IN THE SUPREME COURT OF FLORIDA

MILO A. ROSE,

Appellant,

v.

Case No. 76,377

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

The instant case is an appeal is an appeal from the denial, after an evidentiary hearing, of a Rule 3.850 motion. References to the record on direct appeal to this Honorable Court will be made by the symbol "R" followed by the appropriate page number. References to the record of the instant 3.850 proceedings will be made by the symbol "3.850 R" followed by the appropriate page number.

SUMMARY OF THE ARGUMENT

As to Issue I: Defense counsel, Mr. Darryl Rouson, afforded appellant reasonably effective assistance of counsel for the penalty phase of trial. Notwithstanding a recalcitrant client who had discharged four attorneys prior to Mr. Rouson's representation, defense counsel conducted all necessary investigation and presented significant mitigation at the penalty phase.

As to Issue 11: Your appellee urges this Honorable Court to find that a "competent" mental health expert is one who is duly licensed and registered. "Competency" in the Ake v. Oklahoma context should not be equated with effective assistance of counsel. In any event, the evaluation and examination conducted by Dr. Slomin in the instant case was more than adequate and appellant was not denied any constitutional rights by virtue of that examination.

As to Issue 111: The testimony adduced at the evidentiary hearing and relied upon by the trial judge in her decision shows that Mr. Rouson acted as a zealous advocate on behalf of appellant. The problems which developed at trial between defense counsel and his client were of the client's doing. Mr. Rouson merely expressed those feelings which naturally occur in counsel for any party during the course of litigation.

As to Issue IV: The trial judge correctly summarily denied appellant's claim that he was deprived of the effective assistance of counsel at the guilt phase of the trial. There is

no indication in this record that, even had the case been tried as collateral counsel now would, the result of the proceeding would have been different. Defense counsel made use of the blood test evidence in his closing argument in an effort to create reasonable doubt. In addition, defense counsel's cross examination of state witnesses was adequate. There is no basis in the record to find that appellant was afforded anything less than effective assistance of counsel.

As to Issue V: Defense counsel was not ineffective with respect to his handling of a possible intoxication defense. Defense counsel was faced with a client who adamantly insisted upon urging that he was innocent in that he was not present at the scene of the murder. Although defense counsel was aware that an intoxication defense was possible, this defense could not be legitimately urged where the client maintained that he was not present at the scene. In addition, there was no evidence to indicate that appellant was, indeed, intoxicated. The most the evidence showed was that he might have been drinking on the day of the offense.

As to Issues VI - XI: In his last six issues on appeal, appellant presents claims which are not cognizable in collateral proceedings. These are claims which either were or should have been raised at trial and on appeal. The summary denial of these claims was proper by the trial court, and this Honorable Court should affirm the trial court's decision.

ARGUMENT

ISSUE I

WHETHER APPELLANT RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE OF HIS TRIAL.

Claims concerning the effectiveness of counsel must be viewed in light of the two-pronged test established by the Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The Court held that the burden is upon the defendant to show that counsel's performance was deficient (i.e., counsel made errors so serious that he was not functioning as "counsel" within the meaning of the Sixth Amendment), and the defendant* must also show that the deficient performance prejudiced the defense in so far as there is a high probability that the outcome of the proceeding wauld have been different but for the actions of defense counsel. In applying the two-pronged test, a reviewing court must indulge in a strong presumption that counsel's representation was effective. Effective counsel does not mean errorless assistance, and an attorney's performance is to be judged on the totality of the circumstances in the entire record rather than on specific actions.

This Honorable Court in Blanco v. Wainwright, 507 So.2d 1377, 1381 (Fla. 1987), explained Strickland thusly:

> A claimant 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. In evaluating this prong, reports are required to (a) make every effort to eliminate the distorting effects of hindsight by evaluating the performance from counsel's perspective at the time, and (b) indulge a strong presumption that counsel has rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgement with the burden on the claimant to show otherwise. Second, the claimant must show that there is a reasonable probability that the results of the proceedings would have been different but for the inadequate performance.

In the instant case, appellant has failed to carry this heavy burden.

Your appellee submits that when reviewing allegations of ineffective assistance of counsel, the general presumption 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. Absent a denial of counsel or counsel who entirely failed to subject the state's case to adversarial tests, there must be both a showing of specific deficiency and resulting prejudice. See United States v. Cronic, 466 U.S. 648 (1984). An examination of the testimony adduced in the evidentiary hearing before the trial court demonstrates that the appellant's trial counsel acted as an advocate. Not only has appellant failed to show that trial counsel's conduct fell outside that wide range of reasonable professional assistance, but he has also failed to show that the results of the penalty phase would have been different.

Your appellee submits that, based on the evidence adduced at the evidentiary hearing, Mr. Rouson provided more than effective assistance of counsel. Perhaps a good starting point is to examine the testimony of Mr. Rouson with respect to what he did to prepare for the penalty phase of the trial:

> Well, first of all, I had to go through the entire trial to recall what occurred, reconsider the testimony of witnesses, the evidence that came out, refer to the defendant's background, his history, talk to those persons that were made accessible to me who were close to him, who knew him. Contact the psychologist that the court had appointed to the case and who had testified. And I suggested to the defendant at one point that he should take the stand in the penalty phase and describe himself, tell the jury about himself.
>
> You know the instructions, I went through the instructions to see what they pointed out. Of course, what was going to be read to the jury. Take those and apply them to what had occurred in the trial, and pull out everything I could. (3.850 R 838)

