IN THE

SUPREME COURT OF FLORIDA

THEODORE AUGUSTUS BASSETT, JR. Appellant, vs. THE STATE OF FLORIDA, Appellee.	)	CASE NO. 71,130

REPLY BRIEF OF APPELLANT

(On Appeal from the 7th Judicial Circuit
In and For Volusia County, Florida)

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AUTHORITIES CITED

ARGUMENT

I

Trial Counsel's Ineffectiveness at the Guilt and Penalty Phases

For its primary defense, the State contends this Court cannot reach the merits of the prejudice component of the effective assistance claim because the "law of the case" precludes it. It argues that in reviewing counsel's failure to prevent or preserve errors, this Court's direct appeal findings end the inquiry into any resulting prejudice. The State says "... there is no question that these issues have already been litigated and decided against appellant. Ergo, if these issues fail pursuant to a direct appeal, it follows that appellant could never prevail with these issues pursuant to a collateral attack." Ans. Brf. 43 (emphasis supplied). See also Ans. Brf. 28, 30, 37, 41-44.

Such a creative application of the "law of the case" doctrine would certainly lighten the post-conviction caseload, but it is not the law. This Court's review of guilt and penalty phase issues on direct appeal, for instance, did not prevent it from ordering a new appeal in Wilson v. Wainwright, 474 So.2d 1102 (Fla. 1985). In Wilson this Court rejected the similar argument of the state that review of issues on direct appeal "cured" the deficiencies of appellate counsel. Similarly, in Johnson (Paul) v. Wainwright, 498 So.2d 938 (Fla. 1987), this Court vacated the convictions and sentences because of in-

effective assistance, using precisely the rationale the state criticizes here. Trial counsel ineffectiveness claims, where shown, similarly undermine the reliability of direct appeal findings.

The cases cited by the State, in fact, are entirely at odds with its argument that failure to find direct appeal error preordains a "no prejudice" finding on post-conviction. McCrae,[1] Johnson (Larry),[2] and Johnson (Marvin)[3] all hold in relevant part that certain issues may be barred when raised post-conviction on their merits, not as ineffective assistance claims. Ineffective assistance is undeniably cognizable post-conviction under Florida law, and that is precisely the claim Mr. Bassett has raised.

The merits of this claim are covered in the initial brief. The state's distortion and minimalization of the record in its answer brief otherwise speaks for itself.[4]

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1 McCrae v. State, 510 So.2d 874 (Fla. 1974).

2 Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985)

3 Johnson v. State, 13 F.L.W. 201 (Fla. Apr. 11, 1988).

4 Appellant would like to draw this Court's attention to its decision in Cooper v. Dugger, 13 FLW 312 (Fla. May 12, 1988), decided since the initial brief was filed. In Cooper, the Court granted Hitchcock relief finding harmful error in part because of evidence relating to the co-defendant's violent nature and dominance. Mr. Bassett has proferred similar evidence, and the post-conviction court below refused to admit much of it. This point is briefed at IB 5 of the initial brief, beginning at Page 75. The state wrongly contends the evidence relating to the co-defendant Cox is not relevant, Ans. Brf. 66-69, a point refuted by Cooper.

II

Limitation on Mitigation

There really is no doubt that the weighty advisory opinion of the jury was corrupted by unconstitutionally limiting instructions. The standard recently announced by the United States Supreme Court controls here:

> The critical question, ... is whether petitioner's interpretation of the sentencing process is one a reasonable jury could have drawn from the instruction given by the trial judge....

Mills v. Maryland, 56 U.S.L.W. 4503, 4506 (June 7, 1988) (citing Francis v. Franklin, 471 U.S. 307, 315-16 (1985). Clearly, Mr. Bassett's advisory jury was limited.

The limitation is not harmless. A capital sentencing decision to dispense mercy is frequently "difficult to explain," McCleskey v. Kemp, 107 S.Ct. 1756, 1777 (1987), based, as it must be, on innumerable factors. "[I]t is the jury's function to make the difficult and uniquely human judgments that defy codification and that 'buil[d] discretion, equity, and flexibility into a legal system.'" McCleskey, 107 S.Ct. at 1777. The jury was allowed no such flexibility here. "The possibility that petitioner's jury conducted its task improperly certainly is great enough to require resentencing." Mills, 56 U.S.L.W. at 4502. (emphasis supplied).

The death sentences are due to be vacated.

III

Knowing Use of False Evidence

The State's surprising contention is that its agents can knowingly use perjured testimony without recourse to the defendant, so long as trial counsel has been provided with documents showing the falsity. Ans. Brf. at 80. Those days of gamesmanship are long gone. The Due Process Clause prohibits the State from obtaining a conviction by knowingly using false testimony, and any conviction so obtained must be set aside whether the testimony is used with or without the knowledge of trial counsel. United States v. Agurs, 427 U.S. 97 (1976); Mooney v. Holohan, 297 U.S. 103 (1935).

The allegations and supporting documentation make out a strong case of knowing use of false testimony, and an evidentiary hearing is required. See State v. Crews, 477 So.2d 984 (Fla. 1985).

CONCLUSION

Wherefore, Appellant respectfully requests this Court reverse the Order of the trial court and vacate the convictions and sentences.

Respectfully submitted,

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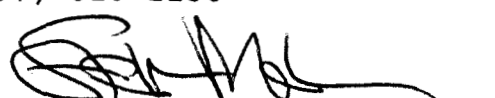
BY 
STEVEN H. MALONE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by mail to BRIAN BAYLY, Assistant Attorney General, 125 North Ridgewood Avenue, 4th Floor, Daytona Beach, Florida, this 24th day of June, 1988.

Of Counsel