IN THE SUPREME COURT OF FLORIDA

WILLIE MITCHELL, JR.,

Appellant/Cross-Appellee,

v.

Case No. 76,038

STATE OF FLORIDA,

Appellee/Cross-Appellant.

BRIEF OF THE APPELLEE/CROSS-APPELLANT

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was due 8-5-91

TABLE OF CONTENTS

TABLE OF CITATIONS

PAGE NO.

SUMARY OF THE ARGUMENT

ISSUE I

The court below found that counsel's performance was deficient, but that this deficiency did not prejudice the defendant. (R 337 - 338) The state contends, however, that not only has Mitchell failed to show that the results of the trial would have been different, but he has also failed to show that trial counsel's conduct fell outside that wide range of reasonable, professional assistance.

ISSUE II

As there were no facts brought under this claim which would show that the alleged nondisclosure of the evidence discussed in this claim created a reasonable probability that had it been known at the time the result of the trial would have been different this claim was properly denied by the court below.

ISSUE III

None of the so-called newly discovered evidence in this case, neither individually nor collectively, invalidates an essential element of the state's case against Mitchell. Even if all of the evidence was presented to the court and/or the jury, the result in the proceeding below would not have changed.

CROSS-APPEAL

ISSUE IV

The court below ordered a new sentencing hearing because " there was no preparation, and there is no way in the world we can put somebody in the electric chair under these conditions". (R

363) With all due respect to the trial court, the fact that counsel may have done no preparation for the penalty phase does not per se amount to prejudice under the test set forth by the United States Supreme Court in Strickland. To satisfy the second prong of Strickland, a claimant must show that the inadequate performance actually had an adverse effect so severe that there is a reasonable probability that the results of the proceedings would have been different but for the inadequate performance. Given the heinous nature of the murder in the instant case, as well as the two other aggravating factors, the existence of the insubstantial mitigation evidence now presented by collateral counsel, does not undermine confidence in the outcome of the proceeding.

ARGUMENT

ISSUE I

WHETHER MR. MITCHELL WAS DENIED A FAIR ADVERSARIAL TESTING OF THE PROSECUTION'S CASE THROUGH THE INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE PHASE OF HIS CAPITAL TRIAL, THROUGH THE STATE'S NONDISCLOSURES OF MATERIAL EXCULPATORY EVIDENCE, AND THROUGH THE STATE'S USE OF FALSE OR MISLEADING EVIDENCE AND ARGUMENT, CONTRARY TO THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Mitchell alleges that he was deprived of the effective assistance of counsel at the guilt phase of his capital trial. As our courts have consistently pointed out since 1984, claims of ineffective assistance of counsel are controlled by the standards set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 89 L.Ed.2d 674 (1984). A defendant who asserts ineffective assistance of counsel faces a heavy burden. First, he must identify the specific omissions and show that counsel's performance falls outside the wide range of reasonable, professional assistance. Second, the defendant must show that the inadequate performance actually had an adverse effect so severe that there is a reasonable probability that the results of the proceeding would have been different but for the inadequate performance. Blanco v. Wainwright, 507 So.2d 1377, 1381 (Fla. 1987).

The court below found that counsel's performance was deficient, but that this deficiency did not prejudice the defendant. (R 337 - 338) The state contends, however, that not

only has Mitchell failed to show that the results of the trial would have been different, but he has also failed to show that trial counsel's conduct fell outside that wide range of reasonable, professional assistance.

The state submits that when reviewing allegations of ineffective assistance of counsel, the general assumption is that defense counsel is presumed to have performed competently and effectively within the meaning of the Sixth Amendment. Strickland v. Washington, supra. Furthermore, the defense is required to prove prejudice. Strickland v. Washington, supra. A defendant asserting a claim of ineffectiveness must sufficiently plead deficiency and prejudice. Hill v. Lockhart, 474 U.S. 52 (1985). The absence of sufficiently pleading deficiency or prejudice results in the claim being subject to dismissal. Hill v. Lockhart, Id. Absent a denial of counsel or counsel who entirely failed to subject the state's case to adversarial testing, there must be both a pleading of specific deficiency and a resulting prejudice. See United States v. Cronic, 466 U.S. 648 (1984). An examination of the trial transcript and the transcript of the evidentiary hearing conducted before the same trial judge reveals that Mitchell's counsel competently subjected the state's case to an adversarial testing.

