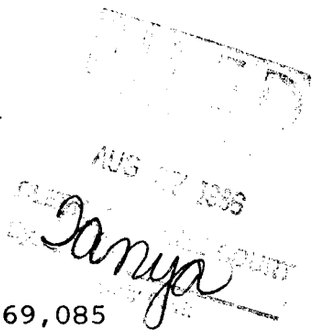
IN THE SUPREME COURT OF FLORIDA



FREDDIE LEE WILLIAMS, Petitioner,	)	
vs.	)	CASE NO. 69,085
LOUIE L. WAINWRIGHT, ETC., Respondent.	)	

PETITIONER'S RESPONSE TO RESPONDENT'S
RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

The Petitioner, FREDDIE LEE WILLIAMS, by and through his undersigned attorney, pursuant to the Order to Show Cause issued by this Honorable Court on July 29, 1986, hereby responds to the Respondent's Response to Petition for Writ of Habeas Corpus and states as follows:

I. BASIS FOR RELIEF

Petitioner very strongly disagrees with the State's assertion in its response that appellate advocacy is far less important than trial advocacy and that a mere cursory raising of an issue by appellate counsel will lead this Court to itself conduct a thorough examination of the record on appeal. An appellate court relies upon the factual representations in a statement of case and a statement of facts in a brief by appellate counsel. Overfelt v. State, 434 So.2d 945 (Fla. 4th DCA 1983). If appellate counsel improperly and incorrectly concedes a fact in his statement of case and facts to an appellate court, this clearly can constitute ineffective assistance of counsel. This is certainly the case in the instant situation.

Appellate counsel in the instant case clearly did not render effective assistance of counsel which undermined the competence and the fairness and correctness of the appellate result in Petitioner's case. Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985). This is especially so in this case in which a proper proportionality review presented in effective, appellate advocacy

fashion would demonstrate that this is not a situation wherein the death penalty is appropriate. The State itself concedes that the theory of its circumstantial evidence case against the Defendant was that he killed the victim, whom he had carried on an 18 year domestic relationship with, because he felt that the victim had been unfaithful to him and had cheated on him that night with another man. This domestic passion dispute type of factual scenario is not the type of case that the death penalty was meant to apply to.

A. THAT PETITIONER WAS DEPRIVED OF A FULL AND MEANINGFUL APPEAL ON THE DEATH SENTENCE ISSUE DUE TO INEFFECTIVE REPRESENTATION PROVIDED BY HIS APPELLATE COUNSEL IN AFFIRMATIVELY REPRESENTING AND ARGUING IN PETITIONER'S BRIEFS THAT NO MITIGATING CIRCUMSTANCES WERE FOUND BY THE TRIAL COURT TO WEIGH AGAINST THE FINDING OF TWO AGGRAVATING FACTORS WHEN, IN FACT, THE TRIAL COURT FOUND THE EXISTENCE OF ONE MITIGATING CIRCUMSTANCE, RELATING IN AN IMPROPER AND INADEQUATE PROPORTIONALITY ARGUMENT TO THIS COURT.

The State in its response at page 6 argues that the Defendant's appellate counsel did attempt in its Brief to argue for the existence of the non-statutory mitigating factor. However, the State ignores the fact that appellate counsel's argument was directed to its assertion that the Trial court had not found the existence of the non-statutory mitigating factor rather than basing his appellate argument on the position that this one mitigating factor was found by the Trial court. The State fails to address the point that there is a completely different standard of review for a defendant in a death penalty appeal to argue error on the Trial court's part in failing to find the existence of a mitigating factor than the standard of review in a proportionality argument when such factor was, in fact, found to exist by the Trial court.

Petitioner would again submit that a common sense reading of the Trial court's oral and written pronouncements imposing the death sentence shows that the Trial court did find the existence of the one nonstatutory mitigating factor. Petitioner's appellate counsel not only missed that fact, but further aggravated the situation by affirmatively arguing that the Trial court had found no mitigating circumstances. The State in its response does absolutely nothing to shake the certainty of this error. Certain-

ly, the State's reference to a brief statement by the Assistant Attorney General representing the State of Florida at oral argument also does nothing to change this fact.

It is significant that the State in its response does not cite to or distinguish cases that this Court cited to in the Defendant's appeal to this Court which were distinguished by this Court on the basis of Defendant's appellate counsel's representation that the Trial court found no mitigating factors to exist in Petitioner's case. Blair v. State, 406 So.2d 1103 (Fla. 1981); Kampff v. State, 371 So.2d 1007 (Fla. 1979); Halliwell v. State, 323 So.2d 557 (Fla. 1975).

The State at page 8 of its response states that this Court, in conducting a proportionality review, merely looks at the factual situations involved rather than taking into consideration a finding of mitigating and aggravating circumstances. The State's argument to this effect is shown to be incorrect in the Defendant's own case wherein the majority of this Honorable Court distinguished the Defendant's case from other cases based upon the incorrect representation of appellate counsel that no mitigating circumstances were found to exist. Williams v. State, 437 So.2d 133 at 137.

