IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1051

DUSTY SPENCER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, STATE OF FLORIDA

REPLY BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

This reply brief addresses claims I (A), 1 (B), 1 (C) of Mr. Spencers initial brief. As to all other issues, Mr. Spencer stands on the previously filed initial brief.

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ISSUE I (A)

THE APPELLEE IS INCORRECT IN ASSERTING THAT PROSECUTORIAL MISCONDUCT DID NOT DEPRIVE MR. SPENCER OF A FAIR TRIAL.

In the direct appeal brief Mr. Spencer raises several claims centering around prosecutorial misconduct. These claims included improper use of gloves, a false statement regarding an iron, a false statement that Mrs. Spencer was armed with a rifle, a prejudicial statement concerning the presence of a dog at the crime scene, improperly commenting on Mr. Spencer's right to remain silent, and misstating the evidence as to whether Mr. Spencer told Dr. Lipman that he recalled stabbing the victim.

THE PROCEDURAL BAR ISSUE

In the answer brief, Appellee asserts that the trial court was correct in finding that all of the above claims are procedurally barred as matters which could have been raised on direct appeal. This assertion is not supported by existing Florida law relating to post conviction proceedings. As Mr. Spencer correctly pointed out in the initial brief, he alleged in the 3.850 motion that trial counsel was ineffective for failing to object to the prosecutorial misconduct. Ineffective assistance of counsel claims for failing to object to prosecutorial misconduct are contemplated by Rule 3.850 and have been recognized by Florida courts as a legal basis for bringing a postconviction actions. *See* Overton v. Florida, 531

So.2d 1382 at 1387 (Fla. 1st DCA 1988); Brown v. State, 755 So.2d 616 at 623 (Fla. 2000); Mills v. Dugger, 507 So.2d 602 at 604 (Fla. 1987); Teffeteller v. Dugger, 734 So.2d 1009 (Fla. 1999). The Court was obligated to determine, on the merits, all ineffective assistance of counsel claims concerning the failure to object to instances of prosecutorial misconduct. Further, these claims are not barred due to any issues actually raised in the direct appeal. The only claim of prosecutorial misconduct actually included in the direct appeal concerned the objected to comments by the prosecutor about Mr. Spencer holding a rifle on the day of the homicide. *Spencer* at 383. This Court found that singular comment, although improper, was not so inflammatory to have influenced the jury to reach a more severe verdict than that it would have otherwise. Id. This Court has never addressed the remaining claims of prosecutorial misconduct alleged in the 3.850 motion in terms of ineffective assistance of counsel for failing to object.

Additionally, these claims of prosecutorial misconduct are presented in the 3.850 as fundamental error. As Mr. Spencer properly pointed out in the initial brief a claim of fundamental error can be raised at any time including a motion for postconviction relief (citing the Smith, Hill, and Christopher cases). Florida courts have generally recognized that prosecutorial misconduct, even unobjected to by defense counsel, can amount to fundamental error. In Defreitas v. State, 701 So.2d 593 (4th DCA

1997), the Fourth District specifically held that prosecutorial misconduct for improper comments can constitute fundamental error even without a proper objection or preservation where the error goes to the foundation of the case or goes to the merits of the cause of action. Id. at 595. Since fundamental error can apply to instances of prosecutorial misconduct, it is proper to raise the issue in a postconviction action. This court is obligated to decide the issues of prosecutorial misconduct raised in Mr. Spencer's 3.850 on the merits and not allow the state to hide behind a nonexistent procedural bar.

THE CUMULATIVE EFFECTS DOCTRINE

The answer brief in this case repeats the error of the trial court in the analysis of the prosecutorial misconduct claims brought by Mr. Spencer in his 3.850 motion. Both the trial court's order denying the 3.850 claims and the answer brief address each instance of prosecutorial misconduct in isolation when assessing whether they deprived Mr. Spencer of a fair and impartial trial, materially contributed to the conviction, were so harmful or fundamentally tainted as to require anew trial, or were so inflammatory that they might have influenced the jury to reach a more severe verdict that it would have otherwise (the standard enumerated by this Court in Spencer 645 So.2d at 383). It is a well settled principle of Florida law that a court must address the cumulative impact of all improper comments or actions by the

prosecutor in determining there impact on the fairness of the trial. In Defreitas the Fourth District stated:

