IN THE SUPREME COURT OF FLORIDA

CASE NO. SCOO-414

EDWARD RAGSDALE,
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

AMENDED REPLY BRIEF OF APPELLANT

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ARGUMENT I

MR. RAGSDALE DID NOT RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL OR THE ASSISTANCE OF A COMPETENT MENTAL HEALTH EXPERT IN THE PENALTY PHASE OF HIS TRIAL IN VIOLATION OF FIFTH, SIXTH, EIGHTH, *AND* FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Mitigating Testimony by Ernie Ragsdale Would Not Have Undermined Trial Counsel's Defensive Strategy

One of the arguments advanced on behalf of Mr. Ragsdale in the initial brief concerns the failure of trial counsel to call Ernie Ragsdale as a mitigation witness at the penalty phase. Ernie was the lead witness called by collateral counsel at the evidentiary hearing. He provided a wealth of mitigating evidence. He was a very credible witness, given his military service, solid employment history, home and family situation and so on, and he described himself as having been the closest of the brothers to the defendant. Especially remarkable is that he was listed as a State's witness at trial, deposed by predecessor trial counsel, and actually appeared at the trial in response to a state's subpoena. The prosecutors talked to him and told him to *go* home, which he did. He was not hard to find, he was willing and able to testify as a mitigation witness, but defense counsel never contacted him.

Now the State argues that Ernie Ragsdale would not have made such a great witness after all, because, according to the State, "This is the same Ernie that Ragsdale gave the knife to after confessing to Mace's murder," citing to Dir. App. Vol. II, 311.

(Appellant'sAnswer Brief, page 34).

The record citation given here **is** to the trial testimony of Terry Ragsdale, the brother who **was** buttonholed outside of the courthouse **by** defense counsel and who was such **a** disaster when called to the stand. Ernie never got to testify at all because the prosecutors told him to ***go*** home and defense counsel had never contacted him.

Five points need to be made here:

1. At the trial, the prosecutors talked to Ernie and then sent him home without calling him as a witness.

2. The State had the opportunity to cross examine Ernie on this issue at the evidentiary hearing and did not **do** so.

3. Defense counsel never made an informed strategic decision not to call Ernie as **a** mitigation witness because the defense never contacted him.

4. Terry Ragsdale **is** demonstrably not a credible witness.

5. Most importantly, the evidence cited would have been perfectly consistent with defense counsel's relative culpability strategy. Dr. Delbeato reported that, "Mr. Ragsdale tells me that he is innocent of the murder of a Mr. Ernest Mace. He states that his co-defendant, a Mr. Leon [Illig], is the perpetrator of the crime. He states that he was indeed an accessory after the fact to the crime but did not murder the victim."

The State correctly argues the general principle that mitigation offered in postconviction which would have done the

defense more harm than good at the penalty phase of the trial will not survive the prejudice requirement of Strickland. That, however, is not the case here, and the fact remains that a valuable mitigation witness who was obviously available at the time of trial never got to testify because defense counsel never made the minimal effort needed to contact him.

B. The State's Characterization of the Mitigation Adduced at the Evidentiary Hearing Is Misleading.

The State argues that, "The fact that one brother out of Ragsdale's six person family came forward at his evidentiary hearing" somehow substantiated Mr. Culpepper's conclusion that the family was uninterested in helping. (AB 34). First of all, this is beside the point. A lack of interest in the case by family and friends does not mean that defense counsel can adopt the same attitude. It also mischaracterizes what happened at the evidentiary hearing. In addition to Ernie, two other family members testified at the evidentiary hearing, both testifying that they would have been willing to appear at the trial but that no one ever contacted them. One of them was living in the area at the time of trial. Two more family members who did have medical reasons for not coming to court gave evidence by way of depositions to perpetuate testimony. The mental health expert called by collateral counsel at the evidentiary hearing described his interviews of numerous family members and the use he made of them in reaching his conclusions. The result of all of this was a

wealth of background mitigation evidence that was detailed, specific, graphic, corroborated, consistent, undisputed, and that was never put before the jury because defense counsel merely had his wife make a few telephone calls and gave up on background mitigation.

