IN THE SUPREME COURT OF FLORIDA

CASE NO. SC-02-1342

LOWER TRIBUNAL No. 94-150-CF–2

ANTHONY FLOYD WAINWRIGHT,

Appellant,

v.

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT,
IN AND FOR HAMILTON COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENT I

THE CIRCUIT COURT ERRED IN DENYING MR. WAINWRIGHT'S CLAIM THAT HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS CAPITAL TRIAL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION WHEN HIS TRIAL COUNSEL FAILED TO MAKE AN OBJECTION REGARDING THE ADMISSION INTO EVIDENCE OF THREE ADDITIONAL DNA LOCCI.

Appellee, like the circuit court, excuses counsel's deficient and prejudicial performance by blithely acquiescing to the combined efforts of the state and the court to incredulously allow, **after opening statements in the trial**, the state to expand their body of evidence beyond that which was properly disclosed to appellant's attorney. The inference of the State's position is that in capital cases there should be no effective close to the discovery phase and it can freely continue, as was allowed in the case at bar, throughout and during the actual trial to present

[1]Mr. Wainwright will not reply to every issue and argument, however he does not expressly abandon the issues and claims not specifically replied to herein. For arguments not addressed herein, Mr. Wainwright stands on the arguments presented in his Initial Brief.

whatever evidence it can uncover whenever it does so. The novel theory of the state’s position, is that because the discovery phase should remain open, the prosecution is free to continue to investigate its case even after trial has begun and should be free to use any such evidence it acquires regardless of fairness to the opposing side. This egregious error below is effectively a license for the ambushing of defense counsel by the state by whatever its continuing investigation yields in the course of the trial.

The trial court ineffectively sought to remedy this error. Instead of excluding the additional three DNA loci, which it clearly should have, it lamely provided a twenty-four hour continuance. Actually it was not a continuance but rather a delay of the trial because it had already begun. Appellant had made and effectively committed to its strategy based on the discovery which had been provided to it by the state. Defense was forced to now continue in a trial where it had effectively misstated in its opening argument what the evidence would be through no fault of its own. The damage to its credibility in the eyes of the jury was self-evident.

Because appellant's trial attorney counseled him without the benefit of discovering all the rule evidence against him,

appellant's decisions and elections in regards to his trial strategy were critically flawed. The content of the testimony of the aforementioned three additional DNA Locci related to a most critical issue namely linking Mr. Wainwright to the situs . Such information would have been critical to both the appellant and trial attorneys in deciding upon a defense strategy. If such discovery had been known prior to the commencement of trial, this surely would have altered the decision by Anthony Wainwright who would have tailored his strategy accordingly.

It bears reviewing the chronology of events behind this claim. On the very day of appellant’s opening statement, which was May 18, 1995, after such opening statement at 10:30 a.m. at approximately 4:45, p.m. the state provided to appellant’s defense this most crucial, additional DNA evidence. (R-1093)

Subsequent to that is when appellants attorney was ineffective in failing to more specifically allege either prosecutorial misconduct or to demand a Richardson hearing.

What the State fails to acknowledge is that appellant’s lawyer never did argue a discovery violation for the lower court to review. Even the state acknowledges in its answer brief that this Court in appellant’s direct appeal Wainwright v. State, 5454 So. 2d 323 (Fla 1995) held that appellant’s counsel did not

allege that the state deliberately withheld the evidence or committed some other discovery violation but simply that the state was dilatory in conducting the DNA test and noted that the Defense made no subsequent objection. Wainwright at 515.

It is ineffective assistance of counsel to fail to preserve these crucial incidents for appeal an issue as important and central to appellant's defense as this.

More importantly it is reversible error not to have even conducted an evidentiary hearing on this case. Without such a record there is nothing to conclusively refute an otherwise strong and consistent theory of ineffectiveness of counsel.

Mr. Wainwright was unquestionably prejudiced by the late disclosed evidence provided to him by the State. His lawyer was manifestly ineffective for not objecting on the grounds of prosecutorial misconduct or in insisting on a Richardson hearing. His trial counsel was ineffective in failing to do so. Relief is proper.

The court summarily denied this claim without a hearing. In so doing, the court erred. A rule 3.850 litigant is entitled to an evidentiary hearing on a motion for relief unless (1) the motion, files and records in the case conclusively shows that the prisoner is entitled to no relief or the (2) motion or particular

claims are legally insufficient. See Patton v. State, 2000 WL 1424526 (FLA) September 28, 2000. As was argued with particularity in the initial brief, legally sufficient claims were asserted by appellant in his motion for postconviction relief. Yet the trial court fails to sufficiently explain its reasons for summarily denying each claim without the benefit of a hearing. Consequently, its order is far below any threshold of legal acceptability. See Patton v. State, 2000 WL 1424526 (Florida, September 28, 2000).

