. Parker v. State, 476 So.2d 134 (Fla. 1985). Defendant did not seek certiorari review with the United States Supreme Court.

The trial court held a pre-trial suppression hearing on September 3, 1982, on defendant's challenge to any use in evidence, by the State, of his May 5, 1982 statement to the police. (SR, 1-88). The State initially presented the testimony of Art Jackson, an administrator of the Martin County Detention Center. (SR, 5). He testified that, as he went through the hall around 4 P.M., May 5, 1982, near Parker's cell, Jackson heard Parker call to him. (SR, 5, 6). Parker asked Jackson to get in touch with the sheriff. (SR, 6).

Upon being advised of these circumstances, Sheriff James Holt went to Parker's cell. (SR, 8). Defendant acknowledged he had asked to see the sheriff, and began to talk about the case, wanting to give his version. (SR, 8-9). Holt told the defendant that the sheriff could not speak with defendant about the case, and that Holt would have to notify Parker's court-appointed attorney, who had given written notice that the police not speak with any of the defendants. (SR, 9). Holt contacted and spoke with Elton Schwarz, the Martin County public defender, and advised Schwarz that Holt had told Parker he could not speak to him without an attorney's awareness or presence, but that Parker still wanted to talk.

(SR, 10). Schwarz indicated he would send an attorney, who turned out to be Stephen Greene, known by Holt to be a public defender. (SR, 10). Greene spoke with Parker, for about 10 minutes. (R, 10). Afterwards, Greene advised Holt that he had advised Parker not to speak, but that Parker nevertheless wished to, and Greene could not stop him from doing so. (SR, 12).

After summoning two other detectives, and in Greene's presence, and on tape, Holt advised Parker that Parker did not have to talk, and read him the rights form, which Parker examined and understood, but did not sign. (SR, 11, 16). Holt also advised Parker, on tape, that Holt had previously told defendant he could not speak to Parker, without presence of counsel, but that Parker nevertheless wanted to talk to the police. (SR, 11).

John Forte, one of the detectives called in by Holt, testified that he advised the defendant of his rights, on tape. (SR, 19-21). Defendant indicated he understood his rights, and did not at any time refuse to talk, or ask that the questioning end. (SR, 21). Parker never indicated that he would stop answering any other questions, until counsel was present. (SR, 21). Forte testified that Parker never challenged Greene's statements that Greene was acting as Parker's counsel, and did not indicate that he did not want Greene, or that he wanted an attorney his mother obtained. (SR, 27).

David Powers testified that on May 7, 1982, at 10:30 A.M. at the Martin County jail, he was told by a supervisor that

Parker wanted to cooperate with the investigator. (SR, 30-32). Powers asked Defendant if he wanted to cooperate, and Defendant agreed, but wanted to speak to his mother. (SR, 30-32). After Defendant did so, and Powers did, as well, Powers read Parker his rights. (SR, 32). Parker remained aware he was not to speak with the police, but still wanted to speak, said he understood his rights, and signed the rights waiver form (SR, 31-32, 37). Powers noted in writing that Parker was advised that the public defender did not want him talking to the police, and that Parker was doing so on his own. (SR, 33-34). Parker was completely cooperative, and drove the route of the crime with two police officers. (SR, 34, 36). Parker stated he wanted to show the police, the location of the knife used on the victim; that the killing of a police officer had been contemplated, when the defendants were stopped on the night of the murder, but had been rejected, because the police already knew the tag number of Bush's car; and that the money and gun were in the back seat of the car. (SR, 33-34, 36).

The defense called Sheriff Holt, who reiterated that Parker had never indicated a desire not to continue talking, and had never stated an intent to remain silent, until he talked to his mother, or until she got an attorney for him. (SR, 48). Defendant understood what he was told by Holt, said he wished to speak, and did not thereafter state that he did not want to talk to the police. (SR, 49).

Elkon Schwarz maintained that he told Holt that the public defender's office was going to seek withdrawal as counsel, on "conflict" grounds, and that Holt stated Parker's continuing desire to talk. (SR, 53). Schwarz stated he sent Greene, with instructions to persuade Parker not to make any statements. (SR, 53, 58-60). An order relieving said office, as counsel, was received by the public defender, on the afternoon of May 6, 1982. (SR, 54). Schwarz stated he would have personally advised Parker not to make statements. (SR, 59).

Stephen Greene testified that he was instructed by Schwarz, to advise Parker not to make a statement. (SR, 65). Greene did not discuss the facts of the case with the defendant, but advised him that any statements would likely be used against him at trial. (SR, 66). Greene stated he had the authority to "advise" Parker, and never indicated otherwise, to Parker. (SR, 67).

As to the statement given by Parker, to Holt, the court concluded that it was freely and voluntarily made. (SR, 86). In reaching this conclusion, the Court observed that Parker had initiated the questioning; that Holt had taken all necessary precautions, even in the face of Parker's voluntary request to speak; and that Parker had counsel present, during questioning. (SR, 83-85). The Court further determined that the possible advice to Parker, were the alternatives of "talk or not," and that there was no evidence that another attorney would

have convinced Parker not to speak to police. (SR, 85). The Court finally concluded there was no indication in the transcript, that Parker refused to speak, until an attorney provided by his mother, or some different attorney, was present. (SR, 85, 86). The Court noted that Miranda rights did not obligate police to allow Parker to speak to his mother, prior to questioning. (SR, 85).

In his opening argument at trial, defense counsel maintained that Parker had no active role in the murder, robbery or kidnapping of the victim. (R, 504).

Nancy Anderson testified that Frances Slater was a "relief" clerk, substituting for the regular employee, at 11 P.M. on April 26, 1982, at the Lil General Store, and relieved Anderson at that time. (R, 507, 508).

Marilyn McDevitt, a friend of Frances Slater, stated she was worried about Slater working alone, on the late shift at the store, and visited Slater at the store, from around 11:15 P.M. to 12:45 A.M. (R, 509-511). McDevitt testified she saw a black person in the store, and identified Parker as that person. (R, 511, 512, 522). McDevitt also identified Parker, from a live lineup, on May 12, 1982. (R, 516, 524). Defense counsel got McDevitt to concede she had picked two people out of said lineup. (R, 519-520), and sought to impeach her about the physical description of the man she saw, that she gave at a prior deposition. (R, 513-515).

Johnny Johnson, a Stuart detective, testified that at 2:46 A.M., when he drove past the store, Frances Slater was alive, in the store with two other people. (R, 529, 531).

Danielle Symons, a newspaper carrier, stopped at a red light outside the store, at about 2:45-3:00 A.M., and saw three black males inside the store, and one in a car outside. (R, 533-534, 537). She identified John Bush, as one of the men inside. (R, 535-537). Miles Hekendorn confirmed that Symons had identified Bush, from a lineup conducted on May 12, 1982. (R, 554).

Mark Hall testified that when he stopped at the Lil General Store for cigarettes, at around 3 A.M., there was no one in the store. (R, 562, 563). Hall called the police, and noticed the cash register was open. (R, 563, 564). The victim's car remained outside. (R, 569). The store manager was called, and discovered that $134 was missing from the store, which Parker had no permission to take. (R, 578, 579).

About 4:30 A.M., Andrea Rush, a correctional officer, was stopped by an individual, about 12-14 miles out on SR 76 in Stuart, and saw a body, the identification of whom she knew from a description of the clothes the victim had been wearing. (R, 583, 584).

Richard Douglas, who was on Jensen Beach, in the early morning of April 27, 1982, in a public park, saw four black males, and identified Bush as one of them. (R, 622, 623, 630,

634). Don May identified Bush's car, as the vehicle he saw, parked on the Jensen Beach causeway, in Hutchinson Island, at around 1:40 A.M., April 27, 1982. (R, 636, 645).

Dr. Ronald Wright, then the chief medical examiner for Broward County, testified that he performed an autopsy of the victim, at aboaut 10:30 A.M. on April 28, 1982. (R, 652). Wright testified that State's injuries were a laceration or tearing of the ring finger of her left hand, outside the nail; a stab wound in the abdomen; and a gunshot wound, in the middle of her head. (R, 658, 659). Wright concluded that the gun was fired, at least 2 feet from the victim's head. (R, 659, 660). The knife wound, while "nicking" her liver, did not otherwise cause internal injuries. (R, 660). The gunshot wound destroyed much of the victim's brain, on a straight course, ending up behind her left eye. (R, 661). The victim's bladder was "completely" empty, which Wright stated was consistent with the victim being in fear, prior to her death. (R, 662). The knife wound was consistent with the victim jumping back, in a defensive posture, when inflicted. (R, 662). Wright stated that the gunshot wound was the cause of the victim's death. (R, 664). Defense counsel, inter alia, elicited testimony from Wright, that he found nothing inconsistent with the same person having done both the stabbing and shooting of the victim. (R, 672).

Officer Timothy Bargo testified that he stopped a car, at the Martin County line, in the early morning of April 27,

1982, with four black males. (R, 676, 677). Bargo stated that Parker gave his name as "Mike Goodman." (R, 679). None of the four males appeared drunk, or to be held against their will. (R, 688). The vehicle was identified as registered to John Bush. (R, 677, 694).

A search warrant was executed for Bush's car, based on information obtained from Willie Newkirk. (R, 695-698). The search of the house revealed a 38 calibre revolver. (R, 699).

Based on statements given by John Bush (R, 707), Officer Lloyd Jones sought to find the defendant, along with Alphonso Cave and Terry Wayne Johnson (R, 709-710). Officer Hamrick made it clear that Parker was not to be arrested, or compelled to accompany anyone to the State Attorney's Office, and be transported only if he voluntarily wished to go. (R, 712). Parker did voluntarily accompany officers, to the State Attorney's Office, without promises or threats. (R, 713-715).

At the State Attorney's Office, Parker was advised of his rights, which Parker said he understood, and stated he would speak without presence of counsel. (R, 716-719). Parker was free to go, if he chose. (R, 719). The Court specifically found that his subsequent statement was freely and voluntarily given. (R, 721). When questioned about his whereabouts the night of the murder (R, 717), defense counsel objected to the lack of a predicate (R, 717), prompting the court to establish the voluntariness of such statement. (R, 718, 721).

Parker claimed he was with his mother and girlfriend, on the night of the murder, and denied any knowledge of the crime. (R, 721). His mother confirmed this alibi, stating Parker was with his girlfriend, Charlene Dickerson, until 11:30 P.M., when he then took her home. (R, 722). Dickerson stated that Parker drove her to work, on the morning of April 26, 1982, and then did not pick her up, as he was supposed to. (R, 722-723). In her testimony, Dickerson confirmed that Parker was not with her, on the night of April 26, 1982, and that Parker had failed to pick her up from work that day. (R, 725, 726). She further stated that Parker's hair had been cut lower, two days later. (R, 726). Dickerson testified that the cells of Parker and Bush were across the hall from each other, in Martin County. (R, 728, 729).

After Officer Jones spoke with Parker, on May 5, Ronnie Hayes, the chief investigator for the Fort Pierce State Attorney's Office, advised him of his rights, and without promises or threats, told Parker that he had the right to stop talking, and get counsel. (R, 735-737). Parker chose to speak, and told Hayes he was with his mom and girlfriend, on the night of the murder. (R, 737).

Art Jackson testified that on May 5, 1982, Parker wanted to talk about the trial, and contacted Jackson. (R, 740). Jackson stopped Parker, and said Parker needed to speak to his counsel. (R, 740). Parker stated "I don't want to," and

asked to speak to the sheriff. (R, 740). When Parker told Sheriff Holt he wanted to talk about the case, Holt stopped him, reminded Parker he had counsel, and said Holt would call counsel. (R, 742). Elton Schwarz sent Stephen Greene over to the jail. (R, 743). Greene spoke with Parker for about 10 minutes. (R, 743). Parker kept insisting he wanted to make a statement; Greene told him not to, but Parker decided against taking this advice. (R, 744, 745). On tape, Greene again advised Parker not to talk, but Parker did. (R, 746, 753).

