IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,935

NORMAN PARKER,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT, DADE COUNTY, FLORIDA
CRIMINAL DIVISION

BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

FARIBA N. KOMEILY
Florida Bar No. 0375934
Assistant Attorney General
Department of Legal Affairs
401 N. W. 2nd Avenue,
Suite N921, P. O. Box 013241
Miami, Florida 33101
(305) 377-5441

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INTRODUCTION

This is an appeal from a denial of a motion for post-conviction relief. The consecutively paginated record on appeal and transcripts of the evidentiary hearing are referred to as "PCR. ___." The record on direct appeal of this case, Florida Supreme Court Case No. 61,512, is referred to as "R. ." The symbol "T. " refers to thee trial transcripts from the direct appeal proceedings.

STATEMENT OF THE CASE AND FACTS

A. Procedural History

The defendant was indicted for one count of murder and four counts of robbery, sexual battery and unlawful possession of a firearm during commission of a felony. (R. 11-15a). He pled not guilty and was tried in September, 1981. On September 18, 1981, the jury found the defendant guilty as charged. (R. 38-40). The penalty phase was conducted on September 21, 1981 and the jury recommended a sentence of death on that date by a vote of 10 to 2. (R. 1453). The trial court sentenced the Defendant to death on November 18, 1981. (Id).

This Court affirmed the conviction and death sentence in 1984, having established the following historical facts:

> The evidence at trial established that on July 18, 1978, defendant and his partner Manson were admitted to a Miami home in order to complete an illegal drug transaction with two male occupants of the home. Soon thereafter, defendant and Manson produced a sawed-off shotgun and a chrome-plated revolver, respectively, and demanded cocaine and money from the two victims. The two victims were forced to surrender jewelry, strip naked, and lie on a bed. Two other occupants, a female and her boyfriend (Chavez), were discovered in another room and also forced to strip naked and surrender jewelry. All four victims were then confined in the same room, on the

same bed. Defendant and Manson exchanged weapons and defendant guarded the four victims while Manson searched the home for additional loot. Defendant threatened to kill the victims because he had escaped from jail and had nothing to lose. The victims pleaded with defendant and Manson to take what they wanted and leave. Chavez also pleaded with defendant and Manson to leave his girlfriend alone. After a period of time, defendant aimed the revolver at Chavez's back, whereupon Manson handed defendant a pillow. Defendant then shot Chavez through the pillow. The other three victims heard the muffled shot and nothing further from Chavez. Chavez died from a single gunshot wound to the chest. Defendant then committed a sexual battery on the female. Defendant and Manson fled, but were later identified by the surviving victims from a photographic lineup.

On August 24, 1978, defendant shot a man in a Washington, D.C., bar. A bullet from this victim's body was matched with the bullet taken from Chavez's body. Jewelry found in possession of the defendant in D.C. was similar to jewelry taken from the Miami victims. Defendant testified that he had been in D.C. during the summer of 1978, including the day that the Miami murder was committed. Four other defense witnesses testified by deposition that defendant was in D.C. during the summer of 1978 but, on cross examination, were unable to swear defendant was in D.C. during the period, July 17-19, 1978.

During the penalty phase, the evidence showed that defendant had been sentenced previously to life imprisonment in 1967 for a first-degree murder committed in Dade County, Florida, and that he was sentenced to life imprisonment for a second-degree murder committed in D.C. in August, 1978.

Parker v. State, 456 So.2d 436, 440 (Fla. 1984).

The defendant had raised eight (8) issues on direct appeal as follows:

I.

WHETHER THE DEFENDANT WAS DENIED HIS FLORIDA AND FEDERAL CONSTITUTIONAL RIGHTS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS WHERE THE COURT FAILED TO SUPPRESS STATEMENTS OBTAINED BY INTERROGATING OFFICERS IN VIOLATION OF THE DEFENDANT'S INVOCATION OF HIS RIGHTS TO COUNSEL AND SILENCE AND WHERE THE STATEMENTS WERE INVOLUNTARY?

II.

WHETHER THE DEFENDANT WAS DENIED HIS RIGHT TO A FAIR TRIAL, DUE PROCESS AND A JURY CONSTITUTED PROM A FAIR CROSS SECTION OF THE COMMUNITY AS GUARANTEED BY THE FLORIDA AND FEDERAL CONSTITUTIONS?

III.

WHETHER THE TRIAL COURT ERRED IN REFUSING THE DEFENSE REQUEST FOR ADDITIONAL PEREMPTORY CHALLENGES AND PROHIBITING THE DEFENSE FROM EXERCISING A REQUESTED CHALLENGE AFTER TEN HAD BEEN USED?

IV.

WHETHER THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTION TO INTRODUCE THE DEFENDANT'S STATEMENT AS TO THE WASHINGTON, D.C. SHOOTING WHEN AN INDEPENDENT CORPUS DELICTI HAD NOT BEEN ESTABLISHED?

V.

WHETHER THE CIRCUMSTANTIAL EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE GUILTY VERDICTS WHERE THERE WAS A TOTAL ABSENCE OF SUBSTANTIAL, COMPETENT EVIDENCE THAT THE DEFENDANT PARTICIPATED IN ANY OF THE CHARGED OFFENSES?

VI.

WHETHER THE ADMISSION OF EVIDENCE CONCERNING THE DEFENDANT'S USE OF OTHER NAMES IMPROPERLY SUGGESTED THAT HE WAS A CRIMINZU AND CONSEQUENTLY DEPRIVED HIM OF A FAIR TRIAL?

VII.

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO INTRODUCE INTO EVIDENCE SEVERAL PHYSICAL ITEMS IN THE ABSENCE OF A SUFFICIENT PREDICATE FOR INTRODUCTION WHERE THERE EXISTED A SUBSTANTIAL QUESTION AS TO RELEVANCY AND AUTHENTICITY?

VIII.

WHETHER APPLICATION OF SECTION 921.141, FLORIDA STATUTES, TO IMPOSE DEATH UPON THE DEFENDANT VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

See brief of Appellant, Case No. 61,512; Parker v. State, supra.

On January 2, 1987, the defendant filed a motion to vacate judgment and sentence of conviction, raising thirteen (13) issues which, in the order alleged in the trial court, have been argued as issues I and II, X, IV, XI, XII, XIII, VIII, XIV, XV, IX, XVI, and XVII on appeal herein. (PCR 27-89). Issue thirteen of the motion to vacate, alleging impermissible racial considerations in the Florida's death penalty system, has been deleted on appeal herein.

The State filed a response to the motion to vacate, stating that as to claim I, in the appeal herein, alleging ineffective assistance of counsel at penalty phase, the record demonstrates no prejudice to the defendant, and as to claim 11, alleged ineffective assistance of counsel at guilt phase, the record conclusively refuted the defendant's allegations and that some of these allegations were insufficient as a matter of law. (PCR. 205-212). As to the remainder of the claims in the motion to vacate, points on appeal IV and VIII through XVII, inclusive, the State argued that same could have or should have been, or in fact were raised on direct appeal and were thus procedusally barred. (PCR. 212-216).

During the pendency of the above post conviction proceedings, the governor issued a death warrant for the defendant's execution. Pursuant to Fla.R.Crim.P. 3.851 the defendant filed a petition for writ of habeas corpus in this Court, raising the following seven claims for relief which were decided adversely to him:

I.

MR PARKER WAS CONVICTED OF CAPITAL MURDER AND SENTENCED TO DEATH ON THE BASIS OF STATEMENTS OBTAINED IN VIOLATION THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

II.

THE TRIAL COURT'S CONSTITUTIONALLY DEFICIENT FELONY-MURDER INSTRUCTION WAS

FUNDAMENTAL ERROR WHICH VIOLATED MR. PARKER'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS, AND APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO URGE THIS DISPOSITIVE, CRITICAL CONSTITUTIONAL CLAIM.

III.

MR. PARKER WAS DENIED HIS FUNDAMENTAL FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS BY THE TRIAL COURT'S FAILURE TO INSTRUCT ON LESSER INCLUDED OFFENSES ALTHOUGH MR. PARKER HAD MADE NO RECORD WAIVER OF SUCH INSTRUCTIONS, AND APPELLATE COUNSEL WAS PREJUDICIALLY INEFFECTIVE FOR FAILING TO URGE THESE CLAIMS ON DIRECT APPEAL.

IV.

THIS COURT HAS INTERPRETED 'COLD, CALCULATED, AND PREMEDITATED' IN AN UNCONSTITUTIONALLY OVERBROAD MANNER, AND HAS APPLIED THIS AGGRAVATING CIRCUMSTANCE UNCONSTITUTIONALLY AND OVERBROADLY TO THIS CASE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, AND THE APPLICATION OF F.S. SECTION 921.141(5)(I) IN THIS CASE VIOLATED DUE PROCESS, AND EX POST FACTO CONSTITUTIONAL PROTECTIONS.

V.

MR. PARKER WAS DENIED HIS RIGHTS TO AN INDIVIDUALIZED AND FUNDAMENTALLY FAIR AND RELIABLE CAPITAL SENTENCING DETERMINATION AS A RESULT OF THE PRESENTATION OF CONSTITUTIONALLY IMPERMISSIBLE VICTIM IMPACT INFORMATION, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS AND APPELLATE COUNSEL WAS PREJUDICIALLY INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL.

VI.

MR. PARKER'S DEATH SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

VII.

MR. PARKER'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY THAT THE COURT COULD IMPOSE CONSECUTIVE SENTENCES ON THE OFFENSES ON WHICH MR. PARKER WAS CONVICTED, WHICH COULD ALSO HAVE BEEN ORDERED TO BE SERVED CONSECUTIVELY TO MR. PARKER'S EARLIER FLORIDA AND WASHINGTON, D.C., CONVICTIONS, WAS A LEGITIMATE, PROPER AND LAWFUL THIRD ALTERNATIVE TO A SENTENCE OF DEATH OR LIFE IMPRISONMENT, THUS MISINFORMING AND MISLEADING THE JURY IN FAVOR OF VOTING FOR DEATH, AND VIOLATING MR. PARKER'S RIGHTS TO AN INDIVIDUALIZED AND RELIABLE CAPITAL SENTENCING DETERMINATION.

Petition for writ of habeas corpus, case no. 72,466; See also, Parker v. Dugger, 537 So.2d 969 (Fla. 1988).

During the pendency of the above proceedings, the trial court granted the defendant a stay of execution for an evidentiary hearing an his claim of ineffective assistance of counsel at the penalty phase. (PCR. 220). The evidentiary hearing on this claim commenced on December 12, 1988 and was concluded on December 13, 1988. (PCR. 1542-2114).

After the conclusion of the evidentiary hearing, the defendant on December 23, 1988, filed a "Supplement" to his motion to vacate adding four (4) new claims, which have been argued as points on appeal 111, V, VI, and VII, herein. (PCR. 1384-1452). The defendant also presented additional arguments and factual recitations as to three previously raised issues,

claims III, VI, and X in the motion to vacate argued as points on appeal IV, XIII and IX herein respectively. (Id). The trial court summarily rejected the new claims in the defendant's supplement as "untimely". (PCR. 1456).

The trial court also denied the claim of ineffective assistance of counsel at penalty phase, after making factual and credibility determinations adverse to the defense, as set forth in detail in the subsequent section herein. (PCR.1453-55), pp. 36-38, infra. The remainder of the claims had been summarily rejected prior to the evidentiary hearing. (PCR. 1457-58, 1456).

