IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,657

EDWARD EUGENE RAGSDALE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PASCO COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENT I

THE PUBLIC RECORDS CLAIM

A. Lack of Evidentiary Hearing.

The Appellee claims that the lower court "follow[ed] the dictates of Walton v. Dugger, 634 So. 2d 1059 (1989)"[1] in addressing Mr. Ragsdale's challenge to the alleged exemptions claimed by the State Attorney's Office (Answer Brief at 11). This is not accurate. Appellee's contention that the lower court complied with Walton reflects a misapprehension of what this Court held in Walton. In words that it undoubtedly felt could not be misunderstood, this Court held in Walton that, in circumstances identical to the instant case, "the trial judge should have granted an evidentiary hearing to consider whether the exemptions applied or whether the documents requested were public records subject to disclosure." Id. at 1062 (emphasis added). However, the lower court simply ignored the Court's holding in Walton.[2]

Mr. Ragsdale requested and was entitled to an evidentiary hearing pursuant to Walton in order to fully litigate the numerous exemptions claimed by the State Attorney's Office.[3] The State

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[1]The correct citation is Walton v. Dugger, 634 So. 2d 1059 (Fla. 1993).

[2]The lower court also labeled Mr. Ragsdale's efforts to seek and obtain all public records in this case "bogus and a sham" (PC-R. 399). See Argument II, infra.

[3]Mr. Ragsdale also requested an evidentiary hearing when the State informed that it had erred in one of its exemptions and thereafter released a police report it had previously released in redacted form (PC-R. 573-74). Mr. Ragsdale at that point again requested an evidentiary hearing, as the State Attorney's ability (continued...)

Attorney's Office claimed numerous exemptions for records for which the State Attorney's Office was not the custodian, but rather had received such materials during the course of the investigation and trial. As Mr. Ragsdale claimed below and on appeal, most of the exemptions claimed were patently frivolous and inapplicable on their face, and Mr. Ragsdale was entitled to litigate this issue in the circuit court. The State Attorney's Office had the burden of properly asserting a valid and applicable exemption. Florida Freedom Newspapers, Inc. v. Dempsey, 478 So. 2d 1128 (Fla. 1st DCA 1985). The trial court's wholesale acceptance of the State's assertions of exemptions, over the specific objection of Mr. Ragsdale, violated Walton and Mr. Ragsdale's obligation and right to litigate the validity of the asserted exemptions.

B. Inadequacy of In Camera Inspection.

The Appellee labels "unwarranted" Mr. Ragsdale's arguments about the State's failure to describe with particularity the specific documents withheld (Answer Brief at 20). Appellee does not mention in its brief the issue of the lower court's failure to conduct an in camera inspection of three (3) audio tapes that had been furnished by the State Attorney's Office (PC-R. 279), and the fact that the State Attorney's Office never listed three (3) audio cassettes in its list of materials provided to the trial court. Thus, the trial court refused to disclose audio cassettes (1) that were never listed by the State on its inventory of allegedly exempt

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[3](...continued)
to claim proper exemptions was called into question; however, the lower court denied a hearing (PC-R. 576).

information, (2) that Mr. Ragsdale was never was notified were allegedly exempt and on what basis, and (3) that the trial court never even listened to in order to determined whether they were exempt. To have Mr. Ragsdale's arguments dismissed as "unwarranted" on this record demonstrates the lengths the State will go to defend a record that is indefensible.

As noted above, the State's brief never even addresses the lower court's admission that he failed to listen to three (3) audio tapes that were provided by the State Attorney's Office. This tacit confession of error requires reversal. The lower court failed to conduct an in camera inspection of materials that are allegedly exempt. Walton; Lopez v. Singletary, 634 So. 2d 1054 (Fla. 1994). Moreover, the State should be directed to provide a statutory basis for the exemption it allegedly claimed with respect to these three (3) audio tapes. In the absence of such authority, the tapes must be released to Mr. Ragsdale forthwith.

