IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-2248

HARRY FRANKLIN PHILLIPS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR MIAMI-DADE COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENT I

SUMMARY DENIAL OF MR PHILLIPS' RULE 3.850 MOTION

The State contends that trial counsel's failure to investigate and present evidence of Mr. Phillips' brain damage, low IQ and mental retardation was not ineffective. In particular, the State contends that Mr. Phillips' counsel was not ineffective for failing to investigate Mr. Phillips' brain damage. The State bases this contention on the allegation that "both Drs. Carbonell and Toomer believed that Defendant was probable (sic) brain damaged and that Dr. Carbonell did perform the neuropsychological tests that Dr. Toomer recommended". Answer brief at 41.

The State's contention however is based on a profound lack of understanding as to the nature and purpose of neuropsychological testing. Contrary to the State's assertion, the testing performed by neither Dr. Carbonell nor Dr. Toomer constituted a standard classic neuropsychological battery. Neither Dr. Toomer nor Dr. Carbonell was a qualified neuropsychologist. While they opined that Mr. Phillips was "probably" brain damaged, they were not able to quantify the nature, location or effect of that brain damage with any specificity or detail. And as is well documented in Mr. Phillips' brief, Dr. Carbonell never saw Mr. Phillips in connection with the 1994 resentencing, never did any testing, and never testified. Dr. Toomer spent only a single hour with Mr. Phillips after being appointed as an expert for Mr. Wax in 1993.

Furthermore, neither Dr Carbonell nor Dr. Toomer is a medical doctor. Neither of them were able to perform a neurological evaluation in 1994 to supplement the minimal testing that was done. As Mr. Phillips has argued, had

neurological testing been performed in addition to a proper neuropsychological battery, the jury would have been shown hard evidence of Mr. Phillips brain damage, its nature, etiology and the effects on Mr. Phillips behavior. Failure so to do constituted profoundly deficient performance given the circumstances that resulted in Mr. Phillips only having the benefit of a single hour of expert contact.

In addition, resentencing counsel did not properly investigate Mr. Phillips' mental retardation. As the State notes, in addition to low IQ, to prove mental retardation a defendant must show impairment in adaptive functioning. However, although the State parrots a laundry list of the materials that Dr. Toomer reviewed, it fails to note that neither Dr. Carbonell nor Dr. Toomer did any objective testing of Mr. Phillips' adaptive functioning. They did not conduct any objective tests, nor did they conduct interviews in 1993-1994 of family members, friends schoolteachers or others who had known Mr. Phillips during his formative years. Rather than

being able to conduct an independent investigation through interviews and tests of Mr. Phillips' close associates, they were merely spoon fed with materials that had been prepared by resentencing counsel. Counsel's failure to ensure that his experts conducted a proper in depth review of Mr. Phillips adaptive functioning meant that the experts could not render a proper opinion as to his mental retardation.

Contrary to the State's assertion, resentencing counsel did not investigate Mr. Phillips' brain damage, low IQ and mental retardation adequately, and thus he rendered deficient performance. Under Strickland v. Washington, 466 U.S. 668 (1984), "[t]o establish ineffectiveness, a defendant must show that counsel's representation fell below an objective standard of reasonableness," Strickland at 688. By refusing to allow Mr. Phillips to present competent evidence of counsel's failure to properly investigate Mr. Phillips' mental retardation, low IQ and brain damage, the lower court prevented Mr. Phillips from presenting all the evidence

available as to trial counsel's deficient performance. Only after the evidence has been presented to the lower court at an evidentiary hearing can a proper analysis of the qualitative and quantitative differences between the evidence that was available but not investigated and that which was actually put on be undertaken by the lower court. Such is the purpose of evidentiary hearings.

