IN THE SUPREME COURT OF FLORIDA

JASON BRICE LOONEY,

Appellant,

vs. **Case No. SC05-159**
(L.C. No. 97-215-CF)

STATE OF FLORIDA,

Appellee.

_____/

REPLY BRIEF OF APPELLANT

ON DIRECT APPEAL FROM A FINAL ORDER OF THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR WAKULLA COUNTY, FLORIDA, DENYING APPELLANT'S AMENDED FLORIDA RULE OF CRIMINAL PROCEDURE 3.850/3.851 MOTION FOR POST CONVICTION RELIEF IN A CAPITAL CASE.

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AS TO THE STATE'S STATEMENT OF THE CASE AND THE FACTS

With two exceptions, Looney does not take issue with the state's statement of the case and the facts as set forth on pages 1–27 of the Answer Brief.

The first exception deals with the statement that: "Mr. Cummings, an experienced trial attorney, had handled 12 capital cases before this case, 7 that went to penalty and one other, Chadwick Banks, where the death sentence was imposed." (Pages 21-22 of Answer Brief). As Looney pointed out in the initial brief, the record does not support the assertion that Mr. Cummings was involved in the Chadwick Banks case. In that case, the Initial Brief filed with this court (SC01-1153) appealing the denial of post-conviction relief for Chadwick Banks indicates that Steven Seliger, Esq. was the attorney who conducted the penalty phase of that trial, after Chadwick Banks pled guilty to the charges. Therefore, Looney asserts that the state is giving Mr. Cummings credit for a case in which he apparently did not participate -- at least so far as the record indicates.

The second exception deals with the statement that: "Mr. Cummings discussed his strategy with other colleagues and everyone agreed that it was a 'no-brainer' that Dr. Partyka should not be called [as a witness]." (Page 22

of Answer Brief). Looney addressed this issue in his Initial Brief as well. As Looney set forth in the Initial Brief, at page 30:

> Neither the state's written closing argument nor the court's order denying the post conviction motion fully captures the essence of Mr. Cummings' testimony in this regard. The state asserted that "Cummings discussed this strategy with other colleagues and everyone agreed, it was a 'no-brainer' that Dr. Partyka should not be called." (Vol. III, R. 534) The court's order stated: "After discussion of Dr. Partyka's findings and diagnosis with other experienced colleagues, Cummings made the decision that Dr. Partyka should not testify." (Vol. III, R. 560-561) However, the actual testimony of Mr. Cummings was, as noted above: "I may have discussed it with some of my colleagues . . . [t]here's several individuals you just end up talking to, but I don't recall whether that issue came up. It seemed like a no-brainer to me not to call Dr. Partyka, when your doctor, your expert, tells you you don't want to call me." (Vol. III, R. 454)

Looney therefore takes exception to the state's claim (regarding not calling Dr. Partyka as a defense witness) which makes it appear that Mr. Cummings discussed the strategy at length with other colleagues, and that "everyone" agreed it was a "no-brainer." In his testimony, Mr. Cummings said that he did not recall whether that issue ever even came up with his colleagues.

AS TO THE STATE'S ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN FINDING DEFENSE COUNSEL WAS NOT INEFFECTIVE BY FAILING TO PRESENT IN A CONVINCING MANNER ALL EXTANT STATUTORY AND NON-STATUTORY MITIGATION DURING THE PENALTY PHASE AND FAILING TO UTILIZE THE SERVICES OF A MENTAL HEALTH EXPERT TO PRESENT THE MITIGATION.

On page 29 of the Answer Brief, the state asserts that the arguments made by Looney in the initial brief "do not support a conclusion that a Strickland violation occurred." Obviously, Looney disagrees with this assertion. Although the Answer Brief cites case law, none of the precedents cited deal with fact situations that are completely within the four corners of the instant case. In addition, in citing *Dufour v. State*, 905 So. 2d 42 (Fla. 2005), the state argues a position that is not on point, inasmuch as it is not an argument that Looney made. This is explained in more detail later in this Reply Brief. In short, however, the answer brief devotes seven pages of quotes from *Dufour* (pages 42-48) in order to address an issue not raised by Looney. *Dufour* stands for the proposition that it was not ineffective assistance of counsel for failure to seek another mental expert if the testimony of the first mental expert was not favorable to the defense case. However Looney has not taken such a position.

AS TO FAILURE TO PRESENT ALL EXTANT MITIGATING EVIDENCE

A. The Adoptive Home

The general thrust of the Answer Brief with regard to this issue is that the trial court was correct in concluding there was no deficient performance by trial counsel during the penalty phase as to evidence pertaining to Looney's adoptive home life. (The Answer Brief, pages 48-56). Obviously Looney disagrees with the conclusion of the trial court in this regard, and has so argued in the initial brief, at pages 44-51.

