IN THE SUPREME COURT OF FLORIDA

JOSEPH ROBERT SPAZIANO,

Appellant,

vs. Case No. 72,464

STATE OF FLORIDA,

Appellee.

_____/

APPELLANT'S REPLY BRIEF

Edward S. Stafman, Esq.
317 E. Park Avenue
Tallahassee, FL 32301
(904) 681-7830

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes, Rules and Other Authorities

STATEMENT OF THE CASE AND FACTS

The State's version of the case and facts is misleading, and requires clarification in several areas. First, throughout its statement of facts, the State incorrectly implies that at the Gardner remand hearing, Mr. Spaziano's attorneys deliberately failed to present the substantial mitigating evidence set forth in the instant Rule 3.850 petition and appendices. Second, the State's statement of facts also incorrectly insinuates that the substantial mitigating evidence set out in the instant 3.850 petition may have been considered by the sentencer because some of it was briefly referenced in the presentence investigation (PSI) report. These assertions, seemingly supported by the State's use of certain quotations taken out of context, are simply not supported by the record as a whole.

With respect to the latter issue, the State cites this Court to the two PSIs,[1] each of which briefly mentioned that Mr. Spaziano had suffered head injuries in a serious automobile accident, and suggest that he had a "dull normal intelligence level." State's Brief at 7, 13-14. However, the State's conclusion that the extensive facts set out in the instant Rule 3.850 motion were adequately considered by the sentencer because of these PSI references requires an inferential leap of logic and faith. The State's conclusion is easily dismantled when one only quickly compares the facts set forth in the few PSI references to the

---

[1] The two PSIs are similar. The second one was prepared because the first one inappropriately contained "confidential" information which had not been disclosed to the defense.

facts summarized in the thirty pages (30) of the instant 3.850 motion, and supported by the hundreds of pages of supporting indeces. While head injuries resulting from an automobile accident may vaguely suggest to a sentencer that a defendant may be less than totally responsible for his acts, the bare mention of such an injury can hardly be equated to uncontradicted scientific testimony and evidence that the individual suffers orgain brain damage and orgainic personality disorder with consequent cognitive losses of orientation, memory, intellectual functioning, and impaired judgment.[2]

Regarding the failure to investigate or present this mitigating evidence at the Gardner remand, the State suggests that Mr. Spaziano's attorneys, for some reason, did not wish to present this evidence (of which they were not aware). The State's version of the facts points to two motions in limine filed in the Gardner remand hearing where Appellant argued that the Gardner remand was limited in scope. From those motions, the State concludes that Mr. Spaziano's attorneys did not wish to present the substantial mitigating evidence. However, the face of these motions show that they were directed at excluding as an aggravat-

---

[2] Neither organic brain damage, organic personality disorder, or any of the consequent disabilities are seriously discussed in either PSI, nor did the PSIs make the sentencer aware of Mr. Spaziano's "dream-like states," his "almost primitive emotional and cognitive control," or his periodic loss of consciousness. The importance of this type of evidence is demonstrated by this Court's recent opinion in Fitzpatrick v. State, 13 F.L.W. 411 (Fla. 1988) (holding that similar evidence outweighed five statutory aggravating circumstances, as a matter of law); see also State v. Sireci, 502 So.2d 1220 (Fla. 1987).

ing circumstance evidence of another conviction which had not been considered in the original sentence; they did not constitute an attempt to limit the consideration of the critical unpresented mitigating evidence.[3] See State's Brief at 8-9. The State's representations that Attorney Schwarz "repeatedly contended that the scope of the hearing should be limited," id., omits the fact that this argument was intended only to limit the State's ability to present aggravating factors beyond those which had been found during the first sentencing proceeding.[4]

The State's version of the facts also suggests that other matters in the record indicate that Mr. Spaziano's attorneys diliberately failed to investigate and present the substantial mitigating evidence. Particularly, the State points to Attorney Schwarz's statement that he would be arguing "the weakness of the evidence," and that during his argument, Mr. Spaziano's other attorney suggested that Appellant's daughter, if she were present, would say "don't kill my daddy." The attorney also noted Mr. Spaziano's good behavior while on death row. See State's Brief at 12. From these isolated statements, the State concludes that Mr. Spaziano's attorneys knew that they were

---

[3] One of the motions sets out counsel's erroneous belief that he was limited at the Gardner remand to rebutting the information contained in the PSI, and that he could not present other mitigating evidence. Counsel specifically cited to Songer v. State, 365 So.2d 696 la. 1978); Funchess v. State, 399 So.2d 356 (Fla. 1981) and other authority, which he believed seemed to so hold.