The State also defends Judge Cobb's admission that he merely "perused" the records during the in camera inspection by arguing that "[t]he court below was fully aware of the relevant case law and the purpose and scope of the in camera hearing" (Answer Brief at 20). This record, however, belies the State's assertion. First, Judge Cobb's entire order on the in camera inspection consists of the following:

> Order Denying Defendants' [sic]
> Motion to Compel Disclosure
>
> This court in camera perused the file presented to it by the State Attorney's Office (but did not listen to the three audio tapes

> provided). Upon consideration of this in camera inspection and the arguments presented, it is, hereby,
>
> ORDERED that the defendant's motion to compel further disclosure is hereby denied.

(PC-R. 279). Nowhere in this order does Judge Cobb discuss, much less make any findings about, the validity and applicability of the exemptions.[4] If Judge Cobb was aware of relevant case law, then an evidentiary hearing would have been afforded under Walton and a complete and thorough in camera inspection would have been performed under Lopez. If Judge Cobb was aware of the purpose and scope of the in camera inspection, then there is no explanation for his admitted failure to listen to the three (3) audio tapes except for his open refusal to comply with settled law. The State has offered no explanation in its brief because there is no explanation that would defend Judge Cobb's actions. The only explanation for Judge Cobb's actions, which may explain but clearly not justify his ruling, is contained in Judge Cobb's final order, in which he labels Mr. Ragsdale's efforts to seek and obtain records "bogus and a sham" (PC-R. 399).[5]

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[4]As demonstrated by the parties' briefs on appeal, the issues relating to the statutory exemptions claimed by the State Attorney's Office are intricate and not worthy of summary dismissal by the lower court. In response to the State Attorney's Office assertion of exemptions, Mr. Ragsdale filed an extensive memorandum addressing each with specificity. Of course, it must be remembered that Judge Cobb later disclosed his belief that Mr. Ragsdale's efforts to seek Chapter 119 compliance were "bogus and a sham" (PC-R. 399).

[5]The State analogizes Judge Cobb's repeated use of the term "sham" with a motion to strike pursuant to Fla. R. Civ. P. 1.150 (Answer Brief at 23-24). However, there is a difference between (continued...)

Appellee cites Bryan v. Butterworth, 692 So. 2d 878 (Fla. 1997), for the proposition that this Court should not "'second-guess the trial court' . . . in reviewing findings after an in camera hearing" (Answer Brief at 21) (quoting Bryan, 692 So. 2d at 881). However, in Bryan, the lower court conducted an extensive in camera inspection and issued a lengthy order detailing the records it reviewed, its findings of fact, the applicable law, and its conclusions of law. Id. at 878-81.[6] On the other hand, the lower court in this case simply issued a summary denial, indicated that it merely "perused" the records, and acknowledged that it failed to listen at all to the three (3) audio cassettes. Reversal is required.

C. The Specific Exemptions.

Appellee contends that "case law and public policy demand that information which is statutorily exempt from disclosure must remain exempt even after it has been disclosed to another state agency

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[5](...continued)
striking a pleading as a "sham pleading," which is a legal term of art under Rule 1.150, and calling a capital defendant's Rule 3.850 motion a sham, bogus, and abject whining, as Judge Cobb did in this case. Under Fla. R. Civ. P. 1.150, a civil complaint may be stricken as a "sham pleading" if it is "so undoubtedly false as not to be subject to a genuine issue of fact." Meadows v. Edwards, 82 So. 2d 733 (Fla. 1955). On the other hand, the allegations contained in a motion filed pursuant to Fla. R. Crim. P. 3.850, must be taken as true in order to determine whether an evidentiary hearing is warranted. Lemon v. State, 498 So. 2d 923 (Fla. 1986); Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989). Analogy to Fla. R. Civ. P. 1.150 is simply not relevant to this situation.

[6]Other cases addressed by the Court have also involved situations where the lower courts have conducted adequate in camera inspections and issued orders which reveal the efforts undertaken to determine the validity of claimed exemptions.

under these circumstances." Answer Brief at 12. For this proposition, Appellee cites the Fourth District Court of Appeal's opinion in City of Riviera Beach v. Barfield, 642 So. 2d 1135 (Fla. 4th DCA 1994), rev. denied, 651 So. 2d 1192 (Fla. 1995). Appellee's reliance on Barfield is misplaced in regard to the exemptions claimed for records generated by non-law enforcement agencies. Barfield by its very language is limited to "active police criminal investigative records." Id. at 1135. Further, Barfield finds that active police criminal investigative records that are shared with another police agency maintain their exempt status only during the pendency of the investigation. The situation in Barfield is not the situation before the Court.

