IN THE SUPREME COURT, OF FLORIDA

CASE NO. 90,743

PAUL BEASLEY JOHNSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT,
IN AND FOR POLK COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

GREGORY C. SMITH
Capital Collateral Counsel
Northern Region
Florida Bar No. 279080

HEIDI E. BREWER
Assistant CCC - Northern Region
Florida Bar No. 0046965

OFFICE OF THE CAPITAL
COLLATERAL COUNSEL
1533-B South Monroe Street
Tallahassee, FL 32301
(850) 487-4376

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This reply brief addresses the arguments presented in the State's Answer Brief. Mr. Johnson relies upon his Initial Brief as to issues not specifically addressed herein.

References to the Initial Brief will be designated as "IB" followed by the page number. References to the Answer Brief will be designated as "AB" followed by the page number. The remaining references if applicable are as follows:

"PC-R1" - record on appeal in the instant proceeding;

"Supp. PC-R1" - supplemental record on appeal;

"Supp. Vol. III. RC-R1" - supplemental record on appeal, volume III.

CERTIFICATION OF TYPE SIZE AND STYLE

This is to certify that the Reply Brief of Petitioner has been reproduced in a 12 point Courier type, a font that is not proportionately spaced.

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REPLY TO THE STATEMENT OF THE CASE AND FACTS

Petitioner does not accept the state's rendition of the facts and contends that they are not complete and disregards the rules governing appellate procedure. Rule 9.210 (c), Fla. R. App. Pro. provides:

> The answer brief shall be prepared in the same manner as the initial brief: Provided that the statement of the case and of the facts shall be omitted unless there are areas of disagreement, which should be clearly specified.

REPLY TO ARGUMENT

ARGUMENT I

THE LOWER COURT ERRED IN ITS RULINGS REGARDING PUBLIC RECORDS.

Records

Contrary to the State's position, this claim is firmly supported both by the record and the law. Mr. Johnson made timely requests for public records pursuant to Florida's public records law. A portion of the files from the Hillsborough County State Attorney's office (prosecuting agency) was provided. However records that did in fact exist, were nevertheless withheld and postconviction counsel informed the lower court that this was the case before and after the records were discovered (PC-R. 174). These records were documents generated by the State Attorneys' office as a result of Mr. Johnson's last trial which is the subject of his postconviction proceedings. In fact, the withheld state attorney records were found in the possession of the Attorney General who was present at all of the previous public records hearings when postconviction counsel told the lower court that they had not been provided.

There was no reason for postconviction counsel to assume that original state attorney files would be in the Attorney General's files, especially in light of the representations routinely made by the Attorney General (and in the answer brief, AB at 41) that their files generally contain appellate pleadings.

The State should not be encouraged to transfer files to another state agency and then claim ignorance as to the transfer and then reap the benefits of denying a litigant due process[1]. Such a procedure would only encourage an agency to play "cat and mouse" with postconviction counsel trying to rightfully obtain public records to which a postconviction litigant is entitled. Ventura v. State, 673 So. 2d 479, 481 (1996)("State cannot fail to furnish relevant information and then argue that the claim need not be heard on its merits because of an asserted procedural default that was caused by the State's failure to act.")

Time, Due Process and Prejudice

The lower court provided counsel only 20 days in which to review and plead any new issues arising out of these records and deprived Mr. Johnson of effective assistance of counsel and a full and fair hearing. Twenty days was wholly inadequate and

[1]Postconviction counsel suggested at the public records hearing in July, 1997 that if the state would agree not to assert a procedural bar based upon records that were requested that may show up at a later date, the case could move forward. As it turned out, public records did surface at a later date and the state is attempting to assert a procedural bar (Supp PC-R. 171-173).

unrealistic to review records, identify potential witnesses, locate witnesses, coordinate travel and conduct an adequate investigation in order to fully plead claims arising therefrom - which is what the lower court's ruling required.