[4] Had the Court below granted a hearing as Appellant requested, this issue could have been fully explored and Attorney Schwarz would undoubtedly have explained the nature of his prior assertions that the Gardner remand was limited in scope.

entitled to present new mitigating evidence, and parenthetically, that Attorney Schwarz's present sworn statement to the contrary (RS 28-30) is untrue. However, these brief arguments, unsupported by evidence, do not suggest that Appellant deliberately failed to present the available mitigating evidence; rather, they were naked attempts by Appellant's attorneys to impact the sentencer with these matters, even though they believed they were not permitted to do so, and even though they offered no evidence to support the arguments they were making. There is obviously a vast difference between the presentation of substantial evidence and the making of vague arguments, unsupported by record evidence.[5]

Finally, the State makes reference to the affidavit of Attorney Kirkland, who states that he did not investigate the facts presented below at the time of the original trial because Mr. Spaziano, who was devestated by the verdict, did not wish to "beg for mercy." Attachment "KK" to Appendix of Motion to Vacate Judgment.[6] Mr. Kirkland's affidavit does not explain why no investigation was done at or about the time of the Gardner

---

[5] Once again, this could have all been explained in an evidentiary hearing and this Court would not be required to guess at what may have been meant by various remarks. The State would then be able to test its theory of the facts through cross-examination.

[6] Moreover, the same appendix contains the affidavit of Dr. Krop which concludes that "within a reasonable degree of psychological probability, Mr. Spaziano was incompetent to participate in the penalty phase of his trial," due to organic brain damage, a diagnosis confirmed by various other professionals. Id., Attachments "O", "N", "Q"-"Y."

remand, particularly where the prison files produced in the interim contained the diagnosis of organic brain damage.[7] Id., Attachments "Q", "R."

Appellant believes that the above clarifications provide the Court with a more accurate depiction of the true facts of this case.

I. THE TRIAL COURT ERRED IN SUMMARILY CONCLUDING THAT PETITIONER HAS ABUSED THE WRIT IN THIS SUCCESSOR 3.850 PETITION

The thrust of Mr. Spaziano's argument is that he did not abuse the writ by filing the instant 3.850 Petition because Appellant was precluded from raising the issue raised in that petition in the earlier 3.850 petition. This issue could not have been raised both because the issue was not known to counsel at that time and because the raising of that issue would have required counsel to attack himself as ineffective. These factors establish legal and legitimate "cause" for Mr. Spaziano's failure to earlier raise these issues. Witt v. State, 465 So.2d 510 (Fla. 1985).[8] Mr. Spaziano contends that, at the least, the court

---

[7] The only affidavit in the record discussing the failure to present mitigating evidence at the Gardner remand is that of Attorney Schwarz, who clearly states that he erroneously believed he was not permitted to do so, and that he was too busy due to other demands. (RS-28-30).

[8] This case is easily distinguished from Christopher v. State, 489 So.2d 22 (Fla. 1986), and Tafero v. State, 524 So.2d 987 (Fla. 1987), relied upon by the State. In both Christopher and Tafero, prior 3.850 motions raised issues of ineffective assistance of counsel, and second motions raised additional grounds of ineffectiveness. The Court found that the issues (continued...)

below should have conducted a hearing to determine whether or not he was, in fact, precluded from asserting his present claims in his first 3.850 motion.[9]

The State responds to this argument by claiming that counsel could have raised this issue in the first 3.850 petition and that, in any event, Appellant would have been entitled to no relief because his counsel at the Gardner[10] remand could not be faulted for failing to anticipate the change in the law by virtue of this Court's opinion in Spaziano v. State, 489 So.2d 720 (Fla. 1986) (order affirming denial of Rule 3.850 relief). In essence, the State argues that the affidavit of Attorney Jerry Schwarz, explaining why he could not have presented the important mitigating evidence, should be disregarded and is unworthy of belief.[11] However, the State's argument is essentially a factual

---

[8](...continued)
raised in the latter motions could easily have been raised in the former. Mr. Spaziano, on the other hand, did not raise ineffective assistance of counsel at the Gardner remand in his first motion, and could not have known about that issue at the time. Similarly, the cases cited at page 32 of the State's brief are all distinguishable for the same reasons.

[9] The court below held that Mr. Spaziano had not alleged that the issues raised herein could not have been raised in the first Rule 3.850 motion. The State candidly admits that "appellant is technically correct" that he made the necessary allegations. State's Brief at 32. However, not only is Appellant "technically correct," but he would have proved those allegations, had he been given the opportunity to do so.

