IN THE SUPREME COURT OF FLORIDA

CASE NO. 93,343

DOMINICK OCCHICONE,

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 LOWER COURT'S RULING FOLLOWING THE POSTCONVICTION EVIDENTIARY HEARING WAS ERRONEOUS.

A. INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE

1. Trial counsel's failure to establish a voluntary intoxication defense

Appellee, in its Answer Brief, contends that Mr. Occhicone has not offered any evidence of his level of intoxication at the time of the murders which could have added appreciably to the testimony that was adduced at trial.

Appellee's assertion is erroneous. The testimony presented by Mr. Occhicone at the evidentiary hearing conclusively established that during the 36 hour period preceding the instant offense, Mr. Occhicone engaged in constant alcohol consumption rendering him intoxicated and unable to form premeditation during the commission of the offense.

Despite the State's contention, none of this testimony could possibly have been "adduced" at trial, especially in light of the fact that trial counsel not only failed to call any of their own witnesses, but they also failed to cross-examine any state witnesses as to whether they had seen Mr. Occhicone drinking at any relevant point prior to the murders. Without such testimony, a defense of voluntary intoxication could not possibly be established.

The jury instructions at Mr. Occhicone's trial stated:

> A defense asserted in this case is voluntary intoxication by the use of alcohol and/or drugs. The use of alcohol and/or drugs to the extent that it or they merely arouse passions, diminishes perceptions, relaxes inhibitions or clouds reason and judgment do not excuse the commission of a criminal act.
>
> However, where a certain mental state is an essential element of a crime, and a person was so intoxicated that he was incapable of forming that mental state, the mental state would not exist and therefore the crime could not be committed.
>
> As I have told you, premeditated design to kill is an essential element of the crime of Murder in the First Degree. Therefore, if you find from the evidence that the Defendant was so intoxicated from the voluntary use of alcohol and/or drugs as to be incapable of forming a premeditated design to kill, or you have a reasonable doubt about it, you should find the Defendant not guilty of Murder in the First Degree.

(R. 841).

To be effective, counsel must present "an intelligent and knowledgeable defense." Cunningham v. Zant, 928 F.2d 1006, 1016 (11th Cir. 1991). Considering the jury instructions, and the fact that trial counsel presented no evidence as to Mr. Occhicone's intoxication, it is evident that trial counsel's "suggestion of intoxication" approach amounted to deficient performance, in that trial counsel essentially failed to utilize any defense whatsoever. Had trial counsel presented the testimony of Patricia Goddard, Kimberly Connell, Mike Stillwagon, Lilly Lawson and Cheryl Hoffman, there is a reasonable probability that the outcome of the trial would have been different.

Without having heard the aforementioned testimony, the jury was left with no choice but to believe the State's closing argument:

> Counsel, is trying to suggest that because he was a heavy drinker and was a violent person and that he was mean to everybody in the household that he was a drunken fool on June 10, 1986. And that Anita Gerrety says he smelled of alcohol on June 10th of 1986, and probably smelled of alcohol every day of the week.

(R. 786).

****

> Debra Newell testified that she knew him for three months, I think she knew him the least of all the witnesses. And she said, most importantly, she saw him on June 10th. And she was working in the bar at 1:30 a.m. to 2:30 in the morning, remembering that this event occurred, this murder occurred 4:00 a.m. So, she saw him about an hour and half or so before the murder. He came in, he looked like he had been sleeping and we talked.
>
> And as we talked he drank. He had two–she recalls, two vodka and cranberry drinks.

****

> What is important, she tells you he wasn't intoxicated. He wasn't drunk.

(R. 797-8).

****

> You know, you heard testimony–you heard a lot of adjectives here, sly obsessed, intelligent. Many adjectives to describe the defendant, but you never heard one witness who took that stand and said on June 10th the defendant was intoxicated. That he was incapable of forming an intent.

(R. 816).

Next, Appellee takes issue with the fact that trial counsel knew or reasonably should have known about two of the witnesses, Ms. Connell and Mr. Stillwagon. However, Ms. Goddard, Ms. Connell's sister and housemate, was interviewed by the Pasco County Sheriff's Office and the Pasco County State Attorney's Office (PC-R. Vol VI, 1006). Through diligent investigation, trial counsel certainly would have become aware of Ms. Connell. Due to deficient attorney performance, trial counsel unreasonably failed to contact Ms. Goddard, and therefore never became aware of Ms. Connell. This failure prejudiced the outcome of Mr. Occhicone's trial.

