

IN THE SUPREME COURT OF FLORIDA

KENNETH ALLEN STEWART,

Appellant,

Case No. SC08-2075

vs.

Lower Ct. No. 85-CF-5667

STATE OF FLORIDA,

Appellee.

_____ /

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Mr. Stewart will respond to the State's arguments in Issue I. He will continue to rely upon the Statement of Facts in the Initial Brief and the arguments and authorities cited in the Initial Brief for Issues II and III.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN FINDING THAT TRIAL COUNSEL'S FAILURE TO DISCOVER AND PRESENT EVIDENCE OF ORGANIC BRAIN DAMAGE WAS NOT INEFFECTIVE AND ERRED IN RULING THAT THE CONCLUSIVE EVIDENCE OF ORGANIC BRAIN DAMAGE WOULD NOT HAVE YIELDED A DIFFERENT SENTENCING OUTCOME

In the lower court post-conviction proceedings, Mr. Stewart presented unrebutted evidence from PET scan imaging that established that Mr. Stewart has organic brain damage that has existed since birth. Mr. Stewart presented the testimony of Dr. Wood, who performed the PET scan interpretation, and Dr. Eisenstein, who spent significant time testing and evaluating Mr. Stewart. Both doctors described the effects that organic brain damage has on the behavior and reasoning capabilities and Dr. Eisenstein testified to deficits attributable exhibited by Mr. Stewart specifically. In the Answer Brief the State asserts that other mental health professionals who had previously

examined Mr. Stewart did not find brain damage, so any relief should be denied. The State's position is not supported by competent, substantial evidence or law.

The State takes issue with Mr. Stewart's use of the term "unrebutted" to characterize the evidence presented in the evidentiary hearing about the existence of organic brain damage. Black's Law Dictionary defines rebuttal evidence as "Evidence given to explain, repel, counteract, or disprove facts given in evidence by the adverse party. That which tends to explain or contradict or disprove evidence offered by the adverse party." Black's Law Dictionary, Fifth Ed.(1987), p.1139. The record does not contain any evidence which rebuts the testimony of Dr. Frank Wood that the PET scan was conclusive evidence of left hemisphere brain damage, therefore, the evidence of organic brain damage is unrebutted because the evidence from the PET scan has not been contradicted or disproved by a State witness.

The State avers that the earlier mental health professionals whose opinion that Mr. Stewart did not have brain damage in this case was reached without the benefit of the results of a full and complete battery of neurological tests or a confirmatory PET scan would

continue to maintain their earlier opinion even in light of the new evidence from both Dr. Eisenstein's testing and the PET scan.[State's Answer Brief, p.26-27;33] This argument is without merit and based on pure speculation. There is no evidence in the post-conviction record to support this position since the State called only Dr. Maher, who did not address the results of the PET scan, the State did not recall Dr. Sultan, and Dr. Weiner has never testified at any sentencing proceeding or evidentiary hearing.

The State argues that Mr. Stewart has been evaluated for twenty years and implies that organic brain damage, while searched for, has never been found. {State's Answer Brief, p. 21} Most of the previous evaluations were not neuropsychological exams, but were done to determine competency or sanity. Exams performed in the 1980's and early 1990 by Dr. Merin were done prior to the advent of PET scan technology and were not neurological exams designed to diagnose brain damage. Only Dr. Sultan and Dr. Maher have addressed the existence of brain damage when they testified in the 2001 resentencing hearing that they did not find evidence of organic brain damage. The trial court found Dr. Maher's 2001 testimony unpersuasive on many points and rejected most of his findings. A letter written

to defense counsel by Dr. Weiner is present in the current record. In that letter Dr. Weiner advises defense counsel that he does not believe there is a need to perform additional neuropsychological testing. This letter was not a part of the evidence presented in the 2001 sentencing hearing. Dr. Weiner did not testify as a witness or defend his conclusions as stated in his 2001 letter in the current proceeding. In that letter Dr. Weiner identifies seven tests he conducted- only one of which is a neurological test designed to identify possible brain damage to the right hemisphere of the brain.(VI,R1149-1151) To attempt to give the impression that Mr. Stewart has undergone previous extensive testing for the last twenty years that would have identified organic brain damage for is misleading.[State's Answer Brief, p. 27]

