IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Appellee,

v.

RAY SANDSTROM,

Appellant.
_____/

Supreme Court Case No. 77,773

The Florida Bar File No.
89-52,722 (17C)

ANSWER BRIEF OF THE FLORIDA BAR

DAVID M. BARNOVITZ #335551
Bar Counsel
The Florida Bar
5900 N. Andrews Ave., Ste. 835
Ft. Lauderdale, FL 33309
(305) 772-2245

JOHN T. BERRY #217395
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(904) 561-5839

JOHN F. HARKNESS, JR. #123390
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(904) 561-5600

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STATEMENT OF THE CASE AND OF THE FACTS

The bar accepts appellant's statement of the case. In that appellant has not presented a statement of facts, the bar finds it necessary to do so. Because the referee rendered such a detailed and notated recitation of facts, his findings are presented as the bar's statement of facts.

Appellant is, and at all times hereinafter mentioned, was a member of The Florida Bar subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

Heretofore, appellant represented one Robert Arner ("Arner") in connection with a criminal prosecution venued in the Circuit Court of the 17th Judicial Circuit of Florida entitled State of Florida v. Robert Arner, Criminal Division, case no. 79-1060CF.

Arner was charged in the referenced prosecution with murdering his wife, Elinor Arner (hereinafter called "decedent").

Following a jury trial in the referenced action, during which trial appellant at all times represented Amer, Arner was convicted of the first degree murder of the decedent.

Appellant, in representing Amer, failed to take any pre-trial depositions.

He also failed to conduct a proper investigation as related to evidence available, to establish that decedent's death was due to a cause other than Arner's actions.

The testimony of the medical experts from the transcript of the Rule 3.850 hearing (bar's Exhibit 3 in evidence) established beyond doubt that the proximate cause of decedent's death was medical malpractice. The jury was not presented with such evidence due to lack of adequate preparation on appellant's part.

Dr. John Marracini, Deputy Chief Medical Examiner of Palm Beach County, reviewed decedent's medical records and the autopsy report. He testified that on March 5, 1978, surgery was performed following a diagnosis of pulmonary emboli (Rule 3.850 hearing, volume I, page 18),* but the surgery was based upon a misdiagnosis by the surgeon because decedent did not have pulmonary emboli (18-19). During the surgery, the spleen was injured. The injury to the spleen was unrelated to the head injury for which Mrs. Arner was originally admitted to the hospital and which injury formed the basis for the charge against the defendant. In the words of Dr. Marracini, the spleen injury "was not the result of a physical assault or anything like that initially" (21). Following the injury to the spleen, decedent was given 25-30 units of blood (22-23). Dr. Marricini testified that decedent should have been re-explored. His testimony concluded as follows:

> Q: So what we have here is a pattern. We have first the misdiagnosis of the pulmonary emboli; is that correct?"
>
> A: Yes.
>
> Q: We then have the surgical intervention which ruptures or lacerates the spleen; correct?
>
> A: Yes.
>
> Q: We then have the woman lying in the hospital bleeding to death based upon what the surgery did to her?
>
> A: Yes, the bleeding was a significant attribute to death.

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* All page references herein are to transcript of Rule 3.850 hearing (bar's Exhibit 3, in evidence).

Q: Did the bleeding and the shock that followed the bleeding cause her death?

A: It was one of two mechanisms occurring on or abut that time; the other being pneumonia.

Q: But for the operation would Elinor Arner have lived?

A: Probably (24-25).

Finally, Dr. Marracini opined that the "failure to recognize the problem of internal bleeding was tantamount to malpractice" (36).

Dr. Mitchell Levy, a board certified general surgeon testified. He, like Dr. Marracini, opined that the diagnosis of pulmonary emboli was in error (40). Dr. Levy stated that the surgeons should have first performed an arteriogram to determine whether there were clots in the pulmonary arteries which is done in almost any patient undergoing a vena cava ligation which Dr. Levy described as "a major undertaking and is fraught with multiple post operative complications" (41). Decedent's doctors never performed such a test. In addition, Dr. Levy opined that it was inadvisable to perform the ligation without first performing two (2) types of lung scans, but that only one (1) scan was performed (41-42). Dr. Levy found that the spleen was lacerated because of the surgical intervention. There was no spontaneous eruption of the spleen. He characterized the odds of a spontaneous eruption as about "a million to one" (43). He stated that he was "astounded" that the decedent was not re-operated upon after the surgery (46). He opined:

> This lady should have been immediately prepared for surgery, transfused as high as they can get her, taken back to the operating room, re-explored and taken care of whatever injury occurred during the initial procedure (47).

He stated that the surgeons let decedent bleed to death and were guilty of gross negligence (47, 50-52, 59). Dr. Levy explained that had the malpractice not occurred the decedent would have survived the blow to the head (48).

The original deputy medical examiner who testified for the state at the murder trial was Dr. Fatteh. He was the final medical expert to testify at the Rule 3.850 hearing. On the basis of his autopsy findings, Dr. Fatteh testified that the diagnosis of pulmonary emboli was not correct (172). He stated that the operation was not justified (172). Dr. Fatteh agreed with Drs. Marricini and Levy that the treatment of the decedent vis a vis the surgical intervention was gross negligence (179). Dr. Fatteh agreed that the spleen lacerated was a result of the surgery (174-175). Finally, Dr. Fatteh explained that he testified during the murder trial from a medicolegal standpoint (184), but that he was never asked to address what went wrong medically during the case (184).

Appellant's approach to the cause of death consisted of nothing more than a phone call between him and Dr. Davis at the Dade County Medical Examiner's Office. The call took place after Dr. Davis was asked to review medical records from Mr. Sandstrom's file. Mr. Sandstrom could not testify that the records were complete. He recalled that they were the records he had received from prior counsel's file. All he knew was that they "related to her hospitalization" (225). Based upon whatever those records were, Dr. Davis, according to appellant, agreed with the findings of Fatteh (226). That one (1) telephone conversation between appellant and Dr. Davis constituted appellant's investigation into the cause of death. There was not even a written report from Dr. Davis. There

was no deposition or interview of Dr. Fatteh. There were no interviews or depositions of any of decedent's attending physicians. Even though he concluded that he could not use Dr. Davis as a witness, appellant, nonetheless, listed Dr, Davis as a defense witness ten (10) days prior to trial. When asked to explain, appellant could not (227).

Appellant, in representing Arner, failed timely to challenge by pre-trial motion to suppress and failed timely to challenge by objection at trial, testimony and photographs relating to a search of Arner's vehicle which testimony and photographs were prejudicial to Arner's defense.

The state attempted to establish that appellant's client had murdered his wife by striking her on the head with a hammer. The hammer was introduced into evidence (trial transcript, vol. VII, page 1156).* It became very important, therefore, that a tool chest was found by the police in the trunk of appellant's client's vehicle. Notwithstanding the damaging inferences that might be drawn from Linking the tool chest and hammer, appellant neglected to ascertain the particulars from various of the state's witnesses who were called and who testified concerning the seizure and search of the client's automobile and the photographing of its contents. Kirk B. Watkins was called by the state and testified how he investigated the area where the client's vehicle was found. He explained how he found the hammer (trial transcript, vol. IV, pages 607-608). He explained how the automobile was brought to the police department and how he photographed the vehicle, its interior and its trunk, identifying various

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* The trial transcript was admitted into evidence as the bar's Exhibit 2.

photographs that he had taken of such areas of the vehicle (trial transcript, vol. IV, pages 613A-614). The photographs so identified by the witness were admitted into evidence, without objection by appellant (trial transcript, vol. IV, pages 623-625).

