

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1688

MARTIN GROSSMAN

Appellant,

v.

STATE OF FLORIDA

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT FOR PINELLAS COUNTY,
STATE OF FLORIDA**

REPLY BRIEF OF APPELLANT

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REPLY TO STATE'S RESPONSE

The State erroneously suggests that Mr. Grossman's claim is facially invalid or conclusively refuted by the record. This is incorrect and is merely an attempt by the State to preclude Mr. Grossman from being granted the evidentiary hearing to which he is entitled.

The lower court also erred in summarily denying Mr. Grossman the opportunity to prove this claim at an evidentiary hearing. Mr. Grossman presented a claim of newly discovered evidence which was not facially invalid or conclusively refuted by the record. Fla. R. Crim. P. 3.851 (f)(5)(A) states that "the trial court shall schedule an evidentiary hearing...on claims listed by the defendant as requiring a factual determination." The clearly established standard according to Rule 3.850 and this Court's precedents is that a capital defendant is entitled to an evidentiary hearing "unless the motion and record conclusively show that the defendant is entitled to no relief." Fla. R. Crim. Pro. 3.850 (d). As this Court ruled in Gaskin v. State, 737 So.2d 509 (Fla. 1999),

While the post-conviction defendant has the burden of pleading a sufficient factual basis for relief, an evidentiary hearing is presumed necessary absent a conclusive demonstration that the defendant is entitled to no relief. In essence, the burden is upon the State to demonstrate that the motion is legally flawed or that the record conclusively demonstrates no entitlement to relief.

* * *

The rule was never intended to become a hindrance to obtaining a hearing or to permit the trial court to resolve disputed issues in a summary fashion.
Gaskin, 737 So.2d at 516.

Mr. Grossman's motion for post conviction relief presented factually based claims, which are not conclusively refuted by the record in this case. The lower court erred as a matter of law and fact in denying Mr. Grossman an evidentiary hearing on his claims, thereby precluding him from proving at an evidentiary hearing what he alleged in his post-conviction motion.

Mr. Grossman filed his claim upon the newly discovered evidence concerning a brain mapping study which shows that the frontal brain lobes may not be fully developed until an individual is about twenty-five years old. The study is entitled "Dynamic mapping of human cortical development during childhood through early adulthood" authored by Gogtay and others led by NIH's Institute of Mental Health and UCLA's laboratory of Neuro Imaging and was released on May 17, 2004.

This study was unknown and unavailable at the time of Mr. Grossman's trial. Appellee said in the answer brief that Mr. Grossman has not demonstrated how the article amounts to newly discovered evidence, however the study was not released until May 17, 2004. Mr. Grossman was tried in 1985.

Since the study was not known or could have been known to Mr. Grossman at the time of his trial, the study is newly discovered evidence.

The recently released study by Gotag and others shows that Mr. Grossman's brain would not have been fully developed at the time of the offense when he was nineteen years of age. Mr. Grossman did not have the capacities for self control and reflection that a fully developed adult would possess. When the United States Supreme Court held in Roper v. Simmons, 125 S.Ct. 1183 (2005) that execution of individuals who were under 18 years of age at the time of their capital crimes is prohibited by the Eighth and Fourteenth Amendments, the newly discovered evidence became even more crucial.

As this Court held in Urbin v. State, 714 So.2d 411 (Fla. 1998), the closer the defendant is to the age where the death penalty is constitutionally barred, the weightier this statutory mitigator becomes. However, when the Roper Court found that executing those under age 18 at the time of their capital crimes, combined with the newly discovered evidence regarding brain maturation, the weightier the age statutory mitigator becomes. Even though Mr. Grossman was not chronologically under age 18 at the time of the offense, he was mentally under age 18. Had the evidence regarding brain maturation been available at the time of

the offense, Mr. Grossman would have benefitted as age at the time of the offense would have been granted.

Mr. Grossman did not get the benefit of age at the time of the offense mitigator. The trial court did not consider age at the time of the offense saying:

The only mitigating circumstance which could have been found as a result of the testimony presented in behalf of the Defendant and the Presentence Investigation, was that the Defendant was nineteen (19) years old at the time the crime was committed. However, this Court does not feel that this constituted a mitigating circumstance in the case.

The Court does not find any other aspect of the Defendant's character or record, or any other circumstances of the offense as reflected in the testimony presented at trial and in the penalty phase to be a mitigating factor.

(ROA Vol. II - p. 290)

The court by the above statement clearly demonstrated a lack of understanding of the age mitigator. Age is a mitigator by statute. The court did not consider, much less weigh the age mitigator. Furthermore, the fact that Mr. Grossman's cerebral cortex had not been developed is an aspect of his character and a circumstance of the offense.

The newly discovered evidence establishes that Martin Grossman was under an extreme mental or emotional disturbance at the time of the offense. § 921.141 (6)(b) and (g). The newly discovered evidence demonstrates that Martin's

mental age at the time of the offense was significantly below the age of 18. Had this evidence been presented he would have benefitted in the penalty phase of his trial.

Mr. Grossman should have been granted an evidentiary hearing on this claim. This Court has “encouraged trial courts to hold evidentiary hearings on postconviction motions.” Ragsdale v. State, 720 So.2d 203, 207 (Fla., 1998). The lower court should not have denied Mr. Grossman an evidentiary hearing on his newly discovered evidence claim

CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, the lower court improperly denied Mr. Grossman relief. This Court should order that his convictions and sentences be vacated and remand the case for such relief as the Court deems proper.

CERTIFICATE OF FONT SIZE AND SERVICE

I HEREBY CERTIFY that a true copy of the foregoing REPLY BRIEF OF APPELLANT which has been typed in Font Times New Roman , size 14, has been furnished by U.S. Mail to all counsel of record on this 2nd, day of March, 2006.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing REPLY BRIEF OF APPELLANT, was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210.

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