C. Defense Counsel Failed to Conduct a Reasonable Investigation into Possible Mitigation.

The State argues at some length that Mr. Culpepper's lack of investigation into possible background mitigation was reasonable under the circumstances, (AB 28 through 35), but the State is wrong. Mr. Culpepper said that his wife helped him "a lot." (AB 12). The fact is that all defense counsel did to investigate mitigating evidence was review Dr. Delbeato's report and have his wife make a few telephone calls to some family members. Mr. Culpepper was asked, "You don't know how many [family] members? There may have been one, two, something of that sort?" He answered, "I didn't – I don't really know. I mean, I don't recall.'' (R. Vol. III(a) 414). He said his wife made "some" calls: "I know that she made some calls. I know that she talked to some people up there. I don't know exactly the content of it. I don't recall it." (R. Vol. III(a) 404). He did not recall talking to any family members himself. Id.

The State responds to Mr. Culpepper's failure to recollect anything specific about these calls with sheer speculation: "In all likelihood, Culpepper's wife would have contacted Ragsdale's mother

and father . . . . she may also have spoken to one or more of his brothers and to Raymond Hicks . . . ." (AB 29). One would have thought she might have contacted Byron Ragsdale, who was living in Zephyrhills at the time of the trial, or Ernie Ragsdale who had already given a deposition and who later showed up at the trial in response to a state subpoena. But, according to both witness's testimony at the evidentiary hearing, she did not and neither did anyone else on behalf of the defense.

D. Defense Counsel's Failure to Investigate and Present Mitigation Cannot Be Excused as a Strategic Decision.

The State argues that Mr. Culpepper's failure to investigate and present mitigation was a reasonable strategic decision. (E.g. AB 25, 26). If that is true, then why did he call Terry Ragsdale at all?

Moreover, it is not "reasonable strategy'' when a lawyer uses his wits to get out of the hole he got himself into through lack of preparation. "[T]he mere incantation of 'strategy' does not insulate attorney behavior from review; an attorney must have chosen not to present mitigating evidence after having investigated the defendant's background, and that choice must have been reasonable under the circumstances." Stevens v. Zant, *968* F.2d 1076, 1083 (11th Cir.1992); see also Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir.1991) ("[O]ur case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between

them."); State v. Riechmann, 25 Fla. L. Weekly S163 (Fla. Feb. 24, 2000)("It seems apparent that there would be few cases, if any, where defense counsel would be justified in failing to investigate and present a case for the defendant in the penalty phase of a capital case.").

E. A Claim of Ineffective Assistance Should Be Viewed in Light of the Entire Record.

The State now argues that some issues which collateral counsel now brings up are matters which it claims are procedurally barred. One is that defense counsel failed to request an Enmund/Tison/Jackson[1] instruction despite the fact that his whole strategy was relative culpability vis-a-vis the co-defendant and even after the jury asked during deliberations: "Is it unjust-just to sentence the defendant to a greater sentence (death) than the accomplice, if based on the testimony heard by the jurors, the jurors believe the defendant may have had a lesser part in the murder?" (Dir. Vol. IV, 762). The other is the fact that virtually all of the prosecutor's closing argument in the penalty phase was objectionable, and defense counsel failed to object. The State then takes the additional, erroneous step of arguing that these matters should now be completely ignored. In its answer

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[1] Jackson v. State, 502 So.2d 409 (Fla. 1986)("The jury must be instructed before its penalty phase deliberations that in order to recommend a sentence of death, the jury must first find that the defendant killed or attempted to kill or intended that a killing take place or that lethal force be employed.").

brief the State argues:

> It [the Enmund/Tison/Jackson instruction issue] is not within the claims which were remanded for an evidentiary hearing, and it clearly should not be considered at this time.

(State's Answer Brief, 27), and:

> Ragsdale asks for reconsideration of several claims which this Court initially found to be procedurally barred, alleging that these claims include facts which must be considered as part of the total record in assessing any potential prejudice.

Id. at 38. The State then argues that no authority was cited in support of this request.

In support of the argument that this Court should consider the underlying factual basis for these points along with ineffectiveness claims now properly before this Court for review, the initial brief cites about nine cases, including Strickland: "[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." Id. 466 U.S. at 695-96, (IB 71); but see: "[T]he requirement that a court must consider the totality of the evidence when evaluating ineffective assistance of counsel . . . is a requirement for federal, not state court review." Footman v. Singletary, 978 F.2d 1207, 1211 (11th Cir.1992) n.4.

