IN THE SUPREME COURT OF FLORIDA

ROBERT DEWEY GLOCK, II,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 73493

EMERGENCY: DEATH WARRANT SIGNED; EXECUTION IMMINENT

APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY

BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. LANDRY
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR APPELLEE

/sas

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STATEMENT OF THE CASE AND FACTS

Appellant Robert Glock was convicted of first degree murder, kidnapping and robbery. Following a recommendation of death by the jury, the trial court imposed a sentence of death. On appeal, the Florida Supreme Court affirmed. Glock v. State, 495 So.2d 128 (Fla. 1986)[1]

On appeal, Glock raised the following issues:

POINT I

WHETHER THE LOWER COURT ERRED REVERSIBLY IN DENYING A SEVERANCE WHERE ALLEGEDLY EACH DEFENDANT AT THE PENALTY PHASE PRESENTED EVIDENCE OF SUBSTANTIAL DOMINATION BY ANOTHER.

POINT II

WHETHER REVERSIBLE ERROR APPEARS IN THE TRIAL COURT'S INSTRUCTING THE JURY ON THE PENALTY PHASE AND RECEIVING THEIR RECOMMENDATION ON A SUNDAY.

POINT III

WHETHER THE EXCLUSION OF PROSPECTIVE JURORS OPPOSED TO THE DEATH PENALTY WAS ERROR.

POINT IV

WHETHER THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

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[1] His codefendant's judgment and sentence was also affirmed. Puiatti v. State, 495 So.2d 128 (Fla. 1986).

POINT V

WHETHER THE LOWER COURT ERRED IN NOT FINDING THE DEFENDANT'S CONFESSIONS AND HIS POTENTIAL FOR REHABILITATION AS MITIGATING CIRCUMSTANCES.

The Florida Supreme Court found no error and affirmed.

On October 28, 1988, the Governor signed a warrant of execution for Mr. Glock and the execution is presently scheduled for January 17, 1989. Glock filed a 3.850 motion to vacate and the trial court summarily denied relief on December 22, 1988.

SUMMARY OF THE ARGUMENT

The lower court correctly denied all relief without an evidentiary hearing. Almost all of the issues urged are not cognizable on Rule 3.850 as they are issues which were, could have been or should have been raised on direct appeal.

As explained, infra, appellant is not entitled to consideration of his claim under Bruton-Cruz for his failure to urge it on direct appeal and even if he could, the error is harmless. See Puiatti v. State, 521 So.2d 1106 (Fla. 1988).

The ineffective assistance of counsel claim and the inadequate mental health evaluation issues do not merit relief or a hearing as they are facially insufficient and in light of the direct appeal record amount to nothing more than second-guessing by current counsel that cumulative witnesses should have been presented. There is neither substandard performance by trial counsel nor prejudice.

ARGUMENT

ISSUE

WHETHER THE LOWER COURT ERRED BY DENYING THE 3.850 MOTION WITHOUT AN EVIDENTIARY HEARING.

As a preliminary matter, the state first calls the court's attention to the fact that many of Glock's asserted bases for relief may not be considered via collateral motion because they are matters which either were considered or could have been raised on direct appeal. Since 3.850 is not a substitute for, nor does it constitute a second appeal, consideration of such issues is now precluded. See Raulerson v. State, 420 So.2d 567 (Fla. 1982); Booker v. State, 441 So.2d 148 (Fla. 1983); Palmes v. State, 425 So.2d 4 (Fla. 1983); Hall v. State, 420 So.2d 872 (Fla. 1982); Bundy v. State, 490 So.2d 1258 (Fla. 1986).

Moreover, Glock's failure to properly raise the issue at trial and on appeal constitutes a procedural default precluding collateral review. Wainwright v. Sykes, 433 U.S. 72, 53 L.Ed.2d 594 (1977); Murray v. Carrier, 477 U.S. 478, 91 L.Ed.2d 397 (1986); Smith v. Murray, 477 U.S. 527, 91 L.Ed.2d 434 (1986); Engle v. Isaac, 456 U.S. 107, 71 L.Ed.2d 783 (1982).

Thus, Glock is precluded from litigating most of the issues now urged in his motion for post-conviction relief and the trial court correctly refused to grant relief.

Appellant Glock presented the following issues in his Rule 3.850 motion to vacate:

CLAIM I: Whether the admission of the codefendant's confession and of his statements during the joint confession violated Bruton v. United States, 391 U.S. 123 (1968).