Subsequently, the state called as its witness, Officer Lombard and questioned him concerning the entry of the automobile's trunk at which point appellant attempted to make an illegal search argument. Once again, appellant never attempted to take Officer Lombard's deposition. He never made a pre-trial motion to suppress which is admitted by appellant in his response to the bar's request for admissions. After the photographs were introduced into evidence, appellant attempted to suppress the same on the basis that the search of the vehicle and the photographing thereof constituted an illegal search and seizure (trial transcript, vol. V, pages 821-825). Although the trial judge gave appellant wide latitude and permitted him to pursue the argument (trial transcript, vol. VI, pages 853-866) the trial judge, pointing out that the photographs had already been received in evidence and had even passed the jury, declined to grant appellant's belated application for relief. The court acknowledged that appellant had a proper ground for suppression (trial transcript, vol. VI, page 866) but it was just too late, appellant having failed timely to make a suppression motion or to make a timely objection to the introduction of the photographs.

Appellant failed to discover that a fence surrounding the scene of the alleged crime, which fence, injurious to his client's defense and demonstrated to the jury by the state, by photograph, was not erected until over a year after the alleged crime.

The crime scene was a golf course. It was important to his client's defense to establish that someone other than Mr. Arner was the assailant. An attempt was made to point the finger at Valerie Wade. The issue of access from Ms. Wade's residence to the crime scene therefore became extremely important. Appellant's client testified that there was immediate and easy access from Ms. Wade's premises to the crime scene. He stated that there was no fence to restrict access at the time of the incident; that there was unimpeded access to and from Ms. Wade's premises (trial transcript, vol. XXI, pages 3820-3822). Unfortunately for his client, the state introduced into evidence a photograph of a fence surrounding the scene (trial transcript, vol. XV, pages 2817-2818). The state used the photograph, in closing argument, to demonstrate to the jury that Ms. Wade had no access to the crime scene. The prosecutor stated to the jury:

> The stronger suggestion has been made that our lying witness, Valerie Wade, and I use the terminology lying in quotes, is one who could have done it, because Mr. Arner testified that you could *go* around a fence that wasn't there, or was down, or was less of a fence somehow, and around a creek, or a canal, or some type of construction area, and then across the Diplomat Golf Course through a gate.
>
> I suggest once again you utilize your common sense. Why does a public golf course, or in this case a private golf course have a gate? Because when it's closed, they close the gate and I suggest to you ladies and gentlemen that the Diplomat Golf Course is not open at 2:00 o'clock in the morning or four hours either side of it, so once again you've got to scale the fence, and we've got the photagraphs of that fence in evidence, and I urge you to study all of the exhibits, to look at every one of them, and see what they prove.

> Look at the top of this fence and see if this does not have - and you have to look fairly closely - little strands of barbed wire that the individual crossing that fence is going to have to cover and leave no trace, not a trace, not a stitch of clothing, not anything, and not once but twice would this individual, if it were Valerie Wade, have to do such a feat and, of course, it takes some athletic ability, and you saw her physical condition.
>
> She is not an invalid, but she is certainly no high jump artist, so I suggest to you that any suggestion that Valerie Wade is conceivably the real culprit in this case is absolutely ludicrous, and I think you have heard that term several times during the course of this trial (trial transcript, vol. XXII, pages 4174-4175).

Appellant obviously made no attempt to ascertain the physical layout of the crime scene prior to the trial. Had he done so, he could have, should have and would have found John Hutton who had been superintendent of the crime scene property for the Diplomat since 1957. Mr. Hutton would have testified, as he did at the Rule 3.850 hearing, that the fence demonstrated in the state's photograph was not erected until nearly a year and a half after the incident in question (see Rule 3.850 transcript of hearing, pages 61-70).

Appellant failed to present a critical tape recording to impeach a prosecution witness or to recall such witness for such purposes of presenting such tape recording, the existence of which tape recording was known by and available to appellant.

Once again, appellant never bothered to take Valerie Wade's deposition prior to trial, The implications attaching to appellant's failure to take Ms. Wade's trial deposition are perhaps best articulated by appellant himself who commented, during the course of his cross examination of Ms. Wade, as follows:

> I can't tell until she is on the stand what she is going to say, and you tell me that you knew that she was going to say? (trial transcript, vol. X, page 1831).

Although appellant made reference to a tape recording to attempt to impeach Ms. Wade during his cross examination of her, he made no attempt, whatever, to introduce the tape during his cross examination or to play the same to the jury. He obviously regarded the tape as an extremely critical piece of evidence emphasizing that the witness' demeanor during the taping could clearly be ascertained from her tone, etc. on the tape (trial transcript, vol. XVIII, pages 3311-3315). Appellant waited until Ms. Wade was off the stand and made no attempt to introduce the tape until another witness, Leonard Robbins, was called (trial transcript, vol. XVIII, page 3316). Appellant made no effort to recall Valerie Wade for purposes of attempting to get the tape into evidence even though the prosecutor, during the course of his argument against admitting the tape, stated:

> If he wants to get in some affirmative evidence, then he has an affirmative duty to call the witness. It's not proper impeachment and it's not proper affirmative evidence (trial transcript, vol. XVIII, page 3321).

Appellant failed to become familiar with or know the physical evidence in the case.

Reference has already been made to the scene of the crime and the existence or non-existence of the fence. To further emphasize the fact that appellant was groping his way through the trial with no real understanding or appreciation of the physical evidence in the case, one need only review the colloquy that took place between the trial judge and appellant as follows:

> **THE COURT:** Do you have anything else, letters, or --
>
> MR. SANDSTROM: We haven't got anything. We've got somebody going through a whole stack of stuff up north. I do not know if they are going to find anything. I doubt it. If they do, as soon as I find out about it, I'll tell him (trial transcript, vol. X, pages 1836-1837).

As a result of appellant's failures, his client's conviction of murder in the first degree was set aside by the trial court upon the Rule 3.850 application. See the trial court's April 8, 1988 order granting the Rule 3.850 application admitted into evidence as the bar's Exhibit 1 and attached hereto as Appendix I.

SUMMARY OF ARGUMENT

In a capital case in which his client was convicted of first degree murder, appellant, having undertaken representation of the defendant approximately a year prior to the trial, failed to conduct any discovery with the result that after extensive post trial proceedings it was necessary that the conviction be set aside due to appellant's ineffective representation.

The cumulative effect of appellant's lax and cavalier approach to the defense of a capital case, with the resultant client prejudice and waste of criminal justice resources, constitutes violations requiring imposition of the referee's recommended sanction.

ARGUMENT

I. APPELLANT HAS FAILED IN ESTABLISHING THAT THE REFEREE'S FINDINGS ARE CLEARLY ERRONEOUS OR LACKING IN EVIDENTIARY SUPPORT.

