IN THE SUPREME COURT OF FLORIDA

FLOYD MORGAN, Petitioner, v. STATE OF FLORIDA, Respondent.	CASE NO. 69,104

On Appeal From The Eighth
Judicial Circuit, In And For
Union County, Florida

REPLY BRIEF OF DEFENDANT/APPELLANT FLOYD MORGAN

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INTRODUCTION

Appellee's Answer Brief contains numerous, egregious misstatements of fact and very little pertinent law. It makes no attempt to attack or distinguish the precedent cited by appellant in his Initial Brief. The Answer Brief therefore does not change the conclusion that appellant's trial counsel was ineffective at the penalty phase of his trial and that appellant was prejudiced by that ineffectiveness. Accordingly, this Court should remand this case to the Circuit Court with instructions to correct appellant's sentence to life imprisonment. Alternatively, this Court should vacate appellant's sentence and remand with instructions to convene a new sentencing jury and to conduct a new penalty trial. With respect to the guilt phase, this Court should remand for further proceedings to determine whether counsel's error in failing to develop a defense based on post-traumatic stress disorder was prejudicial on the issue of guilt or innocence.

ARGUMENT

I. APPELLEE'S MISSTATEMENTS IN ITS STATEMENT OF THE CASE AND FACTS.

Appellee makes numerous and serious misstatements of facts in its Statement of the Case and Facts.[1/] See Answer Brief, at 1-10. Its first misstatement is typical of appellee's

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1/ Many of these misstatements are also repeated in the "Argument" section of appellee's Anwer Brief, at 12-31, and are pointed out below.

misrepresentations. There simply has been no finding made that, as appellee states, the appellant, Floyd Morgan ("Morgan"), committed murder "simply because [the victim] owed him money." Id. at 1. See also id. at 24. Indeed, there is evidence to the contrary. R. at 1260-61. Such a representation in the opening sentence of its Answer Brief is unnecessary, unworthy, and abusive on the part of appellee.

Other misstatements of fact are similarly abusive. Appellee, for example, states that Dale Harden, a prison staff member, at "no time . . . proffer[ed] the testimony 'he would have given' regarding Morgan's" actions during the Garment Factory riot. Answer Brief, at 4. In actuality, Mr. Harden testified that "Morgan played a role in helping us get out, saving our lives in this riot." Record on Appeal ("R."), at 515.[2/] Mr. Harden also testified that John Sapp would not be alive today if Morgan had not gone to his assistance and "myself, I wouldn't probably be." Id. Appellee's misstatement also conveniently ignores the stipulated testimony of another prison staff member, John Sapp, which states that he was present in April 1973 at the Garment Factory riot; that he was stabbed with a screwdriver in the back, as a result of which he is paralyzed in his left leg and suffers numbness in his right leg; that

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2/ Appellant's counsel received their copy of the Record on Appeal from the Circuit Court on October 14, 1986, after appellant's Initial Brief was filed. The Initial Brief therefore cited directly to the hearing transcript.

Morgan sprayed a fire extinguisher on the ten or more inmates surrounding Sapp; and that Morgan's actions helped save Sapp's life. Id. at 720-27.

Appellee's next misstatement of fact is that Morgan's trial counsel, William B. Salmon ("Salmon"), did not feel limited in his ability to argue non-statutory mitigating circumstances during the penalty phase of Morgan's trial because he "argued a right to unlimited argument" and presented "a great deal of evidence relevant to nonstatutory mitigating factors." Answer Brief, at 4-5. This argument completely ignores the fact that, even though Salmon asked for permission to present non-statutory mitigating circumstances, the Circuit Court did not allow him to do so. R. at 1400. Instead, the trial judge allowed Salmon to present evidence from Morgan's prison file, as rebuttal to the statutory aggravating circumstance that the defendant committed the crime while under a sentence of imprisonment. Id.

