IN THE SUPREME COURT OF FLORIDA

Case No. SC23-725
Lower Court Case No.2009-CF-0233

LEO LOUIS KACZMAR,
Petitioner,

v.

RICKY DIXON,
Secretary, Florida Department of Corrections,
Respondent.

REPLY BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

This proceeding involves a Petition for Writ of Habeas Corpus filed contemporaneously with Mr. Kaczmar's appeal of the circuit court's denial of his initial Motion to Vacate Judgments of Conviction and Sentence. The State has filed its response to Mr. Kaczmar's petition, and this reply follows. This reply will address only the most salient points argued by the Respondent. Mr. Kaczmar relies upon his petition in reply to any argument or authority argued by the State that is not specifically addressed in this reply.

CITATIONS TO THE RECORD

The following will be utilized to cite to the record: "R." – record on direct appeal; "T." – trial transcript; "RB." – refers to the State's Response to Petition for Writ of Habeas Corpus. Any additional citations will be self-explanatory.

ARGUMENT IN REPLY

I. Appellate counsel was ineffective in failing to raise the circuit court's failure to hold a Nelson hearing after Kaczmar informed the court that he wished to be appointed new counsel

The failure to have a *Nelson* hearing is a fundamental error as it "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Kilgore v. State,* 688 So.2d 895, 898 (Fla.1996). A *Nelson* hearing implicates the defendant's right to counsel and his right to represent himself. *Jones v. State*, 658 So. 2d 122, 126 (2nd DCA 1995) . The US Supreme Court has held that structural errors include "denial of counsel of choice" and "denial of self-representation."*United States v. Davila*, 569 U.S. 597, 611, 133 S. Ct. 2139, 2149, 186 L. Ed. 2d 139 (2013). These types of errors trigger an ***automatic*** reversal. *Id.* When a defendant complains that his counsel is incompetent and no inquiry is made, his right to counsel and his right to represent himself are both violated. It therefore follows, that the Florida district courts have repeatedly held that a ***wholesale*** failure to conduct any sort of *Nelson* inquiry is "per se error." *Boaz v. State*, 135 So. 3d 506, 508 (Fla 5th DCA 2014).

> "[W]hile the failure to conduct an adequate *Nelson* inquiry is subject to an abuse of discretion standard and, presumably, a harmless error analysis, the failure to conduct *any* inquiry is per se error." *Jackson v. State,* 33 So.3d 833, 836 (Fla. 2d DCA 2010) (citing *Maxwell v. State,* 892 So.2d 1100, 1101–02 (Fla. 2d DCA 2004)); *Nesmith v. State,* 6 So.3d 93, 94 (Fla. 1st DCA 2009) (noting the failure to conduct a "preliminary inquiry into the defendant's reason for seeking to discharge court-appointed counsel is not harmless error; rather, it is **'a structural defect in the trial requiring reversal as per se error'** " (quoting *Maxwell,* 892 So.2d at 1102)).

Boaz v. State, 135 So. 3d 506, 508 (Fla 5th DCA 2014)(emphasis retained). *See also Dunn v. State*, 640 So. 2d 201, 202 (Fla.4th DCA1994); M*ilkey v. State,* 16 So.3d 172, 174 (Fla. 2d DCA 2009); *Jackson v. State*, 33 So. 3d 833, 835 (Fla. 2d DCA 2010).

Mr. Kaczmar's actions while in jail were the most damning evidence against him.[1] Mr. Kaczmar was frustrated with Mr. Shea's ineptitude took matters into his own hands by contacting someone on the outside to plant evidence on his co-defendant so that police would shift their investigation to him. Had Mr. Kaczmar's concerns with his attorney been addressed at all, it would have prevented Mr.

[1] Mr. Kaczmar listened to advice of a jailhouse informant, William Filancia, who arranged for him to meet with someone who was willing to plant evidence on Mr. Kaczmar's co-defendant.

Kaczmar's meddling in his own case. A *Nelson* hearing would have resulted in either a new attorney for Mr. Kaczmar, self-representation, or at least a dialogue in court between counsel and Mr. Kaczmar, where Mr. Kaczmar was assured that counsel was competent to handle this case.