In setting aside defendant's conviction for murder in the first degree, the trial judge imposed upon himself a rigid and demanding test enunciated in the order granting the defendant's motion to vacate. The order is attached hereto as Appendix I and was received in evidence as the bar's Exhibit 1.

The teat enunciated by the trial court is as follows:

> In Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Supreme Court announced the applicable standard for determining if trial counsel was effective:
>
> > A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.
>
> Id., 104 So.Ct. at 2064. Competent counsel's actions or omissions can be justified as the products of strategic considerations only if first preceded by reasonable investigation:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Arner v. State of Florida, Seventeenth Judicial Circuit of Florida, Case No. 79-1060 CF, Order Granting Motion to Vacate (April 8, 1988), p. 437-438.

Having enunciated the Strickland test, the trial judge proceeded to state, with particularity, the specifics which, in his opinion, mandated that the jury verdict be set aside; that exhibited appellant's ineffective representation. The State appealed. In affirming the trial court, the District Court of Appeal held:

> We believe that the trial court acted within its discretion in granting a new trial to appellee because of the alleged incompetency of his counsel. On the record before us we cannot say that the trial court applied the wrong legal standard or that its findings of fact were without evidentiary support. State v. Amer, 538 So.2d 528 (4th DCA 1989).

Assessing the very evidence adduced before the trial court, the referee, with detailed specifics and particularization, likewise found appellant's representation to have been woefully inadequate. The report of referee is attached as Appendix II. This Court is now presented with the cumulative presumption of correctness of findings of inadequate representation on appellant's part by the trial court and by

the referee. It is axiomatic that the party seeking review has the burden of showing that the referee's findings are clearly erroneous or lacking in evidentiary support. The Florida Bar v. Wagner, 212 So.2d 770, 772 (Fla. 1968). Unless this burden is met, a referee's findings will be upheld on review. The Florida Bar v. Hirsch, 359 So.2d 856 (Fla. 1978).

The most significant failing on appellant's part as found both by the trial court and the referee was his failure to develop the very critical medical aspect of his client's case. In that the referee adopted the bar's proposed report, it is necessary that bar counsel make extensive reference thereto.

Paragraph five (5) of the bar's complaint alleged that appellant, in representing Arner, failed to conduct a proper investigation as related to evidence available to establish that decedent's death was due to a cause other than Arner's actions. The referee, coming to the same conclusion as did the trial court, found:

> F. Respondent, in representing Arner, failed to conduct a proper investigation as related to evidence available to establish that decedent's death was due to a cause other than Arner's actions.
>
> i. The testimony of the medical experts from the transcript of the Rule 3.850 hearing (bar's Exhibit 3 in evidence) established beyond doubt that the proximate cause of decedent's death was medical malpractice. The jury was not presented with such evidence due to lack of adequate preparation on respondent's part.
>
> ii. Dr. John Marracini, Deputy Chief Medical Examiner of Palm Beach County, reviewed decedent's medical records and the autopsy report. He testified that on March 5, 1978, surgery was performed following a diagnosis of pulmonary emboli (Rule 3.850 hearing, volume I, page 18),* but the surgery was based upon a misdiagnosis by the surgeon because decedent did

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* All page references in this paragraph F are to transcript of Rule 3.850 hearing (bar's Exhibit 3, in evidence).

not have pulmonary emboli (18-19). During the surgery, the spleen was injured. The injury to the spleen was unrelated to the head injury for which Mrs. Arner was originally admitted to the hospital and which injury formed the basis for the charge against the defendant. In the words of Dr. Marracini, the spleen injury "was not the result of a physical assault or anything like that initially" (21). Following the injury to the spleen, decedent was given 25-30 units of blood (22-23). Dr. Marracini testified that decedent should have been re-explored. His testimony concluded as follows:

Q: So what we have here is a pattern. We have first the misdiagnosis of the pulmonary emboli; is that correct?

A: Yes.

Q: We then have the surgical intervention which ruptures or lacerates the spleen; correct?

A: Yes.

Q: We then have the woman lying in the hospital bleeding to death based upon what the surgery did to her?

A: Yes, the bleeding was a significant attribute to death.

Q: Did the bleeding and the shock that followed the bleeding cause her death?

A: It was one of two mechanisms occurring on or abut that time; the other being pneumonia.

Q: But for the operation would Elinor Arner have lived?

A: Probably (24-25).

Finally, Dr. Marracini opined that the "failure to recognize the problem of internal bleeding was tantamount to malpractice" (36).

iii. Dr. Mitchell Levy, a board certified general surgeon testified. He, like Dr. Marracini, opined that the diagnosis of pulmonary emboli was in error (40). Dr. Levy stated that the surgeons should have first performed an arteriogram to determine whether there were clots in the pulmonary arteries which is done in almost any patient undergoing a vena cava ligation which Dr. Levy described as "a major undertaking and is fraught with multiple post operative complications" (41). Decedent's doctors never

performed such a test. In addition, Dr. Levy opined that it was inadvisable to perform the ligation without first performing two (2) types of lung scans, but that only one (1) scan was performed (41-42). Dr. Levy found that the spleen was lacerated because of the surgical intervention. There was no spontaneous eruption of the spleen. He characterized the odds of a spontaneous eruption as about "a million to one" (43). He stated that he was "astounded" that the decedent was not re-operated upon after the surgery (46). He opined:

This lady should have been immediately prepared for surgery, transfused as high as they can get her, taken back to the operating room, re-explored and taken care of whatever injury occurred during the initial procedure (47).

He stated that the surgeons let decedent bleed to death and were guilty of gross negligence (47, 50-52, 59). Dr. Levy explained that had the malpractice not occurred the decedent would have survived the blow to the head (48).

iv The original deputy medical examiner who testified for the state at the murder trial was Dr. Fatteh. He was the final medical expert to testify at the Rule 3.850 hearing. On the basis of his autopsy findings, Dr. Fatteh testified that the diagnosis of pulmonary emboli was not correct (172). He stated that the operation was not justified (172). Dr. Fatteh agreed with Drs. Marricini and Levy that the treatment of the decedent vis a vis the surgical intervention was gross negligence (179). Dr. Fatteh agreed that the spleen lacerated was a result of the surgery (174-175). Finally, Dr. Fatteh explained that he testified during the murder trial from a medicolegal standpoint (184) but that he was never asked to address what went wrong medically during the case (184).

v. Respondent's approach to the cause of death consisted of nothing more than a phone call between him and Dr. Davis at the Dade County Medical Examiner's Office. The call took place after Dr. Davis was asked to review medical records from Mr. Sandstrom's file. Mr. Sandstrom could not testify that the records were complete. He recalled that they were the records he had received from prior counsel's file. All he knew was that they "related to her hospitalization" (225). Based upon whatever those records were, Dr. Davis, according to respondent, agreed with the findings of Fatteh (226). That one (1) telephone conversation between respondent and Dr. Davis constituted respondent's investigation

> into the cause of death. There was not even a written report from Dr. Davis. There was no deposition or interview of Dr. Fatteh. There were no interviews or depositions of any of decedent's attending physicians. Even though he concluded that he could not use Dr. Davis as a witness, respondent, nonetheless, listed Dr. Davis as a defense witness ten (10) days prior to trial. When asked to explain, respondent could not (227). See Report of Referee, Appendix 11, pages 2 through 5. See also, Order Granting Motion to Vacate, Appendix I, pages 432 through 435.