B. Evidentiary Hearing

In his claim of ineffective assistance of counsel at penalty phase, the defendant alleged that trial counsels, Messrs. Roffino and Velayos, failed to investigate and prepare for the penalty phase because they failed to present his alleged history of drug abuse, deprived background, and military service to the jury and to the psychiatrist, Dr. Stillman, who had examined him prior to trial, but did not testify. (PCR. 36-39). Dr. Stillman's report to the defense at the time of trial had concluded that, if it could be shown that the defendant was "seriously intoxicated", in "a severely toxic condition", and in a "massive drug misuse", at the time of the offenses, then the defendant "may have been temporarily insane, not knowing right

from wrong or the nature or consequences of his behavior, because of his severe intoxication, and acting in a disihibited [sic] uncontrolled fashion." (PCR. **29).** Dr. Stillman had also concluded that, "clinically, this subject [defendant] gives no evidence of a major mental disorder of psychotic praportions. He would appear to have some personality difficulties and tends to veer in the direction of being antisocial." **(PCR.** 268). The defense at trial was alibi; the defendant maintained that he was in Washington, **D.C.** at the time of the crimes herein.

1. The defense case

a) Trial counsel Roffino

The first witness at the evidentiary hearing was Michael Roffino, one of the two trial counsel. Mr. Roffino stated that he had graduated law school in January, **1976 and** passed the Florida Bar examination in June, **1976. (PCR.** 1557). **He** was an assistant public defender in 1976 and became a senior trial attorney in that office in late **1979.** (PCR. **1558).** In **1979-1980 he** had **been** involved in a number of first degree murder cases and other life felonies. Id. He had tried five or six capital cases prior to his involvement in the instant trial. **(PCR.1599).** Mr. Roffino testified that he became involved in this case in 1981, because two attorneys, Messrs. Mervis and Aaron, who had been responsible for trial, left the public defender's office. (PCR. 1559). The latter two attorneys "had put a great effort in this

case," and Mr. Aaron wanted to ensure its proper handling after his departure from the office. Id. Thus, Roffino and another assistant public defender, Mr. Velayos, jointly worked on the case from the summer of 1981 until the end of trial. Id. However, Roffino "had the responsibility for Mr. Parker's trial." Id.

Mr. Roffino stated that this case differed from his prior capital trials, because he became involved in it a short time prior to trial. (PCR. 1560). Roffino added, however, that this case "had been fully prepared", and "most of the work was done", when he became involved. Id. Additionally, he stated that whereas he normally prepares for the penalty phase first, in the instant case he "had to get ready for the trial first and the death penalty phase next after I had that, had that under control." (PCR. 1561-62). He had to review "stacks of files, file boxes", rely upon the work already done, and then make strategic decisions. (PCR. 1565, 1595).

Roffino testified that his practice in preparing and investigating the death penalty phase normally begins with reviewing the client's life from child birth through the time of trial for anything that may "sway a jury". The process starts by speaking with the client and reviewing documentation such as:

> . . . school records, military, if the person had been in the military, childhood experiences, psychological status of a person, as well as, psychological status of the person in the past, any treatment that's been received along those lines. Medical difficulties that they have experienced may relate to . . . psychological problems. Substance abuse history and what type of -- what type of substance abuse, how long, under what circumstances and how it relates to the other criminal history, if there is any other individuals. Also, with regard to the criminal history, what the circumstances of those prior cases might be . . . .

(PCR. 1563-64).

With respect to the instant case, Roffino stated that he had spent "a great deal of time" with the defendant prior to trial. (PCR. 1589). The defendant "was intelligent, alert and knew what he wanted, in terms of his defense." (PCR. 1588). The defendant gave general information in terms of names of family members, but he had been away and out of touch with his family for a long time. Id. He had been in prison for ten to eleven years prior to escaping and committing the crimes herein within five to six weeks of the escape. He had then left for Washington, D.C., where he committed unrelated offenses for which he was taken into custody in that jurisdiction. (PCR. 1589).

Nevertheless, Roffino made "numerous attempts" to contact family members in order to obtain background information on the defendant. (PCR. 1572). Roffino actually did see some family members in person, although he could not remember their specific names at the evidentiary hearing. Id. Raffino testified that the "family was rather unconcerned or uncooperative." (PCR. 1573, 1613). He specifically recalled one instance where he was attempting to contact one family member by telephone but the person answering the telephone would not allow a discussion. (PCR. 1572). Roffino had to enlist the defendant's stepmother's assistance, but even a three-way call with the stepmother did not help. (PCR. 1573).

Roffino stated that from his discussions with the defendant and his family, there was nothing to indicate that the defendant might be suffering from an extreme emotional disturbance or that he was unable to fully appreciate the criminality of his conduct. (PCR. 1586-87, 1591). Prior to this trial, Roffino had represented "many" people who had, or appeared to have, emotional or mental health problems (PCR. 1583). He had also had extensive contact with insanity cases and competency problems. (PCR. 1608).

Roffino recalled some discussions with family members with respect to whether the defendant had any serious injuries, specifically head injuries. (PCR. 1609). He obtained knowledge

about a "fall of some type," but nothing to indicate any serious head injuries. Id.

Roffino also investigated and knew about the defendant's drug and alcohol use. (PCR. 1576). Roffino stated that in his discussions with the defendant, he learned that there was drug "use" but not an "abuse problem." (PCR. 1576, 1577, 1601). The defendant had stated that he was not regularly using or dependent upon drugs, but used them "socially." (PCR. 1602).

Roffino testified that he considered using evidence of intoxication by drugs and alcohol as mitigation, but that he simply "didn't have the facts" to support such a theory. (PCR. 1581-82). There was no evidence pointing to intoxication from either the defendant or the three eyewitnesses to the crime, Id. Nor were the facts of the offense consistent with intoxication. (PCR. 1582-83).

More importantly, Roffino testified that the defendant consistently denied committing this crime. (PCR. 1580). The defendant's position, even after conviction, and with respect to the penalty phase, was that "the jury was going to have to see that he had not committed the crime." (PCR. 1684). In view of the defendant's position and the strong presentation of an alibi defense during the guilt phase, Roffino decided that the "main tactic" at the penalty phase would be residual doubt. (PCR. 1617-

18). Roffino stated that he did not present any evidence of "drug abuse" or mental disturbances as a result thereof, because not only was there no evidence of abuse, but that, "drug abuse" would have been inconsistent with the residual doubt theory. (PCR. 1577-79, **1587).**

Roffino stated that instead of focusing on abuse, he introduced letters from the defendant's prison files commending the latter for his work in anti-drug counseling while in jail, in order to demonstrate that the defendant had redeeming qualities and served a useful purpose in prison. **(PCR. 1575-77;** see **also T. 2567-70; 2574-75).** Roffino added that presentation of **drug** abuse evidence would thus have been inconsistent with the positive evidence of redeeming qualities as well. **(PCR. 1577).**

Mr. Roffino was also questioned **as** to why he did not utilize Dr. Stillman's report during the penalty phase. Roffino stated that he had promptly made a decision to keep Dr. Stillman off the witness list, and not call him during the penalty phase. **(PCR. 1578-79).** Roffino had discussed Dr. Stillman's report with prior defense counsels, Mervis and Aaron, and concluded that the negative aspects of the report outweighed the positive aspects. Id. Dr. Stillman had orally reported that the defendant was "sociopathic," and his "personality traits were such that it was consistent with the type af crime that had actually taken place." (PCR. **1579).** Roffino stated that this was inconsistent with the

residual doubt strategy that he was trying to maintain during the penalty phase. (PCR. 1579). Testimony from Dr. Stillman, on crass-examination, that defendant was a "psychopath, antisocial" would not have been helpful either. (PCR. 1593). Thus, even though he knew that pursuing Dr. Stillman's report in some areas (intoxication) might be helpful, Roffino declined to do so because of the above noted negative aspects of the report, and because his own contacts with the defendant did not verify the areas of concern noted by Dr. Stillman. (PCR. 1592).

Finally, Mr. Roffino stated that he was familiar with, but did not present, any of the defendant's record of military service. (PCR. 1589-90). He explained that this was a "judgment call", because the negative aspects of the defendant's military service outweighed the positive side. (PCR. 1590). Roffino stated that the positive aspect was that the defendant had achieved a rank of PSC. Id. However, the "downside" of it was that the defendant had gone absent without leave, had taken a military vehicle and had been prosecuted and jailed for this theft. Id. Moreover, the defendant had received a "dishonorable discharge" from the military. Id.

b) Trial defense counsel Velayas

The second trial defense counsel, Daniel Velayos, also testified at the evidentiary hearing. (PCR. 1795). Mr. Velayos

is a senior attorney with the public defender's office. He had been a criminal defense attorney for four years prior to his participation in this trial. He had conducted three first degree murder trials and one other penalty phase, (PCR. 1801, 1827, 1835).

Mr. Velayos testified that he was assigned to assist Mr. Roffino, and they "split the responsibility all along." (PCR. 1796). Velayos stated that they both were working on both the guilt and penalty phases together, although he actually presented the penalty phase. (PCR. 1797, 1811). Mr. Roffino was lead counsel, and the voluminous files were physically in the latter's office, but both counsel were "reading together, and we used to gather on weekends. I remember we discussed the case and what witnesses we would call and what would be our defense. . . . We just kind of worked together in both sides of the case. . . ." (PCR. 1801, 1811).

The case files were "for the most part . . . pretty prepared" and developed by prior counsels, Aaron and Mervis (PCR. 1802), prior to this witness' involvement. Some materials presented during the penalty phase had already been contained in the voluminous files. Id. Velayos did not recall most of the contents of the file because he had nat seen the defense files in

at least two years.[1] Prior defense counsels, Mervis and Aaron, had worked "very hard on the case". In fact, this case was Mr. Aaron's only work load prior to the latter's departure. (PCR. 1799, 1832).

Mr. Velayos added that he knew "quite a bit" about the defendant's background from the time the latter was 15 or 16 years old until the time of trial. (PCR. 1814-15). He also stated that he had spoken to one or two persons in the defendant's family, probably about the defendant's early childhood, although he did not have a specific recollection of the conversations. (PCR. 1813-15). Mr. Velayos did specifically recall, however, having spoken to the defendant's stepmother, prior to the latter's testimony at the penalty phase, contrary to the allegations of lack af preparation in the motion for post conviction relief. (PCR. 1827). Mr. Velayos could not specifically say whether the family members had been cooperative or not, but he did remember that he personally had to buy clothes for the defendant because the latter could not get clothes from other sources. (PCR. 1829-30).

This witness also testified that he had defended a number of people whom he had felt had mental health problems that needed investigation. (PCR. 1833). He thus knew how to deal with "red

[1] The record reflects that collateral counsel were in possession of the trial files. (PCR. 243-44).

flag" indications of mental health problems. (PCR. **1834).** During his lengthy conversations and interactions with the defendant, Mr. Velayos never observed any mental health issues in this case. (**PCR. 1834,** 1857). **He** never saw any evidence of emotional or mental impairment in the defendant. (**PCR.** 1842).

Mr. Velayos **also** stated that he decided not to utilize Dr. Stillman at the penalty phase, because the latter's report indicated that the defendant had "an antisocial psychopathic personality." (PCR. 1825). Mr. Velayos felt that the presentation of this information to the jury would be damaging. Id.

