IN THE SUPREME COURT OF FLORIDA

ALPHONSO CAVE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 72637

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

In this brief, ALPHONSO CAVE will be referred to as "Appellant"; the STATE OF FLORIDA, as "Appellee."

This cause arises as an appeal, from the ruling of the Circuit Court, in and for Martin County, denying Appellant's motion for post-conviction relief, to vacate his judgment of first-degree murder and sentence of death, and denying a stay of execution. Appellant is under a death warrant, that expires on Wednesday, July 13, 1988; his execution is presently scheduled for Thursday, July 7, 1988, at 7 A.M.

"DMV" will refer to the Appellant's motion to vacate, under Rule 3.850, Fla.R.Crim.P.; "SR" will refer to the State's Response in opposition to said motion. "R" will refer to the Record of Appellant's trial and sentencing proceedings, as compiled on direct appeal before this Court; and "e.a." will mean emphasis added. "A" will refer to the Appendix, accompanying this brief, "SRA" will refer to the Appendix, as attached to the State's Response opposing the Rule 3.850 motion, and presented to the Circuit Court, Martin County.

On Wednesday, June 22, 1988, undersigned counsel was informed by the Clerk's office, of this Court, of the scheduling of oral argument on the morning of Tuesday, June 28, 1988, on Appellant's appeal of the denial of post-conviction relief by the Circuit Court,

and the filing of simultaneous briefs, by the parties, on Monday, June 27, 1988. Because of the time constraints, Appellee attaches its Response in opposition to the Rule 3.850 motion, and attached appendix, as filed before the Circuit Court on June 16, as Exhibit 2 of the Appendix herein. Appellee realleges all allegation and arguments, as if fully set forth herein, in the Argument portion of this brief.

"T" will refer to the transcript of the Circuit Court's two-day hearing, including the presentation of evidence on Appellant's claims of ineffective assistance of counsel, held in Martin County, Stuart, Florida, on June 17 and 21, 1988. As of the filing of this brief, on Monday, June 27, 1988, the filing of the complete transcript was incomplete, since said transcript was still being transcribed and prepared by the Clerk's Office, and Court Administrator's Office, of Martin County. Thus, "T, _", will refer to aspects of the two-day hearing not yet transcribed, and are based on undersigned counsel's notes, of said proceedings. Upon filing by the Martin County Clerk's Office, with this Court, of the complete hearing transcripts, undersigned counsel will provide more complete Record citations, as soon as possible, for this Court's review.

STATEMENT OF THE CASE

After a jury trial, held in December, 1982, in St. Petersburg, Florida, pursuant to a change of venue, Appellant was convicted, on December 8, 1982, of having committed the first-degree murder, robbery with a firearm and kidnapping, of Frances Slater, on April 27, 1982. (R, 307-309; 2892-2893). After an advisory sentencing proceeding, Defendant was sentenced to death, by the Honorable Judge L.B. Vocelle, in accord with a jury advisory sentencing recommendation, of the death penalty. (R, 321; 2957). This Court subsequently entered its written findings, in support of the death penalty, on April 2, 1984, based on evidence demonstrating the presence of three aggravating circumstances (murder committed during the commission of a felony; murder committed was "heinous, atrocious and cruel"; murder was committed to avoid lawful arrest), and no mitigating circumstances. (R, 2986-2988). The Circuit Court further detailed the Appellant's "major role in the victim's death." (R, 2987).

On direct appeal, this Court unanimously affirmed Appellant's conviction, and sentence of death, for the murder of Frances Julia Slater. Cave v. State, 476 So.2d 180 (Fla. 1985). (SRA, Exhibit 1).

On December 19, 1985, Appellant filed for

certiorari, of this Court's opinion on direct appeal, with the U.S. Supreme Court, on December 19, 1985. The U.S. Supreme Court denied certiorari review, on June 19, 1986.

Appellant's clemency hearing, was held before the Florida Cabinet in December, 1987. Governor Martinez signed Appellant's death warrant, on April 27, 1988. (SRA, Exhibit 3). The Governor assigned the execution to be carried out, between noon, Wednesday, July 6, 1988, and noon, Wednesday, July 13, 1988. Appellant's execution is presently set for 7 A.M., on Thursday, July 7, 1988.

In response to this death warrant, Appellant filed a motion for post-conviction relief, pursuant to Rule 3.850, Fla.R.Crim.P., in the Circuit Court, Martin County, Florida, on May 27, 1988. (A, Exhibit 1). The State filed a motion to dismiss Appellant's second claim, on ineffectiveness of counsel, on or about June 7, 1988, and a response in opposition to the motion to vacate, on June 16, 1988. (A, Exhibit 2). Following a two-day hearing, on June 17 and 21, 1988, featuring agreements, and an evidentiary hearing on Appellant's ineffective assistance claim, the Circuit Court denied Appellant's motion, and request for a stay of execution, on June 21, 1988. (A, Exhibit 3). These appellate proceedings follow. There are presently no other pending State or Federal collateral challenges or proceedings, concerning Appellant's death sentence, for the Slater murder.

STATEMENT OF THE FACTS

Appellee files its own Statement, as follows:

A. TRIAL AND DIRECT APPEAL

Appellee relies on its statement of procedural history and facts, stated in its Response to the Motion to Vacate ("SR"), at ppg. 2-14, and realleges all facts therein, as if fully set forth herein. See A, Exh. 2, at 2-14.

B. STATE COLLATERAL PROCEEDINGS

On May 27, 1988, Appellant filed his Rule 3.850 Motion. DMV: A, Exh. 1. In his motion, Appellant raised the following grounds (restated):

> 1. That the State denied Appellant his Fifth and Sixth Amendment rights, by allegedly threatening to elicit information about a pending aggravated battery charge, if Appellant testified at penalty phase; DMV, at 7;
>
> 2. That Karen Steger, Appellant's defense counsel at trial and sentencing, rendered ineffective assistance of counsel at both phases; DMV, at 8-19;
>
> 3. That the State knowingly and falsely argued at Cave's trial that Cave was the "triggerman" in the murder of Frances Slater, DMV, at 19;
>
> 6. That Appellant was denied a fair trial, when counsel's request to poll jurors, concerning their sentencing deliberations, was denied, DMB, at 23;
>
> 5. That jurors were improperly excused for cause, under the criteria announced Witherspoon v. Illinois, 391 U.S. 510 (1968) and Wainwright v. Witt, 469 U.S. 412 (1985), DMV,at 24;

6. That the fact of Bush's implication of Cave, as a "participant" in the offenses, was erroenously admitted at trial, in violation of Cruz v. New Yokr 481, ___ US. ___, 95 L.Ed.2d 162 (1987), and Bruton v. United States, 391 U.S. 123 (1968), DMV, at 25;

7. That Appellant's confession was erroneously admitted at trial, DMV,at 26;

8. That instructions on statutory mitigation of a lack of major involvement, and mental impairment, were improperly denied at penalty phase, DMV, at 26;

9. That the trial court improperly instructed the jury, on the nature and consequence of voting requirements, at the penalty phase, DMV, at 27;

10. That the jury's role in capital sentencing was unduly diminished by trial court and prosecutorial comments, in alleged violation of Caldwell v. Mississippi, 472 U.S. 320 (1985), DMV, at 28;

11. That the aggravating circumstances of "pecuniary gain" and "heinous, atrocious and cruel" were Unconstitutionally applied, sicne not supported by the evidence, DMV,at 29; and

12. That Appellant was Unconstituionally sentenced to death, in alleged violation of Enmund v. Florida, 458 U.S. 782 (1982), and Tison v. Arizona, 481 U.S. ___, 109 S.Ct. ___, 95 L.Ed.2d 127 (1987), DMV, at 31.

The State filed a Response, maintaining that all of the claims, besides ineffective assistance of counsel, were procedurally barred, either because the claims were raised and rejected on direct appeal (Claims 4-9, 11, 12), or because they could or should have been raised on direct appeal (Claims 1, 3, 10). SR, at 14-15.

At the outset of the evidentiary hearing, held on June 17 and 21, 1988, the Circuit Court denied each of the claims made in Claim 1, and 3-12, as procedurally barred, and alternatively lacking any legal merit. (T, 10-70). The Court then proceeded to hear evidence, on Appellant's claim of ineffective assistance of counsel.

Appellant presented the testimony of Karen Steger, Appellant's defense counsel (T, 83); Dr. Michael Krop, a psychologist who examined Cave on May 20, 1988, after the death warrant was signed (T, 206, 208); Austin Maslanik, a local attorney who advised Ms. Steger in her preparation and defense of Appellant (T, ___); Appellant's mother, Connie Hines (T, ____); Appellant's stepfather, Frank Hines, Jr., (T, ____); Appellant's sister, Patricia Young (T, ___); Mrs. Hines' sister, Emma Andrews (T, ___); Jane Dunne and Annie Anderson, former neighbors to the Cave family (T, ____); and the Reverend and Mrs. Carswell (T, ____), who rented a room, in a rooming house, to Cave. The State recalled Ms. Steger, (T, ____) and called Robert Stone and Jim Midelis, who prosecuted all four defendants in the Slater murder, including Cave. (T, ____).

At the conclusion of the two day hearing, the Circuit Court heard oral argument, and thereafter issued its ruling denying relief. The Circuit Court ruled that eight of the claims were procedurally barred, as raised and rejected on direct appeal, that three others were procedurally barred, as claims

that could or should have been raised on direct appeal; that Appellant had failed to demonstrate, in light of the facts and circumstances known to counsel at the time of trial, that Karen Steger had provided ineffective assistance of counsel; and that Ms. Steger's assistance at trial and sentencing, was Constitutionally effective. (A, Exh. 3, at 1-14).