The State had the ability to call any of the prior mental health professionals to rebut the testimony of both Dr. Eisenstein and Dr. Wood and to have them affirmatively testify that their previous opinion remained unchanged. The State did not do this. Instead, the State chose to only recall a single individual, Dr. Maher. Dr. Maher's opinion rendered in the earlier proceedings had been rejected by the trial court. Nevertheless, Dr. Maher

testified that he disagreed with Dr. Eisenstein's opinions on what constituted adequate testing and his conclusions regarding the likelihood that Mr. Stewart had brain damage in the left hemisphere. In what amounted to a desperate attempt to defend his own discounted opinion, Dr. Maher took issue with the Dr. Eisenstein's opinion that there was a need for more extensive testing that would yield results from both hemispheres of the brain and not just one hemisphere. Dr. Maher admitted that he was not qualified to perform neurological testing, but agreed that neurological testing of some type and amount is necessary to identify brain damage.(VIII,T368-370;393) The State did not call Dr. Maher after Dr. Wood presented the findings of the PET scan, perhaps because Dr. Maher had admitted in his testimony at the evidentiary hearing that a PET scan would be important and would provide graphic evidence to a jury of brain damage.(XIII,T394). There is no testimony from Dr. Maher that he would continue to dispute Dr. Eisenstein's finding of organic brain damage after the results of the PET scan were admitted and after the testimony of Dr. Wood, who presented unrebutted evidence that the PET scan imaging confirmed brain damage. The State had the opportunity, the resources, and the ability

to present evidence to contradict the findings of Dr. Eisenstein and Dr. Wood- the State had the obligation to present competent, substantial evidence to support their position and the State failed to do so in the trial court.

While the State suggests that they did not call previous witness such as Dr. Sultan or Dr. Weiner in order to ensure there would be no continued delay, this assertion is not supported by the evidence.[State's Answer Brief, p.33] The State did attempt to rebut the testimony of Dr. Wood by calling Dr. Wilf. Much of the delay in this case arose due to difficulties that Dr. Wilf had in retrieving data given to him by Dr. Wood. While the State was waiting on Dr. Wilf's opinion, they had the opportunity to return to Dr. Maher and ascertain if he would continue in his opinion that Mr. Stewart did not suffer from organic brain damage in light of Dr. Wood's findings. That, however, did not happen. The State also had the ability to contact Dr. Wiener or Dr. Sultan and ascertain their position in light of the testing performed by Dr. Eisenstein and Dr. Wood. This was not done. The only evidence the State presented to contradict the findings of Dr. Eisenstein and Dr. Wood came from Dr. Wilf. The trial court found it necessary to

disregard Dr. Wilf's testimony as he was not qualified to render an expert opinion on the issue presented in this case.

Neither the trial court nor this Court can rely upon conjecture from the State that each prior expert, including those who never testified in this case but had testified in Mr. Stewart's other case, would continue to cling to their prior opinion in light of the findings of Dr. Eisenstein and Dr. Wood. The decision in this case must be based on the evidence presented during the evidentiary hearing- the testimony of Dr. Eisenstein, Dr. Wood, Dr. Maher, and Dr. Wilf. Dr. Wilf, by his own admission, was not qualified to testify in this case and his testimony was properly disregarded. Dr. Maher's testimony must be scrutinized and evaluated within the limitations which exist due to the State's failure to recall him after the testimony of Dr. Wood to affirm his continued belief that Mr. Stewart was not brain damaged in light of the PET scan. Dr. Maher's opinion was based on incomplete data and his previous testimony was certainly colored by his desire defend his own previous erroneous determination that there was no brain damage. The State could have given Dr. Maher the opportunity to state whether or not his opinion would

remain the same, but they did not. This Court should rely on the evidence in the record, the testimony of Dr. Eisenstein and Dr. Wood which is not contradicted or disproved. The evidence that Mr. Stewart has organic brain damage existing since birth has been conclusively established. This evidence is unrebutted. The sentencing jury was deprived of hearing evidence about the existence of brain damage and the effects such damage had on Mr. Stewart. Mr. Stewart's penalty phase jury did not consider what has become one of the most significant mitigating factors in capital litigation.

