IN THE

SUPREME COURT OF FLORIDA

TERRY MELVIN SIMS, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. 77,616

AMENDED REPLY BRIEF OF APPELLANT

On Appeal from the Circuit Court of the Eighteenth Judicial Circuit of Florida, In and For Seminole County.

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
Governmental Center/9th Floor
301 North Olive Avenue
West Palm Beach, Florida 33401
(407) 355-2150

STEVEN H. MALONE
Assistant Public Defender
Capital Crimes Division
Florida Bar No. 305545

ERIC M. CUMFER
Assistant Public Defender
Florida Bar No. 764663

Counsel for Appellant

TABLE OF CONTENTS

AUTHORITIES CITED

CASES **PAGE**

OTHER AUTHORITIES CITED

FLORIDA STATUTES

FLORIDA RULES OF CIVIL PROCEDURE

ARGUMENT

POINT I

MR. SIMS WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF TRIAL.

Suggestive Identification Procedures.

Citing RP 109 and 116, the State claims Dr. Buckhout testified there was nothing inherently unreliable in the hypnosis technique used. Dr. Buckhout testified just the opposite. RP 103-4; 116.

At AB 9, the grounds for the suppression motion are described by the state as based solely on the suggestive photo display. That is not true. The second motion to suppress also included an attack on the hypnotism of the witnesses. RD 968-9.

The State at AB 10 suggests trial counsel were surprised by the identifications by Colleen Duncan and Guggenheim. If so, there would have been no reason for counsel to specifically move to exclude any in-court identification by Sue Kovec, Guggenheim, or Colleen Duncan. RD 971.

Citing no case, the State simply asserts then-extant law supported the admissibility of hypnotically refreshed testimony. AB 10. There was case law at the time of trial speaking to the issue held that statements made while under hypnosis were inadmissible. See Rodriguez v. State, 327 So.2d 903 (Fla. 3d DCA 1976); Shockey v. State, 338 So.2d 33 (Fla. 3d DCA 1976).

The State does not answer our argument that the in court identifications should be suppressed because hypnosis together with the suggestive photo display and viewing of the press photos

irretrievably tainted the witnesses' memories.[1]

At AB 10 the state claims financial considerations restrained counsel's investigation. But counsel representing an indigent defendant has a duty to seek funding to make a reasonable investigation. See United States v. Fessel, 531 F.2d 1275, 1279 (5th Cir. 1976); United States v. Edwards, 488 F.2d 1154, 1164-5 (5th Cir. 1974). This principle includes funding for expert assistance to understand and attack hypnotically refreshed testimony. See Little v. Armontrout, 835 F.2d 1240 (8th Cir. 1987).

The State contends that the failure to call the eyewitnesses to testify at the suppression hearing did not matter since it was cumulative to Salerno's testimony about the lineup. AB 13. Salerno established the photo display was suggestive, but other available evidence undermining the identification was not presented.

At AB 13-4 the state says counsel acted reasonably by relying on cross examination to expose the weakness of the eyewitness identifications. This is a strategy that did not exist. Counsel's undisputed testimony at post-conviction was that they sincerely hoped to suppress the in-court identifications. RP 152 (Heffernan), 300, 302-3 (Rabinowitz). They filed two suppression motions and held a hearing. The State's argument adopts the hindsight the Supreme Court decries in Strickland v. Washington, 466 U.S. 668, 689 (1984) and Kimmelman v. Morrison, 477 U.S. 365, 386-7 (1986).

---

[1] The State also misses this point by arguing counsel would not have wanted to suppress the lineup because it could impeach the witnesses at trial. The suppression motion attacked in-court identifications, not just the identifications made at the lineup.

See Harris v. Reed, 894 F.2d 871, 878 (7th Cir. 1991) (hindsight cannot be used to construct an excuse for errors).

