

IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,341

PAUL WILLIAM SCOTT,

Appellant,

-v-

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR PALM BEACH COUNTY

INITIAL BRIEF OF APPELLANT

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ISSUE PRESENTED FOR REVIEW

WHETHER THE TRIAL COURT ERRED IN DENYING THE
DEFENDANT'S MOTION TO VACATE WHERE THE DEFENDANT WAS
DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF
THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED
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INTRODUCTION

This cause is an appeal from the denial of the defendant's Motion to Vacate filed pursuant to Rule 3.850, Florida Rules of Criminal Procedure. References to the two volume record on appeal are designated by "R". References to the trial transcript are designated by "T". The parties will be referred to as they stood in the lower court.

SUMMARY OF THE ARGUMENT

Richard Kondian and Paul William Scott were indicted for first-degree murder of James Alessi. Upon his arrest in Rhode Island, Kondian gave a detailed statement. In his statement, Kondian explained that he and Scott had gone to Alessi's house to effect a drug deal, that Alessi sexually assaulted Kondian and a violent fight ensued. Kondian further told the police that when Scott observed that Kondian was being severely beaten, he assisted Kondian against Alessi, who was a very large and muscular man and after much fighting, Alessi was subdued and tied by Scott and Kondian who left the house. Kondian added that when he and Scott left, Alessi was alive.

Scott's case was severed and he was tried first. His court-appointed counsel was provided with Kondian's statement, but he did nothing about it. He did not question Kondian or his counsel, he did not subpoena Kondian. At the trial, the state produced Charles Soutullo, who claimed that Kondian and Scott had talked about robbery and murder. Scott's counsel did not investigate the background of that witness and did not depose him until Scott's trial had

already commenced. Evidence that semen was found on Alessi's body consistent with Kondian's statement that Alessi had sexually assaulted him was adduced by the state at the trial.

Scott's counsel did not depose the medical examiner and did not investigate the presence of the semen. Further, Scott's counsel did not depose the lead detective. Both the detective and the medical examiner were key witnesses for the prosecution. Scott was found guilty and sentenced to death.

Kondian retained private counsel. Kondian maintained his claims which prompted his counsel to investigate the state's key witness, Soutullo, and the medical evidence. Soutullo proved to be a known liar, and the medical evidence proved to be consistent with sexual assault by Alessi. Kondian plea bargained with the state and entered a guilty plea to second degree murder.

Scott attacked the incompetence of his counsel. An evidentiary hearing was held wherein Kondian and his counsel testified as witnesses for Scott. Their testimony established that Scott's trial counsel was incompetent. The state presented no witnesses. The trial court denied the motion to vacate.

The legal malpractice committed by Scott's trial counsel rendered the trial a travesty of justice. The jury never heard the critical defense evidence that directly refuted the state's circumstantial case. Scott is entitled to a new trial with competent counsel.

STATEMENT OF THE CASE

The defendant, Paul William Scott, was convicted of first degree murder and sentenced to death. The conviction and sentence were affirmed by this Court. Scott v. State, 411 So.2d 866 (Fla.1982); (R. 262-68). In Scott v. Wainwright, 433 So.2d 974 (Fla.1983), this Court rejected claims raised in requests for habeas and coram nobis relief, following which, the defendant sought relief in the United States District Court for the Southern District of Florida. The federal district court stayed the execution pending consideration of the federal claims, and thereafter, entered an order continuing the stay while the defendant sought relief in the state courts via Rule 3.850, Florida Rules of Criminal Procedure.

The defendant filed his Rule 3.850 motion. The trial court entered an order dismissing the motion on the ground that the motion was not under oath as contemplated by Rule 3.850. The order was affirmed on appeal. (R. 293-95).

The defendant re-filed the motion and an evidentiary hearing was held thereon. On July 23, 1986, the trial court entered a written order denying the motion. Rehearing was denied on August 5, 1986. (R. 352). On September 3, 1986, a notice of appeal was timely filed. (R. 354).

STATEMENT OF THE FACTS

The central issue at the evidentiary hearing was whether the defendant had been ineffectively represented by his court-appointed counsel at his trial and at the sentencing phase. Three witnesses called by the defendant testified at the hearing: (1) Richard Kondian, the co-defendant; (2) George Barrs, the defendant's trial counsel, and (3) David Roth, Kondian's trial counsel. The state presented no witnesses.

The Testimony of Richard Kondian

Richard Kondian appeared at the hearing pursuant to a subpoena issued by counsel for Scott. He had not seen or spoken to Scott from the time of his arrest in December, 1978, through the date of the hearing. This was the first time that any attorney for Scott had summoned him. Kondian was not at all reluctant to testify, waiving any attorney-client privilege. (R. 28-71).

