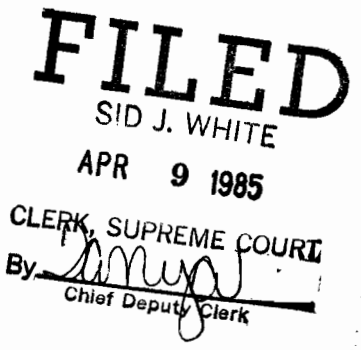
IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,005



ROY ALLEN STEWART,

Appellant,

-vs-

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

REPLY BRIEF OF APPELLANT

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ARGUMENT

WHERE THE UNCONTROVERTED EVIDENCE DEMONSTRATES THAT THE FAILURE OF DEFENSE COUNSEL TO INVESTIGATE AND PREPARE FOR THE PENALTY PHASE OF TRIAL WAS UNREASONABLE AND, CONSEQUENTLY, COUNSEL FAILED TO PRESENT AVAILABLE EVIDENCE TO CHALLENGE AGGRAVATING CIRCUMSTANCES AND ESTABLISH MITIGATING CIRCUMSTANCES, THE TRIAL COURT ERRED IN DENYING ROY ALLEN STEWART'S MOTION FOR POST-CONVICTION RELIEF FROM HIS SENTENCE OF DEATH.

In its brief, the state expresses its basic contention as follows: ". . .(G)iven the nature of the offense, defense counsel's strategy of maintaining innocence was not only a reasonable strategy, it was the only one, which had any chance of saving the Defendant from the electric chair." (Brief of Appellee at 39).[1] To buttress this contention, the state recasted the facts in an attempt to show the relative weakness of the prosecution's case for guilt and the strength of defense counsel's case for innocence. (Brief of Appellee at 3-7, 10-14, 22-27, 39-40). The state's characterization of the evidence at trial is utterly contradicted by its previous assertions and by the trial court's assessment of the case, which was based on the totality of the circumstances as reconstructed at the post-convicton hearing. (R.

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1 In this brief, all emphasis is in the original unless otherwise indicated. The parties are referred to as they stood below. The symbol "R." refers to the record on appeal, the symbol "T." refers to the separately bound transcripts of the evidentiary hearing in this case, and the symbols "SR." and "ST." refer to the record on appeal and separately bound transcripts of the defendant's trial by jury, respectively.

891-898).[2] In light of this distortion of the facts, the evidence adduced by both parties, and the trial court's finding of unreasonableness, the state's argument in support of defense counsel's representation is devoid of merit.

Although counsel's decision to devote the entire efforts of the defense to the guilt phase of trial may have been made for "tactical" or "strategic" reasons sufficient in the state's judgment to support it, under the totality of the circumstances, the failure of counsel to avail himself of information relevant to the capital sentencing proceeding removed all rational support from that decision. See People v. Frierson, 599 P.2d 587, 597-99, 158 Cal.Rptr. 281 (Cal. 1979) (en banc); Davis v. Alabama, 596 F.2d 1214 (5th Cir. 1979), vacated as moot, 100 S.Ct. 1827 (1980); Eldridge v. Adkins, 665 F.2d 228 (8th Cir. 1981), cert. denied, 102 S.Ct. 1760 (1982). Whether counsel's sentencing phase repetition of his unsuccessful denial defense was a strategic decision begs the question:

> It may not be argued that a given course of conduct was within the realm of trial strategy unless and until the trial attorney has conducted the necessary legal and factual investigation which would enable him to make an informed and rational decision.

Ex parte Duffy, 607 S.W.2d 507 at 526 (Tex. 1980).

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2 On direct review of the judgment and sentence, the state claimed, "The evidence against the Defendant was absolutely conclusive and absolutely overwhelming and the Defendant confessed. Indeed, the only defense and testimony at trial was: Yes he beat up and robbed the victim, but she was not dead when he left." (Brief of Appellee in Case No. 57,971 at 8, 27).

