IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC05-189
LOWER TRIBUNAL CASE NO.: 90-16062-CFA

CHADWICK WILLACY,

Defendant/Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

REPLY BRIEF OF APPELLANT CHADWICK WILLACY

BRIAN N. ONEK
Balgo, Onek & Mawn, P.A.
1329 Bedford Drive, Suite 1
Melbourne, Florida 32940
(321)751-9774
Fla. Bar No.: 0373079

ELIZABETH SIANO HARRIS
Stadler & Harris, P.A.
1820 Garden Street
Titusville, Florida 32796
(321) 264-8800
Fla. Bar. No.: 899720

Attorneys for Defendant Chadwick Willacy

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

ARGUMENT I

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT AN EVIDENTIARY HEARING ON CLAIMS IV, VI, AND XV OF HIS AMENDED MOTION FOR POST-CONVICTION RELIEF.

> Claim IV- Defense counsel was ineffective for waiving the appointment of an independent counsel to litigate the facts and circumstances regarding Juror Clark's pending felony charges.

First, the State contends that this argument is procedurally barred. In this regard, the State maintains that any and all issues concerning Juror Clark and any conflict of interest were or should have been raised on direct appeal. This argument is specious.

Mr. Erlenbach and Mrs. Erlenbach were married and worked together. Mrs. Erlenbach was expecting the couple's fourth child during the Defendant's trial. She testified that she was present during some of the Defendant's trial, assisting her husband. (R 119-122). The record establishes that she conducted a portion of voir dire questioning and in fact questioned Juror Clark. (1991 R at 630-695). The State testified that it informed either Mrs. Erlenbach, Mr. Erlenbach or both of Juror Clark's status during the trial. (R 101). Mrs. Erlenbach denied having been informed of Juror Clark's status until sometime after the presentation of all the evidence when prosecutor Craig Rappel made an off-handed remark about Juror Clark's submission to PTI. (R 123-124). Similarly Mr.

Erlenbach denied having been informed of Juror Clark's status and testified that he learned of this fact in July 1992 while preparing the Defendant's direct appeal. (R 65-66).

As highlighted by the trial court, the conflict of interest was obvious.[1] (R 61). In this regard, the trial court chastised Mr. Erlenbach for failing to recognize the apparent conflict. Nevertheless, Mr. Erlenbach refused to recognize the conflict.[2] (R 61-62). This conflict encompassed either zealously pursuing his client's interests and doggedly questioning Mrs. Erlenbach about the State's claim and her ignorance of section 40.013, Florida Statutes, or passively accepting his wife's version, and thus handicapping the Defendant's position. Similarly it involved putting at issue his own credibility given the prosecutors' directly conflicting testimony. (R 103). A finding of credibility, which in this case was not made by the trial court but rather by the State, was paramount to the issue.

Secondly, the State contends that the Defendant has failed to demonstrate any prejudice and thus, this issue has no merit. In this regard,

---

[1] In this regard, the trial court stated:

> Counsel, it sure would have been helpful if you all would have anticipated this. This is so obvious that I'm shocked that you didn't anticipate it. I really am. This is something that's unheard of. Lawyers don't go around in this dual role.

(R 61).

[2] Mr. Erlenbach stated, "Judge, with all due respect there's no way to avoid this." (R 63).

the State emphasizes that in Willacy v. State, 640 So. 2d 1079 (Fla. 1994)(Willacy I), this Court concluded that Juror Clark was not under prosecution. This argument adopts the trial court's position that the facts would have remained unchanged. Yet, a trial court cannot make any determination what a conflict-free attorney would have done. Furthermore, this argument ignores the established principle that any actual conflict of interest, as was clearly present here, deprives a defendant of his right to counsel. Glasser v. United States, 315 U.S. 60, 62 S.Ct. 451, 86 L.Ed. 2d 680 (1942). See also Lee v. State, 690 So. 2d 664 (Fla. 1st DCA 1997). Thus prejudice is inherent.

The State further argues that the trial court correctly found that rule 4-3.7, Rules of Professional Conduct, does not apply because the 1992 hearing on the motion for new trial was not a trial. This argument lacks merits and ignores the intent of rule 4-3.7. The object of the rule is such that a lawyer should avoid putting of his credibility at issue. Arcara v. Phillips M. Warren, 574 So. 2d 325 (Fla. 4th DCA 1991). Here a lengthy evidentiary hearing was held on the motion for new trial. A number of witnesses testified regarding a hotly contested evidentiary matter. The Erlenbachs' testimony was potentially damaging to the Defendant's interests and bore

directly on the factual issues to be determined by the trial court. Clearly this is a situation within the purview of rule 4-3.7.