CLAIM II: Whether the trial court's denial of a severance at guilt and penalty phases deprived petitioner of a fair trial.

CLAIM III: Whether Glock was denied effective assistance of counsel at guilt and penalty phases of trial.

CLAIM IV: Whether the trial court impermissibly shifted the burden of proof in its instructions at sentencing and applied an improper standard in imposing sentence.

CLAIM V: Whether professionally inadequate evaluations by mental health experts resulted in a denial of individualized and reliable sentencing.

CLAIM VI: Whether improper consideration of the victim's character and victim impact information violated Glock's eighth and fourteenth amendment rights (Booth v. Maryland).

CLAIM VII: Whether prosecutor's argument in closing at the guilt phase regarding premeditation was improper.

CLAIM VIII: Whether the jury was misinformed and misled by instructions and arguments which allegedly diluted their sense of responsibility, contrary to Caldwell v. Mississippi, 472 U.S. 320, 86 L.Ed.2d 231 (1985).

CLAIM IX: Whether the jury was misled and incorrectly informed about its function at capital sentencing.

CLAIM X: Whether the trial court improperly refused to provide the jury with proper instructions to channel their discretion.

CLAIM XI: Whether the prosecutor's arguments and remarks violated the golden rule.

CLAIM XII: Whether Glock's emotional dependency precluded him from waiving Miranda rights and giving a voluntary confession.

CLAIM XIII: Whether the joint sentencing proceeding and joint sentencing order deprived Glock of his eighth and fourteenth amendment rights.

CLAIM XIV: Whether the trial court refused to recognize mitigating circumstances presented in the record.

CLAIM XV: The felony-murder instruction.

CLAIM XVI: The trial court's refusal to provide requested instructions regarding mitigating factors.

Since as stated in section II, supra, a motion for post-conviction relief is not a second appeal and appellant may not attempt to litigate or relitigate issues appropriately cognizable on direct appeal, collateral review is precluded on the following claims: I, II, IV, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV and XVI.

Appellee would respectfully submit and emphatically request that this Honorable Court continue to enforce its procedural default policy. If the Court does so, the federal courts will respect the enforcement of that policy. See e.g., Hall v. Wainwright, 733 F.2d 766, at 777 (11th Cir. 1984).

On the other hand, if this Court chooses to reach the merits of claims clearly defaulted, the federal courts will feel free to substitute its judgment for that of this Court and may find a constitutional violation where this Court finds none. County

Court of Ulster County v. Allen, 442 U.S. 140, 60 L.Ed.2d 777 (1979).

Some additional comments are appropriate for the affirmance of the denial of post-conviction relief on many of these issues:

CLAIM II - On direct appeal the Florida Supreme Court found that Glock was not entitled to a severance at the sentencing phase. 495 So.2d at 132. Even if Glock had raised on appeal a challenge to the severance ruling at guilt phase, undoubtedly it would have been rejected as codefendant Puiatti's claim was. 495 So.2d at 130-131.

CLAIM IV - Claims of burden-shifting instructions are barred from collateral review. Preston v. State, __ So.2d __, 13 F.L.W. 583; Jones v. Dugger, __ So.2d __, 13 F.L.W. 667.

CLAIM VI - Booth v. Maryland claims may not be asserted via Rule 3.850. Preston, supra; Jones, supra; Daugherty v. Dugger, __ So.2d __, 13 F.L.W. 639.

Additionally, as to Glock's Booth claim, the trial court has affirmatively declared in the order denying post-conviction relief that it did not consider the victim impact statement of Mrs. Ritchie's relative. Cf. Alford v. State, 355 So.2d 108 (Fla. 1978).

CLAIM VII - Glock's failure to raise the issue on appeal bars review. Parenthetically, we note that the Supreme Court rejected an argument by codefendant Puiatti regarding prosecutorial comment. 495 So.2d at 130.

CLAIM VIII - Caldwell v. Mississippi issue - Failure to raise the issue on appeal precludes consideration. Copeland v. Wainwright, 505 So.2d 425 (Fla. 1987). Additionally, the Florida Supreme Court has held the Caldwell argument to be meritless. See Grossman v. State, 525 So.2d 833 (Fla. 1988); Combs v. State, 525 So.2d 853 (Fla. 1988). Moreover, it is not error to instruct the jury correctly as to its role. Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988).

