IN THE SUPREME COURT OF FLORIDA

CASE NUMBER SC05-1739

CONNIE RAY ISRAEL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT FOR THE SEVENTH JUDICIAL CIRCUIT IN AND FOR PUTNAM COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

Robert T. Strain
Florida Bar Number 0325961
Assistant CCRC
CAPITAL COLLATERAL REGIONAL COUNSEL - MIDDLE REGION
3801 Corporex Park Dr. - Suite 210
Tampa, Florida 33619
(813) 740-3544
Attorney for Appellant

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PRELIMINARY STATEMENT

For this Reply Brief, citations shall be as follows: The record on appeal concerning the trial proceedings shall be referred to as R. ___ followed by the appropriate volume and page numbers. The post-conviction record on appeal will be referred to as PCR. ____ followed by the appropriate volume and page numbers. The appellant's initial brief will be referred to as IB ___ followed by the appropriate page number. The appellee's answer brief will be referred to as AB ___ followed by the appropriate page number. Any other references will be self-explanatory or otherwise explained.

ARGUMENT I

THE APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE CLOSING ARGUMENT OF THE PENALTY PHASE BECAUSE TRIAL COUNSEL MERELY MADE A FEW CURSORY REMARKS TO THE JURY IN WHICH HE APPEARED TO BE DISTANCING HIMSELF FROM HIS CLIENT.

The appellee characterizes this claim as one where "Israel argues because trial counsel gave a 'short' closing argument at the penalty phase of his capital trial, he received constitutionally inadequate representation." (AB - 15). Further, appellee concedes that "[w]hile perhaps counsel's closing argument was not overly animated ... [c]ounsel's strategy of presenting a quick closing argument is certainly not unreasonable, given that the defense mental state expert had just testified that both mental mitigators applied to Israel. While counsel did not go far beyond arguing that both the mental state mitigators were present, in light of the testimony (and the ultimate sentencing findings), there seems to be little to recommend over-arguing the mitigators (especially when the State had presented no counter-expert)." (AB - 17). Therefore, the appellee is suggesting that counsel could skip argument about non-statutory mitigation to the jury as long as the statutory mitigation evidence was fresh in their minds.

The appellee misses the point that this "short" closing argument contained no identification of significant non-statutory mitigation as allowed under F.S. 921.141(h). Ignored by the appellee is that this Court, on direct appeal, noted that

"[a] review of the record in this case demonstrates that Israel failed to identify the areas of drug abuse, brain damage, and low intellectual functioning as specific nonstatutory mitigation for the trial court to consider." Israel v. State, 837 So.2d 381, 392 (Fla. 2002). Further discussed on direct appeal was that "...this Court [has] noted ... "[T]he defense must share the burden and identify for the court the specific nonstatutory mitigating circumstances it is attempting to establish (quoting from Lucas v. State, 568 So.2d 18 (Fla. 1990). Unlike statutory mitigation that has been clearly defined by the legislature, nonstatutory mitigation may consist of any factor that could reasonably bear on the sentence. The parameters of nonstatutory mitigation are largely undefined. This is one of the reasons that we impose some burden on a party to identify the nonstatutory mitigation relied upon." Israel v. State, 837 So.2d at 391-92, quoting from Nelson v. State,748 So.2d 237, 243-44 (Fla. 1999). Mr. Israel's trial counsel failed to meet this obligation.

The appellant recognizes that "[c]ounsel has wide latitude in deciding how to represent a client and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage. Closing arguments should 'sharpen and clarify the issues for resolution by the trier of fact.'" Yarborough v. Gentry, 540 U.S. 1, 5-6, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003)(citing Herring v. New York, 422 U.S. 853 at 862, 95 S.Ct. 2550[, 45 L.Ed.2d 593 (1975).

Further, appellant recognizes that "[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect. (citation omitted). That presumption has particular force where a petitioner bases his ineffective-assistance claim solely on the trial record, creating a situation in which a court 'may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive.'" Yarborough, 540 U.S. at 8.

