IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,598

HARRY PHILLIPS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT, DADE COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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INTRODUCTION

This case is complex and involves a number of significant issues. Mr. Phillips' initial brief and the initial brief of the State were lengthy. In an effort to avoid redundancy, this reply brief does not reiterate what was related in the initial brief, but focuses on the issue relating to counsel's ineffective assistance at sentencing -- an issue upon which Mr. Phillips' entitlement to relief, given this Court's settled precsdenta, is not open to serious dispute.

This proceeding involves the appeal of the circuit court's denial of Mr. Phillips' motion to vacate judgment and sentence filed pursuant to Fla. R. Crim. P. 3.850. The citation method employed herein is the same as that employed in Mr. Phillips' initial brief.

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ARGUMENT IN REPLY

MR. PHILLIPS WAS DEPRIVED OF *AN* INDIVIDUALIZED *AND* RELIABLE SENTENCING DETERMINATION, BECAUSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE AT THE PENALTY PHASE OF THESE CAPITAL PROCEEDINGS.

Defense counael'e own testimony at the Rule 3.850 hearing demonstrated hie stark incompetence and ignorance. Defense counsel's performance in this case waa woefully inadequate under standarde for effective representation at capital sentencing. Even so, this jury recommended that Mr. Phillips be sentenced to death by the slimmest of margins -- seven to five. A single vote for life would have made a difference.

The State in ite Brief argues that "there is no possibility" that the mitigating evidence about Mr. Phillips which was presented at the 3.850 evidentiary hearing would have caused the jurors to recommend life (Brief of Appellee, at p. 86). The State presents this argument notwithstanding the fact that virtually nothing was done for Mr. Phillips at sentencing;' that the substantial body of mitigating evidence regarding Mr. Phillipe which counsel could have developed originally (but did not) was presented at the 3.850 hearing; that the mitigating evidence available in this case was of the type classically recognized by this Court as evidence on which reasonable jurors will rely to vote for life; that nothing about the mitigation heard at the 3.850 hearing would in any way have harmed Mr. Phillipe' case; and that one vote would have made a difference in this case.

The State premises much of its argument on the fact that Mr. Phillips had a criminal history. The jury, however, was painfully aware of this criminal history when five of its members voted for life.[2] The jury was not aware, however, that Mr. Phillips was abused as a child, waa raised in abject poverty, auffers from severe intellectual limitations, and is psychologically

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[1] An omission based on counsel'a ignorance and lack of preparation, as counsel's own testimony at the 3.850 hearing demonstrated.

[2] The criminal history was introduced by the prosecution in response to trial counsel's bizarre argument that Mr. Phillips had no significant history of criminal activity. This and Mr. Phillips "age" (Mr. Phillips waa in his mid thirties) was the only "mitigation" which counsel argued at trial.

impaired. It cannot be justifiably argued that no reasonable juror would vote for life if he or she had learned of Mr. Phillips' background and limitations, when five jurors voted €or life without this mitigation.

The mitigation that could have been provided by Mr. Phillips' family, had defense counsel investigated, was compelling. It easily could have swayed jurors to vote for life.

Mr. Phillipe was the child of migrant farmworkere. His mother testified that the family's life was horrendous when Harry Phillips was growing up (PC-R. 8807). The family originally lived in farm camps (PC-R. 8806), but even after they moved to Opa-locka things were extremely difficult for Harry (PC-R. 8812). The family lived in a segregated section of town, and Harry suffered from racial oppression (PC-R. 8772-3). Harry was scarred and deficient since childhood. He was quiet, kept to himself, and had no friends (PC-R. 8780).

Harry Phillips' father gambled, often did not come home for days, and did not provide €or his son (PC-R. 8812). As a neighborhood friend, Mary Williams, described it, "Well, he'd be home, and then all of a sudden he's gone, and maybe for maybe six months, a year or something" (PC-R. 8867-68). When the father was home, he would beat Harry's mother in front of the children (PC-R. 8814), and he abused Mr. Phillips.

Mrs. Stanley, Harry Phillips' sister, testified at the evidentiary hearing that their father beat their mother severely, and that one time her teeth were chipped a5 a result of the beatings (PC-R. 9777).

Q. Mre. Stanley, did you ever see your father hit your mother?
A. Yes.
Q. How would he hit your mother?
A. With his fiat,
Q. Would he hit her hard?
A. Yes.
Q. Did that go on in front of you?
A. Yes.
Q. In front of Harry?
A. Yes.

(PC-R. 8775). Harry also was severely beaten and abuaad. Mrs. Stanley testified that Harry would withdraw even more when the father was home, because of the beatings (PC-R. 8775; 8778).