As part of his preparation for the penalty phase, Mr. Rouson testified that he went to the jail and obtained people to testify that the defendant was attending Alcoholics Anonymous and was attempting to rehabilitate himself (3.850 R 885). Further, Mr. Rouson even had the victim's mother, Barbara Richardson, testify on behalf of the defendant (3.850 R 886). These efforts were made to present the defendant in the best light to the jury and the trial judge even though the defendant was a most difficult client to represent. As Mr. Rouson testified, after conferring with appellant for a few times, it was apparent why so many other

lawyers had withdrawn from representing appellant (3.850 R 886 - 887). Mr. Rouson's preparation for the penalty phase as outlined above is more than adequate, and even remarkable considering the difficult client and that client's wish to proceed forthwith to trial. Appellant was so adamant about proceeding quickly to trial that Mr. Rouson moved to withdraw from representation of appellant. However, after Mr. Rousan was able to confer with appellant and convince him that some depasitions and discovery were needed, Mr. Rouson was able to adequately represent the defendant (3.850 R 888 - **889).**

Significant to the question of Mr. Rouson's effectiveness is the attitude and desire of his client. The testimony adduced at the 3.850 evidentiary hearing reveals that Mr. Rouson was confronted with a client who adamantly wished to maintain certain postures which made his attorney's job all the more difficult. The defendant wanted his case tried a certain way. The underlying problem faced by Ms. Rouson were caused by his client's adamant insistence that he was not present at the scene of the murder (3.850 R *890).* Mr. Rouson's testimony at the evidentiary hearing reveals the difficulties with representing a client who, despite identification by several eyewitnesses, adamantly maintained absence from the scene:

> . . . [E]ven during the penalty phase of the trial I was still trying to walk the line between Milo saying he wasn't there, he didn't do it, and between trying to throw in these issues of intoxication and insanity, which would put him there.

> He said he wasn't there. So it didn't matter a whole lot, intoxication or insanity, because he wasn't there. That's what my theory of defense **was**. That was what 1 worked on. That's what I worked towards. That's what he wanted me to do. That's -- when I look at the evidence, I want to project to the jury.
>
> In the penalty phase I tried to maintain that tightrope and it was tough. But I still wanted them to think that he was innocent and that they wrongfully found him guilty; therefore, they shouldn't sentence him to death, but life. But I tried to throw in the intoxication and insanity. To me that was a tough juggling act to do. I thought I walked the rope pretty good.
>
> So I couldn't hammer away at it necessarily, because I didn't want to concede them and I didn't want to project to them, yeah, he did it; he did it, but you ought to consider this. (3.850 R 869 **- 870)**

In light of this testimony, it can be said that appellant received reasonably effective assistance of counsel with respect to the preparation and conduct of the penalty phase in the instant case.

In appellant's brief, it appears that the primary thrust of his argument revolves around the purported failure of defense counsel to adequately **prepare** and investigate for the penalty phase. Your appellee submits that the evidence adduced at the evidentiary hearing with respect to Mr. Rouson's preparation demonstrates that the defendant was, indeed, provided with effective assistance of counsel. Collateral counsel for appellant asserts, however, that Mr. Rouson rendered ineffective assistance of counsel by virtue of the failure to contact certain

family members to testify at the penalty phase. In light of all the circumstances of the case, as will be discussed below, Mr. Rouson provided effective representation in this regard. As so, it is clear that appellant has failed to show the prejudice required to support an ineffective assistance of counsel claim, to-wit: that there is a reasonable probability that the result of the penalty proceeding would have been different but for the actions of defense counsel. Strickland v. Washington, supra. Thus, appellant's claim for relief must fail.

Collateral counsel now alleges and argues that Mr. Rouson failed to contact any of the defendant's family members prior to commencement of trial. Although Mr. Rouson was concerned about whether family members could provide background information that could be used for consideration in mitigation, the defendant "made it out as if family was not going to be that important for him, that they were not going to stand up in his behalf or defense or be adamant about it" (3.850 R 839 - 840). Further, Mr. Rouson is sure that he explained to the defendant that it would be important to get everybody and anybody that could help to attempt to mitigate the murder committed by the defendant (3.850 R 840). Mr. Rouson's testimony candidly set forth what occurred with respect to the failure to require family members to testify at penalty phase:

> . . . I perceived that it was important to have anybody and everybody present that would be able to give personal knowledge of Mr. Rose to the jury in the penalty phase. But as I explained what my recollection is

> with regard to the family members he just -- he played it off. It was like they were -- they were not going to stand up in his behalf. **(3.850** R **840 - 841)**

What appears to be significant is the fact that the type of testimony collateral counsel urges should have been considered was, in actuality, presented to the jury. Appellant's problems with alcohol were well documented and presented as was a psychological evaluation which was used in an attempt to place several mitigating factors before the jury. The witnesses produced by the defendant at the **3.850** evidentiary hearing add nothing to the matters which were presented to the jury and trial judge. For example, appellant produced the testimony of his two cousins, Linda Kravec **and** Cheryl Stark. Ms. Stark did not even personally know whether the defendant drank (3.850 R 1045). Additionally, it appears that the cousins were not in a position to tell the jury matters which reflect upon the defendant's character. There was a twenty or twenty-five year gap between the times Mr. Kravec had any contact with the defendant. During this huge **gap** in time Ms. Kravec was not aware that the defendant had been a parole absconder and had been hiding from the law **(3.850** R 1007 **- 1008).** Mr. Kravec **also** acknowledged that the defendant did not have a close family and that it would be fair to say that the family wouldn't be inclined to help the defendant even if they were asked **(3.850** R 1009).

