IN THE SUPREME COURT OF FLORIDA

CASE NO.

RICHARD H. ANDERSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE THIRTEENTH JUDICIAL CIRCUIT COURT,
IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Anderson's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court summarily denied Mr. Anderson's claims without an evidentiary hearing.

The following symbols will be used to designate references to the record in this instant cause:

"R." -- record on direct appeal to this Court;

"PC-R." -- record on 3.850 appeal to this Court.

All other citations will be self-explanatory or will be otherwise explained.

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ARGUMENT I

ACCESS TO THE FILES AND RECORDS PERTAINING TO MR. ANDERSON'S CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF CHAPTER 119, FLA. STAT., THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THE EIGHTH AMENDMENT, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. MR. ANDERSON CANNOT PREPARE AN ADEQUATE 3.850 MOTION UNTIL HE HAS RECEIVED PUBLIC RECORDS MATERIALS AND BEEN AFFORDED DUE TIME TO REVIEW THOSE MATERIALS AND AMEND.

Counsel for the state asserts that any requests for the files of the Florida Parole Commission,[1] the Orlando Police Department, the Florida Department of Law Enforcement, the Pinellas County Sheriff's Office, the Pinellas County Clerk of Court, and the Pinellas County Office of the State Attorney should be pursued in the procedure outlined in Chapter 119 pursuant to this Court's recent opinion in Hoffman v. State, 613 So. 2d 405 (Fla. 1992). Mr. Anderson filed his Motion for Postconviction Relief on October 12, 1992. The mandate in Hoffman issued on March 5, 1993. At the time of filing of the Rule 3.850 motion and of Mr. Anderson's Initial Brief in this Court, this Court's rulings indicated that a motion pursuant to Rule 3.850 was the appropriate place to litigate matters of non-compliance with Chapter 119 for all agencies. Counsel in good faith initiated Rule 3.850 proceedings in order to obtain the

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[1]Undersigned counsel is aware of this Court's opinion in Parole Commission v. Lockett, No. 80,264 (Fla. April 22, 1993). The opinion is not final until rehearing is determined. As of this date, the time in which to file a motion for rehearing has not expired and rehearing has not been determined.

benefit of Chapter 119 for Mr. Anderson. The ruling in Hoffman indicates that this is no longer the appropriate venue to litigate issues of noncompliance with Chapter 119 of agencies outside the circuit of the prosecuting attorney, and undersigned counsel will now seek to compel these records through civil action as outlined in Chapter 119. Mr. Anderson should not be punished for failure to anticipate a change in the procedure required by the law. Upon disclosure of these records, Mr. Anderson should be afforded a reasonable time in which to amend his Rule 3.850 motion. This court has extended the time period for filing Rule 3.850 motions after Chapter 119 disclosure. Hoffman; Jennings v. State, 583 So. 2d 316 (Fla. 1991); Engle v. Dugger, 576 So. 2d 696 (Fla. 1991); State v. Kokal, 562 So. 2d 364 (Fla. 1990); Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990). In these cases, this Court has indicated sixty (60) days constitutes a reasonable period of time to fully review the Chapter 119 materials and to amend Rule 3.850 motions.

The state's argument that Mr. Anderson's request for full Chapter 119 compliance from the Hillsborough County State Attorney is untimely due to failure to raise the issue in his Rule 3.850 motion misstates the record. Specifically, Mr. Anderson noted in his Rule 3.850 motion that files and records received in the office of undersigned counsel immediately prior to filing had not been reviewed, and upon review, follow up investigations would be necessary in terms of additional records requests (PC-R. 15). The files of the Hillsborough County State

Attorney's Office were received on October 8, four days prior to the filing of the Rule 3.850 motion. At the time these files were collected, the State Attorney's Office assured the investigator for Mr. Anderson that the 3 video tapes and 13 audio tapes in the file would be copied and sent to the office of undersigned counsel. Mr. Anderson errantly believed that the State Attorney would honor this commitment to fully comply with the request for public records. This did not occur, and counsel specifically pled non-compliance with Chapter 119 from the Hillsborough County State Attorney's Office in the Motion for Rehearing (PC-R. 56). Despite assurance from the state attorney's office that these tapes would be copied, no tapes have been received by undersigned counsel to date.