Moreover, the doctor, in the first part of his report, had made a lot of "affirmative statements" as to the defendant's mental condition which would indicate to a jury that "there was really nothing wrong with the defendant." (**PCR. 1818-19,** 268-69). **Dr.** Stillman's report was also understood by Velayos to mean that, "if there was evidence that Mr. Parker was under the influence of drugs or alcohol [at time of crime], then he [Stillman] thought that he had a diminished capacity to understand the nature of his acts." (PCR. **1820, 270).** However, Mr. Velayos stated that the defendant "had always denied his involvement in the case at all times, and there was no evidence that if, in **fact,** he was there he was intoxicated in any way." (**PCR, 1821).**

This witness then added that in his opinion it is not reasonable, either in **1981** at the time of this trial, or now with all of his added expertise and information in capital trials, to argue a strong case of alibi in the guilt phase , and then claim diminished capacity in the penalty phase. (PCR. 1849-50, **1836-38).** Mr. Velayos stated that his decision would not change unless "extraordinary" mental health problems such as "a severe organic brain disorder" were involved. In that case the status of the entire trial would probably have to be changed to present an incompetency defense, and the defendant would have to acknowledge that he committed the crime. **(PCR. 1549-50).**

Finally, Mr. Velayos stated that although he considered Dr. Stillman's report harmful, he did not consider or attempt to use any other psychologists or psychiatrists. (R. **1858).** The witness stated that from his experience in the Dade County courthouse and in the public defender's office, Dr. Stillman's reputation is that of "perhaps the most liberal, perhaps, diagnostician." Id. The witness agreed with the lower court's observation that, "In other words, if he [Dr. Stillman] didn't find anything you didn't think no one else could find anything." **(PCR. 1858-59).**

c) Defense counsel Mervis and Aaron

The collateral counsel at the evidentiary hearing considered whether ta call defense counsels Aaron and Mervis. (PCR. 1832, 1898-99). However, despite being given an opportunity to do so (PCR. 1832, 1898-99), collateral counsel chose not to call these witnesses. (PCR. 1904-5).

d) Dr. Stillman

Dr. Stillman testified that he is in the private practice of psychiatry, and has expertise and training in substance abuse disorders. (PCR. 1623-24). He stated that on January 8, 1980, in excess of a year prior to the trial herein, assistant public defender Mervis asked him to examine the defendant. (PCR. 1628-29, 271). Dr. Stillman was to evaluate the defendant with respect to statutory mitigating factors listed in 921.141(6), and advise as to any other information or conclusions, which although not listed in the statute, "may still reflect favorably upon the character of Mr. Parker or help to explain his criminal behavior." (PCR. 271).

Dr. Stillman thus examined the defendant in "great detail." (PCR. 1629). Defense counsel Mervis and Aaron had supplied Dr. Stillman with two prior reports of a 1976 psychological evaluation and a 1977 psychiatric evaluation of the

defendant, performed while he was in custody of the Department of Corrections. (PCR. 1631-37; 272-75). These reports stated that the defendant had started using drugs while in the army in Korea (PCR. 274), and blamed drugs and alcohol for his 1967 conviction of first degree murder, for which he was then serving jail time. (PCR. 272, 274). The psychologist who had evaluated the defendant in 1976 had administered various psychological tests, including Beta IQ, Wrat Reading, Bender Visual Motor Gestalt, H.T.P., Rorschack, and Minnesota Multiphasic Personality Inventory. (PCR. 272). This psychologist had reported that the test results reflect defendant is of average intelligence with no signs of "organic involvement or psychopathology." Id.

Dr. Stillman made his report to the defense counsel shortly after his examination in 1980. (PCR. 1630). The actual written report, however, was not produced until September 15, 1981. (PCR. 1630, 267). In his report, prior to trial, Dr. Stillman recited the defendant's background information, including the demise of his father, being raised by his grandmother, his poor juvenile record, his school and work record, his service and dishonorable discharge from the army in 1965, his arrest, and, circumstances of the offense and incarceration for first degree murder from 1966 until his escape in February, 1978. (PCR. 267-69). Dr. Stillman's report also stated that, according to the defendant, he had previously had pneumonia, asthma, an operation for hemorrhoids and a chelazioh

removal from his eyes. However, according to the defendant, "He has had no other injuries or accidents, has never had epilepsy or diabetes, he has never been in a mental hospital, has used marijuana and cocaine, but very little of these, with no other drugs. He has used alcohol to some small degree socially, usually drinking cognac and takes no medication." (PCR. 268). Dr. Stillman's report also noted that the defendant was of "average intelligence," his "memory for recent and remote events seemed fairly good," and his "judgment seems adequate and his ability to reason abstractly and discriminatively is quite adequate," (PCR. 267).

In his pretrial report, Dr. Stillman also stated that the defendant told him that he was in Washington,D.C. at the time of the crimes and claimed no knowledge of the offenses herein. (PCR. 268). Dr. Stillman thus, in 1981, concluded:

> Clinically this subject gives no evidence of a major mental disorder of psychotic proportions. He would appear to have some personality difficulties and tends to veer in the direction of being antisocial.... For all intents and purposes, the subject is presently sane and competent. In terms of his condition at the alleged time of the alleged offenses, it would appear that the subject tends to totally deny his participation in the offense, and furthermore, it would appear that he has little recollection of the situation. It is apparent that he was involved with drugs rather heavily at that time, and there is some question as to his ability

to function in a sane manner and a competent manner during that period of time. Insufficient information has been offered concerning the state of his functioning at the alleged time of the alleged offense for which he is in the process of being tried. A summary of the events that are alleged to have taken place, along with the indictment have been provided and it would appear that with all the details, the subject, indeed, if he were in a normal state, he should have been able to recall many of the details. His apparent lack of awareness of what took place back in 1978, indicates the possibility that he was in an altered state of consciousness, because of drug abuse, mainly cocaine, which he was involved with in various ways. Apparently, there was a co-defendant involved with him in the offense. In view of the possibility that he was seriously intoxicated and functioning in a toxic state, due to drug and alcohol problems, which he is reported to have had, it may well indeed be that he was not sane and competent at the alleged time of the alleged offense because of massive drug misuse and a severely toxic condition. If, indeed, it can be demonstrated that he was in such a state, then we are dealing with a person who may have been temporarily insane, not knowing right from wrong nor the nature or consequences of his behavior, because of his severe intoxication and acting in a disinhibited uncontrolled fashion. However, reports presented up to this point, do not make much mention of his being in a severely intoxicated toxic state, although it is suggested by materials presented.

. . .

At the present time, therefore, this subject is sane and competent and would appear to have been so at the alleged time of the alleged offense unless it can be demonstrated that he was, indeed, in a severely toxic state, resulting from

> abuse of alcohol and drugs over a sustained period of time.
>
> (PCR. 268-70).

At the evidentiary hearing, Dr. Stillman stated that the above passages from his 1981 report were his way of requesting additional information from trial defense counsel. (PCR. 1663). By the wording of his report, Dr. Stillman was "trying to flag the idea that there should be more investigation into his condition with regard to drug and alcohol abuse." (PCR. 1639). He stated that he does not usually ask for information from attorneys, "I don't have to." (PCR. 1676). According to Dr. Stillman, "ninety nine percent of the attorneys [having read the above passage], jump on that pretty fast." Id.

Dr. Stillman then added that he had not received additional information from trial defense counsel with respect to the defendant's drug and alcohol abuse. However, Dr. Stillman stated that he had currently received additional history from collateral counsel in the form of sworn statements from various family members, indicating that the defendant "had some kind of brain damage." (PCR. 1644). The family affidavits had stated that the defendant was dropped on his head when he was one and one-half years old, and became unconscious at the time. Id. A second instance of unconsciousness was also noted by family members when the defendant was approximately 12-13 years old and was reportedly hit by a train. Id.

In view of the above "extremely valuable" information as to head injuries (PCR. 1646), and information from the defendant himself that he had used more drugs and alcohol, including hallucinogens, such as peyotee, than he had previously admitted to (PCR. 1676-77), Dr. Stillman stated that he had now formed a new diagnosis. Dr. Stillman, at the evidentiary hearing, was of the opinion that the defendant suffers from "organic brain syndrome, which under the influence of the substances, even of a small quantity, would have rendered him insane and incompetent. . . ." (PCR. 1649-50). The defendant, according to Dr. Stillman, had a "long-standing, growing and worsening organic brain syndrome," whereby a "small amount of substances would produce a large effect that would interfere with his consciousness, with judgment, with his abstract reasoning, with his discriminative reasoning, with his insight, with serious functions so that he could not project consequences and so on." (PCR. 1651).

The defendant's medical history from Jackson Memorial Hospital, his school records, his military records and Department of Corrections records were all admitted into evidence. (PCR. 1674). None of these records reflected any head injuries or periods of unconsciousness or brain damage. (PCR. 388-653, 844-1383; 1455). Dr. Stillman clearly and expressly stated that he was solely relying on family member affidavits for his conclusion as to head injury and brain damage. (PCR. 1656). He added that

detecting brain damage has a "creative aspect" to it. (PCR. 1658).

On cross-examination, Dr. Stillman stated that the primary symptom of brain damage is memory and judgment impairment. (PCR. 1679). The witness stated that he "just felt" that the defendant had some memory difficulties. (PCR. 1680). Dr. Stillman, however, had not read the pretrial and trial testimony (PCR. 1679), and knew "very little'' about the facts of the offenses. (PCR. 1694). When confronted with the defendant's testimony, where the latter had clearly recounted his alibi in Washington, D.C., the details of what he had been doing in that jurisdiction, his account of having killed a person there in self-defense, how he had come to the possession of the murder weapon and jewelry from the Florida offenses, etc., Dr. Stillman admitted that such recitations were not consistent with the brain damage symptom of memory impairment. (PCR. 1680; T. 2259-2284).

Dr. Stillman also stated that he had never read any of the eyewitnesses' testimony. (PCR. 1684). Nevertheless, he maintained that the defendant was in a "toxic state" at the time of the crimes. (PCR. 1684-85). When confronted with the facts of the offense, as testified to by the eyewitnesses - i.e., that defendant had been in the house for approximately one and one-half hours, that he walked around calmly, that he did things to further his purposes, such as ripping out telephones, tying the

victims up, taking their clothes, demanding jewelry and money, etc. - Dr. Stillman admitted that such behavior was inconsistent with toxic psychosis. (PCR. 1686). Nevertheless, the witness still maintained that the defendant was in a toxic state, because eyewitnesses to the crimes are "inexperienced observers" whom the doctor could not rely upon! (PCR. 1686-87, 1690, 1693). Dr. Stillman was then reminded that he had previously relied upon affidavits of family members who are also untrained observers. (PCR. 1687). Dr. Stillman distinguished between the family members and eyewitnesses because the former's observations of the defendant had been "long term," even though the defendant had been incarcerated for the eleven-year period preceding the offenses and had not been living with these family members! Id. Dr. Stillman also maintained that he believed that the defendant had continued his drug usage during incarceration, even though there was evidence of daily urine drug tests at his place af incarceration, because he simply "couldn't trust" the people who performed the tests. (PCR. 1689).

Finally, Dr. Stillman stated that the defendant's brain damage was "moderate." (PCR. 1698). According to Dr. Stillman's scale of the range of brain damage, a person can have "moderate" brain damage, "and be a university professor." Id.

e) Family member testimony

The defense then presented testimony from five family members whose affidavits had been presented to Dr. Stillman by collateral counsel.

James John Parker, Jr., was the defendant's cousin (PCR. 1714-15), and testified that he had known the defendant all of his life. (PCR. 1719). The defendant was raised by his uncle and did not spend much time with his parents. (PCR. 1720). He remembered the defendant's return from the army and stated that the latter was "much more humble, much more pleased with himself" when he came back from the service. (PCR. 1722). This witness first stated that he did not know whether the defendant ever started using drugs. Id. However, he then remembered that the defendant had started using drugs after he was in the wark release center (in 1977). (PCR. 1723). This witness stated that he had actually seen the defendant using drugs, but could not state the frequency of usage. (PCR. 1724). Mr. Parker added that the defendant was also drinking "a little" at the same time; "like a beer or maybe a little bit of cognac at times, but not that much heavy drinking, *you* know." Id.

James Parker did not mention any head injuries suffered by the defendant. This witness had been convicted of a felony prior to the 1981 trial (PCR. 1739-40), and had also used drugs himself

for approximately six months. (PCR. 1728). He had overheard his aunt telling his mother about the defendant's trial. However, he stated that by the time he arrived in the courtroom, the trial and sentencing were completed, so he could not testify. (PCR. 1739). He did not know what sentence the defendant had received. Id.

