IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-893

PATRICK C. HANNON,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Hannon's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The following symbols will be used to designate references to the record in this appeal:

"R" -- record on appeal to this Court;

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

"Supp. PC-R." -- supplemental record on instant 3.850 appeal to this Court.

All other citations will be self-explanatory.

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INTRODUCTION

The testimony presented in Mr. Hannon's motion for postconviction relief and at his evidentiary hearing conclusively demonstrated that Mr. Hannon's trial counsel was deficient, and Mr. Hannon was prejudiced by the deficiency. The State's representation of Mr. Episcopo as an experienced criminal trial attorney is misleading. Although Mr.Episcopo had experience as a trial attorney, the bulk of his experience was as a prosecutor and in fact, the only capital cases he tried were as a prosecutor. **Mr. Episcopo testified that Mr. Hannon's case was the first capital case he defended** (PC-R. 2696). The degree of deference given to trial counsel is based on counsel's experience at the time of trial; thus, the more experience counsel has, the greater deference counsel's decisions are given. *See*, *Chandler v. U.S.*, 218 F. 3d 1305 (11th Cir. 2000).

Although he completely lacked experience defending a capital case, he testified that he did not contact any defense attorneys who were doing death penalty work at the time, nor did he attend any death penalty seminars (PC-R. 2757). He was unfamiliar with American Bar Association Guidelines on how to conduct a death penalty case (PC-R. 2770). The record also shows that Mr. Episcopo was unfamiliar with the law. He did not know about *Ake v. Oklahoma*, 480 U.S. 68 (1985), which provides that a criminal defendant has a right to adequate professional mental health evaluation (PC-R. 2806). He also believed

that he could present lingering doubt as his defense at penalty phase. However, that defense was improper under Florida law.

Mr. Episcopo's inexperience was further evidenced by his absurd responses at the evidentiary hearing. When asked if he consulted the ABA Guidelines on how to conduct a capital case, Mr. Episopo replied "No, I'm not familiar with those guidelines. What makes them so much better than me? I don't know. The Bar Association?" (PC-R. 2770). Additionally, he was asked whether he consulted more experienced defense attorneys or had attended the Life Over Death seminar. He replied "What do you mean life over death? What are you talking about?" (PC-R. 2756-57). Furthermore, his complete lack of understanding of mental health mitigation was apparent when he stated "I can determine whether somebody's whacked" (PC-R. 2757). Mr. Episcopo elaborated that he found no basis for mental health mitigation stating "And, why would I do that anyway? We're going to get up there and say he's crazy and therefore, he shouldn't be killed? He wasn't crazy" (PC-R. 2758-59). Mr. Episcopo clearly didn't understand his role for the penalty phase.

At the evidentiary hearing, defense expert Robert Norgard testified extensively regarding the training mandated for a defense attorney representing capital defendants (PC-R. 3122). While Mr. Norgard was not familiar with the training for prosecutors who litigate capital cases, he indicated that generally,

prosecutors are kept out of defense-oriented seminars (PC-R. 3123). Certainly, the training of a prosecutor and defense counsel is different. For instance, a prosecutor is not required to prepare mitigation for a penalty phase proceeding. Thus, Mr. Episcopo's experience as a prosecutor would have little bearing on his ability to defend a capital case that goes to penalty phase. Based on Mr. Episcopo's lack of defense experience at the time of trial, and the testimony of Mr. Norgard about the minimum requirements of a defense attorney trying a capital case, Mr. Episcopo's decision should be given little deference.

ARGUMENT I

The State dutifully cites to the trial court's order summarily denying Mr. Hannon's claim that counsel was ineffective for failing to investigate state expert, Judith Bunker's background and seemingly argues the merits of the claim without addressing the standard for which an evidentiary hearing is required. The law attendant to the granting of an evidentiary hearing in a postconviction motion is oft-stated and well-settled: "[u]nder rule 3.850, a postconviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief." *Gaskin v. State*, 737 So. 2d 509, 516 (Fla. 1999). *Accord Patton v. State*, 784 So. 2d 380, 386 (Fla. 2000); *Arbelaez v. State*, 775 So. 2d 909, 914-15 (Fla. 2000). Factual allegations as to the merits of a Rule 3.850 claim must be accepted as true, and an evidentiary hearing is warranted

if the claim involves "disputed issues of fact." *Maharaj v. State*, 684 So. 2d 726, 728 (Fla. 1996). Mr. Hannon's Rule 3.850 motion was sufficiently plead and the motion and record did not refute his allegations.