CLAIM IX - The issue is defaulted for failure to urge on appeal. Even if it could be considered, it is meritless since the jury recommended death by a vote of 11 to 1. 495 So.2d at 130.

CLAIM XI - Glock's failure to raise the issue on appeal precludes consideration. Additionally, we note that the Florida Supreme Court rejected a similar claim by codefendant Puiatti. 495 So.2d at 130.

CLAIM XIV - The Florida Supreme Court found that the trial court did consider the mitigating factors in the record applying to Glock. 495 So.2d at 132.

CLAIM I - The Bruton - Cruz issue -

Respondent recognizes that appellant may urge that Cruz v. New York __ U.S. __, 95 L.Ed.2d 162 (1987) has changed the law since Glock's direct appeal. Even if Cruz is a change in law, there is no reason for it to be given retroactive effect to cases final prior to the Cruz ruling. In any event, as explained, infra, relief must be denied.

The Cruz v. New York issue -

Appellant did not urge on direct appeal any infirmity in the guilt phase that an error under Bruton v. United States, 391 U.S. 128, 20 L.Ed.2d 476 (1968) or its progeny required reversal. Therefore, any challenge to it now based on Bruton or Cruz v. New York __ U.S. __, 95 L.Ed.2d 162 (1987) is unavailable because it is procedurally defaulted. See Section II, supra.

Appellant's Cruz claim should not be entertained now. In essence, Glock argues that Cruz v. New York, __ U.S. __, 95 L.Ed.2d 162 (1987), constitutes an abrupt departure of existing law since it receded from Parker v. Randolph, 442 U.S. 62, 60 L.Ed.2d 713 (1979), and announced the rule that the introduction of a codefendant's interlocking confession where that codefendant did not testify violated the sixth amendment confrontation clause as explained in Bruton v. United States, 391 U.S. 123, 20 L.Ed.2d 476 (1968).

In response, the state would submit that no new law was announced; no preexisting precedent was overturned. It is true that a plurality view in Parker was rejected in Cruz but the law is well-established that a plurality opinion - one that does not command a majority of the Justices - cannot serve as a legal precedent binding on the lower courts. As the Supreme Court has repeatedly stated, when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the court may be viewed as that position taken by those members who concurred in the judgments on

the narrowest grounds . . ." Gregg v. Georgia, 428 U.S. 153, 169, n.15, 49 L.Ed.2d 859, __ (1976); Marks v. United States, 430 U.S. 188, 193, 51 L.Ed.2d 260, 266 (1977); Lakewood v. Plain Dealer, __ U.S. __, 100 L.Ed.2d 771, 788, n.9 (1988).

In Parker, four Justices opined that there was no constitutional violation by the introduction of a nontestifying codefendant's interlocking confession. Justice Blackmun filed a concurring opinion, suggesting that such introduction did constitute error but that it was subject to harmless error treatment. Thus, the narrowest ground to support the judgment of the Parker court was that the harmless error doctrine could save a conviction where the interlocking confession of a nontestifying codefendant was introduced at trial. This, in itself, was not novel law as Bruton v. United States, errors had previously been subject to harmless error analysis. See Harrington v. California, 395 U.S. 250, 23 L.Ed.2d 284 (1969); Schneble v. Florida, 405 U.S. 427, 31 L.Ed.2d 340 (1972); Brown v. United States, 411 U.S. 223, 36 L.Ed.2d 208 (1973).

Appellant Glock and his appellate counsel were in a situation not unlike that faced by counsel in Smith v. Murray, 477 U.S. 527, 91 L.Ed.2d 434 (1986).

In Smith, defense counsel objected at trial to testimony from a psychiatrist concerning admissions arguably violative of the defendant's fifth amendment rights and then consciously

elected not to pursue that claim before the state supreme court.[2] The basis for that decision was counsel's perception that the claim had little chance of success. With the benefit of hindsight, appellant's counsel contended in the United States Supreme Court that that perception proved to be incorrect. 91 L.Ed.2d at 444.

The Supreme Court ruled counsel's deliberate decision not to raise the issue was "dispositive of any effort to satisfy *Sykes*' 'cause' requirement - 91 L.Ed.2d at 445, that an argument that such a decision should be excused because made in ignorance was foreclosed by Murray v. Carrier, 477 U.S. 478, 91 L.Ed.2d 397 (1986), and the decision not to pursue the claim in light of the then current case law would not support a finding of ineffectiveness under Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674 (1984).

