

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-1413

MARTIN GROSSMAN,

Petitioner,

v.

JAMES CROSBY,

Respondent.

REPLY BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

This reply brief addresses arguments II and III of Mr. Grossman's initial brief. As to all other issues, Mr. Grossman stands on the previously filed initial brief.

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ARGUMENT II

MR. GROSSMAN WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS TRIAL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CONTRARY TO THE HOLDING IN WIGGINS.

In Wiggins v. Smith, 123 S.Ct. 2527 (2003) the Supreme Court of the United States applied the *Strickland* standards to investigations in penalty phase cases. The Court held:

In light of these standards, our principal concern in deciding whether Schlaich and Nethercott exercised "reasonable professional judgment", *id.*, at 691, 104 S.Ct. 2052, is not whether counsel should have presented a mitigation case. Rather we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins background was *itself reasonable*.
Id. at 2536.

The 3.850 court in its order, did not address the issue of the reasonableness of the investigation. The court merely stated: "The Court finds that Mr. McCoun did a competent, effective job of representing the Defendant at all phases of the trial. Even if counsel were deemed ineffective for the reasons stated by the Defendant, such alleged ineffectiveness did not come close to being so prejudicial to the Defendant that it affected the outcome of the case. The facts of this case showed the Defendant's conduct to be so egregious that proof of mitigating circumstances was extremely difficult." (PCR.

Vol. XVI - 2837). In light of the holding in *Wiggins*, the issue of the quality of the investigation merits review by this Court.

Although McCoun had spoken to Paul Melton, no mitigation was discussed. As per the attached affidavit of Paul Melton, no one from the defense had ever asked Melton about Martin and his family. The decision not to call Paul Melton as a witness in penalty phase was a strategic choice, but it was based upon an incomplete investigation, it is not unreasonable to have asked a long time neighbor and relative by marriage about the dynamics of Mr. Grossman's family. Trial counsel's contention that he was "trying to find anybody that would say something beneficial to him" (Martin; Grossman), (PCHR. Vol. III - 287) is self serving on the part of trial counsel. The 32 affidavits contained in the attached exhibit clearly proves that trial counsel did not investigate the mitigation in this case. Appellee's contention on page 14 and 15 of the Response to Successive Petition that "Notably, while both attorneys expressed concern that some additional background witnesses had been discovered, both attorneys also acknowledged that putting on additional mitigation probably would not have changed the outcome of the case," is contrary to the holding in the recent case of Williams v. Taylor, 529 U.S. 362, 364,

120 S.Ct. 1495, 1498 (2000):

Although not all of the additional evidence was favorable to Williams, the failure to introduce the comparatively voluminous amount of favorable evidence was not justified by a tactical decision and clearly demonstrates that counsel did not fulfill their ethical obligation to conduct a thorough investigation of Williams' background.

Id. at 364 *1498.

The tactical decision to avoid negative testimony does not negate the obligation to conduct a thorough investigation.

Appellee Counsel's contention on page 18 of STATE'S RESPONSE TO SUCCESSIVE PETITION FOR WRIT OF HABEAS CORPUS, in regards to Berman's belief that additional information about Grossman's background as a young child, and even up to thirteen years of age would have changed the jury recommendation in this case, is addressed in Wiggins:

The record of the actual sentencing proceedings underscores the unreasonableness of counsel's conduct by suggesting that their failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment. Counsel sought, until the day before sentencing, to have the proceedings bifurcated into a retrial of guilt and a mitigation stage. On the eve of sentencing, counsel represented to the court that they were prepared to come forward with mitigating evidence, App. 45, and that they intended to present such evidence in the event the court granted their motion to bifurcate. In other words, prior to sentencing, counsel never actually

abandoned the possibility that they would present a mitigation defense. Until the court denied their motion, then, they had every reason to develop the powerful mitigation case possible.... Far from focusing exclusively on petitioner's direct responsibility, then counsel put on a halfhearted mitigation case, taking precisely the type of "shotgun" approach the Maryland Court of Appeals concluded counsel sought to avoid. Wiggins v. State, 352 Md., at 609, 724 A.2d, at 15. When viewed in this light, the "strategic decision" the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more *post-hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing. Id. at 2537.

