IN THE SUPREME COURT OF FLORIDA

RONNIE FERRELL,

Appellant/Cross-Appellee,

v. CASE NO. SC07-92

STATE OF FLORIDA,

Appellee/Cross-Appellant.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

# REPLY BRIEF OF CROSS-APPELLANT

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## CROSS-APPEAL ISSUE

**WHETHER THE TRIAL JUDGE ERRED IN GRANTING FERRELL A NEW PENALTY PHASE PROCEEDING**[1]

At trial, Ferrell made an on-the-record waiver of his right to present mitigation evidence at the penalty phase of his capital trial. (TR Vol. XXIX 984). Notwithstanding his waiver, Ferrell raised a claim of ineffective assistance of counsel for failing to investigate and present available mental mitigation evidence.

The collateral court granted a new penalty phase on Ferrell's claim. In granting a new penalty phase, the collateral court found deficient performance and prejudice. The collateral court's finding of deficient performance, however, stemmed solely from its conclusion it could not determine that Ferrell's waiver of his right to put on mitigation evidence was knowing and voluntary because it did not know what attempts counsel made to investigate mental health mitigators and what counsel related to the Defendant regarding any potential mental health mitigators available to him. (PCR Vol. IV 684).

### *A. Deficient Performance*

Before this Court, Ferrell acknowledges he waived his right to present mitigation evidence at the penalty phase of his

[1] References to Ferrell's Reply Brief/Cross-Answer Brief will be referred to as R/CAB followed by the appropriate page number.

capital trial. Ferrell does not dispute that defendants have the right to waive presentation of mitigating evidence and to choose what evidence, if any, the defense will present during the penalty phase. Grim v. State, 971 So.2d 85 (Fla. 2007); Grim v. State, 841 So.2d 455, 461 (Fla. 2003).

As he did below, Ferrell seeks to go behind his waiver to present a cognizable claim of ineffective assistance of counsel.[2] Ferrell alleges his waiver was not knowing and voluntary because counsel did not adequately investigate available mental mitigation. The gist of Ferrell's argument is that counsel's lack of investigation resulted in his inability to fully appreciate the magnitude of his waiver, thus making it invalid. (R/CAB 86). Ferrell also claims counsel was ineffective for failing to present available mental health mitigation.

In its order, the collateral court made no explicit finding that trial counsel unreasonably failed to investigate, and then present, available mental mitigation evidence. Instead, the collateral court assumed deficient performance when the court

[2] Ferrell's claim his waiver was not knowing and voluntary was not a stand alone claim but was instead a claim that counsel was ineffective and as a result Ferrell's waiver was not knowing and voluntary. (Amended Motion at page 46). A stand alone claim would be procedurally barred in post-conviction proceedings because it can be, and should be, raised on direct appeal. Boyd v. State, 910 So. 2d 167 (Fla. 2005); Chandler v. State, 702 So. 2d 186 (Fla. 1997).

concluded it could not find Ferrell's waiver of mitigation was knowingly and intelligently made. (PCR Vol. IV 684).

In relying on the lack of evidence presented at the evidentiary hearing, the collateral court placed the burden on the State to prove Ferrell's waiver was voluntary and, then, that trial counsel's investigation was reasonable under the circumstances. The collateral court erred because Ferrell raised this claim as a claim of ineffective assistance of counsel and the collateral court granted him an evidentiary hearing on the claim. As a result, Ferrell, and not the State, bore the burden to show Ferrell's waiver was involuntary and, then, that counsel's performance was deficient. Asay v. State, 769 So.2d 974, 984 (Fla. 2000) (ruling the defendant bears the burden of proving that counsel's representation was unreasonable under prevailing professional standards and was not a matter of sound trial strategy); Jacobs v. State, 880 So.2d 548, 555 (Fla. 2004) (when the trial court orders an evidentiary hearing, the burden is on the defendant to demonstrate counsel was ineffective under the two-pronged analysis contained in Strickland v. Washington).

