IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-866

HENRY GARCIA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

APPELLANT'S REPLY BRIEF

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ARGUMENT I REPLY

Due to the requirement that the claims contained in Rule 3.850/3.851 motions must allege facts that are verified by the defendant, the State contends that no colloquy beyond a Faretta-type inquiry was necessary at Mr. Garcia's postconviction evidentiary hearing where the defendant attempted to waive the presentation of some of his verified claims upon which a hearing was granted. "Because of these requirements, a defendant will already be aware of the facts underlying the claim before the defendant is even in a position to attempt to waive their presentation." State's Brief at 36. The State's logic is that if only a Faretta hearing is required to waive postconviction representation *in toto*, surely no more is required for a defendant who says he/she wishes to waive only some of the claims upon which an evidentiary hearing has been granted in postconviction, as did Mr. Garcia.

The State's Brief states that Appellant has suggested that Mr. Garcia did not read his Rule 3.850 motion before verifying it. State's Brief at 38. This is not the case. What Mr. Garcia's brief did say was that there is no evidence anywhere in the record that either Mr. Garcia or the lower court were aware of the detailed opinions of the defense or state mental health experts in the case. Initial Brief at

24.[1] As cited in footnote 11 of the Initial Brief, the Rule 3.850 motion was plead very generally, as then allowed by the Florida Rules of Criminal Procedure. The short summary of the facts in the motion was not required to reflect the detailed mitigation memorialized in the expert depositions and reports. In fact the expert depositions and reports reflect that much of the work done by the experts was after the date of the pleading verified by Mr. Garcia. Nowhere in the record is there any indication that either Mr. Garcia or the lower court attended or reviewed any of the mental health experts' depositions or read the reports of Dr. Sultan or Dr. Schretlen that were attached as exhibits to their depositions. Mr. Garcia was simply not aware of the detailed findings of the experts in his case and therefore was unable to waive the presentation of this evidence at the evidentiary hearing. Mr. Garcia argues that when these deficiencies are considered along with the conflict of counsel revealed only during trial counsel Diaz's testimony at the evidentiary hearing immediately before Mr. Garcia's alleged waiver of penalty phase claims, they support both the claim of an inadequate waiver and the claim of abuse of discretion by the lower court in failing to ensure an adequate waiver.

[1]On January 5, 2005, during the pendency of the instant appeal, Mr. Garcia signed an affidavit prepared by undersigned counsel stating in pertinent part that he had never seen the depositions of the defense and state experts in his case. A copy of that affidavit is included as an attachment to this Reply Brief. The original can be supplied if necessary.

The State relies in part on Durocher v. Singletary, 623 So. 2d 482 (Fla. 1993), to support the contention that the requirements outlined in Koon v. Dugger, 619 So. 2d 246 (Fla. 1993)[2], should not apply to the waiver of a postconviction claim during an evidentiary hearing. This Court's holding in Durocher involved an entirely different situation than that concerning Mr. Garcia. This Court held that "[i]f the right to representation can be waived at trial, we see no reason why the statutory right to collateral counsel cannot also be waived." Id. at 483. Mr. Durocher simply did not want to be represented by professional counsel, CCR or otherwise, and went to extraordinary lengths to try to commit state assisted suicide.[3] Mr. Garcia never indicated that he wanted to fire his postconviction

[2]"[W]hen a defendant refuses to allow the presentation of mitigating evidence in the penalty phase against his counsel's advice, (1) counsel must inform the court on the record of the defendant's decision; (2) counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be; and (3) the trial court should then require the defendant to confirm on the record that his counsel has discussed these matters with him, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence. Application of this rule creates a trial record that adequately reflects the defendant's knowing waiver of his right to present evidence in mitigation." Koon at 250 as cited in Spann v. State, 857 So. 2d 845, 853 (Fla. 2003).

[3]"I agree with the majority opinion, but write separately to emphasize that the role of the State in imposing the death sentence transcends the desires of a particular inmate to commit state-assisted suicide. Safeguards to ensure that due process is followed, such as the Faretta-type inquiry of Durocher, are essential in cases of this nature. . .In most cases, I believe such an inquiry would suffice. Durocher's case,

lawyers during the evidentiary hearing. For reasons unknown to the lower court, he requested that the meat and substance of his postconviction penalty phase claims not be addressed even though a hearing had been granted on those claims. The facts recited by this Court concerning the waiver in Spann v. State, 857 So. 2d 845 (Fla. 2003), also cited by the State, are instructive:

> Defense counsel notified the court on the record that Spann did not wish to present mitigating evidence. Spann told the court that he had been thinking about this decision since he was in jail in 1997. On two separate occasions - at the time Spann waived his presentation of mitigation and again when he waived a jury at the penalty phase - the trial judge inquired in detail, and defense counsel indicated on the record what the mitigating evidence would be if it were presented. The court inquired whether Spann's decision was against the advice of counsel, and counsel said it was. The court inquired directly of Spann whether he wished to waive mitigation and whether he understood the consequences of a waiver. The defense also submitted a written sentencing memorandum, and the court ordered a presentence investigation. The judge heard penalty phase arguments and conducted a Spencer hearing. During the proceedings, Spann maintained his position that he did not wish to be present for the penalty phase and did not wish to present mitigation or even to have a penalty phase jury.
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> At sentencing, the court indicated that it considered the

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however, presents an additional problem because he waived the presentation of mitigating evidence at his trial. The appropriateness of the death sentence in his case has never been subjected to true adversarial testing. While I recognize that this issue has been decided, I believe public counsel should have been appointed in Durocher's trial to present mitigating evidence." Id. at 485-86 (Barkett, J. dissenting).

> presentence investigation (PSI) and the sentencing scoresheet, as well as statutory and non-statutory mitigators since the trial court must consider all mitigation anywhere in the record to the extent it is believable and uncontroverted even when a defendant waives the presentation of mitigating evidence. (Citations omitted).
>
> Although the colloquy and repeated questioning of Spann is almost identical to the colloquy in Overton, which was found to be sufficient, Spann argues that his counsel did not thoroughly indicate the mitigation that existed in the record. **The trial court solicited both statutory and non-statutory mitigating evidence from defense counsel. Defense counsel advised the court that Spann was an accomplice with a relatively minor role in the murder, that Spann's mother, sister, and brother would testify that Spann was a good son and brother when he was a young man, and that at some point, Spann fell in with a bad crowd. Counsel also submitted that prison records show that Spann would be capable of living in a prison environment without being a threat to himself or anyone else. Counsel indicated that a mental health expert was hired to examine Spann, but Spann failed to cooperate. The trial court questioned counsel as to what evidence they sought to present as a result of the mental health evaluation. Counsel also stated that they examined school records, social records, and criminal records, and that they met with Spann's family. The trial court specifically inquired about potential mitigating evidence discovered after meeting with Spann's family members.** The trial court acted cautiously, followed the requirements of Koon, and conducted a colloquy similar to that in Overton, which was approved by this Court. The trial court did not abuse its discretion when it granted Spann's request to waive presentation of mitigation.

Id. at 853-854 (emphasis added). The lower court in Mr. Garcia's case failed to meet the standard approved in Spann. This Court's holding in Canakaris v.

Canakaris, 382 So.2d 1197, 1203 (Fla. 1980), suggests that there are limits on the court's discretionary power when different results emerge out of similar factual circumstances:

> The trial court's discretionary power is subject only to the test of reasonableness, but that test requires a determination of whether there is logic and justification for the result. The trial court's discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent manner. Judges dealing with cases essentially alike should reach the same result. Different results reached from substantially the same facts comport with neither logic nor reasonableness.

Id. at 1203. The lower court's decision to settle for a Faretta-type colloquy in the instant case was unreasonable in light of all the circumstances. The lower court's mistake is magnified by the fact that this Court has endorsed the power of the lower court in waiver of mitigation circumstances to appoint special mitigation counsel to serve as officers of the court to present mitigation evidence in the event of a waiver as well as the power of the court to call its own mitigation witnesses. See Muhammad v. State, 782 So. 2d 343, 364 (Fla. 2001). In the instant case, the lower court, which had found no mitigation at trial, expressed no interest in or awareness of the mitigation present in this case. The court never saw or heard about the mental health expert reports and depositions, known to the State, that explained the psychological background of Mr. Garcia's alleged decision to waive

the bulk of his penalty phase ineffective assistance of counsel claims, claims which relied on the presentation of this evidence to be given effect.