Doris Rozier, the defendant's cousin, is forty-eight years old, older than the defendant. (PCR. 1741-42). This witness testified that when she was six years old, "a guy was throwing [the defendant] up and missed him, and knocked all that a loose. As a matter of fact, he went unconscious." (PCR. 1744). Ms. Rozier added that the defendant also had another accident where a train had hit his bicycle when he was approximately 12 years old. Id. She stated that, "I think he had a brain contusion,'' although the defendant ran all the way from the site of the accident to Ms. Rozier's house, did not wait "till rescue came," and was not taken to the hospital. Id. The defendant's grandmother, after that incident, had stated "he would be all right." Id. The defendant was not unconscious after this incident. (PCR. 1759). Ms. Rozier testified that the defendant "seemed much wilder . . . just I guess happy," after the train accident. (PCR. 1745). She explained that, "We just took it upon ourself to say the train did it, you know how family do things, they get a lick on the head, they say that's what caused you to act so different, you know." Id.

Ms. Rozier stated that the defendant's mother "was a little heavy on the sauce," and that his father was a womanizer who would sometimes visit the defendant at their grandmother's house. (PCR. 1746). The defendant was raised by his grandmother, and neither of his parents spent much time with him. (PCR. 1747).

This cousin also testified that she knew that the defendant drank and used drugs. Id. She knew that he drank, because she "smelt it on his breath sometimes when we used to talk." Id. She knew about his use of drugs, because "one night," at a "night club," she had seen needle marks in his arms and "assumed he was shooting up." Id. This incident of assumed drug usage had occurred when the defendant was in his early thirties, and had escaped the work release center. (PCR. 1749). Ms. Rozier did not know how often the defendant was using drugs, id., and never saw the defendant doing drugs. (PCR. 1757). She also stated that she had only seen the defendant, "maybe on weekends, once," since he left the work release center until he moved to Washington, D.C. (PCR. 1755). She had not seen the defendant at all before he left the work release center and during his eleven year incarceration at prison. (PCR. 1756).

Patricia Ann Hacker, another cousin of the defendant, stated that her mother and the defendant's mother are first cousins. (PCR. 1770). She got to know the defendant when she moved back

to Florida in 1965. Id. The defendant was incarcerated in 1967. (PCR. 1779). She visited him when he was at the work release center. Id. At the work release center, the defendant was friendly, loving, cheerful and seemed to get along with everybody. (PCR. 1781). This witness did not know whether the defendant ever used drugs; she never saw him do so. (PCR. 1773-74). She came to court twice during the trial (PCR. 1772) and would have testified had she been asked to. (PCR. 1776). She would have testified that in the summer of 1978, she had no knowledge of the defendant doing drugs. (PCR. 1780).

Jacquelyn Parker, the defendant's younger sister did not grow up with the defendant. (PCR. 1861-62). She assumed that her mother did not raise her and the defendant because she had a drinking problem. Id. She stated that although she did not know anything about their father, she had heard that their father spent some time with the defendant. (PCR. 1863-64). This witness came to trial "a couple of times,'' but moved to South Carolina before the sentencing phase. (PCR. 1873). She saw the defendant occasionally when he came back from the service and before he was incarcerated. (PCR. 1875). During the eleven year period of incarceration from 1967 until 1978, she saw the defendant four or five times. Id. After the defendant's escape from the work release center in February, 1978, until the murder herein, five months later, she saw him a few times. (PCR. 1876). During these times, the defendant did not appear to be under the influence of anything. (PCR. 1878).

Inell Parker testified that the defendant is her first cousin, and her husband's nephew. (PCR. **1882).** She stated that the defendant's mother was a nice person who, in her later years, started to drink "quite a bit." (PCR. **1883).** **The** defendant was raised by his grandmother and uncle. **(PCR. 1884).** The defendant's father was "a beautiful guy," "nice," "quiet spoken." (PCR. **1884).** She did not know much about the defendant's growing **up** because she left Florida in **1945** and did not come back until 1965, when the defendant was getting out of the service. **(PCR. 1884-85).** She then **saw** the defendant approximately every weekend. (PCR. 1885). This witness had never seen the defendant use drugs and did not know whether he had or not. Id. She was never contacted by the defense attorneys, but she was present in court during trial. **(PCR. 1891).**

2. State's case

The State presented **the** testimony of Dr. Leonard Haber, Phd. (PCR. 1909). Dr. Haber is a psychologist whom the parties stipulated was qualified to render expert psychological testimony. He has twenty-eight years of experience. **(PCR. 1910).** Dr. Haber testified that he had reviewed the defendant's trial testimony, the three eyewitnesses' trial testimony, the **1988** deposition of Dr. Stillman for the purposes of the evidentiary hearing, the **1981** report of Dr. Stillman, and the affidavits of

the defendant's family members. (PCR. 1911). He also examined the defendant and performed a psychological interview, mental status exam, and the Bender Gestalt Visual-Motor test. (PCR. 1914). This latter test measures mental disorder and organic brain dysfunction. (PCR. 1915). The eyewitness testimony to an offense is "very important" because it assists a determination of the defendant's sanity at the time of an alleged offense. (PCR. 1912). Eyewitness accounts contain evidence of a defendant's frame of mind, intoxication, etc. Id. It does not matter that eyewitnesses are not licensed mental health experts or trained observers. What matters is that the witnesses be credible. Id. The defendant's own trial testimony is also necessary and important, because "there is no better evidence of the thought processes, the ability to form concepts, retain them, organize things, communicate expressions, ideas . . . ." Id.

After his examination and review of accompanying documentation, Dr. Haber was of the opinion that the defendant's "functioning appeared to be very adequate." (PCR. 1961). He stated that clinically, in his examination of the defendant, he could find no signs of organic brain damage, with the exception of some "soft signs" in the Bender test. (PCR. 1926 . Soft signs are not proof of brain damage. (PCR. 1916). The "soft sign" in the Bender test was that the defendant drew "squiggly lines instead of straight lines," "which could mean brain damage, drug abuse, or not getting a good night's sleep, being tired etc."

(PCR. **1927).** There were no hard signs of organic brain damage, no lack of alertness, no interruption of ability to process information, no difficulty in dealing with new ok newly acquired information, or remote memory. (PCR. **1917).**

Dr. Haber testified that he was familiar with the two instances of head injuries described by the defendant's family. (PCR. 1919). Such injuries could lead to brain damage, but they do not necessarily do so, any more "than a falling out of a window has to mean necessarily breaking your bones or dying." (PCR. **1920).**

Dr. Haber stated that the events described at the time of the crimes in 1978, **the** trial testimony in **1981**, and his examination in **1988** were all consistent and reflected an individual who was well organized, did not give way to impulsive actions, acted in a cold, calculated manner, for the purpose of personal gain, had good cognitive control, and did not have a brain dysfunction or disruption. (PCR. 1944-45). The facts of the offense, as described by the three eyewitnesses, were also inconsistent with the defendant having been in toxic or cocaine psychosis. (PCR. **1922-23).** Dr. **Haber** concluded that the defendant was not suffering from an emotional disturbance at the time of the crime, and, was able to conform his actions to **the** requirements of the law. (PCR. 1953-55).

3. The trial court's findings

The trial court denied the ineffective-assistance-of-counsel at-penalty-phase claim on the grounds that the defendant had not established any prejudice, without determining whether trial counsel's performance was deficient. (PCR. 1455). The lower court made extensive findings of fact **and** credibility of witnesses. (PCR. 1453-1455).

With respect to the defendant's arguments that family members should have been called to testify about his background and character, the lower court noted inconsistency in this testimony and found:

> . . . Indeed in these post-conviction proceedings, three cousins-, a sister and an aunt were called. However, because the defendant had spent more than then years in prison for a prior murder, these witnesses had had little contact with the defendant in the years immediately before the crimes were committed. Their statements had little impact, and at times, supported the view that the defendant appeared normal, rather than brain damaged and impaired.

(PCR. 1453-54).

As to the defendant's argument that trial counsel were deficient for failure to provide information to Dr. Stillman and develop testimony of brain **damage,** the trial court stated that Dr. Stillman's testimony at the evidentiary hearing with respect ta brain damage was not credibile:

> Dr. Stillman's testimony is wholly unpersuasive. His conclusion that the defendant is brain-damaged rests on the relatives' post-sentencing report of defendant's brief loss of consciousness in two childhood accidents. Significantly, the defendant, himself denied any accidents in his 1980 interview with Dr. Stillman and the defendant presents no medical record of any kind to substantiate these alleged injuries. In fact, his IQ, as tested by Dr. Stillman, is slightly higher than average, and there is no objective indication of the defendant's compromised intellectual functioning. Dr. Stillman's opinion is simply that brain damage invariably results from loss of consciousness, no matter how brief the period of unconsciousness.
>
> Moreover, Dr. Stillman's conclusions that the defendant was incompetent to stand trial and insane at the time of the offense-neither conclusion being urged by the defendant in these proceedings, and both canclusions being contradicted by the overwhelming evidence in the case - undermine the credibility of his further opinion that the defendant's capacity to conform his conduct to law was impaired.

(PCR. 1455).

The trial court thus found that the prejudice prong of the Strickland v. Washington, 466 U.S. 668 (1984) test had not been met:

> The Court cannot conclude that the jury likely would have been persuaded by such testimony to recommend a sentence other than death, especially in light of the compelling aggravating circumstance that the defendant had been convicted of murder on two prior and separate occasions. Therefore, even assuming, but not deciding, that trial counsel's

> performance was deficient, **defendant** fails to demonstrate a **reasonable** probability of a different result with effective assistance of counsel. Strickland v. Washington, **466** U.S. 668, **104 S.Ct. 2051, 80** L.Ed.2d **674 (1984).**

(PCR. 1455).

Finally, the trial court summarily rejected the remainder of the defendant's claims, stating:

> The Caurt has **consisdered** and finds without merit the defendant's remaining challenges based **on ineffective** assistance of counsel, including the points untimely raised in the defendant's "Supplement in Support of Motion to Vacate" filed following the supreme court's denial of defendant's petition for writ of habeas corpus, and other arguments that the trial was fundamentally unfair.

(PCR. **1456).**

POINTS ON APPEAL

I.

WHETHER DEFENDANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE BY TRIAL COUNSEL'S FAILURE TO INVESTIGATE, PREPARE, AND PRESENT SUBSTANTIAL AVAILABLE MITIGATING EVIDENCE, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

II.

WHETHER THE DEFENDANT WAS DENIED HIS FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BECAUSE HE DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE PHASE OF HIS CAPITAL TRIAL.

III.

WHETHER THE DEFENDANT WAS CONVICTED OF CAPITAL MURDER AND SENTENCED TO DEATH ON THE BASIS OF STATEMENTS OBTAINED IN VIOLATION OF THE FIFTH, SIXTH EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

IV.

WHETHER THE TRIAL COURT'S FELONY MURDER INSTRUCTION WAS FUNDAMENTAL ERROR WHICH VIOLATED MR. PARKER'S FIFTH, SIXTH EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

V.

WHETHER DEFENDANT WAS DENIED HIS FUNDAMENTAL FIFTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS BY THE TRIAL COURT'S FAILURE TO INSTRUCT ON LESSER INCLUDED OFFENSES ALTHOUGH MR. PARKER HAD MADE NO RECORD WAIVER OF SUCH INSTRUCTIONS.

POINTS ON APPEAL CONT'D.

VI.

WHETHER FLORIDA'S COURTS HAVE INTERPRETED "COLD, CALCULATED, AND PREMEDITATED" IN AN UNCONSTITUTIONALLY OVERBROAD MANNER, HAVE APPLIED THIS AGGRAVATING CIRCUMSTANCE UNCONSTITUTIONALLY AND OVERBROADLY TO THIS CASE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, AND WHETHER THE APPLICATION OF F.S. SECTION 921.141(5)(I) IN THIS CASE VIOLATED DUE PROCESS AND EX POST FACTO CONSTITUTIONAL PROTECTIONS.

VII.