The court below found counsel's performance deficient based solely upon counsel's failure to demand the state complete the laboratory tests on a hair found in the truck and on scrappings taken from the victim's fingernails. State witness, Kathy

Guenther, crime laboratory supervisor for the Florida Department of Law Enforcement, testified that the only thing the tests could have shown was that the hair and scrappings either did or did not belong to the defendant. (R 254) Even if the test showed the hair and scrappings were not consistent with the defendant, it would not establish the identity of another person. Ms. Guenther further testified that fingernail scrappings very rarely show any significance and even when there is identifiable matter it consistently is the victim's own blood. (R 253)[1] Ms. Guenther testified that this is because when someone is scratched they don't usually bleed right away. (R 253)

The trial court failed to consider those things that defense counsel actually did prior to or at trial. There is no mention of the numerous pretrial motions, the evident preparation based upon the cross examination of state witnesses and the thorough presentation of the defense theory. At the hearing below, even trial counsel Silvio Lufriu reluctantly admitted that he did considerable preparation for Mitchell's defense. He testified that he spent several hundred hours on the case. (R 124) He also testified that he traveled to New York and Miami several times working with the two experts he obtained to challenge the state's theory of the case. (R 124) One of the experts

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[1] This is especially likely in the instant case because all of the blood found in the victim's truck belonged to the victim who had been stabbed 110 times.

testified that the murder was consistent with a homosexual rage killing and the other testified that the bite mark found on the victim's body did not contain enough characteristics or any particularly unique or individual characteristics sufficient to permit an identification to be made. (TR 383-392) In light of the foregoing, trial counsel's failure to demand that the state complete these possibly inculpatory tests before going to trial does not constitute deficient performance when it is clear the results of the tests would not exculpate the defendant and where he was able to effectively argue to the jury that the absence of such testing exculpated his client.

However, as the court below found, even if counsel's performance was deficient, Mitchell was not prejudiced by this deficiency. The evidence against Mitchell was overwhelming, whereas the omissions by counsel below were insubstantial. This evidence was outlined by this Honorable Court in Mitchell v. State, 527 So.2d 179 (Fla. 1988), as follows:

> In the early morning of May 1, 1986, the body of Walter Shonyo was found in a residential parking area in Tampa. He had been stabbed approximately 110 times and had a human bite mark on his left arm. He had no wristwatch or wallet, his pants pockets had been emptied and turned inside out, and his pants were undone and pulled down from his waist. Shonyo's truck was found abut 1000 - 1200 feet from his body. There was blood on the floorboard of the truck, especially on the passenger side. All of the blood in the interior of the truck was consistent with Shonyo's blood, but the police later identified palm prints found inside the truck as belonging to Willie Mitchell.

Witnesses testified that at approximately 1:00 - 2:00 a.m. on May 1, Willie Mitchell arrived to spend the night at his cousin's house. Further testimony revealed that Mitchell had a small cut on his lip and his shirt was all wet with blood. He brought with him a cardboard box full of miscellaneous tools. The next day, Mitchell tried to sell the tools at a gas station but could not get a satisfactory price for them. Later, the police found Shonyo's leather glove, watch and blue windbreaker at Mitchell's cousin's house. One of the witnesses testified that he had seen a small pocketknife in the house with dried blood on it close to where Mitchell slept that night following the murder. Annie Harden, Mitchell's cousin, testified that the appellant told her he had been in a fight with two men at a bar over a woman. Annie stated that Mitchell insisted that he had been the winner and stated "[i]f he [one of the men] ain't dead, he wished he was dead." Neither the knife nor the bloody shirt Mitchell wore on May 1 was ever found.

The defense theory was that Shonyo's death was caused by a homosexual rage killing. Mitchell testified that after he left the bar on the night of the murder he spotted Shonyo's truck and decided to burglarize it. After removing some items from the inside of the truck, Mitchell stepped on something with his foot, which turned out to be Shonyo's watch. He picked up the watch an put it in his pocket.