In Allen v. Butterworth, 756 So. 2d 52 (Fla. 2000), the Supreme Court of Florida held that in addition to the unnecessary delay and litigation concerning the disclosure of public records, another major cause of delay in postconviction cases as the failure of the circuit courts to grant evidentiary hearings when they are required. Id. at page 32. The Supreme Court of Florida in its proposed amendments to Florida Rules of Criminal Procedure 3.851. 3.852 and 3.993(no SC96646) (4/14/00) states:

> Another important feature of our proposal is the provision addressing evidentiary hearings on initial postconviction motions. As previously noted we have identified the denial of evidentiary hearings as the cause of unwarranted delay and we believe that in most cases requiring an evidentiary hearing on initial postconviction motions will avoid that delay. Id at page 9.

See also Mordenti v. State, 711 So.2d 30 (Fla. 1998)

Accordingly, appellant requests this Court to order an evidentiary hearing on his claims. His claims involve issues requiring full and fair Rule 3.850 evidentiary resolution. See,e.g., Heiney v. Dugger, 558 So. 2d 398 (Fla. 1990); Mason v. State, 489 So. 2d 734 (Fla. 1986).

Some fact-based postconviction claims by their nature can only be considered after an evidentiary hearing. Heiney v. State, 558 So.2d 398, 400 (Fla. 1990). "The need for an evidentiary hearing presupposes that there are issues of fact which cannot be conclusively resolved by the record. When a determination has been made that a appellant is entitled to such an evidentiary hearing (as in this case), denial of that right would constitute denial of all due process and could never be harmless." Holland v. State, 503 So.2d 1250, 1252-53 (Fla. 1987). "Accepting the allegations. . . at face value, as we must for purposes of this appeal, they are sufficient to require an evidentiary hearing." Lightbourne v. Dugger, 549 So.2d 1364, 1365 (Fla. 1989). (Emphasis added) Appellant has pleaded substantial, factual allegations which go to the fundamental fairness of his conviction and to the appropriateness of his death sentence. "Because we cannot say that the record conclusively shows

appellant is entitled to no relief, we must remand this issue to the trial court for an evidentiary hearing." Demps v. State, 416 So.2d 808, 809 (Fla. 1982). This Court has no choice but to reverse the order under review and remand, and order a complete evidentiary hearing on appellant's 3.850 claims. Here in addition to summarily denying this claim, the trial court failed to provide any explanation for this denial.

ARGUMENT II

THE LOWER COURT ERRED IN DENYING MR. WAINWRIGHT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM THAT TRIAL COUNSEL FAILED TO PROPERLY PRESERVE FOR APPEAL THE ISSUE OF APPELLANT'S STATEMENTS AND ADMISSIONS IN VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION.

The trial court erred in not conducting an evidentiary hearing on this claim because clearly nothing in the record conclusively refutes it. The group of admissions which were alleged to have been made in the time frame of May 10, May 11 and May 20 1995. In arguing that this Court should deny Mr. Wainwright's claim, the State urges this Court to find that this claim is procedurally barred as it was already argued on direct appeal.

Before responding to this inaccurate objection, it bears to review the chronology as well as the essence of the statements and admission which are at the crux of this claim. It is the contention of the appellant, per the testimony of Mr. Wainwright, that the actual deal he made was in Mississippi whereby he would be spared the death sentence provided he : fully cooperated with

the authorities; took a polygraph examination; did not actually commit the murder; did not rape the victim. (R. -III-41) Wainwright's original counsel, Mr. Africano, played no role in this deal and in fact visited only with his client for a total of forty five minutes.

According to Sheriff Reid, Mr. Wainwright proceeded to make a series of statements. These statement include:

- "we planned to kill her and we didn't want anything found" (R. 2588); Appellant on May 20, 1994 admitting to having sex with the victim(R. 2589); on May 10 ,1994, Wainwright allegedly in response to Hamilton who had said "You know what we have got to do? Replied " I know what we have to do."

According to representation made by Wainwright's very own attorney Clyde Taylor, one of the aforementioned statements attributed to Mr. Wainwright by Sheriff Reid, who was a witness and who proffered such statements outside the presence of the jury on the 7th day of the trial, had not been provided or otherwise disclosed to Mr. Wainwright prior to trial. Once again, as in the situation with Claim One, the trial court created an atmosphere in which the pre trial rules of discovery seem not to really apply to the State, who discovered Mr.

Wainwright as to its case-in-chief in the course of its presentation at trial.

The failure of defense counsel to either move for a Richardson hearing or more effectively cross examine Sheriff Reid than he did, clearly constitute ineffective assistance of counsel.