WHETHER DEFENDANT WAS DENIED HIS RIGHTS TO *AN* INDIVIDUALIZED AND FUNDAMENTALLY FAIR AND RELIABLE CAPITAL SENTENCING DETERMINATION AS A RESULT OF THE PRESENTATION OF CONSTITUTIONALLY IMPERMISSIBLE INFORMATION WHICH WAS IRRELEVANT TO ANY AGGRAVATING CIRCUMSTANCE.

VIII.

WHETHER DEFENDANT'S DEATH SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

IX.

WHETHER DEFENDANT'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY THAT THE COURT COULD IMPOSE CONSECUTIVE SENTENCES ON THE OFFENSES ON WHICH MR. PARKER WAS CONVICTED, WHICH COULD ALSO HAVE BEEN ORDERED TO BE SERVED CONSECUTIVELY TO MR. PARKER'S EARLIER FLORIDA AND WASHINGTON, D.C. CONVICTIONS, THUS MISINFORMING AND MISLEADING THE JURY IN FAVOR OF VOTING FOR DEATH, AND VIOLATING MR. PARKER'S RIGHTS TO *AN* INDIVIDUALIZED AND RELIABLE CAPITAL SENTENCING DETERMINATION.

POINTS ON APPEAL CONT'D.

X.

WHETHER THE TRIAL COURT'S FAILURE TO ASSURE MR. PARKER'S PRESENCE IN COURT DURING PARTS OF HIS CAPITAL TRIAL VIOLATED THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

XI.

WHETHER THE PROCEEDINGS RESULTING IN MR. PARKER'S CONVICTION AND SENTENCE OF DEATH WERE INFECTED BY THE USE OF TWO UNCONSTITUTIONALLY OBTAINED PRIOR CONVICTIONS IN VIOLATION OF MR. PARKER'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

XII.

WHETHER MR. PARKER'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE TRIAL COURT'S REFUSAL TO PROVIDE THE JURY WITH A CIRCUMSTANTIAL EVIDENCE INSTRUCTION.

XIII.

WHETHER MR. PARKER WAS DEPRIVED OF HIS RIGHT TO A FAIR AND RELIABLE SENTENCING DETERMINATION, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, BECAUSE THE JURY'S SENSE OF RESPONSIBILITY WAS DIMINISHED AND COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO OBJECT OR LITIGATE THE ISSUE.

XIV.

WHETHER MR. PARKER WAS DENIED HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BY UNCONSTITUTIONAL BURDEN SHIFTING AT SENTENCING.

POINTS ON APPEAL CONT'D.

XV.

WHETHER AN ERRONEOUS JURY INSTRUCTION THAT A VERDICT OF LIFE MUST BE MADE BY A MAJORITY OF THE JURY MATERIALLY MISLED THE JURY AS TO ITS ROLE AT SENTENCING AND CREATED THE RISK THAT DEATH WAS IMPOSED DESPITE FACTORS CALLING FOR LIFE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

XVI.

WHETHER MR. PARKER'S FIFTH, SIXTH EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS WERE DENIED BY THE WRONGFUL EXCLUSION OF POTENTIAL JURORS.

XVII.

WHETHER MR. PARKER'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE TRIAL COURT'S FAILURE TO ADEQUATELY, FAIRLY, AND FULLY CONSIDER NONSTATUTORY AND STATUTORY MITIGATING EVIDENCE.

SUMMARY OF THE *ARGUMENT*

With respect to the claim that counsel was ineffective at the penalty phase, the emphasis is on the failure to develop and present psychological and family testimony. The record supports the trial court's conclusion that prejudice has not been demonstrated. The record also reflects that counsel was not deficient, as sound strategic decisions were made.

The Appellant attacks counsels' performance at the guilt phase as well. There was no basis for counsel to litigate an identification issue based on the use of an 11 year old photo of the defendant in a lineup. Due to the vast amount of alibi evidence presented, the failure to present further such witnesses could not constitute ineffective assistance. As to counsel's failure to seek suppression of "fruit of the poisonous tree," it will be seen that the items in question were not the product of the seizure of a gun which was suppressed. Thus, counsel was not ineffective.

The claim that statements were obtained in violation of Parker's constitutional rights is procedurally barred as untimely. The record also conclusively shows that the statements were properly admitted into evidence, to impeach the Appellant's in-court testimony.

The remaining issues are all procedurally barred, as they either should have been raised on direct appeal or were untimely filed.

ARGUMENT

I.

THE DEFENDANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF THE TRIAL.

The Appellant asserts that trial counsel rendered ineffective assistance at the penalty phase of the trial. The essential components of the Appellant's claim are that: (a) trial counsel did not adequately prepare and investigate for the penalty phase; (2) trial counsel did not develop and present adequate testimony from family members; (3) trial counsel failed to utilize testimony from Dr. Stillman and counsel also failed to furnish Dr. Stillman with adequate information; and (4) trial counsel failed to present evidence of the defendant's military service.

The lower court, in denying the motion after an evidentiary hearing, found that the defendant failed to establish that he was prejudiced as a result of counsel's alleged deficiencies. Not only does the record support that conclusion, but the record also supports the conclusion that counsel was not deficient, an issue which the lower court did not decide.

A review of the record reveals, contrary to Appellant's claims, that trial counsel engaged in extensive preparation for the sentencing phase. Efforts were made to locate family members, but family members were uncooperative, in large part

because they had had nothing to do with the defendant for many years prior to trial. Those witnesses who had been available were presented. As to the defendant's military record, sound strategic reasons existed for not presenting it, as it would have been damaging to the defense. Similarly, sound strategic reasons existed for not using Dr. Stillman's testimony in **1981**, as his original opinions and reports were damaging in many respects and were contradicted or not supported by the evidence. Dr. Stillman's more recent opinions, allegedly based on information which trial counsel should have furnished Stillman, are typically outrageous and out of touch with reality and were properly found to be lacking in credibility by the lower court, after the evidentiary hearing. These themes will be developed herein in greater detail. Moreover, it will also be seen that the alleged deficiencies could not have resulted in any prejudice to the defendant.

Pursuant to Strickland v. Washington, **466** U.S. **668** (1984), in a claim of ineffective assistance of counsel, the defendant must establish that counsel's performance was deficient, and that but for such deficiency, the result of the proceeding probably would have been different. Claims of ineffective assistance must be viewed as of the time of counsel's conduct. Id. at **690**. A "particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Id. at **691**.

Counsel's actions must be assessed in light of the defendant's own statements or actions. Id. Strategic choices may properly be made based upon information supplied by the defendant and the scope of investigation may reasonably be limited by information furnished by the defendant. Id.

Contrary to Appellant's allegations, trial counsel engaged in extensive preparations for both the guilt and sentencing phases. Trial counsel had received and reviewed voluminous materials from prior counsel. (PCR. 1802). They had prior psychological reports reflecting some drug and alcohol use, plus results of psychological testing, which reports had been furnished to Dr. Stillman. (PCR. 1631-37; 272-75). Extensive interviews had been conducted with the defendant, who maintained his innocence and admitted drug use, while denying abuse or dependency. Efforts were made to contact other family members for background information and prior medical problems.

The image portrayed by the Appellant herein, of co-counsel acting in chaos and not knowing what responsibilities each other was undertaking, is repudiated by the record. Velayos and Roffino were both working on bath the guilt and penalty phases, splitting the responsibilities all along, although Velayos actually presented the penalty phase. (PCR. 1796-97, 1811). The two attorneys collaborated closely on all aspects of the case. (PCR. 1801, 1811). This was not a situation where both attorneys

abandoned the sentencing phase. Roffino, at the evidentiary hearing, carefully delineated the strategic reasons for the manner in which the sentencing phase was presented. The strategies were the product of the defendant's insistence on denying commission of the offenses, plus the need to maintain a consistent approach during sentencing. Claims of an alibi, and diminished capacity as a result of drug or alcohol abuse would have been inconsistent if presented at the two respective phases. Exemplifying the strategic reasoning are the avoidance of the military records, which would have been more negative than positive, the presentation of Department of Corrections records of defendant's anti-drug counselling activities, in order to show redeeming qualities during incarceration, and the presentation of a residual doubt defense at the sentencing phase.

The Appellant claims that trial counsel failed to give Dr. Stillman adequate information and to present his testimony at the sentencing phase. Dr. Stillman's 1981 report indicated that if it could be shown that the defendant was seriously intoxicated, in a toxic state, due to massive drug and alcohol misuse, he may have been temporarily insane. Sound strategic reasons existed for not further developing this possibility or for not presenting Dr. Stillman's testimony in 1981. First, as explained by counsel, the defendant steadfastly maintained that he had nothing to do with the Florida offenses. Testimony that the defendant was insane at the time of the offense due to drug or alcohol

misuse would have seriously undermined the claim of factual innocence. Presenting such testimony at the penalty phase would have interfered with the residual doubt theory. Presenting such testimony at the penalty phase might also have stricken the jury as disingenuous - i.e., if such expert testimony were true, why would the defense hold it back at the guilt phase? Thus, presenting such testimony at the sentencing phase, and admitting factual guilt after denying it at the guilt phase, would create serious credibility problems for the defense. See Jones v. State, 528 So.2d 1171 (Fla. 1988) (no ineffectiveness in failing to present psychiatrist at penalty phase where testimony could have destroyed defense credibility with jury, as defense on guilt phase had denied committing the murder, and psychiatric testimony would have repudiated guilt-phase defense).

More significantly, there was no support for the notion that the defendant suffered from major drug or alcohol abuse, either in general or at the time of the offense. The defendant had advised counsel that he did not commit the offense and that he did not regularly use drugs and was not dependent upon them. The defendant, incarcerated for the eleven years prior to these offenses had limited opportunity to use drugs due to his incarceration, and was active in anti-drug counselling while in jail. As further detailed in the statement of facts, and as noted by counsel, the eyewitness accounts of the offense were further inconsistent with claims of drug or alcohol abuse or

insanity. The trial attorneys testified that they took this into account. Family members who testified at the post-conviction hearing presented inconsistent statements, based upon very limited personal knowledge, regarding the defendant's drug use. Three of these witnesses did not know about drug use by the defendant and had never seen the defendant using drugs. The other two witnesses stated that they had knowledge of defendant's drug use from isolated instances. These latter witnesses had no knowledge of the frequency of drug use.

Furthermore, the attorneys were aware that Dr. Stillman's original report included much which could have been damaging to the defendant, if made known to the jury, such as opinions that the defendant was psychopathic and antisocial. Indeed, Stillman's initial oral report reflected that the defendant's personality traits were such that they were consistent with the type of crime which had actually taken place. (PCR. 1579). The first written report of Stillman asserted that the defendant gave no evidence of a major mental disorder. (PCR. 268-70). The trial attorneys were also very experienced and familiar with indicia of mental disturbances, but they did not observe any such indicia in their personal dealings with the defendant. Thus, compelling reasons existed for not presenting Dr. Stillman's testimony in 1981 and in not further pursuing the possibility that the defendant was insane due to drug or alcohol misuse. Likewise, if such testimony had been presented, it would be lacking in

credibility and would not have affected the outcome of the proceedings. The lower court, in emphasizing the absence of prejudice specifically referred to the aggravating circumstancce that the defendant had been convicted af two prior murders, an aggravating factor which would not lightly be overcome by dubious and contradicted evidence of drug abuse.

