IN THE SUPREME COURT OF FLORIDA

(Before a Referee)

THE FLORIDA BAR

Complainant,

Supreme Court Case #: 77,773

Florida Bar File #: 89-52,722 (17C)

vs

RAY SANDSTROM,

ORIGINAL

Respondent.

_____/

# INITIAL BRIEF OF APPELLANT/RESPONDENT

[On Respondent's Petition to Review Proceedings had and taken in Dade County, Florida, before the Honorable Joel H. Brown, as Referee, upon a Bar Complaint against Respondent]

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## PRELIMINARY STATEMENT

The Florida Bar is the Complainant below, and shall be so referred to herein, or as 'The Bar'.

Ray Sandstrom is the Respondent below, and shall be referred to as such or as Appellant, Respondent, or Appellant/Respondent herein,

The 'Report of Referee' is the subject of this appeal, and references thereto shall be as (Report, p 1).

The hearing which was conducted before the Referee has been transcribed and shall be referred to as (R. p 1).

Exhibit '1' is the Rule 3.850 order granting a new trial to Appellant/Respondent's client, Robert Arner, and shall be referred to as (E1, p 1). This was received by the Referee at the hearing below (R. 11-12).

Exhibit '2' is the transcript of the subject trial wherein Appellant/Respondent represented Robert Arner and shall be

referred to as (E2, I p 1). Note the 'volume' is referred to in roman numeral after the 'E' and before the 'p'. This was received by the Referee at the hearing below (R. 12-13).

Exhibit '3' is the transcript of the Rule 3.850 hearing received below by the Referee (R. 13-14).

## STATEMENT OF CASE AND FACTS

Appellant/Respondent represented Robert Arner, the defendant in a first degree murder indictment, the trial of which commenced 15 September 1980 and concluded 25 October 1980 (E2, III-XXIII), with a verdict of guilty as charged (E2, XXIII p 4351).

The defendant appealed to the Fourth District Court of Appeals, which court affirmed the conviction 21 November 1984. ARNER v STATE, 459 So2d 1136).

The defendant pursued collateral relief alleging ineffective assistance of trial counsel, and a hearing thereon was conducted about 20 November 1987 (E3, p 1). The trial court granted that relief, and a new trial was ordered for the defendant. (El).

Appellant/Respondent was served a 'Complaint' by the Bar dated 18 April 1991.

Appellant/Respondent served an 'Answer to Complaint' dated 5 June 1991.

On 7 October 1991 the Referee conducted a hearing on the Bar's complaint. (E3)

On 8 November 1991 the Referee served his Report of Referee, the subject of this appeal. (Report).

**On 24 January** 1992 the **board** of governors meeting ended affirming the Report of Referee.

On 3 February 1992 Appellant/Respondent served his Petition for Review of Referee's Report in this Court.

Further record facts shall be set forth **as** required in the course of arguments.

## POINTS ON APPEAL

### POINT ONE ON APPEAL

THE REFEREE ERRED FINDING THAT APPELLANT/RESPONDENT FAILED TO CONDUCT A PROPER INVESTIGATION RELATING TO EVIDENCE AVAILABLE TO ESTABLISH THAT THE ALLEGED VICTIM'S DEATH WAS DUE TO A CAUSE OTHER THAN THE CLIENT ARNER'S ACTIONS ALLEGED IN THE MURDER INDICTMENT

### POINT TWO ON APPEAL

THE REFEREE ERRED FINDING IMPROPER CONDUCT BY APPELLANT/RESPONDENT RESPECTING THE MOTION TO SUPPRESS EVIDENCE MADE DURING THE TRIAL

### POINT THREE ON APPEAL

THE REFEREE ERRED RELYING UPON THAT THE EXISTENCE VEL NON OF A FENCE INJURED APPELLANT/RESPONDENT'S CLIENT'S CASE AND THAT APPELLANT/RESPONDENT FAILED TO DISCOVER THAT A DEPICTED FENCE WAS ERECTED SUBSEQUENT TO THE ALLEGED CRIME

### POINT FOUR ON APPEAL

THE REFEREE ERRED FINDING THAT APPELLANT/RESPONDENT FAILED TO PRESENT A CRITICAL TAPE RECORDING TO IMPEACH A WITNESS AND IN RELYING THEREON TO INFER MISCONDUCT BY APPELLANT/RESPONDENT

### POINT FIVE ON APPEAL

THE REFEREE ERRED FINDING THE APPELLANT/RESPONDENT FAILED TO BECOME FAMILIAR WITH OR KNOW THE PHYSICAL EVIDENCE

IN THE CASE AND INFERRING **MISCONDUCT** BY APPELLANT/RESPONDENT **THEREON**

## POINT SIX ON APPEAL

THE **COPY** COSTS TAXED BY THE REFEREE ARE EXCESSIVE AND OUGHT TO BE LIMITED TO $.1Ø/COPY AND ONLY THE PORTIONS OF THE PROCEEDINGS RELIED UPON OUGHT BE SUBJECT TO TAXATION AGAINST APPELLANT/RESPONDENT, IF ANYTHING

## SUMMARY OF ARGUMENTS

POINT ONE: The trial evidence and the evidence at the Rule 3.850 hearing establish that Appellant/Respondent's client was not prejudiced by any failure of counsel to pursue an intervening, superceding cause of death of the client's victim-wife. The evidence establishes rather that the head injury allegedly inflicted by the client on the wife caused, or substantially contributed to the cause of the alleged death. Such a defense was not available in fact or law; and moreover Appellant/Respondent made a reasonably sufficient inquiry pre-trial into the possibility of such defense and did reasonably rely upon a respected expert's opinion that the medical examiner's conclusions in the autopsy report that the cause of death was the said head injury and that no superceding, independent cause was apparent.

