IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,338

ROBERT DAVID HEINEY,

Appellant,

v.

State of Florida
~~HARRY K. SINGLETARY~~,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, IN AND FOR OKALOOSA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND THE FACTS

Robert David Heiney murdered Francis M. May, Jr., on June 5 or 6, 1978. (ROA 1).[1] Essentially, Heiney beat his victim to death with a claw-hammer and left the victim's body in a ditch, stealing the victim's car and wallet. The details of the murder are adequately set forth in **Heiney v. State**, 447 So.2d 210 (Fla.), **cert. denied**, 469 U.S. 920 (1984).

Mr. Heiney was initially represented by David Pascoe, Esq. Prior to trial, however, Mr. Heiney filed a motion for leave to act as his own attorney pursuant to **Faretta v. California**, 422 U.S. 806 (1975). (ROA 46). Heiney also moved for an "IQ" and mental health examination for the purpose of establishing his competence, not incompetence, as part of the theory of defense he had chosen to employ. (ROA 53).

Heiney was examined by the staff of the Okaloosa Guidance Clinic under the direction of Dr. Sasser, a licensed psychologist who signed the final report. (ROA 90-1). The report stated that Heiney had in IQ of 118, was not psychotic, but was an antisocial personality who was very manipulative. (ROA 90-91).

As co-counsel, Heiney took an active role in all pretrial proceedings, including discovery. (ROA 121, 123, 480-84, 496).

The defense team went to trial on the theory that an unknown third person murdered the victim after Heiney had stolen the victim's car and abandoned the victim on the side of the road -

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[1] References to the original record on appeal will be cited as (ROA-page #). References to the Rule 3.850 record will be cited as (R-page #). The transcript of the rule 3.850 hearing will be cited as TR-page #).

alive. (ROA 750-754). During the trial, Heiney actively assisted his co-counsel and even conducted some cross-examination personally. (See ROA 864, 869).

Heiney was found guilty of both robbery and first-degree murder. (ROA 1291). After a three day recess, the penalty phase was conducted. Heiney, perhaps to avoid putting his extensive criminal record (for crimes involving honesty) before the advisory jury, put no evidence on during this portion of the trial. Instead, Mr. Pascoe delivered a strong argument based upon residual doubt and the horror of execution. (ROA 1311-1319). In a second argument, Mr. Pascoe alluded to the statutory mitigating factors relating to "stress" or an "appreciation" of the criminal nature of Heiney's alleged conduct, but in doing so Mr. Pascoe argued these issues only as being established "if the state's theory is accepted." Never, however, did Pascoe concede Heiney's guilt or suggest that Heiney killed the victim. (ROA 1328 et seq.).

The residual doubt defense produced a jury suggestion in favor of a life sentence. (ROA 1344). In sentencing Heiney to death, the trial judge specifically attributed the jury's suggestion to the residual doubt factor. (ROA 219-223).

Mr. Heiney filed the Rule 3.850 petition at bar and accused his co-counsel, Mr. Pascoe, of "ineffectiveness," despite the fact that Heiney could not raise this issue (since he was his own attorney), a point made by the state below and in Heiney's second appeal to this Court. (**Heiney v. State**, 558 So.2d 398 (Fla.1990), State's answer brief at 8, 9, 11, 16, 17, 19, 20,

23). For reasons unknown, Heiney was granted an evidentiary hearing on the issue of "ineffective assistance of himself."

Heiney focused on Mr. Pascoe and never, on remand, testified or offered any evidence whatsoever regarding his own conduct as a pro se litigant. Heiney never disclosed the full content of the defense files and, strategically, forced Mr. Pascoe to testify on the basis of "present, independent, recollection" without being able to review the files. (TR 5, et seq.). **Heiney v. State/Dugger**, 558 So.2d 401 (Fla.1990).

