No. 76458

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

JOHN ERROL FERGUSON, OR DOROTHY FERGUSON,
Individually and as Next Friend on Behalf of
JOHN ERROL FERGUSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF
THE ELEVENTH JUDICIAL CIRCUIT

REPLY BRIEF OF APPELLANT

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I. THESE RULE 3.850 PROCEEDINGS SHOULD BE STAYED

A. Ex Parte Communications

Ferguson has demonstrated that he complied with whatever technical rules are deemed to apply to his recusal motions. App't 10-11. Here, moreover, the State concedes that ex parte communications occurred. St. 12, 13, 16, 17 n. 3, 18, 20. What is the point of an affidavit of counsel -- as opposed to his certificate -- attesting that ex parte communications occurred, when the State concedes them? 1/

Ferguson also has demonstrated that a showing of prejudice is not necessary, App't 14-18, but even if it were, the State is merely speculating about the content of the communications. A non-participating party can never know what was said; thus the need for an evidentiary hearing. While the State asserts that "Judge Fuller *** ultimately conducted an evidentiary hearing ***," St. 23, an evidentiary hearing was never in fact held on the content of the ex parte communications. Judge Fuller simply read the same record that is before this Court. 2/

1/ See Keenan v. Watson, 525 So. 2d 476, 477 (Fla. 5th DCA 1988). The ten-day rule relied upon by the State, St. 16-17, 19, is inapplicable on its face; it calls for a motion to disqualify ten days "before the time the case is called for trial ***." The ex parte communication in this case did not occur until after the "trials" at issue were concluded.

2/ The State also implies that the ex parte discussions were unavoidable because defense counsel "could not be flown down to Florida" to resolve every "scheduling question." St. 12. This is nonsense. Defense counsel made clear on the record that they were available by phone for conferences whenever the court needed to discuss any matter. R. 1039, 1978.

The State says the test is "not whether there is prejudice," St. 18, and yet it has argued to this Court Ferguson's "need to demonstrate prejudicial facts in addition to the ex parte communication ***." 3/ If something more must appear, why was it error for defense counsel to object to each ex parte communication, but not move to recuse until the court had demonstrated prejudice? The alleged "ten-month delay" obscures the fact that the defense filed a detailed motion to recuse within one week of Judge Snyder's prejudicial ruling of February 23, 1989. 4/

Finally, this Court has never held, to our knowledge, that denial of a writ of prohibition, without comment, precludes a petitioner from raising claims in a subsequent appeal. This Court could have denied the writ for any number of reasons, including the Court's ability to reach and resolve the same issues later if a merits appeal became necessary. It would be wholly unwarranted to rule that a motion for a discretionary writ that was never even argued should now preclude a full exposition of the law.

3/ Response to Petition for Writ of Prohibition at 14. Fla. S. Ct. Case No. 74,186 (filed June 15, 1989).

4/ The decision in Micale v. Polen, 487 So. 2d 1126 (Fla. 4th DCA 1986), upon which the State principally relies, St. 19, is hardly controlling here. That was a civil divorce case; the trial judge held a hearing and disqualified himself; the moving party could not even show that the ex parte conversation involved her case; and the case was, in fact, assigned to another judge. Id. at 1128-29. The Florida courts have recently ordered recusal on much less compelling grounds than appear here. E.g., MacKenzie v. Super Kids Bargain Store, 565 So. 2d 1332 (Fla. 1990); Barber v. MacKenzie, 562 So. 2d 755 (Fla. 3d DCA 1990), review denied, 576 So. 2d 288 (Fla. 1991).

B. The Constitutional Competency Requirement

Jackson v. State, 452 So. 2d 533 (Fla. 1984), upon which the State principally relies, St. 24-26, did not even address Ferguson's important constitutional claims. App't 21-23. The State is also wrong in contending that this case involves only "legal review * * * of transcripts and other court proceedings," St. 27, and facts ascertainable by counsel. See App't 21-23. The State's further contention that this Court should reject Ferguson's claims to avoid "a never-ending deluge of post-conviction competency litigation," St. 27, ignores the fact that the vast majority of post-conviction petitioners have no interest in staying their proceedings. More fundamentally, constitutional claims cannot be denied wholesale simply because they may cause inconvenience to the State. Ferguson's well-documented claims plainly would satisfy any reasonable requirements or prerequisites the Court might impose to protect against frivolous claims of incompetence.