The state fails to mention the noncompliance of the Hillsborough County Sheriff's Office or the Hillsborough County Jail. Neither of these agencies have responded to repeated requests under Chapter 119. These issues of noncompliance of state agencies within the circuit of the prosecuting state attorney were properly made part of the Rule 3.850 motion, even under this Court's recent opinion in Hoffman. The circuit court's failure to hold a hearing on this noncompliance with Chapter 119 and to allow Mr. Anderson to amend his Rule 3.850 motion following production of these records was error. This matter must be remanded to permit Mr. Anderson an opportunity to pursue Chapter 119 materials.

The records which were not provided pursuant to Chapter 119 request are necessary evidence which is required before this Court can adjudicate the issues pending before the Court in Argument II (summary denial); Argument III (no adversarial testing at guilt phase and penalty phase); Argument VI (improper prosecutorial argument); and Argument IX (cumulative error) presently pending before this Court. Until the state fully discloses these records, Mr. Anderson cannot know if other claims may exist in this case under Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1970); United States v. Cronic, 446 U.S. 648 (1984); Richardson v. State, 546 So. 2d 1037 (Fla. 1989); Roman v. State, 528 So. 2d 1037 (Fla. 1988); and Strickland v. Washington, 466 U.S. 668 (1984). Any claims discovered as a result of Chapter 119 disclosure will be timely raised. Provenzano v. State, 18 Fla. L. Weekly S122 (Fla. Feb. 11, 1993). Without a full opportunity to review all of the records and fully develop all of the claims, Mr. Anderson will be denied his rights under Florida law and under the Eighth and Fourteenth Amendments. The failure to comply with Chapter 119 requests constitutes external impediments which have thwarted Mr. Anderson's efforts to establish he is entitled to post-conviction relief. This matter must be remanded to permit Mr. Anderson an opportunity to pursue Chapter 119 materials and to amend his Rule 3.850 motion. See Jennings; Provenzano; Hoffman.

ARGUMENT II

MR. ANDERSON IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS 3.850 CLAIMS.

Mr. Anderson asserts that the claims contained in his Rule 3.850 motion are not complete. Under the two-year filing limitation period of Rule 3.850, Mr. Anderson's Rule 3.850 motion was not due to be filed until October 7, 1993. However, in order to make a good faith effort to initiate the litigation and compel compliance with Chapter 119 Mr. Anderson filed his motion one (1) year early. Counsel in good faith represented at the outset of his Rule 3.850 motion that Mr. Anderson's pleading was incomplete -- the untenable predicament caused by the lack of time to obtain various agencies' public records, the good faith attempt to expedite the two-year period to prepare the motion, and counsel's demanding workload made it impossible for counsel to properly investigate and effectively present Mr. Anderson's post-conviction claims. This matter must be remanded to permit Mr. Anderson an opportunity to amend his Rule 3.850 motion following public records disclosure.

Counsel for the state cites Gorham v. State, 494 So. 2d 211 (Fla. 1986), for the proposition that the trial court correctly ruled that Mr. Anderson's Rule 3.850 motion was deficient. Counsel fails to note that this Court ruled in Gorham that Mr. Gorham's petition should be dismissed without prejudice. 494 So. 2d At 212. Clearly, the trial court did not follow the law of this Court when it dismissed Mr. Anderson's motion with prejudice. There is absolutely no authority provided by the

caselaw of this Court for the trial court to dismiss a Rule 3.850 motion with prejudice based upon the failure to comply with the verification requirement. Additionally, as noted in the initial brief, Gorham is the only capital case since the creation of the Office of the Capital Collateral Representative (CCR) in which this Court has dismissed a Rule 3.850 motion for lack of verification, and the filing of Mr. Gorham's motion occurred before CCR was fully operational. Mr. Gorham was not represented by CCR. Undersigned counsel asserts that with the creation of CCR, the concerns which gave rise to the verification requirement are satisfied by the obligations imposed upon counsel by the Florida Code of Ethics. All death sentenced individuals in Florida are represented by counsel in post-conviction proceedings. This Court should rule that it is not necessary for Mr. Anderson's Rule 3.850 motion to be verified by the defendant when it is signed by his capital collateral representative.