The critical question is why did the jury not hear of the existence of brain damage? What was the reason for trial counsel's failure to present the mitigation? See, Rose v. State, 675 So.2d 567, 571 (Fla. 1996). The reason is simple- defense counsel was misadvised by the doctor he consulted, Dr. Weiner. Dr. Weiner did not provide competent mental health assistance when he failed to conduct any testing of the left hemisphere of Mr. Stewart's brain. Dr. Weiner ignored scoring discrepancies recognized as "red flags" for brain damage and did not administer a sufficient number of tests that would have engage the left brain and demonstrate the deficiencies of the left

hemisphere. Hitchcock v. State, 991 So.2d 337 (Fla. 2008) Dr. Weiner's deficient testing led to an erroneous opinion that was relied on by trial counsel to the detriment of Mr. Stewart. "Trial counsel must be prepared and knowledgeable about the law and the facts of his client's case concerning both aggravation and mitigation in order to make informed strategic choices and to provide the adversarial testing required under our adversary system of justice and the dictates of Strickland." Porter v. State, 788 So.2d 917, 931(Fla. 2001)(Anstead, dissenting), relief granted, Porter v. Crosby, 2007 WL-1747316 (M.D. Fla. June 18, 2007). Because of the deficient performance of Dr. Weiner, trial counsel was not knowledgeable about the mitigation in this case, thus causing a breakdown in the adversarial testing process.

The State correctly notes that trial counsel has broad discretion in determining what mental health mitigation to present.[State's Answer Brief, p.25] However, there is no evidence in this record that suggest that trial counsel would have chosen to withhold evidence of brain damage to the jury in this case. Trial counsel was well aware of the very persuasive nature of this type of evidence, both to a jury, trial court, and, ultimately, this Court. See, Sexton

v. State, 997 So.2d 1073 (Fla. 2008). There should be no credibility given to any suggestion or argument that trial counsel would have chosen to omit evidence of brain damage from consideration to the jury in this case had Mr. Stewart been properly tested and had the brain damage been discovered. In this case there was no "double-edged sword" that would lead to a decision to forgo the presentation of organic brain damage as mitigation. Testimony that Mr. Stewart has organic brain damage did not open a door to more damaging testimony, nor was it more harmful than helpful. See, Winkles v.State, 34 Fla. Law Weekly S521 (Fla. September 3, 2009), ---So.3d---, 2009 WL 2778204 (Fla. 2009).

Relying on a set of string citations, the State argues that Mr. Stewart should not prevail because he merely presented "more favorable mental health testimony" in post conviction than what was presented in the resentencing proceeding.[State's Answer Brief, p.25] That is not what occurred in this case and an analysis of the cases contained in the State's string cite demonstrate the weakness of this position. In Pace v. State, 854 So.2d 167 (Fla. 2003), the issue in post-conviction centered on the reasonableness of trial counsel's actions in forgoing the

presentation of certain mitigation testimony related to the defendant's crack cocaine usage and the effect of that usage on him at the time of the offense. This Court found that the reasonableness of counsel's decision were based in large part the defendant's repeated denials to trial counsel of any ill effects from drug abuse at the time of the crime. This Court declined to find counsel ineffective for relying upon the representations of the defendant. In this case there is no evidence that Mr. Stewart in any way misrepresented or in any way contributed to the failure to properly indentify brain damage.

During the post-conviction hearing, Pace presented testimony from new doctors who opined that the defendant's drug usage affected him. These opinions were based on changes in testimony from witnesses from trial. No new evidence was presented by the defendant at the post-conviction hearing from neuropsychological testing that differed from the trial testimony and the opinion of this Court does not state whether or not a PET scan was done on Pace during post conviction. Again, Mr. Stewart's case differs from Pace because the new evidence in this case did not arise from a change in testimony and Mr. Stewart

presented new evidence that differed completely from the previous mental health testimony on the question of brain damage.