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

POINTS ON APPEAL

POINT I

WHETHER THE TRIAL COURT APPROPRIATELY DENIED APPELLANT'S LEGAL CLAIMS, OTHER THAN INEFFECTIVE ASSISTANCE OF COUNSEL, BECAUSE SAID CLAIMS WERE PROCEDURALLY BARRED, AND/OR HAD NO LEGAL MERIT?

POINT II

WHETHER THE TRIAL COURT APPROPRIATELY DENIED APPELLANT'S CLAIM THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL OR SENTENCING, SINCE EVIDENCE AT HEARING CLEARLY SUPPORTED FINDING THAT COUNSEL'S PERFORMANCE WAS NEITHER DEFICIENT OR PREJUDICIAL, UNDER STRICKLAND v. WASHINGTON, 466 U.S. 668 (1984)?

SUMMARY OF ARGUMENT

The Circuit Court, Martin County, correctly denied all of Appellant's non-ineffective assistance of counsel claims, as procedurally barred. Claims that were either raised and rejected on direct appeal, and/or could or should have been so raised, were properly barred, as not cognizable in a Rule 3.850 proceeding. Additionally, each of said claims had no legal merit, and conclusively rebutted by the trial and sentencing Record, and did not entitle Appellant to post-conviction relief.

The Court appropriately denied all of Appellant's claims of ineffective assistance of counsel, since the evidence did not establish deficient performance or prejudice, under the test in Strickland v. Washington, 466 U.S. 668 (1984).

ARGUMENT

POINT I

TRIAL COURT APPROPRIATELY DENIED APPELLANT'S LEGAL CLAIMS, OTHER THAN INEFFECTIVE ASSISTANCE OF COUNSEL, BECAUSE SAID CLAIMS WERE PROCEDURALLY BARRED, AND/OR HAD NO LEGAL MERIT.

In his post-conviction motion, Appellant challenged various legal aspects of his trial and sentencing, in eleven of his twelve claims therein. (DMV, Claim 1, 3-12). In its detailed Order summarily denying relief on each of these eleven claims, the Circuit Court denied eight of these claims as procedurally barred, because each such claim was raised on direct appeal before this Court, and rejected before this Court. (A, Exhibit 3, at 4-8, 10-11; DMV, Claims 4-9, 11, 12). The Court denied the three other claims, as non-cognizable in post-conviction proceedings, because they could or should have been raised on direct appeal. (A, Exhibit 3, at 2-4, 9; DMV, Claims 1, 3, 10). It is clear that under Florida law, such procedural bars were properly applied, and should be affirmed as such by this Court.

This Court has consistently maintained that claims of error in a capital trial or sentencing, that could or should have been raised by proper objection at trial, or on direct appeal, are procedurally barred from consideration, in a subsequent post-conviction motion.

Doyle v. State, Case No. 72,462; 72,529 (Fla., June 23, 1988), slip op., at 2; Francis v. State, 13 F.L.W. 369 (Fla., June 2, 1988); Henderson v. Dugger, 522 So.2d 835, 836, n. 1 (Fla. 1988); Darden v. State, 13 F.L.W. 196, 197 (Fla., March 14, 1988); Aldridge v. State, 503 So.2d 1257, 1259 (Fla. 1987); Maxwell v. Wainwright, 490 So.2d 927 (Fla. 1985). Thus, Appellant's claims that the State Attorney's Office inappropriately threatened Appellant, at sentencing, with prosecution for aggravated battery while in prison, arising after his incarceration on the Slater murder charges, so as to prevent Appellant from testifying at sentencing (DMV, Claim 1); that the State violated Appellant's Constitutional rights to a fair trial, by arguing at each defendant's trial, that each defendant then on trial, including Cave, was the "triggerman" (DMV, Claim 3); and the prosecution and trial court comments, at trial and sentencing, constituted a violation of Caldwell v. Mississippi, 472 U.S. 320 (1985) (DMV, Claim 10), were properly denied, as procedurally barred, on this basis. Id.; see also, Mitchell v. State, 13 F.L.W. 330, 331 (Fla., May 19, 1988); Tafero v. Dugger, 520 So.2d 287 (Fla. 1988); Card v. Dugger, 512 So.2d 829, 831 (Fla. 1987); Copeland v. Wainwright, 505 So.2d 425 (Fla. 1987), vacated, other grounds, ___U.S.___, 108 S.Ct 55, 98 L.Ed.2d 19 (1987). Despite Appellant's

anticipated arguments to the contrary,[1] each of these claims is based on facts and circumstances clearly known to Appellant, at the time of trial and/or appeal, e.g., see, Christopher v. State, 489 So.2d 22 (Fla. 1986). On the "alternate triggerman" claim, the factual basis existed or arose during closing argument at the Bush trial, held prior to Cave's trial,[2] as well as at Cave's trial. Furthermore, despite Appellant's reliance on Federal appellate decisions, holding that Caldwell claims represent "changes in law" that can be newly considered for the first time in State or Federal collateral proceedings, a majority of this Court has consistently applied procedural bars to Caldwell claims, when not raised at trial or direct appeal, both before and after decisions such as Adams v. Dugger, 804 F.2d 1526 (11th Cir. 1986), modified on rehearing, 816 F.2d 1493 (11th Cir. 1987), cert. granted, Dugger v. Adams, 108 S.Ct 1106 (1988). Doyle, supra, slip.op., at 2; Mitchell, supra; Tafero, supra; Darden v. Dugger, 515 So.2d 227 (Fla. 1987);

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[1] Since the briefs have been ordered to be filed simultaneously on Monday, June 27, 1988, this brief is an anticipatory pleading, as far as Appellant's challenges to the trial court's ruling are concerned.

[2] In her testimony on the ineffectiveness claim, Karen Steger, Appellant's defense counsel, acknowledged and stated that she worked and consulted extensively with counsel for Cave's co-defendants, John Earl Bush, J.B. Parker and Terry Wayne Johnson, including Lee Muschott, Bush's trial counsel.

Copeland, supra; Middleton v. State, 465 So.2d 1218 (Fla. 1985). Thus, each of these claims were correctly barred.

It is equally well settled that claims that have been raised, and rejected by this Court, on direct appeal, are procedurally barred from Rule 3.850 consideration on their merits. Francis, 13 F.L.W., supra, at 370; Johnson v. State, 13 F.L.W. 177 (Fla., March 7, 1988); Gorham v. State, 13 F.L.W. 86, 87 (Fla., February 4, 1988); Aldridge, supra; Meeks v. State, 382 So.2d 673 (Fla. 1980). For this reason, Appellant's claims that he was improperly denied an opportunity, upon request, to individually question the sentencing jurors, about their deliberations (DMV, Claim 4; see, Cave, 476 So.2d, supra, at 186-187); that certain jurors were improperly excused for cause, on the basis of Wainwright v. Witt, ___U.S.___, 105 S.Ct 844, 83 L.Ed.2d 841 (1985), and Witherspoon v. Illinois, 391 U.S. 510 (1968)(DMV, Claim 5; see, Cave, 476 So.2d, at 183-185; 183-185, n. 2); that a non-testifying accomplice's statement (John Bush) was erroneously admitted, at Cave's trial, in violation of the rule in Bruton v. United States, 391 U.S. 123 (1960)(DMV, Claim 6; see, Cave, 476 So.2d, at 183, n. 1; 188[3]); that Cave's con-

[3] Although this Court did not specifically address this claim, in its opinion, it is clear that this Court expressly considered, and rejected as without merit, all claims raised on direct appeal, and reviewed the Record for any other present reversible errors, in accord with Rule 9.140(f), Federal Rules of Appellate Procedure. Cave, 476 So.2d, at 183, n. 1; 187.

fession was wrongly admitted at trial, because allegedly involuntarily obtained as a result of coercion or undue influence (DMV, Claim 7; Cave, 476 So.2d, at 185); that defense-requested instruction, on mitigating circumstances of mental impairment and "minor involvement" by Cave, were erroneously denied (DMV, Claim 8; Cave, 476 So.2d, at 187-188); that the trial court's sentencing instruction, on the nature and consequences of the advisory recommendation as dependent on the vote of the jury, were improper (DMV, Claim 9; Cave, 476 So.2d, at 186); that the trial court's findings of aggravating circumstances were not supported by sufficient evidence (DMV, Claim 11; Cave, 476 So.2d, at 188); and that Cave's limited involvement in the subject crimes, precluded the imposition of the death penalty, as a matter of law, under Enmund v. Florida, 458 U.S. 782 (1982)(DMV, Claim 12; Cave, 476 So.2d, at 187),

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(3)(cont'd) Appellee recognizes that this Court, on direct appeal, did not have the benefit of Cruz v. New York, 481 U.S.___, 109 S.Ct___, 95 L.Ed.2d 162, 172 (1987). However, the Cruz decision did not involve a radical or significant change in the law, so as to be cognizable as a viable post-conviction claim, under Witt v. State, 389 So.2d 922 (Fla. 1980). The Cruz case is clearly an evolution of the rule developed in Bruton, supra, and evolved in Parker v. Randolph, 442 U.S. 62 (1979), both of which preceded Cave's direct appeal.

