IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC03-710
Lower Tribunal No.: 94-00723-CFAWS

BOBBY RALEIGH,

Appellant.

V.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENT I

THE LOWER COURT ERRED IN DENYING MR. RALEIGH'S CLAIM THAT THE MENTAL HEALTH EXPERT DID NOT RENDER ADEQUATE MENTAL ASSISTANCE AS REQUIRED IN AKE v. OKLAHOMA

In a footnote without any analysis, this Court ruled in *Moore v. State*, 820 So. 2d 199, 202, n. 3 & 4 (Fla. 2002) that a claim of inadequate mental state expert based on *Ake* is procedurally barred if not raised on direct appeal. The State is incorrect that this claim is procedurally barred under settled Florida law. In two recent cases, this Court ruled

against the Defendants' *Ake* claims on grounds other than those claims being procedurally barred. *Gorby v. State,* 819 So. 2d 664, 680 (Fla. 2002), and *Randolph v. State*, 853 So. 2d 1051, 1061 (Fla. 2003).

In addressing the merits of the claim, the State neglects to mention that Dr. Bordini specifically criticized Dr. Upson's penalty phase testimony. Judge Foxman's Order summarized the criticism:

> "In review of Dr. Upson's report and testimony, Dr. Bordini testified that Dr. Upson (1) was unaware of critical family history and witness statements, yet he admitted that Defendant simply refused to discuss his sexual abuse at the time of the penalty phase proceedings; (2) failed to adequately understand Defendant's behavior before the murders; (3) did not have enough information bout domination to adequately testify to it; (4) erred by failing to work with a diagnosis; (5) administered and scored the MMPI test wrong (Dr. Bordini could not replicate the results); (6) failed to administer a formal memory test; and (7)

> he failed to fully explore the effects of alcohol on Defendant's judgment and motor function on the night of the murders."

(PCR 593)

Although the State attempts to argue that the new mental state testimony is simply no different in substance from that presented at sentencing. Pg. 25 of the State Brief. This Court has granted relief after scrutinizing the quality of the psychological testimony offer at the evidentiary hearing. This Court has recognized that had a higher quality of evidence been offered at a penalty phase hearing which would have persuaded a jury to recommend a life sentence, than the Court must grant a new penalty phase. *State v. Coney*, 845 So. 2d 120, 131 (Fla. 2003). In contrast to Dr. Bordini's testimony, Mr. Raleigh's jury heard testimony from Dr. Upson who admitted that he knew very little about the facts of the crime. (R. 1700-1701) However, the qualitative difference between the testimony of Dr. Upson and Dr. Bordini is best illustrated by Assistant State Attorney Daly's cross-examination:

> Q Let me ask you this, Doctor, when Ms. Blackburn took your deposition in this case originally, didn't she point out to you that you haven't got all the facts about this crime?
>
> A Yes.

Q Did you go and get them?

A No.

(R. 1731)

Given the vacillating and unsupported nature of Dr. Upson's testimony, it is hardly surprising that Mr. Raleigh's jury returned unanimous death recommendations. Nevertheless, this Court should not be able to conclude that Dr. Bordini's testimony, if heard by the jury, would not have tilted the balance in favor of a recommendation of life. Therefore, Mr. Raleigh should receive a new penalty phase.

ARGUMENT II

THE LOWER COURT ERRED IN FINDING THAT DEFENSE COUNSEL ADEQUATELY PREPARED THE MENTAL HEALTH EXPERT

The State attempts to defend Mr. Teal's preparation of Dr. Upson by citing to an excerpt from the Court's Order:

> "Also, Mr. Teal [trial counsel] testified at the evidentiary hearing that, to his knowledge, he gave Dr. Upson all the information he requested. Whatever documents he requested, Mr. Teal furnished. This testimony was uncontradicted."

Dr. Upson did not testify at the evidentiary hearing. However, Dr. Upson's testimony a*t the penalty pha*se contradicted Mr. Teal on this point, based on the following:

> Q But you're willing to draw an analysis of how much remorse he's feeling, as to whether he's being led. You're willing to make an analysis on all these other factors, but you don't want to know all of the facts. You put on blinders and say don't give me the facts of the case?
>
> A No, I did not do that. I requested the facts of the case and got some of them later. I reviewed the ones that were sent to me. (R. 1732)

The source of Mr. Teal's deficiency in preparing mental health mitigation can be found in the following colloquy:

> Q Did your office provide Dr. Upson with police reports by the time of his deposition on June 26th?
>
> A To the best of my knowledge we did, because I remember talking to him initially and telling him to let me know everything he needed. (PCT 186)

The United States Supreme Court recently recognized the importance of trial counsel's obligations during the penalty phase of a capital case. In ***Wiggins v. Smith***, 123 S. Ct. 2527 (2003), the Court recognized set standards to which trial counsel must adhere in death penalty cases. The Supreme Court held that trial counsel was ineffective when they failed to follow up on leads in Mr. Wiggins' pre-sentence and social services report. ***Id***. at 2536. These two reports indicated that Mr. Wiggins had suffered physical and sexual abuse that was

never investigated by trial counsel.[1] Furthermore, trial counsel neglected to develop a social history regarding Mr. Wiggins' background after funds were provided for such a service. *Id.* at 2533. The Court found this failure to investigate a client's background to be ineffective because counsel did not conduct a thorough search. Determining when trial counsel has failed to conduct an adequate investigation requires "a court [to] consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Id. at 2538. (Emphasis added). It is not enough for counsel to make a cursory investigation into a client's background. Rather, trial counsel is required to diligently and thoroughly examine a client's background for mitigation evidence.

