IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-840

WILLIAM REAVES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT,
IN AND FOR INDIAN RIVER COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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STATEMENT OF FONT

Mr. Reaves' Reply Brief is written in Courier font, size 12.

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ARGUMENT I

The State points out that the trial court found Mr. Reaves' pleadings to be insufficiently pled and/or that the trial record supported the trial court's summary denial order concerning the ineffectiveness of trial counsel at the guilt phase and penalty phase. (State's Brief at 6)(PCR. 1089-95, 1099-1102). Mr. Reaves' position is that he has clearly met the burden under Fla. R. Crim. P. 3.850. 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). See also Peede v. State, 748 So. 2d 253 Fla. (1999). 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. Although Mr. Reaves' pleading was sufficient and adequate under the rules, he made a good faith attempt at the Huff v. State, 622 So. 2d 922 (Fla. 1993) hearing to provide supplemental information concerning several of the claims, an effort that was rebuffed by the State and the trial court. (Supp. PCR. 290-91, 306-07, 338-39, 350).

On February 9, 2000, the Court signed its order denying Defendant's Motion and referred in the summary denial order to alleged deficiencies in the Motion, including what the court described as a failure to plead the names, conclusions and opinions

of a neuropsychologist and other experts retained by postconviction counsel, "The Defendant does not identify either expert or what conclusions and opinions the experts could relate, other than that the psychologist will testify that Reaves suffers from post-traumatic stress disorder." (PCR. 1093).

Regarding the alleged failure by Mr. Reaves to plead details about the experts, the State and the trial court ignore the record. Without regard to the substantial additional information provided at the Huff hearing, the motion does provide substantial information about the opinions and potential testimony of the experts retained by postconviction counsel:

> ...[C]ounsel's failure to obtain the services of experts to explain (i) the impoverished conditions of Mr. Reaves' childhood, (ii) the racial experiences of the black soldier in Vietnam, (iii) the effects of substance abuse on victims of post-traumatic stress disorder, (iv) the duration of post-traumatic stress disorder and its effects in stressful situations, (v) the effects of chronic substance abuse on ability to form specific intent. Counsel also failed to secure the services of an expert qualified to conduct neuropsychological testing even though there were indications from the county jail in Georgia that Mr. Reaves was hospitalized shortly after his arrest complaining of head injuries. Such expert testimony and assistance was available, and would have been significant information for the jury to know. Post-conviction counsel has obtained the services of a neuro-psychologist who has evaluated Mr. Reaves. **Expert testimony at an evidentiary hearing will support the finding of at least additional non-statutory mitigating circumstances based on the neuro-psychological findings to date.** In addition, post-conviction counsel has also had a clinical psychologist examine Mr. Reaves. This psychologist is himself a black Vietnam

> veteran with special expertise in the diagnosis and treatment of post-traumatic stress disorder in veterans. **He is prepared to testify that Mr. Reaves suffers from severe post-traumatic stress disorder and does not suffer from anti-social personality disorder.** Based on the findings of these experts retained by post-conviction counsel, a substance abuse expert is also being retained.

(PCR. 39-40)(emphasis added). Additional detail concerning the prospective testimony was also included in the pleading:

> 6. Undersigned counsel has determined through the use of mental health experts who were available and **would have testified at the time of trial that Mr. Reaves' suffers from Post Traumatic Stress Disorder, brain damage and a severe addiction to drugs. The combination of P.T.S.D. and severe drug use caused Mr. Reaves to suffer from what is commonly known as dissociation (the inability of a person to have integration of action and thoughts) wherein he believes he is back in war. Mr. Reaves would have been incoherent and his ability to make proper judgements evaporated. It has also been determined that the previous diagnosis of anti-social personality disorder is wrong. Far from anti-social, Mr. Reaves is remorseful and sorrowful as was clearly indicated by his confession. Had counsel been effective the previous expert should have been given the right tools with which to make a proper diagnosis. Undersigned counsel has learned that the combination of trauma (P.T.S.D.), substance abuse and lack of knowledge in the African American culture on the part of an expert can lead a psychologist to error in their findings**:
>
> > A major assessment problem, when encountering what appears to be anti-social behavior in combat veterans, is that a personality disorder could be diagnosed although PTSD may be more accurate . . . . A thorough intake evaluation should be employed to differentiate between possible personality disorders and combat veterans with PTSD and accompanying maladaptive

behaviors.