* * *

Dr. Briggle, a dentist and forensic odontologist consultant to the Dade County Medical Examiner, testified without objection that Mitchell's teeth matched the pattern of the bite mark even though the bite had been made through clothing. Dr. Levine, Chief of Forensic Dentistry with the Nassau County, New York, Medical Examiner's Officer, testified for the defense that he could not make any identification because the bite mark did not contain enough unique characteristics.

Mitchell now challenges this Court's basis for finding that the knife was the murder weapon, that Mitchell's shirt was all wet with blood and that he was in possession of Walter Shonyo's watch and alleges that counsel was ineffective for failing to effectively challenge the state's evidence on these facts. The state asserts that this evidence was sufficiently supported by the evidence and that the challenges collateral counsel now asserts do not undermine confidence in the conviction. Even if one or more of these facts was incorrectly found, which it was not, the evidence was still sufficient to uphold the finding of guilt.

With regard to the knife, the evidence presented at trial consisted of the testimony of Gloria Harden and Jessie Harden. Gloria testified that Jessie found a small bloody pocketknife on the floor that belonged to Mitchell. (TR. 91, 96) Jessie testified that he saw a knife on the floor next to where Mitchell slept, but he did not pick it up. (TR. 454-6) Neither witness described the knife at trial other than to say it was a small pocketknife.

A knife was found at the house that had a missing handle. This knife was tested, but showed no traces of blood and no one identified this knife as the knife seen by Jessie. Collateral counsel now asserts that this obviously was the knife that was seen by Jessie. This claim is based on a statement Jessie made to the police that the knife was 2" to 3", silver, with a missing piece. (R 878). There was no evidence presented at the

evidentiary hearing to substantiate this theory. Neither Jessie nor Gloria was asked by collateral counsel to identify the knife. Thus, the state asserts that, having been given the opportunity, Mitchell failed to establish that this was the same knife seen by Jessie the night of the murder and, therefore, has failed to meet his burden of proof.

Even if the knife found by the police was the same knife seen by Jessie, there is nothing is this record that would establish that this knife could not have had blood on it at one point and then been cleaned by the defendant. Further, there is also nothing in this record that would conclusively show that this knife could not have been the murder weapon. While the coroner testified that the wounds were 4" deep it is possible that Mitchell could have been stabbing with such force that he could have made the deeper wounds. Again, it is the defendant's burden to establish deficiency and prejudice. The only thing the defendant has presented here is conjecture. Mere conjecture is insufficient to ineffective assistance of counsel.

The state further notes that while the evidence presented at the evidentiary hearing failed to establish that this was the same knife seen by Jessie or that this knife could not have been the murder weapon, the evidence produced at the evidentiary hearing did show that the missing piece to the knife was found in the open glove box of the victim's truck. Whether the missing piece was in the open glove box because the knife belonged to the victim before the defendant stole it or whether the knife

belonged to the defendant and the handle broke off while the defendant viciously attacked Walter Shonyo, is unclear. In either case, further exploration of the origins of this knife only served to further connect the defendant to the murder scene. (R 139) Further, even without this evidence, the evidence of defendant's guilt remains overwhelming. Therefore, the defendant was not prejudiced by counsel's failure to do what collateral counsel could not do and show that this was the knife seen by Jessie.

Appellant also contends that the shirt Mitchell was wearing the night of the murder was not a black or navy blue shirt as Gloria and Annie Harden both testified, but was a white and blue shirt that was recovered by the investigating officers. Appellant further claims that since this white and blue shirt did not have blood on it, defense counsel could have refuted the trial testimony of Gloria and Annie that Mitchell was wearing a dark colored shirt that was covered in blood when he came in the door. And, indeed Gloria recanted her trial testimony at the evidentiary hearing and claimed the shirt was white or light blue and that it did not have blood on it. She claimed she had only testified to the contrary because either Assistant State Attorney Mike Benito or the police suggested she should. The record, however, clearly refutes this claim.