David Rose, the defendant's brother, also testified at the 3.850 evidentiary hearing. On cross examination, David Rose

testified that he did not contact hi3 brother's lawyer because David was in trouble himself for an aggravated battery **(3.850** R **1031 - 1033).** Your appellee submits that the failure to contact David Rose as a witness at penalty phase did not prejudice appellant's case. For example, during direct examination, David Rase testified that Milo **Rase** was a good father. However, David Rose was not aware that his brother left his family, abandoned his children, and never paid any child support **(3.850** R **1037 - 1038). Also,** what effect would David Rose's testimony have had upon the jury? David Rose, by his own testimony, was in trouble for an aggravated battery, the same aggravated battery used as an aggravating circumstance in the defendant's **case.** The presence of David Rose at the penalty phase of Milo Rose's trial would not have made any difference!

Collateral counsel attempted to **make** something of the fact that Mr. Rouson failed to contact appellant's mother prior to the penalty phase. However, Mrs. Rose did not appear before the trial court during the collateral proceedings to attempt to aid her son. It is ridiculous for present counsel to chastise trial counsel for the failure to procure a witness when that witness was not produced by collateral counsel. Clearly, the defendant cannot show how he has been prejudiced by the failure to even contact someone who is either unwilling or unable to assist counsel in demonstrating the character of her son.

The instant case is not unlike the situation presented in Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987). In Blanco a

four day continuance was granted between the guilt and penalty phases, a situation akin to what occurred in the instant case. Neither Blanco's brother nor sponsor wished to appear on behalf of the defendant and, under those circumstances, this Honorable Court held that trial counsel acted reasonably "in not attempting to override appellant's express wishes that they not be subpoenaed.'' Id. at 1382. In Blanco, no witnesses were called in mitigation, whereas in the instant case, much mitigation was presented through the testimony of Ms. Singletary, Mrs. Richardson and Dr. Slomin, among others. In the instant case, the defendant advised his attorney that his family members would not stand up in his behalf. Unlike the situation in Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986), a case relied upon by appellant before the trial court sub judice, the defendant suggested to his attorney that an investigation would be fruitless. Unlike Thompson, Mr. Rouson did investigate the defendant's background for possible mitigating evidence and, indeed, presented a wealth of mitigation to the jury.

Appellant also contends in his brief that Mr. Rouson was ineffective for failing to present the proper mental health expert at trial. In his brief, appellant relies upon the testimony adduced from Dr. Krop at the evidentiary hearing to support this conclusion. A review of the testimony of Dr. Krop reveals that he was thoroughly cross examined and impeached by the state during the evidentiary hearing. He was unable to show that the substitution of Dr. Krop for Dr. Slomin at trial would

have created a reasonable probability that the outcome of the penalty proceeding would have been different. with respect to the mental health testimony adduced at the evidentiary hearing, it is significant to observe the trial court's findings in this respect. In her discussion of the ineffective assistance of counsel at penalty phase claim, Judge Schaeffer found the following:

* * *

> As to a reasonable probability that the results would have been different, this Court is compelled to suggest that Dr. Fox's conclusions as to the existence of statutory mitigating circumstances in this case were farfetched and unworthy of belief. No reasonable jury, seeing and hearing Dr. Fox, after hearing the facts of the case, would give his testimony much, if any, weight. The bottom line is that all the "extra" testimony produced in the evidentiary hearing would not have changed the recommendation of death. This Court is confident in the outcome of the penalty phase. (3.850 R 562)

Appellant has utterly failed to show that the mental health testimony adduced at the evidentiary hearing would have changed the results of the proceeding.

Your appellee maintains that Mr. Rouson provided effective representation of Milo **Rose** during the penalty phase of trial. Just as clear, if not more so, is the fact that the outcome of the proceeding would not have been different even had trial counsel pursued the penalty phase in the manner suggested by collateral counsel. Even if collateral counsel believes that he could have conducted a "better" penalty phase, this is not the

relevant inquiry. What is clear is that Mr. Rouson afforded the defendant *his* Sixth Amendment right to effective assistance of counsel.

ISSUE II

WHETHER APPELLANT WAS DEPRIVED OF RIGHT TO A PROFESSIONALLY COMPETENT MENTAL HEALTH EVALUATION.

As his next claim on appeal, appellant raises a now-familiar mental health issue which is pled in nearly every capital collateral 3.850 motion. Your appellee submits that Rose, like all other capital collateral defendants, misinterprets the requirements of Ake v. Oklahoma, 470 U.S. 68 (1985), and contends that he is entitled to a "competent" psychiatric evaluation where "competent" is equatable with the same standards used for ineffective assistance of counsel. Ake v. Oklahoma merely requires the state to provide psychiatric assistance where there is a demonstrated need therefore and the defendant cannot afford to hire his own experts. See Clark v. Dugger, 834 F.2d 1561 (11th Cir. 1987). Thus, where the trial court granted Rose's request for an expert and, in fact, Dr. Vincent Slomin a well known and respected mental health professional, examined Rose, there simply is no violation of Ake. In this regard, your appellee refers this Honorable Court to the decision in Clisby v. Jones, 907 F.2d 1047 (11th Cir. 1990). Candidly, the opinion in Clisby was vacated where the Eleventh Circuit voted to rehear the case en banc. 920 F.2d 720 (1990). However, although Clisby has no precedential value, the reasoning therein is adopted to what a "competent" psychiatric evaluation" means in the context of collateral litigation. Under the standards set forth in Clisby, there can be no doubt that Dr. Slomin is a "competent" mental health experts which satisfies the dictates of Ake.