The state fails to address the lack of jurisdiction of the trial court to rule on the sufficiency of the motion after the court ruled that the motion was not properly filed. The trial court clearly had no jurisdiction to rule on the motion after ruling that the motion did not comply with the oath requirement.

Even if the trial court had jurisdiction to rule on the sufficiency of the motion (and Mr. Anderson does not concede that this is true), the summary denial was erroneous. Mr. Anderson has pled substantial, serious allegations which go to the fundamental fairness of his conviction and death sentence which

cannot be resolved without an evidentiary hearing. In addition, as noted in Argument I, the state's failure to provide records requested under Chapter 119 has forced Mr. Anderson into the untenable position of piecemeal litigation. Mr. Anderson cannot fully plead the issues which demand a hearing until all records requested under Chapter 119 are provided and reviewed. To hold otherwise would deny Mr. Anderson due process of the law. As this Court has held, due process is what governs post-conviction litigation. Holland v. State, 503 So. 2d 1250 (Fla. 1987).

The state makes no mention of the trial court's failure to attach portions of the files and records to the summary denial, which was in complete opposition to the clear and unmistakable requirements of the law. The reason for this failure is simple: the files and records in this case do not conclusively show that Mr. Anderson is entitled to no relief. This Court should reverse the order under review and remand to the trial court for a full and complete evidentiary hearing on Mr. Anderson's 3.850 claims.

ARGUMENT III

RICHARD ANDERSON WAS DENIED AN ADVERSARIAL TESTING WHEN CRITICAL, EXCULPATORY EVIDENCE WAS NOT PRESENTED TO THE JURY DURING GUILT PHASE OF HIS TRIAL AND WHEN COUNSEL'S DEFICIENT PERFORMANCE IN PENALTY PHASE RESULTED IN MR. ANDERSON'S SENTENCE OF DEATH. AS A RESULT, MR. ANDERSON WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The state erroneously concludes that Mr. Anderson did not allege that no adversarial testing occurred in the penalty phase in his Rule 3.850 motion, and therefore is unable to assert this claim now. Mr. Anderson pled substantial claims with respect to the penalty phase in Claims IV and IX in his Motion to Vacate (PC-R. 14, 22). In addition, external impediments caused by the state's failure to comply with Chapter 119 have forced Mr. Anderson to file an incomplete pleading (See Argument I). This is particularly true with respect to guilt phase issues. In an good faith effort to initiate litigation and compel Chapter 119 disclosure, Mr. Anderson filed his Rule 3.850 motion one (1) year early. Mr. Anderson waives no guilt phase issues by virtue of this pleading. As Mr. Anderson asserted in his Motion to Vacate and his initial brief to this Court, he is unable to fully plead guilt phase claims prior to full disclosure of Chapter 119 records. It would be contrary to the law of this state to force Mr. Anderson to proceed without full public record disclosure. See Kokal; Hoffman; Provenzano; Jennings; Provenzano v. State, 18 Fla. L. Weekly S122 (Fla. Feb. 11, 1993). In addition, it would encourage the state to continue to ignore this Court's clear

rulings requiring disclosure of public records. Mr. Anderson requests that this Court allow him a reasonable time in which to amend his pleadings after counsel has received and reviewed all of the relevant public records.

The state contends that there is no problem under Ake v. Oklahoma, 470 U.S. 68 (1985) because "Anderson's sanity at the time of the offense has never been in issue..." (Appellee's brief, pp. 10-11). This ignores the fact that death penalty law in Florida by definition makes Mr. Anderson's mental condition relevant to guilt/innocence and sentencing. Mr. Anderson's mental condition is relevant to specific intent to commit first degree murder, statutory mitigating factors, aggravating factors, and myriad nonstatutory mitigating factors. Mr. Anderson was entitled to professionally competent mental health assistance on those issues. Ake v. Oklahoma. When mental health is at issue, counsel has a duty to conduct proper investigation into his or her client's mental health background. Kenley v. Armontrout, 937 F. 2d 1298 (8th Cir. 1991); Brewer v. Aiken, 935 F. 2d 850 (7th Cir. 1991). Mr. Anderson asserts that he was deprived of effective representation at trial. Counsel failed to present any mitigation, and as a result, Mr. Anderson did not have an adequate adversarial testing at his penalty phase.