Q. would your husband beat the children?
A. Yes, he would.
Q. Did you see him hit Harry and Julius?
A. Yes, I have,
Q. How would he hit the boye?
A. Well, he have hit with his fists or either iron cord.

* * *

Q. And, where would he hit the children?
A. Anywhere. Over the head or anywhere.

(PC-R. 8816). The beatings were so severe that they would leave welte and marks on Harry'e body (PC-R. 8847). Harry's brother, Julius, testified:

Q. Did your father hit Harry as well?
A. Yes.
Q. Did you see that?
A. Yes, I did.
Q. What would he hit Harry with?
A. He had a belt, fist; don't matter. He's a very abueive man.
Q. Where would he hit Harry?
A. The head, the ehoulders, back. It doesn't matter.
Q. Mr. Phillipe, was your father at home regularly in Opa-locka?
A. No, he was not.
Q. Ha wouldn't come home in the evening sometimes?
A. He'll come home sometimes, but he'll go in the street, drink. He wae mostly like a street type person.
Q. Was your father gambling back then?
A. I'm pretty sure he was.
Q. Was your family well off?
A. No.
Q. Could they afford --
A. No, we couldn't afford. We needed everything.
Q. How did that make you feel?
A. It made me feel very bad.
Q. Did you ever tell your father to stop gambling?
A. No, I never told him to stop because he probably get angry. I couldn't. He waa a very bad man.
Q. Were you afraid of your father?
A. Yes, I was.

(PC-R. 8755-56).

Finally, Harry's father left for good. The times got even harder for the family. They did not even have the money to pay for the basic necessities of life. As Harry'e mother put it:

A. When my husband left, no water in the house, no lights in there, no food was in the house.

(PC-R. 8820). The family had to beg neighbors for food (PC-R. 8867). Harry, in this setting, received no help €or the deficiencies from which he suffered.

When he was young, Harry was shot in the head (PC-R. 8840; 8781). He fell unconscioue (PC-R. 8795). As a result of the shooting he constantly

complained of headaches (PC-R. 8841; 8851; 8781), became more withdrawn (id.), and behaved bizarrely. Even with his impairments, throughout his life Harry was affectionate towards and tried to help his family (PC-R. 8784-5). Mr. Phillips, for example, would help his sister take care of her children (PC-R. 8786).

All of this evidence is mitigating and all of it was avaliable. However, nothing of a mitigating value was provided to the jury or judge in this case. The family members attended the trial, expressed their concern €or Harry to defense counsel, and were willing to testify, but they were never called. Despite not knowing anything about Mr. Phillips' life except the extent of his criminal history, five membere of the jury voted for a life sentence. Had mitigation been presented, and a single additional juror voted for life, there is no question that this record would have contained more than sufficient mitigation to preclude a judicial override. The result would have been different, but for counsel's deficiencies.

The 3.850 record also demonstrates that substantial mental health mitigation was available in this case. Defense counsel testified that he believed his client was "an idiot", Yet, he aought out no expert assistance. Although Harry Phillips' records were replete with references to his intellectual and psychological deficiencies, the attorney did not seek the appointment of an expert.

The substantial mental health mitigation which was available and could have been developed in this case was discussed at length in Mr. Phillips' initial brief (Initial Brief of Appellant, pp, 7-27). The 3.850 court made no findings whatsoever that this evidence did not support statutory and nonstatutory mitigating factors and the State presented no rebuttal On the mental health mitigation at the hearing, arguing only through its experts that Mr. Phillips was competent to stand trial. The fact that the experts presented by the defense had different conclusions as to competency from the conclusions on the competency issue of the experts presented by the State does not dilute the significance of the mitigation regarding Mr. Phillips'

diminished intellectual and psychological functioning. Even the State's experts confirmed these deficiencies.

The experts retained by the State ware expressly asked to consider only Mr. Phillips' competency to etand trial. They preeented no opinions undermining the mental health mitigation. No expert testified that mental health mitigating evidence was unavailable to the defense in this case, that Mr. Phillips' deficiencies were not mitigating in nature, or that Mr. Phillipe did not suffer from deficiencies.

