IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,084

THOMAS DEWEY POPE,

Appellant,

v.

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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

ARGUMENT IN REPLY

ARGUMENT I

Appellee's never once addresses the merits of the allegations made by Mr. Pope in his Rule 3.850 motion, but rather seeks to avoid addressing the issue by hiding behind procedural bars. Here, the Appellee argues that Mr. Pope's claims of ineffective assistance of counsel can never be heard because Mr. Pope was not entitled to postconviction counsel, much less the effective assistance of such counsel (Answer Brief at 27). Therefore, Appellee argues that these otherwise meritorious claims are barred from consideration by this Court. However, it is this Court's duty to review the propriety of the judgment of conviction in death penalty cases, and duty cannot be automatically overcome by the State's assertion of a procedural bar. Wuornos v. State, 676 So. 2d 966, 968 (Fla. 1996).

The State rests its argument squarely on this Court's opinion in Lambrix v. State, 21 Fla. L. Weekly S365 (Fla. Sept. 12, 1996). The State's argument is that Mr. Pope is not constitutionally entitled to the effective assistance of postconviction counsel, citing Lambrix and Murrav v. Ciarrantano, 492 U.S. 1 (1989), and therefore the otherwise meritorious claims that are presented by Mr. Pope should never be heard. The State misapprehends Mr. Pope's arguments.

In reality, Mr. Pope's argument is that because he is statutorily entitled to collateral counsel in Florida, he is entitled to the effective assistance of that counsel. This principle is well-settled, and has been repeatedly addressed by this Court. See Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988); Seaziano v. State, 660 So. 2d 1363 (Fla.

1995). Mr. Pope has not argued that his statutory right to counsel "create[s] a constitutional right to effective assistance of collateral counsel," as the State misapprehends (Answer Brief at 27). Rather, Mr. Pope is arguing that because he is entitled to counsel under Florida law, that counsel should and must be effective in order for the appointment of counsel to have any meaning. This principle is also well-settled. In Remeta v. State, 559 So. 2d 1132 (Fla. 1990), the Court addressed the statutory right to clemency counsel for death-sentenced inmates. The Court held that "this statutory right necessarily carries with it the right to have effective assistance of counsel." Id. at 1135. As the Court observed, "[t]he appointment of counsel in any setting would be meaningless without some assurance that counsel give effective representation." Id. (emphasis in original).

There is no difference between the situation facing the Court in Remeta and the situation that is before the Court in Mr. Pope's case. In both situations, statutory law provided for the appointment of counsel. In Remeta, the Court held that the statutory right to counsel necessarily included the right to effective assistance of that counsel, a principle which has also been acknowledged with respect to collateral counsel seeking postconviction relief under Rule 3.850. See Spalding; Spaziano. The question before the Court in Mr. Pope's case is whether there is a compelling difference between the situation in Remeta and in the instant case to justify wholly different conclusions about a defendant's right to effective representation of counsel.

This Court has previously acknowledged that there are circumstances where justice and fairness dictate that otherwise procedurally-defaulted claims can be heard on

their merits. For example, in Breedlove v. Singletary, 595 So. 2d 8 (Fla. 1992), this Court excused the procedural default in that case. In Mr. Pope's case, the State argues that Breedlove is "inapplicable" because Mr. Pope "cannot raise collateral counsel's ineffectiveness as a 'unique circumstance' warranting review on the merits" (Answer Brief at 28). However, the issue in Breedlove was essentially whether Mr. Breedlove was denied the effective assistance of counsel in his prior collateral proceedings because prior collateral counsel, who worked in the same Public Defender's Office at trial counsel, did not raise any claims of ineffectiveness against his own law office. Breedlove, 595 So. 2d at 11. There is no meaningful difference between the situation in Breedlove and the instant situation, with the exception of the possibility of grossly different outcomes were this Court to accept the State's position.

To the extent that the State believes Lambrix controls, Mr. Pope submits that Lambrix should and must be read very narrowly to the facts of that case. Further, Mr. Pope submits that Lambrix should be revisited in light of the situation presented in Mr. Pope's case. Mr. Pope's volunteer counsel, who also represented Mr. Pope during his first postconviction motion, acknowledged that he was "not knowledgeable enough in the nuances of capital representation to know one way or another" about capital litigation, especially procedural bars (Supp. PC-R. 9-10). Mr. Pope's volunteer counsel also acknowledged to the lower court that he had "no expertise in knowing the ins and outs of the law as it relates to capital representation" (Supp. PC-R. 10). According to the State, Mr. Pope should be legally precluded from fairly litigating the serious allegations of ineffective assistance of counsel during his capital trial because his volunteer counsel,

who was a civil practitioner with no experience in or knowledge about capital representation, failed to raise the meritorious issues presented in a second Rule 3.850 motion due to ignorance and inexperience. This Court has never condoned such ignorance in the law when trial counsel in capital cases fail to have sufficient legal knowledge of capital litigation. See, e.g., Garcia v. State, 622 So. 2d 1325, 1329 (Fla. 1993) ("counsel's failure to comprehend the most fundamental requirement governing the admissibility of evidence in capital sentencing proceedings was clearly unreasonable"), See also Van Poyck v. State, __ Fla. L. Weekly S__ (Fla. 1997) (Anstead, J., concurring in part and dissenting in part) (noting "the already considerable body of evidence that the death penalty process is seriously flawed by the legal system's tolerance of incompetent counsel"). If Mr. Breedlove was given the opportunity to present his claims on their merits, see Breedlove v. Singletarv, so should Mr. Pope. To hold otherwise would be to eviscerate the statutory right to postconviction counsel that this Court has consistently upheld. Spalding; Spaziano.

