IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-942

BILLY LEON KEARSE,

Petitioner,

v.

JAMES R. McDONOUGH, Secretary,
Florida Department of Corrections,

Respondent.

REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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CLAIM I

APPELLATE COUNSEL FAILED TO RAISE NUMEROUS MERITORIOUS ISSUES ON DIRECT APPEAL TO THE FLORIDA SUPREME COURT AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I §§ 9, 16(A) AND 17 OF THE CONSTITUTION OF THE STATE OF FLORIDA, WHICH WARRANT REVERSAL OF EITHER OR BOTH THE CONVICTIONS AND SENTENCE OF DEATH.

A. THE LOWER COURT ERRED BY DENYING MR. KEARSE'S CHALLENGE TO A BIASED JUROR FOR CAUSE.

1. This claim is not procedurally barred.

The State argues that Mr. Kearse is procedurally barred from alleging ineffective assistance of appellate counsel for failing to confront the trial court's denial of the cause challenge to Juror Matthews. The State's argument is that Mr. Kearse is forever barred from any claims that may involve a juror issue because his direct appeal included the issues of trial error for granting a cause challenge to the State for Juror Jeremy, and for the denial of cause challenges by defense counsel concerning Jurors Barker and Foxwell. However, this argument is erroneous.

The failure of appellate counsel to appeal the denial of the defense cause challenge to Juror Matthews is entirely a different issue than was presented in Mr.

Kearse's direct appeal. The State's faulty argument neglects to consider that the challenge here is to the failure of the appellate counsel to raise a claim that presents reversible error, thereby depriving Mr. Kearse of effective assistance of counsel during the appellate process.

The State cites to Blanco v. Wainwright, 507 So. 2d 1377 (Fla. 1987), for the proposition that habeas corpus is not a vehicle for obtaining a second appeal of issues which were raised, or should have been raised on direct appeal. Mr. Kearse is not in dispute with this long-standing law. However, it does not apply in this instance.

In Blanco, this Court noted that:

> Blanco's petition for writ of habeas corpus is almost entirely a repetition of the issues raised in the Rule 3.850 proceeding, the gravamen of the petition, to use Petitioner's phrase, is appellate counsel's failure to recognize egregious fundamental constitutional error appearing on the face of the trial record, to wit: ineffective assistance of trial counsel.

Blanco, at 1384.

Therefore, the Blanco court was faced with challenges to defense counsel's trial representation in a habeas corpus action. This is clearly not the proper vehicle for ineffective assistance of trial counsel claims. However, it is the proper avenue for challenges to ineffective assistance of appellate counsel. Therefore, this claim is not procedurally barred.

2. This claim is not piecemeal litigation:

The State alleges that this claim is Mr. Kearse's attempt to provide a second or substitute appeal of issues that should have been raised on direct appeal:

> On direct appeal, appellate counsel challenged the denial of "for cause challenges" during the seating of his re-sentencing jury, although counsel directed this Court's attention to three jurors other than Matthews. … Having raised the issue on direct appeal, Kearse may not raise the same issue, but on different ground…defendant may not raise claims of ineffective assistance on a piecemeal basis by filing successive motions.

(State's Answer to Petition for Writ of Habeas Corpus, p. 10).

Mr. Kearse submits that this argument shows that the State has conceded this issue, and is obviously in agreement with Mr. Kearse that appellate counsel provided ineffective assistance by failing to raise this on direct appeal. This is further evident in the authority cited by the State.

In Pope v. State, 702 So. 2d 221 (Fla. 1997), post-conviction counsel had filed a motion pursuant to Rule 3.850 alleging, among other things, ineffective assistance of trial counsel - which was denied and the denial affirmed on appeal. Later, after the expiration of the time limit to file an initial postconviction relief motion, (and after some federal court proceedings), post-conviction counsel filed another 3.850 motion again alleging ineffective assistance of trial counsel. This Court held that under those circumstances, the successive postconviction motion

must be based on newly discovered evidence, and deemed it an impermissible attempt for a second bite at the apple.

In the instant action, Mr. Kearse is challenging appellate counsel's failure to appeal a cause challenge to Juror Matthews. The State agrees that trial counsel followed the proper procedures to raise the issue (State's Answer to Petition for Writ of Habeas Corpus, p. 14) and says that this issue should have been raised on direct appeal. Therefore, the State has agreed that this is a viable issue for a habeas review. This is not piecemeal litigation of the same issue as on direct appeal.

3. This claim was preserved for appeal.

The State's argument here is that when defense counsel challenged Juror Matthews for cause, the trial court was not put on notice that the challenge was because Matthews had a business relationship with the prosecutor. That argument fails to recognize that the record clearly reflects there were three areas of inquiry during *voir dire* of Juror Matthews by defense counsel: (1) she was the insurance agent for Prosecutor Morgan and his family; (2) she was influenced by pre-trial publicity, and (3) she was related by marriage to a lead detective who would be testifying at the trial. (R2-T. 504-508; 860-872; 1008-1016). Indeed, Juror Matthews characterized her relationship with the Prosecutor as something that she thought would have a bearing on her willingness or ability to serve as a juror, which began the inquiry into that relationship. (R2-T. 507).

Defense counsel, after a full inquiry, made his challenge for cause "based on her relationship with Detective Raulerson, based on her knowledge of the facts of the case, and other statements which would indicate that she could not be fair and impartial." (R2-T. 1097). Under the circumstances, this sufficiently puts the court on notice that part of the challenge is based on the juror and prosecutor's business dealings, and was therefore properly preserved for appeal.

4. The State incorrectly argues that Juror Matthews had not met Det. Raulerson in order to minimize the fact that the juror was related by marriage to a lead detective testifying at trial.

