IN THE

Supreme Court of Florida

COSTA T. VATHIS, Petitioner, v. STATE OF FLORIDA, Respondent.	Case No. _____ District Court Case No. 1D02-3906

JURISDICTIONAL BRIEF OF PETITIONER

ROBERT AUGUSTUS HARPER
Robert Augustus Harper Law Firm, P.A.
325 West Park Avenue
Tallahassee, Florida 32301-1413
(850) 224-5900/fax (850) 224-9800
FL Bar No. 127600/GA Bar No. 328360

MICHAEL ROBERT UFFERMAN
Robert Augustus Harper Law Firm, P.A.
FL Bar No. 114227

Counsel for Petitioner **VATHIS**

A. TABLE OF CONTENTS

B. TABLE OF CITATIONS

Page

1. Cases

2. Other Authority

C. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS.

Petitioner Vathis was convicted by a jury of sexual battery on a child under twelve by a person eighteen years of age or older (count I) and lewd, lascivious, or indecent assault on a person under the age of sixteen (count II). Petitioner Vathis timely filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850. In his motion, Petitioner Vathis claimed that trial counsel rendered ineffective assistance by failing to object and move for an immediate mistrial at the conclusion of the alleged victim's testimony when her parents spontaneously rushed to the witness stand and escorted the victim back to the gallery without the court's permission and in full view of the jury.

The trial court summarily denied the postconviction motion on 26 November 2001. Petitioner Vathis timely appealed the denial. On 30 April 2003, the First District Court of Appeal issued an order requiring the State to file an answer brief pursuant to *Toler v. State*, 493 So. 2d 489 (Fla. 1st DCA 1986). In the reply brief, Petitioner Vathis cited to decisions from other jurisdictions that have held that it is erroneous to allow unauthorized persons to come into contact with a testifying witness at the witness stand in the presence of the jury. *See State v. Suka*, 777 P.2d 240, 242 (Haw. 1989) ("Thus, [the counselor's] presence with and laying her hand on the shoulder of complainant during her testimony could have had the effect of conveying to the jury

[the counselor's] belief that complainant was telling the truth, thereby denying defendant the right to a fair and impartial trial."); *People v. Adams*, 23 Cal. Rptr. 2d 512, 527 (Cal. Ct. App. 1993) ("The presence of a second [unauthorized] person at the [witness] stand affects the presentation of demeanor evidence by changing the dynamics of the testimonial experience for the witness.")

On 24 July 2003, the district court issued a written opinion affirming the trial court's denial of Petitioner Vathis' postconviction claim, concluding that the claim was facially insufficient. *See Vathis v. State*, 859 So. 2d 517 (Fla. 1st DCA 2003). Judge Ervin issued a strongly worded dissenting opinion reasoning that Petitioner Vathis had in fact stated a facially sufficient claim of ineffective assistance of counsel. Judge Ervin explained that the majority failed to follow the proper standard of review for a summary denial of postconviction motion. *See also Vathis*, 859 So. 2d at 521 (Ervin, J., dissenting) ("As for the prejudice prong, the majority ignores appellant's allegations, made under oath, that the emotional display tainted the jury's verdict due to consideration of sympathy. Although the majority might disagree, as previously stated, nothing attached to the order conclusively shows otherwise."). Judge Ervin argued that the case should be remanded for an evidentiary hearing.

D. SUMMARY OF ARGUMENT.

The decision of the First District Court of Appeal in *Vathis v. State*, 859 So. 2d

517 (Fla. 1st DCA 2003), expressly and directly conflicts with *Beasley v. State*, 774 So. 2d 649, 669 (Fla. 2000), concerning whether prejudice caused by emotional displays in the courtroom is a proper subject of objection and instruction by the trial court. Second, the decision in *Vathis* expressly and directly conflicts with *Rose v. State*, 774 So. 2d 629, 632 (Fla. 2000), concerning the proper standard of review of a trial court's summary denial of a postconviction motion. Third, the decision in *Vathis* expressly and directly conflicts with *Reaves v. State*, 826 So. 2d 932, 938 (Fla. 2002), concerning whether a finding that some action or inaction by defense counsel was "tactical" is appropriate without affording the defendant an evidentiary hearing. Finally, the decision in *Vathis* expressly and directly conflicts with *Seminole Shell Co. v. Clearwater Flying Co.*, 156 So. 2d 543 (Fla. App. 1963), concerning whether a trial court should immediately instruct a jury in order to cure potential prejudice caused by improper conduct or evidence.