Your appellee submits that as aforementioned, it is improper to equate a "competent" mental health professional with "effective counsel". There is a constitutional requirement that a defendant receive effective counsel and, therefore, the standards employed to determine effectiveness must be more stringent. Where, however, the constitution only requires that the state provide a capital defendant with a "competent" mental health professional, that standard is met where, as in the instant case, the state provides a properly licensed mental health professional to evaluate the defendant.

If this Honorable Court concurs with your appellee's theory that "competent" refers to a properly licensed and regulated professional, there is no need to examine this issue further. However, in the alternative, your appellee submits that appellant is entitled to no relief on this claim. The instant case can be contrasted with this Honorable Court's decision in State v. Sireci, 536 So.2d 231 (Fla. 1988), previous history, State v. Sireci, 502 So.2d 1221 (Fla. 1987). In the trial court, appellant relied upon Sireci but this reliance was clearly misplaced where Sireci is inapposite to the circumstances of the instant case. In the Sireci case cited in 502 So.2d this Honorable Court affirmed the trial court's order granting the defendant's request for an evidentiary hearing. In so doing, this Court held:

> We must warn that a subsequent finding of organic brain damage does not necessarily warrant new sentencing hearing. *James v.*

> *State,* **489** So.2d **737** (Fla. 1986). However, a new sentencing hearing is mandated in case which entail psychiatric examinations so grossly insufficient that they ignore clear indications of either mental retardation or organic brain damage. *Mason v.* ***State,*** 489 So.2d 734 (Fla. 1986).

State v. Sireci, 502 So.2d at **1224.** Upon remand for an evidentiary hearing, and at the conclusion of that hearing, the trial court found that the two-court appointed psychiatrists failed to diagnose organic brain syndrome caused by a car accident in which the defendant was left semiconscious for a two week period right-side facial paralysis. The trial court found that had the psychiatrists known about the facial paralysis they would have conducted additional testing to determine if the defendant suffered from an organic brain disorder. The trial court therefore found that circumstances existed at the time of the defendant's pretrial examinations by the psychiatrists that required under reasonable medical standards at the time, additional testing to determine the existence of organic brain damage. The failure to discover those circumstances resulted in the deprivation of due process by virtue of the denial of an adequate psychiatric examination. In the instant case, however, the evidence is far from clear as to whether the defendant suffers from organic brain syndrome. To the contrary, it must be noted that in Dr. Crop's original evaluation done in September, 1987, the time frame under which appellant was under his first death warrant, no evidence of organic brain syndrome was found by Dr. Crop. However, after further testing done approximately one

week prior to the evidentiary hearing held in this cause, Dr. Krop diagnosed the defendant as suffering from minimal brain damage (3.850 R 1100, 1117). Dr. Fox, the other expert called by the appellant at the 3.850 evidentiary hearing specifically testified that he could not make the diagnosis of organic brain syndrome. Dr. Fox, a psychiatrist, testified that he could not, with the evidence available to him, offer a jury any testimony that the defendant was brain damaged or that alcohol specifically had an effect on the defendant (3.850 R 1398). The instant case, therefore is materially distinguishable from Sireci where there is no conclusive evidence of a mental condition which could have been diagnosed with use of reasonable medical or psychological standards.

Although both Drs. Krop and Fox criticized Dr. Slomin's reliance upon the defendant's self-report of his history, it is significant to note that it appears that medical records simply were or are not available with respect to the defendant's childhood history. See, generally 3.850 R 1129 - 1136) Dr. Krop also testified that he basically relied upon affidavits from family members rather than upon certified medical records. Heavy reliance was placed upon the affidavit of the defendant's mother, a woman whom Dr. Krop understood refused to testify on behalf of her son. (3.850 R 1141). Dr. Krop's conclusions as to high temperature, convulsions, the need for a vaporizer, a sickly childhood, and a difficult delivery all depend upon the affidavit of the defendant's mother, and were not based upon substation by

medical charts (3.850 R 1139). The alleged cause of the alleged brain damage also is subject to much doubt considering that Dr. Krop relied only upon the affidavits of the family members rather than upon medical records substantiating the claim (3.850 R 1142 - 1143). Dr. Krap did testify that he had medical records on the defendant that were developed during the defendant's previous incarcerations. The medical records did not support some of the matters asserted by family members via their affidavits (3.850 R 1145) Dr. Krop acknowledged that no previous mental health expert ever diagnosed the defendant as having brain damage (3.850 R 1148). Also, in addition to Dr. Slomin's diagnosis, a prison psychologist also diagnosed the defendant as being an antisocial personality (3.850 R 1148 - 1150).[1]

Dr. Fox testified that because he found evidence of organic brain damage, he asked Dr. Ksop to reevaluate and re-test the defendant. It was only after this suggestion by Dr. Fox that Ds. Krop found evidence of minimal brain damage (3.850 R 1377). Additional testimony of Drs. Krop and Fox could be discussed in this brief, however, it should suffice to say that their testimony in no way tended to show that Dr. Slomin's initial

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[1] In reviewing Dr. Crop's testimony, it is interesting to note that he equated anti-social personality with "psychopath". Apparently, inasmuch as Dr. Crop was appellant's expert witness during the collateral proceedings, it was not error, as alleged in the 3.850 motion, for a mental health professional to equate the two terms.

evaluation made in this case was anything less than professionally acceptable.

