IN THE SUPREME COURT OF FLORIDA

CASE NO. 90,119

LOUIS B. GASKIN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR FLAGLER COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

ARGUMENT I

THE TRIAL COURT ERRED IN SUMMARILY DENYING MR. GASKIN'S AMENDED MOTION TO VACATE ON THE GROUNDS THAT THE CLAIMS WERE PROCEDURALLY BARRED. THE COURT MISTREATED THE AMENDED MOTION AS A SUCCESSIVE MOTION.

Appellee argues that the lower court did not err when it summarily denied Mr. Gaskin an evidentiary hearing on some issues because the court reasoned that the motion was successive and thus the claims were procedurally barred (PC-R. 444, 455). Appellee relies on the fact that Mr. Gaskin filed an initial motion prior to the two year time limitation and then filed an amended motion on his two year date.

In addition to filing his initial motion in accordance with the agreement with the Governor's office, Mr. Gaskin filed his initial motion to invoke the jurisdiction of the trial court to compel certain Florida state agencies to comply with his requests for public records pertaining to his case (PC-R. 6-8). This Court has expressly held that "capital post-conviction defendants are entitled to chapter 119 disclosure and that denial of such a request may be properly considered in rule 3.850 post-conviction relief proceedings" Walton v. Dugger, 634 So. 2d 1059, 1061 (Fla. 1993). See also State v. Kokal, 562 So. 2d 324 (Fla. 1990); Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990).

Appellee suggests that Mr. Gaskin has abused the process by filing an amended 3.850 motion prior to the expiration of the two year period. Appellee also argues that allowing a defendant to

amend prior to the expiration of the two year period creates "piecemeal litigation". However, neither the rule nor this Court has ever held that a defendant is not free to file an amended motion **prior** to the expiration of his two year time limit. In Brown, this Court held that "the two-year limitation does not preclude the enlargement of issues raised in a timely-filed (sic) first motion for post-conviction relief" 596 So. 2d 1026, 1027 (Fla. 1992). See also Rivet v. State, 618 So. 2d 377 (5th DCA 1993)("[A]lthough rule 3.850 requires that a motion be filed within two years, there is no bar to filing relevant supplemental documentation within a reasonable time after expiration of the two years if the original, deficient motion was timely filed").

In addition, in Ventura v. State, 673 So. 2d 479 (Fla. 1996), Peter Ventura, a death-sentenced prisoner, filed a Rule 3.850 motion eight (8) months before the Rule 3.850 deadline in his case. Mr. Ventura, like Mr. Gaskin, filed an incomplete motion in order to comply with the schedule established by the Governor's office and to initiate public records litigation (PC-R. 558, 562-65). The motion simply listed the claims he intended to raise once state agencies complied with his requests for public records. See Ventura, 673 So. 2d at 479-480. The trial judge dismissed all of Mr. Ventura's claims. See Id. at 480. This Court held that "the trial judge erred in prematurely considering and dismissing Ventura's original rule 3.850 motion and that Ventura must be allowed to amend his original rule 3.850

motion once all public records issues have been resolved." Id. at 481.

Despite appellee's characterization that Mr. Gaskin's amended motion was successive, (Appellee's Answer Brief at 14), this Court has repeatedly interpreted successive motions under rule 3.850(f) as motions that have been filed after an original post conviction motion has been denied and the claimant received an adjudication in conjunction with a full and fair opportunity to present claims. Roberts v. State, 678 So. 2d 1232 (Fla. 1996); State v. Zeigler, 494 So. 2d 957 (Fla. 1986). Mr. Gaskin certainly had not had a full and fair opportunity to present claims and therefore his amended motion should not have been treated as successive by the lower court.

