IN THE SUPREME COURT OF FLORIDA

GROVER REED,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 80,518

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

On February 27, 1986, Grover Reed robbed, sexually battered and murdered Mrs. Betty Oermann. (R 20).[1]

Although originally represented by the Public Defender, the existence of a potential conflict of interest caused the court to appoint private counsel, Mr. Nichols (R 205). Contrary to the intimation in Mr. Reed's brief, Mr. Nichols was not selected by the state, nor is there any record support for the claim that Mr. Nichols was selected as the "worst possible attorney."

Mr. Nichols took depositions and obtained funds for his own investigator and for expert witnesses (R 210-216). A full mental health history was obtained and an evaluation of Reed was submitted to the trial court (R 315-378).

Since an insanity defense could not be sustained, Mr. Nichols and Mr. Reed decided to pursue a strategy of attacking the circumstantial nature of the state's case. Mr. Reed's strategic decision was placed on the record (TR 99, 719, 850-51).

Mr. Reed was convicted as charged and sentenced to death in accordance with the recommendation of the advisory jury. (TR 837, 930-33). Six aggravating factors and no mitigating factors were established by the evidence (TR 938-40).[2]

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[1] References to the original record on appeal will be cited as (R-page) Citations to the trial transcript will be styled (TR-page). Citations to the Rule 3.850 proceedings will be cited as (ROA-page).

[2] The six aggravators were: (1) Prior conviction for a violent felony; (2) felony murder; (3) murder to avoid arrest; (4) murder for pecuniary gain; (5) heinous, atrocious, or cruel; (6) cold calculated-premeditated.

Mr. Reed appealed to the Florida Supreme Court, focusing his brief on the one issue (racial bias in jury selection) deemed worthy of merit by this Court. That brief, however, was struck as deficient and the Public Defender filed a new brief which raised additional but non-meritorious issues. This Court initially ruled in Mr. Reed's favor on the basis of the issue briefed by Mr. Nichols, but on rehearing upheld the judgment and sentence. Reed v. State, 560 So.2d 203 (Fla.) cert. denied, 111 S.Ct. 230 (1990).

The next step in the litigation process was the filing of a motion for post-conviction relief pursuant to Fla.R.Crim.P. 3.850 (ROA 1-216). The petition was prepared and filed by the Office of the Capital Collateral Representative (CCR). At the heart of the petition stood a litany of accusations of "ineffective assistance of counsel." Again, contrary to the Appellant's representations on appeal, the petition made direct allusions to Mr. Nichols' files and raised other issues for which said files contained (or should contain) relevant evidence, to wit:

> 1. The Petition alleged that Mr. Nichols never visited Mr. Reed (ROA 2).
>
> 2. The Petition alleged that Mr. Reed performed no legal research (ROA 4).
>
> 3. The Petition alleged that Mr. Nichols did not prepare for trial (ROA 4).
>
> 4. The Petition specifically alleged that Mr. Nichols file contained "critical but ignored evidence." (ROA 5).
>
> 5. The Petition specifically alleged that "nothing in trial counsel's file" indicated consultation with experts. (ROA 44).
>
> 6. The Petition specifically alleged that trial counsel's file did not contain a

deposition of a witness named Doleman. (ROA 45).

7. The Petition alleged that counsel never investigated "chain of custody" issues (ROA 55).

8. The Petition alleged that counsel never interviewed a Mrs. Niznik. (ROA 94).

9. The Petition alleges that trial counsel was contacted by various witnesses (ROA 138).

10. The Petition alleges that counsel failed to follow through on a credible theory of defense put together by the preceding attorney (ROA 5).

The State was prejudiced in its ability to respond since Mr. Nichols' file was held by CCR. In addition, while the Rule 3.850 petition cited to alleged "affidavits", CCR had not appendixed the alleged affidavits to its petition. Thus, a motion to produce was filed. (ROA 218). The State did not want to be served with affidavits, etc., after the onset of any evidentiary hearing or suffer other tactical abuse (ROA 218).

The motion was granted (ROA 220) and CCR stated that no "appendix" existed notwithstanding the citations to affidavits in its petition (ROA 221).

In the meantime, Judge Southwood recused himself and was replaced by Judge Wiggins. The successor judge heard oral argument on the "discovery" issue and the Rule 3.850 petition. (Supp. ROA at 31, et. seq.). After the hearing, both sides were allowed to serve proposed orders.

The trial court denied relief on all counts. ROA 309 et. seq.) Most of Mr. Reed's "claims" were denied as procedurally-barred. (ROA 309 et. seq., see claims II, IV, VI, IX, X, XII, XIII). The claims of "ineffective counsel" were conclusively

refuted by the record (ROA 312-15) while the remaining claims were rejected as unsupported or beyond the jurisdiction of the court.

Absolutely no "sanctions" were imposed for any failure to comply with discovery and Mr. Reed's petition was not dismissed on said grounds.

Due to an ambiguity in the last paragraph of the lower court's order, the case was remanded for clarification of said order. (See supp. record)

SUMMARY OF ARGUMENT

The Appellant is not entitled to reversal of the lower court's decision denying relief on Reed's motion for post-conviction relief.

Much of Mr. Reed's appellate argument is based upon material that is de hors the record and which, in fact, Reed refused to provide to the trial court and the State even in the face of court ordered discovery.

Mr. Reed's motion was not dismissed as a sanction for his misconduct, but rather was denied because the claims raised were either refuted by the record or procedurally barred. Reed's appeal, even with its citation to nonrecord materials, fails to show any error by the lower court.