Appellee also states that Salmon denied at the hearing held on December 30, 1985, on Morgan's 3.850 motion that "his capital work had provided him with any insight at all into the construction of an 'ineffective counsel' claim." Answer Brief, at 5. In fact, Salmon testified that he had not consulted or actively participated in rendering advice, including advice to appellant's counsel, as to how to sustain an ineffective assistance of counsel claim. R. at 554. In addition, appellee states that Salmon testified at the hearing that he had handled 30-50 trials "involving legal and evidentiary issues similar to

those at issue in the capital case." Answer Brief, at 5. In fact, Salmon merely testified that he had conducted 30-50 jury trials.[3/] R. at 554. Moreover, he testified that he had never handled a capital case prior to Morgan's, see id., and therefore had never prepared for or conducted the penalty phase of a capital case.

Next, appellee states that Salmon's testimony revealed that he procured a letter from Morgan's mother for use at the penalty phase and that he apportioned his time among his cases to devote sufficient time to preparing Morgan's case. Answer Brief, at 6. Neither of these statements is correct. The record reveals that the letter from Morgan's mother was submitted to the Florida State Prison and that the trial court allowed it to be read to the jury during the penalty phase because it was part of Morgan's prison files.[4/] R. at 1410-11. Regarding the time he spent in preparation of Morgan's case, Salmon stated only that he spent more time on the case than on the other numerous cases he

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3/ Appellee later refers to these trials as "50 felony trials." Answer Brief, at 15. It is clear from Salmon's testimony, however, that his statement that he had conducted 30-50 jury trials included all types of trials, including misdemeanors. R. at 554.

4/ Appellee also observes that, "[c]uriously, Salmon seemed hostile to the State and willing to be found 'ineffective'" and points to the trial court's Order of June 9, 1986, denying Morgan's motion for post-conviction relief in support. Answer Brief, at 4. However, appellee does not note that the trial court's Order merely adopted the proposed Order submitted by the State's attorney verbatim. R. at 792-814.

was handling, not that the time spent was sufficient. Id. at 557. Appellee's mischaracterization of Salmon's testimony ignores his other testimony to the effect that his schedule severely limited the amount of time he could spend on any one case and that he wished he had more time to spend on preparing Morgan's case. Id. at 522-23.

Appellee also mischaracterizes the testimony of Dr. Joyce Carbonell, appellant's expert in clinical psychology and PTSD. Appellee states that Dr. Carbonell testified that it would be "her duty to locate and procure a patient's records . . . . She is not entitled to sit back and wait for counsel to deliver records to her." Answer Brief, at 7. Instead, Dr. Carbonell testified that, when she is working with a lawyer, "it is a joint responsibility" to obtain records. R. at 607 (emphasis added). See also Answer Brief, at 17, 29.

Appellee also states that the testimony of Morgan's expert witness on ineffective assistance of counsel, Baya Harrison, "revealed that he did not utilize the Strickland test." Answer Brief, at 8. This statement is, at the least, regrettable hyperbole. Mr. Harrison specifically testified that Morgan was denied effective assistance of counsel as defined by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). R. at 618. Mr. Harrison's remark regarding Supreme Court precedent came during a discussion of whether he would allow a client charged with a capital crime to direct the

strategy of his defense.[5/] R. at 641. In addition, Mr. Harrison did not state that "lawyers must go from doctor to doctor, as long as it takes, until a favorable medical opinion is obtained . . . ."[6/] Answer Brief, at 9. Instead, he testified that an attorney for a client charged with a capital offense must "keep probing," should not "stop at the opinion of one psychologist," and cannot rely on an expert's opinion if relevant records are not presented to the expert. R. at 640, 651-52.