The use of medical and other mental health testimony to establish deficient performance is well established in post conviction litigation. For example, in Lockett v. Anderson, 230 F. 3d 695 (5th Cir. 2001), the Fifth Circuit Court of Appeals noted that "[t]he medical evidence [introduced at the evidentiary hearing] similarly indicates that Lockett's possible problems were inadequately investigated" Lockett at 712. As the doctor hired in Lockett testified, "[b]ased on the medical and other records which were available in 1986 at the time of Carl's original trial, if I had been hired as an expert for Carl, I would have advised that the aforementioned tests to evaluate the extent of Mr. Lockett's brain damage

and/or other mental disorders be given to provide mitigating evidence at his sentencing trial" Lockett at 712. The same considerations apply equally to Mr. Phillips' case. Mental health mitigation which was qualitatively and quantitatively superior to that presented at trial was available, had trial counsel chosen to investigate it. Given an evidentiary hearing on the matter, Mr. Phillips can prove deficient performance on the part of resentencing counsel.

The State's argument that the evidence of brain damage, low IQ and mental retardation has already been presented is clearly refuted by the facts noted in Mr. Phillips' brief and by reference supra. Clearly if counsel had conducted follow up investigation to enhance and substantiate the testimony of Dr. Toomer the outcome would have been different. This is especially the case here, where the jury recommendation was only 7-5 for death. Had only one more juror voted for a life sentence, the recommendation would have been for a life sentence. It is peculiarly within the province of the jury to sift

through the evidence, assess the credibility of the witnesses and determine which evidence is most persuasive. There is a vastly superior quality and quantity of evidence that could be presented by Mr. Phillips at an evidentiary hearing and ultimately at a new sentencing proceeding. Without conducting such an evidentiary hearing, and given the 7-5 recommendation, the lower court's summary denial of Mr. Phillips's claims ignored the fact that the evidence that could be presented, if heard by the 1994 jury would have tilted the balance in favor of life.

Contrary to the State's veiled assertion, resentencing counsel's omissions were not based on strategy or tactic. No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, see, Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991), or on the failure to properly investigate or prepare. See, Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991); Kimmelman v. Morrison, 477 U.S. 365 (1986). See also, Rose v. State, 675 So. 2d 567 (Fla. 1995); Hildwin v. Dugger, 654 So. 2d

107 (Fla. 1995); Deaton v. Dugger, 635 So. 2d 4 (Fla. 1994). There is "no doubt that [resentencing counsel's] failure to conduct an adequate investigation hampered his ability to make strategic decisions regarding the penalty phase". See Battenfield v. Gibson, 236 F. 3d 1215, 1228 (10th Cir. 2001).

This Court has often found both deficient performance and prejudice despite the presentation of limited mitigation at the penalty phase. For example, in State v. Lara, 581 So. 2d 1288 (Fla. 1991), the Court affirmed a Dade circuit court's grant of penalty phase relief to a capital defendant where the defendant presented evidence that, as the State conceded in that case, was "quantitatively and qualitatively superior to that presented by defense counsel at the penalty phase." Id. at 1290. Mr. Phillips should be allowed the opportunity to do likewise.

The type of evidence that Mr. Phillips pleaded and could have presented at an evidentiary hearing is similar to that which has given rise to penalty phase relief in

several instances. In 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"). Given an evidentiary hearing, Mr. Phillips can similarly establish statutory and non statutory mitigation which could and should have been presented at his penalty phase.

Mr. Phillips met his burden under Fla. R. Crim. P. 3.850 in order to show the need for an evidentiary hearing. As noted by this Court, "[w]hile the post conviction 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". Gaskin v. State, 737 So. 2d 509 (Fla. 1999). "This Court has indicated on numerous occasions that a defendant is entitled to an evidentiary hearing on his initial postconviction motion unless (1) the motion, files and records in the case conclusively show that the defendant is entitled to no relief or (2) the motion or

a claim is legally insufficient. Cook v. State, (2001 WL 721070). Whether ineffective assistance of counsel is alleged the defendant must establish a prima facie case that there was a deficient performance by counsel and that there is a reasonable probability that the deficient performance affected the outcome of the proceeding. Mr. Phillips has met his burden under this standard. See also Peede v. State, 743 So. 2d 253, 258 (Fla. 1999) ("To uphold the court's summary denial of claims raised in a Rule 3.850 motion the claims must be either facially invalid or conclusively refuted by the record". 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. Id. See also Arbelaez v. State, 775 So. 2d 909 (Fla. 2000). An evidentiary hearing is warranted.