POINT TWO: Appellant/Respondent moved to suppress anything observed in the trunk of the victim's vehicle, wherein the victim was discovered mortally injured by police. It does not appear

that the client had standing to assert an expectation of privacy, and it does not appear that the police needed a warrant in any event to search the trunk of that vehicle in the prevailing circumstances, or to inventory same. Moreover, the trunk of the vehicle, and its contents were not harmful to the client's defense. The client maintained he did not do it. Further, to the extent that the suppression issue had merit Appellant/Respondent ably and fairly argued same; including moving to strike photos in evidence, but not published to the jury, alleged to be depictive of the subject of the motion to suppress

**POINT** THREE: No fence erected after the fact was any part of the trial. The fence issue in any event was not relevant to any issue in the case, nor harmful to the defense posited. In any event, Appellant/Respondent established that the area was not fenced in at the time of the victim's discovery such that access to the vehicle at the location it was found was not obstructed from the golf course intervening that location and the residence of another suspect in the murder, Valerie wade.

POINT **FOUR:** The tape recording wherein Wade swore to exculpate the client was not critical, but merely cumulative at best. In any event, Wade testified to the substance of that for which the tape was being offered. Wade moreover was so severely impeached otherwise that the tape was surplusage.

**POINT** FIVE: It does **not** appear that Appellant/Respondent was derelict in any way respecting becoming familiar with and presenting evidence in the trial of the client's case. The trial

transcript reflects rather that Appellant/Respondent was well cognizant of pertinent matters and aggressively and diligently represented his client's interests at the trial.

POINT SIX: The copy costs are excessive and ought be limited in respect to cost per page and to the portions of the transcripts actually relied upon for the Referee's findings sustained against Appellant/Respondent. Certainly the record which supports Appellant/Respondent against the allegations of misconduct ought not be taxed against him, and likewise as to that which supports the Referee's findings in his favor and against the Bar's complaint's a11egations.

## POINT ONE ON APPEAL

THE REFEREE ERRED FINDING THAT APPELLANT/RESPONDENT FAILED TO CONDUCT A PROPER INVESTIGATION RELATING TO EVIDENCE AVAILABLE TO ESTABLISH THAT THE ALLEGED VICTIM'S DEATH WAS DUE TO A CAUSE OTHER THAN THE CLIENT ARNER'S ACTIONS ALLEGED IN THE MURDER INDICTMENT

The Referee at paragraph 'F' in its report finds that Appellant did not properly investigate the 'superseding cause of death' issue apparent in the case. (Report, p 2-5). The Referee concludes that the medical experts at the Rule 3.850 hearing (viz Drs Levy and Marracini) "established beyond doubt that the proximate cause of decedent's death was medical malpractice [and tlhat the jury was not presented with such evidence due to lack of adequate preparation on respondent's part". (Report, p 2). A review of those witnesses' testimonies at that hearing will be

helpful to display the exaggerations in the **Referee's Report's** description thereof to support said conclusion and finding.

At the 3.850 hearing the Defendant, Arner, introduced two doctors, Mitchell Levy and John Marracini. (E3, p 14-36; 37-60). Page references as to these witnesses shall be of Exhibit '3'.

Marracini **was** the medical examiner in Palm Beach County (p 14-17). Based on 'records' he read, surgery was performed on the victim 5 March 1978 purposed to treat anticipated pulmonary emboli (p 18) and to ligate a duodenum ulcer (p 20-21). The autopsy report reflected no evidence of emboli "occurring on or about the time of the operation or subsequent to **it**" (p 20), thus a mis-diagnosis (d). He inferred that "sometime during surgery **it** appears that injury was caused to have happened to the spleen", which injury was "an operative complication" (p 21). Thus surgical intervention caused the spleen to lacerate (id). He allows only that a "negligent event" occurred or that the surgeons were "guilty of some negligence" for not re-exploring **the** patient after the surgery (p 23-24). So far as the internal bleeding bore upon causation of death, "**it** was one of two mechanisms occurring on or about that time; the other being pneumonia" (p 25). He suggests that the victim would 'probably' have lived but for the operation (id).

On cross Marracini admitted he did not have any 'hands on' examination of the victim as did Fatteh at autopsy to support his diagnoses (p 26-27, 35-36); he had not talked to Fatteh (p 27); he reviewed no photographs of the spleen seen at the autopsy (p 27); and he never spoke to Galante nor any other doctor actually

involved with the victim's treatment (p 30-31). While he admitted that the 'sepsis' issue as to the rupturing process of the spleen would require microscopic examination (p 28), he yet opined that it was 'infarction' rather than sepsis which affected the spleen, that is, that the spleen lost its integrity, fell apart, broke open and leaked (p 28-29). But he remained "not sure" if the deterioration process was not sepsis but infarction (p 28). He acknowledged that the gastro-intestinal bleeding and blood clot concerns which predicated the surgery at issue were foreseeable complications from head trauma (p 33-35). Marracini disagrees with Fatteh's "conclusion regarding the mechanisms of death" (p 36). It is his opinion that the failure to recognize the problem of internal bleeding was tantamount to malpractice (id). Maracini is familiar with and respects Dr. Davis, the Dade County Medical Examiner (p 32)

Levy is a general surgeon (p 37-38). He reviewed the medical record from 25 January to 11 March (p 39). As to the surgery of 5 March:

> The preoperative diagnosis was duodenal ulcer, multiple pulmonary emboli and the procedure that they wanted to perform was a vena caval ligation and repair of duodenal ulcer

(p 40). Based on the autopsy report of 12 March, he believes that the surgeons mis-diagnosed the presence of pulmonary emboli (clots) (p 40). Respecting the ulcer treatment procedure:

> When you are doing this procedure the spleen is an organ which is very fragile and [] very frequently the capsule of the spleen can be lacerated and I believe that's what happened in this case.

(p 42-43). He opined that it is "probably correct" that during the surgery the doctors lacerated the spleen (p 43). Levy saw nothing in the records that a spontaneous eruption of the spleen occurred due to sepsis (p 43). He believed the proximate cause of death was the surgical intervention and loss of blood (p 47), and that it was 'gross negligence' not to have reopened the victim (p 45-47)

On cross, Levy admitted he reviewed no autopsy slides, no microscopic findings, was not at the autopsy, and talked to no one actually involved (p 48-49, 53). It was his opinion that regardless as to 'how' the spleen ruptured, or what caused it to do so, the victim had to be re-explored (p 50). He does allow that bronchial pneumonia, hemiparesis, pulmonary emboli, urinary tract infection, and duodenal ulcer disease probably developed from the head injury (p 55-56). He maintains too that it is difficult to say whether or not the victim was affected with generalized septicemia (p 57).