Kondian was in Rhode Island when he learned that there was a warrant for his arrest for the murder of James Alessi. He surrendered to the police and was interviewed on December 8, 1978, by Rhode Island Lieutenant Kenneth Mancuso who was a friend of the Kondian family. Kondian told Mancuso about the events of December 4, 1978. Mancuso reduced Kondian's statement to writing. (Defense Exhibit 1).

Kondian verified the accuracy of the pertinent portions of his statement which established that he and Scott went to Alessi's house to get high and obtain drugs from Alessi. There was no plan to rob or steal or kill, contrary to the

uncorroborated testimony of Charles Vincent Soutullo at Scott's trial. (R. 28-58).

Kondian testified that Alessi (a very large man and known homosexual and drug user), came out of the bathroom naked and tried to sexually assault Kondian. Kondian feared for his life as he was being raped by Alessi. When Scott saw the fight, he came to Kondian's aid. Scott was unsuccessful at first in trying to pull Alessi from Kondian, so he picked up a vase and hit Alessi over the head with it. Alessi, however, continued to struggle with Kondian. The struggle was violent and Kondian remained in fear for his life throughout. (R. 33-39).

Kondian managed to pick up a champagne bottle and hit Alessi in the head twice. Scott stopped struggling with Alessi but Kondian continued. Alessi was tied up to prevent him from re-attacking. When Kondian and Scott left, Alessi was still alive and breathing. (R. 58; Defense Exhibit 1).

Kondian was charged by indictment along with Scott with premeditated murder of Alessi. No one attempted to subpoena Kondian for the trial of Scott. Kondian stated that had he been subpoenaed and would not have been in jeopardy, he would have testified on behalf of Scott. (R. 45-47).

Although Kondian had acted only in self-defense, he plea bargained after Scott was sentenced to death. Kondian received a sentence of 45 years. His plea colloquy contains no admission of guilt of murder. The defense appears in the colloquy. The lower court took judicial notice of the entire lower court file, including the transcript of the colloquy. (R. 48-59; 135).

Kondian verified that his attorney had procured the testimony of witnesses from Alabama against Charles Vincent Soutullo to show that Soutullo, the only witness against Kondian, was a liar and dope fiend who would say anything to get out of trouble. (R. 60-62).

The Testimony of George Barrs

George Barrs, Scott's court-appointed counsel, testified and acknowledged he was provided in pre-trial discovery with a copy of Kondian's statement to the Rhode Island police officers. Barrs stated that he had made no effort either by himself or through any investigator or associate to interview the officers who took Kondian's statement. Barrs never attempted to speak to Kondian. Barrs made no other effort to obtain the testimony of Kondian in defense of Scott. Barrs was not aware of the case law authorizing severance and the use of an affidavit from Kondian to exculpate his client. (R. 72-85). When asked why he did not pursue the defense, his only response was: "I don't remember what I had thought about it." (R. 85). He offered no strategic reason for having failed to present, much less investigate the defense.

Barrs testified that he did not try to procure any affidavits or testimony attacking the credibility of Soutullo, or investigate Soutullo's background in his homestate of Alabama. Barrs did not depose Soutullo until the first day of Scott's trial, even though he knew that Soutullo had been available for many months while incarcerated in California. Barrs was "disappointed" when

he learned that Soutullo had been released from the San Diego Jail. He had "hoped" that Soutullo would not appear for trial, although there was no real basis for that wish. (R. 85-91).

Barrs did not depose Kathy Ober, also known as Sunshine, although her name was supplied to Barrs on a list of state witnesses. (R. 170). Ober was Kondian's girlfriend and she traveled with Kondian before and after the incident. The medical examiner was not deposed by Barrs. Lead Detective, Bernard Collins, was not deposed by Barrs. See Deposition of Collins, Defense Exhibit 2. (R. 91-100).

The Testimony of David Roth

David Roth, a member of the Florida Bar since 1969 who specializes in criminal law, was Kondian's trial counsel. Roth verified that his office conducted a complete investigation of Soutullo. As a result thereof, witnesses were located who would have testified that Soutullo had a bad reputation for truth and veracity. (R. 122-129).

Roth was aware of the case law that authorized Barrs to obtain an affidavit from Kondian exculpating Scott and warranting severance. Barrs never sought such an affidavit of Kondian through Roth. (R. 129).

Roth testified as to the critical nature of the proposed testimony of the medical examiner. In light of Kondian's claim that Alessi had sexually assaulted him and he was defended by Scott, it was of paramount importance for Roth to determine whether the sperm found on Alessi was the

result of trauma to the head, as theorized by the state and supported by Drs. Fatteh and Cuevas, or was the result of an attempt at sexual contact with Kondian. For that reason, Roth visited Dr. Fatteh with the medical examiner's office. Together, they reviewed the evidence. The doctor subsequently opined that it was more likely that the sperm on Alessi was the result of sexual or attempted sexual contact rather than trauma to the head. Roth later spoke to Dr. Cuevas who revised his opinion and in fact, thought the likelihood of sexual contact was even greater than that supposed by Dr. Fatteh. (R. 132-134).

