IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-1387

KENNETH HARTLEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

CORRECTED REPLY BRIEF OF APPELLANT

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ARGUMENTS IN REPLY

I. Replying to the "Statement of the Case and Facts"

Replying to the "Statement of the Case and Facts" (Ans. Brief 2-17), Appellant contests the factual conclusiveness of the State's initial assertion, as if the assertion has been established beyond dispute, that "In April 1991, Kenneth Hartley, along with Ronnie Farrell and Sylvester Johnson, murdered seventeen-year-old Gino Mayhew. (Ans. Brief 2) Appellant concedes that he was charged and convicted of this killing. However, he vigorously denies the veracity of the charge and contests the reliability of the conviction.

Replying to the State's citation of the "colloquy" between the trial judge and the Appellant set out in the answer brief, apparently suggesting an explanation for why Mr. Hartley's trial lawyer called no guilt-phase witnesses, Appellant explicitly rejects any implication that Appellant's reliance on or invocation of his Constitutional rights does, in fact, explain or excuse his lawyer's ineffectiveness in failing to investigate the case adequately or prepare a guilt-phase defense. Any insinuation to the contrary is contra to the weight of the record. (Ans. Brief 3-4)

Similarly, Appellee's tactic, discussed supra, juxtaposing a factual statement of counsel, whereas the failure to present witnesses in the guilt-phase, with a colloquy of dubious relevance to the factual assertion, as though the juxtaposition somehow makes sense of counsel's deficient performance, Appellee correctly notes that, during the penalty phase, Mr. Hartley called two witnesses to testify for the defense. (Ans. Brief 4) Thereafter, Appellee segues once again into another colloquy wherein the prosecutor, noticing the defense's "failure to present any psychiatric testimony," is reassured by trial counsel that the defense is acting with "deliberate exercised judgment" to "not put on mental mitigation evidence." Therefore, Appellant is again compelled to explicitly reject this proposed factual scenario because of the implicit connection

between the effectiveness of the counsel's performance in the penalty-phase and the factual scenarios Appellee recites in its brief. (Ans. Brief 4)

Replying to Appellee's assertion that "Hartley never formally amended his motion for post-conviction relief to add a legally sufficient claim of newly discovered evidence," Appellant notes that Appellee provided no record citation for what is apparently a conclusion of law reached by counsel, perhaps necessitated by the State's failure to timely raise this concern during the hearing and by the court's failure to rule on the sufficiency of the claim as asserted in the motion. Regardless, Appellee cannot make such a conclusion of law *sua sponte,* which, in any case, is not supported by the record either as a matter of fact or as a conclusion of law. Mr. Johnson, the witness whose testimony the State contests, testified fully at the evidentiary hearing. Therefore, the sufficiency of the allegations of the motion, which was prepared in order to determine whether there was an entitlement to an evidentiary hearing, is a moot question once the testimony was elicited without objection. Certainly, at this time, Appellate counsel cannot assert the sufficiency of the motion as a defense to the substance of the claim the testimony gives rise to.

In reply to Appellee's citation to the record of the status hearing wherein the trial attorney advised the court that he would not be calling Mr. Johnson as a witness because, at that time, according to the attorney, Johnson was refusing to talk to him. (Ans. Brief 10) The Court sensibly insisted that the trial attorney consult Mr. Hartley about Morrow's decision not to call Johnson to testify. Id. Subsequently, Johnson does testify, and now, for the first time, Appellee asserts that hearing counsel has failed to move to conform the record to the testimony. Thus, Appellant replies that Appellee's assertion that the pleadings were not properly amended or conformed is not timely. (Ans. Brief 11)

Similarly, current counsel for the first time on appeal raises a pleading protestation regarding the issue of whether the presentation of the false testimony of Bronner and Brooks supports a claim that the Appellee committed a Giglio violation. (Ans. Brief 11) See, Giglio v. U.S., 405 U.S. 105 (1972) (State cannot knowingly elicit false testimony) Again, Appellee's protestations are not timely.

Regarding Mr. Hartley's frequently quoted protestations regarding the question of Mr. Morrow's representation at the hearing and the apparent fact that Mr. Morrow has not called all of the witnesses that Mr. Hartley was expecting to be called , Appellee writes that Mr. Hartley initially raised this disagreement with counsel at the conclusion of the January 17, 2003 evidentiary hearing. (Ans. Brief 11) Appellee further reported that the court then advised Mr. Hartley that he could "bring forward" more witnesses. Id. However, the court nor Appellee indicate *how* Mr. Hartley would present those witnesses, but, ultimately, Attorney Morrow requested additional time from the court to, as he says, locate Bronner, Brooks, and other witnesses and the court agrees to grant him that additional time. Id. Also, Appellee identifies a telling exchange wherein Mr. Hartley states that he wants to find a witness by the nickname "Stag," and, ignoring the perils of entering into an open discussion with his client in court, Attorney Morrow, considering his actions in the most favorable light, at least pushes the boundaries of privilege when he complains that he doesn't know "Stag" and that his client hasn't identified "Stag." (Ans. Brief 12) Appellee then recites the skeletal facts of the dispute between Mr. Morrow and his client but ultimately finds the sufficiency of Mr. Hartley's responses instructive while completely ignoring the more pertinent questions regarding the quality and thoroughness of Attorney Morrow's pretrial investigation. (Ans. Brief 12)