In any event, the point being urged here is a rather mundane one, that the presence of a procedural bar is not a reason to pretend that certain facts appearing on the record do not exist. The main issue before this Court at this time is the claim of

ineffective assistance of counsel in the investigation, preparation and presentation of available mitigation. The State argues that defense counsel's failure to investigate available mitigation can be ascribed to strategy. Defense counsel's failure to request an instruction that would have supported his entire theory of defense through both the guilt and penalty phases of the trial and his failure to object to improper prosecutorial argument in the penalty phase are relevant in assessing his overall performance and the prejudice caused by any deficiency.

This Court and others have routinely evaluated the reasonableness of a purportedly strategic act or omission in light of counsel's capital case experience, or lack thereof. This was Mr. Culpepper's first and last capital case. Some of the objectionable remarks in the prosecutor's penalty phase closing argument would have been objectionable in a noncapital case as well, but some, like minimization of the jury's role, could only apply to capital cases. Defense counsel may not have known better.[2] Defense counsel failed to request an Enmund/Tison/Jackson instruction when his whole defense in both the guilt and innocence phases of the trial was geared to relative culpability vis-a-vis the co-defendant. An Enmund/Tison/Jackson instruction only applies

[2]At the evidentiary hearing the lower court sustained an objection when collateral counsel asked Mr. Culpepper a question relating to the prosecutor's penalty phase closing argument and ruled that it would "not permit" further questioning in that direction. (PC-R2. Vol. III (a) 411-12).

to capital cases. These facts tend **to** show that Mr. Culpepper did not know applicable capital penalty phase law.

At the evidentiary hearing, Dr. Berland said that Dr. Delbeato's report suggested a number of statutory and nonstatutory mitigators, including the issue of chronic drug and alcohol abuse, low IQ, learning disability, chronic depression, and intoxication **at** the time of the offense." (R. **Vol.** III(a) 332). He thought that the potential mitigation indicated in Dr. Delbeato's report "with a minimum of effort could have been followed up on." (R. Vol. III(a) 332). In fact, Dr. Delbeato reported: " [Ragsdale] states to me that he told you [predecessor defense counsel] that there are three witnesses to the effect that he did imbibe alcohol and take drugs." **(PC-R2** Supp. Vol. I, 96-97). When asked about nonstatutory mental mitigation existing in the case, Dr. Berland said:

> He has a substantiated long and heavy history of alcohol and drug abuse, again, a substantial - an affirmed nonstatutory mitigator.
>
> There is at least some evidence of intoxication, which needs to be further developed, at the time of the offense, which would **be** a separate nonstatutory mitigator, and - let's see. ***Not as a*** *result* ***of my evaluation, but as a result of Dr. Delbeato's evaluation and supplemented recently by*** findings *from* ***Dr. Merin***, there's evidence of borderline intellectual functioning, a nonstatutory mitigator.
>
> ***Dr. Delbeato referred to what he believed to be a developmental learning disability,***

> *which, certainly, if that was confirmed would be – has been endorsed as a nonstatutory mitigator.*
>
> *The other two that he refers to, the chronic depression, which was, of course, in his report from 1986, and the claim by the defendant, again reputedly verifiable, that he was using drugs and alcohol at the time of the crime, I've already alluded to as nonstatutory, or in the case of the depression, a statutory mitigator.*

(PR-2.Vol. III(a)315)(emphasis added). Mr. Culpepper decided not to pursue any mental mitigation after reading Dr. Delbeato's report, without making so much as a telephone call. Cf. ~~Cherry v.~~ State, 25 FLW S719 (Fla. 2000)("[T]he report of [the defense mental health expert] which summarized and contemplated the Defendant's background, mental history and alcohol & drug history was entered into evidence at penalty phase and thus was considered by the jury in their recommendation . . .").

Mr. Culpepper felt that, when he received the case, all the discovery had been done and that "it was a matter of learning the material and learning – you know, getting in the position to try it." (R. Vol. III(a) 401). Both a review of the record on direct appeal, including the discovery depositions taken by predecessor counsel, and Dr. Delbeato's report and testimony at the evidentiary hearing, show a case that might have been ready for a guilt phase, but not one that was ready for the penalty phase. These facts and others addressed in the initial brief all tend to show a general lack of penalty phase preparation or even much more than a bare

awareness that a separate proceeding called a "penalty phase" was to take place.