The State argues that the hypnosis sessions did not affect the witnesses' previous statements and therefore the identifications would be admissible, citing Bundy v. State, 455 So.2d 330 (Fla. 1984). This Court refused to address the problems of hypnosis in Bundy I because the witness had testified it had no effect. This record is to the contrary, as discussed in the Initial Brief.

At AB 12, the State claims that the photo display was not unnecessarily suggestive, but does not distinguish the many cases cited at IB 38 holding multiple photos of a suspect in a lineup is unnecessarily suggestive.[2] Other case law supports the arguments made in the Initial Brief.[3]

---

[2] See also Dispensa v. Lynaugh, 847 F.2d 211, 220 (5th Cir. 1988) (when victim told to expect suspect to be present in restaurant and suspect walked by victim three times with police escort on last occasion, procedure unnecessarily suggestive requiring habeas corpus be granted); Thigpen v. Cory, 804 F.2d 893, 896 (6th Cir. 1986) (when witness saw robbery suspect at police lineup without selecting him and then as spectator at later court appearances, repeated viewing after indication of police suspicion made identification unreliable).

[3] In O'Brien v. Wainwright, 738 F.2d 1139, 1141 (11th Cir. 1984) and Passman v. Blackburn, 652 F.2d 559, 570 (5th Cir. 1981), the courts held that photo displays consisting of numerous black and white snaps and a color photo of the defendant were unnecessarily suggestive. Other singularities of photos impermissibly suggest the depicted person is the suspect. See Young v. Herring, 917 F.2d 858, 863 (5th Cir. 1990) (lineup was suggestive when photo had name which the witness knew was suspect's name and was only one with glasses and clean shaven of that age). The combination of the singular driver license photo with a name on it, the color photo when only 3-4 others of the 40 plus photos were in color, and the repetitious photos impermissibly made Mr. Sims stand out "like the proverbial 'sore thumb.'" Passman, 652 F.2d at 570.

Shackling.

The State argues Mr. Sims' shackling could have been raised on direct appeal and so is not cognizable as an ineffective assistance claim. This is not the law. The issue could not have been raised on appeal because trial counsel did not preserve it.

Restriction on cross examination.

Appellant relies on the Initial Brief, with one exception. The state raised no objection to the evidence of prejudice shown at the post-conviction hearing, but now says some prejudice proven at that hearing was not alleged. AB 16. The post-conviction judge found no such bar. The state did not object on this ground below. The technical objection raised for the first time here by the state, that some of the prejudice proven was not specifically alleged in the 3.850 motion, is waived. See Rule 1.190(b), Florida Rules of Civil Procedure ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings....").

Judicial Comments.

The State distorts the claims relating to the court's comments. Mr. Sims argues not only that the trial judge showed bias against defense counsel, but also that he restricted counsel from performing their jobs and commented upon the evidence.

The citation to Lambrix v. Dugger, 559 So.2d 1137 (Fla. 1990) for the proposition that comments by the court could be raised on direct appeal shows the distinction here. The defendant in Lambrix

argued a juror was improperly seated; this Court noted the record revealed all the facts relied upon. Not so here.

Prosecutorial Comments.

This Court's decision on direct appeal not to find prosecutorial misconduct fundamental error is no bar to raising the issue as an ineffectiveness claim. Refusing to find fundamental error does not mean this Court decided there was no error.

As a strategy for not objecting, the State relies on Heffernan's statement he thought it important to prepare his closing argument. But Heffernan's responses to particular questions about the prosecutor's closing shows his actions were not strategic. He openly admitted to making errors from "ignorance" or, in the case of the prosecutor's assertions about Sims running with Baldree, in the mistaken belief evidence was in the record which was not. RD 191-96

In its final paragraph, the State makes allegations not contained in the record, claiming counsel succeeded in suppressing "the fact that Sims has a bullet in his thigh." AB 25. The trial court did refuse the State's request to surgically investigate and remove what the State believes to be a bullet in Mr. Sims; however, there is no evidence in any record that a bullet is actually in his thigh. This Court has a duty to ignore this unsupported and unprofessional nonrecord allegation. See Jackson v. State, 575 So.2d 181, 193 (Fla. 1991). Nor does a single competent act magically change ineffective performance into effective performance. See Kimmelman, 477 U.S. at 385-7 (counsel ineffective

for not suppressing bedsheet; proficient trial performance does not affect that finding).