Helpful too are the testimonies of Dr. Fatteh at the 3.850 hearing and at the trial, as well as the trial testimony of Doctor Donald Galante.

At the trial (E 2, VI pp 970-1006) [Page references for this witness are of E3, VI]. Dr. Donald Galante testified as the board certified neurosurgeon who treated the victim, commencing 25 January until her death 11 March 1978 (p 970-73, 980-981). When Galante came to the victim she was unconscious with a head injury, obviously quite acutely ill (p 974, 976). Blood and brain matter were extruding from the skull injury (p 976), the

brain having been lacerated by the crushed bone of the skull (p 978). Galante cleaned it and removed some brain tissue, and patched it (p 978-79). The victim was placed in intensive care and followed up (p 979-9801, still unconscious (id). The victim had a "very complicated course" because of the head injury, including fever (p 980). After she became relatively stable, with some fever, she was transferred to a regular surgical floor (p 980-81). Other problems developed, including generalized infection in the lungs, blood clots in the lungs, kidney problems because of low blood pressure, and "overwhelming fluids in the intracephalous from the lungs", then she died (p 981). These complications were caused by and the result of the skull injury (p 983)

On cross examination it was adduced that other abnormalities arose, including gastro-intestinal bleeding (p 986), a lot of lung trouble as well as blood-clots therein (p 987-88), and infection and fever (p 986). The victim was in intensive care for 10-12 days, and started to wake up only after she was out of that unit (p 985, 988). She began talking after 2-3 weeks (p 988). Galante recalled that an operation was performed on 5 March 1978 (p 992). This operation was performed in order to control existing stomach bleeding and to ligate the main vein from lower extremities which would carry clots (if any) from the legs to the already congested lungs (p 989-990). The victim was quite ill with her lung problems and infection (p 992-93)

On redirect Galante testified that the ulcer and ligation operation was the result of the complications from the head

injury and the long hospitilization therefor (p 995-996). On recross the witness said the clots in the legs were treated, but not with a medication (p 996, 998), and on redirect that the vena cava ligation portion of the operation was purposed for that (p 998-99)

The medical examiner, Dr. Abdullah Fatteh, who performed the autopsy of deceased-victim testified at the trial (E2, VII pp 1062-111) and at the 3.850 hearing (E3, pp 167-190).

At the trial [page references to E2, VII] Fatteh was admitted as a qualified, experienced expert pathologist/medical examiner for Broward County (p 1062-65). He performed the autopsy on 12 March 1978, the day after the victim died (p 1065, 1078). He described the head/brain injuries (p 1066-67); "extensive bronchopneumonia in both lungs" (p 1067); and a duodenum ulcer (p 1067). He too described surgery in the abdominal area, and blood in that cavity which he "associated with laceration of the spleen" (p 1068). Fatteh's microscopic examination of tissues confirmed his gross autopsy findings (p 1068) as did his examination of the hospital records (p 1069). The 'ulcer' appeared to be chronic, about one to two months old, and a stress-related complication of the head-injury (p 1070-71). Fatteh's opinion was that the cause of death was "complications of head injury" (p 1068)

On cross examination Fatteh further testified that "[t]he direct cause of death was intra-abdominal hemorrhage due to laceration of the spleen" (p 1073), and that "laceration of the spleen was associated with actual inflammation of the substance

of the spleen, which would make it more liable to rupture and cause the bleeding" (id). Further, the "direct cause of the rupture was the inflammation of the substance of the spleen [and t]he inflammation of the spleen was associated with generalized inflammation of organs, such as lungs, and also poisoning of the blood stream due to inflammation or infection of the blood itself [which latter infection i]n all probability [] was related to the infection of the lungs" (p 1073-74). Respecting the indicated abdominal surgery, Fatteh noted that several procedures were performed during same, including for ligation of the ulcer (p 1074). This surgery was performed 5 March, six days before the victim died (p 1075, 1078). One of the reasons apparent for performing that surgery was that there were prior episodes of internal bleeding (p 1077), and the main objective was to treat indicated complications from the head injury - duodenum ulcer and pulmonary embolism (p 1080). Because an initial indication for the operation was pulmonary embolism, a 'vena cava ligation' procedure was adopted to prevent further blockage in the victim's lungs (p 1081), the lungs being afflicted with "extensive bilateral bronchopneumonia, which is infection of both lungs with formation of abscesses in the lungs" (p 1088). This affliction was of two weeks duration (id). Fatteh had not, at the time of autopsy, read all the medical records, but did so prior to his trial testimony (p 1078). He noted therein that an 'anticoagulant' had been administered 21 February (twelve days before surgery and eighteen days before death) to reduce blood clots, which medication is 'contraindicated' for the ulcer (p

1087). The victim's condition **worsened after that, and even** moreso after the surgery on 5 March (p 1084). Fatteh's examination of the 'spleen' disclosed 'fresh clots' around it, which "were caused probably within minutes before death" (p 1094), and "the rupture of the spleen caused the clots" (id). The "rupture of the spleen was probably related to the infection of the spleen" (id). As to the infection being the result of 'incisions', Fatteh testified as follows:

> In my opinion, the infection [involved with the incision] was not related to the laceration of the spleen. The incision was caused several days before death [i.e. 5 March, death occurring **11** March] but the laceration and bleeding around the spleen occurred shortly before death [i.e. "probably within minutes before death" (p 1094)]

(p 1095). Fatteh's microscopic examinations confirmed his autopsy findings and testimony (p 1098)

On redirect examination Fatteh testified that the overall treatment of various maladies afflicting the victim **was** "appropriate" **(p** 1100-01). He also testified further as to the spleen malady

> Q [STATE]: The laceration of the spleen, you testified was caused as a result of some inflammation of the spleen [which] inflammation was as a result of what?
>
> **A:** That inflammation was a reflection of generalized infection of the blood throughout the body, which was associated with bilateral bronchopneumonia in the lungs. * * * That condition of poisoning of the blood, or infection of the blood, is called septicemia, and that is a fairly common complication of pneumonia. * * * The pneumonia usually results, in a patient such as this, from immobilization, which results in slowed circulation throughout the body. If a person is unconscious and immobilized, that person's defenses are reduced and they are more susceptible to contracting pneumonia. * * * The autopsy showed that there was a fracture of the skull, **and** laceration of the brain,

which would be consistent with unconsciousness, and the records are consistent with what I found.