Finally, appellee states that the "actual text of any live testimony from John Sapp [a prison staff member whose life Morgan saved during a prison riot] was never proffered." Answer Brief, at 9. Appellant is at a loss to understand how appellee can make this statement in good faith, since stipulated testimony from Mr. Sapp was introduced into evidence at the December 30 hearing. R. at 720-27. Because of Mr. Sapp's poor physical condition, see id. at 720, appellant attached to the stipulated testimony a transcript of a sworn question and answer statement

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5/ Appellee also cites Mr. Harrison's remark about Supreme Court precedent out of context later in its Answer Brief, stating that when Mr. Harrison was reminded that it is not the law that a lawyer needs to keep soliciting doctors until one finds something wrong, Mr. Harrison "cavalierly exclaimed" that he did not care what Supreme Court law holds. Answer Brief, at 15. This colloquy simply did not occur. See R. at 641.

6/ Appellee later repeats this misstatement in its discussion of the law. See Answer Brief, at 15 ("Baya Harrison testified that in his personal opinion, counsel was obliged to keep soliciting doctors until someone found something wrong").

given by Sapp "live" during Morgan's clemency proceedings and detailing Morgan's rescue of Sapp during the Garment Factory riot. Id. at 722-27.

II. TRIAL COUNSEL WAS INEFFECTIVE AT THE PENALTY PHASE AND MORGAN WAS PREJUDICED BY COUNSEL'S INEFFECTIVENESS.

Appellee's Answer Brief does nothing to change the conclusion that the failure of Morgan's trial counsel to present critical mitigating evidence from family members and from two prison staff members and of Morgan's army service, PTSD, and possible organic brain damage were acts or omissions outside the wide range of professionally competent assistance of counsel. Neither does the Answer Brief rebut the conclusion that, but for his trial counsel's errors, the outcome of Morgan's trial would have been different.

Appellee first attempts to rebut these conclusions by attacking what it characterizes as appellant's "claim that Mr. Salmon failed to adequately prepare 'mental mitigating evidence' on behalf of Mr. Morgan." Answer Brief, at 14. Appellee breaks this claim into three parts: (1) an alleged failure to go from doctor to doctor until the desired result was obtained; (2) unwarranted reliance upon the opinions of experts; and (3) an alleged failure to provide extensive background material to the experts.[7/] Id. Morgan, however, makes no claim even remotely

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7/ During its argument, appellee states that "Morgan's 'PTSD' has never been established." Answer Brief, at 16 (emphasis (Footnote continued)

close to the first argument appellee suggests. Instead, he argues that effective counsel would have investigated the change in Morgan's behavior following Vietnam and would have obtained his prison and military records and family history for the use of his doctors in their psychiatric evaluations of Morgan. See Initial Brief, at 28. In addition, effective counsel would have investigated evidence indicating that Morgan suffered from organic brain disorder.[8/] Id. at 29.

Appellee relies on a hitherto-unknown study to support its argument that doctors merely reflect the diagnosis "spoon-fed" to them. Answer Brief, at 17-18. Not only is this study completely irrelevant to any argument appellant is making, its use by the government in its Answer Brief shows disrespect for the legal process and for this Court. The study is unsupported and has not been subject to cross-examination. It has never been entered into evidence. Its use here is completely improper, and this Court should disregard it in reaching a decision in this case.

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added). This is a most extraordinary observation since the parties stipulated that, in the event that the trial court determined that it was ineffective for trial counsel not to pursue evidence of PTSD or organic brain damage, the question of prejudice from these omissions would be reserved for a separate hearing. See Initial Brief, at 27 n.11.

8/ Appellee makes the outrageous and unjustified misstatement in its Answer Brief, at 17, that Mr. Harrison testified that it is counsel's obligation to "spoon-feed the desired diagnosis" to the defendant's experts. There is no such testimony in the record.

