IN THE SUPREME COURT OF FLORIDA

CASE NO. 66629

WILLIAM MIDDLETON,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee

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INITIAL BRIEF OF APPELLANT

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INTRODUCTION

The appellant was the defendant in the trial court and appellee was the prosecution. In this brief, the parties will be referred to as they stood in the trial court. The appendix to this brief will be referred to by the abbreviation "App".

STATEMENT OF THE CASE

The defendant was sentenced to death by electrocution by the Honorable Judge David L. Levy of the Dade Circuit Court Eleventh Judicial Circuit on September 23, 1980 for his conviction of the crime of first degree murder. The defendant was charged with First Degree Murder; Grand Theft; and Possession of a Firearm in the Commission of a Felony. The trial started on September 17, 1980 before a jury.

An appeal was taken to this Court and this Court affirmed the conviction. See Middleton v. State, 426 So.2d 548 (Fla. 1982).

A Motion for New Trial was filed on October 6, 1980, but it was never scheduled for a hearing.

A Petition for Writ of Certiorari to the United States Supreme Court was filed and denied by the Court on July 6, 1983.

A Petition for Clemency was filed on March 21, 1984. On March 21, 1984 defendant appeared before the Florida Board of Executive Clemency. On February 8 the Governor denied clemency and signed a death warrant effective from noon on February 28, 1985 to noon on March 7, 1985.

The Superintendent of Florida State Prison of Starke, Florida where the defendant is incarcerated, has set his execution for 7:00 a.m., March 6, 1985.

Other than those legal proceedings referenced above, defendant has filed no other petitions, applications or motions regarding his judgments and sentences before he commenced this post-conviction proceeding.

In March of 1984 the defendant filed a Motion to Vacate the Judgment and Sentence of the trial court pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. Amendments to this motion were filed in June of 1984 and on February 25, 1985. The primary thrust of the motion was that the defendant was denied his right to effective assistance of counsel, particularly during the sentencing phase of his trial.

On February 25, 1985, the defendant also filed an application for a stay of his death sentence.

Without conducting an evidentiary hearing, the trial court denied all of the aforesaid motions on February 27, 1985.

On February 27, 1985, the defendant filed a Notice of Appeal to this Court.

ARGUMENT

POINT ONE

THE DEFENDANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION

The locus of the defendant's claim of ineffective assistance of counsel is his failure to adequately investigate, prepare and present testimonial and documentary evidence relating to various, legitimate mitigating circumstances that are present in the defendant's case and which, if presented to the jury at the sentencing hearing and to the Court, would have dictated a sentence of life in prison rather than the sentence of death.

The United States Supreme Court has repeatedly held that the Constitution requires stricter adherence to procedural safeguards in a capital case than in other cases.

> "The penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion) (footnote omitted) [1]

The performance of defense counsel is a crucial component of the system of protections designed to ensure that capital punishment is administered with some degree of rationality.

"Reliability" in the imposition of the death sentence can be approximated only if the sentencer is fully informed of "all possible relevant information about the individual defendant whose fate it must determine. Jurek v. Texas, 428 U.S. 262,276 (1976) (plurality opinion, emphasis added). The job of amassing that information and presenting it in an organized and persuasive manner to the sentencer is entrusted principally to the defendant's lawyer. The importance to the process of counsel's efforts[2] combined with the severity and irrevocability of the sanction at stake, require that the standards for determining what constitutes "effective assistance" be applied especially stringently in capital sentencing proceedings.[3]

In the case at bar, trial counsel failed miserably in his performance at the sentencing phase of the defendant's trial. Counsel failed to enumerate the glaring mitigating circumstances to the jury and Court, which consist of both statutory as well as non-statutory mitigating factors. The most crucial of those present being the defendant's inability to conform to the requirements of the law as a result of mental disease. See Affidavit of defendant (App. 1,2) and Affidavit of Dr. Mark J. Kane (App. 3).

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1 See also Zant v. Stephens, ___ U.S. ___ (1983); Eddings v. Oklahoma, 455 U.S. 104, 110-112 (1982); Lockett v. Ohio 438 U.S. 586, 604 (1978) (plurality opinion)

2 See Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L. Rev. 299, 303 (1983)

3 An additional reason for examining carefully a Sixth Amendment challenge when it pertains to a capital sentencing proceeding is that the result of finding a constitutional violation in that context is less disruptive than a finding that counsel was incompetant in the liability phase of a trial.

In 1974, the defendant was described in a Psychiatric screening report as having a "passive aggressive personality", yet this report was not mentioned to the jury and there was no testimony presented to substantiate the mental disorder. Counsel failed to present testimony concerning the physical and mental abuse that the defendant was subjected to as a youth from his father, nor was it mentioned that the defendant had lost his mother at an early age and was consequently shuffled from one foster home to the next. In deed, counsel never even discussed these mitigating factors with the defendant or inquired of the defendant's background and childhood. Such an omission rendered the sentencing phase of the trial meaningless, but more importantly, counsel's failure to adequately investigate, prepare and present evidence of the defendant's background and mental illness deprived the defendant of effective assistance of counsel as guaranteed by the Constitution.