Through reasonable diligence, trial counsel also would have become aware of Mr. Stillwagon. In her testimony at the evidentiary hearing, Cheryl Hoffman established the presence of Michael Stillwagon at Shooters on the evening of June 9th (PC-R. Vol VI, 1056). Furthermore, Ms. Lawson testified at the evidentiary hearing that she saw Mr. Occhicone leave the bar on the evening of June 9th with Mr. Stillwagon (PC-R. Vol VI, 1039). Counsel failed to obtain such readily available information from either Ms. Hoffman or Ms. Lawson.

Counsel's highest duty is the duty to investigate and prepare. Where, as here, counsel unreasonably fails to investigate and prepare, the defendant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable. See, e.g., Kimmelman v. Morrison, 477 U.S. 365, 384-88 (1986) (failure to request discovery based on

mistaken belief state obliged to hand over evidence); Henderson v. Sargent, 926 F.2d 706 (8th Cir. 1991)(failure to conduct pretrial investigation was deficient performance); Chambers v. Armontrout, 907 F.2d 825, (8th Cir. 1990)(en banc) (failure to interview potential self-defense witness was ineffective assistance); and Code v. Montgomery, 799 F.2d 1481, 1483 (11th Cir. 1986) (failure to interview potential alibi witnesses).

Appellee also argues that trial counsel made a strategic decision that, although the attorneys were aware of other intoxication evidence, they chose not to present it because of its cumulative nature. Yet, contradicting its own argument, Appellee concedes in its brief that trial counsel were unaware of Michael Stillwagon and Kimberly Connell. Additionally, although Ms. Goddard was interviewed by the State, Mr. Occhicone's trial attorneys failed to contact her (PC-R. Vol VI, 1000, 1006). Further, the trial attorneys were apparently ignorant to the fact that Lilly Lawson and Cheryl Hoffman, two state witnesses who testified at trial, actually saw Mr. Occhicone on the day before the murders (PC-R. Vol VI, 1054-7, 1037-41).[1] Thus, any claim by Appellee that trial counsel made a strategic decision is inaccurate, given the fact that the trial attorneys were grossly unaware of this information.

In arguing that Mr. Occhicone's trial attorneys made a strategic decision not to call any witnesses at guilt phase with

[1]Trial counsel failed to question either witness about this extremely pertinent, readily available, information.

regard to establishing a voluntary intoxication defense, Appellee also relies on Rose v. State, 675 So. 2d 567 (Fla. 1996), in which the Court held that, "In light of the strong likelihood that the State could have successfully impeached each of these witnesses, it is apparent that there was a reasoned basis for counsel's decision." Id. at 570.

However, at Mr. Occhicone's evidentiary hearing, trial counsel never expressed any concern that the aforementioned witnesses would be subject to impeachment. In fact, two of the witnesses who testified at the evidentiary hearing, Lilly Lawson and Cheryl Hoffman, were State witnesses at trial. Thus, the State's reliance on Rose is misplaced.

2. Trial counsel's failure to call experts at the guilt phase

Appellee maintains that trial counsel's failure to call any experts at the guilt phase was also based on reasonable trial strategy. Again, Appellee attempts to disguise ineffectiveness as strategy.

One of the "strategic" reasons supplied by trial counsel was that they reasonably believed it would be more beneficial to use the experts in the penalty phase, where counsel thought they at least had a chance for a favorable jury recommendation. Also, trial counsel did not think that they could credibly offer the experts at both phases of the trial (PC-R. Vol V, 792).

These statements alone verify the ineffectiveness of trial counsel. First, trial counsel admittedly withheld expert testimony at the guilt phase in order to strengthen their stance

at the penalty phase. This action unquestionably prejudiced the outcome of Mr. Occhicone's trial. Expert testimony would have been effective in establishing that Mr. Occhicone was unable to commit first-degree premeditated murder. For example, as established at the evidentiary hearing, Dr. Fireman's testimony would have adequately countered virtually all of the evidence of premeditation that the State presented.[2]

Secondly, trial counsel was obviously and inexplicably unaware of the standard penalty phase jury instructions, which were given at Mr. Occhicone's trial:

> Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or innocence of the Defendant and evidence that has been presented to you in these proceedings.