Contrary to the state's assertion that postconviction counsel had over 60 days to assert any new claims before during or after the evidentiary hearing (AB at 47), the lower court's rulings specifically precluded Mr. Johnson from doing so:

> The court reviewed the amended motion and issued an order on February 3, 1999. In the order, the court stated that CCR could utilize t**he new material to support any claims previously raised, but denied the request for additional time for review and investigation.**

(PC-R6; 898-900)(emphasis added).

Moreover, the lower court ruled:

> There will be **no further extensions of time** and counsel shall be prepared to litigate the motion for postconviction relief **that was filed on January 28, 1997, at the evidentiary hearing scheduled for March 3, 1997.**

(PC-R6; 898-900)(emphasis added). This ruling was contrary to this Court's precedent. Ventura, 673 So. 2d at 481. Mr. Johnson was denied due process of law and effective assistance of counsel by the lower courts actions precluding him from the full and fair postconviction process to which he is entitled. Holland v.

State, 503 So. 2d 1250 (Fla. 1987). The prejudice he suffered as a result is manifest.

Simply put, if the records that were withheld had been properly maintained and produced (as is required by law) (state attorney Karen Cox[2] indicating no knowledge of how state attorney files were transferred to the Attorney General, Supp. Vol. III PC-R. 309; and admitting that the state attorney's office had no procedures for monitoring the whereabouts of public records in its control, Supp. Vol. III PC-R. 300) this issue would not be before this Court. Mr. Johnson should not now suffer for the actions of the state agencies which failed in the first instance.

> . . . the "reasonable conditions" referred to in s. 119.07(1),F.S., do not include anything that would hamper or frustrate, directly or indirectly, a person's right of inspection and copying. Instead, the "reasonable conditions" relate to the custodian's duty to ensure that the public records under his supervision are kept safe. *See, Fuller v. State*, 17 So. 2d 607 (Fla.1944).

Government in the Sunshine Manual, Volume 19, 1997 Edition.

The portion of the appellee's argument that rests upon the notion of an alleged untimely inspection of the Attorney Generals records is illusory. Had the records custodian of the state attorney's office done the job as required of a public official, the records would have been in the possession of the state

[2]The Attorney Generals office represented to the lower court the belief that Ms. Cox was the person responsible for these records. (Supp. PC-R. 20).

attorney and presumably (and as suggested by the state AB. 50) turned over when first requested. The state now urges that Mr. Johnson be penalized for not finding the files which were wrongly housed in a different state agency (due to the fault of the state agency) in the first place. Such a result would reward state agencies that have poor record keeping practices or that intentionally shuffle records among other public agencies. Accordingly, a postconviction litigant would have to request records from every public agency within the state for fear that the records sought were transferred to another agency and that if those requests were not made, the litigant would suffer the harm for not finding them. Certainly, this cannot be said to be the intent or the spirit of public records law and the postconviction procedure and it should not be encouraged.

Unlike the cases relied upon by the state, (e.g. Downs v. State, 24 Fla. Law Weekly S231 (Fla. May 20, 1999), Mendyk v. State, 707 So. 2d 320 (Fla. 1997)), Mr. Johnson did not fail to demonstrate that the records existed. To the contrary, the records did in fact exist, just as postconviction counsel said they did. The lower court denied Mr. Johnson due process of law, effective assistance of counsel and this Court's precedent by precluding him from an adequate opportunity to avail himself of the records. Ventura.

The state's reliance on Buenoano v. State, 708 So. 2d 941 (Fla. 1998) is also misplaced and clearly distinguishable.

Buenoano dealt with a third postconviction motion and the records requests were described as "eleventh hour". Buenoano at 953. This is Mr. Johnson's first postconviction motion and he timely requested public records.

REPLY TO ARGUMENT

ARGUMENT II

THE LOWER COURT ERRED IN DENYING MR. JOHNSON'S MOTION TO DISQUALIFY JUDGE.

