IN THE

SUPREME COURT OF FLORIDA

No. 64,728

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HENRY PERRY SIRECI,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

On Appeal from the Circuit Court
of the Ninth Judicial Circuit,
In and For Orange County, Florida

REPLY BRIEF OF APPELLANT

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ARGUMENT

I

THE COOPER/LOCKETT ISSUE

A. "Raised or Should Have Been Raised on Direct Appeal"

Appellee's primary argument is that this issue was raised, or should have been raised, on direct appeal. Both contentions will be addressed.

The issue raised here is different from that raised on direct appeal, and the difference reflects the different natures of direct appeal and collateral attack. On direct appeal, Appellant argued that on its face Florida's statute violated Lockett during the two-year period between Cooper and Songer. The issue was properly raised on direct appeal, because resolution of such a facial challenge does not require development or examination of evidence or information outside of the original trial record. To resolve the issue, one need only analyze the opinions in Cooper, Lockett, and Songer. The facial challenge is not case-specific: resolution in the defendant's favor means that all death sentences imposed during the relevant two-year period are per se invalid. No examination of prejudice in individual cases is required, so no extra-record material explaining such prejudice is necessary to the claim.

By contrast, the issue now raised challenges the application of the statute to Appellant's particular case. This sort of "as applied" attack is properly brought in a postconviction proceeding because, like a claim of ineffective assistance of counsel, it requires exploration of facts outside the original trial

record: whether counsel in fact felt and acted limited by Cooper what nonstatutory mitigating evidence was not investigated and why. Precisely these issues were addressed and developed at the evidentiary hearing held below.

Similarly, the issue could not have been raised on direct appeal. A Rule 3.850 motion cannot be used as a "second appeal" for review of issues which could have been raised on direct appeal. But in deciding whether an issue "should have been raised",this Court must ask whether the procedural mechanism of direct appeal is such that a particular claim may effectively be raised by that route Issues which may be resolved on the basis of the trial record should be required to be raised on direct appeal. When disposition of an issue invovles development of facts outside of the record, however, those facts must developed in a postconviction proceeding and that issue should be cognizable in 3.850.

The Cooper/Lockett question in this case is just such an issue. The evidence presented at the evidentiary hearing on Appellant's 3.850 motion revealed (and Judge Baker found) that trial counsel did in fact, in this case, limit his defense in reasonable reliance on Cooper. These facts, crucial to fair disposition of the issue, were not in the record on direct appeal and could only be developed as they were here: in an evidentiary hearing pursuant to a postconviction attack.

Because this issue was not raised, and could not have been raised, on direct appeal, it must be cognizable in a collateral proceeding.

B. The Merits

The key here is what Appellee does not argue. Appellee does not dispute that the statute in effect at the time of Appellant's trial could easily be read, and was reasonably being read by judges and attorneys alike, as precluding nonstatutory mitigating circumstances in a manner identical to that condemned in Lockett. Appellee only disputes the facts in this case: whether the potential for unconstitutional application did in fact actualize in this case, whether counsel did in fact rely on Cooper and whether, as a result, substantial mitigating evidence was never investigated, developed or presented. But Appellee's complaints about the facts flatly contradict the factfindings made by Judge Baker following the evidentiary hearing in the court below.

Appellee argues that Appellant's trial attorney did not really rely on Cooper to the detriment of his client. See Appellee's Brief at 6-8. Judge Baker held an evidentiary hearing on this issue, during which Appellant's trial attorney testified and was cross-examined at length. Following this hearing, Judge Baker made several findings of fact. Judge Baker found (1) that "the law of Florida on the admissibility of a defendant's evidence in mitigation at the time of Mr. Sireci's sentencing hearing on November 5, 1976, was as stated by the Florida Supreme Court in Cooper" (V. 875); (2) that "at the 3.850 motion hearing, Cooper v. State was the law that defense [counsel] testified he followed and was bound by when he said he did not try to develop nonstatutory mitigating evidence. The trial judge was also bound by it and appears to have consistently followed Cooper" (V. 876); (3) "in their motion for rehearing, defense counsel makes this

observatrion, which seems a fair one: 'The Florida Supreme Court has recognized the widespread belief among lawyers and judges [after Cooper] that the mitigating circumstances were limited to those in the statute';" trial counsel's reading of Cooper was "neither an uncommon interpretation, nor an implausible one" (V 910). As discussed in Appellant's initial brief (pp. 14-16), these findings by Judge Baker are amply supported by the record.