> Measuring the prosecuting attorney's conduct in the instant case by the aforementioned well settled standard, we are persuaded that appellant has been denied one of his most precious constitutional rights, the right to a fair criminal trial, by the **cumulative effect** of one prosecutorial impropriety after another one. Furthermore, we are equally persuaded that the **cumulative effect** of the numerous acts of prosecutorial misconduct herein were so prejudicial as to vitiate appellants entire trial. In addition, we are likewise persuaded beyond question that the **cumulative effect** of the numerous acts were of such a character that neither rebuke nor retraction could have or would have destroyed there sinister influence. The prosecutorial misconduct, taken in its entirety and viewed in its proper context, is of such a prejudicial magnitude that it enjoys no safe harbor anywhere in the criminal jurisprudence of this state. Accordingly, we find fundamental error.

701 So.2d at 600 (*emphasis added*).

Other Florida cases also hold that the cumulative effect of the prosecutor's comments or actions must be viewed in determining whether a defendant was denied a fair trial. *See* Brown v. State, 593 So.2d 1210 (Fla. 2nd DCA 1992)(holding that a combination of improper comments made by the prosecutor in closing argument amounted to fundamental error); Kelley v. State, 761 So.2d 409 (Fla. 2nd DCA 2000)(holding that the **cumulative effect** of the prosecutor's improper comments and questions deprived Kelley of a fair trial)(*emphasis added*); Garron v. State, 528 So.2d 353 (Fla.

1988); Ryan v. State, 509 So.2d 953 (Fla. 4th DCA 1984)(holding that prosecutorial misconduct amounts to fundamental error and is excepted from the contemporaneous objection/motion for mistrial rule, when the prosecutors remarks, **when taken as a whole** are of such character that its sinister influence could not be overcome or retracted)(*emphasis added*); Freeman v. State , 717 So.2d 105 (Fla. 5th DCA 1998); Pacifico v. State, 642 So.2d 1178 (Fla. 5th DCA 1994)(holding that the **cumulative effect** of prosecutorial misconduct during closing argument amounted to fundamental error)(*emphasis added*); Taylor v. State, 640 So.2d 1127 (Fla. 1st DCA 1994); Carabella v. State, 762 So.2d 542 (Fla. 5th DCA 2000)(holding that the **cumulative effect** of improper prosecutorial comments during closing argument was so inflammatory as to amount to fundamental error)(*emphasis added*); Pollard v. State , 444 So.2d 561 (Fla. 2nd DCA 1984)(holding that the court may look to the "cumulative effect" of non objected to errors in determining "whether substantial rights have been affected")(*emphasis added*).

The above case law establishes that the trial court erred in failing to assess the cumulative effect of the prosecutors misconduct in this case. This is a legal error that is afforded no presumption of correctness and is subject to de-novo review by this Court. In conducting the de-novo review this Court should assess the cumulative effect of the prosecutorial misconduct in accordance with the law contained in the cases cited above.

THE GLOVES AND THE EMOTIONAL OUTBURST

The answer brief of appellee is incorrect in stating that the use of the gloves combined with the emotional outburst during closing argument by the prosecutor was proper. To the contrary, Florida law prohibits such courtroom dramatics by the prosecuting attorney. In Taylor v. State, 640 So.2d 1127 (Fla. 1st DCA 1994), the First District found the actions of the prosecutor in a striking a table with the murder weapon and his conjecture concerning the child's dying words were harmful error. The court stated "the activities were designed to evoke an emotional response to the crimes or to the defendant and fall outside the realm of proper argument". Id. at 1135. *See also* Bertolotti v. State, 476 So.2d 130, 134 (Fla. 1985); Garron v. State, 528 So.2d 353 (Fla. 1988).

