IN THE SUPREME COURT OF FLORIDA

CASE NO. SC96,333

TERRELL M. JOHNSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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STATEMENT OF FONT

Mr. Johnson's Reply Brief is written in Courier font, size 12.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT IN REPLY

ARGUMENT I

The Answer Brief of the State argues that the trial court's order denying relief is reliable and provides adequate support for this Court to uphold the summary denial of Mr. Johnson's 3.850 motion. The trial court's summary denial was based first and foremost on procedural considerations that Mr. Johnson's 3.850 motion was "both untimely and successive." (M. 283).

The State's position regarding the substance of Argument I is that the existence of the relevant Miranda card cannot be "newly discovered evidence" because the existence of the card was either known to defense counsel at the time of trial, or in the alternative, was known by Mr. Johnson himself, whose refusal to sign the initial Miranda card in question at five minutes after midnight on January 6, 1980, within hours of his detention, forms the core of the claim. The State relies on lengthy quotes from the trial court's order denying relief to buttress their position on this issue and several others.

As was noted in the Defendant's Motion for Rehearing submitted to the trial court after the summary denial, as well as in Mr. Johnson's Initial Brief, the trial court's order denying relief simply ignores the facts. First, it was never revealed to trial counsel or successor counsel that the police had created a record, the Miranda card, proving that Mr. Johnson invoked all of his rights, including the right to silence, when he refused to sign a Miranda waiver form presented to him by Officer Peterson of the Jefferson County, Oregon Sheriff's Department at 12:05 a.m. on January 6, 1980. (M. 313). Furthermore,

there is no evidence that any state actor turned over a copy of this **particular** Miranda card to any of Mr. Johnson's lawyers. Mr. Johnson made discovery requests at trial and public records requests after entering postconviction, yet was **never** provided with a legible copy of the "refusal to sign" Miranda card until after CCRC was allowed to depose the Orange County Sheriff's Office records custodian in September 1997, some seventeen (17) years after Mr. Johnson's trial. In addition, the position of the trial court, adopted by the State, that the Miranda card could not be "newly discovered evidence" in any case because Mr. Johnson "was personally aware of his initial refusal and all circumstances attendant to his interrogation," is not borne out by the record. Three contrary examples are of note: the original trial court made a finding on the record that Mr. Johnson was an alcoholic and a drug abuser (R. 544); an expert testified at Mr. Johnson's 1986 evidentiary hearing that Mr. Johnson, suffering from alcohol withdrawal, was "in a state of impaired judgement" at the time of his contact with Peterson (P. 180-81); and finally, a contemporaneous 1980 police report by Officer Peterson himself, the same police officer who annotated the Miranda card at issue, stated that Mr. Johnson "appeared to be assuming a pose of not remembering."

This evidence, along with Mr. Johnson's testimony at an evidentiary hearing would be a more reliable source of information than the trial court's conclusory speculation about what Mr. Johnson's state of mind was at the time of the "circumstances attendant to his interrogation." These facts underline the importance of consideration

by this Court of **all** the facts and circumstances in the prior records and files along with the current briefs and oral arguments before arriving at a decision in Mr. Johnson's case.

The lower court attached to its summary denial order, as evidence that relevant Miranda card had been provided to trial counsel, a June 3, 1980 letter to Mr. Johnson's trial attorney from Assistant State Attorney Bruce Hinshelwood that refers to a "Miranda card". (M. 314)(M. 257) Neither the record on appeal nor the public records received from the State Attorney include the 87 pages of attachments referenced internally in the original letter. Thus, it is impossible to know which Miranda card the June 3, 1980 letter refers to. The State supplied this letter and several others addressed to trial counsel, along with copies of four different Miranda cards (one signed by Mr. Johnson's girlfriend Pat Sweeney, one noted as the "refused to sign" card, and two cards signed by Mr. Johnson) to Judge Mihok under a cover letter dated May 8, 1999. (R. 250). The State's brief and the lower court's order failed to mention that the record reveals that there were numerous Miranda cards noted in deposition and testimony in 1980 and 1986 and that it is completely unclear which Miranda card Mr. Hinshelwood was referring to in his letter of June 3, 1980.

Even more significantly, the record itself reveals that there are at least three other Miranda cards that law enforcement testified that Mr. Johnson signed, none of which are included in the materials supplied by the State to Judge Mihok in May 1999. (M. 320,337,338,339,346). There is no evidence that the particular card in question was **ever** turned over to defense counsel. A review of the

transcripts of the 1980 suppression hearing and the 1986 evidentiary hearing bear that out.

