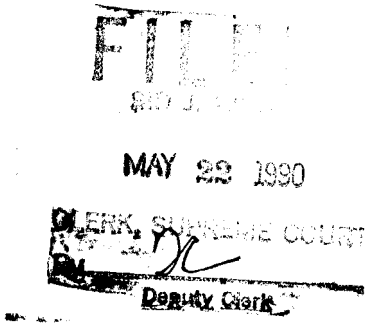
IN THE SUPREME COURT OF FLORIDA



GREGORY SCOTT ENGLE,

Appellant,

v. CASE NO. 74,902

STATE OF FLORIDA,

Appellee.

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The "facts" as set forth in Engle non-conforming and untimely brief are not accepted.

Gregory Scott Engle and Rufus Stevens brutally murdered Elanor Tolin on or about March 13, 1979. Engle's knife was the murder weapon. Engle's guilt is undisputed. See Engle V. State, 438 So.2d 803 (Fla. 1983) ("Engle I").

On direct appeal, Engle raised seven claims; to-wit:

(1) "Witherspoon" error.

(2) Sequestration error.

(3) The admission of photographs into evidence.

(4) "Failure" to properly reinstruct thejury on lesser degrees of murder.

(5) Incorrect instruction on the weight to be afforded to Engle's pretrial statements.

(6) "Tedder" error.

(7) Imprpper use of codefendant Stevens' statement.[1]

Mr. Engle won resentencing on the strength of claim (7) but was again sentenced to death. Engle did not appeal Judge Santora's denial of the motion for disqualificatioin (thus waiving the claim) but he did raise two other issues:

(1) An Enmund claim.

(2) A Tedder claim.

This Honorable Court agreed with Judge Santora in an opinion which has not been challenged as "biased". Engle V. State, 510 So.2d 881 (Fla. 1987) ("Engle II").

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[1] Stevens and Engle were tried separately and had different attorneys.

The Office of the Capital Collateral Representative ("CCR") took over Mr. Engle's defense. CCR filed another motion to disqualify Judge Santora and made a written "Public Records Act" or Chapter **119** demand on the State.

On September **28, 1989,** a motion to vacate judgment pursuant to Fla.R.Crim.P. **3.850** was filed. (R **16-158).** The motion raised the following claims:

(1) A challenge to Fla.R.Crim.P. **3.851.**

(2) A "**Brady**" claim.

(3) A subornation of perjury claim.

(4) An "ineffective trial counsel" claim.

(5) An "ineffective penalty phase counsel" claim.

(6) An "ineffective expert witness" claim.

(7) An "incompetent defendant" claim.

(8) A "**Booth**" claim.

(9) Denial of his motion to recuse Judge Santora.

(10) A challenge to the jury override.

(11) A challenge to the written sentencing order.

(12) "**Lockett**" error.

(13) "Failure" to find mitigating factors.

(14) "Failure" to suppress statements.

(15) Admission of hearsay at trial.

(16) The use of a jury instruction on premeditation.

(17) The introduction of photographs.

(18) A "**Maynard v. Cartwright**" claim.

(19) A "burden shifting" jury instruction claim.

(20) Alleged use of non-statutory aggravating evidence.

On October **10, 1989,** Judge Santora granted the motion for disqualification stating:

> JUDGE: I think I have to disqualify myself, and I hate to do it because all its doing is costing taxpayers more money and more work for another judge. But in view of what the Supreme Court said in the Stevens' case and what I have said about Engle, I find that the motion is legally sufficient.
>
> It is true everything they say. I have prejudice against Engle. I sat there and listened to the evidence for a week, and I being a normal average human being, I developed, as any judge would, the opinion that he deserved to die for what he did to that woman. If I had it to do all over again I'd sentence him to die again and I don't think it is a fair shake for me to sit in judgment on these matters feeling about this cruel murder as I do.
>
> So your motion is granted. Another judge will be appointed to whom you have to defer all these other matters.
>
> MR. NOLAS: Thank you, Your Honor. And let me say based on the action Your Honor just took, you're more than a normal human being.

(Transcript of hearing held October **10, 1989** at **59-60).**

Judge Santora engaged in some non-record banter which CCR subsequently converted into non-contextual affidavits for use on appeal. The State objects to any references to non-record material.

The case was reassigned to Judge Hudson Olliff, who thoroughly read the record and set the case for oral argument on Sunday, October **15, 1989.** Five minutes before the hearing, CCR

presented the State with a massive "appendix". (Transcript of hearing held October **15, 1989** at **17).**

Judge Olliff asked the parties to argue the need for an evidentiary hearing on those issues which were not procedurally barred.

CCR rested on its pleadings as to Claim I. **(Id,** at **33).**

CCR confessed that Claims II and III were mere conclusory allegations for which no supporting facts were available. **(Id,** at **33-35).** The only "fact" even alleged by CCR was that Dr. Floro gave differing reports on the quantity of blood during the two trials **(id,** at **41)** but CCR never spoke to Floro or obtained one of its ubiquitous affidavits from him.

Given the facial deficiency of these first three counts, as confessed by CCR, they were denied orally. **(Id,** at **41, 42).**

The court then asked for oral argument on claims IV-VII but CCR declined to do *so,* resting on its written submissions. **(Id,** at **44, 45).** CCR even agreed that an evidentiary hearing is not required in every case. (Id, at **51).**

The court ruled that based upon its reading of the record an evidentiary hearing was unnecessary. **(Id,** at **52).** When the court requested oral argument on the merits, CCR declined. **(Id,** at **53-57).**

The court directed CCR to submit a proposed order on the merits and stated it would defer its ruling until Monday evening while it considered the appendix and CCR's order. **(Id,** at **57-58).** CCR never bothered to submit any proposed order, *so* the court ruled (in the State's favor) after waiting until Wednesday, October **18, 1989.** (R **685,** et seq.).

This Honorable Court established a briefing schedule. The State filed a brief, CCR did not. CCR did file, however, a 157-page motion for stay. On May 1, 1990, CCR finally filed its "brief".

SUMMARY OF ARGUMENT

Mr. Engle's Rule 3.850 petition raised nothing more than a gaggle of unprepared, unresearched and unsubstantiated claims of a "boilerplate" variety which "usually" get evidentiary hearings.