Appellee next argues that trial counsel's failure to locate and call the two prison staff and family members did not amount to ineffective assistance of counsel. Answer Brief, at 21-25.[9/] Contrary to appellee's assertions, however, trial counsel's failures to investigate and present evidence from family members and from the two prison guards were acts or omissions of counsel outside the wide range of professionally competent assistance. See Initial Brief, at 30-43. Appellee states that these failures were actually strategic decisions and that "poor strategy" will not support a finding of ineffectiveness. Answer Brief, at 22. Salmon, however, testified at the December 30 hearing that he did not make a tactical judgment that it was inadvisable to call family members and the two prison guards during the penalty phase of Morgan's trial. R. at 530, 533. Trial counsel for a capital defendant must be deemed ineffective where he testifies that he had no strategy for the sentencing phase and that he failed to consider or develop possible mitigating evidence. See Initial Brief, at 38-39. Moreover, even if trial counsel does not admit that his decision was not strategic, a claim of ineffectiveness may be made out

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9/ Once again, appellee's arguments are replete with misrepresentations. Appellee repeats its statement that no actual testimony regarding the Garment Factory riot was elicited from the two prison staff members. Answer Brief, at 21. This is simply not true. See R. at 515, 720-27. Appellee also repeats its argument that trial counsel solicited a letter from Morgan's mother. Answer Brief, at 23. This also is simply not true. See R. at 1410.

where the circumstances clearly show that counsel's failure to offer mitigating evidence could not have been based on reasonable strategy. See id. at 39. Salmon's failure to present family and prison guard testimony simply cannot be deemed to be a strategic decision taken after a reasonable investigation into the alternatives. See id. at 39-40.

Appellee also argues that Salmon cannot be deemed ineffective because Morgan directed him not to contact his family and because Salmon did contact them to get a letter from Morgan's mother and clothes for Morgan's use at trial. Answer Brief, at 23. Morgan's reluctance to have his family involved, however, did not absolve trial counsel from his failure to investigate family testimony for use at the penalty phase. See Initial Brief, at 41. See also Thomas v. Kemp, 796 F.2d 1322, 1324 (11th Cir. 1986) (statements of defendant that he did not want to take the stand and did not "want anyone to cry for him" did not support a waiver of use of character witnesses at sentencing phase of capital murder prosecution). Trial counsel must evaluate the potential benefits of available avenues of defense and advise the client of those of possible merit. See id. at 42. See also Foster v. Strickland, 707 F.2d 1339, 1343 (11th Cir. 1983), cert. denied, 466 U.S. 993 (1984). Salmon testified that he did not so discuss use of family history with Morgan. R. at 531-32. Thus, Morgan's uneducated indications to Salmon cannot excuse his failure to pursue family testimony.

Moreover, as noted above, Salmon did not contact Morgan's mother to obtain a letter from her. See R. at 1410-11. In addition, all of Morgan's brothers and sisters testified that they were never informed of Morgan's trial prior to its conclusion. Id. at 709, 713, 715, 718.

Appellee also argues that counsel cannot be deemed ineffective merely because he failed to call witnesses. Answer Brief, at 22. In fact, however, trial counsel may be ineffective even when they have produced some, but not all, mitigating evidence available. See Initial Brief, at 32-34, 37-38. See also Stanley v. Zant, 697 F.2d 955, 962, 965 (11th Cir. 1983), cert. denied, 467 U.S. 1219 (1984). An attorney does not provide effective assistance of counsel if he does not adequately explore all avenues of defense or if his failure to investigate is not based upon a reasonable set of assumptions. See id. at 20-21. Defense counsel has a special duty to be prepared for the penalty phase of a capital trial. See id. at 21-23. Salmon's failures to investigate and present evidence from family members and from two prison staff members demonstrate that he did not adequately explore all avenues of defense and that he was not prepared for the penalty phase of Morgan's trial. Thus, his failures were acts or omissions outside the wide range of professionally competent assistance.[10/] See id. at 30-34.

10/ Appellee's remark that family history and mental evidence are of speculative value is not supported by the case law. See, e.g., Thomas v. Kemp, 796 F.2d 1322, 1324 (11th Cir.
(Footnote continued)

Appellee also argues that the jury was allowed to consider non-statutory mitigating evidence at the penalty phase of Morgan's trial. See Answer Brief, at 26-27. Although appellee would have us believe that trial counsel was permitted to put whatever mitigating evidence he chose before the jury, the State must know that the trial court refused to allow Salmon to introduce any non-statutory mitigating evidence he chose, but instead limited him to entering evidence that rebutted, explained, or refuted any aggravating circumstances the State presented. See R. at 1400. As a result, Salmon limited his evidence in mitigation to information contained in Morgan's prison records. See id. Salmon's failure to inform the trial court of the Supreme Court's opinion in Lockett v. Ohio, 438 U.S. 586 (1978), was therefore also an act or omission amounting to professionally incompetent assistance of counsel. See Initial Brief, at 29-30.