The Answer Brief cites no opposing case law in this section negating the case law cited by Looney in the Initial Brief. In fact, the quotes provided in the Answer Brief support Looney's argument, because they point out instances in which this court has found inexperienced defense counsel wanting for failure to properly investigate extant mitigation.

B. The Statutory Age Mitigator

The Answer Brief does not refute the argument made by Looney in the Initial Brief with regard to the statutory age mitigator. While there is no disagreement that the *Roper* decision[1] drew a line at 18 years of age, the Initial Brief clearly points out that Looney relies only upon the rationale

[1] *Roper v. Simmons*, 125 S.Ct. 1183 (2005).

used by the Supreme Court in reaching the decision, rather than citing *Roper* as controlling precedent.

C. Statutory Mitigator – Extreme Emotional Disturbance

The answer brief cites no authority for the position that it takes; merely asserting that Dr. Partyka did not mention any extreme emotional disturbance. However, Looney made the argument in the Initial Brief, at pages 56-57, that Dr. Mosman's opinion was that there was evidence of extreme emotional disturbance, that no evidence was presented by the state to rebut this testimony, and therefore it must be accepted as true. The Answer Brief goes on to assert that defense counsel cannot be faulted for having made a tactical decision to not call Dr. Partyka as an expert witness. However, Looney does not disagree with this, and has made no such argument. Looney's argument is that a mental health expert should have been utilized to present the available mitigating evidence to the jury – not that Dr. Partyka necessarily should have been the one to present it.

D. Non Statutory Mitigation

Again, in this section, the answer brief cites no authority to support its position, but merely argues that the decision of the trial court in denying Looney's 3.850/3.851 motion was correct. Obviously Looney disagrees

with the state's position, and presents arguments in the Initial Brief to that effect at pages 57-59.

E. Failure to Use a Mental Health Expert

The state cites *Dufour v. State*, 905 So. 2d 42 (Fla. 2005) to support its position in this section, and asserts that *Dufour* controls the issue. However, *Dufour* does not control because *Dufour* is not on point.

The state apparently misunderstands the thrust of Looney's argument regarding the failure of defense counsel to utilize a mental health expert. This court held in *Dufour* that it was not ineffective assistance of counsel where defense counsel failed to seek additional experts after receiving an initial unfavorable report from the one they had consulted. This is not at all the issue that Looney is arguing. Looney's Initial Brief states, on page 60, that:

> Trial counsel was also ineffective because he failed to utilize a mental health expert to present, explain and interpret existing mitigating evidence to the penalty phase jury.

The issue is simply whether defense counsel was ineffective for not using a mental health expert to present the mitigating evidence to the jury. Dr. Mosman pointed out that there was mental health mitigation that was not presented, and it follows that a different mental health expert would have been able to point that out. Therefore, it was crucial to the penalty phase

that a mental health expert be utilized to explain and interpret existing mitigating evidence. This issue is adequately covered in Looney's initial brief at pages 60-63, and will not be replicated here.

Looney also disagrees with the state's view of *Wiggins v. Smith*, 539 U.S. 510 (2003) as set forth on page 67 of the Answer Brief. It is generally agreed that the *Wiggins* case firmly established the constitutional obligation of defense counsel to thoroughly investigate the personal history of the client. Or, as one commentator observes: "After nearly twenty years, *Strickland v. Washington* has finally been given teeth." 117 *Harv. L. Rev*. (November, 2003). When the state asserts that "Wiggins does not control here since no mitigation was unearthed that was not investigated by defense counsel," (Page 67 of the answer brief). That is not correct. The thrust of Looney's argument is that there was mitigation which was not investigated by defense counsel, including the testimony of the other adoptive children of the Looney family. *Wiggins* therefore controls.

The state cites *Rompilla v. Beard*, 125 S.Ct. 2456, 2005 U.S. LEXIS 4846, 73 U.S.L.W. 4522 (decided June 20, 2005) in support of its position. Although Looney's post-conviction counsel conducted a careful analysis of *Rompilla* to see if it would be helpful to the appeal, he made a decision not to cite it in the initial brief because the fact situation of *Rompilla* was very