The United States Supreme Court has addressed the issue of the value of presenting character and background circumstances in the sentencing phase of a capital trial. In Eddings v. Oklahoma, supra at 112, the Court stated:

> "the fundamental respect for humanity underlying the Eighth Amendment. . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."
>
> quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (opinion of Stewart, Powell and Stevens, JJ.)

Counsel's failure to present evidence of mitigating fac-

tors to the jury and Court was even noticed by this Court in it's opinion affirming the defendant's conviction and sentence of death. In Middleton v. State, 426 So.2d 548 (1982) at page 838, the Court addressed the imposition of the death penalty and stated:

> "Appellant contends that the trial court erred in finding no mitigating circumstances. Specifically he argues that the judge should have found and considered the fact that appellant was operating under the influence of extreme emotional disturbance. He says that he was under great stress as the aftermath of his prison experience, that the tension built up, and that he lost his temper and directed his anger towards the victim. The evidence to support his position is not clear enough to enable us to hold that the trial judge erred in declining to find the existence of such mitigating factors." (emphasis added).

The reason that it was not clear enough to this Court was because trial counsel failed to investigate, prepare and present in an organized and meaningful way to the jury and trial court, all of the necessary documentation, expert testimony as well as psychiatric reports that would have substantiated the defendant's position that the death penalty was not appropriate under law and the facts of this case. Because the sentencer was not "fully informed of all possible relevant information about the individual defendant whose fate it must determine", the reliability of the outcome of the proceeding has cast a serious doubt, Jurek, supra, and therefore, the sentence of death should be vacated.

The United States Supreme Court recently defined the Sixth Amendment's requirement of effective assistance of counsel in Strickland v. Washington, ____U.S.____, 104 S.Ct. 2052, 80

L.Ed.2d 674, (1984). In Strickland the Court held that in adjudicating a claim of ineffectiveness of counsel, a court should keep in mind that the principles the Court had set down for ineffective assistance of counsel claim did not establish mechanical rules. The Court stated:

> "Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the Court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." Id at 35 CrL 3074.

In the case at bar, counsel's failure to investigate, prepare and present the mitigating factors in the defendant's case to the jury and trial court amounts to a breakdown in our adversarial process and the end result is the unreliability of the outcome of the sentencing phase of the trial. Strickland, Jurek, supra.

Trial counsel's failure to discuss with the defendant the mitigating factors and circumstances involved in his case left counsel unprepared to effectively argue these factors to the jury. This failure was demonstrated in the jury sentencing proceeding where counsel did not present a case at all. The jury sat in judgment on a capital sentencing hearing wherein only one side presented any argument. The State presented a one sided argument for the death penalty with aggravating factors. Counsel's job was to argue the mitigating factors as they relate

to the offense, defendant's background, any mental disorders, etc. The record will reflect that this was not done.

The operative significance of this was that the defendant was denied his constitutional right to effective assistance of counsel at the sentencing phase of the trial. The basis for a decision in this capital sentencing - aggravating versus mitigating circumstances - were argued by the State with no adversarial rebuttal by counsel. Trial counsel simply failed to present meaningful arguments relating to the defendant's inability to conform his conduct to the requirements of law or his extreme emotional disturbance and relative youth. Counsel did not play the adversarial role necessary to ensure fairness of the capital sentencing proceeding. The direct and proximate result of counsel's deficient performance before the jury and Court at sentencing was the denial of mercy by the jury. In such a capital penalty trial, the defendant has but one line of defense, arguments by counsel that the mitigating factors outweigh the aggravating factors. The argument of counsel to the jury during the penalty phase reflects his ignorance to his client's potential defenses.

POINT TWO

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO VACATE THE JUDGMENT AND SENTENCE WITHOUT FIRST CONDUCTING AN EVIDENTIARY HEARING ON THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

The factual allegations of the motion to vacate judgment and sentence (which are set forth in the foregoing argument under Point One) state an extremely strong claim of ineffective assistance of counsel under the standards of Knight v. State, 384 So.2d 997 (Fla. 1981) and the Strickland case, supra. The three parts of the Knight burden for establishing ineffective assistance claims have been met here. Defendant has identified specific acts and omissions upon which the effective assistance claim is based; shown the omissions are "substantial and serious" deficiencies below the standard for competent counsel, particularly in light of the fact that higher standards are required of attorneys trying cases in which a man's life is at stake; finally, deficiency was such that there is a reasonable probability that the result of the sentencing phase would have been different. And therefore, an evidentiary hearing is mandated. See Smith v. State, 457 So.2d 1380 (Fla. 1984).