C. Ferguson's Incompetence

The State fails to address Ferguson's basic contention: in finding him "competent," the court below relied on its clearly erroneous determination that Ferguson "does not suffer from a major mental illness" because he is "malingering." R. 1008. The record overwhelmingly establishes that Ferguson has suffered from incurable paranoid schizophrenia since at least the early 1970s. 5/ The

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5/ Indeed, even today Ferguson is in the Florida Corrections Mental Health Institution at Chattahoochee for treatment --

[Footnote continued]

State, however, simply reasserts the basic analytical error made below -- that if Ferguson was faking any symptoms, he was necessarily faking all of his symptoms; therefore, he does not suffer from a major mental illness; and he is thus competent to assist counsel. See App't 30-33. This analysis simply cannot be squared with the evidence of record.

HF+II. THE NUMEROUS PREJUDICIAL ERRORS DURING FERGUSON'S TRIALS ENTITLE HIM TO NEW PROCEEDINGS

A. Ineffective Assistance of Counsel at Sentencing

The State does not dispute that defense counsel at both of Ferguson's trials made only the most cursory of presentations+ imaginable at the sentencing phase of a capital case. Nor does the State take issue with -- indeed, it does not even mention -- Stevens v. State, 552 So. 2d 1082 (Fla. 1989), and Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988), upon which Ferguson principally relies. These undisputed facts and unchallenged precedents standing alone make clear that counsel's performance was deficient on multiple grounds at both trials.

5/ [Footnote continued]

including continuing his anti-psychotic drugs -- because yet another group of state-employed expert physicians, as well as the judge who committed him and the administrative judge who, after a second hearing, extended his hospitalization, found that he has schizophrenia.

1. The Carol City Trial

Contrary to the State's suggestion, St. 42, the court below entered no finding that trial counsel, Robbins, acted reasonably in investigating Ferguson's family background. Accordingly, there is no basis for deference in reviewing this issue.

This Court already has rejected the State's suggestion, St. 42, that an investigation can be deemed reasonable merely because trial counsel spoke to defendant's family, 6/ especially where there is uncontradicted evidence that counsel never inquired into defendant's background. See App't 48. Robbins simply never asked the questions necessary for an "informed decision" on whether and how to present Mrs. Ferguson's testimony or other family background evidence. Stevens, 552 So. 2d at 1087; Middleton, 849 F.2d at 493-494. Moreover, the State seriously misstates the record in suggesting, St. 42, that two of Ferguson's sisters were "uncooperative" or "unwilling to testify": one sister testified below that she would have testified at trial if asked, had Robbins either subpoenaed her or secured an assurance that her government job would not be jeopardized, R. 3024-25; the other sister said nothing to suggest an unwillingness to cooperate or testify. R. 3065-69.

6/ Stevens, 552 So. 2d at 1085 & n.7; accord, e.g., Cunningham v. Zant, 928 F.2d 1006, 1019 (11th Cir. 1991) ("minimal preparation" of defendant's mother before testimony amounts to ineffective assistance at sentencing).

The State additionally did not even to address Robbins' admitted failure to make any effort to locate public records concerning Ferguson's background. R. 3034-35. Indeed, in another section of its brief, the State concedes that counsel can obtain "a wealth of information from a defendant's school records, employment records, other public records, as well as from relatives friends, employees, teachers, doctors, etc." St. 27. This concession makes even more indisputable that Robbins departed from prevailing standards in failing to request public records of the type proffered at the post-conviction hearing. R. 3091-92 (Link).

Moreover, contrary to the State's repeated assertions, St. 42-45, Robbins was not presented with "highly contradictory" evidence concerning Ferguson's psychological conditions. Instead, Robbins saw only the four reports from May 1978, which, although equivocal in some respects, all found Ferguson to be competent. Robbins simply never sought or considered the most compelling mitigating evidence on this point. Because Robbins "was unaware the evidence existed," his conduct cannot be justified as an informed "strategic judgment." Stevens, 552 So. 2d at 1087. 7/

