IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,144

CLEO DOUGLAS LECROY,

Petitioner,

vs.

HARRY K. SINGLETARY, JR,

Respondent.

MEMORANDUM IN REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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ARGUMENTS IN REPLY

ARGUMENT I

THIS COURT SHOULD ADDRESS THE MERITS OF ALL ARGUMENTS CONTAINED IN MR. LECROY'S PETITION FOR WRIT OF HABEAS CORPUS.

Respondent suggests that this Court should decline to address many of the arguments presented in the petition because Mr. LeCroy should not be allowed to use habeas corpus to seek "second and third bites of the apple." Response, at 18. Mr. LeCroy does not ask this Court for consideration of the merits of claims which it has already decided. What it does seek, and what it is clearly entitled to seek, is a determination of the merits of his claims that he has been deprived of his right to the effective assistance of appellate counsel guaranteed under the Sixth Amendment of the Constitution due to his appellate counsel's failure to raise clearly meritorious issue on direct appeal and counsel deficient performance in the manner which he raised those meritorious issues which he did raise. Evitts v. Lucy, 469 U.S. 387 (1985).

ARGUMENT II

APPELLATE COUNSEL'S FAILURE TO PRESENT THE EXCLUSIVE VENIRE CLAIM.

Respondent maintains that this issue is without merit because it was not properly preserved at trial and because appellate counsel cannot be deemed ineffective for failing to anticipate this Court's decision in Spencer v. State, 545 So.2d 1352 (Fla. 1989). As for the latter argument, appellate counsel was not obliged to anticipate Spencer because, as Mr. LeCroy fully argued in his original memorandum, see, Petitioner's Memorandum at 3-7, Spencer was merely an application of existing law. State v. Moreland, 582 So.2d 618 (Fla. 1991). Regarding the former argument, the record speaks for itself and reveals that Mr. LeCroy raised this claim before the circuit court in a manner adequate to preserve it for appellate review.

What Respondent does not address is whether confidence in the outcome of Mr. LeCroy's appeal has been undermined by appellate counsel's failures. Ferguson v. Singletary, 632 So.2d 53 (Fla. 1993). The reason for Respondent's failure is clear, if it were to address the prejudice prong of Furguson, he would be required to concede that relief was appropriate. Had counsel performed as the constitution required, Mr. LeCroy would have been entitled to a new trial. Spencer. It was solely due to counsel's deficient performance such relief was not obtained. The writ should issue.

ARGUMENT III

APPELLATE COUNSEL'S FAILURE TO CHALLENGE THE TRIAL COURT'S REFUSAL TO CONSIDER UNCONTRADICTED AND UNIMPEACHED MITIGATING EVIDENCE.

Respondent contends that appellate counsel cannot be ineffective for failing to argue on appeal that the trial court failed to consider unimpeached and uncontradicted mitigating evidence because that issue was not meritorious. He maintains that whether particular evidence is mitigating is within the sole discretion of the trial court. Response at 20, citing Campbell v. State, 571 So.2d 415 (Fla. 1990).

Even if the trial court's refusal to consider mitigating evidence was within its discretion, this Court has repeatedly held that where a reasonable quantum of competent, uncontradicted mitigating evidence of a mitigating circumstance is present, the trial court must find that the mitigating circumstance has been proven. Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990). See Maxwell v State, 603 So.2d 490 (Fla. 1992). That is exactly the situation in Mr. LeCroy's case.

Mr. LeCroy presented absolutely uncontradicted evidence that Mr. LeCroy was a good husband and father, that he did well on probation, that he had been a good and decent person before the offense, that he helped out with his family, and that he adjusted well to incarceration. Notably, he also produced uncontradicted and unimpeached evidence that he was mentally slow and immature for is age. Despite the fact that not only this Court, but the federal court's have repeatedly held that this type of evidence is mitigating, the trial court stated that it was not. Moreover, as to the issue of Mr. LeCroy's immaturity, the trial court accepted Assistant State Attorney Barlow's knowingly false and wholly unsupported argument that Mr. LeCroy was exceptionally mature as if it were fact. The trial Court then

made a corresponding finding which was flatly wrong and which unfortunately skewed this Court's proportionality analysis.