Assuming arguendo this Court views Cruz as cognizable (there is no post-Cruz Florida case law that supports this conclusion), Appellant's Bruton claim was appropriately and properly denied on the merits, in the alternative, by the Circuit Court. (A, Exhibit 3, at 6; SR, at 40-43).

were properly denied, as procedurally barred, and not subject to relitigation. Francis, supra; Johnson, supra; Gorham, supra; Aldridge, supra; Meeks, supra. Appellant has not advanced any argument, that renders any of these claims cognizable, or otherwise undermines the Circuit Court's application of procedural law.

Each of these claims were denied by the Circuit Court, on the additional basis of the absence of any legal merit, to each such claim. (A, Exhibit 3, at 2-11). Appellee relies on the Circuit Court's factual and legal conclusions, Id., and the State's Response on the merits, before the Circuit Court (SR, at 16-17; 35-57), which demonstrates well-documented and substantial support in the trial Record, and in law, for the substantive denial of each non-"ineffective assistance of counsel" claim. Appellant's conclusory contentions in his motion contained no specified page references in the Record, or case law, to document or substantiate his claims, and were properly denied as lacking any adequate factual or legal support.

Thus, this Court should affirm the Circuit Court's denial of relief, as to all non-"ineffective assistance " claims brought in the post-conviction motion, as without procedural and/or substantive merit.

POINT II

TRIAL COURT APPROPRIATELY DENIED APPELLANT'S CLAIM THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL OR SENTENCING, SINCE EVIDENCE AT HEARING CLEARLY SUPPORTED FINDING THAT COUNSEL'S PERFORMANCE WAS NEITHER DEFICIENT OR PREJUDICIAL, UNDER STRICKLAND v. WASHINGTON, 466 U.S. 668 (1984).

Appellant has maintained that his counsel at trial and sentencing, Karen Steger, provided ineffective assistance, in a variety of ways, at both stages. However, Appellant's abstract criticisms of counsel, without regard for the facts and circumstances then known to her, and Appellant's present offer of evidence and witnesses, is merely an inappropriate exercise in hindsight. The trial court's ruling, that Appellant did not meet his burden, under the applicable criteria, for establishing that Ms. Steger was ineffective, A, Exh. 3, at 12-13, was completely supported by the Record.

As the Circuit Court consistently and correctly observed, Appellant's allegations and evidence must be considered, under the well-established criteria of Strickland v. Washington, 466 U.S. 668 (1984), as reiterated in Burger v. Kemp, 483 U.S. ____, 107 S.Ct. ____, 97 L.Ed.2d 638 (1987). As recently applied by this Court, a capital defendant has the burden of establishing that his counsel's actions and/or omissions were below the level of competent counsel, under prevailing norms, to such a severe degree, that confidence in the reliability and

outcome of the proceedings is undermined. Strickland, 466 U.S., supra, at 689-690; Francis, 13 FLW., at 370; Bertolotti v. State, 13 FLW 253 (Fla. April 17, 1988); Blanco v. Wainwright, 507 S.2d 1377, 1381 (Fla. 1987); Bush v. Wainwright, 505 S.2d 409, 411 (Fla. 1987); Downs v. State, 453 S.2d 1102 (Fla. 1984). This test, involves application of a standard of reasonableness, examined in light of those facts and circumnstances, then known to counsel, not those alleged to exist, in hindsight. Strickland, 466 U.S., at 689; Burger, 97 L.Ed.2d, supra, at 654; Foster v. Dugger, 823 F.2d 402 (11th Cir. 1987); Bertolotti, supra; Downs, supra. This standard, when applied, carries with it a strong measure of deferrence to counsel's actions as reasonable, and a presumption that counsel's performance was effective, and within "the wide range of professionally competent assistance." Strickland, 466 U.S., at 689, 690; Blanco, 507 S.2d, supra, at 1381. Perhaps most significantly, in "reconstructing the circumstances" from counsel's perspective at time of trial, a reviewing court must "make every effort" to eliminate hindsight. Strickland; Burger.

Once a defendant establishes deficient performance, he must show that counsel's performance "actually had an adverse effect so severe that there is a reasonable probability that the results of the proceeding would have been different but for the inadequate performance." Francis, 13 FLW, at 1370, quoting Blanco, 507 S.2d, supra, at 1381; Strickland; Burger; State v.

Bucherie, 468 S.2d 229, 231 (Fla. 1985). This inquiry, as applied to representation at a defendant's capital sentencing, focuses upon ". . . whether there is a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death". Strickland, 466 U.S. at 695. In order to be considered "effective", Appellant's counsel need not have explored every conceivable avenue, and presented all available information, particularly if such evidence, testimony, or suggested different strategy, would have been inconsistent with counsel's chosen strategy, or would have lead to a more detrimental impract, on Cave's trial or sentencing proceedings. Strickland; Burger, 97 L.Ed.2d, supra, at 656, 657; Elledge v. Dugger, 823 F.2d 1439, 1447 (11th Cir. 1987); Combs v. State, 13 FLW 142 (Fla, Feb. 18, 1988); Middleton v. State, 465 S.2d 1218 (Fla. 1985). Moreover under Strickland, speculative conjecture, as to the potential impact of presently evidence or testimony, does not meet the "prejudice" prong of Strickland. Strickland, 466 U.S., at 697; Bucherie, supra; Downs, supra.

A review of the Record, demonstrates that the Circuit Court's finding that Appellant did not meet either of the Strickland tests, regarding any of his claims of ineffective

counsel, is supported by the evidence. Henderson, supra; Doyle, supra; Francis, 13 FLW, supra, at 371, n. 9.

a. Failure to investigate/present certain mitigation evidence/witnesses, at penalty phase

Appellant has alleged that the Circuit Court erred, in finding that counsel's conduct of investigation and/or presentation of mitigation evidence or witnesses, at Cave's penalty phase, did not deny Appellant's Constitutional rights to effective assistance of counsel. The Record of the evidentiary hearing, amply supports the conclusions that counsel's investigation was Constitutionally adequate, and that her decision was reasonable, consistent with her strategy, and did not prejudice the outcome of the penalty phase.

Counsel's strategy at the penalty phase, as it was at the trial phase, was to focus upon the fact that Appellant did not participate in the actual killing, and should be treated differently than Bush and Parker. (T, 177). Counsel also sought, in trying to portray Cave as a minor player in the crimes, that Cave's confession demonstrated an honest, straightforward individual, who came forward and told the truth about his own involvement. (T, 165, 176, 197). Ms. Steger further testified about her intentions to gain sympathy for Cave, recalling that she cried during her closing arguemnt, at the penalty phase. (T, 165). Furthermore, Steger wanted to convey

to the jury that Cave and Steger were a "team", and counsel tried to use her status as a young female, and her body and voice contact with Appellant, as a show of confidence and belief in her client. (T, 107, 162-163).

In employing this strategy, counsel consulted with counsel for each fo Cave's co-defendant's, John Earl Bush, J. B. Parker, and Terry Wayne Johnson.[4] She reviewed case law (T, 157-158), sought instructions on six different mitigating circumstances, R, 2912-2916, and argued, both by motion and in seeking mitigating instructions, that Cave's involvement presented the death penalty, under Enmund v. Florida, 458 U.S. 782 (1982). (R, 2898-2901; 2912, 2913). Steger requested and received two court-appointed psychologists, to examine Cave on a confidential basis for the purpose of developing possible mental or psychological mitigating circumstances, or defenses to the charges themselves, if an examination revealed the existence of any. (R, 153-156, 174); (T, ____). Steger specifically sought (and got) Dr. Sheldon Rifkin, because of her knowledge from prior personal experience with Rifkin, his reputation in the legal defense community, and her knowledge of his prior involvement in first-degree murder cases, that Rifkin was defense-oriented. (T,). Ms. Steger obtained and used the opportunity to address the jury first and last, at closing argument during the penalty

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[4] In other testimony, Steger stated that the four attorneys, for the four Slater murder defendants, literally "spent the summer together", in preparing the cases. (T, 120, 168).

phase; this was consistent with the importance Steger placed, on having the last word at the guilt phase, so that the prosecution did not have the opportunity to parade Cave's confession, as the last item heard by the jury. (T, 172-173); R, 1799, 2847-2855.[5] In her closing argument, Steger focused upon the nature of Cave's lack of involvement in the actual murder of the victim, and his forth-rightness in admitting his involvement in the robbery, rather than complete denial of any involvement. (R, 2940-2942, 2944, 2946). Steger pleaded for mercy for Cave, as a human being who had "goals in life", and who "did wrong, but doesn't deserve to die". (R, 2944, 2946). She further stressed that the length of Cave's potential imprisonment, could be 3 consecutive life terms R, 2943, obviously to convince the jury to be comfortable that a life sentence advisory recommendation, would effectively remove Cave permanently from society.

This strategy, and its employment by Steger in a variety of ways, was eminently reasonable, and further calculated to maintain her credibility, as well as that of Cave, with the jury. Steger tried to use the nature of Cave's pre-trial statements to police, as a sign of Cave's honesty, recognition of his crime, and acceptance of responsibility for this crime.

[5] Steger clearly regarded closing argument, as one of her strengths as an attorney. She testified, at the outset, that she was "recruited" by other attorneys, while an assistant public defender in Martin County, to try felony cases, because of her ability to "sell things to the jury that no one else could". (T. 87).

Under the totality of circumstances, this strategy was clearly a reasonable and credible one. Strickland, supra.

