IN THE SUPREME COURT OF FLORIDA

CASE NO. 91,014

RONNIE LEE JONES,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, CRIMINAL DIVISION

BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

RANDALL SUTTON
Assistant Attorney General
Florida Bar No. 0766070
Office of the Attorney General
Rivergate Plaza -- Suite 950
444 Brickell Avenue
Miami, Florida 33131
PH. (305) 377-5441
FAX (305) 377-5654

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGE**

CASES **PAGE**

OTHER AUTHORITY

CERTIFICATE AS TO TYPE SIZE

It is hereby certified that this brief was prepared with a 12-point Courier New font.

NOTE ON REFERENCES

Except as noted, the State will follow Defendant's system of citation to the record. Thus, "**R** ___" and "**SR** ___" refer to the original and supplemental record prepared for the instant post-conviction appeal.

"**R1** ___" and "**SR1** ___" refer to the original and supplemental record on direct appeal. The supplemental record consists of transcripts of hearings held on June 19 and October 19, 1981.[1] However, as the June hearing also appears at R1 2003-10, "SR1" will be used to refer only to the October hearing, with the June hearing referenced to "R1."

"**R2** ___" refers to the transcript of the original 1985 post-conviction proceedings.

---

[1] The transcript indicates June 19, 198**2**, however it is clear from the record that the hearing in question was held on June 19, 198**1**.

"**R3d** ___" refers to the record in Third District case no. 83-1780,[2] with which the State has contemporaneously moved to supplement the record.

Defendant's symbols "T," "H," and "A," which all refer to items encompassed in the above records, and are thus redundant, will not be used

---

[2] As is noted in the State's motion to supplement, this record is from the appeal of Defendant's 1983 robbery trial and conviction in Eleventh Judicial Circuit no. 80-8102. Defendant was originally tried and convicted in that case in 1981, and the conviction was the basis for the prior violent felony aggravator in this case. The conviction was reversed by the district court, Jones v. State, 418 So. 2d 430 (Fla. 3d DCA 1982), and Defendant was retried and convicted in 1983. The latter conviction was affirmed. Jones v. State, 453 So. 2d 56 (Fla. 3d DCA 1984).

POINTS ON APPEAL

(Restated)

STATEMENT OF THE CASE AND FACTS

As Defendant's statement of the case and facts appears to be more argument than fact, the State declines to accept it and sets forth the following discussion of the record.

Defendant was charged, in an indictment filed on July 23, 1980, in the Eleventh Judicial Circuit of Florida in and for Miami-Dade County, Florida, case number 80-12103, with committing, on July 2, 1980: (1) the first degree premeditated or felony murder of John Uptgrow; (2) the first degree murder premeditated or felony of Bernard Hill; (3) the first degree premeditated or felony murder of Byron Hamilton; (4) the attempted first degree premeditated or felony murder of McKeva Smith; (5) the attempted first degree premeditated or felony murder of Raymond Fleming; (6) the armed burglary of Uptgrow's occupied dwelling with an assault; (7) the armed robbery of Uptgrow; (8) the possession of a firearm during the commission of a felony; and (9) the carrying of a concealed firearm. (R1 7-11). Defendant was convicted as charged on all counts. (R1 1853-54). At the close of the penalty phase, the jury recommended a sentence of death as to all three murders by a vote of 11 to 1. (R1 1985). The trial court found four factors in aggravation as to all three murders: that Defendant had a prior violent felony conviction; that Defendant knowingly created a great risk of death to many persons; that the murders were

committed during the commission of a robbery and burglary; that the murder of Uptgrow was for pecuniary gain, which the court merged with the robbery/burglary aggravator; and that the murders were cold, calculated and premeditated. As to Hamilton and Hill, the court further found that they were killed for the purpose of witness elimination. The court found that no mitigating circumstances had been proven, and sentenced Defendant to death for all three murders. (R1 360-73).

On direct appeal, this court summarized the facts of the crime as follows:

> On the late night of July 1 and early morning of July 2, 1980, seven men were at the home of John Uptgrow. About midnight, defendant and an unidentified male companion were admitted to the home by Uptgrow. Once inside, defendant removed a concealed firearm from under his shirt and asked Uptgrow for shells. Uptgrow asked why the shells were needed since the firearm was loaded. Defendant asked to speak to Uptgrow privately and the two men went to a bedroom with the defendant walking behind Uptgrow. Within seconds, a gunshot was heard. Uptgrow's body was later found in the bedroom with a gunshot wound to the head consistent with a shot fired from the right rear.
>
> An occupant of the home, Fleming, testified that he was in the bathroom when the first shot was heard. When he started to leave the bathroom, he saw a gunman approaching from the bedroom. The gunman wore clothes similar to those worn by defendant and unlike those worn by his unidentified companion. Fleming retreated into the bathroom and closed the door, whereupon a series of shots were fired through the door into the bathroom. Fleming remained in the bathroom, uninjured, for a period of time until he tried to flee and was shot in the elbow by the gunman; he feigned death and survived.

Two other witnesses, Lynch and McDonald, identified defendant as the man who entered the home, produced a loaded gun, asked for shells, and went to the bedroom with Uptgrow to talk privately. Before the gunshot, defendant's companion was sitting on a couch in the living room; after the shot the companion rose and went toward the bedroom with no visible weapon. After the first shot, another occupant, Hamilton, was seen going to the front door where he turned and said, "Don't do that." Hamilton's body was later found near the door with gunshot wounds. Lynch and McDonald fled through a back door and hid nearby until the police arrived.

Another occupant, Hill, had been asleep on a couch in the living room. His body, with gunshot wounds, was found still on the couch. Another occupant, Smith, was found seriously wounded by a gunshot to the head but could not testify as to the occurrence.

Lynch and McDonald testified that Uptgrow had in his possession a distinctive black pouch containing a large sum of money and that he was wearing gold jewelry. The pouch with the money and the gold jewelry were missing when Uptgrow's body was found. The empty pouch was discovered weeks later hidden in a room which had been occupied by defendant.

Defendant was arrested in the early morning of July 3, 1980, as he was awakening. A distinctive handgun was found under his pillow. Lynch and McDonald testified that the handgun looked like the gun defendant had on the night of the murders.

A fingerprint expert testified that four of defendant's fingerprints were found in the Uptgrow home.

Jones v. State, 449 So. 2d 253, 255-56 (Fla. 1984)("Jones I").

Defendant raised the following issues on direct appeal, verbatim:

I. TRIAL COURT ERRED BY FAILING TO CONDUCT A PROPER INQUIRY WITH REGARD TO A WAIVER OF COUNSEL AND BY REQUIRING MR. JONES TO PROCEED PRO SE WHEN HE DID NOT EFFECTIVELY WAIVE LEGAL

REPRESENTATION.

II. THE TRIAL COURT ERRED BY PERMITTING INTRODUCTION INTO EVIDENCE OF EXTREMELY PREJUDICIAL STATEMENTS MADE BY THE DEFENDANT DURING PLEA NEGOTIATIONS.

III. THE TRIAL COURT GREATLY PREJUDICED MR. JONES IN THE PRESENCE OF THE JURY AND DENIED THE DEFENDANT HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY CHAINING HIM TO HIS CHAIR.

IV. THE TRIAL COURT ERRED IN FAILING TO DISCHARGE THE DEFENDANT DUE TO A VIOLATION OF THE SPEEDY TRIAL RULE.

V. THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTOR AND CHIEF STATE WITNESS TO COMMENT ON THE FAILURE OF MR. JONES TO CONSENT TO THE TAKING OF A POLYGRAPH EXAMINATION.

This court rejected the first claim, finding that the trial court had properly conducted a Faretta[3] inquiry and allowed Defendant to represent himself where the record demonstrated that he "was literate, competent and understanding." Jones I, 449 So. 2d at 257-59. The Court also rejected the contention that the trial court abused its discretion in briefly shackling Defendant after he attempted to disrupt the trial. Jones I, 449 So. 2d at 259-62. The court also rejected Defendant's speedy trial claim, finding that the record was "patently clear" that the demand was spurious. Jones I, 449 So. 2d at 262. Finally, the Court rejected as unpreserved Defendant's claims that his statements to the police, including his agreement to take a polygraph, as well as his

---

[3] Faretta v. California, 422 U.S. 806 (1975).

subsequent refusal to take the test, should have been suppressed. Jones I, 449 So. 2d at 263. The Court further noted that even had the issue been preserved, any error would have been harmless, given that "the other evidence supporting the convictions [wa]s overwhelming." Id. Defendant's sentences and convictions were affirmed on May 23, 1984.[4]

Defendant sought certiorari review, raising the following issues, verbatim:

> WHETHER THE DECISION OF THE SUPREME COURT OF FLORIDA WAS A MISAPPLICATION OF THE SIXTH AMENDMENT WHERE THE COURT DECIDED THAT THERE WAS NO VIOLATION BASED ON THE FOLLOWING FINDINGS:
>
> > 1. DEFENDANT'S DELAY AND DEMANDING OF COUNSEL OF HIS OWN CHOICE, APPOINTMENT OF STANDBY COUNSEL, AND UNCOOPERATIVENESS WITH APPOINTED COUNSEL, AS WELL AS THE INFERENCE FROM THE RECORD THAT THE DEFENDANT WAS LITERATE, COMPETENT, AND UNDERSTANDING ALL OBVIATED THE NEED FOR CONDUCTING A COMPREHENSIVE INQUIRY INTO DEFENDANT'S APPARENT DESIRE TO WAIVE COUNSEL.
> >
> > 2. DEFENDANT'S PERSISTENT DEMANDS FOR COUNSEL OF HIS OWN CHOICE WAIVES HIS RIGHT TO APPOINTED COUNSEL.

---

[4] The Court noted that Defendant failed to raise any penalty phase issues. The Court nevertheless reviewed the record, and noted that the trial court had improperly doubled the pecuniary gain and during a robbery/burglary factors, but concluded that the error was harmless. Jones I, 449 So. 2d at 263. The State would respectfully note, however, that the trial judge specifically noted that she could not double these factors, and considered them as one. (R1 364 n.1). Thus no error, harmless or otherwise, actually occurred in the penalty phase.

3. DEFENDANT'S ACTIONS DURING THE GUILT PHASE OF THE TRIAL MADE IT NO MORE THAN FORM OVER SUBSTANCE TO REQUIRE RENEWING THE OFFER OF COUNSEL AT THE SENTENCING STAGE, DESPITE DEFENDANT'S SPECIFIC REQUEST FOR COUNSEL AT THE SENTENCING STAGE AND HIS INABILITY TO EFFECTIVELY PROCEED PRO SE.

WHETHER THE DECISION OF THE SUPREME COURT OF FLORIDA WAS A MISAPPLICATION OF THE FIFTH AMENDMENT WHERE THE COURT DECIDED THAT THERE WAS NO VIOLATION BASED ON THE FOLLOWING FINDINGS:

THE ADMISSION OF STATEMENTS A DEFENDANT MAKES DURING PLEA BARGAINING WHICH WERE BOTH INCULPATORY AND EXCULPATORY IN NATURE AND COMMENTING BY A WITNESS AND THE PROSECUTOR AS TO THE DEFENDANT'S REFUSAL TO TAKE A POLYGRAPH EXAMINATION WHERE THE DEFENDANT FAILED TO PRESERVE THESE FUNDAMENTAL ISSUES ON APPEAL BY A CONTEMPORANEOUS OBJECTION WAS HARMLESS ERROR.

WHETHER THE DECISION OF THE SUPREME COURT OF FLORIDA WAS A MISAPPLICATION OF THE FIFTH AND SIXTH AMENDMENTS RIGHT TO A FAIR TRIAL WHERE THE COURT DECIDED THAT THERE WAS NO VIOLATION BASED ON THE FOLLOWING FINDINGS:

SHACKLING THE DEFENDANT TO HIS CHAIR WHO WAS FORCED TO PROCEED PRO SE AND WAS ATTEMPTING TO VOIR DIRE THE JURY WAS A PROPER METHOD OF RESTRAINT DESPITE DEFENDANT'S CONTINUED OUTBURST OF SONG WHEN THE JURY RETURNED WHERE HE LATER CONDUCTED HIMSELF PROPERLY DURING THE COURSE OF THE TRIAL AND THAT THEREFORE ANY PREJUDICE SUFFERED WAS A RESULT OF HIS OWN WILLFUL ATTEMPT TO DISRUPT THE ORDERLY PROCEEDINGS OF THE COURT.