If Dr. Stillman's 1981 opinions were uncorroborated and contradicted by all the other evidence, his 1988 opinions and testimony verge on the outrageous and similarly surpass the outer limits of credibility; they were thus properly rejected by the lower court due to such lack of credibility. Notwithstanding the defendant's protestations to counsel and to Dr. Stillman himself, that he did not abuse drugs or alcohol,[2] and notwithstanding eyewitness accounts that are inconsistent with such abuse or diminished capacity, Dr. Stillman, in 1988, maintained that the defendant did suffer from such abuse and that he also suffered from organic brain syndrome. The basis for this revised opinion were affidavits from family members that the defendant was dropped on his head while an infant, and that the defendant was once hit by a train, while a young boy of 12 or 13. These alleged incidents were totally unsupported by any contemporaneous

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[2] With respect to contradictions between the defendant's representations to counsel and Stillman's conclusions regarding drug and alcohol abuse, see Correll v. Dugger, 558 So.2d 422, 426 at n.3 (Fla. 1990) (defense counsel cannot be deemed deficient for failing to present a matter upon which the defendant and his relatives provided dramatically opposite testimony).

medical reports or treatment. There was no mention of such injuries in any of the extensive school, military, hospital and corrections records presented at the evidentiary hearing either. Furthermore, Dr. Haber found no basis for concluding that those incidents, even if true, resulted in any brain damage. Dr. Haber found no hard signs of brain damage, and the only soft sign, the writing of squiggly lines, has many potential explanations, and does not constitute evidence of brain damage, as soft signs are not proof of brain damage.[3] Dr. Stillman's more recent conclusions were also inconsistent with the defendant's original information, inconsistent with the eyewitness accounts, inconsistent with the defendant's lack of memory impairment, as evidence by the defendant's detailed recollection of events in Washington, D.C., and inconsistent with prison records. Dr. Stillman admittedly lacked knowledge of the eyewitness accounts of the offenses and he admitted that he was predicating his opinion on the uncorroborated information of the family members. Stillman's opinion was also inconsistent with the defendant's higher than average IQ and the absence of objective indicia of any compromised intellectual functioning. Most significantly, as the two specious "accidents," for which no facts are known, are at the heart of Stillman's opinion, it is most significant that

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[3] In James v. State, 489 So.2d 737, 739 (Fla. 1986), the Court stated: "the possibility of organic damage . . . does not necessarily mean . . . that one may engage in violent, dangerous behavior and not be held accountable. There are many people suffering from varying degrees of organic brain disease who can and do function in today's society."

the defendant, in his 1980 interview with Stillman, denied having been in any accidents.

The lower court, in its written findings, rejected Stillman's more recent testimony for all of the above reasons (R. 1454-55), and aptly described the absurd and unreal quality of Stillman's conclusions: "Dr. Stillman's opinion is simply that brain damage invariably results from loss of consciousness, no matter how brief the period of unconsciousness.'' (PCR. 1455). Such absurdity is reinforced by Stillman's opinion that a person with moderate brain damage can be a university professor. (PCR. 1698). Thus, even after Dr. Stillman's 1988 testimony, the conclusions are still valid, that trial counsel were not deficient and that there was no prejudice in not pursuing Stillman's testimony. The absence of prejudice is established not only by the dubious and contradictory nature of Stillman's testimony, but by the compelling nature of the aggravating circumstances, especially the two prior murders, an aggravating factor which would not easily be overcome.

With respect to the failure to present the defendant's military record, counsel aptly explained that the information would do more harm than good - i.e., a dishonorable discharge, being AWOL, and stealing a military vehicle. The highly negative side of this testimony once again emphasizes that it would not have affected the outcome of the proceedings.

With respect to the development of family testimony, trial counsel attested to substantial efforts to obtain such testimony as well as difficulties emanating from uncooperative family members. That is not surprising, as the defendant' had been incarcerated and apart from family members for over eleven years prior to these offense. Nothing uttered by the relatives at the evidentiary hearing was of sufficient significance to demonstrate prejudice under Strickland when viewed in light of the facts of the homicide and the aggravating circumstances. The testimony of the family members regarding drug and alcohol use was highly inconsistent and specious at best. The lower court, in finding that testimony of the family members had little impact on the court, emphasized that the witnesses had little contact with the defendant far over ten years prior to the offense, and that their testimony supported the conclusion the defendant appeared normal, rather than brain damaged.

Thus, the foregoing facts and arguments support the conclusions that trial counsel were not deficient, that their actions were governed by sound strategic decisions, and that the defendant failed to establish prejudice under Strickland.

Many cases decided by this Court support the foregoing conclusions. In Stewart v. State, 481 So.2d 1210 (Fla. 1985), this Court held that trial caurt's findings on an ineffective

assistance of counsel claim would not be disturbed on appeal when supported by competent, substantial evidence. That holds true as to both parts of the Strickland test.

The high burden of demonstrating prejudice under Strickland is demonstrated clearly by Medina v. State, 573 So.2d 293, 297-98 (Fla. 1990). There, trial counsel failed to pursue the appointment of mental health experts at the sentencing phase. At the Rule 3.850 hearing, recently found experts testified that the defendant was psychotic, had organic braing damage, and suffered from paranoid schizophrenia or a major depressive disorder, and was psychotic. The Court concurred that this testimony did not establish prejudice and was, in part, detrimental to the defendant. So too, in the instant case, prejudice was not established, and Stillman's testimony would, to a significant extent, have been detrimental - e.g., references to anti-social personality, psychopathic, above average intelligence, etc.

Just as the lower court found that the evidence adduced at the Rule 3.850 hearing would not overcome the compelling factor of two prior homicides, so too, in Strickland, supra, substantial psychological evidence of emotional stress was found to not significantly affect the sentencing proceedings in large part because of the compelling aggravating factors, including the fact that the offense was a multiple murder. See also, Buenoano v. Dugger, 559 So.2d 1116 (Fla. 1990)(there was substantial evidence

presented at Rule 3.850 hearing regarding emotional disturbances and inability to conform conduct to the law; the defendant claimed that counsel failed to present such evidence at trial; the Court held that such mitigation evidence would not suffice to overcome the compelling evidence and four aggravating factors found at trial: "We do not believe the unfortunate circumstances of Buenoano's childhood are so grave nor her emotional problems so exteme as to outweigh, under any view, the four applicable aggravating circumstances." Id. at 1119); Correll v. Dugger, 558 So.2d 422 (Fla. 1990) (counsel not ineffective far failing to present evidence of drug and alcohol abuse, where defendant insisted he was not guilty, and such evidence would not have overcome heinous nature of multiple murders); Lambrix v. State, 534 So.2d 1151 (Fla. 1988) (evidence of alcoholism would not have affected outcome of sentencing proceeding in light of double murder and substantial aggravating factors); Engle v. Dugger, 16 F.L.W. S123 (Fla. January 15, 1991) (failure to present family members in addition to mother and sister not deemed ineffective); Smith v. Dugger, 565 So.2d 1293 (Fla. 1990) (allegations of deprived childhood failed to show extensive deprivation or abuse); Francis v. State, 529 So.2d 670 (Fla. 1988) (evidence of family members at Rule 3.850 hearing found to be speculative as to whether it would establish mitigating circumstances, due to inconsistencies and remoteness of time).

II

THE DEFENDANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT **THE GUILT PHASE.**

This argument is based upon the first portion of defendant's claim I below. (PCR. 32-36). The defendant had argued that his trial counsel were ineffective during the guilt phase because they a) did not litigate the legality of eyewitnesses having identified the defendant during a pretrial photo lineup; b) did not litigate the "fruit of the poisonous tree" issue; and, c) did not present alibi witnesses. (Id.). The state responded that the trial transcripts and records filed before the trial court conclusively refuted this claim, and that some of the allegations by the defendant were insufficient. (PCR. 205-209). Accordingly, the trial court denied the request for an evidentiary hearing as to these issues on this ineffective assistance of counsel claim and summarily rejected same. (PCR. 1456, 1457-58). The claim was correctly denied by the trial court, as is demonstrated below.

A) Failure to litigate identification issue

The defendant argues that his trial counsel were ineffective because they withdrew a motion to suppress the pretrial identification of the defendant by the three eyewitnesses to the crime during a photo lineup, on the ground

that the photo of the defendant used during this lineup was taken eleven years earlier and thus did not resemble the defendant. Trial counsels' decision to withdraw the defendant's motion to suppress identification is understandable, as there was no basis for suppression. The fact that the photograph of the defendant was eleven years old would have made it more difficult for the three victims to identify the defendant; it would certainly not facilitate any identification.

Moreover, the record reflects that two of the eyewitnesses, the two male victims, were with the defendant for over an hour and a half. (T. 1266). Both of these witnesses had also conducted a drug deal with the defendant prior to the robbery. Additionally, the third eyewitness, the female victim, had spent twenty-five minutes with the defendant. (T. 1667). Indeed, the defendant made this sexual battery victim stare into his face repeatedly, while he abused and assaulted her. (T. 1658-62). All three eyewitnesses thus had excellent opportunities to view the defendant, testified that they had taken good looks at the defendant before and during the crimes herein, and were unequivocal in their identifications of the defendant. (T. 1358, 1540, 1658-59). Thus, even if the photo lineup was overly suggestive, which it clearly was not, such suggestiveness did not create a "substantial likelihood of misidentification" either during the lineup or at trial. The "substantial likelihood of misidentification" test was formulated by the United States

Supreme Court in Neil v. Biggers, 409 U.S. 188, 43 S.Ct. 375 (1977), and was adopted by this Court in Grant v. State, 390 So.2d 391 (Fla. 1980) (five factors are to be assessed: 1) the witness's opportunity to observe; 2) the witness's degree of attention; 3) the accuracy of prior descriptions; 4) the witness's level of certainty; and, 5) the length of the time between the offense and the confrontation).

In short, the fact that the defendant's photograph was eleven years old did not render the lineup overly suggestive, and in any event the circumstances of the offense were such as to ensure the reliability of the victims' identifications. Thus, trial counsel were justified, not deficient, in electing not to pursue this meritless issue, and the defendant has not shown any prejudice. The court therefore correctly rejected this issue without an evidentiary hearing.

B) Failure to litigate "fruit of the poisonous tree" issue

The defendant has argued that since the trial court had granted his motion to suppress a gun obtained from him by the District of Colombia due to an illegal search and seizure, trial counsel should have moved to suppress jewelry, bullets and statements taken from the defendant after his arrest, as fruits of the poisonous tree. However, the record reflects that the

physical evidence and the statements did not flow from the seizure of the gun and thus could not be suppressed as "fruits" of the illegal seizure of the gun. The defendant was arrested in Washington, D.C., on an unrelated barroom shooting incident, prior to the seizure of the firearm. After the valid arrest of the defendant, the Washington police then proceeded to search a residence and back yard, without a search warrant. The gun which was seized at that time was ultimately suppressed from use as evidence at trial, as the search proceeded without a search warrant for the residence. See, State v. Parker, 399 So.2d 24, 27 (Fla. 3d DCA 1981). Prior to the arrest of the defendant in Washington, and prior to the seizure of the gun, the victims herein had already identified the defendant and an arrest warrant had already been obtained in Florida. (T. 1483-84).

Neither the two bullets, the jewelry, or the defendant's statements constituted the fruit of the poisonous tree. The fruit of the poisonous tree doctrine has no applicability when the government learns of the evidence from an independent source or when the evidence would have inevitably been discovered. Wong Sun v. United States, 371 U.S. 471, 487 (1963); Silverthorne Lumber Co. v. United States 251 U.S. 385, 392 (1920); Murray v. United States, 487 U.S. 533 (1988). The fruit of the poisonous tree doctrine applies to "the introduction of derivative evidence . . . that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search." Murray, 487 U.S. at 436-37.

The two bullets which were admitted into evidence were bullets removed during the respective autopsies of the Washington and Florida victims. The ballistics testimony at trial was limited to the fact that the two bullets were fired from the same gun. (T. 1952-53, 1971). The gun itself was not admitted into evidence and played no part in the analysis. Id. The bullets were clearly not the product of the seizure of the gun. The police already had the arrest warrant for the defendant for the Florida offense. The removal of the bullet from that victim was in no way the product of the seizure of the gun in Washington. Likewise, the bullet removed from the Washington victim was not the product of the seizure of the gun. The Washington police pursued the defendant pursuant to eyewitness accounts of the barroom shooting in Washington. Parker, supra, 399 So.2d at 27. Thus, the bullet was removed from that victim independently of the seizure of the gun.