The collateral court also erred because the collateral court failed to apply the strong presumption that trial counsel's performance was not deficient. (PCR Vol. IV 684). In reviewing counsel's performance, the collateral court must

indulge a strong presumption that trial counsel's conduct falls within the wide range of reasonable professional assistance. Mungin v. State, 932 So.2d 986, 996 (Fla. 2006). In finding trial counsel was deficient solely because the evidence presented at the evidentiary hearing did not reveal the extent of counsel's investigation into potential mental mitigation evidence or the nature of trial counsel's discussions with Ferrell on the subject, the collateral court failed to apply a presumption that trial counsel rendered effective assistance of counsel.

Ordinarily, a defendant like Ferrell could bear his burden of proof to show trial counsel's investigation into potential mental mitigation evidence was inadequate by calling trial counsel to the witness stand during the evidentiary hearing and, perhaps, introducing records that demonstrate counsel's investigation was minimal or unreasonably postponed until shortly before the penalty phase was to commence. *See e.g.* State v. Lewis, 838 So. 2d 1102, 1109-1114 (Fla. 2002)(finding counsel ineffective when, among other things, the evidence presented at the evidentiary hearing showed that trial counsel spent less than eighteen hours preparing for the penalty phase, and waited more than two weeks after the guilty verdict before seeking the appointment of a mental health expert to testify in the penalty phase). In this case, however, trial counsel was

dead and Ferrell presented no records to show that trial counsel spent little time preparing for the penalty phase or unreasonably postponed his investigation until shortly before the penalty phase.[3]

However, trial counsel's death and Ferrell's inability to produce trial counsel's records did not deprive Ferrell of a meaningful opportunity to prove his claim. To bear his burden of proof, Ferrell could have, but did not, testify at the evidentiary hearing.

For instance, Ferrell could have, but did not, testify that Mr. Nichols failed to take a thorough medical and social history from him or to question him about potential witnesses who could provide insight into Ferrell's upbringing. Ferrell could have, but did not, testify that he provided information to trial counsel that would have put a reasonable counsel on notice that Ferrell should be evaluated by a mental health professional. Ferrell could have, but did not, testify that Mr. Nichols failed to relay information regarding any potential mental health mitigators available to him and the pros and cons of presenting such evidence. Ferrell could have, but did not, testify that he

[3] Ferrell attempts to support his claim that trial counsel failed to investigate because of there are no subpoena in the record for Ferrell's school, hospital, medical, DOC, etc. This "factual allegation" is outside this record. (R/CAB 87). Moreover, as it was Ferrell's records that were at issue, Ferrell offers no support for the notion that subpoenas would have been necessary to obtain Ferrell's own records.

instructed trial counsel not to put on any evidence in mitigation because he was unaware of the evidence that could have been presented and the potential impact such evidence could have on a jury.

In finding trial counsel's performance was deficient because the collateral court could not determine whether Mr. Nichols investigated potential mental mitigation evidence or discussed presenting mental mitigation evidence with Ferrell, the collateral court improperly placed the burden on the State to show Ferrell's waiver was voluntary and overlooked the strong presumption that trial counsel provided effective assistance of counsel. In turn, Ferrell failed to satisfy his burden to show counsel unreasonably failed to investigate and present available mental mitigation evidence and that his on-the-record personal waiver of his right to present mitigation was anything other than knowingly, intelligently, and voluntarily made.

B. ***Prejudice***

The collateral court found Ferrell was prejudiced by trial counsel's failure to put on mental mitigation testimony. (PCR Vol. IV 684). The collateral court erred in at least three ways.

First, in order to show prejudice on this claim of ineffective assistance of counsel, Ferrell had to present evidence that he would have allowed counsel to put on mitigation

evidence if only counsel would have fully investigated and fully advised him of the availability of potential mitigating evidence. Schriro v. Landrigan, 127 S.Ct. 1933, 1941 (2007) (if defendant instructed his counsel not to present mitigation, failure to conduct further investigation is not prejudicial). At the evidentiary hearing, Ferrell did not testify at the evidentiary hearing that he would have made a different decision at trial if counsel had been more diligent.

