

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1351

CHARLES FINNEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

This reply brief covers issues II, V & VI of Mr. Finney's initial brief. As to the remaining issues Mr. Finney relies upon the argument and law presented in the initial brief.

TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
 ISSUE II	
APPELLEE IS INCORRECT IN STATING THAT THE TRIAL COURT DID NOT ERR IN SUMMARILY DENYING MR. FINNEY’S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO OBJECT TO PROSECUTORIAL COMMENTS AND ARGUMENTS	1
THE PROCEDURAL BAR ISSUE	1
THE CUMULATIVE EFFECTS DOCTRINE	2
 ISSUES V & VI	
THE APPELLEE IS INCORRECT IN ASSERTING THAT THE TRIAL COURT DID NOT ERR IN SUMMARILY DENYING MR. FINNEY’S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO PRESENT MITIGATION WITNESSES	5
CONCLUSION AND RELIEF SOUGHT	8
CERTIFICATE OF SERVICE	9
CERTIFICATE OF COMPLIANCE	10

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Brown v. State,</u> 755 So.2d 616 at 623 (Fla. 2000)	1
<u>Brown v. State,</u> 593 So.2d 1210 (Fla. 2 nd DCA 1992)	3
<u>Carabella v. State,</u> 762 So.2d 542 (Fla. 5 th DCA 2000)	4
<u>Defreitas v. State,</u> 701 So.2d 593 (Fla. 4 th DCA 1997)	2
<u>Freeman v. State,</u> 717 So.2d 105 (Fla. 5 th DCA 1998)	4
<u>Freeman v. State,</u> 761 So.2d 1055 (Fla. 2000)	5
<u>Garron v. State,</u> 528 So.2d 353 (Fla. 1988)	3
<u>Gaskin v. State,</u> 737 So.2d 509, 515 (Fla.1999)	8
<u>Jackson v. Dugger,</u> 633 So.2d 1051 (Fla. 1993)	7
<u>Kelley v. State,</u> 761 So.2d 409 (Fla. 2 nd DCA 2000)	3
<u>Lecray v. Dugger,</u> 727 So.2d 236 (Fla. 1998)	6
<u>Mills v. Dugger,</u> 507 So.2d 602 at 604 (Fla. 1987)	1
<u>Overton v. Florida,</u> 531 So.2d 1382 at 1387 (Fla. 1 st DCA 1988)	1
<u>Pacifico v. State,</u> 642 So.2d 1178 (Fla. 5 th DCA 1994)	4
<u>Pollard v. State,</u> 444 So.2d 561 (Fla. 2 nd DCA 1984)	4

Ryan v. State,
509 So.2d 953 (Fla. 4th DCA 1984) 3

Spencer v. State,
645 So.2d 377 at 383 (Fla. 1994) 2

Stephens v. State,
748 So.2d 1028, (Fla.1999) 4

Taylor v. State,
640 So.2d 1127 (Fla. 1st DCA 1994) 4

Teffeteller v. Dugger,
734 So.2d 1009 (Fla. 1990) 1

ISSUE II

APPELLEE IS INCORRECT IN STATING THAT THE TRIAL COURT DID NOT ERR IN SUMMARILY DENYING MR. FINNEY'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO OBJECT TO PROSECUTORIAL COMMENTS AND ARGUMENTS

Mr. Finney alleged in his initial brief that the trial court erred in summarily denying his 3.850 claims that counsel was ineffective for failing to object to prosecutorial comments in voir dire and in closing argument; misstatement of the law; and improper closing argument. In the answer brief Appellee incorrectly asserts that these claims are procedurally barred and are without merit. As will be demonstrated below these claims are not procedurally barred and the trial court did not apply the proper legal standard when assessing the prejudice to Mr. Finney caused by the prosecutorial misconduct.

THE PROCEDURAL BAR ISSUE

Contrary to the assertions of the Appellee, ineffective assistance of counsel claims for failing to object to prosecutorial misconduct are contemplated by Rule 3.850 and have been recognized by Florida courts as a legal basis for bringing a postconviction action. See Overton v. Florida , 531 So.2d 1382 at 1387 (Fla. 1st DCA 1988); Brown v. State ,755 So.2d 616 at 623 (Fla. 2000); Mills v. Dugger, 507 So.2d 602 at 604 (Fla. 1987); Teffeteller v. Dugger, 734 So.2d 1009 (Fla. 1990).