In this case, there was no reasonable basis for counsel's failure to investigate and prepare for the penalty phase. Rather, the decision was based on counsel's unreasonable belief that he could win this case against overwhelming odds, his ignorance of the procedures of capital sentencing and case law that could have guided him, and his misallocation of the resources at his disposal, which included the failure to use the services of an attorney and an investigator for an independent penalty phase investigation. (T. 161-66, 170-73, 190-91). Moreover, there is not the slightest basis for contending that defense counsel viewed evidence of mitigating circumstances as fundamentally damaging to the integrity of his client's case. (Brief of Appellee at 35-38).

Counsel's view of mitigating evidence is found in his testimony: "It got to the point where we got to the sentencing and I needed some warm bodies and I needed [the defense witnesses]" (T. 189); and, "I don't think I gave [the possibility of presenting evidence of the defendant's history of substance abuse in mitigation] too much attention." (T. 186-87). Given the additional facts that counsel had not even bothered to arrange for the appearance of those "warm bodies" he met for the first time on the morning of sentencing; that counsel did not know that voluntary intoxication is a valid defense in this state; and that counsel persisted in his unsuccessful denial defense because of his subjective belief that his client was innocent and that the trial court had restricted his reasonable doubt argument before the jury, it is clear that counsel's strategy of maintaining

innocence precludes any finding that he made a reasonable decision rendering further investigation unnecessary. See Strickland v. Washington, 466 U.S. ___, 104 S.Ct. 2052 at 2066 (1984). The record reveals that counsel gave no thought to the possibility that a presentation of character evidence at sentencing would be inconsistent with a repetition of the denial defense rejected by the jury. (T. 187-88). And, by calling some people to the witness stand, counsel did attempt to present evidence of a mitigating nature at the penalty phase of trial. Thus, it cannot be said that counsel viewed the presentation of mitigating evidence as incompatible with his theory of the case, let alone its integrity. What can be said is that counsel's strategy for the capital sentencing proceeding under the circumstances of this case was nothing more than an eleventh-hour act of desperation.

> Denial defenses pose specal advocacy problems in capital cases. Guilt phase denial, for example, alibi or mistaken identity, will almost certainly preclude a sentencer's crediting any penalty phase admission of guilt or evidence of extenuating circumstances, remorse, or rehabilitation. Counsel therefore must bear in mind when making strategic decisions that denial defenses signifi-cantly limit the range of mitigating evidence that can be persuasive at the penalty phase. A guilty verdict means that the sentencer disbelieved the denial defense. Having been unpersuaded by the guilt phase defense evidence, the sentencer may also disbelieve or discredit even that penalty phase mitigating evidence which is compatible with the denial defense.

Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L.Rev. 299, 330 (1983) (footnote omitted). Therefore, where evidence of guilt is overwhelming and

the possible punishment is death, counsel must consider from the outset the impact of his guilt phase defense on sentencing. Id. at 329. It is recognized that counsel need not invariably present all possible mitigating evidence, or any evidence, if that decision is warranted in a particular case. To formulate an effective strategy, however, counsel must know what mitigating evidence there is and what evidence may be used to rebut it. "Penalty phase investigation and preparation therefore are fundamental to effective advocacy in capital cases." Id. at 320; accord, Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982); Douglas v. Wainwright, 714 F.2d 1539 (11th Cir. 1983), affirmed on remand, 739 F.2d 531 (11th Cir. 1984).

In this case, the defendant has shown the failure of his counsel to fulfill his duty to investigate and prepare and to be an effective advocate. As the state acknowledged, "[Lead counsel] Goldstein spoke with his client and had, 'a couple of conversations' with members of the Defendant's family and concluded that sending an investigator to South Carolina would not have accomplished much[;] (w)ith respect to witnesses in mitigation, from South Carolina, Goldstein said that he was lead to believe that their attendance was prevented by financial constraints." (Brief of Appellee at 24, 25). The record demonstrates, though, that counsel's choices were not supported by reasonable professional judgment. See Strickland v. Washington, 104 S.Ct. at 2066. Indeed, the Supreme Court of the United States long ago decried the role of assumptions in a capital case where no investigation or preparation had been made:

> . . . (D)uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendant did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself. . . . .
>
> It is not enough to assume that counsel thus precipitated into the case thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thorough-going investigation might disclose as to the facts. No attempt was made to investigate. No opportunity to do so was given. . . . .