Lastly, the State argues that the Defendant waived any conflict and therefore, is precluded from now obtaining relief on this issue. However, the record fails to establish in clear, unequivocal, and unambiguous language that the Defendant knowingly and intelligently waived his right to conflict-free counsel. As noted above, Mr. Erlenbach failed to recognize the conflict. Even after being chastised by the trial court, Mr. Erlenbach continued to argue that no conflict of interest existed. In its answer to the motion for new trial, the State had already plainly asserted its position that it had informed Mrs. Erlenbach, Mr. Erlenbach, or both of Juror Clark's submission to PTI and that it intended to call a witness to support that fact. Thus, the Erlenbachs' credibility had been placed squarely at issue. (R 1967-1970).

Prior to the evidentiary hearing, Mr. Erlenbach knew that both his and his wife's credibility were central to the motion and would be subject to attack by the State. He knew that he would have to argue his credibility and his wife's over the prosecutors'. Yet, he denied the conflict and urged the trial court that there was no other way to proceed.

Given his steadfast denial of any conflict Mr. Erlenbach was incapable of advising the Defendant of the conflict and its effect on the

defense. Nothing in the record establishes a knowing and intelligent waiver of the Defendant's right to conflict-free counsel. As such, summary denial of this claim was inappropriate.

Claim VI- Defense counsel was ineffective for failing to object to Juror Clark's ineligibility to serve on the Defendant's jury**.**

The State contends that this issue was properly denied because this Court determined in Willacy I that Juror Clark was not under prosecution and therefore, the Defendant has failed to demonstrate any prejudice from defense counsel's failure to object at trial. This argument ignores this Court's position that, "during the trial the State informed Willacy's counsel of Clark's status and his counsel voiced no objection." Willacy I, 640 So. 2d at 1083. As such this Court's opinion serves as the basis for a finding of deficiency.

In light of this, the Erlenbachs allowed a juror who had committed juror misconduct to remain seated. Juror Clark failed to disclose relevant and material information regarding his pending prosecution on felony charges and submission to PTI not only to the jury clerk but on his jury questionnaire and during voir dire questioning. The record does not conclusively refute the Defendant's claim that the Erlenbachs were ineffective in allowing Juror Clark to be seated. As such the Defendant was entitled to an evidentiary hearing and summary denial was inappropriate.

ARGUMENT II

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S CLAIM FOR POST-CONVICTION RELIEF BASED ON TRIAL COUNSEL'S FAILURE TO ASSERT THE INDEPENDENT ACT DEFENSE.

The State contends that the trial court properly denied the claim for a myriad of reasons. First, the State contends that the independent act defense is supported solely by the Defendant's "questionable account of the events," and in fact, is contrary to the evidence. In this regard, the State maintains that Mr. Erlenbach cannot be found to be ineffective for failing to assert a defense for which there was no supporting evidence.

The State urges that this is a classic case of hindsight and that Mr. Erlenbach's strategy of eliminating as much of the evidence as possible was sound trial strategy. Interestingly, the State later in its brief recognizes the tremendous amount of State evidence left unexplained by the defense. This position stems from the State's "Santa Claus" burglar argument at trial, ridiculing the defense. (1991R at 2577). The State consistently talks out of both sides of its mouth, extolling the validity of Mr. Erlenbach's trial strategy yet, at every turn reveling in the strength of its case and therefore, the purported improbability of affecting the outcome of the trial.

In so arguing, the State ignores the fact that the Defendant's suppressed statement contains all the elements of the independent act

defense, and thus, served as a basis for such a defense. The Defendant's statement was not, as erroneously viewed by Mr. Erlenbach, a confession to felony-murder, but rather was a confession to the crime of burglary and importantly a complete defense to murder. The State further ignores the plethora of evidence which corroborates the Defendant's statement and further establishes the independent act defense.

For example, the testimony of Agent Demers established that the blows with the hammer to the head of the victim were struck with the left hand. (1991R at 1537). Testimony established that the Defendant is right-handed. Such evidence suggests the involvement of a second person.

