IN THE SUPREME COURT OF FLORIDA

CASE NO. 97,043

JAMES FLOYD

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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CERTIFICATE OF TYPE STYLE AND SIZE

This proceeding involves an appeal of the circuit court's summary denial of Mr. Floyd's motion for postconviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The type size and style in this brief is 12 pt. New Courier.

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ARGUMENT I

THE TRIAL COURT ERRED IN SUMMARILY DENYING MR. FLOYD'S RULE 3.850 MOTION.

In summarily denying Mr. Floyd's Rule 3.850 motion, the trial court said that the evidence presented in Mr. Floyd's penalty phase was "inconsistent with, and directly refutes, Defendant's current claims of mental illness or retardation." (PC-R. at 143).

The trial court used the incorrect standard for assessing this claim. In Freeman v. State, 761 So. 2d 1055 (Fla. 2000) this Court reaffirmed that a defendant is entitled to an evidentiary hearing on a postconviction motion unless the motion, files and records on the case conclusively show that the prisoner is entitled to no relief, or the motion or a particular claim is legally insufficient. The lower court completely ignored facts pled in the Rule 3.850 motion. The files and records in this case did not conclusively rebut Mr. Floyd's allegations. Mr. Floyd is entitled to an evidentiary hearing before an impartial judge.

The lower court also refused to accept Mr. Floyd's allegations as true. Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989). For example, despite Mr. Floyd's repeated allegations that school records showed that he was mentally retarded with an IQ 51, and that school records indicated that he

was slow and below average in all areas of school, and the fact that mental retardation is lifelong and impacts all aspects of life, the lower court flatly rejected these facts, concluding that the "evidence presented during the penalty phase is inconsistent with, and directly refutes, Defendant's current claims of mental illness or retardation." (PC-R. at 143). The trial court failed to properly apply the law and improperly denied this claim.

Mr. Floyd alleged that he was mentally retarded and trial counsel was ineffective for failing to investigate Mr. Floyd's background and mental status. Mr. Floyd's diagnosis that he is mentally retarded with an IQ of 51 was easily discoverable in Pinellas County School records. School psychologists found that Mr. Floyd was "slow" and "below average" in all areas of school. Trial counsel failed to learn these facts and failed to learn that mental retardation is not an illness that can be cured, but affects Mr. Floyd's long-term functioning capabilities.

Because the information contained in the Rule 3.850 motion was different from the trial testimony and because the factual allegations contained in the Rule 3.850 motion cannot be refuted by the record, Mr. Floyd is entitled to an evidentiary hearing.

In its Answer Brief, the State argued that evidence of Mr. Floyd's mental retardation was "refuted by the trial and resentencing evidence (such as his claim of severe mental

disabilities)" (Answer Brief at 16). Yet, no evidence pertaining to Mr. Floyd's mental abilities was presented at trial or resentencing. No mental health expert evaluated Mr. Floyd. No evidence was presented that Mr. Floyd was mentally retarded -- an ongoing condition that persists throughout one's life. No evidence was presented that Mr. Floyd was slow to grasp simple concepts.

In its Answer Brief, the State makes it appear that Mr. Floyd was not impaired at all because he was able to "plan and execute a course of action to achieve his goal of financial gain." The State also argued that Mr. Floyd was so smart that he was able to take over "his father's lawn business while working a second job." The State argued that Mr. Floyd's "mental infirmities that may have existed years after Floyd's poor academic record could not ameliorate his behavior in January 1984" (Answer Brief at 21-22).

The State failed to mention that under Mr. Floyd's "take over," the lawn business failed shortly after Mr. Floyd's father died. As defense witness Eula Williams testified, "After his father died I guess they kept the service going for a little while, and then they didn't work. I mean, you know, they didn't - the yard service kind of went down." (RS. at 851) (emphasis added). As a result, defense counsel had many indications that Mr. Floyd had mental health problems.

Mr. Floyd's infirmities were many, yet trial counsel failed to investigate them. The State erroneously argued that "no facts were offered which should have reasonably alerted counsel to the need to further explore mental health issues." (Answer Brief at 20).

This was untrue. At resentencing, one defense witness testified that Mr. Floyd had "extreme mood swings," (RS. 859); that Mr. Floyd stared into space and was oblivious to what was around him; that Mr. Floyd was in a "big depression," and appeared "manic" (RS. 859). Those are facts that the defense attorney knew yet failed to investigate further.