The overriding theme of Pascoe's testimony was a loss of memory. Mr. Pascoe did not recall his vigorous, if not bitter, "discovery" battles with the prosecutor. (TR 5). Pascoe did not recall his penalty phase defense. (TR 6). Pascoe did not recall speaking to Heiney's family. (TR 11). Pascoe did not recall obtaining an order granting a full mental health evaluation (TR 18) and in general did not seem to recall any details of this case at all.

Although Mr. Pascoe utilized at least one investigator, a public defender's office investigator named Graham, it was not clear just what this professional investigator did.

Mr. Graham basically testified that he did "nothing." Despite being an experienced professional, Graham testified that he did nothing to even obtain background information on his client. (TR 38-39)

The representation (to the trial court) that "Pascoe did nothing" fell apart shortly thereafter. First, Heiney called a sister (Kay Yanni) to testify to the theory that the family was

never called by Pascoe or Heiney (as co-counsel) prior to trial. (TR 48-49). The next witness, however, was Jean Vallera, a second sister who testified that Mr. Pascoe did call (TR 54) and that she, in turn, had contacted the rest of the family. (TR 54).

Kay Yanni said she had had no contact with Heiney for ten years prior to the trial and did not know about the case. (TR 49). Jean Vallera said she was "under stress" and medically unable to attend. (TR 55-57). A third sister, Jacqueline Ward, did not appear at the hearing and CCR failed to show she was unavailable. Nevertheless, the Court considered her affidavit. (TR 59). Lou Ann Ward (Jacqueline's daughter) testified that her father (Mr. Ward) had "police contacts" and learned about Heiney's trial after it was over. (TR 62).

The inconsistent and incredible testimony of Heiney's relatives prompted CCR to divulge a portion of Mr. Pascoe's file and, contrary to their own presentation, concede that counsel had in fact contacted Heiney's family. (TR 63). Nothing was revealed regarding the content or context of any communication.

The next phase of the Rule 3.850 hearing involved recently procured medical evidence that could allegedly have been presented as an alternate theory of defense. No testimony was offered, however, regarding the value of any "diminished capacity" defense during the penalty phase when the guilt phase defense was "Heiney was not there and did not do it." No evidence was shown to the Court and no testimony was proffered to show that the same "life" suggestion would have resulted from the proffer of inconsistent defenses.

What Heiney did proffer was the testimony of two recently hired defense experts.

The first expert was Jethro Toomer, a psychologist who admitted that he testified "for the defense." (TR 67). Dr. Toomer tested Mr. Heiney almost a decade after trial and based his diagnosis on records which, in part, did not exist in 1979. (TR 68-69). Based upon this data, Toomer diagnosed a "borderline personality disorder" as defined by the "DSM III R," a text that did not exist in 1979. (TR 81).

Dr. Toomer's "borderline personality disorder" theory was based upon factual presumptions which did not enjoy support in the data he allegedly analyzed. Dr. Toomer presumed that Heiney was terribly abused as a child, but confessed he had no reports of child abuse. (A point conceded by CCR as well). (TR 116-118). Dr. Toomer had no corroboration for the "cement block" story related by Mrs. Yanni. (TR 119). There were no actual medical reports of any serious head injury stemming from the (1949) car accident or the (1950) bicycle accident. (TR 120). In fact, Toomer did not know whether Heiney was x-rayed or tested for brain damage. (TR 121).

The "headache and insomnia" reports (from when Heiney was in the Army) just happened to coincide with an army prosecution (of Heiney) for sleeping through reveille. (TR 121-122). Toomer did not find this significant.

When forced to concede that there was no record of repeated serious head injuries, Dr. Toomer attempted to salvage his testimony by retorting "it only takes one." (TR 126). Dr.

Toomer rejected the evaluation of the Okaloosa Guidance Clinic (signed by Dr. Sasser and Linda Haese) and he rejected the results of a psychiatric evaluation performed on Heiney by officials at the Kansas State Reception and Diagnostic Center prior to trial. (TR 126-127).