Mr. Culpepper essentially delegated the job of investigating and preparing a case in mitigation to his wife: "She was the one who was contacting the people up in Alabama, which was his family, and she would have been the one who made the contacts with them." (PC-R2. Vol. III(a) 404). He did not recall talking to any family members himself. Id. There is a general consensus among defense lawyers that a capital case should **be** tried by two lawyers, one focusing on the guilt phase and the other on the penalty phase:

> [T]he Commission on Legislative Reform of Judicial Administration recommended that two counsel **be** appointed upon **a** showing of good cause. The Commission Report states:
>
> There is at present no requirement that two counsel **be** afforded to defendants facing the imposition of the death penalty. Public Defenders who appeared before the commission and the Capital Collateral Crimes Representative who addressed the commission all explained that the complex nature of the sentencing phase **of** a death penalty case made appointment of two counsel, one to handle the guilt phase and one to handle sentencing, a matter of effective representation **of** the defendant. The Deputy Attorney General also indicated that a two-lawyer requirement was appropriate and would **be** in the state's interest. Judge Belvin Perry, commission member and Chief Judge of the Ninth Judicial Circuit, told the commission that not all cases required two counsel, although most of the testimony indicated that if a case were going to trial, two counsel were essential. Commission Report at ***6***.

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Minimum Standards for Attorneys in Capital Cases, 759 So.2d 610, 613 n.5(1999). This is not to say that there is anything wrong with using a non lawyer mitigation assistant, but having one's spouse make a few telephone calls is not an adequate substitute for co-counsel.

All of these facts tend to show that Ragsdale was represented by a lawyer who was out of his depth when it came to a capital case penalty phase.

F. The Cases Cited by the State on the Issue of Prejudice Do Not Support its Position.

The State cites a number of cases where relief was ultimately denied to support its argument that the additional mitigation shown to have existed in this case does not establish prejudice under Strickland. All of them are distinguishable in significant ways.

The State cites Breedlove v. State, 692 So.2d 874 (Fla.1997). Breedlove's lawyers did put on a case in mitigation, although they said it was deficient because the judge had not given them time to prepare for it adequately. More to the point, this Court found that the additional mitigation brought out in postconviction would have opened the door to, among other things, Breedlove's confession to another murder. By contrast, here even the State concedes that the additional mitigation would not 'directly contradict the relative culpability strategy" pursued by Mr. Culpepper. (AB 40). Likewise, in Haliburton v. Singletary, 691 So.2d 466 (Fla.1997), another case cited by the State, the defense lawyer testified and

this Court observed that the additional mitigation offered in postconviction would have undermined the defense strategy used at trial. Also, Haliburton's attorney had thoroughly investigated mitigation through his earlier work in the case. Id. 471.

Here, the available mitigation would not have undermined or contradicted defense counsel's strategy. Indeed, as pointed out in the initial brief, it would have been a clever move to call Dr. Delbeato as a mitigation witness and perhaps let the prosecution elicit Ragsdale's statements about relative culpability. ("[T]he patient was not trying to smooth over or fake. Validity scales reveal a profile which tends to be open and candid . . . Mr. Ragsdale tells me that he is innocent of the murder of a Mr. Ernest Mace. He states that his co-defendant, a Mr. Leon [Illig], is the perpetrator of the crime. He states that he was indeed an accessory after the fact to the crime but did not murder the victim."). Admittedly this is Monday morning quarter backing by undersigned counsel, but it does show how this case is unlike those where mitigating evidence offered in postconviction could have undermined a reasonable defense strategy at trial.

In most of the cases cited by the State there is the fact that trial counsel at least to some extent investigated and tried to put on a case in mitigation. Of note in Rutherford v. State, 727 So.2d 216(Fla.1998) and Rose v. State, 617 So.2d 291 (Fla. 1993), for example, is that the defense lawyers managed to put on a case in mitigation despite the lack of cooperation and sometimes active

interference of their client.[3] See also Routly v. State, 590 So.2d 397 (Fla.1991)("Much of this evidence was before the judge and jury, although in a different form than now proffered . . ."); LeCroy v. Dugger, 727 So.2d 236 (Fla.1998) (defense counsel presented the testimony of numerous family members); Bottoson v. State, 674 So.2d 621 (Fla.1996)(counsel had defendant examined by two psychiatrists and counsel called witnesses suggested by defendant).