Roth testified that in his opinion, given the facts of this capital case, no competent attorney would have failed to have deposed the medical examiner and the lead detective, and failed to have conducted a background on check Soutullo, or failed to have deposed Soutullo before trial. (R. 143-144).

The trial judge denied the motion to vacate in a written order which, in addition to being factually inaccurate, did not address Kondian's statement to the police upon his arrest or the failure of counsel to have pursued the defense revealed therein. (R. 344-346).

ARGUMENT

I.

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO VACATE WHERE THE DEFENDANT HAD BEEN DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The testimony at the evidentiary hearing on the defendant's motion to vacate was overwhelming and not rebutted by the state. Had the defendant been competently represented at trial, the jury would have been apprised of eyewitness testimony and expert evidence establishing that James Alessi had sexually assaulted Richard Kondian and was threatening to kill Kondian when the defendant, Paul William Scott, defended Kondian. A violent struggle ensued. Eventually, Scott and Kondian were able to subdue Alessi, who was a strong and large man. They tied Alessi to prevent further fighting and left him alive.

Kondian was arrested only a few days after the alleged crime and he immediately gave a statement to the police stating exactly the above facts. Defendant Scott was arrested and both were charged with Alessi's murder. Their cases were severed and Scott went to trial. Scott's court-appointed counsel had received Kondian's statement in pre-trial discovery.

The state relied upon circumstantial evidence. Its key witness was Charles Vincent Soutullo, who claimed that he had overheard Kondian and Scott plan to rob and/or kill Alessi. The claim was uncorroborated.

Barrs did not depose Soutullo until the first day of Scott's trial, thereby rendering impossible any investigation into Soutullo's background.

Semen was found on Alessi's body (consistent with Kondian's allegation that Alessi had sexually attacked him), but Barrs did not depose the medical examiner.

Kondian was available to exculpate Scott in person or by affidavit. Barrs did not question or seek to question Kondian. He thought he was not allowed to question Kondian. Kondian testified at the evidentiary hearing:

Q. Did anybody attempt to subpoena you for the trial of Paul William Scott?

A. No, sir; not that I remember.

Q. If you had been subpoenaed for trial and you would not yourself be in jeopardy, would you have testified in behalf of the defense of Paul William Scott to the charge of murder?

A. Yes, sir.

(R. 47).

Kondian's lawyer, an expert in criminal law, testified that Barrs' representation of Scott was incompetent because Barrs did not depose the medical examiner, did not investigate Soutullo, did not depose the lead detective, did not investigate or introduce the evidence available of the sexual assault of Kondian and Scott's defense of Kondian.

Kondian's lawyer did investigate Soutullo and obtained witnesses to testify that Soutullo was not credible, was a drug user, and would lie under oath. Kondian's lawyer did investigate the medical evidence and obtained expert testimony from the medical examiner establishing that it was

likely that the semen found on Alessi was the result of sexual activity and not trauma.

The state produced no expert testimony at the evidentiary hearing. In fact, the state presented no witnesses at the hearing. The testimony that was adduced conclusively established that Scott's lawyer ineffectively ignored the clear defense to the charges. There was no strategic reason for his failure to have pursued Kondian's exculpatory eyewitness testimony. There was no strategic reason for his failure to have investigated Soutullo. There was no strategic reason for his failure to have deposed the medical examiner, failure to have investigated the medical evidence, and failure to have taken the deposition of the lead detective.

Because of this gross incompetence, Scott is on death row for a crime which, according to an eyewitness, was never committed. Rather, the affirmative defense of justifiable use of force to prevent the imminent death or great bodily harm to another was available and provable. See Section 776.012, Florida Statutes.

In Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the standards for reviewing claims of ineffective assistance of counsel were articulated. If counsel's "acts or omissions were outside the wide range of professionally competent assistance," id., 104 S.Ct. at 2066, and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different". Competent assistance necessarily entails defense counsel's "duty to

make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Id. at 2066.

Barrs' omissions were unquestionably outside the range of competent assistance. As the un rebutted testimony of Attorney David Roth provided, no competent counsel could have failed to have deposed the lead detective, deposed the medical examiner, and investigated Soutullo's bad reputation.

The failure to have pursued in any fashion Kondian's statement upon arrest that established that Scott acted in defense of Kondian is the gravest error. By no stretch of the imagination is there any justification for the failure to have pursued this defense for trial, much less the sentencing phase.