The state attempts to minimize the importance of the facts and circumstances supporting this claim. When viewed in its totality however with Mr. Johnson's other claims, the error is clear. James Leon Smith was an important witness against Mr. Johnson. He was not a co-defendant. He was a jailhouse snitch who received an undisclosed benefit from the state for his testimony. That benefit was awarded to Smith by Judge Bentley.

The facts surrounding Judge Bentley's involvement are instructive. Smith's *Motion to Mitigate* his own sentence was originally denied by Judge Bentley on October 6, 1981. Without explanation, Judge Bentley then reset the motion on November 16, 1981. This was done **after** communication from Smith to the prosecutor in Mr. Johnson's case (saying that he had not been treated properly after providing the State assistance) and **after** communication from the prosecutor to Judge Bentley. Judge Bentley then entered an order suspending Smith's sentence from seven years to probation. The interrelationship of these events created in Mr. Johnson a well grounded fear that he would not receive a fair proceeding before Judge Bentley. The motion to recuse was legally sufficient. It should have been granted. Authority for this conclusion has been presented in the Initial Brief and will not be duplicated here (IB. 62-69).

REPLY TO ARGUMENT

ARGUMENT III

THE LOWER COURT ERRED IN DENYING MR.

JOHNSON'S BRADY, GIGLIO AND INEFFECTIVE ASSISTANCE OF COUNSEL DURING GUILT PHASE CLAIMS.

This claim, the claim that Judge Bentley erred in denying the motion to recuse and Mr. Johnson's claim that the state violated the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution by its unconstitutional use of a jailhouse informant to elicit statements from Mr. Johnson[3], cannot be viewed in isolation.

Although the state now claims that Smith's testimony was not necessary to convict Mr. Johnson, it is clear that the state's *modus operandi* in this case was the use of jailhouse informants. As the record demonstrates, the state previously attempted to use a known jailhouse snitch (Larry Brockelbank). The state abandoned Brockelbank when it was revealed that in fact he was not credible. Interestingly, the state found another jailhouse informant, Smith, (who also previously worked with the state, PC-R. 270) to take Brockelbank's place. One must wonder why the state went to such lengths to secure a jailhouse snitch if what the state now says is true, i.e. that the snitch testimony was not necessary.

Judge Bentley failed to fully evaluate the proof entered at the evidentiary hearing regarding Smith's communication to the prosecutor, the prosecutors communication to Judge Bentley and

[3]The lower court erroneously summarily denied this claim.

Smith's mitigated sentence. This evidence corroborated Smith's testimony at the evidentiary hearing. Accordingly, the lower courts ruling regarding Smith was not properly considered or evaluated and not based upon all of the evidence (including documentary) presented. The lower court's selective use of the evidence presented belies any assertion that the ruling is supported by competent and substantial evidence.

The lower court also erred in summarily denying Mr. Johnson's claim that the state's use of Smith violated United States v. Henry, 447 U.S. 264 (1980). It was established and unrefuted at the evidentiary hearing that Mr. Johnson had filed a *Notification of Exercise of Rights Form* in 1981 and renewed at the 1988 trial (PC-R. 48-51). The *Notification of Rights Form* was to ensure Mr. Johnson's fifth and sixth amendment rights were not violated. In fact, Mr. Johnson's fifth and sixth amendment rights were violated when the state used the information Smith provided. Smith elicited unwarned statements from Mr. Johnson which were used at trial. The purported statements were relevant to both the guilt/innocence and penalty phase.

The state argues that the exculpatory evidence possessed by Smith was equally available to Mr. Johnson's trial counsel and thus there is no Brady violation citing Roberts v. State, 568 So. 2d 1255 (199) and James v. State, 453 So. 2d 786 (Fla. 1984) (AB at 66). This argument must fail in light of Strickler v. Greene, 119 U.S. 1936 (1999). The argument must also fail based upon the

undisclosed manner in which the state used Smith. When the error is premised upon the state hiding the falsity and instructing the witness to perpetuate that falsity, it makes no sense to assert that trial counsel could have known about it. However, as the record demonstrates, trial counsel did have suspicions about Smith and attempted to prove that Smith was used illegally (IB. 10, 12). If it is said that trial counsel should have discovered the information, then trial counsel was ineffective for failing to find it. Additionally, trial counsel cannot be effective when deceived by the state United States v. Cronic, 104 S. Ct. 2039 (1984).