ARGUMENT II

THE CLAIM REGARDING THE MENTAL RETARDATION STATUTE IS PROPERLY BEFORE THE COURT AND HAS MERIT

The State contends that the claim that Mr. Phillips is

precluded for execution by the recently enacted statute is procedurally barred because it should have been raised below. In fact, Mr Phillips has consistently challenged the constitutionality of his death sentence and asserted his mental retardation. The fact is that a statute newly enacted in 2001 gives added authority to Mr. Phillips' long held position. The State's position that this argument is procedurally barred suggests that counsel could have anticipated the passage of the act in question at the time he was forced to file his postconviction motion in December 1999. In fact Mr. Phillips motion did state that "[c]ontemporary society's attitude toward a particular punishment should be measured by as much objective evidence as possible" and then cited to Penry v. Lynaugh, 492 U.S. 302, 331 (1989).

The Florida ban on execution of the mentally retarded statute was passed in June 2001, long after Mr Phillips was denied relief by the lower court. For Mr. Phillips to have pleaded the 2001 statute in 1999 with specificity when his Rule 3.850 motion was filed would have required

a crystal ball or other such instrument of clairvoyance. The State's contention in this regard is simply absurd.[1]

The State's argument is particularly distressing in that it makes much of the fact that the Florida law is prospective only in nature. However, the State blatantly ignores the problems with this aspect of the statute. In Fleming v. Zant, 386 S.E. 2d 339 (Ga. 1989), the Georgia Supreme Court was presented with a similar enactment precluding the execution of one found to be mentally retarded. However, the statute was only intended to apply to capital proceedings that began after July 1, 1988. As the Georgia Supreme Court noted, "On its face, the statute does not apply to Son Fleming who was tried more than ten years ago". Id. at 341. After full briefing and oral

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[1]Appellant notes that since his Initial Brief was filed, the United States Supreme Court has substituted a new case on certiorari regarding the Federal Constitutionality of the execution of the mentally retarded, Atkins v. Virginia, 2001 WL 1149397 (U.S.) for McCarver v. North Carolina, 121 S. Ct. 1410 (2001), following action by the North Carolina General Assembly and Governor Mike Easley in 2001 retroactively and prospectively ending the use of the death penalty for the mentally retarded in that state.

argument the Georgia Supreme Court held that "although there may be no 'national consensus' against executing the mentally retarded, this State's consensus is clear" Id. at 342. Thus the execution of the mentally retarded sentenced to death before the statute's effective date violated the Georgia Constitution's prohibition against cruel and unusual punishment. The prospective nature of the Florida statute violates the equal protection and due process clauses of the United States Constitution and the corresponding provisions of the Florida Constitution. Relief should not be withheld on this ground.

The State next claims that this argument is refuted because the statute is limited to persons with mental retardation and Mr. Phillips is not retarded. As a general principle, how is anyone to prove mental retardation without a hearing? Judicial economy would appear to dictate a return to circuit court to resolve the issue of Mr. Phillips' retardation at an evidentiary hearing as soon as possible, rather than waiting to take advantage of the procedures in the new statute at some

later date in the likely event that this Court (or the United States Supreme Court pursuant to Atkins v. Virginia) should hold that execution of the mentally retarded is per se unconstitutional. However, as Mr. Phillips notes in Argument 1 supra, given an evidentiary hearing on counsel's failure to investigate and properly present strong evidence of his mental retardation, he can prove that he is in fact mentally retarded. The State's position here is nothing short of an oxymoron. On the one hand, it retreats in horror at the thought of Mr. Phillips being offered the opportunity to prove inter alia his retardation, but then claims that Mr. Phillips has not proven his mental retardation. This argument is, in fact, strong additional support for the need for an evidentiary hearing, against the State's stated position. A full evidentiary hearing and relief should be granted.