ARGUMENT

POINT I

THE APPELLANT'S MOTION FOR POST-CONVICTION RELIEF WAS NOT DENIED AS A SANCTION FOR ANY REFUSAL TO PROVIDE DISCOVERY OR FOR ANY IMPROPER ASSERTION OF THE ATTORNEY-CLIENT PRIVILEGE

(A) The Petition Was Not Dismissed As A Sanction

The Appellant, Mr. Reed, contends that the trial court dismissed his motion for post-conviction relief as a sanction for his refusal to comply with court-ordered discovery. This position is not supported by the record and, in fact, completely misstates the holding of the trial court.[3]

The order in question, even prior to the remand for clarification, plainly disposed of Mr. Reed's thirteen claims on procedural grounds, jurisdictional grounds and as refuted by the record. At (ROA 314), a portion of the order that was not changed on remand, the trial court specifically stated that it was not going to impose sanctions for Mr. Reed's refusal to comply with discovery. Thus, even prior to this Court's remand, Mr. Reed's order disposed of his case on traditional grounds and not as an extraordinary sanction.

Claim I was a demand for Chapter 119 disclosure and not, itself, a claim of entitlement to relief.

Claims II, IV, VI, IX, X, XII and XIII offered procedurally barred claims for which dismissal was appropriate. Byrd v. State, 597 So.2d 252 (Fla. 1992); Davis v. State, 589 So.2d 896

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[3] The lower court order was amended on remand after Mr. Reed filed his brief due to an ambiguity in the final paragraph of the order.

(Fla. 1991); Mills v. Dugger, 574 So.2d 63 (Fla. 1990); Roberts v. State, 568 So.2d 1255 (Fla. 1990); Atkins v. State, 541 So.2d 1165 (Fla. 1989).

Claim XI was a claim of "appellate ineffectiveness" which should have been offered by petition for writ of habeas corpus in this Court.

The remaining issues all dealt with the question of "ineffective assistance of counsel." These claims were denied on the basis of the record and the total lack of support for Mr. Reed's conclusory allegations in his petition. No sanctions were applied.

It is incumbent upon the petitioner to plead "error" and "prejudice" as defined by Strickland v. Washington, 466 U.S. 668 (1984). "Error", of course, means more than simple or even "unreasonable" error. The level of error required to satisfy Strickland is error so serious that counsel was the equivalent of "no counsel, at all." Id. at 687. Furthermore, tactical or strategic "error" is not subject to review. Strickland, id.,; Rose v. State, 617 So.2d (Fla. 1993); State v. Singletary, 549 So.2d 996 (Fla. 1989); Provenzano v. State, 561 So.2d 541 (Fla. 1990). In fact, as noted in United States v. Cronic, 466 U.S. 648, 666 (1984):

> "When a true adversarial criminal trial has been conducted, even if defense counsel made demonstrable errors, the kind of testing envisioned by the Sixth Amendment has occurred."

Finally, "error" does not and cannot be defined as a failure to develop, prepare or present a line of defense that is not the truth, even if Petitioner "might have won." Nix v. Whiteside,

475 U.S. 157 (1986); Matthews v. United States, 518 So.2d 1245 (7th Cir. 1975); Card v. Dugger, 911 F.2d 1494 (11th Cir. 1990); Scott v. Dugger, 891 F.2d 800 (11th Cir. 1990); Code of Professional Responsibility Rule 4-3.3.

After pleading error with requisite sufficiency, the petitioner must plead "prejudice", again as defined by Strickland, supra. "Prejudice" does not mean arguable or even possible prejudice, since virtually any error would cause such prejudice. Strickland, supra at 693. Instead, the petitioner must show some actual impact on the verdict sufficient to undermine the very reliability of the decision. The mere fact that the petitioner "might have won" is not controlling. Lockhart v. Fretwell, 506 U.S. ___, 122 L.Ed.2d 180 (1993).

The standards announced in Strickland, supra, and its progeny are not the only standards to be considered in reviewing the decision of the lower court. Rather, we must also consider the pleading requirements attending Fla.R.Crim.P. 3.850 itself. In that regard, it is incumbent upon the petitioner to plead his claims with specific reference to any supporting facts. Mere conclusory allegations will not suffice. Swain v. State, 502 So.2d 495 (Fla. 1st DCA 1987); Perry v. State, 599 So.2d 234 (Fla. 1st DCA 1992).

Similarly, the court cannot base its decision, for petitioner or the state, on bald assertions of fact not supported by the record or by references to non-record "affidavits". Kelly v. State, 175 So.2d 542 (Fla. 1st DCA 1965); Falagon v. State, 167 So.2d 62 (Fla. 1st DCA 1964); Robinson v. State, 516 So.2d 20 (Fla. 1st DCA 1987).

When, in fact, a Rule 3.850 petition is insufficient as pled and is clearly refuted by the record, dismissal or disposition without an evidentiary hearing is appropriate even when the claim asserted is "ineffective assistance of counsel." Bundy v. State, 497 So.2d 1209 (Fla. 1986); Stano v. State, 520 So.2d 278 (Fla. 1988); Agan v. State, 503 So.2d 1254 (Fla. 1987); Lightbourne v. State, 471 So.2d 27 (Fla. 1985); Provenzano v. State, 561 So.2d 541 (Fla. 1990); Glock v. State, 537 So.2d 99 (Fla. 1989).

With these standards in mind, we can see why Mr. Reed's petition was denied, and why the specific findings of the Circuit Court have not been appealed in this portion of the Appellant's brief. (To avoid redundancy, the state will address specific allegations of ineffective assistance in other portions of this brief, in the order presented by Mr. Reed.) The trial court followed established law and based its findings on the law and the record before it. Mr. Reed's reliance upon files which he refused to produce and (non-record) "secret affidavits," that may or may not have existed, was simply not sufficient to compel relief.

(B) Sanctions Would Have Been Appropriate Under The Facts Of This Case

Although Mr. Reed's petition was not dismissed as a sanction for his willful and bad faith refusal to provide discovery, the law of this state clearly provides for such a result in proper cases. Mercer v. Raine, 443 So.2d 944 (Fla. 1983); New Hampshire Ins. Co. v. Royal Ins. Co., 559 So.2d 103 (Fla. 2nd DCA 1990); Besco Equipment Co. v. Golden Loaf Bakery, Inc., 458 So.2d 330 (Fla. 5th DCA 1984); Brodbeck v. Gonzalez, 336 So.2d 475 (Fla. 3rd DCA 1976); Fla.R. Civ.P. 1.380 (b)(2)(c).

