Filing # 116890887 E-Filed 11/18/2020 02:06:34 PM

RECEIVED, 11/18/2020 02:07:43 PM, Clerk, Supreme Court

IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case No.: SC20-1036

Lower Tribunal Case No.: 591993CF3237AOOOXX

EDWARD JAMES,
Appellant,

v.
STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY[1]

This is a capital case and Mr. James is under two sentences of death. Heightened standards of due process apply. *See Elledge v. State*, 346 So. 2d 998 (Fla. 1977), *Furman v. Georgia*, 408 U.S. 238 (1972) and *Gregg v. Georgia*, 428 U.S. 153 (1976).

Mr. James went without counsel in state court from April 22, 2003 until February 11, 2019 when the circuit court granted the unopposed motion filed by Capital Collateral Regional Counsel—Middle region and appointed undersigned counsel's office to represent him.

The State argues in its answer brief that all claims raised in Mr. James' successive motion are either time-barred, procedurally barred, refuted by the record, or without merit and that the circuit court properly denied the motion without an evidentiary hearing. (AB: 10-31).[2] Mr. James respectfully disagrees. The circuit

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[1] This reply will address only the most salient points argued by the State in its answer brief. Mr. James relies upon his initial brief in reply to any argument or authority argued by the State that is not specifically addressed in this reply.

[2] The following will be used to cite to the record: The first three volumes of the thirteen-volume record on appeal, comprising the pleadings, court notices, status conferences and motions hearings will be referenced as "RP" followed the volume and page number: (RP1:1). Transcripts from the penalty phase will be referenced as "T" followed by the volume and page number: (T1:1). The record on the initial post-conviction proceedings will be referenced as "PCR1" followed by the page number: (PCR1:1). The record from this successive post-conviction proceeding will be referenced as "PCR2" followed by the page number: (PCR2:1) and references to Mr. James' initial brief and the State's answer brief will be referenced as "IB" followed by the page number and "AB" followed by the page number.

court should have ordered an evidentiary hearing to receive evidence on claims filed that were not conclusively rebutted by the record.

ARGUMENT I

FAILURE TO PRESENT AVAILABLE DEFENSES AND URGING APPELLANT TO PLEAD TO CAPITAL CHARGES AND AUTOMATIC AGGRAVATION

Counsel had a duty to fully investigate the case, challenge the state's evidence and present defenses. Instead, they conceded arguments at every turn and did not provide the "guiding hand of counsel" envisioned by the United States Supreme Court in *Powell v. Alabama*, 287 U.S. 45 (1932). Trial counsel has a "duty to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Specifically, counsel has a duty to investigate in order to make the adversarial testing process meaningful. *Id.* At 690. "An ineffective assistance of counsel claim has two components: A petitioner must show that counsel's performance was deficient and that the deficiency prejudiced the defense. To establish deficient performance a petitioner must demonstrate that counsel's representation 'fell below an objective standard of reasonableness.'" *Id.* at 687-88.

Mr. James received two death sentences for crimes described by Justice Anstead in his concurring opinion from the direct appeal (joined by two other justices) as "the classic horror story with needless tragic consequences that we read

about in our papers and tell to our citizens as we implore them to avoid the use of drugs-especially psychedelic and hallucinogenic ones like LSD." *James v. State*, 695 So. 2d 1229, 1238 (Fla. 1997) (Anstead, H.L., concurring, joined by Kogan, G. and Shaw, L.). Troubled by this aberrant conduct by Mr. James, Justice Anstead further opined, "Other than this crazed killing spree itself, there is no credible evidence in the record that this defendant, . . ., was capable of the acts in question, absent the use of the mind-altering drugs apparently involved." *Id.* This otherwise inexplicable conduct by Mr. James due to his use of dangerous and mind-altering drugs and alcohol on the night of the offenses and in the months before the offenses, his long-standing use of drugs and alcohol since his early teens, and his memory deficits about the events of that night should have prompted trial counsel to investigate and present to a jury a voluntary intoxication defense. Indeed, trial counsel discussed raising an intoxication defense with Appellant and directed him not to cut his hair as they were going to have his hair examined for the presence of LSD. (Deposition of Gary Andersen, PCR2: 324-325). Counsel subsequently told Mr. James that they could not obtain the testing and that he was free to get his hair cut. (*Id.*) At the time of these offenses, there was available a defense of voluntary intoxication that could have been argued during the guilt phase. The State excuses trial counsel's abandonment of that defense and argues that the better "strategy" for trial counsel was to concede the crimes and hope for mercy with an explanation from

experts and lay witnesses that Appellant was under the influence of alcohol and hallucinogenic drugs at the time of the murders. (AB: 22).

