Case No. 15-____

IN THE UNITED STATES SUPREME COURT

JULIE L. JONES, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Cross-Petitioner,

v.

JOHN GARY HARDWICK, JR.,

Cross-Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

PAMELA JO BONDI
Attorney General
Tallahassee, Florida

CANDANCE M. SABELLA*
Chief Assistant Attorney General
*Counsel of Record

TIMOTHY A. FREELAND
Assistant Attorney General
Office of the Attorney General
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607
813-287-7910
candance.sabella@myfloridalegal.com

CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

John Gary Hardwick, Jr. was a drug dealer. Believing that Keith Pullum had stolen his supply, Hardwick tortured him in an effort to recover the missing narcotics and eventually killed him. Hardwick filed a postconviction motion challenging his attorney's effectiveness which was denied in the state court after five days of testimony.

On appeal from the denial of his federal habeas petition, the Eleventh Circuit decided that Hardwick's state postconviction proceeding was not full and fair, ignoring the stipulation filed by Hardwick that he had no additional evidence to present. Moreover, the Eleventh Circuit ordered a new evidentiary hearing and specifically instructed the District Court to consider hearsay affidavits that had been stricken in state court. The District Court complied and thereafter concluded that counsel was ineffective in failing to present available mitigation in Hardwick's penalty phase, a determination which was affirmed by the Eleventh Circuit.

The United States Court of Appeals for the Eleventh Circuit's decision gives rise to the following questions presented:

1. May the Eleventh Circuit reject the state court's findings of fact under Anderson v. Bessemer City, NC, 470 U.S. 564 (1985), where the defendant's postconviction hearing was full and fair and the findings were not clearly erroneous?

2. In granting habeas corpus relief to a state prisoner under pre-AEDPA 28 U.S.C. 2254(d), did the Eleventh Circuit impermissibly relieve the defendant of his burden of proof under Strickland v. Washington, 466 U.S. 668 (1984)?

3. May the Eleventh Circuit grant habeas relief under Strickland notwithstanding the fact that (a) the defendant waived presentation of mitigation and impeded counsel's attempts to do so, or (b) the evidence the defendant claims should have been presented was either not available, not credible, or not mitigating?

4. Does Schriro v. Landrigan, 550 U.S. 465 (2007) require denial of Hardwick's habeas claim where counsel's unchallenged and credible testimony was that his client instructed him not to present any evidence in mitigation?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS iii

PRELIMINARY STATEMENT REGARDING RECORD CITATIONS iv

TABLE OF AUTHORITIES v

CITATION TO OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 17

1. In granting habeas corpus relief to a state prisoner, the Eleventh Circuit improperly failed to accord the state court findings the deference mandated by 28 U.S.C. section 2254(d), pre-AEDPA. 18

2. The Eleventh Circuit impermissibly relieved the prisoner of his burden of proof on his claim of ineffective assistance under Strickland. 33

CONCLUSION 38

APPENDIX ....A1 - A16

Supplemental Order, State v. Hardwick, Duval County Case No. 85-3779-CF, filed March 21, 1991

PRELIMINARY STATEMENT REGARDING RECORD CITATIONS

Citations to documents from the postconviction appeal record will be designated with "PCR" followed by the appropriate page numbers. Citations to the transcript from the postconviction evidentiary hearing will be designated with "PCR-T" followed by the appropriate page numbers.

Citations to the federal evidentiary hearing will be designated with "EH" followed by the appropriate page numbers.

TABLE OF AUTHORITIES

Federal Cases

Amadeo v. Zant,
486 U.S. 214 (1988) 17, 18, 21

Anderson v. Bessemer City, N.C.,
470 U.S. 564 (1985) 19

Bell v. Cone,
535 U.S. 685 (2002) 30

Berger v Kemp,
483 U.S. 776 (1987) 30

Blystone v. Pennsylvania,
494 U.S. 299 (1990) 30

Castillo v. United States,
34 F.3d 443 (7th Cir. 1994) 35

Coleman v. Thompson,
501 U.S. 722 (1991) 28

Copenhaver v. Bennett,
355 F.2d 417 (8th Cir. 1966) 35

Daniels v. United States,
54 F.3d 290 (7th Cir. 1995) 35

Darden v. Wainwright,
477 U.S. 168 (1986) 30

Hardwick v. Crosby,
320 F.3d 1127 (11th Cir. 2003) .... passim

Hardwick v. Secretary, Fla. Dept. of Corrections,
803 F.3d 541 (11th Cir. 2015)...................... 1, 16, 36

Herrera v. Collins,
506 U.S. 390 (1993)... 36

Jones v. Cunningham,
313 F.2d 347 (4th Cir. 1963)................................. 35

McCleskey v. Zant,
499 U.S. 467 (1991)... 33

Miller-El v. Cockrell,
537 U.S. 322 (2003)... 17

Schriro v. Landrigan,
550 U.S. 465 (2007)... 15, 30

Slack v. McDaniel,
529 U.S. 473 (2000)... 17

Strickland v. Washington,
446 U.S. 668 (1984)....................................... passim

United States v. Cronic,
466 U.S. 648 (1984)... 27

United States v. Oregon State Medical Society,
343 U.S. 326 (1952)... 20

United States v. Smith,
331 U.S. 469 (1947)... 33

Wade v. Mayo,
334 U.S. 672 (1948)... 18

Walker v. Johnston,
312 U.S. 275 (1941) 34, 35

State Cases

Hardwick v. Dugger,
648 So. 2d 100 (Fla. 1994) 8, 11, 29

Hardwick v. State,
521 So. 2d 1071 (Fla. 1988) 5

Other Authorities

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2254 (1994 ed.) 17

28 U.S.C. § 2254(d)(1994 ed.) 2

Anti-Terrorism and Effective Death
Penalty Act of 1996 .... 17, 18

Fed. R. Evid. 1101(b) 34

CITATION TO OPINION BELOW

The opinions of the Eleventh Circuit Court of Appeals are reported at Hardwick v. Crosby, 320 F.3d 1127 (11th Cir. 2003) (Pet. App. A-7) and subsequently, the decision affirming, following remand, Hardwick v. Secretary, Fla. Dept. of Corrections, 803 F.3d 541 (11th Cir. 2015) (Pet. App. A-9). Hardwick's petition for panel rehearing was denied November 5, 2015. (Pet. App. A-10).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional provisions at issue here include the Sixth and Fourteenth Amendments to the United States Constitution. Statutory provisions include the former 28 U.S.C. Section 2254(d)(1994 ed.):

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit -
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and hair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

STATEMENT OF THE CASE

Trial Testimony

Hardwick v. State, 521 So. 2d 1071, 1072-73 (Fla. 1988), summarized the guilt and penalty phase evidence:

> On Christmas Eve morning 1984, a fisherman discovered the body of Keith Pullum floating in the St. Johns River near Jacksonville. Pullum had died of a gunshot and stab wounds, and had been beaten about the head. Michael Hyzer, a friend of both the appellant John Hardwick and the victim, contacted police on Christmas Day and told them of a conversation with Hardwick. According to Hyzer, Hardwick said he had shot and stabbed Pullum earlier in the week for stealing Quaaludes, and then had thrown the body in the river. Shortly thereafter, Hardwick was arrested and charged with murder.
>
> During the guilt phase at trial, arresting officers testified to a number of statements Hardwick made allegedly corroborating Hyzer's initial statement. Hardwick purportedly volunteered that some of his Quaaludes were missing. Two detectives testified that Hardwick said "a man can't go around robbing dope dealers and not expect to get killed." A number of Hardwick's friends and drug customers also corroborated Hyzer's statement. One man, Jeffrey Showalter, said he had seen Hardwick in the company of the

victim on December 23, and that Hardwick had threatened to kill the victim or Showalter if his Quaaludes were not returned in an hour. Showalter also testified that, shortly before the murder occurred, he saw Hardwick driving up behind Pullum in a car and slow down, although he was not sure that Pullum got into the car.

Several other witnesses also testified that Hardwick had complained about the theft of his Quaaludes and had threatened to kill the victim, or later had bragged about 'taking care' of the individual who took his Quaaludes.