Despite the State's argument that trial counsel had a strategic reason for not presenting this evidence, there is no indication in the record what his reasons were. Without the testimony of trial counsel as to why he presented no mental health evidence on Mr. Floyd's mental retardation, this argument must fail and an evidentiary hearing is required.

The State also erroneously argued that any testimony about the character of Mr. Floyd's father and Mr. Floyd's substance abuse "would have detracted from the testimony abut Floyd being industrious and dependable."

There is no indication in the record that this was trial counsel's reason for not presenting mental health mitigation. In fact, this evidence would not have detracted, but would have

presented a more accurate picture of Mr. Floyd than the jury received.

Rex Estelle testified that he believed that Mr. Floyd was involved in drugs or alcohol (RS. 857; 864) yet trial counsel failed to have Mr. Floyd evaluated for drug or alcohol problems or other mental health problems. Trial counsel never even looked at public school records that were readily available and clearly demonstrated Mr. Floyd's problems.

The jury never saw an accurate picture of Mr. Floyd because trial counsel failed to present one. The jury learned that Mr. Floyd was dependable and hard working. Yet, none of the witnesses called by the defense knew that Mr. Floyd had previously been in trouble with the law. Each witness knew more about Mr. Floyd's alcoholic mother and father than they knew about Mr. Floyd himself.

The State argued that Mr. Floyd's "intellect was sufficiently developed to negate any mitigating value of his poor school performance" (Answer Brief at 21). However, there is no testimony of the trial attorney to support this contention. It is a strategy formulated by the State. Defense counsel has never had the opportunity to give his reasons for not presenting compelling and incontrovertible evidence of Mr. Floyd's mental deficiencies. The State's argument is indefensible and misunderstands Mr. Floyd's mental retardation. Mental

retardation did not only affect Mr. Floyd's school performance, although that is where Mr. Floyd was first diagnosed as mentally retarded and that is where that information was easily obtained. The State adopted an uninformed understanding of mental retardation and failed to understand that:

> ...mental retardation is a permanent learning disability that manifests itself in several predictable ways, including poor communication skills, short memory, short attention span and immature or incomplete concepts of blameworthiness and causation...A person who is mentally retarded is not just "slower" than the average person. Mental retardation is "a severe and permanent mental impairment that affects almost every aspect of a mentally retarded person's life." (Citations omitted)

Hall v. State, 614 So. 2d 473, 48-481 (Fla. 1993)(J. Barkett, dissenting).

As in Hall, the State and the trial judge here failed to understand the nature of mental retardation. For the State to limit Mr. Floyd's mental retardation to how he performed in school is misleading and wrong. His mental condition obviously affected his ability to problem solve as is evident by his failure to run his father's business, failure to hold down other jobs and his inconsistent statements to police.

The State also argued that trial counsel's failure to present evidence of Mr. Floyd's good prison record "was a strategic decision which should not be second guessed in a post conviction action" (Answer Brief at 23). The State argued that defense counsel "was aware of this evidence and in fact argued

this mitigation to this judge at the sentencing hearing" (Answer Brief at 23).

However, no evidence of Mr. Floyd's good prison behavior was presented to the jury in any form. The only information about Mr. Floyd's good prison behavior was the following statement by defense counsel to the judge at sentencing. The jury never heard this argument:

> Judge, I had an opportunity to talk to James a number of times. In addition to him having no violent prior criminal history or any violent criminal history, you didn't hear anything about the fact that while James has been in prison, he's caused no trouble. Here in the Pinellas County Jail which he mentioned but didn't really get into any details about, while he's been there, I found it interesting in talking to him, he hasn't had any problems. When other prisoners in there had some problems the guards have talked to them -- maybe James could talk to them and calm them down a little bit. He's done that. He's done that. It would be a perfect opportunity for him when he's been Sentenced to death -- he's come back, he has another jury verdict coming back to say "forget it, I'm giving up." He hasn't done that. He has still attempted to help other people to some degree.

(RS. At 1057).

Defense counsel relied on the statements from his client to argue that Mr. Floyd had a good prison and jail record. Even though the records were readily available, defense counsel made no effort to prove his claims with records from the Department of Corrections or Pinellas County Jail. See, Skipper v. South Carolina, 476 U.S. 1 (1986). Furthermore, defense counsel made

no effort to present even Mr. Floyd's self-serving statements to the jury, which was to decide Mr. Floyd's fate. Defense counsel was never given the opportunity to say why he failed to present valid Skipper evidence.