The trial court's order is flawed in several respects. First, the trial court relies on this Court's direct appeal opinion in Mr. Hannon's case, to support the admissibility of Judith Bunker's testimony. *Hannon v. State*, 638 So. 2d 39, 43 (Fla. 1994). However, the issue before this Court on direct appeal was based on the admissibility of victim Snider's bloody shorts and shirt, through Judith Bunker, as it related to relevance and prejudice. This Court determined that the shorts and shirt were admissible because the "clothing was admitted into evidence and used by Bunker to explain how the murders occurred…splatter evidence was consistent and tied in with the other evidence detailing the manner of commission of the crime." *Id*. at 43. This did not address the credibility of Judith Bunker, nor does it do so in the context of an ineffective assistance of counsel claim.

Furthermore, both the State and the trial court's reliance on *Correll v. State*, 698 So. 2d 522 (Fla. 1997) is misplaced as *Correll* is distinguishable from Mr. Hannon's claim. As Mr. Hannon pointed out in his initial brief, Correll made a claim of newly discovered evidence, not ineffective assistance of counsel. Additionally, in rejecting Correll's newly discovered evidence claim, this Court found that "the fact that it is undisputed that she worked on thousands of cases

while in the employ of the medical examiner" lessens the seriousness of the discrepancies on her curriculum vitae. In his postconviction motion, Mr. Hannon alleged that Bunker's representations of her caseload were also false.

Ms. Bunker was classified as a secretary at the Medical Examiner's Office from November 30, 1970 through June 2, 1974. During this time period there is no evidence in her employment records that she had any opportunity or occasion to perform any crime scene investigations whatsoever, not to mention develop any expertise in performing blood stain pattern analysis outside of her becoming aware of the field through a State Attorney sponsored general homicide investigation seminar. Ms. Bunker was only classified as a "Medical Examiner's Assistant" from July 14, 1974 through September 27, 1981. Only from December 6, 1981 until April 30, 1982 did Ms. Bunker actually occupy the position of "Technical Specialist." And during those five brief months, that position only entailed a twenty-four hour work week. Based on this information, Bunker's claim to have examined 1, 500 to 2,000 cases a year while at the medical examiner's office between 1970-1982 is patently false.

Mr. Hannon also alleged in his postconviction motion that Ms. Bunker's misrepresentations regarding her experience went well beyond her lack of experience at the Orange County Medical Examiner's Office. Bunker also had not

lectured at the places she purported to and had not been employed at the places listed on her resume.

Here, counsel's failure to investigate Judith Bunker's background, as well as failing to adequately prepare for her testimony and cross-examine Bunker,[1] not only resulted in her testimony being admissible, but, deprived the jury of accurately determining her credibility and the weight to be given her testimony. The State and the trial court did not address Mr. Hannon's argument that had counsel investigated, prepared and adequately cross-examined Bunker, he could have impeached Bunker's credibility by showing she misrepresented her education and experience. Although the State claims that Bunker's testimony was supported by several other witnesses, it was Bunker's testimony that was used in support of the HAC aggravator. The only other witness that corroborated this aggravator was Ronald Richardson, Mr. Hannon's co-defendant with self-serving motives. The State and the trial court have ignored the significance of Bunker's testimony as it pertains to this aggravating circumstance.

[1] Mr. Hannon's claims of ineffective assistance for failing to investigate Bunker's background and his ineffective assistance claim for failing to adequately prepare and cross-examine Bunker are directly intertwined, therefore Mr. Hannon addresses both here. Although the facts of each claim are intertwined, Mr. Hannon only received an evidentiary hearing on counsel's failure to adequately prepare for and cross-examine Bunker.

