IN THE SUPREME COURT OF FLORIDA

RAYMOND STONE,

Appellant,

vs. CASE NO. 63,638

STATE OF FLORIDA,

Appellee.
_____/

SUPPLEMENTAL BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Raymond Stone, the capital criminal defendant in Stone v. State, 378 So.2d 765 (Fla. 1979), cert. denied, 449 U.S. 986 (1980) and the unsuccessful movant for post-conviction relief concerning an alleged violation of Brady v. Maryland, 373 U.S. 83 (1963) below, will be referred to as "appellant." Appellee, the State of Florida, the prosecuting authority below, will be referred to as "the State."

References to the three-volume record on appeal involving the instant proceeding will be designated "(R:)." Aside from the deficiences noted by appellant, this record omits page 12 of the State's "motions to dismiss", as well as the full text of its "notice of supplemental authority" and "alternative motion for summary judgment", plus all of the exhibits submitted in conjunction with these documents. Undersigned counsel and defense counsel Susan Cary will soon stipulate that the record be supplemental with these materials, which the State will here take the liberty of designating "(SR:)."

All emphasis is supplied by the State.

STATEMENT OF THE CASE AND FACTS

The State rejects appellant's statement of the case and statement of the facts because they fail clearly to present the legal occurrences and the evidence adduced below upon his second motion for post-conviction relief in the light most favorable to the State as the prevailing party. See Jones v. State, 446 So.2d 1059 (Fla. 1984). The State therefore substitutes the following statement for purposes of resolving the narrow legal issues presented upon appeal.

On June 8, 1970, while appellant was incarcerated in this State for a sex offense unrelated to the instant case, he authorized psychologist Lee Overstreet of the Florida Division of Corrections Reception and Medical Center at Lake Butler to request that officials of the Farmington State Hospital in Missouri forward information concerning his juvenile psychiatric history which had been complied during his stay at that institution, under the name of Walter Herron, beginning in 1955 (R 107-113; 207-208; 98-102). Overstreet was not acting as a law enforcement officer at this time (R 113). Mrs. Dorothy Banks of the Hospital responded to his inquiry on June 30 with about twenty pages of material which detailed that while appellant, a "small undernourished looking boy" from a poor and abused background had been committed to the Missouri Training School in Boonville from 1951 to 1956 for the December 18, 1950 drowning death of young Paul Nichols, he had once escaped and stolen a car, and in addition had been diagnosed as having a low I.Q., poor impulse control, homosexual and exhibitionistic tendencies, and psychopathic as opposed to psychotic tendencies

(R 206; 209-228; 101-102). Overstreet, after presumably using this material to classify appellant, forwarded it to appellant's general prison file at the Florida State Prison in Starke (R 113-118). The general prison file is distinct from the medical records file, also located at the Florida State Prison, and is also distinct from the central office file, located in Tallahassee (R 101-103; 93-95). However, information from any of these three files is available to defense counsel or other authorized personnel upon request or subpoena (R 93; 98; 104).

On November 4, 1974, appellant was indicted in the Circuit Court of the Eighth Judicial Circuit in and for Union County, Florida, for the first degree murder of Jackequeline Smith the previous August 23, by agency of clubbing and throwing the victim into a body of water (SR: Exhibit III). His appointed counsel, Assistant Public Defender Gary Dunham, filed a general demand for discovery and inspection of evidence on November 6 (SR: Exhibit IV). Counsel for the State, Assistant State Attorney Kenneth Herbert, answered on November 15 (SR: Exhibit V).

