IN THE SUPREME COURT
STATE OF FLORIDA

GUERRY WAYNE HERTZ,

Appellant,

vs.

Case No. SC05-59
L. C. No. 97-214-CF

STATE OF FLORIDA,

Appellee.
_____/

REPLY BRIEF OF APPELLANT

On Direct Appeal From A Final Order Of The Circuit Court Of The Second Judicial Circuit, In And For Wakulla County, Florida, Denying Hertz' Florida Rules Of Criminal Procedure 3.850/3.851 Motion For Post Conviction Relief, As Amended, in a Capital Case.

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PRELIMINARY STATEMENT

Hertz will use the same designations regarding the record on appeal as he used in his Initial Brief of Appellant.

AS TO THE STATE'S STATEMENT OF THE FACTS AND OF THE CASE

Hertz does not take issue with the Statement of the Case and of the Facts as set forth on pages 1-29 of its Answer Brief. It is noted that the state does not take issue with Hertz' version of same in this section either.

AS TO THE STATE'S SUMMARY OF THE ARGUMENT

Hertz disagrees with the state's abbreviated summary of the argument as set forth on page 29 of its Answer Brief, including the contention that the trial court did not err in denying the appellant's motion for post conviction relief. There was a significant body of evidence regarding additional mental mitigation that was not presented at trial. Hertz asserts that the evidence presented during the post conviction proceedings established that he was denied effective assistance of counsel during the penalty phase of his state court trial because of the failure to present all extant mental health mitigation, and that, because it was not presented, prejudice resulted.

AS TO THE STATE'S ARGUMENT

Issue I Generally: Whether the trial court erred in denying the defense's motion for post conviction relief, finding defense counsel's representation effective at the penalty phase.

Hertz does not take issue with the state's recitation of the general principles governing the quality and quantity of evidence that must be presented in a post conviction capital case in order to establish ineffective assistance of counsel and prejudice as set forth in the Answer Brief, pp. 30-32. The landmark case of *Strickland v. Washington*, 466 U.S. 668 (1984) is the controlling decision in this regard. However, the state's reliance on *Kimbrough v. State*, 886 So. 2d 965 (Fla. 2004) and *Henry v. State*, 862 So. 2d 679 (Fla. 2003), as set forth on pages 32-39 of the Answer Brief, involving post conviction proceedings that Dr. Mosman testified in, is misplaced since it is clear from reading the quotes cited by the state that those cases involve facts not similar to those in the case at bar. Finally in this regard, the state begs the question when it argues that Mr. Rand " . . . individualized the mitigation during the penalty phase of the trial . . ." (The Answer Brief, p. 40) While it is true that Rand presented specific aspects of Hertz' upbringing, health issues and emotional problems that might be

considered mitigating in a general sense, he did not address the mitigating evidence in the context of the individual mitigators as set forth in Section 921.141(6), Florida Statutes. He should have if he wanted to attempt to overcome the statutory aggravation presented by the state in the context of Section 921.141(5), Florida Statutes.

A. Failure to fully develop and present the diminished capacity statutory mitigator per Section 921.141(6)(e), Florida Statutes.

This issue is set forth on pages 49-55 of Hertz' Initial Brief, and need not be repeated here. The state argues that, since the jury heard some evidence related to this mitigator, the claim is without merit. (The state's Answer Brief, pp. 42, 43) The state misses the point. Because the mitigator was presented in such a weak manner, the trial court gave it only "some weight" in the process of sentencing Hertz to death. (OR Vol. II, pp. 295-300.) Rand never mentioned the mitigator in his opening statement or closing argument during the penalty phase. (OR Vol. XIX, pp. 2209-2212; OR Vol. 2394-2402) According to Dr. Mosman, Dr. Sesta had information to the effect that this mitigator could have been established. (OR Vol. III, pp. 371-373.) His findings included indications of impairment and damage to the frontal area of Hertz' brain. (OR Vol. II, p. 384; EH, p. 54) But Rand failed to call him (Dr. Sesta) as a witness. This constituted ineffective

assistance of trial counsel. The failure to call Dr. Sesta cannot be excused based upon a claim that it was a strategic decision. The jury needed to hear of some medical/psychological reason why Hertz would have acted as he did.

B. Failure to develop and present evidence of extreme mental illness mitigator per Section 921.141(6)(b), Florida Statutes.