Both criteria for proving ineffective assistance of counsel on appeal have been met in Petitioner's case. Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985).

B. THAT APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO ARGUE OR RAISE IN THE DIRECT APPEAL AS TRIAL COURT ERRORS: 1) IMPROPER PROSECUTORIAL ARGUMENT SUGGESTING THAT IF THE JURY DID NOT IMPOSE THE DEATH SENTENCE, THE PETITIONER WOULD SHOOT SOMEONE AGAIN; 2) THAT THE PETITIONER HAD A REPUTATION FOR SHOOTING PEOPLE, ESPECIALLY WOMEN, INJECTING A NON-STATUTORY AGGRAVATING FACTOR INTO THE JURY'S AND JUDGE'S SENTENCING CONSIDERATION; 3) IMPROPER PROSECUTORIAL ARGUMENT THAT THE JURY COULD FIND THE EXISTENCE OF THE STATUTORY AGGRAVATING FACTORS OF A COLD, CALCULATED AND PREMEDITATED MANNER OF MURDER BY FINDING THAT THE PETITIONER HIMSELF WAS A "COLD, CALCULATED TYPE OF PERSON TO WHOM THIS AGGRAVATING CIRCUMSTANCE SHOULD APPLY"; 4) IN ADMITTING THE TWO INFORMATIONS CHARGING PRIOR AGGRAVATED ASSAULTS LISTING THE NAMES OF THE SAME VICTIM THE PETITIONER WAS CONVICTED OF KILLING IN THE INSTANT CASE, MARY ROBINSON, AS WELL AS THE NAME OF ANOTHER PERSON NOT INVOLVED IN THE INSTANT CASE, WINMAN ESTERS.

The State in its response argues that the Defendant did not object to the introduction of the informations charging the

prior assaults on Mary Robinson and Winman Esters. Contrary to the State's assertion, the defense counsel specifically objected to the introduction of those informations stating:

> "But for the State to be able to introduce that [the informations themselves] and for the jury to go back and say, 'hey, he's hurt this girl before', it is not one of the listed aggravating circumstances, and is prejudicial and inflammatory. The defense objects to any of the circumstances surrounding those two prior offenses coming into evidence." (R-763-766).

The State in its response correctly points out that the Petitioner inadvertently in his Petition for Writ of Habeas Corpus referred to the "trial court" as improperly arguing during the penalty phase that Petitioner was himself a "cold, calculated type of person". (See page 10 of Respondent's response). Petitioner meant to refer to the Respondent and not the Trial court as making that improper argument.

C. THAT HABEAS CORPUS RELIEF SHOULD BE GRANTED ON THE BASIS: 1) THAT THIS COURT SHOULD RECONSIDER WHETHER RESIDUAL "UNREASONABLE BUT POSSIBLE" DOUBT AS TO GUILT SHOULD BE CONSIDERED AS PART OF THIS COURT'S REVIEW OF THE APPROPRIATENESS OF THE DEATH PENALTY IN LIGHT OF LOCKHART V. MCCREE, 106 S.Ct. 1758 (1986), IN A CIRCUMSTANTIAL EVIDENCE CASE SUCH AS THE INSTANT CASE; AND 2) THAT APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE AND ARGUE AS AN APPELLATE ISSUE THE CONSIDERATION OF RESIDUAL "UNREASONABLE BUT POSSIBLE" DOUBT AS TO GUILT AS ONE OF THE FACETS OF THE APPROPRIATENESS OF THE DEATH PENALTY.

Petitioner would argue that in light of Lockhart v. McCree, 106 S.Ct. 1758 (1986), an appellate court should consider whether residual "unreasonable but possible" doubt as to guilt should be considered as part of this Court's review of the appropriateness of the imposition of the death penalty. Certainly, there could not be any stronger mitigating circumstance for not upholding the death penalty than because a defendant could possibly be innocent although the facts which point to this possibility are not reasonable. Appellate counsel should have made this argument to this Court in this case. This mitigating circumstance exists particularly in this case involving MR. WILLIAMS based entirely upon circumstantial evidence.

The Defendant in his initial Petition cited numerous Federal and out-of-state cases which have recognized "possible but unreasonable doubt" as a mitigating circumstance for not imposing

the death sentence. Petitioner asks this Honorable Court to reconsider its positions in Buford v. State, 403 So.2d 943 (Fla. 1981), and Burr v. State, 466 So.2d 1051 (1985), in light of Lockhart v. McCree, supra.

