IN THE SUPREME COURT OF FLORIDA

CASE NO. 90,540

PAUL ALFRED BROWN, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENT I

MR. BROWN WAS DENIED A FULL AND FAIR HEARING REGARDING HIS PROSECUTORIAL MISCONDUCT CLAIM.

Appellee argues that the Circuit Court did not err when it rejected the claim that Mr. Brown's trial counsel was ineffective in failing to object to the prosecutor's closing argument. Such an argument overlooks or misinterprets applicable case law.

First, citing an inapposite line of cases[1], Appellee maintains that counsel is not required to anticipate future appellate decisions. However, as Appellee's argument assumes, Appellant is not suggesting that trial counsel anticipate future changes in the law. Rather, Appellant maintains that trial counsel was ineffective in failing to object to prosecutorial misconduct which was recognized as such by established law.

In Bertolotti v. State, 476 So. 2d 130 (Fla. 1985), this Court counseled: [The prosecutor's argument] must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law. Bertolotti at 134.

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[1] Ellege v. Dugger, 823 F.2d 1439 (11th Cir. 1987); Provenzano v. Dugger, 561 So. 2d 540 (Fla. 1990); Nelms v. State, 596 So. 2d 441 (Fla. 1992); Stevens v. State, 552 So. 2d 1082 (Fla. 1989); Muhammmed v. State, 426 So. 2d 533 (Fla. 1982); Lambrix v. Singletary, 641 So. 2d 847 (Fla. 1994).

The Appellee's argument that the Florida Supreme Court did not rule until 1988 on the same or similar jury argument Prosecutor Benito used in other cases misses the Appellant's point that trial counsel should have objected in the instant case. It is elemental that, if trial counsel does not effectively protect his client by preserving error, this Court doesn't generally address the error. Guided by Bertolotti, trial counsel should have recognized the erroneous, inflammatory argument and objected.[2]

Secondly, Appellee notes that several decisions following Mr. Brown's trial had affirmed the judgments of death when the same or similar prosecutorial arguments had been made.[3] However, despite affirmances rendered under the specific facts of Hudson, Jackson, and Hodges, this Court did not condone the prosecutorial arguments put forth. As the Court wrote in Taylor v. State, 585 So. 2d 323 (Fla. 1991):

> The Court in Hudson did not approve the argument made by the prosecutor. That case stands only for the fact that the

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[2]Several of the cases which Appellee cites therefore have little or no bearing with regard to the present argument. Elledge v. Dugger, 823 F.2d at 1439, for example, considers the effect of a change in the law regarding the interrogation of a suspect. Nelms v. State, 596 So. 2d at 441, involves the effect of administrative order that was subsequently ruled unconstitutional.

[3]Appellee cites to Hudson v. State, 538 So. 2d 829 (Fla. 1989); Jackson v. State, 522 So. 2d 802 (Fla. 1988); Hodges v. State, 595 So. 2d 929 (1992).

> prosecutor's argument, under the circumstance of that case, did not constitute reversible error. Second, the Jackson opinion, which was issued a year before this trial, clearly prohibits this type of argument.

Taylor at 330[4] (emphasis added).

Perhaps more disturbingly, it seems that Appellee continues to justify as proper the prosecutorial conduct of improper argument and surreptitious review of privileged facts. Appellee still maintains that the prosecutor's objectionable remarks could be a mere tautology. To support this contention, Appellee apparently relies on trial counsel Chalu's self-serving rationalizations regarding the argument: "I personally don't think it was so bad," (PC-R. Vol.IV, 91) and "I didn't think it was that prejudicial." (PC-R. Vol. IV, 91)

Appellee's and Mr. Chalu's assessment of the propriety of the argument is erroneous. The prosecutor's argument was improper prior to and after Mr. Brown's trial. See Bertolotti, 476 So. 2d at 134; Taylor, 583 So. 2d at 330. Trial counsel should have objected to the argument, and, had trial counsel properly preserved this issue for review, Appellant respectfully

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[4]Appellee further contends that Appellant now wishes to avoid Mr. Chalu's testimony after having obtained an undesirable response. Appellant is in no way attempting to avoid Mr. Chalu's testimony. Mr. Chalu's observations are, in fact, irrelevant because, as Appellee conceded several times in its answer brief, Mr. Alldredge, not Mr. Chalu, was responsible for the penalty phase.

contends that this Court would have found it to be improper. See Taylor, 583 So. 2d at 330; Jackson, 522 So. 2d at 809.

