IN THE SUPREME COURT OF FLORIDA

F.W. CUMMINGS-EL,

Appellant,

vs.

FSC case no. 01-1501
Lower case no. F91-33268

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT OF
THE ELEVENTH JUDICIAL CIRCUIT, IN
AND FOR DADE COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant, F.W. CUMMINGS-EL, was the defendant in the trial court below and will be referred to herein as “Appellant” or by his proper name. Appellee, the State of Florida, was the petitioner in the trial court below and will be referred to herein as “the State." Reference to the original record on appeal will be by the symbol “PL” for the single volume of separately-paginated pleadings, followed by the appropriate page number(s), and “TR" for the six volumes of sequentially-paginated transcripts, followed by the appropriate volume and page number(s). Reference to the post-conviction record on appeal will be by the symbol "PCR" for the four volumes of pleadings, followed by the appropriate volume and page number(s), and “PCRS” for the supplemental record (eight volumes of transcripts), followed by the appropriate volume and page number(s).

STATEMENT OF THE CASE AND FACTS

Appellant will rely on the statement of the case and facts presented in his initial brief.

SUMMARY OF ARGUMENT

Issue I - Trial counsel, Theodore Mastos, rendered constitutionally ineffective assistance of counsel throughout Appellant's entire case. Ultimately, Mr. Mastos did nothing to investigate or present a penalty phase case. He did not interview witnesses. He did not speak to Appellant's family, friends, or co-workers, many of whom were available and willing to testify. He did not investigate Appellant's educational, medical, psychological, or social history. In sum, he made absolutely no effort to document Mr. Cummings-El's life prior to this crime. As a result, Mastos' constitutionally deficient representation prejudiced Appellant's case. The trial court should have granted relief, but did not. In order to remedy this error, this Court should reverse the trial court's order and grant a new trial in this cause.

ARGUMENT

ISSUE I

TRIAL COUNSEL RENDERED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF COUNSEL THROUGHOUT APPELLANT'S ENTIRE CASE.

A. Introduction

The State has taken Appellant's single issue relating to trial counsel's pervasive, case-wide ineffective assistance of counsel and broken it down into seven distinct issues. As Appellant explained in his initial brief, trial counsel's actions should not be examined singularly, in a vacuum, but instead should be examined as a pattern of deficient conduct so all-encompassing that the cumulative effect of such deficiency prejudiced Mr. Cummings-El's right to a fair trial and undermined confidence in the outcomes of both the guilt and penalty phases of his trial.

B. Counsel's failure to request a second-chair attorney--Claim VIII

Appellant raised the substance of this claim in his motion for post-conviction relief. (PCR 67-68). Because the trial court improperly summarily denied the claim, Appellant was prevented from fully developing the facts at an evidentiary hearing. Nevertheless, the State, in questioning trial counsel, Theodore Mastos, in relation to other claims, elicited a factual basis that

supports this claim even though it was summarily denied by the trial court.

In brief, the State elicited the fact that Mr. Mastos, despite his 18 years of experience as an attorney, was not qualified to single-handedly litigate a capital case. During the first eight years of his career, Mr. Mastos admittedly handled no capital cases as an assistant state attorney and county court judge. (PCRS VII 1702-04, 1742). During the next eight years of his career, as a circuit court judge, he handled only two capital cases that progressed through to the penalty phase, both of which were twice reversed and remanded because of serious errors that then-Judge Mastos committed. See Gilliam v. State, 514 So.2d 1098 (Fla. 1987) (reversing conviction where Mastos refused to allow Gilliam, who was representing himself, to backstrike jurors); Gilliam v. State, 582 So.2d 610 (Fla. 1991) (remanding for resentencing on a sexual battery charge where Mastos had imposed a more severe sentence after retrial, suggesting vindictiveness for Gilliam having successfully attacked his first conviction); Scull v. State, 533 So.2d 1137 (Fla. 1988) (vacating two death sentences where Mastos improperly considered victim impact evidence and improperly found five of six aggravating factors as to one victim and four of six as to the other. "[B]ecause we believe that the sentencing order is so replete with error, we cannot say that the sentence must be upheld."); Scull v. State, 569 So.2d 1251 (Fla. 1990) (reversing

both death sentences again where "the trial court's haste in resentencing Scull violated his due process rights" and where "the appearance of irregularity so permeates these proceedings as to justify suspicion of unfairness.").