(p 1101-02).

At the 3.850 hearing [page references to E3], over seven years after his trial testimony aforesaid (E2, VII p 1045; E3, p 1), Fatteh was questioned most specifically as to the vena cava ligation procedure circumstance (p 171-72). He recalled that his autopsy disclosed that no 'pulmonary emboli' existed then, such that the suspicion or diagnosis thereof upon which that procedure was predicated was apparently error (p 172, 180). Rather than pulmonary emboli at the time of autopsy he determined extensive pneumonia in the lungs (p 172). He also recalled that several other procedures were performed during that same surgery, other than vena cava ligation (p 172-73). Bleeding persisted for the next several days, and transfusions were given (p 173); and a Penrose Drain attached (p 174). Asked about the laceration of the spleen he allowed that it most likely took place during the surgery because "there were a lot of manipulations [which] involve moving the organs to and fro and this could result in injury to the spleen" (p 175). He notes that the "precipitating cause [of death] was internal hemorrhage from the laceration of the spleen'' (id), and further testified:

> Q [ATTORNEY ROSEN]: Was there negligence committed by the surgeons during the course of the operation?
>
> * * *
>
> A: [T]he diagnosis of pulmonary emboli was wrong and therefore the procedure of doing ligation of the inferior venal cava was in error. Therefore, that can be considered negligence.
>
> Q: Did the vena cava ligation cause the spleen to lacerate?

A: The overall performance of the operation together with several other procedures done at the same time contributed to the laceration of the spleen.

(p 176-77).

On cross examination Fatteh recalled he had reviewed all the medical records when he testified at trial (p 180). The diagnosis of 'pulmonary emboli' was justified by radiologist reports (p 181). When he testified at trial he knew about the internal bleeding and the supposed 'mis-diagnosis' when he gave his 'cause of death' opinion based on the autopsy (p 180-81, 183).

> When I formed the opinions, when I wrote the autopsy report and when I testified at the trial, I was working in the capacity of a Medical Examiner with a specific objective; to arrive at a true cause of death.
>
> In this particular instance it was important to come to a conclusion as to what the cause of death was. Knowing that this person had suffered head injury and knowing that death occurred several days after that, regardless of what happened in between, head injury was related to death and therefore I came to a conclusion as to the cause of death and that was complications of head injury. That picture is in light of my position as a Medical Examiner.
>
> Today, a different set of questions are being raised and today we're discussing what went wrong medically in this case.

(p 183-84). As to what caused the spleen to rupture, he testified that "the principal factor was the interference during surgery and secondary [] factor was the inflammation of the spleen itself as a result of generalized infection [t]hat was a complication of head injury" (p 185-86). However, "From a medicolegal standpoint if I were to give the cause of death as a Medical Examiner I would give the cause of death as complications of head injury" (p 187). If made to isolate different interim influences, then hemorrhaging was the proximate cause of death(p

186-87), but the medicolegal interpretation incorporates such intervening factor so that the "final cause of death [] would be complications of head injury" (p 188-89). Fatteh reaffirmed that his trial testimony was the truth (p 189).

Appellant submits that the foregoing testimonies do not support the Referee's 'findings' on this point. There was no agreement on "gross negligence", only Levy being available to that suggestion. The surgery was not solely based upon the 'emboli' indications; rather gastro-intestinal bleeding was already occurring, and an ulcer was manifest. Moreover, Fatteh, who had actually examined the spleen and microscopic data, deduced at the time of trial and for the purposes of his medical report that that organ ruptured minutes prior to death and not as a direct result of the surgery manipulations and in the course thereof. And no one suggested that the injury to the spleen was unrelated to the head injury which predicated the murder charge. Rather all agreed that the spleen was deteriorated, either septically or by infarction, as a result of the victim's condition caused by that head injury. Likewise, the effects of the surgery necessarily combined with the results of the head injury, e.g. pneumonia and the generally debilitated condition of the patient, to occasion her death to whatever extent it did militate thereto. No one said the operation alone caused the death, regardless of negligence. The 'beliefs' of 'experts' who merely read available paper reports cannot establish the suggested fact beyond a reasonable doubt, let alone that the head injury was not involved as a matter of fact and law in causing

death when all the data available at the trial and provided in discovery was consistent only with that the head injury was causative of death. See Appellant's argument to Referee at the hearing below (R. 95-110).

In any event, even if "medical malpractice" was the "proximate cause of [the charged] death", yet such is insufficient as a matter of law to avoid criminal liability of the person who struck the victim and occasioned the head injuries thereto. This Court in HALLMAN v STATE, held:

> A defendant cannot escape the penalties for an act which in point of fact produces death, which death might possibly have been averted by some possible mode of treatment. The true doctrine is that, where the wound is in itself dangerous to life, mere erroneous treatment of it or of the wounded [person] suffering from it will afford the defendant no protection against the charge of unlawful homicide.

371 So2d 482, 485 (Fla 1979). See ROSE v **STATE**, ____ So2d ____ (4DCA 1991) 16 FLW D403. Indeed, in the state's appeal of the trial court's order granting the Rule 3.850 petition, the Honorable Judge Glickstein dissented from the affirmance by the panel, and as to the point at issue said:

> Having called on a prestigious medical expert for advice [see below as to Dr. Davis], and having been told the record supported the cause of death stated on the death certificate, defendant's attorney [Appellant] conducted himself reasonably when he did not go shopping for experts who would disagree.
>
> Moreover, even if there was medical malpractice that resulted in the victim's death, the actions of the surgeons in this case were in response to or the result of injury from the criminal attack on the victim, and therefore are not in criminal law a superseding cause of death.,
>
> The trial court misperceived the essential requirements of law that should have guided its decision. Even if defense counsel had found, and produced at trial, witnesses who would have shown the

> surgeons had committed medical malpractice, this would not legally have affected the defendant's culpability for the death of his wife.