Indeed, it appears that Dr. Slomin was given the same type of background materials as were given to the mental health professionals by collateral counsel. Dr. Slomin "was given several files, including the defendant's background, history, information related to his family; background information in general" **(3.850** R 1216). Dr. Slomin attempted to set facts **before** the jury and show the jury that "persons with Mr. Rose's disorder are not necessarily executed, but rather placed in prison for long periods **of** time" **(3.850** R 1217). Dr. Slomin testified how he diagnosed anti-social personality and this diagnosis was confirmed upon receiving additional information during the weekend part of a trial (3.850 R 1219). This diagnosis was based upon materials which for the most part were the same as those relied upon by the experts called by collateral counsel. Dr. Slomin received two large file folders filled with notes, background related to previous history, background to the defendant, family members and hospitalization records (3.850 R 1225).

Although Drs. Slomin, Krop and Fox, may have differences of opinion with regard to certain specific matters, there is no indication that Dr. Slomin rendered less than a competent psychological evaluation. Of course, expert witnesses disagree all the time and the question in the context of the instant case boils down to whether Dr. Slomin exercised reasonable

psychological methods and standards in his evaluation of the defendant. No evidence was offered by appellant in the collateral proceedings ta suggest that his burden has been met with respect to such a showing. Certainly, appellant has not shown that Dr. Slomin's evaluation was so unprofessional as to necessitate a finding of the denial of due process rights. To the contrary, Dr. Slomin rendered reasonable and adequate assistance with respect to the mental health issues involved in the case.

ISSUE III

WHETHER DEFENSE **COUNSEL,** MR. ROUSON, REPRESENTED **APPELLANT** AS **A** ZEALOUS ADVOCATE.

A5 his third claim on appeal, appellant contends that Mr. Rouson was ineffective because he did not act as a zealous advocate in his representation of the defendant. The record of both the original trial proceedings and the 3.850 evidentiary hearing totally belies this contention.

Appellant premises his claim upon the fact that defense counsel attempted to withdraw from the case during the middle of trial. This motion to withdraw was necessitated by the recalcitrant defendant and his apparent unwillingness to cooperate with counsel. This was not the first time appellant acted in this manner. In fact, four prior attorneys had withdrawn from representation of the defendant in this case. The trial court had correctly determined that appellant, although entitled to have an attorney appointed to represent him, was not entitled to an attorney of his choice and was not entitled to keep running attorneys off the case. In any event, the question of Mr. Rouson's advocacy was resolved during Mr. Rouson's testimony at the 3.850 evidentiary hearing. **That** testimony in and of itself reflects that counsel was able to reconcile any negative feelings and was able to continue to act as a zealous advocate who is able to feel endeared to his client and who didn't want ta see the defendant convicted or sentenced to death (3.850 R 862). Mr. Rouson specifically testified as follows:

I recall being accused by my client of being ineffective. I recall him making statements that he lost confidence in me. We went in chambers to discuss my motion to withdraw, which was an oral motion before the court in the proceedings, during the proceeding.

I recall the discussion going on, "Well, we -- Darryl, you -- basically we've come this far." You know, "What is it, why do you really want to withdraw?"

I recall explaining that I felt that there were real differences between theories of strategy, theories of defense, of what my client wanted me to do, with him loosing his confidence in me. I was beginning to doubt my self at that point and whether or not I could effectively continue and advocate for him in the purest of form. I was beginning to doubt my self.

I think that in any trial, during the course of any trial, lawyers go through those periods where you feel good at one point. You just made an objection and it got sustained and/or you just -- and you're on a real high or excitement with that, but you can't let that ruin your objectivity of your conduct for the rest of the case. You've got to remember that you may lose the next objection, you may lose the next motion. So you have to continue being the trial lawyer trying that case.

As well as you can't let low points in the trial deter you from giving your client a fair adversarial hearing.

I recall making those balances, thinking about all those things. I recall that being part of the discussion "Well, can you do it? Can you overcome? Do you think you can?" It was left up to me. The decision was, you know, "If you just -- if you can't do it, then I'm going to let you off. You can withdraw. But think about these things."

I remember going through that internally and mentally myself. You know, "Can I do

> this? Do I even like my client? Does he like me?" And I recall resolving all of that with the idea of, well this is a defendant in the criminal system of the United States of America. He deserves a fair hearing, a fair trial, and a good defense. I can do that. I can do that for him. And I recall making the decision myself to continue with the case.
>
> At various times in the trial and prior to trial I had doubts about his own guilt or innocence. And I think that's natural. I think that any lawyer is looking at the evidence of the trial, whether he is a defense lawyer or the prosecutor on a case, if he is looking purely at the evidence and he is building his case, at some point you begin to wonder -- I'm sure prosecutor's have done it -- you wonder if the person is really guilty when you prosecute them sometimes based on the evidence.
>
> Those thoughts entered my mind and they entered my mind prior to trial and during the trial at different points. I don't recall that being a specific topic of discussion in chambers, I cannot deny if someone said, "Hey, this is what we did." Okay. Well, fine. Everyone doesn't remember everything that happened.
>
> I remember the big, salient factor was that I made a decision to continue on that case. I made a decision that I could overcome my feelings, the differences that I had with my client, that he had with me and that I could give him the defense that he deserved. And I expressed that to the judge and I continued on the case. (3.850 R 856 - 858).

There is no indication that Mr. Rouson, even in his own mind, was unable to act as anything less than an effective and zealous advocate on behalf of Milo Rose.