Moreover, Smith could not rely on the argument of novelty-as-cause on the basis that Estelle v. Smith, 451 U.S. 454 was decided after his appeal because the question is not whether subsequent legal developments have made counsel's task easier but whether at the time the claim was available at all. In the words of Engle v. Isaac, 456 U.S. 107, 133, 71 L.Ed.2d 783, 804 (1982), the tools were available to appellate counsel. Not only could Glock's appellate counsel have argued that Parker's plurality had not commanded a majority view but also the Bruton claim was

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[2] Similarly, in the instant case, appellate counsel filed a notice explaining why he was not asserting the Bruton claim.

"percolating" elsewhere. Counsel for the defendant in Cruz v. New York was pursuing the argument as was defense counsel in Lee v. Illinois, 476 U.S. 530, 90 L.Ed.2d 514 (1986) and even Glock's co-counsel for codefendant Puiatti was simultaneously advancing the argument. Puiatti v. State, 495 So.2d 128 (Fla. 1986), cert. granted, Puiatti v. Florida, __ U.S. __, 95 L.Ed.2d 523 (1987), Puiatti v. State, 521 So.2d 1106 (Fla. 1988), appeal after remand.

Glock cannot convincingly argue that his appellate counsel was ineffective under the Strickland test. Not only did he act as an advocate by winnowing out claims that seemed unlikely to succeed in order to advance more noteworthy issues - and in making that selection relied on a United States Supreme Court decision that appeared to offer little solace - but the prejudice prong of Strickland cannot be satisfied in light of the Florida Supreme Court's subsequent post-Cruz argument by codefendant Puiatti. See Puiatti v. State, 521 So.2d 1106 (Fla. 1988), cert. denied, Puiatti v. Florida, __ U.S. __, 102 L.Ed.2d 153 (1988), wherein this Court opined:

> [2] We fully recognize the Supreme Court's warning about the potential damning effects of a codefendant's confession on the incriminated defendant. However, we find that the facts in the instant case are clearly distinguishable from those in **Cruz** because Puiatti and Glock not only entered into separate interlocking confessions, but they also subsequently entered into a joint confession resolving all prior inconsistencies. Neither **Cruz** nor **Parker** concerned a true joint confession entered into by both defendants. The joint

> confession, as we explained in the majority opinion, is substantially consistent with the individual confessions of Glock and Puiatti. Further, the joint confession was so interlocking, we do not believe **Bruton** applies because reliability was clearly established, but, even if it was error, its use with Glock's name was harmless. We find the introduction of the individual confession of Glock to be harmless error under the circumstances of this case, and it falls squarely within the harmless error situation noted by Justice Blackmun when he stated: "I fully recognize that in most interlocking confession cases, any error in admitting the confession of a nontestifying codefendant will be harmless beyond a reasonable doubt." **Id.** at 79, 99 S.Ct. 2142 (Blackmun, J., concurring in part and concurring in the judgment).
>
> Accordingly, upon reconsideration in light of the new principles adopted by the Supreme Court in **Cruz**, we find that the alleged confrontation was harmless. We again affirm Puiatti's conviction and sentence of death.
>
> (text at 1108)

The Florida Supreme Court's rejection of this claim in Puiatti similarly compels rejection now (if it may be considered at all).

CLAIM III - Ineffective assistance of counsel at the guilt and penalty phases of trial.

(A) Penalty Phase -

Appellant contends that trial counsel failed to provide information to the judge and jury about Glock's family background.

The trial court record reflects that at the penalty phase of trial counsel for Glock presented the testimony of:

(1) Willie Mae Glock, appellant's stepmother, who described their finding Glock in an orphan's home at age fourteen and their struggle with his mother to get custody of the appellant (R 2230-2233). She added that he had run away at times because he didn't like to be disciplined and described him as a follower (R 2233-2234). The witness explained that he never had anyone to love him or care for him or discipline him or teach him right from wrong (R 2236).

(2) Dr. Gerald Mussenden, a clinical psychologist - who examined Mr. Glock and opined that he found in his personality a difficulty in relating to authority and to women and that he has a poor self-concept (R 2246-2250). Dr. Mussenden further described Glock's disruptive childhood - the rejection and failure he felt as a youngster in an institution. Glock went to live with his father and experienced a second rejection, a second failure when that didn't work out well. Glock experienced further failure when he joined the armed services (R 2253-2255).

