IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1435

ANTHONY NEAL WASHINGTON,

Appellant,

v.

STATE OF FLORIDA

Appellee.

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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The following symbols will be used to designate references to the record in the instant case:

"R." – The record on direct appeal to this Court.

"PC-R." – The record on instant 3.850 appeal to this Court.

ARGUMENT I

THE LOWER COURT ERRED IN DENYING MR. WASHINGTON'S CLAIM THAT MR. WASHINGTON WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, AND AS A RESULT, MR. WASHINGTON'S DEATH SENTENCE IS UNRELIABLE.

A. COUNSEL WAS INEFFECTIVE FOR FAILURE TO PRESENT MITIGATING EVIDENCE.

Appellee argues:

> Appellant...with 20/20 hindsight pontificates that drug use should have been presented at the Spencer hearing. Appellee would note that the sentencing order was filed in September of 1992, prior to this Court's instruction in Spencer v. State, 615 So.2d 688 (Fla. 1993). Counsel need not anticipate future developments in the law and this Court has acknowledged that Spencer is not to be given retroactive effect. See, e.g. Armstrong v. State, 642 So.2d 730, 738 (Fla. 1994); Pittman v. State, 646 So.2d 167, 172 (Fla.) 1994).

(Answer Brief, 44). (Emphasis in original).

Appellee correctly states that Spencer was decided after Mr. Washington's sentencing. However, Appellee's belief that the procedure set out in Spencer to allow a defendant an opportunity to present additional evidence prior to sentencing does not apply in Mr. Washington's case is incorrect. Spencer was not a "future development in the law" (Answer Brief, 44). It was merely a restatement of this

Court's decision in Grossman v. State, 525 So.2d 833 (Fla. 1988).

In Spencer this Court stated:

> **In *Grossman***, we directed that written orders imposing the death sentence be prepared prior to the oral pronouncement of sentence. However, we did not perceive that our decision would be used in such a way that the trial judge would formulate his decision prior to giving the defendant an opportunity to be heard. **We contemplated that the following procedure be used in sentencing phase proceedings. First, the trial judge should hold a hearing to:** a) give the defendant, his counsel, and the State, and opportunity to be heard; b) **afford, if appropriate, both the State and the defendant an opportunity to present additional evidence**; c) allow both sides to comment on or rebut information in any presentence or medical report; and d) afford the defendant an opportunity to be heard in person. Second, after hearing the evidence and argument, the trial judge would then recess the proceeding to consider the appropriate sentence. If the judge determines that the death sentence should be imposed, then, in accordance with section 921.141, Florida Statutes (1983), the judge must set forth in writing the reasons for imposing the death sentence. Third, the trial judge should set a hearing to impose the sentence and contemporaneously file the sentencing order.

Spencer, at 690, 691. (Emphasis added).

The Grossman decision clearly contemplated a Spencer-type hearing for presentation of additional mitigation evidence. Grossman predates Mr. Washington's sentencing date.

In addition, Appellee's citation to Armstrong and Pittman for the holding that Spencer is not to be given retroactive effect in this case

is both inapplicable and incorrect.[1]

The retroactive application of Spencer is not relevant in Mr. Washington's case because the trial court provided defense counsel with the opportunity to present additional mitigation evidence in writing

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[1]Armstrong concerned only the prospective application of Spencer to a trial court's prepared sentencing order. This Court stated:

> Moreover, the record reflects that the trial judge allowed Armstrong an opportunity to present evidence at the sentencing hearing....We therefore hold that any defendant who was sentenced before our decision in Spencer, **and who was provided a full and fair opportunity to present evidence at the sentencing hearing**, cannot challenge,...a sentencing order on the grounds that the trial judge prepared the order before the sentencing hearing....**[B]ecause Armstrong was provided with a full and fair opportunity to present evidence at the sentencing hearing**,...we deny this claim.

Armstrong, at 738.

Likewise, Pittman does not state that the requirement of a Spencer hearing is not to be given retroactive effect. This Court, in fact, found that the defendant had been given an opportunity to present additional evidence to the court, as required by Spencer:

> In addition we have reviewed the record and find that Pittman was given an opportunity to present evidence to the judge concerning his sentences. In fact, Pittman called to the court's attention an error in the sentencing scoresheet and succeeded in having his sentence reduced on the arson charges. After that, the judge asked whether the State or the defense had anything to say before sentencing on the three murder convictions.

Pittman, at 172.

and at a Spencer-type hearing prior to the sentencing date. Unfortunately for Mr. Washington, defense counsel neglected to take advantage of the numerous opportunities provided by, and in fact, requested by the trial court to supply additional mitigation evidence.

As Appellee points out in a footnote on page 44 of the Answer Brief, the trial court requested, and received a defense sentencing memorandum (R. 1530-36) and a defense supplemental sentencing memorandum (R. 1553-56). Most importantly, the trial court held a separate hearing on August 14, 1992, prior to the September 4, 1992 sentencing date, for the defense to provide additional mitigation evidence. The trial court described the purpose of the hearing at the sentencing date:

> The Court held a separate sentencing hearing on August 14th, 1992...**to allow the Defense the opportunity to present any additional mitigating factors**, also to provide both sides with any additional argument that they might wish to present. And one last time, to give the Defendant any opportunity he might wish to make a statement.
>
> Thus, at the conclusion of that hearing, the Court felt that all testimony, evidence and argument had been presented with the exception of the State's – I'm sorry, the Defense's request by co-counsel to submit a second memorandum listing and discussing additional nonstatutory mitigation.

