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IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,528

MICHAEL T. RIVERA,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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SUMMARY OF ARGUMENTS IN REPLY

1. The trial court erred in denying Mr. Rivera's motion to disqualify the judge. Judge Ferris explicitly stated that not only had he already decided that Mr. Rivera's conviction and sentence should not be vacated and/or reduced, he stated that his opinion could not be changed. The trial court's expressed prejudgment of the very issue before it would cause Mr. Rivera, or, for that matter, any reasonable person, to fear that he would not receive fair hearing. (Initial Brief Claim I)

2. The failure of the jury to hear the alibi testimony of Mark Peters rendered Mr. Rivera's conviction and sentence constitutionally infirm. The State cannot avoid consideration of the effect of this constitutional omission by asserting one constitutional error as a defense to another constitutional error. Mr. Rivera was prejudiced by this error. (Initial Brief Claims II, III, and X).

3. The trial court improperly denied Mr. Rivera's penalty phase ineffective assistance of counsel claim without an evidentiary hearing. Unpresented additional mitigating evidence offering a separate grounds for a statutory mitigating factor is not cumulative merely because another grounds for that factor has been presented. The additional grounds increases the weight given to the factor. The additional non-statutory mitigation alleged by Mr. Rivera was neither insignificant, nor cumulative. In Mr. Rivera's case, there is a reasonable probability that the weight of this additional evidence would have resulted in a lesser sentence. (Initial Brief Claim IV).

4. Where new facts reveal constitutional error, that error must be analyzed in conjunction with existing error previously considered harmless. Moreover, when new facts reveal that previously rejected assertions of error were meritorious, they must be revisited. (Initial Brief Claim XX)

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ARGUMENT I

MR. RIVERA'S MOTION TO DISQUALIFY SHOULD HAVE BEEN GRANTED.

While Appellee devotes a number of pages setting out in great detail most of the allegations in Mr. Rivera's motion(s) to disqualify Judge Ferris and discussing at length why it believes that these facts were legally insufficient to warrant recusal, when it comes to the allegation that Judge Ferris stated that he was inalterably opposed to any reduction or alteration in Mr. Rivera's conviction and sentence, it suddenly turns to summarization of the alleged facts and a perfunctory citation to Suarez v. Dugger, 527 So.2d 190 (Fla. 1988).

Try as it might, the State cannot avoid Judge Ferris's words:

> I am inalterably opposed to any consideration for Executive Clemency and I believe the sentence of the court should be carried out as soon as possible.

(PC-R. 741, 1046). Emphasis supplied.

Judge Ferris's statements are not merely an expression of his opposition to clemency. Unlike in the portion of Suarez cited by Appellee, Judge Ferris specifically stated that his opinion that the conviction and sentence should stand and be carried out immediately could not be changed. Whether Mr. Rivera's conviction and sentence should be vacated and whether the sentence should be carried out were the very questions which Mr. Rivera had presented to Judge Ferris. (Indeed, many of the grounds raised in the clemency petition were similar, if not identical, to the issues presented in Mr. Rivera's Rule 3.850 Motion to Vacate.) It defies rational thought to argue that Mr. Rivera would not have a well grounded fear that Judge Ferris (who had stated that he did not believe that the issues upon which Mr. Rivera sought legal relief were even adequate to merit the governor's mercy and that his mind could not be changed) would fairly consider Mr. Rivera's motion.

This Court's decisions are clear and do not require further discussion in this Reply Brief. Judge Ferris should have disqualified himself because his statements, including that is mind could not be changed, were "sufficient to warrant fear on [Mr. Rivera's] part that he would not receive a fair hearing by [Judge Ferris]." Suarez, 527 So.2d at 192. Judge Ferris's refusal to follow the clear mandates of this Court and to insist on following his own preconceived and "inalterable" opinion that Mr. Rivera deserved to die "as quickly as possible" have delayed Mr. Rivera's right to a prompt resolution of his claims by an impartial tribunal. This Court should not hesitate to order that this matter be remanded to the circuit court for the appointment of a truly impartial judge.