While appellant, in the first eighteen (18) pages of his brief, attempts to suggest that other reasons were offered at the original trial regarding the surgical intervention, diagnosis, etc., he ignores the emphatic testimony offered at the Rule 3.850 hearing, as recited hereinabove, to the effect that decedent would not have died save for an erroneous diagnosis and negligent surgical procedure.

Appellant, in a further attempt to rationalize his failure to explore, in more than a cursory fashion, the medical aspects of his client's case, cites Hallman v. State, 371 So.2d 482 (Fla. 1979) and Rose v. State, 591 So.2d 195 (4th DCA 1991). Additionally, appellant makes reference to a dissenting opinion in State v. Arner, 538 So.2d 528 (4th DCA 1989). It is respectfully submitted that respondent's reliance upon such "precedent" is misplaced. In Hallman and Rose, it was apparent that the injuries inflicted by the defendants in such cases were, in themselves, lethal. Upon an additional consideration not cited in appellant's brief, the court, in Rose v. State, 16 FLW D1250 (4th DCA 1991) clarified the law relating to independent, intervening causes of death in a criminal milieu. In Rose, the infant victim's death was a lethal injury to the back of the head. The court stated:

> The evidence was unrefuted that death was caused by the resulting subdural hematoma. The physicians' alleged failure to diagnosis and treat this injury in no way contradicted the fact that, left untreated, it was a mortal wound.

The court emphasized that under the circumstances, it was not error for the exclusion of evidence relating to medical malpractice "unless it could be shown that as a matter of law, the malpractice was the sole cause of death." (emphasis supplied). In the case at bar, the evidence adduced at the Rule 3.850 hearing, as recited above, established that the misdiagnosis and resultant negligent surgical intervention were the sole causes of death. Dr. Marracini opined that but for the operation the victim would have lived (pages 24 - 25, Rule 3.850 transcript). Dr. Mitchell Levy opined that had the malpractice not occurred, the decedent would have survived the blow to the head (Rule 3.850 hearing, page 48). With respect, the dissent in State v. Arner, supra, failed to recognize the distinction.

At the end of his first point, appellant makes reference to information not forming a part of the record in this case. Specifically, appellant makes reference to Mr. Arner's plea. Firstly, the Court is mislead by omission. The referenced plea occurred prior to the final hearing in this matter. Secondly, it is respectfully submitted that the plea has no relevance. Finally, should the Court entertain such information and the proffered plea colloquy, then the bar respectfully requests an opportunity to reveal and lay bare to the Court the extremely compelling reasons underlying Mr. Arner's decision to "plead out."

In response to the findings of the trial court and of the referee that appellant failed timely to challenge by pre-trial motion to suppress and failed timely to challenge by objection at trial, testimony and photographs relating to a search of his client's vehicle (see report of referee, pages 5 - 7, item G) appellant suggests that "the suppression

issue was not significant in the circumstances of the client Arner's case" (appellant's brief, page 24). While appellant certainly is entitled to such opinion and observation, the test is whether or not the findings of the referee are supported by competent evidence. In a detailed and careful analysis, both the trial court and the referee specified precisely how and why the failures attributed to appellant impacted the underlying criminal case. It is respectfully submitted that appellant's suggestion that the issue was not "significant" does not meet appellant's burden to demonstrate that the referee's findings are "clearly erroneous or lacking in evidentiary support."

Appellant attempts to debunk the findings of the trial court and of the referee that appellant's failure to ascertain the physical layout of the crime scene, especially as the scene related to the existence or nonexistence af certain fencing, constituted ineffective representation. As appellant rationalized his failures in other respects, he likewise rationalizes that "the 'fence' issue was not important in any event" (appellant's brief, page 29). Appellant also suggests that the witness, Hutton, produced at the Rule 3.850 hearing, did not give evidence to substantiate the referee's findings. The witness's testimony more than substantiates the identical findings arrived at by the referee and the trial court. A reading of the trial transcript inescapably leads to the conclusion that appellant's trial strategy was to attempt to lead the jury to believe that a third party had committed the crime. Attention was particularly focused on one Valerie Wade. The fence issue became relevant and a focal point in that the prosecution attempted to establish that Ms. Wade could not have vacated the crime scene within certain time parameters as fencing would have barred her way. Appellant makes the naked assertion that "the Referee is sorely mistaken to find

that Mr. Hutton would have testified, as he did at the Rule 3.850 hearing, that the fence demonstrated in the State's photograph was not erected until nearly a year and a half after the incident in question." In fact, Mr. Hutton, making specific reference to the area where the defendant's vehicle was found, which area was depicted in photographs submitted to the jury and which photographs established the existence of a fence, testified at the 3.850 hearing as follows:

> Q. Was there a gate?
>
> A. There's a gate right about 200 feet west of that pumping station. Right about where that car was there was a big grove of trees in there.
>
> Q. Do you recall what the condition of the fence was back at that time?
>
> A. It was pretty well beat up. The kids would cut the fence and go in and fish and play golf.
>
> Q. Would there have been any problems walking through that fence from where the car was found?
>
> A. No, not really.
>
> Q. Would there have been any impediment by way of a fence to traverse the golf course from north to south?
>
> A. No, there's nothing. (Transcript of Rule 3.850 hearing, pages 69 - 70).

Appellant attempts to refute the findings of the trial court and of the referee regarding appellant's failure to introduce a certain tape recording. Specifically, the trial court and the referee found that although appellant made reference to a tape recording in an attempt to impeach a witness, he made no effort to introduce the tape during the cross examination or to play the tape to the jury. Further specifics relating to the tape and its importance appear in the report of referee (Report of Referee, pages 9 and 10, item i). In his brief, appellant states, categorically, that the findings of the trial court and of the

referee are without basis. He makes reference to specific pages in the trial transcript (1608-09, 1693-1711, 1846, 1849-50) with an inference that appellant did, in fact, attempt to have the tape recording admitted during the subject witness's testimony. In fact, appellant made no effort to introduce the subject recording during the course of the witness's presence on the stand. As specified in the report of referee, appellant waited until another witness was called and then, inappropriately, attempted to introduce the tape into evidence. Even after being prompted by the state as to the appropriate manner to attempt to have the tape received, appellant did not take the hint and failed to achieve his purpose. As with his other omissions, appellant again characterizes his failing as inconsequential. As before, appellant has, in no manner, established that the referee's findings are clearly erroneous or lacking in evidentiary support.

Finally, appellant urges that the referee erred in finding that appellant failed to familiarize himself with the physical evidence in the case. Appellant suggests that the referee (and obviously the trial court which had the same evidence and reached the same conclusion) took certain of appellant's remarks at trial out of context. In fact, the remarks in question (included in the Report of Referee at page 10, item J) are annotated to a specific page of the trial transcript. The referee, at his request, was furnished with complete transcripts of the murder trial and of the Rule 3.850 hearing. The referee's reference to the subject colloquy was cumulative to all of the other specific inadequacies noted in his report and was cited by the referee in context of the accumulation of errors. Thus, the referee specifically noted that "reference has already been made to the scene of the crime

and the existence or non-existence of the fence" (report of referee, page 10, item J.i.). It was "to further emphasize the fact" that the referee included the subject colloquy.