Again, the State erroneously argued that since defense counsel failed to present such evidence to the jury, it must have been a "strategic decision" (Answer Brief at 23). However, no record citation accompanies that statement because nowhere in the record does defense counsel make that statement. No evidentiary hearing was held in this case. Trial counsel never testified at an evidentiary hearing why he failed to present Skipper evidence to the jury. Trial counsel never testified why he put on certain evidence and failed to investigate other information. Trial counsel never testified that he made a "strategic decision." It is the State's unsupported speculation that trial counsel made a "strategic decision." When there are facts in dispute that cannot be refuted by the record, Mr. Floyd is entitled to an evidentiary hearing. Mr. Floyd had a constitutionally protected right to present Skipper evidence to the jury.

The facts of Mr. Floyd's ineffective assistance of counsel claim are virtually identical to the facts in Williams v. Taylor, 120 S.Ct. 1495 (2000). Mr. Floyd is entitled to the same relief that Mr. Williams received. In Williams, the United States Supreme Court reaffirmed the standards of Strickland v.

Washington, 466 U.S. 668 (1984). Williams v. Taylor, 120 S. Ct. 1495, citing Wright v. West, 502 U.S. 1021 (1991). In a factual comparison with the Williams case, Mr. Floyd's case should be remanded for an evidentiary hearing. Cf. Lockett v. Anderson, 2000 WL 1520594 (5th Cir. Miss. October 13, 2000).

Mr. Williams had a constitutionally-protected right to provide his jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer. See, Williams v. Taylor, 120 S. Ct. at 1513. In Williams, the Virginia Supreme Court, relying on Lockhart v. Fretwell,506 U.S. 364 (1993), was admonished for requiring a separate inquiry into fundamental fairness even when he was able to show that his lawyer was ineffective and that his ineffectiveness more than likely affected the outcome of the trial. The Virginia Supreme Court's prejudice determination was found to be unreasonable because it failed to evaluate the **totality of the available mitigation** presented at trial and at the habeas proceeding. Id., at 1513.

In Williams, the United States Supreme Court upheld the Virginia trial court's decision of deficient performance at penalty phase. The record showed that Mr. Williams' trial counsel failed to prepare for penalty phase until one week before trial. Defense attorneys failed to "uncover extensive records graphically describing Williams' nightmarish childhood, not

because of any strategic calculation but because they incorrectly thought that state law barred access to the records." Williams v. Taylor, 120 S. Ct. 1495 at 1513-14.

> Had they (defense counsel) done so, the jury would have learned Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and been returned to his parents' custody.
>
> Counsel failed to introduce available evidence that Williams is "borderline mentally retarded" and did not advance beyond sixth grade in school. Id, at 595. They failed to seek prison records recording Williams' commendations for helping to crack a prison drug ring and for returning a guard's missing wallet, or the testimony of prison official who described Williams as among the inmates "least likely to act in a violent, dangerous or provocative way." Id., at 569, 588. Counsel failed even to return the phone call of a certified public accountant who had offered to testify that he had visited Williams frequently when Williams was incarcerated as part of a prison ministry program, that Williams "seemed to thrive in a more regimented and structured environment," and that Williams was proud of the carpentry degree he earned while in prison. Id., at 563-566.

Williams v. Taylor, 120 S. Ct. 1495, 1515 (2000)(emphasis added).

While not all of the additional evidence was favorable to Mr. Williams, the "voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision to

focus on Williams' voluntary confession." Id., at 1516.[1]

In this case, defense counsel failed to properly investigate Mr. Floyd's background. Defense counsel failed to follow up on leads that showed that Mr. Floyd suffered from "manic" mood swings or a "big depression." Defense counsel failed to investigate Mr. Floyd's use of drugs during the time of the crime. These facts were available to the defense because the State's own undercover agent, Gregory Anderson, talked about sharing drugs with Mr. Floyd (R. 118). And, Mr. Estelle, who found Mr. Floyd in a "manic" and depressed state believed that Mr. Floyd was on drugs (RS. 859).