Appellee reports that Mr. Morrow subsequently moved to withdraw from the case "citing an unidentified conflict of interest." Id. (Appellant respectfully suggests that the previous two pages of the Appellee's brief identify several potential problems arising between Mr. Morrow and Mr. Hartley.) However, Appellee does not address Appellant's fully explicated contention that Mr. Morrow's representation was ineffective and that Mr. Morrow labored under at least one conflict of interest created by demanding funds from Mr. Hartley's brother while being paid by the Registry. Finally, Appellee notes that Mr. Hartley requested the appointment of another lawyer if Morrow is relieved of the duty to represent him. (Ans. Brief 12-13)

Regarding the hearing on Attorney Morrow's Motion to Withdraw, Appellee confirms that the chief judge of the Fourth Judicial Circuit (Judge Moran) held an "*in camera* hearing" on the Motion. However, Appellee inaccurately declares that Mr. Hartley was present at this hearing. When the court refused to put it on record, he refused to participate. Mr. Hartley's family had arrived in the courtroom, thinking the hearing would be in open court in front of the judge who had presided previously (Judge Day), and Mr. Hartley was also in the courtroom with Mr. Morrow when Judge Moran appeared and directed Morrow and Hartley to his chambers, where Judge Moran directed them to proceed prior to Mr. Hartley indicating that he insisted on having a reporter present. Mr. Hartley was then excluded from the Judge's chambers, and Judge Moran and Morrow completed what may or may not be described as a hearing. Appellee is correct that the State was not present. Appellant regretfully recognizes that he cannot cite the record for obvious reasons, which is why Mr. Hartley had requested a court reporter in the first place. Finally, Appellee correctly indicates that Judge Moran granted Mr. Morrow's Motion to Withdraw.

Appellee correctly reports that Attorney Westling was then appointed to represent Appellant. (Ans. Brief 13) Appellant protested this appointment because of, *inter alia*, Westling's communications with Attorney Morrow. Id. Subsequently, Attorney Malnik was retained to appear for Appellant. Id. Again, Appellee has focused on the absence of a formal motion to conform or amend the 3.850 Motion regarding Johnson's testimony and the Giglio allegation. (Ans. Brief 15) And, again, Appellant rejects that position for the reasons previously asserted.

Appellee observes that Mr. Hartley's written closing argued that newly discovered evidence "in the guise of James Johnson's testimony" entitled him to a new trial. (Ans. Brief 15) While Appellee mysteriously asserts that Appellant did not include his closing argument in the record on appeal, Appellant doesn't know whether or why it was not included but certainly made no intentional exclusion of any material from the proceedings below. Regretfully, Appellant's focus on the technical aspects of the presentation of the closings by counsel comes at the expense of a more thoughtful analysis of the testimony presented and the substance of the arguments and claims supported by that testimony.

In sum, Appellant relies upon the arguments propounded in the initial brief and will not restate those arguments in full in this reply. Primarily, Appellee's Answer attempts to read the pleadings narrowly, while ignoring or understating the testimony elicited in support of Appellant's arguments and claims. Furthermore, perhaps inadvertently, Appellee's synopsis seems to emphasize the fact that the Appellant repeatedly asked the court for an investigation and for the presentation of more witnesses who Appellant clearly expected his counsel to present. It is clear that hearing counsel failed to undertake the investigation Mr. Hartley expected. Appellee's emphasis on what Appellant contends are resolved pleading issues and

focus on the technicalities and mechanics of pleading practice obfuscates the more pressing Constitutional questions regarding the reliability of the jailhouse "snitches" who, exclusively, provided the testimony upon which the conviction and death sentence stands and regarding the effectiveness of counsel's penalty-phase presentation, which omitted numerous lay witnesses who might have introduced Mr. Hartley, the man, to the jury. Thus, the proceedings below call into question the fullness and the fairness of the hearing provided to Mr. Hartley.

II. Replying to Appellee's Answer to Argument One – Penalty-Phase IAC

Appellant respectfully suggests that Appellee has failed to adequately consider the weight of the testimony presented at the evidentiary hearing as elicited from lay witnesses available to but not called by, counsel at the time of the hearing.

