IN THE SUPREME COURT OF FLORIDA

FLOYD MORGAN,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. 63,679
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

SUPPLEMENTAL BRIEF OF APPELLANT

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This is an appeal from a circuit court order denying without an evidentiary hearing appellant's motion for post-conviction relief under Fla. R. Crim. P. 3.850. Appellant Morgan is a state prisoner under sentence of death. An application for executive clemency is pending before the Board of Executive Clemency. No warrant for execution of sentence has issued. Since this appeal was argued and submitted on December 8, 1983, decisions have been rendered by the United States Supreme Court and by this Court which strongly support appellant's argument, see Appellant's Initial Brief at 5-17, that the trial court improperly denied him an evidentiary hearing on his claim of ineffective assistance of counsel.

I. THE ORDER BELOW MUST BE REVERSED OR VACATED AND REMANDED FOR RECONSIDERATION IN LIGHT OF THE RECENT UNITED STATES SUPREME COURT DECISION IN STRICKLAND v. WASHINGTON

At the time this appeal was briefed and argued, the standards governing claims of ineffective assistance of counsel were those set forth in the seminal case of Knight v. State, 394 So.2d 997, 1001 (Fla. 1981). Under Knight a criminal defendant was required to show that his counsel's deficiencies were likely to have altered the outcome of the court proceedings. Id. The United States Supreme Court has recently held that the "likelihood" test of Knight imposes too heavy a burden on criminal defendants. See Strickland v. Washington, _____ U.S. _____, 52 U.S.L.W. 4565, 4572-73 (U.S., May 14, 1984). A criminal defendant making an ineffective assistance claim need not show that

his "counsel's conduct more likely than not altered the outcome in the case." Id. at 4572. Instead, he need only show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. A "reasonable probability," the Court explained, is simply "a probability sufficient to undermine confidence in the outcome." Id.

Although the precise basis of the circuit court's ruling below is hard to divine from its short and cryptic order, see R-61, it is fully apparent that the court applied the Knight standard on prejudice to appellant's ineffective assistance claim. See section 3(c) of the Order Denying Motion for Post-Conviction Relief, at R-61 (rejecting allegations of ineffective assistance on the ground that they "fail to demonstrate prejudice likely to effect [sic] the outcome of the trial") (emphasis supplied). Furthermore, the instant appeal was briefed and argued in this Court on the basis of the now rejected Knight standard. See Initial Brief of Appellant at 12-13. This is reason enough to vacate the circuit court's order and remand the cause for reconsideration. On remand, appellant should be afforded an opportunity to replead his ineffective assistance claim in light of Strickland.

Alternatively, this Court should simply reverse the order below on the basis of Strickland and remand for an evidentiary hearing on the ineffective assistance claim. Appellant

has alleged in his Rule 3.850 motion, and stands prepared to offer proof at an evidentiary hearing, that his trial counsel's performance fell below the standard of "reasonableness" articulated in Strickland, 52 U.S.L.W. at 4569-70. Among other things, defense counsel failed to conduct an adequate investigation into mitigating circumstances and failed to develop available witnesses to testify as to those mitigating circumstances.

First, defense counsel inexplicably failed to call as witnesses two prison guards, John G. Sapp and Dale Harden, whose lives Morgan had saved during a 1973 prison riot (R-7). In light of prison guard Sapp's sworn testimony before the Executive Clemency Board on January 4, 1983, appellant stands ready to offer proof at an evidentiary hearing that if called at trial Sapp could have testified to the following:

> (i) During the Garment Factory Riot in April, 1973, Sapp was attacked by rioting inmates and stabbed in the back with a screwdriver;
>
> (ii) Morgan dispersed some rioting inmates by spraying them with a chemical fire extinguisher;
>
> (iii) This action of Morgan's helped to save Sapp's life;
>
> (iv) Morgan took this action at considerable risk to his own immediate personal safety and to his continued security within the prison;
>
> (v) The stabbing Sapp received left him paralyzed in one leg and severely injured in the other; and
>
> (vi) Sapp is married with a family.

Similarly, in light of prison guard Harden's sworn testimony before the Executive Clemency Board on January 4, 1983, appellant stands ready to offer proof at an evidentiary hearing that if called at trial Harden could have testified to the following:

> (i) The rioting inmates would have killed Sapp and Harden if it had not been for the assistance rendered by Morgan and others;
>
> (ii) Harden is married, with three young children;
>
> (iii) Morgan was a good worker and good inmate who helped the guards in any way he could.

The testimony of Sapp and Harden would have constituted very powerful mitigating evidence in Morgan's behalf, for it would have shown the jury that Morgan has saved lives, as well as taken them. Defense counsel's failure to call these witnesses was wholly unreasonable "under prevailing professional norms." Strickland, 52 U.S.L.W. at 4570. Moreover, given the extreme closeness of the jury vote on appellant's death sentence (7 jurors voted for death; 5 jurors voted for life), it can hardly be doubted that there is a "reasonable probability" that the jury would have recommended a life sentence had Sapp and Harden testified. See id. at 4572. Live testimony by these local persons whom Morgan had saved would certainly have had a greater impact on the jury than the reading of a brief and conclusory commendation from the Governor.

