IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,698

BRYAN FREDRICK JENNINGS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE EIGHTEENTH JUDICIAL CIRCUIT COURT, IN AND FOR BREVARD COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

MARTIN J. MCCLAIN
Chief Assistant CCR
Florida Bar No. 0754773

OFFICE OF THE CAPITAL COLLATERAL REPRESENTATIVE
1533 South Monroe Street
Tallahassee, FL 32301
(904) 487-4376

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

STATEMENT OF THE FACTS

In its Statement of the Facts, the State discussed the testimony of the mental health experts regarding intoxication. Further, the judge found that Mr. Jennings had failed to prove intoxication and thus he did not consider it mitigating. However, the mental health experts, the jury, and the judge were all deprived of critical evidence which clearly would have caused Mr. Jennings to meet his burden of proof as to intoxication. The mental health experts, the judge and the jury did not know that according to Judy Slocum, Mr. Jennings "was pretty much loaded." "That's why he asked me to drive him home to change clothes" (T.313). The mental health experts, the judge, and the jury did not know that according to Annis Music Clausen "[a]t 2:30 a.m., [she] received a call by Bryan...[whose] speech was extremely loud and slurred and there was no mistaking that Bryan could barely walk and was far too intoxicated to be driving" (T. 338-39). The mental health experts, the judge and the jury did not know that according to Charles Patrick Clausen, "Bryan was definitely drunker than anyone else at the bar." "Bryan was staggering, his eyes were glassy and, he could not keep his head up straight" (T. 342-43).

ARGUMENT I

MR. JENNINGS' JUDGE AND JURY CONSIDERED AND RELIED ON THE VICTIM'S PERSONAL CHARACTERISTICS, THE IMPACT OF THE OFFENSE ON THE VICTIM'S PARENTS, AND THE PROSECUTOR'S AND FAMILY MEMBERS' CHARACTERIZATIONS OF THE OFFENSE AND THE VICTIM'S PERSONALITY OVER DEFENSE COUNSEL'S TIMELY AND REPEATED OBJECTION IN VIOLATION OF MR. JENNINGS' EIGHTH AND FOURTEENTH AMENDMENT RIGHTS, BOOTH V. MARYLAND, SOUTH CAROLINA V. GATHERS, JACKSON V. DUGGER, AND JONES V. STATE.

The State argues that this claim is procedurally barred because Booth was decided before this Court issued its opinion on direct appeal. However, none of the parties cited Booth to this Court, nor did this Court in its opinion address Booth. In fact, it was not until Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989), that this Court held Booth to be a change in Florida law. Just as in

Jackson, the parties and this Court failed to consider Booth in the direct appeal. Just as in Jackson, Mr. Jennings is entitled to have this Court decide this case in light of the body of precedent this Court recognized in Jackson v. Dugger and Jones v. State, 569 So. 2d 1234 (Fla. 1990).

ARGUMENT II

THE TRIAL COURT'S SUMMARY DENIAL OF MR. JENNINGS' MOTION TO VACATE WAS ERRONEOUS AS A MATTER OF LAW AND FACT.

The State argues "The trial court fully discussed all issues . . . ." (Appellee's Brief at 22). In Mills v. Dugger, 559 So. 2d 578 (Fla. 1990), this Court said that, in determining whether an evidentiary hearing was required, the Rule 3.850 allegations must be treated "as true except to the extent rebutted by the record." However, in Mr. Jennings' case the circuit court did not accept as true the affidavit obtained from Mr. Jennings' trial counsel. This affidavit provided:

> AFFIDAVIT OF MR. VINCENT W. HOWARD, JR., ESQ.
>
> BEFORE ME, the undersigned authority, this day personally appeared, VINCENT W. HOWARD, JR., ESQ., who, being first duly sworn, says:
>
> 1. My name is Vincent W. Howard, Jr., Fla. Bar #326496, and I practice law in Sanford, Florida.
>
> 2. I was appointed to represent Mr. Bryan Fredrick Jennings on charges of first degree murder, kidnapping and sexual battery charges.
>
> 3. Before Mr. Jennings' trial, I demanded discovery under Rule 3.220(a), Fl.R.C.P. and Brady v. Maryland, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963). I had a subpoena duces tecum issued to the Sheriff of Brevard County in order to have a meeting with the prosecutor and review all the physical evidence the state had in its possession or control. This meeting occurred. Mr. Jennings' collateral counsel has informed me that a cassette tape recording was made by the Brevard County Sheriff's Department of one Judy Slocum. I have reviewed a transcript of the contents of the statement. The statement contains critical eye witness evidence concerning the degree of Mr. Jennings' intoxication, and the existence of a broken zipper on his pants. At no time did the State divulge that Ms. Slocum had made a statement to the State concerning material evidence pertaining to Mr. Jennings' case. At no time did the State divulge that Ms. Slocum was a material witness, and further, at no time was I provided with the original tape, a copy thereof, or a transcript by the State.