Mr. Kaczmar wrote the court directly asserting that he had concerns about his attorney's experience with criminal cases. (R4:742-745). He asked the court to appoint a new attorney. (R4:742-745). This alone satisfies the requirements articulated in *Morrison*, where the defendant must make "a formal allegation of incompetence." *Morrison v. State*, 818 So. 2d 432, 441 (Fla. 2002). Perhaps the defendant is too polite for his own good, but there is no meaningful distinction between questioning someone's competence and questioning someone's experience.[2]

The State relies heavily on *Morrison v. State* for its position that Mr. Kaczmar was not entitled to a *Nelson* hearing, but the court in

[2] In addition, Mr. Kaczmar stated that counsel was not providing discovery, counsel was not filing motions, counsel was not talking to witnesses, and counsel was not communicating with him. (R4:742-745). These cover nearly every aspect of counsel's responsibilities, leading one to wonder, if counsel was not doing these things, what *was* counsel doing?

Morrison did address the issues raised by the defendant with counsel and the defendant. *Morrison v. State*, 818 So. 2d 432, 441 (Fla. 2002). This is in stark contrast to the instant case, where there is no record that Mr. Kaczmar's concerns were ever allayed by any sort of inquiry on the part of the court. Not that these are particularly meaningful, but there is not even a colloquy at the end of trial or the *Spencer* hearing to ensure that the defendant is satisfied with the representation he received.[3]

The State attempts to blame Mr. Kaczmar for not re-asserting the issue. But again, *Morrison* is distinguishable on that issue. While the court in *Morrison* did not hold a full *Nelson* hearing, the court in *Morrison* did make multiple inquiries of Mr. Morrison about his satisfaction with counsel. Unlike Mr. Morrison, Mr. Kaczmar was never "given the opportunity to raise anything further." *Morrison v. State*, 818 So. 2d 432, 441–42 (Fla. 2002). The court here never explained what counsel was doing, nor attempted to "address and alleviate" any concerns on the part of Mr. Kaczmar. *Id.* at 442. It

[3] There is a colloquy of this sort when Mr. Kaczmar enters a plea to his tampering charges. However, Mr. Kaczmar never asserted that Mr. Shea was incompetent to handle those charges.

strains logic to hold a defendant responsible for preserving an objection to his counsel's ineffectiveness.

Respondent cites to three cases for the argument that the defendant (himself) has the duty to preserve this issue. *Soltis*, however is distinguishable in that the defendant had a colloquy where he "expressed his satisfaction with the same court appointed counsel." *Soltis v. State*, 270 So. 3d 428, 429 (Fla. 4th DCA 2019). An affirmative waiver of the issue is distinct from not re-asserting the issue with the court. The other two cases the state cites to have limited opinions which do not speak to the additional facts which caused the courts to conclude that the issue was affirmatively waived. Additionally, they are in conflict with the cases that identify this as a structural error.

Respondent argues that appellate counsel was not ineffective because the issue was meritless and it was strategically omitted.[4] Because a court never addressed this issue, which implicates both Mr. Kaczmar's right to counsel and his right to self-representation,

[4] The Respondent is imbuing a strategic reason for the omission, but it is more likely that Mr. Kaczmar's short motion was simply overlooked in the voluminous record.

it's even more essential to raise it. This is unique from the cases respondent relies on where a Nelson Hearing was held and the issue on appeal was whether the hearing was sufficient. In this instance, no court has ever addressed this structural (and fundamental) error. It was appellate counsel's responsibility to bring the issue to this Court's attention. The 2nd and 4th DCA have both urged the State to remonstrate with the trial court as far as holding a *Nelson* hearing when the issue is raised, urging that the State can "provide a valuable public service by noting the relevant case law, thus potentially avoiding the necessity for a new trial." *Ewing v. State*, 996 So. 2d 871, 872–73 (Fla. 2nd DCA 2008); *Graves v. State,* 642 So.2d 142, 144 (Fla. 4th DCA 1994). Similarly, appellate counsel has a duty to bring it to this Court's attention thereby eliminating unnecessary litigation.

