original

IN THE SUPREME COURT OF FLORIDA

CASE NO. 71,443

BOBBY MARION FRANCIS,

Appellant/Petitioner,

vs.

THE STATE OF FLORIDA,

Appellee/Respondent.

****

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICAL CIRCUIT OF FLORIDA IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

****

BRIEF OF APPELLEE/RESPONDENT

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INTRODUCTION

Appellee, the State of Florida, was the respondent in the trial court and Appellant, Bobby Marion Francis, was the petitioner. The parties will be referred to as the State and the defendant, respectively. The record on appeal from the Rule 3.850 proceedings in the trial court was not yet compiled as of the preparation of this brief. Therefor the transcripts from those proceedings will be referred to by the date on which they occurred, and the page number cited will correspond to the number in the top right corner of transcript pages. The case number from the defendant's direct appeal is 64,148, decided June 20, 1985. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

The defendant filed the instant Rule 3.850 motion on October 15, 1987, the thirtieth day under Fla.R.Cr.P. 3.851. The defendant had sought an extension of the thirty day period, which this Court denied. The defendant's 3.850 motion contained four claims for relief. Initial legal arguments were heard October 27, 1987, and on that date the trial court ordered that an evidentiary hearing be held November 10, 1987, which date was moved to November 12, 1987. Upon request of the defendant. Also on October 27th,

the defendant filed an amended Rule 3.850 motion containing a fifth claim for relief. On this date also the trial court summarily denied Claims III and IV as having been raised and decided on direct appeal. Claims I and II were set for evidentiary hearing, and Claim V was held in obeyance. On November 12 and 13, 1987, the trial court conducted an evidentiary hearing as to Claims I and II, and denied both claims on the merits. After hearing legal arguments as to Claim V, this claim was likewise denied on the merits, and this appeal follows.

STATEMENT OF THE FACTS

The following witnesses testified for the defendant at the evidentiary hearing:

DR. JAMES MERIKANGAS

Dr. Merikangas specializes in the fields of neurology and psychiatry. He is currently involved as a consultant in a study to determine the effects of fetal alcohol use. He interviewed and examined the defendant on October 12, 1987, and reviewed affidavits of family members, school records and a Corrections Department medical report from 1983 which consisted of a one page checklist. Dr. Merikangas also did research on the fetal alcohol syndrome prior to reaching his

diagnosis. He did not conduct a CAT Scan, though he recommends it be done (11/12/87, p.41). He conducted various other neurological tests. He noted a peculiar facial structure, including hypertelorism, meaning overly wideset eyes, and a very high and arched shaped pallet (11/12/87, p.43). His ears had "simplification of the convoluted covers of the campus, meaning they were rather rounded and low set (Id. p.44). His fingers were also hyperextendable, meaning easily bent back. The defendant also had reduced sensation in the left cornea, indicative of neurological damage (Id. 46). There could be several causes for this, which is why a CAT Scan is indicated (Id.47).

The defendant was very verbal, with a good memory and high degree of intelligence (Id.). Mr. Merikangas concluded that based on his interview, examination and background material, the defendant suffers from fetal alcohol syndrome, which is a congenital malformation of the brain, i.e. brain damage (Id, 48). The defendant nevertheless was alert, oriented and had a good memory, with no hallucinations, delusions or other evidence of psychiatric dysfunction. Rather, the defendant's condition is a neurological disorder (Id. 49,50). His condition causes impulsive behavior and a basic lack of reasoning and judgment, even when it does not cause retardation. Dr. Merikangas then goes on to state that the condition results in everything from retardation to simple hyperactivity (Id. 53).

In regards to Florida's sentencing statute, and in particular the defendant's capacity to appreciate the criminality of his conduct, Dr. Merikangas concluded:

> A. I am saying that he is a brain damaged and defective individual. And that his capacity is thereby diminished. I was not questioned about legal insanity at the time of the offense.
>
> But that based upon his neurologic condition he's not a normal human being in that he has in my opinion the diminished capacity.
>
> (Id. 57).

On cross examination Dr. Merikangas stated that extensive planning for a crime is not inconsistant with impulsiveness, and that just because extensive steps are taken to conceal a crime, does not mean the person appreciated the criminality of his conduct (Id. 69-71). He further stated that it is unnecessary to examine the facts of the offense because the diagnosis is a neurological one which doesn't depend on the facts of the particular case (Id. 71,72).

The following exchanges are worthy of reproduction in full:

> Q. Well Doctor, how can you make a statement that this man's behavior at the time of the offense was the affect of his brain damage, when you don't know what his behavior at the time of the offense was?

A. Because I didn't make the statement.

Q. Doctor, you stated that based on your findings at the time of the offense, he had a diminished capacity to appreciate the criminality of his conduct. I'll read that to you.