Furthermore, on the day after the murder the cardboard box that had been covering the bathroom window of the Defendant's house was knocked to the inside of his house. Testimony established that the cardboard box had been covering the window for several weeks. The only reasonable explanation for the cardboard covering having been removed from the window is that someone knocked it into the house. When Detective Santiago initially approached the Defendant about entering the Defendant's house, the Defendant told Detective Santiago that the window was covered with a cardboard box. Detective Santiago then informed the Defendant that there was no cardboard box covering the window at that time. (1991R at 2161).

The evidence also supports a finding that before the murder was committed by the other party, the Defendant was observed on his way to the ATM machine shortly after the victim's arrival at her home. (1991R 1490-1494). The evidence further indicates that while the Defendant was on his way to the bank, the murderer killed the victim and then attempted to move items from the victim's house into the Defendant's home, gaining access through the bathroom window. The evidence established that the Defendant's fingerprints were not found on any of the items uncovered in his residence.

Of particular importance are the coin holders belonging to the victim's deceased husband that were found in a gym bag in the Defendant's home. At least 13 fingerprints of value were lifted from these coin holders. None matched the Defendant's fingerprints nor the victim's deceased husband. (1991R at 1718).

Further at 3:00 p.m. on the day of the murder, Marta Anderson saw a black male from a short distance away in the neighborhood. Marta Anderson did not identify the Defendant as the man she observed. The man seen by Marta Anderson was not the Defendant, but rather was the murderer. (1991R at 972-973; 977-978).

The fingerprint on the driver's door of the blue LTD in the garage was not matched to the Defendant or any of the other people known to have come in contact with the car. This is the car that was parked in the victim's garage. The driver's door was a few feet from where blood drops were found on the garage floor. Again, this evidence suggests the involvement of a second person.

Lastly the State attempts to discredit the Defendant's statement claiming that Carlton Chance had an airtight alibi for the day of the murder. However, at the evidentiary hearing Reverend Ronald Whittaker testified that he gave his statement to police on September 12th, which was several days after the homicide. He explained that the police questioned him about where Carlton Chance had been that day. Reverend Whittaker could not recall the exact date, only that the day he spoke to police was the day he had worked with Carlton Chance. (R 1469-1482). He testified that no one from law enforcement confirmed the dates by checking his payroll records.

The State ignores the fact that the independent act defense provided a complete explanation for all of the State's evidence. In particular, the independent act defense explained the ATM photograph and the victim's property discovered in the Defendant's home. As repeatedly urged by the State, this evidence was damaging to the Defendant and remained utterly

unexplained. The State further argues that the Defendant's statement would have done "great harm" to the innocent explanation asserted for the Defendant's fingerprints. This argument is flawed and seems to ignore that the two defenses, independent act defense and the asserted SODDI defense would be mutually exclusive. As such the Defendant demonstrated that he was denied effective representation, and therefore, was entitled to a new trial.

ARGUMENT III

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S CLAIM FOR POST-CONVICTION RELIEF BASED ON TRIAL COUNSEL'S FAILURE TO MOVE TO DISQUALIFY THE TRIAL JUDGE AT THE SENTENCING PROCEEDING.

The State contends that this claim was properly denied for two reasons. First, the State argues that the issue is procedurally barred. In this regard, the State argues that the Defendant raised the alleged Spencer[3] violation on direct appeal, and therefore, it is barred on collateral review. The State contends that the issue cannot be salvaged by re-couching it in the form of ineffective assistance of counsel.

This argument fails because the crux of the issue is not whether there was a fulfillment of the requirements of Spencer but rather, whether by failing to move to disqualify Judge Yawn Mr. Kontos allowed a predisposed trial judge to impose sentencing. The alleged Spencer violation occurred some time after Mr. Kontos learned of Judge Yawn's pre-prepared order. Upon learning of the trial court's pre-prepared order, Mr. Kontos should have moved to disqualify the trial judge. As such, the issue is separate and distinct from the claimed Spencer violation.

[3] Spencer v. State, 615 So. 2d 688 (Fla. 1993).

Secondly, the State contends that the issue lacks merit. In this regard, the State argues that any motion to disqualify would have been legally insufficient. The State urges that the issue of the trial court having pre-prepared the sentencing order was raised on direct appeal and found to have been meritless. Thus, the State argues that the trial court's conduct would not have served as a proper basis for disqualification.