POINT II

THE USE OF UNCONSTITUTIONALLY UNRELIABLE HYPNOTICALLY INDUCED TESTIMONY.

The State argues this claim is barred from consideration in a 3.850 motion because it should have been raised on direct appeal. However, this error is fundamental and can be raised now. When identification testimony has been rendered unreliable by suggestive police procedures, using that testimony is fundamentally unfair and deprives the defendant of basic due process. See Foster v. California, 394 U.S. 440, 442 (1969); Carter v. State, 366 So.2d 54, 57 (Fla. 2d DCA 1978); Baxter v. State, 355 So.2d 1234, 1237 (Fla. 2d DCA 1978). Fundamentally erroneous due process violations can be raised to attack convictions collaterally. See Clark v. State, 336 So.2d 468 (Fla. 2d DCA 1976), aff'd 363 So.2d 331 (Fla. 1978); Gonzalez v. State, 432 So.2d 171 (Fla. 3d DCA 1983); Young v. State, 177 So.2d 345 (2d DCA 1965). This Court has considered a collateral attack alleging that suggestive police procedures led to unreliable evidence at trial, rejecting the claim on its merits. Fuller v. Wainwright, 238 So.2d 65, 66 (Fla. 1970).

POINT III

THE PROSECUTOR'S KNOWING USE OF PERJURED TESTIMONY, AND HIS FAILURE TO DISCLOSE THE ACTUAL BARGAIN EXTENDED TO JAMES HALSELL FOR HIS TESTIMONY.

Contrary to what the state says, Brady/Giglio claims such as the one presented here have long been held to be cognizable post-conviction. Arango v. State, 467 So.2d 692 (Fla.), vacated 474 U.S. 806 (1985), on remand, 497 So.2d 1161 (Fla. 1986); Aldridge v.

State, 503 So.2d 1257, 1258-59. The post-conviction court recognized such, ruling directly on the merits of the claim contrary to the same objection. Order at 11. The state cannot avoid responsibility for its presentation of perjured testimony on this procedural ground.

The state misstates that "both defense attorneys testified that they were well aware of Halsell's deal." AB 27. A look at the record citation provided for this proposition shows otherwise. (RP 162-77, 316). Trial counsel knew there was a deal but were misled as to its true nature. They did not know: (1) that "everyone knew" Halsell would actually get two years; (2) that Halsell had not been sentenced; and that (3) the state attorney and lead detective on the case would speak on Halsell's behalf for a reduction in sentence. These material misrepresentations portray an entirely different view of Halsell's interest in testifying to the state's satisfaction than what the jury was told existed by the prosecutor: Halsell "is a witness for the state, who is under a sentence for armed robbery." RD 236 (opening); "You think a man would put himself in State Prison for ten years for a crime he didn't commit?" RD 741 (closing).[4]

POINT IV

THE PROSECUTION DELIBERATELY WITHHELD EXCULPATORY DOCUMENTARY AND TESTIMONIAL EVIDENCE.

The state points the finger at defense counsel for not knowing it played unfairly in withholding a significantly exculpatory

---

[4] Trial counsel Heffernan described the enhanced impeachment value of the circumstances as opening "a completely different door". RP 175-76.

document and related testimony. It says defense counsel had "equal access" to the smoking gun receipt showing Terry Wayne Gayle purchased lockpullers with Gene Robinson from the same "private detective agency" which sold the lockpullers used in the case at bar. That is just not so. Detective Salerno visited the detective agency, and picked up the receipt on April 14, 1978, early on in the case: "Yes ... that's the date I took the documents." RPC 23. Defense counsel both testified no such receipt was in their file, even though their investigator had also visited the agency. RP 318.