Appellant's incompetence has been examined by the trial judge, an appellate court and this Court's referee. All have agreed that appellant's representation was incompetent. Appellant has not demonstrated to the contrary.

ARGUMENT

11. THE REFEREE PROPERLY ASSESSED COSTS FOR THE BAR'S EXPENSES IN PRODUCING COPIES OF THE EXTENSIVE TRIAL AND RULE 3.850 TRANSCRIPTS.

Part of the record in this case is a transcript of an August 16, 1991 status conference during which it was agreed by all parties that the bar would file with the referee the entire transcript of the murder trial and the entire transcript of the Rule 3.850 record on appeal and that the bar would furnish the same material to the respondent. It would seem to the bar to have constituted reversible error had the bar not supplied to the trier of the fact an opportunity to review appellant's total representation at the trial. Insofar as the copying charge is concerned, Rule 3-7.6(n) prescribes reproduction costs at $1.00 per page which formed the basis for the referee's assessment in this matter.

CONCLUSION

Appellant has not met his burden to establish that the referee's report and findings are clearly erroneous or lacking in evidentiary support. Accordingly, the referee's findings should be upheld on review.

All of which is respectfully submitted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct of the foregoing answer brief of The Florida Bar has been furnished to Kayo E. Morgan, Attorney for Appellant, 432 N.E. 3rd Avenue, Ft. Lauderdale, FL 33301, by regular mail, on this 27th day of May, 1992.

David M. Barnovitz

DAVID M. BARNOVITZ #385551
Bar Counsel
The Florida Bar
5900 N. Andrews Ave., Ste. 835
Ft. Lauderdale, FL 33309
(305) 772-2245

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR BROWARD COUNTY

CRIMINAL DIVISION

CASE NO. 79-1060 CF (KAPLAN)

ROBERT ARNER,

Movant, Defendant,

-vs-

STATE OF FLORIDA,

Respondent, Plaintiff.

ORDER GRANTING MOTION TO VACATE

This cause came before the Court upon the defendant's motion to vacate filed pursuant to Rule 3.850, Florida Rules of Criminal Procedure. The Court ordered an evidentiary hearing which was held on November 20, 1987. The Court has carefully considered all of the pleadings filed by both parties. The Court has also conducted its own review of the original trial transcripts. Based upon all of the foregoing, the Court finds merit in the defendant's contention that he was not afforded effective assistance of trial counsel.

Following a jury trial, the defendant was convicted of the first degree murder of his wife, Elinor Arner. The defendant's trial counsel wan Ray Sandstrom. At the evidentiary hearing on the defendant's Rule 3.850 motion, the defendant contended, inter alia, that Mr. Sandatrom failed to properly investigate and present evidence that would have established that Elinor Arner's death waa attributable to medical malpractice rather than the trauma she suffered to the head. In support thereof, the defendant: presented three medical experts.

Dr. John Marracini, Deputy Chief Medical Examiner of Palm Beach County, testified that on March 5, 1978, surgery was performed on Elinor Arner following a diagnosis of

pulmonary emboli. That diagnosis was wrong, Mrs. Arner did not have pulmonary emboli, however, during the surgery, her spleen was injured. Following the injury to the spleen, Mrs. Arner was given approximately 30 units of blood or some 14 quarts of blood product. Dr. Marracini testified that such an unusual loss of blood should have prompted Mrs. Arner's doctors to have re-operated on her. Instead, Mrs. Arner died from loss of blood, shock and pneumonia. But for the surgery, the doctor testified; Elinor Arner would have lived.

the defendant also presented Dr. Mitchell Levy, a board certified general surgeon and member of the American College of Surgeons and the International College of Surgeons, who agreed that the diagnosis of pulmonary emboli was wrong. He found that the spleen was lacerated because of the surgical intervention. The doctor flatly contradicted the trial testimony of Dr. Fatteh which suggested spontaneous eruption of the spleen shortly before death. Dr. Levy characterized the odde of a spontaneoue eruption as about "a million to one." Such eruption was even less likely here, the doctor testified, because Mre. Arner had a liver-spleen scan prior to the surgery and her spleen was completely normal.' Therefore, the doctor was able to conclude that the chance of her having had a spontaneoue rupture from sepsis of the spleen was next to none.

The doctor agreed with Dr. Marracini that the postoperative need for blood mandated reinvestigation by way of surgery, which was not done. This was based upon the analysis of a blood sample performed on March 7. Mrs. Arner was rupturing blood into her abdominal cavity and it was corning through the drain site.

Dr. Levy stated that the surgeons Let Mrs. Arner bleed to death and they were guilty of gross negligence. fiad the

malpractice not occurred, Dr. Levy testified that she would have survived the blow to the head and recovered fully.

The original Deputy Medical Examiner who testified for the state at the defendant'e trial was Dr. Fatteh who was also offered as a witness by the defendant at the evidentiary hearing. He stated that he did not have the full medical charts, Laboratory reports, ox blood requisitions as of the time of his testimony at trial in this cause. At trial, he testified that he did review the medical records. However, he was unclear whether he viewed all of them at that time. At trial, he testified that the death was caused by bleeding of the lacerated spleen, but that the spleen ruptured shortly before death because of an infection and not from any surgical intervention.

At the evidentiary hearing, after being shown certain medical recorde, Dr. Fatteh's testimony is in complete conflict with his trial testimony. He says that his answers are different now because a different set of questions are now being asked regarding what went wrong medically.

On the basis of his autopsy findings, Dr. Fatteh also agreed that the diagnosis of pulmonary emboli was not correct and therefore, the operation was unnecessary. Dr. Fatteh now characterizes the treatment of Elinor Arner as gross negligence. Ha now states that the autopsy showed a laceration to the spleen which most likely took place during surgery.

Dr. Fatteh noted that he testified at the trial in his capacity as medical examiner and he Listed in general terms the cause of death as complications of head injury simply because death was "related" to the injury. But he now states that the proximate intervening cause of death was internal hemmorhage due to the laceration of the spleen.

The defendant alleged that baaed upon the foregoing, the proximate cause of death of Elinor Arner was an issue

that should have been extensively investigated prior to trial and thereafter presented at trial as a major defense to the charge of homicide. Instead, the defendant points to Mr. Sandstrom's failure to have deposed the medical examiner or any doctors who attended Mrs. Arner, failure to have secured and reviewed the complete medical records, and failure to have secured any medical witnessem for the defense. The defendant alleges that becauee of the incompetence of Mr. Sandstrom, the issue of intervening medical malpractice as a defense was presented in a token and perfunctory fashion and was therefore ineffectual.