ARGUMENT II

UNPRESENTED ALIBI EVIDENCE ENTITLES MR. RIVERA TO A NEW TRIAL. (INITIAL BRIEF CLAIMS II AND III)

A. The failure of the jury to hear relevant evidence of Mr. Rivera's innocence undermines confidence in the outcome of Mr. Rivera's trial.

Substantial and compelling evidence of Mr. Rivera's innocence was not heard by the jury who convicted him of first degree murder. Appellee, however, contends that this omission was of no significance because of the, "overwhelming evidence against Rivera which included his admissions to various people" (Appellee's Brief at 29) and because the evidence did not establish an alibi. (Appellee's Brief at 27).

Mr. Rivera's "admissions" do not constitute "overwhelming" evidence of anything. While Mr. Rivera made statements to the effect that he had killed Ms. Jazvac, he claimed in those same statements to have used ether to subdue Ms. Jazvac and to have had sex with her, causing her to bleed. (R. 1087-1092). The latter claim was demonstrably

false. No evidence of sexual assault, much less penetration, existed. Furthermore, the other portions of his "admissions" consisted almost entirely of facts which were available to anyone who read the newspaper. See Appellant's Brief at 70-71. There was also absolutely no evidence that ether had been used to subdue the victim. Indeed, Mr. Rivera told law enforcement that he had made the story in order to further his sexual fantasies during an obscene phone call. (R.1513-14). Psychological testimony was available to establish that these admissions were fantasies fabricated from newspaper accounts as a result of Mr. Rivera's severe mental disorders. It was only because of the State's ability at trial to place the victim and Mr. Rivera in Mr. Peter's van at or about the time of the murder that these statements had any credibility whatsoever.

Mr. Peters' testimony would have removed Mr. Rivera from the van before Ms. Jazvac was killed. In fact, Mr. Peters' testimony would have removed Mr. Rivera from the van before, Ms. Jazvac was last seen. The State contends that this is of no significance because, even though Mr. Peters' testimony would have established that Mr. Rivera could not have killed Ms. Jazvac prior to picking up Mr. Peters at work, he could have killed her after Mr. Peters had dropped Mr. Rivera off at home and Mr. Peters taken his van with him. Appellee's Brief at 24, 27. What Appellee ignores is that the State contended at trial that hair evidence places Ms. Jazvac in Mr. Peter's van. (R 1305). If victim had not been picked up in the van and murdered before Mr. Rivera picked up Mr. Peters (which would have been impossible under Peters' testimony), but was in the van after Mr. Peters had dropped off Mr. Rivera, Mr. Peters' testimony would not only have established Mr. Rivera's alibi, it would have pointed to another murderer. (From the time of his trial forward, Mr. Rivera has sought to introduce further evidence that someone else murdered Ms. Jazvac. After Mr. Rivera's arrest, another female was sexually assaulted and strangled

with a pair of women's pantyhose of the same brand as those used to murder Ms. Jazvac. Her body was found within feet of where the body of Staci Jazvac was found. She could not have been murdered by Mr. Rivera. See Initial Brief at 95)

The evidence against Mr. Rivera was not "overwhelming" because he did not kill Ms. Jazvac. A jury which knew that, not only were large portions of Mr. Rivera's so-called "admissions" contrary to the physical evidence and that the remaining portions were matters of public knowledge (Initial Brief at 69-71), but also that Ms Jazvac was in Mr. Peters' van, but only after Mr. Rivera had been dropped off by Mr. Peters, would have reached a verdict consistent with that truth. Prejudice under any standard has been established. Strickland v. Washington, 466 U.S. 668 (1984); Brady v. Maryland, 373 U.S. 83 (1963); Jones v. State, 591 So.2d 911 (Fla. 1991).

