IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,623

JAMES FRANKLIN ROSE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE SEVENTEENTH JUDICIAL CIRCUIT COURT,
IN AND FOR BROWARD COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENT I

The State does not dispute that time was the defense theory at Mr. Rose's trial.[1] In fact, the State's brief agrees, "The State's case was circumstantial, and the time of death was a critical element, so Mr. Bush 'tailored [the] defense to make time critical'" (Answer Brief at 7, quoting testimony of trial counsel). The State also does not dispute that the time witnesses presented at the evidentiary hearing testified consistently with their statements to police at the time of the homicide. The State also does not dispute that the trial court did not make any findings against the credibility of the time witnesses. The State has not said that these witnesses lied or were wrong. The State does not dispute that Mr. Rose's jury never heard what the time witnesses had to say.

The State does not address what the evidence from the time witnesses shows--i.e., that Mr. Rose could not have committed this offense. Instead of dealing with the true import of this evidence and considering that perhaps the State made a mistake in its prosecution of Mr. Rose, the State falls back on inaccurate representations of the record and on trial counsel's excuses and inaccurate testimony.

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[1]The State's brief is very confusing because it does not address the issues as they are presented in Mr. Rose's appeal. This reply brief will address the issues as they are presented in Mr. Rose's appeal.

The question presented here is simple. If an attorney says that he had a justification for his actions at trial--no matter how unreasonable that justification is, no matter how inaccurate counsel's memory is--is that the end of an ineffective assistance of counsel claim? In this case, where counsel had a theory of defense but did not call the very witnesses who could support that theory, counsel's actions were unreasonable and resulted in ineffective assistance.

The State relies on trial counsel's testimony that he decided to elicit the time inconsistencies through cross-examination of state witnesses (Answer Brief at 7). The State provides no citation from the trial record showing where trial counsel did this. No such citations exist. Trial counsel testified that he asked the detectives to whom the time witnesses gave statements about the statements (PC-R2. 263). Trial counsel testified that he asked Detective McClellan about the statements: "And that's what I did through the other witnesses. . . . Detective McLellan, you have a police report in your hand that said that Lisa Lynne Berry was alive at 11:45 and he had to answer yes and that's the way we did it" (PC-R2. 246).[2] No such question appears in the record of Detective McClellan's trial testimony. None of the detectives who testified were questioned regarding the time witnesses' statements. Thus, trial counsel's justification of his actions is wholly contrary to the record.

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[2]Trial counsel did not offer any explanation for how such hearsay testimony would be admissible, nor does the State in this appeal.

The State argues that trial counsel did not want to present the time witnesses -- the only witnesses who supported the defense theory -- because some of them did not like Mr. Rose and because some of them could also provide some damaging testimony (Answer Brief at 11-14). As was made clear at the evidentiary hearing, the time witnesses testified consistently with their police statements regardless of their dislike of Mr. Rose. Further, the State glosses over the fact that all of the damaging information observed by these witnesses was brought out repeatedly through numerous state witnesses at trial (See Initial Brief, pp. 13-16). Trial counsel's testimony in this regard was also inaccurate. According to trial counsel, only "one or two [state witnesses] testified to the blood on his pants" (PC-R2. 243-44). Actually, five (5) lay witnesses and two (2) police officers testified to seeing blood on Mr. Rose's pants, two (2) other police officers testified to questioning Mr. Rose about the blood on his pants, and two (2) forensic experts testified about the blood on Mr. Rose's pants (See Initial Brief, pp. 13-14). The State contends that even if this testimony came out from other witnesses, trial counsel "did not want his defense witnesses to bolster the State's case (PC-R2. 245-47)" (Answer Brief at 15). Trial counsel's testimony on the transcript pages cited by the State does not discuss any concern about "bolstering" the State's case. Rather, in that testimony trial counsel inaccurately testified that he brought out the time witnesses' statements through cross-examination of the detectives

(PC-R2. 246). Again, trial counsel's recollection was inaccurate, and his decisions were unreasonable -- the only witnesses who could support the theory of defense were not called to testify, while all the damaging testimony came out from numerous State witnesses.

The State contends that trial counsel wanted to preserve the opportunity to present the final closing argument in order to argue unrebutted that the murder was committed by a boy named Tommy Vicors (Answer Brief at 18). However, as the State itself recognizes, "Tommy was only at the bowling alley a few minutes, he was not seen leaving with Lisa, he did not have Lisa's blood or blouse in his van, and he had a solid alibi" (Id.). In fact, trial counsel testified regarding the Tommy Vicors theory, "That dog was not going to hunt" (PC-R2. 259-60). Again, trial counsel's actions were unreasonable.