Present counsel has claimed that Steger's independent investigation of possible mitigating witnesses was non-existent, and/or Constitutionally inadequate. Steger's testimony established that she repeatedly asked Cave and his mother, for names of witnesses who could testify in Cave's behalf, and tried to impress upon them, the importance and seriousness of the penalty phase. (T, 103, 113-114, 116, 171-172). The only witness names she was provided with, were Connie Hines, Cave's mother, and the Reverend and Mrs. Carswell, whom she proceeded to list, in response to discovery requests by the State, (T, 103, 171; R, 250-251). Steger consistently and repeatedly stated that Mrs. Hines was "adamant" in refusing to testify at the penalty phase, out of fear that she would be fired from her job with "white people", and she did not want them to know her relationship to Appellant. (T, 114-115, 172, 175). Steger listed Hines, in the hope Hines would ultimately agree to testify, but Hines never did. (T, 116-117, 194). Steger testified that, despite her pleas, no other witness came forward. [6] (T, 194).

Appellant has suggested that Steger should have gone beyond this level of investigation, of possible character

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[6] No witnesses testified at sentencing, because Hines refused, and the Carswells each had medical conditions, physically preventing their testimony. (T, ____). Steger's testimony was corroborated by the Carswells, based on Mr. Carswell's recovery from back surgery, at the time of the penalty phase, and Mrs. Carswell's "dangerous" condition of "uncontrollable hypertension", and treatment with sedatives, at said time. (T, ____).

witnesses. It is clearly recognized, as reasonable investigation into possible existing mitigation, to rely on Appellant, his mother and other family members[7], for possible mitigation witnesses. Strickland, 466 U.S., at 691; Burger, 97 L.Ed.2d, supra, at 655, 656; Clark v. Dugger, 834 F.2d 1561, 1568 (11th Cir. 1987); Mitchell v. Kemp, 762 F.2d 886, 889 (11th Cir. 1985); Gray v. Lucas, 677 F.2d 1086, 1093 (5th Cir. 1982). In view of the failure by Appellant and other family members to provide Steger with any witnesses, or any indication that further investigation for mitigating witnesses would prove fruitful, and in light of Appellant's mother's unwillingness to testify, Steger's decision, to do no further investigation, was reasonable and not deficient. Strickland, at 466 U.S., at 672-673, 699 (Attorney spoke with defendant, his mother and wife, concluded character evidence would be no help, did not investigate further, held to be reasonable, investigation, not ineffective assistance); Laws v. Armontrout, 834 F.2d 1401, 1419 (8th Cir. 1987) (Attorney discussed mitigation with stepmother and other relatives, who refused and/or were "adamant about not testifying", investigated no further character witnesses -- not deficient performance); Clark, 834 F.2d, supra, at 1568 (Attorney

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Carswell's "dangerous" condition of "uncontrollable hypertension", and treatment with sedatives, at said time. (T, _____).

[7] Emma Andrews, Appellant's aunt, testified that Steger had asked about Appellant's background and childhood, T, ______, further demonstrating her efforts to elicit possible mitigation, on Cave's behalf.

spoke to friends, uncovered nothing helpful -- no ineffectiveness); Mitchell, 762 F.2d, supra, at 888-889 (Attorney spoke with defendant's father, who was indifferent, did not speak to only other identified mitigation witness, and defendant told attorney not to contact family -- reasonable not to conduct further investigation); Gray, 677 F.2d, supra, at 1093 (when Attorney spoke with family, friends and employers, was told by defendant he didn't want any witnesses, and mother thought defendant should die, and was not given names of any other witnesses, no ineffectiveness in failing to further investigate existence of mitigation witnesses). Steger could clearly and reasonably have determined that any further investigation, in light of Appellant's mother's completely negative reaction, and the absence of any other suggested witnesses besides the Carswells, would be counter-productive or fruitless. Strickland, 466 U.S., at 699; Laws, 834 F.2d, supra, at 1419; Clark, 834 F.2d, supra, at 1568; Gray, 677 F.2d, at 1093-1094. Steger testified, corroborated by Robert Store and Jim Midelis[8], that "forcing"

[8] Mr. Stone and Mr. Midelis, were the prosecutors, of all four of the Slater murder defendants, including Cave. Each of these witnesses, who was qualified as an expert witness in criminal law, testified, among other things, that forcing an uncooperative or hostile character witness to testify, would not be helpful to the defense. (T. ______).

Appellant challenged the Circuit Court's acceptance of Stone and Midelis as expert witnesses, based primarily on the argument that their status, as the prosecutors of Cave, disqualified them as experts. Clearly, any contention that such status might produce a particular bias, involved the weight to be given to their testimony, by the fact finder, and did not affect the admissibility of the testimony given by Stone and Midelis, in (Con't on next page).

unwilling or hostile witnesses, by subpoena or otherwise, to nevertheless testify as defense character witnesses at the penalty phase, would not be helpful, and would likely be devastating, in the jury's minds. (T, 115, 172, 195); Laws, 834 F.2d, supra, at 1419. Based on these circumstances, and the fact that Appellant and his family gave no reason to Steger to believe that investment of her time and resources into additional investigation of possible mitigation witnesses would be beneficial, counsel's actions, in not pursuing further investigation or presenting additional witnesses, were not unreasonable. Strickland, 466 U.S., at 690-691, 699; Laws; Clark; Mitchell; Gray.

Furthermore, and perhaps more significant, counsel's alleged failure to investigate and/or present other character evidence or witnesses, can not possibly be deemed prejudicial to the outcome of the sentencing proceeding, in light of the

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their capacity as expert witnesses. Lopez v. State, 478 S.2d 1110 (Fla. 3rd DCA 1985). The Circuit Court correctly admitted Stone and Midelis as expert witnesses, based on their knowledge, training and experience (unquestioned by defense counsel), and the fact that their testimony was helpful to the trier of fact. Kruse v. State, 483 S.2d 1383, 1386 (Fla. 4th DCa 1986); §90.702, Fla. Stat. (1980). It is clear that their testimony was not mere directives on how to decide the issue of Ms. Steger's competence in representing Cave, but helped the Circuit Court in evaluating the factual circumstances of all four prosecutions, and the impact of such circumstances on Steger's representation. Town of Palm Beach v. Palm Beach County, 460 S.2d 8379 (Fla. 1984); Kruse, supra. These witnesses were not rendered unqualified as experts, merely because their testimony might be subjective, or represent a particular view. Lopez, supra. Under the logical extension of Appellant's argument, Dr. Krop's testimony, on Appellant's behalf, would be inadmissible as expert testimony, because of his clear bias for the defense.

extremely detrimental and damaging nature of the testimony of Appellant's character witnesses, at the Circuit Court evidentiary hearing. Initially, it should be noted that the positive value of such testimony -- Appellant's status as a good, obedient child; his closeness to his family, his help with other people's chores, and his babysitting -- was largely remote to the time of the crime, and of highly speculative mitigating impact. Strickland, 466 U.S., at 699-700; Francis, 13 FLW, supra, at 370; Blanco, 507 S.2d, supra, at 1382-1383; Middleton, 465 S.2d, supra, at 1224. Furthermore, each of these witnesses, especially Mrs. Hines, revealed, or "opened the door" to extremely negative character traits of Cave, that were detrimental, and inconsistent with Steger's strategy of Cave's honesty in his statements e.g., Strickland; Burger; Combs, supra; Middleton, supra.

The testimony of Connie Hines, Appellant's mother, would have been extremely damaging, to any prospects for an advisory or actual life sentence, for a variety of reasons. On direct examination by present defense counsel, Hines stated that Cave's school record was good. (T. ___). This was completely contradictory to Dr. Rifkin's confidential report in September, 1982, that school was not "rewarding" to him, and "had been a frustrating and defeating experience for him". Rifkin's Report, at 1, 5.[9] Additionally, Dr. Krop had reported that Appellant had

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[9] Dr. Rifkin's report was introduced at the evidentiary hearing, as Exh 4.

quit school in the tenth grade, "earned poor grades throughout his academic career as he [Cave] suggests that he thought school was a waste of time". Krop's Report, at 3.[10] Thus, the negative impacts of this testimony, was to emphasize that Cave's mother was not familiar with her son's school record; and that his record at school, as Ms. Steger described it, was not "glowing". T, 174. Thus, Hines' testimony on this point was detrimentally negative to Cave, and was inconsistent with other mitigating evidence presented by Cave. Burger; Francis, supra. Furthermore, such testimony would have "opened the door," to the admission of Dr. Rifkin's report at Cave's 1982 sentencing, where it was otherwise inadmissible as a confidential report prepared solely by Steger, and its impact, in this and other areas of Cave's character, would have been devastating, according to Steger, Stone and Midelis. (T, _____). Burger; Strickland; Middleton.