When Mr. Mastos was appointed to Appellant's case, he had been a criminal defense attorney for only two years. In that time, he had litigated not a single capital case through to the penalty phase. Moreover, he had attended only one death penalty seminar. (PCRS VII 1737-38). Yet, despite the fact that he was facing two experienced prosecutors, he made no effort to seek the appointment of a second-chair attorney. Similarly, he made no effort to retain a private investigator. Nor did he have any support staff to assist him in this case. (PCRS VII 1765, 1766-67).

In Lewis v. State, 27 Fla. L. Weekly S1032 (Fla. Dec. 12, 2002), trial counsel had 40 years of legal experience prior to his appointment to the defendant's case, but, as in the present case, he had previously represented only one capital defendant. Because Lewis' counsel completely failed to investigate the defendant's background for mitigation, the trial court vacated Lewis' sentence and ordered a new trial, a ruling this Court affirmed on appeal.

Critically, what Lewis demonstrates is that experience as a judge or as an attorney, in and of itself, cannot be the State's saving grace in these cases. Counsel must have experience in capital litigation before years of experience alone can be cited as

exclusive evidence of an attorney's qualifications. Here, Mr. Mastos needed the assistance of an experienced capital litigator to assist him in this case. The fact that he failed to recognize his shortcomings and to seek assistance in this case is indicative of his overall ineffectiveness. Ultimately, his inexperience in capital litigation severely prejudiced Appellant's case. Therefore, this Court should grant relief and grant Mr. Cummings-El the opportunity to present his case to a jury with the assistance of a qualified and constitutionally effective capital litigator.

C. Counsel's failure to object to the State's method of death qualifying the jury and failure to object to the trial court's improper exclusion of Jurors Kozakowski and Oshinsky--Claim I

From virtually the moment the venire walked into the courtroom, those lay persons were bombarded with questions regarding the death penalty. Undoubtedly, such questions led them to believe that the issue of guilt or innocence was unimportant or unworthy of serious discussion or consideration -- that the proper punishment was the only real issue at question in this case. By allowing the State to focus immediately and strongly on the death penalty, Mr. Mastos allowed the State to plant a deadly seed, one that the State would cultivate for the duration of the voir dire

process. No other issue or topic of discussion had as much significance to those uninformed and impressionable jurors as the issue of the death penalty. It had the effect of predisposing these jurors to impose punishment before they determined guilt, and to impose death over life imprisonment. Ultimately, through its confusing and misleading questioning, the State was allowed to plant ideas in the jurors' minds and words in their mouths that would disqualify them long before Mr. Mastos had an opportunity for questioning. By remaining silent, Mastos allowed the State to prejudice Mr. Cummings-El's jury in favor of death and to improperly disqualify for cause those jurors whom the State did not favor on the jury. As a result, Mr. Mastos' conduct was constitutionally deficient and prejudiced Mr. Cummings-El's rights to a fair and impartial jury, to a fair trial, and to a fair sentencing proceeding.

D. Counsel's failure to object to the trial court's comment on Appellant's right to remain silent--Claim IV

Appellant will rely on the arguments he made in his initial brief.

E. Counsel's failure to investigate and present evidence in mitigation--Claims V, XII, and XIV

Dr. Lynn Schram is a clinical neuropsychologist at Mt. Sinai Medical Center. As such, he was hired by the defense to perform,

and did so perform, a battery of neuropsychological tests on Appellant to determine whether Appellant suffered from organic brain damage. Dr. Schram concluded, among other things, that the pattern of tests and results showed a probability of brain damage, likely caused by Appellant's extensive history of drug use. The trial court rejected Dr. Schram's conclusion, however, finding more credible the testimony of Dr. John Spencer, a psychologist, who performed only a personality inventory (the MMPI II) and concluded, despite multiple indications that Appellant was malingering "good" on the test, that Appellant had no brain damage.

Contrary to the State's assertion, this type of credibility finding by the trial court cannot be countenanced where the facts and record do not support such a credibility determination. Dr. Spencer was simply not qualified to testify in the area of neuropsychology. Thus, the trial court should not have used his opinions to discredit the valid findings of a qualified neuropsychological expert.