(R. 1357). The jury was instructed, by law, to base their advisory sentence on guilt phase testimony **and** penalty phase testimony. Therefore, trial counsel's infatuation with "saving" the experts for the penalty phase was pointless, because guilt phase testimony has to be considered at the penalty phase. Counsel, in not knowing the law failed to "bring to bear such skill and knowledge as [was required to] render the trial a reliable adversarial testing process." Strickland v. Washington, 466 U.S. 668 (1984).

Finally, Appellee's assertions that trial counsel's decision was a strategic one is directly contradicted by the testimony of Mr. Boyer. At the evidentiary hearing, Mr. Boyer testified that,

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[2]See Appellant's Initial Brief, Argument I.A.2.

prior to the beginning of the trial, defense counsel intended to present witnesses at the guilt phase "[O]nly if we had to do that to establish the alcohol consumption sufficient to get the experts on at the penalty phase." (PC-R. Vol V, 777) (emphasis added). Mr. Boyer maintained that "the place we wanted them [experts] to testify was on the penalty phase" (PC-R. Vol. V, 774), and that "they weren't going to help us out on the guilt phase, they were all going to come back with he had the intent."[3] (PC-R. Vol V, 792). However, during his opening argument at the guilt phase, Mr. Young stated:

> You will hear testimony as to the amount of alcohol he drank, and you will hear testimony, as I'm sure you already know, somebody that drinks a lot manages to walk a line. But you will hear testimony as to the amount of the alcohol that was consumed prior to the incident, and had been for days.
>
> You will hear testimony from a doctor telling you the affect this has on somebody's operation of his mind. You will also hear all the circumstances, some Halkitis didn't bring out, most he did, that play into this situation. And you're going to hear from the doctors that there was no intent to kill Mr. or Ms. Artzner.
>
> You're going to hear that this thing erupted–and Dominick was struck on the head with that broomstick which everybody denies happened. But you're going to hear from the nurse at the jail and the records reflect the injury to the head. And you're going to hear from the doctor, and he's going to tell you something like this will set somebody off,

[3]Despite Mr. Boyer's statements, a review of the trial record verifies that at multiple times during the penalty phase, trial counsel's experts indicated that Mr. Occhicone did not have the capacity to form premeditated intent (R. 1043, 1043, 1102, 1104, 1008).

it's called a suicidal rage.

> And the Doctor will tell you Dominick at this time would have shot Mr. Artzner if it was video-taped by the police department. And he's going to tell you that is not premeditated intent.

(R. 228-9) (emphasis added).

Trial counsel's actions were not based on strategy. Conversely, a complete lack of strategy was evident in that Mr. Young's opening statement completely contradicts Mr. Boyer's testimony at the evidentiary hearing.[4] Counsel evidently informed the jury that specific testimony and witnesses would be forthcoming when it knew in advance of trial that it would not deliver on such a promise. As a result, not only did trial counsel fail to present critical, available lay witnesses and experts, but they compounded the situation by promising such evidence without any intention of presenting it. See Anderson v. Butler, 858 F.2d 16 (1st Cir. 1988) (trial counsel's failure to call expert psychiatric witnesses during trial was ineffective and prejudicial following counsel's opening statement indicating to jury that such witnesses would be called, notwithstanding whether counsel's failure to call the witness alone would have been ineffective.) Counsel's deficient performance prejudiced the outcome of the trial.

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[4]Mr. Boyer considered himself to be the lead attorney (PC-R. Vol V, 789), as did Mr. Laporte (PC-R. Vol V, 874). It is also interesting to note that Mr. Young did not become involved in the case until "well after the charges had been filed and the other two attorneys had been involved in a lot of the pretrial investigations." (PC-R. Vol V, 825).