However, by entering those guilty or no contest pleas, Appellant unknowingly conceded the existence of two of the three aggravating circumstances found by the trial court in imposing the death sentences: that the murders were committed during the commission of a felony and that he was contemporaneously convicted of violent felonies. Had the circuit court ordered an evidentiary hearing, Appellant would have testified that if he had been made aware that his admissions to the crimes would prove these aggravating circumstances, he would have not pleaded guilty.

More importantly, had Appellant insisted on a trial and offered a voluntary intoxication defense, counsel could have explained Appellant's tragic conduct with testimony from Jere Pearson about his observations that Appellant had ingested at least ten LSD "hits" and then had experts explain to the jury the synergistic effects of the alcohol and LSD. If nothing else, the foundation would have been laid for mitigation before that same jury if it had found Appellant guilty of the capital crimes in the first phase.[3] Instead counsel urged Appellant to plead guilty to all offenses with no concessions by the State and then failed to establish credible evidence of

[3] This was not a case where trial counsel would have been in the almost impossible position of arguing a defense in the guilt phase that was inconsistent with the defense in the penalty phase, such as a denial of the crimes in the guilt phase and a plea for mercy because the defendant was a "good guy" in the penalty phase.

Appellant's LSD ingestion. Sound strategy decisions must be based on a thorough and competent investigation. That did not happen here.

The State argues that trial counsel had no duty to ensure the presence of its key witness, Jere Pearson, at trial in a sober state to testify to Appellant's ingestion of large amounts of LSD. Pearson was the one witness who could establish that Appellant was under the influence of LSD at all material times. His testimony was critical to establish the necessary foundation for Dr. Buffington's testimony about the synergistic effect of the drugs and alcohol Appellant ingested that night. Appellant could not remember all the drugs he took that night, according to statements he made to Dr. Guttman. Pearson could have supplied that vital information to the jury.

And contrary to the State's argument, it is not unreasonable for competent trial counsel for either side to get their witnesses to trial in a presentable, sober state. Trial counsel acknowledged he had done it in the past. An investigator for the defense could have made those arrangements. Instead, Tim Dick, the son of one victim and the uncle of the other, delivered Pearson to court in an intoxicated state. Any credibility of Pearson was undermined by his appearance in court in a drunken state and by the trial court's obvious displeasure with him. Any witness's credibility would be undermined under those circumstances and the use of a prior statement by Pearson made during a discovery deposition could not unring that bell. Indeed, the

trial court refused to find that the defense had established that Appellant was under the influence of LSD on the night of the murders. *James*, *supra* at 1238.

Next, the State argues that the failure of trial counsel to raise questions at trial about the conduct of Tim Dick would not have mattered because of the overwhelming evidence of Appellant's guilt. (AB: 23). However, had trial counsel presented testimony from witnesses Keith McCauley and Sandra Dichiari who were readily available at the time of trial, those witnesses could have given support for an argument to the jury that Mr. Dick encouraged Appellant in his inebriated and drug-crazed state to kill his mother for Mr. Dick's gain and that Tim Dick had exposed himself to the child victim and her sister in close time to the murders. (IB: 11-12). This probably would have mitigated the acts, demonstrated inconsistencies in the State's witnesses testimony, and convinced more jurors to recommend life.

Particularly egregious was counsel's urging of Appellant to plead guilty or no contest to all counts on the unfounded hope that the state would present an abbreviated version of the gruesome facts of this case. Instead, the State spared no details of the crimes in its jury presentation. Counsel missed a golden opportunity to show the jury in a guilt phase the extraordinary alcohol and LSD abuse by Mr. James and have experts explain his aberrant behavior. Horrific facts, such as these here, do not dictate a death sentence. *See Porter v. McCollum*, 130 S.Ct. 447 (2009) (McCollum murdered his former girlfriend and her new boyfriend and the

sentencing court found four aggravating circumstances); *Wiggins v. Smith*, 123 S.Ct. 2527 (2003) (Wiggins drowned an elderly woman in her apartment during a burglary); and *Colorado v. Holmes,* 12 CR 1522 (Colo. 2012) (Holmes massacred twelve movie-goers in an Aurora, Colorado theater).