Defense counsel renewed his suppression motion, when the State offered the tape into evidence. (R, 761-762). He also objected to giving transcripts to the jurors. (R, 762-773). In the statement, Greene stated he had advised Parker not to make a statement, and that any statement made was being given over his objection. (R, 775-776). After being advised of his rights, Parker understood them. (R, 776, 777). When asked to sign a rights waiver form, Parker said he wanted to see if his mother obtained an attorney for him. (R, 777). Parker then stated he wanted to get something "off his mind". (R, 778). When Parker asked if he had to sign the form, to speak to the sheriffs, he was told he could speak to them without signing. (R, 778). Greene advised that a signing of the form, waived his rights. (R, 778). Parker asked if he could see if his mom had gotten an attorney, to be with him, and wanted his mother to get one. (R, 778, 779). Holt told Parker that no one would force him to

talk; that Parker had expressed interest in making statements, which Parker acknowledged; and that Parker could make a statement, without signing a waiver form. (R, 779). Holt then asked Parker if he still wanted to give a statement, and Parker did. (R, 779).

Parker stated he did not intend to rob, and knew nothing about a plan to commit robbery, until he was in the car, in Stuart. (R, 780). He claimed he stayed in the "bushes," when the others first went to the Li'l General Store, earlier in the evening. (R, 782). Parker claimed he asked Bush not to hurt the girl. (R, 783). He then stated that Bush shot and stabbed Frances Slater, and that he had stayed in the car, and turned his head away from the victim, before the shot. (R, 784). Parker offered to show the police the location of the knife, and Greene objected to any attempt by Parker to do so. (R, 785, 792). Parker admitted that the money and gun were in a sack, in the car, when the car was stopped by police, at the Martin County line. (R, 787). Bush threatened Parker, that Parker "would take the whole rap," if Parker talked. (R, 788). Parker also claimed that Bush had the gun in his hand, while driving; that he said, and intended to, kill the girl, when they were at the store, and took her with them; and that Bush was the only one who got out of the car with Frances Slater. (R, 789-791). At the conclusion of the statement, Parker again acknowledged he had given the statement freely, on his own. (R, 793).

David Powers testified that on May 7, 1982, Parker volunteered to find the knife, and to go to the crime scene. (R, 795). After being advised of his rights, Parker signed a waiver, on which it was written that the public defender had advised Parker not to speak to the police, but that Parker wanted to show them where the knife was. (R, 795-797). At the scene, Parker pointed out the area, where Ms. Slater was found, and said "they" had taken her out of the car, in that area. (R, 798). He again stated that Bush shot and stabbed Slater. (R, 798). The police went further down the road, looking for the knife, which Parker said Bush had thrown, with his left hand, over the top of the car, and into the bushes. (R, 798, 799, 801). Parker stated that when the car was stopped, on the night of the murder, the group considered shooting the officer, but decided not to, because he had already retrieved the tag number from Bush's car. (R, 801-802). According to Parker, Bush hid the gun, and the robbery money was split up at Cave's house, with all four present, with Parker getting some $20-30. (R, 802-803). On cross-examination of Powers, defense counsel established that no notes of Parker's statement at the crime scene were taken, and a report was prepared 10 days later. (R, 808). Defense counsel did not ask about Bush's statement, once the trial court indicated this would "open the door" to the admission of Bush's entire statement. (R, 812-817, 823, 828, 832-834). Officer Vaughn, who was also at the crime scene with Parker, verified

Parker's statement that he got $25-30, out of the robbery money (R, 841), and that he pointed out "that's where we put the body." (R, 848)(e.a.).

The parties stipulated that Kathy Slater would testify that Frances Slater was home, between 9-10 P.M. on April 26, 1982, and had the same white slacks on, that she was found in, and was watching television. (R, 849).

Daniel Nippes, a criminologist, testified he analyzed Bush's car, and the clothes and hair of the victim. (R, 852, 855-857). He stated that the yellow fibers found on Slater's pants, and those found in Bush's car, matched the carpet in the Slater's home, in the TV room. (R, 860-861). The fibers on Slater's tennis shoes, matched those found, as "identical," in Bush's car. (R, 862). The hair of the victim, matched the hair found in the car. (R, 863). A hair from the head of the victim, found in the car, was forcibly removed from her head; Nippes concluded that the hair was consistent with someone having yanked it out, but was equally consistent with other possible causes. (R, 867, 869).

Defense counsel unsuccessfully objected to not being able to ask Georgeann Williams (Bush's girlfriend), on cross-examination, about any arrests for petty larceny, and whether she told her mother, to show that Williams lied at her deposition about this. (R, 870-876). Williams then testified, after the court granted the State's motion, over defense objection, to

preclude any questions, about prior arrests, of Williams. (R, 870-876).

Williams testified she visited Bush, in jail, every weekend after his arrest on May 4, 1982. (R, 880). The first weekend she was there, Williams stated that Bush had told her something about Slater's murder. (R, 881). She went to Parker's cell, and asked what had happened. (R, 881). Parker asked if Bush had told her, and she said no, and wanted to know who shot Slater. (R, 881, 882). Parker stated that he shot her, while Bush had stabbed her, (R, 883), and that if she talked, it would be her word against his, and that Bush had a criminal record. (R, 883). She told her mother, sister and Bush about the statement (R, 884), but not the police or Bush's lawyer. (R, 883, 884). Williams statd she testified against Bush at his trial. (R, 886). On the night of the murder, when Bush came to Williams to borrow money, he told her Parker was in the car with him. (R, 886).

On cross-examination, defense counsel elicited that no one else heard Parker's statement to her. (R, 888). Williams admitted that she had lied to her parents, about Bush's criminal crecord, because she would not have been permitted to get involved with Bush, by them. (R, 898, 899). She stopped visiting Bush in jail, well before his trial. (R, 902). Defense counsel brought out, by inference, that Williams claimed she would not lie to save Bush's life, but did lie, to continue

seeing him. (R, 903). Williams' mom admitted that her daughter said nothing about Bush's criminal past, because she would not have wanted Georgeann to continue the relationship. (R, 919, 922). Nealie Williams said that in May, 1982, Georgeann told her that Bush stabbed the victim, and another person shot her, but that Nealie could not remember his name. (R, 913, 918). Sandra Williams, Georgeann's sister, also testified, over defense objections (R, 913-917), that "Pig" told Georgeann that he had shot Slater, while Bush stabbed her. (R, 923).

Art Jackson testified that, in light of the location and nature of the Parker and Bush jail cells, Georgeann Williams "could hear anything and see anything." (R, 929-931).

Parker testified at trial, in his own defense. (R, 959). He maintained that he drank about a half-bottle of gin, smoked marijuana, fell asleep after leaving a bar, and woke up, in the car, in Stuart. (R, 967, 969, 972). Bush said "We're going to rob something". (R, 972). Parker claimed he stayed in the car, the first time the group went into the Li'l General Store, not wanting to be involved. (R, 574). Bush pulled out a gun, while they were driving through Stuart, after getting money from Bush's girlfriend, and went back to the store. (R, 976, 977). Parker did not think that they were going to rob the store. (R, 978, 979). Parker went inside, found no one inside, came back out, and saw Cave walking Frances Slater out of the back of the store, with a gun to her head. (R, 979). Bush want

to kill her, because he didn't want to be identified by a witness. (R, 983). Parker claimed that Bush got out of the car, with a knife; that Ms. Slater asked them not to hurt her; that he saw Bush stab her, got back in the car, looked away, and heard a shot. (R, 984, 986). Parker denied receiving money from the robbery. (R, 992). Parker claimed he lied about an alibi, because he was scared. (R, 992, 995). Parker denied any conversation with, or confession to, Georgeann Williams. (R, 996-998). Parker further denied an intent to rob or murder. (R, 997-998).

On cross-examination Parker denied having heard, after his arrest, that Bush told the police about the "circumstances." (R, 1016). He admitted lying about not getting money from the robbery, and about denying knowledge of his other 3 accomplices. (R, 1019-1021). The State established that Bush was smaller than Parker, and that Bush did not have the gun, when the car was stopped by police on the night of the murder. (R, 1026). Parker continued to deny that he thought there would be a robbery, even though Bush said they would rob the store. (R, 1028, 1039, 1040). The State further sought to impeach him, with his May 5, 1982 statement, including his May 5 admission of being in the store during the robbery. (R, 1029-1032, 1034, 1038).

During the State's closing argument, defense counsel moved for mistrial, on the alleged basis that the State had violated a pre-trial motion in limine, by referring to Bush's

statement about the crime, and implying that Bush implicated Parker as the shooter. (R, 1154-1156). In his closing argument, Makemson emphasized that many of the State's witnesses, did not prove or establish that Parker participated in, aided or committed the subject crimes. (R, 1093-1106). Counsel argued that the coroner's testimony was consistent with the theory that Bush shot her, when he realized that the stab wound did not "wound her greatly." (R, 1105-1106). Defense counsel emphasized inconsistencies and possible doubts in the testimony of some of the police officers. (R, 1106-1115). Counsel expressly labelled Georgeann Williams, as an admitted liar, who continued to lie to avoid her parents' concern about dating Bush, with his criminal record, and to help save Bush's life. (R, 1115-1119). Makemson urged the jury to listen to the tape of Parker's statement, and that the tape, consistent with his in-court testimony, established his desire not to be involved in the crime. (R, 1120-1121; 1167-1169). Counsel urged that the individual who was most involved, and had the greatest motive to kill Frances Slater, was John Bush, and that, according to Parker, Bush did shoot and kill Ms. Slater. (R, 1173-1174).

The jury's verdict of guilty was reached, after approximately 2 hours, 12 minutes of deliberation. (R, 1201).

At the outset of the penalty phase, defense counsel read Parker's personal waiver, of the statutory mitigating circumstance of "no significant prior criminal activity"

(§921.141(6)(a), Fla. Stat.), which Parker acknowledged he understood, in open court. (R, 1205-1206). Defendant's counsel also sought to prevent the State from introducing evidence of Parker's prior criminal activity. (R, 1206-1207). The State responded by arguing that if the door was opened by defense, the State would seek to rebut with evidence of negative aspects of Parker's character. (R, 1210, 1211, 1214). Counsel stated he had advised his witnesses "not to say that Mr. Parker was a good boy and Mr. Parker was not in trouble. (R, 1207). Judge Nourse concluded that he believed in evidence being revealed, and that the situation would be dealt with, if it came up, at that time. (R, 1214, 1215). The State stated it would rely on trial evidence, for proof of aggravating circumstances. (R, 1219).

Defense counsel presented three witnesses. Parker's mother's boyfriend, Douglas Smith, testified that he had never seen Parker, with Cave or Bush, and that he did not know Cave or Bush. (R, 1221-1222). Parker's mother, Elmina Parker, testified that Parker was 19 years old, at the time of the crime (R, 1225); that Parker was the ninth, of ten children, and picked fruit (R, 1227); that Parker's real father was "around" for about 4 years (R, 1226); that she did not know Bush (R, 1228); and that she had seen Cave, two or three times before, at her home. (R, 1228). Defense counsel successfully prevented the State from going into Parker's criminal record, while his mother was being cross-examined. (R, 1231-1232).

Dr. Paul D. Eddy, a clinical psychologist, testified for the defense. (R, 1235). Eddy examined Parker on December 27, 1282. (R, 1241). Eddy stated that Parker said he had been drinking gin and smoking marijuana, on April 26, 1982. (R, 1247). Parker's psychological profile was that of a "borderline retarded" man, with an IQ of 87. (R, 1249-1251). Eddy classified Parker as a "follower," immature and naive, with "moderate" depression. (R, 1253-1255). Eddy further indicated that Parker had no appearance or indication ofpsychosis, but had a passive, non-aggressive, personality disorder. (R, 1256-1257). Eddy concluded that Parker was likely to break the law, in non-aggressive, non-violent, non-victim situations, such as breaking and entering, and stealing. (R, 1258-1260). Dr. Eddy also concluded that Parker suffered from alcoholism. (R, 1260).

In questioning Dr. Eddy as to his conclusions about Parker's "passive" personality, the State inquired whether such an opinion was consistent with breaking and entering of a school, on March 28, 1977. (R, 1280). Defense counsel objected, complaining that the State was improperly introducing evidence of defendant's past crimes, in the face of Parker's waiver of mitigation, based on no significant criminal history. (R, 1280, 1281). The State maintained that it was merely impeaching a witness, not seeking to rebut mitigating circumstances, and that the prosecution sought to explore the basis for Dr. Eddy's conclusions. (R, 1281-1284). The court ruled that Parker could

not elicit some testimony about his personality and background, and keep other aspects from being examined or explored by the State. (R, 1284-1285). Dr. Eddy stated he was unaware of Parker's episodes of breaking of windows and vandalism of a school, in March 1979, (R, 1286-1287), but stated it was consistent with passive personality, to have directed these acts towards objects and not people. (R, 1288, 1360). Eddy revealed that Parker had told him about a breaking and entering incident, when he was 9, and two or three disorderly conduct charges. (R, 1292-1293, 1296). Eddy stated he did not expect a truthful account of crimes, from jailed felons. (R, 1376). He acknowledged that he had not questioned Parker, regarding several break-ins, and vandalous acts. (R, 1332-1333, 1342, 1362, 1369-1370). Eddy confirmed that he found no evidence of brain dysfunction, psychotic disorders or a "distortion of reality" by Parker. (R, 1378). Eddy further testified that Parker would not cause problems as a prisoner, but was unaware of some jail disturbances involving Parker, and was aware of Parker's participation in two fights in middle school. (R, 1383-1386).