In applying the above stated law to the present case, it is clear that the emotional outburst by the prosecutor while donning the latex gloves was designed to evoke an emotional response by the jury to the crime and to the defendant and is prohibited by Florida law. Premeditation was a highly contested aspect of this case. Contrary to the assertions of the appellee in the answer brief, the state of the evidence as to premeditation as to Mr. Spencer was hardly "overwhelming". This Court struck down the use of the CCP aggravator due to lack of evidence as to the murder being cold calculated and premeditated. *Spencer at 384.* Although this Court

did affirm Mr. Spencer's conviction for premeditated murder, the striking of the CCP aggravator does evidence that the issue of premeditation in the case was a close call and not "overwhelming". Also, the jury's advisory sentence of death was by a 7-5 vote and shows that the aggravating circumstances in the case were likewise not "overwhelming".

It is in the context of this very close case in both the guilt and sentencing phase that the actions of the prosecutor must be assessed. At a most critical stage in the trial concerning the most important issue in the case (premeditation), the prosecutor chose to put on a pair of latex gloves, flail her hands in front of the jury while stating "premeditation" in a blubbering type broken voice, and then became so overcome with emotion she could no longer speak. The point the prosecutor was trying to establish, that the gloves established premeditation, could have been argued without donning the gloves and making an emotional outburst. The only purpose which can be attributed to donning the gloves is to play to the emotion of the jury. Murder cases are often conducted in a highly charged environment with facts and circumstances that naturally elicit strong emotional feelings. It is incumbent on the prosecuting attorney not to exacerbate these emotions in an attempt to sway the jury with improper courtroom demonstrations and histrionics.

Furthermore, contrary to the assertions of the appellee in the

answer brief, the fact the prosecutor did not "cry" during the closing argument is not dispositive as to whether her actions were proper. Crying is not a requirement under Florida law in order for a closing argument to be found improper. The prosecutor in the Taylor case did not cry when he hit the table with a hammer during closing argument, yet his actions were found to be improper. There are many other cases cited within this reply brief and the initial brief concerning findings by courts of prosecutorial misconduct that have nothing to do with crying. It is the actions of the prosecuting attorney of donning the gloves and the emotional histrionics which are improper. The absence of tears is not a legal basis for denial of the claim.

FALSE STATEMENT REGARDING IRON

In the initial brief, Mr. Spencer raised the claim that prosecutor Sedgwick made a knowing misrepresentation to the jury in opening statement that Timothy Johnson witnessed Mr. Spencer beating Mrs. Spencer with an iron. In the answer brief Appellee states "Appellant calls the prosecutor disingenuous for stating under oath that she believed Tim would state he observed his mother being struck with an iron. However, the State notes that the prosecutor in fact corrected her misstatement at the time of trial during her own closing argument. (T.R. 1022). The jury was not misled by the prosecutor's opening statement. Appellant's personal attack on the prosecutor is wholly unwarranted". (Appellee's answer

brief at 34).

The citation of T.R. 1022, which is asserted by Appellee to contain a correction by the prosecutor of her "misstatements" is in fact the closing argument of defense counsel Robert Smallwood. At no point in her actual closing argument did Ms. Sedgwick correct her misstatement in opening statement about Timothy Johnson's observations of Mr. Spencer using an iron to beat Mrs. Spencer. The erroneous reference to the record by the Attorney General should not be considered by this Court in assessing this claim.

NON-HEARING INSTANCES OF PROSECUTORIAL MISCONDUCT

In the initial brief Mr. Spencer raises several "non hearing" instances of prosecutorial misconduct including improper comments by the prosecutor as to Mr. Spencer's failure to testify. (Appellant's brief p. 43-45). Specifically, when the prosecutor was cross examining a defense mental health expert, Dr. Kathleen Burch, she questioned her about the fact that Mr. Spencer's statement to her was not under oath and then blatantly commented on Mr. Spencer's failure to testify by stating:

> Would you consider the type of testimony that the **jury would have received**, that **the jury would have heard**, that being **sworn testimony subject to cross examination by the state**, and defense to be a superior form of fact finding for factual determination than you did, just listening to Dusty Spencer's answers?