To summarize rebuttal, appellant is pointing to the lack of any identification of non-statutory mitigation in the jury's closing argument. Again, the penalty phase closing argument comprises three pages of trial transcripts (R. Vol. XX, 3952-55) in contrast to the more thorough and extensive closing argument at the conclusion of the guilt phase of the trial (R. Vol. XX, 3770-3787). If the length of defense counsel's closing argument had been limited by the court, it would have been subject to an abuse of discretion review on direct appeal and possibly reversed as unreasonable under the facts and circumstances of the case. Stockton v. State, 544 So.2d 1006, 1009 (Fla. 1989)(reversing a 33 minute closing argument in a second-degree murder case)(citing Hickey v. State, 484 So.2d 1271 (Fla. 5th DCA 1989)[thirty-minute time limit error in second-degree murder]; Neal v. State, 451 So.2d 1058 (Fla. 5th DCA 1984)[thirty-minute limit error on second-degree murder and robbery]; Pittman v. State, 440 So.2d 657 (Fla. 1st DCA 1983)[thirty-

minute error in resisting arrest]. See also Vaz v. State, 626 So.2d 1022 (Fla. 3rd DCA 1993)(finding ineffectiveness of counsel for failure to join in co-defendant's objection to a fifteen-minute limitation on closing argument for a two-day trial); and Curry v. State, 930 So.2d 849 (Fla. 2nd DCA 2006)(reversal due to twenty-minute limitation in case involving three counts of sexual battery on a child less than twelve and one count of sexual battery on a child between twelve and eighteen by a person in familial authority).

"The closing argument is an integral component of the entire trial representation. It is the lawyer's last opportunity to summarize the evidence, tie together key themes, and convince the jury why his or her position should prevail... [T]he final argument is the pinnacle of the trial representation." Tucker Ronzetti and Janet L. Humphreys, "Avoiding Pitfalls in Closing Arguments," 77 Fla.BarJ. 36 (December, 2003). As previously noted by appellant, the United States Supreme Court explained that "[i]t can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole." Herring v. New York, 422 U.S. at 862 (citing In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). (IB -20-21). In appellant's penalty phase, there was no sharpening and clarification of the sentencing issues for the jury when non-

statutory mitigation was ignored and not discussed. There was no presentation to the jury of the whole case for mitigation. The brevity of the penalty closing argument to the jury is, therefore, only emblematic of the shortcomings by counsel. This final argument was not the pinnacle of appellant's penalty phase. By needing only five additional votes for a life recommendation, Israel v. State, 837 So.2d at 385, counsel's conduct cannot be deemed strategic, reasonable and non-prejudicial. His failure to recall any reasons for the argument he made (PCR. Vol. IV 676-679) should not give him nor the appellee a pass on this claim. Duncan v. State, 894 So.2d 817 (Fla. 2004).

ARGUMENT II

TRIAL COUNSEL WAS INEFFECTIVE AND PREJUDICED APPELLANT'S CASE WHEN HE FAILED TO FILE A SENTENCING MEMORANDUM OF LAW FOR THE HEARING HELD PURSUANT TO SPENCER V. STATE, 615 SO.2D 688 (FLA. 1993).

Appellee states that "... [I]srael is arguing for the establishment of a *de facto* checklist of required actions by trial counsel which must be followed precisely in order to avoid being found ineffective. ... [w]hile counsel certainly could have filed a [sentencing] memorandum, the fact that he did not does not mean that his performance was deficient." (AB - 22).

In rebuttal, appellant wants to make clear that he is not arguing for a *de facto* ineffectiveness checklist. What appellant has done with this claim is to recognize

the inexplicable failure of defense counsel to file the requested sentencing memorandum in favor of a life sentence for his client. Appellant recognizes that the postconviction court noted that "[t]his court did request such a memorandum from trial counsel that was not provided. While a memorandum is not required under Spencer it can be helpful to the Court and this Court's request was not complied with." (PCR. Vol. V 854). The court at trial, in fact, explained that it would read the parties' sentencing memoranda before coming to any sentencing decision. (R. Vol. XX 3908).

