IN THE SUPREME COURT OF FLORIDA

RUFUS E. STEVENS, Petitioner, v. RICHARD L. DUGGER, Secretary, Department of Corrections, State of F'lorida, Respondent.	Case No. 70,955

PETITIONER'S REPLY IN SUPPORT OF HIS AMENDED PETITION FOR WRIT OF HABEAS CORPUS

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RUFUS E. STEVENS, Petitioner,	)	
v.	)	Case No. 70,955
RICHARD L. DUGGER, Secretary, Department of Corrections, State of Florida, Respondent.	)	

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I. INTRODUCTION

Petitioner Rufus E. Stevens replies below to Respondent's Response to Amended Petition and Court Order.[1] Not only will we set forth the deficiencies in the State's arguments in opposition to various aspects of our claim that appellate counsel, John R. Forbes, was ineffective, but we will also note each argument as to which the State has made no response. As to those latter points, the State has conceded them.

The State's principal argument (RHC 1-2, RHC 6, RHC 8) is that Forbes provided "per se effective appellate representation" and that Stevens suffered no prejudice from that representation because Forbes "convinced two Justices of this court that the trial court erroneously rejected the jury's

1. Page references to Respondent's Response will be preceded by "RHC"; references preceded by "PHC" are to the Amended Petition for Writ of Habeas Corpus; references preceded by "AIB" are to the appropriate pages of Appellant's Initial Brief in Case Nos. 68,581 and 69,112; references preceded by "SAB" are to the State's Answer Brief in those cases; those preceded by "ARB" are to Appellant's Reply Brief in those cases; references preceded by "R" are to the record on Appeal No. 68,581; those preceded by "RDA" are to the record on the direct appeal, No. 57,738; those preceded by "BDA" are to Forbes' brief on Stevens' direct appeal to this Court; those preceded by "T" are to the stenographer's transcript in the post-conviction proceeding; and those preceded by "TT" are to the stenographer's transcript of the trial, sentence and related proceedings.

recommended sentence of life imprisonment." Although Justices McDonald and Overton did indeed dissent as to the imposition of the death penalty --- Stevens v. State, 419 So. 2d 1058, 1065 (Fla. 1982), cert. denied, 459 U.S. 1228 (1983) --- the State's argument is preposterous on its face. The partial dissent as to the penalty means that Stevens' conviction was unanimously affirmed and that his sentence was affirmed by a majority vote. Such a result was as prejudicial to Stevens as if neither Justice had voted to reduce his sentence to one of life imprisonment.

We need not rely, however, solely upon logic to demonstrate the silliness of the State's principal argument. In Wilson v. Wainwright, 474 So. 2d 1162, 1163-64 (Fla. 1985), this Court concluded that appellate counsel had been ineffective for failing to "raise or discuss any issue relating to the sufficiency of the evidence to support the jury's finding of premeditation" despite the fact that that "issue was sufficiently apparent from the cold record that the two dissenting justices raised it in their separate opinions." This Court has thus rejected the State's argument in circumstances virtually identical to those in Stevens' case. See also, Fitzpatrick v. Wainwright, 490 So. 2d 938, 939-40 (Fla. 1986), in which this Court concluded that appellate counsel on direct appeal--- Fitzpatrick v. State, 437 So. 2d 1072 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984) --- had been ineffective notwithstanding the partial dissents on that direct appeal by Justices McDonald and Overton as to the imposition of the death penalty.[2]

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2. The State also argues (RHC 2) that Forbes' effectiveness is proven by the fact that he "convinced" Judge Santora to exclude the confession Stevens made at the time of the polygraph examination from the State's penalty stage evidence. The State does not mention the key fact that prosecutor T. Edward Austin, conceding that he had previously stipulated with Forbes that what Stevens said at the polygraph examination would not be used against him, did not try to convince Judge Santora to let the State introduce that evidence but rather simply sought the court's guidance on the issue. After Judge Santora expressed reluctance to allow the admission of such evidence, the

11. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

A. Ineffectiveness Relating to the Conviction

In his habeas corpus petition Stevens identified two claims relating to his conviction which effective counsel would have raised on direct appeal. The State --- whether through deliberate misunderstanding or otherwise --- fails to address itself to either claim, though it does try to characterize one of those issues as something entirely different than what we raised.