Although Berman admitted at the 3.850 hearing that he believed that a jury could have easily found Mr. Grossman guilty of first degree murder based upon the evidence and that it was clear that there was a likelihood of a second phase in the trial, (PCHR. Vol III 291-292) his investigation consisted of walking from the Criminal Courts building to the Pinellas County Jail which is within the same complex, and talking to people employed at the jail. Clearly this conduct fell below an objective standard of reasonableness. It was McCoun who investigated Myra and Steven Martakas. As cited in the original petition, Berman, the penalty phase attorney, relied on McCoun's work pre trial instead of going to Miami, interviewing local witnesses, and generally doing the job

expected of a penalty phase attorney. At the penalty phase of the trial, McCoun presented the testimony of Myra Grossman. (R. Vol. XV- 1346). As cited in the original petition, Berman had never met her. At the 3.850 hearing, Mr. McCoun detailed the relative involvement of the attorneys in regards to the penalty phase:

Q. Let me ask you this question. With reference to you and Mr. Berman and the penalty phase of the case, tell us what you did with reference to preparation for that aspect of it.

A. I don't know what Ira did. I can tell you that it wasn't a great deal. (PCHR. Vol. I -37).

Mr. McCoun's frustration at Berman's penalty phase presentation is reflected in the following testimony at the 3.850 hearing:

Q. Can you, as you sit here today, characterize your penalty phase preparation for Martin Grossman?

A. I think it was - yes. As I sit here today, the way I would characterize it would be inadequate.

Q. How about his presentation?

A. I think I was pretty angry. I probably should have stayed out of the penalty phase totally, but we hadn't really developed much of a penalty phase. Mr. Berman was out scrounging, trying to put it together and it did not develop very well. (PCHR. Vol. I 39).

It should be noted that Mr. Berman was "out scrounging" *during trial*. This is exactly what happened to the attorneys

in *Wiggins*. Upon denial of their motion to bifurcate, the *Wiggins* defense team abandoned the investigation and put together a slap-dash mitigation case. In this case, upon denial of the motion to continue, due to Mr. McCoun's busy trial calendar and Mr. Berman's inability to accept his duties as penalty phase attorney, the investigation was abandoned and a half-hearted attempt at mitigation was presented. At the 3.850 hearing trial counsels invoked the "strategic decision" defense to justify counsel's limited pursuit of mitigating evidence which resembled more *post-hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing. Under *Wiggins*, relief is proper.

On pages 17 & 18 of Appellee's response, she contends that "Both trial attorneys recognized at the evidentiary hearing below that putting on additional mitigating evidence probably would not have changed the outcome in this case." This is but another "strategic decision" trial counsel seeks to invoke to justify counsel's limited pursuit of mitigating evidence and this conduct is expressly prohibited by *Wiggins*.

Trial counsel's failure to investigate Mr. Grossman's drug history prejudiced Grossman by depriving him of an important statutory mitigator. The affidavits show a shy,

withdrawn child who, upon the death of his father and grandfather, began using his mentally unstable mother's prescriptions. Mr. Grossman's statement "We are never going to get high again" as detailed in the original petition, should have been investigated by trial counsel. Mr. Grossman contends that the investigation into possible statutory mitigation and his background did not meet the minimum standards of the profession. Opposing counsel points out that there was a unanimous recommendation of death. Mr. Grossman contends that had a proper investigation been done, available and compelling mitigation would have been discovered. Mr. Grossman was prejudiced by trial counsel's ineffectiveness. Berman's belief that additional information about Grossman's background as a young child, and even up to thirteen years of age, would not have changed the jury recommendation in this case, was based on ignorance. Berman had not investigated Grossman's background; he did not interview possible witnesses in New Port Richey or in Hialeah. Opposing counsel's contention that the mitigation was simply a parade of character witnesses is rebutted by not only the wealth of historical information about the Grossman family, but by the Affidavit of Sally Karoth. Karoth was a qualified expert witness and was prepared to testify as to

the effect of caring for a terminally ill family member has on an impressionable young boy. Opposing counsel's conclusion that Grossman's actions are not reasonably mitigated by any newly proffered mitigation is merely her conclusion unsupported by fact. Relief is proper.

ARGUMENT III

THE FLORIDA STATUTE 921.141 UNDER WHICH MR. GROSSMAN WAS SENTENCED TO DEATH IS UNCONSTITUTIONAL UNDER RING V. ARIZONA AND SHOULD BE APPLIED RETROACTIVELY IN MR. GROSSMAN'S CASE

Respondent erroneously urges this Court to deny Mr. Grossman relief by arguing that his claims are procedurally barred, that he is not entitled to retroactive relief, that Ring did not invalidate Florida's sentencing scheme, and that any possible error would be harmless. Respondent is incorrect in asserting that Mr. Grossman should be denied relief.