A. I believe he has a diminished capacity today and he had a diminished capacity when he was 15 years old, therefore, at the time of the offense he also has diminished capacity that doesn't relate to the particular thing he was doing at the time. He's not functioning with an intact brain is what I am saying in that statement that there was an impairment.

Q. Doctor, what portion of his brain?

A. Answer to the question was he insane it says he is not a normal human being and it my opinion to a reasonable degree of medical certainty he has brain damage; therefore, he has reduced capacity. I didn't say that he was totally innocent of criminality.

Q. Okay. So you don't need to know any particular behavior or whatever because this syndrome is affecting him throughout everything that he does?

A. It does, yes, and each individual thing has to be judged on his own merits.

(Id, 83, 84).

Q. If I can have one minute Doctor, would you agree or disagree that you seem to be saying that every person that is suffering brain damage also suffers from a diminished capacity in impulsive behavior, is that true?
A. No, I said that they suffer from diminished capacity I don't think I

listed impulsive behavior in that sense.

Q. Okay.

A. If I did, forgive me.

Q. All right, in your report Doctor, you state that generally fetal alcohol syndrome results in mental retardation even when it does not the brain damage causes results in abnormal impulsive behavior and basically lack of judgment and reasoning?

A. That I did say.

Q. So every person with fetal alcohol syndrome then has suffered from impulsive behavior and a basic lack of reasoning?

A. To some degree.

Q. Did you do any testing though to test his ability to reason and to plan?

A. Did I?

Q. Yes?

A. I think we have the man's life history to look at for that.

Q. Okay. But aren't there tests that you can do to tell if a person's reasoning ability is impaired?

A. Yes, there are.

Q. Okay. Did you consider giving them to Mr. Francis?

A. Well no one has asked me to give them to Mr. Francis, I would be very happy to give them to Mr. Francis

Q. Wouldn't that be important instead of a general diagnosis you can make a specific finding as to whether his reasoning ability was impaired?

A. My opinion is that should have been done before his trial and had he been sent to me I would have done those things.

Q. Well Doctor, weren't they important to your diagnosis at the time that you did it?

A. There are some diagnoses that you can make without those kinds of tests that in medicine there are many more diagnosis that are made from the history and the physical that are made from an x-ray.

(Id. 89-91).

BERTHA JOHNSON

Mrs. Johnson is the defendant's aunt, who raised the defendant after his mother died when he was six years old. The defendant's mother was Mrs. Johnson's sister. The defendant's mother lived in Georgia and would come to Miami and visit Mrs. Johnson. During these visits the defendant's mother would "party" including drinking. The only specific date she gave for a particular visit was 1949 (Id. 105-106). It should be noted the defendant was born August 7, 1944. (See page 846 of the record on direct appeal). One one such visit the defendant's mother died en route on a bus, and Mrs. Johnson then took in the defendant and two of his sisters.

The defendant lived first in Overtown and then moved to a single family home in Liberty City (Id. 108). It was not a

fancy home, but was the best she could do. It was in better condition than their first home in Overtown (Id. 110). While she was at work her daughter, Anne, looked after the children (Id. 111). Anne eventually married and moved out, but by then the children were old enough to leave by themselves (Id, 112).

Mrs. Johnson's husband, Leroy, was a heavy drinker, and the two would fight regularly. However Leroy did not fight with the children, and specifically he did not fight with defendant to her knowledge, nor was Leroy mean to the defendant that she knew of (Id. 112-113). The children were all afraid of Leroy, in that they were afraid he would hurt Mrs. Johnson. There were times when she left Leroy, but she always took the children with her (Id. 114). She was present at the trial, but was not asked to testify (Id. 115), though she would have done so. She always tried to do the best she could for the defendant (Id. 118-119).

QUEEN ELIZABETH DEAN

Mrs. Dean is the defendant's younger sister. She was only four months old when their mother died on a bus trip to Miami. The house they lived in with Mrs. Johnson was a big wooden house in Liberty City (Id. 122). They did not have alot of money, but they were getting some welfare assistance. Mrs. Johnson would make her dresses, but the defendant had few clothes (Id. 123).

As for food, the welfare people provided powdered eggs and milk and canned meat, which wasn't very good (Id. 124). The defendant was ashamed that they had to eat government food. He called the meat "dog food". They sometimes ate bread cakes with syrup. Mrs. Johnson was very strict and made the defendant stay home and babysit and clean the house (Id. 124-125). When she wasn't home they had to stay inside and were not allowed to have company.

Mrs. Johnson did not drink, but her husband Leroy was a drinker. Sometimes he would miss work, and he would then comb their hair for them (Id. 125). Leroy would fight with Mrs. Johnson over the welfare check, and he would slap her around. One time he shot a gun through the bathroom door during a fight, although the defendant was not present (Id, 126-127). The children were afraid of Leroy because when he drank he would yell and complain that they didn't clean up good and would bicker and nag at them.