Thereafter, the State presented rebuttal witnesses, who testified about Parker's "aggressiveness" in jail, his lack of symptoms of alcoholism during past breaking and entering/robbery offenses, and his ability to understand and answer questions about such offenses. (R, 1391-1402).

In his closing argument, Makemson initially maintained that he hoped and understood that the jury's verdict of guilt, was or could be under felony-murder doctrine, based on a jury finding that Parker participated in the robbery in some respect. (R, 1467). He again urged Parker was not the killer. (R, 1467-1468). Makemson argued that State's death was instant aneous, not torturous, and that there was no evidence of abuse, therefore not "heinous, or cruel" as statutory aggravation. (R, 1469-1473). He further stated that Bush killed Ms. Slater, to keep from being identified and going back to prison. (R, 1473-1474). As to mitigating circumstances, Makemson argued that defendant's participation was less than Cave and Bush, who did the actual robbery, kidnapping and murder. (R, 1474). He relied on Dr. Eddy's testimony, as proof that Parker was substantially dominated by others, and that his ability to conform conduct to law was impaired. (R, 1475-1476).

As to background and character, defense counsel urged the jury to consider his circumstances, as the ninth of ten children, who "never really knew his father," and whose whole family was fruit pickers. (R, 1477). He relied on Eddy's analysis of Parker's "marked social, cultural deprivation [sic]," of his mental problems, and of his "follower" personality. (R, 1478-1479). Makemson emphasized that his acts of stealing were consistent with his personality profile. (R, 1479-1480). Counsel stressed that Parker's acts in prison were not violent or

dangerous. (R, 1481-1482), and reminded the jury of Dr. Eddy's testimony about Parker's alcohol and drug use, and its effect on his ability to conform his conduct to law. (R, 1484, 1485, 1486). Finally, counsel maintained that a mandatory minimum 25-year term, without parole, was harsh punishment. (R, 1486).

In his written factual findings, supporting imposition of the death penalty, Judge Nourse initially found that the murder was committed "while (Parker) was engaged in the commission of a kidnapping and robbery. P, 569. As factual support for this finding, the trial court stated that Parker entered the store twice, to commit robbery; knew from the first robbery attempt that the victim would be kidnapped and killed, to prevent identification; and that the victim was kidnapped, and shot by Parker in "a remote area." P, 569.

The court's support, for its finding that the murder was "committed for pecuniary gain", was that about $120 was taken, and split amongst four defendants, with Parker getting $20-30 of proceeds. P, 569.

The court further found that the murder was "evil, wicked and cruel," in that the evidence showed the victim was in great fear for her life; was told, at the outset of a "thirty minute, twenty mile rid" that she was to be killed, to prevent identification of any of the defendants; that she pleaded for life, and voided her bladder from fear; and was shot by Parker, and stabbed in Parker's presence. P, 569-570..

To support the finding that the murder was committed "in a cold, calculated and premeditated manner," the court cited evidence, demonstrating that Parker had early knowledge that the victim would be killed, to prevent identification, and that her killing was discussed by all four men, while the victim was being taken to the area where she was shot. P. 370.

In mitigation, the trial court found that the victim "was not sexually molested"; that Parker was 19 at the time; and that his trial behavior was "acceptable." P, 570. The court concluded that the aggravating circumstances exceeded mitigation, and sentenced Parker to death. P, 570; (R, 1706-1711).

On direct appeal, the Florida Supreme Court rejected all five challenges, made by Parker to his conviction. Parker v. State, 476 SO.2D 134, 137-138 (Fla. 1985). The court initially determined that it was improper to admit testimony by Georgeann Williams' mother and sister, regarding Georgeann's statement to them, of having heard Parker's confession to shooting the victim, as prior consistent statements made by Williams, to corroborate Williams' testimony. Parker, 476 So.2d, supra, at 137. However, the court determined that such error was harmless, since the testimony of the mother and sister "did not give significant additional weight" to Williams' testimony. Id.

The Court clearly rejected Parker's contention that his request to see his mother, to check if she had gotten him an attorney, invoked his right to remain silent. Parker, 476 So.2d,

at 137-138. The Court concluded that, based on the Record, Parker "made a knowing, intelligent and voluntary waiver of his right to silence, Parker, 476 So.2d, at 138; that he "repeatedly voiced his desire to make a statement," even in the face of contrary advice by a member of the public defender's office; and that he was repeatedly advised that he did not have to make any statements. Id. In rejecting other challenges to his conviction, the Court, inter alia, rejected the claim, "without discussion," that Parker was prejudiced by improper prosecutorial comments. Id.

As to the sentencing phase, the Court ruled that Dr. Eddy's testimony, that he based his conclusions, in part, on Parker's prior criminal history, "opened the door" to State cross-examination, exploring the basis of the doctor's knowledge of Parker's criminal history. Parker, 476 So.2d, at 139. The Court approved the trial court's reliance on the aggravating circumstance of "heinous, atrocious and cruel," and "cold, calculated and premeditated", based on the Record circumstances of the crime. Parker, 476 So.2d, at 139, 140. Additionally, the Supreme Court concluded that the aggravating circumstances of felony murder and pecuniary gain, were not improperly doubled, because the kidnapping aspect of the "felony-murder" circumstance, was completely separate from the conduct relied on to find "pecuniary gain" as aggravation. Parker, at 140. Finally, the Court determined, based on its own independent

proportionality review, that the imposition of death, upon Parker, was appropriate. Id.

B. STATE COLLATERAL PROCEEDINGS

On December 7, 1987, Appellant filed his post-conviction motion, in the Circuit Corut, Martin County, Florida. P, 455-492. In his motion, Appellant argued, (as restated), as follows:

> 1) That Robert Makemson, Appellant's counsel at trial and sentencing, rendered ineffective assistance of counsel, in allegedly failing to advance certain grounds in support of suppression of Appellant's May 5, 1982 statement to police, and failing to get the Statement suppressed; P, 457-470
>
> 2) That Makemson rendered ineffective assistance of counsel, at sentencing, by allegedly failing to investigate and/or present additional mitigating character and background evidence; P, 470-482.
>
> 3) That the State violated Appellant's due process rights, by failing to disclose the fact that the prosecution had argued, at the previous trials of Parker's co-defendants, that each of the co-defendants was the "triggerman", in Frances Slater's murder; P 483-487, and
>
> 4) That Appellant's alleged minimum degree of involvement and culpability, in the murder, prevented the imposition of the death peanlty under Enmund v. Florida, 458 U.S. 782 (1982), and Tison v. Arizona, 481 U.S. ___, 109 S.Ct. ___, 95 L.Ed.2d 127 (1987). P, 488-490.

The State filed a Response, P, 793-923, maintaining, inter alia, that those claims, besides ineffective assistance of counsel, were procedurally barred, because those claims (Claims 3 and 4) should or could have been raised, on direct appeal. P, 814. The State otherwise argued that none of the claims had

merit, and that counsel Makemson provided effective assistance of counsel. P, 814-837.

An evidentiary hearing was held, on February 11 & 12, 1988. P, 1-359. Appellant presented the testimony of Belinda Dickerson, the sister of Parker's girlfriend, at the time of the murder, P, 38-43; Douglas Smith, Parker's mother's boyfriend, who did testify at the sentencing phase, P, 44-53. The State then presented the testimony of Robert Makemson, Parker's trial counsel, who testified, inter alia, about his strategies and defenses, in seeking suppression of the May 5, 1982 Statement, and in presenting setencing phase evidence and argument. P, 56-108. Parker then presented the testimony of Steven Greene, the representative of the Martin County Public Defender's Office Who was present during the May 5 statement. P, 109-138. Appellant then introduced some sixteen additional affidavits, of family, friends, and neighbors of Parker, as well as counsellors at the Okeechobee School for Boys, and former grade school teachers. P, 142-145. The State then presented Jim Midelis (now a St. Lucie County judge), p, 146-194, who testified, as an expert witness in homicide prosecutions, concerning the facts and circumstances of the Parker trial, and the impact of such facts on Makemson's representation of Parker. Subsequently, the defense presented Parker himself, as a witness. P, 195-234. Appellant also proffered the testimony of Gloria Marshall, a counsellor with the Okeechobee School for Boys. The State presented Robert Stone,

the other prosecutor in the Parker, Cave and Bush trials, who also offered expert testimony, on the subject of Maekmson's representation of Parker, as affected by the facts, circumstances, and evidence presented, concerning Parker's participation in the murder. P, 240-260. Mr. Makemson was recalled as a witness, by the State, to complete his testimony. P, 262-299.

At the conclusion of the hearing, the Court requested that post-hearing briefs be filed, by both parties. P, 355-357. Following the filing of these memoranda, P, 1568, 1584, the Circuit Court issued an order, on April 5, 1988, denying Appellant's post-conviction motion. P, 1598-1601.

Any and all other relevant facts, not included herein, will be discussed, in the context of the Argument portion of this brief.

SUMMARY OF ARGUMENT

The Circuit Court's ruling, denying Appellant's post-conviction claim, alleging ineffective assistance of counsel, regarding suppression of Appellant's May 5, 1982 statement, was appropriate. The evidence at the post-conviction evidentiary hearing, demonstrates that Makemson actively sought suppression, on the grounds that Appellant's statement was not voluntary, and was obtained in violation of his Fifth and Sixth Amendemnt rights to counsel, and to remain silent. Defense counsel actively pursued these theories, in writing, and through effective direct and cross-examination on the theories Parker now seeks to re-litigate. The trial and post-conviction Record, show that the Public Defender's assistance to Parker, did not constitute an actual conflict of interest, that actively benefitted Cave's defense, to Parker's detriment. The Record further supports the trial court's ruling, and this Court's ruling on direct appeal, that Parker's statements were voluntary, and that Parker did not invoke his right to counsel. Because Parker's suggested grounds, for suppression, were factually and legally unsupported, defense counsel was not ineffective, in his efforts at suppression. Furthermore, even in the absence of the May 5, 1982 statement, Parker suffered no prejudice, since there was other overwhelming evidence to support the guilty verdict and death sentence.

The Circuit Court's denial of relief, based on Appellant's allegations of ineffective assisance of counsel at sentencing, was also appropriately supported by the evidence. Counsel's reliance, on then-controlling Florida Supreme Court case law, to seek exclusion of any references to Parker's prior criminal hisory, was reasonable under the circumstances. The Record demonstrates that counsel Makemson, because of his investigation of Appellant's character and background, adequately prepared to contest attempts by the State, to refer to Parker's prior criminal history at sentencing. Furthermore, Makemson employed a sound and reasonable strategy, for Parker's sentencing phase, and was not ineffective for failing to present additional mitigating evidence, relating to Parker's character and background. The testimony elicited by Parker, at the evidentiary hearing, would have stressed and reinforced negative aspects of character and background, far outweighing any limited probative value of such evidence. Such general testimony, as to Parker's generosity, kindness, passive and non-violent nature, and status as a good worker, would not have altered Parker's sentence, and were clearly overwhelmed by the aggravating circumstances of the murder. Parker's evidence, on ineffectiveness of counsel, did not fulfill his burden of proof, under Strickland v. Washington, 466 U.S. 668 (1984).

The State did not engage in prosecutorial misconduct or vioalte Parker's rights of due process, by failing to inform the

jury, of the nature of evidence and arguments, on the identity of the "shooter", at Bush and Cave's trials. Such a claim should have been raised, on direct appeal, and is procedurally barred from consideration. The State's reliance on argument, based on the evidence at Parker's trial, was proper comment and inferrences from evidence; the same was true, at the other trials. The State had no obligation, to either violate Florida law, forbidding references to evidence and argument at co-defendants' trials, or disclose irrelevant evidence and arguments at Parker's trial. Such disclosure was not "material", in the dur process sense, and would have had a tremendously detrimental impact on Parker's guilt and sentencing proceedings.