In the case at bar, Mr. Reed filed specific allegations of "ineffective assistance of counsel" in a motion for post-conviction relief. Under Mr. Reed's theories of "justice" and "full and fair" review, Mr. Reed alleged that he had the right to level charges against counsel while simultaneously holding and concealing the casefiles containing (possibly) conclusive evidence. Mr. Reed's bad faith in asserting the attorney-client privilege was exacerbated by his arguments sub judice which misstated facts and law.

As noted by the court (ROA 313), during oral argument Mr. Reed's counsel (CCR) attempted to assert the privilege on the theory that proceedings filed pursuant to Fla.R.Crim.P. 3.850 are "criminal cases" and, in fact, an extension of the prosecution. Not only did this claim misrepresent the law, since Rule 3.850 proceedings are civil in nature notwithstanding the placement of the rule, see State v. White, 470 So.2d 1377 (Fla. 1985); State v. Lasley, 507 So.2d 711 (Fla. 2nd DCA 1987), it was facially inconsistent with CCR's demands for Chapter 119 disclosure, which were contingent upon the fact that Rule 3.850 proceedings are not criminal cases and that the statutory exemption governing "criminal files" does not apply. As noted by the Court, "This abrupt change in Mr. Reed's position could be attributed to a willful avoidance of discovery." (ROA 313).

Moreover, Mr. Reed fell back to the argument that the state was seeking disclosure "in violation of" Kight v. Dugger, 574 So.2d 1066 (Fla. 1991). That was clearly untrue, since Kight addressed the states's reciprocal use of Chapter 119, Fla. Stat., and not discovery in general.

Finally, in a fallback position, CCR argued that the privilege belonged to counsel, not the client, so production of Mr. Reed's files should not be sought from Mr. Reed but rather from counsel. (Since Reed was invoking the privilege, counsel was caught in the middle and could not freely reveal anything.) The privilege, of course, belongs to the client, not counsel. §90.502, Fla. Stat., Neu v. Miami Herald, 462 So.2d 821 (Fla. 1985).

The "bottom line", as far as Mr. Reed was concerned, was that Reed did not want a "full", "fair" or "honest" hearing. Mr. Reed wanted to file a claim of "ineffective assistance of counsel" and force the state into an evidentiary hearing in which the evidence would be manipulated by Mr. Reed's attorneys contrary to Johnson v. State, 608 So.2d 4 (Fla. 1992).

The trial court was not obliged to permit trial by ambush and the state could not, legally or equitably, be expected to endure such tactics. No good faith argument was, or could be, made to justify Mr. Reed's claims of "privilege."

If this Court was to accept the theory that Reed's petition was dismissed as a sanction, then it is submitted that such a sanction would have been appropriate.

(C) The Attorney-Client Privilege Was Waived

When the concept of post-conviction collateral review was created by the Judiciary Act of 1875, collateral review did not extend to the issue of "competence of counsel." Bator, Finality In Criminal Law and Federal Habeas Corpus For State Prisoners, 76 Harvard L.R. No. 3 441 (1963). The ability to challenge the competence of counsel evolved prior to enactment of Florida's

Rule 1 (now Fla.R.Crim.P. 3.850) see, Capetta v. Wainwright, 203 So.2d 609 (Fla. 1967). Gradually, recognition of the state's responsibility to protect Sixth Amendment rights caused the courts to entertain allegations of ineffective assistance of public defenders, but not privately retained counsel, and then all attorneys. Vagner v. Wainwright, 398 So.2d 448 (Fla. 1981).

As noted in Strickland, supra, the expansion of the remedy of post-conviction collateral relief to cover dealings over which the state had no control, but for which the state could nonetheless be penalized, clearly put the state in an unfair or vulnerable position. Theoretically, an attorney and client could cooperate in winning a second trial in the event the strategy utilized at the first trial proved unsuccessful. Some attorneys could be threatened or persuaded to "roll over" for their clients. Other counsel might feel morally obliged to cooperate with their client simply out of opposition to capital punishment.[4] Thus, the State not only had no control over the attorney-client relationship during trial, it's position on collateral review was wholly contingent upon the willingness of trial counsel to run the risk of defending himself.

Since the avowed intent of judicial proceedings is to ascertain the truth, Strickland v. Washington, supra at U.S. 691, expressly held that claims of ineffectiveness can often be resolved by review of defense counsel's files and by review of

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[4] The courts have recognized these potential problems by assigning no weight to attorney "roll over" affidavits. Kelly v. State, 569 So.2d 754 (Fla. 1990); Hill v. State, 556 So.2d 1385 (Fla. 1990); Johnson v. State, 463 So.2d 207 (Fla. 1985); Harris v. Dugger, 874 F.2D 756 (11th Cir. 1984).

what the client told his lawyer. Such communications would include communications of fact as well as strategic decisions.

Strickland cites to United States v. DeCoster, 624 F.2d 196, 209-10 (D.C. Cir. 1976). DeCoster states:

> [12] Realistically, a defense attorney develops his case in large part from information supplied by his client. As the Third Circuit indicated in Green, choices based on such information should not later provide the basis for a claim of ineffectiveness even though that basis would have been undercut by inquiry of others. Judicial intervention to require that a lawyer run beyond, or around, his client, could raise ticklish questions of intrusion into the attorney/client relationship, and should be reserved for extreme cases where an effect on the outcome can be demonstrated.

The DeCoster decision cites, in turn, to Matthews v. United States, 518 F.2d 1245, 1246 (7th Cir. 1975). The decision in Matthews flatly recognized the relevance of attorney-client communications to any post-conviction inquiry, stating:

> Petitioners have not told us what was said in their conference with counsel. Perhaps, for all we know, they merely explained that they had indeed forged the 35 ballot applications which were placed in evidence by the government and that they were indeed guilty as charged. Surely, if that were the case, counsel had no duty to search for witnesses, expert or otherwise, who might falsely testify to the contrary.

The Matthews case, in fact, relied upon the same approach used by the Court sub judice; to wit: the petitioner's refusal to disclose relevant facts could be construed against him in weighing the credibility of his claims.