The fact that the prosecutorial misconduct alleged in the

3.850 motion occurred "on the record" is not a legal basis to deny the claims. It is the actions of the defense counsel for failing to object that are the subject of the ineffectiveness claim. Since no objections were made the substance of the prosecutorial comments were not preserved for direct appeal review and are not now procedurally barred.

THE CUMULATIVE EFFECTS DOCTRINE

The answer brief in this case repeats the error of the trial court in the analysis of the prosecutorial misconduct claims brought by Mr. Finney in his 3.850 motion. Both the trial court's order denying the 3.850 claims and the answer brief address each instance of prosecutorial misconduct in isolation when assessing whether they deprived Mr. Finney of a fair and impartial trial, materially contributed to the conviction, were so harmful or fundamentally tainted as to require anew trial, or were so inflammatory that they might have influenced the jury to reach a more severe verdict than it would have otherwise (the standard enumerated by this Court in Spencer v. State , 645 So.2d 377 at 383 (Fla. 1994)). It is a well settled principle of Florida law that a court must address the cumulative impact of all improper comments or actions by the prosecutor in determining their impact on the fairness of the trial. In Defreitas v. State, 701 So.2d 593 (Fla. 4th DCA 1997) the Fourth District stated:

Measuring the prosecuting attorney's conduct
in the instant case by the aforementioned well

settled standard, we are persuaded that appellant has been denied one of his most precious constitutional rights, the right to a fair criminal trial, by the **cumulative effect** of one prosecutorial impropriety after another one. Furthermore, we are equally persuaded that the **cumulative effect** of the numerous acts of prosecutorial misconduct herein were so prejudicial as to vitiate appellants entire trial. In addition, we are likewise persuaded beyond question that the **cumulative effect** of the numerous acts were of such a character that neither rebuke nor retraction could have or would have destroyed there sinister influence. The prosecutorial misconduct, taken in its entirety and viewed in its proper context, is of such a prejudicial magnitude that it enjoys no safe harbor anywhere in the criminal jurisprudence of this state. Accordingly, we find fundamental error.

Id. at 600 (*emphasis added*).

Other Florida cases also hold that the cumulative effect of the prosecutors comments or actions must be viewed in determining whether a defendant was denied a fair trial. See Brown v. State, 593 So.2d 1210 (Fla. 2nd DCA 1992) (holding that a combination of improper comments made by the prosecutor in closing argument amounted to fundamental error); Kelley v. State, 761 So.2d 409 (Fla. 2nd DCA 2000) (holding that the **cumulative effect** of the prosecutors improper comments and questions deprived Kelley of a fair trial) (*emphasis added*); Garron v. State, 528 So.2d 353 (Fla. 1988); Ryan v. State, 509 So.2d 953 (Fla. 4th DCA 1984) (holding that prosecutorial misconduct amounts to fundamental error and is excepted from the contemporaneous objection/motion for mistrial

rule, when the prosecutors remarks, **when taken as a whole** is of such character that its sinister influence could not be overcome or retracted) (*emphasis added*); Freeman v. State, 717 So.2d 105 (Fla. 5th DCA 1998); Pacifico v. State, 642 So.2d 1178 (Fla. 5th DCA 1994) (holding that the **cumulative effect** of prosecutorial misconduct during closing argument amounted to fundamental error) (*emphasis added*); Taylor v. State, 640 So.2d 1127 (Fla. 1st DCA 1994); Carabella v. State, 762 So.2d 542 (Fla. 5th DCA 2000) (holding that the **cumulative effect** of improper prosecutorial comments during closing argument was so inflammatory as to amount to fundamental error) (*emphasis added*); Pollard v. State, 444 So.2d 561 (Fla. 2nd DCA 1984) (holding that the court may look to the **"cumulative effect"** of non objected to errors in determining "whether substantial rights have been affected") (*emphasis added*).

The above case law establishes that the trial court erred in failing to assess the cumulative effect of the prosecutors misconduct in this case. This is a legal, not a factual error and is afforded no presumption of correctness under Stephens v. State, 748 So.2d 1028, (Fla.1999) and is subject to de-novo review by this court. In conducting the de-novo review this court should assess the cumulative effect of the prosecutorial misconduct in accordance with the law contained in the cases cited above.

ISSUES V & VI

THE APPELLEE IS INCORRECT IN ASSERTING THAT THE TRIAL COURT DID NOT ERR IN SUMMARILY DENYING MR. FINNEY'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO PRESENT MITIGATION WITNESSES

In the answer brief Appellee asserts that the trial court was under no legal obligation to conduct an evidentiary hearing on Mr. Finney's ineffectiveness claims which were based upon failure to present available mitigation evidence. The Appellee asks this Court to rely upon cases which are not on point and which do not hold that a trial court should not conduct an evidentiary hearing in circumstances such as in the present case.