The medical evidence at trial indicated that the victim was stabbed three times in the chest and back, then shot in the lower right back and then struck about the head. According to this testimony, the victim became unconscious within five to six minutes of being stabbed. The blows to the head apparently occurred immediately after death, since there was almost no bleeding from the resulting wounds. There was some evidence the victim's hands had been bound, but the medical examiner could not say with certainty that this had happened.

* * *

At the penalty phase, the state called no witnesses, but presented evidence of prior convictions reflecting violent felonies. The state offered no other evidence of aggravating factors, and the appellant presented no

witnesses or evidence in support of mitigating factors.

The jury returned an advisory sentence recommending death on a seven-to-five vote. The trial court adjudicated Hardwick guilty of first-degree murder and sentenced him to death after finding no statutory or nonstatutory mitigating factors and five aggravating circumstances: (1) prior violent felony convictions, (2) the murder was committed during a kidnapping, (3) the murder was for pecuniary gain, (4) the murder was heinous, atrocious and cruel, and (5) the murder was cold, calculated and premeditated.

The State Court Strickland[1] Hearing

In early 1990, shortly after Florida's governor signed a warrant scheduling his March 14, 1990 execution, Hardwick filed a Rule 3.850 postconviction motion alleging ineffectiveness of trial counsel. Among the claims raised was an assertion that trial counsel Tassone failed to investigate or present a penalty phase defense. The state postconviction court scheduled the evidentiary hearing for February 22, 1990. Because of the impending execution, the State agreed that Hardwick could introduce hearsay affidavits to demonstrate what mitigating evidence was available at Hardwick's trial. The state postconviction court took testimony from trial counsel Tassone, accepted the hearsay affidavits, and ultimately denied relief. On review, the Florida

[1] Strickland v. Washington, 446 U.S. 668 (1984).

Supreme Court granted a stay of execution and remanded with instructions that the court conduct a complete evidentiary hearing. Hardwick v. Dugger, 648 So. 2d 100, 102 (Fla. 1994).

In preparation for the hearing on remand, the postconviction court told the parties that attorney Tassone's previous testimony was of record, but he could be recalled if necessary. The State also withdrew its earlier stipulation regarding Hardwick's hearsay affidavits. The court then heard a total of four additional days of testimony. Hardwick rested his case after filing a written stipulation that he had no more evidence to present. Hardwick did not testify, and he did not re-call Mr. Tassone. The state postconviction court entered its Supplemental Order denying relief, in which it expressly found Mr. Tassone's testimony credible, and said the following with regard to Hardwick's mother, Nell Lawrence:

> [….]Ms. Lawrence was openly guilt-ridden about her treatment of Hardwick as a child and stated that she could never forgive herself for putting him in his present fix. (See TR 27).
>
> In assessing overall credibility, the Court finds that Ms. Lawrence, confronted with her child's execution, has succumbed to internal pressure to save her son's life by testifying at this late date. As such, her credibility is certainly suspect in comparison to Mr. Tassone. For that reason, the Court finds Mr. Tassone's statement more credible and concludes that Ms. Lawrence was not a willing witness in 1985.

(PCR p. 594). Specifically with regard to the penalty phase ineffectiveness issue, the postconviction court found:

> The entire question of Mr. Tassone's performance during the penalty phase is tempered by the established and uncontroverted fact that Mr. Hardwick ordered Mr. Tassone to present no mitigation evidence at the penalty phase. This fact, which the Court finds was clearly established and never controverted by Hardwick, was corroborated by the testimony of Florie Benton, who testified that Hardwick told her not to come to the trial.
>
> * * *
>
> The Court finds that Florie Benton, James Hardwick, Mary Powell, Grady Hardwick, James Britt and Nell Lawrence were not available as witnesses and that their inaction in this case was consistent with their lack of support for John Hardwick in his other cases. Florie Benton was actually put off by Hardwick himself, thus stopping him from claiming he wanted her to testify. Jeff Hardwick's testimony was not used for strategic reasons.
>
> Rosemary Mason and Mary Braddy were not shown to have been willing or able to volunteer relevant testimony at the time.

Dr. Barnard appears to have been rejected as a penalty phase witness because his alcohol-drug-impairment testimony was offset by his equally adamant testimony that Hardwick overcame these impediments and had a fully formed conscious intent to kill his victim. Again, counsel made a strategic decision.

* * *

This Court, having heard and observed both Dr. Barnard and Mr. Tassone testify regarding this matter, finds that Mr. Tassone did discuss possible mitigation testimony and evidence with Dr. Barnard.

The Court also finds that after considering this possible mitigating information from Dr. Barnard, Mr. Tassone made a strategic decision not to use Dr. Barnard in the penalty phase.

Additionally, the Court finds that although Dr. Barnard did request information, the information provided to Dr. Barnard was essentially the same as the information provided by collateral counsel.

Dr. Barnard is an experienced, professional doctor who presumptively does his job in a professional manner. That includes the professional collection of data prior to rendering a medical opinion.

Dr. Barnard had Hardwick's records from the youth home in South Carolina. He

> interviewed Hardwick (TR I, 17-19). Dr. Barnard knew Hardwick was claiming he was high on drugs during the murder. (TR I). Indeed, Dr. Barnard characterized the "new" evidence as being consistent with that information he possessed in 1985.

(Id. p. 597-598). The postconviction court denied relief thusly:

> Counsel has been proved, by Hardwick's own witnesses, to have tactically considered and rejected certain penalty phase evidence. Counsel appears to have felt that evidence that Hardwick was an illegal drug user and seller was as damaging as his alleged "addiction" was mitigating. Hardwick's childhood neglect was offset by his juvenile record and the fact that his ten siblings did not follow his path of crime, drugs and murder. Of course, Hardwick was sane and competent despite any drug problem. Counsel's strategic decision to rely upon argument rather than this evidence of mixed value cannot be second guessed. The Court does not find any reasonable probability that a different recommendation would have come from the advisory jury. The evidence would not, if offered, have prompted a sentence other than death from this Court.

(Id. p. 599). The same trial judge presided over Hardwick's trial and postconviction hearings. In affirming the postconviction court, Hardwick v. Dugger, 648 So. 2d 100, 104 (Fla. 1994), the Florida Supreme Court said:

> In the instant case, despite an uncooperative client who disagreed about trial strategy and ordered counsel to present no mitigation evidence at the penalty phase, trial counsel took extensive depositions, interviewed a number of witnesses, obtained a psychiatric evaluation by a mental health expert, and conducted an investigation of Hardwick's background.

With his state court proceedings completed, Hardwick then sought relief in federal court. In denying his federal habeas petition, the District Court initially concluded:

> The testimony before the state trial court during the post conviction proceedings established that the Petitioner's counsel began preparing for a possible penalty phase presentation several weeks before the trial. Counsel spoke to the Petitioner, to the Petitioner's mother, Nell Lawrence, to the Petitioner's wife, Darlene, to the Petitioner's brother, Jeff Hardwick, and to Dr. George W. Barnard, M.D., a psychiatrist previously appointed by the court.[fn7]
>
> > fn7. On March 18, 1985 early in the pretrial stages of the case, Petitioner's counsel filed a motion seeking the appointment of a psychiatrist. The court granted the motion by order entered on April 4, 1985, appointing Dr. Barnard who then examined the Petitioner on April 10, 1985. Dr.

Barnard's subsequent written report concluded:

> It is my medical opinion at the present time that the defendant meets the criteria of DSM III for multiple substance abuse and for anti-social personality disorder. It is my medical .opinion he is competent to stand trial and to assist counsel in the preparation of his defense . . . . ·It is my medical opinion at the time of the alleged crimes, the defendant did know what he was doing, did know the results from his actions, and did know that they were wrong.

The Petitioner's counsel specifically asked the Petitioner and his mother to testify about the Petitioner's difficult childhood, but the Petitioner declined to do so and ordered his counsel not to present any evidence in mitigation. The Petitioner's mother, Nell Lawrence, was openly hostile to his case and even voiced the opinion that her son deserved the death penalty.[fn8] The Petitioner's wife had disappeared before the trial. She had not been a friendly witness in any event. Dr. Barnard could have testified about the Petitioner's background and that the Petitioner may have had diminished capacity -- a statutory mitigating circumstance -- but cross examination would have revealed Dr.