Accepting that the half-hour lunch break satisfied the dictates of Spencer, such does not negate the inherent prejudice stemming from the trial judge having prepared a tentative sentencing order before all mitigating evidence was presented. As such it is abhorrent for the State to argue that the trial court's actions in preparing a tentative order prior to the Spencer hearing, and thus prior to the introduction of all mitigation evidence, would not have been a proper basis for disqualification.

Certainly it is not too much to ask that the trial court not begin its deliberation process until it has heard all the evidence. If a jury is required to follow such an instruction, it is incumbent upon the trial court to do so as well. Judge Yawn demonstrated his prejudice towards the Defendant. Mr. Kontos knew of such prejudice, yet he allowed the trial court to remain seated. A properly filed motion to disqualify would have been sufficient to remove Judge Yawn from any further proceedings in the Defendant's case.

The Defendant was entitled to an impartial magistrate. As such the Defendant is entitled to be resentenced.

ARGUMENT IV

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S CLAIM FOR POST-CONVICTION RELIEF BASED ON TRIAL COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT EVIDENCE OF STATUTORY AND NON-STATUTORY MITIGATING FACTORS.

The State contends that the trial court properly denied this issue for a myriad of reasons. First, the State contends that Mr. Kontos never knew about any issues of physical or alcohol abuse. He similarly did not know about any childhood problems experienced by the Defendant or any referrals for psychological evaluations. The State argues that the Defendant's family testified directly opposite to these facts at the first two trials. Thus, the State contends that Mr. Kontos cannot have been ineffective. In so arguing the State ignores Mr. Kontos' failure to fully inquire of the family concerning all aspects of the Defendant's childhood. Rather, the record establishes that Mr. Kontos specifically directed the family to concentrate on the positive aspects of the Defendant's life. The record establishes that Mr. Kontos had no prior death penalty litigation experience and had not attended any death penalty seminars. He obtained no medical or school records of the Defendant. Had he done so, he would have learned of the Defendant's extensive history.

The State also argues that Mr. Kontos made a strategic decision to concentrate on the positive aspects of the Defendant's life and not to present

any negative testimony such as any evidence of anti-social personality. In so arguing, the State ignores the fact that this purported strategic decision was made without a meaningful investigation into all available mitigation evidence. Rather the decision was made as a reaction and not as a result of reasoned analysis of all the facts of the Defendant's background and psychological makeup.

Mr. Kontos chose his defense prior to accumulating all the facts. Mr. Kontos' preconceived "nice guy-life worth saving" course of action directed the course of the investigation. The family was specifically told that the attorney was interested only in uncovering the Defendant's good qualities and good deeds. The focus was limited to what Mr. Kontos saw as the direction of his defense and thus, potential sources of mitigating evidence were overlooked by Mr. Kontos' blinders. As a consequence no one asked about nor sought out psychological, medical, emotional or abuse problems for which the Defendant suffered or was exposed to within the family setting.

The word "psychopath" or "sociopath" jumped out at Mr. Kontos. Immediately upon hearing that potential finding, Mr. Kontos locked away the key for any potential mental health expert testimony. Mr. Kontos' focus on how he foresaw the path of the mitigation prevented a full and complete

mental health mitigation work-up. Undoubtedly, if Dr. Riebsame was permitted to have completed a timely, thorough mitigation investigation, Mr. Kontos would have realized how shortsighted his original focus was and would have incorporated the abusive aspects of the Defendant's childhood into his defense.

The abuse itself negates the impact of the antisocial finding as it is from this childhood abuse that the antisocial behavior blossomed. Mr. Kontos lacked the foresight to see that a full and complete picture of the Defendant's childhood and early adulthood would leave the jurors with the decision that the Defendant was in fact a life worth saving as opposed to his defense that "other than setting his neighbor on fire, the Defendant is a good person".

Lastly, the State maintains that Mr. Kontos diligently obtained the services of a mental health expert prior to trial. According to the State, Mr. Kontos conducted a sufficient investigation, received unfavorable results and elected not to present it. The State argues that under Strickland[4], Mr. Kontos was not required to shop around until he found another expert with more positive results. This argument wholly ignores the unrebutted evidence.

[4] Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984).