In an attempt to lessen the legal challenge that Juror Matthews was related by marriage to a State witness who worked at the same police department as the victim and who was characterized as the lead detective at the crime scene (R2-T. 1307) as well as the chief crime scene officer (R2-T. 1252), the State asserts that Juror Matthews had not met the detective: "From this exchange, it is obvious Matthews and Raulerson never spoke, and in fact, had not met." (State's Answer to Petition for Writ of Habeas Corpus, p. 13).

The record shows that, although the juror and detective were not close, the juror certainly knew the detective and intended on seeing him at the coming Christmas, although she hadn't seen him in the past three years. (R2-T. 867-870). Her familial relationship with a lead detective, her business relationship with the prosecutor and her knowledge of the case through pre-trial publicity were

compelling reasons to remove her for cause. The trial court erred in failing to do so, and Mr. Kearse's appellate counsel failed to provide effective assistance by neglecting this issue on appeal. Mr. Kearse is entitled to the relief requested.

B. THE TRIAL COURT ERRED IN DENYING TRIAL COUNSEL'S MOTION FOR CO-COUNSEL AT MR. KEARSE'S TRIAL.

The issue of the court's denial of co-counsel was properly preserved for appeal, was a denial of due process, rendered trial counsel ineffective, and should have been raised on direct appeal. The State has again mischaracterized the arguments presented in Mr. Kearse's Petition for Writ of Habeas Corpus, and has misapplied the law to lend credence to its erroneous argument. The main thrust of the State's argument is that because trial counsel had said that the case was not complex, this statement, in and of itself, is dispositive of the issue - thereby making the denial of co-counsel a proper exercise of judicial discretion and thereby exonerating appellate counsel for failing to appeal the issue. The law does not agree.

Florida Rule of Criminal Procedure 3.112, specifies that a court must appoint lead counsel and, upon written application and a showing of need by lead counsel, should appoint co-counsel to handle every capital trial in which the defendant is not represented by retained counsel or the Public Defender. (Emphasis added). However, as the State points out, this Rule was promulgated in 2000, and therefore was not in effect at the time trial counsel was requesting co-

counsel in this case. Yet, the Committee Notes affirm that this is in conformance with the American Bar Association Standards that require two lawyers be appointed at the trial level whenever there is a possibility of the imposition of the death penalty. While it is true that the Committee Notes say the Rule does not confer an independent legal right, the Notes cite to several cases decided before the Rule, and that "these cases stand for the proposition that a showing of inadequacy of representation in the particular case is required." Committee Notes to Rule 3.112, Florida Rule of Criminal Procedure.

Furthermore, the law in effect at the time Mr. Kearse's trial counsel had repeatedly requested the aid of co-counsel was that "appointment of multiple counsel to represent an indigent defendant is within the discretion of the trial judge and is based on a determination of the complexity of a given case and the attorney's effectiveness therein." Armstrong v. State, 642 So. 2d 730 (Fla. 1994) (Emphasis added)[1].

Accordingly, although a Petition for Writ of Habeas Corpus, in this context, is appropriate to challenge ineffective assistance of appellate counsel as opposed to trial counsel, Mr. Kearse mentioned some of the facts showing ineffective assistance of trial counsel as made in his Initial Brief, as a basis for showing that

[1] Note that in both Armstrong v. State, 642 So. 2d 730 (Fla. 1994) and Cummings-El v. State, 863 So. 2d 246, 258 (Fla. 2003), although the court disagreed with appellant/petitioner's arguments, it also found that the claim of denial of co-counsel **should have been raised on direct appeal** and was barred.

the denial of co-counsel rendered trial counsel ineffective. Therefore, the State is also incorrect in saying that "Kearse's complaints about Udell's performance during the first trial and resentencing have no place in this petition". (State's Answer to Petition for Writ of Habeas Corpus, p. 19). Rather, under the context of this issue, the law in effect at the time of the denial of co-counsel requires this showing. Since appellate counsel did not bring this to the attention of this Court, it is necessary to show that trial counsel was rendered ineffective as a basis to argue that appellate counsel was also ineffective for failing to appeal the issue.

The State's characterization of trial counsel's basis for requesting co-counsel is also inaccurate. While it is true that immediately prior to trial, Mr. Kearse's counsel did state it was "not a complex case", he also stated "I'm seeking appointment of co-counsel simply **for the reasons I set forth in the motion and as alleged in the affidavit**…" (R1-T. 65) (Emphasis added). The grounds in the motion included an equal protection argument considering the practice of all Florida Public Defenders and the Public Defender in that county to always appoint two attorneys in death cases, the ABA Standards and the U.S. Code requiring two lawyers in capital cases tried in federal court. (R1. 2464-2467). Even more important was trial counsel's admissions that he couldn't adequately represent Mr. Kearse alone and needed help in preparing for trial, citing to over 80 State witnesses, discovery over 800 pages long, and at least 5 State expert witnesses.

(R1. 34). Although trial counsel didn't characterize this as a "complex case," the State is clearly incorrect in its analysis and argument. This was a complex case, and there were many other grounds alleged by trial counsel that justified the basis for appointment of co-counsel, regardless of his error in assessing the complexity of the case. Therefore, the trial court abused it's discretion in denying co-counsel. Appellate counsel's failure to appeal this issue thereby undermined confidence in the correctness of the original appellate decisions.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Kearse respectfully urges this Court to grant habeas corpus relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing REPLY has been furnished by United States Mail, first-class postage prepaid to Leslie Campbell, Asst. Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, FL 33401, on the 18TH day of October, 2006.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this petition complies with the font requirements of rule 9.100(l), Fla. R. App. P.

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