When given oral argument on the need for an evidentiary hearing, Engle confessed the absence of supporting facts and rested on his written pleadings.

The trial court correctly resolved each claim on the record, the facial deficiencies in Engle's pleadings, or the existence of a procedural bar.

In a desparate appeal, Engle seeks reversal with a host of **ad hominem** arguments and references to "facts" that are totally **de hors** the record.

What Engle has not done, however, is establish reversible error by the lower court.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN DENYING *AN* EVIDENTIARY HEARING

The focus of this appeal should not shift from the issues to personal attacks upon counsel or the trial judges, so the State will not address much of the rhetoric in Engle's brief. Any assertion not dignified with a response, however, should not be taken as admitted or conceded.[2]

An evidentiary hearing is not required in every single Rule 3.850 proceeding, a point conceded by Engle at oral argument. To qualify, the petitioner carries the burden of pleading sufficient facts and law to merit additional inquiry. The mere filing of generic claims which "usually" provoke a hearing does not, alone, entitle a petitioner to relief. **Kennedy** v. **State,** 547 So.2d 912 (Fla. 1989); **Glock** v. **State,** 537 So.2d 99 (Fla. 1989); **Coleman** v. **State,** 183 So.2d 714 (Fla. 1st DCA 1966); **Thomas** v. **State,** 206 So.2d 475 (Fla. 4th DCA 1968); **Davis** v. **State,** 207 So.2d 79 (Fla. 2nd DCA 1972).

The burden of proof remains with the unsuccessful petitioner on appeal. **Coleman v. State,** 183 So.2d 714 (Fla. 1st DCA 1966). On appeal, the facts and all inferences from the facts are taken in favor of the judgment being appealed, **not** the appellant's position.

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[2] The **ad hominem** attack upon Judge Olliff as biased, "odius" in his conduct and "acting without thought or review" (Brief, pp. 10-12), should be reviewed in context with **Mann v. State,** 476 So.2d 1369 (Fla. 2nd DCA 1985).

Mr. Engle is not immune from these standards of review or from the requirements of Fla.R.Crim.P. 3.850. As this Court held in **White** v. **State,** 511 So.2d 984, 987 (Fla. 1987):

> We point out again to the office of collateral counsel that failure to follow rules 3.850 and 3.851 procedurally bars relief. The fact that we are dealing with a death sentence does not excuse appellant's failure to abide by the Florida Rules of Criminal Procedure.

Regarding the lower court's adoption of the State's proposed order, we note that this practice is not improper or impermissible. **E.E.O.C.** v. **Federal Reserve Bank,** 698 F.2d 633 (4th Cir. 1983); **Golf City** v. **Wilson Sporting Goods, 555** F.2d 426 (5th Cir. 1980). When a court adopts a proposed order the said document becomes the court's order, not the "prevailing party's'' order.[3]

Mr. Engle points to only one possible error in the order. In noting that Engle's counsel violated E.C. 4-3.3 by filing a procedurally barred claim without advising the court, the court cited **Tompkins** v. **State,** 549 So.2d 1370 (Fla. 1989), and stated that the same attorney was involved. While the same law firm was involved (CCR) and while Nolas is the Chief Assistant (who therefore supervised the **Tompkins** case), he was not formally of record in that case.

Other alleged "errors" were not errors at all. Mr. Engle did not at any time avail himself of the statutory remedies attending Chapter 119. While Mr. Engle may be correct in stating

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[3] Again, Mr. Engle refused to submit his own order despite a specific request from the court. Had Engle submitted a better order, it would have been signed.

that Chapter 119 disputes can be efficiently handled by the Rule 3.850 court, the statute does not draw this conclusion and the statute cannot be amended by judicial fiat. The finding that the State had "no motive to get Dr. Floro to lie" is supported by the record since Dr. Floro was testifying on an issue not contested by the defense. (The theory of the defense was that Stevens killed Ms. Tolin, the manner of death was not important under this theory). The court was correct in finding that Engle could have appealed the disqualification issue but did not do so - and Engle has yet to produce a brief raising the disqualification claim. We, too, could go on but, without waiving any issue, simply note that Mr. Engle's disagreement with the court's findings of fact does not render those findings erroneous.

Mr. Engle was given a clear opportunity to argue in support of an evidentiary hearing and to show to the court supporting facts to back up his charges. Given the fact that CCR withheld its massive appendix until five minutes before the hearing, any support for Engle's petition buried in that pile of paper could have been shown to the court at the time to emphasize its value. Engle, after all, had the burden of proof.

When offered argument on Claim I (the challenge to Rule 3.851), Engle rested on his pleadings. Engle did not "confess" the meritless nature of his claim (as he contends on appeal) in his written petition (as required by Rule 4-3.3) and he only grudgingly did so after being confronted by the court. The court did not err in any of its findings on the merits of this issue.

When offered argument on Claim II **(Brady),** Engle's lawyer confessed that the petitioner had no supporting facts but hoped to find some in the future. This lack of supporting facts supports the lower court's decision.

When offered argument on Claim 111, Engle again confessed a total absence of any proof that Dr. Floro committed perjury or that the State put him up to it. Absent any facts, this issue was undeserving of a hearing and, in fact, was highly improper. **Thomas** v. **State,** 210 So.2d 488 (Fla. 2nd DCA 1968); **Bogan** v. **State, 211** So.2d 74 (Fla. 2nd DCA 1968); **Giles** v. **State, 363** So.2d 164 (Fla. 3rd DCA 1974); **Bumgarner** v. **State,** 245 So.2d **635** (Fla. 4th DCA 1971). It is indeed telling that Engle's massive appendix included no statement by Dr. Floro on the topic of perjury.

Claims IV and V were **de rigeur** attacks upon the competence of trial counsel which Engle declined to even argue. The court relied upon the complete trial record in rejecting the claims and was not required to cut and paste specific excerpts for inclusion in its order under the circumstances. As noted in **Mauldin** v. **State,** 382 So.2d 844 (Fla. 1st DCA 1980), "attachment" of portions of the record is not required when the reviewing court already has the record before it. Since codefendant Stevens had a different lawyer and a separate trial, the fact that he won a hearing does not control our case.