It is evident defense counsel had no "equal access" to the receipt, because by the time counsel appeared, it was no longer at the "detective agency". The indictment in the case was handed down April 12, 1978. RD 843-845. No counsel was even appointed on this case until Mr. Sims was returned to Seminole County in the days following his waiver of extradition from California on June 27, 1978. RD 855. Salerno had picked up the documents in question on April 14, 1978. By the time the defense investigator (much less a defense attorney) arrived on the scene, the receipt was not at the "detective agency", it was in the files of the lead detective, Ralph Salerno.

The state also says such a document would not have been admissible, but clearly it would have been, as briefed more fully in the Initial Brief, pages 77-79. "It is error to deny the admission of evidence that tends, in any way, to prove the defendant's theory of innocence of the offense charged." Billeaud v. State, 578 So.2d 343 (Fla. 1st DCA 1990). In particular, "where

evidence tends in any way, even indirectly, to prove the defendant's innocence, it is error to deny its admission. See Watts v. State, 354 So.2d 145 (Fla. 2d DCA 1978)." Chandler v. State, 366 So.2d 64, 70 (Fla. 2d DCA 1979).

Detective Salerno testified he showed pictures of Gene Robinson and Terry Gayle to Joy Russell, a co-owner of the detective agency, and she identified them as the ones who had bought lockpullers from her. RP 23. Detective Salerno also testified he was told by Joy Russell that Robinson accompanied Gayle in purchasing the lock pullers. PCR 25.

The state contends Mrs. Russell would have had to personally testify to the transaction, and leaps to the conclusion the documents and related testimony are inadmissible. But Salerno's statements would be admissible at trial in any event. The defense has shown the state's agent would have testified to an out of court identification by a witness, a hearsay exception admissible under Section 90.801(2)(c), as an "identification of a person made after perceiving him." To meet that exception, the declarant (Joy Russell) would have to testify. Section 90.801(2), Fla. Stat. Regardless of what she said in court about the transaction, once she did testify and was made available for cross-examination, Detective Salerno's testimony that she previously identified Gayle and Robinson as the lock puller buyers would be admissible under the "out of court identification" exception to the hearsay rule. There really is no question. The exculpatory evidence pointing to Terry Gayle, and not Terry Sims, is relevant and admissible.

This physical evidence and related testimony goes directly to the heart of the defense, that Terry Gayle, not Terry Sims, was the person involved in the robbery-murder with Robinson. It is written proof of Gayle's involvement in the same type of crime in the same time period, and depriving the defense of this documentation violates Brady.

POINT V

THE TRIAL JURY, JUDGE, AND REVIEWING COURT WERE LIMITED IN THEIR CONSIDERATION OF MITIGATING CIRCUMSTANCES.

The State apparently concedes there was Hitchcock error in the jury instructions, but argues it was harmless. The disparate treatment of Mr. Sims' codefendants strongly mitigates this offense: see IB 89 n.70. Also the State's evidence showed the mastermind of the entire scheme was not tried.

Although according to the state's theory Mr. Sims shot the victim, the codefendants' treatment still mitigates. In addition to the authorities cited at IB 89, in Eutzy v. State, 458 So.2d 755, 759 (Fla. 1984), this Court plainly held that the disparate treatment of any person who would be a principal in the first degree to a murder can mitigate the sentence. Accord, Dolinsky v. State, 576 So.2d 271 (Fla. 1991)[5] The cases cited by the State at AB 39-40 are inapposite as they do not even discuss the disparate treatment mitigator, except for Demps v. Dugger, 514 So.2d 1092 (Fla. 1987). Demps does not conflict; the error there was harmless

---

[5] See also McCampbell v. State, 421 So.2d 1072, 1073 and 1076 (Fla. 1982) (defendant executed security guard during robbery; disparate treatment of three codefendants who helped rob but not kill and pled to lesser charges could be considered).

because of Mr. Demps' prior murders.