4. Mr. Slocum's statement provided critical material evidence that Mr. Jennings was severely intoxicated shortly before the time of the offense was committed. The statement also contained evidence that would have been useful in rebutting the State's evidence that a sexual battery had occurred. This information would have been key material evidence I would have used to impeach state witnesses, and photographic evidence on the sexual battery charge.

5. If I would have had Ms. Slocum's statement I definitely would have presented her testimony to the jury in the guilt phase as part of the voluntary intoxication defense. This testimony would have become a key part of Mr. Jennings' defense. I would also have presented Ms. Slocum's statement to the mental health experts to aid their evaluation in determining Mr. Jennings' mental state at the time of the offense. I do not believe that the mental health experts were able to make an accurate and adequate evaluation on the issue of voluntary intoxication without the benefit of Ms. Slocum's material statement. Ms. Slocum's statement to law enforcement officers or her live testimony should have been presented to the guilt phase jury. There should have been an adversarial testing before a jury on the facts presented in Ms. Slocum's material statement.

6. If I had known of Ms. Slocum's statement I would have presented her testimony or the statement itself in the penalty phase to establish that Mr. Jennings' ability to conform his conduct to the law was substantially impaired, or, at the very least, that he was severely intoxicated, which is itself a nonstatutory mitigating circumstance. I would have presented her testimony or the statement itself in the penalty phase to rebut the State's evidence that the crime was committed in a cold, calculated, and premeditated manner. Further, the descriptive testimony of Ms. Slocum regarding Mr. Jennings' intoxication would have been relevant and material to establish that he was immature, and to argue that his age should have been found as a mitigating circumstance. Case law interpretation of this statutory mitigating circumstance places emphasis on the maturity of the Defendant, and Ms. Slocum's testimony clearly shows an immature individual, raucous and socially inept, who overindulged in consumption of beer, and acted like an adolescent. I would have presented the statement to the mental health experts in order for them to have an accurate picture of Mr. Jennings' mental status at the time of the offense. The contents of the statement is exactly the type of evidence that would have given the mental health experts a true picture of Mr. Jennings' severe intoxication. Due to the fact that there was never an adversarial testing regarding Ms. Slocum's statement before the jury, there was not full and fair trial by the jury, with regard to either guilt or sentence.

7. During the trial the state presented testimony that the victim was the narrator of her school play, that she was excited about this prospect, that she loved school, that she learned to read faster than anyone in her class, and other similar evidence from both family members, and her school principal. I objected strenuously to the admission of this highly inflammatory and prejudicial testimony. I stated my reasons for objecting, made a motion for a new trial, based in part on this inflammatory and prejudicial testimony. I believe that this testimony had no probative value, was irrelevant, and was

not material to any of the elements at issue in this case. When my objections were overruled and the jury heard the inflammatory viction [sic] impact statements it was clear from their collective reactions that the testimony had an adverse effect. The jury was visibly inflamed by this irrelevant victim impact testimony, and, as this material was being presented, would turn and glare at Mr. Jennings. The adverse effect was heightened due to the fact that this testimony was presented early in the State's case, and I feel that, thereafter, the jurors were irreversibly biased against Mr. Jennings. This material was exactly the same type of information the United States Supreme Court found repugnant to the Eighth and Fourteenth amendments in Gathers v. South Carolina, 109 S. Ct. 220, 104 L.Ed.2d 876 (1989) and Booth v. Maryland, 482 U.S. 496, 96 L.Ed.2d 440, 107 S.Ct. 2529 (1987).