Defense counsel presented witnesses who had no relevant information about Mr. Floyd. They said they knew him for 15 years, but not one knew that Mr. Floyd had been in trouble with the law. Not one witness was asked about Mr. Floyd's mental abilities or disabilities. Not one witness called by the defense was asked how his mother's alcoholism affected Mr. Floyd and how it impacted on him. Not one witness was asked about Floyd Sr.'s temper or how he treated Mr. Floyd. Only one defense witness, Rex Estelle, testified that Mr. Floyd had "extreme mood swings."

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[1]Whether or not these omissions were sufficiently prejudicial to have affected the outcome of sentencing, they clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background. See 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1980) cited by Williams v. Taylor, supra.

(RS. 859). Mr. Estelle testified that James would stare into space, and not notice what was occurring around him. Mr. Estelle also noticed a "big depression" (RS. 859). He said Mr. Floyd appeared "almost in a manic" state. Mr. Estelle confronted Mr. Floyd, thinking he was on drugs (RS. 859).[2]

Despite these statements, trial counsel failed to have Mr. Floyd examined by a mental health expert. An expert would have explained the mood swings to a jury. An expert would have determined that Mr. Floyd was abusing drugs and what impact it had on Mr. Floyd's ability to form premeditation. An expert would have testified to statutory and nonstatutory mitigating evidence.[3]

Despite trial counsel's failure to present any mental health mitigation, four jurors believed that Mr. Floyd's life should be spared. The State's argument "that the facts now offered by Floyd would not rise to the level of mitigating his actions toward Mrs. Anderson" (Answer Brief at 16), is pure speculation. Had the jury known that Mr. Floyd was mentally retarded; that his functioning level was that of a 10-year-old child; that when he was in the tenth grade, he read like a third grader; that

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[2]These facts clearly discount the State's argument that "no facts have been offered which should have reasonably alerted counsel to the need to further explore mental health issues" (Answer Brief at 20).

[3]The trial court found no mitigation. (RS. 1071).

mentally retarded people lack the impulse controls of non-retarded and are prone to impulsive, unthinking action, and have limited ability to cope and function in the real world, the jury decision would have been different. Had the jury heard evidence of Mr. Floyd's mental retardation, there is a reasonable probability that the outcome would have been different. See, Rose v. State, 675 So. 2d 567 (Fla. 1996)("It is apparent from the record that counsel never meaningfully attempted to investigate mitigation and hence violated the duty of couns4el 'to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence'")(quoting Baxter v. Thomas, 45 F. 3d 1501 (11th Cir.), cert. denied, 116 S. Ct. 385 (1995)). See also, Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995)[4], where this Court found prejudice despite a unanimous death recommendation and that "Hildwin's trial counsel did present some evidence in mitigation at sentencing" but that it was "quite limited." Id. at 110 n. 7.

The State erroneously argued that Mr. Floyd's claim "is premised on the suggestion that counsel had a duty to obtain all school records in every capital case." (Answer Brief at 21). No.

[4]In his Rule 3.850 Motion, Mr. Floyd alleged that based on testing conducted by experts in post-conviction, Mr. Floyd suffers from mental retardation and has an IQ of 60 (Third Amended Post-Conviction Motion at 29, 95). An expert would have testified that mental health testing showed that Mr. Floyd's mental age is that of a 10-year-old child. He has poor planning skills and has trouble grasping reality. An expert also would have testified that Mr. Floyd has organic brain damage.

Counsel had a duty to investigate Mr. Floyd's background. Typically, when conducting a background investigation, school records, like prison and hospital records, are an easy source of information. In this case, had the school records been obtained, they would have provided a wealth of information on Mr. Floyd's history. But school records were not the only indication that mental problems existed. The defense's own witness told trial counsel. He just failed to act.

Counsel's failure to investigate his client's background and failure to obtain a professional mental health expert's assistance and evaluation was deficient performance consistent with Williams. Counsel's failures deprived Mr. Floyd of the opportunity to present statutory mitigation of his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law and being under the influence of extreme mental or emotional disturbance.

Trial counsel merely had to pursue obvious leads to present a powerful penalty phase case with mental mitigation that would have portrayed Mr. Floyd as a man who was mentally retarded and led a tragic life. Trial counsel could have presented evidence of Mr. Floyd mental retardation; the effects his mother's alcoholism on him; his father's abusiveness and violent rages; his drug abuse at the time of the offense; and his extreme emotional disturbance.

