

IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,341

PAUL WILLIAM SCOTT,

Appellant,

-v-

THE STATE OF FLORIDA,

Appellee.

CLERK

Deputy Clerk

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

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REPLY BRIEF OF APPELLANT

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ISSUE PRESENTED FOR REVIEW

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ARGUMENT

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.

A.

Defendant Paul Scott's appointed trial counsel, George Barrs, overlooked and failed to consider the fact that the co-defendant, Richard Kondian, gave a statement to the police immediately upon his arrest which exonerated Scott by establishing that neither he nor Scott had murdered James Alessi. Rather, Scott had defended Kondian against Alessi's attack of Kondian. Contrary to the state's argument in this Court, that critical and inexcusable oversight was not the product of trial strategy. Instead, according to the uncontradicted testimony below of expert witness David Roth, who was Kondian's lawyer, and according to Barrs' himself, Barrs' afforded ineffective assistance at Scott's trial. In ignoring Kondian's eyewitness account, Barrs never sought Kondian's affidavit or testimony. Barrs did not even depose, much less seek the testimony of the officers who took Kondian's statement. Concomitantly, he did not conduct an investigation into the pertinent medical evidence. If he had, as did Kondian's lawyer after Scott's trial, he would have discovered that Kondian's version was corroborated thereby.

Richard Kondian never deviated from his exculpatory account. His testimony below was obviously not an attempt to create a scenario to assist Scott. He had no motive to

fabricate. Rather, he related the only eyewitness testimony available at the time of Scott's trial and still available today. Following Scott's trial, Kondian pled guilty to second degree murder upon the advice of counsel after Scott had been sentenced to death. Kondian's plea colloquy afforded him the first opportunity to testify as to what had happened. Those plea proceedings also establish that neither he nor Scott committed murder. See Supplemental Record.

Kondian related that he had been attacked and Scott came to his defense. At the evidentiary hearing below, Kondian maintained his and Scott's innocence and testified that Barrs never asked him to testify on behalf of Scott. If asked, Kondian would have so testified.

Scott's conviction, much less his sentence of death, cannot be upheld, given the ineffectiveness of his trial counsel. Moreover, Barrs failed in many other material respects, but it is enough to mandate a new trial that he never considered Kondian's evidence of Scott's innocence. Thus, a new trial is mandated wherein a jury hears both accounts of the events that led up to the indictment. The state in its brief has not and indeed could not logically or legally support this level of incompetent representation in a capital case.

B.

As discussed in greater detail in the Initial Brief of Appellant at 14-17, trial counsel in this case was prejudicially ineffective much in the same way counsel was

held constitutionally deficient in Smith v. Wainwright, 799 F.2d 1442 (11th Cir.1986), a case not addressed in the state's brief. In both Smith and in the case at bar, defense counsel had available and failed to use evidence "critical to the determination of ... guilt or innocence." Id. at 1443. In Smith, that evidence consisted of the prior inconsistent statements of the state's key witnesses. In this case, the evidence was even more probative of guilt or innocence. It consisted of the co-defendant's statement to the police upon his arrest. The statement gave a detailed account of the events witnessed only by the defendant, co-defendant, Alessi. That statement was highly critical to the determination of Scott's guilt or innocence. The undisputed testimony below established that the defendant's trial counsel failed to use that evidence not because of a strategic decision, but because of an ignorance of the procedural and substantive law and an utter lack of pre-trial preparation and investigation. The contention of the state that trial counsel chose a "strategy" is a fiction which is squarely belied by this record.

C.

The first paragraph of the state's argument is as follows:

Appellant argues that he did not have effective assistance of trial counsel because Mr. Barrs failed to depose potential defense and state witnesses, and these failures prevented the jury from being apprised that Appellant had acted in defense of another.

Answer Brief of Appellee at 10.

This opening paragraph sounds the theme of the state's answer brief. That theme is an oversimplification of this case which if taken at face value might lead one to believe that this case is one of a series of cases where defense counsel's performance in a capital trial is being picked apart in hindsight simply because mere "potential" witnesses were not deposed, or because counsel did not pursue every "conceivable line of inquiry". No contention could be further removed from the un rebutted testimony adduced at the evidentiary hearing. Here, defense counsel failed to pursue at all, investigate at all, depose anyone about, or even think about, the one and only defense which was provided by the co-defendant, Richard Kondian, who upon being arrested, gave a detailed statement exonerating the defendant by establishing that the victim had attacked Kondian and that Scott had come to Kondian's defense.

