IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1559
LT No. 87-1775CFAWS

SAMUEL JASON DERRICK,

Appellant,

v.

STATE OF FLORIDA,

Appellee

ON APPEAL FROM THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PASCO COUNTY, STATE OF FLORIDA

CORRECTED REPLY BRIEF OF APPELLANT

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ARGUMENT 1:

REPLYING TO ANSWER TO THE IAC PENALTY PHASE CLAIM

In a recent case, Burns v. State of Florida, No. SC01-166 (Fla. 2006, this Court considered an allegation of ineffective assistance of counsel partially procedurally and factually analogous to the instant case, particularly on the issue of counsel's failure to present the testimony of a mental-health expert at a re-sentencing, although such a presentation had been made at the initial penalty-phase.

Although this Court denied Mr. Burns' prayer for relief, Burns is instructive to a consideration of the quality of counsel's conduct in considering whether to present a mental-health expert. Importantly, the quality of counsel's conduct can be analyzed in comparison with the action, and inaction, of counsel in the instant case, and, thus, Burns is illustrative in considering the question of whether Appellant's counsel did, in fact, breach the "norms of professional conduct." Occhicone v. State, 768 So. 1037, 1048 (Fla. 2000); Strickland v. Washington, 466 U.S. 668 (1984).

In Burns, the re-sentencing record reveals that counsel considered calling the mental-health expert at both the re-sentencing trial and at the subsequent Spencer

hearing. Burns v. State, No. SC01-166 at 8;. Spencer v. State, 615 So. 2d 688 (Fla. 1993)

From the testimony by Mr. Burns' counsel, it is apparent that, during post-conviction procedures, counsel remained in touch with several experts, including a mental-health expert, and, hence, was actively considering calling a mental-health expert thoughout the litigation. Hence, the flux of his thinking reflects the flux of a trial, his preparation manifest in his engagement.

Further, the Burns Court notes that, although counsel ultimately did not present any testimony on statutory mental-health mitigation, the defense did present over thirty witnesses, mostly friends and family. Burns v. State, SC01-166 at 9. Those witnesses presented extensive non-statutory mitigation. Id. at 9-10

The Burns defense also presented an expert sociologist on the ability of Mr. Burns to adjust to confinement and on future dangerousness. Id at 10. Lastly, at the Burns evidentiary hearing, Dr. Dee, who incidentially also testified for Mr. Derrick, testified that the statutory mental-health mitigation were applicable. Id at 13-14.

In affirming the hearing court's denial of Mr. Burns' claim, this Court noted that the lower court's finding was supported by the transcript of the record, which indicated

that trial counsel ultimately rejected the idea of calling a mental-health expert. Id. at 14. This Court, thus, seemed to be emphasizing the important aspect of counsel's consideration in the context of a complete, coherent trial strategy involving calling, or not calling, the expert.

In Rutherford v. State, 727 So. 2d 216, 223, this Court emphasized that counsel "was aware" of possible mental mitigation but made a strategic decision not to use it. Rutherford v. State, 727 So. 2d at 223. Thus, as the Burns Court noted, it is counsel's awareness of the potential mitigation, born of an extensive investigation, that distinguishes Burns from a case like Hildwin v. State, 654 So. 2d 107, 109 (Fla. 1995) (penalty phase counsel was ineffective because he "failed to unearth a large amount of mitigating evidence.") Burns, SC01-166 at 15-16 N. 10.

In its Answer Brief, the State argues that Attorney Kester relied on a report by Nancy Simon, generated prior to the first trial in response to a letter from the defense, and that that report determined that she didn't want to use Ms. Simon. State's Answer Brief pp 36-38. Kester's review of this skimpy report, coupled with a statement by Mr. Derrick during their initial meeting that he wanted to "go positive," comprises the totality of the investigation. The State argues that Attorney Kester "took

one look" at Dr. Simon's report and knew why the defense didn't call her in the first trial. Answer Brief p. 37. Just one look, as the extent of a penalty phase mental-health mitigation query, certainly falls far short of what this Court contemplates in Burns.

Surely, Mr. Derrick's conviction of this crime, his background of horrible deprivation and abuse, and the years of state-place pedophilia visited upon him would suggest that a more thorough inquiry into Mr. Derrick's mental-health would be required.

Appellee relies upon non-record suppositions about anti-social personality disorder, the defendant's contention of innocence (despite the upheld conviction), and the report's alleged "negation" of statutory mental-health mitigation (which the report did not specifically address) to try to inflate the weightiness of this early, brief evaluation generated pursuant to a pro-forma request from defense counsel. To justify counsel's failure to perform an investigation which pales in comparison to that this Court concluded it could rely on in Burns, Appellee has inflated both the intent and content of the report.