The state's suggestion that Smith somehow had nothing to lose by virtue of his recent recantation is also without logic. In fact, Smith consulted with an attorney during his testimony at the evidentiary hearing (IB. 29; PC-R. 222). The lower court also advised Smith of his rights (PC-R. 224-228). Certainly this is indicia that Smith was not eager to now tell the truth and supports his testimony that he felt he now had to "do the right thing". (PC-R. 298).

REPLY TO ARGUMENT

ARGUMENT IV

THE LOWER COURT ERRED IN DENYING MR. JOHNSON'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE.

AND

ARGUMENT V

THE LOWER COURT ERRED IN DENYING MR. JOHNSON'S CLAIM UNDER AKE V. OKLAHOMA.

These issues are presented together for purposes of this reply in light of this Court's recognition that claims of ineffective assistance of counsel at penalty phase and claims arising under Ake v. Oklahoma, 470 U.S. 68 (1985) necessarily overlap. Ragsdale v. State, 720 So.2d 203, 208 (Fla. 1998).

As demonstrated in the Initial Brief (IB. 80-92) these claims were erroneously denied by the lower court. A wealth of evidence was presented at the evidentiary hearing establishing these claims. Trial counsel testified that he had no strategic reason for failing to present it (PC-R. 117).

Moreover not only were the claims denied contrary to the evidence, the lower court completely failed to address the testimony of Dr. Lee Evans. Likewise, the state fails to address the lower court's error in totally ignoring Dr. Evan's testimony.

This situation is analogous to that presented in Campbell v. State, 571 So. 2d 415 (Fla. 1990) wherein the sentencing court must expressly evaluate in a written order each mitigating circumstance proposed by a defendant, determine if it is supported by the evidence, whether it actually constitutes mitigation, must find as mitigating every proposed circumstance that is mitigating and reasonably proven by greater weight of evidence. The same procedure should have been afforded Mr. Johnson. Instead, the lower court's order is completely devoid of any mention of Dr. Evans.

As demonstrated in the Initial Brief, Dr. Evans established the enhanced impact of drug use by a person who is brain damaged. That Mr. Johnson suffers from brain damage was established through Dr. Fisher and unrefuted by the state at the evidentiary hearing. Dr. Fisher learned of Mr. Johnson's extensive developmental and neurological history, using portions of the *Halstead – Reitan Battery*, *Wechsler Adult Intelligence Scale*, *Bender Visual Motor Gestalt Test*, *House Tree Person*, cards from a Thematic Apperception Test, a Neurological History Questionnaire

and series of questions to determine malingering and deception (PC-R. 240). Dr. Fisher found that Mr. Johnson was not malingering or being deceptive. He also discovered that doctors in the past who evaluated Mr. Johnson never addressed the issue of malingering and the one who did (Dr. McClane) said that Paul was not malingering (PC-R. 240-241).

None of the experts used at trial conducted the type of tests Dr. Fisher did and Dr. McClane performed a mental status related only to memory. Dr. Fisher made primary findings that Mr. Johnson suffered at the time of the crime from both toxic psychosis **and** neurological damage (PC-R. 241-242). The neurological damage should not be dismissed.

The state and the lower court has attempted to minimize the significance of Mr. Johnson's brain damage. However it is not the quantity of mitigation but the quality that is significant as well as the fact that it was never pursued at trial. Mr. Johnson's penalty phase jury never knew that he was brain damaged. This makes the fact that Dr. Evans' testimony was ignored all the more egregious.

Dr. Evans also testified that Mr. Johnson suffers from brain damage (PC-R. 315). Additionally Dr. Evans testified that the fact that Mr. Johnson was brain damaged and a polysubstance abuser should have been considered given the exacerbated effects of the use of drugs by a brain damaged individual (321-325).