The State cites Owen v. State, 773 So. 2d 510, 515 (Fla. 2000), for the proposition that a defendant's failure to present evidence in support of his claims at an evidentiary hearing serves as a waiver of the claims. The State's use of this case ignores several important aspects of this Court's holding in Owen that distinguish it from Mr. Garcia's case. Owen presents a complicated fact pattern that involves two different murder cases in which the defendant was represented by different lawyers. Owen, and his postconviction counsel, chose not to present additional evidence at the evidentiary hearing on his "Worden" case after the conclusion of the testimony of the first witness called, his defense counsel in the re-trial pending "Slattery" case. Owen invoked attorney-client privilege concerning the "Slattery" case and "declined to proceed any further with the evidentiary hearing." Id. at 513. First, this Court found that Owen and his counsel had failed to proceed in good faith in the "Worden" evidentiary hearing to the extent attorney-client privilege allowed. And second, Owen and his counsel "made no effort to proffer any substantive evidence that would have been excluded by the privilege." Id. at 514. Counsel in Mr. Garcia's case disagreed with Mr. Garcia's alleged waiver. There was no breach of "good faith" in Mr. Garcia's case by

postconviction counsel in the sense that the evidentiary hearing did proceed on other matters and trial counsel was called as a witness. In Mr. Garcia's case although there was no claim of attorney/client privilege standing in the way of a proffer, neither was there a request for one from the lower court.

The Owen opinion also calls into question whether the Faretta standard should have been the standard applied in Mr. Garcia's waiver case, since this Court held that it did not apply in Owen:

> [T]he principles underlying Faretta are applicable only when a defendant in a criminal case seeks to waive professional legal representation and proceed unrepresented. These principles are inapplicable here where Owen freely chose to be represented by counsel at the proceeding below and registered no objection to counsel's performance. The record shows that collateral counsel and Owen *jointly* made the strategic decision to end the evidentiary hearing. Owen's ineffectiveness and conflict claim is a fact-based issue that requires development at an evidentiary hearing, which Owen - by his actions below - opted to forego. The claim is waived.

Owen at 515. Mr. Garcia never attempted to waive professional legal representation but counsel in Mr. Garcia's case did not agree with his decision to waive certain claims. In Mr. Garcia's case, the information concerning penalty phase IAC summarized in the life history and brief statement of the facts in the Initial Brief and detailed in the expert reports and depositions of defense experts Dr. Schretlen, Dr. Hyde, and Dr. Sultan should have been included in a proffer of

mitigation by counsel before any waiver was deemed to be adequate. The experts had all been listed as witnesses before the evidentiary hearing. Such a proffer would have applied to both prongs of Strickland, not just to the prejudice prong as the State argues. The wealth of mitigation that was never investigated or presented at trial is material to the issue of both the existence of deficient performance by trial counsel and the resulting prejudice to Mr. Garcia. This Court's pre-Strickland opinion in Smith v. State, 445 So. 2d 323 (Fla. 1983), relied on by the State in support of the proposition that Mr. Garcia's alleged waiver of the penalty phase IAC claims at the evidentiary hearing necessarily resulted in a failure to meet defendant's burden of proof to overcome the presumption of effectiveness of counsel, actually provides some limited support for a mixed determination:

> First, the specific omission or overt act upon which the claim of ineffective assistance of counsel is based must be detailed in the appropriate pleading. Second, the defendant has the burden to show that this specific omission or overt act was a substantial and serious deficiency measurably below that of competent counsel. In making this second determination, **the performance of counsel must be judged in light of the totality of the circumstances**. Meeks v. State. Third, the defendant has the burden to show that this deficiency, when considered under the circumstances of his case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of court proceedings. Fourth, in the event a defendant does show a substantial deficiency and presents a prima facie showing of prejudice, the state still has the opportunity to rebut those assertions by showing beyond a reasonable doubt that

there was no prejudice in fact.

Id. at 325 (emphasis added). This Court has recently held that it is necessary in non-capital Rule 3.850 motions practice "to allege what testimony defense counsel could have elicited from witnesses and how defense counsel's failures to call, interview, or present the witnesses who would have so testified prejudiced the case." Nelson v. State, 875 So. 2d 579, 583 (Fla. 2004). Further, this Court noted that "[i]f a witness would not have been available to testify at trial, then the defendant will not be able to establish deficient performance or prejudice from counsel's failure to call, interview, or investigate that witness." Id. The clear lesson is that a claim concerning ineffective assistance should include both a statement as to availability of witnesses at trial as well as content of the witness testimony at an evidentiary hearing and that those facts go to proving up both trial counsel's deficient performance and to the ultimate question of prejudice to the defendant.

As to the other arguments in the State's Brief, Mr. Garcia will rely on the argument in his Initial Brief and any subsequent supplemental authority submitted prior to oral argument.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing REPLY BRIEF has been furnished by United States Mail, first class postage prepaid, to Sandra

Jaggard, Assistant Attorney General, 444 Brickell, Miami, Florida this 4th day of January, 2006.

CERTIFICATE OF COMPLIANCE

I further 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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