E. JURISDICTIONAL STATEMENT.

The Supreme Court of Florida has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the Supreme Court or another district court of appeal on the same point of law. *See* Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv).

F. ARGUMENT AND CITATIONS OF AUTHORITY.

The decision of the First District Court of Appeal in *Vathis v. State*, 859 So. 2d 517 (Fla. 1st DCA 2003), expressly and directly conflicts with *Beasley v. State*, 774 So. 2d 649, 669 (Fla. 2000), *Rose v. State*, 774 So. 2d 629, 632 (Fla. 2000), *Reaves v. State*, 826 So. 2d 932, 938 (Fla. 2002), and *Seminole Shell Co. v. Clearwater Flying Co.*, 156 So. 2d 543 (Fla. App. 1963).

In *Vathis v. State*, 859 So. 2d 517 (Fla. 1st DCA 2003), the First District Court of Appeal held that counsel was not ineffective for failing to object to an emotional outburst at the witness stand in the presence of the jury. Petitioner Vathis submits that the presence of nontestifying third-parties at the witness stand at the same time as the testifying witness, in the presence of the jury, can and did lead to a prejudicial emotional outburst. Petitioner Vathis further submits that the emotional outburst was so egregious that no reasonable and effective attorney would have failed to object, failed to move for a curative instruction, and failed to move for a mistrial. In the postconviction motion, Petitioner Vathis alleged that the emotional outburst that occurred during his trial was prejudicial and therefore counsel fell below the applicable standard of performance for failing to object to the witness misconduct.

The district court below held that the failure to object to an emotional outburst at the witness stand in the presence of the jury *can never amount* to ineffective assistance of counsel *as a matter of law*. *See Vathis*, 859 So. 2d at 518 ("We cannot say that the trial lawyer in this case made an error at all, much less an error so serious as to be the equivalent of a deprivation of the constitutional right to counsel."). The

Vathis holding is in conflict with this Court's opinion in *Beasley v. State*, 774 So. 2d 649, 669 (Fla. 2000). In *Beasley*, the Court recognized that possible prejudice caused by emotional displays in the courtroom is a proper subject of objection and instruction by the trial court. The Court explained that when such outbursts are brought to the trial court's attention, the trial court must "maintain[] vigilance," "caution[] the audience to keep its . . . emotions in check," and "direct[] counsel to advise family members accordingly." *Beasley*, 774 So. 2d at 669. The Court concluded that the trial court in *Beasley* properly imposed safeguards to prevent improper emotional outbursts in front of the jury. *See id. See also Vathis*, 859 So. 2d at 520 (Ervin, J., dissenting) ("Moreover, possible prejudice caused by emotional displays in the courtroom is a proper subject of objection and instruction by the court. *See, e.g.*, *Beasley v. State*, 774 So. 2d 649, 669 (Fla. 2000).").

The decision of the First District Court of Appeal in *Vathis* is in conflict with the decision in *Beasley*. Had counsel in Petitioner Vathis' case brought the improper emotional display to the trial court's attention, the trial court would have been required to impose appropriate safeguards to reduce the effect of the prejudice caused by the display, including either granting a mistrial or instructing the jury to disregard the improper conduct. The district court below not only held that counsel was *not* ineffective for failing to object to the emotional outburst, but that a petition alleging

ineffective assistance of counsel could *never* sustain a claim on these grounds. Accordingly, Petitioner Vathis requests the Court to grant review in order to resolve the conflict between *Vathis* and *Beasley*.

