IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-633

FRANK A. WALLS,

APPELLANT,

v.

STATE OF FLORIDA,

APPELLEE.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR OKALOOSA COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

ARGUMENT I

THE LOWER COURT'S RULING FOLLOWING THE EVIDENTIARY HEARING WAS ERRONEOUS.

A. INEFFECTIVE ASSISTANCE OF COUNSEL IN GUILT AND PENALTY PHASES

1. Trial counsel's failure to exclude from evidence references to the uncharged crime of sexual battery.

As Appellee, in its Answer Brief, observes, the hearing court found that, "the jury was made aware of the purpose of the [sexual battery] kit and they could not have inferred from the testimony that the defendant had committed an uncharged sexual battery." (Answer Brief at 13-14)

This finding and Appellee's argument that trial counsel's passivity in permitting the state to present testimony and evidence regarding the uncharged crime of sexual battery can be excused as trial strategy are not supported by the record.

Thus, this Court, exercising *de novo* review pursuant to the standard enunciated in *Stephens v. State,* 748 So. 2d 1028, 1034 (Fla. 1999), should reject Appellee's argument and reverse the lower court's conclusion of law that Appellant has not carried his burden under *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 674 (1984) to satisfy the familiar, two-pronged test,

establishing (1) deficient performance and (2) a reasonable probability that the outcome of the trial would have been different. *See, also, Spencer v. State,* 842 So. 2d 52, 61 (Fla. 2003); *State v. Davis,* Nos. SC02-803 & SC03-186 (Fla. 2004) (rejecting trial court's determination that counsel's remarks on racial animus during voir dire were a legitimate tactical approach by experienced counsel and that Davis approved the tactic.)

In *Davis,* this Court characterized the defendant's burden under the *Strictland* standard: "First, a defendant must establish conduct on the part of counsel that is outside the broad range of competent performance under prevailing professional standards." *State v. Davis at 6-7, citing Gore v. State,* 846 So. 2d 461, 467 (Fla. 2003). "Second, the deficiency must be shown to have so affected the fairness and reliability of the proceedings that confidence in the outcome is undermined." *Id.* at 7. Further, this Court noted the relationship between the two prongs of the test in that "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Id., citing Rutherford v. State,*

727 So. 2d 216, 219 (Fla. 1998) (quoting *Strickland,* 466 U.S. at 686). Thus, this Court, in the instant case, as in *Davis*, must defer only to findings of fact based on competent, substantial evidence and will undertake an independent review of deficiency and prejudice as mixed questions of law and fact. *State v. Davis* at 7, citing *Gore,* 846 So. 2d at 468; *Stephens v. State,* 748 So. 2d 1028, 1033-34 (Fla. 1999)

Davis powerfully rejects the lower court's conclusion and the state's argument that trial counsel's explicit expressions of racial prejudice to the jury could constitute an acceptable tactic or strategy. *Davis at 7.* In *Davis,* this Court further emphasized the acute necessity of vigilance against racial prejudice "when the justice system serves as the mechanism by which a litigant is required to forfeit his or her very life," *Id.* at 9, and reiterates the importance of the "death is different" principle to both the state and the defendant and the unique need for effective counsel in capital proceedings. *Id. at 10,* citing, *Gregg v. Georgia,* 428 U.S. 153, 188 (1976); *State v. Dixon*, 283 So. 2d 1, 7 (Fla. 1973); and *Sheppard & White, P.A. v. City of Jacksonville*, 827 So. 2d 925, 932 (Fla. 2002).

Appellant respectfully suggests that trial

counsel's alleged strategy in the instant case, of intentionally allowing the introduction of evidence of an uncharged sexual battery, by reference to a "sexual battery kit" and by failing to redact, despite a letter from the state indicating a willingness to redact portions of the tape, or otherwise exclude from the jury's consideration particularly charged portions of the defendant's taped examination by officers wherein the officers assert their belief that Appellant raped the female victim and Appellant's response is ambiguous at best.

Like counsel's base appeal to buried bigotries in *Davis,* it is difficult to imagine, even, or perhaps especially, in a brutal murder case what evidence might unnecessarily inflame a jury in the direction of death than the suggestion of rape-murder which counsel contends was knowingly admitted, though never charged, in this case.

Despite the fact that the defense theory was that this was a "burglary gone bad" and that a sexual battery completely undercuts that argument and suggests an even darker motive, trial counsel contended at the hearing, and Appellee argues on appeal, that, though the burglary theory effectively concedes felony-murder, counsel wanted to curry

favor from the jury by winning acquittal on the uncharged crime of rape or, in the penalty phase, arguing that the absence of evidence of rape constituted mitigation.

Although an examination of the comments made by the officers and by the defendant are simply not as clearly as exculpatory as trial counsel and the lower court seem to assume, and in fact there is no evidence to support the argument that the jury did not and could not sentence the defendant to death based on the belief that this was sexually motivated murder.