Appellee, like the lower court, has failed to consider the un-rebutted evidence that Attorney Willis did not investigate, prepare or take any substantial steps in the presentation of Mr. Hartley's penalty-phase case. At the evidentiary hearing, Mr. Willis testified that his view was that the primary defense for Mr. Hartley in the penalty-phase lay in prevailing in the guilt-phase as Mr. Willis felt there was a high probability that Mr. Hartley would get the death penalty if he was convicted in the guilt-phase. (R. 1900-1901) After he lost the guilt-phase he had a couple of weeks before the penalty-phase and "made an effort to gather witnesses," although he was not sure he could characterize that effort as an investigation and, regardless of what it was called it was, according to Willis, "largely unsuccessful." (R. 1901) In other words, Mr. Hartley's counsel didn't prepare the penalty-phase until he lost the guilt-phase, and, then, the "investigation" consisted mostly of a condolence call to one of Mr. Hartley's sisters. (R. 1905-1906)

Regarding Willis' failure to call Shawn Jefferson, Mr. Hartley's NFL-playing brother, Willis noted that Jefferson paid his bills. Jefferson testified that money was all Willis wanted to talk to him about. Appellant summarized in the initial brief the extensive testimony from Mr. Jefferson that was not presented to the jury. Appellee does not really dispute the power of that testimony but, like the court, succumbs to Willis' baseless speculation, denied by Jefferson, that Jefferson was more worried about his NFL career. The record, however, considered in its entirety, does not support the conclusion that Jefferson, at the time of the trial, wanted to from his family. On the contrary, he testified that Willis did not speak to him about testifying. Certainly, the strength of his testimony and its effect upon the jury are not convincingly disputed.

Several other lay witnesses could have been called to have presented the jury with a full picture of Mr. Hartley's life. Mr. Hartley's high-school coach, Mr. Hartley's family and friends, and several of the elderly ladies of in the neighborhood, all entranced Mr. Hartley, could have presented a picture of Mr. Harley with many winning and redeeming qualities. Mr. Hartley's football coach could have told the jury that he was well-mannered and could have described his close relationship with his younger brother, with whom Mr. Hartley was inseparable. Cheryl Daniels, a sister, could have told the jury how loving he was and how he lightened the family atmosphere with his graceful, good humor. Importantly, to the jury, she would have told them that he did not like to hear people make fun of his elderly neighbors and that he was particularly protective of the most vulnerable. Ms. Daniels' description of Mr. Hartley, as a caring and sweet guy who loved "everyone" would have helped the jury understand the kind, caring, funny, loving, and sweet characteristics of Mr. Hartley's personality. Ms. Daniels and Mr. Hartley went to church and participated in community activities.

Mr. Hartley's mother would have told the jury how he was raised up in the church, that he had a curfew at night, and was a good boy. Perhaps she also could have instructed the jury on the societal pull of neighborhood crime and how many of the young boys were enticed by dangerous and destructive enterprises of darkness. In fact, the whole family could have testified about growing up in the rough neighborhood and the problems a young man would experience growing up there. Nevertheless, Mr. Hartley sought the light as well and sang in church and served as an usher there. His mother delighted in his love for his elders. She was so empathetic in her concern for her worry for their well-being that Mr. Hartley compassionately urged her not to attend the trial and endure the stress. Inevitably, perhaps, she insisted on supporting him by presence as well as prayer.

Denise Grooms, a local school teacher, testified that she had been friends with Mr. Hartley since they were kids. She painted a picture of a young man who grew up in the church, who was active in the community, and who played sports. Another old friend, Tanya Hawk, sweetly described the crush she has had on him since third grade and how, whenever she needed something, or wanted something, she would look to Kenneth for help, and, he was always ready to help her out. She also noticed how generous he was to the elderly in the neighborhood and personally observed the kindnesses which he bestowed upon them. Yes, she knew that he had gotten in trouble, but she still testified that the man that she knows is a good, helpful friend, and she would have liked the jury to have known that man too.

The record is clear that the hearing witnesses know Mr. Hartley well, know of the criminal charges, and know the substance of the state's allegations about him. Nevertheless, each of the witnesses is firm in their long held, good opinion of Mr. Hartley and they could have shown the jury the part of him that needed to preserved.

III. Replying to Appellee's Answer to Argument II: the Newly Discovered Evidence and Giglio Claims

In the first part of this Reply Brief, Appellant addressed several of the technical bars which Appellee now asserts for the first time in this appeal. Now he will briefly recap the substance of his claims that the prosecutor knowingly presented false testimony at trial.

At the evidentiary hearing, the Appellant presented compelling evidence that, at the trial, the prosecution elicited false testimony without which Mr. Hartley could not have been convicted. The jailhouse snitches, Mr. Bronner and Mr. Brooks, provided the only evidence linking Mr. Hartley to the crime. Mr. Johnson's testimony, presented at the evidentiary hearing exposed the lies which are the foundation of Mr. Hartley's conviction.