Consequently, Mr. Teal should have recognized that it was his responsibility to provide Dr. Upson with readily available materials and direction to assist Dr. Upson. The amended pleading cites extensively from Dr. Upson's testimony and it reveals the following deficiencies:

1) Dr. Upson was unaware of the crime scene, because he was not asked to evaluate the crime scene. (PCR 394) (R. 1670-1672)

[1] The Court found that these reports also included information regarding Mr. Wiggins alcoholic mother, placements in foster care, and borderline retardation. *Wiggins* 123 S.Ct. at 2533.

2) Dr. Upson was not asked to clinically diagnose Mr. Raleigh. (PCR 394) (R. 1677)

3) Dr. Upson was not provided information that Mr. Raleigh allegedly claimed Douglas Cox had asked him to come to the trailer to make a deal. (PCR 395) (r. 1688-1690)

4) Dr. Upson was not provided information that Mr. Raleigh encountered Mr. Baker before the homicide at the trailer. At this time, Mr. Raleigh waived a gun and fired a shell into Mr. Baker's chest. Mr. Raleigh stated he better shoot them. (R. 1688-1690)

The prejudice that Mr. Raleigh suffered as a result of Mr. Teal's poor preparation is best exemplified by the following exchange between Assistant State Attorney Sean Daly and Dr. Upson:

> Q You didn't know a lot about what happened out there, did you?
>
> A I knew very little. (R. 1700-1701)

It is difficult to believe that an exert witness would have any credibility with a jury after such an admission. To say that an attorney is absolved of responsibility if he or she provides what an expert requests would eviscerate the concept of effective assistant of counsel. Effective Assistance of counsel requires the criminal defense attorney to provide the expert witness with all reasonably available witness statements, police

reports and crime scene materials. Mr. Teal was ineffective because he failed to provide his mental health expert with the necessary information so that Dr. Upson would have known "a lot about what happened."

ARGUMENT III

THE LOWER COURT ERRED IN FAILING TO FIND THAT THE STATE VIOLATED MR. RALEIGH'S RIGHT TO DUE PROCESS BY PRESENTING FALSE EVIDENCE

The State is correct in its analysis of law that is deferential to the strategic choices of counsel. The defense would concede that if the defense would have entered a Stipulation to the introduction of Mr. Figueroa's tape statement in lieu of his live testimony that such a decision would be unassailable. However, counsel did not make such a well-reasoned strategic choice as evidenced by the following colloquy:

> Q Did you have an agreement with the State as a matter of record that the statement would be admissible in lieu of Mr. Figueroa testifying?
>
> A No, not a specific agreement.
>
> Q Did you ever notify the Court of this?
>
> A I think we dealt with it as it arose.
>
> Q When you say you dealt with it as it

> arose, all those discussions concerning the admission of that statement would be a matter of record; correct?
>
> A No. Discussions between Mr. Clayton, myself and then discussions with Mr. Raleigh, no.

(PCR 231-4-14)

Nowhere in the record was there any agreement precluding Mr. Figueroa from being called as a witness.

In fact, this was not well-reasoned strategy. The State is now taking a curious strategy by stating that due to relaxed evidentiary rules that apply to such proceedings - there is no indication that the transcript could ultimately have been successfully excluded. (Brief 33-34)

The State is incorrect in maintaining that Mr. Figueroa's statement would have been admissible over a defense objection.

The Florida Supreme Court in ***Rodriguez v. State***, 753 So. 2d 29 (Fla. 2000) articulated the rationale behind the exclusion of hearsay statements of co-defendants in the penalty phase when the Court wrote at 753 So. 2d 43, 44:

> "We start with the uncontroverted proposition that the Sixth Amendment right of confrontation applies to all three phases of the capital trial. *See Donaldson v. State*, 722 So. 2d 177, 186 (Fla.

1998)(quoting *Engle v. State*, 438 So. 2d 803, 813-14 (Fla. 1983).

