IN THE SUPREME COURT OF FLORIDA

RAYMOND STONE,

Appellant,

vs. Case No. 63,638

STATE OF FLORIDA,

Appellee.

On Appeal From Denial of Motion To Vacate By The Circuit Court of The Eighth Judicial Circuit, In And For Union County, Florida.

SUPPLEMENTAL BRIEF OF APPELLANT

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Issue Presented For Review

WHETHER THE COURT ERRED IN CONCLUDING THAT NO BRADY VIOLATION HAD OCCURRED.

TABLE OF AUTHORITIES

Preliminary Statement

Appellant Raymond Stone will be referred to as Appellant or Stone. The State will be referred to as the State or as the Appellee.

The Record of the Brady remand hearing is referred to as RB, followed by the appropriate page number.

It should be noted that the Record filed herein contains several errors: In Volume II, pages 96 and 97 are in reverse order as are pages 115 and 116. Additionally, in Volume III, the Index incorrectly labels some of the Exhibits. Exhibit No. 3 is the records from Missouri State Hospital sent to the Reception and Medical Center and should include pages 207-228. Exhibit No. 4 is excerpts from the penalty hearing on July 18, 1975, and should be pages 229-234.

Statement of the Case

While appeal from summary denial of a Motion to Vacate was pending in this court, defense counsel discovered the existence of a claim in violation of Brady v. Maryland, 373 U.S. 83 (1963). A Motion to Relinquish Jurisdiction was granted on December 14, 1983, for further findings in conjunction with the facts alleged in the Motion.

After depositions for purposes of discovery on the Brady claim, Appellant filed his Notice of Amendment of Pleadings on April 20, 1984, claiming denial of his rights to be warned about possible detrimental use of psychiatric records sought and obtained by the State pursuant to Stone's release.

An evidentiary hearing was held April 24, 1984, before The Honorable John J Crews, Judge, Eighth Judicial Circuit. The court's order denying relief was entered May 11, 1984. Notice of Appeal was filed June 8, 1984. Appellant sought and received permission of this court to file a Supplemental Brief on the Brady claim.

After some difficulties in obtaining an accurate record were encountered, Appellant's Motion to Correct the Record was granted. A corrected Record was filed December 17, 1984. This Supplemental Brief follows.

Statement of the Facts

In 1970, the State of Florida, Department of Corrections, obtained from state hospitals in Missouri detailed psychiatric and social welfare records on Raymond Stone. These records were obtained pursuant to an authorization signed by Stone (RB 240) at the request of Lee Overstreet (RB 105; 108; 207-208), psychologist, State of Florida, Department of Corrections, Reception and Medical Center, whose duties were to conduct psychological screening interviews of persons committed to the custody of the Department of Corrections (RB 109). Despite the fact that these were confidential psychiatric records, they were placed in Stone's institutional file rather than his medical file because Overstreet was assigned to classification, not the medical department (RB 116).

There are at least two sets of files kept on each prisoner at the local institution: an institutional file and a medical file, both of which accompany a prisoner upon transfer from one institution to another (RB 189).

The information Overstreet sought could not be obtained without Stone's consent (RB 109). Overstreet initiated the process resulting in Stone's signing the release (RB 111). Overstreet did not explain to Stone how the records could be used (RB 110). The cover letter sent with the release states that any "information furnished for our professional use will

be handled with proper responsibility." (RB 207). Stone was not advised that the material could be given to the State Attorney (RB 111).

On November 21, 1974, Stone's trial counsel Gary Dunham (hereinafter Dunham) sent a letter to the State of Florida, Division of Corrections, Chief Medical Librarian, Lake Butler Reception and Medical Center, Lake Butler, Florida (RB 154; 260), where Raymond Stone was incarcerated (RB 155). That letter indicated Dunham's "understanding that Mr. Stone has a history of psychiatric problems and that he has been institutionalized in State Mental Hospitals in other states." The letter specifically requested any pertinent medical records so that Dunham could determine Stone's past medical history, particularly emotional or psychological impairment. The letter further asked that the letter be forwarded to an appropriate psychiatrist for a summary of Stone's past medical history, the location of any mental hospitals he had been in and the results of the most recent evaluation of his mental and emotional state.