An issue other than the failure of trial counsel to move for a hearing was disposed of on direct appeal, therefore this claim is not procedurally barred. Nothing conclusively refutes this valid assertion of professionally deficient representation. An evidentiary hearing on this claim is warranted and relief is proper.

ARGUMENT IV

THE LOWER COURT ERRED IN DENYING MR. WAINWRIGHT'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE AT HIS FAILING TO MOVE FOR MISTRIAL OR OTHERWISE PRESERVE FOR APPEAL THE ISSUE OF A MICROPHONE BEING FOUND IN MR. WAINWRIGHT'S JAIL CELL IN VIOLATION OF HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

In one of the more bizarre aspects of this case, it became known in the course of the trial that at one point a microphone recording device was placed in Mr. Wainwright's jail cell at the Hamilton County Jail. This was discovered during the sixth day of trial. Wainwright informed his trial counsel on Thursday. Trial counsel did not appear at the jail until Friday, at which point the microphone had been removed (R. 2349) (AB 34).

As a result of this development, relations between Mr. Wainwright and his attorney, Clyde Taylor, began to deteriorate. Mr. Wainwright suspected that Mr. Taylor had knowledge of the microphone and upon learning that his client was aware of it tipped off the authorities who then removed the listening device.

The state's defense of this glaring defect in the trial is specious. Firstly it was clearly ineffective assistance of counsel not to have moved for a mistrial. Mr. Wainwright discovered on the sixth day of his trial that there was a

listening device in his jail cell. This disturbing fact is ineffectively dismissed by the state and the trial court with the hollow and unverifiable assurance that there was no untoward use or motive in this. What is even more disturbing is the fact that this knowledge was made known to the trial Judge, **who failed to make an immediate disclosure, as he should have to all parties.** Although the State steadfastly claims that the communication to the judge was not ex parte because it was not made by the State Attorney, it is clear that the jail is an arm and for that matter an agent of the State for purposes of this communication. Whether the Judge was told this passively or actively solicited it is of no pertinence.

This development during the trial occasioned a breakdown of the adversarial system as contemplated by United States v. Cronic, 466 U.S. 648 (1984) it prevented counsel from rendering effective assistance and denied Mr. Wainwright his rights under the Sixth, Eighth and Fourteenth Amendments as well as his rights to a reliable adversarial testing of the state's case.

Where circumstances are of a such a magnitude to infer both breakdown in the adversary process and the small likelihood that any lawyer, even a fully competent one, could provide effective assistance of counsel, the presumption of prejudice is

appropriate without inquiry into the actual conduct of the trial. United States v. Cronic, 466 U.S. 648 (1984).

The investigation, arrest, representation and prosecution of appellant Anthony Wainwright occurred in an atmosphere of massive local print and electronic media coverage. The integrity and reliability of the law enforcement investigation, the state attorney investigation, the public as well as the judicial administration of appellant's trial were seriously compromised by the media interest in appellant's story.

The atmosphere of notoriety and media obsessiveness with appellant's story effectively dictated and controlled the flow and character of the investigation, representation and adjudication of appellant's case. It created an atmosphere non-conducive to a reliable adversarial testing of the case and led rather to a breakdown in the adversary process.

Because of this breakdown, counsel rendered wholly ineffective assistance of counsel as an inevitable and unavoidable byproduct.

The aforementioned aspects of the investigation, prosecution, representation and adjudication of appellant's case created "external constraints" on trial counsel's performance as contemplated by the United States Supreme Court in United States

v. Cronic, 466 U.S. 648,104 S. Ct. 2039, 80 L. Ed. 657 (1984) and inferred as well the type of breakdown in the adversarial process contemplated by that case.

Otherwise it was abject ineffective assistance of counsel for trial counsel not to have moved for a mistrial. According to testimony at the penalty phase, his client suffered from mental challenges that rendered him close to borderline mentally retarded. He obviously was very distressed at this development and was clearly, despite the efforts of his attorney to make things better, unable to meaningfully assist in his own defense.

At the evidentiary hearing, Mr. Wainwright presented evidence substantiating his claims regarding ineffective assistance of counsel at the guilt and penalty phases of his trial. Based on the testimony presented, Mr. Wainwright was entitled to relief. In Stephens v. State, 748 So. 2d 1028 (Fla. 1999), this Court reiterated the proper standard of review to be applied when assessing ineffective assistance of counsel claims following an evidentiary hearing.

> While normally a trial court's factual finding must be based upon competent substantial evidence, an appellate court is not required to accord particular deference to a legal conclusion of constitutional deficiency or prejudice under the Strickland test for evaluating the effectiveness of counsel.
>
> Yet despite this deference to a trial court's findings of fact, the appellate court's obligation to independently review mixed questions of fact and law of constitutional magnitude is also an extremely important appellate principle. This obligation stems rom the appellate court's responsibilities to ensure that the law is applied uniformly in decisions based on similar facts and that the appellant's representation is within constitutionally acceptable parameters. That is especially critical because the Sixth Amendment right to assistance of counsel is predicated on the assumption that counsel "plays the role necessary to ensure that the trial is fair"

748 at 1028.