WHETHER THE DECISION OF THE SUPREME COURT OF FLORIDA IS A MISAPPLICATION OF THE SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL WHERE THE COURT DECIDED THAT THERE WAS NO VIOLATION BASED ON THE FOLLOWING FINDINGS:

THE DEFENDANT WAS NOT CONTINUOUSLY AVAILABLE FOR TRIAL EVEN THOUGH THIS CONCLUSION WAS BASED ON MISINFORMATION FROM THE PROSECUTION AND THE TRIAL COURT INDICATED THAT THE

DEFENDANT WAS READY TO STAND TRIAL BY DENYING HIS MOTION FOR CONTINUANCE.

The Supreme Court denied review on October 9, 1984. Jones v. Florida, 469 U.S. 893 (1984).

On October 29, 1985, after Governor Martinez issued a death warrant, Defendant filed a motion for post-conviction relief pursuant to Fla. R. Crim. P. 3.850, raising the following issues, verbatim:

CLAIM I

MR. JONES WAS INCOMPETENT TO STAND TRIAL, AND SUBJECTING HIM TO TRIAL WHILE HE WAS INCOMPETENT VIOLATED HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

CLAIM II

THE TRIAL COURT'S AND PRETRIAL HEARING JUDGES' FAILURE TO CONDUCT ANY INQUIRY INTO MR. JONES' COMPETENCY AFTER THE ISSUE WAS SUFFICIENTLY RAISED, VIOLATED MR. JONES' FOURTEENTH AMENDMENT DUE PROCESS RIGHTS.

CLAIM III

PRETRIAL, TRIAL AND ADVISORY COUNSEL CONDUCTED NO OR GROSSLY INADEQUATE INVESTIGATION INTO MR. JONES' MENTAL CONDITION, TO MR. JONES' SUBSTANTIAL PREJUDICE, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

CLAIM IV

BECAUSE NEITHER THE TRIAL COURT NOR DEFENSE COUNSEL CONDUCTED ANY INVESTIGATION INTO MR. JONES' BACKGROUND AND MENTAL CONDITION, SUBSTANTIAL DEFENSES TO THE CHARGES WERE NOT DISCOVERED, AND MR. JONES WAS DENIED AN EFFECTIVE DEFENSE AND A RELIABLE, MEANINGFUL, INDIVIDUALIZED SENTENCING DETERMINATION, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

CLAIM V

THE TRIAL COURT VIOLATED MR. JONES' FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND EQUAL PROTECTION BY REFUSING TO APPOINT A PSYCHIATRIST TO EVALUATE MR. JONES CONCERNING THE FULL PANOPLY OF MITIGATING CIRCUMSTANCES, AND THE RESULTING DEATH SENTENCES ARE FUNDAMENTALLY UNRELIABLE, IN VIOLATION OF THE EIGHTH AMENDMENT

CLAIM VI

MR. JONES WAS DEPRIVED OF HIS RIGHT TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN A PSYCHIATRIST APPOINTED POST-TRIAL AND PRESENTENCING TO CONDUCT A LIMITED EVALUATION WAS UNABLE AND FAILED TO CONDUCT AN A APPROPRIATE AND COMPETENT EVALUATION

CLAIM VII

THE TRIAL COURT OFFERED MR. JONES A PSYCHIATRIC EXAMINATION, AND INFORMED MR. JONES THAT HE COULD USE OR REFUSE TO USE THAT PSYCHIATRIST IN MITIGATION; AFTER THE "CONFIDENTIAL" EXAMINATION WAS CONDUCTED, MR. JONES DECLINED TO USE THE PSYCHIATRIST, WHEREUPON THE PSYCHIATRIST SENT A CONFIDENTIAL REPORT OF HIS DEALINGS WITH MR. JONES TO THE COURT; THE COURT EXPRESSLY USED THE REPORT TO SENTENCE MR. JONES TO DEATH, WITHOUT INFORMING MR. JONES THAT SHE WOULD DO SO, WITHOUT ENSURING THAT MR. JONES HAD A COPY OF THE REPORT, AND WITHOUT ALLOWING HIM THE OPPORTUNITY TO REBUT THE REPORT, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM VIII

IN CLOSING ARGUMENT AT SENTENCING, THE PROSECUTOR REDUCED THE JURORS' SENSE OF RESPONSIBILITY, AND URGED THE RECOMMENDATION OF A DEATH SENTENCE BASED ON IRRELEVANT AND INFLAMMATORY MATTERS TOTALLY DIVORCED FROM ANY LEGITIMATE SENTENCING CONCERN, THEREBY FOSTERING AN UNRELIABLE SENTENCING DETERMINATION, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

CLAIM IX

MR. JONES DID NOT KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY WAIVE HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS, AND THE FAILURE TO ANALYZE THESE

"WAIVERS" IN LIGHT OF MR. JONES' BRAIN DAMAGE VIOLATED HIS DUE PROCESS RIGHTS

CLAIM X

BECAUSE THERE WAS NO JURY FINDING THAT MR. JONES KILLED OR INTENDED TO KILL, THE IMPOSITION OF DEATH VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XI

BECAUSE OF THE ACTIONS AND INACTIONS BY THE TRIAL COURT, AND THE ACTIONS OF THE STATE AT THE TRIAL IN THIS CAUSE, FUNDAMENTAL ERROR OF CONSTITUTIONAL SIGNIFICANCE OCCURRED DURING MR. JONES' TRIAL, AND THE CUMULATIVE EFFECT OF THE CONSTITUTIONAL ERROR DENIED MR. JONES OF HIS RIGHT TO FAIR TRIAL AND DUE PROCESS OF LAW.

A hearing was held on October 31, 1985, at which time the trial court denied the motion without an evidentiary hearing. (R2 47).

Defendant appealed, raising the following issues, verbatim:

I.

THIS COURT SHOULD STAY MR. JONES' EXECUTION AND REMAND THE CASE FOR AN EVIDENTIARY HEARING BEFORE THE TRIAL COURT TO DETERMINE WHETHER MR. JONES WAS COMPETENT TO STAND TRIAL, AND WHETHER THE TRIAL COURT SHOULD HAVE SUA SPONTE CONDUCTED A COMPETENCY HEARING IN 1981
(CLAIMS I AND II)

CLAIM III [sic]

PRETRIAL, TRIAL, AND ADVISORY COUNSEL CONDUCTED NO OR GROSSLY INADEQUATE INVESTIGATION INTO MR. JONES' MENTAL CONDITION, TO MR. JONES' SUBSTANTIAL PREJUDICE, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

CLAIM IV

BECAUSE NEITHER THE TRIAL COURT NOR DEFENSE COUNSEL CONDUCTED ANY INVESTIGATION INTO MR. JONES' BACKGROUND

AND MENTAL CONDITION, SUBSTANTIAL DEFENSES TO THE CHARGES WERE NOT DISCOVERED, AND MR. JONES WAS DENIED AN EFFECTIVE DEFENSE AND A RELIABLE, MEANINGFUL, INDIVIDUALIZED SENTENCING DETERMINATION, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

CLAIM V

THE TRIAL COURT VIOLATED MR. JONES' FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND EQUAL PROTECTION BY REFUSING TO APPOINT A PSYCHIATRIST TO EVALUATE MR. JONES CONCERNING THE FULL PANOPLY OF MITIGATING CIRCUMSTANCES, AND THE RESULTING DEATH SENTENCES ARE FUNDAMENTALLY UNRELIABLE, IN VIOLATION OF THE EIGHTH AMENDMENT

CLAIM VI

MR. JONES WAS DEPRIVED OF HIS RIGHT TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN A PSYCHIATRIST APPOINTED POST-TRIAL AND PRESENTENCING TO CONDUCT A LIMITED EVALUATION WAS UNABLE AND FAILED TO CONDUCT AN A APPROPRIATE AND COMPETENT EVALUATION

CLAIM VII

THE TRIAL COURT OFFERED MR. JONES A PSYCHIATRIC EXAMINATION, AND INFORMED MR. JONES THAT HE COULD USE OR REFUSE TO USE THAT PSYCHIATRIST IN MITIGATION; AFTER THE "CONFIDENTIAL" EXAMINATION WAS CONDUCTED, MR. JONES DECLINED TO USE THE PSYCHIATRIST, WHEREUPON THE PSYCHIATRIST SENT A CONFIDENTIAL REPORT OF HIS DEALINGS WITH MR. JONES TO THE COURT; THE COURT EXPRESSLY USED THE REPORT TO SENTENCE MR. JONES TO DEATH, WITHOUT INFORMING MR. JONES THAT SHE WOULD DO SO, WITHOUT ENSURING THAT MR. JONES HAD A COPY OF THE REPORT, AND WITHOUT ALLOWING HIM THE OPPORTUNITY TO REBUT THE REPORT, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM VIII

IN CLOSING ARGUMENT AT SENTENCING, THE PROSECUTOR REDUCED THE JURORS' SENSE OF RESPONSIBILITY, AND URGED THE RECOMMENDATION OF A DEATH SENTENCE BASED ON IRRELEVANT AND INFLAMMATORY MATTERS TOTALLY DIVORCED FROM ANY LEGITIMATE SENTENCING CONCERN, THEREBY FOSTERING AN UNRELIABLE SENTENCING DETERMINATION, IN VIOLATION OF THE

EIGHTH AND FOURTEENTH AMENDMENTS

CLAIM IX

MR. JONES DID NOT KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY WAIVE HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS, AND THE FAILURE TO ANALYZE THESE "WAIVERS" IN LIGHT OF MR. JONES' BRAIN DAMAGE VIOLATED HIS DUE PROCESS RIGHTS

CLAIM X

BECAUSE THERE WAS NO JURY FINDING THAT MR. JONES KILLED OR INTENDED TO KILL, THE IMPOSITION OF DEATH VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XI

BECAUSE OF THE ACTIONS AND INACTIONS BY THE TRIAL COURT, AND THE ACTIONS OF THE STATE AT THE TRIAL IN THIS CAUSE, FUNDAMENTAL ERROR OF CONSTITUTIONAL SIGNIFICANCE OCCURRED DURING MR. JONES' TRIAL, AND THE CUMULATIVE EFFECT OF THE CONSTITUTIONAL ERROR DENIED MR. JONES OF HIS RIGHT TO FAIR TRIAL AND DUE PROCESS OF LAW.

On November 4, 1985, this court, having previously granted a stay of execution, reversed and remanded the case:

> The gist of Jones's claim is that he was incompetent to stand trial. In support, Jones has filed affidavits from his lawyers opining that he was incompetent to stand trial and from various doctors opining that he suffers from organic brain damage and was and is incompetent to stand trial. The state urges that these affidavits are refuted by the trial record which shows that Jones was competent to stand trial and that the trial court did not err in denying the motion without an evidentiary hearing. Whatever the ultimate merits of the respective positions, we do not agree that the motion, files, and records conclusively show that Jones is not entitled to any relief. We reverse and remand with instructions that Jones be granted an evidentiary hearing.

Jones v. State, 478 So. 2d 346, 347 (Fla. 1985).

On September 12, 1986, Defendant filed a petition for writ of

prohibition in this court, seeking to recuse Judge Korvick, who had presided over the trial and first R. 3.850 proceedings. The petition was denied on December 29, 1986. Jones v. Korvick, 501 So. 2d 1283 (Fla. 1986).

On April 6, 1995, Defendant filed an amended motion for post-conviction relief, raising the following issues, verbatim:

CLAIM I

SUBJECTING MR. JONES TO TRIAL WHILE HE WAS INCOMPETENT VIOLATED HIS CONSTITUTIONAL RIGHTS.

CLAIM II

THE ABSENCE OF ANY INQUIRY BY THE TRIAL COURT OR THE PRETRIAL HEARING JUDGES INTO MR. JONES' COMPETENCY AFTER THE ISSUE WAS SUFFICIENTLY RAISED VIOLATED MR. JONES' SIXTH, EIGHTH AND FOURTEENTH AMENDMENT DUE PROCESS RIGHTS AND HIS RIGHTS GUARANTEED BY ARTICLE I, SECTIONS 9, 16, AND 21 OF THE FLORIDA CONSTITUTION.

CLAIM III

THE STATE WITHHELD HIGHLY MATERIAL EXCULPATORY EVIDENCE IN VIOLATION OF BRADY V. MARYLAND AND ITS PROGENY, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND ARTICLE 1, SECTIONS 9, 16, and 21 OF THE FLORIDA CONSTITUTION.