narrow. However, since the state has now cited it, Looney will take the opportunity to note that *Rompilla* fixes even more firmly the constitutional obligation of a defense attorney in a death penalty case to investigate and present available mitigating circumstances. In *Rompilla*, the Supreme Court extended its line of cases holding that defense counsel were ineffective for failing to adequately prepare for the trial penalty phase. As in *Wiggins v. Smith, supra*, the Court held that a decision not to pursue certain mitigating evidence cannot be strategic (and therefore effective assistance under the standard of *Strickland v. Washington)* if it is based on inadequate investigation. The Court also again relied on the American Bar Association standards for defense counsel in determining what is reasonable, just as they did in *Wiggins.* "[W]e long have referred [to these ABA Standards] as 'guides to determining what is reasonable.' " *Wiggins v. Smith*, 539 U.S., at 524 (quoting *Strickland v. Washington*, 466 U.S., at 688). *Rompilla* is particularly noteworthy for showing that the Supreme Court is willing to find ineffective assistance in a particular decision by trial attorneys even where the defense performance over all was adequate.

Rompilla was the third major case since 2000 to overturn death sentences because of ineffective assistance of counsel during the penalty phase, based partly on American Bar Association guidelines for representing

criminal defendants. In *Wiggins v. Smith*, 539 U.S. 510 (2003) the Supreme Court reversed a death sentence based on ineffective assistance of counsel for failing to prepare, or request, a report on the defendant's social history, which could have been used as mitigating evidence. And in *Williams v. Taylor*, 529 U.S. 362 (2000) the court likewise found ineffective assistance of counsel based upon inadequately preparing mitigation evidence.

As this court stated in *Hodges v. State*, 885 So. 2d 338, 347 (Fla. 2003), cited by the state at page 30 of the Answer Brief:

> Our analysis of this case turns on the distinction between the after-the-fact analysis of the results of a reasonable investigation, and an investigation that is itself deficient. Only the latter gives rise to a claim of ineffective assistance of counsel.

The state would have *Hodges* support their position. Looney would assert, however, that *Hodges* supports his position, in that the investigation by defense counsel into the facts surrounding the adoptive home and the potential testimony of the other adoptive children was itself deficient and thus gives rise to a claim of ineffective assistance of counsel in this particular case.

Looney desires also to make it clear that by "investigation," he is not referring to that work performed by the investigator, Mr. Johnson, which apparently was thorough. That work was already done when Mr. Cummings

was appointed to the case after the initial defense counsel (Bernard Daley) withdrew. Thus, Looney is referring to the failure of Mr. Cummings to adequately follow up on the material which Mr. Johnson had already assembled.

F. Failure to Present Mitigating Evidence Effectively

Looney's Initial Brief, at pages 63-70, points out the failure of defense counsel to effectively present mitigating evidence during the penalty phase of the trial.

The competence of Looney's trial counsel is not at issue. Appointed on very short notice with what appears to be scant experience in the mitigation phase of a death penalty case, he more than likely did the best he could in a case where the evidence of guilt was overwhelming. Nevertheless, it was not sufficient.

It is very clear, notwithstanding the arguments that the state is obliged to make to the contrary, that Looney was not provided the opportunity to have all extant mitigating evidence effectively presented to the jury on his behalf. There is a distinct likelihood that such evidence would have persuaded the jury to recommend life in prison, rather than death. This was the fault of defense counsel, and constituted ineffective assistance of counsel.

The state also argues in the Answer Brief at page 34 that the trial judge factored in the different mitigation issues, regardless of what deficiencies there might have been in the presentation to the jury. Yes, Looney agrees that the trial judge was able to do that. But there was prejudice because the jury must also be involved in the determination to put a member of society to death, and defense counsel did not provide the jury with the proper guidance to enable them to likewise consider the different mitigation issues. They did not have that guidance because defense counsel was ineffective in the presentation of the mitigation material.

CONCLUSION

Therefore, the Court is requested to reverse the order of the trial court that denies Looney's 3.851 motion, remand the cause to the trial court with instructions to vacate Looney's death sentence, and afford Looney a new penalty phase trial.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing initial brief of appellant has been furnished to counsel for appellee, the State of Florida, Carolyn Snurkowski, Esq., Chief of Criminal Law, the Office of the Attorney General of Florida, the Florida Capitol, Plaza Level One, Tallahassee, Florida 32399-1050, and to Eddie Evans, Esq., Assistant State Attorney, the Office of the State Attorney, Second Judicial Circuit of Florida, 4th Floor, Leon County

Courthouse, 301 South Monroe Street, Tallahassee, FL 32301, by U.S. mail delivery, this _____ day of November, 2005.

_____
Frank E. Sheffield, Esq.

CERTIFICATE OF COMPLIANCE

I certify that this initial brief of appellant was prepared using a Times New Roman font, 14 pitch, in compliance with the provisions of Florida Rule of Appellate Procedure 9.210.

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Frank E. Sheffield, Esq.