> POST-TRAUMATIC STRESS DISORDERS: A Handbook For Clinicians, Edited by Tom Williams, Psy.D., published by the Disabled American Veterans, 1987, page 105.

7. Persistent under-reporting of the prevalence and severity of post traumatic stress disorder in Vietnam veterans continues to be an obstacle in mounting a defense based in part on the presence of PTSD. There has been serious attention given to this matter:

> Findings from the *National Vietnam Veterans Readjustment Study (NVVRS)*, a rigorously designed and executed nationwide epidemiological study of a random sample of Vietnam-era veterans and a random sample of demographically similar civilian controls, showed that 35.8 percent of male Vietnam combat veterans met the full American Psychiatric Association diagnostic criteria for PTSD at the time of the study, in the late 1980s. This many men had grossly unhealed psychological injuries, almost twenty years after their was experience. This is a thirty-two fold increase in the prevalence of PTSD compared to the random sample of demographically similar civilians. More than 70 percent of combat veterans had experienced at least one of the cardinal symptoms ("partial PTSD") at some time in their lives, even if they did not receive the full syndrome diagnosis.
>
> JONATHAN SHAY, M.D., PH.D., ACHILLES IN VIETNAM: COMBAT TRAUMA AND THE UNDOING OF CHARACTER 168 (1994).

In recent years, increasing attention has been given to the problem of diagnosticians and experts mistaking the symptoms of PTSD for antisocial personality disorder, as occurred in Mr. Reaves' case:

> Regardless of when they were first seen, most of my patients have also been

> diagnosed with borderline or antisocial personality disorder, as well as other personality disorders. I do not believe the official PTSD criteria capture the devastation of mental life after severe combat trauma, because they neglect the damaging personality changes that frequently follow prolonged, severe trauma. The World Health Organization's *Classification of Mental and Behavioral Disorders* offers the category "Enduring personality change after catastrophic experience," defined as these personality features that did not exist before the trauma:
>
> (a) a hostile or mistrustful attitude toward the world;
> (b) social withdrawal
> (c) feelings of emptiness or hopelessness
> (d) a chronic feeling of being "on the edge," as if constantly threatened;
> (e) estrangement.
>
> More than simply inflicting the set of symptoms described in DSM-III-R, prolonged combat can wreck the personality. Id at 169.

(PCR. 46-49)(emphasis added). In addition to the proffered testimony, the references to other sources were provided to counsel by the experts and their inclusion was intended to supplement the pleadings. Thus Mr. Reaves' pleading, standing alone, provided ample description of the prospective testimony, certainly sufficient to meet the pleading requirements. At the Huff hearing counsel also specifically proffered that an African American psychologist that been retained who had diagnosed Mr. Reaves with Post-Traumatic Stress Disorder and that he would testify as to the presence of statutory mitigation based on five different tests for PTSD. (Supp. PCR. 337-339). Mr. Reaves should be granted an

evidentiary hearing so that the expert witnesses can be heard and in order to create a complete record.

In Gaskin v. State, 737 So.2d 509, footnote 10 (Fla. 1999), the Supreme Court delineated that evidentiary hearings are necessary as follows:

> . . . Specifically, the trial court denied Gaskin's claims of ineffective assistance of guilt and penalty phase counsel, in part because he failed to name the witnesses he intended to call and state whether they were available to testify. Contrary to the trial court's finding however, there is no requirement under rule 3.850 that a movant must allege the names and identities of witnesses in addition to the nature of their testimony in a postconviction motion. Rather, rule 3.850 merely requires the motion to state the judgment or sentence under attack, whether there was an appeal from the judgment and the disposition thereof, whether a previous postconviction motion was filed and, if so, the reason the claims in the present motion were not filed in the former motion, the nature of the relief sought, and a brief statement of the facts relied upon in support of the motion. See Fla. R. Crim. P. 3.850(c).
> In Valle v. State, 705 So.2d 1331 (Fla. 1997), we held it was error for the trial court to summarily deny Valle's 3.850 motion on the basis that no supporting affidavits had been submitted:
>
> > Rule 3.850(c), which sets forth the contents of a 3.850 motion, requires a movant to include a brief statement of the facts (and other conditions) relied on in support of the motion. Fla. R. Crim. P. 3.850(c)(6). However, nothing in the rule requires the movant to attach an affidavit or authorizes a trial court to deny the motion on the basis of a movant's failure to do so.
>
> Id. at 1334. Likewise, nothing in the rule states that a movant must allege the identities of the witnesses, the nature of their testimony, or their availability to testify. It is during the evidentiary hearing that Gaskin must come forward with witnesses to substantiate the allegations raised in the postconviction motion. Therefore, we hold that it was error for the trial court to require Gaskin to plead the identities of witnesses in order to be entitled to a hearing.

Mr. Reaves should be treated no differently than Gaskin and therefore should be permitted to present the facts alleged in his Motion during an evidentiary hearing. The findings in the trial court's summary denial order are plainly erroneous.

This Court recently clarified that a claim under Strickland v. Washington, 466 U.S. 668 (1984), "is a mixed question of law and fact, subject to plenary review." Stephens v. State, 748 So. 2d 1028, 1032 (Fla. 1999). While a reviewing court applies the "competent and substantial evidence" standard to a trial court's factual findings and credibility determinations, the ultimate legal determination of both deficient performance and prejudice are mixed questions and the appellate court owes no deference to lower court rulings and must perform *de novo* review. Further, in assessing the deference afforded to factual findings, **review of the entire record is also required**. See Way v. State, 760 So. 2d 903 (Fla. 2000)(emphasis added)(concluding that lower court's finding that Brady evidence had been disclosed to trial counsel was not supported by competent and substantial evidence). This Court, as the trial court failed to do, should take into account all the additional material presented at the Huff hearing as well as the material cited above. (Appellant's Initial Brief at 13). It is clear that under the appropriate standard of review, ignored by the Appellee, that Mr. Reaves will prevail on his Strickland claim if he is allowed to develop his case in an evidentiary hearing.

Dr.Weitz, the defense mental health expert at trial, did find

both statutory mental health mitigators. (R. 2052). And the State's Brief points out that in the summary denial of Mr. Reaves postconviction motion the trial court relied on this fact and the fact that the jury was instructed on both mental health mitigators as proof that trial counsel's use of mental health experts was not deficient performance. (State's Brief at 5). The State ignores the fact that trial counsel failed to address mitigating circumstances in his closing argument at the penalty phase. (R. 2299-2312). But despite the credentials and credibility that the State imputes to Dr. Weitz in their Brief, Judge Balsiger found no statutory mitigation. (R. 3009-36). The State's Brief simply does not respond to the meat of Mr. Reaves penalty phase ineffectiveness argument. Dr. Weitz's performance as a mental health expert was substandard and deficient on its own terms and included an demonstrably outright misdiagnosis of Mr. Reaves as antisocial personality disorder based on the then existing diagnostic criteria. Weitz also failed to find that Mr. Reaves suffered from PTSD, a finding that is directly contradicted by the experts retained by postconviction counsel. These issues would, of course, have been features of the expert testimony at an evidentiary hearing. However, these glaring diagnostic errors were only symptomatic of the host of problems with the mental health evaluation of Mr. Reaves and the trial counsel's preparation of the penalty phase case. The prejudice to Mr. Reaves that ensued from Dr. Weitz's testimony is clear. Weitz failed to properly diagnose Mr. Reaves' major mental illness on Axis I; he provided a false but

damaging finding of antisocial personality disorder that buttressed the testimony of the State's expert, Dr. Cheshire; and, the result was that his testimony failed to convince the court that there was any statutory mitigation.