In addition to the foregoing medical witnesses, the defendant presented at the evidentiary hearing attorney Stephen J. Bronis. The Court finds that Hr. Bronis is a respected criminal defense attorney of the highest quality and caliber as reflected by his credentials and his reputation, as well as the Court's observations. He is considered by many of the area's finest lawyers as being a "lawyer's lawyer". Mr. Bronis stated it was the first time that he ever testified about a fellow attorney and accused him of being ineffective counsel. He concluded that the representation afforded the defendant by Mr. Sandstrom fell substantially below objective reasonable standards of competent counsel.

Mr. Bronis testified that in addition to the cause of death issue, the following areas were indicative of that ineffectiveness:

-- Mr. Sandstrom failed to timely challenge by a pre-trial motion to'suppress the search of the trunk of the Buick automobile, having failed to discern the issue due to his failure to have taken any pre-trial depositions, Although he was allowed orally to argue the issue, the Court found the matter moot: because Mr. Sandstrom failed to object

when photographs of the contents of the trunk were previously admitted.

-- Mr. Sandstrom also failed to invoke the accountant-client privilege in opposition to the testimony of Lloyd Platt, the accountant produced by the State in an attempt to prove motive, despite the clear applicability of the privilege.

-- The defendant testified at trial that fences did not surround the property in question, thereby giving Valerie Wade or anyone else easy access to and from the scene. That claim was contradicted by the prosecutor in his closing argument when he showed to the jury a photograph in evidence of a fence surrounding the scene. Due to Mr. Sandstrom's lack of preparation, he did not know that the fence was erected after the assault. Additionally, there was a witness available at the time of the trial and who was produced at the evidentiary hearing, John Hutton, who has been the superintendent of property for the Diplomat since 1957. He testified that he was never approached on behalf of Mr. Arner until this hearing. Mr. Hutton produced the building permit for the fence issued nearly a year and a half after the incident.

-- Mr. Sandstrom never interviewed his client's physician, Dr. Drimmer, and as a result, adduced unfavorable evidence regarding the interaction of alcohol and the medication being taken by the defendant on the night in question.

-- Mr. Sandstrom ineffectively failed to present evidence of a critical tape recording of Valerie Wade during her testimony. Instead, he tried to introduce the tape later in the trial during the testimony of another witness, but an evidentiary ruling by the Court would not allow it at that time. Mr. Bronis added that even at that point in the

trial, Mr. Sandetrom could have asked that Wade be called as a court witness €or introduction of the tape.

-- Mr. Sandatrom failed to take a single pra-trial deposition in the case. The only deposition taken was that of Detective Castiglione, and it was taken by attorney Leonard Robbins who preceded Sandstrom.

-- Mr. Sandstrom did not know the physical evidence involved in the case even in the middle of the trial. We refers to Mr. Sandstrom's comments during trial that 'we've *got* somebody going through a whole stack of stuff up North."

.-- Mr. Sandstrorn introduced into evidence the death certificate thereby assisting the state's case.

Mr. Bronis indicated numerous other areas of ineffectiveness, but those matters are considered by the Court to be elementary trial errors and amount to nothing more than "nitpicking".

In Strickland V. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Supreme Court announced the applicable standard for determining if trial couneel was effective:

> A convicted dafendant'a claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence.has two componente. First, the defendant must show that counsel'e performance was deficient, This requires showing that counsel made errors So serious that counael was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel'e errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id., 104 S.Ct. at 2064. Competent counsel's actions or omissions can be justified as the products of strategic considerations only if first preceded by reaeonable investigation:

> [S]trategic choices mads after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after lass than complete investigation are reasonable precisely to the extent that reasonable professional judgments suppbrt the limitations on investigation. In other words, couneel has a duty to make reasonable

> investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984) (emphasis supplied).

Applying these tests to the cause of death issue, the Court concludes that the type of medical testimony presented at the evidentiary hearing could have been cultivated by trial counsel had he conducted a proper investigation which he did not. The testimony established that but for the surgical intervention, Mrs. Arner would have lived. Evidence which was available but neither presented nor investigated by trial counsel would have contradicted the trial testimony of Dr. Fatteh that the rupture of the spleen occurred immediately before death. The evidence available to the defendant at trial, but not presented, ehowed that the spleen was lacerated during the surgery. Mr. Sandstrom's telephone conversation with Dr. Davis, who confirmed Dr. Fatteh's original findings, was totally inadequate. In fact, Mr. Sandstrom testified at the evidentiary hearing that he did not even remember what records *were* sent to Dr. Davis. Thus, Dr. Davis may have reviewed incomplete records. Additionally, counsel's failure to have given any of the trial witnesses complete medical records was ineffective, as especially evidenced by his cross-examination of Dr. Giulianti. Mr. Sandstrom deposed not a single witness prior to the trial. Given the gravity of the charge and the delay in the death of Mrs. Arner for approximately six weeks after the assault, it is significant that a proper medically oriented investigation be made and the failure to engage in discovery constitutes further evidence of ineffectiveness.

Some of the other areas alleged by the defendant could also be deemed as constitutionally ineffective. However,

the medical malpractice aspect not pureued because of counsel's failure to employ the rules of discovery and failure to investigate is so egregious that the Court finds it unnecessary to discuss these other grounds.

Pursuant to Strickland, the Court finds that counsel's performance was constitutionally deficient because the errors committed were so serious that the defendant was not afforded competent counsel guaranteed by the Sixth Amendment. The Court further finds that this deficiency prejudiced the defendant, depriving him of his right to a fair trial and undermining confidence in the reliability of the verdict.

Based upon the foregoing, it is hereby:

ORDERED AND ADJUDGED that the defendant's motion to vacate is GRANTED and that the defendant's conviction for first degree murder is set aside.

DONE AND ORDERED this 8 day of April, 1988, at Broward County, Florida.

Stanton L. Kaplan
CIRCUIT JUDGE

Filed in Open Court
4/8/88
Deputy Clerk

IN THE SUPREME COURT OF FLORIDA
BEFORE A REFEREE

THE FLORIDA BAR,

Complainant,

v.

RAY SANDSTROM,

Respondent.
_____/

Supreme Court Case No. 77,773

The Florida Bar File No.
89-52,722 (17C)

REPORT OF REFEREE

I. SUMMARY OF PBOCEEDINGS:

The undersigned was appointed as referee to preside in the above referenced disciplinary proceeding by order of this Court dated April 26, 1991. The pleadings, transcript of final hearing and all other documents filed with the undersigned, which are forwarded to the Court with this report, constitute the entire record in this case.

Respondent was represented by Kayo E. Morgan, Esquire. The bar was represented by David M. Barnovitz, Assistant Staff Counsel.

11. FINDINGS OF FACT AS TO EACH ITEM OF MISCONDUCT OF WHICH THE RESPONDENT IS CHARGED:

A. Respondent is, and at all times hereinafter mentioned, was, a member of The Florida Bar subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

B. Heretofore, respondent represented one Robert Arner ("Arner") in connection with a criminal prosecution venued in the Circuit Court of the 17th Judicial Circuit of Florida entitled State of Florida v. Robert Amer, criminal division, case no. 79-1060CF.

C. Arner was charged in the referenced prosecution with murdering his wife, Elinor Arner (hereinafter called "decedent").

D. Fallowing a jury trial in the referenced action, during which trial respondent at all times represented Arner, Arner was convicted of the first degree murder of the decedent.