II. **Appellate counsel was ineffective in failing to raise the circuit court's failure to inquire about trial counsel's active conflict in representing Kaczmar.**

Respondent has argued that this claim should be denied as Petitioner did not assert that the failure to inquire was a fundamental error. However, petitioner did assert that it was a structural error as it violates Mr. Kaczmar's 6th amendment right to counsel. Similar to

the failure to conduct a *Nelson* hearing, a failure to inquire about an active conflict, implicates the defendant's right to counsel. As such it is a structural error under *Davila*. *United States v. Davila*, 569 U.S. 597, 611, 133 S. Ct. 2139, 2149, 186 L. Ed. 2d 139 (2013). *Cuyler* also recognizes that "a defendant who shows a conflict of interest affected the adequacy of representation need not demonstrate prejudice in order to obtain relief." *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980). The reasoning behind this is that prejudice follows from a violation of a defendant's sixth amendment right and courts need not "to indulge in nice calculations as to the amount of prejudice" attributable to the conflict. *Id*. at 349 (cleaned up).

Respondent argues that the trial court has no duty to look into the "copious filings" in this case to see whether there was any conflict between counsel and Mr. Kaczmar. (RB. 19). In Mr. Kaczmar's petition the deposition of Mr. Filancia was referenced as the clearest indication of the actual conflict that Mr. Kaczmar's counsel had.[5]

[5] In the deposition Mr. Filancia explained that Mr. Kaczmar met with Mr. Filancia's own attorney and eventually became so frustrated with Mr. Shea that he hired Filanica's friend Carlos to do some work for him on the outside. Carlos was an undercover police officer, and Mr. Kaczmar ended up with evidence tampering charges that came into this trial as "consciousness of guilt." (R8:1394, 1422, 1423, 1791).

Aside from the deposition, there were other indications made in open court. Det. Sharman testified that Mr. Kaczmar wanted to fire his attorneys. (T. 736). Mr. Kuritz, testified that he had consulted with the defendant about a personal injury case, and Mr. Kaczmar had asked him if he would be interested in taking the proceeds from the personal injury case as compensation for the criminal case. (T. 833). While not explicitly indicating a conflict, this testimony combined with Mr. Kaczmar's initial letter (requesting a new attorney) should have peaked the court's interest to inquire into what exactly was going on with Mr. Kaczmar and his Mr. Shea.

Respondent argues that this claim was rightfully omitted on direct appeal because conflict claims are routinely raised in post conviction. However, on the facts in Mr. Kaczmar's case a postconviction claim relating to the actual conflict would be procedurally barred as it could have been raised on direct appeal since the conflict was evident on the face of the record. *Finney v. State*, 660 So.2d 674, 684 (Fla.1995); *Rutherford v. Moore*, 774 So. 2d 637, 646 (Fla. 2000). Conflict claims are routinely raised in postconviction because it is rare for there to be evidence of a conflict on the record. Respondent cites to multiple cases where a conflict

claim was raised in postconviction, and none of them involve conflicts that were apparent on the face of the record: *Calhoun v. State*, 312 So. 3d 826, 850 (Fla. 2019); *Buenoano v. Dugger*, 559 So. 2d 1116, 1119-1120 (Fla. 1990); *Porter v. Wainwright*, 805 F. 2d 930, 939-41 (11th Cir. 1986). The conflict raised in *Calhoun* was that another attorney in the public defender's office was personally acquainted with the victim. *Calhoun v. State*, 312 So. 3d 826, 850 (Fla. 2019). This was discovered during postconviciton investigation and is not evident on the face of the record. The conflict raised in *Buenoano* was that trial counsel and the defendant had a contract for counsel to receive proceeds from any book or film adaptation of the defendant's life. Again, this is a claim that would've needed some investigation and would not have been evident from the record. *Buenoano v. Dugger*, 559 So. 2d 1116, 1119-1120 (Fla. 1990). The conflict raised in *Porter* was that the trial attorney had previously represented one of the trial witnesses. This would be evident in the record of the *witness's* case, but not from the record in *Porter*. *Porter v. Wainwright*, 805 F. 2d 930, 939-41 (11th Cir. 1986). The conflicts in these cases were not evident on the face of the record, this make them distinguishable from Mr. Kaczmar's case. Mr. Kaczmar's conflict

claim had to be raised in the direct appeal as it would be procedurally barred in postconviction as the basis for the claim is apparent on the face of the record.

