

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC96641

**CHARLIE THOMPSON,
Appellant,**

v.

**STATE OF FLORIDA,
Appellee.**

**ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT FOR
HILLSBOROUGH COUNTY, STATE OF FLORIDA**

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
ARGUMENT IN REPLY	1
INTRODUCTION	1
ARGUMENT I	
THE LOWER COURT ERRED IN SUMMARILY DENYING MR. THOMPSON’S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS WITHOUT AN EVIDENTIARY HEARING.	2
A. COUNSEL WAS INEFFECTIVE FOR FAILURE TO ADEQUATELY QUESTION POTENTIAL JURORS ABOUT THEIR VIEWS ON THE CREDIBILITY OF WITNESSES, THEIR VIEWS ON MENTAL HEALTH MITIGATION AND MENTAL HEALTH EXPERTS, AND COUNSEL ALSO FAILED TO DISCOVER AND REMOVE BIASED JURORS, AND TO PRESERVE THE ISSUE FOR APPEAL.	2
B. COUNSEL WAS INEFFECTIVE FOR FAILURE TO ADEQUATELY INVESTIGATE AND ARGUE THE CASE DURING THE GUILT PHASE.	7
C. COUNSEL FAILED TO EFFECTIVELY PRESENT AND CROSS- EXAMINE WITNESSES.	9
D. COUNSEL WAS INEFFECTIVE FOR FAILURE TO OBJECT TO STATE INTERFERENCE WITH EVIDENCE.	10

E. COUNSEL WAS INEFFECTIVE FOR FAILURE TO VOIR DIRE, CALL WITNESSES AND OBJECT TO INADMISSABLE EVIDENCE. 11

F. COUNSEL WAS INEFFECTIVE FOR FAILURE TO MAKE PROPER OBJECTIONS DURING PENALTY PHASE. 13

G. COUNSEL WAS INEFFECTIVE FOR FAILURE TO PROVIDE MR. THOMPSON'S MENTAL HEALTH EXPERT WITH ADEQUATE BACKGROUND INFORMATION TO PERMIT A MEANINGFUL EVALUATION OF MR. THOMPSON FOR THE PRESENCE OF MITIGATION OR INTOXICATION NEGATING SPECIFIC INTENT. 14

H. COUNSEL WAS INEFFECTIVE BECAUSE PENALTY PHASE COUNSEL NEVER MET WITH THE DEFENDANT PRIOR TO THE ACTUAL COMMENCEMENT OF THE PENALTY PHASE. 15

ARGUMENT AS TO REMAINING CLAIMS 16

CERTIFICATE OF FONT AND SERVICE 17

TABLE OF AUTHORITIES

	Page
<u>Gaskin v. State,</u> 737 So. 2d 509, 519 (1999)	1
<u>Lemon v. State,</u> 498 So. 2d 923 (Fla. 1986)	1
<u>Mordenti v. State,</u> 711 So. 2d 30, 33 (Fla. 1998)	1
<u>Penry v. Lynaugh,</u> 492 U.S. 302, 109 S.Ct 2934, 106 L. Ed. 2d 256 (1989)	11
<u>Robinson v. State,</u> 707 So.2d 688 (Fla. 1998)	3

ARGUMENT IN REPLY

INTRODUCTION

Mr. Thompson was denied relief by the lower court without the benefit of an evidentiary hearing on **any** of his claims. The law strongly favors full evidentiary hearings in capital post-conviction cases, especially where a claim is grounded in factual as opposed to legal matters (A post-conviction movant is entitled to an evidentiary hearing unless "the motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief.") Fla. R. Crim. P. 3.850; Lemon v. State, 498 So. 2d 923 (Fla. 1986).

Moreover, this Court has clearly indicated the need for mandatory evidentiary hearings on initial rule 3.850 motions. In his concurring opinion in Mordenti v. State, 711 So. 2d 30, 33 (Fla. 1998). Justice Wells stated that "the rule should be amended to require that an evidentiary hearing is mandated on initial motions which assert ineffective assistance of counsel, Brady, or other legally cognizable claims which allege an ultimate factual basis."

Subsequently, Justice Pariente, in a special concurring opinion in Gaskin v. State, 737 So. 2d 509, 519 (1999), reiterated her agreement with Justice Wells that "the better practice would be to require trial courts to hold evidentiary hearings on the initial 3.850 motion in death penalty cases..."