Mr. Pope's second Rule 3.850 motion should be heard on its merits. The information that was never presented to Mr. Pope's jury establishes that no reliable adversarial testing occurred at the guilt phase of his capital trial. The State never addresses the merits of the allegations. In light of all the circumstances of Mr. Pope's case, Mr. Pope submits that his claims should be heard on their merits, and that an evidentiary hearing be ordered. See Breedlove v. Singletarv. If Mr. Pope's volunteer counsel "could have, and should have" raised these allegations in the first postconviction motion, as the State argues (Answer Brief at 25), Mr. Pope should not suffer the ultimate

penalty because his volunteer counsel admittedly had no expertise in capital litigation. Relief is warranted.

ARGUMENT II

The State argues that this claim is not cognizable because it is untimely as not having been raised in Mr. Pope's initial Rule 3.850 motion (Answer Brief at 30). The State's position is totally contrary to settled precedent on this issue. A litigant is not required to raised this claim in prior postconviction motions in order to make it cognizable. In fact, this is the whole point in the Court's precedent establishing that Espinosa-type claims are cognizable in postconviction. See James v. State, 615 So. 2d 668 (Fla. 1993); State v. Breedlove, 655 So. 2d 74 (Fla. 1995).

The State also argues that the claim is not cognizable because counsel failed to object to the jury instructions below (Answer Brief at 29). However, Mr. Pope also alleged that trial counsel rendered prejudicially deficient performance in failing to object to such a fundamental issue. Trial counsel was clearly ignorant of criminal law, and specifically of issues relating to capital cases. The legal tools were clearly available for trial counsel to lodge the proper objections. See Godfrey v. Georgia, 446 U.S. 420 (1980); State v. Breedlove, 655 So. 2d 74 (1995). This Court will entertain an Espinosa claim if the issue is properly preserved at trial. James; Breedlove. Therefore, it follows that Mr. Pope's trial counsel unreasonably failed to object to the obvious constitutional error. Starr v. Lockhart, 23 F. 3d 1280 (8th Cir. 1994).

Based on these arguments and those contained in his Initial Brief, Mr. Pope submits that an evidentiary hearing and relief are warranted.

ARGUMENT III

The State argues that the lower court did not find that volunteer counsel had a conflict of interest (Answer Brief at 34). The State fails to explain how this is so when the lower court granted counsel's motion to withdraw based on a conflict of interest, yet refused to allow counsel to withdraw until after the court ruled on Mr. Pope's postconviction motion (PC-R. 621).

The State also takes the position that "the trial court considered Appellant's ***pro se*** amended 3.850 motion, which alleged Mr. Wagner's ineffectiveness as an excuse for the untimeliness of his claims" (Answer Brief at 35). What the State ignores is the fact, although the lower court appointed the Office of the Capital Collateral Representative (CCR) to represent Mr. Pope following the withdrawal of volunteer counsel, the court simply denied the amended motion outright (PC-R. 632), as well as CCR's request to hold the motion in abeyance to permit CCR counsel to become familiar with Mr. Pope's case. Mr. Pope's requests were apparently agreed to by the State in the lower court, which argued that Mr. Pope's amended motion "must be fairly litigated" (PC-R. 629). A Rule 3.850 motion is not "fairly litigated" when counsel have just been appointed and have no familiarity with the pending proceedings. See Spaziano v. State, 660 So. 2d at 1370 (ordering stay of execution because CCR "presently unprepared to represent Spaziano on such short notice . . . [and] to provide CCR additional time for the evidentiary hearing").

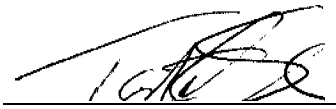
The State finally argues that the lower court's denial of Mr. Pope's amended 3.850 motion was proper because the claims were allegedly barred anyway (Answer Brief at

35). There is no "harmless error" test for a deprivation of counsel. Mr. Pope was entitled to counsel, and the lower court appointed CCR to represent Mr. Pope, yet went ahead and ruled on his amended motion without affording counsel the opportunity to consult with Mr. Pope, become familiar with the case, and, in the words of the State's representative below, "fairly litigate" Mr. Pope's case. The lower court deprived Mr. Pope of his statutory right to effective representation in these proceedings. Relief is warranted.

CONCLUSION

Based on the record and the arguments presented herein, Mr. Pope respectfully urges the Court to reverse the lower court's order, order a full evidentiary hearing, and vacate his unconstitutional convictions and sentences.

I HEREBY CERTIFY that a true copy of the foregoing INITIAL BRIEF has been furnished by United States Mail, first class postage prepaid, to all counsel of record on April 10, 1997.



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