The State next cites to Davis v. State, 875 So.2d 359 (Fla. 2003). In Davis the trial court had found both statutory mental health mitigators at sentencing. Evidence had been presented at the original penalty phase that Davis suffered from PTSD caused by sexual abuse he suffered as a child. Three mental health experts testified to this diagnosis at penalty phase. During post-conviction Davis called an expert, who agreed with the prior diagnosis of PTSD stemming from childhood sexual abuse that had been presented at the original penalty phase. The new expert merely disagreed with the emphasis the earlier experts had placed on the sexual abuse and believed that it would have been better to call an expert in child sexual abuse to better explain the effects of such abuse to the jury. However, the new expert did not offer any new evidence or diagnosis and testified that she concurred with the previous diagnosis. This Court found that there was no evidence of ineffective assistance of counsel because there was no new evidence that had been overlooked or misdiagnosed. Davis differs from this case because new

evidence of organic brain damage was presented in this case and both Dr. Eisenstein's and Dr. Wood's testimony established a diagnosis that would establish the statutory mental health mitigators as extreme instead of only "some evidence" of the statutory mental health mitigators as previously determined by the trial court.

Asay v. State, 769 So.2d 974 (Fla. 2000) is also distinguishable. In Asay new testing in post conviction led to the same diagnostic conclusion that had been previously reached in penalty phase and testified to by the defense expert. This Court noted that the diagnosis of brain damage by the post conviction expert was speculative, since brain damage had not been confirmed by a PET scan. Mr. Stewart's diagnosis of brain damage is not speculative; it has been confirmed by a PET scan, differing significantly from Asay.

This Court rejected the defendant's claim for relief in Rivera v. State, 859 So.2d 495 (Fla. 2003), because the penalty phase experts relied heavily upon and largely concurred with the trial mental health expert on whether or not the defendant's cocaine usage established the statutory mitigators of substantially impaired capacity to appreciate the criminality of his conduct and conform behavior to the

requirements of the law. At trial, the defense mental health expert had testified that Rivera was impaired, and after observing all the evidence presented at the post conviction hearing, testified that the new evidence would not change her previous opinion. No new evidence was presented in post conviction, a significant difference from this case.

In Jones v. State, 732 So.2d 313 (Fla. 1990), defense counsel contacted family members, reviewed the defendant's prison records, met with the defendant, and obtained a mental health evaluation. Trial counsel called his mental health expert at trial, who testified about the defendant's drug abuse, IQ, and mental status, but who did not believe that either statutory mental health mitigators were present. At the evidentiary hearing, post conviction counsel called two mental health witnesses, both who testified that they believed each statutory mental health mitigator was present. This Court upheld the trial court's denial of relief, finding that while the new experts had different opinions, those opinions were based on substantially the same evidence that was relied upon by the trial mental health experts. In this case, Mr. Stewart's post conviction doctors relied upon substantially different

evidence to reach their conclusions. Dr. Eisenstein relied on the results of a full battery of neuropsychological tests that tested the entire brain, in contrast to Dr. Weiner who used only one test targeted to the right side of the brain. Dr. Wood relied on the confirmatory and unrebutted imaging results of the PET scan, unlike Dr. Maher, Dr. Sultan, or Dr. Weiner who did not have either the results of a full neurological exam or a PET scan.

In Pietri v. State, 885 So.2d 245 (Fla. 2004), trial counsel had waited until just before penalty phase to secure a mental health expert. Despite the dilatory actions of trial counsel, no new mental health evidence was presented during the post conviction evidentiary hearing that differed from what had been presented at trial. In fact, the experts presented at the post conviction hearing contradicted each other on whether or not any or all of the statutory mitigators would apply. Only one of the post conviction experts believed there was some evidence of brain damage, which was not confirmed by a PET scan. This Court found no error, noting that the conflict among Pietri's experts in post conviction could preclude relief. There are no conflicts among the Mr. Stewart's experts in

the post conviction proceedings in this case. Both Dr. Eisenstein and Dr. Wood opined that Mr. Stewart has organic brain damage present in the left hemisphere since birth.

With nothing else to fall back on, State finally claims that Mr. Stewart has not been prejudiced by the failure to diagnose and confirm brain damage. Mr. Stewart has demonstrated that the mental health examinations in this case were deficient. He was prejudiced by the omission from the jury's consideration of mitigation of evidence of organic brain damage, the effect that left hemisphere brain damage has on individuals in general and Mr. Stewart specifically, and the existence of fetal alcohol syndrome and its developmental effect on Mr. Stewart and as a contributor to the organicity of the brain damage.(IV,R627-641;654) When determining whether or not prejudice has been established, all the evidence is reweighed to see if the evidence in aggravation against the totality of mental health mitigation presented during the post-conviction evidentiary hearing leads to a determination that confidence in the outcome of the penalty phase is undermined. Hurst v. State, ---So.3d---, 2009 WL 2959204 (Fla. September 17, 2009). It is imperative to focus on the nature of the new mental health mitigation evidence

that is now being presented. Rutherford v. State, 727 So.2d 216, 223 (Fla. 1998); Wiggins v. Smith, 539 U.S. at 534, 123 S.Ct. 2527, 156 L.ED 2d 471 (2003). Prejudice is established where strong mental health mitigation is essentially un rebutted, and especially so where the jury vote is close. Phillips v. State, 608 So.2d 778, 783 (Fla. 1992).