The trial court's admission of expert testimony, on the issue of Makemson's effective performance, was an appropriate exercise of discretion. Such testimony was helful to the trier of fact, and was not rendered inadmissible, merely because it involved an issue of ultimate fact. The question of bias, was one involving weight and credibility of evidence, and did not preclude the admission of expert testimony by the State. Even in the absence of such testimony, the trial court's denial of post-conviction relief, was supported by substantial competent evidence.

ARGUMENT

POINT I

DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL, IN COUNSEL'S ATTEMPTS TO SUPPRESS DEFENDANT'S PRE-TRIAL STATEMENTS.

Parker, through present counsel, has maintained that the trial court committed error, in denying his claim that trial counsel provided ineffective assistance at trial, in his efforts to seek suppression of pre-trial statements. Specifically, Parker has argued that counsel failed to present particular facts, arguments and grounds, relating to the public defender's alleged "conflict of interest" in advising Parker, prior to his May 5, 1982 statement; the denial of Parker's right to counsel, and right to silence; and the failure to use Parker, as a suppression hearing witness. Initial Brief, at 17-37. It is apparent, from review of the trial and post-conviction evidentiary hearing and records, that trial counsel, Robert Makemson, provided substantial assistance of counsel, at this pre-trial juncture. Parker's present arguments are mere re-litigation, of the validity of the suppression issues, adequately raised by Makemson, and sufficiently reviewed and rejected by this Court, on direct appeal.

Under the well-established criteria in Strickland v. Washington, 466 U.S. 668 (1984), and reiterated in Burger v. Kemp, 483 U.S.___, 107 S.Ct___, 97 L.Ed.2d 638 (1987), a defendant's claim of deficient performance, that prejudiced the outcome of his suppression hearing, trial or sentencing, must be examined, based on those circumstances and facts, then known to trial counsel. Strickland, 466 U.S., supra, at 689; Burger, 97 L.Ed.2d, supra, at 654; Foster v. Dugger, 823 F.2d 402 (11th Cir. 1987). Parker's claim must be evalu-

ated, as a threshold matter, by "making every effort" to eliminate hindsight, and by "reconstructing the circumstances," from trial counsel's perspective at the time, with deference paid to counsel's strategic decisions. Blanco v. Wainwright, 507 So.2d 1377, 1381 (Fla. 1987); Clark v. Dugger, 834 F.2d 1561, 1567-1568 (11th Cir. 1987);

Foster; Burger; Strickland. In evaluating Parker's claims, it is significant to refrain from imposing a duty on counsel, in order to be considered "effective," to explore every avenue, and present all possible information, particularly if such information would have been inconsistent with counsel's then-chosen strategy, or could have led to a more harmful impact, on Parker's pre-trial motions, trial or sentencing. Burger, at 656, 657; Elledge v. Dugger, 823 F.2d 1439, 1447 (11th Cir. 1987); Middleton v. State, 465 So.2d 1218 (Fla. 1983).

In assessing a claim of ineffective assistance of counsel, based on alleged failure to seek suppression of statements or evidence, such effectiveness does not require that all conceivable claims for suppression be made. Magill v. State, 457 So.2d 1367, 1370 (Fla. 1984); Palmes v. State, 425 So.2d 4, 6 (Fla. 1983); see also, Bush v. Wainwright, 505 So.2d 409, 411 (Fla. 1987). When a basis for suppression, newly asserted by collateral counsel, is not supported factually or legally, trial counsel is not considered ineffective, for failing to pursue a meritless claim. Bush, supra; Magill, supra; Gettel v. State, 449 So.2d 413, 414 (Fla. 2nd DCA 1984); Palmes, supra; Owens v. Wainwright, 698 F.2d 1111, 1114 (11th Cir.

1983); Ford v. Strickland, 696 F.2d 804, 816 (11th Cir. 1983)(en banc). This is particularly true in situations where trial counsel sought suppression of statements, which were properly admitted into evidence.

Palmes; Ford v. Strickland, supra; Turner v. Sullivan, 661 F.Supp. 535, 538-539 (ED NY 1987). Even where counsel was not effective, and should have sought suppression, on grounds that were not properly raised at trial, counsel will not be deemed ineffective, if other evidence demonstrates a defendant's guilt, even without the challenged statements or evidence. Magill; Zamora v. State, 422 So. 2d 325, 327 (Fla. 3rd DCA 1982); Zamora v. Dugger, 834 F.2d 956, 959 (11th Cir. 1988); Owens, supra; Ford.

An analysis of defendant's claimed errors by trial counsel, in failing to seek or obtain suppression of his May 5, 1982 statement, reveals that such claims for suppression have no merit, are unsupported by facts or law known to counsel, at time of trial, and did not prejudice Parker, by their alleged omission. Strickland.

In asserting that counsel's performance, on suppression, was defective, Parker has selectively and totally ignored the substantial nature of this actual performance, and its effect on Parker's claims. Counsel Makemson filed a motion to suppress the May 5, 1982 statement Parker gave to police, in August, 1982 (R, 1620-1621). In this motion, Makemson challenged the statement on several grounds. He alleged, inter alia, the statements were involuntary; that they were obtained in violation of Parker's Miranda[1] rights; that Parker was

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

improperly questioned, after invoking his rights to silence and/or counsel; and that Steven Greene was not an "attorney," within the Sixth Amendment, by virtue of his "intern" status, and the lack of consent by Parker, to Greene's representation. (R, 1620-1621). Counsel also alleged he would offer other grounds for suppression, and asked for an evidentiary hearing (R, 1620-1621). Thus, substantial Fifth and Sixth Amendment grounds for suppression were explicitly raised, in writing, including virtually all of the potential grounds, that Parker now claims were not asserted.

At the suppression hearing, held September 3, 1982 (SR, 1-88), Makemson conducted extremely effective cross-examination of the State's witnesses, eliciting information in support of his claims. Sheriff Holt was forced to admit that Holt was aware of co-defendant's statements, implicating Parker as the murder's "triggerman." (SR, 14). Both Forte and Holt admitted that Parker had not signed a rights waiver form (SR, 16, 24). Forte further acknowledged that Parker asked to see his mother, on three separate occasions, and that questioning of Parker nevertheless persisted. (SR, 25-28, 48, 49). Detective Powers admitted that he did not verify Steven Greene's status, as an attorney, when Greene appeared to help Parker. (SR, 38).

Makemson's defense witnesses, at suppression, were used to further his grounds for suppression. Though the testimony of Elton Schwarz, the elected public defender, Makemson sought to establish that the Public Defender's Office informed the sheriff of its intent to "conflict out" of representing Parker (SR, 53, 54). Greene testified to his "intern" status (SR, 61), and stated he did not tell

Parker that he was not an "attorney," or that Parker could obtain one. (SR, 63-64, 67). Makemson concluded his suppression presentation, by stressing, in argument, (inter alia), that Parker's rights to counsel, and silence, were not honored, and that Greene did not afford Parker an "attorney," as Constitutionally required and provided. (SR, 74-83). Significantly, Makemson preserved these claims, for appellate review. Parker v. State, 476 So.2d 134, 137-138 (Fla. 1985).

Makemson's testimony, at the evidentiary hearing on his Rule 3.850 motion, substantiates his efforts, in seeking suppression of the subject statement. Makemson met several times, with Parker, prior to the suppression hearing, to discuss Parker's May 5 statement, review the surrounding circumstances, and discuss prossible grounds for suppression. (P, 59-60, 81, 89-90), Parker confirmed the existence of these meetings. (P, 227). Makemson reiterated that his main suppression theories, were to argue that Parker's right to cut off questioning had not been appropriately honored; and to argue that Steven Greene was not an "attorney," and did not render legal advice, such that Parker had assistance of "counsel." (P, 82, 83, 299). Makemson confirmed Greene's status, as an "intern," prior to the hearing. (P, 295). Makemson further testified about his understanding of the facts, at the time of the suppression hearing, including Parker's desire to speak to the sheriff, and make a statement, to give his version of events, and show that Bush had lied in implicating Parker as the "triggerman." (P, 81-82, 84-85, 268-270, 293-294). Defense counsel further recalled his elicitation of testimony, during the suppression hearing, in support of his Fifth and Sixth Amendment legal theories. (P, 83,

84). Makemson was fully aware of all of Parker's statements, and those made by his co-defendants. (P, 62). Furthermore, counsel developed a strategy, in the event Parker's statement was admitted, to use said statement, consistent with his trial defense theory, that Parker was present during the crimes, but was not a major participant. (P, 62-63, 65-66).

Thus, Parker's trial counsel's challenge of the May 5 statement, on both Fifth and Sixth Amendment grounds, involving the right to counsel, directly contradicts any present contention that such attempts at suppression were not made. At best, Parker now maintains an alternative aspect ("conflict of interest"), of the same denial of the right to counsel claim, that trial counsel argued in seeking suppression. The mere allegation of different grounds, to support the same claim for suppression actually sought by defense counsel, does not demonstrate ineffective assistance. Palmes, supra; Turner v. Sullivan, supra.

A. Greene's "Representation" of Parker, as Grounds for Suppression

Parker claims that Makemson failed to assert that the Public Defender's initial representation of Parker, through Stephen Greene, represented a "conflict of interest," that denied Parker his Sixth Amendment right to effective counsel. Initial Brief, at 18-27. In light of the Public Defender's representation of Alphonso Cave (one of Parker's co-defendants), at the time of Parker's statements, Parker argues that the representation of Parker was a conflict of interest, that

was prejudicially omitted by trial counsel, as a basis for suppression. Because such a claim, under the facts and circumstances, would not have been a viable or successful basis for suppression, this claim of ineffective assistance lacks merit.

Significantly, Appellant's claim presupposes that Parker appropriately invoked his right to counsel, prior to making his May 5 statement. The testimony at the suppression hearing, as corroborated by the evidence at the post-conviction hearing, wholly contradicts this position.

In this Court's opinion, on direct appeal, this Court concluded that Parker did not invoke his right to counsel, by stating he wanted his mother to get him counsel. Parker, 476 So.2d, at 138. This Court noted Parker's persistent desire to make a statement, despite being fully advised of his right, and being fully "advised by a representative of the Public Defender's Office not to say anything." Id. The voluntary nature of Parker's statements, as found by this Court, was fully supported by the trial Record. At the suppression hearing, the State's witnesses repeatedly stated that Parker initiated the contact with the sheriff, to discuss the case, and make statements about his involvement. (SR, 5-12, 30-34). Parker never expressed unwillingness to make a statement, never expressed a desire for counsel besides Greene, or dissatisfaction with Greene. (SR, 10-12, 21, 27, 48, 49). Parker never tried to terminate questioning, and consistently sought to speak about the case. (SR, 8-12, 21, 27, 28; 48, 49; R, 742-746, 753, 777-779, 793). Based on this evidence, the trial court concluded that no showing had been made, that other counsel

would have succeeded in keeping Parker silent, or would have advised him to do more than remain silent, and be aware of his Constitutional rights. (SR, 84-85; R, 742-746, 753). There was nothing presented at the Rule 3.850 hearing, that does anything but substantiate the voluntary nature of the statement, and the absence of any invoking by Parker, of a right to counsel.

In addition to his testimony, concerning his understanding of Parker's constant desire to speak to the sheriff, counsel Makemson unequivocally denied that Parker ever advised him, to the contrary. (P, 86-90). The nature of Parker's express willingness to give a statement, despite clear and repeated advice not to, was verified by every witness, including Parker, at the hearing. Steven Greene reiterated that he understood Parker's desire to make a statement; that he directly advised Parker that it would "be stupid" to give a statement, and that his top priority was to tell Parker not to talk; that Parker nevertheless made his statement, to get his side of the story across to the police; and that the statement was not the result of promises or threats. (P, 111, 112, 122-125, 130, 132, 133; SR, 65, 66). Parker himself admitted that he understood Greene to be an attorney, that he understood Greene's advice not to talk; that he asked to speak to the sheriff, and that he was not forced to speak by the sheriff. (P, 203, 204, 224, 225, 227-230). Parker also conceded he had told Sheriff Holt, that he wanted to "get it off his mind," and give his version. (P, 228, 230). Most significantly, Parker admitted, in both live and affidavit testimony, that he knew of the importance of having an attorney, because of his prior contacts with the

judicial system, involving an armed robbery case against him. (P, 219, 221, 222. By these admissions, and corroboration of all other witnesses, Parker's decision to give a voluntary statement, in the face of contrary advice and knowledge, is absolutely undisputed.