More recently, this Court issued proposed amendments to rule 3.851, which include the requirement of an evidentiary hearing on the initial motion for postconviction relief. Amendments To Florida Rules Of Criminal Procedure 3.851, 3.852, and 3.993, No. SC96646 (April 14, 2000).

Mr. Thompson has pled substantial, serious allegations which go to the fundamental fairness of his conviction and to the appropriateness of his death sentence. An evidentiary hearing is warranted on several of appellant's claims.

ARGUMENT I

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. THOMPSON'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS WITHOUT AN EVIDENTIARY HEARING.

Appellee argues that none of Mr. Thompson's assertions warranted an evidentiary hearing by the lower court (Answer at 13). As will be discussed below, Appellee's argument is erroneous.

- A. COUNSEL WAS INEFFECTIVE FOR FAILURE TO ADEQUATELY QUESTION POTENTIAL JURORS ABOUT THEIR VIEWS ON THE CREDIBILITY OF WITNESSES, THEIR VIEWS ON MENTAL HEALTH MITIGATION AND MENTAL HEALTH EXPERTS, AND COUNSEL ALSO FAILED TO DISCOVER AND REMOVE BIASED JURORS, AND TO PRESERVE THE ISSUE FOR APPEAL.**

Appellee contends that this issue is procedurally barred based on this Court's

holding in Robinson v. State, 707 So.2d 688 (Fla. 1998) (Answer at 15). However, Appellee's reliance upon Robinson is misplaced since the issue in that case related to the composition of the jury panel or its ethnic mixture. In the present case, the issue concerns the failure to remove biased jurors, as well as conducting an **adequate** inquiry about race and its effects upon the panel.

Although Appellee maintains that this issue is procedurally barred, Appellee argues that, even if considered, no relief is warranted (Answer at 15). Although counsel made a minimal effort during voir dire regarding the racial issues, this clearly was an inadequate means of obtaining information relating to the potential bias of a juror. Counsel's performance prejudiced Mr. Thompson.

Further, Appellee acknowledges that the credibility of police officers was not discussed, but proceeds to conclude that any deficiency in this regard could not have prejudiced Mr. Thompson. Again, if this element along with the failure to ask about mental health experts and mitigation is taken as a whole, the totality clearly reveals ineffectiveness of counsel.

The claim of ineffectiveness of counsel is appropriate because of the totality of circumstances. Counsel failed to adequately inquire on an individual basis about racial prejudice even though Mr. Thompson, an African- American, was accused of murdering a white woman and white man. Counsel made a statement to the panel

that both of Mr. Thompson's counsel were black and that race thus had nothing to do with the case; however he failed to adequately inquire about the racial impact from an individual perspective with each of the prospective jurors (R. 41, 42).

The trial court found that because counsel asked a general question regarding race, and pointed out to the prospective jurors that both he and his client were black, that this was adequate (PC-R. 132). Even though there were black jurors seated on the panel, it does not cure counsel's failure to ensure a racially unbiased panel. This question regarding counsel's performance can only be resolved with an evidentiary hearing. It was not ripe for review in the direct appeal as suggested by Appellee since ineffectiveness of counsel is a postconviction matter.

Mr. Thompson's trial counsel also failed to question jurors about their beliefs regarding witnesses' credibility, including the police, and their views on the death penalty. In addition, counsel failed to question jurors about their views concerning mental health experts and mental health mitigation as it related to both the guilt or penalty phase (R. 19-64).

The trial court addressed the issue of failing to question jurors about their beliefs regarding witness credibility by alluding to a generic comment by counsel while also admitting that he did not address the credibility of police officers (R. Vol I 43-45). However, an evidentiary hearing on these issues was required to obtain

evidence of counsel's reasons for not adequately questioning jurors in those areas.

In its order, the court, after acknowledging that counsel failed to make any inquiry into these areas, assumes that even if counsel were deficient it would not have resulted in prejudice (PC-R. 140). The court's conclusion that counsel's failure was not prejudicial is erroneous. Jurors' beliefs about mental health and the experts who testify about it are pivotal in ensuring that the defendant receives a fair and impartial trial and sentencing. Furthermore, the court's determination that there was no prejudice is unreasonable without the benefit of an evidentiary hearing.