The record shows that upon searching a nearby dumpster, the police found a shirt that did not match anyone's description and did not have blood on it. (TR. 814-815) Contrary to Mitchell's

assertion, no one testified that Mitchell was wearing a light shirt with horizontal stripes on the evening of the murder. As previously stated, Gloria and Annie both testified on cross-examination that the shirt was dark colored. Jessie Harden testified that it was too dark for him to tell what color the shirt was or if it had blood on it. (TR. 454-6) Algernon Belgin also testified that it was too dark to tell the shirt's color. Belgin further stated that the next day Mitchell was not wearing a shirt but he was carrying a blue shirt under his arm as he left the house. (TR. 184-5, 189) Annie testified that Mitchell had changed clothes and was wearing a blue shirt with white trim the next day. (TR. 83) She also testified that the night before he got rid of the clothes he was wearing at the time of the murder. (TR. 84) Gloria testified that the next day Mitchell was wearing a pullover shirt that belonged to Annie. (TR. 94) Regina Harden did not testify but she told police officers that the morning after the murder she saw Mitchell asleep on the living room floor face down. He was wearing a white short sleeved shirt with blue horizontal stripes, blue jeans and possibly Reeboks and that he had blood on his face and shirt. (TR. 875) No one testified that the defendant was wearing a light colored shirt on the night in question.

Finally, Mitchell also claims this Court's finding that the defendant was in possession of a watch belonging to the defendant was a result of a bit of "Hokus Pokus" by the state. Whether Shonyo's son correctly identified the watch is inconsequential in

light of the defendant's own testimony that after he burglarized Shonyo's truck, he stepped on a watch lying beside the truck and put it in his pocket. (TR. 463, 467, 485-6) Thus, by the defendant's own admission he was in possession of the victim's watch, as well numerous other items belonging to the defendant.

As for the remaining allegations, these claims were also refuted by the record and rejected by the trial court. For example, there was no evidence presented that linked the tennis shoes found to the defendant. Also, there was no credible testimony that the prosecutor in any way intervened on behalf of the Gloria or Annie Harden in any pending criminal matters. Again, Mitchell simply failed to establish that he was prejudiced by any of counsel's alleged deficiencies.

Accordingly, the state asserts that based on the foregoing, that even if counsel's performance was deficient, that Mitchell was not prejudiced by counsel's deficiency. In Strickland v. Washington, 466 US 668, 104 S.Ct. 2052, 80 L.Ed 674 (1984), the United States Supreme Court held with regard to the required showing of prejudice, the proper standard requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is one that undermines confidence in the outcome. As the trial court below found, there is no reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different See, also, Harris v. Dugger, 874 F.2d 756, 761

(11th Cir.) (if the failure to investigate did not deprive the appellant of beneficial evidence, there may be inadequate assistance, but no prejudice and thus no constitutional deprivation); Lambrix v. State, 534 So.2d 1151, 1154 (Fla. 1988) (counsel's failure to investigate did not prejudice defendant where there was no reasonable probability that outcome would have been different) Cave v. State, 529 So.2d 293, 296 (Fla. 1983) (even if counsel's performance was inadequate, there is no reasonable probability that the performance contributed to the conviction). Combs v. State, 525 So.2d 853 (Fla. 1988) (counsel not ineffective for failing to investigate where most of evidence defendant claims should have been discovered would have been inadmissible).

ISSUE II

WHETHER THE STATE FAILED IN ITS DUTY TO DISCLOSE MATERIAL AND EXCULPATORY INFORMATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Appellant next presents a claim under Brady v. Maryland, 373 U.S. 83 (1963). To establish a Brady violation a defendant must establish the following:

> (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

Hegwood v. State, 575 So.2d 170 (Fla. 1991), quoting, United States v. Meros, 866 F.2d 1304, 1308 (11th Cir. 1989).

At the hearing below Mitchell failed to establish that any material exculpatory evidence was suppressed. In his Motion for Post-Conviction Relief Mitchell alleged that counsel did not receive certain police reports containing material evidence that would have impeach or contradicted the testimony of the state's star witnesses. And, while it is true that trial counsel, who had not reviewed his file from 1986 because it was in the possession of collateral counsel, testified that he had not received these police reports, a review of the file revealed that he had indeed been given these reports. (R 54) Accordingly, the house of cards collateral counsel built upon this false

premise quickly crumbled. Nevertheless, knowing that this claim was unsubstantiated below, counsel now reasserts that same claim and excludes that portion of Lufriu's testimony where he admits that he was in possession of these police reports. This claim is wholly without basis and should be rejected as such.