As for Mrs. Johnson, there was one episode in which she beat the defendant with a stick after tying him to a tree in the back yard and spraying him with water (Id. 127-128). Also, when the defendant was about 12, his cousin Joe shot him in the feet with a BB gun to make him dance, and the defendant cried (Id. 128).

The defendant seemed to get the least of everything, and there wasn't much love and affection in the home (Id. 129). However, Bobby got the same amount of food as everyone else (Id. 130). No one ever asked her to testify at trial, although she would have if asked (Id. 131).

CARRIE SAINTLOT

She met the defendant for the first time in May of 1957 when she married his cousin Joe (Id. 132). It should be noted that the defendant was three months short of his thirteenth birthday at that time. She lived at Mrs. Johnson's house from 1957-1959. The house was big enough for the entire family (Id. 133). The area was a poor area.

She states the defendant was poorly treated as a kid, without proper clothes, and that half the time he wasn't given any food so she would have to slip him some food on the side. Leroy was very cruel and would beat the defendant and chase him out of the house, and lock the food up in the refrigerator so the defendant couldn't get it (Id. 134). He would beat the defendant on the back with a belt. The defendant didn't do anything to deserve it, but couldn't defend himself because he was only 11 or 12 (Id. 135). Leroy would beat the defendant whenever he could catch him, so the defendant would stay outside until after Leroy went to bed. Most of the time when Leroy drank, he would stay in his room

and go to sleep (Id. 136). Mrs. Johnson knew what was going on, but was afraid to do anything about it.

Leroy would make Bertha lock the freezer and chain the refrigerator (Id. 138). The defendant was only allowed one meal a day, sometimes none (Id. 140). Had she been asked, she would have testified.

On cross-examination she stated she divorced the defendant's cousin Joe in 1969, that Joe then remarried, and that she had no further contact with Joe after that (Id. 141).

GEORGIA JONES AYERS

Mrs. Ayers in a community activist, who testified as to the poor economic and educational opportunities for black children of the defendant's generation, and the high level of poverty and crime which infested the areas where the defendant grew up. She could and would have testified for the defendant had she been asked.

EUGENE ZENOBI

Mr. Zenobi was the defendant's trial counsel. He has practiced law for seventeen years, and had assisted Michael Von Zamft at the second trial. The files for the case

stretched across his entire office, and it was an extremely complex case to handle (11/13/87, page 5), causing him to expend considerable time and effort. When the judge overrode the jury's life recommendation, Zenobi was shocked, although he sincerely believes the trial court was not being vindictive in sentencing the defendant to death (Id. 11). Because of the tremendous amount of work involved in the guilt/innnocence phase, he was unable to put as much time into the sentencing phase (Id. 13). Because of time restraints, he was unable to conduct a thorough investigation of the defendant's childhood (Id). He did not have the defendant evaluated by a psychiatrist, as he found the defendant to be a sharp individual whose opinion he respected (Id. 14).

On cross-examination Zenobi stated that in the weeks prior to trial he was confronted with serious evidentiary issues which consumed a great deal of his time and energy (Id. 17-19). He had very little free time and was forced to set priorities, and that in retrospect he could have done more in some areas, but that he did the best he could (Id. 19-20).

Based on conversation with the trial court concerning the morality of the death penalty, Mr. Zenobi felt that if the jury recommended life the trial court would follow that recommendation, and thus it was crucial to get a life

recommendation (Id. 21). Zenobi was able to evoke an emotional response from the jury using the gospel, which he sincerely believes was a proper approach (Id. 22, 23).

STUART GITLITZ

Mr. Gitlitz represented the defendant on direct appeal. Over a strenous objection from the State that he was not a disinterested expert, Gitlitz testified that failure to present evidence of the defendant's early background was deficient (Id. 34-36).

On cross-examination Gitlitz stated that Mr. Zenobi had an excellent reputation in the legal community (Id.38). He was then asked if the fact that Zenobi obtained a life recommendation in 42 minutes, after two prior juries had voted 12-0 for death, constituted a significant victory. Gitlitz responded that a significant victory would have been a not guilty verdict, though admitting that the life recommendation was a "good result" (Id. 38-40).

The State called one witness on its behalf at the hearing.

DR. CHARLES MUTTER

Dr. Mutter is a psychiatrist with training in neurology

as well, though his practice is in psychiatry. In this case Dr. Mutter reviewed the report of Dr. Merikangas, the affidavits of the defendant's family members, statements of the defendant to the trial court during the trial and the trial testimony of numerous witnesses who testified at trial (Id. 161-162). Dr. Mutter also did extensive research on the fetal alcohol syndrome. He relied heavily on two specific sources, Kaplan and Sadock Comprehensive Text of Psychiatry, published in late 1986, and Current Medical Diagnosis and Treatment, 1987, edited by Krupp, Schroeder and Tierney. Dr. Mutter prepared a synopsis of the portions of these two texts which deal with the syndrome, which is part of the record on appeal (Id. 163-164).