The most imposing failure of Mr. Thompson's trial counsel was to allow a prejudiced juror to remain on the panel. When jurors were questioned about whether they would insist on Mr. Thompson taking the stand, at least two jurors replied that they could not follow the law even if the judge instructed them that they could not infer anything from the fact that Mr. Thompson did not take the stand (R. 37-39).

Potential juror Leonora Wolcott stated she believed that an innocent defendant would speak out, and if Mr. Thompson remained silent, she would have difficulty believing his innocence (R. 37). Both potential jurors Cheri Russel and Wolcott insisted that they would not be able to follow the judge's instructions as to Mr. Thompson's right to remain silent (R. 37-39).

Inexplicably, counsel failed to request a strike for cause on either of these two jurors. He could have requested additional peremptory challenges or at a minimum interposed an objection to preserve the issue for appeal. Ultimately, Ms. Wolcott did serve as a juror in this case (R. 60). The resulting prejudice was a conviction and the 7-5 vote for death.

The court finds in it's order that the failure of counsel to remove juror Leonora Wolcott was not prejudicial because the Supreme Court found that the evidence was more than sufficient to support the convictions (PC-R. 141). Mr. Thompson's claim is not based upon sufficiency of evidence. The issue is whether that juror was tainted and whether she tainted the panel regarding Mr. Thompson's right to remain silent.

The court erred and violated Mr. Thompson's right to due process and the Fifth Amendment by allowing a juror to remain on the panel especially when her opinion about Mr. Thompson's right not to testify and remain silent was so blatantly in contravention of constitutional law. The court should have exercised its power and excluded this juror with or without the aid of counsel. Moreover, the court should have granted an evidentiary hearing on this issue of ineffectiveness since it had ramifications both as to the guilt and penalty phases of the trial.

B. COUNSEL WAS INEFFECTIVE FOR FAILURE TO

**ADEQUATELY INVESTIGATE AND ARGUE THE CASE
DURING THE GUILT PHASE.**

Trial counsel failed to adequately investigate and argue the case by not utilizing potential alibi witnesses. Mr. Johnson, trial counsel, was aware of two alibi witnesses who could have provided a defense for Mr. Thompson by verifying that Mr. Thompson did not have the opportunity to be at the crime scene when the crime occurred. This shows that counsel did not adequately investigate the case even though counsel filed a Notice of Alibi (R. 51-52).

The court states that counsel's failure to call alibi witnesses to testify as to Mr. Thompson's whereabouts from 10:00a.m. to 1:30p.m. did not result in prejudice (PC-R. 143). Without an evidentiary hearing on this claim, it is not possible for the court to make this determination. The fact that the alibi witnesses are now deceased is not dispositive of the issue since it is only relevant whether these witnesses could have been called at the time of trial.

Trial counsel also never conducted an independent forensic evaluation of the crime scene. This was especially important since tangible evidence from the crime scene such as DNA, fingerprints or shoe imprints might have been attributable to someone other than Mr. Thompson.

The court again makes a finding that the deficient performance did not result

in prejudice (PC-R. 143,144). An evidentiary hearing should have been held to make that finding.

Trial counsel failed to investigate and argue the consequences of Mr. Thompson's mental retardation as it affected his competency to stand trial, and his mental state at the time of the offense both for the guilt and penalty phase. Moreover, when the Court asked for case law on the issue of mental retardation, and its effect on competency, only the State provided the Court with law (R. 771). Defense counsel, having knowledge of Mr. Thompson's mental retardation, failed to research or address the court as to the significance that retardation may have had on Mr. Thompson's competency to stand trial and for mitigation purposes.

The trial court should have granted an evidentiary hearing on these issues, however, the court again admits that it was deficient performance but did not result in prejudice without providing an explanation (PC-R. 142-145).

C. COUNSEL FAILED TO EFFECTIVELY PRESENT AND CROSS-EXAMINE WITNESSES.

The medical examiner suggested a struggle between Mr. Swack and his attacker. However, trial counsel never presented alternative theories of how these wounds could have occurred. Counsel failed to obtain an independent forensic pathologist to determine the validity of the State's theory regarding a struggle which helped to support the H.A.C. aggravator.

Dr. Diggs' testimony on this point was greatly exaggerated, and it would have strengthened Mr. Thompson's contention that there was no credible evidence of intent or premeditation to have been able to discredit this testimony with an expert witness.

The trial court again uses a sufficiency of evidence argument to determine that there was not any prejudice (PC-R. 145,146). However, the claim relates to ineffectiveness of counsel and this issue could only have been properly determined by an evidentiary hearing.