CLAIM IV

THE STATE ENGAGED IN EGREGIOUS MISCONDUCT DURING TRIAL IN PURSUING A THEORY THEY KNEW WAS FLATLY CONTRARY TO THE EVIDENCE AND THAT MATERIALLY AFFECTED THE OUTCOME OF THE CASE IN VIOLATION OF MR. JONES' FUNDAMENTAL DUE PROCESS RIGHT TO A FAIR TRIAL AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND ARTICLE 1, SECTIONS 9, 16, and 21 OF THE FLORIDA CONSTITUTION.

CLAIM V

THE STATE'S EVIDENCE OF TAMPERING WITH A DEFENSE WITNESS AND ITS KNOWING PRESENTATION OF FALSE EVIDENCE VIOLATED RONNIE JONES' FUNDAMENTAL DUE PROCESS RIGHT TO A FAIR TRIAL AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 9, 16, AND 21 OF THE FLORIDA CONSTITUTION.

CLAIM VI

PRETRIAL, TRIAL AND ADVISORY COUNSEL CONDUCTED NO OR A GROSSLY INADEQUATE INVESTIGATION INTO MR. JONES' MENTAL CONDITION, TO MR. JONES' SUBSTANTIAL PREJUDICE, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9, 16, AND 21 OF THE FLORIDA CONSTITUTION.

CLAIM VII

BECAUSE DEFENSE COUNSEL FAILED TO CONDUCT ANY INVESTIGATION INTO MR. JONES' BACKGROUND AND MENTAL CONDITION, SUBSTANTIAL DEFENSES TO THE CHARGES WERE NOT DISCOVERED, AND MR. JONES WAS DENIED AN EFFECTIVE DEFENSE AND A RELIABLE, MEANINGFUL, INDIVIDUALIZED SENTENCING DETERMINATION, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTIONS 9, 16, 17, AND 21 OF THE FLORIDA CONSTITUTION.

CLAIM VIII

THE TRIAL COURT VIOLATED MR. JONES' RIGHTS TO DUE PROCESS AND EQUAL PROTECTION BY FAILING TO APPOINT A PSYCHIATRIST PRIOR TO TRIAL TO DETERMINE JONES' COMPETENCY TO WAIVE HIS RIGHT TO COUNSEL AND TO DEVELOP GUILT PHASE DEFENSES, AND BY RESTRICTING THE PSYCHIATRIC EXAMINATION PRIOR TO THE PENALTY PHASE TO A SINGLE MITIGATING FACTOR, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTIONS 9, 16 AND 21 OF THE FLORIDA CONSTITUTION.

CLAIM IX

THE TRIAL COURT VIOLATED MR. JONES' CONSTITUTIONAL RIGHTS BY OFFERING HIM A PSYCHIATRIC EXAMINATION THAT HE COULD USE OR REFUSE TO USE IN MITIGATION AND THEN, WHEN MR. JONES DECLINED TO USE THE PSYCHIATRIST, USING THE PSYCHIATRIST'S "CONFIDENTIAL" REPORT TO SENTENCE MR.

JONES TO DEATH, WITHOUT INFORMING MR. JONES THAT SHE WOULD DO SO, WITHOUT ENSURING THAT MR. JONES HAD A COPY OF THE REPORT, AND WITHOUT ALLOWING HIM THE OPPORTUNITY TO REBUT THE REPORT.

CLAIM X

IN CLOSING ARGUMENT AT SENTENCING, THE PROSECUTOR MISLED THE JURORS' CONCERNING THEIR SENTENCING RESPONSIBILITY, AND URGED THE RECOMMENDATION OF A DEATH SENTENCE BASED ON IRRELEVANT AND INFLAMMATORY MATTERS TOTALLY DIVORCED FROM ANY LEGITIMATE SENTENCING CONCERN.

CLAIM XI

MR. JONES DID NOT KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY WAIVE HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS AS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES, OR ARTICLE I, SECTIONS 9, 16, AND 21 RIGHTS AS GUARANTEED BY THE FLORIDA CONSTITUTION, AND THE FAILURE TO ANALYZE THESE "WAIVERS" IN LIGHT OF MR. JONES' BRAIN DAMAGE VIOLATED HIS DUE PROCESS RIGHTS.

CLAIM XII

BECAUSE THERE WAS NO JURY FINDING THAT MR. JONES KILLED OR INTENDED TO KILL, THE IMPOSITION OF DEATH VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XIII

THE STATE'S KNOWING USE OF FALSE TESTIMONY PREJUDICED RONNIE JONES AND DEPRIVED HIM OF A FAIR TRIAL AND DUE PROCESS AS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES AND THE FLORIDA CONSTITUTION.

(R 406-550). The trial court ordered an evidentiary hearing on the issues of competency, deferring the remaining issues until after the completion of that proceeding. (R 63)

The hearing was held on February 18-20, 1997. The testimony of the witnesses will be examined in depth in the argument portion

of the brief. In summary, the defense called three mental health witnesses. The first was Albert Jaslow, the psychiatrist who had examined Defendant prior to the penalty phase of the trial to determine his capacity to appreciate the criminality of his conduct, who generally testified that although his examination of Defendant was relatively brief and narrowly focused, he did not recall or record any indications that Defendant might not be competent, although he did have an impression that Defendant might have been malingering. (R 642-53). Jaslow also found that Defendant did not suffer from any major mental disorder. Likewise, if he had noted any evidence of brain damage from Defendant's responses, he would have recommended further testing to determine the nature or extent of such damage, which he did not do. (R 654-55). The second was psychiatrist Richard Dudley, who examined Defendant in 1991 and opined that Defendant was presently competent but had been incompetent at the time of trial because he suffered from organic brain damage and a paranoid delusional syndrome. (R 679-793). Defendant's final expert was psychologist Barry Crown who examined Defendant in 1985, and concluded that Defendant was incompetent both at the time of trial and at the time of the hearing, based upon Defendant's alleged organic brain damage. Crown did not, however conclude that Defendant had any paranoid delusional disorder. (R 842-77).

The defense also called two of the legion of attorneys that were appointed to represent Defendant during the pretrial proceedings, Martin Nathan and Joe Kershaw, although neither had spent more than a few minutes with Defendant at that time. (R 671-78, 800-05). The defense also called now-circuit judge Thomas Wilson, who had been appointed Defendant's standby counsel after he chose to represent himself at trial. Judge Wilson also had little contact with Defendant or recollection of Defendant or his mental health. (R 904-10).

The remaining two defense witness were Defendant's sister, Dorothy Hanes, and fellow inmate Samuel Louis Fuller, who gave highly inconsistent and improbable testimony about Defendant's alleged drug use at the time of trial. (R. 806-826, 827-842).

In rebuttal, the State called Jay Weinstein, who was the head of neuropsychology at Jackson Memorial Hospital and a professor with the University of Miami School of Medicine. Dr. Weinstein examined Defendant extensively in 1991 and concluded that Defendant was largely malingering during his testing, and that Defendant showed no signs whatsoever of suffering from any organic brain damage. (R 879-945). The final witness was Detective Donald Blocker, who was the lead detective in the murder investigation, and who testified as to his impressions of Defendant's mental

status during interviews he conducted with him in July 1980 and February 1981. (R. 947-72).

Thereafter, after taking the matter under advisement, the court denied relief, and this appeal follows.

SUMMARY OF THE ARGUMENT

1. Defendant asserts that the prosecutor improperly presented at a trial a gun that he knew could not have been the murder weapon. This claim, based on language in a ballistics report is without merit where the record reflects that the ballistics findings were equivocal and other evidence strongly indicated that the gun was in fact the murder weapon. Moreover, the purported error would have been harmless where the evidence of Defendant's guilt, including two eyewitness identifications, fingerprint evidence, and proceeds of the crime discovered in Defendant's bedroom, was overwhelming, even without the gun. Finally, Defendant's claims regarding closing argument are procedurally barred as they could have been raised on direct appeal.

2. Defendant's claim of prosecutorial misconduct regarding the comments on the fingerprint evidence during closing argument is procedurally barred because it should have been raised on direct appeal, and/or is untimely. Moreover, the argument was not improper. Finally, any error would be harmless beyond a reasonable doubt, given the overwhelming evidence of guilt, particularly since the fingerprint issue was thoroughly aired by both sides both during trial and during closing.

3. The trial court had abundant basis to reject Defendant's claim that he was not competent to stand trial where his expert findings were refuted by the State, and factually unsupported, and where there was abundant contemporaneous evidence of Defendant's competence at the time of trial.

4. Defendant's final claim, that trial counsel were ineffective for failing to request a competency evaluation is without merit where Defendant was in fact competent.

ARGUMENT

I.

THE RECORD REFUTES DEFENDANT'S CLAIM THAT ALLEGED PROSECUTORIAL MISCONDUCT RENDERED HIS TRIAL FUNDAMENTALLY UNFAIR.

Defendant's first claim is that the prosecutor improperly misled the jury regarding the murder weapon. The trial court properly denied this claim without an evidentiary hearing where the record refutes the contention that the State acted improperly. However, even accepting Defendant's claim of prosecutorial impropriety, the record establishes that the prosecutor's alleged misconduct could not have affected the outcome of the proceedings. Finally, Defendant's claims regarding closing argument are procedurally barred.

The gravamen of Defendant's claim is that the State introduced into evidence as the murder weapon a gun that the prosecutor purportedly knew had not fired the bullets recovered from the scene. He bases this claim on a ballistics report in which it was opined that certain bullets submitted for analysis "probably" were not fired from the gun that was introduced at trial.[5] However,

---

[5] Defendant cannot claim a violation of Brady v. Maryland, 373 U.S. 83 (1963). The facts on which this claim is based were known to Defendant at trial. Indeed, Defendant initially attempted to introduce the ballistics report, but the State objected, and the court informed Defendant that he would have to call the author of the report, Hart. (R1 1616). Hart was subpoenaed on Defendant's behalf, but Defendant affirmatively elected not to call him as a matter of "strategy." (R1 1618, 1628-29, 1685). Consistent with

there was ample basis, regardless of the ballistics report, for a good-faith belief that the gun was in fact the murder weapon. Moreover, even if an evidentiary inquiry would have been required to resolve the issue of the propriety of the prosecutor's presentation of the evidence, there remains the question of whether the alleged impropriety casts doubt on the reliability of the verdict. Given the quantity and quality of the other evidence before the court, the record decisively refutes the notion that a differing outcome would have obtained, even had the gun not been mentioned at all.

The gun that was introduced into evidence was a distinctive chrome Ruger with a long (six-inch) barrel and a brown handle. It was found under the pillow on which Defendant was sleeping at the time of his arrest slightly more than 24 hours after the murders. (R1 1272). It was of the same caliber as the bullets recovered at the scene. The ballistics report on which Defendant relies, while stating that the comparison bullets were "probably not" fired from the Ruger or the other .38[6] submitted for evaluation, also notes that they were probably fired by a Ruger, a Taurus, or a Smith &

---

this strategy, Defendant then argued in closing that there was no evidence that the gun in evidence was in fact the murder weapon, pointing out, no less than four times, that no ballistics evidence had been presented. (R1 1775, 1781, 1783, 1784).

[6] This gun belonged to the victim Uptgrow, and was found locked in the hall closet after the murders.

Wesson. The report further notes that the opinion is based on "a lack of similar individual characteristics." There is no indication in the report that there were inconsistent characteristics, only insufficiently similar ones. Moreover, according to the police reports, Detective Blocker spoke with firearms examiner Hart on July 10, 1980, the day after Hart prepared the ballistics report. Hart told Blocker that the bullets were probably not fired by the Ruger, but also stated that the bullets "could have been" fired by the Ruger, and that "he was unable to eliminate them from consideration." (SR 350). Thus, the ballistics conclusions were equivocal. The other evidence strongly suggested, however, that this gun, with which Defendant just happened to be sleeping the day after the murders, was in fact the murder weapon.[7]

David Lynch, one of the surviving witnesses, testified that the gun Defendant had at the murder scene was silver with a brownish grip and had a long barrel. (R1 958). Lynch further testified that it resembled the Ruger that was introduced into evidence. (R1 960). Of particular note, Lynch gave the same description of the gun, chrome with a brown handle and a six-inch barrel, in his stenographically recorded statement to the police

---

[7] This equivocation was undoubtedly the reason for Defendant's "strategy" of not calling Hart.

that he gave at 6:00 a.m. the day of the murder, some 22 hours before Defendant was arrested and the Ruger was recovered. (SR 100).

Anthony McDonald, who had fled the scene with Lynch and avoided harm, also testified that the gun Defendant used, a long chrome pistol with a brown handle, looked like the Ruger. (R1 1019). And as with Lynch, Detective Blocker also interviewed McDonald at 4:20 a.m. on the day of the murder, again, a whole day before Defendant was arrested and the Ruger was recovered. (SR 327). According to the police report, at that time McDonald told Blocker that the gun was silver with a brown handle and an extra-long barrel. (SR 329). In his recorded statement taken the morning of the murder, McDonald described the gun as being a large silver revolver. (SR 113).