B. Appellee may not assert one constitutional violation as a defense to another.

While the fact that evidence which demonstrates that an innocent man has been convicted and sentenced to death was not heard by the jury constitutes an enormous "pea", the State nonetheless attempts to hide that "pea" through an elaborate shell game. First, it claims that Peters' testimony isn't "new" because trial counsel, although not the jury, learned of it at the time of trial (Appellee's Brief at 29); then, that trial counsel can't be ineffective because, even though he knew of the value of Peters' testimony, it wasn't trial counsel's fault that Peters left the area without telling anyone were he was going and trial counsel had obtained his deposition (Appellee's Brief at 28); then, that it wasn't a Brady violation because the State didn't know where Peters had gone (Appellee's Brief at 28); and then, that counsel can't be ineffective for failing to move for dismissal based upon pre-indictment delay because the delay wasn't long enough. (Appellee's Brief at 35). Finally,

the State simply ignores Mr. Rivera's claim that trial counsel was ineffective for failing to present sufficient foundation for the admission of Mr. Peters' deposition under Fla. Stat. 90.804(2)(a), if indeed Mr. Peters' attendance at trial could not have been obtained through the exercise of due diligence. (Initial Brief at 82).

There are valid grounds upon which this Court could determine that all of Mr. Rivera's arguments meritorious, see, generally, Issues II, III, and X, Initial Brief. More importantly, there are absolutely no grounds upon which this Court may find that none of Mr. Rivera's arguments are valid. Assuming that each of the State's arguments are true, Mr. Peters would have been nothing more than a witness who was unavailable at the time of trial, through no fault of anyone. If Mr. Peters was unavailable, then his deposition was admissible, just has Mr. Rivera has argued without opposition from the State. If the State should belatedly argue that the deposition was not admissible because Mr. Peters was available through the exercise of due diligence, then trial counsel was ineffective for failing to exercise due diligence to secure Mr. Peters' attendance at trial. Strickland. One of these errors of constitutional magnitude necessarily had to have occurred. Because prejudice was manifest, see, Argument II, A., infra, Mr. Rivera is entitled to a new trial.

ARGUMENT III

MR. RIVERA WAS ENTITLED TO AN EVIDENTIARY HEARING ON HIS PENALTY PHASE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

Appellee concedes that the trial court had no basis for its determination that Mr. Rivera's claim of ineffective assistance of trial counsel during the penalty phase of his capital trial was procedurally barred. Appellee's Brief at 38. Rather than confess error, however, Appellee asks this Court to sustain the trial court's denial of this claim. In

support of this request, Appellee argues that even if the claim was not procedurally barred, Mr. Rivera was not entitled to an evidentiary hearing.

While Appellee comes up with a handful of cases where this Court determined that under the facts of those cases, no evidentiary hearing was warranted on a claim of ineffective assistance of counsel at the penalty phase of a capital trial, it notably fails to acknowledge the standard which this Court has set forth for making that determination. An evidentiary hearing is required unless the files and records conclusively show that the allegations contained in a Rule 3.850 motion would not entitle the defendant to relief, or that those allegations are untrue. Lemmon v. State, 498 So.2d 923 (Fla. 1986); State v. Crews, 477 So.2d 984 (Fla. 1985).

Appellee's apparently argues that the fact that the fact that trial counsel presented some mitigating evidence conclusively proves that he had adequately investigated for Mr. Rivera's penalty phase. Appellee's Brief at 40. This argument is directly contrary to this Court's decision in Hildwin v. State, 654 So.2d 107 (Fla. 1995), though Appellee fails to appropriately cite that decision. Appellee attempts to buttress this shaky proposition by then asserting that the unpresented mitigating evidence alleged by Mr. Rivera was cumulative and unnecessary because: (1) trial counsel had established one statutory mental health mitigating factor; (2) the mental health professional utilized by trial counsel had reached similar conclusions as those alleged by Mr. Rivera; and, (3) trial counsel presented the "most" of the alleged background testimony at sentencing through family members. Appellee's Brief at 40, 42, 44.

Appellee's assertion that "most of the background evidence had been presented at trial is simply untrue. Not only did trial counsel not present "most" of the mitigating family

history evidence alleged by Mr. Rivera, he presented practically none of that evidence. In describing the evidence presented at sentencing, Appellee states:

> Rivera's family testified that he had been molested at an early age. And (sic) that ever since that experience he became very isolated. His family all expressed love and concern for him. A former girlfriend testified that Rivera must have a split personality to be capable of committing such crimes because she only experienced his kind side.

Appellee's Brief at 42. Citations omitted.