The state claims that the trial court "(e)ssentially" found "all of Dr. Mosman's opining to be unsupported by the record." (The state's Answer Brief, p. 50) The State argued in this regard that Dr. Mosman did not read certain documents relating to Hertz' court proceedings. The state is mistaken. As has already been detailed in Hertz' Initial Brief, Dr. Mosman explained his reasons for omitting certain documents from his study. He limited his research and study of documents to those that could inform him as to Hertz' mental history. (See the Initial Brief of Appellant, pp. 28-31.) This included reading Dr. Sesta's report (R. Vol. II, p. 343; EH, p. 13), certain mitigation memoranda (R. Vol. II, p. 361; EH, p. 31), Hertz' medical records (R. Vol. II, pp. 337-341), and the testimony of the defense witnesses who appeared during the penalty phase. (R. Vol. II, p. 361; EH, p. 31) Additionally, Dr. Mosman administered psychological tests to Hertz in person. (R. Vol. II, pp. 337-341) Thus, Dr. Mosman's recitation of how

defense counsel failed to fully develop the diminished capacity mitigator as described on pages 49-55 of Hertz' Initial Brief should have been accepted by the trial court.

C. Failure to Properly Present the Statutory Age Mitigator

In answering this claim, the state brushes aside the fact that the age mitigator as codified in Section 921.141(6)(f), Florida Statutes, is not limited to chronological age. *Foster v. State*, 778 So. 2d 906 (Fla. 2000). The state also attacks Dr. Mosman's credibility by asserting that he "divined" this mitigator, or at least the mental age aspects of it. (The Answer Brief, p. 52) The state is wrong. Rand should have understood that the critical mitigator is not limited to a matter of chronology. Dr. Mosman found Hertz' mental age to be that of a 14 year old child. But the jurors were left with the impression that the only weight they could give to this mitigator was in the context of a person whose age was 2 years beyond the age of majority. It is little wonder that this critical mitigator was given little weight. Rand erred in this critical oversight and Hertz suffered the consequences.

D. Failure to Present Nonstatutory Mitigation.

The state argues on pages 52-57 of its Answer Brief that Mr. Rand presented the nonstatutory mitigation that Dr. Mosman contended had not been presented during the penalty phase of the trial. This included Hertz' ability to be a positive person in the prison system. Rand did not address this mitigator. And while Rand referenced Hertz' color blindness and club foot, these disabilities were not addressed in the context of their genetic origins. (R. Vol. II, pp. 349, 350; EH, 19, 20) Dr. Mosman also noted that Dr. Sesta diagnosed Hertz with brain damage, and indicated that Hertz' history of ADHD could have been caused by that brain damage which can be considered as a separate nonstatutory mitigator. (R. Vol. II, p. 349, 350; EH, p. 19, 20) While Rand addressed the ADHD problem; he did not do so in terms of being the result of brain damage. Furthermore, the type of brain damage detected indicated that it was permanent and genetically related. (R. Vol. II, pp. 349-351; EH, pp. 19-21) Dr. Mosman also found that Hertz' genetic defects, including his clubfoot, caused disruptions in his schooling and in peer group relationships. (R. Vol. II, p. 350; EH, p. 20) While the jury was advised of Hertz' clubfoot, the damaging effect upon his mental

health was not made clear. In other words, Rand presented evidence of many of Hertz' physical and emotional problems, but he understated their severity by neglecting their origins. Thus, not all of the nonstatutory mitigation that could have been presented per Section 921.141(6)(h) was provided the jury.

E. Trial Counsel's Method of Presenting Mitigation was Ineffective

The State argues that Mr. Rand worked arduously to present information to the jury, notably his collection of facts about Hertz' life presented in book form to the jury. (The state's Answer Brief, pp. 57, 58) The fact remains that Mr. Rand did not specifically enumerate any statutory mitigators during his closing arguments in the penalty phase within the context of Section 921.141(6), Florida Statutes. Instead, trial counsel treated the penalty phase as if it were a non-capital case. This was ineffective.

CONCLUSION

For the reasons set forth above, the Court is again requested to reverse the final order of the lower tribunal rendered on December 30, 2004, find that Hertz was denied effective assistance of counsel during the penalty phase of his state court trial for the failure of counsel to present all available mental health mitigation, remand the cause to the lower tribunal, order a new penalty phase trial and grant Hertz such other relief as is deemed appropriate in the premises.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief of Appellant has been furnished to counsel for appellee, the State of Florida, Hon. Carolyn Snurkowski, Esq., Chief of Criminal Appeals, the Office of the Attorney

General of Florida, the Florida Capitol, Plaza Level One, Tallahassee, Florida 32399-1050; and Eddie Evans, Esq., the Office of the State Attorney, Second Judicial Circuit of Florida, 4th Floor, Leon County Courthouse, Tallahassee, FL 32301, by U.S. mail delivery, this 19th day of September, 2005.

CERTIFICATE OF COMPLIANCE

I certify that this Reply Brief of appellant was prepared using a Times New Roman font, 14 pitch, in compliance with the provisions of Florida Rule of Appellate Procedure 9.210.

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Clyde M. Taylor, Jr.