Appellee relies upon Freeman v. State, 761 So.2d 1055 (Fla. 2000) in asserting that this Court should affirm the summary denial of the ineffectiveness claims because the claims do not offer specific facts of mitigating evidence which could have been presented or how such evidence could have effected the outcome of the case. The Appellees reliance on Freeman is misplaced. Freeman involves a claim of ineffectiveness for defense counsel's failure to call a witness to state that the defendant had told her that he did not intend to kill the victim. Id. at 1062. This Court held that the claim was insufficient and did not warrant an evidentiary hearing because Freeman was convicted of felony murder and the intent for the murder is inferred from the underlying felony. Id.

Thus the ineffectiveness claim concerned an issue that was irrelevant as a matter of law and no evidentiary hearing was required. Freeman does not address the issue of the factual sufficiency of a 3.850 motion and is irrelevant to this Court's consideration of the need for an evidentiary hearing in the present case.

The Appellee further relies upon Lecray v. Dugger, 727 So.2d 236 (Fla. 1998) for the proposition that an evidentiary hearing was not warranted in this case. However, Lecray is distinguishable from the case at bar. In Lecray this Court found the trial court properly applied the law in denying an evidentiary hearing where the allegations in the 3.850 motion were wholly conclusory without any basis in fact. Id. at 239. The defendant claimed that there was a wealth of information that was available that defense counsel should have presented yet the defendant failed to detail the nature and source of the evidence. Id.

In contrast to Lecray , the 3.850 motion filed by Mr. Finney is not wholly conclusory without any basis in fact. Specific witnesses with knowledge of Mr. Finney's character were listed in the motion and these witnesses were not called at the sentencing portion of the trial. Those witnesses included Anastasia Jones, Jo Ann Nelson, Otis Williams, Katherine Richardson, Rev. Billy Stubbs, Jamie Wesley, Lynn Wesley and Joyce Wesley. These witnesses were not cumulative but were instead corroborative of important

nonstatutory mitigation evidence put forth on Mr. Finney's behalf.

The Appellees reliance on Jackson v. Dugger, 633 So.2d 1051 (Fla. 1993) is also erroneous. Jackson is a pre-Huff case and would not be applicable to the present case where a Huff hearing was held by the lower court. In the present case the lower court is obligated to consider all arguments presented at the Huff hearing when assessing the need for an evidentiary hearing. Further, in Jackson this Court found the defendant's bare allegations of failure to present mitigation to be legally insufficient to warrant an evidentiary hearing. Id. at 1054. In contrast, Mr. Finney expressly states in his 3.850 motion that the mental health expert, Dr. Michael Gamache, was not provided adequate information to complete his evaluation. Specific witnesses are identified that were not provided to Dr. Gamache. Those witnesses were Katherine Richardson, Rev. Billy Stubbs, Jamie Wesley, and Lynn Wesley. Further, Mr. Finney specifically alleged that had this information been provided to the expert he could have presented evidence at sentencing phase that he was suffering from extreme emotional or mental disturbance at the time of the offense. The fact that the motion does not state that Dr. Gamache's testimony would "change" is irrelevant. Mr. Finney specifically asserted in his 3.850 that he could establish the existence of mental health mitigators that were not found at trial and he should be given that opportunity at an evidentiary hearing.

Charles Finney was entitled to an evidentiary hearing on this ineffective assistance of counsel claim because the motion and record do not clearly show that he was not entitled to relief. In Gaskin v. State, 737 So.2d 509, 515 (Fla.1999) this Court held:

While the postconviction defendant has the burden of pleading a sufficient factual basis for relief, an evidentiary hearing is presumed necessary absent a *conclusive* demonstration that the defendant is entitled to no relief. In essence, the burden is upon the state to demonstrate that the motion is legally flawed or that the record conclusively demonstrates no entitlement to relief. The rule was never intended to become a hindrance to obtaining a hearing or to permit the trial court to resolve disputed issues in a summary fashion.

Gaskin, 737 So.2d at 516. The state made no such demonstration in Mr. Finney's case.

CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, the lower court improperly denied Charles Finney's rule 3.850 relief. This Court should order that his convictions and sentences be vacated and remand the case for such relief as the Court deems proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant has been has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this _____ day of _____, 2001.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Reply Brief of Appellant, was generated in Courier New, 12 point font, pursuant to Fla. R. App. P. 9.210.

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