Every mental health expert who examined Mr. Phillips concluded that his psychological functioning and intelligence are impaired. Theee Eacta are plain from the record of the evidentiary hearing. Even the Brief of the Appellee confirms them. For example, Dr. Haber, the State's expert, did not dispute that Mr. Phillips waa deficient and impaired. He testified on the basis of his estimate of Mr. Phillips' intelligence that, "[Mr. Phillips] demonstrated ... an intelligence that would formally be measured within the range that Dr. Carbonell Suggested, between 75 and 07, suggesting an intellectual category placement of between borderline and low average intelligence" (Brief of Appellee, p. 24). Dr. Carbonell conducted extensive psychological and neuropeychological testing of Mr. Phillips, including intelligence testing. She concluded, as a result of those tests, that Mr. Phillipe' I.Q. is 73 (PC-R. 9169). An I.Q. of approximately 70-75, all the experts aleo agreed, is the traditional cutoff for a finding of mental retardation. Dr. Miller, the State's other expert, also agreed that Mr. Phillipa' intellectual and psychological functioning were impaired. Dr. Toomer, the other expert called by the defense, also agreed that Mr. Phillips functioned in the borderline range. And defense counsel's own opinion was that Mr. Phillips wae "an idiot."

According to the State's brief, the main difference in the assesements of the experts related to a letter written by Mr. Phillips before trial. The State argues that this letter is relevant to the decision of whether or not Mr. Phillips was competent. This "Bro White" letter is attached to the Brief

of Appellee as Exhibit A. A version of the letter is also printed at page 15 of the Brief of Appellee, but there it ha0 been edited, with proper punctuation, capitalization, and tenee supplied by the editor (perhaps the court reporter at the evidentiary hearing, who heard a reading of a version of the letter but did not see the original). It is illustrative of Mr. Phillips' level of intelligence to look at the original letter (attached to the State's brief) as compared to the cleaned up version. In any event, no expert (and no one elee) hae said that the letter shows that Mr. Phillips is not impaired or that mental health mitigation was not available in this case.

Once again, Dr. Miller and Dr. Haber, the State's experts, evaluated Mr. Phillips only on the issue of competency. Although they believed him to be competent, they never said that statutory or nonstatutory mitigating factors were not available in this case. To the contrary, they agreed with Dr. Toomer and Dr. Carbonell that Mr. Phillips wae deficient and impaired. There was not only relevant mitigation available here, there wae substantial mitigation available, but defense counsel failed to investigate, and thus failed to present it to the jury. The 3.850 court erred in ruling that this evidence would not have changed the outcome of the sentencing hearing.

The issues of whether a reaeonable juror would be affected by mitigating evidence, whether confidence in the jury's verdict has been undermined, and whether there exists a reaeonable probability of a different result from a jury which hears the mitigation involve questions of law. See Wav v. Dugger, 568 So.2d 1263 (Fla. 1990); Hall v. State, 541 So.2d 1125 (Fla. 1989); Nixon v. Newsome, 888 F.2d 112, 115 (11th Cir. 1989); Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991); Strickland v. Washington, 466 U.S. 668, 698 (1984). This Court's precedents and those of the federal courts make it plain that a ruling that mitigation such as that involved here would have no effect on a juror cannot be sustained as a matter of law. The trial court erred in its legal conclusions because the mitigating evidence which counsel failed to develop and present would affect a reasonable juror. Counsel's omissions undermine confidence in the result and warrant the granting of relief. See

Strickland v. Washington, 466 U.S. 668 (A "reasonable probability" of a different result is a probability "sufficient to undermine confidence in the outcome.")[3]

CONCLUSION

Appellant, based on the foregoing and on the discussion in his initial brief, praye that the Court vacate his unconstitutional capital conviction and death sentence and grant all other relief which the Court: deems just and equitable.

Respectfully submitted,

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[3] Lastly, Appellant notes that the cases relied on by the State, Routly v. State, ___ So.2d ___, No. 73,963 (Fla. October 17, 1991) and Francis v. State, 529 So.2d 670 (Fla. 1988), are inapposite. The testimony of the mitigating witnesses in Mr. Phillips' case was coneistent (as evidenced even by the summaries provided by the State, "Mrs. Stanley's account of the Defendant'e background was coneistent with Julius' account" [Brief of Appellee, p. 3]; "Mrs. Phillips' testimony about Defendant's childhood environment was consistent with Mrs. Stanley's and Julius'" [Brief of Appellee, p. 5], and this case is thue quite unlike the situation in cases such as Francis, on which the State now relies. See Francis, 529 So.2d 673 ("not only is the testimony of these witnesses inconsistent,..."). Counsel's woeful inadequacy in the sentencing proceeding in this case does undermine confidence in the result.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, first class, postage prepaid, to Ralph Barreira, Assistant Attorney General, Department of Legal Affairs, 401 N.W. Second Avenue, Suite 921N, Miami, Florida 33128, this 20th day of February, 1992.

Attorney