Mitchell also claims here, as he did in Issue I, that the prosecutor had a secret deal with Gloria and Annie Harden in exchange for there testimony. This claim was also refuted by the record.

Gloria Harden testified that one morning she was arrested for shoplifting and that immediately upon her arrest she called Benito and he got her released the same day. The record shows, however, that Gloria was arrested on a Sunday at 1:30 p.m. and that the prosecutor was not at work that day. (R 302-4) The record also shows that Gloria's statement's concerning Mitchell's actions following the murder were consistent throughout the investigation and original trial. Up until this latest hearing, Ms. Harden's version of the events never waivered and showed no evidence of having been influenced by anyone. It is only now, after her cousin was sent to death row and she's had to contend with unhappy family members, that Gloria has suddenly changed her story. Ms. Harden could not give an explanation for why she allegedly lied before, only that someone suggested it to her. (R 301) She also did not claim that she testified for the state in exchange for any special treatment or as part of any deal. The testimony of Gloria Harden at the evidentiary hearing was not

credible and it was within the trial court's discretion to reject it. Accordingly, this claim was also properly denied by the court below. See, Kight v. Dugger, 574 So.2d 1066 (Fla. 1990)

In Kight, this Court reviewed a claim that the state failed to disclose information concerning alleged concessions which had been made to four jailhouse informants who testified against the defendant at trial. After considering the credibility of witnesses who testified at the evidentiary hearing, the trial court denied relief, finding that no undisclosed concessions had been made and the evidence was not material. This Court held that while there was conflicting testimony it was within the trial court's discretion to find the state's witnesses more credible than the defenses' and that there was sufficient competent evidence adduced at the hearing to support the trial court's denial of the claim.

Mitchell also contends the state failed to supply him with Bivens rap sheet and that the state failed to complete laboratory tests on the hair and blood samples sent to Orlando. The law is clear that the State does not have a duty to actively assist the defense in investigating a case. Hegwood, supra, citing Hansbrough v. State, 509 So.2d 1081 (Fla. 1987).

> We emphasize that the prosecution is not required to "make a complete and detailed accounting to the defense of all police investigatory work on a case." *Spaziano v. State,* 570 So.2d 289 (Fla. 1990), *quoting, Moore v. Illinois,* 408 U.S. 786, 795, 92 S.Ct. 2562, 2568, 33 L.Ed.2d 706, 713 (1972).

Bivens 'rap sheet' is a matter of public record and was just as available to trial counsel as it was to collateral counsel or the state. "There is no Brady violation where alleged exculpatory evidence is equally accessible to the defense and prosecution." Roberts v. State, 568 So.2d 1255 (Fla. 1990), citing James v. State, 453 So.2d 786, 790 (Fla. 1984). Further, it is questionable whether the nature and facts of Bivens' arrest would have been admissible. Accordingly, even if the state did have a general duty to disclose the 'rap sheets' of all potential witnesses, the evidence in the instant case was not material or relevant as it would have been inadmissible at trial. cf. Combs, supra. (no prejudice where evidence defendant claims should have been obtained was inadmissible).

As for the failure to complete the lab tests on the hair and fingernail scrappings, again, the state has no duty to investigate the defendant's case for him. Further, as discussed in Issue I, the results of the tests could only have established if the sample was consistent with a known party, in this case either the victim or the defendant. As Mitchell has failed to show this evidence was exculpatory in nature or that any material evidence was suppressed.

Accordingly, as there were no facts brought under this claim which would show that the alleged nondisclosure of the evidence discussed in this claim created a reasonable probability that had it been known at the time the result of the trial would have been different, this claim was properly denied by the court below.

> We emphasize that the prosecution is not required to "make a complete and detailed accounting to the defense of all police investigatory work on a case." *Spaziano v. State,* 570 So.2d 289 (Fla. 1990), *quoting, Moore v. Illinois,* 408 U.S. 786, 795, 92 S.Ct. 2562, 2568, 33 L.Ed.2d 706, 713 (1972).