Second, appellant's trial counsel failed completely to investigate the possibility that Morgan was suffering from a psychological disorder as a result of his participation in the

Vietnam War. See R-8. Appellant stands ready to offer proof at an evidentiary hearing that trial counsel could have discovered and been able to present to the jury the following:

> (i) Morgan enlisted in the army in January, 1966, at the age of nineteen. He was sent to Vietnam in May, 1967;
>
> (ii) While in Vietnam Morgan had several traumatic combat experiences. He tried to cope with these experiences, and with the stress of combat, by excessive drinking. He was discharged from the service, after psychological evaluation, because of his disordered behavior; and
>
> (iii) Friends and family members noticed a significant change in Morgan's behavior after his return from Vietnam. He drank excessively, drifted from job to job, distanced himself from his friends and family, experienced dissociative states and low affect, and showed signs of increased irritability and impulsive behavior. All these are classic symptoms of post-traumatic stress disorder (PTSD).

Trial counsel's failure to develop and present evidence of Morgan's combat experience and its psychological effects, to call expert witnesses to testify to the possibility that Morgan was suffering from PTSD at the time of his offenses, or even to make more than incidental reference to his military service, greatly prejudiced Morgan during the sentencing proceeding. Had such testimony been offered, there is a "reasonable probability" that the jury "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland at 4572.

Third, defense counsel failed even to contact family members and friends of Morgan or to investigate his social and familial background. See R-7. Appellant stands prepared to offer proof at an evidentiary hearing that several family members (including his brother Robert, sister Alice, and niece Laura Jean) and friends (including Mrs. Dale Hindes and Martha Lynn Nimmo) could have offered evidence in mitigation. Among other things, these witnesses could have testified that Morgan's father died when he was young, that his stepfather treated him badly, that he joined the army because his family pushed him out of the house, and that he was docile and peaceable before joining the army, but moody, apathetic, and easily provoked after his return from Vietnam.

Fourth, defense counsel failed to follow up clear indications in Morgan's files that Morgan suffers from some kind of brain damage or disorder. He did not obtain past medical records, which contain additional evidence of such a disorder. Nor did he request that an EEG be administered. See R-9. Appellant stands ready to offer proof at an evidentiary hearing that trial counsel could have discovered and been able to present to the jury evidence that:

> (i) Joanna Byers, a clinical psychologist, recommended on December 23, 1973 that Morgan be given a thorough neurological workup, including an EEG, to verify indications of organic disturbance. Dr. Byers noted enough signs of visuo-motor coordination difficulties to suggest some brain dysfunction, dysrythmia or petit mal epilepsy (R-9);

(ii) Morgan experienced episodes of memory loss and unconsciousness while in the army; and

(iii) Army doctors observed sufficient signs of neurological or brain disorder to request that a complete neurological workup be done.

The performance of Morgan's trial counsel, in sum, fell measurably below the prevailing standard of reasonableness. See Strickland at 4570-71. In particular, trial counsel failed to develop and present mitigating evidence which lay readily at hand. He overlooked or disregarded without reason several fruitful lines of investigation. He inexplicably neglected to call available witnesses whose testimony (about Morgan's heroic action during a prison riot, experience in the army, and family and social background) would have greatly impressed the jury. He did little more during the penalty phase of the trial than read aloud a string of lifeless excerpts from Morgan's prison file. There is certainly a "reasonable probability" that but for these failures, the jury would have recommended and the judge imposed a life sentence - especially in view of the fact that five of the twelve jurors voted for a life sentence despite the minimal presentation made by trial counsel.

Because the factual allegations in appellant's 3.850 motion state a legally sufficient claim of ineffective assistance of counsel under Strickland, compare Muhammed v. State, 426 So.2d 533, 538 (Fla. 1982), and because the motion, records, and files

do not "conclusively" refute these allegations, [1] the trial court was required to hold an evidentiary hearing. See Vaught v. State, 442 So.2d 217, 219 (Fla. 1983); LeDuc v. State, 415 So.2d 721 (Fla. 1982); Meeks v. State, 382 So.2d 673 (Fla. 1980); Clements v. State, 340 So.2d 1183 (Fla. 4th DCA, 1976). As in Vaught, Morgan "was prepared to present evidence that at the time of trial his counsel was an inept lawyer. He sought to demonstrate that general ineptness by showing specific omissions and commissions that likely affected his conviction and sentence. The trial judge should have given him an audience." Vaught, supra, 442 So.2d at 219. See also Jones v. State, 446 So.2d 1059 (Fla. 1984) (even where not legally required, trial courts should routinely hold evidentiary hearings on ineffective assistance of counsel claims raised in 3.850 motions).

CONCLUSION

For the foregoing reasons, the order below should be reversed and the case remanded for an evidentiary hearing on appellant's ineffective assistance claim. Alternatively, the order should be vacated and the case remanded for reconsideration

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1/ The State's position at oral argument herein was that the decision below could be sustained on the basis of asserted facial insufficiency of the 3.850 motion (not on the basis that the allegations in the motion were refuted). A denial of the 3.850 motion on this ground of facial insufficiency, as Assistant Attorney General Marky conceded at oral argument before this Court, is necessarily without prejudice. Thus, even if this Court should affirm on the ground that appellant's 3.850 motion was legally insufficient on its face, appellant should be expressly granted leave to file an amended 3.850 motion.

under the newly announced Strickland standard. On remand, appellant should be afforded an opportunity to replead his ineffective assistance claim in light of Strickland.

Respectfully submitted,

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