IN THE SUPREME COURT OF FLORIDA

Case No. SC16-801

ERIC KURT PATRICK
Appellant,
v.
STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENT I

PATRICK IS ENTITLED TO A NEW PENALTY PHASE PURSUANT TO *HURST V. FLORIDA* AND *HURST V. STATE.*

The State believes that this argument is not properly before this Court because the dismissal without prejudice of this claim by the lower court was not final. Answer Brief at 8. The State also acknowledges that Patrick raised a *Hurst* claim in the Petition for Writ of Habeas Corpus filed simultaneously with the Initial Brief. The State responded to the substance of this claim in its response to the Petition. Patrick will therefore rely on the Initial Brief, the Petition and the Response to the Reply to the Petition to show he is entitled to relief under *Hurst v. Florida* and *Hurst v. State*.

ARGUMENT II

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THE VOLUNTARINESS OF PATRICK'S CONFESSION

The State contends that trial counsel was not ineffective for failing to properly investigate and challenge the voluntariness of Patrick's confession through the use of an appropriate expert. The State trumpets the fact that trial counsel consulted with a toxicologist, Dr. Teri Stockholm as if that alone were enough. However, the State does not address the fact a toxicologist was not the right sort of expert for this type of investigation. In postconviction, Patrick retained Dr. William A. Morton, a Psychopharmacologist, as an expert witness. As he explained at the evidentiary

hearing:

> …as a psychopharmacologist I would see active, live patients and seeing how the medicine is helping or hurting them. I would have thoughts and comments about the pharmacokinetics, how the drug is broken down and handled, by the body and various side effects, risk of side effects of continuing that.
>
> I would also have opinions about what would be lethal levels. On the other hand, a toxicologist would be [dealing] primarily with people that have become very toxic on the substance and possibl[y] died. Toxicologists generally work[ ] in a laboratory and ensures that the laboratory process for evaluating drug levels is done in a standard way and that quality control is done and assists, administrates a laboratory and they would be experts in the various procedures, such as the laboratory tests, actually how they are done and does that -- can that be reliable, is it predictable, within what degree of percent. They may have seen patients, but generally they see patients that have died.

(PCR. Vol. 25 p. 108)

So although trial counsel consulted with an expert, Dr. Stockholm was the wrong ***type*** of expert for the particular case at hand, a fact that the State disregards.

The State dismisses the fact that the Guidelines require attorneys to hire experts who are qualified to suit the individual needs of the case because the Guidelines are "not mandatory". However, the Guidelines are, as their name suggests – a guide for defense attorneys as to standard practice in death penalty cases, and a tool for use by the courts in which to measure counsel's performance. While adherence to the Guidelines is not mandatory, it is a good indicator of whether

counsel is performing to a constitutional standard. The choice of expert by trial counsel in this case was poor and ill informed.

Even if trial counsel had consulted an appropriate expert, she provided her expert with no collateral materials, and gave her no access to Patrick. The State completely disregards the fact that Dr. Stockholm was given no medical records, no drug history, no access to the videotaped confession, and no opportunity to speak with Patrick. Trial counsel merely spoke to Dr. Stockholm about what Patrick had told her. This did not constitute the requisite thorough investigation necessary to formulate a complete assessment of the facts. Counsel scratched the surface of the problem and then gave up after her initial contact with Dr. Stockholm was unavailing. As Adam Tebrugge testified, trial counsel should have retained an expert who was trained to evaluate "Patrick's entire pattern of substance abuse and behavior." (PCR. Vol. 23 p. 96)

The State's Answer Brief appears to suggest that because Patrick was not in an acute state of intoxication at the time he made his statement to law enforcement, there was no deficient performance. However, the State ignores the un-refuted fact testified to by Dr. Morton that cocaine withdrawal normally takes "weeks to months" for the symptoms to subside and the individual to return to normal capacities. (PCR. Vol. 25 p. 134) The time between Patrick's arrest and his statement was a little over a day. Given the extent and severity of his drug history, it was vital to investigate his

withdrawal.

The State quotes with approval the trial court's finding that counsel was not ineffective for failing to utilize an appropriate expert in this area, because while the expert could point out the "subtleties" that would show withdrawal they would not be "glaring behavior" that would lead triers of fact to conclude that he was in withdrawal. The purpose of using expert witnesses is to educate the triers of fact as to the details of any condition that a defendant may be suffering from that may not be apparent to the untrained eye. If the lower court's reasoning were applied to other fields of expertise, it would be very rare for any mental health mitigation ever to be found because the defendant appeared "normal" to the untrained eye. This is not a case involving a "battle of the experts". There was nothing presented at trial or at the evidentiary hearing to counter Dr. Morton's testimony. Relief is warranted.

