IN THE SUPREME COURT OF FLORIDA

CASE NO. 65991

FRANK E. SMITH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

APPELLANT'S SUPPLEMENTAL AND REPLY BRIEF

Appellant Frank Smith herewith respectfully submits this Supplemental and Reply Brief in his appeal from the October 10, 1984, Order of the Honorable Judge Cooksey, Second Judicial Circuit, denying Appellant's Motion to Vacate Judgment and Sentence pursuant to Fla.R.Crim.P. 3.850. Appellant's Initial Brief was submitted on the afternoon of October 10, 1984. Appellant herein supplements that Brief and replies to the Brief for Appellee.

PRELIMINARY STATEMENT

Judge Cooksey signed an Order denying Appellant relief on his Motion to Vacate Judgment and Sentence pursuant to Fla.R.Crim.P. 3.850 at approximately 11:30 a.m. on October 10, 1984. Counsel hastily attempted to prepare, type and submit Appellant's Initial Brief in a matter of hours. For this reason, Appellant's Initial Brief to the Florida Supreme Court contains certain typographical and other inadvertent errors which Appellant now will correct.

(a) The second paragraph on page four of the Initial Brief indicates that Appellant's original writ of habeas corpus was submitted on October 10, 1984. It will be submitted on October 11, 1984, prior to Oral Argument before this Court, along with the instant Supplemental and Reply Brief.

(b) On page ten, the first sentence of the second paragraph should read:

"Finally, the denial of a hearing on Smith's claim that racial discrimination violated Mr. Smith's Eighth and Fourteenth Amendment rights violated his substantive state and federal constitutional rights since this claim involves the most fundamental right of all -- Equal Protection of law." (Citations omitted.)

(c) On page twelve, the parenthetical following the citation to O'Neal v. State, 308 So.2d 569 (Fla. 2d DCA 1975) should read: "defendant deprived of due process right to notice."

(e) On page fourteen, the second paragraph should read:

"As a corollary to these principles, the court below had the authority to consider the issues presented which had not been raised on direct appeal. These issues, albeit not presented to the Florida Supreme Court, raised fundamental grounds that involved the essense of constitutional protections. Thus, these issues were cognizable in collateral proceedings. See, e.g., Benitez v. State, 230 So.2d 190 (Fla. 2d DCA 1970); Cioli v. State, 303 So.2d 82 (Fla. 4th DCA 1974)(defendant's mental competence at time of trial or or plea). Most recently, the District Court of Appeal for the Third District held that denial of the right to trial by a fair and impartial jury is an infringement on the rights of the accused which constitutes fundamental error. Nova v. State, 489 So.2d 255, 262 (1983). Thus, the Court concluded that this issue was cognizable in collateral proceedings although not raised on direct appeal, Nova, supra, at 261. The standard is appropriate for 3.850 proceedings for capital defendants such as Mr. Smith. See, Gardner, supra; Wells v. State, supra. Since all the issues presented in the proceeding below were either the type traditionally raised under Fla.R.Crim.P. 3.850 or encompassed fundamental rights, that Court should have considered the Motion in its entirety. Moreover, since all of the issues presented on appeal to this Court involve fundamental rights, this Court has the authority to consider them on the merits and grant Appellant relief."

THE TRIAL COURT ERRED IN ITS ORDER CONCLUDING THAT APPELLANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING.

Appellant submits that Judge Cooksey's findings of fact regarding counsel's effectiveness at the penalty phase are clearly erroneous and are directly contravened by the transcript of the hearing held on October 10, 1984.

Counsel knew nothing specific about the credentials of the one psychologist by whom he had Mr. Smith examined although he knew that he was not a medical doctor (T. 67).* The psychologist never told trial counsel that he had performed the myriad of tests by which an organic brain disorder can be diagnosed (T. 68). See affidavit of Dr. Clarence Ray Jeffery, Appendix 2 to Motion to Vacate (indicating that organic brain disorders cannot be diagnosed by subjective testing in the absence of physiological tests). Moreover, counsel failed to inquire what tests the psychologist performed as well as failing to inquire about the results of those tests. (T. 68).