The first issue (PHC 4-5 Pars. 9-10) was predicated upon the possibility that this Court might uphold Judge Santora's finding that Forbes knew all the circumstances concerning how the dull knife was found and that he therefore had sufficient information to seek its suppression on Fourth, Fifth and Sixth Amendment grounds. We maintained that if, and only if, the Court rejected our position (in the consolidated appeal from the denial of Stevens' motion for post-conviction relief) that the State had kept the requisite information from Forbes, Forbes was constitutionally ineffective for not pursuing on direct appeal the failure to suppress the dull knife. That would be so because, if the circumstances in which we have asked the Court to consider this claim were to occur, this Court would necessarily have concluded that no Brady violation had occurred.

The State did not respond to the above claim but chose to mischaracterize it as an allegation that Forbes had failed to preserve a Brady claim (RHC 3). The State's principal argument is that this Court should uphold Judge Santora's finding that no Brady violation occurred. The State never addresses our argument that, if this Court were to so find,

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prosecutor indicated his satisfaction with that ruling (TT 1196-1200). So much for Forbes' "excellent trial skills" (RHC 2).

Forbes, having then been determined by this Court to have had the knowledge of the necessary facts, should have contested before this Court Judge Santora's failure to suppress the dull knife. The principal arguments the State does make (RHC 3) are irrelevant because they are totally off the point.

Secondarily, the State argues (RHC 3-4) that Forbes was not ineffective for failing to raise on appeal the failure to suppress the dull knife[3] because this Court on direct appeal stated --- 419 So. 2d at 1062 --- that the statements made at the polygraph session were not unconstitutionally obtained. The State, however, ignores the fact that this Court was totally misled on direct appeal as to the facts concerning Stevens' statements at the polygraph examination (see AIB 138-45). Despite our having made this point in our habeas corpus petition (PHC 4 n.6), the State continues to act as if this Court's prior finding on totally erroneous facts were conclusive on this issue. Based upon the actual facts (see AIB 142-43) --- that Detective Parmenter interrogated Stevens for two to three hours without ever administering Miranda warnings* in the absence of his counsel and then seized the knife at Stevens' home without obtaining a warrant --- this Court surely would have ruled that the knife was unconstitutionally seized, had the issue been raised.[5]

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3. While we made it clear (PHC 5 Par. 10) that Forbes should have raised this issue on Fourth, Fifth and Sixth Amendment grounds, the prosecution (RHC 4) has characterized our position as having included only Fourth Amendment grounds.

4. The polygraphist testified that it was his practice to give Miranda warnings, but he had no recollection of having done so and neither of the agencies which would have received such forms was able to produce the forms which would have shown that he had done so (see AIB 142 n.153).

5. The prosecution argued (RHC 4) with respect to this issue that "Lieutenant Dedmon conclusively convinced the trial court that Petitioner voluntarily led police to the knife (T 880-84)." The page references are to Dedmon's testimony. Judge Santora never made any such finding; indeed he did not mention Dedmon's name in his ten-page findings (R 629-38). How then the State could say that Judge Santora was "conclusively convinced" is beyond us.

The second issue relating to his conviction which Stevens maintained in his habeas corpus petition (PHC 5-6 Pars. 11-13) that Forbes should have raised on appeal was the following: the prosecution, in violation of the rule of Brady v. Maryland, 373 U.S. 83 (1963), failed to reveal until after the conviction was obtained that the semen stains upon which it relied to tie the rape of Kathy Tolin to the back seat of Stevens' car might well have been left there during the sex Stevens had had with September Jinks. The prosecution fails to address this issue in any way.[6] Its failure to do so is an implicit concession of the issue.

The prosecution also fails to address the fact that two of the issues Forbes did raise on appeal were so weak that he virtually conceded their meritlessness on oral argument (see PHC 6-8 Pars. 14-16). Obviously the prosecution cannot defend that ineffectiveness.

B. Ineffectiveness Relating to the Sentence

While we raised seven different aspects in which Forbes made erroneous arguments or failed completely to advance meritorious claims relating to Stevens' sentence, the State has chosen not to respond to most of our contentions.

We first pointed out (PHC 8-9 Pars. 17-19) that Forbes sabotaged Stevens' effort to show that he had "no significant history of prior criminal activity" by stating that Stevens had a felony conviction and had been sentenced to a jail term. Neither, of course, was true. Recognizing an

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6. The State does address (RHC 4) one third of the argument (PHC 17 Par. 35) we made concerning the issues relating to Stevens' sentence which should have been made with respect to September Jinks by denying that the trial prosecutor hid Jinks from the defense. The record shows, however, that Jinks was being secreted in the State Attorney's office and that the prosecutors were insisting upon being present for an interview (T 829-30, T 853-55). Such conduct violated Stevens' constitutional right to due process of law. See Gregory v. United States, 369 F.2d 185, 187-89 (D.C. Cir. 1966).

argument that it could not win, the State decided to ignore this egregious ineffectiveness.