On November 21 Dunham, having been informed by his client of past difficulties in Missouri, wrote to the Chief Medical Librarian at the Reception and Medical Center in Lake Butler, stating only that appellant had a history of mental problems and had been institutionalized in unspecified other states, and requesting that any information on this score be forwarded (R 260). Appellant was subsequently to assert that Dunham's letter reflected a "haphazard,'hope you can help investigative method" and criticize counsel for not resorting to a subpoena (SR: Exhibit XV, p. 15). Alternatively, he has argued that the letter constituted a

"specific request" for discovery ("Supplemental Brief of Appellant", pp. 4, 10). Chief Medical Technician Donald Riggs at the Florida State Prison in Starke ultimately received Dunham's letter, checked only the medical file there as this was the extent of his authority, and informed Dunham on December 23 only that appellant's "medical records indicate that he has never been seen nor had any psychiatric or psychological problems while at this institution" (R 69-70; 77; 204). Riggs did not intentionally withhold the Missouri information in the general prison file from Dunham (R 79-80). Dunham does not know whether he or his investigator thereafter checked the general prison file personally, but such would have been possible and was standard procedure (R 180-181).

Following a trial which ran from July 8 through July 11, appellant was found guilty as charged (SR: Exhibit VIII). On July 16, Classification Coordinator Phillip Welsh of the Florida Department of Corrections wrote a memo to the central office file in Tallahassee essentially stating that upon the authorization of Deputy Director For Inmate Treatment Ron Jones, he had informed the Classification Supervisor at the Florida State Prison, Ken Snover, to turn over certain information regarding appellant's Missouri juvenile psychiatric history to an unnamed Assistant State Attorney (R 205; 83-96; 191-195). However, neither Welsh nor Snover nor Jones nor Hebert have any independent recollection of this request, and Florida State Prison records from July 16 do not reveal any visitors from the State Attorney's Office (R 85; 192; 195; 119-120). By the July 18 jury penalty advisory proceedings, Hebert possessed an undeterminable portion of the Missouri material, for during their deliberations, noting that appellant himself

had just testified to his Missouri juvenile difficulties in mitigation, he referred to aggravating records concerning the Nichols drowning in open court and offered Dunham copies (R 121-145; 229-234). Hebert had not illicitly withheld any information from Durham, and did not use whatever information he had against appellant (R 171; 131). Apparently Durham either did not desire to open the door concerning the Nichols drowning or did not immediately accept Hebert's offer, for he did not seek a continuance for the jury to consider this material (R 187-188; 144-146). Sometime after the jury recommended death and August 1, Dunham sought to obtain information regarding appellant's background directly from the Missouri authorities for the first time (SR: Exhibit XI; R 161; 261).

By August 26 and September 2 Dunham had obtained essentially all of the Missouri information from 1951 - 1956 which had been in appellant's general prison file and which ultimately came into Hebert's possession (R 235-258; 184), plus an additional report from 1958 revealing that appellant often fantasized taking revenge on perceived enemies (R 264-267), for upon these dates he forwarded this material to the trial judge (R 161-162; 262-276). At the October 1 sentencing, appellant addressed the judge in disrespectful terms and asked for death (R 277-296). Dunham made understated generalized references to appellant's troubled background, hoping by this soft sell to convince the court that appellant's past was mitigating in nature (R 188; 277-296). The judge, however, imposed a death sentence, declining to find that appellant's past mitigated against such a penalty (R 277-296).

On April 5, 1976 and October 31, 1977, Assistant Public Defender David Busch filed briefs with this Court upon direct appeal of appellant adjudication and sentence, declining to argue that any discovery violations had occurred below. Busch did argue that the trial judge had failed to afford the submitted evidence of appellant's deprived and depraved past its proper status as mitigation (SR: Exhibit XIII). This effort was to no avail, however, as this Court affirmed the dispositions below on November 1, 1979, in an opinion which contains the following relevant passages:

> Even though defendant confessed and even though he expressed a desire to be executed, this Court has, nevertheless, examined the record to be sure that the imposition of the death sentence complies with all of the standards set by the constitution, the legislature, and the Court. See Goode v. State, 365 So.2d 381 (Fla. 1978)
>
> The sentence recommendation of the jury was rendered July 18, 1975. Sentence was imposed on October 1, 1975. On August 26th and September 2nd, 1975, defendant's trial counsel forwarded copies of psychiatric reports to the trial court which disclosed that defendant was admitted to the Farmington State Hospital on June 8, 1955, under the alias "Walter Herron." The case history of defendant included an incident which occurred when he was eleven years of age. At that time he and two other boys bound another child and threw the child into a river where he drowned. The diagnostic report revealed the following:
>
> "Sociopathic youth from a deprived and depraved environment whose basic trust in others is so low that the possibility of an uneventful adjustment is considered very doubtful. He is considered to be of low average intelligence and in good contact with reality; however, his stated and perhaps fantasized revenge motives towards individuals and society are so malignant that he may constitute a grave danger to others upon his custody."