Dr. Mutter outlined the causes and symptoms of the syndrome. He explained that the symptoms noted by Dr. Merikangas are anatomic defects which are not of themselves diagnostic of brain damage (Id. 168-170). In determining whether the defendant actually has brain damage, Dr. Mutter examined two statements made by the defendant during trial. In particular Dr. Mutter found the defendant's following statement illuminating:

> THE DEFENDANT: Good morning, Your Honor. I have a disagreement with Mr. Zenobi as per change of venue.
>
> His viewpoint on the change of venue differs from mine and I would vigorously object to the change of venue.

I've been in law quite awhile. I assume to know that they're--in Dade County there's a million people at a minimum. Out of a million people I'm sure you can seat fourteen if you use two alternates that's not read a newspaper clipping or, at least, give it a try mainly because my family is here and I just don't think that it's such an inflammatory article to impair a person coming to a rational decision in my case.

Now, that's my opinion and this is where I differ from my attorney.

(Trial Transcript at 19-20).

THE DEFENDANT: Your Honor, I've been fighting this case a long time and me, myself, I know the courts are tied up.

Of course, I'm tied up, you know, and I want--I really was asking Mr. Zenobi regardless of anything whether he told you or not, I wouldn't mind if it started right this moment, you know. I just cannot see the logic in a change of venue without, at least, attempting to seat a jury that has no knowledge of this because everyone does not read a newspaper, everyone does not look at the news. At least make some kind of attempt to seat a jury and this is my total argument.

As far as his judicial experience and whatnot, I have no qualms about it whatsoever.

It's just a matter that I'm being bounced here, there and there, you know. I'm not trying to dictate to you what to do because you run it. It's just a matter that this can be resolved without going through this, if there was just made an attempt to do so, and this is what I was requesting and if I could have spoken to him earlier before this motion was made, I'm sure that it would not have been made and as it stands right now,

> I'm sure that he's willing to withdraw the motion so not that--not that it's his knowledge of law that I question because by no means who am I, I don't know Adam from a house cat. It's just the change of venue situation and it really upsets me and I really don't think--I really can't see why out of a million people there wouldn't be an attempt made to, at least, sit fourteen to--within the time frame that you might say.
>
> (Trial Transcript at 21-22)

From this and other statements Dr. Mutter concludes that the defendant is articulate and fully aware of court procedures, and that his speech exhibits highly structured and organized reasoning, which is grossly inconsistant with a diagnosis of brain damage (Id. 172-173). He goes on to state that Dr. Merikangas never tested the defendant's judgment or memory orientation, but that there is no evidence the defendant's judgment or reasoning capacity was impaired.

Dr. Mutter was asked how important the facts of the case are in determining whether a defendant appreciated the criminality of his conduct. His answer bears repeating:

> A. I think that's crucial.
>
> In other words, a doctor's opinion is only as good as if it fits the facts of the case, whether it's a psychiatrist or other physician.
>
> Q. Now, in order to make the critical finding, did you review

> trial testimony of the witnesses that you have already described?
>
> A. Yes, I did. I looked at the statements of people who were directly involved and this is why I asked for all the records.
>
> In other words, not only did this man say in court during the time that he was in trial, but other people who observed his behavior before and after the fact, I think that's crucial.
>
> (Id at 175).

Dr. Mutter then stated that the facts of the offense showed that the defendant had a clear understanding of right and wrong and the nature and consequences of his acts at the time of the offense, and he used as an example the defendant's changing his statement to the police, admitting that he lied initially about the gun and then relating a new explanation as to how he came into possession of the murder weapon (Id. 176). Dr. Mutter concluded there was nothing in the trial record to indicate the defendant's behavior was anything but organized, contrived behavior (Id. 177-178).[1]

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[1] The State did not feel it necessary at the hearing to belabor the point by questioning Dr. Mutter concerning the numerous other instances of the defendant's conduct illustrating his appreciation of the criminality of his conduct. Had this been an actual sentencing proceeding, multiple other instances of defendant's conduct illustrating his appreciation of the criminality of his conduct would have been explored, including:

> a) The defendant's expressed his intention to kill the victim two

(Continued)

After entering its findings, the trial court corrobo-

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weeks prior to the murder. (T.364-367).

b) The defendant hid his car under a tree, with the license plate hidden, so as to ambush the defendant (T.415-418, 972-974).

c) The defendant gagged the defendant, tortured him for two hours, then used a pillow to muffle the shots (T.351-353, 428-430).