On December 23, 1974, D. A. Riggs, Medical Technician Supervisor, State of Florida, Division of Corrections, Florida State Prison (RB 66-67; 156) responded that Dunham's letter had been forwarded to him and that Stone's medical records indicated he had never been seen nor had he had any psychiatric or psychological problems while at Florida State

Prison (RB 67;204). In order to respond to Dunham's request for records and information, Riggs inspected Stone's prison medical file (RB 68). He did not check any other records (RB 68-70). There were no past psychiatric records in the medical file (RB 69). Riggs knew, however, that past psychiatric records would not normally be in the medical file (RB 70) and that they would be in the psychological department, but he did not forward the request or look in the psychological department which was about 100 yards from his office (RB 70). He did not tell Dunham that the records he sought might be somewhere else (RB 71). He felt that his response fully replied to Dunham's request (RB 72). Riggs had custody and control over only the medical file, although he knew of the existence of several other files (RB 77). Dunham's understanding after receiving Rigg's letter was that the prison had no psychiatric records at all (RB 158; 261). Riggs testified that he did not intentionally hide any records (RB 79).

Phillip D. Welsh, Classification Coordinator for the State of Florida, Department of Corrections (RB 84), on July 16, 1975, wrote a memo (hereinafter "the memo") to Stone's central office inmate file (RB 85; 205). The State of Florida, Department of Corrections, keeps two sets of records, one in Tallahassee Central Office and the prison and medical file at the local institution (RB 189). The institutional file

normally contains more records than the central office file(RB 189). Kenneth Snover, who was Classification Supervisor at Florida State Prison, had sought advice of the Department of Corrections General Counsel as to whether to release to the State Attorney copies of material on Stone from Missouri State Hospital which the prison had obtained pursuant to Stone's release (RB 86; 205). In the General Counsel's absence, Snover spoke with Welsh who in turn spoke with his supervisor Mr. Ron Jones, President of the Adult Services Department (RB 89) and Snover was told to release the material to the State Attorney as an officer of the court (RB 88-89). Welsh did not ask to see the documents which were being requested nor consider consulting with Stone's counsel (RB 90-91). The memo to the file memorializing these transactions (RB 205) was probably filed in Stone's central office file within two or three days of July 16, 1975 (RB 93). It would not have been in Stone's file at the prison or anywhere else (RB 95). Officers of the Department of Corrections were authorized to release information in the prison file to officers of the court (RB 94). Snover had no present recollection of the events in the memo (RB 192), but he had no reason to doubt that the events described had taken place (RB 193).

Doyle Kemp, Inmate Records Supervisor, Florida State Prison (RB 96), testified that the Welsh memo is not in

Stone's prison file (RB 100). He also testified that anyone who works in the prison has access to the prison files (RB 100).

Kenneth Hebert, the Assistant State Attorney who had prosecuted Stone, was not able to determine who had gone to the prison to get Stone's records (RB 120). He was unable to say precisely when he had received Stone's prison records, but he assumed that the records he referred to in the July 18, 1975, penalty hearing (RB 233-34) were those records (RB 123). He had told Dunham at penalty phase that he had some records relating to a juvenile incarceration (RB 233-34), but he did not know whether Dunham had ever picked up copies of them (RB 124). Dunham did not seek a continuance to review the records (RB 145). The State did not give the records to the court (RB 131), but Dunham did when he eventually obtained some of the records on his own (RB 131; 262; 268). The records in possession of the State Attorney's Office are identical to those in the prison file (RB 147) and more extensive than those Dunham obtained (RB 165; 182). (Compare Exhibit 3, in evidence, the records from Stone's prison file, RB 206-234 with Exhibit 9, RB 262-267, and Exhibit 10, RB 268-276).

Gary Dunham, Stone's trial attorney*, had filed a pre-

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*The issue of ineffective assistance of counsel was not before the court in this proceeding (RB 151).

trial demand for discovery (RB 153; 259). Additionally, he wrote to the Reception and Medical Center for any psychological records, as mentioned above, because that is where Stone was housed at the time (RB 155). Riggs' letter (RB 204) was all he ever received in response (RB 156). His understanding was that the prison had no psychiatric records at all (RB 158; 261). After seeking and receiving documents from State mental hospitals at Fulton and Farmington, Missouri, Dunham forwarded the records to the court with cover letters dated August 26 and September 2, 1975 (RB 161; 262; 268). Dunham was not aware prior to July 18, 1975, that the State Attorney had any such records (RB 164) and he was never furnished copies of the records by the State Attorney (RB 165). The materials which the State Attorney had were more extensive than those sent to Dunham from the hospitals (RB 165; 182).