In Smith v. Wainwright, 799 F.2d 1442 (11th Cir.1986), the federal district court ordered a new trial and the appeals court affirmed. The case is analogous to that sub judice, but differs in one respect -- the ineffectiveness of counsel is much more obvious in this case. Smith's counsel was held ineffective because he failed to use exculpatory prior inconsistent statements of the two state witnesses to impeach them which evidence was "critical to the determination of [Smith's] guilt or innocence." Id. at 1443. The facts in Smith are as follows.

Wesley Johnson was the only witness whose testimony implicated Smith. When Johnson first went to the police and confessed, he named himself as the murderer and made no mention of Smith. Johnson's wife was interviewed separately

at the same time and related what Johnson had told her, also making no mention of Smith. At the time of Smith's trial, Johnson struck a bargain to testify against Smith in exchange for escaping the death penalty.

The jury was never advised that Johnson had given a detailed statement to the police confessing that he was the principal actor in the murder while making no assertion that Smith was either present or involved. Instead, the jury heard Johnson's testimony that he was with Smith and that Smith was the leading actor in the killing who inflicted wounds upon the victim, orchestrated the acquisition of gasoline, and saw to it that the automobile was set afire with the gasoline as incendiary material causing the death of the victim locked in the trunk.

Smith's trial counsel did make efforts to impeach Johnson by showing that his integrity was questionable, that he had confessed to three murders, and he had struck a bargain with the state. But the jury never heard any testimony indicating that Johnson's story had ever been anything but his version at the trial.

Johnson's wife testified for the state to buttress her husband's testimony. She claimed that Johnson had implicated Smith when he first told her about the murders, before going to the police. This hearsay was admitted over objection as a prior consistent statement by Johnson and was used to rebut the defense's attempts to impeach Johnson.

The Eleventh Circuit agreed with the district judge that the failure of counsel to have impeached Johnson or his

wife with their prior statements was prejudicial to Smith's defense and that counsel rendered ineffective assistance:

The conviction rested upon the testimony of Johnson. His credibility was the central issue in the case. Available evidence would have had great weight in the assertion that Johnson's testimony was not true. That evidence was not used and the jury had no knowledge of it. There is a reasonable probability that, had their original statements been used at trial, the result would have been different.

Id. at 1444.

If Smith is entitled under Strickland to a new trial, it necessarily follows that Scott is entitled to a new trial because the evidence not used in this case was much more than just impeachment evidence. The jury never was advised that Kondian, the only eyewitness to the alleged crime other than the defendant, gave a statement upon his arrest that Alessi was the aggressor and that Scott had defended Kondian from a brutal homosexual attack. Although Kondian's statement to the police upon his arrest was credible, that credibility determination is best left to a jury at a new trial. Obviously, Scott has satisfied the prong of deficient performance by defense counsel just as the defendant had in Smith.

The other prong in Strickland is that of prejudice. The defendant is entitled to a new trial where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 104 S.Ct. at 2068.

In this case, the prejudice is manifold. Scott was prejudiced by his counsel's failure to have investigated Soutullo's background and failure to have deposed the medical examiner in a fashion similar to that of competent counsel such as Roth. Roth's deposition and investigation seriously undermined the state's case. Roth's testimony at Scott's evidentiary hearing was the only expert testimony presented and clearly established prejudice. In Smith, supra, only the defendant presented expert testimony as well, which led the court to conclude that "[o]n the record created at that hearing, only one resolution of the prejudice issue would have been available to the district court. A finding of prejudice was fully supported by the evidence and a finding of no prejudice could not have been sustained." Smith, supra, 799 F.2d at 1444-45 n.1. The same reasoning applies here.

This record conclusively establishes that Barrs deprived Scott's jury of critical evidence as detailed in Kondian's statement upon arrest. If the jury had doubted the credibility of Soutullo, and had the jury known of the homosexual proclivities of Alessi and his drug abuse, and had the jury heard evidence of Alessi's attack upon Kondian, the verdict might well have been different. If only the unchallenged evidence presented by the state is considered, namely, that Soutullo claimed he heard Kondian and Scott plan to cause harm to Alessi, the prejudicial omissions are apparent. The case for a new trial for Scott is far more compelling than that of Smith.

Barrs' admitted lack of knowledge (at the time of Scott's trial as well as seven years later at the post-trial evidentiary hearing) as to the pertinent law cannot be excused. Barrs was not aware of the need for nor legal significance of an affidavit from Kondian exculpating Scott. In State v. Talavera, 243 So.2d 595 (Fla.1971), this Court held that severance shall be granted when a defendant files a motion showing: (1) the exculpatory nature of the testimony to be elicited from a codefendant; (2) some assurance that the codefendant is willing to testify; (3) facts indicating that the codefendant would not be willing to testify at a joint trial; (4) the testimony sought from the codefendant is relevant, material, competent and noncumulative. Because Barrs never even sought the exculpatory testimony, he never reached the point of seeking severance, much less presenting the defense.