Despite the trial court's clear error, appellate counsel failed to challenge its blatant disregard for the precepts of Edding and Lockett. That was deficient performance. Moreover, it was deficient performance which undermined confidence in the outcome of Mr. LeCroy's appeal. The absence of mitigation and evidence of immaturity were the two factors this Court specifically mentioned when setting Mr. LeCroy's case apart from every other capital murder case in the State of Florida and refusing to reduce his sentence to life imprisonment. The writ should issue.

ARGUMENT IV

APPELLATE COUNSEL'S FAILURE TO CHALLENGE THE EXCLUSION OF JON LECROY'S ADMISSIONS OF GUILT ON DUE PROCESS GROUNDS.

Respondent contends that appellate counsel could not be ineffective for failing to challenge the trial court's exclusion of Jon LeCroy's inculpatory statement under Chambers v. Mississippi, 410 U.S. 284 (1973), because the statements would not have been admissible under Chambers. Though Respondent acknowledges that Chambers requires only that the evidence which the defendant seeks to introduce be reliable, he attempts to argue that the Jon LeCroy's statements do not fall under Chambers. Finally, Respondent amazingly contends that this Court's decision in Gudinas v. State, 693 So.2d 953 (Fla. 1997), stands for the proposition that Chambers does not control outside of Mississippi

Respondent fails to provide any meaningful distinction between Chambers and Mr. LeCroy's case. It provides no explanation why statements made spontaneously to law enforcement officers shortly after the crime, as were Jon LeCroy's statements, are less reliable that statements made to "close friends", as were the statements in Chambers. (If indeed Respondent is now confessing that such statements are unreliable, it has called into question the propriety of virtually every criminal conviction in this state.) Respondent argues that Jon LeCroy statement's were "ambiguous" and that he did not "confess" to the crime. Among other statements indicating his knowledge of the Hardemans' death, Jon LeCroy stated that he was the last person to see the them alive. There is no ambiguity in that statement. Moreover, taken together with Jon LeCroy's, the statements are not only unambiguous, they provides the basis for a case of first degree murder, as the State recognized when it presented these supposedly "unreliable" statements in Jon LeCroy's

trial. (Jon LeCroy transcript 12-35, 1100, 1102-03,1109, 1126-29, 1137-38, 1143-44, 1151-52, 1169-70, 1192-94, 1196, 1198-99, 1203-04, 1211-23, 1228, 1343-49, 1343-49, 13733-74, 1399-1400, 1403-04, 1436-38, 1453-1504, 1561-83, 1591-94, 1647-49, 1651-52).. The United States Supreme Court explained in Rock v. Arkansas, 483 U.S. 44 (1987), that Chambers, while somewhat factually limited, stands for the principle that when a state attempts to exclude relevant, competent evidence offered by a criminal defendant, the Court must balance the state's interest in excluding that evidence against the defendant's right to due process. Here, the State allowed Jon LeCroy's statements to be used against him in is own trial. The only distinction between Mr. LeCroy's trial and his brother's was that in Mr. Lecroy's trial the staements assisted the accused, rather than the State. Unless Respondent seriously contends that there is some valid interest in allowing the State should to introduce less reliable evidence when seeking a criminal conviction against a citizen than the citizen defending himself against State accusations of criminal conduct, the balance in this case tilts clearly toward Mr. Lecroy.

Appellate counsel should have challenged the exclusion of Jon LeCroy's inculpatory statements on due process grounds. Clearly Chambers not only offered more support for his argument that Jon LeCroy's statements should have been admitted, it provided clear grounds for a finding of error. Failure to present cogent legal argument when it is available is deficient performance. The writ should issue.

CONCLUSION

On the basis of the forgoing points and authorities, the petition, and memorandum supporting the same, Petitioner submits that the writ should issue.

I HEREBY CERTIFY that a true and correct copy of the forgoing Response has been furnished by United States Mail, first class postage prepaid, to all counsel of record on September 26, 1997.

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