Certainly counsel's assertion that their strategy was to prove that the defendant did not commit an uncharged sexual battery and thus garner the jury's appreciation does not, to Appellant, seem, under the circumstances of this case, to constitute a viable strategy in either the guilt-phase or the penalty-phase of the trial.

In fact, as Appellee argues, the first jury recommended life for the death of Mr. Alger and, by a single vote, death for the killing of Ms. Peterson. Rather than evidencing counsel's effectiveness, as Appellee argues, this apparent differentiation in the jury's recommendation raises the reasonable probability that the jury considered the evidence of a sexual battery on Ms. Peterson. See, *Lawrence* v. State, 614 So. 2d 1092, 1097 (Fla. 1993) (erroneous admission of

collateral crime evidence in guilt phase not harmless beyond reasonable doubt in penalty phase); *Castro v. State,* 547 So. 2d 111, 115-16 (Fla. 1989) (same).

Finally, it is important to note that the Appellee does not contend that the evidence of sexual battery could not have been excluded, by redaction or otherwise, had counsel sought to keep it from the jury. See, Sections 90.403 and 90.404, Florida Statutes. The record does not reflect that the State intended to introduce the sexual battery evidence as similar fact evidence of other crimes, wrongs, or acts. See, *Smith v. State, No. SC01-2103 (Fla. 2004)*; *Jackson v. State,* 451 So. 2d 458 (Fla. 1984) Rather, the record establishes that defense counsel simply failed to follow-up on the state's offer to discuss redaction in the July 1, 1988 letter from the state attorney to trial counsel.

2. <u>Remaining IAC Claims</u>

Appellant will rely on the initial brief in support of the remaining ineffective assistance of counsel claims.

B. The Lower Court Erred In Denying Appellant Relief On The "Nixon" Issue

Appellee argues that *Nixon v. Singletary,* 758 So. 2d

618 (Fla. 2000) and *Harvey v. State, 28 Fla. L. Weekly S513* (Fla. July 3, 2003) do not apply to a concession of guilt to a felony murder count but a contested count of premeditated murder. However, Appellee cites no case nor rational for such a distinction. Further, Appellee's contention that *Strickland v. Washington,* 466 U.S. 668 (1984), rather than *United States v. Chronic,* 466 U.S. 648 (1984), governs the analysis of a "partial concession."

Appellee's analysis, however, seems more rooted in the Appellee's argument that Mr. Walls would have been convicted anyway, such that there is no prejudice, than in the holdings of *Nixon* and *Harvey,* neither of which draw the distinction propounded by Appellee.

Further, Appellee correctly states that, in guilt phase opening statements, counsel stated that he was not going to deny most of the facts and admits that defendant broke in the trailer and two people died as a result. (III 370; VI 998). This is clearly a concession of guilt as to felony murder.

Taken as a whole, counsel's hearing testimony is not as specific regarding the alleged affirmative, explicit acceptance of the concession as Appellee insinuates. Mr. Loveless testified that he was never sure if Mr. Walls was competent when they talked and noticed his diminished

responsiveness in the second trial. (PCR. IV 606-610). Mr. Walls' own testimony demonstrated how easily bewildered he was by the legal process.

Counsel do indicate that the general strategy was to argue that this was a burglary-gone-bad. Less clear is the reason for the extensive concessions. While counsel characterize the concessions as a tactic, the only benefit seems to be that the jury would appreciate counsel's forthrightness, though counsel never clarifies precisely how this appreciation might translate into a tangible benefit for Mr. Walls.

The admission of the burglary also served as the concession of the commission of a felony aggravator. Counsel testified this was the only available strategy, though he does not explain why. (PCR. 605) Counsel did not contest felony murder. (PCR. 626)

Mr. Walls, according to attorney Loveless, would not have heard his opening or closing but would have heard what he was going to get across to the jury. (PCR. 609)

Loveless also does not explain how he squares his competency concerns regarding Mr. Walls with his opinion that Mr. Walls generally understood him. (PCR. 606-610) Loveless testified that Walls agreed with "the procedure" of conceding and says Walls agreed with this tactic, but the

nature of the tactic remains unclear in his testimony, unless, as he testified, he means retaining his credibility as the only thing he had. (PCR. IV 642) Counsel can, of course, simply hold the State to its burden of proof.

Walls did testify at the evidentiary hearing and did not believe he agreed to the concessions (PCR. IV 714-715), His general befuddlement with the process is also evident in his responses and serves to increase the challenge to counsel to clarify such drastic concessions while in no way minimizing the scope of their duty to do so.

Counsel identified a strategy to the extent conceding to felony murder and the commission of a felony, the prior violent felony, and the pecuniary gain aggravators can constitute a viable strategy in a death case.

Neither counsel nor Appellee has been able to articulate how conceding to Mr. Walls' death-eligibility and several statutory aggravators in the opening inured to the benefit of Mr. Walls.

Further, the record may arguably support the contention that Mr. Walls was told "the procedure" of conceding, but there is no reliable evidence that he knowingly agreed to immediately concede to the jury guilt of a capital

felony-murder and the substance of several statutory aggravating factors.