8. I did not contact Annis Music to determine the extent of the information she possessed concerning Mr. Jennings' level of intoxication at the time of the offense for use in the guilt and penalty phase of the trial. I had no strategic or tactical reason for not determining what she knew, and had a note in my file to contact her for this purpose.

9. I had no tactical or strategic reason for not contacting Mr. Charles Patrick Clausen to determine the extent of his knowledge of facts pertinent guilt and penalty phase issues, but believed he was stationed in the United States armed forces outside of the United States, and would be unavailable for trial.

(T. 316-20). Nowhere in its Order Summarily Denying Defendant's Motion for Post-Conviction Relief does the circuit court address defense counsel's affidavit explaining his trial strategy or lack thereof and how it would have changed in light of Judy Slocum's taped statement or in light the statements of Annis Music or Charles Patrick Clausen. The circuit court did not accept Vincent Howard's affidavit as true or explain how the record rebutted Mr. Howard's sworn statement. The circuit court's summary denial is in error under Mills v. Dugger and Hoffman v. State, 571 So. 2d 449 (Fla. 1990). An evidentiary hearing must be held.

ARGUMENT III

THE STATE'S WITHHOLDING OF MATERIAL AND EXCULPATORY EVIDENCE VIOLATED MR. JENNINGS' RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The State argues that Judy Slocum's undisclosed taped statement is at best cumulative evidence of Mr. Jennings' intoxicated state. However, at trial, the sentencing judge refused to find that the defense had established intoxication.

Moreover, the State's position is totally at odds with the circuit court's order denying rehearing. In that order, the circuit court concluded that the defense did not pursue intoxication as a defense, and that therefore, "It is inconceivable that had the State disclosed Slocum's statement . . . the theory of the defense would have changed" (T. 476). However, the circuit court ignored the affidavit of trial counsel which indicated that Slocum's statement would have altered the theory of defense and caused a much greater emphasis to be placed upon intoxication.

Certainly, the Slocum statement would have caused trial counsel to pursue intoxication with Annis Music and Patrick Clausen, both of whom had pretty compelling testimony of Mr. Jennings' intoxication which the jury did not hear. Annis Music would have told the jury: "At 2:30 a.m., I received a call from Bryan . . . . Bryan's speech was extremely loud and slurred and there was no mistaking Bryan was thoroughly intoxicated." "[At 4:00 a.m.] Bryan was staggering and could not keep his balance, his pupils were fully dilated and he had a wild look about him. From his appearance, it was clear to me that Bryan was under the influence of more than just alcohol." "[H]e was unable to walk a straight line stumbling every few feet and hitting one side of the wall and then the other" (T. 337-38). Patrick Clausen would have testified, "Bryan was thoroughly intoxicated at [2:30 a.m.] and while we were all feeling no pain, Bryan was definitely drunker than anyone else at the bar." "Bryan was

staggering, his eyes were glassy and, he could not keep his head up straight" (T. 342).

The Slocum statement would have caused the defense to tap into a wealth of evidence establishing intoxication. These witnesses would have given the mental health experts specific descriptions of the effects of the alcohol on Mr. Jennings. These descriptions are necessary to gauge the effects of alcohol on a particular individual, and are much more useful than simple estimates of the amount of alcohol consumed.

Accepting Mr. Jennings' allegations as true, certainly confidence is undermined in the outcome. The sentencing judge found intoxication was not involved in the offense. However, there was a wealth of evidence which would have established Mr. Jennings' highly intoxicated state which did not reach the triers of fact because of the State's failure to disclose the Slocum taped statement. At a minimum, an evidentiary hearing is required.

ARGUMENT IV

THE STATE VIOLATED CHAPTER 119 OF THE FLORIDA STATUTES.

The State refused to comply with Chapter 119 because "In light of the recent signing of a death warrant for the execution of Bryan F. Jennings, the State of Florida does reasonably anticipate that the litigation has not concluded because other avenues for attacking his conviction still remain available to Mr. Jennings" (T. 329). This justification for noncompliance with Chapter 119 was specifically rejected in State v. Kokal, 562 So. 2d 324 (Fla. 1990).

Kokal further provides that when the State wishes to withhold records after receiving a Chapter 119 request, an in camera inspection before the trial court is the appropriate way for the parties to obtain a determination of the validity of the claimed exemption. Mr. Jennings was denied such an in camera inspection because the trial court erroneously concluded Rule 3.850 proceedings were not

available as a means of litigating Chapter 119 claims.