As in Williams, Mr. Floyd had "voluminous amount of evidence" that spoke in his favor in mitigation, but defense counsel never looked for it. Trial counsel failed to get any records that showed not only that Mr. Floyd was mentally retarded but also that he had a learning disability and emotional problems. He was placed in a special class. He became known as the biggest and slowest kid in class. His school records showed that he missed weeks of school and that he was promoted only to move him along.

The State argued that counsel was effective because Mr. Floyd was shown to be nice person who respected women and who was affected by his father's death and "may have been taking drugs and money from the church" (Answer Brief at 29). The State argued that people who knew Mr. Floyd found him respectful and responsible. The State argued this was not a case where the postconviction motion revealed substantial mitigation not presented at trial (Answer Brief at 30).

Again, the State is wrong. The picture portrayed by trial counsel was obviously incomplete. Just because defense counsel presented "some" evidence doesn't mean in the totality of the circumstances he could not have found extensive mitigating evidence. No witnesses were called to testify about Mr. Floyd's mental retardation. No experts were sought to determine if Mr. Floyd suffered from any mental disabilities. For the State to

argue that counsel did not seek out mental health experts because he had no indication that his client suffered from mental disabilities is pure speculation. Without an evidentiary hearing, it is impossible to know why counsel failed to present available mitigating evidence.[5]

In Hildwin v. Dugger, 654 So. 2d 107, 110 (Fla. 1995), this Court found that although some mitigation was presented at trial, counsel's "failure to present abundant and available evidence amounted to constitutionally ineffective assistance of counsel."

This Court has traditionally found the statutory mitigating factors, particularly the mental health mitigators, to be the "weightiest" type of mitigation that can be presented. See Chaky v. State, 651 So. 2d 1169 (Fla. 1995); Santos v. State, 629 So. 2d 838,840 (Fla. 1994).

The State failed to address the facts outlined in Mr. Floyd's Initial Brief and instead argued that "Floyd never explained how his current suggestions for trying the case could have possibly made any difference, and his allegations of guilt

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[5]Unless defense counsel was a professional mental health expert, it was impossible for him to determine Mr. Floyd's mental state. "Not only are retarded individuals often skilled at masking their limitations, but few of the participants in the criminal justice system -- police officers, attorneys, judges, and in some cases even mental health professions -- are trained to recognize mental retardation." John Blume & David Bruck, Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis, 41 Ark. L. Rev 725, 733-734 (1988). In this case, however, there were indications that Mr. Floyd suffered from "mania" and "depression" – signs which defense counsel should have investigated.

phase ineffectiveness fall short of demanding an evidentiary hearing" (Answer Brief at 26).

Mr. Floyd did explain that while the defense attorney file was never found, a bill for investigative services was, which showed a total of 27 hours of work on Mr. Floyd's case. Trial counsel directed the investigator to work 27 hours on a circumstantial case in which the State was seeking death.

Mr. Murry also told the jury that Mr. Floyd was innocent, and that fourteen (14) people would testify to show that his client was innocent. Yet, when it came time to present its case, the defense rested, without presenting any defense witnesses.

The lower court and the State speculated that this statement was directed at all witnesses who would appear at trial (PC-R. at 149) and (Answer Brief at 27) ("Viewed in context, Murry was clearly referring to witnesses that would be called by the State"), but without an evidentiary hearing, nothing in the record indicates that this is true. The State and the lower court provided "strategies" without a factual basis to do so. The fact that there is conflicting issues shows that Mr. Floyd is entitled to an evidentiary hearing on this claim. The record does not conclusively rebut this claim.

Mr. Murry failed to rebut the State's evidence. A bloody sock allegedly found in Mr. Floyd's jacket was said to be type O, the victim's blood. But the defense retained no expert to rebut

the State's evidence. The jury was told that FDLE investigators found eight Negroid hair fragments, but defense counsel failed to explain to the jury about the ambivalent nature of hair analysis.

The only factual investigation Mr. Murry did was to take depositions. No other investigation was done. The State objected to the lengthy factual scenario outlined in Mr. Floyd's Initial Brief detailing Mr. Murry's performance on Mr. Floyd's case and his subsequent disbarment in 1989. As argued in the Initial Brief, Mr. Murry's problems were occurring during the time he represented Mr. Floyd. The outcome of his deficient performance was not handed down by the Florida Bar until four years later when he was finally disbarred. Mr. Murry's disbarment occurred as a result of previous conduct and he was by no means instantaneously disbarred four years later. Mr. Murry's disbarment is a proper consideration for this court.