Powell v. Alabama, 287 U.S. 45, 57-58, 53 S.Ct. 55, 59-60, ___ L. Ed. ___ (1932).

Contrary to counsel's assumptions in this case, it has been shown that much favorable evidence would have been accomplished by investigating the defendant's background and character and that the failure to do so had nothing to do with financial constraints. Counsel's failure to prepare for sentencing is both inexcusable and insupportable.

Similarly unavailing to the state is its argument that the defendant failed to show that he was prejudiced by counsel's representation at the penalty phase of trial. In asserting that the psychiatric testimony, as reflected in the pretrial evaulations, "would have been devasting to the Defendant's denial defense, where he reported to the psychistrists that he remembered leaving the scene with blood on his hands" (Brief of Appellee at 38-39, 43), the state ignored the defendant's own

admission of that fact in his "denial" testimony at trial. (ST. 1941). In asserting that the evidence presented by the defendant at his post-conviction hearing was "largely cumulative and even redundant to the matters already present before the jury. . ." (Brief of Appellee at 42), the state ignored the record of the penalty phase, in which the story of the defendant's background and character omitted the first fourteen years of his life. (ST. 2359-2386). In asserting that "at least two of the Defendant's witnesses offered at the Rule 3.850 hearing, Mixon and Cox, would probably have harmed the defendant's case testifying that the Defendant was apparently always a thief" (Brief of Appellee at 42-43), the state ignored the fact that Stewart's childhood acts of thievery were symptomatic of his mental illness as it was explained by Dr. Marquit. (R. 700-704; T. 424-25, 432-43).[3] In asserting that evidence of the defendant's long history of drug abuse up to and including the time of the offense would not have had any effect on the sentencing decision in this case (Brief of Appellee at 43), the state ignored the uncontroverted testimony of the defendant's medical experts establishing two statutory mental-mitigating circumstances based on such evidence. (T. 704, 706; T. 426, 280-84, 430, 434, 446-49, 469-71). And, in asserting that counsel's strategy was not only reasonable, it was the only one which had the chance of saving the defendant's life,

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3 At the evidentiary hearing in this case, Dr. Marquit was qualified to give his expert opinion without objection by the state. (T. 419-20). The state made no attempt to rebut either the expert testimony pertaining to the defendant's mental condition or the lay testimony on which it was based.

the state ignored the entire record.

The thrust of the evidence of defendant's background and character presented at the post-conviction hearing was not that Roy Allen Stewart was a model citizen, but that his personality and motivation could be explained by his childhood development and consequent abuse of alcohol and drugs. Although this is precisely the kind of humanizing evidence that would have made a critical difference in this capital case, see Stanley v. Zant, 697 F.2d 955, 969 (11th Cir. 1983), counsel failed to investigate or to use what meager evidence he did have in a meaningful way. Counsel thus created the impermissible risk that the death penalty was imposed in spite of factors calling for a less severe penalty. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978). Counsel's performance in this case is an apt example of the kind of breakdown in the adversarial process, Strickland v. Washington, 104 S.Ct. at 2063-64, that requires this Court to find the results of the proceeding unreliable. Counsel's failure to present available evidence of mitigating circumstances to explain his client's actions mandates reversal of the death penalty in this case. Douglas v. Wainwright, 739 F.2d 531 (11th Cir. 1984); King v. Strickland, 748 F.2d 1462 (11th Cir. 1984); Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985).

CONCLUSION

Based on the cases and authorities cited herein, the appellant requests this Court reverse the judgment of the lower court and remand this cause for a new sentencing proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, Calvin L. Fox, Assistant, Suite 820, 401 N.W. 2nd Avenue, Miami, Florida 33128, this 8th day of April, 1985.

Robin H. Greene

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