The state also alleges that "[t]here is no legitimate reason, however, to allow the piecemeal filing of claims such as those made by Gaskin in his amended motion". (Appellee's Answer Brief at 17) However, this position is inconsistent with the state's previous concession that an incomplete motion is proper in some situations. In Hill v. Butterworth, the federal suit brought to determine Florida's compliance with the "opt-in" provisions of the federal habeas corpus statute, Richard Martell, Assistant Attorney General, acknowledged that an incomplete 3.850 motion would comply with state law. Mr. Martell stated, "many post-conviction motions that are filed in state court are not necessarily complete at the time of the filing, they request further amendment, **they request further leave to develop**

evidence, they request further matters. These pleadings can be filed in such a way that there would be a tolling of the federal time limits." Transcript of Temporary Restraining Order Hearing, Hill v. Butterworth, No. 4:96-CV-288-MMP at 37 (N.D. Fla. July 18, 1996). Similarly, Mr. Martell's rationale applies to Mr. Gaskin who was forced to file his 3.850 motion early in order to avoid having his death warrant signed.

The trial court erred in denying Mr. Gaskin's claims based on the incorrect belief that the claims were successive.

ARGUMENT II

THE LOWER COURT ERRED IN DENYING MR. GASKIN'S AMENDED MOTION ON LACK OF SUFFICIENCY.

Appellee next argues that the trial court did not err in denying Mr. Gaskin's claims because they were facially insufficient. At the Huff hearing, the state argued that Mr. Gaskin was required to plead witness names, attach affidavits and plead in his postconviction motion all of the facts he would prove at an evidentiary hearing (PC-R. 18-20). The lower court adopted this position and found that "[t]he Defendant's Motion fails to demonstrate who would have provided the mitigating evidence and how it would have changed the outcome of the proceedings ..." (PC-R. 441). Despite this finding and this position appellee cannot dispute that there is no such requirement under rule 3.850. Rule 3.850 makes it clear that all that is required is a "brief statement of the facts" (Fla. Crim. R. P. 3.850)(emphasis added).

Furthermore, this Court has held:

> Rule 3.850(c), which sets forth the contents of a 3.850 motion, requires a movant to include a brief statement of facts (and other conditions) relied on in support of the motion. However, nothing in the rule requires the movant to attach an affidavit or authorizes a trial court to deny the motion on the basis of a movant's failure to do so.

Valle v. State, 22 Fla. L. Weekly S751 (1997)(citations omitted). Mr. Gaskin's claims were pled sufficiently. If taken as true, as required, they could not be conclusively rebutted by the record and an evidentiary hearing was required. Lemon v. State, 498 So. 2d 923 (Fla. 1986).

Appellee also argues that the court did not err in denying Mr. Gaskin's claims regarding ineffective assistance of counsel because they were insufficient. Appellee claims that it is Mr. Gaskin's burden to make a prima facie showing of deficient performance. Recently, in Valle, this Court reiterated the standard for a reviewing court:

> Strickland requires a defendant claiming ineffective assistance of counsel to show both (1) that counsel's performance was deficient and (2) that the deficient performance resulted in prejudice. As to the deficiency requirement, a reviewing court must determine whether in light of all the circumstances, counsel's acts or omissions fell outside the wide range of professionally competent assistance. For the prejudice prong, the reviewing court must determine whether there is a reasonable probability that but for the deficiency, the result of the proceeding would have been different.

22 Fla. L. Weekly S571 (1997)(citations omitted). In his motion Mr. Gaskin asserted a litany of omissions and failures committed

by trial counsel. If taken as true, these omissions would certainly qualify as ineffective assistance. The resulting prejudice was Mr. Gaskin's conviction and sentence. Mr. Gaskin is entitled to an evidentiary hearing where he could prove this claim.

Appellee also specifically addresses the conflict of interest issue due to Mr. Cass' appointment as a special deputy sheriff. Appellee argues that this claim is legally insufficient. (Appellee's Answer Brief at 22). A similar claim has been heard in regard to Howard Pearl in several other postconviction proceedings. Teffeteller v. State, 676 So. 2d 369 (Fla. 1996). This Court has consistently ordered a hearing on this issue and determined that judges must consider this claim on a **case by case basis**. Teffeteller v. State, 676 So. 2d 369, 371 (Fla. 1996)("The appellants raise factually specific claims regarding Pearl's representation of them ..."). See also, Quince v. State, 592 So. 2d 669 (Fla. 1992); Wright v. State, 581 So. 2d 882 (Fla. 1991); Herring v. State, 580 So. 2d 135 (Fla. 1991). Clearly, Mr. Gaskin's allegation regarding Mr. Cass is similar to the "Howard Pearl" claim and is sufficient to entitle him to a hearing on this claim.