Second, the collateral court erred because the court relied on the testimony of Drs. Krop, Golding, and Miller in finding prejudice. While the collateral court acknowledged the State presented its own doctor (Dr. Glen) to rebut the mental health mitigators presented at the evidentiary hearing, the court found that "the jurors would have to weigh the credibility of each doctor and determine what testimony to believe." (PCR Vol. IV 684). In relying upon the testimony of all three defense doctors and finding that one juror might have been swayed by their testimony, the collateral court failed to recognize that Dr. Golding's and Dr Miller's testimony at the evidentiary hearing would not have been presented before Ferrell's penalty phase jury.

At the evidentiary hearing, Dr. Golding's testimony centered around his criticism of trial counsel in failing to investigate areas of potential mitigation and his criticism of

Dr. Miller's competency exam.[4] Neither opinion would have any relevance at all to the penalty phase of Ferrell's capital trial.

Likewise, Dr. Miller's testimony at the evidentiary hearing was limited to his recount of his competency evaluation and the fact he could not recall being asked to conduct an investigation into potential mitigation evidence. He also could not recall conducting any such investigation. (PCR Vol. VI 131, 133, 146). Dr. Miller did not evaluate Ferrell during post-conviction proceedings and as such, was not called upon to offer an opinion as to the presence of mental mitigation evidence.

Like Dr. Golding's, Dr. Miller's testimony would not be presented during the penalty phase of Ferrell's capital trial. Contrary to the collateral court's finding, neither Dr. Golding's nor Dr. Miller's testimony could have swayed a single juror because no juror would have heard their testimony.

The collateral court judge did, however, correctly look to Dr. Krop's testimony in evaluating Ferrell's claim. The collateral court erred, however, in finding that calling Dr.

[4] Dr. Golding could not testify that any of the alleged "unexplored mitigation" was even applicable to Ferrell because Dr. Golding never evaluated or even interviewed Ferrell. (PCR Vol. VIII 420). Likewise, while Dr. Golding criticized Dr. Miller's competency exam, Dr. Golding did not conclude that Ferrell was incompetent. Dr. Golding's opinion that trial counsel did not investigate was completely unsupported. Dr. Golding never spoke with trial counsel about his investigation nor apparently had access to any of his files.

Krop probably would have swayed at least one juror to vote for life over death. (PCR Vol. IV 684).

Dr. Krop testified that Ferrell has an IQ of 78. Dr. Krop also testified that testing indicated that Ferrell showed signs of significant deficits in frontal lobe functioning. Dr. Krop testified that frontal lobe deficits can impact a person's impulse control, flexibility, and ability to control behavior. (PCR Vol. VII 322-323, 326). No medical tests confirmed Dr. Krop's opinion.[5]

Dr. Krop, however, provided no nexus between Ferrell's low IQ and brain damage and the murder of Gino Mayhew. Dr. Krop offered no opinion that at the time of the murder, Ferrell was, as a result of his low IQ or frontal lobe damage, under an extreme emotional or mental disturbance. Likewise, Dr. Krop offered no opinion that at the time of the murder, Ferrell's low IQ or frontal lobe damage impaired Ferrell's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. However, Dr. Krop did testify that Ferrell is not mentally retarded, does not suffer from any mental illness and has anti-social personality disorder. (PCR Vol. VII 338).

[5] State expert Dr. Tannahill Glen disagreed with Dr. Krop's conclusions, based on her independent review of Ferrell's neuropsychological testing results, that Ferrell had brain damage.

Had Dr. Krop been called to testify, the jury would have heard that a person with anti-social personality disorder has problems with impulse control and delaying gratification. A person with an anti-social personality disorder gets involved in illegal activity or at least commits acts against society, and does not think about, or learn from, the consequences of his actions. The jury would have also heard that Ferrell had been suspended from school, been involved in the juvenile and adult justice system, and sold drugs to make money. (PCR Vol. VII 340-341).