The State argues that the time witnesses departed from their police statements in their depositions (Answer Brief at 15). First, trial counsel did not testify that all of the time witnesses testified differently at deposition. Trial counsel testified that he believed Fay Grebowski, Walter Isler and John Hass departed from their police statements at their depositions (PC-R2. 242). So even if these three (3) witnesses testified differently at deposition (they did not, See infra), there were still five (5) other witnesses who did not depart from their police statements. Further, even these witnesses did not testify differently at deposition. Again, trial counsel's testimony was

not accurate. Walter Isler was not asked a single question at his deposition regarding what time he saw Mr. Rose or the victim (Deposition of Walter Isler, State v. Rose, Cir. Ct. No. 76-5036-CF). John Hass testified in his deposition to exactly the same thing he said in his police statement. In his police statement, Mr. Hass said that when Mr. Rose left the bowling circle at 10:05 p.m., the victim was still there and that Mr. Hass last saw the victim at 10:30 p.m. (Def. Ex. 22). In his deposition, Mr. Hass testified that the victim was still in the bowling circle when Mr. Rose left at 10:05 p.m. and that Mr. Hass last saw the victim at 10:30 p.m. (Deposition of John Hass, pp. 10, 13, State v. Rose, Cir. Ct. No. 76-5036-CF). In her police statement, Fay Grebowski said she last saw the victim at 11:00 p.m. (Def. Ex. 19). At deposition, Ms. Grebowski did not retract this statement, but simply said she was "shook up" when she made it (Deposition of Fay Grebowski, p. 25, State v. Rose, Cir. Ct. No. 76-5036-CF). Again, trial counsel's testimony regarding the time witnesses was inaccurate.

By misrepresenting the evidentiary hearing record, the State attempts to argue that Mr. Rose was somehow responsible for trial counsel's unreasonable decisions. For example, the State contends, "[Trial counsel] consulted with Appellant regarding the problems with each potential defense witness" (Answer Brief at 7, citing PC-R2. 168-69). Trial counsel's actual testimony was that when he discussed the case with Mr. Rose, Mr. Rose **"deferred"** to counsel's decisions (PC-R2. 168). Counsel did not testify that

Mr. Rose was directing the case, nor that he and Mr. Rose did not get along. Rather, according to counsel's testimony, Mr. Rose did exactly what a client is supposed to do--rely on his attorney to handle the case.

The State argues that the time witnesses "could have [been] seriously impeached" (Answer Brief at 15). However, the State gives no examples of this supposedly devastating impeachment. The witnesses testified at the evidentiary hearing and were not impeached there. Even the State's brief recognizes that these witnesses were not friends of James Rose--many of them disliked him--and had no reason other than telling the truth to give testimony favorable to Mr. Rose.

The State also does not address the fact that the lower court did not read the trial record.[3] The record clearly shows the evidentiary hearing judge was not familiar with the trial record (PC-R2. 193 ["Unfortunately I'm not acquainted with the record, nor was I present when the record was being made"]; PC-R2. 233 ["Well, you have had the benefit of that record which I haven't"]). Thus, the lower court had no way to assess the accuracy of trial counsel's testimony regarding what occurred at trial.

Trial counsel's justifications for his actions at Mr. Rose's trial were unreasonable. The only witnesses who could support the defense theory were not presented to the jury. Instead, counsel waited until his final argument to present a defense when

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[3]The evidentiary hearing judge was not the trial judge.

counsel knew "that dog was not going to hunt." "[M]erely invoking the word strategy to explain errors [is] insufficient since" decisions must be assessed for reasonableness. Horton v. Zant, 941 F.2d 1449, 1461 (11th Cir. 1991).

Finally, the State baldly asserts that Mr. Rose has not established prejudice regarding the time witnesses (Answer Brief at 15-16). As the State agrees, however, the case against Mr. Rose was circumstantial. The time witnesses possessed the only evidence which could show that the circumstantial evidence was not the result of Mr. Rose murdering the victim. The time witnesses' testimony shows that Mr. Rose could not have murdered the victim because she was still alive after the only time period when Mr. Rose could have committed the crime. Moreover, time was the theory of defense at trial, as the State also agrees.

Under Strickland v. Washington, 466 U.S. 668 (1984), counsel's deficient performance is prejudicial if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. The United States Supreme Court has recently made it clear that "a defendant need not establish that the attorney's deficient performance more likely than not altered the outcome" and that the reasonable probability standard "is not a sufficiency of evidence test." Kyles v. Whitley, 115 S.Ct 1555, 1566 (1995).[4] That is, to establish prejudice, Mr. Rose does not

[4]Although Kyles is a Brady case, the Strickland prejudice standard and the Brady materiality standard are the same. Kyles, 115 S.Ct. at 1566.

have to show that there is insufficient evidence to convict, but that the evidence which was not presented at trial "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. Here, the unpresented evidence that the victim was seen alive by numerous people after the only time when Mr. Rose could have committed the offense puts the case in an entirely different light, showing that Mr. Rose could not have committed the offense. Mr. Rose is entitled to a new trial.