7/ In defending Robbins' "investigation" of Ferguson's psychological and emotional background, the State relies solely on Robbins' reading of four competency reports from May 1978, which made only passing reference to Ferguson's psychological treatment prior to 1978. But Robbins has admitted (1) that he never even looked for the numerous more helpful pre-1978 reports and records, see R. 1517, 1538-44, 1554-78 (admitted into evidence as Exs. D-M at 5/17/90 hearing), (2) that he had no strategic reason for not doing so, and (3) that he would have used those reports or records had he found them. R. 3035, 3050-58. Under these circumstances, Robbins' unexplained

[Footnote continued]

The State finally misconceives the "prejudice prong" of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), in urging this Court to displace the role of a fairly informed jury by weighing for itself various aggravating factors against the substantial mitigating evidence now in the record and by concluding on that basis that Ferguson deserves to die. St. 45-46. Where, as here, counsel fails to present substantial mitigating evidence and does "virtually nothing" during the sentencing phase, that alone is "sufficient to undermine confidence in the outcome" of sentencing deliberations. Stevens, 552 So. 2d at 1088 & n.13. Or, as the Eleventh Circuit recently put it, "prejudice" results whenever, as here, counsel so significantly fails to focus the jury on the "particularized characteristics of the defendant" as to deny him an "individualized sentence." See Cunningham, 928 F.2d at 1019. 8/

7/ [Footnote continued]

decision not to investigate Ferguson's pre-1978 background cannot possibly be justified as an "informed judgment." Johnson v. Dugger, 911 F.2d 440, 464 (11th Cir. 1990).

8/ In Cunningham, trial counsel called three witnesses at sentencing. Although the court did not fault Cunningham's counsel for failing to locate or call additional witnesses (something for which Robbins clearly can be faulted), it nevertheless concluded that counsel was deficient in failing to elicit complete testimony on the defendant's "minimal schooling, on his poverty-stricken socioeconomic background, or on the fact that his father died" when defendant was young. 928 F.2d at 1016-17. The court also criticized counsel for presenting only "passing" references to a skull injury suffered by defendant. Id. at 1017-18. The deficiencies which prejudiced Cunningham's right to an "individualized sentence" thus were closely analogous to -- and much less significant than -- the deficiencies in this case.

2. The Hialeah Trial

Hialeah trial counsel, Hacker, has conceded that he prepared the case under the erroneous belief that evidence of a defendant's family background was inadmissible. R. 3166-67. The State seeks to dismiss Hacker's resulting deficiencies solely by asserting that he and an associate had spoken with Ferguson's family (but see App't 55) and by misstating again that two of Ferguson's sisters were "unwilling to testify." St. 48. That bald assertion and misstatement of the record cannot justify Hacker's deficiencies, just as they could not justify Robbins' failure to investigate Ferguson's family background. See supra at 5-6.

Nor can the State excuse Hacker's failure to present evidence of Ferguson's psychological and emotional background for purposes of sentencing simply by reciting testimony offered at the guilt-innocence phase. See St. 48-52. The State does not dispute that Hacker elicited testimony directed solely at the M'Naughton standard; thus, he failed to question any witness on the two statutory mitigating factors relevant to Ferguson's case, even though the State's own witnesses had expressed opinions outside the jury's hearing that would have strongly supported those statutory factors. R. 3104-05. This deficiency was particularly prejudicial since, as the State concedes, the Hialeah jury was erroneously instructed to consider only the statutory factors. St. 62-63.

The State also is wrong in suggesting, St. 47 n.10, that Ferguson has abandoned his claim that the closing argument on sentencing was ineffective. See App't 58-59 & n.48.

Finally, the State cannot seriously claim "there is no reasonable probability that the outcome of the sentencing proceeding would have been changed," St. 49, when at least two of the first four jurors polled recommended against sentencing Ferguson to death, App't 60, despite the deficient performance of trial counsel described above and the admittedly erroneous instructions discussed below. Moreover, the failure to investigate and present family background evidence was particularly prejudicial, because such evidence could have enhanced significantly the psychological testimony available to Hialeah counsel. R. 3101-03, 3143-44 (Link). Had counsel properly developed such a comprehensive presentation, there is at least a "reasonable probability" that additional jurors would have joined with those already prepared to recommend life imprisonment. Stevens, 552 So. 2d at 1088.

B. The Hitchcock Errors

1. The Afterthought Instruction in Carol City

Contrary to the State's suggestion, St. 55, the instructions actually received by the Carol City jury were anything but clear or unambiguous. Indeed, the State's brief wrenches the afterthought instruction completely out of context by ignoring the fact that the court itself twice instructed the jury that it could consider only statutory mitigating factors. See App't 62.