Appellant also makes contentions that he was deprived of the right to be present at a critical stage in the proceedings. Your

appellee strongly disagrees with this assertion and would assert that the in-camera discussion with defense counsel was predicated upon actions started by the defendant himself. Nothing was done in chambers out of the presence of the defendant which impacted upon the trial judge's decision to impose the death sentence in this case. Appellant's assertion that defense counsel "revealed his concern that Mr. Rose was guilty of murder to the judge'' is nonsense when the testimony of Mr. Rouson as outlined above is reviewed. Mr. Rouson did not state that his client was guilty. Rather, he stated that he, not unlike most attorneys trying a case, had doubts as to the guilt or innocence of his client during the course of the trial. Mr. Rouson equated this doubt with the same doubt a prosecutor feels during the presentation of the state's case. There are certainly times during the course of the trial where doubt about the validity of you case sets in.[2] In any event, the trial judge, "after reviewing the record, and after hearing testimony [was satisfied] that defense counsel acted as a zealous advocate throughout Defendant's trial/sentencing phase before the jury and sentencing before the Court." (3.850 R 561). These findings by the trial court are

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[2] It should be noted that Mr. Ruson had for several years prior to his representation of appellant had been an assistant state attorney and was, thus, familiar with the mental processes of a prosecutor during the course of a trial.

sustainable in the record and should be affirmed by this Honorable **Court.**

ISSUE IV

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIMS THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF TRIAL.

As his next point on appeal, appellant contends that the trial court erroneously summarily denied his claim of ineffective assistance of counsel at the guilt phase of trial. The standards for determining ineffective assistance of counsel have been set forth above under Issue I and will not be repeated herein, However, as will be demonstrated below, appellant failed to show, even the allegations, that trial counsel afforded anything less than effective representation.

Appellant's basic premise that the trial court summarily denied his guilt phase ineffectiveness claim without adequate hearing or without adequately explaining why the files and records conclusively showed that appellant was entitled to no relief is totally incorrect. The record reveals that at least on two occasions the trial judge.entered her findings on the record as to why the guilt phase ineffectiveness claim was being denied. Those portions of the trial court's order which rejected the specific contentions of ineffectiveness raised by appellant will be set forth below as they pertain to the particular contentions.

Appellant complains that defense counsel did not adequately handle the question of the blood found on appellant's person. Appellant's collateral contention is that defense counsel could have shown that there was no blood of the victim on the person of

appellant and, therefore, appellant was not the perpetrator of the crime. However, trial counsel did, indeed, attempt to show the weakness of the state's evidence as it related to the blood evidence. An examination of trial counsel's closing argument reveals that an attempt was made to discredit the state for failure to positively identify any blood other than that of the defendant:

> Now you will get the circumstantial evidence instruction. And the Judge will explain to you that the circumstances all must be consistent with guilt and inconsistent with innocence. She is going to tell you that, and you are going to have to listen to that and apply it like every other instruction.
>
> What is the evidence in this case? Milo Rose's clothes? There it is right there. cinder block -- brick? That is the brick. It is not animal blood. Blood stains. Samplings from the defendant, from the accused, from the victim. Blood samples. Is that too much to ask in 1982 of the Clearwater's finest? And if Detective Fire, sixteen years' law enforcement, ten years' Detective since 1972, could watch Technician Bowers take these samplings, why couldn't he tell you how to do them?
>
> * * *
>
> . . . Detective Fire, yes, with all his law enforcement experience, if he could watch Bowers take these blood samples, these swabbings, why couldn't he tell him how to do it? Is that too much to ask? Is that too much evidence for them to bring before you in a first degree murder trial? Where they are accusing somebody of being there and doing this thing? And why did they want the blood samples? Why did they want them? Because if these are the splattering, okay, huh, they look like they are dripping down, down, to me. You look at them. You know, nose bleeds

> drip down. Do you see anything dripping up? Now, if these -- why do they want the blood samples? So that they can say, well, the victim's blood, the deceased's blood is on him. Now, Rouson how do you fight that? It would be pretty strong evidence. It would be pretty strong evidence, but they don't have it. The Judge will tell you that a reasonable doubt as to the guilt may arise from the evidence, from conflicts in the evidence, ok lack of evidence. Is that too much to ask?
>
> What is the other evidence? Okay, well, the cotton swabs. That was never brought in because they just, okay, we messed up. Sorry, but we still got a case. (R 1062 - 1065)

In a hearing held on October 22, 1987, during the pendency of the death warrant that was signed in appellant's case, the trial judge ruled that trial counsel, Darryl Rouson, was not ineffective with respect to his handling of the blood evidence in this case. The trial judge specifically stated:

> Part of the problem is so many times its better to have an unknown where you can make hay with it, than it is to take a known and have it thrown out to hit you in the face.
>
> Suppose he had had those analyzed, and low [sic] and behold they would have found this fellow's blood. Then they'd have given the state a weapon they didn't have before, because they couldn't prove whose it was. They could infer, but he could say that just isn't good enough in a first degree murder case. You are not supposed to infer, you are supposed to know. They don't know that it is a lack of evidence, that is the tact that he took.
>
> You get an expert. The expert turns out to help the state, becomes the state witness and the expert gets asked who came to you first, and here it was the defense. And they have mud slung under the table. But it seems

> to me those are tactical decisions that he had to make then.
>
> And I don't know that I am prepared to say at this point in time he was grossly inept on not getting an **expert** who very well could have helped the state prove their case. (3.850 R 731 - 732)

What collateral counsel is attempting to do in these proceedings is to have trial counsel declared to be ineffective merely because he did not take the same tact as collateral counsel presently would. Nevertheless, trial counsel effectively demeaned the lack of evidence presented by the state with respect to the blood evidence. Thus, the trial court's ruling that handling this matter differently would not have made a difference is supported by the record.[3]

The trial judge also determined that appellant's contention that defense counsel failed to properly impeach eyewitness testimony was refuted by the record. Again, collateral counsel is suggesting that a better job could have been done of impeachment if his questions, rather than trial counsel's were asked. This is not the relevant inquiry. What is important is