The decision below is also in conflict with the decisions from this Court and all other district courts regarding the proper standard of review to be applied to a trial court's summary denial of a postconviction motion. When a trial court denies postconviction relief without conducting an evidentiary hearing, an appellate court "must accept [the defendant's] factual allegations as true to the extent they are not refuted by the record." *Rose v. State*, 774 So. 2d 629, 632 (Fla. 2000).[1] Pursuant to *Rose*, the First District was required to accept as true Petitioner Vathis' representations regarding the "emotional display" that occurred as a result of the witness's parents "rush[ing] to the witness stand." Yet a review of the district court's opinion demonstrates that the court did not "accept [the defendant's] factual allegations as true to the extent they are not refuted by the record"; rather, the district court *weighed and rejected* Petitioner Vathis' factual allegations, as demonstrated by the following statements in the opinion:

However, the defendant has not alleged that an objection was necessary,

---

[1] *See also Jancar v. State*, 711 So. 2d 143, 145 (Fla. 2d DCA 1998); *Saint-Fleur v. State*, 840 So. 2d 261, 262 (Fla. 3d DCA 2002); *Whitfield v. State*, 549 So. 2d 779, 779 (Fla. 4th DCA 1989); *Hatten v. State*, 698 So. 2d 899, 900 (Fla. 5th DCA 1997).

> or even that it would have been wise. *Some lawyers might conclude* that the jurors would see the parents' emotional display for what it is, and that an objection would be out of place.
>
> . . .
>
> . . .The defendant claims that the parents' outburst was a form of nonverbal "bolstering" of the child's testimony, *but that is not necessarily so. A more logical deduction* from these facts is that the parents were trying, in their way, to comfort a child who had been through the ordeal of testifying. In any event, *we would be giving very little credit* to the jurors to say that the incident made them *more likely* to believe the child's account of the crime. Few criminal trials are completely devoid of emotion. *We cannot presume* that the emotion shown in this one must have been prejudicial.
>
> . . . [T]he jurors were instructed that "[the] case must not be decided for or against anyone because [they] feel sorry for anyone or are angry at anyone." This instruction was given for a purpose, and *we must assume* that the jurors followed it in deciding their verdict.

Vathis, 859 So. 2d at 518-19 (emphasis added). Petitioner Vathis submits that although "some lawyers might conclude that the jurors would see the parents' emotional display for what it is," for purposes of review of a summary denial of a postconviction motion, the district court was *required* to accept that most lawyers would conclude that the parents' emotional display was improper. Petitioner Vathis submits that although it is "not necessarily so" that "the parents' outburst was a form of nonverbal 'bolstering' of the child's testimony," for purposes of review of a summary denial of a postconviction motion, the district court was *required* to accept that the parents' outburst was, in fact, a form of "bolstering" of the child's testimony.

Finally, Petitioner Vathis submits that for purposes of review of a summary

denial of a postconviction motion, the district court should not have engaged in "logical deductions," should not have "give[n] credit to jurors," and should not have "presume[d]," "speculate[d]," or "assume[d]" whether the emotion shown was prejudicial or not. Rather, after accepting the factual allegations *as true*, the district court's narrow focus should have been on whether Petitioner Vathis' claim "alleges specific facts which are not conclusively rebutted by the record and which demonstrate a deficiency in performance which prejudiced the defendant." *Bethea v. State*, 767 So. 2d 630, 631 (Fla. 5th DCA 2000). Deductions, presumptions, speculations, and assumptions in favor of the State are not appropriate for an appellate court reviewing a summary denial of a postconviction motion. Deductions, presumptions, speculations, and assumptions can only be made by a trial court sitting as a fact-finder, *after an evidentiary hearing*, and after both parties have been afforded an opportunity to present evidence and witnesses in support of their positions. Accordingly, Petitioner Vathis requests the Court to grant review in order to resolve the conflict between *Vathis* and *Rose*.

The decision below is also in conflict with the decisions from this Court and all other district courts concerning whether a finding that some action or inaction by defense counsel was "tactical" is appropriate without affording the defendant an evidentiary hearing. In *Reaves v. State*, 826 So. 2d 932, 938 (Fla. 2002), the Court recognized

that "counsel may make a tactical decision [in regards to a particular action or inaction], but a trial court's finding that such a decision was tactical usually is inappropriate without an evidentiary hearing." (citation omitted).[2] In the opinion below, the First District reasoned that Petitioner Vathis' defense counsel had a strategic reason for not objecting to the improper emotional outburst because "[s]ome lawyers might conclude that the jurors would see the parents' emotional display for what it is, and that an objection would be out of place." *Vathis*, 859 So. 2d at 518. The First District's reasoning is in conflict with *Reaves*. If there was a strategic reason for not objecting to the emotional outburst, then "the evaluation of such strategic decisions generally requires resolution through an evidentiary hearing." *McCann*, 854 So. 2d at 791. Accordingly, Petitioner Vathis requests the Court to grant review in order to resolve the conflict between *Vathis* and *Reaves*.