The jury never heard of how Michael almost died at birth because he could not breathe. It never heard how he almost died at the age of six from a ruptured appendix. It never heard of how as a child he was practically imprisoned a small apartment with his tree siblings because his parents were too scared to let them go outside. It never heard of Mr. Rivera's violent home life. It never heard of his early incidents of glue sniffing. It never heard of the serious head injury he suffered before the age of thirteen. Importantly, it never heard of his early introduction and addiction to drugs and how by the age of fourteen it had transformed him from an A-B student to a D-F student. It never heard how he was sexually victimized over an extended period of time by an older man named Robert Donovan and how it was after this that Mr. Rivera began wearing a woman's bathing suit (a picture of Mr. Rivera in a woman's bathing suit was shown to the jury during Mr. Rivera's trial). It never heard of how Mr. Rivera was unable to overcome his addiction to drugs and how his addiction changed his behavior. It never heard of how Mr. Rivera had been burned and scarred by hot tar and how he wished he could have died to escape the pain. It never heard how this incident caused his drug use to escalate. It also never heard direct evidence of the existence of "Tony", the alternate personality merely theorized by Mr. Rivera's trial mental health expert.

Clearly none of this available evidence could have been cumulative because it was not presented at trial. Moreover, the trial court found that trial counsel failed to present family history evidence which could be considered mitigating. Because the same cannot be said for the evidence alleged by Mr. Rivera, it cannot be cumulative.

Appellee's argument that trial counsel could not be deemed ineffective for failing to present competent psychological testimony because Mr. Rivera's trial expert reached the same conclusions as those alleged in Mr. Rivera's Rule 3.850 motion and the trial court found one statutory mitigating factor is ignores this Court's directives on how mitigation is to be assessed by the sentencer. Both in the case of mitigation and aggravation, the question is not the number of mitigating factors established, but the mitigating nature of the evidence presented to support those mitigating factors.

> The trial court's statement, taken on its own, seems to ignore the principles we have repeated since State v. Dixon, 283 So.2d 1 (Fla. 1973), cert denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). That is, the sentencing scheme requires more than a mere counting of aggravating and mitigating circumstances. It requires the trial court to make "a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present." Dixon, 283 So.2d at 10. The trial court may not simply tabulate the aggravating and mitigating circumstances, but must weigh those circumstances in imposing the appropriate sentence.

Floyd v. State, 569 So.2d 1225, 1233 (Fla. 1990).

While Mr. Rivera's trial expert may have reached similar psychological diagnoses and opinions as those alleged in Mr. Rivera's motion, she did so without adequate reliable background information, a fact recognized by the trial court when it rejected two of the three mitigating factors which she had opined. Trial counsel's presentation of unfounded expert opinions did not relieve him of the duty to present the factual support for those

opinions. As noted, that information, e.g., direct evidence of the existence of the "Tony" personality and Mr. Rivera's inability to control "Tony's" actions, was available. The difference between the opinions alleged in Mr. Rivera's motion and that presented at trial is that Mr. Rivera alleged the necessary factual predicate for those opinions. The opinions alleged by Mr. Rivera could not have been rejected by the trial court. Nibert v. State, 547 So.2d 1059 (Fla. 1990).

Contrary to Appellee's representation, however, this was not the only compelling mental health testimony alleged by Mr. Rivera. He also alleged available testimony from lay witnesses to establish the his life long addiction to drugs and alcohol and expert testimony to establish the effect of that addiction on his actions on the day of Staci Jazvac's murder. Much of this evidence was actually produced at hearing (PC-R. 432-439, 440-444, 446-448, 459-476, 509-511). The trial court, however, did not consider whether this evidence would have affected the outcome of the sentencing phase of Mr. Rivera's trial because the court would not give Mr. Rivera an evidentiary hearing on his claim of penalty phase ineffective assistance of counsel.

Clearly Mr. Rivera not only alleged facts which were different from those presented at sentencing, he alleged facts which would have established valid statutory and non-statutory mitigating factors which trial counsel failed to establish. Because Appellee's argument that Mr. Rivera had not alleged facts sufficient to establish prejudice from counsel failure's is predicated upon the same misrepresentation of the facts alleged in Mr. Rivera's motion and the facts presented at trial (Appellee's Brief at 44), and because there is a reasonable probability that the outcome of Mr. Rivera's sentencing would have been different had the facts alleged by Mr. Rivera been presented (Initial Brief at 28, 40, 43), he is entitled to relief.