3. Trial counsel failed to call Audrey Hall as a witness

Appellee argues that trial counsel made a reasonable decision in not calling Ms. Hall as a witness. Although Appellee and trial counsel have provided multiple excuses as to why Ms. Hall wasn't called, i.e., Ms. Gerrety's testimony, possible impeachment, etc., (PC-R. Vol V, 784, 840, 860, 880), Appellee's after-the-fact rationalizations ignores the **facts** of what occurred at Mr. Occhicone's trial: that the trial attorneys were adamant in their desire to call Ms. Hall as a witness after Ms. Gerrety testified, in order to counter Ms. Gerrety's testimony (R. 615-616). In light of this, it is evident that Mr. Occhicone's trial counsel was deficient in failing to present Ms. Hall's testimony, and that had such testimony been presented, there is a reasonable probability that the jury would have returned with a second degree murder conviction.

B. INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE

Appellee's contention that the testimony of Anna Montana and Father Ed Lamp would have been cumulative to that of Joanne Carrico is also erroneous. As demonstrated at the evidentiary hearing, both witnesses testified to additional mitigating evidence that was distinct from that of Ms. Carrico.

For example, Ms. Montana's testimony portrayed Mr. Occhicone as a human being who cared for his child and who had faith in God (PC-R. Vol VI, 982, 984-6). Father Ed Lamp's testimony demonstrated that Mr. Occhicone came to him for counseling and was in desperate need of help (PC-R. Vol IV, 624-6). The fact

that none of this testimony was ever presented to a jury constitutes ineffective assistance of counsel. The United States Supreme Court has held that, in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976) (plurality opinion). In Gregg and its companion cases, the Court emphasized the importance of focusing the sentencer's attention on "the particularized characteristics of the individual defendant." Id. at 206. See also, Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

Counsel here did not meet rudimentary constitutional standards. As explained in Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985):

> In Lockett v. Ohio, the Court held that a defendant has the right to introduce virtually any evidence in mitigation at the penalty phase. The evolution of the nature of the penalty phase of a capital trial indicates the importance of the [sentencer] receiving accurate information regarding the defendant. Without that information, a [sentencer] cannot make the life/death decision in a rational and individualized manner.

Id. at 743 (citations omitted).

Considering the fact that the jury decision was only one vote shy of a life recommendation, this mitigating testimony certainly would have altered the outcome, and the jury would have returned a life sentence recommendation.

Appellee further argues that trial counsel contacted all of the priests identified by Mr. Occhicone, but that none of them would have been helpful. Therefore, Appellee maintains that trial counsel made a reasonable decision not to call Father Lamp as a witness. However, in light of the testimony of Craig LaPorte at the evidentiary hearing, it is apparent that Mr. Occhicone's trial attorneys failed to contact all of the priests of whom they were aware:

> Q (by Terri Backhus): The State asked you a question regarding Father Ed Lamp. Are you certain that Father Ed Lamp was the person you spoke to at--what did you say it was, Lady Queen of Peace?
>
> A (by Craig LaPorte): Our Lady of Queen Peace. I'm certain only because there were three names given to us by Mr. Occhicone, Father Madden, whom I spoke with on the phone and I have a note to that effect, Father Ed who was at Our Lady Queen of Peace Church, and I did go to Our Lady Queen of Peace Church and spoke to the priest at that location. And there was another one which I believe was Father Behr or something like that, and I think Mr. Boyer spoke to that priest.
>
> Q: Do you recall whether that was Father Ed Lamp?
>
> A: No. I just remember it was Father Ed. that's my best recollection.
>
> Q: Could you take a look at this document and see if that refreshes your recollection as to which priest it was that you spoke with.
>
> A: Father Ed. It says Father Ed, in parentheses O'Conner with a question mark. This would have been a note that I made when I was speaking to Dominick.
>
> Q: Okay. So that doesn't--that doesn't help

you in any way?

A: No. It says Father Ed, Our Lady Queen of Peace, off boulevard, and that's where I went and spoke to a priest.

Q: Okay. So whomever Father Ed was he was certainly the one at Our Lady Queen of Peace?

A: My recollection, yes, ma'am. I have a specific recollection of going to that church with Mr. Boyer and talking to somebody.

Q: Let me show you another item and see if that refreshes your recollection as to which priest it was you spoke with.

A: This reflects that I had information about Father Ed at St. Vincent De Paul Catholic Church in Holiday.

Q: Is that the Father Ed you're referring to or--

A: I'm sure it is because there was only one Father Ed that Dominick told us about. But we met him at Our Lady Queen of Peace Church, I'm very certain of that because I'm very familiar with that location.