d) The defendant sent a witness to get drano and a syringe, and when the witness took a long time to return the defendant became extremely nervous (T.351-353, 597-598).

e) The defendant told witness Deborah Wesley that she didn't know him, had never seen him, and that he was never there (435-437, 551-557).

f) When Deborah Wesley's grandmother came by the defendant told Wesley to get rid of her and not to try anything foolish. He also refused to let anyone leave (T.541, 551-557).

g) The defendant told everyone present that they were all involved, and that everyone was equally guilty. (T. 987).

h) After the murder the defendant ordered several witnesses to put the body in a bag and dump it somewhere in the Keys (T.435-437, 551-557, 987).

i) After his arrest, the defendant told witness Arnold Moore to change his story and blame it on Opal Lee and Charlene Duncan (T.364-367).

j) The defendant called witness Deborah Wesley from jail and said if he had known she was to talk to the police, he would have put her in the bathtub with the victim (T.563).

(Continued)

rated Mr. Zenobi's testimony concerning their off the record conversations as to the morality of the death penalty, that he would like to see the death penalty abolished, but that he had felt bound in the case to uphold the law and sentence the defendant to death (Id. 82).

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k) The defendant disposed of the shells on the way back to Miami (T.990).

l) After the discovery of the victim's body was made public, the defendant ordered witness Charlene Duncan to leave town (T.992).

m) The defendant denied his involvement to the police placing blame on two of the witnesses. He changed his story concerning how he ended up with the murder weapon, though steadfastly denying his involvement. And finally, he was extremely interested in the statements of the witnessess during police interrogation, and even asked questions himself. (T.726-727, 731, 737-739).

CLAIMS PRESENTED

CLAIM I

WHETHER MR. FRANCIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED WHEN MR. FRANCIS CHOSE TO EXERCISE HIS CONSTITUTIONAL RIGHTS TO PLEAD NOT GUILTY AND TO BE TRIED AND HE WAS CONSEQUENTLY SENTENCED TO DEATH BY A JURY OVERRIDE BECAUSE HE DID NOT ACCEPT THE TRIAL COURT'S OFFER TO PLEA TO FIRST DEGREE MURDER.

CLAIM II

WHETHER MR. FRANCIS WAS DENIED DUE PROCESS AND A MEANINGFUL AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION BECAUSE OF COUNSEL'S UNREASONABLE FAILURE TO CONDUCT INDEPENDENT INVESTIGATION, HIS FAILURE TO PRESENT COMPELLING AND AVAILABLE MITIGATION EVIDENCE, AND HIS FAILURE TO OBTAIN DEFENSE MENTAL HEALTH EXPERTS, IN VIOLATION OF THE SIXTH EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM III

WHETHER THE STATE FAILED TO REVEAL, AND/OR DEFENSE COUNSEL UNREASONABLY FAILED EFFECTIVELY TO PRESENT THE STATE'S ABSOLUTE LAWLESSNESS VIS-A-VIS THE PROCUREMENT OF CHARLENE DUNCAN'S TESTIMONY, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND THE STATE'S MISCONDUCT HERE REQUIRES REVERSAL WITHOUT A SHOWING OF PREJUDICE.

CLAIM IV

WHETHER MR. FRANCIS' SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO CONFRONT WITNESS DEBORAH WESLEY EVANS CONCERNING HER PENDING CHARGES BEFORE THE SAME STATE ATTORNEY'S OFFICE THAT PROSECUTED HIM, WERE VIOLATED?

CLAIM V

WHETHER APPELLATE COUNSEL SUBVERTED JUSTICE AND VIOLATED THE CONSTITUTIONAL INTEGRITY OF THE PROCEEDINGS BY NOT FULLY REVEALING TO THE FACT-FINDERS THE STATE'S DUPLICITOUS AND CONFLICT-RIDDEN DEALING WITH STATE WITNESSES, AND TRIAL COUNSEL UNREASONABLY FAILED TO DISCOVER AND/OR REVEAL THIS INFORMATION, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

ARGUMENT

CLAIM I

MR. FRANCIS' CONSTITUTIONAL RIGHTS WERE NOT VIOLATED WHEN THE TRIAL COURT SENTENCED THE DEFENDANT TO DEATH AFTER HAVING OFFERED A PLEA TO LIFE PRIOR TO THE VERDICT.