The Hinshelwood letter and the additional documentation supplied by the State on May 8, 1999 still fail to explain which Miranda cards the documents were referring to since there are at least seven different cards mentioned in the record. The lower court relied on the Hinshelwood letter as evidence that defense counsel got a copy of the relevant card through discovery. The letter actually has no bearing on the question of whether the "refused to sign" card was ever supplied. The reliance by the State on this flawed evidence supports granting Mr. Johnson an evidentiary hearing on this claim. These are facts that are in dispute. Mr. Johnson is entitled to an evidentiary hearing if the records and files do not show that Mr. Johnson is entitled to no relief. See, Fla. R. Crim. P. 3.850; Lemon v. State, 498 So. 2d 923 (Fla. 1986).

If trial counsel had the "refused to sign" card at the suppression hearing, he would have used the card as evidence that Mr. Johnson had attempted to exercise his right to silence at his first opportunity. That is the reason that Mr. Johnson is now heard to complain about a 1980 Miranda violation by state authorities. Recently, it was reaffirmed that "Miranda requires procedures that will warn a suspect in custody of his right to remain silent and which will assure the suspect that the exercise of that right will be honored." Dickerson v. United States, 120 S.Ct. 2326, 2335 (2000). Mr. Johnson has never received the benefit of the Miranda rule

The State relies again on the order entered by the trial court in

discussing the Brady material found in the body of handwritten notes that were provided by the Orange County Sheriff's Office in legible form for the first time after their records custodian was deposed by CCR in 1997. (Supp.M. 29-30, 38). Mr. Johnson plead in detail the contents of the notes that were produced (M. 141-43). The content of these notes is qualitatively and quantitatively superior to the form that the State contends was provided to trial counsel in discovery materials. The detail contained in the notes is both material and exculpatory as to Mr. Johnson. The notes reveal witness names, and very specific descriptions by the witnesses of alleged perpetrators and their vehicles.

As to the remarks of victim Charles Himes' girlfriend regarding his violent reputation, it is worth reminding the Court that Mr. Himes was the customer whose death resulted in Mr. Johnson's second degree murder conviction. Mr. Johnson was sentenced to death after a seven to five jury recommendation for the first degree murder of the bartender/owner of Lola's Tavern, James Dodson.

The State concedes that evidence of Mr. Johnson's good behavior would be admissible if Mr. Johnson receives a resentencing hearing. See Skipper v. South Carolina, 106 S.Ct. 1699 (1986). If such evidence is not plead in the 3.850 motion, how does the State believe Mr. Johnson will ever receive a hearing that includes the opportunity to present such evidence? The Skipper opinion anticipates that evidence of "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination." Id at

1672. Moreover, a defendant's "likely future behavior in prison" is one of the "relevant facets of the character and record of the individual offender." Id. at 1673. In Mr. Johnson's case, expert speculation about what his behavior might be is unnecessary. There are 20 years of incarceration records and witnesses that have accumulated as he awaits execution.

This Court should review all the claims with an eye toward the impact of cumulative error and should err on the side of allowing a hearing in circuit court on the claims rather than upholding the summary denial. See State v. Gunsby, 670 So.2d 920 (Fla. 1996). The order of the trial court simply failed to do such a review, and, as the State has pointed out, denied Mr. Johnson's motion based on a finding that it was "both untimely and successive" (M. 283) rather than allowing adjudication on the merits of his claims.

The proper place for factual development of claims is during an evidentiary hearing in circuit court where witnesses can be called and evidence can be introduced. Mr. Johnson has been diligent in attempting to develop his claims of ineffective assistance of counsel, newly discovered evidence, and Brady violations in circuit court and remains determined to preserve his right to a hearing. See Williams (Michael) v. Taylor, 120 S.Ct. 1479 (2000). If "the entire postconviction record, viewed as a whole and cumulative of []evidence presented originally, raise[s] 'a reasonable probability that the result of the [] proceeding would have been different' if competent counsel" had represented the defendant, then prejudice is demonstrated under Strickland. Williams at 1516. Mr. Johnson need not establish

his claims by a preponderance of the evidence; rather the standard is less than a preponderance. Williams, 120 S.Ct. at 1519 ("[i]f a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be `diametrically different,' `opposite in character or nature,' and `mutually opposed' to our clearly established precedent ..."). A proper analysis of prejudice also entails an evaluation of the totality of available mitigation--both that adduced at trial and the evidence presented at subsequent proceedings. Id. at 1515. This Court should take into consideration the fact that after considerable deliberation under unusual circumstances, the jury in this case recommended death by only a seven (7) to five (5) vote. (R. 744). If the newly discovered evidence had been available to trial counsel and had been presented by effective counsel to the jury, the jury probably would have returned with a life recommendation.

CONCLUSION

On the basis of the argument presented to this Court in his Initial and Reply Briefs, as well as on the basis of his Rule 3.850 motion, Mr. Johnson respectfully submits that he is entitled to 3.850 relief, and respectfully urges that this Honorable Court set aside his unconstitutional convictions and sentence of death.

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 September 18, 2000.

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