Appellee concludes its Answer Brief with a section devoted to "miscellaneous concerns." One "concern" of appellee is that Morgan's expert witnesses were not credible. Answer Brief, at 28-29. It bases this "concern" on its view that the witnesses contradicted each other, that there was contrary lay evidence, and that the witnesses were biased and did not

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1986) (affirming district court's decision that trial counsel's failure to investigate and present mitigating evidence, including testimony from defendant's mother and other family members or individuals who knew defendant, constituted ineffective assistance of counsel).

personally examine Morgan. Id. Morgan's expert on ineffectiveness, Baya Harrison, however, merely testified that an effective lawyer will gather relevant data to give to his experts, while Dr. Carbonell testified that she believes the psychiatrist also has a duty to ask for relevant records. R. at 607, 652. This is hardly a material variation in testimony. Even though Salmon and his doctors had access to Morgan's prison records (not military records and family history), there is no evidence in the record that the two doctors looked at any records relating to Morgan. There is also no factual basis for the State's assertion that Mr. Harrison testified on the basis of personal feelings rather than the actual law. Finally, Dr. Carbonell need not have examined Morgan personally to give her testimony that Morgan's lawyer and doctors should have investigated evidence that Morgan suffered from PTSD and/or organic brain disease.

Another of appellee's "concerns" is that Morgan's trial counsel tried to maximize his ineffectiveness at the hearing. Answer Brief, at 29. The record, however, indicates an effort on the part of Salmon to be completely fair in his assessment of his own conduct of Morgan's trial. He need not have had absolutely no trial plan before he may be found ineffective.

The State also argues that PTSD was not a recognized defense in 1978. Answer Brief, at 30. This statement is contradicted by the testimony of Morgan's two experts, Mr. Harrison and Dr. Carbonell, R. at 625-26, 585-86, and even by the State's own arguments in its Answer Brief. See Answer Brief, at

17 ("[s]tress-related mental problems, whether called 'PTSD' or 'delayed stress reaction' or 'combat fatigue' are not unknown to the medical community. If it was present, or present in a significant manner [in Morgan], the doctors [who examined Morgan in 1978] would have found it").

Finally, contrary to appellee's assertions, Morgan is not seeking another 3.850 hearing. Instead, he is seeking correction of his sentence or, alternatively, a new penalty-phase hearing before a jury. He is also seeking a determination whether new proceedings should be conducted as to his guilt or innocence.

CONCLUSION

The failures of Morgan's trial counsel to investigate and present evidence from two prison staff members, from family members, and of Vietnam-related psychiatric problems, among other failures, were acts or omissions outside the wide range of professionally competent assistance. There is a reasonable probability that the jury in this case would have recommended a life sentence for Morgan but for Salmon's failure to present such evidence of mitigating circumstances at the penalty phase. Accordingly, this Court should remand this case to the Circuit Court with instructions to correct Morgan's sentence to life imprisonment. Alternatively, this Court should vacate Morgan's sentence and remand with instructions to convene a new sentencing jury and to conduct a new penalty trial.

With respect to the guilt phase, the court should remand for further proceedings to determine whether counsel's error in failing to develop the PTSD defense was prejudicial on the issue of guilt or innocence.

Respectfully submitted,

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Dated: December 18, 1986

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CERTIFICATE OF SERVICE

It is hereby certified that two copies of the Reply Brief of Defendant/Appellant Floyd Morgan were mailed first class, postage prepaid, to the Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, Florida, this 18th day of December, 1986.

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