ARGUMENT II

The State agrees that resentencing counsel had never handled a capital case (Answer Brief at 26), that counsel sought a continuance of the resentencing which was denied (id.), that resentencing counsel did not obtain any school or hospital records or seek the assistance of a mental health expert (id. at 27), and that resentencing counsel agreed that evidence of organic brain damage, low intelligence, mental deficiencies caused by long-term alcohol abuse, and poor performance in school would have been helpful in presenting mitigation (Id. at 27-28). However, despite this clear proof of resentencing counsel's ineffectiveness, the State contends that resentencing counsel was not ineffective because "he did everything he could do in 65 days" and because resentencing counsel allowed an attorney who was not appointed as Mr. Rose's counsel to distract resentencing counsel from investigating and presenting mitigation. The

State's arguments are unpersuasive, and Mr. Rose is entitled to resentencing.

Although the State attempts to blame Mr. Rose for resentencing counsel's failures, the State fails to point out that, with one exception, resentencing counsel did not testify that Mr. Rose prevented him from investigating or presenting any mitigating evidence.[5] Rather, resentencing counsel testified that he was "sidetracked . . . to some degree" by Louis Carres's and Mr. Rose's interest in developing an accidental death theory (PC-R2. 321). However, resentencing counsel believed the focus of the resentencing should be on developing "other areas of mitigation," but he could only do as much as time allowed (PC-R2. 322). Thus, despite knowing that he should develop mitigation, resentencing counsel permitted an attorney who was not appointed as Mr. Rose's counsel to "sidetrack" counsel from preparing for the resentencing. This is unreasonable attorney performance.

The State also argues that Mr. Rose has not established prejudice because this Court has already determined that Mr. Rose's death sentence would have survived a jury override (Answer Brief at 33). What the State fails to understand is that this Court made this statement based on the then-existent record, not on the basis of the mitigation that was not presented at resentencing. As set forth in detail in Mr. Rose's initial

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[5]The only matter which resentencing counsel testified that Mr. Rose prevented him from presenting was a certificate given Mr. Rose by a prosecutor when Mr. Rose thwarted a crime (PC-R2. 321).

brief, the available mitigation which was not presented at resentencing would have precluded a jury override (See Initial Brief, pp. 21-34, 50-53).

Also as to prejudice, the State argues that the "evidence in mitigation pales in comparison to the aggravating factors" (Answer Brief at 33). The aggravating factors were that Mr. Rose had a prior violent felony conviction, was on parole at the time of the offense, and that the murder occurred during a kidnapping. These aggravators are not aggravators such as heinous, atrocious or cruel and cold, calculated and premeditated which this Court has recognized as the most serious. Further, this Court has found prejudice established based on mitigation similar to that present in Mr. Rose's case even in cases with numerous aggravating factors (See Initial Brief, p. 52 & n.11, citing and discussing cases where prejudice was found).

Mr. Rose was deprived of the effective assistance of counsel at his resentencing. Resentencing counsel was not given sufficient time to prepare for resentencing and unreasonably allowed an attorney who was not Mr. Rose's counsel to distract him from preparing mitigation. The available mitigation establishes that Mr. Rose was prejudiced by counsel's omissions.

ARGUMENT III

Although the State has attempted to obscure it, Mr. Rose's claim is straightforward. At resentencing, the defense requested that the jury be instructed on the definitions of premeditated murder and felony murder so that the jury would understand the

basis of Mr. Rose's conviction and therefore his level of culpability. The basic premise of this argument is that in order to reach a reliable and individualized capital sentencing decision, the jury must be given accurate information. This is also the premise of cases such as Espinosa v. Florida, 112 S. Ct. 2926 (1992), and James v. State, 615 So. 2d 668 (Fla. 1993), as well as numerous other cases regarding penalty phase jury instructions.

The State agrees that this claim was presented on direct appeal, but argues that since the claim was presented on direct appeal, it should not be reconsidered (Answer Brief at 35). The State fails to recognize that there are exceptions to the rule that claims raised on direct appeal will not be reconsidered in post-conviction. One such exception occurs when a claim meets the procedural requirements set forth in James. Mr. Rose's claim meets those requirements: the claim was preserved at resentencing and raised on direct appeal. Cases such as Espinosa and James now show that Mr. Rose's resentencing and direct appeal claim was correct. Thus, as in James, fairness requires that the claim be reconsidered.