The State further seizes upon the similarity between the afterthought instruction and an instruction characterized by this Court as "not misleading" in Adams v. State, 543 So. 2d 1244, 1248 (Fla. 1989). Adams, however, is clearly distinguishable. The Adams

instruction was specifically designed for a single purpose: to remedy potential confusion caused by the prosecutor's suggestion that the jury could consider only statutory mitigating factors. In contrast, here, the court itself, as well as the prosecutor, improperly instructed the jury. Moreover, the afterthought instruction did not purport to correct the prior infirm instructions and in no way guided the jury as to which instruction to follow.

Because this Court cannot know which instruction was followed, the afterthought instruction cannot be said to have cured the constitutional error inherent in the instructions as a whole. See Francis v. Franklin, 471 U.S. 307, 322, 105 S. Ct. 1965, 1975, 85 L. Ed. 2d 344, 358 (1985). Rather, when the instructions are read as a whole, see App't 65, there is at least a "reasonable likelihood" that the jury was influenced by Hitchcock error. See Cage v. Louisiana, ___ U.S. ___, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990). 9/

2. The State's Harmless Error Analysis

The State's harmless error argument, St. 61-65, improperly engages in just the sort of "remarkable exercise in speculation" condemned in Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989). A court in determining whether a Hitchcock error

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9/ Because the Carol City jury was instructed improperly, neither the trial judge nor the resentencing judge could properly rely on the jury's sentencing recommendation. See, e.g., Delap v. Dugger, 890 F.2d 285, 304 (11th Cir. 1989), cert. denied, ___ U.S. ___, 110 S. Ct. 2628, 110 L. Ed. 2d 648 (1990).

is harmless is not to reweigh the evidence and speculate whether a properly instructed jury would have reached a different outcome. See State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). Rather, the Court need determine only whether the State has met its "heavy burden" of proving beyond a reasonable doubt that the nonstatutory mitigating evidence, if properly developed and presented, could not have provided a properly instructed jury with a "reasonable basis" for recommending life imprisonment. Hall, 541 So. 2d at 1128.

The record now contains evidence of a "wide array" of nonstatutory mitigating circumstances. Copeland v. Dugger, 565 So. 2d 1348, 1349 (Fla. 1990). See App't 37-44. This evidence clearly would have given properly instructed juries in both cases reasonable bases for recommending life imprisonment. Accordingly, the Hitchcock errors issue here cannot be held harmless, regardless of the aggravating circumstances that might have been found. See Jackson v. Dugger, 931 F.2d 712, 716-16 (11th Cir. 1991); Booker v. Dugger, 922 F.2d 633, 636 (11th Cir. 1991), cert. denied, 60 U.S.L.W. 3265 (Oct. 7, 1991).

C. The State's Use of False Testimony

1. The State's Procedural Bar Claim

Ferguson's motion to supplement was filed before his notice of appeal, at a time when the court below clearly retained jurisdiction over this action. Moreover, the motion was filed as soon as diligent inquiry brought the relevant facts to counsel's attention, making the motion timely under the plain terms of Rule

3.850 itself. See App't 72 n.62. Finally, the gross prosecutorial misconduct underlying this claim amounts to a fundamental error under Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965).

2. Prejudicial Effect of the False Testimony

The prejudicial effect of Officer Hartmann's false testimony was not eliminated by the prosecutor's introduction of court records relating to the October 1969 shooting incident, Case No. 69-9963. A prosecutor has an affirmative duty to elicit the truth from a witness who has just spoken falsely, not merely to introduce court records in the hope that the jury itself will sift through the details and stumble upon the truth. See Lee v. State, 324 So. 2d 694, 697 (Fla. 1st DCA 1976). The State further strains credulity in suggesting that a prosecutor seeking to establish the aggravating factor of prior violent felonies inadvertently substituted the charge of assault with intent to murder a police officer for the only charge on which Ferguson was convicted in Case No. 69-9963 -- grand larceny. See St. 70. A mistaken belief on this subject easily could have influenced a juror's sentencing recommendation. App't 74-75.

D. The State's Failure to Disclose Impeachment Evidence

The State has four defenses to its failure to disclose that three dectectives who testified against Ferguson had themselves engaged in drug-related crimes. The State is wrong on each count.