In Laughner v. State, 373 F.2d 326 (5th Cir. 1976), the federal circuit recognized the absence of any privilege in collateral proceedings where counsel's conduct is challenged.

This principle, in turn, is codified as Rule 503 (d)(3), Fed.R.Ev.; §90.502, Fla. Stat., see also Wilson v. Wainwright, 248 So.2d 249 (Fla. 1st DCA 1971); Turner v. State, 530 So.2d 45 (Fla. 1987); Delap v. State, 440 So.2d 1242 (Fla. 1983).

(D) The Extent of Mr. Reed's Waiver Of The Privilege

It is indeed ironic that Mr. Reed cites to the canons of ethics in support of objectives which do not promote honesty or the just and fair determination of his case. While the attorney-client privilege deserves great respect, it cannot be used to frustrate the truth-seeking process when the competence of counsel is challenged in a collateral proceeding. Fla. Bar Ethics Opinion 70-40; Wilson v. Wainwright, 248 So.2d 249 (Fla. 1st DCA 1971); Turner v. State, 530 So.2d 45 (Fla. 1987); Delap v. State, 440 So.2d 1242 (Fla. 1983); Johnson v. State, supra.

In point of fact, the only issue before this Court is the extent of discovery rather than the state's right to discovery.

Mr. Reed alleges that any state access to his files is limited to some undefined "bare minimum." Rule 4-1.6, Code of Professional Responsibility. The state agrees that disclosures of Mr. Reed's file should be limited to the extent that only issues raised by Mr. Reed should be addressed, but the definition of "bare minimum" must, of necessity, vary from case to case on the basis of the "errors" alleged. Again, we point to the Strickland-DeCoster-Matthews trilogy and their reference to client admissions.

In the case at bar, Mr. Reed accused counsel of not performing any investigation, not doing legal research, not using evidence "in the file" and, most important of all, not developing

and presenting an alternate theory of defense. All of these issues can be answered by the files, but the challenge of counsel's "theory of defense" bears special notice.

In Card v. Dugger, 911 F.2d 1494 (11th Cir. 1990) and, again, in Scott v. Dugger, 891 F.2d 800 (11th Cir. 1990), collateral counsel argued that trial counsel was ineffective under Strickland if counsel failed to prepare and present a viable defense even though the putative defense was false. This Machiavellian concept, placing counsel's duty to "win" over the truth-seeking objective of the justice system, was flatly rejected by the Eleventh Circuit.

Applying Card and Scott to our case, it is clear that, under Strickland, counsel had no constitutional obligation to prepare or present a false defense, to put on false evidence, to proffer false medical reports or untrue affidavits or to offer perjured testimony. In fact, as noted in Matthews, supra, the entire issue of what counsel was required to prepare is controlled by what Mr. Reed told his lawyer or what the lawyer's investigation uncovered regarding Reed's guilt.

The accusations levelled against trial counsel by Mr. Reed went to the very core of the attorney-client relationship. Counsel was accused of everything from failure to do legal research to failure to investigate to failure to use evidence that was already in the file. Every aspect of counsel's performance was questioned from the conduct of cross-examination to selection of trial strategy. (ROA 2, 4, 5, 44, 45, 55, 94, 13.) Under these circumstances, and given CCR's specific references to "the files", it cannot be said that any portion of the file would be exempt from disclosure.

(E) The Denial Of Relief On The Basis Of The Record Was Proper

Again, however, the state submits that the "discovery" controversy is largely moot. Mr. Reed's petition was denied because the existing trial record refuted his conclusory, unsupported and facially deficient pleadings. Reed did not offer anything to the Court that would support his accusations, despite having ample opportunity to do so. Given the strength of the trial record, relief was properly denied.

POINT II

THE APPELLANT IS NOT ENTITLED TO AN EVIDENTIARY HEARING

Mr. Reed contends that the trial court erred in denying his motion for post-conviction relief without granting him an evidentiary hearing.[5] A review of Mr. Reed's claims, however, clearly shows why a hearing was unnecessary.

Claim I was a request for Chapter 119 disclosure and not a request for relief under the rule (ROA 309).

Claim II was a procedurally barred reargument of the State v. Neil 457 So.2d 481 (Fla. 1984) argument from the direct appeal, improperly repackaged was an "ineffective counsel" claim to circumvent the obvious procedural bar. The claim and the tactic behind it were both improper. King v. Dugger, 555 So.2d 355 (Fla. 1991); Blanco v. Wainwright, 507 So.2d 1377 (Fla.

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[5] The trial court's order makes specific reference to the record on appeal and trial transcripts, thus meeting the requirements of Hoffman v. State, 571 So.2d 449 (Fla. 1990) for either the attachment of record excerpts or the citation to specific portions of the trial record. See, Lightbourne v. State, 471 So.2d 27 (Fla. 1985); Goode v. State, 403 So.2d 931 (Fla. 1981).

1987). (ROA 310). In addition, the allegations contained in the petition were clearly absurd. For example, trial counsel was faulted for not discovering events in the lives of various venire persons that had not happened yet at the time of Reed's trial, and for "failing" to discover caselaw that similarly did not exist at the time of trial (ROA 310-311).

Claim III was a claim of "ineffective assistance of counsel" which expressly cited to counsel's files (see Point I) and non-record affidavits. The Court could not trust or rely upon Mr. Reed's representations of fact when he refused to back up his conclusory allegations with the very documents he cited. Any threshhold credibility Reed enjoyed was further undermined by his misrepresentations of fact and law. (ROA 313-14). As noted by the Court:

> Although the Court does not find any sanctionable misconduct (see Rule 4-3.4 Code of Professional Responsibility) this Court considers Mr. Reeds' three misstatements of law and his refusal to disclose his files as record evidence of the unreliable nature of his legal and factual assertions. Thus, Reed has deprived himself of any prima facie presumption of correctness which might otherwise apply to his petition.

(ROA 314).