ARGUMENT III - PUBLIC RECORDS

The fact that the State's Brief takes nine pages to attempt to refute Mr. Phillips' two page public records argument is telling. The State's position regarding the

actions of the lower court flies in the face of the actual events related to Mr. Phillips case. The State's position that due diligence required more than what CCRC South did in regards to obtaining Mr. Phillips public records from the repository is nonsense. A reality check is badly needed.

It is ludicrous to suggest that in the face of counsel's repeated blanket requests to the Commission on Capital Cases (predecessor to the Secretary of State's repository) for paper copies of all the records produced to the Commission, that counsel could have done more. The Commission was backed up for months with requests for copies of records that had been produced for all three CCRC offices. For most of that period, including the period noted in Mr. Phillips' brief, CCRC staff were specifically prohibited from copying anything held at the repository, even if they made the long trip from South Florida to Tallahassee. The "staff" at the repository then charged with reproducing the materials were volunteer law students from the Florida State University School of

Law that had been retained on the cheap. Lawyers visiting the repository were allowed only to make notes, not to make copies.

CCRC-South is not located in Tallahassee. Counsel for Mr. Phillips did not "do nothing" as the State erroneously charges. Quite to the contrary, Mr. Phillips' counsel did everything that was possible to get the records into the Miami/Ft. Lauderdale offices during 1999. The finding by the trial court that CCRC had "deliberately delayed" was an unfair and prejudicial finding by a lower court that had an agenda unknown to Mr. Phillips.

Mr. Phillips detailed his complaints about the public records process extensively in his 3.850 motion, in a motion to disqualify the trial court, and in a subsequent Writ to this Court. Pursuant to Fla. R. Crim. P. 3.852(e)(2), the State Attorney for the Eleventh Judicial Circuit did file a *Notice of Compliance By State Attorney* in the Circuit Court stating that "all public records in my possession have been copied, sealed, indexed, and delivered to the records repository..." At the same time,

the State Attorney also filed a *Notice of Delivery of Exempt Public Records to Records Repository*. Both of these Notices were served on Neal Dupree, the CCRC-South on or about January 19, 1999.

On February 26, 1999, Neal Dupree, CCRC-South, sent a letter to the Commission on Capital Cases, a creation of the Legislature, requesting copies be provided pursuant to Rule 3.852 of **all** the records in the Archives in **all** CCRC-South cases. That correspondence was followed up by a letter on March 23, 1999, signed by CCRC-South Litigation Director Todd Scher, specifically directed to the Bureau of Archives as to the status of the public records in Mr. Phillips' case. Counsel never received transmittal forms from the repository until September 24, 1999, the day **after** a status hearing before Judge Ferrer on September 23, 1999. One of the transmittal sheets received from the repository on September 24, 1999 noted that the records provided to the repository by Florida Department of Corrections included confidential records which were sealed. So there was no way that the public records

process could possibly have been completed under these circumstances unless and until counsel: (1) had 60 days to review all public records that were actually produced on paper directly to counsel through the process that had been set in place; (2) requested and received any supplemental records discovered through review of what was produced; (3) and only then was required to file a 3.850 motion.

During the status hearing before Judge Ferrer on September 23, 1999 (the day before CCRC received the transmittal about the DOC records) CCRC-South director Neal A. Dupree, an administrator attorney who never has carried a case load, appeared to explain that Mr. Phillips had been without assigned counsel since Kenneth Malnik left CCRC-South in late July 1999 to return to private practice. Only during that hearing, did the status of the public records in Mr. Phillips' case become an issue between the parties. Mr. Dupree advised the lower court that he was unaware of **any** records that had been received by the repository because no transmittal notices

had been received from the Archives. In addition, he knew of no records that had been copied or provided by the Florida Legislature's Commission on Capital Cases, the Legislative agency then responsible for duplicating the archival records and providing the copies to the three CCRC offices in Ft. Lauderdale, Tallahassee and Tampa per the terms of a prior agreement intended to fulfill the explicit terms of Rule 3.852.