[10] Gardner v. Florida, 430 U.S. 349 (1977).

[11] Although Attorney Schwarz explains in his affidavit that he did not understand that he was permitted to present mitigating evidence until after this Court affirmed the denial of Rule 3.850 relief, 489 So.2d 720 (Fla. 1986), the State essentially calls
(continued...)

one requiring the resolution of the factual question of whether this issue could have been raised in the first 3.850 petition as the State asserts or whether it could not have been raised as asserted by Mr. Spaziano and his prior attorneys. The entire point of this appeal is that that factual dispute should have been resolved by the trial court, after opportunity for hearing all of the evidence, and not by resort to the State's interpretation of the facts.

The State's attempt to distinguish State v. Sireci, 502 So.2d 1221 (Fla. 1987), is unpersuasive. In Sireci, this Court quoted Christopher v. State, 489 So.2d 22 (Fla. 1986), writing that a successor Rule 3.850 motion may be summarily denied

> unless the movant alleges that the asserted grounds were not known and could not have been known to the movant at the time the inital motion was filed.

Sireci at 1224 (emphasis supplied). In good faith, Mr. Spaziano has made precisely that allegation.

In Sireci, this Court was presuaded by the fact that as soon as the new information became available to Mr. Sireci, he sought to present it. Similarly, once he learned of his claim, Mr. Spaziano did not proceed to bring a habeas corpus action in federal court on the already exhausted issues, 28 U.S.C. Section 2254, allow that to proceed through the entire federal system,

---

[11](...continued)
him a liar by sarcastically referring to the realization that he was allowed to present such evidence (after this Court ruled) as a "revelation". State's Brief at 26 (quotation marks in original); see also State's Brief at 33-34.

and then come back to the trial court for a second round of review. Rather, when Mr. Spaziano learned of his claim, he immediately presented it in the most proper way he knew. We submit that Sireci controls herein.

The State also argues that Mr. Spaziano had deliberately bypassed the opportunity to include the instant allegations of ineffective assistance in his first Rule 3.850 petition and had deliberately bypassed the opportunity to present the mitigating evidence at the Gardner remand, contentions which Mr. Spaziano adamantly denies. With respect to each of these "deliberate bypasses," both the State's position and that of Mr. Spaziano may be supported by contrary record evidence or reasonable inferences therefrom, such as the sworn testimony in Attorney Schwarz's affidavit and the inferences from other record matters drawn by the State in its brief. However, it seems clear that under these circumstances, the issue of deliberate bypass must be decided by an evidentiary hearing.

A very similar issue was presented to the Eleventh Circuit in Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1986). There, the federal district court had concluded that Mr. Hall deliberately bypassed the right to present evidence in a state court post-conviction hearing. The district court's conclusion was based on a statement of Hall's counsel that "I choose to not put on any testimony as a matter of tactics at this time." Id. at 776 n. 14. However, the Eleventh Circuit noted other statements which seemed to contradict that remark. The Eleventh Circuit wrote:

> Unless it is clearly shown on the record that a deliberate bypass has occurred, a federal [trial] court must hold an evidentiary hearing to discern whether a deliberate bypass has occurred. [citations omitted]. The district court ruled that Hall deliberately bypassed his right to vindicate himself in state court. The district court relied on one statement, but other statements to the contrary in the record indicate Hall did not bypass. Since the record does not clearly show a deliberate bypass, the district court must hold an evidentiary hearing on whether Hall deliberately bypassed his state remedies.

Applying the principles of Hall to this case, it is clear that there are disputed facts about Mr. Spaziano's attorneys' motives in the Gardner remand, and in the Rule 3.850 proceeding, which require an evidentiary determination. If Mr. Spaziano is correct that his attorneys did not investigate or present mitigating evidence because they unreasonably believed that they were not permitted to do so, then they were ineffective, and that issue could not have been raised in the prior Rule 3.850 proceeding because, until this Court issued its order affirming the denial of Rule 3.850 relief, 489 So.2d 720, counsel maintained the same unreasonable belief and could not attack himself.