ARGUMENT IV

CUMULATIVE ERROR

Appellee dismisses Mr. Rivera's assertion of that the errors which infected his capital trial and sentencing as nothing more than an attempt to avoid procedural bars. Appellee's Brief at 95, citing Ziegler v. State, 452 So.2d 537 (Fla. 1984), sentence vacated on other grounds 524 So.2d 419 (Fla. 1988). Mr. Rivera does not ask this Court to view previous error as a pattern, he merely asks that this Court acknowledge that previous error occurred and that the effect of that previously determined error must be considered in conjunction with the effect of the error demonstrated during postconviction proceedings when determining whether the constitutional error which infected Mr. Rivera's trial and sentencing undermined confidence in their outcome. This is far from a novel proposition, it is the law. See, Initial Brief at 98-99.

Furthermore, there is no doubt but that new facts may reveal error in prior determinations of law. Rule 3.850 specifically provides that claims predicated upon facts which were unknown at the time of trial and direct appeal. Facts revealed in postconviction proceedings reveal that a prior evidentiary ruling made by the trial court, and affirmed by this Court, was in error. At the time of trial, the trial court excluded evidence that, after Mr. Rivera had been arrested, a woman, Linda Kalitan, had been abducted, sexually assaulted and strangled with a pair of pantyhose and that her body had been dumped within feet of where the body of Staci Jazvac had been found. The excluded evidence also showed that the same brand of pantyhose had been used to murder both Ms. Jazvac and this female victim. The excluded evidence showed that Ms. Kalitan, like Ms. Jazvac, had been riding her bike at the time of she was abducted. The trial court found that there was an insufficient nexus between the facts of the crimes. As this Court is now aware, the

evidence now exists to demonstrate that whomever drove the van in which Staci Jazvac was abducted could have also murdered Ms. Kalitan. While this new information is not extensive, it must be considered in light of the fact that the trial court's decision to exclude the evidence of Ms. Kalitan's murder must necessarily have been a very close call. Both victims were engaged in the same activity when they were abducted. There was at least some suggestion of sexual activity against both victims (though, contrary to the State's position, only minimal evidence in the case of Ms. Jazvac). Both victims were strangled with pantyhose. The pantyhose were the same brand. Both victims were dumped by the same lake and within feet of each other's body. Given this many points of similarity, practically any additional evidence connecting the two crimes would have necessarily altered both the trial court's and this Court's decision.

Had this evidence been admitted, there is most certainly a reasonable probability of a different outcome. This evidence would have established the truth. Mr. Rivera is nothing more that the victim of a psycho-sexual disorder which not only created the twisted fantasy that he had raped and murdered Staci Jazvac, but compelled him to tell it to other people. He was not in Peters' van at the time she was abducted and murdered. He no more kidnapped Staci Jazvac while she was riding her bike, strangled her with a pair of a particular brand of pantyhose, and dumped her body by a single particular lake than he did the same to Linda Kalitan. The fact that many people may find Mr. Rivera's disorder disturbing, or even repulsive, does not justify imprisoning him and killing him for a crime which he did not commit.

CONCLUSION

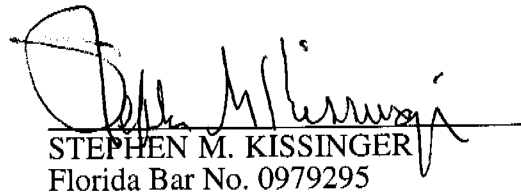
On the basis of the forgoing points and authorities and those contained in Mr. Rivera's initial brief, it is respectfully submitted that this Court should issue an order:

1. Vacating Mr. Rivera's conviction and sentence and remanding this matter for a new trial; or, in the alternative,

2. Vacating the decision of the circuit court and remanding this matter for a full and fair evidentiary hearing before an impartial tribunal; or, in the alternative

3. Vacating the decision of the circuit court and remanding this matter for an full and fair evidentiary hearing on all claims involving material issues of fact.

I HEREBY CERTIFY that a true and correct copy of the forgoing Reply Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on October 13, 1997.



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