Glock apparently teamed up with the codefendant as someone he could relate to (R 2255). The testing indicated that Glock did poorly on family discord (R 2258). Mussenden opined that the potential for rehabilitation was very good (R 2258).

(3) Tammy Lynn Yonce - appellant's sister - who declared that his childhood wasn't very nice; specifically, their mother was an alcoholic who physically and mentally abused her children until the court placed appellant in an orphan's home at age thirteen (R 2273-2276). They were beaten almost daily for simple

things (R 2274). She mentally abused Glock by calling him names (R 2275). She opined that mother was mentally sick (R 2276). Mother thought it was a big joke when she got a letter asking if she would testify and advised Tammy Yonce she would be stupid if she testified for the appellant (R 2276).

(4) Robert Glock testified about his relationship with his mother (hectic) and his father (good feelings but never really a relationship) (R 2281).

The instant record amply demonstrates no deficiency by trial counsel. He presented evidence concerning appellant's background and Glock's most current set of lawyers merely seeks to second-guess trial counsel by suggesting that what was done should have been done differently.

In the seminal case of Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674 (1984), the Supreme Court announced displeasure with using claims of ineffective assistance of counsel to create mini-trials of counsel's performance:

> **[14, 15]** Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to secondguess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. **Engle v. Isaac**, 456 U.S. 107, 133-134, 71 L.Ed.2d 783, 102 S.Ct. 1558 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because

of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See **Michel v. Louisiana**, supra, at 101, 100 L.Ed. 83, 76 S.Ct. 158. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. See **Goodpaster,**

[466 U.S. 690]

The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 NYU L Rev 299, 343 (1983).

The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

(emphasis supplied) (80 L.Ed.2d at 694-695)

The Supreme Court concluded:

"The state courts properly concluded that the ineffectiveness claim was meritless without holding an evidentiary hearing."

(80 L.Ed.2d at 702)

While some may believe that the mere mention of a claim of ineffective assistance of counsel should suffice to hold an evidentiary hearing, that is not a correct assessment and the Florida Supreme Court has approved the summary denial of relief on such a claim where the allegations are deficient or the record otherwise reflect that relief should be unavailable. See Porter v. State, 478 So.2d 33 (Fla. 1985); Lambrix v. State, __ So.2d __, __ F.L.W. __ (Case No. 73,348, opinion filed November 30, 1988).

In the instant case, appellant simply urges that additional or different witnesses could have been added to those witnesses whom trial counsel did produce to describe appellant's abused childhood. In Francois v. Wainwright, 741 F.2d 1275, 1284-1285 (11th Cir. 1984), the Court found no prejudice in counsel's failure to present additional mitigating evidence relating to the defendant's life where counsel had presented relatives who testified about his character and background. A subsequent attempt to litigate Francois' sordid background similarly was unsuccessful. Francois v. Wainwright, 743 F.2d 1188, 1191 (11th Cir. 1985).[3]

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[3] The court rejected the following:

> The proffered evidence shows that Francois was the product of a sordid and impoverished childhood environment. His parents were not married. His father was a habitual heroin addict who never worked, who brought other addicts into the home for the ingestion of heroin in front of Francois when a child, and who beat Francois because he would not fight

See also Woods v. State, 531 So.2d 79, 82 (Fla. 1988):

> "The jury, however, heard about Woods' problems, and the testimony now advanced, while possibly more detailed than that presented at sentencing, is essentially, just cumulative to the prior testimony. More is not necessarily better."

And see Foster v. Dugger, 823 F.2d 402, 406 (11th Cir. 1987); Cape v. Francis, 741 F.2d 1287, 1301 (11th Cir. 1984); Boykins v. Wainwright, 737 F.2d 1539, 1543 (11th Cir. 1984) (failure to elicit additional testimony from witnesses did not lead to breakdown of adversarial system supporting a claim of ineffective assistance of counsel).

And in Booker v. State, 413 So.2d 756 (Fla. 1982), the Florida Supreme Court disapproved a defense ploy that a new expert could provide a different conclusion than originally presented:

> with other children when he was a boy. Francois' mother often worked as a prostitute and was of little benefit to Francois during his childhood. She married but Francois' step-father abused him. Francois grew up as a child of the street. At the same time he was smart, and although not finishing school, he obtained his G.E.D.
>
> The behavioral scientists in their affidavits posit that ". . . some offenders, like Marvin Francois, are themselves victims of circumstances that shape their lives in ways beyond their deliberate control." They suggest that given Francois' chaotic antisocial upbringing, "clear mitigation of punishment compellingly surfaces."