Exactly what happened that led to the death of James Alessi is known only to the defendant, Paul Scott, and the co-defendant, Richard Kondian. The state did not use Richard Kondian as a witness at Scott's trial. The circumstantial evidence was not conclusive, and was based upon physical evidence and opinion testimony. The state's theory of the case was just that, a theory. It was flatly contradicted by Kondian's statement upon his arrest. According to that statement, Paul Scott did not murder the victim. Rather, a violent fight took place after Scott came to the defense of Kondian after Alessi had sexually assaulted Kondian. Alessi used his enormous size and strength to fight the smaller Scott and the even smaller

Kondian. He later died apparently as result of the injuries sustained during the fight.

George Barrs did absolutely nothing in the way of pursuing the defense that his client's co-defendant had provided. See Section 776.012, Florida Statutes. Barrs failed to speak with Kondian because, as he testified below, he thought he did not have such a right. The state would have this Court believe that this failure was a sound strategic decision. Obviously, it was the product of ignorance and incompetence.

Similarly, when asked why he did not at all pursue the evidence that his client had come to the defense of Kondian, Barrs' answer was not that he had strategically chosen a different defense after considering and rejecting Kondian's statement. The fact is he never considered the defense revealed by Kondian.

On appeal, the state casually dismisses Kondian's eyewitness account as follows:

Appellant now wishes this Court to accept the ludicrous proposition that defense counsel could have convinced the jury that Jim Alessi was so high on drugs, and had such overpowering libidinous desires that he attempted the homosexual rape of Richard Kondian, while his friend, Paul Scott, was wandering about his house. Even if the jury had been presented with Mr. Kondian's testimony, it is absurd to conclude that the result of the proceedings would have been different.

Answer Brief of Appellee at 14. "Absurd" and "ludicrous" are strong words that should be supported by strong evidence. But there is no evidence to support this argument.



The state has confused its role in this court with the role of a jury in the trial court. It is not the function of the state to decide which version of the evidence is to be believed. Credibility determinations are the exclusive province of a jury. If Scott's jury had been presented with a choice between Kondian's version and that of Soutullo, the jury could have reasonably rejected the proven liar's testimony and accepted the testimony of eyewitness Kondian. (The state has admitted in its brief that Soutullo was a proven liar. Answer Brief at 13.) The state's prediction of the outcome of a trial where the jury had the benefit of Kondian's testimony must be rejected as a basis to support Scott's conviction and sentence.

The state also claims that Kondian would not have testified because he would have been placed in jeopardy and his counsel would not have allowed such testimony. Answer Brief at 14. This is also a speculative claim.

Kondian testified at the evidentiary hearing that he would have testified on behalf of Scott. Even if his counsel had advised otherwise, Kondian was not bound by that advice. Thus, it cannot fairly be stated that Kondian would not have testified. The point is he was never asked.

Additionally, even taking into account what Kondian's counsel might have advised, it must be remembered that Barrs never sought Kondian's testimony or affidavit because he was totally ignorant of the law regarding severance and co-defendant affidavits. See Opening Brief of Appellant at 18-19. Therefore, it never occurred to him to that his client would benefit if Kondian's case proceeding first.

For example, if Kondian pled guilty prior to Scott's case instead of after, there would have been no bar to his testimony, voluntary or otherwise, at Scott's case. At the very least, he could have supplied an affidavit. Even if it is true that "the State would not have agreed" to setting Kondian's case first, Answer Brief at 15, that does not mean the trial judge would have so agreed.

The proverbial "bottom line" is that all of these omissions resulted from incompetence, not strategy considerations, and all of them deprived the jury of evidence critical to a fair determination of Scott's guilt or innocence. No amount of speculative hindsight by the state can excuse Barrs' failure to have pursued the exculpatory evidence.

Scott's Sixth Amendment rights were violated because of Barrs' lack of knowledge of the law, and lack of investigation of the law and facts. As the Supreme Court of the United States has recognized:

[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984).

As to investigation of the law, Barrs was ignorant of pertinent case law at Scott's trial, and has remained so as

evidenced by his testimony below. As to investigation of the facts, the evidence is uncontradicted that he made no investigation of Kondian's claim of Scott's innocence, and he failed to conduct any pre-trial investigations in all related aspects.

Pre-trial "'investigation and preparation are the keys to effective representation.'" Rummel v. Estelle, 590 F.2d 103, 104 (5th Cir.1979) (quoting ABA Projects on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function, 224 (App.Draft 1971)). Specifically, "[a]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir.1979), vacated as moot, 446 U.S. 903, 100 S.Ct. 1827, 64 L.Ed.2d 256 (1980).