Hines further reported that Appellant was caught, in grade school, trying to smoke marijuana, and that he was stopped by police, as a boy, for jumping a fence, that appeared to be viewed by the police as trespassing. (T, ____). This would have portrayed Appellant to the jury, as a drug user at a very early age; would have contradicted Cave's self-report to Dr. Krop, that he "began using marijuana", in ninth grade, Krop's Report, at

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[10] The State believes Dr. Krop's report was introduced, as Exh. 3. (T, ____). Both parties referred to Krop's report, during his testimony. (T, 208-209, 215-218, 236, 239-289).

p. 4; would have emphasized the negative aspects of Cave's additional report to Krop, of later experimentation with heroin, cocaine and THC, thus portraying Appellant as an escalating drug user, who progressed to harder drugs, from his childhood to teenage years; and would have likely conveyed a portrait of escalating anti-social and illegal conduct by Appellant, beginning in grade school and culminating in the Slater murder. Thus, Cave's credibility, as well as that of his attorney, would have been severely strained, by his differing versions of the origins of drug use in his life, and the evidence of escalating drug use and criminal acts would have been especially damaging, because of their nature, and because the source of such information, was his mother. Burger; Strickland; Whitley v. Bair, 802 F.2d 1487 (4th Cir. 1986). Evidence of drug use, as possible explanation for Appellant's conduct, would have at least admitted the physical act of Cave's participation in the murder, a position clearly and totally at odds, with Steger's strategy of denial of such involvement. Burger; Combs, supra; Middleton, supra; Blanco, supra; Buford v. State, 403 S.2d 943, 953 (Fla. 1981). This evidence would have been made all the more dramatically detrimental to Cave, by his mother's admission that she would have known about drug use, if Cave was taking drugs; that she did not know about Cave's confessed involvement with cocaine, heroin and THC to Dr. Krop, and that Krop was "lying" if Krop reported that Appellant admitted such drug use; and that Cave "never lied to me". (T, ____). Burger; Strickland; Blanco;

Middleton; James v. State, 489 S.2d 737 (Fla. 1986); Porter v. State, 478 S.2d 33, 35 (Fla. 1985); see also Elledge, 823 F.2d, supra, at 1447.

Hines' testimony featured other aspects, reflecting very negatively on her credibility, as well as the credibility of her son, and Ms. Steger, and portraying Appellant in a highly unfavorable light, considering Steger's strategy. Hines claimed that Cave told her, on the night of his arrest when she visited him in prison, (the same night as his confession) that the victim's family had paid someone to kill Cave. (T, ____). Hines additionally claimed that the aggravated battery charge against Cave, arising from an incident allegedly occurring in jail, while Cave awaited trial on the subject murder, kidnapping and robbery charges, was the result of the State "planting" a "victim" into the jail, to "torture" Cave. (T, ___). These charges by Hines were wild accusations, wholly unsubstantiated. Significantly, such statements portrayed a sense of Cave as a "victim", to the same jury that had just convicted him of three reprehensible crimes, including first-degree murder, based on facts depicting Cave's brutal "victimization" of Frances Slater, in part according to Cave's own testimony. This portrait of Cave, woould have further "opened the door" to aspects of Dr. Rifkin's report, in which Cave expressed views of the crime that the murder charge "is nothing but circumstantial evidence", that the "case had been over emphasized", and that the charges were motivated by racism and community desires for revenge. Rifkin's Report, at 3.

(e.a.). Aside from the obvious greatly self-destructive impact of this information to the jury, this picture of Cave was the utmost in inconsistency, with Steger's strategy to portray Cave as honest and remorseful about his involvement in the murder, so as to engender sympathy from the jury. Id. This information was further contrary to other mitigating evidence, presented by Dr. Krop, that Cave had "compassion for others", was non-aggressive, "kind" and "giving" as a person. Krop's Report, at 5; Id; see also Francis, supra, at 370. As inconsistent with Steger's strategy, inconsistent with other mitigation evidence, and utterly damaging in and of itself, Hines' testimony created no "reasonable probabilty" that, but for the absence of her testimony at the penalty phase, the outcome of the sentencing proceeding would have been life. Strickland; Burger; Blanco; Middleton.

The presentation of family members, including Hines, was clearly designed by present counsel to create sympathy for Cave, by showing Cave's closeness to his family. However, Mrs. Hines revealed in her testimony, that she did not attend Cave's trial, because her attorney told her she did not have to be present, or testify there. (T, ___). Assuming arguendo the credibility of this statement, it would have substantially undermined any sense by the jury of Cave's closeness to his family, for them to hear testimony that his mother did not attend her son's trial, literally for his life, because she did not have

to. The negative impact of this testimony, can not be overstated. Burger; Strickland; Blanco.

Other aspects of Hines' testimony, as to Cave's general good character, obedience, help with chores, and good relationship with family members, resulted in cross-examination by the State, concerning Hines, lack of knowledge of other criminal charges against Cave; drug use by Cave; and Cave's involvement in race riots in school, as reported by Cave to Dr. Krop. Krop's Report, at 3. (T, ___). This type of mitigation testimony, again "opened the door" to the extremely damaging aspects of both Dr. Krop and Dr. Rifkin's reports, and would have allowed the State to impeach with evidence of prior bad acts. Steger testified that this scenario would have been "devastating", a conclusion corroborated by witnesses Stone and Midelis. (T.). It is thus readily apparent that Steger could not be considered ineffective, for failing to present testimony that would likely have resulted in a stronger recommendation and/or justification for the death penalty. Strickland; Burger; Darden v. Wainwright, 477 U.S. 187, 106 S.Ct. ___, 91 L.Ed.2d 144, 160 (1987); Elledge, 823 F.2d, at 1447; Harick v. State, 484 F.2d 1239, 1241 (Fla. 1986); Middleton, supra; Lightbourne supra; Henderson supra; Blanco, supra. Any limited positive value of Hines' testimony, was substantially outweighed by the substantial harm her testimony would have done, to Cave's prospects for a life sentence. Porter, supra. Strickland; Burger.

Cave's stepfather, Frank Hines, Jr., testified as to Cave's general good character, as a boy in Little League baseball; that Cave enjoyed sports, including hunting with his father; that Cave was not a discipline problem, in school or with the police; and that the two enjoyed a close relationship (T, -). Cave's good character was limited in time, by his stepfather's testimony, to when Cave was about 10 or 11 years old; this is very remote in time, to his character at the time of the offense, when he was twenty-three, and has speculative impact. (R,2916). Francis; Blanco; Stone v. State, 481 So.2d 478 (Fla. 1985). Mr. Hines' testimony, as to lack of discipline problems, or problems with law enforcement, was inconsistent with Mrs. Hines' revelations of early drug use, trespassing, and her revelation of Cave's confession of the robbery to her, on the night of his arrest. (T, -). Francis. Hines' testimony "opened the door" to evidence of prior bad acts, known to a considerable extent to exist, by Steger, as his wife's testimony had done. Burger; Strickland. Hines' statements demonstrated Cave's familiarity with guns, which clearly was not helpful, in emphasizing the brutality of the Slater robbery, kidnapping and murder, and its attendant circumstances. Id. Finally, in response to the State's final question on cross-examination --- why Mr. Hines had not attended

his son's trial --- Mr. Hines gave no answer, a fact which the State emphasized, in requesting that the Record reflected no response, as the last word of Mr. Hines.[11] (T,). This powerful final message to the jury, showing no explanation or reason that Cave's stepfather failed to attend his son's trial for his life, would have effectively diluted or undermined any sense of a close relationship between Cave and Frank Hines. Id. This evidence further corroborated Ms. Steger's testimony, that no family members came forward to assist her, by testifying at the penalty phase.

This undermining, of the closeness between Cave and his family, also occurred when Patricia Young testified. Young, Cave's sister, claimed a close relationship, to the point that Cave "straightend me out," when Young did something wrong, and was a good older brother. (T, -). In addition to her same lack of knowledge of other criminal charges, or Cave's drug use, Young did not ask her parents about the course of her brother's trial, claiming she was "busy," attending to her own children and family, and because her parents were also "busy." (T, -). While concern for her own children was not a negative one, her failure to even inquire about the murder trial, and her admission that her parents did not report to her about the trial, would have cast severe doubt about Cave's closeness

[11] Defense counsel conducted no re-direct examination of Mr. Hines. (T,).

with his family. Burger; Strickland.

The other family and neighbor character witnesses, would have similarly contributed more harm than good, to Cave's cause. Similarly, other family and friends were unaware of Appellant's drug use, race riots, or of other criminal charges, and their testimony that Cave's family was close, would have been greatly undermined. Supra. Significantly, Connie Hines' sister could not recall or remember whether Mrs. Hines asked Appellant's counsel, if Hines should testify for her son, (T, -), thus failing to corroborate a key element of Hines' testimony. Emma Andrews' further statement that she did not want to see her nephew receive any penalty, let alone the death penalty, (T,), was damaging contradiction of Steger's "honesty," remorseful strategy. Burger; Middleton. Andrews' testimony further corroborated that Steger had sought beneficial witnesses for Cave, from Hines and Andrews. (T, -). Finally, the testimony of a neighbor, Annie Anderson, and Patricia Young, that Cave was "jolly," liked to tell jokes, was thankful for what he had in life, and was never seen to be angry, or hurt anyone (T, -), would have been contradicted by the facts and attendant circumstances of the crime. This evidence would have "opened the door" further, to Rifkin's conclusions that Cave was evasive, bitter, non-remorseful, did not accept responsibility for

his crimes, and was a "schemer" with no conscience. Rifkin's Report, at 3-5. Burger; Strickland; Francis; Middleton; Blanco.

In sum, as to present counsel's evidence of family and neighbors testimony, there is virtually no possibility, let alone a reasonable probability, that had this testimony been presented, it would have altered the balance of substantial aggravating, versus any mitigating circumstances, by this Court or the Circuit Court, to produce a life sentence. Burger; Strickland; Doyle, supra; Blanco; Middleton; Downs, supra.