ARGUMENT II

As the State noted, a claim of ineffectiveness tracks, of course, the oft-stated standard enunciated by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). However, relying on *Strickland*, the United States Supreme Court in *Williams v. Taylor*, 529 U.S. 362 (2000) and *Wiggins v. Smith*, 539 U.S. 510 (2003), explained further and looked at not whether counsel should have presented a mitigation case, but rather, whether the investigation supporting counsel's decision **not** to introduce mitigation was itself reasonable. The State attempts to distinguish *Williams* and *Wiggins* based on the mitigating facts uncovered in those cases, however, the importance of *Williams* and *Wiggins* is the holding that counsel's highest duty is the duty to investigate, present and prepare available mitigation. "Strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." *Wiggins* at 2538. The *Wiggins* Court clarified that "in assessing the reasonableness of an attorney's investigation, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Id*.

In *Wiggins*, trial counsel decided not to expand their investigation beyond a pre-sentence report and a social services report and in doing so, fell short of capital

defense work standards. Counsel's decision to stop investigating, even after learning about Mr. Wiggins' alcoholic mother and his problems in foster care, was unreasonable. The Court said that any reasonably competent attorney would have realized that pursuing such leads was necessary to making an informed choice among possible defenses. "Indeed, counsel uncovered no evidence in their investigation to suggest that a mitigation case, in its own right, would have been counterproductive, or that further investigation would have been fruitless" *Id.* Counsel's failure to investigate stemmed from inattention, not strategic judgment. *Id*. The same is true in Mr. Hannon's case.

Mr. Episopo decided to conduct no penalty phase investigation despite having knowledge of Mr. Hannon's drinking and cocaine use. Instead, Mr. Episcopo chose to continue an innocence defense, which did not work in the guilt phase, without conducting the requisite investigation to make an informed strategic choice. Trial counsel's failure to investigate stemmed not only from inattention, but also from ignorance and inexperience.

The State asserts that the issue before the Court is whether counsel's strategy was within the broad range of discretion afforded counsel responsible for the defense. However, counsel's strategy must be evaluated for reasonableness based on the facts of the case, viewed as of the time of counsel's conduct. *Strickland.* There was extensive testimony at the evidentiary hearing regarding the standards

for representing a capital defendant in 1991. Mr. Episcopo's legal errors and omissions were obvious when Robert Norgard testified as to what a reasonable death penalty attorney performance was in 1991. Mr. Norgard, a criminal defense attorney, was qualified as an expert in criminal defense with specialization in criminal defense litigation to testify about community standards in 1990-1991, at the time of Mr. Hannon's capital trial (T. 6/21/02 at 170-177). In 1990-1991, the investigation required for a first-degree murder case guilt phase was essentially no different from any other criminal case, except in a capital case, you begin looking at mitigation as you prepare your case for trial (T. 6/21/02 at 179). In 1990, if an attorney was advancing an innocence defense, that would not limit an investigation into penalty phase issues. Mr. Norgard said investigation into mitigation, even in an innocence case, should begin "well before the trial." In his final analysis, Mr. Norgard said:

> There's absolutely no reason not to present mitigation in a capital case and even in those cases you would proffer it to the Court and want to make as thorough a record as you could. Now, it's mandated by case law that you do the investigation, proffer it, even if your client doesn't want to present it. Back then it was a given that you do your penalty phase investigation.

(T. 6/21/02 at 204). Mr. Norgard's opinion was that Mr. Episcopo had failed to do what a reasonable attorney would have done in 1991.

The State argues that it was Mr. Hannon's decision to forgo presentation of mitigation at the penalty phase as a result of Mr. Hannon being adamant that he did not commit the crime. Counsel cannot blindly follow the commands of a client. Rather, counsel "first must evaluate potential avenues and advise the client of those offering potential merit." *Blanco v. Singletary*, 943 F 2d 1477, 1502 (11th Cir. 1991) (quoting *Thompson v. Wainwright*, 787 F. 2d 1447 (11th Cir. 1986))(the ultimate decision that was reached not to call witnesses was not a result of investigation and evaluation, but was instead primarily a result of counsels' eagerness to latch onto Blanco's statements that he did not want any witnesses called.) Indeed, this case points up an additional danger of waiting until after a guilty verdict to prepare a case in mitigation of the death penalty: Attorneys risk that both they and their client will mentally throw in the towel and lose the willpower to prepare a convincing case in favor of a life sentence. *Blanco*, 943 F. 2d at 1503. Mr. Hannon was unaware of any avenues available to him in the penalty phase, because Mr. Episcopo believed he had to continue his innocence defense. Even where there is a pure innocence claim, a defense attorney must prepare for a penalty phase (PC-R. 3138). Based on the community standards discussed by Mr. Norgard regarding presentation of mitigation even where the guilt phase defense was innocence, Mr. Episcopo's strategy to present no substantial mitigation was unreasonable. There is no evidence in the record

indicating that Mr. Episcopo discussed alternate strategies with Mr. Hannon and because Mr. Episcopo conducted no investigation into mitigation, Mr. Hannon had no idea what could be presented.