STATE v ARNER, 538 So2d 528 (4DCA 1989) 14 FLW 443. So the Referee's finding was inapposite to the issue at bar - whether Appellant undertook Arner's case without adequate preparation and was negligent in that matter entrusted to him. The Referee on the instant point must have rejected Appellant's following uncontroverted testimonies at the Rule 3.850 hearing and at the instant Bar hearing.

Appellant/Respondent, Ray Sandstrom, has been an attorney since 5 February 1951 (E3, p 193), having tried "well over 100" murder cases and probably 30-40 first degree murder cases (E3, p 194-95). He has tried many hundreds of criminal trials in his career (E3, p 195).

Appellant was approached by the defendant Arner, who was hunting for a lawyer to try his case (#79-1060CF). Arner was charged with the first-degree murder of his wife, the alleged means of death being by infliction of a head injury (E3, p 202). Arner already had retained an attorney, Leonard Robbins, who was to have prepared the case up to trial for "somebody else to try it" (E3, p 195-96). Arner said he had spoken to other attorneys, but eventually settled on Appellant (E3, p 196). Eventually Appellant received the file which was "allegedly prepared and [Arner] was just looking for somebody to try the case" (E3, p 201). Appellant did not take depositions (id), and his review of the reports and statements supported that decision (E3, p 201-202). However, that review also occasioned in Appellant's mind

"that the death might not have been as simple as it was stated; that it didn't come as a result of the blow from the hammer" (E3, p 202). Appellant therefore "endeavored to find out if there were any faults in the medical examiner's report" (E3, p 202-203), and he contacted Dr. Joe Davis out the Dade County Medical Examiner's Office (E3, p 203). Appellant sent Davis "all the material in order to go over it and determine and advise me whether or not the result that was given in the Medical Examiner's report was accurate" (E3, p 203). Davis confirmed that report's findings to be appropriate and proper (E3, p 204). Appellant recalls going over it with Davis "rather in detail because I was hoping there would be something in there" (id). At trial Appellant "tried to make as much as I could out of the fact that it took all this time to bring about her death, but I didn't have a medical witness I could put on *to* contradict what occurred there" (E3, p 20). Appellant gave nothing less than his full ability in the trial of Arner's case (E3, p211). See the jury argument at trial (E2, XXIII p 4226-4240).

Appellant so testified as well under oath at the hearing before the referee on this issue (R. 118-132).

Appellant submits that the Referee's finding and conclusion on this point at paragraph 'F' in his Report is not supported in fact and law, and is rather contrary to law. See: STRICKLAND v **WASHINGTON**, 466 US 668, 80 L Ed2d 674 (1984); STATE v ARNER, supra, J. Glickstein dissenting. [Appellant's counsel is informed by the office of the clerk of the circuit court that Arner has recently plead guilty to the second degree murder of

his wife, The order of judgment . and plea colloquy shall be submitted to this Court by separate notice.].

## POINT TWO ON APPEAL

THE REFEREE ERRED FINDING IMPROPER CONDUCT BY APPELLANT/RESPONDENT RESPECTING THE MOTION TO SUPPRESS EVIDENCE MADE DURING THE TRIAL

At paragraph 'G' in the Referee's Report the Referee finds significant fault with Appellant's challenge at trial to testimony respecting the entry by police of the trunk of the vehicle. (Report, p 5-7). The situation developed as follows.

A vehicle was found by the police backed into bushes of a street nearto a fence (E2, IV p 472, 474). The unconscious victim was carried out of the vehicle by the police to the rescue van (E2, IV p 435). A police identification technician, George Covaleski, arrived at the scene of the vehicle about that time, roped off the area, and took pictures of the vehicle in question (E2, IV p 509-510). The state at trial had Covaleski identify various exhibits: 'A' (p 511-12); 'B' (p 512); 'C' (p 513); 'D' (id); 'E' (id); 'F' (p 514); 'G' (id); 'H' (p 514-515); 'I' (p 514-15); 'J' (p 515); 'K' (p 519); 'M' (p 516); 'N' (id); 'O' (id); 'P' (id); 'Q' (517); 'R' (p 517); 'S' (id); 'T' (id); 'U' (id) 'V' (p 517-518); 'W' (p 518); 'X' (id)'; 'Y' (p 518); 'Z' (p 518-19). (E2, IV p 51-52). The witness further identified state's exhibits 'AA', 'BB', and 'JJ' (E2, IV p 520-524). Signficantly, State's Exhibit 'W' for identification aforesaid

was identified as **"a picture of the dash and floorboard,** front" (E2, IV p 518). This exhibit was eventually admitted into evidence as State's Exhibit '22' (E2, IV p 584). To this point no photograph purported to depict the vehicles' trunk's interior or any contents thereof. Appellant had objected to these photos in any event for "no proper foundation" (E2, IV 581).

It is the foregoing 'exhibits' and photographs that the court permitted the state to publish to the jury (E2, IV p 599).

Thereafter another technician, Kirk Watkins, testified to his discovery of a 'hammer' at the area of the vehicle in the brush near the fence at a golf course (E2, IV p 602-03, 607-09). He further testified to pictures he took of the victim at the emergency room (E2, IV p 610-12), and then of pictures he took of the aforesaid vehicle which had by then been towed to the police compound (E2, IV p 613). Of the vehicle's pictures, the following testimony occurred:

> A: I then photographed the car again; again made a search of the interior to see if there was any type of evidence left within. After that was completed, we then processed the interior and exterior of this vehicle for likely fingerprints.
>
> Q: Directing your attention to * * * State's Exhibit VV for Identification, do you recognized [it]?
>
> A: Yes, this is the license number [] on the vehicle * * *.
>
> Q: * * * State's WW, do you recognize that?
>
> A: These are the items that were in the trunk of the vehicle, as we opened the trunk
>
> Q: State's [XX]?
>
> A: This is the right side of the trunk - what was inside there

Q: [] State's YY for **Idenfication.**

**A:** [] This is an overall shot of the previous two, showing the articles in the trunk of the car.

Q: State's Exhibit 22.