The trial court then addressed the five sub-claims to the general issue:

§§(1) "Failure to Call Witnesses:": The decision to call or not call witnesses is strategic under Strickland, supra, and is not subject to review. (ROA 314). In fact, the decision not to call guilt phase witnesses was strategic and this strategic decision was set out in the trial records (TR 719) with Reed's personal concurrence. (R 719).

§§(2) "Ineffective Appellate Counsel": This claim was not before the correct court. State v. District Court of Appeal, First District, 569 So.2d 439, 442, n.1. (Fla. 1990).

§§(3) "Failure To Retain Experts": The record flatly belies this claim. Counsel consulted, deposed and obtained funds for experts. (R 208, 210, 212, 218). (Mr. Doleman's proffered opinion was also scientifically incorrect) (ROA 315).

§§(4) "Failure To Challenge Chain Of Custody": This was a speculative challenge to a clearly tactical decision. (TR 106, agreement announced by counsel). There is no legal authority compelling counsel to raise such a challenge in every trial and Reed's petition did not show "prejudice". (ROA 315).

§§(5) "Ineffective Cross-Examination": Again, a hindsight laden exercise in speculation and semantics that failed to allege or show "error" or "prejudice" as defined by Strickland v. Wainwright, supra.

The invocation of the phrase "ineffective assistance of counsel" does not guarantee one an evidentiary hearing. In fact, when, as here, a petitioner fails to plead an actionable claim, summary dismissal is appropriate. Bundy v. State, 497 So.2d 1209 (Fla. 1986); Stano v. State, 520 So.2d 278 (Fla. 1988).

Claim IV, "Sufficiency Of The Evidence," was procedurally barred as an issue which could have been raised on appeal. Harich v. State, 542 So.2d 980 (Fla. 1989); Atkins v. State, 541 So.2d 1165 (Fla. 1989).

Claim V, "Ineffective Counsel", accused counsel of incompetence for being honest and candid in making certain arguments to the court and the jury. This did not warrant any hearing. (ROA 315).

Claim VI, "Introduction Of Evidence", was procedurally barred as an issue resolved on appeal (ROA 316). Francis v. State, 529 So.2d 670 (Fla. 1988).

Claim VII and VIII, "Ineffective Assistance Of Counsel: Penalty Phase Preparation" was denied as refuted by the record and as being unsupported by any of the files, affidavits, etc. which Reed's petition relied upon. Again, the trial record showed clearly a strategic decision by Mr. Reed not to put on any evidence and to assert his innocence. (TR 846-855). Nothing was offered by Reed to refute the record.

Claim IX: "Burden Shifting Instructions" was procedurally barred. (ROA 316).

Claim X: "Automatic Aggravator", was procedurally barred (ROA 316).

Claim XI: "Appellate Error", was beyond the court's jurisdiction. (ROA 316).

Claim XII: "Cumulative Error", did not revive any claims.

Claim XIII: "Heinous, Atrocious, Cruel" Instruction, was procedurally barred (ROA 317).

Before leaving the issue, it must be noted that Mr. Reed's appellate desire for a "full and fair" evidentiary hearing is inconsistent with the position he assumed below. In addition, it was Mr. Reed - not the state - who compelled the court to rule on the basis of the record.

The State is perfectly well aware of the general preference for evidentiary hearings, particularly as to claims of ineffective assistance of counsel. In fact, assuming that any failed Rule 3.850 petition will be followed by federal litigation

under 28 USC §2254, it is to the state's tactical advantage, under Sumner v. Mata, 449 U.S. 539 (1981) to have this issue resolved in the state courts after a "state" hearing. Thus, the state did not lightly seek summary disposition.

The State, in the interests of a full, fair and honest disposition of the case, sought access to the non-privileged files cited by Mr. Reed and a copy of the mysterious affidavits allegedly possessed by CCR.

The Appellant's response was to deny the existence of the very documents that allegedly supported his Rule 3.850 petition, by denying the existence of any "appendix" when ordered to allow discovery by the trial court.

On appeal, Mr. Reed requests a "presumption of correctness" on the basis of affidavits which are not even known to exist and on nonrecord documents which he refuses to disclose. Given the equitable nature of Fla.R.Crim.P. 3.850, see White v. State, 470 So.2d 1377 (Fla. 1985), it is difficult, if not impossible, to reconcile the two positions assumed by Mr. Reed. In fact, Mr. Reed's inequitable conduct can be compared to the strategy discredited in McPhee v. State, 254 So.2d 406 (Fla. 1st DCA 1971). There, the court noted that a litigant cannot pursue one strategy at trial and then demand a new trial to enable him to test an alternate theory.

In sum, Mr. Reed was not granted an evidentiary hearing on his petition because his claims were either procedurally barred, incorrectly filed in circuit court, or unsupported by and/or clearly refuted by the record. While a presumption of correctness does apply to allegations made in a Rule 3.850 petition, that presumption came to be forfeited in this case.

POINT III

THE APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL WAS PROPERLY DENIED

First, as noted above, much of Mr. Reed's argument is predicated upon material that is dehors the record.

Mr. Reed's third point on appeal argues the alleged merits of his various claims of ineffective assistance of counsel. The claims themselves are easily disposed of, but prior to doing so the state must address two collateral issues.

First the State should not be compelled, on appeal, to respond to nonrecord affidavits[6] that CCR claimed "did not exist" when ordered to produce them.

Second, Mr. Reed, accused the prosecutor of manipulating the proceedings to "remove" Reed's attorney and deliberately replace him with an incompetent (selected by the prosecutor and appointed by the judge). The object of this conspiracy was the conviction and execution of an innocent man. This startling scenario derives from nothing more than an order appointing Mr. Nichols as counsel when, due to a potential witness conflict, the public defender was removed from the case.

Given the absence of any record support for Mr. Reed's theory of "conspiracy" and the absence of any assertions of supporting fact in either the brief or the Rule 3.850 petition, these accusations are highly inappropriate. Thomas v. State, 210 So.2d 488 (Fla. 2nd DCA 1968); Giles v. State, 363 So.2d 164 (Fla. 3rd DCA 1974); Benjamin v. State, 245 So.2d 635 (Fla. 4th

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[6] See, Kelly v. State, 569 So.2d 754 (Fla. 1990) CCR composed affidavit "more than likely inaccurate."