At the conclusion of the September 23, 1999 hearing, Judge Alex Ferrer ordered that Mr. Dupree file a final 3.850 motion in Mr. Phillips' case on or before December 2, 1999, and he also set a Huff hearing in the case for January 6, 1999. At this point, as it turned out, the only public records that had actually been physically duplicated and provided to CCRC-South in Mr. Phillips' case were the State Attorney files.

On September 27, 1999, Mr. Dupree sent the following correspondence to Assistant State Attorney Penny Brill:

September 28, 1999

Penny Brill
Assistant State Attorney
1350 N.W. 12 Avenue
Miami, Florida 33136

Re: State v. Harry Phillips, Case No. 83-435

Dear Ms. Brill,

Pursuant to what I had conveyed to you in our telephone conversation on September 24, 1999, I am writing this letter to inform you that after the status hearing on the 23th of September, and based upon your representation that records from the State Attorney's Office were sent to the repository, we found three boxes of records that appear to be files from your office which were sent from the repository. During our telephone conversation on the 24th of September, you had informed me that you do not believe these records to be from the repository but were State Attorney files that were sent to Mr. Phillips's prior attorney, Mr. Billy Nolas. These three boxes were found among the numerous boxes that CCRC-S has received from Mr. Nolas in the last several months. As I informed the court at the status hearing, CCRC-S did not receive any transmittal notices from the repository notifying CCRC-S that the records regarding Mr. Phillips were in fact in Tallahassee at the repository. Upon further investigation, I was informed by Elena Richburg, the Capital Postconviction Records Archivist, that

> prior to February 11, 1999, it was not the policy of the Records Archive to send transmittal notices to any of the CCRCs. See Attachment A. Since that time, CCRC-S has requested the repository to provide us with notice of records being received at the repository, See Attachment B, as well as a blanket request for all records to be delivered to our office. See Attachment C. Regarding this case, CCRC-S was not informed from the repository that records regarding Mr. Phillips were at the archives.
>
> Subsequent to the status hearing, I contacted Mr. Ken Malnik, Mr. Phillips's former lead attorney. Mr. Malnik informed me that he was not aware that CCRC-S received any records from the repository nor did he receive notice from the repository that records were in their possession. I apologize for any inadvertent misrepresentation to the court regarding Mr. Phillips's records. However, without the transmittal notices, we were not aware which records were received at the repository.
>
> Sincerely,
>
> Neal A. Dupree
> CCRC-S

The important point is that the records at issue in

this correspondence were **only** those from the State Attorney. It was not until October 19, 1999 that CCRC-South received six (6) additional bankers boxes of records from the repository that included **additional records** from the Dade County State Attorney, and initial production from the Miami-Dade Police Department and the Florida Department of Corrections.

Yet another delivery of two folders of records in Mr. Phillips' case were received through Federal Express on October 27, 1999. These records were not labelled and counsel has never been able to determine what agency produced them to the repository. The Commission on Capital Cases also supplied these copies to CCRC-South.

Just why the lower court made a finding of "intentional delay" directed at Mr. Dupree on September 23, 1999, months before the final initial production of records was provided to counsel has always been unclear.

This Court should certainly be aware that it was only on November 30, 1999, two months after Judge Ferrer's finding and two days prior to the "drop dead" due date for the final postconviction pleading as set by Judge Ferrer, that undersigned counsel finally received the copy of the Record on Appeal that had been provided by the Florida Supreme Court to the records repository. So counsel certainly should have been given additional time to both review the records received on October 19, October 27, and arguably on November 30, and then to request additional records pursuant to 3.852 based on these productions. This process would have provided Mr. Phillips with an additional two to three months to investigate and work on his case. Unfortunately, Judge Ferrer refused to allow counsel even a minimal thirty (30) days to review the existing records and to then file affidavits with the Court regarding additional records pursuant to Fla. R. Crim. P. 3.852(i)(1). Mr. Phillips' counsel was forced into a "bum's rush" pleading without ever gaining access to all the records that he was required to pursue. See

Steinhorst v. State, 695 So. 2d. 1245 (Fla. 1997). Judge Ferrer refused to allow any supplemental records requests at a hearing on November 17, 1999.