Thus, Parker's post-conviction evidence, contained no demonstration that Parker invoked his right to counsel, and/or was unwilling to make a statement, absent counsel. Parker's failure to invoke his right to counsel, completely undermines the "conflict of interest" claim, that is premised on the mistaken factual assumption that such rights were invoked. Since such a claim is totally lacking in merit, trial counsel cannot be faulted for failing to make it. Agan v. Dugger, 508 So.2d 11, 12 (Fla. 1987); Bush; Magill; Palmes; Owens, supra; Ford, supra.

In asserting that the Public Defender's Office had a conflict of interest, Parker has merely engaged in reliance on general principles and conclusory propositions, with no specific legal or factual support. Case law in existence, at or around the time of the suppression hearing, required that a violation of a defendant's Sixth Amendment rights could be established only by an "actual conflict" of interest that "adversely affected" an attorney's performance. Cuyler v. Sullivan, 446 U.S. 335, 348, 350 (1980); Glasser v. United States, 315 U.S. 60, 72-75 (1942); State v. Oliver, 442 So.2d 1073, 1075 (Fla. 3rd DCA 1983); Washington v. State, 419 So.2d 1100 (Fla. 3rd DCA 1982); Belton v. State, 47 So.2d 97 (Fla. 1968). An actual conflict of interest, amongst co-defendants represented by single counsel, was defined as

existing, when one co-defendant stood to gain significantly at the other defendant's expense, by the eliciting of information or advancement of arguments for one defendant, that would effectively damage the other defendant. Webb v. State, 433 So.2d 496, 498 (Fla. 1983); Oliver, 442 supra, at 1075; Foxworth v. Wainwright, 516 F.2d 1072, 1076 (5th Cir. 1975). Without a demonstration of actual conflict, no violation of rights could be argued to have occurred. Cuyler, supra; Oliver, supra; Washington, supra; Foxworth, supra.

On the facts herein, no such actual conflict of interest, adversely affecting the Public Defender's performance, was demonstrated. In fact, it is clear that, in light of the potential conflict between co-defendants, the Public Defender's Office studiously avoided addressing any facts or possible arguments, that might have helped Cave, at Parker's expense. (P, 110, 121, 122; SR, 53, 60, 65, 66). Most significantly, it cannot be seriously suggested that advice by the Public Defender's representative, to Parker, to remain silent and not speak with law enforcement, created a situation where Cave stood to gain, in any way, at Parker's expense. Cuyler; Foxworth. Because such a position could not have been sustained under then-existing facts or law, counsel was not deficient, in not pursuing this line of argument. Bush; Magill; Palmes; Owens; Ford.

B. Parker's Right to Own Counsel of Choice, as Grounds for Suppression

Parker has also challenged his counsel's ineffectiveness, in failing to assert, as an argument favoring suppression of the May 5 statement, that Parker was denied counsel, of his own choosing. Parker has maintained that, despite his express desire for counsel, other than Greene, the failure by the sheriff or Greene to provide such counsel, mandated suppression of the statement. Because Appellant is merely re-asserting a position that trial counsel did raise, without success, this claim does not demonstrate ineffective assistance of counsel. Bush; Palmes.

This basis for suppression was raised and argued, at considerable length, by Makemson. In writing, Makemson asserted the denial of Appellant's Miranda rights, urged that Parker had asked about obtaining counsel, through his mother, had not consented to Greene, and challenged Greene's status, as "effective counsel." (R, 1620-1621). Makemson focused on eliciting testimony, at the suppression hearing, to support these positions, and argue that Parker wanted his own counsel, considering this to be one of his main suppression theories. (SR, 26, 63-67, 74-79; P, 82-83). This testimony and argument combined to make the invoking of a right to counsel, as the major aspect of the suppression issue that this Court addressed, on direct appeal. Parker, 476 So.2d, at 137-138. Parker's counsel could not have argued this point more strenuously than he did. Parker's claim on this point, amounts to no more than dissatisfaction with the outcome of this Court's ruling, on direct appeal.

Bush; Strickland.

Parker heavily relies on his Rule 3.850 testimony, to suggest that he had continuously and persistently sought counsel other than Greene. It is crucial to note that Makemson was given contrary information by Parker, at the time of trial. Makemson repeatedly stated that his understanding of the facts, in discussions with Parker, was that Parker had actively sought to make a statement, against contrary advice, to give his version of events, because of Bush's implication of him in the shooting. (P, 81-85; 86, 87, 293-294, 299). Makemson maintained that Parker never told him the facts Parker stated in his affidavit or post-conviction testimony, some six years later, to the effect that he had sought other counsel from Holt. (P, 86-92). Greene's post-conviction statement, as it related to Parker's desire to speak to his mother about obtaining other counsel, (P, 117-118, 134), was argued by Makemson at suppression, in stressing the nature of statements Parker made to Holt, to this effect, (SR, 26, 27), and in eliciting, through Greene, that Greene had not advised him, of a right to counsel, besides Greene. (SR, 66, 67). Furthermore, Greene's and Parker's post-conviction testimony,[2] fully substantiated Parker's compelling desire to speak to police, and make a statement, even though he understood he was advised not to, and was not forced to. (P, 111, 117-118, 123, 125, 130, 132, 133, 138, 203, 204, 210, 219-222,

[2] Parker admitted, inter alia, that he knew Greene to be an attorney (P, 203); that he understood Greene's advice to him not to say anything (P, 204, 227); that he spoke to police, based in part on Bush's statement, implicating him (P, 197, 210, 228-230); that he understood the importance of having an attorney (P, 219-222); and that he was not forced to speak, against his will (P, 224-225, 230).

224-225, 227, 228).

Under these circumstances, the trial court's analysis, and this Court's characterization of Parker's statement, as voluntary, and his requests to see his mother, as not sufficient to have invoked a right to counsel, is supported beyond all question. Parker, at 137-138; SR, 83-86. It is clear that Parker now seeks to merely relitigate the issue of right to counsel, that was argued and lost at trial and on appeal, under the guise of ineffective assistance. Blanco, 507 So.2d, at 1383. This issue clearly had no merit. In fact, presentation of Parker's current testimony, at suppression, would have only confirmed this conclusion. Counsel's efforts, to prevail on this ground, cannot be considered ineffective, merely because they were unsuccessful. Bush.

C. Sheriff Holt's Responses to Parker's Statements, to see his mother, as Grounds for Suppression

Parker has further argued, that trial counsel should have maintained that Sheriff Holt's attempts to clarify Parker's intentions, constituted a refusal to honor his right to counsel. As with his other arguments, it is apparent that trial counsel did argue this theory, in seeking suppression, and that Parker's real complaint, concerning his dissatisfaction with the outcome, does not establish ineffectiveness of counsel.

It is absolutely clear that trial counsel intended to, and did maintain, as the linchpin of his suppression theories, that Parker had expressed a desire to have counsel, during the course of Sheriff

Holt's questioning. (R, 1620-1621; SR, 25, 26, 43-45, 74-77, 82-83; P, 82, 83). Makemson focused on Parker's statements to Holt, about seeing his mother, as an expression of right to silence, and to cut off questioning, as well as expressing a desire for counsel. Thus, present counsel is merely attempting to relitigate the merits of a position fully urged by trial counsel, which this Court, and the trial court, concluded as without legal and/or factual merit. Blanco, supra; (SR, 83-86); Parker, 476 So.2d, at 137-138.

Furthermore, Appellant's reargument, on the merits, constitutes selective consideration and interpretation of isolated statements by Parker, rather than a studied and thorough consideration of the totality of circumstances. Parker initiated all contact with Sheriff Holt, by asking that the sheriff be summoned to Parker's cell, for Parker to give his side of the story. (SR, 8, 9; R, 742, 744, 774). Parker continued to express a desire to make a statement, even when Greene advised him not to, initially, and again on tape. (R, 744, 745, 746, 753, 775, 776, 778; P, 111, 117-118, 123, 125, 130, 132, 133, 138, 203, 204, 210, 219-222, 224-225, 227, 228, 230). When asked to sign a rights waiver form, he expressed a desire to see if his mother had gotten an attorney for him, while continuing to assert he wanted to "get this off my mind." (R, 778). When Parker repeated his request to see if his mother had gotten an attorney, Sheriff Holt then accurately restated the circumstances, leading up to that point:

> (H) "I think I understand where you're coming from. You asked me to come over and that's why I'm here. I went back and explained to you that you did have a lawyer appointed

for you. Nobody is going to make you make a statement. You asked me could you talk to me and explain to me just exactly what happened, that you felt like that there was something being put on you that wasn't right. You wanted to tell me the story just like it was. Am I correct in that?

(P) "Yes, sir."

(H) "Okay. You can still give me a statement without signing that. All that says right there is that you understand that you don't have to. Do you still wish to give us a statement at this time?"

(P) "Yes, sir."

(H) "Okay, we'll continue on with it now.

(R, 779)(e.a.). At that time, and thereafter, Parker never indicated any desire to end questioning, or for counsel other than Greene, and made a full statement, admitting that it was voluntarily given. (SR, 21, 27, 48, 49; R, 774-793). Thus, the overall context and circumstances demonstrated Parker's willingness and desire to waive his rights, and speak with counsel.

There was Florida, and Federal case law, at and/or around the time of the suppression hearing in September, 1982, and the appellate oral argument in May, 1984, to support this Court's findings. All of these cases focused on the context of statements and actions by defendants, which in the totality of circumstances clearly demonstrated a desire to waive rights, and give voluntary statements. North Carolina v. Butler, 441 U.S. 369, 373-375 (1979)(express waiver of right to counsel not necessary; can have waiver, through conduct, words and acts of defendant); Cannady v. State, 427 So.2d 723, 726,

728-729 (Fla. 1983)[3] (defendant's statment that he "should call my lawyer," coupled with statements of culpability and willingness to speak, indicates voluntariness, waiver of rights); State v. Craig, 237 So.2d 737, 739-741 (Fla. 1970) (defendant's statement that he "would like to have [an attorney] in a way," and that he was "going to make one [a statement] to him" [attorney], combined with conduct showing willingness to talk, and consistency with waiver, equals a waiver of right to counsel). Parker's conduct, both before and after Sheriff Holt's statement, clearly demonstrates such a waiver, even assuming arguendo that Parker's requests to see his mother was a request for counsel.[4] The nature of Sheriff Holt's statement, was not a misrepresentation to Parker at all,[5] and did not in any way go beyond clarifying Parker's wishes. This statement was not at all comparable to the police statements to the defendant in Thompson, supra,

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[3] In its decision in Cannady, this Court made reference to the authority now relied on by Appellant, for the proposition that upon an expressed desire for counsel and desire to waive counsel, law enforcement is limited to clarifying a defendant's wishes. Cannady, 427 So.2d, at 728-729, citing Thompson v. Wainwright, 601 F.2d 768 (5th Cir. 1979); Nash v. Estelle, 597 So.2d 513 (5th Cir. 1979). This Court's implicit rejection therein, of any factual application of Thompson, to the facts in Cannady (similar to those herein), further demonstrates the lack of merit to Appellant's suppression argument, at that time. Strickland. This is substantiated by the affirmance, in Nash, of the admissibility of the subject statements, based on a conclusion of waiver, similar to that in Cannady. Nash, 597 F.2d, at 515-520.

[4] It is clear, as this Court found on direct appeal, that Parker did not invoke his right to counsel, by asking to see his mother, or to see if she got him an attorney. Parker, 476 So.2d, at 137-138.

[5] In fact, Parker agreed with Holt's statement (R, 779), and at the post-conviction hearing, confirmed that he had told Holt he wanted to get his side "off his mind," and that Holt's statement reminded him that Bush had implicated him. (P, 210, 228, 230).

which misinformed the defendant that if he waited to speak to an attorney, he would never be able to tell the police, what had occurred. Thompson, 601 F.2d, supra, at 769-770, n. 2; 792.

Because this claim lacked substantive merit, and would not have resulted in suppression of the May 5 statement, Makemson was not ineffective, in his attempt to obtain suppression. Bush; Palmes; Owens; Ford.

D. Counsel's Decision not to use Parker, as Witness at Suppression Hearing, was Reasonable and Strategic, and Did Not constitute Ineffective Assistance of Counsel

Counsel has additionally argued that Makemson prejudicially failed to use Parker as a witness, at the suppression hearing, was ineffective for this failure. Under the circumstances then known to Makemson, his strategic decision not to use Parker was extremely reasonable and effective.