Appellant has further suggested that Ms. Steger was ineffective, in her decision not to present Appellant, as a witness at the penalty phase. Steger's testimony, establishes that this was a strategic decision, that was based on her observation of the performance of Cave, and the prosecutor's cross-examination of Cave, at the suppression hearing. (T, 121-123, 134, 169, 170). Steger stated that Cave's performance as a suppression witness was so poor, and Stone's cross-examination so devastating, that she decided not to risk such testimony at trial or sentencing, where Stone could stress Cave's participation in the robbery, and Cave's admission of his participation. (T, 121-123, 134, 169, 170). The poor performance of Cave, at the suppression hearing, is borne out by the Record,

which indicates that Cave admitted, under Stone's cross-examination, that he was not threatened into making statements, (R, 2090); that he decided to tell the truth, upon recognizing Bush's voice on tape (R, 2089-2090), and that he had voluntarily agreed to talk with police. (R, 2097). Steger also discussed the benefits and risks of using Cave as witness, with Bush's attorney, Lee Muschott, who had had "a very bad experience with his client on the stand in front of a jury." (T, 169). Clearly, Steger's decision was reasonable and tactical, under these circumstances, and did not prejudice Appellant.[12] Burger; Strickland.

Appellant offered the testimony of Dr. Harry Krop, (T, 208-289), including his report, based on an examination of Cave on May 20, 1988, apparently as an expert on psychological mitigating evidence Steger should have investigated and presented at the penalty phase. Ms. Steger testified that she obtained the services of Rifkin, a defense-oriented psychologist, but did not use the report or list Rifkin as a witness, because the report was "so negative." (T, -). Steger was particularly troubled by Cave's evident absence of remorse, which was

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[12] Since Appellant's testimony was not offered as potential mitigation, at the evidentiary hearing, it is clear that Appellant has failed to meet his burden, under either part of the Strickland test, on this matter.

inconsistent with her strategy of obtaining the jury's sympathy, by portraying Cave's admission of involvement as an acceptance of responsibility and remorse. Burger; Blanco. Steger clearly did not want the admission of any statements by her client, that the Slater prosecution was racially motivated, and had been "overemphasized." Rifkin's Report, at 3. Burger; Strickland.

Appellant has suggested that counsel was obligated, to be considered effective, to seek another examination, by Dr. Rifkin or some other doctor. In the first place, Steger had used the two doctors she was allotted by court order, and would not have been entitled to any further confidential examinations; thus, the State would have known about any further doctors she requested. (T, -). More significantly, Steger was not obligated to investigate possible psychological mitigation, until she received an evaluation favorable to Cave. Elledge, 823 F.2d, at 1447, n. 1; Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985).

In analyzing Krop's testimony, it is apparent that this Court has not regarded defense-hired psychological experts, conducting examinations years after the crimes, as persuasive evidence of ineffective assistance of counsel, particularly if inconsistent with another doctor's finding, made more contemporaneous to the crime.

Henderson, 522 So.2d, supra, at 837; Stano, 520 So.2d, supra, at 281; Bush v. State, 505 So.2d 409, 411 (Fla. 1987); James, 489 So.2d, supra, at 738-739; Middleton. Similarly herein, Dr. Krop's report, based on an examination done over six years after the crime, and some 5½ years after Rifkin's examination, does not support Appellant's claim of ineffective counsel. Id. Initially, Krop's report substantially conflicted with Rifkin's conclusions, and would have "opened the door" not only to the fact, but the nature of these inconsistent conclusions. Elledge; Henderson; James.

Furthermore, Krop's conclusions are completely rebutted by the facts and circumstances of the murder, undermining both the primary basis for his conclusions -- namely, Appellant's unverified and uncorroborated statements to Krop in May, 1988 -- the conclusions themselves, and the credibility of Cave and his counsel. Cave's statement of his involvement to Krop (Cave was drinking, "did not know what was going on," told the victim she would not be hurt, tried to take her away from the car, to save her life, telling her not to look back, until Bush and Parker came "from out of nowhere," and stabbed and shot the victim), Krop's Report, at 1-2, was completely and diametrically inconsistent, with the statement he gave to police, and repeated to his mother,

at the time he was initially questioned. Furthermore, this version of events would have opened the door to the fact that Cave did not relate such a version to Dr. Rifkin, and was evasive and non-remorseful in his discussions about the crime with Rifkin. Rifkin's Report, at 3. Such clear credibility problems, resulting from these inconsistences, was totally contradictory to Steger's strategy, and would have been very detrimental for the sentencing jury to consider. Burger; Strickland. Adding to this damage, was Krop's concession that he had not reviewed Appellant's original statement to police, or spoken with the officers who took the statement, even though acknowledging that therse factors would have been "important and helpful" to his diagnosis (T, 248). The failure by present counsel to provide full, or more negative information, for Dr. Krop to consider, and Krop's failure to independently corroborate what Cave told him, (T, 248, 257, 262, 271, 280) largely invalidates his conclusions, and thus would have destroyed whatever credibility Steger was trying to establish, for her and her client. Burger; Strickland; Elledge; Laws, supra; Blanco. This information clearly undermines Krop's conclusions that Appellant was "candid" with Krop, and thus a good rehabilitation candidate. (T, 217).

Krop's conclusions about Appellant's lack of prior violent history, his remorse and candor, and his

acceptance of responsibility for his crimes, (T, 217, 218), would have opened the door to cross-examination and rebuttal concerning Appellant's prior drug use, charges of aggravated battery and rape, and race riots, as well as Dr. Rifkin's conclusions, about Appellant's bitterness, lack of remorse, avoidance of responsibility, and blame on others, racism, and revenge. Rifkin's Report, at 3-5. Burger; Strickland. As earlier stated, nearly all of this rebuttal evidence could not otherwise have been introduced before the sentencing jury, but for testimony and reports, such as that of Dr. Krop. Burger; Strickland. The impact of this negative rebuttal cross-examination and/or rebuttal, would have been extremely adverse to Cave. Id. This harmful impact takes on added significance, because of Dr. Krop's acknowledgement that he did not have or obtain full pertinent data about the case; that he could not reconcile Appellant's confession, once apprised of it, with what Cave told him concerning the crime; that much of Cave's statements to him could have been merely self-serving; and that Cave's statements to Rifkin, as related in Rifkin's report, did not sound like anything but self-serving. (T, 248, 256, 257, 262, 271, 280).

Krop's characterization of Cave, as a passive, aggressive personality who sought to avoid conflict, (T,216,269), was completely rebutted by the facts, as relied on by this

Court to approve Appellant's conviction and sentence, based on Cave's major active participation, as the actual robber, who forced Ms. Slater at gunpoint into the car, that carried her to the scene of her murder. *Cave*, 476 So.2d, *supra*. It would clearly have been against Steger's strategy, and otherwise destructive to Cave's chances for life imprisonment, to portray psychological evidence that had absolutely no factual basis to it. *Burger*; *Strickland*; *Blanco*; *Middleton*. Furthermore, Krop's report relates Cave's statement, never before made, that he talked Parker and Johnson out of killing Bush, because of their belief that they would be caught for this crime by law enforcement, because of Bush. (T, 262-265); Krop's Report, at 2. Assuming *arguendo* this statement to be true,[13] it shows Cave to be a persuasive ringleader, not a passive follower, and would inevitably have led the jury to reinforce its consideration of Cave's active role in the crime. *Francis*.

Finally, Krop's conclusions that Appellant's drinking and drug consumption impaired Cave's judgment during the crime, (T, 218), is particularly suspect. This conclusion

[13] The negative ramifications of this statement extend beyond inconsistency with a passive, conflict-avoidance personality: This evidence demonstrates that discussions about a cover-up of the murder, and about contemplating other murders, took place. This would not be beneficial to, or consistent with Steger's attempts to convince the jury of Cave's remorse and sincerity.

conveniently ignores Cave's admission that he knew what he was doing, on the night of the crime (SRA, Exhibit 7, at 3), which Krop admitted he did not consider (T. 248). Moreover, the nature of the details, recalled by Cave about the crime, and the facts and circumstances of his robbery and apprehension of the victim, at gunpoint, in the store and from the store, totally belies the suggestion of intoxication during the crime. Buford, 403 So.2d, supra, at 953; Henderson, 522 So.2d, at 838; Bertolotti, 13 F.L.W., supra, at 253; Cirack v. State, 201 So.2d 706, 709-710 (Fla. 1967). It would have been extremely inconsistent, with the reasonable strategy of denial of involvement in the actual killing, to put forth evidence admitting the physical act of murder, but explaining or justifying it by evidence of intoxicants. Combs; Blanco; Burger; Middleton; Funchess v. Wainwright, 772 F.2d 683, 689-690 (11th Cir. 1985). Additionally, evidence of historical drinking or drug abuse, reported by Cave to Krop, Krop's Report, at 3-4 (T, 268, 278), in and of itself would be damaging; it would further have devastated Appellant, that such conclusions were based on unsubstantiated admission by Cave, made to a doctor under a death warrant, for the first time, 5½ years after his conviction and sentence. Elledge; Bertolotti; Buford; Cirack, supra. It was not ineffective to fail to present this type of testimony, under the

circumstances, particularly in light of Steger's knowledge of the effectiveness with which Stone and Midelis cross-examined doctors (T, -), and the testimony of Stone and Midelis, on how devastating such cross-examination and rebuttal could have been. (T, -). Burger; Strickland; Blanco; Bush; Elledge; James.