Trial counsel was unable to state that he had discussed the statutory mitigating and aggravating circumstances

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* "T." refers to the Transcript of the October 9, 1984, proceedings before the Honorable Judge Cooksey.

with Dr. Kennedy and stated that he never did any research on psychiatry himself (T.69). Counsel moreover failed to question the psychologist regarding the sources upon which he was basing his evaluation of Mr. Smith (T. 70). In essence trial counsel stated that he consulted the psychologist he did because the psychologist would test his client without charge (T. 67, 71). Counsel was unable to state that he made even the preliminary inquiries necessary to have his client examined by a psychiatrist (T. 72), nor did he take his client to any other experts (T. 75). Notwithstanding counsel's awareness that his client had had epilepsy (T. 74), he failed to have him tested for epilepsy and failed to even request the funds to have him so tested (T. 76).

Counsel was unable to state that he examined Mr. Smith's school records prior to the sentencing phase of the trial, nor his hospital or Department of Corrections records (T. 76). Counsel affirmatively stated that he had the opportunity to review all of those records and did not do so (T. 76-77). Counsel stated that he could not recall looking at any documents discussing his client's childhood, nor any hospital records regarding his alcoholism (T. 77); neither did counsel investigate any such documents about his client from schools or prisons (T. 77).

Trial counsel stated explicitly that he did not deliberate over what to present at sentencing (T. 78), arguably the most

critical proceeding in a capital case. His lack of deliberation is apparent from his complete failure to present any evidence whatsoever, notwithstanding his admitted awareness of Mr. Smith's alcohol and drug problems (T. 78-79).

Counsel, fully aware that his client had been in prison with adults at the age of 15 (T. 80-81), failed to argue at the sentencing hearing ,the effect that might have had on Mr. Smith.

Moreover, while counsel had argued to the jury at the guilt-innocence phase that his client had withdrawn from the criminal venture, he failed to even request that the judge give an instruction on withdrawal or intent at the penalty phase (T. 82), notwithstanding the fact that testimony regarding his client's withdrawal from the criminal venture and his lack of intent to kill the victim had been elicited at trial (T. 83). In fact, he did not draft any particular instructions for the judge to give at sentencing (T. 82).

Trial counsel also failed to consider any mitigating circumstances other than those enumerated in the statute (T. 82).

Although counsel knew that his client had been physically abused as a child, he failed to go into the specifics of those experiences (T. 85) or to argue about the impact that

having been abused might have had on his client.

Counsel never investigated the effect of his client's epilepsy on his performance in school, nor did he contact any of Mr. Smith's neighbors or friends, other than deposing Victor Hall,* the codefendant who testified against Mr. Smith (T. 86).

Trial counsel, an experienced criminal attorney, by his own testimony, and knowing that his client, a small person, had been incarcerated with adults at the young age of fifteen (15) failed to inquire about any instances during which his client might have been raped, and stated explicitly that the "thought never crossed (his) mind." (T. 91).

Counsel's lack of investigation and preparation for the sentencing phase of Appellant's trial clearly prejudiced Mr. Smith. Counsel presented no mitigating evidence whatsoever.

Judge Cooksey's finding failed to consider the impact that the evidence counsel failed to present would have had on the jury at sentencing. Moreover, Judge Cooksey's Order failed to objectively consider the impact of the evidence

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* In fact, counsel failed to elicit from Victor Hall the important mitigating testimony which Hall could have provided. See Appendix 4 to Motion to Vacate.

counsel failed to present.

Clearly, the evidence which counsel failed to investigate, prepare and present would have affected the jury's decision respecting a death sentence. The record of the October 9, 1984, hearing, along with the exhibits submitted in Appellant's Appendix to his Motion to Vacate clearly demonstrate that counsel's representation failed to meet Sixth Amendment standards. That Appellant was prejudiced is evident from the record at Appellant's trial.

The Sixth Amendment right to counsel includes the right to effective representation by counsel. In Strickland v. Washington, ___U.S.___, 104 S.Ct. 2052 (1984), the United States Supreme Court stated that the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied on as having produced a just result." This determination, according to the Court in Strickland, supra, requires a two part inquiry: first a showing of deficient performance such that the Sixth Amendment right to counsel was denied, and second, that the deficient performance was prejudicial.