Dr. Toomer was followed by Dr. Larson. (TR 137, et seq.). Dr. Larson reviewed the same materials as Dr. Toomer and also conducted a recent evaluation. (TR 146). Again, the most that could be found was a "borderline personality disorder." (TR 146). The cross-examination of Dr. Larson revealed the same evidentiary gaps as before. (TR 156-160).

Heiney rested his case without testifying regarding his own conduct, as co-counsel, and without offering any testimony supporting the notion that the defense-theory supported by Drs. Toomer and Larson ever actually would have been used. In fact, all Heiney did was demonstrate the given fact that there was more than one way to try his case.

Judge Gordon found defense counsel "ineffective" for not procuring this evidence but, given the nature of the trial, found any error to have been "harmless." (R 2334-35).

SUMMARY OF ARGUMENT

Mr. Heiney's appeal fails to demonstrate reversible error by the lower court in rejecting his claim of ineffective assistance of counsel.

Heiney failed to establish "error," since he - as co-counsel - shared responsibility for all strategic decisions.

Heiney failed to show prejudice because he failed to show that his "new evidence" existed, was available, or even would have been used.

In sum, Heiney's petition was simply a hindsight laden exercise in conjecture over the potential success of an alternate approach to his case. Such conjecture does not prove ineffective assistance of co-counsel.

ARGUMENT

THE APPELLANT IS NOT ENTITLED TO RELIEF GIVEN HIS FAILURE TO ESTABLISH "ERROR" AND "PREJUDICE" AS DEFINED BY STRICKLAND v. WASHINGTON.

(A) Standard of Review

Claims of ineffective assistance of counsel are judged pursuant to the standards announced in **Strickland v. Washington**, 466 U.S. 688 (1984). In order to prevail, litigants such as Mr. Heiney must satisfy the conjunctive requirements of **Strickland**'s "error and prejudice" test. Error, as defined, means error so serious that counsel was the equivalent of "no counsel at all," while "prejudice" means an adverse impact so severe that, but for counsel's error, the result of the trial would probably have been different.

Strickland notes that the strategic and tactical decisions of counsel, even if "professionally unreasonable" by hindsight, will not establish "ineffectiveness." **Ferguson v. State**, 17 FLW S92 (Fla.1992); **Rose v. State**, 17 FLW S393 (Fla.1992); **Provenzano v. State**, 561 So.2d 541 (Fla.1990). **Strickland** also holds that no two defense attorneys would ever try a case in exactly the

same way, and the fact that an alternate strategy "might gave worked better" does not establish either error or prejudice.

In keeping with this approach, the state and federal courts have concurred that counsel's conduct must be judged from "the attorney's shoes, at the time" and not by hindsight. **Rose v. State, supra; Mulligan v. Kemp**, 771 F.2d 1436 (11th Cir.1985). Thus, counsel's alleged errors may be offset by the conduct of the defendant. **Burger v. Kemp**, 483 U.S. 776 (1987). For example, counsel cannot be faulted for failing to call witnesses if the client forbids it, **Foster v. Strickland**, 707 F.2d 1339 (11th Cir.1983); **Foster v. Dugger**, 823 F.2d 402 (11th Cir.1987) or where the client withholds information from counsel. **Funchess v. Wainwright**, 772 F.2d 683 (11th Cir.1985); **Tucker v. Kemp**, 776 F.2d 1487 (11th Cir.1985); **Burger v. Kemp**, 483 U.S. 776 (1987).

Defense counsel is not required to put on any particular defense, **Card v. Dugger**, 911 F.2d 1494 (11th Cir.1990) and is not required to prepare or present a false defense. **Scott v. Dugger**, 891 F.2d 802 (11th Cir.1990). This is true even of the popular "mental health" defenses which dominate collateral review proceedings. If the client does not manifest signs of mental illness and if any alleged incapacity does not appear to have influenced the client's conduct during the crime, counsel is not required to prepare a mental health defense. **Blanco v. State**,[2]

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[2] It should be noted that the Eleventh Circuit interpreted the facts of **Blanco** differently and found counsel ineffective. **Blanco v. Singletary**, 943 F.2d 1477 (11th Cir.1991). Unlike this case, Blanco did not involve a defendant who was examined by experts prior to trial and found competent.