In two federal cases arising out of Florida, the denial of such a motion was held to be violative of due process. Tifford v. Wainwright, 588 F.2d 954 (5th Cir.), reh'g denied, 592 F.2d 233 (5th Cir.1979); Byrd v. Wainwright, 428 F.2d 1017 (5th Cir.1970). These two cases were known by Roth, but were not known to Barrs. This lack of knowledge as to state and federal law was prejudicial to the defense and constituted ineffective assistance of counsel. See Trass v. Maggio, 731 F.2d 288 (5th Cir.1984) (trial counsel's failure to move for severance because of apparent ignorance of state law constituted ineffective assistance of counsel). If Barrs had been aware of the law, and had sought a "Byrd-Tifford affidavit", then under this same line of

cases, he could have asked the trial court to set Scott's case to follow Kondian's to assure the presentation of Kondian's testimony.

Scott was also denied effective assistance of counsel at the sentencing phase. Counsel's failure to have introduced the inculpatory evidence at the sentencing hearing, where all such evidence is admissible, Lockett v. Ohio, 438 U.S. 586, 98 U.S. 2954, 57 L.Ed. 973 (1978), and his failure to have investigated, prejudiced Scott at that phase in the same way.

Also, Barrs testified that he was aware that while Scott was incarcerated in California, he saved a prison guard's life. When asked if he presented that evidence to the advisory jury, Barrs stated, "I believe I offered it and the objection to it was sustained, I believe." (R. 100). Review of the sentencing phase fails to reveal that Barrs presented that evidence. That failure was obviously prejudicial and constituted ineffective assistance of counsel.

An attorney has a duty to raise "any honestly debatable issue that may aid his client's position." Palmer v. State, 425 So.2d 4,6 (Fla.1983). At the very least, the defendant's counsel did not raise the "honestly debatable" issue raised by Kondian's statement upon arrest. As demonstrated by an analysis of the state's strongest evidence, Kondian's eyewitness version of the facts presented a viable defense.

A. The Scene

Undoubtedly the scene had an emotional impact upon the jury which viewed a videotape of the signs of a violent bloody struggle. The tape included Alessi as he was found.

Contrary to the state's interpretation of the physical evidence, Kondian testified that there was no premeditated murder:

Q. Did you with premeditated design kill James Alessi?

A. No, sir; no truth to it whatsoever.

(T. 47). The violent struggle was commenced by Alessi's homosexual attack upon Kondian. The struggle was bloody because of Alessi's enormity and strength. Alessi would have killed Kondian had Scott not entered the fight. Nevertheless, Kondian pled guilty to second degree murder out of fear because Scott was tried first and sentenced to death (for a crime that, according to Kondian, had never taken place). Kondian testified as follows:

Q. Did you perpetrate any act imminently dangerous to another, evincing a depraved mind or did you act in self-defense?

A. I acted in self-defense.

Q. Then why would you plead guilty to a crime that you never committed or Mr. Scott ever committed?

A. 'Cause I was scared at the time, and what was being told to me was scary. Okay. I --

Q. Tell us what you were told.

A. I've never been in trouble in my life. I was young. I was confused. I was on drugs at the time.

Q. Who --

A. I was mostly scared after Mr. Scott went to trial and I saw what happened to him. I only pled for my life. It's the only reason. I still regret it to this day.

(R. 51-52).

At the evidentiary hearing, Kondian verified the specifics of the statement he gave upon arrest:

Q. ... you state "Mr. Alessi had left the room and a couple of minutes later, Mr. Alessi came out of his bathroom or his bedroom; I'm not sure which, it was on this side of the house, and he didn't have any clothes on. And by the time I looked up, when I noticed him, he was in front of me and he had come on to the couch and put his you know, pinned me to the couch and said that he wanted to have sex with me."

Is that true?

A. Yes, sir.

Q. Is that the same thing you said to Cranston, Rhode Island --

A. Yes, sir.

Q. -- which is almost 14 months before [Scott's trial]?

A. Yes.
Yes, sir.

Q. "Now, Mr. Scott wasn't there, right in the room to see this. As I say, he was walking around, looking at Mr. Alessi's house."