At the Spencer[1] hearing, defense counsel argued his motion for new trial and the appellant addressed the court. Counsel failed to argue anything in mitigation, statutory and non-statutory, otherwise try to diminish the State's aggravators, and did not present any additional evidence. (R. Vol. XX 3892-3910). After initially

[1]"In Grossman [v. State, 525 So.2d 833, (Fla. 1988), cert. denied, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989)], we directed that written orders imposing the death sentence be prepared prior to the oral pronouncement of sentence. However, we did not perceive that our decision would be used in such a way that the trial judge would formulate his decision prior to giving the defendant an opportunity to be heard. We contemplated that the following procedure be used in sentencing phase proceedings. First, the trial judge should hold a hearing to: a) give the defendant, his counsel, and the State an opportunity to be heard; b) afford, if appropriate, both the State and the defendant an opportunity to present additional evidence; c) allow both sides to comment on or rebut information in any presentence or medical report; and d) afford the defendant an opportunity to be heard in person. Second, after hearing the evidence and argument, the trial judge should then recess the proceeding to consider the appropriate sentence..." Spencer v. State, 615 So.2d 688, 690-691 (Fla. 1993).

testifying at the postconviction hearing that he "... thought he could articulate it verbally better..." [i.e, the argument in support of a life sentence in opposition to the death sentence] (PCR. Vol. IV 692), counsel testified he did not know why he made no verbal Spencer sentencing argument and did not file a post-Spencer sentencing memorandum. (PCR. Vol. IV 696).

The prosecuting attorney's sentencing memorandum argued to the court that "[t]he only other evidence the Court can consider in mitigation [other than Dr. Krop's testimony about statutory mental mitigators] is any other aspect of the defendant's character or record, and any other circumstance of the offense. Nothing about this catch-all mitigating factor applies to Mr. Israel. His record is bad, his character is worse, and the offense is horrible. The Court should assign no weight to this mitigating factor." (R. Vol. XIII 2404). The trial court's sentencing order read, as to non-statutory mitigation, that "[o]ther evidence the Court has considered in mitigation are aspects of the Mr. Israel's character, his record and other circumstances of the surrounding offense. In the Court's opinion nothing about this catch-all mitigating factor applies to Mr. Israel. His record is bad, his character worse, and the offense is horrible. The Court assigns no weight to this mitigating factor." (R. Vol. XIII 2441). Thus, the trial court's adoption of the State's precisely worded sentencing position as to non-statutory mitigation reflects not only ineffectiveness on counsel's part but prejudice to the appellant.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing, the lower court improperly denied Rule 3.851 relief to Connie Ray Israel. This Court is respectfully urged to order that his conviction for and sentence of death be vacated and remand the case for such further relief as the Court deems proper.

Respectfully submitted,

_____

Robert T. Strain
Florida Bar Number 0325961
Assistant CCRC
CAPITAL COLLATERAL REGIONAL
COUNSEL - MIDDLE REGION
3801 Corporex Park Dr. - Suite 210
Tampa, Florida 33619
(813) 740-3544
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of the Appellant has been furnished by United States Mail, first class postage prepaid, to Kenneth S. Nunnelley, Senior Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118-3958 on this _____ day of _____, 2006.

_____

Robert T. Strain
Florida Bar Number 0325961
Assistant CCRC
CAPITAL COLLATERAL REGIONAL
COUNSEL - MIDDLE REGION
3801 Corporex Park Dr. - Suite 210
Tampa, Florida 33619
(813) 740-3544
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, pursuant to Fla.R.App.P. 9.210, that the foregoing was generated in Times New Roman 14-point font.

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Robert T. Strain
Florida Bar Number 0325961
Assistant CCRC
CAPITAL COLLATERAL REGIONAL
COUNSEL - MIDDLE REGION
3801 Corporex Park Dr. - Suite 210
Tampa, Florida 33619
(813) 740-3544
Attorney for Appellant