

IN THE SUPREME COURT OF FLORIDA

LYNFORD BLACKWOOD,

Appellant,

vs.

Case No. SC03-1553

STATE OF FLORIDA,

Appellee.

_____ /

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

REPLY BRIEF OF APPELLEE ON CROSS-APPEAL

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PRELIMINARY STATEMENT

Appellant, LYNFORD BLACKWOOD, was the defendant in the trial court below and will be referred to herein as "Appellant" or "Blackwood." 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 record in this case will be as follows:

"PCR"- Record in 3.851 appeal

"PCT"- Transcripts in 3.851 appeal

"DA"- Record from direct appeal

Reference to an supplemental pleadings and transcripts will be by the symbols "SPCR", etc. followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

1. Dr. Block-Garfield could not recall whether Mr. Trachman was still Blackwood's attorney at the time of her second evaluation of Blackwood (PCT Vol. 4, 19-20). Her evaluation was given directly to the court so she wouldn't know (PCT Vol. 4, 19-20).

2. Dr. Block-Garfield believed that six weeks was a sufficient amount of time for her to render an opinion for the Spencer hearing (PCT Vol. 4, 60-61). Factored into her decision was the fact that she had previously examined him on two occasions (for competency) so she already had his background and it would just be a matter of getting an update and focusing on the mitigators (PCT Vol.4 60-61).

3. Dr. Block-Garfield agreed that court often takes longer than you expect (PCT Vol.4, 43).

4. Dr. Block-Garfield did not state that Mr. Ullman did not provide her with "important" information as Blackwood's brief suggests (AB 8); she just agreed that she had not been provided with the information (PCT Vol. 4 29).

5. Dr. Block-Garfield agreed that Mr. Ullman sent her a copy of the mitigators and that she looked at each and every statutory and non-statutory mitigator (PCT Vol. 4, 63-64). She also agreed that she never asked Ullman for any other

information and that she would have asked had she needed anything additional (PCT Vol.4, 64).

6. Contrary to Blackwood's assertion, Dr. Block-Garfield states in the portion of her testimony cited in footnote 15 that she "did not think that there was anything really neurologically wrong with [Blackwood]." (AB 11, f.n. 15).

7. Dr. Block-Garfield agreed that she spoke with Mr. Ullman prior to the Spencer hearing, but they did not have a conference, nothing of sufficient length to make notations on (PCT Vol.4 70-71). could not say that he was indeed neurologically impaired because of the depression and the lack of any other indicators of neurological impairment (DA Vol. 11 p. 1192). reviewed Blackwood's EMSA jail records after While Mr. Ullman stated that he initially wasn't aware that the State was seeking the death penalty, he noted that once he looked at the file, he knew the facts were significant and that the possibility of the State seeking death was a reality (PCT Vol. 6, 232).

8. Blackwood asserts that Mr. Ullman did not ask Dr. Macaluso to be a mitigation expert in October, 1996, prior to trial; however, the record shows that Mr. Ullman could not recollect whether he asked Dr. Macaluso at that time (PCT Vol. 6 299-300).

9. Regarding his letter to the investigator, McCoy, Mr. Ullman explained that McCoy was a personal friend of his and that his request for McCoy to tell Blackwood what a great lawyer Ullman was, was his attempt at wit or sarcasm which he was "sure Mr. McCoy took [] with the intent it was written." (PCT Vol. 6, 245).

10. Blackwood asserts that Mr. Ullman did not send Dr. Block-Garfield Blackwood's school records, the medical examiner's testimony or the audio tape of Blackwood's statement, but the record reveals he stated he could not remember whether he sent her those items (PCT Vol. 6 250).

11. Although Mr. Ullman's time records do not indicate any meeting or conversations with Dr. Block-Garfield, he noted that he saw her frequently at the courthouse and spoke with her about the case and her report (PCT Vol. 6, 252, 255).

SUMMARY OF ARGUMENT

Cross-Appeal- The trial court erred by vacating Blackwood's death sentence and ordering a new penalty phase. The trial court improperly applied both the deficiency and prejudice prong of Strickland and its conclusions are erroneous as a matter of law.