Admittedly, the theory of defense in the guilt phase was that Mr. Thompson did not commit the crime. However, penalty phase counsel failed to present complete evidence to the jury of Mr. Thompson's chronic alcohol and drug abuse, retardation, and he failed to present witnesses to testify as to the effects of the

childhood abuse. There is a reasonable probability, that the outcome of the sentencing phase would have been different had this evidence been presented, especially in light of the fact that that jury had returned a 7-5 vote.

D. COUNSEL WAS INEFFECTIVE FOR FAILURE TO OBJECT TO STATE INTERFERENCE WITH EVIDENCE.

At the time of trial, the State was aware that Mr. Herman Smith was the individual who matched the description given by the bartender at Clementi's lounge. It was Mr. Smith, and not Mr. Thompson, who, just after the crime, was attempting to cash the check signed by Mr. Swack. Moreover, the State failed to disclose this suspect's fingerprints, or that he was a suspect in this crime, to the defense.

Counsel also failed to investigate the derivation of the male Caucasian hair that was found in the female victim's underpants. The trial court continues its use of the sufficiency of evidence argument as a basis for its ruling that no prejudice resulted (PC-R. 150). Yet, an evidentiary hearing would have revealed that not only was counsel's performance deficient, but that it was highly prejudicial, and that there is a reasonable probability the outcome of the trial would have been different.

E. COUNSEL WAS INEFFECTIVE FOR FAILURE TO VOIR DIRE, CALL WITNESSES AND OBJECT TO INADMISSABLE EVIDENCE.

When trial counsel stipulated to Dr. Gonzalez and Dr. Sprehe's qualifications rather than voir dire them about their expertise in retardation, counsel forfeited the right to impeach them based upon their qualifications. Contrary to Appellee's argument (Answer at 25-6), the two doctors not only did not test for retardation , but they may not have been able to sustain their opinions about Mr. Thompson's competency because of the retardation if counsel had challenged their qualifications.

Dr. Gonzalez testified that he concluded that Mr. Thompson was not mentally retarded, and therefore, the defendant was competent to proceed to trial (R. 674-692). However, Dr. Gonzalez did not perform any psychological tests to determine Mr. Thompson's intelligence level (R. 680, 684-686). Counsel was thus ineffective for failing to voir-dire Dr. Gonzalez or Dr. Sprehe as to what information they used to determine their competency evaluation opinions.

The court erred by again stating that, even if assuming counsel was ineffective, no prejudice occurred. However, the jury heard very little, if any, evidence of Mr. Thompson's mental retardation during the guilt or sentencing phase. Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct 2934, 106 L. Ed. 2d 256 (1989).

Defense counsel also failed to object to the admission of Mr. Thompson's identification card (R. 198-200). This photo I.D. had no relevance to this case as to who murdered the victims, and it was prejudicial to Mr. Thompson because it was suggestive of guilt. Defense counsel was ineffective for not objecting to the introduction and admission of this evidence.

Appellee on attempts to justify the admission of the ID card (Answer at 27) when it was known that a witness identified Mr. Smith, Mr Thompson's supervisor, as the one who tried to cash the check written by the victim Swack. Appellee argues that because this Court did not reverse on this issue in the direct appeal, it is not ineffectiveness of counsel.

Defense counsel failed to properly object when Mr. Smith made a statement that his crew members saw Mr. Thompson "carry" the victims out of their office with a gun in his pocket (R. 314). He was also the individual who was identified as trying to cash the check for \$1500 dollars signed by Mr. Swack. Additionally, counsel asked the question which set the chain of events in motion and ultimately caused this hearsay to be admitted that was highly prejudicial to Mr. Thompson.

After removal of the jury, the court asked counsel what he wanted to do, and counsel asked that the court instruct the witness to answer his question. However, counsel asked for a mistrial later which the court denied probably because counsel

had set the event in motion (R. 312-317).

The bell could not be un-rung. The prejudice to Mr. Thompson should be readily apparent. Defense counsel's performance here was ineffective and prejudicial. Had this evidence been properly excluded there is a reasonable probability that the outcome of the trial would have been different.

The lower court correctly stated in its order that the Florida Supreme Court had ruled on direct appeal that counsel had invited the deadly response, and found the evidence to be more than sufficient to support the convictions in ruling that there was no prejudice to Mr. Thompson. However, this is error because the issue here is whether counsel's performance was deficient and caused prejudice. The Supreme Court did not address the ineffectiveness of counsel claim. An evidentiary hearing would have been proper.