The state argues that the case relied upon by appellant for the argument that the prosecutor's comments were improper, Jackson v. State, 522 So. 2d 802 (Fla. 1988), was not final until after Mr. Anderson's trial, so trial counsel could not have known

that the argument was improper. This novel proposition ignores the plethora of cases from this Court and other courts throughout the country which were final prior to Mr. Anderson's trial and which hold that arguments such as those made by the state attorney in Mr. Anderson's case violate Due Process and the Eighth Amendment and render a death sentence fundamentally unfair and unreliable. See Teffeteller v. State, 439 So. 2d 840 (Fla. 1983); Drake v. Kemp, 762 F.2d 1449, 1458-61 (11th Cir. 1985)(en banc); Potts v. Zant, 734 F.2d 526, 536 (11th Cir. 1984); Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985); Coleman v. Brown, 802 F.2d 1227, 1239 (10th Cir. 1986). Jackson is not the only nor the first case pointing out the impropriety of arguments which urge the jury to rely on passion and emotion in determining a defendant's fate. Apparently, the state feels that this Court must point out each and every inappropriate argument that a prosecutor could possibly make, and then and only then will counsel be found ineffective for failing to object to obviously improper and prejudicial comments from the state attorney. This argument flies in the face of logic.

The state concedes that defense counsel did not object to the prosecutor's inflammatory argument, but argues that this "could" be because counsel felt the argument reflected the sentiments of a large number of people. It is just as possible that the defense attorney "could" have failed to object because he was ineffective. This is a factual issue requiring resolution

in an evidentiary hearing. See O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984).

ARGUMENT V

MR. ANDERSON'S DEATH SENTENCE WAS TAINTED BY CONSTITUTIONALLY INVALID JURY INSTRUCTIONS AND BY IMPROPER APPLICATION OF STATUTORY AGGRAVATING CIRCUMSTANCES IN VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The state asserts that Mr. Anderson's reliance on Richmond v. Lewis, 113 S. Ct. 528 (1992) is in error because no justice in this Court engaged in an improper reweighing. The point that the state misses is that no sentencing calculus free from taint occurred at all in Mr. Anderson's case, as is required in Richmond. In Richmond, the Supreme Court concluded that "in a 'weighing' state, where the aggravating and mitigating factors are balanced against each other, it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor, even if other valid aggravating factors obtain." 113 S. Ct at 534. After concluding that the sentencer in Richmond had considered an invalid aggravating factor and that the state appellate court had not remedied this error, the Supreme Court held, "Where the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the state appellate court or some other state sentencer must actually perform a new sentencing calculus, if the sentence is to stand." 113 S. Ct. at 535. This is precisely the error that occurred in Mr. Anderson's case. The sentencer was

instructed on and considered invalid aggravating factors.[2] No "sentencing calculus" was performed in which the narrowing constructions of vague and facially overbroad aggravating factors was considered. This error requires this Court to conduct a harmless error analysis as to the jury's recommendation or to remand for jury resentencing. Richmond; Espinosa v. Florida, 112 S. Ct. 2926 (1992).

The state also asserts that appellate counsel failed to raised this issue in direct appeal to this Court. In James v. State, 18 Fla. L. Weekly 139 (Fla. March 4, 1993), this Court held that Espinosa was a change in Florida law cognizable in postconviction proceedings under the principles of Witt v. State, 387 So. 2d 922 (Fla. 1980). This Court held that, where an objection to the jury instructions was registered at trial and raised on appeal, "it would not be fair to deprive [the capital defendant] of the Espinosa ruling." James, 18 Fla. L. Weekly at 139. Here, the State has simply maintained that appellate counsel did not adequately raise the issue on direct appeal.

To the extent that this Court finds the Espinosa issue was inadequately raised, this Court must find ineffective assistance of appellate counsel's. Ignorance of the law constitutes deficient performance. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). The deficient performance prejudiced Mr. Anderson under this Court's decision in James v. State. In fact, James

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[2]The "jury is a co-sentencer under Florida law." Johnson v. Singletary, 18 Fla. L. Weekly 90 (Fla. Jan. 29, 1993).

for the first time held that appellate attorneys had a duty to raise and preserve Espinosa claims. In light of the opinion in James, Mr. Anderson an evidentiary hearing is necessary to get the facts concerning the ineffective assistance of appellate counsel. See Swafford v. State, No. 80,182; Smith v. State, No. 78,199.