Barnard's ultimate opinion that the Petitioner "did know what he was doing, did know the results from his actions, and did know that they were wrong." Worse, cross examination of Dr. Barnard would also have revealed the totality of the Petitioner's criminal history as well as the Petitioner's detailed description to Dr. Barnard of the nature of the murder, thereby completely undermining the insufficiency of the evidence defense and, perhaps, providing a stronger record basis for the state to argue for the presence of the statutory "heinous, atrocious and cruel" aggravating circumstance. See Florida Statute 921.141(5)(h).

The Petitioner produced other relatives at the Rule 3.850 evidentiary hearings in the state court, all of whom recited that they would have testified about his childhood background if they had been asked to do so at the time, but their names were never given to counsel and none of them independently attended the trial. The state court found as a fact that these witnesses, under those circumstances, were unavailable at the trial, and that finding too is fairly supported by the record and is entitled to deference.

fn8. There was a direct conflict in the testimony on this point between Lawrence and attorney Tassone, but the state trial judge credited Tassone, and that purely factual determination, which is fairly supported by the record,

> is entitled to deference and a presumption of correctness under 28 USC § 2254.

(Pet. App. A-4 pp. 14-16).

On review, the Eleventh Circuit[2] rejected the District Court's findings because it believed Hardwick's state postconviction proceeding was not "full and fair." The Eleventh Circuit entered an interlocutory order remanding for a limited evidentiary hearing concerning allegations of ineffective assistance of counsel in the penalty phase of the state proceedings, while retaining appellate jurisdiction. The Court directed the District Court, as part of its evidentiary review, to "consider the various affidavits [...] from the state 3.850 proceeding..." id, fn. 207.

Prior to the federal evidentiary hearing, Respondent filed several motions asking the District Court to consider the effect of Schriro v. Landrigan, 550 U.S. 465 (2007). The State also filed a Motion in Limine objecting to the use of hearsay as substantive evidence. The District Court denied the motions. (See Doc #130, 145).

At the federal evidentiary hearing in the District Court, Hardwick did not testify and none of his family members appeared; instead, he relied upon hearsay affidavits (introduced into evidence over the State's objection) and transcripts from the state postconviction proceeding. Hardwick also presented

---

[2] Hardwick v. Crosby, 320 F.3d 1127 (11th Cir. 2003).

several expert witnesses in the field of mental health who described possible mitigation that could have been presented in Hardwick's penalty phase, and testimony from several defense attorneys who described how to defend a capital case. Hardwick's trial attorney, Frank Tassone, also testified. (EH3 pp. 5-137).

Because none of Hardwick's family appeared, the District Court's credibility findings relating to their testimony was derived entirely from affidavits and transcripts. Hardwick did not testify and Mr. Tassone's testimony that Hardwick refused to testify, directed him not to present a penalty phase defense, and obstructed his efforts to do so was, once again, unrefuted. The District Court's grant of habeas relief was affirmed by the Eleventh Circuit in a final order rendered September 18, 2015. Hardwick v. Secretary, Fla. Dept. of Corrections, 803 F.3d 541 (11th Cir. 2015).

Hardwick's Certiorari Petition was docketed by this Court April 7, 2016, and the instant Conditional Cross-Petition follows.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's grant of habeas relief is not only in direct conflict with Strickland v. Washington, but also with this Court's long-standing deference rule, thus implicating questions of federalism, comity and the disruption of state court decisions. This case presents a clear example of a failure to accord proper deference to factual findings under the former 28 U.S.C. section 2254 (1994 ed.).[3] While it is a pre-AEDPA case, the lower court's decision has continuing and nationwide application because the same principles of deference continue to apply even after the adoption of the present federal habeas statute.[4]

This Court should reverse for at least two reasons. First, the Eleventh Circuit improperly rejected the state court's factual finding that (1) trial counsel's postconviction testimony was credible, (2) he presented reasonable, strategic reasons for his

---

[3] The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) took effect after Hardwick's federal habeas petition was filed and is therefore not applicable here. Slack v. McDaniel, 529 U.S. 473 (2000).

[4] Under pre-AEDPA law, correctness was presumed unless the challenger established that the state court's determination was clearly erroneous. Amadeo v. Zant, 486 U.S. 214 (1988). Under AEDPA, the challenging party must present clear and convincing evidence that the state court's findings were erroneous to avoid the presumption. Miller-El v. Cockrell, 537 U.S. 322, 341-342 (2003). While the former is a standard of review and the latter is a standard of proof, the quantum of evidence necessary to successfully challenge a state court finding of fact is approximately identical.

actions, and (3) Hardwick instructed defense counsel to present no evidence in his penalty phase and actively thwarted counsel's attempts to locate and present witnesses. Of particular significance here is the fact that Hardwick has *never* testified, not in the state court or the federal evidentiary hearing in the District Court, and his trial attorney's credible testimony at both proceedings on this final point remains unrefuted.

Second, the Eleventh Circuit's order directing a new evidentiary hearing improperly diminished Hardwick's burden under Strickland by requiring the District Court to consider unchallengeable hearsay as substantive evidence. Thus, even if proper, the parameters of the Strickland hearing ordered by the Eleventh Circuit reduced Hardwick's burden with regard to prejudice, and hamstrung the State's ability to respond through effective cross examination. The resulting grant of habeas relief directly conflicts with Strickland and other precedent from this Court.

1. In granting habeas corpus relief to a state prisoner, the Eleventh Circuit improperly failed to accord the state court findings the deference mandated by 28 U.S.C. section 2254(d), pre-AEDPA.

Hardwick's habeas petition was filed before the effective date of AEDPA and was therefore subject to the former 28 U.S.C. § 2254(d). Under the former statute, a state court's findings of fact are presumed correct and may only be rejected if the state court's determination was clearly erroneous. Wade v. Mayo, 334 U.S. 672 (1948); Amadeo v. Zant, 486 U.S. 214

(1988). In practice, the "clearly erroneous" standard requires the appellate court to uphold any factual determination made by the lower court that falls within a broad range of permissible conclusions. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Anderson v. Bessemer City, N.C., 470 U.S. 564, 573-574 (1985). Moreover, a credibility finding "demands even greater deference to the trial court's findings… when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can *virtually never* be clear error." Id. (emphasis supplied).

The Eleventh Circuit rejected the state court's findings of fact for two reasons. First, the court believed the credibility findings lacked fair record support, and second, the proceedings overall were not full and fair. Neither of these conclusions is supportable because the state court's determinations were not clearly erroneous.

Credibility

The state postconviction court took testimony over the course of five days spanning a total of six months. Witnesses included trial counsel as well as Nell Lawrence (Hardwick's mother) and other members of the defendant's family. The state court was in the

best position to be able to assess credibility[5] and found that counsel was credible, while Hardwick's mother was not. The state court's findings were affirmed by the Florida Supreme Court, and accepted on habeas review by the District Court (Pet. App. A-4).

The Eleventh Circuit, however, rejected the state court's credibility assessment. In doing so, the Eleventh Circuit identified a number of facts which, in its view, demonstrated the existence of conflict among the witnesses who testified.[6] It *never*, however, made any finding that either Tassone or Nell Lawrence's testimony was *implausible*, which is

---

[5] See, e.g., United States v. Oregon State Medical Society, 343 U.S. 326, 339 (1952) ("[H]ow can we say the judge is wrong? We never saw the witnesses.")

[6] See Hardwick v. Crosby, 320 F.3d 1127 at note 202 (11th Cir. 2003). There was direct conflict between Tassone, who testified that Hardwick's mother refused to testify, and the mother, who asserted that Tassone never asked her to testify. The trial court properly recognized and resolved the conflict. The Eleventh Circuit was especially critical of the trial court's explanation for its credibility assessment, which it deemed "undocumented speculation" that Lawrence "succumbed to internal pressure to save her son's life by testifying at this late date." The trial court is permitted, however, to draw reasonable inferences from the testimony, including Nell Lawrence's own statement of remorse that she felt responsible for her son's plight. That she had previously helped Hardwick when he was arrested as a juvenile does not render counsel's testimony implausible. Nell Lawrence and Hardwick's brother were in court throughout Hardwick's penalty phase, yet no one, not Hardwick, his mother, or Hardwick's brother, complained to the trial judge about not testifying.

the correct standard of review under Bessemer City.[7] In the absence of a finding that the state court's credibility assessment was clearly erroneous, the Eleventh Circuit's order conflicts with this Court's precedent; the effect of this error is not small, as Hardwick has been improperly granted a new sentencing hearing in a 1984 homicide where the verdict was rendered more than thirty years ago.