Here, the records claimed to be exempt by the State Attorney include records that were not "active police criminal investigative records." The records at issue include: a) juvenile complaint report and Department of Health and Rehabilitative Services referral history of Mr. Ragsdale's co-defendant; b) NCIC and FCIC criminal justice information of arrest history (rap sheets); c) hospital patient records; d) records of emergency calls which contain patient or treatment information; and e) financial records. Barfield relies on the definition of active criminal intelligence information contained in Chapter 119, to wit:

> "Criminal intelligence information" means information with respect to an identifiable person or group of persons collected by a criminal justice agency in an effort to anticipate, prevent, or monitor possible criminal activity."
>
> "Criminal investigative information" means

> information with respect to an identifiable person or group of persons compiled by a criminal justice agency in the course of conducting a criminal investigation of a specific act or omission . , . .
>
> Criminal intelligence information shall be considered **"active"** as long as it is related to intelligence gathering conducted with a reasonable, good faith belief that it will lead to detection of ongoing or reasonably anticipated criminal activities.
>
> Criminal investigative information shall be considered **"active"** as long as it is related to an ongoing investigation which is continuing with a reasonable, good faith anticipation of securing an arrest or prosecution in the foreseeable future.

Barfield at 1136, citing various sections of Chapter 119. The records claimed to be exempt by the State Attorney do not fall within the dictates of Barfield. Juvenile complaint reports and Department of Health and Rehabilitative Services referral histories are not criminal intelligence information gathered by a criminal justice agency. Any juvenile record involving Mr. Ragsdale's adult co-defendant cannot be considered **"active."** NCIC and FCIC criminal justice information of arrest history (rap sheets) are not considered **"active"** if they refer, as they must by definition, to past arrests and convictions. Hospital patient records are not generated by a criminal justice agency conducting a criminal investigation. Records of emergency calls which contain patient or treatment information are not criminal intelligence or investigative information;, nor are financial records; and neither are generated by criminal justice agencies. Further, none of that information **is "active."** The investigation into the murder for

which Mr. Ragsdale was convicted was over years ago. Mr. Ragsdale's conviction is final, thus the State Attorney cannot claim the active criminal intelligence or investigative information exemption. State v. Kokal, 560 So. 2d 324 (Fla. 1990); Tribune Co, v. Public Records, 493 so. 2d 480 (Fla. 2d DCA 1986). Appellee's reliance on Barfield to rebut Mr. Ragsdale's claim of entitlement to the enumerated records is unavailing.

Specifically regarding financial records claimed to be exempt under § 655.057, Florida Statutes, a recent opinion by the Third District Court of Appeal finds that claim of exemption to be invalid. There the court held:

> The appellants now contend that the public documents are exempt from disclosure for two reasons. First, they contend section 655.057(1), Florida Statutes (1995), which, under certain circumstances, limits public access to various records of the Department of Banking and Finance, exempts the documents. This contention is stopped in its tracks, however, by the section's specific exception (from nondisclosure) of records and information which are otherwise public records. Thus section 655.057(1), Florida Statutes (1995) quite clearly protects the public's right to access to documents submitted to the department which are public records of other agencies.

Wallace v. Guzman, 687 So. 2d 1351, 1352 (Fla. 3d DCA 1997)(footnote omitted). The State Attorney's claim of exemption under § 655.057(1), Florida Statutes, is invalid.

Appellee contends that "Many of the statutes involved may implicate privacy rights of the subjects of public records." Answer Brief at 13. This argument too must fail. The people of the State of Florida and the Legislature have already spoken

regarding the tension between public access to public records and privacy rights:

> Right of Privacy. Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to publio records and meetings as provided by law.

Article 1, section 23, Florida Constitution (emphasis added). A general argument that privacy rights are implicated does not defeat Mr. Ragsdale's constitutional right to public records. As the Wallace court noted:

> The legislature has balanced the private/ public rights by creating the various exemptions from public disclosure contained in section 119.07, Florida Statutes (1995) . . . The people and the legislature have balanced the competing interests. It is not within the scope of our authority to create new exemptions -- which is what we would be doing if we, in a balancing process, came down on the side of nondisclosure of nonexempt public documents.