Claims VI and VII were flatly refuted by the record, including **neutral** mental health evaluations by experts who saw Engle **at the time.** Engle offered no support, during oral argument, for his request for an evidentiary hearing.

Engle's remaining claims were procedurally barred. Engle, again, did not even argue them before Judge Olliff.

Ad hominem attacks on the trial judge and distortion of the issues cannot distract this Honorable Court from the central issue. Did Engle plead sufficient facts to warrant an evidentiary hearing? No, he did not. Did Engle even have sufficient facts to justify his scandalous accusations? As Mr. Nolas confessed in open court, Engle did not.

Under these circumstances, the lower court did not err.

POINT II

THE SO-CALLED "TEDDER" ISSUE IS PROCEDURALLY BARRED

Engle has already appealed the "**Tedder**" issue and lost. He is not entitled to a second appeal. **Adams** v. **State,** 484 So.2d 1216 (Fla. 1986); **Clark** v. **State,** 533 So.2d 1144 (Fla. 1988); **Demps** v. **State,** 515 So.2d 196 (Fla. 1987). Engle is not entitled to relief "even if" he might receive a new sentence today. **Johnson** v. **Dugger,** 523 So.2d 161 (Fla. 1988); **Francis** v. **State,** 529 So.2d 670 (Fla. 1988).

Of course, the jury's life suggestion here was so untenable that **Engle** II this Court rejected the "**Tedder**" argument as "not serious".

Engle wants to reargue **Tedder** v. **State,** 322 So.2d 908 (Fla. 1975), by attacking the alleged "bias" of Judge Santora. He cannot do so.

Engle moved to disqualify Judge Santora prior to resentencing and lost. Given the chance to appeal, Engle never

raised the recusal issue. Therefore, he specifically waived it. **Bundy** v. **State,** 538 So.2d 445 (Fla. 1989); **Grossman** v. **State,** 525 So.2d 833 (Fla. 1988). Indeed, Engle's failure to pursue the recusal issue is itself a waiver of the claim. See In **Re: Estate of Carlton,** 378 So.2d 1212 (Fla. 1979).

Judge Santora's recorded statements show that he applied the statute (8921.141) correctly. The record is equally clear that this Court, whose impartiality is not challenged, agreed with Judge Santora's legal and factual conclusions. Nothing in the record proves or implies that Engle received an unjust sentence.

The mere fact that a judge enters decisions adverse to a party does not establish bias or compel recusal. **Wilson** v. **Renfroe,** 91 So.2d 857 (Fla. 1957); **Nasseta** v. **Kaplan,** 15 F.L.W. **630** (Fla. 4th DCA 1990). Judge Santora ruled against Engle on the sentencing issue, but his conclusion was based on the evidence adduced at trial, not upon improper or external factors. While Judge Santora was and is certain that Engle deserved capital justice, mere certainty in passing sentence does not render the sentence "invalid" as "biased". In fact, one would hope that a judge would be certain before sentencing someone to death.[4]

Judge Santora had the intelligence and respect for the system to remove himself from this case at a time he felt he should not continue. This was not the conduct of a "biased" or unfair jurist, as conceded in Mr. Nolas' comments to Judge

[4] Judges do not exist in a vacuum and are not expected to rule without being affected by their experiences or the evidence. See **Barclay** v. **Florida,** 463 **U.S.** 939 (1983).

Santora at the end of the hearing. It was the conduct of an honest jurist who deserves better than to be ambushed with his off-the-record asides. We submit that Judge Santora's "bias" in 1989 would arguably not even be relevant to his opinion at the time of Engle's sentencing. Judge Santora's sensitivity to Engle's rights is more than obvious.

In sum, however, the simple fact remains that the **Tedder** issue is procedurally barred, as is the "recusal" issue. The record clearly and unequivocally supported the imposition of capital justice in this case as well as the rejection of the advisory jury's untenable suggestion of life. Engle 11, supra.

Engle is not entitled to a second appeal on the **Tedder** issue.

POINT III

THE TRIAL COURT DID NOT ERR IN SUMMARILY DENYING ENGLE's "PERJURY" CLAIM

Dr. Floro's written autopsy report indicated recovery of 4 cc's of blood from the body of the victim, Ms. Tolin. This amount was substantially less than the five tablespoons of blood reported at (R 370) trial.

This inconsistency was inflated by Mr. Engle into a charge of subornation of perjury against the prosecutor. Engle's position was that the prosecutor induced Dr. Floro to "lie" just so Engle could be given the death penalty.

Absent from Engle's petition is any confession from Mr. Coxe, any statement by Dr. Floro, any proof of conspiracy between the two men, any proof of "motive" for Mr. Coxe or Dr. Floro (to

single out Engle or to risk their careers) or any proof of "consideration" or payment to Dr. Floro.

Judge Olliff asked Engle's lawyer for proof of a prosecutorial plot to suborn perjury. Mr. Nolas openly confessed he had no proof at all. In addition, Nolas stated that these wild accusations "would be withdrawn" if CCR's investigation turned up no evidence. (Transcript of hearing held October **15, 1989** at **34-35).** In other words, these noxious attacks were nothing more than speculation, drafted in an inflammatory manner on the eve of an execution to provoke a hearing.

As noted above, the filing of uninvestigated charges of this kind is highly improper. Thomas, supra; Bogan, supra; Giles, supra; Bumgarner, supra. Had Judge Olliff been as biased as Engle now alleges, he could have justifiably imposed sanctions based upon counsel's confession of misconduct. Instead, Judge Olliff merely dismissed the claim.

If claims are to be filed in a rule **3.850** proceeding, they should only be filed after they are investigated. Even if the "Chapter **119**" demand had not been answered, there was still no justification for public charges of criminal conduct against Dr. Floro or Mr. Coxe.

Dismissal in the confessed absence of any evidence was proper.

POINT IV

THE TRIAL COURT DID NOT ERR IN DISMISSING ENGLE'S "BRADY" CLAIM

Once again, Engle filed a claim in the absence of any supporting evidence and prior to the completion of any investigation. Once again, the court asked counsel for evidence and once again counsel confessed he had absolutely none. Once again, Engle's lawyer could only opine that maybe something would turn up after Engle's Chapter 119 demand was met.