E. Respondent, in representing Arner, failed to take any pre-trial depositions.

F. Respondent, in representing Amer, failed to conduct a proper investigation as related to evidence available to establish that decedent's death was due to a cause other than Arner's actions.

i. The testimony of the medical experts from the transcript of the Rule 3.850 hearing (bar's Exhibit 3 in evidence) established beyond doubt that the proximate cause of decedent's death was medical malpractice. The jury was not presented with such evidence due to lack of adequate preparation on respondent's part.

ii. Dr. John Marracini, Deputy Chief Medical Examiner of Palm Beach County, reviewed decedent's medical records and the autopsy report. He testified that on March 5, 1978, surgery was performed following a diagnosis of pulmonary emboli (Rule 3.850 hearing, volume I, page 18),* but the surgery was based upon a misdiagnosis by the surgeon because decedent did not have pulmonary emboli (18-19). During the surgery, the spleen was injured. The injury to the spleen was unrelated to the head injury for which Mrs. Arner was originally admitted to the hospital and which injury formed

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* All page references in this paragraph F are to transcript of Rule 3.850 hearing (bar's Exhibit 3, in evidence).

the basis for the charge against the defendant. In the words of Dr. Marracini, the spleen injury "was not the result of a physical assault or anything like that initially" (21). Following the injury to the spleen, decedent was given 25-30 units of blood (22-23). Dr. Marricini testified that decedent should have been re-explored. His testimony concluded as follows:

> *Q:* So what we have here is a pattern. We have first the misdiagnosis of the pulmonary emboli; is that correct?"
>
> A: Yes.
>
> *Q:* We then have the surgical intervention which ruptures or lacerates the spleen; correct?
>
> A: Yes.
>
> Q: We then have the woman lying in the hospital bleeding to death based upon what the surgery did to her?
>
> A: Yes, the bleeding was a significant attribute to death,
>
> Q: Did the bleeding and the shock that followed the bleeding cause her death?
>
> A: It was one of two mechanisms occurring on or abut that time; the other being pneumonia.
>
> Q: But for the operation would Elinor Arner have Lived?
>
> A: Probably (24-25).

Finally, Dr. Marracini opined that the "failure to recognize the problem of internal bleeding was tantamount to malpractice" (36).

iii. Dr. Mitchell Levy, a board certified general surgeon testified. He, like Dr. Marracini, opined that the diagnosis of pulmonary emboli was in error (40). Dr. Levy stated that the surgeons

should have first performed an arteriogram to determine whether there were clots in the pulmonary arteries which is done in almost any patient undergoing a vena cava ligation which Dr. Levy described as "a major undertaking and is fraught with multiple post operative complications" (41). Decedent's doctors never performed such a test. In addition, Dr. Levy opined that it was inadvisable to perform the Ligation without first performing two (2) types of lung scans, but that only one (1) scan was performed (41-42). Dr. Levy found that the spleen was lacerated because of the surgical intervention. There was no spontaneous eruption of the spleen. He characterized the odds of a spontaneous eruption as about "a million to one" (43). He stated that he was "astounded" that the decedent was not re-operated upon after the surgery (46). He opined:

> This lady should have been immediately prepared for surgery, transfused as high as they can *get* her, taken back to the operating room, re-explored and taken care of whatever injury occurred during the initial procedure (47).

He stated that the surgeons let decedent bleed to death and were guilty of *gross* negligence (47, 50-52, 59). Dr. Levy explained that had the malpractice not occurred the decedent would have survived the blow to the heed (48).

iv The original deputy medical examiner who testified for the state at the murder trial was Dr. Fatteh. He was the final medical expert to testify at the Rule 3.850 hearing. On the basis of his autopsy findings, Dr. Fatteh testified that the diagnosis of pulmonary emboli was not correct (172). He stated that the operation was not justified (172). Dr. Fatteh agreed with Drs. Marricini and Levy that the treatment of the decedent vis a vis the surgical intervention was

gross negligence (179). Dr. Fatteh agreed that the spleen lacerated was a result of the surgery (174-175). Finally, Dr. Fatteh explained that he testified during the murder trial from a medicolegal standpoint (184) but that he was never asked to address what went wrong medically during the case (184).

v. Respondent's approach to the cause of death consisted of nothing more than a phone call between him and Dr. Davis at the Dade County Medical Examiner's Office. The call took place after Dr. Davis was asked to review medical records from Mr. Sandstrom's file. Mr. Sandstrom could not testify that the records were complete. He recalled that they were the records he had received from prior counsel's file. All he knew was that they "related to her hospitalization" (225). Based upon whatever those records were, Dr. Davis, according to respondent, agreed with the findings of Fatteh (226). That one (1) telephone conversation between respondent and Dr. Davis constituted respondent's investigation into the cause of death. There was not even a written report from Dr. Davis. There was no deposition or interview of Dr. Fatteh. There were no interviews or depositions of any of decedent's attending physicians. Even though he concluded that he could not use Dr. Davis as a fitness, respondent, nonetheless, listed Dr. Davis as a defense witness ten (10) days prior to trial. When asked to explain, respondent could not (227).

G. Respondent, in representing Arner, failed timely to challenge by pre-trial motion to suppress and failed timely to challenge by objection at trial, testimony and photographs relating to a search of Arner's vehicle which testimony and photographs were prejudicial to Arner's defense.

i. The state attempted to establish that respondent's client had murdered his wife by striking her on the head with a hammer. The hammer was introduced into evidence (trial transcript, vol. VII, page 1156).* It became very important, therefore, that a tool chest was found by the police in the trunk of respondent's client's vehicle. Notwithstanding the damaging inferences that might be drawn from Linking the tool chest and hammer, respondent neglected to ascertain the particulars from various of the state's witnesses who were called and who testified concerning the seizure and search of the client's automobile and the photographing of its contents. Kirk B. Watkins was called by the state and testified how he investigated the area where the client's vehicle was found. He explained how he found the hammer (trial transcript, vol. IV, pages 607-608). He explained how the automobile was brought to the police department and how he photographed the vehicle, its interior and its trunk, identifying various photographs that he had taken of such areas of the vehicle (trial transcript, vol. IV, pages 613A-614). The photographs so identified by the witness were admitted into evidence, without objection by respondent (trial transcript, vol. IV, pages 623-625).

ii. Subsequently, the state called as its witness, Officer Lombard and questioned him concerning the entry of the automobile's trunk at which point respondent attempted to make an illegal search argument. Once again, respondent never attempted *to* take Officer Lombard's deposition. He never made a pre-trial motion to suppress

* The trial transcript was admitted into evidence as the bar's Exhibit 2.

which is admitted by respondent in his response to the bar's request for admissions. After the photographs were introduced into evidence, respondent attempted to suppress the same on the basis that the search of *the* vehicle and the photographing thereof constituted an illegal search and seizure (trial transcript, vol. V, pages 821-825). Although the trial judge gave respondent wide latitude and permitted him to pursue the argument (trial transcript, vol. VI, pages 853-866) the trial judge, pointing out that the photographs had already been received *in* evidence and had even passed the jury, declined to grant respondent's belated application for relief. The court acknowledged that respondent had a proper ground for suppression (trial transcript, vol. VI, page 866) but it was just too late, respondent having failed timely to make a suppression motion or to make a timely objection to the introduction of the photographs.