Wallace, 687 So. 2d at 1353 (citation omitted). The same result is required here.

Appellee also asserts that the State Attorney properly withheld judicial records maintained by the Office of the clerk, referring to juvenile complaint reports and HRS referral histories of Mr. Ragsdale's co-defendant. Answer Brief at 15. Appellee argues that "[T]o the extent that these records are maintained by the clerk's office, the records are not subject to disclosure under Chapter 119." Answer Brief at 20, This argument is somewhat meaningless. Acknowledging that Chapter 119 does not apply to the

judicial branch, the Florida Supreme Court has nonetheless affirmed the openness of court records. In re: Amendments to Rule of Judicial Administration 2.051 -- Public Access to Judicial Records, 651 So. 2d 1185 (Fla. 1995). In its Commentary to Rule 2.051, this Court noted that Rule 2.051 was adopted to conform to Article I, section 24, making the public's right to public records a constitutional right. Rule 2.051 also sets forth exemptions from disclosure, none of which is applicable to the records at issue here. Rule 2.051(c), Florida Rules of Judicial Administration (1995). The records should be disclosed to Mr. Ragsdale.

Appellee's harangue regarding "the absurdity to which public records claims can be litigated," Answer Brief at 15-16 and n.2, and its reference to a case completely unrelated to Mr. Ragsdale's, should be disregarded. Appellee concedes that all parties involved know the identity of the murder victim in this case. Answer Brief at 16. As such, the State Attorney's claim of this exemption is not made in good faith. Of course if the State Attorney feels it is an appropriate use of state resources to assign personnel to go through hundreds of pages of documents page by page and redact any mention of the victim's name when that name is already known to the court, opposing counsel, and anyone who reads a newspaper, that is a decision best made by the State Attorney's Office and reviewed by the legislature that appropriates funds. However, counsel would note that if the only exemption claimed by the State Attorney was the victim identity exemption, this matter would not be pending before this Court. It is the State Attorney's improper claim of

many exemptions that makes this issue appropriate for appellate review. Mr. Ragsdale includes his argument regarding the victim identity exemption only to show the State Attorney's pattern of claiming exemptions in violation of the spirit of Chapter 119 and Article I, section 24 of the Florida Constitution. Palm Beach Community Collese Foundation v. WFTV, Inc., 611 So. 2d 588, 589 (Fla. 4th DCA 1993); Bludworth v. Palm Beach Newspapers, Inc., 476 so. 2d 775 (Fla. 4th DCA 1985)(Exemptions from disclosure are construed narrowly; when in doubt, courts are obliged to find in favor of disclosure rather than secrecy).

Mr. Ragsdale respectfully requests that this Court relinquish jurisdiction to the trial court with instructions that the lower court order the State Attorney to disclose to Mr. Ragsdale all records erroneously claimed to be exempt.

ARGUMENT II

THE JUDICIAL DISQUALIFICATION CLAIM

In what can be its only plausible line of defense for the indefensible remarks made by Judge Cobb, Appellee asserts that "[t]he fact that a trial judge is not persuaded by the appellant's claims for relief does not provide a reasonable basis for a belief that the judge was biased" (Answer Brief at 22). See also Answer Brief at 23 ("appellant's argument for disqualification merely boils down to the fact that the judge found his claims to be without merit"). However, Mr. Ragsdale did not and does not allege that Judge Cobb was biased because he summarily denied Mr. Ragsdale's postconviction motion. Had Judge Cobb simply stated in his order that Mr. Ragsdale's motion was denied, or that he was not persuaded by the arguments, then the State's argument could have merit. However, Judge Cobb's remarks were not indicative of a lack of persuasion of the merits of the claims raised by Mr. Ragsdale; rather, they were indicative of prejudice and bias, derision of constitutional claims in a capital case, and a lack of judicial temperament and discretion that established Judge Cobb's inability to be fair and impartial in this case.