ARGUMENT VII

THE LOWER COURT ERRED IN DENYING MR. WAINWRIGHT'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE IN HIS ABANDONMENT OF MR. WAINWRIGHT AND FOR FAILING TO PROPERLY REPRESENT MR. WAINWRIGHT DURING THE INITIAL STAGES OF THE INVESTIGATION AND ARREST IN VIOLATION OF HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Where, as here, counsel unreasonably fails to investigate and prepare, the appellant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable. See, e.g., Kimmelman v. Morrison, 477 U.S. 365,384-88 (1986) (failure to request discovery based on mistaken belief state obliged to hand over evidence); Henderson v. Sargent, 926 F.2d 706 (8th Cir. 1991)(failure to conduct pretrial investigation was deficient performance); Chambers v. Armontrout, 907 F.2d 825, (8th Cir. 1990)(en banc) (failure to interview potential self-defense witness was ineffective assistance); Nixon v. Newsome, 888 F.2d 112 (11th Cir.1989)(failure to have obtained transcript witness's testimony at co-appellant's trial was ineffective assistance); Code v. Montgomery, 799 F.2d 1481, 1483 (11th Cir. 1986) (failure to interview potential alibi witnesses).

To produce a just result, effective assistance requires an attorney to investigate all reasonable sources of evidence which

may be helpful to the defense. Strickland, 466 U.S, at 691. Counsel's strategic choices made after thorough investigation of law and facts relevant to plausible options are not usually ineffective. However, if counsel fails to investigate before adopting a strategy, and that failure results in prejudice to the appellant, counsel's failure is ineffective assistance. No tactical motive can be attributed to an attorney whose omissions are based on ignorance, or on the failure to properly investigate or prepare.

Through disinterest, abdication of duties, and conflict of interest, attorney Africano failed to investigate and prepare for Anthony Wainwright's guilt phase. Anthony Wainwright death sentence is the resulting prejudice. There is a reasonable probability that the guilt would have resulted in a conviction of a lesser included offense such as manslaughter or second degree murder if the trial strategy had been based on more thorough preparation and had been presented to the jury. Strickland, 466 U.S. at 694.

There is, as a result of trial counsel's omission, certainly a reasonable probability that but for such omissions the outcome of the trial would have been different. Remand for an evidentiary hearing in this claim is warranted. There is a reasonable

probability that the guilt would have resulted in a conviction of a lesser included offense such as manslaughter or second degree murder if the trial strategy had been based on more thorough preparation and been presented to the jury. Strickland, 466 U.S. at 694.

There is, as a result of trial counsel's omission, certainly a reasonable probability that but for such omissions the outcome of the trial would have been different."One of the primary duties defense counsel owes to his client is the duty to prepare himself adequately prior to trial." Magill v. Dugger, 824 F.2d 879, 886 (11th Cir. 1987); "pretrial preparation, principally because it provides a basis upon which most of the defense case must rest, is, perhaps, the most critical stage of a lawyer's preparation." House v. Balkcom, 725 F.2d 608, 618 (11th Cir.), cert. denied, 469 U.S. 870 (1984); Weidner v. Wainwright, 708 F.2d 614, 616 (11th Cir. 1983). As stated in Strickland, an attorney has a duty to undertake reasonable investigation or "to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691.

The Eighth Amendment recognizes the need for increased scrutiny in the review of capital verdicts and sentences. Beck v. Alabama, 477 U.S. 625 (1980). The United States Supreme Court

noted, in the context of ineffective assistance of counsel, that the correct focus is on the fundamental fairness of the proceeding:

> A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of factual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Strickland v. Washington, 466 U.S. 668, 696 (1984) (emphasis added). The evidence presented in this claim demonstrates that the result of Mr. Wainwright's trial is unreliable.

Remand for an evidentiary hearing in this claim is warranted.

CONCLUSION

The circuit court erred in denying Mr. Wainwright's Rule 3.850 motion. Mr. Wainwright did not receive a full and fair evidentiary proceeding and did not receive effective assistance of counsel.

Mr. Wainwright is entitled to relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by first class mail, postage prepaid, to Meredith Charuba, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, FL 32399-1050, on March 8, 2004.

CERTIFICATION OF TYPE SIZE AND STYLE

This is to certify that the Reply Brief of Appellant has been reproduced in a 12 point Courier New type, a font that is not proportionately spaced.

Respectfully submitted,

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