The new mental health evidence presented at the evidentiary hearing has been thoroughly outlined in the Statement of Facts in the Initial Brief. It is un rebutted. In summary, Mr. Stewart was found to have organic brain damage in the left hemisphere. This brain damage has existed since birth. Left hemisphere brain damage interferes with the ability to make good decisions or decisions that make sense under a specific set of circumstances, renders multitasking impossible, and the inability to process information in an organized, coherent manner.(IV,R651;668) Organic brain damage in the left hemisphere leads to problems in thinking behavior, how one responds to situations, decision making, poor impulse control, irritability, inflexible thinking, and constriction of affect in unproductive and damaging ways such as alcohol and drug abuse, and the lack of

intention.(IV,R668) Alcohol consumption in someone with brain damage like Mr. Stewart's was described as "lethal".(IV,R671) Alcohol consumption would so disrupt the thinking capabilities of Mr. Stewart to the point that little to no "thinking" would occur.(IV,R671)

The evidence of brain damage, the effects of that damage on Mr. Stewart's abilities at the time of the offense, coupled with evidence of fetal alcohol syndrome is significant mental health mitigation. Organic brain damage and fetal alcohol syndrome have been characterized by this Court as "strong mitigators"- even possible brain damage has been referred to as a "strong mitigator" in Hurst where the testimony about brain damage was presented without benefit of a confirmatory PET scan or MRI. See, Hurst v. State, ---So.3d---, 2009 WL 2959204; Mitchell v. State, 595 So.2d 938, 936 (Fla. 1992). The presence of such a significant mitigator as organic brain damage, especially when coupled with fetal alcohol syndrome, directly affects the findings regarding the existence of both statutory mental health mitigators in this case. The existence of organic brain damage undercuts the trial court's finding that Mr. Stewart's disturbance was not extreme and his

impairment was not substantial and casts doubt on how much weight should be assigned to the statutory mental health mitigators.(Vol.VI,R60-63)

The Constitution requires that a defendant facing execution be provided with effective mental health assistance. Effective mental health assistance, should at minimum, include testing which is generally accepted as adequate within the scientific community for diagnostic purposes. That did not occur in this case. In this case, the prior expert assistance was inadequate and failed to include testing components that would measure complete brain function. Had effective mental health assistance been provided, organic brain damage would have been diagnosed. As a result of the deficiencies of the mental health exams, trial counsel did not have the necessary information to asses and present compelling mitigation- this mitigation was missed. Even the minimal testing that was performed contained red flags which indicated a need for further neuropsychological testing and a PET scan. Again, that need was ignored or improperly misdiagnosed by Dr. Wiener, resulting in ineffective assistance from the mental health expert. The prejudice which resulted from the ineffective mental health diagnostics resulted in trial counsel's

failure to discover and present relevant mitigation consistent with the penalty phase strategy. The failure to properly test and diagnose resulted in the failure of trial counsel to present to the jury what has been recognized as among the most compelling mitigation evidence. This mitigation was missed in a case where the barest majority recommended death. Under the facts of this case, confidence in the outcome of the penalty phase has been unconstitutionally shaken, resulting in a violation of Mr. Stewart's Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution and the corresponding provisions of the Florida Constitution. A new penalty phase proceeding must be conducted.

CONCLUSION

Based upon the arguments and citations of authority on the issues presented in the Initial Brief and this Reply Brief, this Court must reverse the order of the trial court denying relief and order that a new penalty phase be conducted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Reply Brief has been furnished by U.S. Mail to the Office of the Attorney General, Carol M. Dittmar, Concourse Center 4, 3507 E. Frontage Rd., Suite 200, Tampa, FL 33607 this ___ day of October, 2009.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that a the size and style used in this Reply Brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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