ARGUMENT III

TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO FULLY INVESTIGATE AND PRESENT READILY AVAILABLE MITIGATION EVIDENCE AT THE PENALTY PHASE RESULTING IN PREJUDICE TO PATRICK

1. Failure to use a mitigation specialist

Throughout its Answer to this argument the State trumpets the belief that it is not mandatory for trial counsel to follow the Guidelines promulgated by the ABA and that failure to do so is not *per se* ineffective assistance. Patrick has never argued

that it is. Certainly every case is different, and there will be occasions where specific circumstances require an approach to mitigation investigation that does not completely comport with the Guidelines. However, the Guidelines remain just that - guidelines. And the use of a mitigation specialist is considered to be necessary by national consensus of the national death penalty defense community. The office-wide policy of the Broward Public Defender of not using mitigation specialists puts it as an outlier in the field of death penalty work.

Members of this Court are aware of the importance of mitigation specialists in death penalty defense work. In *Middleton v. State*, 42 Fla. Law Weekly 295, __ So. 3d ___, Justice Pariente wrote a concurrence that explained the importance of using a mitigation specialist:

> I write separately to emphasize the importance of a mitigation specialist to the defense team's investigation and presentation in a capital case and to encourage trial courts to provide defense counsel the assistance of both a mitigation specialist and a fact investigator upon a proper and timely request. In my view, a trial court should not deny a request for a mitigation specialist either based on the misconception that these specialists are similar to fact investigators or based on undue emphasis on an additional expert "costing too much." It is also important that prosecutors do not add to that misconception by arguing, as the prosecutor did here, that all "a mitigation expert does is synthesiz[e] spankings and timeouts and things of that nature," and "you don't have to be an expert" to "go out and find people who can offer mitigation about ... bumps [the defendant] got on the head or spankings he got in school or whatever the case might be." The prosecutor's sarcastic comments reflect not only a misunderstanding of

the effect of early childhood traumas on brain development but also highlight the tendency of some prosecutors to degrade mitigation. *Cf. Oyola v. State*, 158 So. 3d 504, 512–13 (Fla. 2015) (rebuking prosecutorial arguments that characterize a defendant's mitigating evidence as "excuses," "make believe," "flimsy," or "phantom").

As for the importance of a mitigation specialist, this Court has emphasized that "the obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated—this is an integral part of a capital case." *State v. Lewis*, 838 So. 2d 1102, 1113 (Fla. 2002). The investigation into mitigation can be a monumental undertaking, requiring a significant amount of time that would ideally begin as soon as possible. *See* American Bar Association (ABA) Guidelines for the Appointment & Performance of Defense Counsel in Death Penalty Cases (ABA Guidelines), Commentary to Guideline 1.1, reprinted in 31 *Hofstra L. Rev*. 913, 925 (2003). The difference between a thorough assessment of mitigation and a cursory one could, quite literally, be a matter of life and death. When funding is properly requested, the defense team should receive the assistance of both a fact investigator and a mitigation specialist to ensure a complete and reliable mitigation investigation. There is an "apparent widespread use of mitigation specialists or coordinators" in Florida.

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The ABA has published guidelines to "set forth a national standard of practice for the defense of capital cases in order to ensure high quality legal representation" for defendants facing a possible death penalty. ABA Guidelines, 31 *Hofstra L. Rev*. at 919. At the hearing on the motion to appoint a mitigation specialist in this case, the defense counsel urged the trial court to consider the ABA Guidelines, by explaining that these Guidelines "include [ ] a suggestion, if not a mandatory requirement,

that a mitigation specialist ... should be appointed in death cases because of the nature of the crime and because of the serious nature of the potential penalty." The prosecutor's misguided response was, "I could care less about what they [the ABA] think about the death penalty and how it operates in the State of Florida."

