IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-1594

ROBERT DWAYNE MORRIS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT,
IN AND FOR POLK COUNTY, STATE OF FLORIDA

AMENDED REPLY BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

This reply brief addresses arguments I, and III of Mr. Morris: initial brief. As to all other issues, Mr. Morris stands on the previously filed initial brief and Habeas Corpus Petition.

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ISSUE I

THE APPELLEE IS INCORRECT IN ASSERTING THAT DEFENSE COUNSEL WAS NOT INEFFECTIVE IN FAILING TO PROPERLY PREPARE FOR WITNESS LAVENTURE=S TESTIMONY

Appellee contends on page 49 of his Answer Brief the failure of trial counsel to call investigator Barfield in an attempt to impeach Laventure was without merit is misplaced. Barfield was merely one of several options which trial counsel should have considered in the preparation of Laventure=s testimony:

> First of all, with regards to the depositions, Mr. Aguero made a point of saying, AHave you ever been surprised in court?@ In fact, everybody gets surprised in court; isn=t that correct, sir?
> And you said, yes you do get surprised, right?
> A. Yes, I do get surprised.
> Q. And everybody gets surprised, don=t they?
> A. I would assume everybody does.
> Q. Well, sir, you were aware, as evidenced by that exhibit, that this woman was an unwilling witness?
> A. Yes, I was aware of that.
> Q. So you, had the option, sir, of getting a written statement from this woman, calling Brad Barfield in rebuttal to this woman, or taking a deposition from this woman?
> A. Yes, those were B
> Q. Correct, sir?
> A. Those were all options I had, yes.(PCR V.III -377)

Trial counsel admitted that he did not depose Laventure nor did he have any prior written statements of Laventure. (PCR V. III-358).

Trial counsel also admitted that the State exploited the fact that he was unable to

impeach Laventure. (PCR V. III-359).

The testimony of trial counsel at the 3.851 hearing clearly establishes that Barfield had spoken to Laventure a number of times, was in a better position to rebut Laventure=s statement that the person who was seen around the Livingston apartment was not white, and that Barfield would have been the more appropriate witness to call rather than Toni Maloney. (PCR V. III-361-364).

Mr. Dimmig testified that due to an outright unfounded accusation that the Public Defender=s Office attempted to cause her to testify falsely, he obtained a stipulation and also went into what he referred to as the Amother-hen-mode.@ Mr. Dimmig testified that his motive was to Abolster the image of the Public Defender=s Office and present the image that we had not in any way attempted to influence the testimony of a witness.@ (PCR V. III-464-5). Trial counsel was extremely upset over this allegation by Laventure and dealt with that issue rather than the rebuttal of the testimony of Laventure. (PCR v. III 470-472). Mr. Morris contends that when trial counsel went into his Amother-hen-mode@, he had forgotten that he was representing Mr. Morris, not the Office of the Public Defender. Appellee relies upon Spencer v. State, 842 So.2d 52 (Fla. 2003). Spencer can be distinguished from the case at bar by the testimony cited above. Mr. Morris contends that there is no matter of conjecture in this case. Trial counsel testified that Barfield had more contact with Laventure, his representations were relied upon by trial counsel when counsel called Laventure as a

witness. Furthermore, trial counsel admitted that Barfield would have been the better witness for impeachment. His failure to effectively represent his client resulted from his deep sense of loyalty to the Office of the Public Defender. Relief is proper.

ISSUE III

THE LOWER COURT ERRED IN RULING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CALL MR. MORRIS TO TESTIFY AT THE PENALTY PHASE OF THE TRIAL.

Appellee=s statement on page 62 of his Answer Brief that AIt can be surmised that he was aware of his right to testify, and, in fact, he did testify during the guilt phase.@ assumes facts not in evidence and therefore his argument is without merit. The evidence is clear that the trial court did not make an inquiry nor did trial counsel request that an inquiry be conducted. (FSC ROA V. XXXV-4472). Penalty phase counsel testified at the evidentiary hearing that she was aware that the right to testify is a personal right which an attorney cannot waive on behalf of the client. (PCR V. III - 393). Ms. Garrett testified that she had no recollection whether the trial court conducted a colloquy or whether she discussed with Mr. Morris his right to testify during the penalty phase. (PCR V. III-394). Guilt phase trial counsel had testified at the evidentiary hearing that he did not know if Mr. Morris understood that Mr. Morris could testify at both phases of the trial. (PCR V. III-469).

A waiver by a criminal defendant of his right to testify, to call witnesses, and to

present evidence in mitigation must be knowing, voluntary, and intelligent. This Court addressed the right to testify in Deaton v. Dugger, 635 So.2d 4 (Fla. 1993). In Deaton, the trial court set aside the death sentence and ordered a new sentencing proceeding stating:

> Based on the totality of the circumstances presented at the evidentiary hearing, this court is not convinced by a preponderance of the evidence that the defendant knowingly, freely and voluntarily waived his right to testify or to call witnesses at the penalty phase. While the court does not find that the evidence presented by the defendant at the evidentiary hearing would necessarily have been beneficial to his cause at the sentencing phase, the court finds that the defendant was not given the opportunity to knowingly and intelligently make the decision as to whether or not to testify or to call these witnesses.