The State also suggests that counsel was not ineffective at the Gardner remand as a matter of law, because a lawyer may not be deemed ineffective for failing to anticipate a "change in the law." State's Brief at 27. While this statement is fundamentally correct, this Court held in Spaziano v. State, 489 So.2d 720 (Fla. 1986), that its decision did not represent a "change in the law," and that the prosecutor and trial court made it patently

obvious to Mr. Spaziano's attorneys that they were entitled to present mitigating evidence at the Gardner remand, beyond rebutting the PSI:

> The record establishes, prior to resentencing, the state filed a pleading entitled "Motion to Compel Disclosure/Statement of Particulars of Non-statutory Mitigating Circumstance." At the hearing held on this motion, the prosecutor conceded that, under Lockett, Spaziano was entitled to present evidence on non-statutory mitigating factors. The trial judge agreed: "I don't think, in view of Lockett I can put a straightjacket on [defense counsel] here." On the basis of this record, we distinguish this case from Harvard v. State, 486 So.2d 537 (Fla. 1986), and find no violation of Lockett.

Spaziano v. State, 489 So.2d 720, 721 (Fla. 1986). Thus, counsel is not being faulted for failing to anticipate a change in the law, but for his failure to recognize the apparent (according to this Court) state of the law that Mr. Spaziano was indeed entitled to present this evidence at the Gardner remand.

Indeed, counsel's ineffectiveness resulted from the failure to even investigate this substantial mitigating evidence, let alone present it. It is well-settled that "[a] lawyer . . . must first evaluate the potential avenues of investigation and then advise the client of their merit . . . A strategy of silence may be adopted only after reasonable investigation of mitigating evidence or a reasonable decision that investigation would be fruitless." Tafero v. Wainwright, 796 F.2d 1314, 1320 (11th Cir.

1986), cert. denied, 107 S.Ct. 3277 (1987).[12] It simply cannot be said that the total failure to investigate the mitigating circumstances in this case was a reasonable strategy decision, given this Court's decision that it was apparent to counsel that he had the right to present mitigating evidence.[13]

The State also complains that Mr. Spaziano had not shown that a reasonably competent attorney could have located experts at the time of the Gardner remand to provide the testimony submitted in the proceeding below. State's Brief at 37. Of course, Appellant was never given the opportunity to make this showing because he was denied an evidentiary hearing. Moreover, the affidavit of Jerry Schwarz indicates that no investigation of any

---

[12] This is true even where a defendant decides to limit the investigation. Id. Assuming a competent defendant (which the instant record does not support), the defendant's desires may limit the scope of the investigation, but will not negate the duty to investigate, a duty which was totally breached in the case at bar. Tafero, at 1320; see Davis v. Alabama, 596 F.2d 1214, 1220 (5th Cir. 1979), vacated on other grounds, 446 U.S. 103 (1979). Appellant submits that an attorney's reliance on his client's statement that he does not suffer brain damage, in the face of severe head injuries requiring hospitalization and a mental hospital admission, is patently unreasonable.

[13] Contrary to the State's assertion, State's Brief at 27, Appellant has not now abandoned his contention that Judge McGregor limited his consideration to statutory mitigating circumstances. Appellant recognizes that this Court has previously rejected that position. Assuming that this Court is correct in its holding and Judge McGregor indeed was willing to consider non-statutory mitigating evidence, then counsel was certainly ineffective for failing to present it. If, on the other hand, this Court was incorrect and Judge McGregor did not and will not consider nonstatutory mitigating evidence, then surely Appellant will be entitled to relief in the federal courts. These alternative arguments do not represent an abandonment of either. Similarly, Appellant does not see how the present alternative argument estops him "from later seeking relief on the grounds of Hitchock v. Duggar, 107 S.Ct. 1821 (1987)." State's Brief at 28.

kind was done into this matter and the failure to even investigate strongly suggests that counsel was ineffective. Tafero, supra. It seems plain that, given the opportunity to do so, Mr. Spaziano could have established at a hearing that "a reasonable likelihood that a similar expert [to Dr. Krop] could have been found at the [time of the Gardner remand] by an ordinarily competent attorney using reasonably diligent effort." Elledge v. Duggar, 823 F.2d 1439, 1446 (11th Cir. 1987). Indeed, strong hints about some of the evidence existed in 1966, and is contained in appendices "S"-"Y". Moreover, the Department of Correction files of 1976 described Mr. Spaziano's "brain damage as rather extensive, with complete post-traumatic amnesia symptoms," Appendix "Q", and diagnosed him as suffering "organic brain syndrome due to trauma." Appendix "R". It is ludicrious to suggest that an expert could not have been located to testify in June, 1981 (the time of the Gardner remand) about Mr. Spaziano's brain damage, when the Department of Corrections' psychiatrist and psychologist had each made the diagnosis five years earlier. Experts could easily have been located by any reasonable investigation.[14]

---

[14] The State's argument that Mr. Spaziano did not wish to present mitigating evidence at the Gardner remand is without merit. Whatever motive Attorney Kirkland may have had at the time of the original trial, it is clear that no investigation of mitigating evidence was done at the time of the Gardner remand because counsel erroneously believed that he was not permitted to present such evidence and because he was too busy. See notes 6-7, supra, and accompanying text.