Contrary to the opinion of the prosecutor in this case, the ABA Guidelines do have relevance to capital cases, even if these guidelines are not binding in determining whether counsel rendered ineffective assistance. The United States Supreme Court has referred to the various renditions of these guidelines as "guides to determining what is reasonable" for an attorney's performance, or as reflecting "well-defined norms" for attorney conduct. *Rompilla v. Beard*, 545 U.S. 374, 387 & n.7, 125 S. Ct. 2456, 162 L.Ed.2d 360 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524, 123 S. Ct. 2527, 156 L.Ed.2d 471 (2003). This Court has also relied upon these guidelines in determining whether trial counsel has adequately investigated mitigation evidence. *See, e.g., Parker v. State*, 3 So. 3d 974, 984–85 (Fla. 2009) (citing the ABA Guidelines in a postconviction appeal to determine that trial counsel's performance as to investigating and presenting mitigation evidence was deficient); *Blackwood v. State*, 946 So. 2d 960, 974 (Fla. 2006) (citing the Supreme Court's reliance on the ABA Guidelines in *Wiggins* in determining that trial counsel unreasonably failed to attempt to present mental health mitigation evidence, and concluding that there was competent, substantial evidence to support the trial court's finding of deficient performance).

A mitigation specialist is "an indispensable member of the defense team throughout all capital proceedings[,] ...possess[ing] clinical and information-gathering skills and training that most lawyers simply do not have." ABA Guidelines, Commentary to Guideline 4.1, 31 *Hofstra L. Rev*. at 959. Not only do mitigation specialists have honed skills in gathering and understanding the nature of potential mitigation evidence, such as the significance of

> early childhood trauma, but mitigation specialists—unlike the defendant's lawyer—can testify in the penalty phase to impart the results of their mitigation investigation to the jury that must weigh the mitigation and aggravation in determining whether to recommend the death sentence.

The State's blithe dismissal of the importance of the mitigation specialist within the team is misplaced, just as was the prosecutor referred to by Justice Pariente.

2. Social History

The State maintains that the social history presented at the penalty phase was "adequate". Answer Brief at 30. The State faults Patrick with telling trial counsel that his mother was not abusive, and therefore no evidence of his mother's abuse was presented. However as the Guidelines make clear, multiple witnesses should be interviewed. The investigation does not stop with the defendant. The fact that Carsten was able to testify about the abuse of, not only his father but also his mother is significant. Rather than having one abusive parent and one benign parent as was implied at the penalty phase, the reality for Carsten and Eric Patrick was complete hell, as Carsten Patrick's testimony vividly demonstrates. Nor can this testimony be dismissed as cumulative, as the State attempts to do.

Regarding witness Hank Dube, the State again complains that the evidence is "cumulative" and that it should be discounted because it relates to a time when Patrick was six years old. Answer Brief at 36. The State is completely missing the point. Again the Guidelines are clear that investigation should cover all aspects of

the client's life, including early childhood and before. Again the State is taking the stance of the *Middleton* prosecutor by attempting to minimize the effect of early childhood trauma.

Regarding witness Sharon Compton, who had been contacted by letter by the trail fact investigator Phil Arth, but never spoken to in person, the State asserts that the " Defendant now argues that had she been spoken to in person (rather than over the telephone), she would have offered more details about the abuse that Defendant suffered at the hands of his father ." Answer Brief at 36. The State's assertion that she was contacted by telephone is incorrect as borne out by the record. But it is not Defendant who is "arguing" that she would have testified, it is her sworn testimony. (PCR. Vol. 26 p. 49)

3. Mental Health Mitigation

The State claims that the mental health evidence adduced at trial was "adequate". Answer Brief at 38. However, the State ignores the need, as set forth by the Guidelines, that the experts chosen need to be specifically suited to the case in point. As witness Adam Tebrugge testified, "There's not a one-size-fits-all expert." (PCR. Vol. 23 p. 80) The only mental health evidence heard by the jury was Dr. Fichera, who had been used before by trial counsel and who had a standard slide show that was only marginally adapted to Patrick's case. The jury never heard from a neuropsychologist, a trauma specialist or an addiction expert, all of who could have

cast additional light on Patrick's life.

The State goes to great lengths to discount the testimony of the mental health experts who testified at the evidentiary hearing. Trauma expert Dr. Steven Gold is derided because "he purported to be an expert in epigenetics." Answer Brief at 40. Dr. Gold was an expert in trauma and was aware of the fact that trauma can be transmitted through generations of a family. While he said that he teaches his students about epigenetics, it is not relevant that he does not treat multigenerational trauma.