The State's response to Mr. Phillips' abuse of discretion argument is particularly disingenuous. The motion to withdraw was predicated on a conflict between Mr. Phillips and postconviction counsel that was set into motion by the actions of the lower court improperly forcing Mr. Phillips to file without access to all the necessary materials. Mr. Phillips has never complained to the courts about prior counsel's timeliness in providing records directly to him. The State's argument that granting the motion to withdraw "would only endorse the tactic of delaying capital post conviction proceedings" simply ignores the reality that the produced public records were not provided to Mr. Phillips, through a mechanism that had been set into place and agreed to by all the parties, until weeks and months after the September 23, 1999 hearing when Judge Ferrer first found CCRC to be "delaying." The inadequacies of this system

are not in doubt. It has been replaced by the banishment of the Commission on Capital Cases from the records business and into the netherlands of the private counsel registry. Good riddance. The fact is that Mr. Phillips had no lawyer from July until November 1999 to file motions to compel for him. And the entity that had taken on the responsibility of copying and shipping records for the CCRCs failed to do so despite repeated requests. But Mr. Phillips should not suffer because of bureaucratic inefficiencies and governmental rivalries that impacted on counsel's access to his records.

The State takes the position that there was no explanation in Appellant's Brief as to how the lower court's order denying the motion for rehearing prior to the date of the hearing on which the State had noticed the motion evidenced the lower court's bias or prejudice. The prejudice is self-evident where the State agreed to a hearing on the motion for rehearing and in fact the State contacted the judicial assistant and set the hearing date. The State did not file a response to the motion for

rehearing and never took the position now articulated in the responsive brief, that Mr. Phillips' motion "simply reargued matters that had been presented to the lower court on [the] motion for postconviction relief." At the eleventh hour the lower court cancelled the hearing **sua sponte** and issued a written order denying the motion for rehearing. The State's argument ignores the references in the motion for rehearing to new case law revitalizing Strickland that was not available at the time Mr. Phillips' postconviction motion was filed in 1999.

> [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 v. Taylor, 120 S.Ct. 1495, 1516 (2000). Mr. Phillips' motion for rehearing stressed that the new evidence of mental retardation and brain damage that would be presented from a neurologist and a mental retardation expert at an evidentiary hearing would meet this

rearticulated standard. And because the jury recommendation in Mr. Phillips' case was only seven (7) to five (5) for death, with credible expert testimony that Mr. Phillips was mentally retarded, suffers from organic brain damage, and that both statutory mental health mitigating factors were present at the time of the offense, there is a reasonable likelihood that the jury recommendation would have been six (6) to six (6).

Finally, the State's brief contains an admission that there were outstanding public records matters that should have been heard as to potentially newly discovered evidence after the summary denial. The State's speculation as to what the latter-day DOC medical records of Mr. Phillips might revel or not reveal about his mental status is additional support for an evidentiary hearing. The State is in no position to offer medical opinions or speculation regarding Mr. Phillips.

CONCLUSION

Mr. Phillips submits that relief is warranted in the form of a new trial and/or a new sentencing proceeding. At a

minimum, a full evidentiary hearing should be ordered. As to those claims not discussed in the Reply Brief, Mr. Phillips relies on the arguments set forth in his Initial Brief and on the record.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by United States Mail, first-class postage prepaid, to Sandra S. Jaggard, Office of Attorney General, Rivergate Plaza, Suite 950, 444 Brickell Avenue, Miami, FL 33131-2407, on October 19 2001.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the

font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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