507 So.2d 1377 (Fla.1987); **Groover v. State**, 574 So.2d 97 (Fla.1991); **Harich v. Dugger**, 844 F.2d 1464 (11th Cir.1988).

In certain cases, counsel's conduct is tempered even further by the defendant's elevation, under **Faretta v. California**, 422 U.S. 806 (1975), to the status of co-counsel. In **Bundy v. State**, 497 So.2d 1209, 1210 (Fla.1986) this Court held:

> "We find the claim of ineffective assistance insubstantial. Appellant, fully advised by the trial court of the availability of appointed counsel, chose to represent himself. As noted by the United States Supreme Court in **Faretta v. California**, [citation] 'whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to be denial of 'effect assistance of counsel'.'"

Bundy controls this case. The Appellant, after a full psychological evaluation by Dr. Sasser and his staff, and after a proper **Faretta** hearing, was allowed to serve as his own attorney. Mr. Pascoe, at that point, was relegated to the status of co-counsel.

Oddly, Mr. Heiney never brought up this issue in either the Rule 3.850 hearing or in his brief to this Court. Heiney's status as lead counsel was central to any disposition of this case, yet the trial judge never alluded to this fact while attributing "error" to Mr. Pascoe.[3] Thus, even though Judge Gordon was correct in denying relief, he reached the correct

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[3] This point was argued by the state in the lower court, particularly in the telephonic hearing conducted May 18, 1989, with Judge Gordon, CCR (attorney Daugherty) and this attorney (TR 30).

result for the wrong reason. **Savage v. State**, 156 So.2d 566 (Fla. 1st DCA 1963).

The usual "error and prejudice" analysis of **Strickland** does not apply to this case. Instead, **Bundy** and **Faretta** control. Although the state will discuss error and prejudice, any review must be conducted from counsel's shoes, at the time, as mere co-counsel to Heiney himself.

(B) **Strickland** Analysis: "Error"

In **Burger v. Kemp**, 483 U.S. 776 (1987) the Supreme Court held that the responsibility of counsel for any "errors" committed prior to or during trial is diminished by the conduct of the client. Thus, when the client preempts strategic decisions, withholds the names of witnesses or refuses to cooperate with counsel, any resulting "error" lies in the lap of the client, not counsel. **Rose v. State, supra; Agan v. State**, 503 So.2d 1254 (Fla.1987); **Funchess v. Wainwright**, 772 F.2d 683 (11th Cir.1985); **LoConte v. Dugger**, 847 F.2d 745 (11th Cir.1988); **Tucker v. Kemp**, 776 F.2d 1487 (11th Cir.1985). When the attorney under attack was not even lead counsel, his responsibility is diminished still further.

In the lower court, Heiney took strategic measures to keep the **Faretta** issue away from the Court. For example, Heiney obtained and never disclosed the defense team files. When it suited his purposes, small portions of his files were released, but the files were never disclosed. Also, Heiney never testified and, therefore, never explained why he, as counsel, never forced Mr. Pascoe to pursue the theories of defense that Heiney now

advocates. In fact, Heiney never explained a number of factors, including:

(1) Why he never insisted on having witnesses called on his behalf.

(2) Why he never contacted his relatives. (Assuming he did not.)

(3) Why he refused to cooperate with the staff at the Okaloosa Clinic.

(4) Why he pursued his **Faretta** option if he wanted an incompetency evaluation.