Arguably, then, the facts of this case are more egregious than those of *Nixon* or *Harvey* in that counsel also conceded facts sufficient to support several aggravating factors.

In such a case, counsel's credibility with the jury is of little use to their client, particularly if the numerous concessions are compounded by the unnecessary introduction of evidence of an uncharged sexual battery and counsel tries to characterize the sexual battery evidence as mitigation.

Finally, Appellee's argument that concession of guilt in a capital case is ameliorated by the assertion that "counsel's focus in a capital case is on the sentence" (Answer Brief at fn. 12) and that "[O]btaining a life sentence is winning a capital case" is not an accurate statement of counsel's obligations.

Indeed, such an attitude supports this Court's observation that concession of guilt before a single witness has been called or exhibit has been introduced by the state, which bears the heaviest burden in the law, is tantamount to a guilty plea. *Nixon,* 758 So. 2d at 624.

> The record, at a minimum, establishes that Mr. Walls did not wish to plead guilty. The mere fact that counsel has dressed up this most substantive of actions in the raiment of a procedural strategy, while never articulating the alchemy by which Mr. Walls benefited from the guilt concession as well as the concession of numerous statutory aggravating factors, should not satisfy the sensible stricture which this Court Has articulated in *Nixon* and *Harvey,* which is neither satisfied nor diminished by the difficulty of the case or by counsel rapport and credibility with the jury in the absence of a knowing, explicit affirmation by a client who understands that he is in effect pleading guilty to a crime that makes him death-eligible and that he is also effectually alleviating the state of its burden to prove the guilt case and several statutory aggravating factors beyond a reasonable doubt.
>
> In this case, there is no evidence that Mr. Walls understood the extent, or even the effect, of counsel's concessions.

Appellant will rely on the arguments in his initial brief on the issue of the propriety of prosecutorial comments.

ARGUMENT II

THE HEARING COURT ERRED IN SUMMARILY DENYING APPELLANT A HEARING ON THE FOLLOWING CLAIMS

A. Penalty Phase IAC Claims

Appellant will rely on the arguments made in his initial brief on the lower court's summary denial of his claim that counsel was prejudicially ineffective for failing to present an expert on ritilin, forfailing to present lay witnesses regarding mitigation and mitigation evidence regarding his affliction with bi-polar disorder, for failing to present a neuropharmacologist regarding the effects of Mr. Walls abuse and use of legal and illegal drugs and alcohol, for failing to obtain a PET SCAN or conduct medical testing to demonstrate the extent of Mr. Walls' brain damage and dysfunction, and for failing to movefor the imposition of a life sentence based on prosecutorial misconduct necessitating a second trial. He contends he should have been allowed to present testimony supporting these claims.

B. Mental Retardation Claim

The lower court erroneously denied Mr. Walls a hearing on his claim that he is mentally retarded and that he cannot be executed under *Atkins* and Section 921.137,

Florida Statutes (2002). The Lower Court denied Mr. Walls a hearing on the ground that the Florida Statute is not retroactive.

Contrary to the state's assertion, the record does not conclusively rebut the claim that Mr. Walls is mentally retarded. However, Appellee argues this claim as if a hearing had been held. The lower court held, instead, that the Florida retardation statute was not retroactive. Subsequently, hearing counsel filed *Atkins v. Virginia,* 536 U.S. 304 (2002) and again urged the court to permit appellant to present evidence that he is mentally retarded and cannot be executed. The Court did not permit such hearing.

In his motion Mr. Walls indicated that he would be able to present evidence of mental retardation with sufficient specificity to warrant a hearing. Although Appellee argues as though in fact a hearing had been held and there is no evidence that Mr. Walls is mentally retarded, Appellant overlooks the Court's own finding in mitigation at trial, when the issue of mental retardation as a bar to execution was not being litigated, that Mr. Walls had been classified as emotionally handicapped; that Walls had apparent brain dysfunction and brain damage; and that Walls had a low IQ so that he functioned intellectually at about the age of twelve

or thirteen. (Appellee's Answer Brief fn 17)

Under *Atkins* and the Florida statute, Mr. Walls' execution would constitute cruel and unusual punishment.

The lower court erred in holding that the statute will withstand Constitutional challenge if it is determined not to be retroactive.

This matter should be remanded to the circuit court for a hearing on this issue.

CONCLUSION

Based on the foregoing arguments and upon the record, Mr. Walls respectfully urges this Court to vacate his convictions and sentences, and to remand the case for a new trial, for an evidentiary hearing, or for such other relief as the Court deems proper.

CERTIFICATE OF SERVICE

The below-signed counsel of record hereby certifies that a true copy has been furnished by first class mail to Charmaine Millsaps, Assistant Attorney General, Department of Legal Affairs, The Capitol, PL-01, Tallahassee, Florida on _____, 2004.

CERTIFICATE OF COMPIANCE WITH TYPE SIZE AND STYLE

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

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