Mr. Kontos testified that he contacted Dr. Riebsame because he had been advised to do so by a fellow lawyer. He plainly stated that he believed "it was probably going to be a waste of time." (R 1005; 1076). He contacted Dr. Riebsame eleven days before the start of trial. Mr. Kontos provided Dr. Riebsame with nothing on the case but the two-page arrest affidavit. (R 1112-1114). Dr. Riebsame testified that he was asked to do a competency evaluation and he "didn't assume that it was [his] job to prepare mitigation evidence in this case given what [he] was provided." (R 1116). He specifically stated that he did not do the evaluation necessary to prepare mitigation. Dr. Riebsame also testified that eleven day was an insufficient period of time to conduct a thorough mental health evaluation for mitigation purposes.

Pursuant to Wiggins, Mr. Kontos' decision not to present mitigation evidence was not reasonable because the investigation upon which this decision was based fell far below prevailing professional norms. The record conclusively establishes that Mr. Kontos presented little or no mitigation. As noted in Wiggins, "any reasonably competent attorney would have realized that these leads were necessary to making an informed choice among possible defenses, particularly given the apparent absence of any

aggravating factors in [the Defendant's] background." Wiggins v. State, 539 U.S. 510, 525, 123 S.Ct. 2527, 156 L. Ed. 2d 471 (2003).

Mr. Kontos' inexperience lead to a lack of preparation which resulted in a meaningless investigation and ultimately a deficient presentation of penalty phase evidence. There was extensive mitigation available if Mr. Kontos had dutifully investigated this case. In addition extensive mitigation evidence was available had Mr. Kontos provided his mental health expert with sufficient information, time and direction in order to adequately conduct a thorough psychological evaluation. Extensive mitigation was available had he properly interviewed the Defendant's family. As a consequence of Mr. Kontos' failure to do any of the above, the Defendant was sentenced to death. The Defendant is entitled to a new penalty phase.

ARGUMENT V

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S CLAIM FOR POST-CONVICTION RELIEF BASED ON TRIAL COUNSEL'S FAILURE TO INQUIRE REGARDING JUROR CLARK'S STATUS RESULTING IN FUNDAMENTAL ERROR.

The State again argues that this issue is procedurally barred in that it could or should have been raised on direct appeal. The State seeks to sidestep all issues concerning Juror Clark by blanketly claiming procedural bar. The State seeks to hide behind this Court's decision in Willacy I and wholly ignore this Court's decision in Lowrey. Without explanation, the State seeks to avoid the irreconcilable conflicts raised by Juror Clark's service. At no time has the State ever addressed the applicability of Lowrey to the facts of this case nor has it argued any distinguishing feature. Nevertheless, Mr. Erlenbach's failure to have pursued questioning which would have yielded the facts concerning Juror Clark's pending felony charges and his inherent prejudice is not an issue for appeal. Rather, Mr. Erlenbach's inaction is a clear issue for collateral review.

Relying on Willacy I, the State contends that Mr. Erlenbach cannot be found ineffective when Juror Clark was found eligible under section 40.013. This argument distorts the issue. Mr. Erlenbach testified that he was unfamiliar with section 40.013, and therefore may not have known to strike Juror Clark as statutorily ineligible. Thus Juror Clark's eligibility is not at

issue here. Rather at issue is the fact that had Mr. Erlenbach followed up on the State's questioning which Juror Clark refused to answer, he would have learned of Juror Clark's pending felony charges and submission to PTI. He similarly would have learned that Juror Clark had intentionally concealed relevant and material information from the jury clerk, his jury questionnaire and during voir dire questioning. Knowing that information, Mr. Erlenbach classified Juror Clark as the "worst possible juror". As such, the record establishes that Mr. Erlenbach would have either struck Juror Clark peremptorily or for cause. Mr. Erlenbach's failure to inquire resulted in the "worst possible juror" acting as the foreman of the Defendant's jury, thus negating the Defendant's constitutional right to a fair and impartial jury. As such, the Defendant is entitled to a new trial.

ARGUMENT VI

THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR IN FAILING TO APPLY THIS COURT'S DECISION IN LOWREY V. STATE, 705 So. 2d 1367 (Fla. 1998) RETROACTIVELY IN THIS CASE.

The State contends that this issue is procedurally barred because it could or should have been raised on direct appeal. The Lowrey decision was issued three years after this Court's decision in Willacy I. Thus the retroactive application of Lowrey could not have been raised on direct appeal. As such, this is clearly an issue for collateral review.