Gloria Tillman testified at trial that the Ruger appeared to be the same long silver gun with a brown handle that Defendant had fired at a wall the day before the crimes,[8] and with which she had also seen him the after the murders. (R1 1181-1184). She stated that Defendant put the gun under his pillow when he went to bed the

---

[8] Defendant himself told the police when he was arrested on Thursday, July 3, 1980, that he had had the gun since the "previous Monday." (R1 1506). The crime was committed in the early morning hours of Wednesday, July 2, 1980.

night he was arrested, and that it was the same gun that was introduced at trial. (R1 1191). According to the police reports, Tillman had related all of this information to the police a few days after the murder. (SR 343).

Given the foregoing evidence, the prosecutor was fully justified in arguing that the Ruger was the murder weapon. As such, Defendant's claim of prosecutorial misconduct in presenting it is clearly without merit.

Even assuming arguendo, that this evidence were insufficient to refute Defendant's claims, the record conclusively refutes Defendant's contention that the alleged impropriety casts doubt on the soundness of the verdict. The following evidence, wholly apart from the gun, established Defendant's guilt of the three execution-style murders and the other crimes well beyond any reasonable doubt.

David Lynch testified that he went to John Uptgrow's house with Raymond Fleming and Byron Hamilton around 10:00 p.m. on the night of the murders. When they got there, Uptgrow, Hamilton's cousin, Bernard Hill, and Lynch's cousin, Anthony McDonald, were there. (R1 949). McKeva Smith subsequently arrived. (R1 950). Between midnight and 1:00 a.m. there was a knock on the door. (R1

951). After Uptgrow unlocked the door, two people came in, one of whom Lynch identified as Defendant. Fleming went to the bathroom at that point, and the second man sat on the couch where Fleming had been seated. The second man was not armed and did not threaten anyone. He never got up from the couch. (R1 960).

Defendant then showed Uptgrow a gun, and asked if he had any shells for it. (R1 960). Uptgrow asked Defendant why he needed shells, because the gun was already loaded. The conversation took place in the middle of the living room. (R1 961). Lynch talked to Defendant, and when Lynch touched the gun, Defendant told Lynch he did not want to get his fingerprints in it. (R1 962). Defendant then asked to talk to Uptgrow privately. Defendant and Uptgrow went down the hall to the bedroom. (R1 963). Then they heard a gunshot from the bedroom, about five seconds later. (R1 964). As soon as they heard the shots, Lynch and his cousin ran out the back door and hid in some bushes a block away for about fifteen minutes. (R1 965). They saw two police officers, and told them what happened. (R1 966). They eventually brought them to the house. (R1 967).

Lynch also testified that Uptgrow had a little black pouch that he usually kept in his hand. Lynch saw Uptgrow put a lot of money in it about twenty-five minutes before the shooting, all in

large bills. (R1 971-72). Uptgrow had the bag in his hand when he went into the back room with Defendant. (R1 973). As he usually did, Uptgrow was also wearing about nine or ten gold chains when Lynch last saw him. (R1 974). Hill was asleep on the couch when Uptgrow and Defendant went into the back room. (R1 975). Lynch subsequently picked Defendant out of a photographic lineup and identified him at trial. He was positive Defendant was the person at the apartment the night of the murders. (R1 976). Lynch also thought that he recognized a photo of a man named Clyde Fasen who might have been the other man, but he was not positive. He was positive about Defendant, however. (R1 977).

Uptgrow's nineteen-year-old brother, Anthony McDonald, also testified, giving a description of the events substantially the same as Lynch's. (R1 1007, 1010-27). Additionally, McDonald had been at Uptgrow's house the night before the incident with Uptgrow's roommate Anthony Williams. Uptgrow was not there, but Defendant was with Williams, who introduced Defendant to McDonald. (R1 1008-09). McDonald thus also positively identified Defendant as the person who was at the house the night of the murders. (R1 1009). Furthermore, McDonald was the person who initially answered the door when the knock came. He asked who was there and Defendant responded "Ronnie." (R1 1016). Defendant came in wearing a white

T-shirt. The other man was wearing dark clothes. McDonald never saw the other man threaten or harm anyone. (R1 1020). McDonald was also shown a photographic lineup, from which he identified Defendant. He was positive that Defendant was the man who came to the apartment and went to the back room with Uptgrow.[9] McDonald likewise described Uptgrow's small black pouch, in which he had a lot of money on the night of the murders. (R1 1028-31). McDonald also confirmed that Uptgrow had around ten gold chains on that night. (R1 1032).

Fleming also gave a similar description of the events. (R1 1042-43). About the time the knock came at the door, Fleming got up and went into the bathroom. (R1 1044). As he was going toward the bathroom, someone went to answer the door. He heard someone asking for shells or bullets. (R1 1045). Then he heard some shots. As he went to leave the bathroom, someone charged the door, like he was trying to break it down. The man came from the direction of the bedroom. Then several shots came through the door. (R1 1046). Fleming had stepped out of the bathroom, but went back in as soon as he realized what was going on. That was when the man tried to force the door. All Fleming saw was the

---

[9] The lead detective testified that McDonald's identification of Defendant was the quickest he had ever gotten. (R1 1489-90).

man's white T-shirt.[10] (R1 1047). Then the bullets came through the door. (R1 1048). There were about three shots. Fleming was not hit. He then waited about 15 minutes, hoping they would leave. Then he left the bathroom, and ran for the front door. (R1 1050). He could not open the front door, however, because it was locked and the key was missing. Then someone came out of the back room and shot him. (R1 1051). It was the man with the white T-shirt again. He got hit in the left elbow, and fell down and played dead. His "little cousin," Hamilton was lying there also and had been shot. Hamilton was still alive and moving around at that point. (R1 1052). When he got to the hospital, Fleming had a large bloody spot on the back of his shirt that did not come from his elbow. Hamilton had rolled over and had put his head where the blood stain was. After Fleming was shot, he heard someone say "don't move" about three times. Fleming played dead for about 15 to 20 minutes. Then he got up and checked to see whether anyone else had been hurt. (R1 1053). Uptgrow had been shot in the bedroom. (R1 1054). Hill had also been shot. Smith had also been shot, and was still sitting at the table. (R1 1055). After seeing that they had all been shot, Fleming ran out the back door to go get help. (R1 1057). He was hurt and bleeding at the time. The only ID he could offer of the shooter was that he was a black man

---

[10] As noted, the other witnesses testified that Defendant was wearing a white T-shirt, while the other man had on dark clothing.

with a white T-shirt. (R1 1060). Fleming did also note that Uptgrow was wearing a number of gold chains on the night of the murder that were not on him after he was shot. (R1 1056-57). Fleming also reiterated the information about Uptgrow's black pouch, observing that there was a lot of money in it, and that most of the night Uptgrow carried it around with him. (R1 1058-59).

Medical examiner Roger Mittelman testified regarding the cause of death of the murder victims. He found Hill, who was in his late teens, partially on the couch, having been shot in head (R1 1088-89). The wound was consistent with Hill having been shot while lying on the couch. (R1 1093). He had no additional injuries, defensive or otherwise. (R1 1094-95).

Uptgrow had also been shot in head just forward of the right ear. (R1 1096). The exit wound from the shot near the ear was consistent with Uptgrow having been shot from behind. (R1 1099). Uptgrow likewise had no additional injuries, defensive or otherwise. (R1 1096, 1100).

Mittelman did not examine Hamilton at the scene, because he was still alive when he was found, and had been taken to the hospital. Hamilton, like Hill, was in his teens and weighed 117 pounds. (R1 1100). Despite attempts to save him, Hamilton died

the same day. (R1 1101). Hamilton had an incision[11] at the left rearward part of his forehead, with evidence of a gunshot wound around incision site (R1 1102). Based upon the stippling pattern, Hamilton would have been shot from a distance of less than 18 inches (R1 1104). Like the other two victims, Hamilton had no defensive wounds and no other injuries. (R1 1107).

When the crime scene technician arrived, Smith was sitting at the kitchen table bleeding profusely. There was a puddle of blood under the chair. He had been shot in the head but was lucid.[12] (R1 1120). There was a dead man on the couch in the living room. (R1 1131). There were blood splatters on the front door and several bullet holes in the door (R1 1133). The nature of the holes indicated that the bullets had passed from the inside to the outside. There were bullet marks on the building across the yard (R1 1134). There were "inbound" gunshot holes in the bathroom door. (R1 1135). There were two holes above the knob and one below. (R1 1137). The third hole was fired at close range, as demonstrated by a powder burn surrounding the hole. The gun would have been less than a foot from the door. There was also a body lying on the floor of the bedroom. (R1 1138). That victim had a

---

[11] The incision was made by the medical staff during the attempts to save his life.

[12] Smith, however, had no recollection of the events of the evening. (R1 1517).

fine broken chain around his neck. There were a number of charms that appeared to have slipped off a necklace near the body. (R1 1139). There were no other chains in the house. A few more charms were found in the doorway to the bedroom. (R1 1140).

The day after the murders, Gloria Tillman accompanied Defendant to the home Walter Winfield. (R1 1184). While she was there, Defendant talked to someone on the phone, said "If them people come there again, tell them I don't have nothing to do with it." Then Defendant said to Tillman, "See the droplets on my fingers." (R1 1188). Defendant also said that if the police came, he would show them where the dead people were. After Winfield left, Defendant went into the bathroom and shaved off his beard. Defendant told her that he and his partner made $5900 and that he had received half. (R1 1190). Defendant then went to sleep and Tillman left. When she got home, she spoke with the police. (R1 1192). She identified a photo of Defendant, and showed the police where he was at Winfield's house. (R1 1193).

The police executed an arrest warrant at Winfield's apartment around 3:45 a.m. When they knocked on the door, Winfield answered it. (R1 1229). He slammed the door on the arm of one of the detectives, and the police then pushed the door open. (R1 1229-30). After they forced their way in, Winfield ran down the hall to

the bedroom. They found Defendant lying face-down on the bed. Defendant was waking and slid his hand under the pillow; one of the detectives put his gun to Defendant's head and told him not to move. (R1 1270). They handcuffed him on the bed, and recovered a revolver from under Defendant's pillow. (R1 1271-72). After the arrest, the police found a towel in bathroom with blood stains on it. (R1 1301). There was a pile of hair on the floor of bathroom. (R1 1302). The hair looked like it had been shaved off in one piece; it was matted. (R1 1419). On the living room coffee table, they found a newspaper opened to an article about the murders. (R1 1304, 1411).

Nina Howard testified that her sister, Rose Bailey, had dated Defendant, and that during June and early July of 1980, Defendant had lived with them. (R1 1248-49). The last time Howard saw Defendant was the day before the murders. (R1 1250). A while after the murders, Howard cleaned all of Defendant's stuff out of the room in which he had been staying, and found a black pouch in the bed. (R. 1251). There was a broken syringe in the pouch. (R1 1511). It was the same brand and had the same wrapping as numerous similar ones that were found at the scene of the murders.(R1 1512).

Uptgrow's sister, Birdella Marie Uptgrow, bought the pouch for Uptgrow two years before he was killed. She testified that he

always carried it. (R1 1324). She was able to conclusively identify the pouch that has been turned in by Howard as her brother's, both by appearance, and by the smell of a distinctive oil that Uptgrow used for "good luck." A lot of his possessions smelled like it. (R1 1334).

Ms. Uptgrow also testified that she was notified that Uptgrow had been murdered and arrived at his house around 8:15 a.m. the following morning, while the police were still investigating the scene. (R1 1328). While she was standing at the perimeter with her mother, a bronze Cadillac drove by very slowly. (R1 1330). There were 2 men and a woman in the car, and the man in the back seat was looking in the direction of the house and the people standing there. (R1 1331). He stared at her, too. Defendant was the man in the back seat. A few minutes later the car drove by slowly again. (R1 1332). She was three to four feet from Defendant when saw him in the car. (R1 1374). Later that day, as she was taking her brother's personal belongings from the house, the car went down the street in front of the house a third time. Again, Defendant was staring out the back window. (R1 1333).

Fingerprints belonging to Defendant were recovered from the phone in the bedroom, from an ashtray, and on a ceramic cat in the living room. (R1 1449, 1451-52). Of 238 latents gathered, 60 were

of value. Several belonged to the crime victims. One, recovered from Uptgrow's employment ID that was found on the back porch belonged to Clyde Fasen.[13] None of remaining 52 usable latents were matched to any known standards. (R1 1454-56).