An evidentiary hearing would have proved these points.

ARGUMENT II

FAILURE TO CHALLENGE THE COMPETENCE OF APPELLANT TO PLEAD TO CAPITAL CHARGES AND PROCEED TO A PENALTY PHASE JURY TRIAL

Despite numerous red flags that Mr. James was using dangerous, mind-altering drugs and alcohol on the night of the offenses and for months before, his long-standing use of drugs and alcohol since his early teens, a history of multiple head injuries, his memory deficits of the events of that night, and his mental health issues, trial counsel never challenged his competence to plead to two murders and stand trial in the penalty phase.

Incompetence to proceed is an absolute bar to proceeding in any criminal case, especially in a double capital murder. *See* Fla. R. Crim. P. 3.210(a). The criminal trial of an incompetent defendant violates due process. *Drope v. Missouri*, 420 U.S. 162, 171 (1975). This due process right cannot be waived. *Pate v. Robinson,* 383 U.S. 375, 384 (1966).

> [A] person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to

> consult with counsel, and to assist in preparing his defense may not be subjected to a trial. . . . [T]he prohibition is fundamental to an adversary system of justice.

Drope, 420 U.S. at 171-72. The test for assessing a defendant's competency is whether he "ha[d] sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he ha[d] a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402 (1960). At the time of Mr. James' plea, penalty phase, and sentencing proceedings, no competency evaluations were conducted, and no competency hearing was held. Mr. James' counsel did not request—and the trial court did not sua sponte order—a competency evaluation or competency hearing.

Trial counsel was objectively deficient for failing to raise this issue and prejudice is presumed as incompetent defendants may not be proceeded against under federal and Florida laws.

The trial court found in its order appealed from and the State argues that the competence issue was waived because it was not raised in a timely manner. (PCR2: 570-74, AB: 23-25). That would mean that Appellant would have to had raised the issue himself. Undersigned counsel could not have raised this issue because her office was not appointed to represent Mr. James until February 11, 2019. Had the circuit court ordered an evidentiary hearing, counsel could have presented evidence

of Appellant's incompetence at that time. It is absurd to expect Mr. James to have raised his incompetence on his own.

ARGUMENT III

APPELLANT WAS INCOMPETENT TO WAIVE HIS INITIAL POSTCONVICTION PROCEEDINGS

Initial postconviction counsel had access to all records relied upon by undersigned counsel that would have led them to investigate Appellant's competence before and at the time of his pleas and penalty phase trial and during the postconviction proceedings. Incompetence to proceed in capital postconviction proceedings suspends the action unless and until the defendant is restored to competence under Rule 3.851(g), Fla. R. Crim. P.

Mr. James was not actually competent to waive his post-conviction proceedings. In addition to the impairments Mr. James had at trial, he was under stressors related to being incarcerated under a death sentence, isolated from family and other sources of emotional support, and his solitary confinement on death row.

The circuit court should have ordered an evidentiary hearing on this claim.

CONCLUSION AND RELIEF SOUGHT

Mr. James has been on death row for more than twenty-five years and without counsel for nearly sixteen of those years. Mr. James, through years of drug and alcohol abuse starting when he was a teenager, and with a history of head injuries and mental illness, pleaded guilty or no contest to some crimes he could not explain

and others he could not remember. Three of seven justices of this Court found his conduct inexplicable but for his use of LSD and other drugs and alcohol on the night of these offenses. Had the jury been presented a full defense, it is probable that the results of the trial would have been different, that the jury would have accepted an intoxication defense or voted to spare Mr. James' life, meeting the standard of prejudice required under *Strickland*, *supra* at 687.

Based on the foregoing, the circuit court improperly summarily dismissed Appellant's successive motion and his case should be remanded for an evidentiary hearing on all issues if it is determined that he is competent to proceed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic service to Patrick Bobek, (Patrick.Bobek@myfloridalegal.com and cappapp@myfloridalegal.com); Stewart Stone, Asst. State Attorney (SStone@sa18.org) and by U.S. Mail to Edward James, DOC # 969121, Union Correctional Institution, P. O. Box 1000, Raiford, FL 32026 on this date, November 18, 2020.

Respectfully submitted,

_/s/ Karin L. Moore

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing reply brief of Appellant was generated in Times New Roman 14-point font, pursuant to Fla. R. App. P. 9.100 and 9.210.

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