Respondent suggests that the conflict could have been raised as an IAC claim, where counsel failed to present evidence of Mr. Kaczmar's motivation in trying to plant evidence on his co-defendant. However, in evaluating ineffectiveness courts give great deference to counsel's strategy decisions. But, Mr. Shea should not be in the situation where he is making strategic decisions between maligning his own reputation and presenting evidence that would help exculpate his client. Counsel cannot make an unbiased decision on whether to utilize that strategy as he is intertwined in the issue. Rule 4-1.7(a)(2) of the Rules Regulating the Florida Bar states that a lawyer must not represent a client if "there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by *a personal interest of the lawyer.*" (emphasis supplied). Mr. Shea's personal interest in preserving his reputation affected the adequacy of Mr. Kaczmar's representation and it went unaddressed

by the court, creating a structural error that appellate counsel was ineffective in failing to raise.

IV. **Appellate counsel was ineffective in failing to appeal the circuit court's ruling on the defendant's motion for individual and sequestered voir dire for evidentiary hearing to tax costs**

There was no ruling on this issue in spite of renewed motions on the part of trial counsel. While there was no binding caselaw at this point in time, this is the sort of issue that is catalytic in the sense that it needs to be raised in order to preserve it and in order to prompt potential changes in the law in the future. This Court has previously held that claims are time barred when they are raised for the first time after a change in the law *even* when they would have been frivolous had they been raised prior to the change in law. *Bowles v. State*, 276 So. 3d 791, 794 (Fla. 2019). As such, even though there was Florida law at the time on this issue at the time, appellate counsel had a duty to preserve the issue for the future.

V. **A fundamental error occurred when the aggravating factors were not found by the grand jury in this case**

Respondent misapprehends the issue at hand. Petitioner does not seek a "not-yet-recognized, new right to have a grand jury find aggravators." (RB. 51). The Florida Constitution already provides

that only a grand jury can charge a capital offense. It is not that the indictment is defective, it is that an indictment for 1st degree murder with no articulated aggravators does not grant the State authority to seek death. More fundamentally, the issues that would possibly result in the State being granted authority by the citizens of this State to seek death were removed from their consideration.

VI. **Appellate counsel was ineffective in failing to raise the fundamental error that occurred when the judge told the venire that Kaczmar was previously sentenced "to life--to death."**

Respondent takes issue with Petitioner's citation to *Knight* as *Knight* states that fundamental error "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Respondent argues that Kaczmar cannot explain "how the state would not have been able to obtain its death recommendation without the judge's minor comment or why he is absolved from proving that fact for fundamental error under *Knight*. Kaczmar had cited to *Knight* as it is a case addressing misstatements from the judge in jury instructions. The language about the validity of the trial helps define fundamental error as an error that sets up a faulty

framework for the proceeding. However, *K*night only deals with fundamental error in the guilt phase. It is not a standard that can be applied in a penalty phase.

The standard for fundamental error in the penalty phase is distinct. In a penalty phase, the question is whether the error is "so prejudicial as to taint the jury's recommended sentence." *Wyatt v. State*, 641 So. 2d 355, 360 (Fla. 1994); *Thomas v. State,* 748 So.2d 970, 985 n. 10 (Fla.1999); *Fennie v. State*, 855 So. 2d 597, 609 (Fla. 2003). These cases all deal with improper statements made by the State in their closings. A statement by the court is more prejudicial than anything the state would say as the jury is told that the State's arguments are not evidence, but the judge is expected to accurately and properly instruct the jury. Being told by the court that Kaczmar was previously sentenced to death is an error which reached down into the validity of the proceeding and is so prejudicial as to taint the jury's recommended sentence, it was ineffective for appellate counsel not to have raised this fundamental error.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Kaczmar respectfully urges this court to grant habeas relief and set aside his conviction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic service to Jason Rodriguez, Assistant Attorney General, on this 28th day of September, 2023.

CERTIFICATE OF COMPLIANCE

This is to certify that the foregoing was generated in Bookman Old Style 14 point font and contains 3,063 words, pursuant to Fla. R. App. P. 9.100.

Respectfully submitted,

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