After Defendant was arrested, he waived his rights and was interviewed. (R1 1496-99). Defendant stated that he was at the Palace Bar at the time of the murders, and denied knowing Uptgrow. He denied that he had ever been in the apartment. Defendant was shown photos of Uptgrow and Anthony Williams, but he denied knowing them. (R1 1505). Defendant subsequently contacted the police about seven months later. (R1 1518). After again waiving his rights, Defendant stated that he had not committed the murders, and reiterated his initial claims of being in the bar. (R1 1527-33). Defendant was told that the evidence was to the contrary. Defendant then stated that he would reveal the facts if he were guaranteed a ten-year maximum sentence. (R1 1534). The detective told Defendant that he first needed to know what information Defendant had, and that the prosecutor would make any determinations. He also told Defendant that anything he said would have to be corroborated. (R1 1535). Defendant then said that he accompanied three other men to the scene, that he was not aware of

---

[13] No witness was able to positively place Fasen inside the premises the night of murder. (R1 1603).

what was going to happen, and that two of them had gotten out of the car and went into Uptgrow's house. Defendant conceded he knew Uptgrow, to whom he referred as "Big John." (R1 1536). Defendant claimed that his cohorts had used his name to gain entry. After several minutes, Defendant heard gunfire, and then two men ran out of the back of the house. They said that they had had to shoot up the place to get what they came for. Defendant never admitted to being in the house. Defendant told him that the men had used a pair of .38 revolvers. He said that one of them was registered to one of the people who went into the apartment. (R1 1537). After the shooting, Defendant said they went to the yard of a former employer on Arcola Lake. (R1 1538). They threw the guns off the dock there. Defendant said his alleged accomplices declined to share the proceeds with him because he had been "too chicken" to go inside. On the day of the murders, however, Defendant had given $25.00 and a gold "C" charm to Bailey. (R1 1539). Defendant then agreed to take a polygraph to help corroborate his story. (R1 1540). Defendant then changed his story and asserted that he was aware that there was going to be a robbery and knew that Uptgrow had large sums of money. Defendant continued to deny, however, that he had entered the house. It was agreed that Defendant would take the polygraph and go to the scene of the alleged weapons disposal the next morning. (R1 1541).

Police divers searched Lake Arcola where Defendant indicated that the guns had been thrown, but because the lake bottom was very weedy and silted, any gun would have sunken into the muck and they would have been unable to find it, even with a metal detector. Nothing was recovered from the lake. (R1 1548-49). The next day, Defendant declined to take the polygraph. (R1 1550-51). The police were unable to verify any of the information that Defendant had given them. (R1 1552). There simply is no possibility that a jury would not have convicted Defendant on the foregoing evidence. As such, any purported impropriety would be harmless beyond a reasonable doubt.

Finally, to the extent that Defendant bases this claim on the State's closing argument, it is procedurally barred because there were no objections at trial and the issue was not raised on direct appeal. Moreover, even if the issue had been raised at trial, and presented on direct appeal, any error would have been harmless beyond a reasonable doubt, as discussed above. For the same reasons, had the issue been presented on direct appeal as fundamental error, the claim would have failed.

The comment in closing was to the effect that the bullets were too "flattened" to have allowed a ballistics comparison. While

this is undisputedly not an entirely[14] accurate statement, it neither added to nor detracted from the evidence of guilt actually presented. Defendant fails to persuasively explain how this brief comment could have affected the outcome of the proceedings. He alleges only that it "allowed the jury to reject the defendant's argument that the State had failed to present any ballistics evidence."[15] (CB 31). This contention defies logic. Regardless of the reason for the lack of ballistics evidence, the fact remained that none was presented. Thus, this contention would have failed had it been presented in a timely manner. Likewise, it cannot form the basis for any showing of prejudice as to the claim regarding the alleged impropriety of admitting the gun. Defendant's first claim should be rejected.

---

[14] Defendant alleges in his brief that "there was no evidence" to support the prosecutor's assertions. (CB 34, emphasis Defendant's). However, crime scene technician Turner had testified that the bullets recovered from the bathroom where Defendant shot at Fleming were "flattened." (R1 1444-45). Technician Stone testified that he also recovered a "flattened" projectile. Likewise, the medical examiner testified that the bullet retrieved from Uptgrow's head was "very deformed." (R1 1098). He further stated that "fragments" were recovered from Hamilton's brain and "portions of a bullet" were found in Hill's. (R1 1091, 1105). Thus the portion of Defendant's argument based on the alleged arguing of facts not in evidence is clearly without basis.

[15] See note 5, supra.

II.

DEFENDANT'S CLAIM OF PROSECUTORIAL MISCONDUCT RELATING TO THE FINGERPRINT EVIDENCE IS PROCEDURALLY BARRED AND WHOLLY WITHOUT SUBSTANTIVE MERIT.

In his second point, Defendant asserts that the trial court erred in rejecting the claim that the prosecutor misrepresented the fingerprint evidence in closing argument. This contention was raised for the first time in an amended Rule 3.850 motion that was filed nearly ten years after the original motion. As such the claim is time-barred. Even were it not, it would be procedurally barred as an issue that clearly could have been raised on direct appeal. Finally, Defendant's contentions are substantively without merit, where the comments in question properly reflected the evidence adduced and the import of the fingerprint evidence was exhaustively argued to the jury by both sides.

Defendant filed his original Rule 3.850 motion on October 29, 1985. This court remanded this case after reversing the denial of that motion in 1986. The instant claim was in no way presented to the court below until Defendant filed his amended 3.850 motion on April 6, 1995. As such this claim is clearly time-barred.[16] Although a motion for post-conviction relief may be freely amended, any amended claim must still be timely raised. The instant claim

---

[16] Contrary to the focus of Defendant's argument, this claim is barred not because it is successive, but because it is untimely.

was not raised until nearly eleven years after Defendant's conviction and sentence became final, and eight years after the expiration of the grace period incorporated into Rule 3.850 when the time limitations were added to it. Moreover, contrary to Defendant's claims, this issue is wholly unrelated to any of the other claims previously presented. As such there is no "relation back" that allows the time bar to overlooked. As such this claim was properly rejected below.

Moreover, even were this claim not time-barred, it is based wholly upon evidence presented and argument made at trial. As such, it could or should have been raised on direct appeal, and is therefore procedurally barred. Rose v. State, 675 So. 2d 567, 569 (Fla. 1996)(claims of improper prosecutorial argument should be raised on direct appeal, and are therefore barred from consideration in post-conviction proceedings); Card v. State, 652 So. 2d 344 (1995)(same). Defendant notes, (CB 49 n.12), that "in an abundance of caution" he has also presented this claim in his habeas petition, asserting ineffectiveness of appellate and post-conviction counsel. As will be discussed in the response thereto, appellate counsel was not ineffective for failing to raise an issue that was nonmeritorious, and which, in any event, was not preserved

for appellate review.[17] As for the claim regarding prior post-conviction counsel, it is well settled that alleged ineffectiveness of collateral counsel presents no basis for relief.

Even were this court to reach this claim, its lack of merit would be apparent. The record shows that all the facts that are now alleged regarding the fingerprint evidence were fully presented to the jury at trial, and the prosecutor's comments when taken in context were reasonable comment on the evidence.

Defendant complains of several comments regarding the fingerprints. In the first cited comment, (CB 54), the prosecutor stated that Defendant's fingerprints were found in several locations in the apartment. This was absolutely true. He then stated that no other prints were found other than the elimination prints. Defendant avers that this was a lie because a total of 52 usable latents were recovered. In the context of the argument, however, it is plain the prosecutor was referring to the matches. Moreover, that a substantial number of usable prints were recovered, but that only a small number of them were identified, was thoroughly presented to the jury both on direct and cross examination of the fingerprint analyst. (R1 1453-65). That this

---

[17] As Defendant proceeded pro se at trial there can be no claim of ineffectiveness of trial counsel in failing to preserve the issue.

argument could have in some way misled the jury simply defies reason. The remaining cited comments are all of the same tenor, and although Defendant quibbles over the use of the word "identifiable," the evidence before the jury and the context of the argument make it clear the prosecutor was referring to the latents that had actually been matched to known standards. This claim is simply without merit.

Finally, Defendant asserts that the alleged error is such that "harmless error analysis need not even be reached." (CB 57). Defendant is incorrect. Defendant overlooks clear precedent that alleged prosecutorial misconduct in closing argument is always subject to harmless error analysis. Moreover, the alleged impropriety here would plainly be harmless beyond a reasonable doubt. As discussed with regard to Point I, Defendant was clearly identified by two of the surviving witnesses, one of whom had met him before. Although one of Facen's fingerprints was found at the scene, none of the witnesses could positively identify him as one of the participants. More importantly, the testimony was undisputed that Defendant was the one with the gun; Defendant was the sole person in the room with Uptgrow when he was shot; Defendant was the sole person present wearing a white T-shirt, which the third survivor stated the person who shot him was wearing; Defendant was the person under whose bed Uptgrow's purse

was found; Defendant was the man seen by Uptgrow's sister circling the scene of the crime the morning after the murders; and Defendant was the person who bought the newspaper that was found on the coffee table where he was living, open to an article about the murders. In view of this evidence of identity, any comment by the State regarding fingerprints, particularly where, as Defendant notes, the jury was informed that Defendant had allegedly been the house two days earlier, could not possibly have affected the outcome of the proceedings. This claim is wholly without merit, and was properly rejected below.

III.

THE TRIAL COURT HAD ABUNDANT EVIDENCE UPON WHICH IT COULD PROPERLY REJECT DEFENDANT'S CLAIM THAT HE WAS INCOMPETENT TO STAND TRIAL.

Defendant's third claim is that trial court erred in rejecting, after an evidentiary hearing, his competency claims. Defendant appears actually to present two substantive claims: that he was denied the right to a competency hearing at the time of trial in violation of Pate v. Robinson, 383 U.S. 375 (1966), and that under Drope v. Missouri, 420 U.S. 162 (1975), his right to due process was violated because he was tried while actually incompetent. These claims are legally distinct, yet Defendant confuses the issue by intermingling them in his argument. As will be seen, a Pate claim must be raised on direct appeal, or will be procedurally barred, as is the case here. Defendant's Drope claim is not subject to procedural bar, but was properly found to be without merit where there was abundant contemporaneous evidence of Defendant's competence at the time of trial, and his post hoc expert testimony was simply not credible. Additionally, Defendant's claim that a criminal discovery deposition was admissible as substantive evidence is wholly without merit under well-established precedent and the Rules of Criminal Procedure. Finally, Defendant's contention that the order denying relief was inadequate would be harmless, even were it meritorious.

Defendant's analysis of this issue indiscriminately relies on cases that address Pate or Drope claims while failing to distinguish between the two. These claims are not, however, interchangeable. The first pertinent distinction is that "Pate claims can and must be raised on direct appeal." James v. Singletary, 957 F.2d 1562, 1572 (11th Cir. 1992); accord Christopher v. State, 416 So. 2d 450, 452 (Fla. 1982)(claim alleging on post-conviction review that trial court failed to conduct competency evaluations procedurally barred as claim that could or should have been raised on direct appeal). Defendant failed to raise any issue as to the trial court's alleged failure to conduct a competency evaluation on direct appeal, and as such, to the extent the present claim is based on such a default, it is procedurally barred. Therefore, the only claim that was properly before the court below in these post-conviction proceedings is that presented under Drope.

Moreover, the distinction is not merely a matter of semantics, because the the two claims are evaluated differently:

> To put it bluntly, a Pate claim is a substantive incompetency claim with a presumption of incompetency and a resulting reversal of the proof burdens on the competency issue.

James, 957 F.2d at 1571. In a Drope claim, however, the defendant, like any defendant, is presumed competent, and the defendant retains the burden of proving that he was not. Id. Yet the vast

majority of cases cited by Defendant involve Pate claims and were decided on direct appeal.[18] Defendant relies on one case of relevance to the issue properly before the Court: Mason v. State, 597 So. 2d 776 (Fla. 1992). Although Mason provides the correct framework for review, it does not support Defendant's position. Indeed, in Mason, this court affirmed the trial court's rejection of the defendant's claims of incompetency to stand trial. As will be seen, the trial court below also properly rejected Defendant's claims.

