IN THE SUPREME COURT OF FLORIDA

CASE NO. **73,757**

BARRY HOFFMAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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INTRODUCTION

There should be no question that Mr. Hoffman's case must be remanded for compliance with the Public Records Act. Fla. Stat. section 119. Mr. Hoffman has never been afforded *any* records from law enforcement or state attorney files. He specifically requested them from the State; the State refused the request. He specifically requested that the lower court order disclosure; the lower court denied the request. This case is controlled by Provenzano v. State, 561 So. 2d 541 (Fla. 1990), and State v. Kokal, 562 So. 2d 324 (Fla. 1990). Under Kokal and Provenzano there is no question that disclosure is required, and that (as in those cases) the case should be remanded to the trial court with directions that the trial court order disclosure.

Similarly, there can be no serious dispute whatsoever that an evidentiary hearing is required in this case, that the files and records by no means conclusively show that Mr. Hoffman is entitled to no relief, and that Mr. Hoffman's validly pled and facially sufficient claims cannot be resolved properly anywhere but in an evidentiary hearing in the trial court. See Lemon v. State, 498 So. 2d 923 (Fla. 1986); see also Menendez v. State, 562 So. 2d 858 (Fla. 1st DCA 1990). Mr. Hoffman has pled classic evidentiary claims (involving Bradv violations; ineffective assistance of counsel; denials of the right to counsel) and evidentiary resolution is required.

The purpose of this reply brief is to correct some of the

inaccuracies in the Appellee's brief and to bring certain precedents to the attention of the Court; some of the precedents were issued after the filing of Mr. Hoffman's initial brief.

At the outset, we further note that this case involves an important issue concerning violations of Mr. Hoffman's right to counsel. Mr. Hoffman, in this regard, respectfully refers the Court's attention to Stano v. Dugger, No. 88-3375 (11th Cir. Nov. 17, 1989), pending in banc review, which is relevant to this issue. Regarding this issue, in addition, one plain inaccuracy in the Appellee's "Statement of the Case" needs to be corrected at this juncture. The State mentions that Mr. Hoffman filed two pro se motions, one to dismiss counsel and one to withdraw his guilty plea (Answer Brief, pp. 1, 2). The first of these motions was denied (R. 47) and the second was granted (R. 118). However, it should not be overlooked that Mr. Hoffman never indicated any desire to represent himself, and there was never a discussion or inquiry pursuant to Faretta v. California, 422 U.S. 806 (1975), about his ability to represent himself. He did, however, end up representing himself during critical stages of the proceedings, without any Faretta inquiry whatsoever by the court. The issue in this case is the denial of counsel. Indeed, while he still had counsel, counsel failed to even appear during critical stages of Mr. Hoffman's criminal prosecution. This case does require evidentiary resolution.

ARGUMENT I

The standard for denial of an evidentiary hearing under Fla. R. Crim. P. 3.850 is well known and oft quoted by this Court. The State contends that the motion and the record conclusively show that Mr. Hoffman is entitled to no relief (Answer Brief, p. 12). Rule 3.850, however, is explicit in requiring that in such instances "a copy of that portion of the files and records which conclusively shows that the prisoner is entitled to no relief shall be attached to the order." No such copies were attached to the order here, nor could they be. The files and records do not refute Mr. Hoffman's claims. To argue that no evidentiary hearing is required in this case based on the valid, substantial claims Mr. Hoffman has presented, is to make an argument that simply cannot be squared with the facts pled or this Court's standards attendant to evidentiary hearings in Rule 3.850 proceedings.

The State's reliance on Correll v. State, 15 F.L.W. 147 (Fla. 1990), is misplaced. Mr. Correll, unlike Mr. Hoffman, did not abuse drugs and alcohol on a regular basis. Further, while the attorney in Mr. Correll's case may have not wanted to introduce alcohol and drug abuse testimony, counsel in Mr. Hoffman's case could not have had such a tactic because he failed to even investigate Mr. Hoffman's drug usage, as it related either to guilt or to penalty phase issues. Counsel cannot have a tactic for that of which he is unaware. Harris v. Dugger, 874

F.2d 756 (11th Cir. 1989). The failure to explain that Mr. Hoffman was a serious narcotics addict could not be the result of strategy or tactic: counsel did not investigate in the first instance.

We also note that the State has failed altogether to address the necessity of an evidentiary hearing on the basis of the ~~Bradv~~ v. Maryland, 373 U.S. 83 (1963), claim in this case. In addition to the Fla. Stat. section 119 violation, Mr. Hoffman has presented a substantial claim pursuant to Bradv and its progeny. This claim cannot be rebutted by the files and records because, by definition, this claim of improperly withheld discovery material involves facts which do not appear of record.