This Court has consistently recognized that anti-social personality disorder is "a trait most jurors tend to look disfavorably upon." Freeman v. State, 852 So.2d 216, 224 (Fla. 2003). *See also* Willacy v. State, 967 So.2d 131, 144 (Fla. 2007); Reed v. State, 875 So.2d 415, 437 (Fla. 2004). This Court has also found, on numerous occasions, that counsel is not ineffective for failing to put on mental mitigation evidence when such evidence will inform the jury that the defendant has anti-social personality disorder. *See e.g.* Looney v. State, 941 So.2d 1017, 1028-1029 (Fla. 2006) (Counsel not ineffective for failing to call mental health expert, Dr. Gutman, who diagnosed Looney as anti-social personality disorder); Hamilton v. State, 875 So. 2d 586, 593 (Fla. 2004) (counsel not ineffective for not presenting the testimony of defense expert,

Dr. Mhatre, who would opine that Hamilton had anti-social personality disorder); Elledge v. State, 706 So. 2d 1340, 1346 (Fla. 1997) (observing that one expert has described an anti-social personality disorder this way: it is not a mental illness, but a life long history of a person who makes bad choices in life, choices that are conscious and volitional).

Given that this Court has recognized that anti-social personality and its traits is not favorable evidence, coupled with the fact that Dr. Krop's testimony would have also revealed to the jury matters that they never heard, specifically that Ferrell had been suspended from school, been involved in the juvenile and adult justice system, and had been a drug dealer, the collateral court erred in finding the testimony of Dr. Krop probably would have persuaded at least one juror to vote for life over death. Reed v. State, 875 So. 2d at 437("an ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword").

In his answer brief, Ferrell simply ignores the parts of Dr. Krop's testimony that would have been damaging to trial counsel's efforts to persuade the jury to recommend a life sentence. Instead, Ferrell claims that trial counsel should have investigated Ferrell's family history and presented Dr. Krop and lay witnesses such as Ferrell's mother, sisters and

brother. (R/CAB 92). Ferrell claims that had trial counsel presented Dr. Krop and Ferrell's family members, some thirty-one non-statutory mitigators would have been established. (R/CAB 90-92).

A review of Ferrell's list, however, demonstrates that many of them are based on similar facts which Ferrell stretches into 31 separate mitigators. (R/CAB 90-92). In reality, the mitigation offered at the evidentiary hearing consisted of evidence of low IQ, signs of frontal lobe damage, a difficult childhood marked by violence and abuse at the hands of his father, a loving and caring relationship with his wife and children, his appropriate courtroom behavior during trial, the fact he was not the shooter, and his potential for successful rehabilitation. (R/CAB 90-92).[6]

Dr. Krop, however, testified at the evidentiary hearing that Ferrell denied any physical or emotional abuse as a child, denied any sexual abuse or neglect, and denied any childhood trauma. Ferrell also told Dr. Krop that he was chronically unfaithful. Dr. Krop described Ferrell's lifestyle, both in and out of his marriage, as "promiscuous". (PCR Vol. IV 351). Such

[6] Ferrell's family members would not have been competent to testify that Ferrell has a low IQ or brain damage. Accordingly, presenting this testimony would have also brought forth the many unfavorable aspects of Dr. Krop's testimony. Additionally, the jury was well aware that Ferrell was not the shooter and was in a position to observe his demeanor during the trial.

testimony would have seriously undermined any notion that Ferrell was a good husband and father.

Additionally, had Ferrell presented the testimony of family members such as his mother and siblings, the jury would have heard much evidence that cast Ferrell into an unfavorable light. While each of Ferrell's family members testified that Ferrell's father was abusive, both toward his children and his wife, calling Ferrell's family members would have revealed that Ferrell's mother was hardworking, nurturing and supportive and did everything she could to both escape from her abusive husband and persuade her son to walk down the right path in life.