(R. 182) (*emphasis added*)

In the answer brief, Appellee states that no relief is warranted for the remarks. Appellee reasons for asking this Court to deny the claim are: (1) Since the remark was made during penalty phase, no prejudice would attach because Mr. Spencer had already been found guilty (Appellee's brief p. 38); (2) Since Dr. Burch was relating Mr. Spencer's allegedly self serving statements to the jury, the prosecutor was entitled to point out that they were not under oath and had not been subject to cross examination (Appellee's brief p. 37-39); (3) The comment is proper under the authority of this Court's decision in Stewart v. State, 620 So.2d 177, 179 (Fla. 1993). As will be demonstrated below, all of the reasons stated in Appellee's answer brief for denial of the claim of prosecutorial misconduct for improper comment on Mr. Spencer's failure to testify are erroneous.

As to Appellee's first contention, that the remark was harmless because it was made in penalty phase, this Court has unequivocally held on many occasions that the right against self incrimination applies in the penalty phase of a death penalty case. In Burns v. State, 699 So.2d 646 (Fla. 1997) this Court stated:

> We agree with Burns' contention that the Fifth Amendment right against self incrimination, made applicable to the State's through the Fourteenth Amendment continues through the sentencing phase of a capital murder trial.

Id. 650.

The Appellee is also incorrect in stating that the comments by the prosecutor are proper rebuttal to allegedly "self serving" comments by Mr. Spencer to expert witness Burch. A prosecutor is never permitted to comment on a defendant's failure to testify, even as a supposed contradiction to statements made to a mental health expert. There is no such exception recognized by Florida law. On the contrary, Florida law is clear that any comment which is fairly susceptible as being interpreted as referring to a defendant's failure to testify is error and strongly discouraged. *See* Rodriguez v. State, 753 So.2d 29, 37 (Fla. 2000); State v. Marshall, 476 So.2d 150, 153 (Fla. 1985).

In applying the "fairly susceptible" standard test to the remarks of the prosecutor it is clear that they were a direct comment on the fact that Mr. Spencer did not testify. The prosecutor belittled the testimony of the expert because the statements made to her by Mr. Spencer were not "under oath" and not the type the jury "would have heard" and not "subject to cross examination by the state". There is no other interpretation of those remarks other than an attempt to diminish the impact of the experts testimony by commenting on Mr. Spencer's failure to testify. To allow prosecutors to make such remarks merely because the defendant calls a mental health expert for the purpose of establishing mitigation would have a chilling effect on the ability

of a defendant to present mental mitigation evidence in the penalty phase. Following the reasoning of the Appellee would effectively force every defendant who wanted to present mental mitigation evidence to testify in penalty phase or be subject to comments by the prosecutor for failing to testify. This Court should not embrace such patently unconstitutional circumstances.

Lastly, the Appellee relies upon Stewart v. State, 620 So.2d 177 (Fla. 1993) as authority for the proposition that the comments by the prosecutor were proper. (Appellee's brief p. 39). Appellee asserts that the comments in Stewart were much more direct comments on the defendant's failure to testify and ,therefore, the comments by the prosecutor in the present case are proper. The Appellee's reliance on Stewart is misplaced for two reasons. In the first place, the procedural posture of the Stewart case was totally different than in the present case. Stewart involved a direct appeal from conviction and held that the matter was procedurally barred because no objection was made. Stewart at 179. Thus, the decision did not even address whether counsel was ineffective for failing to object to the comments by the prosecutor. Further, Mr. Stewart actually testified at the penalty phase. Id. Therefore, there was no prejudice associated with remarks about his failure to testify as he took the stand in his own defense. Id.

Due to these important distinctions, the Stewart case is inapplicable to the present case and is not authority upon which

this Court should rely in assessing this claim. The Appellee has put forth no legal basis for this Court to allow such blatant remarks by the prosecutor on Mr. Spencer's failure to testify. The remarks, along with defense counsels failure to object, constitute both ineffective assistance of counsel and fundamental error. Mr. Spencer is entitled to relief.

ISSUE I (B)

APPELLEE IS INCORRECT IN STATING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN THE GUILT PHASE FOR FAILING TO PRESENT EVIDENCE OF LACK OF PREMEDITATION.