Indeed, the evidentiary hearing in this case is most peculiar due to the silence of Mr. Heiney and the petitioner's concealment of key evidence. Heiney's dubious conduct tainted the proceedings below, as evidenced by the following incident:

As noted in the statement of the facts, Heiney used the testimony of Mr. Pascoe and Kay Yanni to create the false impression that Pascoe never called Heiney's relatives. Heiney's sister, Mrs. Vallera, upset the apple cart by revealing that Mr. Pascoe did call, and that she, in turn, contacted other family members. At that point Heiney had to disclose that counsel's file contained written proof that the family was called - but nothing else was disclosed.

The so-called "full and fair hearing" Heiney sought from this Court was, in fact, limited by Heiney's manipulation of the evidence to reveal only half of the facts and virtually nothing about his own conduct (under **Faretta**) as counsel. Thus, Heiney's extensive citations to the hearing transcripts are inherently irrelevant to the issues.

Even so, if we examine Mr. Pascoe's conduct from his shoes, at the time, we still find no error based upon this record, to-wit:

> (1) Mr. Pascoe's co-counsel dictated an alibi defense which rendered any penalty phase "incompetence" defense contradictory and incredible.
>
> (2) Mr. Pascoe's co-counsel was examined by mental health experts and found to be competent, cutting off the need for additional evaluations. **Groover v. State**, 574 So.2d 97 (Fla.1991).
>
> (3) Mr. Pascoe's co-counsel was found competent (under **Faretta**) and was therefore responsible for any disclosures to the doctors or the courts.
>
> (4) Mr. Pascoe won a life recommendation from the jury and was, competent. **Buford v. State**, 492 So.2d 355 (Fla.1986).

Strategic decisions, including the decision not to put on conflicting guilt and penalty phase defenses, are not subject to review under **Strickland**. **Provenzano v. Dugger**, 561 So.2d 541 (Fla.1991); **Jones v. State**, 528 So.2d 1171 (Fla.1988); **Rose v. State, supra; Straight v. State**, 422 So.2d 827 (Fla.1982).[4]

Before leaving the topic of "error" one other issue must be confronted. Prior to trial, Heiney was examined by Dr. Sasser and his staff at the Okaloosa Guidance Clinic. For the benefit of his Rule 3.850 hearing, Heiney attacked Linda Haese, an assistant at the clinic, as an "unlicensed psychologist" who was per se incompetent and who should have been challenged by Mr. Pascoe. This assertion is propped up by a dubious "roll over"

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[4] In **Straight**, the vary tactical decision involved in this case was considered and found not to constitute error.

affidavit[5] from Ms. Haese - who was not produced at the Rule 3.850 hearing and was not shown to be unavailable to testify.

What Heiney did not tell the lower court was that Ms. Haese, as a staff employee at the clinic, was exempt from any licensing requirement under contemporary law. Sect. 490.23(1)(a), Fla. Stat. (1977). Furthermore, Ms. Haese was supervised by Dr. Sasser, who was licensed.

Although Heiney tried very hard to twist the lower court proceedings into a disjointed, hindsight-laden review of the conduct of Mr. Pascoe, with no review of his own conduct as co-counsel, he cannot hide from the record on appeal. The absolute failure of Mr. Heiney's brief to confront the actual facts is a tacit admission that trial co-counsel, Mr. Pascoe, cannot be held responsible for any alleged "error" orchestrated by Mr. Heiney.

(C) **Strickland** Analysis: "Prejudice"

Mr. Heiney's arguments regarding "prejudice" rely upon certain basic assumptions which enjoy no support from this record.