This issue was raised and decided by this Court on direct appeal:

> Finally, we find no merit to Francis' contention that the trial court unconstitutionally sentenced him to death because he chose to exercise his constitutional right to a jury trial and rejected a plea offer of life imprisonment. There is no record support for Francis' assertion that the trial court, just prior to the return of the jury verdict, promised a sentence of life if Francis would plead guilty. Even were there record support for this assertion, we find no reversible error. The trial court properly found several aggravating factors to be proven beyond a reasonable doubt. The sentence of death in this case represents a reasoned judgment based on the circumstances of the capital felony and the character of the offender after giving due consideration to the jury's recommendation.
>
> Francis v. State, 473 So.2d 672 at 677 (Fla. 1985)

The trial court nevertheless allowed the defendant to present evidence as to plea offer. Trial counsel stated the trial court did make a plea offer of first and life, but that he did not see any indication of malice or vindictivenes in override, but rather that the trial court was simply trying to pursue the law as he saw it (11/13/87 at page 11). The trial court held that counsel's testimony was accurate and that there was in fact no vindictiveness on his part (Id. 80).

The State again submits that the issue was decided on direct appeal, and in any event the trial court's ruling was eminently justified.

CLAIM II

THE TRIAL COURT PROPERLY FOUND THAT TRIAL COUNSEL WAS NOT DEFICIENT FOR FAILING TO PRESENT PSYCHIATRICT TESTIMONY AND TESTIMONY CONCERNING THE DEFENDANT'S CHILDHOOD, AND THAT IN ANY EVENT IT WOULD NOT HAVE PROVIDED A REASONABLE BASIS FOR THE JURY'S LIFE RECOMMENDATION

The trial court specifically found that defendant's expert testimony was not credible, and that the defendant did not suffer from fetal alcohol syndrome (11/13/87 at page 79). The Court adopted the findings of Dr. Mutter, the State's expert. As noted by Dr. Mutter, the facts of this case were grossly inconsistant with an individual with diminished capacity, and indeed the defendant's actions prior, during and after the offense (facts which the defendant's expert never considered) showed a heightened, well developed appreciation of the criminality of his actions. The defendant's actions were so well planned and executed that this Court approved the trial court's finding of cold, calculated and premeditated as an aggravating factor. As stated in footnote 1 above, had defense counsel attempted to argue diminished capacity via expert testimony, the details of the defendant's planning and elaborate steps at concealment would all have been repeated to the jury as rebuttal, thus negating everything defense counsel was trying to achieve at the sentencing.

The evidence at the hearing showed the defendant to be an intelligent, articulate, well organized individual, and counsel had no duty to attempt to go clutching for straws which would inevitably have ended up tightly around the defendant's neck.

As to the evidence of the defendant's childhood, it should first be stressed that the defendant was 31 years old at the time of the offense. As the Eleventh Circuit noted in Francois v. Wainwright, 763 F.2d 1188 at 1191 (11th Cir. 1985), evidence of a deprived and abusive childhood (which was much more severe than the instant case) is entitled to little if any mitigating weight where the defendant was 31 years old at the time of the offense.

A second important consideration is that although trial counsel could not recall what investigation he did of the defendant's background, the sentencing record indicates he at least considered calling family witnesses:

> THE COURT: Blank in favor and blank opposed. Mr. Zenobi, do you have any witnesses other than the probation department officers?
>
> MR. ZENOBI: Possibly the family.
>
> THE COURT: Mr. Bailiff, you may allow the spectators into the room at this time.
>
> THE BAILIFF: None present at the time.

THE COURT: No spectators out there?

THE BAILIFF: No.

THE COURT: Then the family is not out there.

MR. ZENOBI: I'll check on it.

(Trial Transcript at page 1246)

In assessing whether trial counsel was deficient, this Court must resist the temptation to apply hindsight, but rather must face the picture as it appeared to counsel prior to sentencing. To begin with, counsel was faced with an enormously complex case at the guilt/innocence level, one which became even more complex as the trial approached. The time constraints were enormous, and he had to set priorities. As the Eleventh Circuit noted recently in Elledge v. State, 11 F.L.W. Fed. C1074 (11th Cir. July 20, 1987):

> In making this determination, the court must look to what constitutes a reasonable effort; i.e., what a competent attorney would have done given the constraints of time and money under the facts of the case.
>
> Id. at 11 F.L.W. Fed C1080, Note 15

In addition, counsel knew that two prior juries had recommended 12-0 for death, and that given the compelling aggravating circumstances, something very radical had to be done. Based on his discussions with the Court, whereby the

Court expressed serious misgivings as to capital punishment,[2] and based on the Court's pre-verdict plea offer of first and life, trial counsel reasonably assumed that if he could convince the jury to recommend life, the Court would accept that recommendation.

It is with these factors in mind that trial counsel's sentencing strategy and conduct must be viewed. As this Court noted in its opinion, counsel employed a nonlegal, emotional plea based on religious tenets and the virtue of forgiveness. The result was that an emotion filled jury returned a life recommendation in 42 minutes. Although the trial court overrode this recommendation he gave it great weight, and although the court imposed death it did so with great reluctance (11/13/87 at 82). In other words, trial counsel almost pulled off a minor miracle, nearly turning a 12-0 death case into a life sentence.[3]

The defendant now attempts to second guess consel's strategy by claiming he should have focused attention on his

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[2] The trial court, the Honorable Phillip Knight, was a Civil Court Judge who was specially appointed to hear Francis' case (11/13/87 at page 12), thus he had no death penalty track record.