The State also argues that there was no prejudice flowing to Mr. Spaziano from counsel's failings. See Strickland v. Washington, 466 U.S. 668 (1984). The State bases this argument on brief statements in the PSIs which it contends adequately apprised the sentencer of the facts pertaining to Appellant's brain damage and background. See pp. 1-2, supra. Once more, it is difficult to evaluate the State's claim absent an evidentiary hearing. However, the existing record suggests that this contention is silly. Unlike the cases cited by the State at page 40 of its brief, the significant evidence adduced and set out below is not merely cumulative, nor is it information about which the sentencer was seriously aware. The fact that there happens to be a small overlap between the information that was actually in the sentencer's hands and the new information does not suggest that the sentencer adequately considered the crucial mitigating evidence. Indeed, the importance of mitigating evidence of the type presented below was made plain by this Court's recent opinion in Fitzpatrick v. State, 13 F.L.W. 411 (Fla. 1988), where this Court held that similar mitigating evidence outweighed five aggravating circumstances in a police killing. The importance of organic brain damage as a mitigating circumstance was again emphasized by this Court in State v. Sireci, 502 So.2d 1220 (Fla. 1987), where the Court held that

> a new sentencing hearing is mandated in cases which entail psychiatric examinations so grossly insufficient that they ignore clear indications of either mental retardation or organic brain damage.

Id. at 1224 (emphasis supplied). Indeed, the Sireci Court considered evidence of organic brain damage so crucial that it allowed the issue to be raised for the first time on a successor 3.850 proceeding, even though prior psychiatric examinations failed to reveal Sireci's organic brain damage.

The State's disagreement with the facts reported by the experts is not properly before this Court. See State's Brief at 41. The place for the State to dispute the facts asserted by Appellant is in an evidentiary hearing where the witnesses, not the Assistant Attorney General, can present the testimony and the Court (after having heard the evidence), not the Assistant Attorney General, can make findings of fact.[15]

Finally, the State's argument that counsel could have attacked himself as ineffective in his first 3.850 motion because he was not "sole" counsel is flatly wrong. The instant 3.850 petition alleges that Mr. Spaziano was represented by Mike Mello, or a member of that attorney's firm, at both the resentencing hearing and during the first 3.850 proceeding (RS-25). Although there were other attorneys in each proceeding, in order for Attorney Mello (who was lead counsel) to raise the ineffectiveness of other attorneys employed by Public Defender Richard

---

[15] Page 41 of the State's Brief "suggests that even a layman may safely criticize [the expert's] report." The State then goes on to "cross-examine" the report, speculating on the expert's answers to its cross-examination, and denying Appellant any opportunity for redirect. Again, this is a matter for testimony and fact-finding, not the Assistant Attorney General's opinions. Although the Assistant Attorney General undoubtedly has a fine legal mind, he candidly admits that he "is not a psychologist." Id.

Joranby, he would have been required to attack members of "his firm."[16] This would have placed Attorney Mello in the

> dilemma of vigorously asserting [Mr. Spaziano's] claim or defending the professional reputation of his office. This would be at least as great a conflict as having the same [public defender's] office represent two defendants with conflicting interests . . . Also, it is likely that a member of his office will be called as a witness which would create an additional impediment.

Adams v. State, 387 So.2d 421 (Fla. 1980), citing Disciplinary Rules 5-101(A),(B),7-101, Florida Code of Professional Responsibility. Obviously, this creates "a hopeless conflict of interests," id., regardless of whether or not Attorney Mello had co-counsel.

Appellant respectfully suggests that all of the foregoing demonstrates that, at the least, Appellant is entitled to an evidentiary hearing on his claim. Accordingly, this Court should reverse and enter an order accordingly.

Respectfully submitted,

Edward S. Stafman
317 East Park Avenue
Tallahassee, FL 32301
(904) 681-7830

ATTORNEY FOR APPELLANT

---

[16] At the time the 3.850 petition was filed, Attorney Mello was employed by the CCR. However, he previously represented Mr. Spaziano while employed by Public Defender Joranby, as did many of Joranby's assistants, including Attorney Schwarz.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been delivered by U.S. Mail to **Richard B. Martell, Esq.**, Department of Legal Affairs, 4th Floor, 125 North Ridgewood Avenue, Daytona Beach, Florida 32014, on this fourteenth day of November, 1988.

Edward S. Stafman