**A:** Same again, showing the items in the trunk.

Q: With regard to the items in the trunk, were you able to see anything with a similar brand name to the hammer that you located?

[Objection to leading , overruled]

**A:** There was a tool box with the word Craftsman in the **back.** It is down in this side right here.

(E2, **IV** p 613A-614). The court received 'WW' in evidence (E2, IV **p** 625). But this photograph of purported 'items in the trunk as it was opened' was not published to the jury prior to Appellant making the subject ore tenus motion to suppress (E2, IV **p** 625 - **V** p 821), as neither was any such other photograph

It was when Detective Barry Lombard began to testify that he "was directed to gain entry to the trunk of that vehicle" (E2, V **p** 821) that Appellant drew issue with the police "unlocking of the trunk'' and their authority to do so (E2, V **p** 821-825, 850; **VI** p 853-866). Appellant moved to strike any photographs or testimony respecting the contents of the trunk when the police gained entry thereto, including upon his 'no foundation' objection originally made (id). The state conceded that it did not list the contents of the trunk in its discovery answer (E2, VI p 863-65), and that it did not intend to use the contents of the trunk (E2, V **p** 823) but rather "[j]ust photographs" (E2, VI p 865). The trial judge **was** persuaded that the motion as articulated and upon the authorities presented was well founded

(E2, VI p 865-66), and that Appellant's 'improper foundation' objection had been correct (E2, VI p 866). However, because the 'pictures' were already in evidence, and notwithstanding Appellant's motion to strike same from evidence, and although the court was "not sure the jury saw those", the judge denied the motion to suppress and motion to strike (E2, VI p 865-66).

In fact as stated the jury had not yet seen the photographs of the trunk's interior, or its contents; particulary of when the police initially gained entry therein.

Appellant submits that the suppression issue was not significant in the circumstances of the client Arner's case. First, even if the client was the sole owner of that vehicle [although Arner himself testified that when he awoke in the morning to find his wife not in bed with him he looked outside and the victim's "car wasn't out in front" (E2, XX p 3660) but his own vehicle was (E2, XX p 3661)], the fact that he had allowed another (i.e. his wife/victim) to exclusively possess it vitiated any reasonable expectation of privacy he may have had, and therefore too his standing to challenge the police search or inventory of that vehicle. STATE v. CRIBBS, 406 So2d 1295, 1296 (2DCA 1981). Cf STATE v SINGLETON, 17 FLW S 166 (Fla 1992). Second, the wife/victim, as the obvious possessor of the vehicle is the party whom the police at the time were required to advise of the "right to provide an alternate to impoundment before an inventory search may be performed". BOND v STATE, 431 So2d 343 (2DCA 1983), citing MILLER v STATE, 403 So2d 1307 (Fla 1981) Third, the police, investigating the scene of an apparent

attempted murder whereat within the vehicle the victim was situated, manifestly were authorized to take that vehicle into protective custody therefor. See, DILYARD v STATE, 444 So2d 577 (5DCA 1984) ("when police are authorized to take a car into protective custody an 'inventory search' is permitted"). In circumstances involving the police with the subject vehicle containing the critically injured wife/victim of the client, Arner, "exigent circumstances [were] not required to justify [a] warrantless trunk search". STATE v LANDRY, 459 So2d 428, 429 (1DCA 1984), citing FLORIDA v MEYERS, 80 L.Ed2d. 381 (1984). It ought not be presumed that the wife (being rendered unconsious by the actions of an assailant) shall have withheld her consent for police to search that vehicle possessed by herself and comprising a part of the scene of the crime wherein she was the critically injured victim. Compare: BERNOVICH v STATE, 272 So2d 505 (Fla 1973) (where the defendant gave his wife his car to drive, and the wife presents the car and its contents to police to search, held proper consensual search). In any event it is inevitable that the police shall have gained entry to the trunk of that vehicle and determined its appearance and contents. Moreover, the vehicle's trunk and its contents in no way prejudiced the defense of the client Arner. Plainly, Arner's defense was that he did not commit the crime against his wife but that someone else did. (Exhibit 2). The fact that a hammer in the car was used as the means of commission of that crime in no way undermined that theory of defense on behalf of Arner. It simply was not "very important [] that a tool chest was found by the

police in the trunk of [the] vehicle'' (Report, p 6). No "damaging inferences [] might be drawn from linking the tool chest and hammer" (id). Arner in fact openly testified he had recently worked on the vehicle's alternator and used a hammer therefor, which hammer he threw into the passenger compartment of the car rather than the already-closed trunk (E2, XXI p 3824-28, 3890-94). Clearly, in no way did the photograph of the trunk impair that testimony or impeach same; the fact that the hammer was accessible to anyone, and not necessarily to someone with peculiar access to the vehicle in question, when Arner's wife was attacked remained uncontroverted,

Appellant submits that the 'suppression issue' is no ground to assign misconduct to him. In the circumstances of Arner's case it was commendable that Appellant was able to persuade the judge at all that a meritorious 'search and seizure' issue existed of the trunk of the vehicle. And Appellant's resort to a motion to strike any photographs theretofore 'admitted in evidence' was appropriate in order to preserve the integrity of the issue so recognized. See: FLORIDA JURISPRUDENCE 2d, App.Rev. section 100, Evid. section 558, Trial sections 50, 54-57; THOMPSON v STATE, 46 So 842 (1908); DANSON v STATE, 56 So 677 (1911). At any rate, the effect of the point was harmless if error at all

The Referee erred finding fault against Appellant upon this issue. (R. 15-39)

## POINT THREE ON APPEAL

THE REFEREE ERRED RELYING UPON THAT THE EXISTENCE VEL NON OF A FENCE INJURED APPELLANT/RESPONDENT'S CLIENT'S CASE AND THAT APPELLANT/RESPONDENT FAILED TO DISCOVER THAT A DEPICTED FENCE WAS ERECTED SUBSEQUENT TO THE ALLEGED CRIME

The Referee's Report at its paragraph 'H' assigns that Appellant/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". (Report, p 7-9). This 'finding' is simply not substantiated by the record.