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[3] In his brief, appellant asserts that "the state is still adamantly opposing defendant's request to obtain answers to the defendant's clothing" (Appellant's brief at page 44). Apparently, this false allegation is made to buttress the contention that somehow the blood evidence has more significance than it does. In point of fact, the state did not "adamantly oppose" the request to have access to the clothing to test for the blood typing. At the hearing held in this cause on October 22, 1987, it can plainly be seen that the state was willing to cooperate with the defense in having the clothing tested (3.850 R 757 - 761).

whether or not trial counsel acted as an advocate and put the state's case to an adversarial test. Mr. Rouson's handling of the impeachment of eyewitnesses in this case demonstrates that he ably attempted to test the state's case. At the October, 1987, hearing, the trial judge with respect to this claim stated:

> I believe that, my recollection of the eyewitness testimony is Mr. Rouson made a lot of hay with it. He made a lot of hay as to discrepancies in their testimony of the various and sundry things. Any you can make an awful lot of hay when you have three eyewitnesses and they all say that that may be, it may have been fifty feet, one hundred fifty or twenty feet, but all three **say** that it the guy. And you have two people who say he jumped in the car and said he just killed Butch and left him a vegetable, and would they provide an alibi (3.850 R 756).

Additionally, on the first day of the evidentiary hearing held in this cause which commenced on September 7, 1988, the trial court stated as follows:

> As I indicated before, and probably not very articulately, and probably won't be very articulate right now, but I will do a written order where I will put this down in a fashion that is more acceptable. As far as the guilt phase of this, if we look -- you can add all this if you want, but the Court is not going to find that the result was any different even had these folks been presented. In effect, they could have been presented.
>
> * * *
>
> As to the others, as I say, I don't think it would have been different. We have three or four folks, all of who identify Mr. Rose. I think Mr. Rouson did some cross examination of them. It doesn't have to be perfect. And likewise as to whether or not that was Mr. Rose's blood on himself or whether it was the victim's blood, it's

> really irrelevant to this particular case. And I think Mr. Rouson made that clear to the jury. So I don't think that necessarily either prong is totally met and I certainly don't think you can show from what you presented to me that the result would have been different. That is why I'm denying your hearing on that. . . . (3.850 R 781 - 782).

Your appellee submits, as the trial judge below found that appellant was afforded effective assistance of counsel by Mr. Rouson in the instant case. The trial judge correctly determined that the record of the trial proceedings revealed on their face that appellant would be entitled to no relief. The trial judge's explicit finding that appellant could not meet the prejudice prong of the Strickland test is supported by the record. The trial court correctly found that even had witnesses and evidence been adduced as present counsel now would, such additional evidence does not create a reasonable probability that the results of the proceeding would have been different. The trial court correctly summarily denied appellant's ineffective assistance of counsel claim as it pertained to the guilt phase of trial.

ISSUE V

WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR ALLEGEDLY FAILING TO INVESTIGATE AND PRESENT TESTIMONY REGARDING INTOXICATION.

Appellant next asserts that trial counsel was ineffective for failing to adequately investigate and present an intoxication defense. This claim is totally refuted by both the record of the original trial proceedings and by the record of the 3.850 proceedings.

At the outset, it should be mentioned that there is no evidence in the trial record that appellant was intoxicated. Although evidence exists in the record that appellant may have had approximately five beers prior to the commission of the murder, this evidence does not support an intoxication defense. Compare Lambrix v. State, 534 So.2d 1151 (Fla. 1988). On this basis alone, appellant's point should have been **denied.**

However, an even more compelling reason exists to support the rejection of this claim. As discussed above, appellant was adamant about presenting the defense that he did not do it because he was not present at the **scene** of the murder. In her ruling as to why this claim would not support an evidentiary hearing, the trial judge succinctly stated:

> As far as intoxication, I haven't changed about that. I think -- I don't think -- or mental health -- I don't think that you can put a requirement on a lawyer to present affirmative defenses if in fact his client has maintained, as is apparent from the record in this case, that he is innocent and not the person who committed this offense. I don't think that you can allow a

> lawyer to have a relationship with a client where he says "I don't care what you say, I'm going off here on the vein that you did and here's the defense to it." (3.850 R 781 - 782)

Based upon the discussion in Issue I, supra and in light of the trial court's correct ruling that it is totally inconsistent to present a defense that you are innocent and not at the scene but, if I was there, I was so intoxicated that I did not have the intent to commit the crime, the trial court correctly summarily denied this claim.

It is also interesting to observe that appellant would not have been able to prove this claim even if the trial judge did not summarily deny it. At the evidentiary hearing (with respect to ineffectiveness at penalty phase) collateral counsel presented the testimony of an expert psychiatrist, Dr. Fox. Even appellant's own witness specifically testified that he could not, with the evidence available to him, offer a jury any testimony that alcohol had an affect on the defendant (3.850 R 1398).

Inasmuch as it is clear from the record that defense counsel was instructed by his client to pursue the defense of innocence, rather than the defense of negated specific intent, trial counsel was not ineffective in his handling of the intoxication issue.

ISSUE VI

WHETHER THE DEATH SENTENCE IN THE INSTANT CASE IS DISPROPORTIONATE PUNISHMENT.