The hopitalization occurred between 1955 and 1958 and this remoteness seriously affects its use as a mitigating factor.

The defendant testified at the sentence hearing and stated that he had been in mental institutions at various times until he was 19 or 20 years of age. He relies upon Messer v. State, 330 So.2d 137 (Fla. 1976) and Miller v. State, 332 So.2d 65 (Fla. 1976) where we ordered new hearings for sentencing purposes because of failure to afford defense counsel an opportunity to present psychiatric testimony to the jury. The Court in the case sub judice did not declare the reports inadmissible. In fact, the reports had not been received and, therefore, could not be presented to the jury. Neither the judge nor defense counsel could be faulted for the absence of the reports at the jury phase of the sentence hearing.

Defendant knew he had been hospitalized and testified before the jury to that effect. Stewart v. State, 339 So.2d 710 (Fla. 2d DCA 1976), involved a situation where the defendant did not inform counsel that he had been found criminally insane while using another name until after his conviction. Stewart is not applicable for it involved newly-discovered evidence while the instant case does not.

There is nothing in the record from which the trial court could conclude that a mental examination would be appropriate. Although defendant testified as to his use of beer and marijuana, there were many witnesses who saw him at various times shortly after the homicide. On each occasion he seemed normal, not intoxicated. Also, there is no evidence that defendant could not distinguish right from wrong. Quite the contrary, his behavior in cleaning up the blood, preparing to flee and leave the area, demonstrates his awareness that his act was wrong. According to the defendant's statement, he specifically discussed the fact that he was in trouble and the advisability of leaving town shortly after the killing.

The reports furnished the trial judge prior to sentencing included a psychiatric examination made in 1955 when defendant was sixteen years of age. At that time "it was felt that for some reason the patient was malingering in an effort to get a low grade, but that nevertheless he was mildly mentally defective." Three years later the staff diagnosis was "sociopathic

> personality without mental disease." On April 15, 1958, he was discharged from the hospital and transferred to the penitentiary. There is no evidence of mental illness. From these reports, his observation of the defendant, and the evidence produced in the case, the trial judge found that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not substantially impaired. In other words, the trial judge found no mitigating circumstances, so the death sentence was appropriate.

Stone v. State, 378 So.2d 765, 773-774.

On February 22, 1983 appellant, now represented by Susan Cary and Donald Middlebrooks, filed a Fla.R.Crim.P. 3.850 motion for post-conviction relief with the trial court on various and sundry grounds, including Dunham's allegedly ineffective use of appellant's psychiatric history at sentencing, but excluding any claimed violation of Brady v. Maryland, (SR: Exhibit XV). The trial court denied appellant's motion without an evidentiary hearing on March 3, finding essentially that three of appellant's claims had been de jure resolved adversely to appellant upon direct appeal, and finding that the ineffectiveness claim had been de facto resolved upon direct appeal on the basis of the aforecited passages (SR: Exhibit XV).

Appellant appealed this summary denial to this Court and, on June 20, filed his brief (SR: Exhibit XVI). The State answered on July 12 that, inter alia, the ineffectiveness claim against Dunham was legally uncompelling because appellant's pleading was either conclusory or unavailing if taken as true; because appellant was in effect seeking to litigate matters

which could have been raised upon direct appeal; because appellant had skewered Dunham's strategy by asking for death; and that strategic interests dictated that the allegedly mitigating evidence (which as noted included the fact that appellant had a low I.Q.; had homosexual and exhibitionistic tendencies; had grown up in a reformatory; and fantasized taking revenge on his perceived enemies) be mentioned in a very understated manner if at all (SR: Exhibit XVII).