> If "evidence" such as that offered here is found to warrant a new proceeding, there will be no end to the appeal process. The finality of the judicial process would be nil if a new proceeding was required everytime a party found an expert who reached a conclusion, with regard to information available at the time of trial, that differed from the opinions and conclusions presented at that trial. There must be a point at which the proceeding is concluded and the matter is settled.
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> (413 So.2d at 757)

(B) Guilt Phase -

Appellant also contends that trial counsel rendered ineffective assistance at the guilt phase for failure to ask for a change of venue, counsel's alleged failure to conduct an adequate voir dire, counsel's alleged failure to request an instruction defining voluntariness, and alleged act of disloyalty by conceding guilt during the opening statement (R 1656).

(1) Change of Venue -

Of course, trial counsel may not be deemed ineffective for failure to file every conceivable motion. In the instant case, the trial record reflects that an impartial jury could be obtained through the thorough voir dire examination at trial (Vol. V - VII, R 776-1621). The voir dire examination clearly established either that exposure to the case via the media was de minimis or that the jurors could appropriately decide the case on the evidence presented.

Glock has failed to allege either a serious deficiency by trial counsel or that the prejudice prong of Strickland is present here.

(2) Voir Dire -

Appellant complains that trial counsel failed to conduct an adequate voir dire because he did not ask the jurors if they could keep the cases of Glock and Puiatti separate. Appellant is simply mistaken. The very first question counsel for Glock made on voir dire related to whether the jurors could consider the charges and evidence applicable to each separate (R 956-957) (see also R 1098; R 1319; R 1420).

Appellant also complains that trial counsel was ineffective for failing to object to an alleged limitation on voir dire at a bench conference at R 852-854. Trial counsel was neither deficient nor did prejudice accrue as a result of the trial court's agreement with the prosecutor that King v. State, 390 So.2d 315, 319 (Fla. 1980), held that voir dire examination should focus on the jurors' impartial application of existing law rather than on their conception of what laws should exist.

No serious contention can be made upon review of the record at R 775-1620 that the defense was not permitted to conduct voir dire.

(3) Statements -

Appellant argues that trial counsel failed to request an instruction on voluntariness concerning the suppression of Glock's statements.

The instant record reflects that Glock's counsel did file a motion to suppress statements (R 171-174), which was denied (R 208), following an evidentiary hearing (R 370-707). That record

sufficiently demonstrates trial counsel acted as an effective advocate on behalf of his client as required by Strickland v. Washington.[4]

Glock suggests that he might have used someone like Dr. Merikangas to urge that Glock could not give a free and voluntary confession. But the information available to trial counsel would not have supported that argument. For example, defense witness Dr. Mussenden testified at penalty phase that at the time of the offense Glock was cognitive, knew right from wrong and could appreciate the quality of his behavior. He was competent to stand trial and he passed "all eleven points of competency" (R 2251-2252). (See also, Petitioner's Ap. 8, 9, 10)

The suggestion now advanced by Glock would have been inconsistent with the other information he had available; in fact Glock testified that he was aware of his Miranda rights (R 658-659), and the officer testified that Glock understood his rights (R 464; R 513-514).

That current counsel for appellant Glock can now dig up an out of state mental health expert to provide a contrary opinion to the information available in Florida does not render counsel incompetent. In Elledge v. Dugger, 823 F.2d 1439, 1445-1447 (11th Cir. 1987), the court declared:

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[4] The trial court was eminently correct in noting that trial counsel validly explained at the time of trial that he did not want a jury instruction on voluntariness of the confessions because that would only serve to emphasize for the jury's attention damaging evidence (R 1985).

1. Whether a favorable psychiatrist could have been found with reasonable diligence

The district court stated that "counsel for the respondent conceded that a psychiatrist such as Dr. Dorothy Lewis, who testified in Mr. Elledge's defense during the evidentiary hearing before this Court, could have been located in 1977 to testify during the sentencing proceeding...." This led the court to conclude that counsel's performance fell below the standard set out in **Tyler v. Kemp**, 755 F.2d 741, 744-45 (11th Cir. 1985). The court went on to conclude, however, that even had counsel produced such a witness the death sentence nevertheless would have been imposed. Consequently, Elledge was not prejudiced; counsel was not ineffective under **Strickland**; and the sixth amendment was not violated.