As to the jewelry in question, that was observed on the defendant, while in police custody, after his arrest. As the arrest was valid (and preceded the gun seizure), the jewelry was similarly not the product of the seizure of the gun. As to the defendant's statements, the State did not introduce them in its case-in-chief. The statements were not introduced into evidence until the State cross-examined the defendant, and used those statements to impeach testimony which the defendant gave during

direct examination and which contradicted the statements. Thus, the statements came in only to attack the defendant's credibility, in reliance on Harris v. New York, 401 U.S. 222 (1971) and Walder v. United States, 347 U.S. 62 (1954). See Parker v. State, supra, at **441-442.**

In sum, **as** the record reflected no "fruits" from the illegal seizure of the gun being admitted at trial, the lower court correctly rejected the argument that counsel were ineffective in failing to seek the suppression of such nonexistent "fruits."

C) Ineffective presentation of alibi defense

The defendant in the lower court argued that his trial counsel were ineffective for failing to present new witnesses found by collateral counsel who would now testify that he was in Washington, D.C. on July 18, 1978, the date of the crimes herein. (PCR. 35-37). In terms of the minimal pleading requirements under Fla.R.Crim.P. 3.850, the defendant did not allege that he informed trial counsel of the identity of these witnesses, or that having done so, counsel neglected to investigate their possibility as witnesses. Id. **The** defendant failed to amend his pleading even after the State pointed out this deficiency. (PCR. 208-9). Thus, the trial court was correct in summarily rejecting this alleged instance of ineffective assistance of counsel due to

lack of specificity as required by Strickland v. Washington, supra, and Knight v. State, 394 So.2d 997, 1001 (Fla. 1981).

Moreover, the record herein reflects a substantial alibi presentation by trial counsel. Trial counsel presented the alibi testimony of five witnesses, all of whom placed the defendant in Washington, D.C., during the summer of 1978.

The first witness, Wendell Harrington, testified that the defendant frequented Harrington's bas throughout the summer, but could not say if the defendant was there on any given day, or specifically on July 18, 1978. (T. 2088). Witness Earlene Smith worked for Harrington, and her testimony was virtually identical to his. (T. 2095).

Witness Diane Barry was the defendant's girlfriend in Washington, during the summer of 1978. She testified that she saw the defendant three to four times a week, every week, and that the defendant never left Washington during that period. (T. 2108-2110). However, she too could not say whether she saw him on any particular day, such as July 18, 1978.

Witness Marilyn Walker testified that she met the defendant at her brother's birthday party on July 1, 1978, and they became friends. She saw the defendant about three times a week, every week, from then until the second week of August. (T.

2172). The defendant never left Washington during that period, according to her. (T. 2179). Walker testified that she was sure she saw the defendant on July 18, but on cross-examination, she admitted that it was possible that she saw him on the 17th and 19th, but not on the 18th of July.

Witness Arnicia Donaldson testified that she saw the defendant throughout July, 1978, and was certain she saw him on July 16th; however, she couldn't be sure whether she saw the defendant an July 18th. (T. 2217). Finally, the defendant himself testified that he was in Washington, D.C. on July 18, 1978.

Th s, the record reflects a substantial alibi presentation by trial counsel. The fact that some of the witnesses could not pinpoint the defendant's presence in Washington on July 18th is hardly surprising. Indeed, it would be highly unusual, many months later, to remember precisely which dates they had seen the defendant that summer.

In sum, the lower court was correct in summarily rejecting this claim since it lacked sufficient allegations to be cognizable, and in any event, the record demonstrated that trial counsel diligently pursued and presented the defendant's alibi defense.

III

APPELLANT'S CLAIM THAT STATEMENTS WERE OBTAINED IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS, WAS UNTIMELY PRESENTED, PROCEDURALLY BARRED, AND REFUTED BY THE RECORD.

The defendant, in the lower court, argued that his statements to the Florida police officers with respect to the instant Florida crimes were obtained after he was arrested, arraigned and appointed counsel on unrelated Washington, D.C. charges. He thus contended that the statements to the Florida officers were in violation of his Fifth and Sixth Amendment rights to counsel pursuant to Edwards v. Arizona, 451 U.S. 477 (1981); Arizona v. Roberson, 108 S.Ct. 2093 (1988), and Michigan v. Jackson, 106 S.Ct. 1404 (1986). The defendant contended that both his appellate and trial counsel were ineffective for having failed to suppress his statements on the above-noted grounds. (PCR. 1385-1400).

This claim was contained in the defendant's "Supplement in Support of Motion to Vacate Judgment and Sentence," presented after the conclusion of the evidentiary hearing below, on December 23, 1988. The state argued that said claim was procedurally barred as it was filed in violation of the two-year time limitation, and the prohibition against successive Rule 3.850 motions set forth in that rule. The trial court summarily rejected this claim, noting its "untimeliness." (PCR. 1456). The

state respectfully submits that this Court should find this claim to be procedusally barred due to its untimely filing, pursuant to the requirements of Fla.R.Crim.P. 3.850 and 3.851. See, Parker v. Dugger, supra at 973 (raising an additional issue through a "supplement" filed after the expiration of Fla.R.Crim.P. 3.851 time limits, is untimely and thus procedurally barred); Preston v. State, 528 So.2d 896 (Fla. 1988) (trial court can properly declined to rule on motions filed after an evidentiary hearing which seek to inject new issues into the case).

Moreover, the state would note that insofar as this claim was based upon ineffective assistance of appellate counsel, it was appropriately rejected by the lower court for lack of jurisdiction. See, Butzy v. State, 536 So.2d 1014 (Fla. 1988). Insofar as the claim is based upon allegations of ineffective assistance of trial counsel, the state would note that the defendant has admitted that Edwards v. Arizona, supra, had not been decided at the time of his pretrial suppression hearing. See Brief of Appellant, at p. 51. This Court has previously held that counsel can not be deemed to have rendered deficient performance for failing to anticipate changes in the law. Muhammad v. State, 426 So.2d 533 (Fla. 1982). Moreover, Roberson v. Arizona, supra, has been expressly held not to apply to collateral praceedings by the United States Supreme Court. Butler v. McKellar, 494 U.S. ___, 108 L.Ed.2d 347 (1990). Finally, any argument that arraignment and appointment of counsel

on an unrelated offense prevents interrogation by the police with respect to unrelated, uncharged crimes, on the basis of the Fifth or Sixth Amendment rights to counsel, has been soundly rejected by the United States Supreme Court in McNeil v. Wisconsin, 501 U.S. ___, 111 S.Ct. ___, 115 L.Ed.2d 158 (1991). Additionally, as noted by this Court on direct appeal, the statements of the defendant complained of herein were admitted during the defense case, on cross-examination of the defendant, after his testimony on direct examination to facts directly contrary to those stated by him to the police officers. Thus, even if the statements had been inadmissible as direct evidence, they were properly admitted as impeachment to attack the defendant's credibility, in reliance on Harris v. New York, 401 U.S. 222 (1971) and Walder v. United States, 347 U.S. 62 (1954). See, Parker v. State, supra at 441-42.

IV.

THE TRIAL COURT'S FELONY MURDER INSTRUCTION DID NOT VIOLATE THE DEFENDANT'S CONSTITUTIONAL RIGHTS.

In Claim III of the motion to vacate and subsequently, in claim XV of the "Supplement," the defendant argued that the trial court had erroneously given constitutionally deficient felony murder instructions. The State, in accordance with its argument below, (PCR. 213), respectfully submits that this is a matter which should have been raised on direct appeal and was thus procedurally barred. Dobbert v. State, 456 So.2d 424, 429 (Fla. 1984); Harvard v. State, 486 So.2d 537 (Fla. 1986); Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987).

Moreover, the State would note that the defendant also raised this issue in his petition for writ of habeas corpus to this Court, which then held:

> . . . During the oral instructions, the trial judge inadvertently omitted the definition of first-degree felony murder. The definition was included in the written instruction which the jury was told it should review if in doubt on any instruction.
>
> . . . Moreover, even if the written instructions were not sufficient to advise the jury, the omission is harmless. The prosecution placed heavy emphasis on the evidence showing that the murder was premeditated, not merely that it was committed during the course of a felony, and that the jury returned verdicts of guilt on four counts of robbery, sexual battery, and unlawful

possession of a firearm during the commission of a felony. This was not merely a murder occurring during a felony. In finding that the murder was cold, calculated, and premeditated, we stated:

> The evidence shows that the murder victim had bene pleading with defendant not to harm his girl friend and, at the time he was murdered, was lying naked, face down, on a bed. Before killing the victim by a gunshot blast into his back, defendant accepted a pillow from his partner in order to muffle the shot. It is clear beyond any reasonable doubt that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, in order to prevent any interference by the murder victim with the sexual battery which immediately followed the murder.

Parker, 456 So.2d at 444. Under the circumstances, the omission was harmless. *Brown v. State*, 521 So.2d 110 (Fla. 1988); *Teffeteller v. State*, 439 So.2d 840 (Fla. 1983), *cert. denied*, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984); *Frazier v. State*, 107 So.2d 16 (Fla. 1958).

Parker v. Dugger, supra at 970-71.

As the failure to orally instruct has been found harmless, no prejudice to the defendant has been demonstrated.

V.

THE TRIAL COURT'S FAILURE TO INSTRUCT ON LESSER INCLUDED OFFENSES WAS NOT ERROR.

This claim was first raised in the defendant's "Supplement", presented after the conclusion of the evidentiary hearing below. (PCR. 1420). The State argued that said claim was procedurally barred as it was filed in violation of the two-year time limitation and the prohibition against successive Rule 3.850 motions set forth in that rule. The trial court summarily rejected this claim, noting its "untimeliness." (PCR. 1456). The State respectfully requests that this Court find this claim to be procedurally barred due to its untimely filing, pursuant to the requirements of Fla.R.Crim.P. 3.850 and 3.850. See, Parker v. Dugger, supra at 973; Preston v. State, supra.

In any event the State would note that the defendant raised the merits of this issue in its petition for writ of habeas corpus. This Court addressed the claim with an exhaustive analysis, and rejected it. Parker v. Dugger, supra, at 971-72. The conclusions of this court, in part, were that "unlike Beck [v. Alabama, 447 U.S. 625 (1980)] and Harris [v. State, 438 So.2d 787 (Fla. 1983)], instructions on the lesser included offenses of the first-degree (capital) offense were given to the jury and it was not presented with the stark choice condemned in Beck .... [T]he failure to include lesser included offenses on the noncapital underlying felony charges could have no effect on the

jury's deliberations on the capital charge in view of our finding on claim two that the jury verdict rested on premeditated murder." Id. at 972.

VI.

FLORIDA COURTS' INTERPRETATION OF "COLD, CALCULATED, AND PREMEDITATED" IS NOT UNCONSTITUTIONAL.

Again, this claim was first raised in the defendant's "Supplement", presented after the conclusion of the evidentiary hearing below. (PCR. **1425**). The State argued that said claim was procedurally barred as it was filed in violation of the two-year time limitation and the prohibition against successive Rule **3.850** motions set forth in that rule. The trial court summarily rejected this claim, noting its "untimeliness". (PCR. **1456**). The State thus requests that this Court find this claim to be procedurally barred due to its untimely filing, pursuant to the requirements of Fla.R.Crim.P. 3.850 and **3.851**. See Parker v. Dugger, supra, at 973; Preston v. State, supra.

In any event the State would note that the defendant raised the merits of this issue in his petition for writ of habeas corpus. This Court rejected the claim, and held, in relevant part:

> The issue has also been previously decided contrary to petitioner's position. *Justus v. State*, **438 So.2d 358** (Fla. 1983), *cert. denied*, **465 U.S. 1052**,

> 104 S.Ct. 1332, 79 L.Ed.2d 726 (1984). Moreover, in view of the five aggravating and no mitigating factors present here, we are satisfied that deletion of the cold, calculating, and premeditated factor would not affect the sentencing decision.