D. THAT THE PETITIONER WAS DEPRIVED OF FULL AND MEANINGFUL APPEAL OF THE DEATH SENTENCE ISSUE DUE TO INEFFECTIVE REPRESENTATION PROVIDED BY APPELLATE COUNSEL IN FAILING TO PRESENT AS AN APPELLATE ISSUE THE ERROR BY THE TRIAL COURT IN ALLOWING THE PROSECUTOR TO ARGUE TO THE JURY THE CONSIDERATION OF TWO AGGRAVATING FACTORS WHICH WERE NOT SUPPORTED IN THE EVIDENCE AND WHICH THE TRIAL COURT LATER FOUND DID NOT EXIST.

Petitioner would strongly submit to this Court that the Trial court should not allow a sentencing advisory jury in a death penalty case to be instructed on aggravating circumstances that are not supported by facts in the record. This leads to the jury being misled and confused and invites the jury to improperly find the existence of statutory aggravating factors that are not supported by evidence in the record. This, in turn, leads to a sentencing recommendation based upon factors that do not properly exist. Petitioner would suggest that the Trial court has the duty not to allow the jury to consider the applicability of such factors when there is no support in the record for same.

Further, Petitioner would submit that appellate counsel should have raised this issue as well as the issue relating to the prosecutor being allowed to argue to the jury aggravating factors that, as a matter of law, were not supported by facts in the record. The State in its response does not address the fact that in cases wherein this Court has remanded death penalty cases to the trial court for new sentencing proceedings with a jury, it sometimes considers the propriety of the Trial court's findings as to the existence of aggravating or mitigating factors. See Teffeteller v. State, 439 So.2d 840 (Fla. 1983). In those cases, on remand, the State would certainly not be allowed to argue the existence of aggravating factors not found to exist by the Court.

E. THAT PETITIONER WAS DEPRIVED OF A FULL AND MEANINGFUL APPEAL ON THE DEATH PENALTY ISSUE DUE TO INEFFECTIVE REPRESENTATION PROVIDED BY HIS APPELLATE COUNSEL IN FAILING TO ARGUE IN APPELLANT'S BRIEFS THE EXISTENCE OF THE ADDITIONAL NON-STATUTORY MITIGATING FACTOR THAT THE PETITIONER HAD BEEN DRINKING ALCOHOLIC BEVERAGES PRIOR TO THE MURDER.

The State in its response argues that it would have been inconsistent for the Defendant to argue as a mitigating circumstance that he had been drinking alcoholic beverages prior to the murder when his defense was that he did not commit the offense. However, the Defendant's Trial counsel himself during the penalty phase assumed that the issue of guilt was not relevant at that stage, had already been decided, and that the issue of guilt could not be argued to the jury at that point. Clearly, appellate counsel should have argued to this Court the existence of this non-statutory mitigating factor in Appellant's direct appeal. There was substantial evidence that the Defendant had been drinking alcoholic beverages prior to this incident. The State in its response does not cite to or distinguish Bucklam v. State, 355 So.2d 111 (Fla. 1978), and Chamber v. State, 339 So.2d 204 (Fla. 1976), which were in existence at the time of the Defendant's direct appeal to this Court. The fact of the Defendant's consumption of alcoholic beverages coupled with the domestic passion element of this incident are very compelling mitigating factors.

While Ross v. State, 474 So.2d 1170 (Fla. 1985), was decided subsequent to Petitioner's case, it still points to the fact that this Court will consider the issue of possible intoxication of a defendant in evaluating the appropriateness of a death sentence notwithstanding that the Defendant, himself, testifies he was "cold sober" at the time of a murder. Appellate counsel was clearly deficient in failing to raise this argument.

F. THAT PETITIONER WAS DEPRIVED OF A FULL AND MEANINGFUL APPEAL ON THE DEATH SENTENCE ISSUE DUE TO THE CUMULATIVE ERRORS CAUSED BY THE INEFFECTIVE ASSISTANCE ON APPEAL BY PETITIONER'S APPELLATE COUNSEL.

Petitioner would adhere to his argument that, viewed collectively together, the multiple separate grounds of ineffective representation provided by appellate counsel discussed herein as a whole even more so undermined the competence and the fairness and correctness of the appellate result in Petitioner's case.

II. CONCLUSION

This Court should hold appellate counsel ineffective for

failing to raise the claims stated above. Furthermore, this Court should entertain the Petition as directed to fundamental errors committed in the Trial court and appellate court as part of its continuing jurisdiction in death penalty cases. Petitioner requests as relief reversal of his death sentence and imposition of a life sentence with the mandatory 25 year incarceration without eligibility of parole, or an order granting a new trial, or a new appeal, or a new sentencing hearing.

Respectfully submitted,

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Attorneys for the Petitioner,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail delivery to Margene A. Roper, Assistant Attorney General, 125 North Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014, and to Mr. Louie L. Wainwright, Department of Corrections, 1311 Winewood Boulevard, Tallahassee, Florida 32301, this 25th day of August, 1986.

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