Once again, "speculation" is not "proof", nor can some general defense presumption of prosecutorial misconduct serve as a substitute for the facts when seeking Rule 3.850 relief.

POINT V

THE TRIAL COURT DID NOT ERR IN DENYING THE CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

The trial court correctly denied relief on Engle's "ineffective assistance of counsel" claim on the basis of the record and the "error and prejudice" test of **Strickland** v. **Washington,** 466 U.S. 688 (1984). Engle was not entitled to an evidentiary hearing given the facial meritlessness of his **de riguer** attack upon counsel. **Provenzano** v. **State, 15** F.L.W. 260 (Fla. 1990), see **Bundy v. Dugger,** 850 F.2d 1402 (11th Cir. 1989).

Each of Engle's claims can be repudiated as follows:

(A) "Failure" To Suppress Statements Made Following An Illegal Arrest

Engle openly asserts that this claim of ineffective assistance of counsel is also being used to litigate "Claim XIV", regarding the legality of his arrest.

A claim of ineffective assistance of counsel cannot be used as a vehicle to argue procedurally barred substantive claims. Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987); Bolender v. State, ____ So.2d ____ (Fla. May 17, 1990), Case No. 75,665. Therefore, the legality of Engle's arrest and the admissibility of his post-arrest exculpatory, post-Miranda, statement is not before the Court.

Engle also improperly attempts to raise a de novo claim of ineffective assistance of counsel on appeal, in that Engle has inserted a claim that trial counsel, on remand in 1984, should have raised the "arrest" issue. This claim was not included in the petition given to Judge Olliff, is not, properly before this Honorable Court, and should not be considered.

Engle claims that counsel failed to move to suppress his (post-Miranda) exculpatory statements as somehow being the fruit of an unlawful arrest. Engle was tried in 1979, when Florida law expressly allowed warrantless arrests of this kind. State v. Perez, 277 So.2d 778 (Fla. 1973). The case of Payton v. New York, 445 U.S. 573 (1980), was as yet undecided. In the companion case of Stevens v. State, 552 So.2d 1082 (1989), an analogous, if not identical, claim of ineffective counsel was rejected by this Court due to these facts.

Engle alleges that his case is unlike the Stevens case, primarily becuase of the way he has presented his collateral attack. Engle contends that Payton, while "new law" was not a clear break with established precedent and that counsel had the working tools to file a pre-Payton claim. Thus, Engle claims counsel was totally incompetent.

Had Engle read **Strickland v. Washington, supra,** with the same care with which he read **United States** v. **Johnson, 457 U.S. 537 (1982),** he would not (if he is even proceeding in good faith) have filed this claim.

Strickland, as this Court correctly observed in **Stevens,** does not require counsel to predict the advent of "new law" even if, arguably, the "working tools" for a precedent setting claim exist. The **Johnson** case, while finding that the **Payton** decision was supported by precedent and was not "new law" in that context, nevertheless identified **Payton** as "new law" of another kind, i.e., answering a novel or unsettled question of Fourth Amendment law.

Pursuant to **Kimmelman** v. **Morrison, ____ U.S. ____, 106** S.Ct. **2574, 91** L.Ed.2d **305 (1986),** Engle cannot establish a **Strickland-**Fourth Amendment claim without **first** establishing that a Fourth Amendment claim (a) existed and (b) could have prevailed. Engle has "proclaimed" that his arrest was illegal and that his statement should have been suppressed, but he had not established that threshhold standard.

Regarding the arrest, "exigency", especially in **1979,** would have been found. Under the operative facts, Hamilton was picked up by the police late in the evening of March **19, 1979.** (R **570).** Hamilton knew about the Tolin murder but refused to speak until his family was in protective custody. (R **590-591).** When the police went to the Hamilton home, they encountered Rufus Stevens, who left. (R **592-593).** Hamilton then told the police that Stevens and Engle were the killers, meaning that Stevens now knew

the police were on his trail and that he and Engle would try to run. Faced with two at-lage killers who were tipped-off that the police were on their trail, the police arrested Engle. Can we, from an armcchair, a decade later, discount the exigent circumstances present in this case? Of course not, if we consider the controlling nature of the Perez case (in 1979).

At most, counsel might have raised the claim *so* as to put it in the "pipeline" *so* that Payton, in the future, could be retroactively applied to his case under Johnson.

This speculative benefit, however, does not satisfy Kimmelman *so* that Engle can even qualify for further Strickland analysis. That is why the trial court was correct in applying Stevens.

Assuming arguendo that Engle could have established an illegal arrest, we must recall that Engle was still given all of his Miranda rights before making his exculpatory statement. Engle did not confess. At most, Engle stated that he was with Stevens the night Stevens killed Ms. Tolin. Courtesy of Engle's statements to Hamilton, the police already knew that. Given subsequent events, we know that discovery of this fact was inevitable anyway.

Engle's defense at trial was a straightforward statement of non-involvement in the murder, period. (R 820). Engle's statement provided Engle with a vehicle for putting this defense, from Engle's lips, before the jury without defense counsel having to risk putting Engle on the witness stand. Indeed, the entire defense strategy was served, not hurt, by Engle's statement.

It is not clear, therefore, that Engle had a reason to seek suppression. More to the point, however, is the total impact of this situation of the "error and prejudice" test of **Strickland.**

"Error" under **Strickland** means more than tactical error. "Error" means error so serious that counsel was virtually not acting as counsel at all. In **United States v. Cronic, 466 U.S. 648, 666 (1984),** the court held, as it did in **Strickland,** that even demonstrable, or even "unreasonable", error will not necessarily establish the ineffective assistance of counsel. Did counsel err? In viewing this case from counsel's shoes at the time, as we must, it does not appear he did so. The motion was not likely to succeed, the theory of defense stood to be better served by showing Engle's consistent denials and the alternative was to either put Engle on the stand or attempt an alternative "defense", such as intoxication, which would have still convicted the client if not believed or would have convicted him of a lesser degree of homicide if believed.