H. Respondent failed to discover that a fence surrounding the scene of the alleged crime, which fence, injurious to his client's defense and demonstrated to the jury by the *state*, by photograph, was not erected until over a year after the alleged crime.

i. The crime scene was a golf course. It was important to his client's defense *to* establish that someone other than Mr. Arner was the assailant. An attempt was made to point the finger at Valerie Wade. The issue of access from Ms. Wade's residence to the crime scene therefore became extremely important. Respondent's client testified that there was immediate and easy access from Ms. Wade's premises to the crime scene. He stated that there was no fence to restrict access at the *time* of the incident; *that* there was unimpeded

access to and from Ms. Wade's premises (trial transcript, vol. XXI, pages 3820-3822). Unfortunately for his client, the state introduced into evidence a photograph of a fence surrounding the scene (trial transcript, vol. XV, pages 2817-2818). The state used the photograph, in closing argument, to demonstrate to the jury that Ms. Wade had no access to the crime scene. The prosecutor stated to the jury:

> The stronger suggestion has been made that our lying witness, Valerie Wade, and I use the terminology lying in quotes, is one who could have done it, because Mr. Arner testified that you could go around a fence that wasn't there, or was down, or was less of a fence somehow, and around a creek, or a canal, or some type of construction area, and then across the Diplomat Golf Course through a gate.
>
> I suggest once again you utilize your common sense. Why does a public golf course, or in this case a private golf course have a gate? Because when it's closed, they close the gate and I suggest to you ladies and gentlemen that the Diplomat Golf Course *is* not open at 2:00 o'clock in the morning or four hours either side of it, so once again you've got to scale the fence, and we've got the photographs of that fence in evidence, and I urge you to study all of the exhibits, to look at every one of them, and see what they prove.
>
> Look at the top of this fence and see if this does not have - and you have to look fairly closely - Little strands of barbed wire that the individual crossing that fence is going *to* have to cover and leave no trace, not a trace, not a stitch of clothing, not anything, and not once but twice would this individual, if it were Valerie Wade, have to do such a feat and, of course, it takes some athletic ability, and you saw her physical condition.
>
> She is not an invalid, but she is certainly no high jump artist, so I suggest to you that any suggestion that Valerie Wade is conceivably the real culprit in this case is absolutely ludicrous, and I think you have heard that term several times during the course of this trial (trial transcript, vol. XXII, pages 4174-4175).

ii. Respondent obviously made no attempt to ascertain the physical layout of the crime scene prior to the trial. Had he done so, he could have, should have and would have found John Hutton who had been superintendent of the crime scene property for the Diplomat since 1957. Mr. Hutton would have testified, as he did at the Rule 3.850 hearing, that the *fence* demonstrated in the state's photograph was *not* erected until nearly a year and a half after the incident in question (see Rule 3.850 transcript of hearing, pages 61-70).

I. Respondent failed to present a critical tape recording to impeach a prosecution witness or to recall such witness for such purposes of presenting such tape recording, the existence of which tape recording was known by and available to respondent,

i. Once again, respondent never bothered to take Valerie Wade's deposition prior to trial. The implications attaching to respondent's failure to take Ms. Wade's trial deposition. are perhaps best articulated by respondent himself who commented, during the course of his cross examination of Ms. Wade, as follows:

> I can't tell until she is on the stand what she is going to say, and you tell me that you knew that she was going to say? (trial transcript, vol. X, page 1831).

ii. Although respondent made reference *to a* tape *recording* to attempt to impeach Ms. Wade during his cross examination of her, he made no attempt, whatever, to introduce the tape during his cross examination or to play the same to the jury. He obviously regarded the tape as an extremely critical piece of evidence emphasizing that the witness' demeanor during the taping could clearly be ascertained from

her tone, etc. on the tape (trial transcript, vol. XVIII, pages 3311-3315). Respondent waited until Ms. Wade was off the stand and made no attempt to introduce the tape until another witness, Leonard Robbins, was called (trial transcript, vol. XVIII, page 3316). Respondent made no effort to recall Valerie Wade for purposes of attempting to get the tape into evidence even though the prosecutor, during the course of his argument against admitting the tape, stated:

> If he wants to get in some affirmative evidence, then he has an affirmative duty to call the witness. It's not proper impeachment and it's not proper affirmative evidence (trial transcript, vol. XVIII, page 3321).

J. Respondent failed to become familiar with or know the physical evidence in the case.

i. Reference has already been made to the scene of the crime and the existence or non-existence of the fence. To further emphasize the fact that respondent was groping his way through the trial with no real understanding or appreciation of the physical evidence in the case, one need only review the colloquy that took place between the trial judge and respondent as follows:

> THE COURT: Do you have anything else, letters, or --
>
> MR. SANDSTROM: We haven't *got* anything. We've *got* somebody going through a whole stack of stuff up north. I do not know if they are *going* to find anything. I doubt it. If they do, as soon as I find out about it, I'll tell him (trial transcript, vol. X, pages 1836-1837).

K. As a result of respondent's failures, his client's conviction of murder in the first degree was set aside by the trial court upon the Rule 3.850 application. See the trial court's April 8, 1988 order granting the Rule 3.850 application admitted into evidence as the bar's Exhibit 1.

III. **RECOMMENDATIONS AS TO WHETHER OR NOT THE RESPONDENT SHOULD BE FOUND GUILTY:**

A. By virtue of his lack of preparation, lack of investigation and his failures as recited in paragraphs A through J, inclusive of my findings of fact, respondent violated Disciplinary Rules 6-101(A)(2) and 6-101(A)(3) of the Code of Professional Responsibility which provide that a lawyer shall not handle a legal matter without preparation adequate in the circumstances and shall not neglect a legal matter entrusted to him.

IV. **RECOMMENDATIONS AS TO DISCIPLINARY MEASURES TO BE APPLIED:**

I recommend that respondent be suspended from the practice of law for one year.

V. **PERSONAL HISTORY:**

Respondent is 67 years of age and has been a member of the Florida Bar since February 5, 1951.

VI. **STATEMENT AS TO PAST DISCIPLINE:**

Respondent received a private reprimand for lack of courtroom demeanor in The Florida Bar File No. 82-03,394.

VII. STATEMENT AS TO COSTS OF THE PROCEEDING AND RECOMMENDATIONS:

The *costs* of these proceedings were as follows:

Administrative Costs: (Rule 3-7.6(k)(5))	$	500.00
Court Reporter:		
Status Conference		97.25
Final Hearing		4.61.25
copy costs: Three (3) copies of murder trial and three (3) copies of Rule 3-8.50 record - 15,000 copies at $.15/copy	$	2,250.00
TOTAL	$	3,308.50

I recommend that such *costs* be taxed against the respondent.

RENDERED this 7th day of November, 1991 at Miami, Florida.

JOEL H. BROWN, REFEREE

Copies furnished to:

David M. Barnovitz, Bar Counsel
Kayo E. Morgan, Attorney for Respondent