Next, the State maintains that Mr. Hannon was obligated to provide mitigating information to trial counsel. In support of this notion, the State cites *Stewart v. State*, 801 So. 2d 59 (Fla. 2001). *Stewart* differs from Mr. Hannon's case. In Stewart, the defense hired investigators and a mental health expert. Although the defendant was questioned regarding abuse, he reported a happy childhood and no abuse. That was not the situation in Mr. Hannon's case. There was no penalty phase investigator and no mental health evaluation conducted. Contrary to the State's assertions that Mr. Hannon and his family were interviewed before the penalty phase and reported no abuse or mental health problems, Mr. Episcopo never even questioned Mr. Hannon or his family about the family background or mental health issues. The only time he prepared the family for the penalty phase was in the hallway during trial (PC-R. 2748).

Mr. Episcopo said he did not question Mr. Hannon's parents in the hallway during trial about his background because "[he] had no indication that it was bad" (PC-R. 2761). He didn't ask about his drug problems because he "didn't see it as relevant" (Id.). He said the preparation did not require more than that "because they had told me he didn't do it. That was our mitigation" (Id.). Unlike Stewart,

where mitigating evidence, of which the mental health expert and counsel was aware, was ultimately not presented, Mr. Episcopo was not aware of the abundant mitigation available in Mr. Hannon's background because he did not conduct even a minimal investigation.

The State repeatedly refers to the mitigation presented at the evidentiary hearing as additional, arguing that it is not sufficient to show that counsel could have done more. Trial counsel did nothing to investigate the penalty phase. Mr. Episcopo's preparation of the family for penalty phase consisted of telling them "get up there and - and remember this is our defense and basically you've just got to look at the jury and tell them what you feel from your heart…" (PC-R. 2760). As a result the only "mitigating" evidence the jury heard was what a good boy Mr. Hannon was and that he was incapable of committing such a crime. In fact, the only mitigation considered by the trial court was that Mr. Hannon was not a violent person and the plea agreement of co-defendant Ron Richardson (R. 1807, 1809).

In discussing the prejudice prong of Strickland, the State overlooks the abundant non-statutory mitigating factors presented by Mr. Hannon at the evidentiary hearing. As Mr. Hannon argued in his initial brief, the evidence established the domination of Mr. Hannon by co-defendant Ron Richardson, a history of chronic and severe drug and alcohol abuse, intoxication at the time of the crime, parental neglect, a dysfunctional family, an alcoholic mother and absentee

father, neurological impairments resulting in poor impulse control and flawed decision making. Mr. Hannon was an extreme follower and dependent on others to assist him with basic living skills. Unfortunately for Mr. Hannon, the prejudice of Mr. Episcopo's failings came through in the jury's 12-0 vote for death. Essentially, Mr. Hannon's trial concluded when his guilt phase was over. The prejudice to Mr. Hannon is that he had nothing in penalty phase. In similar circumstances, the Florida Supreme Court has found the performance by counsel to be reversible error. *See Riechmann v. State,* 777 So. 2d 342 (Fla. 2000). A new penalty phase is required here.

CONCLUSION

As to the remaining arguments argued in Mr. Hannon's brief, he relies on the arguments and authority cited therein. Based on the forgoing arguments and those in his initial brief, Mr. Hannon requests that this Court reverse the lower court and grant an evidentiary hearing, and/or grant his request for a new trial and/or sentencing proceeding.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first class postage prepaid, to Katherine Blanco, Assistant Attorney General, 3507 East Frontage Road, Concourse Center 4, Suite 200, Tampa, FL 33607 on January 26, 2005.

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The undersigned counsel certifies that this brief is typed using Times New Roman 14 point font.

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