The trial court erroneously utilized the sufficiency of the evidence argument again to decide that there was not any prejudice to Mr. Thompson resulting from the ineffective performance of counsel.

F. COUNSEL WAS INEFFECTIVE FOR FAILURE TO MAKE PROPER OBJECTIONS DURING PENALTY PHASE.

The Appellee suggests that the improper comments made by the prosecution were cured by the court's instructions to the jury, and that therefore, they were not

improper (PC-R. 156, 157)(Answer at 28). However, counsel was ineffective for not objecting and preserving this issue for the direct appeal.

G. COUNSEL WAS INEFFECTIVE FOR FAILURE TO PROVIDE MR. THOMPSON'S MENTAL HEALTH EXPERT WITH ADEQUATE BACKGROUND INFORMATION TO PERMIT A MEANINGFUL EVALUATION OF MR. THOMPSON FOR THE PRESENCE OF MITIGATION OR INTOXICATION NEGATING SPECIFIC INTENT.

Trial counsel did not provide Mr. Thompson's mental health experts with adequate background information to enable them to make a meaningful evaluation of Mr. Thompson's retardation. This failure constitutes ineffective assistance and greatly prejudiced Mr. Thompson. At the penalty phase, counsel provided only scant information about Mr. Thompson to the judge and jury in contrast to the vast amount of revealing information that was available for mitigation.

Florida law is clear that competency and mental health mitigation are assessed under distinctly different standards. A defendant may be legally answerable for his actions, and he may still deserve some mitigation of his sentence because of his mental state.

Appellee states that this is an attempt to use postconviction proceedings as a second appeal (Answer at 30-1) when in fact, it is the conduct of counsel in failing to object and preserve the issues of improper comment by the prosecutor in closing,

and failure to ensure complete information is provided to mental health experts, that warrants the ineffectiveness claims that could not legally be raised on direct appeal.

H. COUNSEL WAS INEFFECTIVE BECAUSE PENALTY PHASE COUNSEL NEVER MET WITH THE DEFENDANT PRIOR TO THE ACTUAL COMMENCEMENT OF THE PENALTY PHASE.

Penalty phase trial counsel failed to meet with Mr. Thompson prior to trial, and question Mr. Thompson on facts that related to mitigation issues. Consequently, those issues were never presented to the jury. Appellee attempts to negate this failure by counsel by alluding to the fact that there were two prior trials (Answer at 31-2).

This argument is specious at best since counsel had an obligation to meet with his client and ferret out additional information that was important that could have provided a basis to explore and present to the jury Mr. Thompson's retardation. It was not fully explored as Appellee contends by the testimony of Dr.'s Berlund and Logan. It is this very failure that is the basis for ineffectiveness of counsel, and it clearly shows that the result could have been different given the close vote by the jury. An evidentiary hearing was warranted on these issues.

ARGUMENT AS TO REMAINING CLAIMS

The Appellee argues that as to claims 2, 3, 4, 5, 6, 7, 8, and 9 that they are procedurally barred for the reason of raising the issue for the first time in a postconviction proceeding or because the claims were not included in the postconviction motion before the trial court. As a point of clarification, the Appellant disputes Appellee's assertion that these claims were not presented to the trial court: ARGUMENT II was included under Claims VII, XI, and X, on page 19, 20 and 21 of the initial postconviction motion which was incorporated into the amended motion; ARGUMENT III was included under Claim II on page 22 of the amended motion; ARGUMENT IV was included under Claim XI on page 21 of the amended motion; ARGUMENT V was included under Claim IV on page 27 of the amended motion; ARGUMENT VI was included under Claim XIX on page 25 of the initial motion; ARGUMENT VII was included under Claims XVI and XX on pages 24 and 26 of the initial motion; ARGUMENT VIII was included under Claims XVIII and XXIV on pages 25 and 28 of the initial motion; and ARGUMENT IX was included under Claim III on page 25 of the amended motion.

CERTIFICATE OF FONT AND SERVICE

I HEREBY CERTIFY that a true copy of the Foregoing *Reply Brief of Appellant*, which has been typed in **Times New Roman** font size 14, has been furnished by United States Mail, first class postage prepaid, to all counsel of record on **May 15, 2000**.

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