Tassone testified at the state postconviction hearing. He was an experienced litigator who at the time of Hardwick's trial had tried approximately twenty capital cases. He explained that in the course of exploring penalty phase issues he interviewed

[7] The Eleventh Circuit sought to justify its rejection of the state court's credibility findings by couching it in terms of whether those findings are adequately supported by the record, which it proceeded to demonstrate by identifying what it perceived as conflicts and inconsistencies in the testimony. The lower court's novel approach has no legal justification and, in fact, directly conflicts with this Court's habeas precedent: "[T]he Court of Appeals offered factual rather than legal grounds for its reversal of the District Court's order, concluding that neither of the two factual predicates for the District Court's legal conclusion was adequately supported by the record. The Court of Appeals never identified the standard of review that it applied to the District Court's factual findings. It is well settled, however, that a federal appellate court may set aside a trial court's findings of fact only if they are 'clearly erroneous,' and that it must give 'due regard ... to the opportunity of the trial court to judge of the credibility of the witnesses.'" Amadeo v Zant at 223, citations omitted. When the smoke has cleared, what remains is trial counsel's statement that she refused to testify, opposed by the mother's testimony that she was never even asked. As both statements are equally plausible, the Eleventh Circuit should not have disregarded the trial court's credibility assessment favoring trial counsel.

Hardwick, Hardwick's wife, the mother and at least one brother. Based on those interviews he identified several possible mitigators, including Hardwick's troubled family history involving physical and sexual abuse as well as drugs and alcohol (PCR-T p. 53, 127). Counsel investigated Hardwick's arrest records, jail medical records, and spoke with "civilian people who did counseling work" at the jail (PCR-T p. 165). Counsel spoke to Hardwick about mitigation and suggested Hardwick, his mother, his siblings, and Hardwick's wife as penalty phase witnesses (PCR-T p. 179). Hardwick, however, refused to assist Tassone in preparing for penalty phase (PCR-T p. 67) instructed him not to present any witnesses, and actively prevented him from doing so (PCR-T p. 181).[8]

Tassone's penalty phase investigation also included his consultation with Dr. Barnard, a psychiatrist, about possible mitigation. He specifically asked him about voluntary intoxication involving either alcohol or drugs, as well as diminished capacity, which counsel said would have included whether Hardwick suffered some type of mental or emotional impairment that might have affected his ability to understand what he was doing at the time of the offense (PCR-T p. 121-122). Barnard independently collected information which included witness statements obtained from the prosecution, Hardwick's extended family (PCR-T p.

---

[8] The trial court noted that Tassone's testimony in this regard was corroborated by Hardwick's aunt Florie Benton, who testified that when she asked if he needed her testimony, Hardwick told her not to come. (PCR p. 460-461).

325), prison records from South Carolina, local hospital records (PCR-T p. 254) as well as Hardwick's extensive juvenile record (PCR-T p. 327).[9] Dr. Barnard could have testified at the 1986 trial that Hardwick suffers from multiple substance abuse disorder, had previously attempted suicide more than once (PCR-T p. 282-284), had a deprived and abusive childhood and had abused both alcohol and drugs (PCR-T p. 311). This mitigating evidence is countered, however, by substantially negative information including Dr. Barnard's opinion that Hardwick suffers from anti-social personality disorder. Worse, Barnard's report documents Hardwick's graphic description of how he killed Pullum, including details not available from any other source: Hardwick, upset because someone had stolen his drugs, pointed his gun at Mr. Pullum "to scare him" and shot him. Pullum begged to be taken to the hospital and Hardwick shot him again; then stabbed him, which again failed to kill Mr. Pullum, who was still asking to be taken to the hospital. Hardwick struck him in the head with a jack handle and then held Pullum's head under the water until he died (PCR-T p. 77; State's Exhibit A).

Tassone testified that he discussed penalty phase issues with his expert but decided not to use him (PCR-T p. 179-181); while Dr. Barnard could testify to available mitigation, "through cross examination

[9] The Eleventh Circuit faulted Tassone because he did not provide these records to Dr. Barnard, while ignoring Dr. Barnard's testimony that he, a licensed psychiatrist hired by Tassone to assist in Hardwick's defense, obtained them through his own independent investigation.

the State could have gotten out a lot more horrible stuff." (PCR-T p. 59).

Tassone instead turned to Hardwick's mother and begged her to testify because she had much to offer:

> "I felt that her testimony about John's or Mr. Hardwick's physical and sexual abuse, her testimony about being a single parent raising her children, having Mr. Hardwick placed in a home because she was unable to support him and not real able to control him was, in my opinion, a significant mitigating, nonstatutory mitigating factor."

(PCR-T p. 164). Nevertheless, the mother refused to testify and told Tassone that in her opinion, "death may be an appropriate sentence" for him (PCR-T p. 53-54). Tassone explained that even if she had agreed to testify, "there is no way I felt I could call her to have the jury hear that" (PCR-T p. 159). Similarly, the brother also refused (PCR-T p. 55).

Nell Lawrence testified differently:

> "He never asked me to testify, but I asked him about testifying and Mr. Tassone told me that if I – did I have anything to say that would help Johnny, and I said well what kind of things do you mean. He says well can you say that Johnny was a real good boy, that he was a Christian boy, that he was a Boy Scout, that he did good deeds for people, and I said, no, sir, I can't say he was a Christian boy but Johnny has always been good to people. He

> said, you know, if you can't say things like that then you cannot do anything to help him. Whatever you might say would only harm him."

(PCR-T p. 535). Clearly Nell Lawrence's testimony was in direct conflict with that of Mr. Tassone. While it is unlikely that a criminal defense attorney of Tassone's experience would have asked her to testify in the manner she describes, at worst, her statement is not implausible; *some* attorney might have asked if she could testify to such things. The point, however, is that there is nothing about either statement warranting a conclusion that the state court's assessment of credibility was clearly erroneous. The trial court's presumptively correct assessment of credibility should not have been disturbed.

Full and Fair Hearing

The Eleventh Circuit court also rejected the state postconviction court's factual findings because it believed that the proceeding failed to meet the full and fair standard. This conclusion lacks any record support whatsoever.

Hardwick's death warrant scheduling his execution for March 20 was issued in early 1990. Hardwick immediately filed a Rule 3.850 motion challenging counsel's effectiveness, and the trial court, faced with limited time to address Hardwick's claims, heard testimony February 22. The hearing commenced at 2:15 in the afternoon with Mr. Tassone's testimony. (PCR-T p. 4) There was a four hour break between 4:25 and 8:30 (PCR-T p. 78),

after which Mr. Tassone testified for an additional four hours (PCR-T p. 193). The Florida Supreme Court subsequently stayed the execution and remanded for a complete evidentiary hearing, and the trial court then took testimony on May 3-4 and August 15-16. The trial court advised the parties that Mr. Tassone's previous testimony was of record but he could be re-called by either party. Mr. Tassone, however, was not called for additional testimony. Instead, Hardwick used his time to show what mitigation might have been available in 1986, after which he filed a stipulation announcing that the defense had no further evidence to present. Under these facts, the Eleventh Circuit deemed the state court proceedings inadequate.

In support of its conclusion, the Eleventh Circuit focused on the fact that trial counsel was never called for additional testimony after the February 22 hearing:

> [We find] procedural problems only with the first of the three-part proceedings, where solely Tassone testified in a protracted session that lasted through the night into the early morning with stand-in counsel for Hardwick. This was the part of the 3.850 proceeding that the Florida Supreme Court found to be insufficient and remanded for further proceedings. *Tassone never testified again.* Thus, the evident concerns with his testimony were never rectified. These problems do not exist with the second two parts of the extended 3.850 proceedings, which contain mitigation evidence from family members and others,

> that serve to emphasize and show the mitigation evidence that Tassone could have presented at the penalty phase.