DCA 1971), see also McNealy v. State, 183 So.2d 738 (Fla. 1st DCA 1966).

Turning now to Mr. Reed's claim of ineffective counsel the State, like the trial court, will begin with the case that Mr. Reed cannot and does not address, Strickland v. Washington, 466 U.S. 668 (1984).

Strickland holds that one filing a claim of ineffective counsel must establish both "error" and "prejudice". Error means more than simple error. Instead, the defendant must show error so serious that counsel was the equivalent of "no counsel at all." Furthermore, since no two lawyers would ever try a case the same way, tactical and strategic decisions are not subject to review. Finally, counsel must be judged "without the distorting effects of hindsight." Winfrey v. Maggio, 664 F.2d 550 (5th Cir. 1980); Burger v. Kemp, 483 U.S. 776 (1987).

"Prejudice" means more than the existence of an arguable or speculative impact on the verdict. In fact, the mere probability that the defendant "would have won" does not establish "prejudice." Lockhart v. Fretwell, 506 U.S. ___, 122 L.Ed.2d 180 (1983). Rather, "prejudice" requires proof that the errors committed by counsel denied the defendant a "fair trial, a trial whose result is reliable." Strickland, supra, at 687.

Mr. Reed's allegations are factually untrue and/or unsupported, are refuted by the record and fail to allege or show "error" or "prejudice" as defined by Strickland, et.al.

(1) THE TRIAL ERRORS

(A) JURY SELECTION

The first series of challenges refer to counsel's alleged failure to argue the Slappy[7] issue "effectively" at trial or to develop important background information from some prospective jurors.

The trial court correctly identified Mr. Reed's claim as an attempt to reargue the Neil/Slappy issue (from the direct appeal) under the facade of "ineffective counsel." The use of a claim of ineffective counsel to reargue an appeal or circumvent a procedural bar is improper. See, Breedlove v. State, 595 So.2d 8 (Fla. 1992); King v. Dugger, 555 So.2d 355 (Fla. 1990); Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987) and the court's summary rejection of the barred Neil/Slappy claim was appropriate.

The substantive issue, of course, was reargued in the Rule 3.850 petition on the basis of facts known at the time of the appeal, such as Mrs. Humphries' workmen's compensation claim (ROA 28), and facts which could not have been revealed at trial because they did not exist[8], such as Mr. Strickland's educational achievements (ROA 31). It should also be noted that two of these venire persons would, at most, have been alternate jurors. Since no alternate jurors were used to replace any petit jurors at trial, there is simply no support for the notion that any of the

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[7] State v. Neil, 457 So.2d 481 (Fla. 1984); State v. Slappy, 522 So.2d 18 (Fla. 1988).

[8] It should be noted that Slappy v. State, 522 So.2d 18 (Fla. 1988), which trial counsel is apparently accused of not consulting, did not exist at the time of Reed's trial.

veniremen in question would have actually participated in the determination of Reed's guilt or sentence.

This Court carefully reviewed this issue on direct appeal and found no reversible error. Reed v. State, 560 So.2d 203 (Fla.) cert. denied, 111 S.Ct. 230 (1990). The issue of whether the state violated the Neil/Slappy standard is now settled and is procedurally barred.

(B) GUILT PHASE ERRORS

Mr. Reed made the strategic decision not to call guilt phase witnesses and placed that strategic decision on the record. (R 719). Mr. Reed's speculative claims regarding potential guilt phase witnesses or the fruits of additional investigation are facially deficient under Strickland, supra, see, also, Aldrich v. Wainwright, 777 F.2d 630 (11th Cir. 1985), because said witnesses would not have been used.

(1) "Failure To Seek Experts"

As confessed by Mr. Reed, the original record on appeal contains an order granting Mr. Nichols funds for the hiring of expert witnesses (R 233) and records establishing Mr. Nichols procurement of psychiatric experts (R 218) and at least one other deposition of an FDLE expert (Mr. Luten). (R 212).

While we are not privy to either the fruit of trial counsel's investigation or any communications by Mr. Reed which would have affected the extent of such efforts (see argument one), we do know that Reed's basic claim is refuted by these portions of the record. We also know that Reed elected not to call any witnesses, "expert" or otherwise .

Mr. Reed's petition fails to refute the record and fails to overcome his own strategic decision. Strickland, supra. The record clearly shows that counsel investigated Reed's case and that the defense subsequently elected not to call any witnesses. (R 716-719).

Turning to the specific areas of expert inquiry mentioned by Mr. Reed, we find.

(2) Serology Evidence

Reed alleges

> (A) He is a non-secretor with type-O blood.
>
> (B) The victim, Betty Oermann, was subjected to a post-mortem exam which included a vaginal swab.
>
> (C) The vaginal swab "proved" her attacker was a secretor with type-O blood, thus proving his innocence.

As usual, however, Reed carefully sidesteps the "entire" record:

> (A) Reed had type-O blood and was a non-secretor, but Mrs. Oermann also had type-O blood and she was a secretor. (R 631)
>
> (B) The vaginal swab extracted a mixture of her vaginal fluids and his semen. Thus, the presence of the H-antigen "secretor" blood is attributable to Mrs. Oermann. (R 637-638)
>
> (C) The absence of any other blood tends to show that Mrs. Oermann could have been raped by a non-secretor of the same blood-type. (i.e. Reed). (R 638)
>
> (D) The titration test run by Mr. Doleman also could have picked up H-antigens from the cell walls of Reed's sperm even if he was a non-secretor, since that antigen bonds to cell walls. (This is an accepted scientific fact set out in the text Applied Blood Group Serology, 2nd Ed. and noted by the trial court without objection.)

Thus, the very premise that Reed's innocence could have been argued is simply not the truth.