While "[a] trial judge is required to make determinations as to the validity of a defendant's claims as part of his or her job" (Answer Brief), Judge Cobb did not merely make a ruling on Mr. Ragsdale's motion; he expressed his derision for Mr. Ragsdale's attempt to even raise the claims he did. The State goes on to explain at length that the terms "bogus" and "sham" are sort of

terms Of art and therefore are not "facially prejudicial" terms (Answer Brief at 23). Notably absent from the Appellee's discussion is any discussion of Judge Cobb's use of the phrase "abject whining" in discussing the constitutional claims raised by Mr. Ragsdale. Clearly the context of Judge Cobb's order reflects that his use of "bogus" and "sham" were intended, along with the accusation of "abject whining" to demonstrate not Judge Cobb's determination as to the "validity" of the claims (Answer Brief at 23), but rather his extra-judicial bias with respect to those claims.

The State posits that Judge Cobb's order simply reflects a "criticism of CCR and expression of frustration in dealing with capital postconviction cases" (Answer Brief at 24), and that this is insufficient to require disqualification (Id.). If Judge Cobb is "frustrated" with capital postconviction cases, then Judge Cobb should have disqualified himself from these proceedings; Mr. Ragsdale's capital postconviction motion is not the proper forum in which Judge Cobb should take out his alleged "frustration" with capital cases in general. Judge Cobb's function as a judge was not to act based on whatever "criticism of CCR" he obviously had; rather, his function was to act as a judge and provide Mr. Ragsdale with a fair and impartial forum in which to litigate his claims. Whatever the extra-judicial source of Judge Cobb's "frustrations" and "criticisms" of CCR and capital cases,[7] Judge Cobb erred in

[7]The source of Judge Cobb's "criticism of CCR" was not made clear by Judge Cobb. Mr. Ragsdale's counsel had never even (continued...)

taking out his "frustrations" and "criticisms" on Mr. Ragsdale's case.

The State cites to several cases for the proposition that Judge Cobb's comments are acceptable. However, these cases are inapposite to Mr. Ragsdale's case and in fact, in Ellis v. Henning, 678 So. 2d 825 (Fla. 4th DCA 1996), and Wargo v. Wargo, 669 So. 2d 1123 (Fla. 4th DCA 1996), writs of prohibition were granted. Mr. Ragsdale acknowledges that in Ellis, the court granted the writ because the attorney general's office responded on behalf of the judge and disputed the allegations in the underlying motion; however, although the court did not find the defendant's allegations to be legally sufficient, the court indicated that the basis for this holding was that no transcript of sworn allegations were set forth regarding the context of the complained-of comments. Ellis, 678 So. 2d at 827. Here, Judge Cobb's words in his order reveal the nature of his comments and the context in which they were made -- an order denying postconviction relief in a capital case. In Wargo, the writ was granted when the court found that "the judge made gratuitous remarks which were disparaging of husband's position prior to hearing any evidence in the case. Thus, the remarks may have sisnaled a predisposition, rather than an impression formed after reviewing the evidence." Wargo, 669 So. 2d at 1125 (emphasis added). Here, Judge Cobb made remarks

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[7](. ..continued)
appeared before Judge Cobb in other cases, so for Judge Cobb to malign counsel and his office in general based on generalized and extra-judicial bias against "CCR" deprived Mr. Ragsdale of due process and a fair and impartial tribunal.

disparaging of Mr. Ragsdale's position without affording Mr. Ragsdale the opportunity for a hearing, remarks which clearly "signaled a predisposition11 on Judge Cobb's behalf.

Mr. Ragsdale respectfully requests that this Court remand for further proceedings before an unbiased and impartial judge chosen at random.

ARGUMENT III

THE GUILT PEASE ADVERSARIAL TESTING CLAIM

First, Mr. Ragsdale must take issue with Appellee's attempt to categorize the various allegations of Mr. Ragsdale's adversarial testing claim as ineffective assistance of counsel claims or Brady claims. Without an evidentiary hearing, it cannot be determined whether the jury never heard the evidence at issue because counsel was ineffective, because the State wrongfully failed to disclose, or because the evidence was not discoverable at the time of trial through the exercise of due diligence. The question before this Court is whether the files and records conclusively demonstrate that Mr. Ragsdale is entitled to no relief. Given the substantial amount of evidence Mr. Ragsdale has claimed should have been disclosed to the jury, Mr. Ragsdale should have been given an evidentiary hearing on his adversarial testing claim.

Additionally, the State filed no answer to Mr. Ragsdale's Rule 3.850 motion in the trial court. As such, the State has waived any argument alleging factual inadequacy of the motion.