It is not true that "the state introduced into evidence a photograph of a fence surrounding the scene" (Report, p 8). The following is the actual testimony at the trial being referred to:

> Q [STATE]: From the spot where the car was located, do you know whether or not a person could go as the crow flies directly across?
>
> A [WITNESS, Castiglione]: They'd have to jump over a fence and forge a canal
>
> Q: I ask you to look at State's 2 in evidence. Do you see the fence and fence post there?
>
> A: There is a fence; yes, sir.
>
> Q: And the foliage?
>
> A: And the foliage, and that's clear in the photograph that there is a fence there

(E2, XV p 2817-18). The said "State's 2 in evidence" had been its exhibit "BB for Identification". (E2, IV p 583). Exhibit "BB" was described as a photograph taken the same day Arner's

victim-wife was found and it depicted officer Watkins pointing to a 'hammer' he found in the area of the vehicle and a 'fence' was perceivable in the foliage at that particular location. (E2, IV p 521). There is simply no testimony about "a fence surrounding the scene" as the Referee purports to find (Report, p 8). Importantly, the prosecutor also testified at the 3.850 hearing that the subject photograph was taken the same day as the victim was discovered in the vehicle at the location the photograph depicts (E3, p 252). There is no testimony at trial which depended upon a photograph of a fence erected after the alleged event; and 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" (Report, p 9). Hutton merely testified about a permit for fencing in theretofore unfenced portions of the golf course which issued over a year after the incident in question (E3, p 68). Hutton in fact confirmed that the 'fence' depicted in the said photograph was extant at the time of the incident (E3, p 68-70). Nowhere in his testimony at the 3.850 hearing does he represent what the Referee says he would have testified to (E3, p 61, 65-70). Appellant's cross-examination of Castiglione at trial negated that that witness was familiar with the 'fence' arrangement then (E2, XV p 2819-23). and Arner's testimony at trial respecting the 'fence' arrangement at the relevant time went uncontroverted (E2, XXI p 3820-21). The state even objected to any 'new fence' testimony being suggested (id). Respecting

the state's closing argument, the prosecutor 'suggested' an argument as to the fence and made representations entirely without record support (e.g. that the golf course was not open between 10:00PM and 6:00AM) in doing so (E2, XXII p 4174-75). In his closing, Appellant pointed out the dearth of evidence to support the state's position in that regard, and how Arner's testimony stood uncontroverted thereon (E2, XXIII p 4271-72). The Referee's findings are clearly erroneous and lack evidentiary support. THE FLORIDA BAR v HOOPER, 507 So2d 1078 (Fla 1987)

Appellant further submits that the 'fence' issue was not important in any event. The apparent scene of the crime was the automobile, and nothing indicated that the assault occurred otherwise than therein and possibly elsewhere than the place where the vehicle was discovered by police. Therefore, no imperative existed that the golf course have been traversed to arrive at any other particular location after depositing the vehicle with the victim at that place. Nothing precluded the actual perpetrator from leaving the scene otherwise than "as the crow flies" Many possible alternative scenarios are reasonable without necessity to traverse fences and canals, or even golf courses. Therefore, the point was of harmless significance, if significant at all in the circumstances of the case.

The Referee erred relying on this point against Appellant/Respondent. (R. 39-50).

## POINT FOUR ON APPEAL

THE REFEREE ERRED FINDING THAT APPELLANT/RESPONDENT FAILED TO PRESENT A CRITICAL TAPE RECORDING TO IMPEACH A WITNESS AND IN RELYING THEREON TO INFER MISCONDUCT BY APPELLANT/RESPONDENT

The Referee at paragraph 'I' in the Report finds that 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 respondent". (Report, p 9-10). The witness as to which this point relates is Valerie Wade. This witness was extensively cross-examined and impeached by Appellant at the trial (E2, IX p1598-1641; X p 1642-1840; XI p 1843-1919, 2033-2040; XII p 2043-2086).

Initially the Referee at paragraph 'I(i)' in the Report infers against Appellant for his not taking a deposition of Wade prior to trial. A statement by counsel taken entirely out of context is relied upon as illustrative of the "implications attaching" to that 'omission'. Importantly, even the attorney (Bronis) who was used as a witness by Arner at the 3.850 hearing admitted that he "probably wouldn't have taken her deposition either since [there was] enough there not to need to" (E3, p 152), meaning that wade had given so many conflicting statements that her essential impeachment was assured. (E2, X p 1832). The attorney Bronis, moreover, so testified even though he had earlier sworn he "always" took depositions of "all witnesses" in a case (E3, p 130). See, BLATCH v STATE, 495 So2d 1203 (4DCA

1986). It is in the context of that witness's repeated change of testimonies from statement to statement that the language quoted of Appellant by the Referee has significance; and that colloquy has no reference to Appellant not knowing what Wade had sworn to in order to effectively impeach her at trial, as he did.

