IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-1460

HARRY FRANKLIN PHILLIPS,

Petitioner,

v.

MICHAEL W. MOORE,

Secretary, Florida Department of Corrections,

Respondent.

PETITIONER'S REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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REPLY TO CLAIM I RESPONSE

The essence of the State response is that Claim I is procedurally barred because it was not properly preserved, and even if it was preserved, the claim lacks merit. Notwithstanding whether resentencing counsel's motion in limine regarding the exclusion of non-statutory aggravation and his renewed update prior to Detective Smith's testimony was specific to all non-statutory aggravators, or only to Petitioner's parole history, the fact that Detective Smith was permitted to testify to irrelevant and unduly prejudicial hearsay denied Petitioner a fair resentencing. (R. 110, T. 670).

Furthermore, as detailed in Petitioner's Writ of Habeas Corpus, resentencing counsel was prevented from rebutting Detective's Smith's inaccurate testimony. Direct appeal counsel failed to properly raise this issue on appeal. The framework of Detective Smith's testimony would have been utterly undermined had resentencing

counsel been permitted to freely confront this featured witness with the proven inaccuracies of his testimony.

The State cites to Teffeteller v. State, 495 So. 2d 744 (Fla. 1986) for their position that evidence regarding guilt may be "admitted to familiarize the jury was (sic) the facts of the case" (State's Response, p.10). However, not only did the Detective Smith's testimony present prejudicial non-statutory aggravators to the jury, the testimony was especially damaging because resentencing counsel was not permitted to adequately rebut his hearsay-ridden testimony. As detailed in Petitioner's Writ of Habeas Corpus, there was an abundance of evidence resentencing counsel could have used, if permitted, to rebut the factual inaccuracies of Detective Smith's testimony. Relief is warranted.

REPLY TO CLAIM II RESPONSE

In the State's response to Claim II, the State takes the position that resentencing counsel did not allege that sentencing Defendant to death was unconstitutional because he was mentally retarded (State's Response p.14).

However, appellate counsel was aware that evidence of the possible mental retardation of Mr. Phillips had been presented at the resentencing. On page 44 in the Statement of the Case and the Facts in appellate counsel's initial brief, he recites the findings of Dr. Carbonell as follows:

> Mr. Phillips' behavior is that of an impaired individual -- "he has ...deficits in his adaptive functioning. He has life-long deficits in his ability to adapt...He has deficits in all those spheres. He's not able to cope with any adversities. He can't cope with any problems in his life. He doesn't seem to learn from his experience about what kind of behavior will keep him out of trouble and what kind will get him in trouble..."(S.R.170). "He lacks that capacity for that" (S.R.170).
>
> The margin of error on intelligence tests is plus or minus five points. **Given Mr. Phillips' history of deficits in adaptive functioning, the fact that he functions like mentally retarded individuals and the fact that his actual intelligence could be lower than an I.Q. 73 or 75, he could be classified in the mentally retarded range** (S.R.170).cf Phillips v. State, 608 So.2d 778, 783 (Fla. 1992)([E]ven [the State's] experts agreed that Phillips' intellectual functioning is at least low average and possibly borderline retarded").

Here, appellate counsel failed to raise the constitutionality of executing the mentally retarded where Penry v. Lynaugh, 492 U.S. 304 (1989) had indicated that although persons with mental retardation as a class were not then exempt from the death penalty, a societal consensus might emerge from the states in the future such that mental retardation would be considered a violation of the Eighth Amendment.

Although appellate counsel could not predict exact changes in the law, based upon the opinion in Penry appellate counsel was ineffective for failing to raise this issue where he knew evidence existed indicating that Mr. Phillips was mentally retarded. Appellate counsel was further ineffective for failing to raise this issue where mounting evidence existed demonstrating societal changes and the emerging acceptance that sentencing mentally retarded individuals to death violates the 8th Amendment to the United States Constitution[1]. Relief is warranted

[1] Petitioner notes that since his initial Petition for Habeas Corpus was filed, the United States Supreme

and would be timely.

REPLY TO CLAIM III RESPONSE

In regard to direct appeal counsel's failure to raise on appeal the issue of Dr. Miller's evaluation and subsequent testimony during the resentencing, Petitioner relies upon the arguments made in his initial Petition.

REPLY TO CLAIM IV RESPONSE

The State responds to Claim IV by stating that direct appeal counsel's failure to raise an issue regarding the denial of resentencing counsel's standing objection to the admission of autopsy photos is procedurally barred and without merit. Petitioner would note that resentencing counsel preserved the issue by moving for a standing objection to the introduction of the photos. The denial

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Court has accepted a new case to test the constitutionality of the execution of mentally retarded individuals. Atkins v. Virginia, 2001 WL 1149397 (2001) has been substituted for McCarver v. North Carolina, 121 S. Ct. 1401 (2001). The McCarver case became moot when North Carolina changed its law to retrospectively and prospectively ban the use of the death penalty as a sanction where the offender is mentally retarded.

of this motion for a standing objection should have been raised on appeal. Resentencing counsel's rationale for not renewing his objection in front of the jury when the photos were introduced, as well as the ensuing prejudice requires evidentiary development.

CONCLUSION

It is clear that several meritorious arguments were available to be raised on direct appeal, yet appellate counsel unreasonably failed to assert them. Particularly when compared with the arguments that appellate counsel did advance, the unreasonably prejudicial performance of appellate counsel is obvious. These errors, singularly or cumulatively, demonstrate that Mr. Phillips was denied the effective assistance of appellate counsel. Relief is warranted.

CERTIFICATE OF SERVICE

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

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this counsel hereby certifies that this Reply complies with the font requirements of rule 9.100(l), Fla. R. App. P.

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