In an attempt to refute the obvious prejudice to Mr. Reaves, the State's Brief argues that the family members and friends testimony that was presented at trial refutes the claim that trial counsel failed to conduct an adequate investigation into Mr. Reaves family background. (State's Brief at 18). The trial court's order summarily denying postconviction relief regarding the social history/family history portion of the penalty phase ineffective assistance of counsel claim stated that,". . .the source of this narrative is not identified, so it is impossible for the Court to determine whether a particular witness did testify at trial, or whether the witness would have been available." (PCR. 1099). At the Huff hearing counsel for Mr. Reaves explained the source of the narrative. (Supp. PCR. 340-41).

Judge Balsiger's sentencing order after trial detailed the relevance and weight he gave to the testimony at trial from family and friends:

> [T]he only testimony concerning his family and community background, and it dealt primarily with his life up until the age of 15 or 16. The Court has weighed and considered these factors and also instructed the jury that it could consider any other aspect of the defendant's character or record. The court finds this view of the defendant's younger years is deserving of some consideration, but on balance it carries little weight, as a mitigating circumstance.

(R. 3022). So although it is true that defense counsel presented some limited family mitigation testimony at the penalty phase in this case, Mr. Reaves case is similar to Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995), where this Court found prejudice despite a unanimous death recommendation and also found that "Hildwin's trial counsel did present some evidence in mitigation at sentencing" but that it was "quite limited." Id. at 110 n.7. The selection of witnesses would obviously be different at Mr. Reaves' evidentiary hearing when the expert testimony that family witnesses are intended to support would include a neuropsychologist, a clinical psychologist, and a substance abuse expert. And as outlined in the Initial Brief, the importance of the total absence of serious cross-examination of the State's military experts at the penalty phase cannot be overemphasized. This Court has often found 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. The circuit judge found that the failure to present the type and quality of evidence that had been adduced at the hearing prejudiced the defendant. Id. at 1289. Mr. Reaves should be allowed the opportunity to present his evidence at a hearing.

The State's position is that Mr. Reaves' reliance on Hildwin

is misplaced. The State argues that there is no prejudice because trial counsel did present some mitigation at Mr. Reaves' penalty phase, therefore there was not a complete failure of counsel to conduct any investigation into mitigation. (State's Brief at 10).

In a special concurrence in Hildwin, Justice Anstead noted that the postconviction judge, who was not the original sentencing judge, struggled with the issue of prejudice precisely because he was not the original sentencing judge. Id. at 111-12 (Anstead, J., specially concurring, in which Kogan, C.J., and Shaw, J., joined). Justice Anstead noted that the postconviction judge was hesitant to grant relief, even though he felt that no adversarial testing had occurred, because he believed that the trial judge would have imposed the death penalty notwithstanding the compelling additional mitigation. Id. Justice Anstead wrote:

> We should all pause to consider the magnitude of this disclosure. When trial judges take an oath to uphold the law, that includes taking on the responsibility for sentencing in capital cases, including the potential for imposition of the death penalty in those cases where the circumstances mandate its application in accord with legislative policy and judicial restraints. However, such a decision is controlled by the circumstances of each particular case, and cannot be made until those circumstances are developed through the detailed sentencing process required in capital cases. The constitutional validity of the death sentence rests on a rigid and good faith adherence to this process. Confidence in the outcome of such a process is severely undermined if the sentencing judge is already biased in favor of imposing the death penalty when there is "any" basis for doing so. Such a mindset is the very antithesis of the proper posture of a judge in any sentencing proceeding.

Id. at 112. As in Hildwin, in Mr. Reaves' case the trial judge who sentenced Mr. Reaves to death after finding no statutory mitigation did not preside over his postconviction case. The judge who signed the summary denial order never heard any of the additional evidence in mitigation that was pled. The type of evidence that Mr. Reaves pleaded should have been developed and presented at an evidentiary hearing and is similar to that which has given rise to penalty phase relief in several instances. See: Phillips v. State, 608 So. 2d 778, 783 (Fla. 1992) (prejudice established by "strong mental mitigation" which was "essentially unrebutted"); Mitchell v. State, 595 So. 2d 938, 942 (Fla. 1992) (prejudice established by expert testimony identifying statutory and nonstatutory mitigation and evidence of brain damage, drug and alcohol abuse, and child abuse); State v. Lara, 581 So. 2d 1288, 1289 (Fla. 1991) (prejudice established by evidence of statutory mitigating factors and abusive childhood); 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. Reaves can similarly establish statutory and non statutory mitigation which could and should have been presented at his penalty phase. He can thus establish prejudice.