Both the State and the circuit court failed to anticipate Kokal. This matter must be remanded for reconsideration in light of this Court's ruling there.

ARGUMENTS V, VI AND VIII

BRYAN JENNINGS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE AND PENALTY PHASES OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The State in its brief argues that trial counsel "intentionally did not pursue a voluntary intoxication defense" (Appellee's Brief at 41). However, trial counsel in his affidavit has stated that his trial tactics resulted from the failure to adequately investigate:

> 8. I did not contact Annis Music to determine the extent of the information she possessed concerning Mr. Jennings' level of intoxication at the time of the offense for use in the guilt and penalty phase of the trial. I had no strategic or tactical reason for not determining what she knew, and had a note in my file to contact her for this purpose.
>
> 9. I had no tactical or strategic reason for not contacting Mr. Charles Patrick Clausen to determine the extent of his knowledge of facts pertinent guilt and penalty phase issues, but believed he was stationed in the United States armed forces outside of the United States, and would be unavailable for trial.

(T. 320). Tactical or strategic decisions are only reasonable to the extent that they rest upon adequate investigation and preparation. See Stevens v. State, 552 So. 2d 1082, 1087 (Fla. 1989)(the exercise of "reasoned professional judgment" requires an "informed decision" based upon investigation); Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989). As the Eighth Circuit Court of Appeals recently explained:

> Counsel's decision not to investigate and pursue this evidence cannot be justified as a strategic decision. This court has held that "[t]he decision to interview a potential witness is not a decision related to trial strategy. Rather, it is a decision related to adequate preparation for trial." Chambers v. Armontrout, 907 F.2d 825, 828 (8th Cir.)(en banc), cert. denied, ___ U.S. ___, 111 S.Ct. 369, 112L.Ed.2d 331 (1990). Reasonable performance of counsel includes an adequate investigation of the facts of the case, consideration of viable theories, and development of evidence to

> support those theories. Counsel has "a duty . . . to investigate all witnesses who allegedly possessed knowledge concerning [the defendant's] guilt or innocence." Lawrence v. Armontrout, 900 F.2d 127, 130 (8th Cir. 1990). We have stated that "[i]t is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty.'" Eldridge v. Atkins, 665 F.2d 228, 232 (9th Cir. 1981)(quoting American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function sec. 4.1 (Approved Draft 1971)), cert. denied, 456 U.S. 910, 102 S.Ct. 1760, 72 L.Ed.2d 168 (1982).

Henderson v. Sargent, 926 F.2d 706, 711 (8th Cir. 1991). Here, counsel has admitted a failure to adequately investigate. He had a note to contact Annis Music, but through neglect failed to learn of the evidence she had to present. Through neglect he failed to pursue Patrick Clausen. As a result of counsel's failure, critical evidence regarding the level of Mr. Jennings' intoxication was not known when the theory of defense was developed. Trial counsel has indicated that the unknown evidence would have changed his theory of defense. Moreover, this evidence never reached the mental health experts. This evidence was crucial to such experts in order for them to testify as to the effects of the alcohol on Mr. Jennings at the time of the offense. Furthermore, this evidence was absolutely critical at the penalty phase where the defense failed to establish that intoxication contributed to the offense. Under Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989), confidence is undermined in the outcome. At the very least, an evidentiary hearing on counsel's ineffective assistance is required.

CONCLUSION

Based upon the foregoing and upon the discussion presented in Mr. Jennings' Initial Brief, this Court should order an evidentiary hearing and grant Rule 3.850 relief.

RESPECTFULLY SUBMITTED,

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

MARTIN J. McCLAIN
Chief Assistant Capital
Collateral Representative
Florida Bar No. 0754773

OFFICE OF THE CAPITAL
COLLATERAL REPRESENTATIVE
1533 South Monroe Street
Tallahassee, FL 32301
(904) 487-4376

By: Martin J. McClain by Gail E. Anderson
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been forwarded by United States Mail, first class, postage prepaid, to Barbara Davis, Assistant Attorney General, Department of Legal Affairs, 210 North Palmetto Avenue, Suite 447, Daytona Beach, FL 32114, this 22nd day of April, 1991.

Martin J. McClain by Gail E. Anderson
Attorney