(R. 1929-30). (Emphasis added).

At the Spencer-type hearing on August 14, 1992, the trial court specifically asked defense counsel to provide additional mitigation

evidence, including Mr. Washington's history of drug abuse:

> THE COURT: I'm asking you all certain things. I would ask you folks if you have any additional information that you wish to present regarding this sentencing...

(R. 1883).

Later in the hearing the trial court addressed defense counsel:

> THE COURT: Any other evidence to be presented or offered today for the defense?
>
> MR. McCOUN: No, ma'am.

(R. 1894).

The trial court again asked defense counsel about mitigating circumstances:

> THE COURT: Anything else the defense wishes to present?
>
> MR> McCOUN: No, ma'am.

(R. 1913).

Defense counsel's unreasonable failure to provide the available, additional non-statutory mitigation evidence allowed the trial court to override the jury life recommendation and sentence Mr. Washington to death. Counsel was ineffective. Prejudice is clear.

B. COUNSEL WAS INEFFECTIVE FOR FAILING TO PROVIDE MR.

WASHINGTON'S MENTAL HEALTH EXPERT WITH ADEQUATE BACKGROUND INFORMATION TO PERMIT A MEANINGFUL EVALUATION OF MR. WASHINGTON FOR THE PRESENCE OF MITIGATION OR INTOXICATION AND/OR DRUG ABUSE NEGATING SPECIFIC INTENT.

Appellee does not contest the unrebutted testimony of Dr. Sprehe regarding Mr. Washington's substance abuse disorder, a non-statutory mitigator. Instead, Appellee reproduced the trial judge's order denying relief:

> This court is very familiar with Dr. Merin. He has been used by me as an expert witness in my law practice and has testified in my court on numerous occasions. He is an excellent witness, as is obvious by the result he helped to obtain in this case. **Defendant's newly acquired doctor added nothing to what Dr. Merin found except drug dependency**...

(Answer Brief, 47). (Emphasis added).

Both the trial court and Appellee concede Dr. Sprehe's testimony, after receiving adequate background information, established the unrebutted non-statutory mitigator of drug dependency, which would have provided a reasonable basis for the jury's life recommendation.

Counsel's failure to provide Mr. Washington with a competent psychological evaluation was deficient performance which prejudiced Mr. Washington. Had counsel provided a competent psychological examination such as Dr. Sprehe's, the trial court would not have been able to override the jury's will and impose a sentence of death. Confidence in the outcome is undermined. Strickland, 466 U.S. at 461.

C. COUNSEL'S INEFFECTIVE FAILURE TO PRESENT MITIGATING EVIDENCE CAUSED THE SENTENCING COURT'S INABILITY TO FIND AND APPLY VARIOUS MITIGATING CIRCUMSTANCES VIOLATING THE EIGHTH AMENDMENT.

Appellee argues that Mr. Washington is asking this Court to revisit the trial court's 1992 sentencing order and apply Keen v. State, 775 So.2d 263 (Fla. 2000). Appellee is incorrect.

In fact, Mr. Washington asks this Court to apply Tedder v. State, 322 So.2d 908 (Fla. 1975), as clarified by Keen, which was decided during the pendency of this appeal, to the trial court's order denying relief on Mr. Washington's Rule 3.850 motion. See Florida East Coast Railway Company v. Rouse, 194 So.2d 260 (Fla. 1966), ("[A]n appellate court, in reviewing a judgment on direct appeal, will dispose of the case according to the law prevailing at the time of the appellate disposition, and not according to the law prevailing at the time of rendition of the judgment appealed") Id. at 262; Smith v. State, 598 So.2d 1063 (Fla. 1992), ("Thus, we hold that any decision of this Court announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of this state in every case pending on direct review or not yet final. To benefit from the change in law, the defendant must have timely objected at trial if an objection was required to preserve the issue for appellate review") Id. at 1066; Clay v. Prudential Insurance Company, 670 So.2d 1153 (Fla.

1996).[2] Thus, Appellee's argument and citation to Mills v. Moore, 786 So.2d 532 (Fla. 2001), is inapplicable to the instant facts. Mills was a *habeas* attack on an original sentencing order from 1979. Mills argued that Keen was new law and, therefore, should be applied retroactively to the 1979 sentencing order. In Mr. Washington's case, Keen is the law prevailing during the pendency of the order appealed.

[2]In this case, Mr. Washington could not object at the time of the evidentiary hearing because the lower court did not enter the order until seven (7) months after the evidentiary hearing.

ARGUMENT AS TO REMAINING CLAIMS

Anthony Washington relies on argument presented in his initial appeal regarding these issues.

CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, the lower court improperly denied Mr. Washington's Rule 3.850 relief. This Court should order that his conviction and sentence be vacated and remand the case for a new trial, penalty phase, evidentiary hearing, or 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 ***1st day of October, 2001***.

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CERTIFICATE OF COMPLIANCE

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

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