As already discussed, Makemson had discussed the facts and circumstances of the May 5 statement with Parker. (P, 81-82, 84, 89-90, 227). From Parker, Makemson learned that Parker voluntarily sought to give his version of events to law enforcement, to show that Bush lied in accusing Parker of being the "triggerman." (P, 81-82, 84). Makemson additionally knew that Parker would ultimately testify to this effect, at a suppression hearing. (P, 293-294). Despite Parker's present version of these facts, and stated desire to testify, these were then unknown to Makemson, and Parker never told him this presently contradictory information. (P, 84, 86-92). Clearly, Makemson's

major suppression theories, that Parker was denied his right to counsel, and to silence, encompassed the alleged compulsory, non-voluntary nature of his statement. (P, 85). Because Parker's version of events was diametrically opposed and completely inconsistent with Makemson's suppression theories, Makemson made the decision not to use Parker as a suppression witness. (P, 82-85, 268-270, 293-294). Makemson also was apprehensive that ethical problems would be created, if Parker testified in a manner knowingly at odds with what Parker told Makemson. (P, 86). Makemson also feared that Parker's credibility would be placed at issue, in terms of voluntariness, and would be damaged by any forced admission that he was a convicted felon, in cross-examination by prosecutors Makemson knew to be very aggressive. (P, 68, 268-270).

It is axiomatic that an attorney's decision to call or not call a particular witness, is one particularly subject to strategy determinations, based on particular facts and circumstances. Magill, supra. It is equally well-settled that counsel cannot be deemed ineffective for deciding not to elicit information, or to pursue a certain course of action, if inconsistent with counsel's then-chosen reasonable strategy, or if harmful or damaging to a defendant's prospects. Strickland, supra; Burger, supra; Cave, supra; Blanco, supra; Middleton, supra. On the facts and circumstances then know to Makemson, Strickland; Blanco, there is no doubt that his decision not to use Parker as a suppression witness, was reasonable.

Using Parker, at the suppression hearing, would have com-

pletely undermined any prospects for success, that Makemson's suppression theories and arguments had. Any suggestion by Parker that his statement was voluntary, and was not coerced, would have destroyed any credibility, that Makemson's arguments might have had. Parker's credibility, in the face of contrary evidence on voluntariness, from all state suppression witnesses, would have been severely damaged. This damage would have been amplified, by Parker's status as a convicted felon.[6] Parker's own post-conviction testimony, demonstrates the very damaging impact such testimony would have had, at suppression and beyond, by his inconsistencies, avoidance of answers to troublesome questions on cross-examination, and admissions of voluntariness, and a desire to give his story. (P, 212-238). Additionally, Parker was forced to admit that, upon initial questioning by police, he had lied in giving them a false alibi, for his whereabouts during the crime. (P, 217; R, 737). In view of these circumstances, and the compelling evidence from witnesses, including Parker, that his statements were voluntary, despite advisements of rights, and advice to exercise those rights, counsel represented Parker very effectively, in this context. Strickland; Burger; Cave; Blanco; Middleton.

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[6] Such status was elicited, at cross-examination at the Rule 3.850 hearing, by the State. (P, 219-221). Furthermore, the nature of Parker's prior convictions, which might have otherwise been inadmissible, see Martin v. State, 411 So.2d 987, 989*), would have been revealed by Parker, when he testified about his knowledge of the importance of having an attorney, and his desire to have the attorney who represented him, in a 1979 armed robbery case. (P, 219, 220).

*) (Fla. 3rd DCA 1982),

E. Makemson's Representation of Parker, in seeking suppression of Parker's May 5 statement, did not create any possibility that, but for counsel's actions, Parker would not have been convicted of murder, or sentenced to death

Appellant concluded his argument, in Point I, by maintaining that, without the admission of the May 5 statement into evidence, Parker would not have been convicted of first-degree murder, or given the death penalty. Initial Brief, at 37-44. Parker has selectively ignored the overwhelming nature of other evidence, including other statements given by Parker, which clearly would have supported his conviction and death sentence. Appellant's feeble attempts to discount and/or discredit such evidence, does not support his contentions that Makemson's actions, constituted prejudicial omissions, under relevant case law.

In order to prevail on this point, Appellant holds the burden of demonstrating that, but for counsel's omissions of deficiencies, there is a reasonable probability that the outcome of Parker's trial and/or sentencing would have been different. Strickland; Burger; Cave; Blanco. There is undoubtedly no question, that the absence of the May 5 statement would not even have remotely had such an impact, or that its inclusion had an "adverse effect so severe" that the outcome of the proceedings would have differed. Cave, 529 So.2d at 297; Blanco, 507 So.2d, at 1381. This Court should affirm the trial court's ruling, on Appellant's failure to show "prejudice," alone. Strickland; Cave.

The May 5, 1982 statement, in the scheme of the State's

entire case, was relatively exculpatory, in identifying Bush as the "shooter" and "stabber" of Frances Slater, and stressing Parker's lack of intent or involvement in the robbery and kidnapping. (R, 780-793). Exclusion of this statement could not possibly have altered the impact of other evidence, inter alia, demonstrating the following:

1) Parker's admission to Georgeann Williams, that he shot Frances Slater (R, 881-883), and medical evidence that the shooting was the cause of death (R, 659-664);

2) Parker's voluntary statements to police, in taking them to the crime scene, pointing to where "we put the body" (R, 798-804, 848);

3) Parker's participation in the division of the robbery money (R, 798-804; 841);

4) Parker's presence in the front seat of Bush's car, when stopped by police after the crime, and giving of a false alias (R, 679, 839);

5) The matching of fibers of Ms. Slater's hair, between the carpet in Ms. Slater's home, and those found in Bush's car (R, 860-869); and

6) Evidence, that the victim's bladder was empty, when shot, consistent with fear (R, 662); that the stab wounds were defensive in nature (R, 662); and that the victim was forcibly pulled out (R, 867-869).

This evidence of admitted involvement, as the person who shot and killed Frances Slater; taking the victim out of the car, at the scene of the shooting; and receiving some of the robbery money, after the murder, would obviously have supported a verdict of premeditated or felony murder. Moreover, this degree of active involvement

clearly permitted imposition of the death penalty, consistent with Appellant's Eighth Amendment rights, under either Enmund v. Florida, 458 U.S. 782 (1982), or Tison v. Arizona, 481 U.S.___, 109 SA___, 95 L.Ed.2d 127 (1987). Tison, supra; Enmund, supra; Elledge v. Dugger, 823 F.2d 1439, 1449-1450 (11th Cir. 1987), modified on rehearing, other grounds, 833 F.2d 250 (11th Cir. 1987); Diaz v. State, 513 So.2d 1045 (Fla. 1987); Garcia v. State, 492 So.2d 360 (Fla. 1982).[7] Parker's present attempts to reweigh and/or speculate, on the effect of such evidence, absent the May 5 statement, is speculative and wholly self-serving.

In light of other overwhelming evidence of Parker's guilt, and evidence supporting the factual findings used to impose the death penalty, (SR, 2-3), counsel's failure to obtain suppression of the May 5 statement, did not prejudice Parker, under the Strickland standards. Strickland; Agan, supra; Zamora v. Dugger, 834 F.2d 956, 958-959 (11th Cir. 1987); Magill, 457 So.2d, at 1370; Zamora v. State, 422 So.2d 325, 327 (Fla. 3rd DCA 1982); Owens; Ford.

Since Appellant failed to demonstrate either of the Strickland prongs, in challenging the effectiveness of trial counsel's suppression efforts, the trial court's ruling, denying post-conviction relief on this ground, must be affirmed.

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[7] From the proper standpoint of perspective, in evaluating counsel's conduct at the time of trial and sentencing, Strickland; Blanco, any considerations of the applicability of Tison are irrelevant. It is abundantly clear that Parker's involvement had no connection or similarity to the limited knowledge and involvement of the robbery "get away" driver in Enmund. It is nevertheless relevant that Bush's death sentence, reflecting involvement that did not include striking the fatal blow as Parker did, was upheld by this Court, against Enmund concerns. Bush v. State, 461 So.2d 936, 944 (Fla. 1984).

POINT II

PARKER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL, AT SENTENCING PHASE.

Appellant has challenged the effectiveness of his trial counsel's efforts, at sentencing. Specifically, Appellant has alleged that counsel should have anticipated the nature of the State's confrontation of defense psychological testimony, and should have presented other mitigating evidence, through family, friends and neighbors. Initial Brief, at 45-56. Parker's arguments present a classic example of second-guessing the reasonable strategic decisions made by trial counsel, and characterizing them as "unreasonable" because such efforts did not successfully prevent imposition of the death penalty. Defendant has again selectively ignored the facts and circumstances in the Record, that surrounded and influenced defense counsel, which demonstrate his overall effectiveness, in representing Parker, at sentencing.

Under governing precedent, counsel Makemson was not obligated to explore all possible avenues of mitigation. Lightbourne v. Dugger, 829 F.2d 1012, 1025 (11th Cir. 1987); Foster v. Dugger, 823 F.2d 402 (11th Cir. 1987). Counsel cannot be considered ineffective, just because the mitigating evidence that was presented, did not work, Bush, or because more could have been said or done. Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986). The strategy of counsel, at a sentencing phase, is not considered unreasonable or ineffective, when such strategy does not uncover or present evidence or argument that is inconsistent with such strategy, inconsistent with known facts, or

would reveal information, devastating or harmful to defendant. Burger, 97 L.Ed.2d, at 656, 657; Strickland; Elledge, 823 F.2d, at 1447; Cave, 529 So.2d, supra, at 298; Jones v. State, 528 So.2d 1171, 1175 (Fla. 1988); Harris v. State, 528 So.2d 361 (Fla. 1988); James v. State, 489 So.2d 737 (Fla. 1986); Porter v. State, 478 So.2d 33, 35 (Fla. 1985); Middleton, supra. Petitioner's complaints, and presentation of possible mitigating evidence, all fall within these categories.

Makemson's overall strategy at sentencing, consistent with his trial strategy, was to emphasize Parker's minimal role, if any, in the actual killing of Frances Slater. (P, 63-65). Makemson testified that he intended to rely on the jury's guilty verdict, as reflecting only Parker's involvement in the underlying felonies. (P, 63). Makemson sought to "humanize" Appellant, through his mother; Douglas Smith, his mother's companion[8]; and Dr. Paul Eddy, without "opening the door," to evidence of Parker's criminal past. (P, 63-65; 67-71; 93, 94, 96). Makemson used these witnesses, to show Parker as a passive, non-violent person, who had an alcohol problem, and who had a family who loved and supported him. (P, 63-66). Makemson was very aware of Parker's criminal history, and the devastating impact such information would have, on prospects for avoiding a death sentence, if this history was exposed. (P, 67-71). Makemson also rejected heavy reliance on sociological factors, such as Parker's childhood or economic circumstances. (P, 64, 65, 96).

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[8] The name of Douglas Smith, was the only name given to Makemson, by Parker and his mother, when he asked them for possible mitigation witnesses, for the sentencing phase. (P, 77).

Makemson believed that such conditions would not excuse or mitigate Parker's crime, and would be inconsistent with Parker's denial of involvement in the killing. (P, 63, 64, 65, 96). Makemson devised and applied this strategy, with the full consultation and agreement of Parker and his mother. (P, 67-71).

Thus, the Record demonstrates that Makemson did investigate and present argument and evidence, in mitigation, both of a psychological and "humanizing" nature. His decision to try and exclude any references to Parker's character, positive and negative, must be viewed as reasonable and entirely justified, considering Parker's criminal history, and the criminal acts, with attendant circumstances, that he had been convicted of. Burger; Strickland; Jones, supra; Harris, supra; Middleton, supra; James, supra; Porter, supra.

Nevertheless, Appellant maintains that counsel should have anticipated and/or prepared for the State's cross-examination of Dr. Eddy, and ability to elicit information concerning Petitioner's criminal background. Makemson was certainly aware of the strength of the prosecution team. (P, 68). He used Dr. Eddy to demonstrate that Parker was a non-aggressive individual, who would behave in prison, and to demonstrate that any involvement by Parker in the shooting, was "out of character" with his psychological profile. (P, 66). Dr. Eddy was known to Makemson, as a witness who had performed well as such, in other cases. (P, 285, 288). Makemson heavily relied on this Court's decision in Maggard v. State, 399 So. 2d 973 (Fla. 1981), to focus on excluding any references to Parker's

prior criminal history, by agreeing (with Parker's in-court consent) to waiver of reliance on no significant prior criminal history, as a statutory mitigating circumstance. (P, 68-69; R, 1205, 1206).