The State also contends that the retroactive application of Lowrey was not raised in the Defendant's rule 3.851 motion. In claim VIII, the Defendant alleged that pursuant to Lowrey he was not required to demonstrate resulting prejudice from Juror Clark's service on the jury, but rather prejudice was presumed, entitling him to a new trial. As such the issue was raised in the Defendant's motion for post-conviction relief.

The State also argues that the Lowrey decision is not retroactive and thus, the Defendant is not entitled to relief. In support of this argument the State cites Chandler v. State, 916 So. 2d 728 (Fla. 2005). In Chandler, the defendant sought retroactive application of Crawford v. Washington[5], wherein the United States Supreme Court held that a testimonial hearsay

[5] 541 U.S. 35, 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004).

statement was inadmissible at trial unless the declarant is shown to be unavailable and the party against whom the statement is admitted had an opportunity for cross-examination. Chandler, 916 So. 2d at 729. This Court found that Crawford satisified the first two Witt[6] factors. This Court further concluded that Crawford was a procedural rule controlling the admissibility of testimonial hearsay. As such under Witt, Crawford can only be applied retroactively if retroactive application is deemed necessary after assessing the Stovall[7] and Linkletter[8] factors.

This court concluded that the purpose of the rule in Crawford was not to improve the accuracy of trials or to improve the reliability of evidence. This Court further concluded that the rule in Roberts[9] which Crawford overruled had been relied on by trial courts for over twenty years. Thus, much testimony had likely been admitted pursuant Roberts. As such this Court concluded that given the extent of reliance on Roberts, if Crawford were applied retroactive, the administration of justice would be greatly affected by requiring courts to "overturn convictions' and "delve into stale records" to determine whether defendants had an opportunity to cross-

[6] Witt v. State, 387 So. 2d 922 (Fla. 1980).
[7] Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed. 2d 1199 (1967).
[8] Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed. 2d 601 (1965).
[9] Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2431, 65 L.Ed. 2d 597 (1980).

examine unavailable witnesses. Thus, this Court determined that Crawford was not retroactive. Id. at 731.

Nothing announced in Chandler by this Court precludes the retroactive application of Lowrey. Retroactive application of Lowrey would not require the widespread overturning of convictions. To the contrary, Lowrey is extraordinarily limited in its scope and thus, would impact a narrow and defined group of defendants.

Here all the Witt and Teague[10] factors are satisfied. Therefore, Lowrey should be applied retroactively, and the Defendant is entitled to a new trial.

[10] Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed. 2d 334 (1989).

ARGUMENT VII

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR POST-CONVICTION DNA TESTING

The State first contends that pursuant to rule 3.853(f), Florida Rules of Criminal Procedure, this issue has been waived for failure to timely appeal the trial court's order. Rule 3.853(f) states:

> An appeal may be taken by any adversely affected party within 30 days from the date the motion is rendered. All orders denying relief must include a statement that the movant has the right to appeal within 30 days after the order denying relief is rendered.

Here the trial court's order failed to contain the required language informing the Defendant of his right to appeal the order within thirty days. Contrary to the State's assertion, the Defendant is entitled to a belated appeal on this issue as a result of the trial court's failure to include the required language. Doss v. State, 840 So. 2d 375 (Fla. 1st DCA 2003). See State ex rel Shevin v. Dist. Court of Appeal, Third District, 316 So. 2d 50 (Fla. 1975).

In Shevin, this Court wrote that rule 3.850 grants a right to appeal an adverse ruling that, "is rendered useless if the movant is not informed of its existence and of the time limitations governing its utilization." Id. at 51. So too, rule 3.853 grants a right to appeal which is similarly rendered useless if

the defendant is not informed of its existence and the applicable time limitations. Accordingly, the Defendant's right to appeal the trial court's order denying post-conviction DNA testing has not be waived, but rather, the Defendant is entitled to belated appellate review herein.

Alternatively, the State contends that the issue lacks merit because the Defendant's motion for post-conviction DNA testing was facially insufficient. This argument fails.