Hardwick v. Crosby, 320 F.3d 1127 at fn. 207 (emphasis in original). The Eleventh Circuit ignored Hardwick's counseled, signed pronouncement that he had no further evidence to present, and more importantly, failed to recognize that it was Hardwick's burden under Strickland to establish entitlement to relief. If Mr. Tassone did not testify at the later postconviction hearings, it was because Hardwick was satisfied with his testimony; there can be no dispute on this record that Hardwick was granted the opportunity to call him. The Eleventh Circuit's failure to accord due deference to the state court's factual proceedings under these facts defies logic and conflicts with Strickland, which places the burden of proof on the defendant.

With all of trial counsel's testimony disposed of as having been "inadequate," the Eleventh Circuit then considered only the remaining evidence, which consisted of statements from Hardwick's family and expert testimony showing what mitigation was available. All findings of fact that might have derived from Tassone's testimony were inexplicably and erroneously excluded from the Eleventh Circuit's analysis.

The defendant bears the burden of establishing a Sixth Amendment violation under Strickland. United States v. Cronic, 466 U.S. 648, 658 (1984). Similarly, the defense bears the responsibility of exhausting his federal constitutional claims in the state court, if he

can. <u>Coleman v. Thompson</u>, 501 U.S. 722 (1991). In criticizing the trial court's resolution of Hardwick's ineffectiveness claims, the Eleventh Circuit focused on postconviction counsel's claimed lack of preparedness and inability to secure witnesses during the February 22 hearing. <u>Hardwick v. Crosby</u>, 320 F.2d 1127, n. 130 (11th Cir. 2003) ("[W]e note that any findings concerning [trial counsel] Tassone derive from his testimony at the initial, February 22, 1990, evidentiary hearing, found to be deficient by the Florida Supreme Court.")

Tassone's February 22 testimony addressed the claims advanced by Hardwick in his Rule 3.850 motion, and postconviction counsel's extensive cross examination takes up 100 pages of transcript and lasted over four hours. Neither the Eleventh Circuit nor Hardwick has ever identified anything that needed further development. Moreover, as it was Hardwick's burden to establish his claim, it was incumbent on him to re-call Mr. Tassone to the stand if he had additional questions; this he could have easily done on May 3, or May 4, or August 15, or August 16. The Florida Supreme Court's Order remanding for additional testimony did not strike the testimony from the earlier hearing; it merely directed the lower court to conduct a "full" evidentiary hearing, which commenced with the postconviction court's unchallenged pronouncement that it intended to consider Tassone's previous testimony. Hardwick's counseled decision not to call Mr. Tassone for further questioning should have been dispositive of the matter, given his stipulation that he had no further evidence followed by the Florida Supreme Court's

affirmance of the postconviction proceedings.[10] It is significant that Hardwick advanced no claim on appeal that he was denied the opportunity to further challenge Mr. Tassone. Yet, inexplicably, the Eleventh Circuit elected to disregard the trial court's findings of fact because, in its own judgment, the first day of testimony was inadequate.[11]

In addition, the Eleventh Circuit ignored Hardwick's failure to testify in support of his postconviction claims. Without Hardwick's testimony, there was no challenge to Tassone's statement that he was instructed not to present a penalty phase defense, or that Hardwick refused to participate and actively interfered with counsel's penalty phase efforts. As we have seen, defense counsel conducted extensive investigation, and had his client authorized him to do so, he could have presented mitigating evidence. Tassone, however, presented no penalty phase because of Hardwick's instructions, and in any

---

[10] Hardwick v. Dugger, 648 So. 2d 100 (Fla. 1995).

[11] The Eleventh Circuit's majority opinion was soundly criticized by the dissent: "[T]o the extent Hardwick might have found fault with the examination or cross-examination of Tassone, the record is clear that there was ample opportunity to recall Tassone either in May or August 1990. Indeed, at the beginning of the evidentiary hearing on remand, on May 3, 1990, the 3.850 judge noted that Tassone's previous testimony was in the record. However, he expressly advised the parties that: "I don't want to preclude anybody from calling Mr. Tassone that wishes to." May 3, 1990 hearing at 209. Counsel for Hardwick entered no objection, and did not recall Tassone. I know of no case holding that a deficient hearing by a lower state court forever taints the state proceedings, notwithstanding an appellate remand for a full evidentiary hearing."

event Hardwick's obstructive behavior left him with no viable mitigation witnesses (PCR-T p. 57). Counsel could not have been deemed ineffective under these circumstances. Schriro v. Landrigan, 550 U.S. 465 (2007).

Because the Eleventh Circuit improperly failed to consider Tassone's postconviction testimony (and the attendant credibility findings made by the state court), its conclusions regarding counsel's effectiveness under Strickland (which are reviewed under the *de novo* standard) were also erroneous. The record shows, however, that the state court correctly denied postconviction relief under Strickland.

In terms of deficient performance, the Constitution does not prohibit a defendant in a capital case from waiving presentation of penalty phase evidence. Blystone v. Pennsylvania, 494 U.S. 299 (1990). Nor is there a per se rule that counsel is ineffective in failing to present such evidence in every capital case. Even in the absence of an uncooperative client who obstructs counsel's efforts and directs him to present nothing, counsel may have legitimate, strategic grounds for choosing not to present a penalty phase case. See, e.g., Bell v. Cone, 535 U.S. 685 (2002) (counsel not ineffective for calling no penalty phase witnesses and waiving closing, where those decisions were informed and strategic); Berger v Kemp, 483 U.S. 776 (1987) (available mitigating evidence properly excluded where, in counsel's professional opinion, it would not have minimized the defendant's risk of the death penalty); Darden v. Wainwright, 477 U.S. 168, 186 (1986) (where counsel

presented no penalty phase evidence, "there are several reasons why counsel reasonably could have chosen to rely on a simple plea for mercy").

At the state postconviction proceedings, trial counsel's testimony established that his performance was adequate. Tassone explained that he attempted to contact every witness identified by Hardwick; some of them could not be located, while others were witnesses who, in Tassone's view, were either unreliable or actively hostile to Hardwick. Many of them were State's witnesses who testified against Hardwick, whom counsel explained offered more risk than reward.

Mitigating evidence in the form of mental health testimony could have been elicited through Dr. Barnard, but doing so would also have permitted the State access to Hardwick's graphic description of exactly how he killed Mr. Pullum, which (as the District Court recognized in its first decision denying habeas relief) would have given the State additional evidence to support the HAC aggravator. Given the fact that Nell Lawrence, Jeff Lawrence, and Hardwick had all refused to testify, trial counsel had no remaining available witnesses to use during penalty phase. The postconviction court made a finding of fact that none of Hardwick's remaining family members were available to testify (PCR p. 597).

Nor is this a case where counsel made no effort to find mitigating evidence; we have seen that Tassone knew from conversing with Hardwick, Hardwick's mother, and Dr. Barnard, of substantial mitigation

that might have been offered. While it is not disputed that additional mitigation was available, Tassone's investigation was adequate, and the first Strickland prong is not met.

In terms of prejudice, the state postconviction court determined that Florie Benton, James Hardwick, Mary Powell, Grady Hardwick, James Britt and Nell Lawrence were unavailable as witnesses, and strategic reasons existed for not calling the remaining ones. Dr. Barnard testified at the state postconviction hearing that additional background information developed by postconviction counsel was consistent with the information he had in his possession at the time of Hardwick's trial (PCR-T p. 289) and did not change his opinion about Hardwick's mental state (PCR-T p. 309); the postconviction court also made a finding of fact that the additional information provided to Dr. Barnard by postconviction counsel was "essentially the same" as that available to him at trial (PCR-T p. 598). In short, the mitigation preferred by Hardwick was not, in the postconviction court's view, truly mitigating (PCR-T p. 599). Hardwick's ineffectiveness claim therefore fails on the prejudice prong. Accordingly, the state postconviction court's denial of relief was correct and those findings should not have been disturbed by the Eleventh Circuit.