The only expert to testify below opined that Barrs' representation fell outside the range of reasonably professional assistance. That expert occupied a particularly advantageous position. The expert was David Roth, who had represented Kondian and knew of Barrs' shortcomings firsthand. Viewing the evidence adduced at the evidentiary hearing, and applying the heaviest hand of deference to his "judgments", Barrs' omissions rendered his assistance ineffective.

D.

At Scott's trial, the prosecutor relied upon the testimony of Dr. Cuevas to establish that the presence of sperm on Alessi's body was consistent with head trauma. Barrs did not bother to depose Dr. Cuevas or investigate the

medical aspects of the case. The critical nature of this failure is dramatically evidenced by the competent representation afforded Kondian after Scott's trial. Counsel for Kondian presented his client's version of the facts to the doctor, and it resulted in a significant change of opinion.

The state now claims that Barrs' ineffectiveness in this regard would not have changed the outcome. Answer Brief at 15. This view of the evidence is unrealistic. It is the totality of Barrs' failures which must be squared with the Sixth Amendment, not isolated pieces of evidence. Strickland, supra. Moreover, counsel's failure to have investigated or deposed the medical witnesses was conceded below as not having been strategic, and the defendant's expert witness, Kondian's lawyer, opined that Barrs was ineffective. The medical evidence was portrayed by the prosecution as an important link in the circumstantial evidence. That evidence was dealt a severe blow, but only after Scott's case, and by Kondian's lawyer after he had conducted the appropriate investigation. It was important for Barrs to have done the same, had he first investigated Kondian's testimony, because such basic investigatory work would have yielded evidence supportive of Scott's innocence.

E.

Kondian's lawyer also properly investigated Soutullo. Barrs conducted no investigation and did not even depose this critical witness until trial had commenced. In and of itself, such discovery practice in a capital case is highly questionable. If Barrs had investigated Soutullo, as had

Kondian's lawyer, he would have obtained evidence that law enforcement authorities knew Soutullo as a perjurer.

The state argues on appeal that because the prosecutor told the jury that Soutullo was an "unusual character", a thief, a drug user, and a fugitive, there was no need for Barrs to have investigated him. Answer Brief at 12. In other words, the state is now claiming that Barrs' failure to have investigated Soutullo to establish his lack of credibility was "cured" by the prosecutor's closing argument.

Needless to say, closing argument is not evidence. More importantly, the state's argument on appeal is misleading and hypocritical . It is misleading because the prosecutor never indicated that Soutullo was not credible. It is hypocritical because the state relied upon Soutullo's testimony on direct appeal to this court to support its theory of premeditated murder. See Scott v. State, 411 So.2d 866 (Fla.1982), Case No. 58,588, Answer Brief of Appellee at 3, "Statement of the Facts".

In further regard to the direct appeal, the state relies upon that portion of the opinion of this court stating that premeditation was evidenced by the manner in which the victim was murdered. Answer Brief at 16. But that statement must be placed in the context of a trial where the defense attorney failed to present, much less investigate prior to trial, the critical evidence of the Scott's defense of Kondian. Without that evidence, this court was presented only with one side of the evidence, including Soutullo's testimony and the medical opinion prior

to its change. With Kondian's eyewitness account and the changed medical evidence, it cannot be said that the jury would have returned the same verdict.

F.

Finally, the state's argument addressing the sentencing phase misses the mark which is that Barrs failed to adduce testimony that Scott saved a prison guard's life. The testimony of Brad Fisher quoted in the state's Answer Brief at 16-17 does nothing to refute Barrs' failure. The quoted testimony makes no mention of saving a guard's life. Barrs' ineffectiveness is evidenced by the fact that he could have adduced such testimony and failed.

G.

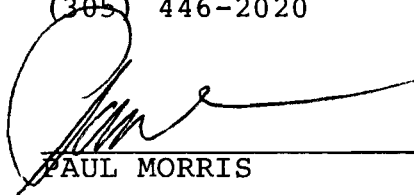
In sum, Kondian's version of the facts establishes that Scott did not murder Alessi. It is only because of trial counsel's ineffectiveness that those exculpatory facts were not investigated prior to trial. Because Scott was prejudiced thereby, a new trial is required in accordance with the constitutional guarantee of effective assistance of counsel.

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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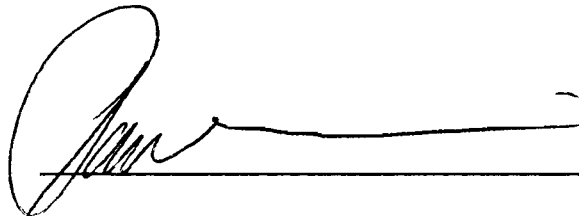
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CERTIFICATE OF SERVICE

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 24 day of February, 1987.



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