Further, it should be noted that the purpose of the Brady rule is not to displace the adversary system as the primary means of uncovering the truth; rather, the paramount goal is to guard against miscarriages of justice. Therefore, unless the prosecutor's omission deprives the defendant of a fair trial, there is no constitutional violation requiring the verdict to be set aside. Consequently, the United States Supreme Court has deemed it appropriate to apply the harmless error rule adopted in Chapman to Brady violations, thereby preventing the automatic reversal of convictions where the discovery violation was harmless beyond a reasonable doubt. Smith v. State, 500 So.2d 125 (Fla. 1986).

The defendant was afforded a fair trial. No material evidence was withheld from the defendant. The state further asserts however, that even if the evidence alleged by Mitchell as having been withheld was withheld, Mitchell has still failed to meet his burden of showing that there exists a reasonable probability that the outcome of the proceeding would have been different. Accordingly, error if any, was harmless.

ISSUE III

WHETHER NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT MR. MITCHELL'S CAPITAL CONVICTION AND SENTENCE WERE CONSTITUTIONALLY UNRELIABLE AND IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Appellant contends that there is "newly discovered evidence" which establishes that Mitchell's conviction and sentence are constitutionally unreliable. This is another example of a capital collateral defendant making much ado about nothing. There simply has not been any "newly discovered evidence" which creates doubt upon the validity of Mitchell's conviction and death sentence. Rather, collateral counsel attempts to create the impression that James Bivens committed the crime even when there is absolutely no evidence linking Bivens to the murder of Walter Shonyo.

Our courts have consistently held that newly discovered evidence must be such that it would have precluded the entry of judgment. The fact that a jury might have reached a different result had it heard this new evidence does not satisfy the conclusiveness test of Hallman. Hallman v. State, 371 So.2d 482 (Fla. 1979). In Gilliam v. State, 493 So.2d 56 (Fla. 1st DCA 1986), the court held that relief was not warranted where a third party confession exonerated the defendant. Accord Riley v. State, 433 So.2d 976 (Fla. 1983) and Pridgen v. State, 531 So.2d 951 (Fla. 1988).

The "conclusiveness" requirement was discussed in depth in Rolle v. State, 451 So.2d 497, 499 (Fla. 4th DCA 1984), approved,

475 So.2d 210 (Fla. 1985). The court said:

> "The rule that can be deduced from this line of cases is that newly discovered evidence, if true, must directly invalidate an essential element of the state's case. Riley, 433 So.2d 980. For example, if the sole prosecution witness recants his testimony, the state would be left with no evidence, and the petition might be granted. Cf. Tafero, 406 So.2d at 93 note 8 and 94 note 11. In each of the cases cited above, the newly discovered evidence did not refute an element of the state's case; rather, the evidence contradicted other existing evidence. Therefore, in each case, sufficient evidence to convict the petitioner remained even after the allegations in the petition, taken as true, were considered."

None of the so-called newly discovered evidence in this case, neither individually nor collectively, invalidates an essential element of the state's case against Mitchell. Even if all of the evidence was presented to the court and/or the jury, the result in the proceeding below would not have changed.

Defense counsel vigorously presented to the jury below his argument that Bivens was responsible for the murder. This newly discovered evidence does not add anything to the presentation of that evidence. And, in fact, the evidence as presented herein not only does not refute an element of the state's case, it does not even contradict an element of the state's case. Further, much of the evidence petitioner presents here as newly discovered evidence would have been inadmissible at trial. Appellant does not allege that Mr. Bivens had any convictions which were consistent with the method of killing in the instant case. Rather, he only alleges that Bivens had homosexual arrests, that

during one of these encounters he had a knife in his possession and that Bivens had been mistaken for a woman during one of these encounters. None of this evidence would have been relevant or admissible and none of this evidence refutes the overwhelming evidence against the defendant.

There is simply no newly discovered evidence which has any bearing upon this particular murder. This Honorable Court should affirm the trial court's denial of this claim.

CROSS APPEAL

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN GRANTING APPELLANT A NEW SENTENCING HEARING BASED UPON A FINDING OF INEFFECTIVE ASSISTANCE OF COUNSEL.

At the close of the hearing below the trial found that counsel's performance in the penalty phase of Mitchell's trial was deficient.