The State contends that the claim is without merit because lingering doubt is not a valid mitigating circumstance (Answer Brief at 35-36). According to the State, Mr. Rose's argument is an impermissible attempt to negate guilt at resentencing (Id. at 36). However, this is not a lingering doubt claim. Mr. Rose did not ask that the jury be instructed to reconsider his guilt, but

that the jury be given sufficient information to understand what kind of guilt had been found in the prior trial. The discussion in Mr. Rose's initial brief regarding the trial evidence[6] and the circumstantial nature of the State's case shows that Mr. Rose's conviction could only have been based on a felony murder theory, not on premeditated murder. However, the resentencing jury was not informed of the two different kinds of first degree murder. Rather, the jury was read the indictment and told that Mr. Rose had been convicted on the charge that "he did unlawfully and feloniously and from a premeditated design to effect the death of a human being, known as Lisa Berry, did kill and murder her" (S. 80). Thus, Mr. Rose's jury was provided inaccurate information that Mr. Rose had been convicted of premeditated murder.

The State argues that evidence regarding the facts of the crime is admissible at resentencing only to support aggravating factors or negate mitigating factors (Answer Brief at 36). This position is contrary to law. The facts of the offense can also negate aggravation and support mitigation. A capital sentencing jury must be allowed to "consider[], as a mitigating factor, . . . the circumstances of the offense as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978).

The State also argues that a defendant's degree of culpability is not a sentencing consideration unless there are

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[6]The resentencing jury was read the entire transcript of the guilt phase of Mr. Rose's trial.

codefendants involved (Answer Brief at 36). This argument, too, is contrary to common sense and to the law. Jurors' common sense tells them that a planned murder is more reprehensible than a murder which was the unplanned result of another felony. Indeed, this Court has expressly recognized that felony murder and premeditated murder involve different levels of culpability and that these differing levels of culpability have an effect upon the capital sentencing decision. Jackson v. State, 575 So. 2d 181, 190-93 (Fla. 1991). See also Breedlove v. State, 595 So. 2d 8, 12 (Fla. 1992) ("A strong presentation of mitigating evidence is more likely to tip the scales in a case where the killing was not premeditated"); Proffitt v. State, 510 So. 2d 896, 898 (Fla. 1987) (not "every murder during the course of a burglary justifies the imposition of the death penalty").

The resentencing jury was not allowed to consider on what basis the guilt phase jury rested their findings of guilt as to kidnapping or first degree murder. The jury was "precluded from considering, as a mitigating factor, . . . the circumstances of the offense [which Mr. Rose proffered] as a basis for a sentence less than death." Lockett, 438 U.S. at 604. Mr. Rose's sentence violates the Eighth and Fourteenth Amendments.

ARGUMENT V

Before the circuit court and now before this Court, Mr. Rose argued that the procedure by which special assistant public defenders and expert witnesses are appointed to handle capital cases and the manner in which they are funded in Broward County

creates an irreconcilable conflict of interest in violation of Mr. Rose's rights under the United States and Florida Constitutions (See PC-R2. 919-28; Initial Brief of Appellant, Argument V). The basis for the claim was discovered only after this Court remanded Mr. Rose's case to the circuit court, and the claim was presented in a Supplemental Motion to Vacate Judgment and Sentence. The circuit court never ruled on the claim.

In another Broward County case in a nearly identical procedural posture, the State (represented by the same branch of the Attorney General's office which represents the State in Mr. Rose's appeal) conceded the need for an evidentiary hearing on the Broward County funding claim. State v. Rivera, No. 86-11716CF10 (17th Cir., Broward County). In Rivera, the defendant presented the Broward County funding claim in a supplemental Rule 3.850 motion (Attachment A to Appellant's Motion to Relinquish Jurisdiction and Hold Appeal In Abeyance filed August 11, 1995), after the circuit court had ordered an evidentiary hearing. At the evidentiary hearing, the State stipulated that the Broward County funding claim required an evidentiary hearing, and the court ordered an additional evidentiary hearing in order to address the funding claim (Attachment B to Appellant's Motion to Relinquish Jurisdiction).

The identical claim presented in Rivera was presented in Mr. Rose's case. As the State conceded in Rivera, Mr. Rose is entitled to an evidentiary hearing.

REMAINING CLAIMS

As to the other claims presented in this appeal, Mr. Rose relies on his initial brief.

CONCLUSION

Based upon this discussion herein and in his initial brief and upon the record, Mr. Rose respectfully requests that the Court grant him the relief he seeks.

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by Federal Express, to all counsel of record on September 27, 1995.

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