IN THE SUPREME COURT OF FLORIDA

CARY MICHAEL LAMBRIX,
Appellant

vs.

RICHARD L. DUGGAR,
Appellee

CASE NO. 74,452

APPEAL FROM THE CIRCUIT COURT
IN AND FOR GLADES COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT - PRO SE

CARY MICHAEL LAMBRIX - PRO SE
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OTHER AUTHORIES -

PRELIMINARY STATEMENT

Appellant would rely on the facts and authorities as originally submitted within this Appellants Initial Brief, supplementing such with the following response to the States Reply Brief.

Appellant does not argue the states position that NO constitutional right, per se, exists which provides Any CRIMINAL defendant with A Right to counsel at collateral, post-conviction stages of the Appellate proceedings. In light of the recent decision of MURRAY VS. GIARRATANO, 492 U.S. —, 109 S.Ct. —, 106 L.Ed.2d. 539 (1989), NO ABSOLUTE Right to counsel exists even for capital defendants pursueing collateral, post conviction appellate review. But the MURRAY decision does not at All address the issue of effectiveness of provided collateral counsel. In Florida, Collateral counsel is provided, And even MANDATED, by the creation of A state statute. This Court has already RECOGNIZED that such counsel Must be effective. As cited in the States own ARGUMENT, in Spalding vs. Duggar, 526 So2d. 71 (Fla 88) this Court RECOGNIZED that under Florida Statute 27.703 "A capital defendant has A Right to effective legal representation in All collateral Relief proceedings."

A capital collateral defendant does have A Right to be effectively represented by court-appointed counsel in Florida. Appellant does claim that by creation of A Right to counsel, the statute automatically encompasses A Right to effective counsel. And most esspecially so, where as in the instant case, such collateral counsel WAS virtually forced upon A defendant against his will, when this Appellant WAS denied An opportunity to represent himself. The RECORD conclusively shows that this Appellant was forced by the Court to be represented by counsel. To now claim that NO right to effective ASSISTANCE of counsel exists would be judicial hypocrisy. Counsel did Act INCOMPETENTLY And ineffectively in failing to RAISE the issue of juror MISCONDUCT, And Appellant is entitled to Relief

ISSUE I

THE TRIAL COURT ERRED IN DENYING APPELLANTS CLAIM OF INEFFECTIVE ASSISTANCE OF COLLATERAL APPEAL COUNSEL

This Appellant would rely on the facts and authorities set forth within the original Initial brief as why relief should be granted, and would now address only the states claim that no right to the effective assistance of Appellate counsel at Collateral stages exist in light of the Recent Rulings in MURRAY VS. GIARRATANO, 492 U.S. ___, 109 S.Ct. ___, 106 L.Ed.2d. 1 (1989).

Appellant would first point out that in MURRAY, the issue addressed was not at All whether an appellant had a Right to effective assistance of counsel during post-conviction proceedings. Rather, MURRAY simply determined that no constitutional Right to counsel for capital defendants exists. So the States Reliance on MURRAY is without merit.

As the State has pointed out, this Court has Already Recognized that a capital Appellant does have "a Right to effective legal Representation by the capital Collateral Representative in All Collateral Relief proceedings" because of the States creation of Florida Statute § 27.702. See Spalding vs. Duggar, 526 So2d. 71 (Fla. 1988), but the State would have this Court to believe that such a Right does not Allow an Appellant to later claim ineffectiveness.

Appellant would point out that even if the creation of a Right to counsel in and of itself did not automatically encompass a Right to effective Collateral counsel, the circumstances in this case do greatly heighten the Responsibility of collateral counsel, because such counsel was not Merely provided by the grace of a statute. This Appellant has a Right to be competently and effectively

Represented by collateral counsel because not only was collateral counsel provided by authority of Florida statute § 27.702, but counsel was virtually forced upon an unwilling Appellant. As shown in the attached documents, this Appellant did all humanly possible to have the appointed collateral counsel removed, and exercise his right to proceed pro se, but was denied an opportunity to do so.

The State has submitted that no right to effective assistance of collateral counsel exists, even in spite of a statutory right to the appointment of counsel. Appellant again relies on the original initial brief, claiming that by statute, such a right to effective counsel does exist, and that Appellant was entitled to effective representation.

Appellant would further submit that in the highly unique circumstances of this case, this Appellant did have an absolute right to the assistance of effective collateral representation, because not only was such counsel provided by the authority of State statute, but counsel was literally forced upon this Appellant against his expressed wish.

As conclusively shown in attached Appendix A, a transcript of the proceedings before Glades County Circuit Court Judge Elmer Friday, on December 9, 1988, this Appellant did move the Court to dismiss collateral counsel, and seek leave to exercise his right of self-representation. But although this Appellant had a constitutionally protected right to proceed "pro se", the trial Court denied this Appellants motion, and found that by the creation of Florida statute 27.703, this Appellant had no right to represent himself at collateral stages. The full ruling of the Court is found as attached Appendix B.