Q: Okay. So you're certain that it was Father Lamp you spoke to at--

A: No, ma'am, I didn't say that. I said I spoke to a Father Ed; I do not know his last name.

(T. 157-158) (emphasis added).

Although trial counsel may have spoken to a Father Ed, it is apparent from their own notes that they did not speak to the Father Ed from St. Vincent De Paul. Father Ed Lamp was a priest at St. Vincent De Paul Church, not Our Lady Queen of Peace (PC-R. Vol IV, 623). Through Mr. LaPorte's own testimony, it is clear that trial counsel was aware of Father Lamp yet never spoke to

him about testifying at trial.[5]

No tactical motive can be ascribed to an attorney whose omissions are based on ignorance. See, Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991), or on the failure to properly investigate or prepare. See, Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991); Kimmelman v. Morrison, 477 U.S. 365 (1986). See also, Rose v. State, 675 So. 2d at 567; Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995); and Deaton v. Dugger, 635 So. 2d 4 (Fla. 1994).

ARGUMENT II

MR. OCCHICONE WAS DENIED A FULL AND FAIR EVIDENTIARY HEARING IN VIOLATION OF DUE PROCESS AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

A. THE LOWER COURT PREVENTED MR. OCCHICONE FROM PRESENTING HIS CASE DURING THE POSTCONVICTION EVIDENTIARY HEARING BY REFUSING TO ALLOW THE TESTIMONY OF MULTIPLE MITIGATION WITNESSES

Appellee argues, essentially, that trial counsel fulfilled their duty to investigate the mitigating circumstances of Mr. Occhicone's background; that Mr. Occhicone has failed to identify a specific deficiency in their investigation that led to the failure to find a number of witnesses; and that the lower court's ruling, which prevented several mitigation witnesses from testifying at the evidentiary hearing, was proper. [6]

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[5]Also, Father Lamp testified at the evidentiary hearing that, had he been contacted, he would have been available to testify in Mr. Occhicone's behalf at this trial (PC-R. Vol IV, 633).

[6]Additionally, Appellee asserts that these witnesses were (continued...)

In support of this argument, Appellee cites to a litany of pages from the evidentiary hearing transcript (PC-R. Vol V, 797, 833-837, 862, 882, 892-5, 917), to establish that each of the attorneys spoke to family members and tried to develop life history mitigation. However, a review of these pages also reveals that Mr. Boyer conceded that Mr. Laporte was responsible for the actual family, and that Mr. Boyer only spoke to a niece during the trial (PC-R. Vol V, 797); that Mr. Young testified that his involvement with the investigation was very minimal (PC-R. Vol V, 835), and that a good part of the investigators' task was to go find the mitigation witnesses (PC-R. Vol V, 861); and that Mr. Laporte testified that the investigators spoke to Mr. Occhicone, but he wasn't present during their discussions with him (PC-R. Vol V, 894), and doesn't recall if he personally interviewed any of the witnesses for guilt or penalty phase (PC-R. Vol V, 882).

Had trial counsel properly investigated Mr. Occhicone's background for mitigation purposes, they would have known that Mr. Occhicone grew up in Carmel, New York (PC-R. Vol. VI, 966), and that he spent the bulk of his formative years there. This information would have led trial counsel to discover witnesses such as Kenny Volpe, Andy Kinash, and Brenda Balzano. Had he been permitted to testify at the evidentiary hearing, Mr. Volpe would have stated:

(...continued)
not family members.

My name is Kenny Volpe, and I live in Woodstock, New York. I was a friend of Dominick Occhicone when we were both young adults. Everyone always called him “Junior.”

I first met Junior when his family started coming up to Lake Carmel for the summers, about two years before they moved up permanently. Junior and I were in about the same grade in school.

I slept over at Junior’s house several times and visited as well. If remember that Junior’s father yelled a lot. There was no interaction between Junior and his parents–they didn’t talk but just lived in the same house. Junior’s parents weren’t interested in getting to know me or any of Junior’s friends and didn’t pay much attention to me or to Junior when I was there. This was very different from my other friends’ parents, who tried to interact with their sons and their sons’ friends.

I remember going with Junior to New Haven, Connecticut, where we bother took the Navy entrance test. I passed it, but Junior failed the test. This test was not difficult, and it made me realize that Junior was really not very bright. I was in the Navy from 1963 to 1967 and didn’t see Junior at all during that time.