Gladys Ferrell testified that she had been employed at St. Vincent's Medical Center for thirty years. She left her husband when Ferrell was eleven years old because her husband was abusive and she did not "want her children to be involved in that." (PCR Vol. VI 83).

Ms. Ferrell loved her son when he was growing up, tried to help him and tried her best to teach him right from wrong. (PCR Vol. VI 92). She testified she did her best to raise Ferrell to be a contributing member of society and to instill a work ethic in her oldest son. (PCR Vol. VI, page 92). Ms. Ferrell testified that despite her efforts, Ferrell kept getting in trouble. (PCR Vol. VI 93).

Ferrell was charged with burglary when he was just 12 years old. He got off with a warning from the judge. (PCR Vol. VI 93). Ms. Ferrell tried to teach him that he should learn a lesson from that experience and follow the law.

Ms. Ferrell testified that despite her counsel, Ferrell was charged just one year later for carrying a concealed weapon. (PCR Vol. VI 93). She once again counseled with Ferrell to try to turn away from crime. Yet, just two years later, Ferrell was arrested for stealing. (PCR Vol. VI 93-94). Ms. Ferrell testified that Ferrell was put on probation in juvenile court.

Ms. Ferrell also told the court that when Ferrell was 19, he was charged and convicted of armed robbery and sentenced to four years in prison. (PCR Vol. VI 94-95). Once again, Ms. Ferrell counseled her son to learn a lesson from that experience. (PCR Vol. VI 95). Ms. Ferrell told the court that after he got out of prison, he was arrested again on weapons and drug charges and subsequently with starting a jail riot in the Duval County Jail. Ms. Ferrell related Ferrell received another four year sentence and that once again she tried to convince him to turn his life around. (PCR Vol. VI 92-96).

Ferrell's older sister, Linda, testified their mother was a loving mother who did her best to teach her kids right from wrong. Linda Ferrell also ran afoul of the law. When Linda was 21 years old, she shot and killed a guy she was dating. She was

convicted of second degree murder. Linda claimed the homicide was self-defense. She received a life sentence but was paroled after serving 6 and ½ years of her sentence. (PCR Vol. VI 112-113, 118).

Linda Ferrell testified she learned a lesson from her experience and had been a law abiding citizen since her release. (PCR Vol. VI 118). Like her mother, Linda Ferrell counseled her younger brother to lead a law abiding life and to learn a lesson from his mistakes. (PCR Vol. VI 119). She also told this court that Ferrell has two children. Her mother takes Ferrell's children to visit him in prison. (PCR Vol. VI 112).

Another sibling, Towanna Ferrell, was a school teacher and had never been in trouble with the law. (PCR Vol. VI 166, 177). Ms. Ferrell witnessed the same abuse as did Ferrell. She was also aware of her brother's extensive criminal history. She testified that although she would visit him in jail, she, unlike her mother and siblings, did nothing to counsel him on turning his life around. (PCR Vol. VI 178-179).

The collateral court erred in concluding that trial counsel's failure to present mental mitigation evidence prejudiced Ferrell during the penalty phase of his capital trial. If Ferrell had put on Dr. Krop, the jury would have heard evidence that Ferrell was anti-social, led a promiscuous lifestyle, and had been a drug dealer. If trial counsel would

have presented Ferrell's mother and siblings, the jury would have heard evidence that while Ferrell's childhood was less than ideal, Ferrell grew up with a hardworking, loving and caring mother who took action to protect her children from her abusive husband and who made genuine efforts to raise Ferrell within the confines of the law. The jury also would have heard that despite Ms. Ferrell's best efforts, Ferrell engaged in a continuous and escalating course of criminal conduct that belied his youth and culminated in the murder of Gino Mayhew.

## CONCLUSION

Based upon the foregoing, the State requests respectfully this Court reverse the collateral court's order granting Ferrell a new penalty phase.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by email and U.S. Mail to Rick Sichta and Frank Tassone, 1833 Atlantic Boulevard, Jacksonville, Florida 32207 this 2d day of September 2008.

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## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

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MEREDITH CHARBULA
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