Ultimately, the State fails in its answer brief to otherwise dispel the quality or quantity of mitigating evidence that Appellant presented at his evidentiary hearing —- evidence that Mr. Mastos could have, and should have, discovered and presented to the jury. Rather, it continues to assert that Mr. Cummings-El precluded trial counsel from investigating this case. This

assertion, however, and the trial court's ultimate finding in this regard, is simply not supported by the record. In fact, the record shows that Mr. Mastos waited an entire year to broach the subject of mitigation with Appellant. When he did finally raise the issue (three weeks before trial), Mastos candidly conceded that Appellant was not adamant about waiving mitigation at this point. While Appellant may not have been completely forthcoming and cooperative in assisting Mastos in his investigation, there is absolutely no evidence that Appellant completely precluded Mastos from doing so. In fact, Appellant twice invited Mastos to contact his family and friends. But Mastos did nothing, preferring instead to rely on Appellant's uninformed opinion that mitigation would constitute "begging" before the jury –- an action Mr. Cummings-El did not want to do.

In the end, trial counsel had a duty to investigate mitigation, despite Mr. Cummings-El's perceived disinclination. Neither counsel nor Appellant could make rational, informed choices about what to present, and why, until they both knew what evidence was available to them. Given that duty, and counsel's complete failure to uphold that duty, it was disingenuous at best for Mastos to claim, and the trial court to agree, that Appellant's recently established mitigation would not have been helpful and would not have had any effect on the jury's recommendation.

In Lewis, cited supra, the defendant's trial counsel testified at the post-conviction evidentiary hearing that he did nothing to investigate mitigation in the thirty days between the jury's guilty verdict and the penalty phase. Moreover, he testified that at the penalty phase Lewis did not want any family members to testify and did not want to present any mitigation. In finding counsel ineffective for failing to properly investigate and present a wealth of mitigating evidence similar to the evidence in the present case, this Court reaffirmed 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. Although a defendant may waive mitigation, he cannot do so blindly; counsel must first investigate all avenues and advise the defendant so that the defendant reasonably understands what is being waived and its ramifications and hence is able to make an informed, intelligent decision." 27 Fla. L. Weekly at S1035.

Although Appellant did not ultimately waive mitigation as did Mr. Lewis, this Court's conclusion is no less binding. To the extent the State claims here, as it did in Lewis, that Appellant prevented trial counsel from investigating, the record refutes that claim. Finally, as in Lewis, the evidence that Mastos could have, and should have presented, did, in fact, prejudice Appellant's

case. Therefore, this Court should reverse the trial court's order, vacate Appellant's sentence of death, and remand for resentencing.

F. Counsel's failure to call Daphne Roberts in the penalty phase to establish mental mitigation--Claim II

Appellant will rely on the arguments he made in his initial brief.

G. Counsel's failure to object to the cumulative and inflammatory testimony of the victim's mother and cousin in the penalty phase--Claim XIII

Appellant will rely on the arguments he made in his initial brief.

H. Conclusion--Claim IX

Appellant maintains that he had the functional equivalent of no attorney at all. Mastos made no objections, made no investigation of the case, presented no evidence, and did nothing otherwise to preserve Appellant's rights to a fair trial and an impartial jury. Had counsel investigated Appellant's social and psychological history, had he presented the wealth of information that was available, and had he made proper objections and motions during the trial, there is a reasonable probability that Appellant's conviction and sentence would have been different. Therefore, this Court must reverse the trial court's order denying relief herein and remand with instructions to grant Mr. Cummings-El a new trial.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, Appellant, F.W. CUMMINGS-EL, respectfully requests that this Honorable Court reverse the trial court's denial of relief and remand this cause for a new trial.

Respectfully submitted,

_____
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Sandra Jaggard, Assistant Attorney General, 444 Brickell Avenue, Miami, Florida 33131; Tony Moss, Esquire, Law Office of Tony Moss, P.a., 851 N.E. 118th Street, Miami, Fl 33161; and F.W. Cummings-El, Inmate # 120190, Union Correctional Institution, P.O. Box 221, Raiford, Florida 32083, this ____ day of January, 2003.

_____
SARA K. DYEHOUSE, ESQ.

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in this brief is Courier New, 12 point, a font that is not proportionately spaced.

_____
SARA K. DYEHOUSE, ESQ.