Following the denial of this Appellants motion to dismiss appointed collateral counsel, and exercise his right to self-representation, this

Appellant did file A "Petition for Writ of Prohibition, ect" with this Court, seeking this Courts protection against the forced representation. A copy of that original Action, filed pro se by this Appellant with this Court on January 26, 1988 is attached as Appendix C.

The facts do conclusively show that this Appellant was literally forced to accept the representation of collateral counsel by Authority of Florida Statute 27.703. In light of this, even if the creation of A state statute which provides for the appointment of collateral counsel in itself does not automatically encompass A constitutionally protected Right to effective assistance of counsel, such A right must exist when the statute is used as a tool to force state-provided counsel on an unwilling client, steipping this Appellant of his Right to exercise self-representation.

The State has further argued that collateral counsel was effective, as counsel did raise all meritious issues, And further, that counsel did examine the underlying issue of juror misconduct, And found such to be without merit. To substaniate this claim, the State has introduced the transcript of proceedings before the US. District Court on March 28, 1989 in which Collateral Counsel claims that he did investigate the issue, And made A stentegic decision not to litigate it.

But what the State has failed to bring to the attention of this Court is the fact that Mr. Spalding made An entirely contrary statement to the trial Court. In A "Statement of Counsel." Attached as Appendix D, Counsel claimed that such issue was, in fact, raised - Although records clearly indicate it was not.

In conclusion, Appellant did have A Right to be represented by competent, effective collateral counsel when such counsel was provided

And literally forced upon an unwilling Appellant by authority of a State Statute, and counsel was ineffective for failing to raise and properly litigate an issue involving clear juror misconduct. The failure to competently raise the issue of juror misconduct was not the deliberate result of a strategic decision, but rather was the result of counsels ineffectiveness. In fact, had counsel made such a strategic decision, the decision itself was clearly an act of poor judgement constituting ineffective assistance of counsel.

Appellant has claimed, and does claim an entitlement of relief as had counsel represented this Appellant effectively, and raised the issue of juror misconduct, this Appellant would had been granted full relief in accordance with the law.

Issue II

The Trial Court Erred in Denying Appellants Claim of Juror Misconduct, which Resulted in Appellants Right to a Fair Trial, as well as denial of Appellants right to exercise peremptory challenges in an intelligent and informed manner.....

Appellant would Rely on the facts and authorities as set forth within the original initial brief, supplementing such with the following response to the States claims.

In response to this Appellants claim for Relief, the State has introduced three basic Arguements as to why no Relief is entitled. Appellant would now address each, individually.

First, State counsel argues that counsel had no obligation to raise the instant issue of juror misconduct, since counsel did raise numerous other issues. But as previously cited within Appellants initial brief, it is not enough to raise a large quantity of issues, as "even a single, isolated error on the part of counsel may be sufficient to establish that an (appellant) was denied effective assistance." United States vs. Cronic, 466 U.S. 648, 657 N. 20 (1984); Kimmelman vs. Morrison, 106 S.Ct. 2574, 2588 (1986); (See Also, Washington vs. Watkins, 655 F.2d. 1346, 1355 (5th Cir.) Reh. Denied, with opinion, 662 F.2d. 1116 (1981). The Appropriate test of ineffectiveness of counsel is determining whether the outcome of the proceedings has been undermined. If counsels actions, or failure to act, was so significant as to undermine the Courts confidence in the outcome, then the Court should find that counsel was indeed ineffective.

The issue counsel failed to raise was and is significant enough

to undermine the confidence in the outcome, as the facts are so clear, that had counsel simply brought the issue to the attention of this Court, the conviction would had been set aside. Raising a multitude of insignificant issues is not a defense. The issue is not "without merit," And should had been properly investigated and duly litigated.

Second, State counsel has claimed that even if the issue was litigated, it has no legal merit and so counsels failure to raise such an issue was not error, and the trial court properly rejected the claim.

The State has supported such a line of thought by claiming that the question presented to juror Maxine Hough was inadequate to actually derive her previous involvement. The State has interpreted the question to exclude anything but actual jury experience Appellant would simply point to the entire transcript. In light of the totality of questions put forth to Ms. Maxine Hough, it would be at best, ridiculous to conclude that she was unaware her previous involvement in this Appellants first trial did not matter. She sat not even at arms length as a fellow potential juror was asked the same question, and dismissed for cause when he admitted his same degree of previous jury involvement.

The State also claimed that even if Ms. Hough had admitted her previous involvement, it would not had been sufficient grounds to have dismissed her for cause. Again, this argument lacks merit, as the record does conclusively show that potential juror Bruce Taylor was dismissed for cause when he admitted his previous involvement. To now claim that Ms. Maxine Hough would not had also been dismissed under the same, exact grounds is without logic.

