IN THE SUPREME COURT OF FLORIDA

NO. 95,336

JOHNNY L. ROBINSON,

Petitioner,

v.

MICHAEL W. MOORE,
Secretary, Florida Department of Corrections,

Respondent.

REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

On April 20, 1999, the Florida Supreme Court requested that the State of Florida file a response to Mr. Robinson's petition for writ of habeas corpus. In the same order the Court allowed Mr. Robinson to reply on or before May 20, 1999.

Although Mr. Robinson continues to maintain that he is entitled to relief on each of his claims, his reply will be limited to the State's response to Claim I.

CLAIM I

APPELLATE COUNSEL FAILED TO RAISE ON DIRECT APPEAL THE FUNDAMENTAL ERROR CAUSED BY THE STATE ATTORNEY'S DELIBERATE INJECTION OF RACIAL PREJUDICE AT THE GUILT PHASE OF MR. ROBINSON'S TRIAL.

In its Response To Petition For Writ Of Habeas Corpus, Respondent makes several attempts to evade the injustice that was inflicted upon Mr. Robinson: that fundamental error was caused by the State's deliberate injection of racial prejudice at the guilt phase of Mr. Robinson's trial, and that appellate counsel was ineffective in failing to raise this issue on direct appeal.

First, Respondent mistakenly seeks to minimize the error by claiming that Mr. Robinson only cites a "single occurrence" of racial prejudice (Response at 1). In reality, Mr. Robinson not only identifies the "white bitch" comment during the testimony of Clinton Fields (Petition at 10), but he also raises the impermissible and egregious comments made by the prosecutor during his closing argument (Petition at 11). Additionally, Mr. Robinson also noted that this was a case in which this Court previously acknowledged the very real possibility of an infection of racial prejudice, "The situation presented here, involving a black man who is charged with kidnapping, raping and murdering a white woman, is fertile soil for the seeds of racial prejudice." Robinson v. State, 520 So. 2d 1, 7 (Fla. 1988); (Petition at 9).

Contrary to Respondent's assertions, the racial prejudice inflicted upon Mr. Robinson's trial was not a single occurrence. Regardless, the notion that a single comment could not constitute fundamental error is mistaken. See Brooks v. Kemp, 762 F.2d 1383, 1413 (11th Cir. 1985), *vacated and remanded on other grounds*, 478 U.S. 1016 (1986), *reinstated*, 809 F.2d 700 (11th Cir. 1987), *cert. denied*, 483 U.S. 1010 (1987) (quoting United States ex rel. Haynes v. McKendrick, 481 F.2d 152 (2d Cir. 1973), ("Even if brief, use of race as a factor in closing argument obviously would be improper, and would have great potential for prejudice").

Respondent also contends that appellate counsel is not ineffective in failing to raise claims which were not properly preserved (Response at 3). Respondent's statement is accurate only to the extent that fundamental error is not involved. However, as is the case here, "Appellate counsel may be deemed to have rendered ineffective assistance in failing to raise a meritorious issue on appeal even if trial counsel did not preserve it for appeal if the error or impropriety rises to the level of a due process violation, constitutional violation, or another matter of fundamental error." Meyer v. Singletary, 610 So. 2d 1329, 1331 (Fla. 4th DCA 1992); See Roberts v. State, 568 So. 2d 1255, 1261 (Fla. 1990) ("Appellate counsel's failure to raise a claim which was not preserved for appellate review and

which does not present a fundamental error does not amount to a serious deficiency in performance"). Here, unlike the situation in Roberts, fundamental error is involved. (See Reynolds v. State, 580 So. 2d 254, 256 (Fla. 1st DCA 1991) (quoting Miller v. State, 583 F.2d 701, 703-704 (4th Cir. 1978), ([R]ape convictions reversed where prosecutor's summation, without any objection from the defense, included references to the defendants as "these black men" and statements that a defense based on consent was inherently untenable because no white woman would ever consent to having sexual relations with a black man, "so infected the trial with unfairness as to deny the defendants due process of law").

Respondent further asserts that the failure to raise an issue does not prejudice the defendant where the act complained-of is a matter which comes within the discretion of the trial judge. Tompkins v. Dugger, 549 So. 2d 1370 (Fla. 1989); (Response at 3). First, Respondent appears to have misstated the holding by this Court in Tompkins.[1] Secondly, since Respondent points to the discretion of the trial judge in ultimately determining whether appellate counsel can be deemed ineffective

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[1]In Tompkins, this Court stated that: "The record shows that trial counsel objected to the introduction of this evidence. The decision of the trial judge to admit this evidence was within the parameters of his discretion. Therefore, Tompkins cannot demonstrate that he was prejudiced by appellate counsel's failure to raise this claim on direct appeal." 549 So. 2d at 1371-1372 (emphasis added).

(Response at 3), then the actions of the trial judge at the resentencing weigh heavily.

After being informed that Mr. Fields would not testify at the resentencing, and that his previous trial testimony would be read to the resentencing jury, the following occurred:

> THE COURT: I have a point here in that testimony too, that I want to bring to everybody's attention.
>
> MR. PEARL: Yes, sir. It's probably the same one.
>
> THE COURT: Mischaracterization of the testimony. On Page 115, there was testimony by Mr. Fields that Mr. Robinson had said he'd kill the bitch. And on Line 12 on-that was on Line 12, Page 114. Page 115, Mr. Alexander asked the question, and he then puts in the word "white" bitch. And Mr. Fields had not said the word "white".
>
> MR. PEARL: That was the point at which, Your Honor, I was planning to do something about it.
>
> THE COURT: That will be stricken. That word "white" will be stricken from the record, because that is a mischaracterization of the evidence.

(R2. 172-3).

Mr. Robinson contends that the trial court's ruling is tantamount to a concession that, in its discretion, the jury should not have been subjected to the "white" bitch comment by the prosecutor, Mr. Alexander, at the guilt phase of the original

trial.[2] Clearly, Mr. Robinson was prejudiced by appellate counsel's failure to raise this issue on direct appeal.

CONCLUSION

Mr. Robinson was denied the effective assistance of counsel on direct appeal to the Florida Supreme Court in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Mr. Robinson has set out specific instances of ineffective assistance of counsel on direct appeal. He has also shown that confidence in the appellate result is seriously undermined. Mr. Robinson should be given a new direct appeal where he can present these serious issues to this Court.

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[2]Interestingly, when Mr. Alexander was reminded during his deposition that the word "white" was removed at the resentencing, his response was, "I certainly hope so." (Response, Appendix A at 74).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing **REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS** has been furnished by United States Mail, first-class postage prepaid, to all counsel of record on **May 19, 1999.**

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