When I got our of the Navy, I went out with Junior a few times and, looking back on it now, I can see that drinking was a real problem for Junior. He drank too much too often. I remember seeing Junior drunk many times. I also remember the very poor judgment that Junior had when he had been drinking and then got in his car to drive. I went with him once, before I knew better, and I remember that he took a lot of undue risks and seemed to have no fear when he was driving drunk–driving too fast and very recklessly.

I remember that Junior worked at Putnam Motors, where he began as a clean-up person and, with his initiative, worked his way up to being a mechanic. I also remember him working for himself as a mason, and everybody

> knew he was a hard worker. Being a mason is hard work, and the general feeling in the community was that Junior was a good, hard worker and went to work every day.
>
> Despite this hard work, Junior also showed pretty poor judgment in other ways. This had always been true of Junior. I remember that when we were in school, Junior followed along after kids who weren't the greatest influence on him. He just didn't have good sense, and he often let others make his decisions for him.
>
> I don't remember ever hearing about or seeing Junior fighting. He wasn't any kind of troublemaker.
>
> A friend told me about Junior being on Death Row a couple of years ago. This same person had also said that he had seen my obituary in a local paper, so I didn't know what to believe. Junior being on Death Row seemed about as likely as hearing about my own death. I was very surprised, to say the least, and would never think of Junior as going out to kill someone.
>
> No one on Junior's defense has ever talked to me about him before. If they had, I would have been happy to give this information at any time.

Affidavit of Kenny Volpe, (PC-R. Vol I, 130-2).

Andy Kinash, a retired police officer and friend of Mr. Occhicone, would have also testified beneficially on Mr. Occhicone's behalf:

> My name is Andy Kinash, and I live in Carmel, New York. I recently retired after 21 years as an officer with the Town of Kent Police Department. I am a friend of Dominick Occhicone. Everybody here in Carmel always calls him "Junior."
>
> I became friends with Junior when he was in his early 20's because Junior was roommates with my partner on the force, Joey Puleo. Joey, Junior, and I spent many of our

> evenings together, typically going to bars and drinking.
>
> At that time, Junior was working as a brickmason, and he was excellent at his work. Everybody around here still remembers the beautiful structures he crafted. In fact, he built a bar-b-que at my father's home, and after nearly twenty years later, it's still there and working well.
>
> Junior was <u>never</u> a violent guy. He wasn't the kind of person to challenge anybody. I remember he was kind of possessive of women he dated, but it was because he was so afraid of losing them. He was very insecure in his relationships with women. I remember hearing, years later, that his wife had died, and he had some bad problems dealing with her death.
>
> Junior drank quite a bit–every night as far as I remember. He was really dependent on alcohol.
>
> It absolutely took my breath away when I heard that Junior had been arrested on this charge. I would never have imagined Junior using a gun. He was just never at all violent, and I sure saw nothing like that during the years I knew him.
>
> No one has ever talked to me about Junior before. If they had, I would have been happy to tell what I know about Junior and to testify at any time.

Affidavit of Andy Kinash, (PC-R. Vol I, 133-4).

Further, Brenda Balzano, a long-time friend of Mr. Occhicone, would have also testified in conformity with postconviction counsel's tender:

> Ms. Balzano would state that she has known Mr. Occhicone for over twenty years. She would also state that he drank every night, [was] very emotional, tending to overreact to situations, that he often got depressed and he sobbed in public when he drank. Ms. Balzano further would state that

> Mr. Occhicone was a kind person, a good friend, he was always doing things for others. He was kind to his girlfriends and was an excellent Mason.
>
> Lastly, Ms. Balzano states the Mr. Occhicone had attempted suicide on two occasions and he had called her and her husband a few other times after he moved to Florida threatening to commit suicide from various things such as life stresses, loss of a job and a breakup with his girlfriend, respectively.
>
> ****
>
> Ms. Balzano would also state that if she was called she would testify to those events if she was called in 1986.

(PC-R. Vol VI, 974-6).