Then the State again jumped to an entirely different train of thought as it was argued that no relief can be granted, as this

Appellant has failed to claim any actual prejudice. Even superficial examination of the original petition shows that Appellant did most certainly allege actual prejudice, as the entire claim is a deprival of a fair trial, as well as a denial of the right to intelligently exercise peremptory challenges as a result of Juror Hough's failure to respond honestly and completely. Furthermore, it has long been recognized in Florida and by this Court- that:

> "The well-established rule is that the failure of a juror to honestly answer material questions propounded to (her) on voir dire examination constitutes bad faith requiring (her) disqualification from serving on the jury in that case." Scay vs. State, 139 Fla. 433, 190 So.702 (1939), Further, that "we must conclude actual bias must be presumed" Minnis vs. Jackson 330 So2d. 847 (Fla. 3d DCA, 1976) (See also, Perkins vs. United States, 748 F.2d. 1519 (11th Cir., 1985)

The States claim that this Appellant has failed to set forth an actual claim of prejudice is contrary to the record. The original Petition for Writ of Habeas sets forth specific facts, and claims of actual prejudice. And although as the State has cited in Wainwright vs. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d. 841 (1985) the key question is whether the juror can follow the law, and render a just and fair verdict- that question is conclusively ~~also~~ answered in the negative, as Ms. Maxine Noughs own actions clearly indicate she could not. (Scay, supra; Perkins, supra)

And third, as a last ditch effort the State has claimed that in any event, all claims of relief were properly denied, as even if Ms. Hough's actions did constitute juror misconduct, the issue is "based upon record material and therefore, the failure to raise an issue appearing

on record on direct appeal would preclude collateral review" (cites). This Appellant can appriciatte State counsels effects to Argue as vigiourously as possible, but such a claim cannot even be made in good faith. This issue of juror misconduct is NOT a record issue. In fact, transcripts of the first trial were not even available until four years after trial. This claim is a classic, collateral post-conviction issue which should had been afforded a full hearing at trial court level to determine the extent of actual peejudice pursuant to the authority of Thompson vs. State, 300 So2d. 301 (2d DCA, 1974) (Ironically, Thompson also involved a similian situation originating in the SAME Court.)

Appellant would again submit that the facts and authories as cited within the original Initial beief are relied upon as grounds for relief sought, and the instant reply as well as attached Appendixes serve only to supplement those claims by responding to the States submitted reply brief.

Conclusion

Although Appellant is inexpeienced in the complexities of our judicial system, this instant action is presented to the best of his ability — as a pro se capital litigant. Apologies are made to this Honorable Court for the primative fashion in which such claims are now presented, as this Appellant prays this Court will open-mindedly and objectively review the issues presented in spite of the natural peejudice which stems from pro se petitions.

A claim of ineffective assistance of collateral counsel exists in this instant case, as this Appellant was virtually forced to accept representation against his wishes. The documents provided to this

Court do conclusively establish that counsel was forced upon an unwilling defendant. To now claim that this Appellant was not entitled to effective assistance of collateral counsel under such circumstances is judicially repulsive.

Furthermore, the facts presented within this action do conclusively establish that Juror Maxine Hough did knowingly and intentionally conceal information which if revealed would had mandated her disqualification. Another juror under the exact same circumstances was excused for cause. Had Ms. Hough also responded fully and truthfully, she too would had undoubtably been excused for cause. But even if not, her failure to respond truthfully All but Eliminated this Appellants Absolute right to exercise peremptory challenges in an intelligent and informed manner.

The facts in this case warrant the relief requested. Appellant would pray this Court grants the relief so entitled.

Respectfully Submitted,

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Sworn and Subscribed
before me this 7th
day of November, 1989

Notary Public - Florida

NOTARY PUBLIC STATE OF FLORIDA
My Commission Expires Mar. 24, 1992

CERTIFICATE OF SERVICE

I, CARY MICHAEL LAMBRIX, do hereby certify that A true And correct copy of the foregoing Reply Brief- And All Appendix's so Attached- has been provided to Robert Kraus, Asst. Attorney General, 1313 TAMPA St (* 804) Park Trammel Building, TAMPA, Florida 33602 upon this 7th day of November 1989 by U.S. Mail service.

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APPENDIX'ES

PG. #

APPENDIX "A"

TRANSCRIPT of PROCEEDINGS before CIRCUIT COURT JUDGE ELMER FRIDAY on DECEMBER 9, 1987

Appendix "B"

ORDER denying (APPELLANTS) MOTION to DISMISS COLLATERAL COUNSEL AND PROCEED "PRO SE"

Appendix "C"

Petition for WRIT of PROHIBITION filed AGAINST JUDGE FRIDAY in FLA. SUPREME COURT, in JANUARY 1988

Appendix "D"

STATEMENT of COLLATERAL COUNSEL REGARDING APPELLANTS PRO SE WRIT of HABEAS CORPUS PETITION