Appellee also argues that the evidence not presented at sentencing was "only" character evidence and so could not have made any difference anyway. Judge Baker found otherwise.

As proffered by affidavits in the court below, Judge Baker found that had such investigation been undertaken, counsel would have discovered

> Sireci's rejection by family and society while he was a child. A severe automobile accident is recalled in which Sireci received a serious head injury at 16, and a change in his personality was observed at that time. Some of the affiants noted that Sireci came to find out his paternity was questionable, leading him to change his name to Butch Blackstone. Sireci was described by some as a good worker, a good employee, a good husband and a good father to two children. There was a record of his successful completion of probation on a conviction for unarmed robbery about six years before this offense (V 876).

It is true that Appellant, testifying on his own behalf at the penalty phase, did testify about a few of these subjects. His testimony did bring out that his father was not his real father, that he left home young, and that his mother had called him a liar (V 40 S 49-53, 59-60). But at that time he was addressing a jury that had just convicted him of capital murder. His credibility, in pleading for his own life, could not have been high. Had

a number of persons, comparatively disinterested in the outcome, informed the sentencer of the full array of Appellant's qualities as a person, the sentencer might well have concluded that this person does not deserve to die. Further, the evidence would have been more focused and specific. It was vaguely brought out at trial, for example, that Appellant was a good worker. But now we have an affidavit from Appellant's employer saying that he was one of the best workers that had ever worked at his plant; that he would work the longest hours; that his boss would hire Appellant back today, despite the murder charge for which Appellant now sits on Death Row (V 333).

This evidence would have allowed the jury to see Appellant as a human being. It would have suggested that Appellant's personality and motivation could be explained, at least in part, by his stormy and unhappy personal history and would have shown that there was a Henry Sireci worth saving. It is thus precisely the kind of evidence the United States Supreme Court had in mind when it wrote Lockett and Eddings. "Evidence of a difficult history and of emotional disturbance is typically introduced by defendants in mitigation." Eddings, 455 U.S. at 115. The Lockett Court was concerned that unless the sentencer could "consider compassionate and mitigating factors stemming from the diverse frailties of humankind," capital defendants would be treated not as unique human beings, but as a "faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 304 (1976). This is just the kind of humanizing evidence that

"may make a critical difference, especially in a capital case." Stanley v. Zant, 697 F.2d 955, 969 (11th Cir. 1983). It could have made the difference between the life and death in this case.

II

THE RACE ISSUE: THE FOURTEENTH AMENDMENT ASPECT

Appellant will rely upon the discussion in his initial brief, except that two brief observations are in order.

First, Appellee collapsed the fourteenth amendment dimension and the eighth amendment dimension of this claim into a single issue, and then proceeded to totally ignore the eighth amendment. See Appellee's Brief at vii, 10-17. The difference between the two is crucial. As Appellant demonstrated in his initial brief, the fourteenth amendment requires a showing of discriminatory intent , whereas under the eighth amendment a showing of dispute impact is enough to make out a claim.

Secondly, Appellee relies upon Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978). The eleventh circuit has granted rehearing en banc to reconsider the standards governing the claim of discrimination in the application of a capital punishment system, i.e., to reconsider the continued viability of Spinkellink. See Spencer v. Zant, 715 F.2d 1562 (11th Cir. 1983); McCleskey v. Zant, 729 F.2d 1293 (11th Cir. 1984). The questions presented in Spencer/McCleskey are included as Appendix A to this Reply Brief. Spencer and McCleskey are Georgia cases, but the identical issue is presently pending before the court in a Florida case, Hitchcock v. Wainwright, ___F.2d___, No. 83-3578, argued in April. [1]

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[1] The outcome of Sullivan v. Wainwright, 721 F.2d 316 (11th Cir.

III

THE RACE ISSUE: THE EIGHTH AMENDMENT ASPECT

Appellant will rely upon the discussion in his initial brief.