Contrary to Defendant's assertions, the joint issues presented in a Drope claim, whether a retrospective competency evaluation is possible and whether the defendant was in fact competent, cannot be neatly divorced. Indeed, they rely largely upon the same evidence. See Mason, 597 So. 2d at 777-79 (addressing the two issues jointly). Here there was abundant evidence regarding Defendant's competency, as well as equally abundant evidence showing the weakness of the defense experts' claims to the contrary. Of importance, most of this evidence dated from the time of trial.

---

[18] Hill v. State, 473 So. 2d 1253 (Fla. 1985), is the sole exception. Despite its citation to Christopher, in which an identical Pate claim was held procedurally barred, the Court in Hill found Pate error on post-conviction review. With due respect to the Court, the State submits that Hill was an anomaly, was wrongly decided, and clearly does not reflect the current state of the law as expressed in James v. Singletary.

Defendant relies heavily on Mason's observation that the defendant in that case had two competency examinations at the time of trial, in contrast to the limited examination conducted before the penalty phase in this case. While it is true that Dr. Jaslow's mandate was limited to the existence of the "capacity to conform" mitigator, the evidence showed that Defendant presented no obvious signs of incompetence to the doctor, and indeed showed evidence of malingering. Moreover, Mason does not rely alone on the contemporaneous psychological evaluations but also on the "lay witnesses" and the transcript of the defendant's trial testimony, which stood "in stark contrast to the predictions of Mason's mental health experts." Here, there was lay witness testimony and the judge's own recollections[19] regarding Defendant's demeanor and behavior. Most telling, however, is the transcript, not merely of Defendant's testimony, but of his active participation as his own counsel during some two weeks of trial. The record is replete with proof that Defendant understood the issues, the penalties, the adversary nature of the process, the roles of the parties, and above all, the facts of the case to a degree that would rival that of many defense counsel. He formulated strategy, competently

---

[19] Defendant's case is likely the only capital murder trial that the judge has ever tried that involved five shooting victims, and in which the defendant represented himself. As such, it would be surprising if the memory were not strong in the judge's mind. The judge also tried Defendant in a robbery case three years later.

cross-examined witnesses, relevantly objected, succeeded in getting evidence suppressed, and comported himself appropriately.[20] Perhaps not all the strategies he chose were well-advised, but that is why defendants are warned of the perils of self-representation. Nothing, however, suggests that Defendant was anything but competent within in the meaning of Drope, Dusky v. United States, 362 U.S. 402 (1960), and Fla. R. Crim. P. 3.210. On the other hand, the testimony of the defense witnesses was largely contradicted by the facts, and to a large extent, refuted by the State's expert. Defendant's assertions, (CB 75), that the State's expert did not rebut the defense claims do not survive any reasonable reading of the record. As expert testimony of dubious factual basis may be rejected even if uncontradicted, the trial court plainly did not abuse its discretion in rejecting that of Defendant's hired doctors here.

---

[20] Defendant has attempted to paint his trial behavior as "bizarre," (CB 13), presumably relying on Defendant's contumacious behavior and outburst of song the first day of trial after yet another of his dilatory requests was denied. The judge ordered him restrained, and the State proceeded with the examination of its first witness. (R1 934-48). At the conclusion of the direct examination, Defendant promised to behave himself if released:

> THE DEFENDANT: I'd like to cross-examine the witness, and I'd like to say that I will conduct myself in a manner respectable if I'm unhandcuffed."

(R1 977-78). Defendant behaved appropriately throughout the remainder of the two-week trial.

Although Defendant had the burden of overcoming the presumption of competency,[21] the State will address the testimony of the State's expert first, because it shows that the trial court indeed had ample basis, even beyond the inconsistent and improbable nature of the defense presentation, to reject the claim of incompetency.

The State presented the testimony of clinical neuropsychologist Jay Weinstein. (R 880). Dr. Weinstein is the director of neuropsychology at Jackson Memorial Hospital in Miami, and a professor at the University of Miami School of Medicine in the Department of Psychiatry. His work focused on brain injuries as a result of drugs and malnutrition, but primarily because of physical trauma. (R 881). He had taught courses in brain trauma 50 or 75 times. He had testified in court a few dozen times, and many more times in depositions. (R 882).

Weinstein examined Defendant on July 2 & 3, 1991. (R 883). He examined Defendant to determine the presence of any brain damage, and conducted testing at that time. (R 884). Defendant did not engage in any bizarre or unusual behavior. Weinstein would

---

[21] Defendant expends considerable ink debating which side had the burden of establishing that a nunc pro tunc competency determination was possible. However, Defendant presented two experts, both of whom opined that such a determination was possible in this case. As such, Defendant may not now argue the trial court erred in accepting those opinions.

place importance on a person's performance being inconsistent from one test to another. (R 885). Depending on the profile of the inconsistencies, it could reflect on the person's motivation and whether the deficits were consistent with the alleged or documented brain injury or illness. He had seen Crown's report in which there was reliance on a gunshot injury as the cause of brain damage. If there had been a right-side head injury, Weinstein would expect to see some damage to motor skills or functions. (R 886). The deficit would be on the opposite side of the body.

Weinstein administered the finger tapping and pegboard tests to Defendant. (R 887). Both measure motor function. On the fingertapping Defendant scored normal on the right and below normal on the left. On the peg test, the results were opposite. There would be no medical explanation for such a result. It would be inconsistent with neuroanatomy, and inconsistent with having damage on one side or the other. (R 888). On the visual field examination, which would indicate impairment on one side or the other, Defendant demonstrated difficulties on both sides. (R 889). It would be highly unusual to have problems on both sides, and this raised more questions about Defendant's performance.

In the figure drawing test, a person is given a blank sheet and told to copy a design from another paper. Difficulty in

copying could indicate visual analysis problems, motor problems, or visual-spatial problems. (R 890). Defendant's drawing was very accurate. It did not indicate brain damage. (R 891). The dog drawing, which was the version given, was one of the more complex shapes in the testing process. In the motor free test, Defendant was asked to look at a variety of shapes and compare them, maybe four, such as a circle, a triangle, etc. to see if he could match circle to circle, triangle to triangle, etc., or shown four very similar designs, and asked to pick out the one with a square embedded in it. These types of tests are more basic. They are geared to elementary school children. Defendant had some difficulty with these tests. Compared with his good performance on the more difficult dog-drawing test, Weinstein again questioned Defendant's motivation. (R 892-93).

In another test Defendant was given a list common simple words, such as drum, curtain, bell, coffee, school, parent, moon, garden, hat, former, nose, turkey, color, house, river, to determine his ability to recall them. (R 894). The words were read to Defendant and he was asked to recall as many as he could, and then the same process was repeated four times. (R 895). Typically performance improves each time the list is read. Defendant got 10 out of 15 the fifth time. That would be normal. After the fifth time, a second list was read. Then the original

list was read again. This time Defendant remembered seven of the words. (R 896). That would be slightly low, but still within standard deviation, normal being about 9 or 10. Defendant was then given a paragraph containing the fifteen words. (R 897). The paragraph was placed in front of Defendant for him to read. This was an easier test, since he only had to recognize, rather than recall, the words. Defendant only got 4. (R 898). This was unusual because most people do better on this part than the first part. This was again inconsistent.

Weinstein also gave Defendant the WAIS-R. It is possible to intentionally do poorly on that test. (R 899). On the information subtest, Weinstein would expect, with a diffuse brain injury, that there would be random wrong answers all the way through from the easy questions to the most difficult. (R 900). If the person gets five wrong answers in a row, the test is stopped. The first test question was in what direction did the sun rise. Defendant did not answer it correctly. When asked to name four U.S. presidents since 1900, Defendant named Bush, Reagan, Nixon and Carter. (R 901-02). He claimed not to know how many weeks there are in a year. After that question, Defendant did not get another correct answer, except he stated that Martin Luther King, Jr. was a black reverend. Defendant named Johnson as president during the civil war, whereas 99.9 percent of test takers say Lincoln. (R 903). Defendant's

results were wholly inconsistent with the ability he displayed during the course of the two-day interview. (R 904). As part of the IQ test, Weinstein also administered the Digit Span or Digit Recall test, which consisted of reading Defendant a series of numbers in random order and asking him to repeat them in the same order. It started with a short series. Then in each successive trial another number was added, so it went from simple to complex over time. (R 922). Normal would be about seven. Defendant could only do four forward and three backwards. It would have been very easy to have intentionally done poorly. (R 923).

Weinstein obtained IQ results of verbal 73, performance 77, and a full scale of 74. (R 924). The difference between Crown's score[22] and Weinstein's was significant. Crown's was in the normal range. Moreover, to lose 20 points would be highly unusual without intervening brain trauma or deteriorating cognitive function. If Defendant lost 20 points between 1985 and 1991, Weinstein would expect Defendant to be completely demented and unable to perform any functions of daily living by the time of the hearing. (R 925). Assuming that there was some sort of trauma around the time of trial, Weinstein would not have expected to see any further deterioration between 1985 and 1991. (R 926). There would have

---

[22] Crown obtained an IQ equivalent in 1985 of verbal 97, performance 93, and a full scale of 96, all in the low-average range.

had to have been significant injury between 1985 and 1991 for a 20-point drop to have occurred. (R 927). In terms of trauma occurring in the late 70's Weinstein would not expect any significant deterioration or improvement after the first two years, at the most. The exception would be if the injury caused accelerated atrophy of the brain. (R 928). If Defendant suffered accelerated atrophy as a result of his gunshot wound, he most likely would not be alive today, or would require total custodial care -- i.e., he would not be able to eat, bathe or use the bathroom by himself. Defendant did not display any such problems. (R 929).

Weinstein concluded that Defendant was malingering during his interview. (R 930). Defendant appeared to perform below his abilities and in ways inconsistent with diffuse brain injury. (R 931). Weinstein did not find the existence of any diffuse organic brain damage. Nor did he find any evidence of localized brain damage. (R 932). He did not find, on the tests in which Defendant actually put forth any effort, any evidence of brain damage of a significant degree regardless of etiology. (R 933). Even if Defendant were performing to the best of his ability, the test results were not consistent with diffuse organic brain damage:

> [W]ithin reasonable neuropsychological certainty, without speculating as to his motivation, his performance is not consistent with any syndrome that I'm aware of.

(R 942). Weinstein did not detect any brain damage that would prevent Defendant from being competent. (R 943).

Notably, Albert Jaslow, the psychiatrist who examined Defendant at the time of the original trial found nothing at that time to call into question Defendant's competency. (R 651). Moreover, Jaslow too, felt that Defendant was malingering. (R 652). Detective Blocker who interviewed Defendant in July 1908 and in February 1981, also noted nothing in their time together that in any way suggested that Defendant had any brain dysfunction. (R. 952).

Perhaps the most persuasive evidence of Defendant's competency is to be found, however in his pro se performance during the two-week trial. After his initial attempt to disrupt the trial proved futile, Defendant behaved in an exemplary manner. Moreover, he conducted the examination of the witnesses with a skill approaching that of many attorneys.[23] Even a summary examination of the that proceeding belies the defense contentions that Defendant was unaware of what was occurring or what was at stake.

---

[23] He had the sense to decline to cross-examine the witnesses that testified only as to the identity of the murder victims. (R1 892, 895, 1082). Defendant cross-examined every other witness.

Defendant also adopted the clever tactic of referring to himself throughout trial by his name or as "the defendant." Many of the witnesses followed his lead, giving the impression that someone else was on trial.

Defendant appropriately attempted to impeach key witness David Lynch through the use of prior inconsistent statements:

> Q: About 15 minutes. You never heard or have read any news papers as far as the defendant, Ronnie Lee Jones, being arrested, is that true or false?
>
> A: That's true.
>
> Q: Do you read any papers?
>
> A: No, I haven't.
>
> Q: Did you watch any news?
>
> A: No.
>
> Q: Mr. Lynch, I have a statement that you made under oath on deposition -- you stated you heard on the news and you called Detective Blocker, is that true or false.

(R1 979). Defendant also questioned Lynch's inability to state what time the knock came on the door, particularly since he had just stated a time on direct. (R1 978). He also challenged the circumstances of Lynch's selection of Defendant from the photo array, the nature of the description Lynch gave to the police, what Lynch and McDonald did after they fled the house, and whether Lynch was using drugs the night of the murders. (R1 984-89). On re-cross, Defendant again returned to the line-up issue, and attempted

to insinuate that Lynch had also claimed a second photo, of another man, was also Defendant. (R1 1004).

On cross of McDonald, Defendant, in a theme he would return to, elicited the facts that no force was used to obtain entry into the house,[24] that he did not see or hear Defendant threaten anyone or demand money, and that no one had seen him actually shoot anyone. (R1 1036-39).