First, Heiney presumes that the life recommendation won by counsel through the use of a "residual doubt" defense would also have resulted from his touted mental health defense. This notion is not supported by any evidence and is purely speculative. It is quite probable that Heiney's jury would have suggested "death"

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[5] The reliability of these post-hoc confessions of malpractice by people who were involved with the defense has been questioned before. **Routly v. State**, 16 FLW S677 (Fla.1991); **Kelly v. State**, 569 So.2d 754 (Fla.1990); **Hill v. Dugger**, 556 So.2d 1385 (Fla.1990). Other affidavits may be of dubious reliability given their source. **Kelly v. State, supra.**

if Heiney told them "I lied before, but trust me now, I'm sick." It is not appropriate, therefore, for Heiney to suggest that he would have had the benefit of a life recommendation and any subsequent review under **Tedder v. State**, 322 So.2d 908 (Fla.1975).

Second, Heiney presumes that the favorable mental health reports he was able to procure for his Rule 3.850 hearing either could or would have been available in 1978.

The idea that these evaluations "would" have been obtained is seriously refuted by the record. Heiney had the opportunity to see and cooperate with experts at the Okaloosa Guidance Clinic but did not take advantage of the chance. There is nothing in the record, not even testimony from Heiney himself, that he would have cooperated with the doctors or allowed them the opportunity to prepare the defense upon which he now relies.

The question of whether Heiney "could" have obtained the same diagnosis in 1979 was not settled at the Rule 3.850 hearing.

First of all, Dr. Toomer and Dr. Larson evaluated Heiney more than a decade after trial, using records that did not exist in 1979. No effort was made (below) to filter out the irrelevant and post-hoc data which tainted the conclusions of the experts. In **Drope v. Missouri**, 420 U.S. 162 (1975) the Supreme Court held that the Missouri courts, despite other errors, did not err in excluding tainted nunc pro tunc testimony of this kind.

Second, Drs. Toomer and Larson evaluated Heiney using the DSM III R, a text which sets forth criteria that did not exist in 1979. This distinction is important, since the criteria used by

Drs. Toomer and Larson differed from those used by Dr. Sasser; to-wit:

> "Psychiatry has been continuously plagued by difficulties in achieving reliable classification. The American Psychiatric Association has revised the official diagnostic manual at a quickening pace: The first Diagnostic and Statistical Manual of Mental Disorders (DSM I) was published in 1952, DSM II in 1968, DSM III in 1982, and DSM III revised in 1987. The next revision, DSM IV, is slated for publication in the early 1990's. This process of revision little resembles the refinement of categories or cumulative gains common to advanced scientific fields. DSM I and II often produced poor inter-rater agreement (5), and the diagnostic system was radically altered with the publication of DSM III. DSM III introduced more specific classification procedures, changed hundreds of diagnostic criteria, and added or eliminated numerous categories of disorder. DSM III R introduced about 200 additional changes in diagnostic guidelines and criteria."
>
> Faust & Ziskin, The Expert Witness in Psychology and Psychiatry, Science Vol. 241, p. 31 (1988).[6]

Third, the record contained no proof that Drs. Toomer or Larson were available to testify in 1979. In fact, Mr. Heiney's contention that he would or could have obtained his current diagnosis in 1979 is refuted by his lack of cooperation with Dr. Sasser and his desire to be found competent for the sake of his **Faretta** motion. Heiney failed to prove that he would have

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[6] Faust and Ziskin note that the DSM criteria establish clinical criteria which do not, as often touted, correspond to "legal" criteria for capacity to appreciate the consequences of one's actions. (Id. at 32). Thus, people falling within a diagnosis of "Post Traumatic Stress Disorder" may, for example, vary widely in "legal" competence. This uncertainty opens up vast opportunities to abuse psychological "evidence" for personal benefit. (Id. at 32).

received the same diagnosis in 1979 or that he even wanted such a diagnosis. There is no foundation for any claim of "prejudice" on the basis of the entire record.