Had the objection been lodged by counsel and sustained by the Trial Court, the 7-5 jury recommendation would likely have been different. If the properly preserved objection was not sustained and was subsequently raised on appeal, this Court would, based on the above-cited authorities, have then considered whether the prosecutor's conduct constituted harmless error.

The Circuit Court, in the Order currently at issue, erroneously concluded that there was not a reasonable probability that the outcome would have been different:

> Assuming without deciding that penalty phase counsel was deficient in his performance for failing to object to this portion of the prosecutor's argument, this Court cannot and does not find that the alleged deficient performance resulted in prejudice which meets the prejudice prong of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), that is, a reasonable possibility that the outcome would have been different.

(PC-R. Vol. III, 451).

Although the Court has declined to find counsel's performance either effective of deficient, the Circuit Court fails to take into account the very close jury vote and the fact the misconduct complained of is in jury argument.

In Taylor, this Court analyzed a factual scenario analogous to that of Mr. Brown's case and concluded: "Unlike Jackson, which involved a double murder and minimal mitigating circumstances, we

cannot say that the offending argument constituted harmless error." Taylor, 585 So. 2d at 330. Similarly, Mr. Brown's case concerns a single killing, involves substantial mitigation that was, or should have been, presented by trial counsel, and, importantly, rendered a jury recommendation one vote shy of life, this despite the inflammatory jury argument presented.

When a jury, so closely divided, is infected by inflammatory argument, the Appellant urges this Court to consider the jury's narrow division and to hold that the Circuit Court erroneously held the prosecutor's conduct to be insufficiently prejudicial to warrant vacation of the sentence and a new trial.

ARGUMENT II

MR. BROWN WAS DENIED A FULL AND FAIR HEARING, DEPRIVED OF HIS RIGHT TO A RELIABLE ADVERSARIAL TESTING, AND DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AND MENTAL HEALTH EXPERTS AT THE PENALTY PHASE OF HIS CAPITAL TRIAL.

At the evidentiary hearing, Appellant contended that Mr. Brown's trial counsel was prejudicially ineffective for failing to provide his experts with sufficient background information concerning Mr. Brown. In its ruling on this issue, the Circuit Court stated, in part:

> Most of the evidence presented addressed this issue, but it boils down to defense counsel failing to discover an earlier "presentence investigation report," and some school records. While Mr. Alldredge expressed dissatisfaction with the level of investigation provided by his office, the records eventually located by the Defendant

> did not in any way change the opinion of the mental health experts and the opinion of the defense's mental health experts at the evidentiary hearing did not differ from the opinions offered at trial. The essence of the Defendant's allegation seems to be that the experts' opinions would have been given greater weight if they had the additional records upon which to base their opinions at trial, but the psychologist who testified at the hearing stated that although the additional information might have been helpful, his opinion was unchanged.
>
> * * * * *
>
> No reasonable probability has been shown that but for the deficient performance by counsel at the guilt or penalty phase, the result would have differed.

(PC-R. Vol. III, 452-453).

Thus, essentially, the Circuit Court concluded that the background documentation would have been of extreme importance at the trial because it would have provided the jury with a foundation for and corroboration of the testimony of the experts at trial. (Again, the jury recommendation was 7-5.)

At the evidentiary hearing, Dr. Berland, an expert who was called by Mr. Brown at trial, affirmed the value of background information to a doctor:

> Q. Okay. Well, of course, the record speaks for itself. But as far as historical data, would historical data have, in your experience, helped you to explain better to a jury--historical data, I'm talking about record of childhood, school records, previous record of psychological treatment or evaluation, anything of that nature with regard to a defendant, would that sort of

> information have helped you as an expert witness to explain better to a jury the genuine nature of the psychotic profile that you found?
>
> A. I think the impact it would have had--I'm not sure I would say it would help me explain it because I would have to display certain concepts to them. I think it would reinforce the believability of what I was saying if I were able to cite data showing that he was psychotic from a time period in which he had no reason to be pretending to be.
>
> So in the sense that it would give greater weight or gravity perhaps to my opinion, that in spite of him faking that he was genuinely mentally ill, I think it could only have helped.