As his next claim, appellant presents one which he knows is procedurally barred. The trial judge recognized that the question of proportionality was raised and rejected on appellant's direct appeal and, therefore, must be rejected in post-conviction proceedings (3.850 R 561). Indeed, appellant's reliance upon Parker v. Dugger, 111 S.Ct. 731 (1991), is misplaced. In Francis v. Barton, 16 F.L.W. S461 (Fla. June 15, 1991), this Court held as follows:

> . . . Issues raised and disposed of on direct appeal are procedurally barred in post-conviction proceedings. (citations omitted) The cases Francis now relies on, e.g., Parker v. Dugger, 111 S.Ct. 731 (1991) (other citations omitted), are evolutionary refinements, rather than major constitutional changes, in the law and do not require retroactive application in post-conviction proceedings.

Therefore, inasmuch as this claim was raised and determined on direct appeal in this case, this claim was correctly summarily denied by the trial judge.

ISSUE VII

WHETHER INSTRUCTIONS THAT THE COURT OR COMMENTS DURING TRIAL DENIGRATED THE ROLE OF THE JURY IN VIOLATION OF CALDWELL V. MISSISSIPPI.

As his seventh point on appeal, appellant presents a claim which has been consistently rejected since the filing of the 3.850 motion in this cause. Appellant's Caldwell claim is procedurally barred. See Atkins v. State, 541 So.2d 1165, 1166, n. 1(6). This claim was correctly rejected by the trial judge (3.850 R 560 - 561).

ISSUE VIII

WHETHER THE TRIAL COURT ERRED BY REJECTING APPELLANT'S CLAIM THAT THE SENTENCING INSTRUCTION SHIFTED THE BURDEN TO THE DEFENDANT TO PROVE DEATH WAS NOT THE APPROPRIATE PENALTY.

In his eighth claim, appellant presents another claim which has been consistently rejected by this Honorable Court. The trial court held that because no objection was made to the jury instructions or arguments of counsel or that no appeal of this issue was taken, appellant was procedurally barred from raising the issue collaterally. This Honorable Court has consistently rejected this claim on the basis of a procedural default. Most recently, in Johnston v. Dugger, 16 F.L.W. S459 (Fla. June 20, 1991), this claim was held to be procedurally barred. See also Atkins v. State, supra at 541 So.2d 1166, n. 1(3).

ISSUE IX

WHETHER THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY THAT A VERDICT OF LIFE MUST BE MADE BY A MAJORITY OF THE JURY.

This claim, like so many of those presented in appellant's 3.850 motion, is clearly procedurally barred. See Atkins v. State, supra at 541 So.2d 1166, n. 1(7). Additionally, the trial court found that because the recommendation for death in this case was 9 - 3, the argument presented was moot. This claim was correctly denied by the trial court, although your appellee asserts that this Honorable Court should find this claim to have been procedurally barred for failure to raise it at trial or on appeal.

ISSUE X

WHETHER THE TRIAL COURT ERRED IN ITS INSTRUCTIONS CONCERNING THE HEINOUS, ATROCIOUS, OR CRUEL AND THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCES.

As his next point on appeal, appellant presents a claim which has always been rejected by this Honorable Court. It should also be noted that in this claim on appeal, appellant discusses the constitutionality of the "cold, calculated and premeditated" aggravating circumstance, but that issue was not raised in the 3.850 pleadings below and should, therefore, be rejected summarily by this Honorable Court. Even if this claim was presented to the trial court, it would not support 3.850 relief. See Brown v. State, 565 So.2d 304 (Fla. 1990).

In her order denying 3.850 relief, the trial judge expressly found that at trial, defense counsel was permitted during his closing penalty phase argument to argue the proper standards of heinous, atrocious, and cruel approved by this Honorable Court (3.850 R 564). In any event, it is clear that this Honorable Court has rejected, either for reasons of procedural default or on the merits, this claim. See Johnston v. Dugger, supra, at 16 F.L.W. S461, n. 2(1). This Honorable Court should affirm the denial of the 3.850 relief on this claim.

ISSUE XI

WHETHER THE TRIAL COURT ERRONEOUSLY PERMITTED INTRODUCTION OF NONSTATUTORY AGGRAVATING FACTORS IN THE SENTENCING PHASE OF APPELLANT'S TRIAL.

As his last claim on appeal, appellant contends that nonstatutory aggravating factors were introduced which resulted in the denial of appellant's constitutional rights. Appellant recognizes that this claim was presented on direct appeal. This claim was rejected as having no merit.

> . . . When the trial judge weighed the evidence, she enumerated the aggravating circumstances that she found were proven beyond a reasonable doubt and the evidence that substantiate these aggravating circumstances. The .evidence complained of by the appellant was not contained in the order nor was it considered in determining the propriety of the death penalty.

Rose v. State, **472 So.2d 1155, 1158 (Fla. 1985).** Therefore, where this claim was presented and rejected on direct appeal, appellant cannot pursue the same issue collaterally.

Appellant attempts to have this Honorable Court revisit the claim by opining that Hitchcock v. Dugger, **481** U.S. **393** (1987), is **a** change in law which recognizes that the jury must be treated as a sentencer for Eighth Amendment purposes. Appellant's assertion is totally incorrect, especially in light of **the** United States Supreme Court's recent decision in Walton **v.** Arizona, 497 U.S. ___, 110 S.Ct. ___, **111** L.Ed.2d **511 (1990).** In Walton, the United States Supreme Court observed that Florida's death sentencing scheme provides for sentencing by the judge, not the

jury. Walton, id. at 111 L.Ed.2d 524. The trial court correctly rejected this claim (3.850 R 564), and this Honorable Court should sustain the affirmance of that denial.

CONCLUSION

Based upon the foregoing reasons, arguments and authorities, the decision of the trial court in denying appellant's Rule **3.850** motion should be affirmed by this Honorable Court.

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 8th day of July, 1991.

OF COUNSEL FOR APPELLEE.