It is clear from the Record that, with Dr. Eddy and the other sentencing witnesses, Makemson believed that by waiving this mitigating circumstance, and carefully instructing his witnesses not to open the door, by testimony as to good character, he could exclude references to bad character or criminal history. (R, 1205-1212, 1280, 1282, 1283; P, 68-71). The State's witnesses at the post-conviction hearing both stressed the reasonableness of this choice of a "professional" person, who would hold no possible bias as a family member or friend. (P, 155-156, 254). Parker's position, essentially complains that this tactic and approach proved unsuccessful; such a conclusion does not mean Makemson's approach was deficient.

At the time of Parker's sentencing, this Court's decision in Maggard, supra, was the seminal decision, governing the ability of a defendant to avoid reference to criminal history at a capital sentencing, by waiving reliance on an absence of such a history in mitigation. The Maggard decision then stood as an absolute bar to the State, preventing admission or reference to a defendant's bad character, as exemplified by a criminal record, if the defendant affirmatively chose not to rely on this statutory mitigating circumstance. Maggard, 399 So.2d, at 977-978. Significantly, there were no decisions of this Court, prior to Parker itself, that would have led counsel to believe that the State could successfully avoid the

impact of Maggard.[9]

This conclusion is substantiated by the issuance of Jennings v. State, 453 So.2d 1109 (Fla. 1984), approximately one month before Parker. In Jennings, supra, the trial court struck the State's attempt to explore prior criminal history, in direct examination of a doctor, at the penalty phase, concerning the basis of his opinion. Jennings, 453 So.2d, at 1114. This Court approved the trial court's striking of testimony, and denial of mistrial. Id. While Jennings suggested that a defendant who "opened the door" to character, would risk admissible State cross-examination on prior crimes, Id., the decision did not implicitly or explicitly disapprove of the trial court's application of Maggard. Thus, the nature and result in Jennings, almost two years after Parker's trial, vindicates Makemson's then-held reliance on Maggard.

Appellant's approach would require the conclusion that Makemson was unreasonable, in failing to be clairvoyant, and anticipate the subsequent distinction of Maggard in Parker, and decisions like Muehlman v. State, 503 So.2d 310 (Fla. 1987).[10] Such unantici-

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[9] The decisions cited by Parker, Initial Brief, at 47, were relied on in the Parker decision, for the first time, in applying the principles therein to the issues originally decided in Maggard, involving a capital sentencing proceeding. Parker, 476 So.2d, at 139. Appellant has still not cited a capital sentencing decision, that would have then led Makemson to doubt the application of Maggard, to Parker's benefit. As such, Appellant's view would have placed an obligation on Makemson, to clairvoyantly foresee Parker and subsequent decisons that distinguished Maggard. Elledge v. Dugger, supra; Spaziano v. State, 489 So.2d 720, 721 (Fla. 1986).

[10] The Muehlman decision confirms the conclusion, that until Parker,

pated clairvoyance was simply not a reason for the trial court to find Makemson's sentencing representation incompetent. Elledge v. Dugger, supra; Sullivan v. Wainwright, 695 F.2d 1306, 1309 (11th Cir. 1983); Spaziano v. State, 489 So.2d 720, 721 (Fla. 1986). This is particularly true, when the Record shows that Makemson had actually anticipated the risk of "opening the door" to prior crimes, by specifically instructing his sentencing witnesses not to speak about Parker as being a "good boy." (R, 1207-1212; P, 67-71). Both Stone and Midelis regarded the use of Dr. Eddy, as the "best approach" at sentencing, even though a "calculated risk." (P, 155-156, 254). Stone pointed out that any impeachment of Dr. Eddy was not as devastating in impact, as impeachment of family or friends would be, who knew Parker personally. (P, 254). The fact that Eddy did not do as well, on cross-examination, as Makemson legitimately expected, (P, 288), does not make Makemson ineffective.

Parker has additionally argued that Makemson did not prepare Dr. Eddy for such possible cross-examination, by criminal history, and failed to investigate Parker's character. It is precisely

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the Maggard decision had not been previously distinguished, except by dicta, in Jennings, supra. Muehlman, 503 So.2d, at 315-316. This Court distinguished the issue in Muehlman, by determining that the facts more closely resembled those in Parker, than in Maggard. Muehlman, at 316. Furthermore, Muehlman demonstrates that the Maggard decision remains viable, and that Parker in fact expanded the analysis of the impact of a "strategical waiver" by a defendant, of lack of prior crimes in mitigation, to considerations of the nature and relevance of the State's reference to prior crimes, and prejudice to a defendant. Muehlman, at 316. The older decisions cited in Parker, and relied on by Parker, Initial Brief, at 46, simply do not suggest that Makemson should have anticipated the Parker decision's expansion of Maggard.

because Makemson conducted such investigaion, and reviewed his strategic approach with Parker and his mother, that Makemson was able to attempt to preclude the State, from eliciting such information. Makemson stated that because Dr. Eddy did not ask to be furnished with criminal history information, Makemson relied on Eddy's status as a "professional," and Eddy's determination of what was necessary to his diagnosis. (P, 288). It is apparent that Dr. Eddy was aware, prior to taking the stand, of the nature and existence of some of defendant's criminal history. (P, 288-289; R, 1292-1293, 1296, 1361-1362). There is absolutely no evidence to support Parker's conclusory statements, that Makemson's failure to provide information to Eddy, on defendant's criminal past, was the cause of Dr. Eddy's poor showing as a witness. Initial Brief, at 48-49. Further, it is sheer speculation, as to the impact such greater knowledge by Dr. Eddy would have had upon his testimony, or its effect on jury and judge.

Appellant has further challenged Makemson's alleged failure to present additional mitigation witnesses, particularly after his prior criminal record was explored, by cross-examination of Dr. Eddy. Parker asserts that more character witnesses were required, and that once Parker's criminal record was known, there was no longer any legitimate strategic reason, not to present such testimony. Dr. Eddy's testimony did not require a total abandonment of Makemson's strategy, to avoid "good character" witnesses.[11] Even in the face of Dr. Eddy's

[11] In fact, Makemson was able to argue, from Dr. Eddy's testimony, that the nature of Parker's crimes (especially those involving property, and burglaries of empty places), was consistent with a passive,

cross-examination, Makemson clearly had no desire to present other character witnesses, which would consistently and repeatedly reinforce references to Parker's criminal record. (P, 291). Even as impeached, Dr. Eddy's testimony presented a far less devastating impact, than impeachment of family witnesses would have. (P, 155-156, 254). Furthermore, reinforcement of Parker's prior criminal history, would have only compounded the negative aspects of Parker's character, rather than limiting the State to "one shot" at such character. (P, 191, 192, 247-248). Counsel cannot be faulted, for failing to adduce witnesses and testimony, that clearly would have harmed Parker's prospects for a life sentence. Burger; Strickland; Cave; Jones; Harris.

The evidentiary hearing testimony, of Belinda Dickerson and Douglas Smith,[12] substantiates these conclusions. Ms. Dickerson's sole contribution, of an arguably positive nature, was that Parker would take her to the movies, and "riding," and taught the witness' sister (Parker's girl friend) how to drive. (P, 39-40). Otherwise, her testimony reinformed Parker's placement at the Okeechobee School for Boys; showed her lack of knowledge of his criminal past, reinforcing this aspect of character; her lack of knowledge of the facts

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non-aggressive personality. (R, 1479-1482). Dr. Eddy suggested this himself, on cross-examination. (R, 1288, 1360, 1365-1366).

[12] Dickerson and Smith were the only two live witnesses, presented by Appellant at the Rule 3.850 hearing. The remainder of Parker's supporting witnesses submitted affidavits, admitted by the Court.

of the Slater murder, reinforcing the crime and its surrounding circumstances; and her lack of any close personal contact with, or knowledge of Parker's activities, outside her house. (P, 42, 43). Douglas Smith's testimony was even more devastating. Smith, who did testify at sentencing, referred to Parker as the "leader of the house," who always tried to lead the family, as to "what he thought they ought to do," and had respect because of this quality. (P, 47-48). As Makemson stated, this evidence was completely contrary to the passive portrait of Parker that counsel sought to present. (P, 64, 65, 72-74; Burger; Strickland; Jones; Harris. This degree of testimony would have stressed Parker's negative attributes, "opened the door" to criminal history, and focused on Parker's participation in horrible, violent crimes, in a manner that was inconsistent with Makemson's reasonable strategy. Id.

Parker presented a proffer, and affidavits, from counsellors at the Okeechobee School for Boys, a juvenile detention facility. (P, 142-145, 238 (affidavit of Gloria Marshall). This testimony would have reinforced the fact, and reasons for Parker's placement at such a facility. (P, 78-80; 271). This focus on prior crimes would have devastated Parker, on the subject of his criminal past, in a greater way than any other testimony. Even with such history elicited through one witness, Parker would not have benefitted from repetition of these circumstances. Marshall's characterization of Parker, as a "model" for the other boys at the school (P, 239), again presents Parker as leader, or possessing leadership qualities, that were wholly at odds with Makemson's strategic approach. Given the uncontested

testimony, as to the detrimental impact that such repeated references would have on a sentencing jury, Makemson clearly was not ineffective, for failing to consider or present such evidence.

An examination of the affidavit, submitted by Parker's family, friends and neighbors, does not demonstrate ineffectiveness of performance by trial counsel. Much of these statements, generally characterizing Parker as a non-violent child, generous, a good worker, and a follower-type personality, was too remote, from the time of the crime, to have had any beneficial impact. Cave, 529 So.2d, supra, at 298; Stone v. State, 481 So.2d 478 (Fla. 1985). Additionally, such testimony was largely cumulative, of evidence the jury heard at sentencing, concerning Parker's passive, non-violent nature, and his socioeconomic background as a migrant fruit-picker. Burger; Stone, supra; Lightbourne v. State, 471 So.2d 27 (Fla. 1985); Middleton, 465 So.2d, at 1223. References to Parker's non-violent nature as a child, would have emphasized his development into a more violent person, as he grew older, and would have strssed the contrast with the degree of violence in the murder Parker had just been convicted of, by the same jury. Burger. Statements by his mother, and by others, that Parker committed prior criminal acts, and had been involved in fights (P, 507-508; 546), would have made these character references more devastating to Parker. Id. Acts of generosity by Parker, of a general nature, was highly inconsistent with (and would have reemphasized) the lack of any mercy for Frances Slater. Id. The affidavits of Parker's mother and girl friend, would also have served to reiterate Parker's admission of a false alibi, initially

given to police, that he had been with them at the time of the crime. (P, 217; R, 737). This testimony would have established the mother's original support for the alibi (R, 721, 722), which could not have been more damaging, as impeachment, to Parker. These statements confirm the reasonableness of Makemson's approach, to stay away from character references, as much as possible. Furthermore, much of the information, between affidavits, was contradictory.

The testimony of Parker's fourth and fifth grade teachers (P, 548-555), besides being highly remote from the crime, was cumulative to evidence presented at sentencing, regarding Parker's personality, background and learning capabilities. Burger; Cave; Stone; Middleton. Furthermore, their statements, that Parker was not a discipline problem (R, 548, 552), would again have highlighted his subsequent crimes and incarcerations, as a highly negative factor. Burger; Strickland. Finally, any evidence that Parker was subject to domination by others, would have absolutely contradicted the facts in this case, including Parker's own admission to the shooting. Burger. Further, Makemson's emphasis on creating and sustaining credibility between his trial and sentencing approach, would have been destroyed, by a trial defense that denied guilt, and a sentencing strategy that would have necessarily admitted full involvement. Burger; Strickland.

None of Parker's live, or affidavit evidence, remotely approached fulfillment of his burden, to prove that, but for alleged omissions of counsel, the advisory jury and/or sentencing judge would have been reasonably likely to balance the aggravating and

mitigating circumstances, to recommend or impose life. Strickland; Cave; Blanco; Maxwell, supra; Middleton. As argued here, much of this information would have done far greater harm than good. More significantly, the overwhelming strength of the aggravating circumstances entered by the trial court (P, 569, 570), and unanimously approved by this Court on direct appeal, Parker, 476 So.2d, at 139-140, completely outweighs the very limited positive value, of Parker's evidentiary presentation. (Murder committed, during a robbery and kidnapping; committed for pecuniary gain; crime was "heinous, atrocious and cruel"; and crime was committed in a "cold, calculated and premeditated manner"). Burger; Strickland; Cave; Harris, supra; Bush, supra; Stone; Middleton. The attendant circumstances of this crime (P, 569-570), literally and heavily overwhelmed the extremely weak mitigation, found to exist, such as the conclusion that no rape occurred, and that Parker behaved himself during trial. This comparison cannot be overstated, and Parker's evidence would not have altered the sentencing outcome. Id.