Factually, this case is much closer to those where this Court has ordered or authorized a new penalty phase. See e.g. Stevens v. State, 552 So.2d 1082, 1087 (Fla.1989) (holding that defense counsel's failure to investigate defendant's background, failure to present mitigating evidence during the penalty phase, and failure to argue on defendant's behalf rendered defense counsel's conduct at the penalty phase ineffective); Mitchell v. State, 595 So.2d 938, 941-42 (Fla.1992):

> Defense counsel presented no evidence at the penalty phase of the trial. He testified that he thought he was going to obtain a not-guilty verdict, so he had not prepared for the penalty phase. He had had Mitchell examined by two mental health experts, but he had not made arrangements for them to testify. Both of these doctors indicated that had they been asked, they could have testified to both

[3]Dr. Delbeato's reported: "[Ragsdale] states to me that he told you that there are three witnesses to the effect that he did imbibe alcohol and take drugs." (PC-R2 Supp. Vol. I, 96-97). This is not the behavior of an uncaring or uncooperative client. There is no indication anywhere in this record that Ragsdale has ever been a "problem client."

> statutory and nonstatutory mitigation. At the postconviction hearing, Mitchell also introduced evidence of more recent evaluations by mental health experts which indicated the presence of brain damage, resulting primarily from prolonged use of drugs and alcohol. In addition, numerous family members said that had they been asked to do so they could have testified as to Mitchell's history of child abuse, his compassionate and caring nature, and his history of substance abuse.

Id.; Phillips v. State, 608 So.2d 778, 782 (Fla.1992)(Defendant's counsel was ineffective at sentencing phase in presenting only testimony of defendant's mother in mitigation; counsel testified that he did virtually no preparation, counsel failed to offer evidence of defendant's impoverished, abused childhood and low intellectual functioning and defendant suffered prejudice as jury vote was seven to five in favor of death penalty).

G. Prejudice Is Shown by the Trial Court's Sentencing Order.

In Muhammad v. State, 2001 WL 40365 (Fla. Jan 18, 2001)(NO. SC90030)this Court found that the lower court's decision to give great weight to the jury's death penalty recommendation amounted to reversible error in light of Muhammed's refusal to present mitigating evidence and the failure of the trial court to provide for an alternative means for the jury to be advised of available mitigating evidence. Id. Slip. Op. 12. The Court observed that:

> In determining whether the court erred in this case in giving the jury's recommendation great weight, we must consider the role of the advisory jury. Pursuant to section 921.141(2), Florida Statutes (1995), the jury's advisory

> **sentence must** be **based** on "[w]hether sufficient aggravating circumstances exist as enumerated in subsection (5)" and "[w]hether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found **to** exist." § 921.141(2)(a)-(b), Fla.Stat. (1995). "The jury's responsibility in the process is to make recommendations based on the circumstances of the offense and the character and background of the defendant." Herring v. State, 446 So.2d **1049, 1056 (Fla.1984).**
>
> . . . .
>
> This legal principle also contemplates **a** full adversarial hearing before the jury with the presentation of evidence of aggravating and mitigating circumstances

Id. The jury's question in the instant case indicates that the jury as a whole believed that Ragsdale was less culpable than the co-defendant, who received a life sentence. The trial court nevertheless rejected **Mr.** Culpepper's entire relative culpability defense, and in fact found Ragsdale to be the more culpable of the two co-defendants. (Dir. Vol VI, 916). The trial court found that no mitigating circumstances existed in the case. Id. This finding was dictated by the rejection of the relative culpability defense plus defense counsel's failure **to** present any other evidence in mitigation. Defense counsel's failure **to** present any of the mitigation **that** was available effectively precluded any meaningful weighing of aggravating and mitigating circumstances by both the judge and the jury.

CONCLUSION AND RELIEF SOUGHT

Mr. Ragsdale's jury recommended death by a vote of eight to four only after submitting a question reflecting its belief that the co-defendant who received a life sentence was the more culpable party, after defense counsel failed to request or the court to give an appropriate instruction in response to that question, and after defense counsel offered essentially no evidence in mitigation. The evidentiary hearing established, without any real dispute, that a wealth of such mitigation existed and was available to defense counsel if he had made any real effort to investigate and present it. Mr. Ragsdale did not receive the effective assistance of counsel or the assistance of a competent mental health expert in the penalty phase of his trial in violation of Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. This cause should be remanded with directions to vacate the sentence of death and to conduct a new penalty phase before a jury.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Amended Reply Brief **has** been has **been** furnished by United **States** Mail, **first class postage prepaid,** to all **counsel** of **record** on this 23 day of May, 2001.

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

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