In addition, the State argues the error was harmless as to the judge error, citing Heiney v. Dugger, 558 So.2d 398 (Fla. 1990) and Tafero v. Dugger, 520 So.2d 287 (Fla. 1988). Heiney does not concern the disparate treatment mitigator. Although this Court refused to reverse the Hitchcock error in Tafero despite a claim of disparate treatment, Mr. Tafero waived mitigation.

Mr. Sims also relies on his harmless error argument at IB 87-92, which the State does not address. In addition, the diminished credibility of the primary state witnesses, Halsell and Baldree, about the circumstances of the offense could influence the sentencing decision.[6] In this case, the State's primary witnesses were Halsell and Baldree, both drug addicts who gained their freedom in face of murder charges by testifying as they did. The jury could reasonably disbelieve their accounts.

The State contends this Court ruled on the restriction by the trial judge of mitigation on direct appeal and need not do so again. AB 41. But case law squarely holds this Court's prior decision is no bar to raising the trial judge's restricted consideration of mitigation now. This Court has repeatedly held that Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) changed the law sufficiently to require Florida courts

---

[6] See Douglas v. State, 575 So.2d 165, 167 (Fla. 1991) ("The State's primary witness was the wife of the victim. The credibility of her testimony concerning the circumstances surrounding this murder could have reasonably influenced the jury's recommendation."); see also Downs v. State, 572 So.2d 895, 899 (Fla. 1990) (error to excluded penalty phase testimony establishing alibi for defendant as it related to circumstances of the offense).

to address Hitchcock claims on their merits despite otherwise valid procedural defaults,[7] and that it will reach the issue even if it previously rejected an identical claim on its merits in a prior proceeding. Ziegler, 524 So.2d at 420; see Downs, supra.

The State at AB 42 contends that this Court's prior review was not flawed by reliance on the trial court's order and urges this Court to conduct its own findings of fact on the mitigating circumstances. The State contends this Court found on direct appeal that the misapplication of the aggravating circumstances was harmless and so still is harmless. This argument is circular. On direct appeal, this Court explicitly relied on the finding of no mitigators to declare the errors harmless. See Sims v. State, 444 So.2d 922, 926 (Fla. 1983). But that finding relied on the flawed sentencing order. The State also says that since the trial court found seven aggravators, any error on mitigation is harmless. This overlooks this Court's finding that the trial court erred in finding three of these aggravators: the finding of the heinousness aggravator (HAC), and the doubling of two aggravating circumstances

---

[7] See Hall v. State, 541 So.2d 1125, 1126 (Fla. 1989); Riley v. Wainwright, 517 So.2d 656, 659 (Fla. 1987); Cooper v. Dugger, 526 So.2d 900, 901 (Fla. 1988); Thompson v. Dugger, 515 So.2d 173, 175 (Fla. 1987); Ziegler v. Dugger, 524 So.2d 419, 420 (Fla. 1988); Downs v. Dugger, 514 So.2d 1069, 1070 (Fla. 1987).

Alternately, Mr. Sims notes this Court has held that restriction of mitigating evidence in a capital sentencing is fundamental error that may be raised at any time. See Riley, 517 So.2d 656, 660 n.2 (Fla. 1988) ("Moreover, this Court implicitly has recognized that exclusion of any relevant mitigating evidence affects the sentence in such a way as to render the trial fundamentally unfair. See Harvard [v. State, 486 So.2d 537 Fla. 1986)](remanded for resentencing on appeal of trial court's denial of post-conviction relief even though same claim had been rejected on direct appeal).")

into four. In addition, the trial court improperly found a great risk to others.[8]

POINT VI

COUNSEL'S INEFFECTIVE REPRESENTATION RENDERS MR. SIMS' DEATH SENTENCE UNLAWFUL.