Moreover, Mr. Anderson is entitled to relief. The Espinosa error was not harmless beyond a reasonable doubt. Hitchcock v. State, 18 Fla. L. Weekly 87 (Fla. January 28, 1993). Relief must issue.

ARGUMENT VI

THE PROSECUTOR'S INFLAMMATORY AND IMPROPER COMMENTS AND ARGUMENT, THE INTRODUCTION OF NON-STATUTORY AGGRAVATING FACTORS AND THE SENTENCING COURT'S RELIANCE ON THESE NON-STATUTORY AGGRAVATING FACTORS RENDERED MR. ANDERSON'S CONVICTION AND RESULTING DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The state asserts that this claim is not appropriately pled in a Rule 3.850 motion. Yet, this Court has recognized that prosecutorial misconduct can be so egregious that it deprives a capital murder defendant of a fair trial and sentencing phase, requiring a vacation of the death sentence. Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990). The prosecutorial misconduct in Mr. Anderson's case denied him the fair trial and sentencing guaranteed him by the Sixth, Eighth and Fourteenth Amendments. It cannot be "determine[d] that the needless and inflammatory comments by the prosecutor did not substantially contribute to

the jury's advisory recommendation of death during the sentencing phase." Teffeteller v. State, 439 So. 2d 840, 845 (Fla. 1983). Fundamental fairness requires that this Court grant Mr. Anderson a new sentencing phase in front of a newly empaneled jury.

There is no question that the prosecutor's argument was meant to evoke an emotional response from Mr. Anderson's jury. The cumulative effect of this closing argument was to "improperly appeal to the jury's passions and prejudices." Cunningham v. Zant, 928 F.2d 1006, 1020 (11th Cir. 1991). See also Presnell v. Zant, 959 F.2d 1524, 1528 (11th Cir. 1992). Such remarks prejudicially affect the substantial rights of the defendant when they "so infect the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 647 (1974); See also, United States v. Eyster, 948 F.2d 1196, 1206 (11th Cir. 1991).

The prosecutor's argument went far beyond a review of the evidence and permissible inferences. He intended his argument to overshadow any logical analysis of the evidence and to generate an emotional response, a clear violation of Penry v. Lynaugh, 109 S. Ct. 2934 (1989). He intended that Mr. Anderson's jury consider factors outside the scope of the evidence.

Florida law requires that "a prosecutor's concern 'in a criminal prosecution is not that it shall win a case, but that justice shall be done.' While a prosecutor 'may strike hard blows, he is not at liberty to strike foul ones.'" Rosso v. State, 505 So. 2d 611, 614 (Fla. 3rd DCA 1987).

These comments went without objection by defense counsel. Improper argument by a prosecutor reaches the threshold of fundamental unfairness if it is "so egregious as to create a reasonable probability that the outcome was changed." Brooks v. Kemp, 762 F.2d 1383, 1403 (11th Cir. 1985). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland v. Washington, 466 U.S. 668 (1984). A duty to bear such skill and knowledge as will render the trial a reliable adversarial testing process is placed upon defense counsel under Strickland. Courts have repeatedly recognized that reasonably effective counsel must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970). Thus, an attorney is charged with the responsibility of presenting legal argument in accord with the applicable principles of law. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989).

Clearly, defense counsel was ineffective for his failure to object. Arguments such as those made by the prosecutor in Mr. Anderson's trial and sentencing violate Due Process and the Eighth Amendment, and render his death sentence fundamentally unfair and unreliable.

ARGUMENTS IV, VII, VIII, & IX

Mr. Anderson relies on the arguments presented in his Initial Brief to the Court with respect to all claims not otherwise addressed in this brief.

CONCLUSION

On the basis of the arguments presented herein, Mr. Anderson respectfully submits that he is entitled to an evidentiary hearing, a new guilt phase and a new penalty phase in the trial court. Mr. Anderson respectfully urges that this Honorable Court remand to the trial court for such proceedings, and that the Court set aside his unconstitutional conviction and death sentence.

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on April 26, 1993.

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