Not only did the lower court fail to evaluate Dr. Evans' testimony, it failed to evaluate the background materials submitted by collateral counsel regarding Mr. Johnson's father (Ommer). These background materials are an important and significant body of evidence describing Mr. Johnson's family history (IB. 92).

The appellee's argument that the outcome of the proceedings would not have been different must also fail. While the appellee addresses the conviction, the appellee totally ignores (as did the lower court) the impact that Smith's statements (in particular that Paul would just act crazy) had on the penalty phase. Mr. Johnson's sentencing jury recommended death by votes of 8-4 and 9-3 having heard the improper statements attributed to Mr. Johnson by Smith. Proper evaluation of the claim must take into account the effect this improper statement had on the penalty phase jury and the fact that the penalty phase jury never knew that Mr. Johnson was in fact brain damaged, the severe effects of drug use upon a brain damaged individual, and that the jury never heard any of the other mitigation testimony presented at the evidentiary hearing (e.g. the extreme abuse suffered by Mr. Johnson's mother while she was pregnant with him and Mr. Johnson's ability to be a loving compassionate person). IB. 79-84.

The humanity of a person is a critical question at the penalty phase of a capital case. Evidence was presented and

unrefuted at the evidentiary hearing that Paul Johnson was an individual worth saving. This evidence established "compassionate and mitigating factors stemming from the diverse frailties of humankind" in order to show Mr. Johnson as a unique human being instead of a "faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death" Woodson v. North Carolina, 428 U.S. 280, 304 (1976). This is the kind of humanizing evidence that "may make a critical difference, especially in a capital case." Stanley v. Zant, 697 F.2d 955, 969 (11th Cir. 1983). The lower court ignored significant portions of the evidence.

Confidence is undermined in the sentence of death. Garcia v. State, 622 So. 2d 1325) (Fla. 1993).

Mr. Johnson was denied the full and fair consideration of all of the evidence presented at the evidentiary hearing, denying him due process of law. The lower court's findings are not reliable and should not stand given this glaring deficiency.

Additionally as a result of the lower court's refusal to address this evidence, the state's reliance upon Blanco v. Singletary, 702 So. 2d 1250 (Fla. 1997) and Grossman v. Dugger, 708 So. 2d 249 (Fla. 1997) as the controlling standard by which this Court should review the lower court's findings must also fail.

REPLY TO ARGUMENT

ARGUMENT VIII

THE LOWER COURT ERRED IN DENYING MR. JOHNSON'S CLAIM THAT CUMULATIVE ERROR DENIED HIM A FULL AND FAIR ADVERSARIAL TESTING.

At the evidentiary hearing Mr. Johnson established number of errors (See generally Initial Brief). The summary denial of this claim **prior** to hearing any of the evidence at the evidentiary hearing is indicia that the lower court never intended on properly considering the claim. The lower court should have analyzed the cumulative effect of these errors. Swafford v. State, 679 So. 2d 736 (Fla. 1996); Kyles v. Whitley, 115 S.Ct 1555 (1955). As a result Mr. Johnson was denied the proper review and a full and fair evidentiary hearing.

CONCLUSION

For the reasons set out in Mr. Johnson's Initial Brief and

this Reply, this Court should remand Mr. Johnson's case to the circuit court for a full and fair evidentiary hearing or any other relief this Court deems appropriate.

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 6, 1999.

GREGORY C. SMITH
Capital Collateral Counsel
Northern Region
Florida Bar No. 279080

HEIDI E. BREWER
Assistant CCC - Northern Region
Florida Bar No. 0046965
Post Office Drawer 5498
Tallahassee, FL 32314-5498
(904) 487-4376
Attorney for Appellant

Copies furnished to:

Candance Sabella
Assistant Attorney General
Department of Legal Affairs
Westwood Building, 7th Floor
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2391