As we stated in *Engle*:

> The requirements of due process of law apply to all three phases of a capital case in the trial court: 1) The trial in which the guilt or innocence of the defendant is determined; 2) the penalty phase before the jury; and 3) the final sentencing process by the judge. Although defendant has no substantive right to a particular sentence within the range authorized by statute, sentencing is a critical stage of the criminal proceeding. The sixth amendment right of an accused to confront the witnesses against him is a fundamental right which is made obligatory on the states by the due process of law clause of the fourteenth amendment to the United States Constitution. The primary interest secured by, and the major reason underlying the confrontation clause, is the right of cross examination. This right of confrontation protected by cross-examination

is a right that has been applied to the sentencing process. 438 So. 2d at 813-14 (citations omitted).

On the other hand, the statute regulating the admission of evidence during the penalty phase provides that:

> Any such evidence which the Court deems to have probative value may be received, regardless of is admissibility under the exclusionary rules of evidence, *provided the defendant is accorded a fair opportunity to rebut any hearsay statements.* However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida.

§921.141(1), Fla. Stat. (1997)(emphasis supplied). Under section 921.141, the linchpin of admissibility is whether the

> defendant has a "fair opportunity to rebut any hearsay statements." The Court has consistently found that the defendant had no opportunity to rebut the out-of-court statements of codefendants who were not available to testify. *See Donaldson*, 722 So. 2d at 186; *Walton v. State*, 481 So. 2d 1197, 1200 (Fla. 1985); *Gardner v. State*, 480 So. 2d 91,94 (Fla. 1985); *Engle*, 438 So. 2d at 813-14. Thus, the admission of these hearsay statements of co-defendants in the penalty phase violated the Confrontation Clause. *See Donaldson*, 722 So. 2d at 186; *Gardner*, 480 So. 2d at 94; *Engle*, 438 So. 2d at 813-14. *Rodriguez v. State*, 753 So. 2d 29 (Fla. 2000)"

(PCR. 361-363)

Therefore, the lower court should have granted a new penalty phase, because the defense failed to object to a prejudicial and inadmissible statement of Mr. Raleigh's co-defendant.

ARGUMENT IV

THE LOWER COURT ERRED IN FAILING TO FIND DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE ADMISSION OF THE CO-

DEFENDANT'S TAPED STATEMENT IN VIOLATION OF SECTION 921.141(1), FLORIDA STATUTES

The State, in is third argument takes the position that the it cited inconsistent argument rather than inconsistent evidence. The State is correct that *State v. Parker*, 721 So. 2d 1147 (Fla. 1998) stands for the proposition that inconsistent arguments do not amount to constitutional error. However, the State is wrong in its position. It presented inconsistent evidence.

The State in the instant case presented necessarily contradictory evidence in Mr. Figueroa and Mr. Raleigh's trial concerning Mr. Figueroa's involvement. Mr. Figueroa's statement that was introduced against Mr. Raleigh (Appendix B PCT 723-759) clearly implicates Mr. Raleigh as the actual killer of Mr. Cox and Mr. Eberlin.

In response to the Court's questioning in the evidentiary hearing, Mr. Alexander alluded to contradictory evidence that was presented in Domingo Figueroa's trial.

> THE COURT: I think the question put to you in the one you need to try and answer, and that is did you argue that Raleigh killed one and Figueroa killed another?
>
> THE WITNESS: I argued, apparently, in closing argument on Page 1374 that he had told, talking about the defendant, Figueroa, told his Uncle Jose that he had killed one -- I'm sorry, this must have been, I guess --

> I don’t know, it’s one of their uncle’s, I don’t know which defendant it is, but apparently one of the two defendants told their Uncle Jose, and I guess this testimony came out during the course of the trial, that Figueroa had killed one and that Bobby Raleigh had killed one. So I am mentioning that on Page 1374. (PCT 304-305)

Mr. Alexander was shown the transcript and acknowledged that the transcript was fair and accurate. He clarified which defendant made the statement to Uncle Jose. (PCT 317)

> Q Did you, sir, tell the jury, quote: I mean he told his uncle the truth, I killed one and Bobby killed one. And when we talk about “I” it’s a reference to Domingo Figueroa. Did you say that to the jury?
>
> A That’s what I said. (PCT 317)

This testimony concerning Domingo Figueroa telling his Uncle Jose that Domingo Figueroa killed one and Bobby Raleigh killed the other victim was never offered in Mr. Raleigh’s trial. Therefore, necessarily contradictory evidence was presented. Consequently, a constitutional infirmity existed in the instant case unlike the situation in *Parker*.

CONCLUSION

Mr. Raleigh submits that relief is warranted in the form of a withdrawal of a plea and/or a new sentencing proceeding. As to those claims not discussed in the Reply Brief, Mr. Raleigh relies on the arguments set forth in his Initial Brief and on

the record.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellant has been furnished by U.S. Mail to: Kenneth S. Nunnelley, Esq., Senior Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, FL 32118-3958; Rosemary Calhoun, Esq., Assistant State Attorney, Office of the State Attorney, 251 N. Ridgewood Avenue, Daytona Beach, FL 32114-3275 this 28th day of May, 2004.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Reply Brief complies with the font
requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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