In upholding the trial courts ruling this Court stated:

> In this case, the trial judge found that Deaton had waived the right to testify and the right to call witnesses to present evidence in mitigation, but concluded that, because his counsel failed to adequately investigate mitigation, Deaton=s waiver of those rights was not knowingly, voluntarily, and intelligent. The rights to testify and to call witnesses are fundamental rights under our state and federal constitutions. Although we have held that a trial court need not necessarily conduct a *Faretta* type inquiry in determining the validity of any waiver of those rights to present mitigating evidence, clearly, the record must support a finding that such a waiver was knowingly, voluntarily, and intelligently made. [id at 8, emphasis added]

Although this Court does not require that trial courts conduct a Faretta type hearing, the record must show that a waiver of the right to testify must be made knowingly,

voluntarily, and intelligently. Nowhere in the record can a waiver of Mr. Morris= right to testify be found. Trial counsel does not recall an on the record wavier being done. A record waiver was not done in Mr. Morris= case in violation of this Court=s holding in Deaton. The issue in Deaton is not what the defendant would have said, but rather if he knew if he could say it. So it is with this case.

Appellee=s reliance on Davis v. State, 875 So.2d 359 (Fla. 2003), is also misplaced. The recommendation in Davis was 12-0 for death, in Mr. Morris= case the recommendation was 8-4.

Attorney Garrett, by not explaining to Mr. Morris his right to testify, waived his fundamental right guaranteed him under the Sixth Amendment of the United States Constitution. In Rock v. Arkansas, 483 U.S. 44, 52, 107 S.Ct. 2704, 2709 (1987), the Supreme Court of the United States held:

> Moreover, in Faretta v. California, 422 U.S., at 819, 95 S.Ct., at 2533, the Court recognized that the Sixth Amendment AGrants to the accused *personally* the right to make his defense. It is the accused, not counsel, who must be >informed of the nature and cause of the accusation,= who must be >confronted with the witnesses against him,= and who must be accorded >compulsory process for obtaining witnesses in his favor.@ (Emphasis added) Even more fundamental to a personal defense that the right of self-representation, which was found to be Anecessarily implied by the structure of the Amendment,@ *ibid.*, is an accused=s right to present his own version of events in his own words. A defendant=s opportunity to conduct his own defense by calling witnesses is incomplete if he may not present himself as a witness. Id. at 52, 2709.

In DeLuca v. Lord, 858 F. Supp. 1330, 1361 (S.D. New York 1994) the court held:

> This corroborating testimony persuades the Court that DeLuca was, in fact, unaware that she had the ultimate right to decide whether or not to testify. Since the preponderance of evidence suggests that the petitioner was unaware that it was ultimately her decision whether or not to testify, and counsel admittedly did not correct that misperception, this Court finds that petitioner has been denied effective assistance of counsel. Id. at 1361

It is uncontroverted that Mr. Morris was unaware that he had the ultimate right to decide whether or not to testify at the penalty phase. The *DeLuca* court went on to hold:

> The testimony of a criminal defendant at his own trial is unique and inherently significant. The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself. *Nichols v. Butler*, 953 F. 2d 1550, 1553 (11th Cir. 1992) (quoting *Green v. United States* 365 U.S. 301, 304, 81 S.Ct. 653, 655, 5 L.Ed.2d 670 (1961)). Id. at 1361.

Robert Morris might have spoken to the penalty phase jury with Ahalting eloquence.@ He was never given the chance. At the evidentiary hearing, Mr. Morris testified that he would have answered any questions that were asked of him, explained any facet of his upbringing or correct any erroneous testimony in the penalty phase. This was an 8 to 4 death recommendation. To suggest that Morris= own perspective on his upbringing delivered with Ahalting eloquence@, Awould not have made any difference in the outcome@ or Awas merely cumulative@, is a prediction unfairly made by Appellee.

Four jurors voted for life based upon the testimony of third parties. On page 64 of Appellee=s Answer Brief, footnote 12, reads the following:

> Morris testified that he would have been in a position to tell the jury of his upbringing, how it felt to have his mother make him steal, and how he came to be diagnosed with ulcers.(V-3, 426). He did not state how it actually felt.

Mr. Morris testified that he would have answered all questions posed to him if he had been advised that he had the right to take the stand in penalty phase. If trial counsel had asked AHow did it actually feel to endure such depravity as a child?@ Morris would have certainly answered with Ahalting eloquence.@ Mr. Morris contends that at least two other jurors would have been swayed. An accurate prediction of what would have occurred requires a tool which neither courts nor lawyers in this country have; a crystal ball. Relief is proper.

CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, the lower court improperly denied Robert Morris= rule 3.851 relief. This Court should order that his convictions and sentences be vacated and remand the case for such relief as the Court deems proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Amended Reply Brief of the Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this 15th day of July, 2005.

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I hereby certify that a true copy of the foregoing Amended Reply Brief of the Appellant was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210.

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