Had counsel performed a proper investigation into Mr. Occhicone's life history, these witnesses would easily have been discovered. Given the fact that the jury recommendation was 7 to 5, despite the paucity of mitigating evidence that was presented at the penalty phase[7], this additional evidence would likely have resulted in a life recommendation. Although each of these witnesses was available to testify at the evidentiary hearing, the lower court erroneously denied the admission of their testimony.[8] This matter should be remanded to the lower court for a full and fair evidentiary hearing, and thereafter sentencing relief must issue.

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[7]At the penalty phase, counsel presented one lay witness, Joanne Carrico, a friend of Mr. Occhicone's from Florida (R. 929-956), two corrections officers (R. 905, 915) and three expert witnesses.

[8]See Appellant's Initial Brief, Argument II.A.

B. THE LOWER COURT ERRED IN ALLOWING THE POSTCONVICTION STATE ATTORNEY TO TESTIFY AT THE EVIDENTIARY HEARING

Appellee relies significantly on Scott v. State, 717 So. 2d 908 (Fla.) to support its position that it was permissible for the prosecutor, Mr. Halkitis, to testify at the evidentiary hearing. However, the facts of this case are distinguishable from those of Scott, in which the Court held:

> While Rule Regulating the Florida Bar 4-3.7 prohibits a lawyer from acting as an advocate and witness in the same trial, a purpose of the rule is to prevent the evils that arise when the lawyer dons the hats of both an advocate and witness for his or her own client. Such a dual role can prejudice the opposing side or create a conflict of interest. These concerns are not implicated in the present case where the state attorney was called as a witness for the other side on a Brady claim in a postconviction evidentiary hearing before a judge.[9]

Scott, 717 So. 2d at 910 (emphasis added).

Here, the state attorney was not called as a witness by Mr. Occhicone in relation to a Brady claim. Rather, Mr. Halkitis called himself as a rebuttal witness to contradict the testimony

[9]Appellee, in its Answer Brief, partially quotes Scott as saying that any contrary result would "bar many trial level prosecutors–who may be the most qualified and best prepared advocates from the State–from representing the State" in postconviction evidentiary hearings. 717 So. 2d at 910, 911. Appellant contends, however, that a complete reading of the quote is necessary in order to fully convey this Court's holding: "To hold otherwise or this issue would bar many trial level prosecutors–who may be the most qualified and best prepared advocates from the State–from representing the State in a Brady claim in a subsequent postconviction evidentiary hearing." Id. at 911 (emphasis added).

of Dr. Mussenden (PC-R. Vol VII, 1260).[10] In doing so, Mr. Halkitis was acting as both an advocate and witness.

Mr. Occhicone was unquestionably prejudiced by Mr. Halkitis' testimony, as evidenced by the lower court's explicit reliance on this testimony to deny his claim of ineffectiveness of counsel:

> In Paragraphs 38 through 42 of Claim II, the defendant assigns as evidence of ineffectiveness of trial counsel, the failure of trial counsel to present expert testimony regarding the defendant's extensive use of alcohol and drugs and the effect that it may have had upon him.
>
> ****
>
> When Dr. Mussenden was called as a witness during the hearing on this motion, he initially claims not to have known much of the testimony about the extent of the defendant's drinking and the depth of the defendant's dismay over his breakup with Anita Gerrety. Dr. Mussenden indicates that trial counsel never spoke to him except at his deposition. <u>This testimony on the part of Dr. Mussenden is contradicted by the testimony of Assistant State Attorney Michael Halkitis who indicates that he sent depositions to Dr. Mussenden and had conversations with him of these topics</u>.

(PC-R. Vol IV, 602) (emphasis added).

Appellant submits that the lower court's reliance on the postconviction prosecutor's testimony, which relates directly to the credibility of a significant witness on an important claim for relief, is not the type of permissible prosecutorial/witness testimony that this Court envisioned in <u>Scott</u>. Therefore, Mr.

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[10]Mr. Halkitis was permitted to testify despite his presence at the hearing after Mr. Occhicone had invoked the Rule (PC-R. Vol VII, 1260).

Halkitis' testimony should be stricken, and this case should be remanded back to the lower court to evaluate this claim without the taint of such testimony.

ARGUMENT III

THE LOWER COURT ERRED IN SUMMARILY DENYING MERITORIOUS CLAIMS WITHOUT THE BENEFIT OF AN EVIDENTIARY HEARING.