(3) Hair Expert

Apparently the person who examined Reed's hair in comparison to hairs on the victim's body made a threshold analysis of the hair to exclude the negroid hair type. If the test had shown that the rapist was of African origin, Reed would have immediately been eliminated as a suspect.

Reed takes this threshold test and conjures up the existence of some mysterious and undisclosed "negro suspect." The claim is, at best, highly suspect, but more to the point is its irrelevance. The hairs recovered from Mrs. Oermann were not negroid but matched Reed's hair. (TR 665-668).

No "error" or "prejudice" exists within this ridiculous claim.

(4) FINGERPRINTS

Mr. Reed's fingerprints were found on checks belonging to the victim, that were found in the back yard of her home. Mr. Reed casually dismissed this evidence as insignificant because he lived for a time with the Oermanns.

Now Mr. Reed contends that an expert could have refuted the state's fingerprint evidence regarding the possible age of the defendant's fingerprints. Mr. Reed offered no evidence at trial, and his Rule 3.850 petition does not allege that he had permission to use the Oermann's checks or to go through their checkbook at any time, before or during the day of the murder.

Again, this highly speculative claim fails to confront the strategic decision by Mr. Reed not to call witnesses and fails to

address the simple fact that trial counsel is not ineffective under Strickland if counsel fails or refuses to put on a defense that is untrue or illusory.

Reed never contends that such an expert would have been called "but for" counsel or that such a defense would have been compulsory because the facts intimated (access to the checkbook) were true. Thus, Reed only sought relief on the rankest speculation.

(C) Failure to Prepare And Present A Credible Defense

The mere existence of some alternate theory of defense does not establish the ineffectiveness of trial counsel. Engle v. State, 576 So.2d 696 (Fla. 1991); Strickland, supra. Thus, Mr. Reed's creative or visionary defenses do not, by their existence, establish error or prejudice by trial counsel.

Mr. Reed's petition suffered from other facial deficiencies as well. First, as noted above, it is apparent from the record that trial counsel took extensive depositions and carefully investigated the case. Second, the strategic decision not to call any witnesses (including Mr. Reed's friend - who he obviously knew - Mrs. Niznik) (see brief at 43) was placed on the record. Strategic decisions are not subject to review. Strickland, supra. Third, if Reed was in fact guilty, counsel had no duty to put on any particular defense. Card, supra; Scott, supra; Strickland, supra; DeCoster, supra; Matthews, supra.

The pleadings filed by Mr. Reed, even if taken as true (i.e. another defense was possible) does not allege error or prejudice sufficient to establish ineffectiveness under Strickland.

Before leaving this issue, we will address counsel's alleged failure to impeach Nigel Hackshaw. This allegation merely asserts the existence of cumulative evidence of Hackshaw's criminal past that would have added nothing of substance to the record impeachment of Mr. Hackshaw as a "snitch" who made a "deal." (R 591-593).

Miss Hipp allegedly was charged, but not convicted, of theft of electricity. (Interestingly, CCR's petition indicates that Mr. Reed lived with Miss Hipp while this was going on). Mr. Reed cites to no authority for the proposition that the existence of an unproven accusation is a valid basis for inpeachment of a witness at trial.

(D) Failure To Object To The Prosecutor's Arguments

Mr. Reed lifts various arguments, even to the point of single sentences and sentence fragments, out of context "to accuse" trial counsel of selling out his client to the jury. The record, when read in context, belies the claim and shows neither "error" or "prejudice". Ferguson v. State, 593 So.2d 508 (Fla. 1992).

The argument quoted at (R 514-515), was Mr. Nichols' statement that the State should not be allowed to introduce drug evidence. In an effort at persuasion, counsel noted that such a reckless move by the State could needlessly jeopardize its case. That persuasive technique is not unusual and is clearly a tactical approach that is beyond second-guessing under Strickland.

The sentence fragments set out from (R 741), at page 49 of the brief, are distorted by Reed. Counsel was not confessing anything to the jury. Rather, he was arguing the jury's duty to hold the State to its burden of proof no matter how horrible the facts of the case. The fact that the murder was horrible is not a confession that Reed committed said murder.

The sentence fragment from (R 792), is again misrepresented by Reed's brief. The actual argument was that the jury should not simply convict Mr. Reed out of anger over the nature of the crime in the hope that he was in fact guilty.

Theft is not robbery. Counsel conceded that Reed's fingerprints on Mrs. Oermann's personal checks might be consistent with "theft" but it did not prove robbery, rape or murder (R 790).

Clearly, Reed's petition failed to allege any basis for relief that was not refuted by the record. The disingenuous representations of "fact" however, did detract from, any presumption of correctness that might ordinarily attach to a 3.850 petition.

POINT IV

MR. REED'S CLAIM OF INEFFECTIVE PENALTY PHASE COUNSEL WAS PROPERLY DENIED

The State and the defense entered into an agreement that kept either side from offering evidence in the penalty phase (R 846). Mr. Reed then personally went on the record to maintain his innocence but stated that he did not want to testify (R 850).

After the penalty phase, Mr. Nichols provided the court with extensive background information on Mr. Reed.

The decision not to put on a penalty phase display of evidence that was inconsistent with Reed's guilt phase defense was an informed strategic decision by Mr. Reed and Mr. Nichols that is not subject to relief under Strickland, supra. Rose v. State, 617 So.2d 291 (Fla. 1993); Jones v. State, 528 So.2d 1171 (Fla. 1988). Furthermore, Reed's putative "evidence" clearly would not compel a life sentence in the face of the overwhelming aggravating evidence at bar. Thus, Reed has not established "prejudice", Lambrix v. State, 534 So.2d 1151 (Fla. 1988), since his allegedly "tough youth", if believable under the circumstances at bar, was clearly not so atypical as to compel a different sentence. Mendyk v. State, 592 So.2d 1076 (Fla. 1992).