The State argues that the failure to discover a marijuana cigarette was not argued as a Brady violation in Appellant's postconviction motion, but rather solely under Strickland and should therefore be procedurally barred. (State's Brief at 40-41).

In fact the argument in paragraph 27 of Claim III is buttressed by a specific cite to Brady in paragraph 3 of the same claim. (PCR. 487,466).

ARGUMENT V

As noted in Mr. Reaves' Initial Brief, a request to interview jurors in support of the juror misconduct claim was included in his 3.850 motion, along with a brief description of the allegation and the source. (Appellant's Brief at 59). Because the source was not clear to the State, the State's position is that the claim was not in good faith and that counsel was required to append the pleading with affidavits, presumably from trial counsel, the source of the allegations. The trial court agreed and in its order denying relief as to the juror misconduct claim found, "The defendant does not identify the source of the information . . ." (PCR. 1096). If counsel was abiding by the rules of professional conduct and acquired the information, "through investigation", that trial counsel was approached by two jurors after the trial with information about possible misconduct, the good faith source of such information would logically be the trial counsel and not the jurors. If one or more of the jurors came forward voluntarily to counsel, it would be difficult to describe such a source as "through investigation." If, in fact, Mr. Reaves' jury foreman was discussing Reaves' guilt long before deliberations began, counsel is obligated to make the claim and attempt to develop it with the assistance of the trial court. The State's argument at the Huff hearing that Mr. Reaves was restricted to the four corners

of his pleading and that it was inappropriate for the defense to bring in additional facts or evidence as to this or any other matter was relied on by the trial court in denying relief. As argued elsewhere, this Court can undertake de novo review on this issue.

ARGUMENT XI

This Court should review all Mr. Reaves' claims with an eye toward the impact of cumulative error and should err on the side of allowing a hearing in circuit court on the claims rather than upholding the summary denial. See State v. Gunsby, 670 So.2d 920 (Fla. 1996). The summary denial order of the trial court simply failed to do such a review and denied the cumulative error claim as procedurally barred. (R. 1098-99). The trial court summarily denied Mr. Reaves' motion based on findings that all the Appellant's claims were either procedurally barred or that the motion and the record conclusively demonstrate no entitlement to relief rather than allowing adjudication on the merits of his claims. (PCR. 1103).

The proper place for factual development of claims is during an evidentiary hearing in circuit court where witnesses can be called and evidence can be introduced. Mr. Reaves has been diligent in attempting to develop his claims of ineffective assistance of counsel, newly discovered evidence, and Brady violations in circuit court and remains determined to preserve his right to a hearing. See Williams (Michael) v. Taylor, 120 S.Ct. 1479 (2000). 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 at 1516. Mr. Reaves does not need to establish his claims by a preponderance of the evidence; rather the standard is less than a preponderance. Williams, 120 S.Ct. at 1519 ("[i]f a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be `diametrically different,' `opposite in character or nature,' and `mutually opposed' to our clearly established precedent ..."). A proper analysis of prejudice also entails an evaluation of the totality of available mitigation--both that adduced at trial and the evidence presented at subsequent proceedings. Id. at 1515. Mr. Reaves was foreclosed by the summary denial of his postconviction petition from ever making a showing of the totality of available mitigation. This Court should take into consideration the fact that the jury recommendation of death in the case was not unanimous, rather it was a ten (10) to two (2) vote. (R. 3610). If trial counsel had properly selected, prepared and used his mental health experts and family background mitigation had been presented by effective counsel to the jury, the jury probably would have returned with a life recommendation.

CONCLUSION

On the basis of the argument presented to this Court in his Initial and Reply Briefs, as well as on the basis of his Rule 3.850 motion, Mr. Reaves respectfully submits that he is entitled to 3.850 relief 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 all the claims not discussed in the Reply Brief, Mr. Reaves relies on the arguments set forth in his Initial Brief and on the record.

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on March 19, 2001.

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