An evidentiary hearing is required in this case. It should have been conducted by the trial court. The trial court erred in failing to do so. This Court should therefore order that the evidentiary resolution which this case requires should be afforded.

ARGUMENT II

The State misconstrues Mr. Hoffman's claim regarding the deprivation of counsel. The instances at which Mr. Hoffman was denied counsel include his appearance at his codefendant's trial, under the State's compulsory process, but are not limited to those. It is undisputed that defense counsel was not present at Mr. Mazzara's trial when Mr. Hoffman was called, but counsel was also absent when, during Mr. Mazzara's trial, Mr. Hoffman was

called as a court witness and questioned under oath, after the State had informed the Court that it was declaring the plea agreement null and void and that it would be formally proceeding against Mr. Hoffman on first degree murder charges **(R. 95-111)**.

In addition to what transpired during Mr. Mazzara's trial, Mr. Hoffman was also denied his right to counsel during countless hours of interrogation and deposition by the State (R. 97), after counsel had been appointed, Mr. Hoffman had been charged, and the State was proceeding formally against him. But there is still more.

On September **24, 1982,** the trial court allowed defense counsel, Mr. Nichols, to withdraw from representation of Mr. Hoffman (R. **116)**. The Court then went on to hear Mr. Hoffman's motion to withdraw his guilty plea -- prior to appointing new counsel **(R. 118)**. Mr. Hoffman never expressed any desire whatsoever to proceed without counsel: waiver of counsel was never addressed in any context. In fact, just prior to hearing the motion to withdraw the guilty plea, the trial judge stated that he would do everything possible to find Mr. Hoffman another attorney (R. **116)**. But Mr. Hoffman never got one at that truly critical stage of the proceedings.

There is no more important right guaranteed to criminal defendants than the right to counsel.

> Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may

have.

United States v. Cronic, 466 U.S. 648, 654 (1984)(footnote omitted).

While there are numerous cases defining the role, scope and level of expertise of counsel, there can be no question that a person facing the ultimate punishment -- death -- is absolutely entitled to the guiding hand of counsel who is present during critical stages of the proceedings. Mr. Hoffman was not afforded that right in a number of instances. Further, while the effective assistance of counsel turns on a showing of deficient performance coupled with prejudice, Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), the very presence of counsel is not subject to such showing of prejudice. In fact, in a case involving complete denial of counsel, there can be no result but reversal. "If no actual 'Assistance' 'for' the accused's 'defense' is provided, then the Constitutional guarantee has been violated." United States v. Cronic, 466 U.S. at 654 (footnote omitted).

Unlike the vast majority of cases discussing this constitutional guarantee, in Mr. Hoffman's case there was not even a "sham" or "formal compliance" with the sixth amendment. Counsel, in the instances cited above, was not even in the room.

Cronic discusses the complete denial of counsel:

> There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.

> Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial.

Cronic, **466 U.S.** at **658** (footnote omitted). The footnote to the above-quoted passage provides:

> The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical state of the proceeding. See, e.g., Geders v. United States, **425** US **80, 47** L Ed **2d 592, 96** S Ct **1330 (1976);** Herring **v.** New York, **422** US **853, 45** L Ed **2d 593, 95 S** Ct **2550 (1975);** Brooks **v.** Tennessee, **406** US **605, 612-613, 32 L** Ed **2d 358, 92 S** Ct **1891 (1972);** Hamilton v. Alabama, **368** US **52, 55, 7 L** Ed **2d** 114, **82 S** Ct **157 (1961);** White v. Maryland; **373** US **59, 60, 10 L** Ed **2d 193, 83 S** Ct **1050 (1963)** (per curiam); Fersuson **v.** Georgia, **365** US **570, 5 L** Ed 2d **783, 81 S** Ct. **756 (1961);** William v. Kaiser, **323** US **471, 475-476, 89 L** Ed **398, 65** S Ct **363 (1945).**

Id.

There can be no question that the withdrawal of a guilty plea is a critical stage of the proceedings, as is under oath questioning about one's participation in a homicide, by the State, pursuant to an agreement with defense counsel, after a capital prosecution has begun (e.g., after indictment, arraignment, etc.), and during critical stages of the proceedings. The State misleadingly argues that Mr. Hoffman spoke to Mr. Nichols before he withdrew his guilty plea (Answer Brief, **p.** 15). The record more accurately reflects that Mr.

Nichols spoke to Mr. Hoffman, but for "a few moments this morning," when Mr. Nichols told Mr. Hoffman he was making an oral motion to withdraw as counsel, solely to tell Mr. Hoffman that he (Mr. Nichols) was withdrawing (R. 115). No advice whatsoever was given. No counseling was afforded by counsel. The record does not, in any way whatsoever, indicate that Nichols spoke to Mr. Hoffman about the motion to withdraw his guilty plea. An evidentiary hearing is required, as is a new trial and sentencing.