LAY WITNESS TESTIMONY

In his initial brief Mr. Spencer claimed counsel was ineffective for failing to present lay witness testimony concerning lack of premeditation. Curtis Zink, Bonnie Britton, and Andrew Brochold all testified at the evidentiary hearing that Mr. Spencer told them he was going to his wife's house to pick up the title to his car. (Appellant's brief p. 50-52). Defense counsel failed to present these witnesses to negate the state's theory of premeditated murder. In the answer brief, Appellee asserts that the testimony of these lay witnesses would have been inadmissible hearsay.(Appellee's brief p. 47) That position is contrary to Florida law. Section 90.803(3)(a) of the Florida Evidence Code states:

(3) Then existing mental, emotional or

> physical condition -
>
> (a) A statement of the declarant's then existing state of mind, emotion. or physical sensation, including a statement of intent, plan, motive, design, mental feelings, pain or bodily health when such evidence is offered to:
>
> 1. Prove the declarant's state of mind, emotion or physical sensation at that time or at any other time when such is an issue in the cause of action.
>
> 2. Prove or explain acts of subsequent conduct of the declarant.

Applying the above Rule of Evidence to the present case, the lay witness testimony concerning Mr. Spencer's state of mind as to his purpose in going to see Mrs. Spencer is admissible. The witnesses testimony would have proved that Mr. Spencer went to the house on the 17th of January to get the title to his car and not to commit murder. Contrary to Appellee's argument, these statements are admissible under the above exception, and the failure to use the testimony as to refute premeditation was ineffective assistance of counsel. Had the jury heard this testimony concerning Mr. Spencer's intentions, then they probably would not have found Mr. Spencer guilty of first degree murder. Mr. Spencer is entitled to relief.

ISSUE I (C)

APPELLEE IS INCORRECT IN STATING THAT DEFENSE COUNSEL WAS NOT INEFFECTIVE DURING THE PENALTY PHASE OF THE TRIAL.

DISSOCIATIVE STATE EVIDENCE

In his initial brief, Mr. Spencer alleged counsel was ineffective for failing to present available mental health mitigation evidence that Mr. Spencer was in dissociative state during the homicide. Specifically, Mr. Spencer alleged ineffectiveness for failing to question defense experts Dr. Kathleen Burch and Dr. Jonathon Lipman concerning Mr. Spencer's dissociative state during the homicide. Had counsel conducted a proper inquiry of those two experts, the jury would have been given evidence that Mr. Spencer was in a dissociative mental state during the homicide and that his actions were not of his own conscious choice. This evidence would have negated the HAC and CCP aggravators.

Appellee incorrectly states that only Dr. Lipman opined that Mr. Spencer was in dissociative state (Appellee's answer brief p. 79). Dr. Burch also stated at the evidentiary hearing that she could have given the opinion that Mr. Spencer was in a dissociative state at the time of the killing but she was not asked about this at trial. (PC-R 268). Thus, Mr. Spencer could have presented two expert opinions on his dissociative state at the time of the homicide.

Appellee further asserts that the failure to introduce evidence of the dissociative condition was not ineffective because the jury heard testimony about Mr. Spencer's amnesia concerning the

details of the killing (Appellee's brief p. 73). This assertion missed the point of Mr. Spencer's ineffectiveness claim. While it is true that evidence of amnesia was presented, that evidence only concerned Mr. Spencer's lack of memory after the homicide. The dissociative condition described by Dr. Lipman and Dr. Burch at the evidentiary hearing mitigates Mr. Spencer's actions during the homicide. Mental health mitigation carries it's strongest impact when it addresses the defendant's actions at the time of the homicide. In the present case, the jury never heard the evidence that Mr. Spencer was in a dissociative state during the homicide and was unable to form conscious intent. This Court should view this lack of mitigation claim in light of the jury's close 7-5 advisory sentence. Given the narrow 7-5 death recommendation, counsel's failure to present evidence of Mr. Spencer's dissociative state, which negated the HAC and CCP aggravators as well as supported the statutory mental health mitigators, was clearly deficient performance which prejudiced Mr. Spencer. Had the jury heard this evidence, at least one more juror would have recommended life.

CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, the lower court improperly denied Dusty Ray Spencer's rule 3.850 relief. This Court should order that his convictions and sentences be vacated and remand the case for such relief as the Court deems proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this _____ day of _____, 2001.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief, was generated in Courier New, 12 point font, pursuant to Fla. R. App. P. 9.210.

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