Mr. Johnson knew Mr. Hartley and shared a mutual friend with him. He also knew snitches Bronner and Brooks. He subsequently shared a jail cell with both of them while Appellant waited for trial. While they were incarcerated together, Bronner and Brooks talked about their testimony against Mr. Hartley. Initially, Mr. Johnson noticed that Mr. Brooks would be called out of his cell every couple of weeks or so and when he returned he would be loaded down with "goodies." Brooks would brag that he had been at the State Attorney's office rehearsing his testimony against Hartley. The State Attorney was feeding him fancy food and giving him cigarettes and "stuff." On the day that Brooks was released, Brooks, Bronner and Johnson all went to court together. While they were sitting there Brooks said, referring to his testimony against Mr. Hartley at trial, that "man I did some f'd up stuff, it was really f'd up what I did." Mr. Brooks explains he had lied on Mr. Hartley. He lamely rationalized that he lied on Hartley because Hartley had it hard, apparently meaning he could take it. Brooks stated that the State had told him exactly what to testify to against Mr. Hartley. Thus, he had explicitly lied in court to help the state win the conviction of murder.

Bronner told Johnson that he was going to put him in the cell with Hartley so they could get him to tell what he knew about the murder. He denied knowing anything about it. The prosecutor then told Bronner that if he played ball he could go free and that the State was going to tell him what to say against defendants' Hartley and Ferrell.

Without repeating everything in the initial brief, Johnson's testimony is un-rebutted and completely convincing. When Hartley was arrested, the State had no evidence against him. The whole case rested upon the testimony gathered from Brooks and Bronner. Johnson had no reason to fabricate the testimony and no reason to risk making the State angry at him. His testimony is completely credible.

Mr. Bateh told Johnson that he did not want Bateh for an enemy. Johnson has risked a lot and gained nothing except the knowledge that he has done the right thing by testifying truthfully. The allegations of bribery and the feeding of testimony to witnesses clearly violate Giglio. The State questions why Mr. Johnson didn't come forward sooner but simultaneously lashes out at him for coming forward at all. After all, he has witnessed the State manufacture a case which has put a man on death row. This court should commend Johnson for coming forward and encourage others to do the same.

IV. Replying to the State's Answer to Argument III – Flaws in the Process Below

Mr. Hartley had at least four attorneys during the recent parts of the post-conviction proceedings alone. As Appellee's review of the record makes clear, the pleadings are, at best, inartful, which should not be surprising with so many cooks in the kitchen. However, the circumstances involving Mr. Morrow's conflict and the hearing about which the court refused to make a record of cannot be explained away by the participation of various attorneys or by mere deficiencies in the pleadings.

Mr. Hartley concedes that there is no Constitutional right to effective assistance of post-conviction counsel. See, e.g., Lambrix v. State 698 So. 2d 247 (Fla. 1996) However, Appellee does not respond to Appellant's contention that this Court, in Peede v. State, 748 So. 2d 253 (Fla. 1999), acknowledged a minimal right to due process, even in post-conviction proceedings, and, perhaps, especially in capital post-conviction proceedings. As in Peede, this court cannot be satisfied that it can rely on the record provided of the proceedings below. As Appellee's belabored recital of the case history and facts of the case make clear, Appellant consistently had problems with his post-conviction attorney, resulting in questionable exchanges in open court between counsel and client and evidencing a consistent concern of Appellant with the quality of counsel's investigation and presentation of witnesses and with the reliability of communications between counsel and client. Further, the hearing in which Appellant's motion to remove counsel is considered is procedurally flawed. A record was not made of the hearing, although Mr. Hartley requested a reporter for which transgression he was removed from the hearing room. Appellant cannot provide a citation for certain of these allegations, which are not however refuted by the record or addressed by Appellee.

V. Conclusion and Relief Sought

The Appellant expressly reserves all claims and arguments made in the initial brief whether or not cited herein and renews his request for the relief sought therein, including the vacation of the convictions and sentences and a remand for a new trial. Further, Appellant urges this court to remand the case to the Circuit Court to give counsel the opportunity, within a designated period of time, to investigate, to amend the 3.850, if necessary, to conduct any necessary supplementary hearings, and to otherwise, cleanup the record below as the Court deems proper.

Certificate of Compliance

Below-signed counsel certifies that this brief was prepared with Times New Roman 12 point font, a font that is not spaced proportionately.

Harry P. Brody

Certificate of Service

I hereby certify that a true and correct copy of the foregoing has been furnished by U.S. Mail to Meredith Charbula, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida, this the _____ day of June, 2007.

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