Contrary to the Appellee's contentions, Mr. Ragsdale's initial brief explained in detail Mr. Ragsdale's trial counsel's efforts to obtain the results of the luminal testing conducted by the State. It must be determined at an evidentiary hearing whether the fault lies with trial counsel or the State. Appellee argues that trial counsel knew the luminal testing had been done and successfully obtained a court order authorizing funds for an expert to examine the clothes and photographs, Answer Brief at 27-28. Appellee

concludes, however, that, given the trial court's willingness to insure that the appellant had access to this evidence and the lack of further indication in the record suggesting that the evidence was not disclosed, Mr. Ragsdale has failed to offer facts that warrant an evidentiary hearing. Answer Brief at 28. Appellee's argument establishes exactly why an evidentiary hearing is required on this claim. There is no indication in the record that Mr. Ragsdale's counsel was ever granted access to the luminal testing results and photographs. Mr. Ragsdale has pled that he was never given access to the test results and photographs. Because the files and records do not conclusively establish that Mr. Ragsdale is entitled to no relief, an evidentiary hearing must be held.

Appellee's argument regarding materiality of the undisclosed luminal testing is similarly unavailing. Appellee contends that because State witness Cindy LaFlamboy indicated co-defendant Illig told her that blood had squirted on him after Mr. Ragsdale allegedly cut the victim's throat, Answer Brief at 29, any luminal test results showing blood on Illig's clothes is not material. Again, Appellee's argument establishes that an evidentiary hearing is required. There is a stark difference between a hearsay account of a co-defendant alleging to have been "squirted" with the victim's blood during the commission of the crime by another and the presentation to the jury of the black and white photographs taken after the luminal testing of Illig's clothes, showing that his clothing was, quite literally, covered in blood. Not only would the presentation of such evidence implicate Illig and not Mr.

Ragsdale, but it would also cast doubt on LaFlamboy's credibility. The State further misses the point when it argues that any evidence that Illig in fact killed the victim was immaterial because the State was proceeding on a principal theory. Answer Brief at 31. Cindy LaFlamboy's testimony implicating Mr. Ragsdale was an important element of the State's case. Defense evidence casting doubt on LaFlamboy's testimony would have undermined her credibility, thus undermining the State's case against Mr. Ragsdale. The information regarding the luminal testing is material and exculpatory, and Mr. Ragsdale should have been granted an evidentiary hearing on this claim.

Appellee complains that Mr. Ragsdale never identified the witness whom he alleges was the subject of threats and intimidation by the State. Answer Brief at 32. For that reason, the "seriousness of the issue [is] difficult to assess." Answer Brief at 32. Mr. Ragsdale has alleged that the State used threats and intimidation against a state witness to procure misleading testimony. At an evidentiary hearing, Mr. Ragsdale will call this witness to testify in accordance with Mr. Ragsdale's allegation. There is no requirement in Rule 3.850, Florida Rules of Criminal Procedure, requiring Mr. Ragsdale to identify the witnesses he intends to call at an evidentiary hearing. Rule 3.850(c)(6), Florida Rules of Criminal Procedure, requires only that Mr. Ragsdale plead "a brief statement of the facts (and other conditions) relied on in support of the motion." Mr. Ragsdale has done that. The allegation on its face is sufficient to make out a

claim under Giglio v. United States, 405 U.S. 150 (1972). As such, Mr. Ragsdale is entitled to an evidentiary hearing.

Appellee misapprehends the nature of Mr. Ragsdale's complaint regarding counsel's failure to know and argue the law regarding co-defendant Illig's invocation of the Fifth Amendment. Had counsel objected and preserved this issue for appeal, this Court would have found error had occurred.[8] By failing to argue this issue and preserve it for appeal, counsel rendered ineffective assistance that prejudiced Mr. Ragsdale.

Appellee suggests Mr. Ragsdale is not entitled to an evidentiary hearing on his claim that counsel was ineffective for failing to pursue a voluntary intoxication defense. Answer Brief at 37. Contrary to Appellee's assertion, Mr. Ragsdale's Rule 3.850 motion alleges that witnesses are available who can provide testimony in support of this claim.' Mr. Ragsdale is alleging facts sufficient to support a voluntary intoxication defense, to

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'Even Appellee does not defend Judge Cobb's actions in allowing Illig to invoke the Fifth Amendment.