We contended (PHC 10-13 Pars. 21-25) that Forbes was ineffective for failing to argue the unconstitutionality of the admission of, and Judge Santora's reliance upon, co-defendant Gregory Scott Engle's statement to Nathan Hamilton that "Rufus went crazy." While apparently conceding that Forbes' failure to raise this issue was an "unreasonable error," the State maintains (RHC 5) that there was no prejudice to Stevens because this Court recently affirmed Engle's resentence, which had been imposed without reliance on Stevens' statements. Engle v. State, 12 F.L.W. 314 (Fla. June 26, 1987). That is a complete non-sequitur. Since Engle made the inadmissible statement to Nathan Hamilton, it was clearly admissible at his resentence. As far as Stevens is concerned, Engle's statement was the sole basis upon which Judge Santora found, and this Court upheld the finding, that "the capital felony was committed for the purpose of avoiding or preventing a lawful arrest." §921.141(5)(e), Fla. Stat. Judge Santora's improper reliance on this aggravating circumstance coupled with the mitigating circumstances which should have been established would have entitled Stevens to at least a remand for resentencing. See Elledge v. State, 346 So. 2d 998 (Fla. 1977). There is thus no doubt that Forbes' deficiency on this score severely prejudiced Stevens.

Stevens argued (PHC 13-16 Pars. 26-31) that Forbes was ineffective for failing to challenge the substantial reliance placed upon the unconstitutionally-obtained psychiatric report. The State's only response was that Estelle v. Smith, 451 U.S. 454 (1981), did not apply because Forbes initiated the psychiatric examination. While it is true that the court in Smith ordered the examination without the knowledge of defense counsel, that fact is not essential to Smith's holding. See Booker v. Wainwright, 703 F.2d 1251, 1256 (11th

Cir.), cert. denied, 464 U.S. 922 (1983) (counsel's initiation of the exam does not vitiate Smith's constitutional protection); Battie v. Estelle, 655 F.2d 692, 700-03 (5th Cir. 1981) (same). Not surprisingly, the State fails to address the fact that Forbes ignored the Estelle v. Smith issue even after a member of this Court sua sponte raised the issue at oral argument (see PHC 14 Par. 28).

The State completely ignores our argument (PHC 16-17 Pars. 32-34) concerning Forbes' possible (depending upon whether this Court accepts the State's procedural default claim concerning the underlying issue) ineffectiveness in not challenging the fact that Stevens was not given an opportunity to review the presentence investigation and psychiatric reports. Likewise, the State fails even to try to rebut our assertion (PHC 17-18 Par. 36) that it was ineffective not to challenge the State's reliance before Judge Santora on aggravating circumstances as to which it had disclaimed reliance before the jury.

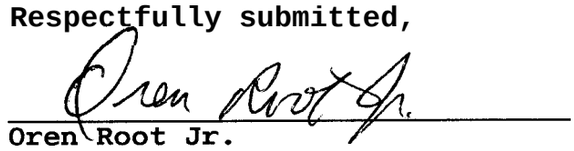
Finally, the State argues (RHC 8) that Stevens' confession to the underlying felonies justified Forbes' "strategy" on appeal of relying on the jury's recommendation of life imprisonment. While Forbes did quite properly rely upon the jury's recommendation, it is unwarranted to conclude that he had any kind of coherent strategy or that he should be excused from raising other compelling claims just because he raised one issue he should have.

III. CONCLUSION

A writ of habeas corups should issue. With respect to the issues relating to the conviction, the Court should direct that a new trial be held. With respect to the issues relating to the sentence, the Court should direct that Stevens be resentenced to life imprisonment. Alternatively, the Court

should direct that Stevens be allowed to file a new appeal so that he may fully brief the issues which should have been raised upon his original direct appeal.

Respectfully submitted,



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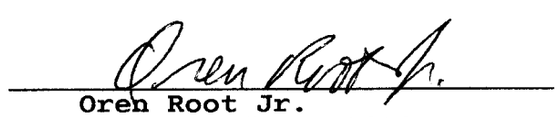
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing reply in support of amended petition for habeas corpus has been furnished by United States Express Mail to Hon. Robert A. Butterworth, Attorney General, State of Florida, The Capitol, Tallahassee, Florida 32399-1050 (Att: Bradford L. Thomas, Esq.), and by United States mail to Hon. T. Edward Austin, State Attorney, 600 Duval County Courthouse, Jacksonville, Florida 32202, this 21st day of September, 1987.



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