[3] It is true that no mitigating evidence was presented at the first two trials, and that at the third trial counsel presented testimony that while awaiting trial, the defendant had been a model prisoner by informing on other inmates. Given that the defendant had tortured and killed the victim for just this type of behavior, it is clear, as this Court found, that the life recommendation was based on counsel's emotional appeal, not model prisoner evidence.

proverty stricken background and lack of meaningful opportunities. This would not have helped counsel's strategy, as the jury was just as likely to feel that millions of similarly situated persons don't commit vicious murders, and that whatever effect his poor childhood had, provides no excuses for a 31 year old man. The Eleventh Circuit has offered considerable wisdom in this area. In Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983), that Court stated:

> Representation of capital defendant calls for a variety of skills. Some involve technical proficiency connected with the science of law. Other demands relate to the art of advocacy. The proper exercise of judgment with respect to the tactical and strategic choices that must be made in the conduct of a defense cannot be neatly plotted in advance by appellate courts.[12]
>
> There may well have been sound considerations which dictated that counsel pursue the path that he elected. He may have felt that he had placed before the jury enough of the usable mitigation information and that a parade of family and friends-testimony available to most capital defendants-would do no good, and indeed would detract from the force of the argment which he intended to make. Whatever his reason, lack thereof, it was not presented to the habeas court. In such situations "[c]ourts presume, in accordance with the general presumption of attorney competence, that counsel's actions are strategic." Washington v. Strickland, 693 F.2d at 1257. In the absence of any evidence to overcome the presumption, no constitutional error is shown.

> None of this is very precise, but that in fact, is the point of our reluctance to second guess trial counsel's strategy. Effective counsel in a given case may consider the introduction of character evidence to be contrary to his client's interest. In other cases he may consider it unlikely to make much difference. In certain cases he may conclude that although available testimony might be minimally helpful, it would detract from the impact of another approach that he considers more promising. His position in reaching these conclusions is strikingly more advantageous than that of a federal habeas court in speculating post hoc about his conclusions. His knowledge of local attitudes, his evaluations of the personality of the defendant and his judgment of the compatibility of the available testimony and the jury's impression of defendant, his familiarity with the reactions of the trial judge under various circumstances, his evaluation of the particular jury, his sense of the "chemistry" of the courtroom are just a few of the elusive, intangible facts that are not apparent to a reviewing court, but are considered by most effective counsel in making a variety of trial and pretrial decisions.
>
> Id. at 970.

Counsel's performance must be judged in light of all the circumstances. Lighbourne v. Dugger, 1 F.L.W. Fed. C1452 (11th Cir. September 18, 1987). In the instant case counsel chose a rational approach which very nearly succeeded. Only by engaging in the most blatant hindsight can counsel's performance be deemed deficient.

Even if this Court finds the alleged omission to be constitutionally deficient, the defendant has not demonstrated, pursuant to Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), that the childhood background testimony probably would have changed the outcome. Even in override cases, the mere presence of mitigating evidence does not automatically provide a reasonable basis for the jury's recommendation. Demps v. Dugger, 12 F.L.W. 547 (Fla. October 30, 1987); Echols v. State, 484 So.2d 568 (Fla. 1986). Mills v. State, 476 So.2d 172 (Fla. 1985); Francis v. State, supra, and White v. State, 403 So.2d 331 (Fla. 1981).

In the instant case the defendant's aunt, who raised him from a small child, and his sister both testified they lived in a poor area, but had their own house. The defendant's clothing was minimal and the food of poor quality, but the defendant got as much as anyone. Although the man of the house, Leroy Johnson, physically abused his wife, he did not physically abuse him and the other children when he was drunk. According to the sister, the only beating the defendant ever received was a single one from the aunt.

The other family testimony was from Carrie Saintlot, who married into the family just before the defendant's thirteenth birday. Her testimony was totally contradicted by the aunt and sister, and her ridiculous, obviously contrived

testimony should be given zero weight by this Court. The net result of the family testimony would be that as a child, the defendant's family had little income, poor food and clothing, and a male figure who drank and physically abused the defendant's mother figure. Given that the defendant was 31 years old, at the time of the murder, and given the compelling and overwhelming nature of the aggravating factors, this is not the type of nonstatutory evidence which would have provided a reasonable basis for a life recommendation.