The lower court was bound under Lemon v. State, 498 So. 2d 923 (Fla. 1986) and Fla. R. Crim. P. 3.850 to take the facts alleged as true. None of the facts alleged in the Rule 3.850 motion are directly refuted by the record. In its Answer Brief, the State argued that strategies existed but have no factual support in the record The jury was entitled to hear this abundant evidence and evaluate its credibility because it is a co-sentencer under Florida law. Espinosa v. Florida, 113 U.S. 26 (1992).

Moreover, in cases such as this, where there has been no evidentiary hearing and where trial counsel failed to present available substantial mitigation, particularly compelling mental health mitigating factors, this Court has granted relief despite the presence of numerous aggravating circumstances. See Rose v. State, 675 So. 2d 567 (Fla. 1996) (prejudice established "[i]n light of the substantial mitigating evidence identified at the hearing below as compared to the sparseness of the evidence actually presented [at the penalty phase]); Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995) (prejudice established by "substantial mitigating evidence"); Phillips v. State, 608 So. 2d 778, 783 (Fla. 1992) (prejudice established by "strong mental mitigation" which was "essentially unrebutted"); Mitchell v. State, 595 So. 2d 938, 942 (Fla. 1992) (prejudice established by expert testimony identifying statutory and nonstatutory mitigation and evidence of brain damage, drug and alcohol abuse, and child abuse); State v. Lara, 581 So. 2d 1288, 1289 (Fla. 1991) (prejudice established by evidence of statutory mitigating factors and abusive childhood); Bassett v. State, 541 So. 2d 596, 597 (Fla. 1989) ("this additional mitigating evidence does raise a reasonable probability that the jury recommendation would have been different"). The Court also has granted relief based on penalty phase ineffective assistance of counsel when the defendant had a prior murder conviction. Torres-Arboleda v. Dugger, 636 So. 2d 1321 (Fla. 1994).

The evidence alleged in Mr. Floyd’s Rule 3.850 motion is

identical to that which established prejudice in these cases, and Mr. Floyd is similarly entitled to relief, or at a minimum, an evidentiary hearing. Reversal is warranted.

ARGUMENT II -- BRADY[6]

The jury never learned that at the time of the murder, a witness told police that she saw several white men force their way into the victim's home. This witness observed the white men at the same time the State estimated the victim had died (R. 855). This witness said she told police what she saw. This witness was shown a photo lineup and identified two men who she saw at the victim's house that day. Neither of these two men were Mr. Floyd. One of the men this witness identified was known by police to be bilking elderly women out of money and had forged checks. This information was never disclosed to Mr. Floyd's trial or resentencing counsel.

In its Answer Brief, the State argued that this information was not Brady because there was no evidence that it could have been obtained with due diligence (Answer Brief at 32). The trial court also said Mr. Floyd failed to show or allege that counsel did not have this evidence or could not have obtained it with any reasonable diligence through public records (PC-R. at 146).

On March 14, 1984, Martin Murry, Mr. Floyd's first trial counsel, made a motion and demand for discovery (RS. 12). This

[6]Brady v. Maryland, 373 U.S. 83 (1963).

request shows that trial counsel diligently requested discovery.

But no evidence of other suspects was ever presented at Mr. Floyd's trial or resentencing. Either Mr. Murry obtained the police report and failed to use it, or Mr. Murry never obtained it because the State withheld the information. This information was either withheld pursuant to Brady or trial counsel was ineffective for failing to discover this information.

If defense counsel knew or should have known of this evidence, Mr. Floyd received ineffective assistance of counsel. The evidence was not presented to the jury. In either event, Mr. Floyd is would be entitled to relief. State v. Gunsby, 670 So. 2d 920, 924 (Fla. 1995)["In the face of due diligence on the part of Gunsby's counsel, it appears that at least some of the evidence presented at the rule 3.850 hearing was discoverable through due diligence at the time of trial. To the extent, however, that Gunsby's counsel failed to discover this evidence, we find that his performance was deficient under the first prong of the test for ineffective assistance of counsel."]

This police report containing the Brady material was not made a part of the record on appeal nor was it submitted into evidence at trial. The police report was given to the Court by the State Attorney in 1999 and was used at that time to deny Mr. Floyd relief on this claim. This report has not been authenticated in any court proceeding. There was no showing that

trial counsel received a copy of this police report at trial or resentencing. Yet, in denying relief, the trial court relied on this extra-record material to say that Mr. Floyd failed to show or allege that counsel did not have this evidence or could not have obtained it with any reasonable diligence through public records (PC-R. at 8).