IV

THE HOLTZINGER ISSUES

Two aspects of the state's handling of witness Holtzinger render Appellant's death sentence constitutionally unfair: first, the state violated the dictates of Giglio v. United States, 405 U.S. 150 (1970); second, the trial court erred in denying a continuance to allow the defense time effectively to respond to Holtzinger's devastating testimony. Appellee does not address the continuance issue, so Appellant will rely on his initial brief.

Appellee's argument on the Giglio issue seems to be that because defense counsel may have known Holtzinger's name prior to trial, it does not matter that the state failed to disclose the deal between Holtzinger and the prosecutor. This argument makes no sense. As developed in Appellant's initial brief, the hearing below revealed that the state withheld evidence suggesting a deal between Holtzinger and the prosecutor. This is a textbook Giglio violation. The issue is clearly cognizable in 3.850. Smith v. State, 400 So.2d 956, 962-63 (Fla. 1981).

1983) and Adams v. Wainwright, ___ F.2d ___ (11th Cir. 19840, stay vacated, 104 S.Ct. ___ (1984) do not affect the pendency of the issue in the federal courts. Adams and Sullivan were successive petitioners. Compare Stephens v. Kemp, 104 S.Ct. 562 (1983) with Smith v. Kemp, 104 S.Ct. 510 (1983).

Appellee also makes much of the fact that trial counsel termed certain of his decisions concerning Holtzinger "strategic". But to label such choices "strategic" is meaningless, because the decisions were made in an informational vacuum. Because of the state's Giglio violation, counsel's choices were made without crucial knowledge of Holtzinger's pending charges or deal with the prosecutor (V 58-59). It is inaccurate to suggest that counsel was able to make an informed, reasoned, calculated strategy choice. The state's withholding of critical information rendered that impossible.

Appellee's final argument is that its Giglio violation did not prejudice Appellant, because Holtzinger's testimony was cumulative of evidence adduced from other witnesses at trial. Part of Holtzinger's testimony was cumulative. Appellant confessed to Holtzinger that he killed the victim; Appellant confessed similarly to six other people who testified at trial. But this testimony was not what made Holtzinger a key witness. Holtzinger testified at great length about an alleged plan by Appellant to murder his brother-in-law. Because Holtzinger was the only witness to testify about this alleged attempted murder, his testimony was extremely prejudicial, especially on the issue of penalty.[2] His credibility was an essential issue.

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2 Holtzinger's testimony also went to guilt/innocence, since without it the jury might well have convicted of a lesser offense.

V

THE COMMENT ON SILENCE ISSUE

Appellee's analysis of this issue begins and ends with a misunderstanding of this Court's 1981 opinion in Appellant's direct appeal. Appellee reads this Court as holding that the comment on silence was harmless, in that it resulted in "no prejudice" to the defendant. Appellee's Brief at 21. But the harmless error holding was specifically stricken from this Court's opinion on rehearing, though the opinion actually reported in the Southern Reporter is ambiguous. The original opinion, the rehearing petition and the order modifying the initial opinion are included in Appendix D of Appellant's initial brief. The original opinion, dated April 9, 1981, stated two grounds for denying Appellant's claim based on comments on silence: (1) the "defendant made no objection to the admission of this testimony nor did he move for a mistrial," and (2) any error was harmless. Appellant argued on rehearing that comments on silence are not subject to a harmless error analysis. _See_ Appendix D. This Court agreed and modified its prior opinion so as to "delete its statement that a comment on silence can be harmless error." _See_ Appendix D. But when the revised opinon was released (and published in the Southern Reporter), it _included_ the harmless error conclusion and _excluded_ the failure to object ground. 399 So.2d at 970; Appendix D.

In all other respects, Appellant relies upon his initial brief.

VI

THE HOPPER ISSUE

Appellant relies upon his initial brief.

CONCLUSION

For the foregoing reasons, together with those presented in his initial brief, Appellant respectfully requests this Honorable Court to vacate the sentence of death or, in the alternative, remand the cause for an evidentiary hearing and findings of fact.

Respectfully Submitted,

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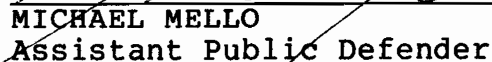
BY 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by mail to MARGENE ROPER, Assistant Attorney General, 125 North Ridgewood, 4th Floor, Daytona Beach, Florida, 32014, this 17th day of May, 1984.

Of Counsel