Finally, the most damning legacy of testimony and conclusion, such as Dr. Krop's, is that Rifkin's report would have been revealed to the jury. Burger. There is simply no way to underestimate the overwhelmingly negative picture of Cave's character, that the jury would have heard through Rifkin. Rifkin's characterization of Cave as a "braggart," evasive, distrustful, disclaiming himself of guilt or responsibility, "street smart," anti-social, manipulative, and a "schemer" with no conscience, could have been of no possible benefit. Rifkin's Report, at 2-7. Moreover, Rifkin found no major thought or psychotic disorders, or evidence of any brain damage, and despite a low IQ, did not find Appellant to be retarded. Rifkin's Report, at 4-6.[14] While Krop had maximized the impact of a learning disability by Cave (T, 229), Rifkin found that such a condition was not a "major difficulty," and did not directly affect Cave's action, on the night of the crime. Report, at 6.

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[14] Krop agreed with the absence of any psychosis, mental or thought disorder. Krop's Report, at 4; T. 217.

In stark contrast to Cave's self-report to Krop concerning alcohol and drug use, Rifkin reported Cave did not drink or do drugs a lot, did not drink to excess, and had not suffered any inability to control his behavior, or act "consciously or purposefully," as a result of drinking. Rifkin's Report, at 2, 6, 7. Thus, the negative impact of Rifkin's conclusions, coupled with the undermining of Krop's suggestion of mitigating circumstances, would have overwhelmingly outweighed any conceivable beneficial impact of psychological mitigating testimony. Burger; Strickland; Elledge; Parker.

Appellant has strongly argued that Karen Steger should have pursued a lack of prior criminal convictions, in mitigation at the penalty phase. The Record demonstrates that Ms. Steger knew that the trial court would permit the State to use unconvicted bad acts, as rebuttal of no significant prior ciminal history, if Appellant relied on this mitigating factor. (R, 2906-2907). Steger's testimony, at the evidentiary hearing, further shows that Steger was aware of certain bad acts, including the rape charge in Pennsylvania, the aggravated battery charge, stemming from an incident in the Martin County jail, as well as Appellant's admissions to her of marijuana use. (T, -). It is thus apparent that Steger strategically decided not to rely on such mitigation, thus enabling her

to avoid mention or reference by the State of these or other bad acts, in rebuttal. Burger; Strickland.

Appellant has nevertheless maintained that counsel could have effectively relied on no prior convictions in mitigation, and diluted any rebuttal, by stressing to the jury that no weight should be accorded bad acts which did not result in convictions. Under Florida law as it then existed, the State clearly had the ability to properly rebut reliance on "no significant criminal activity," with arrests, accusations, drug use, and other unconvicted conduct. Simmons v. State, 419 So.2d 316, 319 (Fla. 1982); Booker v. State, 397 So.2d 910, 918 (Fla. 1981); Washington v. State, 362 So.2d 658, 666 (Fla. 1978), cert. denied, 441 U.S. 937 (1979); see also, Funchess, 772 F.2d, supra, at 694. Thus, any reliance by Steger on such mitigation, would clearly have been muted by the clearly negative aspects of State rebuttal evidence, of drug use, and accusations and arrests for two extremely serious felonies. Having already just convicted Appellant of murder, robbery and kidnapping, the jury would likely have viewed rape and aggravated battery charges, as well as admitted use of cocaine, heroin and THC, in a light most unfavorable to Cave. The suggestion that Steger should have risked the devastating impact of such bad act evidence, in the hopes that the jury would be unaffected by such acts without con-

victions, is completely untenable and unrealistic.

Appellant further challenged counsel's failure to further investigate his school or employment records, for possible mitigation. Steger's conclusions, drawn from Cave's failure to finish high school, that this circumstance was not "glowing"accomplishment, was further substantiated by Mrs. Hines' admission of Cave's marijuana use in grade school, and Cave's self-report of poor grades, contrary to his mother's view of his academic achievements. Appellant's "unstable" employment history did not lend itself to any indication of positive mitigation. This was buttressed by Mrs. Hines' admission that Cave may have been fired from a hospital cleanup crew job. (T, -). Appellant's present counsel did not present <u>any</u> positive mitigation evidence, that could have been developed from further investigation. Counsel's actions were clearly reasonable, and did not prejudice Cave, in this respect. <u>Strickland</u>.

None of Cave's evidence, fulfilled his burden, under either aspect of Strickland. In addition to the extremely prejudicial impact that present counsel's evidentiary showing would have had at the penalty phase, the incredibly weak positive nature of such testimony, was far outweighed by the aggravating aspects and circumstances of Cave's crime. <u>Strickland</u>. There can be little doubt that, in comparison to the aggravating factors of heinous, atro-

cious and cruel; felony-murder; and avoiding arrest, Appellant's evidence does not remotely create a reasonable probability that, but for counsel's failure to present such evidence, such evidence would have produced a life sentence. (SRA, Exhibit 1; Burger; Strickland; Lightbourne; Elledge; Blanco; Bush; Doyle; Francis; Middleton. The trial court's denial of relief, after a two-day evidentiary hearing, at which defense counsel presented eleven witnesses, was correct. Strickland; Lightbourne; Francis; Middleton.

b) failure to object, to evidence of fact of Bush's implication of Cave

Appellant has contended that the failure by counsel to object and seek exclusion of testimony by a police officer, that Cave "was with Bush, and did participate", R, 2716-2617, demonstrated improper appreication of the rule in Bruton v. United States, 391 U.S. 123 (1968). Appellant suggests that such ineffectiveness resulted in prejudicial admission of the fact that Bush, Cave's accomplice, generally implicated him. Appellant has analyzed such circumstances from a purely theoretical standpoint, failing to take into account the facts and circumstances then know to defense counsel. Strickland.

Counsel was clearly aware of the Bruton rule, supra, and was successful in excluding Bush's statement itself, R, 2680, 2681, 2716, and its damaging reference to the knife used to stab the victim, as owned by Cave. (R, 2718-2723). As counsel Steger testified, Cave had conceded his involvement and participation in the robbery, and his role in securing the victim in the car, at gunpoint. (T, 111-112, 165, 167, 169). Bush's general statement that Cave "participated", added nothing to what the jury heard from Cave himself, with the subsequent admission fo Cave's statement. (R, 2717, 2753-2758). Counsel determined it would be strategically more effective, to down play the evidence, and give the impression Cave "had nothing to hide" from it. (T, 129, 132). This tactical decision was further consistent with her strategy, to portray Cave, as honest about his involvement.

Strickland. Given this fact of Cave's confession, counsel's decision was very reasonable under the circumstances. Id. Further, no prejudice resulted from such action, since under then-prevailing law, Bush's general reference to Cave's participation was admissible, as "interlocking" with Cave's Statement. Parker v. Randolph, 442 U.S. 62 (1979).

Since counsel's actions were tactically sound, and had no prejudicial impact on Cave's trial, even if arguendo deficient, these circumstances were correctly rejected by the Circuit Court, as an insufficient basis for relief. Strickland.

c) cross-examination of medical examiner, regarding impeachment of fear, as reason for victim's voiding of bladder

Appellant has argued that it was ineffective for counsel not to cross-examine the medical examiner, Dr. Wright, concerning his conclusion that the victim's voiding of her bladder, was consistent with being in fear. Given the circumstances in the Record, this is clearly a ludicrous claim.

This area of testimony was clearly "emotional dynamite, in the State's favor, ultimately substantiating, in part, the Circuit Court's findings of aggravating circumstances. As counsel testified, (T, 179-180), the medical examiner's conclusions, that fear was the cause of the victim's loss of bladder control, could not have been completely eliminated, as a plausible explanation. According to Steger, the "visual picture" of the victim's wetting of her pants, in a car surrounded by four

black men, was utterly devastating. Id. Steger reasonably determined not to reinforce this visual image, for the jury. Strickland.

The reasonableness of this strategy, was actually supported by the Terry Wayne Johnson trial excerpts, filed before the Circuit Court in support of this claim. DMV, Appendix, Exh. 1. Johnson's counsel's inquiry did not eliminate fear as the cause of the victim's bladder control loss, and the prosecution succeeded, on re-direct examination, in undermining possible causes other than the victim's fear, such as her death. DMV, Appendix, Exh. 1, at 500, 503, 504. Mr. Stone testified that, had Steger conducted such cross-examination, he would have conducted similarly successful re-direct examination. Moreover, Steger's decision could hardly be considered prejudicial, in that other evidence, including Cave's statement, amply established the victim's fear, as expressed by her pleas for her life, her forcible removal from the store, and the car, and the defensive nature of the stabbing, immediately preceding her death, by shooting. (R, 2619, 2717, 2758, 2784, 2785). Focus upon this fact, would have been additionally inconsistent with Steger's strategy to isolate Cave, from the acts of the actual murder. Burger; Strickalnd; Blanco; Middleton. Counsel has not established that the Circuit Court was incorrect, in its ruling on this claim.

d) comprehension of first-degree felony murder culpability,

At the evidentiary hearing, present counsel challenged counsel's understanding of first-degree felony murder doctrine, because of counsel's decision to strategically try and create reasonable doubt and/or confusion about the law, in efforts to obtain a jury pardon. In light of the fact and circumstances, this was reasonable strategy. Strickland.

Essentially, Steger did the best she could, given the facts and circumstances she faced. Henderson; Bertolotti, Strickland. Present counsel's hindsight critique of this strategy, as employed, failed to account for the difficulty in circumstances. Counsel clearly recognized the substantial hurdle that Cave's confession to the robbery presented, in terms of felony murder culpability, and gave considerable effort to seeking its suppression. Once admitted, Steger recognized the "clear cut" nature of Cave's culpability under Florida law. Cave's admission of intent, and knowledge of what he was doing, negated any possible intoxication or other mental or psychologically-connected defense. Bertolotti; Henderson; Buford; Cirack. Steger also recognized that felony-murder culpability was a difficult concept for lay persons to understand. (T, 182). Thus, by taking advantage of these confusing aspects, and promoting a credible theory, consistent with the facts as admitted by Cave, Steger pursued a practical and credible

defense, under the circumstances.[15] Strickland; Henderson; Bertolotti.