This brings us to the **conjunctive** requirement of establishing **prejudice -** as defined by **Strickland.** Prejudice does not mean "arguable" prejudice, since any error by counsel could meet that test. Instead, Engle must show an actual adverse impact on his case so serious as to undermine the reliability of the result. Since counsel had no guarantee, in **1979,** a motion to suppress would prevail, since the facts arguably supported a finding of exigency, since Engle's statement was post-Miranda, since Engle's statement was exculpatory, since Engle's statement did not harm his theory of defense and since Engle's statement

meant Engle did not have to testify, "prejudice" under **Strickland** has neither been **alleged** or shown.

The trial court record regarding the theory of the defense is clear. The historical sequences of **Perez,** Engle and **Payton** is also clear. An evidentiary hearing was not necessary under these circumstances, especially given this Court's correct ruling in the **Stevens** case.

The trial court's order should be affirmed.

(B) Failure To Object To Hamilton's "Hearsay" Testimony Re: Rufus Stevens' Statements

Rufus Stevens raised this same issue regarding Hamilton's testimony on comments by Engle. In rejecting this argument, this Court noted that the decision to object or not is a tactical decision by counsel which will not be second guessed. **Stevens** v. **State, supra.** Judge Olliff correctly relied upon **Stevens,** as well as **United States** v. **Cronic, supra, on** the issue of prejudice. (We note that trial counsel effectively cross-examined Hamilton).

(C) "Failure" To Request A "**Richardson**" Hearing

Engle's theory of defense was that Stevens killed Ms. Tolin.

Engle and counsel were told during pre-trial discovery that the State had the knife used to kill Ms. Tolin, see Second Amended Response to Demand for Discovery (R 31).

In the lower court, CCR at least acknowledged that there was no discovery violation. For reasons unknown, that fact has been omitted from the Appellant's brief.

For the record, a **Richardson** hearing would have been appropriate if the State violated discovery by producing a knife whose existence it failed to reveal, but where the State complied with discovery, counsel had no right to request a hearing. Thus, the allegation that counsel violated the standards of **Strickland** by failing to request a hearing he could not get is more than meritless, it is fatuous.

Also, we note that defense counsel never intended to contest the cause of death or the fact that Ms. Tolin was murdered. This strategic decision was announced on the reord. (R 293-294). Defense counsel, in reacting to the knife, stated that he did not represent Rufus Stevens. Counsel represented Engle, who blamed Stevens for the murder.

Absent a discovery violation counsel had no basis for requesting a **Richardson** hearing. Since the use of the knife by Stevens was not contested, no prejudice resulted from its introduction. Absent error or prejudice, Engle did not meet **Strickland's** standards. The lower court correctly resolved this issue on the strength of the record.

(D) "Failure" To Adequately
Cross Examine Dr. Floro

The current brief alleges this claim as an alterna ive to the baseless "perjury" claim answered above.

The theory of the case was that Stevens killed Ms. Tolin and that Engle did not kill or brutalize her at all. The issues of "bleeding" or her physical state at any given time were relevant to Stevens' conduct but not to Engle's conduct under this theory.

Although Engle's brief again conveniently omits the relevant facts, this Court can take additional note of defense counsel's closing argument (R 825-829), in which counsel explained his limited examination of Dr. Floro, which minimized the weight of Floro's autopsy because Floro could not state that more than one person touched or harmed Ms. Tolin. (R 829).

Therefore, counsel had clearly defined and identified reasons for not pursuing a more detailed cross examination of Dr. Floro and those reasons are set forth on the record. The trial court did not err in denying relief.

(E) "Failure To Object To Jury Instruction"

CCR (Engle) contends that defense counsel was incompetent, in 1979, for failing to raise an objection to a standard jury instruction which has **never** been declared invalid. (The "objection" is a challenge to the felony-murder concept and is facially absurd).

This ridiculous assertion does not satisfy the error-prejudice test but it **does** underscore once again the lack of research and overall bad faith of Engle's petition, a point not lost on any reviewing court. (We again object to the claim in footnote 27 as improper).

(F) Failure To Raise A "Voluntary Intoxication''Defense

Engle's defensive strategy was to attest to his innocence. It is not unusual for alternative theories of defense to exist in any case. Counsel cannot be deemed ineffective becauses he chose an unsuccessful approach. **Songer** v. **Wainwright,** 733 F.2d 788

(11th Cir. 1984); Palmes v. Wainwright, 725 F.2d 1511 (11th Cir. 1984).

(G) "Failure" To Raise Competence To Stand Trial

Engle did not manifest incompetence to stand trial to his lawyer (R 95) or to any mental health experts. Counsel is not obligated to always seek out this defense.

We would note that Engle even swore to his present petition, so even CCR confesses he is not incompetent and never has been.

(H) "Failure" To Sequester Jury

On direct appeal, this Court ruled that the trial court did not commit error in "failing" to sequester the jury, and no prejudice to Engle was found. Based on this finding, Engle cannot establish either error or prejudice under **Strickland.**

(I) Failure To Prove Available Mitigation

Engle's first trial lawyer, Mr. Shorestein, made a deliberate tactical decision to minimize his presentation to the advisory jury because he felt that the jury may have made some sort of "compromise" during the lengthy guilt phase deliberations. (R 1030-1031).

By minimizing the penalty phase (which consisted exclusively of argument), counsel:

(1) Told the jury he could have used "capital defense teams" because in some cases, but not this one, they are needed. (R 1002).

(2) He repeatedly argued that Engle merely "aided" the "real killer" Rufus Stevens. (R 1002-1022).

(3) The lack of evidence of prior violent crimes. (R **1015).**

(4) That "anyone who commits robbery" is mentally disturbed so there was no need to bring in a psychiatrist. (R **1015).**

(5) That Stevens was the killer.

While the jury was deliberating, counsel put additional strategic considerations on the record. (R **1030).**

Mr. Shorestein's excellent strategy paid off in the form of a life recommendation.

Prior to Engle's actual sentencing, Mr. Shorestein had Engle examined by Drs. Yates and Miller. A "PSI" was prepared as well.