Meanwhile, on June 24, Cary had discovered the Welsh memo of July 16, 1975 for the first time, despite the fact that his document had been available to any authorized person within a few days of its preparation as noted (SR: Exhibit XVIII). On the basis of her find, Cary moved this Court on July 28 to relinquish jurisdiction to the trial court concerning the Brady violation the memo allegedly suggested (SR: Exhibit XIX). The State replied that a remand was unwarranted in view of appellant's twin procedural defaults in failing to argue a discovery violation upon direct appeal and in failing to argue a Brady violation upon his initial collateral attack of February 22; also arguing that the alleged Brady claim was nothing of the sort inasmuch as it concerned a matter which was known to appellant (i.e. his depraved and deprived past) and hence could have been uncovered with due diligence; and also arguing that the essence of a Brady claim is withholding mitigating evidence and the evidence at issue here was highly aggravating (SR: Exhibit XX). On December 14,

this Court, by a 4-3 vote, ordered jurisdiction temporarily relinquished to the trial court "for further findings in conjunction with the facts set out in (Appellant's) motion to relinquish," (SR: Exhibit XXI). Thus, this Court did not relinquish the cause for findings on any matter except the Brady claim, and did not specify whether these findings should be legal or factual or both. In other words, this Court did not necessarily mandate an evidentiary hearing.

Prior to the April 24, 1984 hearing below, the State filed four motions to dismiss with the trial court, arguing that appellant had failed to plead a true Brady v. Maryland violation as a matter of law firstly in that the material at issue was not mitigating in nature and was shown on the record to have been either actually known or readily obtainable to the defense at all operative times through due diligence; secondly in that appellant had procedurally defaulted upon his Brady claim by inexcusably failing to urge a discovery violation upon direct appeal although the alleged withholding of evidence was indisputably known to appellate defense counsel by that time; thirdly in that appellant had similarly procedurally defaulted upon his Brady claim by inexcusably failing to urge such a violation in his initial motion for post-conviction relief; and fourthly in that appellant was collaterally estopped from arguing that the disputed material was withheld from Dunham in violation of Brady after having inconsistently alleged that Dunham was ineffective for not using this material, which

presupposed that he had it to use (SR: "Motions To Dismiss", pp. 1-13;"Notice of Supplemental Authority", pp. 1-2). The State subsequently restyled the third of these motions to dismiss as a motion for summary judgment insofar as it had relied upon an affidavit from Welsh to establish the inexcusable nature of appellant's collateral default (SR: "Alternative Motion For Summary Judgment", pp. 1-4). Appellant responded to the State's procedural claims, and also amended his pleadings to incorporate an allegation that Overstreet had obtained appellant's release to acquire, and the State had subsequently used against him, the now essentially aggravating evidence of his juvenile difficulties in violation of Miranda v. Arizona, 384 U.S. 436 (1966) (R 10-34; 4-7).

The trial judge stayed his ruling upon the State's motions, and held an evidentiary hearing at which matters evolved in his view as heretofore described, for he thereafter issued a factually detailed written order denying appellant's Brady v. Maryland claim upon the merits (R 47-53). The judge alternatively granted the State's prehearing motions in their entirety, and denied appellant's Miranda v. Arizona claim as "unfounded and beyond the purview of the instant inquiry" (R 53). This timely appeal followed (R 54).

SUMMARY OF ARGUMENT

The State disagrees with appellant's allegation that the judge below erred in determining that he had failed to establish any basis for relief due to a purported violation of Brady v. Maryland, 373 U.S. 83 (1963). The judge properly found that this claim was procedural infirm for four distinct reasons, and additionally properly found in the alternative that this claim was not substantively established by the evidence adduced insofar as the disputed material was not properly requested from the prosecution, was available to the defense through due diligence, and was not exculpatory.

ISSUE

THE TRIAL JUDGE PROPERLY DETERMINED THAT APPELLANT FAILED TO ESTABLISH ANY BASIS FOR RELIEF DUE TO THE STATE'S ALLEGED VIOLATION OF BRADY V. MARYLAND, 373 U.S. 83 (1983).