A. Yes, sir.

Q. You don't know what he was doing?

A. No, I don't.

Q. He could have been stealing everything in the house, for all you know?

A. Sure, but I don't believe him to be like that.

Q. Okay. You had no plan with Mr. Scott to rob Mr. Alessi or his house?

A. No, sir.
I met his [Alessi's] family before we went there. Why the hell would I do something like that?

Q. "At that time I tried to struggle to pull myself up. I was unable to do that. So I, you know, I called for Paul's help and he came and saw, saw what was going on and tried to pull Mr. Alessi off but couldn't do it."

Is that true?

A. Yes, sir.

Q. "So, because Mr. Alessi was big, so he picked up an object or vase or statue or something and hit Mr. Alessi on the head. Mr. Alessi shook that blow off and continued to fight with us and it was just a violent struggle of blows and fighting from then on."

Is that true?

A. Yes, sir.

(R. 55-57).

Kondian and Scott had great difficulty in subduing Alessi. Once they did, they tied him to stop the fight:

Q. ... He got tied up after the struggle was over."

Is that true?

A. Yes, sir. That's true.

Q. Did he get tied up so he would stop struggling?

A. So he would stop -- yes, sir.

Q. When you left the house, was he alive?

A. Yes, sir; he was.

Q. And how do you know that? Did you tell the Judge in [the plea hearing] here?

Well, I'll tell you what you told him.

"At the time that you left the house, was he still alive, to the best of your knowledge?"

"Yes, sir; he was."

"How do you know that?"

"Because he was breathing; you could hear him breathing."

That's what you said.

(R. 57-58).

The physical evidence, without Kondian's explanation, could have given the impression that Alessi was killed after he was tied. But Kondian testified:

Q. Did you strike Mr. Alessi at any time after he was tied up?

A. No, sir.

(R. 67).

Kondian went on to testify as follows:

And then he asked you, "Do you know what, if any, property Mr. Scott took during or or before this struggle?"

"To my knowledge, I don't know if Mr. Scott took anything. I don't know anything about that -- about it."

Is that true:

A. Yes, sir.

Q. That is basically the facts as you told the Court on that day of what happened.

How could you have pled guilty to something that you admitted under oath in that courtroom, which does not amount to a crime?

A. I was scared. He went to trial first. I was 18 years old; never been in trouble in my life. Okay. You're telling me I'm going to get the electric chair for something I didn't do. They told me self-defense was out of the question and all this other stuff. I was scared, I was confused and I was on drugs at the time. I wasn't even in my right state of mind. I'm not even the same person I was back then. I couldn't even recollect the whole thing; bits and pieces of it.

I know I didn't do anything wrong. I know I defended myself, but I pled guilty because I was scared, and that man [Paul Scott] should have never got convicted of first-degree murder, either.

(R. 58-59).

Thus, Kondian's eyewitness testimony refuted the state's interpretation of the physical evidence, and was

consistent therewith. Scott's counsel ineffectively failed to pursue it or present it.

B. Soutullo's Testimony

The state's key witness was Charles Vincent Soutullo, who claimed that he had overheard a conversation involving Kondian in the presence of Scott, wherein robbery and murder were mentioned. Kondian knew of Soutullo's lack of credibility and drug use, and Kondian's lawyer, unlike Scott's, established same through basic investigation. Kondian testified:

Q. Did your attorney inform you that he had procured, he had gotten the testimony of some witnesses from the State of Alabama against Mr. Charles Vincent Soutullo?

A. Yes, sir.

Q. So you were aware that there were witnesses available to you that would show that the only witness against you, Mr. Soutullo --

A. Yeah.

Q. -- was an out-and-out liar; is that correct?

A. Yeah. He's a dope fiend, has no credibility. The guy was in trouble. He did whatever he could to get out of it.

(R. 59-60).

Indeed, Kondian's lawyer easily found witnesses who were police officers to testify that Soutullo was not believable. Kondian was available to so testify, but Barrs failed to even try to question him, and Barrs conducted no investigation into Soutullo's reputation.

C. The Defense of Scott

Scott's counsel sought to blame Kondian for the murder. He completely overlooked Kondian's statement upon arrest that Scott had defended him against attack by Alessi. He

similarly failed to question Kondian or obtain his exculpatory testimony. In fact, he thought he did not have the right to talk to Kondian! (T. 97). When asked whether he ever stopped to think about the applicability of the defense, it was clear that he had not. Further, no strategically logical choice had been made. Barrs testified:

A. Well, I don't remember, but, you know, I'm -- I know what you're talking about. I don't remember what I thought about it.

(R. 85).

Barrs was asked whether he attempted even to locate Soutullo. He said he tried but was unsuccessful. Even though the state supplied Barrs with a witness list that included Soutullo's name, Barrs "didn't think he was coming" to the trial. (R. 86). He had merely "hoped" that he would not have to deal with him. (R. 98). His speculative hope proved wrong and he learned that Soutullo would appear. Barrs deposed Soutullo the morning of Scott's trial. Barrs virtually conceded the inadequacy of such an approach to the state's key witness against his client:

Q. Do you honestly believe that that was adequate time in which not only to ask the important questions to be asked at that deposition, but for you to investigate his assertions in the deposition, to do an investigative background check of him to see what kind of individual he was in order to be properly prepared for trial, the morning of a first-degree murder case involving the State's most important single witness?