At the second hearing, Nathan Hamilton was called by the defense, as the person who could identify Stevens as "dominant" over Engle. (R **1036).** Mr. Shorestein also provided the psychiatric reports to the court. (R **1041).** Shorestein and Engle discussed the PSI. (R **1042).**

Shorestein argued, from Dr. Miller's report, that Engle had a history of psychiatric treatment, drug abuse and a character disorder. (R **1044).**

Mr. Shorestein argued against using any confession by Rufus Stevens (R **1051-1052)** and even moved to call Stevens as a witness if his motion to strike was denied. (R **1053).**

Although Engle was sentenced to death, Mr. Shorestein's excellent work in creating an "override" case and in preserving the record enabled Engle to win resentencing on appeal. Engle I, supra. Inasmuch as resentencing was granted, Mr. Shorestein's "effectiveness" is no longer an issue.

On resentencing, new defense counsel appeared (Mr. Chipperfield). Counsel moved to disqualify Judge Santora, had a new psychiatric evaluation done and prepared a new sentencing memorandum. (RII, 41, 60, 65, 66, 75).

At resentencing, Chipperfield called Florence Eileen Engle (RII 18) and Peggy Jo Pugh (RII 26).

Florence Engle is the defendant's mother. (RII 19). She told Judge Santora about the defendant's birth problems **(id,** 20), his sickly youth **(id,** 20), her sick husband **(id,** 21-22), Engle's arson **(id,** 22) and that Engle is a "follower" **(id,** 26).

Peggy Jo Pugh, Engle's sister, testified about their abusive father **(id,** 29, **30)** and Engle's peaceful nature **(id, 30).**

Mr. Chipperfield argued **"Tedder",** the "reasonableness" of the verdict, "domination" by Stevens and the other defense theories.[5]

On collateral attack, Engle's burden was to plead "error" and "prejudice" under **Strickland.** We note at the outset that Engle filed a sworn and verified Rule 3.850 petition. Obviously, Engle is not incompetent and obviously collateral counsel do not consider him incompetent, since they had him execute his verification. We also note that, in terms of pleading or establishing "prejudice", that in Claim X, Engle's current lawyers stipulated, and in fact argued, that trial counsel at sentencing and at resentencing put on more than enough mitigating

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[5] At this point, the State would make clear the fact that it does **not** accept these proposed mitigating factors as true or as applicable. This Court will note that Rufus Stevens claims to have been dominated by Engle.

evidence to support the jury's life verdict. (RIII 104-105, 107-111).

Applying **Strickland,** it is plain to see that Engle himself has pled that the error-prejudice test cannot be satisfied. The lawyers, according to Engle, and if judged from their shoes "at the time", **Winfrey** v. **Maggio, 6646** F.2d **550** (5th Cir. 1980) won a life recommendation from the jury and put on a strong enough penalty phase defense (and argument) to uphold it. The fact that counsel lost does not erase Engle's stipulation that there was, at least, no prejudice.

The current appeal is nothing more than the usual eleventh-hour aggregation of enhanced arguments and cumulative affidavits. We see this same material in every capital case.

Engle was examined by three different doctors. His attorneys, who are not required to be doctors, as well as lawyers, were entitled to rely upon these professionals to do their job. The lawyers were not required to go from doctor to doctor to get the most helpful evaluation possible. **Washington** v. **State,** 397 So.2d 285 (Fla. 1981); **Strickland** v. **Washington, supra; Foster v. Strickland,** 707 F.2d 1339 (11th Cir. 1983); **Foster** v. **Dugger,** 823 F.2d 402 (11th Cir. 1987). While it is true that anti-death penalty doctors exist who travel from state to state to "interpret" raw data in favor of mitigation, counsel is under no obligation to call witnesses of that ilk or put on a false defense. **Scott** v. **Dugger,** ____ F.2d ____, 3 F.L.W. Fed. C 1783 (11th Cir. 1990).

Engle now challenges his arson conviction, but fails to confront the basic fact that a valid conviction was on the books and that Judge Santora would not be bound by the testimony of Engle's cousin or decades-old second guessing by a police officer. To this day, the Ohio conviction has never been vacated.[6]

Defense counsel obviously spoke to and used the testimony of family members. Their alleged "error" was in not calling cumulative witnesses. This, of course, is not required under Strickland.

The record shows us that Engle's lawyers were presumpatively competent in winning a life verdict, having him examined three times, and using family members as witnesses. The pleadings contain Engle's own stipulation that counsel did a competent job, blaming only the court for "ignoring" the evidence.

Neither error nor prejudice was shown.

(J) Failure To Obtain A "Confidential" Report

Mr. Engle argues that counsel, to be effective, must order confidential psychiatric evaluations, citing Perri v. State, 441 So.2d 606 (Fla. 1983). Perri places no such obligation on counsel and does not mention "confidentiality" at all.

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[6] The affidavits of Jo Pugh and Florence Engle are not even accurate. They allege that they never spoke to anyone about Engle's father, his birth problems, the arson, etc. Yet, their trial testimony at least touched on these things, so they must have spoken to counsel. The lower court was clearly not bound to accept at face value anything in these affidavits.

The issue of "confidentiality" was correctly assessed below. An honest, neutral expert would give the same report in either a public or private report. Thus, "confidentiality" is not the issue **per se.**

Engle's real complaint goes to tactics. Engle contends that counsel should have obtained secret reports *so* that:

> (1) An unfavorable evaluation could be suppressed or withheld from the court, or
>
> (2) Counsel could work to change the mind of any expert who rendered an unfavorable diagnosis.

There is nothing in **Strickland** supporting either one of these propositions.

Counsel, under **Strickland,** need only take reasonable actions to assist their client. Here, counsel obtained three evaluations, from competent doctors, of a client who manifested no signs of psychosis or incompetence. Indeed, the operative legal presumption is that Engle presented his symptoms in the most favorable way he could. **Mims** v. **United States,** 375 F.2d 135 (5th Cir. 1967); **United States** v. **Makris,** 535 F.2d 899 (5th Cir. 1976); **United States** v. **Mota,** 598 F.2d 995 (5th Cir. 1979).

The plain fact is that **Strickland** does not require the procurement of "confidential" evaluations. Thus, counsel did not err. Since these reports also provided ammunition for counsel's arguments in mitigation, no "prejudice" has been shown either.