CROSS APPEAL

**THE TRIAL COURT ERRED, AS A MATTER OF LAW,
BY VACATING BLACKWOOD'S DEATH SENTENCE AND
GRANTING A NEW PENALTY PHASE.**

Blackwood erroneously contends that the State has waived "its opportunity to argue that the lower court erred in 'factoring in' [Dr. Garfield's] testimony with regard to the prejudice prong because "[t]he State never objected to the testimony of Dr. Block-Garfield" (AB 63) and she was admitted "without objection from the State . . . as an expert in the area of clinical psychology." (AB 63). This argument lacks merit. First, the State did not know what Dr. Garfield's testimony would be at the post-conviction evidentiary hearing and therefore could not have objected to her being a witness at that hearing. Second, the State's position is not that Dr. Garfield should have been precluded as a witness at the evidentiary hearing; but rather, that the trial court erred by relying upon her testimony in concluding that Strickland's prejudice prong was met in this case.

As noted by the State in its Initial Brief, the dispositive issue in this case, as phrased by the trial court, was whether Ullman was ineffective for failing to present **mental health mitigation** at the penalty phase. After finding Ullman deficient in not presenting such testimony, the trial court found that

Blackwood was prejudiced by the deficiency **because the result of the penalty phase would have been different had the jury heard the mental health testimony.** The trial court concluded that "[h]ad the jury been presented with expert mental health mitigation, there is a reasonable probability that the balance of the aggravating and mitigating circumstances would have changed their recommendation." (PCR 320). The court noted that "[i]n weighing the single aggravator against the mitigators presented, [it] gave great weight to the jury's recommendation." (PCR 320).

The State's argument is that this was an erroneous legal conclusion because it ignores the fact that the trial court heard Dr. Block-Garfield's mental health mitigation **before** imposing the death sentence, but was **unpersuaded** that it outweighed the HAC aggravator. If the trial court was **unpersuaded** that Dr. Garfield's mental health mitigation outweighed the HAC aggravator, how can it conclude that the **jury's recommendation would have been different had it heard her testimony.** That is, if her testimony made no difference to the trial court, how is there a reasonable probability that it would have changed the jury's recommendation. Significantly, Dr. Block-Garfield's testimony **did not change between the Spencer hearing and the 3.850 evidentiary hearing.** Thus, it should not

have been relied upon by the trial court in determining whether the prejudice prong was met here.

Moreover, even including Dr. Block-Garfield's testimony in the analysis, it is clear that there is **not** a reasonable probability that Blackwood would have received a life recommendation based on the testimony given at the evidentiary hearing. The jury heard testimony at the penalty phase that Blackwood was depressed and suffering from a mental disturbance and that he had a difficult childhood. Blackwood's brother, Michael Blackwood, testified that growing up in Jamaica, while their mother was in America trying to make a better life for them, it was hard and they tried to make it (DA Vol. 10, 1010).

He further testified that the defendant was emotionally upset that Carolyn had broken off their relationship and that before the homicide, he told Michael that he and Carolyn had been having problems and he was upset and did not want to talk about it (DA Vol. 10, 1013). Michael went to Blackwood's home one afternoon and the house was a mess and it seemed like Blackwood had been in bed all day. Michael found him curled up in a ball upset over Carolyn (DA Vol. 10, 1014). Thus, evidence of Blackwood's mental state at the time of the crime was heard and considered by the jury in weighing the aggravating and mitigating circumstances. It is highly unlikely that the

addition of a statutory mitigator from experts, i.e., that Blackwood was under an extreme emotional disturbance, would have resulted in a life sentence here, where the State established that the murder was heinous, atrocious, or cruel (HAC).

CONCLUSION

WHEREFORE, based on the foregoing, the State requests that this Honorable Court reverse the trial court's vacation of Appellant's death sentence and ordering of a new penalty phase.

The State requests re-imposition of the death sentence and affirmance of the summary denial of Appellant's remaining claims.

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 TODD SCHER, Counsel for Appellant, 5600 Collins Ave., #15-B, Miami Beach, Fl. 33140, this 8th day of June, 2005.

DEBRA RESCIGNO

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.

DEBRA RESCIGNO