Respondent first argues that Mr. Grossman's challenge to the constitutionality of his sentence is an issue that should have been raised on direct appeal. Respondent's argument is spurious because Mr. Grossman's claims are based on the decisions of Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed. 2d 556 (2002); Apprendi v. New Jersey, 530 U.S. 466 (2000); Bottoson v. Moore, 833 So.2d 693 (Fla. 2002); and King v. Moore, 831 So.2d 143 (2002). At the time Mr.

Grossman's post conviction pleadings were filed, these cases had not yet been decided and Mr. Grossman could not have made the claims. Even though Mr. Grossman's claims are based on cases recently decided, he did in his habeas petitions raise claims directed to the claims now raised. Mr. Grossman, in his state habeas petition, in Claim II, raised a claim based on Caldwell v. Mississippi, 472 U.S. 320 (1985) directed to the dilution of the juries responsibility in the sentencing process. This claim was also raised in Ground V in Mr. Grossman's federal Writ of Petition of Habeas Corpus. Also raised in Ground VI B. of that petition is a claim that Florida's sentencing scheme violates the Fifth, Eighth, and Fourteenth Amendments by impermissible shifting of the burden to the defendant. Thus, Respondent is further incorrect in asserting that Mr. Grossman's claims should be procedurally barred because they should have been raised on direct appeal. The claims were previously raised, are not procedurally barred, and are preserved for review.

Respondent is incorrect in asserting that Mr. Grossman's claim is procedurally barred. Respondent suggests that this Court should rely on Teague v. Lane, 489 U.S. 288 (1989) in considering whether Ring should be applied retroactively in Mr. Grossman's case. However, Teague applies to changes in

procedural rules and not changes in substantive rules. Ring, as applied to Mr. Grossman's case, is a change in substantive law and thus Teague does not apply in an analysis of whether Ring is retroactive. Furthermore, the Teague standard is applied in cases of habeas review in federal court and need not be applied in state court review.

This Court applies the standard in Witt v. State, 387 So.2d 922 (Fla. 1980) in determining retroactivity. In applying the Witt standard of this Court, Ring has retroactive application in Mr. Grossman's case. Respondent erroneously urges this Court to reconsider the continued applicability of Witt and adopt the Teague standard as the proper analysis for determining the retroactivity of Ring and Apprendi. However, this Court determines retroactivity by applying the standards set in Witt. The standard in Witt is the appropriate standard to apply in Mr. Grossman's case.

Applying the appropriate standard to Mr. Grossman's case demonstrates that he is entitled to the retroactive application of Ring and Apprendi. The doctrine of finality should be abridged in Mr. Grossman's case because Ring and Apprendi are sweeping changes that alter the procedural underpinnings of capital sentencing proceedings. Both Ring and Apprendi emanated from the United States Supreme Court,

are constitutional in nature, and constitute developments of fundamental significance. The decisions substantively and fundamentally impact Mr. Grossman's sentence and should be applied to Mr. Grossman's case retroactively.

The Florida sentencing scheme diminishes the jury's sense of responsibility in the sentencing process in violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633 (U.S. Miss., 1985). In Caldwell, the Supreme Court held, "that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Id. at 329.

The jury's sense of responsibility in Mr. Grossman's case was diminished when the jury was instructed to deliberate and give an advisory recommendation to the court. Because the jury was told that their verdict was advisory, and that the judge would be making the sentencing decision, the jury's sense of responsibility was diminished in violation of Caldwell. The diminution of responsibility on the part of the jury not only violates the precepts of Caldwell, but also exacerbates the constitutional issues raised by Ring. Mr. Grossman was sentenced by a judge, who had final

responsibility for sentencing only after a jury made a sentencing recommendation who was told, in effect, that their recommendation did not mean that much because the judge would make the ultimate decision as to the sentence imposed. Ergo the jury's sense or responsibility in their recommendation to the sentencing judge was diminished in violation of Caldwell.