(K) Conclusion

An evidentiary hearing is not required every time a knee-jerk ineffective counsel claim is filed. In this case, Engle has

totally ignored **Strickland** and has filed a host of facially deficient, contradictory and surreal accusations which failed to show either error or prejudice. The trial court did not err in summarily denying relief.

POINT VI

THE TRIAL COURT DID NOT ERR IN DENYING RELIEF ON ENGLE'S "MEDICAL MALPRACTICE" CLAIM

As noted before, it is the duty of a Rule **3.850** petitioner to place before the trial court a petition supported by competent facts. Mr. Engle did not do *so* in this instance.

Although his petition and his appellate brief refer to the existence of psychiatric evaluations by various experts (Carbonell and Fox) and alleged agreement with those evaluations by the three experts who saw Engle in either **1979** or **1982,** none of these reports have been placed in the record. This Honorable Court will even note that Engle's brief, where it purports to quote these doctors, carries **no record citations.**

Just as Judge Olliff had been confronted with an uninvestigated and reckless "perjury" charge and a baseless "**Brady**" claim, here he was confronted with a "mental health" claim devoid of any record support. Unlike Engle's other claims, this deficiency could not be laid off or explained away as the product of an unmet Chapter **119** demand. Engle (allegedly) had these reports but did not provide them to the court.

Now, with consummate impropriety, Engle "cites" these non-record reports in his brief as proof of some "error" by his original doctors (in **1979)** and Dr. Vallely (in **1982).** The record

simply does not support this assertion and the arguments of appellate counsel are not evidence.

The circuit court should not be reversed on the basis of "secret reports" it was never given. The lower court must be affirmed if it is correct for any reason. **Savage v. State,** 156 So.2d 566 (Fla. 1st DCA 1963).

Without waiving this defense, we note that Engle's brief alleges that Dr. Carbonell would testify to:

(1) Frontal lobe brain damage (p.75).

(2) "Cognitive deficits" (p.76).

(3) "Substance abuse" (p.76).

(4) "How people like this generally act" (p.70).

(5) Engle abusive father.

(6) Bumps on the head and childhood ilnesses (p.76).

(7) Organic brain damage.

(8) "Schizoid" tendencies and **possible** "altered consciousness" during the crime.

(9) Engle's passive nature.

Dr. Fox, they claim, will swear:

(1) Engle's father was mentally ill and disabled (p.78).

(2) Engle's father abused him (p.78).

(3) Engle has brain damage and is "slow" (p.78).

(4) Engle was bumped on the head once (p.79).

(5) Engle used drugs and alcohol (p.79).

(6) Engle has "organic brain damage" (p.80).

(7) Stevens "dominated" Engle.

Comparing these phantom evaluations to the record, we find:

(1) Dr. Yates' 1979 report states:

(a) Engle was alert, aware of the charges and aware of the impact of this evaluation on his death sentence (R 11, 47).

(b) Engle's dad was a disabled war veteran with psychiatric problems who frequently beat up the defendant (R 11, 47).

(c) Engle is detached with no close relationships (R 11, 47).

(d) Engle has a history of drug abuse (R 11, 48).

(e) Engle violated parole (R 11, 48).

(f) Engle denied hallucinating.

She conceded that Engle had a history of drug use and juvenile offenses. Engle had poor judgment, difficulty in interpersonal relationships and a character disorder (R 11, 50).

(2) Dr. Miller reported:

(a) Engle reported the events of the night Ms. Tolin died (R 11, 42).

(b) Engle denied being under duress from Stevens and stated that duress was not a factor since Stevens was the killer (R 11, 43).

(c) Engle hated his childhood. He was unable to learn, had no friends, committed arsons, (R 11, 44) uses alcohol and drugs (R 11, 43).

(d) Engle's EEG and motor skills were all normal (R 11, 44).

(e) Engle is a nail-biter and though his manner is bland and his speech was somewhat pressured (with loose verbal associations), he was well-oriented to time and place and not delusional (R 11, 44).

Dr. Miller concluded that Engle had a lifelong history of drug abuse, physical abuse and detachment. But, Engle was not psychotic, he was in touch with reality and was not vulnerable to duress or domination. Thus, the defendant was not significantly impaired. He merely has a character disorder (R 11, **45**).

(3) Dr. Vallely's **1984** report stated:

> (a) Twelve different diagnostic tests were run on Engle (R 11, **75**).
>
> (b) Engle was the product of premature birth and incubation (R 11, **75**). He suffered from pyromania but denied any physical abuse as a child (R 11, **75**).
>
> (c) Engle was knocked unconscious once by a brick and has been in many accidents (R 11, 76). He had drug blackouts.
>
> (d) Engle had frontal lobe damage and thinking impairments (R 11, **77**). His mental capacities for self control are diminished as a result (R 11, **78**).

The **only** discrepancy between the data compiled by Vallely, Miller and Yates and the new data from Fox and Carbonell (if any) seems to be the number of unprosecuted arsons committed by Engle as a youth. In every essential way, however, Engle's doctors knew about the abusive father, the drug use, the alcohol abuse, the "frontal lobe" damage and all the other "facts" allegedly discovered by Fox and Carbonell.

Although minor differences in the raw data reported by these experts appear in their reports, the aggregate data was available to Vallely and, more importantly, to Judge Santora.

The bottom line is that Carbonell and Fox did not uncover "new" evidence. They simply reviewed cumulative evidence and then reached a different result than their predecessors. No

amount of semantic gamesmanship can alter this simple truth, nor can it overcome the fact that Judge Olliff **correctly** identified the defendant's claim and **correctly** disposed of it. Engle is not entitled to relief just because two recently hired, notoriously anti-death, "experts" reviewed the evidence and reached a different result. **Booker** v. **State,** 413 So.2d 756 (Fla. 1982); **Card** v. **State,** 497 So.2d 1169 (Fla. 1986); **Jackson** v. **Dugger,** 14 F.L.W. 355 (Fla. 1989).

Dr. Fox and Dr. Carbonell did not see Engle in 1979 and their **nunc pro tunc** evaluations of past competence are not even relevant. **Drope** v. **Missouri, 20 U.S.** 162 (1975) (recognizing that state courts need not accept **nunc pro tunc** evaluations). Their conclusions - at least as reported in Engle's brief - appear to be little more than generalities regarding "how organically brain damaged people generally act". This, too, is incompetent "evidence". See **James** v. **State,** 489 So.2d 737 (Fla. 1986).