CLAIM III

THE ISSUE OF THE STATE'S FAILURE TO DISCLOSE THE FULL EXTENT OF THE CONSIDERATION GIVEN WITNESS CHARLENE DUNCAN WAS RAISED AND DECIDED ON DIRECT APPEAL.

The trial court found the issue to have been raised and decided on direct appeal, and with good reason. Issue II in the defendant's brief on direct appeal read as follow:

> WHETHER THE DEFENDANT WAS DEPRIVED OF DUE PROCESS OF LAW AND A FAIR TRIAL THROUGH THE ACTIONS OF THE STATE IN CONNECTION WITH THE TESTIMONY OF CHARLENE DUNCAN, INCLUDING THE USE OF FALSE, FRAUDULENT OR MISLEADING TESTIMONY; ACTING OUTSIDE OF ITS AUTHORITY; AND FAILING TO INFORM THE DEFENDANT OF EXCULPATORY MATERIAL IN ITS POSSESSION, ALL IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION?

This Court dealt extensively with this issue, Francis v. State, supra. at 675, as did the concurring opinion of Justice Overton, Id. at 677. The issue is therefor barred from further review in this proceedings. Mikenas v. State, 460 So.2d 359 (Fla. 1984), Demps v. State, 416 So.2d 808 (Fla. 1982), and Meeks v. State, 382 So.2d 673 (Fla. 1980).

CLAIM IV

THE ISSUE OF THE TRIAL COURT'S REFUSAL TO ALLOW THE DEFENDANT TO CROSS EXAMINE WITNESS DEBORAH WESLEY EVANS CONCERNING HER PENDING MURDER CHARGE WAS RAISED AND DECIDED ON DIRECT APPEAL.

The trial court properly held this issue to have been decided on direct appeal. Issue I of the defendant's brief on direct appeal stated:

> WHETHER THE TRIAL COURT ERRED IN IMPROPERLY PROHIBITING THE DEFENDANT FROM CROSS-EXAMINING DEBORAH WESLEY EVANS CONCERNING HER THEN PENDING CHARGES BEFORE THE SAME STATE ATTORNEY'S OFFICE WHO WAS PROSECUTING THE DEFENDANT, THEREBY DENYING THE DEFENDANT HIS SIXTH AMENDMENT RIGHT TO CONFRONT HIS ACCUSERS?

This Court expressly ruled on this issue in it opinion, Francis v. State, supra at 674, 675. See also partial concurrence of Chief Justice MacDonald, Id at 678. This issue is thus foreclosed from further review. Mikenas, Demps, and Meeks, supra.

CLAIM V

THE ISSUE OF THE STATE'S ASSISTANCE TO WITNESS CHARLENE DUNCAN IN HER OWN 3.850 PROCEEDING WAS RAISED AND DECIDED ON DIRECT APPEAL, AND FORMER MONROE COUNTY STATE ATTORNEY JEFF GAUTHIER'S CONFLICT OF INTEREST WAS PERSONAL TO HIM AND HAD NO EFFECT ON HIS SUCCESSOR'S ABILITY TO PROSECUTE THE DEFENDANT'S THIRD TRIAL.

Appellate counsel raised and dealt at length with the State's dealings with witness Charlene Duncan, and indeed Justice Overton roundly criticized the State's actions in this regard in his concurring opinion, though agreeing the error was harmless given the overwhelming evidence of the defendant's guilt. Francis v. State, supra at 677.

The defendant also raises as alleged conflict the fact that the Monroe County State Attorney's Office prosecuted his third trial after voluntarily withdrawing fom the prosecution of the second trial based on conflict of interest. As the trial judge related at the hearing (11/12/87 at pages 25-27), the reason the Monroe County State Attorney's Office withdrew before the second trial was that newly elected State Attorney Jeff Gauthier had represented witness Opal Lee at the first trial. Gauthier disqualified his office in order to avoid the appearance of impropriety. While the second conviction was in the process of being overturned, Gauthier was replaced as State Attorney by Kirk Zuelch. With him went the source

of the conflict. See State v. Fritzpatrick, 464 So.2d 1185 (Fla. 1985); Nash v. State, 466 So.2d 378 (Fla. 1st DCA 1985); and State ex rel Oldham v. Aulls, 408 So.2d 587 (Fla. 5th DCA 1981). In addition Opal Lee, the source of Gauthier's conflict, did not even testify at the third trial

Given that no conflict existed, trial counsel was hardly deficient for not wasting time raising this issue in the trial court.

CONCLUSION

All five claims were properly denied by the trial court, and its order denying Rule 3.850 relief should therefor be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing **BRIEF OF APPELLEE**, was furnished by mail to **MARK E. OLIVE**, Capital Collateral Representative, Independent Life Bldg., 225 West Jefferson Street, Tallahassee, Florida, 32301 on this 16th day of November, 1987.

RALPH BARREIRA
Assistant Attorney General

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