In the instant case, counsel's failures at the penalty phase of petitioner's trial prejudiced petitioner in the gravest possible way; they resulted in his being sentenced to death. The magnitude of this prejudice is unparalleled and has been so recognized by the Supreme Court. See, Beck v. Alabama, 447 U.S. 625 (1980).

Under Knight v. State, 394 So.2d 997 (Fla. 1981) a determination as to whether a client was rendered ineffective assistance of counsel rests on a three-part showing:

1) a detailed explanation of the specific acts or omissions which are claimed to have resulted in the ineffective assistance of counsel;

2) that the specific acts or omissions constituted a substantial and serious deficiency falling measurably below that of competent counsel; and

3) that the deficiency was substantial enough to demonstrate a prejudice likely to have affected the outcome of the proceedings.

Failure to adequately prepare a case, as happened in the instant case at the sentencing phase, has been recognized as a violation of the accused's right to effective assistance of counsel. Roberts v. Wainwright, 666 F.2d 517, 519 (11th Cir.) cert. denied, 103 S.Ct. 174 (1982); Scott v. Wainwright, 698 F.2d 427, 430 (11th Cir. 1983). Failure to request a jury instruction, as counsel failed to do at the sentencing phase in petitioner's case, has been deemed a denial of effective assistance of counsel, Taylor v. Starnes, 650 F.2d 38, 41 (4th Cir. 1981), as has failure to investigate potential sources of exculpatory information. See, United States v. Barnes, 687 F.2d 659, 673 (3d Cir. 1982).

Counsel's failure to procure the available mitigating evidence, which present counsel, being foreign attorneys unfamiliar with the area have been able to gather in a matter of days, is clearly a violation of the right to effective assistance of counsel. Counsel did not investigate any of petitioner's hospital, school, or Department of Corrections records nor did he speak with petitioner's former teachers, employers, or probation officers. These omissions must be examined in light of the totality of the circumstances. See, United States v. Hinton, 703 F.2d 672 (2d Cir.), cert. denied, 103 S.Ct. 3091 (1983); Gray v. Lucas, 677 F.2d 1086, 1092 (5th Cir. 1982) (counsel's performance must be considered in

light of the "number, nature, and seriousness of the charges,... the strength of the prosecution's case and the strength or complexity of the defendant's possible defenses") (quoting Washington v. Watkins, 655 F.2d 1346, 1357 (5th Cir. 1981)), Cert. denied, 103 S.Ct. 1886 (1983). Doubtless the totality of the circumstances in petitioner's case included the fact that he was exposed to the extraordinary and ultimate penalty of death. In light of that and given the seriousness of the charges and the strength of the state's case at the guilt-innocence phase of the trial, counsel's omissions were of the most serious sort and clearly establish the extreme prejudice caused to petitioner.

In the instant case the specific omissions of counsel, required under the Knight test, are chronicled in the Motion to Vacate, filed pursuant to Fla.R.Cr.P. 3.850, and in the Appendix submitted therewith, and also appear in the transcript of the October 9, 1984, proceeding below. Therein Appellant indicated the very minimum of work counsel could have done on his behalf in preparation for the sentencing phase. If present counsel in a few short days and soon after they arrived from foreign jurisdictions were able to gather all the information discussed in the claim on ineffective assistance of counsel, surely counsel at trial, with seven months to prepare, could have met the minimum standards required for effectiveness. Counsel's failures constituted a serious and substantial deficiency measurably below that of competent counsel.

It is unmistakable that taken together the omissions by counsel seriously prejudiced petitioner as they resulted in his death sentence. There is no more serious prejudice petitioner could have suffered. Cf., Beck v. Alabama, supra.

Under either the standard in Knight, supra or that in Strickland, supra, which makes reference to the Knight test, it is unmistakable that counsel did not render effective assistance of counsel to Mr. Smith and that Mr. Smith was severely prejudiced as a result.

Respectfully submitted,

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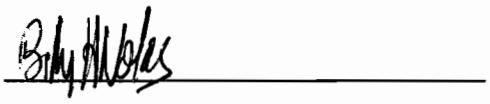
By 

Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand to Lawrence Kaden, Office of the Attorney General, The Elliot Building, 401 South Monroe Street, Tallahassee, Florida, this 11th day of October, 1984.

ATTORNEY