'Counsel is unable to provide a citation to the record. Due to the break-up of CCR mandated by the legislature and signed into law by the Governor, Mr. Ragsdale's case is being handled by the Middle Regional office of CCRC. However, due to a number of factors including the Governor's failure to appoint a CCRC for the middle region, the records on Mr. Ragsdale's case remain in the Tallahassee office. Chief Assistant CCR Todd Scher wrote part of this brief before the case was reassigned to Tampa. Mr. Scher had a copy of the record on appeal in Miami; undersigned counsel does not have a copy fo the record on appeal in Tampa. Until there is a CCRC appointed for the Middle Region, no one has authority to contract for additional office space or storage space for files. Until such time as additional office and storage space are provided for, the files on most of the Middle Region's cases will remain in Tallahassee.

wit, that on the night of the murder, he had consumed alcohol and drugs. As such, Mr. Ragsdale is entitled to present witnesses who will support these allegations at an evidentiary hearing.

Appellant will rely on the arguments in his initial brief regarding the remaining arguments involving the adversarial testing claim.

ARGUMENT IV

PENALTY PHASE ADVERSARIAL TESTING CLAIM

Appellee attempts to dismiss this claim by arguing counsel made a "classic strategic decision" that cannot be second-guessed, Answer Brief at 42, when counsel failed to call family members to testify regarding Mr. Ragsdale's health and mental health history. Appellee cannot supply a strategic reason where none has been stated by defense counsel, testifying at an evidentiary hearing and subject to cross-examination. Because the records and files do not conclusively establish that counsel's failure to call these witnesses was a strategic decision, and that that decision was reasonable, Mr. Ragsdale is entitled to an evidentiary hearing on his claim.

Appellee suggests that Mr. Ragsdale's claim that the jury should have heard about his mental health deficits, including organic brain damage, are "conclusory and do not include specific facts so as to require a hearing." Answer Brief at 43. In fact, the Rule 3.850 motion and Mr. Ragsdale's initial brief set forth in detail what a mental health expert will testify to at an evidentiary hearing. See Initial Brief at 43-44 (Expert will

testify Mr. Ragsdale has organic brain damage, language and listening comprehension difficulties, impaired ability to concentrate, inhibited reasoning abilities, and impaired judgment). Again the Appellee seems to think some rule or case law in Florida requires that Mr. Ragsdale attach affidavits from mental health experts to his Rule 3.850 motion in order to show his entitlement to an evidentiary hearing. Answer Brief at 44. Such is not the law in Florida. All Mr. Ragsdale must do is plead a short, plain statement of the facts entitling him to relief. Mr. Ragsdale has done so, and he is entitled to an evidentiary hearing on his claim.

ARGUMENT V

THE AKE CLAIM

Appellee suggests that, because trial counsel sought the assistance of a mental health expert, Mr. Ragsdale cannot make out a violation of Ake v. Oklahoma, 470 U.S. 68 (1985). Answer Brief at 50-51. Appellee does not address Mr. Ragsdale's allegation that trial counsel failed to provide a mental health expert with sufficient background material, forcing the expert to rely on self-report, or that trial counsel did not request that any neuropsychological testing be performed, These allegations are the substance of Mr. Ragsdale's claim, supporting the conclusion that the mental health assistance his counsel received at trial was inadequate, and thus failed to discover Mr. Ragsdale's brain damage. Mr. Ragsdale has pled facts sufficient to entitle him to an evidentiary hearing on his claim.

Due to page limitations and the unavailability of the

postconviction record on appeal to undersigned counsel, Mr. Ragsdale relies on the allegations in his Rule 3.850 motion, all pleadings in the circuit court, and in his initial brief to this Court. All allegations and factual matters contained in those pleadings are fully incorporated herein by specific reference, and no argument previously made and not addressed in this Reply Brief is waived or abandoned.

CONCLUSION

Based upon the record and the arguments presented herein and in his Initial Brief to this Court, Mr. Ragsdale respectfully urges this Court to reverse the lower court, order a full and fair evidentiary hearing before a fair and impartial circuit court judge, and vacate his unconstitutional convictions and sentences.

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on September 5, 1997.

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