Finally, although Appellee argues that "the primary value of Dr. Dee's testimony was that of a non-statutory mitigation," the doctor's actual testimony is far more

compelling. Answer Brief p. 25; Initial Brief p. 43, citing PCR. 940-941. Specifically, Mr. Derrick, Dr. Dee testified, would have difficulty conforming his conduct to the dictates of the law because of his extreme impulsivity. Id. Thus, he found that both mental-health mitigators applied and would have so testified in 1991. (PCR. 941)

Although Appellee now argues that post-conviction counsel merely disagrees with trial counsel's strategic decisions, Answer Brief p. 26, it is trial counsel's failure to investigate and prepare, so that counsel's actions and inactions can truly be called either "strategic" or "decisive, that is most egregious."

In Wiggins v. Smith, 539 U.S. 510 (2003) trial counsel argued that the decision not to present mitigating evidence was tactical because of an alternative guilty-phase strategy. Wiggins v. U.S., 539 U.S. at 521. The Supreme Court responded that the focus must be on the reasonableness of the investigation supporting the decision on the introduction of mitigation. Id. at 522-523. In Wiggins, the Court concluded, counsel's failure to investigate did not result from reasoned strategic judgment. Id.

Appellee argues that counsel had no viable statutory, or non-statutory, mitigation to present via a mental-health

expert in 1988. Answer Brief p. 39. However, even assuming arguendo that this is true, the insinuation that this would relieve counsel of the burden to investigate to prepare for the new sentencing trial is not supported by citation to the record by logic. Appellee's reliance on the reasonableness of prior counsel's performance is inapposite to the issue at hand. See, Answer Brief pp. 39-40. Appellee goes into depth about what prior counsel did and repeats that Mr. Derrick maintained that he was innocent but has little to say regarding what counsel at the re-sentencing actually did to investigate or prepare for the trial.

The decision counsel made, "to present Derrick as a good, helpful person rather than including that he had an alcoholic mother and a sexually, abusive older friend, achieved more success. Answer Brief p. 42 (e.a.). However, there is no evidence in the record that such a choice was necessary. Further, the description of Mr. Derrick's custodian as a "sexually abusive older friend" is outrageously inaccurate! Unfortunately, the State chooses to describe the pedophile it placed Mr. Derrick in the custody of in misleading terms. In this ludicrously white-washed phraseology, there is the horrible implication that Mr. Derrick, a 13-year old boy, was complicit in this

sexual crime, and even that he enjoyed it – hence “friend.” The underlying suggestion, that this could be sold to a jury to constitute a negative “ungood” characteristic of Mr. Derrick, is not supportable.

In fact, trial counsel had no choice to make between good and bad Derrick. There is not anything “bad” in Mr. Derrick because he had an alcoholic mother, and he was the victim, not the perpetrator, of the sexual abuse. The pedophile, sodomite, and rapist was not his “older friend.” Appellee’s implication of conspiracy, acquiescence, or complicity is shameful, and the attribution of a good Derrick strategy to the one-vote difference in jury recommendations or to the non-existent strategy of keeping the most powerful mitigation imaginable away from the jury is as baseless as holding a child victim responsible for his adult victimizer’s degeneracy. Such an “he liked it” argument has no support in the record, and Appellee’s and trial counsel’s contention, that she made an election between a good Derrick and a bad Derrick is a canard unfit to qualify as strategy.

The horrendous abuse Mr. Derrick suffered at home, compounded terribly by the state’s efforts to ameliorate it, could have easily been presented along with the good Derrick evidence Appellee seems to applaud so heartily.

The closeness of the jury votes establishes that the presentation to the jury of a true picture of the young man whose life and death were in their hands, while requiring more investigation and preparation than counsel invested, would likely have resulted in a life recommendation for Mr. Derrick.

ARGUMENT II

REPLYING TO THE ANSWER TO CLAIMS SUMMARILY DENIED

Appellant will reply on the arguments set forth in his Initial Brief in reply to Appellee’s Answer.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing, Appellant prays that this Court reverse the lower court and remand this case for a hearing on the summarily denied claims and, if necessary, for a new penalty-phase trial.

Certificate of Font and Service

Below signed counsel certifies that this corrected reply brief was generated in Courier New 12 point font pursuant to Fla. R. App. P. 9.210 and served on all parties hereto by first-class U.S. mail on this _____ day of December, 2006.

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