Finally, the decision below is in conflict with *Seminole Shell Co. v. Clearwater Flying Co.*, 156 So. 2d 543 (Fla. App. 1963), concerning whether a trial court should immediately instruct a jury in order to cure potential prejudice caused by improper conduct, testimony, or evidence. At the end of the opinion below, the First District stated the following:

---

[2] *See also McCann v. State*, 854 So. 2d 788, 791 (Fla. 2d DCA 2003); *Gordon v. State*, 608 So. 2d 925, 925-26 (Fla. 3d DCA 1992); *Hall v. State*, 754 So.2d 70, 70 (Fla. 4th DCA 2000); *Lopez v. State*, 773 So. 2d 1267, 1268 (Fla. 5th DCA 2000).

> [T]he jurors were instructed that "the case must not be decided for or against anyone because they feel sorry for anyone or are angry at anyone." This instruction was given for a purpose, and we must assume that the jurors followed it in deciding their verdict.

Vathis, 859 So. 2d at 519. The First District therefore held that a belated instruction given at the conclusion of all the evidence can cure the prejudice caused by an emotional outburst that occurred in the middle of the trial. *Cf. Vathis*, 859 So. 2d at 520 (Ervin, J., dissenting) ("The majority's reliance on the standard instruction to the jury. . . is misplaced, because that instruction, given at the conclusion of trial, was too remote to counter the prejudicial effects of the improper emotional display occurring during the states's case-in-chief.").

In contrast to the holding in *Vathis*, the court in *Seminole Shell Co.* recognized that when the jury witnesses a prejudicial comment or display, the trial court should *immediately* instruct the jury to disregard the improper comment or display:

> The evidence having been admitted for consideration by the jury, the belated attempt by the Court in its general instruction at the close of the case to correct this error was insufficient. The effect upon the minds of the jury can't under such circumstance be so easily and completely neutralized. *It has been uniformly held that the Court should act immediately to appropriately instruct the jury*.

156 So. 2d at 545 (citations omitted) (emphasis added). Accordingly, Petitioner Vathis requests the Court to grant review in order to resolve the conflict between *Vathis* and *Seminole Shell Co*.

G. CONCLUSION.

The Court has discretionary jurisdiction to review the decision below. The Court should exercise its discretion to consider the merits of Petitioner Vathis' argument. This case presents an important issue regarding the facial sufficiency of a postconviction motion pursuant to Florida Rule of Criminal Procedure 3.850, which is of statewide concern in the criminal law of the State of Florida.

H. CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

Office of the Attorney General
Department of Legal Affairs
PL01, The Capitol
Tallahassee, Florida 32399-1050

by hand/mail delivery this _____ day of January, 2004.

Respectfully submitted,

ROBERT AUGUSTUS HARPER
Robert Augustus Harper Law Firm, P.A.
325 West Park Avenue
Tallahassee, Florida 32301-1413
(850) 224-5900/fax (850) 224-9800
FL Bar No. 127600/GA Bar No. 328360

MICHAEL ROBERT UFFERMAN
Robert Augustus Harper Law Firm, P.A.
FL Bar No. 114227

Counsel for Petitioner **VATHIS**

xc: Costa T. Vathis

I. CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies pursuant to Florida Rule of Appellate Procedure 9.210(a)(2) that the Jurisdictional Brief complies with the type-font limitation.

ROBERT AUGUSTUS HARPER
Robert Augustus Harper Law Firm, P.A.
325 West Park Avenue
Tallahassee, Florida 32301-1413
(850) 224-5900/fax (850) 224-9800
FL Bar No. 127600/GA Bar No. 328360

MICHAEL ROBERT UFFERMAN
Robert Augustus Harper Law Firm, P.A.

FL Bar No. 114227

Counsel for Petitioner **VATHIS**