POINT V

THE ISSUE OF IMPROPER ARGUMENT WAS NOT RAISED IN THE LOWER COURT AND CANNOT BE DECIDED ON APPEAL

The issue of prosecutorial misconduct is not only procedurally barred as an issue which, if preserved, could have been raised on appeal, Atkins, supra; Harich, supra, it is also not properly before this Court because it was not raised as one of Mr. Reed's thirteen claims in his motion for post-conviction relief. As such, this issue is not properly before this Court. Doyle v. State, 526 So.2d 909 (Fla. 1988).

POINT VI

THE TRIAL COURT DID NOT ERR IN RULING THAT IT HAD NO JURISDICTION TO REVIEW JUDGMENTS OF THE FLORIDA SUPREME COURT

The sixth point on appeal was rejected by the circuit court because that court had no jurisdiction to review decisions of the Florida Supreme Court. Mr. Reed, on appeal, does not address the

decision sub judice, choosing instead to launch into a "merits" argument without regard for the facts or the law.

Even if the issue had some jurisdictional basis, the sub-issue regarding the propriety of the trial court's jury instructions was procedurally barred. Johnson v. Singletary, 612 So.2d 575 (Fla. 1993); Henry v. State, ___ So.2d ___ (Fla. 1993), 18 Fla.L.Weekly S33 (Fla. 1993); Kennedy v. Singletary, 602 So.2d 1285 (Fla. 1992); Sochor v. Florida, 504 U.S. ___, 119 L.Ed.2d 326 (1992). The merger of these two issues does not create standing for appellate review.[9]

POINT VII

MR. REED IS NOT ENTITLED TO RELIEF ON HIS CHAPTER 119, FLORIDA STATUTES, CLAIM

The Chapter 119 issue argued by Mr. Reed was presented as Claim I in his petition, but was not argued or proven by Mr. Reed during oral argument (Supp. Rec. 30-97). The claim itself is a listing of Mr. Reed's suspicions and assumptions regarding records that he thinks might exist and nothing more.

After oral argument, the trial court ruled that Mr. Reed failed to establish any non-compliance with Chapter 119 (R 309). That order sets forth the controlling facts for appellate purposes. Shapiro v. State, 390 So.2d 344 (Fla. 1980); Gilvin v. State, 418 So.2d 996 (Fla. 1982).

The arguments presented by Reed fall into two categories. First, Reed complains that he has been denied access to the

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[9] Mr. Reed's "merits argument" is rejected as an incorrect statement of law but will not be addressed in detail since it is procedurally barred.

Governor's "clemency files". Now, of course, we know that he is not entitled to those files. Parole Commission v. Lockett, ___ So.2d ___ (Fla. 1993), 18 Fla.L.Weekly S258. Second, using "citations" to alleged files and documents that are de hors the record, Reed alleges that these documents have been "stripped" to prevent disclosure.

In Walton v. Dugger, 18 Fla.L.Weekly S. 309, 310 (Fla. 1993), this Court held:

> "Obviously, as we noted in Kokal, the state attorney would not be required to disclose information from a curent file relating to the post-conviction relief motion, nor would the state be compelled to produce records not subject to the public records law. In making this observation, however, we emphasize that the state must still disclose any exculpatory document within its possession or to which it has access, even if such document is not subject to the public records law."

This decision, however, would still seem to be subject to Lockett, supra, wherein a writ of prohibition was granted to preclude a trial court from ordering the production of clemency files in a capital proceeding. In fact, Lockett suggests the following procedure:

> "We note, however, that while these rules expressly make this sensitive information confidential, they also give the Governor the sole authority for making such records public. We are disturbed that no attempt was made by the Capital Collateral Respresentative to request the Governor to exercise his authority either to make the records public or to allow the Capital Collateral Representatie to examine them in camera with counsel for the state. We further note that the trial judge was not informed by the Capital Collateral Representative about the provisions of the Rules of Executive Clemency or the procedure in the rules for obtaining the clemency investigative files and reports produced by

the Parole Commission for the Governor and Cabinet."

While the Walton decision would appear to provide for in camera review of any public records "not subject to Chapter 119," the Lockett decision granted a writ of prohibition which effectively precluded the production of clemency records for said review. Taken in pari materia, the two decisions make it clear that the Florida Constitution affords special status to the Governor's files above and beyond the "statutory" exemption that applies to other documents which, potentially, could be subjet to disclosure but for the legislature's decision to exempt them.

Thus, Mr. Reed (CCR) had the duty to seek disclosure from the Governor rather than the court. He cannot prevail on appeal.[10]

Absent any legal or factual basis for his claim, Mr. Reed cannot prevail.

POINT VIII

THE "BURDEN SHIFTING" ISSUE WAS PROCEDURALLY BARRED

The "burden shifting" issue offered by Mr. Reed was denied as procedurally barred. The decision was correct, Atkins, supra; Harich, supra, and this issue does not warrant relief.

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[10] The State would note that Mr. Reed's concurrent filing of a Chapter 119 demand with, or as a part of, his Rule 3.850 petition rather than prior to filing the petition is tactically incorrect, since Chapter 119 was available at all times. Agan v. State, 560 So.2d 222 (Fla. 1990); Demps v. State, 515 SO.2d 196 (Fla. 1987). Apparently, this tactic is employed to circumvent the two-year time bar by use of "amendments" based upon alleged "newly discovered evidence." The use of such "amendments" was condemned in Woods v. State, 531 So.2d 79 (Fla. 1988).

POINT IX

CUMULATIVE ERROR

Mr. Reed has failed to allege or show any basis for reversal of the trial court. Since the "whole" cannot be greater than the sum of its parts, the "cumulative" error claim is facially frivolous and unworthy of consideration.

CONCLUSION

The decision of the lower court should be affirmed.

Respectfully submitted,

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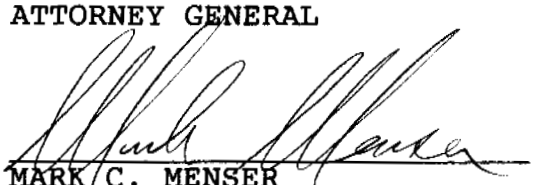
ATTORNEY GENERAL



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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Martin J. McClain, Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, on this 30th day of July, 1993.

MARK C. MENSER
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