A. THE STATE KNOWINGLY PRESENTED FALSE EVIDENCE AND FAILED TO DISCLOSE EXCULPATORY INFORMATION IN VIOLATION OF MR. OCCHICONE'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS WELL AS THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

1. The State's withholding of material witnesses and evidence relevant to the Defendant's state of mind at the time of the offense

Appellee argues that a thorough review of Appellant's allegations clearly demonstrates that the lower court's reasoning in denying this claim was correct. In denying an evidentiary hearing on this issue, the lower court based its finding, in part, on the fact that:

> Second, the State Attorney notes attached by Defendant appear to be the prosecutor's trial preparation notes as the comments therein of "need as a witness" or "don't need as a witness" indicate. The notes do not contain signatures or approvals by the witnesses of the statements to whom they were attributed. As such, this type of material is generally not subject to discovery or disclosure, and is therefore not evidence of prosecutorial misconduct.

(PC-R. Vol II, 223) (citation omitted).

Recently, in Young v. State, 1999 WL 394889 (Fla.), this Court addressed a similar issue when the lower court, in denying an evidentiary hearing for postconviction relief, stated:

> Defendant alleges that the State failed to disclose its impression of Trooper Brinker's strength as a witness as reflected in the prosecutor's personal interview notes, and the prosecutor's specific preparations for trial, including its purpose for interviewing witnesses at the "range." This Court finds, however, that such information does not constitute the type of evidence envisioned by Brady.

Id. at 6. This Court disagreed with the lower court's order and held that, "[W]e find that the trial court's decision that the state attorney notes of witness interviews were not Brady material was error." Id.

In light of this decision, it must follow that the lower court's reasoning in the instant case was also erroneous, and that, although the attorney notes were made in preparation for trial and were not signed by witnesses, they do in fact constitute Brady-type material.

2. The State's failure to disclose a deal with a key prosecution witness

Initially, Appellee comments that, with regard to Mr. Occhicone's Brady allegations, the lower court's reasoning in summarily denying the claim was correct. Apparently, Appellee concurs with the lower court's rationale that "Baker's testimony that no deal was made is not material or crucial as Defendant argues, but merely collateral to Defendant's case because it relates to Baker's credibility only."[11] (PC-R. Vol II, 225).

As this Court recently noted in Young v. State, 1999 WL

[11]Appellant maintains that to the extent that trial counsel could have discovered this deal, trial counsel was ineffective.

394889 at 3, “In the third prominent case on the way to current Brady law, United States v. Bagley, the Court disavowed any difference between exculpatory and impeachment evidence for Brady purposes...” Thus, despite the lower court’s assertions, impeachment of Baker’s credibility is, in fact, material to a Brady claim.

Further, in summarily denying this claim, the lower court held that there were several more damaging statements of premeditation made by Defendant to other witnesses who testified at trial (PC-R. Vol II, 226). However, upon a review of the expert testimony presented at the evidentiary hearing, it has been demonstrated that these other statements were not evidence of premeditation (PC-R. Vol VII, 1152-3, 1232).[12]

Finally, Appellee makes an additional argument, that the “deal” as described in the 3.850 motion is not in any way inconsistent with Baker’s testimony at trial. Appellee overlooks one significant fact, that Baker specifically denied having a deal at trial:

> Q Were any promises made to you by anyone in law enforcement to get you to testify against the Defendant?
>
> A No.

(R. 583).

In its ruling denying an evidentiary hearing, the lower

[12]Dr. Mussenden stated, “I see that more as an alcoholic just talking tough and saying things that he personally could never cope with directly; as opposed to verbally confronting someone he would talk to everyone. Displacement of his anger.” (PC-R. Vol VII, 1152).

court even conceded that a deal had in fact been made (PC-R. Vol II, 225), despite testimony at trial to the contrary. Thus, Appellee's argument is misplaced.

CONCLUSION

Based upon the foregoing arguments and upon the record, Mr. Occhicone respectfully urges this Court to vacate his convictions and sentence, and to remand the case for a new trial, for an evidentiary hearing, or for such other relief as the Court deems proper.

CERTIFICATE OF SERVICE & FONT

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant, which was generated in a Courier non-proportional, 12 point font, has been furnished by United States Mail, first class postage prepaid, to all counsel of record on August 30, 1999.

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