Rule 3.853 provides in relevant part as follows:

> (b) Contents of Motion. The motion for post-conviction DNA testing must be under oath and must include the following:
>
> (1) a statement of the facts relied on in support of the motion, including a description of the physical evidence containing DNA to be tested and, if known, the present location or last known location of the evidence and how it originally was obtained;
>
> (2) a statement that the evidence was not tested previously for DNA, or a statement that the results of previous DNA testing were inconclusive and that subsequent scientific developments in DNA testing techniques likely would produce a definitive result;
>
> (3) a statement that the movant is innocent and how the DNA testing requested by the motion will exonerate the movant of the crime for which the movant was sentenced, or a statement how the DNA testing will mitigate the sentence received by the movant for that crime;
>
> (4) a statement that identification of the movant is a genuinely disputed issue in the case and why it is an issue or an explanation of how the DNA evidence would either exonerate the defendant or mitigate the sentence that the movant received.

As required by rule 3.853(b)(1-2), the motion details what items of evidence were sought to be tested and how these items of evidence were originally obtained. The Defendant's motion also contains a statement of innocence: "The Defendant is innocent and the DNA testing will exonerate the Defendant." (R 2330). The motion contains a statement explaining how DNA testing would exonerate him:

> The DNA results would confirm that the blood belonged to Ms. Walcott and not the victim's as alleged by the State. This would eliminate incriminating blood evidence and would lead to the Defendant being exonerated of this crime. . . In addition DNA results would establish the identity of the wearer of [the] green tank-top shirt and the men's white shirt, thereby excluding the Defendant as the perpetrator.

(R 2330).

Furthermore, as required by rule 3.853(b)(4), the motion contains a statement explaining how DNA testing would mitigate his sentence: "Furthermore, the DNA results would mitigate the Defendant's sentence by supporting the statutory mitigating factor of minor participant in a new penalty phase proceeding." (R 2330). As such, the Defendant's motion meets the technical pleading requirements of the rule. See Sireci v. State, 908 So. 2d 321 (Fla. 2005).

Specifically with regard to the napkin and the multi-colored shorts referenced in the Defendant's motion for DNA testing, the motion satisfies

the pleading requirements of the rule and thus, the trial court's conclusion that, "the Defendant has failed to explain with reference to specific facts about the crime, how the results will exonerate the Defendant or mitigate his death sentence on the minor participant theory" is error. (R 2335).

Quite clearly if DNA testing established that the blood on the napkin and the multi-colored shorts was not the victim's, the State would have been precluded from introducing these items at trial. Thus, DNA testing would have eliminated blood evidence introduced at trial by the State to establish that the Defendant had direct physical contact with the victim at the time of her murder. The State's position that DNA testing of these items would have been inconsequential to the outcome because the jury was told that the Defendant's girlfriend and the victim had similar blood types misconstrues the issue and pointedly ignores the fact that this evidence would have been irrelevant and inadmissible. DNA testing would have eliminated these incriminating items of evidence from the jury's consideration. As such, having satisfied the requirements of the rule, the Defendant should be permitted to conduct DNA testing on the napkin and the multi-colored shorts.

With regard to the green tank-top and the white shirt referenced in the Defendant's motion, the trial court erroneously concluded that the Defendant

had failed to establish a reasonable probability that he would have been acquitted or would have received a lesser sentence.

Both experts testified that DNA testing on these items could be performed and definitive results obtained. The trial court's hesitation to allow DNA testing based on the possibility that the wearer of the items was not a "sluffer" is misplaced. Rather, the emphasis should be on the probability that the wearer was a "sluffer" and significant evidentiary findings would be uncovered. As such, the DNA results would have excluded the Defendant as the wearer of the shirt and resulted in either the Defendant being exonerated of the murder or receiving a lesser sentence. Accordingly, the trial court erred in denying the Defendant's request for DNA testing.

CONCLUSION

Based on the foregoing, the trial court's order denying the Defendant's Motion for Post-Conviction Relief must be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Barbara Davis, Esquire, Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118 by U.S. Mail this ___ day of March, 2006.

_____

ELIZABETH SIANO HARRIS
STADLER & HARRIS, P.A.
1820 Garden Street
Titusville, Florida 32796
Fla. Bar No.: 899720

_____

BRIAN N. ONEK
Balgo, Onek & Mawn, P.A.
1329 Bedford Drive, Suite 1
Melbourne, Florida 32940
(321)751-9774
Fla. Bar No.: 0373079

Attorneys for Defendant Chadwick Willacy

CERTIFICATION OF TYPE

It is hereby certified that the size and type used in this Brief is 14 point Times New Roman.

_____

Elizabeth Siano Harris