A. Well, I wasn't satisfied with it, no. I mean I wasn't pleased with it. ***

No, I don't think that's good.

(T. 87). Barrs went on to state that he knew that Soutullo had been in jail in California. (T. 91-92). But he never

took advantage of that time prior to trial to depose or investigate him. When he ultimately learned that Soutullo had been released, Barrs was "disappointed." (T. 95).

A competent attorney would have investigated Soutullo, and that is exactly what Kondian's lawyer did. David Roth, a criminal law specialist, was Kondian's retained lawyer. After he was retained, he did "a complete investigation of Mr. Soutullo and took depositions in the State of Alabama", Soutullo's home. (T. 125). That investigation revealed the following:

[Roth]: The import of those depositions, two from police officers and one is from a school principal, in summation is that Mr. Soutullo had a very bad reputation for truth and veracity in the State of Alabama. As far as the two officers are concerned, they would not believe Mr. Soutullo under oath.

(T. 125).

Because of Kondian's insistence that Alessi had sexually assaulted him, Roth investigated the medical examiner's theory that the sperm found on Alessi's body was the result of trauma to the head. That investigation resulted in an important change in the nature of the medical opinions:

[Roth]: As I recall, and I do have a specific recollection of this, the decedent, there was evidence of sperm on the decedent's body when the police recovered it. This was of interest to me and, as I recall, Dr. Cuevas, in either deposition or in his autopsy protocol, determined that the presence of sperm on the decedent was as a result of trauma to the head.

In light of what my client had advised me -- I assume, Judge, that my client has waived attorney-client privilege.

THE COURT: He has.

[Roth]: In light of what my client informed me, it was of substantial interest to me to see whether or not the

presence of sperm on the decedent could have come as a result of an attempt at sexual contact with my client.

For that reason, I went down and spoke to Dr. Fatteh, I believe his name was, who was at that time either the medical examiner or associate medical examiner for Broward County.

I brought the file with me and reviewed it with him, and after he had done some preparation and some research, I assume, he informed me that in his opinion it was more likely that the presence of sperm on the decedent's body was as a result of sexual contact or attempted sexual contact -- at least this is my recollection -- than it was as a result of trauma to the head, although there was a percentage of cases in which trauma to the head would cause this phenomenon.

I then -- and I'm basing my testimony here on refreshed recollection from the plea colloquy -- spoke to Dr. Cuevas and informed him of the results of my investigation with respect to the pathologist or forensic pathologist in Broward County.

My recollection is, as refreshed by the statement, that Dr. Cuevas acknowledged that that was accurate and, in fact, according to the plea colloquy, acknowledged that it was even a higher percentage as a result of attempted sexual contact as compared to head trauma than Dr. Fatteh had rendered his opinion.

(T. 1312-34).

At Scott's trial, Dr. Gabino Cuevas, then Associate County Medical Examiner for Palm Beach County, testified for the state. His testimony on this point was as follows:

Q [by the prosecutor]: All right. Now, Doctor, did you examine Mr. Alessi's body for signs of sperm?

A. Yes. We took swabs from different areas of the body and around his penis there were secretions that were positive for sperm or spermatozoid. I would like to point out that this is not infrequent at the time of death, as a agonal situation.

Q. If I can just explore that for just a moment. In other words, the fact that there was sperm or semen around Mr. Alessi's penis when he died, does not indicate recent prior sexual activity?

A. That is correct.

Q. In fact, it's rather common when someone dies under circumstances like that.

A. Not common, but it happens frequently enough.

(T. 1200-1209).

This testimony on direct examination by the prosecutor left the jury with the impression that in general, when someone dies, the presence of sperm or semen occurs "frequently", and in this case, that presence on Alessi did not indicate recent sexual activity.

The medical testimony was critical given Kondian's statement that Alessi had sexually attacked him. Even though Scott's counsel had incompetently failed to pursue the defense, one would nevertheless have expected competent counsel to have deposed the medical examiner. Instead, Scott's counsel did not depose him. One would nevertheless have expected competent counsel to have cross-examined him at trial to establish that the presence of semen was consistent with sexual activity. Barrs' cross-examination covered a mere two and one half pages, and did not touch upon that issue. (T. 1210-1213).

Ultimately, after Attorney Roth's investigation of Kondian's claim, Doctors Cuevas and Fatteh each indicated that there was actually a higher percentage probability that there had been sexual activity (T.139), which was a far cry from the impression left with the Scott jury.