Although the district court's conclusion that the sixth amendment had not been violated is correct, the analytic framework the court used to determine that a favorable witness could have been located was inaccurate. The record reveals that the State's counsel merely acknowledged that Dr. Lewis was extant in 1977 and had formulated her clinical theories at that time. The State never conceded that a reasonably diligent investigation would have uncovered either Dr. Lewis or a similar expert who would have testified favorably at Elledge's sentencing.

Specifically, the district court concluded that, in 1977, counsel "could have located" Dr. Lewis. The test, however, is not simply whether counsel "could have located" a witness similar to the one eventually produced. Instead, the court must determine whether it is reasonably likely that a reasonable attorney, operating under the circumstances of the case and acting in a reasonably professional manner, would have located such a witness.

[8] In other words, **Strickland** requires only that counsel conduct a **reasonable** investigation. **Strickland**, 466 U.S. at 691,

> 104 S.Ct. at 1066. To prove that he was prejudiced by counsel's failure to investigate and to produce a certain type of expert witness, a habeas petitioner must demonstrate a reasonable likelihood that an ordinarily competent attorney conducting a reasonable investigation would have found an expert similar to the one eventually produced. If such a result was not reasonably probable, the petitioner was not prejudiced by counsel's failure to investigate. Merely proving that someone - years later - located an expert who will testify favorably is irrelevant unless the petitioner, the eventual expert, counsel or some other person can establish a reasonable likelihood that a similar expert could have been found at the pertinent time by an ordinarily competent attorney using reasonably diligent effort.
>
> In deciding whether a petitioner has met this burden a court must look to all the circumstances of the case and consider all the evidence presented. **See Strickland**, 466 U.S. at 695, 104 S.Ct. at 2069, 80 L.Ed.2d at 698. In Elledge's case, he has made no showing that it was reasonably probable that an ordinary, reasonable lawyer, operating under the time and monetary constraints Elledge's counsel faced and using reasonable diligence, would have discovered a psychiatrist who would have testified as did Dr. Lewis. Accordingly, Elledge cannot demonstrate that he was prejudiced by counsel's failure to investigate his mental condition and produce a favorable expert witness.

(4) Duty of Loyalty -

Finally, appellant urges that counsel was ineffective for mentioning in the opening statement that appellant bore culpability for the murder of Sharilyn Richie and that the real question for the jury was to decide the degree of culpability.

In light of the fact that Glock and his codefendant were captured in possession of the victim's auto and with her property, and that Glock had given both an individual confession and a joint confession with his codefendant admitting his involvement in the kidnapping and murder, it cannot be deemed an unwise tactic to attempt to gain credibility with the jury by seeking to focus on the degree of culpability of the appellant rather than to absurdly deny the facts of the crime. Cf. McNeal v. Wainwright, 722 F.2d 674 (11th Cir. 1984), wherein the court opined:

> Both the state court and the district court were correct in holding that this argument amounted to a tactical argument well within the discretion of counsel, so obvious from the record that no evidentiary hearing was necessary. **Schultz v. Wainwright**, 701 F.2d 9000, 901 (11th Cir. 1983); **Dickson v. Wainwright**, 683 F.2d 348, 351 (11th Cir. 1982).
>
> [2,3] The sixth amendment guarantee of effective assistance of counsel is counsel reasonably likely to render and rendering reasonably effective assistance given the totality of the circumstances. **Wiley v. Wainwright**, 709 F.2d 1412, 1413 (11th Cir. 1983). Counsel will not be deemed unconstitutionally deficient because of tactical decisions. **Adams v. Wainwright**, 709 F.2d 1443, 1445 (11th Cir. 1983); **Ford v. Strickland**, 696 F.2d 804, 820 (11th Cir. 1983) (en banc); see **United States v. Costa**, 691 F.2d 1358, 1364 (11th Cir. 1982). McNeal's attorney's arguments to the jury concerning manslaughter were tactical and strategic. Throughout the trial and argument, his attorney stressed McNeal's emotional state in an attempt to negate premeditation. In view of the overwhelming evidence against McNeal, including a tape recording of his confession to the shooting,

> the strategy of trial counsel was proper and would not amount to a constitutional violation.
>
> (text at 676)

The record on appeal, in totality, demonstrates that trial counsel acted as an advocate and did not abandon his client in either the guilt or penalty phases of trial.