(PC-R. Vol. VII, 431) (emphasis added).

Dr. Berland further acknowledged that:

> Having had some old documents would have made it perhaps easier for them to believe that in spite of his manipulations with me, that there was a reason to believe he had genuine mental illness.

(PC-R. Vol. VII, R. 435) (emphasis added).

When asked specifically about the incidents described in the school records, Dr. Berland answered, "That's strange stuff and probably I would have been including that in anything I presented, showing that there was a long history long before he was charged with murder of strange behavior, suggesting mental illness." (PC-R. Vol. VII, 436).

In addition to Dr. Berland's lucid testimony on this point, Mr. Brown's penalty-phase attorney, Mr. Alldredge, recognized the

value of assembling complete background information in effectively representing a client:

> Q. Had you had school records that indicated that, for example, Mr. Brown had psychological problems, that he was banging his head against the desk, or speaking with inanimate objects, or what have you in elementary school, would this information been something you would have wanted to provide your mental health experts?
>
> A: It would be something that I would provide to the experts and it would be something that I would use in my presentation. Certainly these are graphic injuries showing a very disturbed child, and I would have loved to have had that to use for the jury.
>
> Q: Would these type of records given you other possible avenues of investigation or indicate to you that there could be other avenues of other psychiatric evidence out there that you might want to investigate?
>
> A: Certainly. On certain occasions, we had gone back and talked to the young man's or young woman's teachers and we often find that the teachers would remember them distinctively and provide very valuable information to us.

(PC-R. Vol. V, 138) (emphasis added).

Appellee dismisses the relevance of the Presentence Investigation Records (PSI), which Appellant contends should have been discovered and introduced at trial, citing trial counsel Chalu's testimony that he would have refrained from using them:

> There was to be sure something that might have been additionally helpful, but in

> my judgment, it was far outweighed by the very, very negative matters which we've just talked about that were in the PSI, which in my judgment of course, from hindsight, because I didn't know about it back then, would have been very, very devastating to his case in the second phase. So on balance, if I would have known about it, I honestly do not believe at this time that I would have used that or disclosed that to the prosecution.

(PC-R. Vol. VII 456-457) (emphasis added).

The irony of this testimony is, of course, that Mr.Chalu did not even seek to obtain these record prior to trial so he could make a decision about using them. Perhaps Mr. Chalu is merely attempting to bolster his deficient performance in failing to procure these records by rationalizing that, after the fact, he would not have utilized these records had they been in his possession. Irrespective of the admissibility of the "devastating" aspects of the PSI (which Appellant contends could have been excluded or redacted in the discretion of the Court), trial counsel had a duty to at least obtain these records, which would ultimately have led counsel to investigate other avenues of mitigating evidence. For example, Dr. Berland, trial counsel's expert, acknowledged how the report would have expanded the scope of his inquiry:

> Q: Would that have been an area if you would have had an opportunity to review this report at the time, in 1986 or so, would that have been an area after reviewing this report that you would have probably suggested should merit further investigation?

> A: Yes, that's correct. I would have wanted to see Dr. Fleischaker's records to see on what basis he rendered the opinion that he was psychotic and whether there was specific evidence of psychotic symptoms or whether this was a gross labeling process for a severely disturbed child.

(PC. R. Vol. VII 437).

Evidence corroborating expert testimony of Mr. Brown's mental illness would have strengthened the testimony of the expert witnesses at trial, would have strengthened his trial counsel's jury argument, and would have directly impacted the deliberations of his closely divided jury. Appellant respectfully urges this Court to conclude, as he contends, that discovery and utilization of complete background information documentation would have altered the outcome of Mr. Brown's trial, and that the jury would have probably recommended a life sentence for Mr. Brown.

CONCLUSION AND RELIEF SOUGHT

Based upon the foregoing arguments and upon the record, Mr. Brown respectfully urges this Court to reverse the Circuit Court and vacate his sentence, to grant his motion for a new trial, and to grant such other relief as the Court deems just and proper.

CERTIFICATE OF SERVICE

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 October ____, 1998.

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