The existence of organic grain damage or even some recognized mental illness does **not** prove that a defendant was impaired on any particular occasion. **James** v. **State, supra; Boay v. Raines,** 769 F.2d 1341 (9th Cir. 1984); **Symposium:** Current **Issues in Mental Disability Law,** 39 Rutgers Law Review 274 (1987) (on the impact of mental illness on competence); "**The Brain on Trial-Sorry, Anatomy Can't Excuse Murder",** The Washington **Post** (April 28, 1990).

Expert opinions that are inconsistent with the record (the evidence at trial and, here, Engle's active participation in his

defense) may be disregarded. **Thompson** v. **State,** 14 F.L.W. 527 (Fla. 1989); **Francis** v. **State,** 529 So.2d 670 (Fla. 1988); **Bundy** v. **Dugger,** 850 F.2d 1402 (11th Cir. 1988); **Bertolotti** v. **Dugger,** 883 F.2d 1503 (11th Cir. 1989).

In sum, Engle failed to prepare or present any record support for his claim. His "experts" did not uncover new data. All Engle did was procure a re-evaluation of his mental problems a decade after trial. Finally, even if Engle had mental problems, the were not linked to the offense sufficiently to compel relief.[7]

Absent any factual or legal basis for reversal, the lower court must be affirmed.

POINT VII

THE TRIAL COURT DID NOT ERR IN REJECTING ENGLE'S CLAIM OF INCOMPETENCE

Mr. Engle's serendipitous realization that he was "incompetent" in 1979 was not concurred in by the lower court or supported by the record. On appeal, he offers nothing more than unfounded and unsupported generalizations about his alleged illness.

The record belies Engle's claims and this Court is not bound by **nunc** pro **tunc** evaluations that are contrary to the record. **Thompson** v. **State,** 14 F.L.W. 527 (Fla. 1989); **Card** v. **State,** 497 So.2d 1169 (Fla. 1986); see **Bertolotti** v. **Dugger,** 883 F.2d 1503

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[7] We most not forget that Engle has maintained a posture of total non-involvement in the killings. An "impaired capacity" defense is inconsistent and, in fact, would adversely affect Engle's ability to blame Stevens. We must also note that Stevens is presently contending that he was dominated by Engle.

(11th Cir. **1989).** The mere fact that Engle has procured a favorable evaluation (from the usual stable of "experts") does not compel a competency hearing. **Card** v. **State, supra; Jackson v. Dugger, 14** F.L.W. 355 (Fla. **1989).**

POINT VIII

THE TRIAL COURT WAS CORRECT IN DENYING ENGLE'S "**BOOTH**" CLAIM

Engle's **Booth** claim was and is procedurally barred. **Clark** v. **State, 15** F.L.W. **50** (Fla. **1990); Parker** v. **Dugger, 14** F.L.W. 557 (Fla. **1989).** The trial court did not err.

POINT IX

THE TRIAL COURT DID NOT ERR IN DENYING ENGLE'S **HITCHCOCR-LOCKETT** CLAIM

This issue, too, is procedurally barred.

Engle's claim specifically assigns as error the trial **judge's** failure to consider non-statutory mitigating evidence, not the jury's failure.

The error in "**Hitchcock**" is the jury instruction and its impact on the advisory jury. Under **Adams** v. **State, 14** F.L.W. 235 (Fla. **1989),** Engle had until July **1, 1989,** to file his "**Hitchcock**" claim. This deadline was extended to August **1, 1989,** by Engle's law firm. Engle did not raise his claim as required so that when he finally did take action it was time barred.

Engle alleges, however, that he actually had more time since two years had not yet passed since **Engle** 11. This argument overlooks the fact that:

(1) This Court had given special consideration to "**Hitchcock**" cases **as** a

group, as evidenced by **Adams,** and that **Hitchcock** itself was over two years old.

(2) **Engle** II did not raise either a **Lockett** or a **Hitchcock** claim.

The importance of (2) above is apparent on close inspection of the case.

Engle was originally sentenced in 1979, over a year after publication of **Lockett** v. **Ohio,** 438 U.S. 586 (1978). Engle did not raise a **Lockett** issue on direct appeal in 1979, **nor** did he do so in 1982. Thus, for Engle, any **Lockett** claim would **be procedurally barred.** See **Autry v. Estelle,** 719 F.2d 1247 (5th Cir. 1983).

Hitchcock v. Dugger, 481 U.S. 393 (1987), was identified as a "change of law" but it was not a "clear break" with the principles of **Lockett.** Instead, it merely extended them to an advisory jury as an evolutionary extension of **Lockett. Penry** v. **Lynaugh,** 492 U.S. ____, 106 L.Ed.2d 256 (1989).

Thus, the concept (or argument) that Judge Santora "failed to consider non-statutory mitigating evidence" was available in 1979 but not raised, available in 1982 but not raised and was not "created" by the advent of **Hitchcock** in 1987.

Engle, of course, received a life recommendation from the advisory jury and then two separate sentencings. Judge Santora's second order clearly shows that he considered **all** of the evidence and did not limit himself to the statutory factors. Thus, the so-called "**Hitchcock**" aspect of the claim may also be rejected as harmless error. **Smith** v. **State,** 15 F.L.W. 57 (Fla. 1990); Tafero **v. Dugger,** 520 So.2d 287 (Fla. 1988); **Johnson** v. **Dugger, 520** So.2d 565 (Fla. 1988).

POINTS X, XI, XII, "XV" AND "XVI"

THE TRIAL COURT CORRECTLY DISPOSED OF BARRED CLAIMS

Despite being granted leave to file an oversize and non-conforming brief to "thoroughly discuss" relevant issues, Engle (manifesting contempt) concludes his brief by dumping into it a host of procedurally barred claims that either were or could have been raised on appeal. Engle has abused the good graces of the Court. His claims were, and are, procedurally barred and an abuse of process.

CONCLUSION

The lower court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Billy H. Nolas, Esq., Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 22 day of May, 1990.

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