In view of the uncontested evidence at the post-conviction hearing, showing that defense counsel's actions and strategies at sentencing were neither prejudicial or deficient, this Court should affirm the denial of relief, on this ground. Strickland; Cave; Bush.

POINT III

STATE'S ARGUMENTS AT PARKER'S TRIAL AND SENTENCING, AND LACK OF DISCLOSURE OF THEORY OF CASE AND EVIDENCE AT CO-DEFENDANTS' TRIAL, TO PARKER'S JURY, DID NOT CONSTITUTE PROSECUTORIAL MISCONDUCT, OR RESULT IN DUE PROCESS VIOLATION.

Parker has argued that the State should have disclosed its theory of the cases, and evidence elicited at the trials of Bush and Cave, to Parker's jury, to inform them of the State's alleged alternating identification of the "triggerman," at each of the three trials. Parker maintains that such alternate identification of each defendant as the "shooter," at each defendant's respective trial, demonstrated the State's uncertainty over the identity of the shooter. Appellant contends that the failure to disclose this fact, to Parker's jury, constituted prosecutorial misconduct, resulting in a due process violation. Initial Brief, at 56-58. This claim is a re-visiting of the exact same claim, rejected on both procedural and substantive grounds by this Court in Cave v. State, 529 So.2d, supra, at 295-296, and compels the same result in this case.

In Cave, supra, this Court stated the issues, inter alia, as involving claims that the State improperly argued in Cave's trial, that Cave was the shooter, when it also argued that the co-defendants were the killers, in their separate trials. Cave, 529 So.2d, at 295. This Court defined the issue, as involving prosecutorial breach of ethics, and of the "prosecutor's responsibility to provide a fair trial." Id. This claim in Cave, thus exactly parallels the due process arguments, urged here. As resolved in Cave, this claim was

clearly one that could or should have been raised on direct appeal, and is procedurally barred as a result. Cave, at 295, 296. Furthermore, allegations of a due process violation, by virtue of prosecutorial acts or omissions, have been previously regarded by this Court, in other contexts, as non-cognizable, under Rule 3.850, e.g., Demps v. State, 515 So.2d 196, 198 (Fla. 1987)(allegation of violation of Gardner v. Florida, 430 U.S. 349 (1977) -- lack of opportunity to confront pre-sentence investigation report information, as alleged due process violation -- not cognizable under Rule 3.850, because it could have been presented, trial or direct appeal); Blanco, 507 So.2d, at 1380 (issue of prosecutorial comment, propriety of argument, similarly barred under Rule 3.850); Bundy v. State, 490 So.2d 1258, 1259 (Fla. 1986)(State's alleged failure to preserve exculpatory evidence, barred under Rule 3.850, since it should/could have been raised, direct appeal); Quince v. State, 477 So.2d 535, 536 (Fla. 1985)(same as Demps, supra; Lightbourne v. State, 471 So.2d 27 (Fla. 1985)(allegation that State, by using peremptory challenges on voir dire to excuse blacks, not cognizable, Rule 3.850); Middleton, 465 So.2d, supra, at 1225 (claim that State misrepresented evidence to the jury, similarly barred, under Rule 3.850). As the third of the three trials, Parker was clearly aware of the basis for his claim, and could have presented same at trial, or direct appeal. Hansbrough v. State, 509 So.2d 1081, 1084 (Fla. 1987). Thus, Appellant cannot obtain substantive consideration, by this Court, of this barred claim. Id.

On the merits, Parker's claim, carried to its logical con-

clusion, would have obligated the State to violate his rights, by disclosure of evidence, argument and theories, used at the co-defendants' trials. Under Florida law, the State is prevented from telling a jury, in a subsequent case, what happened to the co-defendants at their respective trials; even a defendant may not introduce this information, at trial. Jacobs v. State, 396 So.2d 1113 (Fla. 1981); Thomas v. State, 202 So.2d 883 (Fla. 3rd DCA 1967). The underlying rationale, behind this prohibition, is that evidence at one trial, is not necessarily the evidence at another, and that each defendant or co-defendant, has a right to have his guilt or innocence determined, based solely on the evidence at his trial. Therefore, Appellant's allegation that the State had a duty to disclose such information, when by law, the State had a legal obligation not to, compels rejection of this claim. Cave, at 296 ("...the state could not properly argue on evidence adduced in other trials...").

It is apparent that the prosecution argued, based on the evidence adduced at Parker's trial, that Parker was the shooter. Initial Brief, at 58; R, 883, 889. This was proper comment upon, and inferences from, the evidence at Parker's trial. Tacoronte v. State, 419 So.2d 789, 792 (Fla. 3rd DCA 1982); White v. State, 377 So.2d 1149 (Fla. 1979). The State argued no differently than it did at Bush's and Cave's trial, in seeking to draw legitimate inferences, from the evidence presented, at those trials. Id.; (P, 158, 258-260, 300). It was not improper, at each of these trials, based on the evidence gathered therein, to suggest that the jury was faced, with the only live witness then at trial for the murders, and

maintain, based on evidence, the portion of the defendants' collective responsibility, borne by each defendant for the killing. Cave; Tacoronte, supra; Thomas, supra; P, 167-172; 258-260. It is also apparent, from the transcript excerpts produced at the Rule 3.850 hearing, of the Cave and Bush trials, that the State did not engage in inaccurate or inconsistent "triggerman" culpability. (P, at 828-830; 848-963). This Court, in reviewing the Cave transcript of closing argument, concluded that the nature of the argument, was to convey that Cave, although he did not do the actual killing, was nevertheless responsible and culpable for it. Cave, at 296 ("The last thing the State wanted the jury to believe was that the State had the burden of showing that Cave was the actual killer"); P, 158; 258-260. The State did not have any due process obligation, to argue or disclose to the jury, evidence or theories of culpability that were relevant only to evidence submitted at other trials.

The State's failure to disclose the nature of the Bush/Cave trials and arguments, to Parker's jury, did not prejudice him, since such information was hardly "material," in the due process sence. United States v. Bagley, 473 U.S. 667, 682 (1985); Wasko v. State, 505 So.2d 1314, 1316 (Fla. 1987); Jones v. State, 453 So.2d 786, 789 (Fla. 1984). Disclosure of information from other trials would not have altered Parker's devastating admission, to being the person who shot and killed Slater. (R, 883, 889). There is little doubt that the evidence at Parker's trial, was sufficient to cnvict Parker, on either a felony/murder, or "principals" theory. (P, 163-164, 251). §782.04, Fla. Stat.; §776.011, Fla. Stat.; Mills v. State, 407 So.

2d 218, 221 (Fla. 3rd DCA 1981); Foxworth v. State, 267 So.2d 647, 653 (Fla. 1972). There is no probability, that anything about the Bush or Cave arguments by the State would have altered the outcome of Parker's trial.

The detrimental impact, of requiring such disclosure by the State, would have been tremendous. The disclosure that different juries and judges had convicted Parker's co-defendants of murder, and sentenced them to death, would have invited the jury to "treat (Parker) alike." (P, 161-162, 248-250). Moreover, admission of such information would possibly have "opened the door" to the reasons why such arguments were made at other trials, leading to the admission of statements by Bush and Cave, identifying Parker as "triggerman," that Makemson steadfastly sought to exclude.[13] (R, 26, 27, 795-797; 812-817, 823, 828-834; 1154-1156, 1681-1682; P, 167-172; 258-260; 262, 263; Huff v. State, 495 So.2d 145 (Fla. 1986); Dragovich v. State, 492 So.2d 350 (Fla. 1986); Blair v. State, 406 So.2d 1103, 1106 (Fla. 1981). Parker cannot seriously maintain that disclosure of such information would have accomplished a protection of his due process rights. There was no uncertainty, based on the evidence at Parker's trial, in the State's argument that Parker was shown to be the "triggerman."

Parker's attempts to distinguish the Cave decision is completely unavailing and inaccurate, since the same due process argu-

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[13] In view of Makemson's strategy, to blame the shooting on others, and argue that Parker could not be linked to the actual shooting (P, 62-71; R, 504, 1093-1121; 1167-1174), it would have been completely inconsistent and devastating for defense counsel to seek or demand such disclosure. Burger; Strickland.

ments were made therein. Cave, at 295, 296. In the absence of any mischaracterization of evidence, by the State, at any of the Bush, Cave or Parker trials, Parker's contentions must be similarly rejected.

POINT IV

TRIAL COURT PROPERLY EXERCISED ITS DISCRETION, IN ADMITTING EXPERT TESTIMONY, RELEVANT TO ISSUE OF DEFENSE COUNSEL'S EFFECTIVENESS.

Parker has challenged the Circuit Court's decision to admit expert testimony, from State witnesses Stone and Midelis, on the issue of Robert Makemson's effectiveness, in representing Parker. Parker has alleged that such testimony did not aid the court, as the trier of fact, and invaded the court's province on an ultimate legal issue. Parker further argues that such evidence should have been excluded, because the State's experts were not capable of "objective" interpretations of the facts, and were too biased in their assessment.

In admitting expert testimony, the Circuit Court ruled that the testimony of Midelis and Stone were relevant to the issues, and would assist him, as the trier of fact, from the witness' unique "vantage point," as the prosecutors in the case. (P, 149-150, 243). Parker conceded, before this Court and the Circuit Court, that the Florida Evidence Code does not exclude expert testimony, merely because such opinion is on an ultimate fact or issue to be decided. §90.703, Fla. Stat. As a mixed question of law and fact, the issue of ineffective assistance of counsel, is distinct, from those pure issues of law, which Parker has relied on, in his cited authorities. Strickland; Sullivan v. Wainwright, 695 F.2d, supra. The "ultimate fact" aspects of the issue did not require exclusion of the testimony. §90.703, supra.

The testimony of Midelis and Stone was properly admitted, as helpful to the trier of fact. (P, 149-150, 243). Kruse v. State,

483 So.2d 1383, 1384 (Fla. 4th DCA 1986); §90.702, Fla. Stat. The witness' conclusions were not mere directives, on how to decide the issue, but offered a valuable perspective, in evaluating the facts and circumstances, surrounding Parker's trial, as well as those of Bush and Cave, and their impact on Makemson's representation of Parker. Town of Palm Beach v. Palm Beach County, 460 So.2d 879 (Fla. 1984). The prosecutors' knowledge and perspective gave them a more informed "vantage point" than perhaps any other individuals, associated with these cases. The content of their testimony held considerable probative value, in assisting the Court to assess Makemson's testimony, as to his decision-making process, the accuracy of Makemson's view of the strengths and weaknesses of the State's case, and the impact of these factors, on his strategy and defense, at trial and sentencing. Kruse, supra. These evaluations and opinions, by Midelis and Stone, went well beyond the "four corners" of the trial record. Id.

Appellant challenged the experts' lack of objectivity, as a ground for exclusion of their testimony. In so doing, Parker confuses the question of admissibility of such testimony, with the issue of weight to be given to an expert's conclusions. The nature of expert testimony, in virtually any forum, is subjective, and is sought to favor a particular litigant and/or conclusion. Any requirement, as suggested by Appellant, that expert testimony be objective, as a prerequisite to admission, would eliminate all expert testimony. While bias is a proper factor, regarding the credibility or weight to be given such evidence, it does not render expert testimony

inadmissible, merely because the experts represent or express a particular point of view. Lopez v. State, 478 So.2d 1110 (Fla. 3rd DCA 1985).

Assuming arguendo that the admission of such expert testimony was error, there was otherwise very substantial competent evidence (much of it undisputed), to support the trial court's ruling, denying relief. State v. Michael, 13 F.L.W. 580 (Fla., Sept. 22, 1988), and cases cited therein; Cave, supra.

CONCLUSION

Based on the foregoing circumstances and arguments, Appellee respectfully requests that this Court AFFIRM the Martin County Circuit Court's denial of post-conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee has been mailed to FRANCIS LANDREY, ESQUIRE, Proskauer, Rose, Goetz & Mendelsohn, 300 Park Avenue, New York, NY 10022, this 3rd day of November, 1988.

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Of Counsel