The State argues Mr. Sims' counsel investigated reasonably since Mr. Sims forbade them from talking with his family. This mischaracterizes the record and relies on distinguishable cases. Lead counsel testified that he believed Judge Waddell would not impose a death sentence, and this belief "played some role in my lack of significant diligence" in investigating the penalty issues. RP 232. Counsel admitted almost all of the penalty investigation was done after the conviction. Although Mr. Sims was not forthcoming to requests for information, lead counsel admitted the need for such evidence was not fully explained. RP 229. Although Mr. Sims did not volunteer information, at booking, he had provided the name, address, and phone number of his sister, Claudette

---

[8] This Court, while not explicitly striking the aggravator that Mr. Sims knowingly created a great risk of death to many people, did not recite that aggravator as one properly found in its prior harmless error analysis. Sims, 444 So.2d at 926. If this Court does perform its own harmless error analysis, it should again refuse to use this aggravator. The State's theory at trial was that Mr. Sims shot and killed Pfeil at the front of the pharmacy. There was no showing that anybody beyond the robber, Pfeil, and perhaps Guggenheim were in the line of fire. Nobody other than the robber and Pfeil were shot at all. In similar circumstances, this Court has struck the great risk to others aggravator and should do so here. See Williams v. State, 574 So.2d 136, 138 (Fla. 1991) (defendant created some risk but not great risk by shooting security guard in bank robbery with customers present, but no immediate and present risk such as shooting indiscriminately in customers' direction); Hallman v. State, 560 So.2d 223, 225-6 (Fla. 1990) (great risk did not exist although gunfight with bank guard occurred in busy thoroughfare).

Meadows. RD 847. This information was readily available to counsel had they looked.

Further, contrary to the State's contention, counsel must investigate mitigation, even if the client says he does not want to use some particular evidence. As the recent case of Blanco v. Singletary, 5 F.L.W.Fed. C1685, 1696-7 (11th Cir. Sept. 30, 1991), holds, counsel cannot advise and clients cannot intelligently decide what evidence to use until reasonable investigation is complete. This Court agreed with this holding in State v. Lara, 581 So.2d 1288 (Fla. 1991).

The State relies on Eutzy v. State, 536 So.2d 1014, 1016 (Fla. 1989), where this Court held counsel reasonably abandoned investigation into the defendant's background in the belief other damaging evidence would come out. Here, both counsel testified they would have used the evidence presented at post-conviction had they known of it. RP 205 (Heffernan), 330-1 (Rabinowitz).

Although it is true that the Supreme Court overruled part of Booth v. Maryland in Payne v. Tennessee, 111 S.Ct. 2597 (1991), this is irrelevant to the ineffectiveness argument about victim impact. It is still the law in Florida that only evidence relevant to a statutory aggravating circumstance should be admitted at penalty. Mr. Sims relies at IB 97 on well-established Florida law that such argument and evidence was improper.[9]

---

[9] The State at AB 49 again attempts to construct a nonexistent strategy for counsel not to object to the victim impact testimony. Constructing such a strategy is improper use of hindsight. See Strickland, supra; Kimmelman, supra; Harris, supra. Counsel did not object because he was ignorant of the law, RP 210.

Contrary to the State's contention at AB 51, Mr. Sims did raise counsel's ineffectiveness for not objecting to the 1958 robbery conviction relied upon by the trial court. RP 824.

CONCLUSION

For these reasons, Mr. Sims respectfully moves this Court vacate his judgments of guilt for first degree murder and robbery and vacate his sentence of death, and remand for further proceedings not inconsistent with its opinion.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
Governmental Center/9th Floor
301 North Olive Avenue
West Palm Beach, Florida 33401
(407) 355-4328

STEVEN H. MALONE
Assistant Public Defender
Capital Crimes Division
Florida Bar No. 305545

ERIC M. CUMFER
Assistant Public Defender
Florida Bar No. 764663

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by United States Mail to Kellie Nielan, Assistant Attorney General, Department of Legal Affairs, 210 North Palmetto Avenue, Daytona Beach, Florida 32114, this 19th day of December, 1991.

Of Counsel