1. Whether or not the three detectives were engaged in criminal misconduct when they were actually on the stand is irrelevant. But the fact is that Detective Derringer, for example,

was charged in an indictment with beginning his criminal activities in late 1977 -- prior to Ferguson's Carol City arrest and to the Hialeah alleged offenses -- and with continuing those criminal activities into 1980 -- months after Ferguson's trials. R. 1257, 1260, 1270-71, 1282, 1287. Thus, the Derringer crimes blanketed the Ferguson arrests and trials. 10/

2. One cannot imagine information jurors would have found more material to their consideration of guilt and sentencing than that, for example, the officers who took an alleged confession and who, according to Ferguson, beat it out of him, were themselves being investigated at the time for crimes involving homicide, the theft of narcotics, arresting persons without justification, and bribery. How could information be more material than this? 11/

3. An official investigation of this entire sequence of events by the Internal Review Section of the Dade County Public Safety Department was underway at least as early as January 31, 1978 -- prior to Ferguson's arrests and trials in the Carol City and the

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10/ The State cannot claim that, because Derringer was not ultimately convicted of all these offenses, there was no duty to reveal the investigation. Derringer's jury verdict was not rendered until four years after Ferguson's last trial. See United States v. Alonso, 740 F.2d 862, 876-877 (11th Cir. 1984). It is the culpatory knowledge the State possessed at the time the Brady requests were made that controls; otherwise, damaging evidence would never have to be produced because it might be vitiated by future events.

11/ The State relies upon Breedlove v. State, 580 So. 2d 605 (Fla. 1991), but there "the detectives' criminal activities had nothing to do with Breedlove's case." Id. at 609. Here, the detectives had every reason to "finger" Ferguson. See App't 77-85.

Hialeah cases. R. 1326. Therefore, an investigative agency of the State did have actual knowledge of the investigation at the time of the Brady requests. Whether the particular persons who prosecuted Ferguson had this knowledge is irrelevant. The State cannot build a Chinese wall between its various components; to allow this would be to put a premium on strategies that shield prosecutors for the very purpose of defeating Brady claims. See App't at 82 n.76.

4. If, as the State suggests, Breedlove means that an investigation is relevant only where it involves police brutality, see 580 So. 2d at 609, we respectfully urge the Court to reconsider. An investigation for police brutality is no more serious than the drug-related Alonso investigation, particularly since the Carol City case involved drug-related homicides. Moreover, the critical evidence of Ferguson's confession was introduced at the Hialeah trial through the very detectives who were investigated for criminal conduct. App't 79 n.72. The jury was entitled to determine whether these criminally enmeshed officers had motives to fabricate. The information clearly "may" have made a difference. United States v. Bagley, 473 U.S. 676, 105 S. Ct. 3380, 87 L. Ed. 2d 490 (1985).

E. Ineffective Assistance in Jury Selection

1. The State's Exclusion Of Blacks

The uncontradicted testimony at the post-conviction hearing demonstrated both that all the jurors and alternates at both trials were white and that the State exercised peremptory challenges to strike black prospective jurors having no

objections to the death penalty. R. 2892-95. At the same time, the State allowed eight whites to be impaneled at the Hialeah trial even though each had expressed objections to the death penalty. R. 2895-96. Such conduct plainly raises an inference of impropriety under Batson v. Kentucky, 476 U.S. 79, 96-97, 106 S. Ct. 1712, 1723, 90 L. Ed. 2d 69, 87-88 (1986).

2. Trial Counsel's Ineffectiveness

The State concedes that Batson did not work a fundamental change in the law. St. 84. In the absence of such a change, objectively reasonable defense counsel should have recognized this prosecution tactic and objected to it as improper, if not unconstitutional. Contrary to the State's contention, id., the unchallenged exclusion of black jurors alone undermines confidence in the outcome of a trial, App't 86-88, and thus is prejudicial under Strickland.

CONCLUSION

Either these proceedings should be stayed, or Ferguson's convictions and sentences should be vacated.

Respectfully submitted,

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I hereby certify that on this 18th day of October, 1991, a copy of the foregoing Reply Brief of Appellant was sent by Federal Express to:

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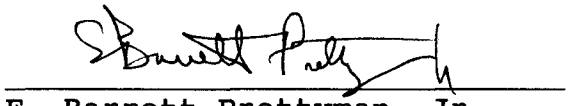

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