For a case directly in point, we would rely upon Holmes v. State, 429 So.2d 297 (Fla. 1983). In that case, this Court observed:

> "The second category of arguments is that defense counsel's representation throughout the sentencing proceedings was substantially deficient. Specific acts which appellant points to in claiming that counsel was ineffective are: the waiver of the right to an advisory sentencing jury, the failure to

> contest or negate the existence of aggravating circumstances, and the failure to present available expert evidence of appellant's mental and emotional condition in support of mitigating circumstances."

In reversing the death sentence, this Court said:

> "We find defense counsel's representation during the proceedings on sentencing to have been substantially deficient and measurably below the standard for competent counsel. Instead of concentrating on the particular mitigating aspects of the case, defense counsel made a general argument against capital punishment and expressed the hope that the judge had "mellowed" since the last time he had sentenced an offender to death. Furthermore, we find that under the circumstances the deficiency was so substantial as to have probably affected the outcome of the proceedings on the question of sentencing. Since the response of the state in the proceeding below and on appeal has not shown beyond a reasonable doubt that Holmes was not prejudiced by the ineffectiveness of the legal counsel he received, we find that Holmes is entitled to relief on his motion to vacate the sentence of death".

In Holmes, the trial court properly held an evidentiary hearing. The necessity of holding an evidentiary hearing on a claim of ineffectiveness of counsel was stressed by this Court in Jones v. State, 446 So.2d 1059 (Fla. 1984). There, this Court reasoned as follows:

> "Although we find that the trial judge did not commit reversible error in failing to have an evidentiary hearing on this ineffective-assistance-of-counsel claim, we would encourage trial judges to conduct evidentiary hearings when faced with this type of proceeding in view of the relatively recent decision of the United States Supreme Court in Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981). It is important for the trial courts of this state to recognize that, if they hold an evidentiary

> hearing on this type of issue, under the Sumner decision their finding of fact has a presumption of correctness in the United States district courts.
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> * * * * *
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> When a state court does not hold an evidentiary hearing, the United States district courts believe they are mandated to hold an evidentiary hearing because of the provisions of subparagraphs (2),(3),(6),(7) and (8) of section 2254(d) unless they can find that the petition is totally frivolous. The practical effect of the state court's denial of an evidentiary hearing on an ineffective-assistance-of-counsel claim is to leave the factual finding on this issue to the federal courts. It is for this reason that we suggest, even when not legally required, that trial courts conduct, in most instances, evidentiary hearings on this type of issue".

POINT THREE

REPEATED REFERENCE TO DEFENDANT'S PRISON TERM AND THAT HE WAS ON PAROLE AT THE TIME OF THE OFFENSE VIOLATED THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSITUTION.

Defendant's prior incarceration and parole was referred to on numerous occasions by the prosecutor, defense counsel, and several witnesses (Tr. 131, 162-3, 296, 308-9) during the guilt phase of trial. These references were made gratuitously and excessively and bore no relevance to the issue of guilt being tried and were highly prejudicial to defendant. Defense counsel failed to object or otherwise adequately move to limit these references.

During cross-examination of the defendant at trial, the prosecutor made reference to the fact the defendant was on parole

and had violated it by leaving the state (Tr. 369), excessive reference to the fact defendant was "able" to work but did not (394), revealed that he was previously in prison by asking his "address" just prior to living with victim (Tr. 376), implied the burden of proof shifted to the defendant because he had not brought in "other witnesses to demonstrate where he was on the date of the offense (386). None of these questions was objected to by defense counsel, and the questions and answers were not relevant and were highly prejudicial to defendant.

Florida law has long prohibited the introduction of evidence or questioning of witnesses about prior convictions of the defendant which are unrelated to the crime charged. Whitehed v. State, 279 So.2d 99 (Fla. 2d DCA 1973); Williams v. State, 110 So.2d 654 (Fla. 1959); F.S.A. Section 90.404(2)(a). See also Warren v. State, 371 So.2d 219 (Fla. 2d DCA 1979); Fouts v. State, 374 So.2d 22 (Fla. 2d DCA 1979). The repeated reference to the prison and parole was excessive and overreaching, and resulted in the trial of defendant on irrelevent issues. Introduction of such evidence and testimony was found to violate due process and to render a trial fundamentally unfair in Panzaveccio v. Wainwright, 658 F.2d 337 (5th Cir. Unit B 1981) ("The proper balance between judicial economy and the prejudicial effect of evidence of prior convictions was not struck in this instance.") The position of the Florida Courts is that "admission of evidence of an accused's prior arrests is ordinarily deemed so prejudicial that it automatically requires reversal of his conviction", Dixon v. State, 426 So.2d 1258 (2d DCA 1983).

CONCLUSION

Based on the foregoing argument and authorities cited, this Court should grant the defendant's motion for stay of execution, reverse the trial court's order denying the motion to vacate judgment and sentence, and remand this cause to the trial court for an evidentiary proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered to the Office of the Attorney General, 401 N.W. 2nd Avenue, Room 820, Miami, Florida 33128 this 27th day of February, 1985.

By N. Joseph Durant, Jr.
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