The instant claim is meritless and warrants summary denial of the motion for post-conviction relief.

Claim V - Whether Glock's eighth amendment rights were violated allegedly because mental health experts rendered professionally inadequate evaluations -

Glock complains (1) that Dr. Fesler was appointed on defense counsel's motion to determine Glock's competency to stand trial and counsel allegedly failed to provide relevant background information; (2) that prior to sentencing Dr. Stephen Szabo was appointed as a confidential expert to evaluate Glock for possible mitigation and failed to find any; (3) the other expert appointed for sentencing Dr. Gerald Mussenden allegedly did not have access to appellant's family or other records. Information available was not reviewed by Dr. Mussenden.

The instant record reflects that trial counsel filed a motion pursuant to Rule 3.216 to determine the accused's competence to stand trial and sanity at the time of the offenses (R 110-111). He also asked for an order providing for the payment of fees to psychiatrists to be selected by the accused to

assist in the sentencing proceeding (R 28-29).[5] Further, counsel for appellant asked for similar relief for the appointment of a psychologist (R 137-139).

At the hearing on December 22, 1983, Glock's counsel stated that the court on December 12, had granted the request for the appointment of a psychiatrist for penalty purposes (R 327). The trial court granted the motion for appointment of a psychologist and Dr. Mussenden was appointed (R 331, R 149-150).

Trial counsel utilized the testimony of Dr. Mussenden at the penalty phase proceedings (R 2239-2271).

Based on the pleadings furnished by appellant, relief can be summarily denied without an evidentiary hearing. At the time of trial and sentencing, Glock's counsel had available to him: (1) a psychological evaluation conducted by Dr. Gerald Mussenden which concluded that Glock was intelligent, competent to stand trial, competent at the time of the offense and that he could benefit from rehabilitation (Petitioner's App. 8); (2) a psychiatric evaluation by Dr. James Fesler who also found that appellant understood the charges against him and its possible consequences; there was no indication of insanity and Glock was fully capable of standing trial (Petitioner's App. 9); (3) a report from Dr. Stephen Szabo who opined that appellant was <u>not</u> suffering from any significant mental or emotional illness at the time of the evaluation nor did he indicate that he previously had so

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[5] These two motions were granted (R 136-137).

suffered. Furthermore, it did not appear that Glock was under the influence of extreme mental or emotional disturbance, was not under extreme duress or the substantial domination of his accomplice at the time of the crime; and Glock was able to appreciate the criminality of his conduct and to conform to the requirements of law. Glock was fully competent and capable of cooperating with his attorney at the present time and was capable and competent at the time of the alleged crime (Petitioner's App. 10).

The gist of the present claim appears to be that counsel may have been negligent in failing to canvass the entire continent or in failing to go to New Haven, Connecticut to find Dr. Merikangas who now asserts his view of Glock's dependent personality (a view consistent with Mussenden's testimony that Glock was easily influenced - R 2250).

Such second-guessing by a different "expert" for the appellant does not mean that the earlier experts failed to conform to the requirements of the profession in conducting their evaluation. See James v. Wainwright, (Case No. 86-320-Civ-T-10(C), May 4, 1987) p.6-9, a copy of which is attached hereto.

Appellee further agrees with the trial court's analysis describing the dissimilarities between the instant case and Mason v. State, 489 So.2d 734 (Fla. 1986) and State v. Sireci, 502 So.2d 1221 (Fla. 1987) at pages 4 through 7 of his order denying

post-conviction relief and would adopt it herein rather than burden the Court simply by repetition.[6]

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[6] No evidentiary hearing is required every time a collateral death row inmate under a warrant mentions that a new psychologist has information to offer. See James v. State, 489 So.2d 737 (Fla. 1986); Witt v. State, 465 So.2d 510 (Fla. 1985).

CONCLUSION

Based on the foregoing reasons, the Rule 3.850 motion to vacate and application for stay of execution was properly denied and this Court should affirm.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Robert J. Landry

ROBERT J. LANDRY
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Office of the Capital Collateral Representative, 1533 S. Monroe Street, Tallahassee, Florida 32301, this 9th day of January, 1989.

Robert J. Landry

OF COUNSEL FOR APPELLEE