The State is incorrect in relying on Turner v. Crosby, 339 F.3d 1247 (11th Cir. 2003) to support their contention that Mr. Grossman's Ring claim is procedurally barred and not subject to retroactive application. The petitioner in Turner, for the first time, raised his Ring claim in federal court. Turner did not raise the claim in state court which would have given the state court an opportunity to act on the claim. In failing to raise the claim in state court, Turner failed to exhaust all remedies before raising the issue in federal court. "A state habeas corpus petitioner who fails to raise his federal claims properly in state court is procedurally barred from pursuing the same claim in federal court absent a showing of cause for and actual prejudice from the default." Turner at 1280 (quoting Bailey v. Nagle, 172 F.3d 1299, 1302 (11th Cir. 1999)) Turner never raised a Sixth Amendment right to a jury trial claim in the Florida courts. Because Turner failed to raise the claim and exhaust all

available remedies, he was procedurally barred from pursuing the claim in federal court.

Mr. Grossman did raise his Sixth Amendment claim in state court, presently giving this Court an opportunity to act on the claim, and further preserving the issue for potential federal review. Mr. Grossman is not procedurally barred from bringing his claim before this Court on the basis of the holding in Turner. Mr. Grossman is complying with the dictates of Turner regarding the doctrine of exhaustion of remedies and is not procedurally barred from asserting his claim.

Mr. Grossman was sentenced after the court found statutory aggravators, which did not include a prior violent felony, and after a jury, whose sentencing responsibility was diminished, made only an advisory recommendation to the sentencing court. It is not known, nor can it ever be known, which, if any of the aggravators recommended by the jury and later used to sentence Mr. Grossman to death were proved beyond a reasonable doubt. This is because juries in Florida do not make specific findings regarding aggravators. The jury made a recommendation, and the judge proceeded to enhance Mr. Grossman's sentence from what would, at that point, have been a sentence of life to a sentence of death.

Ring and Apprendi are changes in the law of sentencing which precludes exactly what happened to Mr. Grossman. His sentence was unconstitutionally enhanced and he was sentenced by a judge who had the responsibility for finding the aggravating circumstances to support a death sentence. Ring and Apprendi precludes a judge, sitting alone, from enhancing punishment beyond that of the maximum authorized by the jury verdict alone. The decisions are of fundamental significance which so drastically alter the underpinnings of Grossman's death sentence that "obvious injustice" exists. Witt at 925 Such is a change in the law of sufficient magnitude to necessitate retroactive application. Id. at 931.

The State is incorrect in asserting that every federal circuit court to address the issue of whether Apprendi is retroactive has found that it is not retroactive. The Ninth Circuit Court of Appeals, in Summerlin v. Stewart, 341 F.3d 1082 (9th Cir. 2003) found that Ring, which is based on Apprendi, should be applied retroactively. Thus, Apprendi has retroactive application in capital sentencing.

The State is incorrect in asserting that any possible error would necessarily be harmless under the facts of this case. The jury was instructed on four aggravators: (1) during the course of a robbery or burglary; (2) murder

committed to avoid arrest; (3) murder committed to hinder or disrupt law enforcement; and (4) heinous, atrocious or cruel. Although the jury unanimously recommended a sentence of death, the jury verdict did not indicate which, if any, of the aggravators were proved to the jury beyond a reasonable doubt. The jury verdict only reflected a twelve to zero vote but did not indicate which, if any, specific aggravators were proved beyond a reasonable doubt. Regarding proof of the individual statutory aggravators, none of the aggravators may have been proved unanimously, and thus no specific aggravator proved beyond a reasonable doubt. The jury could have rendered split decisions as to each particular aggravator and voted in the aggregate by lot or some other device. One can only speculate as to which, if any, of the aggravators found to exist by the sentencing judge were actually proved to the jury beyond a reasonable doubt. Mr. Grossman was severely prejudiced by the sentencing in his case. The prejudice to him was not harmless but harmful.

Mr. Grossman is not procedurally barred from raising this claim. The sentencing scheme used to sentence Mr. Grossman is unconstitutional. The harmful prejudice to Mr. Grossman can only be cured by retroactive application of the holdings in Ring and Apprendi.

CONCLUSION

For the reasons set forth above and in his petition for habeas corpus, Mr. Grossman respectfully requests this Honorable Court to grant him relief, vacate his death sentence, and order a new penalty phase.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Petitioner has been furnished by United States mail, first class postage prepaid, to all counsel of record on this ___ day of October, 2003.

—

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Reply Brief of Petitioner, was generated in Courier New, 12 point

font, pursuant to Fla. R. App. P. 9.210.

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