The events in Hardwick's case occurred more than thirty years ago, and the victim's family should be entitled to rely on the finality of judgment. Instead, as a consequence of the Eleventh Circuit's decision, the State must effectively retry the entire case, given that the State's aggravators derive from the specific

events of the crime. The prejudice suffered by the State is extreme. See McCleskey v. Zant, 499 U.S. 467 (1991) ("[W]hen a habeas petitioner succeeds in obtaining a new trial, the 'erosion of memory and dispersion of witnesses that occur with the passage of time' prejudice the government and diminish the chances of a reliable criminal adjudication") (quoting Kuhlmann v. Wilson, 477 U.S. 436, 453 (1986) (plurality opinion) (internal quotation marks omitted; citation omitted)); United States v. Smith, 331 U.S. 469 (1947).

Cross-Petitioner therefore asks this Court to grant certiorari review.

2. The Eleventh Circuit impermissibly relieved the prisoner of his burden of proof on his claim of ineffective assistance under Strickland.

Even if properly freed of deference to the state court's findings, the Eleventh Circuit's grant of habeas relief impermissibly alleviated the petitioner's burden by requiring the district court to consider hearsay as substantive evidence. Moreover, the hearsay in question was not considered by the state postconviction court, which instead relied upon live witnesses who were subjected to cross examination. The Eleventh Circuit's Order insured that unchallengeable hearsay would be treated on par with trial counsel's live testimony at the federal evidentiary hearing. Certiorari should be granted because the Court relieved Hardwick of his burden of proof.

The District Court, acting on directions from the Eleventh Circuit, relied on the hearsay affidavits as a substantial aspect of its credibility assessment as well as its overall factual determination in granting habeas relief. Accordingly, the District Court's grant of habeas relief conflicts with this Court's precedent and requires reversal. It is axiomatic[12] that both parties must follow the rules of evidence; Cross-Petitioner knows of no exception that would authorize the defendant's use of hearsay where the State objects. In the instant case, the hearsay at issue affected the District Court's assessment of credibility. Witness credibility in a contested hearing may not be determined solely based upon evidence presented through an affidavit. In Walker v. Johnston, 312 U.S. 275 (1941), the court concluded that affidavits in a habeas proceeding have "no other office" besides determining "the issues which must be resolved by evidence taken in the usual way." 312 U.S. at 287. The Court discussed the importance of subjecting the affiants to the crucible of adversary testing:

> The witnesses who made them [affidavits] must be subjected to examination ore tenus or by deposition as are all other witnesses. Not by the pleadings and the affidavits, but by the whole of the testimony, must it be determined whether the petitioner has carried his burden of proof and shown his right to a discharge.

---

[12] See Federal Rules of Evidence 1101(b); the rules apply to civil cases, which would include a hearing to resolve a habeas claim.

Id. Other federal courts have relied upon Walker in assessing the validity of testimony adduced solely through affidavit. Jones v. Cunningham, 313 F.2d 347, 353 n.4 (4th Cir. 1963), cited to Walker and held that "issues of fact presented in habeas corpus proceedings may not be established by ex parte affidavits." Likewise, Copenhaver v. Bennett, 355 F.2d 417, 421-22 (8th Cir. 1966), affirmed the summary denial of a habeas petition and explained that "ex parte affidavits, standing alone, may not be used to decide substantial disputed questions of fact. But, such material may be used to determine whether any substantial factual issues exist." The entire purpose of the evidentiary hearing ordered by the Eleventh Circuit was to resolve material issues of fact. Directing the lower court to consider hearsay as part of its Strickland calculus was improper. See also Daniels v. United States, 54 F.3d 290 (7th Cir. 1995); Castillo v. United States, 34 F.3d 443, 445 (7th Cir. 1994) ("[A] determination of credibility cannot be made on the basis of an affidavit.)

Credibility was crucial to evaluating not only the adequacy of counsel's actions, but how Hardwick's mitigating evidence would have been received by the jury. The absence of live testimony subject to cross-examination granted Hardwick a free pass in terms of the District Court's assessment of credibility and viability. It is significant, for example, that the state postconviction court observed Nell Lawrence's demeanor and deemed her not credible; the District Court never saw her yet found her affidavit

credible.[13] The District Court relied extensively on material gleaned from the hearsay affidavits (Pet. App. A-8 pp. 55, 60 n.15, 61-62, 63).

Hardwick took full advantage of the Eleventh Circuit's order. His reliance on the affidavits reduced the quantum of evidence necessary to carry his burden of proof. Because the Eleventh Circuit's Order authorized his reliance on hearsay, it relieved him of the need to call witnesses, prevented the Secretary from cross-examining them and shielded Hardwick from possible adverse assessments stemming from either testimonial inconsistency and/or witness demeanor.[14] See, e.g., Herrera v. Collins, 506 U.S. 390, 417 (1993) (affidavits supporting a claim of actual innocence are suspect and of little value in the absence of cross examination and the opportunity to assess credibility).

---

[13] The District Court also accepted as credible Nell Lawrence's state court testimony, in spite of the fact that the judge who was in the best position to assess it found her statement unworthy of belief.

[14] One of the likely consequences of the Eleventh Circuit's ruling is Hardwick's decision not to testify at the federal evidentiary hearing. The State is particularly troubled by the District Court's finding that "[b]ased on his actions, Hardwick would not have precluded Tassone's presentation of *some* mitigation." (Pet. App. A-8 p. 109, fn. 33). Hardwick did not testify; the *only* source for this conclusion is Tassone who, as previously argued, testified that Hardwick directed him to present no mitigation case; some of the "actions" Tassone described included Hardwick's refusal to divulge telephone numbers for mitigation witnesses to Tassone's investigator (EH3 p. 69). The Eleventh Circuit accepted the District Court's finding that Hardwick would have permitted counsel to offer mitigation, however, without question. Hardwick v. Secretary, 803 F.3d 541, 563.

The state court's postconviction findings were reliable and entitled to deference. The federal evidentiary hearing was unnecessary and unfairly obviated Hardwick's obligation to prove his case by allowing him to present hearsay testimony as substantive evidence from a source that had not only been stricken by the state postconviction court, but also included testimony from at least one witness (Nell Lawrence) whose credibility had been found lacking by the trial judge who actually observed her. The Eleventh Circuit's grant of habeas relief under these circumstances should be reversed.

CONCLUSION

Based on the foregoing, Cross-Petitioner respectfully requests that this Court grant the cross-petition for writ of certiorari.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

CANDANCE M. SABELLA*
Chief Assistant Attorney General
Florida Bar No. 0445071
*Counsel of Record
candance.sabella@myfloridalegal.com

TIMOTHY A. FREELAND
Assistant Attorney General
Florida Bar No. 539181
3507 East Frontage Road
Suite 200
Tampa, Florida 33607-7013
Telephone: 813-287-7910
Facsimile: 813-281-5501
timothy.freeland@myfloridalegal.com
E-Service:
capapp@myfloridalegal.com

COUNSEL FOR
CROSS-PETITIONER

Case No. 15-____

IN THE UNITED STATES SUPREME COURT

JULIE L. JONES, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Cross-Petitioner,

v.

JOHN GARY HARDWICK, JR.,

Cross-Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

---

APPENDIX TO CROSS-PETITION FOR A WRIT OF CERTIORARI

STATE ATTORNEY NO: 85-16981

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY,FLORIDA.

CASE NO: 85-3779-CF
DIVISION: CR-C

STATE OF FLORIDA

vs.

JOHN GARY HARDWICK

SUPPLEMENTAL ORDER

This cause comes before the Court on remand from the Supreme Court of Florida for additional evidentiary development on the issue of the effectiveness of trial counsel.

To fully accommodate Mr. Hardwick, the Court held extended hearings on May 3 and 4, 1990, and August 15 and 16, 1990. In addition, Mr. Hardwick received disclosures from the State, pursuant to Chapter 119 of the Florida Statutes. In addition, and to further accommodate Mr. Hardwick, the Petitioner was granted leave to file an Amended Rule 3.850 Petition at any time until July 20, 1990. Mr. Hardwick was allowed to call all desired witnesses.

The Court has carefully considered the testimony and evidence presented at the hearings, along with the transcript of the first Rule 3.850 hearing, the trial transcripts, the pleadings, exhibits and memoranda submitted by the parties.