The reactions of the State, and trial court, in objecting to her characterization of the evidence and the law, reflects the effectiveness of this strategy. (R, 2842-2846). Her closing argument at the guilt phase, advising the jury to carefully consider the trial court's instructions on felony-murder, (R, 2845-2847), but emphasizing at the same time Cave's non-involvement in the killing, the weakness of the State's case, containing no independent corroboration of Cave's involvement, (R, 2801-2805, 2834-2835), and the possibility of the death penalty (R, 2852, 2853), demonstrates a complete understanding of felony-murder, and a reasonable strategy to deal with it. Strickland.

Present counsel did not present any evidence, that there was any other viable alternative strategy or defense, which to a reasonably probability would have obtained a more favorable result, Counsel's evidence and arguemtns suggest no more than dissatisfaction with the fact that Steger's strategy did not work, which does not demonstrate ineffective assistance of counsel. Blanco; Bush.

[15] Both Stone and Midelis, recognizing that Steger had perhaps the most difficult defense, of all four defendants, based on the facts admitted by Cave, would have pursued the same defense, of isolating Cave from the actual killing, and seeking a jury pardon, based on reasonable doubt. (T. ______).

e) <u>request for continuance of penalty phase</u>

Appellant alleged that counsel should have requested a postponement of the penalty phase. At the evidentiary hearing, counsel presented no evidence, of any specific information that Ms. Steger would have uncovered, if she had obtained a continuance. <u>Messer v. State of Florida</u>, 834 F.2d 890, 897 (11th Cir. 1987). Ms. Steger had no sentencing witnesses, because no one came forward to testify. In light of the nature of Mrs. Hines' <u>ultimate</u> testimony, and the testimony of the Carswells that Cave was a nice tenant who occasionally did chores to help pay his rent, it is apparent that any decision not to request a continuance, did not prejudice Cave. <u>Strickland</u>.

Present counsel appears to have based his argument, on the testimony of Austin Maslanik, whom Ms. Steger sought advice from, during trial. Ms. Steger's testimony, directly rebutted Maslanik's suggestion that she was unprepared for penalty phase. Maslanik corroborated Steger's testimony that she was having trouble with witnesses at this phase (T, _____), yet maintained she should have requested a continuance, because the public defender's office, where he worked, regularly requested one, as a matter of course (T, _____). Maslanik significantly acknowledged that this course of making such a request, did not make Steger unprepared, and that there would be no point in requesting a continuance, if Steger could not retrieve any witnesses (T,).

There was no evidence presented at all, that such a request would have been granted, or what the grounds of such a motion, besides general unpreparedness, would have been. In light of the wide discretion the Circuit Court would have had in deciding whether to grant such relief, e.g., Jackson v. State, 464 S.2d 1181 (Fla. 1985); Lusk v. State, 446 S.2d 1038 (Fla. 1985), and counsel's clear preparedness for penalty phase, this claim is without foundation. Burger; Strickland.

f) attacking weight of Cave's confession, evidence of threats against Appellant

Appellant has argued that the evidence, at the evidentiary hearing, showed that Steger was ineffective, for failing to elicit evidence of threats allegedly made against Cave, to induce his Statement. Ms. Steger was clearly hindered in this regard, by Cave's admission, during cross-examination at the suppression hearing, that no threats were made against him, that forced him to speak against his will. (R, 2090-2097); (T, 186). Ms. Steger extensively cross-examined Officer Jones, about the circumstances surrounding Cave's statement, including its length, its timing in the early morning hours, the continuation of questioning despite Cave's initial denial of involvement, and the failure to tape the entire proceeding. (R, 2726-2748); A, Exh. 2, at 28). Ms. Steger testified she could only elicit evidence of threats, through the police officer, (who she did not believe would suddenly admit such a thing, T, 187), or through putting Appellant on the stand at trial, a choice she had already

strategically determined to avoid. (T, 187). Present counsel did not put on any evidence, at the Rule 3.850 hearing, that there were threats made that Steger failed to discover, and did not put on Appellant at all.

Counsel can hardly be deemed ineffective, for failing to elicit non-existing information, by further cross-examination of law enforcement, or by risking devastating cross-examination of Appellant, if he testified at trial. (T, 121-123, 134, 138, 169-170, 186, 187, 189-190). Strickland.

g) objections to State's closing argument, as improper shift of burden of proof

There was no evidence presented on this point, although alleged. Counsel can not be considered ineffective, when this Court rejected an attack on the propriety of comments by the State that Appellant could not show his lack of guilt of kidnapping. (R, 2810); Cave 476 F.2d, at 183, n. 1; 188 (Point IV, direct appeal). The State's comments were not regarded as a misstatement of law by Ms. Steger. (T, 195-196). Such remarks, correctly directed to rebutting Steger's attempts to deny involvement in any crime, except robbery (R, 2801-2805), were fair comments on a lack of evidence, and invited by Steger's summation. State v. Shepherd, 479 S.2d 106 (Fla. 1986); Tacoronte v. State, 419 S.2d 789 (Fla. 1982); White v. State, 377 S.2d 1149 (Fla. 1979); See also, Lynn v. State, 395 S.2d 621 (Fla. 1st DCA 1981), cert. denied, 402 S.2d 611 (Fla. 1981). Thus, counsel's determination, not to object to proper comments

on evidence, was reasonable, and did not constitute ineffective assistance under Strickland.

h) objections to State's intent to rebut mitigation of no significant prior criminal history, with evidence of aggravated robbery charge

Appellant had alleged, in his Rule 3.850 motion, that a State Prosecutor threatened Steger, with use of an aggravated battery charge if Cave testified at sentencing, thereby keeping him from testifying. As already addressed in II a herein, Steger's decision not to place Appellant on the stand, had already been made, prior to the State's actions on this matter. Furthermore, Appellant did not testify at the Rule 3.850 evidentiary hearing, so he can not possibly establish the fact or manner, in which he was allegedly prejudiced by the State's stated rebuttal intentions. Strickland. This claim can be denied, on this basis alone. Id.

Steger testified that the State's intended use of other criminal changes, to rebut any reliance on no significant prior criminal history, §921.141(6)(b), Fla. Stat. (1980), was not legally objectionable. (T, 188). Steger's perception of the law, as already discussed in II a, supra, was correct, since at the time of Appellant's sentencing hearing in December, 1982, Florida law clearly permitted rebuttal. Simmons, supra; Booker, supra; Washington, supra; Funchess v. Wainwright, supra. Despite Appellant's considerable protestations, there was no evidence at the Rule 3.850 hearing, other than Mrs. Hines' unsubstantiated

accusations, and present counsel's speculative conjecture, that the aggravated battery charge was brought in bad faith.[16] There is clearly no question, based on arguments previously made, that counsel was not ineffective, for deciding not to object to legitimate tactics by the State, and to not rely on such a mitigating factor. Strickland.

Appellant's entire claim of ineffective assistance of counsel, has been a classic attempt to re-evaluate counsel's conduct, in hindsight, and to selectively ignore the facts and circumstances she faced in 1982. The collection of present experts and/or character witnesses, five and one-half years later, does not demonstrate ineffective assistance of counsel, merely by focusing on the failure of Steger's strategy. Stano; Henderson; Bush. More significantly, mere reliance on Steger's alleged failure to obtain just one more vote in her favor, at sentencing, does not alleviate Appellant's burden of demonstrating actual deficient performance and prejudice. Strickland. It is not enough to suggest that counsel needed only

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[16] Counsel's suggestion, at the hearing, that he should have had more time,. to investigate the aggravated battery charge, is specious. The State's intent to seek rebuttal of no significant prior criminal history, is clear from the Record. (R, 2909-2919). It was present counsel who filed his motion to vacate, about two weeks before the expiration of the two year limitations period under Rule 3.850, and failed to document this claim. Counsel was never denied access to the State's files on this case, and waited until the evening of the second day, after all witnesses had testified, to ask for more time on this claim. The court correctly denied the request, as a "back door" attempt to avoid the Rule 3.850 limitations period, and/or obtain an unwarranted stay of execution

one more vote, and then merely present eleven defense witnesses at a hearing, without analysis of the impact of such witnesses, on Appellant's trial and sentencing outcome. id. As analyzed herein, the likely devastatingly negative impact of Appellant's claims and witnesses, would have produced a stronger recommendation for death.

As this Court recently ruled in Francis, supra, there is no one better equipped, than the judge who heard Cave's trial and sentencing, to decide the prejudicial impact oa Appellant's claims of ineffectivenes, in accord with Strickland. Francis, at 370, n. 9. Judge Vocelle, who presided at Cave's trial and sentencing, heard Appellant's claims, and judged them to be without merit. A, Exh. 3, at 13-14. Appellant has demonstrated nothing that should disturb this finding, which is "entitled to considerable weight." Francis, at 370, n. 9.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of Appellee was hand-delivered to ANDRES J. VALDESPINO, Walsh & Valespino, 230 Park Avenue, New York, NY 10169 this 27th day of June, 1988.

Richard G. Bartmon

Of Counsel