ARGUMENT III

The State attempts to muddy the waters concerning Mr. Hoffman's Bradv v. Maryland, 373 U.S. 83 (1963), claim. Mr. Hoffman has raised a claim pursuant to Bradv and its progeny and a claim challenging the denial of access to law enforcement and state attorney files pursuant to Fla. Stat. section 119. The actions were consolidated for purposes of this appeal. These are two separate, equally valid claims. However, they are intertwined to the extent that Mr. Hoffman cannot be sure that his Brady claim is complete, due to the continuing refusal to provide access to files by the State.

As to the Bradv claim, the State's response seems to be that since the defense showed that George Marshall was somehow involved in the murders, that excuses the failure of the State to turn over multitudinous exculpatory and impeachment evidence concerning Mr. Marshall's true involvement as well as

information relating to other suspects, as it excuses the State's presentation of inaccurate facts at the trial.

The State also argues that the failure to disclose hair sample evidence is permissible because "[t]here is no evidence in this record that the hair evidence was significant with regard to whether Hoffman was or was not the murderer" (Answer Brief, p. 23). This argument merely underscores the need for an evidentiary hearing precisely because the record is silent. Mr. Hoffman pled the violation and the prejudice. Evidentiary resolution is required.

The State also fails to address the allegation that evidence concerning several other suspects was kept from defense counsel. This too calls out for evidentiary resolution. While defense counsel's job is not to prove that someone else committed the murders, information that the police investigated several other suspects and the evidence they relied on can be very exculpatory for the defense. This was not provided to counsel in this case. An evidentiary hearing is more than appropriate.

As to disclosure pursuant to the Public Records Act, Fla. Stat. section 119, the law is now clear that the lower court's failure to order disclosure was erroneous. Because of this Court's recent precedents, it is unnecessary to address in detail the State's arguments on this issue. This Court's recent opinions in State v. Kokal, 562 So. 2d 324 (Fla. 1990), and Provenzano v. State, 561 So. 2d 541 (Fla. 1990), make crystal

clear that the lower court's ruling refusing to direct disclosure was erroneous. This case should be remanded to the circuit court with instructions that an order issue directing the State to comply with the Public Records Act. This is particularly necessary in this case given the facts involved in the Brady claim. As in Provenzano, 561 So. 2d at 549, a remand with instructions that the circuit court direct disclosure is required.

ARGUMENT IV

To clarify Mr. Hoffman's position, he is not claiming that defense counsel was ineffective for failing to find Dr. Fox (Answer Brief, p. 34). He is claiming that defense counsel was ineffective for failing to seek out any mental health expert assistance whatsoever. Mr. Hoffman's inordinate dependence on drugs was well known to defense counsel. Still, defense counsel did nothing to investigate the issue, to develop evidence about it, or to seek expert assistance. As a result, substantial mitigation, and substantial issues (e.g., waiver questions), were ignored by defense counsel, without a tactic or strategy.

ARGUMENT V

An evidentiary hearing is necessary on this and other claims involved in this appeal. Once again the State asserts that the files and records refute Mr. Hoffman's claims. The State, however, like the circuit court, once again neglects to point to or attach any files and records which show that Mr. Hoffman is

entitled to no relief. The State cannot do so, for no such records exist. The files and records do not refute Mr. Hoffman's claims. An evidentiary hearing is mandated by Rule 3.850. The State repeatedly guesses at the supposed **"strategy"** of the defense counsel. Mr. Hoffman, however, has alleged that there was no such strategy, and indeed could not be, because defense counsel failed to adequately investigate and/or was denied critical exculpatory (and/or impeachment) evidence.

Mr. Hoffman urges that this Court allow the evidentiary hearing which this case requires.

REMAINING CLAIMS

As to the remaining claims raised in this appeal, Mr. Hoffman will rely on the argument presented in his initial brief.

CONCLUSION

There is no question that this case requires an evidentiary hearing. Because the lower court's orders were erroneous as a matter of fact and law, the decisions below should be reversed, and this case should be remanded for proper evidentiary resolution. Because it is appropriate in this case, this Honorable Court should vacate Mr. Hoffman's unconstitutional convictions and sentence of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Hand Delivery to Carolyn Snurkowski, Assistant Attorney General, Department of Legal Affairs, Magnolia Park Courtyard, **111-29** North Magnolia Drive, Tallahassee, FL **32301**, this 31st day of August, **1990**.

_____
Attorney