The same token holds true for the State's criticism of neuropsychologist Dr. Ouaou. The State trumpets the *Spencer* hearing of the trial neuropsychologist Dr. Ribbler (who the jury of course never heard). The State also complains that Dr. Ouaou did not evaluate Patrick until a decade after the crime and did not speak to him about the crime. Answer Brief at 41. The State's argument is misplaced for several reasons. First of all, as the United States Supreme Court has made clear there is absolutely no requirement for a "nexus" between mitigation and the facts of the crime. *See Tennard v. Dretke*, 542 U.S. 274, 286 (2004). And while experts who are opining about statutory mental health mitigation may need to discuss the crime with the defendant, this was not the role of Dr. Ouaou. He conducted neuropsychological testing to look at Patrick's brain functioning. Asking about the crime was simply irrelevant to his work. The jury would have been informed by his testimony.

The State also discounts the need for an addictions specialist such as psychopharmacologist Dr. Morton who testified at the evidentiary hearing. The State praises trial counsel for having consulted toxicologist Dr. Terri Stockholm who could not find anything helpful to say. Answer Brief at 53. The State ignores the fact, again, that this was not the right type of expert for this case. Obviously it was important to look at Patrick's consumption of drugs and alcohol in the time leading up to the crime, but it was similarly necessary to take an informed substance abuse history through a face-to-face meeting with the defendant, such as Dr. Morton did. Dr. Morton testified that toxicologists tend to work in laboratory settings often with dead people, whereas addictions specialists such as himself are trained to interview individuals about their substance abuse and to posit the effect on the brain and behavior. Again, the extensive drug history of Patrick was something that the jury should have been made aware of.

4. Multigenerational Trauma

The State claims that because trial counsel attempted to elicit history from witnesses about events prior to Patrick's birth, it should have been raised on direct appeal and is now precluded in postconviciton. Patrick was well aware that trial counsel attempted to raise this kind of issue. However, trial counsel was unaware of the science of multigenerational trauma and could not make proper argument to the lower court as to its relevance to Mr. Patrick. Contrary to the State's assertion this is

not an attempt to litigate something that should have been raised on direct appeal but a separate and valid claim of ineffectiveness.

The State mischaracterizes Patrick's claim that evidence of multigenerational trauma should have been presented to the jury, because the Supplemental Guidelines are not to be presented to the jury. Answer Brief at 45. It is the State, and not the defense that is mistaken in this regard. The Supplemental Guidelines recommend taking a family history that goes back three generations as part of the mitigation investigation. If this multigenerational investigation reveals evidence that could be relevant to mitigation for the defendant then that evidence should be put before the jury. Here, counsel wanted to present evidence of Ingrid Franke's traumatic early life, but could not persuade the court as to why it was relevant to Patrick. That was the deficient performance.

Again, the State derides Dr. Gold's testimony in this area, and claims that he is not an expert in epigenetics. It claims that because he has never treated a patient in this area, he is not "legally qualified" as an expert to testify. The State does not give any authority for this assertion, because there is none. If treating patients were the requirement for mental health experts to testify, a lot of forensic psychologists, including most of the ones used by the State would be excluded. The State's argument is absurd.

5. Prejudice

The State argues that Patrick cannot show prejudice because the trial court "found six aggravators and assigned weight." Answer Brief at 50. The State also trumpets the confession and the testimony of the medical examiner as reasons why Patrick cannot show prejudice. However, it is not what the trial court found that is relevant here, but the effect on the **jury.** Here, the jury recommended death by the slim majority of seven to five, notwithstanding that they were instructed on the invalid CCP aggravator. The State does not address the effect on the jury of any of the additional mitigation or of the wrongly instructed CCP aggravator. The State does not attempt to engage with Patrick's analogy of *Sears v. Upton,* 130 S. Ct. 3259 (2010) and *Porter v. McCollum* 558 U.S. 30 (2009) The State relies solely on the trial judge's findings which is plain error. Relief is warranted.

ARGUMENT IV

THE TRIAL COURT'S SUMMARY DENIAL OF CERTAIN OF PATRICK'S CLAIMS DEPRIVED HIM OF DUE PROCESS AND ACCESS TO THE COURTS IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Patrick relies on the arguments presented in his Initial Brief. No argument is waivered or abandoned.

CONCLUSION

Based on the arguments in this brief and the Initial Brief, the evidence and testimony presented during the evidentiary hearing, and the arguments and authorities contained in Patrick's Rule 3.851 motion. Patrick submits that the Court should grant him a new trial and/or a new sentencing proceeding.

Respectfully submitted,

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CERTIFICATES OF SERVICE AND FONT

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed on this 13th day of June, 2017, and opposing counsel will be served on this date. Counsel further certifies that this brief is typed in Times New Roman 14-point font.

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