Dunham was aware in November, 1974, that Stone had been in Missouri mental institutions (RB 172). Stone's recollection of past events was sketchy (RB 173). Stone had been known as Walter Herron in Missouri; both names were listed on his rap sheet (RB 174-175). Information in the rap sheet was sufficient to have enabled Dunham to request records from specific institutions under the correct name (RB 176). The Missouri psychiatric records in the prison file contained leads to other records (RB 183). It was

standard procedure for Dunham or an investigator to review prison files of prison clients (RB 180). Dunham was not aware that there was an active and inactive prison file on Stone (RB 189). If the investigator had reviewed Stone's prison file, there would have been a memo in Dunham's file and there was no such memo (RB 181). Neither Dunham nor his investigator found the Missouri psychiatric record in Stone's prison file (RB 180-181).

ARGUMENT

THE COURT ERRED IN CONCLUDING THAT NO BRADY VIOLATION HAD OCCURRED.

The withholding of evidence favorable to an accused on the issue of guilt or penalty denies due process. Brady v. Maryland, 373 U.S. 83 (1963). The withheld evidence must be "material." The definition of "material" depends upon whether the defense has made a specific request for the evidence. United States v. Agurs, 427 U.S. 97 (1976). Where there has been a specific request, the requirement is that "the suppressed evidence might have affected the outcome of the trial." Agurs, 427 U.S. at 104. (Where there has been only a general Brady demand or where there has been no demand at all, the evidence is not considered material unless it "creates a reasonable doubt of guilt that did not otherwise exist." Agurs, 427 U.S. at 112.) Here, however, there was a specific request made for "any pertinent medical records that you might have in his files in order that I [defense counsel] may determine the extent of his past medical history, especially insofar as emotional and/or psychological impairment." (RB 260).

The law is clear that there is no requirement that the withholding of evidence be deliberate. Brady, itself a

death penalty case, held that the suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. The Supreme Court cited with approval the comment of the Maryland Court of Appeals noting that a due process violation had occurred even though the withholding was not "the result of guile."

In reiterating the holding of Brady, the Supreme Court said that, "If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." United States v. Agurs, 427 U.S. 97 (1976). Further, in Giglio v. United States, 405 U.S. 150 (1972), a violation was found even though the current prosecutor had had no knowledge of the suppression. In Giglio, while the appeal was pending, Defendant discovered that the court's key witness had been promised immunity in exchange for his testimony. The witness at trial had denied any deals and the prosecutor had emphasized that fact in closing. It was discovered after trial that another prosecutor had promised immunity without relaying that information to the prosecutor who tried the case and who had in fact told the witness he could still be prosecuted. Reiterating the holding of Brady that suppression of material evidence justifies a new trial "irrespective of the good faith

or bad faith of the prosecution," the court held that "whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor." Giglio, 405 U.S. at 153.

A similar result was reached in Freeman v. Georgia, 599 F.2d 65 (5th Cir. 1979), where a police detective had hidden a crucial witness, unbeknownst to the prosecutor and despite the considerable efforts of the prosecutor to find the witness. The officer's conduct in concealing the witness' whereabouts was held to be state suppression of favorable evidence.

Information in the hands of state officers is subject to the Brady requirement regardless of prosecutorial knowledge. Antone v. State, 355 So.2d 777 (Fla. 1978). The inefficiency of state prosecutorial forces should not be permitted to keep critical evidence from defense counsel. Pina v. Henderson, 586 F.Supp. 1452 (E.D. N.Y. 1984). In Pina, information known to a state probation service was treated as information known to the prosecutor.

It is clear that information tending to mitigate penalty must be disclosed. Brady itself concerned that exact problem. The trial court here discussed the evidence only as psychological reports connected with a murder charge against Stone when he was twelve years old (RB 14). The court overlooked references to a small, undernourished,

considerably retarded child (age 11); from one of the most slovenly depraved backgrounds ever encountered; a child who would require extended therapy (which he never got); a child with a deep-seated character neurosis needing a very sympathetic and understanding environment (which he never got); a child who over-idolized the father whose morals and values were such that they were not conducive to any healthy principles of living; a father who sexually abused his children, whose youngest children finally were taken from him, whose home was the back of a truck in the town dump, who kept the children out of school to sell paper flowers on the streets; a child who was bounced from one institution to another his entire life.

Lockett v. Ohio, 438 U.S. 586 (1978), requires that the sentencer be allowed to consider as a mitigating factor any aspect of a defendant's character or record that the defendant proffers. Eddings v. Oklahoma, 455 U.S. 104 (1982) specifically addresses a history of severe abuse as relevant to the issue of penalty.

After the evidentiary hearing in this cause, the trial court made certain findings of fact upon which to apply the law and then denied the claim in error stating that "withholding information presumes knowledge of its existence." (RB 51).* As stated above, even if the prosecutor does not

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*The State filed several Motions to Dismiss alleging the

know about the information, a Brady violation can occur.