On cross examination, when Fleming made reference to seeing a "big old krome [sic] gun," Defendant immediately jumped on it, pointing out that Fleming had just told the prosecutor that he did not see the gun. (R1 1062). When Fleming then responded that he saw the white T-shirt, Defendant told Fleming to limit his responses to the questions that had been asked.[25] (Id.) Fleming then said there was "something" in the assailant's hand. Defendant responded, "Something?" Fleming then stated that he saw something chrome that could have been a knife or something. Defendant continued to press the issue: "Didn't see a gun?" Fleming then returned to the chrome gun story, at which point Defendant asked, "Lets get this straight ..." Defendant then immediately asked

---

[24] This was an obvious attempt to avoid the "unlawful entry" element of the burglary charge.

[25] A State objection to Defendant's admonishment of the witness was overruled. (R1 1062).

Fleming about whether he had been drinking or using drugs that evening, with Fleming admitting that he had had a couple of daiquiris and a couple of joints, and that he did not who shot him. (R1 1062-64, 1067). Defendant then returned to his theme of no one seeing any burglaries, robberies or actual shootings. (R1 1067-68).

With crime-scene technician, Turner, Defendant focused on the presence of evidence of possible drug usage or sales at the crime scene. (R1 1153-55).

With Officer Vigoa, one of the officers that lynch and McDonald flagged down, Defendant attempted to insinuate that the crime scene was not secure, and that the witnesses might have been suspects. (R1 1168-70, 1174-77).

With Gloria Tillman, Defendant inquired as to the relationship between her and "the defendant," insinuating that she had an ax to grind.[26] (R1 1198).

That Defendant was well aware of what was going on and well

---

[26] Tillman had also filed sexual battery charges against Defendant, and when the State requested a sidebar on the issue, the court warned Defendant against "opening the door." Defendant managed to complete his examination of the witness without doing so. (R1 1199-1200).

understood the process is amply illuminated in his successful suppression of a State exhibit based on a discovery violation:

> THE DEFENDANT: Your honor, may I ask the State a question before I answer that?
>
> THE COURT: Go ahead and see if they can answer it.
>
> THE DEFENDANT: Was this picture attached to the warrant?
>
> MS. KAGHAN: That's the way it appears.
>
> THE DEFENDANT: Like that?
>
> THE COURT: You may go ahead and answer him that, Officer.
>
> Was the picture attached to the warrant when Gloria Tillman identified the warrant?
>
> THE WITNESS: I believe it was, yes.
>
> THE DEFENDANT: Mrs. Korvick, I believe this warrant and the photograph fall within discovery, and there is no copy with any picture on the warrant, and as far as any tangible papers or objects which were obtained from or belonging to the accused --
>
> THE COURT: Let me ask the State -- how do you respond to the discovery situation?
>
> * * *
>
> THE DEFENDANT: I have no objection to the State removing the photograph and not attempting to introduce the photograph, since the defendant believes that is somehow prejudicial by learning of this at this late time ...
>
> THE COURT: Your objection is sustained as to the photograph.

(R1 1218, 1221). This exchange in particular punctures one of Defendant's central theories at the evidentiary hearing: that Defendant apparent knowledge was merely the parroting of

information that had been fed to him by his fellow inmates. Defendant was surprised by the introduction of the photograph, and was well versed enough with both the case file and the law to realize that the State had not previously produced the warrant with a photo and that he was therefore entitled to have it suppressed because of prejudice at the late production of it. Yet no break was taken in which Defendant could have consulted with his "jailhouse lawyer." Moreover, having successfully had the warrant photo suppressed, Defendant then took advantage of the situation, proceeding to cross-examine the officers who executed it as to how they even knew they had the right person. (R1 1232-35). He also asked pointed questions as to how long "the defendant" was detained before being taken into the station. (R1 1240). He also repeatedly insinuated that the police had used improper procedures executing the warrant. (R1 1276-77). He asked on of the officers whether they used force to enter Winfield's apartment. When the officer responded that they did not kick the door off the hinges, Defendant jumped on the answer, asking, "Do you have to kick a door off hinges to get inside by using force?" (R1 1278-79).

During the cross-examination of Uptgrow's sister, Defendant innocuously asked if Uptgrow had been a diabetic, and when she replied no, he inquired why so many syringes had been found at the scene, returning to his drug-house theory. (R1 1336). Defendant

also managed to confuse her into contradicting her prior identification of him. (R1 1338). When she then responded with an inflammatory remark, Defendant immediately moved for a mistrial. (R1 1338, 1340). Later during her cross-examination, Defendant was again guilty of lawyer-like behavior, with the court admonishing him not to badger the witnesses. (R1 1348). Defendant also focused on the fact that the sister had not initially mentioned to the police that she had seen Defendant in the back of the car cruising by the murder scene. (R1 1346).

When the State called the prosecutor who handled Defendant's first appearance to testify as to comments Defendant had made at that time, Defendant quickly demanded a copy of the first appearance transcript so that he could cross-examine the witness. (R1 1439).

As noted previously, Defendant cross-examined the fingerprint analyst in extensive detail, focusing on the huge number of lifts, and the fact that a large number of usable latents were never identified. (R1 1457-65).

On cross examination of lead detective Blocker, Defendant demonstrated his mastery of the case by picking apart virtually every aspect of the murder investigation. He noted that Lynch was

not presented with the photo lineup until after Defendant was arrested (R1 1553). Defendant insinuated that it was Blocker who initiated the February interview. (R1 1557). He suggested that Blocker had told Defendant's girlfriend Sharon Canty that Blocker knew Defendant did not commit the crimes. He went through a series of suspects that the police had investigated. (R1 1559). Defendant made a minor production of Blocker's destruction of his original notes (R1 1562-63). Defendant suggested that if gun were murder weapon would not he have disposed of it? (R1 1564). Defendant questioned whether inmates could receive phone calls in response to Blocker's direct testimony that Defendant's attorney had called Defendant while he was in jail, to which Blocker conceded that the statement "might have been an error." (R1 1565). Defendant then conducted a series of inquiries about Clyde Fasen, forcing Blocker to deny asking Defendant about Fasen, to deny telling Defendant about Fasen's fingerprints. (R1 1567-69). Defendant also took the opportunity to elicit, for the purpose of explaining the presence of his fingerprints, that someone had said Defendant had been in the apartment the night before the murders and, that Defendant had used phone to call his girlfriend. (R1 1570). Defendant then quickly reeled off the charges against him,[27] and pointedly noted that Fasen had not been charged, but that

---

[27] Again, this tends to refute the defense expert contentions that Defendant did not understand the charges he was facing.

Fasen presently incarcerated, and therefore could have been located. (R1 1572). He highlighted the fact that only three of the many fingerprints on the scene were his, and that the "major items" were not tested for fingerprints. (R1 1573). Defendant again returned to the theme of Blocker's destruction of his notes, and suggested that perhaps he had altered Defendant's statements as well, referring to the "statement that you destroyed." (R1 1574). Defendant elicited that Fasen had declined to be interviewed, and wanted to know why he was not then arrested, given that Lynch had picked him from a photo array. Defendant then averred that Blocker had told Lynch that his first line-up choice "couldn't be him," and only then did Lynch identify Defendant's picture. (R1 1575-76). Defendant then pointed out that the original of the photo that Lynch identified had been lost. (R1 1576). Defendant then essentially testified that Smith had been his teacher in school, suggesting that Smith therefore could have identified him had he (Defendant) actually been the shooter. (R1 1581-83). Defendant then returned again to his theory that Lynch's original photo pick had gotten lost. (R. 1584-86). Blocker was forced to concede that he had not brought the photo array of Fasen. (R1 1585). Defendant then elicited that one Raymond Atkins had said that Leroy Jones had committed the crimes. (R1 1586). However Leroy Jones was not interviewed, which Blocker conceded was something they tried to do but was "just something that didn't get done." (R1 1587-88).

Defendant then again went through a list of suspects he insinuated the police had not sufficiently investigated. (R1 1589-90). Defendant pointed out that no hand swabs had been taken of Uptgrow's roommate Anthony Williams, who did not return until 5:00 a.m. the morning of the murders. Blocker also stated that he did not know if swabs were done of Lynch, McDonald, or a neighbor that wandered onto the scene. (R1 1593). Defendant then brought out that were swabs taken of Defendant's hands for blood, and they returned negative. Defendant asked Blocker to explain what negative meant so the jury would be sure to understand. (R1 1594). Defendant also pointed out that statements were made that a .22 had been left by K table; Blocker could not explain how it got into the locked closet. Finally, Defendant returned again to the issue of drug paraphernalia at the murder scene. (R1 1610).

After the State rested, Defendant participated in the charge conference in an obviously understanding manner, taking the position that he wanted an "all or nothing verdict" and that he did not want any lessers read to the jury. (R1 1632-45). Subsequently, during his motion for judgment of acquittal, Defendant averred that the State had failed to show a "premeditated design," which was why he did not want any instructions on lessers. (R1 1707).

During his case Defendant called the medical examiner, a detective and the crime scene tech, and elicited testimony relating to the usage of drugs by the victims and the presence of various items that could have been drug paraphernalia. (R1 1646-49, 1654-65, 1693-95).

As noted at Point I, one of Defendant's main strategies was to highlight the absence of ballistics evidence connecting him to the crime. During the testimony of the Detective Stone, the State asked a number of detailed questions regarding the effects of various types of ammunition. Defendant objected on the grounds that the witness was "not a ballistics expert," which objection the trial court sustained. (R1 1677-79).

Nor was Defendant's argument, as he would now suggest, rambling and incoherent. Rather, Defendant appropriately focused on the State's burden of proof and highlighted those points he believed showed the weakness in the State's case. Indeed, reading the transcript, Defendant's argument is little distinguishable from the type of argument frequently presented by lawyers, wherein many little points are attacked in an effort to make the whole look insubstantial:

> The witnesses that took this stand in this case never said they saw, Ronnie Lee Jones, the defendant kill any one ...

* * *

> If a person commits a robbery, why would a person ... leave the jewelry on the man's hand and his watch? Why would a robber do that?
>
> * * *
>
> Why do you feel the State has not put a ballistics expert on the stand? They used every possible expert in this case to testify. Why wasn't a ballistics expert on the stand.
>
> * * *
>
> Anyone shot me, you bet I would get a look -- not only at his shirt, I would look at his face, make sure that person would never get out of jail.
>
> * * *
>
> Ladies and Gentlemen of the jury, the .357 magnum is in evidence. That gun had sat there for you all to look at. What happened to the ballistics expert to tell the difference?

(R1 1774-75, 1778, 1784).

During the penalty phase, Defendant essentially followed a lingering doubt strategy. Indeed he told Dr. Jaslow that he did not want to call him because he felt that presentation of mental mitigation would be inconsistent with his continued maintenance of innocence. (R 655). He did however call two former employers who both testified that Defendant was a good worker, one of them bringing out Defendant's work helping children. (R1 1922-23, 1932-34). Defendant also presented the testimony of his sister, who testified as to what a wonderful helpful person he was. 1925-26).

Defendant then gave a closing argument that was consistent with the evidence he had presented. (R1 1976).

Defendant's chief witness at the hearing below was Dr. Richard Dudley, a psychiatrist with no forensic training, who had worked only for the defense bar in capital cases. (R 683). Dudley's central thesis was that Defendant suffered from organic brain damage, resulting from abuse as a child, a gunshot wound to the head at age 17, and a history of boxing and of drug abuse. (R 688, 690-91). Even setting aside Dr. Weinstein's finding of a complete absence of any objective evidence of brain damage, there was simply no evidence of the postulated head trauma on which Dudley based his conclusions. There was no record of any head injury resulting from either the boxing or from child abuse.[28] (R 865-67). As for the gunshot, the medical records revealed that it was a graze that did not even break the skin. (R 728-31). Moreover, at the time of the injury, Defendant was found to be oriented times three, and had normal eye and reflex examinations. (R. 742-44).

Dr. Barry Crown, Defendant's other expert, who examined him in

---

[28] In addition to the absence of any evidence of resulting head injury, Defendant himself had previously told another of his own experts, as well as Department of Corrections mental health examiners that he never suffered any child abuse. (R 741-42). Moreover, Defendant had no history of any learning disability as a child. (R 747). All the experts agreed that Defendant was of low average intelligence. Id.