Attorney Roth offered expert testimony regarding Barrs' handling of the case. Roth opined that it was essential that the sexual aspect of the case be pursued, as well as self-defense, for the following reasons:

The first thing that I would have pursued would have been the self-defense issue, however, in my opinion in this particular case and in this particular county and

the climate that existed, especially at that time, I would have wanted the jury to know that this individual, the decedent, was a homosexual. I would have wanted the jury to know that there was at least an allegation, substantiated by expert testimony, of sexual assault.

Finally, Roth gave the following ultimate opinion:

Q. Can you ever fathom the fact that hypothetically in this case, under those set of circumstances, that not only was the lead investigator never deposed; the medical examiner never deposed; the lead witness against the Defendant deposed the day of trial; no background investigation done of Mr. Soutullo ...

And can you imagine an attorney, competent to practice before this Court, doing none of the things that we've just described and being ready and competent and effective as attorney of record?

A. I can imagine an attorney not doing all of those and not falling below the standard of competent counsel, but I can't honestly imagine an attorney doing none of the things you mention in any respect whatsoever, and falling within the accepted standard of competence.

(T. 144-45).

The state presented no expert witness to rebut Roth's testimony. In fact, the state offered no witnesses at all at the evidentiary hearing. Given the evidence available to Scott's counsel, and his lack of excuse for not having pursued it as did co-counsel for Kondian, this conviction cannot stand.

The trial court erroneously denied the motion to vacate. The order of denial virtually ignored the testimony of all three witnesses and instead viewed the trial in a vacuum.

The trial judge found that Soutullo had been deposed prior to Scott's trial. (R. 345). The trial judge was wrong. Soutullo was deposed by Barrs after trial had

commenced on December 1, 1979, at 12:30 p.m., thereby precluding any pre-trial investigation of Soutullo.

The trial judge found that Soutullo's "bad reputation was not in dispute". This finding ignores the fact that Soutullo was the state's key witness and was relied upon at trial and on appeal to prove premeditation. Barrs presented no evidence to establish that Soutullo was not a credible witness, although Kondian's lawyer had obtained two police officers from Soutullo's homestate to testify that they would not believe Soutullo under oath.

The trial judge found that Barrs had made a "reasonable strategic decision to minimize Scott's involvement in the crime and to argue that the co-defendant was the real murderer." Barrs' own testimony flatly refutes this finding. There was no such strategic choice made. Barrs' conduct was, according to Attorney Roth, unconstitutionally ineffective. No reasonable strategy called for no questioning of Kondian or presentation of his exculpatory evidence, much less no questioning of the lead detective, no questioning of the medical examiner, no questioning of the state's key witness until trial had commenced in a capital case.

The trial judge also stated that Dr. Cuevas found that the sperm could have been from sexual activity. But Cuevas' testimony at Scott's trial carried with it the clear import that the sperm was from head trauma. That is why he testified for the state. Barrs did not bother to depose Cuevas or conduct any investigation which would have established, as did Attorney Roth, a far different picture,

namely, that it was much more likely that the sperm was the result of recent sexual activity, thereby supporting Kondian's statement to the police.

Finally, the trial judge ruled that the physical evidence was not consistent with self-defense. That conclusion is subject to fierce debate and there is absolutely no evidence to support it. It is an issue for a jury to decide once it has been presented with both versions of the facts.

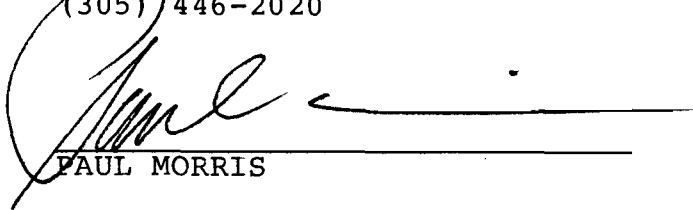
The ultimate penalty of death cannot be imposed where there is substantial doubt as to the integrity of the fact-finding process engendered by the incompetence of defense counsel. The evidence never heard by a jury in this case due to counsel's omissions is simply too substantial for this court to approve execution. The courts must minimize the risk of convicting and executing those whose Sixth Amendment, due process of law, and fundamental fairness guarantees have been violated. For these reasons, and common sense as well, a new trial is mandated.

CONCLUSION

Based upon the foregoing, the defendant respectfully requests that the judgment entered below be reversed with directions to order a new trial. Alternatively, the defendant requests reversal with directions to conduct a new sentencing hearing before an advisory jury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing brief was mailed to Lee Rosenthal, Office of the Attorney General, Counsel for the Appellee, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401, this 23rd day of January, 1987.