The Referee at paragraph 'I(ii)' in the Report finds that Appellant "made no attempt whatever to introduce the tape during his cross examination of [wade] or to play same to the jury". However, this finding is totally against the record. At the trial Appellant presented a tape recording of Wade's exculpatory (of Arner) recantation of her prior sworn inculpatory (of Arner) allegations as 'defense exhibit B', asked Wade to identify it, but which Wade initially could not do (E2, IX p 1608-09). [Wade had originally given the prosecution a sworn statement inculpating Arner in his wife's murder and upon which the Indictment was founded; she then recanted, saying she lied, and the cause abated; and she then recanted her recantation and the cause was resurrected, progressing then to the trial]. shortly thereafter, with the jury absent, the tape was published to Wade and she then identified its accuracy, etc. (E2, X p 1693-1711). The state objected to its admissibility at all (E2, X p 1693-1711; XI p 1846, 1849-50). Importantly, during the ensuing cross-examination of Wade she admitted that the subject tape recording would reflect her 'convincing' tone and demeanor she presented to the attorney Robbins (Arner's original attorney who accomplished the tape of Wade) thus masking from him the actual fear compelling her to make that recantation; i.e. that the tape

would reflect she was calm and willing in her recantation of her original accusations against Arner in the murder of his wife. (E2, p XI 1892, 1911, 1922). Appellant made extensive argument for the tape's admissibility in order to reflect Wade's tone and demeanor at that time to be other than evincing the 'fright' which she maintained at trial motivated her to give that taped account. (E2, XVIII 3311-3332). At one point the trial court. sided with Appellant (E2, XVIII p 3323) but then changed its position (E2, XVIII p 3327, 3331). Appellant too presented the attorney Robbins as a defense witness to further identify the tape recording (E2, XVIII 3355-56)

The Referee's finding aforesaid is without any record support. Plainly Appellant did attempt to have the tape recording admitted for the purpose of reflecting the witness's tone and demeanor contrary to the suggestion at trial that she was 'frightened' during that taping. However, the further finding that the admission of this tape was "critical" is also without record support. wade herself verily testified that she was 'convincing' on the tape and that the 'fright' would not be reflected thereon. The tape itself thus shall have been merely cumulative at best. See, ARNER v STATE, 459 So2d 1136 (4DCA 1984). Moreover, it is submitted that Appellant laid a sufficient predicate to support the admission of the tape into evidence, and that the trial court simply committed legal error (albeit probably harmless because, for example, the tape would be merely cumulative) when it denied admission. See, F.S. 90.614(2); WRIGHT V STATE, 427 So2D 326 (3DCA 1983); NICKLES v

STATE, 106 So 479 (1925); **STEWARD v STATE,** 50 So2642 (1909). But see ARNER v STATE, supra. Compare KIMBLE v STATE, 537 So2d 1094 (2DCA 1989) 14 FLW 288

It was error for the Referee to assign misconduct to Appellant/Respondent on this point. (R. 50-64)

POINT FIVE ON APPEAL

THE REFEREE ERRED FINDING THE APPELLANT/RESPONDENT FAILED TO **BECOME** FAMILIAR WITH OR KNOW THE PHYSICAL EVIDENCE IN THE CASE AND INFERRING MISCONDUCT BY APPELLANT/RESPONDENT THEREON

The Referee at the Report's paragraph 'J' finds tha Appellant "failed to become familiar with or know the physical evidence in the case". (Report, p 10). The Referee then asserts at 'J(i)' in the Report **that** "[r]eference has already been made to the scene of the crime and the existence or non-existence of the fence" (id). See POINT III ON **APPEAL,** supra. The Referee continues to find as follows: "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", and then is quoted an exchange in Volume X of the trial record beginning at line 23 on page 1836 and concluding **at** line six on page 1837 (E2, X p 1836 **37).** The Referee does not note the context in which the quoted colloquy occurred. Doing so reflects that the reference is inapposite for the inference **it is** resorted to as support.

The context of the subject colloquy was a discovery objection posed by the prosecution during Appellant's cross examination of the witness Valerie Wade, Arner's key accuser (E2, X p 1770-1777). Then, out of the jury's presence, the court called for a proffer, and the parties questioned the witness (E2, X p 1777-1797). The judge, when the proffer concluded, asked Appellant if there was any other items not yet disclosed, to which Appellant replied "We may have. We are still searching through all kinds of records at his house. We may have a lot of them. I don't know. We didn't have time." (E2, X p 1797). The jury then returned and cross examination continued (E2, X p 1799-1821). The prosecutor made another discovery objection and the jury was absented (E2, X p 1822). Argument ensued thereon, without the jury present (E2, X p 1822-1837). It was at the end of that argument that the quoted exchange occurred, to wit: That appellant did not have any further letters or items such as had been presented which occasioned the state's objections; however, Appellant re-apprised the court and prosecutor that someone wa yet searching through records and that if anything was found same would be disclosed as soon as Appellant learned of it. (E2, X p 1836-37).

Appellant submits that the above context does not involve the quoted language in the inference insisted on by the Referee that Appellant "was groping his way through the trial with no real understanding or appreciation of the physical evidence in the case" (Report, p 1Ø). Neither does the 'fence' suggestion. POINT III ON APPEAL, supra

**The Referee erred in this purported 'finding'.**

## POINT SIX ON APPEAL

THE COPY COSTS TAXED BY THE REFEREE ARE EXCESSIVE AND OUGHT TO BE LIMITED TO $.1Ø/COPY AND ONLY THE PORTIONS OF THE PROCEEDINGS RELIED UPON OUGHT BE SUBJECT TO TAXATION AGAINST APPELLANT/RESPONDENT, IF ANYTHING

Appellant/Respondent prevailed before the Referee on the Bar's Complaint's paragraphs '9', '1Ø', and '11. Respecting the emaining allegations sustained by the Referee same are not dependent upon the entire trial transcript for the Referee's determination.

Accordingly, Appellant/Respondent submits that only the portions of the record depended upon for the determination of the Referee's Report against Appellant/Respondent ought be subject to 'copy costs' taxation. Further, it is submitted that $.1Ø per such copy is more than sufficient if any taxation is determined appropriate in this regard

Therefore, the cause ought be remanded for determination of copy costs in accord therewith

## CONCLUSION

WHEREFORE, based upon the foregoing, and either of them, the Referee's recommendations ought be rejected and the Bar's complaint dismissed; or in the alternative the recommendation of one year suspension be rejected and a private reprimand imposed in lieu; and in any event the copy costs amended as stated.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy hereof has been mailed to DAVID M. BARNOVITZ, Bar Counsel, The Florida Bar, at 5900 North Andrews Avenue, Suite 835, Ft. Lauderdale, Florida 33309, this 18 May, 1992.

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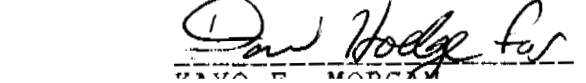

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