1985, also concluded that Defendant had organic brain damage, based on extensive bilateral problems with sound, space, senses, vision and naming, the very categories that Dr. Weinstein found Defendant to be either normal or malingering. Crown also heavily based his conclusion of brain damage on the history of gunshot injury. (R 853, 863). Crown, however, was not aware, until the day of the hearing, that the "wound" did not even break the skin. (R 863). This new information did not cause him to consider reevaluating his conclusions, however. Likewise, Crown was willing to assume the existence of pre-trial head trauma from boxing, despite the absence of any evidence thereof. Conversely, however, Crown was unwilling to postulate that the alleged head trauma might have resulted between the time of trial and Crown's examination, from one of the many documented prison fights Defendant engaged in, because there was no evidence that Defendant suffered any head injury from these fights. (R 866-67).

Dudley would also rest his finding of incompetence on Defendant's alleged substance abuse, both historically, and at the time of trial. The major flaw in this theory was that main effect of the drug abuse would have been to exacerbate the non-existent brain damage. Moreover, there simply was no credible evidence of drug abuse during the trial. The only evidence thereof came from two witnesses -- Defendant's sister and fellow inmate Samuel

Fuller. However, the testimony of these witnesses was diametrically opposed regarding virtually every aspect of Defendant's drug use. Further, their testimony was virtually incredible on its face.

Fuller stated that normally Defendant was clam and complacent, but when he was on drugs he became hyperactive. During trial Defendant used heroin, LSD, purple haze, "microfem," microdot, and speed pills. Defendant acted strange from the first day they met. Defendant was obsessed with voodoo, a.k.a. "roots." Defendant would put his underwear on backwards put oil on himself, "put the 23rd song" and burn candles and call on the "forces of whoever you are calling" to save him and make him invincible. (R 830). Fuller did not think Defendant appeared to be in touch with reality. He also chanted. These were not rituals a lot of people did in jail. Fuller accidentally took Defendant's "root bag" and when he opened it he saw rocks and balls and some other things that "people that believe in these things believe in this." (R 831). Fuller stated that Defendant was "brain dead." He did not understand anything about the legal system. He was traumatized by the facts of the case, particularly by the morgue photos. It made him not want to deal with reality. (R 835). On cross, Fuller conceded that he did not even know if he was in jail at the time of Defendant's trial. In addition to heroin, marijuana, speed, cocaine, LSD, Fuller also

claimed that Defendant also other inmates' psychotropic medications. (R 839).

On the other hand, Defendant's sister, Dorothy Hanes, testified their mother had been obsessed with voodoo rituals, and that Defendant did not like the rituals. (R 813-16). She claimed that after Defendant's arrest for the murders, she noticed that his eyes were glassy and his behavior had changed. So she went to see him in jail, where she learned that Defendant's girlfriend was bringing him cocaine. Hanes stated that Defendant was high the entire time he was in jail. (R 822). He was taking drugs during the trial too. "He was spaced out." Hanes also stated that Defendant had glassy eyes during the entire trial. Defendant did not speak much during trial, and she could tell by his behavior that he did not know what he was doing. She could tell he was spaced out during trial by the "facial expressions in his eyes." (R 825). Based upon her observations she felt that he was high during the entire trial. (R 826).

Of course it was noted that neither the judge nor the prosecutor recalled Defendant ever being spaced out or glassy-eyed during trial, despite the fact that they were close to Defendant while the sister was on the other side of the bulletproof glass partition that separated the parties from the spectators in the

In view of the foregoing, an examination of the competency criteria in effect at the time of Defendant's trial demonstrates that Defendant was clearly competent.

1. Defendant's appreciation of the charges

Dudley conceded that Defendant suffered no deficit in this area. (R 715). Crown, however, did not believe Defendant appreciated the charges. (R 851). As noted above, however, the trial record clearly establishes that Defendant was well aware of the charges against him.

2. Defendant's appreciation of the possible penalties

Dudley also conceded that Defendant suffered no deficit in this area. (R 715). Crown, however, did not believe Defendant appreciated the possible penalties. (R 851). Again the record shows that Defendant was very much aware the penalties he faced:

> I am quite sure the State's Attorney's Office is trying to take my life.

(R1 584).

> This is my life I am talking about ...

(R1 611).

> I know if I am found guilty I am supposed to go -- they will get the death penalty on me.

(R 652). Etc.

3. Defendant's understanding of the adversary nature of the process

Dudley asserted that although Defendant understood that the State was his adversary, he did not meet this criterion because he thought his own attorney and the court were opposed to him as well. (R 716). Crown felt Defendant had only a limited understanding of the adversary process. (R 851). Again this conclusion is belied by Defendant's own clemency testimony. Moreover, the trial transcript reflects that Defendant was well aware that the State was against him. By the same token, once the "ground rules" were laid down, Defendant treated the court with respect ant occasionally sought its advice.

4. Defendant's capacity to disclose pertinent facts to counsel

Dudley felt Defendant's delusions prevented him from having sufficient trust to allow Defendant to disclose pertinent facts to his attorney, and that obsessing on certain facts and Defendant's substance abuse also impaired him in this regard. (R 717). Crown felt Defendant was wholly impaired in this regard. (R 851). Again, these conclusions are based on the discredited notion that Defendant suffers from brain damage. Moreover, the transcript amply demonstrates that Defendant was fully aware of what was relevant and of what the issues at stake were. Finally, given that Defendant validly waived counsel, the relevance of this factor would seem to be slim.

5. Defendant's ability to relate to his attorney

Dudley felt Defendant was impaired with regard to this criterion for the same reasons as the previous one. (R 717). Crown felt Defendant was wholly impaired in this regard. (R 851). For the same reasons discussed above, the defense expert conclusions in this regard are simply flawed, assuming this factor has relevance where the Defendant is proceeding pro se.

6. Defendant's ability to assist in planning a defense

Dudley felt this factor was impaired for the same reasons as the previous two factors. (R 718). Crown felt Defendant was wholly impaired in this regard. (R 851). Given that Defendant almost singlehandedly and effectively carried out his own defense, the record effectively refutes these conclusions.

7. Defendant's capacity to realistically challenge prosecution witnesses

Dudley opined that Defendant's thinking was too disorganized, too concrete and too stuck on issues to be able to move onto new issues when they were raised, and that he was unable to pay attention in any consistent way, and as such was unable to realistically challenge prosecution witnesses. (R 718). Crown felt Defendant was wholly impaired in this regard. (R 851). Of course, neither of these professionals had read the entire record, and indeed Crown was not even aware that Defendant had gone to

trial pro se. (R 749, 867). As the above excerpts demonstrated, regardless of any theories these doctors may have had about Defendant's ability to do so, in reality Defendant proved himself very much able to effectively challenge the State's witnesses.

8. Defendant's ability to manifest appropriate courtroom behavior

Dudley also felt Defendant's ability to manifest appropriate courtroom behavior was tenuous. (R 718). Crown did not comment on the subject. Again the trial transcripts, along with the transcript of the 1983 robbery trial where Defendant fails to even open his mouth, (R3d), clearly demonstrate Defendant's ability to behave properly, when he chooses.

9. Defendant's capacity to testify relevantly

With little in the way of explanation, Dudley also concluded that Defendant's capacity to testify relevantly was impaired. (R 719). Crown felt Defendant was wholly impaired in this regard. (R 851). Again Defendant's ability to "stay with the program" for two weeks while acting as his own counsel belies the experts' vague conclusions that Defendant could not testify relevantly if called upon to do so.

10. Defendant's motivation to help himself in legal process

Dudley felt that Defendant's abilities were "more mixed" in

this regard. He believed that Defendant did not want to harm himself, but that his disorders prevented him from exercising good judgment (R 719). Crown felt Defendant was motivated to help himself, but was too "cognitively confused" to sustain goal oriented activity. These conclusions are likewise belied by the record.

11. Defendant's capacity to cope with stress of incarceration pretrial

Dudley also felt that Defendant's abilities in this regard were also mixed, despite his opinion that those with disorders like those Defendant was alleged to suffer from usually did better under the structure provided by incarceration. (R 719). Crown felt Defendant was wholly impaired in this regard. (R 851). Again, the doctors provide no basis for their conclusions. Presumably if the defense were able to produce some evidence that Defendant actually had had some difficulty coping with incarceration pretrial (other than the frivolous Mr. Fuller) they would have done so. Thus the record speaks for itself in this regard.

In view of all of the foregoing, it is abundantly clear that the trial court's conclusion that Defendant had not met his burden of overcoming the presumption of competency is supported by competent, substantial evidence. As such this claim should be rejected.

As a final note, Defendant avers that the court below erred in excluding the discovery deposition of Dr. Stillman. Defendant concedes that under the Rules of Criminal Procedure and recent precedent from this court, discovery depositions are inadmissible for any purpose in criminal proceedings. He nevertheless makes an argument that collateral proceedings are historically viewed as civil in nature. Regardless the accuracy of that assertion, Defendant's argument has a fatal flaw: it is directly contrary to the plain language of the Florida Rules of Criminal Procedure. Rule 3.010 provides:

> These rules shall govern the procedure in all criminal proceedings in state courts <u>including ... proceedings under rule 3.850</u> ...

Plainly the trial court was correct in excluding the Stillman deposition.

IV.

REGARDLESS OF WHETHER DEFENDANT'S COUNSEL SHOULD HAVE REQUESTED A COMPETENCY HEARING, HIS CLAIMS OF INEFFECTIVENESS IN THAT REGARD MUST FAIL WHERE HE CANNOT SHOW PREJUDICE BECAUSE HE WAS COMPETENT TO STAND TRIAL

Defendant's final claim is that the multitude of attorneys who were appointed to represent him during the pre-trial proceedings were ineffective for failing to request a pre-trial competency evaluation. This claim is superfluous for the simple reason that Defendant was competent to stand trial, as discussed above. It therefore follows that he cannot meet the prejudice prong of the ineffectiveness test under Strickland, and this claim must fail.[30]

Although this claim is irrelevant the State would nevertheless point out that Defendant has presented no credible basis for a conclusion that counsel were deficient. He cites the Zenobi affidavit. However, that affidavit was not evidence. Moreover, despite the fact that Zenobi still lives and practices in Miami, he was not called at the evidentiary hearing. If Zenobi could in fact have called Defendant's competency into question, it must be presumed that he would have been called as a witness at the lengthy hearing that was held below on that very subject. Notably, Zenobi, an experienced criminal defense attorney, never called Defendant's

---

[30] On the other hand, if the Court were to accept Defendant's claim that he was not competent when he was tried, he would be entitled to a new trial on that basis alone, and this claim would still be surplusage.

competence into question during his representation of Defendant either in this case or in the preceding robbery trial.[31] Finally, the only contemporaneous "evidence"[32] presented by Defendant below was through his sister, who claimed that Defendant began behaving oddly, but not until after the end of Zenobi's representation of him. (R 824).

Nathan "represented" Defendant for all of 45 minutes, and by Nathan's own testimony, Defendant declined to have him as an attorney. As such the State fails to see how he had any duty to Defendant at all. Moreover, despite recalling nothing about the case, he allegedly had clear recollections about Defendant's competency. (R 673-75). His opinions were based upon his belief that Defendant thought all white people were out to get him. (Id.) This testimony of course overlooks the fact that Defendant was equally vehement in not wanting to be represented by Kershaw, who was African-American. (R 801). Likewise, Kershaw also spoke with Defendant all of 10 to 15 minutes. (R 801).

Finally, Defendant faults Wilson for not raising Defendant's

---

[31] Notably, no question was raised as to Defendant's competency in the subsequent 1983 retrial on the robbery charges, either. See R3d.

[32] As noted above, the testimony of Defendant's sister was highly incredible.

competency. Wilson however, never represented Defendant at all, but was merely appointed, over both his and Defendant's objection, as "stand-by" counsel, while Defendant proceeded pro se. As such no claim of ineffectiveness can be made as to his conduct.

As noted above, however, even were Defendant to establish that any or all of these attorneys were deficient in failing to seek a competency evaluation, this claim would be without merit. Strickland requires a showing of both deficient performance and prejudice. Failure to satisfy either prong defeats the claim. To show prejudice in this context, however, Defendant would have to demonstrate that he was tried while incompetent. As exhaustively discussed in the previous point, however, Defendant was competent at the time of trial. As such this claim must fail.

CONCLUSION

For the foregoing reasons, the the trial court's denial of relief should be affirmed

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

RANDALL SUTTON
Assistant Attorney General
Florida Bar No. 0766070
Office of the Attorney General
Rivergate Plaza -- Suite 950
444 Brickell Avenue
Miami, Florida 33131
PH. (305) 377-5441
FAX (305) 377-5654

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to SYLVIA H. WALBOLT, Counsel for Defendant, P.O. Box 2861, St. Petersburg, Florida 33701 this day 29th of October, 1998.

RANDALL SUTTON
Assistant Attorney General