On the basis of this careful review, the Court finds as follows:

The Petitioner has accused his trial attorney of ineffectiveness under Strickland v. Washington, 466 U.S. 688 (1984). In five (5) counts of his Petition, Mr. Hardwick raises four (4) general claims, to-wit:

CLAIMS II AND IV:

Failure to select and prove a defense of voluntary intoxication.

CLAIM VI:

Failure to object to the prosecutor's penalty phase arguments.

CLAIM X:

Failure to put on penalty phase evidence.

CLAIM XI:

Failure to assist the defense psychiatrists.

As a courtesy to any reviewing courts under Shapira v. State, 390 So. 2d 344 (Fla. 1980) and Sumner v. Mata, 449 U.S. 539 (1981) this Court will first note its findings of fact.

FACTS: COUNTS II AND IV

The Petitioner has accused counsel of being ineffective for not preparing and presenting a defense of voluntary intoxication. As an adjunct to this claim, Petitioner lists specific witnesses whom counsel failed to call.

First, the court finds that Frank Tassone was a very experienced criminal trial attorney.

Second, the Court finds that Mr. Tassone was assisted by an investigator and psychiatrist, Dr. Barnard, who provided a confidential report to Mr. Tassone.

Third, the Court finds that Mr. Tassone took extensive depositions and filed a host of defense motions on Hardwick's behalf. (See R 26, 32, 34, 36, 40, 43, 46, 49, 53, 61, 66, 68, 74, 80, 83, 92, 115, 121, 125, 135, 137).

Fourth, the Court finds that Mr. Hardwick and Mr. Tassone openly disagreed on trial (defense) strategy. (R 64, 58, 799-802). However, Mr. Tassone did attempt to locate witnesses suggested by Hardwick (TR 87) and did not reject suggested witnesses without first interviewing them. (TR 87).

Fifth, while Mr. Hardwick does not seem to have indicated if his current witnesses were on the list over which he and Mr. Tassone disagreed, he has listed 'witnesses who should have been called during the guilt-innocence portion of his trial. The Court has had the benefit of these witnesses' testimony and/or testimony regarding their worth and can specifically state the following findings regarding each putative witnesses:

A. Connie Wright: The Court finds that Connie Wright was only 14 years old at the time of the murder. At trial, she testified for the State. She was equivocal on the issue of intoxication but adamant that Mr. Hardwick confessed to murdering Keith Pullum. Counsel made a strategic decision not to use this witness and the Court, having now seen Ms. Wright twice, cannot say that Counsel's decision was outside the broad scope of Strickland.

B. Jeff Bartley: Mr. Bartley did not testify in this 3.850 proceeding. The trial record shows that Bartley disliked Hardwick, that Hardwick threatened Bartley's life and that Bartley was a friend of the victim. Hardwick confessed to Bartley as well. (R 740-475). Mr. Tassone testified to strategically rejecting this potentially hostile and damaging witnesses and recalled that Bartley may even have been "passed out" from December 23 to 25, and thus negating any ability to testify to Hardwick's condition on the 24th. (TR 40-41). Again, the Court finds that a strategic decision was made

by counsel not to use a deposed witness. Given the uncertain, nature of Mr. Bartley's testimony, the Court cannot second guess counsel.

C. Nell Lawrence: Ms. Lawrence is Mr. Hardwick's mother. Mr. Tassone stated that he was in regular contact with Ms. Lawrence and that she refused to testify, did not get along that well with Mr. Hardwick and that she felt he deserved a death sentence. (TR 45, 53-54). At the second hearing (Vol. 6, Pg. 4-80), Ms. Lawrence agreed with Mr. Tassone about their regular contact but denied refusing to testify to agreeing with the result. (TR 51-54). This testimony is the clearest conflicting evidence in this case and causes the Court to gauge the respective credibility of these witnesses.

Mr. Tassone was cross examined on issues of malpractice liability and his financial stake in the outcome of this case. Mr. Tassone was not only not impeached, the record shows that he continued to protect his client by refusing to reveal damaging evidence if it would violate Hardwick's rights.

On the other hand, Ms. Lawrence was openly guilt-ridden about her treatment of Hardwick as a child and stated she could never forgive herself for putting him in his present fix. (See TR 27).

In assessing overall credibility, the Court Finds that Ms. Lawrence, confronted with her child's execution, has succumbed to internal pressure to save her son's life by testifying at this late date, As

such, her credibility is certainly suspect in comparison to Mr. Tassone. For that reason, the Court finds Mr. Tassone's statement more credible and concludes that Ms. Lawrence was not a willing witness in 1985.

D. Jeff Hardwick: Jeff Hardwick openly stated that he and Mr. Tassone discussed the potential strengths and weaknesses of his testimony and decided, strategically, he should not testify during the penalty phase. Jeff Hardwick now alleges he could have offered guilty phase testimony, but Mr. Tassone testified that "the brother" to whom he spoke during trial was only there to comfort Nell Lawrence and did not want to testify. (TR 55). Again, the motivation to help his brother, as well as pressure from his mother, could explain Jeff's sudden decision to testify. The Court simply does not find Jeff's testimony credible.

Drs. Levin and Dee: The Court finds no evidence that Drs. Levin or Dee were available as witnesses in 1985 and no authority for the proposition that Mr. Tassone was required to go from doctor to doctor until he found them.

Dr. Barnard: Although not listed by Mr. Hardwick, Dr. Barnard was available at trial and did examine Hardwick. Dr. Barnard does not recall whether he spoke to Mr. Tassone about an intoxication defense. (Vol. I, 21, 69). Dr. Barnard was aware, in 1985, of Hardwick's abused childhood, his alcohol and drug use and his claim he was

intoxicated during the murder. (TR I, 70). Even in light of cumulative data provided by Hardwick's new counsel, Dr. Barnard still maintains that despite any "impairment" to his reasoning, Hardwick overcame the impairment and consciously murdered Keith Pullum with a full rational understanding of the criminality of his conduct. (TR I, 19, 20, 50, 55, 68, 87-91). Dr. Barnard candidly described Hardwick's attempted "suicides" as false attempts, designed merely to get attention. (TR I, 42). Dr. Barnard stated that the new background information has had on Mr. Hardwick is merely consistent with the records he had at the time of trial. (TR I, 41, 48). Thus, Dr. Barnard's assessment was the same. (TR I, 55).

Mr. Tassone did not use Dr. Barnard because the doctor's testimony, in Tassone's judgment, would not establish intoxication to the point of incapacitation or loss of intent. (TR 51.). The Court finds this strategic decision still to be within the parameters of Strickland.

FACTS: COUNT VI

Mr. Tassone stands accused of failing to object to certain penalty phase arguments made by the prosecutor.

The Court finds that Mr. Hardwick has not pursued this issue and that Hardwick did not question Mr. Tassone on this issue.

The evidence at trial showed that Mr. Hardwick murdered Keith Pullum for stealing Quaaludes. The prosecutor's arguments relating to Hardwick's motive, as a drug dealer, were not necessarily objectionable and the conjectural comments regarding how the jury may have interpreted any arguments are unsupported.

Other objections to the prosecutor's arguments are predicated on Mr. Hardwick's evidence itself or other interpretations thereof. The Court is aware of no authority, and Hardwick offers none, for the proposition that parties cannot argue their interpretation of the evidence.

Given Mr. Hardwick's failure to pursue this issue, the Court finds as a matter of fact that it has been abandoned or, in the alternative, that it is without merit.

<u>FACTS: COUNT X</u>

It is undisputed that defense counsel put on no evidence during the penalty phase. Mr. Hardwick, the record shows, did not want to testify on his own behalf.

The entire question of Mr. Tassone's performance during the penalty phase is tempered by the established and uncontroverted fact that Mr. Hardwick ordered Mr. Tassone to present no mitigation evidence at the penalty phase. This fact, which the Court finds was clearly established and

never controverted by Hardwick, was corroborated by the testimony of Florie Benton, who testified that Hardwick told her not to come to the trial.

Mr. Tassone has defended approximately twenty (20) capital defendants, perhaps only two (2) of whom (from this record, Mr. Davis and Mr. Hardwick) received a death sentence.