The court's finding that defense counsel's inquiry was misdirected (RB 49) is erroneous. Counsel wrote to the Reception and Medical Center because Stone was housed there due to an injury (RB 155) and that is where his records were. When the request was forwarded to Florida State Prison because Stone had been transferred there, the Medical Technician who answered counsel's request did not look anywhere but in Stone's medical file, did not check any other files, and did not tell counsel that the records might be elsewhere. This is the classic case of bureaucratic inefficiency discussed in Pina. The Rules of the Department of Corrections did not put the general public on notice as to the existence of myriad sets of records. See Fla. Admin. Code Chapter 10B-6 (1971). Because of the existence of active and inactive files, of which counsel was unaware, (RB 189) it is not at all certain that had counsel searched Stone's prison record himself, he would have discovered the information he sought, as found by the

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same grounds offered in this court in opposition to the Motion to Relinquish Jurisdiction. The trial court correctly construed the remand to require findings of fact and a ruling on the merits (RB 53) as this court had remanded specifically for further findings in conjunction with the facts alleged in the Motion. The findings inherent in the remand order are binding upon the trial court as law of the case. Stuart v. Hertz Corp., 381 So.2d 1161 (Fla. 4th D.C.A. 1980).

Ineffective assistance of counsel was not litigated in this proceeding (RB 150-151). In pursuing this Brady claim, Stone has in no way abandoned his claim that he received ineffective assistance of counsel at guilt and penalty phases. The claims are pled in the alternative.

court. The records are located in Stone's inactive file (RB 43).

The court concluded that there was no withholding by the Prosecutor because he made counsel aware that he had the records at the penalty hearing. The Prosecutor, however, referred to only records concerning a prior juvenile adjudication without the slightest hint that there were many other records there incorporated. Although Stone did testify as to some of his history, counsel said that Stone's memory was sketchy (RB 173) and Stone had been characterized as a liar at guilt phase. The records made at the time would have corroborated Stone's testimony. The records which counsel eventually obtained were not as extensive as those obtained by the prison and released to the State Attorney. They lacked reports from Washington University Clinics referring to Stone as a considerably retarded, small and undernourished child and containing leads to social history data available from the welfare department and also a psychiatric report of E.C. Chiasson, M.D., who described Stone's depraved background, recognized Stone's critical need for extended therapy, and noted that Stone had at the age of only eleven spent ten months in adult jails. All of this information, properly presented, should have tended to mitigate Stone's sentence. It should have been disclosed to defense counsel upon his specific request to

the State of Florida, Department of Corrections, whose inefficiency precluded disclosure, and by the State Attorney at penalty phase. The court's conclusion (RB 49) that Riggs, who answered Dunham's request, had no authority to search the general prison file, is erroneous. The Records Custodian testified that any prison employee with a legitimate reason has access to the prison files (RB 100). Whether he was specifically requested to search the general institutional file as opposed to the medical file is irrelevant. He was requested to find the documents in question. It is reasonable to assume that psychiatric records would be found in a medical file.

The court's conclusion that a clerical error committed by all parties caused the unintentional withholding is also in error. Counsel was correct to send his request to the Reception and Medical Center because that is where his client was then housed. He was not unreasonable in directing a request for confidential psychiatric records to the medical department.

The court concluded (RB 49) that the State cannot be held at fault for failing to provide information it did not know it had. It is not necessary that the Prosecutor personally suppress the evidence. Arango v. State, ___ So.2d ___ (Fla. 1985), Slip op. filed January 31, 1985. As stated above, intent is not a requirement to prove a Brady violation.

The court's conclusion is erroneous. Bureaucratic inefficiency is not a defense to a Brady claim. The court is reminded that, pursuant to statute, Stone himself had no access to these records. §921.141, Fla. Stat.

Thus, a specific request was made to the State for records intended to mitigate penalty. Counsel was led to believe that no such records existed in Stone's prison files. The Prosecutor at penalty phase referred to reports of Stone's prior juvenile incarceration without indicating the wealth of information contained therein. The records eventually obtained by defense counsel contained less information than that in the possession of the State. Whether intentional or not, a Brady violation has occurred.

CONCLUSION

The court erred in concluding that no Brady violation had occurred. The judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to John W. Tiedemann, Esquire, Office of the Attorney General, Suite 1502, The Capitol, Tallahassee, Florida, 32301, this 4th day of February, 1985.

Respectfully submitted,

Susan Cary

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