ARGUMENT

Appellant alleges that the trial judge erred in determining that he had failed to establish any basis for relief due to the State's alleged violation of Brady v. Maryland, 373 U.S. 83 (1983). The State totally disagrees.

I

The State would initially contend that the trial judge properly granted in the alternative its four prehearing motions for a dismissal and/or a summary judgment on procedural grounds. Given the instant space limitation, the State will merely restate these contentions here and rely largely upon the arguments it made below in support thereof, adding only a few brief comments:

Firstly, the State continues to contend that appellant was procedurally precluded from relief because he failed to plead a true Brady v. Maryland violation as a matter of law, insofar as the material at issue was not mitigating in nature and was shown on the record to have been either actually known or readily obtainable to the defense at all operative times through due diligence.

Secondly, the State continues to contend that appellant was procedurally precluded from relief because he inexcusably failed to argue a discovery violation upon direct appeal although the alleged withholding of evidence was indisputably known to appellate defense counsel by that time. The State would add that this contention is now further supported by this Court's recent decision in State v. Snow, ___So.2d___(Fla. 1985), 10 F.L.W. 40, indicating a preference for litigating alleged errors upon direct appeal rather than collaterally.

Thirdly, the State continues to contend that appellant was procedurally precluded from relief because he inexcusably failed to argue a Brady v. Maryland violation in his initial motion for post-conviction relief. The State would add that this contention is now further supported by this Court's recent decision in Smith v. State, 453 So.2d 388 (Fla. 1984), indicating that successive motions for post-conviction relief may constitute an abuse of the process warranting their summary denial.[1]

Fourthly, the State continues to contend that appellant was procedurally precluded from relief because he was collaterally

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1 The Court may judicially notice that the State's research for its theory that successive motions for post-conviction relief may be abusive, accepted in Smith v. State, was originally developed for the instant case.

estopped from arguing that the disputed material was withheld from Dunham in violation of Brady after having inconsistently alleged that Dunham was ineffective for not using this material, which presupposed that he had it to use. The State would add that this contention is now further supported by appellant's supplemental inconsistent action in amending his pleadings below to allege that this material was actually essentially aggravating and obtained and used by the State in violation of Miranda v. Arizona. The Court might at this point pause to consider whether it wishes to permit a litigant before it to conceivably profit from alleging that the very same material was both mitigating and aggravating in nature, and was withheld from him, turned over to him but not used for him, and used against him.

II

The State would alternatively turn to the merits by initially noting that the true gravamen of the instant Brady v. Maryland claim is that the prosecution deliberately or negligently withheld from the defense information generally and properly requested in discovery[2] which the defense could not have uncovered

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2 The State thoroughly disagrees with appellant's instant characterization of Dunham's letter to Lake Butler, which ultimately reached Riggs in Starke, as a "specific request" for discovery of the disputed material. Dunham knew his client had had past difficulties in Missouri, yet did not specify this fact in the letter. He requested only "medical" files from prison authorities, not named documents from the prosecution. The State would note that appellant himself had earlier asserted that Dunham's letter reflected a "haphazard, 'hope you can help' investigative method", and critized Dunham for not resorting to a subpoena.

itself through due diligence and which was of a materially exculpatory nature to the point of creating a reasonable doubt that the outcome of the proceeding at issue would have been different had the material been provided and used. See Brady v. Maryland; United States v. Agurs, 427 U.S. 97 (1976); United States v. Antone, 603 F.2d 566 (5th Cir. 1979); Jarrell v. Balkcom, 735 F.2d 1242 (11th Cir. 1984); and Halliwell v. Strickland, 747 F.2d 607 (11th Cir. 1984), the latter of which holds that the prosecution's actual knowledge of the disputed material is a factor to be considered. The record in this cause affirmatively establishes that the prosecution did not withhold from the defense any information of the aforedescribed nature.