> THE COURT: "I find that the trial counsel's inaction in this penalty phase amounted to a substantial and serious deficiency, miserably below the standard for competent counsel.
>
> Under the circumstances presented in this case, there has been demonstrated a reasonable, well, I can't say that there has been demonstrated reasonable probability that his inaction may have affected the jury's verdict."
>
> ***
>
> THE COURT: "Let me finish. It would not change what I would do. I know what I would do. I would give him death in the electric chair which I did, and not withstanding all of this, so just to make the record very clear, notwithstanding all of this, it wouldn't change my decision.
>
> (R. 361-3)

Nevertheless, the court below ordered a new sentencing hearing because " there was no preparation, and there is no way in the world we can put somebody in the electric chair under these conditions". (R 363) With all due respect to the trial court, the fact that counsel may have done no preparation for the penalty phase does not per se amount to prejudice under the test

set forth by the United States Supreme Court in Strickland, supra. As this Court stated in Blanco v. State, 507 So.2d 1377, 1381 (Fla. 1987), to satisfy the second prong of Strickland, a claimant must show that the inadequate performance actually had an adverse effect so severe that there is a reasonable probability that the results of the proceedings would have been different but for the inadequate performance. See, also, Tompkins v. Dugger, 549 So.2d 1370 (Fla. 1989); State v. Michael, 530 So.2d 929 (Fla. 1988); Francis v. State, 529 So.2d 670 (Fla. 1988).

Thus, rather than relying solely on counsel's failure to present the evidence now presented by collateral counsel, the trial judge's determination that it wouldn't have changed the sentence he entered is in itself the proper determination to be made. In Francis, supra, this Court noted the deference to be paid to the trial judge who had presided over the defendant's trial.

> "The judge who heard this motion presided at Francis' third trial. Who, better than he, could determine whether failure to introduce this evidence prejudiced Francis sufficiently to meet the Strickland v. Washington test? Post conviction relief motions are not abstract exercises to be conducted in a vacuum, and this finding is entitled to considerable weight."
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> Id. at 673 n.6

Given the heinous nature of the murder in the instant case, as well as two other aggravating factors upheld by this Court,[2] the existence of the insubstantial mitigation evidence now presented by collateral counsel, does not undermine confidence in the outcome of the proceeding. Even if the jury had recommended life, the facts of the instant case would support a jury override. Francis v. Dugger, 908 F.2d 696 (11th Cir. 1990); Thompson v. State, 553 So.2d 153 (Fla. 1989); Torres-Arboledo v. State, 524 So.2d 403 (Fla. 1988); Engle v. State, 510 So.2d 881 (Fla. 1987); Francis v. State, 473 So.2d 672 (Fla. 1985).

No evidence was taken concerning the penalty phase, other than the testimony of defense counsel that he did not think about the penalty phase because he thought the defendant would be acquitted or that he would have time after it was over. (R. 97) In support of his motion Mitchell presented affidavits from family members and Drs. Merin, Gonzalez, Caddy and Macaluso.

Drs. Merin and Gonzalez had examined the defendant in 1986 at the request of Silvio Lufriu to determine if Mitchell was competent to stand trial. (R. 895, 898). They were also contacted prior to the penalty phase hearing regarding mitigating evidence. Both doctors said there was no evidence of psychosis or any neurosis. (TR. 619-620) In the affidavits submitted at the post-conviction hearing neither doctor contradicted their

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[2] In addition to heinous, atrocious or cruel, this Court also upheld the court's finding of a prior violent felony and that the murder was committed during the course of a robbery.

earlier assessment, they only stated that they were not told to look for brain damage or other mitigating evidence. (R. 895, 898) Dr. Gonzalez asserted that if he'd have testified he could have told the jury about the defendant's state of intoxication at the time of the offense. This is of course contrary to what Lufriu represented to the court at trial. At that time Lufriu told the court that, with regard to mitigating evidence, Dr. Gonzalez had stated :

> "Doctor Arturo Gonzalez, who is a psychiatrist, indicated the only mitigating circumstances that he could find is the fact when he discussed the situation with Mr. Mitchell, Mr. Mitchell, in fact denied participation in the death of the victim but that he did admit to burglarizing the vehicle."
>
> (TR. 605)