Parker v. Dugger, supra, at 972.

VII.

THERE WAS NO ERROR IN PRESENTATION OF INFORMATION.

Again, this claim was first raised in the defendant's "Supplement", filed after the conclusion of the evidentiary hearing below. (PCR. 1435). The State argued that said claim was procedurally barred as it was filed in violation of the two year time limitation, and prohibition against successive Rule 3.850 motions set forth in that rule. The trial court summarily rejected this claim, noting its "untimeliness." (PCR. 1456). The State requests that this court find this claim to be procedurally barred due to its untimely filing, pursuant to the requirements of Fla.R.Crim.P. 3.850 and 3.851. Parker v. Dugger, supra, at 973; Preston v. State, supra.

In any event the State would note that the defendant riased the merits of this issue in his petition for writ of habeas corpus to this Court, which rejected it. Parker v. Dugger, supra, at 972. This Court in part, stated:

> . . . Moreover, the testimony heard by the jury cannot be fairly characterized as victim impact evidence. As for the victim impact information heard by the judge, the prosecutor pointed out to the judge that the information in the PSI could not be used in determining aggravating factors and the judge made clear in her remarks and sentencing order that he limited his sentencing decision to the statutory aggravating factors. *Grossman.* The five aggravating factors found by the judge included the facts that petitioner was an escapee from life imprisonment for a previous first-degree murder and had been previously convicted in another murder committed after fleeing from this murder. This weighty aggravation, the other aggravation, the absence of mitigation, and the recommendation of the jury which heard no victim impact evidence show beyond a reasonable doubt that the death sentence would have been imposed absent the victim impact evidence. *Grossman.*

Id.

VIII.

UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE.

The defendant raised this issue, without any allegations of ineffective assistance of counsel, in his claim VII of the motion for post-conviction relief. (PCR. 50-52). Subsequently, after the conclusion of the evidentiary hearing below, the defendant again raised this issue in his "Supplement" and added allegations of ineffective assistance of trial counsel. (PCR. 1444-49). The allegations of ineffective assistance of counsel

were thus untimely and procedurally barred. Parker v. Dugger, supra at 973; Preston v. State.

The remainder of the claim is also procedurallyy barred because it was not raised on direct appeal. Bertolotti v. State, 534 So.2d 386, 387 n.3 (Fla. 1988). Moreover, the merits of this argument have been rejected. Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988); Bertolotti, supra.

IX.

TRIAL COURT'S FAILURE TO INSTRUCT THAT IT COULD IMPOSE CONSECUTIVE SENTENCES.

The defendant first raised this issue without any allegations of ineffective assistance of counsel, in his claim X of the motion for post conviction relief. (PCR. 58-9). Subsequently, after the conclusian of the evidentiary hearing below, the defendant again raised this issue in his "Supplement," and added allegations of ineffective assistance of trial counsel. (PCR. 1449-51). In so far as this claim relies upon the trial court's alleged error in failing to instruct the jury as to an option of consecutive sentences, same should have been raised on direct appeal and was thus procedurally barred. Henderson v. Dugger, 522 So.2d 835, 836 *(8) (Fla. 1988). The allegations of ineffective assistance of counsel in this regard, contained in the "Supplement," were untimely filed, and are thus also procedurally barred. Parker v. Dugger, supra; Preston v. Dugger, supra.

X.

TRIAL COURT'S FAILURE TO ASSURE DEFENDANT'S PRESENCE IN COURT DURING HIS CAPITAL TRIAL.

In the court below, the defendant alleged that he was absent during portions of the trial, and that no proper waiver of his right to be present was obtained by the trial court. (PCR. 40). Trial errors are reviewed by an appellate court, not the trial judge who allegedly committed the error. This issue should have been raised on direct appeal and was thus procedurally barred. Blanco v. Wainwright, 507 So.2d 1377 at 1380 (Fla. 1987) (claim that trial court conducted critical phase of trial in absence of defendant barred under Rule 3.850, as it could and should have been raised on direct appeal). The State would also note that there were no allegations of ineffective assistance of counsel with respect to this issue in the lower court. Such allegations can not be raised for the first time on appeal. Doyle v. State, 526 So.2d 909, 911 (Fla. 1988).

XI"

USE OF UNCONSTITUTIONALLY OBTAINED PRIOR CONVICTIONS.

Whether the trial court erred in relying on the defendant's two prior murder convictions is a matter which could and should have been raised on direct appeal. Adams v. State, 449 So.2d 819, 820 (Fla. 1984) (alleged improper use as an

aggravating circumstance of Adam's 1962 Tennessee conviction for rape, was found procedurally barred, because "the issue could have been raised in the first appeal to this Court."); See also Henderson v. Dugger, 522 So.2d 835, 836, **Bundy** v. State, 538 So.2d 445, 447 (Fla. 1989). This issue is thus procedurally barred.

The defendant has also claimed that the lower court erred in not allowing an evidentiary hearing, in order to establish trial counsel's ineffectiveness for failing to overturn the two prior convictions and prevent their use as aggravating circumstances. The State would note that in the lower court, the defense specifically stated that they had not had access to the District of Columbia trial transcripts and trial or appellate files. (PCR. 44). The defendant however, alleged that, "his Sixth Amendment rights in the District of Columbia proceedings were violated", based upon, "matters respecting the District of Columbia conviction that were elicited during Mr. Parker's Florida trial." Id. The only District of Columbia matters elicited during the Florida proceedings were the gun and statements of the defendant to District of Columbia officers. See State v. **Parker**, 399 So.2d 24 (Fla. **3d** DCA 1981); Parker v. State, 456 So.2d 436 (Fla. 1984). The trial court thus held that the defendant had not alleged sufficient facts to establish prejudice from any alleged deficient performance of counsel:

> "Assuming that counsel here had the duty to initiate this collateral attack **and** that defendant could show that his counsel had been deficient in failing to file a motion to suppress, Mr. Parker still would not meet his burden of prejudice. There is no reason to believe that without evidence of the gun in the Washington case Mr. Parker would have been acquitted. There were eye witnesses to the shooting in the Washington bar who identified Parker **as** the shooter, and Parker, himself admitted to the shooting and asserted the defense of self-defense.

(PCR. 1458); Also see State v. Parker, supra.

Likewise, with respect to the 1967 Florida conviction for first degree murder, the trial court again found insufficient allegations of prejudice to overturn this prior conviction:

> In this case, Parker was convicted of first degree murder upon his plea of guilty to the charge. He was sentenced to life in prison. In challenging this conviction, Defendant argues that his plea resulted from coercion, fear, and secret threats and was, therefore, not voluntarily entered. Nowhere in his collateral attack does **he** allege that, but for the treachery of his trial counsel he would have plead not guilty and would likely have been acquitted by a jury. Therefore, even though **there** may be a basis to set aside **and** vacate the guilty plea, there is no basis to find that Defendant would not have been convicted of murder after a jury trial. Thus, no prejudice can be shown.

(PCR. **1458).**

There was thus no basis for an evidentiary hearing as the defendant's allegations of prejudice as to each of the prior

convictions was insufficient. Moreover, there is no basis for finding a duty on the part of Florida defense counsel to undertake judicial proceedings in a jurisdiction, outside Florida, in which such counsel is neither licensed nor authorized to engage in the practice of law.

The State would additionally note that even if the prior murder convictions were invalid, the aggravating circumstance of prior violent felony, based on the three robbery and one sexual battery count on the surviving victims herein, would still have been present. These latter convictions have never been challenged, and there is thus no prejudice. Bundy v. State, 538 So.2d 445, 447 (Fla. 1989); Duest v. Dugger, 555 So.2d 849, 851 (Fla. 1990).

XII.

TRIAL COURT'S REFUSAL TO PROVIDE THE JURY WITH A CIRCUMSTANTIAL EVIDENCE INSTRUCTION.

In the court below the defendant argued that the trial court erroneously refused to instruct the jury on "circumstantial evidence." (PCR. 45-46). Whether the trial court erred in giving or denying a particular jury instruction is a matter which could and should have been raised on direct appeal. Gorham v. State, 521 So.2d 1067, 1070 (Fla. 1988) (Any claim of error regarding instructions given by the trial court should have been raised on

direct appeal). This claim should thus be found procedurally barred.

XIII.

THE TRIAL COURT DID NOT DIMINISH THE JURY'S SENSE OF RESPONSIBILITY.

In the court below, the defendant alleged that the sentencing jury was **repeatedly** misled by instruction and arguments which inaccurately diluted their sense of responsibility for sentencing, in violation of Caldwell v. Mississippi, **472** U.S. 320 (1985). (**PCR**. 47-50). There were no allegations of ineffective assistance of counsel with respect to this claim in the lower court. Such allegations can not now be added for the first time on appeal. Doyle, supra. This claim, as raised in the lower court, was procedurally barred because it should have been raised on direct appeal. Bertolotti, supra, at 255 n.2.

XIV.

UNCONSTITUTIONAL **BURDEN** SHIFTING AT SENTENCING.

Again, in the lower court, the defendant raised this issue without any allegations of ineffectiveness. (PCR. **52-54**). The issue, as raised in the lower court, was procedurally barred as it could or should have been raised on direct appeal, and as such was not proper for a motion for post conviction relief. Atkins **v.** Duqqer, **541** So.2d **1165, 1166** n. **1** (Fla. 1989); Doyle, supra.

XV.

JURY INSTRUCTION THAT A RECOMMENDATION OF LIFE MUST BE MADE BY A MAJORITY VOTE MISLED THE JURY.

This claim could and should have been raised on direct appeal. Atkins v. Dugger, supra, at 1166 n.1; Gorham, supra. It should therefore be found procedurally barred.

XVI.

WRONGFUL EXCLUSION OF POTENTIAL JURORS.

In the lower court, the defendant alleged that a number of jurors were improperly excluded solely because they expressed reservations concerning the death penalty in violation of Witherspoon v. Illinois, 391 U.S. 510 (1988). (PCR. 59). No other details were given. The defendant raised several challenges to the jury selection process on direct appeal, which were all rejected by this Court. Parker v. State, supra, at 492. The instant claim should likewise have been raised on direct appeal, and is thus procedurally barred.

XVII.

TRIAL COURT'S FAILURE TO FULLY AND FAIRLY CONSIDER NONSTATUTORY AND STATUTORY MITIGATION.

In the lower court, the defendant argued that the trial court did not consider non-statutory mitigating factors set out

in the record. (PCR. 60). There were no allegations of ineffective assistance of counsel in the pleading below. The claim, as set out in the trial court, should have been raised an direct appeal and is thus procedurally barred. Engle v. Dugger, 576 So.2d 696, 702 (Fla. 1991); Roberts v. State, 568 So.2d 1255, 1257-8 (Fla. 1990). The new allegations added by the Appellant on appeal are not cognizable because they were not raised below. Doyle, supra.

CONCLUSION

Based on the faregoing, the order of the lower court denying the motion for post-conviction relief should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

FARIBA N. KOMEILY
Florida Bar No. 0375934
Assistant Attorney General
Department of Legal Affairs
401 N. W. 2nd Avenue, Suite N921
P. O. Box 013241
Miami, Florida 33101
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing INITIAL BRIEF OF APPELLEE was furnished by mail to BILLY H. NOLAS, Special Assistant CCR, JULIE D. NAYLOR, Special Assistant CCR, P. O. Box 4905, Ocala, Florida 32678-4905 and LARRY HELM SPALDING, Capital Collateral Representative, GAIL E. ANDERSON, Assistant CCR, OFFICE OF THE CAPITAL COLLATERAL REPRESENTATIVE, 1533 South Monroe Street, Tallahassee, Florida 32301 on this 25 day of November, 1991.

FARIBA N. KOMEILY
Assistant Attorney General