ARGUMENT III

THE LOWER COURT ERRED IN NOT ORDERING THE STATE TO PROVIDE NOTES NOT CLAIMED AS AN EXEMPTION UNDER CHAPTER 119.

The trial court did err in its decision that Mr. Gaskin had waived the right to disclosure of notes in the possession of the State Attorney's Office. Mr. Gaskin properly filed a request for these records. The State improperly withheld those notes without filing an exemption. It was only at the 119 hearing when counsel learned of those notes. It was the state's responsibility to either turn the notes over to counsel or claim an exemption. Fla. Stat. Ch. 119.07(3)(b)(1993). Mr. Gaskin never rescinded his request for these documents. He is entitled to the disclosure of these documents.

ARGUMENT IV

MR. GASKIN WAS ENTITLED TO A HEARING ON WHETHER HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS TRIAL.

The lower court held that Mr. Gaskin's claims of ineffective assistance were insufficient (PC-R. 441-43). Appellee argues that Mr. Gaskin asserted "conclusory allegations" in support of this claim. In his amended 3.850, Mr. Gaskin claimed that trial counsel failed to investigate and present mitigating evidence on his behalf. In support of this claim Mr. Gaskin specifically outlined several of trial counsel's omissions and deficiencies. Mr. Gaskin provided facts that illustrated trial counsel's ineffectiveness. For instance, trial counsel failed to provide Dr. Krop with the materials he requested; failed to present

testimony regarding Mr. Gaskin's mental illness, his dysfunctional family life, his troubled childhood and his lack of education (PC-R. 319-28). Trial counsel had the duty to investigate and prepare. Kimmelman v. Morrison, 477 U.S. 365, 384-88 (1986). Clearly counsel did not investigate or prepare for the penalty phase.

Appellee relies on Jackson v. Dugger, 633 So. 2d 1051 (Fla. 1993), to suggest that Mr. Gaskin's claim regarding trial counsel's failure to prepare Dr. Krop was insufficient to warrant an evidentiary hearing. (Appellee's Answer Brief at 39-40). In Jackson, this Court reasoned that Jackson had failed to show how the mental health expert would have testified if called. Mr. Gaskin's claim cannot fail for this reason because he specifically stated that Dr. Krop would testify that he had requested material, but was not provided with it (PC-R. 320-21). Furthermore, Dr. Krop testified in a deposition and had concluded that Mr. Gaskin was one of the "most disturbed individuals I've ever worked with" (PC-R. 514). Mr. Gaskin had the right to an adequate mental health evaluation and counsel had the duty to prepare his mental health expert so that he could conduct such an evaluation. Ake v. Oklahoma, 470 U.S. 68 (1985). Counsel was ineffective in failing to do so.

Appellee argues that it was "obvious" that trial counsel did not present any mental health evidence to the jury because of the information that could have been elicited on cross examination. Both Dr. Krop and Dr. Rotstein knew about Mr. Gaskin's sexual

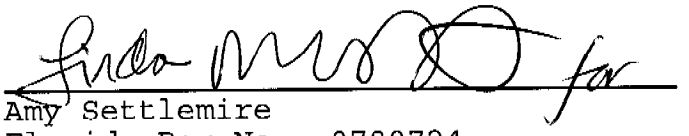
deviance and distorted thoughts. However, these are facts that bolster mental health claims. In Mr. Gaskin's case it is "obvious" that these facts could have only illustrated that Mr. Gaskin is seriously disturbed and mentally ill. Mr. Gaskin deserves an evidentiary hearing on these claims. Relief is warranted.

CONCLUSION

Appellant respectfully submits that he is entitled to relief from his unconstitutional death sentences, to an evidentiary hearing and to all other relief that the Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on March 26, 1998.



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