The mitigation Dr. Gonzalez now feels he could have offered is a result of 20-20- hindsight, as is collateral counsels' contention that course of action taken by Lufriu was ineffective. While this new argument, that the brutal slaying of Walter Shonyo was mitigated by the defendant's intoxication the night of the murder, may have been a tactical course to take, it was not necessarily the best course open to counsel at the time. The record shows that counsel maintained the defense position that the defendant did not commit the crime, apparently relying on a lingering doubt argument.[3] Any argument that the defendant was

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[3] While the state recognizes that lingering doubt is not properly considered as mitigation, counsel was able to argue same at the hearing. This argument was apparently effective as the jury returned a recommended death by a vote of 7-5. In Francis v.

intoxicated would have been inconsistent with the defense position of innocence.

This Court in Jones v. State, 528 So.2d 1171, 1175 (Fla. 1988), held that it was a reasonable tactical decision not to call witnesses in the penalty phase whose testimony was inconsistent with the defense theory of innocence in the guilt phase because it would have destroyed any credibility counsel had with the jury to admit the defendant had committed the murder. Just as this Court found in Jones, counsel for Mitchell was not ineffective for maintaining Mitchell's innocence throughout the guilt phase.

Drs. Macaluso and Caddy evaluated Mitchell at the request of collateral counsel. Dr. Macaluso suggested the following as possible mitigation: 1) chemical dependency, 2) brain damage resulting from chemical dependency, 3) voluntary intoxication at the time of the offense, 4) global impairment induced by chemical dependency, 5) intoxication resulted in Mitchell lacking capacity to appreciate the criminality of his conduct. (R. 916) Dr. Caddy also felt the defendant lacked the capacity to conform his conduct to the requirements of the law because at the time of the crime he was under the influence and because the defendant's mental capacity is in the dull/normal range. Conversely, both Dr. Caddy and Dr. Macaluso found that the defendant had good

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State, 529 So.2d 670, 672 (Fla. 1988), this Court noted that a jury recommendation of life imprisonment is a strong indication of counsel's effectiveness.

recall of the evening of the murder and that there was no evidence of psychosis. (R. 910-12, 935-941) This analysis was consistent with that given by Drs. Merin and Gonzalez at the original trial.

Thus, even if the defense counsel had chosen this course of action, state contends that evidence of the defendant's good memory of the events of the evening of the murder, coupled with evidence of Mitchell's attempt to cover-up his involvement in the crime, clearly rebuts the suggestion that the defendant did not appreciate the criminality of his conduct. Furthermore, the only thing to support the suggestion that the defendant did not appreciate the criminality of his conduct is the doctors' belief that Mitchell was intoxicated and as such he was not responsible for his actions. While this may have been mitigating evidence, the weight that should be afforded it is minimal at best. Again, even if counsel should have presented this evidence, Mitchell has failed to show that he was sufficiently prejudiced by counsel's failure to present this evidence.

Mitchell also presented affidavits of family members who described his childhood. Mitchell was the illegitimate child of Beulah Coles. (R. 983) He was raised by her parents, who thought of him as their own child. (R. 983) Her father was of the old school, he believed in 'spare the rod/spoil the child'. (R. 983) He would beat Mitchell to punish him for bad behavior. (980) The defendant got into trouble when he started hanging out with the Hardens. (R. 981) All of the family thought Mitchell

was a good person who wouldn't hurt anyone and who was incapable of this crime. Mitchell resented being left with his grandparents, but his mother stated that she tried to make him understand that it was for his own good. (R. 988) The facts of this case totally contradict any argument that Mitchell was a loving nonviolent person whose every action was excused by his involvement with drugs and alcohol. In addition to the two other valid aggravating factors, this was a particularly heinous murder that clearly outweighs the mitigating evidence now presented for the Court's consideration.

Accordingly, the state urges this Court to find that Mitchell has failed to carry his burden to show prejudice and reverse the order of the lower court granting Mitchell a new sentencing hearing.

CONCLUSION

Based on the foregoing arguments and citations to authority, the state urges this Court to reverse the lower court's order granting a new sentencing hearing and affirm the denial of the three claims raised in the instant appeal by the defendant.

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. Regular Mail to the Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 30 day of July, 1991.

OF COUNSEL FOR APPELLEE.