Any reliance by the lower court and the State on such non-record information defeats any argument that an evidentiary hearing is not warranted. See, e.g. Clark v. State, 491 So. 2d 545 (Fla. 1986).

The allegations contained in Mr. Floyd's motion are not "mutually inconsistent" in terms of establishing a cognizable claim for relief. Mr. Floyd was denied an adversarial testing. State v. Gunsby. At a minimum, an evidentiary hearing is warranted because there is a factual dispute. Without an evidentiary hearing, the trial court must take this allegation as true, but failed to do so. Fla. R. Crim. P. 3.850; Lemon v. State, 498 So. 2d 923 (Fla. 1986). The trial court also was confused about when pubic records are available to counsel. Trial counsel was not entitled to public records before or during trial. Only in post-conviction, when public records become available, did post-conviction counsel eventually learn and obtain this Brady material. See, State v. Kokal, 562 So. 2d 324 (Fla. 1990).

Moreover, claims involving Brady violations can only be brought in a collateral proceeding because they involve facts that are not "of record." See, Muhammad v. State, 603 So. 2d 488, 489 (Fla. 1992)(claims arising under Brady are proper in a Rule 3.850 motion); Breedlove v. State, 580 So. 2d 605 (Fla. 1991)(extensive discussion of Brady in post-conviction setting); Demps v. State, 416 So. 2d 808, 810 (Fla. 1982) (Brady violations properly bought in a Rule 3.850 motion); Gorham v. State, 597 So. 2d 782 (Fla. 1992) (defendant's conviction and death sentence reversed in postconviction and new trial ordered due to Brady violations).

In its Answer Brief, the State conceded that trial counsel was ineffective when he deposed Detective Engleke and could have asked about other suspects, but failed to do so (Answer Brief at 33). But trial counsel he had no good faith basis for asking the questions. He did not know a witness had seen two white men at the victim's house. It is not defense counsel's obligation to ferret out exculpatory evidence. It is the State's duty to disclose.

This factual dispute is not resolved by the record and an evidentiary hearing should have been granted on this claim. The State fails to suggest how trial counsel could have been more diligent than he had already been. He requested discovery. The State simply did not follow Brady.

ARGUMENT III -- JUDICIAL DISQUALIFICATION

Mr. Floyd sought the disqualification of Judge Richard Luce because of ex parte contact he had with the State Attorney in summarily denying Mr. Floyd relief in his Rule 3.850 Motion.

In its Answer Brief, the State conceded that "Although the subsequent filing may suggest that some communication between the court staff and the prosecutor may have occurred....there is no basis for further speculation that the judge himself contacted the State to supply requested information" (Answer Brief at 39-40). However, how else would the State have known what documentary evidence to provide to the court?.

There is no indication that the court staff was responsible for the communication. The materials provided by the State were not addressed to a staff attorney, but to the judge himself (PC-R. at 845). Moreover, this was not simply an administrative matter, like changing the date of a hearing. The judge was preparing to deny Mr. Floyd relief but needed the assistance of the State Attorney to get additional records. All of this occurred without the knowledge of Mr. Floyd. Mr. Floyd did not have the opportunity to provide records or information to the contrary.

This was not simply an administrative issue, it dealt with substantive evidentiary support for the judge's denial of the Rule 3.850 motion. Counsel for Mr. Floyd should have been noticed

about the communication and not kept out of the process. The court's order was not its own, but a rehashing of the State's response. The ground alleged in the motion to disqualify were ground that created a reasonable fear to Mr. Floyd that Judge Luce could not be fair and impartial. Mr. Floyd's fears are reasonable. See, Riechmann v. State, 2000 WL 205094 (Fla. Feb. 24, 2000); Porter v. State, 723 So. 2d 191 (Fla. 1998); Thompson v. State, 731 So. 2d 1235 (1998).

CONCLUSION

For the foregoing reasons, Mr. Floyd prays that this Court will reverse the trial court's order summarily denying his claims for post-conviction relief and remand for a full evidentiary hearing or vacate the convictions and sentences, including his sentence of death, and remand for a new trial.

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 October 30, 2000.

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