Heiney's problems in establishing prejudice do not stop there, however. Heiney's responsibility below was to establish a reasonable probability of a different result "but for" counsel's error. Even if we ignore Heiney's status as co-counsel, and even if we ignore the basis for the jury's "life" recommendation and even if we assume that Heiney would or could have gotten the favorable evaluation he now touts, we cannot ignore the existence of three valid statutory aggravating factors.[7]

It is submitted that mere personality disorders carried even less mitigating weight in 1979 than they do today.[8] In **Ferguson v. State**, 417 So.2d 631 (Fla.1982) this Court, despite remanding the case (because the judge used the M'Naghten Test for weighing mental mitigating evidence), held that the "heinous, atrocious, cruel (HAC) aggravating factor outweighed evidence of a sociopathic personality disorder coupled with paranoid-schizophrenic tendencies and "Ganser Syndrome." In **Foster v. State**, 369 So.2d 928 (Fla.1979) psychiatric records and testimony from three experts failed to preclude a death sentence in a case factually similar to this one. In **Johnson v. State**, 442 So.2d 185 (Fla.1983) the existence of organic brain damage and assorted

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[7] The murder was especially heinous, atrocious and cruel, it was committed by a person under sentence and it was committed during a robbery.

[8] **Ake v. Oklahoma**, 470 U.S. 68 (1985) notes that the courts view of psychological evidence tends to change as this infant science progresses and evolves.

mental problems was offset by the defendant's conduct during and before the crime. In **Card v. State**, 453 So.2d 17 (Fla.1984), sociopathic and "impulse control" disorders were insufficient to compel a life sentence.[9]

In **Roberts v. State**, 510 So.2d 885 (Fla.1987) the unrebutted testimony of three experts that Roberts had organic brain damage did not require the court, as trier of fact, to accept the diagnosis. **See Witt v. State**, 465 So.2d 510 (Fla.1985); **James v. State**, 489 So.2d 737 (Fla.1986).

Simply stated, despite the "unrebutted" speculation of Drs. Toomer and Larson, Heiney cannot show a "reasonable probability" that he would have received a different sentence even in the unlikely event of a helpful diagnosis from some doctor back in 1979.

Finally, Heiney suggests that his sisters should have been called. The record is clear on this point. Heiney, as his own lawyer, spoke to his sisters directly, or through Mr. Pascoe or (his sister) Mrs. Vallera. No one came to help. If Heiney told them not to come, he cannot complain. (Heiney's gamesmanship with his files and his insistence upon a "residual doubt" defense support this notion). If Heiney neglected to call them, it is his fault under **Faretta**. If these witnesses, for some reason, were unavailable, Heiney cannot prove error or prejudice.

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[9] Federal courts also discounted these disorders. **See Boag v. Raines**, 769 F.2d 1341 (9th Cir.1978); **Schiro v. Clark**, ___ F.2d ___, 51 Cr.L 1213 (7th Cir.1992).

Mrs. Vallera was "too stressed" to testify. Mrs. Yanni had not seen Heiney for ten years and claimed she did not know about the case (contradicting Vallera).[10] Ms. Ward did not come to the Rule 3.850 hearing was not shown to be "unavailable."

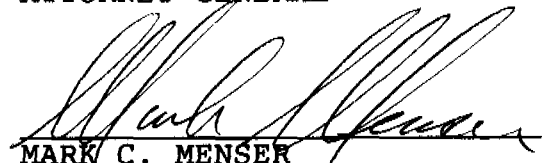
In sum, Heiney simply cannot show that he suffered any "prejudice." He has failed to show that his new evidence was available, would have been used, or would have generated a life recommendation and a life sentence.

CONCLUSION

The Petitioner/Appellant is not entitled to relief.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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[10] The story about Heiney once being tied to a cement block came from Mrs. Yanni and was relied upon by the new experts. Even if Heiney, once, drew an odd punishment for running away (the cement block) he has not established an especially bizarre childhood and is no more deserving of relief than the petitioner in **Mendyk v. State**, 17 FLW S21 (Fla.1992) ("ordinary" tough childhood).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Gail E. Anderson, Assistant CCR, Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301 this 30th day of July, 1992.

MARK C. MENSER
Assistant Attorney General