The record does support a conclusion that officials at the Florida State Prison in Starke possessed in their general prison file the full record of appellant's Missouri difficulties which appellant for a time did not receive. However, the record also supports the conclusion that this failure to receive the information was occasioned by Dunham's general request, directed to Lake Butler but ultimately received by Riggs in Starke, to check only appellant's medical file. The record does not support a conclusion that Riggs withheld any information from the defense in bad faith, and also does not support a conclusion that Hebert withheld whatever portion of this information he may have had on July 18 at all, let alone in bad faith.

Furthermore, even assuming aguendo that the record demonstrated an appropriately specific discovery request and a

bad faith refusal to respond, the fact remains that the disputed material was undeniably available to the defense at all operative times through the exercise of due diligence, "insofar as it involves appellant's own life story." Smith v. State, 445 So.2d 323,326 (Fla. 1983); cf Henry v. Wainwright, 743 F.2d 761 (11th Cir. 1984), cert. denied, ___U.S.___(1984). Overstreet received from appellant information sufficient to direct his correspondence to the appropriate Missouri authorities and receive back this information in 1970; certainly Dunham could have done the same in 1974, as he further proved by so doing in 1975, thereafter providing this information to the trial judge.

Moreover, even assuming arguendo that the record demonstrated an appropriate discovery request, a bad faith failure to respond, and that the disputed information was unavailable to the defense through due diligence, the fact remains that this information was not of a materially exculpatory nature to the point of creating a reasonable doubt that appellant would have escaped a death sentence had the information been provided and used by the jury. As noted, this information disclosed among other things that when appellant had been committed to various Missouri institutions from 1951 to 1958 for the 1950 drowning of another boy, he had once escaped and stolen a car, and in addition had been diagnosed as having a low I.Q., poor impulse control, homosexual and exhibitionistic tendencies, psychopathic as opposed to psychotic tendencies, and fantasies of revenge upon perceived enemies. That such information was

sporadically intercut with references to that fact that appellant was a "small undernourished looking boy" from a poor and abused background simply does not render the overall tone of this information - which was all fair game if any of it was - "mitigating" in nature as he now intermittently contends. What type of withheld information is truly mitigating may be derived from the United States Supreme Court's holdings in Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982), striking down capital sentencing proceedings in which the sentencing judge was statutorily precluded from considering in his deliberation significant mitigating factors bearing upon the defendant's character and past, and the nature of the offense. In Lockett, the excluded evidence encompassed the defendant's "character, prior record, age, lack of specific intent to cause death, and her relatively minor part in the crime", 438 U.S. 586,597, while in Eddings the excluded evidence encompassed the youthful defendant's recent brutalized upbringing. Only appellant himself, 36 at the time of this crime, could fail to appreciate the essential difference between the nature of the material excluded in Lockett and Eddings and that under debate here, which would have been, from a 1975 North Florida jury's point of view, explosively aggravating. Cf Wainwright v. Goode, ___U.S.___, 78 L.Ed.2d 187 (1983).

Appellant's attempted reliance upon the decisions of Giglio v. United States, 405 U.S. 150 (1972) and Pina v.

Henderson, 586 F.Supp. 1452 (E.D.N.Y. 1984) for the inmate proposition that the prosecution is strictly liable for failing to turn over every shred of material compiled by any state agency on a defendant upon pain of forfeiting a conviction, regardless of whether such was available to or favorable to the defense, must fail. These decisions essentially involve pervasive nondisclosures of indisputably exculpatory evidence. The State would suggest that the decision of Halliwell v. Strickland, in which the nondisclosure until after trial of arguably exculpatory evidence unknown to both sides but reasonably obtainable to the defense through due diligence was held not to constitute a Brady violation, is far more germane to the instant case.

CONCLUSION

WHEREFORE, the State of Florida respectfully submits that this Honorable Court must AFFIRM the findings entered below upon each and every basis.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Supplemental Brief of Appellee has been forwarded to Ms. Susan Cary, Attorney at Law, 1215 N. W. 4th Street, Gainesville, FL 32601, and to Mr. Donald M. Middlebrooks, Counsel for Appellant, Steel, Hector and Davis, 1400 Southeast Bank Bldg., Miami, FL 33131, on this 22nd day of February, 1985.

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