Mr. Tassone testified that he began thinking about the penalty phase at once, a point corroborated by his pretrial motions. (TR 146). Counsel interviewed Nell Lawrence, the Defendant, Dr. Barnard and others in preparation. (TR 146). Dr. Barnard and Jeff Hardwick corroborate Mr. Tassone or at least do not deny speaking to him about the penalty phase. (TR I, 68, 209). Even Nell Lawrence agreed counsel spoke with her. (TR I, 55).

Mr. Hardwick suggests that other witnesses "would have" testified for him.

Florie Benton, Hardwick's Aunt, states she "would have" testified but she was told by Hardwick himself not to bother. (TR 11, 26). Although her Nephew was on trial for his life, she did not attend the trial. She has never before testified in any adult or juvenile proceeding on Hardwick's behalf. (TR II, 24-25).

James M. Hardwick, the Defendant's Uncle, testified he could "never get close to" the Defendant (TR II, 23) and had little or not contact with him

after the Defendant turned five (5) years old. (TR II, 26). James has never before testified on the Defendant's behalf. (TR II, 22).

Another Aunt, Mary Powell, again had little direct knowledge of John's childhood and had never testified for him in the past. (TR IV, 27).

Another Uncle, Grady Hardwick, had more exposure to John, but, again, had never bothered to go to adult or juvenile court on his behalf. (TR V, 32, 33). Grady said that Hardwick was "not crazy" (TR V, 21) and never actually took drugs while around him. (TR V, 35).

Nell Lawrence's testimony has already been discussed.

James Britt, Hardwick's Brother, said he could not afford a trip to Florida to save his Brother's life. (TR VI, 183).

Jeff Hardwick discussed his testimony with Mr. Tassone and the strategic decision was made not to use it. (TR VI, 209). Jeff had never before testified to help his Brother. (TR VI, 220).

Ms. Ericka Johnson repudiated her affidavit. (TR IX).

Rosemary Mason, a Probation Officer, had no relevant contact with the Petitioner, nor did Mary

Braddy, a Chaplain's Assistant who had befriended Hardwick. (TR VI, 139-143).

The court finds that Florie Benton, James Hardwick, Mary Powell, Grady Hardwick, James Britt and Nell Lawrence were not available as witnesses and that their inaction in this case was consistent with their lack of support for John Hardwick in his other cases. Florie Benton was actually put off by Hardwick himself, thus estopping him from claiming he wanted her to testify. Jeff Hardwick's testimony was not used for strategic reasons.

Rosemary Mason and Mary Braddy were not shown to have been willing or able to volunteer relevant testimony at the time.

Dr. Barnard appears to have been rejected as a penalty phase witness because his alcohol-drug-impairment testimony was offset by his equally adamant testimony that Hardwick overcame these impediments and had a fully formed conscious intent to kill his victim. Again, counsel made a strategic decision.

FACTS: COUNT XI

The final claim against counsel is that he failed to provide sufficient information to Dr. Barnard.

Dr. Barnard testified that although he did not recall any conversations with Mr. Tassone regarding

mitigation testimony, he stated that he may have had those conversations and merely forgotten them. Dr. Barnard's recollection on this point was vague.

Mr. Tassone, on the other hand, had a very clear and vivid recollection of having numerous conversations and discussions with Dr. Barnard regarding possible mitigation testimony and evidence.

This Court, having heard and observed both Dr. Barnard and Mr. Tassone testify regarding this matter, finds that Mr. Tassone did discuss possible mitigation testimony and evidence with Dr. Barnard.

The Court also finds that after considering this possible mitigating information from Dr. Barnard, Mr. Tassone made a strategic decision not to use Dr. Barnard in the penalty phase.

Additionally, the Court finds that although Dr. Barnard did request information, the information provided to Dr. Barnard was essentially the same as the information provided by collateral counsel.

Dr. Barnard is an experienced, professional doctor who presumptively does his job in a professional manner. That includes the professional collection of data prior to rendering a medical opinion.

Dr. Barnard had Hardwick's records from the youth home in South Carolina. He interviewed

Hardwick. (TR I, 17-19). Dr. Barnard knew Hardwick was claiming he was high on drugs during the murder. (TR I). Indeed, Dr. Barnard characterized the "new" evidence as being consistent with that information he possessed in 1985.

Dr. Barnard, more significantly, has not changed his opinion that Hardwick was sane and competent. (TR I, 68).

Mr. Hardwick has failed to offer a new or conflicting medical opinion from Dr. Barnard based upon new evidence not provided by, but available to, Mr. Tassone.

CONCLUSION

The Court finds that Mr. Hardwick has failed to establish the ineffective assistance of trial counsel under Strickland v. Washington, 466 U.S. 668 (1984).

Strickland recognizes that counsel is not required to call every possible witness, is not required to second-guess his experts and is not subject to reevaluation of his strategic decisions by "hindsight".

The Court also, at the outset, recognizes the recent decision in Scott v. Dugger, ____ F.2d _____ , 3 F.L.W. Fed C 1783 (11th Cir. 1990), which states that counsel is not required to prepare or present a false defense.

Judging Mr. Tassone from his shoes, at the time, see Bertolotti v. Dugger, 883 F.2d 1503 (11th Cir. 1989), the Court finds:

As to Counts II and IV: The decision not to call the listed witnesses was both reasonable and strategic. Nell Lawrence was not available as a witness. Counsel is not required to call witnesses he considers potentially harmful to his client, Tucker v. Kemp, 776 F. 2d 1487 (11th Cir. 1985); Blanco v. State, 507 So. 2d 1377 (Fla. 1987). The Court notes that Hardwick expressed a specific intent to kill Mr. Pullum, he killed Pullum and reported his crime in detail afterwards. Even if Hardwick was mildly intoxicated, he was not significantly impaired or incapacitated. Our Federal Circuit Court has recognized that under these facts counsel was not required to pursue a defense of "intoxication". Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988).

Mr. Hardwick has failed in his burden to prove a likelihood of a different guilty phase verdict under these facts. (Lambrix v. State, 534 So. 2d 1151 (Fla. 1988).

As to Count VI: Mr. Hardwick, if he has not abandoned this claim, has failed to show, error or prejudice. Counsel apparently, strategically decided not to object to closing argument. Anderson v. State, 467 So. 2d 781 (Fla. 3rd DCA 1985). A mere failure to object, standing alone, does not prove ineffectiveness. Provenzano v. State, 15 F.L.W. S. 260 (Fla. 1990).

As to Count X: Counsel has been proved, by Hardwick's own witnesses, to have tactically considered and rejected certain penalty phase evidence. Counsel appears to have felt that evidence that Hardwick was an illegal drug user and seller was as damaging as his alleged "addiction" was mitigating. Hardwick's childhood neglect was offset by his juvenile record and the fact that his ten siblings did not follow his path of crime, drugs and murder. Of course, Hardwick was sane and competent despite any drug problem. Counsel's strategic decision to rely upon argument rather than this evidence of mixed value cannot be second guessed. The court does not find any reasonable probability that a different recommendation would have come from the advisory jury. The evidence would not, if offered, have prompted a sentence other than death from this Court.

As to Count XI: The Court finds that Mr. Tassone did not provide a great deal of cumulative evidence to Dr. Barnard. However, Dr. Barnard was aware of Hardwick's tough childhood, drug problem and possible intoxication and the new evidence he received was consistent with evidence he already possessed.

Also, Dr. Barnard's opinion was unchanged that Hardwick was sane at the time of the murder. The Court finds that even if counsel had given cumulative evidence to Dr. Barnard, nothing in this record supports the idea that either the strategic

decision not to use Dr. Barnard would have changed or that the outcome of the case would have been different.

Since, as a professional, Dr. Barnard had an independent duty to perform a professional evaluation, the Court cannot conclude Counsel erred in not doing Dr. Barnard's job for him. There is no proof, therefore, of error or prejudice under Strickland.

Having failed to satisfy his burden of proof under Strickland v. Washington, supra, Mr. Hardwick is not entitled to relief.

WHEREFORE, it is ordered that the Petition for Post-Conviction Relief is DENIED.

DONE AND ORDERED, this 21st day of March, 1991.

/s/ LAWRENCE PAGE HADDOCK
JUDGE